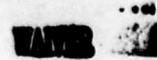


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SENDER

Debra Dubell

Part E - ~~Wolfe, Parker, Fisher, Yonetti~~ MESSANO (T/A)



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SUPERIOR COURT  
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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1217-04T4

STATE OF NEW JERSEY,

: CRIMINAL ACTION

Plaintiff-Respondent,

: On Appeal from a Judgment  
of Conviction of the

v.

: Superior Court of New  
Jersey, Law Division, Mercer

LARRY FLEMING,

: County.

Defendant-Appellant.

:

FILED  
APPELLATE DIVISION

Sat below:  
Hon. Bill Mathesius,  
J.S.C., and a jury.

AUG 21 2006

*John M. Chock*  
CLERK

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

12 A Mercer County indictment, numbered 03-02-0286, charged  
11 defendant, Larry Fleming, with the following three counts: 1)  
12 first degree murder, contrary to N.J.S.A. 2C:11-3a, 2) first  
19 degree felony murder, contrary to N.J.S.A. 2C:11-3a(3), and 3)  
-13 second degree aggravated arson, contrary to N.J.S.A. 2C:17-1a(1).  
(attached appendix, Da 1-3)<sup>1</sup> These charges resulted from an  
incident in Trenton which involved the burning of an abandoned  
house inhabited by drug users.

18 After a three-day trial by jury before the Hon. Bill  
Mathesius, J.S.C., defendant was convicted of all counts. (3T 108-  
16 13 to 109-11)<sup>2</sup>

18 On April 2, 2004, the trial judge sentenced Mr. Fleming to a  
life term of imprisonment for murder, subject to the 85% parole  
bar of the No Early Release Act. The court merged felony murder  
into murder but imposed a consecutive 10-year term of imprisonment  
1 for aggravated arson, subject to the 85% NERA parole bar. (4T 25-  
1 25 to 27-1)

1 A notice of appeal was subsequently filed with this Court.

(Da 6)

14  
22 <sup>1</sup> Efforts to obtain the verdict sheet were unsuccessful. However, in the jury  
charge the verdict sheet is described by the trial court in detail. (3T 96-20  
to 99-20)

<sup>2</sup> "1T" refers to the trial transcript dated February 3, 2004.  
"2T" refers to the trial transcript dated February 4, 2004.  
"3T" refers to the trial transcript dated February 5, 2004.  
"4T" refers to the sentencing transcript dated April 2, 2004.

**STATEMENT OF FACTS**

According to Ed Warren, on May 11, 2002 he went to Stokes Bar on Brunswick Avenue in Trenton and bought wine and beer. He then went outside, purchased some cocaine and ran into a neighborhood friend, Carmen Jones. They went to an abandoned house on 340 Brunswick Avenue where Jones stayed. They entered through a back door that was partially boarded up which was the only means of entering the house. (1T 91-6 to 94-12)

On their way to Jones' second floor room, Warren (a/k/a "Big Al;" 1T 133-11 to 13) saw the victim Ellis McNeil (a/k/a "Peanut"), who was another drug user and resident of the house. (1T 95-7 to 16) Warren and Jones went to Jones' room and "got high." (1T 94-19 to 22) Jones then went out several times to buy more drugs. As it was getting dark, defendant (a/k/a "Fruit") came into the room and tried to sell them some drugs. According to Warren, defendant repeatedly asked him to buy drugs despite Warren's indication that he had no money. Warren admitted that he had purchased drugs from defendant in the past and that defendant never told him that he "owed" defendant any money. (1T 96-17 to 100-18)

After defendant left the room, Jones came running to Warren "saying that the house was on fire." (1T 103-5 to 7) Warren kicked some of the boards out of a window and both he and Jones jumped

from the building. As a result, Warren fractured his left leg and broke his ankle. (1T 103-9 to 104-13) After he fell to the ground, Warren heard somebody from within the house yell for help. (1T 105-3 to 11)

Warren initially did not want anyone to know that he was inside the house, but he later gave a formal statement to the police at a nearby hospital. (1T 107-1 to 3; 108-2 to 8) At trial, Warren stood by the statement and indicated that he did not have an altercation or negative encounter with anyone during the time he was in the house. (1T 116-5 to 10) Warren also admitted that he may have previously had sex with Jones in exchange for drugs. (1T 119-19 to 120-24)

While Jones' testimony basically corresponded to that of Warren regarding the incident, there were some substantial inconsistencies. She admitted that she went out of the house about ten times to purchase more cocaine. (1T 135-3 to 136-10) She also indicated that there were several drug dealers on the street and that a "few of them did come to the house." (1T 138-16 to 20) Contrary to Warren's testimony that he had no money, Jones indicated that he "was spending a large amount of money. It was more than \$30 at a time." (1T 138-21 to 24) Jones also testified that the victim, Peanut, was in the front room with Bernadine. (1T 139-9 to 22)

Jones also claimed that she encountered defendant on the street who accused her of being a "cross-artist." (1T 142-11 to 19) At first she ignored him but then responded, "How can anyone cross you when we don't know what time you come out?" (1T 143-9 to 14) Jones indicated that "cross-artist" meant that "we didn't spend money or anything with him" (1T 143-17 to 20), and that she had purchased drugs from another drug dealer, P.J., during the day. (1T 144-25 to 145-8)

Contrary to Warren's testimony, Jones claimed that defendant came into her room and accused Warren of being a "cross-artist." (1T 145-22 to 146-10) According to Jones, defendant left but then came back into the house 15 minutes later with Curt Hawkins. (1T 149-4 to 150-23) She also indicated that her cousin, G.I. Joe (a/k/a Joseph McKinney) "came from around both of them towards me...." (1T 150-24 to 25) Jones claimed that defendant had a light in his hand along with a small gas can (1T 151-23 to 152-24) but she "didn't think nothing of it" since she "figured he was going to put some gas in his car." (1T 153-2 to 3)

After checking on the victim in his room, Jones went to her room where she got high with Warren. (1T 154-23 to 21) Jones indicated that the place was only lit by candles since they had no electricity. (1T 156-12 to 16) She then heard someone "hollering, fire, fire." (1T 155-3 to 4) Jones then walked out of the room and



started down the steps when she was "hit in the face with the smoke and I felt the heat." (1T 155-14 to 16) She ran back into her room and was able to get out of the house through a window along with Warren (a/k/a Big Al) and Joe. (1T 155-20 to 157-14) She ran to the nearby *Stoke's Bar* and called the fire department. (1T 157-19 to 21) Jones also indicated that P.J. and his father were trying to get into the house because someone was still trapped in the building. (1T 157-24 to 158-17) She admitted that she did not see defendant in the area. (1T 159-4 to 15)

While admitting that she shared her room with Warren and that she had a \$40 per day drug habit, she denied ever having sex with him. Jones admitted that she may have had sex with Curt Hawkins, a good friend, and also admitted that her police statement did not reveal that Hawkins was with defendant and Joe when they walked into the house with the gas can. (1T 179-4 to 184-2)

Joe McKinney (a/k/a GI Joe) did not have much to add about the incident except that he had purchased drugs from defendant and claimed that the fire occurred about a minute and half after he saw defendant with the gas can. (1T 196-1 to 6; 200-23 to 25) Contrary to Jones' testimony, he made no mention of Hawkins in the area or with defendant. (1T 197-5 to 198-12; 202-14 to 19)

Curt Hawkins, who admitted that he is a "hustler" (1T 218-23 to 24), provided the most damaging yet inconsistent testimony

regarding defendant. Hawkins indicated that defendant sold drugs and admitted that "we worked together...." (1T 211-21 to 212-22) In exchange for "watch[ing] his back," Hawkins earned "\$40 a night and a gram [of cocaine]." (1T 214-7 to 11) On the day of the fire, Hawkins also admitted that he worked for P.J., a rival drug dealer. (1T 215-4 to 14)

According to Hawkins, P.J. went into the house where Jones and Warren stayed about "seven or eight times" and sold drugs. (1T 217-21 to 218-5) Hawkins claimed that defendant was upset with P.J.'s activities and subsequently went into the house, pushed the door open and confronted Warren (Big Al). Contrary to Warren's testimony, Hawkins claimed that defendant demanded \$50 from Warren who denied owing defendant any money and that defendant told Warren, "[w]ell, that one more \$50 be spent out of here, you suffer the consequences." (1T 220-2 to 11)

According to Hawkins, P.J. continued to sell drugs to Jones and Warren. Two to three hours later while he was talking to P.J., he saw defendant with a gas can in his hand. (1T 224-9 to 20) Hawkins claimed that defendant instructed him to get gas at a nearby gas station because the "[l]ady across the street wants some gas." (1T 224-17 to 3) Hawkins returned with the gas and received in exchange "some coke." (1T 226-14 to 15) Hawkins claimed that he told defendant, "If you burn [friend and neighbor]

Tony's place down, if you do anything to hurt her, I will fuck you up." (1T 226-16 to 18) Hawkins further claimed that he followed defendant and, contrary to Jones' testimony that he was inside the house with defendant, testified as follows:

I said, I'm saying, like, don't even go there, because I'm right behind him. So when he scoops up under the door, like, I'm just peeping like this right under the floor, like, he's coming running, and flames is behind him. Like, the flames, flames are like, you could see the flames and stuff. He got the gas can, boom, he goes through the alleyway, hit Oxford Street, and I ain't seen him no more after that.

(1T 227-6 to 13) Hawkins reiterated, contrary to Jones' testimony, that he did not even go "all the way in" the house with defendant, but peered into the house. (1T 229-14 to 23) Hawkins admitted that his police statement indicated that he was "in Stokes Bar playing poker when [he] first learned of the fire" (1T 243-18 to 21) and that he was possibly afraid that the police might think he had something to do with the fire. (1T 244-4 to 9)

Sometime around 10:15 p.m., Firefighter Clifford Willever was dispatched to the fire at 340 Brunswick Avenue along with several other officers of his rescue unit. (1T 49-18 to 50-) Willever entered the building and made his way up the stairs to the hallway fighting the fire when he found the victim, Ellis McNeill. (1T 55-21 to 56-8) Other firefighters determined that McNeill was dead.

(1T 56-23 to 57-2) An autopsy revealed that the cause of death was carbon monoxide poisoning. (2T 167-2 to 24)

Detective Lloyd Mathis, an arson investigator, testified that the fire was started about 9:55 p.m. (2T 93-11 to 22) He concluded that:

.... In this particular fire, somebody took an ignitable liquid, gasoline, and poured it at the base of the steps here, pours it through this room, pours it into the middle room, and then ends right up at the rear room or the dining room area.

(2T 84-11 to 16) Detective Mathis further concluded that the "gasoline was placed on the flooring by the front door, and it was trailed from the front door through the first room..., through the middle room... and then ignited in this area [the third room]" by throwing something into the gas. (2T 90-6 to 91-15)

Throughout the trial, defense counsel brought out inconsistencies among the witnesses and suggested to the jury during summation that Curtis Hawkins was the arsonist. (3T 12-1 to 13-16) After instructing the jury on murder, felony murder as well as aggravated manslaughter and reckless manslaughter, the jury convicted defendant of all counts. (3T 108-13 to 109-11)

LEGAL ARGUMENT

POINT I

THE INSTRUCTION SOLELY PERTAINING TO THE USE OF DEFENDANT'S INVOLVEMENT IN DRUG SALES IN "ASSESS[ING] THE IDENTIFICATION OF AND/OR THE RELATIONSHIP BETWEEN THE WITNESSES AND THE DEFENDANT" WAS ERRONEOUS, REQUIRING THE REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below)

The trial court instructed the jury as follows:

I'm going to give you a cautionary and limiting instruction. You've heard testimony in this case that the defendant, Larry Fleming, has been involved in narcotics sales. Our rules of evidence in the State of New Jersey limit the application of those acts and preclude you from considering that evidence in your deliberations as proof that the defendant committed the acts alleged in the indictment.

In other words, you can't say, Fleming is a drug dealer, therefore, he committed the crimes in the indictment. Prior acts can't be attached to show that Mr. Fleming had a predisposition to commit a crime and he was a criminal, and therefore, he committed the present offenses. You can - I should say, evidence that a defendant has committed prior crimes or other wrongs or acts cannot be used by you as proof of conduct in conformance with the charges listed in the indictment to show further proof that he had in fact committed the offenses in the indictment.

However, you may use the testimony to gauge and assess the identification of and/or the relationship between the witnesses and the defendant. In other words, there was a history of some prior involvement. You can use that to determine whether Flemming was known to them and under what circumstances he was known to them, but you just can't say he committed a

crime and, therefore, he committed the crime now. I think you can understand that.

(3T 70-4 to 71-6) Since the vague instruction singled out defendant without any mention that the jury could consider the illegal acts of the State's witnesses and wrongly informed the jury that they could use defendant's drug involvement to assess identity, defendant's rights to due process of law under both the United States and New Jersey Constitutions were violated.

N.J.R.E. 404(b) provides that:

Evidence of other crimes, wrongs or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Ordinarily, a hearing is required to determine the admissibility of other-crimes evidence. See State v. Hernandez, 170 N.J. 106, 127 (2001). All four-prongs of the following test must be satisfied before such other-crimes evidence can be admitted:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and

4. The probative value of the evidence must not be outweighed by its apparent prejudice.

State v. G.V., 162 N.J. 252, 257 (2000), quoting State v. Marrero, 148 N.J. 469, 482-83 (1997), quoting State v. Cofield, 127 N.J. 328, 338 (1992); see also State v. Darby, 174 N.J. 509, 518-519 (2002); Hernandez, 170 N.J. at 118-119; State v. Sanders, 320 N.J. Super. 574, 581 (App. Div. 1999).

Moreover, once it has been determined that other-crimes evidence is admissible for some limited purpose, "the court *must* instruct the jury on the limited use of the evidence." Cofield, 127 N.J. at 340-41. Since the other-crimes evidence is so "inherently prejudicial," the limiting instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." Cofield, 127 N.J. at 341; see also State v. Oliver, 133 N.J. 141, 156-159 (1993); Sanders, 320 N.J. Super. at 584-586.

Here, the jurors were wrongly told that they could use defendant's drug involvement to assess identity -- the sole issue in the case. However, admission of other-crimes evidence to prove identity requires the application of a more rigorous standard as follows:



In order for evidence of a prior crime to be admissible on the issue of identity... the prior criminal activity with which defendant is identified must be so nearly identical in method as to earmark the crime as defendant's handiwork. The conduct in question must be unusual and distinctive so as to be like a signature, and there must be proof of sufficient facts in both crimes to establish an unusual pattern.

State v. Fortin, 162 N.J. 517, 530 (2000), quoting State v. Reldan, 185 N.J. Super. 494, 502-03 (App. Div.), certif. den. 91 N.J. 543 (1982); see also State v. Sempsey, 141 N.J. Super. 317, 323 (App. Div. 1976), certif. den. 74 N.J. 272 (1977).

Here, defendant's involvement with drugs had virtually no similarity whatsoever with arson, much less establishing an "unusual pattern" or that the crimes were committed in some novel or extraordinary way. Rather than a limitation, the instruction that the jurors could consider defendant's drug involvement as germane to identity smacks of the propensity prohibition -- since defendant dealt in illegal drugs he must be the arsonist.

Even assuming *arguendo* that "involv[ement] in drug sales" was part and parcel of the offense and therefore *res gestae* warranting no instruction (see generally State v. L.P., 338 N.J. Super. 227, 235 (App. Div.), certif. den. 170 N.J. 205 (2001)), the error of telling the jurors that they could use defendant's drug involvement to assess identity still mandates reversal of defendant's convictions. See State v. Wilson, 128 N.J. 233, 241



(1992) ("incorrect instructions of law are poor candidates for rehabilitation under the harmless error theory"); cf. Marrero, 148 N.J. at 496 (while *incomplete* limiting instruction was not plain error, Court insinuates "affirmative misstatement of the law" falls within Wilson's *per se* reversible error mandate). The court's instruction singled out defendant as the only person whose drug involvement the jury could specifically consider. In the absence of any instruction, the jury would hardly use defendant's drug involvement in itself against him since all of the other material witnesses were either drug users and/or sellers (e.g. Hawkins who testified that he helped both P.J. and defendant sell drugs). The instruction, solely aimed at defendant, also insinuated that the involvement of the State's witnesses with drugs could not be used for any purpose.

Finally, apart from the error regarding use of defendant's drug involvement to assess identity, the instruction at best is vague and does not "explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." Cofield, 127 N.J. at 341; see also Hernandez, 170 N.J. at 131. Allowing the jurors to take into account defendant's involvement with drugs to assess "the relationship between the

witnesses and the defendant" could mean anything, and does not even remotely limit the use of defendant's drug involvement to accepted uses of other-crimes evidence such as proof of motive, opportunity, and intent as set forth in N.J.R.E. 404(b).

Since the instruction regarding the use of defendant's drug involvement singled out defendant without mention of the State witness' drug activities and wrongly told the jurors that they could use defendant's drug involvement to assess identity, this Court should reverse defendant's convictions and remand the matter for a new trial.

#### POINT II

**THE JUDGE REPEATEDLY MISINFORMED THE JURORS THAT THEIR ROLE WAS TO DETERMINE THE "GUILT OR INNOCENCE" OF DEFENDANT, THEREBY REDUCING THE STATE'S BURDEN IN PROVING DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT. (Not Raised Below)**

The trial court thrice misinformed the jurors that their role was to determine the "guilt or innocence" of defendant, thereby denying defendant due process of law and a fair trial under both the United States and New Jersey Constitutions.

At the end of the instruction on expert testimony, the trial judge told the jurors that:

It's your - ultimately your determination to make, and you, as I said, you can rely on some or all or none of the expert testimony or the witnesses themselves, however you conclude

in your collective sense. That determination of the ultimate *guilt or innocence* remains and is always in the province of the jury.

(3T 66-19 to 25; emphasis added)

The judge again misinformed the jury -- this time in the context of the homicide charges -- that:

So we're talking about the hierarchy, in this case, Count 1, murder. You'll make a determination as to the *guilt or innocence*. If you find him not guilty, then you come down and you consider aggravated manslaughter.

(3T 81-11 to 13; emphasis added)

The judge yet again, for the third time -- in explaining the verdict sheet -- misinformed the jury that:

If you find guilty, you skip over the next, C, and you go to question 2. If you find not guilty, then you go and assess the *guilt or innocence* of the lesser-included offense of reckless manslaughter in that the defendant, Larry Flemming did recklessly cause the death of Ellis McNeill....

(3T 97-23 to 98-3) These erroneous instructions went to the very heart of the jury's role in assessing whether the State proved that defendant was guilty beyond a reasonable doubt and therefore were clearly capable of producing an unjust result.

The United States Supreme Court has steadfastly emphasized the fundamental importance of the due process standard of guilt beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 478-79, 120 S.Ct. 2348, 2355-56 (2000); United States v. Gaudin,

515 U.S. 506, 509-11, 115 S.Ct. 2310, 2313-2314 (1995); Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 1242 (1994); Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 2080 (1993).

Our Supreme Court has succinctly summarized the State's exclusive burden of proving a defendant's guilt beyond a reasonable doubt and the importance of a relevant jury instruction:

Under the Sixth Amendment, the jury, not the court, determines guilt in a serious criminal case. [citations omitted] Due process mandates that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan, supra, 508 U.S. at 278, 113 S.Ct. at 2081, 124 L.Ed.2d at 188. A jury instruction that fails to communicate the State's burden to prove guilt beyond a reasonable doubt is not amenable to harmless-error analysis and requires reversal. Id. at 278-81, 113 S.Ct. at 2081-83, 124 L.Ed.2d at 189-90.

State v. Medina, 147 N.J. 43, 50 (1996), cert. den. 520 U.S. 1190 (1997); see also State v. Fuqua, 303 N.J. Super. 40, 45 (App. Div. 1997).

While the trial court gave a standard instruction on reasonable doubt and the presumption of innocence (3T 57-2 to 58-13), it did not dispel the grossly erroneous instructions that the jurors were obliged to determine defendant's guilt or innocence. The instructions improperly informed the jurors that there were only two choices: that defendant was either guilty or he was

innocent. The improper instructions had the effect of reducing the State's burden since the State's failure to prove any element of the offenses beyond a reasonable doubt would hardly compel a juror to think that defendant, then, is innocent. Therefore, where a juror thought that defendant was probably guilty but had a reasonable doubt about an element or whether he was the arsonist rather than Hawkins, the juror would have been compelled to convict since the only other choice was finding defendant "innocent."

Instructions relating to the reasonable doubt standard "must be considered in their entirety." Medina, 147 N.J. at 52. Here, however, the instructions regarding the jury's role to determine "guilt or innocence" derailed a juror's fundamental role in determining whether defendant was guilty or not guilty and were not the sort of instructions that could be cured by a later accurate but abstract instruction on reasonable doubt. See State v. Moore, 122 N.J. 420, 433 (1991) ("[c]ontradictory and inconsistent charges are inherently inadequate as they 'create likelihood that a juror understood the instructions in an unconstitutional manner...'" [citations omitted]). Moreover, such erroneous instructions, regarding easily understood notions of "guilt or innocence," are far more palatable to a lay juror than other more abstract embellishments on the reasonable doubt

standard, especially in light of the nuances of inconsistent testimony. Cf. Medina, 147 N.J. at 52-53 (improper phrase "when we talk about a reasonable doubt we mean doubt from which a reason can be given" ameliorated by subsequent instruction immediately following the phrase); State v. Love, 245 N.J. Super. 195, 200 (App. Div.), certif. den. 126 N.J. 321 (1991) (telling jurors that their "sole interest is to ascertain the truth on the evidence" in context of charges was "used in an abstract sense and not as an admonition to resolve specific factual disputes").

Furthermore, there is no way to assess the impact that the erroneous instructions had on the jury. Therefore, the instructions, going to the very heart of the jurors' role in a criminal trial, were "structural error[s]" and not amenable to harmless error review. See Brecht v. Abrahamson, 507 U.S. 619, 629, 113 S.Ct. 1710, 1717 (1993), quoting Arizona v. Fulminante, 499 U.S. 279, 307-8, 111 S.Ct. 1246, 1264 (1991) (State's improper use of a defendant's post-Miranda silence to impeach defendant was a harmless "trial error"); compare Sullivan, 508 U.S. 275, 113 S.Ct. 2078 (Cage instruction [Cage v. Louisiana, 498 U.S. 39, 39-40, 111 S.Ct. 328, 329 (1990)], equating reasonable doubt with "grave uncertainty" and "actual substantial doubt," was a structural error not amenable to harmless error analysis) with Victor, 511 U.S. at 16-20, 114 S.Ct. at 1248-50 (7-2

decision) (distinguishing Cage since instructions -- peppered with phrases regarding "moral certainty," "moral evidence," "strong probabilities of the case," and "substantial doubt" -- overall, satisfied due process standard).

Finally, in a recent case where the trial court employed the same "guilt or innocence" phrase in jury instructions, this Court acknowledged that:

The trial judge provided a reasonable doubt charge consistent with the rule announced in [Medina, supra]. The injection of the concept of innocence, however, may tend to reduce the State's burden of proof because of the starkly different choices presented to the jury. Therefore, the use of the term "guilt or innocence" should be avoided in the future.

State v. White, 360 N.J. Super. 406, 413 (App. Div. 2003).

However, the White court wrongly rebuffed the impact of the error:

Although we do not consider the use of the phrase "guilt or innocence" throughout the charge error which in isolation would require a new trial, we comment on its use because a new trial on count two is required.

White, 360 N.J. Super. at 413. The White Court's insinuation that the "guilt or innocence" phrase is subject to harmless-error review is contrary to the admonition by our Supreme Court that, "A jury instruction that fails to communicate the State's burden to prove guilt beyond a reasonable doubt is not amenable to harmless-error analysis and requires reversal." Medina, 147 N.J. at 50. As acknowledged by the White Court, "[t]he injection of the concept

of innocence... may tend to reduce the State's burden of proof...." Id. An instruction that has the capacity to reduce the State's burden of proof pertains to a fundamental matter as acknowledged by the State and Federal courts. Therefore, in tune with the litany of case law that mandates reversal of convictions resulting from instructional errors regarding fundamental matters, Mr. Fleming's convictions must be reversed.



POINT III

**SINCE THE COURT EXPRESSED PERSONAL HOSTILITY AGAINST THE DEFENDANT THAT WENT WAY BEYOND ASSESSMENT OF AGGRAVATING AND MITIGATING FACTORS, DEFENDANT AT THE VERY LEAST SHOULD BE RE-SENTENCED BEFORE A DIFFERENT TRIAL COURT AND THE ARSON SENTENCE SHOULD BE IMPOSED CONCURRENTLY. (Not Raised Below)**

The trial court found no mitigating factors and the following four aggravating factors: the nature and circumstances of the offense, risk of re-offense, extent of defendant's prior record, and need to deter. (4T 22-4 to 24-15) In finding that the aggravating factors substantially outweighed the mitigating factors, the court sentenced Fleming to a maximum life-term of imprisonment for murder, subject to the 85% NERA parole bar. The court merged felony murder into murder but imposed a maximum 10-year term of imprisonment for aggravated arson, subject to the 85% parole bar, consecutive to the murder conviction. (4T 25-1 to 26-25)

During sentencing, the trial judge launched into a personal attack of defendant that went beyond the aggravating and mitigating factors and was not supported by the record. The judge began a personal tirade against Mr. Fleming before any assessment of aggravating factors by claiming: "The Court sees in the bigger picture, a malignancy, a parasite on

society since the day, at least as early as 14 years of age."  
(4T 22-5 to 8) The trial judge continued: "The risk and the guarantee if Mr. Fleming were permitted to set foot away from the bars that would keep him incarcerated, I hope for the rest of his life.... because he knows absolutely nothing else in his life but being a parasite." (4T 22-17 to 20) The judge then took it upon himself to provide an unsupported psychological assessment of defendant, further undermining his impartiality: "In psychological terms, Mr. Fleming is psychologically incapable, being possessed of what, say psycho-analytically, he does not have a super ego, he has no conscience, he has no remorse, he has no care, and it won't deter him...." (4T 24-16 to 20)

Since the trial judge expressed such personal hostility against Fleming that went beyond assessment of the mitigating and aggravating factors and undermined even an appearance of impartiality, this Court at the very least should remand the matter to a different trial court for a complete re-sentencing. See Rule 1:12-1(f) (court should disqualify itself if, among other things, "there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so").

In addition, the trial court's imposition of a consecutive sentence for the aggravated arson charge was

unfounded. While the arson charge, as the predicate felony, does not merge into murder, every single Yarbough factor compels the imposition of a concurrent sentence for the arson conviction. See State v. Carey, 168 N.J. 413, 421-22 (2001), quoting State v. Yarbough, 100 N.J. 627, 643-44 (1985) (setting forth the factors).

**CONCLUSION**

For the reasons stated in Points I and II, Mr. Fleming's convictions must be reversed and the matter remanded for a new trial. Alternatively, the matter should be remanded for re-sentencing for the reasons set forth in Point III.

Respectfully submitted,

YVONNE SMITH SEGARS  
Public Defender  
Attorney for Defendant-Appellant

BY: 

LON TAYLOR, A.D.P.D.

DATED: August 21, 2006

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

SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY  
LAW DIVISION - CRIMINAL

FILE NO. 02-1807  
INDICTMENT NO. 03-02-0286 I

THE STATE OF NEW JERSEY

STATED SESSION January 2003

v.

TERM July 2002

LARRY FLEMING,

DEFENDANT

COUNT I  
MURDER (FIRST DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did purposely or knowingly did cause the death of Ellis McNeil or purposely or knowingly did inflict serious bodily injury resulting in death, contrary to the provisions of N.J.S. 2C:11-3a(3), and against the peace of this State, the Government and dignity of the same.

1a

1

38

COUNT II - MURDER (FELONY MURDER)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Ellis McNeil during the commission of, the attempt to commit, or flight after committing the crime of aggravated arson, contrary to the provisions of N.J.S. 2C:11-3a(3), and against the peace of this State, the Government and dignity of the same.

2a  
2

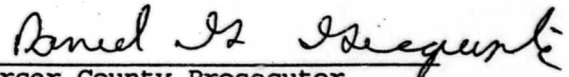
39

COUNT III- AGGRAVATED ARSON (SECOND DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did start a fire, thereby purposely or knowingly placing another in danger of death or bodily injury, contrary to the provisions of N.J.S. 2C:17-1a(1), and against the peace of this State, the Government and dignity of the same.

ENDORSED AS A TRUE BILL:

  
Foreperson

  
Mercer County Prosecutor

DATE: 2/27/03

pc

State of New Jersey

v.



New Jersey Superior Court  
Law Division – Criminal  
Mercer County

Defendant:  
(Specify Complete Name)

Larry Fleming

DATE OF BIRTH  
1/16/74

SBI NUMBER  
805357B

DATE OF ARREST  
6/9/02

DATE INDICTMENT/  
ACCUSATION FILED  
2/28/03

DATE OF  
ORIGINAL PLEA  
4/28/03

ORIGINAL PLEA  
 Not Guilty  Guilty

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

\*Amended 3<sup>rd</sup> count to aggravated arson on May 18, 2004.

ADJUDICATION BY

GUILTY PLEA

DATE:

NON-JURY TRIAL

DATE:

JURY TRIAL

DATE: February 3-5, 2004

DISMISSED / ACQUITTED

DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
03-02-0286	1	Murder	1 <sup>st</sup>	2C:11-3a(3)
	2	Murder (Felony Murder)	1 <sup>st</sup>	2C:11-3a(3)
	3	Aggravated Arson	2 <sup>nd</sup>	2C:17-1a(1)

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE
1	Murder	1 <sup>st</sup>	2C:11-3a(3)
2	Murder (Felony Murder)	1 <sup>st</sup>	2C:11-3a(3)
3	Aggravated Arson	2 <sup>nd</sup>	2C:17-1a(1)

It is, therefore, on 4/2/04 ORDERED and ADJUDGED that the defendant is sentenced as follows:

A jury found the defendant guilty of counts 1, 2 & 3.

Count 1- Committed to the Custody of the Commissioner Department of Corrections for a term of 75 years. 85% Rule Applies.

Count 2- To merge into count 1.

Count 3- Committed to the Custody of the Commissioner Department of Corrections for a term of 10 years. Minimum Parole Ineligibility of 8.5 years. Count 3 is to run consecutive to count 1.

- The defendant is hereby sentenced to community supervision for life.
- The defendant is hereby ordered to serve a 5 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.

Defendant is to receive credit for time spent in custody (R. 3:21-8).

TOTAL NUMBER OF DAYS  
664

DATE: (From/To)  
6/9/02-4/2/04

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  
Count 1- 75yrs. 85%  
Count 3- 10 years/MPI  
8.5 years

Institution CCDC

Total Probation Term \_\_\_\_\_

4a



<p>Total Fine \$ _____</p> <p>Total RESTITUTION \$ _____</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, 1996 but before December 23, 1991, unless a higher penalty is noted. Assessment is \$25 if offense is before January 9, 1986.)</p> <p><input checked="" type="checkbox"/> Assessment imposed on count(s) <u>1,3</u> is \$<u>100.00</u> each.</p> <p>Total VCCB Assessment \$<u>200.00</u></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> <p>_____ 1<sup>st</sup> Degree @ \$3000 _____ 4<sup>th</sup> Degree @ \$750          _____ 2<sup>nd</sup> Degree @ \$2000 _____ Disorderly Persons or Petty Disorderly Persons @ \$500          _____ 3<sup>rd</sup> Degree @ \$1000 _____</p> <p>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 _____ Eye Color _____ Sex _____ Date of Birth 1/16/74</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>
---	--

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. 169). 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).

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) 75x2=150.00

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 \$ \_\_\_\_\_.

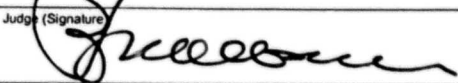
If the crime occurred on or after January 9, 1997, a \$30 Law Enforcement Officers Training and Equipment Fund penalty is ordered. 30x2=60.00

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 debauch 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.

Name (Court Clerk or Person preparing this form)	Telephone Number	Name (Attorney for Defendant at Sentencing)
L. Lucas	609-571-4135	Vernon Clash, Esq.

**STATEMENT OF REASONS - Include all applicable aggravating and mitigating factors**

This defendant was found guilty of counts 1,2,3. The court found aggravating factors; (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner; (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable or exercising normal physical or mental power of resistance; (3) The risk that the defendant will commit another offense; (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted; (9) The need for deterring the defendant and others from violating the law; (11) The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices. The court found no mitigating factors. The court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. Reasons for sentence weighed and stated on the record.

Judge (Name)	Judge (Signature)	Date
Bill Mathesius, J.S.C.		5/18/04



**FILED**  
**APPELLATE DIVISION**

**NOV 05 2004**

YVONNE SMITH SEGARS  
Public Defender  
Office of the Public Defender  
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31 Clinton Street, 9th Floor  
P.O. Box 46003  
Newark, New Jersey 07101  
(973) 877-1200

*Jon Flynn*  
**CLERK**

A-1217-04TY

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
IND. NO(S). 03-02-0286  
ACC. NO(S).

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

.....

PLEASE TAKE NOTICE that the defendant, Larry Fleming, confined at New Jersey State Prison, Second & Cass Streets, P.O. Box 861, Trenton, New Jersey 08625-0861 appeals to this Court from the final judgment of conviction of murder and aggravated arson entered on April 2, 2004, as amended May 18, 2004 in the Superior Court, Law Division, Mercer County, in which a sentence of 75 years with an 85% parole disqualifier, consecutive to 10 years with an 8.5 year parole disqualifier; \$200.00 VCCB penalty; \$150.00 SNSF penalty; \$60.00 LEOTEF was imposed by the Honorable Bill Mathesius, J.S.C.

YVONNE SMITH SEGARS  
Public Defender  
Attorney for Defendant-Appellant

BY: *[Signature]*  
LOUIS G. GONNELLA  
Assistant Deputy Public Defender  
Intake Unit

6a

04TY

A-1217-04TY  
prisoner

Superior Court of New Jersey  
Appellate Division  
Docket NO. A-1217-04TA

RECEIVED  
APPELLATE DIVISION  
JAN 03 2007

State of New Jersey  
Plaintiff - Respondent

v.

LARRY Fleming

Defendant - Appellant -

FILED  
APPELLATE DIVISION

JAN 03 2007

Jul M. Chodura  
CLERK

Brief and Appendix on behalf of Defendant-Appellant

RECEIVED  
APPELLATE DIVISION  
DEC 18 2006  
CRIMINAL  
SUPERIOR COURT  
OF NEW JERSEY

On Appeal from a Judgment  
of Conviction of the Superior  
Court of New Jersey, Law  
Division, Mercer County.

Sat below:

Hon. Bill Mathesius,

J. S. C. and a jury.

LARRY Fleming, # 480775

Pro-Se

Of Counsel and on  
the brief.

nltnl

LARRY Fleming, # 480775

New Jersey State Prison

P.O. Box 861

Trenton, N.J. 08625

Defendant is Confined

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Point 2

The Assistant Prosecutor elicited what was known to be perjured testimony from State's witnesses, failed to correct those statements, and relied on the perjured testimony during summation. (Not raised below) \_\_\_\_\_

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## PROCEDURAL HISTORY

On FEBRUARY 28, 2003, The Mercer County Grand Jury returned indictment NO. 03-02-0286 charging defendant LARRY FLEMING, with the following three counts: First Degree Murder, contrary to N.J.S.A. 2C:11-3A (COUNT ONE), First Degree Felony Murder, contrary to N.J.S.A. 2C:11-3A(3) (COUNT TWO), and Second Degree Aggravated Arson, contrary to N.J.S.A. 2C:17-1A(1) (COUNT THREE). (Attached appendix, DA 1-3)

Following a jury trial on FEBRUARY 3, 4, 5, 2004, before the Honorable Bill Mathesius, J.S.C. and a jury, defendant was found guilty on all counts (3T 108-13 to 109-11).

On April 2, 2004, defendant appeared before judge Mathesius, J.S.C. and was sentenced on: COUNT ONE, SEVENTY-FIVE YEARS (75), subject to the 85% PAROLE BAR OF THE NO EARLY RELEASE ACT., COUNT TWO, to MERGE INTO COUNT ONE, AND COUNT THREE, CONSECUTIVE TEN-YEAR TERM WITH AN MINIMUM PAROLE INELIGIBILITY OF 85% (4T 25-25 to 27-1)

On November 5, 2004, defendant filed Notice of Appeal, NONE PRO TUNE with the permission of the court. (DA 6)



## STATEMENT OF FACTS

According to Detective THOMAS, on May 11, 2002 AT approximately "11:45pm" that evening he was detailed to 340 BRUNSWICK AVENUE, in the city of TRENTON, ON A REPORT by the dispatcher of a house fire where there was a fatality within the structure (IT 74-9 to 74-15).

AFTER being on the scene for a half hour he talked to witness; Curtis Hawkins, (IT 88-8 to 88-10) standing on the corner of Middle Rose Street and Brunswick Ave., near Stoke's Bar (IT 82-3 to 82-7). As he walked up to witness; Hawkins, Detective THOMAS testified, "witness; Hawkins, was shaking his head, his shoulders were slumped forward, and he was going, THIS AIN'T RIGHT, MAN. THIS AIN'T RIGHT. Fruit (defendant) did this shit. (IT 82-8 to 82-13).

At that point, since witness; Hawkins, was a witness, he was transported to headquarters (TPD) by patrol officers, (IT 85-4 to 85-6) was a alert was broadcasted for Larry Fleming on a suspicion that he had, at least had, something to do with the fire (IT 85-24 to 86-6).

At headquarters, a formal statement (Iden. S-44) was taken from witness; Hawkins, by Detective Sheehan. Detective Thomas, testified he had an opportunity, at least at some point, to review the statement and found, after reviewing the statement, it was substantially the same as the information that was gave to him on the street, within an hour or so of the fire. (IT 85-10 to 85-20).

Detective Thomas confirmed that he had been told by a Nicole Blackshear, prior to speaking with Curtis Hawkins, that Curt knew who did it and that it was obvious that Curtis Hawkins had, had some discussions with others in the area before he had spoken to him (Curtis Hawkins) (IT 88-11 to 88-23).

"From here out, defendant will rely on counsel's statements of facts."

STATEMENT OF FACTS

According to Ed Warren, on May 11, 2002 he went to Stokes Bar on Brunswick Avenue in Trenton and bought wine and beer. He then went outside, purchased some cocaine and ran into a neighborhood friend, Carmen Jones. They went to an abandoned house on 340 Brunswick Avenue where Jones stayed. They entered through a back door that was partially boarded up which was the only means of entering the house. (1T 91-6 to 94-12)

On their way to Jones' second floor room, Warren (a/k/a "Big Al;" 1T 133-11 to 13) saw the victim Ellis McNeil (a/k/a "Peanut"), who was another drug user and resident of the house. (1T 95-7 to 16) Warren and Jones went to Jones' room and "got high." (1T 94-19 to 22) Jones then went out several times to buy more drugs. As it was getting dark, defendant (a/k/a "Fruit") came into the room and tried to sell them some drugs. According to Warren, defendant repeatedly asked him to buy drugs despite Warren's indication that he had no money. Warren admitted that he had purchased drugs from defendant in the past and that defendant never told him that he "owed" defendant any money. (1T 96-17 to 100-18)

After defendant left the room, Jones came running to Warren "saying that the house was on fire." (1T 103-5 to 7) Warren kicked some of the boards out of a window and both he and Jones jumped

from the building. As a result, Warren fractured his left leg and broke his ankle. (1T 103-9 to 104-13) After he fell to the ground, Warren heard somebody from within the house yell for help. (1T 105-3 to 11)

Warren initially did not want anyone to know that he was inside the house, but he later gave a formal statement to the police at a nearby hospital. (1T 107-1 to 3; 108-2 to 8) At trial, Warren stood by the statement and indicated that he did not have an altercation or negative encounter with anyone during the time he was in the house. (1T 116-5 to 10) Warren also admitted that he may have previously had sex with Jones in exchange for drugs. (1T 119-19 to 120-24)

While Jones' testimony basically corresponded to that of Warren regarding the incident, there were some substantial inconsistencies. She admitted that she went out of the house about ten times to purchase more cocaine. (1T 135-3 to 136-10) She also indicated that there were several drug dealers on the street and that a "few of them did come to the house." (1T 138-16 to 20) Contrary to Warren's testimony that he had no money, Jones indicated that he "was spending a large amount of money. It was more than \$30 at a time." (1T 138-21 to 24) Jones also testified that the victim, Peanut, was in the front room with Bernadine. (1T 139-9 to 22)

Jones also claimed that she encountered defendant on the street who accused her of being a "cross-artist." (1T 142-11 to 19) At first she ignored him but then responded, "How can anyone cross you when we don't know what time you come out?" (1T 143-9 to 14) Jones indicated that "cross-artist" meant that "we didn't spend money or anything with him" (1T 143-17 to 20), and that she had purchased drugs from another drug dealer, P.J., during the day. (1T 144-25 to 145-8)

Contrary to Warren's testimony, Jones claimed that defendant came into her room and accused Warren of being a "cross-artist." (1T 145-22 to 146-10) According to Jones, defendant left but then came back into the house 15 minutes later with Curt Hawkins. (1T 149-4 to 150-23) She also indicated that her cousin, G.I. Joe (a/k/a Joseph McKinney) "came from around both of them towards me...." (1T 150-24 to 25) Jones claimed that defendant had a light in his hand along with a small gas can (1T 151-23 to 152-24) but she "didn't think nothing of it" since she "figured he was going to put some gas in his car." (1T 153-2 to 3)

After checking on the victim in his room, Jones went to her room where she got high with Warren. (1T 154-23 to 21) Jones indicated that the place was only lit by candles since they had no electricity. (1T 156-12 to 16) She then heard someone "hollering, fire, fire." (1T 155-3 to 4) Jones then walked out of the room and

started down the steps when she was "hit in the face with the smoke and I felt the heat." (1T 155-14 to 16) She ran back into her room and was able to get out of the house through a window along with Warren (a/k/a Big Al) and Joe. (1T 155-20 to 157-14) She ran to the nearby *Stoke's Bar* and called the fire department. (1T 157-19 to 21) Jones also indicated that P.J. and his father were trying to get into the house because someone was still trapped in the building. (1T 157-24 to 158-17) She admitted that she did not see defendant in the area. (1T 159-4 to 15)

While admitting that she shared her room with Warren and that she had a \$40 per day drug habit, she denied ever having sex with him. Jones admitted that she may have had sex with Curt Hawkins, a good friend, and also admitted that her police statement did not reveal that Hawkins was with defendant and Joe when they walked into the house with the gas can. (1T 179-4 to 184-2)

Joe McKinney (a/k/a GI Joe) did not have much to add about the incident except that he had purchased drugs from defendant and claimed that the fire occurred about a minute and half after he saw defendant with the gas can. (1T 196-1 to 6; 200-23 to 25) Contrary to Jones' testimony, he made no mention of Hawkins in the area or with defendant. (1T 197-5 to 198-12; 202-14 to 19)

Curt Hawkins, who admitted that he is a "hustler" (1T 218-23 to 24), provided the most damaging yet inconsistent testimony

regarding defendant. Hawkins indicated that defendant sold drugs and admitted that "we worked together...." (1T 211-21 to 212-22) In exchange for "watch[ing] his back," Hawkins earned "\$40 a night and a gram [of cocaine]." (1T 214-7 to 11) On the day of the fire, Hawkins also admitted that he worked for P.J., a rival drug dealer. (1T 215-4 to 14)

According to Hawkins, P.J. went into the house where Jones and Warren stayed about "seven or eight times" and sold drugs. (1T 217-21 to 218-5) Hawkins claimed that defendant was upset with P.J.'s activities and subsequently went into the house, pushed the door open and confronted Warren (Big Al). Contrary to Warren's testimony, Hawkins claimed that defendant demanded \$50 from Warren who denied owing defendant any money and that defendant told Warren, "[w]ell, that one more \$50 be spent out of here, you suffer the consequences." (1T 220-2 to 11)

According to Hawkins, P.J. continued to sell drugs to Jones and Warren. Two to three hours later while he was talking to P.J., he saw defendant with a gas can in his hand. (1T 224-9 to 20) Hawkins claimed that defendant instructed him to get gas at a nearby gas station because the "[l]ady across the street wants some gas." (1T 224-17 to 3) Hawkins returned with the gas and received in exchange "some coke." (1T 226-14 to 15) Hawkins claimed that he told defendant, "If you burn [friend and neighbor]



Tony's place down, if you do anything to hurt her, I will fuck you up." (1T 226-16 to 18) Hawkins further claimed that he followed defendant and, contrary to Jones' testimony that he was inside the house with defendant, testified as follows:

I said, I'm saying, like, don't even go there, because I'm right behind him. So when he scoops up under the door, like, I'm just peeping like this right under the floor, like, he's coming running, and flames is behind him. Like, the flames, flames are like, you could see the flames and stuff. He got the gas can, boom, he goes through the alleyway, hit Oxford Street, and I ain't seen him no more after that.

(1T 227-6 to 13) Hawkins reiterated, contrary to Jones' testimony, that he did not even go "all the way in" the house with defendant, but peered into the house. (1T 229-14 to 23) Hawkins admitted that his police statement indicated that he was "in Stokes Bar playing poker when [he] first learned of the fire" (1T 243-18 to 21) and that he was possibly afraid that the police might think he had something to do with the fire. (1T 244-4 to 9)

Sometime around 10:15 p.m., Firefighter Clifford Willever was dispatched to the fire at 340 Brunswick Avenue along with several other officers of his rescue unit. (1T 49-18 to 50-4) Willever entered the building and made his way up the stairs to the hallway fighting the fire when he found the victim, Ellis McNeill. (1T 55-21 to 56-8) Other firefighters determined that McNeill was dead.

(1T 56-23 to 57-2) An autopsy revealed that the cause of death was carbon monoxide poisoning. (2T 167-2 to 24)

Detective Lloyd Mathis, an arson investigator, testified that the fire was started about 9:55 p.m. (2T 93-11 to 22) He concluded that:

.... In this particular fire, somebody took an ignitable liquid, gasoline, and poured it at the base of the steps here, pours it through this room, pours it into the middle room, and then ends right up at the rear room or the dining room area.

(2T 84-11 to 16) Detective Mathis further concluded that the "gasoline was placed on the flooring by the front door, and it was trailed from the front door through the first room..., through the middle room... and then ignited in this area [the third room]" by throwing something into the gas. (2T 90-6 to 91-15)

Throughout the trial, defense counsel brought out inconsistencies among the witnesses and suggested to the jury during summation that Curtis Hawkins was the arsonist. (3T 12-1 to 13-16) After instructing the jury on murder, felony murder as well as aggravated manslaughter and reckless manslaughter, the jury convicted defendant of all counts. (3T 108-13 to 109-11)

## Legal Argument

### Point 1

The Assistant Prosecutor failed to disclose Brady material, favorable to the defense, after a specific request. Violating defendant's right to Due-Process of law.  
(not raised below)

This claim of a Brady violation centers on the prosecutor's suppressing exculpatory material favorable to the defense, prior to trial, of State's witnesses and the use of those statements during summation.

In order to establish a Brady violation, the defendant must demonstrate that:

- (1) The prosecutor failed to disclose the evidence.
- (2) The evidence was of a favorable character for the defendant.

(3) The evidence was material.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963); State v. Landano, 271 N.J. Super. 1 (1994); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976); Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L. Ed. 2d 706 (1972).

The United States Supreme Court developed three general factual settings concerning the standard of materiality for determining whether a Brady violation required a new trial. State v. Carter, 85 N.J. 300, 311-312, 426 A.2d 501 (1981).

First, where the prosecution knowingly used perjured testimony, the Court has held that the conviction will be set aside if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. at 103, 96 S.Ct. at 2397, 49 L.Ed. 2d at 349-350 (1976). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959), Chief Justice WARREN

SUMMARIZED this principle: "First, it is established that a conviction through use of false evidence known to be by representatives of the State, must fall under the Fourteenth Amendment..... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269, 79 S.Ct. at 1177.

Second, illustrated by the facts in *Brady*, is one in which the defense has made a specific request for the withheld evidence. The Court has determined that the conviction must be vacated if the suppressed evidence might have affected the outcome of the trial. *United States v. Agurs*, 427 U.S. 104, 96 S.Ct. at 2394, 49 L.Ed. 2d at 350 (1976).

The third variation was revisited by the United States Supreme Court. In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), the Court held that the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), was "sufficiently flexible to cover the "no request, general request, and specific request" cases of prosecutorial failure to disclose evidence

favorable to the accused." 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed. 2d at 494 (1985). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed. 2d at 494 (1985).

To best highlight the claim of a Brady violation ~~remembered~~ by the prosecution, this petitioner will first establish a valid Brady demonstration and identify the specific standard of materiality as it applies to the ~~Brady~~ 373 U.S. 83 test.

As alluded to in point one of this brief, defense, undisputedly provided the State with a "Written Demand For Discovery" request, pursuant to N.J. Ct. R. 3:13-3(c)(1) through (9) (DA 9). However, the State did not comply fully with this request, leaving counsel to believe that no additional discovery existed.

At trial, during Detective Thomas' testimony, as set forth:

As I walked up to him, he was shaking his head. His shoulders were slumped forward and he was going. This ain't right, man. This ain't right. Fruit (defendant) did this shit. (IT 82-10 to 82-13)

It became clear, the prosecutor had failed to honor her discovery obligation, R. 3:13-3(c)(4)(8), and in doing so, denying defendant his entitlement to know the state's case against him within reasonable time to permit the preparation of a defense. State v. Bellamy, 329 N.J. Super. 371, 376 (2000); R. 3:13-3(c)(7)(8).

After hearing Detective Thomas' testimony (IT 82-10 to 82-13) the defense was surprised. The defense knew the versions of Detective Thomas' testimony were not in his Supplementary Report (DA 10-11), nor were they reported in witness Hawkins' own Formal Statement (DA 12-15). Counsel with no choice but to object, OBJECTED! (IT 82-14 to 82-15)

At sidebar, the prosecutor admitted having prior knowledge of the existence of favorable information.



all along, as set forth: "He's going to say it all, and he wrote down a statement and gave a description and identified who did it. It's a prior identification of an individual. It's an excited utterance. (IT 82-21 to 82-24).

Trail prosecutor's actions or inactions in this respect is clear, thus satisfying the first demonstration that the prosecutor failed to disclose the evidence.

As to the second part of demonstrating a valid Brady claim, that the evidence was a favorable character for the defense, defendant asserts here, that had the evidence been provided before trial, counsel would have requested an N.J.R.E. 104(a) hearing, arguing: (1) Detective Thomas' Supplementary Report (DA 10-11) does not report, Fruit did this shit, allegedly stated by witness Hawkins, or any statement at all, of witness Hawkins, (2) No other investigating Detectives or patrol officers reported in their reports any statements of Curtis Hawkins' out-of-court statements (IT 827-6 to 827-13), including Detective Sheehan, who recorded a Supplementary Report (DA 16-18) of an interview with witness Hawkins, and who recorded witness Hawkins Formal Statement (DA 12-15) and including Officer

Thomas Ertel's Investigation Report, which is an actual on scene interview, documented, with witness Hawkins (DA 19-21). Making a strong argument at the N.J.R.E. 104(A) hearing, based on N.J.R.E. 803(C)(6) (Records of Regularly Conducted Activity) and further supporting an argument under N.J.R.E. 803(C)(1) (Absence of an entry in records of regularly conducted activity).

Thereby, Detective Thomas' Supplementary Report (DA 10-11), along with the out-of-court statements (1T 82-10 to 82-13), had counsel known and or had the prosecutor disclosed the evidence, prior to trial, would have been an issue under N.J.R.E. 803(A)(1) at the hearing, (3) Moreover, counsel at the hearing would have revealed that witness Hawkins' own formal statement (DA 12-15) does not make any mentioning of the out-of-court statements (1T 227-6 to 227-13; 1T 234-10 to 234-14), (4) counsel would have also, informed the judge that the out-of-court statements of both; Detective Thomas (1T 82-10 to 82-13) and Curtis Hawkins (1T 227-6 to 227-13; 1T 234-10 to 234-14) were never testified to at the Grand Jury (see Grand Jury transcripts), which one would have thought that these crucial and important out-of-court statements, if made, would have been the linchpins for the Grand Jury and the reports, and

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(5) had counsel been provided with the out-of-court statements in advance, counsel's trial strategy to impeach Detective Thomas would of been enhanced with the help of the dispatcher's radio logs (DA 22-24), by way of proving that Detective Thomas' Supplementary Report (DA 10-11) reporting upon his arrival (11:45pm) (DA 11), in which his testimony corroborated (IT 74-9 to 74-11; IT 75-1 to 75-2) was perjury, equally affecting his trial testimony of locating witness Hawkins after 30 minutes on the scene, (12:15 AM [IT 81-6 to 81-12; IT 81-22 to 82-7]) on the corner of Middle Rose Street and Brunswick Avenue. Furthermore, testimony of Detective Thomas of locating witness Hawkins on the corner of Middle Rose Street and Brunswick Avenue (IT 81-6 to 81-12) near Stoke's Bar (IT 81-22 to 82-7) 30 minutes after being on the scene (IT 88-8 to 88-10) after arriving at "11:45pm" (IT 75-1 to 75-2) could not have been possible, for that the dispatcher's radio logs (DA 22-24) verify that not only was Curtis Hawkins not at the corner of Middle Rose Street and Brunswick Avenue, near Stoke's Bar, at the time or place, Detective Thomas testified to, but that witness Hawkins was being transported to headquarters (TPD), between "11:51pm - 12:07AM" (DA 24)

Thus, satisfying the second demonstration, that the evidence was a favorable character for the defense.

For the third Brady demonstration, in that the evidence was material. Defendant argues here, the out-of-court statements: (1) Implies that the defendant was witnessed setting 340 Brunswick Avenue on fire, as though the declarants of the statements were actual eye-witnesses, (2) Implies that defendant is the cause of Mr. McNeil's death, (3) Implies defendant was identified, by name (Fruit) and as the perpetrator of the fire at 340 Brunswick Avenue, and (4) Implies that the out-of-court statements was made at the place, time, and to Detective Thomas, as testified to (IT 82-3 to 82-13; IT 233-24 to 234-13).

Thus satisfying the third demonstration, in that the evidence was material.

In this case, it can not be denied, the defendant requested Brady material through a "Written Demand For Discovery," pursuant to N.J. Ct. R 3:13-3(c) (1) through (e) (DA 9). In retrospect, perhaps counsel's request should have been more specific. However,

defense counsel's request was tailored to what was only known prior to trial and what counsel and defendant reasonably could expect from the prosecutor.

Under these circumstances, the defendant's request was sufficiently specific to put the prosecutor on notice of her responsibility to provide discovery. R. 3:13-3(c)(7)(8) and (G).

Here, the undocumented out-of-court statements:

As I walked up to him. He was shaking his head. His shoulders were slumped forward and he was going. This ain't right, man. This ain't right. Fruit did this shit. (IT 82-10 to 82-13)

by Detective Thomas were never disclosed and were a surprise to the defense, and as was the out-of-court statements of Curtis Hawkins:

I said, I'm saying, like, Don't even go there, because I'm right behind him. So when he scoops up

under the door, like, I'm just peeping like this right here. And next thing I know, he's coming running, and flames is behind him, like, the flames, flames are like, you could see the flames and stuff. He got the gas can, boom, he goes through the alleyway, hit Oxford Street, and I ain't seen him no more after that

(IT 227-6 to 227-13), which were also a surprise to the defense and never, prior to trial, disclosed.

These out-of-court statements, even before trial, was obviously inconsistent to Detective Thomas' Supplementary Report (DA 10-11), which reported no statement from Curtis Hawkins, and inconsistent to witness Hawkins' Formal Statement (DA 12-15), which made no mentioning of who set 340 Brunswick Avenue on fire or his above testimony (IT 227-6 to 227-13) or even allegedly witnessing defendant.



The prosecutor should have known, that the out-of-court statements (1T 82-10 to 82-13; 1T 227-6 to 227-13) were of such substantial value and favorable material to the defense, that it was elementary fairness for the out-of-court statements to be disclosed, even without a request.

Any response from the State, that the "Written Demand For Discovery" (DA 9) was not a specific enough request, its specificity is irrelevant. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985). Our United States' Supreme Court has held: Regardless of the specificity of defendant's request, evidence is material for Brady purposes "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, supra. 514 U.S. at 434, 115 S.Ct. at 1566, 131 L. Ed. 2d at 506 (1995); *State v. Nelson*, supra. 153 N.J. at 500, 715 A.2d 281 (1998).

Had the undisclosed, out-of-court statements been known to defense, prior to trial, the defense with



knowledge that the statements (IT 82-10 to 82-13; IT 227-6 to 227-13) were not documented anywhere through out the discovery package or reported in either Detective Thomas' Supplementary Report (DA 10-11) or witness Hawkins' Formal Statement (DA 12-15), to show its existence of accuracy, counsel would have motioned the court to conduct an N.J.R.E. 104(a) hearing to determine the admissibility and reliability of the out-of-court statements. Motioned for an N.J.R.E. 901 to authenticate the dispatcher's radio logs (DA 22-24) to show that Detective Thomas' out-of-court statements, in which his testimony corroborated, (IT 75-1 to 75-2; IT 88-8 to 88-10) of arriving on the scene at "11:45pm" and 30 minutes after being on the scene (12:15am), located and spoke with witness Hawkins, who allegedly stated, "Fruit did this shit," (IT 82-10 to 82-13) was false, and for impeachment purposes, in the event the N.J.R.E. 104(a) hearing was unsuccessful.

However, had counsel and defendant been successful at the N.J.R.E. 104(a) hearing, the trial proceeding would have undoubtedly been different, on the grounds, there would have been no testimony from Detective Thomas, as to

witness Hawkins, stating to him, "This ain't right, man. This ain't right. Fruit did this shit," (IT 82-12 to 82-13) OR ANY TESTIMONY AT ALL FROM Detective THOMAS, who basically testified to the unreported, undisclosed, out-of-court statements, only, (IT 82-10 to 82-13) AND OR FROM Curtis Hawkins, as to the out-of-court statements, "I told them Fruit did it (IT 234-10 to 234-14).

Leaving the prosecutor with no witness, testifying defendant did it or that defendant was witnessed setting 340 Brunswick Avenue on fire. Also, leaving witness Hawkins' testimony of the out-of-court, undisclosed statements (IT 227-6 to 227-13; IT 229-7 to 229-13; IT 230-9 to 230-13; IT 234-10 to 234-14) isolated and under more suspicious view, in comparison with his multiple inconsistencies.

Moreover, had counsel been advised of the out-of-court statements, in advance, counsel would have subpoenaed Officer Thomas Ertel, who documented an actual on scene interview with Curtis Hawkins, to show that witness Hawkins' out-of-court statements (IT 227-6 to 227-13; IT 234-10 to 234-14) and testimony were never stated

to him while conducting his ON SCENE INTERVIEW (DA 19-21). Detective SHEEHAN, would have BEEN subpoenaed, who recorded witness HAWKINS' FORMAL STATEMENT (DA 12-15) AND who also documented AN INTERVIEW WITH witness HAWKINS AT HEADQUARTERS (TPD) (DA 16-18), to show that HAWKINS' testimony AND alleged out-of-court STATEMENTS (IT 227-6 to 227-13; IT 241-25 to 242-7; IT 234-10 to 234-14) were NEVER stated to him, during his interview, AND NEVER MENTIONED by him (HAWKINS) during the recording of his FORMAL STATEMENT (DA 12-15), which HAWKINS, RE-READ OVER AND found it to be EXACTLY AS he had told it, signed it in his own handwriting, acknowledging it to be A TRUE, FREE, AND VOLUNTARY STATEMENT (DA 15).

It is REASONABLE to ASSERT that A JUROR OR JURORS would have considered the fact, that such A crucial AND important STATEMENT, being absent from all investigating Detectives reports AND even the declarant's own FORMAL STATEMENT, was enough to entertain A REASONABLE doubt towards the existence of the undocumented, unreported, out-of-court STATEMENTS AND would have possibly discredited those STATEMENTS, AS testified to, AND the ASSERTION of witness HAWKINS, AS A EYE-WITNESS, AS his testimony of the out-of-court STATEMENTS implied.

However, the few means of attacking the statements were perverted by the prosecutor's failure to disclose, depriving the defense of certain evidence, and had the effect of presenting to the defense, the evidence did not exist and reliance on this misleading representation, the defense abandon lines of independent investigation, defenses, and trial strategies that it otherwise would have pursued. *United States v. Bagley*, 473 U.S. 686, at 3385 (1985).

In *Brady v. Maryland*, the United States Supreme Court held, "the suppression by the prosecution of evidence favorable to an accused [which has been requested in pretrial discovery] violates due-process where it is material either to guilt or to punishment, irrespective of the good faith or bad faith of the State." 373 U.S. at 87, 83 S.Ct. at 1196-1197, 10 L. Ed. 2d at 218 (1963); *State v. Engel*, 249 N.J. Super. at 389 (1991).

Here, the defendant had an absolute Due-Process-based right to a Fair Trial. U.S.C.A. Const. Amend. 6. That Due-Process right further requires that the State to disclose information it possesses which is MATERIAL

to the defense, even where it concerns only the credibility of a State's witness. *State v. Spano*, supra, 69 N.J. at 235, 353 A.2d 94, quoted from, *State v. Rodriguez*, 262 N.J. Super. 564, 571 (1993).

The credibility of Detective Thomas on the unreported out-of-court statements (IT 82-10 to 82-13) in the presence of the jurors, were more crucial coming from him, than coming from witness Hawkins (IT 227-6 to 227-13; IT 227-7 to 229-13; IT 230-9 to 230-13; IT 234-10 to 234-14), who was allegedly the declarant of the statements.

Detective Thomas, being a law enforcement officer, an investigator of this crime, 2C:11-3(a)(3); 2C:11-3(a); 2C:17-1(a)(1), with the authority to arrest and or to direct the investigation, and who was apart of the prosecutor's team, *State v. Nelson*, 330 N.J. Super. 206, 213 (2000); *State v. Lozada*, 257 N.J. Super. 260, 274, 608 A.2d 407 (App. Div. 1992); *United States v. Thornton*, 1 F.3d 149, 158 (3rd Cir 1993), whose duty sworn upon his oath to serve, protect, and to uphold the law, clearly possessed the capacity to have affected the jurors evaluation of his own credibility and possibly led the jurors to believe that his

testimony, of the out-of-court statements (IT 82-10 to 82-13), were in fact stated to him by witness Hawkins at the place (IT 81-9 to 81-12; IT 82-3 to 82-7) and time (IT 88-8 to 88-10) as he testified to, especially without any confrontation of the out-of-court statements as reported in his Supplementary Report (DA 10-11) or any impeachment of his testimonial time of arriving on the scene, locating witness Hawkins, 30 minutes after being on the scene, or and speaking with Hawkins, with the dispatcher's radio logs (DA 22-24).

Detective Thomas' credibility as a witness was therefore an important issue in this case, and any evidence affecting his credibility should of been disclosed prior to trial, because it was relevant.

The fact that the prosecutor choice, rather than to fulfill her responsibility, not to disclose the favorable material to the defense, prior to trial, but choice, rather to surprise the defense at trial, by revealing the out-of-court statements through actual testimony, not only violated defendant's right to discovery, R. 3-13-3(c)(4)(8) and (6), but defendant's trial was unfair and not that of the sixth Amendment of the United States Constitution

The prosecutor took full advantage of her failure to disclose the out-of-court statements, during summation of Detective THOMAS' testimony:

You heard Detective THOMAS, you heard what he said, Curt was upset. He was upset: Fruit did this shit, Fruit did this. You heard Detective THOMAS tell you that, and he was there in the beginning.

(3T 36-4 to 36-8), and relied on Curtis Hawkins' out-of-court statements:

Does it make sense to you that he's going to put himself there, tell the police all of this stuff, go down and give a statement? Yeah, he wants to back away from it a little bit. Doesn't want the police to know he was right at the door. But he tells them: EVERYTHING he told them on the street winds up in that statement.



(3T 36-12 to 36-18) Here, the prosecutor must be referring to the statements that witness Hawkins Wrote Down, in which stated at sidebar, (1T 82-21 to 82-24) because the defense did not have the out-of-court, undisclosed statements (1T 82-10 to 82-13; 1T 82-21 to 82-24; 1T 227-6 to 227-13; 1T 234-10 to 234-14), in which the prosecutor claimed, everything said to the police wound up in that statement, by witness Hawkins (3T 36-12 to 36-18).

Here, the defendant asserts that the prosecutor's remarks further establish that she possessed additional favorable information never known to the defense or disclosed.

The Brady disclosure rule applies to information of which the prosecution is actually or constructively aware. State v. Nelson, 155 N.J. 487, 498 (1998); Calley v. Hoffmann, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed. 2d 760 (1976); State v. Nelson, 330 N.J. Super. 206, 213 (2000).

The prosecutor's use of these out-of-court, undisclosed statements, during summation, might have led the jurors to believe that the defendant was actually witnessed setting 390 Brunswick Avenue on fire, causing

Mr. McNeil's death, as witness Hawkins testimony implied. The jurors might have also believed that Detective Thomas' credibility, as to being told, "Fruit did this shit" (1T 82-10 to 82-13) by witness Hawkins, was as testified to, do to the prosecutor's comments (3T 36-12 to 36-18) and failure to disclose.

The prosecutor's knowing use of favorable material, never disclosed to defense, during summation was inexcusable.

The actions of the prosecutor in this respect, clearly violated defendant's right to Due-Process. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194-1197, 10 L.Ed. 2d 215 (1963), Therefore, the trial prosecutor's failure to disclose to the defense, prior to trial, favorable material and the use of the undisclosed out-of-court statements, during summation, this court should reverse defendant's conviction and remand the matter for retrial.

## Legal Argument

### Point 2

The Assistant Prosecutor elicited what was known to be perjured testimony from State's witnesses, failed to correct those statements, and relied on those perjured testimonies during summation (Not raised below).

The Supplementary Report of Detective Thomas, reveals that Detective Sheehan, Pollard, and Detective Thomas, all responded to 340 Brunswick Avenue together on a report by the dispatcher of a house fire (DA 15-11)

The chronology of the dispatcher's radio logs (DA 22-24) establish, Detectives were enroute to the scene at "10:40 pm" and were logged, "CIB (Criminal Investigation Bureau) Det. Thomas on the way," at "10:47pm" to the scene, May 11, 2002.

Sometime between "10:47pm to 10:56pm" Detectives' Sheehan, Pollard, and Thomas actually arrived at the

SCENE, do to Detective Pollard requesting (NS3E) officer Thomas Ertel to be called to or back to the scene, according to the dispatcher's radio logs (DA 23).

The dispatcher's radio logs, provided by the State, pursuant to N.J. Ct. R. 3:13-3, clearly proves Detective Thomas' entire trail testimony of arriving on the scene at "11:45pm" (IT 75-1 to 75-2) and locating witness Hawkins, 30 minutes after being on the scene (12:15AM) (IT 88-2 to 88-10) was the product of perjury. Det. Thomas' own Supplementary Report refutes his testimony of arriving at "11:45pm", for it reports he arrived at "10:17pm" (DA 10)

The dispatcher's data, (DA 22-24) likewise refutes Detective Thomas' trail testimony, which set forth, after he located witness; Hawkins, Hawkins stated to him, "This ain't right, man. This ain't right. Fruit (defendant) did this shit." (IT 82-12 to 82-13) verifying that Detective Thomas' testimony, on the clearest grounds, Hawkins stated to him, Fruit did this shit, (IT 82-12 to 82-13) could not have been stated at the time he testified to (12:15AM), especially not at the corner

of Middle Rose Street and Brunswick Avenue, near  
Stoke's Bar, (1T 81-9 to 81-12; 1T 82-3 to 82-7)  
because according to the dispatcher's radio logs, witness  
Hawkins, along with another witness, were been trans-  
ported to headquarters (TPD) between "11:51pm - 12:07am"  
(DA 24).

Further perjured testimony by Detective Thomas  
was revealed, perjured testimony the prosecutor knew of,  
because she had the same discovery package she provided  
to the defense, pursuant to N.J. Ct. R. 3:13-3, as set  
forth:

Q (Prosecutor) At headquarters was a formal  
statement taken from Curtis  
Hawkins?

A (Det. Thomas) Detective Sheehan recorded a  
formal statement from him.

Q (Prosecutor) Did you have an opportunity, at  
least at some point, to review  
that statement?

A. (Det. Thomas) Yes, I have

Q (PROSECUTOR) Is the information in that statement substantially the same as the information that he gave to you on the street within an hour or so of the fire?

A. (Det Thomas) Yes, It is.

(IT 85-10 to 85-20) Here, the prosecutor, even before asking the question, knew the formal statement of witness, Hawkins, (DA 12-15) was not the same or substantially the same, because the formal statement does not report who set the fire at 340 Brunswick Avenue.

Officer Thomas Ertel's Investigation Report (DA 19-21) supports defendant's claim, that Detective Thomas testimony, "This ain't right, man. This ain't right. Fruit (defendant) did this shit," allegedly told to him by witness Hawkins, were not made, if made at all, at the time Detective Thomas testified they were, (IT 88-8 to 88-10) because not only is Officer

Thomas Ertel's report (DA 19-21) AN ACTUAL ON SCENE interview with witness Hawkins, which does not mention OR REPORT Detective THOMAS' versions of his testimony, (IT 82-10 to 82-13) NOR witness Hawkins' testimonial versions, (IT 234-10 to 234-14) but OFFICER Ertel's REPORT, REPORTS that he AND Detective THOMAS were together, while interviewing witness Hawkins. Curtis Hawkins testimony CONFIRMS the two were together (IT 236-11 to 236-14) AND AS WELL does Detective THOMAS' testimony (IT 87-11 to 87-12).

FURTHERMORE, Detective THOMAS testified that AN ALERT WAS BROADCASTED FOR DEFENDANT AFTER he spoken to witness Hawkins (IT 85-24 to 86-6), which according to Detective THOMAS' testimony, had to be AT OR AFTER 30 MINUTES BEING ON THE SCENE "12:15AM", AFTER ARRIVING AT "11:45PM," BECAUSE Detective THOMAS had not located witness Hawkins until then (IT 75-1 to 75-2; IT 88-8 to 88-10). However, the dispatcher's radio logs REVEALS that AN ALERT WAS BROADCASTED, (DA 24) but not at the time Detective THOMAS testified it WAS, but in fact the broadcast WAS ACTUALLY MADE AT "11:41PM," BEFORE Detective THOMAS ARRIVED ON THE SCENE, ACCORDING TO HIS OWN TESTIMONY (IT 75-1 to 75-2; IT 88-8 to 88-10).

Moreover, AT TRAIL, the prosecutor had elicited testimony



of undisclosed, undocumented, and out-of-court statements from Curtis Hawkins, as well:

Q (PROSECUTOR) When you were still in front of the scene, did you tell him who did it?

A. (HAWKINS) Yes, I did.

Q (PROSECUTOR) Who did you tell him did it?

A. (HAWKINS) I told him, Fruit.

(IT 234-10 to 234-14), which the prosecutor falsely informed the jurors, during summation:

Everything he told them on the street winds up in that statement (3T 36-17 to 36-18).

These perjured testimonial versions, the prosecutor's comments of them during summation, the failure to correct

these perjured testimonies, and its overall affect on defendant's trail, defendant's conviction should be REVERSED, on the grounds, DUE-PROCESS to a fair trail was violated, and the matter REMANDED for RETRAIL. U.S.C.A. CONST. AMEND. 14.

It is UNCONTROVERTEDLY the law in New Jersey AND all the States, that the use of perjured testimony by the State, whether willful OR MERELY negligent, deprives the defendant of a fair trail. STATE V. CAHILL, 125 N.J. Super. 492, 311 A.2d 766 (1973).

In NAPOE V. ILLINOIS, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959), Chief Justice WARREN SUMMARIZED this principle:

"First, it is established that a conviction through use of false evidence known to be by REPRESENTATIVES of the State, must fall under the Fourteenth Amendment..... The same result obtains when the State, although not soliciting false evidence allows it to go UNCORRECTED when it appears." Id. At 269, 79 S.Ct. at 1177.

The Supreme Court, long ago, made clear, that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with, "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340-342 (1935). The principle that the State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply, merely because the false testimony goes only to the credibility of the witness. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed. 2d 1214 (1959); *State v. Taylor*, 49 N.J. 440, 453, 231 A.2d 212 (1967); *State v. Carter*, 69 N.J. 420, 433 (1976); *State v. Cahill*, 125 N.J. Super. 492, 496 (1973).

In *Giglio v. United States*, 405 U.S. 150 (1972), a unanimous court again concluded that the Government was responsible for false testimony on the part of a material witness, even though the prosecutor was unaware of its falsity. It is also recognized that, although it is a violation of the due process for the State to convict a defendant based on false evidence, such a conviction will not be set aside unless it is shown that the false evidence had a material effect on the verdict. *Id.*, at 153-154 (1972).

Further: "A finding of materiality of evidence is required under BRADY, SUPRA. AT 87. A new trial is required if the perjury could have affected the judgment of the jury."

In United States v. Bagley, 473 U.S. 667 (1985), the court's opinion in Napue antedated Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), where the "harmless error beyond a reasonable doubt" standard was established. The Court in Chapman said there was little, if any, difference between a rule formulated, as in Napue, in terms of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," and a rule "required the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed. 2d at 710. Synthesizing these decisions, the Court in Bagley stated that its "precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard." 473 U.S. at 679, n.9. 105 S.Ct. at 3382, n.9, 87 L.Ed. 2d at 492, n.9.

In elaborating on these general rules, it is established that the trial prosecutor had an affirmative obligation to correct the record when Detective Thomas, principle prosecution witness, falsely claimed that the Formal Statement of witness Hawkins (DA 12-15) was substantially the same, "..... This ain't right, man. This ain't right. Fruit did this shit," (IT 82-10 to 82-13) "as it was gave to him on the street," (IT 85-10 to 85-20) after reviewing the statement at headquarters (TPD), and that he arrived on the scene at "11:45pm," (IT 75-1 to 75-2) located witness Hawkins, 30 minutes after being on the scene (12:15am), (IT 88-8 to 88-10) was other than testified to.

The mere fact that the prosecutor failed to correct the record, when such testimony was known to be perjury, the defendant is entitled to a new trial on Due-Process grounds. *Napue v. Illinois*, 360 U.S. at 264, 79 S.Ct. at 1173 (1959); *Giugio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 311 L.Ed. 2d 104 (1972).

The defendant does not argue here, that Detective Thomas did not speak with witness Hawkins. Defendant does argue here, that Detective Thomas did not speak with witness Hawkins at

"12:15AM," 30 minutes after being on the scene (IT 88-8 to 88-10) and that the out-of-court statement, "..... Fruit did this shit," (IT 82-10 to 82-13) did not, also happen at "12:15AM," nor was the Formal Statement of Curtis Hawkins substantially the same, according to Detective Thomas' testimony. (IT 85-10 to 85-20) Furthermore, without any discovery of, documentations, or reports of, the alleged out-of-court statement, there is no way of proven the statements were even stated.

However, the Assistant Prosecutor has to be fully responsible for Detective Thomas' perjured testimony as a matter of law. State v. Nelson, 155 N.J. 487, 498-500, 715 A.2d 281 (1998), cert. den. 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed. 2d 788 (1999) [Lack of awareness by trial prosecutor does not relieve the State of its Brady obligation]. Further responsibility must fall on the trial prosecutor, because Detective Thomas, was an investigator with the authority to arrest and/or to direct the investigation, as well as, apart of the prosecutor's team. State v. Nelson, 330 N.J. Super. 206, at 213 (2000).

Defendant argues, the State must know what testimony the witness will offer and that it is unrealistic to believe that any representative would call on its own witness whose

anticipated testimony was unknown. Therefore, Detective Thomas' credibility as a witness was an important issue in this case, and any evidence affecting his testimony was relevant and should of been revealed at trial and prior to trial.

The fact that defendant and his counsel were aware of the falsity of State's witness' testimony, did not relieve the prosecutor of her affirmative duty to come forward with the truth. State v. Cahill, 125 N.J. Super. 492, at 499 (1973). The Assistant Prosecutor's persistence in remaining silent rather than bringing the error to the Court's attention, violated Due-Process. Mills v. Scully, 653 F. Supp. (S.D.N.Y. 1987); State v. Cahill, 125 N.J. Super. 492, 499 (1973).

Whether it was the prosecutor's failure to correct, what was known to be perjured testimony of Detective Thomas, or defendant's counsel/ inexcusable failure to correct the error himself, an unfair trial accrued, irrespective of who is to blame. However, the prosecutor should not be absolved for misleading the jury and the judge. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959); State v. Cahill, 125 N.J. Super. 492, 499 (1973).



There can be no denial, according to the record, that during the prosecutor's direct examination, (IT 75-1 to 75-2; IT 82-8 to 82-13; IT 85-10 to 85-20); (IT 234-10 to 234-14; IT 235-16 to 236-1) the witness testified falsely to highly material facts, and still further, there can be no denial that the prosecutor did not attempt to correct these matters before the jury. These actions or inactions was highly prejudicial to defendant, for it not only pertained directly to the credibility of the witnesses, but also to the highly material issues of whether, (1) Detective Thomas arrived at the scene at "11:45 PM," (2) Detective Thomas arrived and located witness Hawkins, 30 minutes after being on the scene (12:15 AM), who allegedly stated, "This ain't right, man. This ain't right Fruit did this shit," (3) Detective Thomas reviewed the formal statement, and found it to be substantially the same, as gave to him on the street, (4) Curtis Hawkins in fact told the police, "Fruit did it," and (5) Curtis Hawkins was actually still at the scene at (12:15) to give any statement. In other words, was defendant identified as the actual perpetrator of setting 340 Brunswick Avenue on fire, causing Mr. Neil's death, at the scene, at headquarters, or at all.

Detective Thomas, being duly sworn upon his oath to

serve, protect, and to up-hold the law, in the eyes or minds of the jurors, clearly possessed the capacity to have affected the judgment of the jurors' evaluation of his own credibility and possibly led the jurors' to credit his testimony as credible, considering the prosecutor's failure to correct.

Defendant's trial was materially affected, do to the prosecutor's failure to correct perjured testimony. Had the prosecutor honored her affirmative obligation to correct, what was known to be perjured testimony and informed the jurors that Detective Thomas' testimony of arriving on the scene at "11:45pm," (IT 75-1 to 75-2) and locating witness Hawkins, 30 minutes after being on the scene, (12:15am) (IT 88-8 to 88-10) was not as testified to, but that evidence she possess, in her files (dispatcher log's; DA 22-24), verify that Detective Thomas, along with two other Detectives; Sheehan and Pollard, (DA 11, 16) was dispatched to the scene at "10:40pm" (DA 22), and that Detective Thomas, CIB, was on the way at "10:47pm" (DA 23) to the scene, and between "10:47pm - 10:56pm" actually arrived on the scene (DA 23), some 49 minutes before his testimony of arrival, and some 79 minutes before his testimony of locating witness Hawkins,

(IT 75-1 to 75-2; IT 88-8 to 88-10) had the prosecutor also revealed that when Detective Thomas did arrive, earlier than he testified to, he and Officer Thomas Ertel were presently together, during the interview with Curtis Hawkins (DA 16) and that neither, Detective or Officer, reported the witness alleged out-of-court statement, "This ain't right, man. This ain't right. Fruit did this shit," (IT 82-10 to 82-13) as Detective Thomas testified to, the jurors, or at least a juror, could have considered some amount of disbelief towards his testimony or discredited it completely, and or the same of his testimony, the witness was shaking his head, his shoulders were slumped forward, and that he was upset (IT 82-10 to 82-13; IT 83-25 to 84-2). The jurors could have further, reasonably weighed Curtis Hawkins' testimony, he told them, (Police) Fruit did it, (IT 234-10 to 234-14) as possibly untruthful as well, testimony that in part corroborated Detective Thomas' testimony.

There can be no doubt that a jury's appraisal of a person's credibility can weigh heavily in its final verdict. The Supreme Court has long rejected the notion that credibility is unrelated to a fact-finder's final decision to acquit or convict. "The jury's estimate of the truthfulness and reliability

of a given witness may well be determinative of guilt or innocence . . . . . " Napue v. Illinois, 360 U.S. 264, 269 (1959).

Had the prosecutor, also, revealed to the jurors that Detective Thomas' testimony of finding witness Hawkins' Formal Statement, substantially the same, as allegedly gave to him on the street, (DA 12-15) (IT 85-10 to 85-20) was other than testified to, by informing the jurors the truth, in that she in fact reviewed the Formal Statement, because she possessed it in her own files, and the statement (DA 12-15) of witness Hawkins does not state, Fruit did it (IT 82-10 to 82-13; IT 234-10 to 234-14) or who did it. A juror or jurors could have entertained that an alleged statement, as crucial and important as one identifying a perpetrator, in which caused the death of Mr. Neil, is highly unlikely to be overlooked and easily noticeable in its absence, and if Detective Thomas had reviewed the statement, he would not have founded it substantially the same, as gave to him on the street, if made at all, and would not have testified to it, as it was the same.

Therefore, it is reasonable to assume a juror or jurors would have either discredited or considered some disbelief

in his testimony and possibly could have also judged Curtis Hawkins' testimony, as to allegedly, stating, "Fruit did it," (IT 234-10 to 234-14) as suspect.

MOREOVER, had the Assistant Prosecutor done her duty to correct, when perjured testimony appeared, and informed the jurors that Detective THOMAS' testimony of speaking with witness HAWKINS, 30 minutes after arriving (12:15AM) (IT 88-8 to 88-10) on the scene at "11:45pm," (IT 75-1 to 75-2) was at that time impossible, because the dispatcher's radio logs, (DA 22-24) clearly reveals, witness HAWKINS and another witness were being transported to Trenton Police Headquarters' between "11:57pm - 12:07am," (DA 24) a juror or jurors might have also, in comparison that Detective THOMAS was not at the scene at "11:45pm," but there between "10:47pm - 10:56pm" (DA 23), as testified to (IT 75-1 to 75-2), which his own Supplementary Report, reports arrival time at "10:17pm" (DA 10), did not locate witness HAWKINS, 30 minutes after being on the scene at "12:15am," as testified to (IT 88-8 to 88-10), and did not, nor could not, find witness HAWKINS' formal statement (DA 12-15) substantially the same, as allegedly gave to him on the street, as testified to, (IT 85-16 to 85-20)

possibly found it hard to believe that a statement, "Fruit did this shit," (1T 82-10 to 82-13) which implicated defendant as the person who set 340 Brunswick Avenue on fire, was ever stated or existed, as testified to.

Had the prosecutor full-filled her obligation, it is reasonable to assert that a juror or jurors could have found a reasonable doubt, that did not exist, do to the prosecutor's deliberate failure to correct, existed.

According to law, *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Agurs*, 427 U.S. 104, at 104, 96 S.Ct. 2397 (1976), this conviction can not stand and should not. The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor, here, should have corrected herself immediately and the impression she created when she misinformed the jurors during summation that, "Everything he (Curtis Hawkins) told them (Police) on the street, winded up in that statement," (3T 36-17 to 36-18) when in fact, everything Curtis Hawkins allegedly said on the streets, as he testified to, "I told them, Fruit did it (1T 234-10 to 234-14) did not wind up in his statement (DA 12-15), nor any



other investigating Detectives' or Officers' report. Here, the prosecutor should have also corrected the perjured testimonies given by Detective Thomas (IT 75-1 to 75-2; IT 88-2 to 88-10; IT 82-12 to 82-13; IT 85-10 to 85-20) and the impression it created. She should have by immediate statements of her own or by further appropriate examination of Detective Thomas, forthrightly exposed the lies, so that the court and jurors would have known the witness or witnesses has testified falsely. The prosecutor's failure here, to do so, constitutes' error so fundamental, so substantial, defendant's Due-Process and corresponding State-Constitutional rights were denied, a verdict of guilt should not be permitted to stand and the matter must be reversed.

### Conclusion

For the reasons stated in point one (1) and two (2), defendant; Mr. Fleming, conviction must be reversed and the matter remanded for a New Trial.

Sincerely  
Amy Fleming



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

SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY  
LAW DIVISION - CRIMINAL

FILE NO. 02-1807  
INDICTMENT NO. 03-02-0284I

THE STATE OF NEW JERSEY

v.

LARRY FLEMING,

DEFENDANT

STATED SESSION January 2003

TERM July 2002

COUNT I  
MURDER (FIRST DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did purposely or knowingly did cause the death of Ellis McNeil or purposely or knowingly did inflict serious bodily injury resulting in death, contrary to the provisions of N.J.S. 2C:11-3a(3), and against the peace of this State, the Government and dignity of the same.

1a

22

COUNT II - MURDER (FELONY MURDER)

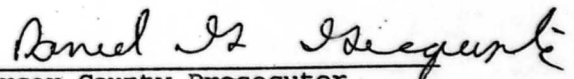
The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did cause the death of Ellis McNeil during the commission of, the attempt to commit, or flight after committing the crime of aggravated arson, contrary to the provisions of N.J.S. 2C:11-3a(3), and against the peace of this State, the Government and dignity of the same.

COUNT III- AGGRAVATED ARSON (SECOND DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths present that LARRY FLEMING on or about the 11th day of May, 2002, in the City of Trenton in the County aforesaid, and within the jurisdiction of this Court, did start a fire, thereby purposely or knowingly placing another in danger of death or bodily injury, contrary to the provisions of N.J.S. 2C:17-1a(1), and against the peace of this State, the Government and dignity of the same.

ENDORSED AS A TRUE BILL:

  
Foreperson

  
Mercer County Prosecutor

DATE: 2/25/03

pc

2.

UA

State of New Jersey

v.



New Jersey Superior Court  
Law Division – Criminal  
Mercer County

Defendant:  
(Specify Complete Name)

Larry Fleming

DATE OF BIRTH

1/16/74

SBI NUMBER

805357B

DATE OF ARREST

6/9/02

DATE INDICTMENT/  
ACCUSATION FILED

2/28/03

DATE OF  
ORIGINAL PLEA

4/28/03

ORIGINAL PLEA

Not Guilty

Guilty

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

\*Amended 3<sup>rd</sup> count to aggravated arson on May 18, 2004.

ADJUDICATION BY

GUILTY PLEA

DATE:

NON-JURY TRIAL

DATE:

JURY TRIAL

DATE: February 3-5, 2004

DISMISSED / ACQUITTED

DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
03-02-0286	1	Murder	1 <sup>st</sup>	2C:11-3a(3)
	2	Murder (Felony Murder)	1 <sup>st</sup>	2C:11-3a(3)
	3	Aggravated Arson	2 <sup>nd</sup>	2C:17-1a(1)

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE
1	Murder	1 <sup>st</sup>	2C:11-3a(3)
2	Murder (Felony Murder)	1 <sup>st</sup>	2C:11-3a(3)
3	Aggravated Arson	2 <sup>nd</sup>	2C:17-1a(1)

It is, therefore, on 4/2/04 ORDERED and ADJUDGED that the defendant is sentenced as follows:

A jury found the defendant guilty of counts 1,2 & 3.

Count 1- Committed to the Custody of the Commissioner Department of Corrections for a term of 75 years. 85% Rule Applies.

Count 2- To merge into count 1.

Count 3- Committed to the Custody of the Commissioner Department of Corrections for a term of 10 years. Minimum Parole Ineligibility of 8.5 years. Count 3 is to run consecutive to count 1.

- The defendant is hereby sentenced to community supervision for life.
  - The defendant is hereby ordered to serve a 5 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.

Defendant is to receive credit for time spent in custody (R. 3:21-8).

TOTAL NUMBER OF DAYS  
664

DATE: (From/To)

6/9/02-4/2/04

Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).

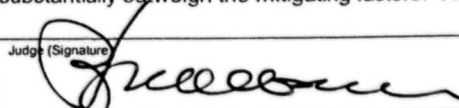
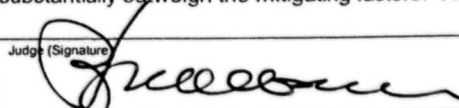
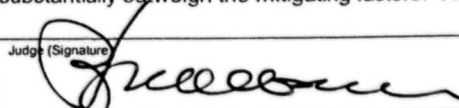
TOTAL NUMBER OF DAYS

DATE: (From/To)

DATE: (From/To)

Total Custodial Term Count 1- 75yrs. 85%  
Count 3- 10 years/MPI  
8.5 years      Institution CCDC      Total Probation Term \_\_\_\_\_

4a

<p style="text-align: center;"><b>Total Fine \$</b></p> <p style="text-align: center;"><b>Total RESTITUTION \$</b></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 checked="" type="checkbox"/> Assessment imposed on count(s) <u>1,3</u> is \$<u>100.00</u> each.</p> <p><b>Total VCCB Assessment \$200.00</b></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%;">_____ 1<sup>st</sup> Degree @ \$3000</td> <td style="width:50%;">_____ 4<sup>th</sup> Degree @ \$750</td> </tr> <tr> <td>_____ 2<sup>nd</sup> Degree @ \$2000</td> <td>_____ Disorderly Persons or Petty Disorderly Persons @ \$500</td> </tr> <tr> <td>_____ 3<sup>rd</sup> Degree @ \$1000</td> <td></td> </tr> </table> <p style="text-align: right;"><b>Total D.E.D.R. Penalty \$</b> _____</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.</p> <p style="text-align: right;"><b>Total Lab Fee \$</b> _____</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 _____.</p> <p>Driver's License Number _____</p> <p>(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)</p> <p>Defendant's Address _____ Sex _____ Date of Birth <u>1/16/74</u></p> <p>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> <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. 169). 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) 75x2=150.00</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. 30x2=60.00</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 debauch 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> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Name (Court Clerk or Person preparing this form)</td> <td style="width:33%;">Telephone Number</td> <td style="width:33%;">Name (Attorney for Defendant at Sentencing)</td> </tr> <tr> <td>L. Lucas</td> <td>609-571-4135</td> <td>Vernon Clash, Esq.</td> </tr> </table> <p><b>STATEMENT OF REASONS - Include all applicable aggravating and mitigating factors</b></p> <p>This defendant was found guilty of counts 1,2,3. The court found aggravating factors; (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner; (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable or exercising normal physical or mental power of resistance; (3) The risk that the defendant will commit another offense; (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted; (9) The need for deterring the defendant and others from violating the law; (11) The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices. The court found no mitigating factors. The court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. Reasons for sentence weighed and stated on the record.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:50%;">Judge (Name)</td> <td style="width:30%;">Judge (Signature)</td> <td style="width:20%;">Date</td> </tr> <tr> <td>Bill Mathesius, J.S.C.</td> <td></td> <td>5/18/04</td> </tr> </table>	_____ 1 <sup>st</sup> Degree @ \$3000	_____ 4 <sup>th</sup> Degree @ \$750	_____ 2 <sup>nd</sup> Degree @ \$2000	_____ Disorderly Persons or Petty Disorderly Persons @ \$500	_____ 3 <sup>rd</sup> Degree @ \$1000		Name (Court Clerk or Person preparing this form)	Telephone Number	Name (Attorney for Defendant at Sentencing)	L. Lucas	609-571-4135	Vernon Clash, Esq.	Judge (Name)	Judge (Signature)	Date	Bill Mathesius, J.S.C.		5/18/04
_____ 1 <sup>st</sup> Degree @ \$3000	_____ 4 <sup>th</sup> Degree @ \$750																		
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Judge (Name)	Judge (Signature)	Date																	
Bill Mathesius, J.S.C.		5/18/04																	

**FILED**  
**APPELLATE DIVISION**

**NOV 05 2004**

YVONNE SMITH SEGARS  
Public Defender  
Office of the Public Defender  
Appellate Section  
31 Clinton Street, 9th Floor  
P.O. Box 46003  
Newark, New Jersey 07101  
(973) 877-1200

*Jon Flynn*  
**CLERK**

A-1217-04TY

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
IND. NO(S) . 03-02-0286  
ACC. NO(S) .

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

::::::::::::::::::::::::::::::::::::

PLEASE TAKE NOTICE that the defendant, Larry Fleming, confined at New Jersey State Prison, Second & Cass Streets, P.O. Box 861, Trenton, New Jersey 08625-0861 appeals to this Court from the final judgment of conviction of murder and aggravated arson entered on April 2, 2004, as amended May 18, 2004 in the Superior Court, Law Division, Mercer County, in which a sentence of 75 years with an 85% parole disqualifier, consecutive to 10 years with an 8.5 year parole disqualifier; \$200.00 VCCB penalty; \$150.00 SNSF penalty; \$60.00 LEOTEF was imposed by the Honorable Bill Mathesius, J.S.C.

YVONNE SMITH SEGARS  
Public Defender  
Attorney for Defendant-Appellant

BY: *[Signature]*  
LOUIS G. GONNELLA  
Assistant Deputy Public Defender  
Intake Unit

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0474

STATE OF NEW JERSEY, Plaintiff,	)	SUPERIOR COURT OF NEW JERSEY
	)	MERCER COUNTY
	)	LAW DIVISION—CRIMINAL
v.	)	
	)	Ind. No. 03-02-0286
LARRY FLEMING	)	Pros. No. 02-1807
Defendant.	)	
	)	VERDICT SHEET

February 5, 2004

**Question One**

- (A) How do you find as to **COUNT ONE** of the indictment, charging defendant, Larry Fleming, with Murder in that he did purposely or knowingly cause the death of Ellis McNeil or purposely or knowingly did inflict serious bodily injury resulting in death ?

NOT GUILTY \_\_\_\_\_

GUILTY  \*

*\* If guilty proceed to Question Two. Do not answer Question One (B).*

- (B) If not guilty under Question One (A), How do you find as to the lesser include offense of Aggravated Manslaughter in that defendant, Larry Fleming, did recklessly cause the death of Ellis McNeil under circumstances manifesting extreme indifference to human life?

NOT GUILTY \_\_\_\_\_

GUILTY \_\_\_\_\_

DA 7





**Question Two**

- (A) How do you find as to **COUNT THREE** of the indictment, charging defendant, Larry Fleming, with Aggravated Arson in that he did, start a fire, thereby purposely and knowingly placing another in danger of death or bodily injury?

