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MICROFILM PREPARATION TRANSMITTAL (CALENDARING UNIT)

PART D TUE DEC 5 2006 WAIVER

A- 3853-0517

A- _____

LIST ALL DOCKET NUMBERS
IF CONSOLIDATED

A- _____

TITLE: STATE vs Watkin

RECORD IMPOUNDED OR PARTIALLY IMPOUNDED

(IF APPLICABLE CIRCLE IN RED)

FEB 2007

TOTAL BRIEFS AND APPENDIX VOLUMES TRANSMITTED
(TOTAL DOCUMENT COUNT)

2

TOTAL TRANSCRIPTS TRANSMITTED

4

NUMBER OF TRANSCRIPTS IN APPENDIX

0

THIS FORM IS TO BE STAPLED TO THE COVER
OF THE ORIGINAL APPELLANT'S BRIEF

SENDER KTB

Part D - Keelin, Weissbard, Payne, ~~Graves~~ Lantz (T/A)

22
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SP

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SENDER MTB

Part D - Keelin, Weissbard, Payne, ~~Graham~~, Libatz (TIA)

A-3853-05T4



JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER

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APPELLATE DIVISION

JUL 31 2006

SUPERIOR COURT
OF NEW JERSEY

July 31, 2006

ABBY P. SCHWARTZ
Assistant Deputy
Public Defender

Of Counsel and
On the Letter-Brief

LETTER-BRIEF AND APPENDIX ON BEHALF OF
DEFENDANT-APPELLANT

FILED
APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY JUL 31 2006
APPELLATE DIVISION
DOCKET NO. A-3853-05T4

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from a Judgment of
v.	:	Conviction of the Superior
CHARLES A. WATKINS III,	:	Court of New Jersey, Law
Defendant-Appellant.	:	Division, Mercer County
	:	Denying Defendant Admission
	:	into the PTI Program.
	:	Sat Below:
	:	Hon. Maria M. Sypek, J.S.C.
	:	<u>DEFENDANT IS NOT CONFINED</u>

Your Honors:

This letter is submitted in lieu of a formal brief pursuant
to R. 2:6-2(b).

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PROCEDURAL HISTORY

Defendant, Charles Watkins was charged by Mercer County Indictment 04-01-0008, with theft by deception, in violation of N.J.S.A. 2C:20-4 (count one) and unsworn falsification to authorities, in violation of N.J.S.A. 2C:28-3a (count two). (Da 1-2)¹

Defendant applied to the Pre-Trial Intervention program (hereinafter referred to as "PTI"). He was rejected by the prosecutor's office. (Da 3-4)

On September 24, 2004 and November 19, 2004, a hearing was held before the Honorable Maria M. Sypsek, J.S.C., on defendant's motion to appeal his rejection from PTI. By Order dated February 22, 2006, the court affirmed defendant's rejection. (Da 5-6)

On February 7, defendant appeared before the Honorable Maryann K. Bielamowicz, J.S.C. At that time, defendant entered a plea of guilty to count one of the indictment, theft by deception. In exchange for this plea, the state agreed to recommend that defendant receive a three-year probationary sentence with the stipulation that defendant make restitution.

¹ "Da" represents defendant's appendix.

"1T" represents the transcript of September 24, 2004. (PTI Hearing)

"2T" represents the transcript of November 19, 2004. (PTI Hearing)

"3T" represents the transcript of February 7, 2005. (Plea Proceedings)

"4T" represents the transcript of April 15, 2005. (Sentencing)

It was agreed that if defendant was able to pay the restitution in less than three years that his probationary term would be terminated. (3T 2-16 to 5-5; Da 7-9)

On April 15, 2005, defendant appeared before Judge Bielamowicz for sentencing. At that time, defendant was placed on probation for three years with the understanding that if defendant paid off the restitution before that time, the probationary term would be terminated. All legislatively mandated fines and penalties were imposed. (4T 6-15 to 7-9; Da 10-11) A Notice of Appeal was filed on April 4, 2006. (Da 12)

STATEMENT OF FACTS

Between May 24, 1998 and May 22, 1999, defendant was collecting unemployment benefits. He had been working at the Trenton Psychiatric Hospital in 1989, and in 1989 he was laid off. At that time, he applied for unemployment. While he was receiving the benefits, he was also going to school which was being financed by unemployment. At the end of 1989 or the beginning of 1990, defendant was called back to work. But, he had not finished school and for as long as he was going to school, he continued to receive unemployment checks. So, defendant went back to work, stayed in school and continued to collect unemployment benefits. (3T 11-6 to 12-20) The total amount of the theft was \$5,670.00, contained in nine checks. Each check required defendant to certify that he was unemployed. (Da 4)

Interestingly, at the first PTI hearing on September 24, 2004, the prosecutor stated that one ground for rejection was that defendant had been a public employee. As the court had never heard of such a policy, the matter was adjourned for the prosecutor to produce evidence of this as a standard for rejection. (1T 7-18 to 22; 1T 22-7 to 24-20) At the hearing of November 19, 2004, the prosecutor stated:

Your Honor, the State doesn't necessarily per se have a blanket policy denying PTI admission to public employees. However, our reasons for denying public employees' admission into PTI is well grounded within the guidelines of the PTI rule adopted by the Supreme Court.

* * *

Before the Department of Labor refers any of these cases over to the Division of Criminal Justice for prosecution, they have a lot of built in procedures built in, at least three remedies where they ask the claimant to handle this civilly before they bring this over to our office for criminal prosecution.

(2T 2-23 to 3-14)

At the close of that day's hearing, the court indicated that it was "going to take some time to think on this one...." (2T 9-20 to 21) The court indicated that this case was no different from welfare fraud cases and that often, those candidates are admitted into PTI. The court noted that it had "discomfort" that there were opportunities for defendant to resolve this matter civilly and that his failure to do so resulted in his being characterized as "someone who disregards paying back the money and therefore disregards and perhaps is not rehabilitatable." (2T 9-10 to 11-9) However, as the court noted,

it continues to be unsettling to me that if the State affords that opportunity to resolve these matters in a civil way - under the civil proceedings with a fact finding hearing and perhaps a payment schedule being worked out, once it's referred to the State, presumably similar people who have resolved it without a criminal consequence and admittedly those people responded in that civil context.

Nonetheless, those that don't, they are now not afforded an opportunity for PTI because they didn't do well in the civil portion, they didn't respond, I don't know.

(2T 11-11 to 23)

After raising these issues, the court did not conduct

another hearing nor did it address these concerns in its final order. The questions raised were never answered. The court merely issued an Order, summarizing its rulings. The court found that the thefts occurred over a five-month period of time and involved nine separate checks, as well as that defendant had a 1990 disorderly persons conviction for receiving stolen property. Based on this alone, without mention of the other concerns, the court held that the state's denial of defendant's application for PTI was not arbitrary or capricious and the appeal was denied.

(Da 5-6)

LEGAL ARGUMENT

THE COURT'S AFFIRMANCE OF THE PROSECUTOR'S REJECTION OF DEFENDANT'S ADMISSION INTO PTI IS A GROSS ABUSE OF DISCRETION, WHICH MUST BE CORRECTED BY THIS COURT.

The defining purpose of PTI is to divert qualified defendants from prosecution in order to serve the interest of the individual, the criminal justice system, and society. State v. DeMarco, 107 N.J. 562, 567 (1987). The purposes of PTI include deterrence of criminal behavior via early rehabilitative services as an alternative to prosecution, while allowing the limited resources of the traditional criminal justice system to be focused on serious criminal acts. Id.

Admission into PTI is contingent upon a prosecutor's evaluation of an applicant's amenability to rehabilitation and the nature of the criminal offense. State v. Leonardis, 71 N.J. 85, 100-103 (1976); R. 3:28; N.J.S.A. 2C:43-12a. PTI diverts certain offenders, usually first-time, from criminal prosecution. Under Guideline 2 of R. 3:28, individual evaluation is the controlling focus of PTI. Under Guideline 2, even those defendants whose offenses would otherwise disqualify them are to be allowed to present "compelling reasons justifying" their admission. Id. A review of the instant case indicates that this defendant has presented compelling reasons justifying his admission into PTI.

The possibility for rehabilitation and the nature of the crime must usually be considered together in most PTI

applications. State v. Mickens, 236 N.J. Super. 272 (App. Div. 1989). "It is fairly understood that the prosecutor has great discretion in selecting whom to prosecute and whom to divert to an alternative, such as PTI." State v. Wallace, 146 N.J. 576, 582 (1996) (citing State v. Leonardis II, 73 N.J. 360, 381 (1977)). However, the prosecutor's discretion is not unbridled. "If a defendant can 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of ... discretion, a reviewing court may overrule the prosecutor and order a defendant admitted to PTI.'" Wallace, 146 N.J. at 582, citing Leonardis II, 73 N.J. at 381.

The "patent and gross abuse of discretion" standard was articulated in State v. Bender, 80 N.J. 84 (1979):

Ordinarily an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or amounted to a clear error in judgment.... In order for such an abuse of discretion to rise to the level of "patent and gross," it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pre-Trial Intervention.

Id. at 93. (Emphasis added.) Accord Wallace, 146 N.J. at 583.

Here, the prosecutor initially relied on three factors to deny defendant's application. The prosecutor relied on the fact that defendant was a public employee, that he had a disorderly person's conviction from 1990, and the extent to which

defendant's crime constituted a part of a continuing pattern of antisocial behavior. Ultimately, the prosecutor fudged on the issue of defendant's being a public employee, leaving as hard objections the ongoing nature of the offense (Guideline 3(i)(2)), and defendant's prior record (N.J.S.A. 2C:43-12a). These objections misapply this Guideline, afford insufficient weight to defendant's suitability for PTI, and reach the wrong conclusion on whether he should be admitted into the program.

