SUPREME COURT OF NEW JERSEY

CASE NUMBER C-30-1976

STATE OF N-J.

PLAINTIFF

VS.

CLARK E. SQUIRE

DEFENDANT

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201-673-7500

June 8, 1976

12,746

Honorable Judges of the Supreme Court
of New Jersey
State House Annex
Trenton, New Jersey 08625

RE: State v. Clark E. Squire
Docket No.

Honorable Sirs:

This letter is intended to serve in lieu of a formal petition for certification in the above-captioned matter. The defendant will rely on his Appellate Division Brief and Appendix in support of his Petition for Certification.

The defendant, Clark E. Squire, was indicted by the Middlesex County Grand Jury with Joann Chesimard in Indictment No. 1436-72 charging: (1) murder; (2) murder; (3) atrocious assault and battery; (4) assault and battery on a police officer; (5) assault with an offensive weapon; (6) assault with intent to kill; (7) possession of an illegal weapon; and (8) armed robbery. Following a mistrial, the Honorable Leon Gerofsky, A.J.S.C., granted a defense motion and ordered the impaneling of a foreign jury.

During the jury voir dire, defendant Chesimard became pregnant and was severed from the trial.

Following this, trial was held before the Honorable John E. Bachman, J.C.C., and a jury, from January 2, 1974 to March 11, 1974. After the Court dismissed count two, the defendant was found guilty of all remaining counts. On March 15, 1974, Judge Bachman sentenced the defendant as follows: count (1), life imprisonment; count (6), 10 to 12 years; counts (3) (4) and (5) were merged with count (6); count (7), 2 to 3 years; and count (8), 12 to 15 years, all sentences to be served consecutively.

Thereafter, on June 18, 1974, Judge Bachman denied defendant's motion for a new trial. The notice of appeal was filed on March 25, 1974. The State then filed a cross appeal and defendant's unopposed motion to dismiss the cross appeal was granted by the Appellate Division on March 7, 1974.

The Appellate Division affirmed defendant's conviction on May 20, 1976.

Defendant relied on the following points in his appeal:

1. Joint representation of the defendant by co-counsel, who was also counsel for a severed co-defendant, violated the defendant's right to effective assistance of counsel under the 6th and 14th amendments since a conflict of interest existed between the co-defendants. It is clear from the Appellate Division opinion that the Court ignored the holding in United States Ex. Rel. Hart v. Davenport, 478 F.2d 203 (3 Cir. 1973), wherein the Court stated that representation of co-defendants at a joint trial is defective upon a showing of a possible conflict of interest, however remote, regardless of whether any specific prejudice can be shown. See also, State v. Ebinger, 97 N.J. Super. 23, 27 (App. Div. 1967).

2. The Court committed reversible error in qualifying an expert witness itself and permitting him to testify outside the scope of any alleged expertise.

3. The Court erred in failing to charge that the defendant may be guilty of the crime of being an accessory after the fact.

4. The Court's charge to the jury was erroneous in that it failed to instruct the jury that it could find the defendant guilty of manslaughter rather than murder.

5. The Court committed error by admitting a fingerprint card bearing the defendant's fingerprints and personal information in that doing so was a violation of Rule 55 of the New Jersey Rules of Evidence.

6. The Court abused its discretion in admitting photographs of the victim into evidence, since prejudice arising from the photographs outweighed any probative value.

RE: State v. Clark E. Squire
Docket No.

June 8, 1976

7. The prosecutor's remarks during the summation were improper and prejudicial to the defendant.

8. The aggregate of legal error at the trial created an atmosphere so hostile and prejudicial to the defendant as to preclude the rendering of a fair and impartial verdict.

9. It was error for the trial court to deny defendant's motion for judgment of acquittal on the ground of robbery, since on the evidence produced no reasonable jury could have found the defendant guilty of robbery beyond a reasonable doubt.

10. The defendant's conviction for robbery should have merged with his conviction for murder.

11. The verdict below was against the weight of the evidence as to the assault and robbery counts.

12. The defendant's sentence is manifestly excessive and unduly punitive.

Therefore, based upon the defendant's Appellate Division brief and appendix, and the opinion below, it is respectfully requested that the defendant's petition for certification be granted.

Respectfully submitted,

STANLEY C. VAN NESS
Public Defender
Attorney for Defendant-Petitioner

BY: JOHN A. SNOWDEN, JR.
Assistant Deputy Public Defender

JAS/ML

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1882-73

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLARK E. SQUIRE,

Defendant-Appellant.

Argued May 4, 1976 -- Decided MAY 20 1976

Before Judges Halpern, Crane and Michels.

On appeal from Middlesex County Court.

Mr. John A. Snowdon, Assistant Deputy Public Defender, argued the cause for appellant (Mr. Stanley C. Van Ness, Public Defender of New Jersey, attorney).

Mr. William Welaj, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

PER CURIAM.

Tried to a jury, defendant was convicted of (a) murder in the first degree for killing New Jersey State Trooper Woerner Foerster, (b) the armed robbery of Foerster, (c) assault with intent to kill New Jersey State Trooper James Harper (other

related convictions were merged herein when sentence was imposed) and (d) the unlawful possession of a gun without a permit. He was sentenced to State Prison for life on the murder conviction. On the convictions for armed robbery, assault with the intent to kill and unlawful possession of a gun, he was sentenced to consecutive terms of 12-15 years, 10-12 years and 2-3 years, respectively.

The relevant and essentially uncontroverted facts (defendant did not testify) were amply sufficient for the jury to find the following: At about 12:45 a.m., on May 2, 1973, Harper stopped a car being driven by defendant in a southerly direction on the New Jersey Turnpike because it had a defective taillight. Harper's car came to a stop a short distance behind defendant's car, at a point about 200 yards south of the Turnpike Administration building. The passengers in defendant's car were James Costan, seated in the rear, and Joanne Chesimard, seated in the front passenger seat. Defendant and Harper exited their respective cars and met midway between both vehicles where defendant produced a New York driver's license issued to one Archie Gibson, and a Vermont car registration bearing a female's name as owner. Defendant told Harper he had borrowed the car and was headed for Philadelphia. Harper then went to defendant's car to check its serial number against the registration certificate. When Chesimard told Harper they were on

their way to Washington, D.C., he became suspicious and asked for their identifications.

At about this point Foerster, who had been previously summoned by Harper to help him, called out "Jim, look what I found," and held up a clip for an automatic weapon. Simultaneously therewith, Harper ordered Costan and Chesimard to place their hands on their laps. When Chesimard did not obey his command, but instead made a loud sound and a "gritting face" and moved her right hand toward her leg, he retreated toward his car. While retreating Harper was shot in the shoulder, presumably by Costan or Chesimard. Chesimard got out of the car firing a gun. Shots were exchanged and Chesimard fell wounded but continued her firing. Harper saw Foerster grappling with defendant and heard shots fired. Harper exchanged shots with Costan during the course of which Harper shot and presumably wounded or killed Costan. Harper then ran toward the Turnpike Headquarters for help - while running he heard more shots being fired.

Other troopers converged at the scene and found Foerster's car parked behind Harper's. Both cars had lights on and the motors were running. Foerster was dead and his body was found lying by the right rear door of Harper's car. A New York driver's license and a social security card bearing the name of Archie Gibson was found nearby. A registration certificate issued to one Isabelle Johnson, for the car defendant was driving, was also found nearby.

Tire marks on the road in front of Harper's car indicated that defendant's car had "spun out" in leaving the area and headed south.

Defendant's car was found by Trooper Robert Polentchar several miles south of where Harper's car was parked. Polentchar saw a black man, wearing a white jacket, emerge from the woods bordering the highway and approach the parked car. When the man failed to stop when ordered to do so, Polentchar fired several shots but missed him. Defendant was captured in the general area at 2 p.m., on May 3, 1973. He had in his possession keys which fitted the ignition and doors of his car and a white jacket. He had no gun. He had a wound or cut on the web of his right hand between his thumb and first finger which the jury could find resulted from the slide of an improperly held automatic weapon.

Chesimard was also found in the area of defendant's car. She was wounded and unable to stand. Costan was found dead, with a bullet wound in his chest, in the nearby woods with Foerster's gun near his body. Also found near Costan's body was a .380 caliber Browning automatic. A clip with 13 rounds of ammunition for an automatic weapon was found in Costan's pockets, and on his body was a belt with a black holster strapped to his back.

The State's proofs further revealed that Foerster died as the result of two bullets fired at close range from his own gun which entered his neck and head. There were additional bullet wounds in

his chest and arm which did not cause his death. All the weapons found, other than Foerster's, were jammed and could not be fired.

Defendant appeals from the judgment of conviction and raises the following issues in his brief:

Point I - Joint representation of defendant by co-counsel, one of whom was counsel for a severed co-defendant, violated defendant's right to effective assistance of counsel under the Sixth and Fourteenth Amendments.

Point II - The court erred in qualifying Chief Mullin as an expert witness and permitting him to testify outside the scope of any alleged expertise.

Point III - The court erred in failing to charge accessory after the fac as requested by counsel.

Point IV - The court's charge to the jury was erroneous in that it failed to instruct on manslaughter.

Point V. - Admission of a fingerprint card violated R. 55 of the New Jersey Rules of Evidence and the New Jersey and United States Constitution.

Point VI - The court abused its discretion in admitting photographs of the victims in evidence. (Partially raised below).

Point VII - The prosecutor's remarks during summation were improper and prejudicial to the defendant (Not raised below).

Point VIII - The aggregate of legal errors at the trial created an atmosphere

so hostile and prejudicial to the defendant as to preclude the rendering of a fair and impartial verdict (Not raised below).

Point IX - It was error for the court to deny defendant's motion for judgment of acquittal on the robbery count, since on the evidence produced no reasonable jury could have found guilt beyond a reasonable doubt.

Point X - Defendant's conviction for robbery merged with his conviction for murder. (Not raised below).

Point XI - The verdict below was against the weight of the evidence as to the assault and robbery counts.

Point XII - The defendant's sentence is manifestly excessive and unduly punitive.

We have considered all the issues advanced and find them to be clearly without merit. R. 2:11-3(e)(2). We deem it advisable, however, to briefly discuss Points I, IV, V, IX, X and XI.

At the outset, it will suffice for our purposes to indicate that the testimony of the State's eyewitnesses, and the strong and overwhelming circumstantial proofs presented, warranted the jury's finding beyond a reasonable doubt that defendant was guilty of the charges for which he was convicted.

I.

Defendant and Chesimard had been separately indicted on sim-

ilar charges and were jointly scheduled to stand trial. Prior to the scheduled trial date Raymond Brown, a New Jersey attorney, moved for the admission pro hac vice of Charles McKinney, a New York attorney, to try the case for defendant, and for the admission of Evelyn Williams to try the case for Chesimard. The motions were granted with the understanding that Brown and other attorneys from his office, would assist during the trial and, if necessary, be prepared to take over the trial if either McKinney, Williams, or both, dropped out or were prevented from continuing their respective representations of defendant and Chesimard.

During the selection of a jury it was learned that Chesimard was pregnant. She was, therefore, severed from the trial. Brown assisted McKinney during defendant's trial by participating in the examination of witnesses and during motions made during and after trial. It is now contended that Brown's participation in defendant's trial violated defendant's right to effective assistance of counsel - presumably because Brown was in a conflict of interest position since he was acting on behalf of defendant and Chesimard. We disagree.

It is clear from an examination of the record that when defendant and Chesimard were joined for trial that the attorneys intended to act as a team and present a common defense. Appellant admitted at oral argument that if the trial had not been severed

there could be no claim of conflict of interest. If this is so, and we find it to be so, how can defendant's separate trial be deemed improper? When the trial was severed Brown did only what he would have done had it been a joint trial. There is absolutely nothing in the record which in any way supports the assertion that McKinney was "chilled" in defending defendant, or that Brown did or said anything to prejudice defendant. In fact, the record is to the contrary.

When the motion for severance was made, defense counsel objected, claiming it would be prejudicial to defendant because "We have been acting as a team in relation to the defense of this case ***." At the commencement of summation McKinney showed his appreciation for Brown's assistance by publicly thanking his " *** able associate in this case, Mr. Brown from Jersey City ***." To now argue defendant was prejudiced, without showing how he was prejudiced, lacks substance. Glasser, et al. v. United States, 315 U.S. 60 (1942), rehearing denied in Kretske v. United States, 315 U.S. 827 (1942) and in Roth v. United States, 315 U.S. 827 (1942); Kruchten v. Eyman, 406 F. 2d 304, 311-312 (9 Cir. 1969), modified on other grounds 408 U.S. 934 (1972), reh. den. 409 U.S. 897 (1972); Fryar v. United States, 404 F. 2d 1071, 1073 (10 Cir. 1968), cert. den. 395 U.S. 964 (1969); United States v. De Berry, 487 F. 2d 448, 452 (2 Cir. 1973); Marxuach v. United States, 398 F. 2d 548, 551-552 (1 Cir. 1968), cert. den. 393 U.S. 982 (1968);

United States v. Cozzi, 354 F. 2d 637 (7 Cir. 1965), cert. den. 383 U.S. 911 (1966); Porter v. United States, 298 F. 2d 461, 463-464 (5 Cir. 1962); Craig v. United States, 217 F. 2d 355, 358-359 (6 Cir. 1954); State v. Smith, 59 N.J. 297, 300 (1971). We do not believe the holding in United States ex rel. Hart v. Davenport, 478 F. 2d 203 (3 Cir. 1973) that representation by one attorney in a joint trial of six defendants is defective upon the showing of a possible conflict of interest, however remote, should be applied to the instant case. In Hart the defendants clearly had different conflicting interests which were the compelling reasons for the court's holding. As indicated, defendant here had separate counsel who very ably represented him when he had little or nothing to present as a defense, and where not even a possible conflict of interest has been shown. At best, Hart represents a minority view that we are not prepared to adopt in view of the circumstances existing herein.

If it could be said that a conflict existed, such was induced, encouraged, acquiesced in or consented to by defense counsel and no claim of prejudicial error can be predicated thereon absent a clear demonstration that prejudice resulted. See State v. Harper, 128 N.J. Super. 270, 277 (App. Div. 1974), certif. den. 65 N.J. 574 (1974). No such showing has been made.

II.

Defendant alleges the trial judge erred in failing to instruct the jury that they could return a verdict of manslaughter. He

argues the jury could have believed that reasonable provocation existed so as to justify defendant's actions once the shooting started. In short, he is saying the jury should have been permitted to infer that defendant had been unlawfully arrested, or that excessive force was being used by Foerster or Harper in arresting him, which would make his use of force excusable, thus reducing the offense from murder to manslaughter.

There is no merit to this contention. The record is barren of any proof which could give rise to the defense of voluntary or involuntary manslaughter. If the trial judge had charged manslaughter on this record, he would have improperly permitted the jury to speculate on a factual issue not supported by the evidence. See State v. Artis, 57 N.J. 24 (1970); State v. Gosser, 50 N.J. 438 (1967), cert. den. 390 U.S. 1035 (1968); State v. Di Paolo, 34 N.J. 279, 298-299 (1961), cert. den. 368 U.S. 880 (1961); State v. Wynn, 21 N.J. 264 (1956).

III.

Defendant further asserts the trial judge erred in allowing into evidence a fingerprint card of the New York Police Department of one Archie Gibson which merely contained the prints and the officer's signature. The trial judge allowed the card into evidence, without objection or a request for a limiting instruction, because the State proved that the prints on the card were those of defendant, and, therefore, under Evid. R. 55 it was admissible to prove identity. Defendant admits its relevancy but argues that

under Evid. R. 4 it should have been excluded because its probative value substantially outweighed the prejudice resulting from its admission. We disagree.

The testimony was admissible as an exception under Evid. R. 55 because it was relevant to show " *** motive, intent, plan, knowledge, identity, or absence of mistake or accident." State v. Zwillman, 112 N.J. Super. 6, 17-19 (App. Div. 1970), certif. den. 57 N.J. 603 (1971). In addition, the connection between defendant and his use of the name Archie Gibson was vitally important to the State's case since defendant when stopped by Harper produced a driver's license bearing that name, and various documents were found by the police in the trunk of defendant's car bearing the name Archie Gibson. Thus, in effect, it was part of the res gestae and therefore admissible. Evid. R. 64; State v. Jones, 94 N.J. Super. 137, 140-141 (App. Div. 1967). Furthermore, ch proof raised the almost inescapable inference that defendant actually or constructively possessed the ammunition in the trunk and the automatic guns in the car, and was at the outset cooperating with Harper and Foerster to allay suspicion and avoid a car search.

Finally, since defendant did not object to the admission of the fingerprint card or request a limiting instruction under Evid. R. 6, it became necessary for defendant to show that the error was fairly capable of producing an unjust result. R. 2:10-2; State v. Lair, 62 N.J. 388, 392 (1973); so viewed, we perceive no error,

let alone plain error. State v. Edge, 57 N.J. 580, 588 (1971); State v. Macon, 57 N.J. 325, 333 (1971).

IV.

In Points IX and X of defendant's brief he argues (a) the trial judge should have entered a judgment of acquittal on the armed robbery charge and (b) as plain error that the armed robbery conviction merged with his conviction for murder. The thesis advanced is that even though defendant may have taken Foerster's gun from him and killed him, he had no intention of stealing the gun and, in any event, the robbery merged into the murder since it was part of the same continuing event. Again, we do not agree.

At the outset we point to the significant fact, overlooked by defendant, that this case was not presented as a "felony murder." The indictment charged defendant with unlawfully murdering Foerster " *** a New Jersey State Trooper then and there acting in the performance of his duties while in uniform, contrary to the provisions of N.J.S. 2A:113-1 and N.J.S. 2A:113-2 ***." The case was tried on that basis and the trial judge instructed the jury in accordance with the dictates of State v. Madden, 61 N.J. 377 (1972), and not on the theory of a felony murder. Unquestionably, if this had been the usual case of a homicide committed during the course of a robbery a merger would result. See State v. Hubbard, 123 N.J. Super. 345 (App. Div. 1973), certif. den. 63 N.J. 325 (1973) and cases cited

therein.

Based on the uncontroverted proofs the jury was warranted in finding that during the course of the struggle between defendant and Foerster, defendant used his own gun in wounding Foerster. Thereafter, he forcibly took the gun from Foerster for the purpose of (a) killing him as evidenced by the close range at which the fatal shots were fired and (b) using it to prevent his capture since his gun and his accomplices' guns were inoperable. Such a finding is consistent with defendant's having carried Foerster's gun with him for a distance of several miles from where Foerster was killed. So too, the jury could reasonably infer that defendant left the gun near Costan's body to avert suspicion from himself or to lay the groundwork for a subsequent claim that Costan killed Foerster. This theory is understandable when considered in the light of the defense projected at trial that Costan fired the fatal shots.

In summary, giving the State the benefit of all reasonable inferences to be drawn from the testimony, defendant's motion for judgment of acquittal was properly denied. State v. Reyes, 50 N.J. 454 (1967). The proofs warranted a finding that by the use of force defendant took Foerster's gun with the intent to steal it and permanently deprive him of it. State v. Mayberry, 52 N.J. 413 (1969), cert. den. 393 U.S. 1043 (1969).

Likewise, the armed robbery did not merge into the murder conviction because under the circumstances existing in this case, the armed robbery was a separate and distinct offense from the murder. The proofs supporting one offense are neither components of nor comparable to proofs supporting the other. The fact that these separate crimes arose out of the same criminal episode merely made it mandatory that the State join the offenses so as to dispose of them at one time. State v. Gregory, 66 N.J. 510, 518 (1975).

V.

Finally, we find no merit in defendant's bare and unsupported assertion that the sentences imposed were manifestly excessive and unduly punitive. In view of the heinous nature of this brutal and senseless murder of a police officer, committed while he was performing his duty to protect society, the consecutive sentences imposed were warranted and no showing has been made that the trial judge abused his sentencing discretion. State v. Tyson, 43 N.J. 411, 417 (1964), cert. den. 380 U.S. 987 (1965).

Affirmed.

A TRUE COPY

Elizabeth M. Langhlin

Clerk

C80 SEP 1976

PRESENTLY CONFINED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1882-73

STATE OF NEW JERSEY,

Plaintiff-Respondent,

-v-

CLARK E. SQUIRE,

Defendant-Appellant.

Criminal Action

On Appeal from Judgment of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County

Sat Below:

Honorable John E. Bachman, J. C. C., and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

STANLEY C. VAN NESS
Public Defender
Attorney for Defendant-Appellant
576 Central Avenue
East Orange, New Jersey 07018

JOHN A. SNOWDON
Assistant Deputy
Public Defender

Of Counsel and
On the Brief

INTRODUCTION

The entire record of the instant appeal encompasses some 36 volumes of testimony. During the preparation of appellant's brief, for clarity, each volume was assigned an ordered volume number, indicated in the upper right corner of the title page for each volume. Only those volumes dealing with trial testimony and those dealing with motions or other matters raised in appellant's brief have been submitted with this brief. Thus, all volumes are not included here. Hence, the following citation form for reference to the record has been adopted by appellate counsel: example, 26T 144, 16-19, indicates volume 26, page 144, lines 16-19.

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RULES OF EVIDENCE CITED

OTHER AUTHORITIES CITED

PROCEDURAL HISTORY

The defendant, Clark E. Squire, was indicted by the Middlesex County Grand Jury with Joann Chesimard in Indictment No. 1436-72 charging: (1) murder; (2) murder; (3) atrocious assault and battery; (4) assault and battery on a police officer; (5) assault with an offensive weapon; (6) assault with intent to kill; (7) possession of an illegal weapon; and (8) armed robbery. (Da-1 to Da-5) Following a mistrial, the Honorable Leon Gerofsky, A.J.S.C., granted a defense motion and ordered the impaneling of a foreign jury. (Da-6 to Da-7)

During the jury voir dire, defendant Chesimard became pregnant and was severed from the trial.

Following this, trial was held before the Honorable John E. Bachman, J.C.C. and a jury from January 2, 1974 to March 11, 1974. After the Court dismissed count two, the defendant was found guilty of all remaining counts. (Da-8 to Da-9) On March 15, 1974, Judge Bachman sentenced the defendant as follows: count (1), life imprisonment; count (6), 10 to 12 years; counts (3) (4) and (5) were merged with count (6); count (7), 2 to 3 years; and count (8), 12 to 15 years, all sentences to be served consecutively. (Da-9)

Thereafter, on June 18, 1974, Judge Bachman denied defendant's motion for a new trial. (Da-10) The notice of appeal was

filed on March 25, 1974. (Da-11 to Da-14) The State then filed a cross appeal (Da-15 to Da-16) and defendant's unopposed motion to dismiss the cross appeal was granted by the Appellate Division on March 7, 1974. (Da-17) This appeal followed.

STATEMENT OF FACTS

Following openings, the State made an offer of proof stating that it intended to have a New York City policeman testify to a prior arrest of defendant Squire and his subsequent fingerprinting for the purpose of comparing those fingerprints of Squire to prints taken from the scene of the New Jersey incident for the purpose of proving identity under Rule 55. Defendant Squire objected. The objection was overruled. (19T 40)

The first witness for the State was Michael James Sullivan, a New York City Transit Policeman. (19T 40) He stated that on May 1, 1973, he had occasion to arrest a man in New York. (19T 42, 7) The man identified himself as one Archie Gibson, showing the officer a New York drivers license. (19T 42, 18-19) The officer then indicated, in court, the defendant, Clark Squire, to be the man he arrested in New York on May 1st. (19T 47, 18-24) The witness then identified the document P-1 for identification which he stated was the license shown to him by the defendant as identification. (19T 48, 25)

Officer Charles Christiano of the New York City Police Department was then called. He stated that he had made a review of his files for the records of one Archie Gibson for an arrest on May 1, 1973 (19T 55, 22-24), and found a card for that date

and person. The card (which he had brought with him) was marked P-2 for identification. (19T 56) Ronald Manaker, also of the New York City Police Department, was then called. He examined P-2 for identification and stated that it was signed by him, thereby indicating that he took the prints on the card. (19T 58, 16-22)

The next witness was Detective Casmir Smerecki, of the Middlesex County Prosecutor's office. He stated that he was a criminal identification expert, particularly with regard to fingerprints. His expertise was not challenged. (19T 61) He stated that he had examined P-2 and found that the prints thereon were of Clark Squire. (19T 61, 20-21) The document P-2 was offered into evidence but objected to by defendant. (19T 61) Thereafter, Officer Manaker was recalled and P-2 was again offered into evidence. On cross-examination Manaker testified that he was not the official keeper of the records. (19T 65-1) He further stated that he had not completed all the information contained on the card and when he last dealt with the card, some of the areas on it were still blank. (19T 67, 1-4) After directing the clerk to seal up the top and the back so that only the fingerprints on the card were visible (19T 67, 13-18), the Court admitted it, over objection (19T 67), on the grounds that Manaker had testified that he was the officer who took the fingerprints on the card. (19T 68-1)

Detective Smerecki was then recalled. Smerecki testified that he compared the New York identification card with another card containing fingerprints from the Middlesex County Sheriffs office (P-3). (19T 73-7 and 19T 90, 1-5) Defense counsel again objected to the admission of the fingerprint evidence on the grounds that it violated Rule 55 in that it implied evidence of a prior crime. (19T 75) The court ruled that the evidence was admissible under Rule 55 for the purpose of proving identity. (19T 88 et seq.) Officer Smerecki then testified that on January 18, 1974, he compared the fingerprints on P-2 and P-3. (19T 96, 10-13) Over objections, Officer Smerecki testified that the fingerprints on both cards P-3 and P-2 were made by the same person. (19T 97, 8-10)

The State then called James Michael Harper, a State Trooper. He testified that on May 2, 1973, he was assigned to uniformed patrol duty on the New Jersey Turnpike from Interchange No. 11 to mile post 97, driving a 1973 grey, unmarked, Oldsmobile. (19T 98, 22 to 19T 99, 24) At about 1:00 P.M. he had occasion to stop a 1965 Pontiac. (19T 101) As he approached behind the Pontiac he noticed the tail-lights of the car were not in proper working condition. (19T 102, 20-21) As he drove past the car he noted that it carried Vermont license plates. (19T 103, 13-15) After he passed the Pontiac he crossed over in front of it to the slow lane and began to decrease his speed to allow the Pontiac to pass

him. (19T 104, 6-8) After it did so, he began to follow it keeping an even pace. Harper then changed his position again pulling even with the Pontiac in the left hand lane and signalling the driver to pull over. (19T 105, 8-11) As the Pontiac pulled over, Harper slowed and pulled in behind the Pontiac on the shoulder of the road. (19T 105, 21-23) The driver of the Pontiac exited his car but was told by Harper to return to his car and pull it further off the road. (19T 106, 6-12) As the man complied, Harper could see that he was a black male wearing a white Safari type jacket and black pants. (19T 106, 18-21)

After pulling the Pontiac further to the side of the road, the defendant again got out of his car and began to walk towards the trooper, meeting him at a point midway between the two cars. (19T 134, 12-16) Harper told the defendant that his tail lights were not working and asked to see his registration and driver's license, and defendant thereupon produced same. (19T 135, 1-9) Harper recalled that since the driver's license was of New York issue and the Vermont registration was in the name of a woman, he walked to the Pontiac and opened the driver's door and knelt down to verify that the serial number of the automobile agreed with the number appearing on the registration certificate. (19T 137, 13-19) As he opened the door to examine the number, he noted a black female sitting in the right front passenger seat

and a black male sitting in the right rear passenger seat. (19T 138, 13-16) The male was dressed in a blue jacket and dungarees and light brown boots. The female had on a red shirt or red jacket and dark colored pants. Harper asked the passengers in the automobile where the car was from and they replied they had borrowed it from someone in New York City. At this point Harper asked them for identification. (19T 140, 11-16) The man complied, handing Harper a hospital identification card. As Harper was asking these questions, he heard someone call his name and looked up over the Pontiac and saw Trooper Werner Foerster standing with the driver of the car, apparently having arrived at the scene unnoticed by Harper. (19T 141, 1-12) Foerster said to Harper, "Jim, look what I found," and held something out in his hand (19T 141, 18-21) which appeared to be a clip for an automatic weapon. (19T 142, 19-20)

After seeing the clip, Harper ordered the two occupants of the car to place their hands on their laps in front of them. While the male complied, the female, who was sitting with her right hand out alongside her body, began groping for something near the seat. (19T 143, 1-11) Harper immediately turned to run towards the rear of the car and, as he did so, heard a shot fired and felt pain and a burning sensation in his shoulder. (19T 145, 11-15) Harper continued to run to the rear of his own car and took up a position behind the car. (19T 146, 17-19)

He looked around the corner of his car and saw the black female who was previously sitting in the front seat coming out of the driver's door firing a pistol (19T 147, 7-12) in his direction. (19T 147, 14-15) Harper fired three shots and heard the female scream and saw her fall to the ground. (19T 147, 19-23) Harper moved to the other side of the car and rose up over the trunk to see where Trooper Foerster was. He spotted Foerster and the driver of the car struggling in the roadway. (19T 148, 5-10) As Harper observed them grappling, he heard additional shots fired, crouched down, and moved back to the left side of the bumper. (19T 152, 2-6) He saw the black male who had been seated in the rear of the car kneeling beside the female and holding a weapon in his hand. He then saw the man fire the weapon at him (Harper). (19T 152, 15-23) As Harper ducked back behind the car, he heard two more shots fired which had a more "full" tone than the previous firing he had seen from the woman or the passenger from the rear of the car. (19T 153, 1-10) He looked around the corner of the bumper again and fired two shots and heard the male who had been kneeling with the female scream. (I9T 153, 11-15) Harper heard more shots, and began to reload his weapon, ejecting the spent shells. After reloading the weapon, he stood up and began to back away from the rear of his car. As he backed away, he looked towards the area where he had previously seen the driver of the car grappling with

Trooper Foerster. He did not see either of them in that spot. (19T 155, 1-11) As he backed further from his car, he turned and began to run toward the State Police Barracks, which were directly behind the cars, about 200 yards away. (19T 155, 11-17) After he had run part of the way to the barracks he heard more shots fired. (19T 155, 19-23)

When he ran inside the station he saw Troopers Baginsky, O'Rourke and Foster in the office. While at the station, Sergeant Baginsky partially undressed the wounded Harper. (19T 159, 1-2) Harper identified the shirt he had been wearing that evening noting a bullet hole in the rear and a brownish colored stain surrounding the hole. It was offered and accepted into evidence over objection. (19T 161, 13-15) He also identified other articles of clothing including his hat, ammunition belt and shoulder strap. He also identified a jacket as being of the type the driver was wearing on the night in question. (19T 165, 14-15) Harper stated that after reaching the station house he was later transported to the hospital. (19T 165, 23-25)

At this point the direct examination of Trooper Harper was interrupted and a Wade hearing was held. At that hearing the court heard testimony from Harper and five other witnesses concerning the identification of the defendant. Since this issue is not raised on appeal, suffice it to say that after considering

the testimony and argument of counsel, the court found that the in-court identification by Harper was admissible.

Following the hearing, Trooper Harper resumed his direct testimony. Harper identified several pictures of the Pontiac that he stopped on the morning hours of May 2nd and identified Clark Squire in court as the man who had been driving the car on the turnpike. (20T 376, 18-19) Harper then testified concerning his trip to the hospital and his meeting with a Detective Homa which culminated in the drawing of a sketch of Squire on May 3. (20T 377, 1, 25)

On cross-examination Harper stated that he never heard Squire communicate with any of the people inside of the car during the entire occurrence (20T 537, 1-14) and the defendant had not fired at him during the occurrence. (20T 542, 13-14)

The next witness was Robert Silverman. He testified that on May 2, 1973, he had occasion to be driving on the New Jersey Turnpike, southbound. (20T 568, 13-24) He saw a policeman involved in what appeared to be a fight with some other people (20T 569, 4-13) near where three cars were parked on the shoulder, including one marked police car with its flasher on. (20T 569, 18-21) He stated that the policeman he saw was in a position on the passenger side of the middle car (20T 570, 4-5) and that the policeman was grappling with another person. (20T 571, 1-3) He

stated that although he specifically looked he only saw the people involved in the scuffle. (20T 572, 13-14)

Sergeant Chester Baginsky of the New Jersey State Police Department was the next witness. He testified that on May 2, 1973, he was the sergeant in charge of the shift stationed at the New Brunswick station house on the turnpike. (21T 2, 11-24) When he arrived at work Trooper Harper was already on patrol, but Trooper Foerster was still there at about 10:45 P.M. (21T 4, 2) After running an errand for Baginsky, Trooper Foerster was sent out on patrol in car number 820. (21T 5, 25) Baginsky recalled that sometime after 12:00 P.M. he heard, over the radio, Trooper Harper call in to the effect that he was making a stop. (21T 10, 13-14) He also heard one other unit (car 817) respond that it was also responding as a backup. (21T 10, 18-19) Car 817, he testified, was manned by Trooper Palentchar. (21T 12, 3) He then heard, over the radio, that Trooper Foerster in car 820 was responding also. (21T 12, 7) Then, at about 12:55 A.M. he saw Trooper Harper walk into the office. (21T 13, 11-13) He appeared to be ashen and gray and explained to Baginsky that he had been in a gunfight. (21T 13, 18-20) Baginsky began to treat Harper's wound and elicited from him information as to the occurrence and alerted the entire turnpike. (21T 14, 6-11) Over objections, Baginsky testified that Harper told him he had stopped

the car with three colored occupants, there was an exchange of gunfire and he believed one or two of the occupants may have been wounded. (21T 15, 1-5) Harper told him that Foerster had been at the scene and engaged in a gun battle but he had lost track of him during the fight. (21T 15, 13-15) With this information, Baginsky alerted the turnpike.

The next witness for the State was Trooper Robert Palentchar. He testified that he was a New Jersey State Trooper patrolling the turnpike on the morning of May 2, 1973. During the course of the evening, he overheard Trooper Harper advise headquarters that he was stopping a certain white Pontiac. (21T 47, 19-21) At the time, Palentchar was travelling south about 10 miles south of Trooper Harper's location.(21T 48, 24) He also heard Trooper Foerster come on the radio and advise that he was heading towards Trooper Harper as a backup (21T 49, 3-6)(as headquarters had advised Foerster and Palentchar to backup Harper.)(21T 49, 9-11) As a result of a further radio communication from headquarters, as he was proceeding toward Harper, Palentchar pulled into a "U" turn and stopped on the shoulder and shut off his lights. He was waiting for a white Pontiac Tempest with a burned out taillight heading southbound. (21T 50, 19-24) After an uneventful wait of about 30 seconds to a minute,he proceeded through the U turn and began heading

northbound again. (21T 51, 12-13)

Proceeding northward, the trooper travelled approximately 5/10ths of a mile when he looked to his left and saw a white Pontiac Tempest stopped on the shoulder with no lights on. (21T 51, 22-25) As he approached the vehicle, he had no headlights on in order not to draw any suspicion to his car. (21T 52, 21-22) As he neared the vehicle he saw a black male with a white jacket come out of the woods and start towards the car. (21T 53, 15-17) He quickly stopped the car, switched on his lights and jumped out of the car. He shouted "halt" and the black male turned and ran with Palentchar firing four shots at him. (21T 54, 1-8) The trooper stated he did not think he hit the black male but saw him run off into the woods. (21T 55, 1-11) Immediately after this, he saw movement to the right and south of him (21T 60, 1-3) to the right of the Pontiac. He called for the person to halt. The person then stood up and raised her hands. (21T 61, 23-24) He had the person approach the car and noted that she was a light skinned black female wearing a red sweater and black pants and suffering from a wound. (21T 62, 12-24)

Shortly thereafter, other troopers arrived (21T 64, 1-13) and an ambulance was called for the female, while other troopers took flashlights and went into the woods to check

for the two other subjects they were looking for. (21T 70, 18-20) Palentchar then stepped into the woods in the area where he had first seen the female crawling and saw a deceased black male lying on the ground. (21T 73, 1-6) Leaving another trooper to secure the scene, Palentchar returned to his radio car where he met a Detective Carabelli who then assumed responsibility of the investigation.

Several photos of the scene and of the bodies were admitted into evidence over objection (21T 78) and thereafter Palentchar resumed his narrative, stating that at the scene he saw a revolver between the legs of the deceased male, and also a red scarf. (21T 84, 2-4) In a depression in the grass, near where the woman was crawling, he also found an automatic pistol and belt. (21T 84, 12-13) Palentchar noted the serial number of the weapon lying by the dead male's body and then left the scene. (21T 86, 3-16)

Trooper Frank Dryer was then called. On the morning of May 2 he was at the Princeton headquarters when he received a call of a trooper being shot on the turnpike. (21T 97, 8-10) He proceeded to the original scene (milepost 83) where he found a marked police vehicle on the shoulder of the road parked behind another vehicle. (21T 98, 7-13) As he approached the cars, he noticed that the last unit was a marked State

Police car and the front unit was an unmarked State Police car. As he proceeded to look around the scene where the two vehicles were located, he found a State Police hat and a flashlight between the two cars. (21T 105, 3-6) He walked up a dirt embankment in front of the unmarked vehicle and approximately 15 yards in front of the unmarked vehicle on top of the embankment he found a New York driver's license (P-1). (21T 108, 1-3) He handed the license to his partner, Trooper Byrne, and continued to look around the area. After about five minutes he walked up the dirt embankment opposite the right front wheel of the first car. He looked down and saw Trooper Foerster's body lying alongside the unmarked car in the vicinity of the right rear door and wheel. (21T 113, 2-15) While examining Trooper Foerster's body Dryer noticed that his weapon was missing and that there were several automatic pistols in the vicinity of the trooper's body. (21T 116, 10-13) A picture of Trooper Foerster's body was identified by Dryer and objected to by defense counsel on the grounds that he was not properly qualified to support the introduction and on the inflammatory nature of the picture. (21T 125) The objection was overruled and the picture admitted into evidence. (21T 127)

Several witnesses were then called in regard to an issue pertaining to certain FBI pictures which were shown to Harper

in an attempt to identify his assailant.

The trial resumed, with the State calling as its next witness, Henry F. Comeau, an employee of the New Jersey Turnpike Authority. He testified that on the night in question he was working in the Administration Building close to the Communications Section. He testified that Communications Section has a tape recorder which records all incoming and outgoing radio transmissions from State Police cars. (21T 236, 15-22) Comeau then identified a reel of tape as being that which was recorded on the morning of May 2, 1973. (21T 242, 2-6)

The next witness was Cornelius Sheridan. He testified that he also was a shift supervisor and performed the same functions as Mr. Comeau. (21T 245, 1-8) He testified that on May 2nd at approximately 2:30 in the afternoon at the request of a Sergeant Kelly of the State Police he removed the tape of the morning of May 2nd from the lockup and turned it over to Sergeant Kelly. (21T 246, 1-8)

Sergeant Kelly of the State Police was then called. Kelly testified as to the chain of evidence of the tape and the State offered the tape into evidence. This was objected to by defense counsel. Defense objected to the tape on the grounds that (1) it would contain inevitable hearsay (21T 252, 14-18); (2) that defense would be unable to properly cross-examine the people

recorded on the tape and that the prejudice of the tape would outweigh its probative value. (21T 253) The court and counsel then, in camera, listened to the tapes. (21T 258) After listening to the tape, defense counsel f ier argued that the tape was inadmissible as not coming within any exception to the hearsay rule. (21T 262 et seq.) The court ruled that aside from the voice of the dispatcher, the transmission of Troopers Foerster, Harper and Palentchar were part of the res gestae and admissible. As to the transmissions of the dispatcher, Trooper Foerster, the court ruled that these transmissions were hearsay but came within Rule 63(4) and that they were excited utterances made while the dispatcher was in a stress situation. (21T 300) Therefore, the court ruled the tapes admissible subject to preparation of a more accurate transcript. (21T 301)

When trial resumed on February 29, 1974, defense and prosecution had agreed on a specified excerpt from the radio tape. (21T 312) Defense then re-argued its objection, but was overruled.

