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May 10, 2004

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LETTER PETITION FOR CERTIFICATION OF DEFENDANT-PETITIONER

SUPREME COURT OF NEW JERSEY
DOCKET NO. 56,316
APP. DOCKET NO. A-0834-00T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE ANTONIO PEREZ,

Defendant-Petitioner.

CIVIL ACTION

Petition for Certification from the Superior Court of New Jersey, Appellate Division

Sat Below:
HON. Dennis Braithwaite, J.A.D.
HON. Jack L. Lintner, J.A.D.
HON. Joseph F. Lisa, J.A.D.

Honorable Justices:

This letter is submitted in lieu of a formal petition for certification to review the decision of the Superior Court, Appellate Division, dated March 25, 2002.

INDEX TO APPENDIX

STATEMENT OF THE MATTER PRESENTED

Defendant incorporates by reference the Procedural History and Statement of Facts set forth in his Brief and Appendix that was filed with the Appellate Division.

On April 12, 2004, the Appellate Division affirmed the convictions of defendant but remanded the matter for re-sentencing. The Court ruled that the NERA sentence imposed was improper and that there could be only one conviction for conspiracy. (Pa1-Pa118).

A notice of petition for certification to the Supreme Court was filed by the Public Defender on behalf of the defendant. (Pa119).

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the trial court err when it denied defendant's motion for a mistrial with respect to the prosecutor's improper and prejudicial statements made to the jury during his summation?

2. Should defendant's convictions be vacated because the jury did not understand the concept of reasonable doubt?

3. Should the trial judge have excused juror number 13 because he expressed feelings of fear and danger as a result of being followed by certain persons on a lunch break and because this was discussed with other jurors?

4. Should defendant's motion for acquittal at the conclusion of the State's case as to the kidnapping counts of the indictment have been granted?

5. Should defendant's conviction and sentence for felony murder should be vacated and dismissed?

6. Was the court's jury instruction with respect to the crime of felony murder erroneous and prejudicial because the court failed to charge the jury with respect to the affirmative defense set forth in N.J.S.A. 2C:11-3?

7. Did the trial court abuse its discretion when it imposed consecutive sentences for murder and felony murder?

8. Was defendant's sentence excessive because of disparity between his sentence and a co-defendant?

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL WITH RESPECT TO THE PROSECUTOR'S IMPROPER AND PREJUDICIAL STATEMENTS MADE TO THE JURY DURING HIS SUMMATION.

At the conclusion of the State's summation counsel for the defendants moved for a mistrial because of improper comments made by the assistant prosecutor during his summation to the jury. (32T102-11 to 111-20). The trial judge denied this motion.

(33T20-9 to 30-20). Defendant contends that the court erred in not granting a mistrial.

In referring to defense counsel during his summation, the prosecutor said:

> His job is to challenge, challenge the State's evidence. His job is to get his client off, but when he makes up something like that, if somebody starts, in that jury room, to say what about the part -- somebody has got to say, time out, time out, that's a statement of a defense attorney. (32T28-6 to 11).

In State v. Frost, 158 N.J. 76, 86 (1999), the Supreme Court said:

> ***we find the prosecutor's comments suggesting that defense counsel's closing arguments were "lawyer talk," and that defense counsel hoped that one or more jurors had "a bad taste in [their] mouth towards officers" to be improper. A prosecutor is not permitted to cast unjustified aspersions on defense counsel or the defense.

In State v. Adams, 320 N.J. Super. 360 (App. Div. 1999), certif. denied 161 N.J. 333 (1999), the court found to be improper the prosecutor's argument in summation that defense counsel's comments about police brutality were lawyer talk and that lawyers can at any time they want have a response to a certain answer. See also State v. Setzer, 268 N.J. Super. 553, 565, certif. denied 135 N.J. 468 (1994) where the court said that "[I]t is clearly improper for a prosecutor to demean the role of defense counsel or cast aspersions upon a lawyer's motives."

The assistant prosecutor, by saying in his summation that it was the defense attorney's job is to get his client off, was guilty of misconduct that required the trial court to grant a mistrial. As stated by the Supreme Court in State v. Smith, 167 N.J. 158, 181-182 (2001), a new trial is warranted when the prosecutor's conduct is "clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." Frost and Adams clearly show that the assistant prosecutor's comments in this case went far beyond the bounds of acceptable comment.

Counsel also objected to the assistant prosecutor's references to courage in his summation. In discussing the testimony of Juan DeJesus, the assistant prosecutor said:

> For him to take that witness stand showed a respect for human life, it showed courage. You want to know what we're hearing about this year and a half, two years later? He knows firsthand what those men over there are capable of. He knows what they can do in the drop of a hat for Latin King reasons. You can be taken out, but he had the courage to come on that witness stand and tell us what happened.
>
> You want to know what? They questioned him for six hours, eight hours. Did he ever say, you're right, it didn't happen that way? No. He never wavered, he answered every question to the best of his ability and never wavered. He showed courage and commitment to human life. (32T73-9 to 22).

* * *

> But someone who doesn't have the baggage Horizon has, he doesn't have the baggage Spanky has, he's a guy who was in a car, got taken someplace and made some bad decisions on one night, but don't call him names, don't badmouth him. He showed courage to come here. It's a courage you'll have to show, you'll all have to show at some point. (32T74-2 to 8).

It was clearly improper for the assistant prosecutor to refer to the courage of this witness. These comments were so egregious, inflammatory and prejudicial so as to deny the defendant a fair trial. State v. Acker, 265 N.J. Super. 351, 356 (App. Div. 1993).

While the trial judge gave curative instructions to the jury with respect to the comments dealing with the courage of a witness to testify (33T67-14 to 68-15) and the comments with respect to the defense attorney's job to get his client off (33T70-6 to 25), nevertheless, defendant contends that these curative instructions were given to late and after irreparable damage was done. The Appellate Division erred when it said that the giving of a curative instruction removed the harm caused by these remarks.

POINT II

DEFENDANT'S CONVICTIONS SHOULD BE VACATED BECAUSE THE JURY DID NOT UNDERSTAND THE CONCEPT OF REASONABLE DOUBT.

At 11:28 A.M. on the day the jury returned its verdict, the jury sent the following note to the court:

> If the jury has come to a unanimous verdict for four of the defendants, but are hung on two charges for the fifth defendant, what will be the resulting actions of the Court? (37T40-23 to 41-5).

At 1:58 P.M., the jury sent another note to the court:

> Number 1, please read Cake's testimony while at the New Houses. Number 2, please define the phrase reasonable doubt. (37T48-2 to 7).

Based upon the above questions, it appears that at the time the jury announced that they reached a verdict as to four of the defendants, the jury did not understand the meaning of reasonable doubt. This was confirmed when the jury asked the court later to define the term reasonable doubt.

In response to the jury's question requesting the court to define reasonable doubt, the court gave the jury the identical charge that it gave in the original charge to the jury. (37T73-16 to 74-16, 33T71-3 to 72-1). In State v. Medina, 147 N.J. 43, 61 (1996), the Supreme Court adopted this definition and directed trial courts not to deviate from this definition.