NOT GUILTY \_\_\_\_\_ GUILTY  \*

*\* If guilty proceed to Question Three. Do not answer Question Two (B).*

- (B) If not guilty under Question Two (A), How do you find as to the lesser include offense of Arson in that defendant Larry Fleming did purposely start a fire, whether on his own property or another's, thereby recklessly placing another person in danger of death or bodily injury; or thereby recklessly placing a building or structure of another in danger of damage or destruction?

NOT GUILTY \_\_\_\_\_ \* GUILTY \_\_\_\_\_

*\*If not guilty notify Sheriff's Officer you have reached a verdict. Refrain from answering Question Three.*

**Question Three**

How do you find as to **COUNT TWO** of the indictment, charging defendant, Larry Fleming, with Felony Murder in that he did, cause the death of Ellis McNeil during the commission of, the attempt to commit, or flight after committing the crime of Aggravated Arson or the lesser included offense of Arson?

NOT GUILTY \_\_\_\_\_ GUILTY

DA 8



JAMES E. MCGREEVEY  
Governor

State of New Jersey  
Office of the Public Defender

YVONNE SMITH SEGARS  
Public Defender

**Mercer Region**  
Vernon Clash, Deputy Public Defender  
210 South Broad Street, 2<sup>nd</sup> Floor  
Trenton, New Jersey 08608  
609-292-4081 • Fax 609-777-0892  
E-Mail: TheDefenders@OPD.STATE.NJ.US

Daniel G. Giaquinto, Esquire  
Mercer County Prosecutor  
Mercer County Courthouse  
Trenton, New Jersey 08650

Re: State v. Larry Fleming  
Indictment No. 03-02-0286-I  
Pros. File No. 02-1807-01

Written Demand for Discovery

Dear Prosecutor Giaquinto:

The Office of the Public Defender, Mercer Trial Region, Counsel for Defendant in the above captioned case, hereby demands that counsel be provided with a copy of each item designated by R. 3:13(c)(1) through (9) and relevant case law.

Failure to comply with the above demand in a timely manner will result in the defendant making application to the Court for appropriate relief.

Very truly yours,

VERNON W. CLASH  
Deputy Public Defender

I hereby acknowledge service of this  
request for discovery and inspection  
this      day of                      , 2003.

\_\_\_\_\_  
Assistant Mercer County Prosecutor

DA 9

TRENTON POLICE DEPARTMENT

SUPPLEMENTARY REPORT

Case Number 131-02046942		Source Radio Signal PU-51		Time Assigned 2215		Time Arrived 2217		UCR Code	
Crime/Offense/Incident Homicide			Date Of Crime 5-11-02		Victim Trade Name Arrestee  Ellis McNeil B/m 7-1-1954				
New Crime If Changed			NJS		Status Incident  Cl. Arrest			Status Case  Cl. Arrest	
			Additional Stolen Property Value			Additional Recovered Property Value			
Additional Value Stolen Property	Currency	Jewelry	Furs	Clothing		Auto		Misc.	
LIST NAME ONLY OF PREVIOUS ACCUSED - COMPLETE INFORMATION ON NEW ACCUSED - INCLUDE ADDITIONAL PERPETRATORS - SUSPECTS - RECORD ALL DEVELOPMENTS SINCE LAST REPORT - EXPLAIN ANY CRIME CHANGE - LIST ADDITIONAL INTERVIEWS OF VICTIMS - PERSONS CONTACTED - WITNESSES - EVIDENCE - TECHNICAL SERVICES - STOLEN PROPERTY - RECOVERED PROPERTY - COURT ACTION									

Charge #2: Criminal Attempt Homicide

Charge #3: Aggravated Arson

Arrestee: Larry Fleming, AKA "Fruit", B/m, 1-16-74, 108 East Ingham Avenue, Trenton, NJ

Witness: Curtis Hawkins, B/m, 10-1-66, 214 Brunswick Avenue, Trenton, NJ

Witness: Nicole Blackshear, B/f, 12-29-77, 370 North Clinton Avenue, Trenton, NJ

Witness: Carmen Jones, B/f, 3-1958, 449 North Montgomery St., Trenton, NJ

Witness: Ed Warren, B/m, 9-21-48, 50 Escher St., Trenton, NJ

Witness: Crystal White: B/f, 10-12-69, 218 Brunswick Avenue, Trenton, NJ

Witness: Gordeed Singh, O/m, 406 Brunswick Avenue, Trenton, NJ

Fire Personnel: Battalion Chief Graham Smith Battalion Five

TEMS: Alexis Duriacher, 11-20-1978, Trenton Emergency Medical Service

Mercer County Prosecutors Office: Detective Lloyd Mathis (Arson Investigator)

Detective Dean McCleese (Homicide Unit)

Medical Examiner: Harvey Geibel

Officers: Officer Ertel, Officer Ruiz, Officer Leopardi, Sgt. Smickley, Lt. Tramontana,

Detective Sheehan, Detective Pollard, Detective Thomas, Detective McMillan

Detective Sgt. Johnson, Detective Sgt. Gonzalez, Detective Lt. Orsini

Name Detective Timothy Thomas		Badge Number 534/4666		Page 1		Of 2		Date Of Report 5-31-02	
Signature				Time Completed 1500		GA Number			

Approved By *[Signature]* Copy For \_\_\_\_\_

93

Case Number: 131-02046942

On Saturday (5-11-02) at 2345 hours, we (Detective Pollard, Detective Sheehan, & Detective Thomas) were detailed to 340 Brunswick Avenue on a report of a fire. We were advised by the dispatcher, there was a fatality within the structure.

We went to 340 Brunswick Avenue and arrived at the scene. Upon our arrival we met with Sgt. Smickley and Ptl. Ertel and they advised us of their findings to this point. Details of their investigation are carried in the attached PD -100, which is self explanatory.

I spoke to Alexis Durlacher from TEMS, and she advised me, Ed Warren told her he had jumped from the building prior to the arrival of the Trenton Fire Department. I went and talked with Ed Warren and he told me he heard a person screaming inside of the building and attempted to enter the structure to help the person..

Upon arrival, I spoke to Battalion Chief Graham, who informed me a body was found on the second floor of the building, outside of the middle bedroom. Chief Graham further advised me, the fire appeared to have been intentionally set, but the fire marshal was still attempting to determine the origin and cause of the fire.

I called Detective Sgt. Johnson and advised him of the incident. Detective Sgt. Johnson responded to the scene.

At the scene, I was approached by Nicole Blackshear. Nicole Blackshear related to me the following details concerning the incident. She believed "Peanut" was in the house, at the time of the fire because he lived in the abandoned house. Blackshear told me, she saw Crystal White carrying a small red gas can, while she was walking on Mid Rose St. towards Brunswick Avenue prior to the fire. Blackshear told me, "Curt" knew who started the fire, and she described Curt to me.

I searched the area for Curt, and located him standing at the corner of Mid Rose St. and Brunswick Avenue. After interviewing Curtis Hawkins, I determined he was a witness to the incident. Curtis Hawkins was transported to Hq's by patrol officers.

Blackshear was transported to Hq's by patrol officers.

Hawkins gave Detective Sheehan a formal statement detailing the incident in it entirety. (See Hawkins Statement For Details).

Name Detective Timothy Thomas	Badge Number	Page 2	Of 2	Date Of Report 5-31-02
Signature PDFORM 105				

DA 11

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Report  
02

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TRENTON N.J., POLICE DEPARTMENT  
CRIMINAL INVESTIGATION BUREAU  
PROPERTY CRIMES UNIT

CASE NUMBER : 131-02-046942  
OFFENSE(S) : Homicide  
STATEMENT DATE : Sunday, May 12, 2002  
STATEMENT TIME : 0130 hours [ 1:30 A.M. ]  
STATEMENT LOCATION : Trenton Police Headquarters  
Criminal Investigation Bureau  
225 North Clinton Avenue  
Trenton, New Jersey 08609  
STATEMENT OF : Curtis Hawkins BM/10-1-66  
214 Brunswick Avenue  
Trenton, New Jersey 08650  
RECORDED BY : Detective Robert Sheehan  
Property Crimes Unit  
WITNESSED BY : Detective Louis Pollard  
Robbery Unit

Q. Mr. Hawkins, the Criminal Investigation Bureau of the Trenton Police Department is conducting an investigation of a homicide that took place on Saturday, May 11, 2002 at approximately 2215 hours [ 10:15 P.M. ] at 340 Brunswick Avenue. What can you tell us in regards to this matter that we are now investigating?

A. I was on Brunswick Avenue walking towards Stokes bar when I was approached by Larry Fleming. He had a gas can with him and he then gave me two dollars and asked me to go to the gas station and get some gas for a girl that needed it for her car.

Q. Mr. Hawkins, what happened next?

A. I then went to the Roadrunner gas station at the corner of Brunswick Avenue and Southard Street and I bought some gas for a dollar and fifty cents and I kept fifty cents for myself. I

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Report

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Sunday, May 12, 2002

PAGE: 2

then took the gas and went back up Brunswick Avenue and as I got near the alley by 340 Brunswick Avenue Larry told me to put the gas can down there. Larry then crossed over the street from the direction of Al's auto body and gave me some coke. Larry then took the can of gas and walked down the alley and went into 340 Brunswick Avenue. He got into the place by going through the door at the rear where you have to bend over to get into the house.

Q. Mr. Hawkins, what happened next?

A. I then walked away and went to Stokes bar and went inside to play the poker game. I was in the bar and a short time later I heard that there was a fire outside. I then left the bar and went down the street and saw that 340 Brunswick Avenue was on fire. I then stayed in the area until a detective talked to me and then I came to the police station to give my statement.

Q. Mr. Hawkins, who is Larry Fleming and how long have you known him?

A. I just know him from the street and I have known him for about two years. His street name is fruit.

Q. Mr. Hawkins, I am showing you a picture and asking you if you recognize the person depicted in it?

A. That is Larry Fleming. [ witness identified, dated and signed a photo of Larry Fleming BM/1-16-74 ]

Q. Mr. Hawkins, describe the gas can that Larry Fleming had in his possession?

A. It was a red plastic two-gallon gas can with a yellow funnel.

Q. Mr. Hawkins, what did you do with the cocaine that Larry Fleming gave to you?

A. I gave it away to a guy that I know as DC.

Q. Mr. Hawkins, what takes place at 340 Brunswick Avenue?

A. It is an abandoned house where people smoke crack and use drugs.

Q. Mr. Hawkins, do you know if anyone stays at 340 Brunswick Avenue?

A. Yes, two people stay there and they are named peanuts and Carmen.

Q. Mr. Hawkins, who is peanuts?

A. I have known peanuts from the street for about four years, but I do not know his real name. CH

DA 13

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CH  
9

Continued Statement of Curtis Hawkins Case# 131-02-046942  
Sunday, May 12, 2002  
PAGE: 3

- Q. Mr. Hawkins, I am showing you a city of Trenton welfare identification card and asking you if you recognize the person depicted in it?
- A. Yes, that is peanuts. [ witness identified a photo of Ellis McNeil BM/7-1-54 ]
- Q. Mr. Hawkins, was peanuts a drug user?
- A. Yes.
- Q. Mr. Hawkins, who is Carmen?
- A. I have known her from the street for about four years but I do not know her real name.
- Q. Mr. Hawkins, can you describe Carmen?
- 
- A. She is a short black girl, dark complexion with short hair. Tonight she was wearing a dark colored skirt with light colored flowers on it and she is in her forties.
- Q. Mr. Hawkins, is Carmen a drug user?
- A. Yes she is.
- Q. Mr. Hawkins, I am showing you a photo and asking you if you can identify the person depicted in it?
- A. Yes that is Carmen. [ witness identified, dated and signed a photo of Carmen Jones BF/3/58 ]
- Q. Mr. Hawkins, prior to 2200 hours [ 10:00 P.M. ] had you observed Larry Fleming anywhere else or in the company of another party?
- 
- A. Yes at around 9:30 P.M. I was in the 200 block of Brunswick Avenue and I saw Larry Fleming with Crystal White.
- Q. Mr. Hawkins, who is Crystal White?
- A. I have known Crystal White from the street for about three years.
- Q. Mr. Hawkins, I am showing you a photo and asking you if you can identify the person depicted in it?
- A. Yes, that is Crystal White. [ witness identified, dated and signed a photo of Crystal White BF/10-12-69 ] CH

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CH

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Sunday, May 12, 2002

PAGE: 4

Q. Mr. Hawkins, when you saw Larry Fleming and Crystal White together did you notice anything?

A. Crystal had a gas can and it was just like the one that Larry had brought to me later when he wanted me to go get the gas. I then left the 200 block of Brunswick Avenue and I did not see them together again for the rest of the night. I did see Crystal after the fire had started in the area of Stokes bar, but then she walked away towards Sanford Street.

Q. Mr. Hawkins, why do you think that Larry Fleming might have started the fire that resulted in the death of Ellis McNeil at 340 Brunswick Avenue?

A. The word on the street is that Larry Fleming was mad because the people at 340 Brunswick Avenue would not buy drugs from him.

Q. Mr. Hawkins, how come the people at 340 Brunswick Avenue would not buy drugs from Larry Fleming?

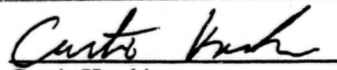
A. Because he cheated them on weight and he does not give them their money's worth.

Q. Mr. Hawkins, can you read and write the English language?


A. Yes.

Q. Mr. Hawkins, after you have read this statement over, and if it is exactly as you have told us, will you sign it, in your own handwriting, acknowledging it to be a true, free and voluntary statement?

A. Yes. *CH*

  
Curtis Hawkins

  
Det. Louis Pollard

  
Det. R. Sheehan

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TRENTON POLICE DEPARTMENT

SUPPLEMENTARY REPORT

Case Number <b>131-02-046942</b>		Source Radio Signal Pu-51	Time Assigned 2215	Time Arrived 2235	UCR Code
Crime/Offense/Incident Homicide		Date Of Crime 5-11-02	Victim Trade Name Arrestee Ellis McNeil BM/7-1-54 Lka 161 Passaic St., Trenton, NJ		
New Crime If Changed		NJS	Status Incident  active	Status Case	
			Additional Stolen Property Value	Additional Recovered Property Value	
Additional Value Stolen Property	Currency	Jewelry	Furs	Clothing	Auto  Misc.
LIST NAME ONLY OF PREVIOUS ACCUSED - COMPLETE INFORMATION ON NEW ACCUSED - INCLUDE ADDITIONAL PERPETRATORS - SUSPECTS - RECORD ALL DEVELOPMENTS SINCE LAST REPORT - EXPLAIN ANY CRIME CHANGE - LIST ADDITIONAL INTERVIEWS OF VICTIMS - PERSONS CONTACTED - WITNESSES - EVIDENCE - TECHNICAL SERVICES - STOLEN PROPERTY - RECOVERED PROPERTY - COURT ACTION					

Victim- see above

Suspect- Larry Fleming BM/1-16-74- 108 East Ingham Avenue, Trenton, New Jersey 08650

Witness- Carmen Jones BF/3-58- 449 North Montgomery Street, Trenton, New Jersey 08650

Witness- Crystal White BF/10-12-69- 218 Brunswick Avenue, Trenton, New Jersey 08650

Witness- Curtis Hawkins BM/10-1-66- 214 Brunswick Avenue, Trenton, New Jersey 08650

Witness- Ed Warren BM/9-21-48- 50 Escher Street, Trenton, New Jersey 08650

Witness- Nicole Blackshear BF/12-29-77- 370 North Clinton Avenue, Trenton, New Jersey 08650

Witness- Gordeed Singh OM/50- 406 Brunswick Avenue, Trenton, New Jersey 08650 989-9044

Witness- Thomas McNeil BM/6-12-52- 73 Race Street, Trenton, New Jersey 08650 278-4157

Officers- Det. Lt. Orsini, Det. Sgt. Johnson, Det. Sgt. Gonzalez, Dets. McMillan, Cadlett, Pollard, Thomas, Lt. Tramontana, Sgt. Smickley, Police Officer Ertel- HQ/TPD

Other Persons- Dets. McCleese and Mathis- M.C.P.O.

Other Person- Inv. Harvey Geibel- M.C.M.E.

At time and date listed the undersigned, along with Dets. Thomas and Pollard, responded to 340 Brunswick Avenue per the request of patrol units under the supervision of Sergeant Smickley. This was in regards to a fire at that location and the subsequent discovery of a fatality within the structure. Upon our arrival we met with Sergeant Smickley and Ptl. Ertel [ investigating uniformed officer ] and they advised us of their findings to this point. Details of their investigation are carried in the attached PD-100, which is self-explanatory. Detective

Name Detective Robert Sheehan <i>Det. R. Sheehan</i> Signature	Badge Number/Det 1675/414	Page 1	Of 3	Date Of Report 5-12-02
		Time Completed 2400	GA Number	

Approved By *[Signature]* Extra Copy For \_\_\_\_\_

DA 16

101

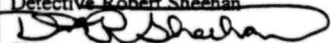
Case Number: 131-02-046942

Cadlett [ ID bureau ] had already been summoned by the patrol units and he arrived on the scene to photograph it as well as to collect any possible evidence. Having confirmed the presence of a fatality I then had the radio room contact the M.C.M.E. and subsequently Inv. Harvey Geibel arrived on the scene to remove the remains of the victim upon completion of the investigation. Det. Lt. Orsini and Det. Sgt. Johnson were also contacted and arrived on the scene to assume command of the investigation. While at the scene of this offense the undersigned detected an odor of gasoline coming from the first floor area of 340 Brunswick Avenue and I also observed this location to be an abandoned property that was apparently frequented by homeless persons and drug abusers.

Detective Cadlett then handed over to me a black wallet that had been recovered from the person of the victim. Identification cards in this wallet showed the victim to have been Ellis McNeil BM/7-1-54 and prior to the body being removed, I viewed the remains of the victim and his face matched with the pictures on the ID cards. The wallet and ID cards were to be receipted on a PD-102 by this detective for use as evidence, however other old pers. papers that had been in the wallet had been destroyed by the water and fire and they were discarded.

Three witnesses were located and interviewed [ by Det. Thomas ] at the scene and were identified as Ed Warren BM/9-21-48 , Nicole Blackshear BF/12-29-77 and Curtis Hawkins BM/10-1-66. Per the orders of Det. Lt. Orsini and Det. Sgt. Johnson Mr. Hawkins and Ms. Blackshear were then conveyed to headquarters where the investigation was to be continued. Mr. Warren was unable to come to headquarters because he had sustained an injury to his right leg or foot [ possible fracture ] and he was conveyed to the hospital by TEMS for treatment. Detectives Thomas, Pollard and I [ Sheehan ] then proceeded into headquarters to continue our investigation but while enroute we stopped at the Roadrunner gas station at the c/o Brunswick Avenue and Southard Street. There we met with the owner, who was identified as Gordeed Singh OM/50 and he told me that earlier in the evening he had sold \$1.25 worth of gas to a black male that had been wearing a yellow shirt and had been in possession of a gas can. This confirmed some information that was had received from one of the witnesses [ Hawkins ] at the scene.

- Upon our arrival at headquarters we met with Det. Sgt. Gonzalez and advised him of our investigation to this point. Detective Thomas then interviewed Ms. Blackshear and Detective McMillan then arrived and was to be the lead homicide investigator. While we were at headquarters the brother of the victim, who was identified as Thomas McNeil BM/6-12-52 of 73 Race Street [ 278-4157 ] arrived and was advised of the incident. He also

Name Detective Robert Sheehan 	Badge Number/Det 1675/414	Page 2	Of 3	Date Of Report 5-12-02
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PDFORM 105

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CONTINUATION PAGE

Case Number: 131-02-046942

viewed the picture on one of the identity cards, that had been recovered from the body, and stated that the person depicted in it was his brother, who he identified as Ellis McNeil BM/7-1-54.

Per the orders of my supervisors I then recorded a formal statement from Curtis Hawkins in regards to this matter and that statement is attached and is self-explanatory. This statement commenced at 0130 hours and was completed at approximately 0330 hours. During the recording of this statement the witness signed a number of photos for identification purposes but in doing so used the false name of Curt Johnson, which was the name he had supplied to us from the onset of the investigation. However his true identity was then established and verified as being Curtis Hawkins BM/10-1-66 of 214 Brunswick Avenue, Trenton, New Jersey. The statement was then corrected to show the true identity of the witness. Upon completion of the statement, Dets. Pollard and McCleese conveyed the witness home, and I then receipted the victim's wallet and the photos used for ID purposes [ during the recording of the statement ] on PD-102s. This concluded my involvement in the matter, see other attached reporting for further details.

Name Detective Robert Sheehan	Badge NumberDet 1675/414	Page 3	Of 3	Date Of Report 5-12-02
Signature				
PDFORM 105				

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TRENTON POLICE DEPARTMENT

INVESTIGATION REPORT

1 CASE NO. 19102046942		2 SOURCE-RADIO SIGNAL PU: 22		3 TIME ASSIGNED 2217		4 TIME ARRIVED 2218		5 UCR CODE	
6 NAME OF OFFENSE/INCIDENT HOMICIDE				7 I.D. NO. 2C: 11-2		8 OCCUPATION/TRADE NAME/PROFESSION ELLIS MCNEIL B/A		9 RACE	
10 DATE AND TIME BETWEEN AT X		11 HOUR 2200		14 D WK 6		15 MTH 5		16 DAY 11	
17 YEAR 02		18 HOME ADDRESS-CITY-STATE HOMELESS				19 PHONE 7/1/54		11 DOB	
21 LOCATION/PLACE OF OCCURRENCE 340 BRUNSWICK AVE. TRENTON				20 EMPLOYER SCHOOL		23 BUSINESS PHONE			
22 ONE SECTOR 1B3		23 STREET CRIME YES		24 CODE		25 PERSON REPORTING CRIME P.O. T. ERTEL		26 DATE AND TIME	
27 TYPE OF PREMISES RESIDENCE		28 CODE 80		29 WEAPONS/TOOLS OTHER ACTION		30 CODE 56		31 ADDRESS 225 N. GUYTON AVE. TRENTON	
32 PHONE-SUBPHONE ETC. 987-3909		33 HOW ATTACKED SET SUSPECT ALLEGEDLY SET FIRE TO ABANDONED BUILDING OCCUPIED BY LISTED VICTIM							
34 VEHICLE 1A		35 YEAR		36 MAKE		37 BODY TYPE		38 COLOR	
39 REG NUMBER & STATE		40 SERIAL NUMBER OR IDENTIFICATION							
41 CURRENCY		42 JEWELRY		43 FURS		44 CLOTHING		45 AUTO	
46 MISC		47 TOTAL VALUE STOLEN		48 TOTAL VALUE RECOVERED		49 TELETYPE ALARM		50 WEATHER CLEAR	
51 STATUS INCIDENT X/CLEAR		52 STATUS CASE							

IF OTHER PERSONS INVOLVED, IDENTIFY ADDITIONAL VICTIMS AND CONDITIONS, DESCRIBE PERPETRATORS OR SUSPECTS • ACTION TAKEN INCLUDE FINDINGS AND OBSERVATIONS OF INVESTIGATOR • PHYSICAL EVIDENCE FOUND • CRIME TO WHICH • DISPOSITION, PRESENT LOCATION AND TECHNICAL SERVICES PERFORMED • INTERVIEW OF VICTIMS • WITNESSES • PERSONS CONTACTED • ACCUSED SUSPECTS • LIST • DESCRIBE STOLEN PROPERTY • VALUE • CURT ACTION • ATTACH STATEMENTS

SUSPECT: LARRY FLEMING; B/M; 1/16/44; L.K.A. 108 E. INGHAM AVE. TRENTON  
 WITNESS #1: CURT JOHNSON; B/M; 10/1/1946; 213 BRUNSWICK AVE. TRENTON  
 WITNESS #2: NICOLE S. BLACKSHEAR; B/F; 12/29/77; 144 G8-7722 L.K.A. 27 GRANT AVE. TRENTON  
 WITNESS #3: EDWIN WARREN; B/M; 9/21/48; 50 ESCHER ST. TRENTON  
 I.F.D.: BATTALION CHIEF SMITH; ENGINE 5  
 EMS NORTH: DURLACHER; BLEDSOE  
 MEDICAL INVESTIGATOR: HARVEY GIEDEL  
 OFFICERS: ERTEL, RUIZ (NS3); LEOPARDI (NORTH K-9); SGT. SMICKLEY, LT. TRAMANTONA;  
 T. THOMAS; L. POLLARD; R. SHEEHAN (C.I.B.); A. CADLETT (I.D.); SGT. JOHNSON  
 (ARSON)

57A LIST OTHER RELATED CASES

57B OTHER REPORTS SUBMITTED:  SUPPLEMENTARY  PROPERTY  VEHICLE  ARREST  OTHER

NAME P.O. T. ERTEL	58A BADGE NUMBER 313	58B 592	59 PAGE 1 OF 3 PAGES	60 DATE OF REPORT 5/1/02
SIGNATURE P.O. T. ERTEL	4941	5554	61 TIME COMPLETED 0900	62 S.A. NO.

APPROVED BY: [Signature] DATE: [Signature] COPY FOR: C.I.B. 13



RENTON POLICE DEPARTMENT

CONTINUATION PAGE

USE NO. 131 02046TH 2

ON 5/11/02 AT 2217 HRS. WE RESPONDED TO 340 BRUNSWICK AVE. TO ASSIST THE RENTON FIRE DEPARTMENT, WHO HAD A WORKING HOUSE FIRE AT THAT LOCATION, WITH CROWD AND TRAFFIC CONTROL. WHILE AT THAT LOCATION WE WERE INFORMED BY BATTALION CHIEF SMITH THAT THEY HAD LOCATED A BODY ON THE SECOND FLOOR LANDING INSIDE OF THE RESIDENCE.

SGT. SMICKLEY WAS ADVISED OF THE INCIDENT AND RESPONDED TO OUR LOCATION AND I TURN NOTIFIED C.I.R. AND I.D. UNIT AND SAME RESPONDED.

I WAS THEN APPROACHED BY ALEXIS DURLACHER (TEMS NORTH) WHO POINTED OUT A B/M AT THAT LOCATION AND STATED TO ME THAT HE TOLD HER THAT HE WAS INSIDE OF THE HOUSE AND JUMPED OUT WHEN THE FIRE STARTED BUT THEN TRIED TO GET BACK IN WHEN HE REALIZED THAT "PERNUT" (LISTED VICTIM) WAS STILL INSIDE. I THEN SPOKE WITH THE B/M WHO WAS POINTED OUT TO ME. HE IDENTIFIED HIMSELF AS EDWIN WARREN 9/2/48 OF 50 ESCHER ST. E. WARREN STATED THAT HE WAS WALKING BY 340 BRUNSWICK AVE. WHEN THE FIRE STARTED, HEARD SOMEONE CREAMING AND TRIED TO GET INSIDE TO HELP. E. WARREN DENIED BEING INSIDE OF 340 BRUNSWICK AVE.

G. DURLACHER ALSO DIRECTED ME TO A B/F WHO WAS STANDING ACROSS THE STREET FROM 340 BRUNSWICK AVE. AND STATED THAT SHE WAS IN THE AREA. I THEN SPOKE TO THE B/F WHO IDENTIFIED HERSELF AS NICOLE S. BLACKSHEAR 12/29/77 OF 27 GRANT AVE. N. BLACKSHEAR STATED THAT HE WAS NEAR STOKES BAR (ROSE ST. AND BRUNSWICK AVE.) WHEN SHE WAS TOLD THAT THERE WAS A FIRE AT 340 BRUNSWICK AVE. SHE STATED THAT SHE KNEW THAT VICTIM MCNEEL AND A B/F THAT SHE IDENTIFIED AS CARMEN JONES WERE BOTH INSIDE OF THAT ABANDONED RESIDENCE AT THE TIME OF THE FIRE. AN ALERT WAS BROADCAST, VIA RADIO, FOR CARMEN JONES WHO WAS WANTED FOR QUESTIONING REGRARDS TO THE FIRE. N. BLACKSHEAR ALSO STATED THAT A B/M NAMED "CURT" WHO'S MOTHER LIVED AT 214 BRUNSWICK AVE. KNEW MORE ABOUT THE INCIDENT.

DET. T. THOMAS AND I PROCEEDED TO 214 BRUNSWICK AVE. TO SPEAK WITH "CURT" WHEN WE OBSERVED A B/M FITTING THE DESCRIPTION PROVIDED BY N. BLACKSHEAR, (SHORT B/M WEARING A YELLOW "SHIRT"), STANDING AT THE 50 MIDDLE ROSE ST. AND BRUNSWICK AVE. WE APPROACHED THIS INDIVIDUAL AND HE IDENTIFIED HIMSELF AS CURT JOHNSON 10/1/66. CURT STATED THAT A B/F NAMED "CRYSTAL" HAD RUN OUT OF GAS AND ASKED LARRY FLEMING TO TAKE A GAS CAN TO THE ROADRUNNER GAS STATION

NAME P.O. T. ERFEL

BADGE NUMBER

PAGE

DATE OF REPORT

SIGNATURE P.O. 100

313/9971

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5/11/02

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13102040-2

BRUNSWICK AVE + SOUTHARD ST.) TO GET HER GAS C. JOHNSON THEN STATED THAT L. FLEMING APPROACHED HIM NEAR STOKES BAR AND GAVE HIM THE GAS CAN, TWO (2) DOLLARS IN CASH AND SOME COCAINE IF HE WOULD TAKE THE GAS CAN AND GET TWO (2) DOLLARS WORTH OF GAS.

C. JOHNSON AGREED TO GET THE GAS AND TOOK THE TWO (2) DOLLARS AND THE COCAINE. JOHNSON STATED THAT HE DID NOT WANT THE COCAINE AND GAVE IT TO A PARTY NAMED "DC" AND THEN AGREED TO THE ROADRUNNER FOR GAS. ONCE AT THE ROADRUNNER C. JOHNSON GOT \$1.50 WORTH OF GAS IN THE PLASTIC GAS CAN AND KEPT .50 CENTS FOR HIMSELF.

C. JOHNSON THEN BEGAN WALKING WITH THE GAS CAN FROM THE ROADRUNNER BACK TOWARD 1/2 ST. AND BRUNSWICK AVE. WHEN C. JOHNSON GOT TO THE 1/2 340 BRUNSWICK AVE. L. FLEMING WALKED TO HIM FROM ACROSS THE STREET. C. JOHNSON STOPPED AND L. FLEMING APPROACHED HIM AND TOLD HIM TO PUT THE GAS CAN DOWN. C. JOHNSON PUT THE CAN DOWN AND L. FLEMING PICKED UP THE CAN AND BEGAN WALKING TO THE 1/2 340 BRUNSWICK AVE. C. JOHNSON ASKED L. FLEMING WHAT HE WAS DOING WITH THE CAN AND L. FLEMING SAID HE WAS TAKING IT BACK TO "CRYSTAL". JOHNSON ASKED WHY HE WAS GOING THAT WAY AND L. FLEMING IGNORED HIM AND KEPT WALKING TOWARD THE 1/2 340 BRUNSWICK AVE. C. JOHNSON THEN WENT TO STOKES BAR AND WAS INSIDE THE BAR WHEN HE HEARD THE FIRE DEPARTMENT, CAME OUTSIDE AND SAW THAT 340 BRUNSWICK WAS ON FIRE.

AN ALERT FOR SUSPECT L. FLEMING WAS BROADCAST VIA RADIO.

I.D. DETECTIVE A. CADLETT RESPONDED TO THE SCENE AND PROCESSED SAME.

HARVEY GIEBEL, MEDICAL INVESTIGATOR, OF THE MERCER COUNTY MEDICAL EXAMINERS OFFICE RESPONDED TO THE SCENE AND TOOK CUSTODY OF THE BODY.

THOMAS MCNEIL, BROTHER OF THE VICTIM, APPROACHED ME AT THE SCENE AND ASKED IF HIS OTHER WAS INVOLVED. T. MCNEIL WAS DIRECTED TO H.Q. TO SPEAK WITH DETECTIVES IN REGARDS TO VICTIM MCNEIL.

P.O. R. MEYER RESPONDED TO THE SCENE TO GUARD SAME (SEE SUPPLEMENTAL REPORT).

DET. T. THOMAS AND DET. R. SHEENAN WILL BE CONTINUING THE INVESTIGATION.

NAME P.O. T. ERTEL	BADGE NUMBER 313/4941	PAGE 3 of 3 DA 21	DATE OF REPORT 5/11/02 15
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COMMENTS FOR INCIDENT#....02-001539 340 BRUNSWICK AV

22:40:01 DET'S AND WSGT ARE ENROUTE  
 22:46:08 FIRE PLACE UNDER CONTROL BY NB  
 22:50:59 \*\*LOCATION MODIFIED TO: 340 BRUNSWICK AV  
 22:51:17 PER NB FIRE ORIGINATED IN 340 BRUNSWICK EXTENSION  
 INTO 342, 344 IS ATTACHED BUT UNINVOLVED  
 23:14:16 R1-SR SUPV 7 OK  
 23:17:25 REQUESTING SOMEONE FROM PROSECUTOR'S OFFICE TO  
 RESPOND  
 23:23:28 COUNTY DET MATHIS NOTIFIED,RESPONDING  
 23:35:34 POLICE SGT ON SCENE,OVERHAULING,WILL BE AVAIL SHORTLY  
 23:38:05 PROPERTY OWNED BY AL'S AUTO BODY 45 WELLER AVE  
 HAMILTON TWP  
 01:26:53 E5-LEAVING FIRE GROUNDS NOT AVAILABLE.  
 02:13:22 E5-SR SUPV 7 OK

Unviewed Options...U,R,I  
 INQ OK, Page Down TO CONTINUE or F4 TO RETURN

FII..( )

DA22

202

IIC COMMENTS FOR CALL#...02-046942

22:15:44 GETTING NUMEROUS CALLS, VACANT BLDG  
22:18:22 TALAYA REPORTING SOMEONE INSIDE PROPERTY, AMBU DETAILED.  
\*\*NON CRITICAL UPDATE SENT BY CALL TAKER: 3785  
22:19:51 \*\*UPDATE FROM CALL TAKER 3785 IS REVIEWED BY 4719  
22:20:28 NS3E-NS2N HAS CORNER OF BRUNSWICK/SOUTHARD. NS3E RESPONDING  
TO BRUNWICK/ROSE ST  
22:23:48 NK9-NK9 ADV TO TAKE BRUN/SOUTH, WK9 ADV TO TAKE BRUN/ROSE  
22:33:46 NWR1-NWR1 RELIEVING WK9 BRUN/ROSE  
22:38:30 NSG-NSG ADV REQUESTING SUPERVISOR ON SCENE  
22:47:26 WSG-CIB DET THOMAS ON THE WAY  
22:47:36 WSG-ID DET CADLETT ON THE WAY  
22:53:49 \*\*PREEMPTED FROM UNIT> WK9  
22:56:43 NS3E-DET POLLARD REQUESTING ME BE CALLED TO THE SCENE  
22:57:28 \*\*PREEMPTED FROM UNIT> NSG  
23:01:56 NK9-DIRECTOR HEMSEY PAGED  
23:04:21 \*\*PREEMPTED FROM UNIT> NWR1  
23:07:33 WSG-DIRECTOR GOLDEN NOTIFIED  
23:08:16 WSG-CHIEF OF ADMIN GEORGE CLISBY PAGED  
23:09:44 WSG-CORONER RESPONDING 45 MINUTES

Unviewed Options...I

II-AB..( )

ENTER BRANCH OPTION or PRESS Page Down (F8-OPTIONS HELP)

DA 23

225

IIC COMMENTS FOR CALL#...02-046942

23:10:48 \*\*NS3E-ADDRESS MODIFIED FROM: BRUNSWICK AV/BOND ST  
TO: 340 BRUNSWICK AV  
23:10:59 NS3E-CARMEN JONES S/B FEMALE FLOWRY LONG DRESS A/O  
MLK  
23:22:22 WSG-COUNTY DET MATHIS (ARSON) PAGED  
23:41:37 LARRY FLEMMING LG SKIN 5'5"8 WEARING ALL BLK HEADED TO  
TRAIN STATION BREADED HAI.FREQUENTS FEDERAL/CENTER  
23:51:29 WS4N-WS4N AUTHORITY OF LT TRAM BRING IN 2 WITNESSES AND  
BRING THEM INTO HQ'S  
00:03:02 WS4N-TAKING 2 TO HQ'S WITNESS WSRN  
00:07:11 \*\*UNIT> WS4N ENROUTE TO TAKING PARTIES HQ'S  
00:15:29 NK9-AUTH LT ORSINI THIS ASSIGN IS NOW A HOMICIDE  
\*\*CFS CODE MODIFIED FROM: 22AFDT TO 47HOM  
\*\*PRIORITY MODIFIED FROM: 2 TO 1 ( PF# 1963 )  
00:28:25 NK9-DIRECTOR GOLDEN NOTIFIED REF HOMICIDE,  
00:28:41 NK9-MR GEORGE CLISBY PAGED  
00:31:41 NK9-SGT DELLAIRA NOTIFIED , HE STATED DO NOT CALL THE  
CHIEF, ON HIS AUTH  
00:42:59 NS3E-ANNO CALLER STATES THAT SUSPECT IS STAYING AT THE

Unviewed Options...I

II-AB..( )

ENTER BRANCH OPTION or PRESS Page Down (F8-OPTIONS HELP).

DA 24

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A-1217-04T4

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1217-04T4

STATE OF NEW JERSEY, : CRIMINAL ACTION

Plaintiff-Respondent, : On Appeal from a Judgment  
of Conviction of the

v. : Superior Court of New  
Jersey, Law Division,

LARRY FLEMING, : Mercer County.

Defendant-Appellant

RECEIVED  
APPELLATE DIVISION  
NOV 29 2006

**FILED**  
APPELLATE DIVISION

NOV 29 2006

Sat below:

Hon. Bill Mathesius  
J.S.C., and a jury. SUPERIOR COURT  
OF NEW JERSEY

*Paul M. Chocko*  
CLERK

---

BRIEF AND ~~APPENDIX~~ ON BEHALF OF PLAINTIFF-RESPONDENT

---

JOSEPH L. BOCCHINI, JR.  
MERCER COUNTY PROSECUTOR  
Mercer County Prosecutor's  
Office  
Mercer County Courthouse  
Broad and Market Streets  
Trenton, New Jersey 08650  
(609) 989-6305

TIMOTHY P. WARD  
Assistant Prosecutor

DEFENDANT IS CONFINED

Of Counsel and  
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tward@mercercounty.org

*alt*

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THE TRIAL COURT'S INSTRUCTION ON THE USE OF EVIDENCE OF DEFENDANT'S PRIOR DRUG INVOLVEMENT DID NOT DEPRIVE DEFENDANT OF DUE PROCESS AS IT PROPERLY PRECLUDED THE JURY FROM CONSIDERING THE SAME AS EVIDENCE OF CRIMINAL PROPENSITY. (Not Raised Below).....10

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*Removed - filed as Exhibit*

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### PROCEDURAL HISTORY

Defendant Larry Fleming was charged under Mercer County Indictment no. 03-02-0286 with first degree murder, N.J.S.A. 2C:11-3a (Count I); first degree felony murder, N.J.S.A. 2C:11-3a(3) (Count II); and second degree aggravated arson, N.J.S.A. 2C:17-1a(1) (Count III). (Da 1-3).<sup>1</sup> Following a three-day trial before the Honorable Bill Mathesius, J.S.C., a jury convicted defendant of all counts. (3T108-13 to 109-11). At sentencing, the trial court merged the felony murder conviction into the murder conviction and imposed a life term of imprisonment with an 85% parole-ineligibility term under the No Early Release Act (NERA). N.J.S.A. 2C:43-7.2. The trial court imposed on the aggravated arson conviction a consecutive ten-year term, also subject to NERA. (4T25-25 to 27-1).

Defendant subsequently appealed his convictions and sentences. (Da 6).

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<sup>1</sup> "Da" refers to defendant's appendix.  
"Db" refers to defendant's brief.  
"Sa" refers to the State's appendix.  
"1T" refers to the trial transcript of February 3, 2004.  
"2T" refers to the trial transcript of February 4, 2004.  
"3T" refers to the trial transcript of February 5, 2004.  
"4T" refers to the sentencing transcript of April 2, 2004.

STATEMENT OF FACTS

At about 10:15 p.m. on May 11, 2002, Clifford Willever, a Trenton City firefighter assigned to the "Rescue 1" unit, was dispatched to 340 Brunswick Avenue in Trenton, where he donned protective gear and entered the building through the front door. (1T52-16 to 23). Once inside, Willever grabbed a hose line from his captain and advanced up the stairs, battling fire as he went. (1T49-18 to 55-19). Willever reached the second-floor hallway, where he found Ellis McNeill. Willever continued to fight the blaze while fellow firefighters determined McNeill already was dead. (1T55-20 to 57-2).

Heat from the fire burned McNeill's eyes and made the skin peel off of his face, hands, left leg and back. (2T155-22 to 158-7). Black soot in his nose, in his tracheal airways and lungs and on his tongue showed he was alive during the fire and was breathing in smoke, resulting in death from carbon monoxide poisoning. (2T158-10 to 19; 2T160-7 to 161-5; 2T162-3 to 14). Investigators determined someone poured gasoline on the floor by the front door of 340 Brunswick Avenue, trailed the gasoline through the first floor, including at the base of the stairs, and then ignited the gasoline near a door in the rear of the first floor. (2T84-10 to 16; 2T90-1 to 11).

Late in the afternoon of May 11, 2002, Edwin Warren arrived at Stokes Bar on Brunswick Avenue. He bought beer and wine and then went outside to buy crack cocaine. He saw his friend, Carmen Jones, with whom he sometimes got high. (1T91-6 to 92-21; 1T99-1 to 7). They went to 340 Brunswick Avenue, where they entered through a partially boarded back door. The house was abandoned, but Jones and Ellis McNeill stayed there at times; Jones in the rear second floor bedroom, and McNeill, whom both Warren and Jones knew as "Peanut," in the front second floor bedroom he shared with a woman named Bernadine. While Warren and Jones got high in Jones' room, McNeill was in his room. (1T93-5 to 96-16; 1T131-4 to 133-1).

More than once, Warren gave Jones money to buy more drugs or to go to the store. Jones testified drug dealers, including one she knew as "P.J.," actually came into the house to make sales. (1T130-16 to 139-15). During one trip to the store, defendant, who Jones knew as "Fruit," approached her and said "You all a cross-artist." (1T140-19 to 142-19). Jones testified this meant "we didn't spend any money or anything with [defendant]," from whom Jones purchased drugs on prior occasions. (1T143-17 to 144-6).

Jones returned to the front of 340 Brunswick Avenue, where she saw Warren, Bernadine and P.J. Jones and Warren

went back to her room. While they were listening to the radio, defendant knocked on the door and Jones let him in. (1T144-9 to 145-24). According to Jones, defendant said to Warren, "You are a cross-artist. You crossed me. What's going on?" (1T146-4 to 5). Jones testified Warren told defendant he had no money and needed a ride home to get more money to buy drugs. After the conversation, defendant left and closed the door behind him. (1T147-14 to 148-25). Warren recalled the conversation somewhat differently: defendant asked Warren if he wanted to buy drugs. Although Warren had purchased drugs from defendant before, he declined this time, telling defendant he had no money. Defendant then left. (1T97-20 to 101-9).

Jones and Warren talked some more, and then she heard someone throwing stones up to the window and calling her name. She went downstairs where she saw defendant, Curtis Hawkins and her "cousin," Joseph McKinney, whom she knew as "GI Joe." This was, according to Jones, about 10 or 15 minutes after defendant had been in Jones' room. McKinney came to 340 Brunswick that night because he could not stay at the rescue mission. When McKinney entered the house through the rear door, he saw defendant, whom he knew as "Mr. Fruit," from prior drug purchases, standing inside with a gas can. (1T193-24 to 197-4).

McKinney told Jones he needed a favor, but Jones told him to wait a moment, as defendant began to ask her if she needed more drugs. Jones told defendant she was alright. During his conversation with Jones, defendant held some kind of a light, and in his left hand, defendant had "a red can with a yellow nozzle." Due to the red can, Jones thought perhaps defendant was going to put gas in his car. By the time her conversation with defendant ended, Hawkins was already going out the door. (1T148-25 to 151-19; T151-23 to 153-3; 1T160-15 to 161-4).

Once defendant and Hawkins left, Jones told McKinney to "go ahead . . . and lay down on [a] couch." She went to McNeill's room to ask for a blanket for McKinney. McNeill told her to get one from a closet, which she did. She gave the blanket to McKinney, went back to McNeill's room to give him batteries for his radio, and then returned to her room to get high with Warren. (1T153-6 to 154-21). Before she could, however, she heard stones hitting the window and someone "hollering fire, fire." At first Jones paid no attention, but when the calls persisted she walked out of the room and started toward the steps. She was "hit in the face with the smoke and heat" and ran back to her room, where she and McKinney, who had come into the room as well, tried to kick out a window while Warren helped by moving

things out of the way. (1T154-25 to 157-9). The three of them were able to jump out the window, but once she was outside, she realized McNeill was still inside and could hear him saying from the second floor "[H]elp me, please. Somebody help me." (1T157-10 to 158-9).

Warren testified after defendant came to Jones' room, Warren stayed in the room and waited to come down from his cocaine high so he could leave. (1T102-7 to 11). At some point, Jones left the room. When Warren went to the hallway to see where she was, Jones ran toward him and told him the house was on fire. Warren looked towards the steps and saw "a big ball of black smoke and fire." (1T102-22 to 103-12). With the stairway "engulfed in flames," Warren and Jones went into Jones' room and kicked out the boards covering one of the windows. Warren testified he thought someone else was with them, and he, Jones and the third person jumped from the window. Warren broke his leg when he landed outside, and Jones helped him stumble into the alleyway. Warren could hear someone still inside the house yelling for help. (1T103-12 to 105-11; 1T112-18-21).

McKinney testified he had gone to a room upstairs where there was a couch. McKinney started to take off his shoes and "all of a sudden [he] heard a great big boom. . . [T]he whole house rocked." (1T198-7 to 199-13). He

went to the stairwell but met a "ball of heat," so he started yelling "fire." Jones came out of her room but McKinney told her they could not go down the stairs. He and Jones went into Jones' where they and a man McKinney did not know escaped through the window. (1T199-15 to 200-13).

Once Jones, Warren and McKinney were safely outside, Jones saw P.J. and P.J.'s father trying to enter one of the side windows of the house. She saw a woman she knew as "Cherie," defendant's girlfriend, who started joking about the fire. She did not see defendant anywhere. (1T158-12 to 159-15).

Curtis Hawkins testified he knew defendant from working with him on the street, whether watching defendant's back while defendant sold drugs or directing customers to defendant. On May 11, 2002, however, Hawkins was performing the same kind of service for P.J. (1T211-3 to 215-14). On that day, P.J. sold drugs at 340 Brunswick Avenue, with Hawkins acting as a go-between for Jones and P.J. and acting as a look-out. Hawkins testified P.J. went into 340 Brunswick Avenue about seven or eight times that day to sell drugs. On one occasion when P.J. exited the building after a sale, defendant, whom Hawkins knew as "Fruit," said "What the fuck that nigger keep running in



and out of there for?" Hawkins testified defendant did not know he was working with P.J. (1T215-15 to 218-24).

At some point, defendant and Hawkins went inside 340 Brunswick Avenue. Defendant went upstairs to Jones' room while Hawkins stayed at the top of the steps. Hawkins heard defendant ask Warren where defendant's \$50 was. Warren denied owing defendant money, and defendant said "Well, that one more \$50 be spent out of here, you suffer the consequences." After more conversation between Warren and defendant about buying drugs, defendant and Hawkins left the building. (1T219-19 to 223-8).

Between two and three hours later, according to Hawkins, he and P.J. were three or four houses away from 340 North Brunswick Avenue when Hawkins saw defendant coming toward him. Defendant had a gas can in his hand. Defendant told Hawkins the "[l]ady across the street wants some gas." (1T223-10 to 224-24). Hawkins saw a woman he did not know standing across the street and agreed to get the gas. Defendant gave him two or three dollars and Hawkins went to a gas station a few blocks away. When he returned, he met defendant at the alleyway by 340 Brunswick Avenue. (1T224-24 to 225-23). Hawkins gave defendant the gas can and defendant gave him some cocaine in return. Defendant walked into the alley, toward the back of 340

Brunswick Avenue. Defendant had the gas can and also carried a small flashlight. He went inside 340 South Brunswick. Defendant was inside for about one or two minutes, then Hawkins "saw the redness of the flames" and defendant came out and ran from the area. (1T226-14 to 230-16).

Hawkins walked out of the alley and stood by Stokes Bar, about a half block away from the fire. After a minute or two Jones ran by; Hawkins also saw Warren on the ground. Hawkins could hear someone screaming inside the burning building. The street began to fill with people and Hawkins hollered "Fruit, Fruit, Fruit did it." An unidentified man standing nearby said "That's my cousin. Hey man, keep your mouth shut." (1T230-17 to 233-3).

Hawkins was still outside when police arrived. Det. Timothy Thomas of the Trenton Police Department approached Hawkins and saw Hawkins' shoulders were slumped forward and he was shaking. Hawkins did not have about him the smell of fire or gasoline, and there were no burn or singe marks on his hands. (1T81-6 to 84-13). Hawkins told Det. Thomas "This ain't right, man. This ain't right. Fruit did this shit." (1T83-20 to 24; 1T232-11 to 234-14).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S INSTRUCTION ON THE USE OF EVIDENCE OF DEFENDANT'S PRIOR DRUG INVOLVEMENT DID NOT DEPRIVE DEFENDANT OF DUE PROCESS AS IT PROPERLY PRECLUDED THE JURY FROM CONSIDERING THE SAME AS EVIDENCE OF CRIMINAL PROPENSITY. (Not Raised Below)

The trial court instructed the jury it could use testimony regarding defendant's prior drug involvement with some of the witnesses "to gauge and assess the identification of and/or the relationship between the witnesses and the defendant." (3T70-23 to 25). Using the trial court's inclusion of the word "identification" as a springboard, defendant leaps to the conclusion the trial court improperly instructed the jury it could infer defendant committed arson and murder based on evidence he sold drugs. However, the trial court did not instruct the jury to consider this evidence in the manner suggested by defendant, and this claim must be rejected.

Because defendant did not object to the instruction when it was given, the plain error standard applies. R. 2:10-2. State v. Bunch, 180 N.J. 534, 541 (2004). In the context of a jury instruction, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the

defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970)). Moreover, the alleged error cannot be viewed in isolation from the rest of the charge, Ibid. (citing State v. DiFrisco, 137 N.J. 434, 491 (1994), cert. denied, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996)), and a finding of plain error "depends on an evaluation of the overall strength of the State's case." Ibid. (citing State v. Cotto, 182 N.J. 316, 326-27 (2005)). Because defendant cannot satisfy the requirements of plain error review, his claim must be rejected.

Essentially, defendant contends the trial court's instruction was a misapplication of N.J.R.E. 404(b), which governs the admission of other crimes evidence for certain limited purposes, among them identity. Defendant notes the heightened standard for admission of other crimes/identity evidence, see State v. Fortin, 162 N.J. 517, 530 (2000), and focuses on a single use of the word "identification" in the trial court's instruction. However, defendant ignores that the jury was not instructed to consider the evidence

for the issue of identity in the sense contemplated by N.J.R.E. 404(b). The evidence was not admitted for that purpose. Instead, it was admitted as res gestae evidence.

"Res gestae" refers to evidence that explains acts or conduct of the defendant. State v. Long, 173 N.J. 138, 157 (2002). In Long, the Court found a homicide defendant's statements, related by the victim to her mother, about the death of the defendant's mother, were admissible as res gestae evidence because they were proof of motive and "establishe[d] the context of the criminal event and assist[ed] in presenting the full picture of the crime to the jury." Id. at 157-58.

In State v. Cherry, 289 N.J. Super. 503, 521-22 (App. Div. 1995), the trial court admitted evidence the defendant was involved in a conspiracy to rob a bar, allowing the inference the defendant had reason to be at the scene of a murder unrelated to the conspiracy. Finding the evidence within the res gestae of the charged offense, this Court recognized "a jury 'cannot be expected to make its decision in a void - without knowledge of the time, place and circumstances of the acts which form the basis of the charge.'" Ibid. (quoting United States v. Masters, 622 F. 2d 83, 86 (4th Cir. 1980)).

As in Long and Cherry, the trial court here admitted evidence of acts which, though not elements of the charged offenses, nonetheless "establishe[d] the context of the criminal event, explain[ed] the nature of, [and] present[ed] the full picture of the crime to the jury." Ibid. (citing State v. Louf, 64 N.J. 172, 178 (1973)). The State's evidence showed that, shortly before the fire, defendant expressed anger over the fact another drug dealer made several sales inside of 340 Brunswick Avenue; that defendant tried unsuccessfully to sell drugs to Jones and Warren; and that defendant accused Jones and Warren of being a "cross-artists." This evidence was tied together by testimony that defendant made drug sales to some of the witnesses on prior occasions: defendant was angry because his customers were buying from someone else. This evidence, "part of the 'mosaic' of the criminal event," Long, supra, 173 N.J. at 158 (quoting State v. Baldwin, 47 N.J. 379, 394, cert. denied, 385 U.S. 980, 87 S. Ct. 527, 17 L. Ed. 2d 442 (1966)), was necessary to present to the jury the full picture of the crime.

Unlike "other crimes" evidence, admission of res gestae evidence does not require a limiting instruction. State v. Martini, 131 N.J. 176, 242 (1993). Accord, State v. L.P., 338 N.J. Super. 227, 235 (App. Div.), certif.

denied, 170 N.J. 205 (2001). In L.P., the trial court admitted res gestae evidence but nonetheless gave a limiting instruction which failed to inform the jury it could not use the res gestae evidence to establish the defendant's criminal predisposition. L.P., supra, 338 N.J. Super. at 235. Even though the instruction would have been insufficient had N.J.R.E. 404(b) other crimes evidence been at issue, this Court still found no reversible error because no instruction was required at all. Ibid.

Here, unlike in L.P., the trial court's instruction expressly precluded the jury from using the res gestae evidence as proof of defendant's criminal predisposition:

I'm going to give you a cautionary and limiting instruction. You've heard testimony in this case that the defendant, Larry Fleming, has been involved in narcotics sales. Our rules of evidence in the State of New Jersey limit the application of those acts and preclude you from considering that evidence in your deliberations as proof that the defendant committed the acts alleged in the indictment.

In other words, you can't say, Fleming is a drug dealer, therefore, he committed the crimes in the indictment. Prior acts can't be attached to show that Mr. Fleming had a predisposition to commit a crime and he was a criminal, and therefore, he committed the present offenses. You can - I should say, evidence that a defendant has committed prior crimes or other wrongs or acts cannot be used by you as proof of conduct in conformance with charges listed in the indictment to show further proof that he had in fact committed the offenses in the indictment.



However, you may use the testimony to gauge and assess the identification of and/or the relationship between the witnesses and the defendant. In other words, there was a history of some prior involvement. You can use that to determine whether Fleming was known to them and under what circumstances he was known to them, but you can't say he committed a crime and, therefore, he committed the crime now. I think you can understand that.

[3T70-4 to 71-6].

Although the trial court was not required to give this instruction, the instruction was legally accurate, as it precluded the jury from considering evidence of prior drug involvement to establish defendant's criminal disposition.

Defendant's argument the trial court improperly instructed the jury to use the res gestae evidence to prove identity pursuant to N.J.R.E. 404(b) is unpersuasive. In Cherry, supra, 289 N.J. Super. at 522, the State offered the conspiracy evidence "on the issue of identity." Notwithstanding the State's proffered purpose, this Court still found the conspiracy evidence was res gestae evidence and not other crimes evidence. Likewise, the trial court's use of the word "identification" did not transform res gestae evidence into other crimes evidence. This is especially so where the trial court did not instruct the jury to consider the evidence to prove "identity" in the sense contemplated by N.J.R.E. 404(b).

The model charge for other crimes/identity evidence, liberally borrowing from Fortin, supra, 162 N.J. at 530, instructs the jury to consider whether "[the prior crime] and [the charged crime] are so similar and so unique that [it] may infer that the same person committed both of them." The model charge cautions the jury not to "draw this inference unless [it] conclude[s] that the prior criminal activity with which defendant is identified is so nearly identical in method as to earmark the crime as defendant's handiwork. The conduct in question must be unusual and distinctive so as to be like a signature, and there must be proof of sufficient facts in both crimes to establish an unusual pattern." Model Jury Charge, Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b)) (May 22, 2000).

The trial court's instruction, despite including the word "identification," did not in any way invite the jury to make the inference described in the model charge. Instead, it expressly cautioned against any inference that because defendant sold drugs he committed the charged offenses, or that because he sold drugs he had a criminal propensity. Further, the colloquy among the trial court and counsel demonstrates the parties' understanding, consistent both with the State's evidence and the actual

charge given the jury, that this was res gestae evidence and a 404(b) charge was unnecessary. (3T48-12 to 51-8).

Defendant also argues the trial court's instruction unfairly singled him out as the only person whose drug involvement the jury specifically could consider. No such instruction was requested, and defendant offers no authority for the proposition the trial court was required, sua sponte, to charge the jury to consider the other witnesses' drug involvement. However, assuming the lack of such an instruction held the potential for prejudice, the trial court issued an instruction on witness credibility that tracked the model charge. Model Jury Charge, Criminal Final Charge, Credibility of Witnesses (February 24, 2003). Coupled with defense counsel's forceful summation highlighting how the witnesses' drug involvement "affect[ed] [their] motives, how it affect[ed] their opportunities, how it affect[ed] their alliances," (3T19-11 to 18), the jury had the necessary prompting to consider the witnesses' drug involvement in its credibility determinations if it were inclined to do so. See State v. Marshall, 123 N.J. 1, 145, cert. den., 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993) (holding "the prejudicial effect of an admitted instruction must be evaluated in light of the totality of the circumstances

including all the instructions to the jury, [and] the arguments of counsel") (citations omitted).

Finally, assuming arguendo the trial court's charge was flawed, plain error analysis requires this Court to consider the strength of the State's case. Chapland, supra, 187 N.J. at 289 (citing Cotto, supra, 182 N.J. at 326-27). Here, in addition to the evidence subject to the challenged instruction, the State offered ample evidence of defendant's guilt. Of the four witnesses who placed defendant at 340 Brunswick Avenue shortly before the crime occurred, three of them, Jones, McKinney and Hawkins, testified defendant was carrying a gas can. Hawkins testified in detail how, unaware of defendant's purpose, he obtained gasoline for defendant, and also testified he saw defendant run from the building as the fire started. While the defense suggested Hawkins set the fire, the State offered evidence Hawkins showed no tell-tale signs of having done so when Det. Thomas encountered him at the scene. Notably, it was defendant, and not Hawkins, who fled the scene after the fire started. The jury obviously credited the State's witnesses. Therefore, in light of the strength of the State's case, even if the trial court's instruction was flawed, it did not have the capacity to prejudice defendant.

POINT II

DEFENDANT WAS NOT PREJUDICED BY ANY ERRONEOUS REFERENCES IN THE JURY CHARGE TO "GUILT OR INNOCENCE" BECAUSE THE TRIAL COURT REPEATEDLY INSTRUCTED THE JURY THE STATE HAD TO PROVE EACH ELEMENT OF EACH CHARGE BEYOND A REASONABLE DOUBT. (Not Raised Below)

Defendant complains the jury charge diminished the State's burden of proof. First, after charging the jury on expert testimony, the trial court instructed the "determination of the ultimate guilt or innocence remains and is always in the province of the jury." (3T66-23 to25). During the homicide charge, the court instructed, as to the charge of murder, "You'll make a determination as to the guilt or innocence. If you find him not guilty, then you come down and you consider aggravated manslaughter." (3T81-12 to 15). Finally, in explaining the verdict sheet, the trial court instructed, "If you find not guilty, then you go and assess the guilt or innocence of the lesser included offense of reckless manslaughter . . . ." (3T97-24 to 98-1). Having scoured the transcript and found three references to "guilt or innocence," defendant argues the instruction reduced the State's burden of proof and deprived him of due process.

Defendant did not object to the charge when it was given. Therefore, the plain error standard applies. R. 2:10-2. Bunch, supra, 180 N.J. at 541. "[P]lain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" Chapland, supra, 187 N.J. at 289 (quoting Hock, supra, 54 N.J. at 538). Moreover, an allegedly faulty jury instruction cannot be viewed in isolation from the rest of the charge, Ibid. (citing DiFrisco, supra, 137 N.J. at 491). Defendant's argument fails, as this Court has rejected similar claims in the past and, in any event, the rest of the jury charge dispelled any doubt as to the State's burden of proof.

In State v. Medina, 147 N.J. 43, 52 (1996), cert. denied, 520 U.S. 1190, 117 S. Ct. 1476, 137 L. Ed. 2d 688 (1997), the Court held "[o]nly those instructions that overall lessen the State's burden of proof violate due process." In State v. White, 360 N.J. Super. 406, 413 (App. Div. 2003), this Court recognized the obvious difference between a finding of not guilty and a finding of innocence. While noting "[t]he injection of the concept of

innocence . . . may tend to reduce the State's burden of proof," the Court nonetheless "d[id] not consider the use of the phrase "guilt or innocence" throughout the charge error which in isolation would require a new trial" where the reasonable doubt charge was consistent with Medina. Ibid. (emphasis added). The same conclusion resulted in State v. Vasquez, 374 N.J. Super. 252, 264-65 (App. Div. 2005), where the Court saw "no likelihood" a reference in the charge to "guilt or innocence" "affected the jury's verdict."

Here, as defendant acknowledges, the trial court issued reasonable doubt and presumption of innocence instructions compliant with Medina. Not only that, but in contrast to a mere three references to "guilt or innocence," the trial court reminded the jury several times throughout the charge that it must determine whether defendant was guilty or not guilty and that the State bore the burden of proof. In addition to the standard charge on presumption of innocence, reasonable doubt, and burden of proof, (3T57-2 to 58-13), the trial court repeatedly instructed the jury the State bore the burden of proving every element of each charge beyond a reasonable doubt. For example, the trial court instructed:



In order for you to find defendant guilty of murder, the [S]tate is required to prove each of the following elements beyond a reasonable doubt . . . . One element that the [S]tate must prove beyond a reasonable doubt is the defendant acted purposely and knowingly. . . . The other element that . . . the [S]tate must prove beyond a reasonable doubt is that the defendant caused Ellis McNeill's death or serious bodily injury resulting in death. . . . Now, those are the two elements to - that the [S]tate must prove beyond a reasonable doubt in order to convict the defendant of murder.

\* \* \*

If, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that the defendant either purposely or knowingly caused Ellis McNeill's death or serious bodily injury resulting in death, then your verdict must be guilty.

On the other hand, if you determine the [S]tate has not proven beyond a reasonable doubt that the defendant purposely or knowingly caused death or serious bodily injury resulting in death, then you must find him not guilty of murder . . . .

[3T73-13 to 74-22; 3T77-25 to 78-9].

The trial court repeated its admonition that the State must prove each element beyond a reasonable doubt and, if it failed to do so, the jury must find defendant not guilty, when it instructed the jury on the lesser-included charges of aggravated manslaughter and manslaughter, and on the separate charges of felony murder and aggravated arson (as well as the lesser-included offense of arson). For all of these charges, the trial court set forth the State's

burden of proof beyond a reasonable doubt as to each element and properly informed the jury it must find defendant not guilty if the State did not meet its burden.

Inasmuch as the White Court did not consider references to "guilt or innocence" throughout the charge reversible error, it follows three fleeting references to "guilt or innocence" do not rise to the level of plain error here, especially where the trial court repeatedly instructed the jury it must find defendant not guilty if the State failed to prove each element of the charges beyond a reasonable doubt. To the extent defendant could argue the White Court's discussion of "guilt or innocence" in the jury charge was dicta, as the Court found a separate basis for reversal in part, the Vasquez Court affirmed the defendant's convictions while expressly rejecting the same argument defendant raises in this appeal. Defendant likewise should not prevail on this claim.

POINT III

**DEFENDANT'S SENTENCE IS APPROPRIATE BECAUSE, NOTWITHSTANDING THE TRIAL COURT'S ALLEGED "HOSTILITY" TOWARD HIM AT SENTENCING, THE TRIAL COURT'S FINDINGS WERE SUPPORTED BY THE RECORD. (Not Raised Below)**

Defendant contends the trial court, at sentencing, expressed personal hostility toward him. He requests a remand to a different trial court for resentencing. However, because the trial court's findings of aggravating and mitigating factors and its determination that consecutive sentences were appropriate both were supported by the record, this claim should be rejected.

Defendant sets forth in his brief the comments of the trial court to which he objects. (Db21-22). However, defendant does not assert a lack of support in the record for the trial court's findings and weighing of aggravating and mitigating factors. As set forth in defendant's judgement of conviction (Da5), the trial court found aggravating factors (1), (2), (3), (6), (9) and (11). N.J.S.A. 2C: 44-1a. The trial court found no mitigating factors. The trial court announced these findings on the record. (4T21-14 to 26-3). Notwithstanding the comments by the trial court giving rise to defendant's claim of hostility, the trial court's findings as to aggravating and mitigating factors were fully supported by the evidence

adduced at trial and by the information in the pre-sentence report (Sal-12). Therefore, despite defendant's claims of partiality, there is no need to remand this matter for resentencing on the basis of the trial court's comments.

Defendant also claims the imposition of consecutive terms was inappropriate. In State v. Carey, 168 N.J. 413, 422-23 (2001), the Court reiterated the now-familiar factors courts must consider in the determination of whether to impose consecutive sentences:

"(1) there can be no free crimes in a system for which the punishment shall fit the crime;

(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

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

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

[Ibid. (quoting State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986))].

As the Carey court noted, a sixth factor was legislatively abolished. Id. at 423 n.1.

Here, the trial court's imposition of a consecutive term, while perhaps not demanded by the Yarbough factors, does not contravene them. As required by State v. Brown, 138 N.J. 481, 560-61 (1994), overruled o.g., State v. Cooper, 151 N.J. 326 (1997), cert. denied, 528 U.S. 1084, 120 S. Ct. 809, 145 L. Ed. 2d 681 (2000), the defendant's arson conviction did not merge with the murder conviction for sentencing purposes. Inasmuch as the first Yarbough factor recognizes there are no free crimes, imposition of a concurrent term acknowledged this important consideration. Yarbough also demands sentencing courts consider the facts relating to the crimes.

Here, while only McNeill was killed by defendant, defendant's act of arson exposed at least three others to the risk of a similar fate. Warren in fact suffered a broken leg trying to escape the blaze. The trial court acknowledged these circumstances. This is important because in Yarbough itself, the Court recognized there are "cases so extreme and so extraordinary," deviation from the

guidelines is acceptable. Yarbough, supra, 100 N.J. at 647. In State v. Mujahid, 252 N.J. Super. 100, 120 (App. Div. 1991), certif. den., 127 N.J. 561 (1992), this Court held the circumstances of the case, in which the defendant started a fire late at night in a boarding home, resulting in two deaths and multiple injuries, constituted an "extraordinary case" and justified consecutive terms. Here, while only one death resulted, not only did defendant start a fire in a house where he knew at least two people were present, he also poured gasoline at the base of the stairs, blocking the only conventional exit in an attempt to trap anyone upstairs. It is no stretch to find an act this despicable justifies concurrent sentencing.

Because the trial court imposed a consecutive term on defendant's arson conviction in accord with Yarbough, defendant's demand for resentencing must be rejected. In the alternative, the Court should remand for resentencing limited to the issue of concurrent or consecutive sentencing so the trial court can more fully explain its reasons for imposing a consecutive sentence.

CONCLUSION

For the reasons set forth in Points I and II, defendant's convictions should be affirmed. For the reasons set forth in Point III, defendant's sentences should be affirmed.

Respectfully submitted,

JOSEPH L. BOCCHINI, JR.  
MERCER COUNTY PROSECUTOR

By: Tim Ward

TIMOTHY P. WARD  
ASSISTANT PROSECUTOR

Dated: November 29, 2006



**A-1217-04T4**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
IND. NO. 03-02-0286  
APP. DIV. NO. A-1217-04T4

THE STATE OF NEW JERSEY, )  
)  
)  
vs. )  
)  
LARRY FLEMING, )  
)  
)  
Defendant. )

**RECEIVED**  
**APPELLATE DIVISION**  
DEC 28 2004  
**STENOGRAPHIC TRANSCRIPT**  
**SUPERIOR COURT**  
**OF NEW JERSEY**

PLACE: Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey

DATE: February 3, 2004

**B E F O R E:**

HON. BILL MATHESIUS, J.S.C.  
AND A JURY

**FILED**  
**APPELLATE DIVISION**  
DEC 28 2004

Transcript Ordered By:

OFFICE OF THE PUBLIC DEFENDER

*Ann Flynn*  
CLERK

**A P P E A R A N C E S:**

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For the Defendant

\* \* \* \* \*

MARIAN V. WALSH, C.S.R., C.R.R.  
Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey 08650

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COLLOQUY

1 (The following is out of the presence of the jury.)  
2 THE COURT: We don't have anything before  
3 the jury?

4 MS. LACKEN: We can do it before the  
5 witnesses go on.

6 MR. HAMILTON: We have noncontroversial  
7 witnesses first.

8 THE COURT: We'll do it when we take a  
9 break. The witnesses will take us far enough.

10 MS. LACKEN: That's fine.

11 SERGEANT-AT-ARMS: Jury entering court.  
12 (The following is in the presence of the  
13 jury.)

14 THE COURT: All right. Please be seated,  
15 ladies and gentlemen. Good morning. Good to see you  
16 all today.

17 I should give you a little bit of a  
18 heads-up in terms of another distinction between what  
19 you see on television and what you see in this  
20 courtroom, and that would be the lack of specificity  
21 and exactness in terms of time. We don't break for  
22 commercials, but we do have logistical problems and  
23 things that witnesses are here or not here. There are  
24 a variety of reasons, so everything is not so quite as  
25 precise.

COLLOQUY

1 You're here well before that, so I'll  
2 apologize for any delays that might be encountered  
3 during the trial. But we will try to keep things  
4 moving as best we can.

5 Are you prepared to proceed?

6 MS. LACKEN: Can we have a sidebar, please.

7 THE COURT: Start right off?

8 MS. LACKEN: Yes.

9 MR. HAMILTON: On the record or no?

10 MS. LACKEN: On the record.

11 (The following is a discussion at sidebar.)

12 MS. LACKEN: Judge, I have just been  
13 informed by Detective Francis that when we were about  
14 to start, Captain Multop from the fire department  
15 and -- he was in the back. And apparently, he  
16 indicated to Detective Francis that his niece is on the  
17 jury. Apparently -- I don't know which one is his  
18 niece, but apparently, that wasn't brought to our  
19 attention yesterday, so now I'm bringing it to everyone  
20 else's attention.

21 MR. HAMILTON: My concern is whether he has  
22 any particular attention as to the case in general  
23 terms. I don't have any problem with that relationship  
24 because I don't intend to challenge his credibility.

25 THE COURT: There's nothing of great import

## COLLOQUY

1 being delivered by the witness?

2 MR. HAMILTON: No, no. Basically, the  
3 defense concedes that there was a fire, and also that  
4 it appears to have been set deliberately, and that --

5 THE COURT: It just wasn't the defendant?

6 MR. HAMILTON: Right.

7 MS. LACKEN: I'm not sure which juror it  
8 is. I could certainly find out to make it more  
9 complete.

10 MR. HAMILTON: We could clean it up nicely  
11 by finding out who it is.

12 MS. LACKEN: I can walk out and ask him  
13 which one it is and I'll be right back.

14 (Recess is taken.)

15 MS. LACKEN: The juror is Ms. Caruso, and I  
16 think I remember her saying that she knew Captain  
17 Multop. So we have gone through that, so we're  
18 covered.

19 THE COURT: Very good. Thank you.  
20 (The discussion at sidebar is concluded.)

21 THE COURT: I might add, ladies and  
22 gentlemen, that generally we try to get things done  
23 before you come in, but sometimes that doesn't work  
24 out, so that's why we have a sidebar.

25 Prosecutor, are you prepared to proceed

## OPENING - MS. LACKEN

1 with your opening?

2 MS. LACKEN: I am.

3 THE COURT: You may proceed.

4 MS. LACKEN: May it please the Court,  
5 Mr. Hamilton, ladies and gentlemen, good morning. On  
6 May 11 of 2002, the lifeless body of 47-year-old Ellis  
7 McNeill was found by Trenton firefighters on a second  
8 floor of a burning building. His eyes were burned, his  
9 face was burned, and his skin was peeling away from his  
10 body. Ellis McNeill was literally burned to death.

11 Ellis McNeill was found in a building that  
12 was located at 340 Brunswick Avenue in Trenton. It was  
13 an abandoned home. It was boarded up. The fire that  
14 killed Ellis McNeill was not accidental. It was  
15 intentionally set on purpose by a man who was out there  
16 that same day selling drugs. That fire was set by a  
17 man who was angry that other people in the same house  
18 in which Ellis McNeill's body was found wouldn't buy  
19 drugs from him.

20 The fire was set as a payback, to get back  
21 at the drug users in 340 Brunswick Avenue who wouldn't  
22 buy their product from the man who set the fire. And  
23 as Ellis McNeill was trapped in that burning building,  
24 as he was screaming for help, screaming for his life,  
25 the man that set the fire ran away into the night. The



1 man that set that fire, ladies and gentlemen, the man  
 2 that trapped Ellis McNeill to die in that burning  
 3 building sits before you today, and his name is Larry  
 4 Fleming.

5 Ladies and gentlemen, you know that my name  
 6 is Kim Lacken. I'm an assistant prosecutor here in  
 7 Mercer County, and I am here to present to you the  
 8 evidence that will prove Larry Fleming guilty of  
 9 murder, felony murder, and aggravated arson.

10 Ladies and gentlemen, this case is about  
 11 drugs; the use of drugs and the sale of drugs. Drugs  
 12 will permeate throughout this entire case. This case  
 13 is about the greed that attaches to the sale of drugs,  
 14 the greed that motivated Larry Fleming to set  
 15 340 Brunswick Avenue on fire, killing one man, and but  
 16 for the grace of God, almost killing three others.

17 On May 11 of 2002, it was a Saturday, the  
 18 day before Mother's Day, Larry Fleming was out in the  
 19 area of Brunswick Avenue, 340, and he was selling  
 20 drugs. 340 Brunswick Avenue is between Stoke's Bar --  
 21 that's located on Mid Rose Street and Bond Street.  
 22 It's a residential area. It's an area that has row  
 23 homes, some of which are boarded up, some of which are  
 24 not. Larry Fleming was out there selling drugs that  
 25 day, and he was watching the area of 340 Brunswick

1 Avenue.

2 And you will learn that that particular  
 3 area is an area where local drug users go and they use  
 4 their drugs. They oftentimes buy them, go into that  
 5 area, into that building, and they use the drugs.  
 6 Larry Fleming was watching that area that day, and he  
 7 noticed that there was drug traffic going on, buying  
 8 and selling. He noticed that while he was out selling  
 9 his drugs.

10 And he was angry. He was angry at the fact  
 11 that he wasn't getting any of that action, that his  
 12 product wasn't being sold there, that he wasn't getting  
 13 any of that money.

14 You will learn that a woman by the name of  
 15 Carmen Jones, who was a local drug user, stayed at  
 16 340 Brunswick Avenue, even though it was a boarded-up  
 17 home, and most of the doors and windows were boarded  
 18 up. There was one door toward the back of the building  
 19 that some of the boards had been taken off of, and that  
 20 was the door that drug users and drug sellers would use  
 21 to go in and out of the building, to sell the drugs and  
 22 to use them.

23 Carmen Jones lived in a room in that  
 24 building on the second floor. That was her home away  
 25 from home, a place where she could go -- she was



1 homeless -- where she could go. It had a bed, it had a  
 2 bookcase in one of the rooms, in her room where she  
 3 would stay the night.

4 On that particular day, Carmen met up with  
 5 a guy by the name of Ed Warren, and you will hear him  
 6 referred to as Big Al. She met up with him later on in  
 7 the afternoon. He got dropped off in the afternoon  
 8 near Stoke's Bar after work. He went into Stoke's Bar,  
 9 he bought some alcohol, some beer and some wine, and he  
 10 bought some drugs, and he and Carmen went into 340 in  
 11 order to do their thing, get high, do whatever.

12 During the period of time that Al Warren  
 13 and Carmen Jones were in that building, they came  
 14 out -- at least Carmen did -- she came out and she  
 15 bought some drugs. And in fact, other drug dealers had  
 16 gone into that house to buy -- pardon me -- to sell  
 17 drugs.

18 Larry Fleming was watching that all day.  
 19 He was getting angry. There was money being spent in  
 20 that building, and he wasn't getting any part of it.

21 Carmen Jones decided to leave the building,  
 22 and she wanted to go to the store. She looked down the  
 23 hall and there she saw Ellis McNeill and a woman she  
 24 knew by the name of Bernadine. She and Ellis McNeill  
 25 were friends. His nickname was Peanut. She went down

1 and she greeted him.

2 Ellis McNeill was a homeless man too. He  
 3 shared one of the rooms in that abandoned building. In  
 4 fact, his room was separated by a bathroom from Carmen  
 5 Jones. And there were other people that would come in  
 6 and stay, apparently, in the home. Although it was in  
 7 disrepair -- it was definitely not something that  
 8 people would normally live in, apparently -- there were  
 9 couches in there, it was a place where people went and  
 10 they stayed.

11 Carmen left the building in order to go to  
 12 the store, and as she was walking, Larry Fleming walked  
 13 up behind her, and he said something to the effect of,  
 14 You all are cross-artists. She didn't pay any  
 15 attention, but she knew what he meant. She knew he was  
 16 angry about the fact they weren't buying his product,  
 17 they weren't spending their money with him.

18 She went in, she went to the store, she did  
 19 her business. She went back into 340. A while passed.  
 20 More drugs were being bought and sold out of that  
 21 house.

22 At one point, Larry Fleming, watching all  
 23 of this, decided, hey, there's too much money being  
 24 spent up in that house. I'm going to go up and see who  
 25 is in there.

1 He goes into the building. Now, you'll  
 2 learn a guy by the name of Curt Hawkins was also out on  
 3 the street that day. Curt was a guy who worked here  
 4 and there at Stoke's Bar; he would fill it with beer.  
 5 He would watch the people's cars outside who would  
 6 patronize the bar. He also watched out for local drug  
 7 dealers; they were in the area, he would watch out for  
 8 the police. He would let them know if the police were  
 9 coming, and the drug dealers would give him 30 or 40  
 10 bucks to keep his eyes open.

11 That day Curt was out on the street, and he  
 12 was working with Fruit. Fruit, you will hear, is the  
 13 nickname of Larry Fleming. Larry told Curt, Let's go  
 14 up in the building and see what's going on. The two of  
 15 them went in the building. Larry Fleming went in  
 16 through the door in the back of the house, made his way  
 17 through the house and up the stairs to the second  
 18 floor. He pushed open the door to Carmen Jones' room,  
 19 and he saw Carmen and Big Al in there.

20 He starts talking to Big Al, saying, You  
 21 owe me money.

22 Al says, I don't owe you any money.

23 Larry Fleming says, Why don't you spend  
 24 some of your money with me?

25 Big Al insisted he didn't have any money.

1 That wasn't good enough for Mr. Fleming.  
 2 Come on, Big Al, spend some money with me. Spend some  
 3 money with me.

4 Al wouldn't do it.

5 Larry Fleming says, Fine. What you guys do  
 6 to me is going to happen to you. You guys are going to  
 7 have to pay the consequences. If you want anything,  
 8 I'll be outside.

9 And he left. He and Curt went outside.

10 Curt went along, you know, Brunswick  
 11 Avenue, went back into the bar, was doing his own  
 12 thing, and they stayed out for a while. Apparently  
 13 Mr. Fleming was outside, and he saw the drug activity  
 14 continue, and he had had enough.

15 So he went down the street and he took a  
 16 gas can from an individual by the name of Crystal  
 17 White. He took that gas can and he walked up the  
 18 street and he found Curt, who had been in and out of  
 19 the bar doing his own thing.

20 And he said to him, There's a lady down the  
 21 street who needs gas, do me a favor and go get it.

22 And Curt looks and sees a woman standing by  
 23 the bar, and he says, Okay, I'll go. Goes and gets the  
 24 gas, two dollars' worth of gas. Curt pockets 50 cents  
 25 and he buys \$1.50 worth of gas and he brings it back to

1 Larry Fleming.

2 Larry Fleming grabs the gas can and instead  
3 of walking off toward the lady, he walks off towards  
4 340 Brunswick Avenue.

5 All of a sudden Curt realizes what's going  
6 to happen. This ain't right. What are you doing?  
7 What are you doing? he says, and he follows Larry  
8 Fleming to the back of 340 Brunswick Avenue.

9 Now, you're going to hear that the only way  
10 out of 340 Brunswick Avenue, except if you're going to  
11 jump out of a window, is from the door in the back that  
12 is half boarded up. Larry Fleming went in through that  
13 back door. He walked through the house. While he was  
14 in there, Carmen was downstairs and she saw him. She  
15 saw him with the gas can in one hand and what appeared  
16 to be some type of light in the other. She doesn't  
17 know whether it was a lighter or a flashlight. She has  
18 no idea what it was.

19 While Larry Fleming was in there with a gas  
20 can, a guy by the name of Joe McKinney walks in. He  
21 sees Fruit, doesn't pay any mind. He knows he has a  
22 car, sees him with a gas can, doesn't pay him no mind.  
23 He says, Fruit, what's up?

24 Larry Fleming watches Joe McKinney walk  
25 through the house and up the stairs. Carmen Jones is

1 still in that house too. She's downstairs. She sees  
2 Larry Fleming come in with a gas can, they talk, she  
3 goes back upstairs.

4 Next thing you know, Joe McKinney, he went  
5 upstairs because he needed a place to crash. Carmen  
6 said, Go down the hall in the living room. There's a  
7 couch, you can use that. Joe was also homeless as  
8 well.

9 He goes down the hall. He takes off his  
10 boots. All of a sudden, boom, he feels the house  
11 shake. There was an explosion. He gets his shoes back  
12 on, runs out of his room to the top of the stairs.

13 Carmen comes out of the room. Smoke is  
14 billowing up the stairs. They could see the flames  
15 downstairs. There's no way that they can get out now.  
16 They cannot go down the stairs because the flame is  
17 coming up the stairs.

18 So they run into Carmen's room and Joe,  
19 Carmen, and Big Al kick out the boarded window from  
20 Carmen's room; kick out the window, and they jump from  
21 the second floor. They are able to go out of the  
22 window onto a little roof, and then they had to jump  
23 off of the roof, the little edge area, to get to the  
24 ground.

25 Big Al broke his foot when he jumped.

1 Carmen ran to the corner to call 911. And Joe ran off  
2 down the alley.

3 But one person didn't make it out. Peanut,  
4 Ellis McNeill, was in his room. He either didn't hear  
5 what was going on or didn't hear the other individuals  
6 Carmen and Joe, yelling, Fire, fire, fire.

7 He didn't get out of the house. In fact,  
8 while everyone was outside, they heard his screams.  
9 They heard him screaming, Help me. Somebody help me.  
10 They heard him screaming while he was being consumed by  
11 the fire. Ellis McNeill collapsed seven feet away from  
12 the stairs leading downstairs. It didn't matter,  
13 because he wouldn't have been able to get out from  
14 those stairs. The fire was coming up.

15 You will learn that the Trenton Police  
16 Department responded to that fire. Al Warren was taken  
17 to the hospital because of the injury he sustained when  
18 he jumped out of the window.

19 You will hear that a fire investigation  
20 ensued. The investigators, along with the Trenton Fire  
21 Department, investigated the scene. They cleared the  
22 debris and they found that there had been an  
23 accelerant, gasoline, poured from the very front of the  
24 steps leading to the second floor, through the front  
25 room into the middle room into the back room. The

1 only -- that gasoline was poured in the only area in  
2 which the people upstairs could get out of the  
3 building. They were literally trapped by the fire.

4 They also found, ladies and gentlemen, when  
5 they took pieces of the flooring, it confirmed their  
6 suspicion. Not only could they smell the gas and see  
7 the burn pattern on the ground, but they took pieces of  
8 the flooring and they sent them to the New Jersey State  
9 Police for analysis purposes.

10 You will hear from the forensic scientist  
11 that did the analysis, and he confirmed in fact what  
12 was poured in front of the stairs what stopped them  
13 from coming down the steps was in fact gasoline.

14 Ladies and gentlemen, an investigation  
15 ensued. The police came as the fire department was  
16 fighting the fire. Larry Fleming was nowhere to be  
17 seen. But significantly enough, Curt was still there.  
18 He couldn't believe what had happened. He was --  
19 absolutely could not believe he had just trapped -- he,  
20 the defendant -- trapped all of those people in that  
21 building and set it on fire.

22 The police approached him. Curt told them  
23 what he knew, and he told them who set the fire, and he  
24 told them Larry Fleming was the one who set the fire.

25 Carmen was later spoken to by the police,



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OPENING - MS. LACKEN

1 and Carmen gave a statement, and she said when she was  
2 downstairs right before the fire, the person that she  
3 saw with the gas can in his hand was none other than  
4 Larry Fleming.

5 And through the investigation, Joe McKinney  
6 was found. Joe McKinney was found just weeks ago, and  
7 he, too, indicated that when he walked in the building,  
8 he saw Larry Fleming with a gas can in his hand, and  
9 within three minutes later, he felt the explosion.

10 Because of those facts, ladies and  
11 gentlemen, the Mercer County Grand Jury came down with  
12 a three-count indictment, and his Honor, Judge  
13 Mathesius, has read that to you.

14 Count 1 charges first degree murder, that  
15 Larry Fleming did on May 11, 2002, purposely or  
16 knowingly, cause the death of Ellis McNeill or  
17 purposely or knowingly inflicted serious bodily injury  
18 upon Ellis McNeill causing his death.

19 Count 2, felony murder, that on that same  
20 date in Trenton, Larry Fleming did cause the death of  
21 Ellis McNeill during the commission of, the attempt to  
22 commit, or the flight after committing the crime of  
23 aggravated arson.

24 And Count 3, that Larry Fleming on that  
25 same date in May 2002, did start a fire, thereby

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OPENING - MR. HAMILTON

1 purposely or knowingly placing another in danger of  
2 death or bodily injury, contrary to law.

3 Throughout this case, ladies and gentlemen,  
4 as I said before, you're going to hear a lot about  
5 drugs. It's an environment that most of us don't know  
6 much about, drug users and drug sellers. The bottom  
7 line, ladies and gentlemen, is a man died in that fire.  
8 A man that had no dealings with the man who killed him,  
9 a man that was just in a room minding his own business.  
10 whatever good or bad he did with the use of drugs,  
11 whatever good or bad other people in that house did  
12 with the use of drugs, it doesn't take away from the  
13 fact that Ellis McNeill died because of Larry Fleming's  
14 greed. That's what it comes down to.

15 At the end of this case, ladies and  
16 gentlemen, I'll have an opportunity to speak to you  
17 again, and that's what is known as the state's  
18 summation. And I'll point you to the evidence that the  
19 state presented to show why Larry Fleming is guilty of  
20 the crimes in the indictment.

21 You'll hear from Carmen Jones, and you're  
22 going to hear from Curt Hawkins, and you're going to  
23 hear from Joe McKinney. Listen to them. Judge for  
24 yourselves what happened on that date.

25 when this case is over, I'm going to come

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1 to you, ladies and gentlemen, and I'm going to show you  
2 why the evidence has proven that Larry Fleming is  
3 guilty of murder, felony murder, and aggravated arson.  
4 Until that time, I thank you for your anticipated  
5 attention.

6 Thanks.  
7 THE COURT: Thank you, Ms. Lacken.  
8 Mr. Hamilton.

9 MR. HAMILTON: Ladies and gentlemen, you're  
10 normal people. Around this time you must be asking  
11 yourself, what can the defense possibly do in the face  
12 of such an overwhelming case?

13 Actually, it's not such an overwhelming  
14 case. There are certain facts that you will know with  
15 certainty. For instance, that a fire was set by  
16 somebody using gasoline. That's not going to be in  
17 dispute. That someone died as a result of the fire,  
18 if not by burning alive, then at least first by carbon  
19 monoxide poisoning, as reflected by the reddening of  
20 the internal organs. And we'll hear about all of that  
21 from the doctor who testifies, but directly as a result  
22 of the fire.

23 And one other thing, one of the very few  
24 things that you'll know with certainty, is that Curt  
25 Hawkins bought the gasoline from a Mr. Singh at the

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1 Roadrunner gas station. Almost all of the rest of this  
2 case will be based on the say-so of drug addicts who  
3 have some sort of a relationship with each other, as  
4 reflected by their presence in or around the crack  
5 house, 340 Brunswick Avenue, together.

6 Now, this case is -- is simple in a way,  
7 but it's exquisitely difficult in another way. One of  
8 the difficulties is because the defendant is a man that  
9 you would love to despise by virtue of his status as a  
10 drug dealer.

11 The prosecutor has talked a lot about drugs  
12 in her opening. I'm sure that none of you are in love  
13 with crack users or crack dealers. It's an ugly  
14 reality that infests our city, and we do with it what  
15 we can to live with it in here. It colors the job that  
16 you have in how you see the facts and what you do with  
17 the case.

18 I suggest to you that when his Honor  
19 instructs you as to the law, he will tell you you are  
20 to decide this case dispassionately, without bias.

21 Now, we all have our own personal biases  
22 and prejudices. It's okay. That's part of the human  
23 condition. We all have our own way of seeing things,  
24 and one of those ways, if you're normal, would be an  
25 aversion to somebody labeled as a drug dealer.

1 But what you have to do is realize that  
 2 that individual is not on trial for being a drug  
 3 dealer, although emotionally it may feel that way at  
 4 first blush. What he's on trial for is murder, felony  
 5 murder, and arson. The \$64,000 question in this case  
 6 is who set the fire.

7 Now, while you're considering the case, I  
 8 want you to keep in mind some questions, along with a  
 9 grain of salt, and a healthy dose of scepticism, and a  
 10 good dose of common sense. Keep these questions in  
 11 your mind.

12 What, if anything, did Curt Hawkins have as  
 13 a motive for setting the fire himself? What motive, if  
 14 any, did Curt Hawkins have to say that Larry Fleming  
 15 did? Was Curt Hawkins acting kind of as the junior  
 16 drug dealer about this time? Had he been helping Larry  
 17 Fleming sell drugs to these people? Are you confident  
 18 on the nature and extent of that seller/purchaser  
 19 relationship?

20 These are people who are not at the top of  
 21 their class and are not bucking for a certificate of  
 22 merit here. This is really a gamey city crew we have  
 23 here at both sides of the table. You've got to take  
 24 what they say with a really healthy dose of scepticism.  
 25 What bias or motive might they have to say what they

1 say if, by chance, it should turn out to be less than  
 2 the truth? How would they benefit?

3 We'll get more into this later. All I want  
 4 to do is ask you to keep maintaining the strict  
 5 attention you've been giving us so far. It's going to  
 6 be a short case, but it's a significant case. It's a  
 7 case where you'll be asked to render justice both to  
 8 the dead and to the living, to render justice unto  
 9 others as you would have it rendered unto yourselves or  
 10 your family, if you would be so unfortunate if you were  
 11 to have the finger of guilt pointed at you.

12 MS. LACKEN: Judge --

13 THE COURT: A little bit on the summation  
 14 side.

15 MR. HAMILTON: With that, I'll sit down.

16 THE COURT: Thank you very much,  
 17 Mr. Hamilton.

18 Prosecutor, you may call your first  
 19 witness.

20 MS. LACKEN: Thank you, your Honor. The  
 21 state calls Captain Multop.

22 THE CLERK: Raise your right hand.

23 R O B E R T M U L T O P, STATE'S WITNESS, SWORN.

24 THE CLERK: Please state your name.

25 THE WITNESS: Robert Multop.



1 THE COURT: Good morning, Captain.  
 2 THE WITNESS: Good morning.  
 3 DIRECT EXAMINATION BY MS. LACKEN:  
 4 Q Captain, can you please tell the Court and  
 5 jury for whom you are employed?  
 6 A City of Trenton, fire division.  
 7 Q How long have you been employed by the City  
 8 of Trenton?  
 9 A 35 years.  
 10 Q What capacity do you serve?  
 11 A Captain.  
 12 Q And what type of fire unit do you work in?  
 13 A I work on an engine company.  
 14 Q Can you tell me what an engine company is?  
 15 A They carry hose for extinguishment of fire.  
 16 Q Okay. Are there different types of units  
 17 within the fire department?  
 18 A Yes, there are.  
 19 Q What other units are there?  
 20 A We have ladder companies and -- that carry  
 21 ladders, perform rescue and ventilation. We have the  
 22 rescue company which performs search and rescue. And  
 23 we have the other units that provide support systems.  
 24 THE COURT: Captain, for a fireman, you  
 25 have a soft voice. Would you mind kind of speaking

1 into the mike. See if that's on. Just tap it.  
 2 Q Captain, when was your last tour of duty?  
 3 A Last night through this morning.  
 4 Q Captain, let me ask you: I'm going to  
 5 direct your attention to Saturday, May 11, of 2002.  
 6 what engine company were you working with then?  
 7 A I was assigned to engine 5.  
 8 Q Now, how many people? Engine 5, it's like  
 9 if you were to look at it, is it a fire engine we would  
 10 all know?  
 11 A Yes. It's an engine company.  
 12 Q And you travel in what type of vehicle?  
 13 A A pumper and fire apparatus.  
 14 Q It's a truck that allows you to pump water  
 15 from --  
 16 A Right.  
 17 Q -- fire hydrants?  
 18 A From the fire hydrant to the pumper to the hose.  
 19 Q How many men are on the engine?  
 20 A Right now there were three of us assigned:  
 21 myself, my driver, and a nozzle man.  
 22 Q A nozzle man, a person who actually holds  
 23 the fire hose in the fire?  
 24 A Right.  
 25 Q Now, as a captain, do you take part in the

1 actual firefight, or do you help dictate what goes on  
 2 and direct people to their duties?  
 3 A I take part, and I'm the safety officer with my  
 4 nozzle man at the fire.  
 5 Q You'll have to explain that to me. What's  
 6 a safety man?  
 7 A Well, he's on the nozzle spraying the water on  
 8 the fire, and I'm right in back of him, directing him,  
 9 and also looking for any safety concerns around us.  
 10 Q Now, you said there were three people --  
 11 two people working with you, three including yourself,  
 12 correct?  
 13 A Correct.  
 14 Q Who were they on May 11 of 2002?  
 15 A My driver was Firefighter Brian Sirack, and my  
 16 nozzle man was --  
 17 Q Willever?  
 18 A No. He was on a rescue company.  
 19 Q Vincent Marshall?  
 20 A Marshall Vincent.  
 21 Q That's okay. I know you're tired.  
 22 So tell me, around approximately 10:17  
 23 p.m., were you dispatched to a fire?  
 24 A Yes.  
 25 Q Where was that fire?