Defense counsel asked the court to instruct the jury that the tapes were offered only to show the actions of the troopers and not to prove the truth of the statements that they had made. (21T 315-21T 321) The court ruled that it would so instruct the jury, however, it would do so during the final charge. (21T 320) The tape, exhibit "P-39" was then marked into evidence over objection. (21T 340)

The next witness for the State was New Jersey State Police Trooper James Challender. He testified that he was familiar with the voices of Troopers Harper, Palentchar, Foerster and Foster. (21T 341, 9-15) He testified that also he was familiar with the tape now marked State's exhibit "P-39". After explaining how the timing device worked on the recorder, the trooper prepared to play the tape. The court cautioned the jury that the tapes were to be considered as evidence for the proof of only two things. First, the time sequence of the events and second, the actions of the state troopers during this time period. (21T 344, 1-4) The jury was also assisted by a prepared transcript. (21T 344, 7-11) The tape was then played for the jury. (21T 353)*

The next witness was Detective Carl Carabelli of the New Jersey State Police. On May 2nd, he responded to milepost 78 on the southbound lane of the New Jersey Turnpike at approximately 1:35 A.M. (21T 365, 8-13) He saw a white Pontiac parked by the side of the road and parked his car behind it. There were three or four troopers there at the time. After talking with Trooper Palentchar he walked into a grassy area and observed a dead black male lying on his back in the grass. (21T 368, 22-24) Carabelli testified that under the right knee of the male was a .38 caliber Smith and

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* Since the contents of the tape was not recorded by the stenographer at the trial, the transcript referred to above is attached hereto as Da-30. The copy was supplied by the Middlesex County Prosecutor, Mr. C. Judson Hamlin.

Wesson revolver. (21T 379, 4-5) About eight feet east of his foot was a .380 caliber automatic weapon along with a black belt (21T 379, 7-9), and in his upper left pocket was a clip containing thirteen rounds of ammunition. (21T 379, 13-14) He further testified that when the body was turned over he observed a blue belt with a holster strapped on the back of the deceased. (21T 386, 5-6)

The next witness for the State was Trooper Charles R. Thom. He testified that on the 2nd of May, 1973, he had occasion to proceed to milepost 78 in the southbound lane of the New Jersey Turnpike. (21T 466, 1-3) When he arrived, he saw other troopers including Detective Carabelli who ordered him to stay with the vehicle, a 1965 Pontiac with Vermont license plates. (21T 466, 12-16) He testified that later that evening he saw the car loaded on to a flat bed truck and towed away. (21T 469, 3-4)

Detective James Challender was then recalled to the stand. He testified that after receiving a phone call on May 2nd, he responded to New Jersey Turnpike milepost 78 southbound. (21T 510, 1-2) He arrived at the scene at approximately 1:38 A.M.. He then had a conversation with Detective Carabelli (21T 510, 10-19), and walked with Carabelli to a grassy portion adjacent to the southbound berm where Carabelli showed him the body of a black man lying in the grass. (21T 511, 1) Close by the body he observed two weapons. He also observed a black female in an ambulance, and then

returned to his car and proceeded to the Middlesex General Hospital in New Brunswick. (21T 514, 4-7) There he saw Trooper Harper lying on a cot and observed medical people rendering attention to the black female he had observed in the ambulance. (21T 515, 3-5) He then proceeded to talk to Trooper Harper, as a result of which he learned of the death of Trooper Foerster. (21T 515, 14-15) After the interview, he called the New Brunswick Station and relayed the description of the driver of the car Harper had seen. (21T 515, 23-24)

Challender testified that while at the hospital he observed closely the body of Trooper Foerster as it was brought in. He observed that his face was covered with dried blood as were his hands. There was an enormous amount of blood in the area of his right arm and a hole in the back of his neck. He noted a protrusion at the rear of his head, much blood in his hair, and blood spattered on the entire front of his uniform. (21T 519, 12-25) He also noted that there was a long laceration in Foerster's left throat area. (21T 520, 12-13) He also noted Foerster's weapon was missing from his holster. (21T 521, 3-4) From the body of Foerster, Challender removed his belongings and equipment (21T 522, 6-21), wrapped these articles in white paper and, as he had done with the clothes from the black female, put them in a paper bag and locked them in the trunk of his car. He took all of these items to headquarters in New Brunswick where they were turned over to Detective Sergeant Wilke. (21T 523, 8-19)

The next witness for the State was Trooper Elmer Phillips. He testified that on the morning of May 2nd, 1973, he proceeded to milepost 78 on the turnpike in the southbound lane. (21T 623, 8-13) He guarded the body and did not allow anyone to come close or touch the body until Detective Carabelli took over the scene from him. (21T 628, 4-22)

The next witness for the State was Detective Louis Parisi, who testified that on the morning of May 2, after reporting in, he proceeded to the Middlesex General Hospital where he observed Trooper Harper, Joanne Chesimard and several state police officers, doctors and nurses, and conducted an interview with Trooper Harper. (21T 642, 3-14) After this he proceeded back to the Administration Building where he went down to the garage of the building where the Pontiac was being processed and assisted in processing it. (21T 646, 1-2) Detectives Wilke and Demeter were working on the car and asked him to look in the trunk and check the bags therein. (21T 647, 6-12) Parisi testified that he opened an attache case and found in it some materials bearing the name of one "Archie Gibson." (21T 650, 16-18) Over objections, Parisi testified that he also found a page torn from a telephone book with the name "Archie Gibson" underlined, a birth certificate in the name of Archie Gibson, a United Insurance Company Hospitalization form in the name of Archie Gibson and a Selective Service Card in the name of Archie Gibson. (21T 653, 1-11)

Detective Robert Conrad of the New Jersey State Police then testified that on the night of May 2, he was called to the scene of the shooting of Trooper Foerster at milepost 83. (21T 777, 8-9) At the scene he met Troopers Byrne and Dryer. He testified that at the scene he saw Trooper Foerster's body lying along the right rear side of Trooper Harper's Oldsmobile. (21T 780, 15-17) After having some discussion with Troopers Byrne and Dryer, he was handed a New York driver's license which he identified as "P-1" in evidence (21T 781, 7-8) with the name Archie Gibson on it. (21T 781, 9-10) To the rear of the unmarked vehicle, car number 894, Conrad found a trooper's hat and a flashlight. (21T 792, 5-6) The badge number on the hat, 2108, was Trooper Harper's badge number. (21T 793, 3-5)

He stated that upon examination of the body, he saw lying nearby an automatic pistol with the shells stuck in the breach. (21T 806, 5-7) Also nearby was a clip from an automatic pistol. It was a smaller clip, however, than that which would be used in the gun lying near the body. (21T 806, 21-22) He also found a green hat with a large brim with a metal buckle-type band lying near Foerster's feet (21T 807, 1) and a short distance from Foerster's foot was a spent shell. (21T 807, 2-3) He testified that he saw another automatic pistol just south of Foerster's feet, lying on the shoulder of the road (the pistol with the shell jammed in the breach). It was a Browning automatic. (21T 829, 1-11) He indicated that at the scene he

had seen some spent shells south of car 886 (Harper's car), and found tire marks on the road (21T 836, 17-25), which were made by a car spinning out as it left the scene. (21T 839, 18-19) He noted some damage to Harper's car (21T 839, 21T 845, 21T 852), and some red stains on the right side and door. (21T 853, 1-5)

Sergeant Norman A. Demeter of the New Jersey State Police was then called and testified that on May 2 he was attached with the Field Identification Bureau of the State Police. (22T 3, 1-2) Sergeant Demeter was then qualified as an expert in fingerprint identification (22T 4, 1-7), and after some testimony it was stipulated between counsel that the identity of the black female was that of Joanne Chesimard (22T 165, 3-7), and that the deceased male involved was one James Costan. (22T 165, 9-11) Demeter testified that he began to process the weapons seized, along with Detectives Wilke, Toranto and Carabelli. (22T 165, 20-23) He dusted three automatic weapons and one .38 police weapon for fingerprints (22T 166, 1), but no identifiable fingerprints were readable from the weapons. (22T 166, 11-13) The clips from the automatic weapons were dusted in the same way producing the same result. (22T 166, 19-21)

Demeter, along with Detective Wilke then proceeded to the parking garage in the Administration Building to examine two automobiles, the 1965 Pontiac and Troop Car 886. (22T 192, 22-24) The first one he examined was the Pontiac, which was photographed and

dusted for prints. (22T 193, 19-20) There were no readable fingerprints on the outside of the car. (22T 194, 6-8) Inside the car on the front seat, he saw a red handbag lying on the floor and a small pool of blood and a shell casing. In the back, there was a black leather case which housed a typewriter, several maps (22T 194, 15-21), a handbag on the passenger side in the front, another brown handbag in the back, several books, magazines and maps in the back seat and glass. (22T 206, 23 to 22T 207, 2) He testified that he looked into the handbag that he found on the front seat (22T 207, 5-6), and testified that he found three clips for an automatic weapon in the pocketbook. (22T 213, 24-25) The maps he found in the car were also dusted for fingerprints (22T 215, 7-12), and a latent print was raised. (22T 217, 2-6) On the rear seat was found an unexpended shell (22T 217, 16-17), and in the trunk he fou several suitcases, a brown attache case, a brown duffle bag and clothes. (22T 218, 20-22) In the attache case, he found various papers, while in the suitcases he found a license plate, shotgun shells, bullets, an assortment of clothing, (22T 219, 8-13) and ammunition for a .38 police revolver. (22T 220, 3-19)

After examining the Pontiac, Demeter proceeded to observe Troop Car 886. (22T 21, 10-11) After noting some damage, he stated that he noticed the head of a bullet protruding from a piece of molding near the rear of the car. (22T 222, 11-14) Demeter recovered

a piece of lead from the right rear molding and a piece of lead from the headlight compartment of the car. (22T, 8-10)

After completing these examinations of the cars, Officer Demeter proceed to Perth Amboy General Hospital where he, Detective Wilke and Trooper Strachensky were present to witness an autopsy of Trooper Foerster and James Costan. (22T 228, 15-22) Demeter saw certain bullet heads removed from Foerster's body by Dr. Albano and given to Detective Wilke. (22T 229, 4-9) The ballistic evidence, namely the bullets, was given to Detective Orsman. (22T 230, 13-15) The following day he then proceeded to the Administration Building in New Brunswick where he witnessed several detectives bring in the defendant. (22T 232, 1-17) Demeter photographed the defendant, gave him a neutron activation test, a nail scraping was taken, hair from his head was taken and saw him fingerprinted by Detective Wilke. (22T 233, 2-6) Demeter also photographed a particular wound on defendant's hand. (22T 233, 19-23) Demeter then compared the fingerprints taken by Detective Wilke of the defendant with the latent print he had lifted from the map found in the Pontiac and found that the print from the map was the left middle finger of the defendant. (22T 235, 13-24)

On cross-examination, he admitted that he had dusted and examined four weapons and three clips, none of which yielded any identifiable prints. (22T 264, 1-3)

Trooper George Seitz was called. He testified that on May 2, 1973, he was patrolling on the turnpike between milepost 83 to interchange 8A. He stopped at the time to speak with Trooper Strashinski, who was securing the scene, and as he exited his car to talk with Strashinski, he noticed five spent shell casings lying on the dirt portion of the road, near police car 820. (22T 19, -18) He retrieved the shells and returned them to the New Brunswick station (22T 20, 1-2), giving them to Trooper Carabelli. (22T 20, 13)

Sergeant Herbert R. Ulbrich of the New Jersey State Police was then called. He testified that on the morning in question, he, along with a forensic chemist, George Hickman, was directed to proceed to the scene at milepost 83. (22T 33, 15-16) He checked the scene and noted a large pool of blood on the shoulder of the highway and discovered an expended bullet lying on the right hand lane of the southbound portion of the npike. (22T 33, 21-25)

A "Miranda hearing" was then held outside the presence of the jury to determine the admissibility of a statement allegedly made by the defendant. After hearing testimony from several witnesses and argument, the court ruled that the alleged statement was inadmissible.

The State then called Frank Zygmund, of the East Brunswick Township Police Department. He stated that on May 3rd, he proceeded to the Hearts Lane area where he took part in a search in

which the suspect was apprehended. (22T 134, 1-8) He stated that officers formed a skirmish line and proceeded across the area they wished to search. During the search, as he approached a thicket of young trees, he noticed what appeared to be a body covered with what appeared to be leaves and grass of the surrounding area. (22T 135, 19-24) Officers were called and the suspect apprehended. He identified, in court, the defendant Squire as the man (body) he had found in the field during the search. (22T 136, 14-18) He also added that when the defendant was made to stand up in the field, Zygmund noticed that he had a white jacket wrapped around his left arm. (22T 137, 5) On cross-examination, he admitted that a pat search of the defendant had failed to disclose any weapon. (22T 138, 22-23) A more thorough search conducted later uncovered only a roll of currency. (22T 139, 2-4)

The next witness was Officer Randall Kluj, also of the East Brunswick Police Department. He largely reiterated Zygmund's testimony concerning the capture of the defendant. (22T 143 to 22T 149)

Trooper Douglas Osborne was then called. He largely corroborated the testimony of Zygmund and Kluj. He added, however, that when he observed the defendant at the time of the arrest, he had a wound on the web of his hand, between his thumb and first finger. (22T 153, 1) He also added on cross-examination that no guns or weapons or bullets of any kind were found on the defendant. (22T 161, 17-21)

The next witness was State Police Detective Michael Langan. He testified that on May 4, he proceeded to the Middlesex County Jail where preparations were being made to take a blood sample from defendant Squire. The blood was taken by a Dr. Lind (22T 316, 3-8), in a vial which was put in an envelope, labelled, and taken by Detective Langan to the State Bureau of Identification Laboratory in West Trenton. (22T 316, 11-17)

The next witness was William Gelder, an employee of the New Jersey Turnpike Authority. Gelder testified that his occupation was automobile body repairman. He testified that at sometime during the month of June, he had occasion to work on a gray Oldsmobile, license number SFA 894. (22T 328, 14-17) He testified that in the course of his repair work, as he was about to replace the headliner, he saw a small copper object. He took it down from the inside of the roof, showed it to his superior, who then called a detective who came down and took possession of the object. (22T 329, 1-7)

The next witness was Edward Wilke, a Detective Sergeant of the New Jersey State Police. Defense objected to Wilke's being qualified as an identification expert on the grounds that over a period of ten years he had testified on only four occasions, none of which involved a charge of murder. (22T 340, 4-11) However, Wilke was qualified as an expert over objection. (22T 341, 10-14) As a result of a communication he proceeded to milepost 83. (22T 343,

1-4) At milepost 83, he met Troopers Conrad, Dryer and Byrne and saw several cars parked in a row north of car 886. (22T 343, 17-24) He took photographs of the scene (22T 345, 9-14), especially Troop Car 886 (22T 346, 1-2), and Trooper Foerster's body. (22T 346, 7-8) He noticed the jammed automatic lying near Trooper Foerster's hand, a clip near his knee, a spent shell near his toe, another jammed automatic approximately seven feet from the car and a hat near Foerster's feet. (22T 347, 1-8) He noticed that two of the automatics that he picked up at the scene were jammed open. (22T 350, 10) He saw an automobile registration certification made out to one Isabelle Johnson which he testified he found near Foerster's body when the body was moved. (22T 354, 1-12) He then identified Trooper Foerster's hat as being the hat he had found at the scene.

After securing all evidence found at the scene at milepost 83, he proceeded with Trooper Byrne to milepost 78. (22T 371, 8-10) There he again photographed the scene and collected evidence. He testified that he saw a clip sticking out of the left pocket of the deceased black male, a butt of a gun appearing between his legs and a button. (22T 375, 3-5) Wilke then identified a small Browning pistol which he found lying near Costan's body. (22T 386, 9-16)

Later, he fingerprinted Trooper Foerster and photographed Trooper Harper. (22T 395, 23-25) After leaving the hospital he proceeded back to the Administration Building, where Detective

Challender gave him Chesimard's clothes and some of Trooper Foerster's equipment. (22T 396, 14-17) More ballistics evidence was taken from the Pontiac and turned over to Detective Orsman. (22T 422, 1) He then testified that he attended the autopsy performed by Dr. Albano and identified several photographs of that autopsy. He identified the clothes and equipment Trooper Foerster had been wearing (22T 424), and also identified a webb pistol belt, and a mexican wallet which was removed from the body of James Costan, whose autopsy he also witnessed. (22T 424, 14 to 435, 5) He testified that during the autopsy, he saw Dr. Albano remove three fragments from Foerster's right arm (22T 429, 4), and head. (22T 430, 2-20)

On May 3rd he fingerprinted the defendant. (22T 438, 11-12) He testified that in Sergeant Demeter's presence he compared a latent print and the prints that he had taken from Squire. (22T 439, 1-4) He testified that as a result of that comparison, he made a positive identification of the left middle finger of Clark Squire with the latent print from the map processed by Detective Demeter. (22T 439, 6-9)

Detective Demeter was then briefly recalled to the stand. He testified that in furtherance of his investigation of this case, on June 21, he was directed to proceed to the Hightstown Garage on the turnpike. (23T 73, 11-14) When he arrived there he was approached by Mr. William Gelder, who handed him a copper bullet. (23T 73, 19 to 23T 74, 1)

Clifford Coyle, also of the New Jersey State Police, testified that on May 3, 1973, he had the responsibility of transporting a certain 1965 white Pontiac. (23T 123, 17-19) The Pontiac was placed on a flat bed truck, and Coyle escorted it down to Trenton (23T 124, 4-8), where it was turned over to the laboratory. (23T 124, 10)

Vincent M. Peterson, a detective with the New Jersey State Police stated that in May of 1973, he was assigned as the assistant bureau chief for the Fingerprint Record Bureau for the State Police. He received at that time, a 1965 white Pontiac delivered to the laboratory. (23T 126, 16-17) On May 7, Peterson and Detective O'Donohue and Mr. George Hickman, a chemist, examined the automobile for anything of evidential value, including fingerprints, bullet holes, etc. (23T 127, 6-13) Peterson recovered from the channel of the rear window a bullet with a lead core. (23T 127, 16-21)

On cross-examination, Peterson admitted that he assisted Detective O'Donohue in dusting the car for latent prints, but was unable to raise any. (23T 156, 11-19)

The next witness was Sergeant Lewis Taranto. He testified only as to the chain of evidence of certain items recovered from the vehicles, as did the following witness, Detective Ronald Horstman. Horstman added that he was also asked on September 19th to check out four keys given to him by Sergeant Taranto. He testified that the gold colored key marked "B10" fit and operated a maroon door which

was on the right hand side of the Pontiac. The two keys that were silver in color, fit and operated the ignition of the vehicle. (23T 170, 1-6)

On cross-examination, Horstman admitted that while the two silver keys fit the ignition and turned the lock, they were unable to start the car, presumably because the battery was dead. (23T 178, 17-18) No one ever attempted to start the car with the keys with a good battery. (23T 178, 20-25)

John Lintott, a State Police ballistics expert, was qualified as an expert (24T 197) and identified the following items: P-8, a revolver (24T 199, 1-4); P-71, a .38 caliber Llama super auto P-53 as a Browning 380 caliber automatic pistol; and P-76, a Browning 9mm Luger caliber automatic pistol. (24T 210, 6-19) He stated that he tested the above weapons and pieces of ammunition and arrived at the following conclusions: P-131, a silver shell, had been fired from P-71, the 38 super auto; P-132, being shells from the 38 caliber Llama pistol (24T 221, 7-8); a bullet recovered from Harper's car which had been fired from the Llama (24T 227, 13-15); P-88, P-108 and P-149 as bullets also fired from the Llama (24T 231, 9-11 and 24T 233, 13-17); several rounds and clips which fit the Browning. (24T 238 and 24T 239)

Lintott then identified "P-142" and 127, another metal jacketed bullet (24T 242, 16-20), which he testified that his tests

showed that this bullet had been fired by the 9mm caliber Browning automatic, "P-76." (24T 243, 1-10)

Over objection (24T 260), Lintott testified that he compared "P-48" in evidence as being Costan's holster with the 9mm Browning and found that because of the stretch marks in the holster, he determined that these marks corresponded to the protruding parts of the gun (24T 261, 5 to 24T 262, 10) concluding by stating that he felt that a 9mm Browning had been carried in that holster. He did admit that another gun could have been carried in the holster on the night in question and still have found the stress marks from the Browning in it. (24T 270, 12-14)

He then testified that "P-53" in evidence (the Browning 380 caliber automatic pistol) found by Costan's boot was examined in the laboratory and found to be operable and having blood stains on it. (24T 271, 22-24) He testified that the serial number had been removed from the Browning 38 automatic and the 9mm Luger caliber automatic. (24T 272, 20-24) Through a chemical process he was able to restore the serial number on "P-53" in evidence, the number being "71N12237". (24T 273, 19) He then identified "P-158" for identification as being six 380 caliber metal jacketed bullet cartridges (24T 275, 12-15) and "P-122", a 380 caliber discharged shell casing (24T 276, 11-12), which he testified had been fired from the 380 caliber Browning automatic pistol. (24T 276, 15-19)

He then identified "P-8" in evidence as being Trooper Harper's 38 special caliber colt revolver. (24T 281, 16-24) He then identified "P-84" for identification, which consisted of five shells for a 38 special caliber revolver (24T 282, 3-12), which he determined had been fired from Trooper Harper's revolver (P-8). (24T 282, 17) Lintott then identified "P-52" as being the special Smith and Wesson revolver issued to Trooper Foerster (24T 290, 14-25), and "P-123" as being some discharged shells of 38 special caliber. (24T 291, 16-18) He testified that his comparison tests showed that these shells had been fired from Foerster's revolver. (24T 291, 21-25) He then identified "P-140 and P-141" for identification stating that it was a bullet which his tests indicated had been fired from Foerster's revolver. (24T 293, 1-8)

The next witness was Dr. Edwin Albano, Medical Examiner for the State of New Jersey. Dr. Albano was qualified as an expert (24T 367), and then testified that he performed a post-mortum examination of the body of Werner Foerster, at the Perth Amboy Hospital Morgue on May 2, 1973. (24T 367, 19-22) He stated that when he first saw Foerster's body, he was wearing a light blue uniformed shirt, bloodstained with two holes in it; light trousers, bloodstained; a white undershirt, bloodstained with a hole in the front of it; and bloodstained shorts. (24T 368, 8-25) Clothes were then admitted into evidence over defense objection. (24T 371) He found the following marks of injury: A bullet wound

of entrance on the left side of the neck with powder marks surrounding the entrance of the wound (24T 373, 1-7), passing through the skull. The bullet, of large caliber and distorted, was found lodged at a point near the scalp. (24T 373, 12-22) There was also a second bullet wound of the head with the wound of entrance situated back and above the left ear. (24T 374, 7-11) There were no powder marks noticable near this wound. The bullet also passed through the skull and the brain and lodged near the point where the spinal cord meets the brain. (24T 374, 16 to 24T 375, 14) This was also a large caliber, distorted, lead bullet. (24T 375, 7-10) Albano also found a bullet wound of entrance in the right chest which also had no indication of blacking or scorching or gun powder marks. (24T 375, 15-22) There was,however, a broad scrape or abrasion just below the wound of entrance. (24T 375, 22-23) This bullet passed through muscle and tissue in the right chest and part of the lower right lung, and exited at a point on the outside of the right shoulder. (24T 376, 2-10) There was another bullet wound of entrance in the front of the right arm, slightly about 16 inches below the right shoulder. (24T 376, 16-18)

Other wounds found by Albano were abrasions of the left cheek, laceration of the scalp about four inches back from the bridge of the nose, laceration of the left side of the head and various other small lacerations, of the left thumb, left index

finger, middle forefinger, scattered bruises over the skin of the right leg, and small scattered abrasions on the back of the right hand. (24T 377, 17 to 24T 378, 13) In his opinion the weapon from which the bullet was fired that made the wound entering the neck was fired at a distance of at least six inches but not more than 18 inches from the body. (24T 386, 11-14) The doctor stated that death was due to bullet wounds of the head with lacerations, abrasions and hemorrhaging of the brain. (24T 386, 24-25)

Albano then testified that he also performed a post-mortum examination of one James Costan. (24T 389, 20-25) He found a bullet wound of the chest, which showed no powder marks, which continued through the chest into the lung and liver and exited out the lower right back. (24T 395, 1-21) Death was determined to be due from the bullet wound perforating the right lung and liver with massive hemorrhage in the right chest cavity. (24T 397, 1) Over objection, the doctor testified that one receiving such a bullet wound would collapse and fall to the ground immediately. (24T 399, 12 through 13)

The next witness was Frank J. Tonaino, Dr. Albano's assistant. He testified that on the second of May, he assisted with the autopsy that was performed on Werner Foerster and James Costan. (24T 401, 12-14) He testified that he took blood samples from Foerster and Costan and turned them over to Detective Wilke. (24T 402, 1-10)

The next witness was Deputy Chief of Police Edward John Mullin from Perth Amboy. Defense objected to his qualifications as an expert to testify about an injury to Squire's hand, since during the voir dire he stated that he would be unable to tell that a specific injury was caused by a specific weapon. (24T 420) The court overruled the objection to Mullin's expertise (24T 427), and Mullin then stated that the most common type of injury one receives from an automatic weapon is due to the slide of the weapon hitting the web portion of the hand due to an improper grip with the hand being too high on the handle of the weapon. (24T 428, 11-14) By the webbing, he meant the portion between the thumb and index finger. He testified further that when this type of injury occurs, it also slows down the action of the slide and can possibly cause a jamming in the pistol. (24T 429, 3-4) Mullin examined "P-109" and "P-110" (pictures of Squire's hand) and testified that he had seen this injury numerous times on persons who have mishandled or misfired an automatic weapon. It was the classic type of injury that he had previously described from holding a weapon with the hand too high on the handle. (24T 430, 7-10) This testimony was admitted over objection. (24T 432) Mullin then testified that of the three weapons he examined, the Browning 380 caliber automatic weapon is the one most likely to have caused the injury shown in the photographs. (24T 433, 14-15)

He admitted on cross-examination that any one of the three guns, if held improperly, could inflict an injury of the same type. Also that each one had a safety notch which is the part of the slide that would actually cause the injury to one's hand. (24T 442, 2-14) He further admitted that he could not say with certainty that particular injury could only be caused by the misuse of the particular gun, "P-53." Defendants' motion that this testimony be stricken was denied. (24T 444, 24)

The next witness was George Hickman, a Principal Forensic Chemist with the New Jersey State Police. Hickman was stipulated to be an expert in the area of blood groupings (24T 502), and over objection, was qualified as an expert in regards to bullet holes in fabric and metal. (25T 509, 5-10) He examined blood specimens and classified and typed the groups of that blood (25T 509, 16-18), to wit; type "O" blood was that of Costan; apparently Squire was also type "O"; Chesimard was type "B"; and Foerster was type "AB." (25T 512, 20 to 25T 513, 2) Hickman then testified that he examined "P-53" (which was the 380 automatic) and found traces of blood type "O". (25T 514, 4 to 10) He then examined Foerster's equipment. On "P-52", Foerster's revolver, he found type "O" blood. (25T 515, 5) On "P-56", Foerster's holster, he also found type "O" blood. (25T 515, 16) He also found type "O" blood on Foerster's belt buckle, pants and hat. (25T 516, 1-21) On "P-135", Foerster's shirt, he

found type "AB" blood. (25T 51[illegible] 2-3) On "P-144", a hubcap, he found type "AB" blood. (25T 518, 2) And on "P-173", the steering wheel from the white Pontiac, he found type "AB" blood. (25T 520, 12-13) On the interior of the Pontiac, over objection, (25T 523), he testified that he found type "O" blood on the right side of the left seat. (25T 522, 6-7) Type "B" blood on the right side of the roof and exterior passenger side, and on the driver's side handle. (25T 523, 18-20)

Hickman continued testifying stating that on "P-45", a jacket, and "P-47", he was unable to find any identifiable blood, although bloodstains were found. (26T 532, 11-12) But on "P-46" he found type "O" blood. (T 533, 12-13) He next tested Chesimard's clothes for blood, and found type "AB" on her jacket, and traces of type "B" on the jacket cuff. (26T 535, 1-4) On "P-76", a green hat, he found type "AB" blood. (26T 535, 10-12) On the right side doors of car 886, he also found type "AB" blood. (26T 536, 20-21)

He further testified that he found bullet holes on a portion of the roof and near the rear window of the white Pontiac. (26T 537, 23-25) Over objection as to competency, he stated that one of the holes indicated that the bullet had been fired from within the car. (26T 541, 4-25) He then testified that he examined "P-88", a bullet, and found traces of glass imbedded in it. (26T 544, 12-14) He testified the clothes of both Costan and Chesimard showed no

traces of powder burns around the bullet holes. (26T 545, 1-18)

After this the State rested and defense made motions as follows: A motion for a judgment of acquittal with respect to Indictment 1436-72 (27T 2), and that the 4th, 5th, 3rd and 6th count of the indictment (assaults on Harper) be dismissed on the ground that there was no evidence of any conspiracy or activity on the part of defendant Squire towards Trooper Harper. (27T 6, 3-6) Defense counsel argued that there was no proof that Squire aided and abetted anyone with respect to the attack on Harper. (27T 7, 2-8) Defense counsel then argued that if the court chose not to dismiss these counts against Mr. Squire, then the 3rd, 4th, 5th and 6th counts should be merged and regarded as one charge of assault with intent to kill or assault and battery on a police officer, or assault with an offensive weapon. (27T 12, 13-24) Defense argued that the seventh count should also be dismissed since all of the weapons were not only in the automobile but in the personal possession of Costan and Chesimard, therefore, not attributable by way of constructive possession to Squire. (27T 20, 6-13)

The court ruled as follows: The motion to delete the name of James Henry Walker from the caption of the matter was granted (27T 73); motion to delete the name of Archie Gibson was denied (27T 74); the motion for directed verdict as to the first count of the indictment was denied (27T 74, 6-10); motion as to the

second count was granted (27T 81); motion on the 3rd, 4th, 5th and 6th counts were also denied (27T 76). The court noted also that the merger of the counts would take place at sentencing. (27T 75, 1-7) On the 7th count, the motion was denied. (27T 82)

Following this, the defense called its first witness, Dr. David M. Spain. After stating his qualifications as a physican and pathologist, Dr. Spain stated that he had sat at counsel's table in the court and heard testimony of two witnesses, in particular the testimony of Deputy Chief Mullin. (27T 86, 1-11) He also had occasion to review three photographs in respect to alleged injuries of the hand of the defendant. (27T 86, 7-11) He also examined a particular weapon, namely, the 380 Browning automatic pistol, P-53, in evidence. (27T 88, 19-24) His opinion was that he did not believe that the weapon could have caused the injury to the hand. (27T 92, 20-21) Dr. Spain continued testifying, stating that he had listened to the testimony of Dr. Albano and read a copy of Dr. Albano's autopsy report with respect to James Costan. (27T 93, 1-7) He testified that in his opinion Costan could have survived a period of time from a few minutes to 3/4 of an hour or more with the injury he had received. (27T 93, 24-25) He further stated that Costan actually could have been active for a period of time with the injuries he had sustained. (27T 96, 12-13) He further stated that the individual could not collapse until enough time had passed where he had lost enough

blood to throw him into shock. (27T 96, 19-20). The defense then rested, and renewed its motions made at the end of the State's case, which were denied by the court. (27T 127)

Following summations and the charge, the defendant was found guilty of all counts.

On May 3, 1974, a motion for a new trial was made before Judge Bachman. At this time, the defense stated that the motion was actually four motions. (1) A motion for a new trial to set aside a jury's verdict(which was actually a continuation of the motion made at the end of the trial), and a motion for a new trial based on the fact that the verdict was against the weight of the evidence; (2) A motion to return certain monies of Squire's allegedly seized from him by the police; (3) A renewed motion for leave to challenge the panel of the original jury selection in Morris County, and (4) A motion by the State to strike certain statistical data having to do with the motion on attacking the panel. (30T 2)

The court stated it would adjourn the motion to attack the panel to a later date when Mr. Brown would be available to argue it. (30T 4) The court ruled that upon receipt of a satisfactory affidavit, the monies of the defendant would be returned to him. (30T 5) The motion for a new trial was denied. (30T 13)

At sentencing, defense moved that the 3rd, 4th and 5th counts, involving assaults, be merged and considered for the purposes

of sentencing, as one offense. He also asked that the armed robbery count be merged with the first count - murder in the first degree, as a concept of felony murder. (31T 3) The court then merged the 3rd, 4th and 5th counts into the 6th count, granting that motion. (31T 5) The court denied the defendant's motion to merge the possession of a weapon count into the murder count. (31T 11)

Defendant was sentenced by Judge Bachman to life imprisonment on the first count; 10-12 years on the sixth count; 2-3 years on the seventh count and 12-15 years on the eighth count. All sentences to be served consecutively. (31T 41)

LEGAL ARGUMENT

POINT I

JOINT REPRESENTATION OF DEFENDANT BY CO-COUNSEL, ONE OF WHOM WAS COUNSEL FOR A SEVERED CO-DEFENDANT, VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Defendant Squire was indicted with co-defendant Joanne Chesimard. (Da-1 to Da-5) At the start of the trial Squire was represented by James T. McKinney, Esq., and Chesimard jointly by Evelyn Williams, Esq. and Raymond Brown, Esq. McKinney and Williams were New York attorneys appearing in New Jersey on a pro hoc vice basis, with Raymond Brown acting as supervising attorney for both, as well as retained counsel for Chesimard. During the jury voir dire, however, it was discovered that defendant Chesimard was pregnant. Thereafter, over a defense objection, a severance was granted. (14T 10) Mr. Brown, who had been retained by defendant Chesimard's family (14T 20, 21-25), was then told by the Court that as "supervising attorney" he would be responsible for both the present trial and for the later-expected trial of Chesimard. (14T 19, 2-14) The following colloquy then ensued:

But the law of the case is that Mr. Brown has sponsored both of you. I don't want to hear anything about it. I didn't set it up.

I don't want to hear a single, solitary word about it,--

MRS. WILLIAMS: Well, may I--

THE COURT: --the conflict of interest problem.

MRS. WILLIAMS: Your Honor, may I just say this: would your Honor at least consider, prior to making a decision on the Prosecutor's motion, having both--

THE COURT: And if--let me say this: if there be any possibility of conflict of interest, then it's almost incumbent upon me to grant the Prosecutor's motion.

Think that one over. You just said there's a possibility of conflict of interest. If there is, then I have no choice but to grant this motion.

MRS. WILLIAMS: Your Honor, it is my very distinct impression that Mr. McKinney, Mr. McKinney's admission before the Courts of New Jersey was based on the sponsorship of Mr. Brown, who is retained by the family of Chesimard to represent her.

At no time has it been my understanding that he also represented defendant Squire.

THE COURT: Well,--

MRS. WILLIAMS: Except in that role.

THE COURT: We'll let you read Judge-- the transcript of Judge Gerofsky's ruling.

MRS. WILLIAMS: I have it.

THE COURT: All right. He's responsible, he's the New Jersey attorney responsible for both of you and, as such, must have a New Jersey attorney in the courtroom at all times, even on a separate processing, and there is no question about that. (14T 19 to 14T 21, 13)

Again, just prior to the start of the trial attorney Brown, apparently sensing a possible conflict of interest situation developing, represented to the court that he wished to withdraw from the case. (19T 2, 16-18) He pointed out that he had been retained only by Chesimard's family and, although he had agreed to the joint trial originally, he felt that since the severance a conflict situation would arise. (19T 2, 16 to 19T 3, 7) The court denied his request but stated that a member of Mr. Brown's firm could sit in for Mr. Brown. (19T 3, 8 to 19T 5, 7)

Following this, attorney Brown not only attended the trial daily as supervising attorney, but, while still retained by Chesimard, actually took part in the trial, ostensibly on behalf of Squire, conducting several key examinations. It is of this

participation as well as the "supervision" of Squire's attorney that the defendant now complains. Defendant submits that the dual representation of possibly adverse parties by the same attorney violated defendant Squire's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments, for two reasons: (1) that Mr. Brown's allegiance to his retained client, Chesimard, prevented him from vigorously pursuing all avenues of defense for Squire, and (2) that Brown's role as "supervising attorney" had a chilling effect on the defense put forth by Squire's retained attorney, Charles McKinney.

The United States Supreme Court declared in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932), that a criminal defendant has a right to the "effective appointment" of counsel as an integral part of his "right to counsel" as that term appears in the Sixth Amendment to the Constitution.

The full protection of the Constitutional right of a criminal accused requires that judicial scrutiny focus upon the competency or adequacy of representation afforded to such persons. This is especially so in cases involving court-appointed defense counsel. As was stated by Mr. Justice Black in Von Moltke v. Gillies, 332 U.S. 708, 725-26; 68 S. Ct. 316 (1948),

> "Undivided allegiance and faithful devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And, nowhere is this service deemed more honorable than in the case of appointment to represent an accused too poor to hire a lawyer."

The State of New Jersey is, of course, in full concurrence with the Federal position as is shown by State v. Ercolino, 65 N.J. Super. 20, 27-28 (App. Div. 1961):

> "The right of an accused in a criminal case 'to have the assistance of counsel in his defense' is granted by our Constitution, N.J. Constitution (1947), Art. I, par. 10. When counsel is assigned at the request of a defendant he becomes bound to fully and faithfully serve the interests of his client within the boundaries of professional ethics. His duties include not only the extremely important matter of satisfying himself that the defendant understands the nature of the charge laid against him, and the consequences of a plea of guilty, but also of fully acquainting himself with the nature of the charge and the facts of the case so that he may informally advise the defendant concerning the same."

This principle was reaffirmed recently in the case of State v. Anderson, 117 N.J. Super. 507, 520-521 (App. Div. 1971), mod. and aff'd 60 N.J. 437, in which it was held that:

> "Defendant was entitled to the effective assistance of competent counsel. He cannot be left to the mercies of incompetent counsel. It is one of our functions to assure that attorneys representing defendants in criminal cases maintain proper standards of professional performance."

The Federal Courts have often held that the assignment of counsel in a state prosecution under such circumstances as to preclude the giving of effective aid in the preparation and trial of a case is a denial of due process of law. Reece v. Georgia, 350 U.S. 85, 76 S. Ct. 167 (1955): Powell v. Alabama, supra; Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321 (1940).

Yet, what is meant by "effective assistance of counsel"; what standards are acceptable?

A defendant is entitled to the individual loyalty and attention of counsel. The leading United States Supreme Court case, Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) states:

> "...The 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that said assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." 62 S. Ct. at 465.

That court further pointed out: "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness " (62 S. Ct. at 467) See also Government of Virgin Islands v. Hernandez, 476 F. 2d 791 (3rd Cir. 1973).