The major objection is that defendant, over the course of four months stole \$5,6700.00 from unemployment. And, although the state seemed to have dropped the standard that it would not accept a public employee into PTI, the notion that defendant had, but failed to utilize civil remedies, seemed to stay in the case -- rankling the state and maybe the court. A major problem in this case is that the trial court did not render an opinion. Announcing that the availability of a civil remedy troubled the court, and adjourning the matter to think about the effect of the availability of these remedies, suggests that this did play a part in the court's decision. Yet, without a formal decision, there is no way to know if or how the court dealt with this argument.

Moreover, in failing to render a decision, there is no way to know if or how the court looked at the person of Charles Watkins and whether he is a suitable candidate for PTI. Prior to this incident, defendant had worked at the Trenton Psychiatric Hospital for 15 years. (PSR 5) He had attended the Art and

Fashion Institute of Philadelphia as well as Mercer County Community College. (PSR 6) While at Mercer County Community College, defendant studied Culinary Arts and went on to complete a program through Rutgers University - graduating with Honors. When defendant went back to work at the hospital, he opened an off-site business called "Treasured Memories Catering." Additionally, while studying culinary arts, defendant opened the first culinary cafeteria at Mercer County Community College called "Lucky 7 Lunch Box." (Da 8-9) Defendant is remorseful and willing to make full restitution.

In denying the defendant admittance into PTI, the court below erred as the prosecutor's decision constituted such "a clear error in judgment" that, if upheld, it "will clearly subvert the goals underlying Pre-Trial Intervention." Bender, 80 N.J. at 93. If applicants such as defendant are denied admission, then frankly the program is meaningless. Just because defendant committed fraud/theft over the course of several months is no reason to per se disqualify him from PTI. One court has wisely noted that "[e]ven when a 'continuing criminal enterprise' is clearly involved, it does not always present a difficult barrier to surmount. Defendants charged with welfare fraud, for example are frequently and routinely admitted." State v. Marie, 200 N.J. Super. 424, 428 (Law Div. 1984).

The New Jersey Supreme Court promulgated guidelines for the operation of Pre-trial Intervention which provide courts and prosecutors with criteria for making decisions regarding PTI

admission. R. 3:28. Guidelines 1 and 2 are relevant in this case. Guideline 2 provides that "[a]ny defendant accused of a crime shall be eligible for admission into a PTI program." A defendant is also given the opportunity to present "any facts or materials demonstrating the defendant's amenability to the rehabilitative process, showing compelling reasons for justifying the defendant's admission, and establishing that a decision against enrollment would be arbitrary and unreasonable." Id.

Guideline 1 enumerates the purposes served by PTI:

(a) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which cause both the alleged offense and the need to prosecute might not have occurred.

(b) To provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct.

(c) To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses.

(d) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems.

(e) To deter future criminal or disorderly behavior by a defendant/participant in pretrial

intervention.

The defendant's admission into PTI would fulfill all five purposes of PTI as outlined in Guideline 1. As a threshold matter, defendant would receive early rehabilitation services that would deter future criminal behavior. Moreover, defendant at age 38 has a nearly unblemished record, with no prior arrests for any indictable offenses. His one arrest was for receiving stolen property, a disorderly person's offense, and occurred 14 years prior to the instant offense. (PSR 7) The notion that the prosecutor used this earlier disorderly offense in support of its theory that defendant's prior experience with the criminal justice system did not have a significant deterrent effect on him - "further indicating that he is not a suitable candidate for PTI" is absurd. (Da 5) An arrest for receiving stolen property 14 years prior to this incident does not equate with the notion that the experience did not have a deterrent effect. Given the nature of defendant's circumstances, if he is admitted into PTI, he will continue to strive and to lead a productive life with the proper supervision and counseling.

Second, if admitted into PTI, defendant would not be harmed by criminal sanctions but instead would be given an alternative to prosecution, expected to deter criminal conduct. The lack of conviction² would certainly allow defendant access to more jobs

² It is not at all clear why a guilty plea was entered prior to the court rendering its decision on the PTI appeal. However, defendant cannot be held responsible for this oddity.

and, in fact allow him to go back to his job at the hospital. Furthermore, defendant would be in a position to make restitution in a quicker manner, which he indicated he was willing to do. Thus, affording defendant PTI would, on many levels, deter him from committing future criminal conduct and at the same time enable the state to obtain restitution.

Third, had he been approved for PTI, the criminal calendar would have been relieved of a trial, and resources could have been properly directed to more serious criminal matters.

Fourth, defendant's admission would deter future criminal behavior of PTI participants. He has addressed the situation head-on by admitting his guilt. He is willing to make full restitution. PTI supervision and counseling could only benefit defendant.

While N.J.S.A. 2C:43-12e provides 17 criteria to be considered, "among others," in evaluating PTI applicants, the Supreme Court has noted that "nowhere does the statute attempt to instruct the prosecutor [or the program director] on the relative weights to be assigned these criteria." Wallace, 146 N.J. at 585. Nevertheless, it is clear that individual consideration must be given to the circumstances of each case, and that the nature of the offense alone cannot be deemed dispositive. In Leonardis, 71 N.J. at 102, our Court noted that "[b]ecause rehabilitation is dependent on an individual's propensity for correction, conditioning his admission solely on the nature of his crime may be both arbitrary and illogical. Greater emphasis

should be placed on the offender than on the offense"; accord, State v. Baynes, 148 N.J. 434, 442 (1997) (citing from other cases with approval for proposition that PTI decisions are "primarily individualistic in nature" and require consideration of "an individual defendant's features that bear on his or her amenability to rehabilitation.")

In Wallace, the defendant was charged with the second-degree offense of possession of a firearm for an unlawful purpose. The charge itself and the underlying facts both placed defendant in a situation where PTI would ordinarily be denied. The defendant also had a recent past history of instability and violence, and the prosecutor's rejection of the defendant was upheld on appeal. In Wallace, despite the presumption against admission, the Supreme Court stated:

We are not to be understood as endorsing unbridled prosecutorial discretion simply because all relevant factors and no inappropriate factors are in the mix. On the contrary, it remains the obligation of the judiciary to check those instances where the prosecutor has so inappropriately weighted the various considerations so as to constitute a "clear error in judgment."

146 N.J. at 158.

Mickens, is almost on all fours with the instant case and mandates that defendant be admitted into PTI. Ms. Mickens, who was charged with welfare fraud sought admission into PTI, was denied, entered a guilty plea and appealed. The fraud consisted of a failure to disclose employment while the defendant was collecting welfare payments, and the funds improperly received

totaled more than \$15,000 over a four-year period. 36 N.J. Super. at 272. In the instant case, the amount of the fraud was \$5,670.00 over a four-month period. The prosecutor in Mickens based his rejection of defendant's PTI application on Guideline 3(i), arguing that defendant's conduct constituted "a continuing criminal business or enterprise." While this Court did not disagree with the prosecutor's characterization of the defendant's conduct, it found that the prosecutor had failed to give adequate weight to positive factors present in the case: (1) the fraud had been committed in order to obtain money to remove the defendant's three children from an undesirable welfare hotel, and (2) the defendant had secured desirable employment that she would lose on conviction. Id. at 274-275. Because the prosecutor had made a "clear error of judgment" in rejecting defendant's application, the Appellate Division ordered defendant's admission into PTI without a remand for the prosecutor's reconsideration. Id. at 279. The court stated:

PTI is premised on the recognition that the applicant has done something wrong, has made a mistake. The applicant need not have been driven to that conduct. He must, however, acknowledge his error, be sincerely remorseful, be willing to make amends for it outside the criminal justice system, and have the capacity to do so.

Id.

In State v. Fitzsimmons, 291 N.J. Super. 375 (App. Div.), certif. den. 146 N.J. 568 (1996), this Court recognized that PTI is appropriate, even in the case of a second-degree drug

distribution offense, when it will allow a defendant to avoid ordinary prosecution by early rehabilitative services, which can reasonably be expected to deter future criminal behavior, and to "provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct." Id. at 382. This Court noted that the state's insistence on a conviction rather than PTI "accomplished little more than giving a criminal record to this young defendant...." Id. at 381.

In State v. DeMarco, 107 N.J. 562, 572-573 (1987), the Supreme Court ruled that even a charge of aggravated assault with a deadly weapon, brought against a police officer, does not necessarily preclude admission into PTI where counseling, community service and other conditions are available to serve the purposes of PTI. See also State v. Munos, 305 N.J. Super. 9 (App. Div.), certif den. 152 N.J. 186 (1997) (directing defendant's admission into PTI on a charge of assault by auto based upon alleged driving while intoxicated, over the prosecutor's objection that the nature of the offense alone was enough to justify denial). In State v. Hoffman, 224 N.J. Super. 149 (App. Div. 1988), the Attorney General objected to the defendant's admission into PTI, based on a breach of public trust by a court constable. This Court ruled that that rejection constituted a patent and gross abuse of prosecutorial discretion because it failed to accord proper weight to the defendant's

amenability to correction and responsiveness to rehabilitation.

In State v. Burger, 222 N.J. Super. 336, 341 (App. Div. 1988), this Court noted that a PTI rejection cannot stand, even where the defendant's crime constituted a continuing criminal enterprise, generally warranting rejection, where it appears that full consideration has not been given to factors indicating the defendant's amenability to correction and responsiveness to rehabilitation. Reliance upon the nature of the offense alone is an inadequate basis for rejection.

Here, defendant respectfully submits that the arguments and documents he supplied to PTI and the court unquestionably established his amenability to correction and responsiveness to rehabilitation, which, measured against the nature of his offenses, mandate his acceptance into PTI.