While the trial court charged the jury as to reasonable doubt in accordance with Medina, nevertheless, the trial judge had the duty and obligation to clarify this definition if the jury did not understand it. By requesting the trial judge to define reasonable doubt, it must be assumed that the jury did not understand the initial charge that defined reasonable doubt. The Appellate Division erred when it said that the recharge given was adequate even if not understood by the jury.

In State v. Jordan, 147 N.J. 409, 421, the Supreme Court said that the jury must be given a "plain and clear exposition of the issues". The fact that the jury asked the court to define the term reasonable doubt leads to the conclusion that it was not plain and clear to the jury at the time of the initial charge to the jury what was meant by reasonable doubt. The trial judge had an obligation to explain further the meaning of reasonable doubt and answer and clarify any questions that the jury may have.

POINT III

THE TRIAL JUDGE SHOULD HAVE EXCUSED JUROR NUMBER 13 BECAUSE HE EXPRESSED FEELINGS OF FEAR AND DANGER AS A RESULT OF BEING FOLLOWED BY CERTAIN PERSONS ON A LUNCH BREAK AND BECAUSE THIS WAS DISCUSSED WITH OTHER JURORS.

Juror 13 advised the court on February 18, 2000 that on the previous Monday, during the lunch hour, four people were following him. As he was crossing the street, these persons laughed and joked as so as to intimidate him. The juror was alone at the time. (20T156-24 to 157-25). This juror further stated that another juror said that someone approached her. Juror 13 then suggested that she say something about this and that the jurors should think of being a little more secure than hanging out in the halls. (20T158-1 to 10).

Juror 13 said that these persons laughed, followed and laughed. They had not been back in the courtroom since that incident. (20T159-2 to 16).

Juror 13 said he was afraid. He felt that their conduct was towards him and that it was a scare tactic. He believed that this conduct was to let him know that he was in danger. He felt uncomfortable. This juror did say that he could be a fair and impartial juror. (20T160-8 to 13).

Based on the above facts, counsel asked that this juror be excused. This application was denied. (20T165-4 to 9).

In State v. Bisaccia, 319 N.J. Super. 1, 14-15 (1999), this court said:

> The Sixth Amendment of the United States

> Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants "the right to ... trial by an impartial jury." State v. Williams, 93 N.J. 39, 60, 459 A.2d 641 (1983); State v. Scherzer, 301 N.J. Super. 363, 486, 694 A.2d 196 (App. Div.), certif. denied 151 N.J. 466, 700 A.2d 878 (1997). Thus, a defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself.' Williams, supra, 93 N.J. at 60. As a result, the trial judge must take action to assure that the jurors have not become prejudiced as a result of facts which "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Scherzer, supra, 301 N.J. Super. At 486 (quoting Panko v. Flintkote Co., 7 N.J. 55, 61, 80 A.2d 302 (1951). "The test is 'not whether the irregular matter actually influenced the result but whether it had the capacity of doing so.'" Scherzer, supra, 301 N.J. Super. At 486 (quoting Panko, supra, 7 N.J. at 61).

In this case, Juror 13 said that he was in fear. He was exposed to outside influences by his encounter with persons whom he believed were trying to intimidate him. This happened during the first week of the trial at a time when there were four alternate jurors available. This juror should have been dismissed because his exposure had the capacity of influencing the result of the trial.

In addition, the trial judge should have voir dired the entire jury in order to determine whether any other juror may have been exposed to such an encounter or whether they were made aware of this encounter by Juror 13. There was no certainty that this jury was not tainted and the

court was obligated to find out from the other jurors whether they were exposed to any wrongful conduct.

POINT IV

DEFENDANT'S MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE AS TO THE KIDNAPPING COUNTS OF THE INDICTMENT SHOULD HAVE BEEN GRANTED.

Counsel for all of the defendants moved for acquittal as to the kidnapping counts of the indictment after the State rested. These motions were denied. (30T33-7 to 37-7). Defendant contends that the court erred in denying these motions and that this court should vacate and dismiss all of the kidnapping charges against him.

Defendant in counts two, seven, twelve, and sixteen was charged with violating N.J.S.A. 2C:13-1b.(1) which provides as follows:

> A person is guilty of kidnapping if he unlawfully removes another from the place where he is found or if he unlawfully confines another for a substantial period, with any of the following purposes:
> (1) to facilitate commission of any crime or flight thereafter;

To support a conviction for kidnapping, the confinement must be more than merely incidental to the underlying crime. State v. La France, 117 N.J. 583, 591 (1990); State v. Soto, 340 N.J. Super. 47, 73 (App. Div. 2001). The confinement must constitute an independent

first-degree crime as opposed to satisfying an element of another and often less serious crime. State v. Lyles, 291 N.J. Super. 517, 526 App. Div. 1996), certif. denied 148 N.J. 460 (1997). It is the "enhanced risk of harm resulting from the confinement and isolation of the victim." State v. Soto, supra, 340 N.J. Super. 74.

The underlying crimes in this matter were the attempted murders of Omar W. Morante and Juan Cortes and the murders of Omar D. Morante and Jimmy Cabrera. These persons were the victims in the kidnapping charges. The confinement of these persons was merely incidental to the ultimate crimes that were committed. Lyles, supra, 291 N.J. Super. 527. The force that was used to kill Omar D. Morante and Jimmy Cabrera was not increased as a result of the transportation of these victims to Branch Brook Park. The harm to these victims was not enhanced as a result of their confinement.

POINT V

DEFENDANT'S CONVICTION AND SENTENCE FOR FELONY MURDER SHOULD BE VACATED AND DISMISSED.

Defendant was charged with felony murder based upon the kidnapping of Jimmy Cabrera. Cabrera was not actually killed by the defendant. Defendant disagrees with the Appellate Division that this felony murder charge can only

be dismissed if the kidnapping convictions for both Cabrera and Morante were reversed.

POINT VI

THE COURT'S JURY INSTRUCTION WITH RESPECT TO THE CRIME OF FELONY MURDER WAS ERRONEOUS AND PREJUDICIAL BECAUSE THE COURT FAILED TO CHARGE THE JURY WITH RESPECT TO THE AFFIRMATIVE DEFENSE SET FORTH IN N.J.S.A. 2C:11-3. (NOT RAISED BELOW).

N.J.S.A. 2C:11-3a(3) is the felony murder statute. That statute sets forth the following affirmative defense when the defendant is not the only participant in the underlying crime:

> [I]t is an affirmative defense that the defendant:
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

In instructing the jury as to the crime of felony murder (33T135-25 to 140-6), the trial judge did not charge the jury with respect to this affirmative defense to this crime. This failure on the part of the trial judge

constituted prejudicial error and therefore, defendant's felony murder conviction should be vacated.

In State v. Warren, 104 N.J. 571, 578 (1986), the New Jersey Supreme Court said that it is the duty of the trial court to instruct the jury on the relevant legal principles and that counsel may assume that fundamental matters will be covered in the charge. Even in the absence of an objection, the court will find plain error court where the jury instructions failed to explain relevant legal issues. State v. Grunow, 102 N.J. 133, 148-149 (1986).

The evidence in this case indicated that the defendant did not actually cause the death of Jimmy Cabrera. Ricardo Diaz actually killed Cabrera. Defendant was found to be not guilty of purposely or knowingly murder of Cabrera by the jury. (Da43). Therefore, it was extremely crucial that the jury be instructed properly as to the crime of felony murder and any affirmative defense to that crime. This was not done and defendant's felony murder conviction should be vacated.