The Third Circuit has also confronted the issue. In United States ex rel. Hart v. Davenport, 478 F. 2d 203 (1973), the Court of Appeals held that:

> The legal standard to be applied to a claim of prejudice from joint representation is clear enough. The right to counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead [citation omitted] and during trial [citation omitted]. Recognizing that the right to such assistance of counsel may be waived [citation omitted], we have refused to find any such waiver from a silent record. [Citations omitted]. We have not yet held that the coincidence of joint representation and a silent record is alone enough to require relief [citation omitted]. On the other hand, we have rejected the approach that before relief will be considered the defendant must show some specific instance of prejudice. [Citations omitted].

> Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective. [at 209-210]

Further, the Third Circuit has held that while representation of co-defendants by the same attorney is not tantamount to denial of effective assistance of counsel guaranteed by the Sixth Amendment, there must only be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find joint representation as constitutionally defective. Walker v. United States, 422 F. 2d 374 (3rd Cir. 1970), cert. den., 399 U.S. 915, 90 S. Ct. 2219, 26 L. Ed. 2d 573 (1970). This test is applicable to State proceedings. United States ex rel. Hart v. Davenport, supra at 210.

The ABA Project Standards for Criminal Justice, Standards Relating to the Defense Function (Approved Draft, 1971), at §35 and commentary at p. 214 counsels strongly against joint representation noting among other things that:

> "The weaker defense may often detract from the stronger, and a lawyer may find to assert a point vigorously for one client operates to disparage the other or put him in a bad light. Such situations underscore the need for separate representation...[T]he risk of an unforeseen and even unforeseeable conflict of interest developing

> is so great that a lawyer should decline multiple representation unless there is no other way in which adequate representation can be provided to the defendants."

Nor will it do to show the defenses were consistent. Sanchez v. Nelson, 446 F. 2d 849 (9th Cir. 1971); For this reasoning is often circular, since it is clear that the very fact of joint representation frequently prevents the development of real differences and strategies. The test remains that set forth in United States ex rel. Hart, supra: whether there exists a possible conflict of interest or prejudice. However remote, this will render the joint representation constitutionally defective.

It is possible, of course, to waive one's right to effective assistance of counsel by ratifying, in effect, a conflict of interest arising from joint representation. Hart, supra at 209, 210. While the right to such assistance of counsel may be intelligently and knowingly waived, a waiver cannot be found on a silent record. Government of Virgin Islands v. Hernandez, supra, Government of Virgin Islands v. John, 447 F. 2d 67 (3rd Cir. 1971). There is a duty on the trial judge to preserve the defendant's right to effective assistance of counsel and "to indulge every reasonable presumption against waiver." Glasser, supra, 62 S. Ct. at 465. Further, it makes no difference that counsel was retained rather than assigned as in Glasser. United States ex rel. Hart v. Davenport, 478 F. 2d 203 (3rd Cir. 1973);

State v. Ebinger, 97 N.J. Super. 23 (App. Div. 1967); Campbell v. United States, 352 F. 2d 359 (D. C. Cir. 1965). A growing number of courts have come to recognize the importance of the need for an affirmative finding of waiver on the record by the trial judge. Campbell v. United States, supra; Lollar v. United States, 376 F. 2d 243 (1967); United States v. Lovano, 420 F. 2d 769 (2nd Cir. 1970); United States v. Foster, 469 F. 2d 1 (1st Cir. 1971), Government of Virgin Islands v. Hernandez, supra, United States v. Deberry, 487 F. 2d 448 (2nd Cir. 1973), State v. Green, 129 N.J. Super. (App. Div. 1974). Such a waiver will not be founded on a silent record. Hart, supra. In fact, New Jersey courts have recommended that trial courts conduct voir dires whenever a possible conflict situation arises. State v. Green, supra.

The above being the current state of the law, the questions presented here are: (1) was there a conflict of interest in the participation by Mr. Brown in Squire's defense; (2) was defendant Squire prejudiced therefrom; and, (3) did Squire waive his right to effective representation.

That a possible conflict existed seems obvious. All three defense counsel recognized this and informed the Court of the conflict on at least two occasions. (14T 19 to 14T 21, 13 and 19T 2, 16-18) The Court not only rejected counsels' arguments, but indeed ordered Brown to be present

at Squire's trial. This, defendant submits, was error. (It should be noted here that this claim of error is actually two-fold: that the Court erred in ordering Brown to continue as "supervising" attorney and that the Court and counsel McKinney erred permitting Brown to take an active part in the trial. Since the constitutional right to effective assistance of counsel does not depend on court or counsel requesting same, and since the Court has the ultimate responsibility of assuring the defendant a fair trial, the error must be ascribed to the court.)

The most recent New Jersey case on the issue at bar is State v. Green, 129 N.J. Super. 157 (App. Div. 1974). In that case one Guida, a hitchhiker, was given a ride by Green. Green's van was stopped by the police, narcotics were found in the van, and Green and Guida were charged with possession of a controlled dangerous substance. Green, at 160. Both were represented by one counsel and both convicted. Guida appealed claiming that he was denied effective assistance of counsel because of the conflict of interest between himself and Green. The Court agreed, holding that this case required separate counsel for each defendant, since the defense of each depended upon placing the possession of the narcotics with the other. Green, at 163. The Court, citing with approval State v. Ebinger, 97 N.J. Super. 23, 27 (App. Div. 1967) stated:

> The right to adequate and effective representation by counsel is so fundamental that invocation of it cannot be made to depend on a showing of prejudice [citations omitted]. Moreover, where, as here, a substantial conflict of interest is present, the matter of adequate and effective representation falls into a shadowy area which is almost impossible to probe.*** [State v. Ebinger, 97 N.J. Super. 23, 27 (App. Div. 1967)] cited in Green, at 163.

Thus, in Green, the Appellate Division found a conflict when it recognized that the best defense for each defendant would be to attribute the possession of the narcotics to the other. Green, at 163. Likewise, in the present case, the obvious, and perhaps only, defense for Squire was to attribute the murder and assaults only to Chesimard. Such a defense would have been reasonable and perhaps even believable considering the State's own evidence. For instance, Harper had testified that, prior to the shooting, Squire had cooperated with him completely; that he never saw Squire with a weapon; and that Squire had not been firing at him (19T 542, 13-14); and, most tellingly, that Squire had not communicated with Chesimard or Costan at any time during the occurrence. (19T 537) Considering these facts, it is conceivable that the jury could have believed that Squire did not murder Foerster, rather Chesimard did, and that he did not

share the common intent with Chesimard and Costan to be found guilty of assaulting Harper as an aider and abettor. The theory that could have been reasonably advanced, based on Harper's testimony and other evidence was that no common plan existed between Squire and Chesimard before the shooting; that while Squire had no intent to murder or assault (as evidenced by his cooperation with Harper), he reacted against Foerster in self-defense after Chesimard, ex parte, shot Harper; and that after Harper fled and Squire had wounded Foerster in self-defense, Chesimard executed Foerster with his own weapon. While this theory may not have been believed by the jury, it is submitted that it was an obvious theory to advance as suggested by the evidence. However, nowhere is this theory ever clearly espoused. The closest the defense comes to it is in the cross-examination of Dr. Albano and the testimony of Dr. Spain, where it is very indirectly suggested that Costan may have lived long enough to shoot Foerster.

But however tenable or untenable this theory may be, the question remains as to why two experienced lawyers failed to vigorously pursue this or related defenses. Why was no clear defense theory ever outlined to the jury during openings or closings? Why did the defense try to attribute Foerster's murder to the mortally wounded Costan, instead of the slightly

wounded Chesimard (who was still ambulatory at her capture (21T 62, 12-24))? Why was not the blame shifted to the instigator and prime mover of the occurrence, Joanne Chesimard? As in Green, one can only surmise that because of the joint representation by an attorney who expected to face trial as Chesimard's attorney was the defense of Squire restricted. The case at bar, as in Green, was one in which the defense of one defendant could result in conviction of the other. Conflict was alarmingly obvious and clearly called for Brown to be replaced as "supervising" attorney and especially demanded that he take no active part in the trial. He most certainly should not have examined key witnesses who could, while aiding Squire, shift the guilt to Chesimard. It is patently clear that participation by Brown in Squire's trial was in obvious conflict with his representation of Chesimard. As outlined in Hart:

> ...upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective. Hart, supra at 209, 210. (emphasis added)

We next turn to the question of prejudice. It is clear, first of all, that when a possible conflict, however remote, (Hart, supra) is shown, the defendant need not point to any particular prejudice to him resulting therefrom. State v. Ebinger, 97 N.J. Super. 23, 27 (App. Div. 1967).

In Ebinger, the defendant was convicted of armed robbery while a co-defendant, represented by the same counsel, entered a plea of guilty to the same charge and testified against Ebinger prior to his own sentencing. Ebinger at 25. Thus, one counsel represented a man pleading innocence and a co-defendant admitting his guilt and hoping for a lighter sentence through his cooperation with the State by testifying against the former. The State conceded the conflict but alleged that no prejudice resulted from it. The court disagreed, holding:

> The right to adequate and effective representation by counsel is so fundamental that invocation of it cannot be made to depend on a showing of prejudice. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). See Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (2); Porter v. United States, supra. Moreover, where, as here, a substantial conflict of interest is present, the matter of adequate and effective representation falls into a shadowy area which is almost impossible to probe. We hold that in the circumstances here presented defendant did not have adequate and effective representation at trial in the constitutional sense and that, irrespective of the question of actual prejudice, his conviction cannot stand.
> Ebinger, at 27.

See also, Porter v. United States, 298 F. 2d 461 (5 Cir. 1962); United States ex rel. Platts v. Myers, 253 F. Supp. 23 (E. D. Pa. 1966).

It is submitted, however, that even though a showing of prejudice is not required, it is obvious in the case sub judice from the record. As discussed in detail above, all theories of defense were not vigorously pursued, no clear theory of defense ever presented to the jury in openings or closings, and the long aimless cross-examinations of State's witnesses never pointed toward Squire's innocence at the expense of Chesimard. Most tellingly, the unreasonable course of trying to place the murder weapon in the hands of the mortally wounded Costan, through examination of Lintott, Albano and Spain was followed instead of accusing the only slightly wounded Chesimard. All of this must lead inescapably to the obvious conclusion that Squire's attorneys were not prepared to defend Squiare at the risk of eliciting damaging testimony which could possibly be later used against Chesimard.

The same situation existed in United States ex rel. Platts v. Myers, 253 Supp. 33 (E. D. Pa. 1966). There the court stated:

> "The testimony of the two confederates clearly implicated the relator, but the relator's plea of not guilty clearly indicated his contention that he was not

> involved in the robbery. The lawyer was thus in a very awkward position. On the one hand his job was to present the best possible case for the petitioner, and this involved the impeachment of his other two clients who were witnesses for the Commonwealth. On the other hand, he also had the task of protecting them. Since the Court had deferred their sentencing until after petitioner's trial, it seems obvious that the severity of their sentences depended in large measure on their testimony against the relator and their general cooperation with the prosecution. If the attorney had succeeded in impeaching these two witnesses for the relator's benefit, he would have destroyed the effectiveness of their testimony and thus vitiated the very factor that would have weighed heavily in their favor when they came up for sentencing. No attorney could have effectively advocated both these positions simultaneously.
>
> * * *
>
> Whether or not prejudice existed, it is sufficient to constitute a violation of the relator's constitutional rights if the lawyer is serving conflicting interests." Platts, at 24, 5.

Likewise, defendant Squire, as do all defendants, had a right to nothing less than the undivided loyalty of counsel. Thus, although prejudice need not be shown, when it is apparent, as in

the case at bar, it is an even more compelling reason mandating reversal.

Finally, it is submitted that defendant did not waive his right to effective assistance of counsel.

As noted in Campbell v. United States, 352 F. 2d 359 (D. C. Cir. 1965), an individual is rarely sophisticated enough to evaluate the potential conflicts.

> "Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes an affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the unavailability of assigned counsel." Campbell, p. 360.

The right to effective assistance of counsel is a constitutional right too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser, supra, 62 S. Ct. 467. Accord: State v. Ebinger, supra.

Moreover, not only will waiver not be presumed from a silent record (Government of Virgin Islands v. Hernandez, supra), but the New Jersey courts have clearly outlined the procedure to be followed in the face of a possible conflict. In State v. Green, supra the Court stated:

> Whenever an instance of dual representation appears, it would be appropriate for the court to conduct a voir dire at the earliest convenient time to determine whether or not all defendants thus represented have been fully informed of the potential hazards of such a course. If they have been fully informed and still elect to proceed in that fashion, their willingness to do so should be made a matter of record.[1] If this procedure is followed it will be unnecessary for an appellate court to decide on a silent record whether or not a defendant has been denied his constitutional right to effective assistance of counsel by joint representation. Green, at 162.

Not only was this procedure not followed in the case sub judice, but to the contrary, when counsel pointed out the possible conflict to the Court, the court simply replied that it was not interested in the problem. (14T 19 to 14T 21, 13) The court apparently felt that the matter had been settled by Judge Gerofsky in ordering Brown to be "supervising attorney" (14T 19), and that since Brown could substitute a member of his firm, there would be no conflict. (19T 3, 8 to 19T 5, 7) Both reasons are incorrect. Judge Gerofsky's ruling was made when there was to be a joint trial. His reasoning was no longer cogent after the severance.

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1. See Code of Professional Responsibility, DR 5-105(C), for the nature of the obligations imposed on the attorney electing to represent multiple clients and see also Standard 3.5 of the ABA Project on Standards for Criminal Justice, "Standards Relating to the Defense Function" (Approved Draft 1971).

Secondly, it is clear that a conflict would have remained even if Brown had substituted an associate for himself.

In sum, it is clear defendant Squire was denied effective assistance of counsel. It is obvious that a defense attorney devoted solely to the interests of Squire would have emphasized the absence of evidence against him in comparison to that against Chesimard. It is also obvious that any effort to negate this evidence as to Squire would have the inevitable reaction of focusing attention on Chesimard, Brown's other client. By the very fact of his representation of both, Brown was restricted in both argument and scope of questioning and thereby prevented from maintaining a vigorous defense on Squire's behalf. Such being the case, reversal is mandated.

POINT II

THE COURT ERRED IN QUALIFYING CHIEF MULLIN AS AN EXPERT WITNESS AND PERMITTING HIM TO TESTIFY OUTSIDE THE SCOPE OF ANY ALLEGED EXPERTISE.

Deputy Police Chief Edward Mullin testified that for 23 years he had been a firearms instructor and had extensive experience with firearms. (24T 405) He also testified that he had observed injuries caused by the mishandling of automatic pistols. (24T 406, 15-24) Over an objection to his qualifications as an expert, Mullin was permitted to testify as follows:

Mullin stated that the most common type of injury one receives from an automatic weapon is due to the slide of the weapon hitting the web portion of the hand due to an improper grip, with the hand being too high on the handle of the weapon. (24T 28, 11-14) By the webbing, he meant the portion between the thumb and index finger. He testified further that when this type of injury occurs it also slows down the action of the slide and can possibly cause a jamming in the pistol. (24T 29, 3-4) Mullin examined "P-109" and "P-110" (pictures of Squire's hand) and testified that he had seen this injury numerous times

on persons who have mishandled or misfired an automatic weapon. It was the classic type of injury that he had previously described, resulting from holding a weapon with the hand too high on the handle. (24T 430, 7-10) This testimony was admitted over objection. (24T 32) Mullin then testified that of the three weapons he examined, the Browning 380 caliber automatic weapon is the one most likely to have caused the injury shown in the photographs. (24T 433, 14-15)

He admitted on cross-examination that any one of the three guns, if held improperly, could inflict an injury of the same type. Further, each one had a safety notch which is the part of the slide that would actually cause the injury to one's hand. (24T 442, 2-14) He further admitted that he could not say with certainty that that particular injury could only be caused by the misuse of the particular gun, "P-43." He further admitted that upon looking at the photographs he could not say that the injury was caused by the gun slide to the exclusion of any other source. (24T 449, 8-10) A motion to strike his testimony was then denied. (24T 449, 17-19)

Defendant here submits that although it may have been within the Court's discretion to qualify Mullin as a firearms expert, the Court erred in permitting Mullin to testify as to the cause of the injury to Squire's hand since this testimony

was outside the scope of Mullin's expertise and not properly the subject of expert opinion testimony.

Generally, the opinion of witnesses possessing peculiar skill is admissible in evidence whenever the subject matter of inquiry is such that inexperienced persons are unlikely to be capable of forming a correct judgment upon it without such assistance. Nesta v. Meyer, 100 N.J. Super. 434 (App. Div. 1968); Pincus v. Sublett, 26 N.J. Super. 188 (App. Div. 1953). The decision as to whether a witness possesses expertise in a specific area and whether that expertise is necessary, is discretionary with the judge. State v. Griffin, 120 N.J. Super. 13 (App. Div. 1972). But it has always been the law in New Jersey that the Court commits error when it allows a witness to express an opinion where there is no evidence to show expert knowledge of the subject under inquiry. Riley v. Camden and T. Ry. Co., 70 N.J.L. 289 (E & A 1904). Similarly, it is error to allow expert testimony in an area which does not require that expertise. "In the final analysis the inquiry must of necessity be whether the jury needs the witness' inference, either because of his skill or because his 'observed data' does not lend itself to adequate reproduction. Wigmore, section 1925." Priest v. Poleshuck, 15 N.J. 557, 564 (1954). In the first instance, the error is that of incompetence. In the second instance,

the error is that of invading the province of the jury.

In State v. Sachs, 69 N.J. Super. 566 (App. Div. 1961), the court stated that the detective's expertise ended at the nature and use of various items. Citing Cook v. State, 24 N.J.L. 843 (E & A 1855) and State v. Rabatin, 25 N.J. Super. 24 (App. Div. 1953), the Court held that the detective's conclusion as to who had custody or control of the tickets was one for the jury's determination. "Such a conclusion was not one which depended on peculiar knowledge or experience, not common to the world. State v. Lederman, 112 N.J.L. 366 (E & A 1933); Ranpfer v. Dearfield Packing Corp., 4 N.J. 135, 142 (1950)." Sachs, at 577. In the case sub judice, the determination that the defendant's wound was caused by a particular weapon is clearly not a conclusion which depended on Mullin's peculiar knowledge or experience. It was an issue which could b ecided by anyone with common experience and further, was without the scope of expertise of a firearms expert, being rather medical testimony. The fact that the conclusion was drawn by an "expert" must have given undue added weight to its conclusiveness in the mind of the jury.

In State v. Vigliano, 50 N.J. 51 (1967), the State's witness, who had examined the scene of the crime, testified as to the position of the victim before and after each shot;

whether the victim was sitting or standing; whether the defendant moved from one position to another between shots; and as to the path of the bullets. The court held that these conclusions called for speculation rather than permissible expert opinion, and consequently invaded the province of the jury. The court stated that the trial court committed error when it permitted this testimony. In the present case, the officer was permitted to speculate not only as to the cause of the wound, but actually as to which weapon caused it. The speculative nature of his opinions was clearly highlighted during cross-examination when Mullin admitted that not only could any one of the weapons have caused the injury (24T 442), but also that he could not even say that the injury could only be caused by a pistol slide as opposed to any other source. (24T 449, 8-10) Thus, the very witness who placed, by implication, the murder weapon in Squire's hand, was basing his opinion on conjecture and surmise.

In Biro v. Prudential Insurance Co. of America, 110 N.J. Super. 391 (App. Div. 1970), rev'd 57 N.J. 204 (1970), the plaintiff related the facts surrounding the injury to the Medical Examiner. Based on these facts, and a later examination of the body, the trial court permitted the examiner to give his opinion as to how death occurred. The Supreme Court determined that this was error.

> "An expert witness merely has an expanded body of knowledge or skill in one or more particular fields which are beyond the scope of laymen called for jury service. It is to help the jurors that he is permitted to testify as to conclusions to be drawn from the scope of his enlarged expertise." Biro, at 404.

But to allow the examiner to testify as he did here, continued the Court, would upset the delicate balance which is the fact-finding process. The jury was perfectly capable, given the medical and physical evidence, to come to its own conclusion about whether the death was a suicide. Biro, at 404-405. In the case sub judice, the jury was perfectly capable of comparing the photographs of the wound with the pistols in evidence and drawing or not drawing a conclusion therefrom.

Likewise, in In re Hyett, 61 N.J. 518 (1972), the Court rejected the testimony of a doctor as to Hyett's insanity because the opinion was founded on the doctor's belief that Hyett, a lawyer, would not have acted in the manner he did, in the handling of a particular case, unless he was "insane." The court reasoned that the doctor was not qualified to determine what would be the "normal" handling of a case by a sane lawyer, hence could not assess Hyett's conduct as abnormal. Hyett, at 531. The court, in describing the role of the expert witness stated:

> An expert witness should distinguish between what he knows as an expert and what he may believe as a layman. His role is to contribute the insight of his specialty. He is not an advocate; that is the role of counsel. Nor is he the ultimate trier of the facts; that is the role of the jury or judge, as the case may be. The trier of the facts may be misled if the expert goes beyond what he can contribute as an expert. Hyett, at 531.

In the case sub judice, while Mullin may have been qualified to state that such a wound could come from the improper handling of an automatic weapon, he clearly overstepped the bounds of his expertise when he testified that the wound came from a particular weapon.

POINT III

THE COURT ERRED IN FAILING TO CHARGE ACCESSORY AFTER THE FACT AS REQUESTED BY COUNSEL.

After the court's initial charge to the jury an several questions by the jury on the concept of aiding and abetting, the defendant requested that the court charge accessory after the fact as an alternate verdict. (27T 277, 1-8)[2] The court refused and it is that refusal which is raised here as error.

It is well settled that the function of the trial court's charge to the jury is to inform the jury as to the law of the case applicable to the facts in such a manner that the jury may not be mislead. Hoffman v. Trenton Times, 125 N.J.L. 450 (E & A 1940). It is equally as clear that the court must instruct on every issue or theory having any support in evidence, including theories or grounds of defense. Stevenson v. United States, 162 U.S. 313, 40 L. Ed. 980, 16 S. Ct. 839 (1896); State v. Butler, 27 N.J. 560, 594, 595 (1958).

In reiterating this mandatory duty of a trial judge to instruct the jury as to the fundamental principles of law in a

2. This was also requested in the request of charge; see Da-18 to 29.

case, our Appellate Division has stated that, in a charge to the jury,

> "...the classical practice generally followed in criminal cases is for the judge to outline the applicable law, explaining and defining the offense charged..."

State v. Thomas, 105 N.J. Super. 331, 337 (App. Div. 1969); State v. Beachlor, 52 N.J. Super. 378 (App. Div. 1958). The issue to be decided here then, is did the facts of the case require that accessory after the fact be charged?

Initially, it must be noted that the crime of accessory after the fact is distinct from the concept of aiding and abetting. N.J.S.A. 2A:85-14 provides, in relevant part, that

> "Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal."

State v. Fiorello, 36 N.J. 80 (1961); State v. Smith, 32 N.J. 501, 552 (1960).

There must be proof that the defendants:

> "...associated themselves with a criminal venture [and] participated in it with the express intention that it succeed. Nye and Nissen v. United States, 336 U. S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1948)."

As stated in State v. Sullivan, 43 N.J. 209, 237 (1964)

> "There can be no criminal responsibility without that knowledge [of the planned criminal activity] and the necessary community of purpose."

The New Jersey Supreme Court in State v. Fair, 45 N.J. 77, 95 (1965) states:

> "To render both defendants guilty, it is essential that they shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act. Mere presence at the scene of the crime, however is insufficient to render a defendant guilty."

It is well settled that

> "One is an 'aider and abettor' in the commission of a crime where he was an active partner in the intent which was the crime's basic element. Commonwealth v. Strantz, 328 Pa. 33, 195A, 75 (Sup. Ct. 1937)."

State v. Ellrich, 10 N.J. 146, 150 (1952) (other cites omitted).

It is the lack of this intent described in Ellrich which distinguishes an aider and abettor from an accessory after the fact under N.J.S. 2A:85-2. Since an accessory does not take part in the initial crime hence lacks the criminal intent to commit it - he is charged only with aiding the perpetrators after the crime and is not punished as a principal for the under-

lying crime, but rather for the misdemeanor of being an "a ssory after the fact." N.J.S. 2A: 85-2; State v. Sullivan, 77 N.J. Super. 81 (1964).

It is submitted that under the facts of the instant case, a charge of accessory after the fact as an alternate verdict to the murder and assault charges was both proper and mandated. The theory of the defense, at least by implication, was that Squire was a victim of circumstance of the attack started by Chesimard; that he never took part in the attack on Harper and was merely defending himself from Foerster's reaction to Chesimard's spontaneous attack. Thus, his only crime was that of being an accessory in that he aided Chesimard and the wounded Costan to escape. This theory has some basis in fact as evidenced by the testimony of several witnesses, most particularly, Harper. Harper had testified that prior to the shooting, Squire had cooperated with him completely; that he never saw Squire with a weapon and particularly stated that Squire had not been firing at him (19T 542, 13-14); and, most tellingly, that Squire had not communicated with the occupants of the car at any time during the occurrence, especially after Harper's questioning of Chesimard and Costan, the act which precipitated the shooting. (19T 537, 1-14) Considering these facts, it is conceivable that the jury could have believed that Squire did

not possess the common intent with Chesimard and Costan to be guilty as an aider and abettor (Ellrich, supra), but could have believed him guilty of the lesser crime of accessory after the fact, had they been so charged.

The defendant is not unaware of the rule in State v. Mayberry, 52 N.J. 413, 438 (1968). The court in that case held that the refusal of the trial court to charge accessory after the fact was correct as to the alleged getaway driver whose defense was that he was unaware that his passengers were planning the robbery. The rationale was (1) that the defendant was not indicted as an accessory, but rather as a principal; and (2) the State's theory was of aiding and abetting - that the defendant knowingly took part in the robbery as the driver. Mayberry, at 438. Defendant submits that the rule in Mayberry is incorrect insofar as it conflicts with Stevensen and Butler, supra. The charge should be tailored to fit the evidence in the case. That is, the duty to charge all the law of a case, particularly the law applicable to reasonable theories of defense, should not depend on the technisms of indictment and procedure, but rather upon the proofs as elicited at trial.

In the case sub judice, although the accessory theory was not charged in the indictment, it was proposed, however indirectly, as a theory of defense. As such, it was

error to refuse to charge the theory, Mayberry to the contrary notwithstanding. Stevensen v. United States, 162 U.S. 313, 16 S. Ct. 839 (1896); State v. Butler, 27 N.J. 560 (1958). Further, it is submitted that if Mayberry is correct in holding that accessory after the fact cannot be mentioned in the instructions if it is not specifically charged in the indictment, then the court in the present case should have charged that if the jury only believed the defendant guilty as an accessary after the fact, then they must acquit him of the crimes charged in the indictment, since by definition, they are mutually exclusive theories. Failure to so charge, it is submitted, was error.

POINT IV

THE COURT'S CHARGE TO THE JURY WAS ERRONEOUS IN THAT IT FAILED TO INSTRUCT ON MANSLAUGHTER.

Defense counsel objected to the court's charge to the jury on the grounds that it failed to include instructions on manslaughter. (27T 237, 8-12) The court replied that it had considered the matter but had decided that the case should go to the jury on a "murder or nothing" basis. (27T 237, 13-23) Defendant here respectfully submits that the court's refusal to charge manslaughter was error requiring reversal.

It is well settled that the function of the trial court's charge to the jury is to inform the jury as to the law of the case applicable to the facts in such a manner that the jury may not be mislead. Hoffman v. Trenton Times, 125 N.J.L. 450 (E & A 1940). In reiterating this mandatory duty of a trial judge to instruct the jury as to the fundamental principles of law in a case, our Appellate Division has stated that, in a charge to the jury,

> "...the classical practice generally followed in criminal cases is for the judge to outline the applicable law, explaining and defining the offense charged..." [emphasis added]

State v. Thomas, 105 N.J. Super. 331, 337 (App. Div. 1969); State v. Beachlor, 52 N.J. Super. 378 (App. Div. 1958). It is equally as clear that the court must instruct on every issue or theory having any support in evidence, including theories or grounds of defense. See discussion and citations, Point III, supra.

It is the defendant's position that a plausible theory of defense in the present case could have supported a manslaughter charge and thus failure to give that charge was error.

The court below based its refusal to charge manslaughter on a reading of State v. Madden, 61 N.J. 377 (1972). In that case the defendant was convicted of the murder of a police officer, John V. Gleason, who was stationed at the perimeter of an area in Plainfield, New Jersey, which had just experienced serious racial rioting. In response to some movement by one Williams, the officer fired his weapon, wounding Williams. Thereupon a mob came at the officer. The officer tried to escape, but after a pursuit involving a considerable distance, he was brought down. Members of the mob inflicted a savage beating which continued until he died. As to Madden, a woman weighing about 300 pounds, there was testimony from which it could be found she jumped upon and stomped the victim as he lay prostrate on the ground.

Following Madden's conviction for first degree murder, the Appellate Division reversed the conviction and granted a new trial. Thereafter the Supreme Court of New Jersey granted the State's petition for certification. 59 N.J. 287 (1971). Among other issues, the Supreme Court considered the validity of the trial court's charge in which manslaughter was charged but involuntary manslaughter was not. The Court noted that the trial court's charge in effect stated that neither a lawful arrest nor the use of necessary force to accomplish an arrest can constitute reasonable provocation justifying a finding of manslaughter as opposed to murder. Madden, at 398. While the Supreme Court agreed with this, it did not indicate that an unlawful arrest or excessive force could not provide reasonable provocation sufficient to reduce murder to manslaughter. To the contrary, in fact, the court discussed in detail the relationship necessary between the victim of the unlawful arrest or unnecessary force and the murderer in order for the murderer to claim that he was incensed (thus provoked) by the treatment accorded to the other. Madden, at 402. And, although finding that on the facts of Madden a manslaughter theory would not hold, the court did state:

> A claim of provocation could be understandable in a close relative [to the victim of the unlawful arrest or excessive force] who is on the scene.... Id.

It is clear that the Court was primarily concerned with the issue of whether a defendant may claim as reasonable provocation ill treatment of a third person by a police officer. But it is equally clear that the Court did state that an illegal arrest or excessive force by a police officer could be reasonable provocation. Id. It is this theory that the Court, in the present case, failed to grasp.

In the case sub judice, the Court stated that it did not believe that a charge of manslaughter could be sustained under the facts and in light of Madden. (27T 237, 13-23) Clearly the Court was in error. The incidents of the night in question, particularly after the gun battle started, could have supplied reasonable provocation to Squire, who did not participate in the shooting at Harper, if Foerster attempted to subdue Squire through unnecessary force. The jury could have believed that Squire had been wrestling with Foerster, after the shooting started, in an attempt to resist an unlawful arrest or excessive force, especially since Squire had clearly exhibited a cooperative manner with Harper prior to the shooting. Hence, since Madden can only be read to require a close or family relationship in order for one to claim reasonable provocation from the ill treatment of another by an officer, the facts in the present case are distinguishable since the facts could be

construed to show that the provocation arose from Squire's own treatment at the hands of Harper and Foerster. This theory would clearly fall within the ambit of Madden and require that the manslaughter charge be given.

Furthermore, Madden is factually dissimilar from the present case in another way. In Madden, regardless of the "transferred provocation" issue, the Court did not believe that any provocation existed, noting that the crowd had chased the officer some distance from Williams (whom the officer had shot and wounded), hence the subsequent actions of the crowd were not spontaneous acts committed in a "transport of passion" in an attempt to protect Williams, but rather were done to "punish" the officer, who was, at that point, only trying to escape from the mob. Madden, at 402. In effect, then, the Court found a "cooling off" period had occurred. Such was not the situation in the present case. The jury could have believed that reasonable provocation existed in the interaction between Foerster and Squire after the shooting had started. The jury should have been instructed that although one may not resist even an illegal arrest by one he knows to be a police officer (State v. Mulvihill, 57 N.J. 151 (1970)) and hence a defense of self-defense would not lie, Squire's actions might have been provoked by Foerster's

actions and thus a "defense" of manslaughter would lie. Failure to so instruct on a viable theory of defense was error. Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839 (1896); State v. Butler, supra, at 594-5 (1958). The conviction for murder, therefore, must be reversed.

POINT V

ADMISSION OF A FINGERPRINT CARD VIOLATED R. 55 OF THE NEW JERSEY RULES OF EVIDENCE AND THE NEW JERSEY AND UNITED STATES CONSTITUTION.

State's witnesses testified that the defendant's fingerprints were compared with the prints of one "Archie Gibson" on file with the New York City Police Department and found to be identical. (19T 61, 20-21 and 19T 97, 8-10) Defense objected to this testimony and to the admission into evidence of the New York fingerprint card on the grounds that it violated Rule 55 of the New Jersey Rules of Evidence in that the card would be evidence of other crimes. (19T 75) The court admitted the evidence, however, apparently on the ground that it was offered to prove identity. (19T 75) It is respectfully submitted that the court erred in this ruling since even if the evidence was offered as an exception to Rule 55, its possible prejudice to the defendant far outweighed any probative value. Rule 4. It is submitted therefore, that the admis[illegible] of this evidence, and failure to strike it or adminis[illegible] a cautionary instruction to the jury

concerning the proper use of the evidence, was error.

Rule 55 of the New Jersey Rules of Evidence provides:

> Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion but, subject to Rule 48, such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity or absence of mistake or accident.

Clearly Rules 47 and 55 of the Rules of Evidence restrict the use of testimony as to prior crimes to specific instances. In State v. Ascolese, 59 N.J. Super. 393 (App. Div. 1960) the court, echoing Rule 55, stated that evidence of prior crimes is inadmissible except to prove motive, intent, plan, knowledge, identity or lack of mistake. Ascolese at 397. None of the enumerated exceptions were present in the case sub judice.

It is conceded that the evidence may have had some relevance to the issue of the identity of Squire and Gibson. However, it is submitted that the prejudicial effect of this

evidence so outweighed its probative value as to demand its exclusion under Rule 4. The evidence possessed a high likelihood of persuading the jury that the defendant had a propensity to involve himself in violent crime, and that therefore he may have participated in the crime charged, regardless of any contra evidence in the case, and therefore should have been excluded. The only value of the evidence was to show that Squire was Gibson, ostensibly to explain the "Gibson" name on certain documents found at the scene. However, such proof was unnecessary to the State's case. The defendant was identified by Harper (an eyewitness) and tied to the scene through blood tests, ballistics tests and a plethora of other evidence. It made little difference to the State which name he had been using. Opposed to this was the obvious danger in presenting evidence of prior crime and the prejudicial effect of that evidence upon a jury.

It may be argued that since the card and testimony could only lead to the inference that the defendant was guilty of a prior crime, it was not prejudicial. However, case law is contrary to that position. The importance the Courts have attached to the prejudice inherent in a showing of prior crimes, even by implication, is obvious in State v. Harris, 105 N.J. Super. 319 (App. Div. 1969). There, the

Court held that the trying of several unrelated crimes at one trial was improper since the knowledge of prior crimes could prejudice the jury because it could infer that the defendant was a "bad man." Harris, at 322. Thus in Harris, the showing of prior crimes, even by implication, was condemned.

Further, the fact that the defendant later cross-examined the witnesses as to the fingerprints should be of no account. It is probable that the testimony in this respect was, in effect, of a necessity to attempt to neutralize the effect of the testimony on the jury. After the testimony was heard by the jury the defendant was left with two equally distasteful alternatives: (1) attack the testimony through cross-examination of the officers, or (2) hope for a reversal on appeal. He should not be penalized on appeal for choosing the former of the alternatives, for such a decision would, for all intents and purposes, render Rule 55 impotent.

Moreover, the failure of the court to give a cautionary instruction to the jury to disregard the evidence, or to at least caution the jury as to the proper use of this evidence, further compounded the error. Rule 6 of the New Jersey Rules of Evidence requires that:

> When relevant evidence is admissible as to one party or for one purpose and is not admissible as to other parties or for another purpose, the judge shall restrict the evidence to its proper scope and instruct the jury accordingly.

It is possible that limiting instructions could have cured the error if they had been given when the evidence had been introduced, so that the jury could have considered the evidence with its limited effect clearly in mind. Otherwise, the jury throughout the trial could very well have believed that the evidence was admissible to show a propensity towards crime on the defendant's part. Since the trial judge did not give limiting instructions, it is highly possible that the jury considered that the evidence was for the purpose of proving a propensity toward crime on the defendant's part. This is clearly what Rules 6 and 55 were designed to avoid. Failure to adhere to the Rules was clearly error.

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POINT VI

THE COURT ABUSED ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE VICTIMS IN EVIDENCE. (Partially Raised Below)

Defense counsel objected to the admission into evidence of certain photographs, to wit:

(1) P-35 (21T 78)
(2) P-34 (21T 79)
(3) P-33 (21T 82)
(4) P-43 (22T 374)
(5) P-68 (21T 804)
(6) P-37 (21T 125-127)
(7) P-72 (21T 831)
(8) P-73 (21T 827)
(9) P-38 (21T 115) (no objection)
(10) P-78 (21T 844)
(11) P-176 (26T 546)
(12) P-134 (25T 379)[3]

Exhibits P-35 and P-37 were specifically objected to as being inflammatory, and all exhibits were objected to on some ground, except P-38, raised here as plain error. As to the others, it is submitted that since the court's attention was drawn to the exhibits by objection, albeit improperly voiced, the court, sua sponte, should not have admitted the photographs,

3. Defendant has been unable to secure copies of the photographs in question and therefore requests that the Middlesex County Prosecutor make these photographs available for the Appellate Court to consider, and to the Attorney General. The photographs are in the Prosecutor's possession and in the possession of the New Jersey State Police. Although copies were secured by defendant's trial counsel, appellate counsel's efforts to secure them have failed.

since it was obvious that the prejudicial effect of them clearly outweighed their probative value. New Jersey Rules of Evidence, Rule 4.

> "It has long been the rule in this State that admission of photographs of the victim of a crime rests in the discretion of the trial court, and the exercise of its discretion will not be reversed in the absence of a palpable abuse thereof. [citations omitted] Such abuse exists only where the 'logical relevance will unquestionably be overwhelmed by the inherently prejudicial nature of the particular picture.' State v. Smith, 32 N.J. 501, 525, cert. den., 364 U.S. 936, 81 S. Ct. 383, 5 L. Ed. 2d 367 (1961)." State v. Thompson, 59 N.J. 396, 420-1 (1971).

It is submitted that in the present case the admission of the photographs was error, not only because of the inherent prejudice stemming from the shocking photographs, but also because their admission was unnecessary. The victims' positions and condition at the time of death had already been amply described by testimony, and the defense never seriously disputed the victims condition, position, appearance or wounds. Notwithstanding that, it is clear that even if a given photograph may possess some probative force, that fact alone is not determinative of its admissibility. Its relevance to an issue may be

overbalanced by its prejudicial quality. State v. Walker, 33 N.J. 580 (1961); Evidence Rule 4. Further, the cumulative nature of these photographs could play no significant part in assisting the jurors in their deliberations. Their gruesome and horrifying nature served but one purpose: to unnecessarily inflame the jurors.