For all of the foregoing reasons, this Court must find that the facts clearly and convincingly point to the conclusion that defendant can successfully be rehabilitated within the time constraints of PTI, that he is unlikely to become involved again in criminal activity, and that he is a particularly appropriate candidate for the benefits that PTI affords. Moreover, he is sincerely remorseful, he is willing to cooperate with PTI, and to make full restitution as an alternative to prosecution. He is a productive man whose life should not be disrupted by causing his career to be tainted and stunted. The alternative of prosecution and conviction would be extremely destructive and counterproductive, not only for this defendant individually, but

to the interests of society in general, which can only benefit from preserving, rather than destroying, the productive lives of its members.

CONCLUSION

Based on the foregoing facts and law, defendant's conviction must be vacated and the trial court's Order denying defendant admission into PTI must be vacated and an Order entered compelling his admittance into PTI.

Respectfully submitted,

YVONNE SMITH SEGARS
Public Defender
Attorney for Defendant-Appellant

BY: 

ABBY P. SCHWARTZ
Assistant Deputy Public Defender

DATED: July 31, 2006

SUPERIOR COURT OF N.J.

FILED

JAN 29 2004

DONALD E. PHELAN
CLERK

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL

State Grand Jury

Number SGJ489-04-2

Superior Court

Docket Number 04-01-00008-S

STATE OF NEW JERSEY)

v.)

CHARLES A. WATKINS III)

INDICTMENT

The Grand Jurors of and for the State of New Jersey,
upon their oaths, present that:

COUNT ONE

(Theft By Deception-Third Degree)

CHARLES A. WATKINS III

between on or about May 24, 1998 and on or about May 22, 1999, at
the City of Trenton, in the County of Mercer, elsewhere, and
within the jurisdiction of this Court, purposely did obtain by
deception property of the State of New Jersey valued in excess of
\$500; that is, the said CHARLES A. WATKINS III did purposely
obtain unemployment insurance benefits in the amount of \$5,670.00
by submitting or causing to be submitted documents for
unemployment insurance benefits to the State of New Jersey,
thereby creating or reinforcing false impressions to the State of
New Jersey that the said CHARLES A. WATKINS III was unemployed;

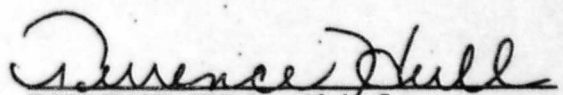
WHEREAS IN TRUTH AND IN FACT, as the said CHARLES A. WATKINS III then and there well knew, he was employed, all contrary to the provisions of N.J.S.A. 2C:29-4, and against the peace of this State, the government and dignity of the same.

COUNT TWO

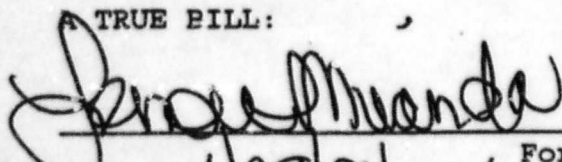
(Unsworn Falsification to Authorities-Fourth Degree)

CHARLES A. WATKINS III

on or about February 1, 1999, at the City of Trenton, in the County of Mercer, elsewhere, and within the jurisdiction of this Court, knowingly did make a written false statement which he did not believe to be true on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; that is, the said CHARLES A. WATKINS III did make and submit or cause to be submitted Unemployment Insurance Benefit check number 18081264 dated February 1, 1999, containing a false statement that the said CHARLES A. WATKINS III did report all earnings and holiday or vacation pay and otherwise met all eligibility requirements to receive unemployment insurance benefits for the weeks ending January 23, 1999 and January 30, 1999 and said form bearing notice, authorized by law, to the effect that false statements made therein are punishable, contrary to the provisions of N.J.S.A. 2C:28-3a, and against the peace of this State, the government and dignity of the same.


TERRENCE HULL, Chief
Major Financial Crimes Bureau

TRUE BILL:



Dated: 1/29/04 , Foreperson



State of New Jersey
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW AND PUBLIC SAFETY
 DIVISION OF CRIMINAL JUSTICE
 FIVE EXECUTIVE CAMPUS - SUITE 205
 CHERRY HILL, NJ 08002
 TELEPHONE: (856) 484-3900

JAMES E. MCGREVEY
 Governor

PETER C. HARVEY
 Attorney General

VAUGHN L. MCKOY
 Director

April 19, 2004

Janet VanFossen, Assistant Division Manager
 Superior Court of New Jersey
 Mercer Criminal Division
 Court House, Room 105
 Trenton, New Jersey 08650

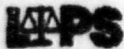
Re: Charles Watkins III

Dear Ms. VanFossen:

This letter is in response to the admission of Charles Watkins III into Mercer County's Pre-Trial Intervention Program. For the following reasons the State must withhold its consent from Mr. Watkins' admission into the diversionary program.

As your postponement order indicated, a two-count indictment was returned on January 29, 2004 charging Charles Watkins III with theft by deception (third degree) and unsworn falsification to authorities (fourth degree). These charges are based on misrepresentations that Mr. Watkins made to the New Jersey Department of Labor (DOL) in order to receive unemployment benefits to which he was not entitled. Mr. Watkins began receiving unemployment insurance benefits in May 1998 when he was temporarily laid-off from Trenton Psychiatric Hospital. Mr. Watkins' unemployment benefits were extended in 1999 under the "Additional Benefits During Training Program" (ABT) whereby certain "eligible" claimants may obtain an extension of unemployment insurance benefits while pursuing education and job training skills to enhance their employment opportunities. Mr. Watkins pursued a degree at the community college while receiving UI benefits under the ABT program but knowingly failed to report his re-employment with the Trenton Psychiatric Hospital to the Department of Labor.

Between January 23, 1999 through May 22, 1999 Mr. Watkins cashed nine unemployment checks, all of which required him to certify that he was unemployed, collecting \$5,670 in unemployment benefits. Based upon his earnings at Trenton Psychiatric Hospital



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EXHIBIT A

4a

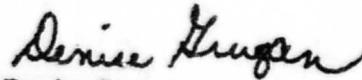
during this time period, Mr. Watkins was not entitled to any of this money.

The facts of this case indicate that the fraud continued from January to May 1999, a five-month period of time, involving nine separate instances where Mr. Watkins lied about his employment status in order to cash employment checks. Accordingly it is the State's position that the defendant's crime falls within the ambit of Guideline 3(1)(2) of Rule 3:28 as a continuing criminal enterprise justifying his rejection from PTL. Mr. Watkins committed a substantial fraud over a lengthy period of time. The circumstances surrounding this case coupled with his status as a public employee clearly demonstrates that he is not amenable to a rehabilitative process.

Finally, although there are no explicit per se rules excluding offenders from PTL eligibility, the statute provides that "*supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal law . . .*" N.J.S.A. 2C:43-12a. According to NCIC, Charles Watkins has a 1990 municipal court conviction for receiving stolen property. Obviously Mr. Watkins prior experience with the criminal justice systems has not had a significant deterrent effect on him and further indicating that he is not a suitable candidate for PTL.

In conclusion, the State has considered all relevant and material factors pertaining to Mr. Watkins PTL application and concludes that he is not a candidate amenable to the diversionary process and accordingly, must withhold its consent.

Respectfully submitted,



Denise Grugan
Deputy Attorney General

ORDER PREPARED BY THE COURT.

FEB 22 2006

Sue Regan

SUE REGAN
DEPUTY CLERK OF SUPERIOR COURT

STATE OF NEW JERSEY

Plaintiff,

CHARLES WATKINS,

Defendant

SUPERIOR COURT OF NEW JERSEY

MERCER COUNTY COURT

LAW DIVISION - CRIMINAL

IND. NO.: ~~98-04-0421~~ 04-01-008-5

PROS. FILE NO.: 98-207 04-398

ORDER DENYING APPEAL OF

PRE-TRIAL INTERVENTION REJECTION

THIS MATTER having been opened to the Court on defendant Charles Watkins' appeal of the State's rejection of his application for entry into the Pre-Trial Intervention (PTI) program and the Court having considered the arguments of counsel.

IT IS HEREBY ORDERED on this 22nd day of February, 2006 that the defendant's appeal of his rejection from the PTI program is denied. During the hearings on the appeal, the State initially asserted three bases for PTI denial: the fact that the defendant was a state employee and the policy of the Attorney General's Office was to hold state employees to a higher standard of conduct and deny them PTI entry; the fact that the offense occurred over a five-month period of time and involved nine separate unemployment checks; and the defendant's prior criminal behavior, which involved a 1990 disorderly persons conviction for receiving stolen property. At a subsequent hearing conducted on November 19, 2004, the State withdrew the defendant's employment with the State as a basis for rejection and relied upon the

two other aforementioned bases. After considering those bases for rejection, the Court finds that the State's denial was not arbitrary or capricious and, therefore, denies the defendant's appeal of his PTI rejection.



MARIA M. SYPEK, P.J. Cr.

PLEA FORM

County MERCER

Prosecutor File Number _____

DEFENDANT'S NAME CHARLES NATHAN III

before Judge M. K. BILIAMOWICZ, J.S.C.

