SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
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TITLE: State v John Lee Allen

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APPELLATE DIVISION

DOCKET NO. A-2434-91T4

CRIMINAL ACTION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN LEE ALLEN, JR.,

Defendant-Appellant.

ON APPEAL FROM
FINAL JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY

SAT BELOW
THE HONORABLE CHARLES A. DELEHEY, J.S.C., AND A JURY

FILED
APPELLATE DIVISION
NOV 5 1992
Clerk

BRIEF AND APPENDIX
FOR
DEFENDANT-APPELLANT

CONFINED

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PROCEDURAL HISTORY

On June 22, 1990, Mercer County Indictment No. 90-06-1003 was filed, charging defendant John Lee Allen, Jr., and his codefendants Ronald Allen and Gregory Williams with the following: the murder of Willie Rodgers ("Rogers" in the trial transcript and hereinafter "Rogers"), contrary to the provisions of N.J.S.A. 2C:11-3a(1), 2C:11-3a(2) and 2C:2-6 (Count One); the felony murder of Willie Rogers, contrary to the provisions of N.J.S.A. 2C:11-3a(1)(3) and 2C:2-6 (Count Two); the robbery of Willie Rogers, contrary to the provisions of N.J.S.A. 2C:15-1 and 2C:2-6 (Count Three); the kidnapping of Willie Rogers, contrary to the provisions of N.J.S.A. 2C:13-1b and 2C:2-6 (Count Four); the possession of a weapon for an unlawful purpose against Willie Rogers, contrary to the provisions of N.J.S.A. 2C:39-4d and 2C:2-6 (Count Five); the murder of Francis Bodnar, contrary to the provisions of N.J.S.A. 2C:11-3a(1), 2C:11-3a(2) and 2C:2-6 (Count Six); the felony murder of Francis Bodnar, contrary to the provisions of N.J.S.A. 2C:11-3a(3) and 2C:2-6 (Count Seven); the robbery of Francis Bodnar, contrary to the provisions of N.J.S.A. 2C:15-1 and 2C:2-6 (Count Eight), and the possession of a weapon for an unlawful purpose against Francis Bodnar, contrary to the provisions of N.J.S.A. 2C:39-4d and 2C:2-6 (Count Nine). (Da 1 to 9).

On May 21, 22, 23, 24 and June 4, 1991, the Honorable Charles A. Delehey, J.S.C., conducted a hearing as to the admissibility of inculpatory statements allegedly made by defendant and his codefendants to the police. On June 5, 1991, Judge Delehey deemed the statements admissible. (13T 2-1 to 28-4).

On June 5, 1991, Judge Delehey also granted the State's motion to sever Gregory Williams from the trial of John and Ronald Allen, due to Bruton problems. (13T 30-2 to 5).

On June 6, 1991, Judge Delehey denied the Allens' motions to sever their trial from one another, the defendants having contended that their respective statements could not be effectively redacted. (14T 2-5 to 20-25).

With Judge Delehey presiding, a jury was selected on June 10, 1991, and the Allens were tried jointly on June 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, July 1, 2, 3, 8, 9 and 10, 1991. On July 10, the jury returned guilty verdicts as to all the counts contained in the indictment as to both the Allens. (Da 10).

On September 6, 1991, Judge Delehey sentenced defendant as follows: as to Rogers murder, to a life term of imprisonment with a 30-year parole disqualifier; as to the Rogers felony murder, it merged with the murder conviction; as to the Rogers robbery, to a concurrent 20-year term of imprisonment with a

10-year parole disqualifier; as to the Rogers kidnapping, to a consecutive 30-year term of imprisonment with a 15-year parole disqualifier; as to the unlawful possession of a weapon against Rogers, to a concurrent 10-year term of imprisonment with a five-year parole disqualifier; as to the Bodnar murder, to a consecutive life term of imprisonment with a 30-year parole disqualifier; as to the Bodnar felony murder, it merged with the murder conviction; as to the Bodnar robbery, to a consecutive 20-year term of imprisonment with a 10-year parole disqualifier; and as to the unlawful possession of a weapon against Bodnar, to a concurrent 10-year term of imprisonment with a five-year parole disqualifier (36T 13-5 to 15-11). In aggregate, defendant received two life terms plus 50 years, with an 85-year parole disqualifier. (36T 18-1 to 5). He also received a Violent Crimes Compensation Board penalty totaling $10,150. (Da 11).

On January 8, 1992, defendant's Notice of Appeal was filed with the Appellate Division. (Da 13).

On January 28, 1992, the Appellate Division granted defendant's motion to file his Notice of Appeal nunc pro tunc. (Da 14).

STATEMENT OF FACTS

On November 19, 1989, shortly after midnight, Trenton police discovered the body of Francis Bodnar. Bodnar, a taxi driver, was found shot to death (one bullet in the back of his head) behind the wheel of his cab on Gouveneur Street in Trenton. (17T 70-18 to 73-18; 18T 26-16 to 17). A spent bullet was found lying on the dashboard of Bodnar's cab and was secured by the police. (24T 18-15 to 22). Findings from Bodnar's autopsy disclosed that his death occurred between 11:30 and midnight on November 18. (18T 39-23 to 40-4).

At about 7:30 a.m. on November 19, police discovered the body of a second cab driver, Willie Rogers. He was found off Prospect Street in Trenton, behind an establishment known as Bud's Barbeque. Like Bodnar, Rogers was found behind the wheel of his red and black Diamond Cab, shot in the back of the upper neck. (17T 92-2 to 95-11; 18T 24-15 to 19). Rogers' autopsy revealed that his death occurred at about 9:45 p.m. on November 18. (18T 50-19 to 21). During the autopsy, a bullet was recovered from his body and secured by the police. (17T 103-6 to 15).

The police lifted four latent fingerprints from the cab, which were subsequently analyzed. (24T 52-10 to 11). One of the prints left on the passenger's side window of Bodnar's cab was identified as belonging to Ronald Allen. (26T 25-16 to 19; 26T

However, the twins and Williams remained and, according to Wiley, informed him that they were going to stick up cab drivers for the purpose of obtaining about $300 to show to some drug dealers, so as to purchase cocaine. (18T 115-6 to 118-3). Before the Allens and Williams left on their mission, Williams declined the Allens' suggestion to take the sawed-off shotgun because it was not concealable. (18T 118-17 to 23). The three told Wiley to remain in the residence to take care of John's dog. (18T 115-13 to 116-1).

About an hour after leaving Wiley, the three returned and told him that they had found a cab driver who had a woman in his cab. They related that they told the driver to drop the woman off and, after doing so, to pick them up. After the driver complied, they pulled out the magnums and directed him to drive behind Bud's Barbeque. They then took his money and John shot him, because they feared that he could identify them. One hundred dollars was taken from the driver, and the three split the money among themselves at the Allens' residence. (18T 121-25 to 124-12).

Dissatisfied with the amount of money that they had taken from the cab driver, the three decided to go out again and get more money. According to Wiley, he told them not to go. However, when they assured him that they would not shoot another cab driver, Wiley acquiesced to take Williams' place. However,

upon further reflection, it was decided that Williams would go with the Allens again because he runs faster than Wiley. (18T 126-4 to 15).

A couple of hours after leaving the Allens' residence, the twins and Williams returned. Ronald expressed disgust that they had obtained only $6 from the second cab driver. In response to Wiley's inquiry if they had done anything to this driver, they told him that he was shot because he was uncooperative. After being informed of this second incident, Wiley left the residence with the three and walked with them, before separating and going his own way. (18T 131-10 to 132-11).

In the days following the shootings, Wiley offered to get rid of the two guns. However, the Allens declined his offer, stating that the guns would be with either Webb or L.C. Pegues, a friend of the Allens', and that one or the other would be charged with the shooting if they were found with the guns. (18T 133-20 to 134-6). On December 20, 1989, Wiley saw Ronald give Pegues the chrome magnum and heard him warn Pegues that "those guns had bodies on them so be careful." (18T 135-8 to 9; 18T 147-4 to 18).

Two days later, on December 22, Wiley and John Allen were arrested. (18T 148-19 to 23). Prior to his arrest, Wiley and the Allens had agreed to blame the New York Boys and whoever was caught with the guns if they ever were questioned regarding the

shootings. (18T 151-25 to 152-14). Initially upon being questioned by the police on December 22, Wiley was uncooperative and denied the Allens' involvement in the shootings. As a result, he maintained that Detective Salvatore slapped him twice and asked him if he wanted to go to the electric chair. (18T 152-18 to 24; 19T 49-22 to 23). Moreover, Captain Constance yelled at him (19T 53-12 to 14) and Sergeant Dileo, who had treated him nicely, threatened to leave the interrogating room and "two other guys are going to come in who were not as nice." (19T 53-2 to 3; 19T 59-18 to 23). After an all-morning interrogation, Wiley implicated the Allens, and soon thereafter implicated Williams. (18T 155-2 to 17).

In April 1990, Wiley testified before a grand jury. He subsequently admitted perjuring himself before the grand jury, in denying that he ever possessed the guns. (19T 99-15 to 17; 19T 110-5 to 8). Moreover, he admitted lying to defense investigators in January and in May 1990, when he told them that the police coerced him into giving a statement implicating the Allens and in denying to them that the Allens ever told him that they had killed the cab drivers. (18T 169-18 to 171-18). Furthermore, Wiley admitted lying to family members, by telling them that he was coerced into giving a false statement and by saying that the New York Boys, working with Gregory Williams, had committed the murders. (18T 168-11 to 18). According to Geneva

Watson, Wiley's and the Allens' grandmother, Wiley frequently had complained about the police constantly harassing him, and on April 29, 1990, she noted in her diary that Carl said that he couldn't take it anymore and that he was going to kill himself. (31T 137-16 to 138-24). In November-December 1989, and when he testified before the jury implicating the Allens, Wiley had no criminal charges pending and maintained that the Mercer County Prosecutor's Office did not offer him any type of deal in exchange for his information and testimony. (19T 174-10 to 175-3).

At about 11:30 p.m. on November 18, 1989, Alemaine Williams and Dwayne Fletcher, her boyfriend, were en route to a friend's house in a car driven by Fletcher. They were followed in a car driven by Kenneth Davis. Upon arriving at their friend's house, the three had decided to race their cars through the streets of Trenton. (20T 40-18 to 44-17; 20T 77-8 to 78-15). On Gouveneur Street the two cars passed a cab stopped in the middle of the street. Glass was outside the cab and the interior light was on. The person in the driver's seat had his head on the head rest and seemed to be hurt. Three other people were in the cab, two in the rear and one in the front, and appeared to be looking for something. Alemaine thought that the three individuals in the cab were males but could not discern if they were white or black.

She could not identify any of the three, as she did not observe their faces. (20T 45-17 to 68-9).

Kenneth Davis, who had criminal convictions for breaking and entering, possession of a weapon and possession of a controlled dangerous substance, as well as a violation of probation, knew the Allens. (20T 74-9 to 76-2). He recalled that when his car passed the stopped cab, he was unable to identify the people in the cab. (20T 86-19 to 21). However, shortly after arriving at his friend's house to race cars, he claimed that he returned to the cab so as to determine if the driver was all right. Upon his return, he saw the Allens, along with another man who he did not know, exit the cab. (20T 87-6 to 89-17). That night, Davis was questioned by the police and told them that he had not recognized anybody in the cab. Davis, who used his brother's name when talking to the police, later explained that he lied because there was an outstanding warrant for his arrest and he did not want to get involved. (20T 89-24 to 90-24). After the Allens were arrested in December 1989, Davis continued to represent himself to the police as his brother, and when he was shown a mugshot of Ronald Allen, Davis maintained that he was not one of the three men who he had seen inside the cab. (21T 109-17 to 113-10).

Davis subsequently was arrested for violating his probation, and between March 19, 1990 and April 26, 1990, he occupied the same tier as Ronald Allen in the Mercer County Detention Center.

(20T 97-18 to 22). During their various conversations, Davis mentioned to Allen that he had driven by the cab. Ronald asked him if he saw him in the cab, and when Davis replied that he could not recognize him, Allen asked if he could testify for him in court. Davis answered that he probably could. (21T 115-2 to 9). Prior to being released from jail on April 26, 1990, Davis gave Allen his name and address in writing. (21T 139-20 to 25). However, he denied signing a notarized exculpatory statement prepared by Allen on March 30, 1990. (21T 131-21 to 132-6). But the notary public attested that Davis had in fact signed the statement. (22T 2-16 to 21).

On May 31, 1990, Davis received his first state-prison term, a four-year sentence for violating his probation. A few days thereafter, Davis contacted the Mercer County Prosecutor's Office and offered information for the first time implicating the Allens. (21T 131-11 to 132-22). Davis professed to have contacted the prosecutor's office because "I had a conscience about it," and denied receiving any promises or consideration regarding his prison sentence. (21T 103-2 to 22).

Dwayne Fletcher had been convicted of larceny and of possession of a controlled dangerous substance with intent to distribute prior to November 18, 1989. (21T 197-4 to 10). Additionally, he had two drug charges pending as of that date, and three separate indictments pending against him when he

testified at the Allens' trial. (21T 147-12 to 148-1; 21T 182-2 to 9). Claiming that no promises were made to him by anyone regarding his pending charges (21T 178-18 to 20), Fletcher identified the Allens as being two of the three men he observed in the cab (21T 180-6 to 9), though he acknowledged that the three were bent down in the cab. (21T 187-21 to 24). Fletcher, who had not known the Allens prior to November 18, 1989, spoke to the police for the first time on December 20, 1989, and selected the Allens' photos from an array on that date. (21T 165-13 to 170-4). Fletcher was a close friend of Davis', and prior to providing information to the police, he discussed with Davis his going to the police, including his lying to the police by concealing Davis' true identity. (21T 186-16 to 187-1).

L.C. Pegues had been convicted in Pennsylvania in 1986 for conspiracy, reckless endangerment, theft by unlawful taking, receiving stolen property and unauthorized use of an automobile. For these convictions, he received a two-year probationary term. (22T 15-3 to 11). In 1987 Pegues was arrested twice in New Jersey on drug charges and, as a result, met Officer Maldonado of the Trenton Police Department. Sometime thereafter, Pegues became Maldonado's informant regarding drug dealing in Trenton and received payment for information provided on three occasions. (22T 165-4 to 17-5).

In November 1989, Pegues needed a gun to protect himself. Aware that the Allens were familiar with guns and possessed a sawed-off shotgun, Pegues went to their residence and asked for their help. The Allens showed him two .357 magnums, one black and one chrome, along with the ammunition for the guns. Pegues purchased the two magnums for $100. (22T 25-17 to 27-8; 22T 34-1 to 38-13).

In early December 1989, Pegues unexpectedly saw the Allens, accompanied by Maurice Webb, in a pizzeria. John told Pegues that they needed the guns. When Pegues refused to return the guns, John said that the guns "got bodies on them." According to Pegues, the Allens then explained that they were the ones who killed the cab drivers because they needed money for drugs. (22T 39-13 to 45-25). Not believing the Allens, Pegues still refused to return the guns and left the pizzeria. (22T 47-4 to 10).

After reflecting upon his discussion with the Allens, Pegues attempted to contact Maldonado. Unsuccessful in his attempt, Pegues returned the guns to the Allens a few days later, though he did not receive any money in exchange. (22T 49-18 to 51-23). After additional attempts to contact Maldonado, he was successful. Pegues related to him his conversation with the Allens but initially did not mention that he recently possessed the guns, fearing that he would get in trouble. Later that day upon meeting with Maldonado, Pegues admitted that he had

possessed the guns, only to have returned them to the Allens. Pegues agreed to cooperate with the police, by being wired and attempting to get the guns back. (22T 54-15 to 56-4).

On December 15, 1989, Pegues, wired for sound, met with John Allen. During their conversation, Pegues tried to get him to confess to the cab driver shootings and also attempted to get the guns. At one point, Allen alluded to the murders as having been committed with the guns. (22T 67-24 to 73-15). However, the taped conversation also included John's stating, "We had" either "something" or "nothing to do with that shit." (24T 3-20 to 7-12).* When Pegues asked to have the guns returned to him because he needed them for a robbery, John agreed to return them. (24T 74-23 to 76-22).

Five days later, in the evening of December 22, Pegues received the black magnum from John who, in turn, had received it from Webb. Ronald gave Pegues the chrome magnum. Pegues received ammunition from both the Allens. (24T 86-19 to 96). He went home with the guns and the ammunition and contacted

*Although the jury ultimately was to decide after listening to the tape whether John said "nothing" or "something," the court, after hearing the tape, agreed with defense counsel out of the jury's presence: "That is clearly the word nothing to me." (23T 203-24 to 25).

Maldonado. Soon thereafter, the guns and the ammunition were brought to police headquarters. (24T 97-20 to 98-8). Subsequent ballistic analysis disclosed that the black magnum was consistent with having discharged the bullets retrieved from Rogers' body and Bodnar's dashboard, and were identical to the rare-type of ammunition that Pegues received from the Allens. (30T 87-15 to 108-3).

In January 1990, Pegues was arrested on weapon charges and incarcerated in the Mercer County Detention Center. According to Pegues, Ronald Allen was on his tier and asked him if he had said anything to anybody. When Pegues answered no, Ronald allegedly said, "Cool, then they ain't got nothin'." (23T 127-9 to 128-13).

Soon thereafter, Pegues was released, only to be rearrested on drug charges, assaulting an officer and resisting arrest. Again, he was placed in the Mercer County Detention Center, where this time he conversed with both the Allens. During one conversation with Pegues, John supposedly mentioned that Maurice, Carl and Freeze had told on them, and that if he caught Maurice he would do "what he had to do." Ronald suspected Black as the informer and threatened to kill him. Both the Allens commented as to killing Freeze. (23T 129-2 to 132-18).

For testifying truthfully against the Allens and for pleading guilty to two drug charges for which he received seven

the latter owned a .357 magnum. After about a two-and-a-half-hour interview with Salvatore, John agreed to cooperate further with the police investigation. In return, Salvatore suggested that the police would assist him in being released from custody. (24T 57-9 to 69-11).

As a result of the fingerprint analysis identifying Ronald Allen's print as being on Bodnar's cab and information received from L.C. Pegues and Dwayne Fletcher, arrest warrants were issued for the Allens on December 12, 1989. (24T 88-17 to 90-21; 24T 104-9 to 105-4).

The next day, John Allen and Carl Wiley were fortuitously arrested in the Trenton Municipal Court lobby. Allen was taken to an interview room where he was read his Miranda rights. When advised of the charges filed against him, he stated, "This is bullshit man, Heavy D did that shit; man, I didn't kill anybody." (24T 109-21 to 113-12). Wiley was placed in another interview room. Salvatore denied slapping him or mentioning the electric chair. (24T 114-21 to 115-9).

That afternoon, Salvatore and Lieutenant McKee transported John Allen to get his palm printed. During the procedure, Allen maintained that he "didn't kill nobody, Heavy D did that shit, man, the New York Boys did it." When Salvatore responded by saying that they had ballistic evidence, statements, identifications and fingerprint evidence to the contrary, John replied, "Okay, I was there, but I didn't shoot anybody, Arif did

it." Allen then was returned to the interview room but no formal statement was taken from him at this time, because the police were preoccupied with apprehending his brother. (24T 122-15 to 126-23).

Later that afternoon, Ronald was arrested and transported to police headquarters, where he was placed in an interview room. (24T 132-7 to 15j). After he was read his Miranda rights, Captain Constance entered the room. At first, Ronald denied any knowledge regarding the cab driver shootings, but soon thereafter stated that he had heard on the street that the New York Boys were responsible. After about 10 minutes, Ronald changed his story and said that Maurice committed the first robbery; that he was with Maurice when Maurice pulled a gun on the cab driver and ordered him to drive to the back of Bud's Barbeque, and that he, Ronald, left the cab and did not know what happened after that. (24T 135-8 to 150-7).

About 35 minutes into the interview, the captain was handed a note informing him that Wiley claimed that the Allens and Freeze had committed the murders. When Constance mentioned Freeze to Ronald, he again changed his story, this time saying that it was all Freeze's idea; that he, Ronald, did not shoot anybody; that he and Freeze had gotten into a cab; that Freeze pulled out a black .357 magnum and directed the driver to go behind Bud's Barbeque; that he, Ronald, ran out of the car and, after doing so, heard a gunshot; that he later met up with Freeze

and they had Chinese food before getting into another cab; that Freeze again pulled out the same gun; that when the cab stopped in the middle of Gouveneur Street and he anticipated what Freeze was going to do, he ran out of the cab and, after doing so, heard two gunshots; that he ran to his residence, where he met up with Wiley and Freeze; and that he refused Freeze's offer to split the money taken from the cab drivers. (24T 150-20 to 156-5).

Still later that afternoon, Constance entered the interviewing room occupied by John Allen. After advising him of his Miranda rights and telling him that his brother had given his version as to what had occurred, Constance offered John the opportunity to relate his version. John proceeded to tell Constance that Freeze had come over his house and said that he wanted to rob some drug dealer but did not have a gun; that he told Freeze that he could get a gun from Maurice; that he and Freeze went to Maurice's house, and Maurice gave Freeze a black .357 magnum; that after leaving Maurice, he and Freeze hailed a cab; that Freeze pulled the gun and ordered the driver to the back of Bud's Barbeque; that he, John, jumped out of the cab and suddenly Freeze shot the driver in the back of the head; that he returned to his house and went to sleep, only to be awakened by Freeze who gave him $60 of the $100 taken from the driver; that he and Freeze walked to a Chinese restaurant and, after eating, hailed another cab; that after the driver picked up a regular

customer, they asked him to drop them off and return after he dropped the customer off; that soon thereafter the driver returned and picked them up; that he, John, said to Freeze, "Don't do it, man," when he saw Freeze reach into his coat for the gun; that when the driver stopped on Gouveneur Street, he jumped out of the car and Freeze fired two shots hitting the driver's head; and that he, John, jumped back into the cab when he saw cars coming. (27T 56-15 to 65-9). After the completion of this interview, John agreed to provide a formal statement. (27T 65-10 to 12).

After learning that her sons had been arrested, Pearl Allen phoned the Trenton Police Department at approximately 4 p.m. on December 22. The desk sergeant transferred her call to a man who, according to Mrs. Allen, identified himself as Captain Constance. He acknowledged that her sons were in custody and told her that Lieutenant McKee was handling the case but was unavailable. Mrs. Allen then heard a dial tone and thought they had been disconnected. She immediately called back, again spoke to Constance and asked if her sons had an attorney. He replied that they did not need one. When Mrs. Allen demanded that her sons not be questioned on murder charges without an attorney or herself present, Constance allegedly said, "I don't give a fuck what you want," and hung up the phone. A third phone call by Mrs. Allen resulted in her speaking to McKee, who assured her that her sons had not been charged with anything and that she had

nothing to worry about. (31T 28-5 to 31-18). As a result of these phone calls, all of which occurred before 4:30 p.m., Pearl Allen contacted Jack Seelig, an attorney, and retained him to represent her sons at about 7 p.m. that evening. (31T 32-1 to 34-16).

At about 6:05 that evening, Detective Ashbock interviewed Ronald after advising him of his Miranda rights. His version given to Ashbock was substantially similar to that he earlier had given to Constance. After completing the interview, Ashbock asked Ronald if he would provide a formal typewritten statement. Allen agreed, and completed and signed the typewritten statement, which was substantially similar to his earlier verbal statements, at about 7:30 p.m. (28T 178-9 to 208-18).

At about 6:50 that evening, John Allen was read his Miranda rights and signed an acknowledgment as to same (29T 116-2 to 119-6). Detective Cosmo then conducted an interview with John, followed by his taking a typewritten and sworn statement. Both the interview and the statement, the latter commencing at about 7:10 p.m. and signed by John, were substantially similar to the verbal statement John had given to Constance earlier in the day. (29T 119-7 to 131-3). The typewritten statement pertained to the first cab driver shooting and included John's saying, "I was shocked that Freeze pulled the gun on the driver." (29T 128-10). A second typewritten and sworn statement, focusing upon the second cab driver shooting, was taken from John, commencing at

about 8:30 p.m., and subsequently signed by him. Again, it was substantially similar to the statement that he had given Constance earlier in the day. (29T 141-8 to 148-6). It included John's saying that he agreed to rob the second cab driver, "Because Freeze said he wasn't going to shoot anyone else." (29T 145-5 to 8).

During the taking of the Allens' typewritten statements, shortly after 7:30 p.m., Jack Seelig phoned the Trenton Police Department. He spoke to McKee, advised him that he had been retained by Ms. Allen to represent her sons, requested that all questioning cease, that he wanted to meet with the Allens, and that he was on his way to the police department. (31T 119-25 to 121-1). Seelig and Mrs. Allen arrived together at the station at about 8 p.m., and with Mrs. Allen waiting outside the detective bureau, Seelig entered and spoke to Constance at 8:15 p.m. Seelig informed Constance that he had been retained to represent the Allens and wanted to confer with them. Constance countered that they did not want a lawyer and denied Seelig access to them. Soon thereafter, Seelig and Mrs. Allen left the police station, not having spoken to either John or to Ronald. (31T 122-3 to 124-18). While readily acknowledging that he denied Seelig access to the Allens because neither one wanted a lawyer (27T 74-13 to 19), Constance denied having any phone conversations with Mrs. Allen earlier that day. (27T 86-25 to 87-4).

Between 8 and 9 p.m. on November 18, 1989, Jonathan Bing and Jerome Laster were en route to purchase blankets for a football game the next day. They approached a red and black Diamond Cab and observed a light-skinned black male wearing a skull cap,slouched in the rear of the cab. After Bing and Laster mentioned their destination, the man replied that he was not going in that direction. Without taking the cab, Bind and Laster proceeded on their way. (31T 56-9 to 58-23; 31T 63-3 to 65-7).

One evening between 9:30 and 10 p.m. in the middle of November 1989, Johnny Barretto, an admitted drug user and dealer, was going to his mother's house in Trenton. As he took a shortcut by a walking behind Bud's Barbeque, Barretto saw L.C. Pegues, who he knew and described as a light-skinned black and wearing a "night hat," in a cab with two other black passengers and the driver. Continuing to walk towards his mother's house, Barretto heard a shot and then saw Pegues, as he exited the cab, drop a black gun. (31T 70-15 to 75-6).

In January 1990, according to Barretto, Pegues approached him in a liquor store and warned him that he would kill him and get his family if he ever told anybody what he had seen. (31T 75-15 to 22). About two weeks later, Barretto saw Pegues in an unmarked police vehicle with three men who identified themselves as police officers. One of the officers handed Pegues an envelope containing $400. Pegues, apologizing for having

threatened him and telling him that the money was his, handed Barretto the envelope. Needing the money to finance his drug habit, Barretto accepted the payment. (31T 76-5 to 79-8). Barretto claimed that he subsequently received a letter stating that if he needed any money to call. Included in the letter were the business cards of three detectives -- Salvatore, Cosmo and Tedder -- all of whom were investigating the cab driver murders. (31T 80-4 to 9; 31T 83-16 to 23). Having been incarcerated in the Mercer County Detention Center for a time, Barretto conceded talking to Ronald Allen there on one occasion about the cab driver shootings but only to the extent that "I was being pressured and people were telling him [sic] to keep your [sic] mouth shut." (31T 86-9 to 87-9).

Neither of the Allens testified at the trial. (32T 9-8 to 9; 32T 11-11).

LEGAL ARGUMENT

POINT I - THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT SUPPRESSING DEFENDANT'S ALLEGED INCULPATORY STATEMENTS, BECAUSE THE STATE DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS CONSTITUTIONAL RIGHT TO COUNSEL IN OBTAINING THE STATEMENTS.

At the pretrial hearing regarding the admissibility of inculpatory statements allegedly made by defendant and his codefendants to the police, it was established that on December 21, 1989, arrest warrants were issued for the Allens' in connection with the cab driver shootings. (4T 30-12 to 31-1). Defendant was arrested at approximately 9:25 the next morning, and except for palm print processing, spent the remainder of the day and the evening in a room, where he was interviewed periodically by the police. (4T 32-7 to 33-3).

At about 3:30 p.m. on December 22, defendant was advised of his Miranda rights by Captain Constance, signed an acknowledgment as to same and then, for approximately the next hour, allegedly proceeded to give a verbal statement, wherein he admitted being with Gregory "Freeze" Williams and his brother Ronald when Williams shot the cab drivers. However, defendant claimed that the shooting were unexpected and came as a surprise to him and apparently to his brother. (6T 59-7 to 68-18; 7T 121-12 to 17).

At approximately 4 p.m. on December 22, Pearl Allen, after learning that her sons had been arrested, phoned the Trenton Police Department. The desk sergeant transferred her call to a man who identified himself as Captain Constance. He acknowledged that her sons were in custody and told her that Lieutenant McKee was handing the investigation but was unavailable. Mrs. Allen immediately called back, claimed that she again spoke to Constance and asked if her sons had an attorney. He replied, according to her, that they did not need one. When Mrs. Allen demanded that her sons not be questioned on murder charges without an attorney being present, Constance responded, "I don't give a fuck what you want," and hung up the phone. A third phone call to the police department by Mrs. Allen resulted in her talking to McKee, who assured her that her sons had not been charged with anything, that they only were being questioned and that she had nothing to worry about. Extremely upset, Mrs. Allen replied that they should have an attorney and that she was going to bring one to the police department. McKee answered, "Suit yourself," and hung up the phone. (10T 83-2 to 86-2). According to McKee -- significantly, Constance did not testify at the pretrial hearing -- he conceded receiving a phone call late that afternoon from a woman identifying herself as the Allens' mother, but recollected her as only inquiring as to why her sons had been arrested. (6T 110-22 to 111-22).

In any event, at about 6:30 that evening, defendant again was advised of his Miranda rights and signed an acknowledgment as to same. (4T 70-13 to 76-12). At 7:10 p.m., the taking of a formal typewritten statement -- substantially similar to the verbal statement earlier given to Constance and focusing upon the Rogers shooting (29T 119-7 to 131-3) -- and subsequently sworn to and signed by defendant, commenced. (4T 74-12 to 75-17).

During the taking of this statement, McKee acknowledged receiving a phone call at about 8 p.m. from a man who identified himself as Jack Seelig, an attorney retained by the Allen family to represent John and Ronald. Not certain whether the man actually was an attorney, McKee recalled inviting him to come to the police station. (6T 71-5 to 73-12). According to Seelig, who in fact had been retained by Mrs. Allen, he informed McKee that he was aware that the Allens were being questioned, that he was going to the police station, and requested that all questioning cease pending his arrival. McKee did not indicate that he would stop the questioning. (10T 45-4 to 46-17).

Immediately after getting off the phone with Seelig, McKee told Detective Cosmo, who was taking the typewritten statement from defendant, to "finish up the, with whatever [he] had, wherever you are, finish it up and ask the individual if he will sign it." (7T 117-21 to 118-6). Sometime between the

termination of the Seelig-McKee phone conversation and Seelig's arrival, John signed the statement. (6T 75-3 to 5).

Upon Seelig's arrival at the police station with Mrs. Allen, who waited outside the detective bureau, he spoke to Constance. Seelig's notes, which were recorded that evening, reflected that the conversation occurred between 8:15 p.m. and 8:25 p.m. (10T 50-13 to 151-11). Seelig advised Constance that he had been retained by Mrs. Allen to represent her sons, that he wanted to see them, and that he wanted his presence known to them. (10T 46-23 to 48-3). Constance replied that they had confessed to one of the murders and were in the process of confessing to the second murder, and that they had been advised of their right to an attorney but did not want one. Consequently, Constance denied Seelig's request and denied him access to the Allens (10T 48-21 to 49-4). Soon thereafter, Seelig and Mrs. Allen departed the police station. (10T 50-11 to 12).

At about 8:30 p.m., just after Constance's conversation with Seelig had ended, the taking of a second typewritten statement -- substantially similar to the earlier statement defendant allegedly gave to Constance, this one pertaining to the Bodnar shooting. (29T 141-8 to 148-6) -- and subsequently sworn to and signed by defendant later that evening, commenced. (4T 77-1 to 18-5; 6T 76-12 to 14).

Contrary to the police claim that defendant never asked for an attorney while being in custody on December 22 (7T 156-19 to 157-4), John Allen, testifying at the pretrial hearing, asserted that he did request an attorney prior to any questioning by the police. (10T 123-24 to 124-3). Additionally, he related that at an undetermined time (there was no clock in the room where he was held), Constance entered the room and proceeded to kick him and smack him for up to 10 minutes, warning him that he had better sign the various statements that the police had prepared for him. Told by Constance that the police just wanted Freeze and trying to prevent any further beating, defendant claimed that he signed the various documents given to him by the police without reading them. (10T 124-23 to 125-25; 11T 126-1 to 129-7; 11T 130-24 to 131-4). Moreover, he denied ever stating that he was present when Freeze shot the cab drivers. (11T 131-5 to 17).

After hearing the testimony at the pretrial hearing, the trial court rejected arguments that the police violated defendant's privilege against self-incrimination and right to counsel. Hence, defendant's statements -- verbal and typewritten -- were deemed admissible. (13T 2-1 to 28-4).

Defendant maintains that the procedure employed by the police violated his constitutional rights, and that their subsequent admission and the testimony thereto constitutes reversible error.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), established the following rules as to the waiver of an individual's Fifth Amendment privilege against self-incrimination when encountering custodial interrogation:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver's made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wants to consult with an attorney before speaking there can be no questioning. [384 U.S. at 444-445.]

As held in Miranda, and reiterated many times thereafter, a defendant's waiver must be made voluntarily for it to be valid. See, e.g., Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 2285, 84 L.Ed. 2d 222 (1985). Moreover, the admissibility of inculpatory statements resulting from a waiver must be established beyond a reasonable doubt. State v. Miller, 76 N.J. 392, 404-405 (1978).

In the instant matter, the State failed to shoulder its considerable burden regarding the admissibility of defendant's alleged statements. Defendant's contention that Constance physically abused him was not rebutted by the State. Constance conspicuously failed to testify at the pretrial hearing and McKee, while video-and audio-monitoring in another room some of Constance's interaction with defendant and denying that Constance

struck defendant (7T 139-8 to 10), admitted, "I have no idea what happened for those other six hours that I didn't watch Mr. Allen." (7T 139-19 to 21). Thus, absent Constance's testimony -- other than defendant's testimony -- there was no full accounting of Constance's interaction with defendant.

Additionally, R. 3:4-1(a) provides, "A person, arrested under a warrant issued upon a complaint shall be taken, without unnecessary delay, before the court named in the warrant." Therefore -- and independent of defendant's claim of physical abuse -- the failure of the police to bring defendant before a court on December 22, 1989, even though he was arrested outside Trenton Municipal Court and then subjected to day-long interrogation, constitutes a compelling factor as to the involuntariness of defendant's statements. State v. Jones, 53 N.J. 588 (1969); State v. Seefeldt, 51 N.J. 472 (1968).

Apart from Fifth Amendment considerations, both our state and federal constitutions provide that a criminal defendant has "the right to * * * have the Assistance of Counsel" for his defense. U.S. Const. Amend. VI; N.J. Const. of 1947, Article I, paragraph 10. That protection embodies "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself." Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461, 1465 (1938). Extending beyond the right to representation of trial,

the right to counsel attaches at all critical stages of criminal proceedings. Maine v. Moulton, 474 U.S. 159, 170, 106 S.Ct. 477, 484, 88 L.Ed. 2d 481, 492 (1985). In particular, once a suspect is charged with a crime, "he has a right to legal representation when the government interrogates him." Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 1240, 51 L.Ed. 2d 424, 438 (1977). Moreover, this right "does not depend upon a request by the defendant." Id. at 404, 97 S.Ct. at 1242, 51 L.Ed. 2d at 438.

As stated in Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed. 2d 261 (1988), "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." [Id. at 290, n.3, 108 S.Ct. at 2393, n.3, 101 L.Ed. 2d at 271, n.3.].

In Moulton, the Supreme Court had expounded:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. * * * [A]t the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. [474 U.S. at 170-171, 106 S.Ct. at 484, 88 L.Ed. 2d at 492-493.]

The Court concluded that "knowing exploitation by the State of an opportunity to confront the accused without counsel being

present, is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity." Id. at 176, 106 S.Ct. at 487, 88 L.Ed. 2d at 496.

Defendant submits that the State in the matter at bar failed to prove that he voluntarily, knowingly and intelligently waived his right to counsel. Patterson, supra, 487 U.S. at 288-290, 108 S.Ct. at 2393, 101 L.Ed. 2d at 270. The State must prove the suspect voluntarily relinquished or abandoned the right to have counsel present at the interrogation. Ibid. Stated differently, "the accused must '[k]now what he is doing' so that his 'choice is made with eyes open.'" Id. at 292, 108 S.Ct. at 2395, 110 L.Ed. 2d at 272 (quoting Adams v. United States ex. rel McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268, 275 (1941)). Moreover, "courts indulge in every reasonable presumption against waiver." Brewer, supra, 430 U.S. at 404, 97 S.Ct. at 1242, 51 L.Ed. 2d at 440. Under the State Constitution, the right to counsel is similarly exalted, State v. Sugar, 84 N.J. 1, 15-16 (1980), and the State must prove the waiver of this indispensable constitutional right beyond a reasonable doubt. State v. Gerald, 113 N.J. 40, 118 (1988).