Admission of P-134 is an example of the prejudice inherent in the photographs. That photograph showed the wounds found on Foerster's hands. This photographs was certainly surplusage as Dr. Albano had already testified to where the wounds were found in his direct testimony, and these facts were not contested. But apart from this, the picture, while ostensibly showing wounds of Foerster's hands, also shows a pale body, obviously drained of blood, and a closeup of an awesomely gruesome bullet hole in the abdomen. This shocking and revolting closeup of the wound was clearly capable of prejudicing and inflaming the jury. The fact that the picture was totally unnecessary further compounds the error of its admission. The testimony of the doctor describing Foerster's wounds did not require buttressing, and in light of the gruesomeness of the pictures of the wound, these pictures should have been excluded. See State v. Walker, supra.

State v. Bucanis, 26 N.J. 45 (1958), cert. den., 357 U.S. 910, 78 S. Ct. 1157, 2 L. Ed. 2d 1160 (1958); State v. Coleman, 46 N.J. 16, 26-7, cert. den., 383 U.S. 950, 86 S. Ct. 1210, 16 L. Ed. 2d 212 (1966). Defendant submits that this case is one in which the probative value of the photographs was outweighed significantly by their inherently inflammatory potential.

Thus, the pictures, possessing a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the evidence, should not have been admitted. Reversal is warranted.

POINT VII

THE PROSECUTOR'S REMARKS DURING SUMMATION WERE IMPROPER AND PREJUDICIAL TO THE DEFENDANT. (Not Raised Below)

In the present case, the prosecutor made certain remarks during his summation which the defendant contends were improper and prejudicial. The complained of comments are as follows:

> (1) He didn't see 820. That is the marked car. Are you surprised that a man shot at, people jumping out of a car shooting at him, can run by a car without seeing it? Would you? People jumping out of a car, running, shooting at you, you'd walk by an elephant and you wouldn't see it. Is it so surprising or is it precisely the kind of recollection you would expect of a man being shot at, people trying to kill him. Do you understand that, trying to kill him. How would you react if I pulled out a gun now and started pointing it at you and shooting, how observant would you be? (28T 7, 16 to 28T 8, 1)
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> (2) There are fifty some rounds of ammunition in the trunk for the .380. You heard one of the officers testify that he looked in the trunk and there were extra rounds of ammunition for the Llama pistol, extra rounds of ammunition for the Luger. Take a look at that ammunition, it's not standard ammunition,

super-vel, lead nose, hollow nose, designed for one thing, killing; killing.

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(3) Down the road they go, the three of them. Trooper Palentchar comes. You know, it's amazing. Mr. McKinney likes to pick apart--when a witness says something he likes, that must be gospel. If the same witness says something he doesn't like, he says it must be wrong. On the one hand he says, Bob Palentchar, there's a good fellow. She [Chesimard] opened that door and got in and he never did anything. He's lucky that there

> wasn't another gun in that car, because if there was the same thing would have happened to him. It was that same trusting attitude of the police that got him into trouble. (28T 17, 1-11)

The first remark is objected to because it asks the jury what "they would do" and how "they would react" rather than to judge what did happen. The second and third remarks are clearly objectionable on two grounds: they were per se highly prejudicial, and also improper on evidential grounds, since the statements are references to other crimes not charged in the indictment. The prosecutor repeatedly stated that more killing would have taken place if circumstances had been different. He clearly wanted to view the defendant, who, of course, did not testify, as an evil man by implying that he would have taken part in still more killing if he could have (and, inferably, would continue killing if acquitted). This is precisely what the law forbids.

Clearly Rules 47 and 55 of the Rules of Evidence restrict the use of testimony as to prior crimes to specific instances. In State v. Ascolese, 59 N.J. Super. 393 (1960), the court, echoing Rule 55, stated that evidence of prior crimes is inadmissible except to prove motive, intent, plan, knowledge, identity or lack of mistake. Ascolese, at 397.

None of the enumerated exceptions were present in the case sub judice. Furthermore, it is submitted that remarks of a prosecutor referring to other crimes is a more serious infraction of the law than testimony from witnesses, since a remark by the former, charged with a knowledge of the law, can hardly be considered inadvertent. Furthermore, our court has clearly stated the principle that:

> ...the average jury, in a greater or less degree, has confidence that these obligations [of fair play], which so plainly rest upon the prosecuting attorney, will be faithfully observed.

State v. D'Ippolito, 19 N.J. 540, 546 (1955); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1955).

> Where his [the prosecutor's] conduct has crossed the line and resulted in foul play, we have not hesitated to reverse the decision below and remand it for a new trial. D'Ippolito, at 550.

Not only were the comments improper as being violative of Rule 49 and Rule 55, and per se inflammatory, but also because they were clearly comments on facts not in evidence.

The bounds of propriety of a prosecutor's summation have traditionally followed the general proposition that:

> So long as he stays within the evidence and the legitimate inferences therefrom the prosecutor is entitled to wide latitude in his summation.

State v. Mayberry, 52 N.J. 413, 437 (1968); State v. Hill, 147 N.J. 490, 499 (1966). However, in State v. Bogen, 13 N.J. 137, 140 (1953), Justice Brennan clearly stated the rule that:

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Clearly a prosecutor may sum up his case forcefully and graphically. State v. Johnson, 31 N.J. 489, 510 (1960), cert. den'd., 368 U.S. 933 (1960). However, while he is allowed wide latitude in his comments, he may not comment on facts not in evidence or reasonably inferrable from the evidence. State v. Farrell, 61 N.J. 99, 102 (1972). Doing so is grounds for reversal. State v. Welsch, 29 N.J. 152 (1959); State v. Siciliano, 21 N.J. 249 (1956). The State cannot be permitted to deprive the defendant of a fair trial by means of insinuations and innuendoes which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible. Locken v. United States, 383 F. 2d 340 (9 C. C. A. 1967).

Hence, the remarks that the defendant had committed past crimes, and, if not apprehended, would still be committing crimes, were doubly impermissible and prejudicial being comments on prior crimes and on facts not in evidence. As such, the remarks were improper and constituted reversible error.

It is true that no objection was made to these comments, thus they are raised here as plain error. State v. Macon, 57 N.J. 325 (1971). However, it is submitted that even if objections had been offered, the remarks were of such a prejudicial nature that no instruction from the court could have neutralized their effect. It is submitted that any instruction that the court might give to the jury to disregard the remarks would be inadequate to erase the impression the remarks must have made on the jury. It would be a denial of a basic trait of human nature to believe that a juror could ignore the remarks because of any instruction from the court. State v. Roberts, 86 N.J. Super. 158, 168 (App. Div. 1969). It is fallacious to believe that strict judicial impartiality could be maintained by the jury after hearing such a remark. The occurrence could only lead to groundless conjecture and foundationless surmise as to the character of the defendant. As such, the remarks were incurable even by the most detailed conscientious of instructions, and thus are reversible error. State v. Siciliano, 21 N.J. 249 (1956); State v. D'Ippolito,

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Furthermore, it is untenable, in considering the comments to believe that counsel could have seen any possible advantage in not objecting to the comments. Hence, any failure to object must have been inadvertent. The defendant should not suffer from counsel's errors. State v. Macon, supra. Thus, reversal, based on the remarks, as plain error, is warranted.

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POINT VIII

THE AGGREGATE OF LEGAL ERRORS AT THE TRIAL CREATED AN ATMOSPHERE SO HOSTILE AND PREJUDICIAL TO THE DEFENDANT AS TO PRECLUDE THE RENDERING OF A FAIR AND IMPARTIAL VERDICT. (Not Raised Below).

In the case of State v. Orecchio, 16 N.J. 125 (1954), the Supreme Court of New Jersey stated:

> "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. Orecchio, at 129.

It is urged, in the present case, that the defendant's trial was wrought with legal errors as discussed above which, in the aggregate, resulted in creating an atmosphere of hostility and distrust towards the defendant, thus precluding him from receiving a fair and impartial trial. Such being the case, reversal is mandated.

POINT IX

IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY COUNT, SINCE ON THE EVIDENCE PRODUCED NO REASONABLE JURY COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT.

At the close of the State's case defense moved for a judgment of acquittal on the ground that the State failed to prove a prima facie case. The court denied the motion as to the robbery count, among others. (27T 77)

The test for determining the sufficiency of the evidence when a motion for judgment of acquittal is made is:

> "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 459 (1967).

The defendant here submits that the State failed to present evidence from which a reasonable jury could find the defendant guilty of robbery. The defendant submits here

that although the State's theory was that the defendant robbed Foerster's pistol and then murdered him with it, (27T 55) the State failed entirely to present any evidence of intent to rob, or any evidence from which such an intent could be inferred. As such, the motion for judgment of acquittal, as to the robbery, should have been granted.

Robbery, like all criminal offenses, requires proof of intent to do the act. However, robbery also requires the specific intent to steal and to permanently deprive the victim of his property. State v. Mayberry, 52 N.J. 413 (1968), cert. den'd., 393 U.S. 1043, 89 S. Ct. 673 (1968). It is respectfully submitted that under no reasonable interpretation of the evidence could any intent to rob be found. The taking and using of Foerster's revolver was done with the same intent that any available weapon would have been used - with the intent to use the revolver, not to steal it. Not even a tortured view of the evidence can support a theory that any independent intent to steal existed. A theory that all the events of the night occurred as a result of the defendant's desire to rob Foerster of his revolver is almost to ludicrous to mention. Clearly the taking and use of the revolver was an integral part of the murder and not the product of any independent intent to steal.

As such, it was clearly error to deny defendant's motion for a judgment of acquittal as to the robbery count. Since the State, not having shown any facts from which a reasonable jury, giving the State the benefit of all favorable inferences, could have inferred any intent to rob, the motion should have been granted. Reyes, supra. Failure to do so was error.

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It is urged, in the present case, that the defendant's trial was wrought with legal errors as discussed above which, in the aggregate, resulted in creating an atmosphere of hostility and distrust towards the defendant, thus precluding him from receiving a fair and impartial trial. Such being the case, reversal is mandated.

POINT IX

IT WAS ERROR FOR THE COURT TO DENY DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY COUNT, SINCE ON THE EVIDENCE PRODUCED NO REASONABLE JURY COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT.

At the close of the State's case defense moved for a judgment of acquittal on the ground that the State failed to prove a prima facie case. The court denied the motion as to the robbery count, among others. (27T 77)

The test for determining the sufficiency of the evidence when a motion for judgment of acquittal is made is:

> "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 459 (1967).

The defendant here submits that the State failed to present evidence from which a reasonable jury could find the defendant guilty of robbery. The defendant submits here

that although the State's theory was that the defendant robbed Foerster's pistol and then murdered him with it, (27T 55) the State failed entirely to present any evidence of intent to rob, or any evidence from which such an intent could be inferred. As such, the motion for judgment of acquittal, as to the robbery, should have been granted.

Robbery, like all criminal offenses, requires proof of intent to do the act. However, robbery also requires the specific intent to steal and to permanently deprive the victim of his property. State v. Mayberry, 52 N.J. 413 (1968), cert. den'd., 393 U.S. 1043, 89 S. Ct. 673 (1968). It is respectfully submitted that under no reasonable interpretation of the evidence could any intent to rob be found. The taking and using of Foerster's revolver was done with the same intent that any available weapon would have been used - with the intent to use the revolver, not to steal it. Not even a tortured view of the evidence can support a theory that any independent intent to steal existed. A theory that all the events of the night occurred as a result of the defendant's desire to rob Foerster of his revolver is almost to ludicrous to mention. Clearly the taking and use of the revolver was an integral part of the murder and not the product of any independent intent to steal.

As such, it was clearly error to deny defendant's motion for a judgment of acquittal as to the robbery count. Since the State, not having shown any facts from which a reasonable jury, giving the State the benefit of all favorable inferences, could have inferred any intent to rob, the motion should have been granted. Reyes, supra. Failure to do so was error.

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POINT X

DEFENDANT'S CONVICTION FOR ROBBERY MERGED WITH HIS CONVICTION FOR MURDER. (Not Raised Below)

The defendant was convicted of, among other things, the murder of Trooper Foerster. The State's theory apparently was that after wounding Foerster, Squire then took Foerster's pistol and killed Foerster. (27T 55, 15-25) Based on this theory, the State also charged Squire with, and won a conviction for, the robbery of Foerster's pistol. It is here submitted that the conviction for robbery merged with the conviction for murder, hence the robbery conviction, and the sentence based thereon, must be vacated.

The doctrine of merger of offenses which prohibits fractionalization grows out of the constitutional prohibition against multiple prosecution or punishment for the same offense, popularly known as "double jeopardy." U. S. Constitution, amend. V; State v. Currie, 41 N.J. 531 (1964); State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833). The difficulty has been in determining what offenses are "the same." State v. Currie, supra. New Jersey Courts in attempting to meet this

problem have at times devised different criteria or "tests" to simplify the task.

The earliest of these originated in State v. Cooper, supra, in which the defendant, previously tried and convicted for arson, was again brought to trial on a charge of murdering a victim of the same fire. The defendant interposed a plea of autrefois convict. The court (Drake, J.) said: "If the whole offense in the eye of reason and philosophy is one...we ought not to presume that the legislature meant to punish it as two... In this case the arson is a necessary constituent of the murder." Id.

This was the birth of what became known as the "included offense test," and it enjoyed a long if not prolific, life. See, e.g., State v. Dixon, 40 N.J. 190 (1963); State v. Midgely, 15 N.J. 574 (1954). Eventually, however, there arose the need for a clearer exposition of the principles of Cooper. In 1918 the old New Jersey Supreme Court had occasion to re-examine the problem of double jeopardy. That court, without citing Cooper, determined that if the facts essential to prove guilt on the second indictment were identical to the facts proven at the first trial, the plea of autrefois convict would bar the second conviction. State v. Mowser, 91 N.J.L. 395 (Sup. Ct. 1918), rev'd, 92 N.J.L. 474 (E & A 1919). On appeal the Court of

Errors and Appeals rejected this "same facts" test as propounded below, saying "the unsoundness of this reasoning lies in assuming that the offenses must have legal identity in all cases, and in ignoring a most essential factor, that is, whether or not the offenses grew out of the same transaction or were the product of the same criminal act." State v. Mowser, 92 N.J.L. 474, 483 (E & A 1919). This court did cite Cooper, and embroidered upon it what became known in the many cases which followed it, as the "same transaction test." See, e.g., State v. Pennsylvania R. R. Co., 9 N.J. 194 (1952); State v. Wines, 47 N.J. Super. 235 (App. Div. 1957); State v. Hoag, 35 N.J. Super. 555 (App. Div. 1955), aff'd, 21 N.J. 496 (1956), aff'd, 356 U.S. 464 (1958).

However, the old Supreme Court's "same facts test," criticized though it was, reappeared in State v. DiGiosa, 3 N.J. (1950). In this reincarnation the test was "...whether the evidence necessary to support the second indictment would have been sufficient to secure a legal conviction upon the first..." Id. at 419. The case went on to point out that though an accused may be convicted of a lesser offense when brought to trial upon a greater, once an accused has been acquitted or convicted of the greater offense, a subsequent trial for the lesser offense is barred, Id., thus restating the principle of Cooper.

This "same evidence test" was rather easy to apply and was widely used. See, e.g., State v. Mark, 23 N.J. 162 (1957); State v. Liebowitz, 22 N.J. 102 (1956); State v. Shoopman, 11 N.J. 333 (1953); State v. Labato, 7 N.J. 137 (1951). However, even this test was not absolute and in each of the cases mentioned reference was also made to cases in which other tests were used. The time came when the court recognized the futility of efforts to formulate a precise "test." In State v. Roller, 29 N.J. 339 (1959), Justice Jacobs speaking for a unanimous court said:

> Neither test ("same facts" or "same transaction") has been considered absolute nor has either test proved to be entirely acceptable; the fact is that while the court has been seeking the elusive ideal test it has in each instance endeavored fairly to protect the State's vital interest in bringing the guilty to justice while at the same time fairly protecting the accused from multiple trials and punishment where in all substance and reality there has been but a single wrongdoing. Id. at 346 (citations omitted).

Identical sentiments were expressed by the Justice five years later in State v. Currie, 41 N.J. 531 (1964), where, again speaking for a unanimous court he stated, "In applying the prohibition against double jeopardy, the emphasis should be on underlying policies, rather than technisms. The primary

considerations should be fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals." Id. at 539.

It is respectfully submitted therefore, that under any and all of the tests outlined above, the conviction for robbery, being an integral part of the murder, should have merged with the murder. Clearly the taking of Foerster's pistol was a necessary step in accomplishing the murder, not the fulfillment of an intent to rob. Certainly no one would advance the theory that the events of May 2 were for the purpose of robbing Trooper Foerster of his weapon. Not only was the robbery not a separate offense, but moreover, it was actually a step in the murder. It is submitted that under any of the tests outlined above, the fair fulfillment of the reasonable expectations of the law requires that the conviction for robbery be vacated. Currie, supra. Conviction for the robbery as well as the murder clearly violated defendant's constitutional protection against double jeopardy.

The case of State v. Fitzsimmons, 60 N.J. Super. 230 (App. Div. 1960), deals with the issue at bar. In that case, a police officer attempted to arrest defendants, Eugene and Paul Fitzsimmons, for breaking and entering. Eugene picked up a pistol and a struggle ensued between Eugene and the

officer. During the struggle Paul "robbed" the officer's service revolver from him and murdered the officer with it. Defendants were indicted for murder [Indictment No. 467-57] and convicted on the above theory. Fitzsimmons, at 232. Following this, defendants were then indicted for armed robbery [Indictment No. 518-57] and breaking and entering. Id. Defendants moved before the Appellate Division to quash the indictments. Id. Although the charge of breaking and entering was sustained, the robbery count was dismissed, the court stating:

> The transcript is clear that the two indictments refer to the identical robbery. Based upon the same evidence test, the same transaction test, or any other test to determine double jeopardy, the motion to dismiss Indictment No. 518-57 for armed robbery should be granted. The conviction of the defendants for murder under Indictment No. 467-57 is a bar to further prosecution under Indictment No. 518-57. "Where the accused may be convicted of a lesser offense included in the greater laid in the indictment, an acquittal or conviction of the greater offense is on grounds of former jeopardy a bar to a subsequent trial for the lesser offense." State v. DiGiosia, 3 N.J. 413, 419 (1950). See also State v. Labato, 7 N.J. 137, 144 (1951); State v. Mowser, 92 N.J.L. 474, 479 (E & A 1918); State v. Cooper, 13 N.J.L. 361 (Sup. Ct.

1833); State v. Rosa, 72 N.J.L. 462 (E & A 1905).

This was clearly the factual situation presented in the present case. The State's theory was that during the struggle, Squire removed ("robbed") Foerster's revolver and killed him with it. (See, e.g., 27T 55, 15-25; and Dr. Albano's testimony) As such the case falls squarely within Fitzsimmons. The crucial question is, if Squire had been charged and convicted only of murder, and then re-indicted at a later date for robbery of the pistol, could the latter indictment stand or would it violate double jeopardy rules? Clearly, under Fitzsimmons, the indictment could not stand. Therefore, not only was it error to deny defendant's motion for a judgment of acquittal on the robbery count, but also it is clear that, failing to dismiss the count, the conviction must merge at sentencing. Failure to do so was error.

POINT XI

THE VERDICT BELOW WAS AGAINST THE WEIGHT OF THE EVIDENCE AS TO THE ASSAULT AND ROBBERY COUNTS.

On May 3, 1974 defendant's motion for a new trial was heard before the Honorable John E. Bachman, J.C.C. t/a, and was denied. (Da-10) It is submitted that it was error to deny this motion as to the assault and robbery counts.

The standard to be applied in determining whether the verdict was against the weight of the evidence must be distinguished from that which is applied upon a motion for judgment of acquittal. See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). On a motion for judgment of acquittal, the judicial function is rather "mechanical" and is not concerned with the worth, nature or extent of the evidence, but only with its existence, viewed most favorably to the State. Id. Upon a motion for a new trial, however, a process of evidence evaluation and weighing is required which "calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury." Supra, at 6. Such a motion may properly be granted even though the state of the evidence may not justify the granting of a motion for judgment of acquittal. Id. The standard to be applied was concisely set forth by Justice Hall in Dolson, supra:

> /T/he trial judge shall grant the motion, if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law. Id. at 7.

An appellate court is duty-bound to reverse a conviction if there was plain and obvious failure of the fact-finder to perform its function. State v. Butler, 32 N.J. 166, 196, cert. denied, 362 U.S.984 (1960); State v. Williams, 39 N.J. 471, 490, cert. denied, 374 U.S. 855 (1963); State v. Landeros, 20 N.J. 76, 83 (1955), cert. denied, 351 U.S. 966 (1956); State v. Haines, 18 N.J. 550, 565 (1955); State v. Monahan, 16 N.J. 83, 93, cert. denied, 348 U.S. 889 (1954). A verdict must be set aside as against the weight of the evidence where it "clearly and unequivocally appears that there was a manifest denial of justice under the law. Hartpence v. Grouleff, 15 N. J. 545, 549 (1954). It is submitted that there is surely a miscarriage of justice under the law when a verdict of guilty is rendered on the basis of evidence which is manifestly insufficient to prove each element of the offense charged beyond a reasonable doubt.

> To warrant a conviction of crime, the testimony should prove the guilt of the accused beyond a reasonable doubt. If it fails to do this, i.e., if it be of such a nature that, when fully and fairly considered, it will not satisfy any thoughtful mind, beyond a reasonable doubt, of the guilt of the accused, then a conviction does manifest wrong, according to our system of administering criminal law.

Kohl v. State, 59 N.J.L. (30 Vroom) 445, 445-46 (E & A 1896).

The defendant respectfully contends that the verdict of the jury below was against the weight of the evidence as to the assault and robbery charges as to give rise to the inescapable conclusion that the verdict was the product of mistake, passion, prejudice or partiality. See Hager v. Weber, 7 N.J. 201, 210 (1951).

Defendant submits that there was no evidence that he participated in the assault on Harper either as a principal or an aider and abettor. There was no evidence of a conspiracy to assault or that the defendants had ever conferred with each other after being stopped by Harper. The theory that Squire aided by incapacitating rster is based solely on groundless conjecture and surmise. Squire might have just as easily been defending himself from Foerster's highly predictable reaction

to the shooting of Harper. There is no evidence to the contrary. As to the robbery charge, clearly there was no evidence before the jury from which it could have found the necessary intent to rob. (See Points IX and X supra). Failure to grant defendant's motion for a new trial was error as to the assault and robbery charges.

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POINT XII

THE DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

It is settled law in New Jersey that an "appellate court has the power to review any exercise of the trial court's discretion, including the power to revise a prison sentence where it is manifestly excessive, even though within statutory limits." State v. Bess, 53 N.J. 10, 18 (1968); State v. Montague, 55 N.J. 387, 407 (1970); State v. Provoid, 110 N.J. Super. 547, 559 (App. Div. 1970).

The defendant respectfully submits that his sentence is manifestly excessive and unduly punitive, particularly its consecutive nature.

Our system of criminal law, which is humane in its outlook and policy, graduates the punishment according to the magnitude of the crime and tries to protect the defendant from a punishment which is so disproportionate to the crime as to shock our sense of justice. State v. Johnson, 67 N.J. Super. 418, 429 (App. Div. 1961). Expressed in other terms, "...the [illegible]ling theme is that punishment should fit the offender as well as the offense." State v. Ivan, 33 N.J. 197, 200 (1960);

State v. Ford, 92 N.J. Super. 356, 361 (App. Div. 1966) State v. Ward, 57 N.J. 75 (1970) at page 82, stated, "sentencing judges should direct the punishment they impose to the goal of reformation. Too severe a punishment will do little towards advancing this goal."

Defendant respectfully submits that the consecutive nature of the sentences imposed is manifestly excessive and unduly punitive and respectfully requests that they be made to run concurrently with his life sentence.

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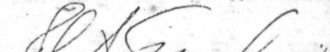
CONCLUSION

For the foregoing reasons defendant respectfully requests that defendant's conviction be reversed and the case remanded for entry of a judgment of acquittal or for a new trial, or, in the alternative, that defendant's sentence be modified.

STANLEY C. VAN NESS
Public Defender
Attorney for Defendant-Appellant

BY: 
JOHN A. SNOWDON, JR.
Assistant Deputy Public Defender

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164 - 47-70

MURDER,
FELONY MURDER,
ATROCIOUS ASSAULT & BATTERY,
ASSAULT & BATTERY ON POLICE OFFICER,
ASSAULT W/DANGEROUS WEAPON,
ASSAULT W/I TO KILL,
ILLEGAL POSSESSION OF WEAPON,
ARMED ROBBERY

NEW JERSEY SUPERIOR COURT

MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

File No. 73-1134

THE STATE OF NEW JERSEY

vs.

CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson,
Defendant.

INDICTMENT No. 1436-73
First Grand Jury
May 1973 Stated Session

September Term 1972

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT that CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, did unlawfully, willfully, feloniously and with malice aforethought kill and murder Werner Foerster, a New Jersey State Trooper then and there acting in the performance of his duties while in uniform, contrary to the provisions of NJS 2A:113-1 and NJS 2A:113-2, and against the peace of this State, the government and dignity of the same.

SECOND COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT that CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, did unlawfully, willfully, feloniously and with malice aforethought kill and murder James Coston, a/k/a Zayd Malik Shakur, contrary to the provisions of NJS 2A:113-1 and NJS 2A:113-2, and against the peace of this State, the government and dignity of the same and to the form of the statute in such case provided.

THIRD COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT CLARK EDWARD SQUIRE, a/k/a James Henery Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, did commit an atrocious assault and battery upon James M. Harper, by atrociously and willfully wounding, maiming and injuring him, contrary to the provisions of NJS 2A:90-1, and against the peace of this State, the government and dignity of the same.

FOURTH COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT CLARK EDWARD SQUIRE, a/k/a Archie Gibson, a/k/a James Henry Walker, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, did commit an assault and battery upon James M. Harper, a New Jersey State Trooper then and there acting in the performance of duties while in uniform, by unlawfully, willfully wounding, maiming and injuring him, the said State Trooper, contrary to the provisions of NJS 2A:90-4, and against the peace of this State, the government and dignity of the same.

FIFTH COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths PRESENT THAT CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, unlawfully, willfully and maliciously did commit an assault upon James M. Harper with a certain offensive weapon or instrument, to wit, a handgun, then and there had and held, contrary to the provisions of NJS 2A:90-3, and against the peace of this State, the government and dignity of the same.

SIXTH COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, willfully, maliciously and feloniously did make an assault upon James M. Harper with a certain firearm, loaded with gun powder and metal bullets, with intent willfully, maliciously and feloniously then and there to kill the said James M. Harper, contrary to the provisions of NJS 2A:90-2, and against the peace of this State, the government and dignity of the same.

SEVENTH COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, unlawfully carried and possessed and had under his custody and control, certain weapons, to wit,

one (1) 9 Milimeter Bergman .38 Super Automatic Llama Pistol - Serial #24831
and/or one (1) 9 Milimeter Luger Browning Automatic Pistol
and/or one (1) .380 caliber Browning Automatic Pistol Serial #71N12237

without having obtained the requisite permit to carry the said firearms, contrary to the provisions of NJS 2A:151-41(a), and against the peace of this State, the government and dignity of the same.

EIGHTH COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT CLARK EDWARD SQUIRE, a/k/a James Henry Walker, a/k/a Archie Gibson, on the 2nd day of May 1973, in the Township of East Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, while armed with a firearm, to wit, a handgun, then and there did unlawfully, forcibly and feloniously take from the person of Werner Foerster, a New Jersey State Trooper, property of the said Werner Foerster, to wit, a .38 caliber Smith & Wesson revolver, by violence, to wit, by shooting, slaying, and killing the said Werner Foerster, contrary to the provisions of NJS 2A:141-1 and NJS 2A:151-5, and against the peace of this State, the government and dignity of the same.

A True Bill:

Leon Gerity, Foreman

BY: ASSISTANT PROSECUTOR

JOHN S. KUHLTHAU
Middlesex County Prosecutor
County Administration Building
New Brunswick, New Jersey 08903
Telephone (201) 246-6300

STATE OF NEW JERSEY,	:	MIDDLESEX COUNTY COURT
-vs-	:	LAW DIVISION (CRIMINAL)
CLARK EDWARD SQUIRE a/k/a JAMES HENRY WALKER a/k/a ARCHIE GIBSON,	:	INDICTMENT NO. 1436-72
Defendant.	:	

. . . . . .

STATE OF NEW JERSEY,	:	MIDDLESEX COUNTY COURT
-vs-	:	LAW DIVISION (CRIMINAL)
JOANNE DEBORAH CHESIMARD,	:	INDICTMENT NO. 1437-72
Defendant.	:	ORDER

This matter coming on before the Court upon application of the attorneys for the defendants, Raymond A. Brown, Esquire and Evelyn A. Williams, Esquire, appearing on behalf of the defendant Chesimard and Charles T. McKinney, Esquire, appearing on behalf of the defendant Squire, and in the presence of C. Judson Hamlin, 1st Assistant Prosecutor of Middlesex County for the State for an Order granting a change of venue, or in the

alternative, for a foreign jury, and a request for continuance being withdrawn; and

The Court having considered the affidavits and pleadings on file, the Briefs and arguments of counsel, and for other good cause shown;

It is on this first day of November, 1973 ORDERED and ADJUDGED that:

1. Defendants' motion for a foreign jury shall be and hereby is granted.

2. The County of Morris is hereby designated for purposes of jury selection pursuant to N.J.S.2A:76-2.

3. Upon completion of jury selection, the cause shall be returned to Middlesex County for trial.

4. The trial of the cause shall be continued for such reasonable period of time as is necessary to select and summon an appropriate panel of veniremen.

5. Such further Orders as are necessary to administratively implement the summoning of the panel shall be issued by the Court sua sponte and shall be served upon counsel for the parties.

Leon Gerofsky
LEON GEROFSKY, A.J.S.C.

We hereby consent to the form and entry of the foregoing Order.

RAYMOND A. BROWN
Attorney for Defendants

CHARLES T. McKINNEY
Attorney for Defendant
Squire

EVELYN A. WILLIAMS
Attorney for Defendant
Chesimard

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION—CRIMINAL

Indictment No. 1436-72

Accusation No. .....

FILED MARCH 15, 1974

THE STATE OF NEW JERSEY

V.

CLARK EDWARD SQUIRE
a/k/a APCHIE GIBSON

Defendant.

JUDGMENT
AND
ORDER FOR COMMITMENT

The defendant on May 29, 1973 having entered a plea of Not Guilty to all counts

to Indictment ~~Accusation~~ No. 1436-72 for the crime of 1st ct - Murder 2nd ct - Murder - 3rd ct, Atrocious Assault & Battery on Trooper Harper - 4th ct. Assault & Battery on Trooper Harper - 5th Count, Assault on Trooper Harper with offensive weapon, 6th count, Assault on Trooper Harper w/intent to kill - 7th count Ill. Possession of a weapon and 8th count - Armed Robbery

and the defendant having on January 2, 1974 to March 11, 1974 (51 days) RETRACTED PLEA OF NOT GUILTY AND ENTERED PLEA OF GUILTY

BEEN TRIED ~~without~~ with A JURY AND A verdict OF findings Guilty to 1st, 3rd, 4th, 5th, 6th, 7th &8ith

having been rendered on March 11, 1974

It is, therefore, on March 15, 1974

Ordered and Adjudged that the defendant be and is sentenced to the New Jersey State Prison on 1st count - Life Imprisonment, 6th Count - 10 to 12 years - 7th count - 2 to 3 years and 8th count 12 to 15 years - Sentences to be served consecutively (2nd count dismissed on motion on March 7, 1974) 3rd count merged with 6th, 4th count merged with 6th, 5th count merged with 6th.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

Frank Schatzman
County Clerk

John E. Bachman
JOHN E. BACHMAN, J.C.C. Judge

March 15, 1974
Date

JOHN S. KUHLTHAU
Middlesex County Prosecutor
County Administration Building
New Brunswick, New Jersey 08903
Telephone (201) 246-6330

STATE OF NEW JERSEY,	:	MIDDLESEX COUNTY COURT
-vs-	:	LAW DIVISION (CRIMINAL) INDICTMENT NO. 1436-72
CLARK EDWARD SQUIRE,	:	
Defendant.	:	ORDER

This matter being opened to the Court on motion of Charles T. McKinney, Esquire, and Raymond A. Brown, Esquire, attorneys for defendant, for an Order granting defendant a new trial, and C. Judson Hamlin, 1st Assistant Prosecutor, appearing on behalf of the State; and

The Court having considered the proceedings on file, the arguments of counsel and for other good cause shown;

It is on this 18th day of June, 1974 ORDERED and ADJUDGED that defendant's motion for a new trial be and the same is hereby denied in its entirety.

/s/ JOHN E. BACHMAN, J.S.C.

A-1837-23

STANLEY C. VAN NESS
PUBLIC DEFENDER
10-12 North Stockton Street
Trenton, New Jersey 08625
(609) 292-7087

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
(Criminal)

Plaintiff-Respondent THE STATE OF NEW JERSEY vs. Defendant-Appellant CLARK EDWARD SQUIRE	Indictment No. 1436-72 NOTICE OF APPEAL

TO: HONORABLE JOHN S. KUHLTHAU
Prosecutor Middlesex County
Administration Building
New Brunswick, New Jersey

SIR:

PLEASE TAKE NOTICE that the above named defendant-appellant hereby appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the judgment entered in the Middlesex County Court, Criminal Division, on the 15th day of March, 1974, as herein more particularly set forth:

The name and address of the defendant-appellant is CLARK EDWARD SQUIRE, New Jersey State Prison.

The names and addresses of the attorneys for defendant-appellant are: Charles T. McKinney, Esq., 401 Broadway, New York, New York, and Brown, Vogelman & Ashley, Esqs., 26 Journal Square, Jersey City, New Jersey.

The offenses charged against the defendant-appellant upon which the judgment is entered are: First Count - violation of N.J.S. 2A:113-1 and N.J.S. 2A:113-2, murder; Third Count - violation of N.J.S. 2A:90-1 atrocious assault and battery; Fourth Count - violation of N.J.S. 2A:90-4, assault and battery; Fifth Count - violation of N.J.S. 2A:90-3, assault; Sixth Count - violation of N.J.S. 2A:90-2 assault with firearm; Seventh Count - violation of N.J.S. 2A:151-41(a) possession of firearm; Eighth Count - violation of N.J.S. 2A:141-1 and N.J.S. 2A:151-5.

The sentence imposed by the Court on the 15th day of March, 1974 was as follows:

First Count	- Life Imprisonment
Third Count)	
Fourth Count)	
Fifth Count)	- Merged - 10 to 12 years
Sixth Count)	
Seventh Count	- 2 to 3 years
Eighth Count	- 12 to 15 years

From Third to Eighth Count to run consecutively.

Sat Below - Honorable John E. Bachman, Middlesex County Court.

Sentencing Judge - Honorable John E. Bachman.

STANLEY C. VAN NESS
PUBLIC DEFENDER

By CHARLES T. McKINNEY
CHARLES T. McKINNEY
Attorney for Defendant-Appellant

BROWN, VOGELMAN & ASHLEY
Attorneys for Defendant-Appellant

By RAYMOND A. BROWN
RAYMOND A. BROWN
A Member of the Firm

The Public Defender's representation of defendant-appellant Clark Edward Squire, at this point is provisional under Rule N.J.S.A. 2A:158A-14.

STANLEY C. VAN NESS
PUBLIC DEFENDER

By CHARLES T. McKINNEY
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Attorney for Defendant-Appellant

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Attorneys for Defendant-Appellant

By RAYMOND A. BROWN
RAYMOND A. BROWN
A Member of the Firm

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

JOHN S. KUHLTHAU
Middlesex County Prosecutor
County Administration Building
New Brunswick, New Jersey 08903
Telephone (201) 246-6330

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

-vs- : NOTICE OF CROSS APPEAL

CLARK EDWARD SQUIRE, :

Defendant-Appellant. :

TO: Stanley C. Van Ness, Public Defender
Attorney for Defendant
10-12 North Stockton Street
Trenton, New Jersey 08625

Raymond A. Brown
Attorney for Defendant
26 Journal Square
Jersey City, New Jersey

Charles T. McKinney
Attorney for Defendant
32 Court Street
Brooklyn, New York

GENTLEMEN:

PLEASE TAKE NOTICE that pursuant to R.R.2:4-2, the

above named Plaintiff-Respondent hereby cross-appeals to the Superior Court of New Jersey, Appellate Division, from the Order of the Honorable John E. Bachman, J.C.C., dismissing the Second Count of the Indictment in the within matter, on the 7th day of March, 1974, at the conclusion of the State's case-in-chief during trial of the above captioned matter.

JOHN S. KUHLTHAU
County Prosecutor

By: _____
C. JUDSON HAHLIN
1st Assistant Prosecutor

Dated: 4/1/74

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1882-73
MOTION NO. M-1401-73
BEFORE PART D

STATE OF NEW JERSEY

VS.

CLARK EDWARD SQUIRE

JUDGES KOLOVSKY
FRITZ
CRANE

ORIGINAL FILED
MAY 7 1974
ELIZABETH McLAUGHLIN
CLERK

MOVING PAPERS FILED APRIL 22, 1974
ANSWERING PAPERS FILED APRIL 25, 1974
DATE SUBMITTED TO COURT MAY 3, 1974
DATE ARGUED
DATE DECIDED MAY 6, 1974

ORDER

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

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/~~PETITION~~ TO DISMISS CROSS APPEAL	X		X

SUPPLEMENTAL:

State advises it does not oppose motion.

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

Elizabeth McLaughlin
Clerk

FOR THE COURT:

HAROLD KOLOVSKY
P.J.A.D.

WITNESS, THE HONORABLE HAROLD KOLOVSKY, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 6th DAY OF MAY 1974.

CHARLES T. McKINNEY
32 Court Street
Brooklyn, New York 11201

BROWN, VOGELMAN & ASHLEY
26 JOURNAL SQUARE
JERSEY CITY, N. J. 07306
(201) 653-2301
ATTORNEYS FOR Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION--MIDDLESEX COUNTY
(Criminal)

Plaintiff	:	
THE STATE OF NEW JERSEY	:	
	:	Indictment No. 1436-72
vs.	:	REQUESTS TO CHARGE
Defendant	:	
CLARK EDWARD SQUIRE	:	
	:	

. . . . . .

It is now respectfully requested that the Court instruct the jury as follows:

1. A person charged with crime is presumed to be innocent until proven guilty. This presumption abides with him through the trial. Therefore, when the jury go from the bar of the court to their room to deliberate, they enter the jury room with the presumption of innocence still protecting the defendant. In the various mental conditions, ranging from that in which the jury think the defendant innocent to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty.

2. The burden is upon the prosecution to prove the charge made in the indictment beyond a reasonable doubt and that burden never shifts.

3. A reasonable doubt may arise from the evidence presented or from the lack or want of evidence.

4. Criminal intent necessary to complete the crime charged against the accused must be proved by the prosecution beyond a reasonable doubt.

5. The indictment is not evidence against the defendant and is not to be considered as such during the jury's deliberation upon the evidence in this case.