1. List the charges to which you are pleading guilty:

Ind. Acc./Comp.#	Count	Nature of Offense	Degree	Statutory Maximum			
				Time	Fine	VCCB Assmt	
<u>-01-0008-5</u>	<u>1</u>	<u>Threatening</u>	<u>3rd</u>	<u>MAX</u>	<u>5</u>	<u>15,000</u>	<u>50</u>
Your total exposure as the result of this plea is:				TOTAL	<u>5</u>	<u>15,000</u>	<u>50</u>

PLEASE CIRCLE APPROPRIATE ANSWER

2. a. Did you commit the offense(s) to which you are pleading guilty? [YES] [NO]

b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? [YES] [NO]

3. Do you understand what the charges mean? [YES] [NO]

4. Do you understand that by pleading guilty you are giving up certain rights? Among

~~the right to a jury trial in which the state must prove you guilty beyond a reasonable doubt?~~ [YES] [NO]

b. The right to remain silent? [YES] [NO]

c. The right to confront the witnesses against you? [YES] [NO]

5. Do you understand that if you plead guilty:

a. You will have a criminal record? [YES] [NO]

b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Violent Crimes Compensation Board Assessment? [YES] [NO]

c. You must pay a minimum Violent Crimes Compensation Board assessment of \$50 (\$100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is \$30 if offense occurred between January 9, 1986 and December 31, 1991 inclusive, \$25 if offense occurred before January 1, 1986.) [YES] [NO]

d. If the offense occurred on or after February 1, 1995, or before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to \$1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to \$2.00 for each occasion when a payment or installment payment is made? [YES] [NO]

VIOLENT CRIMES COMPENSATION BOARD ASSESSMENT

Defendant's Initials CW

5. a. If the offense occurred on or after August 2, 1993 you must pay a \$75 Safe Neighborhood Services Fund assessment for each conviction? [YES] [NO]
- f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to \$25 per month for the term of probation? [YES] [NO]
- g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of \$30? [YES] [NO]
- h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [YES] [NO]
6. Do you understand that the court could, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentence imposed? [YES] [NO]
7. Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term? [YES] [NO]
- a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.
8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [YES] [NO]
9. Are you presently on probation or parole? [YES] [NO]
- ~~10. Do you realize that a guilty plea may result in the loss of your right to probation or parole? [YES] [NO] [N/A]~~
10. Are you presently serving a custodial sentence on another charge? [YES] [NO]
- a. Do you understand that a guilty plea may affect your parole eligibility? [YES] [NO] [N/A]
11. Do you understand that if you have plead guilty to or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [YES] [NO] [N/A]
12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree
04-01-00085	2	Unlawful Falsification OC 2813a, 4th degree

13. Specify any sentence the prosecutor has agreed to recommend:
Probation Supervision (2 years) - Waiver of Prob. Sup. Jus-
condition upon Consent Judgment - Conditional Plea -
under p 3.9.3 def. preserves right to appeal denial
 PTL

Defendant's Initials CW

14. Has the prosecutor promised that he or she will NOT F-28-302
- a. Speak at sentencing? [YES] [NO]
 - b. Seek an extended term of confinement? [YES] [NO]
 - c. Seek a stipulation of parole ineligibility? [YES] [NO]
15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [YES] [NO] [N/A]
16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [YES] [NO] [N/A]
17. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [YES] [NO] [N/A]
18. Have you discussed with your attorney the legal doctrine of merger? [YES] [NO] [N/A]
19. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [YES] [NO] [N/A]
20. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else, as a part of this plea of guilty:

21. Have any promises or threats mentioned on this form, or any threats, been made in order to cause you to plead guilty? [YES] [NO]
22. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [YES] [NO]
- b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [YES] [NO]
- c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [YES] [NO]
23. Are you satisfied with the advice you have received from your lawyer? [YES] [NO]
24. Do you have any questions concerning this plea? [YES] [NO]

DATE 2/7/05 DEFENDANT Charles Waters

DEFENSE ATTORNEY John D. Caruso

PROSECUTOR Denise Huggan DAG

[] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

State of New Jersey

v.



New Jersey Superior Court
Law Division - Criminal
Mercer County

Defendant:
(Specify Complete Name) **Charles A. Watkins**

- JUDGMENT OF CONVICTION
- CHANGE OF JUDGMENT
- ORDER FOR COMMITMENT
- INDICTMENT / ACCUSATION DISMISSED
- JUDGMENT OF ACQUITTAL

DATE OF BIRTH 3/19/66	SBI NUMBER 698108b
DATE OF ARREST 4/26/04	DATE INDICTMENT/ ACCUSATION FILED 1/29/04
DATE OF ORIGINAL PLEA 4/5/04	ORIGINAL PLEA <input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty

ADJUDICATION BY

GUILTY PLEA DATE: **2/7/05** NON-JURY TRIAL DATE:

JURY TRIAL DATE: DISMISSED / ACQUITTED DATE:

IND / ACC NO.	COURT	DESCRIPTION	DEGREE	STATUTE
Ind: 04-01-0008 Pros: 04-0398	1	Theft by Deception	3 rd	2C:20-4
	2	Unsworn Falsification to Authorities	4 th	2C:28-3a

COUNT	DESCRIPTION	DEGREE	STATUTE
Cl. 1	Theft by Deception	3 rd	2C:20-4

It is, therefore, on **4/15/05** ORDERED and ADJUDGED that the defendant is sentenced as follows:
Cl.1- Probation: Three years(3). Probation may be terminated after 2 years if restitution is paid in full.

- The defendant is hereby sentenced to community supervision for life.
- The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.
- The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.
- The court finds that the defendant is amenable to sex offender treatment.
- The court finds that the defendant is willing to participate in sex offender treatment.
- The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

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

<input type="checkbox"/> Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS	DATE: (From/To)
		DATE: (From/To)
<input type="checkbox"/> Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE: (From/To)
		DATE: (From/To)

Total Custodial Term _____ Institution _____ Total Probation Term **3 yrs.**

11a

<p>Total Fine \$ Total RESTITUTION \$7,619.78</p> <p>If the offense occurred on or after December 23, 1991, an assessment of \$50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is \$30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is \$25 if offense is before January 9, 1986.)</p> <p><input type="checkbox"/> Assessment imposed on count(s) <u>C1,1</u> is \$50, each.</p> <p>Total VCCB Assessment \$50.</p> <p>Installment payments are due at the rate of \$_____ per _____ beginning _____ (Date)</p>	<p>If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,</p> <p>1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)</p> <table style="width:100%; border: none;"> <tr> <td style="width:50%;">_____ 1st Degree @ \$3000</td> <td style="width:50%;">_____ 4th Degree @ \$750</td> </tr> <tr> <td>_____ 2nd Degree @ \$2000</td> <td>_____ Disorderly Persons or Petty Disorderly Persons @ \$500</td> </tr> <tr> <td>_____ 3rd Degree @ \$1000</td> <td></td> </tr> </table> <p style="text-align: right;">Total D.E.D.R. Penalty \$_____</p> <p><input type="checkbox"/> Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.</p> <p>2) A forensic laboratory fee of \$50 per offense is ORDERED. _____ Offenses @ \$50. Total Lab Fee \$_____</p> <p>3) Name of Drugs involved _____</p> <p>4) A mandatory driver's license suspension of _____ months is ORDERED. The suspension shall begin today, _____ and end _____. Driver's License Number _____ (IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.) Defendant's Address _____ Sex _____ Date of Birth 3/19/66 Eye Color _____</p> <p><input type="checkbox"/> The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____</p> <p><input type="checkbox"/> Defendant's non-resident driving privileges are hereby revoked for _____ months.</p>	_____ 1 st Degree @ \$3000	_____ 4 th Degree @ \$750	_____ 2 nd Degree @ \$2000	_____ Disorderly Persons or Petty Disorderly Persons @ \$500	_____ 3 rd Degree @ \$1000	
_____ 1 st Degree @ \$3000	_____ 4 th Degree @ \$750						
_____ 2 nd Degree @ \$2000	_____ Disorderly Persons or Petty Disorderly Persons @ \$500						
_____ 3 rd Degree @ \$1000							
<p>If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to \$1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 109). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to \$2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).</p>							
<p>If the offense occurred on or after August 2, 1993, a \$75 Safe Neighborhood Services Fund assessment is ordered for each conviction. (P.L. 1993, c.220) \$75.</p>							
<p>If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to \$25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month \$_____.</p>							
<p>If the crime occurred on or after January 9, 1997, a \$30 Law Enforcement Officers Training and Equipment Fund penalty is ordered. \$30.</p>							
<p>If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endanger the welfare of a child by engaging in sexual conduct which would impair or debase the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution, pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a \$800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.</p>							
<p>Name (Court Clerk or Person preparing this form) Isabella Provost</p>	<p>Telephone Number (609) 571-4155</p>	<p>Name (Attorney for Defendant at Sentencing) Christopher G. Hewitt, Esquire</p>					
<p>STATEMENT OF REASONS - Include all applicable aggravating and mitigating factors</p> <p>Defendant, age 38, entered guilty plea to theft by deception, based upon his receipt of unemployment benefits while employed for a period of 5 months. This is his first upper court conviction.</p> <p>Aggravating factors: Need for deterring defendant and others from violating the law; the offense involved deceptive practices committed against a division of State government.</p> <p>Mitigating factors: Defendant will compensate victim for his conduct; he has 2 prior disorderly persons offenses, but no prior indictable convictions; he is particularly likely to respond affirmatively to probationary treatment.</p> <p>The court finds the mitigating factors outweigh the aggravating. Under all circumstances a term of probation conditioned upon restitution is found to serve the interests of justice.</p>							
<p>Judge (Name) Maryann K. Bielamowicz, J.S.C.</p>	<p>Judge (Signature) </p>	<p>Date 4/26/05</p>					

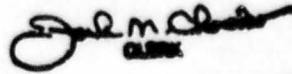
12a

YVONNE SMITH SEGARS
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FILED
APPELLATE DIVISION

APR 04 2006


A - 3853 - 0574


CLERK

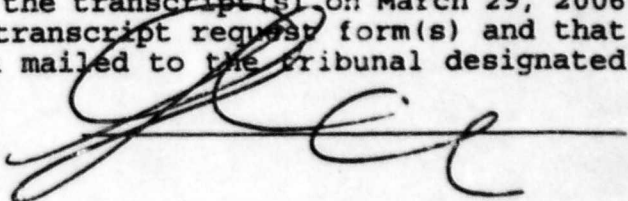
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO(S). 04-01-0008

STATE OF NEW JERSEY, : CRIMINAL ACTION
Plaintiff-Respondent, : NOTICE OF APPEAL
v. :
CHARLES WATKINS, :
Defendant-Appellant. :

.....
PLEASE TAKE NOTICE that the defendant, Charles Watkins,
confined at Mercer County Correction Center, P.O. Box 8068,
Trenton, New Jersey 08650 appeals to this Court from the final
order denying appeal of PTI Rejection entered on February 22, 2006
in the Superior Court, Law Division, Mercer County, by the
Honorable Maria M. Syper.