In the instant matter, the trial court framed the right-to-counsel argument as follows:

> When did the Sixth Amendment rights of the defendants, Allen, attach, at the time of their arrest or at their arraignment the following day?
>
> The answer to this question is critical, for it is agreed that if the right to counsel attached at the time of arrest, but before arraignment, the police would be precluded from initiating any dialogue or interrogation of the defendant. The state argues that it attaches at the first judicial proceeding. The defendants argue that it attaches at the time that the charge is drawn, in this case, on December 21, 1989, when warrants were issued for the arrest or arrests of the defendants.
>
> * * *
>
> Whether the issuance of the complaint and warrant constitutes a formal charge by which a Sixth Amendment right to counsel attaches, is the pivotal issue which this Court must resolve. [13T 17-7 to 20; 13T 19-5 to 8.]

The court erroneously concluded that the right to counsel had not attached, relying in large part upon Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed. 2d 410 (1986). (13T 23-18 to 24-6).

In Moran, the Court held, as a matter of federal constitutional law, that the police had no obligation to advise a defendant that a third party had summoned an attorney to represent him and that, in the absence of a request by the defendant himself, an attorney's presence at the police station does not affect the right of the police to interrogate the defendant.

However -- and ignored by the trial court in the matter at bar -- the Moran Court added the following caveat:

> It is clear, of course, that, absent a valid waiver, the defendant has the presence of an attorney during an interrogation after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel attaches. [Citations omitted.] And, we readily agree that once the right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney as a "'medium' between [the suspect] and the State during interrogations." [Citations omitted.] The difficulty for respondent is that the interrogation sessions that yielded the inculpatory statement took place before the initiation of "adversary judicial proceedings." [Citations omitted.]; [475 U.S. at 428, 89 L.Ed. 2d at 425-426 (emphasis added).]

See Brewer, supra, stating as to when "adversary judicial proceedings" begin:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him -- "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." [430 U.S. at 398, 51 L.Ed. 2d at 436 (quoting Kirby v. Illinois, 406 U.S. 689, 92 S.Ct. 1877, 32 L.Ed. 2d 411, 417 (1972).]

See also State v. Burden, 155 N.J. Super. 462, 465 (App. Div. 1977), holding that "adversary judicial proceedings" begin at the time that a complaint is signed charging the defendant with an offense.

It is beyond dispute that on December 21, 1989, arrest warrants were issued for the Allens, charging them with the homicides. (4T 50-8 to 10). Clearly, then, the right to counsel under federal constitutional law attached and defendant's subsequent alleged inculpatory statements -- particularly the two typewritten, sworn and signed statements, which were consummated after defendants' attorney communicated with the police -- should have been suppressed.

State v. Reed, 249 N.J. Super. 41 (App. Div. 1991), certif. granted, 127 N.J. 552 (1991), followed the Moran lead, by the Appellate Division's ruling that the defendant was not denied his right to counsel under the federal and state constitutions and, accordingly, his inculpatory statements were deemed admissible. In that scenario, unknown to defendant, who was detained in the prosecutor's office for questioning, counsel was retained by his friend. The lawyer went to the prosecutor's office to provide legal advice to the defendant and to accompany him during interrogation. The prosecutor told the lawyer that the defendant had not requested a lawyer and, without such a request from the defendant himself, the lawyer would not be permitted to see the defendant.

By granting certification in Reed, the New Jersey Supreme Court may expand upon the right to counsel as provided in the State Constitution as compared to the Sixth Amendment right to

counsel as interpreted by the Moran Court. However, even if the court adheres to Moran, both Reed and Moran are significantly distinguishable to the matter at bar, because of the initiation of "adversing judicial proceedings" herein.

Because the erroneous admission of defendant's statements and of the testimony thereto was of constitutional dimension, an appellate court must find beyond a reasonable doubt that their admission did not contribute to the guilty verdicts, so as to uphold the convictions. Chapman v. California, 386 U.S, 18, 24, 87 S.Ct. 821, 17 L.Ed. 2d 705, 710-711 (1967); State v. Macon, 57 N.J. 325, 335-336 (1971).

See also State v. McCloskey, 90 N.J. 18 (1982), where the New Jersey Supreme Court reversed the defendant's conviction due to the erroneous admission of his incriminating statements taken during custodial interrogation. Although finding that "the State has sufficient evidence so that a reasonable jury might convict him," the Court was unable to conclude that the error was harmless beyond a reasonable doubt. Id. at 32.

In its opinion, the Court provided two compelling reasons for applying the harmless error doctrine sparingly, if ever, when the State has violated a defendant's rights during custodial interrogation:

> First, the importance of the [Fifth Amendment] privilege to our accusatory system of justice requires us to guard carefully

> against its infringement. The privilege is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and expression as well.
>
> Second, the improper use of incriminating statements made by a criminal defendant has great potential for prejudice. We can assume that inculpatory remarks made by a defendant have a tendency to resolve jurors' doubts about a defendant's guilt to his detriment. [Id. at 31.]

Clearly, as to the matter at bar, defendant's alleged statements to the police and their testimony thereto not only contributed, but were essential, to the guilty verdicts.

Absent defendant's alleged statements, the State's case was grounded shakily, if not fatally, upon witnesses (L.C. Pegues, Kenneth Davis and Dwayne Fletcher) who had criminal records (20T 74-9 to 76-2; 21T 197-4 to 10; 22T 15-3 to 11); witnesses (Carl Wiley, Davis Fletcher and Pegues) who claimed they had lied to the police, or to investigators, and/or perjured themselves regarding their prior accounts, either by exculpating the Allens or themselves from involvement in the shootings (18T 169-18 to 171-18; 19T 99-15 to 17; 19T 110-5 to 8; 20T 89-24 to 90-24; 21T 109-17 to 113-10; 21T 165-13 to 170-4; 22T 54-15 to 56-4); a witness (Wiley) who apparently aided and abetted in the cab driver robberies, if not the shootings, but never had any charges filed against him (18T 115-13 to 118-3; 18T 126-4 to 15; 18T 131-10 to 132-11; 18T 133-20 to 134-6; 19T 174-10 to 175-3); a

witness (Pegues) who hoped to receive the $13,000 reward pertaining to the shootings (22T 78-16 to 18; 23T 132-17 to 19); a witness (Pegues) who readily acknowledged that lying was not a difficult thing for him to do (23T 137-13 to 15) and, according, to another witness, who said that he would do anything to get his prison time reduced by telling lies regarding the Allens (31T 42-12 to 44-7); a witness (Pegues) who had three charges dismissed against him and received a plea bargain regarding other pending charges in exchange for his testifying "truthfully" at defendants' trial (22T 12-11 to 14-22; 23T 133-6 to 8); a witness (Fletcher) who had pending charges when he testified at defendants' trial (21T 182-2 to 9); a witness (Davis) who contacted the police and inculpated the Allens only days after he received his first state-prison term, professing that his "conscience" bothered him (21T 103-2 to 22; 21T 131-11 to 132-22); and a witness (Wiley) who frequently claimed to family members that the police had coerced a statement from him wherein he inculpated the Allens, that the police still were harassing him and, as a result of this police misconduct, threatened suicide (31T 137-16 to 138-24).

Indeed, except for defendant's alleged statements to police, there existed no credible evidence placing him at the scene of the shootings and, as opposed to defendant's supposed involvement, testimony by Johnny Barretto (31T 70-15 to 75-6),

Jonathan Bing and Jerome Laster (31T 56-9 to 58-23; 31T 63-3 to 65-7) targeted L.C. Pegues as the perpetrator.

Assuming arguendo that defendant's verbal statements to the police are deemed admissible because they preceded Seelig's communication to the police that he had been retained to represent the Allens, the omission of the sworn to and signed typewritten statements by defendant still mandate a reversal of his convictions.

In general, the memorialization of a defendant's verbal inculpatory statements lends invaluable corroboration to a policeman's testimony. In this matter, the credibility and tactics of the police were particularly under attack, given the trial testimony of Mrs. Allen, which related crude and devious treatment by the police, including Captain Constance (31T 28-5 to 31-18), and given Carl Wiley's maintaining -- despite his probably being the State's main witness -- that he was physically abused, threatened and yelled at prior to his implicating the Allens (18T 152-18 to 24; 19T 49-22 to 23; 19T 53-2 to 3; 19T 53-12 to 14; 19T 59-18 to 23).

Accordingly, because the State cannot prove beyond a reasonable doubt that the erroneous admission of defendant's alleged inculpatory statements and the testimony thereto did not contribute to the guilty verdicts, his convictions must be reversed.

POINT II - THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT SEVERING DEFENDANT'S TRIAL FROM HIS CODEFENDANT BROTHER'S TRIAL, BECAUSE EFFECTIVE DELETIONS COULD NOT BE MADE REGARDING THEIR INCULPATORY STATEMENTS, THEREBY IRREPARABLY PREJUDICING DEFENDANT.

The Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee a criminal defendant "the right... to be confronted with the witnesses against him." The confrontation clause "provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed. 2d 40, 53 (1987) (citation omitted).

The seminal case in this area is Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). Bruton involved a joint trial for armed robbery. The Supreme Court held that the pretrial confession of one debt could not be admitted against the other unless the confessing defendant took the stand and was subject to cross-examination. The trial court's instruction to limit the jury's consideration of the confession as against only the confessor was held to be an inadequate protection of the non-confessing defendant's rights in the joint trial. The Court reasoned that "because of the substantial risk that the jury, despite instructions to the contrary, looked to

the incriminating extrajudicial statements in determining [defendant's] guilt, admission of [codefendant's] confession in this joint trial violated [defendant's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." Id. at 126, 88 S.Ct. at 1622, 20 L.Ed. 2d at 479. The Bruton Court resolved that if a confession cannot be effectively deleted to omit reference to codefendants, the defendants must be tried separately.

The New Jersey Supreme Court had anticipated the Bruton problem and ruled in substantially the same manner in State v. Young, 46 N.J. 152 (1962), holding that where effective deletions of a codefendant's confession cannot be made, the trial court should order separate trials. Id. at 157. R. 3:15-2(a) codifies the procedure adopted in Young:

> If two or more defendants are to be jointly tried and the prosecuting attorney intends to introduce at trial a statement, confession, or admission of one defendant involving any other defendant, he shall move before trial on notice to all defendants for a determination by the court as to whether such portion of the statement, confession or admission involving such other defendant can be effectively deleted therefrom. The court shall direct the specific deletions to be made, or, if it finds that effective deletions cannot practically be made, it shall order separate trials of the defendants.

An effective deletion has been defined in Young as "the elimination of not only direct and indirect identification of

codefendants but of any statements that could be damaging to the codefendants once their identity is otherwise established." 46 N.J. at 159.

In Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed. 2d 713 (1979), the Court held that "interlocking confessions" of non-testifying codefendants did not violate the Sixth and Fourteenth Amendments when accompanied by jury instructions that each confession was evidence against its source. However, in State v. Haskell, 100 N.J. 469 (1985), the New Jersey Supreme Court held that, under the State Constitution, defendants who had given "interlocking confessions" implicating one another were entitled to separate trials.

Having provided this backdrop, defendant turns to the particulars of his matter.

Prior to trial, the court granted the State's motion to sever Gregory Williams' trial from that of the Allens, because of Bruton problems. (13T 30-2 to 10). However, the State desired that the Allens be tried jointly, contending that effective deletions could be made regarding the Allens' incriminating statements by eliminating references to one another in the confessor's statements and by using the pronoun "we," so that the jury would believe that the confessor was referring only to himself and to Williams. (13T 31-5 to 32-17).

Defense counsel opposed a joint trial, anticipating witnesses that will place both Allens and Williams at the scene of the crimes, thereby resulting in the jury's concluding that the "we" in the statements referred to both the Allens and to Williams. (13T 32-22 to 38-3). Moreover, as advanced by defense counsel:

> Redaction does not mean that you can change the defendant's statements. Redaction does not mean that you can make the defendant saying two people were there, when in his statement, he said three people were there. You are, in essence, making the statement untrue, because the statement was me, Ronnie and Freeze. But we're changing it now to we, so the jury only thinks two people were there. That's not redaction, that's not effective deletion, that's changing the statement and the words that were made. That's what Bruton says you can't do. You have to effectively delete to say me and another guy.
>
> In this case, you have identical twins, you have brothers, and it's going to overflow. New Jersey has also not recognized interlocking statements. In the federal system, if you have interlocking statements, then they can come in. But in this case, you have two virtually identical statements, you have Ron Allen saying we went to Popo's, we went down the street, we followed this street, we called on the phone.
>
> * * *
>
> In the actual statement ["we"] was all three. What they did, the actions that were allegedly made, they walked down Riverside through Gouveneur. And what they did there, went to a phone booth. The original statement, John Allen gives his statement, we

> walked down Riverside. We went to Gouveneur. We went to a phone booth. We called. We hailed. We brought Ruth Walker, she got in the cab. We told her to stop. She got out. You have virtually identical statements from the two of them.
>
> Now, you're saying, Ron Allen says, Gregory Williams and I got into the cab. John Allen said Gregory Williams and I, we got into this cab. They're virtually identical. What's the jury going to do with that? How can they separate and distinguish that, I would submit to the Court, when the Court is to say th [sic] effective deletion, that is sophistry then is protected under Bruton because of the manner in which the statement has been "redacted?"
>
> Bruton says you must be able to effectively delete the references without causing any prejudice to the defendant, the non-inculpating defendant. And I would suggest to this Court you cannot effectively delete without prejudicing the non-inculpated defendant. [13T 39-16 to 40-9; 13T 40-11 to 41-9.]

Furthermore, defense counsel emphasized that "in essence, by redacting, the Court, or allowing redaction of the statement[s] in this manner, the Court will have created [ ] inconsistent statement[s] by the defendant[s] as to the facts of the case that are going to be testified by the other state witnesses" (13T 41-12 to 17), and that the created-inconsistent statements could undermine the large portion of those statements which are exculpatory:

> [The jury] could conclude that what the Allens said on December 22 was, indeed, a true recitation of what occurred on November

> 18. That it was, indeed, Mr. Williams who shot the cab driver. That they were not involved in it. That they, when Mr. Williams pulled out the gun, when Mr. Rogers -- they fled the cab at that point before Mr. Rogers was shot, and were not actually participants in that.
>
> And then they might even conclude that having gotten back in the cab again with Mr. Williams on that evening, that, again, they were not aware that it was his intention to kill Mr. Bodnar.
>
> [The statements] are, by their nature, exculpatory in a sense, where they deny actually participating in the killing[s] and rather than being on the scene, and mere presence on the scene is not sufficient to convict. And under those circumstances, it's possible the jury would factually conclude, even though they were there on both occasions, they were unaware of the intention of Mr. Williams. [13T 42-12 to 23; 13T 44-4 to 11.]

In denying defendants' motion for a severance from one another, the court stated:

> Turning first to the issue of redaction, the Court has in its possession four statements, two by John Allen, two by Ronald Allen. Those statements are the proposed redacted statements.
>
> The first being the statement of John Allen given at 7:10 p.m. on December 22, 1989. The second being a statement on December 22, 1989 at 8:30. The statements of Ronald Allen were also taken on December 22, 1989, the first commencing at 6:50 p.m. and the second at 8:05 p.m.
>
> The Court here has reviewed each of those statements in redacted form. The Court concludes that the statements in their

> present redacted form do not effectively inculpate one defendant by another. That the redaction is such that a fair reading of the statements by John Allen and by Ronald Allen inculpate only Gregory Williams and as such, the statements are admissible in redacted form, and are not in violation of Bruton versus United States.
>
> Therefore, those statements will be admitted into evidence in that form. (14T 3-17 to 4-9.]

When defense counsel reiterated his objection that "the redacting is not actually redaction, but it's a material alteration" which prejudices defendants (14T 8-14 to 9-4), the court responded:

> In each of those statements, the declarent [sic] places himself at the scene of the crime, and he places Gregory Williams at the crime. In the redacted statement, he did not place the codefendant at the crime, and therein lies the concern of Bruton and the Hearsay Rule by removing the presence of the other defendant, the non-confessing defendant is protected, and the state has available to it what constitutes an admission on the part of the confessing defendant.
>
> The Court finds, again, that the statements in redacted form are admissible. [14T 10-15 to 23.]

Subsequently, testimony as to the Allens' signing the typewritten statements of December 22, 1989, and the statements themselves -- with the aforementioned modifications, wherein each defendant directly implicated only himself as being with Williams during the shootings -- were heard and admitted, respectively,

before the jury. (28T 178-9 to 208-18; 29T 119-7 to 131-3; 29T 141-8 to 148-6; 30T 116-2 to 9). The jury also had heard testimony as to substantially similar verbal statements -- the same modifications were made -- having been given to Captain Constance in the afternoon on December 22. (24T 150-20 to 156-5; 27T 56-15 to 65-19).

Contrary to the trial court's ruling, effective deletions had not been made as to the statements, thereby irreparably prejudicing defendant.

As had been foreseen by defense counsel, various witnesses -- Carl Wiley, L.C. Pegues, Kenneth Davis and Dwayne Fletcher -- an unsavory lot and possessing dubious credibility, placed defendants at the scene of the crimes. This resulted in the indirect identification of John by Ronald's statements -- thereby constituting ineffective deletions under State v. Young, supra -- as the jury must have inferred that the "we" in Ronald's statements alluded not only to himself and to Williams but also as to John. Additionally, these ineffective deletions violated the prohibition against "interlocking confessions" pursuant to State v. Haskell, supra.

And of utmost significance, defendant's statements were exculpatory as to his involvement in the shootings, exemplified in the first typewritten and signed statement by John's including that "I was shocked that Freeze pulled the gun on the [first cab]

driver" (29T 128-10), and his admitting in the second typewritten and signed statement that he had agreed to rob the second cab driver, "Because Freeze said he wasn't going to shoot anyone else." (29T 145-5 to 8).

See State v. Barnett, 53 N.J. 559 (1969), holding that where a confessing defendant's statement contained portions tending to exculpate himself and to inculpate the codefendant and redaction of references to the codefendant could not be done without prejudice to the confessing defendant, the denial of the confessing defendant's motion for severance was prejudicial error.

Similarly herein, the denial of defendant's motion to sever his trial from his codefendant brother's, and the prejudice redounding to defendant as the result of the ineffective and damaging deletions from the statements -- particularly when compounded by the State's virtually exclusive reliance upon the suspect testimony of criminal and rogue elements to convict defendant -- mandate a reversal of his convictions.

POINT III - THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING THE TESTIMONY OF TYRONE LOMAX AND/OR THE TESTIMONY OF JEROME BLASSINGAME, BECAUSE THEIR PROFFERED TESTIMONY WAS RELEVANT AND, BEING DECLARATIONS AGAINST INTEREST, CONSTITUTED EXCEPTIONS TO THE HEARSAY RULE.

Pursuant to a report dated May 24, 1991, prepared by Investigator Dolan of the Public Defender's Office and resulting from an interview conducted by him on the same date with Tyrone Lomax in the Mercer County Jail, defense counsel proffered the following testimony:

> Mr. Lomax states that when he was first arrested in February of 1990, he was placed on Tier 6 South of the Mercer County Jail. He states that he overheard two unknown black males from New York talking about setting up two Allen twin brothers.
>
> He thinks that one of the black males was names Lex, and the other's name was unknown. Mr. Lomax states that he overheard the two on their floor about setting up the two Allen twin brothers and some money. [31T 4-15 to 23.]

Defense counsel argued the importance of the proffer:

> I think what is significant, your Honor, is that he indicates not only that we have two black males, but also that they were from New York. This entire trial has been pervaded by testimony with regard to the so-called New York boys, and I think that it would be a fair inference to draw by this jury that the New York boys may have actually been involved in the two homicides. There has been testimony, as the Court recalls, that the handguns were initially -- even based upon the state's witness -- in the possession of

> Benjamine Hunter, better known as Black. And several other of the New York boys were seen in possession of those weapons.
>
> The fact that Mr. Lomax can now relate that he overheard two black males in the jail identifying their source of origin, shall we say, as New York, would be relevant to establish that these weapons may have been in the possession of the people that the state has already established had the weapons, were in their possession, and may have been in their possession as of November 18, 1989. Thus, giving them reason to attempt to set up the Allen brothers and sort of have them take the weight, as the phrase has been utilized throughout the case. [31T 5-3 to 24.]

The trial court rejected the proffered testimony, ruling:

> The Court having read the statement of Tyrone Lomax, having heard the comments of counsel, and being of the opinion that the only thing that Mr. Lomax could say is that he heard two unidentified people speaking in the Mercer County Jail. He thinks that they may be from New York and that they were talking about setting up the Allens. That all of that is what the prosecutor says it is. It is hearsay. There is no way of knowing who the declarant or declarants were, and it has absolutely no probative value in this case. [31T 7-2 to 11.]

Defense counsel then proffered the testimony of Jerome Blassingame, as the result of an interview conducted with him on December 7, 1990:

> We would proffer that Mr. Blassingame's testimony would be that he indicated in 1989, subsequent to the Trenton taxicab killings, he was incarcerated at the bullpen section of the Trenton Police jail when two Trenton Police detectives questioned him about these murders. He could not give the detectives'

names, but states that one had red hair, moustache, and glasses, and the other had dark hair, moustache, and glasses.

Mr. Blassingame states that the detective promised him a brand new car and a couple thousand dollars if he told them who committed these murders. He said to the police that he didn't know who did it. He further continues that Trenton Police detectives then told him they were looking for tall black guy named Larry.

The proffer with regard to Mr. Blassingame, your Honor, would be that the entire theory of Ronald and John Allen's defense in this case is that they were not involved in the homicides of November 18 of 1989, but rather there was put into effect by the Trenton City Police Department an investigation which brought them into the -- or placed them at the scene by virtue of fabricated evidence and testimony. And that there has been repeated testimony by the detectives, be it Captain Constance, Detective Salvatore, Cosmo Ashbock, that at no time was anything offered at all to the Allens in exchange for providing their alleged statements.

And, in addition, there has been repeated testimony by all of the state's witnesses, citing examples as Carl Wiley and Kenneth Davis, indicating that at no time was anything offered to them in exchange for their cooperation, and that being either their initial cooperation or where they provided the information or their subsequent agreement to testify at time of trial against the Allens.

I would submit, your Honor, that this conduct as described by Mr. Blassingame, indicating that the detectives even though he cannot identify them, Trenton City Police detectives -- and I think that that is -- I think the Court can almost take judicial notice of the size of the Detective Bureau as it has been

described by the various police witnesses who have testified in this case. That these particular officers were working on the case, and that they made these rather extravagant offers to Mr. Blassingame in exchange for information about the murders.

I think it goes to two relevant points. First, of all, the pressure that the detectives would have been under in order to solve the case to have caused them to make this type of offer to Mr. Blassingame. And in addition, your Honor, it shows that the detectives and, also, the state's witnesses, the civilian witnesses who were under charges or serving sentences were, in essence, not telling the truth when they indicated that they were not promised anything. Whether or not there was any delivery or not, that's a different story, but I would submit that it certainly goes to those two relevant issues. [31T 7-15 to 9-10.]

In rejecting this proffer, the court stated:

The statement of Mr. Blassingame has been marked DRA-10. It reflects that Mr. Blassingame, if called as a witness, would say that a detective who had red hair, a moustache, and glasses and another detective who had dark hair, a moustache, and glasses offered Mr. Blassingame a new car and a couple of thousand dollars if he told them who committed the cabbie murders. And that the detectives indicated they were looking for a black guy names Larry. Mr. Blassingame is unable to identify the detective or detectives with whom he spoke.

The Court here concludes that the testimony he would offer would be violation of the hearsay rule. The Court further finds that it would have virtually no probative value. The description does not match any detective who has testified in this case. And even if it did match a detective who testified in this case, its probative value would be

> almost minuscule. But the Court here in the first instance concludes that it is hearsay and has no probative value. The testimony of Jerome Blassingame is barred. [31T 10-17 to 11-11.]

The trial court committed reversible error by excluding the testimony of Tyrone Lomax and/or of Jerome Blassingame.

Evid. R. 63(10), Declarations Against Interest, provides:

> A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in criminal prosecution.

Thus, notwithstanding the trial court's ruling excluding the statements in part because they constituted inadmissible hearsay, the identity of the declarants (the two black males, as regarding Lomax' proffered testimony, and the two Trenton Police detectives, as regarding Blassingame's testimony) was not essential to admissibility as long as it had been established that the declarant's statement in fact constituted a declaration against interest, as were the scenarios herein. Indeed, the inherent trustworthiness of the declarations against interest is considered to be especially strong because of the likelihood that

the declarants -- the two black males inculpating themselves in setting up the Allens and the two detectives offering bribes for information -- would not have made such declarations contrary to their best interests unless they were truthful. State v. Phelps, 96 N.J. 500, 511 (1984); State v. Gomez, 246 N.J. Super. 209, 215 (App. Div. 1991).

As for the trial court's other reason for rejecting the proffered testimony due to it having very little, if any, probative value, in determining whether evidence is relevant the inquiry should focus upon "the logical connection between the proffered evidence and a fact in issue," State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990), that is, whether the evidence offers the desired inference more probable than it would be without the evidence. State v. Davis, 96 N.J. 611, 629 (1984). If the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by law. Evid. R. 7(f). This formulation was repeated approvingly in State v. Deatore, 70 N.J. 100, 116 (1979), where the Supreme Court noted that "this test is broad and favors admissibility." State v Davis, supra. Thus the bottom line is that if the test is met, the proffered evidence may be admitted even if it does not by itself support or prove the material fact. State v. Allison, 208 N.J. Super. 9, 17 (App. Div. 1985); State v. Coruzzi, 189 N.J. Super. 273, 302

(App. Div. 1983), certif. denied, 94 N.J. 531 (1985). Moreover, in State v. Garfole, 76 N.J. 445, 452-453 (1976), the Supreme Court suggested that some lower standard of relevancy than normal was applicable when a defendant offered exculpatory evidence at trial, stating that "an accused is entitled in his defense to any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made."

In disallowing the proffered testimony of Lomax/Blassingame, the trial court failed to employ the applicable test, ignoring that the evidence -- the two black males setting up the Allens and the two detectives providing payment for information -- offered the desired inferences -- that the New York Boys were responsible for the cab driver shootings, that the information received by the Trenton Police and the testimony inculpating defendant by civilian witnesses at trial were fabricated, as well as the impugning of the police officers' credibility - more probable than they would be without the evidence.

Consequently, because the erroneous exclusion of the Lomax/Blassingame testimony obviously had a devastating impact upon the defense, as the jury was denied critical exculpatory evidence, the exclusion clearly was capable of producing the guilty verdicts and, therefore, mandates that defendant's convictions be reversed. R. 2:10-2; State v. Macon, supra.

POINT IV - EVEN IF THE INDIVIDUAL ERRORS AS SET FORTH IN POINTS I, II AND III DO NOT CONSTITUTE REVERSIBLE ERROR, THE ERRORS AGGREGATELY DENIED DEFENDANT A FAIR TRIAL AND MANDATE THAT HIS CONVICTIONS BE REVERSED. (NOT RAISED BELOW).

In State v. Orecchio, 16 N.J. 125 (1954), through it found that no individual errors committed at the trial warranted the reversal of defendant's conviction, the Court reversed the conviction, stating:

> Where, however, the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury. [Id. at 129.]

Similarly herein, the errors as set forth in POINTS I, II and III, supra, aggregately, if not individually, rendered defendant's trial unfair and mandate that his convictions be reversed.

POINT V - THE ROGERS-KIDNAPPING SENTENCE AND THE BODNAR-ROBBERY SENTENCE SHOULD HAVE BEEN IMPOSED TO RUN CONCURRENTLY RATHER THAN CONSECUTIVELY TO THE ROGERS-MURDER SENTENCE AND TO THE BODNAR-MURDER SENTENCE, RESPECTIVELY; ADDITIONALLY, THE SENTENCING COURT ERRED BY IMPOSING PAROLE DISQUALIFIERS AS TO THE KIDNAPPING CONVICTION, THE ROBBERY CONVICTIONS AND THE WEAPON CONVICTIONS. (NOT RAISED BELOW).

Defendant, as well as his brother, received the following sentence: as to the murder of Willie Rogers, to a life term of imprisonment with a 50-year parole disqualifier; as to the felony murder of Rogers, it merged with the Rogers-murder conviction; as to the robbery of Rogers, to a 20-year term of imprisonment with a 10-year parole disqualifier to run concurrently with the Rogers-murder conviction; as to the kidnapping of Rogers, to a 30-year term of imprisonment with a 15-year parole disqualifier to run consecutively with the Rogers-murder conviction; as to the unlawful possession of a weapon against Rogers, a 10-year term of imprisonment to run concurrently with the Rogers-murder conviction; as to the murder of Francis Bodnar, to a life term of imprisonment with a 30-year parole disqualifier to run consecutively with the Rogers-murder conviction; as to the felony murder of Bodnar, it merged with the Bodnar-murder conviction; as to the robbery conviction of Bodnar, to a 20-year term of imprisonment with a 10-year parole disqualifier to run consecutively with the Bodnar-murder conviction; and as to the

unlawful possession of a weapon against Bodnar, to a 10-year term of imprisonment with a five-year parole disqualifier to run concurrently with the Bodnar-murder conviction. (36T 13-5 to 15-11). In aggregate, defendant received two life terms plus 50 years, with an 85-year parole disqualifier. (36T 18-1 to 5).

In imposing the sentence, the court stated in pertinent part:

> The commission of each of the crimes was independent of the other crimes.
>
> The Court notes the following aggravating factors. It notes the vulnerability of both of the victims of the murders. Both were cab drivers. Both were unarmed. Both were unable to defend themselves. The killings were heinous and senseless.
>
> There is a likelihood that the defendant would commit additional crimes. The commission of the crimes for which the defendants stand convicted were to serve as a springboard for the commission of drug-related crimes.
>
> The need to deter is apparent.
>
> The Court finds no mitigating factors.
>
> The defendants, although only 22 years of age, are vicious and amoral.
>
> * * *
>
> This Court is aware of the dictates of State v. Yarbough, 100 New Jersey 627, which provides guidelines for sentencing in multiple offense cases. As noted in Yarbough, the paramount goal is that the punishment fit the crime, not the criminal. In fashioning punishment for a defendant

convicted of multiple offenses, the Court should make an overall evaluation of the punishment for the several offenses involved, reflecting that its goal is not to -- it is not an exercise whose object is to find maximum possible periods of incarceration for a convicted defendant. In short, Yarbough holds that there should be a limitation on consecutive sentences for multiple offenses. The sentence of the Court is not to exceed the maximum that may be imposed for the two most serious offenses. In determining whether consecutive sentences are appropriate, the Court is to consider whether the crimes and their objectives were predominantly independent of each other, whether the crimes were committed at different times or separate places rather than being committed so closely in time and place as to indicate a single period of aberrant behavior, and whether the crimes involve different victims. Applying that criteria, this Court concludes that consecutive sentences to the maximum permitted by Yarbough are absolutely warranted.

The proofs at the time of trial disclosed that the defendants, on the night of November 18th, 1989, planned robberies of cab drivers in order to obtain up-front money to finance a drug transaction. They carefully discussed the weapon or weapons to be used. They estimated the amount of money that each robbery would yield and they carefully, with purpose and malice aforethought, set out to commit those crimes. First they entered the cab of Willie Rogers and then, while armed with weapons, had him drive to an obscure location. After kidnapping Mr. Rogers, they took his money. Then without any reason whatsoever, they placed a gun to the back of his head and pulled the trigger. Following the robbery, kidnapping and murder of Willie Rogers, the defendants returned to a building where one of them was staying. They counted the money and then planned, in the same

> manner, the commission of the second robbery. Again armed, they entered the cab of Francis Bodnar, who drove them to a location where they asked to be taken. Having reached that location, they put a gun to the back of Mr. Bodnar's head and pulled the trigger. They took from Mr. Bodnar the sum of six dollars. They returned to the same building where they had planned the crimes and divided the spoils. Mr. Bodnar was killed at approximately 11:30 p.m., about two hours after the defendant murdered Mr. Rogers.
>
> Although the murders and robberies were committed within a short period of time, it cannot be said that the time frame is indicative of a single period of aberrant behavior. Rather, each of the crimes committed here was planned and thought out separately and independently of each other. The crimes, except for the ulterior motivation, stealing money from others, were clearly independent of each other. They involved separate acts of violence and were committed at separate times and places. There are to be no free crimes in a system in which punishment is to fit the crime. To treat the commission of these crimes as a single period of aberrant behavior would be to ignore that simple maxim of sentencing policy. [36T 12-15 to 13-4; 36T 15-12 to 17-25.]

Indeed, in State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed. 2d 308 (1986), the Supreme Court adopted the following guidelines for sentencing courts on fashioning consecutive sentences:

> (1) there can be no free crimes...
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

(3) ...the sentencing court should [consider]... whether or not (a) the crimes and their objectives were predominantly independent of each other; (b) the crimes involved separate acts of violence or threats of violence; (c) the crimes were committed at different times or separate places, rather than being committed so closely in time as to indicate a single period of aberrant behavior; (d) any of the crimes involved multiple victims; [and] (e) the convictions for which the sentences to be imposed are numerous.

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses. [100 N.J. at 643-644.]

Notwithstanding the sentencing court's analysis to the contrary, the imposition of consecutive sentences as to the Rogers kidnapping and the Bodnar robbery violated the Yarbough guidelines.

Those sentences running consecutively with the terms imposed for the Rogers murder conviction and the Bodnar murder conviction, respectively, obviously exceeded "the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses."

To be sure, the Supreme Court expressly provided for exceptions within the sentence guidelines, though adding a caveat:

> We recognize that even within the general parameters that we have announced there are cases so extreme and so extraordinary that deviation from the guidelines may be called for. Still we believe that we must strive for proportionality... It is a goal that we have pursued continually for over fifty years in New Jersey. [Id. at 647.]

See also State v. Louis, 117 N.J. 250 (1989), where the Court clarified its Yarbough holding:

> When we said in State v. Yarbough that some cases might warrant a departure from guidelines, we did not intend that the sentences would wholly disregard the principles that relate to consecutive sentencing. Among the factors mentioned in Yarbough that the trial court declined to apply was whether the crimes and their objectives were predominantly independent of each other, whether the crimes were committed at different times or places, and whether there was any double counting of aggravating factors. [Id. at 254.]

Although recognizing that the Louis crime did involve separate acts of violence against multiple victims (the attempted murder and the kidnapping of a mother and child, as well as the sexual assault and robbery of the mother and an aggravated arson), the Court nevertheless upheld the Appellate Division's decision to reduce the sentencing court's 130-year sentence with

a 65-year parole disqualifier to a 60-year sentence with a 30-year parole disqualifier, reasoning that

> the crimes and their objectives did not seem to be predominantly independent of each other. Nor were they committed at different times or in separate places rather than being so closely in time as to indicate a single period of aberrant behavior. Nor can we be certain from this sentence that the court did not double-count aggravating factors by applying the horror of the assaultive crimes to each individual crime. [Ibid.]

Similarly, the Rogers kidnapping and the Rogers murder were not, as posited by the sentencing court, predominantly independent of one another, as they essentially were committed at the same time and place so as to indicate a single period of aberrant behavior for the purpose of robbing Rogers. And, of course, the Bodnar murder and robbery were inextricably intertwined, much less predominantly independent of one another.

As to the sentencing court's concern that "[t]here are to be no free crimes" (36T 17-22), thus attempting to justify the Rogers kidnapping and Bodnar robbery terms as consecutive sentences, Louis rejected the rationale that a court's failure to impose a consecutive term for a separate crime constitutes a "free crime":

> This determination does not mean that every crime after two is a "free crime." It does mean that the successive crime need not necessarily be graded at the maximum range. As we noted in State v. Zola, 112 N.J. 384, 436 (1988), the imposition of the sentence of

> death for the murder count "does not dictate the imposition of maximum consecutive sentences for all related offenses." [117 N.J. at 256.]

Therefore, because the imposition of the consecutive terms for the Rogers kidnapping and the Bodnar robbery violated the Yarbough-Louis tenets, the consecutive terms must be vacated.

Moreover, as excerpted from its rationale in imposing sentence, the court also violated Yarbough and Louis by applying the horror of the murders as to each of the other crimes, thereby double counting the aggravating factors.

Consequently, imposition of the parole disqualifiers as to the kidnapping conviction, the robbery convictions and the weapon convictions must be vacated, as one is unable to discern from the record whether the aggravating factors -- as applied to each individual crime, without double counting -- "substantially outweigh[ed] the mitigating factors" pursuant to N.J.S.A. 2C:43-6b, so as to justify the parole disqualifiers. See also State v. Kruse, 105 N.J. 354, 359-360, 363 (1987), holding that sentencing courts always must state on the record precisely how the sentencing decision was reached, including the factual basis for aggravating and mitigating factors found and a qualitative analysis of these and the manner in which they were balanced.

CONCLUSION

For the reasons stated herein, it is respectfully urged that defendant's convictions be reversed, or, in the alternative, that his sentence be modified.

Respectfully submitted,

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BY: _____
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Designated Counsel

DATED: October 15, 1992

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SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION-CRIMINAL

FILE NO. 89-3543-01, 89-3543-02
89-3543-03
INDICTMENT NO. 90-06-1002-I

THE STATE OF NEW JERSEY

vs.