6. The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate" - with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

7. The credit and belief to be given to respective witnesses, both for the State and for the defense, must be determined by you and you alone. Any remarks made by the Court to counsel or counsel to the Court or between counsel should not be considered in your deliberations. While the Court is not aware of any outward reactions on its part to any testimony given by the witnesses, I do, however, instruct you that if such reactions did occur, that you disregard the same, and not draw any inference therefrom, because, as I stated before, the credit and belief to be given to the respective witnesses, both for the State and the defense, should be determined by you and by you alone.

8. In appraising the testimony of a witness, there are certain guides that you may use to assist you. You may take into account the common experience of mankind. You may test whether the testimony of the witness is either inherently probable or inherently improbable. You may examine the demeanor of the witness on the stand as he or she testified, that is the way in which the witness reacted to questions and so forth, and you may also, of course, take into consideration the questions of whether there is any motive to misstate any fact which has been testified to.

In this connection you must also consider the interest that the witnesses may have in the final outcome. You will note that all of the witnesses testified for the State with the exception of Mr. Silverman, which were either New York City police State police, other law enforcement officers or division personnel employed by the State Police or the State of New Jersey and many of these witnesses were friends, acquaintances or co-workers of Troopers Foerster and Harper. It is therefore most important that you weigh the interests that these particular witnesses may have in achieving for the State a conviction.

9. The defendant does not have to prove his innocence. The state must prove his guilt beyond a reasonable doubt. The cornerstone of our system of justice is the defendant's presumption of innocence. We are bound under the law to respect this presumption. The defendant has been cloaked with this presumption

of innocence throughout his entire trial and he remains so cloaked at this very moment. You must carry this presumption of innocence with you through the door of the jury room and it is to continue to shroud the defendant during your deliberation, until such time as the jury unanimously decides, if it ever does, that the defendant has been proven guilty by the State beyond a reasonable doubt.

10. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case, the burden or duty of calling any witnesses or producing any evidence.

Remember also that the question before you can never be: will the State win or lose the case? The State always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

11. Within the meaning of the law, a person is in possession of a weapon when he has an intentional dominion and control of the weapon accompanied by a knowledge of its character. Possession means the mental attitude of a person to intentionally possess or appropriate an object to himself, coupled with effective realization of this attitude. "Effective realization of this attitude" means that the object is possessed to the exclusion of others by the person or persons intending to possess it.

To constitute possession of a weapon, the dominion

or control must be accompanied by knowledge on the part of the possessor of the presence of a weapon. Without such knowledge there can be no possession within the meaning of the law.

Possession requires both intent and knowledge, and there can be no possession without both being present.

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find possession on the part of the defendant, you must first find intent, that is, that he intended to exercise control over the weapon. And, in addition to intent, possession requires knowledge, that is knowledge by the defendant of the character of that which he possessed. It is possible to possess something without knowing it, but such possession is not possession within the meaning of the law.

Remember that both intent and knowledge are conditions of the mind which cannot be seen.

12. If you become convinced beyond a reasonable doubt that the defendant is guilty of the unlawful taking of the life of Trooper Foerster such an unlawful homicide would be murder in the second degree. Then and only in that event an unlawful homicide is presumed to be murder in the second degree. The burden is then the States to prove facts which elevate the offense to murder in the first degree. State v. Williams, 29 N.J. 27, 44 (1959) N.J.S. 2A:113-2 specifies what murders are in the first degree.

We are here concerned with the category described as a "willful, deliberate and premeditated killing". The statutory language is actually an inverse statement of the natural sequence of the required mental operations. As settled by judicial construction, the first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word "deliberate" does not here mean "willful" or "intentional" as the word if frequently used in daily parlance. Rather it imports "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word "willful" signifies an intentional execution of the plan to kill which has been conceived and deliberated upon.

13. Circumstantial evidence is of two kinds, namely, "certain", or that from which the conclusion in question necessarily follows; and "uncertain", or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by a process of reasoning. In criminal cases, because of the serious and irreparable nature of the consequences of a wrong decision, the jurors must be satisfied beyond a reasonable doubt of the guilt of the accused, or it is their duty to acquit him, the charge not being proved by that high degree of evidence which the law demands. It is not sufficient if the evidence, on the whole, agrees with and supports the supposition which it is adduced to prove - in a criminal case the evidence must exclude every other

Defendant's Exhibit F

rational supposition but that of the guilt of the accused, and if it does not do so he must be acquitted.

14. The carelessness or superficiality of observers, the variety of powers or graphic description and the different force with which the peculiarity of form or color or expression strikes different persons, makes recognition or identification one of the least reliable facts testified to by actual witnesses who have seen the parties in question.

15. Murder is the unlawful killing of another human being with malice and without reasonable provocation or justifiable cause or excuse. In New Jersey, by enactment of the legislature, the crime has been divided into two degrees, first degree and second degree. It is presumed that every unlawful killing of another human being is murder in the second degree. However, before such a presumption arises an unlawful killing must be established. The mere proof of a killing does not give rise to a presumption of any kind.

Malice, as I have used the word, means that there must be a concurrence of an evil meaning mind with an evil doing hand.

Malice means either one or both of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist even where that act is unpremeditated:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; or

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

16. The elements constituting the crime of murder are premeditation which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word deliberate does not here mean "willful" or "intentional" as the word is frequently used in daily conversation or parlance. Rather it conveys the meaning of "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally the word "willful" signifies an intentional execution of the plan to kill which has been conceived and deliberated upon.

17. Whether these mental operations which I have just described were performed by defendant are questions of fact for the jury.

17. The defendant in this case chose not to be a witness. It is the constitutional right of a defendant to remain silent. I charge you that you are not to consider for any purpose

or in any manner in arriving at your verdict, the fact that the defendant did not testify nor should that fact enter into your deliberations or discussions in any manner at any time. The defendant is entitled to have the jury consider all of the evidence and he is entitled to the presumption of innocence even if he does not testify as a witness.

18. Mere presence at or near the scene of a crime does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an aider or abettor, but it is not in itself conclusive evidence of the fact. To constitute guilt there must exist a community of purpose and actual participation--an aiding and abetting in the crime committed.

19. In every criminal case the burden is on the State to prove all of the essential elements of the crime charged to your satisfaction beyond a reasonable doubt. In this case there are three such essential elements with respect to atrocious assault count which must be so proved by the State before you may find the defendant guilty. They are:

First: That the defendant in fact committed an assault and battery. An assault is an attempt to offer with unlawful force or violence to do a bodily hurt or physical injury to another. No particular degree of force or violence or injury is necessary to constitute an assault and battery.

Second: That the assault and battery was committed upon a state, county or municipal police officer or other law enforcement officer.

Third: That the said law enforcement officer was the victim of an assault and battery while either:

(a) Acting in the performance of his duties while in uniform, or

(b) Acting in the performance of his duties while exhibiting evidence of his authority.

If you find that any of these three essential elements of this crime has not been proved by the State beyond a reasonable doubt, it is your duty to return a verdict of not guilty. However, if you are satisfied beyond a reasonable doubt that the defendant did violate the statute and all the elements thereof, you must find the defendant guilty.

20. Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. Obviously there may be facts entirely legitimate connected with such a departure which would not support such an inference at all. Such facts may include fear of being falsely accused, fear of injury, fear of death or fear of bodily harm or panic arising out of the totality of the circumstances not necessarily out of consciousness of guilt.'

21. An accessory after the fact is one who has knowledge of another's commission of a crime, received, relieved,

comforted, or assisted the felon in order to hinder his apprehension, trial or punishment. Under the facts in this case, if you are not satisfied that the prosecution has established by proof beyond a reasonable doubt that defendant Squires neither personally caused the death of, nor assisted in bringing about the death of Trooper Foerster, but did sometime thereafter with knowledge of the commission of a crime upon Troopers Foerster and Harper assist other persons present at the scene of the alleged offenses in leaving the scene such as to hinder their apprehension, you must then find that defendant Squires was an accessory after the fact and may not be found guilty of any crime upon the persons of Troopers Foerster and Harper.

22. An accessory after the fact is one who has knowledge of another's commission of a crime, received, relieved, comforted, or assisted the felon in order to hinder his apprehension, trial or punishment. If you find under the facts in this case that the defendant Squires acted as an accessory after the fact within the context of this definition then you may not find him guilty as a principal in the murder of Trooper Foerster, in the robbery of Foerster or with respect to any assault upon Trooper Harper.

Respectfully Submitted,

Charles T. McKinney

CHARLES T. McKINNEY
Attorney for Defendant

42:00 Negative

43:00 Negative

44:00 Negative

45:42 Bruns 886 stopping.

45:57 Go 886.

45:59 All right, just south of station Vermont Reg. Hold on.

46:09 1166 Able Vermont, 2 black males, 1 female.

46:31 817 from Brunswick.

46:34 Didn't get the 28, what was it?

46:35 Just south of the station.

46:41 Right. I'm at 73 - South now.

46:50 Receive Bruns.

46:53 Received, just head up this way.

47:03 I'm heading up there.

47:06 Bruns 823. I'm at 84 southbound. I'll be right up there.

47:08 All right, you head down this way.

47:16 Meet you at the pass, partner.

48:00 Negative

49:00 Negative

50:00 Negative

51:00 Negative

52:00 Negative

53:42 817 from Bruns and 820 from Brunswick.

53:50 820 and 817 from Brunswick.

817 go.

817, that car that Harper stopped, they just shot Trooper Harper.

820, be on lookout for this car.

What kind of a car is it again, Bruns?

Bruns, what kind of car is it again? I'm at a U-turn.

Just down from 73. What kind of car you got?

It is a Pontiac, one tail light, Vermont reg. 1166 Able, Vermont Reg. One tail light, one tail light, right?

Right. 2 black males, 1 black female.

Received. I'm at a U-turn. I'll be waiting for him - Is that northbound or southbound?

Southbound.

Negative.

Brunswick to all cars. Brunswick to all cars and patrols: That's a Vermont Reg 1166 A, Vermont, white Pontiac, 2 black males, 1 black female headed south on the Turnpike. 2 of the subjects should be hit.

Bruns, what milepost was that at?

This was Milepost 83, about Milepost 83, just below the station, Milepost 83, but they headed south.

817 Bruns.

817 right. I'm stopped at a U-turn. Nothing of that type car coming up this way. I'm just up from . . . I'm in East Brunswick. I guess I'm right up from 79. I haven't seen nothing much gone south of me.

58:30 Not necessarily, Bob, they may make a U-turn. Last seen headed south.

Right.

59:54 Okay, Bruns. I've got a white Pontiac on a shoulder just across from the service area. I'm going to have to make a U-turn and go back. It's all dented up on one side. I don't know what we got yet, but it's white.

00:06 That's a white Pontiac, Bob, watch it, they are armed and there's two of them are probably hit.

00:13 It's a Pontiac, looks like a Tempest. Right across from 8 Nancy.

00:15 Right.

00:17 Brunswick cars, 817 has a white Pontiac parked across from Service Area 8 Nancy there.

00:30 820, 881, Bruns.

00:34 Southbound. I'm pulling up on 79 now. I'll let you know - it's a Pontiac.

01:06 881 from Bruns.

01:09 They're in the woods, Brunswick, they're in the woods. It's a Pontiac, Vermont Reg. green tags. Stand by.

01:30 Okay, Bruns, that does it, they're taking off; I'm firing at them, they're in the woods.

Moorestown from 8 . . .

01:00 820 from Brunswick.

01:04 881 from Brunswick.

01:08 822 from Bruns.

01:12 They're going in the woods right across from 8 Nancy, Bruns. I'm not going up to the car yet, until a couple cars come.

01:15 One black male got out of the car and went into the woods. I fired at him, he took off. The window's out on this car 1166 Able.

01:35 That's it, 1166 Able.

01:37 820 from Brunswick.

02:29 822 from Brunswick.

02:33 822 from Brunswick.

02:43 822, 881 from Brunswick.

02:53 Come on, Bruns, get some cars. This guy's in the woods somewhere. I don't know what's in that car yet.

03:34 820, 881 or 822 from Brunswick.

C30 SEP 1976

State of New Jersey

WILLIAM F. HYLAND
ATTORNEY GENERAL

Robert J. Del Tufo
DIRECTOR

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE

APPELLATE SECTION
7 GLENWOOD AVENUE
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ALFRED J. LUCIANI
CHIEF, BUREAU OF RESEARCH AND PLANNING

June 15, 1976

FILED
JUN 15 1976
Florence R. Peskoe
CLERK

Ms. Florence Peskoe
Clerk, Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: State v. Clark E. Squire
Docket No. 12,746

Dear Ms. Peskoe:

We are in receipt of the petition for certification in the above-captioned matter.

The State opposes the petition and relies upon its brief below and the opinion of the Appellate Division. Please find enclosed herewith nine copies of the State's Appellate Division brief in the above-captioned matter.

In the event that this petition is granted the State would request the opportunity to file a brief supplementing its brief below pursuant to R.2:12-11.

Respectfully submitted,

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

By: William Welaj
William Welaj
Deputy Attorney General

WW:cp
Encls.
cc: Hon. Stanley C. Van Ness

C30 SEP 19/6

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-1882-73

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLARK E. SQUIRE,

Defendant-Appellant.

Criminal Action

On Appeal From A Judgment of Conviction of the Superior Court Law Division, Middlesex County

Sat Below: Hon. John E. Bachman, J.C.C. and a Jury.

BRIEF AND APPENDIX FOR THE STATE OF NEW JERSEY

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

WILLIAM WELAJ
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LEGAL MIMEOGRAPHING SERVICE, INC.
561 Broad St., Newark, N. J. (201) 643-4292

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RULES CITED

OTHER SOURCES CITED

TABLE TO APPENDIX

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The Middlesex County Grand Jury filed Indictment No. 1436-72 charging the defendant as follows: in Count 1 with the murder of Werner Foerster, contrary to N.J.S.A.2A:113-1 and 2; in Count II with the murder of James Costan, contrary to N.J.S.A. 2A:113-1 and 2; in Count III with atrocious assault and battery upon James Harper, contrary to N.J.S.A.2A:90-1; in Count IV with assault and battery upon a law enforcement official (James Harper), contrary to N.J.S.A.2A:90-4; in Count V with assault with an offensive weapon (upon James Harper), contrary to N.J.S.A.2A:90-3; in Count VI with assault with intent to kill (James Harper), contrary to N.J.S.A.2A:90-2; in Count VII with possession of a gun without a permit, contrary to N.J.S.A.2A: 151-4(a); and in Count VIII with armed robbery, contrary to N.J.S.A.2A:141-1 and N.J.S.A.2A:151-5. (Da-1 to Da-5). In a separate indictment, co-defendant, Joann Chesimard was charged with the same offenses. On November 1, 1973, the Honorable Leon Gerofsky, A.J.S.C. granted defendant's motion for the impaneling of a foreign jury. (Da-6 to Da-7). During the jury voir dire, co-defendant Chesimard became pregnant and was severed from the trial.

Trial was held before the Honorable John E. Bachman, J.C.C., and a jury from January 2, 1974 to March 11, 1974. After the trial court dismissed Count II of the indictment, the defendant was found guilty of all remaining counts. (Da-8 to Da-9). On March 15, 1974, Judge Bachman sentenced the defendant to life imprisonment on Count I (murder), and to consecutive

terms of 10 to 12 years on Count VI (assault with intent to kill), two to three years on Count VII (possession of a gun without a permit), and 12 to 15 years on Count VIII (armed robbery). Counts III, IV and V were found to merge with Count VI. (Da-9).

On June 18, 1974, Judge Bachman denied defendant's motion for a new trial. (Da-10). A Notice of Appeal was filed on March 25, 1974, (Da-11 to Da-14), followed by a cross-appeal by the State. (Da-15 to Da-16). The defendant's unopposed motion to dismiss the cross-appeal was granted by the Appellate Division on May 7, 1974. (Da-17).

e courtroom.

nd then when Chesimard would
be required to do that, too?

hat's right. That's right.

: Your Honor, --

ou're still on the case, yes.

: Your Honor, it seems to me
licit in your Honor's statement
ility here of -- of conflict

wn has sponsored the admission
y.

m -- I won't even listen to
even listen to that.

f you ever have to file an
t that in the briefs, in the
Judge Gerofsky.

of the case is that Mr. Brown
both of you. I don't want to
about it. I didn't set it up.

to hear a single, solitary
--

Well, may I --

the conflict of interest

Your Honor, may I just say
r Honor at least consider,
a decision on the Prosecutor's
both --

if -- let me say this: if
ssibility of conflict of
it's almost incumbent upon
Prosecutor's motion.

e over. You just said there's
conflict of interest. If
have no choice but to grant

Your Honor, it is my very
ion that Mr. McKinney, Mr.
sion before the Courts of

1 COUNTER-STATEMENT OF FACTS

Prior to trial, defense counsel for defendant Chesimard made a motion for a one-week continuance due to the physical state of his client. (14T4-24 to 5-12). The prosecutor opposed the motion by requesting a mistrial as to defendant Chesimard and a severance as to defendant Squire. (14T6-6 to 9-25). The trial court, after hearing oral argument on the issue, granted the prosecution's motion of an indefinite continuance as to defendant Chesimard and severance of the indictments which had previously been consolidated for trial. (14T50-24 to 55-18). During oral argument, defense counsel for defendant Chesimard argued that a severance would be prejudicial to defendant Squire, since

> "We have been acting as a team in relation to the defense of this case... This will no longer be true if it means there would be a severance. It certainly at this point works to his disadvantage and at the same time places upon him an extreme burden of, at this point, having to again go through a variety of defense postures, aliases, characterizations, other kinds of necessary defense activities by himself on his own, when they have been done in conference and jointly.

THE COURT: No, that -- that -- that doesn't disturb me at all. I still have --

MRS. WILLIAMS: I'm sure it disturbs defendant Squire.

THE COURT: Mr. McKinney and Mr. Brown, Mr. Brown -- Mr. Brown being the New Jersey attorney responsible and sponsoring Mr. McKinney here, we would still have Mr. Brown and/or one of his associates.

MR. BROWN: You mean Mr. Brown would be required to be a participant?

THE COURT: Mr. Brown will be required, if the motion is granted, to have a New Jersey

terms of 10 to 12 yea
kill), two to three y
out a permit),and 12
Counts III, IV and V
On June 18,
motion for a new trial
on March 25, 1974, (Da
by the State. (Da-15 t
motion to dismiss the
Division on May 7, 1974

as based on the sponsor-
Brown, who is retained by
f Chesimard to represent

e has it been my understand-
lso represented defendant

Well, --

: Except in that role.

e'll let you read Judge --
t of Judge Gerofsky's ruling.

: I have it.

ll right. He's responsible,
Jersey attorney responsible
ou and, as such, must have a
torney in the courtroom at all
n a separate processing, and
uestion about that." (14T18-

ening statements, Raymond Brown, Esq.,

at since he had originally been retained

on behalf of defendant Chesimard, he

of interest as a result of the sever-

permission to withdraw from the present

f interest situation; in addition, he

y, Esq., was an extremely able and

3 to 3-7). The court denied the motion,

his permission to practice
n this State granted by
, who set up the original
etween counsel and the admis-
e and Mrs. Williams, certainly
hat there be a New Jersey
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lawyer in the courtroom.

MR. BROWN: And then when Chesimard would be tried, I'd be required to do that, too?

THE COURT: That's right. That's right.

MRS. WILLIAMS: Your Honor, --

THE COURT: You're still on the case, yes.

MRS. WILLIAMS: Your Honor, it seems to me that just implicit in your Honor's statement is the possibility here of -- of conflict of interest.

Now Mr. Brown has sponsored the admission of Mr. McKinney.

THE COURT: I'm -- I won't even listen to that. I won't even listen to that.

You know, if you ever have to file an appeal, you put that in the briefs, in the ruling made by Judge Gerofsky.

But the law of the case is that Mr. Brown has sponsored both of you. I don't want to hear anything about it. I didn't set it up.

I don't want to hear a single, solitary word about it, --

MRS. WILLIAMS: Well, may I --

THE COURT: -- the conflict of interest problem.

MRS. WILLIAMS: Your Honor, may I just say this: would your Honor at least consider, prior to making a decision on the Prosecutor's motion, having both --

THE COURT: And if -- let me say this: if there be any possibility of conflict of interest, then it's almost incumbent upon me to grant the Prosecutor's motion.

Think that one over. You just said there's a possibility of conflict of interest. If there is, then I have no choice but to grant this motion.

MRS. WILLIAMS: Your Honor, it is my very distinct impression that Mr. McKinney, Mr. McKinney's admission before the Courts of

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New Jersey was based on the sponsorship of Mr. Brown, who is retained by the family of Chesimard to represent her.

At no time has it been my understanding that he also represented defendant Squire.

THE COURT: Well, --

MRS. WILLIAMS: Except in that role.

THE COURT: We'll let you read Judge -- the transcript of Judge Gerofsky's ruling.

MRS. WILLIAMS: I have it.

THE COURT: All right. He's responsible, he's the New Jersey attorney responsible for both of you and, as such, must have a New Jersey attorney in the courtroom at all times, even on a separate processing, and there is no question about that." (14T18-17 to 21 -12).

Prior to the opening statements, Raymond Brown, Esq., indicated to the court that since he had originally been retained by Evelyn Williams, Esq. on behalf of defendant Chesimard, he felt there was a conflict of interest as a result of the severance. Thus, he requested permission to withdraw from the present case to avoid a conflict of interest situation; in addition, he noted that Charles McKinney, Esq., was an extremely able and competent attorney. (19T2-3 to 3-7). The court denied the motion, stating, in part:

"Now, however, his permission to practice pro hac vice in this State granted by Judge Gerofsky, who set up the original arrangements between counsel and the admistion of both he and Mrs. Williams, certainly contemplated that there be a New Jersey lawyer, and I think Judge Gerofsky's mind a specific New Jersey lawyer, present in the courtroom at all times.

It's my understanding that the conflict of interest situation was aired fully before

Judge Gerofsky, and at which time it was represented to him that there would be no conflict of interest and, therefore, he allowed you to sponsor both of these lawyers in this State. I have varied Judge Gerofsky's ruling somewhat in that last week. I told you I did not think it was necessary for Ray Brown personally to sit in with Mr. McKinney; that you could send someone else from your office. I still so rule. I think I have varied Judge Gerofsky's directions to that degree, but I do not want to vary what he originally contemplated that much by excusing the obligation to have a New Jersey lawyer present during the course of this trial." (19T3-25 to 4-22).

The prosecutor then made an offer of proof, stating that he intended to present testimony concerning the defendant's arrest in New York City under the name of Archie Gibson on May 1, 1973, and that he was booked, fingerprinted and then released. The defendant displayed the same license (Archie Gibson) to Trooper Harper the following day. The prosecutor indicated his intent to demonstrate that the defendant and Archie Gibson were the same individual by comparing fingerprints, stating that such evidence was admissible under Evidence Rule 55 to establish identity. (19T35-15 to 38-9). The trial court denied defendant's objection to the presentation of this evidence. (19T39-13 to 40-8).

The first witness for the State was New York City Transit Policeman Michael Sullivan. (19T15-19). On May 1, 1973, he arrested an individual who identified himself as Archie Gibson and showed the officer a New York driver's license. (19T41-5 to 12; 19T42-6 to 19). The witness, who was in the individual's presence for three hours, identified the defendant as the "Archie Gibson" he arrested. (19T44-10 to 17; 19T47-7 to 22). He then

identified the license shown him by the defendant. (19T48-9 to 49-1).

Charles Christiano of the Identification Section of the New York City Police Department reviewed the section's files with respect to the arrest of Archie Gibson. (19T54-6 to 55-24). He found a card in the file corresponding to the person and date arrested. (P-2). (19T55-25 to 56-11).

Ronald Manaker of Bronx Central Booking (19T57-9 to 23) acknowledged his signature on P-2, indicating that he had taken the fingerprints on the card. The signature of the individual fingerprinted was the only other writing on the card. (19T58-10 to 59-10).

Detective Casmir Smerecki of the Middlesex County Prosecutor's Office was qualified as an expert in criminal identification, particularly with regard to fingerprinting. (19T59-19 to 61-2). When P-2 was offered into evidence, defense counsel objected because (1) it was not an official record and (2) it contained inadmissible information on it. (19T61-22 to 63-19). Officer Manaker was then recalled and, on cross-examination, indicated that he was not the official keeper of P-2 and other similar documents, that he did not fill out the entire card, and that when he handled the card it had not been completely filled in. (19T66-23 to 67-10). Defense counsel's objection to the admission of P-2 was overruled; the Court indicated that the top and back of the card would be sealed, so that only the fingerprints and the officer's signature were visible. (19T67-13 to 21). In so ruling, the Court noted that Officer Manaker had testified.

that he took the fingerprints, and that the record keeper, Officer Christiano, had indicated that they came from the identification bureau in New York City. Consequently, the court was satisfied as to their authenticity. (19T67-25 to 68-7).

Detective Smerecki then testified that he compared P-2 with the defendant's fingerprint card (P-3) from the Middlesex County Sheriff's Office. (19T70-9 to 73-7). Defense counsel again objected to the admission of the fingerprint evidence, arguing that it violated the provisions of Rule 55 since (1) the evidence involved an arrest of the defendant not resulting in a conviction and (2) it implied that the defendant had been found guilty of a crime in another state. (19T74-12 to 86-2). The court again overruled the objection, noting that since the arrest testimony could infer to the jury that the defendant committed a crime, and since it was nevertheless probative of identity, its introduction into evidence was proper under Rule 55. (19T87-19 to 89-5).

Lawrence Golec of the Identification section of the Middlesex County Sheriff's Department then identified P-3 as the card upon which he took the defendant's fingerprints. (19T89-15 to 90-14). P-3 was then admitted into evidence with certain extraneous material deleted from view. (19T91-3 to 94-8). Officer Smerecki, who compared the fingerprints found on P-2 and P-3 on January 18, 1974, then testified that the fingerprints were of the same individual. (19T96-3 to 97-10).

Trooper James Harper testified that on May 1 and 2, 1973, he was assigned to patrol the Woodbridge Township to the Carteret Borough area of the New Jersey Turnpike in an unmarked car.

His shift ran from 10:00 P.M. to 6:00 A.M. (19T97-17 to 99-24). At approximately 12:45 A.M., he noticed a 1965 Pontiac heading south at Mile Post 85; the right taillight was out while the red lens covering the left taillight was broken. (19T101-2 to 103-1). In passing the car, he noticed that it was a shade of white, having Vermont license plates and containing three individuals. (19T103-2 to 24). He then allowed the car to pass him on the left before maintaining an even speed with it. Shortly thereafter, the trooper pulled alongside and to the left of the Pontiac, and motioned it to pull over; the driver of the car acknowledged the signal and pulled to the side of the road by Mile Post 83. (19T103-25 to 106-1). Both vehicles came to a halt 200 yards south of the Turnpike Administration Building. (19T106-1 to 3). The driver of the Pontiac then exited and approached the trooper's vehicle; the trooper noticed that he was a black male wearing a safari jacket, a flop hat, and dark pants, and having a goatee with blemish marks on his eye and cheekbone. (19T106-6 to 107-4; 19T133-7 to 14). In addition to the artificial lighting in the area, the officer had put on his high beams, which focused on the Pontiac. (19T131-22 to 132-6).

Trooper Harper, who had exited his car, met the driver (subsequently identified as the defendant), midway between the two cars. (19T134-7 to 18). After informing the defendant that his taillights were not functioning properly, the officer asked to see his registration and driver's license. He produced a New York license and a Vermont registration bearing a female's name. (19T135-3 to 136-4). In response to questioning, the

defendant indicated that he had borrowed the car from a girl in New York City and was heading to Philadelphia. (19T136-20 to 137-5). The trooper told the defendant to remain there while he checked the registration with the car's serial number. He then opened the driver's door of the Pontiac and shined his flashlight on the inside panel to obtain the serial number. (19T137-6 to 19). As he did so, he noticed a black male seated in the rear of the car and a black female in the right front passenger seat. (19T 138-8 to 139-24).

After verifying that the serial number corresponded with the registration, Trooper Harper asked the two occupants who owned the car; the male replied that he had borrowed it from someone in New York City, while the female added that they were headed to Washington, D.C. At this point, the officer asked both occupants for some form of identification. (19T140-2 to 16). The female moved her right hand down along her leg and began moving it around; the officer assumed she was looking in her pocketbook for some identification. (20T558-16 to 559-16). As the male gave him a plastic hospital card, the officer heard someone call his name; turning toward the rear of the Pontiac, he saw Trooper Werner Foerster standing by the defendant to the right front of Car 886. (19T140-17 to 141-17). Foerster said, "Jim, look what I found," and held up a clip for an automatic weapon. (19T141-18 to 142-22). The witness immediately focused his attention back to the two passengers, ordering them to put both of their hands on their laps. While the male complied, the female did not. Rather, she remained in the same position, sitting at an angle facing the officer with her right

hand out of sight on the side of her leg. (19T142-23 to 143-25).

As the officer repeated his earlier command, the female made a "gritting face" and a loud sound and began moving her right hand. (19T144-4 to 145-3; 20T560-8 to 25). The trooper backed out of the car and began to run to the rear of the car; as he turned he heard a shot being fired and felt pain and a burning sensation in his shoulder. (19T145-4 to 15). The witness continued to run to the rear of his patrol car and crouched behind it. As he did so, he heard several shots being fired. (19T146-17 to 23). Reaching for his revolver, he looked around the corner of the car and saw the female exiting the Pontiac on the driver's side. She had a pistol in her right hand which she was firing at Harper as she exited the car. (19T146-24 to 147-15).

The officer returned the fire; after his third shot he heard the female scream and fall to the ground, the gun still in her hand. She continued to fire at the officer, who again moved behind the bumper of his car. (19T147-18 to 148-3). When the shooting stopped, the trooper stood up to see where Foerster was; he saw the defendant engaged in a struggle with him. The defendant was above Foerster during the struggle, the latter apparently being in a slightly crouched position. (19T148-5 to 14; 19T150-12 to 151-24). As Harper observed this, he heard more shots being fired although he did not know by whom. Moving to the left of his car, he saw the male passenger kneeling beside the female on the ground. The male began firing at the officer, causing him to duck behind his car. (19T152-2 to 153-1). The officer heard two shots being fired as he did so; the first shot was a loud popping sound but the second, which followed

immediately, was even louder although it had a muffled tone to it. It seemed to emanate from a louder weapon but did not have the echoing effect that the others hand. (19T153-1 to 10).

Trooper Harper returned fire to the area where the passengers were. After firing two shots, he heard the male scream and start to fall to the ground. (19T153-11 to 19). After hearing more shots, he began to reload his revolver. (19T153-23 to 154-25). Backing away from his car, he did not see Foerster and the defendant. He then turned around and ran toward the barracks 200 yards away. (19T155-2 to 15). As he ran, he heard more shots. (19T155-16 to 22).

Upon entering the building, he saw Sergeant Baginski and Troopers O'Rourke and Foster. (19T155-23 to 156-10). A summer uniform shirt with a brownish stained hole in the back, (19T159-9 to 22) and a cut shoulder strap (19T162-14 to 164-7) were then identified by the witness as part of his uniform he was wearing that night.

A Wade hearing was then conducted outside of the jury's presence concerning the identification of the defendant. Following the testimony of Harper and five other witnesses (19T170-4 to 346-21), the trial court found the in-court identification by Harper to be admissible. (19T364-3 to 368-18).

In the presence of the jury, Trooper Harper estimated that the entire incident lasted approximately ten minutes. He then identified the defendant as the driver of the Pontiac (20T376-5 to 21), before briefly describing the identification procedure elicited during the Wade hearing. (20T377-14 to 384-21).

On cross-examination, Trooper Harper indicated that after he had signaled to the driver of the Pontiac to pull to the side of the road, he radioed the police barracks to advise them of his location, that he was stopping a car, and the description of the car and its occupants. (20T417-21 to 419-14; 20T422-19 to 423-3). From the time he initially met the defendant between the two cars to his leaving the scene to run to the police barracks, the officer did not hear any conversation between the defendant and the occupants of the car. (20T536-14 to 537-14). After being hit in the shoulder and running to the rear of the car for protection, he heard several shots being fired; these shots came from the area of the Pontiac he had just left. (20T541-15 to 543-4). On redirect, the officer indicated that he saw the defendant and Foerster struggling near the right front fender of his car. (20T561-24 to 562-5).

Robert Silverman testified that on the night in question he was travelling south on the Turnpike at approximately 1:00 A.M. when he saw the flashing light of a State Police car. (20T568-12 to 569-7). He saw a policeman engaged in a fight with another individual, as well as two other cars alongside the road. (20T569-10 to 570-2). The two were struggling near the passenger side of the middle car. (20T570-3 to 12). The policeman's back was to the witness but it appeared that the second participant, who was wearing a white shirt, was tackling the officer while the latter attempted to push him away. (20T570-13 to 571-23). The man did not see anyone else in the vicinity. (20T572-12 to 14).

Sergeant Chester Baginski, in charge of the evening

shift at the New Brunswick Station, arrived at work at 10:30 P.M. on the night in question. (21T2-7 to 3-14). Shortly after 11:00 P.M., he sent Trooper Foerster out on patrol in Car 820. (21T3-22 to 5-25). Shortly before midnight, he heard by radio transmission that Trooper Harper was making a vehicle stop and requested backup assistance. Soon thereafter, he heard Car 817 (manned by Trooper Palantchar) as well as Car 820 indicate that they were responding as backup vehicles. (21T35-21 to 36-12; 21T10-13 to 12-12). At 12:55 A.M., the sergeant observed Trooper Harper enter the station looking pale. (21T13-6 to 18). He indicated that he had been in a gun fight and was wounded. As Baginski examined the shoulder wound, Harper described the Pontiac and its occupants. He added that during the gunfire, two of the individuals might have been wounded, and that in the gun battle he had lost sight of Foerster who had been at the scene. (21T14-1 to 15-19). The witness then issued a general alarm advising all patrol cars and Turnpike stations of the incident. (21T15-20 to 22).

Trooper Robert Palentchar testified that he was on patrol of the Turnpike in Car 817 at approximately 12:30 A.M. when he overheard a radio transmission from Trooper Harper indicating to headquarters that he was stopping a white Pontiac. (21T45-7 to 46-14; 21T47-3 to 21). At the time Palentchar was travelling south at Mile Post 73, ten miles south of Harper. (21T21 to 24). The witness then heard Trooper Foerster radio to headquarters that he was at Mile Post 84, one mile north of Harper and was heading to the area as a backup. (21T47-23 to 49-6). When Palentchar was advised to proceed to the same area, he made

a U-turn and proceeded north at milepost 72. After not hearing any radio transmissions for a while, the trooper became concerned and accelerated his vehicle. He reached Mile Post 78 when he received a radio transmission from headquarters; as a result of the call, he pulled into the U-turn road, stopped, and waited for the white Pontiac. (21T49-7 to 51-4).

After waiting about a minute without seeing the car, Palentchar proceeded north for approximately one-half mile at which point he observed a white Pontiac to his left on the shoulder of the southbound road without lights. (21T51-5 to 25). The officer radioed this information to headquarters and made a U-turn at Mile Post 79. (21T52-1 to 16). As he slowly approached the Pontiac, he saw a black male with a white jacket emerge from the woods proceeding toward the car. When the man stopped, Palentchar hit his brakes, turned on his red light, jumped out of the car and yelled, "Halt." (21T52-19 to 54-7). When the man turned and ran, Palentchar fired four shots at him from 50 yards away. The officer did not think he hit the man, who disappeared into the woods. (21T54-7 to 55-11).

The trooper immediately ran behind the driver's door of his car while he reloaded his revolver. (21T58-17 to 59-22). After several minutes had passed, he saw movement in the woods to his right and south, about 25 yards south of the point where the man had entered the woods. He observed a red sweater move in the grass area and yelled to the individual to put his hands up. (21T59-23 to 60-12; 21T61-11 to 20). Repeating his threat that he would shoot if the person did not come up to the Pontiac, the officer saw a black female approach the car. (21T61-21 to

62-14). After she placed her hands on top of the car, the female, who was apparently wounded, opened the door of the Pontiac and sat down. (21T62-15 to 63-22).

After radioing headquarters, several troopers from Moorestown and Newark arrived. (21T63-23 to 64-11). The officers then went up to the Pontiac but found only the female, who was then brought to the area between the cars and laid on the ground. (21T65-4 to 14). Several more troopers who had arrived at the scene went into the woods after the male while Palentchar called for an ambulance. Five minutes later, he went into the wooded area where the female had emerged from. (21T70-9 to 72-20). Upon entering the area he saw a black male who appeared to be dead. (21T72-23 to 73-3). He also found a revolver between the legs of the deceased and red scarf to his side. In a depression in the grass nearby was a belt and an automatic pistol. (21T84-2 to 18).

Trooper Frank Dreyer was at Princeton Headquarters on the night in question when he received a call at about 1:00 A.M. indicating that a trooper had been shot on the Turnpike. (21T96-9 to 97-13) As he and Trooper Byrne proceeded to the area (Mile Post 83), they saw a marked State Police vehicle parked on the shoulder of the road behind an unmarked police car; both cars were still running and had their lights on. (21T98-5 to 99-9; 21T104-1 to 4). Trooper Dreyer, in searching the area, found a trooper's hat and flashlight between the two cars. (21T105-2 to 6). As he walked up a dirt enbankment in front of the unmarked car, he found a New York driver's license (P-1) about 15 yards away. (21T107-22 to 109-8). Continuing to look around the area, the

officer found the body of Trooper Foerster on the embankment lying alongside the right rear door and wheel of the unmarked car. (21T112-2 to 113-6). The fallen trooper was obviously wounded and appeared to be dead. (21T113-7 to 15). The witness noticed that Foerster's revolver was gone, but that there were several automatic pistols in the immediate area. (21T116-2 to 13).

Henry Comeau, a communications shift supervisor for the Turnpike Authority Administration Building in New Brunswick (21T 235-1 to 236-1), was responsible for operating a tape device which ran continuously and recorded all incoming and outgoing radio transmissions from State Police cars, as well as the time at which each communication was made. (21T236-9 to 238-5). He identified a reel of tape (P-39) as being the one which recorded all such communication between midnight and 4:00 A.M. on the night in question. (21T239-7 to 242-10). Cornelius Sheridan (21T245-1 to 246-8) and Sergeant Richard Kelly (21T248-1 to 251-16) then testified as to the chain of evidence of the tape, after which it was offered into evidence. After argument was heard concerning its admissibility, during which time the tape was played in an in camera hearing (21T252-15 to 299-3), the trial court ruled that the radio transmissions of Troopers Foerster, Harper and Palentchar were part of the res gestae and thus admissible. With respect to the transmissions of dispatcher Foster, the court held them to constitute an exception to the hearsay rule under Rule 63(4), since they were excited utterances made while he was in a stress situation. Subject to the preparation of a more

accurate transcript, the court ruled the tape admissible. (21T 299-4 to 301-23). Both defense counsel and the prosecutor agreed upon a specific excerpt from the tape (Da-30 to Da-33), which was admitted again over defense's objection. (21T312-7 to 315-12). Pursuant to defense counsel's request, the trial court indicated that it would charge the jury that the information on the tape was admissible only to show the actions of the troopers involved and not to prove the truth of the statements contained therein. (21T315-3 to 320-20; 21T329-2 to 7).