REASONS FOR GRANTING CERTIFICATION

Certification should be granted because this case raises questions of general public importance with respect to the administration of justice.

Certification should be granted because this case calls for the exercise of the Supreme Court's supervision. Issues relating to prosecutorial conduct and jury tampering are raised in this appeal and should be considered by this Court.

Certification should be granted in the interests of justice. Defendant was convicted of multi crimes and received an eighty-year prison sentence. Under the circumstances, the Supreme Court should review defendant's convictions and sentence.

CONCLUSION AND CERTIFICATION

For the reasons set forth herein, defendant-petitioner, Jose Antonio Perez's Petition for Certification should be granted.

The undersigned certifies that this application presents substantial questions and is filed in good faith and not for purposes of delay.

YVONNE SMITH SEGARS
PUBLIC DEFENDER

By: /s/ Charles H. Landesman
Charles H. Landesman
Designated Counsel

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6593-99T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL ROMERO,

Defendant-Appellant.

A-0282-00T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUIS MANSO,

Defendant-Appellant.

A-5704-00T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JESUS RODRIGUEZ,

Defendant-Appellant.

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A-0834-00T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE ANTONIO PEREZ,

Defendant-Appellant.

A-4974-99T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES BYRD,

Defendant-Appellant.

Docket Nos. A-6593-99T4, A-0282-00T4, A-5704-00T4, and A-0834-00T4 - Submitted March 17, 2004

Docket No. A-4974-99T4 - Telephonically Argued March 11, 2004

Decided APR 12 2004

Before Judges Braithwaite, Lintner and Lisa.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment. No. 98-11-4417.

Yvonne Smith Segars, Public Defender, attorney for appellants (Robert Seelenfreund, Assistant Deputy Public Defender, of counsel and on the brief for

appellant Michael Romero; Alan I. Smith, Designated Counsel and on the brief for appellant Luis Manso; Jack Gerber, Designated Counsel and on the brief for appellant Jesus Rodriguez; and Charles H. Landesman, Designated Counsel, of counsel and on the brief for appellant Jose Antonio Perez).

Anthony J. Iacullo argued the cause for appellant Charles Byrd (Yvonne Smith Segars, Public Defender, attorney; Mr. Iacullo, Designated Counsel and on the brief.)

Peter C. Harvey, Attorney General, attorney for respondent (Erik W. Daab, Deputy Attorney General, of counsel and on the brief in the appeals of appellants Michael Romero, Luis Manso, and Jose Antonio Perez; Linda K. Danielson, Deputy Attorney General, of counsel and on the brief in the appeal of appellant Jesus Rodriguez).

Erik W. Daab argued the cause for respondent in the appeal of appellant Charles Byrd (Peter C. Harvey, Attorney General, attorney; Mr. Daab, Deputy Attorney General, of counsel and on the brief).

Appellants Michael Romero, Luis Manso, and Jesus Rodriguez filed pro se supplemental briefs.

PER CURIAM

This opinion disposes of five appeals that arise out of the kidnap and murder of members of the Latin Kings Organization ("Latin Kings") by other members of the same group. Essex County Indictment 98-11-4417, returned November 5, 1998, charged defendants Michael Romero, Luis Manso, Jesus Rodriguez, Jose Antonio Perez, and Charles Byrd with six different crimes

against four victims, in eighteen counts. They were all charged with four counts of second-degree conspiracy to commit kidnapping (counts one, six, eleven and fifteen), N.J.S.A. 2C:5-2 and N.J.S.A. 2C:13-1; four counts of first-degree kidnapping (counts two, seven, twelve and sixteen), N.J.S.A. 2C:13-1(b); four counts of second-degree conspiracy to commit murder (counts three, eight, thirteen and seventeen), N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3; two counts of murder (counts four and nine), N.J.S.A. 2C:11-3(a)(1) and (2); two counts of felony murder (counts five and ten), N.J.S.A. 2C:11-3(a)(3); and two counts of attempted murder (counts fourteen and eighteen), N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3.

Six co-indictees pled guilty: Edwin Diaz, Ricardo Diaz, David Martinez, Sfand Rajabzaden, Edmund (or Edwin) Rivera and Miguel Torres. The five defendants who are the subject of this appeal, were tried before a jury between January 24 and March 17, 2000. On March 17, 2000, the jury convicted defendants Romero, Manso and Rodriguez on all counts.

Defendant Perez was acquitted of murder (count nine), and attempted murder (counts fourteen and eighteen). He was convicted of third-degree criminal restraint as a lesser-included offense of kidnapping contained in count sixteen and the remaining counts of the indictment.

Defendant Byrd was convicted of four counts of second-degree conspiracy to commit kidnapping (counts one, six, eleven, and fifteen), four counts of fourth-degree false imprisonment as lesser-included offenses of counts two, seven, twelve, and sixteen, and four counts of second-degree conspiracy to commit murder (counts three, eight, thirteen, and seventeen). He was acquitted of the remaining charges.

I. The Sentences Imposed on Defendants.

On April 26, 2000, defendant Romero was sentenced. He received two consecutive life sentences for the first-degree murder convictions (counts four and nine), eighty-five percent without parole; four concurrent life sentences for the kidnapping convictions (counts two, seven, twelve and sixteen), eighty-five percent without parole, concurrent to the sentence on count four; and two concurrent fifty-year sentences for the attempted murder convictions (counts fourteen and eighteen). The remaining convictions merged.

On April 25, 2000, defendant Manso was sentenced. He received two consecutive thirty-year sentences, without parole, for the first-degree murder convictions (counts four and nine); four concurrent thirty-year sentences for the kidnapping convictions (counts two, seven, twelve, and sixteen), eighty-five percent without parole on counts two and seven, and fifteen

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years without parole on counts twelve and sixteen; and two concurrent twenty-year sentences for the attempted murder convictions (counts fourteen and eighteen), ten years without parole. The remaining convictions merged.

On April 26, 2000, defendant Rodriguez was sentenced. He received two consecutive life sentences for the first-degree murder convictions (counts four and nine), eighty-five percent without parole; four concurrent life sentences for the kidnapping convictions (counts two, seven, twelve and sixteen), eighty-five percent without parole on count two; and two concurrent fifty-year sentences for the attempted murder convictions (counts fourteen and eighteen). The remaining convictions merged.

On April 5, 2000, defendant Perez was sentenced. He received two consecutive forty-year sentences for the first-degree murder and felony murder convictions (counts four and ten), with an eighty-five percent period of parole ineligibility. He received two concurrent thirty-year sentences for kidnapping (counts two and twelve), eighty-five percent without parole. He also received three concurrent twenty-year sentences for two counts of conspiracy to murder and conspiracy to kidnap (counts thirteen, fifteen and seventeen), with ten

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years of parole ineligibility on each. The remaining convictions merged.