JOHN ALLEN
RONALD ALLEN
GREGORY WILLIAMS

DEFENDANTS

STATED SESSION March 1990

TERM July 1989

COUNT I
MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, purposely or knowingly cause the death or serious bodily injury resulting in the death of Willie Rodgers, contrary to the provisions of N.J.S. 2C:11-3a(1); 2C:11-3a(2); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT II - FELONY MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Willie Rodgers during the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, contrary to the provisions of N.J.S. 2C:11-3a(3); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT III - ROBBERY

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, in the course of committing a theft, use force upon Willie Rodgers or inflict bodily injury upon Willie Rodgers while armed with deadly weapons, to wit: handguns, contrary to the provisions of N.J.S. 2C:15-1; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

Ct 3

COUNT IV - KIDNAPPING

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did unlawfully remove Willie Rodgers a substantial destance from where he was found, or did unlawfully confine the said Willie Rodgers for a substantial period, with purpose to facilitate the commission of crimes, to wit: robbery or murder, or flight therafter, or to inflict bodily injury on or to terrorize the said Willie Rodgers, the said defendants John Allen, Ronald Allen, and Gregory Williams not releasing Willie Rodgers unharmed and in a safe place prior to their apprehension, contrary to the provisions of N.J.S. 2C:13-1b; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT V - POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did have in their possession weapons, to wit: handguns, with purpose to use said weapons unlawfully against the person of Willie Rodgers, contrary to the provisions of N.J.S. 2C:39-4d; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

Da5

COUNT VI - MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or the 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, purposely or knowingly cause the death or serious bodily injury resulting in the death of Francis Bodnar, contrary to the provisions of N.J.S. 2C:11-3a(1); 2C:11-3a(2); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

Dab

COUNT VII - FELONY MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Francis Bodnar during the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, contrary to the provisions of N.J.S. 2C:11-3a(3); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT VII - FELONY MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Francis Bodnar during the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, contrary to the provisions of N.J.S. 2C:11-3a(3); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT VIII - ROBBERY

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, in the course of committing a theft, use force upon Francis Bodnar or inflict bodily injury upon Francis Bodnar while armed with deadly weapons, to wit: handguns, contrary to the provisions of N.J.S. 2C:15-1; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT IX - POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did have in their possession weapons, to wit: handguns, with purpose to use said weapons unlawfully against the person of Francis Bodnar, contrary to the provisions of N.J.S. 2C:39-4d; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

ENDORSED AS A TRUE BILL:

Foreman

Paul J. Koenig CKF
Mercer County Prosecutor

Municipal Court Docket No. 89-25177-79, 80, 82, 83, 84, 86, 87, 89, 90
89-25365, 67-68, 70-71

Police Report No. D-9-323-3526, D-9-323-3587

Pg 9

COUNT IX - POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did have in their possession weapons, to wit: handguns, with purpose to use said weapons unlawfully against the person of Francis Bodnar, contrary to the provisions of N.J.S. 2C:39-4d; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

ENDORSED AS A TRUE BILL:

Foreman

Paul J. Koenig (KF
Mercer County Prosecutor

Municipal Court Docket No. 89-25177-79, 80, 82, 83, 84, 86, 87, 89, 90
89-25365, 67-68, 70-71

Police Report No. D-9-323-3526, D-9-323-3587

DAP

Criminal D.

State of New Jersey

v.

New Jersey Superior Court
L-96 Mercer County
Law Division - Criminal

John Lee Allen, Jr.
Defendant (Specify Complete Name)

☐ Judgment of Conviction

☒ Order for Commitment

455146B	SBI #
12/22/89	DATE OF ARREST
6/22/90	DATE INDICTMENT FILED
6/26/90	DATE OF ORIGINAL PLEA
☒ NOT GUILTY ☐ GUILTY	ORIGINAL PLEA

ADJUDICATION BY	DATE
☐ GUILTY PLEA	
☒ JURY TRIAL	6/10-1/13; 6/17-6/20
☒ NONJURY TRIAL	6/24-6/27; 7/1-7/3 7/8-7/10

ORIGINAL CHARGES

Indictment No.	Count	Description	Degree	Statute
Ind. 90-06-1003	Ct 1	Murder		2C:11-3a(1)
	Ct 2	Felony Murder		2C:11-3a(3)
	Ct 3	Robbery		2C:15-1
	Ct 4	Kidnapping		2C:13-1b
	Ct 5	Possession of Weapon for Unl. Pup.		2C:39-4d
	Ct 6	Murder		2C:11-3a(1)
	Ct 7	Felony Murder		2C:11-3a(3)
	Ct 8	Robbery		2C:15-1;
	Ct 9	Poss. Wpn. for Unl. Purp.		2C:3

FINAL CHARGES

Jury Verdict on July 10, 1991 to all of the above counts.

It is, therefore, on 9/6/91 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

Counts 1 and 2 merged for sentence:
Ct 1 - C.C.D.C. Life - Minimum parole 30 years. VCC: $10,000
Ct 3- C.C.D.C. 20 years - Minimum parole 10 years Concurrent to Ct 1. VCC.3
Ct 4 -. C.C.D.C. 30 yers. - MPE 15 years Consecutive to Ct 1. VCC:$30.00
Ct 5- C.C.D.C. 10 yrs. - MPE 5 years Concurrent to Ct 1. - VCC:$30.00
Court Merged Counts 6 and 7.
Ct 7- C.C.D.C. Life - MPE 30 years Consecutive to Ct 1. -VCC: $10,000.
Ct 8- C.C.D.C. 20 yrs. MPE 10 yrs. Consecutively tl Ct 1. VCC:$30.00
Ct 9- C.C.D.C. 10 yrs. MPE 5 years concurrently to Ct 1. VCC:$30.00

☐ It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is to receive credit for time spent in custody. _____ TOTAL NO. DAYS 12/22/89 to present. DATES (From - To)

Total Life imprisonment - MPE Total 85 yrs

_____ DATES (From - To)

Administrative Office of the Courts (OVER) CPO11B (REV. 3/91) Replaces LR 3A:8 & LR 3B

09 10

State of New Jersey v. John [illegible]e Allen, Jr. S. # 455146B I90-06-1003

If the offense occurred on or after January 9, 1986, a penalty of $30 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1 (Penalty is $25 if offense is before January 9, 1986 unless a higher penalty is noted.)

☐ Penalty imposed on count(s) 1 thru 9

at $ _____ each

Total VCCB Penalty $ 10,150.00 payable during period of incarceration & or parole

Total FINE $ _____

Total RESTITUTION $ _____

☐ Installment payments are due at the rate of $ _____ per _____ beginning _____ (DATE)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

___ 1st Degree @ $3000 ___ 4th Degree @ $750
___ 2nd Degree @ $2000 ___ Disorderly Persons or Petty Disorderly Persons @ $500
___ 3rd Degree @ $1000

Total D.E.D.R. Penalty $ _____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program

2) A mandatory driver's license suspension of _____ months is ORDERED

The suspension shall begin today _____ and end _____

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING)

Defendant's Address 620 West State St. Trenton 08618

Eye Color Brown Sex M Date of Birth 3/18/69

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____ Driver's license # _____

☐ Your non-resident driving privileges are hereby revoked for _____ Months

3) A forensic laboratory fee of $50 per offense is ORDERED ___ Offenses @ $50

Total LAB FEE $ _____

NAME (Court Clerk or Person who prepares this form)
Blanca M. Diaz, Court Clerk

NAME (Attorney for Defendant at Sentencing)
Mark Catanzaro, Esq.

STATEMENT OF REASONS

The defendant is convicted of two purposeful and knowing murders, two robberies, a kidnapping, and two weapons' violations. (Two Felony Murder convictions have been merged into the purposeful and knowing murder convictions.) The commission of each of the crimes was independent of the other crimes for which the defendant was convicted and is sentenced.

AGGRAVATING FACTORS: The court notes the vulnerability of the victims of both murders. Both were cab drivers who were unarmed and unable to defend themselves. The killings were heinous and senseless. There is a likelihood that the defendant would commit another crime, since the commission of the crimes for which the defendant stands convicted, were to serve as a springboard for the commission of drug related crimes; the need to deter is apparent.

MITIGATING FACTORS: None

Counts One through Five relate to crimes committed against Willie Rogers. Counts Six through Nine relate to crimes committed against Francis Bodnar. Those crimes were committed at different times and at different places. Thus, the court, under Yarbough, has sentenced the defendant on the two most serious crimes which relate to each of the victims. The remaining charges with respect to each

OVER

JUDGE (Name)
Charles A. Delehey, J.S.C.

JUDGE (Signature)
Charles A. Delehey

DATE
9/6/91

Administrative Office of the Courts

DC/1

CHIEF PROBATION OFFICER, AOC STATISTICAL SERVICES, DEPARTMENT OF CORRECTIONS

CN0108 (REV. 3/90) Replaces LR 3A & LR 3B

of the victims have resulted in the imposition of concurrent sentences.

The defendant, although only 22 years of age, is vicious and amoral. He does not belong in any form of an institution for youthful offenders.

ORIGINAL FILED

JAN 8 1992

Emilie R. Cox, Esq.
Clerk

WILFREDO CARABALLO
Public Defender
Office of the Public Defender
P. O. Box 46003
31 Clinton Street
Newark, New Jersey 07101
(201) 877-1200

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO. 90-06-1003

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN LEE ALLEN, JR.

Criminal Action

NOTICE OF APPEAL

Defendant-Appellant.

PLEASE TAKE NOTICE that the defendant, confined/residing at, #236390,YR, New Jersey State Prison, CN 861, Trenton, N.J. 08625 appeals to this Court from the final judgment of conviction of murder, robbery, kidnapping, possession of a weapon for an unlawful purpose,

entered on 9/6/91 in the Superior Court, Law Division, Mercer County, in which a sentence of two life imprisonment terms plus 40 years with an 85 year parole disqualifier, $20,150. Violent Crime Compensation Board penalty, was imposed by the Honorable Charles A. Delehey

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

WILFREDO CARABALLO
PUBLIC DEFENDER
Attorney for Defendant-Appellant

By: FRANK J. SOLTIS
Assistant Deputy Public Defender

The undersigned certifies that the requirements R. 2:5-3(a) have been complied with by ordering the transcript(s) on 1-7-92 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

PLEASE NOTE that trial transcripts were ordered in the case of co-defendant Ronald Allen.

FRANK J. SOLTIS

DA 13

A-2434-91T4

ORDER ON MOTION

STATE OF NEW JERSEY

VS

JOHN LEE ALLEN, JR.

SUPERIOR COURT OF NEW JERSEY
APPELLATE, DIVISION
DOCKET NO. A-2434-91T4
MOTION NO. M-2686-91
BEFORE PART:
JUDGE(S): Michels

MOTION FILED: JANUARY 8, 1992

ANSWER(S) FILED: _____ BY: _____

_____ BY: _____

DATE SUBMITTED TO COURT: JANAURY 28, 1992

FILED
APPELLATE DIVISION
JAN 28 1992
Clerk

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO COURT, IT IS ON THIS 28th DAY OF JANUARY 19 92, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
JOHN LEE ALLEN, JR.
TO FILE NOTICE OF APPEAL
NUNC PRO TUNC

GRANTED	DENIED	OTHER
X		

SUPPLEMENTAL: It appearing that the preconditions of the Supreme Court in its "NOTICE TO APPELLATE BAR", 100 N.J.L.J. 1208 (1977), identified and explained in State v. Altman, 181 N.J. Super. 539 (App. Div. 1981), have been met, the motion to file the notice of appeal nunc pro tunc is granted.

FOR THE COURT:

HERMAN D. MICHELS, P.J.A.D.

MERCER CO. #90-06-1003

/np

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

T-24

A-2434-91T4

Approved for Filing BM

Superior Court of New Jersey

Appellate Division

FILED
APPELLATE DIVISION
FEB 26 1993
Clerk

REC'D
APPELLATE DIVISION
FEB 26 1993
Clerk

DOCKET NO. A-2434-91T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Mercer County.
v.	:	
JOHN ALLEN,	:	
Defendant-Appellant.	:	Sat Below: Hon. Richard J.S. Barlow, J.S.C., Hon. Charles A. Delehey, J.S.C., and a jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

NANCY A. HULETT
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX CN086
TRENTON, NEW JERSEY 08625
(609) 292-9086

OF COUNSEL AND ON THE BRIEF

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
CN 086
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625-0086
TELEPHONE: 609-984-6500

ROBERT J. DEL TUFO
ATTORNEY GENERAL

Clerk
ROBERT T. WINTER
DIRECTOR

February 26, 1993

Emille R. Cox, Esq.
Clerk, Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Re: State v. John Allen
Docket No. A-2434-91T4

Dear Mr. Cox:

Enclosed herein for filing in the above captioned matter are five copies of the State's brief. Also enclosed is an Affidavit indicating service upon our adversary.

Very truly yours,

Nancy A. Hulett
Deputy Attorney General

NAH:sh

Enclosures

c: Office of the Public Defender
Attn: Steven M. Gilson, Esq.,
Designated Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CASES CITED (CONT'D)

CASES CITED (CONT'D)

CASES CITED (CONT'D)

CASES CITED (CONT'D)

CASES CITED (CONT'D)

STATUTES CITED

STATUTES CITED (CONT'D)

RULES CITED

CITATIONS (CONT'D)

"17T" Transcript of trial proceedings dated July 2, 1991;
"18T" Transcript of trial proceedings dated July 3, 1991;
"19T" Transcript of trial proceedings dated July 9, 1991;
"20T" Transcript of trial proceedings dated July 10, 1991
"ST" Transcript of sentencing hearing dated September 6, 1991.

OTHER CITATIONS TO THE RECORD

"Da" Defendant's Appendix;
"Db" Defendant's brief.

COUNTER STATEMENT OF PROCEDURAL HISTORY

On June 22, 1990, the grand jury for Mercer County returned Indictment Number 90-6-1003I charging defendant John Allen and his codefendants Ronald Allen and Gregory Williams with the purposeful or knowing murder of Willie Rodgers, contrary to N.J.S.A. 2C:11-3a(1), (2) (count one), felony murder, contrary to N.J.S.A. 2C:11-3a(3) (count two), armed robbery, contrary to N.J.S.A. 2C:15-1 (count three), kidnapping, contrary to N.J.S.A. 2C:13-1b (count four), possession of handguns with the purpose to use them unlawfully against Willie Rodgers, contrary to N.J.S.A. 2C:394-d (count five), the purposeful or knowing murder of Francis Bodnar, contrary to N.J.S.A. 2C:11-3a(1),(2) (count six), felony murder, contrary to N.J.S.A. 2C:11-3a(3) (count seven), armed robbery, contrary to N.J.S.A. 2C:15-1 (count eight) and possession of handguns with the purpose to use them unlawfully against Francis Bodnar, contrary to N.J.S.A. 2C:39-4d (count nine). (Da1-Da10).

The Honorable Richard J.S. Barlow, J.S.C., presided over certain pre-trial hearings, including defendant's arraignment on June 26, 1990. (MT-2MT). The Honorable Charles A. Delehey, J.S.C., also presided over pretrial hearings, including defendants' joint motions to suppress their statements to the police. (3MT-13MT). Prior to trial, Judge Delehey granted the State's motion to sever codefendant Williams from the trial of defendant and codefendant Allen. (13MT29-11 to 13; 13MT30-2 to 10). He also denied defendant's motion to sever his trial from that of codefendant Allen. (14MT4-10 to 11, 14MT20-24 to 25).

Judge Delehey presided over the Allens' joint jury trial from June 10, 1991 to July 2, 1991. (T-17T). The jury was charged on July 3, 1991 and deliberated on July 3rd, July 9th and July 10th. (18T-20T). On July 10, 1991, the jury found defendant and codefendant Allen guilty

on all nine counts in the indictment. (Da10; 20T4-19 to 20T8-9).

On September 6, 1991, Judge Delehey sentenced both defendants. (ST). He merged each felony murder conviction (counts two and seven) into the respective purposeful or knowing murder conviction (counts one and six). (ST13-5 to 8; ST14-11 to 16). The aggregate sentence for both defendants turned out to be two life terms, plus 50 years, with an 85 year parole bar. The sentences broke down as follows. On count one, each defendant received a sentence of life imprisonment, 30 years without parole. (Da10; ST13-10 to 13). A $10,000 VCCB penalty was imposed on this count. (Da10; ST13-13 to 14). On count three (armed robbery of Willie Rodgers), both defendants received twenty years in prison with a ten year parole disqualifier and a $30 VCCB penalty. (Da10; ST13-15 to 18; ST13-20 to 21). The sentence imposed on count three was to run concurrently with the sentence imposed on count one. (Da10; ST13-18 to 20). On count four (kidnapping of Willie Rodgers), both defendant received a term of thirty years in prison, fifteen years without parole, and a $30 VCCB penalty. (Da10; ST13-22 to 25; ST14-103). This sentence was made to run consecutively to the sentence imposed on count one. (Da10; ST13-25 to ST14-1). On count five (weapons offense against Willie Rodgers), defendants received a concurrent term of ten years in prison, five years without parole, and a $30 VCCB penalty. (Da10; ST14-3 to 10). On count seven (purposeful or knowing murder of Francis Bodnar), defendants received a consecutive sentence to count one of life imprisonment, 30 years without parole and another $10,000 VCCB penalty. (Da10; ST14-17 to 21). On count eight (armed robbery of Francis Bodnar), defendants received a consecutive term to count one of twenty years in prison, ten years without parole, and a $30 VCCB penalty. (Da10; ST14-22 to 25; ST14-2 to 3). Finally, on count nine, defendants received a concurrent term of ten years in

jail with a five year parole bar and a $30 VCCB penalty. (Da10; ST15-4 to 11).

On January 8, 1992, defendant filed a Notice of Appeal with this Court. (Da13).

COUNTER-STATEMENT OF FACTS

It was very cold outside on the evening of November 18, 1989, but the adverse weather conditions did absolutely nothing to deter defendant, his twin brother Ronald and codefendant Williams from venturing out onto the streets of Trenton to prey upon and rob cab drivers. Within the span of only 2 1/2 hours, these gun-toting desperados robbed and ruthlessly murdered two Trenton cab drivers, Willie Rodgers and Francis Bodnar, each of whom was killed by a single blast to the back of the head with a .357 magnum revolver.

As of November, 1989, defendant and his brother, codefendant Allen, were twenty years old and were living at 72 Laurel Place in Trenton. (3T60-19 to 21; 3T113-6 to 12; 13T198-22 to 24). The house that they lived in offered little comfort: there was no heat or electricity so defendants used candles and kerosene to produce light and heat. (3T113-6 to 12). Defendant kept his clothes at the house in his bedroom on the second floor, but he spent the nights with his girlfriend, Christine McQuillar, who lived at 620 West State Street in Trenton. (3T64-10 to 14; 3T112-11 to 19; 3T112-22 to 25).

Defendant and his brother hung out with a host of characters that included codefendant Williams, Maurice Webb, Carl Wiley and L.C. Pegues. Codefendant Williams, who was thirty-six years old and who was known as "Freeze," knew the man who owned the house at 72 Laurel Place and he would hang out with the Allen brothers for about an hour each day. (3T60-19 to 3T61-7; 3T75-16 to 20; 3T76-2 to 5; 3T76-22 to 3T77-21; 13T204-9 to 11). Maurice Webb, who was about twenty years old,

lived up the street from the Allen brothers and he spent a lot of time with them. (3T66-11 to 13; 3T67-3 to 11; 3T67-16 to 25). Seventeen year old Carl Wiley was the Allens' first cousin and he was "very close" to them during the summer and fall of 1989. (3T58-18 to 19; 3T59-23 to 24; 3T66-11 to 13). For awhile, Carl lived at 72 Laurel Place with the Allens, but he eventually moved out and went back to live with his mother at 110 S. Overbrook Avenue in Trenton. (3T61-21 to 24; 3T61-25 to 3T62-8; 3T64-5 to 9; 3T113-18 to 23). L.C. Pegues visited with the Allen brothers at 72 Laurel Place once or twice a week; they considered Pegues to be a "thorough nigger," meaning a person who could be trusted. (3T79-3 to 23; 3T80-2 to 6; 7T17-23 to 24).

Defendant and his brother were also friendly with a man from New York whose street name was "Black." (3T81-5 to 17; 3T82-1 to 3). They also spent a lot of time at Shelia Johnson's residence. (4T146-2 to 5; 4T146-23 to 4T147-1). Defendants had gone to school with her former boyfriend and they visited with her almost every day. (4T146-15 to 22; 4T148-3 to 11). On some occasions, defendants would bring Carl with them to her residence. (4T148-12 to 19).

Any conversation between the Allen brothers and their friends would almost always touch upon the topic of guns. (3T108-20 to 24; 4T154-14 to 20; 4T155-1 to 4; 7T37-21 to 24). They had gun books at 72 Laurel Place and they would bring gun magazines to Sheila Johnson's house. (3T108-25 to 3T109-5; 4T155-10 to 13). On many occasions, defendants would talk to Carl about the fact that a .357 magnum revolver was more powerful than a .38 caliber handgun; likewise, they would tell him that a .357 magnum bullet was more effective in killing a person than a .38 caliber bullet. (3T109-9 to 19). To this effect, the brothers would tell Carl about "the holes" that a .357 magnum

revolver would leave in a person. (4T45-16 to 18). Defendants had told L.C. Pegues that a .38 caliber does not kill, but a .357 magnum bullet does kill. (7T37-4 to 8). The brothers also knew about hollow-nosed bullets and they told Carl they preferred to use these kind of bullets. (4T107-11 to 14). Defendants related to Carl that a .38 caliber bullet would fit a .357 magnum revolver, but that a .357 magnum bullet would not fit a .38 caliber revolver. (3T109-22 to 3T110-4). After awhile, all the talk about guns and ammunition became "a little old" to Carl. (4T45-14 to 16). Whenever the Allen brothers visited Sheila Johnson, they would often look at a bullet case that Sheila's former boyfriend left in the apartment to see what type of bullets were in it. (4T155-14 to 24).

The Allen brothers not only read and talked about guns, but they possessed and carried guns, as well. In the late spring of 1989, they came into possession of a black .357 magnum revolver which "Black" used to carry. (3T83-17 to 3T84-8; 3T84-14 to 21; 3T99-18 to 21). Defendant and his brother admired the gun and "Black" gave it to them to hold. (3T85-6 to 12). The two defendants also came into possession of a chrome .357 magnum revolver. (3T100-3 to 5; 3T101-2 to 4). This gun was formerly in the possession of "Dee" who was a member of a gang called the "New York Boys." (3T100-6 to 13; 3T100-18 to 23). "Black" was associated with the members of the gang. (3T100-14 to 15).

Defendant especially liked the black .357 magnum revolver and his brother Ronald especially liked the chrome .357 magnum revolver; each would carry the favored gun in his waistband. (3T111-18 to 24). A few days before the murders on November 18th, codefendant Allen brought the chrome .357 magnum revolver to Sheila Johnson's residence and showed it to all who were present. (4T149-12 to 4T150-20; 4T152-2 to 9; 4T153-4 to 12). When he was asked if he was scared carrying such a weapon, he

said no. (4T151-19 to 23). He also pulled out the ammunition for the gun which he kept in his pockets. (4T152-15 to 18). After everyone present looked at the gun, codefendant Allen put it back into his pants. (4T153-21 to 4T154-13).

In addition to the .357 magnum revolvers, the Allens kept a sawed-off shotgun at 72 Laurel Place. (3T104-6 to 8; 3T104-15 to 18; 3T104-22 to 23). Carl had seen the shotgun in defendant's room on the second floor and on the third floor of the house. (3T104-3 to 5; 3T105-2 to 6). Defendants also kept ammunition in the house: .357 magnum caliber bullets; .25 caliber bullets; and shotgun shells. (3T106-20 to 25). They kept the bullets in two carry-on bags, one of which belonged to codefendant Williams. (3T110-17 to 22). During the summer of 1989, defendant and his brother would purchase ammunition at the Trigger and Reel Sporting Goods Store in Ewing Township using codefendant Williams' driver's license. (10T48-10 to 17; 10T176-10 to 20). On June 15, 1989, defendants purchased a box of .25 caliber PMC ammunition and a box of .38 caliber PMC ammunition. (10T51-23 to 10T52-8). On July 30, 1989 and on August 15, 1989 defendants purchased a box of .357 magnum PMC ammunition. (10T52-9 to 13; 10T52-16 to 21).

In the fall of 1989, defendant and his brother decided it was not safe to keep their guns and ammunition at 72 Laurel Place because they were living with a known thief. (3T78-9 to 17). So, they enlisted the help of Carl and Maurice Webb each of whom would take one of the .357 magnum revolvers or the ammunition and keep it at their homes until the Allens asked for the gun or ammunition back. (3T98-24 to 3T99-4; 3T99-10 to 17; 3T101-12 to 16; 3T102-21 to 25; 3T103-1 to 2; 3T103-21 to 23). Carl would keep the gun and ammunition under his bed. (3T103-6 to 8; 3T111-9 to 11).

The Allens did not simply warehouse their favored .357 magnum

revolvers and their ammunition at various homes; they would use their weapons to commit crime. Such was their purpose when they met with codefendant Williams at 72 Laurel Place on the evening of November 18, 1989 to discuss a plan to "stick up connects," or drug dealers. (3T114-2 to 4; 3T114-23 to 25; 3T115-4 to 8; 3T116-16 to 17). Before they could rob "the connects," they needed to get some money because no "connect" would take them seriously if they could not produce some cash. (3T116-18 to 3T117-1). The three defendants figured they needed at least $300. (3T117-2 to 4). They decided to rob at gunpoint cab drivers because they were "easy prey." (3T117-8 to 15). They estimated that they could rob $100 from one cab driver and, thus, they planned on committing three armed robberies. (3T117-24 to 3T118-3). Carl, who had stumbled upon the conversation, agreed to stay at the house and watch defendant's dog. (3T114-23 to 25; 3T119-12 to 13). Defendant and his brother armed themselves with their favored .357 magnum revolvers. (3T119-22 to 3T120-2; 3T120-5 to 7; 3T120-21 to 3T121-4). They tried to get codefendant Williams to take the shotgun, but he refused, claiming the weapon was too big to conceal. (3T118-21 to 3T119-2). The three defendants then left the house.

Once outside, all three defendants walked to the corner of Stuyvesant Avenue and Prospect Street where they flagged down a cab being driven by thirty-three year old Willie Rodgers. (3T4-4 to 6; 3T4-10 to 11; 12T62-10 to 11; 14T120-22 to 14T121-4). Defendant got into the back seat behind Willie Rodgers; codefendant Williams sat next to him; and codefendant Allen got into the front seat. (3T123-23 to 3T124-2). They told Willie to take them to a street called Belvidere. (12T62-19 to 21; 14T121-8 to 9). However, once they got to Belvidere, defendant and his brother brandished their guns and announced that they wanted all of Willie's money; they ordered Willie to drive to the back

of Bud's Barbecue which is located on Prospect Street in West Trenton. (2T92-19 to 20; 2T92-24 to 2T93-2; 2T93-21 to 24; 12T62-22 to 24; 14T121-9 to 10). Willie's dispatcher had been in touch with him at 9:30 p.m. and 9:39 p.m. that night; on the second call, Willie sounded "sort of perturbed." (4T167-1 to 3; 4T173-24 to 4T174-1; 4T176-22 to 4T177-1). The dispatcher tried to contact Willie after the 9:39 p.m. call, but he was unable to reach him. (4T177-15 to 18).

In the meantime, Willie followed defendants' order and drove to the back of Bud's Barbecue. Once the cab was pulled to a stop, the keys to the cab were thrown out the window. (12T62-25 to 12T63-1; 14T121-14 to 16). After Willie handed over his money, defendant pointed his gun at the back of Willie's head. From a distance of only four inches, defendant fired one shot from his .357 magnum revolver which hit Willie in the back of the upper neck. (3T24-8 to 14; 3T20-23 to 3T21-2; 3T24-18 to 20; 12T63-3 to 4; 14T121-20 to 22; 15T104-4 to 15T105-1; 15T188-2 to 3; 15T90-24 to 15T91-3). All three defendants then fled the area and ran back to 72 Laurel Place. (12T63-5; 14T121-23 to 24).

Shortly after defendant murdered Willie Rodgers, between 9:48 p.m. and 9:50 p.m., an employee of a company that installed and maintained burglar alarm systems was in the area of Bud's Barbecue checking up on a customer's alarm system when he saw Willie's cab behind the restaurant. (3T40-14 to 17; 5T8-18 to 21; 5T9-12 to 15; 5T10-2 to 4; 5T10-1 to 5T11-1; 5T11-9 to 15; 5T11-22 to 5T12-2; 5T12-14 to 18). He saw that no lights were on inside the cab and he also saw no one in the area. Therefore, he did not think to call the police. (5T13-6 to 8; 5T13-16 to 18; 5T15-3 to 7).

When the three defendants arrived back at 72 Laurel Place, Carl was waiting for them; their total time away from the house had been

about an hour. (3T121-6 to 8; 13T121-23 to 25). Defendant was still carrying the black .357 magnum revolver and codefendant Allen was carrying the chrome-colored one. (3T120-21 to 3T121-4). Codefendant Williams began counting the loot which totalled $100, and they split the money three ways. (3T124-15 to 12). They explained to Carl that they had picked up a cab and had told the driver to take them behind Bud's Barbecue because they figured no one would find them there. (3T122-21 to 25; 3T123-12 to 14; 3T123-1 to 11). They told Carl that they took the cab driver's money and that defendant shot him. (3T123-15 to 17; 3T124-25 to 3T125-2). They also told Carl where they had been sitting in the cab and explained to him that the cab driver had to be shot because he could identify them. (3T123-18 to 3T124-2). When they said they had to go out and rob more money, Carl urged them not to go, but they promised him that the second cab driver would not get shot. (3T126-1 to 8). Before leaving this second time, defendants made sure that the .357 magnum revolvers had enough ammunition. (4T110-12 to 4T111-5). When they left the house, defendant was still carrying the black .357 magnum revolver and his brother was still carrying the silver-colored .357 magnum revolver. (4T111-6 to 8).

Out on the streets again, defendants purchased some food at a Chinese restaurant after which they flagged down a second cab. (12T63-15 to 22; 14T122-20 to 25). The unsuspecting cab driver was thirty-eight year old Francis Bodnar. (3T28-11 to 12). The seating arrangements were the same as in Willie's Rodger's cab: codefendant Allen sat in the front seat; defendant sat in the back seat behind the cab driver; and codefendant Williams sat in the back seat next to defendant. (3T140-1 to 13). They told Francis that they were headed "westward." (12T63-22). En route, at about 10:45 p.m., Francis stopped to pick up a fourth passenger, Ruth Walker, who wanted to be

taken to Trenton Psychiatric Hospital. (5T17-22 to 23; 5T18-21 to 24; 5T19-3 to 11; 5T20-3 to 7; 5T20-12 to 15; 5T21-5 to 6; 5T20-21 to 23; 5T21-10 to 15; 12T63-23 to 12T64-1; 14T122-25 to 14T123-4). Defendant told Francis that he should drop himself and his two cohorts off and pick them up after taking Ruth Walker to the hospital; Francis agreed. (5T23-1 to 10; 5T25-6 to 17; 12T64-6 to 7; 14T123-4 to 7).

When Francis returned to pick up defendants, they got back into the cab and asked Francis to take them to Overbrook Avenue in Trenton. (12T64-21 to 24; 14T123-1 to 11). They took the same positions in the cab as they had taken previously. (3T140-1 to 13). At Overbrook Avenue and Riveside Street, defendant and his brother pulled out their guns and ordered Francis to stop the cab. (12T64-25 to 12T65-1; 14T123-12 to 14). Francis did not stop the cab, but continued driving at a slow rate of speed. (12T65-1 to 2; 14T123-12 to 14).

Shortly thereafter, Francis turned onto Gouveneur Avenue where he slammed on the brakes. (12T65-3 to 4; 14T123-14 to 15). The time was now between 11:30 p.m. and midnight. (3T39-23 to 3T40-4). Once the cab had been brought to a stop, defendant put his .357 magnum revolver to the back of Francis' head and fired one shot; his brother also fired a shot from his magnum revolver which missed Francis completely; instead, the bullet shattered the driver's side window. (3T30-5 to 19; 3T30-20 to 23; 3T41-17 to 21; 4T82-4 to 13; 15T97-3 to 9; 15T97-14 to 20; 15T88-2 to 3; 15T90-24 to 15T91-3).

Right as defendants shot Francis Bodner on Gouveneur Avenue, two cars turned onto the street: a yellow Chevrolet Nova being driven by Dwayne Fletcher and a blue Hyundai being driven by his friend Kenneth Davis. (5T40-18 to 22; 5T42-1 to 6; 5T42-7 to 13; 5T42-21 to 22; 5T78-24 to 25; 6T150-14 to 18). Dwayne, who was driving ahead of Ken Davis, saw the glass on the driver's side of the cab shatter onto the street;

his passenger, Alemarie Williams, saw it, as well. (5T46-2 to 6; 6T152-20 to 6T153-1; 6T153-16 to 20). Dwayne's car, which was used as a race car, was so loud that the noise from the car drowned out the sounds of the gunshots from inside the cab. (5T42-21 to 22; 5T43-1 to 3; 6T153-10 to 15). Dwayne and Alemarie saw that the lights inside the cab were on and that there were four occupants: two in the front seat; two in the back seat. (5T46-7 to 10; 5T47-2 to 4; 5T47-23 to 5T48-6; 6T154-15 to 16; 6T154-23 to 6T155-1). They both saw that the cab driver was not moving, unaware that he had just been shot in the back of the head with defendant's .357 magnum revolver. (5T48-7 to 14; 6T155-2 to 4). However, they saw that defendants were moving in the area of the cab driver's pockets as if they were looking for something. (5T48-7 to 14; 5T51-2 to 6; 5T48-22 to 5T49-1; 6T155-8 to 10; 6T155-17 to 21; 6T155-25 to 6T156-3; 6T172-3 to 6T173-10; 6T180-6 to 14). When Alemarie began to panic, Dwayne decided not to stop his car. (5T53-3 to 6; 6T162-6 to 11).

When Kenneth Davis passed Francis Bodnar's cab, he saw the two back seat passengers lean toward the front seat; the passenger in the front seat seemed to be tugging at the cab driver's clothing. (5T82-16 to 21; 5T83-4 to 12). He saw that the cab driver's head was laying back. (5T85-8 to 9). After driving past the cab, Kenneth decided to drive back to the area and make sure that the cab driver was alright. (5T86-22 to 24; 5T87-13 to 20). When he got back to the area, he saw that the three passengers were now standing outside the cab; he immediately recognized the Allen brothers. (5T88-14 to 17; 5T89-4 to 14). After defendants left the area, Kenneth honked his horn and approached the cab. (5T89-1 to 3; 5T91-5 to 12). Francis moved his head a little bit and Kenneth figured he was alright even though he saw blood in Francis' left ear area; he figured Francis' head had been

smashed through the driver's side window. (5T91-12 to 17; 5T92-4 to 6).

In the meantime, defendants ran back to 72 Laurel Place. (3T128-10 to 11; 3T128-19 to 21). Carl was still at the house and defendants told him they had just shot a second cab driver. (3T129-9 to 13). When Carl asked why they shot the cab driver, defendants said he was uncooperative and appeared to reach for something. (3T129-12 to 17). They told Carl that both defendant and codefendant Allen shot at the driver and that the driver's head exploded after being shot. (3T129-17; 3T130-13 to 15). Defendants expressed no remorse for murdering Francis Bodnar although they said they had not wanted to shoot Willie Rodgers because he was black. (3T130-22 to 3T131-4). Codefendant Allen counted the proceeds of the second armed robbery and after realizing that their stash was only $6.00 he said, "Dag, that's all the money we got." (3T129-5 to 9; 3T130-2 to 5). Each defendant got $2.00. (3T130-6 to 9). Codefendant Allen then took the .357 magnum revolvers and stored them at Maurice Webb's residence. (3T131-17 to 20).

By 12:09 a.m. on November 19, 1989, Trenton police officers had found Francis Bodnar in his cab with its headlights on and its engine running. (2T68-25 to 2T69-10; 2T70-10 to 24; 2T71-12 to 16; 2T71-22 to 25; 2T72-8 to 13; 2T72-20 to 24). By now, Francis was dead. (12T73-19 to 12T74-3). Inside the cab, there was a puddle of blood on the car floor behind the driver's seat and there was blood all over the front seat. (2T78-16 to 20; 9T15-18 to 22). Blood stains were found on the ground near the rear passenger door, as well as bloody foot prints that led away from the cab. (2T78-5 to 9; 2T86-18 to 23; 2T87-11 to 15; 2T88-1 to 5; 2T88-8 to 11). Under the inspection sticker on the dashboard, police found a spent bullet and a piece of the bullet called

a gas check. (9T16-1 to 5; 9T18-13 to 22).

Later that morning, the police discovered Willie Rodger's cab behind Bud's Barbecue. (2T91-1 to 8; 2T92-6 to 7; 2T92-19 to 20; 2T93-3 to 6; 2T93-21 to 24; 2T95-5 to 11). The cab's engine was turned off and the car doors were unlocked. (2T94-25 to 2T95-6). Police found Willie Rodger's lifeless body inside the cab; the nylon pouch around his waist was opened and it appeared to be empty. (2T95-7 to 11; 2T96-3 to 4). There was a large amount of blood behind the driver's seat on the floor. (2T96-5 to 8). On the front seat of the passenger's side, police found a copper-colored cap which appeared to be a projectile. (2T97-15 to 2T98-5).

The autopsies, performed later that day, showed that both Willie Rodgers and Francis Bodnar died from gunshot wounds to the back of the head. (2T143-6 to 9; 3T24-18 to 20; 3T41-17 to 21). Willie suffered extensive fractures of the upper jaw, nasal bones and palate; the bullet traveled at the base of the brain, causing fractures of three upper cervical vertebra, and then moved upwards to the upper jaw area where it stopped. (3T11-16 to 18; 3T13-4 to 8; 3T15-23 to 24; 3T19-2 to 9; 3T20-23 to 3T21-2). The bullet caused extensive hemorrhaging in Willie's neck and into the base of his brain. (3T11-1 to 3; 3T11-6). The bullet lodged in Willie's palate was recovered, as well as $2.46 in coins that defendants left behind in Willie's black vinyl pouch. (2T119-16 to 2T120-1; 2T104-19 to 23). Francis' skull had been severely shattered as a result of the contact gunshot wound. (3T29-14 to 19). The bullet entered at the back of his head and exited from the left temple region. (3T30-5 to 19; 3T31-5 to 11). The bullet passed through the brain, causing extensive lacerations and hemorrhaging. (3T32-6 to 11). In a rear pants pocket, police found $45 in cash; in a shirt pocket, the police found $19 in cash. (2T107-19 to 23; 3T28-1 to

3).