YVONNE SMITH SEGARS
Public Defender
Attorney for Defendant-Appellant
BY: 
LOUIS G. CONNELLA
Assistant Deputy Public Defender
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have
been complied with by ordering the transcript(s) on March 29, 2006
indicated on the accompanying transcript request form(s) and that
a copy of this Notice has been mailed to the tribunal designated
above.



WILLIAM J. GARCES
WILLIAM N. GRABLER

KELLY A. SMITH
ARLINDO B. ARAUJO
JOHN D. CARUSO
ANIELLO D. CERRETO
DUARTE CONTRERAS, JR.
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HARVEY LEVINE, OF COUNSEL
GERALD B. O'CONNOR, OF COUNSEL

A CERTIFIED CIVIL TRIAL ATTORNEY
A CERTIFIED CRIMINAL TRIAL ATTORNEY
C CERTIFIED WORKERS' COMPENSATION TRIAL ATTORNEY
* MEMBER D.C. BAR * MEMBER N.J. BAR
* MEMBER NY BAR * MEMBER PA BAR

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Se habla español

July 22, 2004

Honorable Maria M. Sypek, P.J.S.C.
Mercer County Superior Court
209 South Broad Street
P.O. Box 8068
Trenton, New Jersey 08650-0068

Re: State v. Charles Watkins, III
Indictment No: 04-01-0008
PTI Rejection Appeal

Dear Judge Sypek:

Please accept this letter brief in lieu of a more formal memorandum supporting defendant's motion for acceptance into the Pre-Trial Intervention Program.

STATEMENT OF FACTS

Charles Watkins is a (38) thirty-eight year old man who was born and raised in Trenton, New Jersey. On or about January 29, 2004, a State Grand Jury indicted Mr. Watkins, charging him with Theft by Deception, third degree. More specifically, it is alleged that during the time period of January 1999 through May 1999, defendant improperly received unemployment benefits in the amount of \$5,670 (a total of \$7,712.78 including taxes and penalties). To date, Mr. Watkins has paid restitution in the amount of \$102.00.

Upon being indicted, Mr. Watkins applied to the Pre-Trial Intervention Program (PTI) and was accepted by the Mercer County Criminal Case Management. Subsequently, on April 19, 2004, the Deputy Attorney General rejected Mr. Watkins' admission into the program in a letter attached as Exhibit A. Defendant now moves to appeal that rejection. In support of his appeal, the Defendant offers the following information.

As noted, defendant was born and raised in Trenton, New Jersey having attended the Trenton School system and receiving his High School Diploma from Trenton Central High School in 1984. During this time, his father, Charles Watkins Sr., contracted prostate cancer and was forced to take an early retirement from Trenton Psychiatric Hospital after (20) twenty years

of service due to the advanced progression of the cancer. Despite his protracted battle, the disease spread to his brain and spine, finally killing his spirit in 2001. Prior to his death, Charles Watkins Sr. was confined to a wheelchair and needed constant assistance, provided by the defendant. During this time frame, not only was Charles Watkins, III giving around the clock care to his father, Mr. Watkins was responsible for the full time care of his mother, Pauline Watkins and brother, Larry Steel, both diagnosed as being terminally ill.

Specifically, Pauline contracted cancer of the bladder and ultimately died on April 8, 1996. Defendant's brother, Larry Steele, contracted the HIV virus in the early 1960's due to intravenous drug use. Ultimately, the virus advanced to full blown Aids, causing liver failure. Larry died on March 23, 1996, just (2) two week before his mother. Both family members died at defendant's home and under his care. Not only did he support them physically and emotionally, but financially as well.

Defendant has extremely strong commitment to family. Aside from the care and compassion provided to his mother, father, and oldest brother, defendant took in his youngest brother, Curtis Watkins, Jr. and his (2) two children Dominique, age (8) eight and Curtis, age (5) five. Curtis Sr. has battled a drug addiction for many years and is losing. Recently losing his home, Curtis and his (2) two young children would have been put out into the street if not for the kindness of defendant. Charles provided not only a roof over their heads and food on the table, but provides a stable environment and a steady parental figure to these kids. Aside from the financial commitment extended to Curtis, defendant made sure that his brother entered a long term rehabilitation center and is finally completing a stay at the "Carrier Clinic". I am advised that the children's mother is also an addict and has no contact with the kids. Certainly, she provides no financial support towards their care.

Notwithstanding the above personal setbacks, defendant has provided himself with an education and has a strong work history. In 1985, defendant received a certificate from Mercer County Community College for Secretarial and Clerical Skills. After working several unfulfilling office jobs throughout the Trenton area, defendant re-entered school in Philadelphia attending the "Art and Fashion Institute of Pennsylvania", studying Fashion Merchandising, Marketing and Design, receiving an additional certificate in 1987.

In 1988, defendant was hired by the Trenton Psychiatric Hospital as a Human Service Assistant. Soon thereafter, defendant was promoted to a Human Service Technician where he has worked for over the last (14) fourteen years. In 1998, due to the massive State downsizing and financial pressure, defendant was temporarily laid off. It was during this time frame that defendant re-entered Mercer County Community College to study Culinary Arts. Ultimately, defendant completed an extensive program through Rutgers University, graduating with Honors. In the summer of 1999, defendant's job at Trenton Psychiatric Hospital was re-extended to him, at which time he worked full time and completed advanced credits at school, again graduating with Honors.

Subsequently, defendant started applying his skills and talents at the Trenton Psychiatric Hospital cooking for his clients and promoting an over-all better living environment. Defendant also started an off-site catering business called "Treasured Memories Catering" through the Hospital which is benefiting everyone. Clearly, this is a man that loves his job and is extremely devoted to his colleagues and clients.

Additionally, during his Culinary Arts education, defendant opened the first Culinary Cafeteria at Mercer County Community College, called the "Lucky 7 Lunch Box". (The name

was derived due to the fact that only seven students were able to complete the courses successfully)

It should be noted that it was during this time frame that the within offense was committed.

Defendant has represented that he is extremely willing to make restitution and will execute a Civil Judgment. Given the fact that he is a state employer, a conviction of this nature will result in the termination of his employment with Trenton Psychiatric Hospital. Aside from the obvious financial hardship that would be endured by the defendant, his family member, specifically his young niece and nephew will suffer as well.

It is acknowledged that defendant has a prior mark on his criminal record, but it also respectfully pointed out that the charge was only municipal court conviction dating back to 1990, over fourteen (14) years ago. The crime entailed "receiving stolen property". This was not a crime of violence and is extremely old. It is respectfully submitted that given the nature of this offense and its date, it should not even be factored into considering whether the defendant would make a good P.T.I. candidate.

In conclusion it is submitted that there is more to Charles Watkins, III than meets the eyes. He is a compassionate, motivated hardworking individual that loves his family and is devoted to his patients. He made a minor mistake in 1990 and has spent the last (14) fourteen years trying to rebuild his life. In 1999, he made a mistake, but it was one of opportunity, not one that was premeditated. Defendant is willing to make full restitution, participate in community service, and successfully meet any and all conditions of PTI. Failure to permit defendant a chance to prove himself as a good PTI candidate, will result in the termination of his employment. Aside from the devastating effects same will have upon his dependant family, defendant will have a conviction on his record, making securing future employment even more difficult. Without a steady income, defendant will be hard-pressed to make timely restitution payments.

The court is urged to view defendant as a whole person and not to consider the offense in a vacuum. Defendant has expressed deep remorse and shame for his actions. It is submitted that he is exactly the kind of candidate that the legislature and Courts contemplated. It is further submitted that the State's rejection is capricious and arbitrary and that the Deputy Attorney General failed to consider all the relevant factors. In support of defendant's appeal, the following legal argument and authorities are offered, infra.

LEGAL ARGUMENT

POINT I

THE DEFENDANT'S REJECTION FROM PTI IS AN ARBITRARY PATENT AND GROSS ABUSE OF DISCRETION

The defining purpose of Pre-Trial Intervention (PTI) is to divert qualified defendant from prosecution in order to serve the interest of the individual, the criminal justice system and society. State v. DeMarco, 107 N.J. 562, 567 (1987) (The purpose of PTI include deterrence of criminal behavior via early rehabilitative services as an alternative to prosecution while allowing the limited resources of the traditional criminal justice system to be focused on serious criminal acts).

Admission into PTI is contingent upon a prosecutor's evaluation of an applicant's amenability to rehabilitation and the nature of the crime must usually be considered together in most PTI applications. State v. Mickens, 236 N.J. Super. 264 (App. Div. 1989). "It is fairly understood that the prosecutor has great discretion in selecting whom to prosecute and whom to divert to an alternative, such as PTI." State v. Wallace, 146 N.J. 576, 582 (1996) (citing State v. Leonardis, 73 N.J. 360, 381 (1977)). However, the Prosecutor's discretion is not unbridled. "If a defendant can 'clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of ... discretion, 'a reviewing court may overrule the prosecutor and order a defendant admitted to PTI.'" Wallace, 146 N.J. at 582 citing Leonardis, 73 N.J. at 381.

The "patent and gross abuse of discretion" standard was articulated in State v. Bender, 80 N.J. 84 (1979) as the following:

"Ordinarily an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment... In order for such an abuse of discretion to rise to the level of 'patent and gross,' it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pre-Trial Intervention.

Id. at 93. See also Wallace, 146, N.J. at 683.

It has also been determined that a case can be remanded for reconsideration by the prosecutor under the following circumstances:

"A defendant may persuade a court to vacate a PTI rejection and remand to the prosecutor for reconsideration on a somewhat lesser showing. If the reviewing court finds that the prosecutor's decision was arbitrary, irrational, or otherwise an abuse of discretion, but no a patent and gross abuse, and also determines that a remand will serve a useful purpose' it could send the case back to the prosecutor.