On April 28, 2000, the judge sentenced defendant Byrd to ten years on each of the conspiracy to commit kidnapping charges (counts one, six, eleven and fifteen), to be served concurrently; ten years on each count of the conspiracy to commit murder (counts three, eight, thirteen and seventeen), concurrent with one another but consecutive to the sentences for conspiracy to commit kidnapping. The judge merged the convictions for false imprisonment, a lesser-included offense of kidnapping, (counts two, seven, twelve and sixteen) with the convictions for second-degree conspiracy to commit kidnapping (counts one, six, eleven and fifteen). It is clear from the sentencing transcript that the aggregate sentence was twenty years, and the State agrees, though the judgment of conviction is not so clear. It states that the sentences on counts three, eight and seventeen are consecutive with count one, without stating that counts eight and seventeen are concurrent with count three.

II. The Facts Presented at Trial.

On June 29, 1998, pursuant to orders from defendant Byrd (a/k/a Chin, or Supreme), defendants Romero, Manso, Perez, and Rodriguez, with other fellow members of the Latin Kings,

kidnapped Omar D. Morante ("Morante"), his twin brother, Omar W. Morante, another brother, Jimmy Cabrera, and Juan Cortes. Omar W. Morante and Cortes escaped, but Morante and Cabrera were taken to Branch Brook Park in Newark, where they were beaten and strangled to death and left lying face down in the water.

All five defendants were members of a local chapter of the Latin Kings, a national organization whose tenets are contained in its Manifesto, a document that governs the organization. Each defendant had a place in the Latin Kings hierarchy and one or more nicknames.

Latin Kings member David Martinez pled guilty to conspiracy to commit murder and received a five-year sentence (instead of a ten-year sentence) after he agreed to cooperate with the State and testify. According to Martinez, defendant Byrd was the highest-ranking Latin King in New Jersey, the "Supreme." Martinez, Omar W. Morante, and every other Latin Kings member who testified confirmed that defendant Byrd had been elected Supreme at a "Universal," a meeting in Newark attended by 600 to 700 members. Defendant Romero was next in line, serving as the Prince, or the chairman of the crown council for the state, a position Martinez described as like the judge for the state. The crown council, which was like a court, was made up of the six crown council chairmen from each region.

Below the state officers were four regional officers. Each local chapter had a First Crown, or Inca, who ran the town; Second Crown, or Cacique, who helped run the town; Third Crown, Enforcer, who administered "violations" for infractions; Fourth Crown, Secretary; and Fifth Crown, Treasurer. Martinez was the Enforcer in Elizabeth. The Enforcer was in charge of taking care of problems outside the chapter and giving "violations" or "physicals" (beatings) to members who broke rules. These violations varied in scope (head to toe, or more limited areas of the body), time, and number of attackers. Usually, the most severe physical was five men, five minutes, and it was not intended to result in death.

Defendant Manso was the regional officer in charge of the local chapters, or tribes, in Elizabeth, Perth Amboy and Newark. Defendant Rodriguez was the First Crown in Newark. In Elizabeth, defendant Manso had established the Orange Crush, an elite enforcement group appointed by him to handle special problems. Martinez was a member of the Orange Crush. Defendant Perez was also a member of the Orange Crush.

A meeting was held at defendant Romero's home at the "New Houses" in Jersey City, on June 29, 1998. At that meeting, defendant Romero told other Latin Kings that the day before, Morante and Cabrera had conducted a drive-by shooting at the

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apartment complex where Romero lived. They had done so in retaliation for a June 28, 1998, street fight, targeting someone named Chilnini. However, defendant Romero believed he was the target.

Defendant Romero wanted the Latin Kings to retaliate on his behalf, and defendant Byrd agreed, first proposing another drive-by shooting. However, that plan was later scrapped in favor of defendant Byrd's ordering the Orange Crush to kidnap Morante and Cabrera that night, break their shooting arms and kill them. After the orders were given, defendant Manso and Martinez drove defendant Byrd to work at Newark's Pennsylvania Station. Defendant Manso procured an assault rifle from defendant Rodriguez's home. Defendant Manso was driving a black Pontiac Sunfire borrowed from his girlfriend, Tracy Shimonis. He told her that there had been a drive-by shooting in Jersey City the day before, involving a couple of his friends, and he needed to go up to North Jersey to "tend to those matters."

Defendant Manso and Martinez, along with Angel Tirado, returned to defendant Romero's house, where about twenty-five members of the Latin Kings had gathered. Jose Torres, an Orange Crush member, along with Martinez and defendants Manso and Perez, picked up Omar W. Morante and Cortes to bring them to Romero's house. Morante was also picked up and brought back to

the home of defendant Romero. Cabrera and Cortes also came to the house meeting.

Omar W. Morante was searched by defendant Perez, and told that no one could leave. In the living room Omar W. Morante found his twin brother, Morante, his other brother Cabrera, and Cortes. According to Edwin Diaz, defendants Romero and Manso, and Edmund Rivera, First Crown in Jersey City, were discussing the situation privately. According to Juan DeJesus, defendant Rodriguez was talking to them also. DeJesus overheard the others trying to dissuade defendant Manso from his plan, but he would not listen, telling them, "an order is an order."

When the meeting concluded, defendant Manso told Omar W. Morante and Cortes to get in Rivera's Bronco with Torres, which they did. He explained that they would be taken somewhere to write a statement. Had they refused, he was under orders to "beat them down right there on the spot." A sawed-off shotgun was delivered in a duffle bag. Martinez was told to give it to Cortes with the instruction to shoot Morante to show Cortes's loyalty; if Cortes refused, Martinez was to shoot them both.

Rivera's Bronco carried Martinez, who was driving, Rivera, Torres, Cortes, and Omar W. Morante. Two other cars left Jersey City along with the Bronco. Defendant Manso's black Sunfire carried defendants Romero, Manso and Perez. Morante was in this

vehicle. The other vehicle, defendant Rodriguez's Chevrolet Impala, driven by DeJesus, carried defendant Rodriguez, Luis Rodriguez, Ricardo Diaz, Cabrera, and Rajabzaden. Martinez was not sure where in Newark they were headed, so when they passed a tollbooth on the New Jersey Turnpike ("Turnpike"), he pulled over, and the other cars followed. Defendants Romero and Manso, along with others, went to the pay phones to make calls. Defendant Manso called defendant Byrd and confirmed that their orders were to carry out the punishment without a trial. According to Martinez, while defendant Manso was speaking to defendant Byrd, Luis Rodriguez wanted to speak to defendant Byrd to persuade him that a trial was necessary, but defendant Manso said defendant Byrd refused to reconsider. According to DeJesus, when defendant Manso hung up, he said, "Chin said we got to do this." Defendants stipulated that, on the night of the murders, a call was placed from defendant Byrd's place of employment to a pay phone at Exit 14C of the Turnpike.

While they were stopped, Omar W. Morante received permission to leave the car to use the bathroom, but instead headed for the toll collector booth and began talking to a man and a woman there. By his own account, he said: "Can you help me? I think he's going to -- they're going to try to kill my brothers." The toll collector said he couldn't help, but

directed Omar W. Morante to the nearby office. There he found an officer, who called the State Police.

Defendant Romero sent Martinez to get Omar W. Morante, and Martinez grabbed Omar W. Morante's arm while he was talking to the toll collector, but the toll collector objected, so Martinez let him go. Two of the cars pulled away, but the Bronco remained to wait for Omar W. Morante. When Rivera asked the toll collector about him, the toll collector said he was at the office making a telephone call. Rivera decided to leave. However, anticipating a possible police stop, he put the shotgun in the nearby bushes, and Martinez put his dagger in the glove compartment.