Detective James Challender of the New Jersey State Police, who was familiar with the voices of the four individuals on the tape (P-39), explained how the tape recorder operated. (21T341-1 to 343-17). Prior to playing the tape, the court instructed the jury that the tape was being admitted into evidence for proof of only two things: the time sequence of the events and the actions of the troopers during the time period. (21T343-22 to 344-17). During the playing of the actual tape, of which the jury had a written transcript, the witness identified the voices heard. (21T345-10 to 356-10). (Da-30 to Da-33).

Detective Carl Carabelli of the State Police arrived at Mile Post 78 at 1:35 A.M. on the night in question and parked behind a white Pontiac. (21T364-1 to 365-24). After conversing with Trooper Palentchar, he went into the grass area where the body of the deceased black male lying on his back was located. (21T366-13 to 22; 21T368-22 to 369-19). Under the right knee of the deceased was a .38 caliber Smith and Wesson revolver. (P-52). (21T379-4 to 5). About six inches from his waist was a red scarf and eight feet away was a three eighty caliber

Browning automatic weapon (P-53) along with a black belt. A brown button was also located a few feet away, while in the left pocket of the deceased was a clip containing 13 rounds of ammunition for an automatic weapon. (P-51). (21T379-6 to 17). When the body was turned over, the officer observed a belt with a black holster strapped to the back. (21T383-24 to 384-24).

Trooper Charles Thom testified that upon arriving at the scene, he was ordered to remain with the Pontiac having Vermont license plates. (21T465-7 to 466-16). No one touched the vehicle while he was there; later that evening the car was towed away. (21T468-7 to 469-14).

Detective Challender was recalled, testifying that he arrived at the scene (Mile Post 78) at approximately 1:38 A.M (21T509-6 to 510-8). After conversing with Detective Carabelli, the two proceeded to the grass area off the road where the witness was shown the body of the dead black male lying face up. Nearby was a red scarf and the two weapons previously described. (21T 510-20 to 511-13). Challender then went up to an ambulance parked nearby, where he saw the wounded black female lying on a stretcher. (21T512-18 to 513-8). Shortly thereafter, he proceeded to Middlesex General Hospital where he saw Trooper Harper lying on a stretcher as well as the black female, who was receiving medical attention. (21T514-4 to 515-5). The witness talked with Harper for 30 to 45 minutes to ascertain what had happened; during that time he learned of Trooper Foerster's death. (21T515-6 to 19). He then telephoned the description of the driver of the Pontiac to police headquarters. (21T515-20 to 24).

After obtaining the clothes of the injured black female

and securing them in his trunk (21T515-25-25 to 518-2), Challender observed the body of Trooper Foerster. (21T518-6 to 19). His face and hands were covered with dried blood, and there was a great deal of blood in the area of the right arm. There was a hole in the back of the neck, a protrusion on the rear area of the head, and a lot of blood matted in the hair as well as splattered over the front of his uniform. Blood was on the lower calf of his left leg, a long laceration existed in the left throat area, and the knee part of his trousers were dirty. Challender also noticed that his revolver was missing. (21T519-12 521-4). The witness then removed and secured the equipment and clothes from the body. (21T522-4 to 523-19).

Detective Louis Parisi of the State Police went to the garage of the Administration Building on May 2nd and assisted in processing the white Pontiac. (21T645-21 to 646-10), along with Detectives Wilke and Demeter. When he opened the attache case in the trunk of the car, he found various materials bearing the name "Archie Gibson" (21T647-4 to 650-19). Included were a torn telephone page with the above name underlined, a birth certificate for Archie Gibson, a hospitalization card and and a Selective Service card, both for the same name. (21T653-2 to 11).

Detective Robert Conrad of the New Jersey State Police arrived at the mile post 83 scene at 2:10 A.M. and conferred with Troopers Byrne and Dreyer. (21T775-8 to 778-15). He observed the body of Trooper Foerster lying near the right side of car 886.

(21T780-12 to 17). He was given a New York driver's license (P-1) by the two troopers with the name "Archie Gibson" on it. (21T780-18 to 781-20). Along the shoulder of the road he found a Social Security card (P-67) bearing the same name. (21T789-20 to 790-13). Between Cars 886 and 820 Detective Conrad found a flashlight (P-69) and Trooper Harper's hat (P-10). (21T792-2 to 793-5).

Upon examining Foerster's body at the scene, the detective saw an automatic pistol (P-71) with a shell stuck in the breach lying between Foerster's right hand and hip. A clip (P-70) smaller than one which would be used in the above-mentioned gun was lying by his right side. A green hat (P-26) was found between his feet and a spent shell (P-130) was lying by his right foot. (21T860-3 to 807-16). In addition, the detective saw another automatic weapon (P-76) just south of Foerster's feet lying on the shoulder of the road. A shell was also jammed in the breech of the gun. (21T828-13 to 829-14). Between cars 886 and 820 the witness found a spent 9mm shell (22 feet from Car 886), two similar shells 30 feet and 12 feet from the car, and a 38 caliber automatic shell casing along the right door of Car 886. (21T834-5 to 835-5). In front of the car he found two black marks on the shoulder of the road indicating that a car had "spun out" in leaving the scene. (21T836-14 to 837-9).

Sergeant Norman Demeter of the State Police, after being qualified as an expert witness in the area of fingerprinting,

testified that he was directed to go to the Middlesex General Hospital at 4 a.m. on the night in question. (22T17 to 4-6; 22T27-22 to 8-8). While there, he fingerprinted the injured black female and performed a neutron activation test on Trooper Foerster's hand. (22T8-17 to 9-8; 22T13-1 to 16). He also saw the same test performed on the female's hand. (22T9-19 to 25).

After Demeter was excused as a result of illness, Trooper George Seitz testified that he arrived at milepost 83 at approximately 6:00 a.m. following the shootings. (22T17-18 to 18-18). Both the marked police car (Car 820) and the unmarked unit (Car 886) were still there. (22T18-23 to 24). As he was talking to another trooper, he noticed five spent casings about one foot to the right rear of Car 820. He picked up the casings (P-84), which were eventually turned over to Detective Wilke. (22T19-8 to 21-22).

Sergeant Herbert Ulbrich of the State Police arrived at milepost 83 between 6:00 and 7:00 a.m., and was instructed to look for evidential items along with George Hickman. (22T32-5 to 33-11). Both police units (Cars 820 and 886) had been removed by that time. (22T33-12 to 19). Ulbrich noticed a large pool of blood on the shoulder of the highway (22T33-20 to 25), and an expended bullet (P-88) 50 feet north of the puddle, lying three feet into the right lane of the turnpike. (22T35-16 to 36-24).

A Miranda hearing was then held outside of the jury's

presence to determine the admissibility of a statement obtained from the defendant. After hearing testimony (22T45-24 to 103-25), and oral argument on the issue (22T104-18 to 128-3), the trial court ruled that the statement was inadmissible. (22T128-10 to 131-20).

In the jury's presence Officer Frank Zygmund of the East Brunswick Township Police Department testified that at 2:00 p.m. on May 3, 1973, he took part in a search in a heavily wooded area off milepost 78 in an attempt to apprehend the defendant. (22T133-12 to 135-1). He, along with numerous other officers, formed a skirmish line and proceeded across the area. During the search, he observed a body lying face down covered with leaves and mud. (22T135-2 to 136-2). The officer placed his shotgun against the individual's back, while other nearby officers were summoned to assist in apprehending the suspect, who was identified in court as the defendant. (22T136-3 to 22). The defendant had been lying on top of a white jacket which he had wrapped around his left arm. (22T137-2 to 8). The witness, along with a Trooper Osborne and two other troopers, transported the defendant back to headquarters. A search revealed no weapons, only a roll of money. (22T137-9 to 139-7).

Officer Randall Kluj (22T142-9 to 149-16) and Trooper Douglas Osborne (22T149-23 to 162-7) corroborated the testimony of Zygmund. Osborne added that when he saw the defendant in the woods after his arrest, he observed a cut on the web of his right hand between his thumb and first finger. (22T152-24 to 153-3).

Detective Norman Demeter was recalled and during his testimony it was stipulated that the injured black female was Joann Chesimard and the deceased black male was James Costan. (22T165-3 to 13). After leaving the hospital on the night in question, the witness went to the administration building where he dusted three automatic weapons and one .38 police weapon for fingerprints in the presence of several officers. (22T165-17 to 166-9). Although there were fragmentary prints and smudges on the weapons, none were identifiable. A dusting of the three clips what were in the weapons resulted in the same finding. (22T166-10 to 21). Demeter and Detective Wilke then proceeded to the garage level in order to examine the 1965 Pontiac and the two patrol units. (Car 820 and Car 886). (22T192-20 to 193-4). After dusting the outside of the Pontiac, they were unable to obtain any identifiable fingerprints. (22T193-13 to 194-10). On the inside of the car, the witness found a red handbag laying in the front seat, a small pool of blood, and a shell casing on the left front floor. In the back was a black leather case housing a typewriter, a brown bag, and several books, magazines and maps on the seat. (22T194-11 to 21; 22T206-20 to 207-2). The witness found three loaded automatic clips in the handbag. (P-95, P-96, P-97). (22T213-24 to 214-24).

On one of the four maps found, the officer was able to obtain a partially identifiable latent print. (22T215-2 to 216-24). On the rear seat of the car Detective Wilke found

an expended shell. (22T217-14 to 218-12). Inside the trunk were two suitcases, a brown attache case and a brown duffel bag. Inside one of the suitcases was an Alabama license plate, as well as shotgun shells and two boxes of .38 police super vel ammunition. (P-104, P-105). (22T218-13 to 220-19). During the examination of the unmarked police unit (Car 886), the witness discovered a bullet head (P-107) protruding from a piece of molding near the rear of the car, as well as a piece of lead (P-106) from the front headlight compartment. (22T221-10 to 223-1; 22T226-8 to 227-22).

After completing the examination, Demeter went to Perth Amboy General Hospital and, along with Detective Wilke and Trooper Strachensky, witnessed the autopsies of Trooper Foerster and James Costan. During the autopsy, he saw certain bullet heads removed from Foerster's body by Dr. Albano. (22T228-15 to 229-9). The next day, he went to the Administration Building in New Brunswick where he saw several detectives bring in the defendant. (22T231-7 to 233-1). At that time, Officer Demeter photographed the defendant, administered a neutron activation test to his hands, took nail scrappings and a hair sample and watched Detective Wilke fingerprint him. In addition, the witness photographed (P-92, P-109, P-110) the wound on the defendant's hand. (22T233-2 to 234-23). A comparison of the defendant's fingerprints and that taken from the map found in the Pontiac indicated that the map print was from the defendant's left middle finger. (22T235-11 to 239-11).

On cross-examination, it was acknowledged that the result of the neutron activation test was negative. (22T288-20 to 289-3). On redirect, the officer explained that the results of a neutron activation test would not always be positive for an individual who had fired a gun, since there is an 18 hour limitation as well as numerous circumstances affecting the test. In fact, the witness indicated that he had never received a positive result on such a test, nor had he ever obtained an identifiable fingerprint from a gun. (22T312-4 to 19; 22T309-17 to 310-13).

Detective Michael Langen of the State Police testified that on May 4, 1973, he observed a blood sample being taken from the defendant by a Dr. Lind at the Middlesex County Jail. (22T315-15 to 316-10). He took the vial containing the sample to the State Bureau of Investigation. (22T316-11 to 21).

William Gelder, a car repairman for the New Jersey Turnpike Authority, worked on a gray Oldsmobile during June, 1973. (22T328-3 to 20). As he was replacing the headliner in the roof, he saw a small copper bullet. (P-142) After he had removed it, he gave it to a Detective Demeter on June 21. (22T328-21 to 329-9; 23T73-11 to 74-1).

Detective Sergeant Edward Wilke of the State Police was then qualified, over objection, as an expert witness in identification procedures. (22T331-14 to 341-14). He arrived at the scene (milepost 83) at approximately 2:20 a.m. on the night in question, where he met three troopers already present.

(22T341-17 to 343-21). He took photographs of the scene, including Car 886, Trooper Foerster's body, and the various evidence found. (22T345-13 to 346-18). He noticed a jammed automatic weapon (P-71) under Foerster's right hand, a clip (P-70) by his knee, a spent .38 automatic shell (P-130) near his toe, and another jammed automatic weapon (P-76) about seven feet from the right front of Car 886. In addition, there was a trooper hat (P-116) and a "super flight" type of hat (P-26) between Foerster's feet, another trooper hat in back of Car 886, along with a flashlight found in front of Car 886. (P-83). (22T346-23 to 347-19; 22T350-7 to 353-3). A registration certificate (P-82) in the name of Isabelle Johnson was found under Foerster's body when it was moved. (22T353-21 to 354-20). The trooper hat (P-116) found at Foerster's feet was then identified as belonging to the deceased. (22T359-16 to 361-13). The jammed automatic weapon (P-76) was found to have one jammed bullet and nine other bullets in its clip. (22T366-25 to 367-15). The clip found by Foerster's knee (P-70) was full and had six rounds (P-117) in it. (22T367-23 to 368-16). The officer indicated that after completing his work, he found a spent casing (P-121) to the rear of Car 886. (24T403-10 to 24).

Detective Wilke then proceeded to milepost 78 where he photographed the scene. (22T371-8 to 24). While he was photographing the body of James Costan he noticed a clip (P-51) in the pocket containing rounds; the butt of a gun (P-52) partially loaded was also found not far from the body. (22T386-9 to 387-7).

Detective Wilke subsequently witnessed the autopsies of Trooper Foerster and James Costan. He saw Dr. Albano remove three fragments (P-139) from Foerster's right arm and body. (22T429-2 to 431-14). He also received two pieces of lead (P140, P-141) from Dr. Albano which he had removed from the head. (22T431-15 to 432-6).

On May 3rd, the detective fingerprinted the defendant. Upon comparing the prints with the latent print obtained from the map found in the Pontiac, he concluded that the latent print was made by the defendant's left middle finger. (22T438-11 to 439-9).

Detective Vincent Peterson of the State Police then testified that he, along with a Detective O'Donohue and a George Hickman, examined the 1965 white Pontiac on May 7, 1973 for anything of evidential value, such as bullet holes and fingerprints. A bullet (P-149) with a lead core (P-150) was found in the channel of the rear window. (23T126-1 to 127-25; 23T141-22 to 142-10). However, no identifiable fingerprints on the car were found. (23T156-9 to 157-12).

Detective Ronald Horstman of the State Police testified that he was given four keys, which had been found on the defendant, to check with respect to the white Pontiac on September 19, 1973. (23T169-1 to 17). A gold-colored key fit the door lock on the passenger side, while two silver keys fit and operated the ignition of the vehicle. (23T169-23 to 171-4). However, the Pontiac was never started with the two keys, since the battery

was reported to be dead; the keys merely fit and turned the ignition. (23T177-25 to 179-1).

Sergeant John Lintott of the State Police was then qualified as an expert witness in ballistics. (23T192-4 to 197-12). He explained the differences between a revolver and an automatic weapon, noting that the two utilized different types of ammunition. (23T199-1 to 200-19). He then identified P-8 as a revolver. (23T198-14 to 199-1). Lintott was given four types of ammunition to examine: 9 millimeter Luger caliber, 380 auto caliber, 38 super auto and 38 special. The first three types are all designed for use in an automatic pistol while the last type is designed for a revolver. (23T207-1 to 11). He also tested three types of automatic weapons: a 38 super auto Llama automatic pistol (P-71), which utilized 38 super auto cartridges; a 380 caliber Browning automatic pistol (P-53), which utilized 380 auto caliber cartridges; and a 9 millimeter Luger caliber Browning automatic pistol (P-76), which utilized 9 millimeter Luger caliber cartridges. (23T210-1 to 19). None of the clips utilized in the automatic weapons could be interchanged. (23T213-18 to 214-11).

Detective Lintott examined and tested the weapons mentioned above together with the various type of ammunition found at the two scenes. With respect to the 38 super auto Llama (P-71) which had been found by Trooper Foerster's body, he concluded that the following shells had been discharged from it: P-131, found on the front floor of the Pontiac (24T15 to 220-1);

P-132, found on the rear seat (24T220-12 to 20); P-130, found by Foerster's foot (24T222-12 to 20); P-128, containing two shells found on the ground in front of Car 886 (24T223-8 to 16); P-157, found in the front bumper of Car 886 (24T223-23 to 227-15); P-88, found on the highway at milepost 83 (24T230-21 to 231-11); P-106, which were removed from the headlight compartment of Car 886 (24T233-9 to 17); and P-149, which was removed from the rear window of the Pontiac. (24T233-25 to 234-10). The Llama, when discovered, contained one jammed cartridge and two cartridges in its clip. (24T312-23 to 313-11).

With respect to the jammed 9 Millimeter Luger Browning automatic (P-76) found seven feet from the right front of Car 886, near Foerster's body, the detective concluded that the following shells were discharged from the weapon: P-142, which was found in the headliner of the roof area in Car 886 (24T242-16 to 243-10); and P-126, P-126-A, and P-127, containing 4 discharged shells which were found in front of Car 886 (24T249-21 to 252-9); In addition, the clip (P-51) containing 13 rounds of ammunition (P-125) found in Costan's pocket, and the ten rounds of ammunition (P-118) found in the clip jammed in the Luger Browning were determined to fit the above-mentioned weapon. (24T238-17 tp 24;-25).

Detective Lintott examined the holster (P-48) found on Costan and compared it with the 9 mm Luger Browning. Because of the wear marks and stress marks found in the holster, which

corresponded to the protruding parts of a 9 mm Luger Browning, he concluded that the same type of weapon had been carried in that holster. (24T260-24 to 262-12). However, theoretically another type of gun could have been carried in the holster on the night in question without altering the stress and wear marks. (24T267-25 to 270-14).

The witness then identified the 380 caliber Browning (P-53) found near Costan's body, noting that it was found to have bloodstains on it. In addition, the serial number had been removed from that weapon as well as from the 9 mm Luger, although the serial number on the former was chemically obtained. (24T271-6 to 273-19). The clip (P-70) containing 6 rounds (P-117) found near Foerster's body was found to fit the Browning. In addition, the Browning itself contained one jammed discharged shell (P-122-A)and a clip containing six bullets. (P-122-B). (24T274-4 to 279-22).

P-8 was identified as a 38 special caliber revolver issued to Trooper Harper. The five spent casings found to the rear of Car 820 (P-8), as well as the spent casing found to the rear of Car 886 (P-121), were found to have been fired from that revolver. (24T281-16 to 283-1). The detective then identified the 38 special caliber Smith and Wesson revolver (P-52) found between Costan's legs as belonging to Trooper Foerster. (24T290-14 to 291-2). Two expended shells (P-123) were found in the revolver; the two bullets taken from Trooper Foerster's body (P-139, P-140) were determined to have been fired from that weapon. (24T291-12 to 294-16).

Dr. Edwin Albano, the New Jersey State Medical Examiner, conducted an autopsy on Trooper Foerster on May 2, 1973 (24T367-14 to 22), and found the following injuries: a bullet wound produced by a large caliber distorted bullet which entered the left side of the neck and lodged in the skull near the scalp--powder marks surrounded the entrance of the wound; a second bullet wound caused by a similar bullet which entered the skull above and in back of the left ear which lodged at the base of the brain - no powder marks were visible; a bullet wound in the right chest, without powder marks, but having a grazing abrasion or broad scrape just below the entrance wound, with the exit wound being the outside of the right shoulder; and bullet wound in front of the right arm, with the exit wound being at the back of the right arm. Fragments of a lead bullet were taken from Foerster's body with respect to the latter injury. (24T372-23 to 377-17). In addition, there were some abrasions on the left cheek, a laceration at the top of the forehead, a laceration on the left side of the head, on the lower lid of the left eye, in back of the left thumb, in the mid forehead, and on the left index finger, as well as bruises in back of the left index finger and on the right, and scattered abrasions on back of the right hand. (25T377-17 to 378-13). With respect to the neck wound, the doctor opined that the bullet was fired from a distance of six to eighteen inches. (25T384-13 to 386-14). Death was due to bullet wounds of the head with lacerations

and hemorrhaging of the brain. (25T386-22 to 25). Death occurred within minutes of the wound; the deceased would not have been capable of movement after either head wound. (25T387-15 to 23).

With respect to the autopsy he performed on James Costan, Dr. Albano testified that he found a bullet wound in the chest area which passed through the lung and liver and exited through the lower back. (25T394-18 to 396-14). The cause of death was massive hemorhaging of the right chest cavity caused by the bullet wound. (25T396-22 to 397-1). Upon receiving such a wound, the doctor opined that the individual would collapse and fall to the ground. (25T397-2 to 399-13).

Deputy Chief of Police Edward Mullen of Perth Amboy was then questioned concerning his qualifications with respect to certain proffered expert testimony. (25T403-9 to 16). He was qualified as a firearms training officer by the F.B.I., had taken numerous courses in firearms, and has been a firearms instructor for over 20 years. (25T404-12 to 405-7). During his military and police experience in automatic weapons, he had observed over a hundred injuries received from the handling of guns, about ten to thirty of which resulted from handling automatic pistols. (25T405-14 to 407-3; 25T412-5 to 16). However, he could not specifically say whether he had ever seen an injury caused by a Browning automatic (25T414-16 to 415-11), or any of the automatics (P-53, P-71 and P-76)

found in the present case. (25T415-12 to 416-1). He stated that if three individuals had sustained injuries from each of the above three weapons, he could not distinguish the injuries. (25T416-8 to 14). The officer had previously testified in a trial regarding injuries received from the handling of a pistol. (25T417-15 to 418-3).

After oral argument and over defense counsel's objection, Chief Mullen was permitted to testify concerning the cause of the injury to the defendant's hand. (25T418-9 to 427-14). In so ruling, the court noted that the witness was not testifying in a medical capacity, but was,

> "an expert on the handling of weapons and their potentiality for causing injury and the fact that they do cause injury.... As far as I'm concerned, the man who's been a police officer for 27 years is more qualified to testify as to the way a weapon might injure you than any doctor in the world, unless that doctor has been handling weapons for 27 years." (25T427-6 to 14).

Chief Mullen then testified that the most common type of injury from an automatic weapon resulted from an improper grip, where the hand is held too high, thus engaging the webbing between the thumb and index finger in the operation of the slide portion of the gun on recoil. (25T428-11 to 25). As a result, the weapon can become jammed. (25T429-1 to 4). When shown photographs of the defendant's hand injury (P-109, P-110), the witness stated he had seen the same type of injury numerous times resulting from an improper hand grip on the handle. (25T429-5 to 430-15). He opined that of the three automatic weapons in evidence (P-53, P-71, P-76) the 380 caliber Browning was the one most likely to have caused the injury to the defendant's hand.

(25T432-18 to 433-15). He came to this conclusion because of the weapon's design and construction, and its safety factors; the other two weapons had such safety features that it would be less likely that they would cause that type of injury. (25T433-16 to 434-12).

On cross-examination, Chief Mullen stated that each of the three weapons contained a safety notch which is part of the slide that causes the hand injury resulting from an improper grip. Thus, any of three, if held improperly, could inflict a similar injury. (25T435-6 to 442-14). He added, however, that one of the two weapons (either P-71 to P-76) would not have caused as deep a gash or as much tearing as the injury on the defendant's hand. (25T443-2 to 9). He could not say that the injury was caused by the gun slide to the exclusion of all other types of injuries, however. (25T449-4 to 11).

George Hickman, a Principal Forensic Chemist with the New Jersey State Police, was qualified as an expert in the area of blood groupings as well as with regard to bullet holes in fabrics and metals. (25T502-1 to 509-10). He examined various blood specimens, classifying and grouping them as follows: both James Costan and the defendant had type O, Joann Chesimard had type B, and Trooper Foerster had type AB. (25T509-16 to 513-2). With respect to various items submitted to him for analysis, he reached the following findings: type O blood on the grips and the slide of the 380 Browning automatic (P-53), on the grip area and, side plates of Foerster's revolver (P-52), on his holster (P-56), belt buckle, pants and hat, and on the right side of the left bucket seat in the white Pontiac (25T515-5 to 516-21);

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type AB blood on Foerster's shirt, on the right rear hubcap (P-144) of Car 886, on the driver's license (P-1), and on the steering wheel of the white Pontiac (25T517-2 to 522-7; 26T552-14 to 553-1); and type B blood on the right side of the roof and the exterior passenger side, and on the driver's side handle. (25T523-18 to 20).

Although bloodstains were found on the clothes taken from James Costan's body (P-45, P-46, P-47), the only identifiable blood group found was type O on the sweater (P-46) (26T531-16 to 533-13), and type AB blood on the right leg and back left pocket of his trousers. (26T549-1 to 22). With respect to the clothes worn by Joann Chesimard, the witness found traces of type AB blood on her socks, the right leg of her slacks, and the right cuff of her jacket; type B blood on the right jacket cuff and the left thigh of her slacks. (26T533-16 to 535-4). Type AB blood was also found on the green hat (P-26) found by Foerster's body as well as on the right front and rear doors of Car 886. (26T535-6 to 536-21).

During his examination of the white Pontiac, Hickman found bullet holes on the roof and along the rear window moulding. (26T537-16 to 25). The bullet hole in the rear deck indicated that the bullet had been fired from within the car and did not exit it. (26T540-20 to 542-2). The witness testified that the bullet (P-88) was found to have glass imbedded in it. (26T544-1 to 14).

The State then rested. (26T581-11).

In response to various motions made by defense counsel (27T2-4 to 73-15), the trial court made the following rulings:

that the motion to delete the names of James Henry Walker from the indictment be granted, but denied as to the name of Archie Gibson (27T73-14 to 74-5), that the motion to dismiss Count I (murder of Trooper Foerster), Counts III, IV, V, and VI (the various assaults on Trooper Harper), and Count VII (possession of a weapon) be denied, and that the motion to dismiss Count II (murder of James Costan) be granted: (27T74-6 to 82-9).

The defense called as its only witness Dr. David Spain, a physician and pathologist who had heard the trial testimony of Dr. Albano and Deputy Chief Mullen. (27T83-21 to 86-6). With respect to the latter's testimony, after having examined the photographs of the defendant's hand injury, as well as analyzing the 380 Browning (P-53), the doctor opined that the weapon could not have caused the injury. With respect to Dr. Albano's testimony, he opined that Costan could have survived from a few minutes to 3/4 of an hour with the type of injury he received (27T92-22 to 96-13), and could have been active during that time. Such an individual would not collapse immediately but would only collapse after a period of time during which he lost enough blood to cause shock. (27T96-14 to 20).

POINT I

THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Prior to trial, the court granted the prosecution's motion for a severance of the indictments against the defendant and co-defendant Chesimard, which had previously been consolidated for trial. During oral argument of the motion, defense counsel for defendant Chesimard argued that such a severance would be prejudicial to defendant Squire, since,

> "We have been acting as a team in relation to the defense of this case... This will no longer be true if it means there would be a severance. It certainly at this point works to his disadvantage and at the same time places upon him an extreme burden of, at this point, having to again go through a variety of defense postures, aliases, characterizations, other kinds of necessary defense activities by himself on his own, when they have been done in conference and jointly.
>
> THE COURT: No, that -- that -- that doesn't disturb me at all. I still have --
>
> MRS. WILLIAMS: I'm sure it disturbs defendant Squire.
>
> THE COURT: Mr. McKinney and Mr. Brown, Mr. Brown -- Mr. Brown being the New Jersey attorney responsible and sponsoring Mr. McKinney here, we would still have Mr. Brown and/or one of his associates.
>
> MR. BROWN: You mean Mr. Brown would be required to be a participant?
>
> THE COURT: Mr. Brown will be required, if the motion is granted, to have a New Jersey lawyer in the courtroom.
>
> MR. BROWN: And then when Chesimard would be tried, I'd be required to do that, too?
>
> THE COURT: That's right. That's right.

MRS. WILLIAMS: Your Honor, --

THE COURT: You're still on the case, yes.

MRS. WILLIAMS: Your Honor, it seems to me that just implicit in your Honor's statement is the possibility here of -- of conflict of interest.

Now Mr. Brown has sponsored the admission of Mr. McKinney.

THE COURT: I'm -- I won't even listen to that. I won't even listen to that.

You know, if you ever have to file an appeal, you put that in the briefs, in the ruling made by Judge Gerofsky.

But the law of the case is that Mr. Brown has sponsored both of you. I don't want to hear anything about it. I didn't set it up.

I don't want to hear a single, solitary word about it, --

MRS. WILLIAMS: Well, may I --

THE COURT: -- the conflict of interest problem." (14T18-17 to 20-9).

Prior to the opening statements, Raymond Brown, Esq., indicated that since he had originally been retained by Evelyn Williams, Esq. on behalf of defendant Chesimard, he felt there was a conflict of interest as a result of the severance. Thus, he requested permission to withdraw from the present case to avoid a conflict of interest situation. The court denied the motion, stating, in part,

> "Now, however, his permission to practice pro hac vice in this State granted by Judge Gerofsky, who set up the original arrangements between counsel and the administration of both he and Mrs. Williams, certainly contemplated that there be a New Jersey lawyer, and I think Judge Gerofsky's mind a specific New Jersey lawyer, present in the courtroom at all times.

> It's my understanding that the conflict of interest situation was aired fully before Judge Gerofsky, and at which time it was represented to him that there would be no conflict of interest and, therefore, he allowed you to sponsor both of these lawyers in this State. I have varied Judge Gerofsky's ruling somewhat in that last week. I told you I did not think it was necessary for Ray Brown personally to sit in with Mr. McKinney; that you could send someone else from your office. I still so rule. I think I have varied Judge Gerofsky's directions to that degree, but I do not want to vary what he originally contemplated that much by excusing the obligation to have a New Jersey lawyer present during the course of this trial." (19T3-25 to 4-22).

Judge Gerofsky's ruling apparently occurred during the hearing concerning the application of the firm of Brown, Vogelman and Ashley to have Charles McKinney, Esq. admitted pro hac vice for the purpose of handling the present case. As indicated at that time, it was the intention of Mr. McKinney to serve as chief trial attorney for the defendant Squire. (TM4-1 to 4).* In addition, Mr. Ashley stated that,

> "... Mr. Brown appeared and I was present at the time, moved the admission of Mrs. Evelyn Williams pro hac vice, too. At that time the understanding was, in the event Mrs. Williams chose, for whatever reason, or the Court chose that Mrs. Williams should not be involved in the case any longer, that Mr. Brown, or my office, would undertake the obligation of trying the case with or without her presence. I submit to the Court that the same understanding applies in this instance.
>
> Certainly I don't anticipate in any way that there will be any problem which would result in Mr. Charles McKinney not being

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* TM refers to the transcript of the motion before Judge Gerofsky on May 29, 1973. (Pa-1 to Pa-4).

able to try the case on behalf of Mr. Squire. I submit to the Court that Mr. Brown and I have been involved in other cases where he has represented one defendant and I have represented another defendant. In the event that an eventuality does create itself, certainly my office is willing to undertake the obligation of having myself defend Mr. Squire and having Mr. Brown defend Miss Chesimard.

I also should say for the record, your Honor, I have not consulted with Mr. Squire, I have never met the man, but I submit in the event that there is this emergent situation my office will undertake the obligation which I have already expressed to the Court. So I don't think there will be any problem, your Honor." (TM2-10 to 3-22).

During the course of the trial, Mr. Brown handled various procedural motions and arguments, and conducted the cross-examination of several State's witnesses. The defendant presently contends that the dual representation of possibly adverse parties by the same attorney violated his right to the effective assistance of counsel. Specifically, he argues that while the only viable defense was to attribute the murder and various assaults to co-defendant Chesimard, (1) no clear theory of defense was ever presented to the jury, (2) counsel implicitly attempted to attribute the murder to Costan rather than Chesimard, and (3) his attorneys were not prepared to elicit damaging evidence on cross-examination which could possibly have been utilized later against Chesimard. Thus, defendant contends that Mr. Brown's allegiance to his retained client prevented him from vigorously pursuing his defense, and that Brown's role as "supervising attorney" had a chilling effect on the defense presented by Mr. McKinney. The State respectfully disagrees.

Although it is possible in some circumstances for a conflict of interest to arise when one attorney represents co-defendants, an examination of the record indicates that such a situation did not exist in the instant case. Whether or not a defendant is deprived of his right to counsel depends principally upon the facts of each particular case.

> "For while it is fundamental that a defendant is deprived of the effective assistance of counsel, contrary to the sixth amendment, where dual representation involving interests inconsistent with his makes his defense less effective than it would have been absent such conflict of interest, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), not every situation of common representation is per se constitutionally fatal to a trial of either or both defendants." U.S. ex rel Smith v. New Jersey, 341 F.Supp. 268, 271 (1972).

Numerous cases have held that defendants have not been denied effective assistance of counsel where they were represented by the same attorney. See Sanchez v. Nelson, 446 F.2d 849 (9 Cir. 1971); U.S. v. Moore, 424 F.2d 276 (4 Cir. 1970); Crow v. Coiner, 323 F.Supp. 555 (D.C. W.Va. 1971); People v. Curkendall, 36 App.Div.2d 979, 320 N.Y.S.2d 955 (1971); Combs v. Turner, 25 Utah 2d 397, 483 P.2d 437 (1971); People v. Hughes, 268 Cal.App.2d 796, 74 Cal.Rptr. 107 (1969); Davenport v. State, 70 Md.App. 89, 253 A.2d 768 (1969); State v. Robinson, 271 Minn. 477, 136 N.W.2d 401 (1965), cert. denied 382 U.S. 948 (1965); Trotter v. State, 237 Ark. 820, 377 S.W.2d 14 (1964), cert. denied 379 U.S. 890 (1964); People v. Welch, 212 Cal.App.2d 397, 28 Cal.Rptr. 107 (1963).

Defendant maintains that to establish a violation of the right to effective assistance of counsel, it is only

necessary that the accused establish that his counsel was serving possible conflicting interests at the time he was representing the accused. U.S. ex rel Platts v. Myers, 253 F.Supp. 23 (D.C. Pa. 1966); U.S. ex rel Watson v. Myers, 250 F.Supp. 293 (D.C. Pa. 1966). He relies on the recent United States Court of Appeals case for the Third Circuit, U.S. ex rel Hart v. Davenport; 478 F.2d 230 (3 Cir. 1973), which rejected the approach that before relief will be considered, the defendant must show some specific prejudice resulting from a common counsel. Instead, it held that it would regard joint representation as constitutionally defective "upon a showing of a possible conflict of interest or prejudice, however remote." This holding did not constitute a departure from prior holdings in Third Circuit cases. See Walker v. United States, 422 F.2d 374 (3 Cir. 1970), cert. denied 399 U.S. 915 (1970).

Contrary to the holding in the Third Circuit, the general rule appears to be that a specific instance of prejudice or a real conflict of interest must be shown to exist before it can be said that effective assistance of counsel has been denied. United States v. Lovano, 420 F.2d 769, 774 (2nd Cir. 1960). See Glasser v. United States, supra, 315 U.S. at 72-76; Marxuach v. United States, 398 F.2d 548, 551-2 (1st Cir. 1968), cert. denied 383 U.S. 982 (1968); United States v. DeBerry, 487 F.2d 448 (2nd Cir. 1973); Sawyer v. Brough, 358 F.2d 70, 72-73 (4th Cir. 1966); Porter v. United States, 298 F.2d 461, 463-464 (5th Cir. 1962); Craig v. United States, 217 F.2d 355, 358-359 (6th Cir. 1954); United States v. Cozzi, 354 F.2d 637

(7th Cir. 1965), cert. denied 383 U.S. 911 (1966); Kurchten v. Eyman, 406 F.2d 304, 311-312 (9th Cir. 1969); Eryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied 395 U.S. 964 (1969).

Cases in New Jersey have given little treatment to this area, but seemed to have reached a similar conclusion. In State v. Ebinger, 97 N.J.Super. 23 (App.Div. 1967), the court dealt with a claim of ineffective assistance of counsel. There an attorney represented two co-defendants, one of whom pled guilty and testified on behalf of the State at the other's trial. Although he was not to be sentenced until after the trial, the court noted that his cooperation with the prosecution might well have been a factor bearing on his sentence. The court found that because a real and substantial conflict of interest existed between the co-defendants, it need not have additionally found a specific showing of prejudice in order to constitute inadequate representation. Id. at 27.

However, in State v. Smith, 59 N.J. 297, 300 (1971), the Court held that there was no conflict of interest stemming from joint representation of co-defendants since both defendants, charged with drunken driving, sought to show that defendant Barr was the driver of the vehicle in hope that defendant Smith could avoid a mandatory jail term and ten year loss of driving privileges. The Court found that defendants' argument failed, not because they had one lawyer instead of two, but because the police officers were believed, not defendants.

More recently, in State v. Green, 129 N.J.Super. 157 (App.Div. 1974), co-defendant Guida, a hitchhiker, was given a

the charges of murder and robbery in the instant case.

In evaluating the merits of the defendant's contention, it is significant to note that prior to the severance, counsel indicated that the two defendants and their respective attorneys had "been acting as a team in relation to the defense of this case." (14T18-17 to 18). In arguing against the prosecution's motion for a severance, it is evident that neither counsel felt that a conflict of interest existed because of their common defense. This is apparent from Mr. Ashley's statement that if Mr. McKinney and Mrs. Williams could not participate in the trial, the firm of Brown, Vogelman and Ashley would represent both the defendant and Ms. Chesimard at the joint trial.

Consequently, it is apparent that had a joint trial been conducted, there would not have been a conflict of interest. Yet, this could only have occurred if neither the defendant nor Chesimard would have attempted to attribute the various charges to the other; rather both would necessarily have had a common defense (such as self-defense against Harper's allegedly unprovoked shooting and Foerster's reaction to the initial shooting) or, at the very least, separate defenses which were in no inconsistent with each other. It logically and necessarily follows that if a conflict of interest would not have existed at a joint trial, it could not have existed at separate trials. Counsel might argue that at the severed trial, defendant could have theoretically attributed the charges to Chesimard which he would not have done at the joint trial because of the lack of a factual basis. However, while a defendant has the right to present a viable defense, he does not have the right to

claim that he could have fabricated a defense, but was precluded from advancing such a fabrication because of an alleged conflict of interest. Such a contention pre-supposes the right to subvert the channels of justice and the legal system itself.

An examination of the record supports the State's position that a conflict of interest did not exist in the present case, and that the defendant was not prejudiced to any degree as a result of the dual representation. Initially, all of the evidence which could possibly have been presented concerning the events on the night in question was presented at trial. Since the defendant voluntarily chose not to testify, and since Chesimard clearly could not be compelled to take the stand, the testimony of James Harper and the passing motorist was the only evidence which could have been elicited from eyewitnesses. All of the other evidence presented related to the various demonstrative items found at the scene and the scientific tests and analysis conducted on these items. The lengthy cross-examination by defense counsel, while failing to elicit exculpating testimony, was not "aimless" or ineffective in the sense that counsel was not prepared to elicit damaging testimony which could be utilized subsequently against Chesimard. Rather, a fair review of the record demonstrates that cross-examination could not possibly have elicited anything further which the State had not previously presented concerning the possible participation of Chesimard in the various activities that night. Thus, Harper's testimony as well as the scientific evidence clearly connected Chesimard and Costan to the initial shooting, while various scientific evidence (Foerster's blood found on Chesimard's

sock and right leg, her pistol found by Foerster's body, and an expended shell from her pistol found by Foerster's foot) linked Chesimard to the scene of the killing. Since defense counsel could not have presented any additional evidence, the defense advanced by the defendant was necessarily limited by the testimony elicited by the State during the trial.