1 A Brunswick Avenue; 340 Brunswick Avenue, I  
 2 believe.  
 3 Q Where was engine company 5 back in May of  
 4 2002?  
 5 A Pennington and Willow, approximately seven blocks  
 6 from the fire location.  
 7 Q You were working what tour of duty?  
 8 A C platoon.  
 9 Q What time of night?  
 10 A We went from 5:00 at night, and we went to 7:00  
 11 the next morning.  
 12 Q In the fire station, how are you alerted  
 13 there is a fire?  
 14 A The lights go on and then there's an announcement  
 15 over the PA system. And at the same time we have a  
 16 printout on the computer paper, printout that shows us  
 17 the address, cross-streets, hydrants, things like that.  
 18 Q Approximately 10:15, 10:17, in that area,  
 19 when you received the dispatch, what did you and your  
 20 crew do?  
 21 A We got up from our seats, proceeded to the  
 22 apparatus, donned our firefighting gear, and we were  
 23 out the door in approximately 30 seconds after receipt  
 24 of the alarm.  
 25 Q What type of firefighting gear do you have

1 to wear?  
 2 A I have bunker pants, which are long, insulated  
 3 pants. I have a klondike.  
 4 Q what's a klondike?  
 5 A A klondike is a heavy black coat that's fire  
 6 resistant.  
 7 Q what else do you wear?  
 8 A I wear a leather helmet, breathing apparatus,  
 9 compressed air on my back, gloves.  
 10 Q Do you wear a mask?  
 11 A Mask when I go into the fire.  
 12 Q Tell us what happened when you were  
 13 approaching 340 Brunswick Avenue.  
 14 A We were approaching 340 Brunswick Avenue, and I  
 15 looked to my right in the alleyway, wide alleyway, and  
 16 I saw heavy fire out the first two windows that I could  
 17 see. And we proceeded, and there was also an  
 18 individual in the alley with an ax, with his back to  
 19 me, trying to gain access to the third window down on  
 20 the side of the building.  
 21 Q When you approached 340 Brunswick Avenue,  
 22 can you describe the building itself? what type of  
 23 building was it?  
 24 A Two-and-a-half-story, semi end of the row.  
 25 Q Was it boarded up?

1 A Boarded up, HUD windows.  
 2 Q HUD windows, meaning big white board?  
 3 A Big board. The board had burned off the side two  
 4 windows at that point.  
 5 Q But the rest of the windows, you saw, at  
 6 least from your vantage point, were covered with these  
 7 thick HUD windows?  
 8 A Plywood windows.  
 9 Q You indicated you saw someone in the  
 10 alleyway attempting to gain access, you said?  
 11 A Yes.  
 12 Q what were they doing?  
 13 A They appeared to have an ax, and they were  
 14 hacking at the side window, the third window that was  
 15 not burned away.  
 16 Q Can you describe the person any better than  
 17 "an individual"?  
 18 A A large individual with his back to me.  
 19 Q It was a man or woman?  
 20 A Man.  
 21 Q Black or white?  
 22 A Black.  
 23 Q When you arrived, did you hear anything  
 24 coming from the building at that point?  
 25 A No.

1 Q Would you tell me what you did, you and  
2 your crew?

3 A We proceeded to take off one section of fire  
4 hose. We waited for the rescue company to take the  
5 plywood off the front door. At that point --

6 Let me back up a little bit. We were  
7 standing out front before the plywood was off the door.  
8 I saw in the transom above the front door heavy fire.

9 Q What's the transom?

10 A It's a little window above the front door they  
11 had in older houses.

12 Q So you saw fire coming from the windows  
13 from the side of the house, and you saw fire through  
14 that little, you call it transom, or window, above the  
15 front door?

16 A Right.

17 Q Now, were you the first responding fire  
18 unit?

19 A Yes. I -- we were the first ones to physically  
20 go in the building.

21 Q Were there other fire units responding,  
22 getting to the scene at the same time you were?

23 A Yes.

24 Q You indicated you were waiting for a rescue  
25 unit to help take down the door?

1 A The rescue job at that point was to access the  
2 door by pulling the plywood off the front door.

3 Q And while that was done, you were waiting  
4 to go in?

5 A We were masking up, turning our masks on, putting  
6 them in place, so when the door was opened, we could  
7 fight the fire.

8 Q Tell us what happened when the door was  
9 opened.

10 A I witnessed heavy fire in the vestibule or the  
11 doorway, and the stairs right ahead of us. And they  
12 had heavy fire going up the stairs, and there was fire  
13 to the right in the room that we were eventually going  
14 to go in to fight the fire.

15 Q The home, 340 Brunswick Avenue, what type  
16 of home was it?

17 A Two-and-a-half-story semi-, end of the row.

18 Q Looking at the home, where was it attached,  
19 on the left side or the right?

20 A The left side.

21 Q To the right of the home there was what?

22 A There was the alley that we approached first from  
23 that direction.

24 Q Now, you indicated that Marshall Vincent  
25 was your nozzle man?

1 A Correct.

2 Q He was the first one in the door with the

3 fire hose?

4 A Yes.

5 Q Tell us what happened, what you did and

6 what he did.

7 A We knocked down the fire, as I said, in the

8 vestibule and the doorway. And then we saw the fire,

9 so we proceeded with him and I as a unit, a team, on

10 our hands and knees into the room to the right on the

11 first floor.

12 Q Could you see anything?

13 A No. Heavy fire. And then when we hit the fire

14 and the smoke banked down, I couldn't see anything.

15 Q Could you hear anything or smell anything

16 at that point?

17 A Not at that point because -- smell, because we

18 had our masks on, and I didn't hear anything. I heard

19 voices in back of us that were the other firefighters.

20 Q What did you do when you went into the room

21 on the right?

22 A We slowly proceeded in. We hit all visible fire.

23 When we were crawling into the room, about five or six

24 feet into the room, we had fire underneath the

25 staircase that was proceeding up to the second floor on

1 our left. And we hit that, and we hit the fire in the

2 room, and then we eventually proceeded to the second

3 room and hit that fire.

4 Q So the fire was raging in front of you when

5 you walked in. You had to make a right to get to the

6 first room?

7 A Yes.

8 Q The fire was obviously going on in there?

9 A Yes.

10 Q You said you hit it?

11 A We knocked it down with the water line.

12 Q And then you proceeded into another room

13 going towards the back of the house?

14 A Yes.

15 Q Was there fire in that second room?

16 A Yes.

17 Q What did you have to do then?

18 A We continued with our extinguishment.

19 Q Did the fire go into any other room that

20 you could see on the first floor?

21 A Not that I could see. I think the second room

22 was the only room that we had heavy fire in. There was

23 heat and smoke, of course, in the other rooms on the

24 first floor, but that's the only fire that we saw.

25 Q Captain, if you didn't have that mask on,



1 would you have been able to breathe in that fire?  
 2 A No.  
 3 Q Now, what did you do after you knocked the  
 4 fire down in the first and second rooms?  
 5 A We backed the line out to the first room, and we  
 6 extinguished spot fires which were still burning, which  
 7 is considered overhaul at that point.  
 8 Q What is overhaul?  
 9 A Overhaul is considered knocking down the pockets  
 10 of fire, pulling the molding from around the doors and  
 11 the windows, upsetting debris on the floor to  
 12 extinguish it.  
 13 Q Now, while you were downstairs, fighting  
 14 the fire there, were there other firefighters involved  
 15 in fighting the fire upstairs?  
 16 A Yes. I heard them on the -- they had brought a  
 17 second line in the building, and they proceeded  
 18 upstairs from our pumper.  
 19 Q From the time that you actually arrived at  
 20 340 Brunswick Avenue until the time that the fire was  
 21 completely extinguished, how long would you say it  
 22 took?  
 23 A In our area, about 20 minutes.  
 24 Q Now, did you ever have an opportunity to go  
 25 up to the second floor of 340 Brunswick Avenue?

1 A Yes.  
 2 Q When you did so, what did you observe?  
 3 A We were told, before we proceeded up to the  
 4 second floor, by the battalion chief, there was a body  
 5 on the second floor right at the top of the stairs, to  
 6 avoid that area.  
 7 Q Who was that body found by?  
 8 A I presume the rescue company. I'm assuming the  
 9 rescue company.  
 10 Q What did you have to do upstairs? What  
 11 duties did you have?  
 12 A We proceeded via ladder through an open area that  
 13 I think was pulled downstairs that was burned away or  
 14 was left open, and we proceeded to the attic area, and  
 15 we assisted with extinguishment of fire there.  
 16 Q The attic area, where was that located in  
 17 relation to the stairs that you had to go up to reach  
 18 the second floor?  
 19 A Right at the top of the stairs, you could look up  
 20 and see the attic area through the trapdoor.  
 21 Q Did you have an opportunity to see the body  
 22 of the victim on the second floor?  
 23 A Yes.  
 24 Q Can you describe it for me?  
 25 A He was laying with his head against the radiator

1 and his feet facing the doorway to a room to my  
2 right-hand side.

3 Q As you're coming up the stairs?

4 A As I'm coming up the stairs.

5 Q Did you notice any type of fire debris  
6 around him or anything of that nature?

7 A He was partially covered with fire debris.

8 Q Was the body of the victim removed by  
9 firefighters at that point?

10 A No, it was left in place.

11 Q For what purpose?

12 A Investigation purposes, I guess -- I assumed that  
13 he had been declared at that point.

14 Q Dead?

15 A Dead.

16 MS. LACKEN: Your Honor, I have S-1, S-2,  
17 S-3, S-5, S-7, S-8, S-9.

18 THE COURT: So noted.

19 Q Captain, I'm going to show you a series of  
20 photographs. I'm going to show them to you without  
21 publishing them to the jury, and then I will ask they  
22 be moved into evidence.

23 I'm going to show you what has been marked  
24 as state's exhibit S-1. Do you recognize what is in  
25 this photograph?

1 A Yes.

2 Q What is that?

3 A The fire building at 340 Brunswick Avenue.

4 Q Is that how it appeared to you that night  
5 after the fire had been extinguished?

6 A Yes.

7 Q S-2? Do you recognize what's in that  
8 photograph?

9 A Yes.

10 Q What is that?

11 A That's the same fire building.

12 Q Different view?

13 A Different view from head on in the front.

14 THE COURT: Excuse me. You did mention  
15 what you called "HUD windows."

16 THE WITNESS: Yes. They're in the  
17 pictures.

18 THE COURT: What does "HUD" mean?

19 THE WITNESS: They're plywood which has  
20 been placed on vacant buildings. There's no access.

21 THE COURT: H-U-D?

22 THE WITNESS: Housing and Urban  
23 Development.

24 THE COURT: Okay. Thank you.

25 Q Does S-2 appear to be the house at



1 340 Brunswick Avenue after the fire was extinguished?  
 2 A Yes.  
 3 Q I show you S-3. Do you recognize what's in  
 4 that photograph?  
 5 A Yes.  
 6 Q What is that?  
 7 A That's the first floor that we were first in in  
 8 the extinguishment.  
 9 Q Does that accurately reflect how that first  
 10 floor looked after the fire on May 11?  
 11 A Yes.  
 12 Q S-5?  
 13 A It's looking at the stairway on the left of the  
 14 entrance we made in the first floor.  
 15 Q And does that look as it did after the  
 16 extinguishment of the fire on May 11, 2002?  
 17 A Yes.  
 18 Q S-7? That's a photograph, obviously, and  
 19 coming from the first room you were in?  
 20 A Right.  
 21 Q What is this room?  
 22 A That's the second room we had fire in.  
 23 Q Does it look the same as it did back when  
 24 the fire was extinguished back in May of 2002?  
 25 A Yes.

1 Q S-8, same room, different view?  
 2 A Yes.  
 3 Q Okay. And does that look the same as it  
 4 did back in May of 2002, after the fire was  
 5 extinguished?  
 6 A Yes.  
 7 Q Finally, I'm showing you S-9. Do you  
 8 recognize what that is a picture of?  
 9 A Yes.  
 10 Q What is that?  
 11 A That's at the top of the stairs on the second  
 12 floor.  
 13 Q Looking at that photograph, what's in the  
 14 middle of that?  
 15 A A body.  
 16 Q Is that how that body looked after the fire  
 17 was extinguished back on May 11, 2002?  
 18 A Yes.  
 19 MS. LACKEN: Your Honor, I request that  
 20 S-1, 2, 3, 5, 7, 8, and 9 be entered into evidence.  
 21 THE COURT: Any objection?  
 22 MR. HAMILTON: No objection.  
 23 Was 4 included in that?  
 24 THE COURT: No.  
 25 Into evidence.

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1 MS. LACKEN: Thank you, your Honor.  
 2 MR. HAMILTON: Was 9 included in that?  
 3 THE COURT: Yes.  
 4 (S-1 through 3, 5, and 7 through 9 are  
 5 marked into evidence.)  
 6 Q Captain, I'm going to ask you to step down,  
 7 and I'm going to put a couple of these photographs on  
 8 the easel and ask you to identify what is depicted in  
 9 these photographs.  
 10 MS. LACKEN: For the record, on the easel I  
 11 have S-1, S-2, and S-3.  
 12 THE COURT: Do you need any more of those  
 13 clips?  
 14 MS. LACKEN: Right now we have enough.  
 15 THE COURT: Do you want a high-tech  
 16 pointer?  
 17 MS. LACKEN: Sure.  
 18 THE COURT: Just push the button.  
 19 Q Starting with S-1 for the record, it's the  
 20 top left side of the easel. Can you tell us what is  
 21 shown in that photograph?  
 22 A It shows the side two windows that I witnessed on  
 23 the way, proceeding this way, that were burned out.  
 24 These are the front windows, and this was the door we  
 25 made entrance to.

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MULTOP - DIRECT - LACKEN

1 Q Presumably, that's 340 Brunswick Avenue,  
 2 correct?  
 3 A Correct.  
 4 Q Now, when you were referring to HUD windows  
 5 before, can you point them out with the laser pointer  
 6 and tell us what you're talking about?  
 7 A They're plywood windows put on the structures to  
 8 keep vandals out.  
 9 Q At this point, in looking at the  
 10 photographs, it seems that many of those HUD windows  
 11 were broken out.  
 12 How did that happen?  
 13 A The ladder company has chain saws and they -- as  
 14 you can see here, this window is cut in half. The  
 15 chain saw will be cutting the window in half for  
 16 ventilation.  
 17 Q In order to ventilate what, the smoke out  
 18 of the house?  
 19 A The smoke and the heat.  
 20 Q When you arrived at 340 Brunswick Avenue,  
 21 in first responding to the fire, all of those windows  
 22 were boarded up completely?  
 23 A Except these two were burned off.  
 24 Q Now, I'm going to show you S-2 now in  
 25 evidence, and in looking at that, what is that?

1 A That's the remnants of a HUD window that was on  
 2 this window here.  
 3 Q Now, obviously, that's also, for the  
 4 record, 340 Brunswick Avenue?  
 5 A Correct.  
 6 Q Front view?  
 7 A Yes.  
 8 Q Do you see the area where you and other  
 9 members of your fire department went in to fight the  
 10 fire?  
 11 A That door, front door.  
 12 Q The middle left of the photograph, correct?  
 13 A Right.  
 14 Q And that door was cut open and pried open  
 15 by your rescue company, correct?  
 16 A Correct.  
 17 Q I'm asking you to take a look at S-3 which  
 18 is still on the easel. Tell us what's in that  
 19 photograph.  
 20 A This photograph? This is the room -- this is the  
 21 door that you see here, over here.  
 22 Q One second.  
 23 Can you identify that?  
 24 A That is the front door. Those are the stairs  
 25 going up. We made entrance to this area right here,

1 extinguished the fire, kneeling there, and proceeded  
 2 into this room and back this way (indicating).  
 3 Q For the record, there are some open windows  
 4 here, and this area here was the area of the stairwell  
 5 (indicating), correct?  
 6 A Correct.  
 7 Q I'm looking at all of the area here. What  
 8 do you notice in the vertical, the vertical posts here?  
 9 A Heavy charring at this point.  
 10 Q Significant of?  
 11 A Heavy fire. Okay.  
 12 Q And that is reflected also in the various  
 13 areas in that picture, correct?  
 14 A Correct.  
 15 Q When you went in, Captain Multop, did you  
 16 notice any other means by way to get to the second  
 17 floor in the house, by any other staircases?  
 18 A No.  
 19 Q This would be the only way to get up to and  
 20 down from the second floor?  
 21 A Correct.  
 22 Q I ask you to take a look at S-5 that is now  
 23 in evidence. Can you describe for the jury what is  
 24 depicted in that photograph?  
 25 A Heavy charring. This was the stairway underneath

1 the stairs which, when we came in, this was all burned  
2 away. And when we were coming in, we hit the fire  
3 here, and then we proceeded to this doorway here. We  
4 proceeded into the back.

5 Q S-7, do you recognize what's in that  
6 photograph?

7 A Yes.

8 Q In looking at S-5 -- you can't really see  
9 it here -- there's a wall with a doorway, correct?

10 A Correct.

11 Q That doorway is this doorway?

12 A Correct.

13 Q The front room leads into the room you see  
14 in S-7?

15 A Correct.

16 Q In that room you also indicated that you  
17 had to fight the fire, correct?

18 A Correct.

19 Q All right. Did you proceed into and  
20 through this room into another room?

21 A No.

22 Q Did you check the other rooms to see  
23 whether or not there was any fire?

24 A Yes.

25 Q And there was none that needed your service

1 at that time?

2 A No.

3 Q S-8 in evidence, what do you see in that?

4 A This is another room. This is one of the windows  
5 on the side of the building that was burning when we  
6 pulled up.

7 Q In that photograph there's depicted all of  
8 the fire damage to the walls, et cetera?

9 A Correct.

10 Q Finally, S-9, do you recognize what's in  
11 that photograph?

12 A Yes.

13 Q What is that?

14 A It's the hallway on the second floor, and the  
15 stairway would have been over here. I'm assuming this  
16 was taken down the hallway facing the back and the  
17 stairway. There's a ladder over here; that was the  
18 ladder we used to go up to the cock loft.

19 Q That loft is basically an attic or third  
20 floor?

21 A An attic.

22 Q The area in here where you indicated in the  
23 middle or bottom of the photograph, that's the victim?

24 A Yes.

25 Q That's how he was when the fire was

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1 extinguished?  
2 A Yes.  
3 Q From what you can see on the ground and  
4 around him, was that fire debris?  
5 A Fire debris.  
6 Q Thank you. You may be seated.  
7 MS. LACKEN: If I can have a moment, your  
8 Honor.  
9 THE COURT: Sure.  
10 MS. LACKEN: Thank you, your Honor.  
11 Captain.  
12 Your Honor, I have no further questions.  
13 THE COURT: Cross-examine.  
14 MR. HAMILTON: No questions for the  
15 Captain. And thank you for your service.  
16 (The witness is excused.)  
17 THE COURT: You may call your next witness.  
18 MS. LACKEN: Thank you, your Honor.  
19 Your Honor, the state calls Cliff Willever,  
20 firefighter.  
21 C L I F F O R D W I L L E V E R, STATE'S WITNESS,  
22 SWORN.  
23 THE CLERK: State your name.  
24 THE WITNESS: Clifford Willever.  
25 THE COURT: Prosecutor.

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WILLEVER - DIRECT - LACKEN 48

1 DIRECT EXAMINATION BY MS. LACKEN:  
2 Q Good morning.  
3 A Good morning.  
4 Q Firefighter Willever, for whom are you  
5 employed?  
6 A City of Trenton.  
7 Q How long have you been employed with  
8 Trenton?  
9 A 12 years.  
10 Q What capacity are you employed?  
11 A As a firefighter.  
12 Q And what unit or engine company or rescue  
13 company are you involved with?  
14 A I work for rescue 1.  
15 Q What's rescue 1?  
16 A Rescue 1 is the only rescue company in the city.  
17 It's primarily a manpower unit. We respond to every  
18 house fire in the city, along with other various jobs.  
19 Q When was your last tour of duty?  
20 A Last night.  
21 Q As a member of the rescue unit, do you take  
22 part in actual firefighting?  
23 A Yes.  
24 Q What are your duties and responsibilities?  
25 A Primary -- okay. An engine company's primary job



1 is to put water on the fire. Ladder company is to --  
 2 to make entry into the building, forced entry and  
 3 ventilation. The rescue company kind of assists in --  
 4 in whatever they need, according to the battalion  
 5 chief. And then most of the time we go in and do a  
 6 search.

7 Q When you say you "do a search," can you  
 8 describe what you mean?

9 A We'll follow the engine company in and do a  
 10 primary search, which is more or less a rapid search,  
 11 rapid yet thorough. We don't ever rely on -- we always  
 12 search every building no matter what we do. We don't  
 13 rely on people saying it's empty. Automatically, we do  
 14 a search of the entire building.

15 Q And you're looking for people and things?

16 A Anything. People, problems that firefighters  
 17 could run into.

18 Q I'm going to direct your attention to  
 19 May 11, 2002, somewhere around 10:15 p.m., give or take  
 20 a couple minutes.

21 Were you dispatched to a fire at  
 22 340 Brunswick Avenue?

23 A Yes.

24 Q Where was rescue 1 located back in May of  
 25 2002?

1 A 244 Perry Street.

2 Q When your rescue unit is dispatched, how  
 3 many people normally go?

4 A Five.

5 Q Do you remember who was working with you  
 6 back in May of 2002?

7 A Yes.

8 Q Who was working with you?

9 A Captain Nick Doura was the man in charge; Gary  
 10 Sabo was the driver; myself; and Charlie Metzger,  
 11 Firefighter Metzger; and Firefighter Ronald Ettenger.

12 Q Do you wear the same firefighting gear that  
 13 people on engines and ladder companies wear?

14 A Yes, yes.

15 Q Now, what happened when you received the  
 16 dispatch there was a fire at 340 Brunswick Avenue?

17 A We get dressed, we get in the truck, and we  
 18 respond.

19 Q Part of your garb is breathing apparatus?

20 A Yes.

21 Q Tell us what happened when you arrived at  
 22 340 Brunswick Avenue.

23 A We arrived at 340. We pulled past engine 5,  
 24 parked to the left to get out of the way, because our  
 25 rescue truck -- like, engines and ladders, engines have



1 hose and water, ladders have ladders. Rescue has us  
2 guys and all kinds of specialty equipment we don't use  
3 for house fires. A few things. We can get out of the  
4 way. We want to be able to, when the fire is under  
5 control, to break free for the next assignment.

6 Q As you're approaching 340 Brunswick Avenue,  
7 do you see anything?

8 A Yes.

9 Q Tell me what you saw with regard to the  
10 house and the surroundings.

11 A When we got -- when I got off the truck, I walked  
12 up, I seen fire first floor right above the door.  
13 There's a little, like, I don't know what you would  
14 call, a little opening above the door. I could see  
15 fire through there. I walked past the building to look  
16 down the alley on side D.

17 Q Which is the side of the house?

18 A Yes. The alley side of the house, that's side D.  
19 I basically do that to size up the building, to see  
20 when I get in there, if I have to get out, how am I  
21 going to get out if I can't get out the way I went in.

22 Q When you first went to size up the  
23 building, did you see any areas that weren't boarded up  
24 at that point?

25 A No. The entire building was boarded up, from my

1 perspective.

2 Q From your perspective.

3 When you were doing your sizing up, did you  
4 see anyone else in the area?

5 A Yes. I did see a man about -- on side D about  
6 halfway down the alley, trying to get in the door.

7 Q What door were you talking about? Was it a  
8 door?

9 A Yeah, I think it was a door, about halfway down.  
10 A white door.

11 Q How was he trying to get in, do you  
12 remember?

13 A He was chopping it with something; he was hitting  
14 it with something. I don't know. I didn't get close  
15 enough. I stayed out front.

16 Q So after making this first assessment, what  
17 did you do?

18 A I went back to the front of the house and I  
19 started putting on my mask, getting ready to go into  
20 the building. Put on my face piece -- turned the air  
21 on, put my face piece on, and get ready to go in.

22 Q What happened from there?

23 A I went in the front door. The engine company  
24 went straight in, a little bit to the right. I went  
25 along the front wall and made a right-hand search,

1 primary search of the first floor front room.  
 2 Q Now, the information that you had received  
 3 going to that house fire, did you receive any  
 4 information that there might be people inside?  
 5 A Not that I recall.  
 6 Q So you didn't know whether or not there  
 7 were people in the building or not?  
 8 A No. We automatically do a primary search,  
 9 whether we get told somebody is in there or not.  
 10 That's automatic.  
 11 Q You went inside, and you did a search?  
 12 A I did a right search. As I was doing a right  
 13 search, I remember climbing over stuff, and I didn't  
 14 find anyone at that time.  
 15 I got to the front room, there was the  
 16 front door, and then the room going to the second room  
 17 of the first floor between there. And I got to that  
 18 door, I ran into the engine company. They were making  
 19 it into the second room.  
 20 Q When you were going into that room, could  
 21 you see anything?  
 22 A No. It's just black smoke.  
 23 Q Black smoke?  
 24 A Just heavy smoke, real heavy smoke.  
 25 Q Did you have to remain behind the engine

1 company, obviously, not to go into the fire?  
 2 A Yes.  
 3 Q You didn't have a fire hose with you at  
 4 that time?  
 5 A I am just doing the search. I have a tool which  
 6 is probably an ax which I use in my search.  
 7 Q You could feel the heat?  
 8 A Yeah, it was hot in there.  
 9 Q Tell me what happened after you got -- made  
 10 your sweep of that first room.  
 11 A I got to the engine company. I went in that room  
 12 a little bit. I realized they were starting to get a  
 13 good handle on it, on the second room, and I went to  
 14 Firefighter Ettenger. I said, Ron, we're going to try  
 15 to make the second floor.  
 16 Q What happened?  
 17 A At that time I went back to the front door, and  
 18 when I got to front door, I ran into my captain, which  
 19 is Captain Doura, he had the second line. Anytime we  
 20 go into a building, the first line goes in, fights the  
 21 fire. There always has to be a second line in case  
 22 something happens to the first line.  
 23 Q What happened?  
 24 A I ran into that, I ran into him. He had that  
 25 line. I took that line off of him, the hose line,

1 inch-and-three-quarter hose line, and I started  
2 advancing up the steps.

3 Q When you say advancing up the stairs, was  
4 there still fire on the stairs and up the stairs?

5 A Not so much on the stairs, but above the stairs.

6 Q Did anyone else go up the stairs with you?

7 A Yes. We never work alone. Firefighter Ettenger  
8 and Captain Doura came with me.

9 Q What about Firefighter Metzger?

10 A That's who I mean, Firefighter Metzger. Not  
11 Ettenger, he was still on the first floor.

12 Q As you're proceeding up the stairs, what  
13 are you doing?

14 A Knocking the fire down. At that point, I'm --  
15 once I took that line, now I become more or less an  
16 engine man.

17 Q You're knocking the fire down. You mean  
18 you're spraying water all over the fire?

19 A Yes.

20 Q Tell me what you did from there.

21 A At that time I got to the top of the steps. I  
22 went a little bit right and finished that room, like,  
23 hit the fire in that room. And at that time, I was at  
24 the top of the steps a little to the right. Charlie  
25 Metzger, Firefighter Metzger, was right behind me.

1 I made the left, and I started advancing  
2 down the hallway.

3 Q What happened as you were making your  
4 advance?

5 A That's when I ran into the victim.

6 Q Okay. That's when you discovered Ellis  
7 McNeill?

8 A Yes.

9 Q Tell me how you discovered him?

10 A I remember I had the line shut down at the time  
11 because I was looking for the fire, trying to feel it.  
12 You can't see it, you can feel it.

13 At that time I turned to Charlie Metzger  
14 and I said, Charlie, I think I have something here. I  
15 think I have something here. And that's when we  
16 confirmed it was somebody.

17 Q Now, what was your responsibility from  
18 there?

19 A I had the hose line. My job is to continue to  
20 fight the fire, because somebody is tending to the  
21 victim.

22 Q Who was tending to the victim?

23 A At that time, it was Firefighter Metzger and  
24 Captain Nick Doura.

25 Q And they made a determination at that point

1 the victim was dead?

2 A Yes.

3 Q Where you did have to go to continue  
4 fighting the fire?

5 A At that time the fire was pretty much knocked  
6 down on the second floor, and somebody boosted me to  
7 the third floor, and I continued to fight the fire in  
8 the third floor attic space. There was no steps.

9 Q No steps?

10 A No steps. It was just right at the top of the  
11 steps, there was a little hole where it should have  
12 been pull-down steps, I guess.

13 Q Now, was there -- there was active fire on  
14 that third floor or that attic area?

15 A Yes.

16 Q How long would you say it took you from  
17 start to finish, when you first arrived at  
18 340 Brunswick Avenue, to the end of when the fire was  
19 extinguished?

20 A I would say at least 25 minutes, I would say,  
21 because I get about 25 minutes out of a bottle. And I  
22 was still on the first bottle, but it was -- it did go  
23 off.

24 Q When you say "bottle," what are you  
25 referring to?

1 A My air bottle on my back. They're a 30-minute  
2 bottle. When you're working, you can get 20 to 25. I  
3 normally get 25 out of a bottle, working hard. And on  
4 the third floor I remember I ran out of air, but by  
5 then, they had the roof open and it was right there.  
6 It was in the attic, and I kind of went out there.

7 MS. LACKEN: I think the only new ones are  
8 S-11 and S-35.

9 THE COURT: S-11 and S-35. Okay, fine.

10 Q First I want to show you two pictures and  
11 ask you if you recognize them, and I will ask if they  
12 can be moved into evidence.

13 I'm showing you S-11. Do you recognize  
14 what that is?

15 A Yes.

16 Q What is that?

17 A That's the alleyway next to 340.

18 Q Keep your voice up.

19 Does that look the way it did the night of  
20 May 11, 2002?

21 A When I walked down -- when I looked down the  
22 alley, this was still intact. This board was up higher  
23 and it was intact.

24 Q The board to a doorway that's in the middle  
25 of the picture?

1 A Yes.

2 Q I'm going to show you S-35. Do you  
3 recognize what that is?

4 A Yes.

5 Q what is that?

6 A That's the top landing, the hallway on the second  
7 floor at the top of the steps.

8 Q Does this look to be accurate, an accurate  
9 depiction of how that hallway looked after the fire was  
10 extinguished on May 11th?

11 A Yes.

12 MS. LACKEN: Your Honor, I ask that S-11  
13 and S-35 be moved into evidence.

14 MR. HAMILTON: No objection.

15 THE COURT: Into evidence.

16 (S-11 and S-35 are marked into evidence.)

17 MS. LACKEN: If your Honor doesn't mind,  
18 I'll leave the easel here.

19 Q Firefighter Willever, if you would step  
20 down so you don't block the view, I'm going to ask you  
21 to look at what has been previously entered into  
22 evidence as S-1.

23 Do you recognize what is in that  
24 photograph?

25 A Yes. It's 340 Brunswick Avenue.

1 Q I need you to keep your voice up so they  
2 can hear you.

3 A It's 340 Brunswick Avenue.

4 Q Can you show us the area where you saw the  
5 individual trying to get into the side of the building  
6 when you first arrived?

7 A Right there, right in that little doorway.

8 Q Okay. Now --

9 A It was previously boarded up.

10 Q I'm showing you S-11.

11 A Yes.

12 Q Basically, what is this picture?

13 THE COURT: Firefighters, you have to keep  
14 your voice up. Firefighters are very soft-spoken.

15 A Right here is the side of 340 Brunswick Avenue,  
16 and that's where, when I was out front here, I noticed  
17 a man trying to break into the window.

18 Q Trying somehow to gain access to that  
19 building during the fire?

20 A Yes.

21 Q Now, you had indicated previously that this  
22 white door was not in that position when you first  
23 arrived?

24 A No. It was intact; it was up on the door.

25 Q So -- suffice it to say that all of this



1 boarding, at least in the lower floor, was over the  
2 doors and windows?

3 A Yes.

4 Q S-5 is already up on the easel, and it's in  
5 evidence. Do you recognize what's in S-5?

6 A Yes, that's the front room of 340 Brunswick  
7 Avenue, first floor, front room.

8 Q And in S-3, do you recognize that?

9 A It's the same scene, different angle, first  
10 floor, front room.

11 Q That's the area where you entered into the  
12 house?

13 A Yes, right there.

14 Q Now, as -- after you did the sweep of the  
15 room that you indicated on the right, and am I correct  
16 in saying this room over here was the first room that  
17 you swept?

18 A Yes. I swept around the right this way  
19 (indicating).

20 Q And then you went into the second room?

21 A Yes.

22 Q You had to go up these stairs to gain  
23 access to the second floor?

24 A Yes.

25 Q And when you went up there, you indicated

1 you took the fire line and you fought the fire up  
2 there. And then as you were fighting the fire, you ran  
3 into -- I'll move it up -- what we now know was Ellis  
4 McNeill, correct?

5 A Yes.

6 Q I'm showing you S-9. Do you recognize what  
7 was depicted in that photograph?

8 A Yes. That's the hallway in the second floor.

9 Q Okay.

10 A The steps are right there (indicating).

11 Q In order to get to the back of the house,  
12 how would you have to proceed?

13 A I proceeded over top of them that way.

14 Q Now, in the middle of this photograph, what  
15 do you see?

16 A There's the victim right there (indicating).

17 Q Is that how Mr. McNeill looked after the  
18 smoke cleared?

19 A Yes.

20 Q All right. Now I'm showing you S-35. Do  
21 you recognize what's in that photograph?

22 A Yes. That's the opposite, looking down the hall  
23 the opposite way --

24 Q Now --

25 A -- the second floor.



1 Q -- in the middle of the photograph there's  
 2 a doorway structure. What is that doorway?  
 3 A That's the doorway leading to the steps to the  
 4 first floor.  
 5 Q You'd have to go down there to the first  
 6 floor?  
 7 A Yes.  
 8 Q When you said you came up and started  
 9 fighting the fire in the first room, or you made a  
 10 quick right, where did you fight the fire?  
 11 A Right there. I came up the steps and made a  
 12 right, and I stopped right there (indicating).  
 13 Q And in -- in S-35, is that the position in  
 14 which the victim was found after the smoke cleared?  
 15 A Yes.  
 16 Q All of this, I guess, stuff around McNeill,  
 17 that's fire debris?  
 18 A Yes.  
 19 MS. LACKEN: Thank you, your Honor. I have  
 20 no further questions.  
 21 THE COURT: Cross-examine.  
 22 MR. HAMILTON: No questions. Thank you for  
 23 your service.  
 24 THE COURT: Thank you, Firefighter. You  
 25 may step down.

1 (The witness is excused.)  
 2 THE COURT: You may step down. Your  
 3 beverages are here. Don't talk about the case while  
 4 you're together. Enjoy your break. We'll get you back  
 5 pretty soon. Thank you.  
 6 (The following is out of the presence of  
 7 the jury.)  
 8 THE COURT: All right. We'll take 15  
 9 minutes.  
 10 MS. LACKEN: Before the next witnesses, I  
 11 have to go over those certified.  
 12 THE COURT: Do you have time to do it now?  
 13 MS. LACKEN: I can.  
 14 THE COURT: Why don't we -- before you take  
 15 Mr. Fleming, why don't we go over the certified right  
 16 now.  
 17 MS. LACKEN: Okay. For purposes of the  
 18 Sands hearing, I'll start with Larry Fleming, your  
 19 Honor, should he choose to testify.  
 20 For Larry Fleming, he has a series of prior  
 21 convictions. Let me just get my pad, one of my many.  
 22 Okay. Mr. Fleming has five prior  
 23 convictions. He has one under Indictment 93-03-005,  
 24 fourth degree resisting arrest. And he was sentenced  
 25 4-16-93 to two years' probation.

1 He also has Indictment 93-05-0566, which is  
2 a possession of CDS charge, third degree. He was  
3 sentenced on September 10 of '96. Basically, he was  
4 given three years' probation, conditioned upon  
5 weekends. Now, that sentence was -- he violated that  
6 probation and apparently was resentenced on March 1 of  
7 '96 to four years in prison, and it was concurrent to a  
8 couple other indictments, 94-05-0577, and 94-12-257.

9 Now, 94-05-0577 was a charge of attempted  
10 theft, third degree. He was sentenced on that same  
11 date, March 1 of '96, four years -- four years'  
12 incarceration.

13 Also, another possession of CDS charge,  
14 third degree, that was 94-12-57, received four  
15 years for that as well.

16 And then finally, on January 10 of 1997, he  
17 was sentenced to a charge of distribution in a school  
18 zone under 96-07-0815, and he received three with a two  
19 MPI, concurrent to all of his violations.

20 I would suggest, your Honor, that all of  
21 those are within a relatively recent period of time.  
22 And I would suggest they are convictions that the state  
23 can go into should he take the stand. There's no need  
24 for sanitization here because he's charged with arson,  
25 murder, and felony murder. So I submit all of these

1 convictions can be delved into if he should take the  
2 stand.

3 THE COURT: Any objection to any of those?

4 MR. HAMILTON: The only grounds for  
5 objection we have is some remoteness argument. The '96  
6 case is not quite ten years old, and the rest are  
7 younger. But beyond that, Judge, I'll submit.

8 THE COURT: They will be permissible to be  
9 used by the prosecution for cross-examination.

10 MS. LACKEN: All right.

11 with regard to the state witnesses, I have  
12 an individual by the name of Joe McKinney, and he does  
13 have some prior convictions. He has a conviction for  
14 fourth-degree endangering in 1987. He received 18  
15 months imprisonment.

16 MR. HAMILTON: '87 or '97?

17 MS. LACKEN: '87. 18 months, and I'll  
18 double-check. Do you think it's '97?

19 MR. HAMILTON: No, I just misheard.

20 MS. LACKEN: 18 months consecutive to any  
21 VOPs he had.

22 I looked, your Honor. I couldn't find  
23 those. That was Indictment 86-03-0722.

24 He was also convicted on January 24 of '86  
25 to distribution of CDS, third degree, under Indictment

1 678-5-83. He received two years' probation concurrent  
2 to another indictment which is 633-5-83.

3 That was a second distribution of CDS,  
4 1-24-86 he was sentenced. He received two years'  
5 probation on that.

6 Finally, he has a third-degree burglary  
7 conviction under 94-03-0379. He received five years'  
8 probation conditioned on time served, and he was  
9 sentenced on March 3 of '95.

10 He had a violation of that probation, and  
11 he was resentenced on 11-13-98 to four years in prison.

12 Not much I can argue with that your Honor,  
13 I guess, of course, the last sentence that was imposed  
14 was in 1998. I don't really think I have much of an  
15 argument with regard to remoteness. The state submits.

16 MR. HAMILTON: Judge, my position is that  
17 more latitude should be given to use of prior  
18 convictions for testing the credibility of a nonparty  
19 witness.

20 THE COURT: What is the foundation of that  
21 reasoning?

22 MR. HAMILTON: I think it's State v. --  
23 what's the name of the case, Garfole?

24 THE COURT: Simon and Garfunkel? No?

25 MR. HAMILTON: The reason is that they're

1 not in jeopardy and that greater latitude should be  
2 given to inquiring into their past. Here you have a  
3 resentencing --

4 THE COURT: Let me save you the trouble.  
5 We'll permit those to be used.

6 MR. HAMILTON: Thank you.

7 MS. LACKEN: I have those certified copies  
8 of conviction for counsel. If he chooses to go into  
9 them, I'm asking only information on the certified be  
10 used, your Honor.

11 THE COURT: It will be limited.

12 MR. HAMILTON: No problem.

13 MS. LACKEN: Carmen Jones, she will be  
14 testifying for the state, your Honor. She has one  
15 conviction, November 4th of 1992. It was possession of  
16 CDS charge, and she received four years' probation.

17 Now, I would argue on this, although I'm  
18 not quite sure that it's really going to hold water,  
19 frankly.

20 THE COURT: Everybody is kind of confessing  
21 their weaknesses.

22 MS. LACKEN: It was over eleven years ago.  
23 I would argue she doesn't have any other upper-court  
24 convictions since then. I don't think it's actually  
25 going to matter, your Honor, because she's in jail

1 right now for family stuff, for nonpayment of child  
 2 support, so it's not criminal, but she's in jail.  
 3 I'll submit.

4 MR. HAMILTON: I'll submit too, drafting on  
 5 the argument of Mckinney.

6 THE COURT: I'll permit it.

7 MS. LACKEN: With regard to Edwin Allen  
 8 Warren, the only upper-court conviction Mr. Warren has  
 9 is from 34 years ago. He was 18 or 19 at the time. It  
 10 was some type of purse snatching. It was under  
 11 2A robbery charge. He does have a couple of  
 12 DP convictions.

13 THE COURT: They're not using?

14 MS. LACKEN: '99. This was 34 years ago,  
 15 when I believe this witness was 18. I would suggest  
 16 this is too remote. It's not really probative of his  
 17 credibility today. He was quite a young man at the  
 18 time. And I would suggest this conviction be  
 19 suppressed because it is far too remote to have any  
 20 probative value.

21 THE COURT: Any problems with me  
 22 suppressing that?

23 MR. HAMILTON: Judge, I voice a nominal  
 24 objection, but it is rather old.

25 THE COURT: All right. I'll consider that

1 to be too remote to be probative. Young man, now 34  
 2 years older than he was. If he lived 34 years without  
 3 a felony conviction, that's to his credit.

4 MR. HAMILTON: That's about the age of my  
 5 sole moving violation.

6 MS. LACKEN: Your Honor, lastly, we have  
 7 Curtis Hawkins. He has no record in New Jersey. He  
 8 has some type of -- counsel and I talked about it --  
 9 it's some type of assault record which counsel and I  
 10 believe it was -- if it wasn't a DP, it was certainly a  
 11 misdemeanor in North Carolina. He received 18 to  
 12 24 months' suspended sentence and probation. He was  
 13 19 -- 18 when it happened. 19 when he was convicted.

14 THE COURT: When is this?

15 MS. LACKEN: February 15 of 1985. I would  
 16 suggest, your Honor, it was a misdemeanor. It was in  
 17 North Carolina at an age when he was very young. He  
 18 has no other upper-court convictions, and I would  
 19 suggest that that be suppressed.

20 MR. HAMILTON: Judge, the only question I  
 21 have in my mind as to that is that 18 to 24 months  
 22 sounds like it might be --

23 THE COURT: But it was suspended. I give  
 24 those sentences nominally.

25 MR. HAMILTON: It's another way of saying



1 probation. My point is 18 to 24 months would have to  
2 be supported by something more than a municipal court  
3 charge.

4 MS. LACKEN: I don't know what their  
5 misdemeanor statutes are.

6 THE COURT: I am not sure what it's like  
7 back in '85 in North Carolina.

8 MR. HAMILTON: I would be willing to  
9 concede by combination of its remoteness in time and  
10 its apparent lack of strength, that that would not be  
11 one that would be usable in impeachment.

12 But there's another issue we should discuss  
13 about this witness.

14 THE COURT: That would be too remote to be  
15 used, and that's a pretty good guideline at most.

16 MR. HAMILTON: The rumor on the street, if  
17 you will, that I was informed early in the case -- and  
18 I had advised the prosecutor of this also -- was that  
19 Curt Hawkins had a murder conviction of some sort down  
20 south. We found that wasn't true.

21 However, in terms of the perception of  
22 potential witnesses in this case as to Kurt's  
23 dangerousness, my feeling is that is something that can  
24 be explored to a limited extent.

25 THE COURT: His dangerousness. How are you

1 going to do that?

2 MR. HAMILTON: Whether he told people he  
3 had a homicide conviction down south.

4 THE COURT: No, either he did or he didn't.  
5 I don't care what he said.

6 MR. HAMILTON: In terms of somebody's  
7 perception of his dangerousness. We have a bunch of  
8 crack heads dancing to his tune.

9 THE COURT: Denied. If we're going to get  
10 into that kind of speculation, we're going to bring in  
11 a whole host of people who will talk about the  
12 dangerousness of a whole lot of people. Unless you can  
13 show me some law that suggests --

14 MR. HAMILTON: Obviously, it's not the  
15 pressing issue of this particular moment this morning.

16 THE COURT: I'll give you an opportunity to  
17 reargue this.

18 MR. HAMILTON: Okay.

19 THE COURT: Anything further?

20 We'll take a few minutes. Don't wander too  
21 far away.

22 (Recess is taken.)

23 (The following is in the presence of the jury.)

24 THE COURT: You may be seated, folks. All  
25 right.

1 Prosecutor, you may call your next witness.  
 2 MS. LACKEN: Thank you, your Honor.  
 3 The state calls Detective Tim Thomas.  
 4 THE COURT: The last name, please.  
 5 MS. LACKEN: Thomas.  
 6 T I M O T H Y T H O M A S, STATE'S WITNESS, SWORN.  
 7 THE CLERK: State your name.  
 8 THE WITNESS: Timothy Thomas.  
 9 THE COURT: Good morning, Detective.  
 10 THE WITNESS: Good morning, your Honor.  
 11 THE COURT: Prosecutor.  
 12 DIRECT EXAMINATION BY MS. LACKEN:  
 13 Q Good morning, Detective Thomas.  
 14 A Good morning.  
 15 Q For whom are you employed?  
 16 A The Trenton Police Department.  
 17 Q How long have you been employed with  
 18 Trenton?  
 19 A Eight and a half years.  
 20 Q What unit are you presently working in?  
 21 A Currently I'm assigned to the homicide unit.  
 22 Q And I would assume your duties and  
 23 responsibilities there are to investigate deaths and  
 24 homicides, correct?  
 25 A That's correct.

1 Q How long have you been a detective?  
 2 A Two years and approximately four months.  
 3 Q I'm going to direct your attention back to  
 4 Saturday, May 11 of 2002. What unit were you in then?  
 5 A On that date I was assigned to the burglary unit.  
 6 I was working the 4:00 to 12:00 shift.  
 7 Q 4:00 p.m. to 12:00 a.m.?  
 8 A That's correct.  
 9 Q At approximately 11:45 that evening, were  
 10 you given a particular assignment?  
 11 A Yes, I was.  
 12 Q What was that assignment?  
 13 A I was detailed at 340 Brunswick Avenue on a fire,  
 14 and the dispatcher told us there was a fatality within  
 15 the structure.  
 16 Q Now, you indicated that you were in the  
 17 burglary unit back then. Why then would you respond to  
 18 an arson with possibility of a death?  
 19 A Because I was on-duty detective that night.  
 20 Q So regardless of what unit you're in, if  
 21 you're on duty, you go to any job?  
 22 A You make the initial response, that's correct.  
 23 Q What time did you actually -- was the  
 24 original call for the fire and for 911?  
 25 A Approximately 10:15 p.m.



1 Q You responded around quarter to 12:00?  
 2 A That's correct.  
 3 Q When you got to 340, can you describe what  
 4 you saw?  
 5 A Yes. There was -- the fire department was on the  
 6 scene. They were working on the building, which is a  
 7 row home attached at one side, open to the right side.  
 8 And the fire was extinguished, but there was still fire  
 9 personnel activity on the scene.  
 10 Q Can you describe the area of 340 Brunswick  
 11 Avenue? Is it residential? Is it --  
 12 A It's a residential area.  
 13 Q 340 itself, was that a legally occupied  
 14 building, I should say?  
 15 A It was an abandoned structure.  
 16 Q Was it part of row homes?  
 17 A Yes, it was.  
 18 Q Were they also boarded up or not all of  
 19 them; do you remember?  
 20 A I don't recall.  
 21 Q 340 Brunswick Avenue was the corner of a  
 22 row home?  
 23 A It was end of a row.  
 24 Q End row. Okay.  
 25 Now, when you arrived, what were your

1 duties? What did you have to do?  
 2 A My duties as a detective were to locate and  
 3 interview witnesses on the scene and the fire  
 4 department personnel.  
 5 Q The area of Trenton that 340 Brunswick  
 6 Avenue is in, what are the streets that are closest to  
 7 it?  
 8 A Bond Street would be one street. Next street  
 9 down would be Southard Street.  
 10 Q And is Middle Rose in that area?  
 11 A That would be two streets up. It would be Bond  
 12 and Middle Rose.  
 13 Q On Middle Rose is there a bar?  
 14 A Yes. There is Stoke's Bar.  
 15 Q Is that on the corner of Brunswick and  
 16 Middle Rose Street?  
 17 A Yes.  
 18 Q Did you speak to any police personnel when  
 19 you arrived on the scene to kind of get an idea as to  
 20 where the investigation had gone up to that point?  
 21 A Yes, I did. I spoke to Sergeant Smickley and  
 22 Officer Ertel.  
 23 Q You began conducting an investigation at  
 24 that point yourself?  
 25 A That's correct.

1 Q What did you learn, basically, had happened  
 2 prior to you getting there, and at what point in the  
 3 investigation were they when you arrived?  
 4 A At that point they suspected the fire was  
 5 intentionally set.  
 6 Q Did they indicate to you whether a body had  
 7 been in fact found?  
 8 A Yes. A body had been located on the second floor  
 9 outside of the middle bedroom.  
 10 Q And later on, was that person identified?  
 11 A Yes, he was.  
 12 Q Who was he identified as?  
 13 A Ellis McNeill.  
 14 Q Do you know a date of birth offhand?  
 15 A I believe it's 7-1 of '54.  
 16 Q He was identified at the scene, was he not?  
 17 A Yes.  
 18 Q How was he identified?  
 19 A They found a wallet on him with an identification  
 20 card, and Detective Sheehan removed the identification  
 21 card and compared the face on the card to the face of  
 22 the victim.  
 23 Q In fact, he was also later identified by a  
 24 family member, correct?  
 25 A Yes.

1 Q Was Ellis McNeill's body still in the  
 2 building when you arrived?  
 3 A Yes, it was.  
 4 Q And did you learn through your  
 5 investigation that he had a nickname?  
 6 A Yes, I did.  
 7 Q What was that?  
 8 A Peanut.  
 9 Q At that point, while you were at 340, were  
 10 there other Trenton Police Department members summoned  
 11 to help you conduct the investigation?  
 12 A Yes, there was.  
 13 Q Who was on scene? Who came to the scene  
 14 while you were there?  
 15 A Detective Cadlett, who is part of the crime scene  
 16 unit, was detailed to photograph the scene. Since it  
 17 was a suspected arson, Sergeant Johnson, who is in  
 18 charge of the arson unit, was detailed out there. He  
 19 was called back from home, and his commander, who is  
 20 Lieutenant Orsini, was called back to supervise the  
 21 investigation.  
 22 Q Were there any members of the Mercer County  
 23 Prosecutor's Office detailed to the scene to aid in the  
 24 investigation?  
 25 A Yes, there was. Lloyd Mathis, who is the arson

1 investigator, was detailed out there, and Dean McCleese  
2 from the homicide unit.

3 Q Now, while you were out there, did you  
4 become aware there may be individuals in the area that  
5 had information regarding the fire?

6 A That's correct.

7 Q Who were these individuals?

8 A Ed Warren was one person; Nicole Blackshear was  
9 another; and Curt Hawkins was another.

10 Q Now, did you have an opportunity to speak  
11 to all three individuals?

12 A Yes, I did.

13 Q With regard to Nicole Blackshear, was a  
14 formal statement ever taken from her?

15 A Not that I know of.

16 Q Did you take a formal statement from her  
17 that night?

18 A No, I did not.

19 Q Why not?

20 A Because she was clearly under the influence of a  
21 controlled dangerous substance, a/k/a narcotics.

22 Q And she wasn't able to give you a lucid  
23 recitation of what happened?

24 A She told me what happened, but not in full  
25 detail.

1 Q So you chose, based on her demeanor, not to  
2 take a statement from her?

3 A That's correct.

4 Q Now, did you speak with an individual, Ed  
5 Warren?

6 A Yes, I did.

7 Q Where was he when you originally spoke to  
8 him?

9 A He was on a sidewalk approximately 30 feet down  
10 from 340 Brunswick Avenue.

11 Q Now, did you learn from your investigation  
12 that Ed Warren was one of the individuals in the house  
13 during the fire?

14 A Yes.

15 Q He apparently had gotten out?

16 A Apparently he'd jumped out of the building.

17 Q When you were speaking with him, was he  
18 injured?

19 A Yes, he was.

20 Q What was the matter with him?

21 A He suffered a foot or leg injury. He was  
22 complaining about an injury to his leg.

23 Q What happened to him?

24 A He was transported to Helene Fuld.

25 Q Was a detective sent to Helene Fuld to

1 interview Mr. Warren?  
 2 A Yes. Detective McMillan was detailed there to  
 3 interview Mr. Warren.  
 4 Q And he took a statement from him, correct?  
 5 A Yes, he did.  
 6 Q Now, while you were on scene, did you meet  
 7 up with an individual by the name of Curt Hawkins?  
 8 A Yes, I did.  
 9 Q Can you tell me where he was in relation to  
 10 340 Brunswick Avenue?  
 11 A He was approximately two blocks down at the  
 12 corner of Mid Rose and Brunswick Avenue.  
 13 Q When you were out there investigating, were  
 14 other police officers involved in canvassing the area,  
 15 speaking to area people, to see whether or not they  
 16 knew anything about what happened?  
 17 A Yes, there was.  
 18 Q Were there a lot of people out or not that  
 19 many? Can you describe it for us?  
 20 A There were a lot of onlookers looking at the  
 21 activity.  
 22 Q Throughout all of those onlookers, Curtis  
 23 Hawkins was one of them?  
 24 A Yes, he was.  
 25 Q And you had an opportunity to speak with

1 him?  
 2 A Yes, I did.  
 3 Q Can you tell me what his demeanor was like  
 4 when you approached him? He was on the corner of what?  
 5 A Mid Rose and Brunswick Avenue.  
 6 Q Near Stoke's Bar?  
 7 A Yes.  
 8 Q Tell me what it was like when you  
 9 approached him.  
 10 A As I walked up to him, he was shaking his head.  
 11 His shoulders were slumped forward and he was going,  
 12 This ain't right, man. This ain't right. Fruit did  
 13 this shit.  
 14 MR. HAMILTON: Objection, ask that be  
 15 stricken.  
 16 THE COURT: Sidebar.  
 17 (The following is a discussion at sidebar.)  
 18 THE COURT: My inclination is to believe  
 19 that this would be tied in with testimony of the  
 20 individual Hawkins as to what he said.  
 21 MS. LACKEN: He's going to say it all, and  
 22 he wrote down a statement and gave a description and  
 23 identified who did it. It's a prior identification of  
 24 an individual. It's an excited utterance.  
 25 MR. HAMILTON: It seems more the dejected

1 and depressed than the excited, "shoulders slumped  
2 forward." It doesn't seem we have the foundation yet  
3 for an excited utterance.

4 MS. LACKEN: I can certainly go back in.

5 THE COURT: I think the fact that it's  
6 going to be tied in by a statement and it's confirmed  
7 does find its loose exception under the circumstances.  
8 I mean, excited utterance, quote-unquote, or res gestae  
9 of the circumstance, together with the fact that it's  
10 prior I.D., I'm going to permit it. And if it's not  
11 tied up, an appropriate instruction will be given at  
12 this time.

13 MR. HAMILTON: Very good.

14 (The discussion at sidebar is concluded.)

15 THE COURT: Something happened while we  
16 were gone?

17 MS. LACKEN: Apparently.

18 THE COURT: All right. Next question,  
19 please.

20 Q Okay. I think the last question that I  
21 asked you was what he had said, and you indicated what?

22 A He was shaking his head and he was saying, This  
23 ain't right, man. This ain't right. Fruit did this  
24 shit.

25 Q When you were talking to him, what was his

1 demeanor like?

2 A He was upset.

3 Q When you were talking to him, did you  
4 notice anything about him with regard to his clothing  
5 or anything of that nature?

6 A He was wearing a yellow T-shirt.

7 Q When you were next to him, Detective, did  
8 you -- if you can describe it, did you notice the smell  
9 of fire or anything on Curt Hawkins?

10 A I didn't notice any smell of fire, I didn't  
11 notice any singe marks on his hands, any type of burn  
12 marks on his hands, and I didn't notice an odor of  
13 gasoline.

14 Q When you were talking to him on scene,  
15 block and a half, two blocks, from 340 Brunswick  
16 Avenue, did he tell you what he knew about the  
17 incident?

18 A Yes, he did.

19 Q And he indicated that Fruit was the one  
20 that did what you said, "this shit," correct?

21 A That's correct.

22 Q Did he give you an identification or did he  
23 name the person, who Fruit was?

24 A Yes. I asked him who Fruit was. He told me  
25 Larry Fleming.



1 Q And did he tell you exactly what had  
2 happened?

3 A Yes, he did.

4 Q Now, what was done with Curt Hawkins?

5 A At that point, since he was a witness, he was  
6 transported into headquarters by patrol officers.

7 Q When he was telling you about what Larry  
8 Fleming did, did he continue to be upset?

9 A Yes, he was upset.

10 Q At headquarters was a formal statement  
11 taken from Curtis Hawkins?

12 A Detective Sheehan recorded a formal statement  
13 from him.

14 Q Did you have an opportunity, at least at  
15 some point, to review that statement?

16 A Yes, I have.

17 Q Is the information in that statement  
18 substantially the same as the information that he gave  
19 to you on the street within an hour or so of the fire?

20 A Yes, it is.

21 Q Now, while you were on the street in that  
22 area, did you see Larry Fleming?

23 A No, I did not.

24 Q When you were finished speaking with Curt,  
25 was an alert broadcasted in the area?

1 A Yes, there was.

2 Q What was the alert for?

3 A For Larry Fleming.

4 Q On suspicion that he had something to do,  
5 at the very least, with this arson?

6 A That's correct.

7 Q Did the investigation continue from there?

8 A Yes, it did.

9 Q Did you continue working on the  
10 investigation?

11 A Yes, I did.

12 Q Was there a lead detective designated  
13 after, I guess, that first night?

14 A Yes. Detective McMillan was the lead  
15 investigator.

16 Q Why did he -- why was he designated the  
17 lead?

18 A Because it was determined to be a homicide, and  
19 he was in the homicide unit.

20 Q Now, was Larry Fleming ultimately arrested?

21 A Yes, he was.

22 Q When was he arrested for this offense, do  
23 you know?

24 A I believe it was June 9, 2002.

25 Q When was the warrant issued for him?



1 A I believe it was May 22, 2002.  
 2 Q So obviously, then, he wasn't arrested  
 3 anytime close to the time of the fire?  
 4 A That's correct.  
 5 Q When you were speaking with Curt Hawkins,  
 6 do you know where you were standing and where he was  
 7 standing? Like, with regard to 340 Brunswick Avenue,  
 8 what area you were?  
 9 A Approximately two blocks up across the street,  
 10 next to Stoke's Bar.  
 11 Q Were there other people around too?  
 12 A While we were talking to him, no, there wasn't.  
 13 Q Did he make an attempt to run from you at  
 14 all when you approached him?  
 15 A No. He seen me walking right up to him.  
 16 Q What did he do?  
 17 A He stood there and waited for me to come to him.  
 18 MS. LACKEN: If I can have a second, your  
 19 Honor.  
 20 THE COURT: Sure.  
 21 MS. LACKEN: Your Honor, at this point I  
 22 have no further questions of Detective Thomas.  
 23 THE COURT: Cross-examination.  
 24 MR. HAMILTON: Yes.  
 25 THE WITNESS: Good morning, sir.

1 CROSS-EXAMINATION BY MR. HAMILTON:  
 2 Q How long were you at the scene, conducting  
 3 your investigation, that day?  
 4 A I would say approximately an hour, hour and a  
 5 half or so.  
 6 Q About an hour and a half?  
 7 A About.  
 8 Q Can you remember how far into it you talked  
 9 to Curtis?  
 10 A Probably a half hour after being on scene.  
 11 Q And before you talked to Curt, you've been  
 12 told by somebody else that Curt knew who did it, words  
 13 to that effect?  
 14 A That's correct.  
 15 Q That was Nicole Blackshear?  
 16 A That's correct.  
 17 Q So obviously, Curt had had some discussion  
 18 with others in the area before you talked to him?  
 19 A I can't answer that question.  
 20 Q All right. But, obviously, Nicole  
 21 Blackshear had heard something about what he had to say  
 22 to you before you spoke to Curt?  
 23 A That's correct.  
 24 Q Okay.  
 25 MR. HAMILTON: I have no further questions.

1 THE COURT: Any redirect?  
 2 MS. LACKEN: Nothing.  
 3 THE COURT: Thank you, Detective. You may  
 4 step down.  
 5 (The witness is excused.)  
 6 THE WITNESS: Thank you.  
 7 THE COURT: Call your next witness.  
 8 MS. LACKEN: The state calls Edwin Allen  
 9 Warren.  
 10 E D W I N W A R R E N, STATE'S WITNESS, SWORN.  
 11 THE CLERK: State your name.  
 12 THE WITNESS: Edwin Warren.  
 13 THE COURT: Good morning, Mr. Warren.  
 14 THE WITNESS: How are you doing?  
 15 THE COURT: How are you?  
 16 THE WITNESS: Pretty good.  
 17 THE COURT: All right.  
 18 MS. LACKEN: Thank you, your Honor.  
 19 DIRECT EXAMINATION BY MS. LACKEN:  
 20 Q Good morning, Mr. Warren.  
 21 A Good morning.  
 22 Q Mr. Warren, how old are you?  
 23 A 55.  
 24 Q Where are you from?  
 25 A Trenton.

1 Q Have you been from Trenton all your life?  
 2 A Yes, ma'am.  
 3 Q Did you know a guy by the name of Ellis  
 4 McNeill?  
 5 A Yeah. I know him as Peanut. I didn't know his  
 6 name until I read it in the paper, his full name.  
 7 Q How did you know Peanut?  
 8 A Around the neighborhood.  
 9 Q How long did you know Peanut?  
 10 A It was a number of years; five, ten years, maybe,  
 11 maybe longer than that. I mean, actually knowing him,  
 12 oh, maybe about five years.  
 13 Q Were you friends with him?  
 14 A I mean, from the time of that incident happened.  
 15 Q When you're talking about the "incident,"  
 16 you're talking about the day he was killed?  
 17 A Yes, ma'am.  
 18 Q Were you guys friends?  
 19 A Somewhat, yes.  
 20 Q Tell me how you knew him?  
 21 A Mainly from the neighborhood, you know. You know  
 22 how, you know, guys, you know. We didn't hang together  
 23 or anything, but, you know, we just knew each other.  
 24 Q Back in May of 2002, Mr. Warren, were you  
 25 getting high?

1 A Yes, ma'am.  
 2 Q And would you smoke crack cocaine?  
 3 A Yup.  
 4 Q Did you drink back then too?  
 5 A Yup.  
 6 Q I want to direct your attention back to  
 7 Saturday, May 11 of 2002, okay, the night that Peanut  
 8 died.  
 9 Do you remember where you were earlier in  
 10 the day?  
 11 A I was working.  
 12 Q What did you do back then?  
 13 A Painting, sheetrock work.  
 14 Q Did you work an entire day?  
 15 A Yes, just about.  
 16 Q At the end of that day, did you get paid?  
 17 A Yes.  
 18 Q What did you do at the end of that day  
 19 after you got done?  
 20 A I got dropped off by a place called Stokes corner  
 21 bar. It's on Brunswick Avenue.  
 22 Q Okay.  
 23 A And I went and bought some wine and some beer.  
 24 Q Where were you living back then in the area  
 25 of Brunswick Avenue?

1 A Escher Street. It's behind the police station.  
 2 Q So after work you got dropped off in the  
 3 area of Stoke's Bar, you went in and you bought some  
 4 stuff, right? Then what did you do then?  
 5 A Some stuff.  
 6 Q What did you buy?  
 7 A I bought some beer and wine in the bar.  
 8 Q Then what did you do?  
 9 A I went outside and I purchased some rock cocaine.  
 10 Q After you made that purchase, did you run  
 11 into anyone that you knew on the street?  
 12 A I ran into a girl named Carmen.  
 13 Q Where did you run into her?  
 14 A I guess it was near the corner, near the bar  
 15 where I came out at, when I came out the bar.  
 16 Q Now, this woman Carmen, how did you know  
 17 her?  
 18 A Just the neighborhood, getting high together.  
 19 Q Did you have any other relationship with  
 20 Carmen other than just friends?  
 21 A Just friends, getting high.  
 22 Q When you and Carmen get high, where would  
 23 you get high?  
 24 A Where would we get high? Especially -- well,  
 25 that one particular time, we got high on Brunswick

1 Avenue.

2 Q How long had you known Carmen from the  
3 neighborhood back when Peanut had died?

4 A Maybe about five years.

5 Q When you met up with Carmen on the street,  
6 where did you go?

7 A She took me over to the house on Brunswick  
8 Avenue.

9 Q The house that burned up?

10 A Yes, ma'am.

11 Q 340 Brunswick Avenue?

12 A Yes.

13 Q Was she staying there?

14 A I believe so. It was set up like she was staying  
15 there.

16 Q Can you tell me about that house? What  
17 type of house was it?

18 A It was an abandoned house.

19 Q When you say "abandoned" --

20 A It was boarded up.

21 Q How did you get in the house?

22 A Through a back door that was open.

23 Q Was it entirely open, or were there boards  
24 on it or how can you describe it?

25 A Partially. You can open it up and get in the

1 back.

2 Q But it was partially boarded up?

3 A Partially, yes.

4 Q Can you tell me about the house on the  
5 inside? When you got in through the back door, where  
6 did you have to go to go to Carmen's room?

7 A You had to walk all the way through from the back  
8 of the house to the front up the steps. That was the  
9 only exit going through that door.

10 Q So it's the only way you can get into or  
11 out of that building was that door?

12 A Yes, ma'am.

13 Q I mean, besides a window or something?

14 A Except the way I came out of there.

15 Q When -- with regard to the way you got  
16 upstairs, was there only one stairway inside?

17 A As far as I know. It was a large house. I  
18 believe it was only one staircase.

19 Q Tell me what happened when you went  
20 upstairs with Carmen. What did you do?

21 A We got high. I drunk wine, beer, we got high.  
22 And we get high, you just -- you get high.

23 Q When you were high, were you able to talk  
24 with Carmen and have a conversation?

25 A Somewhat, yeah.

1 Q Were you able to notice when other people  
 2 came into or out of the room?  
 3 A Yes.  
 4 Q Tell me what happened while you were inside  
 5 with Carmen.  
 6 A What happened?  
 7 Q Yes. Did there come a point in time -- did  
 8 you see Peanut in that house at all?  
 9 A I believe I seen him once earlier, yeah.  
 10 Q Where was he?  
 11 A I believe I met him in the hallway.  
 12 Q Is that the hallway of the second floor?  
 13 A Yes, ma'am. I think I met him when I was coming.  
 14 Either I was coming in --  
 15 Q Excuse me?  
 16 A I think I seen him when I was coming in.  
 17 Q When you came in, when you went upstairs,  
 18 can you describe the upstairs for me? Is there more  
 19 than one room?  
 20 A There's more than one room.  
 21 Q Where was Carmen's room?  
 22 A Carmen's room was, like, towards the back on the  
 23 side, I guess. On the side of the house towards --  
 24 going towards the rear.  
 25 Q Did Peanut have a room there too?

1 A I imagine so.  
 2 Q Do you know where his room was?  
 3 A I think it was near the top of the steps.  
 4 Q Okay. Did anything separate Carmen's room  
 5 from Peanut's room?  
 6 A I believe it was a bathroom that wasn't being  
 7 used, but I think it was a bathroom there. I'm not  
 8 sure.  
 9 Q When you saw Peanut, where was he?  
 10 A I think he was at the top of the stairs. And we  
 11 spoke, and near that room door where -- the room where  
 12 he was staying.  
 13 Q And then what happened with Peanut from  
 14 there?  
 15 A Peanut went in his room and I went in the other  
 16 room.  
 17 Q While you were in the room with Carmen, I  
 18 mean, did there come a point in time -- you, obviously,  
 19 said you had bought some drugs, and you went up and you  
 20 were smoking with her. But did there come a point when  
 21 you guys, either you or Carmen or both of you, left to  
 22 get more drugs?  
 23 A I'm not saying it didn't happen. It could have  
 24 happened. I can't remember myself going out  
 25 personally. I might have sent her.



1 Q You sent her?  
 2 A Yes.  
 3 Q Did she go out a couple times to get drugs?  
 4 A She went out a couple times.  
 5 Q Do you recall, at least for you, do you  
 6 recall anyone coming in the building, trying to sell  
 7 you drugs?  
 8 A Yeah.  
 9 Q Do you remember making some purchases of  
 10 drugs inside the house?  
 11 A No.  
 12 Q Do you -- but you sent Carmen to do that,  
 13 correct?  
 14 A Yes.  
 15 Q You had money?  
 16 A After a particular time I didn't have any. I  
 17 don't know if you're talking about, you know --  
 18 Q Earlier in the day, you had money?  
 19 A Yes.  
 20 Q When you're saying that "particular time,"  
 21 are you talking about the time that someone came up to  
 22 the room, trying to sell you drugs?  
 23 A Yes.  
 24 Q Who was that?  
 25 A It was Fruit.

1 Q Do you see Fruit in court today?  
 2 A Yes, ma'am.  
 3 Q Can you point him out and tell me what he's  
 4 wearing?  
 5 A Blue tie, at the table right there.  
 6 MS. LACKEN: Your Honor, I'm asking that  
 7 the record reflect that Mr. Warren has pointed out the  
 8 defendant.  
 9 THE COURT: The record will reflect the  
 10 witness has identified the defendant.  
 11 Q Tell me what happened when Fruit came to  
 12 your room.  
 13 A Fruit asked me did I want to purchase anything.  
 14 I told him I didn't have any money. And he told me,  
 15 Come on, Al. You got some money, you know.  
 16 I said I didn't have it.  
 17 Q Did he continue to keep asking you?  
 18 A He might have asked me a couple times.  
 19 Q When you were in the room, who else was in  
 20 there with you?  
 21 A I believe Carmen was there -- yeah, she was  
 22 sitting there.  
 23 Q Do you remember, was it light or dark  
 24 outside when this conversation was going on?  
 25 A I guess it was getting towards dark.



1 Q Do you remember around what time you got  
2 into the area originally?

3 A Oh, man.

4 Q An estimate. When you were done with work  
5 that day?

6 A It could have been around 5:00, maybe. I'm not  
7 sure. Later in the afternoon at the very least.

8 Q By the time Fruit had come up, it was  
9 starting to get dark; is that fair to say?

10 A It was either dark or getting dark.

11 Q Did Fruit -- was Fruit invited in or how  
12 did he come in?

13 A He just came in.

14 Q Opened the door and walked in?

15 A He ain't exactly opened the door, he just, hey --

16 Q Was there a conversation about how, or do  
17 you recall, at least, a conversation about --

18 MR. HAMILTON: Objection to leading. Some  
19 of the questions skirt dangerously close to leading, I  
20 feel. I wish the prosecutor would make an extra effort  
21 not to lead.

22 THE COURT: All right. Let's not have too  
23 much embellishment on the objection.

24 Objection sustained.

25 Q Was there any other conversation in the

1 room between you and Fruit? Like, what did he say when  
2 he first came in?

3 A Well, he wanted me to spend some money, money I  
4 didn't have. And I replied I didn't have any more  
5 money.

6 Q Did you know Fruit?

7 A Just from the neighborhood.

8 Q Had you seen him before?

9 A Yes, ma'am.

10 Q Had you purchased from him before?

11 A Yes, ma'am.

12 Q Did you owe him anything?

13 A No, ma'am.

14 Q Did he think you did?

15 A I don't know.

16 Q Did he try to express that to you in any  
17 way.

18 A No, ma'am.

19 MR. HAMILTON: Objection.

20 THE COURT: Sustained.

21 Q When Fruit was talking to you, do you  
22 remember how he was acting?

23 A How he was acting?

24 Q Yes.

25 A No, not exactly. He was -- he was just asking me

1 did I have -- did I want to spend any money.  
 2 Q And he asked you several times?  
 3 A I believe so.  
 4 Q Let me ask you, Carmen was in there with  
 5 you?  
 6 A I believe so, at that time.  
 7 Q What happened from there?  
 8 A What happened from there? I believe Fruit got up  
 9 and left out, once he realized I didn't have any money.  
 10 Q What was his demeanor like; do you  
 11 remember?  
 12 A Me and him didn't exchange any words, if that's  
 13 what you mean.  
 14 Q Was he exchanging words with anyone else in  
 15 the room?  
 16 A I wouldn't know.  
 17 Q Were you there?  
 18 A I was there.  
 19 Q Mr. Warren, were you high?  
 20 A Yes, I was.  
 21 Q Were you high enough maybe not to remember  
 22 all of the conversation?  
 23 MR. HAMILTON: Objection.  
 24 A I could have been.  
 25 THE COURT: I'll permit it. It's been

1 answered.  
 2 A I've been smoking rock and drinking.  
 3 Q Were you smoking a lot of it?  
 4 A With the money I had, yeah.  
 5 Q Tell me what happened while you were up in  
 6 the room.  
 7 A What happened after Fruit left?  
 8 Q After Fruit left, yes.  
 9 A Well, I was mainly just sitting there, trying to  
 10 calm down to get myself together so I could get up and  
 11 leave down.  
 12 Q Try to calm down?  
 13 A That's the way you get when you smoke rock.  
 14 Q That's how you get, you get excited?  
 15 A Me, anyway.  
 16 Q You got excited?  
 17 A No.  
 18 Q "Calm down" meaning come down from your  
 19 high?  
 20 A Calm down because I guess you might say there's a  
 21 little paranoia with it when you smoke rock.  
 22 Q So what happened after you were coming down  
 23 from your high?  
 24 A What happened?  
 25 Q Yes. What happened while you were in the

1 building?  
 2 A well, at that particular time, when Carmen wasn't  
 3 in the room --  
 4 Q Tell me what happened.  
 5 A -- I got up and went -- went in the hallway to  
 6 see where Carmen was. Carmen was running towards me  
 7 saying that the house was on fire.  
 8 Q When you guys were upstairs, correct?  
 9 A She was upstairs, too, because she came to where  
 10 I was, saying the house was on fire. When I looked  
 11 over towards the steps, I didn't see nothing but a big  
 12 ball of black smoke and fire, so instincts say, time to  
 13 go. So I went out, I ran back in the room, kicked some  
 14 of the boards in the window out, and that's where I  
 15 jumped.  
 16 Q Was anyone else in that room?  
 17 A Carmen was with me and, you know, it was such a  
 18 scuffle, you know. When your instincts kick in, I'm in  
 19 survival mode. I'm about this far from being burned  
 20 up, so --  
 21 Q Tell me what you did?  
 22 A I kicked out the window. She helped me.  
 23 Q Was there anyone else there?  
 24 A I believe it was somebody else there, but, you  
 25 know, all I -- it was just me. I'm trying to get out.

1 Q Basically, every man for himself?  
 2 A I knew Carmen was there, but -- you know, and she  
 3 was there.  
 4 Q And there was another person, too, you just  
 5 don't know who it was?  
 6 A I believe so, I'm not sure.  
 7 Q Tell me what happened. You kicked out the  
 8 window?  
 9 A Went out on the landing on the roof and I jumped.  
 10 I hit the ground and you know, Carmen, she just  
 11 bounced. She weighs about 100 pounds, and I weigh 300  
 12 pounds. And once I hit, I fractured my left leg and  
 13 broke my ankle.  
 14 Q The only place you were able to escape --  
 15 A That easy was from Carmen's room.  
 16 Q There was no way you could make it down the  
 17 stairs?  
 18 A No way at all. No way, because by the time I got  
 19 out on the landing and I looked back, flames of smoke  
 20 was coming out of the window before I jumped off of the  
 21 landing. I just made it out of that room.  
 22 Q When you jumped, you said you hurt your  
 23 leg; you broke it?  
 24 A Shattered it. Doctor said it was the worst break  
 25 he ever seen.

1 Q Tell me what happened while -- after you  
 2 got out of the house. Were there people around?  
 3 A Carmen, she tried to help me off the ground. I  
 4 got to my feet, and I stumbled over to the next  
 5 building away from the fire. And I just stood there  
 6 for a while, but I heard -- you know, I heard glass  
 7 breaking, stuff popping in the house. I thought I  
 8 heard somebody yelling help.  
 9 Q Where were they yelling it from?  
 10 A It sounded like it was coming from inside the  
 11 house.  
 12 Q Who did that turn out to be?  
 13 A From what I heard, it was Peanut.  
 14 Q Peanut died in that fire?  
 15 A That's what I was told, because I didn't know  
 16 that until I was in the hospital.  
 17 Q When you were in the alleyway, you heard  
 18 someone yelling help from the building, what were you  
 19 doing?  
 20 A Looking at my foot. You know, it swelled up, you  
 21 know; it had gotten huge inside my boot.  
 22 Q Were the police and the fire personnel  
 23 responding while you were in the alleyway or on the  
 24 side of the house?  
 25 A They came shortly thereafter.

1 Q Did you see people trying to get in the  
 2 house?  
 3 A Yeah. It was several men out there trying to,  
 4 like, break out some boards.  
 5 Q Was that in the alleyway where you were?  
 6 A On the side of the house. They didn't see me  
 7 because I was up against the other house next door.  
 8 Q But there were people trying to get into  
 9 the house?  
 10 A I believe because they heard the same thing I  
 11 did.  
 12 Q The screaming?  
 13 A Yeah.  
 14 Q Did there come a point in time when  
 15 ambulance personnel arrived?  
 16 A Yes, ma'am.  
 17 Q Before they did that, did you speak to a  
 18 couple ambulance personnel and some police officers at  
 19 the scene?  
 20 A I really didn't see -- I was trying to conceal  
 21 the fact that I was in the fire and whatnot, but I had  
 22 to come forward. I couldn't walk at all.  
 23 Q So originally, you didn't --  
 24 A I couldn't even hop on one foot, because I had a  
 25 fracture of one leg and my ankle was broken.

1 Q Originally, you didn't want anyone to know  
 2 you were inside?  
 3 A Yes, ma'am.  
 4 Q But while you're on the scene, though, you  
 5 told people you were one of the people inside?  
 6 A Yeah.  
 7 Q Where did they bring you -- the ambulance  
 8 personnel helped you?  
 9 A Yes, ma'am.  
 10 Q Where did they bring you?  
 11 A To Helene Fuld.  
 12 Q While you were in Helene Fuld, did you stay  
 13 there for a while?  
 14 A Yes, ma'am.  
 15 Q How long?  
 16 A When I first went, I believe they sent me home  
 17 because they couldn't do anything at that particular  
 18 time because it was too much swelling. But I came  
 19 right back because I couldn't walk. The police were  
 20 going to take me home. I couldn't get in the car with  
 21 the help of crutches, I couldn't stand up at all.  
 22 Q So did you then stay at the hospital for a  
 23 while?  
 24 A The ambulance finally took me home. But when I  
 25 got home, I called up my sister and they talked me into

1 going back to the hospital, and then they kept me.  
 2 Q While you were in the hospital, did a  
 3 detective from the Trenton Police Department come and  
 4 talk to you?  
 5 A Yes, ma'am.  
 6 Q And did you give him a formal statement  
 7 while you were at the hospital?  
 8 A Yes, ma'am.  
 9 MS. LACKEN: S-42, your Honor.  
 10 THE COURT: S-42 for identification.  
 11 Q Mr. Warren, I'm showing you what has been  
 12 marked S-42 for identification purposes. Can you take  
 13 a look at that and tell me if you recognize what that  
 14 is?  
 15 A Yes, ma'am.  
 16 Q What is that?  
 17 A It's a statement I gave to the homicide  
 18 detectives.  
 19 Q Was that statement taken on May 16 of 2002?  
 20 A That's right.  
 21 Q That's while you were still in the  
 22 hospital?  
 23 A Yes, ma'am.  
 24 Q Mr. Warren, I'm going to ask you to, if you  
 25 can step down -- or you can lean, if you want -- and



1 I'm going to ask you to take a look at a picture. You  
 2 can step down. All right.  
 3 I'm going to ask you, if you could -- all  
 4 of these people have to hear you -- I'm going to ask  
 5 you to take a look at S-1. Do you recognize what that  
 6 is a photo of?  
 7 A Yes, ma'am.  
 8 Q What is that a photo of?  
 9 A It's the building that caught on fire.  
 10 Q And what I need you to do is keep your  
 11 voice up so all of these people can hear you.  
 12 In that picture, I'm not quite sure if it's  
 13 the best picture or not, but can you show us in this  
 14 picture where the window was that you and Carmen and  
 15 that third individual had to jump out of?  
 16 A Okay. The window was -- see this landing right  
 17 here?  
 18 Q Yes.  
 19 A It's back this way. It might be out of sight.  
 20 Q This ledge here?  
 21 A I jumped off the front.  
 22 THE COURT: which photo is that, please?  
 23 MS. LACKEN: S-1. Let me get another one,  
 24 your Honor.  
 25 Q I'm going to show you S-11, and do you

1 recognize what this is of?  
 2 A Yes. It's the same ledge.  
 3 Q Would you show us the window you had to  
 4 kick out?  
 5 A I see the two windows. I believe it was this  
 6 window right here (indicating).  
 7 Q One of the windows up here?  
 8 A This one. I think it was this window  
 9 (indicating).  
 10 Q All right. Let me get you this --  
 11 A I'm not sure.  
 12 Q That's okay. S-18?  
 13 MS. LACKEN: S-18, your Honor.  
 14 THE COURT: S-18 for identification.  
 15 Q Before I show the jury, Mr. Warren, I'm  
 16 going to show you S-18. Do you recognize that?  
 17 A I'm saying I think that's the same area I jumped  
 18 off of.  
 19 Q Is that how it looked? Besides this being  
 20 a daylight picture, is that the way it looked the day  
 21 of the fire?  
 22 A I imagine so. I think it was this window  
 23 (indicating).  
 24 MS. LACKEN: I'm going to ask S-18 be moved  
 25 into evidence.



1 THE COURT: Any objection?  
 2 MR. HAMILTON: No objection.  
 3 THE COURT: Into evidence.  
 4 Mr. Warren indicated which window of the  
 5 two on the picture?  
 6 THE WITNESS: Not the small one.  
 7 Q S-18 now in evidence, and looking at this  
 8 picture, it's the side of 340, correct?  
 9 A That's right.  
 10 (S-18 is marked into evidence.)  
 11 Q Can you show us the window you jumped out  
 12 of in order to get out of the fire?  
 13 A It's the large one, the one that's all kicked  
 14 out, not the small one.  
 15 Q You came off of this ledge and jumped  
 16 out --  
 17 A On the concrete, yes, ma'am.  
 18 Q Now, Mr. Warren, you said that --  
 19 THE COURT: Excuse me. For the record,  
 20 you're saying the left window or the right window?  
 21 THE WITNESS: Right window.  
 22 MS. LACKEN: Right window in the top of the  
 23 picture.  
 24 THE COURT: Okay. Thank you.  
 25 Q I'm going to show you S-9. Can you

1 recognize what is in that window?  
 2 A Not really. I know it's the house where the fire  
 3 was. As far as which room that is, or that door --  
 4 Q You're not sure which door?  
 5 A I don't know whether that's upstairs or  
 6 downstairs. But I imagine -- is it upstairs because --  
 7 what's this?  
 8 Q Well, let me ask you a question. It's  
 9 okay, Mr. Warren.  
 10 Let me ask you this: In order to get  
 11 upstairs, you said that you had to go up some stairs?  
 12 A A flight of stairs.  
 13 Q Do you recognize, what is this in this  
 14 photograph?  
 15 A I would imagine this is the front door. I guess  
 16 this is the stairs here.  
 17 THE COURT: You're referring to S-3.  
 18 Q Those are the stairs that you couldn't get  
 19 out of?  
 20 A I couldn't go down those stairs because they were  
 21 engulfed with flames.  
 22 Q Okay. Mr. Warren, you may sit down.  
 23 A Go back here?  
 24 Q Yes.  
 25 MS. LACKEN: If I could have one second,

1 Judge.  
 2 THE COURT: Sure.  
 3 Q Mr. Warren, when you were inside talking to  
 4 Fruit, was there any electricity running into the  
 5 building at that time?  
 6 A I don't believe so.  
 7 Q Now, you said that it was either dark or  
 8 getting dark, and the windows were boarded up upstairs.  
 9 How did you see?  
 10 A Flashlight, candle.  
 11 Q So you had means of seeing inside?  
 12 A Some; not very good.  
 13 Q Good enough to be able to recognize who you  
 14 were talking to?  
 15 A Yes, ma'am.  
 16 MS. LACKEN: Thank you, Mr. Warren.  
 17 Judge, I have nothing further.  
 18 THE COURT: Cross-examine.  
 19 CROSS-EXAMINATION BY MR. HAMILTON:  
 20 Q Mr. Warren, do you remember giving the  
 21 police a signed statement down at headquarters?  
 22 A At the hospital.  
 23 Q At the hospital, as you testified. Do you  
 24 remember being asked the following question and giving  
 25 the following answer:

1 "Edwin, while you were in, or prior to  
 2 going into 340 Brunswick Avenue to get high, did you  
 3 have a negative encounter or altercation with anyone?  
 4 "Answer: No, sir?"  
 5 A No, sir.  
 6 Q You don't remember that?  
 7 A Not that I remember.  
 8 Q Okay.  
 9 THE COURT: Are you talking about the  
 10 statement or the negative encounter?  
 11 MR. HAMILTON: The question and answer in  
 12 the statement in the first instance, you don't remember  
 13 being asked that question and giving that answer,  
 14 correct? Is that what you're testifying to?  
 15 THE COURT: I think your question is a  
 16 little bit confusing. Could you rephrase that, please.  
 17 It's confusing to me.  
 18 THE WITNESS: To me too.  
 19 Q When the police asked you what happened,  
 20 you told them you hadn't gotten in any arguments or  
 21 confrontations with anybody that evening in  
 22 340 Brunswick Avenue, correct?  
 23 A No, sir.  
 24 Q That's not correct, that's not what you  
 25 told them? What do you mean by your answer, sir?

1 A Wait a minute, you're getting me confused.  
 2 MS. LACKEN: I'm going to ask if counsel  
 3 cross-examines him on the statement, I don't have any  
 4 objection to it, but just show him the statement.  
 5 THE COURT: Yes. If you're going to use  
 6 the statement and question, use what the statement says  
 7 as opposed to paraphrasing.  
 8 MR. HAMILTON: Okay.  
 9 THE WITNESS: He's trying to give me some  
 10 trick questions.  
 11 MR. HAMILTON: I ask that that be stricken.  
 12 THE COURT: That will be stricken. The  
 13 jury can ignore that. Mr. Warren can have his own  
 14 opinion at this time.  
 15 (S-42 is marked into evidence.)  
 16 MS. LACKEN: Dave, he has one.  
 17 THE COURT: That is number S-42.  
 18 Q Now, no smoke and mirrors here. I just  
 19 want to show you --  
 20 THE COURT: You have to read it too.  
 21 THE WITNESS: I don't have my glasses.  
 22 Q Okay. Well, I'll point to it and I'll read  
 23 it for you. How about that? Okay.  
 24 Pointing to here (indicating). Now, you  
 25 can't make that out even?

1 A which one?  
 2 Q where my finger is.  
 3 A "Edward, while you were in," that one?  
 4 Q Yes.  
 5 A "while you were in, or prior to getting into  
 6 340 Brunswick Avenue to get high, did you have a  
 7 negative encounter or altercation with anyone?  
 8 "Answer: No, sir, I didn't."  
 9 Q And that was the truth?  
 10 A That was the truth.  
 11 Q And that was also your testimony earlier  
 12 this morning, correct?  
 13 A Same thing.  
 14 Q Okay. So Larry Fleming didn't get into  
 15 your face at 340 Brunswick Avenue and say, You all  
 16 crossed me or words to that effect?  
 17 A I'm not saying he didn't say that. I don't  
 18 remember it.  
 19 Q But when this matter was fresh in your mind  
 20 at the hospital, you told the police you didn't have  
 21 any negative encounter with anybody at 340 Brunswick  
 22 Avenue?  
 23 A That's what I told them.  
 24 THE COURT: Counsel, can I see that,  
 25 please.

1 A Not that I was worried about to the extent of  
2 getting burned alive, no.

3 Q Now, if some drug dealer came up to you and  
4 said that basically, you were a double-crosser,  
5 wouldn't you feel threatened?

6 A All depends on who he was.

7 Q That's supposed to be the candy man, not  
8 the executioner, right?

9 A Pardon me? You got me --

10 Q The drug dealer, that's supposed to be --  
11 MS. LACKEN: Objection, Judge.

12 THE COURT: Hold it, hold it, hold it.  
13 Let's ask a question --

14 THE WITNESS: Please --

15 THE COURT: -- that's just a little more  
16 explicit.

17 Q Now, when the police asked you if you had  
18 had any run-in, or words to that effect, you told them  
19 no?

20 A Told them no.

21 Q It was fresh in your mind, correct?

22 A It happened some days afterwards, but I'm pretty  
23 sure that no, I didn't have any run-ins with anybody.  
24 I didn't have a run-in.

25 Q At least when they took your statement, you

1 were not?

2 A You're not talking about Mr. Fleming, you're  
3 talking about anybody, right?

4 Q Anybody.

5 A No. No, sir.

6 Q Okay. And when you gave the statement, you  
7 weren't under the influence of crack cocaine at that  
8 time?

9 A No, sir.

10 Q Okay. Now, you said you knew Carmen for  
11 about five years?

12 A Maybe. It could have been less, it could have  
13 been more. She was just somebody I knew from the  
14 neighborhood.

15 Q You knew before that day that she stayed  
16 there at 340 Brunswick?

17 A I knew she was going in and out of there.

18 Q And that was not your first time in there,  
19 was it?

20 A My first time, I might have been in there once  
21 before.

22 Q You knew her for five years, you did crack  
23 with her, and your testimony is that you might have  
24 been in there once before this date, correct?

25 A Could have been.

1 Q Could it have been a lot more than that you  
 2 were in there?  
 3 A No.  
 4 Q Now --  
 5 A No, definitely not.  
 6 Q You had spent money on alcohol and drugs  
 7 before going up there with her, correct?  
 8 A Yeah.  
 9 Q Did she give you money for --  
 10 A No, she didn't give me no money. She didn't have  
 11 no money as far as I knew.  
 12 Q Was the relationship that you had with her  
 13 a cooperative one when it came to supplying each other  
 14 with drugs?  
 15 A No, sir.  
 16 Q So you were the giver and she was the  
 17 taker?  
 18 A Always, any time we got high together.  
 19 Q Isn't it true that she would give you sex  
 20 sometimes in repayment?  
 21 A No, sir. She didn't give me any sex that day.  
 22 Q Didn't give you any sex that day, but she  
 23 had before?  
 24 A You're talking about a couple years ago?  
 25 Q Okay.

1 A Prior to that time.  
 2 Q Prior to that time?  
 3 A Yeah.  
 4 Q Was it ever the nature of your relationship  
 5 that she would give you sex, so you would give her  
 6 drugs that you had paid your hard-earned money for?  
 7 A Not that day.  
 8 Q But prior times?  
 9 A Maybe.  
 10 MS. LACKEN: I'm not sure what the  
 11 relevance is.  
 12 THE WITNESS: That's what I want to know.  
 13 What does that got to do with somebody being burned  
 14 alive? Tell me.  
 15 THE COURT: Let's not make any extra  
 16 comments and try to get a little more relevant.  
 17 And if you can represent to me at sidebar  
 18 where we're going.  
 19 THE WITNESS: Please.  
 20 Q I take it by the enthusiastic way you  
 21 answer, you fully support the state's efforts to get a  
 22 conviction here, correct?  
 23 MS. LACKEN: Judge --  
 24 A I just told the truth.  
 25 THE COURT: Sustained.



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1 A I'm telling the truth. What comes out of this, I  
 2 don't know. I'm telling the truth.  
 3 Q On at least one occasion before the date of  
 4 the fire you had had sex with Carmen, correct?  
 5 MS. LACKEN: Objection, relevance.  
 6 THE COURT: Let me see you at sidebar.  
 7 (The following is a discussion at sidebar.)  
 8 THE COURT: Mr. Hamilton, I'll give you  
 9 plenty of latitude, but I'm trying to put it together  
 10 myself. That makes at least three of us, the witness,  
 11 the prosecutor, and myself figuring out the relevance  
 12 of whether he slept with her and had sex with her or  
 13 what the relationship with the drugs is.  
 14 MR. HAMILTON: Our theory is the state's  
 15 witnesses are colluding with each other. The crack  
 16 heads are colluding with each other for the purpose of  
 17 framing Mr. Fleming, not the firefighters, and the  
 18 nature of the relationship they have with each other  
 19 goes to credibility. It also goes to potential  
 20 collateral impeachment material, depending on what  
 21 comes out of whose mouth.  
 22 It's not my purpose to embarrass him. But  
 23 he's a fellow who is a crack addict, and he spent money  
 24 and she didn't. I don't think he's being forthright  
 25 with answering it. I simply wanted to pin down with

ip

1 that last objected question.  
 2 THE COURT: I think you're playing with  
 3 fire, to use a particularly applicable term in this  
 4 case, but I think you've asked -- you've asked the  
 5 question twice. He's answered it, and he's seemingly  
 6 raised his ire or dudgeon, and I'm not sure whether any  
 7 further inquiries on that line will be fruitful.  
 8 (The discussion at sidebar is concluded.)  
 9 Q At any time while you were in 340 Brunswick  
 10 Avenue the day of the fire, did Carmen come up to you  
 11 and tell you that Fruit had come in with a gas can?  
 12 A No, sir.  
 13 Q She never expressed alarm that she  
 14 thought --  
 15 A Not until she was yelling the house was on fire.  
 16 She was trapped in the fire too.  
 17 Q Okay. And what made you first become aware  
 18 of the fact that there was a fire?  
 19 A Black smoke and flames.  
 20 Q All right. You didn't hear any sort of  
 21 explosion, did you?  
 22 A Typical things you hear when there's a fire;  
 23 things popping, glass breaking.  
 24 Q But no initial startling explosion and  
 25 house shaking?

t a



1 A No.  
 2 Q Okay.  
 3 A Do you want to know something else?  
 4 THE COURT: That's all right.  
 5 Q That's okay.  
 6 THE WITNESS: I was going to tell him  
 7 something.  
 8 THE COURT: Don't tell him unless it's  
 9 asked.  
 10 THE WITNESS: It's important.  
 11 THE COURT: It's very tempting to hear, but  
 12 the way we do it, they ask the questions and you answer  
 13 them.  
 14 Q Maybe the prosecutor will help you out.  
 15 You testified earlier that it was starting  
 16 to get dark or --  
 17 A It might have been dark.  
 18 Q That was when you --  
 19 A I was high; I was drinking and I was getting  
 20 high.  
 21 Q You -- when you --  
 22 A I had some cheap wine and some beer. I might  
 23 have had some liquor too.  
 24 Q That's okay. It doesn't make you a bad  
 25 person.