Peter Noble, the toll collector, confirmed that a young Hispanic male had sought help that evening. The young man had told Noble he felt threatened, that something bad was going to happen, and acted "nervous as all hell." Noble confirmed that he had said he could do nothing and directed the young man to the office, and that another young man had tried to pull the "nervous" one away.

The person who Omar W. Morante spoke to at the plaza office was the plaza supervisor, Michael J. Wilson. Wilson explained why he had notified the State Police:

> He asked me for some help, because he felt that he was being threatened by these

> people who were in the cars out on the shoulder of the road, and he asked me for some kind of help because he was afraid they were going to hurt him or his -- he was also with his brother, his friends, his boys he called them, and he asked me to help him because he feared that he was being threatened, he was in danger.

The Bronco vehicle stopped at Journal Square in Jersey City, where Cortes was let go. Because the toll collectors had seen them, Martinez and the others thought it was too risky to kill Cortes. However, they tried to scare Cortes so he would not call the police to warn them about the other two victims, Cabrera and Morante.

The State presented two eyewitnesses to the murders, Ricardo Diaz and Luis Rodriguez. Diaz pled guilty to two counts of aggravated manslaughter, conspiracy to kidnap and conspiracy to commit murder, with a twenty-year recommended sentence with eighty-five percent parole ineligibility. He was the Enforcer, or Orange Crush, for Paterson. Luis Rodriguez pled guilty to conspiracy to commit murder, and the recommended sentence was ten years. At the time of their testimony, neither had been sentenced.

According to Diaz, once at the park, Luis Rodriguez asked the victims: "We had a beef in Newark on Second Avenue. Who's going to go take care of it?" One of the victims asked, "Where's Second Avenue?" A short time later, defendant Manso

ordered, "Set it off," and defendant Romero grabbed Cabrera while defendant Rodriguez grabbed Morante, both in headlocks. Diaz beat Cabrera with his fists and a stick. Defendant Manso grabbed a tree branch to swing at Morante, but missed, hitting defendant Rodriguez in the face. Defendant Rodriguez let go of Morante, and defendant Perez grabbed him, taking over.

Cabrera was not fighting back much, but Morante was resisting so strongly that defendant Romero had to help defendant Perez. Defendant Perez held Morante down while defendant Romero beat him with a belt. Defendant Romero also kicked and punched Cabrera, tore off his shirt and twisted it around his neck, instructing Diaz to hold it tight, which he did until Cabrera stopped moving.

Morante was still struggling, so they dragged him towards the water as he screamed: "I'll tell you whatever you want, just don't kill me. Leave me alone, please." Defendants Romero and Perez appeared to be trying to drown Morante, and when he stopped moving, defendant Perez dragged the body further into the water. At the direction of defendant Manso, Diaz dragged Cabrera's body to the water, as well.

Diaz jumped into defendant Rodriguez's car with him, Luis Rodriguez and DeJesus. Luis Rodriguez asked Diaz if that was his first, and he was speechless. Luis Rodriguez said, "That

kid put up a fight," and defendant Rodriguez said, "Yeah, that mother fucker was strong."

Diaz's testimony was corroborated by Luis Rodriguez. Luis Rodriguez understood that their orders were to kill Cabrera and Morante at Branch Brook Park. According to Diaz, those who left in the cars with the victims were Rajabzaden, DeJesus, Diaz, and defendants Romero, Manso, Rodriguez and Perez. Defendant Manso told Diaz that defendant Byrd had directed them to break Morante's shooting arm before they killed him. They began to beat the victims when defendant Manso said, "Set it off."

According to Diaz, defendant Romero held Cabrera while Diaz hit him. Defendant Rodriguez held Morante while Luis Rodriguez and defendant Rodriguez hit him. Defendant Manso swung at Cabrera with a branch, which broke and hit defendant Rodriguez in the face. Luis Rodriguez backed away and saw Diaz holding Cabrera with something around his neck, and saw defendant Perez hitting Morante with a belt.

Luis Rodriguez was acting as a lookout beside a bridge when he saw Morante fighting for his life as defendant Perez held him under water. Defendant Manso ordered Luis Rodriguez to help, but he refused, and defendant Romero stepped in to help. Meanwhile, Diaz dragged Cabrera, by a rag around his neck, toward the water; Luis Rodriguez was told again to help, which

he did. When Morante saw his brother lying face down in the water he yelled, "No, can't be." Eventually Morante stopped fighting. Two days later, defendant Manso picked up Martinez in Perth Amboy and took him to Jersey City, where he said defendant Byrd wanted to talk to him about what had happened. At a meeting with Martinez, Rivera, and defendants Manso and Romero, defendant Byrd told Rivera that they should not have let Cortes go, but should have proceeded with the plan to kill him. Defendant Byrd said they were a disgrace to their positions.

DeJesus also testified for the State. He pled guilty to conspiracy to commit murder and received a ten-year recommended sentence, but had not yet been sentenced at the time of trial. DeJesus confirmed Martinez's account of the Turnpike stop and defendant Manso's call to defendant Byrd. DeJesus drove the Chevrolet from the tollbooth to Branch Brook Park in Newark. DeJesus stayed in the car when the others got out, and defendant Rodriguez told him, "When you see one of them fall, turn the car on."

DeJesus could not see what was happening, but heard a voice say, "Stop hitting me." He drove around the park until he saw the others run out of the bushes all sweaty and dirty, three with their shirts off. Defendant Rodriguez was bleeding and defendant Perez was soaking wet. They took off in the cars in

which they had come. As DeJesus drove back to Paterson to drop off his passengers, he heard Luis Rodriguez ask Diaz if that was his first time, and he heard a grunt and someone saying, "Hey, that little guy was strong."

A week or two after the murders, two Latin Kings arranged for DeJesus to meet with defendant Rodriguez at a bar in Elizabeth, and defendant Rodriguez told DeJesus that he had thought about blowing him up, but had decided not to. DeJesus said he had never taken a life before, and defendant Rodriguez said, "It's too late, you already took two." About a week later, defendant Rodriguez told him that if he was asked about the day of the murders, he should say they were at a club or something.

The forensic evidence supported the testimony of the State's witnesses concerning the beatings and strangulations. At the crime scene Medical Examiner Leonard Zaretski found the two bodies face down in the water, with visible head and eye injuries. Cabrera's shirt was twisted around his neck, and Zaretski determined that his death was caused by ligature strangulation. Cabrera had also suffered blunt force injuries to his head and eyes, and facial scratches. Medical Examiner Junaid Shaikh determined that Morante's death was caused by

mechanical asphyxiation, and he had sustained numerous blunt and sharp force injuries on other parts of his body.

III. State v. Romero – Docket No. A-6593-99T4

On appeal, defendant Romero's counsel contends:

POINT I

THE COURT'S REFUSAL TO REMOVE MR. DEY FROM THE JURY WHEN TAINT WAS SUGGESTED VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY. U.S. CONST., AMEND. VI; N.J. CONST. (1947), ART. I, PAR. 10.