The defendant argues that his only defense was to attribute the murder to Chesimard, that his only viable theory was that he had reacted in self-defense to Foerster's conduct upon seeing Harper shot, that he had accidently wounded Foerster, and that Chesimard subsequently killed Foerster with his own revolver. Instead, counsel failed to ever outline any defense to the jury, and only implicitly attempted to attribute the murder to Costan. Again, an analysis of the record belies such a contention. As indicated, counsel could not have elicited any additional evidence than had already been presented. Thus, the only procedure counsel could have utilized to attribute the murder to Chesimard, or at least to present a theory of defense, was during summation. Yet, during summation counsel did, in fact, attempt to outline in detail the only defense possible. Thus, he told the jury that since Harper had panicked in leaving the scene without attempting to locate Foerster, they could infer that he had panicked initially upon seeing Foerster with an alleged gun clip and pulled his gun on Chesimard and Costan. Counsel attempted to support this contention by reference to various "inconsistencies" in Harper's testimony, as well as to the cooperative nature of the defendant with Harper. Counsel further argued that accepting the fact that the defen-

dant and Foerster were engaged in a struggle, no conclusion could be drawn as to its cause. It was just as reasonable to infer that Foerster had attacked the defendant, possibly to handcuff him, as to infer that the defendant had initiated the fight. While counsel did not, and could not, speculate as to what exactly had transpired, he emphasized that such uncertainty weakened the strength of the prosecution's proofs. (27T154-19 to 156-1). In essence, counsel was precluded from explicitly arguing with any success that the defendant had been provoked by Foerster into battle, or that he had merely been an accessory after the fact; the evidence clearly did not support such a contention. (See Points III and IV, infra). Nevertheless, counsel utilized the lack of eyewitness testimony concerning the struggle in the only favorable manner possible. Rather than attempt to present a express defense exonerating the defendant, which would have carried little credence because of its necessarily speculative nature, counsel pursued a different course. The best defense under the circumstances was, in essence, to convince the jury that the prosecution had not fullfilled its duty of proving every element of its case beyond a reasonable doubt. This was precisely what counsel attempted to do by referring to alleged inconsistencies and inadequacies in the State's case.

Despite the evidence presented which possibly linked Chesimard in some manner to Foerster's death, attempting to attribute the killing to Chesimard was not viable. Initially, since no conflict of interest would have existed at a joint trial, it can be concluded that the defendant never intended to

interpose such a defense. Thus, he should not be able to prevail upon the theory that he was prevented from presenting a defense which did not exist and which he never intended to utilize. Moreover, the crucial fact relating to the murder was that two bullets from Foerster's revolver caused his death. Yet, since type O blood was found on the grip area and side plates of the revolver, as well as on his holster, belt buckle, pants and hat, the inference is inescapable that the "executioner" had the same blood type. As such, it would appear to be more feasible to attribute the killing to Costan, who had type O blood, rather than Chesimard, who did not. While Chesimard could have been shown to have been in the immediate area, the above testimony and evidence would have virtually eliminated her as the principal. In short, since the individual who actually committed the murder (and, thus, the robbery) undoubtedly had type O blood, counsel's attempt to attribute the act to Costan through Dr. Spain's testimony was thus not only not unreasonable, but seemingly was the only avenue of defense available to the defendant. Further, this theory was expressly advanced during summation when counsel emphasized that the 380 Browning and Foerster's revolver, both bearing O type blood, were found next to Costan's body. Thus, it was logical to argue that the blood on the two weapons was that of Costan rather than the defendant. As such, it presented a much more viable theory of defense than one in which the blame was shifted to Chesimard. (27T179-1 to 180-5). The strength of the State's case precluded

this or any other course of action.*

In summary, the State submits that the defendant has failed to demonstrate that a real conflict of interest or an instance of prejudice resulted from the dual representation. The failure of counsel to advance a more convincing defense cannot be said to have resulted from the desire to prevent the eliciting of damaging testimony concerning Chesimard. Counsel presented all possible arguments and defenses, which were necessarily limited by virtue of the proofs elicited by the State. Even assuming, however, that the test in Davenport is applicable, the State maintains that a similar conclusion must be reached; since a conflict of interest would not have existed at a joint trial, there was not even a remote possibility of a conflict in the present case. The complete absence of any resulting prejudice underscores this conclusion. Therefore, the defendant was not denied effective assistance of counsel.

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* Moreover, it would appear that counsel could have attempted to attribute the murder to Chesimard during summation through argument. In this regard, it is clear that such arguments of counsel, in the absence of independent proof to support them, would in no way jeopardize or damage the defense advanced by Chesimard in the subsequent trial. The failure to do so underscores the conclusion that attributing the acts to Costan was a much more viable and credible theory to advance to the jury in light of the evidence presented.

POINT II

THE TRIAL COURT'S RULING IN QUALIFYING CHIEF MULLEN AS AN EXPERT WITNESS WAS PROPER AND HIS SUBSEQUENT TESTIMONY DID NOT EXCEDE THE SCOPE OF HIS EXPERTISE.

During the ocurse of the trial, Deputy Police Chief Edward Mullen testified that he was a qualified firearms training officer and had been an instructor in firearms for over 20 years. He was familiar with "just about every weapon made." During his experience with automatic weapons, he had observed over a hundred injuries resulting from the handling of guns, about ten to thirty of which had resulted from automatic pistols. (25T403-9 to 407-3; 25T412-5 to 16). He could not specifically recall whether he had ever seen an injury attributed to a Browning automatic, or any of the automatics (P-53, P-71 and P-76) found in the present case. (25T414-16 to 416-1). If three individuals had sustained injuries from each of the above three weapons, he would not be able to distinguish the injuries. (25T416-8 to 14). Over defense counsel's objection, the trial court ruled that Chief Mullen would be permitted to testify concerning the cause of the defendant's hand injury. (25T418-9 to 427-14). In so ruling, the court noted that the witness was not testifying or being offered as an expert on injuries, but rather was,

> "...an expert on the handling of weapons and their potentiality for causing injury and the fact that they do cause injury...
>
> As far as I'm concerned, the man who's been a police officer for 27 years is more qualified to testify as to the way a weapon might injure you than any doctor in the world, unless that doctor has been handling weapons for 27 years." (25T427-6 to 14).

Chief Mullen then testified that the most common type of injury from an automatic weapon resulted from an improper grip, where the hand is held too high, thus engaging the webbing between the thumb and index finger in the operation of the slide portion of the gun on recoil. As a result, the weapon could become jammed. (25T428-11 to 429-4). When shown photographs of the defendant's hand injury (P-109, P-110), Chief Mullen stated he had seen a similar injury numerous times resulting from an improper hand grip on the hand. (25T429-5 to 430-15). Of the three automatic weapons in evidence (P-53, P-71 and P-76), he opined that the 380 Browning was the one most likely to have caused the injury. He came to this conclusion because of the weapon's design and the construction of the safety features; when the slide is extended to the rear, the safety notch is fully exposed and causes the hand injury if there is an improper grip. On the other hand, the Luger was the least likely to cause the injury since the safety lip was higher and the slide did not have a full cut in it. The Llama also had a higher safety lip which acted as a protective device to keep the webbing of the hand away from the slide during its operation. (25T432-18 to 434-12).

The defendant contends that although Chief Mullen might properly have qualified as a firearms expert, his testimony concerning the cause of his hand injury was outside the scope of his expertise and not a proper subject of expert opinion testimony. Specifically, he argues that the witness was not competent to testify as he did, and that his opinion testimony invaded the province of the jury. It is the State's position that the witness' expertise was clearly shown, and that

the trial court's limiting instructions regarding the testimony kept the opinions expressed within proper bounds.

Expert testimony has been the subject of appellate review in this State for at least a century. The central case setting forth the standards for review of the trial court's decision in this regard is New Jersey Zinc and Iron Co. v. Lehigh Zinc and Iron Co., 59 N.J.L. 189 (E.&A. 1896). In upholding the trial court's admission of expert testimony, the Court of Errors and Appeals stated:

> "Who is entitled to be considered as an expert in regard to any question of science or skill cannot be determined by any precise rule, but from the nature of the case must be left very much to the discretion of the trial judge, and his decision is conclusive unless clearly shown to be erroneous as a matter of law." Id. at 194, citing Castner v. Sliker, 4 Vroom 95; S. & B. Manufacturing Co. v. Phelps, 130 U.S. 520.

It is clear from this early rule that a party wishing to overturn a judgment on the basis of an improper ruling in this regard has a heavy burden. In fact, it would appear that the trial court's decision to permit a witness to testify as an expert is almost "conclusive".

This heavy burden was again espoused in Rempfer v. Deerfield Packing Corp., 4 N.J. 135 (1950). There, the New Jersey Supreme Court laid down the rule that "the qualifications of experts are left to the discretion of the trial court and the decision is conclusive unless clearly shown to be erroneous as a matter of law." Id. at 141, citing New Jersey Zinc and Iron Co. v. Lehigh Zinc and Iron Co., supra; Ross v. Commissioners of Palisades Park, 90 N.J.L. 461 (Sup.Ct. 1917); Essex County

Park Commission v. Brokaw, 107 N.J.L. 110 (E.&A. 1930); Cowdrick v. Pennsylvania R.R. Co., 132 N.J.L. 131 (E.&A. 1944); Bosze v. Metropolitan Life Insurance Co., 1 N.J. 5 (1948). The court explained that the admissibility of expert testimony is not premised upon whether the subject matter is common or uncommon or whether many or few persons have knowledge of the matter. Instead, the admissibility rests upon "whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue." Id. at 142, citing Rogers, Expert Testimony, (3rd ed., 1941), §31; Taylor v. Town of Monroe, 43 Conn. 36 (1875).

This State, as most, permits a witness to be qualified as an expert "by reason of study without practice or practice without study." Rockland Electric Co. v. Bolo Corp., 66 N.J. Super. 171 (App.Div. 1961), citing 2 Wigmore on Evidence (3rd ed. 1940), §555 et seq.; 3 Wigmore on Evidence (3rd ed. 1940), §712 et seq.; Wheeler and Wilson Manufacturing Co. v. Buckhaut, 60 N.J.L. 102, 105 (Sup.Ct. 1897); State v. Arthur, 70 N.J.L. 425, 427 (Sup.Ct. 1904); Fenias v. Reichenstein, 124 N.J.L. 196, 200 (Sup.Ct. 1940). The Court in Rockland noted that in other jurisdictions witnesses may qualify as experts by reason of their training, experience, or both. Id. at 176, citing Carroll v. Magnolia Petroleum Co., 223 F.2d 657, 664 (5th Cir. 1955). If the witness has any special study or experience, he is considered to possess special skill or knowledge which is not common to the average man. Ibid., citing Wilmington

Housing Authority v. Harris, 8 Terry 469, 47 Del. 469, 83 A.2d 518, 522 (Sup.Ct. 1952); Tifton Brick and Block Co. v. Meadow, 92 Ga.App. 328, 88 S.E.2d 569, 573 (Ct. of App. 1955). "The expertness may be acquired by occupational experience as well as by scientific study." Ibid., citing Rogers on Expert Testimony (3rd ed. 1941), §40, p.69; Churbuck v. Union Railroad Co., 380 P. 181, 110 A.2d 210, 213 (S.Ct. 1955); United States v. 3969.59 Acres of Land, 56 F.Supp. 831, 838 (N.D. Idaho 1944). Thus, "within broad limits, the qualifications of an expert witness are for the discretionary determination of the trial court; an appellate court will not reverse if there is 'any legal evidence' to support the trial court's action." Ibid., citing Brown v. New Jersey Shortline R.R. Co., 76 N.J.L. 795, 796 (E.&A. 1908) (emphasis by the court).

In the present case, Chief Mullen had over 20 years of experience in both the handling and teaching of virtually every automatic weapon made. As a result of having seen numerous hand injuries stemming from the improper handling of automatic pistols, he was particularly qualified to testify with respect to how and why such injuries occurred. Certainly, he properly testified that the defendant's hand injury was similar to the injuries he had previously observed; the jury could not have been expected to have either the knowledge or experience in assessing the relationship between the defendant's injury and the automatic pistols found in the case. After having observed the various safety features of the weapons, and being familiar with their operation, he was able to opine that of the three,

the 380 Browning was the one most likely to have caused the injury. He came to this conclusion because an individual was more prone to mishandle the Browning than the other two, due to its smaller safety lip and deeper notch on the clip. In elaborating upon the reasons behind his opinion, Chief Mullen demonstrated a skill and knowledge in an area certainly not common to the average layman. The jury would not have been able, absent his testimony, to determine the likelihood of each weapon causing such an injury.

At no time did the witness conclude that the Browning had, in fact, produced the injury on the defendant's hand. Rather, the effect of cross-examination served to illuminate the precise nature and scope of the testimony elicited. The jury was told that as with all automatics, the three weapons in question contained some type of safety device (lip) designed to prevent the hand from coming in contact with the returning slide, and thus prevent an injury to the webbing; consequently, any automatic held improper could inflict a similar injury. (25T435-6 to 442-19). Chief Mullen could not state that the defendant's injury was caused by an automatic gun slide to the exclusion of any other type of injury. (25T449-4 to 16; 25T453-23 to 454-7). Moreover, rather than conclude that the Browning caused the injury, he merely opined that of the three weapons shown him, it was the one most likely to cause it; there were other weapons not found at the scene (such as the 45 caliber) which were almost as likely to cause a webbing injury. (25T454-15 to 455-7; 25T476-18 to 21).

In short, Chief Mullen's testimony was proper as being within his expertise in the field of automatic weapons; at no time did he base any opinion or view on knowledge or facts outside of his specialized field. Certainly, it did not constitute medical testimony. He did not form his opinions on the basis of the injury itself (since any automatic weapon would produce a similar wound), but rather based it upon the design, construction and operation of the various weapons he examined. His opinion dealt with the facts established at trial, and was within the scope of an area of special knowledge and skill which he possessed. See Evidence Rule 56(2). As such, this case is distinguishable from the cases cited by the defendant, in which an expert testified outside of his field of expertise, or within an area of common, everyday knowledge. See, e.g., State v. Sachs, 69 N.J.Super. 566 (App.Div. 1961) (detective opined as to who had had possession and control of lottery tickets); State v. Vigliano, 50 N.J. 51 (1967) (witness testified conerning the position of the victim before and after each shot that was fired); Biro v. Prudential Insurance Co. of America, 110 N.J.Super. 391 (App.Div. 1970), rev'd 57 N.J. 204 (1970) (medical examiner opined as to whether the death had been a suicide); In re Hyett, 61 N.J. 518 (1972) (doctor testified in a legal capacity).

Furthermore, the jury was instructed by the trial court that they were not bound by an expert's opinion, but were to give it appropriate weight on the basis of the facts and reasons underlying the opinion. (27T234-4 to 22). Together with the various qualifications Chief Mullen attached to his opinions as to the cause of the defendant's hand injury, the scope and

import of his testimony was clear: to determine which of the automatic pistols found at the scene was most apt to be mishandled, and thus cause a hand injury. Such testimony relating to a "peculiar knowledge or experience not common to the world, and being an aid to the jury in their determination of the issues, it was properly before them for their assessment. No error could possibly have existed in permitting such testimony.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO CHARGE THE JURY ON ACCESSORY AFTER THE FACT.

The defendant maintains that the trial court erred in not heeding defense counsel's request to charge the jury on accessory after the fact. Arguing that the evidence presented at trial supported this ground of defense, he concludes that reversible error was committed. The State respectfully submits that a fair review of the trial record leads inescapably to a contrary conclusion.

It is well established that the traditional function of a trial court is to instruct the jury with respect to the law governing the issues to be decided by them under the facts of the particular case. State v. Mayberry, 52 N.J. 413, 438 (1968); State v. Butler, 27 N.J. 560, 594-595 (1958); State v. Beachlor, 52 N.J.Super. 378 (App.Div. 1958). Thus, the Court in Butler held that,

> "...a mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case. Among such principles is the definition of a crime, the commission of which is basic to the prosecution against the defendant." State v. Butler, supra, 27 N.J. at 595.

Furthermore, this duty exists even in the absence of a request by defense counsel. State v. Butler, supra; State v. Thomas, 105 N.J.Super. 331, 337 (App.Div. 1969). As a result, the trial court is obliged to instruct the jury with respect to any and all offenses, issues, or theories of defense which could be supported by the evidence and its resulting inferences

elicited at trial; clearly, however, no such duty exists in the absence of a factual basis in the evidence.

Despite defendant's contention to the contrary, State v. Mayberry, supra, is consistent with this principle. In Mayberry, the trial court's refusal to instruct the jury on accessory after the fact as to the alleged getaway driver was held to be proper, despite his defense that he was unaware of his two companions' plan for robbery. In so holding, the Court stated that "the refusal to charge [accessory after the fact] was entirely correct for Miller had never been accused or indicted as an accessory after the fact (N.J.S.A.2A:85-2) and the issue was not in the case." State v. Mayberry, supra, 52 N.J. at 438. (Emphasis supplied). As such, the duty of the court to charge on accessory was held to depend not solely upon the "technisms of indictment", but also upon whether the proofs elicited at trial would support the charge. Clearly, the Court concluded that the evidence presented did not support such a charge.*

The issue thus presented is whether the testimony elicited at trial would support the charge of accessory after the fact. At common law, such an individual was one who, "with

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* See also State v. Saulnier, 63 N.J. 199, 206-207 (1973), which held that there need not be a charge to the jury with respect to an included offense to the one charged in the indictment "unless there is a rational basis in the evidence for a finding that the defendant was not guilty of the higher offense charged but guilty of the lesser included offense." While the charge of accessory after the fact would not appear to be properly characterized as a lesser included offense, nevertheless the principle is applicable.

knowledge of another's commission of felony, receives, relieves, comforts, or assists the felon in order to hinder the [latter's] apprehension, trial or punishment." State v. Sullivan, 77 N.J.Super. 81, 89 (App.Div. 1962), citing Shelly v. United States, 76 F.2d 483, 487 (10th Cir. 1935); 1 Schlosser, Criminal Laws of New Jersey, §116, p.88 (1953); 14 Am. Jur., Criminal Law, §102, p.836 (1938). This law is presently embodied in N.J.S.A. 2A:85-2, which prohibits any aid or assistance to one who has committed a high misdemeanor, "for the purpose of preventing or hindering his apprehension." The mere fact that an individual is present at the scene of a crime does not prohibit that individual from being charged as an accessory. See Smith v. United States, 113 U.S.App.D.C. 126, 306 F.2d 286 (D.C. Cir. 1962). As such, an accessory after the fact is clearly distinguishable from an aider and abettor who is equally guilty with the perpetrator as a principal, State v. Madden, 61 N.J. 377, 392 (1972); State v. Humphreys, 101 N.J.Super. 539 (app.Div. 1968), and is accordingly punished in the same manner. State v. Jacques, 99 N.J.Super. 230 (1968), aff'd 52 N.J. 481 (1968), cert. denied 395 U.S. 984 (1969).

Defendant argues that the testimony elicited at trial provided a factual basis for the charge of accessory after the fact and thus should have been presented to the jury as an alternative verdict to the murder, robbery and assault charges. Specifically, he emphasizes the cooperative nature of the defendant toward Trooper Harper together with the lack of communication between the defendant and the other two occupants of the Pontiac; the resulting inference which could have been drawn

was that the defendant was a victim of circumstances and was merely defending himself from Trooper Foerster's reaction to Chesimard's spontaneous shooting. His only crime, consequently, is that he aided Chesimard and Costan to escape.

The State submits that a careful examination of the trial record demonstrates the complete absence of any evidence, however remote, indicating the viability of an accessory after the fact charge. To allege such a factual basis necessarily involves an exercise in fanciful speculation and conjecture, which is clearly outside the province of the jury. Without detailing the evidence presented at trial, suffice it to say that the only conclusion which could rationally have been drawn was that until Foerster had discovered the automatic clip on the defendant, he, along with his two companions, would purposely be cooperative; they wanted to avoid any suspicion on the officer's part which might lead to a search and thus a discovery of their weapons, their identity, and their cache of ammunition in the trunk. Once it became obvious that the three had aroused the officers' suspicions, Chesimard precipitated the night's activities by firing and wounding Harper. From that point on, while Chesimard and Costan were engaged in a gun battle with Harper, the defendant, sensing the predicament, became involved in a struggle with Foerster. As noted by a passing motorist, the defendant appeared to have the advantage in the battle. Clearly, it was impossible and futile for the defendant to have attempted any communication with his cohorts during this period. Moreover, the fact that the defendant did not fire at any time at Harper is of no consequence -- the defendant was obviously

preoccupied with his own struggle which would end in Foerster's death.

While it is impossible to re-create precisely the sequence of events that night, nevertheless the evidence points in only one direction: that the defendant, if not a principal in the night's activities, was clearly an aider and abettor. A review of the salient evidence reveals that (1) Foerster's stomach wound had a burn mark directly below it, suggestly a bullet shot at close range and during a struggle; (2) the defendant's gun had been fired once before jamming; (3) the defendant's hand injury strongly suggested that it was the result of an improper gripping of the gun handle (which was very conceivable during a struggle); (4) the only two bullets fired from Foerster's gun were found lodged in his head; (5) Foerster's body was found at the same spot where he had initially been fighting with defendant; (6) Foerster's blood was on the steering wheel of the Pontiac, which the defendant drove away in; (7) the defendant's blood type was found on the grips and sides of Foerster's gun; (8) the defendant had no other injuries beside the hand injury; and finally, (9) Foerster was literally covered with wounds and his own blood. Under no stretch of the imagination could it be said that such testimony supported, even remotely, an accessory charge. A difference of opinion could remotely exist over whether the defendant was acting as a principal, or whether, after initially wounding Foerster, he acted as an aider and abettor concerning the murder and robbery. Nevertheless, it is clear that the defendant shared the necessary intent with Chesimard and Costan, and was equally responsible

for the acts committed. The concept of accessory after the fact had no support in the trial record, and the court properly refused to charge the jury on it.

The defendant nevertheless argues that the court should at least have instructed the jury that if they believed he was an accessory after the fact, an acquittal was mandated. However, it is significant that the trial court's charge on aiding and abetting (29T214-17 to 218-2; 29T247-24 to 250-16) was clear and unambiguous, and could not have failed to convey to the jury the need for criminal knowledge on the defendant's part before he could be found guilty of any crime. It presented the applicable principles and was consistent with prevailing case law. State v. Mayberry, supra, 52 N.J. at 538-539; State v. Sullivan, 43 N.J. 209, 236-237 (1964), cert. denied 382 U.S. 990 (1966). In the absence of evidence to the contrary, it must be assumed that the jury understood and followed these instructions. State v. Walker, 33 N.J. 580 (1961); State v. Williams, 30 N.J. 105 (1959); State v. Curcio, 23 N.J. 521 (1957); State v. Boncelet, 107 N.J.Super. 444 (App.Div. 1969). Thus, the charge as presently requested was, in essence, contained in the court's charge as a whole. If the jury had believed the defendant's present theory of defense, they would have acquitted him since every element of each offense, as defined in the charge, had not been demonstrated beyond a reasonable doubt. In light of the instructions and the trial record, it is inconceivable that the jury's verdict was other than a proper finding that the defendant had knowingly engaged in the night's activities, sharing the common intent with his two companions.

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POINT IV

THE TRIAL COURT'S REFUSAL TO CHARGE MANSLAUGHTER WAS PROPER

Defendant maintains that the trial court committed reversible error by refusing to charge the jury concerning manslaughter, as requested by defense counsel. Specifically, he argues that since the evidence could support the inference that the defendant was wrestling with Trooper Foerster in an attempt to resist an unlawful arrest or excessive force, a mitigating defense of manslaughter should have been placed before the jury. The State respectfully disagrees.

As previously noted, the obligation of the trial court is to instruct the jury on all offenses or theories of defense having a factual basis in the evidence presented. State v. Saulnier, supra; State v. Mayberry, supra; State v. Butler, supra. However, it is equally well established in homicide cases that the court need not and, in fact, should not instruct the jury on a specific charge in the absence of evidence supporting the charge. See, e.g. State v.Artis, 57 N.J. 24 (1970), - proper for court not to charge jury on manslaughter; State v. Gosser, 50 N.J. 438 (1967), cert. denied 390 U.S. 1035 (1968) proper for trial court not to charge jury on voluntary manslaughter; State v. Sinclair, 49 N.J. 525 (1967) proper for trial court not to charge jury on manslaughter; State v. Trantino, 44 N.J. 358 (1965), cert. denied 382 U.S. 993

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(1966) proper for trial court not to instruct jury on manslaughter; State v. Wade, 40 N.J. 27 (1968) proper for trial court not to charge jury on second degree murder or manslaughter; State v. Scott, 104 N.J.L. 544 (E.&A.) proper for trial court not to charge jury on manslaughter.

In New Jersey, "a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer in the performance of his duties, whether or not the arrest is illegal under the circumstances obtaining." State v. Koonce, 89 N.J. Super. 169, 184 (App. Div. 1965). The individual's recourse in the event of an illegal arrest is to seek relief in the courts for invasion of his right to freedom. State v. Mulvihill, 57 N.J. 151, 156 (1970); State v. Montague, 55 N.J. 387 (1970). However, if, in effectuating the detention, the officer employs unnecessary and unreasonable force, the citizen may counter with the use of reasonable force to protect himself; if in doing so the officer is injured, no criminal offense has been committed. State v. Washington, 57 N.J. 160, 163 (1970); State v. Williams, 29 N.J. 27 39 (1959). However, two qualifications exist with respect to a citizen's right to repel an officer's excessive force: (1) he cannot use greater force than reasonably appears to be necessary -- if greater force is utilized, the citizen becomes the aggressor and forfeits his right of self-defense and (2) if the citizen knows that the officer's excessive force would cease were he to submit to arrest, he must do so or lose his right of self-defense.

State v. Mulvihill, supra, 57 N.J. at 157.

Nevertheless, even if a citizen does utilize greater force than is necessary in response to an officer's use of excessive force, the offense might still be mitigated to voluntary manslaughter under appropriate circumstances. Without delving at length into the court's discussion of this issue in State v. Madden, 61 N.J. 377 (1972), it would appear that this partial defense might be available to a defendant. Id. at 400-402. See also Bullock v. State, 65 N.J.L. 557,570 (E.&A. 1900) and Brown v. State, 62 N.J.L. 666, 709-714 (E.&A. 1898). However, given the fact of the officer's use of excessive force, a reduction of the homicide to manslaughter would not arise automatically. Madden seemingly indicates the necessity of a subjective standard; the defendant would have to be filled with passion aroused by the excessive force sufficient to meet the usual provocation tests in order to mitigate the offense to voluntary manslaughter. See e.g. Davis v. State, 204 Md. 44, 53-54, 102 A.2d 816, 820-821 (1954).

As such, the applicable law in New Jersey may be summarized thusly: If a citizen responds to an officer's unnecessary use of deadly force in effectuating an arrest, a claim of self-defense and complete exoneration could be warranted if, in protecting himself, the citizen kills the officer. Brown v. State, supra; Bullock v. State, supra. Cf. State v. Mulvihill, supra. If the officer does not use deadly force but nevertheless uses unreasonable and unnecessary force, a claim

of provocation could arise under appropriate circumstances, thus mitigating the offense to voluntary manslaughter. Cf. State v. Madden, supra. Furthermore, Madden indicates that if the officer is not acting in the performance of his duties, and the citizen intended to commit less than a grievous bodily harm, a conviction for involuntary manslaughter might be warranted. Id. at 402.

The issue thus presented is whether the testimony elicited at trial would have supported any of the above theories, thereby warranting a charge to the jury. The defendant argues that it could have been inferred that he had been wrestling with Foerster in an attempt to resist an unlawful arrest or the use of excessive force. In essence, he reiterates his prior argument made in Point III, supra. The State's corresponding response is thus equally applicable here. Without reiterating the relevant evidence presented there, the State submits that there was no factual basis to support the position that Foerster utilized any force, let alone unreasonable or deadly force, to restrain the defendant. This is most vividly demonstrated by the numerous wounds received by Foerster, while in constrast the defendant was unmarked except for his hand injury. Since there was no factual basis in the trial record to infer, even remotely, that Foerster had utilized deadly force (thus precluding the issue of self-defense from arising), or unreasonable force (thus effectively preventing the element of provocation, needed to establish voluntary manslaughter, from arising), there was no need to instruct

the jury on these theories. Furthermore, since the officer was clearly acting in the performance of his duties, a charge of involuntary manslaughter was similarly unwarranted. Simply stated, the evidence presented at trial pointed solely to the commission of a murder; the trial court's refusal to charge manslaughter, and failure to charge self-defense, was clearly proper.

POINT V

THE ADMISSION INTO EVIDENCE OF THE DEFENDANT'S FINGERPRINT CARD WAS PROPER UNDER EVIDENCE RULE 55.

During the course of the trial, it was elicited that an "Archie Gibson" had been arrested and fingerprinted in New York City the day preceding the shooting on the turnpike. The individual, who was identified as the defendant, gave the arresting officer a New York driver's license bearing the same name. (19T41-5 to 59-10). The card which contained the fingerprints of the individual (P-2) was admitted into evidence over defense counsel's objection, after the card had been sealed so that only the prints and the officer's signature were visible. The court ruled that the card was admissible under Evidence Rule 55 to demonstrate identity. (19T59-19 to 89-5). A comparison of the fingerprints on the card with those of the defendant, Clark Squire, on file in the Middlesex County Sheriff's Office (P-3), indicated that the fingerprints were of the same individual. (19T91-3 to 97-10). The defendant presently contends that the prejudicial effect of the card, combined with the failure of the trial court to issue a limiting instruction, constituted reversible error. The State respectfully disagrees.

It is well established as a general rule, that the State cannot prove that the defendant committed other crimes, even though of a like nature, for the purpose of showing that the defendant would be likely to commit the crime charged. State v. Marchand, 31 N.J. 223 (1959); State v. Ascolese, 59 N.J. Super. 393 (1960); State v. Raymond, 53 N.J.L. 260 (Sup.Ct. 1891).

The principle established by the above case law is also embodied in Rule 55, which states:

> "Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion, but, subject to Rule 48, such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident."

The exclusionary aspect of Rule 55 is not based upon the absence of probative value from the other crime evidence. On the contrary, the probative weight of such evidence may be high. This type of proof is excluded under Rule 55, however, in the interests of fundamental fairness and the avoidance of undue prejudice to the defendant. Admission of other crime evidence might lead a jury to believe that he was a bad man in general and convict him for that reason alone. The rationale behind Rule 55 is the policy of providing a trial in which an impartial determination is made upon the facts of the case, rather than upon extraneous and inflammatory material. See Report of the New Jersey Supreme Court Committee on Evidence, (1963 Report), Comment on Rule 55, at 101-102. See also State v. Harris, 105 N.J.Super. 319 (App.Div. 1969).

However, neither Rule 55 nor prior case law prohibit other crime evidence under all circumstances. Thus, other crime evidence is admissible when it is relevant to some fact in issue, even though it would be excluded if offered to show the defendant's general disposition for wrongdoing to infer that he was guilty of the present offense. Such evidence may be offered

as proof of one of the enumerated factors in Rule 55 if one of those factors is actually in issue in the case, although,

> "[I]n general it may be said that whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown." State v. Kociolek, 23 N.J. 400, 419 (1957).

See also State v. Wright, 132 N.J.Super. 130, 148 (App.Div. 1974), rev'd on dissenting opinion, 66 N.J. 465 (1975).

The defendant acknowledges that the evidence in question was probative as to identity, but argues that such proof was unnecessary to the prosecution's case, since the defendant had already been clearly connected to the scene of the crime. However, the significance of the arrest card was not merely to establish the defendant's presence at the scene, although as such it was important to corroborate the identification testimony of Transit Policeman Sullivan and Trooper Harper, which was subject to attack by defense counsel. Rather, such evidence was utilized to demonstrate that the defendant, Clark Squire, had used an alias, Archie Gibson, for purposes of identification. Once having elicited that various documents containing the name "Archie Gibson" had been found in an attache case in the trunk of the Pontiac, it could then be argued that the defendant had knowledge and constructive possession of the shotgun shells and two boxes of 38 super vel ammunition in a suitcase alongside it. As a result, he had reason to be initially cooperative with the trooper upon the stop in order to avoid suspicion, knowing that a search of his person and the car would reveal weapons and ammunition. As such, it serves to refute defense

counsel argument that the defendant's cooperation with Trooper Harper tended to imply that he was not a participant, either directly or indirectly, in the shooting which ensued. Moreover, to the extent that it tended to demonstrate the defendant's dominion and control over the car, it was clearly relevant to the charge of possession of the three automatic pistols in the car. Thus, the evidence was also clearly probative as to the issue of knowledge with respect to the charge of possession.

Furthermore, any prejudiciality engendered by the admission of such evidence was clearly not sufficient to warrant its exclusion under Rule 4. Simply because evidence is damaging to defendant and tends to prove his guilt of the crime which he is charged with inferentially, rather than directly, does not mean a Rule 4 situation is created. "Undue prejudice" in the sense of that Rule is a concept akin to a "due process" notion. Superimposing Rule 4 on a purported Rule 55 situation, the inquiry would be whether the evidence, while ostensibly probative under the exception to the general exclusion embodied in Rule 55, clearly would have its principal impact on the jury as to the ultimate question of guilt by its tendency to show "disposition to commit crime or civil wrong as a basis for an inference, ..." Cf. State v. Boiardo, 111 N.J.Super. 219, 232-233 (App. Div. 1970), certif. den. 57 N.J. 130, cert. den. 401 U.S. 948 (1971).

In this regard, the defendant maintains that because the principal impact of the evidence was to imply a disposition to commit crime, the prejudicial nature outweighed its probative value and warranted its exclusion. In part, this is alleged

to have resulted from the failure of the trial court to issue limiting instructions to the jury. When evidence of another crime is admissible as proof of some fact in issue, the trial court, pursuant to Rule 6 of the New Jersey Rules of Evidence, is to instruct the jury to the limited effect to be given to the evidence in question. This was not done in the present case, although defense counsel neither requested that the court include such an instruction in its charge nor objected to its omission. As such, this case presents a situation similar to that recently discussed in State v. Rajnai, 132 N.J.Super. 530 (App.Div. 1975). There, the trial court failed to instruct the jury as to the limited purpose of "other crime" evidence. Noting that such a limiting instruction should have been given pursuant to Rule 6, the Court added that the issue had to be considered under the plain error rule since no objection has been raised at trial, and that the failure to give a limiting instruction did not necessarily require a reversal. Id. at 537-538. See also State v. Lair, 62 N.J. 388, 392 (1973); State v. DiRienzo, 53 N.J. 360, 384 (1969). The same test would seem equally applicable here.

Initially, it must be noted that with the exception of the brief testimony of Transit Patrolman Michael Sullivan, there was no other reference to the defendant's arrest. The circumstances surrounding the arrest was never elicited or alluded to during the trial. Furthermore, the only reference by the prosecutor to the evidence was a brief comment during summation concerning the issue of the defendant's identity (28T11-5 to 12-13); at no time did the subject of his arrest

ever arise. Consequently, when the evidence is examined in the context of the entire trial, which produced over forty witnesses, it cannot fairly be said that the jury utilized it to infer that the defendant was a bad man in general, and had a disposition to commit crime.

In short, the evidence in question was properly admitted since its prejudicial impact was, at best, minimal, and certainly did not outweigh its probative value. Similarly, since the evidence demonstrating the defendant's guilt was overwhelming, and the possibility of an improper utilization of the evidence by the jury is not apparent under the circumstances of the case, the failure to issue a limiting instruction did not prejudice the defendant.

POINT VI

THE PHOTOGRAPHS WERE PROPERLY ADMITTED INTO EVIDENCE

The defendant contends that the trial court erred when it admitted into evidence twelve photographs depicting varied scenes.* Specifically, he argues that the exhibits were unnecessarily gruesome and inflammatory, as well as being cumulative of trial testimony. Despite only a general objection by defense counsel to most of the photographs, defendant maintains that the court should have excluded them sua sponte pursuant to Rule 4. A review of the relevant exhibits and the trial record, together with the controlling case law, clearly demonstrates the propriety of the trial court's rulings.

In State v. Thompson, 59 N.J. 396,420-421 (1971), the Supreme Court dealt with the admissibility of photographs, stating,

> "It has long been the rule in this State that admission of photographs of the victim of a crime rests in the discretion of the trial court, and the exercise of its discretion will not be reversed in the absence of a palpable abuse thereof. [citations omitted]. Such abuse exists only where the logical relevance will unquestionably be overwhelmed by the inherently prejudicial nature of the particular picture. State v. Smith, 32 N.J. 501,525, cert. denied 364 U.S. 936, 81 S.Ct. 383, 5 L.Ed. 2d 367 (1961)."

Furthermore, the mere fact that photographs are illustrative

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* The photographs in question, plus one other photograph admitted into evidence without objection but having relevance to the present contention, are being forwarded to the court under separate cover.

of cumulative facts does not bar their admission into evidence. As the court held in State v. Smith, supra, 32 N.J. at 525,

> "It is urged that their introduction was unnecessary to establish the State's case and calculated to arouse the passions of the jury. Admission of photographic evidence, properly proved and having probative value, even if somewhat inflammatory, in color and only cumulative, is mainly within the discretion of the trial judge, whose ruling will not be overturned save for abuse, as where logical relevance will unquestionably be overwhelmed by the inherently prejudicial nature of the particular picture. [citations omitted]. Here we find no semblance of any abuse. All such photographs are bound to be unpleasant, but these are not unduly gruesome."

In order to demonstrate the propriety of the trial court's ruling, an analysis of each photograph is both relevant and necessary.

P-33, P-34 and P-35 (21T 78, 79 and 82) and P-43 (21T 386) depict the body of Costan lying on the ground from different angles. The defendant objected to the photographs on the basis that they bore no relationship to him in the trial, and thus could only be prejudicial and inflammatory. The probative value of the photographs is apparent, however. They portrayed to the jury the automatic clip in Costan's pocket and the holster strapped to his back, the latter aspect being necessary to connect him with possession of the 9 mm luger. More importantly, however, they demonstrated the lack of a significant loss of blood, refuting defense counsel's argument that Costan could not have been in the back of the Pontiac because his blood type was not found there, and that

he must have driven the car. It also supports the prosecutor's theory that the type O blood found on Foerster's gun was that of the defendant. Finally, the photographs depict the position of Foerster's gun beneath Costan's knee, and the position of his shirt which had ridden up on his chest. As such, they graphically and vividly support the theory advanced that the defendant had carried both Costan and the trooper's gun to that spot in the woods, tying the defendant, rather than Costan, to the killing of Foerster. Certainly the relevancy of these photographs cannot be minimized, nor can they be characterized as inflammatory and gruesome.