1 A You smoke crack, you lose time of what's going  
 2 on.  
 3 Q Do you recall what time it was when you  
 4 were outside --  
 5 A Time, I'm just estimating. No, I don't know.  
 6 Q But it was dark then for sure?  
 7 A I believe so.  
 8 Q You testified when you first went in, it  
 9 was dark?  
 10 A I'm estimating, I'm not sure.  
 11 MR. HAMILTON: I have no further questions.  
 12 THE COURT: Any redirect?  
 13 MS. LACKEN: One or two.  
 14 REDIRECT EXAMINATION BY MS. LACKEN:  
 15 Q Mr. Warren, when you were talking before,  
 16 you indicated to Mr. Hamilton when he was questioning  
 17 you, there wasn't anything -- and you told this to the  
 18 police too -- there wasn't any altercation that in your  
 19 words made you worry about a fire getting started,  
 20 correct?  
 21 A No.  
 22 MR. HAMILTON: Objection.  
 23 A I wasn't alarmed.  
 24 THE COURT: Sustained.  
 25 A He asked me the same thing.

1 THE COURT: The question is sustained as  
2 phrased. Disregard the answer, folks.

3 MS. LACKEN: I was using his words, but  
4 I'll rephrase.

5 Q You said there was nothing to the extent  
6 that you worried about?

7 A I would have been gone if I was that alarmed.

8 Q Had you spoken to Fruit before?

9 A Before what?

10 Q Before this incident, had you had contact  
11 with him? Did you know him from the streets?

12 A I knew him from the streets.

13 Q So, then, you answered previously to one of  
14 Mr. Hamilton's questions, it would depend on who was  
15 doing the threatening whether or not you would consider  
16 it to be an altercation.

17 When you were talking to Fruit, no matter  
18 what he told you there, anything that came out of his  
19 mouth, did you consider it to be an altercation?

20 A Not at that time. You know, because he asked me  
21 did I want, and I just -- and that was the end of the  
22 conversation. No.

23 Q And when you say it was the end of the  
24 conversation, you were done?

25 A As far as him asking me did I have any more

1 money, yes.

2 Q And whether or not he continued on with  
3 Carmen?

4 A It didn't matter.

5 Q You didn't pay it any mind?

6 A Not at that time.

7 Q No matter what he said after that, you  
8 didn't --

9 MR. HAMILTON: Objection.

10 THE COURT: Sustained.

11 Q When the smoke was coming up the stairs,  
12 did it reach Carmen's room or not?

13 A Yeah. By the time I got out on the landing, it  
14 was flames, not smoke, coming out of the window behind  
15 us. I was this far from being burned up, seconds,  
16 because I didn't know that the fire was deliberate --  
17 was set, you know, on purpose. I was laying in the  
18 hospital bed when I found that out.

19 MS. LACKEN: Judge, I have nothing further  
20 from Mr. Warren.

21 THE COURT: Anything else?

22 MR. HAMILTON: I have an omitted area. I'd  
23 like to ask some questions about Curt Hawkins. Shall  
24 we be heard at sidebar or can we simply get into it?

25 THE COURT: Do you want to reopen an area?

1 Any objection?

2 MS. LACKEN: No.

3 THE COURT: Go ahead.

4 RE CROSS-EXAMINATION BY MR. HAMILTON:

5 Q Back at this time, did you know a man named  
6 Curtis Hawkins, also known as Curtis Johnson?

7 A Curt, I didn't know his last name.

8 Q Was Curt someone who worked with --

9 A I wouldn't know.

10 Q Had you ever bought drugs from Curt?

11 A No.

12 Q Do you recall seeing Curt in 340 Brunswick  
13 Avenue while you were --

14 A Not that day, not that I can recall.

15 Q Had you seen --

16 A I'm not saying he wasn't there. I don't recall  
17 seeing him.

18 Q Do you recall seeing him in that house some  
19 other time, some other occasion?

20 A This wasn't an everyday thing for me. I might  
21 have seen him coming and going. I might have been  
22 standing down the street somewhere, something like  
23 that.

24 MR. HAMILTON: I have no further questions.

25 MS. LACKEN: Nothing, your Honor.

1 THE COURT: Okay. Thank you, Mr. Warren.  
2 You be careful stepping down there. We don't want any  
3 more incidents. All right?

4 THE WITNESS: Thank you. That's it?

5 MS. LACKEN: Yes.

6 (The witness is excused.)

7 THE COURT: All right. Ladies and  
8 gentlemen, this is probably a good time to take a break  
9 for lunch. I don't know if it's raining out. If it  
10 is, don't get too wet. But enjoy your lunch and I'll  
11 see you back in your room at 1:30. We'll try to get  
12 you started at 1:30. As soon as we can.

13 Remember not to talk about the case amongst  
14 yourselves if you're having lunch together. All right,  
15 1:30, folks.

16 (Luncheon recess is taken.)

17 A F T E R N O O N S E S S I O N

18 (The following is in the presence of the  
19 jury.)

20 THE COURT: Ladies and gentlemen, please be  
21 seated. I hope you had an enjoyable lunch. Please be  
22 seated.

23 MS. LACKEN: Your Honor, the state calls  
24 Carmen Jones.

25 Place your left hand on the Bible and raise

1 your right hand.

2 C A R M E N J O N E S, STATE'S WITNESS, SWORN.

3 THE CLERK: Please state your name.

4 THE WITNESS: Carmen Vanessa Jones.

5 THE COURT: Good afternoon, Ms. Jones.

6 Try, Ms. Jones, try to keep your voice nice and close  
7 to the microphone. Okay.

8 THE WITNESS: Okay.

9 THE COURT: Okay. Prosecutor.

10 DIRECT EXAMINATION BY MS. LACKEN:

11 Q Good afternoon, Ms. Jones.

12 A Good afternoon.

13 Q How old are you?

14 A 45.

15 Q Where are you from?

16 A Trenton, New Jersey.

17 Q Obviously, dressed in orange, you're in  
18 custody. Why are you in custody?

19 A For municipal and child support.

20 Q Okay. And are you being held on -- strike  
21 that.

22 Did you know a man by the nickname of  
23 Peanut?

24 A Yes, I did.

25 Q Do you know his real name?

1 A Ellis McNeill.

2 Q How did you know Ellis McNeill?

3 A A good friend. I went with his brother years  
4 ago.

5 Q You dated his brother?

6 A Yes.

7 Q How long had you known Ellis McNeill prior  
8 to his death?

9 A Some years.

10 Q Long time?

11 A Yes.

12 Q Can you give me an estimate?

13 A Over ten years.

14 Q Were you and he friends?

15 A Yes.

16 Q I want to direct your attention back to  
17 Saturday, May 11, 2002, the night that Ellis McNeill  
18 died. Do you remember that?

19 A Yes, I do.

20 Q Do you remember where you were in the  
21 afternoon of that same day?

22 A Of that same day, I was, like, hanging around  
23 between the Boulevard and Brunswick Avenue.

24 Q Did there come a point in time when you  
25 went in the area of Stoke's Bar?

1 A Yes.  
 2 Q Is that near 340 Brunswick Avenue?  
 3 A Yes.  
 4 Q What's 340 Brunswick Avenue?  
 5 A It's an abandoned house.  
 6 Q And when you say "abandoned," can you  
 7 describe it for me?  
 8 A Three-story structure house where no one was  
 9 living at but boarded up.  
 10 Q Was the entire structure boarded up?  
 11 A No.  
 12 Q Did you have any contact with 340 Brunswick  
 13 Avenue?  
 14 A Yes.  
 15 Q What did you do there?  
 16 A I used to stay, hang out there.  
 17 Q Can you describe the inside of it for me?  
 18 A Yes, I can. From what section do you want to  
 19 know? The whole house?  
 20 Q Yes. Tell me, how did you get into  
 21 340 Brunswick Avenue?  
 22 A The side entrance of the house. It's, like, the  
 23 first floor.  
 24 Q I want to ask you to keep your voice up so  
 25 everyone can hear you.

1 A The side entrance of the house, the first floor,  
 2 you go in from the back door, you walk into a pantry,  
 3 into a kitchen, into a room, then another room, and a  
 4 front room, a staircase that took you into a second  
 5 floor. which, at the top of the stairs, if you turn to  
 6 the right, there's a living room, a bedroom, a  
 7 bathroom, a bedroom, a kitchen, and a back pantry.  
 8 Q Now, this place was boarded up, correct?  
 9 A Yes.  
 10 Q You stayed there from time to time?  
 11 A Yes.  
 12 Q Where did you stay?  
 13 A I stayed in the second bedroom on the second  
 14 floor.  
 15 Q When you made your way up the stairs from  
 16 the first floor, can you tell us how you would get to  
 17 your bedroom?  
 18 A You go past the first bedroom -- you have to go  
 19 past the living room, bedroom, the bathroom, and then  
 20 the bedroom, that was my room.  
 21 Q Did anyone else stay in that building?  
 22 A Yes. Peanut and a young lady by the name of  
 23 Bernadine.  
 24 Q Where did Peanut stay?  
 25 A He stayed in the first bedroom that's, like, at



1 the top of the stairs.  
 2 Q What was the distance between your bedroom  
 3 and his?  
 4 A A few feet.  
 5 Q Was there any room between it?  
 6 A A bathroom.  
 7 Q When you got into the area of 340 Brunswick  
 8 Avenue, did you meet up with anyone that day?  
 9 A Yes, I did.  
 10 Q Who did you meet up with?  
 11 A A friend of mine named Big Al. We call him Al.  
 12 Q Do you know his real name?  
 13 A Ed.  
 14 Q Ed what?  
 15 A I don't know his last name.  
 16 Q When you met with Big Al, where was he?  
 17 A He was just getting out of a vehicle, mainly, by  
 18 the corner of Brunswick and Middle Rose.  
 19 Q Do you know where he was coming from?  
 20 A Work.  
 21 Q When you guys met up, how long had you  
 22 known Big Al?  
 23 A I had known him for some years, over ten years.  
 24 Q Were you friendly?  
 25 A Yes.

1 Q What happened when you and Big Al met up?  
 2 what did you guys do?  
 3 A We sat and we talked for a little while. Then he  
 4 asked me certain questions. I gave him the answers to  
 5 them, and then, you know, we had went and got something  
 6 to get high off of and something to drink and some  
 7 snacks and went down to the house on Brunswick Avenue.  
 8 Q Now, the house on Brunswick Avenue, how far  
 9 away would you say that was from Stoke's Bar?  
 10 A Let me see. Stokes Bar. That's Stoke's Bar,  
 11 about seven houses from the corner.  
 12 Q So it's right there?  
 13 A Yes.  
 14 Q Is it on the same side of the street or  
 15 opposite side?  
 16 A Opposite side.  
 17 Q Back then you were getting high?  
 18 A Yes.  
 19 Q All right. And that's in May of 2002?  
 20 A Yes.  
 21 Q What did you get high on?  
 22 A Crack cocaine.  
 23 Q Was Big Al somebody that you got high with  
 24 a lot?  
 25 A Off and on.



1 Q Did he live in that house?  
 2 A No, he didn't.  
 3 Q On May 11, when you and Big Al went to the  
 4 house to get high, what went on?  
 5 A Well, we sat there, we listened to the radio, we  
 6 got high off and on. We talked, played cards. I did  
 7 most of the running in and out, going back and forth  
 8 making his little errands.  
 9 Q When you said you did running in and out,  
 10 can you tell me what you did by that?  
 11 A Going to the store, going to the bar, or going  
 12 and see if anybody was there, out there to buy any more  
 13 product from.  
 14 Q When you say "product," what do you mean?  
 15 A Product meaning cocaine.  
 16 Q When you went -- how many times would you  
 17 say you went in and out of the house that day to buy  
 18 cocaine?  
 19 A Several times during that course of the time we  
 20 were together, up until then.  
 21 Q Can you estimate for me?  
 22 A About ten times.  
 23 Q Were there other people in the house too?  
 24 A Off and on.  
 25 Q Did you see Peanut in the house that day?

1 A Not during the day, during the evening.  
 2 Q When did you see him during the evening?  
 3 A It was, like, when it got dark, he got off of  
 4 work.  
 5 Q Peanut worked back then too?  
 6 A Yes, he did.  
 7 Q Who did you see him with?  
 8 A At the time when I did see Peanut, he had just  
 9 gotten off of work. I went out and came out my room  
 10 and saw him in the front room, talking to Bernadine.  
 11 Q Now, let me ask you, before that, you  
 12 indicated that you had gone in and out of the house  
 13 several times to get your coke and to do errands for  
 14 Big Al. And he was the one who had the money?  
 15 A Yes.  
 16 Q Obviously, Carmen, you were getting high on  
 17 and off that whole day?  
 18 A Um-hum.  
 19 Q Let me ask you something: Tell me about  
 20 how you were when you got high?  
 21 A Sometimes I would be a little woozy high, you  
 22 know, but I wasn't like I couldn't comprehend or you  
 23 know, know what I was doing.  
 24 Q For you was getting high -- how would you  
 25 compare it to maybe drinking?

1 A It's different. It's way different. The high  
2 that I was into, it was like it was -- it would only  
3 last for about 15 minutes or so, and then maybe I would  
4 want to get high again. But you can never get no  
5 higher than you were the first time, so you keep on to  
6 keep on, you start getting, like, headaches.

7 Q Let me ask you something: You said you  
8 left "several times." Does that mean you were high and  
9 came down and were regular?

10 A When I left out the building, it was like I would  
11 come down before I go out the building.

12 Q Why did you do that?

13 A Because I was making runs to the store or just to  
14 go outside and talk to other people.

15 Q Why is it important for you to come down?  
16 I mean, I don't get it.

17 A Why would you want to stay high?

18 Q Well, I mean, I understand you were -- back  
19 there you were getting high, so obviously, you liked  
20 it. But when you came back down, were you worried  
21 about anything out on the street?

22 A No, I wasn't worried then.

23 Q When you came back down?

24 A I was just more aware of things, my surroundings.

25 Q Did you have to be when you were out there

1 buying?

2 A Of course.

3 Q You said you also did some errands for Big  
4 Al. What did you do?

5 A Like, going to the store, make sure I got  
6 cigarettes or, you know, junk food. Or going to the  
7 bar, getting his wine, beer, things like that.

8 Q Big Al, how was he?

9 A How was he?

10 Q Was he high?

11 A Oh, yes. It was a hot day, so that even intensified  
12 it more.

13 Q Did Big Al leave the house to make  
14 purchases?

15 A No, not right at that time.

16 Q Were there people, drug dealers on the  
17 street coming into that house?

18 A Yeah. A few of them did come to the house.

19 Q And they made their sales there?

20 A Yeah.

21 Q What kind of money was Big Al spending?

22 A He was spending a large amount of money. It was  
23 more than \$30 at a time. It wasn't just buying drugs,  
24 it was buying stuff from the bar also.

25 Q When he bought drugs, was he spending big

1 money?

2 A Yes.

3 Q Big money, what do you equate that to?

4 A Like 40, \$50 each time.

5 Q That was going on for, I guess, a few hours  
6 during the day.

7 Can you tell me what happened when you said  
8 you saw Peanut in the house?

9 A Well, when I seen Peanut, I was in my bedroom  
10 talking to Al. Al in turn asked me who was out there  
11 talking, because we heard some voices. I told him it  
12 was Bernadine, and I didn't know who the other voice  
13 was. So when I opened up the door, I looked down the  
14 hallway, and I noticed Peanut was sitting in the front  
15 room.

16 After that, I went down the hallway, and I  
17 asked him how he was doing and gave him a kiss on his  
18 cheek. And he said he was kind of tired and he had  
19 just came in, and he said he would talk to me later on.  
20 And I told him okay, and I went back to my room.

21 Q Bernadine was in there with him?

22 A Yes.

23 Q And when you say the "front room," if  
24 you're looking at the front of the house from the  
25 outside, where is the front room located?

1 A Front room is the front of the house, the second  
2 floor.

3 Q Where you would see the windows?

4 A Yes.

5 Q Do you know -- strike that.

6 What time of day was this? Was it dark,  
7 getting dark, light? Do you even know?

8 A When I met Al, it was, like, mid-afternoon.

9 Q That's when you met him?

10 A Um-hum.

11 Q When you saw Peanut --

12 A Peanut, it was dark, so it had to be, like,  
13 around about 8:00, 9:00, something in that area.

14 Q All right. Do you know exactly what time  
15 it was?

16 A No, I don't. All I know, it was dark at night.  
17 He usually came in something around about 8:00.

18 Q You saw Peanut; he was with Bernadine.  
19 What did you do after you left that room?

20 A I went back to my room. I told Al who was in the  
21 front room, and he said, Oh, okay, and we left it at  
22 that.

23 Q What happened from there?

24 A Then, as we were sitting there, he wanted me to  
25 go to the store for him again. Okay. I told him I

1 would.  
 2 There was a knock at the door. I asked who  
 3 it was, and it was Bernadine. Bernadine stated she  
 4 wanted to speak to Al, and I asked Al if he wanted to  
 5 talk to her.

6 He said, Yeah, you can let her in.  
 7 She came in the room. She asked him for a  
 8 couple dollars because she could get something to eat.  
 9 Al in turn told her he didn't have any change on him.  
 10 I told her that I was going to the store and I would  
 11 give her the couple dollars when I came back.

12 And so Al said, Okay. You'll get that  
 13 back.

14 Q So what happened from there?

15 A I left out of the house, I went to the store. Al  
 16 asked me while I was out to see if a girlfriend of ours  
 17 named Tracy was out there so he could get a ride to go  
 18 home. I said okay, I would, besides going out to the  
 19 store.

20 while I left, Bernadine was talking to Al.  
 21 I went down, Peanut was in his room.

22 Q When you say "in his room," that was not  
 23 the front room?

24 A No, it's the second room.

25 Q Keep your voice up, okay.

1 A I went outside. I stood out in front of the  
 2 house for a few minutes. Then I went down the street,  
 3 and I was in front of Stokes. I stood on the corner  
 4 for a minute or two.

5 Q Okay. I'm sorry. Go ahead.

6 A I stood outside for a minute or two before I went  
 7 down to the bar. Then I walked on down to the corner  
 8 of Brunswick and Southard Street to the store. I got  
 9 some candies and candy and a couple loose cigarettes,  
 10 soda.

11 And I walked back up the street towards the  
 12 bar, stood right there on the corner for a few seconds.  
 13 But I was still looking for a girlfriend named Tracy  
 14 for a ride for Al.

15 And at that time, during that time, a young  
 16 man came down the street by the name of Fruit. He  
 17 walked past me, and he said, what's up?

18 I said, what's up?

19 He said, You all a cross-artist.

20 And in turn, I didn't pay him no attention  
 21 on what he was saying, so --

22 Q Did you know Fruit?

23 A Yes, I did.

24 Q Do you see him in court today?

25 A Yes. He's right there.

1 MS. LACKEN: For the record, I'm asking  
2 that the witness has just identified the defendant.

3 THE COURT: The record will reflect the  
4 witness pointed out the defendant, saying, he's right  
5 there.

6 MS. LACKEN: Thank you, your Honor.

7 Q Now, when he walked past you, he said what?

8 A He said, You all a cross-artist.

9 I didn't pay him any attention at first.  
10 So when he turned, he walked past me, he was walking  
11 towards Brunswick, walking down Brunswick Avenue.

12 And I turned around and walked behind him,  
13 and I made a statement, and I said, How can anyone  
14 cross you when we don't know what time you come out?

15 And he kept on going, and I went across the  
16 street towards the house.

17 Q And when he said you're a "cross-artist,"  
18 what did he mean by that?

19 A That we didn't spend any money or anything with  
20 him, that we didn't come see him.

21 Q Was that an area around 340 Brunswick  
22 Avenue where Fruit --

23 A It was close by it.

24 Q You did know him to sell drugs there?

25 A Yes.

1 Q Have you purchased drugs from him in the  
2 past?

3 A Yes, I have.

4 Q In the area of 340, is that around the area  
5 where he hangs out?

6 A Off and on.

7 Q What happened after you had that  
8 conversation with Fruit?

9 A Okay. I went on back -- I went back towards the  
10 house. I sat outside in front of the house for a few  
11 minutes. Okay. Al and Bernadine were coming out of  
12 the house. When -- I noticed it was those two. I  
13 asked Al in turn did I take too long. He said yes, I  
14 did.

15 So I walked up to a young guy who was  
16 talking to Bernadine, and Al and I were sitting on the  
17 porch. And I told him that the guy Bernadine was  
18 talking to was a friend of mine's named P.J., and I  
19 told him that was my strong people. So Al got up and  
20 he walked over and talked to him.

21 Q Strong people?

22 A Meaning I know them very well.

23 Q How did you know him?

24 A I knew him as a drug dealer and as a friend.

25 Q Now, this kid P.J., was he one of the



1 people that you had been buying drugs off and on from?  
 2 A Yes, it was.  
 3 Q That was the same person, he had -- did he  
 4 go into the house a couple times to sell to you?  
 5 A Yes, he had.  
 6 Q Now, that had been going on during the day  
 7 while you were in there with Big Al?  
 8 A Yes.  
 9 Q After you finished talking to P.J., what  
 10 did you guys do?  
 11 A Al came, P.J. walked out of the alleyway, and Al  
 12 came walking towards me.  
 13 And I said, You ready?  
 14 He said yes, so we turned around and went  
 15 back in the house.  
 16 At this time, we went back into my room and  
 17 closed the door, and we were sitting there and turned  
 18 the radio on, and then there was a knock on the door.  
 19 Q Tell me about what happened after you went  
 20 inside, after you were out front with P.J. and Big Al?  
 21 You said there was a knock on the door?  
 22 A There was a knock on the door. I asked who was  
 23 at the door and opened the door and it was Fruit. So  
 24 in turn I let him in.  
 25 Fruit came around the door and sat in the

1 chair at the foot of the bed. Al was in the middle of  
 2 the bed. I went past the two of them and sat up by the  
 3 chair at the head of the bed.  
 4 And they were talking, and he stated, You  
 5 are a cross-artist. You crossed me. What's going on?  
 6 Q What was he saying to Al? What other  
 7 things was he saying to Al?  
 8 A Really, I wasn't really into the conversation  
 9 because I was listening to the radio, but the  
 10 conversation was going towards the both of them.  
 11 MR. HAMILTON: I beg your pardon? Going  
 12 towards what?  
 13 Q Going towards the both of them.  
 14 Now, when you are in there and you're  
 15 listening to this, you're getting bits and pieces?  
 16 A Bit and pieces of the conversation.  
 17 Q Was there any -- did you buy any drugs from  
 18 Fruit at that time?  
 19 A No.  
 20 Q Was there an attempt -- was Larry Fleming  
 21 up there, or was Fruit up there trying to sell drugs at  
 22 that time?  
 23 A He may have been trying to, but he didn't have  
 24 any at the time.  
 25 Q What do you mean, "he didn't have any"?



1 A He didn't have any drugs on him at the time for  
 2 us to purchase.  
 3 Q Where would he have had them?  
 4 A I don't know.  
 5 Q But was he talking about -- was it drug  
 6 talk?  
 7 A Yes.  
 8 Q Tell me about what happened after he said,  
 9 You are all cross-artists?  
 10 A Like I said, him and Al was talking. The  
 11 conversation was mainly going between the two of them.  
 12 I'm sitting by the window, minding my business,  
 13 listening to the radio. Okay.  
 14 I picked up bits and pieces of the  
 15 conversation, but not really into them, okay. Part of  
 16 it was, like, Al telling him he needed a ride to go  
 17 home and get some money so that he could come back out.  
 18 And for that, that was because he wanted to purchase  
 19 some more drugs.  
 20 Q What happened from there?  
 21 A After -- after the conversation, Fruit got up and  
 22 he went towards the door. And he said he was leaving,  
 23 he was going outside. If anybody needed him, they knew  
 24 where to find him.  
 25 And I said, yeah, yeah, like that. And he

1 left and went out in the hallway and that was it.  
 2 Q During that period of time, was Big Al  
 3 high?  
 4 A Yes, he was.  
 5 Q How were you?  
 6 A I was, like, I was comprehending everything. I  
 7 wasn't high because, you know, I had stopped for a  
 8 while.  
 9 Q Okay. When Fruit had said, You all are  
 10 cross-artists, did he say anything else to that effect?  
 11 A No.  
 12 Q When he was leaving, did he say anything  
 13 about --  
 14 MR. HAMILTON: Objection.  
 15 THE COURT: Rephrase, please.  
 16 Q Okay. What did you take from it when he  
 17 said, You all are cross-artists?  
 18 A Meaning because we didn't buy anything, we didn't  
 19 spend any money with him during the course of that  
 20 time.  
 21 Q When Fruit left, was there anything else  
 22 said by him?  
 23 A No.  
 24 Q What happened then?  
 25 A He closed the door and we started talking; Al and

1 I started talking again. The next thing, you know, I  
2 heard somebody throwing stones up to the window,  
3 somebody calling my name.

4 I went downstairs. When I went downstairs,  
5 I got to the bottom of the steps, turned in from the  
6 front room, getting ready to go into the second room,  
7 and that's when I met Fruit.

8 Q Fruit was downstairs?

9 A Yes. Fruit was coming in. Somebody else was  
10 with him.

11 Q Who was that?

12 A My cousin, GI Joe, was coming around him. Curt  
13 was standing on the side of Fruit.

14 Q When you say "Curt," who are you referring  
15 to?

16 A Curtis, a friend.

17 Q Do you know his last name?

18 A No.

19 Q Did you see Curt upstairs when Fruit was in  
20 the room?

21 A I didn't pay any attention. Only Fruit came into  
22 the room.

23 Q Were there other people outside of your  
24 room or don't you know?

25 A No, I don't.

1 Q Do you know if there were other people in  
2 the house either P.J. and/or Fruit was trying to serve?

3 A No.

4 Q You don't know?

5 A No. P.J. wouldn't come in the house at night.

6 Q He came in to deal with you --

7 A It was daylight. If it was dark, he would not  
8 come in the house. He would stay outside.

9 Q And you would go down to meet him?

10 A Yes.

11 Q So tell me -- how long after Fruit left the  
12 room did you see him downstairs, would you say? Did a  
13 bunch of time go by or not that much?

14 A Not that much time. It was about 10 or 15  
15 minutes.

16 Q When you went downstairs, you saw Fruit,  
17 and what happened? Tell me what you saw?

18 A Okay. When I got down to the bottom of the  
19 steps, to the first room, I saw bright light, okay.  
20 The light was in Fruit's hand, okay. Fruit was, like,  
21 facing the side of the house, meaning the windows  
22 towards the side of the house. Curt was standing on  
23 his left-hand side.

24 My cousin, GI Joe came from around both of  
25 them towards me, and I asked him what was up.

1 He said, I need a favor. I said, wait a  
2 minute. Okay. Hold up. In his term, Fruit asked me  
3 was everybody okay. I told him, yes, we were. He  
4 said, If you need me --

5 Q Slow up a little bit. When you said, okay,  
6 what are you talking about?

7 A I guess in his term, did we need anything.

8 Q As far as?

9 A Drugs. Okay.

10 I told him we was all right. He said,  
11 well, you know where I'm at. I said, okay.

12 Then I turned around and went on back up  
13 the steps.

14 Q When your cousin -- you said GI Joe, you  
15 referred to him, came in, was he with Fruit or don't  
16 you know?

17 A No, I don't know if he was with him. I know he  
18 came in walking right behind him, like he was just  
19 walking past him.

20 Q Was it dark down there?

21 A It wasn't that dark that I couldn't see him with  
22 the light.

23 Q You said Fruit had a light in his hand?

24 A I don't know if it was a candle, a light, or  
25 anything, but it wasn't no flashlight.

1 Q Let me ask this: Did you see anything else  
2 in Fruit's hand?

3 A In his left hand, it was a red can with a yellow  
4 nozzle. Small can, the same can that I spotted on the  
5 corner across the street from Stoke's Bar by a car.

6 Q Do you know a woman by the name of Crystal  
7 white?

8 A Yes, I do.

9 Q Does she live anywhere in that area?

10 A Well, her family had a house across the street  
11 from the bar.

12 Q From Stoke's Bar?

13 A Yes, right by the store.

14 Q Was that -- where was that gas can in  
15 relation to where she was?

16 A The gas can was in front of the beauty parlor  
17 diagonally from the bar.

18 Q How close was that to where her family's  
19 house was?

20 A Across the street on the same side.

21 Q No. You said when you went downstairs, you  
22 saw Fruit, you saw the light in his hand, and you saw  
23 the gas can?

24 A Yes.

25 Q Did you think anything of it? Did you see

1 him doing anything at that point?  
 2 A I didn't think nothing of it. By the gas can, I  
 3 figured he was going to put some gas in his car.  
 4 Q Do you know if he had a car back then?  
 5 A Yeah. He had a white Cadillac.  
 6 Q What happened then?  
 7 A I went on back upstairs, okay. Joe, told him to  
 8 go ahead on in the living room and lay down on the  
 9 couch.  
 10 He needed a blanket. I went into Peanut's  
 11 room. I knocked on Peanut's room and asked him for a  
 12 blanket. He told me to get the blanket by the closet  
 13 door. I got the blanket.  
 14 I went out the door, I closed the door with  
 15 my foot as I was going out. I gave Joe the blanket and  
 16 went back towards my room and closed my door.  
 17 Q Now, Joe was in front room, that would be  
 18 in the front of the house?  
 19 A Yes.  
 20 Q When he asked you for a favor, was that  
 21 what he was asking for, a place to stay?  
 22 A Yes.  
 23 Q What happened after you left Joe in the  
 24 front room?  
 25 A I went on back towards my room -- no, I went into

1 Peanut's room. I peeped my head in Peanut's room and I  
 2 was going toward a bag he had put at the foot of the  
 3 bed. And he told me to get away from it because I  
 4 wasn't supposed to see what was in it until the next  
 5 day, which would have been Mother's Day. He said he  
 6 had some gifts in there for some sisters and his  
 7 godmother.  
 8 So I said okay. I sat there. I gave him a  
 9 couple batteries for his radio and I left on out.  
 10 Q Where did you go then?  
 11 A I went into my room.  
 12 Q Who was in your room when you went in  
 13 there?  
 14 A Al.  
 15 Q Tell me what happened when you were in the  
 16 room with him.  
 17 A Okay. We were sitting in there. I told him that  
 18 it was my cousin, Joe that was in the front room, told  
 19 him who I was talking to, who I went downstairs to go  
 20 meet. And we just sat there, turned the radio on and  
 21 we got high. We started to get high.  
 22 Q You started to get high. Did something  
 23 stop you?  
 24 A I was sitting -- meaning starting to get high.  
 25 He was getting high. I wasn't getting high right at

1 that point because I was re-cooking the product up.

2 Q Okay. What happened then?

3 A Then I heard stones at the window. Then I heard  
4 somebody hollering, fire, fire. I didn't pay it no  
5 attention because the way it sounded, it sounded like  
6 it was coming from the front of the house. By me being  
7 on the side of the house and the only window that was  
8 open, it sounded like the noise is from the front.

9 Then he asked me, what did they say?

10 I said, It sounded like they said fire.

11 So then they said it again.

12 And I said, Yeah, it did sound like they  
13 said fire.

14 So I walked out the room and started down  
15 the steps. That's when I got hit in the face with the  
16 smoke and I felt the heat. I ran back towards my room  
17 and walked towards the window. I tried to pull the  
18 window up, but it didn't go all the way up, so we was  
19 kicking it out.

20 Q When you had gone towards the steps, you  
21 said you felt the heat, obviously, the smoke, you ran  
22 back into the room. Did you tell Big Al, It's a fire?

23 A Yes, um-hum.

24 Q What was his reaction?

25 A Oh, he had jumped up out of the chair, off the

1 bed, and he went towards the window with me. And this  
2 person that came into the room, also, which I thought  
3 was Peanut but it wasn't. I didn't know it wasn't  
4 Peanut until I got out the window.

5 Q Who was it?

6 A It was my cousin, Joe.

7 Q So you're sitting there, and tell me  
8 about -- it's dark, correct?

9 A Yes.

10 Q You're in your room?

11 A Um-hum.

12 Q Can you tell me how it is? Was there any  
13 electricity to that house?

14 A No.

15 Q How did you get light?

16 A We had candles.

17 Q Anyone you were able to see in that room?

18 A Um-hum. But at the time I went back in, you  
19 couldn't see because I hadn't lit the candles yet.

20 Q There were candles in there when you were  
21 there before?

22 A Yes.

23 Q At that point what are you trying to do?  
24 Get out of the building?

25 A Yes.



1 Q You guys are doing what to the window?

2 A Kicking the window pane.

3 Q All three of you?

4 A It was Joe and myself.

5 Q What was Big Al doing?

6 A He was standing alongside of me towards my right  
7 side, behind me, and he was trying to help. He was  
8 moving the stuff out of the way.

9 Q Tell me what happened then.

10 A We got out the window. It was three of us out on  
11 the roof. One went down before I did, and that was on  
12 my left-hand side. And then I went down, me and Al  
13 went down about the same time. But Al hit the ground  
14 hard, so he was, like, up against the building.

15 Q What happened to Al?

16 A When he fell, evidently, he must have hurt his  
17 leg. I was trying to get him up. He told me to call  
18 the fire department. Don't worry about him.

19 When I noticed it was my cousin, Joe  
20 running in front of me, I was running to Stoke's Bar  
21 and used that telephone to call the fire department.  
22 And when I got on the phone I told them to send a truck  
23 to Brunswick Avenue in front of Al's Auto Body Shop  
24 closer to Bond Street, because there was a house on  
25 fire and please to hurry up because somebody was still

1 trapped in the building.

2 Q You say somebody was still trapped in the  
3 building. How did you know?

4 A Because the three of us being outside, I knew it  
5 wasn't Peanut. So when I went back to the building, I  
6 was trying to climb the side of the wall to go back  
7 into the building. I was being pulled down. All I  
8 could hear him saying, Help me, please. Somebody, help  
9 me.

10 Q Where was that coming from?

11 A That was coming from off of the second floor.

12 Q Were there other people out there trying to  
13 get into the house?

14 A Yes, it was. It was P.J. and his father. P.J.'s  
15 father is the main one who tried to pull me down off  
16 the side of the windows. P.J.'s father, in turn,  
17 bought him an ax and he was trying to hit the window.  
18 I told him not to hit the window. If they got a hole  
19 into it, it would intense the fire.

20 I went across the street when the fire  
21 department was there, and the ambulance had came up a  
22 few minutes later. I was across the street. I was  
23 shaking. I was real scared. And I went to the corner  
24 by Stoke's Bar, and that's when there was a couple  
25 girls, one of Fruit's girlfriend named Cherie was



1 talking to me, laughing and carrying on, saying, The  
 2 house is on fire. Everybody gets out.  
 3 I didn't take it as a joke.  
 4 Q Did you see Fruit?  
 5 A No, I did not see him.  
 6 Q And you were right in the area of the  
 7 corner of right where Stoke's Bar was?  
 8 A Yes.  
 9 Q Is that Middle Rose and Brunswick?  
 10 A Yes.  
 11 Q Now, Cherie was up there?  
 12 A She was right at the corner talking to me.  
 13 Q But Fruit wasn't anywhere around?  
 14 A I did not see him. I didn't notice him anywhere  
 15 around.  
 16 Q You said Cherie was talking to you, she was  
 17 making fun?  
 18 A It was like a joke to her just because the house  
 19 was on fire. That's what it seemed like to me.  
 20 Q Did she know you stayed there?  
 21 A She knew I was there off and on. A lot of people  
 22 knew.  
 23 Q Is that where you stayed when you were in  
 24 the area?  
 25 A When I was in the area.

1 Q Did you live somewhere else?  
 2 A I stayed at 183 Roselle.  
 3 Q And you would come into this area for what?  
 4 A When I was out getting fucked up, excuse the  
 5 French.  
 6 Q Okay. Did you -- how long would you say  
 7 you heard Peanut yelling?  
 8 A For at least three or four minutes. Even when I  
 9 went across the street, I heard him.  
 10 Q When you made it out of the house, it was  
 11 dark?  
 12 A Yes.  
 13 Q Did you see Curt?  
 14 A I didn't notice him.  
 15 Q When you said when you went downstairs, you  
 16 saw Curt and Fruit downstairs, and Fruit had the gas  
 17 can?  
 18 A Um-hum.  
 19 Q Did Curt stay the whole time while you were  
 20 in there?  
 21 A No. Curt turned back around and he was going out  
 22 the door.  
 23 Q When you left Fruit downstairs, was Curt  
 24 anywhere around that you saw?  
 25 A When I left Fruit downstairs, there was -- like,

1 Curt was going out the door. Fruit was -- just me.  
2 And I -- me and him just finished saying the words to  
3 each other, and I figured Fruit was just going out the  
4 door too.

5 Q When Fruit was upstairs talking to Big Al  
6 about the conversation they were having, can you tell  
7 me what his demeanor was like?

8 A It was all about drugs, money being spent.  
9 Now, we know what time he came out. He's not out  
10 during the day. He's a night person. He's like a  
11 vampire, like I am half the time. I come out during  
12 the night. But you don't hardly see me during the day.

13 Q Was he -- can you describe how he was  
14 acting?

15 A Kind of normal but not really. He looked like  
16 there was something bothering him.

17 Q Was he upset?

18 A It looked like it.

19 Q After you went to the corner and you were  
20 having your discussions with Cherie, did the fire  
21 department show up?

22 A The fire department was there when I was talking  
23 to Cherie.

24 Q How about the police department?

25 A I think they were there too.

1 Q Did you speak to the police department that  
2 night?

3 A No, I did not.

4 Q Why not?

5 A Because I was scared. It was just like I  
6 panicked, and I didn't want to be bothered with  
7 anybody. So I walked. I went and I got high and I  
8 walked.

9 Q Did there come a point in time when you  
10 spoke to the police?

11 A About a week and a half later.

12 Q Did they ask you to come down to the police  
13 station and give a statement?

14 A Yes, they did.

15 Q Did you do that?

16 A Yes, I did.

17 MS. LACKEN: S-43.

18 THE COURT: S-43 for identification.

19 Q Carmen, I'm going to ask you to take a look  
20 at the top, there's a sticker on that indicates the  
21 number S-43. Do you recognize what that is?

22 A Yes.

23 Q What is that?

24 A The statement that I gave.

25 Q Keep your voice up.

1 A The statement that I gave.  
 2 Q You gave that to the police on May 21,  
 3 2002?  
 4 A Yes.  
 5 Q That was done at Trenton Police  
 6 headquarters?  
 7 A Yes, it was.  
 8 Q When you gave that statement to the police,  
 9 did you tell them who you saw downstairs with the gas  
 10 can?  
 11 A Yes, I did.  
 12 Q Who did you tell them?  
 13 A Fruit.  
 14 Q Any doubt in your mind that the person with  
 15 that gas can was Fruit?  
 16 A I know it was Fruit. I was looking right at him.  
 17 I was talking to him. I was not messed up at that  
 18 time.  
 19 Q You said that you had known Fruit for a  
 20 while before this. How long did you know him?  
 21 A I had known him for about a year.  
 22 Q And you said you had dealings with him?  
 23 A Yes.  
 24 Q Had you talked to him before?  
 25 A Yeah, we talked.

1 Q You did? You knew what his voice sounded  
 2 like?  
 3 A Yes.  
 4 Q Did you know Curtis Hawkins?  
 5 A If that's Curt's last name.  
 6 Q Did you know Curt?  
 7 A Yes. I know Curt for a good while. For a couple  
 8 years.  
 9 Q Recognize him?  
 10 A Yes.  
 11 Q Know his voice?  
 12 A Yeah.  
 13 Q Was Curt trying to sell any drugs that  
 14 night to you?  
 15 A No.  
 16 Q Was he trying to sell drugs to anybody that  
 17 was with you?  
 18 A No.  
 19 Q Did Curt ever have anything to say about  
 20 who you were buying drugs from?  
 21 A No. If I asked him who was out there selling  
 22 them, he would tell me if anybody was nearby.  
 23 MS. LACKEN: If I could have a moment, your  
 24 Honor.  
 25 Has S-13 been identified?

1 THE COURT: No. S-13 and S-16 --  
 2 MS. LACKEN: I have S-13, S-16, S-19. And  
 3 S-15.  
 4 Q Carmen, I'm going to show you a bunch of  
 5 pictures. I'm going to show them to you first, and  
 6 some of them have already been shown to the jury.  
 7 A Okay.  
 8 Q I'm going to show you what has been marked  
 9 S-13. What is that?  
 10 A That's the house.  
 11 Q You need to keep your voice up. That  
 12 address is 340 Brunswick Avenue?  
 13 A Yes.  
 14 THE COURT: Ms. Jones, just get a little  
 15 closer to that mike. See if you can do that.  
 16 Q Now, that picture obviously is taken in the  
 17 day, correct?  
 18 A Yes, it is.  
 19 Q In looking at the house, does that look the  
 20 way that house looked back in May of 2002?  
 21 A Without it being burned, yes.  
 22 Q Now, I'll ask you some more questions on  
 23 that in a minute.  
 24 I'm going to show you S-13. Do you  
 25 recognize that?

1 A Yes, I do. That's the side of the house, the  
 2 side door we went in and out of.  
 3 Q Is that how it looked back in May of 2002?  
 4 A Yes.  
 5 Q S-19?  
 6 A That's my room.  
 7 Q That's on the second floor?  
 8 A Yes, it is.  
 9 Q Does that look how it looked back --  
 10 A Without it being smoked up, yes, but it was a  
 11 little neater.  
 12 MS. LACKEN: I'm asking that S-13, 15 and  
 13 at this time, 19 be into evidence.  
 14 MR. HAMILTON: No objection.  
 15 THE COURT: 13, 15, and 19 into evidence.  
 16 (S-13, 15, and 19 are marked into  
 17 evidence.)  
 18 Q Carmen, I'm going to ask you to step down  
 19 right in front of the podium. I'm going to ask you,  
 20 take a look at S-15 now in evidence.  
 21 You said you recognize that picture?  
 22 A Yes, I do.  
 23 Q You said that's 340?  
 24 A Yes.  
 25 Q Looking at the photograph, were those

1 windows boarded up or open like that before the fire  
 2 started?  
 3 A They were boarded.  
 4 Q Can you show us the area in the picture  
 5 where you indicated on your testimony before that there  
 6 were people trying to get into the house in order to  
 7 help Peanut out?  
 8 A They were right here, the side of the house,  
 9 okay. I was here, trying to climb back up this wall up  
 10 here to get to this roof, because that's the only way I  
 11 thought of.  
 12 This window right here, they used the ax to  
 13 open up the board. When they got the hole in the wood,  
 14 the fire came out.  
 15 THE COURT: Did you hear that, folks?  
 16 Okay.  
 17 Q Now, where was Big Al when you went to call  
 18 the fire department?  
 19 A He was right about here (indicating).  
 20 Q He was standing against 340, the burning  
 21 building?  
 22 A Yes. This is the window we came out of.  
 23 Q You're referring to S-15?  
 24 A Yes.  
 25 Q When you say "this is the window" you came

1 out of, for the record, it's the right picture, the  
 2 right window?  
 3 A Yes.  
 4 Q Right here is the roof of what?  
 5 A This is the roof of -- okay, this is the  
 6 downstairs below my bedroom. This is my bedroom, this  
 7 is the bathroom, and that was Peanut's room.  
 8 Q Okay. At the time on -- in the building,  
 9 were there any other stairs in the building? Was there  
 10 any other way to get inside the building to get to the  
 11 second floor?  
 12 A Not inside the building.  
 13 Q Were there any outside the building?  
 14 A There used to be.  
 15 Q But there weren't at the time of the fire?  
 16 A No.  
 17 Q Now I'm going to show you what has been  
 18 marked as S-9. Do you recognize what that is?  
 19 A That's the hallway on the second floor.  
 20 Q In this picture can you show me where the  
 21 door to Peanut's room was?  
 22 A Right here (indicating).  
 23 Q In the picture, the middle right?  
 24 A Yes.  
 25 Q Can you show me where, if you can, the door



1 to your room was?  
 2 A My room is right back here.  
 3 Q And it is separated by the bathroom?  
 4 A The bathroom. This is a wall right here. And  
 5 there's a door right here (indicating).  
 6 Q Right in between?  
 7 A Yes.  
 8 Q I'm showing you what is in evidence as  
 9 S-35. Do you recognize what is in that photo?  
 10 A Yes, I do. This is the staircase coming from the  
 11 first floor. This is the living room, and this is  
 12 Peanut's door.  
 13 Q Okay. Now, when you said that, when you  
 14 said that you saw Peanut and you saw Bernadine in the  
 15 house when you came out, can you show me where you were  
 16 talking about?  
 17 A The couch, a couch right against the wall, right  
 18 up in here. When I came out of my room, I could see  
 19 Peanut sitting right there. It was light in the room  
 20 and I knew who it was.  
 21 Q That's when you went back there and you  
 22 went to talk to him?  
 23 A Yes.  
 24 Q You can sit down. Thanks.  
 25 I'll show you one last picture, but you can

1 do it sitting down.  
 2 S-19, can you tell the jury what that is?  
 3 A That's my bedroom.  
 4 Q And besides, as you said before, besides it  
 5 being smoked up, that's the bedroom that you had?  
 6 A Yes, it was.  
 7 Q When Fruit came in and was talking to you  
 8 and Big Al, where was he?  
 9 A Fruit was sitting in the chair that was sitting  
 10 right here. It was a chair like this. Al was sitting  
 11 right here and I was sitting over here.  
 12 Q You said you were listening to the radio?  
 13 A Yes. The radio -- well, it's not there. There  
 14 was a yellow radio.  
 15 Q I'm having trouble with these pictures.  
 16 Let me ask you a question, Carmen. With  
 17 regard to Curt, you indicated that he wasn't out there  
 18 selling that day, right?  
 19 A No.  
 20 Q Did he sell drugs that you knew of?  
 21 A No, not that I know of, not unless he was a  
 22 runner for a dealer.  
 23 Q What's a runner?  
 24 A Meaning bringing sales to them.  
 25 Q would he be getting a lot of money for



1 that, or you wouldn't know anything?

2 A I wouldn't know.

3 Q The person that runs is working for the  
4 drug dealer?

5 A Um-hum.

6 Q Did you -- would you say hi to Curt?

7 A Yes.

8 Q You were friends. If you were to  
9 characterize Curt, just based on your friendship with  
10 him and what you dealt with him, was he more of a user  
11 or seller or how would you characterize him?

12 A User.

13 MS. LACKEN: If I can have a moment, your  
14 Honor.

15 THE COURT: Sure.

16 MS. LACKEN: Thank you, Carmen. I have no  
17 further questions.

18 THE COURT: Excuse me, Mr. Hamilton. Would  
19 it be --

20 MR. HAMILTON: Do you want to take a break?

21 THE COURT: I think the drinks are here.

22 MR. HAMILTON: Sure.

23 THE COURT: All right. Folks, we'll take a  
24 break. We'll order Cokes, orange, whatever. Please  
25 don't talk about the case.

1 (The following is out of the presence of  
2 the jury.)

3 MS. LACKEN: Your Honor, we've been  
4 grappling with this issue for a few days now. I've  
5 told Mr. Hamilton about it. I didn't want to bring it  
6 to your Honor's attention until I thought it was  
7 absolutely necessary.

8 It seems that Curt Hawkins, who is a  
9 witness in the state's case, has been approached  
10 several times by the defendant's brother, Angel. I  
11 believe that's the individual that was just in court.  
12 He's been approached to the effect of, you know,  
13 saying, You're not going to be there, you know. When  
14 they come to get you, make sure no one shows up in  
15 court. You got me, right. You're not going to be  
16 coming to court to testify against my brother, things  
17 of that nature.

18 It's been going on for a while, frankly.  
19 In order to keep Mr. Hawkins safe, I've not brought it  
20 to anyone's attention. I may have mentioned it before  
21 in passing to Mr. Hamilton, but nothing that I gave him  
22 any specifics about.

23 I was concerned about Mr. Hawkins' safety  
24 on the streets. It's come to my attention that, again  
25 today, Mr. Hawkins saw either Angel or probably a

1 friend of the defendant's outside of his mom's house  
2 two or three nights ago. He was also approached by  
3 Angel.

4 And now I'm putting it on the record  
5 because -- I'm going to put it on the record when he  
6 testifies. I'm going to ask your Honor I be allowed to  
7 do that. Obviously, those are threats. It goes to  
8 consciousness of guilt.

9 If your Honor pleases, before he testifies  
10 in front of the jury, we could certainly have him come  
11 in here and --

12 THE COURT: Do you want to issue a  
13 complaint?

14 MS. LACKEN: I'm not quite sure we're going  
15 to issue a complaint. At first I wasn't going to bring  
16 it up, because I was concerned about his safety,  
17 because in speaking with him, it became clear to me --  
18 at least clear to me through talking to him, he doesn't  
19 mind if it's out there because --

20 THE COURT: When you say he --

21 MS. LACKEN: It's Curtis who I'm concerned  
22 with.

23 THE COURT: You said he doesn't mind if  
24 it's out there?

25 MS. LACKEN: He doesn't mind if it's out

1 there now. He wants everyone to know it's going on.

2 MR. HAMILTON: The prosecutor has been in  
3 communication with me.

4 THE COURT: There's a number of  
5 difficulties that are confronting me. One is he should  
6 be locked up.

7 MR. HAMILTON: I don't represent him, nor  
8 do I think that any consciousness of guilt supposedly  
9 attributable to him should be transferred to his  
10 brother. It's obviously something people could  
11 consider as a way of resolving it. If he's making  
12 threats, have a complaint and lock him up and that will  
13 keep the witness safe.

14 MS. LACKEN: I'll go out and I'll ask him  
15 for more detail. But it's clear to me that he's -- at  
16 least from my version of it, that he's a representative  
17 of his brother who is in court today. Certainly, we  
18 can explore that on the record more.

19 In any event, that's something that we will  
20 be pursuing outside of court. I think, though, it's at  
21 least an area for exploration before the jury gets here  
22 or whatever, because I want it out in the open before  
23 anything happens. I have grave concerns for his  
24 safety.

25 MR. HAMILTON: I have no problem with

1 exploring it outside of the presence of the jury.

2 THE COURT: That's fine. But what I'd like  
3 you to do is deliver at least a plan of what you're  
4 going to do and what options you're going to be  
5 considering in terms of -- what's Angel's last name?

6 MS. LACKEN: I would imagine Fleming. I  
7 don't think he even knows his last name. Certainly, we  
8 can ask him, because he was in court a couple minutes  
9 ago.

10 MR. HAMILTON: You tell me. I was led to  
11 believe he was defendant's brother.

12 MS. LACKEN: I can get Curt to make an I.D.  
13 We can handle this for criminal charges. I would like  
14 to put it on the record so everybody knows about it. I  
15 am going to ask your Honor to issue a warning, at the  
16 very least, at this point, because I don't know whether  
17 or not we're going to get through Curt today, and I  
18 need to keep him safe.

19 THE COURT: I have no problem with that at  
20 all. Anybody who is going to mess with a witness is  
21 going to go to jail, as simple as that, and it's going  
22 to be \$50,000 bail. And if Angel wants to go to jail,  
23 all he has to do is talk to Curt.

24 We'll explore that after Ms. Jones. If I  
25 had known this, I would have had Ms. Jones

1 cross-examined.

2 MS. LACKEN: There's another witness who  
3 will be here who we'll get on today, probably, after  
4 Mr. Jones -- Ms. Jones. And Mr. Hawkins may not go on  
5 substantively, but at least we can address that issue.

6 THE COURT: I would like someone to make  
7 sure that he has this character available in this room.

8 MS. LACKEN: I'm going to make sure.

9 THE COURT: Make sure he's here.

10 MS. LACKEN: Okay, Judge.

11 (Recess is taken.)

12 THE COURT: Have you located the miscreant?

13 MS. LACKEN: No. What I intended to do is  
14 when we bring over the witness, because I'm not sure --

15 THE COURT: Hold it one second.

16 MS. LACKEN: -- I'm not sure it's the same  
17 brother, the individual that's been in court. When I  
18 went in the hallway, he wasn't there, so I couldn't  
19 have the witness come over and say, That's the guy I'm  
20 talking about.

21 So I'm hoping -- actually, Detective  
22 Francis was on his way over to bring one -- both of my  
23 remaining witnesses across the street. And hopefully,  
24 we'll be able to see whether or not that brother shows  
25 up and whether or not that's the same person that's

1 been --

2 THE COURT: All right. You are certainly  
3 entitled under the -- any prima facie complaint, or you  
4 can develop probable cause, arrest somebody and bring  
5 them in here.

6 MS. LACKEN: I understand, Judge.

7 THE COURT: Bring the jury in.

8 (The following is in the presence of the  
9 jury.)

10 THE COURT: All right. Please be seated,  
11 ladies and gentlemen.

12 Cross-examine.

13 CROSS-EXAMINATION BY MR. HAMILTON:

14 Q Ms. Jones, did I detect you becoming  
15 emotional when you were talking about Peanut?

16 A Yes.

17 Q He was a dear friend?

18 A Yes, he was.

19 Q How long had he been a friend?

20 A He had been a friend for some years; ten years or  
21 more.

22 Q How long had you sort of been  
23 semi-roommates in 340 Brunswick Avenue?

24 A About a year.

25 Q Now, both of you had a pretty comfortable

1 little room set up for yourselves, no?

2 A Yes.

3 Q And Lord knows there's homeless people out  
4 there looking for places to stay.

5 Did you have to sort of be there a certain  
6 amount of time to protect your turf?

7 A No.

8 Q How long would you leave it vacant before  
9 you returned again?

10 A I can go, come and go as many times as I wanted  
11 to. I can leave there for about four days and come  
12 back and things would still be the same.

13 Q How was it the neighbors or homeless people  
14 in the area would respect your territory?

15 A Because they never came to the second floor, they  
16 were always at the first.

17 Q There was nothing obstructing them from  
18 coming to the second floor?

19 A Not unless they wanted to come up there to be  
20 with the people that stayed up there. Or they were  
21 invited.

22 Q Was the community of crack users in that  
23 particular neighborhood sort of interwoven? Did they  
24 know each other, in other words?

25 A Yes, we did.

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1 Q Did that have anything to do with people  
2 respecting your bedroom?  
3 A Yes, somewhat.  
4 Q Now, in the statement that you gave to the  
5 police, I think at one point you talked about you and  
6 Al going back to our bedroom. You used the term, "our  
7 bedroom"?  
8 A Yes, I did. I do recall saying that.  
9 Q Was that because you and Al used that on  
10 and off over time?  
11 A whenever he was around.  
12 Q And the two of you felt a bit -- felt it  
13 belonged to both of you in a sense?  
14 A No, it belonged to me.  
15 Q It belonged to you. But he was a --  
16 A You might as well say a guest.  
17 Q Okay. It's true, isn't it, that at least  
18 at some point in the past you and Al had sex together,  
19 correct?  
20 A No.  
21 Q What kind of a habit did you have back at  
22 the time this all happened? How much were you using in  
23 a day?  
24 A I was spending no more and no less than maybe \$40  
25 a day. --

1 Q Okay.  
2 A -- if I spent the money.  
3 Q All right. You described going out perhaps  
4 ten times to do errands with Al's money --  
5 A Yes.  
6 Q -- that day, right?  
7 A Yes.  
8 Q And that included trying to get more drugs?  
9 A Yes.  
10 Q So if you had the money, you would have  
11 just kept using and using?  
12 A No.  
13 Q Why should we believe that?  
14 A Because -- just because I was a user, that  
15 doesn't mean every time I get money in my hand I would  
16 go out and buy drugs. I would buy other things than  
17 drugs.  
18 Q How long would it take, back around that  
19 time, for you to start to feel uncomfortable, agitated,  
20 going through some sort of withdrawal when you were  
21 without drugs?  
22 A I never was agitated. I may have got frustrated,  
23 and it wasn't because of the drugs. It may have been  
24 because of the company I was around.  
25 Q Okay. Now, the high, you said, lasted



1 about 15 minutes?  
 2 A Maybe.  
 3 Q And then you're looking to get high again?  
 4 A Maybe.  
 5 Q But you never get as high as the first  
 6 time?  
 7 A No, you don't.  
 8 Q But it's a pretty powerful urge you had to  
 9 take these drugs, wasn't it?  
 10 A Let me tell you something: When I was using the  
 11 drugs, if I got high, I got high just because I wanted  
 12 to, or maybe just for the pleasure of the high. When I  
 13 didn't feel like getting high, I did not get high. It  
 14 wasn't because I got high because I had to get high. I  
 15 didn't get high constantly.  
 16 Q You could have quit any time you wanted to?  
 17 A Yes, I could have.  
 18 Q Now, when you first talked about Curt, I  
 19 thought I saw a smile on your face. He was a good  
 20 friend of yours?  
 21 A Yes, he was.  
 22 Q Did you have sex with him?  
 23 A Maybe.  
 24 Q One of the ways you were able to get high  
 25 would be by making that kind of a trade with someone?

1 A No.  
 2 Q No?  
 3 A No.  
 4 Q With Curt, it was just for love?  
 5 A Excuse me?  
 6 Q With Curt, the sex, maybe, was just for  
 7 love?  
 8 A Curt and I were intimate at times.  
 9 Q You know what things for things means?  
 10 A Yes, I do. And it wasn't because of drugs.  
 11 Q Okay. Things for things means?  
 12 A You're swapping drugs for sex.  
 13 Q Were you working at a job back at that  
 14 time?  
 15 A Under the table.  
 16 Q Okay. Were you receiving any sort of  
 17 disability benefits?  
 18 A No.  
 19 Q And what kind of schedule were you working  
 20 under the table?  
 21 A I was a housekeeper. When they needed me, I  
 22 would go and do their house.  
 23 Q For one family?  
 24 A No. It was more than one family.  
 25 Q More than one family. And what sort of



1 money did you make doing that?

2 MS. LACKEN: I'm going to object, because  
3 I'm not sure where it's going and the relevance of all  
4 of this stuff.

5 THE COURT: Are you able to corral this a  
6 little bit?

7 MR. HAMILTON: I'm just exploring the --  
8 her economic ability and her drug needs.

9 THE COURT: I understand that, but let's  
10 not make it a worldwide exploration.

11 Q Now, you never told the police when you  
12 gave your statement that Curt was with Fruit and Joe  
13 when he walked in with the gas can into the house, did  
14 you?

15 A That statement was made, it was just never  
16 written down.

17 Q So the fact that it wasn't in your written  
18 statement doesn't mean you didn't tell them; is that  
19 what you're saying?

20 A I told them.

21 Q Okay. But you've had a chance to review  
22 your statement more than once?

23 A That's right.

24 Q Correct?

25 A Um-hum.

1 Q And no place is it in that statement?

2 A No, it's not.

3 Q All right. So you're telling the jury that  
4 an important fact like that was not in the police  
5 statement, and you didn't take issue with that at the  
6 time?

7 A No, it was not in the statement.

8 Q It was not in the statement?

9 A No, it was not in the statement. When I was  
10 talk -- talk -- normally, when I talked to the  
11 prosecutors, it will -- would come up. It will be  
12 things I may have not gotten.

13 Q You have been reviewing the case with the  
14 prosecutors recently, preparing for trial, correct?

15 A Yes.

16 Q You came down here on Friday and talked to  
17 the prosecutor and her detective?

18 A Yes.

19 Q And you may have talked to them since then  
20 too?

21 A Yes.

22 Q And during the course of those  
23 conversations, you told them that Curt came?

24 A Yes, came in the house. Yes, I has.

25 Q And that would mean there's yet another

1 person who could supposedly corroborate that Larry was  
2 in the house with the gas can, correct?

3 A Yes.

4 Q When did you first see Curt after the fire  
5 happened?

6 A After the fire?

7 Q Yes.

8 A Maybe a few days afterwards.

9 Q He was a close --

10 A It may have been like a day before -- day after  
11 or two.

12 Q He was a close friend and he was in the  
13 immediate vicinity of the building after the fire broke  
14 out, was he not?

15 A Yes.

16 Q Didn't you seek his comfort and help?

17 A No.

18 Q Who did you get your drugs from when you  
19 went and got high?

20 A Different dealers.

21 Q Now, Curt would help you get drugs in his  
22 capacity as a runner from time to time?

23 A No. If I asked him where anybody was at that was  
24 selling drugs, he would let me know.

25 Q But you were well aware he was in the know

1 of who was selling what?

2 A Of course. He was around drug sellers --

3 Q Okay.

4 A -- off and on.

5 Q Was it your previous testimony that Curt  
6 did not work for Larry Fleming or did?

7 A I don't know if he did or didn't.

8 Q Do you know if he worked for P.J.?

9 A I don't know if he did or didn't.

10 Q Had he ever directed you to P.J.?

11 A Yes, he has, because I've directed him to him  
12 also.

13 Q Had he ever directed you to Larry Fleming?

14 A Yes, he has, and I have also done the same for  
15 him.

16 Q Know the way it works? He gets money or  
17 drugs or both?

18 A I don't know what they get.

19 Q You have no idea?

20 A I have no idea. I was never a runner for nobody.  
21 I --

22 Q Isn't it a fact that you repeatedly asked  
23 Larry Fleming if you could work for him --

24 A No.

25 Q -- and he always --

1 A Back that up. Maybe if it was people down at my  
 2 house, down at the house, and he was down there at  
 3 nights, getting sales from them, I would just let him  
 4 know, but that's not actually running for him. That's  
 5 bringing him sales.  
 6 Q Okay. Now, you certainly saw Curt long  
 7 before you went and gave the statement to the police a  
 8 week and a half later, right?  
 9 A Excuse me.  
 10 Q You certainly saw Curt after the fire?  
 11 A After the fire.  
 12 Q Long before you went to give the police A  
 13 statement a week and a half or so later?  
 14 A Um-hum, um-hum.  
 15 Q Your police statement was on May 21 --  
 16 A Um-hum.  
 17 Q -- and this incident happened May 11?  
 18 A Yes, it did.  
 19 Q So you saw Curt between those two times?  
 20 A Yes, I have.  
 21 Q And he told you that he saw Fruit carrying  
 22 the gas can into the house?  
 23 A He didn't tell me anything. He just told me to  
 24 go talk to the police.  
 25 Q You didn't hear that Curt knew who had done

1 this?  
 2 A No.  
 3 Q Do you really expect the jury to believe  
 4 that denial?  
 5 MS. LACKEN: Judge.  
 6 THE COURT: Sustained.  
 7 Q What really happened was Curt told you that  
 8 Larry had torched the house, right?  
 9 A No, Curt did not tell me such a thing.  
 10 Q And the rest of this stuff you're making  
 11 up, too --  
 12 A No, I'm not making up anything.  
 13 Q -- for the departure of your dear friend  
 14 Peanut?  
 15 A An innocent man's life was taken, and I'm not  
 16 going to sit up here in front of this court and this  
 17 jury and tell them no lie. I'm telling what I seen. --  
 18 Q You know one thing.  
 19 A -- and what I heard.  
 20 Q He's got it coming to him, according to  
 21 you, right?  
 22 A He took an innocent man's life when it wasn't  
 23 meant to be him.  
 24 Q But it's a lie about him carrying the can  
 25 in?

1 A No, it's not.  
 2 THE COURT: Could I have the last question  
 3 and answer by the counsel and the witness.  
 4 (The last question and answer are read  
 5 back.)  
 6 THE COURT: Next question.  
 7 Q When is the last time you tried crack  
 8 cocaine?  
 9 MS. LACKEN: Objection, your Honor. It's  
 10 irrelevant.  
 11 THE COURT: I'll permit it.  
 12 A Last time I used crack cocaine was in August.  
 13 Q In August?  
 14 A Yes.  
 15 Q Shortly before your incarceration?  
 16 A Yes.  
 17 MR. HAMILTON: No further questions.  
 18 THE COURT: Any redirect.  
 19 MS. LACKEN: I do.  
 20 REDIRECT EXAMINATION BY MS. LACKEN:  
 21 Q The night you gave your statement to the  
 22 police, or the day you gave your statement to the  
 23 police, May 21 of 2002, before you actually put your  
 24 statement down on paper, did you have to tell your  
 25 story to the police?

1 A I told it to an investigator.  
 2 Q Right. Are you talking about a person who  
 3 didn't have a police uniform on? Suit --  
 4 A No.  
 5 Q -- jacket and tie?  
 6 A T-shirt, I mean, a dress -- he was dressed.  
 7 Q Police officer?  
 8 A Yeah. Well, I don't know -- an investigator.  
 9 Q They reduced what you told them to writing,  
 10 correct?  
 11 A Yes, but it was like the way I had the statement.  
 12 It was more writing on the pad than it was on the  
 13 statement.  
 14 Q So what you're saying is, then, at least at  
 15 one point you told the story a few times?  
 16 A I told the story about three times, three  
 17 different times.  
 18 Q Before it actually made its way down on  
 19 paper?  
 20 A That's right.  
 21 Q When you indicated to the jury, or at least  
 22 to Mr. Hamilton, that you told that story, you had  
 23 three opportunities to tell it this time. Whether or  
 24 not that specific fact made that statement --  
 25 A Um-hum.

1 Q -- you said it?  
 2 A Yes.  
 3 MS. LACKEN: Your Honor -- your Honor, at  
 4 this time I don't think I have any further questions.  
 5 THE COURT: Thank you. Ms. Jones, you can  
 6 step down now.  
 7 THE WITNESS: Thank you.  
 8 THE COURT: Next witness, please.  
 9 (The witness is excused.)  
 10 MS. LACKEN: The next witness, your Honor,  
 11 is Joseph McKinney. Joseph McKinney.  
 12 SERGEANT-AT-ARMS: Put your left hand on  
 13 the Bible and raise your right hand and face the clerk.  
 14 J O S E P H M C K I N N E Y, STATE'S WITNESS,  
 15 SWORN.  
 16 THE CLERK: Please state your name.  
 17 THE WITNESS: Joseph McKinney.  
 18 THE COURT: How are you doing, Mr.  
 19 McKinney?  
 20 THE WITNESS: Fine, sir.  
 21 THE COURT: Good. Prosecutor.  
 22 DIRECT EXAMINATION BY MS. LACKEN:  
 23 Q Good afternoon.  
 24 A Good afternoon.  
 25 Q Joe, how old are you?

1 A 48.  
 2 Q Where are you from?  
 3 A Trenton, New Jersey.  
 4 Q Have you been there, from Trenton? Is that  
 5 where you originated from, all your life?  
 6 A Yes, ma'am.  
 7 Q Joe, out on the street, do you have a  
 8 nickname?  
 9 A It was given to me because I'm a vet. GI Joe.  
 10 Q Who called you GI Joe?  
 11 A Carmen.  
 12 Q When you say Carmen, who do you mean?  
 13 A She was just an associate from the street.  
 14 Q Carmen Jones, do you know her last name?  
 15 A No, I don't.  
 16 Q How -- were you guys friends?  
 17 A Yes.  
 18 Q How long had you known Carmen?  
 19 A Four or five years, I guess.  
 20 Q What relationship did you have with her?  
 21 How did you know her?  
 22 A Well, at this time I was homeless and I was into  
 23 drugs, and --  
 24 Q I'm going to ask you to keep your voice up,  
 25 because all of these people have to hear you.



1 THE COURT: Mr. McKinney, that's a  
 2 microphone. Sit a little closer so everybody can hear  
 3 you. Okay, sir?  
 4 THE WITNESS: All right.  
 5 Q When you say at this particular time, are  
 6 you talking about back in May of 2002?  
 7 A Yes, ma'am.  
 8 Q You said you knew her back then from  
 9 getting high?  
 10 A Right.  
 11 Q Were you a drug user back then?  
 12 A Yes.  
 13 Q What type of drugs did you use?  
 14 A Cocaine.  
 15 Q Were you from the area of 340 Brunswick  
 16 Avenue?  
 17 A No, I was not.  
 18 Q Where did you normally stay?  
 19 A At the Rescue Mission.  
 20 Q Where is that?  
 21 A Carroll Street, I believe.  
 22 Q That's in Trenton?  
 23 A Right.  
 24 Q On May 11, 2002, do you remember going to a  
 25 place where Carmen used to stay?

1 A Yes, I do.  
 2 Q Where was that?  
 3 A I don't remember the address of the place, but  
 4 it's on Brunswick Avenue. It's an abandoned building.  
 5 Q From knowing Carmen back then, did you know  
 6 that she stayed there?  
 7 A Yes.  
 8 Q Was it day or night when you went to  
 9 Carmen's?  
 10 A Evening, night.  
 11 Q Light or dark out?  
 12 A Just dark.  
 13 Q Tell me what happened when you went to see  
 14 Carmen.  
 15 A Well, I couldn't get into the Rescue Mission,  
 16 because there's certain criteria, and I knew I could  
 17 get a place to stay. Because I was living on the  
 18 streets at that time.  
 19 And I went there; you have to duck your  
 20 head down to go in. As I went into this particular  
 21 building, I seen Mr. Fruit there standing with a gas  
 22 can, which I know him also.  
 23 And I said -- he startled me. He said,  
 24 what's up? what's happening?  
 25 I walked on past him, and I walked to the



1 bottom of the steps where I called Carmen.  
 2 Q Wait a second. Let me go back.  
 3 You said you walked into the back of the  
 4 abandoned building where Carmen lived?  
 5 A Yes.  
 6 Q How did you have to get in?  
 7 A There's, like, a half a board over top of the  
 8 structure of the doorway, and you have to duck your  
 9 head down.  
 10 Q Is that towards the front or the back of  
 11 the house?  
 12 A Towards the back of the house.  
 13 Q You indicated you walked in and you came  
 14 across somebody named Mr. Fruit?  
 15 A Yes.  
 16 Q For the record, do you see him in court  
 17 today?  
 18 A Yes, I do.  
 19 Q Can you point him out and tell us where --  
 20 what he's wearing?  
 21 A White shirt, blue tie or striped shirt, blue tie.  
 22 MS. LACKEN: For the record, I'm asking the  
 23 record reflect Mr. McKinney identified the defendant.  
 24 THE COURT: Mr. McKinney did indeed  
 25 identify the defendant.

1 Q You said you knew Fruit?  
 2 A Yes.  
 3 Q How did you know him?  
 4 A Various things through the street.  
 5 Q Did you ever buy drugs off of him?  
 6 A Yes.  
 7 Q Did you -- how long did you know him back  
 8 then? How long had you known him?  
 9 A About three or four months.  
 10 Q Did you talk to him prior to this night?  
 11 A No.  
 12 Q I mean, had you had conversations with him?  
 13 You said you knew him. How did you know him besides  
 14 buying drugs?  
 15 A That was it.  
 16 Q During your drug transactions, you did talk  
 17 to him?  
 18 A No.  
 19 Q How did he know what you wanted if you  
 20 didn't speak?  
 21 A Of course, you tell him what you want.  
 22 Q You, of course, you talked, but not about  
 23 the weather?  
 24 A Right.  
 25 Q You had spoken to him before?

1 A Yes.  
 2 Q You said you knew him for several months  
 3 before this incident?  
 4 A Three or four months.  
 5 Q When you went in, you said you went under  
 6 the board and you went in and you saw him there. Was  
 7 it dark outside?  
 8 A It wasn't that dark where I couldn't identify who  
 9 I was talking to. I could actually see.  
 10 Q You said he startled you?  
 11 A Yes.  
 12 Q What did you see him doing?  
 13 A He was just standing there.  
 14 Q Did he have anything in his hand?  
 15 A A gas can in his hand. To me it was orange.  
 16 Q Did you think anything of it?  
 17 A No, because I knew he had a car. I figured he  
 18 had ran out of gas.  
 19 So I said, what's up, Fruit? what's up?  
 20 And I walked upstairs. I was looking for a place to go  
 21 down to sleep.  
 22 Q Had you been at 340 Brunswick Avenue  
 23 earlier that day?  
 24 A No.  
 25 Q Had you been out on the streets around that

1 address that day?  
 2 A No.  
 3 Q Had you made drug purchases from Fruit or  
 4 anyone else out on the streets that -- earlier that  
 5 day?  
 6 A No.  
 7 Q After you went past Fruit and said what's  
 8 up to one another, where did you go?  
 9 A I went to the front of the house where you make a  
 10 right, and I called Carmen. She was at the top of the  
 11 steps. And I said, Can I stay there? And she said  
 12 yes.  
 13 Q You asked her if you could stay?  
 14 A Yes.  
 15 Q I'm going to ask you to keep your voice up.  
 16 She said yes?  
 17 A Yes, she did.  
 18 Q So what happened?  
 19 A Walked up the steps, made a right and went to the  
 20 front of the house, to the front room where there was a  
 21 couch where I proceeded to lay down.  
 22 Q Was there anyone up in that room when you  
 23 went into it?  
 24 A The room that I went to?  
 25 Q Yes.

1 A No.

2 Q Do you know if anyone was -- at that time,  
3 did you know if anyone else was in the house besides  
4 Fruit and Carmen?

5 A No.

6 Q There could have been, you just don't know?

7 A It's possible, but I didn't know.

8 Q What happened when you went into the front  
9 room?

10 A Well, I sat down on the couch and I proceeded to  
11 take my shoes off. And all of a sudden I heard a great  
12 big boom. And it's like a concrete-brick structure;  
13 the whole house rocked. Something told me -- told me  
14 something wasn't right.

15 I went to the stairwell and I met a ball of  
16 heat. Knowing I couldn't go down that way, so I  
17 started yelling fire. Carmen came out of there, and  
18 she started going towards the stairwell.

19 I said, You couldn't -- can't go down  
20 there.

21 We went in her room and kicked out the  
22 board on the window, like chicken wire, and I tried to  
23 get everybody out.

24 Q When you say chicken wire, like a screen?

25 A Yes.

1 Q How many people were in Carmen's room  
2 trying to get out that window?

3 A It was just Carmen, another guy, and myself.

4 Q The other guy, did you know who he was?

5 A No, I didn't.

6 Q Do you know where he came from?

7 A He was in the room when I went in it.

8 Q Tell me what happened when you were trying  
9 to get out of the building.

10 A After I got the wire and the boards off the  
11 window, I climbed out on a small roof. And I hung off  
12 of it and I jumped, and Carmen followed me. Once I hit  
13 the ground, I disappeared.

14 Q Why did you disappear?

15 A I didn't want to be involved with it.

16 Q Before you left and went running, did you  
17 hear anybody inside?

18 A No, I didn't.

19 Q When you got down, jumped off the roof, did  
20 you hear anybody yelling from inside of the structure?

21 A No, I did not. I was the first one to hit the  
22 ground.

23 Q How soon after you saw Fruit with the gas  
24 can did you realize that the house was on fire?

25 A Minute and a half at the most.

1 Q When you ran out of the house, which way  
2 did you go?  
3 A When I hit the ground, I went through, it's like  
4 a wooded area. I didn't come to Brunswick Avenue. I  
5 went out the back way through the wooded area.  
6 Q Did you see anyone out there when you were  
7 running?  
8 A I really didn't notice.  
9 Q Did you run to a place where you could see  
10 the building or see what was going on?  
11 A No, I didn't. No, I didn't.  
12 Q Did you know a guy by the name of Peanut?  
13 A Yes. He's a very good friend of mine.  
14 Q Did you see him in 340 Brunswick Avenue  
15 that day?  
16 A No, I did not. If I did, he'd still be alive  
17 today.  
18 Q When did you find out that Peanut died in  
19 that fire?  
20 A The next day.  
21 Q Had you had any idea, Joe, that Fruit was  
22 going to set that fire?  
23 A No, ma'am, I did not.  
24 MR. HAMILTON: Objection.  
25 MS. LACKEN: If I can rephrase.

1 THE COURT: Disregard the question and  
2 answer, ladies and gentlemen of the jury.  
3 Q Did you have any idea what Fruit was going  
4 to do with that gas in that gas can?  
5 A No, ma'am, I did not.  
6 Q So when you jumped out of the building, did  
7 you stick around to see if anyone else made it out, or  
8 did you immediately run?  
9 A Well, Carmen was right behind me, and the other  
10 guy was right behind her, the other one who broke his  
11 ankle. So I had no idea there was anybody else in the  
12 building, and once I hit the ground, like I said, I  
13 disappeared.  
14 Q Do you know a guy by the name of Curt  
15 Hawkins?  
16 A Yes, I do.  
17 Q Did you see him around 340 Brunswick Avenue  
18 during the time that you were in there?  
19 A No, ma'am, I did not.  
20 Q Did you go anywhere else in that building,  
21 but through the bottom portion of it and up into your  
22 room?  
23 A No, I did not.  
24 Q Do you know if there were any other people  
25 in the back rooms or anything like that?

1 A No, I did not.  
 2 Q Did you hear any voices or anything like  
 3 that?  
 4 A No.  
 5 MS. LACKEN: If I can have a minute, your  
 6 Honor.  
 7 THE COURT: Sure.  
 8 Q Joe, why didn't you go to the police with  
 9 what you saw or what you heard?  
 10 A I was afraid they may lock me up.  
 11 Q why?  
 12 A Because I was really -- I was trespassing by  
 13 being in an abandoned building, for one thing.  
 14 Q Were you getting high with anybody at that  
 15 point?  
 16 A No.  
 17 Q Were you high when you were --  
 18 A No, I was not.  
 19 Q When you walked in the door, the back door,  
 20 you weren't high?  
 21 A No, ma'am, I was not.  
 22 Q Let me ask you something, Joe. You said  
 23 you know Curt. Had you ever bought drugs off of Curt?  
 24 A No.  
 25 Q Did you know him that way? Like, how did

1 you know him?  
 2 A I met him through getting high.  
 3 Q Did you -- strike that.  
 4 MS. LACKEN: I have nothing further, Judge.  
 5 THE COURT: Cross-examine.  
 6 CROSS-EXAMINATION BY MR. HAMILTON:  
 7 Q You met him through getting high? In other  
 8 words, you got high with him, Curt?  
 9 A Couple times, yeah.  
 10 Q Did you get a chance to catch up with Curt  
 11 at all in the days or weeks following the fire?  
 12 A Yes.  
 13 Q Did he tell you what he knew about it?  
 14 A I didn't ask him. I had read about it in the  
 15 paper.  
 16 Q I know that, but did he tell you what he  
 17 knew?  
 18 A No, he did not.  
 19 Q He didn't say that Larry Fleming had done  
 20 it, that Fruit had done it?  
 21 A Well, there was talk in the street about it, but  
 22 I still didn't say anything about it. I didn't feed  
 23 back into it.  
 24 Q Did anybody tell you that Curt knew what  
 25 had happened?



1 A No, nobody told me that.

2 Q When you went into 340 that night, the  
3 night of the fire --

4 A Um-hum.

5 Q -- did you see Curt walking away from the  
6 building or anything like that?

7 A I didn't see him anywhere in the area at all.

8 MR. HAMILTON: Okay. No further questions.

9 THE COURT: Anything further from --

10 MS. LACKEN: Nothing, your Honor.

11 THE COURT: Thank you, Mr. McKinney. You  
12 may step down.

13 (The witness is excused.)

14 MS. LACKEN: We need to take care of an  
15 issue with the next witness, Curtis Hawkins.

16 (The following is a discussion at sidebar.)

17 MS. LACKEN: I haven't talked to Curt.

18 He's back there, but I need to talk to him before he  
19 goes on the stand to see whether or not we can flesh  
20 out this problem outside the rest of the jury.

21 THE COURT: How do you propose to use that  
22 as evidence of Fleming's guilt? You want a 104?

23 MS. LACKEN: Let me go out in the hallway  
24 and say, Tell me, Curt -- he says he's been getting  
25 messages and threats from Fruit, but I want to be more

1 specific, obviously, and say, what did the guy tell  
2 you, you know. Was it something Fruit told him to tell  
3 you to stay away from the house?

4 I'll get that from him, but I need a couple  
5 seconds.

6 MR. HAMILTON: Should we ask the jury if  
7 they have any particular time constraints this  
8 afternoon? I'd like to get it done.

9 MS. LACKEN: If you want to give me five or  
10 ten minutes, I mean, not Fruit -- whatever his name is.

11 THE COURT: I'll have the jury excused and  
12 then we'll be able to discuss it in court. Just put  
13 him in the room for a few minutes.

14 (The discussion at sidebar is concluded.)

15 THE COURT: All right. Ladies and  
16 gentlemen, there's a matter that we have to discuss  
17 outside of your presence, so I'm going to ask you to  
18 step down and go to your room, your nice, cozy,  
19 comfortable room, and while away the few minutes, and  
20 we'll get you back as soon as we can.

21 But anything else you want to talk about,  
22 Super Bowl, Janet Jackson. Stay away from the case.

23 (Recess is taken.)

24 THE COURT: Okay. What did we have?

25 MS. LACKEN: I had an opportunity to speak



1 with the witness, Curtis Hawkins. As far as he can  
 2 tell me, the threats have been basically -- what  
 3 happened is a couple months ago, when he got the first  
 4 subpoena from us, the defendant's brother came to him  
 5 and said, You know, I could have hurt you if I wanted  
 6 to. I look up in these papers and all I see is your  
 7 name, your name, your name, you know, talking to the  
 8 police. I could have hurt you if I wanted to. My  
 9 brother is my heart, stuff like that. Never an overt  
 10 mention of the fact that the message was being sent  
 11 from the defendant.

12 So basically, what he did was he has been  
 13 saying, Make sure all of the witnesses don't come.  
 14 Make sure you're not home if the prosecutor's office  
 15 comes to bring you in. Make sure the other people  
 16 don't testify. That's enough for us to establish later  
 17 on down the line, a complaint for.

18 THE COURT: No doubt about it.

19 MS. LACKEN: But that I will take care of  
 20 after this is over with. I can tell you the only one  
 21 threat that Mr. Hawkins can testify to actually coming  
 22 from the defendant, which is, his perceived threat was,  
 23 right after this incident, before the defendant was  
 24 locked up. Apparently, there were messages on the  
 25 street from the defendant, threatening him.

1 One time he saw him, between the time of  
 2 the fire and the time that the defendant was picked up,  
 3 and the defendant apparently was in a car and rode by.  
 4 And he looked at Mr. Hawkins and he kind of did one of  
 5 these (indicating), simulating a gun.

6 And Mr. Hawkins, basically -- and this is  
 7 all street jargon and, you know, it was like what --  
 8 here I am, and then that's it. It was a perceived  
 9 threat on the part of Mr. Hawkins. It's the only thing  
 10 that he can attribute directly to the defendant  
 11 himself.

12 So for those reasons, your Honor, we'll  
 13 take care of the complaints against -- if any, against  
 14 Angel, and we'll do that in a more formal fashion. I'm  
 15 just asking at this point, obviously, so we all know  
 16 what's going on, so that if anything happens between  
 17 now and tomorrow or the next day, counsel knows where  
 18 I'm coming from, your Honor knows where I'm coming  
 19 from, and it's all out there.

20 Thank you for the time, Judge.

21 THE COURT: It's a matter of record.

22 MR. HAMILTON: Are we going to hear the  
 23 witness today or tomorrow?

24 MS. LACKEN: He's here.

25 THE COURT: we'll get him started.

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1 MR. HAMILTON: Are we on the same page as  
2 whether mention should be made as to the perceived  
3 drive-by shooting?  
4 THE COURT: I was under the impression that  
5 was not going to be produced for the jury.  
6 MS. LACKEN: It's a contact between the  
7 defendant and a witness and what his perception of  
8 that, I think, is relevant, you know. Certainly,  
9 counsel can, you know, can attempt to cross him on it.  
10 However, that is the only thing I intended  
11 to bring up. I know counsel has been talking about  
12 back and forth, have other witnesses talked to each  
13 other after the fire, and I think contact with the  
14 defendant is relevant.  
15 MR. HAMILTON: Judge, my objection is that  
16 the prejudicial value outweighs the probative value.  
17 It's a perception of something which could be  
18 ambiguous, and I don't think it really means that much  
19 to the case except it casts my client in a bad light.  
20 THE COURT: Unless there's more, I'm not  
21 going to permit it.  
22 MS. LACKEN: All right.  
23 MR. HAMILTON: May the prosecutor so  
24 instruct her witness.  
25 MS. LACKEN: I will go out there.

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1 THE COURT: Ready the jury to bring them  
2 back in, John.  
3 (Recess is taken.)  
4 THE COURT: All right. You may be seated,  
5 ladies and gentlemen. Please be seated, folks.  
6 Call your next witness, Prosecutor.  
7 MS. LACKEN: Thank you, your Honor.  
8 The state calls Curtis Hawkins.  
9 SERGEANT-AT-ARMS: Put your left hand on  
10 the Bible, raise your right hand, and face the clerk.  
11 THE WITNESS: I affirm. I don't swear on  
12 the Bible.  
13 C U R T I S H A W K I N S, STATE'S WITNESS,  
14 AFFIRMED.  
15 THE COURT: Okay, Mr. Hawkins, have a seat.  
16 How are you?  
17 THE WITNESS: Good.  
18 THE COURT: Try to keep your voice up,  
19 okay. And so everybody in the jury can hear you.  
20 THE WITNESS: Yes.  
21 DIRECT EXAMINATION BY MS. LACKEN:  
22 Q Good afternoon, Curt. Where are you from?  
23 A Trenton, New Jersey.  
24 Q Have you always been from Trenton?  
25 A Oh, no, from North Carolina originally.

1 Q How old are you?  
 2 A 37.  
 3 Q Curt, I'm going to direct your attention  
 4 back to May 11 of 2002, the day there was a fire at  
 5 340 Brunswick Avenue.  
 6 Do you remember that date?  
 7 A Yes.  
 8 Q Do you know a guy by the street name of  
 9 Fruit?  
 10 A Yes.  
 11 Q Do you see him in court today?  
 12 A Yes. He's sitting right there.  
 13 Q Tell me what he's wearing.  
 14 A Blue tie, striped shirt.  
 15 MS. LACKEN: Your Honor, the witness has  
 16 pointed to the defendant. I'd ask the record reflect  
 17 same.  
 18 THE COURT: The record will reflect the  
 19 same.  
 20 MS. LACKEN: Thank you.  
 21 Q How did you know Fruit?  
 22 A Well, I met him, like, a couple years before it  
 23 happened.  
 24 Q How did you know him?  
 25 A He used to come around and hustle.

1 Q what do you mean, "hustle"?  
 2 A Sell drugs.  
 3 Q when you say around the way, did he sell  
 4 drugs in the area of 340 Brunswick Avenue?  
 5 A In between Stokes corner bar and up in that way,  
 6 that part.  
 7 Q Stokes corner bar, how far away was that  
 8 from 340?  
 9 A About a block.  
 10 Q How long did you know him?  
 11 A About -- about three years; two or three years,  
 12 somewhere in there.  
 13 Q Back in May of 2002, were you getting high?  
 14 A Yes.  
 15 Q Did you ever purchase, you know, your  
 16 whatever it is drug that you used from Larry Fleming?  
 17 A No, because we worked together.  
 18 Q when you say "worked together," what did  
 19 you mean?  
 20 A I would, like, watch his back while he did his  
 21 things, did his little -- put his little hustle on,  
 22 hustle outside.  
 23 Q You would watch his back when he sold  
 24 drugs?  
 25 A Yeah. I would, like, watch the corner for the

1 police, go with him when he go pick up, and kind of  
 2 like control the crowd so the police won't suspect  
 3 what's going on in that part of the area that he was  
 4 serving at.  
 5 Q When you say "control the crowd," you mean  
 6 people that wanted to buy from him?  
 7 A Send one in at a time.  
 8 Q Did you work back then besides with Fruit?  
 9 A Yeah.  
 10 Q Where were you working?  
 11 A Stokes corner bar.  
 12 Q What did you do at Stokes Bar?  
 13 A I close up at night and watch out for the  
 14 customers' cars while they inside the bar.  
 15 Q On May 11th of 2002, were you doing  
 16 anything else in the bar?  
 17 A I go in and play the game. I was -- that evening  
 18 I had to help stock up, because the -- see, the man  
 19 that do the stocking, he didn't show up that night, so  
 20 I had to stock.  
 21 Q The bar?  
 22 A Yeah. And I usually go in and play the game. I  
 23 go in there and play his deck and keep them occupied.  
 24 Q Can you tell me where you were during the  
 25 daylight hours on May 11 of 2002? Were you with Fruit?

1 A Yeah. I was in and out of the bar, but I was  
 2 with him part of the day too.  
 3 Q What were you doing with him part of the  
 4 day?  
 5 A Making money.  
 6 Q Tell me, what was your arrangement with  
 7 him? If you would help watch his back, what would you  
 8 get out of it?  
 9 A First, it was \$40 a night and a gram.  
 10 Q A gram of cocaine?  
 11 A Yes.  
 12 Q Did you use that for yourself or did you  
 13 sell it or what did you do?  
 14 A We had a street parlay, use and sell.  
 15 Q And on that particular day, when were you  
 16 out with Fruit?  
 17 A It was earlier in the day, because we usually  
 18 come, like, start out, it was like 12:00, start on the  
 19 block.  
 20 Q Did he stay out there all day?  
 21 A No, because, like I said, between school hours we  
 22 would close shop. We don't do nothing during school  
 23 hours. We close shop up.  
 24 Q What time is after-school hours?  
 25 A 4:00.

1 Q This was a business that went on all the  
 2 time out there?  
 3 A Except for Sundays.  
 4 Q May 11, 2002, that was a Saturday?  
 5 A Yes.  
 6 Q When you -- at 4:00, did you meet back up  
 7 with Fruit?  
 8 A Yeah.  
 9 Q What was going on out there? Were you guys  
 10 selling together?  
 11 A Yeah, but I was -- kid down the street, I was  
 12 making money, I was making sales for him too.  
 13 Q Who was that?  
 14 A Kid named P.J.  
 15 Q On that Saturday, where was P.J. making  
 16 sales to?  
 17 A At 340 Brunswick Avenue.  
 18 Q How was that going? How did he do that?  
 19 A Well, the first time Carmen had came out and  
 20 asked me to get him, so I got him and took him down  
 21 there, but he went back. I stays out front.  
 22 Q To watch for the police?  
 23 A Yeah.  
 24 Q When he goes in back, where does he go?  
 25 A He usually go downstairs, because he would not go

1 upstairs because he was like, it's like -- it's like a  
 2 hemmed-in spot. Like if the police came, he couldn't  
 3 get out. So he would stand downstairs by the open  
 4 door.  
 5 Q That was inside of 340?  
 6 A Yes.  
 7 Q That was in the back?  
 8 A In the back. The door was, like, halfway.  
 9 Q Now, you said Carmen came down. Did she  
 10 stay at 340?  
 11 A Yes.  
 12 Q How did you know -- how did you know  
 13 Carmen?  
 14 A We always get high together.  
 15 Q Were you friends?  
 16 A Well, you ain't got no friends out there.  
 17 Associates.  
 18 Q Did you know a guy by the name of Peanut?  
 19 A Yeah.  
 20 Q Who was he?  
 21 A Peanut, quiet. You didn't know he was on the  
 22 block; you didn't know he was there. That's the way he  
 23 was when he came in. You wouldn't even -- lot of  
 24 peoples didn't know he stayed there.  
 25 Q And he stayed at 340 as well?



1 A Yes.  
 2 Q Had you known him for a long time?  
 3 A I used to sell him loose cigarettes at night.  
 4 Q How about a guy by the name of Big Al?  
 5 A Yes.  
 6 Q How did you know him?  
 7 A Well, I met Big Al through his cousin. I used to  
 8 go with his cousin, so I met him through her.  
 9 Q How long had you known him?  
 10 A Oh, about seven to eight years; about seven or  
 11 eight years.  
 12 Q You guys were all part of the getting high  
 13 out there near Brunswick Avenue, right?  
 14 A Yeah.  
 15 Q Now, while you were working with P.J., tell  
 16 me what was going on inside of 340. Did he make a lot  
 17 of sales?  
 18 A Yeah, he made some money up in there.  
 19 Q When you say "he made some money," what  
 20 type of money are you talking?  
 21 A Well, P.J., he was the type, he didn't go -- he  
 22 wouldn't go into no abandoned building for no 10 or  
 23 \$20. It had to be 30, \$40, and on up.  
 24 Q How many times would he go in and out of  
 25 that building that day? Can you give me an estimate?

1 A About seven or eight times.  
 2 Q Were there other people besides Carmen in  
 3 that building that P.J. was serving?  
 4 A There was somebody in that back room, but I never  
 5 knew who was in that back room.  
 6 Q Not the same room Carmen was in?  
 7 A No.  
 8 Q Did there come a time when you and Fruit  
 9 were outside watching what was going on at 340?  
 10 A Yeah.  
 11 Q Tell me about what happened?  
 12 A We were standing there, and P.J. went back there  
 13 and he came back.  
 14 And Fruit was, like, what the fuck that  
 15 nigger keep running in and out of there for?  
 16 Q What did that mean? Like, what happened  
 17 from there?  
 18 A What happened from there was, we went down there  
 19 to check it out. Well, I knew what was going on  
 20 anyway.  
 21 Q Did Fruit know that you were also working  
 22 with P.J.?  
 23 A No, I'm a hustler. I got to get mines any way I  
 24 can.  
 25 Q When -- what was he saying? Did he point



1 out to you what he was noticing at 340?