On November 20, 1989, two days after the murders, the Trenton Police Department set up a task force of several detectives to work exclusively on the case. (12T9-18 to 22). Early on into the investigation, detectives learned that the murder weapon was either a Sturm Roger, a Smith and Wesson or a Taurus revolver with a caliber of either .38 or .357 magnum. (9T38-21 to 9T39-18; 14T80-19 to 14T81-13). The identification of the bullets and the gas checks proved to be more elusive; as of November 30th, detectives had not been able to determine the manufacturer of the bullets. (9T73-22 to 25).

On November 28, 1989, defendant spoke with a detective on the task force. (9T54-20 to 24). Defendant was not a suspect at the time, but the detective knew that defendant hung out with the "New York Boys" and he hoped defendant would be able to provide him with some information. (9T54-20 to 24; 9T68-19 to 22). Defendant lied and claimed that he had no knowledge of the cab driver murders, but he gave the detective the names of the "New York boys" who he claimed might have been responsible for the murders. (9T60-17 to 23; 9T61-2 to 23; 9T62-20 to 9T63-8; 9T63-16 to 17). By this date, defendants had already decided that if the police ever questioned them about the murders, they would point the finger at the "New York Boys" and whoever got caught with their weapons. (3T151-25 to 3T152-3; 3T152-11 to 14). At one point during the conversation, defendant claimed that "Heavy D," whose real name was Darrell Williams or Darrell Matthews, owned a GP 1000 gun which was silver in color. (9T64-1 to 13; 9T64-17 to 22; 9T65-3 to 10). Defendant said the gun was a .357 magnum revolver produced by Sturm Roger. (9T64-25 to 9T65-2). When the detective commented that not even he, a gun owner, remembered the model number of his guns, defendant said he had read a lot of books about guns. (9T65-15 to 23).

Defendant led the detective to believe that the gun and some gas check bullets might be located in an apartment in Bordentown in Burlington County. (9T67-6 to 9). Defendant agreed to cooperate with the police in uncovering the evidence. (9T67-9 to 15). After talking with defendant that day, detectives began to track down and question the people named by defendant. (9T70-17 to 21; 14T83-10 to 21; 14T84-5 to 11; 14T85-8 to 12; 14T85-16 to 18; 14T86-24 to 14T87-10).

As of December 4, 1989, detectives were still looking at the "New York Boys" as possible suspects and were still trying to identify the manufacturer of the bullets that were uncovered from the victims and the cabs. (9T74-18 to 22; 9T75-15 to 18). However, while checking on prior reports of stolen guns, detectives found a report of a stolen Sturm Roger, GP 1000; the report caught their attention because defendant had mentioned that type of a gun on November 28th and their own investigation led them to believe that the murder weapon was a Sturm Ruger. (9T75-19; 9T75-23 to 9T76-20). Detectives spoke with the gun's owner, but were unable to determine from him the manufacturer of the gas check bullets. (9T76-21 to 9T77-1; 9T77-7 to 14; 9T77-17 to 25).

In the meantime, as the police conducted their investigation into the murders, defendant and his brother kept the .357 magnum revolvers in hiding at 72 Laurel Place, Maurice Webb's house and at L.C. Pegues' house. (3T133-3 to 6). Carl offered to get rid of the guns for them, but defendants wanted to keep the guns. (3T133-7 to 12). Defendants figured that whoever got arrested with the guns would get charged with the murders. (3T133-20 to 24; 3T134-2 to 6). Defendants also talked about the murders with people they knew: Carl; Maurice Webb; "Black"; and Pegues. (3T134-7 to 18). Finally, around Thanksgiving, defendants sold both .357 magnum revolvers to Pegues for $100. (7T34-4 to 13;

7T35-21 to 22; 7T38-7 to 10; 8T191-21 to 24).

Shortly, thereafter, on a Saturday night in December, Pegues saw defendants and Webb at a pizza parlor. (7T39-13 to 19; 7T40-4 to 19; 7T41-11 to 14). Pegues displayed the chrome .357 magnum revolver to them at which point defendants said they wanted the guns back. (7T41-19 to 7T42-1; 7T42-14 to 18). Pegues refused because he had paid for the guns. (7T42-24 to 7T43-1). Defendant told Pegues to keep the guns and the one that "had bodies on them." (7T43-4 to 6). Pegues said, "They ain't in Trenton." (7T43-11 to 13). Defendants looked at Pegues, laughed and mentioned the cab drivers. (7T43-14 to 17). Pegues became nervous and demanded to know what was going on. (7T43-16 to 19). When he asked defendants why they had sold him guns which had "bodies on them," defendants said they were not talking. (7T44-10 to 12; 7T44-20 to 23). Pegues came right out and asked the Allens if they had killed the cab drivers; Pegues took defendant's "devilish grin" to mean that they had committed the murders. (7T45-4 to 10).

At this point, Pegues asked codefendant Allen why he and defendant had killed the cab drivers. (7T45-11 to 12). Codefendant Allen said they did it because they had been "beaten" for drugs by another person and they needed money as a result. (7T45-11 to 13; 7T45-17 to 7T46-1). Codefendant Allen then recalled how scared Willie Rodgers had been and how he had begged for his life, mentioning his wife and children. (7T46-2 to 7; 7T46-21 to 22). Codefendant Allen said he laughed at Willie, took the keys from the ignition and threw them out the window. (7T46-22 to 24). He explained that when he turned his head he heard a boom; after seeing the hole in Willie's head, he and his cohorts all took off. (7T46-24 to 7T47-2). He told Pegues they got some money from Willie after which Willie was killed behind Bud's Barbecue. (7T47-14 to 20). Defendant explained that he killed the second cab

driver because the driver had seen both himself and codefendant Allen. As defendant explained it to Pegues, "How many twins do you know in Trenton that get into trouble?" (7T48-19 to 7T49-1). Pegues did not believe defendants' story, believing it was made up to get the guns back. (7T49-4 to 7). When he refused to return the guns, defendants left the pizza parlor. (7T49-11 to 15).

However, after the event, Pegues began to have second thoughts. (7T49-18 to 23). Defendants may have considered Pegues a "through nigger," but what they did not know was the fact that Pegues had acted as a police informant. (7T16-4 to 15). Pegues tried to contact an undercover police officer at the Trenton Police Department, but he was unable to do so. (7T49-24 to 7T50-7). He then contacted defendant and codefendant Allen and told them they could have their guns back. (7T50-11 to 7T51-4; 7T51-14 to 15). Defendants said to Pegues, "Now you learning." (7T51-15 to 16). That same day, Pegues retrieved both .357 magnum revolvers and gave them to defendants. (7T51-19 to 23).

It was not until after defendants had their .357 magnum revolvers back that an undercover police officer reached Pegues. (7T51-24 to 7T52-4). Pegues told the officer that he knew who killed the cab drivers; he did not mention the fact that he had been in possession of the .357 magnum revolvers. (7T53-1 to 5). Pegues was told to call back that coming Monday. (7T53-5 to 6). Pegues complied with the request and he gave the names of defendant and his brother to police. (7T53-14 to 16; 7T54-70 to 10). He also admitted that he had been in possession of defendants' guns. (7T54-20 to 23). Pegues agreed to try and get the guns back from defendants. (7T55-2 to 10).

For over a week, Pegues tried to persuade defendant and his brother to turn over the guns to him. (7T58-21 to 23). On one attempt, Pegues picked up codefendant Allen in his van and talked with

him. (7T60-9 to 23). Codefendant Allen talked about the murder of Willie Rodgers and he repeated much of what he had said at the pizza parlor: Willie was very scared; codefendant Allen laughed about it; Willie was told to drive to the back of Bud's Barbecue; that codefendant Allen threw the keys out the window; that defendants were in need of cash because someone had cheated them out of some drugs. (7T61-15 to 24; 7T62-3 to 11; 7T62-17 to 7T63-4). Codefendant Allen said Willie got killed because he kept looking in the rear view mirror. (7T62-13 to 16). Pegues asked if he could have the guns; codefendant Allen said yes. (7T63-5 to 9). They agreed to meet later that day. (7T63-13 to 15).

Detectives set up a surveillance and obtained authorization to record any conversation between Pegues and codefendant Allen. (7T63-16 to 22; 9T81-1 to 13; 9T81-17 to 19). However, the meeting between Pegues and codefendant Allen never materialized. (7T64-1 to 3). A few days later, Pegues, who was wired and under surveillance by detectives, met up with both defendants, but defendants came without the guns. (7T64-4 to 7; 7T64-8 to 17).

On another occasion, Pegues saw defendant and codefendant Allen with Maurice Webb at a Roy Rogers restaurant in the Trenton train station. (7T64-18 to 7T65-9). Defendants agreed to meet with Pegues and give him the guns. (7T65-25 to 7T66-2). Shortly afterward, Pegues went to 620 West State Street where he confronted defendant and accused defendant of "ducking" him. (7T66-9 to 11; 7T65-15 to 25; 7T67-3 to 5). Defendant said he feared the police were watching him. (7T67-14 to 18).

As of December 15, 1989, the task force investigation was focused on defendant and codefendant Allen. (9T87-13 to 19). Not only did detectives have the information from Pegues, but a latent fingerprint

lifted from Francis Bodnar's cab matched codefendant Allen's fingerprint. (9T95-14 to 22; 11T148-11 to 24; 11T49-14 to 24; 14T87-20 to 14T88-3). On December 15th, Pegues, wired with a recording device, met with defendant about getting the guns back. (7T67-24 to 7T68-8; 7T68-23 to 7T69-3). Pegues told defendant he needed the guns to commit a robbery. (7T74-19 to 22). Defendant told Pegues that Maurice Webb would get the guns. (7T73-11). When Pegues suggested that they go and get the guns, defendant said they could not do so because Webb was not at home. (7T78-22 to 7T79-5). Defendant was nervous and he suspected that the police had tapped his telephone. (7T75-5 to 12). He also mentioned a $13,000 reward for the capture of the murderers. (7T78-16 to 21). Defendant expressed doubts about Webb and Jesse Boston, Pegues' cousin, who was holding the black .357 magnum revolver. (7T79-6 to 17). Defendant and Pegues made plans to meet the next day. (7T82-11 to 12).[1] Detectives set up a surveillance, but defendant and his brother recognized their undercover van; once again, Pegues failed to get the guns back back. (7T84-4 to 25). At this point, detectives told Pegues to get defendants' guns whenever he had the opportunity; it was no longer important that he be wired or under surveillance because the goal was to get defendants' guns off the streets. (9T91-13 to 24).

Finally, on December 20, 1989, Pegues got the guns from defendants. Maurice Webb told Pegues that defendants had the guns. (7T87-18 to 21). Pegues, Webb and Carl Wiley met up with defendant and his brother at 620 West State Street. (7T87-25 to 7T88-15; 7T89-5 to 7; 7T89-1 to 4; 7T90-1 to 7; 7T92-25 to 7T93-2). Pegues reasserted the he needed the guns; defendant agreed to hand them over. (7T92-20 to 21; 7T93-5 to 9). Later that night, Webb retrieved the black .357

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[1] The trial judge instructed the jury that the recorded conversation was admissible only against defendant. (18T8-4 to 11).

magnum revolver from his house; defendants retrieved the silver-colored magnum revolver. (7T94-9 to 7T95-1). Webb handed over to Pegues the black gun and some bullets. (7T95-9 to 19). Codefendant Allen handed over to Pegues the silver-colored gun and about twelve bullets. (7T95-20 to T96-6; 7T96-9 to 10). Pegues promised to return the guns. (7T97-10 to 15). Defendant warned Pegues to be careful with the guns because he had seen "a lot of heads blown off" with them. (7T97-16 to 19).

Pegues immediately contacted detectives and turned over to them the two .357 magnum revolvers. (7T97-20 to 25; 7T98-1 to 12; 9T99-6 to 19; 9T100-1 to 16). Pegues also handed over the ammunition: two .357 magnum bullets manufactured by PMC Munitions Co. and ten, .357 magnum, semi-wadcutter gas check bullets also manufactured by PMC. (7T96-13 to 25; 9T102-7 to 12; 9T103-3 to 5; 15T88-9 to 14; 15T89-13 to 19). It was later determined that the ten gas check bullets were identical to the gas check bullets used in the murders. (15T91-15 to 20).

On December 21, 1989, detectives obtained arrest warrants for defendant and codefendant Allen. (9T104-23 to 9T105-4). They also obtained warrants to search 42 Laurel Place (Maurice Webb's house), 72 Laurel Place and 620 West State Street. (9T105-5 to 8). Detectives looked for defendants until 3:00 a.m. on December 22nd, but to no avail. (9T109-7 to 11). It was by coincidence that defendant showed up in municipal court on December 22nd with Carl Wiley; defendant was recognized and the police were notified. (9T110-13 to 9T111-6; 9T112-3 to 9; 9T111-12 to 16). After defendant and Carl were in custody, detectives worked quickly to find codefendant Allen before he could abscond. (9T115-16 to 22). Around 1:00 p.m. that day, codefendant Allen called police headquarters. (9T127-23 to 9T128-11). The telephone call was traced to 110 S. Overbrook Avenue in Trenton; a group of officers dispatched to the address placed codefendant Allen

under arrest. (9T129-19 to 9T130-3; 9T131-8 to 12; 12T25-8 to 15; 12T25-24 to 12T26-17).

At police headquarters on December 22nd defendant gave statements to police in which he admitted that he was present during the two murders, but that it was codefendant Williams who pulled the trigger. (12T52-23 to 25; 12T61-25 to 12T62-1; 14T120-6 to 11; 14T121-20 to 22; 14T123-16 to 19; 14T143-14 to 14T145-17). Codefendant Allen also gave statements to the police in which he claimed to have been present at the time of the murders, but claimed that it was codefendant Williams who shot the two cab drivers. (12T40-14 to 19; 13T186-14 to 17; 13T189-4 to 5; 13T200-11 to 13T203-12; 13T205-1 to 7; 14T20-12 to 14T22-15). In order to protect Pegues, Trenton police officers staged a phoney arrest of Pegues on December 22nd and filed fictitious weapons charges against him. (13T172-9 to 14; 13T173-11 to 13T174-11; 13T174-19 to 20). Detectives were not aware that codefendant Williams was involved in the murders until Carl Wiley told them so on December 22nd. (9T166-14 to 24). An arrest warrant was prepared for codefendant Williams on December 22nd, but he was not taken into custody until December 27th when authorities arrested him in Georgia. (10T22-14 to 21; 10T24-2 to 23; 10T26-17 to 10T27-2).

Testing performed by the State Police showed that the bullets recovered from Willie Rodgers' head and Francis Bodnar's cab were discharged .38 caliber lead bullets and .38 caliber gas checks. (15T79-1 to 3; 15T79-6 to 8; 15T79-13 to 18). The State Police and the FBI had never seen such ammunition. (15T81-6 to 10; 15T82-17 to 23). The police were not able to determine if the lead bullets and the gas checks were fired from the same gun, but each gas check was fired from the same gun: the black .357 magnum revolver. (15T82-1 to 6; 15T82-13; 15T88-2 to 3; 15T90-24 to 15T91-3). Defendants' .357 magnum

revolvers were capable of firing both .38 special or .357 magnum cartridges, and it was determined that the bullets and gas checks found in Willie's head and in Francis' cab came from .357 magnum cartridges. (15T91-6 to 8; 15T107-15 to 20). The Trenton police also submitted PMC bullets that had been found at 72 Laurel Place in a travel bag; ten of the bullets, which were gas check bullets, were identical to the other gas check bullets submitted by police. (14T102-3 to 20; 14T102-25 to 14T103-2; 15T105-24 to 25T106-7; 15T107-2 to 9). In Maurice Webb's bedroom, police had uncovered a tin that contained ten PMC .357 magnum cartridges. (9T119-2 to 7; 9T121-11 to 13; 9T121-16 to 17; 14T95-17 to 21; 14T96-16 to 22). Testing showed that the black .357 magnum revolver discharged four of the bullets and the crome-colored .357 magnum revolver discharged the other six. (15T98-2 to 6; 15T99-14 to 16; 15T99-9 to 13). Police also found a PMC .357 caliber bullet in Carl Wiley's bedroom under his mattress and in his brother's jacket. (14T156-17 to 14T157-7). Defendant's sawed-off shotgun, which was found at 72 Laurel Place loaded with five rounds, was fully operable. (14T103-20 to 14T104-2; 14T104-21 to 24; 15T100-4 to 25).

Following their arrest, defendants contacted Carl and told him to assert their innocence and claim police brutality. (3T166-20 to 3T167-3; 3T167-13 to 18). Defendants told Carl that they hated guns, never used them and knew nothing about how to use them. (3T167-23 to 3T168-1). Defendants also told Carl to claim that they had been at the Caravan Club at the time of the murders. (3T168-2 to 5). Carl, after being asked by defendants to retract his previous statement to police, told his family that the police slapped him and that the "New York Boys" and codefendant Williams committed the murders. (3T168-6 to 23). Carl also lied to defense investigators by claiming that defendants never implicated their guilt in the murders to him. (3T171-13 to 18).

He also lied by saying the police told him what to say. (3T172-1 to 3; 3T172-6 to 7).

Then, in 1991, codefendant Allen wrote to Sheila Johnson in which he urged her not to testify against him or defendant. He admitted in the letter that Sheila's statement to police against him and defendant could send them to prison "for a long time." (4T158-1 to 3). Codefendant Allen wrote that Carl could not be found and that "We need you to do as we ask." (4T158-7 to 8). Codefendant Allen wrote that if Sheila testified against them in court, they would stay in jail the rest of their lives, a fact which codefendant Allen figured Sheila "would not want to have to live with in [her] mind." (4T158-9 to 12). Codefendant Allen concluded by writing, "Please don't do this to us. We are counting on you, Sheila. Please don't let us down." (4T158-12 to 14). Sheila responded by handing over codefendant Allen's letter to the Prosecutor's Office. (4T158-21 to 23).[2]

Defendant and his brother also leveled threats against people who had talked to police. When codefendant Allen saw Pegues in jail, he asked Pegues if he had talked. (8T127-14 to 19; 8T128-1 to 5; 8T128-9 to 12). When Pegues said no, codefendant Allen said, "Cool, then they ain't got nothing." (8T128-12 to 13). Defendant and codefendant Allen told Pegues in the county jail that they would kill codefendant Williams because he had talked. (8T131-3 to 8; 8T131-22 to 25). Codefendant Allen said he would kill "Black" for talking; defendant said he would do what he had to do with Webb because he had talked. (8T132-4 to 12; 8T131-3 to 8; 8T131-24 to 25).

On April 11, 1990, when defendant and codefendant Allen were brought to police headquarters to be given some paperwork, defendant

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[2] The trial judge instructed the jury that the letter was admissible only against codefendant Allen. (18T7-21 to 18T8-3).

said, after being handed some papers, said "Oh, you found my shotgun, did you find my rifle, too?" (10T58-25 to 10T59-5; 10T60-1 to 17).

Based upon the evidence outlined above, defendant and his brother were convicted of two counts of purposeful or knowing murder, two counts of felony murder, two counts of armed robbery, one count of kidnapping and two counts of possession of a weapon with unlawful purpose. This appeal follows.

LEGAL ARGUMENT

POINT I

DEFENDANT'S ORAL AND WRITTEN STATEMENTS TO POLICE WERE PROPERLY ADMITTED.

Defendant contends that his statements to police were coerced and were obtained in violation of his fifth and sixth amendment right to counsel. In defendant's view, his sixth amendment right to counsel attached when the arrest warrant was issued on December 21, 1989. Hence, defendant claims that he could not be questioned without a lawyer and the police violated his rights when they refused to let a lawyer, retained by his mother, to see him while he was being questioned. Defendant's claims should be rejected. Defendant's statements were voluntary and were given after he waived his Miranda[3] rights, which included his fifth amendment right to counsel. The sixth amendment is of no relevance because defendant's sixth amendment right to counsel does not attach at the time an arrest warrant is drawn. Because defendant had validly waived his Miranda rights, the police were under no obligation to let a lawyer speak to him. Moran v. Burbine, 475 U.S. 412 (1986); State v. Reed, 249 N.J. Super. 41 (App. Div. 1991), certif. granted 127 N.J. 552 (1991) (decision pending). In any event, even if Reed and Moran are not followed, the State submits

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

that the untainted evidence overwhelmingly supports defendant's convictions. Thus, any error is harmless beyond a reasonable doubt.

The following, relevant testimony was adduced at the pretrial hearing by the State and the defense. On December 21, 1989, Trenton police detectives obtained arrest warrants for defendant, his brother and Maurice Webb. (4MT30-22 to 4MT31-1; 4MT32-3 to 6). Detectives also obtained several search warrants: 72 Laurel Place, 42 Laurel Place (Webb's residence) and 620 West State Street. (4MT31-7 to 17; 4MT31-23 to 4MT32-2). After obtaining the arrest warrants on December 21st, Trenton police officers attempted to locate defendant and his brother, but to no avail. (4MT30-22 to 4MT31-3; 6MT50-23 to 24).

The next day, December 22nd, detectives were at police headquarters and were in the process of formulating their schedule to execute the search warrants and arrest warrants when they got word around 9:30 a.m. that defendant was in the building, apparently there to appear in municipal court which is located in the same building as police headquarters. (4MT32-7 to 16; 5MT132-7 to 12; 5MT130-2 to 8). Immediately, officers proceeded to the lobby where defendant was arrested. (4MT32-19 to 4MT33-5). Carl Wiley, who was with defendant, was also arrested. (Id.) One of the officers present, Detective Michael Salvatore, advised defendant of the charges and advised him of his Miranda rights. (4MT7-16 to 18; 4MT33-5 to 8). Defendant responded by saying, "This is bullshit, man, Heavy D did that shit, man. I didn't kill anybody. I know my rights, man. I didn't kill nobody." (4MT33-19 to 4MT34-7).

After being arrested in the lobby, defendant was taken upstairs to the detective bureau where he was placed in a secured, monitored interview room. (4MT34-18 to 22). Defendant was not questioned at this time because detectives wanted to move as quickly as possible in

executing the search warrants and the remaining two arrest warrants, especially since they had heard that the Allens planned on killing potential witnesses. (4MT35-1 to 14; 6MT51-18 to 6MT52-11). After placing defendant in the interview room, Detective Salvatore and other officers went to Webb's residence to execute the search warrant and arrest him. (4MT35-25 to 4MT36-9; 4MT36-20 to 21).

Webb's house was searched that morning and he was placed under arrest. (4MT36-22 to 4MT37-1). Around 12:00 p.m. on December 22nd, Detective Salvatore brought Webb to police headquarters where he was placed in a holding cell. (4MT36-22 to 24; 4MT37-5 to 11; 6MT53-11 to 18). Defendant was still in the interview room where he had been placed that morning. (4MT37-21 to 24). Around 12:15 p.m., Detective Salvatore and another detective, Daniel McKee, took defendant to be processed. (4MT37-12 to 20; 4MT37-25 to 4MT38-3; 6MT53-23 to 6MT54-4; 6MT57-19 to 22). As they walked with defendant, they asked no questions. (4MT38-4 to 11; 6MT54-8 to 11). Defendant, however, was upset and kept telling them that he had nothing to do with the murders. (6MT54-15 to 19). He raised his voice and cursed: "This is all a bunch of crap!" (6MT54-20 to 21). As he was being fingerprinted, defendant continued to assert his innocence, claiming "Heavy D" and the "New York Boys" killed the cab drivers. (4MT38-20 to 4MT39-1). In light of defendant's outbursts, Detective Salvatore mentioned that the police had evidence to implicate him in the murders. (4MT39-2 to 4; 6MT54-22 to 23). Defendant asked, "what kind of evidence do you have?" (4MT39-3 to 4; 6MT54-24 to 25). The detective said ballistics evidence, fingerprints and witnesses. (4MT39-5 to 6; 4MT39-21 to 24; 6MT54-25 to 6MT55-2).

At this point, defendant changed his story. He said, "Ok, we were there, but we didn't shoot anybody, Arif [Bailey] did it." (4MT39-7 to

8; 4MT40-3 to 7; 6MT55-3 to 6). Defendant repeated this claim several times. (6MT55-24 to 6MT56-2). Finally, the detectives indicated to defendant that they were very busy at the time and could not talk to him; they expressed their interest in talking to him later. (4MT40-11 to 15; 6MT56-3 to 6). Defendant kept on talking, claiming that "Arif" killed the cab drivers. (4MT40-16 to 20; 6MT56-7 to 10). The detectives took defendant back to the secured interview room. (6MT56-20 to 24).

As of 12:15 p.m., the time that defendant was processed, the police had not yet arrested codefendant Allen. (4MT41-6 to 9). At this time, the search warrants at 72 Laurel Place and 620 West State Street were being executed. (4MT41-20 to 23). Around 1:00 p.m., codefendant Allen called police headquarters and spoke with Detective Salvatore. (4MT41-24 to 4MT42-6). The detective kept codefendant Allen on the telephone as long as he could so other detectives could trace the call. (4MT42-7 to 12). Codefendant Allen claimed that he was calling from Hamilton Township, but the trace showed that he was right in Trenton, calling from Wiley's house at 110 South Overbrook Avenue. (4MT42-13 to 18; 4MT42-20 to 4MT43-2). While Detective Salvatore talked with codefendant Allen on the telephone, a group of officers proceeded to 110 South Overbrook Avenue to arrest him. (4MT43-3 to 7). The detective was still on the telephone with codefendant Allen when the police stormed the house and arrested him. (4MT43-8 to 18). The time was now around 1:45 p.m. (4MT43-19 to 23).

Officers arrived with codefendant Allen at police headquarters around 2:00 p.m. (4MT44-2 to 5). Codefendant Allen was given his Miranda warnings and, from 2:20 p.m. to roughly 3:30 p.m., he gave an oral statement to Captain Joseph Constance. (4MT45-11 to 15; 4MT46-23 to 25; 4MT47-3 to 7; 4MT48-3 to 12; 4MT49-22 to 4MT50-2; 4MT69-9 to

10). Detective Salvatore sat outside the interview room to ensure the captain's safety and to take notes of the interview. (4MT51-14 to 24; 4MT52-18 to 19). At first, codefendant Allen denied any involvement; the "New York Boys" were responsible. (4MT53-17 to 18; 4MT56-14 to 15; 4MT56-17 to 19). Then, codefendant Allen admitted that he knew about the first robbery, but Maurice Webb killed the second cab driver. (4MT56-20 to 22; 4MT57-5 to 11; 4MT57-17 to 22; 4MT58-15 to 23). Finally, after being told that Wiley had implicated him, his brother and "Freeze," codefendant Allen admitted that he and defendant were in the two cabs, but it was "Freeze" who shot the cab drivers. (4MT60-17 to 4MT62-12; 4MT63-8 to 18; 4MT64-8 to 15; 4MT64-20 to 25; 4MT66-21 to 4MT68-13). After concluding the interview, Captain Constance asked codefendant Allen if he would be willing to give a formal statement; he agreed. (4MT68-14 to 19).

During this time, defendant was still in the secured interview room. (4MT62-16 to 17). Following the interview, Detective Salvatore went to interview Maurice Webb and Carl Wiley. (4MT69-14 to 4MT70-6). Other detectives worked on trying to ascertain "Freeze's" identity. (4MT70-10 to 12). Also, during that day a consensual search at 110 South Overbrook Avenue was conducted. (6MT23-4 to 11).

After concluding the oral interview with codefendant Allen, Captain Constance approached defendant in the secured interview room. The captain introduced himself by name and rank and advised defendant of his Miranda rights. (6MT61-10 to 16). Defendant interrupted the captain and said he knew his rights. (6MT61-18 to 20). When the captain asked defendant if he understood his rights and if he was willing to talk, defendant said yes. (6MT61-20 to 22; 6MT62-1 to 5). During the interview the captain did not take notes; Detective McKee witnessed the interview by way of a video monitoring system and he took

notes. (6MT61-7 to 9; 6MT63-20 to 24). The captain told defendant that they were taking statements from codefendant Allen, Carl Wiley and Maurice Webb. (6MT64-17 to 19). He also told defendant that the police knew what happened in the cabs; he did not give any details. (6MT64-20 to 22; 6MT64-24 to 6MT65-2).

Defendant told the captain that he and codefendant Allen were with "Freeze" the night of the murders and that "Freeze" wanted "to get" drug dealers. (6MT65-20 to 21). Defendant said Maurice Webb supplied "Freeze" with a black .357 magnum revolver. (6MT66-11 to 13). The three of them got into the first cab and at the back of Bud's Barbecue, "Freeze" shot the cab driver after taking his money. (6MT66-13 to 25). Defendant said his brother sat in the front seat, he sat behind the cab driver and "Freeze" sat behind codefendant Allen. (6MT67-1 to 5). Defendant said "Freeze" gave him $60 from the robbery proceeds. (6MT67-1 to 5). Defendant's version of the second murder involved the same scenario: the three men got into the cab with the same seating arrangements, and "Freeze" shot the cab driver. (6MT67-18 to 14). After giving the oral statement, defendant agreed to give a formal statement. (6MT68-19 to 21). Captain Constance then left the interview room. (6MT68-21 to 22).

At 6:50 p.m. that night, Detective Salvatore and Detective Michael Cosmo entered defendant's interview room and presented defendant with a Miranda form. (4MT70-13 to 22; 8MT19-9 to 16).[4] Detective Salvatore read defendant his Miranda rights and had defendant read them. (4MT70-23 to 24; 4MT171-4 to 5; 8MT19-22 to 8MT20-2). Defendant signed this portion of the form after acknowledging that he understood its

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[4] At this time, another detective, Philip Ashbock, was assigned to take codefendant Allen's formal statement. (7MT175-4 to 11). His oral statement began at 6:10 p.m. and ended at 6:40 p.m. (7MT181-22 to 7MT182-3). A formal statement began at 6:50 p.m. (7MT190-23 to 24).

contents. (4MT171-5 to 8; 8MT20-2 to 4). The detective followed the same procedure with the waiver portion of the form. (4MT71-8 to 10; 8MT20-4 to 7). Defendant asked no questions. (4MT72-10 to 11; 8MT20-24 to 8MT21-2). No threats were made against defendant; nor was any force or intimidation used. (4MT73-4 to 8; 8MT21-13 to 19). After defendant waived his rights, Detective Salvatore left the room. (4MT73-23 to 25). When Detective Cosmo asked defendant if he was willing to give a statement, defendant said yes because he was not the shooter. (8MT22-6 to 8). Defendant said "Freeze" was the triggerman. (8MT22-8).

Detective Cosmo first took an oral statement which started at 6:55 p.m. (8MT23-15 to 17). Defendant's story conformed to what he had said earlier that afternoon to Captain Constance. Defendant told the detective that he, codefendant Allen and "Freeze" left 72 Laurel Place after Webb gave "Freeze" a black .357 magnum revolver which "Freeze" needed to rob drug dealers. (8MT23-20 to 8MT24-10). "Freeze" flagged down a black-colored cab and they all got in. (8MT24-11 to 20). "Freeze" then pulled out the gun, demanded the cab driver's money and ordered him to drive behind Bud's Barbecue. (8MT24-20 to 8MT25-6). At Bud's Barbecue, defendant said "Freeze" threw the car keys out the window and took the driver's money. (8MT25-5 to 8). After he and codefendant Allen jumped out of the car, "Freeze" pulled out the gun and shot the driver in the back of the head or neck. (8MT25-9 to 13). Defendant said he and his brother ran back to 72 Laurel Place where "Freeze" later came. (8MT25-14 to 23). Defendant got $60 from "Freeze." (8MT26-2 to 4).

Defendant continued and told the detective about the second murder. Defendant said he agreed to rob the second cab driver because "Freeze" said he would not shoot the second driver. (8MT26-5 to 10).

Defendant said the three of them flagged down the second cab driver, a white man, who dropped them off and then picked them up again. (8MT26-11 to 23). At Overbrook and Riverside, "Freeze" pulled out the gun and ordered the driver to stop. (8MT26-24 to 8MT27-1). Instead, the driver continued driving to Gouverneur Avenue where he slammed on the brakes. (8MT27-1 to 3). Defendant said he and codefendant Allen jumped out of the car; "Freeze" then fired two shots at the driver with the same .357 magnum revolver. (8MT27-4 to 7; 8MT27-21 to 22). He hit the driver in the head. (8MT27-7 to 8). Defendant and codefendant Allen jumped back into the cab when two cars passed by. (8MT27-9 to 11). After the cars passed, the three of them ran back to 72 Laurel Place. (8MT27-11 to 13). Defendant said he got no money from the second robbery. (8MT27-15 to 17). Throughout the oral statement, defendant was cooperative. (8MT27-23 to 8MT28-1).

At 7:10 p.m., Detective Cosmo began the formal statement. (8MT28-9 to 15). The detective asked defendant questions and typed the questions and defendant's answers. (8MT28-16 to 19). Before commencing the actual statement, the detective reiterated that defendant had been advised of his rights and that he understood them. (8MT28-22 to 8MT29-7). Defendant then related his version of the first cab driver murder. (8MT29-8 to 18; 14T126-24 to 14T129-13). Defendant's story was consistent with the oral statement that he had just given. (Id).

While detectives conducted the interviews of defendant and codefendant Allen, Detective McKee received a telephone call at about 8:00 p.m. from a man who asked if the Allens were in custody. (6MT71-5 to 14). He identified himself as Jack Seelig, a lawyer. (6MT71-14 to 15; 6MT71-18 to 20). Seelig told the detective that he had been hired by family members to represent the Allens and he asked to talk with

Captain Constance. (6MT72-7 to 10; 7MT72-20 to 22). Detective McKee did not know Seelig and he so told him; he also told Seelig that he suspected him of being someone from the press. (6MT71-21 to 23; 6MT72-1 to 6). The detective told Seelig that the captain was not available, but if he came to police headquarters, he would speak to him. (6MT72-3 to 5; 6MT72-22 to 6MT73-2). Mr. Seelig said he would come to police headquarters. (6MT73-2 to 3).

After the conversation ended, Detective McKee used a beeper to contact Captain Constance. He related that a lawyer named Seelig claimed to know him. (6MT73-4 to 6). The captain said he knew a lawyer by that name; he told the detective that he would on his way back to headquarters. (6MT73-6 to 9). Detective McKee was not sure what procedures would be in order if Seelig turned out to be a lawyer for defendants. (6MT173-10 to 19). He, therefore, decided to order Detective Cosmo and Ashbock to end their interviews of defendants. (6MT73-20 to 21).

When Detective McKee ordered Detective Cosmo to end the interview with defendant, he gave no explanation. (6MT73-21 to 24). By now, defendant had completed his narrative on the first cab driver murder. (8MT30-5 to 8). Detective Cosmo ended the interview by asking defendant if he would sign the statement, acknowledging it to be true and voluntary; defendant said yes. (8MT30-10 to 8MT31-1). Defendant then signed the statement. (8MT31-2 to 5). The time was now 7:55 p.m. (8MT31-11 to 15). Detective Cosmo then stepped out into the hallway. (8MT32-6 to 9). In the meantime, defendant typed a letter to his girlfriend. (8MT31-23 to 8MT32-5).[5] Nowhere in the letter did defendant indicate that he had been mistreated. (8MT33-7 to 12). He

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[5] Detective Ashbock ended codefendant Allen's interview at Detective McKee's command around 7:50 p.m. (7MT193-21 to 25; 7MT196-9 to 14).

reiterated in the letter that he was not the man the police wanted. (8MT33-17 to 23). Also, during this break, defendant and codefendant Allen were given food and beverages. (6MT78-8 to 14; 8MT32-19 to 23).

When Seelig appeared at police headquarters, Captain Constance had already arrived at the station. (6MT74-7 to 9). After the captain spoke with Seelig, he told Detective McKee that the interviews with defendants could continue. (6MT74-12 to 13). Seelig was not permitted to see defendants or talk with them. (6MT76-11 to 7). Nor was Seelig's presence made known to defendants. (6MT76-8 to 11). Detective Cosmo resumed defendant's interview at 8:30 p.m.; Detective Asbock resumed codefendant Allen's interview at 8:05 p.m. (7MT199-7 to 9; 8MT33-24 to 25).

In his second formal statement, defendant recounted the second murder. (14T142-17 to 14T147-15). Before beginning his narrative, defendant reiterated that he knew his rights and was talking voluntarily. (8MT34-21 to 24). Before signing the statement, defendant acknowledged that he had been given food, drinks and rest periods. (8MT35-4 to 19; 14T147-7 to 10). Throughout the interview, defendant was cooperative. (8MT35-23 to 25).[6] Defendant and codefendant Allen were taken to municipal court for their first appearance in court on December 23, 1989. (4MT81-13 to 17).