Wallace, 146 N.J. at 583 citing State v. Dalglish, 86 N.J. 503, 509-11.

In a memorandum dated April 19, 2004, the Attorney General's office rejected Mr. Watkins admission into PTI based almost exclusively on the "continuing nature of the offense" and defendant's minor municipal court conviction dating back fourteen years ago. The rejection was entered notwithstanding criminal case management's accepting of defendant into PTI.

It appears as no consideration was given to the motivation behind the offense. Obviously, this is not a case wherein Defendant was selling identifications for profit, but rather an act of desperation to ensure his ability to aid his family and to return to the United States. As noted, his motivation certainly does not justify his behavior and actions, but certainly should be considered when reviewing all the circumstances. Moreover, Defendant has no previous criminal record. Criminal Case Management decided Defendant's application prior to his being processed by the Sheriff's Department. Due to the fact that Defendant's lack of a criminal record had not yet been confirmed, Criminal Case Management has deemed it appropriate to simply reject him, instead

of simply delaying their decision. It is submitted that Criminal Case Management should be obliged to reconsider this factor as it can now be confirmed the Defendant does not have a prior record.

POINT II

CHARLES WATKINS IS AN EXCELLENT CANDIDATE FOR PTI

The New Jersey Supreme Court promulgated guidelines for the operation of Pre-Trial Intervention which provides courts and prosecutors with criteria for making decision regarding PTI. R.3:28. Guidelines 1 and 2 are relevant in this case.

Guideline 2 provides that "[a]ny defendant accused of a crime shall be eligible for admission into a PTI program." A defendant is also given the opportunity to present "any facts or materials demonstrating [his] amenability to the rehabilitative process, showing compelling reasons for justifying the defendant's admission. And establishing that a decision against enrollment would be arbitrary and unreasonable. In the instant matter, it appears that the State tendered no consideration whatsoever to the compelling reasons in support of defendant's admission to the guidelines. In support of the defendant's position, the Court is respectfully requested to consider the attached reference letters. (Please see Exhibits B through D). Additionally, attached as Exhibit J is defendant's 2003 yearly performance review for his employment at Trenton State Psychiatric Hospital.

Guideline 1 enumerates the purposes served by PTI:

1. To enable defendant to avoid ordinary prosecution by receiving early rehabilitative services expected to deter future criminal behavior;
2. To provide defendants who might be harmed by the imposition of criminal sanctions with an alternative to prosecution expected to deter criminal conduct;
3. To avoid burdensome prosecutions for "victimless" offenses;

4. To relieve overburdened criminal calendars so that resources can be expended on more serious criminal matters; and
5. To deter future criminal behavior of PTI participants.

Mr. Watkins admission into PTI would fulfill the five purposes of PTI as outlined in Guideline 1.

As a threshold matter, Mr. Watkins would receive early rehabilitation service that would deter from criminal behavior. Moreover, Mr. Watkins has essentially an unblemished record. Mr. Watkins has absolutely no prior indictable convictions and a municipal court conviction dating back 14 years ago. In those fourteen years, Mr. Watkins enjoyed a consistent work history working as an employee at the Trenton State Psychiatric Hospital. As a result of the within offense, Mr. Watkins employment is in jeopardy. It is my understanding that a conviction of this nature would result in the termination of Mr. Watkins job.

Second, Mr. Watkins would not have to be harmed by criminal sanctions but instead be given an alternative to prosecution which would deter future criminal conduct. As noted, Mr. Watkins is employed, paying taxes, and supporting himself and loved ones. A criminal prosecution would not only serve to undermine the employment that he has maintained for years but significantly hinder his ability to pay the outstanding restitution.

Third, Mr. Watkins not only didn't contemplate that his actions would harm another. While it is acknowledged that the "State" is the victim, this is not a crime of violence or a crime dealing with a specific individual.

Fourth, the criminal calendar would certainly be relieved from a lengthy trial. If defendant were in PTI and resources could be properly directed to more serious criminal matters, such as crimes involving drugs or violence.

Fifth, Mr. Watkins admission would deter future criminal behavior of PTI participants. He has addressed the situation head-on. PTI supervision and counseling could only benefit Mr.

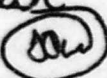
Watkins, his family, and other participants. It is obvious that he is taking responsibility for his actions as demonstrated by his willingness to pay the restitution and enter into a Civil Judgment.

Given the fact that the State has failed to cite any other basis for his rejection, but for its contention that the within charges were "on going", it is presumed that the State finds Mr. Watkins to be a favorable candidate, otherwise.

As such, we respectfully request this Court to order Mr. Watkins into PTI.

Based on the foregoing, it is respectfully requested that defendant be permitted to enter the PTI program.

Respectfully submitted,
Garces & Grabler

By: Kelly Anderson Smith
Kelly Anderson Smith, Esq. 

KAS/tcw

cc: Honorable Maryann K. Bielamowicz, J.S.C.
Denise Grugan, Deputy Attorney General
Charles Watkins

A -3853-05T4



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State of New Jersey

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Governor

September 6, 2006

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Deputy Attorney General
Of Counsel and on the
Letter Brief

LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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

Re: State of New Jersey (Plaintiff-Respondent) v.
Charles A. Watkins III (Defendant-Appellant)
Docket No. A-3853-05T4

Criminal Action: On Appeal From a Final
Order of the Superior Court of New Jersey,
Law Division, Mercer County, Upholding the
Denial of Defendant's Admission into the Pretrial
Intervention Program.

Sat Below: Maria M. Sypek, P.J. Cr.

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a), this letter in lieu
of formal brief is submitted on behalf of the State.

MSJ



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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On January 29, 2004, the State Grand Jury filed Indictment No. SGJ489-04-2 (Mercer County Indictment No. 04-01-008-S), against defendant, Charles A. Watkins III, with third-degree theft by deception, contrary to N.J.S.A. 2C:20-4 (count one); and fourth-degree unsworn falsification to authorities, contrary to N.J.S.A. 2C:28-3a (count two). (Da1-3; Da11).¹ Defendant pleaded not guilty on April 5, 2004. (Da11).

Following the return of the indictment, defendant applied for diversion into the Mercer County Pretrial Intervention ("PTI") Program. Pursuant to a letter dated April 19, 2004, the State denied consent to defendant's entry into the PTI Program. (Da4-5). After two hearings regarding defendant's appeal of the denial of his entry into the PTI Program, the Honorable Maria M. Sypek, P.J. Cr., affirmed the rejection of defendant's application prior to his guilty plea on February 7, 2005. (3T16-13 to 19; see also Da6-7). Judge Sypek issued an order evidencing her 2005 denial of defendant's appeal on February 22, 2006. (Da6-7). Consequently, Judge Sypek had denied defendant's

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- "Da" refers to the appendix to defendant's letter brief.
- "1T" refers to the PTI hearing transcript dated September 24, 2004.
- "2T" refers to the PTI hearing transcript dated November 19, 2004.
- "3T" refers to the plea transcript dated February 7, 2005.
- "4T" refers to the sentencing transcript dated April 15, 2005.
- "PSR" refers to defendant's Adult Presentence Report.

appeal prior to his pleading guilty. (Compare 3T16-13 to 19; Da6-7 with Db11 n.2). Her order however was dated after defendant's plea and sentencing.

On February 7, 2005, defendant entered a conditional retraxit guilty plea before the Honorable Maryann K. Bielamowicz, J.S.C. (Da8-11). On April 15, 2005, Judge Bielamowicz sentenced defendant to three years probation conditioned on his paying restitution of \$7,619.78, less any credits defendant might be due. (4T6-15 to 23; Da12). If defendant paid the restitution in less than three years, his probationary term would terminate after two years. (4T4-24 to 5-6; Da11). Count two of the indictment was dismissed in accordance with the plea agreement. (3T3-19; Da9; Da11). Defendant was ordered to provide a biological sample for DNA testing. (4T7-8 to 9; Da11). All appropriate fines and penalties were assessed. (4T7-4 to 9; Da11).

Defendant filed a Notice of Appeal on April 4, 2006. (Da13).

COUNTER-STATEMENT OF FACTS

Beginning in May 1998, defendant was temporarily laid off from Trenton Psychiatric Hospital and began receiving unemployment insurance ("UI") benefits. (Da4). His UI benefits were extended a second time under the "Additional Benefits During Training Program" ("ABT"), whereby certain eligible unemployment

claimants may obtain an extension of benefits while pursuing education and job training skills to enhance their employment opportunities. Ibid.

In 1999, defendant pursued a community college degree while receiving UI benefits under the ABT Program. However, he knowingly failed to report his re-employment with Trenton Psychiatric Hospital to the Department of Labor ("DOL"). (3T12-12 to 14; Da4).

From January 23 through May 22, 1999, defendant cashed nine unemployment checks, amounting to \$5,670 in UI benefits. (Da4). Based on his earnings at Trenton Psychiatric Hospital, defendant was not entitled to any of these UI benefits. (Da4-5). When defendant received DOL's bi-weekly certifications in the mail regarding his eligibility for UI benefits, he certified that he was unemployed. (3T15-8 to 10). Defendant, however, knew that he was required to report his income from Trenton Psychiatric Hospital. (3T12-18 to 15-25).

Prior to indicting defendant in 2004, the DOL sought to resolve this matter civilly by sending notices to defendant's home address regarding its claim. (2T3-11 to 14). In addition, a September 22, 2000 fact-finding hearing was scheduled for defendant in which the State would have presented its claim to him and a repayment schedule would have been established. (2T3-15 to 22). Defendant neither appeared for the hearing nor

contacted the DOL. (2T3-23 to 4-1). A DOL investigator also attempted to contact defendant by telephone to no avail. (2T4-2 to 20). Defendant made no voluntary payments toward his obligation prior to his indictment. (2T4-20 to 5-3).