P-38 (21T 115) and P-68 (21T 804) both depict the position of the Foerster's body in relation to the unmarked car. The former is a view from the front of the car, also showing where the deceased's flashlight was found, while the latter is a rear view of the car and body and includes the position of Trooper Harper's hat and flashlight when found. The significance and probative worth of the two photographs are obvious when the trial record is examined. During cross-examination of Trooper Dreyer, defense counsel vigorusly attacked at length his testimony. Specifically, he questioned how the officer could have seen the flashlight and hat between cars 820 and 886 without seeing Foerster's body, as well as why he and Trooper Byrne had both walked on the left side of the two police cars in investigating the area. The photographs graphically supply the answers. Because there was a dirt embankment which rose sharply along the right side of the police vehicles, the officers would out of necessity have had to walk on the left side. Furthermore, once P-4 is viewed, it becomes apparent

why the officers had not seen the body when walking along the cars while they were able to see the flashlight and hat. Clearly, the photographs demonstrate that the position of the officers in relationship to the body precluded the possibility of such an observation. Had they been in a different position, as pictured in P-68, the body would have been apparent. Clearly, the probative value of the two pictures is readily apparent. Furthermore, the photographs are not gruesome in any manner.*

P-37 (21T 125-127), objected to as inflammatory and irrelevant, depicts the body of Trooper Foerster lying alongside of the unmarked car. The position of the various items subsequently introduced into evidence (Foerster's hat, the defendant's hat, the expended shell, the Llama automatic) are shown in relation to the body. The dirt on the victim's pants and the cuts on his hands are indications of the struggle in which Foerster was engaged. Especially significant is the position of the holster, which has apparently been pulled from his side to the front in order to take the revolver out. As such, it again represents photographic support for the theory advanced by the prosecution concerning the method in which the killing was committed. The logical relevance clearly predominates over the prejudicial nature, if any, of the photograph.

P-72 and P-73 (21T 827), objected to as irrelevant, depict (1) the relationship of Foerster to the car and the luger

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* Defendant's argument with respect to the above photographs is especially difficult to accept in view of the fact that P-68 and P-38 are virtually identical to J-2 and J-3, which were photographs jointly admitted into evidence by defense counsel and the prosecutor.

automatic found nearby, and (2) the officer's lower legs together with the defendant's hat and a pair of glasses, respectively. While cumulative of testimony concerning the scene, they are nevertheless relevant as evidencing the apparent struggle Foerster was engaged in as well as providing graphic illustrations of the scene in a manner which could not be duplicated by mere testimony. Moreover, they are not of an inherently prejudicial nature.

S-78 (21T 844), objected to as cumulative, again depicts a distant view of the scene from the front of the unmarked car. Its purpose was to demonstrate the existence of black road marks as evidence that the Pontiac had left the scene in a hurry. Since the jury had to evaluate the merits of this contention, the photograph constituted the best evidence possible. As such, it was extremely relevant and certainly not inflamatory.

P-176 (26T 546), objected to as irrelevant, shows the right side doors of the unmarked car and the bloodstains on them. The photograph is probative as to the struggle between Foerster and the defendant, indicating that Foerster was apparently wounded while standing, and that the battle continued in that manner for sometime afterwards. In addition as in prior photographs, the nature of P-176 is neither prejudicial nor gruesome.

Finally, P-134 (25T 379), objected to as irrelevant and immaterial, depicts the hand wounds of Trooper Foerster as well as the bullet wound in the chest. Defense counsel

presently objects to the photograph because of its cumulative nature as well as being "awesomely gruesome." Initially, the State submits that the photograph is not of an inflammatory nature. Moreover, the picture was especially significant since it demonstrated to the jury the chest wound as having a grazing abrasion or scrape just below it. Although Dr. Albano had described the injury, the photograph offered a view of the wound which could not otherwise be portrayed to the jury despite testimony concerning it. As such, it represents an indication that the wound occurred at close range, possibly during a struggle with the defendant's gun. Moreover, the hand injuries lend credence to the prosecutor's statement that "dead men talk ... look at Foerster's hands, he fought for his life, and lost." (28T 23- 1 to 3).

In short, the State submits that the photographs were not merely cumulative of trial testimony. Rather, they conveyed to the jury impressions of the scene and inferences as to what transpired, impressions which could not be achieved merely through hearing testimony. The adage, "a picture is worth a thousand words," truly applies to the present case. Furthermore, none of the photographs are inherently prejudicial or gruesome. Certainly, the trial court's rulings in admitting the photographs into evidence was proper.

POINT VII

THE PROSECUTOR'S SUMMATION WAS PROPER.

During the course of his summation, the prosecutor made the following remarks to the jury:

> "He [Harper] didn't see 820. That is the marked car. Are you surprised that a man shot at, people jumping out of a car shooting at him, can run by a car without seeing it? Would you? People jumping out of a car, running, shooting at you, you'd walk by an elephant and you wouldn't see it. Is it so surprising or is it precisely the kind of recollection you would expect of a man being shot at, people trying to kill him. Do you understand that, trying to kill him. How would you react if I pulled out a gun now and started pointing it at you and shooting, how observant would you be? (28T7-16 to 28T8-1).
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> * * *
>
> There are fifty some rounds of ammunition in the trunk for the .380. You heard one of the officers testify that he looked in the trunk and there were extra rounds of ammunition for the Llama pistol, extra rounds of ammunition for the Luger. Take a look at that ammunition, it's not standard ammunition, super-vel, lead nose, hollow nose, designed for one thing, killing; killing.
>
> When Clark Squire-Archie Gibson got out of that car he knew the license was phoney, the guns were in the car, and what do we know, Mr. Costan in the back had identification in the back, he was Mr. Williams. They were nice they were polite. They were going to take any kind of traffic ticket they were going to get, because that was all right. But they couldn't afford to be arrested. Because he's only going to get booked as Archie Gibson so many times before they find out he's Clark Squire. If they pull him out of that car and find those guns, they will all get arrested. They were not going to be arrested no matter who stood in their way, and I underline "who." Not just

these particular policemen, but any policemen, any policemen who would have been there who would have blocked their road to freedom would have been dead. (28T11-10 to 28T12-6).

* * *

Down the road they go, the three of them. Trooper Palentchar comes. You know, it's amazing. Mr. McKinney likes to pick apart -- when a witness says something he likes, that must be gospel. If the same witness says something he doesn't like, he says it must be wrong. On the one hand he says, Bob Palentchar, there's a good fellow. She [Chesimard] opened that door and got in and he never did anything. He's lucky that there wasn't another gun in that car, because if there was the same thing would have happened to him. It was that same trusting attitude of the police that got him into trouble." (28T17-1 to 11).

Despite the failure of defense counsel to object to the above comments, the defendant presently contends that they were inflammatory and prejudicial, necessitating a reversal. Specifically, he argues that the first comment asked the jury to decide what they would do in a similar situation rather than to judge what actually happened, while the other two comments constituted improper references to other crimes not in evidence. Since a timely objection was not interposed, the alleged deficiency is advanced as plain error. R.2:10-2. See also State v. Hipplewith, 33 N.J. 300, 317 (1960); State v. Riley, 28 N.J. 188, 206 (1958); State v. Sinnott, 24 N.J. 408, 415 (1957). The State respectfully submits that the prosecutor did not exceed the bounds of propriety during his summation.

The law clearly requires a prosecutor to vigorously and forcefully present the State's case and permits his

argument to be couched in strong terms. State v. Bucanis, 26 N.J. 45, 56 (1958). It is also well settled that a prosecutor is duty-bound to confine his summation to the facts revealed during the trial and the reasonable inferences which may be properly drawn therefrom. State v. Bogen, 13 N.J. 137, 140 (1953), cert. denied 346 U.S. 825 (1953). However, so long as his remarks are merely descriptive of the proofs adduced at trial, they afford no basis for a charge of prejudicial error warranting reversal. State v. Mayberry, 52 N.J. 413, 440 (1968), cert. denied 393 U.S. 1043 (1969); State v. Hill, 47 N.J. 490, 499 (1966); State v. Reynolds, 41 N.J. 163, 176 (1963), cert. denied 377 U.S. 1000 (1963). Plainly, a prosecutor cannot be expected to present his summation in a style "appropriate to a lecture hall." State v. Johnson, 31 N.J. 489, 510-511 (1960). It is thus not unusual to find that criminal cases are tried with some showing of emotion.

An examination of the entire prosecutor's summation, together with the trial record and defense counsel's summation, clearly reveals its propriety. Rather than isolate one area and allege it to be of an inflammatory and prejudicial nature, that comment must necessarily be viewed in its proper perspective. Initially, with respect to the first comment, it must be noted that during his summation defense counsel made repeated attacks on Trooper Harper's conduct, alleging that he had panicked, drawn his gun and precipitated the shooting. (27T145-17 to 154-1; 27T161-8 to 17; 27T193-4 to 9). In support of his theory, counsel emphasized the failure of Harper to see Car 820 with its flashing red light, in an attempt to convince

the jury that Foerster may not have even arrived yet when Harper panicked and began shooting. In response to this contention, the prosecutor was merely asking the jury whether it was natural for an individual in Harper's situation to be unable to specifically recall certain circumstances which occurred during the shooting. The prosecutor was thus stating the obvious: that the jury would have to rely upon their experiences in deciding whether the failure to recall the car's presence was natural and reasonable under the circumstances. The comment constituted a fair response to defense counsel's contentions and was clearly proper. State v. Wilson, 57 N.J. 39, 50 (1970); State v. Taylor, 46 N.J. 316, 335 (1966), cert. denied 385 U.S. 855 (1966); State v. Johnson, 31 N.J. 489, 510 (1960), cert. denied 368 U.S. 933 (1961).

With respect to the second comment, defense counsel had argued that at no time did the defendant, being unarmed, ever arouse the officer's suspicions or appear to pose a danger to their safety. In countering this characterization of the defendant as an "innocent third party", the prosecutor called the jury's attention to the contents of the trunk, which contained several boxes of ammunition. This ammunition, which the jury could observe, had been designed in a different manner than most other types of ammunition. Clearly it was not designed for target practice, but was purposely made in a fashion to cause serious injury.

Moreover, the jury was told that the defendant had reason for cooperating fully with the police. Having at least constructive possession of the car and its contents, the

defendant must necessarily have known of the various guns and ammunition in it. To avoid arousing suspicion and a resulting arrest or search which would reveal these items, the defendant would necessarily be cooperative, even to the extent of getting a traffic ticket. The prosecutor was thus attempting to refute defense counsel's contention that if the defendant had intended to assault Harper or any police officer, he would have done so when Harper was questioning the passengers in the Pontiac. Until the suspicions of the police had been sufficiently aroused to justify a search or arrest, the defendant had no need to resort to violence.

Nor can it be said that the prosecutor improperly referred to other crimes not in evidence. Regardless of the prosecutor's comment, the jury would naturally wonder as to the need of the defendant to use an alias and possess numerous identification documents under that assumed name. The inference that the defendant wanted to avoid arrest to prevent the disclosure of his true identity was not only a natural one which was supported by the evidence, but was a logical inference which the jury would doubtlessly have drawn even in the absence of the comment. As such, it was proper as being within the scope of the evidence and in response to contentions initially raised by defense counsel.

The third comment is equally proper for similar reasons. Defense counsel contrasted the conduct of Trooper Harper, who allegedly panicked, with that of Trooper Palentchar, who acted reasonable and compassionately in an equally dis-

tressing situation. (27T175-14 to 177-20). The prosecutor, in response, argued that Harper had also acted rationally and cautiously. In fact, it was because he was over-cautious and failed to draw his gun that he was subsequently shot and Foerster killed. Had he drawn his gun in response to Chesimard's suspicious movements, the three would not have been able to initate the shooting. (28T5-21 to 6-22). The evidence elicited at trial clearly demonstrated the desire of Chesimard to kill Harper, from the initial wounding shot to the volley of shots which ensued immediately afterward. Having demonstrated this type of deadly conduct with Harper, it was a proper inference to note that she would likely have acted similarly with Palentchar had she had the chance. The reference being solely to Chesimard and not to the defendant, it cannot be said that the comment pictured him as an evil man who had committed past crimes and, if not apprehended, would continue to participate in more killing.

In short, the prosecutor's summation was within the facts and inferences established at trial and was merely a fair response to contentions raised by defense counsel. But even assuming prosecutorial impropriety, it is not every excursion outside the evidence that will vitiate an otherwise valid conviction. To compel such a drastic remedy, the infraction must be "clear and unmistakable" and must "substantially prejudice the defendant's fundamental right to have the jury evaluate the merits of his defense." State v. Bucanis, supra, 26 N.J. at 48. Significant to such an inquiry is whether an objection was made or a curative instruction requested.

"On the question whether the improper comment shall have that effect, the making by trial counsel of a timely objection and the action of the trial judge in connection therewith are ordinarily controlling considerations." State v. Vaszorich, 13 N.J. 99, 119 (1953). An appellate court may properly infer from counsel's failure to object to the remarks at the time they were made that he did not, in the atmosphere of the trial, think them to be out of bounds. State v. Wilson, 57 N.J. 39, 50 (1970); State v. Johnson, supra, 31 N.J. at 511.

Plainly, the comments complained of were not so grievous as to infect the proceedings and to require a new trial, even if prosecutorial impropriety could be said to exist. It cannot be said that defendant was denied a fair trial, or that the alleged derelictions led to an unjust result.

POINT VIII

THE CUMULATIVE ERROR DOCTRINE IS NOT APPLICABLE IN THE PRESENT CASE.

Defendant argues that the aggregate effect of the trial court's rulings and the prosecutor's conduct was to deprive him of a fair and impartial trial. In essence, he relies upon the cumulative error doctrine first enunciated by our Supreme Court in State v. Orecchio, 16 N.J. 125 (1954). In Orecchio, the defendant's conviction was reversed because the trial judge committed numerous errors which were of such magnitude as to substantially deprive the accused of a fair trial.

The present case presents a totally different situation. Here, the trial court's rulings were entirely proper, as was the conduct of the prosecutor. But even assuming the existence of error, this Court should not review the legal arguments raised by defendant from the vantage point of twenty-twenty hindsight. Trial tribunals, faced with the burdens of congested court calendars and the pressurized atmosphere of evidentiary hearings, must not be held to an impossible standard of conduct. Undoubtedly, the arguments of counsel and the court's responses could have been more finely articulated. Nevertheless, a fair reading of the record below reveals that the defendant received a fair and impartial trial, and that the jury's verdict was consistent with the weight of the evidence presented. It must always be remembered that "[a] defendant is entitled to a fair trial but not a perfect one." State v.

Boiardo, 111 N.J.Super. 219, 233 (App.Div. 1970), cert. denied 401 U.S. 948 (1971). Trial judges as well as trial counsel are human and perfection cannot be either demanded or expected. As long as the rulings of the trial judge were devoid of error prejudicing the defendant's rights, the conviction must be affirmed.

That the defendant was not seriously prejudiced by the cumulative effect of the court's rulings cannot be disputed. Nothing contained in the record or contained in defense counsel's brief, supports the conclusion that he was denied an impartial trial or that the verdict rendered by the jury was in any way unfair. The evidence in the instant case was conclusive of the defendant's guilt. His conviction, accordingly, should be affirmed.

POINT IX

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO THE ARMED ROBBERY CHARGE.

To establish a prima facie case against an accused, the evidence must connect the defendant in some way to the crime. State v. Reyes, 50 N.J. 454 (1967); State v. O'Donnell, 8 N.J. Super. 13 (App.Div. 1950). However, for the purpose of a motion for a judgment of acquittal at the end of the State's case, the State is given the benefit of all inferences which can reasonably be drawn in favor of the prosecution. If, upon such consideration, a factual issue exists from which a jury could find that the defendant committed the crime, the motion must be denied. State v. Franklin, 52 N.J. 386 (1968); State v. Van Duyne, 43 N.J. 369 (1964), cert. denied 380 U.S. 987 (1964). "The proper issue is simply whether the evidence, viewed in its entirety, including the legitimate inferences therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt." State v. Mayberry, 52 N.J. 413 (1968), cert. denied 393 U.S. 1043 (1969). It is also established that a conviction can rest upon circumstantial evidence alone, and that there need be no direct evidence of a defendant's guilt. State v. Franklin, supra.

In order to find the defendant guilty of robbery under N.J.S.A.2A:141-1, the State must demonstrate that (1) the defendant forcibly took something of value from another; (2) the defendant did so through the use of force or by putting the victim in fear; and (3) the defendant had a specific intent

to steal and to permanently deprive him of the property in question. State v. Mayberry, 52 N.J. 413 (1969), cert. denied 393 U.S. 1043 (1969); State v. Butler, 27 N.J. 560 (1958); State v. McCoy, 114 N.J.Super. 479 (App.Div. 1971); State v. Ford, 92 N.J.Super. 356 (App.Div. 1966). Ordinarily, the degree of transportation necessary to constitute the taking under the statute need only be slight. State v. Culver, 109 N.J. Super. 108 (App.Div. 1970).

The defendant maintains that the evidence presented could not reasonably have supported an intent to rob on his part. Specifically, he argues that the taking and using of Foerster's revolver was done with the intent to use it, not to steal it; as such it was an integral part of the murder. However, by intending to kill Foerster with his own gun, a resulting inference is that the defendant also meant to effectively deprive him of the revolver. The success in obtaining the revolver and using it against Foerster made it obvious that Foerster would never use or possess the weapon again. As such, the defendant's main purpose in taking the gun is at least probative of his intent with respect to the robbery charge.

Moreover, the defendant did not merely leave the revolver at the scene after utilizing it to kill Foerster. Rather, the evidence supports the inference that he carried the gun with him to Milepost 78, especially since his blood type was found on the handle and side plates of the gun. Being without a weapon as the result of the jamming of his Browning, the defendant obviously kept the gun and intended to possess

it to use again in any subsequent encounter with police. When this is combined with the defendant's killing of Foerster, the resulting inference becomes clear: the defendant intended to permanently deprive Foerster of his gun, not merely to effectuate the killing but also to utilize as a substitute for his own jammed weapon.

On this basis, factual issues were presented from which a jury could determine that the defendant had violated the provisions of N.J.S.A.2A:141-1. In assessing a motion for a judgment of acquittal, whether the evidence is strong or frail, if it is fairly susceptible of diverse inferences when considered in its totality, a fact question is presented. In such a situation it presents a case for the determination of the jury, rather than the court, and the motion, as was done in the present case, should properly be denied. State v. Sachs, 69 N.J.Super. 566, 575 (App.Div. 1961).

POINT X

THE DEFENDANT'S CONVICTION FOR ARMED ROBBERY IS DISTINCT FROM HIS FIRST DEGREE MURDER CONVICTION.

During the charge, the trial court instructed the jury that in maintaining that the defendant was guilty of first degree murder, the State was proceeding upon two alternative concepts. Thus, he issued the appropriate principles of law concerning a premeditated, deliberate and willful murder, as well as concerning the intentional killing of a law enforcement official during the performance of his duties. (27T209-1 to 211-13). The jury was also charged as to the necessary elements to support a second degree murder conviction under each of the two concepts. (27T211-14 to 214-16). After deliberating, the jury found the defendant guilty of first degree murder as well as armed robbery. The defendant presently argues that since the robbery of Trooper Foerster's revolver was an integral part of the murder, the robbery conviction should merge with the first degree murder conviction. The State submits that an examination of the trial record together with the applicable case law supports separate convictions in the present situation.

While at common law, murder was defined as a killing done with "malice aforethought", other situations emerged in which actual malice was not required to support a charge of murder. One such category, which became known as the "felony-murder" rule, was a killing in the course of the commission of a felony, as to which the intent to commit

the felony sufficed even though there was no intent to kill. The malicious and premeditated intent to perpetrate one kind of felony was, by implication of law, transferred from such offense to the homicide which was actually committed, sufficient to support a conviction of murder in the first degree. State v. Madden, 61 N.J. 377, 384-385 (1972); State v. Turco, 99 N.J.L. 96, 101 (E. & A. 1923); People v. Nichols, 230 N.Y. 221, 129 N.E.Rep. 883 (1921). This concept now exists as statutory authority in N.J.S.A. 2A:113-1.

However, it is also established that a conviction under the felony-murder concept bars a prosecution for the underlying felony when the killing is the direct result of the perpetration of that felony. See e.g. State v. Hubbard, 123 N.J. Super. 345 (App.Div. 1973), certif. den. 63 N.J. 325 (1972) and State v. Mowser, 92 N.J.L. 474 (E. & A. 1919), in which the acts of robbery, perpetrated by physical attacks, resulted in the death of the victims, and State v. Cooper, 13 N.J.L. 361 (Sup.Ct. 1883), in which the act of arson resulted in the death of the deceased. Consequently, in each case the elimination of the underlying felony would virtually bar a first degree murder conviction because of the lack of the necessary elements of malice aforethought and premeditation, deliberation and willfulness. State v. Cooper, supra, 13 N.J.L. at 368. In essence, therefore, the merger of a felony conviction appropriately occurs when the following two factors exist: (1) the homicide resulted from the

perpetration of certain enumerated felonies, and (2) the underlying felony supplies the necessary element of malice which, in the absence of the felony, could not be demonstrated.

The instant case is clearly distinguishable from such a situation. Initially, it is significant that the robbery, in essence, occurred during the course of the murder of Trooper Foerster; as such, a standard felony-murder situation is not present. It is clear that the defendant, as well as his two companions, intended to kill any police officer that they encountered. This fact can be inferred from the gun battle engaged in with Harper as well as the struggle and initial shooting of Foerster in the chest. Once Foerster was wounded and incapacitated on the ground, the subsequent killing would likely have taken place regardless of whether the officer's revolver was available -- some method would have been utilized to effectuate the death of Foerster. The utilization of the gun was simply a convenient way to carry out this purpose. The officer's revolver was taken not merely because the defendant and his companions wanted to kill Foerster: rather, the three, realizing they were unarmed once their automatic pistols had jammed, knew they would need some type of weapon to effectuate their escape and prevent apprehension by police. See Point IX, supra. Consequently, the robbery of the trooper's revolver, although proximate in time to the murder, was nevertheless a separate and distinct act.

Moreover, it is significant that the jury was not instructed on the felony-murder concept. It is thus apparent that they found the defendant either committed a premeditated, deliberate and willful homicide, or an intentional killing of a law enforcement officer. Consequently, the robbery conviction was not utilized by the jury to supply the element of malice to the charge of murder; the jury found malice on the part of the defendant, as well as an intent to kill, independent of the felony.

In short, the present case involves a situation in which (1) a felony occurred during the commission of a murder, (2) the jury found the defendant guilty of an intentional and premeditated killing, and (3) the jury was not instructed as to felony-murder. The State is unaware of any case which, under such circumstances, holds that the felony conviction merges with the first degree murder conviction.

In determining the issue of merger, courts have often employed three distinct tests in arriving at their determination of the issue: the "same evidence" test, the "lesser included offense" test, and the "same transaction" test. State v. Thomas, 114 N.J. Super. 360, 364 (Law Div.1971), mod. 61 N.J. 314 91972). However, our Supreme Court in State v. Carl Alexander Davis, __ N.J. __ (decided June 10, 1975), once again reiterated its statement that while "a distinct, non-mechanical standard for determining the existence of the same or separate offenses would be most desirable, we recognize the elusive character of that

goal and the probable futility of our efforts to achieve it." Slip Opinion at P.12. The Court noted, however,

> " As a practical matter, however, it may be helpful to employ a certain flexibility of approach to the inquiry of whether separate offenses have been established under the proofs, attended by considerations of 'fairness and the fulfillment of reasonable expectations in the light of constitutional and common law goals.' State v. Currie, 41 N.J. 531, 539 (1964). Such an approach would entail analysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed. Certainly there are other factors to be considered and, along with the above, accorded greater or lesser weight depending on the circumstances of the particular case. We mean to emphasize that by referring to these elements we do not intend either to create exclusive categories of evidence which may be of critical significance or to shroud the analytical process in any mystery. In reality we are simply reflecting, in the context of these cases, on the traditional determination of sufficiency of proofs." Slip Opinion at P.12-13.

In the present case, while the robbery occurred during the commission of the murder, and was thus close in time and place to it, the evidence submitted to the jury concerning the robbery was not a necessary ingredient to a conviction. The absence of a charge for robbery in this case would not have prevented a conviction for first degree murder. Clearly the jury found malice on the defendant's part independent of the robbery. Furthermore, the defendant intended to take the trooper's revolver because of the need for a functioning

weapon in his subsequent attempt to escape apprehension. Its use in killing Foerster was only incidental. As such, the defendant not only had the intent to rob the revolver for his own use, but also had the separate intent to kill Foerster. Certainly under these circumstances the robbery was not such an integral part of the murder that it should merge into it.

The defendant's reliance upon State v. Fitzsimmons, 60 N.J. Super. 230 (App.Div. 1960) is misplaced. In Fitzsimmons, a police officer attempted to arrest the defendants and became involved in a struggle with one of them. During the struggle, the second defendant removed the officer's revolver and killed him with it. Both defendants were indicted for murder and convicted; during the case the only ground advanced to support the charge was felony-murder. Subsequently, both defendants were indicted for armed robbery. However, the charge was dismissed, since,

> "The conviction of the defendants for murder under Indictment No. 467-57 is a bar to further prosecution under Indictment No. 518-57. 'Where the accused may be convicted of a lesser offense included in the greater laid in the indictment, an acquittal or conviction of the greater offense is on grounds of former jeopardy a bar to a subsequent trial for the lesser offense.'" Id. at 233.

The State agrees completely with the holding in Fitzsimmons. Because the prosecution of the murder charge was successfully predicated upon the felony-murder theory, to have permitted the second indictment would have necessarily

entailed a jury determination of the issue of robbery on two separate occasions. Merger of the robbery into the murder under such circumstances is thus apparent.

As previously noted, however, the present case involves a far different situation than that found in Fitzsimmons. Accordingly, the State submits that the conviction for robbery did not merge into the conviction for first degree murder.*

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*While the robbery and murder involved two separate acts, their proximity in time and place might appear to be relevant to the propriety of consecutive, as opposed to concurrent sentences. Cf. State v. Jones, 66 N.J. 563 (1975). However, the State submits that because of the two separate and distinct intents involved, and because the trial court realized the necessity of consecutive sentences to insure adequate incarceration (See Point XII, infra), the propriety of the separate convictions and the appropriateness of the consecutive sentences imposed should not be disturbed.

POINT XI

THE VERDICT WITH RESPECT TO THE CHARGES OF ASSAULT AND ROBBERY WAS CONSISTENT WITH THE WEIGHT OF THE EVIDENCE.

It is well settled that a verdict will not be set aside as being against the weight of the evidence unless there is a plain and obvious showing of a miscarriage of justice. R. 2:10-1. In State v. Johnson, 42 N.J. 146, 161 (1964), our Supreme Court set down certain broad principles to assist a court in evaluating the evidence on review:

> "It is not our function in reviewing the conviction in question to weigh the evidence anew and to make independent findings of fact as if we were sitting in first judgment in the case. Rather our obligation is to determine whether there is adequate evidence to support the judgment below. Citing State v. Emery, 27 N.J. 348 (1958)."

These standards were more precisely set forth in Dolson v. Anastasia, 55 N.J. 2, 7 (1969), wherein the Court stated:

> "The rule might be more precisely stated as the trial judge shall grant the motion, if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law.
>
> The standard governing an appellate tribunal's review of a trial court's action on a new trial motion is essentially the same as that controlling the trial judge. We say the test is 'essentially the same', because where certain aspects are important -- witness credibility, 'demeanor', 'feel of the case', or other criteria which are not transmitted by a written record --, the appellate court must give deference to the views of the trial judge thereon."

An examination of the record below compels the conclusion that the jurors properly performed their function as triers of fact.

Initially, with respect to the charge of armed robbery, the defendant maintains that there was no evidence to demonstrate an intent to steal. As previously indicated, the State presented sufficient evidence to establish a prima facie case as to the robbery. See Point IX, supra. Without reiterating the relevant facts, the State submits that the use of the trooper's revolver by the defendant, together with the subsequent asportation of the revolver from the scene, clearly presented more than adequate evidence to support the verdict reached by the jury. It cannot fairly be said that there was a miscarriage of justice.

Once the trial record is examined, the same conclusion must be reached with respect to the various assault charges against the defendant. As the trial court instructed the jury, the prosecution did not maintain that the defendant was guilty of the assaults against Trooper Harper as a principal. Rather, the theory advanced was that he had aided and abetted their commission by Chesimard and Costan. Thus, the jury was told that while an individual who had willfully and knowingly aided and abetted another in the commission of a crime was equally guilty as a principal, the individual must have shared the same intent required to be proved against the person who actually committed the crime. Therefore, to constitute guilt, there had to be a community of purpose and actual participation in the offense; the jury thus had to evaluate the totality of the circumstances to determine whether the defendant had assented to the various assaults, "lent to it

his countenance and approval and was thereby aiding and abetting ... " (27T214-17 to 218-2; 27T247-24 to 250-16; 27T260-16 to 261-2; 27T272-17 to 275-9). As such, the court's instructions properly and accurately reflected the controlling principles on aiding and abetting. See State v. Madden, 61 N.J. 377 (1972); State v. Mayberry, 52 N.J. 413 (1968); State v. Fair, 45 N.J. 77 (1965); State v. Humphreys, 101 N.J.Super. 539 (App.Div. 1968).

After defining the various elements of the four assault counts, the court again reviewed the law on aiding and abetting, cautioning the jury that the defendant, to be found guilty, had to have the same specific intent as the principal committing the assault. (27T224-14 to 225-3). Significantly, he also told the jury,

> "it is not alleged that Mr. Squire was the actual principal in any one of these assaults, but what they do allege is that he aided and abetted, and they say that he aided and abetted by averting Trooper Foerster from coming to the aid of Trooper Harper." (27T224-7 to 13). (Emphasis supplied).

This instruction was clearly relevant to the present situation and was correct in its statement of the law. In State v. Black, 86 N.J.L. 520 (Sup.Ct. 1914), defendant Curtis argued that the court had erred in denying his motion for a judgment of acquittal. The court, in discussing the claim, stated:

> " ... the ground upon which [the motion] rested, as a legal proposition, is faulty. It was not necessary that it should appear that Curtis had inflicted any injury upon Van Etten in order that he may be found guilty of an assault and battery. If he in anywise aided, encouraged or abetted the others he could be properly convicted

> of an assault and battery. There was some proof in the case which tended to establish that Curtis prevented one Warner from going to the assistance of one Van Etten, while he, Van Etten, was being assaulted. From this circumstance a jury might have reasonably inferred that Curtis was aiding and abetting the others in their assault upon Van Etten." Id. at 522-523.

While it is impossible to re-create precisely the sequence of events which transpired that night, the evidence presented does not even remotely support an inference that Foerster utilized any force to restrain the defendant. As fully presented in Points III and IV, supra, the overwhelming evidence leads inescapably to the conclusion that the defendant, sensing the predicament he and his companions were in following the shooting of Harper, immediately engaged in a struggle with Foerster. By doing so, and subsequently incapacitating Foerster, the defendant clearly prevented the trooper from going to the aid of Harper, who had to battle Chesimard and Costan alone and wounded. From these actions, the jury could logically conclude that the defendant had aided the attempt by his two companions to kill Harper, and that he had done so with the specific intent required for the various offenses. Having intended to kill Foerster, the defendant would certainly have had the same intent toward Harper.

Furthermore, the absence of an express conspiracy between the defendant and his two companions is of no moment. Aiding and abetting does not presuppose the existence of an agreement to commit a crime; rather, aiding and abetting has a broader application making a defendant culpable as a principal whenever he shares in a

criminal act with the necessary intent, regardless of the existence of a conspiracy. Pereira v. United States, 347 U.S. 1, 11-12 (1950); United States v. Valencia, 492 F.2d 1071, 1073-1074 (9th Cir. 1974). Thus, the State submits that the evidence presented at trial clearly demonstrates that the jury's verdict was justified and proper as to the assault on Trooper Harper.

POINT XII

THE SENTENCE IMPOSED WAS PROPER.

In addition to the mandatory life imprisonment term given the defendant with respect to the first degree murder conviction, the sentencing court imposed consecutive terms of 10 to 12 years on Count VI (assault with intent to kill), two to three years on Count VII (possession of a gun without a permit), and 12 to 15 years on Count VIII (armed robbery). Counts III, IV and V were found to merge with Count VI. The defendant maintains that considering the consecutive nature of the sentences, the court's imposition of sentence was manifestly excessive and unduly punitive. The State respectfully disagrees.

Although the appellate court has the power to revise this sentence, State v. Bess, 53 N.J. 10, 18 (1968), it is well established that the sentencing judge has broad discretion as to the quantum of the sentence, as long as it is within the statutory limits. State v. Yormark, 117 N.J.Super. 318 (App.Div. 1971), certif. den. 60 N.J. 138 (1972), cert. den. 407 U.S. 925 (1972); State v. Provoid, 110 N.J.Super. 547, 559 (App.Div. 1970). It is defendant's burden to prove that the sentence was unduly punitive before the reviewing court can interfere with it. State v. Tyson, 43 N.J. 411, 417 (1964), cert. den. 380 U.S. 987 (1965); State v. Cox, 101 N.J.Super. 479, 475 (App.Div. 1968), certif. den. 53 N.J. 510 (1969).

The defendant offers little to show that the sentencing court abused its discretion. The reason for this is obvious -- there

is little to offer in his behalf. The killing of Trooper Foerster represented a senseless and savage taking of one's life, under circumstances which serve only to further illuminate the heinous nature of the crime. The death of Foerster is further compounded by the injuries suffered by Trooper Harper; it is truly fortunate that more individuals, both police officers and passing motorists, did not fall prey to the shooting spree which erupted that night.

Nor is there anything in the history or character of the defendant to suggest that the sentence is unwarranted. Rather, the reverse is true. As noted in the presentence report, the defendant refused to cooperate with probation officials, feeling that it would be "a futile effort." (PSR at 2). Furthermore, although not complete, the presentence report indicates prior trouble with the law.

When sentencing a defendant to consecutive terms on a series of offenses arising out of a single episode, the court evaluates the seriousness of the offenses and determines the aggregate penalty warranted by the occurrence. The court considers the defendant's past history and probability for rehabilitation as well as the need for detention of the defendant in order to protect society. State v. Ivan, 33 N.J. 197 (1960). The court then allocates this quantum of punishment with respect to the various offenses. State v. Quatro, 33 N.J.Super. 333 (App.Div. 1954), aff'd o.b. 18 N.J. 201 (1955); State v. Barbato, 89 N.J.Super. 400, 411 (Cty.Ct. 1965). Thus, the present situation involves the imposition of consecutive sentences as part of a pattern of punishment and rehabilitation.

In evaluating the relevant circumstances, the sentencing court felt that the prevailing consideration was not rehabilitation, but rather the protection of society from further danger. As the court aptly stated:

> I must sentence this man to life. But life, as we all know, under our laws is not really life. It's a matter of being eligible for parole in fourteen years.
>
> And in all circumstances of this case, this Court does not consider that to be sufficient sentence.
>
> The Court feels that when someone comes before me, an avowed revolutionary, and impliedly advocates the continued violence against police officers, whether they be white or black, that the only thing this Court can do to protect the world from such activities is to place the man in prison.
>
> I appreciate and I agree with Counsel there's no question of rehabilitation involved here. The Court feels there's very little rehabilitation done in prison, anyway.
>
> The Court does owe an obligation to society, to all members of society, when somebody is advocating violence, feels that it must protect society. (TS40-3 to 24).
>
> * * *
>
> Please note that in a couple of instances they are not maximum sentences. The Court is giving some consideration to the arguments of Counsel and the statements of Mr. Squire. (TS41-10 to 13).

Clearly, the sentences imposed in this case represented a punishment which fit both the offender as well as the offense. The court wisely exercised his sentencing discretion; the result was a proper sentence which should not be disturbed.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the conviction and sentence imposed below be affirmed.

Respectfully submitted,

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BY William Welaj
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Of Counsel and on the Brief

THE COURT: I will hear counsel.

MR. ASHLEY: If it please the Court, this is an application of the firm of Brown, Vogelman & Ashley, Thomas R. Ashley appearing, to have admitted, pro hac vice, for the purpose of trying the case of State v. Clark Edward Squire a/k/a James Henry Walker, and a/k/a Archie Gibson. Your Honor, for the purpose of the record, I am reading from the indictment, that is Indictment 1436-72.

Your Honor, if it please the Court, Mr. McKinney was admitted to the New York Bar in 1956, and presently has his law offices at 32 Court Street in Brooklyn.

I have spoken to Mr. McKinney, your Honor, and he has indicated to me he has spoken to Mr. Squire and it is Mr. Squires intention, and he has already retained Mr. McKinney for the purpose of trying this case.

So the record can be clear, your Honor, my office, Mr. Brown appeared and I was present at the time, moved the admission of Mrs. Evelyn Williams pro hac vice, too. At that time the understanding was, in the event Mrs. Williams chose, for whatever reason, or the Court chose that Mrs. Williams should not be involved in the case any longer, that

Mr. Brown, or my office, would undertake the obligation of trying the case with or without her presence. I submit to the Court that the same understanding applies in this instance.

Certainly I don't anticipate in any way that there will be any problem which would result in Mr. Charles McKinney not being able to try the case on behalf of Mr. Squire. I submit to the Court that Mr. Brown and I have been involved in other cases where he has represented one defendant and I have represented another defendant. In the event that an eventuality does create itself, certainly my office is willing to undertake the obligation of having myself defend Mr. Squire and having Mr. Brown defend Miss Chesimard.

I also should say for the record, your Honor, I have not consulted with Mr. Squire, I have never met the man, but I submit in the event that there is this emergent situation my office will undertake the obligation which I have already expressed to the Court. So I don't think there will be any problem, your Honor.

I would ask, very respectfully, that the Court grant my motion requesting that Mr. McKinney be permitted pro hac vice to represent Mr. Squire.

THE COURT: You intend to actually take over in the trial and serve, in a sense, as chief trial attorney for Mr. Squire?

MR. MC KINNEY: That is my intention, your Honor.

THE COURT: You are in good standing before the New York Bar?

MR. MC KINNEY: I am, yes.

THE COURT: And a member of the New York Bar?

MR. MC KINNEY: I am, sir. In addition, I am also a member of the Bar of the United States Supreme Court and several District Courts of the United States District Court.

THE COURT: The Court will grant the motion. You will submit the Order, along with a certificate of good standing. I would ask counsel to furnish the Court with such a certificate in regard to Mrs. Williams who appeared here a few weeks ago.

MR. ASHLEY: I will, your Honor. Thank you very much.

MR. MC KINNEY: I might say, your Honor, since Mr. Ashley inserted in the record that he has not consulted with my client, Mr. Squire, nevertheless I have conferred with him on at least two occasions and he is aware of the fact that I have requested of Mr. Ashley that he serve as local counsel in this case

along with me, and he has assented to that request that I made. So that it represents no problem at all.

THE COURT: Fine. Submit an Order.

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I, Louis S. Finkel, Official Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by me at the time and place aforementioned.

Louis S. Finkel

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1882-73

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	ORDER RELAXING THE PAGE LIMITATION OF R.2:6-7
CLARK E. SQUIRE,	:	
Defendant-Appellant.	:	

This matter being opened to the Court by the verified petition of William Welaj, Deputy Attorney General, attorney for plaintiff-respondent, and for good cause shown as set forth in the annexed petition,

It is on this 15th day of September, 1975

ORDERED that the page limitation of R.2:6-7 be and hereby is relaxed to permit the filing of respondent's brief not to exceed 110 pages.

For the Court

/s/ John F. Sylvester
P.J.A.D.