Defendant testified at the hearing and claimed that he was physically abused by Captain Constance. (11MT126-15 to 18; 11MT126-23 to 25). Defendant claimed that the captain never read him his rights before beginning the oral interview; defendant claimed that he was read his rights after he signed the statement, which he claimed the captain

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[6] On December 28th, codefendant Williams gave an oral and written statement in which he claimed that defendant shot the cab drivers. (4MT88-12 to 22; 4MT93-19 to 23; 6MT89-3 to 4; 6MT90-4 to 6). Codefendant Williams put the weapons in defendant and codefendant Allen's hands. (6MT87-21 to 23; 6MT90-4 to 6).

typed and told him to sign. (11MT128-1 to 5; 11MT128-20 to 11MT129-1). Defendant claimed that he asked for a lawyer when he was being processed. (11MT175-1 to 4).

Codefendant Allen called Seelig as a witness and Seelig testified that defendants' mother, Pearl Allen, contacted him on December 22nd and he met with her around 7:50 p.m. (10MT43-13 to 17; 10MT44-4 to 24; 10MT47-20 to 23). She gave him a check as a retainer to represent her sons. (10MT44-18 to 24; 10MT45-5 to 16). Seelig said he told Detective McKee to end all questioning of defendants, pending his arrival at police headquarters. (10MT46-4 to 13). When he spoke with Captain Constance, he was told both defendants had waived their right to counsel. (10MT47-23 to 25). Seelig was told that he could not see defendants. (Id.) Seelig then left the police station. (10MT49-13 to 16). As he sat with Mrs. Allen at the station, he saw Detective McKee carrying sodas for defendant and codefendant Allen. (10MT50-2 to 4).

Judge Delehey ruled that defendant's statements were admissible. (13MT28-3 to 4). The judge rejected defendant's claim that his statements were involuntary, finding that defendant had been advised of his rights and he knowingly and voluntarily waived them. (12MT21-10 to 20; 13MT14-18 to 24). He rejected defendant's claims of brutality on grounds of credibility. (13MT25-12 to 18). Likewise, he rejected defendant's claim that he should have been taken to municipal court on December 22nd. (12MT23-10 to 12MT24-6; 13MT24-7 to 25). The judge found no unnecessary delay. (13MT25-2 to 5). The judge also rejected defendant's sixth amendment claim, finding that the right to counsel under the amendment had not attached at the time of defendant's statements. (13MT19-5 to 8; 13MT23-3 to 8; 13MT23-25 to 13MT24-6). The judge, relying on Moran ruled that since defendant waived his right to counsel, the police were not required to tell him about Seelig's

presence. (13MT26-16 to 13MT27-13). Now, on appeal, defendant claims that his statements were unconstitutionally obtained. For the following reasons, defendant's claims should be rejected.

Defendant's claim that his sixth amendment right to counsel was violated is without merit because that right had not attached on December 22nd when defendant gave his statements to police. The right to counsel under the sixth amendment attaches when "adversary judicial proceedings have been initiated -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 688-689 (1972); State v. Sanchez, 129 N.J. 261, 265 (1992), quoting Kirby v. Illinois, supra, 406 U.S. at 688-689. See also State v. Fuller, 231 N.J. Super. 66, 74 (App. Div. 1989), aff'd 118 N.J. 75 (1990) (defendant's sixth amendment right to counsel does not attach until after the first formal charging procedure). Here, the police had obtained an arrest warrant which does not constitute an "adversary judicial proceeding." In fact, the United States Supreme Court has held that the sixth amendment right to counsel does not attach at the time of arrest. United States v. Gouveia, 467 U.S. 180, 190 (1984). If the police can execute warrantless arrests, it is illogical to hold that issuance of an arrest warrant triggers the sixth amendment. United States ex rel. Dove v. Thieret, 693 F. Supp. 716, 722 (C.D. Ill. 1988). As one court put it, "... to hold that the accrual of the right to counsel is accelerated by use of the warrant procedure would tend to discourage this whereas the policy should be to encourage it." United States v. Duvall, 537 F.2d 15, 22 (2d Cir. 1976), cert. den. 426 U.S. 950 (1976).

Other courts have held that an arrest or the issuance of an arrest warrant does not trigger a defendant's sixth amendment right to counsel. United States v. Langley, 848 F.2d 152, 153 (11th Cir. 1988),

cert. den. 488 U.S. 897 (1988); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir. 1987), cert. den. 486 U.S. 1011 (1988); Lomax v. Alabama, 629 F.2d 413, 416 (5th Cir. 1980); United States v. Duvall, supra, 537 F.2d at 22; United States v. Garcia, 780 F. Supp. 166, 170 (S.D.N.Y. 1991); United States ex rel. Dove v. Thieret, supra, 693 F. Supp. at 722; United States v. Kornblau, 586 F. Supp. 614, 622 (S.D.N.Y. 1984); Logan v. Shealy, 500 F. Supp. 502, 505 (E.D. Va. 1980), aff'd and rev'd o.g. 660 F.2d 1007 (4th Cir. 1981), cert. den. sub. nom. Clements v. Logan, 455 U.S. 942 (1982); Eben v. Alaska, 599 P.2d 700, 706-707 (Alaska 1979); State v. Falcon, 196 Conn. 557, 494 A.2d 1190, 1193 (1985); State v. Vitale, 190 Conn. 219, 460 A.2d 961, 968-969 (1983); Owen v. State, 596 So.2d 985, 989 (Fla 1992); State v. Masaniai, 628 P.2d 1018, 1023 (Haw. 1981); Wright v. State, 593 N.E.2d 1192, 1199 (Ind. 1992); Commonwealth v. Smallwood, 379 Mass. 878, 401 N.E.2d 802, 806-807 (1980). Defendant's reliance on State v. Burden, 155 N.J. Super. 462, 465 (App. Div. 1977) is misplaced. In that case, the defendant appeared in court for arraignment following his arrest at which time the victim identified him in court as her assailant. Id. at 464. This Court ruled that defendant's sixth amendment right to counsel had attached at the time of the identification because the adversary proceedings had begun, defendant having been charged with the offense. Id. at 465. This case is distinguishable from Burden because no adversary proceedings had taken place as of December 22nd. Burden involved an appearance in court following charges; in this case, defendant was arrested pursuant to a warrant. To the extent that Burden can be read to hold that an arrest warrant triggers the sixth amendment right to counsel, it should be disavowed because the United States Supreme Court has held that an arrest does not trigger a defendant's sixth amendment right to counsel. United States v.

Gouveia, supra.

In any event, a review of the court rules pertaining to indictments and arrest warrants show that the latter do not initiate "adversary judicial proceedings." First, an indictment, not a criminal complaint, moves a prosecution forward. R. 3:7-2 specifically provides that a crime shall be prosecuted by indictment. The indictment transforms the relationship between the State and the accused because the State has committed itself to prosecute. State v. Sanchez, supra, 129 N.J. at 276. In contrast, any person may lodge a complaint before a person empowered by law to take complaints and the complaint must thereafter be filed. R. 3:2; R. 3:3-1(a); R. 3:3-2. A summons on a complaint or a warrant issues only if a judge or clerk finds from the complainant probable cause to believe that an offense has been committed. R. 3:3-1(a). The rules do not require that the complaint be made by a person in an official capacity. See R. 3:2; R. 3:3-1(a). Only if a warrant is issued does a defendant make his first appearance in court. See R. 3:1-5(a); R. 3:4-1(a); R. 3:4-2. The judge then notifies one charged with an indictable offense of his right to a probable cause hearing and the indictment by a grand jury. R. 3:4-2.

Even if no probable cause is found after such a hearing, the prosecutor retains the right to investigate further and later indict defendant. See Comment, Pressler, 1993 Rules Governing the Courts of the State of New Jersey, at 504. If the complaints are dismissed, a defendant has no due process/fundamental fairness claim. A probable cause hearing is not constitutionally guaranteed or essential; the absence of such a hearing or a finding of no probable cause does not preclude a later indictment. Id. See also State v. Mitchell, 164 N.J. Super. 198, 201 (App. Div. 1978). Thus, proceedings on a criminal complaint, prior to indictment, do not implicate the sixth amendment

which exists to protect the accused during "trial-type confrontations with the prosecutor." United States v. Gouveia, supra, 467 U.S. at 190. The issuance of an arrest warrant does not trigger the arrestee's sixth amendment right to counsel.

Therefore, the only right to counsel which defendant had on December 22nd was his right to counsel during custodial interrogation under the fifth amendment. The evidence produced below at the hearing overwhelmingly shows that defendant waived his Miranda rights, including his right to counsel; his waiver was knowing, intelligent and voluntary. Miranda v. Arizona, supra, 384 U.S. at 444. Defendant was advised of his Miranda rights at the time of his arrest, at the time he talked with Captain Constance and at the time he talked with Detective Cosmo. Defendant even told Detective Salvatore and Captain Constance that he knew his rights. He signed a Miranda form acknowledging his understanding. Clearly, defendant was fully aware of his rights and the consequences of abandoning them. Moran v. Burbine, supra, 475 U.S. at 421.

The record also shows that defendant's waiver of his Miranda rights was voluntary; the totality of the circumstances show that his will was not overborne. Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973); Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986), cert. den. 479 U.S. 989 (1986); State v. Dixon, 125 N.J. 223, 242 (1991); State v. Bey (II), 112 N.J. 123, 134-135 (1988). Relevant factors include defendant's age, education, intelligence, advice concerning his constitutional rights, length of detention and the nature of the questioning, i.e., whether the questioning was repeated and prolonged and whether it involved promises, mental exhaustion and physical punishment. See State v. Bey (II), supra, 112 N.J. at 135; Miller v. Fenton, supra, 796 F.2d at 608. In this case, defendant was not

subjected to lengthy interrogations that wore down his will. He was interviewed during the afternoon around 3:30 p.m. after which he agreed to give a formal statement. The formal statement, which was preceded by another oral statement, followed a few hours later. Contrary to defendant's claim, these facts do not support a finding of "day-long interrogation." (Db31). Detectives were busy that day executing various warrants and while they performed their duties defendant was kept in an interview room. During defendant's stay at headquarters, he was given food and drink, and he acknowledged this fact in his formal statement. There was no coercion utilized against defendant.

Defendant claims that a "compelling factor" in favor of involuntariness is the fact that he was not taken before a magistrate until December 23, 1989. (Db31). R. 3:4-1(a) provides that a person arrested pursuant to a warrant shall be taken, "without unnecessary delay" before the court which issued the warrant. Any delay under the rule does not invalidate an otherwise voluntary confession. Rather, the delay is a factor which bears on voluntariness. State v. Jones, 53 N.J. 568, 571 (1969); State v. Seefeldt, 51 N.J. 472, 486 (1968); State v. Taylor, 46 N.J. 316, 328 (1966), cert. den. 385 U.S. 855 (1966). The delay in this case was not a product of coercive police tactics. As already noted, the police were extremely busy on December 22nd executing search warrants, executing arrest warrants, "jockeying" arrestees and witnesses in the police station without allowing any contact between them. (6MT22-17 to 23). Moreover, only a limited number of detectives were available that day to work on the case because of the Christmas holiday. (6MT22-25; 7MT160-19 to 7MT161-11). The question is not simply the length of time that defendant was detained, but how that time was used. State v. Puchalski, 45 N.J. 97, 101 (1965); State v. Smith, 32 N.J. 501, 555 (1960), cert. den. 364

U.S. 936 (1961). The police utilized their time on December 22nd to execute warrants and arrange interviews at police headquarters. Given the circumstances that confronted the detectives on duty that day, it was not unreasonable for them to concentrate their efforts on the searches, the arrests and the needs of the investigation at police headquarters. In the meantime, defendant was given food and beverages during the course of his detention. The length of his detention before being brought to court was not the product of "unnecessary delay." Defendant's statements were voluntarily given.

Defendant's claim that the State failed to prove voluntariness by not calling Captain Constance as a witness at the pretrial hearing is unavailing. It is not for defendant to dictate how the State presents it case. See State v. Laws, 50 N.J. 159, 184 (1967), cert. den. 393 U.S. 971 (1968). Contrary to defendant's claim, the State rebutted his claim that he was physically abused by producing the detectives who witnessed defendant's statement to the captain and who took his oral and written statements. They testified that no one saw defendant or codefendant Allen being physically abused. (5MT153-23 to 5MT124-2; 5MT154-14 to 16; 6MT25-22 to 24; 6MT26-1 to 14; 7MT163-24 to 7MT164-12). The State also produced a photograph of defendant and codefendant Allen from December 22nd which showed no signs of bruising, contusions or burns. (6MT27-8 to 6MT29-7). In the end, Judge Delehey, who heard all the witnesses testify, found that the detectives were credible. His finding is supported by the record and it should remain undisturbed by this Court. State v. Johnson, 42 N.J. 146, 161 (1964). See also State v. Smith, supra, 32 N.J. at 550.

The State notes that Seelig's appearance at Trenton police headquarters while defendant was in the process of confessing is of no consequence under Miranda. Under the fifth amendment, the police have

no obligation to advise a defendant that a third party has summoned a lawyer to advise him and that, in the absence of a request from defendant himself, a lawyer's presence at the police station does not affect the right of the police to interrogate him. Moran v. Burbine, supra, 475 U.S. at 422. The Court in Moran reasoned that events occurring outside a suspect's presence and unknown to him can have no impact on his capacity to knowingly and intelligently waive his constitutional rights. Id. Once it is determined that the suspect understood his right to counsel and that he voluntarily relinquished that right, the waiver is valid. Id. at 422-423. The State of mind of police, as well as their conduct toward counsel, is irrelevant and would "ignore Miranda's mission and its only source of legitimacy." Id. at 423-425.

This Court followed Moran in State v. Reed, supra, 249 N.J. Super. at 47-48, just as the majority of other States have done. See Neelley v. State, 494 So.2d 697 (Ala. 1986), cert. den. 488 U.S. 1021 (1989); Mitchell v. State, 306 Ark. 464, 816 S.W.2d 566 (1991); People v. Mattson, 50 Cal.3d 826, 789 P.2d 983, 268 Cal. Rptr. 802, cert. den. ___ U.S. ___, 112 L.Ed.2d 595 (1990); Blanks v. State, 254 Ga. 420, 330 So.2d 575 (1985), cert. den. 475 U.S. 1090 (1986); People v. Holland, 121 Ill.2d 136, 520 N.E.2d 270 (1987); State v. Blanford, 306 N.W.2d 93 (Iowa 1981); Lodowski v. State, 307 Md. 233, 513 A.2d 299 (1986); State v. Beck, 687 S.W.2d 155 (Mo. 1985), cert. den. 476 U.S. 1140 (1986); State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978); State v. Benner, 40 Ohio St. 3d 301, 533 N.E.2d 701 (1988), cert. den. ___ U.S. ___, 108 L.Ed.2d 962 (1990); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), cert. den. 484 U.S. 1079 (1988); Goodwin v. State, 799 S.W.2d 719 (Tex. Crim. App. 1990), cert. den. ___ U.S. ___, 115 L.Ed.2d 1076 (1991); State v. Earle, 116 Wash.2d 364, 805 P.2d 211 (1991); State v.

Hanson, 136 Wis.2d 195, 401 N.W.2d 771 (1987); Wheeler v. State, 705 P.2d 861 (1985). The State submits that the rationale of Moran and Reed should be followed in this case.

It must be remembered that the dispositive fact here is that defendant voluntarily spoke with detectives with full knowledge of his right to an attorney. Under Miranda, the key factor is the desire of the accused to consult with counsel, not the desire of counsel to consult with the accused. State v. DePew, 38 Ohio St.3d 275, 528 N.E.2d 542, 547 (1988). This right, personal to be accused, can be distinguished from denying a lawyer access to the accused, but not an accused to a lawyer. See State v. Blanford, supra, 306 N.W.2d at 96; State v. Matney, 721 S.W.2d 189, 194 (Mo. Ct. App. 1986); Wheeler v. State, supra, 705 P.2d at 863. In short, the appearance of counsel at police headquarters does not increase a suspect's need to invoke his rights, nor does it lessen the State's legitimate need to gather facts and investigate crime. Neither a lawyer nor a third party may exercise a suspect's personal rights to counsel or to remain silent without any request for counsel from the suspect. The reasoning of Moran and Reed is cogent and, as the controlling precedent at this time, should be followed by this Court.[7]

In any event, even if Moran and this Court's decision in Reed are not followed, the State submits that defendant's convictions still stand. The confessional evidence which was completed before Seelig arrived at police headquarters -- defendant's oral statement to Captain Constance, his oral statement to Detective Cosmo and his formal statement to Willie Rodger's murder -- and the State's remaining evidence was so overwhelming of defendant's guilt that any error in

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[7] Arguments in Reed were heard on September 15, 1992. As of this date, the Supreme Court's decision in Reed has not been issued.

admitting the tainted evidence, the formal statement to Francis Bodnar's murder, was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Defendant's formal statement to Francis Bodnar's murder was cumulative to the oral confessions he had already given to Captain Constance and Detective Cosmo. This is not a case where the State's only confession is tainted. Cf. State v. Sanchez, supra, 129 N.J. at 278. Nor is this a case where the State, absent the tainted evidence, is left with only a circumstantial case, no physical evidence or a case that hinges on credibility. Cf. Coppola v. Powell, 878 F.2d 1562, 1571 (1st Cir. 1989), cert. den. ___ U.S. ___, 110 S.Ct. 418 (1989); United States v. Bentley, 726 F.2d 1124, 1130 (6th Cir. 1984); Government of Virgin Islands v. Joseph, 685 F.2d 857, 864-865 (3d Cir. 1982); People v. Cribas, 231 Cal. App.3d 596, 282 Cal. Rptr. 538, 544-545 (1991), cert. den. ___ U.S. ___, 117 L.Ed.2d 650 (1992). The State produced the testimony of Carl Wiley, L.C. Pegues, Kenneth Davis and Dwayne Fletcher, all of whom gave direct evidence that defendant was involved with the murders. Defendant attacks these witnesses as unbelievable, but their testimony must be viewed in light of all the State's evidence, which includes defendant's untainted, confessional evidence. When the State's evidence is seen in its proper light, the testimony of these witnesses is wholly credible. Not only did they implicate defendant in the murders, but defendant himself put himself at the scene of the murders and provided details (the type of gun used, the cabs that were picked up, the location where the cabs were left) that was corroborative of the other evidence. Moreover, the State also produced the ballistics expert who showed that the gas checks which killed Willie Rodgers and Francis Bodnar came from defendant's black .357 magnum revolver. Also, at 72 Laurel Place police found the rare kind of ammunition that killed the two cab

drivers. Similar bullets recovered from Maurice Webb were capable of being fired from the .357 magnum revolvers. The untainted, confessional evidence, plus the other evidence which proved defendant's guilt, leave no doubt that the jury would have reached the same verdict without the second, formal statement. Milton v. Wainwright, 407 U.S. 371, 377-378 (1972). Put another way, there is no reasonable doubt that the second formal statement contributed to the verdict. State v. Macon, 57 N.J. 325, 340 (1971). Thus, even if our Supreme Court does not follow Moran, it would not result in a new trial for defendant because any error was harmless beyond a reasonable doubt.

POINT II

DEFENDANT'S MOTION FOR A SEVERANCE WAS PROPERLY DENIED; DEFENDANT'S CONSTITUTIONAL RIGHT OF CONFRONTATION WAS PRESERVED BY DELETING HIS NAME FROM CODEFENDANT ALLEN'S STATEMENTS TO POLICE.

Defendant contends that Judge Delehey erred in denying his pretrial motion to sever his trial from that of his brother, codefendant Allen. Defendant claims that even though his brother's statements were redacted to delete any reference to himself, the redacted statements were prejudicial to him within the meaning of Bruton v. United States, 391 U.S. 123 (1968) and State v. Young, 46 N.J. 152 (1965). The State submits that defendant's motion for a severance was properly denied. The judge made effective deletions from codefendant Allen's statements to police. Therefore, under Bruton and Young, defendant suffered no prejudice. In any event, even if any error under Bruton or Young occurred, the error was harmless beyond a reasonable doubt.

R. 3:7-7 provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions

constituting an offense or offenses. R. 3:15-2, however, affords defendants relief from prejudicial joinder. Specifically, R. 3:15-2(a) requires that a prosecutor move before trial for a determination by the trial court as to whether those portions of a statement, confession or admission of one defendant involving any other defendant which the prosecutor intends to introduce into evidence at trial can be effectively deleted. The rule also provides that if "effective deletions cannot practically" be made, the trial court must order separate trials for the defendants. R. 3:15-2(a).

R. 3:15-2(a) was enacted in response to the New Jersey Supreme Court's opinion in Young. In Young, the Court held that a trial court must grant a defendant's request to eliminate all incriminating references to him from a codefendant's statement or confession which the State will introduce into evidence at the joint trial. State v. Young, supra, 46 N.J. at 157. The codefendant's statement, which incriminates another defendant, is hearsay as to the incriminated defendant and is violative of his right to confront the witnesses against him should the codefendant exercise his right to remain silent. Id. at 156. The Court rejected the argument that a limiting instruction would protect the incriminated defendant. Id. at 157-158. The deletions from the codefendant's statement must be "effective" -- that is, the trial court must eliminate not only direct and indirect identification of the incriminated defendant, but any statement that could be damaging to the defendant once his identity is otherwise established. Id. at 159. The Court went on to propose the procedure that is set forth in R. 3:15-2(a). Id. at 158-159.

Three years after Young, the United States Supreme Court reached the same holding in Bruton. Like our Supreme Court in Young, the United States Supreme Court ruled that admission of a defendant's

statement which implicated another defendant violated the incriminated defendant's right of confrontation under the sixth amendment, even if the jury was instructed to consider the statement as evidence against the confessing defendant. Bruton v. United States, supra, 391 U.S. at 126. Likewise, the Bruton Court found that limiting instructions in this context were ineffectual since the evidence at issue was so prejudicial to the incriminated defendant. Id. at 135-136. Thus, when a nontestifying defendant's statement is not directly admissible against another defendant, the confrontation clause under the sixth amendment bars the admission of that statement into evidence at a joint trial even if a limiting instruction is given and the incriminated defendant's own statement is admitted into evidence. Cruz v. New York, 481 U.S. 186, 193 (1987). However, any Bruton problems can be eliminated by redaction. Richardson v. Marsh, 481 U.S. 200, 208-209 (1987).

In this case, as outlined in Point I, supra, defendant and codefendant Allen gave several statements to police on December 22, 1989, both oral and written. Each brother claimed that he and the non-confessing sibling were present during the murders, but that codefendant Williams shot the cab drivers. See Point I, supra. On the other hand, codefendant Williams implicated the Allens as the main protagonists in the armed robberies and the murders. See Point I, supra. While the statements of defendant and his brother were similar, or interlocking, the dictates of R. 3:15-2(a) and Young applied. State v. Haskell, 100 N.J. 469, 478-479 (1985).

Before trial, the prosecutor moved under R. 3:15-2(a) to sever codefendant Williams' trial from that of the Allen brothers. (13PT29-11 to 13). Judge Delehey granted the motion. (13PT30-2 to 10). The prosecutor maintained that the Allen brothers could be tried jointly

because their statements to police could be effectively redacted by simply taking out any reference to the incriminated brother. (13PT31-9 to 13PT32-17). Defendant objected and moved for a severance, arguing that the proposed redaction would portray him as a liar: the edited statement would refer to two participants in the murders, but the evidence would show that there were three participants. (13PT34-16 to 25). Judge Delehey ruled that the prosecutor's proposed redaction was effective within the meaning of Young and Bruton. (14PT4-1 to 9). Accordingly, he denied defendant's motion for a severance. (14PT4-10 to 11; 14PT20-24 to 25).

At trial, Captain Constance and Detective Ashbock testified about codefendant Allen's statements, as edited. In conformance with the judge's pretrial ruling, Captain Constance made no mention of defendant's name when he summarized codefendant Allen's oral statement to him on the afternoon of December 22nd: codefendant Allen admitted that he and "Freeze," codefendant Williams, held up the two cab drivers; codefendant Williams shot the two cab drivers. (12T32-12 to 12T47-13). Detective Ashbock followed the same procedure when he outlined codefendant Allen's oral statement from the evening of December 22nd. (13T178-6 to 13T190-5). Detective Ashbock read to the jury the edited versions of codefendant Allen's formal statements. (13T199-3 to 13T206-1; 14T19-5 to 14T28-7). Both written statements, as edited and read to the jury, contained references to codefendant Allen and codefendant Williams, who codefendant Allen referred to as "Freeze." (Id.). Pronouns were dispersed throughout both formal statements whenever codefendant Allen referred to himself, the sole actions of codefendant Williams and joint activity between them: "I";

"he"; "we"; "me and Freeze." (Id.).[8] Now, on appeal, defendant continues to claim that the edited statements of codefendant Allen were ineffectual and that a severance was warranted. The State disagrees and submits that defendant's claim should be rejected.

Defendant claims that the redactions to his brother's statements were ineffectual because the State's evidence showed he was present at and participated in the murders; hence, the jury would infer that the "we" in codefendant Allen's statements referred to all three defendants, not just codefendant Allen and codefendant Williams. (Db48). This contextual approach to Bruton was rejected by the United States Supreme Court in Richardson v. Marsh, supra. In that case, the Court held that Bruton was limited to facially incriminating statements and that any Bruton problem could be resolved through redaction. Richardson v. Marsh, supra, 481 U.S. at 208-209. Thus, if a statement is edited to eliminate any and all references to the incriminated defendant and the trial court gives the jury a limiting instruction, the confrontation clause is not violated. Id. at 211. Here, codefendant Allen's statements to police were redacted such that they implicated only codefendant Allen and codefendant Williams in the murders. See id. at 203. To the extent that other evidence in the State's case-in-chief implicated defendant in the murders, the evidence was properly admitted and its incriminating nature is of no consequence under Bruton. Id.[9] See also State v. Broxton, 49 N.J. 373, 376-377

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[8] The same procedures were followed with respect to defendant's oral and written statements. (12T52-23 to 25; 12T61-25 to 12T65-9; 12T123-24 to 25; 12T125-2 to 3; 14T116-8 to 19; 14T119-7 to 8; 14T118-12 to 14; 14T119-25 to 14T120-2; 14T120-6 to 14T124-4; 14T126-4 to 14T129-18; 14T142-17 to 14T147-15).

[9] This other incriminating evidence included Carl Wiley's testimony about what defendants said before and after the murders and L.C. Peques' testimony about what defendants said to him at the pizza parlor in December, 1989. This evidence was admissible against

(continued...)

(1967).

The edited statements of codefendant Allen effectively protected defendant's constitutional rights because the edited statements did not explicitly or implicitly suggest that defendant was involved with the murders. As noted above, any reference to defendant was simply redacted, leaving the statements with two actors (codefendant Allen and codefendant Williams). There was substitution for defendant's name that logically pointed to him as being involved, such as using the word "blank" in the statements for whenever defendant's name appeared. Cf. State v. Sims, 140 N.J. Super. 165, 169 (App. Div. 1976). While codefendant Allen's formal statements contain the pronoun "we," the word, in the context of the statement, logically refers to the parties named in the edited statement, and not to defendant. Cf. State v. Anderson, 117 N.J. Super. 507, 518-519 (App. Div. 1971), mod. o.g. 60 N.J. 437 (1992). Nor was the use of neutral pronouns so "frequent and pervasive" such that effective deletions could not be made. Cf. State v. Lyons, 194 N.J. Super. 616, 621 (Law Div. 1984), aff'd o.g. 211 N.J. Super. 403 (App. Div. 1986). As originally given, codefendant Allen said he and his brother were present when codefendant Williams murdered the two cab drivers. As edited, codefendant Allen said he was present when codefendant Williams murdered the two cab drivers. The redaction was uncomplicated and eradicated any potential problems under Bruton

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[9](...continued)
defendant under exceptions to the rule against hearsay. Defendant's own statements were admissible as admissions, Evid. R. 63(7), and any statement of codefendant Allen was admissible against defendant as an adoptive admission. Evid. R. 63(8). Bruton does not apply to statements that are admissible against a defendant through an established hearsay exception. United States v. White, 766 F. Supp. 873, 887 (E.D. Wash. 1991), citing Bourjaily v. United States, 483 U.S. 171 (1987). See also Cruz v. New York, supra, 481 U.S. at 193 (Bruton applies where a defendant's statement is not directly admissible against the incriminated codefendant).

and Young.[10]

As defendant points out (Db49), any redaction under Bruton and Young should not be prejudicial to either the incriminated defendant or the confessing defendant. But, no such prejudice obtained to defendant in this case. The redaction to codefendant Allen's statements did not deprive defendant of a potentially exculpatory defense; both he and his brother placed the blame on codefendant Williams and the redacted statements did not, in any way, alter the exculpatory nature of the statements. Cf. State v. Burnett, 53 N.J. 559, 563-565 (1969). The redaction left the codefendant's statement virtually intact, except for the elimination of defendant's name. The same holds true for the editing made to defendant's own oral and written statements. In short, the redactions made to both defendants' statements were not such that the statements became warped, such as making one defendant seem more culpable than originally stated. See id. Here, defendant laid all the blame for the shootings on codefendant Williams, just like codefendant Allen. Moreover, defendant did not dispute the fact that the murders occurred. Rather, defendant claimed that he was not one of the

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[10] The trial judge did not give the jury a limiting instruction with respect to codefendant Allen's statements to police. While it has been suggested that a limiting instruction is not truly necessary since Bruton and Young require redaction of any reference to an incriminated defendant from a codefendant's statement, Biunno, Current N.J. Rules of Evidence, Comment 3, Evid. R. 6, p. 143, defendant did not request a limiting instruction and, even if such an instruction is deemed necessary, the failure to give the instruction was not plain error. State v. Lair, 62 N.J. 388, 391 (1973); State v. Allison, 208 N.J. Super. 9, 18 (App. Div. 1985), certif. den. 102 N.J. 370 (1985). Codefendant Allen's redacted statements only referred to himself and codefendant Williams. Moreover, the State presented overwhelming evidence that defendant participated in the robberies and actually shot the cab drivers. During summations, both defense counsel told the jury that it had to decide the guilt of both defendants separately and Judge Delehey so charged the jury during the jury instructions. (17T31-22 to 17T32-6; 17T56-6 to 7; 18T28-7 to 8; 18T30-13 to 14; 18T33-3 to 6). In the context of the trial, there is no reasonable doubt that the jury's verdict would have been different with a limiting instruction. See State v. Rose, 112 N.J. 454, 490 (1988).

murderers and that his statements to police had been coerced. (See 17T67-15 to 19; 17T69-4 to 9; 17T74-23 to 17T75-1; 17T75-7 to 17T81-25). Thus, beyond implicating the defendant who gave the statement, each redacted statement confirmed the occurrence of the murders in terms that were not disputed. The only real issue at trial was identity. In this context, the redactions were effective in eradicating any Bruton and Young problems; there was no direct or indirect identification of defendant as the murderer in his brother's redacted statements. See State v. Broxton, supra, 49 N.J. at 377.

In any event, even if this Court finds that defendant's motion for a severance should have been granted pursuant to R. 3:15-2(a), Bruton and Young, the error was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 254 (1969) (Bruton error subject to harmless error analysis). Accord Brown v. United States, 411 U.S. 223, 231-232 (1973); Schneble v. Florida, 405 U.S. 427, 430 (1972); State v. Haskell, supra, 100 N.J. at 479; State v. Carter, 54 N.J. 436, 446 (1969), cert. den. 397 U.S. 948 (1970); State v. Lyons, supra, 211 N.J. Super. at 406-407; State v. Hardison, 204 N.J. Super. 1, 7 (App. Div. 1983), aff'd 99 N.J. 379 (1985); State v. Jackson, 204 N.J. Super. 13, 20 (App. Div. 1983), aff'd 99 N.J. 379 (1985); State v. Biddle, 150 N.J. Super. 180, 183 (App. Div. 1977). The State produced overwhelming evidence of defendant's guilt, including Carl Wiley's and L.C. Pegues' testimony. In addition, Kenneth Davis recognized defendant standing outside Francis Bodnar's cab and Dwayne Fletcher identified defendant in a photographic line-up. (6T10-15 to 17). The ballistics evidence established that both gas checks had been fired from the black .357 magnum revolver that defendant liked to carry around. The police found ammunition at 72 Laurel Place which was identical to the other gas check bullets found by the police, and

defendant's .357 magnum revolvers fired PMC ammunition. Finally, in his own statements to police, defendant admitted that he was in the two cabs and that he even agreed to rob the second cab driver. In light of the overwhelming evidence of guilt, any error in not granting a severance was harmless beyond a reasonable doubt. Id.

POINT III

THE TRIAL JUDGE PROPERLY EXCLUDED THE PROFFERED TESTIMONY OF TYRONE LOMAX AND JEROME BLASSINGAME.

Defendant contends that Judge Delehey erred by excluding the proffered testimony of Tyrone Lomax and Jerome Blassingame. The State submits that the proffered testimony was properly excluded. The proffered testimony was not shown to be probative and was nothing more than hearsay. In any event, even if this Court finds error with respect to the judge's ruling, the overwhelming evidence of defendant's guilt renders any error harmless.

After the State concluded its case-in-chief, counsel for both defendants proffered the testimony of Lomax and Blassingame. Defense counsel produced two reports, May 24, 1991 and December 7, 1990, which had been prepared by a defense investigator. (16T4-3 to 19). In the May 24th report, the defense investigator summarized the interview that he had conducted with Lomax in the county jail. (16T4-6 to 7). Lomax told the defense investigator that when he was arrested in February, 1990, he was placed on Tier 6 in the county jail and that he overheard two unknown black men from New York talking about "setting up" the Allen twins. (16T4-14 to 19). Lomax thought that one of the men was named Lex; the name of the other man was unknown. (16T4-20 to 21). Lomax could only relate that he overheard these two men talking about "setting up the two Allen twin brothers and some money." (16T4-21 to 25). Defense counsel stated that Lomax would testify consistently with

the information in the report. (16T6-15 to 24). The December 7th report summarized the investigator's interview with Blassingame in the county jail. (16T4-9 to 11). Blassingame claimed that while he was incarcerated in the county jail, two Trenton police detectives approached him and questioned him about the cab driver murders. (16T7-15 to 20). Blassingame could not give any names, but he said one detective had red hair, a moustache and wore glasses; the other detective had dark hair, a moustache and wore glasses. (16T7-20 to 22). One detective allegedly promised Blassingame a new car and a couple thousand dollars if he would tell them who committed the murders. (16T7-23 to 25). Blassingame said the detectives were looking for a tall black man named "Larry." (16T8-1 to 3). Blassingame said he told the detectives he did not know who murdered the cab drivers. (16T7-25 to 16T8-1).

Defense counsel claimed that Lomax's proffered testimony was relevant because the evidence supported the defense claim that the "New York Boys" committed the murders. (16T5-1 to 21). Defense counsel argued Blassingame's proffered testimony was relevant to contradict the police officers who testified at trial that they were under no pressure to solve these crimes or that they made no promises to anyone. (16T8-4 to 16T9-17). The prosecutor countered by arguing that both proffers were improper because the evidence was hearsay. (16T6-3 to 4; 16T10-5 to 6). Moreover, the alleged declarants were not identified and no police officer involved with the investigation of the murders matched the descriptions given by Blassingame. (16T6-4 to 10; 16T9-21 to 16T10-2).

Judge Delehey agreed with the prosecutor. (16T7-9; 16T11-2 to 3). He found that defendant's proffered evidence was hearsay and lacked probative value. (16T7-9 to 11; 16T11-3 to 5). The declarants were

not identified and he refused to admit the testimony. Now, on appeal, defendant claims that not only was the proffered evidence probative, but that the evidence constituted declarations against interest, an exception to the rule against hearsay. For the following reasons, defendant's claims should be rejected.

The State acknowledges that a defendant may present evidence to show that the crime with which he has been charged was committed by some other third party. State v. Koedatich, 112 N.J. 225, 297 (1988), cert, den. 488 U.S. 1017 (1989); State v. Sturvidant, 31 N.J. 165, 179 (1959), cert. den. 362 U.S. 956 (1960); State v. Jorgensen, 241 N.J. Super. 345, 350 (App. Div. 1990), certif. den. 122 N.J. 386 (1991). However, the rule does not permit defendant to introduce evidence that is immaterial or otherwise inadmissible. The evidence must be relevant and probative -- that is, the evidence must have a rational tendency to engender reasonable doubt about the State's case. State v. Sturvidant, supra, 31 N.J. at 179; State v. Koedatich, supra, 112 N.J. at 298-299. Defendant cannot produce evidence that is remote or based on sheer conjecture. Id.

Based upon these principles, the State submits that Judge Delehey properly excluded the proffered testimony of Lomax and Blassingame. Lomax could only say that a "Lex" and another unidentified man from New York talked about "setting up" the Allen twins and some money. Contrary to defendant's claim, this evidence had no probative value with respect to the proposition for which it was offered: that the "New York Boys" gang was responsible for the murders. See Evid. R. 1(2); State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990). First, as Judge Delehey noted, the supposed declarants were not identified; the mere fact that they may have been from New York is not enough evidence to infer that they were members of the "New York Boys"

gang. Second, the proffered evidence was not clearly a reference to framing defendant and his brother for the cab driver murders; in fact, there was no reference whatsoever to the subject matter of the alleged frame-up. All that the defense presented to the court was unsubstantiated hearsay which had no connection to the charges at issue. Any connection to this case was based on nothing more than "mere conjecture." State v. Sturvidant, supra, 31 N.J. at 179. Judge Delehey properly excluded the proffered testimony of Lomax.