POINT II

THE PROSECUTOR'S COMMENTS DURING SUMMATION WERE SO IMPROPER AND PREJUDICIAL AS TO DENY DEFENDANT A FAIR TRIAL. U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947), ART. I, PARAS. 1, 9, 10. (Partially Raised Below.)

A. The Prosecutor's Misconduct By Improperly Demeaning Defense Counsel And Urging The Jury To Have The Courage To Convict Was Not Rendered Harmless By The Judge's Curative Instructions.

B. The Prosecutor Improperly Commented On Defendant's Failure To Testify. (Not Raised Below.)

POINT III

THE IMPROPER ADMISSION OF HEARSAY STATEMENTS FROM ONE OF THE LIVE VICTIMS, OMAR W. MORANTE (NANYO), CONCERNING HIS FEAR OF DEFENDANT AS PROOF OF DEFENDANT'S INTENT VIOLATED HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. I, PARAS. 1, 9, 10. (Not Raised Below.)

POINT IV

DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.

A. The Court Abused Its Discretion In Imposing Consecutive Sentences On The Two Murder Counts.

B. The Court Erroneously Applied NERA On Four Of The Counts; NERA Does Not Apply To Either Murder Or Extended Terms.

In a pro se supplemental brief, defendant argues:

POINT I

THE EXCLUSION OF HISPANICS, A DISTINCTIVE GROUP IN ESSEX COUNTY, FROM DEFENDANT'S TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN FAILING TO EFFECTIVELY CHALLENGE THE JURY SELECTION PROCESS ON EQUAL PROTECTION AND FAIR CROSS-SECTION GROUNDS. CONTRARY TO DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION. (Raised Below.)

A. As A Hispanic-American, Defendant Readily Identifies With And Is Part Of A Constitutionally Cognizable Group.

b. The Representation Of Hispanics In Essex County Venires Is Neither Fair Nor Reasonable In Relation To The Number Of Such Persons In The Community.

c. In The Absence Of Empirical Data To Satisfy A Prima Facie Showing In Support Of The Fair Cross Representation Claim, Appellant Requests A Limited Remand Where An Evidentiary

Hearing To Conduct Such Challenge May Occur.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SEVER DEFENDANT'S TRIAL FROM HIS CO-DEFENDANT'S BECAUSE THE PREJUDICE FROM "GUILT BY ASSOCIATION" WHICH RESULTED FROM THE JOINDER WAS NOT CURED BY THE TRIAL COURT'S CHARGE.

We reject all of defendant's[1] contentions with the exception of the sentence imposed. We therefore affirm defendant's convictions, but remand for resentencing. The State concedes that the No Early Release Act, N.J.S.A. 2C:43-7.2 ("NERA"), was erroneously applied to the murder convictions and to the extended-term kidnapping convictions.

Defendant argues that the judge erred by failing to dismiss juror thirteen after he reported that he had felt intimidated by four unidentified people who seemed to follow him during a lunch break. The State responds that the judge correctly found no reason to dismiss any juror. We agree with the State.

On February 18, 2001, the judge announced that three jurors had told the Sheriff's officer that someone from the audience had attempted to speak to them. She determined that she must question these jurors. Juror fourteen reported that when she and juror eleven were leaving the courthouse the day before,

[1] In this section of the opinion, defendant refers to Romero.

someone who had been in the courtroom audience walked up behind them and asked, "What do you think?" She did not respond, and no more was said. Juror fourteen believed that this incident did not prevent her from remaining fair and impartial, since there was no more than a question asked. Juror eleven confirmed that account, though she said she had responded, "I don't know nothing." She, too, believed the mere attempt to talk to her would not prevent her from being a fair juror. Juror thirteen was also questioned. He said that no one had attempted to speak to him about the case. He explained:

> What happened, on Monday, I was followed by these four people. I walked across the street; they walked across the street. I went back across the street; they went back across the street. They kind of laughed and joked as [if] to intimidate me. That's what the intention was. I was alone.
>
> So when I -- when the jurors brought up the incident, I said, well, you know what, maybe we should be allowed, in here, to be a little more secure or something, only because I know that there was a tactic that was executed upon me when I was alone, and so that we probably should not be alone, at least as I did, walking the street.
>
> I was actually just going down to see if I could get a salad at McDonald's. That occurred, made me realize I didn't want to leave the building.

He stated that he didn't find the incident significant until another juror said she had been approached, but on hearing that, believed that more security would be desirable. The

people who followed him did not say anything, but, through body language, let him know they knew who he was. He recognized them as people who had been in the courtroom that morning, but said they had not been back since.

Juror thirteen said he was afraid at the time, and thought it was a scare tactic, to let him know he was in danger. He added, "Let's put it this way. I don't like being out in that hall when we're waiting. I don't like being out in that hall." He was not sure if he felt he was in danger, but was "uncomfortable." But he vehemently denied that he had a level of discomfort that would prevent his being a fair and impartial juror in this trial. When asked that question, he said, "Oh, no, not at all. No. What's going on with the trial and what people are sitting here are two different things, and the people that are sitting here, I don't know who they are, what their allegiance is. I know nothing at all."

The judge asked again, "Do you feel you can be a fair and impartial juror?" The juror answered, "Absolutely." The judge asked, "You feel we should take some additional measures?" He answered, "That's the only thing I think." All three jurors were told not to discuss this with the other jurors.

Defense counsel for Rodriguez asked the judge to excuse juror thirteen, saying he was "paranoid," and defendant's

counsel joined in that request. (Counsel saw no problem with jurors eleven and fourteen, because they didn't seem bothered by being approached.) The judge said, "I see no reason whatsoever." The judge then instructed the entire jury concerning the way to treat approaches by outsiders. She also instituted additional measures for keeping the jurors away from spectators, isolating them before and after the court day and at lunch.

In criminal prosecutions, the accused has a constitutional right to trial by an impartial jury. U.S. Const. amend. VI; N.J. Const. Art. I, Para. 10. This means that a defendant is entitled to a jury free of outside influences. State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997). The test for determining whether irregular influences on jurors merit a new trial is whether it "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote Co., 7 N.J. 55, 61 (1951). The capacity to influence is sufficient, and evidence of actual influence is not needed. Ibid. The stringency of this long-standing rule is required by the critical role of the jury. State v. Grant, 254 N.J. Super. 571, 583 (App. Div. 1992). A jury verdict must be "entirely free from the taint of extraneous

considerations and influences." Panko, supra, 7 N.J. at 61.

"A motion to set aside a verdict for alleged interference with jurors is addressed to the sound legal discretion of the judge and in the absence of a showing of prejudice should not be granted." Jardine Estates, Inc. v. Donna Brook Corp., 42 N.J. Super. 332, 340 (App. Div. 1956). An improper communication is presumed prejudicial, but if the record shows affirmatively that any communication with the jury could have had no tendency to influence the verdict, no mistrial is required. Ibid. A trial judge should first determine whether alleged improper conduct has the capacity to prejudice the defendant. State v. McLaughlin, 310 N.J. Super. 242, 256 (App. Div.), certif. denied, 156 N.J. 381 (1998). If it does, the judge should conduct voir dire to determine the extent of juror exposure to the impropriety and whether the affected jurors are capable of deciding the case impartially. Ibid. Where questioning produces credible assurances that any outside influence would not adversely affect jurors' ability and willingness to decide the case fairly and in accordance with the law, a mistrial is properly denied. State v. Nelson, 318 N.J. Super. 242, 256 (App. Div.), certif. denied, 158 N.J. 687 (1999).