2 A He just noticed that he was running in and out,  
3 that was it. So --

4 Q He noticed that P.J. had gone in more than  
5 one time?

6 A Evidently, he did. He said, what the fuck that  
7 nigger running in and out for?

8 Q Did people on the street know that  
9 P.J. sold drugs?

10 A Certain people did.

11 Q So tell me what happened? Was this  
12 daylight or was this nighttime?

13 A It was kind of like daylight.

14 Q Was it early or was it late in the  
15 afternoon?

16 A In the afternoon.

17 Q Tell us what happened when Fruit said that  
18 to you?

19 A We goes down there, go up in there, goes to the  
20 top of the steps, he goes in. I'm standing at the top  
21 of the steps, and he just pushed the door open. And  
22 he's going, what's up, Big Al? Where's my \$50 at?

23 Big Al said, I don't owe you \$50.

24 Q Now, you have to talk a little louder and a  
25 little slower.

1 He's goes in. Now, you're standing where?

2 A At the top of the steps. It's dark in the  
3 hallway, and I got to see what's around me, what's  
4 going on. So he goes in the door. He pushes the door  
5 open, and he says, what's up, Big Al? Where is my  
6 money at, my \$50?

7 Big Al says, I don't owe you \$50.

8 Q What happens from there?

9 A He, like, somebody spending some money up out of  
10 here. He says, well, that one more \$50 be spent out of  
11 here, you suffer the consequences.

12 Q Did he try to get anyone in there with him  
13 to buy drugs from him?

14 A Big Al said he didn't have no money; he ain't got  
15 no more money.

16 Q Did Fruit -- how many times did Fruit ask  
17 him to buy something? Like, what was he doing? Tell  
18 me.

19 A well, I'm in the hallway, and the door -- I  
20 really couldn't see him, but I listened to the  
21 conversation. He was, like, Spend some with me. Spend  
22 some with me. Give me some money.

23 Big Al kept saying he didn't have no money.

24 Q And he kept going on like that, Fruit was?

25 A About a minute. Then we came out and went on

1 down the steps.

2 Q Now, did you go into that room at all?

3 A No.

4 Q Did you see Big Al?

5 A No. I heard his voice.

6 Q How about Carmen? Do you know if she was  
7 in there at the time?

8 A Yes, she was in there.

9 Q Did you see her?

10 A No, heard her voice.

11 Q When -- what was the last thing that Fruit  
12 said before he left?

13 A Last thing he said was -- he come out of the  
14 room -- really, he didn't say nothing. He just came  
15 out of the room. He said, All right. He came on down  
16 the step, came on down the steps.

17 Q As far as you know, did anyone buy anything  
18 off of Fruit up in that room?

19 A Not that I know of.

20 Q When you heard Fruit saying, If I see  
21 another 50 being spent up out of here, you all are  
22 going to suffer the consequences, what did you take him  
23 to mean by that?

24 A Right at that point in time, I just figured we  
25 were like most drug dealers on the street. They would,

1 like, beat you up or something like that. That's what  
2 I thought it meant. Like, give him his \$50, he, like,  
3 beat him up or something like that.

4 Q Do you know whether or not Al owed him any  
5 money?

6 A No, I didn't know.

7 Q Now, you said that you were out in the  
8 hall?

9 A Yes.

10 Q Tell us what happened when Fruit came out  
11 of that room.

12 A He came out. I started going down, he comes  
13 down. And he has his little black hoody on and he just  
14 came on down the steps and he wasn't saying nothing.  
15 He just kept saying, All right, all right, and he goes  
16 out the door.

17 And he goes up to the bar. I goes to the  
18 bar, I goes in. And this was about two, two and a  
19 half, three hours before that.

20 Q So you guys are up there and he's coming  
21 out saying, All right, all right, and put his black  
22 hood up.

23 How well did you know Fruit?

24 A I knew him well enough to watch his little moves  
25 that you could tell when -- you could tell when he's

1 thinking something.

2 Q Did he seem -- what was his demeanor? How  
3 did he seem to you when he was walking down the steps  
4 and he was flipping up his hoody?

5 A He just seemed normal. He had a little smirk on  
6 his face.

7 Q So you guys left the building?

8 A Yes.

9 Q And where did you go?

10 A I went to the bar and started playing the game,  
11 and about two and a half, three hours later, I came out  
12 the bar and I was down there talking to P.J.

13 Q Where were you?

14 A Between P.J., like four -- three houses from 340  
15 and standing right there by his gate. And we was  
16 talking and --

17 Q Was he staying in an abandoned house or no?

18 A No.

19 Q He was down the other way?

20 A Yeah. He was -- he stayed with his father.

21 Q So you were talking to P.J. where was  
22 Fruit?

23 A Well, he was down on the corner. And I seen him,  
24 he was coming towards me. I said, Let me see what he  
25 want.

1 Q Now, in the time period, you know, the  
2 couple hours that you said went by, did you and Fruit  
3 stay on the street, or did you go back and forth out of  
4 the bar and into the street to help Fruit?

5 A I was back and forth in the bar.

6 Q So you were outside sometimes and inside  
7 sometimes?

8 A Yes.

9 Q After you guys had left 340, did you see  
10 people going in and out of there still, drug dealers?

11 A I seen just P.J. a couple times.

12 Q After Fruit said what he said to the people  
13 upstairs, there were some more drug transactions?

14 A Yes, there was.

15 Q So tell me what happened when you walked  
16 out of the bar a couple hours later.

17 A I was standing there talking to P.J. and seen him  
18 coming across the street. I wanted to see what he  
19 wants. And I goes down there and he has a gas can in  
20 his hand.

21 Q Who is "he"?

22 A Larry.

23 So he said, Lady across the street wants  
24 some gas. The lady is standing across the street with  
25 her arms folded. I ain't never seen her.

1 I said, Okay. He gave me two or three  
 2 dollars to go get the gas. So I go down there and I  
 3 gets the gas.  
 4 Comes back, but he didn't meet me where he  
 5 gave me the can at. He met me, like, on the corner of  
 6 the alleyway by 340.  
 7 Q So where you had left him at was where?  
 8 Near Stokes Bar?  
 9 A Yeah. Close to Stokes Bar by the beauty shop on  
 10 the corner.  
 11 Q And 340 Brunswick Avenue was further down,  
 12 so you had to pass Stokes Bar to go toward it?  
 13 A I was already past Stokes Bar on the side that  
 14 340 is on. I was, like, five houses, and then you got  
 15 a big lot where there's a big lot now, and it's like  
 16 almost to the corner.  
 17 Q So you went and you took the gas can from  
 18 him?  
 19 A Yes.  
 20 Q You went where to get the gas?  
 21 A At the Roadrunner.  
 22 Q That was a couple blocks down?  
 23 A Yeah. On Southard and Brunswick.  
 24 Q Did you use all of the money he gave you to  
 25 buy the gas?

1 A No.  
 2 Q What did you do with it?  
 3 A Put it in my pocket.  
 4 Q And you got some gas for him?  
 5 A Yeah.  
 6 Q Tell me what you did when you went back  
 7 down and you met up with Fruit? where was he?  
 8 A He was on, like, the corner of the alleyway where  
 9 340 at. Because there's a big, wide alleyway, and he  
 10 was on this side right here, coming back this way,  
 11 going towards Southard Street.  
 12 Q So when you went up to him, what did you do  
 13 with the gas can?  
 14 A I handed him the gas can and he gave me some  
 15 coke. And I was like, what are you going to do -- I  
 16 said, I know you ain't going to go there. I said, If  
 17 you burn -- I said, If you burn Tony place down, if you  
 18 do anything to hurt her, I will fuck you up.  
 19 Q You're saying Tony.  
 20 First of all, you put this gas can down,  
 21 and what did he do?  
 22 A He picks it up.  
 23 Q where does he go?  
 24 A The alleyway.  
 25 Q where?

1 A 340.  
 2 Q To the front or the back?  
 3 A The back.  
 4 Q As you see him go towards there, what are  
 5 you saying?  
 6 A I said, I'm saying, like, Don't even go there,  
 7 because I'm right behind him. So when he scoops up  
 8 under the door, like, I'm just peeping like this right  
 9 here. And next thing I know, he's coming running, and  
 10 flames is behind him. Like, the flames, flames are  
 11 like, you could see the flames and stuff. He got the  
 12 gas can, boom, he goes through the alleyway, hit Oxford  
 13 Street, and I ain't seen him no more after that.  
 14 Q When he started going towards the back, and  
 15 you said, "don't hurt Tony," who is Tony?  
 16 A That's a friend of mines. She was the first  
 17 person I met when I came to Jersey, and we became best  
 18 friends.  
 19 Q Did she stay in 340?  
 20 A She stayed next door to 340.  
 21 Q In an abandoned house?  
 22 A Yes.  
 23 Q Was it right next to 340 or attached to  
 24 340?  
 25 A Yes, it was.

1 Q Let me ask you something, Curt. What did  
 2 you think he was going to do with the gas when you got  
 3 it for him?  
 4 A I thought he said, like he told me, the lady  
 5 wanted some gas. And she was standing there and he  
 6 pointed to her. I never seen this lady before. And he  
 7 pointed to her and he said she wanted some gas, gave me  
 8 the money, and I got her a dollar worth -- that should  
 9 get her to the gas station -- and I put the rest of the  
 10 money in my pocket.  
 11 Q Curt, when Larry went into the building,  
 12 how long was he in there, do you think, before you saw  
 13 him running out?  
 14 A About one or two minutes.  
 15 Q When he walked in, did he have anything  
 16 else in his hand beside the gas can?  
 17 A Flashlight.  
 18 Q How do you know he had a flashlight?  
 19 A He kept a little flashlight about that long. He  
 20 twists it. It twists, because he usually sticks it in  
 21 his mouth when he's serving coke at night.  
 22 Q Has he had that on several occasions?  
 23 A He always kept it with him.  
 24 Q When you went -- when he went back there,  
 25 did you try to stop him?



1 A When he was going back there, I was like, Don't  
2 go there. Don't go there. That's the best way -- I --  
3 coming out of my mouth at that point in time, Don't go  
4 there. Don't go there. He went inside with the can.

5 Next thing I knew --

6 Q Tell me what you saw.

7 A I seen him go in. He had his can in his hand,  
8 had his little flashlight. He goes in, it's like a  
9 little maze going in there to get in the back. And  
10 next thing I know, I saw the redness of the flames, and  
11 he comes back and he comes running through. I steps  
12 out of the way and he down off the street. He was  
13 gone.

14 Q When he first went in the building, you  
15 said you scooped up under. Did you go in for a minute  
16 and --

17 A No. Like, this is the door here. It had a  
18 little cutoff. I was, like, up my head under, peeping  
19 like.

20 Q You were basically up under, you're in, you  
21 saw what he was doing, and you turned and you got out.

22 A I didn't go all the way in. I stuck my body up  
23 in like this here (indicating) and looked up in there.

24 Q Do you remember, from where you were, did  
25 you see anybody downstairs at that time?

1 A No.

2 Q Did you see anyone out in the alleyway at  
3 that time?

4 A No.

5 Q Were you high then, Curt?

6 A No, I wasn't.

7 Q When you saw Larry Fleming coming out, what  
8 did he do?

9 A He comes out and he -- Oxford Street is back this  
10 way through the little alleyway. He comes out, he  
11 scoops up, and he shoots right through the little  
12 footpath down Oxford Street, and he went towards  
13 Southard Street.

14 Q Would that be towards the front or the back  
15 of 340?

16 A The back.

17 Q What did you do?

18 A Me, I turned around. I was so, like, I couldn't  
19 believe. I couldn't believe he did this.

20 And I just turns and I am walking back out,  
21 and I'm just saying, Fruit, Fruit, Fruit. And then  
22 about a minute or two and I'm standing on the corner  
23 and still by 340, and Carmen shoots by.

24 Q Carmen shoots by?

25 A And she shoots by, and she runs down the street.



1 Q Did anyone else come out of the building  
 2 that you know of?  
 3 A When I looked around there, I seen Big Al on the  
 4 ground.  
 5 Q Did you see how he got out of the house?  
 6 A No.  
 7 Q Did you see how Carmen got out of the  
 8 house?  
 9 A No.  
 10 Q Do you know if anyone else was up in that  
 11 house?  
 12 A Not that I know of. Whoever was in the back  
 13 room, I didn't know who they was. So them was the only  
 14 two I seen was in there. But I didn't know Peanut was  
 15 in there. Nobody knew he was in there.  
 16 Q Did you find out he was in there?  
 17 A Yeah, when they started, when you heard him  
 18 screaming in there.  
 19 Q Where were you standing when you heard him  
 20 screaming?  
 21 A I was standing, like, by Stokes corner bar. I  
 22 was, like, in the middle way by Bradco.  
 23 Q So you were what, a good two blocks away?  
 24 A A block and a half away?  
 25 A A half a block.

1 Q Curt, did you do anything to try and get  
 2 anybody out?  
 3 A Basically, no, I didn't, because it was like --  
 4 Q Were you yelling anything when you were  
 5 outside, besides "Fruit"?  
 6 A Son of bitch set it on fire. It's on fire. The  
 7 house just blazed up so fast, blazed up so fast, I  
 8 said, Fruit, the son of bitch set it on fire. The son  
 9 of a bitch set it on fire. Because at that point I  
 10 was --  
 11 Q When you were at the corner of Stokes Bar,  
 12 were there other people coming out to take a look at  
 13 what was going on?  
 14 A The street was filled.  
 15 Q Do you know a girl by the name of Nicole  
 16 Blackshear?  
 17 A Yes.  
 18 Q Was she out there?  
 19 A Yes, she was. She was standing, like, middle way  
 20 of 340 and Stokes Bar.  
 21 Q When you said you were coming out and you  
 22 were saying "Fruit," you were obviously upset. Were  
 23 you saying this all the way down to the corner?  
 24 A I got about middle way and then I just hollered,  
 25 Fruit, Fruit, Fruit did it.

1 And some guy standing on, I forget his  
2 name, said, That's my cousin. Hey, man, keep your  
3 mouth shut.

4 I said, To hell with that.

5 Q Do you know Cherie Cruz?

6 A Yes.

7 Q Who is she?

8 A That was his girlfriend.

9 Q Was she out there that night?

10 A She was down on the corner by Stokes.

11 Q Did you see her or have any contact with  
12 her?

13 A Yeah, I seen her. She was part of the team.

14 Q Part of what team?

15 A Me, her, and Fruit.

16 Q She would work with him too?

17 A Yeah. She did most of the serving.

18 Q You said that within, I guess, a few  
19 minutes the fire department came; is that correct?

20 A Yeah. They was that quick.

21 Q How about the police department, did they  
22 come?

23 A Yeah. They was that quick too.

24 Q Did you run away from the scene at all  
25 other than walking up to the corner of the bar? Did

1 you leave before talking to the police that night?

2 A No. I was standing on -- I walked up there. I  
3 was standing on the corner by the bar. That's when one  
4 of the officers came up to me and said, what happened?  
5 Did you know what happened?

6 And I told him yeah.

7 Q What did you tell him?

8 A I went down to the station and I gave him my  
9 statement.

10 Q When you were still in front of the scene,  
11 did you tell him who did it?

12 A Yes, I did.

13 Q Who did you tell him did it?

14 A I told him Fruit.

15 Q Were you upset?

16 A Yes, I was, because -- yes, I was upset.

17 Q When did you find out it was Peanut up  
18 there screaming and yelling?

19 A When they -- everybody kept saying -- people was  
20 like, Is everyone out? Is Peanut out? People that  
21 knew him, was Peanut out? And then I seen the  
22 coroner's wagon pull up. That's when we knew that it  
23 was him, because he was the only one that stayed  
24 besides Carmen.

25 Q When the fire was still going, did anyone

1 from the street try to help?

2 A Yes, P.J.

3 Q What was he doing?

4 A He had an ax, chopping the door on the side,  
5 like, the wall, like, the -- to let some of the smoke  
6 out. He was trying to get in, chopping it down so some  
7 of the smoke can come out of it.

8 Q No one could get into the building except  
9 the firefighters; is that correct?

10 A That's all that could get in there. You couldn't  
11 get in that little hole, not the way them flames was  
12 going. They was on top of the roof, trying to cut  
13 through his roof.

14 Q On the top of the roof?

15 A Yeah.

16 Q When you went down to the police station,  
17 you told them everything about what you had seen,  
18 correct?

19 A Yes.

20 Q Did you tell them at that time in your  
21 written statement that you were there selling with  
22 Fruit beforehand?

23 A Yes.

24 Q Did you tell them when you were at the  
25 police station?

1 A Yes. I told them I was out there selling drugs.

2 Q How many different times did you have to  
3 tell your story that night?

4 A Twice.

5 Q You spoke at least one time at the scene,  
6 right?

7 A Um-hum.

8 Q Then, before you gave your statement, did  
9 you also tell the cops what had happened?

10 A Yes.

11 Q Were there a bunch of different police  
12 officers that you were talking to?

13 A It was the same -- the same one I had talked to  
14 at the scene, I talked to him. It was two of them. I  
15 talked to them at the scene, but when I got to the  
16 station, they turned it over to another detective.

17 Q Was he the one that took the statement from  
18 you?

19 A Yes.

20 MS. LACKEN: If I can have a minute, your  
21 Honor.

22 THE COURT: Okay.

23 Q Curt, I'm going to ask you to step down,  
24 stand to the side so you're not in the jury's way.  
25 I'm going to show you S-15, it's in

1 evidence. Do you recognize that photograph?

2 A It's 340.

3 Q You had said that earlier in the day that  
4 P.J. had went and gone into that building a few times  
5 to sell, correct?

6 A Yes.

7 Q Can you show us -- I'm not sure if you can  
8 see it in this picture. Can you show us how he entered  
9 the building?

10 A Right back here (indicating).

11 Q All the way at the back?

12 A Yes. There's a door that's cut off halfway back  
13 there.

14 Q Where -- can you -- strike that.

15 Where on this picture, if you can, were you  
16 standing when you gave the gas can to Fruit?

17 A If -- right there, there are some steps. If you  
18 look past that wall there, right by those steps.

19 Q Which way did Fruit go in order to get into  
20 340?

21 A Right through here and back through there.

22 Q In looking at that picture, when Fruit ran  
23 out of the building, which way did he run?

24 A Down through there (indicating).

25 Q Toward the -- for the record, to the middle

1 of the photograph, toward the --

2 A It's a footpath right through there.

3 Q In the back of that house?

4 A Yes.

5 Q Where did you come in?

6 A I was standing right by there. That's when  
7 Carmen, she shoots past me.

8 Q When the fire was raging, were there other  
9 people out? I mean, I know, obviously, after it  
10 started to go and the fire department came and there  
11 were people all over. But when you walked out, were  
12 people on the street in that area; do you know?

13 A No, not right in this area. But it was peoples,  
14 like, across the street, because it was -- peoples  
15 coming out of the bar, peoples running down there. And  
16 that's when P.J., his father comes across there. And  
17 P.J., his little brother, gets an ax and starts  
18 chopping on the door somewhere in here.

19 Q You can take a seat.

20 Curt, before Larry Fleming came to you with  
21 the gas can, did you see him talking to any female  
22 within, say, a half an hour or an hour before?

23 A Yes. He was talking to Crystal.

24 Q Who is Crystal?

25 A Crystal white. She's another drug user.

1 Q She's a drug user?  
 2 A Yes.  
 3 Q Where was she?  
 4 A They were standing, like, on the corner of -- by  
 5 the store.  
 6 Q Where is the store located?  
 7 A It's across from Stokes.  
 8 Q So the store would be on the same side of  
 9 the street, that's 340?  
 10 A Yes.  
 11 Q Do you know what they were doing over  
 12 there? Did you see what they were doing?  
 13 A I just seen them conversating.  
 14 Q Did he have the gas can at that point?  
 15 A At that point I didn't see no gas can.  
 16 Q Did Carmen -- pardon me. Did Crystal live  
 17 in that area, do you know?  
 18 A She would be over at her mom's house sometime.  
 19 Q Was her mom's house in that area?  
 20 A An abandoned house.  
 21 Q Her mom stayed there?  
 22 A She stayed on Race Street. It was a get-high  
 23 house.  
 24 Q It was a get-high house.  
 25 But you saw Crystal white out there with

1 Fruit. How long before Fruit gave you the gas can did  
 2 you see them together?  
 3 A It was, like, 15 or 20 minutes later.  
 4 Q Is when he came to you with the can?  
 5 A Yes.  
 6 Q Do you remember what the gas can looked  
 7 like?  
 8 A It was a one-and-a-half-gallon can with a red --  
 9 yellow nozzle, comes up out of it.  
 10 Q What color was the can?  
 11 A Red.  
 12 MS. LACKEN: If I may just have a second,  
 13 your Honor.  
 14 Judge, at this time, I have nothing  
 15 further.  
 16 THE COURT: Ladies and gentlemen, I'm going  
 17 to ask your indulgence. Unless you have some other  
 18 business that is pressing, maybe we can finish this  
 19 witness up. And Mr. Hawkins, if we can get him done  
 20 today, the bus will take care of you, no matter how  
 21 long we stay, until 9:00, 10:00 tonight. But we  
 22 should -- I doubt it will take that long.  
 23 why don't we start cross-examination.  
 24 MR. HAMILTON: Okay.  
 25 May I begin?



1 THE COURT: Please.  
 2 CROSS-EXAMINATION BY MR. HAMILTON:  
 3 Q Now, Mr. Hawkins, was it your testimony  
 4 that you saw Larry get the gas can from a woman you  
 5 didn't know?  
 6 A I didn't say that.  
 7 Q Say it again. I missed it.  
 8 A I didn't say that.  
 9 Q Well, say what you said again.  
 10 A I said he was talking to the lady on the corner.  
 11 I never said he borrowed the can from the lady.  
 12 Q But he had the can in his possession at  
 13 that time, right?  
 14 A No. When he approached me, he had the can in his  
 15 possession.  
 16 Q I take it he did not come straight from the  
 17 lady when he had the can in his possession, or did he?  
 18 A Not that I know of.  
 19 Q Okay. But he didn't get the can from  
 20 Crystal white, you're sure of that?  
 21 A I don't know.  
 22 Q And you didn't see Crystal white with a big  
 23 can, did you?  
 24 A I can't recall.  
 25 Q Now, do I assume correctly that you say you

1 told the police about walking down the alley to the  
 2 half doorway of 340 when Larry walked in with the can,  
 3 right?  
 4 A Yes.  
 5 Q And you told them the part about sticking  
 6 your head in?  
 7 A Yes.  
 8 Q And you told them the part about the blast  
 9 coming out?  
 10 A No, I didn't tell them that.  
 11 Q Why would that be?  
 12 A Uh-huh.  
 13 Q Why didn't you tell them that?  
 14 A Because at the time, everything was like -- I was  
 15 still fucked up -- excuse my language -- I was still  
 16 fucked up in the head from what was going on.  
 17 Q Emotionally, but you weren't high?  
 18 A I wasn't high, believe that.  
 19 Q All of the time you spent in the bar, you  
 20 didn't drink any alcohol?  
 21 A I'm not a drinker.  
 22 Q Pardon me for not knowing. All right.  
 23 Your memory was fresh when you gave the  
 24 police your statement, because you gave it to them  
 25 shortly after everything went down, right?



1 A Um-hum.

2 Q Isn't it a fact that you never told the  
3 police anything about going down the alley to the  
4 entryway of 340 Brunswick with Larry?

5 A I can't recall that.

6 Q But it would have been important, so you  
7 probably did tell them, right?

8 A I don't know whether I told them or not, but like  
9 I said --

10 Q But you remember that you didn't tell them  
11 about the blast coming out, right?

12 A Excuse me. What are you saying? Repeat that  
13 again.

14 Q You remember specifically, because you've  
15 testified to it, that you didn't tell them about the  
16 part about the blast coming out of the door?

17 A I don't know.

18 Q And isn't it a fact that you told them that  
19 you were in Stokes Bar playing poker when you first  
20 learned of the fire?

21 A Yes, I did. That was in my statement.

22 Q And why did you distance yourself from the  
23 fire that way?

24 A Distance myself from the fire? I didn't distance  
25 myself from the fire.

1 Q Weren't you standing right by the open door  
2 when the blast came out?

3 A Then I walked down and walked down the street.

4 Q Were you afraid that the police might think  
5 you had something to do with the fire?

6 A Possibility. They might have thought that. A  
7 possibility he would have said I did something with the  
8 fire, I had something to do with the fire. The point  
9 is I went and got the gas.

10 Q What was your financial arrangement with  
11 P.J. for helping him make sales?

12 A There was no financial arrangement.

13 Q You worked for Larry for money, but you did  
14 it for P.J. for love?

15 A No. Ain't no love in the game out there.

16 Q Why did you extend yourself in the game for  
17 P.J. if you didn't get anything out of it?

18 A I got money on the side. Plus I washed his cars  
19 and worked for his father.

20 Q Was there any talk about having more of a  
21 partnership between the two of you, or were you a  
22 little more than a glorified go-fer?

23 A No.

24 MS. LACKEN: I'm going to ask that the  
25 question be a little more succinct.

1 THE COURT: It's a fair request.

2 A Because he was paying me more.

3 Q Were you working towards trying to get  
4 anything more substantial going with P.J.?

5 A No.

6 Q So you're a hustler and you're playing both  
7 of them off?

8 A It wasn't only two I was playing.

9 Q Now, Larry didn't know that you were doing  
10 this with P.J., right?

11 A No.

12 Q And you're bringing P.J. into 340 to make  
13 lots of sales?

14 A Only that one time.

15 Q Only that one time?

16 A Yes.

17 Q And you say you got nothing financial out  
18 of it with P.J.?

19 A I'm not saying I didn't get nothing financial.

20 Q After Larry was no longer in the  
21 neighborhood, shall we say, did you continue to work  
22 with P.J.?

23 A P.J., and whoever else had the money to give.

24 Q Without Larry giving you money, naturally,  
25 you had to get money from somebody?

1 A No, I had a job at the bar.

2 Q You had a job at the bar before you started  
3 working for two drug dealers at one time?

4 A Yeah. I got three kids to feed.

5 Q And a habit, right? You mentioned you were  
6 using.

7 A Yeah, I use drugs.

8 Q And you're still using, aren't you?

9 A No. I drink a little bit now.

10 Q You're drinking a little bit now?

11 A I told you I wasn't a drinker.

12 Q Um-hum. You afraid if the jury thinks  
13 you're using drugs now, they might not believe you?

14 A No, that's not it. I don't get high now, sir.

15 MR. HAMILTON: Do we have a clean copy of  
16 Mr. Hawkins' statement? Was that marked for  
17 identification?

18 Would you like to mark it as a state's  
19 exhibit or should I mark it a defense exhibit?

20 THE COURT: What has counsel decided upon  
21 for the marking?

22 MR. HAMILTON: S-44.

23 THE COURT: S-44 for identification.

24 (Document is marked for identification as S-44.)

25 Q I show you a four-page document. Do you

1 read and write the English language, Mr. Hawkins?

2 A Yes, I do.

3 Q Okay. I show you this four-page document.

4 Take your time, take a look at it, and tell me if you  
5 can identify it?

6 A This is my statement.

7 Q Is it signed at the end by you?

8 A Yes, it is.

9 Q And it's signed right under that last  
10 paragraph where you're asked the question and given the  
11 answer:

12 "Mr. Hawkins, after you have read this  
13 statement over, and if it is exactly as you have told  
14 us, will you sign it in your own handwriting,  
15 acknowledging it to be a true, free, and voluntary  
16 statement?"

17 A Yes.

18 Q And your answer was "Yes," correct?

19 A Yes.

20 Q And your initials C.H. appear next to the  
21 yes?

22 A Yes.

23 Q And your initials C.H. appear at the bottom  
24 of the first page?

25 A Yes.

1 Q The bottom of the second page?

2 A Yes.

3 Q The bottom of the third page and the last  
4 page, right?

5 A Yes.

6 Q As well as your signature?

7 A Yes.

8 Q It was your true and complete statement,  
9 was it not?

10 A That was my statement at the time.

11 Q Your statement at the time.

12 And in that statement, do you remember  
13 being asked the following question and giving the  
14 following answer:

15 "Mr. Hawkins, the Criminal Investigation  
16 Bureau of the Trenton Police Department is conducting  
17 an investigation of a homicide that took place on  
18 Saturday, May 11, 2002, at approximately 2215 hours,  
19 10:15 p.m., at 340 Brunswick Avenue. What can you tell  
20 us in regards to this matter that we are now  
21 investigating?"

22 And it shows an answer being given by you:

23 "I was on Brunswick Avenue, walking towards Stokes Bar,  
24 when I was approached by Larry Fleming. He had a gas  
25 can with him and he then gave me \$2 and asked me to go

1 to the gas station and get some gas for a girl that  
 2 needed it for her car."  
 3 Do you remember giving that answer?  
 4 A Yes.  
 5 Q That was truthful, correct?  
 6 A Yes.  
 7 Q Next, "Do you remember" --  
 8 MS. LACKEN: I'm going to object. If  
 9 there's an inconsistency, that would be fine with me,  
 10 but I think this is improper.  
 11 THE COURT: Good point. You can use it to  
 12 impeach if you care to, but reading the statement is  
 13 providing us with no enlightenment.  
 14 MR. HAMILTON: Okay.  
 15 Q Shortly after that, you told them that you  
 16 got the gas for Larry and you handed it to him, and  
 17 then you walked away. He walked towards the back of  
 18 340 and you walked away, correct?  
 19 A That's -- yeah.  
 20 Q You said nothing about sticking your head  
 21 in the door, correct?  
 22 A Not in that statement, I didn't.  
 23 Q Because it didn't happen, did it?  
 24 A Yes, it did happen.  
 25 Q Well, it was important, wasn't it, for the

1 police to know this?  
 2 A Yes, it was. But at that point in time, like I  
 3 said --  
 4 Q You didn't drink, but you were emotionally  
 5 upset?  
 6 A No, I did not drink.  
 7 Q And you didn't get high. You weren't high  
 8 right then, but you were just swept away --  
 9 A I smoked cocaine, like, two or three hours before  
 10 that.  
 11 MR. HAMILTON: If your Honor please, I'd  
 12 specifically like to ask him about the next question  
 13 and answer, and I'll show the Court what I'm talking  
 14 about. It's this question down here, and then the  
 15 answer that runs --  
 16 MS. LACKEN: Can you tell me.  
 17 MR. HAMILTON: The question at the bottom  
 18 of page 1 where the answer runs onto page 2. The  
 19 question that came immediately after your objection.  
 20 MS. LACKEN: I'm not quite getting it.  
 21 It's basically what he already testified to. If he has  
 22 an inconsistency, he can certainly point it out. But  
 23 I'm not quite sure -- I don't understand what he's  
 24 getting at.  
 25 THE COURT: The point is well taken. This

1 is largely consistent with his comments. Is there  
2 something specifically --

3 MR. HAMILTON: Perhaps we ought to be heard  
4 at sidebar on the record.

5 THE COURT: Okay.

6 (The following is a discussion at sidebar.)

7 THE COURT: The answer to the question on  
8 the first page, Mr. Hawkins, "what happened next?" is  
9 largely the answer -- the answer is largely consistent.  
10 whether he put the can down or handed it to him is the  
11 only difference.

12 You've brought up the second question,  
13 about what happened next, and then that's when he said  
14 he went in to play the poker game. That's what  
15 you've -- and he's admitted to an inconsistency, and  
16 what do you want to do specifically?

17 MR. HAMILTON: Well, I suppose what I want  
18 to do is move the statement into evidence before I'm  
19 done, but I want to show specifically what his answer  
20 was that's inconsistent with what -- inconsistent with  
21 the testimony he gave on direct.

22 THE COURT: Show me what is inconsistent.

23 MR. HAMILTON: "Took the gas can. As I got  
24 near the alley by 340, Larry told me to put the gas can  
25 down there." And it doesn't say that both of them did

1 it -- "then crossed over the street from the direction  
2 of Al's Auto Body and gave me some coke. "Larry took  
3 the can of gas and walked down the alley" -- says  
4 nothing about Curt going with him -- "and went into  
5 340 Brunswick Avenue." Nothing about the blast.

6 MS. LACKEN: It's been pointed out --

7 THE COURT: The way you're using it is  
8 improper. Your cross-examination should be directed to  
9 those points that you find inconsistent, and then you  
10 say if he doesn't remember or that's used to refresh  
11 his recollection, or in the alternative say, isn't it a  
12 matter of fact you said this when that question was  
13 asked? It's not a matter of asking question and  
14 answer.

15 MS. LACKEN: Didn't you say X, Y? Counsel  
16 says he wants to admit the statement.

17 THE COURT: No, that's not appropriate.

18 MR. HAMILTON: All right. I'll try  
19 reasking the question.

20 THE COURT: Thank you.

21 Q All right. Curt, after you bought the gas,  
22 you brought it back to Larry, the can of gas?

23 A Yes.

24 Q And do you remember telling the police that  
25 as you got near the alley of 340 Brunswick Avenue,



1 "Larry told me to put the gas can down there," correct?  
 2 A No, he didn't tell me that.  
 3 Q Did you tell the police that?  
 4 A I don't recall.  
 5 Q All right. Did you tell the police, then,  
 6 that "Larry then crossed over the street from the  
 7 direction of Al's Auto Body and gave me some coke"?  
 8 A I don't recall that. He gave me the coke while  
 9 he came across and gave me the coke after he gave me --  
 10 he gave me the can, he gave me the coke. It was about  
 11 a dime of coke.  
 12 Q Do you remember telling the police that  
 13 next, "Larry took the can of gas and walked down the  
 14 alley and went into 340 Brunswick Avenue"?  
 15 Do you remember telling him that?  
 16 A Yes, I remember telling them that.  
 17 Q And do you remember telling them then, "He  
 18 got into the place by going through the door in the  
 19 rear where you have to bend over and go into the  
 20 house"? Do you remember telling them about that?  
 21 A I can't.  
 22 MS. LACKEN: I'm going to ask if counsel is  
 23 referring to something at that point, ask him to give  
 24 him the statement.  
 25 THE COURT: That's counsel's choice. He

1 can ask him if he remembers. That's his --  
 2 MR. HAMILTON: At this point, might I ask  
 3 him if he remembers the question and answer given.  
 4 We've covered the territory pretty much, I'll proffer.  
 5 MS. LACKEN: I'm not quite sure exactly --  
 6 what I said before, I have no problem asking him about  
 7 if there's inconsistent statements between what he said  
 8 today and what he said at the time. I think that  
 9 there's a proper way to do that, and I'm asking that's  
 10 the way it happens.  
 11 THE COURT: There's a proper way to do  
 12 that, and that's to ask if he cannot recall or if he  
 13 doesn't, ask him to read his statement and ask him if  
 14 it refreshes his recollection. If it doesn't, it  
 15 doesn't.  
 16 Q Mr. Hawkins, I'm going to ask you, starting  
 17 here, to read the question, answer, question, answer,  
 18 down here --  
 19 MS. LACKEN: To himself.  
 20 MR. HAMILTON: To himself.  
 21 Q -- and tell me if that refreshes your  
 22 recollection of what happened, what you told the  
 23 police.  
 24 A I just -- what you just asked me isn't on here.  
 25 MR. HAMILTON: Again, may I ask him a



1 question?

2 A I see it.

3 THE COURT: Ask the question.

4 Q Mr. Hawkins, do you remember being asked  
5 the following question and giving the following answer:

6 "Mr. Hawkins, what happened next?

7 "Answer:" -- and follow along with me --

8 "Answer: I then went to the Roadrunner Gas Station at  
9 the corner of Brunswick Avenue and Southard Street and  
10 I bought some gas for a \$1.50 and I kept 50 cents for  
11 myself. I then took the gas and went back up Brunswick  
12 Avenue, and as I got near the alley of 340 Brunswick  
13 Avenue, Larry told me to put the gas can down there.

14 "Larry then crossed over the street from  
15 the direction of Al's Auto Body and gave me some coke.  
16 Larry then took the can of gas and walked down the  
17 alley and went into 340 Brunswick Avenue. He got into  
18 the place by going through the door at the rear where  
19 you have to bend over to get into the house."

20 Is that in fact the answer that you gave to  
21 that question?

22 A If that's what the statement says.

23 Q Next, they asked you what happened next,  
24 right? And you told them that you went to Stokes Bar  
25 and went inside to play the poker game, right?

1 A That's what the statement says.

2 Q Here, take a look at what the statement  
3 says, this question and this answer.

4 A That's what it says; that's what it says.

5 Q Was that the truth then?

6 A No, it wasn't the truth. It wasn't the truth and  
7 it wasn't a lie.

8 Q What was it?

9 A I did go in the bar, but when I went in the bar  
10 after I left him, I come out of the alleyway and I was  
11 standing on the corner after the fire, after the fire.

12 Q Hold on. "I then walked away and went to  
13 Stokes Bar and went inside to play the pcker game. I  
14 was in the bar and a short time later, I heard that  
15 there was a fire outside. I then left the bar."

16 A I went to the bar. After he ran out of there,  
17 and I was standing at the spot and I could see Carmen  
18 shoot by. I stood and then I goes down to the bar.  
19 I'm standing on the corner by the bar.

20 Q So which is it, you heard it on the  
21 grapevine?

22 A I didn't heard it on the grapevine. I seen it  
23 with my own two eyes. The grapevine ain't got no end  
24 to it.

25 Q So are you working for P.J. still?

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1 MS. LACKEN: Judge, objection.  
 2 THE COURT: Foundation.  
 3 MR. HAMILTON: Judge, I don't want to say  
 4 it in front of the jury. I'll say it at sidebar.  
 5 MS. LACKEN: Judge, it's absolutely  
 6 irrelevant and in fact, it's improper for him to ask  
 7 anything like that. He's not on trial here. His  
 8 client is. It has nothing to do with his testimony  
 9 here nor his credibility.  
 10 MR. HAMILTON: He's not, but he should be.  
 11 THE COURT: Now, ladies and gentlemen,  
 12 that's an improper statement by counsel. I'm going to  
 13 direct you to disregard it. It is absolutely of no  
 14 moment and not a proper question. When I tell you to  
 15 disregard statements, you must absolutely disregard  
 16 them, as I've said before. They are not part of this  
 17 trial at all.  
 18 Now, ask another question. The objection  
 19 is sustained.  
 20 MR. HAMILTON: Very good. I'll place more  
 21 later on the record about it, but I'll respect it.  
 22 THE COURT: You can --  
 23 MR. HAMILTON: No further questions.  
 24 I beg your pardon. Just briefly. I'm  
 25 sorry.

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HAWKINS - CROSS - HAMILTON 258

1 Q When did you first see Carmen after the  
 2 fire?  
 3 A When she ran out of the alleyway.  
 4 Q And when was the next time you had a chat  
 5 with her?  
 6 A I can't recall.  
 7 Q But she was a friend of yours?  
 8 A Associate, like I said.  
 9 Q An associate. Is an associate somebody  
 10 that maybe you have sex with?  
 11 MS. LACKEN: Judge, he can ask about their  
 12 relationship and how they were together. Please, I'm  
 13 just asking the questions to be proper.  
 14 THE COURT: What's the point?  
 15 MR. HAMILTON: Collateral impeachment  
 16 material, information gotten from the other witness.  
 17 THE COURT: You can ask him what he did to  
 18 get the information. whether he slept with her is of  
 19 no moment.  
 20 MR. HAMILTON: The defense theory is that  
 21 there is collusion between them going to credibility.  
 22 THE COURT: You haven't -- keep trying.  
 23 Go ahead, next question.  
 24 MR. HAMILTON: All right.  
 25 Q So you talked to her sometime, you just

1 don't know when, is that it?

2 A Yeah.

3 Q Did you ever help her obtain drugs?

4 A No.

5 Q Not even as a runner?

6 A No.

7 MR. HAMILTON: I have no further questions.

8 THE COURT: Any redirect?

9 MS. LACKEN: A couple.

10 REDIRECT EXAMINATION BY MS. LACKEN:

11 Q When counsel is saying "even as a runner,"  
12 let me be more clear. When she was out looking for  
13 drugs, did you tell her there were particular people in  
14 the area she could buy from?

15 A Yes.

16 Q So whatever Mr. Hamilton was saying, at  
17 least you did help her by pointing out drug dealers on  
18 the street?

19 A Yeah, whoever had it.

20 Q Now, you said that you weren't getting paid  
21 necessarily financially from P.J. You know, why were  
22 you working with him too?

23 A Well, I been knowing P.J. for a while, and I was  
24 dealing with P.J. before he even came around.

25 Q What would you get out of it if you weren't

1 getting money out of it?

2 A He would throw me a few dollars every now and  
3 then, plus I washed his car. And I washed cars around  
4 there, washed his car, do work for his father and  
5 stuff.

6 Q So you were familiar with not only him but  
7 his family?

8 A He was trying to make a little money and start  
9 his little studio up.

10 Q Now, at the time -- so at the time, then,  
11 when you were working for Fruit, was he giving you  
12 money?

13 A Who, P.J.?

14 Q Fruit.

15 A Yeah.

16 Q Fruit would give you money for what you  
17 did?

18 A Money and coke.

19 Q P.J. would give you money here and there,  
20 but you did other things for him?

21 A I did other things, yeah. P.J. was banging his  
22 girl.

23 THE COURT: Wait until a question is asked.

24 MS. LACKEN: Judge, actually, I don't have  
25 any further questions.


1 THE COURT: Anything further?  
 2 RE-CROSS-EXAMINATION BY MR. HAMILTON:  
 3 Q The other things that you do for P.J., do  
 4 you get money for them?  
 5 A Washing his car, yeah.  
 6 Q Is P.J. still in the neighborhood?  
 7 A P.J. got a studio. He records, make studio.  
 8 Q He's out of the drug-dealing business?  
 9 A As far as I know of.  
 10 MS. LACKEN: No questions.  
 11 MR. HAMILTON: I have nothing, Judge.  
 12 THE COURT: You may step down, Mr. Hawkins.  
 13 (The witness is excused.)  
 14 MS. LACKEN: That's all I have for today.  
 15 THE COURT: We don't have another witness.  
 16 Ladies and gentlemen, you have performed  
 17 women's service today. Counsel, courts of the State of  
 18 New Jersey, the Judge, counsel, appreciate you've gone  
 19 above and beyond your service today. It works to our  
 20 advantage that the case will conclude that much  
 21 earlier, so I'm pleased about that.  
 22 I'm going to ask you to step down now, and  
 23 enjoy the evening. Do not speak about the case amongst  
 24 yourselves or with anybody else, and we'll come back in  
 25 tomorrow morning by 9:15.

1 Thank you very much. You may step down.  
 2 Did.  
 3 (The following is out of the presence of  
 4 the jury.)  
 5 THE COURT: You may be seated, folks, if  
 6 you care to, or you may stand.  
 7 Is there anything further we have to  
 8 address before tomorrow?  
 9 MS. LACKEN: Nothing from the state, Judge.  
 10 MR. HAMILTON: Nothing from the defense,  
 11 Judge.  
 12 THE COURT: Okay. Then we'll see you  
 13 tomorrow morning at 9:00.  
 14 (The matter is concluded.)  
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HAWKINS - RECROSS - HAMILTON  
CERTIFICATION

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I, MARIAN V. WALSH, C.S.R., License Number 805, an Official Court Reporter and Notary Public in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript to the best of my knowledge and ability.



Official Court Reporter  
Mercer County Courthouse

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**A-1217-04T4**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
IND. NO. 03-02-0286  
APP. DIV. NO. A-1217-04T4

THE STATE OF NEW JERSEY, )  
)  
)  
vs. )  
)  
LARRY FLEMMING, )  
)  
)  
Defendant. )

STENOGRAPHIC TRANSCRIPT  
OF RECEIVED  
TREATY APPELLATE DIVISION  
DEC 28 2004  
SUPERIOR COURT  
OF NEW JERSEY

PLACE: Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey

DATE: February 4, 2004

**B E F O R E:**

HON. BILL MATHESIUS, J.S.C.

**FILED**  
APPELLATE DIVISION  
DEC 28 2004

Transcript Ordered By:

OFFICE OF THE PUBLIC DEFENDER

*Ann Flynn*  
CLFRK

**A P P E A R A N C E S:**

JOSEPH L. BOCCHINI, JR.,  
PROSECUTOR - MERCER COUNTY  
BY: KIMBERLY M. LACKEN,  
ASSISTANT PROSECUTOR  
For the State of New Jersey

DAVID R. HAMILTON, ESQ.  
(Office of the Public Defender)  
For the Defendant

\* \* \* \* \*

MARIAN V. WALSH, C.S.R., C.R.R.  
Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey 08650



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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
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LARRY FLEMMING, )  
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OF  
TRIAL

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Trenton, New Jersey

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\* \* \* \* \*

MARIAN V. WALSH, C.S.R., C.R.R.  
Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey 08650

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E X H I B I T S

<u>NO.</u>	<u>ITEM</u>	<u>IDEN.</u>	<u>EVID.</u>
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4	S-20	59	50
5	S-21	80	82
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7	S-24	80	82
8	S-25		174
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1 (The following is out of the presence of  
2 the jury.)

3 THE COURT: Let's go on the record with  
4 03-02-0286, State v. Larry Fleming.

5 As we all know, the participation of the  
6 sheriff and his underlings to make anything work in  
7 this building is laughable, so we are not in a position  
8 to have anybody -- we're not in a position to have the  
9 defendant delivered for -- before some outrageous time  
10 because of the inability of the sheriff to deliver  
11 anybody from 8:30, as opposed to after the jury  
12 arrives. And we all know that it would be the end of  
13 the world if the jury saw the defendant in any kind of  
14 custodial circumstance.

15 So that being said, we are now at 9:05,  
16 trying to get this thing on the road.

17 And for purposes of the charge conference,  
18 Mr. Hamilton, are you willing to waive the appearance  
19 of the defendant for that?

20 MR. HAMILTON: Yes, Judge.

21 THE COURT: Okay. Has anybody prepared  
22 anything by way of transferred intent?

23 MS. LACKEN: Judge, I haven't done that  
24 yet, but I am going to go to the 2C basically, and I'm  
25 going to go into the section that deals with

COLLOQUY

1 transferred intent, which is in the beginning, and  
2 pretty much going to --

3 THE COURT: That would be --

4 MS. LACKEN: Pretty much going to copy --

5 THE COURT: 2C:2-3D.

6 MS. LACKEN: It's right here, as a matter  
7 of fact.

8 THE COURT: I'm pleased.

9 And State v. Interests of S.B. also  
10 comments on that, 333 N.J. Super, 236, among other  
11 circumstances. So we will fashion a charge relating to  
12 transferred intent.

13 At this juncture, it does not appear the  
14 defendant is going to testify; is that a fair  
15 assumption?

16 MR. HAMILTON: The defendant is or is not?

17 THE COURT: Is not.

18 MR. HAMILTON: Yes. He indicated to me at  
19 close of business yesterday he did not intend to  
20 testify.

21 THE COURT: And, therefore, have you  
22 discussed with him the charge or the lack of charge?

23 MR. HAMILTON: Not since the beginning of  
24 the case. I need to rediscuss it, but that would be  
25 brief.

4  
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21 THE COURT: And, therefore, have you  
22 discussed with him the charge or the lack of charge?

23 MR. HAMILTON: Not since the beginning of  
24 the case. I need to rediscuss it, but that would be  
25 brief.

1 THE COURT: All right. That charge may be  
2 given.

3 MR. HAMILTON: My inclination is usually to  
4 request it and recommend it.

5 THE COURT: Failure of the defendant to  
6 charge -- to testify, I'm sorry.

7 Now, there is a -- since my knuckles were  
8 so sternly rapped by Judge Ciancia in State v. Davis,  
9 and my knuckles smart even today, that the issue of  
10 identification -- there are -- there are unrevealed in  
11 the charge -- in the Davis case two aspects of  
12 identification. One is proving a defendant did commit  
13 the offense, and the second is involved in the arena of  
14 where the defendant is, his identity is in question.

15 In Davis there was more of an issue of  
16 whether the defendant committed the offense. And the  
17 identification that took place by the undercover DEA  
18 agent of the defendant having seen him one time, et  
19 cetera, et cetera, and identifying him from a  
20 photograph, and whether it was in a lineup or an array,  
21 whatever it might be, that is distinguishable. Do you  
22 suggest that identification, i.e., the labeling of the  
23 defendant as Larry Fleming, the person who was in and  
24 around, according to the testimony, of the Brunswick  
25 Avenue address that was torched, is a question of

1 identification of Larry Fleming per se or whether or  
2 not he committed the offense?

3 MR. HAMILTON: No. It's clear that the  
4 witnesses mean Larry Fleming, the defendant, when they  
5 say Larry Fleming. The question is whether they're  
6 lying about whether it happened or not.

7 THE COURT: Precisely. That's the  
8 distinction I would draw as distinguished from State v.  
9 Davis. So therefore, it's the Court -- it turns that  
10 it's now the Court's new responsibility of the Court to  
11 instruct on identification, even though such a charge  
12 may not be specifically requested.

13 MS. LACKEN: What's the cite for State v.  
14 Davis. Do you have that?

15 THE COURT: It hasn't been cited. It's an  
16 October 24 decision that has not quite filtered into  
17 any -- at least I don't know. It's probably in the  
18 books, but I have not seen the charge itself. And  
19 there is the issue, the attendant issue itself,  
20 identification with respect to in-court and  
21 out-of-court identification.

22 Again, it's the same paradox that at least  
23 appears to this Court to be something of concern. It  
24 is not an unknown defendant, but once again, as counsel  
25 has aptly put it, it's a question of whether they



1 were -- the witnesses were telling the truth, not  
2 whether they knew Fleming -- or not Fleming or Fruit,  
3 as his nickname is, as has been testified to.

4 Therefore, what is the opinion of both of  
5 you with respect to the in-court and out-of-court  
6 identification instruction?

7 MS. LACKEN: From the state, your Honor,  
8 it's clear, it's not a question of whether or not the  
9 witnesses know who the person was, the defendant. They  
10 certainly do. The question is whether or not he did  
11 it.

12 Therefore, I submit there's no need for an  
13 identification charge if we're just trying to find out  
14 the credibility of the witnesses.

15 THE COURT: That's precisely the point.  
16 Would you agree with that?

17 MR. HAMILTON: I would agree with that.

18 THE COURT: Then I'll risk the wrath of  
19 Judge Ciancia, and we will not specifically -- and  
20 we'll hope that the next person who reviews this will  
21 have had some level of experience in the criminal law  
22 and could perhaps bring that to the table in terms of  
23 what is confronted in a case like this.

24 THE COURT: Okay. The other -- the  
25 wraparound charge, which was what we termed the general

1 list of subjects covered, and that will be given and  
2 that will include, for example -- do we want an expert  
3 testimony charge, by the way?

4 MS. LACKEN: You'll have one today, yes.

5 THE COURT: Do we or do we not?

6 MR. HAMILTON: Yes.

7 THE COURT: And the expert will be Mathis?

8 MS. LACKEN: And Dr. Shah.

9 THE COURT: Mathis and Shah.

10 Anything else the state would request aside  
11 from the wraparound charge?

12 MS. LACKEN: I think, I'm not quite sure,  
13 but since we're charging both purposeful and knowing  
14 and SBI murder, you have to do the serious bodily  
15 injury for murder charge under State v. Cruz. I think  
16 there also has to be -- I have to take a look one more  
17 time. I'm concerned this is a no early release, so  
18 there might have to be a NERA charge.

19 THE COURT: When was this?

20 MS. LACKEN: May of 2002, so it was clearly  
21 after the statute was imposed. But I'm not quite sure  
22 whether you still have to have a charge anyway, or  
23 whether or not the charge was just for the Manzie era.  
24 I'm not quite sure. I have to take a look at that.  
25 That's something I have a concern about, and I'll look

1 into that.

2 THE COURT: Is there anything by way of  
3 lesser-included offenses?

4 MS. LACKEN: I don't think so, Judge.  
5 Frankly, I don't think there's any indicia of  
6 recklessness here. It's either he did it or didn't do  
7 it, and that's the state's theory.

8 MR. HAMILTON: I agree.

9 THE COURT: Anything else, Ms. Lacken?

10 MS. LACKEN: I don't, Judge. I don't have  
11 anything that I'm thinking about right now.

12 THE COURT: Mr. Hamilton, is there anything  
13 you specifically request?

14 MR. HAMILTON: No, Judge. Only I think we  
15 ought to talk about what we plan to get done today, and  
16 I think it concerns -- and any concerns the prosecutor  
17 might have.

18 MS. LACKEN: Today, Judge, I have -- the  
19 first witness will be Lloyd Mathis. He's our arson  
20 expert, and then I have Gary Wasko. He was responsible  
21 for collecting the samples to the state police. I also  
22 have -- George Chin is another expert, George Chin who  
23 did the analysis of the specimens sent, and then we  
24 have Dr. Shah.

25 And I don't know whether or not we'll get

1 all that done this morning, but all of my witnesses are  
2 lined up, so in any event -- also, something I need to  
3 bring to the Court's attention -- actually, to  
4 counsel's attention; I think we went over this, but I  
5 just want to make sure -- there was apparently a juror  
6 in the back, and I'm not quite sure who he is, who a  
7 detective from my office recognized as someone that he  
8 knows.

9 Now, I think we went through that. You  
10 know, we may not have gone specifically through the  
11 names of the people in the prosecutor's office, but I  
12 think with everyone, we basically said if they  
13 indicated that they did know people, that they would  
14 not -- it wouldn't --

15 THE COURT: They would never be able to  
16 return a verdict via impartial assessment.

17 MS. LACKEN: Right. I wanted to write that  
18 up in case it was an issue later on. I wanted to bring  
19 that up. I believe it was Mr. -- hold on for a  
20 second -- Hankins. He's a teacher at the Dunn Middle  
21 School. Man in the back row with glasses.

22 I do have a recollection of him saying he  
23 knows various people in the prosecutor's office, and it  
24 would not affect his ability to be fair and impartial.  
25 But since it was brought to my attention, I wanted to

1 bring it to your Honor's attention.  
 2 MR. HAMILTON: I agree with everything the  
 3 prosecutor says and I raise no objection.  
 4 THE COURT: I believe the omnibus question  
 5 addressing the ability of each of the jurors and all of  
 6 them collectively to be fair and impartial,  
 7 notwithstanding the associations, the traumas, the  
 8 other pertinent events that they've suffered, was  
 9 answered positively by each of the jurors, and I don't  
 10 think that's any problem.  
 11 MS. LACKEN: Just so we're all clear,  
 12 because no prior convictions yesterday went into the  
 13 record through either direct or cross-examination of  
 14 the witnesses. Obviously, we're not -- I am asking for  
 15 that charge not to be read to this jury, just --  
 16 THE COURT: There's no reason to do that.  
 17 MS. LACKEN: I'm just making sure we're all  
 18 on the same page with that.  
 19 As far as any other issues, your Honor,  
 20 we'll see how it goes today, obviously, and we'll see  
 21 how it ends. But I don't believe -- but I don't  
 22 believe -- I don't believe the state will be in a  
 23 position to close for your planning position.  
 24 THE COURT: Will you be in a position to  
 25 close tomorrow?

1 MS. LACKEN: Certainly.  
 2 THE COURT: Will you be in a position to  
 3 enjoy your evening at home tonight?  
 4 MS. LACKEN: Actually, no, I won't. But I  
 5 just wanted to discuss that and see if there were  
 6 problems with that, your Honor. I think we'll probably  
 7 go into the afternoon, if I were to guess. Even if  
 8 there's not a large amount of cross-examination, it's  
 9 just stuff that we need to get through for the record.  
 10 MR. HAMILTON: Judge, I don't want to jam  
 11 the prosecutor. I think probably, if she struggled,  
 12 she could get it done, but I will not raise objection  
 13 to what she says.  
 14 THE COURT: I have no problem with that  
 15 either. My only concern is that Thursday we'll be able  
 16 to get the summations and charge in the morning.  
 17 MS. LACKEN: Oh, yes. At least from the  
 18 state, I don't believe there will be any problem doing  
 19 that.  
 20 MR. HAMILTON: well, this shapes up as a  
 21 tense day then.  
 22 THE COURT: why is that?  
 23 MR. HAMILTON: We're going to have to prop  
 24 ourselves up to stay awake.  
 25 THE COURT: Probably if you're as

1 indiscreet on the record as I am.

2 All right. Then at least you have a  
3 foundation from which to vault, to plan your  
4 summations, and we'll know more about it at the end of  
5 the day. Today when we finish the testimony, we will  
6 review once again the charges to ensure that the  
7 testimony has conformed -- or the charges have  
8 conformed to what the testimony has been.

9 Is there anything else we need to discuss  
10 before we try to get the defendant?

11 MS. LACKEN: No, your Honor, not that I  
12 have.

13 MR. HAMILTON: No.

14 THE COURT: Do we have any bails? Let me  
15 see if I can nag somebody to get somebody over here.

16 THE CLERK: Jurors entering court.  
17 (The following is in the presence of the  
18 jury.)

19 THE COURT: Good morning, ladies and  
20 gentlemen. Once again, I apologize. Please be seated.  
21 I apologize for the delay. There were complications  
22 with staffing and what have you, so that's why my law  
23 clerk -- my clerk, Ruth was pressed into service, and  
24 so it's good to see you.

25 Are we ready to proceed?

1 MS. LACKEN: We are. The state calls  
2 Detective Lloyd Mathis.

3 SERGEANT-AT-ARMS: Place your left hand on  
4 the Bible and raise your right and face the clerk.

5 L L O Y D M A T H I S, STATE'S WITNESS, SWORN.

6 THE CLERK: Please state your name.

7 THE WITNESS: L-L-O-Y-D, Mathis,

8 M-A-T-H-I-S.

9 THE COURT: Good morning, Detective Mathis.

10 THE WITNESS: Good morning, your Honor.

11 DIRECT EXAMINATION BY MS. LACKEN:

12 Q Good morning.

13 A Good morning.

14 Q Detective Mathis, where are you employed?

15 A I'm employed by the Mercer County Prosecutor's  
16 Office.

17 Q What capacity besides, being a detective,  
18 do you serve?

19 A My specialty is arson investigation.

20 Q How long have you been with the Mercer  
21 County Prosecutor's Office?

22 A I've been with the prosecutor's office almost  
23 12 years.

24 Q And within the prosecutor's office, how  
25 long have you been doing arson investigation?



1 A I have been in arson investigations for ten  
2 years.

3 Q What are your duties and responsibilities  
4 in the arson unit?

5 A Well, primarily, the -- our arson investigation  
6 unit basically assists the local law enforcement, and  
7 also the fire marshals throughout Mercer County, in  
8 being able to determine the origin or the area where a  
9 fire starts, and also to determine what the cause is.

10 Q Do you go to all of the municipalities in  
11 the county in order to assist those municipalities?

12 A Yes, we do.

13 Q Prior to your employment with the Mercer  
14 County Prosecutor's Office, where were you employed?

15 A I was employed by Princeton University at the  
16 Princeton plasma physics laboratory.

17 Q Did you do anything arson-related there?

18 A I was a firefighter and emergency medical  
19 technician for the laboratory.

20 Q Prior to that, where did you work?

21 A I'm also a volunteer firefighter, and have been  
22 so for the last 17 years, at the Kingston Volunteer  
23 Fire Company in Kingston, New Jersey.

24 Q When you say firefighter and arson  
25 investigator, are there differences?

1 A They are different. Basically, a firefighter's  
2 responsibility is to respond and suppress fire or put  
3 out a fire. And an arson investigator will respond to  
4 a fire scene and, basically, observe until the fire is  
5 extinguished, and then we assist with the fire marshals  
6 to determine what the origin and cause of the fire is.

7 Q Now, can you please detail for us your  
8 education?

9 A Yes. I have an associate's degree in science  
10 from Valley Forge Military Academy and Junior College.

11 Q Have you received training in the area of  
12 arson?

13 A Yes, I have.

14 Q Can you describe for us what type of  
15 training you've had?

16 A Yes. In 1993, I attended the three-week state  
17 arson investigators school that's sponsored by the  
18 Division of Criminal Justice. And I have attended ---  
19 you're required by the state to attend a one-day  
20 refresher course every year to maintain your  
21 proficiency or your certification in the state. And I  
22 have maintained that for the last ten years.

23 Q When you said in 1993 you attended that  
24 course at the Division of Criminal Justice, what did  
25 that entail?

1 A Basically, it entails going through classroom  
2 theory, and also practical exercise, where they have a  
3 live fire and then you're sent in as a team to  
4 investigate that fire. And then, once you make a  
5 determination as to the origin and cause, your  
6 instructors then show you a videotape of what they  
7 actually did to set the fire, to see whether or not you  
8 actually learned the principles and theories to the  
9 fire investigation.

10 Q At the end of that course in 1993, did you  
11 have to go through a testing process to become  
12 certified?

13 A Yes.

14 Q And what did that entail?

15 A The testing process basically is a written  
16 examination on basic principles of fire investigation.

17 Q And you've already indicated after you're  
18 certified, you have to go through yearly in-service  
19 trainings in order to maintain that certification?

20 A That is correct.

21 Q Did you ever attend a fire academy?

22 A Yes, I did.

23 Q What fire academy have you attended?

24 A As a volunteer firefighter, I've attended the  
25 Somerset County Fire Academy and have completed the

1 Firefighter 1, Firefighter 2, and firefighter officer  
2 courses, and numerous other courses, as a volunteer  
3 firefighter.

4 Q What were the purpose of those courses as a  
5 firefighter?

6 A Basically, to teach you the principles of what  
7 fire behavior is, what methods or techniques you use to  
8 extinguish fire, how to locate hidden fire in a  
9 building, how to search and rescue, to rescue occupants  
10 from the building. And, in addition to that, I've also  
11 taken a number of leadership courses, because I held  
12 leadership positions in the fire company.

13 Q Have you attended the National Fire  
14 Academy?

15 A Yes, I have.

16 Q When was that?

17 A 1997, I attended the basic fire and arson  
18 investigation course at the National Fire Academy in  
19 Emmetsburg, Maryland.

20 Q How long is that?

21 A It's a one-week school.

22 Correction, that's a two-week school.

23 Q What did you learn there that helped in  
24 your fire investigation repertoire?

25 A Basically, it's a national course designed to



1 teach basic fire investigation to fire investigators  
2 from all over the country. And it's basically a  
3 very -- it's kind of the equivalent of Quantico for law  
4 enforcement, the FBI Academy. The National Fire  
5 Academy is that equivalent for the fire service.

6 Q Do you actually go through active fires  
7 there, also, through your training?

8 A Yes. There is one practical exercise you go  
9 through where you actually go to a fire scene, and you  
10 go through the debris in that fire scene, and you have  
11 to determine what the origin and cause of the fire is.

12 Q At the end of that academy, do you get a  
13 certification of some type?

14 A You have to take a written examination as well,  
15 and then you're issued a certificate by the academy.

16 Q Have you attended the federal law  
17 enforcement training center?

18 A Yes, I have.

19 Q What is that?

20 A The federal law enforcement training center is a  
21 center that is run now by the Justice Department. It  
22 was run by Treasury previously, and I attended the  
23 Bureau of Alcohol, Tobacco and Firearms advanced origin  
24 and cause courtroom testimony course. It's a ten-day  
25 extremely intensive course that basically brings in

1 some of the best fire investigators from around the  
2 country to teach advanced fire investigation  
3 techniques.

4 Q At the end of that course, do you have any  
5 type of testing?

6 A Yes. There is also a 100-question exam that is  
7 given during that testing, and that course is  
8 recognized by the federal court system for expert  
9 testimony in arson investigation.

10 Q Now, I take it -- and you can correct me if  
11 I'm wrong -- that besides the fire academies and the  
12 federal law enforcement training center that you've  
13 just indicated that you have participated in, in your  
14 eleven years at the Mercer County Prosecutor's Office,  
15 have you been sent to other types of seminars and  
16 trainings that helped keep your fire knowledge current?

17 A Yes. I have attended numerous courses in fire  
18 investigation throughout those ten years, and also, I  
19 instruct at a number of schools.

20 Q Approximately, then, without going into all  
21 of your schools, about how many hours of fire  
22 investigation trainings have you received during your  
23 tenure at the prosecutor's office and as a volunteer  
24 firemen?

25 A I would estimate at least a thousand hours or

1 more of training in the area of fire investigation.

2 Q Now, you indicated that you've also taught.  
3 where have you taught?

4 A I'm an instructor here in Mercer County at the  
5 fire academy. We teach basic arson detection skills to  
6 the firefighters that go through the firefighter  
7 courses at the academy.

8 In addition to that, I'm also an instructor  
9 at the Mercer County College. I teach the fire  
10 investigation course for the college. I'm also an  
11 adjunct instructor at the National Fire Academy in  
12 Emmetsburg, Maryland. And I teach the courtroom  
13 testimony for the first responder course, as well as  
14 the fire and arson investigation course.

15 Q During your thousand hours or so of  
16 training, I would imagine, then, they had, and you've  
17 indicated that they have had, many hours' worth of  
18 origin-and-cause determination training?

19 A Yes.

20 Q Correct?

21 A That's correct.

22 Q Now, have those classes included training  
23 in the various types of fire causes?

24 A Yes, they have.

25 Q Did that include electrical fire?

1 A Yes.

2 Q Did that include accidental fire causes?

3 A Yes.

4 Q Now, then, obviously, based on your  
5 training, it is -- there is the possibility that if you  
6 were to go investigate a scene, you can in most  
7 circumstances find the origin and cause of the fire,  
8 correct?

9 A That is correct.

10 Q Have you been trained in the area of  
11 pattern recognition?

12 A Yes, I have.

13 Q What is that?

14 A Basically, pattern recognition is the ability to  
15 look at the damage from a fire scene and be able to  
16 track the movement of the fire through a building, or  
17 be able to track the smoke patterns through the  
18 building. And then we basically backtrack; we go from  
19 the least amount of damage to the most amount of damage  
20 in a building. So you're trained on how to read those  
21 patterns to be able to find where the fire started.

22 Q Now, you indicated before that your  
23 training included the study of fire behavior, correct?

24 A That is correct.

25 Q Did your training include the effect of

1 fire and heat on various objects?

2 A Yes.

3 Q Do those objects, unfortunately, include  
4 humans?

5 A Yes, they do.

6 Q Now, you indicated that you have been a  
7 member of the Kingston Volunteer Fire Company for  
8 approximately 17 years?

9 A That is correct.

10 Q You are still a current member?

11 A I am a current member.

12 Q When you say you're a member of the  
13 volunteer fire company, do you actually go out and go  
14 to active fires and suppress them?

15 A Yes, that is correct.

16 Q And you've been doing that for 17 years?

17 A That is correct.

18 Q Regarding your career at the Mercer County  
19 Prosecutor's Office as an arson investigator, not as a  
20 firefighter, can you give me an estimate of how many  
21 fire investigations you've actually conducted?

22 A Approximately 143 origin and cause  
23 investigations.

24 Q Have these fire investigations included the  
25 digging through arson debris?

1 A Yes, they do.

2 Q Have you investigated arson or fires for  
3 the prosecutor's office that have included accidental  
4 as well as incendiary or intentionally set fires?

5 A Yes, both.

6 Q When you use "incendiary," that means,  
7 obviously, intentionally set?

8 A Yes.

9 Q You've indicated already that you've  
10 participated in controlled and training burns; is that  
11 correct?

12 A That's correct. And I've also offered them, in  
13 part, as part of my training when I teach other  
14 investigators.

15 Q Have you participated in test fires,  
16 specifically including flammable liquids?

17 A Yes, we have.

18 Q Have you participated in fires, utilizing  
19 various ignition devices?

20 A Yes.

21 Q Have you participated in test fires  
22 involving trailers and other means of spreading the  
23 fire?

24 A Yes.

25 Q What's a trailer?

1 A A trailer is any combustible material that's used  
2 to move the fire from one location through to another  
3 location. It could be a flammable liquid; it could be  
4 a solid material; you could use paper and other types  
5 of material.

6 Q Now, Detective, have you testified as an  
7 expert witness before?

8 A I have been offered as an expert; however, I did  
9 not testify at trial. The case was disposed of prior  
10 to testimony being taken.

11 Q Have you testified before any other forum  
12 as an expert witness?

13 A Yes. On five occasions before the Mercer County  
14 Grand Jury.

15 MS. LACKEN: Your Honor, I am respectfully  
16 requesting that Detective Mathis be qualified as a fire  
17 investigator, including, but not limited to, origin,  
18 manner, and cause of fire determination.

19 THE COURT: Any voir dire?

20 MR. HAMILTON: No, Judge, I'll consent with  
21 my felicitations.

22 THE COURT: Ladies and gentlemen, just so  
23 you're aware of what just transpired, occasionally, as  
24 you will hear me say in my final instructions, and you  
25 may have heard me allude to during my opening

1 instructions, witnesses can testify to facts that they  
2 are aware of. Normally, a lay witness cannot give an  
3 opinion about something, but rather they can only say  
4 what they saw, heard, and received by other of their  
5 senses.

6 And an exception exists, and there may be  
7 another individual or two qualified as experts today.  
8 And an individual or a witness who has some special  
9 qualification, either by experience or by study or by  
10 training, can be qualified as an expert.

11 Consequently, Detective Mathis was  
12 questioned about his expertise. He was offered as an  
13 expert, and counsel did not object to his being  
14 qualified as an expert, so I'm going to permit  
15 Detective Mathis to testify as an expert, which means  
16 he can testify as to opinions.

17 You'll hear more about that later on, but  
18 that's the difference between a lay witness and an  
19 expert witness, just for your edification.

20 Proceed. Expert witness.

21 MS. LACKEN: Thank you, your Honor.

22 Q I'm going to direct your attention to  
23 May 11, 2002. Did you become part of an arson  
24 investigation that occurred in the area of  
25 340 Brunswick Avenue in Trenton?



1 A Yes, I did.

2 Q How did you become involved?

3 A I was notified via pager from the Trenton police,  
4 fire, and radio room.

5 Q When you were notified, you were obviously  
6 asked to respond; is that correct?

7 A Yes.

8 Q Were you given any preliminary information  
9 to aid you in your investigation?

10 A Yes. I was advised by the dispatcher that they  
11 had a fire in progress at 340 Brunswick Avenue in the  
12 city, and that they had confirmed there was a fatality  
13 at that fire.

14 Q Now, approximately what time did you arrive  
15 at the scene?

16 A I arrived at the scene approximately 2245, or  
17 10:45 p.m.

18 Q When you arrived, did you speak with fire  
19 personnel and police officers, whomever was at the  
20 scene, to determine how far the investigation had  
21 proceeded prior to your arrival?

22 A Yes, I did.

23 Q What basic information were you given at  
24 that point?

25 A Basically, I was advised at 10:15 p.m. the fire

1 department was dispatched to 340 Brunswick Avenue for a  
2 structure fire, which means a fire in a building. I  
3 was advised that, you know, the fire department  
4 responded to the scene and conducted their operations,  
5 and while they were conducting their operations, they  
6 found a victim on the second floor of 340 Brunswick  
7 Avenue. They were able to determine that that victim  
8 was dead, and they left the victim's body on the second  
9 floor for the investigation.

10 Q Now, were there any other trained fire  
11 investigators on scene along with you?

12 A Yes, there were.

13 Q Who were they?

14 A Now, Battalion Chief -- he was at the time --  
15 Gliottone, was there, with Sergeant Marvin Johnson from  
16 the Trenton Police Department.

17 Q Now, you've indicated previously,  
18 oftentimes you're there to aid in the arson  
19 investigation. In this particular instance, was there  
20 also an independent origin-and-cause determination  
21 going on by the Trenton Fire Department?

22 A Yes, there was.

23 Q When I say "independent," I mean, are you  
24 working together and you both come to your own  
25 conclusions and then you confer? How does that work?

1 A Basically, the fire department has a  
2 responsibility to -- for public safety to investigate  
3 fires. We try and work together to do the  
4 investigation. However, we have independent,  
5 obviously, opinions as to what started the fire, and we  
6 don't try and influence each other in any way to try  
7 and determine that cause of the fire.

8 But we do conduct investigations  
9 simultaneously to determine what the origin and cause  
10 of the fire is. Obviously, the prosecutor's office has  
11 a different end goal which is, obviously, if it is a  
12 crime and it is a set fire, then we have an obligation  
13 to continue to investigate that fire, and then  
14 prosecute the individual who is responsible for setting  
15 the fire.

16 Q In this particular determination, the  
17 individual from the Trenton Fire Department that was  
18 conducting that independent investigation was whom?

19 A It was Battalion Chief Gliottone.

20 Q And at the end of this investigation, did  
21 your opinion -- did they concur with your opinion?

22 A Yes. they did.

23 Q Now, what did you do in order to begin your  
24 investigation?

25 A Basically, when we conduct fire investigations,

1 we use a systematic approach to be able to conduct that  
2 investigation. It's very similar to the scientific  
3 method that's used by scientists when they conduct  
4 their scientific investigations. So basically, what we  
5 do is we define what the problem is, and then we want  
6 to collect data.

7 Basically, when fire investigators do that,  
8 we talk to people at the fire scene, we look after the  
9 fire while it's active, we walk around the side of the  
10 building and make observations. Once we collect all of  
11 the data, we basically analyze that data and we come up  
12 with a hypothesis or theory. How did the fire start?  
13 I believe the fire started this way.

14 Then we use the data we've collected at the  
15 fire scene to be able to say, yes, the data supports my  
16 theory as to how the fire started, or no, it doesn't.  
17 If it doesn't, then the investigator has to go back and  
18 look at the scene again and come up with a different  
19 theory on how the fire started. And then we report our  
20 findings based upon the investigation.

21 Q When you went to 340 with regard to the  
22 building, what did you do on the outside?

23 A Basically, I looked at the front of the building;  
24 there was active fire suppression activities going on.  
25 And I looked at the front of the building, and I made



1 some initial notes about some of the smoke that had  
2 escaped from the building and some markings that were  
3 on the building.

4 Q Now, when you were going through all of  
5 this, were you taking pictures?

6 A Detective Cadlett from the crime scene  
7 investigation unit at the Trenton Police Department was  
8 taking photographs.

9 Q What did you notice about the outside of  
10 the building with regard to your fire investigation?

11 A I noticed over the front door on the first floor  
12 of the building that there was some heavy soot staining  
13 over the door. And as part of that soot staining there  
14 was an area of what we call a clean burn.

15 And what a clean burn is, is basically when  
16 the fire is intense enough that the soot that comes  
17 from the smoke stains the outside of the building, and  
18 then the heat or flames that come out of that area then  
19 burn away the soot that's over the door. That's an  
20 indication of intense heat coming from that area of the  
21 building.

22 Q Is -- does that have a significance with  
23 regard to your origin, meaning the start area of the  
24 fire?

25 A Yes, it does. It was an indication, at least

1 preliminarily, that the fire was very intense on the  
2 first floor.

3 Q Now, what other indicia of fire did you see  
4 when you looked at the front and the side of the  
5 building?

6 A On the second floor above the area of the door,  
7 there was a heavy soot staining over top of the door.  
8 And as I was able to look in through the window, I  
9 noticed that immediately above the area where the door  
10 is, there's a staircase that leads to the second floor.  
11 And based upon my observation, I was able to at least  
12 determine preliminarily, the staircase acted as a  
13 chimney, basically funneling the heat, smoke, and  
14 by-products of combustion to the second floor of the  
15 building.

16 Q Did you go around the side of the building?

17 A Yes, I did.

18 Q Tell me what you noticed when you went  
19 towards the side of the building, looking at the front  
20 windows and the side.

21 A From the front of the building, if you go around  
22 to the right side -- that's the southwest side of the  
23 building -- there on the first floor there was some  
24 soot demarcation over two windows, more significantly  
25 over the first window that was -- we later learned, was

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1 in the middle room on the first floor. There was heavy  
 2 soot staining over top of the windows.  
 3 we called that demarcation, and it was,  
 4 again, another indication that there was fire activity  
 5 on the first floor.  
 6 MS. LACKEN: S-1 in evidence, S-16 in  
 7 evidence, S-17.  
 8 THE COURT: S-17 for identification.  
 9 Q Let me first show you this one picture not  
 10 in evidence, Detective. It's S-17.  
 11 Do you recognize what that is?  
 12 A Yes, I do.  
 13 Q What is that?  
 14 A That's a picture of 340 Brunswick Avenue, and  
 15 it's a picture of the first- and second-floor windows  
 16 on the southwest side of the building. The first floor  
 17 windows are the two windows in the middle room of the  
 18 first floor of the structure.  
 19 Q And looking at that, does that look to you  
 20 to be how that house looked the day after the fire on  
 21 May 12 of 2002, when you were conducting your fire  
 22 investigation?  
 23 A Yes, it does.  
 24 MS. LACKEN: Your Honor, I ask S-17 be  
 25 moved into evidence.

1 THE COURT: Any objection?  
 2 MR. HAMILTON: No objection.  
 3 THE COURT: Into evidence.  
 4 (S-17 is marked into evidence.)  
 5 Q Detective, I ask you if you can describe --  
 6 MS. LACKEN: Your Honor, can we use your  
 7 pointer?  
 8 THE COURT: Sure. There's a trigger there.  
 9 THE WITNESS: Thank you.  
 10 Q Detective, I'm asking you to take a look at  
 11 S-1.  
 12 THE COURT: Can all of the folks see the  
 13 board?  
 14 MS. LACKEN: Excuse my back for a moment.  
 15 Q At the top is -- can you describe for us  
 16 the fire damage that you've just testified to? And  
 17 point to it on the pictures.  
 18 A I'm pointing to S-1 with the Judge's pointer.  
 19 THE WITNESS: Thank you, your Honor.  
 20 A This is the front side of the building, here at  
 21 340 Brunswick Avenue, and off to the right of the front  
 22 side, this is the southwest wall of the building. As  
 23 you can see on the first floor doorway, you can see  
 24 right over top of the red dot I have an area of clean  
 25 burn. That's the soot demarcation, the blackened area.

1 And then there's an area of white in that picture;  
2 that's what we call a clean burn.

3 Basically, what happens is the fire vents  
4 from that area so intensely, it burns the by-products  
5 of combustion off of the actual brick exterior of the  
6 building. Again, on S-1, on the southwest side, you  
7 can see there are two windows here.

8 THE COURT: Detective, it actually consumes  
9 the soot that otherwise would be there?

10 THE WITNESS: Yes, that is correct, your  
11 Honor.

12 Q Detective, and that is an indication of the  
13 fact that the fire was burning extremely fiercely, for  
14 lack of a better terminology, in that area?

15 A That's an indication of intensity of fire, yes.

16 In these windows, actually, is the middle  
17 room. You can see over the front window and over the  
18 second window there, there's heavy soot demarcation.  
19 This is an indication of the amount of soot that's  
20 coming out of these areas. And it was a preliminary  
21 indication to me that the fire was coming from the  
22 first floor of the building.

23 Q Looking at the side windows, you're saying,  
24 I see the area of soot, but I don't see any clean  
25 burns. Is that significant at all?

1 A It is significant because you can see that the  
2 front door has the clean burn. It's an indication to  
3 me that the fire came from the first floor, but it was  
4 very intense right by the front door of the building  
5 and not as intense near these windows (indicating).

6 Q The front door of the building, which would  
7 be right in front of the stairwell to the second floor?

8 A That is correct.

9 Q Now, when you arrived, Detective, on --  
10 there was still some fire suppression going on; is that  
11 correct?

12 A That is correct. They were conducting overhaul.  
13 That is basically a process where the fire department  
14 is searching for hidden pockets of fire, and they are  
15 trying to find those hidden pockets of fire and trying  
16 to extinguish that.

17 Q After -- in looking at S-17, do you see  
18 much soot damage at all on the second floor, or even in  
19 that attic area up top?

20 A If you look where I have the pointer, this is a  
21 second-floor window, you can see there is some very  
22 mild soot staining over the window, but it is  
23 significantly less than what's coming out of the  
24 first-floor windows.

25 Q That is significant to you because?

1 A It's significant to me because we know that the  
2 by-products of combustion smoke travels up. So this is  
3 the second-floor window, and you can see it doesn't  
4 have much soot demarcation, but yet the first-floor  
5 windows have very heavy soot demarcation over the  
6 windows, so there's indication there was fire activity  
7 here.

8 Q Does the soot that came out of the  
9 second-floor window, does that indicate to you that the  
10 second floor also had the smoke, but not as much fire?

11 A Yes. It did have some smoke, but it probably  
12 didn't have fire activity going on in that particular  
13 area.

14 Q In that particular room?

15 A In that particular room.

16 Q After your investigation on the outside,  
17 did you make any other notes of anything on the outside  
18 of the house that helped you in your investigation?

19 A Yes. We did look at the entranceway into the  
20 building. There was a door along the southwest wall,  
21 and I believe if you look right over top, this area  
22 here, you can barely see it because of these personnel  
23 in the way.

24 But there's a doorway that was used to get  
25 into the building, to gain access to the building, and

1 also, on the rear side of the building, there is a door  
2 that is a second-floor door. And you can tell that  
3 there was a staircase that had been there previously,  
4 and it was removed when the building was probably --  
5 probably when the building was boarded.

6 Q There is no means to get out of the top  
7 floor by a normal doorway or stairway except for inside  
8 the building from the stairwell?

9 A Yes, that is correct.

10 Q Now, that back door that you pointed to --  
11 I'm not quite sure whether or not it's visible in that  
12 picture -- but when you arrived, when you started doing  
13 your fire investigation, was it completely covered or  
14 not?

15 A It was not completely covered. There was  
16 basically a half covering; the bottom section of the  
17 door had been removed.

18 Q During the investigation, was the whole  
19 thing removed for ease of getting into and out of the  
20 building?

21 A Yes.

22 Q Now, the evening of the fire, May 11, 2002,  
23 did you go in the building to continue your  
24 investigation?

25 A Yes, I did.



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1 Q What did you do while you were inside?  
 2 A Basically, while we were inside, I learned that  
 3 evening that the conditions in the building were not  
 4 good, meaning that because of the water and because of  
 5 the fire damage, there were concerns about the  
 6 structural stability of the building.  
 7 So that evening, I did go into the building  
 8 to take a preliminary look at what we were dealing with  
 9 and had to make some decisions as to whether or not we  
 10 were going to continue the investigation that evening.  
 11 Q What were your decisions?  
 12 A Based upon a number of issues, number one, it's  
 13 always better to investigate a fire in natural lighting  
 14 conditions. When you use artificial light, you're  
 15 unable to identify the patterns as well. And also, you  
 16 can't see if the building is starting to shift at all  
 17 or a potential collapse.  
 18 So we made the decision that we were  
 19 basically going to take some preliminary photographs,  
 20 have the remains of the victim removed from the  
 21 building, and we were going to secure it overnight and  
 22 come back the next day so we were afforded the natural  
 23 lighting conditions.  
 24 Q When you were in the building, did you have  
 25 an opportunity to observe where the victim was?

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1 A Yes, I did.  
 2 MS. LACKEN: And S-9 in evidence, 36, and  
 3 62.  
 4 THE COURT: S-36 for identification.  
 5 MS. LACKEN: Yes, your Honor. And S-62.  
 6 THE COURT: And S-62.  
 7 Q I'm going to show you S-62 and S-36 that  
 8 have not yet been moved into evidence. And I'm going  
 9 to ask you, do you recognize what is depicted in S-62?  
 10 A Yes, I do.  
 11 Q What do you see?  
 12 A That is the second floor hallway of 340 Brunswick  
 13 Avenue, and about midway in the picture you can see the  
 14 remains of the victim, Ellis McNeill, in this case.  
 15 Q In looking at that photograph, is that how  
 16 you found Ellis McNeill to have been when you went up  
 17 and did your preliminary investigation on May 11?  
 18 A Yes.  
 19 Q I'm showing you S-36. Can you describe  
 20 what's in that photograph?  
 21 A Yes, I can. S-36 is a close-up picture of the  
 22 remains of the victim on the second floor hallway in  
 23 340 Brunswick Avenue.  
 24 Q In looking at that, is that how you saw  
 25 Ellis McNeill to have been back in May of 2002?

1 A Yes.

2 MS. LACKEN: Your Honor, I'm asking that  
3 S-62 and S-36 be entered into evidence.

4 THE COURT: Mr. Hamilton.

5 MR. HAMILTON: No objection.

6 THE COURT: Into evidence.

7 (S-62 and S-36 is marked into evidence.)

8 Q I'm also showing you now S-9, which is  
9 already in evidence. Detective, is that a very similar  
10 photograph to S-62?

11 A Yes, it is.

12 Q So now, for purposes of just your  
13 preliminary investigation, I'll ask you to take a look  
14 at that and describe what you see in this picture.

15 A Okay. Using the pointer again, this post is  
16 actually a wall, or the remains of a wall. The  
17 staircase is actually in this corner as you come up the  
18 stairs.

19 If you can see in the pointer, I'm circling  
20 approximately in the center of the picture. That's the  
21 remains of Ellis McNeill. His head is immediately  
22 adjacent to a radiator which is right here, and his  
23 feet are actually coming from this room (indicating).  
24 And we were later able to determine that was a room  
25 that he was occupying on the second floor.

1 Q When you were there, is there an  
2 approximate -- I mean, obviously, it's difficult to see  
3 because you can't see the entranceway up to the second  
4 floor. But approximately, how far away was he from the  
5 staircase?

6 A His head, which is right here, was approximately  
7 seven feet from the top step.

8 Q Now, in looking at S-36, can you describe  
9 what you're seeing here?

10 A Yes. In S-36, the clip is actually partially  
11 covering where the radiator is. Right here you can see  
12 this is actually a hand, and there is a jacket or a  
13 shirt covering the head of the victim. This area here  
14 is a shoulder, and this is the back area of the victim.

15 Q There's quite an amount of debris that is  
16 on or around McNeill's remains. Was that there when  
17 you got there?

18 A Yes.

19 Q Was that consistent with fire debris from a  
20 burning building?

21 A Yes, it is.

22 Q After you conducted your preliminary search  
23 inside -- and you've already indicated for obvious  
24 reasons why you didn't stay inside very long on that  
25 evening -- did you go outside and take part in any



1 investigation with witnesses?

2 A Yes, I did.

3 Q When you were outside, was there anyone  
4 that you had contact with that had information  
5 regarding the fire?

6 A Yes.

7 Q Who did you have contact with?

8 A A Curtis Hawkins.

9 Q Now, did you have an opportunity to speak  
10 to Mr. Hawkins yourself?

11 A Yes, I did.

12 Q Tell me where it was and how you were  
13 situated with regard to him.

14 A Basically, the detectives that were involved were  
15 out in front of the building. We were actually right  
16 in front of one of the fire chief's vehicles, because  
17 we were basically discussing with the chief, Chief,  
18 when do you think we can continue on? What do you  
19 think? How safe was the building?

20 We were having some general discussion, and  
21 I believe it was Detective Thomas and Detective  
22 Pollard, they said, Hey, we think we have a witness to  
23 the case, and they introduced me to Curtis Hawkins.

24 And I said to Mr. Hawkins -- he said, My  
25 name is Curtis.

1 I said, Hey, Curtis, I'm Detective Mathis.

2 Q Did you then begin to speak with him?

3 A Yes, I did.

4 Q Did you make any observations of Curtis  
5 with regard to his clothing, or what did you observe?

6 A Basically, I observed, you know, a gentleman who  
7 was standing there, he did not have any soot on him, he  
8 didn't smell of smoke. There were no odors coming off  
9 of his clothing.

10 Q Did he smell of gas?

11 A No, he did not.

12 Q And at that point, was he telling you about  
13 what he had witnessed regarding the fire?

14 A Yes.

15 Q Did -- before you left the scene, you had  
16 an opportunity to speak with him, you had an  
17 opportunity to go inside. Did you get a general story  
18 of what had happened?

19 A Yes, I did.

20 Q Based on the information given from that  
21 general story from Mr. Hawkins, were you looking for  
22 anything around the area that would have helped you,  
23 maybe not determine the start of the fire, but any  
24 evidence outside of the building that you may have been  
25 concerned with?

1 A Yes.  
 2 Q What was that?  
 3 A A plastic gas can.  
 4 Q Now, you had obviously gotten information  
 5 that might have been used in the fire?  
 6 A Yes, that's correct.  
 7 Q Where did you look for this plastic gas  
 8 can?  
 9 A We looked in the rear area of the building. We  
 10 looked at the adjacent structures that evening, and  
 11 then the next day we also called the fire department  
 12 back out with a ladder truck to check the rooftop areas  
 13 around the fire building to see if we could locate a  
 14 gas can.  
 15 Q How far did that gas can search spread out  
 16 from the building?  
 17 A Oh, I would say 2- or 300 feet in just about  
 18 every direction, rooftop also.  
 19 Q Was there any gas can found?  
 20 A No, there was not.  
 21 Q Now, while you were speaking with Curtis  
 22 Hawkins that evening, did he identify who the person  
 23 was who he thought started the fire?  
 24 A Yes.  
 25 Q Did he identify him?

1 A Yes. He said his name was Fruit.  
 2 Q Did he give you his real name?  
 3 A I don't believe he knew his real name.  
 4 Q Do you know for sure or don't you know?  
 5 A I don't know for sure. But I remember him  
 6 calling him Fruit specifically.  
 7 Q I believe you've indicated, but I'll ask  
 8 you again, when you decided to leave the scene, was the  
 9 scene secured?  
 10 A Yes, it was.  
 11 Q How?  
 12 A A Trenton police officer was left at the scene  
 13 and with specific instructions that no one is to go  
 14 into the building, on Sergeant Johnson's authority,  
 15 until we return the next morning.  
 16 Q That's to preserve the integrity of the  
 17 inside of the house?  
 18 A That's correct.  
 19 Q What time did you meet up the next day?  
 20 A The next day we met approximately 10:00 a.m.  
 21 Q Were other individuals -- did other  
 22 individuals come to help aid in the determination that  
 23 you were about to make?  
 24 A Yes.  
 25 Q Anyone else from the Mercer County

1 prosecutor's office?

2 A Yes.

3 Q Who?

4 A Detective Gary Wasko.

5 Q Who else met with you the next day?

6 A I believe Battalion Chief Richard Farletta, Chief  
7 Gliottone, Sergeant Johnson, and Detective Cadlett.

8 Q And the next day, just for the record, is  
9 May 12, 2002?

10 A Yes. It was Mother's Day.

11 Q Now, tell us how you began your  
12 investigation when you arrived on that Sunday.

13 A When we began the investigation, I initially  
14 checked with the Trenton police officer who was on the  
15 scene to ensure that no one had reentered the scene, or  
16 if the fire department had to reenter the scene for  
17 some reason, if a fire had to back up, whether they had  
18 to reenter.

19 I was advised they did not make any  
20 reentries to the scene and it had been secured  
21 overnight. And we asked Detective Cadlett to  
22 rephotograph the building from the outside again while  
23 we took some preliminary measurements of the building  
24 from the outside.

25 Q After taking the measurements, what did you

1 do?

2 A We basically, while Detective Cadlett was taking  
3 the outside photos, we took the measurements, and we  
4 also looked for the gas can again in the debris,  
5 hoping -- or from the outside, and hoping that we would  
6 be able to locate it. And we were unsuccessful in  
7 locating it.

8 Q Was that gas can ever found?

9 A It was not found.

10 Q Now, after doing a search of the area again  
11 on the outside, did you proceed to go inside of the  
12 home?

13 A Yes, I did.

14 Q Tell us what you did -- before you did  
15 that, did you make any determinations outside as to  
16 whether or not there were any sources of electricity or  
17 gas or anything like that running to the building that  
18 could have caused the fire?

19 A Yes. From the outside of the building, along  
20 that southwest wall, there are three meter boxes that  
21 are attached to the building, basically, for electrical  
22 service. The meters were not in place, and when PSE&G  
23 removes your meter, they put a red tag on that meter to  
24 indicate do not reconnect. So the meters were pulled  
25 and they were red-tagged, indicating there was no

1 electrical service to the building.

2 Q During your -- strike that.

3 what happened? You went inside?

4 A We did go inside.

5 Q Tell us which way you entered and how you  
6 conducted your investigation.

7 A We entered the structure from the southwest wall  
8 in the rear; there's an entranceway to come in.

9 There's a room there that appears to be a mud room or  
10 enclosed porch type room, and there were some recycling  
11 cans or trash cans in that area, and also some old  
12 clothing. There was very little, if at all, noticeable  
13 smoke damage in the area, but there was no fire damage  
14 or damage from radiant heat in the area.

15 Q You indicated there was no electric going  
16 to the building. Did you see whether there were any  
17 active gas lines going into the building?

18 A The evening before, on May 11, we learned that  
19 PSE&G had been at the scene, and there was no electric  
20 or gas service to the building prior to the fire, and  
21 it remained off to the fire.

22 Q Was there any running water?

23 A There was no running water to the building.

24 Q Where did you go from there? In the mud  
25 room, or in that area, there was mild smoke staining

1 but nothing of huge amount?

2 A No fire damage back there.

3 Q When you describe fire damage, let's be  
4 specific. Fire damage actually comes from the flame  
5 itself?

6 A Yes.

7 Q And then there's a thing called smoke  
8 damage?

9 A Yes.

10 Q That's the soot?

11 A Yes. Smoke damage is basically what we call  
12 demarcation. Basically, the smoke, when it's heated,  
13 when it goes across a surface that cools, it adheres  
14 itself to the surface, and we call that demarcation.  
15 But that's basically smoke damage.

16 Q Is there a difference between all of that  
17 and heat damage?

18 A Yes.

19 Q What is heat damage?

20 A Heat damage is basically caused by when the gases  
21 are superheated, they will cause some mild damage,  
22 usually at the roof level down. It will cause some  
23 paint to peel and cause some mild damage, but it  
24 doesn't cause deep impact into the material and cause  
25 charring or burning of the material.