The same principles apply to the proffered testimony of Blassingame, which was also unsubstantiated hearsay. Blassingame claimed to have been approached by two unnamed detectives who offered him money and a car in exchange for information about the cab driver murders. Again, the evidence had no probative value and any probative force of the evidence was so remote that its admission would have consumed the jury with misleading and confusing evidence. Evid. R. 4. The detectives were conveniently not identified and, more importantly, the description given did not match of any of the detectives who were connected with the investigation. The proposition for which the evidence was offered, that the Trenton police department was under pressure to solve these crimes and that detectives would have committed bribery to accomplish their task, does not follow from the ambiguous evidence proffered by Blassingame. The proffered evidence would do nothing to attack the credibility of the officers who testified at trial because the actions of unidentified men, allegedly detectives, could have no bearing on the actions of the detectives who outlined their activities in the investigation before the jury. The proffered testimony was irrelevant and was properly excluded.

Defendant's claim that the proffered evidence falls under Evid. R. 63(10), declarations against interest, should be rejected. The

proffered evidence was highly vague. Under Evid. R. 63(10), a statement, to be admissible under the rule, must be so contrary to the declarant's pecuniary or proprietary interest or so for subjected him to criminal liability that a reasonable man in his position would not have made the statement. With respect to both Lomax and Blassingame, the identity of the declarant was never established. Thus, the testimony of Lomax and Blassingame was nothing more than hearsay which was unsubstantiated. See State v. Bowens, 219 N.J. Super. 290, 296 (App. Div. 1987). Moreover, in the context of each statement, it is not at all clear that the declarant was talking against his penal interest. See State v. Abrams, 140 N.J. Super. 232, 236 (App. Div. 1976), aff'd o.b. 72 N.J. 342 (19977). The term "set up" does not necessarily imply that the declarants were about to commit a crime. The same holds true for the unnamed detectives who promised Blassingame money and a car. The evidence proffered by defendant was hearsay that did not fall within the exception to the rule against hearsay.

In any event, even if this Court finds that Judge Delehey erred, any error was harmless. The evidence against defendant was overwhelming. The State produced the testimony of Carl Wiley, L.C. Pegues who both knew that defendant and his brother murdered the cab drivers because defendant admitted these facts to them. Kenneth Davis saw defendant and his brother outside of Francis Bodnar's cab after Francis had been shot and killed. Ballistics evidence established that the black .357 magnum revolver fired the fatal shots; and this gun happened to be the one favored by defendant and carried around by him. A fingerprint of codefendants Allen was found on Francis Bodnar's cab. Bullets, like those found at the crime scene, were found at 72 Laurel Place. And, the State produced defendant's confessions in which he admitted his presence at the crime scenes. The proffered evidence at

issue would not have weakened the State's case, which overwhelmingly established that defendant was the triggerman who ended the lives of two innocent men who had the misfortune of crossing paths with him and his cohorts. Because defendant cannot show that any error on Judge Delehey's part was "clearly capable of producing an unjust result," his convictions must be affirmed. R. 2:10-2.

POINT IV

THE CUMULATIVE EFFECT OF ALLEGED TRIAL ERRORS DID NOT PREJUDICE OR DENY DEFENDANT A FAIR TRIAL.

Defendant contends that his convictions should be reversed because the cumulative effect of the alleged errors cited in Points I, II and III denied him a fair trial. Defendant's claim is without merit and should be rejected.

Incidental legal errors which occur during a trial and which do not prejudice the rights of the defendant or render a trial unfair cannot be invoked to upset an otherwise valid conviction. See State v. Orecchio, 16 N.J. 125, 129 (1954). In this case, the evidence on defendant's guilt was overwhelming. As demonstrated supra, if any error occurred at trial it was harmless and hence, of minimal import. Defendant was not prejudiced. Moreover, any errors that may have occurred at trial did not, in their aggregate, render defendant's trial unfair. Id. Defendant was not prejudiced, nor denied a fair trial. Defendant is entitled to a fair trial, not a perfect trial, and he received no less. Lutwak v. United States, 344 U.S. 604, 619-620 (1953), reh. den. 345 U.S. 919 (1953); State v. Perez, 218 N.J. Super. 478, 487 (App. Div. 1987); State v. Boiardo, 111 N.J. Super. 219, 233 (App. Div. 1970), cert. den. 407 U.S. 948 (1971). Defendant's convictions should therefore be affirmed by this Court.

POINT V

DEFENDANT'S AGGREGATE SENTENCE IS MANIFESTLY PROPER.

Defendant contends that his aggregate sentence of two life terms, plus 50 years with an 85 year parole bar, violated the principles of State v. Yarbough, 100 N.J. 627 (1985), cert. den. 475 U.S. 1014 (1986). Defendant also claims that the sentencing court erred in imposing a parole bar for his kidnapping, armed robbery and weapons-related convictions. The State submits that defendant's sentence should be upheld. The sentencing court's weighing process fully comported with Yarbough and his decision to impose parole bars was not clear error under State v. Roth, 95 N.J. 334 (1984).

At sentencing, Judge Delehey found the following aggravating factors. He noted the vulnerability of defendant's victims in that both were unarmed and both were unable to defend themselves. (ST12-17 to 19). See N.J.S.A. 2C:44-1a(1). He also found that the murders were heinous and senseless. (ST12-20 to 21). See N.J.S.A. 2C:44-1a(1). He found a likelihood that defendant would commit another offense, (ST12-22 to 23), and the need to deter. (ST13-1). See N.J.S.A. 2C:44-1a(3), (9). He found no mitigating factors. (ST13-2). To this effect, he stated that defendants were "vicious and amoral." (ST13-3 to 4).

Judge Delehey then addressed Yarbough and concluded that "consecutive sentences to the maximum permitted by Yarbough are absolutely warranted." (ST15-12 to ST16-12). He outlined the facts of each murder. (ST16-13 to ST17-12). He noted that the time from between the murders, while relatively short, was not "indicative of a single period of aberrant behavior" because each episode was planned and executed separately. (ST17-13 to 18). The crimes committed against Willie Rodgers, and Francis Bodnar involved separate acts of violence and were committed at different times. (ST17-20 to 21). The

judge ruled that if he imposed concurrent sentences for the Francis Bodnar murder, defendant would be afforded a free crime. (5T17-23 to 25). Judge Delehey then imposed sentence. Now, on appeal, defendant claims that his kidnaping and armed robbery convictions should not be made to run consecutively because the crimes were part and parcel of the respective murder conviction. (Db64). Defendant also claims that Judge Delehey double-counted aggravating factors in imposing consecutive sentences. (Db65). Finally, defendant claims that Judge Delehey failed to explain why a parole bar was warranted for his kidnapping, armed robbery and weapons-related convictions. (Db65). For the following reasons, defendant's claim should be rejected.

Under Title 2C, a sentencing court must follow certain guidelines. First, the court must decide whether a period of incarceration is appropriate. State v. Kruse, 105 N.J. 354, 358 (1987). Second, the court must determine the appropriate sentence, considering the statutory aggravating and mitigating factors. Id. Third, the court must determine whether to impose a parole bar. Id. Fourth, the court must also provide a factual basis for the sentence, providing the "balancing process" leading to the sentence. R. 3:21-4(e); State v. Kruse, supra, 105 N.J. at 360.

In reviewing a sentence under Title 2C, the reviewing court must determine whether the sentencing court followed statutory criteria, whether there is substantial, competent evidence to support the court's findings and whether the court made "clear error" -- that is, reaching a result that could not reasonably have been made. State v. Roth, supra, 95 N.J. at 365-366. The reviewing court cannot substitute its judgment for that of the sentencing court. State v. Jabbour, 118 N.J. 1, 5-6 (1990); State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Ghertler, 114 N.J. 383, 388 (1989); State v. Roth, supra, 95 N.J. at

365. Rather, the reviewing court must determine if the sentencing court's sentence is "clearly unreasonable." State v. Jarbath, 114 N.J. 394, 401 (1989). See also State v. Jabbour, supra, 118 N.J. at 6.

In Yarbough, the Supreme Court laid down guidelines to be utilized in imposing consecutive/concurrent sentences whenever a sentence is pronounced on one occasion for a defendant who has committed separate offenses in a single episode or a defendant who has committed separate offenses in unrelated episodes. The purpose of the guidelines is to ensure that the punishment fits the crime and that there be predictability and uniformity in sentencing. State v. Yarbough, supra, 100 N.J. at 630. The Court delineated six guidelines, including the dictates that there can be "no free crimes" in a system for which the punishment shall fit the crime, that the sentencing court state its reasons for imposing consecutive or concurrent sentences, that the sentencing court should not double count aggravating factors, that successive terms for same offense should not ordinarily be equal to the punishment for the first offense and that the "overall limit" in the comulation of consecutive sentences should not exceed the sum of the longest terms that could be imposed for the two most serious offenses. Id. at 643-644. The sentencing court must also look to the facts of the crime; such facts include whether the objectives of the crimes were independent, whether there were separate acts of violence, whether there were multiple victims, whether the crimes were committed at different times and places and whether the sentences to be imposed are numerous. Id. at 644. The Court recognized that the guidelines are "general parameters" and that an "extreme and extraordinary" case may call for a deviation from the guidelines. Id. at 647.

Addressing defendant's Yarbough claim first, the State submits that the sentence imposed by Judge Delehey comports with the Yarbough

guidelines. The ruthless crimes committed by defendant and his cohorts "cry out for something beyond the norm." State v. Louis, 117 N.J. 250, 253 (1989). Defendant claims that the Rodgers kidnapping and the Bodnar armed robbery were not independent of the respective murders, but if consecutive sentences have been upheld where a defendant commits several crimes against several victims arising out of one episode, State v. Serrone, 95 N.J. 23, 28 (1983); State v. Craig, 237 N.J. Super. 407, 417 (App. Div. 1989), then consecutive sentences are equally warranted where, as here, the court is confronted with multiple episodes and multiple victims. As Judge Delehey discussed below, defendants planned and executed each robbery and, during the course of each robbery, they committed other substantive crimes, not the least of which was purposeful or knowing murder. At any time, defendants could have ended their criminal escapades: they did not have to kidnap Willie Rodgers by forcing him to drive, at gunpoint, to a secluded area; they could have simply taken his money. Nor did defendant have to shoot Willie Rodgers in cold blood by putting the .357 magnum revolver to the back of his head and killing him in cold blood. The kidnapping and the purposeful or knowing murder not only involved separate harm to Willie Rodgers, but involved independent objectives. The kidnapping can be seen as a means not only to effectuate the robbery, but to terrorize him. N.J.S.A. 2C:13-1b(1),(2). The murder was done for no reason other than defendants did not want to be caught; the evidence also shows that defendant and his brother were fascinated with guns. These consecutive sentences do not violate the Yarbough guidelines.

For similar reasons, the Bodnar murder and armed robbery were also separate for purposes of Yarbough. As Judge Delehey noted below, defendants committed the Bodnar crimes shortly after they had murdered

and robbed Willie Rodgers. Their purpose was to get more front money and, like the Rodgers episode, the entire event could have been limited to an armed robbery. Instead, defendants forced Bodnar to drive where they wanted at which point defendant shot him, point blank, in the back of the head. This is not a case involving only felony murder, but the underlying substantive crime of armed robbery and purposeful or knowing homicide. Contrary to defendant's claims, these crimes were separate, and consecutive sentences were warranted under Yarbough.

There is no support for defendant's claim that Judge Delehey improperly double-counted the aggravating factors. His opinion, outlined above, clearly shows that he was aware of the Yarbough guidelines, as he followed them in fashioning defendant's overall sentence. In discussing why consecutive sentences were warranted, the judge never relied on the horror of these crimes. He focused on the Yarbough guidelines.

Finally, defendant's challenge to the imposition of parole bars for kidnapping, armed robbery and the weapons-related convictions is without merit. Defendant claims the judge failed to recite the statutory formula for imposing a parole bar, N.J.S.A. 2C:43-6b, but the State submits that failure was of no consequence. The judge found no mitigating factors applicable in this case and, given the aggravating factors cited, the requisite finding is implicit from the record. State v. Porter, 210 N.J. Super. 383, 396 (App. Div. 1986), certif. den. 105 N.J. 556 (1986).

In sum, the aggregate sentence imposed below comports with Yarbough and Roth. Judge Delehey followed the Yarbough guidelines and the base terms, along with the parole bars, were not an abuse of discretion. Defendant's claim to the contrary should be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm the conviction and sentence below.

Respectfully submitted,

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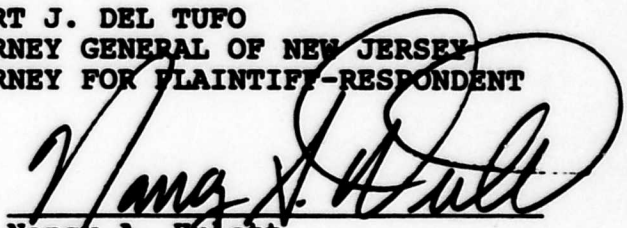
BY: 
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OF COUNSEL AND ON THE BRIEF

DATED: FEBRUARY 26, 1993

A-2434-91T4

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET No. A-2434-91T4

REC'D
APPELLATE DIVISION
MAY 11 1994
Clerk

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff - Respondent	:	On Appeal from a Judgement Of Conviction of the Superior
V.	:	Court of New Jersey, Law Division, Mercer County.
JOHN LEE ALLEN, JR.	:	Sat Below:
Defendant - Appellant	:	Hon. Charles A. Delehey, J.S.C.,
	:	And a Jury

FILED
APPELLATE DIVISION
MAY 11 1994
Clerk

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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CN-861
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Pro Se

DEFENDANT IS CONFINED

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2T refers to transcript dated June 26, 1990
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4T refers to transcript dated May 21, 1991, Part I.
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36T refers to transcript dated September 6, 1991.
1G refers to Grand Jury testimony of Kenneth Davis dated June 15, 1990.

STATEMENT OF PROCEDURAL HISTORY

On June 22, 1990, Mercer County Grand Jury Indictment No. 90-06-1003 was filed, charging the defendant, John Lee Allen, Jr., and his codefendant Ronald Allen and Gregory Williams with the following: the murder of Willie Rodgers (Referred to throughout the transcripts and brief as "Rodgers), in violation of N.J.S.A. 2C:11-3a(1), (2), and 2C:2-6 (Count One); the felony murder of "Rodgers", contrary to the provisions of N.J.S.A. 2C:11-3a(1), (3), and 2C:2-6 (Count Two); the robbery of "Rodgers", contrary to the provisions of 2C:15-1 and 2C:2-6 (Count Three); the kidnapping of "Rodgers", contrary to the provisions of 2C:13-1b and 2C:2-6 (Count Four); the possession of a weapon for an unlawful purpose against "Rodgers", contrary to the provisions of N.J.S.A. 2C:39-4d and 2C:2-6 (Count Five); the murder of Francis Bodnar (Referred to as "Bodnar" throughout the transcripts and brief), contrary to the provisions of N.J.S.A. 2C:11-3a(1), 2C:11-3a(2), and 2C:2-6 (Count Six); the felony murder of "Bodnar", contrary to the provisions of N.J.S.A. 2C:11-3a(3) and 2C:2-6 (Count Seven); the robbery of "Bodnar", contrary to the provisions 2C:15-1 and 2C:2-6 (Count Eight), and the possession of a weapon for an unlawful purpose against "Bodnar", contrary to the provisions of N.J.S.A. 2C:39-4d and 2C:2-6 (Count Nine). (Da 1 to 9).

From May 21-24, and on June 4 1991, the Honorable Charles A. Delehey, J.S.C., conducted a hearing as to the admissibility of inculpatory statements allegedly made by the defendant and his codefendants to members of the Trenton Police Department. On June 5, 1991, Judge Delehey deemed the statements admissible (13T 2-1 to 28-4).

On June 5, 1991, Judge Delehey also granted the State's motion to sever codefendant Gregory Williams from the trial of John and Ronald Allen, due to Bruton problems. (13T 30-2

to 5).

On June 6, 1991, Judge Delehey denied the Allens' motions to sever their trials from one another, contending that their alleged statements could not be effectively redacted. (14T 2-5 to 20-25).

With Judge Delehey presiding, a jury was selected on June 10, 1991, and the Allens were tried jointly on June 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, July 1, 2, 3, 8, 9, and 10, 1991. On July 10, the jury returned with guilty verdicts on all counts contained in the indictment as to both of the Allens. (Da 10).

On September 6, 1991, Judge Delehey sentenced the defendant as follows: as to the Rodgers murder, life imprisonment with a 30-year parole disqualifier; as to the Rodgers felony murder, it merged with the murder conviction; as to the Rodgers robbery, a concurrent 20-year term of imprisonment with a 10-year parole disqualifier; as to the Rodgers kidnapping, a consecutive 30-year term of imprisonment with a 15-year parole disqualifier; as to the unlawful possession of a weapon against Rodgers, a concurrent 10-year term of imprisonment with a 5-year parole disqualifier; as to the Bodnar murder, a consecutive life term of imprisonment with a 30-year parole disqualifier; as to the Bodnar felony murder, it merged with the murder conviction; as to the Bodnar robbery, a consecutive 20-year term of imprisonment with a 10-year parole disqualifier. (36T 13-5 to 15-11). All totaled, the defendant received two life terms plus 50 years, with an 85-year parole disqualifier. (36T 18-1 to 5). The defendant also received a Violent Crimes Compensation Board penalty totaling $10,150. (Da 11).

On January 8, 1992, defendant's Notice of Appeal was filed with the Appellate Division. (Da 13).

On January 28, 1992, the Appellate Division granted defendant's motion to file his Notice of Appeal nunc pro tunc. (Da 14).

STATEMENT OF FACTS

On November 19, 1989, shortly after midnight, Trenton police found the body of Francis Bodnar. Bodnar, a taxi driver, was found shot to death (one bullet in the back of his head) behind the wheel of his cab on Gouvneur Street in Trenton. (17T 70-18 to 73-18; 18T 26-16 to 17). A spent bullet was found lying on the dashboard of Bodnar's cab and was secured by the police. (24T 18-15 to 22). Findings from Bodnar's autopsy revealed that his death occurred between 11:30 pm and midnight on November 18, 1989. (18T 39-23 to 40-4). At about 7:30 a.m. on November 19, 1989, police discovered the body of a second cab driver, Willie Rodgers. He was found off of Prospect Street in Trenton, behind an establishment known as Bud's Barbeque. Like Bodnar, Rodgers was found behind the wheel of his red and black Diamond Cab, shot in the back of the upper neck. (17T 92-2 to 95-11; 18T 24-15 to 19). Rodgers' autopsy revealed that his death occurred at about 9:45 p.m. on November 18. (18T 50-19 to 21). During the autopsy, a bullet was recovered from his body and secured by the police. (17T 103-6 to 15).

The police secured four latent fingerprints from the cab, which were subsequently analyzed. (24T 52-10 to 11). One of the prints left on the passenger's side window of Bodnar's cab was identified as belonging to Ronald Allen. (26T 25-16 to 19; 26T 55-8 to 12). The other lifts were not identifiable. (26T 59-7 to 11).

* * * *

Between 8 and 9 p.m. on November 18, 1989, Jonathan Bing and Jerome Laster were enroute to purchase blankets for a football game the next day. They approached a red and black Diamond Cab and observed a light-skinned black male wearing

a skull cap, slouched in the rear of the cab. After Bing and Laster mentioned their destination, the man replied that he was not going in that direction. Without taking the cab, Bing and Laster proceeded on their way. (31T 56-9 to 58-23; 31T 63-3 to 65-7).

One evening between 9:30 and 10 p.m. in the middle of November 1989, Johnny Barretto, an admitted drug user and dealer, was going to his mother's house in Trenton. As he took a shortcut by walking behind Bud's Barbecue, Barretto saw L.C. Pegues, who he knew and described as a light-skinned black man wearing a "night hat", in a cab with two other black passengers and the driver. Continuing to walk towards his mother's house, Barretto heard a shot and then saw Pegues, as he exited the cab, drop a black gun. (31T 70-15 to 75-6).

In January 1990, Pegues approached Barretto in a liquor store and told him that he would kill him and get his family if he ever told anyone what he had seen. (31T 75-15 to 22). About two weeks later, Barretto saw Pegues in an unmarked police vehicle with three men who identified themselves as police officers. One of the officers handed Pegues an envelope containing $400. Pegues, apologizing for threatning Barretto on an earlier occasion, handed him the envelope and told him that the money was his. Barretto, needing the money to finance his drug habit, accepted the bribe. (31T 76-5 to 798). While in the Mercer County Detention Center, Barretto received a letter stating that if he needed more money to call. Included in the letter were the business cards of two detectives and one Detective Sergeant -- Detectives Salvatore, and Cosmo; and Detective Sergeant Tedder -- all of whom were investigating the cab driver murders. (31T 80-4 to 9; 31T 83-15 to 23). During the time that Barretto was in the Mercer County Detention Center, he conceded to talking to Allen's codefendant Ronald Allen, but only to the that he was being pressured and people were telling him to keep his mouth shut. (31T 86-9 to 31T 87-

9).

On November 18, 1989, Alemarie Williams and her boyfriend, Dwayne Fletcher, were en route to a friend's house in a car driven by Fletcher. A friend of theirs, Kenneth Davis, followed them in his car. When they arrived at the friend's house, they decided to race their cars. (20T 40-18 to 44-17; 20T 77-8 to 20T 78-15). On Goveneur Street, the two cars passed a cab that was stopped in the middle of the road. There was glass on the ground outside the cab and the interior light was on. The driver of the cab had his head on the head rest and appeared to be hurt. There were three passengers in the vehicle, two in the rear and one in the front, who appeared to be looking for something.

Kenneth Davis, who has criminal convictions for breaking and entering. possession of a weapon and possession of a controlled dangerous substance, as well as violation of probation, knew the Allens. (20T 74-9 to 76-2). Initially, Davis recalled that when his car passed the stopped cab, he was unable to indentify the people in the cab. (20T 86-19 to 21). However, shortly after arriving at his friend's house to race cars, he claimed that he returned to the cab so as to determine if the driver was all right. (20T 87-6 to 89-17). That night, Davis, while using his brother's name, was questioned by the police and told them that he had not recognized anyone in the cab. After the Allens were arrested in December of 1989, Davis continued to represent himself to the police as his brother, and when shown a mugshot of Ronald Allen, Davis maintained that he was not one of the three men who he had seen inside the cab. (21T 109-17 to 113-10). Davis spoke to a close friend, Dwayne Fletcher, and discussed to what extent, if any, certain information would be concealed. (21T 186-16 to 187-1).

Davis was subsequently arrested for violating the terms

of his probation, and between March 19, 1990 and April 26, 1990, he occupied the same tier as Ronald Allen in the Mercer County Detention Center. (20T 97-18 to 22). During one of their conversations, Davis mentioned to Ronald Allen that he had driven by one of the slain cab drivers. Ronald Allen asked him if he saw him in the cab, and when Davis replied that he could not recognize him as one of the perpatrators. Ronald then asked him if he could testify for him in court, Davis answered that he probably could. (21T 115-2 to 9). Prior to being released from jail on April 26, 1990, Davis gave the codefendant Allen his name and address in writing. (21T 139-20 to 25). During the trial, Davis denied signing a notarized exculpatory statement prepared by codefendant Allen on March 30, 1990, which spoke of the coercive tactics employed by the Trenton Police Department in attempting to have him implicate both of the Allens in the murders. (21T 131-21 to 132-6). But the notary public of the Mercer County Detention Center attested to the fact that Davis did in fact sign the statement. (22T 2-16 to 21).

On May 31, 1990, Davis received his first state-prison term, a four year sentence for violating his probation. A few days afterwards Davis contacted the Mercer County Prosecutor's Office and offered information for the first time implicating the Allens. (21T 131-11 to 132-22). Davis professed to have contacted the prosecutor's office because his conscience was bothering him. He denied receiving any promises or consideration regarding his prison sentence. (21T 103-2 to 22).

Dwayne Fletcher had been convicted of larceny and of possession of a controlled dangerous substance with intent to distribute prior to November 18, 1989. (21T 197-4 to 10). In aggregate, he had two drug charges pending as of that date, and three separate indictments pending against him when he testified at the Allens' trial. (21T 147-12 to 148-1; 21T 182-2 to 9). Claiming that no promises were made to him by anyone regarding his pending charges (21T 178-21 to 20), Fletcher

identified the Allens' as being two of the three men he observed in the cab that night, (21T 180-6 to 9), though he acknowledged that the three were bent down in the cab. (21T 187-21 to 24). Fletcher spoke to the police for the first time on December 20, 1989, and selected the Allens' photos from an array on that date. (21T 165-13 to 170-4). Fletcher conceded to having a discussion with Davis prior to going to the police, including his lying to the police by concealing Davis' true identity. (21T 186-16 to 187-1).

During the trial, Allemarie Williams, to whom was with Fletcher when he passed the cab, maintained that the three individuals in the cab kept their heads down, therefore while she thought that the individuals were males, she couldn't discern whether or not they were white or black because she never saw their faces. (20T 45-17 to 48-9).

L.C. Pegues had been convicted in Pennsylvania in 1986 for conspiracy, reckless endangerment, theft by unlawful taking, receiving stolen property and unauthorized use of an automobile. For these convictions, he received a 2-year probationary term. (22T 15-3 to 11). In 1987 Pegues was arrested twice in New Jersey on drug charges and, as a result, met Officer Maldonado of the Trenton Police Department. Sometime thereafter, Pegues became Maldonado's informant regarding drug dealing in Trenton and received payment for information provided on three occasions. (22T 165-4 to 17-5).

In November 1989, Pegues allegedly needed a gun to protect himself. Aware that the Allens were familiar with guns and possessed a sawed-off shotgun, Pegues went to their residence and asked for their help. According to Pegues, the Allens showed him two .357 magnums, one black and one chrome, along with the ammunition for the guns. Pegues purchased the two magnums for $100. (22T 25-17 to 27-8; 22T 34-1 to 38-13).

According to Pegues, he unexpectedly saw the Allens, accompanied by Maurice Webb, in a pizzeria in early December 1989. The defendant supposedly told Pegues that they needed the guns. When Pegues refused to return the guns, the defendant was alleged to have stated that the guns "got bodies on them". Once again according to Pegues, the Allens explained to Pegues that they were the ones who killed the cab drivers because they needed money for drugs. (22T 39-13 to 45-25). Not taking the Allens' word, Pegues still refused to return the guns and exited the pizzeria. (22T 47-4 to 10).

Allegedly after reflecting upon his conversation with the Allens, Pegues unsuccessfully attempted to contact Maldonado. Therefore he returned the guns to the Allens a few days later, without receivng any money in exchange. (22T 49-18 to 51-23). After additional attempts to contact Maldonado, he was successful. Pegues related to him his conversations with the Allens, but he did not mention his recent possession of the weapons, fearing that he would get into trouble. Later that day when he met with Maldonado, he admitted that he had possessed the weapons, only to return them to the Allens. Pegues agreed to cooperate with the police, by being wired and attempting to get the guns back. (22T 54-15 to 56-4).

On December 15, 1989, Pegues, wired with audio recording equipment, met with the defendant. During their conversation, Pegues tried to get him to confess to the cab driver shootings and also attempted to get the guns. At one point, the defendant alluded to the murders having been committed with the guns. (22T 67-24 to 73-15). However, the tape also included the defendant stating, "We had" either "something" or "nothing to do with that shit". (24T 3-20 to 7-12)*. When Pegues asked to have the guns returned to him because he needed them for a robbery, the defendant agreed to return them. (24T 74-23 to 76-22).

Pegues also maintains that five days later, on the evening of December 22, 1989, he received the black magnum from the defendant, who in turn, received it from Maurice Webb. And he received the chrome handgun from codefendant Ronald Allen, ammunition was received from both of the Allens. (24T 86-19 to 96). He then went home with the guns and ammunition and contacted Maldonado. Soon thereafter both of the handguns and the ammunition was brought to police headquarters. (24T 97-20 to 98-8). Subsequent ballistic analysis revealed that that black handgun was consistent with having discharged the bullets removed from both Rodgers' body and Bodnars' dashboard, and both were identical to the rare form of ammunition that Pegues purportedly received from the Allens. (30T 87-15 to 108-3).

In January 1990, Pegues was arrested on weapons charges and was detained at the Mercer County Detention Center. Pegues' version of the events was that Ronald Allen was on the his tier and asked him if he had said anything to anybody. When Pegues answered "no". Ronald allegedly said, "Cool, then they ain't got nothin'." (23T 127-9 to 128-13).

Soon thereafter, Pegues was released, only to be rearrested on drug charges, assaulting an officer and resisting arrest. Once again, he was placed in the Mercer County Detention Center, where this time he conversed with both of the Allens. During one conversation with Pegues, John supposedly mentioned that Maurice, Carl and Freeze* had told on them, and that if he caught Maurice he would do "what he had to do." Codefendant Ronald suspected one of the so-called "New York Boys" that by the strret name "Black" as the informer and supposedly threatned to kill him. Both Allens alluded to killing Freeze. (23T 129-2 to 132-18).

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* Although the jury ultimately was to decide after listening to the tape whether the defendant said "nothing" or "something", the court, after hearing the tape, agreed with defense counsel out of the juries presence: "That is clearly the word nothing to me". (23T 203-24 to 25).

For "testifying truthfully" against the Allens and for pleading guilty to two drug charges for which he was sentenced to seven years with a two-year parole disqualifier, Pegues had three other charges dismissed. (22T 12-11 to 14-22; 23T133-6 to 8). Pegues also conceded to his desire to receive the $13,000 reward pertaining to the cab driver shootings (22T 78-16 to 18; 23T 132-17 to 19), and readily acknowledged that lying was not a difficult thing for him to do. (23T 137-13 to 15). In June of 1990, Kenneth Frazier, a good friend of Pegues' and the Allens', encountered Pegues in the Mercer County Detention Center. And Frazier, to whom was serving time for aggravated manslaughter, was told by Pegues that he was going to do anything he could to get his time reduced by telling lies regarding the Allens'. (31T 42-12 to 44-7).

Carl and the defendant are first cousins. (19T 28-6 to 7). In late spring of 1989, Wiley was with the Allens when he met an individual named Black. Black was a known member of the so-called "New York Boys". Black allegedly possessed a black .357 magnum, which the Allen brothers admired and, within a week, acquired. (18T 83-17 to 84-21). In the fall of 1989, Wiley and the Allen brothers were allegedly with an associate of Black's, referred to only as "Dee." Dee had a chrome .357 magnum, which Ronald Allen allegedly asked to borrow. A few days afterwards, Ronald allegedly received the chrome gun from Dee. (18T 100-20 to 102-20). At about the same time, the Allens allegedly also possessed a sawed-off shotgun. (18T 104-19 to 21). All three guns were supposedly kept at either the Allens' residence, Carl Wiley's residence, or at the residence of Lester

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[3] The nickname "Freeze" was used by the Allens' codefendant Gregory Orson Williams.

Maurice Webb (called Maurice by his friends). Carl Wiley was allegedly with his cousins and Gregory "Freeze" Williams, also a friend of Wiley and the Allen brothers, when they purchased ammunition for all three weapons sometime between late spring and early summer 1989. (18T 106-20 to 108-10).

On the evening of November 18, 1989, Wiley allegedly went to the Allen brothers' residence, 72 Laurel Place, where he overheard a plot to rob "a couple of" cab drivers for about $300 so that they could show the money to "stick-up connects" (rob drug dealers). (18T 115-6 to 118-3). Wiley allegedly baby-sat for the defendants' dog at their apartment. (18T 115-6 to 129-17).

In the days following the shootings, Wiley supposedly offered to dispose of the guns for the Allens, only to have the Allens' tell him that either Maurice Webb or L.C. Pegues would have the guns and would be charged with the killings if found with the guns. (18T 133-20 to 134-6). On December 20, 1989, Wiley supposedly also witnessed Ronald give the chrome gun to Pegues, warning him that "those guns had bodies on them so be careful." (18T 133-20 to 9; 18T 147-4 to 18).

A couple of days later, on December 22, 1989, while in the Trenton Municipal Courthouse, Wiley and John Allen were arrested. (18T 148-19 to 23). Prior to his arrest, according to Wiley, he and the Allens' agreed to blame the New York Boys and whoever was apprehended with the guns if they were ever questioned about the murders of the cab drivers. (18T 151-25 to 152-14).

Carl Wiley stated that when he was questioned by the police after his arrest, initially he was uncooperative and denied the Allens' involvement in the incidents. As a result of his uncooperativeness, Detective Micheal Salvatore slapped him twice and asked him if he wanted to go to the electric chair. (18T 152-18 to 24; 19T 49-22 to 23). Wiley also maintained that Captain Constance yelled at him, and Sergeant Dileo, who had been nice to him, threatned to leave the interrogation room, leaving him with "two other guys... who were not as nice." (19T 53-2 to 3; 19T 59-18 to 23). After enduring the all day interrogation, Wiley implicated the Allen brothers. Shortly thereafter, he implicated Gregory Williams. (18T 155-2 to 17).

In April of 1990, Wiley testified before the grand jury regarding the matter herein. During the Allens' trial, he admitted that he perjured before the grand jury by claimimg that he never possessed either of the magnums. (19T 99-15 to 17; 19T 110-5 to 8). He also admitted that he lied to defense investigators in January and May of 1990, when he told them that the police had coerced him into providing a statement implicating the Allen brothers and when he denied that the Allen brothers ever told him they had killed the cab drivers. (18T 169-18 to 171-18). He also admitted to lying to family members when he told them that he was coerced into giving a false statement and by indicating that the New York Boys, with Gregory Williams, had commited the murders. (18T 168-11 to 18).

According to Geneva Watson, both Wiley's and the Allens' grandmother, Wiley complained about being constantly harassed by the Trenton Police, and on April 29, 1990, she recorded in her diary that "Carl said that he couldn't take it anymore and that he was going to kill himself." (31T 137-16 to 138-24). During Wiley's testimony before the grand jury implicating the Allens he indicated that he had no charges pending against him and maintained that the Mercer County Prosecutor's Office had not offered him any kind of deal or otherwise favorable treatment

in exchange for his information to the police or his testimony at the Allens' trial (19T 174-10 to 175-3).

On November 28, 1989, Detective Micheal Salvatore of the Trenton Police Department questioned John Allen regarding the murders. Allen was in custody on an unrelated matter. Allen was not a suspect in the cab driver murders at this time, but according to Detective Salvatore, he had previously cooperated with the police regarding other investigations and Salvatore was hoping that he could assist in the investigation of the cab driver shootings. (24T 54-15 to 55-6). Although not targeted, Allen was read his Miranda rights before being questioned. He first indicated that he had no knowledge regarding the shootings. Nevertheless, according to Salvatore when specifically questioned about the New York Boys and whether they were capable of having committed the shootings, Allen allegedly mentioned Arif Bailey and Heavy D, adding that the latter owned a .357 magnum. After the two and a half hour interview with Salvatore, John supposedly agreed to cooperatefurther with the police investigation. In return, Salvatore suggested that the police would assist him in being released from custody. (24T 57-9 to 69-11).

As a result of the fingerprint analysis identifying Ronald Allen's print as being on Bodnar's cab and information received from L.C. Pegues and Dwayne Fletcher, arrest warrants were issued for the Allen brothers on December 21, 1989. (24T 8817 to 90-21; 24T 104-9 to 105-4). The next day, John Allen and Carl Wiley were arrested in the Trenton Municipal Court lobby. Allen was allegedly taken into an interview room where he was read his Miranda rights. When advised of the charges against him, he supposedly stated, "This is bullshit man, Heavy D did that shit; man, I didn't kill anybody." (24T 109-21 to 113-12). Wiley was placed into another interview room. Salvatore denied slapping or threatning Wiley with the electric chair. (24T 114-21 to 115-9).

Later on that day, Salvatore and Lieutenant Daniel McKee transported John Allen to get his palm printed. During the procedure, Allen maintained his innocence by stating that he "didn't kill nobody", and allegedly stating, "Heavy D did that shit, man, the New York Boys did it." When Salvatore responded by saying that they had ballistic evidence, statements, identifications and fingerprint evidence to the contrary, John supposedly replied, "Okay, we were there, but we didn't shoot anybody, Arif did it." Allen was subsequently returned to the interview room but no formal statement was taken from him at this time because the police were preoccupied with apprehending his brother. (24T 122-15 to 126-23).

Later that afternoon, Ronald was arrested and transported to police headquarters, where he was placed into an interview room. (24T 132-7 to 15). After allegedly being read his Miranda rights, Captain Joe Constance entered the room. At first, Ronald denied any knowledge regarding the cab driver shootings, but soon thereafter allegedly stated that he had heard on the street that the New York Boys were responsible. After about 10 minutes, Ronald supposedly changed his story and said that Maurice committed the first robbery; that he was with Maurice when he pulled a gun on a cab driver and ordered him to drive to the the back of Bud's Barbeque, and that he, Ronald, left the cab and did not kmow what happened after that. (24T 135-8 to 150-7).

After about 35 minutes into the interview, Captain Constance was handed a note informing him that Wiley claimed that the Allens and Freeze had committed the murders. When Constance mentioned Freeze to Ronald, he allegedly changed his story again, this time saying that it was all Freeze's idea; that he, Ronald, did not shoot anybody; then description the crimes in detail. (24T 150-20 to 156-5).

Later on that afternoon, Constance entered the interview room where John Allen was being held. According to Captain Constance, he advised John Allen of his Miranda rights, then told him that he had heard his brothers' version of the homicides and offered him the opportunity to give his version. To which the defendant allegedly conceded his involvement in the homicides. (27T 56-15 to 65-9).