Here, the judge acted within her discretion. Although juror thirteen said he felt intimidated by the laughing people

who seemed to follow him across the street, he made clear that the incident had no capacity to influence him. No words were spoken and there was no indication that the people were trying to influence him. The judge had the opportunity to observe the juror's demeanor.

Defendant speculates that the juror was influenced by fear to find him guilty on all counts. However, influence cannot be inferred merely because that was the verdict. As juror thirteen made clear, he did not get any message which way the outsiders might have wanted to influence him, if at all, or, as he said, what their "allegiance was." The incident was without content, and was related to the trial judge only because he recognized the people as spectators. He was prompted to bring it to the attention of the judge only to support additional protective measures for the jury. We conclude in this regard that no error "clearly capable of producing an unjust result" occurred in this context. R. 2:10-2.

Defendant argues that he was denied his Sixth Amendment right to due process and his Fifth Amendment right to remain silent because the prosecutor demeaned defense counsel, urged the jury to have the courage to convict, and commented on defendant's failure to testify. The State responds that any

improper comments were isolated and rendered harmless by curative instructions. Again, we agree with the State.

It is well established that, although prosecutors have considerable leeway in making opening statements and summations, their remarks must be consistent with the duty to ensure that justice is achieved. State v. Williams, 113 N.J. 393, 447-48 (1988). Prosecutors are entitled to sum up the State's case graphically and forcefully, State v. Pratt, 226 N.J. Super. 307, 323 (App. Div.), certif. denied, 114 N.J. 314 (1988), but should not rely on arguments that divert the jurors' attention from the facts of the case before them. State v. Ramseur, 106 N.J. 123, 322 (1987), cert. denied, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993).

Even if prosecutorial misconduct is found, it requires reversal only if it was so egregious that it deprived the defendant of a fair trial. State v. Timmendequas, 161 N.J. 515, 589 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001); Ramseur, supra, 106 N.J. at 322. In making that determination, the court must consider "whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Marshall, 123 N.J. 1, 153 (1991), cert.

denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993)(quoting Ramseur, supra, 106 N.J. at 322-23). Generally, remarks will not be deemed prejudicial where no objection was made, because that indicates that the defendant did not believe the remarks were prejudicial in context, and also because the failure to object deprives the judge of the opportunity to take curative action. State v. Frost, 158 N.J. 76, 84 (1999).

Defendant contends that the prosecutor unfairly criticized defense counsel. The prosecutor referred to the claim by defendant's counsel in his summation that an investigator had coached Martinez to implicate defendant Byrd by repeatedly referring to his chin and stroking it (an allusion to Byrd's nickname). The prosecutor correctly pointed out that there was no evidence to support that theory, adding:

> His job is to challenge, challenge the State's evidence. His job is to get his client off, but when he makes up something like that, if somebody starts, in that jury room, to say what about the part -- somebody has got to say, time out, time out, that's a statement of a defense attorney. He's not doing anything wrong, he's legally entitled to do that, but that's not your tools . . . Your tools are the evidence in the case.

Defendant also contends that the prosecutor unfairly commented on the "courage and commitment to human life" showed by DeJesus when he took the witness stand. The prosecutor added, "It's a courage you'll have to show, you'll all have to

show at some point." Defendant's counsel did not object immediately, but did join in the objections by counsel for defendant Byrd at the end of the summation.

We agree with defendant that the objections made at the end of the summation, when defense counsel moved for a mistrial, were timely. Moreover, the judge had told counsel (though it was after the first comment now complained of) that she would not permit constant interruption during summation, "unless you have legitimate issues." That did put an extra burden on defense counsel to weigh the significance of their objections before voicing them. In any event, the judge did not reject the objections as untimely, but responded by issuing curative instructions.

The judge agreed that the comment that defense counsel's job was to get his client off was improper, but found that, in context, it was not so egregious as to deprive any defendant of a fair trial. The prosecutor did not disparage defense counsel or attempt to elevate his own position. This contrasts with cases like State v. Adams, 320 N.J. Super. 360, 370 (App. Div.), certif. denied, 161 N.J. 333 (1999), where the prosecutor made ad hominem attacks on defense counsel. It is well accepted that a prosecutor's mischaracterization of the role of defense counsel exceeds the bounds of fair comment. Ibid. However, when the dereliction is both isolated and fleeting, as it was here, forceful jury instruction can obviate the potential for

prejudice. State v. Watson, 224 N.J. Super. 354, 362 (App. Div.), certif. denied, 111 N.J. 620 (1988), cert. denied, 488 U.S. 983, 109 S. Ct. 535, 102 L. Ed. 2d 566 (1988).

The judge found that there was no overreaching in the comment that it required courage for DeJesus to confront defendants and tell his story in court, because DeJesus saw at first hand what happened to the victims and would naturally fear retribution. She had not even taken note of the further comment concerning the courage the jury would have to show in the future, which suggested to her that it was benign. She found it was easily subject to the interpretation claimed by the prosecutor, which was that it referred to courage needed generally in life, and did not exhort the jury to have the courage to return a guilty verdict. The judge concluded that, because the comment was subject to more than one interpretation, she would have preferred it had not been made, but believed that it was not so egregious as to lead to a deprivation of the right to a fair trial, either by itself or in combination with other statements.

Our courts have disapproved comments by prosecutors implying that the jurors would be guilty of cowardice if they voted to acquit. E.g., State v. Sims, 140 N.J. Super. 164, 175 (App. Div. 1976). Here, however, the jury was not exhorted to have the courage to convict, and the judge found that implication was not intended. Nevertheless, to avoid an

improper inference, she instructed the jury to disregard the statement.

Concerning the first comment, the judge advised the jury:

> Now, again, during [the prosecutor's] summation, he commented that it is a defense attorney's job to challenge the State's evidence. That is accurate.
>
> [The prosecutor] also commented it is also a defense attorney's job to get his client off. This is not accurate and should not be considered by this jury. It is not the job of defense counsel to get their clients off. In other words, this remark was improper, it represents a misstatement of the defense attorney's position in the trial of a criminal case. Pursuit of an acquittal or verdict of not guilty is not the sole area in which a defense attorney operates. His duty is to see to it that the lawful rights and privileges of an accused are not invaded and that he is not convicted except on legal evidence and by due process of law. This is the role of defense counsel.
>
> The jury is, therefore, advised they are to disregard that comment by [the prosecutor]. It was an improper comment, and it should play no role in your deliberations.

Concerning the second comment, the judge told the jury:

> I need to bring to your attention a comment that was made during the summations of counsel, particularly -- specifically, I should say [the prosecutor's] comment.
>
> At some point he made a comment to you in the context of talking about the courage of one of these witnesses to come into this courtroom and testify, he made the following comment "It's a courage you'll have to show, you'll all have to show at some point."