1 Q When you proceeded in through the mud room,  
2 you went into the next room?

3 A Yes, that's correct.

4 Q What room was that?

5 A The kitchen area of the structure.

6 Q Now, what did you notice with regard to  
7 heat damage or smoke damage or fire damage in there?

8 A There was some smoke damage and mild heat damage  
9 at roof level. There was no damage caused by fire.  
10 And in that room there was also a stove, and that stove  
11 was disconnected from the gas connection and the gas  
12 connection had been capped off.

13 Q When you say at ceiling level, why is that  
14 significant at all?

15 A Because of combustion, materials will rise up.  
16 Once they hit the ceiling, they will basically start to  
17 spread throughout the structure at roof level, because  
18 they can travel linearly, they just travel along the  
19 ceiling level.

20 Q Take, for example, if you did a fire, it  
21 would mushroom out, hit the ceiling, and start  
22 blackening the walls?

23 A Yes. It's very similar to an ice cream cone, a  
24 sugar cone: If the fuel in that area is all equal, you  
25 basically start out with a point of an ice cream cone

1 and it widens out into a large cone. And then the  
2 flames and smoke start to hit the ceiling and they  
3 spread out from there.

4 Q So then the smoke damage that you found on  
5 the ceiling level was basically radiating from wherever  
6 the origin of the fire was?

7 A That's correct.

8 Q All right. Now, you went into the rear  
9 room next; is that correct?

10 A That is correct.

11 Q And what, if any, fire damage or heat or  
12 smoke damage did you observe in that room?

13 A In the rear room there was more smoke damage.  
14 And also in that area there was a -- as you went from  
15 the kitchen into the rear room, off to your left, there  
16 was an alcove area that basically was -- had a little  
17 doorway alcove. And there was a window that leads from  
18 the alcove into the rear room, or it looked very much  
19 like a dining room area.

20 Q And did you see anything in there?

21 A Initially, no, I did not see anything other than  
22 some smoke and heat damage at roof level.

23 Q Later on did you find more damage?

24 A Yes, I did.

25 Q We'll get to that in a minute.



1 After you went through that rear room, you  
2 went into the next room, which would be the middle  
3 room?

4 A Yes.

5 Q You're working from the back to the front.  
6 when you're in the middle room, what did you see?

7 A I see fire damage, very significant fire damage,  
8 particularly to a door that was -- the doorway leading  
9 from the rear room into the middle room received  
10 significant, significant fire damage on that door.

11 Q When you say "fire damage," actually  
12 charred remains of whatever was there?

13 A It charred the door to the point where it  
14 actually shrunk the size of the door. Because it  
15 partially consumed it, it shrunk it in size of the  
16 depth of the wood.

17 Q Had you made any notice of the fire damage  
18 up to the ceiling or any pieces of lath or anything  
19 like that falling?

20 A Some of the ceiling materials had fallen from the  
21 ceiling in that room. And also, the wooden trim around  
22 on the northeast wall of that room received significant  
23 damage near the floor.

24 Q Now, that middle room, was that adjacent,  
25 or was that the same room that we saw the two side

1 window pictures that you showed us a little while ago?

2 A Yes, it is that room.

3 Q Now, what did you see around the windows of  
4 that -- around the window area in that room?

5 A There was significant charring around the  
6 windowsill of both of those windows.

7 Q Does that mean that the fire was actually  
8 going through those windows?

9 A Yes, it does.

10 Q Now, what about the front room?

11 A Walking into the front room from the middle room,  
12 the doorway from the -- between those two rooms was  
13 significantly charred. And in that room -- in that  
14 next room, which is the front room, there's the  
15 staircase that goes to the second floor, and there's a  
16 wall that actually had some plywood covering over the  
17 wall there.

18 And the wood was actually consumed by the  
19 fire in that room. And I noted that to be pretty  
20 significant, that a piece of plywood that was that  
21 significantly burned, and it was gone. The only reason  
22 I knew it was there is because the nails into the studs  
23 still remained, but the wood, plywood, covering was  
24 gone, and there was a couple pieces in the bottom right  
25 corner of that wall.



1 Q what about the studs themselves?

2 A The studs were significantly charred behind the  
3 plywood. Normally, in a fire, the wall coverages will  
4 protect the studs behind the wall. But the wall  
5 covering was gone and the studs were significantly  
6 charred.

7 Q Now, that wall covering and those studs,  
8 that abutted or butted up against the stairwell?

9 A Yes.

10 Q And did you notice charring on the stairs?

11 A I did notice some charring on the stairs.

12 Q What about the rest of the room?

13 A I noted that the front door was significantly  
14 charred on the backside. When they close up the  
15 buildings that are abandoned, they use what we call a  
16 HUD closure. They basically use pieces of two-by-four  
17 and lag bolts through the wood covering to basically  
18 secure the door so you can't get into the building.  
19 And the two-by-fours were partially consumed on the  
20 inside portion of the door.

21 Q What about the -- with regard to the  
22 windows that faced the front of the house on the  
23 inside?

24 A The windows, again, had received some significant  
25 damage around the sill area partially consuming the

1 wood around those windows.

2 MS. LACKEN: S-3 in evidence, S-4 for  
3 identification, S-5 in evidence, S-6 for  
4 identification, S-7 in evidence, 8 in evidence, 20 for  
5 identification, your Honor, 25 for identification.

6 THE COURT: Identification, right. And 27  
7 for identification.

8 Ms. Lacken, I've been advised that  
9 refreshments are here. Would this be a good time to  
10 take a break?

11 MS. LACKEN: Sure, your Honor.

12 THE COURT: Before we get into the new set  
13 of pictures, ladies and gentlemen, the drinks have  
14 arrived, and you know the logistics that have caused us  
15 a little bit of a delay.

16 I should note when I explained to you about  
17 the witness and an expert witness, as with any witness  
18 that is presented before you, it's always your  
19 judgment. Because Detective Mathis has been qualified  
20 as an expert does not mean you are required to accept  
21 everything he testifies to.

22 Again, it's your judgment and your  
23 assessment of each and every witness that appears  
24 before you, and it's your verdict on that witness which  
25 governs. You can choose to accept, and I'll tell you,

1 you can choose to accept all of what he says, none of  
2 what he says, or any expert witness, so that's just by  
3 way of supplementation.

4 You can step down.

5 And please don't talk about the case. And  
6 we'll get you back here in 10 or 15 minutes, as soon as  
7 you're done.

8 (A recess is taken.)

9 SERGEANT-AT-ARMS: Remain seated.

10 THE COURT: All right. Welcome back,  
11 folks.

12 Are we ready to proceed?

13 MS. LACKEN: We are, your Honor.

14 THE COURT: Okay. Excuse me.

15 Incidentally, I did tell you that you have to be  
16 prepared for the conditions in here. Today it's warm  
17 outside, so it's cold in here; that's one of the  
18 natural consequences. So I hope you all are  
19 comfortable enough. If you're not, tell us, and we'll  
20 see what we can do about it.

21 MS. LACKEN: Thank you, your Honor.

22 Q Detective Mathis, up on the board we have  
23 S-3, the top picture, S-5, both of which are in  
24 evidence, and the bottom is S-6 for identification  
25 purposes, and S-20 for identification purposes.

1 And in looking at S-20, do you recognize  
2 what that is, briefly?

3 A You're pointing to S-6, Prosecutor.

4 MS. LACKEN: S-6.

5 A S-6 is actually a picture of the ceiling above  
6 the front room of 340 Brunswick Avenue.

7 Q And is that how that ceiling looked during  
8 your arson investigation on May 11 and May 12 of 2002?

9 A Yes, is it.

10 Q With regard to S-20, can you tell me what  
11 that is?

12 A S-20 is a picture of the backside of the front  
13 door. If you look in S-3 -- I'm pointing to S-3  
14 currently -- the white section here is the door --  
15 portion of the door that faces out towards the street.

16 Q Now, for identification purposes, does it  
17 look to be the same as it did when you did your  
18 investigation back on May 11 and May 12 of 2002?

19 A Yes, it does.

20 MS. LACKEN: At this time, without  
21 objection from counsel, because we've spoken, I'm  
22 asking that S-6 and S-20 be moved into evidence.

23 THE COURT: S-6 and S-20 are moved into  
24 evidence.

25 (S-6 and S-20 are marked into evidence.)

1 Q Let's discuss, because you've talked about  
2 how you went from back to front in doing your arson  
3 investigation, but for purposes of the jury, let's go  
4 from front to back.

5 In S-3, you have what in the photograph?  
6 A In S-3 you can see in the background; there's a  
7 fire truck in the background. This picture was taken  
8 on May 11. You can see that the front door trim here  
9 is not burned. That's from the outside, but as you  
10 walk into this room, you can see there's significant  
11 fire damage in this room. If you look around the  
12 window trim, you can see there is significant fire  
13 damage and --

14 Q Fire damage meaning charring? Actual fire  
15 burned that?

16 A That's correct. That's correct.

17 Here is the wall I spoke of earlier. These  
18 are the studs to the wall, and as you examine, see  
19 there's no covering on that wall, and there's  
20 significant burning to the studs. Even at floor level,  
21 you can see there's some debris here. But even at the  
22 base of the wall, there's significant burning here.

23 Q What is that indicia of with regard to  
24 origin of the fire?

25 A Well, when we're conducting fire investigations,

1 we look for the lowest most significant burn. That  
2 usually is where you're going to find your area of  
3 origin for a fire. And as you can see here, we've got  
4 burning at floor level; you can't get much lower than  
5 that. So this is definitely an area of interest, and  
6 we wanted to investigate that further.

7 Q And looking at S-20, you were talking about  
8 the front door area, and you said the white was the HUD  
9 covering on the outside.

10 With respect to the inside of the door,  
11 what do you see?

12 A Pointing now to S-20, you can see this is the HUD  
13 covering that I talked about. Basically, they put lag  
14 bolts through the two-by-four here on the inside, and  
15 you can see that there's significant charring here, you  
16 know, from the top of the door all the way down to the  
17 base of the door. You can see there's significant  
18 charring on the door and even some of the covering  
19 here. The wood in the stairwell here, it's all  
20 significantly burned.

21 Q With regard to those HUD coverages that  
22 you've indicated before, are they difficult to get off  
23 the --

24 A They're difficult for the fire department to gain  
25 entry to it. But you can see here this -- this

1 isn't -- at the end of this piece of two-by-four, if it  
2 were broken, you would see the clear part of the wood.  
3 This isn't broken, this is burned away.

4 Q So, therefore, if it's difficult for,  
5 obviously, the fire department to get in, it would be  
6 difficult for people without tools to get in or out,  
7 correct?

8 A That's correct.

9 Q S-5?

10 A S-5, again, is the -- this is a northeast wall on  
11 the first floor, front room. We've got the significant  
12 charring on the studs, but you can see right here in  
13 the corner, there's a little -- and right here on the  
14 second stud at the bottom, there's a little bit of the  
15 remnants of what the wall covering was, and it was  
16 actually a piece of plywood.

17 Q Now, do you see besides that -- I mean, do  
18 you see smoke damage in these photographs as well?

19 A There's heavy smoke damage in here, but  
20 particularly fire damage, which tells me there was a  
21 lot of intensity there.

22 Here there is some smoke damage, but in an  
23 area of origin you'll find a lot of smoke staining.  
24 But here, in the intensity of the fire, you don't have  
25 any smoke staining; you have some, but very little.

1 Q Mostly, it's fire.

2 A Mostly, it's fire. And it appears to me that the  
3 by-products of combustion couldn't attach to the walls  
4 because of the intensity of the fire.

5 Q The fire just ate the walls, and you say  
6 the by-products of combustion, the smoke just goes up?

7 A The smoke just goes up.

8 Q With regard to S-6 now in evidence, what do  
9 you see?

10 A You can see here in S-6, you can see there's an  
11 opening here in the ceiling level, and I -- it's my  
12 opinion that this was a partial collapse from the heat  
13 in this room.

14 Q And that would be right near the, I guess,  
15 the same area?

16 A It's directly over the area in S-3 which would be  
17 in this area here. Directly over top of that, you can  
18 see that the studs are in the background, the top  
19 portion of the studs. But it's directly over this area  
20 here on S-3, basically in the middle of the picture.

21 Q Area of the debris?

22 A Yes.

23 MS. LACKEN: S-5 is already in. S-7 in  
24 evidence, S-8 in evidence.

25 Q Take a look at what is in S-7. Can you



1 describe what room that is?

2 A Yes. S-7 is a picture in the middle room on the  
3 first floor of the building. This now, using the  
4 pointer, is the doorway that leads into the front room,  
5 and as you can see, the wood trim around this door has  
6 significant burning from floor to ceiling, or at least  
7 the top part of the door, and it's got significant  
8 burning around it.

9 In addition to that, you can see to the  
10 right of that, there's burning ash outside of this  
11 area, but this is a cedar closet, and the door for that  
12 cedar closet, you can see, is right on the floor. And  
13 the door, obviously, was in place at the time of the  
14 fire because it protected the contents inside of the  
15 cedar closet. But you can see the side of the door  
16 that is facing us does have significant burning on it.

17 Q In order to get to S-7 from the front room,  
18 you would go through this way. Is this basically  
19 the -- I don't know -- the doorjamb? I don't know --  
20 the molding around the door that would lead into the  
21 picture of S-7?

22 A Yes. The door is actually -- you can't see well  
23 from this picture, but the door is right along this  
24 wall here. And if you move left to right, that would  
25 be going through the doorway into the middle room.

1 Q Into this door and into the middle room?

2 A Yes. Now I'm pointing at S-7, this doorway. And  
3 you'd be coming from left to right into the room.

4 Q what is in S-8?

5 A S-8 is actually another picture in that same  
6 room. This now -- the window here to the right side of  
7 the picture is along the southwest wall. This is one  
8 of the two windows that I spoke of earlier about the  
9 demarcation over the windows, and this is another  
10 closet.

11 You can tell by the fire damage here, you  
12 can see the bottom portion of the door doesn't have a  
13 lot of damage, which indicates to me that it was  
14 probably partially closed at the time of the fire. But  
15 you can see at the upper levels here, you've got  
16 some -- you've got some burning here. And most of that  
17 was probably the movement of the fire towards the  
18 windows. Because you can see, once you go below the  
19 level of the window, you don't have any fire damage at  
20 the door.

21 So once the fire grew, it was seeking  
22 oxygen, and it grew in intensity right near the  
23 windows, once it got the oxygen, it needed to continue  
24 the combustion process. Additionally, you have a lot  
25 of the lath material, which is the roofing material at

1 the top of the room. There was a partial roof collapse  
2 in the room.

3 Q Are you talking about a ceiling collapse?

4 A Yes, ceiling collapse here. And going to the  
5 left, you can see this is part of the door leading into  
6 the rear room or the dining room area, and you can see  
7 the wood trim here is also burned, ceiling to floor.

8 Q Fire damage?

9 A Yes. Going back to S-7, you can see along the  
10 wood trim, along the base of the wall -- this is now  
11 the northeast wall of the room -- you can see there's  
12 burning all along the trim here, and there's also  
13 burning along the trim here (indicating).

14 Q What's that significant of?

15 A It's significant because the burning is low  
16 throughout two different rooms. And if you have an  
17 area of origin, usually you'll see the fire damage  
18 rises up as it grows in intensity, because it starts  
19 from its area of origin.

20 Now, pointing to S-8, you can see there's  
21 an area that's unburned here in this closet door, and  
22 you can see that it's almost equal to the level of the  
23 burn in the window. And that's why it's unburned  
24 because the fire grows and it burns up and out. But  
25 you've got significantly low burning through this room,

1 through the next room, and I was starting to have some  
2 suspicion as to what was causing this fire.

3 Q Now, when you have low burning in one room  
4 and in the other, does that signify to you or draw your  
5 attention to the fact that the fire is not just  
6 burning, but it's moving in a pattern?

7 A Yes.

8 Q Moving in a line?

9 A Yes. At floor level.

10 Q And it's traveling?

11 A And it's traveling at floor level.

12 Q Is that normal? Is that a normal  
13 progression of fire if there's no type of flammable  
14 liquid involved?

15 A That's not a normal progression of fire.

16 THE COURT: Detective, what would be the  
17 normal progression of fire as contrasted to this?

18 THE WITNESS: Your Honor, a normal  
19 progression of a fire, basically, what you would have  
20 is in its area of origin, it would start at its origin,  
21 and it would grow up and outward like an ice cream  
22 cone.

23 If we put up a two-dimensional surface like  
24 a wall, you would have a V- or a U-shaped pattern, and  
25 those are the V patterns in the old days fire



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1 investigators would talk about. You would see it on a  
2 two-dimensional surface.

3 THE COURT: And it would go up --

4 THE WITNESS: And then it would go up. And  
5 then what would happen is your hot layer of gas would  
6 then spread across the room, and if it were confined  
7 within the room, i.e., the doors were all closed, then  
8 what would happen is you would have a hot layer of gas  
9 that would bank down from the ceiling and would come  
10 down the walls.

11 And then you would get a temperature rise  
12 until about 1100 degrees Fahrenheit, at which point all  
13 of the combustion material in the room would ignite at  
14 one time. And that's a condition called flashover, and  
15 that's the normal progression.

16 And then immediately after that, the  
17 temperature would rise in excess of 2000 degrees  
18 Fahrenheit.

19 THE COURT: Thank you.

20 Q Now, we have identification S-27. Can you  
21 recognize what that is?

22 A Yes. S-27 is the door leading between the middle  
23 room and the dining room or rear room of 340 Brunswick  
24 Avenue.

25 Q Looking at that, does that look as it was

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1 back in May of 2002 when you were doing your  
2 investigation?

3 A Yes, it does.

4 MS. LACKEN: I ask that S-27 be moved in.

5 THE COURT: Any objection?

6 MR. HAMILTON: No objection.

7 (S-27 is marked into evidence.)

8 Q With regard to S-8, you said there was a  
9 doorway to the left that led into the third room.  
10 Looking in that picture in S-27, is that the doorway?

11 A Yes, is it.

12 Q What do you see in that photograph?

13 A What is significant in this picture, ladies and  
14 gentlemen, is you can see there's fire damage here  
15 around the door, but the door itself at floor level is  
16 burned so severely that you're starting to get a white  
17 ash onto the door. And it actually, the fire was so  
18 intense here that it actually shrunk the depth of the  
19 door because of the intense heat and fire that was  
20 taking place right here at the door.

21 And later on in my examination, I actually  
22 removed this door and examined it more closely  
23 underneath of the door, the area here that I'm pointing  
24 to with the laser pointer.

25 Q Did you find something significant about

1 that examination?

2 A Yes, I did.

3 Q What was that?

4 A There was also significant charring under the  
5 door, and that is extremely unnatural in the natural  
6 progression of a fire, to have burning underneath of a  
7 door.

8 Q So then what did that signify to you?

9 A I had suspicion that there was a flammable liquid  
10 used to start this fire.

11 Q And that the fire was traveling at floor  
12 level because it was following the path of the  
13 flammable liquid?

14 A That is correct, Prosecutor.

15 Q Now, do you notice anything else with  
16 regard -- so for S-27, the fire progressed now towards  
17 the back of the house?

18 A Yes. And additionally, the -- next to the door  
19 you can look at the wood trim again, and you're getting  
20 ash that's left along the wood trim here. And you can  
21 see that there's some demarcation here around the --  
22 that's basically what we call a shadow pattern, and  
23 it's actually moving the smoke around the outside of  
24 the door.

25 And you can see there's a clean area here.

1 That's actually a pattern that indicates that the fire  
2 kind of progressed this way, because you can see that  
3 there's a small area of clean, and then there's an area  
4 of demarcation where the by-products of combustion are  
5 leaving themselves around the outside trim of the door.

6 Q Detective, let me ask you then: So if the  
7 fire was set in the middle of the room, would you see  
8 fire damage like you're seeing here?

9 A No, you wouldn't. And the reason is because this  
10 shadow pattern -- and basically what this means is the  
11 fire progresses this way, and it leaves a small gap  
12 space as it travels over the door.

13 Q Well, I think -- maybe I was unclear. What  
14 I'm trying to get at is if the fire was set near the  
15 windows or something to that effect, would you see the  
16 progression on the floor line through the doors that  
17 you're seeing here?

18 A No. You wouldn't have -- if the fire was set  
19 near the windows, you'd have significantly low burning  
20 right here at the base of the window and then it would  
21 burn up and out. Here you can see, along the doorway,  
22 you've got burning at floor level. And it goes,  
23 travels all the way to the end of the picture here.

24 And this small area of unburned material  
25 right adjacent to the door, what's happens is as the

1 fire travels along the door, it travels, and then  
 2 there's a small dead area of air. And because there's  
 3 nothing to burn right there, it jumps just a little  
 4 bit, and then it attaches itself back to the wall.  
 5 That's the reason why you have this clean line here,  
 6 and then you have the demarcation along the door.

7 Q Then my question to you then is, in looking  
 8 at that -- and I know you have more of your  
 9 investigation to go -- but when you're looking at that,  
 10 did your suspicion rise as to -- well, strike that.

11 It was clear, then, that this fire was  
 12 traveling through all of the normal doors to get out of  
 13 the building?

14 A Yes. Because the only way for you to get out of  
 15 the building was to travel through -- if you were  
 16 coming from the second floor, you'd have to come down  
 17 the stairs right by the front door. You'd have to make  
 18 a left-hand turn, come through the first floor, come  
 19 through the middle room, come through this third room,  
 20 and come through the kitchen through the back mud room  
 21 area and then out the rear door. So, you know,  
 22 basically, you'd have to come through all of this to  
 23 get out of the building.

24 Q Did you then, after you were finished with  
 25 that part of your investigation on the first floor,

1 travel then to the second floor?

2 A Yes, I did.

3 Q What did you do there?

4 A Basically, I looked at the damage on the second  
 5 floor and looked through all of the rooms on the second  
 6 floor.

7 Q What did you note on the second floor?

8 A On the second floor, once you got to the top  
 9 step, if you made a right-hand turn and made another  
 10 right-hand turn, you actually entered a room that was  
 11 over top of the front room. That room, I believe, had  
 12 a sofa, or possibly two sofas and a chair in there.  
 13 And there was a lot of debris that had fallen, probably  
 14 from the fire department overhauling the room.

15 MS. LACKEN: S-35 in evidence, your Honor.

16 THE COURT: In evidence, yes.

17 MS. LACKEN: And S-62.

18 THE COURT: Already in evidence.

19 Q Can you describe in S-35 how you would come  
 20 upstairs? And talk about the room that already had the  
 21 couches in it.

22 A S-35 in the middle of the picture, you can --  
 23 outlining, basically, the wooden trim that was the  
 24 stairwell. You would come to the top of the stairs,  
 25 make a right, and there's a small walkway that leads

1 into a room back here. You can see there's a  
2 firefighter that is attempting to get out of this  
3 picture in this back section here, or front section.

4 Q That's towards the front of the house where  
5 the windows are?

6 A That's the front of the house where the windows  
7 are. In this picture you can also see there's -- see  
8 heat damage and smoke damage here on the second floor.  
9 If you remember my earlier testimony about how the  
10 smoke starts at the ceiling, and it starts to bank down  
11 the wall, you can see there's a smoke demarcation line  
12 here. That banks down a few feet from the floor.

13 Q Which means that there was smoke,  
14 basically, throughout that entire area?

15 A Yes, and heat.

16 Q Now, you also continued your -- your  
17 assessment on that second floor?

18 A Yes.

19 Q And what did you see? What other types of  
20 fire damage do you note in those two pictures?

21 A Here in S-62 you can see there's a smoke layer  
22 here that is about the top of the radiator, and there's  
23 some peeling of the paint from heat. But there's no --  
24 there's no flame impingement or direct flame contact to  
25 the material here. It's just heat damage and smoke.

1 Q When you say "heat and smoke," you  
2 indicated there was no fire up there, but the heat and  
3 smoke, what type of heat are we talking about?

4 A Well, you're talking temperatures, 8-, 900  
5 degrees Fahrenheit at this level. I mean, it's  
6 actually -- you know, you use a heat gun to melt heat  
7 or melt paint, to remove paint. You can see the paint  
8 is peeling off the walls here; that's pretty intense  
9 heat. And the by-products of combustion, you have  
10 carbon monoxide, carbon dioxide, hydrogen cyanide are  
11 all part of the by-products of combustion.

12 Q Was all of that heat, that 8-, 900 degrees  
13 Fahrenheit, that was all on the second floor you're  
14 pointing to?

15 A Correct. And it used the natural staircase,  
16 because there's no door on the staircase, that acts as  
17 a chimney effect. It funnels all of that smoke and  
18 soot and all of that heat up the staircase to the  
19 second floor.

20 Q Now, was there smoke damage in other of the  
21 rooms in -- that's obviously the hallway in the rooms  
22 you looked at on the second floor; obviously, the first  
23 one where we see the firefighter. Did you go into the  
24 other rooms on the second floor and see what type of  
25 damage was in there?



1 A Yes, I did.

2 Q And was there smoke damage and heat damage  
3 in those rooms as well?

4 A Yes. There was smoke and heat damage in the  
5 rooms, but it got progressively less as we went towards  
6 the rear of the building.

7 Q Indicating what to you?

8 A Indicating that the smoke came off from --  
9 primarily from the staircase, and then it traveled back  
10 towards the rear of the building.

11 Q Now, based on your assessment of the first  
12 and the second floor, I think you already testified  
13 that you at least were getting a suspicion that the  
14 area of the lowest and most severe damage was in the  
15 front room area?

16 A Um-hum.

17 Q What, then, did you do in your  
18 investigation?

19 A Basically, once we completed our examination of  
20 the second floor, we basically went back to those two  
21 rooms and started examining the debris and removing  
22 debris from those two rooms.

23 Q When you say "removing debris," how did you  
24 do it?

25 A Basically, what fire investigators do is they'll

1 take the debris that's in that room, we'll get a  
2 shovelful of it, we'll move it around to make sure that  
3 there's nothing of evidentiary value in the debris.  
4 And then we shovel it into a container or we shovel it  
5 out of the window.

6 Q With regard to the first room of debris  
7 that you were going through there, did you find any  
8 significant debris, meaning anything of any nature, in  
9 there besides the building material?

10 A I believe there was a shopping cart that was in  
11 that front room, and we had to remove that, obviously,  
12 to get it out of the room.

13 Q I think what I'm getting at, Detective, you  
14 took part in the examination of that room; is that  
15 correct?

16 A Yes, that's correct.

17 Q Was there any indicia of the plastic gas  
18 can being left in that house?

19 A No, there was not.

20 Q How would you know that?

21 A Part of what fire investigators are trained in  
22 is, obviously, your household appliances or things you  
23 have in your house, once there's a fire, it doesn't  
24 look the same. It's still there, it's changed form.  
25 It may be melted, it may be discolored, it may be -- it

1 changes form, but the material itself is still there.  
 2 So we're trained on how to identify things  
 3 that, you know, normally would be in a house, or things  
 4 that wouldn't normally be in a house, and what it looks  
 5 like after it's been exposed to that kind of fire.  
 6 A gas can will change color, it will change  
 7 shape. I've seen them pinkish color more so than the  
 8 red, or an orangey color more so than the red, but the  
 9 plastic itself will just kind of adhere to itself and  
 10 it will still have an odor of gasoline.  
 11 Q If in fact that was left in this fire, you  
 12 would have expected to find it?  
 13 A That is correct.  
 14 Q Did you find it?  
 15 A I did not.  
 16 Q Meaning, obviously, that someone who set  
 17 the fire took that with them?  
 18 A Based upon the fact that we searched the outside  
 19 area around the building and we searched inside of the  
 20 building, I would say whoever set this fire took the  
 21 gas can with them.  
 22 Q Now, so when you started to remove the  
 23 debris, what did you do thereafter? I mean, you're  
 24 moving the debris. When you're going through the house  
 25 before moving the debris, are you smelling anything?

1 A Yes. In fact, on May 11, the evening of the  
 2 fire, it was reported that firefighters smelled an odor  
 3 of gasoline in the structure.  
 4 Q When you were going through, did you smell  
 5 anything?  
 6 A Initially, I did not smell any odors of gasoline,  
 7 but when we started moving the debris around, I did get  
 8 a strong odor of gasoline in the structure.  
 9 Q In order to clear the debris, you shoveled  
 10 it out, obviously, and then what did you do? You  
 11 washed it down?  
 12 A Yes. Basically, what we do is we remove the  
 13 debris from the room, and then we use a fire hose to  
 14 wash the remaining soily water, dirty water or dirty  
 15 material, and wash it away so we can actually get a  
 16 look at the floor to see if there's any patterns that  
 17 are on the floor itself.  
 18 Q Is that what you did in this case?  
 19 A Yes, it is.  
 20 MS. LACKEN: Your Honor, for  
 21 identification, S-21 and 22, S-24 for identification,  
 22 28 for identification, 29 for identification, 31, and  
 23 32 all for identification purposes.  
 24 Q Detective, we're going to go through these  
 25 briefly, because they are not yet in evidence, okay.



1 S-21 for identification, do you recognize  
2 what that is?

3 A S-21 is a picture taken from outside of the front  
4 door, 340 Brunswick Avenue. You can see the staircase  
5 in the picture.

6 Q Does that look substantially the same back  
7 when you made your personal observations in May of  
8 2002?

9 A Yes, it does.

10 Q S-22?

11 A S-22 is a picture of the -- through the front  
12 door again. It's now taking a picture of the floor  
13 just in front of the staircase leading to the second  
14 floor.

15 Q Does that adequately reflect how that area  
16 looked after you did some debris removal back in May of  
17 2002?

18 A Yes, it does.

19 Q S-24?

20 A S-24 is a picture of the first floor, front room  
21 of 340 Brunswick Avenue, in May of 2002.

22 Q That was after debris removal?

23 A That was after debris removal.

24 Q S-28?

25 A S-28 is another picture of the first floor, front

1 room of the first floor after we removed the debris.

2 Q S-29?

3 A S-29 is a picture through the doorway leading  
4 from the front room to the middle room of 340 Brunswick  
5 Avenue, first floor.

6 Q S-31?

7 A S-31 is a picture of the middle room on the first  
8 floor of 340 Brunswick Avenue.

9 Q After debris removal?

10 A After debris removal.

11 Q And finally, S-32?

12 A S-32 is a picture of that middle room again with  
13 the doorway leading from the middle room to the dining  
14 room or rear room area.

15 MS. LACKEN: Your Honor, I'm asking that  
16 S-21, 22, 24, 28, 29, 31, and 32 be entered into  
17 evidence.

18 THE COURT: Any objection?

19 MR. HAMILTON: Consent.

20 (S-21, 22, 24, 28, 29, 31, and 32 are  
21 marked into evidence.)

22 THE COURT: And that's -- 31 and 32 are the  
23 last?

24 The CLERK: Yes.

25 MS. LACKEN: Yes, Judge.

1 THE COURT: In evidence.

2 Q A couple of these I want to go over briefly  
3 and I will put some up.

4 what are you looking in in S-21?

5 A In S-21 you're looking at the stairwell leading  
6 from the first floor to the second floor, and you can  
7 see that there is some significant damage, not as  
8 severe as in other areas, but there is a pattern of  
9 movement of the fire going from the first floor up the  
10 staircase to the second floor.

11 Q Basically, what S-21 is showing you, the  
12 fact that's fire damage, not just smoke?

13 A Yes, there is some fire damage and smoke damage.

14 Q S-22?

15 A S-22 shows you, basically at floor level, you can  
16 see there's a burn pattern here. And in fact, this  
17 area is actually covered by a tile. You can see the  
18 white material here is actually tile. In the center of  
19 the picture here you can see that the tile is actually  
20 gone; it's been consumed by the fire. And there's  
21 actual burning in the wood underneath of the tile, so  
22 much so that this one area here right by the front door  
23 is actually consumed, a good portion of the wood.

24 And while we were conducting our  
25 investigation, we actually used the area that was

1 consumed by the wood to poke a hole through the floor.  
2 So actually, after we washed the floor down, the water  
3 would run off so we could get the pictures here without  
4 the water being in place.

5 Q Are you seeing a pattern here?

6 A I'm seeing a significantly low burn pattern, and  
7 it was intense enough that it consumed the tile  
8 flooring right by the front door.

9 Q Detective, we'll start with S-24 in  
10 evidence now. What's it a picture of? And describe  
11 what you see on the floor.

12 A S-24, you have some lighting and also a debris  
13 bucket. That's me in the picture. And if you look  
14 here at the doorway here leading from the middle room  
15 into the front room, you can see that there's a dark  
16 discoloration pattern that I'm kind of outlining for  
17 the jury.

18 You can see this pattern here, and it goes  
19 all the way out towards the front door. And it's right  
20 here in that area that I talked about earlier where the  
21 trim was, and there's significant burning along the  
22 trim area, and there's a burn pattern right into the  
23 wood flooring in this room.

24 Q Does that -- what is that significant to  
25 you as? Obviously, we talked about it before, that

1 there's a line of travel.

2 Did you see, in looking at this picture and  
3 the rest of them, something known as a trailer or pour  
4 pattern?

5 A Yes, a trailer.

6 Q What does that mean?

7 A It's any combustible material that's used to  
8 transport the fire from one room to the next room.

9 Q In English, what does that mean?

10 A In English, it means that somebody is trying to  
11 put the fire in particular locations. In this  
12 particular fire, somebody took an ignitable liquid,  
13 gasoline, and poured it at the base of the steps here,  
14 pours it through this room, pours it into the middle  
15 room, and then ends right up at the rear room or the  
16 dining room area.

17 Q If there wasn't an ignitable liquid, and if  
18 there wasn't a significant amount, would you see this  
19 pour pattern or this trailer going through the rooms  
20 here?

21 A You would not.

22 Q In looking at that, is -- is that something  
23 that when you look at it, boom, you know there was  
24 something ignitable used here?

25 A Absolutely.

1 Q In S-28, you -- it's a different view, but  
2 you're showing -- I guess it talks about, or at least  
3 shows what you were talking about with regard to going  
4 into various rooms; is that correct?

5 A That's correct.

6 Q In the top of S-28, where is that headed?

7 A In the top of S-28, it's heading into the middle  
8 room. This is the front room, but you can see that the  
9 pattern itself comes through the doorway here. And  
10 what happens is when you put a liquid down on the  
11 floor, just like if you spill milk in your kitchen or  
12 something, it falls on the floor and it immediately  
13 spreads out.

14 This is what you have here. It's been  
15 poured and it spread itself out into the point you have  
16 this pattern here.

17 Q It's getting significantly lower when  
18 whoever is pouring it is going through the door, and  
19 then it's being spread out further in the room, in  
20 S-31?

21 A That's correct. What happens is when you pour  
22 this, obviously, the doorway itself constricts where  
23 the liquid will go. It has no place to expand out.  
24 Once you pour it into the next room, you see some  
25 expansion out into the next room.

1 Q This is the middle room towards the back of  
2 the house?

3 A I'm pointing to S-31. This is now the middle  
4 room here, and you can see the burn pattern here in the  
5 middle room. Again, you have -- we've cleared some of  
6 the debris away. You can see there's a consistent burn  
7 pattern at floor level all the way down the trim along  
8 the northeast wall here. You have a little bit here  
9 right at the edge of the doorway between the front room  
10 and the middle room, but significantly here along this  
11 wall, you have -- you have --

12 Q The charring?

13 A Yes. And what's interesting about this is just  
14 above that char, look at how clean the wall is. It's  
15 clean. And the reason it's clean is because this fire  
16 is so intense, it burns up all of the by-products of  
17 combustion. It can't adhere to the wall because of the  
18 intensity of the fire.

19 Q The areas that are lighter, obviously, are  
20 the areas where the fire itself didn't travel?

21 A Yes. We cleaned this floor out to the edge of  
22 the burn pattern, so we did check the other, the rest  
23 of the flooring here, and we did not have the  
24 significant burn pattern that the rest of the room had.

25 Q In looking at S-29, it's that middle room

1 and it's going towards where?

2 A This is a picture of -- taken in the doorway  
3 between the front room, which would be at the bottom of  
4 the picture, into the middle room. And, again, this is  
5 just another angle of the picture, but you can see the  
6 burn pattern, and you can see there's significant  
7 burning at floor level. And you also have -- there is  
8 actually some seeping into the actual spacing in the  
9 flooring itself.

10 Q Now, this is S-32, that same room now going  
11 into the third room, the end of the pour pattern which  
12 you couldn't see in the other photographs, correct?

13 A That's correct. This is the end of the pour  
14 pattern here. Again, now, you can put the pour pattern  
15 in relationship to that door that I talked about  
16 earlier where you have the ash actually on the outside  
17 portion of the door, and then you have a brief  
18 demarcation right here. And then the rest of the wall,  
19 you can see very clearly, is clean of any smoke  
20 staining whatsoever.

21 Q S-39 for identification purposes, what is  
22 that?

23 A S-39.

24 Q Briefly, because it's not in evidence yet.  
25 what is that?



1 A S-39 is a picture taken from the rear room or the  
2 dining room area. And that's taken a picture of the  
3 doorway leading into the middle room.

4 Q Did that look as it did after debris  
5 removal back in May of 2002?

6 A Yes.

7 MS. LACKEN: I ask that S-39 be moved in.

8 MR. HAMILTON: No objection.

9 THE COURT: Into evidence.

10 (S-39 is marked into evidence.)

11 Q With regard to S-39 this is the third room  
12 towards the back of the house. What do you find?

13 A Again, you see the burn pattern on the doorway,  
14 but you can see in this picture there are three small  
15 burn marks on the floor. Initially, once we cleaned  
16 this out, we tend to go a little farther than we need  
17 to clean out.

18 And I'm actually real glad we did that in  
19 this case, because there are three little spots that  
20 look like a drip pattern that after, whoever poured the  
21 ignitable liquid -- when you fill your lawn mower at  
22 home, anytime you fill your lawn mower and you turn  
23 your gas can back up, there's always that little drip.  
24 That's what you have here, where it dripped out of the  
25 gas can or container that was used to ignite the fire.

1 Q So -- okay, and again, is obviously a  
2 volatile substance. To start this fire, based on what  
3 you've seen here, all of the damage and then the  
4 pattern that you've seen, including the drip patterns  
5 in that third room, could someone have just bent down  
6 and struck a lighter or anything like that?

7 A If someone bent down and struck a lighter to  
8 this, and we probably would have seen some fire-related  
9 injury, you would have at least seen singed hair,  
10 eyelashes burn, probably some burning to the hair on  
11 the skin. Anything that would have been exposed  
12 probably would have been burned, if they were able to  
13 touch some kind of flame directly to the pool.

14 Q What does that indicate to you, then?

15 A It indicates to me that whoever lit this fire was  
16 either going to have burn injuries, or that they had to  
17 have set themselves some distance away and been able to  
18 ignite the fire by either -- lighting something and  
19 tossing it into the area.

20 Otherwise, I think they probably would have  
21 had some burns. And by the way, that was checked that  
22 evening. The area hospitals were checked to see if  
23 anybody reported any burn injuries.

24 Q Did Curtis Hawkins have any?

25 A He did not.

1 Q Now, in looking at those burn patterns and  
2 during your investigation, did you make a determination  
3 as to origin and cause and manner of that fire?

4 A Yes, I did.

5 Q And what were your opinions?

6 A My opinion is, is that an ignitable liquid, in  
7 this case, gasoline, was placed on the flooring by the  
8 front door, and it was trailed from the front door  
9 through the first room here, through the middle room,  
10 right to the edge of the door here, and then it was  
11 ignited in this area.

12 Q Could that flame have been ignited at the  
13 bottom of the stairs?

14 A It could not have.

15 Q Why?

16 A For a couple reasons: Number one, the reason why  
17 you have this demarcation here is because the intensity  
18 of the fire is not hot enough right at the ignition  
19 source, but it rapidly gets to a temperature that keeps  
20 the soot from burning on the walls in this area. So  
21 this is -- this line right here is telling me that this  
22 is probably our area of ignition right here.

23 Because what happens is, is it starts,  
24 there's enough soot staining, the fire starts and it  
25 moves this way. And it rapidly gains temperature,

1 enough that the soot staining does not stay on the  
2 walls and it starts to burn back through all of this.

3 And then the other reason is, if you  
4 ignited it here, that doorway is closed. If you  
5 ignited it there, we would have found him in the  
6 building, because this person would have been in the  
7 gasoline pool that had ignited.

8 Q Then it's clear, then, that in order to get  
9 out of that building, that person had to be at least in  
10 the third room to have started that fire, and they  
11 wouldn't have been able to touch it without having  
12 thrown something in it.

13 A That is my opinion. Otherwise, that person would  
14 have had burn injuries, if they had ignited it  
15 otherwise.

16 Q Now, when I asked you previously -- we  
17 talked about whether or not there was any electric to  
18 the building, there was no gas lines to the building,  
19 no water, correct?

20 A That is correct.

21 Q So, then, do you have an opinion as to the  
22 cause of this particular fire?

23 A Yes.

24 Q What is that?

25 A The cause is some type of open flame source. An



1 open flame source could be a match, a lighter, or some  
2 kind of open flame was used to ignite this fire.

3 Q When you say "lighter," it had to be  
4 something that was thrown into it?

5 A Something that was thrown in here. I would say  
6 it could have been anything, but something on fire with  
7 a flame on it was tossed into that room.

8 Q Now, because of what your opinion was here,  
9 were there specimens taken of the floor and of other  
10 areas of the house to confirm your, I guess, your  
11 opinions?

12 A Yes.

13 Q Who took those specimens?

14 A They were taken under -- I actually supervised  
15 the evidence being collected but, they were collected  
16 by Detective Gary Wasko from the Mercer County  
17 Prosecutor's Office.

18 MS. LACKEN: If I could have just a second,  
19 Judge.

20 THE COURT: Sure.

21 MS. LACKEN: At this time, I don't have any  
22 further questions of Detective Mathis.

23 THE COURT: Cross-examine.

24 CROSS-EXAMINATION BY MR. HAMILTON:

25 Q Detective Mathis, would it have been

1 possible to light a paper like that and throw it in?

2 A It would have been possible to ignite a piece of  
3 paper and throw it in. Probably they wouldn't have  
4 balled it as tightly, because you need to have air  
5 space on the piece of ignitable paper to continue the  
6 combustion process. But it would be able to --

7 Q Have a wick or a fuse?

8 A Yes, that's correct.

9 Q Based on your investigation, can you give  
10 us an estimate of when this fire started?

11 A I would say probably -- if I had to give you a  
12 time estimate, I would say that fire probably started  
13 no more than 15 or 20 minutes before the fire  
14 department was called. Because this fire is going to  
15 develop rapidly.

16 Q Do you know off the top of your head, or  
17 with reference to materials before you, approximately  
18 what time of day that would have been?

19 A I would assume it would have been -- if the fire  
20 department was called at 10:15, I would estimate  
21 probably that fire could have started at five minutes  
22 before 10:00, but probably within that time frame.

23 Q Okay. Now, all of these pictures that you  
24 testified to, were they all taken the next day or were  
25 some taken that first day?

1 A Some were taken the first evening, and some were  
2 taken the second day, which was May 12.

3 Q When did you -- when did you leave the  
4 structure that first evening?

5 A I want to -- I believe I probably left sometime  
6 after midnight.

7 Q Okay.

8 MR. HAMILTON: No further questions. Thank  
9 you.

10 THE COURT: Any redirect?

11 MS. LACKEN: None, your Honor.

12 THE COURT: Thank you, Detective. You may  
13 step down.

14 THE WITNESS: Thank you, your Honor.  
15 (The witness is excused.)

16 THE COURT: Call your next witness, please.

17 MS. LACKEN: Detective Gary Wasko.

18 G A R Y W A S K O, STATE'S WITNESS, SWORN.

19 The CLERK: Please state your name.

20 THE WITNESS: Detective Gary Wasko.

21 THE COURT: Good morning, Detective.

22 THE WITNESS: Good morning, your Honor.

23 THE COURT: Prosecutor.

24 DIRECT EXAMINATION BY MS. LACKEN:

25 Q Good morning, Detective Wasko. Where are

1 you employed?

2 A Mercer County Prosecutor's Office.

3 Q How long have you been employed with that  
4 office?

5 A Approximately five years.

6 Q What are your present assignments?

7 A I'm assigned to the insurance fraud investigation  
8 unit as well as the arson investigation unit.

9 Q Now, during your employ at the Mercer  
10 County Prosecutor's Office, have you received training  
11 in arson investigation?

12 A Yes, I have.

13 Q Are you a certified arson investigator?

14 A Yes, I am, through the State of New Jersey.

15 Q And is that the same certification program  
16 that's run by the Division of Criminal Justice?

17 A Yes.

18 Q Have you received other training in the  
19 area of arson that dealt with the collection of arson  
20 specimens?

21 A Yes.

22 Q Approximately how many hours of training  
23 would you estimate that to be?

24 A Numerous. I started in college. I have a  
25 background in fire science, bachelor's degree, and on a

1 yearly basis we do arson collection evidence and  
2 training courses. I wouldn't be able to give you an  
3 exact number. Numerous hours.

4 Q Prior to your employ at the Mercer County  
5 Prosecutor's Offices, did you have any other employment  
6 in fire, either investigation or suppression?

7 A In investigation, I worked for a private  
8 consultant out of Philadelphia doing investigations,  
9 and I've been a firefighter for Lawrence Township for  
10 13 years.

11 Q So you have experience both with fire  
12 suppression and with the actual investigation of origin  
13 and cause?

14 A Yes, I do.

15 Q And then during that training for origin  
16 and cause, you've had extensive training in specimen  
17 collection?

18 A Yes.

19 Q Now, I'm going to direct your attention to  
20 May 12 of 2002. Did you become involved in an arson  
21 investigation, the inception of which took place on  
22 May 11?

23 A Yes, I did.

24 Q How did you become involved in that?

25 A I was contacted by my lieutenant of the arson

1 unit, Dean Raymond -- at that time he was actually the  
2 sergeant -- and Detective Lloyd Mathis, to come out the  
3 next morning and assist them with the arson  
4 investigation.

5 Q The next morning would be May 12 of 2002?

6 A Yes.

7 Q What were your responsibilities when you  
8 were asked to aid in the investigation?

9 A To assist them in the origin and cause of the  
10 fire as well as evidence collection.

11 Q Now, at some point after there was an  
12 origin and cause determination, were specimens  
13 collected from the home?

14 A Yes, they were.

15 Q And when you -- who collected that  
16 evidence?

17 A I did.

18 Q When you were collecting that evidence, did  
19 you use -- make any type of notes or anything to help  
20 keep track of what you were collecting?

21 A I had my field notes while I was on scene, and  
22 then the requests for examination of evidence form with  
23 the New Jersey State Police.

24 Q And your field notes, I assume, then, that  
25 was the location of where and what you were actually

1 collecting, that was then later put into the request  
2 for examination of evidence?

3 A Yes.

4 MS. LACKEN: S-48.

5 THE COURT: S-48 for identification.

6 MR. HAMILTON: No objection.

7 MS. LACKEN: There was no objection. I  
8 just want him to identify it.

9 Q S-48, do you recognize that?

10 A Yes. That's the state police request for  
11 examination of evidence form.

12 Q Who actually filled that out?

13 A I did.

14 Q And then the evidence that's on there, was  
15 that submitted to the New Jersey State Police for  
16 analysis by you?

17 A Yes, it was.

18 Q Can you tell us what evidence that you took  
19 from 340 Brunswick Avenue in order to be tested?

20 A I took clothing from fire debris on the first  
21 floor.

22 Q Okay. Well, my question was -- I'm sorry,  
23 was a little bit vague.

24 There are various items listed on that  
25 form, correct?

1 A Yes.

2 Q All right. And they start with S-1, and  
3 they wind up later onto C-4, correct?

4 A Correct.

5 Q What was S-1?

6 A S-1 was clothing found from fire debris on the  
7 first floor.

8 Q Now, when you found that clothing, do you  
9 know the area where you found it, area of the building?

10 A The front room and middle room we took evidence  
11 from.

12 Q With regard to S-1, how did you -- is there  
13 a particular type of packaging that you use for arson  
14 debris?

15 A For that --

16 THE COURT: Excuse me. For the record,  
17 these S-1s are different from the S-1s in evidence.  
18 These are S-1s --

19 MS. LACKEN: S-1s on the lab form.

20 THE COURT: Okay. For the record. I'm  
21 sorry.

22 THE WITNESS: Could you repeat your  
23 question, please.

24 Q When you collect arson evidence, do you use  
25 special types of packaging in order to keep it for

1 transport?

2 A Yes, we do. Depending on what type of evidence  
3 it is, we use different things.

4 Q For S-1, can you tell me what you collected  
5 it in?

6 A It's an aluminum paint can, unlined paint can.

7 Q And when you are collecting evidence and  
8 you're doing your investigation, are you wearing any  
9 type of clothing or anything of that nature, any  
10 protective gear?

11 A Along with our fire gear on, we also have latex  
12 gloves in order to collect the evidence.

13 Q So then S-1 was some clothing debris found,  
14 correct?

15 A Right, yes.

16 Q You said you found something in the middle  
17 room and the front room?

18 THE COURT: There's actually an alcove area  
19 which was kind of in between the two rooms. I would  
20 have to exactly say where it was. It was a picture  
21 of -- I could look at the picture. It was on the side  
22 of the house, between the middle and the front bedroom.

23 Q There were, like, a little alcove, a door  
24 where there was some debris?

25 A Right.

1 Q Was that where the debris originally was,  
2 or do you have any idea how that debris got out there,  
3 do you know?

4 A There was some debris there, and also, the debris  
5 was moved by us and the fire department.

6 Q Okay. So it was originally in the room,  
7 but it was pushed out just when you were doing your  
8 assessment?

9 A Yes.

10 Q What about S-2? What else was collected?

11 A S-2 was also some clothing found on the first  
12 floor.

13 Q And how was that collected? In the same  
14 manner as S-1?

15 A Yes, it was.

16 Q What was it placed in?

17 A In the same type of can as S-1.

18 Q But different than the one you originally  
19 used?

20 A We use a different can every time we take a  
21 sample. Every sample has its own can.

22 Q When you collect and put it in the coin  
23 taker, do you put markings on the container so you can  
24 later recognize where it came from?

25 A We will write the name of the identification, the



1 address, the sample number, the date. We'll do the  
2 investigator, the time, all types of things.

3 Q On the request for examinations of  
4 evidence, there is S-3, S-4, and S-5, but they were not  
5 submitted. Do you remember what they were?

6 A They were samples of gasoline that I took from  
7 the Roadrunner gas station which is on the corner of  
8 Brunswick and Southard in the City of Trenton.

9 Q Why did you want to do that?

10 A We had smelled an odor of gasoline in the house,  
11 and we wanted to test the gasoline from the Roadrunner  
12 gas station, because we received information that  
13 that's where the gasoline came from. So we wanted to  
14 take samples from that gas station and try to compare  
15 it to the samples of evidence that we were taking out  
16 of the scene.

17 Q Now, was that a comparison that's able to  
18 be done by the New Jersey State Police Lab?

19 A We learned later that week that no, it's not.

20 Q They just can't make that determination?

21 A No, because the damaged debris isn't consistent  
22 with the gasoline coming out of the bumps.

23 Q So even though you had wanted to, it's not  
24 just something they can physically do?

25 A No, they couldn't.

1 Q So what, then -- now, on your request for  
2 examinations of evidence, there's an item that's  
3 originally marked S-6, but then has a written-in  
4 number 3. What was that?

5 A That was the area of the front door, the sill  
6 plate.

7 Q What is a sill plate?

8 A It's the threshold that usually connects the  
9 carpet to the wood. It keeps the carpet down or the  
10 wood down.

11 Q You submitted wood from underneath the sill  
12 plate?

13 A Yes.

14 Q Again, it was collected in a can?

15 A Yes.

16 Q Separately marked?

17 A Yes.

18 Q S-7, which would be number 4, I guess, with  
19 the handwritten notation, first of all, I ask you, the  
20 handwritten notations, who made those?

21 A The New Jersey State Police Laboratory did.

22 Q Okay. And they renumbered them. Do you  
23 know why they renumbered them, or don't you know?

24 A I don't know.

25 Q S-7, which would be their handwritten

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1 notation number 4, what was that?  
 2 A That was also debris of the first floor, the  
 3 actual floor itself from the front bedroom -- front  
 4 room, the front room.  
 5 Q Are we talking on the first or second  
 6 floor?  
 7 A You said S-7?  
 8 Q Yes.  
 9 A First floor, front room, the sample we took from  
 10 the floor.  
 11 Q What were you trying to determine by taking  
 12 these samples?  
 13 A We took a sample from this area because we  
 14 observed a pattern on the floor that's consistent with  
 15 an ignitable liquid spread, and that's why we took the  
 16 sample from that floor, to test for ignitable liquids.  
 17 Q S-8, which would be handwritten notation  
 18 number 5, where was that -- what was that sample and  
 19 where was it taken from?  
 20 A That was taken from the floor in -- on the first  
 21 floor in the middle bedroom.  
 22 Q Middle room?  
 23 A I keep saying bedroom. I mean middle room.  
 24 Q That was a piece of the burned flooring --  
 25 A Yes.

1 Q -- in the burn pattern that's depicted in  
 2 various photographs?  
 3 A Yes.  
 4 Q What was C-1, which would be handwritten  
 5 number 6? C stands for control?  
 6 A C -- I'm sorry, C was our control sample from the  
 7 first floor.  
 8 Q What is a C control sample?  
 9 A What we have to do when we take a sample from  
 10 wood that is burned or destroyed. We have to take  
 11 another sample that is of the same type, same piece of  
 12 wood, maybe in the other corner of the room, that isn't  
 13 damaged so the laboratory can compare the wood that is  
 14 damaged to the wood that isn't damaged so they can say  
 15 they're the same pieces of wood.  
 16 Q They can say there is ignitable liquid on  
 17 the burned area but not on the other?  
 18 A Yes.  
 19 Q C-2, do you remember, it says "not  
 20 submitted" on here? Do you remember what that was?  
 21 A C-2 would have been the control sample for the  
 22 gasoline that we took from the Roadrunner gas station.  
 23 It was just a little, small gauze pad.  
 24 Q C-3, which would be specimen number 7, what  
 25 was that?

- 1 A That was a control sample from the first floor,  
2 front room.
- 3 Q Nonburned wood from there?
- 4 A Nondamaged wood.
- 5 Q And then C-4, number 8?
- 6 A That's also a control sample from the first floor  
7 middle room, nonburned piece of wood on the floor.
- 8 Q S-50 for identification.
- 9 I show you now what has been marked as S-50  
10 for identification purposes. Do you recognize what  
11 that is?
- 12 A This is one of our evidence cans that was taken  
13 from 340 Brunswick Avenue. S-1.
- 14 Q It's labeled S-1. Is that the first item  
15 that you took that was on your list for request for  
16 examination of evidence?
- 17 A Yes, it is.
- 18 Q That's clothing that was found on the first  
19 floor?
- 20 A That's correct.
- 21 Q There's notations on there for the record.  
22 Who put those notations -- pardon me, with the address  
23 and the detective, et cetera? Whose handwriting is  
24 that?
- 25 A That's my handwriting.

- 1 Q Now, taped to that can there are what?
- 2 A These are the gloves that I used to collect the  
3 evidence.
- 4 Q And you submitted them to show you were  
5 wearing gloves when you actually took the evidence?
- 6 A Yes.
- 7 Q In looking at that can, that's the evidence  
8 that you took from the floor with regard to S-1 on your  
9 request for examination of evidence, correct?
- 10 A Yes.
- 11 Q S-51, do you recognize what that is?
- 12 A This is also an evidence can that we took from  
13 340 Brunswick Avenue.
- 14 Q Does that correspond to your number S-2 on  
15 your request for examination of evidence?
- 16 A Yes, it does.
- 17 Q And you know it obviously because there are  
18 various notations on there that you've made yourself?
- 19 A Yes.
- 20 Q S-52?
- 21 A You want this one?
- 22 Q What is S-52?
- 23 A This is another evidence can that has evidence in  
24 it from 340 Brunswick Avenue.
- 25 Q Okay. And which item does it correspond to

1 on your request for examination of evidence?  
 2 A S-6.  
 3 Q Okay. And that is the front door, under  
 4 the sill plate?  
 5 A Yes.  
 6 Q Detective, why do you put the evidence in  
 7 these cans?  
 8 A We put the evidence in those cans; that's how we  
 9 transport it to the New Jersey State Police lab. And  
 10 the state police lab then goes into the can to examine  
 11 it for the gas vapors.  
 12 Q Is there a reason why you use cans instead  
 13 of, like, paper bags?  
 14 A We use cans to protect the evidence. We would  
 15 use paper bags in a case where something would be wet  
 16 to breathe. The cans lock them in and seal tight.  
 17 Q Does it prevent evaporation of a volatile  
 18 liquid that you're looking for?  
 19 A Yes, it does. And that's what the lab is looking  
 20 for.  
 21 Q S-53, what is that?  
 22 A This is S-7. This is the evidence from the first  
 23 floor, front room.  
 24 Q And that's the burnt flooring?  
 25 A Yes.

1 Q S-8?  
 2 THE COURT: That would be S-54, would it  
 3 not?  
 4 Q Sorry, S-54.  
 5 A S-8 is the first floor middle room, burnt  
 6 flooring.  
 7 Q That can has all of your markings on it?  
 8 A Yes, it does.  
 9 Q S-55, what is that?  
 10 A This is control 1, our control sample number 1.  
 11 Q That corresponds to your control sample?  
 12 A This would have been control sample of the  
 13 clothing.  
 14 Q S-56, what would be in that container?  
 15 A This is C-3. This is our control sample from the  
 16 first floor, front room. This is non- -- the nonburnt  
 17 flooring that I was talking about.  
 18 Q S-57?  
 19 A Which is our C-4, it's the control sample from  
 20 the middle room first floor, nonburnt flooring.  
 21 Q Besides the markings of the state police  
 22 laboratory, all of the other handwritten markings on  
 23 those cans were by you?  
 24 A Yes.  
 25 MS. LACKEN: If I can have a second, your

1 Honor.  
 2 THE COURT: Yes.  
 3 MS. LACKEN: At this point, I have no  
 4 further questions of Detective Wasko.  
 5 THE COURT: Cross-examine.  
 6 MR. HAMILTON: No questions.  
 7 THE COURT: Thank you, Detective. You may  
 8 step down.  
 9 THE WITNESS: Thank you, your Honor.  
 10 (The witness is excused.)  
 11 THE COURT: Who is your next witness?  
 12 MS. LACKEN: George Chin.  
 13 THE COURT: Can we get him qualified in 25  
 14 minutes?  
 15 MS. LACKEN: I think so.  
 16 THE COURT: All right. Call him.  
 17 MS. LACKEN: The state calls George Chin.  
 18 G E O R G E W. C H I N, STATE'S WITNESS, SWORN.  
 19 The CLERK: Please state your name.  
 20 THE WITNESS: George W. Chin.  
 21 THE COURT: Good afternoon, sir.  
 22 THE WITNESS: Good afternoon.  
 23 THE COURT: Prosecutor.  
 24 DIRECT EXAMINATION BY MS. LACKEN:  
 25 Q Good afternoon.

1 A Good afternoon.  
 2 Q Mr. Chin, for whom are you employed?  
 3 A By the New Jersey State Police.  
 4 Q What is your title?  
 5 A I'm a Forensic Scientist III assigned to the  
 6 central lab in Ewing Township.  
 7 Q How long have you been employed by the New  
 8 Jersey State Police lab?  
 9 A Just about 24 years.  
 10 Q What specific unit do you work in?  
 11 A I'm the -- one of the supervisors for the  
 12 criminalistics trace evidence section.  
 13 Q What is the trace evidence section?  
 14 A The trace evidence section deals with or handles  
 15 evidence from crime scenes. We deal primarily with the  
 16 nonbiological evidence that is recovered from a crime  
 17 scene. We try to identify, compare, to show contact  
 18 between a victim and or suspect, and between the crime  
 19 scene itself.  
 20 Q When you talk about nonbiological evidence,  
 21 what type of evidence are you talking about?  
 22 A We deal specifically with hairs, fibers, glass,  
 23 paint, gunshot residue, low explosives,  
 24 foot/fingerprints, tool marks, and fire debris  
 25 analysis.



1 Q Now, as a supervisor for the trace evidence  
 2 unit, what are your particular responsibilities?  
 3 A I handle case management, case prioritizing,  
 4 training, establishing protocol, moving the cases along  
 5 within the unit. I also train the new personnel into  
 6 the laboratory, along with perform my -- do my bench  
 7 work or analyze cases that come into the laboratory for  
 8 the section itself.  
 9 Q So not only do you supervise, but you still  
 10 take part in the analysis of specimens that come in?  
 11 A Yes, I do.  
 12 Q Now, prior to becoming supervisor, what  
 13 other positions did you hold within the state police?  
 14 A I was a Forensic Scientist II, a Forensic  
 15 Scientist I, or Senior Forensic Scientist, a --  
 16 Q Basically, what were your responsibilities  
 17 there?  
 18 A As an FSII, or forensic scientist, or senior  
 19 forensic scientist, I worked on the more complicated  
 20 cases that came into the laboratory dealing with trace  
 21 evidence. And prior to working in trace evidence, I  
 22 was a forensic toxicologist for the state police where  
 23 I analyzed blood and urines for DWIs and drugs of  
 24 abuse, along with poisons.  
 25 Q Now, what types of -- I know you said that

1 in the trace unit, you handle all types of  
 2 nonbiological evidence analysis, but what types of  
 3 evidence and things have you examined?  
 4 A Practically everything that I previously  
 5 testified to: hairs, fibers, glass, paint, gunshot  
 6 residues, low explosive, tool marks, footwear  
 7 impressions, tire impressions, fire debris, along with  
 8 gunshot and low explosives.  
 9 Q what did your formal education consist of?  
 10 A I have a bachelor of science and forensic science  
 11 from John Jay College of Criminal Justice, part of the  
 12 City University of New York system.  
 13 Q what type of training did you have to  
 14 receive in order to become a forensic scientist, not  
 15 only for the state police, but then also in the trace  
 16 evidence unit?  
 17 A I had to complete a nine-week internship prior to  
 18 being hired by the New Jersey State Police. And then  
 19 for -- within the trace evidence section, you endure or  
 20 try to complete anywhere from six months to one year's  
 21 training within each discipline of the trace evidence  
 22 section. Along with that, you attend various seminars,  
 23 workshops, dealing with forensic science within the  
 24 community itself.  
 25 Q And when you say you have to have six

1 months to a year with each -- what did you refer to it  
2 as?

3 A Discipline.

4 Q -- you are saying you had to have six  
5 months' training to a year on tool marks, six months to  
6 a year training on arson, in that fashion?

7 A Yes.

8 Q And at the end of each training period, did  
9 you have to become tested or certified in that  
10 particular type of evidence in order to analyze it?

11 A Yes, you do.

12 Q How do you do that?

13 A You complete what's known as an in-house  
14 proficiency that's generated by the trainer or your  
15 mentor within the laboratory. Upon completion of that,  
16 you then request an external competency, or an external  
17 certification, which is generated by an outside  
18 laboratory. And then, once that's done, to maintain  
19 certification on a yearly basis, you have to take  
20 various certifications and the various subdisciplines  
21 that you're certified in throughout the years.

22 Q The proficiencies that you've talked about,  
23 do they include practical tests?

24 A They include both practical and written tests.

25 Q And you had to -- you had to complete those

1 proficiencies before you were able to analyze, and then  
2 yearly, you have to be retested for proficiency?

3 A That's correct.

4 Q And do you -- do you have all of your  
5 current -- are you current in all of your proficiencies  
6 for all of the evidence, types of evidence, that you  
7 have indicated in the trace evidence unit?

8 A Yes, I am.

9 Q Particularly, arson debris analysis?

10 A Yes, I am.

11 Q Are you subject to peer review?

12 A We're subjected to what's known as a dual system  
13 review. Not only are we peer reviewed once a report is  
14 generated, we're a -- where a colleague reviews all of  
15 your notes and your data and reviews your report for  
16 the interpretation of the data. That's considered a  
17 peer review, but it goes beyond that into what is known  
18 as administrative review, where the laboratory director  
19 reviews the whole packet, or the case jacket, with all  
20 of the information before the case is then sent out to  
21 the prosecutor's office or to the submitting agency.

22 Q Now, have you had particular training in  
23 the area of arson debris analysis besides the  
24 certification that you needed to go through?

25 A Yes, I have.

1 Q How long have you been certified in arson  
2 debris analysis, do you know?

3 A About 13 or 14 years.

4 Q What particularized training did you have  
5 with regard to the arson debris analysis?

6 A I've had chromatography courses, or  
7 chromatography workshops, I had a Hewlett Packard mass  
8 spectrum interpretation workshop. I attended the  
9 Federal Bureau of Investigation of -- the FBI Academy  
10 in Quantico, dealing with fire debris analysis.

11 I attended the ATF, or joint ATF-NFTC,  
12 which is the National Forensic Testing Center, dealing  
13 with mass spectroanalysis, dealing with, specifically,  
14 fire debris. I attended a week-long seminar down in  
15 Florida that was offered by the Technical Working Group  
16 for Fire and Explosives. And then along with that was  
17 just, basically, all of the certifications that I've  
18 had over the years dealing with -- specifically with  
19 fire debris.

20 Q Now, you mentioned you had training in  
21 chromatography. What is that?

22 A Chromatography is basically a separation  
23 technique. It's a type of analysis that's performed  
24 where you take a mixture or known composite and you  
25 separate it into its various component parts. So if

1 you have a cake and you want to analyze it, you  
2 separate it out into its recipe. And that's basically  
3 what we do with chromatography; it's a separation  
4 technique.

5 Q What types of things can you determine  
6 through chromatography?

7 A You can try to identify the various components  
8 within a mixture. And that's what we do when we deal  
9 specifically with fire debris.

10 Q How much of your time would you say, as a  
11 forensic scientist, is spent on the analysis of arson  
12 debris?

13 A It can vary anywhere between 50 to 25 percent of  
14 the time spent in the laboratory dealing with fire  
15 debris. It's one of our more common cases that we get  
16 coming into the laboratory.

17 Q So, then, how many cases have you actually  
18 analyzed or done tests on with regard to arson debris  
19 analysis?

20 A I would say thousands of cases itself. And then,  
21 if you break it down to specimens, I'm looking at  
22 anywhere between 4- and 6,000 specimens alone.

23 Q Have you ever taught or lectured in the  
24 area of arson debris analysis?

25 A Yes, I have.

1 Q where?

2 A I guest lecture at various high schools, college,  
3 universities in New Jersey and -- New Jersey and in  
4 Pennsylvania. I also guest lecture at various museums,  
5 such as the Liberty Science Center, State Police  
6 Museum, and the state museum. I also lecture at  
7 various police academies, specifically, the Morris  
8 County Police Academies. And I also lecture at the New  
9 Jersey State Police Crime Scene School. I teach there  
10 three times a year with respect to trace evidence  
11 protocols.

12 Q Have you previously been qualified as an  
13 expert witness?

14 A Yes.

15 Q How many times?

16 A Little over 250 times.

17 Q Now, you have had various training, so let  
18 me break it down.

19 Of the 250 times, how many would be  
20 toxicology?

21 A Little over -- about 200 times in toxicology.

22 Q The remaining 50 or so have been in the  
23 area of trace evidence analysis?

24 A Yes.

25 Q How many times have you actually been

1 offered to testify as an arson debris analysis expert?

2 A This will probably be my third or fourth time as  
3 an expert in fire debris.

4 Q Those times you have been offered, have you  
5 been qualified?

6 A Yes, I have.

7 MS. LACKEN: Your Honor, I'm asking  
8 Mr. Chin be qualified as an expert in trace evidence  
9 analysis, including but not limited to the analysis of  
10 arson debris.

11 THE COURT: Any voir dire?

12 MR. HAMILTON: No, Judge, and no objection.

13 THE COURT: Ladies and gentlemen, Mr. Chin  
14 will be, once again, qualified. As I've indicated, the  
15 previous expert has been qualified, and again, it's  
16 your ultimate decision as to what you -- what weight or  
17 credibility you put in any of the witnesses, but  
18 Mr. Chin is qualified as an expert to testify in the  
19 respective field.

20 MS. LACKEN: He's qualified. I will  
21 continue. You're the one who asked me.

22 THE COURT: would you like to take a break?

23 MS. LACKEN: whatever your Honor pleases.

24 THE COURT: All right. Ladies and  
25 gentlemen, what we're going to do is take our luncheon



1 break now, and you can come back at 1:30. Take a few  
2 extra few minutes to wander in the above-freezing  
3 temperatures.

4 Please don't talk about the case while  
5 you're on your own. Enjoy, and return refreshed and  
6 we'll begin anew close to 1:30.

7 (The following is out of the presence of  
8 the jury.)

9 THE COURT: Okay. 1:40, folks. Thank you.  
10 (A luncheon recess is taken.)

11 A F T E R N O O N S E S S I O N

12 (The following is out of the presence of the  
13 jury.)

14 THE COURT: I've been working on the  
15 problems of lesser-included, and it's my initial  
16 impression, in accordance with what you both seem to  
17 think, there's nothing to be charged with respect to  
18 what we call lesser-included offenses because of the  
19 lack of a rational basis, particularly to the extent  
20 that recklessness plays a part. If you can -- thus far  
21 in the record there doesn't seem to be anything that  
22 would support that kind of a conclusion.

23 MS. LACKEN: That's what I think, your  
24 Honor. Obviously, there's case law, when we're talking  
25 about purposeful and knowing conduct, in the murder

1 statute. State v. Martin, which pretty much talks  
2 about -- by the way it's cited at 213 N.J. Super, 426.  
3 And it says, "The defendant, who set fire to a building  
4 in which he knew there were intoxicated people, with an  
5 intent to quote get them, closed quote, has committed  
6 purposeful or knowing murder."

7 That's kind of where it was reversed but on  
8 other grounds. That's kind of where I draw my argument  
9 from. It's just basically, look, if he had gotten on  
10 the stand and at least said he was there, or that he  
11 was around that area, I think the argument would be a  
12 little more strong. I mean, it's always a risk for the  
13 state to take, not to ask for those if -- and however,  
14 he just --

15 THE COURT: Well, it's also the concern of  
16 the Court as the all-or-nothing kind of situation. But  
17 this does have the breakdown with aggravated arson  
18 should the jury not conclude it's involved with felony  
19 murder or with the first-degree murder. There just is  
20 nothing that bridges that gap, as far as this Court is  
21 concerned, to get you to a, you know -- a -- what would  
22 be a classic second degree situation.

23 MS. LACKEN: I don't know. I think the  
24 only thing maybe, your Honor, if in fact we're talking  
25 about facts on the record which may support it, is the



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1 facts from the state's witness that said that, you  
 2 know, that might indicate some type of passion  
 3 provocation because the defendant was mad. Although,  
 4 frankly, I'm not quite sure that would reach to the  
 5 level that would justify the passion provocation  
 6 manslaughter.  
 7 THE COURT: In my view, that's not a  
 8 rational basis. You know, we can abstract that out to  
 9 the nth degree, it still doesn't come up to that level.  
 10 Mr. Hamilton?  
 11 MR. HAMILTON: As your Honor may have  
 12 gathered, the defense approach is more of an  
 13 all-or-nothing approach. I'm just thinking in my mind,  
 14 gee, what could possibly be imagined? It's a fairly  
 15 absurd example, but the devil might advocate that if  
 16 all that was done was criminal mischief, then there  
 17 wouldn't be felony murder, et cetera. But I really  
 18 think that it's not a case for lesser included.  
 19 THE COURT: To the extent that the Courts  
 20 are sincere when they suggest a rational basis must be  
 21 found for those lesser-included offenses, this Court  
 22 does not find a rational basis for anything that has  
 23 been proposed which would remotely relate to a  
 24 lesser-included offense, and we will go with the three  
 25 levels of offense contained in the indictment.

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1 Okay. Anything else before we bring the  
 2 jury in?  
 3 MS. LACKEN: Not from the state, your  
 4 Honor.  
 5 MR. HAMILTON: No, your Honor.  
 6 THE COURT: All right. Mr. Chin, you can  
 7 come back on the stand. Thank you.  
 8 SERGEANT-AT-ARMS: Jury entering court.  
 9 (The following is in the presence of the jury.)  
 10 THE COURT: Remain seated.  
 11 welcome back, ladies and gentlemen.  
 12 Are we ready to proceed, prosecutor?  
 13 MS. LACKEN: We are, your Honor.  
 14 Q Mr. Chin, did you become involved in the  
 15 arson debris analysis in State v. Larry Fleming?  
 16 A Yes, I did.  
 17 Q How did you become involved?  
 18 A That case was assigned to myself.  
 19 Q Okay. How does it work that you are  
 20 presented with evidence in order to analyze?  
 21 A The case comes into the laboratory via submitting  
 22 agency. The case is checked at the front desk by the  
 23 evidence clerk or the evidence technician. They go  
 24 through the submission request. They log in the  
 25 evidence. They do an inventory of the evidence.

1 The case is assigned to a unique laboratory  
 2 number, and this particular case submission, that  
 3 laboratory number is N011022055. That evidence gets  
 4 placed into the vault, and the submission request comes  
 5 back into the unit. The unit supervisor at that time  
 6 assigns the case to an analyst. The analyst takes that  
 7 submission request to the vault and signs the evidence  
 8 out of the vault and proceeds with their analysis.

9 Q Okay. Now, I see that you're referring to  
 10 something up on the stand. I'm going to ask you. You  
 11 have your notes and stuff, same things we have. We're  
 12 going to use marked copies, if you please.

13 As part of your analysis, obviously, there  
 14 are reports that are generated, correct?

15 A That's correct.

16 Q We already know there's a laboratory  
 17 request form, and then there's also a report generated  
 18 by you, I would assume, about your testing process?

19 A Yes, there is.

20 Q Various notes that are taken?

21 A Yes.

22 Q And various data from the testing process  
 23 itself?

24 A Yes.

25 Q S-58?

1 THE COURT: Is it 49 or 58?

2 MS. LACKEN: 58.

3 THE COURT: 58.

4 Q I'm showing you what has previously been  
 5 marked S-58 for state's identification purposes. Can  
 6 you take a look at that. It's a multi-page document.

7 If you can flip through that and tell me if  
 8 you recognize whether or not that is what is known as a  
 9 discovery packet from the state police?

10 A Yes. This would be considered the discovery  
 11 packet for this particular case.

12 Q When I ask for a discovery packet, that's  
 13 all of the records that are compiled by the state  
 14 police during an examination of specimens?

15 A Yes, is it.

16 Q All right. Now, let me show you what has  
 17 been previously marked S-48 for identification. That  
 18 actually has its own specific number.

19 Do you recognize what that is?

20 A Yes, I do.

21 Q What is that?

22 A This is the copy of the submission request that  
 23 comes from the submitting agency. Basically, it has  
 24 the defendants' names, suspects' names, submitting  
 25 agency, the number of specimens, the types of specimens

1 coming into the laboratory, brief history of the case,  
2 the type of request of analysis that the submitting  
3 agency is asking for, and the unique laboratory number  
4 with a date stamp on that particular submission  
5 request.

6 Q Now, this submission request before you  
7 corresponds to laboratory number N011022055, correct?

8 A That's correct.

9 Q And that is for the submission in -- with  
10 the victim being Ellis McNeill?

11 A Yes, is it.

12 Q Who was that submitted by, what submitting  
13 agency?

14 A The Mercer County Prosecutor's Office.

15 Q What were you asked to do?

16 A We were asked to examine the evidence for the  
17 presence of ignitable liquids.

18 Q Now, when I refer you to the bottom, the  
19 list of specimens that's contained on S-48, there are  
20 some handwritten notations next to the typewritten  
21 items that were submitted.

22 Can you tell me whose they were and why  
23 they're on the submittal form?

24 A The one set of initials with the date belongs to  
25 me; I did the initialing and the date. The second set

1 of initials is my immediate supervisor, the acting or  
2 the assistant laboratory director at that time.

3 What I did was I had to renumber the item  
4 numbers as they were presented on this submission  
5 request to conform to how we normally process evidence  
6 and how we normally dictate what the labeling will be  
7 on the submission request.

8 Q Now, there are various items, S-3 through 5  
9 which were not submitted.

10 The next item that was listed here is S-67,  
11 but it has your handwritten notation number 3.

12 Basically, what you have to do is break it down and  
13 number them in sequential order as you get them?

14 A That's correct.

15 Q Let me ask you a question. I don't know  
16 whether or not you know what S-3 through S-5 were, but  
17 let me ask you. If they were actual specimens of gas  
18 from a particular gas station, like all three octanes,  
19 and they were submitted for your analysis with the  
20 specimens, the other pieces of items that were taken  
21 from the house, would you be able to analyze both the  
22 evidence in the house and try to compare that and match  
23 it to gasoline that was taken from a particular pump?

24 A We are not set up, we don't have procedures and  
25 the protocol to do that type of analysis or that type

1 of comparison. What we can do is identify whether the  
 2 accelerant gasoline is present or not. But we cannot  
 3 compare gasoline from a fire scene to any particular  
 4 gas station. That's not what we can do within the  
 5 laboratory.

6 Q All right. Can you tell us what you did  
 7 when you got the evidence? How did it come to you, in  
 8 what form?

9 I guess my question is, how is it packaged  
 10 for you to then go on and test?

11 A Okay. What I received was a cardboard box  
 12 containing 8 specimens. Each of the specimens were  
 13 individually packaged and they were packaged in metal  
 14 cans. Some were the size of a gallon can, and some  
 15 were the size of a quart can.

16 Q How did you go about testing the individual  
 17 items that were submitted?

18 A What I perform is basically called the heated  
 19 head space method --

20 Q Heated head space?

21 A -- where I basically punch a hole in the top of  
 22 the can. I perform a quick smell or sniff of the can,  
 23 see if there's anything obvious within the can that I  
 24 can identify. And then from that I'll take the can,  
 25 seal it, place it into an oven where the temperature is

1 approximately 90 degrees, heat it for anywhere between  
 2 15 and 20 minutes, depending on the size and the weight  
 3 of the can.

4 What this does is it takes the volatiles  
 5 that's within the can itself or within the debris and  
 6 volatilize it or evaporate it to where it's a vapor  
 7 state just above the debris. And I take a syringe and  
 8 withdraw that vapor and inject it into what is known as  
 9 a gas chromatograph. And that's an instrument or piece  
 10 of equipment that we use that will separate the  
 11 injected sample into its various component parts.

12 From that I'll generate what's known as  
 13 data or a graph, and from the graph I can make an  
 14 interpretation as to what may or may not be there as in  
 15 a contaminated sample or a possible accelerant.

16 Q In looking at S-1, the item that was  
 17 submitted, S-1, and it was obviously numbered by you  
 18 S-1, clothing found from debris on first floor, it was  
 19 submitted to you in a can. So tell me about how you  
 20 tested that and what results you came up with?

21 A As I stated, the first test was considered heated  
 22 head space method. I employed that particular  
 23 technique, and the data that I generated was basically  
 24 what's known as a chromatogram, which is basically a  
 25 series of peaks and valleys in a chart.



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1 And from that I interpreted that there was  
2 very weak volatiles in there, that there was a slight  
3 indication or possible gasoline. When we get samples  
4 like that, we do what's known as a secondary test  
5 where -- it's a concentrating method where we'll take  
6 the same sample, hang a piece of charcoal strip in  
7 there, and then place that can or sample into an oven  
8 for two hours where the volatiles are allowed to  
9 collect on the charcoal strip.

10 where then I take the charcoal strip and  
11 extract the liquids from it, using carbonized sulfide,  
12 and I take that liquid and inject it into the gas  
13 chromatograph. And from this, with the concentrating  
14 over the two-hour period, the weaker volatiles that I  
15 saw earlier can be more concentrated and give me a  
16 higher signal for me to do my interpretations.

17 And that was the second test that was  
18 employed on that particular sample.

19 Q Now, for that particular sample, you did  
20 the heated head space, got the reading of the very weak  
21 volatile, possible gasoline.

22 What came from the second test?

23 A The second test gave me a positive result for  
24 gasoline.

25 Q Now, when you say "positive result for

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1 gasoline," true, there are different types of flammable  
2 liquids?

3 A That's correct.

4 Q Then how can you be sure about the fact  
5 that this was gasoline?

6 A Gasoline in itself is a very unique substance.  
7 It gives us a pattern that's only specific for gasoline  
8 and no other accelerant that we're aware of. We have a  
9 library of well over 200 standards, a library of well  
10 over 200 possible accelerants that are used. And  
11 gasoline in itself is very unique from any other  
12 accelerant that we're aware of.

13 So when I find gasoline, I know for a fact  
14 it is gasoline and no other substance.

15 Q When you get the volatiles, I guess that  
16 means the gas that's come up after the heating process  
17 that adhere to that charcoal strip?

18 A Charcoal strip.

19 Q When you put it in the gas chromatograph  
20 and it does a graph with peaks and valleys --

21 A Yes.

22 Q -- that's what you compare to the  
23 standards, meaning the known graphs for different  
24 volatile substances?

25 A Right. We'll take the injected unknown or the



1 injected sample from a crime scene. We'll generate  
 2 data, and we'll take that chart and compare it to a  
 3 known library. And we'll look at the known library,  
 4 which has a series of peaks and valleys within the  
 5 individual charts, and they correspond to various  
 6 accelerants.  
 7 But when we deal with gasoline, it's one of  
 8 the more common accelerants. When we see -- when we  
 9 see it, we're very familiar with it, and it's very  
 10 easily on our end to identify gasoline if it's there or  
 11 not.  
 12 Q Specimen one, the clothing, there was a  
 13 volative, and that volative you're positive was  
 14 gasoline?  
 15 A That's correct.  
 16 Q Specimen number 2, the two tests that were  
 17 conducted, what did you find?  
 18 THE COURT: Excuse me. Once again, for the  
 19 record, we're using the state police numberings S-1  
 20 equaling S-50. S-2 equaling S-52, correct?  
 21 MS. LACKEN: That's correct. He wouldn't  
 22 know that because he doesn't know the state exhibit  
 23 numbers.  
 24 THE COURT: Why don't you just try to  
 25 append them so we have a record that reflects it.

1 Okay?  
 2 MS. LACKEN: Certainly.  
 3 All right. So, then, we're looking at  
 4 specimen number 2 which would be S-51.  
 5 THE COURT: Right.  
 6 MS. LACKEN: For the record.  
 7 Q And correct me if I'm wrong, but that seems  
 8 to be clothing, a burgundy cloth material, sweaterlike,  
 9 correct?  
 10 A That's correct.  
 11 Q That was also found from the debris on the  
 12 first floor.  
 13 What were the results of your two tests?  
 14 A The first test, again, was weak volatiles,  
 15 possible gasoline. And then when I employed the second  
 16 method or technique for identification, it showed that  
 17 it was positive for gasoline.  
 18 Q Now, when we're talking about now your  
 19 renumbered specimen number 3, we're talking about S-52.  
 20 Can you tell us what -- that apparently was  
 21 some charred wood. Can you tell us what the results of  
 22 your test were?  
 23 A For specimen number 3, the first test showed it  
 24 was very weak volatiles. And no other test was  
 25 employed because, due to the previous positive results,

1 what we try to do is consider case management where we  
2 try to limit the number of specimens that we analyze  
3 from a particular burn scene.

4 Because we try to limit actual specimens  
5 being analyzed because we don't want to analyze  
6 multiple specimens from the same point of origin. And  
7 from what we were seeing within this particular case,  
8 there were multiple points within the first floor, so  
9 we were trying to limit the number of actual samples  
10 that we wanted to analyze.

11 So number 3 was analyzed for initial test  
12 but not confirmed.

13 Q Now, with regard to -- that's a decision  
14 the state police makes, not the submitting agency?

15 A That was what --

16 Q State police lab?

17 A State police laboratory, not the submitting  
18 agency.

19 Q With regard to your number 4, which would  
20 be S-53, I believe -- yes -- and this is now the first  
21 floor, front room burnt floor, what were the results of  
22 your analysis?

23 A The first test show there were volatiles there,  
24 and then the second test that was employed showed there  
25 was gasoline present.

1 Q So for the burnt wood from the front room  
2 of the first floor, that you're positive that was  
3 gasoline that was used?

4 A Yes, I am.

5 Q Your item number 5, which would be state's  
6 exhibit S-54, the charred wood from the middle room,  
7 burnt floor, what can you tell us were the results of  
8 your analysis?

9 A The first test showed they were positive for  
10 volatiles, basically an indication for gasoline, and  
11 the second test showed they were positive for gasoline.

12 Q Now, number 6 would be C-1, and it would  
13 then also correspond to S-55 for identification  
14 purposes.

15 Can you tell us what that was? Some type  
16 of orange cloth material?

17 A It was an orange cloth material.

18 Q It says in your notes, "ran as a control"?

19 A A control was a sample that is submitted from a  
20 crime scene where the investigator feels that there was  
21 no contamination of an accelerant on that particular  
22 piece of evidence.

23 what we use a control for in the laboratory  
24 is as a, what we consider a -- basically, an  
25 elimination type of sample where, if we see other

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- 1 debris with a series of peaks and valleys, we can use  
2 this control to eliminate that potential peaks and  
3 valleys from another piece of specimen as a possible  
4 accelerant. It's basically a control where it's not  
5 contaminated with an accelerant.  
6 Q That was run as a control, and you didn't  
7 expect to find any particular gasoline volatiles?  
8 A No.  
9 Q And did you find any gasoline volatiles?  
10 A I did not.  
11 Q I refer you to New Jersey State Police 7,  
12 which would be S-56, which appears to be a control  
13 sample of the first floor room, which was unburnt wood,  
14 correct?  
15 A That's correct.  
16 Q Was that also ran as a control?  
17 A Yes, it was.  
18 Q And the results, there were no gasoline  
19 volatiles, correct?  
20 A That's correct.  
21 Q Finally, we have S-57, which is New Jersey  
22 State Police Laboratory number 8. It was a control  
23 sample of the first floor, middle room, nonburned  
24 floor, correct?  
25 A That's correct.

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- 1 Q Those were ran as controls also for the  
2 reasons you previously specified?  
3 A That's correct.  
4 Q And with regard to gasoline, were there any  
5 positive volatiles noted there?  
6 A There was no gasoline, but there were volatiles,  
7 but not gasoline.  
8 Q So there was no gasoline volatiles there?  
9 A That's correct.  
10 Q Meaning there was no gasoline present in  
11 that area?  
12 A That's correct.  
13 Q When you get other volatiles, what could  
14 that be?  
15 A It could be inherent to the debris. It could be  
16 volatiles coming off the wood. It could be paint on  
17 the wood. It could be the shellack or finishing on the  
18 wood. It could be whatever debris that was there,  
19 possibly carpet or some type of adhesive material that  
20 is giving us peaks and valleys or valleys that's  
21 generated. But it gave us a pattern that was not  
22 interpred as a potential accelerant or gasoline.  
23 Q Before you actually run these tests, do you  
24 make sure your gas chromatograph is running?  
25 A Yes.

1 Q what do you do to make sure of that?  
 2 A We run a daily standard in the beginning of the  
 3 day, which is basically a check to see if the system is  
 4 working or the machine and equipment is working. It  
 5 was run prior to any of the samples being run, and it  
 6 showed that the equipment and the system was  
 7 functioning properly.  
 8 Q I have a few items to show you and ask you  
 9 if you know what they are. They might be out of order.  
 10 Let's start with S-56.  
 11 Can you recognize what that is?  
 12 A Yes, I could.  
 13 Q What is that?  
 14 A This has the laboratory number N01102-2055 and  
 15 number 7, and it has my initials -- that's all my  
 16 initials -- that's on that particular case.  
 17 Q Okay. And -- in looking at that, is that  
 18 what you analyzed as C-3 -- for the record, it would be  
 19 S-56 -- and performed -- and received results from?  
 20 A That's correct.  
 21 Q And does it look substantially the same to  
 22 you as it did when it was submitted back then?  
 23 A Yes, it does.  
 24 Q S-55, do you recognize what that is?  
 25 A Yes, I do. Again, it has the laboratory number

1 that's unique for this case, it has my initials, and  
 2 the specimen number that corresponds to the submission  
 3 request.  
 4 Q And the specimen number and your submission  
 5 number was what?  
 6 A Number 6.  
 7 Q Which was?  
 8 A Specimen number 6 is listed as the Brunswick  
 9 Avenue control.  
 10 Q Okay. That will be the control of the  
 11 clothing, correct?  
 12 A Right.  
 13 Q S-57.  
 14 A Again, it has the unique laboratory number in my  
 15 handwriting. It has the specimen number and the  
 16 initials, and it has C-4, which is specimen number 8  
 17 for that particular case. And again, it's the control  
 18 from the burnt floor.  
 19 Q It looks substantially the same as when you  
 20 analyzed it?  
 21 A Yes, it does.  
 22 Q When, actually, did your analysis take  
 23 place?  
 24 A I believe it was over a series of days. It  
 25 started on June 3.

1 Q of 2002?

2 A Of 2002. It continued on June 4 of the same  
3 year. And then I continued it on July 26 of that same  
4 year, and it continued into July 29 of the same year.  
5 And it continued onto August 13 of the same year, and  
6 it continued into August 14 of the same year, and then  
7 I generated my report on August 15th.

8 Q When was it submitted to you?

9 A It was submitted on May 14 of 2002.

10 Q I'm showing you S-54.

11 A Again, it has the unique laboratory number, the  
12 specimen number for the case, and it has my initials.  
13 And this was specimen number 5, listed as first floor,  
14 middle room, burnt floor.

15 Q Does that look substantially the same as it  
16 did when you tested that evidence?

17 A Yes, it does.

18 Q S-53.

19 A Again, it has the unique laboratory number, the  
20 item number as listed by the submission request, the  
21 specimen number which was labeled by me, and it has my  
22 initials on there. And it's first floor, front burnt  
23 floor.

24 Q It looks substantially the same as did it  
25 back when you tested it?

1 A Yes, it does.

2 Q S-52?

3 A Again, it has the laboratory number, the  
4 submission number, the specimen number, my initials.  
5 And this corresponds to specimen number 3, which is the  
6 front door, burnt sill plate.

7 Q It looks substantially the same as it did  
8 when you analyzed this?

9 A Yes, it does.

10 Q S-50.

11 A Again, it has laboratory number, the specimen  
12 number, and my initials on it, and this is --  
13 corresponds to the clothing from the debris from the  
14 first floor.

15 Q That item looks substantially the same as  
16 it did back when you analyzed it?

17 A Yes, it does.

18 Q Finally, I'm not sure if I did this one or  
19 not, S-51?

20 A Again, it has the laboratory number, specimen  
21 number, and my initials, and this corresponds to  
22 specimen number 2, which is clothing found on the first  
23 floor.

24 Q This specimen looks substantially the same  
25 as it did when you tested it?



1 A Yes, it does.  
 2 Q Thank you.  
 3 Now, you had indicated that your opinions  
 4 that the volatiles on 1 and 2, which is clothing found,  
 5 4 and 5, which was the burnt flooring, was 100 percent;  
 6 you're 100 percent it was gasoline. So then,  
 7 obviously, then, you are making your opinions within a  
 8 reasonable degree of scientific certainty, are you not?  
 9 A Yes, I am.  
 10 MS. LACKEN: Your Honor, I'm asking that  
 11 S-50 through S-57 inclusive be admitted into evidence.  
 12 THE COURT: Any objection?  
 13 MR. HAMILTON: No objection.  
 14 THE COURT: Into evidence.  
 15 (S-50 through S-57 are marked into  
 16 evidence.)  
 17 MS. LACKEN: Thank you, your Honor.  
 18 Thank you, Mr. Chin.  
 19 MS. LACKEN: No further questions.  
 20 MR. HAMILTON: No cross.  
 21 THE COURT: Thank you, Mr. Chin.  
 22 (The witness is excused.)  
 23 THE COURT: You may call your next witness,  
 24 please.  
 25 MS. LACKEN: Your Honor, the state calls

1 Dr. Daksha Shah.  
 2 THE COURT: Did you move S-48 in, the  
 3 request for the examination?  
 4 MS. LACKEN: No, I didn't.  
 5 D A K S H A S H A H, STATE'S WITNESS, SWORN.  
 6 The CLERK: Please state your name.  
 7 THE WITNESS: Daksha R. Shah.  
 8 The CLERK: You may be seated.  
 9 THE COURT: Good afternoon, Doctor.  
 10 THE WITNESS: Good afternoon.  
 11 THE COURT: Prosecutor.  
 12 DIRECT EXAMINATION BY MS. LACKEN:  
 13 Q Good afternoon, Dr. Shah.  
 14 A Good afternoon.  
 15 Q Dr. Shah, where are you employed?  
 16 A I'm employed as deputy medical examiner in Mercer  
 17 County.  
 18 Q How long have you been a deputy medical  
 19 examiner in Mercer County?  
 20 Dr. Shah, since your voice is very low, I'm  
 21 going to ask you to talk into that.  
 22 A 24 years.  
 23 Q what are your duties and responsibilities  
 24 as the deputy medical examiner in Mercer County?  
 25 A I'm supposed to do the investigation of all the

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- 1 unnatural death, accident, suicide, homicide cases, and  
2 perform autopsy and find cause of death and manner of  
3 death.  
4 Q Besides being the deputy medical examiner  
5 in Mercer County, where else do you practice?  
6 A I work as assistant medical examiner in  
7 Burlington County and assistant medical examiner in  
8 Hunterton County.  
9 Q How long have you worked for Hunterton?  
10 A Two years.  
11 Q How about Burlington?  
12 A Burlington, it's about nine and a half years.  
13 Q Can you please detail your education and  
14 specialized training.  
15 A Yes. I did undergraduate study in India,  
16 B.J. College, in 1968. After that, in here, I did  
17 rotating internship at the Roxborough Memorial Hospital  
18 from 1970 to 1971, and from 1971 to 1975 I finished my  
19 pathology training for anatomic and clinical pathology  
20 at Fitzgerald Mercy Hospital in Darby, Pennsylvania.  
21 Q Can you tell me, what is forensic  
22 pathology?  
23 A Forensic pathology is a branch of medicine that  
24 applies principal and science and applies the knowledge  
25 of medicine, applies to the law.