Both Allens subsequently signed Miranda rights waiver forms and inculpatory statements. However, during the taking of the Allens' typewritten statements, shortly after 7:30 p.m., attorney Jack Seelig phoned the Trenton Police Department. He spoke to Lieutenant Daniel McKee, advising him that he had been retained by Mrs. Allen to represent her sons, and requested that the questioning cease. He stated that he wanted to meet with the Allens, and that he was on his way to the police department. (31T 119-25 to 121-1). Seelig and Mrs. Allen arrived together at the station at about 8 p.m., while Mrs. Allen waited outside the detective bureau, Seelig entered and spoke to Constance at 8:15 p.m. Seelig informed Constance that he had been retained to represent the Allens and wanted to confer with them. Constance stated that the Allens did not want a lawyer and denied Seelig access to them. Without speaking to either of the Allens, Seelig and Mrs. Allen departed (31T 122-3 to 124-18).

LEGAL ARGUMENT

POINT I

STATE ATTORNEY FLICKER'S CONDUCT DURING THE DEFENDANT'S TRIAL WAS SO EGREGIOUS THAT THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE FIFTH AND FOURTEENTH UNITED STATES CONSTITUTIONAL AMENDMENTS.

A. THE EDITING OF THE TRANSCRIPT OF THE TAPE RECORDED CONVERSATION BETWEEN THE DEFENDANT AND UNDERCOVER PAID INFORMANT L.C. PEGUES . . . . . .

During the pre-trial proceedings the admissibility of a tape recorded conversation between the defendant John L. Allen, jr. and undercover paid informant L.C. Pegues was held. [See N.J. Rules of Evidence, Rule 4. Also see State v. Frost 242 N.J. Super 601 (App. Div. 1990)]. During which, a revised edition of the transcript was produced and subsequently marked S-30a, excluding all irrelevant and potentially prejudicial excepts.

The Prosecuting Attorney, Ms. Kathryn Flicker agreed to produce the revised transcript and provide copies to all parties. After preparing the revised transcript the Prosecutor advised counsel that there were changes, but failed to advise the court of these changes. (23T 202-1 to 6). The addition at issue is the word "something" attributed to John Allen in the phrase "We had something to do with that shit" (23T 201-3 to 4). This was not discovered by defense counsel until after the redacted version with the addition was offered to the Jury and State's witness L.C. Pegues, to whom had been utilized as an undercover paid informant in this case, had testified to, "We had something to do with this shit", as coming from John Allen. (23T 201-5 to 7).

This presented several problems for both defendants on trial. First, the statement by the Prosecutor that there were changes in the transcript was an understatement. She said that there were inaudibles that they were able to make out and then advised counsel that they should listen to the tape before the jury heard it later that day. But she failed to inform counsel and the court of the addition. (23T 201-9 to 16). She instead tried to slip the word onto the transcript and slide it by the court and counsel during trial . From the time a transcript of the tape was provided by way of discovery until the time of the incident with Ms. Flicker tampering with this evidence, the word was as defense counsel contends. And the objections were based upon such. See N.J.S.A. 2C:28-7 (Tampering with or fabricating physical evidence) which provides:

> A person commits a crime of the fourth degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:
>
> (1) Alters, destroys, conceals or removes any article, object, record, document or other thing of physical substance with purpose to impair its verity or availability in such proceeding or investigation; or
>
> (2) Makes, devises, prepares, presents, offers or uses any article, object, record, document or other thing or physical substance knowing it to be false and with purposes to mislead a public servant who is engaged in such proceeding or investigation.

Although one of the defense attorneys and the judge agreed on what the word actually was ("nothing"), counsel, with judicial economics and fundamental fairness in mind, agreed to allow the jury to listen to the tape and revise the transcript once more with the words "nothing/ something" along with an instruction to the jury explaining that they will make the final determination. (23T 203-25 to 208-22).

The governing principals set forth in State v. Driver, 38 N.J. 255, 287-288 (1962), proscribe that (1) the recording device be capable of taking the conversation or statement, (2) its operator be competent, (3) the recording be authentic and correct, and (4) no changes, additions or deletions be made in the recording. (See N.J. Rules of Evidence, Rule 8[2]). What occurred was not in accord with these principals. The transcript was utilized as an aid to the jurors, to which is in the province of the trial judge's discretion. (See State v. Zicarelli, 122 N.J. Super. 225, 238-239 (1973).

Although counsel for the defendant made objection to the addition of the word "something", he ultimately agreed to allow both words onto the transcript without requesting an additional Driver hearing. Moreover, harmful errors acquiesed in by counsel are subject to plain error notice if they "cut mortally into the substantive rights of the defendant." (See State v. Shomo, 129 N.J. 248, 260 [1992], also see State v. Harper N.J. Super 270, 277, 319 A.2d. 771 [App. Div.], cert. den. 65 N.J. 574, 325 A.2d. 708 [1974]).

The plain error and harmless error rules have been defined by Current N.J. Court Rules 1:7-5 and 2:10-2 and codified as the have evolved through case law. In effect, plain error is defined as one which is if such a nature as to have been capable of producing an unjust result. If it is of such a nature, then, necessarily, it prejudices a substantial right. Pressler, Current N.J. Court Rules, Comment R. 1:7-5. If it is not of such a nature it does not prejudice a substantial right and is, therefore, harmless. (State v. Douglas, 204 N.J. Super 265, 272-273 [1985], citing State v. Gardner, 51 N.J. 444, 456 [1968]).

State v. Douglas, Id. at 19, also went on to cite State v. Bankston, at 63 N.J. 273 which states:

> The test of whether an error is harmless depends upon some degree of possibility that it led to an unjsut verdict. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. State v. Macon, 57 N.J. 325, 335-336 (1971). Or, as stated in Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. [229], 230, 11 L.Ed.2d. 171, 173 (1963), "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

This type of behavior is tyrannical, and criminal. No officer of the court can be allowed to tamper with evidence. Ms. Flicker's intentions were not in the interests of justice, if so, she could have requested an additional Driver hearing, Id. at 19, she stated that there were inaudibles that "we" were able to make out. (23T 201-9 to 16). She never even made it known who she referred to as "we". At that time it wasn't known, nor is it known by the defense or the court today. And if the identity of persons to whom made out the word "something" is unknown, then so are their qualifications, or lack thereof.

The primary role of a prosecutor is not to obtain convictions but to see that justice is done. State v. Marshall, 123 N.J. 1, 152-153 [1991], citing State v. Farrell, 61 N.J. 99, 104, 293 A.2d 176 [1972]. Thus [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. at 105, 293 A.2d 176 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314, 1321 [1935]).

Whether prosecutorial misconduct requires reversal of a criminal conviction depends on whether "the conduct was so egregious that it deprived defendant of a fair trial." State v. Ramseur, 106 N.J. 123, at 322, 524 A.2d 188 (1987) (citing State v. Kelly, 97 N.J. 178, 218, 478 A.2d 364 (1984). Also see State v. Wilson, 128 N.J. 233 (1992). The defendant was made to suffer for Ms. Flicker's desire to edit the transcript of the tape recorded conversation. This was in no way a harmless error, Id. at 17. The defendant's convictions should not remain in light of what transpired, nor should the State ever be allowed to use this evidence against the defendant in the future.

B. THE STATE'S RELIANCE UPON AND FAILURE TO CORRECT THE KNOWINGLY PERJURED TESTIMONY OF STATE WITNESS CARL LESTER WILEY.

Carl Lester Wiley, witness for the prosecution, gave a voluminous amount of testimony during the grand jury proceeding and throughout trial. Unfortunately, he was often in what was characterized as his "deception mode." (19T 103-13 to 17). Basically, Mr. Wiley was only concerned with protecting himself from prison, the prosecution knew this, and allowed this man to commit perjury as many times as he saw fit in order to convict the defendants in this case. He lied to Police Detectives investigating the murders. (19T 24-11 to 25-11). He also lied to the Grand Jurors investigating the murders in order to "protect himself". (19T 69-7 to 19). And while testifying and the defendants' trial he admitted doing so.

The State would have virtually no problem convicting Mr. Wiley of perjury under the current statutes [Perjury-N.J.S.A. 2C:28-1] which state:

> a. **Offense defined.** A person is guilty of perjury, a crime of the third degree, if in any official proceeding he makes a false statement under oath or the equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.
>
> **b. Materiality.** Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or the outcome of the proceeding or the disposition of the matter. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material is a question of law.

Mr. Wiley lied during the trial of the concerning the Whereabouts of both of the defendants on the evening of November 18-19, 1989. He stated that he was at the defendant's residence at 72 Laurel Place while they were out robbing the victims in this case, and eventually accompanied them to John Allen's girlfriends apartment at 620 West State Street, and stayed for a while. (18T 114-8 to 132-7). He also claimed that John Allen went into one of the bedrooms to check on his girlfriend Christine, and he (Wiley) eventually exited the apartment building, leaving both of the defendants in the aparment while went home. (18T 132-6 to 11). As evidenced by the various statements and testimony offered during the grand jury proceedings, Mr. Wiley misrepresented facts while testifying under oath concerning the whereabouts of the Allen brothers on the evening of November 18, 1989. According to testimony offered by Dr. Rafaat Ahmad, the Chief Medical Examiner for Mercer County, the approximate time of Willie Rodgers' death was 9:45 p.m. on November 18, 1989. (18T 49-1 to 4). And althought one of the witnesses in this case didn't know of the exact time, she testified that the time she observed three individuals in one of the victims cabs was about from 10:45 p.m. to 11:15 p.m., on the night in question. (20T 33-1 to 25). And another witness testified that she observed three individuals in one of the cabs at the crime scene between 11:30 p.m. and something to 12 on the evening in question. (20T 57-20 to 58-6).

Assuming Mr. Wiley's assertions as fact, neither of the Allen brothers proceeded to "the Caravan" in between the time he arrived at their residence until at least the time he left them at 620 West State Street. (19T 120-17 to 23). Furthermore, several grand jury witnesses maintain that both John Allen's girlfriend and his brother Ron were at a bar named "The Caravan" throughout portions of the evening in question. And according at least two witnesses, John Allen was at his girlfriend's apartment when he was informed of a problem with

one of his girlfriends ex-boyfriends, afterwhich he proceeded to "The Caravan". [See exhibits Da 15-19]. The defendants did not seek an alibi defense during the trial, and this is in no way an attempt to establish one now. But Mr. Wiley seemed to do what came to him naturally when in fear of incarceration, lie to protect himself.

The Prosecuting Attorney in this case, Ms. Kathryn Flicker, also presented the State's evidence to the grand jury. She was present during all of the sessions, and she had a bird's eye view of this entire fiasco. She knew he was a liar and yet, she still allowed him to continue to lie and did nothing to stop or correct the problem. The trial of a criminal indictment is nothing more nor less than a search for the truth, not a matter of gamesmanship. State v. Laganella, 144 N.J. Super. 268, 281 (1976). A public prosecutor "must consistently refrain from any conduct that is lacking in the essentials of fair play." State v. D'Ippolito, 19 N.J. 540, 550 (1955). Also See State v. Marks, 201 N.J. Super. 508, 538 (1985), "The role of the prosecutor is to prosecute with earnest and vigor -- indeed he should do so. But while he may strike hard blows, he's not at liberty to strike foul ones." Due process [14th Amendment] is also invoked where by active connivance of the prosecution a conviction is obtained through the use of perjured testimony. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Compare to Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1955). Also see State v. Cahill, 125 N.J. Super. 492 (Law Div. 1973). These lies have definitely affected the course of the defendants trial, therefore the State must be held accountable. For both its unauthorized editing of the transcript of the tape and for what it has condoned in allowing Wiley to misrepresent facts and "protect himself" by reversing the convictions and barring further prosecution on the offenses in the future.

POINT II

THE GRAND JURIES INVESTIGATIVE FUNCTION WAS SUBVERTED, IN VIOLATION OF THE FIFTH AND FOURTEENTH UNITED STATES CONSTITUTIONAL AMENDMENTS, AND ARTICLE 1, PARAGRAPH 8 OF THE NEW JERSEY CONSTITUTION.
(Not raised below)

A. THE PERJURED TESTIMONY OF STATE WITNESS CARL WILEY BEFORE THE GRAND JURY INVESTIGATING THE CRIMES.

During the grand jury investigation into these homicides, Mr. Carl Wiley offered testimony concerning the deaths of the victims and the purported gunmen responsible for their deaths. According to Wiley, he only looked at and touched the handguns possessed by John and Ronald Allen, his first cousins, at various times during 1989. He supplied additional testimony inculpating both of the Allen brothers and Gregory Orson Williams [a co-defendant charged in the indictment] in the investigation of the murders.

Mr. Wiley, who frequented what has been described as his "deception mode" (19T 103-13 to 17), has made it known that he lied during the Grand Jury Session inorder to protect himself (19T 69-7 to 19). He lied to the jurors when asked concerning whether or not he actually possessed either or the handguns at any time by explaining that he looked at them and only touched them. He made it clear that he never possessed them. (19T 86-10 to 19). Yet, during trial he admitted that he has possessed them for days at a time. (19T 24-11 to 22). This omission by Wiley coupled with the fact that at least one of the weapons were ballistically matched to both of the homicides with the bullet fragments removed from Rodgers' body and Bodnars' cab left the jurors with no other rational conclusion to draw than that drawn from the perjured testimony of Wiley.

State v. Gaughran, 260 N.J. Super. 283, 286-287 states the following:

> The Grand Jury system is deeply rooted in our history of jurisprudence. United States v. Calandra, 414 U.S. 338, 342, 94 S.Ct. 613, 617, 38 L.Ed.2d, 561, 568 (1974). It is embodied in both our Federal and State Constitutions. U.S. Const, Amend. V; N.J. Const. (1947) art. I, par. 8.
>
> The Grand Jury performs a two-fold function: "it acts as a sword so that those suspected of wrongdoing may be properly brought to trial, and as a shield to protect the people from arbitrary prosecution". State v. Smith, et. al, 102 N.J. Super. 325, 340, 246 A.2d. 35 (Law Div. 1968). See also Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 8 L.Ed.2d 569, 580 (1962).

Also see State v. Del Fino, 495 A.2d. 60, 65 (1985), which reaffirms the Grand Juries functions:

> For the future, the necessity for insuring that the grand jury be informed of all the evidence should be underscored. As the Supreme Court stated in Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d. 569 (1962). "[the grand jury] has been regarded as the primary security to the innocent against hasty, malicious and oppressive persecution * * *". Id. at 390, 82 S.Ct. 1373, 8 L.Ed.2d. at 580. "It is that body which determines whether "a charge is founded upon reason or was dictated by an intimidating power or by malice or ill will". U.S. v. Provenzano, 688 F.2d. 194, 202 (3rd. Cir.) cert. den. 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d. 634 (1982) quoting Wood v. Georgia, Id.
>
> In fulfilling that constitutional role of standing between citizens and the state, there is no reason that grand jurors not be informed of all evidence before the panel.
>
> The grand jury has always occupied a high place as an instrument of justice in our system of criminal law -- so much so that it is enshrined in both our Federal and State Constitutions. U.S. Const. Amend. V; N.J. Const. (1947) art. I, para. 8. We expect properly charged grand jurors to exercise with responsibility and integrity that "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions", Branzburg v. Hayes, 408 U.S. 665, 686-687, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626, 643 (1972) (footnote omitted), and to inform themselves properly and adequately of the evidence necessary to discharge their constitutional function.

There is no question that the State presented sufficient evidence as to each element of the offenses charged in this indictment. See State v. Bennett, 194 N.J. Super. 231, 476 A.2d. 833 (App. Div. 1984). The question is whether any of the State's witnesses perjured themselves, and if so was it in any way prejudical to the defendant. Mr. Wiley admitted while testifying in open court that he had lied during the grand jury sessions in order to protect himself. (19T 69-7 to 19). The falsity in question is his possession of the weapons presented during trial, one of which being the handgun used to kill both of the victims in this case. The Grand Jury based its decision upon the testimony of several witnesses. Yet, no witness had the impact Carl Wiley had on their decision. He claimed to have been present on numerous occasions when handguns were exchanged and fired by both of the defendants. As well as when conversations were held concerning crimes committed by the defendants. Nevertheless, when asked whether or not he himself had possessed the murder weapons he stated that he only looked at and touched them. (19T 86-10 to 19). This without doubt would have effected his credibility as a witness. And given the nature of his testimony it can be clearly deterimined that the Grand Jury's decision was not a fully informed one. See State v. Del Fino, Id. at 26. Furthermore, while witnesses are not held to the same rigid standards that prosecutors are held to before the grand jury, they don't have a license to purposely mislead this investigative body. And once they've[witnesses] given an oath to tell the truth under the penalty of law they must adhere, or be penalized. See Current N.J. Rules of Evidence, R. 18, which states:

> A witness before testifying shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religion or lack of it.

> This rule sets forth the witness's obligation to either take an oath or make an affirmation or declaration to tell the truth before testifying. See State v. Gambutti, 36

N.J. Super. 219 (App. Div. 1955). If the proposed witness refuses either to take an oath or make an affirmation or declaration, presumably he should not be allowed to testify. See State v. Walton, 72 N.J. Super. 527 (Cty. Ct. 1962).

In this particular case Wiley must be held accountable for such. This indictment was not handed down by a fully informed grand jury, therefore grave doubt exists whether or not the grand jury's decision to indict was made fairly and impartially. As a matter of law, this indictment must be dismissed and Wiley should not be allowed to offer his testimony concerning this case due to his unreliability and desire to protect himself and subvert the grand jury's function as an investigative body.

Serious doubt also exist is to whether Wiley fully understood this obligation. This man has lied everytime he has had a chance to do so. His longstanding reason has been that he wanted to protect himself. (19T 69-7 to 19). This, in the interests of justice, can not be permitted. When in danger of incriminating himself he'll simply enter his deception mode. See Current N.J. Rules of Evidence, R. 17, which proscribes:

> A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and the jury either directly or through interpertation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpretator is subject to all the provisions of these rules relating to witnesses.

The basic application of this rule deals with the competency, or lack thereof, of witnesses. The declared policy is that all people are qualified to be witnesses and give relevant evidence at trial. See N.J. Rules of Evidence, R. 7, also see Germann v. Matriss, 55 N.J. 193 (1970); State v. Briley, 53 N.J. 498, 36 A.L.R. 3d. 811 (1969).

The difference between the basic application of Rule 17 and the case at bar is that in most cases in which witnesses were disqualified, the witnesses were children. Wiley is an adult with no known mental disorders. But his desire to protect himself has and will interfere with the administration of justice in this case. Wiley has lied to police investigators, defense investigators, family members, and grand jurors. And at one point during trial he stated that he was thinking of one answer and simply gave another. (19T 69-7 to 19). In this rare instance, the court need intervene. Although Wiley's testimony is relevant, it will only undermine the sense of fundamental fairness enjoyed by both the State and the defendants in this case. And the State has knowingly use his perjured testimony concerning the whereabouts of the Allen brothers and his possession of the weapons used in the murders. This cannot be condoned. See Napue v. Illinois, Id., at 24. Futhermore, the prosecutor has a duty to correct testimony that she knows is false, U.S. v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991). Also see the standards set forth in the Current N.J. Rules Governing the Courts [Rules of Professional Conduct] that have been trampled upon.

RPC. 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Profesional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honestly, trustworthiness or or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentations;

(d) engage in conduct that is prejudicial to the administration of justice.

Each of the rules cited pertaining to the professional misconduct of an attorney has been violated by the prosecuting attorneys' connivance. On this issue the Courts job is clear. Reversal of the convictions below, and dismissal of the indictment with prejudice.

B. THE PERJURED TESTIMONY OF STATE WITNESS KENNETH BEFORE THE GRAND JURY INVESTIGATING THE CRIMES.

On June 15, 1990, Kenneth C. Davis, a convicted drug dealer, testified during the grand jury sessions that while he was enroute to a friends house on Berkeley Avenue in Trenton, he observed both Ron and John Allen, going through the pockets of one of the victims. (1G 81-17 to 86-4). Initially, Davis told police investigators that he could not identify the people in the cab. (1G 86-18 to 21). His explaination for this was that he had a bench warrant for violating his probation and he didn't want to get involved. (1G 87-2 to 24).

During his testimony he detailed being on the same tier with Ronald Allen, and Allen giving him two versions of the night of November 18, 1989. (1G 88-18 to 89-4). He also testified that there was no doubt in his mind that Ron and John Allen were in that cab on the evening of November 18, 1989. He also stated that no one had told him to say that, or threatned or forced him to say that. (1G 89-19 to 90-3). In any event, Mr. Davis signed an affidavit declaring the exact opposite in the presence of a counselor/Notary Public employed at the Mercer County Detention Center months before testifying. (see exhibit Da 21) Trial exhibit DRA-8. The affidavit was handwritten by Ron Allen and signed by Davis. It clearly states that Mr. Davis's freedom had been threatned by policeman and offers had been made to others to whom had accompanied him that evening, involving pending charges. When Mr. Davis was shown this document by the prosecuting attorney, he told her that he didn't recognize the signature, and he did not think that he signed it, and that if he did sign a document in the jail that it wasn't in that form. (21T 119-14 to 17). The Prosecuting attorney subsequently informed the jury that the signature on the affidavit were that of State witness Davis.

By the State stipulating to the fact that Davis did sign the affidavit, it concedes the defendants claims. This scenario is simple. An eyewitness, Davis, allegedly sees what appears to be three black males inside of one of the victims cabs while enroute to a friends house. During the police investigation Davis, while looking through a police mug shots, informed members of the Trenton Police Department that he knows one of the men in the photographs from Laurel Avenue, where he grew up with him, in Trenton. (21T 111-10 to 21). And he also told the police that although he recognized Ron Allen, he wasn't one of the individuals that he saw in the cab. (21T 112-8 to 17). While in the Mercer County Detention Center, in Trenton, New Jersey, he was on the same tier with Ronald Allen. He eventually spoke to Allen about what he had witnessed and agreed to testify for him. (21T 115-1 to 12). In doing so, he signs an affidavit stating what he has conveyed to Allen while he is still on the same tier with him. Although he testified to the contrary, the fact that he signed this affidavit prior to testifying clearly establishes the fact that Davis intentional mislead the grand jury concerning what he actually saw, and the efforts of the Trenton Police Department' detectives to make him change his version of what he witnessed. This man perjured himself before the grand jury. (See perjury, Id, at 22). After hearing his testimony and relationship with the defendants, the grand jurors had no problem accepting his version as fact.

It should be pointed out that our State Constitution "does not simply mirror its federal counterpart, but instead constitutes a basis for independent rights and protections that are applicable to the citizens of New Jersey". State v. Engel, 249 N.J. Super. 336, 366, 592 A.2d 572 (App. Div. 1991); State v. Mollica, 114 N.J. 329, 352, 554 A.2d 1315 (1989), quoting State v. Gaughran, Id, at 26.

Continuing in this tradition and in order to assure an

independent and fair Grand Jury system in the State of New Jersey, it is essential that the jurors be informed of the relevant facts. See State v. Gaughran, Id, at 26. The facts that were hidden by Mr. Davis were very relevant. His testimony gave the grand jurors the impression that he saw both of the defendants going through the victims pockets. (1G 86-18 to 21). His testimony also gave the grand jurors the impression that he had no doubt in his mind that Ron and John were in one of the victims cabs, and that no one had told, threatned or forced Davis into saying that the Allen brothers were in the cab he saw. Observe the spirited language in United States v. Basurto, 497 F.2d 781, 786-787 quoting Mesarosh v. United States, 352 U.S. 1, 77 S.Ct 1, 1 L.Ed.2d. 1 (1956):

> "Mazzei [the witness], by his testimony, poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity . . . . Pollution having taken place here, the condition should be remedied at the earliest opportunity".
>
> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. . . . [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted".

The Appellate Division retains jurisdiction over this matter and should dismiss the indictment with prejudice accordingly, inorder that justice be done, Mr. Davis's lies were not harmless ones. Harmless error, Id, at 19, does not apply in this situation.

C. JOHNNIE BARRETTO, A MATERIAL WITNESS, WAS BOTH THREATNED AND BRIBED IN ORDER TO REMAIN UNAVAILABLE TO ANYONE INQUIRING ABOUT ONE OF THE HOMICIDES.

On a night in the middle of November 1989, at around between 9:30 to 10:00, while enroute to his sisters' house, Johnnie Barretto heard a loud boom. (31T 71-8 to 13). He was walking from his mothers' house, on Oakland Street in Trenton, to which runs parallel to Cheney Flashing [the scene of the Rodgers murder].

He stated during trial that he had left his mothers' house and was headed to his sisters' house when he decided to take a shortcut around the old railroad tracks. (31T 71-18 to 23). He also stated that there was alot of trash in that area so he took another shortcut behind a pile of rocks. (31T 71-23 to 25). He stated that when he went around the rocks, there was a car in front of the rocks facing the railroad tracks. (31T 71-25 to 72-1). This car was Willie Rodgers' taxi cab. When Barretto first saw the the cab he saw that there was three passengers and and a driver inside of the cab. (31T 72-5 to 9). The only person Barretto was able to notice as soon he saw him was L.C. Pegues, a paid undercover informant in this case, sitting behind the driver. (31T 72-10 to 14).

L.C. Pegues has been lurking the streets of Trenton for quite some time as a paid informant. (22T 165-4 to 17-5). After being seen exiting one of the victims cabs by Barretto Pegues decides to use threats instead of the black revolver he was seen with at the crime scene around the approximate time of Willie Rodgers' death. (31T 74-1 to 15). He approached Barretto in January of 1990 at a liquor store. (31T 75-13 to 17). Pegues told Barretto that if he told anyone about what he saw that he would kill him. (31T 75-20 to 23). Instinctively, Mr. Barretto froze in fear. (31T 75-23 to 76-2). But that wasn't the last of Mr. Pegues. A couple of weeks

later Pegues, while in the company of his cronies, took a different approach to hindering this investigation. While in what was described as an undercover detective car, Pegues was handed an envelope to which Pegues in turn hands to Barretto. Pegues told Barretto that there was money in the envelope and if he didn't go to the police and tell them what it was that he saw the money was his. He also apologized for the manner inwhich he approached Barretto weeks earlier. And then one of the officers told Barretto not to tell anyone, except them, about what he saw. (31T 76-1 to 78-17). The envelope contained about $400. (31T 78-18 to 79-4).

While in the Mercer County Detention Center, Barretto received a letter telling him that if he needed more money or anything to call the numbers on the business cards. (31T 80-1 to 83-22). Mr. Barretto had the cards in his possession while testifying, after presenting them to defense counsel they were marked into evidence as DRA-11, the card of Detective Sergeant Robert Tedder, DRA-12 the card of Detective Micheal Cosmo, and Detective Micheal Salvatore. The Prosecuting Attorney attemptedto minimize the damage done to the State's case by Barretto's testimony by having one of her investigators, to whom worked with these same detectives on this case, testify on rebuttal about how the business cards are given out routinely in the course of their investigation. (32T 21-11 to 22-23).

The irony of all of this is that Barretto witnessed Pegues exiting one of the victims cabs with a black revolver around the time of the cab drivers' death. (31T 74-1 to 7). Yet the prosecutor treated Barretto with nothing but sarcasm and criticism. The conduct of the informant and the police detectives involved in this case is unimaginable. The grand jury had a right to hear Barretto's testimony. It could not subpoena Barretto because the Detectives did not disclose this information to the prosecuting attorney. See In the matter of Grand Jury Subpoenas Duces Tecum served by the Sussex County

Grand Jury on Zulima v. Farber, esq., and Stephen H. Skoller esq., 241 N.J. Super. 18, 574 A.2d. 449 , which bespeaks of the Grand Jury's powers:

> [I]t has been said that the "the public . . . has a right to every[person's] evidence", and thus, "the grand jury's authority to subpeona witnesses is not only historic, but essential to its task." quoting Branzburg v. Hayes, 408 U.S. 665, at 689, 92 S.Ct. 2646, at 2660-2661, 33 L. Ed.2d 626, at 643-644 (1972).
>
> "[I]t is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquires is not to be limited narrowly by questions of impropriety or forecasts of the probable result . . . . or by doubts whether any particular individual will be found properly subject to an accusation of a crime". quoting Blair v. U.S., 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979, 983 (1919).
>
> The scope of the grand jury's powers reflect its special role in insuring fair and effective law enforcement. A grand jury proceeding "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated". U.S. v. Calandra, 414 U.S. at 343, 94 S.Ct. at 617, 38 L.Ed.2d at 569. Rather, "it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be conducted against any person. Ibid. "When the grand jury is performing its investigatory function into a general problem area . . . . society's interests is best served by a thorough and extensive investigation. . . ." quoting Wood v. Georgia, 370 U.S. 375, at 392, 82 S.Ct. 1364, at 1374, 8 L.Ed.2d. 569, 581-582 (1962).
>
> In a similiar vein, the U.S. Supreme Court has emphasized that "an investigation may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors", quoting U.S. v. Calandra, supra 414 U.S. at 344, 94 S.Ct. at 618, 38 L.Ed.2d. at 569, and the grand jury's inquiry "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed". Ibid quoting U.S. v. Stone, 429 F.2d. 138, at 140. (2d. Cir. 1970).

The grand jury's investigative function was subverted by Pegues and the detectives involved in bribing Barretto. During

Pegues and the detectives involved in bribing Barretto. During Barretto's testimony he stated that he was still in fear. (31T 76-1 to 2). Although it can be argued as to when Pegues was acting under the color of state in his role as an informant, the undisputed testimony of Barretto remains. He maintains that he can identify the all of the men in the car, if seen again, when he accepted the bribe. (31T 77-6 to 10). And the detectives involved in the bribe, obviously uncertain as to whether Barretto would keep his end of their deal, went as far as forwarding a letter with their business cards inside so that Barretto could get more money, or anything else, he could call. (31T 80-1 to 17). This shows their connivance. Barretto also maintains that he only spoke to Ronald Allen once while in the Mercer County Detention Center, but only to the extent that he was being pressured and people were telling him to keep his mouth shut. (31T 86-9 to 87-9).

This can not simply be dispelled as insignificant. These detectives work with the prosecutors' office on a regular basis. And based upon the undisputed testimony of various witnesses, under R. 2:10-2 [Plain error] Id. at 19, the defendant is entitled to relief. And as a remedy for this blatant disregard for justice and the grand jury process, the indictment need be dismissed with prejudice. The police aren't held to the same high scrutiny as prosecutors, but the "fundamental fairness" requirement of the due process clause imposes on the police an undifferented and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution. See Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941). Also see State v. Marshall, 123 N.J. 1, 108-109 quoting Arizona v. Youngblood, 109 S.Ct. 333, 337 (1988):

> "Most recently, in Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988), the Court reinstated defendant's convictions for child molestation, sexual assault, and kidnapping, reversing

the judgement of the Arizona Court of Appeals that the State's failure properly to preserve semen samples that could have exonerated defendant constituted a denial of due process. The critical evidence consisted of semen samples on the victims clothing, and an expert witness testified that earlier testing or refrigeration of the clothing might have permitted a conclusive determination of the assailant's identity. There was no indication that the police had acted in bad faith. The trial court instructed the jury that it might "infer that the true fact is against the State's interest" if it determined that the State had lost or destroyed evidence. Id at 54, 109 S.Ct. at 335, 102 L.Ed. 2d at 287. The Court concluded that absent bad faith, no due process violation had occurred:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in [California v.] Trombetta [Citation omitted], that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." We think that requiring a defendant to show bad faith on part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. [Id. 488 U.S. at 57-58, 109 S.Ct. at 337, 102 L.Ed. 2d at 289.]

The circumstances of the case at hand are markedly similar in some aspects, while distinguishable in others. Although the defendants were ultimately able to have Barretto testify during their trial, the fact that he was bribed and threatned inorder to remain unavailable to others investigating the crimes

still remains. As discussed earlier, the defendants had a right to have Barretto testify during the grand jury investigating the crimes. The police investigating these crimes can not impede upon this right. And as mentioned, this is only one in a series of recurring violations. The damage done here is clear and irreparable. The police intentionally failed to uphold this duty. This is not in dispute. The indictment must not survive this type of perversion on part of the State and its representatives.

POINT III

DETECTIVE MICHEAL SALVATORE'S STATEMENT PRIOR TO THE DEFENDANT'S INCULPATORY STATEMENTS RENDERED ALL SUBSEQUENT STATEMENT INVOLUNTARY.

During the Defendant's pretrial hearing regarding the admissibility of inculpatory statements allegedly made by defendant to the police, [See Current N.J. Rules of Evidence, R. 8:3], it was made clear by Detective Micheal Salvatore that he did, in fact, advise the defendant prior to obtaining the inculpatory statements that "If you didn't shoot anyone that it would be in your best interest to tell us[police] what he knew about the killings" (5T 186-9 to 13). Although, according to Detective Salvatore, the defendant was advised of his rights to both remain silent and to have an attorney present if desired* (4T 33-2 to 18), and subsequently waived them, the comment made by Detective Salvatore was a deliberate falsity told to the Defendant inorder to have him waive both his 5th Amendment Constitutional right to remain silent* and his 6th Amendment Constitutional right to have the assistance of counsel during questioning,* and confess to his alleged involvement in the murders.

The opinion in Miranda v. Arizona* contains the following:

> "Moreover, any evidence that the accused was threatned, tricked, or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege" (384 U.S. at 476, 86 S.CT. at 1629, 16 L.Ed. 2d at 724-725).

*Miranda v Arizona, 384 US 430, 86 S.CT. 1602, 16 L.Ed. 2d 604 (1966).

The Honorable Judge Charles A. Delehey, J.S.C., presided over the hearing and the trial inwhich the statements were introduced into evidence. During the hearing Detective Micheal Salvatore agreed that he did in fact tell the defendant that if he didn't shoot anyone, it would be in his best interest to tell us [police] what he knew about the killings. (5T 186-9 to 13). Under the Current New Jersey Code of Criminal Justice, Title 2C, Chapter 2, section 6, the following is contrarily proscribed:

> **2C:2-6 Liability for conduct of another; complicity**
> a. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> b. A person is legally accountable for the conduct of another person when:
>
> (1) Acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;
>
> (2) He is made accountable for the conduct of such other person by the code or by the law defining the offense;
>
> (3) He is an accomplice of such other person in the commission of an offense; or
>
> (4) He is engaged in a conspiracy with such other person.
>
> c. A person is an accomplice of another person in the commission of an offense if:
>
> (1) With the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it;
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so; or
>
> (2) His conduct is expressly declared by law to

establish his complicity.

In State v. Yough, 49 N.J. 587, 601, (1969), the Court stated that it is sound judicial practice to use the "beyond a reasonable doubt" standard in a preliminary hearing on the admissibility and voluntariness of a confession. Also see State v. Johnson, 116 N.J. 99, 101 (1989); State v. Godfrey, 131 N.J. Super. 168 (App. Div. 1974). Compare Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 2285, 84 L.Ed. 2d 222 (1985), "a defendant's waiver must be made voluntarily for it to be valid. And State v. Miller, 76 N.J. 392, 404-405 (1978) which stated, "the admissibility of inculpatory statements resulting from a waiver must be established beyond a reasonable doubt". This was never established by the State. Counsel for the defendant made arguments contending that the statement allegedly made by the defendant was induced by the promise of leniceny. (12T 21-17 to 22-3). See Roesel v. State, 62 N.J.L. 216, 41 A. 408 (E. & A. 1898).

Although it was determined that time had passed from the time Detective Salvatore lied to the defendant and the time of the defendant's alleged inculpatory statements, the defendant remained under the misguided impression of what was told to him earlier in the day. The determination of whether a statement was given freely and voluntarily made may be grounded upon the totality of the circumstances, State v. Dixon, 125 N.J. 223, 242 (1991). Salvatore's "advice" directly effected the voluntariness of all of the subsequent waivers and statements allegedly made by the defendant. This sole factor undermines the State's contention that the defendant's alleged statements were made voluntarily. See Bram v. U.S., 168 U.S. 532, 562-563, 18 S.Ct. 183, 194, 42 L.Ed 568, 580 (1897) (encouragement) "an accused might obtain a mitigation of punishment for a crime by confessing serves a part of totality of circumstances to taint a confession". The only conceivable intent that can be assumed from Salvatore's remark was that he wanted the defendant

to incriminate himself. According to Salvatore, "We [police] have ballistics evidence, numerous statements, and fingerprint evidence to the contrary [of the defendant's claims of innocence]. (4T 39-22 to 24). With this in mind, the alleged oral and written statements contributed to the defendant after the remarks by Detective Salvatore and the fruits of the statements should be rendered inadmissible due to its involuntary nature. See Oregon v. Elstad, at 308., Id., [stating in dicta] "Evidence obtained in violation of any of a defendant's constitutionally guaranteed rights, at trial, must be suppressed". Compare to State v. Porter, 210 N.J. Super. 383, 510 A.2d 49, "Under Fifth Amendment, confession must be excluded if it was not made voluntarily". See also State v. Johnson, 118 N.J. 639, 651 (1990). Therefore the convictions below must be reversed, and the alleged subsequent statement suppressed.

CONCLUSION

In observance of the prejudicial atmosphere created by the State and its witnesses, the indictment needs to be dismissed with prejudice. "The role of the prosecutor is to prosecute with earnest and vigor -- indeed he should do so. But while he may strike hard blows, he's not at liberty to strike fouls ones". State v. Marks, 201 N.J. 508 (1985). This will serve as a deterrent towards this type of behavior.

CERTIFICATION

I, John Lee Allen, do hereby certify that all of the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 5-2-98

Appellant

John Lee Allen

John Lee Allen

A P P E N D I X

to the appellate brief
of appellant John L. Allen, jr.
to the Superior Court of
New Jersey Appellate Division

Docket No. 2434-91T4

Filed June 22, 1990

MERCER COUNTY PROSECUTOR
MERCER COUNTY COURT HOUSE
TRENTON, NEW JERSEY
Telephone (609) 989-6305

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION-CRIMINAL

FILE NO. 89-3543-01, 89-3543-02
89-3543-03
INDICTMENT NO. 90-06-1003-I

THE STATE OF NEW JERSEY

vs.