Defendant was indicted on January 24, 2004, for theft by deception and unsworn falsification to authorities. (Da1-3; Da11). Thereafter, he applied for and was accepted into the Mercer County PTI Program. (Da4). In a letter dated April 19, 2004, the State did not consent to defendant's entry into the PTI Program because (1) his crime constituted a continuing criminal enterprise in which defendant cashed nine unemployment checks over a four-month period in which he lied about his employment status; (2) he had a prior municipal court conviction in 1990 for receiving stolen property; and (3) he was a public employee. (Da6-7). The State dropped defendant's status as a public employee from its justification and relied on the two former reasons. (2T2-23 to 7-7; Da6).

Judge Sypek affirmed the State's rejection of defendant's entry into PTI based on the State's two remaining reasons in a ruling prior to his guilty plea on February 7, 2005. (3T16-13 to 19; see also Da6-7). She issued an order evidencing her 2005 denial of defendant's appeal on February 22, 2006. Ibid.

On February 7, 2005, defendant entered a conditional retraxit guilty plea before Judge Bielamowicz. (Da8-11). On

April 15, 2005, she sentenced defendant to three years probation conditioned on his paying restitution of \$7,619.78, less any credits defendant might be due. (4T6-15 to 23; Da12). If defendant paid the restitution in less than three years, his probationary term would terminate after two years. This appeal follows.

LEGAL ARGUMENT

POINT I

GIVEN THE SERIOUS NATURE OF DEFENDANT'S CRIME, WHICH CONSTITUTED A CONTINUING CRIMINAL ENTERPRISE, AND HIS PRIOR MUNICIPAL COURT CONVICTION, THE TRIAL COURT'S DENIAL OF DEFENDANT'S ENTRY INTO THE PTI PROGRAM WAS PROPER.

Both the trial court and the State properly rejected defendant's entry into the PTI Program because his fraud against the Unemployment Insurance Fund was part of a continuing criminal enterprise over a four-month period and he had a prior municipal court conviction. Defendant has failed to demonstrate that there were compelling reasons that would justify his admission into PTI, to establish by clear and convincing evidence that the State's denial of his admission was a patent and gross abuse of discretion, or to prove that the trial court erred in affirming this denial. This Court should affirm the denial of defendant's entry into the PTI Program.

Here, defendant was charged third-degree theft by deception, punishable by three to five years imprisonment, because he

illegally received nine unemployment checks over a four-month period from January 23 to May 22, 1999. (Da1-4; Da11; see N.J.S.A. 2C:43-6a(3)). He was also charged with fourth-degree unsworn falsification to authorities, punishable by a fixed term of imprisonment not exceeding 18 months, because he submitted bi-weekly certifications to the DOL falsely claiming that he was entitled to unemployment benefits when in fact he was not. (Da1-3; Da11; see N.J.S.A. 2C:43-6a(4)).

The State initially justified the denial of defendant's entry into the Mercer County PTI Program because (1) his fraud over a four-month period in which he illegally cashed nine separate unemployment checks constituted a continuing criminal enterprise within the ambit of Guideline 3(i)(2) of Rule 3:28; (2) he had a 1990 disorderly persons municipal court conviction for receiving stolen property; and (3) he was a public employee. (Da4-5). The State dropped defendant's status as a public employee from its justifications and relied on the two former reasons. (2T2-23 to 7-7; Da6).

The PTI Program exists as an alternative means for the prosecutor to dispose of cases by diverting certain criminal defendants from formal prosecution. State v. Nwobu, 139 N.J. 236, 240 (1995); State v. Leonardis (I), 71 N.J. 85, 89 (1976). Because the very essence of PTI is its function as an alternative procedure, a prosecutor is under no obligation to utilize the PTI

option in every instance in which it is available. State v. Kraft, 265 N.J. Super. 106, 114 (App. Div. 1993). PTI is intended to supplement the criminal justice system when traditional prosecution would be ineffective, counterproductive, or unnecessary. Ibid. The PTI Program's standards and guidelines are defined in N.J.S.A. 2C:43-12 and Rule 3:28.

Additionally, Guideline 3(i)(2) of Rule 3:28 provides that those defendants charged with crimes that were part of a continuing criminal business or enterprise should generally be denied access into PTI. This limitation creates a presumption against admittance into PTI, generally disqualifying defendants engaged in a continuing criminal enterprise absent compelling facts. State v. Baynes, 148 N.J. 434, 443 (1997). The Supreme Court of New Jersey has interpreted this statutory language to mean "it is appropriate to reject a PTI application because of the nature of the offense when the Guidelines express a presumption against PTI." State v. Caliquiri, 158 N.J. 28, 36 (1999); Baynes, supra, 148 N.J. at 447. Furthermore, to rebut the presumption against admittance, defendant must show "compelling reasons" to be admitted into PTI. Caliquiri, supra, 158 N.J. at 36; Nwobu, supra, 139 N.J. at 252. To establish compelling reasons for admission, defendant must make a showing greater than that he is a first-time offender and has accepted responsibility for the crime. Nwobu, supra, 139 N.J. at 253.

Specifically, defendant "must demonstrate something extraordinary or unusual, something 'idiosyncratic,' in his or her background." Id. at 252.

The decision for admittance into PTI lies within the prosecutor's discretion. State v. Leonardis (II), 73 N.J. 360, 381 (1977). Because there is a close relationship between the PTI Program and the prosecutor's charging authority, "courts allow prosecutors wide latitude in deciding whom to divert into the PTI Program and whom to prosecute through a traditional trial. The deference has been categorized as 'enhanced' or 'extra' in nature." State v. Negran, 178 N.J. 73, 82 (2003). In fact, the Supreme Court of New Jersey "has announced that there is an expectation that a prosecutor's decision in this regard 'rarely will be overturned.'" Kraft, supra, 265 N.J. Super. at 111 (quoting Leonardis II, supra, 73 N.J. at 380 n.10). Thus, the scope of any review, in actuality, is severely limited and exists "'to check only the most egregious examples of injustice and unfairness.'" Ibid. (quoting Leonardis II, supra, 73 N.J. at 384); see also Negran, supra, 178 N.J. at 82.

As a general rule, a prosecutor's rejection may not be overturned unless defendant can clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion. Negran, supra, 178 N.J. at 82; Nwobu, supra, 139 N.J. at 246; State v. Motley, 369 N.J. Super. 314, 321

(App. Div. 2004). A patent and gross abuse of discretion has been defined as "more than just an abuse of discretion as traditionally conceived; it is a prosecutorial decision that 'has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention.'" State v. Wallace, 146 N.J. 576, 582-83 (1996) (quoting State v. Ridgway, 208 N.J. Super. 118, 130 (Law Div. 1985)).

Defendant has a heavy burden when seeking to overcome a prosecutorial veto of his admission into PTI. Nwobu, supra, 139 N.J. at 246. He must show that the prosecutor's decision (1) failed to consider all relevant factors; (2) was based on irrelevant or inappropriate factors; or (3) amounted to a clear error in judgment. Negran, supra, 178 N.J. at 83 (quoting State v. Bender, 80 N.J. 84, 93 (1979)).

It is well-settled that the trial court's scrutiny of a prosecutor's denial of entry into PTI "is normally limited to the reasons given by the prosecutor" for his denial. Kraft, supra, 265 N.J. Super. at 112. "Absent evidence to the contrary, it is [to be] presumed that the prosecutor considered all relevant factors before rendering a decision." State v. Dalglish, 86 N.J. 503, 509 (1981). A trial court, therefore, has no authority to substitute its own judgment in PTI matters for that of the prosecutor. State v. Von Smith, 177 N.J. Super. 203, 208 (App. Div. 1980). "This remains so even where the prosecutor's decision

is one which the trial court disagrees with or finds to be harsh." Kraft, supra, 265 N.J. Super. at 112-13.

By accepting the State's reasons for rejecting defendant's entry into the PTI Program, i.e., defendant's fraud was a continuing criminal enterprise and he had a 1990 municipal court conviction, the trial court abided by these well-settled principles. Contrary to defendant's claims, there was no need for the trial court to further elaborate with fact-finding, which would have been equivalent to an impermissible de novo review. Cf. Kraft, supra, 265 N.J. Super. at 113 (this Court found that the trial court plainly failed to abide by the well-settled principles of extending deference to the prosecutor and limiting its review, and instead impermissibly substituted its own judgment for that of the prosecutor and in essence engaged in a de novo review of the PTI application).

After considering State's two bases for rejecting defendant's entry into PTI, Judge Sypek properly affirmed the State's decision. (Da6-7). In this case, defendant has failed to provide any evidence, much less clear and convincing evidence, that the prosecutor's rejection of his PTI application was a patent and gross abuse of discretion. The State properly considered all relevant factors, including the seriousness of defendant's fraud, the integrity and preservation of the Unemployment Insurance Fund, the "continuing criminal enterprise"

nature of his fraud and his prior criminal record. Thus, defendant's reliance on State v. Munos, 305 N.J. Super. 9 (App. Div.), certif. denied, 152 N.J. 186 (1997), where the State's justification for its rejection of the PTI application was based on the nature of the offense alone, is unavailing. Here, defendant's prior criminal record and his involvement in a continuing criminal enterprise invoke the presumption against his admittance into PTI. N.J.S.A. 2C:43-12a; R. 3:28, Guideline 3(i)(2). Defendant has failed to present compelling reasons to rebut this presumption.

Defendant cashed nine unemployment checks over a four-month period in which he certified to the DOL that he was unemployed when in fact he was not. Therefore, defendant received an income from his job and \$5,670 in unemployment benefits while he pursued a community college degree through the DOL's "ABT" Program, which represented a second extension of unemployment benefits to him.