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- 1 Q where are you licensed to practice?  
2 A In Pennsylvania as well as New Jersey.  
3 Q when did you become licensed in  
4 Pennsylvania?  
5 A 1972.  
6 Q And when did you become licensed in New  
7 Jersey?  
8 A 1978.  
9 Q Are you board certified?  
10 A Yes.  
11 Q In what?  
12 A I'm board certified in anatomical pathology,  
13 clinical pathology, and forensic pathology.  
14 Q what is anatomical pathology?  
15 A Anatomical pathology is more related to cancers  
16 and infections, something -- tissue diagnosis.  
17 Q Do you do -- besides what you've indicated,  
18 homicides, suicides, do you do other types of autopsies  
19 for hospitals or no?  
20 A No, they are done in the hospital. But sometimes  
21 in routine duty we have to do medical cases when there  
22 is unnatural death or unexpected death in a young  
23 person, died at home, and we do, we perform. We do  
24 some medical death.  
25 Q Is forensic pathology, then, your area of

1 expertise?  
 2 A Yes.  
 3 Q Do you participate in continuing legal --  
 4 in continuing medical education?  
 5 A Yes.  
 6 Q Where? And what do you do?  
 7 A I attend all of the courses and different  
 8 seminars and at different places.  
 9 Q And do you lecture?  
 10 A Sometime only the -- like, police or some  
 11 students come, and when I'm doing autopsy I --  
 12 Q Do you have students come in and do you  
 13 conduct autopsies while you have medical observers  
 14 there?  
 15 A Right.  
 16 Q Is there a difference between a regular  
 17 autopsy and a medical-legal autopsy?  
 18 A Yes.  
 19 Q What is the difference?  
 20 A In a regular autopsy, your focus is more on  
 21 diagnosing cancer or something like that or why  
 22 somebody die, was in the hospital for a long time, and  
 23 you know, what was happening and any chemical imbalance  
 24 or something, or any real disease or coronary artery  
 25 disease or something like that.

1 Q What's the difference between that and a  
 2 legal autopsy?  
 3 A Legal autopsy, we have to find out, like, person  
 4 got in accident, how he got in accident, or suicide,  
 5 or, like, all of the injuries. More we have to go on  
 6 external examination and internal examination both.  
 7 Q So you're not trying to find a disease, but  
 8 you're trying to find a cause and possibly a manner of  
 9 death?  
 10 A Yes.  
 11 Q How many medical-legal autopsies have you  
 12 performed?  
 13 A More than thousand.  
 14 Q More than a thousand. Okay.  
 15 And how many of those have involved  
 16 fire-related death?  
 17 A Approximately 100.  
 18 Q Are you familiar, then, with the effects  
 19 that fire have on the human body?  
 20 A Yes.  
 21 Q The effect that heated gases have on the  
 22 human body?  
 23 A Yes.  
 24 Q The effects that smoke has on the human  
 25 body?

1 A Yes.

2 Q Are you familiar with carbon monoxide  
3 deaths caused by fire?

4 A Yes.

5 Q Are you familiar with carbon monoxide death  
6 with other manners other than fire?

7 A Yes.

8 Q Obviously, then, you are familiar with the  
9 effects that carbon monoxide has on the human body,  
10 correct?

11 A Yes.

12 Q Have you ever testified as an expert in  
13 superior court?

14 A Yes.

15 Q How many times would you say you've  
16 testified?

17 A About 40; about 40 times.

18 Q About 40 times?

19 A Or maybe more than that.

20 Q And of those times that you've testified,  
21 has your expertise been in the area of forensic  
22 pathology?

23 A Yes.

24 MS. LACKEN: At this time, I'm going to ask  
25 that you qualify, respectfully, Dr. Shah as an expert

1 witness, as a medical examiner, specifically, in the  
2 area of forensic pathology.

3 THE COURT: Any objection or voir dire?

4 MR. HAMILTON: No objection or voir dire.

5 THE COURT: Dr. Shah may be considered as  
6 an expert witness in the area of forensic pathology.

7 Q Dr. Shah, I'm going to direct your  
8 attention to May 13 of 2002. Did you have an occasion  
9 to perform an autopsy on an individual by the name of  
10 Ellis McNeill?

11 A Yes.

12 Q All right. Did you complete a report  
13 regarding your findings during the autopsy?

14 A Yes.

15 MS. LACKEN: S-59.

16 THE COURT: S-59 for identification.

17 Q Dr. Shah, I presented you what has been  
18 marked previously with the sticker S-59 for  
19 identification purposes. Do you recognize what that  
20 is?

21 A Yes.

22 Q It's a multipage document. Can you tell  
23 me, if you look at that, what is that?

24 A This is the autopsy report which was prepared by  
25 me after doing the autopsy on Ellis McNeill.

1 Q Now, in this particular investigation, was  
2 an investigator from the medical examiner's office  
3 called out to the scene on the date of the homicide,  
4 May 11, 2002?

5 A Yes.

6 Q And was that investigator Harvey Giebel?

7 A Yes.

8 Q As a result of his initial observations at  
9 the scene, does he compile a report for you?

10 A Yes.

11 Q Is that called -- is it known as the RIME  
12 report?

13 A Yes.

14 Q Report of the investigator of the medical  
15 examiner?

16 A Yes.

17 Q When you get that report, do you get that  
18 report and rely on the facts in that in order to render  
19 your opinions as to the cause and manner of death?

20 A Yes.

21 Q For you, is that an integral part of the  
22 autopsy report?

23 A Yes.

24 Q What time did you perform the autopsy on  
25 May 13, 2002?

1 A At 11:00 a.m.

2 Q Now, in preparation for the autopsy, prior  
3 to beginning it, do you review any information other  
4 than the RIME to help give you what happened and what  
5 you might be looking for during the autopsy?

6 A I was given the investigation report, the police  
7 report, and Harvey Giebel's report.

8 Q So you were given the RIME report, the  
9 Harvey Giebel report, and the police report, and the --

10 A And the x-rays.

11 Q X-rays are taken of the body before you  
12 actually do the autopsy?

13 A Yes.

14 Q You began your autopsy at 11:00 a.m. Were  
15 there various law enforcement officers present during  
16 your autopsy?

17 A Yes.

18 Q And is that something that is normal during  
19 a medical-legal autopsy?

20 A Yes.

21 Q What was the first thing that you did as  
22 far as your examination of McNeill's body?

23 A I examined the person on external examination,  
24 examination of the clothing, and I also examined the  
25 body from top to bottom.



1 Q When you examined the outside, what  
2 notations did you make or what did you observe  
3 regarding McNeill?

4 A I examined that -- do you want me to go through  
5 the --

6 Q Let me ask you this: when you are  
7 conducting your autopsy, are you taking notes of any  
8 kind? I'm sorry. When you are conducting your  
9 autopsy, are you taking notes of any kind?

10 A Yes. I write up everything, what I am seeing,  
11 like external examination, and while I'm doing autopsy.  
12 And if -- and if my hands are not clean, I'll ask  
13 somebody to write down the weight or any important  
14 stuff.

15 Q Do you also draw on diagrams when you're  
16 conducting the autopsy?

17 A Yes.

18 Q And is that to show where the various areas  
19 of injury that you saw were?

20 A Yes.

21 MS. LACKEN: S-60 and 61 for  
22 identification, your Honor.

23 THE COURT: So marked.

24 Q I'm showing you, Dr. Shah, first, before  
25 you go anywhere, S-60 for identification. Can you

1 recognize what that is?

2 A Yes.

3 Q What is that?

4 A This is the blowup diagram that I made when I was  
5 doing the autopsy.

6 Q All right. And besides being a blowup,  
7 does it look substantially the same as it did when you  
8 conducted the autopsy back in May of 2002?

9 A Yes.

10 MS. LACKEN: I'm asking your Honor that  
11 S-60 be moved into evidence.

12 THE COURT: Any objection?

13 MR. HAMILTON: No objection.

14 THE COURT: Into evidence.

15 (S-60 is marked into evidence.)

16 Q S-61 for identification purposes.

17 Dr. Shah, do you recognize what that is?

18 A Yes.

19 Q What is that?

20 A This is the back of the body in the sketch done  
21 by me.

22 Q Okay. And in looking --

23 A The same autopsy.

24 Q In looking at that, besides being a blowup  
25 version, is it substantially the same as the drawing

1 you did back when you conducted the autopsy in May of  
2 2002?

3 A Yes.

4 MS. LACKEN: I ask that S-61 be moved into  
5 evidence.

6 THE COURT: Any objection?

7 MR. HAMILTON: No objection.

8 THE COURT: Into evidence.

9 (S-61 is marked into evidence.)

10 Q S-60 in evidence. Dr. Shah, can you tell  
11 us about what you found? And if you need to refer to  
12 the autopsy report that I gave you, that's fine. Just  
13 let us know you're doing so.

14 Can you tell us what you observed during  
15 the external examination of McNeill and his clothing?

16 A His clothing included a checkered shirt, blue  
17 pants with a belt, also had a brown shoes, and a blue  
18 pants was burned on the left side.

19 Q His blue pants were burned -- you're facing  
20 the drawing. Would you like a pointer?

21 MS. LACKEN: Your Honor, may we please use  
22 your pointer?

23 THE COURT: Certainly.

24 Q Dr. Shah, if you need to, you can go up  
25 there -- you've got to push the button.

1 THE COURT: High technology there.

2 A Okay.

3 Q So --

4 A Okay. He was completely clothed with a checkered  
5 shirt, blue pants with the belt. It was dirty, and it  
6 was burn on the left side, like the pants, on the left  
7 side.

8 Q We're down here, Dr. Shah, so we're having  
9 trouble hearing you.

10 His pants were burned?

11 A Burned on the left side. And he was wearing  
12 brown shoes, white socks, blue T-shirts, and then shirt  
13 he was holding in his hand.

14 Q He was holding a shirt in his hands?

15 A He was holding in his hand. And blue sweatband.  
16 That was his clothing.

17 So I removed the clothing and then examined  
18 him from top to bottom. And, like, his height was 70  
19 inches, weighed about 140 pounds; hair, curly; eyes  
20 cloudy and burned; and teeth, one top tooth; bottom,  
21 own; and poor hygiene.

22 Q And tell me about him now? You said what  
23 about his eyes? what did you observe about his eyes?

24 A His eyes were cloudy, and that happens because of  
25 the high heat and burn.

1 Q So his eyes were cloudy and burned?  
 2 A That's because of the high heat; that's the  
 3 changes you see.  
 4 Q What else did you observe with regard to  
 5 McNeill after you took off his clothing?  
 6 A Okay. He had all of the skin, face of the skin  
 7 was, like, peeled off, skin. And then you can see the  
 8 cherry-red discoloration underneath the skin because  
 9 skin was peeling off, and you can see the tissue  
 10 underneath, the cherry-red discolored.  
 11 Q Okay. So his -- the skin on his face was  
 12 peeling off?  
 13 A Yes.  
 14 Q Now, you said there was cherry-red  
 15 discoloration underneath. What is that significant of?  
 16 A In carbon monoxide poisoning when it's -- it  
 17 discolors the skin and make it very red-looking  
 18 because of the carbon monoxide.  
 19 Q Now, not just with skin, does the carbon  
 20 monoxide do anything with the coloration of blood?  
 21 A Yes. Cherry-red discoloration of the blood, and  
 22 that's why it's like -- you know, you can differentiate  
 23 even -- without even doing autopsy. You can say this  
 24 person had carbon monoxide poisoning, but you still  
 25 have to do toxicology to determine it.

1 Q That's the telltale sign; the cherry-red  
 2 discoloration is the telltale sign --  
 3 A Yes.  
 4 Q -- of carbon monoxide poisoning?  
 5 A Yes.  
 6 Q Carbon monoxide is a by-product of fire?  
 7 A Yes.  
 8 Q The gases that you breathe in has carbon  
 9 monoxide?  
 10 A Yes.  
 11 Q What about the -- besides of the peeling of  
 12 the face and the cherry-red discoloration?  
 13 A The skin of the both hands like a glove, like  
 14 skin peeling off. That happens because of the high  
 15 heat.  
 16 Q The skin on his hand became glove-like and  
 17 started peeling off?  
 18 A The top of the skin comes out like a glove.  
 19 Q Like a glove. And that is because of the  
 20 high heat in the fire?  
 21 A Yes.  
 22 Q What else?  
 23 A And then there was also skin peeling off on the  
 24 left leg here.  
 25 Q Same thing, when you say "peeling off"?

1 A Same thing on this side, on the left side of the  
2 leg.

3 Q That's due to the high heat?

4 A Yes.

5 Q Where else besides in the left leg and the  
6 extremities did you find skin peeling?

7 A In the back of the body.

8 Q And that's obviously in your other diagram,  
9 correct?

10 A And one more stuff was here. Black soot in his  
11 nose area.

12 Q There was black soot in his nose area?

13 A Yes.

14 Q What is that characteristic?

15 A He was breathing in all of the smoke and stuff  
16 from the --

17 Q He was alive during the fire because he had  
18 to breathe it in?

19 A Yes.

20 Q Would you find soot in the person's nose if  
21 that person was not alive while in the fire?

22 A Yes.

23 Q You would or you wouldn't?

24 A You would not see that.

25 Q All right. I'm just going to hold this up,

1 S-61 in evidence.

2 Can you tell us what notations you've made  
3 on these diagrams?

4 A Again, this same stuff in the back: The skin is  
5 peeling off on the right side and also the left area,  
6 and here.

7 Q That would be his -- the back of his --

8 A Right hand.

9 Q And right arm?

10 A Yes. Right arm and the right side of the back.

11 Q Dr. Shah, did you also have to conduct --  
12 did you also have, besides conducting your external  
13 investigation of Ellis McNeill, did you also conduct an  
14 internal investigation?

15 A Yes. I make a Y incision on the body and examine  
16 the heart, lungs, and internal organ, liver, spleen,  
17 stomach, intestines. I also collect the blood for the  
18 toxicology examinations.

19 Q Now, when you went and did the internal  
20 investigation of the body, can you describe for us what  
21 notations you made when you went through and did your  
22 examination with regard to the neck organs? Did you  
23 examine that area of McNeill's body?

24 A Yes.

25 Q What did you find?

1 A Soft tissues of neck were free of hemorrhage.  
2 Hyoid bone was intact. Like, that is the main bone  
3 high up in the neck.

4 Q That was intact, so that wasn't broken. No  
5 soft tissue damage; there was no trauma to that area?

6 A No.

7 The glottis, the trachea airways were  
8 filled with black soot, and the mucosa is cherry-red  
9 discolored.

10 Q What is the glottis?

11 A It's part of the larynx.

12 Q And then the tracheal airways were filled  
13 with black soot?

14 A Yes.

15 Q You said the mucosa was cherry red and  
16 discolored. What is that indicative of?

17 A It's indicative of carbon monoxide poisoning.

18 Q The soot, that was all the way through his  
19 glottis, near the larynx and near the trachea, what is  
20 that indicative of?

21 A He was alive when he was in the fire, and he was  
22 breathing in the black soot from the fire.

23 Q Did you make any notations with regard to  
24 his tongue?

25 A Tongue also was covered with the black soot.

1 Q with the black soot?

2 A Yes.

3 Q Also indicative of breathing in that smoke  
4 and all of the gases?

5 A Yes.

6 Q Did you make any observations with regard  
7 to your examination of McNeill's heart and thoracic  
8 organs?

9 A Heart and thoracic organ. The heart was  
10 unremarkable. It was slightly left ventricle  
11 hypertrophy, goes with the age, but nothing  
12 substantial. There's no coronary artery occlusion or  
13 anything else. The blood was still cherry-red  
14 discolored.

15 Q So the blood pretty much was cherry red  
16 throughout the organs?

17 A Throughout all of the organs.

18 Q What does that mean? Like, did that give  
19 you any estimation of the period of time that that  
20 person was alive during the fire, or can't you make  
21 that determination?

22 A No. He was -- only thing you can say, he was  
23 breathing in the carbon monoxide, and it should be in  
24 the blood.

25 Q with regard to the vascular system?



1 A It just shows minimal arteriosclerosis, and the  
2 blood also same, cherry-red discolor.

3 Q With regard to the lungs, apparently, there  
4 didn't seem to be any type of trauma to the lungs, but  
5 did you notice anything with regard to soot?

6 A Yes. There was soot in the bronchi and the  
7 bronchial branch.

8 Q What does that mean?

9 A The main, in the right and left side of the lung,  
10 the air flows from the nose to trachea, to larynx,  
11 larynx to trachea, and then goes to bronchi, and then  
12 it divides into bronchia branch. So all of them were  
13 covered with the black soots; the whole air passage was  
14 covered with the black soots.

15 Q With regard to other areas of the body, the  
16 liver and the kidneys, did you note any particular area  
17 of trauma or anything like that?

18 A No.

19 Q Did you note the cherry-red discoloration  
20 throughout McNeill's body?

21 A Yes.

22 Q That is consistent with carbon monoxide  
23 poisoning?

24 A Yes.

25 Q With regard to the cranial cavity, did you

1 do a search there?

2 A Yes. I opened up the head and examined it, and  
3 there was no evidence of any trauma or any other  
4 injuries then, except the discolored blood.

5 Q So no other injuries in the head?

6 A No.

7 Q But the characteristic signs of carbon  
8 monoxide poisoning, correct?

9 A Yes.

10 Q Now, at the -- I assume, although we didn't  
11 hit every organ in the body, that you did an  
12 examination of every organ, and you didn't find  
13 anything significant other than the cherry-red  
14 discoloration and the soot that you noted; is that  
15 correct?

16 A Yes.

17 Q Did you make a list of gross anatomical  
18 findings at the end of the autopsy of Mr. McNeill?

19 A Yes.

20 Q What were your findings?

21 A The body of a middle-aged black male with the  
22 scaphoid abdomen and burned face, exposing cherry-red  
23 discolored subcutaneous tissue. Both hand have  
24 glovelike skin peeling off, skin peeling off on the  
25 left forearm and back of the right hand, and also skin

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1 blistering and peeling off in back of the right-side  
 2 scapular area.  
 3 Q Scapular is where?  
 4 A Back, shoulder blade.  
 5 Q Okay. Shoulder blade?  
 6 A Um-hum.  
 7 Q Lumbar and gluteal area?  
 8 A Lumbar would be the back area and down near  
 9 the --  
 10 Q Gluteus maximus?  
 11 A Yes. Skin is peeling off on the back of the left  
 12 lower leg and lateral surface of the left lower leg and  
 13 portion of anterior side of the lower leg on the left  
 14 side.  
 15 Q So you had skin peeling off on the various  
 16 areas of his leg?  
 17 A Right. Clothes are partly burned, mostly left  
 18 side of the blue pants.  
 19 Q What else did you list during your gross  
 20 anatomical findings?  
 21 A "Blood: cherry red, discolored; heart: soft,  
 22 cherry-red discoloration of the blood and skeletal  
 23 muscle; lungs: black soot in the lumen and cherry-red  
 24 discoloration of the blood, congestion and anthracosis  
 25 of both lungs; liver: congestion and cherry-red

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1 discoloration; spleen: congestion, cherry-red  
 2 discoloration; kidneys: congestion and cherry-red  
 3 discoloration; brain: cherry-red discoloration; neck:  
 4 trachea and larynx filled with black soot, and  
 5 cherry-red discoloration of blood, mucous membrane,  
 6 congestion. Cause of death: Carbon monoxide  
 7 poisoning, due to house fire, manner of death pending."  
 8 Q You said "manner of death pending." why  
 9 did you leave it pending at that point?  
 10 A Because they were still doing the investigation.  
 11 Q How about you? were you still doing  
 12 medical investigation with regard to your autopsy  
 13 findings?  
 14 A Yes. Only the toxicology examination that I was  
 15 waiting for.  
 16 Q How -- when you say "toxicology  
 17 examination," what is that?  
 18 A I collect the blood, brain, and the bile and the  
 19 urine and send for toxicology examination, and send the  
 20 chemical lab, ABC Lab, and they send you the report,  
 21 and for the carbon monoxide.  
 22 Q Now, the laboratory report that is  
 23 generated as a result for your request for a toxicology  
 24 examination, does that get integrated into your autopsy  
 25 report?

1 A Yes.

2 Q And do you rely upon that, obviously, to  
3 support your findings?

4 A Yes.

5 Q With regard to the analysis of blood that  
6 you sent with regard to Mr. McNeill, is there a  
7 notation with regard to carbon -- it says  
8 "carbohemoglobin"?

9 A Carbohemoglobin.

10 Q What is that?

11 A Like, carbon monoxide combined with the  
12 hemoglobin. Hemoglobin is the vein that in a normal  
13 person, the hemoglobin that transfers the oxygen in the  
14 body.

15 Q Hemoglobin is part of your blood?

16 A Yes, and that circulates the oxygen in the body.  
17 But the carbon monoxide, it competes with the oxygen  
18 and has more affinity to hemoglobin than oxygen, so you  
19 don't get oxygen, you get carbohemoglobin.

20 Q The more carbon monoxide that's in a  
21 person's blood means the less oxygen in a person's  
22 blood, correct?

23 A Yes.

24 Q And the higher percentage of carbon  
25 monoxide, the lower percentage of oxygen?

1 A Yes.

2 Q Is that what ultimately causes the death of  
3 a person that dies from carbon monoxide poisoning?

4 A Yes.

5 Q What was the carbon -- how do you say it?

6 A Carbohemoglobin, 75 percent saturation.

7 Q What does that mean?

8 A That is like in a person, like, normal, if you  
9 have nonsmokers, you may find, because of any  
10 pollutions, maybe less than 10 percent in any, you  
11 know, walking person. Person who is smoking, you may  
12 have 20 to 40 percent maximum, but anything more than  
13 that, it is --

14 Q Fatal?

15 A -- fatal. And that's happened because of this  
16 carbon monoxide poisoning.

17 Q As a result of the toxicology report coming  
18 back, and then as a result of the rest of the  
19 investigation, was the manner of death that you list as  
20 "pending" changed ultimately?

21 A Yes.

22 Q And was it -- what was the ultimate  
23 determination?

24 A Homicide.

25 MS. LACKEN: If I can have a second, your

1 Honor.

2 THE COURT: Sure.

3 Q Were all of your opinions today expressed  
4 within a degree of medical certainty?

5 A Yes.

6 Q Dr. Shah, could you tell, based on what you  
7 saw of McNeill's skin peeling off, whether or not that  
8 skin peeling happened prior to death or after death?

9 A It is difficult to say that, even, because the  
10 skin peeling off with the high heat in the area.

11 Q So it could occur prior to or after death?  
12 Or during death?

13 A Around the time of death.

14 Q Okay. But you can't pinpoint whether it  
15 happened before or after?

16 A No.

17 Q Thank you, Dr. Shah.

18 MS. LACKEN: Your Honor, I have no further  
19 questions.

20 THE COURT: Cross-examine.

21 CROSS-EXAMINATION BY MR. HAMILTON:

22 Q Again, medically speaking, when somebody  
23 dies of carbon monoxide poisoning, does there come a  
24 point in time when they lose consciousness but they're  
25 still alive?

1 A Yes.

2 Q Where does that point come?

3 A Anything, like, about 50 percent carbon monoxide  
4 in the body, person do lose consciousness.

5 Q All right.

6 A And then, like, in the beginning, he's coughing  
7 and, you know, respiratory distress, and then as the  
8 breathing gets worst -- the breathing becomes worse and  
9 he becomes unconscious.

10 Q This happens when someone is breathing in  
11 sooty smoke?

12 A It just happened.

13 Q I understand it happens when you're  
14 breathing in sooty smoke, but let's assume a set of  
15 facts where the heater in your house malfunctions,  
16 doesn't send off smoke, but it emits carbon monoxide  
17 which you inhale --

18 A Yes.

19 Q -- and succumb to.

20 Do you have the sort of coughing that you  
21 described in that situation?

22 A In that, like, then the person may have a  
23 coughing or some -- but like mentally, they -- like,  
24 they become confused and then become unconscious.

25 Q All right. Now, did the toxicology tests

1 result in any other potentially toxic substances?  
 2 A Yes.  
 3 Q What did they reveal?  
 4 A It was cocaine and benzoylecgonine. It is a  
 5 by-product of cocaine.  
 6 Q In terms of relation to potential acute  
 7 toxicity, how much was there and how did it relate?  
 8 A It is in the high dosages, like the labels. It's  
 9 2.1. That is a high label level.  
 10 Q By "high" you mean potentially acutely  
 11 toxic?  
 12 A Yes.  
 13 Q What does that mean in terms of a person's  
 14 consciousness? Conscious, but just heavily under the  
 15 influence, or in and out of consciousness? Can you  
 16 orient us?  
 17 A He is under the effect of drugs. He may have,  
 18 like, loss of consciousness, possible, or he may be  
 19 agitated at that time, not, you know, himself.  
 20 Sometimes they become very aggressive with this kind of  
 21 high level of cocaine.  
 22 MS. HAMILTON: All right. Thank you very  
 23 much, Dr. Shah.  
 24 THE COURT: Anything further, Prosecutor?  
 25 MS. LACKEN: Just with respect to that,

1 Dr. Shah.  
 2 REDIRECT EXAMINATION BY MS. LACKEN:  
 3 Q With respect to cocaine and the stuff that  
 4 was found in his system, when you take a look at this,  
 5 is there any question in your mind that that was not  
 6 what killed him?  
 7 A Yeah. That didn't kill him because he was alive  
 8 when -- because, otherwise, you don't get carbon  
 9 monoxide level 75 percent in the body.  
 10 Q Obviously, he was a drug user, but you  
 11 would have no way of knowing with the 2.1 reading that  
 12 you indicated, you know, whether or not he was agitated  
 13 or not? What I'm saying is, basically, it depends upon  
 14 a person's tolerance. That 2.1 could have meant  
 15 nothing to a high user, or someone who doesn't use  
 16 drugs, it could be toxic, correct?  
 17 A It varies how a person respond to it.  
 18 Q Therefore, that 2.1 reading had little  
 19 effect, I would imagine, on your cause or manner of  
 20 death assessment?  
 21 A Yes. Manner of death, yes.  
 22 Q Okay.  
 23 MS. LACKEN: I have nothing further, Judge.  
 24 THE COURT: Thank you, Dr. Shah.  
 25 (The witness is excused.)



1 THE COURT: We'll take our mid-afternoon  
 2 break, ladies and gentlemen. Please step down, please  
 3 don't talk about the case, and enjoy your refreshments.  
 4 (The following is out of the presence of  
 5 the jury.)  
 6 THE COURT: Of course, I relied on the  
 7 representation of the state that you were going to have  
 8 12 witnesses and you had 11.  
 9 MS. LACKEN: I can't find the other one.  
 10 THE COURT: Do you plan to have any  
 11 witnesses?  
 12 MR. HAMILTON: I don't plan on any.  
 13 THE COURT: If you would like, in  
 14 anticipation of the resting of the state, you can make  
 15 the pro forma motion, or the Court will note a 3:18  
 16 motion and deny the same, but for purposes of the  
 17 record, if you would like to embellish upon it, you  
 18 certainly may.  
 19 MR. HAMILTON: I'll submit on such a 3:18  
 20 motion.  
 21 THE COURT: State v. Reyes would govern,  
 22 and it would certainly not be susceptible to the  
 23 dismissal contemplated by 3:18.  
 24 All right. Therefore, we'll take a break  
 25 and be back at 3:00.

1 (Recess is taken).  
 2 SERGEANT-AT-ARMS: Remain seated.  
 3 THE COURT: All right. Prosecutor, if you  
 4 will, call your next witness.  
 5 MS. LACKEN: Your Honor, the state has no  
 6 further witnesses. We do have some evidence that we  
 7 would like to ask be admitted. There are a few  
 8 pictures that I don't believe actually made their way  
 9 into evidence.  
 10 THE COURT: Are there?  
 11 MS. LACKEN: They were identified, Judge,  
 12 but not actually moved in.  
 13 THE COURT: They were marked for  
 14 identification; is that correct?  
 15 MS. LACKEN: Yes. S-4.  
 16 THE COURT: Correct. Any problem?  
 17 MR. HAMILTON: Consent.  
 18 (S-4 is marked into evidence.)  
 19 MS. LACKEN: S-16.  
 20 THE COURT: Right.  
 21 MR. HAMILTON: Consent.  
 22 (S-16 is marked into evidence.)  
 23 MS. LACKEN: S-25.  
 24 MR. HAMILTON: Consent.  
 25 (S-25 is marked into evidence.)

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COLLOQUY

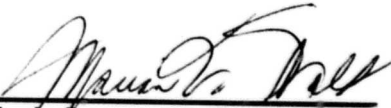
1 MS. LACKEN: I'm not quite sure. It seems  
 2 S-27, we have it in.  
 3 THE COURT: I have it in as well.  
 4 MS. LACKEN: I don't think your clerk does,  
 5 so I'm going to move it in anyway.  
 6 THE COURT: It's in.  
 7 MS. LACKEN: At this time, your Honor,  
 8 that's all the state has by way of evidence. The state  
 9 submits.  
 10 THE COURT: Thank you.  
 11 Mr. Hamilton.  
 12 MR. HAMILTON: The defense also rests.  
 13 THE COURT: All right. Ladies and  
 14 gentlemen, that means you're going to get an easy day,  
 15 in light of you working so hard yesterday. So you'll  
 16 be excused now to come back tomorrow morning when we'll  
 17 hear the summations of counsel and the charge of the  
 18 Court, and you'll be able to begin deliberations  
 19 tomorrow.  
 20 Have a nice evening. Relax. Don't talk  
 21 about the case with anybody, even amongst yourselves.  
 22 We'll see you tomorrow morning. I'm going to ask you  
 23 to see if you can get here at 9:00. Would that cause  
 24 any of you undue hardship? I appreciate your  
 25 willingness to cooperate with the Court.

COLLOQUY

1 We'll start you right off the bat. We hope  
 2 tomorrow we'll have the logistics straightened out. So  
 3 thank you again for your attention, for your  
 4 cooperation and for your willingness to participate.  
 5 Thank you. We'll see you tomorrow at 9:00.  
 6 (The following is out of the presence of  
 7 the jury.)  
 8 THE COURT: All right. Please be seated.  
 9 We will address the final charge issues  
 10 tomorrow morning. I'll have a copy of the charge ready  
 11 for you, and I believe that I'm going to charge arson,  
 12 straight arson, as a lesser included of the aggravated  
 13 arson.  
 14 Has anything been done with respect to your  
 15 proposal for transferred intent?  
 16 MS. LACKEN: I'll do that this afternoon.  
 17 I'll have it for both counsel and your Honor tomorrow  
 18 morning in typed form. And if you would like to alter  
 19 it in any way, I'll ask counsel for his  
 20 recommendations.  
 21 MR. HAMILTON: I have had a chance to talk  
 22 to my client about his election to testify which,  
 23 obviously, we've resolved in the fashion indicated.  
 24 And I have talked to him about the State v. Smith  
 25 charge, whatever it is about his election not to

1 testify, and he's acceding to my wish that that be  
 2 given, and --  
 3 THE COURT: Is that your decision,  
 4 Mr. Fleming?  
 5 The DEFENDANT: Yes, sir.  
 6 THE COURT: And do you believe you -- you  
 7 understand the nature of the charge? I read it to you  
 8 once before.  
 9 The DEFENDANT: Yes.  
 10 THE COURT: And you wish that be charged as  
 11 opposed to no charge?  
 12 The DEFENDANT: Yes.  
 13 THE COURT: Is there anything else we need  
 14 to address before we adjourn?  
 15 MS. LACKEN: Nothing from the state, your  
 16 Honor.  
 17 THE COURT: And that shaking of the head  
 18 would mean nothing from the defense?  
 19 MR. HAMILTON: Correct.  
 20 THE COURT: Thank you very much, both of  
 21 you. See you tomorrow morning at quarter to 9:00.  
 22 MS. LACKEN: Thank you.  
 23 (The matter is concluded for the day.)  
 24  
 25

CERTIFICATION

1  
 2  
 3 I, MARIAN V. WALSH, C.S.R., License Number  
 4 805, an Official Court Reporter and Notary Public in  
 5 and for the State of New Jersey, do hereby certify the  
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12-17-04  
 Date

**A-1217-04T4**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
IND. NO. 03-02-0286  
APP. DIV. NO. A-1217-04T4

THE STATE OF NEW JERSEY, )

vs. )

LARRY FLEMING, )

Defendant. )

STENOGRAPHIC REPORT  
**RECEIVED**  
**APPELLATE DIVISION**  
DEC 28 2004  
**SUPERIOR COURT**  
**OF NEW JERSEY**

PLACE: Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey

DATE: February 5, 2004

B E F O R E :

HON. BILL MATHESIUS, J.S.C. **FILED**  
APPELLATE DIVISION  
DEC 28 2004

Transcript Ordered By:

OFFICE OF THE PUBLIC DEFENDER *Don Flynn*  
CLFRK

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For the State of New Jersey

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\* \* \* \* \*

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COLLOQUY

1 THE COURT: On the record. All right.  
2 With respect to the charges, there's been a  
3 flurry of recent requests, everything from  
4 lesser-included offenses to what has been  
5 mischaracterized as 404(b) testimony, but rather as a  
6 cautionary instruction that may be used in this case.  
7 With respect to the fact that there has  
8 been discussions about the relationship between the  
9 defendant and other of the witnesses, and the potential  
10 relationship with the victim, there was discussion of  
11 drug sales, people owing money for drugs, people -- the  
12 defendant wanting to obtain money from one of the  
13 witnesses because of drug sales, the denial of that  
14 drug sale.  
15 In other words, there's a whole melange of  
16 drug discussion. So the Court is inclined to give a  
17 cautionary instruction regarding the use of that  
18 information for purposes of a foundation to convict the  
19 defendant on the charges with which he is confronted.  
20 So that cautionary instruction will be  
21 given that the jurors should not and cannot take those  
22 discussions, the involvements, the conclusions they  
23 might come to relating to the defendant's sale of drugs  
24 and being a drug seller, as evidence that he committed  
25 the crimes with which he's being charged. And it



1 cannot be used by them other than as a foundation for  
2 their identification and their knowledge of the  
3 defendant as Larry Fleming, a/k/a Fruit.

4 Does that make sense both to both of you?  
5 MR. HAMILTON: That makes sense. But what  
6 strikes me, though, is it's trickier than it appears  
7 sometimes in terms of, I may be seeking to have the  
8 jury draw inferences from the fact that the  
9 relationships between the parties may in fact be drug  
10 user/drug dealer, so forth and so on. And this is  
11 legitimate for those purposes, I think, but I'm just  
12 concerned about if -- if the -- if the cautionary  
13 charge isn't reduced to writing beforehand, it may be  
14 easy to get involved --

15 THE COURT: It will be reduced to writing.  
16 When I get it at eight minutes after nine, I don't have  
17 it at nine minutes after nine.

18 MR. HAMILTON: We are terrible for doing  
19 that to you and I apologize.

20 THE COURT: There is a --

21 MR. HAMILTON: Then we got a plate of  
22 lesser-included worms, too, right?

23 MS. LACKEN: We do.

24 THE COURT: We've already considered the  
25 issue of aggravated manslaughter and manslaughter.

1 what is your observations?

2 MS. LACKEN: Your Honor, last night, after  
3 we left, I went back and I did some more reading. I  
4 think it's clear that the test is a rational-basis  
5 test. If there's any way, based on the facts, the jury  
6 could conclude that it wasn't murder, but it was a  
7 lesser included, then you have to give the charge to  
8 the jury.

9 So in thinking about it, it's -- the jury  
10 could think, okay, Larry Fleming did all of the things  
11 that the state proposes, except that we really just  
12 don't believe that he tried to kill anyone. He was  
13 trying to, you know, scare him or whatever, and  
14 therefore, aggravated manslaughter, the recklessness  
15 would come into it.

16 So I would suggest that although it may not  
17 be the state's theory, it probably should, as a matter  
18 of law, be charged.

19 THE COURT: What about the next lesser  
20 included that -- the purposeful indifference to human  
21 life and what have you?

22 MS. LACKEN: Well, if you're going to  
23 charge aggravated manslaughter, then you should charge  
24 manslaughter, particularly since we decided yesterday  
25 we were going to charge aggravated arson and arson.

COLLOQUY

1 You go back down to that reckless standard, although I  
 2 don't think it's a viable charge based on the evidence.  
 3 My personal opinion, I think it's much higher, it still  
 4 meets the rational-basis test, and I think we should  
 5 charge it.

6 MR. HAMILTON: I hate to say so, but I  
 7 agree with her. I was happy to be in the tactical  
 8 situation. I have an all-or-nothing approach to it.  
 9 And if there was anything else in our pocket should,  
 10 God forbid, that the defendant be convicted, then that  
 11 was fine with me. But I think it's silly, but that  
 12 seems to be the way the case is going.

13 MS. LACKEN: I know your Honor has probably  
 14 already made this conclusion, but I did yesterday tell  
 15 you I would revisit the issue of NERA, I don't think a  
 16 charge has to be given.

17 THE COURT: I'm quite confident it is  
 18 not -- it's a poststatute offense. The NERA is not, in  
 19 my view, any part of this charge.

20 I just say as an editorial note, how a jury  
 21 is really able to divine through this labyrinthine path  
 22 that makes sense because of the lesser-included  
 23 offenses and the nuances that are imposed upon them,  
 24 leads me to believe that either we don't have enough  
 25 faith in jurors to understand what's going on, or there

COLLOQUY

1 is a base fear that exists in the appellate division  
 2 that somewhere someone is going to be convicted of a  
 3 crime.

4 I see the jurors looking when I'm reading  
 5 30 pages of a single-spaced document, and they are  
 6 perplexed and confused, and we're, I guess, fortunate  
 7 that they're able to come up with the answers that they  
 8 do, and disregarding, I guess, much of the impedimenta  
 9 that is purportedly supposed to be included in charges.  
 10 It's really unbelievable.

11 That having been said, we're working on it.

12 MR. HAMILTON: I'm impressed. Those are  
 13 serious, insightful observations of somebody who has  
 14 toiled in the vineyards that do anything but deprecate  
 15 the dignity and seriousness of the process.

16 THE COURT: Thank you. I know that alludes  
 17 to State v. Davis, my favorite case.

18 SERGEANT-AT-ARMS: Jury entering court.

19 THE COURT: Good morning.

20 (The following is in the presence of the  
 21 jury.)

22 THE COURT: Good morning, ladies and  
 23 gentlemen. Please be seated. Let me apologize for the  
 24 conditions in this courtroom. The thermostat says 85.  
 25 I guess I'm getting some benefit for being a little

SUMMATION - HAMILTON

1 higher. I'm glad everybody looks kind of prepared and  
2 I appreciate that. I'm glad that everybody understood  
3 that these conditions could prevail.

4 In any event, we have a 101-year-old  
5 courthouse and it's showing its age. Also, I'd like to  
6 apologize for the delay. I got you here at 9:00, and  
7 it's -- we're starting at 9:39, so that again, that's  
8 two apologies before the day has even started.

9 In any event, we're ready to go.  
10 Mr. Hamilton, are you ready to give your closing  
11 argument?

12 MR. HAMILTON: I am.

13 THE COURT: If you would, please, sir.

14 MR. HAMILTON: I'm ready for a hat trick  
15 too. This gives me a chance to apologize for my  
16 mismatched sweater. I'm not taking it off. It's cold  
17 in here.

18 Ladies and gentlemen, at the beginning of  
19 this case, I think there ought to be mention given to  
20 the memory of Mr. McNeill who died in this fire. He  
21 was apparently a man of humble circumstances at this  
22 time, but he didn't do a thing to deserve what happened  
23 to him and by all accounts that were given in this  
24 courtroom. He was a nice individual. He lives on in  
25 the hearts and minds of those who loved him, including

SUMMATION - HAMILTON

1 some members of his family whom I've noticed have  
2 religiously attended this trial.

3 And it was obvious from the testimony of  
4 Carmen Jones who, whatever else you might have to say  
5 about her, she's good at heart. She's a loyal friend  
6 to him, and he was someone dear to her. You didn't get  
7 the sense that it was anything like the problematic  
8 relationship the defense contends exists between her  
9 and Curtis Hawkins. It was a dear person who -- who  
10 must surely have understood her pain.

11 One of the things that's come out in the  
12 course of this trial is that crackheads are people too.  
13 What a surprise, hopefully, not to any one of you, a  
14 surprise to many people. They have to live like lepers  
15 in a society that condemns their behavior. And they're  
16 by nature, I submit, having heard some of them testify  
17 here, secretive. They seek to make small what they're  
18 doing wrong to sort of deflect the discussion about  
19 what's going on with their life, and also what's going  
20 on with the truth.

21 How about Curt Hawkins? Well, Curt, back  
22 at the time this was all happening with the fire, you  
23 testified you spent a lot of times going in and out of  
24 Stokes Bar. Did you have any alcohol?

25 And he sort of drew himself up in his

1 dignity and said, I don't drink, no.  
 2 Forgive me for asking the question, I  
 3 didn't know.  
 4 Later on, when it suited his purpose, he  
 5 said he doesn't do drugs anymore, he does alcohol.  
 6 Well, you could reconcile them. On the  
 7 other hand, if you had a little bit of a queasy  
 8 feeling, having heard that, I submit to you, you were  
 9 in fine mental health and you have good powers of  
 10 perception. Because the thing is, with a man like  
 11 that, whatever suits his need at a particular moment is  
 12 what he's going to do.  
 13 He has no scruples. He's a hustler, baby,  
 14 and he wants to let you know. He's a hustler. He's  
 15 probably the -- well, I don't want to use bad words.  
 16 You get some sense of how the defense may view him.  
 17 Let's take a look at the core story here.  
 18 We say what happened was that Curt probably, because he  
 19 wanted to flush Carmen out -- he had a thing going with  
 20 Carmen, you know that from her -- Curt wouldn't admit  
 21 it. Wasn't that interesting? This posturing creature  
 22 wouldn't admit that he had something going with her.  
 23 But her, her face lit up. Remember, I  
 24 reminded her of that in the questioning that I did of  
 25 her later and she basically acknowledged it. You know,

1 she didn't take a stand and say I mischaracterized how  
 2 she looked, and she said maybe. Well, that's close  
 3 enough, you know, for the sort of witnesses we're  
 4 dealing with. And I digress.  
 5 What I'd like to do is get to the central  
 6 story of Larry Fleming walking down the alley with a  
 7 gas can into the house and supposedly torching the  
 8 house.  
 9 At the beginning of the case I told you,  
 10 you don't really have solid proof as to that. You just  
 11 have the say-so of one person in this case, Curtis  
 12 Hawkins, plus the say-so of Carmen Jones, whom I submit  
 13 was manipulated by Curtis Hawkins, manipulated by being  
 14 told that Larry Fleming was the one who did it.  
 15 And then her good heart was twisted a bit  
 16 with hatred and the urge to make sure that Larry  
 17 Fleming paid for what he had done to her dear friend  
 18 which she took as fact from her friend/lover/drug  
 19 dealer/Svengali/hustler/ manipulator dude, Curt  
 20 Hawkins. It didn't even have to be specifically  
 21 suggested to her that she did this, perhaps, but five  
 22 will get you ten that it was.  
 23 Now, you know that Curt had plenty of time  
 24 to talk to her before she gave her statement to the  
 25 police on May 21st -- was it? -- 22nd, whatever it was,



1 ten days after the fire happened. And you don't know  
2 what Curt was up to for the first part of that evening  
3 after the fire happened either.

4 Oh, he shows up, you know, no overt signs  
5 of singeing or smelling of gasoline or anything like  
6 that. Is it possible that Curt could be our bad guy  
7 and that he could have done that without getting  
8 gasoline on his clothes, without getting anything on  
9 the boots that he was wearing at the time that he  
10 talked to the police?

11 Did he have time to change clothes, wash  
12 up? He did a better job than I did, except I was real  
13 lucky getting it in the can with a balled up piece of  
14 paper with a piece sticking out, with the way that  
15 Detective Mathis was describing, which would be the  
16 logical way to do it. You could probably get it to the  
17 back of the room.

18 You heard of no fire damage that was done  
19 in the mud room to the back entrance. It seems as if  
20 somebody could have sought shelter in that room,  
21 chucked it out to the other thing, and you wouldn't be  
22 able to tell a couple hours later if he had done that  
23 or not, especially if he had cleaned up.

24 Why would Curtis Hawkins, if he's the one  
25 who did this, do this? I submit to you that Curtis

1 Hawkins has a very volatile personality. He -- he  
2 appears to be a man -- first of all, he appears to be a  
3 pathological liar, but beyond that --

4 MS. LACKEN: Judge, I'm going to object.  
5 Really, we have gone far beyond reasonable argument  
6 here.

7 THE COURT: Take it a little bit easier on  
8 the ad hominems, will you, please.

9 MR. HAMILTON: No sense beating a dead  
10 horse, it's true. Our feelings are clear. Why would  
11 he do such a thing if he did such a thing?

12 Let's take a closer look at the angle with  
13 Carmen Jones. Is it possible that Curt was the sort of  
14 man who imagined himself as having sort of rights in  
15 her beyond those that perhaps she thought he was  
16 entitled to? That's quite possible. That seems to be  
17 consistent with life on the seamier side, as we may  
18 know it from our common experiences, from reading  
19 books, watching movies, reading newspapers, being aware  
20 of the world around us.

21 You're entitled to use your common  
22 experiences, your font of common knowledge, and your  
23 common sense. And what you come up with here, it's not  
24 rocket science, but it's very important. It's  
25 important to the victim's family. It's obviously



## SUMMATION - HAMILTON

14

1 important to my client. It's important to all of us  
2 that justice be done here.

3 And in touching on something the judge will  
4 say to you, the presumption of innocence and all of  
5 that sort of thing, why do you suppose that's in the  
6 system? I submit it's in the system because the  
7 natural tendency is to assume that somebody who is  
8 charged with a crime is guilty.

9 You may have been aware during the jury  
10 selection process there were people who left this room  
11 and didn't become jurors who appeared perhaps unwilling  
12 to accept that notion, and who see a person charged  
13 with a crime, and bang, that person is guilty, that's  
14 it.

15 You have all demonstrated that you are  
16 fair-minded people, as far as we can tell, and the  
17 rest, you know, we just hope we've chosen well. I  
18 think we're probably confident that the 12 people who  
19 finally decide the case together will do a better job  
20 than any of us advocates sitting out here because  
21 you'll have your collective wisdom. And you'll kick it  
22 all around, and there will be things that maybe one of  
23 us won't mention that you'll come up with, and it may  
24 be something significant that turns the case.

25 The basic problem is that the state's case

## SUMMATION - HAMILTON

15

1 is presented by a very capable, well-intended, skilled  
2 prosecutor who didn't make this case up. She simply is  
3 doing her job for you. This case smells like last  
4 week's dead fish. How much credibility can you rest on  
5 the shoulders of Curtis Hawkins? He has two basic  
6 stories that he gives, along with a lot of other  
7 problems that you can see.

8 The two basic stories are the first one  
9 given in his statement of May 12 is, Larry Fleming  
10 asked me to get the gas. I got the gas. I met him in  
11 front of 340, you know, he gave me some crack. Larry  
12 walked down the alley to the back where the entrance  
13 was to 340. I went to Stokes Bar and played poker.

14 He was a little bit like pulling teeth to  
15 get that out. I had to swim upstream and keep at it to  
16 get it out. But, you know, fairness was done, and the  
17 questions, answers, questions, answers, that were given  
18 were presented.

19 And just to refresh your recollection, I'm  
20 going to read them again as they were read and  
21 confirmed before you. And if there are these or any  
22 other things, or things that you hear conflicting  
23 versions about or you don't remember exactly what was  
24 said -- I'm reluctant to impose this duty on the court  
25 reporter -- but you can ask for a readback of such

1 testimony as you see fit to help you in your  
2 deliberative process, just send a note out saying this  
3 is what you want to do.

4 "Mr. Hawkins" -- this is from his statement  
5 dated May 12, 2002, which was initialed and sworn to be  
6 truthful and complete.

7 "Question: Mr. Hawkins, what happened  
8 next?

9 "Answer: I then went to the Roadrunner Gas  
10 Station at the corner of Brunswick Avenue and Southard  
11 Street and I bought some gas for \$1.50, and I kept 50  
12 cents for myself. I then took the gas and went back up  
13 Brunswick Avenue, and as I got near the alley by  
14 340 Brunswick Avenue, Larry told me to put the gas can  
15 down there.

16 "Larry then crossed over the street from  
17 the direction of Al's Auto Body and gave me some coke.  
18 Larry then took the can of gas and walked down the  
19 alley and went into 340 Brunswick Avenue. He got into  
20 the place by going through the door at the rear where  
21 you have to bend over to get into the house.

22 "Question: Mr. Hawkins, what happened  
23 next?

24 "Answer: I then walked away and went to  
25 Stokes Bar and went inside to play the poker game. I

1 was in the bar and a short time later, I heard that  
2 there was a fire outside. I then left the bar and went  
3 down the street and saw that 340 Brunswick Avenue was  
4 on fire. I then stayed in the area until a detective  
5 talked to me, and then I come to the police station to  
6 give my statement."

7 But I give you alligator tears about set a  
8 fire, set a fire, set a fire, set a fire --

9 MS. LACKEN: Judge, I object. We're not  
10 looking for an Emmy here. This is closing argument,  
11 Judge. I mean, clearly --

12 THE COURT: All right. Let's try to return  
13 a little bit to argument, please.

14 MR. HAMILTON: I will. And there's more  
15 than one way to tell when you've reached a sensitive  
16 spot in the case, isn't there?

17 Now, what's his version when he testifies  
18 in court? First of all, in the prosecutor's opening,  
19 she said that Curtis Hawkins was going to say, as he  
20 and Larry are walking down the alley towards the back,  
21 and Curtis has suddenly figured out what is afoot, This  
22 is for somebody's car -- this isn't for somebody's car.  
23 This ain't right. What are you doing? And he's  
24 following, right?

25 His testimony, of course, was -- didn't

1 have anything about that part. But he went down with  
 2 him, and Larry went in, and Curtis, if your  
 3 recollection matches mine, either stood there, or he  
 4 stuck his head in halfway, didn't go in, but it was  
 5 halfway in.

6 Don't you love these guys? You know, it's  
 7 halfway this. Halfway makes everything better somehow,  
 8 you know. You know, I don't drink alcohol, I do drink  
 9 alcohol.

10 So he's out there, and then depending upon  
 11 exactly what he said at what time, he's either got his  
 12 head in the door when the explosion goes off or the  
 13 ignition goes off, or he's standing outside. And Larry  
 14 Fleming is running out, followed closely by, you know,  
 15 the fireball, something like that.

16 Where was that in his first statement? Why  
 17 would it not have been in his first statement? Mark my  
 18 words, all of this is about nailing Larry Fleming to  
 19 the cross for this terrible crime. In the first  
 20 instance it's about deflecting blame; in the second  
 21 instance it's about consolidating his hustler game,  
 22 cutting Larry out, picking up with the P.J. Hey, P.J.,  
 23 look what I did for you.

24 All that slimy stuff which has nothing to  
 25 do with people shouldn't be believed because they're

1 bad people, you know. It's not because you hang a  
 2 label of drug dealer or drug user on somebody. You say  
 3 it's a bad person, therefore, I reject everything out  
 4 of the person's mouth.

5 I'm sure the Court will tell you something  
 6 to the effect that's not what's going on here.  
 7 However, it is part of the factual context of the case,  
 8 as both I and the prosecutor have been saying all  
 9 along. And the testimony presented in court bore that  
 10 out, and it is what it is.

11 And what's important is how it affects  
 12 people's motives, how it affects their opportunities,  
 13 how it affects their alliances, how it affects why they  
 14 might collude together or not. This isn't -- this  
 15 isn't Agatha Christie and a bunch of people with a  
 16 far-fetched plot on the Orient Express. This is ground  
 17 level in crackhead city, and life and human nature are  
 18 to a great extent dictated by circumstances.

19 These are people who don't have the  
 20 everyday luxury about being noble about everything.  
 21 Life is a subsistent struggle for them. Although it  
 22 seemed, you know, kind of comfortable, maybe some of  
 23 you were surprised. 340 was set up inside in a homey  
 24 fashion. Carmen doesn't want to admit she spends that  
 25 much time there. Go figure. How would she keep her

1 turf if she didn't? what was she in jail for,  
2 nonsupport or something like that?

3 And she's in denial. When did she last use  
4 crack? It was in August.

5 Shortly before your incarceration?

6 Yes.

7 But she could quit any time and she can do  
8 without it. But, poor baby, she seems like a nice  
9 person. She seems like a redeemable person, but she  
10 needs to have intensive drug therapy to get through  
11 this somehow. She's right back on the street when she  
12 gets out, and she does what she does for the greater  
13 good.

14 It's not because she's a bad person. She  
15 does what she does because she's wielding the sword of  
16 the Lord for Peanut, her dear friend who was murdered  
17 by that damn drug dealer. And who can blame her for  
18 feeling that way or giving it a good college try?  
19 Interesting little cracks in the sidewalk.

20 I think the prosecutor said in her opening,  
21 and I think that Curtis Hawkins testified that he went  
22 into 340 and Larry Fleming was with him. And Larry  
23 Fleming demanded money that was owed by Al, some  
24 previous debt of some sort -- I think \$50 may have been  
25 mentioned or not.

1 I could be confused -- demanded money of Al  
2 and chastised them for not buying his product, and then  
3 kind of going out, says to Al, you know, what's done to  
4 me comes back at you, you know, a threat. Curtis took  
5 it clearly as a threat, and it is scripted to be a  
6 threat, folks. It's part of the party line, script  
7 story, these poor desperate people threw together to  
8 put the weight on Larry Fleming.

9 Carmen Jones thought she was right by doing  
10 what she did for the greater good. And Cousin Joe is  
11 joining in the party line, doing what he can. This is  
12 a place that he crashes. Who knows where they are in  
13 the constellation of homeless, crack house people out  
14 there.

15 But this was a neighborhood where all of  
16 the addicts sort of knew each other to some extent,  
17 seemed to support and protect each other. And you get  
18 that sense, and they're interdependent. That's the  
19 family of addicts; nobody can understand and tolerate  
20 their presence. Who can persecute or prosecute them?  
21 And they do this rather than other options we would  
22 hope they would take.

23 Carmen Jones doesn't say in her testimony  
24 about the threat, unless your recollection differs from  
25 mine, which is quite possible. There's such a maze of,



1 you know, the same things being said by different  
 2 people that it's hard to get it straight. That's what  
 3 readbacks are for. But if she didn't say it, is that a  
 4 telling flaw, or it's just in the confusion she didn't  
 5 say it?

6 It isn't like she didn't work hard on the  
 7 testimony that she was going to give. Remember when  
 8 she was going on about the \$2 -- who was it? --  
 9 Bernadine wanted to get from Al, and there was a  
 10 progress of events. And she was going on in a staccato  
 11 fashion, you know, it sounded like a rote story, pat  
 12 story, memorized story. It could be that's what really  
 13 happened, and she just worked really hard on memorizing  
 14 what really happened.

15 But a red flag goes up whenever you see  
 16 that because it's starting to sound like a script.  
 17 It's starting to sound like a pat story. I probably  
 18 should have asked her to repeat it again.

19 Let me review my notes. I'll try not to  
 20 beat this to death, ladies and gentlemen.

21 He testified, Curtis Hawkins testified in  
 22 court, If you burn down -- If you burn Tony's place  
 23 down, I will fuck you up. This to Larry, all this  
 24 brave talk, and what I characterize as alligator tears  
 25 afterwards. Where was the struggle? Where was the

1 shouted warning? Where was the attempted intervention?  
 2 You call this intervention?

3 Now, why that story back then and this  
 4 story now? I'll tell you why. First of all, because  
 5 the story given in court ups the ante. We've got to  
 6 convict this guy. Holy shit, trouble. We've got to  
 7 convict this guy. He doesn't have to worry at this  
 8 point about being charged with the crime, it would seem  
 9 to me you would think.

10 I mean, this is the home stretch. Here he  
 11 is, testifying at the murder trial of Larry Fleming.  
 12 So he's not afraid to put himself close to the  
 13 building. That was the problem with doing it the other  
 14 way before: Maybe they'll think I was a part of it.

15 You know, the prosecutor's going to tell  
 16 you, oh, all of this smoke, distractions from the  
 17 defense. Larry Fleming obviously used Curtis Hawkins'  
 18 cover so he wouldn't be identified as the one who  
 19 bought the gas. Curtis Hawkins is the puppet; Larry  
 20 Fleming is the puppet master. If you were an operator  
 21 on the street, would you trust such important stuff to  
 22 that guy, Curtis Hawkins?

23 Wow, you know, here he's putting off two  
 24 small-time drug dealers against each other, claiming  
 25 they don't know about it. He's got this thing going



## SUMMATION - HAMILTON

1 with this woman who has this house up there, who is  
 2 apparently banging Big Al. Did we hear anything about  
 3 she paid for the drugs? Are we really going to believe  
 4 that it's a sheer pleasure of the company of Carmen  
 5 Jones' conversation?

6 What did she say? He asked a few  
 7 questions, and I gave a few answers. Wouldn't you have  
 8 loved to be a fly on the wall to hear what those  
 9 questions were? I think we know what they were. The  
 10 only means she had to compensate him for what he had  
 11 was things for things. It's humiliating and  
 12 embarrassing for somebody who has to live that life and  
 13 talk about it, and that's why you're not going to get  
 14 it out of them.

15 All you get is maybe, I had sex with Curtis  
 16 Hawkins, and No, I never had sex with Al. Whereas Big  
 17 Al, the man, the man who does not trust attorneys, says  
 18 he had sex with her. You've got to keep that grain of  
 19 salt and that healthy scepticism handy. And no matter  
 20 how passionately the prosecutor pleads her case,  
 21 remember what we're dealing here.

22 Now, the problem with a case like this is  
 23 an innocent victim has died. We would hope that his  
 24 death would be avenged. Well, we would also hope that  
 25 the justice system would be properly preserved.

## SUMMATION - LACKEN

1 There's something that sounds rather  
 2 repelling, but it's been around a long time, and that  
 3 is a saying that it's better that nine guilty men go  
 4 free than one innocent man be convicted. We don't like  
 5 the idea of the guilty men going free, but we in this  
 6 country hold very high the value of not convicting an  
 7 innocent man here.

8 No matter what you would like to do here in  
 9 terms of avenging Peanut's death, you also do not want  
 10 to compound the tragedy. And you have real reason to  
 11 doubt Curtis Hawkins' story, and you can probably see  
 12 how everything else could naturally fall into line.  
 13 They're off to the races and here we are. If that  
 14 overly frustrates you, that you agree this case smells  
 15 like last week's fish, get a hold of Prosecutor  
 16 Bocchini after the case and look into the case and  
 17 offer somebody immunity and see what happens.

18 Thank you for listening. Sorry to go on  
 19 longer than I thought. There's much more that I'm sure  
 20 I've forgotten. I'll give the prosecutor her chance.

21 THE COURT: Thank you, Mr. Hamilton.

22 MS. LACKEN: Thank you, your Honor.

23 May it please the Court, Mr. Hamilton,  
 24 ladies and gentlemen. Larry Fleming had seen enough,  
 25 and for him it was pay back time. He was sick of

SUMMATION - LACKEN

1 watching all of the money being made at 340 Brunswick  
2 Avenue right under his nose, on his turf, so he was  
3 going to do something to stop it.

4 At first, he just sent a message to Carmen  
5 Jones when she went to the store on one of her runs for  
6 Big Al: You all crossed me. He was letting her know  
7 that he was watching. He was seeing what was going on  
8 at 340 Brunswick Avenue and he was not having it. They  
9 were spending money, big money, and they weren't  
10 spending it with him.

11 Well, apparently, that message didn't work  
12 because, throughout the day, more money was being  
13 spent. And he was out there and he was watching. P.J.  
14 was in that building, in and out, and everyone on the  
15 street knew that when P.J. was making sales, it wasn't  
16 five or ten dollars' worth; this was big money.

17 So the defendant decided to send a stronger  
18 message, and this time it was a threat. So he goes  
19 into 340 Brunswick Avenue with Curt, and he sees who is  
20 spending the Big Al money. He walks in and he sees Big  
21 Al and he sees Carmen.

22 He approaches Big Al, and he -- first, he's  
23 trying to persuade him to spend some money. First he  
24 says, Hey, you owe me some money.

25 Big Al says, I don't owe you any money.

SUMMATION - LACKEN

1 And he says, Yes, you do. He says, Come  
2 on, Big Al, spend some money.

3 Big Al says, I don't have any money.

4 He said, You have money, spend some money.  
5 He knows he has it even if he denies it, because he  
6 sees all of the drug transactions going on through the  
7 day.

8 Try as he might, the defendant could not  
9 make Big Al spend any money with him. So he decides to  
10 issue a threat: You all crossed me. I know what  
11 you're doing. He didn't say those words, but when he  
12 said, you all crossed me, he let them know he was  
13 watching. He said, If I see one more 50 being spent up  
14 out of here, you're all going to pay the consequences,  
15 and he meant it.

16 After he left and he saw a few more drug  
17 transactions, he had had enough. He had reached the  
18 breaking point. Someone was going to pay. If they  
19 weren't going to pay one way, they were going to pay  
20 another.

21 So he gets Curt to buy him some gas, and  
22 yeah, it was smart, because no one saw Larry Fleming  
23 buy the gas. It's dark now. He gets the gas can from  
24 Curt and he goes into the house. Gas can in one hand,  
25 light in the other.

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SUMMATION - LACKEN

1 when he goes inside, he doesn't expect to  
 2 see Carmen there. He sees her there and he says, Hey,  
 3 anybody need anything? what's he doing? He's  
 4 justifying the fact that he's in the house because he  
 5 doesn't want to make her suspicious.  
 6 She says, No, we don't need anything. All  
 7 right.  
 8 But she sees him with the gas can. He's  
 9 got some type of light.  
 10 You know what else, he doesn't expect to  
 11 see Joe Mckinney. Joe doesn't have anything else to do  
 12 with what is going on in that house. He left because  
 13 he couldn't get in the Rescue Mission. He was going to  
 14 go in there and spend the night in one of the rooms.  
 15 He wasn't looking for anybody except Carmen. He was  
 16 going in just with the sole purpose of getting a place  
 17 to stay.  
 18 In fact, if you remember what Joe said, he  
 19 said, Fruit startled me. I didn't know he was there.  
 20 what did he say? He said, what's up Fruit?  
 21 Fruit said, what's up, man?  
 22 And when he said, what's up, he said he  
 23 scared him. His attention was drawn to him. No one  
 24 was paying attention because Fruit, or Larry Fleming,  
 25 has a car, so they're not paying attention to this.

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SUMMATION - LACKEN

1 It's not out of the ordinary. And Joe has no beef with  
 2 Fruit. He's got no reason to suspect anything. So he  
 3 goes on and he goes upstairs.  
 4 Now, Fruit knows that Carmen and Joe see  
 5 him with the gas can, but he doesn't care, because with  
 6 what he has in mind, they're not going to be around to  
 7 tell the tale.  
 8 So he pours gasoline at the bottom of the  
 9 stairs, the only way out of that boarded-up home. And  
 10 to make sure that the job is finished, he not only  
 11 pours the gas in front of the stairs, but he pours it  
 12 through the passageway that people would have to take  
 13 to get out of the house, the only way out through the  
 14 front room, through the door, into the middle room,  
 15 through the door, and ends in the third room, the only  
 16 way to get out of the building. They were going to  
 17 pay, and he was going to make sure of it.  
 18 Then he set the place on fire and the  
 19 payback begins. Carmen, Big Al, who he has the beef  
 20 with, Joe, who has no beef with anybody, have to kick  
 21 out the window out of the second floor of Carmen's room  
 22 to make it out alive. And Big Al breaks his ankle.  
 23 But the person who pays the most is Ellis  
 24 McNeill. According to everybody here, including the  
 25 defense, he had no beef with anybody. He was minding

1 his own business, doing his own thing. Right or wrong,  
2 he wasn't hurting anybody, and he paid the dearest. He  
3 paid with his life.

4 All of this, ladies and gentlemen, over  
5 money, drug money. Ellis McNeill died because of  
6 greed. It seems clear here, ladies and gentlemen, that  
7 the only thing that you would have to decide is whether  
8 or not Larry Fleming lit the fire and killed Ellis  
9 McNeill.

10 I mean, the defense has come up here and he  
11 has given his summation, and he has basically,  
12 throughout the trial, agreed to certain facts. And I  
13 would submit to you that those facts are pretty well  
14 established. It seems like there's no question that  
15 Ellis McNeill died because of the fire. It's clear,  
16 carbon monoxide poisoning and the effects of heat on  
17 his body, the burning and skin peeling.

18 What also seems clear is the fact that the  
19 fire was intentionally set. This was done on purpose.  
20 So now it's left to you to figure out whose purpose it  
21 was, who had a motivation, who had a reason. Not  
22 something speculative based on argument, but something  
23 that comes from evidence, from what you heard on the  
24 witness stand.

25 That's where you have to get your facts

1 from, ladies and gentlemen; not argument, not some  
2 speculation based on what-ifs and what-could-haves and  
3 probabilities. You have to determine the case from the  
4 evidence that is presented from the witness stand.

5 I suggest to you, ladies and gentlemen,  
6 when you do that, you will find that the answer is  
7 clear. The person who murdered Ellis McNeill is in  
8 this court right now, and he's sitting right there, and  
9 his name is Larry Fleming. And if anyone has to pay  
10 for what happened, it should be the person that caused  
11 it, Larry Fleming.

12 Now, his Honor is going to instruct you as  
13 to the burden of proof beyond a reasonable doubt. And  
14 I'm not going to go into that because, obviously, his  
15 Honor is going to define that for you. But let me give  
16 you an idea of what beyond a reasonable doubt is not.

17 Beyond a reasonable doubt is not beyond all  
18 doubt. Beyond a reasonable doubt is not beyond any  
19 doubt, and it's certainly not to a 100 percent  
20 certainty. As long as you are firmly convinced of the  
21 defendant's guilt, then that's enough to establish the  
22 state's burden. And I suggest to you that you have the  
23 facts that can help you reach that conclusion.

24 Larry Fleming knew there were people  
25 getting high at 340 Brunswick Avenue. Several drug



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SUMMATION - LACKEN

1 transactions had been going in and out, and as I said  
2 before, he sent out warnings. He sent out a warning to  
3 Carmen when she was out, and he saw her outside, and he  
4 actually went in. And if you remember the testimony,  
5 going up to the second floor was dicey business.

6 Drug dealers -- and they were talking about  
7 P.J. -- didn't go up to the second floor, and Curt and  
8 Carmen told you why; because you're in an abandoned  
9 house. You're dealing in the world of drugs. It's  
10 dangerous. You don't go up to the second floor  
11 normally to make purchases, but he did -- or to make  
12 sales.

13 why? Because he was sending a message. If  
14 you are going to buy, it had better be from me. This  
15 is all about money. This is all about his business,  
16 and he was going to straighten this out. If there was  
17 money to be spent, it was going to be with him. And he  
18 was telling them that in their own realm, going  
19 upstairs, taboo, something that's not done. You know  
20 why? Because he was serious; he wanted them to know.  
21 He knew where they were, and he wanted them to know  
22 that they were going to pay if they didn't buy from  
23 him.

24 Now, defense counsel talks about, well, you  
25 know, you hear different stories, and this was somehow,

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SUMMATION - LACKEN

1 some Big Al conspiracy, all drummed up by Curt Hawkins  
2 in order to set up Larry Fleming. Well, let's start  
3 with the threat that went on inside.

4 Carmen tells you, she heard the threat:  
5 You all are cross-artists, you're crossing me.

6 Curt was in the hallway. He was out doing  
7 what he did for Larry on the street, standing at the  
8 top of the steps looking around, watching his back.  
9 And he heard the threat as he was coming down the  
10 stairs: You all are going to pay. You spend another  
11 50 up out of here, and it's not with me, you're going  
12 to pay. That was a threat.

13 Now, Big Al says, you know, we didn't have  
14 a confrontation to the effect, well, that, you know, I  
15 was worried about being burned alive. You heard Big Al  
16 say that Big Al was high. And he tells you he had a  
17 job, and he wasn't out there that often, okay. He  
18 wasn't paying him any mind. To him, what he had to  
19 say, "him" being the defendant, was over for him after  
20 he said, I'm not buying from you.

21 But Carmen heard the threat and so did  
22 Curt, and the defendant meant it.

23 Now, is this some grand conspiracy where  
24 Curtis is putting the pressure on Carmen, and then  
25 Carmen feels this pressure out of love or whatever to



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SUMMATION - LACKEN

1 come in here and tell you the story? She told the same  
2 story to the police back when this happened as she did  
3 today, a couple days ago, in front of you.

4 Now, the defense says, well, isn't it  
5 amazing how Curt, when he tells the police in the  
6 beginning that, you know, he wasn't there, he was  
7 actually in the bar, and now he's telling you that he  
8 was actually there watching him go in?

9 well, ladies and gentlemen, let me ask you  
10 something: Is that all that surprising to you? Here  
11 you have Curt Hawkins. He uses drugs. He's out there  
12 and he's a hustler. Okay. No one is supposed to be in  
13 that building. Everyone out there is afraid of the  
14 police. They're drug users. Of course, he's not going  
15 to say he was right next to there. He doesn't want to  
16 get in trouble. What are the cops going to say? There  
17 is this guy right at the door. Yeah, they're going to  
18 start looking at him. Is it a big surprise that Curt  
19 didn't want that to happen?

20 So he comes in here, and he knows he's  
21 under oath, and he knows he's up here, and he's telling  
22 you what happened. And he admits to the fact that,  
23 yeah, I told the cops that because I didn't want them  
24 thinking I did.

25 But let's listen. Let's think about what

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SUMMATION - LACKEN

1 else he told the police there that proves, I suggest,  
2 that this wasn't his conspiracy or his concoction, but  
3 this in fact was something that was done by Larry  
4 Fleming.

5 He's with the police. Fifteen minutes  
6 after the fire or so, or ten or 15, the fire department  
7 gets called, and they're there within a couple minutes  
8 because they're right down the street.

9 You heard the firefighters in the beginning  
10 say this. When the firefighters get there, the EMTs,  
11 Curtis is out there. Now, if he set this fire to pin  
12 it on the defendant, why is he still there? You've  
13 heard the testimony from various people. Larry Fleming  
14 wasn't around, I suggest to you because he hightailed  
15 it out of there because he just set the fire, and he  
16 didn't want to be anywhere around. If Curt did it, why  
17 would he still be there?

18 And if he in fact washed up and changed his  
19 clothes and hid this gas can, why did he come back? It  
20 makes no sense. If he were to leave to do all that  
21 stuff, why come back? why put yourself there and then  
22 why tell the police that you were the one that bought  
23 the gas? I mean, does it make sense to you that he's  
24 doing all of this and he's the one that set the fire?

25 Trained arson detective talking to him,

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SUMMATION - LACKEN

1 Detective Mathis. No singe marks, no gas, no smell of  
2 smoke, nothing that would make trained investigators  
3 believe that it was Curt, that it wasn't Larry Fleming,  
4 and he is on scene. You heard Detective Thomas, you  
5 heard what he said. Curt was upset. He was upset:  
6 Fruit did this shit, Fruit did this. You heard  
7 Detective Thomas tell you that. And he was there in  
8 the beginning.

9 Is this all a grand conspiracy, or are all  
10 of these facts -- do all of these facts support what  
11 you heard from the witnesses, that Larry Fleming was  
12 the one that did this, not Curt? Does it make sense to  
13 you that he's going to put himself there, tell the  
14 police all of this stuff, go down and give a statement?  
15 Yeah, he wants to back away from it a little bit.  
16 Doesn't want the police to know he was right at the  
17 door. But he tells them; everything he told them on  
18 the street winds up in that statement.

19 I don't know, ladies and gentlemen. I  
20 suggest to you that's a far cry from someone who is  
21 trying to trump up things to try to pin this on Larry  
22 Fleming, because not only that, he would then have to  
23 start juggling and orchestrating everyone else's  
24 testimony.

25 Joe sees him with the gas can, Carmen sees

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SUMMATION - LACKEN

1 him with the gas can, and Curt sees him with the gas  
2 can. I don't know, ladies and gentlemen, I suggest to  
3 you that the facts that can be derived from what  
4 happened that night show you who was the person that  
5 started the fire.

6 Now, when they're out on the street, you  
7 have to remember that they're looking around for this  
8 gas can, and the fact that gas can wasn't there is  
9 important. It wasn't burned up in the fire because  
10 Detective Mathis told you if it was, I mean, he would  
11 have found it in some form or another, which means that  
12 that gas can was taken.

13 Who had the time to do that? Larry  
14 Fleming. Larry Fleming wasn't arrested, according to  
15 Detective Thomas' testimony, until June 9. He had a  
16 month from the time of the fire until the time he was  
17 arrested to do what he needed to do. I mean, to get  
18 rid of that gas can, take it out of the area.

19 And you have to remember there were people  
20 on the stand that told you Larry Fleming was not on  
21 that street. He wasn't one of the onlookers. That's  
22 because he ran and he took the gas can with him. They  
23 did a pretty comprehensive search. They had the fire  
24 truck, they were looking on the roofs, they went out  
25 and spread and looked all over the place. If Curt had

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## SUMMATION - LACKEN

1 dumped that gas can, they would have found it.  
2 He couldn't have gone far. He was half a  
3 block away from the fire when the police talked to him.  
4 They didn't find it. Why didn't they find it? Because  
5 the person who set the fire took it with him, and that  
6 was Larry Fleming.

7 Now, the defense said something about, you  
8 know, well, maybe Curt said it because, you know, he  
9 wants to be a Big Al man out there, and maybe he wants  
10 to show P.J. what he did, whatever.

11 Let's think about it. All Curt Hawkins was  
12 about was money, getting it any way he could. He was  
13 working at the bar, stocking shelves, watching people's  
14 cars. He told you on the stand, who is paying him more  
15 money? Fruit. Fruit's paying him more money, 40 bucks  
16 a night, just for watching out and directing people  
17 over to him.

18 Why is he getting rid of him? He tells  
19 you, P.J. gives me a couple dollars here and there. He  
20 gets work from P.J., washing the car, he's friends with  
21 his family. He's getting easy money from Larry  
22 Fleming. He's just another source for him.

23 I would suggest, the theory is they're  
24 trying to place Curt as some, you know, up and rising  
25 drug dealer. I mean, you know, for lack of a better

## SUMMATION - LACKEN

1 term, he's scratching for crumbs, and that's one of his  
2 biggest contributors, and he is not going to off him.

3 Ladies and gentlemen, there's no evidence  
4 in the record that would suggest that that happened;  
5 none, not even a reasonable inference. It doesn't make  
6 sense, ladies and gentlemen. And I agree with counsel,  
7 use your common sense, use your everyday experience.  
8 Who has a motive here to lie?

9 I mean, does Joe McKinney have a motive to  
10 come in here and tell you, Yeah, Fruit, I saw Fruit  
11 with a gas can? Why would he do that? If Carmen is  
12 under the -- Curt Hawkins' thumb like the defense says,  
13 you know, what about Joe? He's got no allegiance to  
14 anybody. And he sees him with the gas can.

15 And come on, ladies and gentlemen, let's  
16 think about it. If Curtis is going to set this fire,  
17 he told you, and you could tell, he was upset. Ellis  
18 McNeill died in that fire. He was everyone's friend,  
19 everyone's friend. And everyone knew that Ellis, or  
20 Peanut, lived in that house. Everyone knew that.

21 Is he going to set a fire with Carmen, who  
22 he obviously cares about? And so what he didn't admit  
23 the fact they might have slept together? You saw Big  
24 Al's reaction. There are fourteen people here.  
25 People's reaction. He's talking about his sex life.

1 Things that are embarrassing to most people, and he's  
 2 up here saying, I was getting high back then. It's  
 3 embarrassing to himself and his family. He's obviously  
 4 cleaned up.

5 What about Curt? Don't you think he would  
 6 have the same feelings too? Would he want to say,  
 7 yeah, I had sex with Carmen? Really, who cares? What  
 8 relevance is it? And it's embarrassing. I mean, just  
 9 because you're a drug user doesn't mean you don't have  
 10 any feelings or values.

11 It was uncomfortable for him, and maybe  
 12 there's some sense of chivalry that he doesn't want to  
 13 dog Carmen and say, I had sex with her. Maybe he's  
 14 protecting her for some reason that he doesn't want to  
 15 embarrass her. Does that mean he's lying?

16 In fact, ladies and gentlemen, why would he  
 17 put himself there, tell the police that he bought the  
 18 gas? Why would he set fire to a building when people  
 19 he cared about were inside, just to set up Larry  
 20 Fleming? I mean, he was his runner. He was a police  
 21 lookout. He could have looked the other way when  
 22 police were coming in the neighborhood. That would  
 23 have been enough to get him arrested.

24 But setting the house on fire with people  
 25 that you love inside, does that make sense? I suggest

1 to you it doesn't. And particularly in light of the  
 2 fact that there was a motive for Larry Fleming; he had  
 3 issued threats and warnings.

4 Hey, it's all about the money: Buy from me  
 5 or you're not going to buy. He was the only one that  
 6 had a reasonable motive, ladies and gentlemen, not  
 7 something that's speculative, but something that was  
 8 presented to you to from the witnesses. That's  
 9 evidence; that's evidence you can use to convict.

10 Now, I suggest, ladies and gentlemen, that  
 11 his Honor has talked to you about circumstantial  
 12 evidence. Just because no one saw Larry Fleming light  
 13 the match or whatever he did to ignite the fire doesn't  
 14 mean that you can't convict.

15 Obviously, we talked about circumstantial  
 16 evidence. It's just like the snow example. People see  
 17 him with the gas can. He goes in, according to Curt,  
 18 one or two minutes later, boom. Larry Fleming is  
 19 running out of the house, the house is on fire.

20 Joe, two to three minutes after he goes  
 21 inside, he goes to the front room, he's sitting on one  
 22 of the couches taking off his boot, boom, the house  
 23 shakes. And it makes sense, ladies and gentlemen.

24 Have you ever tried to light one of your  
 25 gas grills when the gas is going, and the gas flame?



1 And you're sitting here and you're clicking the little  
 2 thing, and then boom, and sometimes you get singed  
 3 hair? That's, of course, the type of explosion you're  
 4 going to hear.

5 You have to remember, Joe McKinney was in  
 6 over the area of the largest fire, and it makes sense  
 7 he's going to feel it. And he runs and tries to get  
 8 the other people out of the house. Just because no one  
 9 sees Larry Fleming light the match doesn't mean that  
 10 you can't convict him on it.

11 Just like the snow example that the Judge  
 12 gave you. Just because when you go to bed at night,  
 13 you don't see it snowing, doesn't mean when you wake up  
 14 and you see snow on the ground, you can't say it snowed  
 15 during the night. Know what I'm saying? Logic based  
 16 on facts.

17 One of the jobs that you're going to have  
 18 to do, ladies and gentlemen, is you're going to take a  
 19 look at the counts of the indictment, and you're going  
 20 to have to see whether the state has met its burden  
 21 with regard to the elements. His Honor is going to  
 22 instruct you as to the elements. And I suggest to you  
 23 the evidence shows that the state clearly has.

24 One of the things I want to touch on  
 25 briefly is the count of murder. Basically, what the

1 state has to prove is that the defendant did purposely  
 2 or knowingly cause the death of Ellis McNeill, or that  
 3 he, at the very least, caused the serious bodily injury  
 4 of Ellis McNeill resulting in his death.

5 When you're being charged, the Judge is  
 6 going to give you a charge about transferred intent.  
 7 And what you're going to have to do as jurors is to go  
 8 back and say, did Larry Fleming have the purpose to  
 9 kill Ellis McNeill? And you might have remembered the  
 10 testimony, that even though people knew that he lived  
 11 there, some people didn't know he was actually in the  
 12 building.

13 Under our law that doesn't matter. Under  
 14 our law, if I have the -- if I have the purpose to  
 15 shoot person A, to kill person A, but by accident I  
 16 slip and I kill person B, it doesn't matter. Under the  
 17 law, I am still guilty of murder. If my intent was to  
 18 kill person A, but accidentally or for whatever reason  
 19 I kill person B, under the theory of transferred  
 20 intent, my purpose is transferred to whatever victim  
 21 actually dies. You don't get a pass just because you  
 22 kill the wrong person.

23 Also, ladies and gentlemen, you're going to  
 24 have to decide felony murder, and his Honor is going  
 25 to, again, do the honors by instructing you as to what



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SUMMATION - LACKEN

1 that is. But just keep in mind all of the legal  
2 jargon, and his Honor is going to try to explain it in  
3 regular people terms.

4 But what you have to take a look at is for  
5 felony murder, if the defendant goes in that building  
6 and he intends to start the fire to create a risk of  
7 death for people, if he goes in and he intentionally  
8 commits that arson or the aggravated arson, then if a  
9 death occurs as well, it doesn't matter whether he did  
10 it purposely, recklessly, carelessly, or by mistake.  
11 He is strictly liable for that death if he goes in and  
12 he sets the fire, and he is guilty of any death that  
13 results because of it. That's the law of felony  
14 murder. His Honor will give you a more formal  
15 instruction about that in a few minutes.

16 One other thing, ladies and gentlemen.  
17 Detective Mathis was up here for some time, and he was  
18 going over the various pictures with regard to the  
19 physical evidence. You might ask, okay, it doesn't  
20 seem like there's a big question here. Everybody knows  
21 this is a fire, and everybody knows this was on  
22 purpose. It doesn't seem like it's that much of a  
23 contest.

24 The purpose, the method to my madness as to  
25 why I went through all of that evidence, and it's for

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SUMMATION - LACKEN

1 two reasons, ladies and gentlemen. What you can get  
2 out of that physical evidence is two things.

3 Number one, you can get the intent that was  
4 necessary to prove the counts of the indictment. Okay.  
5 What you can get from that is, hey, this wasn't just an  
6 intentional fire, someone setting a fire on purpose.  
7 This was a very strategically planned setting of a  
8 fire. This wasn't like, hey, I'm going to scare him,  
9 I'm going to set the kitchen on fire, or I'm going to  
10 set a fire in the middle of a room.

11 That physical evidence showed you that  
12 there was a more specific, more purposeful intent. Not  
13 only do I want to set the fire, but I want to trap and  
14 kill the people on the second floor. Because if he  
15 just wanted to scare him or was just angry at him, he  
16 could have lit anything else on fire. But that pour  
17 pattern and that low burning show you he was taking  
18 care of business. He was making sure that no one was  
19 getting out of there alive.

20 Not only that, but it also shows you that  
21 this was not a randomly, haphazardly set fire caused by  
22 a person who was trying to off a local drug dealer. To  
23 make that pattern, a person who set that must have  
24 known there were people inside to hurt. Because if  
25 not, like I said, he would have just set it anywhere.

1 He knew there were people inside to hurt, and not only  
 2 did he know that, but that's what he wanted to do.  
 3 There's no other explanation, I suggest,  
 4 for the intentional pattern of that gasoline. And when  
 5 you think about that kind of thought-out act, that  
 6 purposeful, intentional, planned act, you've got to go  
 7 right back to who had the motive, who had a strong  
 8 enough feeling of vengeance or paybacks, Curt Hawkins  
 9 or Larry Fleming?

10 Larry Fleming was out there selling drugs.  
 11 It was all about the money. People had to know if you  
 12 don't buy from me in my neighborhood, in front of my  
 13 face, there's going to be hell to pay. Everybody saw  
 14 that place go up. Everybody on the block knew what was  
 15 going on. He sent a message to everyone, including the  
 16 people in that building.

17 Larry Fleming wanted someone to pay for  
 18 wronging him. The person that paid the dearest was  
 19 Ellis McNeill. And now I suggest to you, based on the  
 20 evidence, that it's time for the person who set the  
 21 fire to pay. And that person is before you, ladies and  
 22 gentlemen, and that person is Larry Fleming. Make him  
 23 pay for what he did, what he did to Ellis McNeill.

24 Thank you.

25 THE COURT: Thank you, prosecutor.

1 Ladies and gentlemen, we'll take our  
 2 morning recess at this point, and then I'll return and  
 3 give you the instructions and you'll begin your  
 4 deliberations.

5 Would you step down, and don't talk about  
 6 the case yet. It will come soon enough. As you've  
 7 noted during the summations, there has been an increase  
 8 in temperature to almost a livability here, so adjust  
 9 yourselves accordingly. My comments should not take  
 10 more than 30 or 40 minutes, and we'll bring you back in  
 11 and you'll begin to deliberate after that.

12 Enjoy your refreshments.

13 (A recess is taken.)

14 (The following is out of the presence of the jury.)

15 THE COURT: My law clerk will be delivering  
 16 the instruction sheets to you momentarily. But let's  
 17 just discuss what we've discussed prior to the case and  
 18 what we discussed since the summations with  
 19 relationship to what might be loosely called 404(b)  
 20 testimony.

21 There was some testimony with respect to  
 22 the involvement of Mr. Fleming, the defendant, and his  
 23 sale and purveying of drugs. Which at the point in  
 24 time it was offered, it was discussed in court and was  
 25 not deemed to be 404(b) evidence, but rather a

1 discussion of the bigger picture of the relationship of  
2 the parties and what have you, and was not --

3 And, therefore, at that point in time, the  
4 Court did not hold a 404(b) hearing and go over the  
5 Cofield-Morano elements, and did not gauge, at least at  
6 that time, the nature and extent of what 404(b) might  
7 or might not portend in terms of the process which was  
8 ultimately used.

9 I believe both counsel were in accord with  
10 that at that time. Is that a fair statement?

11 MS. LACKEN: Yes.

12 MR. HAMILTON: It's basically the res  
13 gestae.

14 THE COURT: Therefore, it has devolved thus  
15 far into a concern by this Court, and a concern by  
16 counsel as well, where we've had a number of  
17 discussions as to how to remediate that, the posture  
18 that we currently find ourselves in.

19 And it's the Court's concern that the jury  
20 not use whatever drug involvement has been attributed  
21 to Mr. Fleming as an element of thereby concluding he  
22 is a bad person and therefore committing the offenses.  
23 That's the classic 404(b) discussion, and warning  
24 against the jury so using that information, but  
25 secondarily, they can use that information to gain

1 other aspects of the case, in this case, the  
2 relationship between the parties remotely, identity, I  
3 would imagine, but how Mr. Fleming was viewed and  
4 perceived by each of the witnesses as part of the  
5 milieu that existed at the time of the event.

6 And I believe we discussed a little bit  
7 about this, because we didn't want to, because now that  
8 we've passed the time when a jury would normally have  
9 heard an instruction from the Court about 404(b)  
10 testimony. And the Court finds that this is less  
11 classic 404(b) testimony, but as counsel observes,  
12 perhaps a little bit as relates to res gestae and the  
13 picture of the interrelationship between the parties.

14 So it goes a little bit to the way. It's  
15 not your classic prior acts of a sex offender or prior  
16 sales of drugs, et cetera, that are the specific  
17 aspects which 404(b) addressed, but might well be part  
18 of a 404(b) instruction in the loosest sense.

19 You will note in the instructions now  
20 provided to you that an instruction will be given which  
21 we talked about in chambers. On page 7, "Other crimes,  
22 wrongs or acts," and I will allow the jury to  
23 understand that they cannot use the testimony involving  
24 the putative defendant's narcotics trafficking and  
25 sales and purveying of narcotics as evidence that he is

1 a bad person and, therefore, committed the acts alleged  
2 in the indictment.

3 I will say, however, you may use the  
4 testimony to gauge and assess the identification and/or  
5 the relationship between the parties in this case. My  
6 clerk loves to use commas in various places, but -- and  
7 not in others, but we'll try to get through that. I  
8 think the substance is clear.

9 Is there any objection or concern about  
10 this type of an instruction?

11 MS. LACKEN: No, Judge. I think it's  
12 necessary, again, to reiterate your Honor's facts.  
13 Just so it's clear, when we started this whole trial,  
14 it's clear on the date in question, all of the stuff  
15 was going to come as res gestae. And I think I was  
16 careful in the state's opening to not say drug dealer,  
17 but dealing drugs on that day.

18 And I think as it evolved, particularly  
19 during the defense opening, and then in the  
20 questioning, that it's clear that his client was a  
21 dealer and these were drug users. And so in that  
22 context, then, that's how it progressed into, you know,  
23 knowing him from prior dealings.

24 And as I said, it's to show the big  
25 picture, certainly, not to cast aspersions on his

1 character. I think everyone was on the same page,  
2 including the defense, and therefore, I suggest  
3 although some instruction's needed, it's more of, as  
4 your Honor has characterized, a limiting instruction  
5 rather than a 404(b) classic charge.

6 THE COURT: Thank you.  
7 Yes.

8 MR. HAMILTON: I agree. There's a slight  
9 tuning of the wording I'd request in the second  
10 sentence. Let's see. "Our rules of evidence  
11 specifically exclude you from considering this evidence  
12 in your deliberations as proof the defendant committed  
13 the alleged offenses."

14 while that's absolutely so, there's a  
15 possibility that they may associate alleged offenses  
16 with the allegation of narcotics trafficking in the  
17 previous sentence.

18 THE COURT: The alleged offenses in the  
19 indictment?

20 MR. HAMILTON: Yes, the offenses alleged in  
21 the indictment.

22 THE COURT: we'll say instead of using  
23 "exclude," we'll use the term "preclude." And I take  
24 it, therefore, you have no objections, Counsel?

25 MR. HAMILTON: No objection, and then



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1 committed the "offenses alleged in the indictment."

2 THE COURT: The offenses alleged in the  
3 indictment. Okay. That's the way I'll give it to  
4 them, and --

5 MS. LACKEN: I don't take issue necessarily  
6 with the word "trafficking." I just want to make sure  
7 that the defense doesn't --

8 THE COURT: Involvement in narcotics sales.

9 MS. LACKEN: I think that would be a little  
10 more euphemistic.

11 MR. HAMILTON: It sounds a little less  
12 grand.

13 THE COURT: It's interesting, this case,  
14 and the nature of Mr. Fleming's alleged involvement in  
15 drugs came on as a kind of rolling event. It didn't  
16 start out -- and the Court is usually very sensitive to  
17 404(b) testimony and the necessity of advising the jury  
18 at the time another offense comes up, that they should  
19 not consider that, et cetera, et cetera, under 404(b).

20 However, this came up, I believe, in the  
21 openings and prevented -- the Court was not able to  
22 anticipate fully that circumstance. But I believe that  
23 this curative instruction will remedy the problem, and  
24 I'm content that both of you are satisfied with the  
25 amendments that we've occasioned, and we're ready to go

JURY CHARGE

1 on the instructions.

2 Any other comments?

3 MS. LACKEN: None from the state, your  
4 Honor.

5 THE COURT: If you would, please, bring the  
6 jury in.

7 Have you seen the verdict sheet as well?

8 MS. LACKEN: I don't have a copy of it.

9 THE COURT: Give them a copy of the verdict  
10 sheet, please. I will ask you before I go over the  
11 verdict sheet with the jury to, if there's any comments  
12 about the verdict sheet, before we address it. And  
13 then we'll go to sidebar if there are impedimenta.

14 All right.

15 (The following is in the presence of the jury.)

16 THE COURT: Please be seated, ladies and  
17 gentlemen. welcome back. I will now give you the  
18 instructions that will pertain, the law that you must  
19 accept in this case.

20 Now, I will tell you that we've broken them  
21 down into two subparts. One is the instructions  
22 relating to the concepts of law that you've already  
23 heard, and I'm going to repeat that because it's so  
24 important; and then we're going to go into the specific  
25 counts and the way you have to deal with the actual



1 allegations against Mr. Fleming in this case.

2 As you know, and you'll hear a lot of  
3 terminology again that may seem not quite laymen's  
4 terms, but you will have a copy of the charge and you  
5 can allude to that. If there's any problems that you  
6 have with the charge or any concerns at all, you can  
7 always ask a question of the Court.

8 And I'll tell you a little bit more about  
9 that as we go along, but that is the way we will  
10 address some of these concerns because it does get a  
11 little technical, and words are a little more complex  
12 than a layperson might normally come in contact with  
13 during the day. But if you have any problem with that,  
14 I'll be available to respond to your questions.

15 Now, before you retire to deliberate, as  
16 you know, it is my obligation to instruct you as to the  
17 principles of law applicable in this case. You should  
18 consider the instructions in their entirety and not  
19 pick out one specific instruction and use it to the  
20 exclusion of others or overemphasize it.

21 As you know, you must accept the law as I  
22 give it to you in this case and in this charge. Any  
23 ideas of what you have as to what the law is or what it  
24 should be should be disregarded, or any statements by  
25 the attorneys that they feel that the law is this,

1 that, or the other thing should be disregarded if it  
2 conflicts with my statements of what the law is.

3 As you know, during the trial, I was  
4 required to make certain rulings on objections, and we  
5 went to sidebar on occasions. Sometimes you were  
6 excluded from the Court at that time. Those rulings  
7 involved questions of law, and the comments of the  
8 attorneys on those matters were not evidence.

9 In ruling, I've decided questions of law  
10 based on the law, and whatever ruling I made is not,  
11 you should understand, not to be an expression of an  
12 opinion by me of the merits of the case. Neither  
13 should my rulings on any aspect of the trial should be  
14 taken as favoring one side or the other. Each side, I  
15 believe, was decided on its merits.

16 When I use the term "evidence," I mean the  
17 testimony you've heard and seen from this witness box  
18 and the exhibits that have been admitted into evidence.  
19 Any testimony that I may have occasion to strike or  
20 otherwise modify shall not enter into your  
21 deliberations or enter only in the way I instruct. And  
22 you'll hear some instructions that limit what you've  
23 heard.

24 This means that even though you may  
25 remember the testimony, you're not to use it in your

1 discussions or deliberations if I've excluded it. Or  
 2 by way of alternative, even though you've heard  
 3 evidence, there may be, and there will be, instructions  
 4 that you can only use evidence for certain purposes,  
 5 and you must confine yourself to that, to those  
 6 purposes.

7 As jurors, it's your duty to weigh the  
 8 evidence calmly and without passion, prejudice, or  
 9 sympathy. Any influence caused by those emotions has  
 10 the potential to deprive both the state and the  
 11 defendant of what you promised them when we opened this  
 12 case, and that is a fair and impartial jury by fair and  
 13 impartial jurors.