JOHN ALLEN
RONALD ALLEN
GREGORY WILLIAMS

DEFENDANTS

STATED SESSION March 1990

TERM July 1989

COUNT I
MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, purposely or knowingly cause the death or serious bodily injury resulting in the death of Willie Rodgers, contrary to the provisions of N.J.S. 2C:11-3a(1); 2C:11-3a(2); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT II - FELONY MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Willie Rodgers during the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, contrary to the provisions of N.J.S. 2C:11-3a(3); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT III - ROBBERY

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, in the course of committing a theft, use force upon Willie Rodgers or inflict bodily injury upon Willie Rodgers while armed with deadly weapons, to wit: handguns, contrary to the provisions of N.J.S. 2C:15-1; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

Ct 3

COUNT IV - KIDNAPPING

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did unlawfully remove Willie Rodgers a substantial destance from where he was found, or did unlawfully confine the said Willie Rodgers for a substantial period, with purpose to facilitate the commission of crimes, to wit: robbery or murder, or flight therafter, or to inflict bodily injury on or to terrorize the said Willie Rodgers, the said defendants John Allen, Ronald Allen, and Gregory Williams not releasing Willie Rodgers unharmed and in a safe place prior to their apprehension, contrary to the provisions of N.J.S. 2C:13-1b; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT V - POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did have in their possession weapons, to wit: handguns, with purpose to use said weapons unlawfully against the person of Willie Rodgers, contrary to the provisions of N.J.S. 2C:39-4d; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT VI - MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or the 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, purposely or knowingly cause the death or serious bodily injury resulting in the death of Francis Bodnar, contrary to the provisions of N.J.S. 2C:11-3a(1); 2C:11-3a(2); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

Dab

COUNT VII - FELONY MURDER

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Francis Bodnar during the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, contrary to the provisions of N.J.S. 2C:11-3a(3); 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT VIII - ROBBERY

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did, in the course of committing a theft, use force upon Francis Bodnar or inflict bodily injury upon Francis Bodnar while armed with deadly weapons, to wit: handguns, contrary to the provisions of N.J.S. 2C:15-1; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

COUNT IX - POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSE

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that JOHN ALLEN, RONALD ALLEN AND GREGORY WILLIAMS on or about the 18th or 19th day of November, 1989, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did have in their possession weapons, to wit: handguns, with purpose to use said weapons unlawfully against the person of Francis Bodnar, contrary to the provisions of N.J.S. 2C:39-4d; 2C:2-6, and against the peace of this State, the Government and dignity of the same.

ENDORSED AS A TRUE BILL:

Foreman

Paul J. Koenig (KF

Mercer County Prosecutor

Municipal Court Docket No. 89-25177-79, 80, 82, 83, 84, 86, 87, 89, 90
89-25365, 67-68, 70-71

Police Report No. D-9-323-3526, D-9-323-3587

State of New Jersey

v.

New Jersey Superior Court
L-96 Mercer County
Law Division - Criminal

John Lee Allen, Jr.
Defendant (Specify Complete Name)

☐ Judgment of Conviction

☒ Order for Commitment

455146B	SBI #
12/22/89	DATE OF ARREST
6/22/90	DATE INDICTMENT FILED
6/26/90	DATE OF ORIGINAL PLEA
☒ NOT GUILTY ☐ GUILTY	ORIGINAL PLEA

ADJUDICATION BY	DATE
☐ GUILTY PLEA	
☒ JURY TRIAL	6/10-1/13; 6/17-6/20
☒ NONJURY TRIAL	6/24-6/27; 7/1-7/3 7/8-7/10

ORIGINAL CHARGES

Indictment No	Count	Description	Degree	Statute
Ind. 90-06-1003	Ct 1	Murder		2C:11-3a(1)
	Ct 2	Felony Murder		2C:11-3a(3)
	Ct 3	Robbery		2C:15-1
	Ct 4	Kidnapping		2C:13-1b
	Ct 5	Possession of Weapon for Unl. Pup.		2C:39-4d
	Ct 6	Murder		2C:11-3a(1)
	Ct 7	Felony Murder		2C:11-3a(3)
	Ct 8	Robbery		2C:15-1;
	Ct 9.	Poss. Wpn. for Unl. Purp.		2C:3

FINAL CHARGES

Jury Verdict on July 10, 1991 to all of the above counts.

It is, therefore on 9/6/91 **ORDERED and ADJUDGED** that the defendant is sentenced as follows:

Counts 1 and 2 merged for sentence:
Ct 1 - C.C.D.C. Life - Minimum parole 30 years. VCC: $10,000
Ct 3- C.C.D.C. 20 years - Minimum parole 10 years Concurrent to Ct 1. VCC:
Ct 4 -. C.C.D.C. 30 yers. - MPE 15 years Consecutive to Ct 1. VCC:$30.00
Ct 5- C.C.D.C. 10 yrs. - MPE 5 years Concurrent to Ct 1. - VCC:$30.00
Court Merged Counts 6 and 7.
Ct 7- C.C.D.C. Life - MPE 30 years Consecutive to Ct 1. -VCC: $10,000.
Ct 8- C.C.D.C. 20 yrs. MPE 10 yrs. Consecutively tl Ct 1. VCC:$30.00
Ct 9- C.C.D.C. 10 yrs. MPE 5 years concurrently to Ct 1. VCC:$30.00

☐ It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority

☒ Defendant is to receive credit for time spent in custody. 12/22/89 to present.
DATES (From - To)

Total Life imprisonment - MPE Total 85 yrs
TOTAL NO. DAYS

Charles F. Lafferty
DATES (From - To)

Administrative Office of the Courts

(OVER)

CN 0108 (REV. 4/91) Criminal

State of New Jersey v. John e Allen, Jr. S. # 455146B I90-06-1003

If the offense occurred on or after January 8, 1986, a penalty of $30 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1 (Penalty is $25 if offense is before January 8, 1986 unless a higher penalty is noted.)

☐ Penalty imposed on count(s) 1 thru 9

at $ _____ each

Total VCCB Penalty $ 10,150.00 payable during period of incarceration & or parole

Total FINE $ _____

Total RESTITUTION $ _____

☐ Installment payments are due at the rate of $ _____ per _____

Beginning _____ DATE

If any of the offenses occurred on or after July 9 1987 and is for a violation of Chapter 35 or 36 of Title 2C

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

___ 1st Degree @ $3000 ___ 4th Degree @ $750
___ 2nd Degree @ $2000 ___ Disorderly Persons or Petty
___ 3rd Degree @ $1000 ___ Disorderly Persons @ $500

Total D.E.D.R. Penalty $ _____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program

2) A mandatory driver's license suspension of _____ months is ORDERED

The suspension shall begin today _____ and end _____

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING)

Defendant's Address 620 West State St. Trenton 08618

Eye Color Brown Sex M Date of Birth 3/18/69

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____ Driver's license # _____

☐ Your non-resident driving privileges are hereby revoked for _____ Months

3) A forensic laboratory fee of $50 per offense is ORDERED ___ Offenses @ $50

Total LAB FEE $ _____

NAME (Court Clerk or Person who prepares this form)
Blanca M. Diaz, Court Clerk

NAME (Attorney for Defendant at Sentencing)
Mark Catanzaro, Esq.

STATEMENT OF REASONS

The defendant is convicted of two purposeful and knowing murders, two robberies, a kidnapping, and two weapons' violations. (Two Felony Murder convictions have been merged into the purposeful and knowing murder convictions.) The commission of each of the crimes was independent of the other crimes for which the defendant was convicted and is sentenced.

AGGRAVATING FACTORS: The court notes the vulnerability of the victims of both murders. Both were cab drivers who were unarmed and unable to defend themselves. The killings were heinous and senseless. There is a likelihood that the defendant would commit another crime, since the commission of the crimes for which the defendant stands convicted, were to serve as a springboard for the commission of drug related crimes; the need to deter is apparent.

MITIGATING FACTORS: None

Counts One through Five relate to crimes committed against Willie Rogers. Counts Six through Nine relate to crimes committed against Francis Bodnar. Those crimes were committed at different times and at different places. Thus, the court, under Yarbough, has sentenced the defendant on the two most serious crimes which relate to each of the victims. The remaining charges with respect to each

OVER

JUDGE Name
Charles A. Delehey, J.S.C.

JUDGE Signature
Charles A. Delehey

DATE
9/6/91

Administrative Office of the Courts

CHIEF PROBATION OFFICER AOC STATISTICAL SERVICES DEPARTMENT

DS-11

of the victims have resulted in the imposition of concurrent sentences.

The defendant, although only 22 years of age, is vicious and amoral. He does not belong in any form of an institution for youthful offenders.

WILFREDO CARABALLO
Public Defender
Office of the Public Defender
P. O. Box 46003
31 Clinton Street
Newark, New Jersey 07101
(201) 877-1200

ORIGINAL FILED

JAN 8 1992

Emilie R. Cox, Esq.
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO. 90-06-1003

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN LEE ALLEN, JR.

Defendant-Appellant.

Criminal Action

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the defendant, confined/~~residing~~ at, #236390, YR, New Jersey State Prison, CN 861, Trenton, N.J. 08625 appeals to this Court from the final judgment of conviction of murder, robbery, kidnapping, possession of a weapon for an unlawful purpose,

entered on 9/6/91 in the Superior Court, Law Division, Mercer County, in which a sentence of two life imprisonment terms plus 40 years with an 85 year parole disqualifier, $20,150. Violent Crime Compensation Board penalty, was imposed by the Honorable Charles A. Delehey

I hereby certify that this foregoing is a true copy of the original on file in my office.

Clerk

WILFREDO CARABALLO
PUBLIC DEFENDER
Attorney for Defendant-Appellant

By:
FRANK J. SOLTIS
Assistant Deputy Public Defender

The undersigned certifies that the requirements R. 2:5-3(a) have been complied with by ordering the transcript(s) on 1-7-92 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

PLEASE NOTE that trial transcripts were ordered in the case of co-defendant Ronald Allen.

FRANK J. SOLTIS

Da 13

A-2434-91T4

ORDER ON MOTION

STATE OF NEW JERSEY

VS

JOHN LEE ALLEN, JR.

SUPERIOR COURT OF NEW JERSEY
APPELLATE, DIVISION
DOCKET NO. A-2434-91T4
MOTION NO. M-2686-91
BEFORE PART:
JUDGE(S): Michels

MOTION FILED: JANUARY 8, 1992

ANSWER(S) FILED: _____ BY: _____

_____ BY: _____

DATE SUBMITTED TO COURT: JANAURY 28, 1992

FILED
APPELLATE DIVISION
JAN 28 1992
Clerk

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO COURT, IT IS ON THIS

28th DAY OF JANUARY 19 92, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT JOHN LEE ALLEN, JR. TO FILE NOTICE OF APPEAL NUNC PRO TUNC	GRANTED	DENIED	OTHER
	X		

SUPPLEMENTAL: It appearing that the preconditions of the Supreme Court in its "NOTICE TO APPELLATE BAR", 100 N.J.L.J. 1208 (1977), identified and explained in State v. Altman, 181 N.J. Super. 539 (App. Div. 1981), have been met, the motion to file the notice of appeal nunc pro tunc is granted.

FOR THE COURT:

HERMAN D. MICHELS, P.J.A.D.

MERCER CO. #90-06-1003

/np

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

T-24

State of New Jersey vs. Allen

STATEMENT OF WANDA SABRINA TIFT - 4/6/90 - 1:45 P.M.

Recorded by Detective Ashbock and witnessed by Detective Cosmo.

Indicated that she arrived at the Caravan Club at approximately 9:00 p.m. in the company of Christine McQueller and Peaches.

Indicated that Richard arrived at the club and began talking to Christine. Indicated that Richard followed them through the bar and finally "Chris got fed up" and she indicated that she was going to call John.

Indicated it was approximately 10:30 p.m or 11:00 p.m. when Christine used the pay phone to call her home. Richard continued to bother Christine at which point she saw Ron Allen standing against the wall. Approximately five minutes later Chris indicated that she was going to call John again. When she returned from the phone, she indicated that John was on his way. Christine then spoke with Ron who subsequently left the bar. About 15 or 20 minutes later Ron and John came back into the bar together. At this point Tift wanted to leave and went to the Paar's Bar and asked Christine to pick her up on the way home. She remained at Paar's until closing at which time Christine, Peaches and John came and picked her up and drove her home.

Tift indicated that on no time on Saturday or during the early morning hours of Sunday was she in the company of Christine McQueller at her residence with Ron and John Allen.

Indicated she was in the company of Christine McQueller beginning at approximately 5:30 p.m. on Saturday, November 18th and did not leave her until she left the Caravan Club to go to the Paar's Bar.

State of New Jersey vs. Allen

STATEMENT OF JOHN PAUL JONES - 4/13/90 - 6:00 P.M.

Recorded by Detective Cosmo and witnessed by Detective Cileo.

Jones employed at Caravan Club from 7:00 p.m. until 2:00 a.m. on Saturday, November 18, 1989. Had known Christine McQueler for 14 years. Indicated that evening she was there with her sister Peaches.

Did not remember when Christine entered or left the bar. Indicated that he did not know John or Ron Allen. Asked if he observed their photographs in the Trentonian which he acknowledged. Then asked whether or not he remembered observing either of them in the Caravan Club on November 18, 1989, to which response was no.

Indicated that in January 1990, McQueler, sister Well, Pearl Allen and two individuals introduced as investigators, one white and one black came to question him about that night at the bar. He indicated the same thing to them.

Indicated that he remembered an individual by the name of Hank bringing the music equipment but could not remember who was the DJ that evening.

Da-16

State of New Jersey vs. Allen

INTERVIEW OF ANTHONY COLEMAN AND LEONARD MARTIN
BY A.P. FLICKER AND INVESTIGATOR DISPOTO
3/7/91 - 4:00 P.M.

Martin indicated that he recalled Ron at the Caravan Club before 9:00 p.m. Indicated that sometime before 9:00 p.m. he gave Allen a ride back to the club after Allen dropped off his mother's car. He indicated they made no stops either on the way to Allen's mother's house or on the way back to the club (did not stop at Allen's girlfriend's house). At some point Allen told Martin that he was leaving but Martin did not remember when the statement was made and did not physically see Allen leave.

Martin remembered an incident occuring outside the Caravan Club involving John Allen, his girlfriend, Ron Allen and another male. Cannot remember when the incident occured but it was the only time he saw John Allen that evening. Did not see John Allen in the club. Recalls Ron Allen spinning a few records but does not recall time. Martin did not remember whether Allen helped him and Coleman pack up the equipment but he does recall Ron Allen present when the party ended.

After party Martin recalls driving Ron Allen to Nino's Pizzarama. Indicated Ron Allen called his girlfriend at which time Martin took Ron Allen to girlfriend's residence. This was between 2:30 a.m. and 3:00 a.m.

State of New Jersey vs. Allen

STATEMENT OF ARTHUR L. DAVIS - 11/19/89 - 2:45 a.m.

Recorded by Detective Salvatore, witnessed by Detective Cosmo.

Indicated that he was going to his friend's home and on Gouvenor Street observed a cab in the middle of the road. Slowed down as he went around the cab and observed three black guys pulling at the man's clothes. When he got alongside the cab, the three men sat back like they were just waiting for change.

His friend wasn't home and when he drove back down Gouvenor Street, he observed three men get out of the cab and walk down Gouvenor toward Riverside. Went near the cab and started beeping his horn. Observed driver in obvious distress.

Described the two individuals in the back seat as between 18 to 20 years old, 5'7" to 5'8" wearing brown waist length jackets. Individual in front seat was about 18 to 20 years old, slim, wearing a white coat that went down to his knees and a dark colored baseball cap. Indicated the guy in the jacket was taller and the other two were shorter, but about the same height as each other. The guy reaching over the back seat had a young face and they "dressed like younger boys."

Indicated that the three walked from the cab, did not run.

Indicated that the driver's side window was broken when he observed the three men pulling on the victim's clothing.

Indicated that he passed the cab at approximately 11:30 and he was driving a blue, four door, Hyundai belonging to his friend, Almarie Williams. Passed on the driver's side.

State of New Jersey vs. Allen

STATEMENT OF ANTHONY COLEMAN - 4/29/90 - 2:00 P.M.

Recorded by Detective Salvatore, witnessed by Detective Ashbrook.

Indicated that he had been a DJ for approximately 9 years. Involved in a business with Leonard Martin.

Obtained employment at the Caravan Club and a week after their audition they played records in the bar for a birthday party. Remembered it was a Saturday night. This was their first party at the Caravan Club. Initially Coleman and Martin were spinning the records and then Ron Allen came later.

Indicated that Ron Allen came into the bar between 9:30 p.m. and 10:00 p.m. Indicated at the first party he spun records for approximately 45 minutes. Indicated that Leonard Martin was present in the Caravan Club the entire night. Indication that he and Martin set up the equipment. Indicated that Martin never told him that he was leaving to give someone a ride back to the bar.

Indicated Ron Allen arrived with John and some other guy. Ron asked if he could spin a few records at which time John and the other guy left the bar. About 5 minutes later, John and the other individual returned, speak with Ron, at which time Ron told Martin he was leaving. Indicated that all three left together.

Indicated that he and Martin broke down the equipment and that Martin left the party alone in his own vehicle. Ron Allen did not help him break down or load the equipment.

Indicated there was never an occasion that Ron Allen worked from 9:00 p.m. until 2:00 p.m. in the Caravan Club.

THE FOREPERSON: And your first name?

THE WITNESS: Kenneth, K-E-N-N-E-T-H.

THE FOREPERSON: Have a seat.

EXAMINATION BY MS. FLICKER:

Q Mr. Davis, you have to keep your voice up and talk into the microphones that are in front of you, okay?

A Right.

Q Why don't we pull your chair up just a little, okay? Any questions you don't understand you stop me. All right?

A Right.

Q Mr. Davis, quite obviously you are in what we call jail house greens. Could you tell the jury where you are currently residing?

A Mercer County Detention Center.

Q And when did you come in to the Mercer County Detention Center?

A March 31st. I mean May 31st.

Q Of this year, '89?

A Yes. '90.

Q '90, okay. I've been talking about '89 so much I've lost what year it is. Mr. Davis, I'm going to take you back to a Saturday night, November 18th, 1989. On that Saturday night were you out of jail, number one?

A Yes.

DA-20 (1 of 14)

Q And on that Saturday night were you in a car about to visit a friend who lives on Berkeley Avenue?

A Yes.

Q Were you following another car?

A Yes.

Q Who was in the car you were following?

A Dwayne Fletcher and Elmarie (phonetic spelling) Williams.

Q Did you get off Route 29, go down Riverside Avenue and turn right on Gouverneur?

A Yes.

Q When you turned right on to Gouverneur, Mr. Davis, did you see something ahead of you that caught your attention?

A Yes, I did.

Q What did you see?

A I seen -- well, first I notice my -- the car in front of me slowed down. And when I looked I seen glass on the ground. At first when I looked up at the CarI seen two -- three guys, two guys in the back seat, one in the front seat and a driver, the driver. The two guys in the back seat was leaning over up into the front seat and the guy on the passenger side of the front seat was leaning over towards the cab driver. Looked like they were going, you know, through his pockets or whatever.

(2 of 14)

After the car in front of me, you know, had almost stopped, he pulled up some, I pulled up next to the cab and looked in the cab and the guy sat back. One was facing towards the driver in the front seat. The one in the front seat was facing towards the driver. The one in the -- behind is sitting in the back seat behind the driver was facing straight towards the street. The other one, one on the passenger's side of the back seat was facing like towards -- looking towards the driver too.

Q I want to slow you down, Mr. Davis. You've given us an awful lot of information. You were following Dwayne Fletcher?

A Right.

Q And in front of Dwayne Fletcher's car there was a cab?

A Yes. And he went around the cab.

Q Dwayne went around the cab and --

A He slowed down next to the cab after he started to go around it.

Q And you then went around the cab as well?

A Yes. But when I went around the cab I almost came to a complete stop looking in the cab. The reason I, you know, the reason we stopped because we seen the glass on the ground from the cab.

Q The glass was from where?

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A The driver's side window.

Q Had you seen the glass come out of the window?

A No, I didn't. It was already on the ground.

Q Do you recall as you drove by, was the light on inside the cab?

A I don't --

Q You don't recall?

A No.

Q As you drove by, as you're watching the cab you see the three men in the cab?

A Right.

Q All looking like they're going through the driver's pockets?

A When I'm coming up from behind the cab.

Q So the two men in the back seat and the man in the front seat next to the driver were going through the pockets of the driver?

A That's what it looked like to me.

Q As you passed the cab could you see an injury to the cab driver?

A Not at first.

Q As you passed the cab did you get a look at the men in the cab?

A That's the reason I had a good look in it -- at the men in the cab because I almost to a comp: -- well, I can't

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remember if I came to a complete stop but I stopped, you know, slowed down enough where I could just look straight into the cab.

Q And when you looked in the cab, Mr. Davis, did you recognize any of the men in the cab?

A At first, not -- at first, no. Then after, you know, I started to pull up, I was still looking, I seen the three guys and, you know, I got a pretty good look. But because of me coming back to -- after I drove around the corner I came back. They were standing outside of the car. That's when I, you know, got a better look at them before they left -- walked away.

Q Okay. Let's slow down. You came by the cab?

A Um hmm.

Q You looked in, you may have stopped, you know you slowed down, correct?

A Um hmm.

Q You then drove around the corner continuing to your friend's house?

A Right.

Q And you were intending to do what?

A I went to his house to see was he there or did he leave yet. I knocked on the door of his house and nobody answered. When I first pulled up Dwayne and them was pulling off. You know, they was going to just, you know,

(500.14)

because we was supposed to meet them further down the street for a race. And after nobody answered I backed down the street.

Q Okay, you backed down Berkeley.

A Berkeley and I turned facing towards the cab.

Q All right. So you backed your car up to the corner of Berkeley and Gouvenear?

A Right, Gouvenear, and when I like turned some facing back going out towards 29.

Q Okay. So you turned your car around and you came back down Gouvenear?

A Right. And at that time the three people in the car was outside the car standing, standing, they get ready to walk away.

Q Where were they?

A On the driver's -- on the passenger's side of the vehicle.

Q And they were standing there?

A They was standing there and they looked up. I guess they looked up towards, well, you know, the car that I was in. And then they started to walk away. As they walked away, after they got fully down the street I pulls up next to the cab driver and looks in the window and you could see blood running down the side of his ear. And I started to blow the horn and he was responding to the horn by trying to

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lift his head up.

Q Mr. Davis, did you recognize any of the men in the cab?

A Yes, I recognized Ron Allen and John Allen.

Q Mr. Davis, how long had you known Ron and John Allen?

A A period of about ten years.

Q Did you recognize the third man?

A No, I didn't.

Q Mr. Davis, you gave a statement to the Trenton Police, did you not, on Sunday, November 19th, 1989?

A Yes, I did.

Q And first of all in that statement you gave your name as Arthur Davis.

A Arthur Davis.

Q Who's Arthur Davis?

A My brother.

Q And you told the police on that occasion that you didn't think you would be able to identify the people in the cab, isn't that so?

A Yes.

Q Would you tell the Grand Jury why you lied to the police --

A Because --

Q -- about your name and the fact that you could

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identify the people in the cab?

A I lied because I knew I had a bench warrant for a violation of probation. And the reason I told them I didn't know who it was because I didn't want to get involved with it. The only reason I had gotten involved with it was because John Johnson had went back to the scene and said that he had knew three people that witnessed the people still in the car. After that the cops talked to him and tried to get one of us to come in that night. I went in and talked to the police but I didn't want to give them my name as Kenneth Davis because I didn't know, you know, whether they'd figure I'd be involved with something like that or if they were to run a warrant check and figure out I had a warrant on me.

Q So initially you didn't give your right name because you had a warrant outstanding?

A Right.

Q And you didn't identify them? Why?

A Because I didn't want to get involved with it or, you know, I didn't know what the consequences would be if I would, you know, told them and they found out who I was or something like that they do know who I am from growing up.

Q You didn't want the twins to find out --

A Right.

Q -- that you told? Is that correct?

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A Yes.

Q Mr. Davis, is it true that earlier this week you called Detective Salvatore of the Trenton Police Department?

A Yes, I did, yes.

Q And you requested that we come speak with you?

A Yes.

Q And we met with you, myself and the detective met with you I think on Tuesday of this week?

A Monday.

Q Monday. And was it on that occasion that you told us that you did know that it was the twins in the cab?

A Yes, I did.

Q Did you also tell us that you keep seeing in your mind the cab --

A Yes.

Q -- driver trying to pick his head up.

A Yes, I do.

Q Mr. Davis, did you further tell us that you're currently in the jail on a tier with the twins?

A With one of the twins, Ron Allen.

Q And he tried to give you some story about that night?

A He tried to give me a story about earlier that day, what happened. Do you want me to explain what he told me?

Q Well, he just tried to give a story indicating he

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wasn't in the cab?

A Yes. First he gave me a story he wasn't in the cab and then later on, next day, I said something to him and he gave me a different story about what happened, earlier that day.

Q Mr. Davis, you are -- you have been sentenced for the probation violation for which there was a warrant out for you?

A Yes.

Q And is it true that you have not received any deal whatsoever in exchange for the testimony you're giving today?

A Right.

Q That you're doing your sentence and that can't be changed and --

A Far as I understand, right.

Q And you have not asked for anything other than to be protected from the Allens?

A Yes.

Q Is there any doubt in your mind, Mr. Davis, that Ron and John Allen were in the cab that you pulled by on that night?

A No, there's not.

Q Has anyone told you to say that?

A No.

Q Anyone threatened you to say that?

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A No.

Q Anyone beaten you to say that?

A No.

MS. FLICKER: Will there be any questions for Mr. Davis?

(No audible response.)

MS. FLICKER: Yes, sir. Mr. Davis, I'll have to ask you to step outside for one minute while I take it from the Grand Juror.

(At this time the machine was turned off and then on again and begins with the following):

A MALE JUROR: Was there anyone else in the car with him and does he recognize the clothing of the Allens as well as their faces.

MS. FLICKER: Okay. You want me to ask if there's anyone else with him?

A MALE JUROR: Um hmm.

MS. FLICKER: Okay. Clothing?

A MALE JUROR: Um hmm.

MS. FLICKER: Anything else?

A MALE JUROR: No.

MS. FLICKER: No, okay.

(At this time the machine was turned off and then on again and begins with the following):

BY MS. FLICKER:

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Q Mr. Davis, a couple questions. Was anyone else in the car with you?

A No, there wasn't.

Q You were alone in your car?

A Yes.

Q To the best of your recollection do you remember the clothing on the individuals?

A I can remember the clothing of two of them. The one in the front seat of the cab driver had on a white coat, a furry looking coat with a hood to it. The twin that was on the passenger side -- I mean the driver's side in the back seat had on a leather bomber, quarter length. That's one of vest coats.

Q Okay. The guy in the front seat -- did you not see his face or did you not recognize him?

A No, I did not recognize him, I never seen him before. To this day I haven't seen him.

Q Okay. And you said the twin on the ba -- in the back seat behind the driver had on a bomber?

A A brown bomber.

Q Brown bomber. With a hood?

A No, it didn't have a hood.

Q Oh, I'm sorry, that was the jacket in the front seat.

A Right.

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Q When you drove back to the three individuals who were near the cab --

A Um hmm.

Q Where did they go as you drove up the street?

A Back out towards 29 and Gouvenear.

Q How did -- where -- which way were they walking, on the sidewalks or in the street?

A On the -- in the street.

Q All three walking together?

A Yes.

Q Back towards 29?

(No audible response.)

Q Did you go to school with the Allens?

A No, I didn't.

Q You've just known them from the neighborhood?

A Yes, Laurel Avenue.

MS. FLICKER: Any other questions?

A MALE JUROR: May we get the clothing of the other one?

A See, I can't really recall what the other one had on because when they was standing next to him he was the last one in line. When they walked -- well, I wasn't really trying to pay attention to him see and I don't want to get mixed from another time I had seen them earlier a few weeks ago. Both of them had on the same bomber. I don't know

13 OP 14

whether he had on the same, you know, a bomber too because I wasn't really paying attention. I was really trying to get up to see whether the cab driver was hurt or whatever.

Q You said a few weeks ago or a few weeks before that?

A Before that happened.

Q Before --

A Yes.

Q -- that Saturday night. All right. And the third man, the third individual with the twins, was he taller or shorter?

A A lot taller.

Q He was a lot taller than the twins. Older or younger, could you tell?

A No, not really.

Q Remember anything else about him?

A Just saw him walking away standing so tall over the other twins that he was lighter than them.

Q Lighter.

A Um.

Q Lighter and taller?

A Yes.

Q Okay.

MS. FLICKER: Any other questions for Mr. Davis?

(No audible response.)

(14 of 14).

AFFIDAVIT

I, Kenneth Davis declare under the penalty of perjury that the below statement is true and correct. Executed at Mercer County Detention Center in the State of New Jersey on this 30th day of March 1990

On Saturday, the 18th evening of November, in the year nineteen hundred and eighty nine, I did bear witness to the Murder of Francis Bodnar.

This incident occured at approximately 11:40 pm, on Governor and near Berkley ave inside the city limits of Trenton New Jersey.

A bulet made it known to several police Detectives, employed by the city of Trenton that 2 of the defendants in this murder trial Ronald Allen and Jesse Allen were not the men I spotted inside Francis Bodnars cab.

Upon telling these matters to the police my freedom has been threatened, and offers have been made involving others who accompanied me that evening, involving pending charges.

NOTARY PUBLIC
My Commission Expires:
Maria Ortega

S/ Kenneth C. Davis
D.A. (1)

REQUEST FOR INVESTIGATION

CLIENTS NAME Ronald Allen

REQUESTED BY John L. Call, Jr., Esquire

REGION NUMBER

DATE REQUESTED September 5, 1990

CHARGE Murder (Mercer County Indictment 90-06-1003-I)

DATE RETURN REQUESTED ASAP

INVESTIGATION REQUEST: Need to immediately interview Kenneth Davis, 898 East State Street, Trenton, (392-2197). According to the defendant, Ronald Allen, and the attached affidavit of Kenneth Davis dated March 30, 1990, Davis was in an automobile and witnessed the murder of Francis Bodnar (cabdriver). Indicated that the individuals who committed the murder were not the defendants Ronald and John Allen.

According to the defendant and the attached affidavit, Davis would also provide information concerning the methods employed by the Trenton Police Dept with regard to threats in jail, etc. According to the defendant, he will provide a statement that the Trenton Police attempted to make him testify falsely against the defendants by utilizing threats and physical force.

There is an excellent possibility that Kenneth Davis is presently incarcerated in either the Mercer County Detention Center and/or the Work Hous

Need to obtain a detailed statement from Davis as to what he (Cont.)

DATE REQUEST RECEIVED

RECEIVED BY PRINCIPAL

DATE ASSIGNED

INVESTIGATOR ASSIGNED

DATE COMPLETED

REVIEWED BY

DATE RETURNED

RETURNED TO

INVESTIGATION CONDUCTED

(10P2

Request for Investigation re: Davis Continued:

witnessed with regard to the murder of Francis Bodner and detailed informati

as to each and every contact with law enforcement concerning this case.

(20P2)

A-2434-91T4

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
25 MARKET STREET
CN 086
TRENTON, NJ 08625-0086
TELEPHONE: (609) 984-6500

DEBORAH T. PORITZ
ATTORNEY GENERAL

TERRENCE P. FARLEY
DIRECTOR

June 17, 1994

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State v. John Allen
Docket No. A-2434-91T4

Your Honors:

Please accept this letter in response to defendant's pro se supplemental brief which raises the issues of prosecutorial misconduct, grand jury improprieties and the admissibility of defendant's statements to police. The State submits that defendant's claims are devoid of merit.

Defendant's claim that the State tampered with evidence is specious. The claim involves the transcript of a recorded conversation between defendant and L.C. Pegues on December 15, 1989. The transcript of the conversation had to be redacted in certain sections, and there was a dispute between the State and defense counsel over one word. The State heard the word as "something" and the defense heard it as "nothing." (8T201-3 to 7).[1] The matter was brought to Judge Delehey's attention, and he agreed that the word uttered on the recording could be understood as "something." (8T203-22 to 25, 8T204-16 to 18). Because the exact word uttered was "not clear," the judge left the matter for the jury to resolve. (8T204-18 to 23). To this effect, the transcript was changed to reflect both words.

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[1] Transcript references comport with those in the State's plenary brief.

(9T5-4 to 12). The judge explained to the jury the dispute over this one word and pointed out the section of the transcript where the disputed word appeared. (9T5-24 to 9T6-8; 9T6-17 to 24). He played the tape of the section of the conversation for the jury and told it that it was to decide what word had been used. (9T6-24 to 9T7-22). Based upon the record, there is absolutely no support for defendant's ex parte claim that the State tampered with evidence. The word at issue was clearly in dispute and in the end, the judge alerted the jury to the discrepancy and left the ultimate decision to the jury. Defendant's right to a fair trial was in no way compromised.

Defendant's claim that the indictment against him should be dismissed because the State produced perjured testimony at the grand jury is equally specious. First, defendant's claim is improvident because he never moved to dismiss the indictment on this ground before trial. R. 3:10-2 expressly provides that any challenge to the indictment must be made before trial. It was not done in this case by defendant and the belated attempt to do so on appeal is improper.[2] Defendant's claim on this issue should not even be considered because it is procedurally barred.[3] In any event, his claim is without merit.

Defendant first asserts that because Carl Wiley admitted at trial that he lied on certain points during the grand jury hearing, the State is guilty of knowingly presenting perjured testimony at the grand jury. There is no support for defendant's claim. Any inconsistency admitted to by Carl Wiley at trial was developed at that time, and it was for the jury to decide if Wiley was a credible witness and to decide the facts of the case. See State v. Ingenito, 87 N.J. 204, 211 (1981). The fact that Wiley admitted to lying before trial is not evidence that the State presented testimony it knew was false.

Defendant's similar claim against Kenneth Davis is based on the fact that he purportedly signed an affidavit which was contrary to his trial testimony that he saw both defendants at the cab of Francis Bodnar after the shooting. Once again,

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[2] Defendant has not even supplied the State or the Court with a full set of the grand jury transcripts.

[3] The State urges this Court to make a plain statement that its ruling rests on a procedural bar. Harris v. Reed, 489 U.S. 255, 261-263 (1989).

this is not evidence that the State utilized perjured testimony at either the grand jury or at trial. In fact, when counsel for codefendant Allen showed Davis the affidavit with his purported signature on it, Davis said he had never seen the document or signed it. (6T131-24 to 6T132-6). While later in the trial it was stipulated that the affidavit had been signed by Davis in the presence of a notary public and that it had been written by codefendant Allen, (17T2-16 to 24), the credibility of Davis was a jury question. It is not evidence of misconduct on the part of the State. For that matter, the State had never seen the affidavit signed by Davis until trial; the defense conceded it had not been provided during discovery. (6T118-22 to 6T120-16). The jury could easily have found that Davis, who was on the same tier as codefendant Allen in the county jail and who had not wanted to reveal to either defendant that he had seen them at the scene of the murder, simply signed what defendant had written for him to sign. (See 5T98-23 to 5T99-3; 5T99-25 to 5T100-2; 6T103-2 to 10; 6T127-13 to 22; 6T142-18 to 6T143-14). Any inconsistencies between Davis' prior statements and his trial testimony were fully explored at trial, and in the end it was up to the jury to decide the credibility and weight of Davis' testimony. State v. Ingenito, supra. No perjured testimony was knowingly presented by the State at either the grand jury or at trial.

Defendant also claims that the State allegedly failed to produce exculpatory evidence to the grand jury. Aside from the fact that this claim is procedurally barred, R. 3:10-2, the State submits it is devoid of merit. The so-called exculpatory evidence is the claim of Johnny Barretto, a witness who testified for the defense at trial. (16T). Barretto claimed that he saw three persons in Willie Rodgers' cab which was parked behind Bud's Barbecue. (16T71-8 to 10; 16T72-8 to 9). Barretto claimed to have heard a "boom" sound; he saw L.C. Pegues exit the cab. (16T71-11 to 15; 16T13-8 to 13). There is absolutely no support for defendant's claim that Barretto was bribed to keep silent by the State. Nor is there any support for defendant's claim that Barretto was an exculpatory witness. He saw three passengers, and could only identify one. This does not negate defendant's guilt. Because Barretto's testimony did not clearly negate guilt, no claim can be made that he should have been presented at the grand jury. See State v. Smith, 269 N.J. Super. 86, 92 (App. Div. 1993).

In any event, the State submits that any error with the grand jury proceedings is clearly harmless because the jury

convicted defendant on all counts, meaning the jury found defendant guilty beyond a reasonable doubt. The State's evidence of guilt was overwhelming, and the guilty verdicts show that the grand jury proceedings had no effect on the outcome of the case. See United States v. Mechanik, ___ U.S. ___, 106 S.Ct. 938, 942 (1986). There is no basis for defendant's claim that the indictment against him should be dismissed.

Finally, defendant claims that his statements to police were involuntary. The State submits that the record fully supports Judge Delehey's finding to the contrary. State v. Johnson, 42 N.J. 146, 161 (1964). To this extent, the State relies upon and incorporates herein by reference Point I in its plenary brief and its supplemental letters filed in defendant's appeal.

For the foregoing reasons, the State submits that defendant's pro se claims should be rejected.

Respectfully submitted,

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: Nancy A. Hulett
Nancy A. Hulett
Deputy Attorney General

NEW
FOLDER
BEGINS