Defendant's collection of a substantial amount of money over a four-month period in which he repeatedly and fraudulently cashed unemployment checks constituted a continuing criminal enterprise within the ambit of Guideline 3(i)(2) of Rule 3:28. A "continuing criminal enterprise" consists of a course of conduct "involving a series of transactions continuing over a period of time." State v. Imbriani, 280 N.J. Super. 304, 317-18 (Law Div. 1994), aff'd, 291 N.J. Super. 171 (App. Div. 1996). "It is a

defendant's repetitive criminal activities which provide a negative implication when rehabilitation is considered." Id. at 318. A "finding of a continuing criminal enterprise is generally sufficient justification for rejection from pretrial intervention." Leonardis (II), supra, 73 N.J. at 382; Imbriani, supra, 280 N.J. Super. at 317-18.

Defendant does not deny that his fraud was a continuing criminal enterprise. Rather, he attempts to excuse the continuing criminal enterprise nature of his crime by pointing to others who defrauded the State with respect to welfare benefits for a longer period of time. See Db13-14; State v. Mickens, 236 N.J. Super. 272, 273-74, 276 n.2 (App. Div. 1989) (Mickens illegally received \$15,000 in welfare benefits for 27 months during a five-year period).

Defendant's fraud was, at bottom, a continuing criminal enterprise. He repeated his fraudulent act of obtaining unemployment benefits to which he was not entitled by cashing nine checks and mailing bi-weekly false certifications to the DOL that he was entitled to this money when he knew he was not. Because defendant committed this fraud over and over again, all while he earned an income from his job, his conduct constitutes a continuing criminal enterprise that demonstrates a lack of amenability to rehabilitation. See generally, Imbriani, supra, 280 N.J. Super. at 318 ("[w]hether the conduct occurred on a

daily, weekly, monthly or some other basis, it is clear that every day during that five-year period [Imbriani] knew that he had performed and was continuing to perform illegal acts and was receiving monies to which he was not entitled").

Defendant's lack of amenability to rehabilitation was also demonstrated when he ignored several opportunities to address the theft of these unemployment benefits civilly by, at a minimum, participating in a fact-finding hearing and working out a repayment plan with the State. (2T3-4 to 4-1). After defendant failed to attend that hearing, an investigator attempted to contact defendant by telephone. Defendant still did not respond. (2T4-2 to 18). From the time the DOL ceased providing unemployment benefits to defendant in May 1999 until the time he pleaded guilty in February 2005, defendant had not made one voluntary repayment of these funds. (2T4-20 to 25). It is as the State stated at the hearing on November 19, 2004 -- defendant has "had every opportunity pre-indictment to handle this. This is indicative of someone whose character is not amenable to rehabilitation and should go through the ordinary criminal process." (2T4-20 to 5-3). Thus, defendant's individual characteristics as the offender were surely considered by the State, which resulted in its rejection of defendant's entry into PTI. Leonardis I, supra, 71 N.J. at 102.

Curiously, defendant does not articulate in any way why he

failed to resolve this matter civilly. In other words, defendant ignored the State's requests to address his fraud and repay these funds in the hopes that he could get away with his crime and keep the money. Imbriani, supra, 280 N.J. Super. at 318 ("[e]ach new act of misappropriation confirmed those which had preceded it, and demonstrated the absence of remorse, the unlawful intent, and his belief that he could continue to do so with impunity. . . .").

The State sought criminal prosecution against defendant only as a last resort. Defendant should not be allowed at this late juncture to avoid criminal prosecution by entering PTI and repaying these illegally obtained unemployment benefits, which he could have done earlier when the State sought civil redress against him. To allow defendant to enter PTI would establish a disincentive for others to handle these matters early before prosecution. Civil resolution of the State's claims benefits defendants in that criminal prosecution is avoided and less interest is accrued; the State and the public benefit because these illegally obtained unemployment benefits are repaid much sooner than they otherwise would be after the criminal process has begun. Therefore, the value of PTI treatment for defendant was outweighed by the public need for prosecution, given his refusal to even acknowledge the State's claim during the civil remedies phase. See N.J.S.A. 2C:43-12e(14); N.J.S.A.

2C:43-12e(17) ("the harm done to society by abandoning criminal prosecution would outweigh the benefits to be derived by society from the channeling of this defendant into PTI"). In this case, the State appropriately determined that the public would benefit most from prosecution rather than diversion.

Additionally, defendant's case is completely inapposite to the welfare fraud case of Mickens, supra. In that case, Mickens, a single mother of three children, illegally received \$15,000 in welfare funds and food stamps for 27 months during a five-year period because she had "trouble making ends meet." Id. at 274, 276 n.2. She and her children lived in undesirable housing. Id. at 274. For a time she lived in an apartment at her mother's house, but that house was sold and the rent increased to an amount beyond her capacity to pay. Ibid. She eventually was able to obtain an apartment in public housing. Ibid. Several months after she received the last improper welfare payment, she obtained a career position at Merrill Lynch. Ibid.

Given the above, this Court found that Mickens had demonstrated a compelling reason for entry into the PTI Program. Id. at 278. Defendant has not. Unlike Mickens, he has a prior criminal record for receiving stolen property, which like theft by deception, involves stealing and dishonesty. Moreover, the State's consideration of his 1990 conviction was not "absurd." Contra Db11. "Although there are no explicit per se rules

excluding offenders from PTI eligibility, the statute provides that 'supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense under the laws of New Jersey, or under any criminal law of the United States[.]' N.J.S.A. 2C:43-12a." State v. Brooks, 175 N.J. 215, 224 (2002). The Supreme Court has ruled that an applicant's criminal and penal violations, history of juvenile and adult arrests and anti-social behavior all may be considered by the prosecutor. Negran, supra, 178 N.J. at 84. Thus, consideration of defendant's 1990 municipal court conviction for receiving stolen property was proper.

It is critical to note that defendant was arrested on February 8, 2004, for interfering with the police. (PSR at 6). He was convicted on April 13, 2004. Ibid. Even though the State did not consider the 2004 conviction in its decision to reject defendant's entry into the PTI Program, that conviction clearly undermines defendant's claim that he had been deterred from further criminal activity since 1990. (Db11). Consequently, at the time the State wrote its April 19, 2004 letter denying defendant's entry into PTI, he had two municipal court convictions, not one. Thus, defendant's reliance on State v. Fitzsimmons, 291 N.J. Super. 375 (App. Div.), certif. denied, 146 N.J. 568 (1996) is misplaced because defendant has not been deterred from further criminal conduct.

In any event, the State based its decision on the sole 1990 conviction, which meant that defendant was not a first time offender. As this Court recently stated, "the 'interests of society may justify the denial of an application for admission into PTI even though a defendant has led an exemplary life except for the conduct which forms the basis of the pending criminal charges.'" Motley, supra, 369 N.J. Super. at 321 (quoting State v. Seyler, 323 N.J. Super. 360, 370 (App. Div. 1999), aff'd, 163 N.J. 69 (2000)). Defendant has not led an exemplary life given his 1990 and 2004 convictions.

Also unlike Mickens, defendant has provided no explanation as to why he continued to receive these illegal unemployment benefits and how he utilized this money. Mickens used the illegal welfare funds to make ends meet and to remove her children from undesirable housing. Defendant continued to receive unemployment checks while he worked at his position at Trenton Psychiatric Hospital and went to college at the expense of the Unemployment Insurance Fund. Thus, defendant used these illegally obtained unemployment benefits to "pad his income" and to open his own catering business. See Db9 (defendant indicates that after he resumed working at the hospital, he opened an off-site business called 'Treasured Memories Catering'); Mickens, supra, 236 N.J. Super. at 277. Defendant did not make one voluntary payment prior to his guilty plea, even though he had an

opportunity to set up a repayment plan during the civil process against him. Defendant had an opportunity to show true remorsefulness by handling this matter civilly. He ignored the State until it proceeded against him criminally. Thus, the State accorded proper weight to defendant's failure to respond to the State's prior attempt to handle this issue civilly; defendant's failure unequivocally demonstrated his lack of amenability to correction and responsiveness to rehabilitation. Because the State accorded proper weight to these two factors, defendant's reliance on State v. Hoffman, 224 N.J. Super. 149 (App. Div. 1988) and State v. Burger, 222 N.J. Super. 336, 341 (App. Div. 1988), where the State did not properly weigh factors, is misplaced.

Lastly, State v. DeMarco, 107 N.J. 562 (1987) is completely inapposite to the facts of this case where the issue was whether the prosecutor could condition DeMarco's entry into the PTI Program on his resignation from the Newark Police Department where he had worked as a police officer for 27 years with an unblemished record. The Supreme Court found that a prosecutor could consider whether the purposes of PTI could be served through counseling, community service, or some other condition. Id. at 572-73. Such alternatives would have been inappropriate in this case where defendant stole unemployment benefits which must be repaid to protect the integrity of the Unemployment

Insurance Fund. The State instituted criminal proceedings against defendant only as a last resort to obtain repayment of the unemployment benefits he stole.

Given all of the above, defendant has failed to rebut the presumption against admittance into PTI. He has failed to show compelling reasons justifying his admission into the Program, and he has failed to demonstrate, by clear and convincing evidence, that the State's refusal was a patent and gross abuse of discretion. The decision to deny defendant's PTI application should be upheld.

Finally, the State emphasizes that defendant received a generous plea bargain of three years probation and restitution of the amount of unemployment benefits he stole. And he could reduce his period of probation by paying early. The State took defendant's purported mitigating factors into account when it offered him such a generous plea offer. Considering the serious nature of his crime and his criminal record, he was rather fortunate to receive the deal that he did.


In conclusion, Judge Sypek properly found that the State's rejection of defendant's PTI application was proper. Her ruling should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm the denial of defendant's application for diversion into Mercer County's Pretrial Intervention Program.

Respectfully submitted,

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