14 Speculation, conjecture, other forms of  
 15 guessing should play no part in your performance of  
 16 your duty.

17 The indictment, as I instructed you in the  
 18 beginning of the trial, the defendant stands before you  
 19 on an indictment returned by a grand jury charging him  
 20 with certain offenses which I will reiterate later.  
 21 The indictment is not evidence of the defendant's guilt  
 22 on the charges. Rather, it is a step in the procedure  
 23 to bring the matter before a Court and a jury for the  
 24 jury's ultimate determination as to whether the  
 25 defendant is guilty or not guilty on the charges stated

1 in it.

2 The defendant, as you know, has pleaded not  
 3 guilty to the charges. Therefore, he is entitled to  
 4 the presumption of innocence, and is presumed innocent.  
 5 And unless each and every essential element of the  
 6 offense charged and offenses charged is proved beyond a  
 7 reasonable doubt, the defendant must be found not  
 8 guilty of that charge.

9 The burden of proving the elements of the  
 10 charge beyond a reasonable doubt rests upon the state,  
 11 and that burden never shifts to the defendant. The  
 12 defendant in any criminal case has no obligation or  
 13 duty to prove his innocence or offer any proof relating  
 14 to his innocence.

15 However, the prosecution must prove its  
 16 case by more than a mere preponderance of the evidence,  
 17 but not necessarily to an absolute certainty.

18 The state has the burden of proving the  
 19 defendant guilty, as you have heard from each of  
 20 counsel and from me before, by proof that establishes  
 21 his guilt beyond a reasonable doubt.

22 A reasonable doubt is an honest and  
 23 reasonable uncertainty in your minds about the guilt of  
 24 the defendant after you have given full and impartial  
 25 consideration to all of the evidence. It is a doubt a

## JURY CHARGE

1 reasonable person would have, hearing the same evidence  
2 that you have heard.

3 Proof beyond a reasonable doubt is proof,  
4 for example, that leaves you firmly convinced of the  
5 defendant's guilt. In criminal cases, the law does not  
6 require proof that overcomes every possible doubt. If,  
7 based upon your consideration of the evidence, you are  
8 firmly convinced that the defendant is guilty of the  
9 crime or crimes charged, you must find him guilty.

10 If, on the other hand, you are not firmly  
11 convinced of the defendant's guilt, you must give the  
12 defendant the benefit of the doubt and find him not  
13 guilty.

14 Now, you are the judges of the facts, and  
15 as judges of the facts, you are to determine the  
16 credibility of the various witnesses, as well as the  
17 weight to be attached to their testimony.

18 You and you alone are the sole and  
19 exclusive judges of the evidence, of the credibility of  
20 the witnesses, and the weight to be attached to the  
21 testimony of each of those witnesses. Regardless of  
22 what counsel said, regardless of what I might have said  
23 in recalling the evidence in this case, it is your  
24 recollection of the evidence that should guide you as  
25 judges of the facts.

## JURY CHARGE

1 Arguments, statements, remarks, openings,  
2 summations, are not evidence and must not be treated as  
3 evidence. Although the attorneys may point out what  
4 they believe is important in the case, you must rely  
5 solely upon your understanding and recollection of the  
6 evidence that was admitted during the trial.

7 Whether or not the defendant has been  
8 proven guilty beyond a reasonable doubt is for you to  
9 determine, based on all of the evidence presented in  
10 this case. Any comments by counsel are not  
11 controlling. It is your sworn duty to arrive at a just  
12 conclusion after considering all of the evidence which  
13 was presented during the course of this trial.

14 My function as contrasted to yours as the  
15 jury, the Court's function is separate and distinct  
16 from the functions of the jury. It is my  
17 responsibility, as you, I'm sure know, to determine all  
18 questions of law arising during the trial and to  
19 instruct you as I am now as to the law which applies in  
20 this case. You must accept the law as given to you by  
21 me and apply it to the facts as you find them to be.

22 I know that I've asked questions of one or  
23 another witnesses. That should not influence you in  
24 any way in your deliberations, other than perhaps to  
25 clear up a situation that I may have found confusing on

1 my own, and I've asked the question.

2 The fact that I've asked questions does not  
3 indicate that I hold an opinion one way or another as  
4 to the testimony given by the witness. Any remarks  
5 made by me to counsel or by counsel to me or between  
6 counsel is not evidence and are not evidence and should  
7 not affect or play any part in your deliberations.

8 I've previously talked to you about direct  
9 and circumstantial evidence. You may recall the  
10 illustration I gave. Evidence may be direct or  
11 circumstantial. Direct evidence means evidence that  
12 goes directly to prove a fact without an inference and  
13 which in and of itself, if true, conclusively  
14 establishes that fact. Circumstantial evidence, on the  
15 other hand, means evidence that proves a fact from  
16 which an inference of the existence of another fact may  
17 be drawn.

18 An inference is a deduction of fact that  
19 may be logically and reasonably be drawn from another  
20 fact or group of facts established by the evidence.  
21 Whether or not inferences should be drawn is for you to  
22 decide, using your own common sense, your knowledge of  
23 everyday experience. You should ask yourself, is it  
24 probable? Is it logical? Is it reasonable? That's  
25 why we have the 12 collective jurors thinking and

1 bringing their experiences to the fore to make such  
2 decisions.

3 It's not necessary that all facts be proven  
4 by direct evidence. They may be proven by direct  
5 evidence, circumstantial evidence, or a combination of  
6 direct and circumstantial evidence. All evidence is  
7 acceptable as a means of proof, and in many cases,  
8 circumstantial evidence may be more satisfying,  
9 certain, and persuasive than direct evidence.

10 All evidence, direct and circumstantial,  
11 should be scrutinized carefully, and a verdict of  
12 guilty may be based on direct evidence alone,  
13 circumstantial evidence alone, or a combination of  
14 direct and circumstantial evidence, provided it  
15 convinces you of a defendant's guilt beyond a  
16 reasonable doubt.

17 The reverse is also true. The defendant  
18 may be found not guilty by reason of direct evidence,  
19 circumstantial evidence, or combination of the two, or  
20 lack of evidence, if it raises in your mind a  
21 reasonable doubt as to the defendant's guilt.

22 Now, as I said before, we talked about some  
23 of the responsibilities of a jury and your necessity to  
24 determine the credibility of the witnesses. And when  
25 you determine the credibility of whether a witness is



## JURY CHARGE

1 worthy of belief, you can take into consideration the  
 2 appearance and the demeanor of the witnesses; the  
 3 manner which he or she may have testified; the interest  
 4 in the outcome of the trial, if there's any; his or her  
 5 means of obtaining the facts; the witness' power of  
 6 discernment; the possible bias on the favor of one  
 7 witness for whom the side of the -- for whom the  
 8 witness testified; the extent to which either the  
 9 witness is either corroborated or contradicted -- that  
 10 is, supported by other evidence offered or discredited  
 11 by other evidence; whether the witness testified with  
 12 an intent to deceive you; the reasonableness or  
 13 unreasonableness of the testimony the witness has  
 14 given; and any and all other matters that you feel  
 15 collectively which serve to support or discredit that  
 16 witness.

17 Inconsistencies, discrepancies in the  
 18 testimony of a witness, or between the testimony of two  
 19 witnesses, may or may not cause you to discredit such  
 20 testimony. Two or more persons witnessing an incident  
 21 may see or hear it differently. As you know from your  
 22 own experiences in life, there may be an innocent  
 23 misrecollection or a failure of recollection. It's not  
 24 an uncommon experience. In weighing the effect of a  
 25 discrepancy, consider whether it pertains to a matter

## JURY CHARGE

1 of importance or is it an unimportant detail, or  
 2 whether the discrepancy results from a willful  
 3 falsehood or an innocent error.

4 Through that analysis, as judges of the  
 5 facts, you weigh the testimony of each witness and then  
 6 determine the weight to give it through that process.  
 7 You may accept all of it, none of it, or some of it.  
 8 It's all up to you.

9 Okay. In assessing the testimony of the  
 10 witnesses, you may determine at a prior time a witness  
 11 had said something which is inconsistent with his  
 12 present testimony at trial. This may be considered by  
 13 you for purposes of judging the witness' credibility.  
 14 It may also be considered by you as substantive  
 15 evidence, that is as proof of the truth of what is  
 16 stated in the prior statement or what is stated at the  
 17 present trial.

18 Before deciding whether the prior  
 19 inconsistent or omitted statement reflects the truth,  
 20 in all fairness, you want to consider all of the  
 21 circumstances under which the statement or failure to  
 22 disclose was made. You may consider the extent of the  
 23 inconsistency or omission, and the importance or lack  
 24 of importance in the inconsistency or omission on the  
 25 overall testimony of the witness as bearing on his or



1 her credibility.

2 You may consider such factors as where and  
3 when the prior consistent or inconsistent statement was  
4 made, or where the omission was -- occurred, or the  
5 reasons, if any, which were offered for the  
6 inconsistency.

7 The extent to which inconsistencies or  
8 omissions reflect the truth is for you to determine.  
9 Consider their materiality and relationship to his or  
10 her entire testimony and all of the evidence in the  
11 case, when and where the circumstances under which they  
12 were made or omitted, and whether the reasons that  
13 person, that witness gave to you before regarding the  
14 inconsistencies appear to be believable and logical.  
15 In short, consider all that I have told you before  
16 about prior inconsistent statements in making that  
17 judgment.

18 You will, of course, consider other  
19 evidence and other inferences from other evidence,  
20 including statements of other witnesses or acts of the  
21 witnesses and others, disclosing other motives that the  
22 witness may have had to testify as he or she did, that  
23 is, reasons other than which were provided by that  
24 witness.

25 Now, folks, you've heard me describe during

1 the trial that certain witnesses were offered as  
2 quote-unquote, expert witnesses. As I told you when  
3 the first couple of expert witnesses testified, there's  
4 the general proposition that witnesses can only testify  
5 as to facts known by them. It doesn't usually permit  
6 the presentation to you of opinions of a witness as  
7 evidence.

8 However, the exception to that rule is in  
9 the case of an expert witness who may give his opinion  
10 as to any matter in which he or she is versed which is  
11 material to the case. In legal terminology, an expert  
12 witness is a witness who has some special knowledge,  
13 skill, experience, or training that is not possessed by  
14 the ordinary juror, and who thus may be able to provide  
15 assistance to the jury in understanding the evidence  
16 presented and determining the facts in this case.

17 Now, in this case, as you know, there are  
18 three individual experts who were qualified, and the  
19 Court said that the witness might give his or her  
20 opinion in the case. Dr. Shah was a pathologist, a  
21 doctor -- a medical doctor and a pathologist who was  
22 permitted to give testimony as to what she believed the  
23 cause of death was and her conclusion as to the type of  
24 death it was.

25 You heard from Detective Lloyd Mathis, he

## JURY CHARGE

1 testified to the cause of fires and origin and  
 2 determination of fires, and you also heard from a  
 3 gentleman from the New Jersey State Police, who was  
 4 presented as an expert as George Chin, who was a trace  
 5 evidence analysis expert. And each one of them  
 6 provided information which most of which was largely  
 7 uncontradicted, but, nevertheless, provided the essence  
 8 of the foundation charges.

9 You're not bound by the experts' opinion,  
 10 but you should consider each opinion and give the  
 11 weight you determine it is entitled, whether that be  
 12 great or slight, or you may reject it.

13 In examining such opinion, you may consider  
 14 the reasons given for it, if any, and you may also  
 15 consider the qualifications and the credibility of the  
 16 expert as I noted and as you have obviously observed.  
 17 There's been no strong disagreement by counsel as to  
 18 the conclusions of the respective experts.

19 It's your -- ultimately your determination  
 20 to make, and you, as I said, you can rely on some or  
 21 all or none of the expert testimony or the witnesses  
 22 themselves, however you conclude in your collective  
 23 sense. That determination of the ultimate guilt or  
 24 innocence remains and is always only in the province of  
 25 the jury.

## JURY CHARGE

1 If you believe that any witness or party  
 2 willfully, knowingly testified falsely to any facts in  
 3 the case with an intent to deceive you, you may give  
 4 whatever weight you deem it is entitled. In other  
 5 words, you can believe some of it, none of it, or all  
 6 of it. It's -- the important thing to remember, it's  
 7 up to you to make that decision from your experiences  
 8 in life and hearing that testimony.

9 Now, you will hear, when I get into the  
 10 specific charges, certain legal notions that relate to  
 11 the state of mind that you're going to have to  
 12 determine perhaps exists, and with the counts of the  
 13 indictment will refer to certain terms which I'm about  
 14 to define for you.

15 Now, these definitions will be here. You  
 16 will find that perhaps for the most part, the  
 17 definitions are largely what you understand them to be.  
 18 I'm going to give you a technical-legal definition, but  
 19 the definition do not depart magnificently from your  
 20 understanding of the words. For example, the terms  
 21 purposely, knowingly, or knowledge, recklessness, these  
 22 are conditions of the mind and cannot be seen and can  
 23 only be determined by inferences from conduct, words,  
 24 or acts. In other words, it's a conclusion that you  
 25 draw.

## JURY CHARGE

1 A person acts purposely with respect to the  
2 nature of his or her conduct or as a result thereof, if  
3 it is a person's conscious object to engage in conduct  
4 of the nature of that nature or cause such a result.

5 A person acts purposely with respect to  
6 attendant circumstances if a person is aware of the  
7 existence of such circumstances or a person believes or  
8 hopes they exist. One can be deemed to be acting  
9 purposely if one acts with design, with a purpose, with  
10 a particular objective, if one really means to do what  
11 he or she does, just like you would understand  
12 purposely when you use it in everyday language.

13 A person acts knowingly, guess what, with  
14 respect to the nature of his or her conduct or the  
15 attendant circumstances if the person is aware that his  
16 or her conduct is of that nature or that such  
17 circumstances exist or a person is aware of a high  
18 probability of their existence. A person acts  
19 knowingly with respect to the result of his or her  
20 conduct if a person is aware that it is practically  
21 certain that his or her conduct will cause such a  
22 result.

23 One is said to act knowingly if one acts  
24 with knowledge, if one acts consciously, if that person  
25 comprehends his or her acts. So we're using terms that

## JURY CHARGE

1 are relatively familiar in your lexicon.

2 A person acts -- despite the complicated  
3 definitions, a person acts recklessly with respect to a  
4 material element of an offense, such as the infliction  
5 of serious bodily injury, for example, if he  
6 consciously disregards a substantial or unjustifiable  
7 risk that the material element exists and will result  
8 from his or her conduct.

9 The risk must be of such a nature and  
10 degree that, considering the nature and purpose of the  
11 actor's conduct and the circumstances known to the  
12 actor, its disregard involves a gross deviation from  
13 the standard of conduct that a reasonable person would  
14 observe in the actor's situation.

15 One is said to act recklessly if one acts  
16 with recklessness, with scorn for the consequences,  
17 heedlessly, or in a foolhardy manner.

18 You also hear that purpose, knowledge, and  
19 recklessness are conditions of the mind that cannot be  
20 seen and can only be determined from inferences from  
21 conduct, words, or acts. It is not necessary that the  
22 state produce a witness to testify that the defendant  
23 stated that he acted with a particular state of mind.  
24 It is within your power to find that proof of purpose,  
25 knowledge, or recklessness has been furnished beyond a

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JURY CHARGE

1 reasonable doubt by inferences that may arise from the  
2 nature of the acts and circumstances surrounding the  
3 conduct in question.

4 I'm going to give you a cautionary and  
5 limiting instruction. You've heard testimony in this  
6 case that the defendant, Larry Fleming, has been  
7 involved in narcotics sales. Our rules of evidence in  
8 the State of New Jersey limit the application of those  
9 acts and preclude you from considering that evidence in  
10 your deliberations as proof that the defendant  
11 committed the acts alleged in the indictment.

12 In other words, you can't say, Fleming is a  
13 drug dealer, therefore, he committed the crimes in the  
14 indictment. Prior acts can't be attached to show that  
15 Mr. Fleming had a predisposition to commit a crime and  
16 he was a criminal, and therefore, he committed the  
17 present offenses. You can -- I should say, evidence  
18 that a defendant has committed prior crimes or other  
19 wrongs or acts cannot be used by you as proof of  
20 conduct in conformance with the charges listed in the  
21 indictment to show further proof that he had in fact  
22 committed the offenses in the indictment.

23 However, you may use the testimony to gauge  
24 and assess the identification of and/or the  
25 relationship between the witnesses and the defendant.

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JURY CHARGE

1 In other words, there was a history of some prior  
2 involvement. You can use that to determine whether  
3 Fleming was known to them and under what circumstances  
4 he was known to them, but you just can't say he  
5 committed a crime and, therefore, he committed the  
6 crime now. I think you can understand that.

7 As you know and are aware, the defendant  
8 Larry Fleming did not take the stand in this case. It  
9 is his constitutional right to remain silent. You must  
10 not consider for any purpose or in any manner in your  
11 arriving at the verdict the fact that the defendant did  
12 not testify. That fact should not enter into your  
13 deliberations or discussions in any manner at any time.  
14 The defendant is entitled to have the jury consider all  
15 evidence presented at trial, and he's presumed innocent  
16 even if he does not choose to testify.

17 Now, there are multiple charges in the  
18 indictment. They are separate offenses designated by  
19 separate counts in the indictment. The defendant is  
20 entitled to have his guilt or innocence separately  
21 considered on each count by the evidence which is  
22 relevant and material to that particular charge, based  
23 on the law that I will give you now. And you should be  
24 aware there is what we call a notion of transferred  
25 intent.



1 MS. LACKEN: I have the same copy you have.

2 THE COURT: There's a problem with --  
3 transferred intent simply means that the fact that  
4 another individual was injured, or in this case  
5 murdered, not being a specific intent simply means that  
6 just because a different person was injured or harmed,  
7 occurred to another person who may not have been the  
8 object of the act, does not exonerate that individual.

9 In other words, an actor is criminally  
10 responsible to the same extent for his conduct even  
11 though the person he injured is different from the  
12 person he intended to injure. And I'll have a little  
13 bit more to say at the end of the case. I'll redefine  
14 that as well, because I don't have the definition in  
15 front of me.

16 Now, you'll find that even though there are  
17 three charges in the indictment, murder, felony murder,  
18 and aggravated arson, there are, you will hear, lesser  
19 included or subordinate offenses which you may or may  
20 not consider, depending on your determination on the  
21 major charges.

22 Count 1 of the indictment charges the  
23 defendant Larry Fleming with murder in that it states,  
24 on or about the 11th day of May, 2002, Larry Fleming  
25 did purposely or knowingly cause the death of Ellis

1 McNeill or purposely or knowingly inflict serious  
2 bodily injury resulting in death.

3 That's what the indictment says. The  
4 pertinent part of the statute in our State of New  
5 Jersey says an actor is guilty of murder if he  
6 purposely causes death or serious bodily injury  
7 resulting in death or knowingly causes death or serious  
8 bodily injury resulting in death.

9 That means a person is guilty of murder if,  
10 one, he causes the victim's death or serious bodily  
11 injury that results in death. And that he did so  
12 purposely or knowingly.

13 In order for you to find a defendant guilty  
14 of murder, the state is required to prove each of the  
15 following elements beyond a reasonable doubt:

16 1. That the defendant caused Ellis  
17 McNeill's death or serious bodily injury that then  
18 resulted in Ellis McNeill's death.

19 2. The defendant did so purposely or  
20 knowingly.

21 One element that the state must prove  
22 beyond a reasonable doubt is the defendant acted  
23 purposely and knowingly. You will recall I told you  
24 about what purposely and knowingly mean. These  
25 definitions will apply throughout. If you have problem



JURY CHARGE

1 with a definition, you go back to page 6 and it refers  
2 you right back to page 6, and those definitions will be  
3 set forth.

4 The other element that the defendant must  
5 prove beyond a reasonable doubt -- the state must prove  
6 beyond a reasonable doubt is that the defendant caused  
7 Ellis McNeill's death or serious bodily injury  
8 resulting in death.

9 In your deliberations regarding Counts 1  
10 and 2, you should consider that a person is not  
11 relieved of criminal responsibility fully or to a  
12 lesser degree for causing a result if the only  
13 difference between what actually occurred and what was  
14 designed, contemplated, or risked is that a defendant,  
15 person, or property was injured or harm occurred.

16 Again I say, in other words, an actor is  
17 criminally responsible to the same extent for his  
18 conduct, even though the person he injures may have  
19 been different from the person he intended to injure.

20 Now, those are the two elements to -- that  
21 the state must prove beyond a reasonable doubt in order  
22 to convict the defendant of murder. You heard a term  
23 that the acts of the defendant are alleged to have  
24 either purposely or knowingly caused the victim's death  
25 or serious bodily injury resulting in death.

JURY CHARGE

1 You should know that serious bodily injury  
2 means bodily injury that creates a substantial risk of  
3 death. A substantial risk of death exists where it's  
4 highly probable that the injury will result in death.

5 In order for you to find the defendant  
6 guilty of purposeful serious bodily injury, murder, the  
7 state must prove beyond a reasonable doubt it was the  
8 defendant's conscious object to cause serious bodily  
9 injury that then resulted in the victim's death, that  
10 the defendant knew that the injury created substantial  
11 risk of death, and it was highly probable that death  
12 would result.

13 In order for you to find the defendant  
14 guilty of knowing serious bodily injury, murder, the  
15 state must prove beyond a reasonable doubt that the  
16 defendant was aware that it was practically certain  
17 that his conduct would cause serious bodily injury that  
18 then resulted in the victim's or another's death  
19 through the transferred intent. That the defendant  
20 knew that the injury would -- created thereby would  
21 create a substantial risk of death, and that it was  
22 highly probable that death would result.

23 Causation has a special meaning under the  
24 law. To establish causation, the state must prove two  
25 elements beyond a reasonable doubt.

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JURY CHARGE

1 First, that but for the defendant's conduct  
2 the victim would not have died. It's called a "but  
3 for" test. But for the defendant's conduct, the victim  
4 would not have died.

5 Second, Ellis McNeill's death, or to the  
6 extent I defined transferred intent, must be within the  
7 design or contemplation of the defendant.

8 If not, it must involve the same kind of  
9 injury or harm as that designed or contemplated, and it  
10 must not be too remote, too accidental in its  
11 occurrence, or too dependent on another's volitional  
12 acts to have a just bearing on the defendant's  
13 liability or on the gravity of that offense.

14 In other words, the state must prove beyond  
15 a reasonable doubt that Ellis McNeill's death was not  
16 unexpected under the circumstances or unusual so that  
17 it would be unjust to find the defendant guilty of  
18 murder.

19 Now, a homicide or a killing by, for  
20 example, use of a combustible material such as gasoline  
21 in the manner alleged by the state in itself would  
22 permit you to draw an inference that the defendant's  
23 purpose was to take life or cause serious bodily injury  
24 resulting in death.

25 A deadly weapon is a number of variety of

JURY CHARGE

1 things that could be -- it could be guns, devices,  
2 instruments, materials, or in this case, as alleged,  
3 the combustible materials used in the manner alleged by  
4 the state, which, in the manner it is used or intended  
5 to be used, is known to be capable of producing death  
6 or serious bodily injury.

7 In your deliberations, you may consider  
8 the -- in this case, the combustible substance, what we  
9 can call the weapon, if you want to, the combustible  
10 substance used in the manner and the circumstances of  
11 the killing. And if you're satisfied beyond a  
12 reasonable doubt that the defendant killed through its  
13 use, that is the gasoline, you may draw an inference  
14 from the use of that gasoline, from the manner and  
15 circumstances of the killing, as to the defendant's  
16 purpose and knowledge.

17 Now, all jurors do not have to agree  
18 unanimously concerning the form of murder, so long as  
19 all believe it was one form of murder or another, the  
20 homicide or the use of the combustible instruments.  
21 However, for a defendant to be guilty of murder, all  
22 jurors must agree that the defendant either knowingly  
23 or purposely caused the death or serious bodily injury  
24 resulting in the death of Ellis McNeill.

25 If, after consideration of all of the

1 evidence, you are convinced beyond a reasonable doubt  
 2 that the defendant either purposely or knowingly caused  
 3 Ellis McNeill's death or serious bodily injury  
 4 resulting in death, then your verdict must be guilty.

5 On the other hand, if you determine the  
 6 state has not proven beyond a reasonable doubt that the  
 7 defendant purposely or knowingly caused death or  
 8 serious bodily injury resulting in death, then you must  
 9 find him not guilty of murder and go on to consider --  
 10 now, here's where a deviation from what you understand  
 11 the charges were -- go on to assess whether the  
 12 defendant should be convicted of the crimes of  
 13 aggravated or reckless manslaughter.

14 These are called lesser-included offenses.  
 15 There will be a verdict sheet at the end of the case,  
 16 and we'll go through that and define the path that you  
 17 must follow if this occasion results. And I'll be a  
 18 little more clear as you go along. It's not altogether  
 19 that difficult.

20 You've heard about the charge of murder  
 21 that's contained in the indictment. If you find the  
 22 defendant is not guilty of murder, and by suggesting  
 23 that there are lesser-included offenses, that goes in  
 24 no way to suggest that you should follow this path.  
 25 It's merely an option that you conclude after you

1 assess the murder charge. You then, after -- if you  
 2 acquit, you must go to the next lesser-included offense  
 3 which is called aggravated manslaughter, and after  
 4 that, it would be manslaughter that will be considered.

5 Aggravated manslaughter is a person is  
 6 guilty of aggravated manslaughter if he recklessly  
 7 causes the death of another person under circumstances  
 8 manifesting extreme indifference to human life. In  
 9 order for you to find the defendant guilty of  
 10 manslaughter, the state is required to prove each of  
 11 the following elements beyond a reasonable doubt:

- 12 1. That the defendant caused Ellis
- 13 McNeill's death.
- 14 2. The defendant did so in a reckless
- 15 manner, and that the defendant did so under
- 16 circumstances manifesting extreme indifference to human
- 17 life.

18 One element that the state must prove  
 19 beyond a reasonable doubt is that the defendant acted  
 20 recklessly. Remember, we defined recklessly as being  
 21 foolhardy, without -- recklessness. So you can refer  
 22 to that definition.

23 In other words, to find the lesser-included  
 24 offense of aggravated manslaughter, you must find the  
 25 defendant was aware of and consciously disregarded the

1 risk of causing death. If you find the defendant was  
 2 aware of and disregarded the risk of causing death, you  
 3 must determine whether the risk that he disregarded was  
 4 substantial and unjustifiable.

5 In doing so, you must consider the nature  
 6 and purpose of the defendant's conduct and the  
 7 circumstances known to the defendant, and you must  
 8 determine whether, in light of those factors, the  
 9 defendant disregarded that risk, and that risk -- and  
 10 that disregard was a gross deviation from the conduct  
 11 of a reasonable person, that a reasonable person would  
 12 have observed in the defendant's situation.

13 Now, I understand you're looking at me, and  
 14 I see a little bit of -- you know what am I talking  
 15 about. It will become more clear to you when I go  
 16 through the verdict sheet, and you will see the path  
 17 that you must follow, and it will make it a little more  
 18 easy to understand, the hierarchy of charges.

19 Another element the state must prove beyond  
 20 a reasonable doubt is that the defendant acted under  
 21 circumstances manifesting extreme indifference to  
 22 human life. The phrase "manifesting extreme  
 23 indifference to human life," it does not focus on the  
 24 defendant's state of mind, but rather under the  
 25 circumstances under which you find he acted.

1 If, in light of all of the evidence, you  
 2 find the defendant's conduct resulted in a probability  
 3 as opposed to a mere possibility of death, then you may  
 4 find that he acted under circumstances manifesting  
 5 extreme indifference to human life.

6 On the other hand, if you find his conduct  
 7 resulted in only the possibility of death, then you  
 8 must acquit him of aggravated manslaughter and consider  
 9 the offense of reckless manslaughter, which I'll once  
 10 again explain.

11 So we're talking about the hierarchy, in  
 12 this case, Count 1, murder. You'll make a  
 13 determination as to the guilt or innocence. If you  
 14 find him not guilty, then you come down and you  
 15 consider aggravated manslaughter. If that does not  
 16 meet with the definitions that you find occurred, then  
 17 you're looking at reckless manslaughter, and you see  
 18 that we've included what we call lesser-included  
 19 offenses, lesser-included offenses. That's on Count 1.

20 The final element that you must prove  
 21 beyond a reasonable doubt is the causation which we  
 22 previously defined, and that will be found in the  
 23 instructions as well: But for the defendant's conduct,  
 24 Ellis McNeill would not have died, and Ellis McNeill's  
 25 death must have been within the risk of what -- of



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JURY CHARGE

1 which the defendant was aware.  
 2 If not, it must involve some kind of injury  
 3 or harm as the probable result of defendant's conduct,  
 4 and must also, again, not be too remote, too accidental  
 5 in its occurrence, or too dependent on another's  
 6 volitional act to have a just bearing on the  
 7 defendant's liability or the gravity of his offense.  
 8 In other words, the state must prove beyond  
 9 a reasonable doubt that Ellis McNeill's death was not  
 10 so unexpected or unusual that it would be unjust to  
 11 find the defendant guilty of aggravated manslaughter.  
 12 Now, if you move on and you say, well, we  
 13 find the defendant not guilty of aggravated  
 14 manslaughter, you may move on to consider the defendant  
 15 recklessly causing Ellis McNeill's death under  
 16 circumstances manifesting -- strike that.  
 17 If you find that not guilty, then you must  
 18 consider whether the defendant should be considered  
 19 guilty of reckless manslaughter. A person is guilty of  
 20 reckless manslaughter if he recklessly causes the death  
 21 of another person, and the state then is therefore is  
 22 required to prove each of the following elements beyond  
 23 a reasonable doubt:  
 24 1. That the defendant caused Ellis  
 25 McNeill's death.

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JURY CHARGE

1 2. The defendant did so recklessly.  
 2 Again, the state must prove both of those  
 3 elements, and the difference is that the defendant in  
 4 this case acted recklessly. A person who causes  
 5 another's death does so recklessly when he is aware of  
 6 and consciously disregards a substantial and  
 7 unjustifiable risk that the death will result from his  
 8 or her conduct. Again, go back to page 6 if you do  
 9 need a definition of reckless.  
 10 In other words, you must find that the  
 11 defendant was aware of and consciously disregarded the  
 12 risk of causing death. If you find the defendant was  
 13 aware of and disregarded the risk of causing death, you  
 14 must determine whether that risk was substantial and  
 15 unjustifiable.  
 16 In doing so, you consider the nature and  
 17 the purpose of the defendant's conduct and the  
 18 circumstances known to the defendant, and you must  
 19 determine whether, in light of those factors, the  
 20 defendant's disregard of that risk was a gross  
 21 deviation from the conduct a reasonable person would  
 22 have observed in the defendant's situation.  
 23 Again, causation is defined, once again,  
 24 and similarly, to what you've already heard, so you can  
 25 refer to the discussion.



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JURY CHARGE

1 If, after all of the consideration of the  
2 evidence, you are convinced beyond a reasonable doubt  
3 that the defendant recklessly caused Ellis McNeill's  
4 death, then your verdict must be guilty of reckless  
5 manslaughter. However, if after consideration of all  
6 of the evidence you are not convinced beyond a  
7 reasonable doubt that the defendant recklessly caused  
8 McNeill's death, you must find the defendant not guilty  
9 of reckless manslaughter.

10 Again, I say to you the fact that Count 1  
11 murder, we've introduced these lesser offenses, should  
12 not be taken in any way as an invitation to disregard  
13 the murder charge or in any way be considered to be a  
14 statement by the Court that that should be done. All  
15 it does is follow a certain process once you make the  
16 distinction on Count 1, and then you move your way  
17 down. It only provides that for your assistance.

18 Now, here's another little switcheroo. You  
19 will remember that I told you early on that Count 1 of  
20 the indictment was murder. Count 2 was felony murder.  
21 Counts 3 was aggravated arson. What we're going to do,  
22 and you will find this being guided by the verdict  
23 sheet, that you're going to assess the third count of  
24 the indictment before you assess the second count of  
25 the indictment.

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JURY CHARGE

1 Why is that? Because your judgment on the  
2 third count of the indictment, aggravated arson, will  
3 pertain directly to the second count of the indictment,  
4 and that determination must be made before you go to  
5 the third count, so -- to the second count. So they're  
6 a little bit interchanged the way they're indicted, but  
7 it's only a number situation. Count 3 of the  
8 indictment, as you will remember, charges aggravated  
9 arson, so you're going from 1 to 3.

10 Count 3 of the indictment charges the  
11 defendant Larry Fleming with aggravated arson in that  
12 on or about the 11th day of May, 2002, he did start a  
13 fire thereby purposely or knowingly placing another in  
14 danger of death or bodily injury.

15 That means that the statute which underlies  
16 that is a person is guilty of aggravated arson if he  
17 starts a fire or causes an explosion, whether on his  
18 own property or another, is thereby purposely or  
19 knowingly placing another person in danger of death or  
20 bodily injury. That's the statutory definition.

21 In order for the defendant to be found  
22 guilty of aggravated arson, the state must prove three  
23 elements:

- 24 1. The defendant purposely started a fire  
25 on his or another's property.

JURY CHARGE

1 2. That he committed the act of starting  
2 the fire.

3 3. He purposely or knowingly placed  
4 another person in danger of death or bodily injury.

5 The first element that the state must prove  
6 is that the defendant purposely started a fire at or  
7 near the premises known as 340 Brunswick Avenue,  
8 Trenton, New Jersey. Purposely is defined again,  
9 page 6.

10 It's not necessary that any significant  
11 damage be done, although in this case you have evidence  
12 that shows significant damage was done. It's only  
13 necessary that a fire be started for one or more of the  
14 purposes to be described. The lack of success of the  
15 perpetrator is immaterial and really doesn't pertain to  
16 this charge in any way.

17 The second element the state must prove  
18 beyond a reasonable doubt is at the time the defendant  
19 started the fire, he purposely or knowingly placed  
20 another person in danger of death or bodily injury.  
21 Bodily injury means physical pain, illness, or any  
22 impairment of physical condition. And I already  
23 defined the meaning of purposefully, and you can refer  
24 to that in the indictment. Here we go again with the  
25 lesser-included offenses.

JURY CHARGE

1 If the state has failed to prove any of the  
2 elements as I described them to you beyond a reasonable  
3 doubt, you must find the defendant not guilty of  
4 aggravated arson. If the state has proven every  
5 element beyond a reasonable doubt, you must find the  
6 defendant guilty of the crime of aggravated arson.

7 Now, I'm going to go back into the lesser  
8 included. Arson is a lesser included offense of  
9 aggravated arson. And that's, even though they're not  
10 contained in the indictment, folks. Just because the  
11 Court is instructing you concerning these offenses, it  
12 does not again mean the Court has any opinion one way  
13 or the other about whether the defendant committed  
14 these or any other offenses. You should consider these  
15 offenses along with those for which the defendant is  
16 indicted.

17 You're not to render a verdict on these  
18 offenses or answer these questions on the verdict sheet  
19 unless you find that the state has failed to meet its  
20 burdens with regard to the offenses in the indictment.  
21 That is to say, your first consideration should be the  
22 charges in the indictment, and you don't move to the  
23 lesser-included offenses unless you find the defendant  
24 not guilty of those primary charges.

25 If you find the state has proven the first

1 two elements of aggravated arson but not the third,  
 2 which is purposely or knowingly placed another person  
 3 in danger of death or bodily injury, then the defendant  
 4 is guilty of the lesser charge of arson.

5 A person is guilty of arson if he purposely  
 6 starts a fire or causes an explosion, whether on his  
 7 property or another's, and thereby places another  
 8 person in danger of death or bodily injury or places a  
 9 building or structure of another in danger of damage or  
 10 destruction.

11 In order for a person to be found guilty of  
 12 arson, the state must prove the following elements  
 13 beyond a reasonable doubt:

14 The defendant purposely started a fire on  
 15 his property or another's, and the starting of the fire  
 16 recklessly placed another person in danger of death or  
 17 bodily injury or recklessly placed a building or  
 18 structure of another in danger of damage or  
 19 destruction. That intersperses the word "recklessly"  
 20 from the aggravated arson of purposely and knowingly.  
 21 In other words, aggravated arson is purposely and  
 22 knowingly; arson is recklessly.

23 Again, the first element the state must  
 24 prove beyond a reasonable doubt is that the defendant  
 25 purposely started a fire or caused an explosion. In

1 this case it's primarily start a fire. It's not  
 2 necessary that any significant damage be done, although  
 3 that's already been shown with some degree of  
 4 certainty.

5 It is only necessary that a fire be started  
 6 and for one or more of the purposes or under one or  
 7 more of the circumstances I've just described. The  
 8 lack of success is not material.

9 The second element is that the defendant  
 10 started the fire recklessly and placed another person  
 11 in danger of death or bodily injury or that he placed a  
 12 building recklessly in danger of damage or destruction.

13 Again, bodily injury means physical pain,  
 14 illness, or any impairment of physical condition. If  
 15 the state has failed to prove any of the two elements  
 16 as I've described them to you beyond a reasonable  
 17 doubt, you must find the defendant not guilty of arson.

18 Contrarily, if you find the state has  
 19 proven every element beyond a reasonable doubt, you  
 20 must find the defendant guilty of arson. Why do we  
 21 interchange those two counts for your consideration?  
 22 Because the second count, felony murder, depending --  
 23 obviously, depending on the circumstances, if you find  
 24 the defendant didn't commit arson or aggravated arson,  
 25 that's the felony that takes it out of felony murder.

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JURY CHARGE

1 That's the simple basic statement.  
 2 Felony murder, you will find, and I will  
 3 define a little bit more to you or for you means a  
 4 murder was occasioned on -- during the commission of a  
 5 felony. In this case the felony was an arson. If you  
 6 find there was no arson, aggravated arson, there cannot  
 7 be felony murder. That is why we changed them around,  
 8 so why you first consider the arson. Otherwise, you're  
 9 doing it backwards.  
 10 Felony murder, Count 2 of the indictment --  
 11 and this is the direction you should go, take the third  
 12 count. If you find aggravated arson or arson charges  
 13 in the indictment, Larry Fleming on or about the 11th  
 14 day of May, 2002, he did cause the death of Ellis  
 15 McNeill during the commission of or the attempt to  
 16 commit or flight after committing the crime of  
 17 aggravated arson.  
 18 The pertinent part of the statute upon  
 19 which this count of the indictment is based reads as  
 20 follows: Criminal homicide constitutes murder when it  
 21 is committed by the actor and the actor is engaged in  
 22 the commission of or attempt to commit or flight after  
 23 committing, in this case, arson, and the course of such  
 24 crime or the immediate flight therefrom causes the  
 25 death of a person other than one of the participants.

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JURY CHARGE

1 Generally, it doesn't matter that the act  
 2 which caused the death was committed recklessly or  
 3 unintentionally or accidental. The perpetrator is as  
 4 guilty of felony murder as he would be if he had  
 5 purposely or knowingly committed the act which causes  
 6 the death.  
 7 In other words, it's the combination of the  
 8 two circumstances, the attempt to commit and the  
 9 attempt to escape from or the commission of a felony  
 10 and the death of another person. That's felony murder  
 11 in a nutshell.  
 12 In order for you to find the defendant  
 13 guilty of felony murder, the state is required to prove  
 14 beyond a reasonable doubt from all of the evidence in  
 15 the case all of the essential elements of the crime  
 16 charged. Accordingly, before you can find the  
 17 defendant guilty of felony murder, the state must prove  
 18 beyond a reasonable doubt that on May 11, 2002, the  
 19 defendant was engaged in the commission of the attempt  
 20 to commit or the flight after committing, and primarily  
 21 it will be the commission of the crime of arson or  
 22 aggravated arson as charged in Count 3 of the  
 23 indictment; that the death of Ellis McNeill was caused  
 24 by the defendant; and that the death -- third, that the  
 25 death of Ellis McNeill was caused at some time within



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JURY CHARGE

1 the course of the commission of that crime, including  
2 its aftermath of flight and concealment efforts.

3 The first element requires the defendant to  
4 prove beyond a reasonable doubt that the defendant was  
5 engaged in the commission of or the attempt to commit  
6 or flight after committing or attempting to commit the  
7 crime of aggravated arson or arson.

8 I've already defined the elements of arson,  
9 and either one of those would suffice to find a  
10 foundation of felony murder.

11 You cannot find the defendant guilty of  
12 felony murder unless you first find him guilty beyond a  
13 reasonable doubt of having committed the crime charged  
14 in Count 3 which we've inverted. You have to find him  
15 guilty of aggravated arson or arson to support the  
16 predicate of felony murder.

17 The second and third elements require the  
18 state to establish that the victim's death was caused  
19 by the defendant and was caused during the commission  
20 of, in this case, the crime of arson or aggravated  
21 arson.

22 State must prove beyond a reasonable doubt  
23 that but for the defendant's conduct in the commission  
24 of, in this case, arson or aggravated arson, the victim  
25 would not have died. In other words, that the victim's

JURY CHARGE

1 death would not have occurred without the commission of  
2 arson.

3 The victim's death, number two of the  
4 remaining elements, was a probable consequence of the  
5 commission of or attempt to commit, or flight after  
6 committing, again, we're talking about committing the  
7 crime of arson or aggravated arson. In order for the  
8 death to be the probable consequence of the arson, or  
9 aggravated arson, the death must not have been too  
10 remote or too accidental in its occurrence or too  
11 dependent on another's volitional act to have a just  
12 bearing on the defendant's liability or the gravity of  
13 his offense.

14 In other words, you must find that the  
15 state has proven beyond a reasonable doubt that under  
16 all of the circumstances, the death did not occur in  
17 such an unexpected or unusual manner, that it would be  
18 unjust to find the defendant responsible for that  
19 death.

20 In conclusion, if you find that after  
21 consideration of all of the evidence that the state has  
22 proven to your satisfaction beyond a reasonable doubt,  
23 each of the elements as I have explained to you, the  
24 defendant engaged in the commission of aggravated arson  
25 or arson; number two, the death of Ellis McNeill was



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JURY CHARGE

1 caused thereby by the defendant; and the death of that  
2 person was caused at sometime within the course of the  
3 commission of the crime, including its aftermath of  
4 flight and concealment efforts, you must find the  
5 defendant guilty. If you find the state has failed to  
6 prove any one of those elements, then you must find the  
7 defendant not guilty of felony murder.

8 Again, you will have these instructions  
9 with you if you get into the technicalities of the  
10 situation that we've covered. It's a little complex,  
11 so you just take your time, and if you have any  
12 questions, you can avail yourself of the Court's  
13 assistance.

14 All right. That concludes my instructions  
15 as to your general principles. I'm sure you're as  
16 happy about that as am I. It concludes the  
17 instructions because they do become very complex and do  
18 require a lot of mental gymnastics, and I appreciate  
19 very much the attention you've paid. I see that each  
20 one of you have remained alert as possible under the  
21 circumstances, and I appreciate that.

22 There's nothing really different in the way  
23 a jury is supposed to consider a case in a criminal  
24 matter from that in which a reasonable person treats  
25 any serious question with which he or she is

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JURY CHARGE

1 confronted, depending on the evidence presented to  
2 them. You're expected to use your own good common  
3 sense, consider the evidence for the purposes for which  
4 it was admitted, and give it a reasonable and fair  
5 construction in light of the knowledge of how people  
6 behave.

7 It is the quality of the evidence, not  
8 simply the number of witnesses that control. Anything  
9 that has been marked in evidence you will receive. If  
10 things were marked for identification, that doesn't  
11 mean they were marked in evidence. You will not  
12 receive things that are not marked in evidence. When  
13 the Court says, mark it into evidence, that's what you  
14 get, and counsel will go over those materials before  
15 we -- before they're allowed to be given to you.

16 Very shortly you're going to go into the  
17 jury room to start your deliberations. You're to apply  
18 the law as I've instructed you to the facts you find to  
19 be for the purpose of arriving at a fair and correct  
20 verdict. The verdict must represent the considered  
21 judgment of each juror and must be unanimous as to each  
22 charge. This means all 12 who are ultimately selected  
23 must agree upon each charge as to guilt or nonguilt.

24 It is your duty to consult with one  
25 another and reach an agreement and to do so without

1 violence to individual judgment. Each of you must  
 2 decide the case for yourself, but do so only after an  
 3 impartial exchange and consideration of the evidence  
 4 with your fellow jurors.

5 In the course of your deliberations, do not  
 6 hesitate to reexamine your views and change your  
 7 opinion if you're convinced that it is erroneous. You  
 8 shouldn't surrender your honest convictions as to your  
 9 opinion or to the weight or effect of the evidence  
 10 solely because of the opinion of your fellow jurors or  
 11 for the mere purpose of returning a verdict.

12 You are not partisans, you are judges,  
 13 judges of the fact. As I've said, you may return a  
 14 verdict of either not guilty or guilty on each count  
 15 and or the subordinate charges that we went over. All  
 16 12 who are ultimately chosen as the deliberating jury  
 17 must agree as to the verdict.

18 Now, do we have verdict forms? Hand out  
 19 the verdict forms, please.

20 The verdict forms will give you kind of a  
 21 road map and make it a little bit, I hope, more  
 22 comprehensible, these instructions.

23 What will happen is eventually you will  
 24 deliberate. Go through it basically the way it's  
 25 proposed on the verdict sheet, and you look at Count 1.

1 How do you find as to Count 1 of the indictment,  
 2 charging defendant Larry Fleming with murder in that he  
 3 did purposely or knowingly cause the death of Ellis  
 4 McNeill or did purposely or knowingly inflict serious  
 5 bodily injury resulting in death?

6 Now, you're going to make a determination,  
 7 guilty or not guilty, by the decision of the 12 of you.  
 8 If you find him guilty of murder, you don't have to  
 9 deal with the lesser-included offenses; you move on to  
 10 question number 3, which is what will be shown.

11 It's question number 2, but it's Count  
 12 number 3, and as it says here, do not answer question  
 13 1B or C, because they will have been precluded by your  
 14 finding of guilt as to the first count. However, if  
 15 you find the defendant not guilty of murder, you move  
 16 to the second question, 1B.

17 If not guilty under question 1A, how do you  
 18 find as to the lesser-included offense of aggravated  
 19 manslaughter, in that the defendant, Larry Fleming did  
 20 recklessly cause the death of Ellis McNeill under  
 21 circumstances manifesting extreme indifference to human  
 22 life.

23 If you find guilty, you skip over the next,  
 24 C, and you go to question 2. If you find not guilty,  
 25 then you go and assess the guilt or innocence of the

## JURY CHARGE

1 lesser-included offense of reckless manslaughter in  
 2 that the defendant, Larry Fleming did recklessly cause  
 3 the death of Ellis McNeill. You'll notice that it says  
 4 recklessly caused the death of Ellis McNeill, but  
 5 deletes in this third charge under circumstances  
 6 manifesting extreme indifference to human life.

7 Once you've concluded that, move on to  
 8 question 2, which represents Count 3, how do you find  
 9 as to Count 3, charging the defendant Larry Fleming  
 10 with aggravated arson, in that he did start a fire,  
 11 thereby purposely and knowingly placing another in  
 12 danger of death or bodily injury? Guilty or not  
 13 guilty?

14 Again, if you find the defendant guilty of  
 15 that charge, you move to question 3, which is Count 2,  
 16 skipping over B. If you find him not guilty, then you  
 17 consider question B. If not guilty, under question 2A,  
 18 how do you find as to the lesser included -- it should  
 19 be included offense of arson in that the defendant,  
 20 Larry Fleming did purposely start a fire, whether on  
 21 his own property or another's, thereby recklessly  
 22 placing another person in danger of death or bodily  
 23 injury, or thereby recklessly placing a building or  
 24 structure of another in danger of damage or  
 25 destruction. That's the lesser-included offense of

## JURY CHARGE

1 arson from aggravated arson.

2 Once you've done that, if you find not  
 3 guilty to question 2A and B, you've eliminated the  
 4 essential element of murder, felony murder, that is,  
 5 the arson or aggravated arson being the felony which  
 6 must be a part of felony murder. So you've reached a  
 7 verdict, and by automatic deduction, question 3 must be  
 8 not guilty because you found no arson or agg arson.

9 However, if you do find aggravated arson or  
 10 arson, then you move to question 3, and then you  
 11 consider felony murder. And you are asked, how do you  
 12 find as to Count 2, charging him with felony murder, in  
 13 that he did cause the death of Ellis McNeill during the  
 14 commission of, attempt to commit, or flight after  
 15 committing the crime of aggravated arson or the  
 16 lesser-included offense of arson? Guilty or not  
 17 guilty?

18 And that's your road map to a decision.  
 19 when you come back into court, I'll ask, and we'll get  
 20 to that in a moment.

21 Let me see counsel at sidebar.

22 (The following is a discussion at sidebar.)

23 THE COURT: All right. Any objections or  
 24 concerns about --

25 MS. LACKEN: No objections, Judge. I have

1 a concern not about what you did, about one thing I was  
 2 thinking about when you were giving the charge.  
 3 Larry Fleming apparently, according to the  
 4 testimony, was giving statements, you know, saying  
 5 things or giving oral statements to the witnesses. I'm  
 6 not quite sure, but I think that might necessitate the  
 7 Kociolek charge. I don't have my evidence book with  
 8 me.  
 9 MR. HAMILTON: What's the basic idea behind  
 10 the Kociolek charge?  
 11 MS. LACKEN: Oral statements, you have to  
 12 judge them, scrutinize them heavily because of the  
 13 effect on the listener because they're not taken down  
 14 on paper. I don't know whether or not -- I think it  
 15 applies to lay witnesses as well as police witnesses,  
 16 but I would need to take a look at it. It's at least a  
 17 concern we should address.  
 18 THE COURT: It's a hell of a time to bring  
 19 it up.  
 20 MS. LACKEN: I apologize, however.  
 21 THE COURT: I think I'll give that right  
 22 now.  
 23 MS. LACKEN: All right.  
 24 (The discussion at sidebar is concluded.)  
 25 THE COURT: There have -- ladies and

1 gentlemen, counsel has brought to my attention certain  
 2 other aspects of direction which might be appropriate  
 3 for you to receive. You will recall there was  
 4 testimony from three or four of the witnesses who  
 5 allege that Mr. Fleming made certain comments to them.  
 6 They were recounted by counsel and they were offered  
 7 for your assessment.  
 8 Those would be considered oral statements,  
 9 and it's your function to determine whether or not  
 10 those statements are actually made by the defendant,  
 11 and if made, whether the statement or any portion of it  
 12 is credible. In this case, somebody said, I'm going to  
 13 get back, you're going to pay the consequences -- I  
 14 don't even recall precisely what the comments were --  
 15 but they could have been construed as comments,  
 16 threats, reactions to what Big Al might have said or  
 17 refused with respect to the solicitation to purchase  
 18 drugs.  
 19 In considering whether the defendant, and  
 20 for that matter, any of the comments by Curt, by  
 21 Carmen, by Joe, by Ed, any of the comments that they  
 22 recount that they attribute to Mr. Fleming, you should  
 23 receive and weigh those comments with some degree of  
 24 caution, because based on the general recognized risk  
 25 of misunderstanding by the hearer or the ability of the



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JURY CHARGE

1 hearer to recall accurately the words used by the  
2 defendant, the specific words used and the ability to  
3 remember them are important to the correct  
4 understanding of any oral communication.

5 what this is, is a little bit of an extra  
6 concern that you might give for oral statements that  
7 are reported, because, as we all know, there is the  
8 concern that a word misplaced may mean a different  
9 thing; it may be correctly communicated or incorrectly  
10 communicated.

11 In other words, use your own common sense  
12 in assessing the cautionary, the comments that are  
13 made. Use your own caution, your own understanding of  
14 human behavior, because the presence or absence of any  
15 change of a single word may substantially change the  
16 true meaning of even the shortest sentence. Therefore,  
17 you should receive and weigh such statements with some  
18 degree of caution.

19 If you consider those factors, and you  
20 determine that the statement was made and was credible,  
21 you can believe specifically what was said. If you  
22 determine that such statements were not made or  
23 incorrectly made, you must give whatever weight or  
24 credibility that you so desire to that statement, or  
25 disregard it entirely if you find it was not made.

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JURY CHARGE

1 As I said, if you find the statement was  
2 made and that part or all of the statement was  
3 credible, you may give what weight you think  
4 appropriate to the portion of the statement you find to  
5 be truthful and credible.

6 Anything further?

7 MS. LACKEN: No, Judge.

8 MR. HAMILTON: Nothing further, Judge.

9 THE COURT: Thank you, Counsel.

10 MR. HAMILTON: I lied. I just direct the  
11 Court's attention to the last paragraph of this version  
12 of the charge. I don't believe you addressed the  
13 subject of possible questions.

14 THE COURT: I haven't gotten to that point  
15 yet.

16 MR. HAMILTON: That would be why.

17 THE COURT: That would be one of the  
18 reasons. I appreciate your anticipation, but --

19 As I've indicated to you already, ladies  
20 and gentlemen, if you have any -- during your  
21 deliberations, any questions or feel you need further  
22 assistance from me, write your question on a sheet of  
23 paper and give it to the sheriff's officer who will be  
24 standing outside the jury room, and who in turn will  
25 give it to me.



1 I'll then go over the question with the  
 2 attorneys, and I'll try to answer it as quickly as  
 3 possible. Please try to be patient. When you send out  
 4 a question, do not disclose where you stand on your  
 5 deliberations. Don't tell us, for example, you're  
 6 eight to four for conviction or four to -- eleven to  
 7 one for acquittal. Keep the numbers out of it.

8 If you reach a unanimous verdict out of it,  
 9 knock on the door and give the sheriff's officer a note  
 10 for me that says, we have reached a verdict, and we'll  
 11 try to get you into court as soon as possible and hear  
 12 your verdict.

13 Now we're going to select the alternates.  
 14 What that will mean is my court clerk, Ruth will reach  
 15 into this little box and one -- two of you will be  
 16 declared alternates as a result of the chance drawing.

17 THE CLERK: Juror number two, Betsy Ross,  
 18 have a seat in the first row, please.

19 Juror number nine, Melissa Caruso. Have a  
 20 seat in the first row, please.

21 THE COURT: That makes you, Mr. Mukerji,  
 22 the foreman by your position as number one juror.  
 23 Therefore, it will be your responsibility to lead  
 24 deliberations, and it will be your responsibility to  
 25 tell what verdict it is once the jury has reached it.

1 When we ask -- when you come out for  
 2 delivery of the verdict, please resume the seats you  
 3 are in now. The Court will then call the roll to make  
 4 sure everybody is in place. And then I'll ask  
 5 Mr. Mukerji to please rise and I'll ask him whether the  
 6 verdict -- whether the jury has reached a verdict and  
 7 is the verdict a unanimous verdict. I presume that the  
 8 answers will both be yes unless there's been some  
 9 confusion on the way out.

10 We will then read the charges and ask what  
 11 your verdict is, and Mr. -- the foreman will respond  
 12 with the answers to the verdict on each charge. After  
 13 that, I will request each of you to respond to the  
 14 question, is that your verdict? In other words, that's  
 15 called a poll of the jury. And I'll ask the foreman,  
 16 is that your verdict? Juror number three, is that your  
 17 verdict? Juror number four --

18 And unless, again, there's some confusion,  
 19 the verdict, the answer should be yes; if there's not,  
 20 then we'll have to address that situation. But if it's  
 21 unanimous, then the verdict delivered will be for the  
 22 most part the verdict arrived at.

23 As you know, Mr. Foreman, your vote does  
 24 not carry any greater weight, but you're assigned these  
 25 responsibilities simply because of the administrative

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JURY CHARGE

1 reasons to preside over the jury deliberations and  
 2 report the results.  
 3 As soon as the officers are sworn, you'll  
 4 be returned to the jury room, but do not begin your  
 5 deliberations until you receive the jury verdict form  
 6 and the exhibits have been delivered to you by the  
 7 officers. You should also be able to be in a position  
 8 to receive your lunch.  
 9 All right. Swear in the officers.  
 10 (Sheriff's officers are sworn.)  
 11 THE COURT: Okay. I'll ask counsel to  
 12 review the evidence and the verdict sheet and make sure  
 13 they're in order, and state so on the record if that's  
 14 the case.  
 15 Ladies and gentlemen, you may step down to  
 16 go to the jury room. The alternates can stay there for  
 17 a second. You may proceed.  
 18 (The jury commences deliberations at  
 19 12:30.)  
 20 THE COURT: You alternate jurors are not  
 21 excused as jurors. I don't know whether it comes as a  
 22 relief or source of disappointment, probably both.  
 23 You'll get your lunch, too, and you'll also, if it  
 24 becomes necessary to substitute one or both of you for  
 25 the jurors that are out, we will readdress both of you,

JURY CHARGE

1 or one of you, whoever, is going to be substituting.  
 2 And it's important that you not discuss the  
 3 case, even though you're the jurors and you're -- the  
 4 rest of the jurors can discuss the case, you cannot.  
 5 Because if you go into it as an alternate, you have to  
 6 begin from ground zero, basically, under those  
 7 circumstances. So talk about whatever you want, but  
 8 don't talk about the case, okay.  
 9 If there's a question that comes up with  
 10 the jury or the verdict, we'll get you in to hear that  
 11 as well. Enjoy your lunch, talk about the cold  
 12 weather, the cold court, whatever you want to do, but  
 13 don't talk about the case.  
 14 Thank you very much.  
 15 THE COURT: Would you mind stating on the  
 16 record the evidence is in order.  
 17 MS. LACKEN: Everything seems to be in  
 18 order.  
 19 THE COURT: All right. Provided to the  
 20 jury.  
 21 All right. Do you want to bring the jury  
 22 in.  
 23 SERGEANT-AT-ARMS: Jury entering court.  
 24 (The jury returns to the courtroom at 2:10  
 25 with a verdict.)

1 THE COURT: All right. Ladies and  
 2 gentlemen, please be seated.  
 3 Mr. Foreman, I've received your note that  
 4 you have reached a verdict; is that correct?  
 5 THE FOREPERSON: Yes, sir.  
 6 THE COURT: Is the verdict unanimous?  
 7 THE FOREPERSON: Yes, sir.  
 8 THE CLERK: Okay.  
 9 THE COURT: Go ahead.  
 10 THE CLERK: Mr. Foreperson, is the verdict  
 11 of the jury a unanimous verdict of all 12 jurors?  
 12 THE FOREPERSON: Yes. Yes, ma'am.  
 13 THE CLERK: Okay. Question 1, how do you  
 14 find as to Count 1 of the indictment charging the  
 15 defendant, Larry Fleming with murder, in that he did  
 16 purposely or knowingly cause the death of Ellis McNeill  
 17 or did purposely or knowingly inflict serious bodily  
 18 injury resulting in the death?  
 19 Not guilty or guilty?  
 20 THE FOREPERSON: Guilty.  
 21 THE CLERK: Question 2, how do you find as  
 22 to Count 3 of the indictment charging the defendant,  
 23 Larry Fleming with aggravated arson in that he did  
 24 start a fire, thereby purposely or knowingly placing  
 25 another in danger of death or bodily injury?

1 Not guilty or guilty?  
 2 THE FOREPERSON: Guilty.  
 3 THE CLERK: Question 3, how do you find as  
 4 to Count 2 of the indictment charging the defendant,  
 5 Larry Fleming with felony murder, in that he did cause  
 6 the death of Ellis McNeill during the commission of the  
 7 attempt to commit or fleeing after committing the crime  
 8 of aggravated arson or the lesser-included offense of  
 9 arson?  
 10 Not guilty or guilty?  
 11 THE FOREPERSON: Guilty.  
 12 (The jury is polled and the verdicts are  
 13 as reflected above.)  
 14 THE COURT: Ladies and gentlemen, once  
 15 again, the jury system is vindicated by your appraisal  
 16 and careful consideration of the evidence. Before you  
 17 depart, I'd like you to know a couple things.  
 18 First of all, you're not required to  
 19 discuss your deliberations or verdict with anyone, and  
 20 no person connected with this trial is allowed under  
 21 the court rules to talk to you about the case or your  
 22 role in its outcome. That's because all jurors have  
 23 the right to expect that their communications that took  
 24 place within the jury room will remain confidential and  
 25 to them alone. Obviously, without that, there could be

1 no fair and free discussion of the evidence.  
 2 Thus, you should never be willing to make a  
 3 statement which you would not be willing to make and  
 4 repeat under oath in open court with your fellow jurors  
 5 present. Obviously, our jury system requires fourteen  
 6 people such as yourselves, and 12 individually, to make  
 7 up a jury to sacrifice as you have done.  
 8 Although this was a relatively short case,  
 9 you nevertheless, gave up time and contributed to a  
 10 serious and thoughtful deliberation of the evidence.  
 11 I'm going to excuse you from jury service. You'll be  
 12 excused for a minimum of three years, and I'm going to  
 13 order the defendant, the bail revoked, and the  
 14 defendant will be remanded to jail and sentencing will  
 15 be on --  
 16 THE CLERK: March 12, 2004.  
 17 THE COURT: All exhibits will be returned  
 18 to counsel. And once more, I'd like to thank you very  
 19 much for your dedicated and sincere service. Without  
 20 your assistance, this couldn't have happened.  
 21 JUROR NUMBER ONE: Do you want these  
 22 papers?  
 23 THE COURT: You can leave them on the  
 24 chair.  
 25 All right. Ladies and gentlemen, you can

1 step down with the thanks of the Court.  
 2 (Jury is excused.)  
 3 THE COURT: Anything more?  
 4 THE CLERK: I am returning her evidence to  
 5 her.  
 6 MS. LACKEN: Received.  
 7 (The matter is concluded.)  
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I, MARIAN V. WALSH, C.S.R., License Number 805, an Official Court Reporter and Notary Public in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript to the best of my knowledge and ability.

Marian V. Walsh  
Official Court Reporter  
Mercer County Courthouse

12-17-07  
Date





**A-1217-04T4**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
IND. NO. 03-02-0286  
APP. DIV. NO. A-1217-04-T4

THE STATE OF NEW JERSEY, )  
)  
vs. )  
)  
LARRY FLEMING, )  
)  
Defendant )

STENOGRAPHIC TRANSCRIPT  
**RECEIVED**  
OF APPELLATE DIVISION  
SENTENCING DEC 28 2004  
**SUPERIOR COURT**  
**OF NEW JERSEY**

PLACE: Mercer County Courthouse  
209 South Broad Street  
Trenton, New Jersey 08650  
DATE: April 2, 2004

B E F O R E:

HONORABLE BILL MATHESIUS, J.S.C.

Transcript Ordered By:  
Louis G. Gonnella,  
Assistant Deputy Public Defender  
(Office of the Public Defender)

**FILED**  
APPELLATE DIVISION  
DEC 28 2004  
*Ann Flynn*  
CLFRK

A P P E A R A N C E S:

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OFFICE OF THE PUBLIC DEFENDER  
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\* \* \* \* \*

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**RECEIVED**  
APPELLATE DIVISION  
DEC 28 2004  
**SUPERIOR COURT**  
**OF NEW JERSEY**

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SENTENCING

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1 THE COURT: Good morning.  
2 MS. LACKEN: Good morning, your Honor.  
3 THE COURT: Let's see, this morning, first  
4 up we'll have the matter of State of New Jersey versus  
5 Larry Fleming, Indictment 03-02-0286, Prosecutor's file  
6 02-1807. Murder in the first degree, murder felony,  
7 murder and aggravated assault, verdicts having been  
8 received in a trial before this Court.  
9 May I have your appearances, please.  
10 MR. CLASH: Vernon Clash appearing on  
11 behalf of Larry Fleming.  
12 MS. LACKEN: Kim Lacken on behalf of the  
13 State.  
14 THE COURT: Miss Lacken, have you had  
15 occasion to review the presentence report?  
16 MS. LACKEN: I have, your Honor, and there  
17 are a couple corrections I would like to point out to  
18 the Court.  
19 THE COURT: If you would, please.  
20 MS. LACKEN: On the first page where it  
21 says mandatory/minimum sentencing pursuant to NJSA  
22 2C --  
23 THE COURT: Yes.  
24 MS. LACKEN: This is a mandatory/minimum  
25 sentencing case because he was convicted of murder, so

SENTENCING

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1 the first box should be checked, as well as the very  
2 last box, 2C:43-7.2. This is a No Early Release Act  
3 case, those two boxes should be checked.  
4 THE COURT: That is correct. The Court was  
5 aware of that, notwithstanding the lack of checking.  
6 MS. LACKEN: Your Honor, also with regard  
7 to the defendant's prior record. I've had an  
8 opportunity in preparing for this case, as I normally  
9 do, I went back and I reviewed all of the defendant's  
10 presentence reports from previous cases. I've taken a  
11 look at one, I've had an opportunity to show it to  
12 Mr. Clash, and our presentence report for some reason  
13 does not reflect the defendant's extensive prior  
14 juvenile record. So, I'm handing your Honor a  
15 presentence report for prosecutor's file 92-0183-01, it  
16 was Accusation 93-03-0085. The Public Defender's  
17 office did represent Mr. Fleming. I'm showing you  
18 this, it's a two page -- well, it amounts to one full  
19 page of a prior juvenile record, which I think is  
20 significant, and I would ask your Honor to take that  
21 into consideration.  
22 THE COURT: I would note that I do not have  
23 that in my presentence report either, and I'm not sure  
24 why. It just reflects the fact -- it just reflects the  
25 fact that Mr. Fleming has had 18 adult arrests and five

SENTENCING

1 prior superior court convictions, leaving out the  
2 wealth of problems endured by Mr. Fleming and imposed  
3 by Mr. Fleming since 1988; Mr. Fleming now being 30  
4 years of age, so that would be some 15 so years ago.

5 MS. LACKEN: I would ask those be added,  
6 your Honor. I can make a photocopy of that, but I  
7 would ask for purposes of completeness that those  
8 convictions also be added to this presentence report.

9 THE COURT: I would intend to refer to  
10 those now that I have them, 12 juvenile arrests with 10  
11 convictions.

12 Now, that, of course, doesn't change a lot  
13 of the Court's conclusions as a result of Mr. Fleming's  
14 adult escapades, but nevertheless, that will be taken  
15 under consideration, and I presume while you may  
16 object, Mr. Clash, if you have any objections, you can  
17 note them on the record, but I do believe that that's  
18 pertinent in this case.

19 MR. CLASH: I think the Court has  
20 sufficient adult records in this matter to be able to  
21 make a judgment as to sentence.

22 THE COURT: Probably so.

23 MR. CLASH: I think the sentence in this  
24 case is mandatory, without, I guess, cluttering it up  
25 with the juvenile history.

SENTENCING

1 THE COURT: well, it does bring a bit, it  
2 does expand upon the picture and enlarge the panorama  
3 that the Court can observe with respect to  
4 Mr. Fleming's parasitic behavior.

5 MS. LACKEN: I would just ask, it's a court  
6 document, I think your Honor can take judicial notice  
7 of it, and frankly, although this is a sentencing that  
8 has mandatory/minimums attached to it, certainly there  
9 are consecutive sentencing issues, as well as the range  
10 for which your Honor will sentence the defendant, and  
11 so, therefore, I would suggest it is pertinent and  
12 should be made part of the record.

13 THE COURT: Thank you.

14 Anything further?

15 MS. LACKEN: Not with regard to the  
16 presentence report, but obviously, I do have things to  
17 say regarding sentencing.

18 THE COURT: Mr. Clash, have you reviewed  
19 the presentence report with Mr. Fleming?

20 MR. CLASH: Yes, I have, your Honor, and I  
21 have no objection to the comments that the Assistant  
22 Prosecutor has made with respect to the presentence  
23 report. There is no substantive comments I wish to  
24 make to the document itself. I have reviewed it with  
25 Mr. Fleming.

SENTENCING

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1 THE COURT: All right.  
2 MR. CLASH: However, I do have an argument  
3 with respect to sentencing that I would like to propose  
4 to the Court.

5 THE COURT: Yes, I would call upon you for  
6 that at this point in time, and, Mr. Clash, if you care  
7 to make comments on behalf of Mr. Fleming, now would be  
8 the time.

9 MR. CLASH: Well, I wasn't the attorney who  
10 tried the case. Notwithstanding that, I would argue  
11 that with respect to the three counts that he was  
12 convicted of, and I have conferred with the Assistant  
13 Prosecutor in this matter, and we disagree, however, I  
14 would argue that as a matter of law, Count Two, felony  
15 murder, merges into Count One, purposeful and knowing  
16 murder for purpose of sentencing.

17 I would also argue that the aggravated  
18 arson, which is the object, which is the felony,  
19 substantive felony underlying the felony murder, would  
20 also merge into felony murder. The case law seems to  
21 suggest that is not an accurate thing to do.

22 THE COURT: To merge or to not to merge?

23 MR. CLASH: The case law indicates that  
24 Count Three would not merge into Count One or Count  
25 Two, that it be separate. How that would -- the

SENTENCING

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1 rationale for that, I'm not prepared to argue. This  
2 seems to be all part of the same transaction.

3 THE COURT: Seems to be the predicate to  
4 the felony murder.

5 MR. CLASH: It certainly is, I mean the  
6 whole issue in this case was the arson that occasioned  
7 the death of the victim in this case. There was no,  
8 there were no other felonies involved in this matter  
9 that I'm aware of, so, therefore, it would seem to me  
10 that the aggravated arson would merge into the felony  
11 murder. If so, and the murder would merge into -- the  
12 felony murder would also merge into murder. My point  
13 is that my client should be sentenced on Count One  
14 alone, and the Count Two and Count Three should be  
15 dismissed, because factually, it's all part of the same  
16 transaction. The fact that there are legal constructs  
17 that can be developed as a result of one type of  
18 conduct is notwithstanding. My position is that  
19 Mr. Fleming should be sentenced on Count One only.

20 That's all I have to say.

21 THE COURT: Thank you, Mr. Clash.  
22 Miss Lacken.

23 MS. LACKEN: Your Honor. Obviously, you're  
24 well aware of the facts surrounding this case. Just  
25 for the record, though, this is the case where the



SENTENCING

1 defendant, because of drug sales that were taking part  
 2 in a building that he was not part of, he set the  
 3 building on fire, knowing, at least from the facts,  
 4 that two people were in the building. But as the facts  
 5 developed, four people were in that building, one  
 6 person lost his life, and that's Ellis McNeill.

7 I don't think that there's any question  
 8 that because this incident occurred May 11th of 2002,  
 9 that the No Early Release Act applies to all three of  
 10 the charges, murder, felony murder and aggravated  
 11 arson. Of course, when we apply merger, then there  
 12 will only be two counts that your Honor will be  
 13 sentencing on.

14 I ask your Honor to go to page 343 of 2C,  
 15 and there is the law with regard to merger. Although  
 16 Mr. Clash makes a logical argument, and I understand  
 17 his argument, that's not the law. The law is that when  
 18 you convict someone for murder and felony murder, that  
 19 those two counts merge, and the underlying felony does  
 20 not. And that's State v. Brown, 138 New Jersey 481,  
 21 560-561, it's a 1994 case, and it is cited in a litany  
 22 of cases, State v. Loftin 287 New Jersey Super. 76,  
 23 it's an App. Div. case, cert. was denied there, 144 NJ,  
 24 175, (1996), and the list goes on and on.

25 THE COURT: I think Mr. Clash has virtually

SENTENCING

1 conceded the law that you cite and the Court is aware  
 2 of that as well.

3 MS. LACKEN: So, therefore, your Honor, you  
 4 will be sentencing the defendant to a count of first  
 5 degree murder and a count of aggravated arson in the  
 6 second degree, Counts One and Three.

7 Regarding the aggravating and mitigating  
 8 balance. I do realize again, this is a case where  
 9 there are minimum parole ineligibility periods.  
 10 However, your Honor has to decide whether or not to  
 11 sentence the defendant consecutively with regard to the  
 12 aggravated arson and the murder, and which number to  
 13 give the defendant for the murder conviction. Will he  
 14 get 30 over 30, or life with 30.

15 I suggest, your Honor --

16 THE COURT: The NERA complication would be  
 17 life with 85 percent.

18 MS. LACKEN: Life with 85 percent, right,  
 19 which would be sixty-six and two-thirds.

20 THE COURT: Or 66 or sixty-four and  
 21 two-thirds years.

22 MS. LACKEN: Correct.

23 Now, your Honor, I would argue that  
 24 aggravating factor number one applies, the nature and  
 25 circumstances of the offense. Again, your Honor sat



## SENTENCING

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1 for the case. This person, the defendant, trapped four  
2 people in a house, two that he knew about, and but for  
3 the grace of God, the three others could have died as  
4 well. However, they were able to make their way out of  
5 the burning building. Not only did he put the property  
6 at risk, he put three other people that did not die at  
7 risk as well.

8 And your Honor, because the aggravated  
9 arson does not merge with the murder, you can take into  
10 account for purposes of sentencing that the murder  
11 occurred during the course of a felony because we're  
12 not sentencing him for felony murder, and that's  
13 pursuant to State v. Ramseur, 106 NJ 123, at 189-190,  
14 it's a 1987 case, and cert. was denied by the U.S.  
15 Supreme Court in 1993.

16 Therefore, your Honor, you can use the fact  
17 that this murder occurred during an aggravated arson as  
18 an aggravating factor to support aggravating factor  
19 number one, and I would suggest that absolutely  
20 applies.

21 I would argue that aggravating factor  
22 number three applies, the risk that the defendant will  
23 commit another offense. I think that that risk is not  
24 a risk at all, it's an absolute certainty.

25 Particularly, in light of the fact that he started his

## SENTENCING

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1 criminal behavior when he was 14 years old in 1988. He  
2 has 12 juvenile arrests and 10 convictions, and then as  
3 an adult, he has 18 arrests with five upper-court  
4 convictions, but also, eight municipal court  
5 convictions.

6 Mr. Fleming apparently has had chances at  
7 probation, they had no effect; he's had jail time, they  
8 have had no effect on him. The only thing apparently  
9 that keeps him substantially crime free is the fact  
10 that he's incarcerated, and, frankly, Judge, he does  
11 have, I believe, if I'm not mistaken, a pending charge  
12 while he was incarcerated. So, therefore, it doesn't  
13 seem that anything deters his criminal behavior, but at  
14 the very least I think his past criminal behavior  
15 guarantees the fact that he has absolutely no regard  
16 for the law and he will continue to violate the law if  
17 he is not kept behind bars.

18 The State also argues that aggravating  
19 factor number six applies, the extent of the  
20 defendant's prior record. If you look at the juvenile  
21 and the adult convictions, it's not just the number,  
22 but it's the type of offenses for which he was  
23 convicted. Resisting arrest, simple assault, receiving  
24 stolen property, robbery, threats, harassment, theft,  
25 and, of course, distribution charges. The robbery

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1 occurred when he was but a juvenile, and in fact, it  
2 continued, his conduct continued to escalate until he  
3 has committed the most serious offense of all, murder.  
4 I think the extent of the defendant's prior record is  
5 clear.

6 Judge, I also argue, obviously, that  
7 aggravating factor number nine applies, the ever  
8 present need to deter the defendant and others from  
9 violating the law.

10 Also, your Honor, I would ask that number  
11 11 be also applied. If you do not sentence defendant  
12 to jail time, and an extensive term of jail time, that  
13 the defendant will just merely see this as a cost of  
14 doing business. I think that that factor is  
15 particularly significant in this case where he, because  
16 of his business, he set the fire that murdered  
17 Mr. McNeill. Therefore, I suggest that aggravating  
18 factor number 11 clearly applies.

19 Your Honor, all of those aggravating  
20 factors I would suggest apply to the murder.

21 Now, because he's also been convicted of  
22 aggravated arson, I suggest that the exact same factors  
23 apply to that offense as well, however, number one  
24 applies a little differently. You cannot, obviously,  
25 say that because, use the fact that there was arson as

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1 an aggravating factor for aggravated arson. However, I  
2 would suggest that it still applies because you can use  
3 the murder, murder is a felony, to consider an  
4 aggravating factor for aggravated arson. The case law  
5 is clear. Once the fire is set, and there is a danger  
6 of death, that is all that is necessary for aggravated  
7 arson. The fact that a murder occurred as well, is an  
8 aggravating factor. And I would suggest that your  
9 Honor impose aggravating factor number one because of  
10 that argument.

11 I think it's clear, Judge, when you look at  
12 presentence report that the defendant still takes no  
13 responsibility for his actions. He has a disrespect  
14 for the law and, apparently, a disrespect for the  
15 Court, as noted in the presentence report under  
16 comments, whether or not he was going to speak at  
17 sentencing, he indicated he might or he might just  
18 decide to throw something at the Judge.

19 THE COURT: Perhaps I should be thankful  
20 he's handcuffed.

21 MS. LACKEN: I think that is a point well  
22 taken.

23 In any event, your Honor, I would suggest  
24 there is nothing that is going to deter this defendant.  
25 I think that, unfortunately, for whatever reason, his

1 life has taken a path of criminal behavior, and it's  
2 not likely to let up ever.

3 For those reasons, your Honor, I'm asking  
4 that on the murder count, that you sentence the  
5 defendant to a period of life imprisonment with the  
6 application of the No Early Release Act, which makes  
7 that sixty-six and two-thirds years before the  
8 defendant is eligible to be considered for parole.

9 With regard to the aggravated arson, I  
10 suggest, your Honor, that he receive the full 10 years  
11 for that, with the application of the No Early Release  
12 Act, which makes that 8.5 years.

13 I think, your Honor, that based on the  
14 circumstances of this offense, and the fact that there  
15 were three other potential victims that, like I said  
16 before, but for the grace of God survived, they would  
17 have died, but they survived, I suggest that that  
18 mandates a consecutive sentence. Obviously, I leave  
19 that in the discretion of the Court, but it is  
20 absolutely conceivable under the law at this time, and  
21 I think there are absolutely no violations, if, in  
22 fact, your Honor wanted to sentence him consecutively.

23 Because of that your Honor, the aggregate  
24 term I'm asking for is 75.16 years, and that's with the  
25 consecutive sentence on the aggravated arson.

## SENTENCING

1 I know there is at least one family member  
2 here today -- there are two, okay -- there are  
3 three -- there are a couple family members here, but  
4 at least a couple want to speak, correct? The first  
5 one I know of is Tawanda Lively, she would like to read  
6 a letter she has prepared to the Court, and then we  
7 have another family member as well.

8 THE COURT: All right. Miss Lively, why  
9 don't you come up, please.

10 Miss Lively, if you could just step towards  
11 the middle and try to keep your voice up. Give us your  
12 full name.

13 MS. LIVELY: Tawanda Lively.

14 THE COURT: And what is your relationship  
15 to this case?

16 MS. LIVELY: He was my uncle.

17 THE COURT: Mr. McNeill was your uncle, the  
18 victim?

19 MS. LIVELY: Yes.

20 THE COURT: Okay, why don't you tell us  
21 what have to say.

22 MS. LIVELY: This is a letter from my  
23 little cousin, she couldn't be here today, she's in  
24 school, and she just wanted me to read this, and it  
25 says:

## SENTENCING

1 "To whom it may concern:  
 2 "Hi, my name is Marcia Gilcrest. I am a  
 3 great-niece of my late Ellis Peanut McNeill. My uncle  
 4 was a good man. My Uncle Peanut was, as we would call  
 5 him, did right by all of his nieces, nephews, sisters,  
 6 brothers and father. Whenever someone needed a  
 7 baby-sitter, or needed help crossing the street, he was  
 8 there. I've shared some very good times with my uncle.  
 9 My uncle showed me how he lived his life day-by-day.  
 10 My Uncle Peanut used to take my cousins and I to the  
 11 soup kitchen to show us where he ate. They have the  
 12 best meatballs besides my grandma's. If one of our  
 13 parents was working late, he would be there standing in  
 14 the school yard waiting to pick us up. My uncle was a  
 15 God-sent man. He never did anything wrong or meant to  
 16 hurt anyone. My uncle may not be here physically, but  
 17 in spirit he will always be loved.  
 18 Sincerely, Marcia Gilcrest."  
 19 THE COURT: Thank you, Miss Lively.  
 20 What is your name, Ma'am?  
 21 MS. ALGIMER: Catherine Algimer.  
 22 THE COURT: What can you tell us?  
 23 MS. ALGIMER: I'm the niece of Peanut, and  
 24 I have a few things on behalf of some family members.  
 25 THE COURT: If you would, please.

## SENTENCING

1 MS. ALGIMER: First, this is my Uncle  
 2 Peanut, in case no one got to know him. This is him.  
 3 (Shows a picture.)  
 4 And I'm going to first begin by speaking --  
 5 THE COURT: For the record, that's a  
 6 picture of your uncle at his memorial?  
 7 MS. ALGIMER: Yes, his funeral.  
 8 THE COURT: Okay, thank you very much.  
 9 MS. ALGIMER: First, I want to speak on  
 10 behalf of my grandfather. I speak on behalf of  
 11 Peanut's father, which is my grandfather, who is  
 12 sitting in this courtroom.  
 13 "My son you have taken away. My son, who I  
 14 love so much, as we all in this courtroom love our  
 15 children. How do I cope with pain? How do I not hear  
 16 the scream of my son Peanut as he yells for help until  
 17 he falls to the floor? How can I feel the pain of my  
 18 son's skin burning? How can I vision his last breath  
 19 of air? How can I wish -- how can I not wish I could  
 20 have helped him? How can I not wish he was alive? All  
 21 that have children, no matter young or old, the love  
 22 for your child never, never decrease, disappear or go  
 23 away."  
 24 This is on behalf of my mother, Margie.  
 25 "Peanut has seven brothers and four



1 sisters, we're all close, they're all close. The one  
 2 sister Margie was like a mother to Peanut. When he was  
 3 sick, he would come to her like a baby and she would  
 4 nurse him back to health. She always knew when he was  
 5 supposed to go to the doctors, if he had any medicine,  
 6 she knew. Peanut was like a son, though he was a  
 7 brother. On Mother's Day he had a gift. He would not  
 8 live one more day to give her this gift. It's not the  
 9 point of the gift that was important, it was the  
 10 thought that she was important to him. Just this alone  
 11 hurts her heart. We still celebrate Peanut's birthday,  
 12 we all gather, share memories of his death which  
 13 occurred on May 22nd, 2002. She is satisfied with the  
 14 ruling of the verdict, guilty on many charges which  
 15 were in her favor. She hopes, I hope, my family hopes  
 16 that the penalty for the death of her brother, my  
 17 uncle, is life without parole. Our feelings of the  
 18 guilty person, Mr. Fleming, he didn't care, he doesn't  
 19 care now, he is carefree and without remorse. This is  
 20 not the person you would want in your neighborhood,  
 21 this is not the person we would want in ours. So let's  
 22 keep him out of ours. The good guy is gone, the bad guy  
 23 is alive, but he will not be free, and that's okay with  
 24 me."

25 That's on behalf of my mother, that's the

1 end of that one.  
 2 This is from me and my son, and the rest of  
 3 my family. The first sentence.  
 4 "My family and I would like to thank Judge"  
 5 -- sorry if I pronounce your name wrong --  
 6 "Mathesius."  
 7 THE COURT: That's pretty good.  
 8 MS. ALGIMER: Thank you. "The jurors, the  
 9 police, the detectives, the fire company, the Mercer  
 10 County Assistant Prosecutor, Kimm, our supporters and  
 11 most of all, the witnesses for their courage and their  
 12 sacrifice.  
 13 Peanut died the day before Mother's Day.  
 14 Our celebration of Mother's Day have not been the same.  
 15 We now have sat around and talked how much we miss  
 16 Peanut. Now, our Mother's Day becomes gathering of  
 17 memories of Peanut.  
 18 As most of us, most of you have already  
 19 heard, Peanut didn't bother anyone. He would help you,  
 20 he would carry your grocery bags to your door, he would  
 21 shovel your snow, he would paint your house, he would  
 22 walk many miles for you if you asked him to. Peanut  
 23 was the I-will-do-it-for-you kind of guy. He was also  
 24 respectful and giving. This is the type of person you  
 25 would want to live for a longer time. For one good



1 person now deceased, I wonder why some good must die.  
2 The bad must stay alive.

3 There have been many days when I ride in my  
4 car, I look to the side and I say to myself, wow, that  
5 looks like my Uncle Peanut. I also think, I wonder if  
6 that is my Uncle Peanut in disguise. It really hurts.

7 I miss my Uncle Peanut. He would do things  
8 like, tell you jokes that didn't even make sense, but  
9 you would laugh anyway just because the way he said it.

10 My son, who cannot be here because he had  
11 school today, wanted the guilty man of his uncle's  
12 death, he wanted to express how much he missed his  
13 uncle. He said he like to go to the soup kitchen with  
14 his Uncle Peanut on Thanksgiving and Christmas. He  
15 would walk from my mom's house to the soup kitchen with  
16 two of his nephews and his niece. My son also has a  
17 fishing pole that remains sitting. The only time he  
18 used it is when he went fishing with his Uncle Peanut.  
19 Now, tell me, guilty person, how do I replace my  
20 uncle?"

21 Love his niece, Cat, which is myself, and  
22 his nephew, Omar, which couldn't be here for school.  
23 And that's all have to say.

24 THE COURT: Thank you very much, I  
25 appreciate your comments.

1 MS. LACKEN: Your Honor, with that, the  
2 State submits for sentencing.

3 THE COURT: Is there anybody who cares to  
4 speak on behalf of Mr. Fleming, family members or  
5 people in the audience?

6 All right. Mr. Fleming, we have in this  
7 country and under our constitution a right of  
8 allocation, which gives you an opportunity to express  
9 whatever you care to express at this point in time.  
10 You can say nothing or you can say whatever you care to  
11 say, perhaps a expectation or hope that it might play a  
12 part in your sentence.

13 THE DEFENDANT: I have nothing to say.

14 THE COURT: The Court, as we know, presided  
15 over the trial of Mr. Fleming. The jury spent 50  
16 minutes having lunch and concluding beyond a reasonable  
17 doubt that Mr. Fleming committed the crimes of murder  
18 in the first degree, felony murder and aggravated  
19 assault.

20 MS. LACKEN: Arson, Judge. Sorry.

21 THE COURT: Arson, I'm sorry. The listing  
22 on the face sheet was wrong, it's aggravated arson, of  
23 course, in the second degree. And the Court is,  
24 therefore, called upon to assess, as it must, in any  
25 sentencing, aggravating and mitigating factors. And in

1 most cases, the Court is able to find some mitigating  
 2 factor, some aspect of a person's life that could be  
 3 called for, at least to acknowledge that the person is  
 4 not without anything of redemption. However, in this  
 5 case, there are no mitigating factors. The Court sees  
 6 in the bigger picture, a malignancy, a parasite on  
 7 society since the day, at least as early as 14 years of  
 8 age.

9 The aggravating factors are numerous,  
 10 overabundant. Obviously, the nature and circumstances  
 11 of the offense, and the heinous, cruel and depraved  
 12 manner in which it was accomplished. The harm that was  
 13 inflicted on not only Mr. McNeill, but the others who  
 14 had to kick out a window and jump two floors to escape  
 15 the pathologically inane activities of Mr. Fleming.  
 16 They are aggravating factors.

17 The risk and the guarantee if Mr. Fleming  
 18 were permitted to set foot away from the bars that  
 19 would keep him incarcerated, I hope for the rest his  
 20 life, he will commit another crime, and yet another and  
 21 another, because he knows absolutely nothing else in  
 22 his life but being a parasite. And when he looks in  
 23 whatever they have for mirrors in the jail, whether it  
 24 be polished chrome or whatever it is that can't be  
 25 broken, Mr. Fleming can look upon a parasite and a

1 malignancy.

2 The extent of the defendant's prior  
 3 criminal record; it's a testimony to the failure of the  
 4 criminal justice system. It's evidence of a  
 5 psycho-pathological individual with 12 juvenile  
 6 arrests, 10 convictions, the range of whatever, and  
 7 these are the things he was caught at. Aggravated  
 8 assault, simple assault, contempt of court, possession  
 9 of a weapon -- this is at 14 -- for unlawful purpose.  
 10 Criminal attempted burglary, simple assault,  
 11 shoplifting, criminal mischief, robbery, theft,  
 12 shoplifting, terroristic threats, criminal mischief,  
 13 robbery, resisting, agg. assault -- this is as a child,  
 14 or what we call a child.

15 Moving on to the adult history, we have the  
 16 perverse panorama of probation, charges 18 adult  
 17 arrests. And it's amusing, because the prior court  
 18 history is reflected in the juvenile material that was  
 19 provided today allows at this point in time that  
 20 Mr. Fleming "only has two upper-court arrests as an  
 21 adult." well, since that was written, apparently the  
 22 defendant has amassed five prior superior court  
 23 convictions, three resulting in the terms of  
 24 incarceration, two convictions resulting in terms of  
 25 probation. This is the defendant's sixth superior

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SENTENCING

1 court conviction. Of course, he has a charm bracelet  
2 collection of municipal convictions for a variety of  
3 offenses, and Mr. Fleming, I must say, that while the  
4 Court is always impressed with its responsibilities of  
5 putting people in jail, and I find people going to jail  
6 for offenses that don't seem to be necessarily jail  
7 worthy, in this Court's view, jails were built for  
8 people like you to protect people like these, and to  
9 protect the victim. So, the Court is comfortable in  
10 its sentence today, and will loose not one tear, nor  
11 drop, nor one second of sleep in sentencing you.

12 There is obviously the need for deterring  
13 the defendant and others from violating the law. It  
14 hasn't worked for Mr. Fleming in the past, as this  
15 Court notes.

16 In psychological terms, Mr. Fleming is  
17 pathologically incapable, being possessed of what, say  
18 psycho-analytically, he does not have a super ego, he  
19 has no conscience, he has no remorse, he has no care,  
20 and it won't deter him, so the only way you can deter  
21 Mr. Fleming from committing crimes is to make sure  
22 there is a lot of concrete and steel between him and  
23 humanity. And, obviously, this case calls for the most  
24 severe penalty, in light of the fact that a man was  
25 burned to death in a fire, set on the first floor, on

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SENTENCING

1 stairs, where four people were existing, albeit  
2 marginally, on the second floor, albeit some involved  
3 with drugs, but nevertheless, human beings, they were  
4 human beings, Mr. Fleming, and when you undertook to  
5 spread the gasoline at the foot of the stairs to trap  
6 four people, one wonders, one marvels at the fact that  
7 you're so resistant to having the slightest speck of  
8 remorse for causing the death of four people or the  
9 potential death of four people and death of one person.

10 I can still recall Mr. Warren, I believe  
11 his name was, was it Mr. Warren?

12 MS. LACKEN: Ed Warren.

13 THE COURT: Ed Warren, also known as Big  
14 Al, hobbling in here because he had broken his leg and  
15 ankle from jumping from the second floor. And he said  
16 he was lucky enough to have said at that time when he  
17 saw the fireball and the smoke coming up the stairs,  
18 realizing there was no escape from that point, I'll  
19 never forget, he said, my instinct told me it was time  
20 to go, and these were good instincts.

21 Mr. McNeill never had the opportunity to  
22 indulge in such an instinct in an effort to escape,  
23 because it was too late by the time he woke up. So,  
24 the Court is comfortable in imposing sentence.

25 It is the sentence of this Court in light

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1 of the aggravating factors, grossly and substantially  
2 outweighing the mitigating factors, of which there are  
3 none, zero, nada, that under Count One, murder,  
4 2C:11-3(a)(3), murder in the first degree, Mr. Fleming  
5 is sentenced to life imprisonment at 85 percent NERA,  
6 No Early Release, which results in some 60 plus years,  
7 whether it's 63 and three-quarters or 66, whatever it  
8 is, that percentage will be applied to the life, which  
9 I believe is 75 years. \$50 VCCB -- I'm sorry, that  
10 would be \$100 VCCB, \$75 Safe Neighborhood, \$30 Law  
11 Enforcement Fund, which is, of course, amusing, that  
12 these fines should be imposed because they will never  
13 be paid.

14 Mr. Fleming is given credit for 664 days in  
15 jail, from June 9th, 2002 to April 2nd, 2004, today's  
16 date.

17 Count Two, felony murder, 2C:11-3(a)(3),  
18 felony murder in the first degree is merged into Count  
19 One, and no sentence is thereby imposed. However,  
20 Count Three, aggravated arson in the second degree, the  
21 Court sentences the defendant to 10 years, 85 percent,  
22 that term to be consecutive to the term imposed on  
23 Count One, and there will be an additional minimum  
24 parole ineligibility of 8.5 years on top of the 85  
25 percent of life. Once again, \$100 VCCB, \$75 Safe

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1 Neighborhood, \$30 Law Enforcement Fund.  
2 While this Court recognizes that  
3 incarcerating Mr. Fleming can only be the very  
4 slightest comfort to the family, given the loss and the  
5 sense of loss and the rage and the pain that they feel,  
6 I hope and I trust that it provides at least that  
7 droplet of comfort to know that Mr. Fleming, absent  
8 conditions beyond this Court's control, will no longer  
9 be in a position to inflict pain upon humanity that he  
10 has managed to do through the first 30 years of his  
11 life. So, to that extent, I hope that we're comforted.  
12 We will feel a little safer at night that Mr. Fleming  
13 is not wandering the streets doing ill.

14 Mr. Fleming, you have 45 days to appeal  
15 this sentence. The assistance of the Public Defender  
16 is terminated.

17 Thank you, folks.

18 MS. LACKEN: Thank you, your Honor.

19 THE COURT: I should say there is 664 days  
20 credit that will be given on that last sentence, as  
21 well on the aggravated arson.

22 (At which time the matter was concluded.)

23 (At a later time the following was put on  
24 the record regarding this matter. Defendant and  
25 counsel were not present at this point.)



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SENTENCING

THE COURT: As a final observation with respect to the matter of State of New Jersey versus Larry Fleming, I believe it's Indictment 03-02-0286, there is the mandatory five year parole supervision requirement which attends the first, the conviction of the first degree murder charge, and that will be imposed as well.

(At which time the matter was concluded.)

CERTIFICATION

I, JANET SBARRO, C.S.R., License Number 718, an Official Court Reporter and Notary Public in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript to the best of my knowledge and ability.

Janet Sbarro  
Official Court Reporter  
Mercer County Courthouse

12-16-04  
Date

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**NEW  
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BEGINS**