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> Now, that statement is subject to more than one interpretation. Let me say this to this jury in terms of what your role is. Being a juror involves a sacrifice. That's one of the things that I said to you at the beginning of the case when you were selected. It is probably one of the most important functions you will perform in your lives as private citizens.
>
> It is not a question of courage, it is a question of fairness, it is a question of calm deliberation, without passion, prejudice or sympathy, and, of course, the decisions that you make in this case must be based upon evidence, and they must be based upon law.
>
> This is the function of the jury, this is the way that the jury is to go about its business. Courage has nothing to do with that. You are to disregard the comment made by counsel during his summation, and it should play no part in your deliberations.

It is true, as defendant points out, that the adequacy of a curative instruction necessarily focuses on the capacity of the offending statement to lead to an unjust verdict. State v. Winter, 96 N.J. 640, 647 (1984). However, the possibility of injustice must be real, and when evaluating the effectiveness of curative instructions, a reviewing judge should give deference to the determination of the trial judge. Ibid. Moreover, it is presumed that the jury will follow the instructions given by the judge. State v. Loftin, 146 N.J. 295, 390 (1996); State v. Manley, 54 N.J. 259, 271 (1969).

Defendant contends that here, virtually no curative instruction would have been sufficient because the defense presented a minimal case and relied almost exclusively on cross-

examination of the State's witnesses. It is not a valid criticism of cautionary instructions that the defense case was too weak to risk the instructions.

Defendant also contends that the curative instruction concerning the role of defense counsel was too narrow, that the instruction concerning courage wrongly included the judge's opinion that it was subject to interpretation, and that both were too remote in time from the offending comments. However, both instructions were detailed and complete, and the primary jury charge in which they were included was an appropriate time to address comments made in summation.

Defendant also argues that the prosecutor improperly commented on his failure to testify, when he said: "Witnesses describe what happened in the park. No witnesses came here and said anything else happened." Defense counsel made no objection, indicating that he did not find the comment prejudicial in the context of the trial.

It is undisputed that prosecutors are not permitted to comment on a defendant's failure to testify in reliance on his Fifth Amendment rights, either directly or indirectly. Williams, supra, 113 N.J. at 454; State v. Engel, 249 N.J. Super. 336, 381-82 (App. Div.), certif. denied, 130 N.J. 393 (1991). We disagree with defendant's contention that the statement that no witnesses contradicted the State's witnesses invited an inference of guilt to be drawn from defendant's

silence. However, the statement must be carefully evaluated, because, "when a prosecutor's comments indicate or imply a failure by the defense to present testimony, the facts and circumstances must be closely scrutinized to determine whether the defendant's Fifth Amendment privilege to remain silent has been violated and his right to a fair trial compromised." State v. Cooke, 345 N.J. Super. 480, 486 ((App. Div. 2001), certif. denied, 171 N.J. 340 (2002).

We are satisfied that in the circumstances here, the prosecutor was actually making a weight of the evidence argument by emphasizing the consistency of the testimony. The specific point to which he was referring was that "[e]very single witness in this case" said that defendant Byrd was the "Supreme." This is supported by the context. Just before the passage complained of, the prosecutor said: "When you come away with this, again, if you don't listen to what the lawyers say as evidence, but you listen from the witness stand, 15 people, how many people said he's the Supreme? Nobody said anything different." This made the point that defendant Byrd's status was well corroborated and not disputed by any witness. It did not make the point that defendant did not testify.

The failure of defense counsel to object supports the conclusion that the remark was not prejudicial. It indicates that defendant did not believe the remarks were prejudicial in context. State v. Frost, supra, 158 N.J. at 84.

Defendant argues for the first time on appeal that the judge erred by admitting, through three witnesses, hearsay statements of Omar W. Morante concerning his fear of all of defendants. The State responds that the statements were admissible either as non-hearsay or under a hearsay exception. We are satisfied that the statements qualified as hearsay admissible under the state of mind exception. N.J.R.E. 803(c)(3).

Because none of the defense attorneys objected below, we must conclude that any error was "clearly capable of producing an unjust result." R. 2:10-2. The failure of the defense to object permits the inference that at the time of trial, defense counsel perceived any error to be of no moment. State v. Baluch, 341 N.J. Super. 141, 186-87 (App. Div.), certif. denied, 170 N.J. 89 (2001).

Omar W. Morante described what happened during the abduction, but prior to the murders, when the vehicles stopped on the Turnpike:

> Q And when you got on the Turnpike, what, if anything, did you -- what happened in your car? What did you do?
> A Well, then we were just driving in, and I see P Rock [the nickname of another Latin King whose birth name is Miguel Torres], like, a little nervous and stuff, moving around too much. I just peeked to him. He putting something, putting gloves on.
> Q Where was P Rock when you saw this?
> A In front of me.
> Q In the front passenger seat?

A Yes.
Q You saw P Rock putting on gloves?
A Yes.
Q What, if anything, did you do or say when you saw this?
A I just looked, said, "Gato [Cortes], they're going to try to take us out." Then Gato just saying, "I don't know." We were -- just then just Gato just teared up, some tears came out of his eyes and my eye, "They're going to take us out," I just kept saying it to him, "Why take -- take --"

[(emphasis added).]

Cortes also testified that when the two were waiting in the stopped car, Omar W. Morante had said to him, "Gato, we're going to die." Omar W. Morante also said that when he reached the tollbooth, he asked the toll collector: "Can you help me? I think he's going to -- they're going to try to kill my brothers." At first the toll collector did nothing, but Omar W. Morante went to the office, where someone called the police. Michael J. Wilson, the plaza supervisor, confirmed that Omar W. Morante had asked for help and explained he felt he and his brothers and friend were in danger.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). The out-of-court statements, "Gato, they're going to try to take us out," and "Gato, we're going to die," were not offered to prove the truth of the assertion that defendant and his cohorts intended to kill the witness and his friend. They

of the truth of its contents, the limiting instructions did not obviate the potential for undue prejudice from the accusatory words contained in the letter.

The circumstances here are unlike those in Downey and Prudden. There, the hearsay evidence was a letter written by the deceased victim prior to the crime saying that if anything happened to him or his children, the defendants would be the cause of it. The judge found in both cases that the state of mind of the victim was not relevant. Downey, supra, 206 N.J. Super. at 391; Prudden, supra, 212 N.J. Super. at 613. Here, in contrast, the hearsay evidence was a statement by a victim made during the commission of the crime, and the state of mind of the victim was relevant to his actions, rendering it admissible under a hearsay exception. N.J.R.E. 803(c)(3). Moreover, here the declarant, unlike the deceased declarant in Downey and Prudden, was available for cross-examination.

Relevant evidence, otherwise admissible, may be excluded if its probative value is substantially outweighed by the risk of undue prejudice. N.J.R.E. 403. However, evidence "shrouded with unsavory implications" should not be excluded when it forms a significant part of the proof. State v. Long, 173 N.J. 138, 165 (2002) (quoting State v. West, 29 N.J. 327, 335 (1959)). Such evidence is excluded only if it has the "'probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues." Id. at 164 (quoting State v.

The judge imposed consecutive life sentences with eighty-five percent parole ineligibility on counts four and nine and concurrent life sentences with eighty-five percent parole ineligibility on counts two and seven. The remaining convictions merged.

Defendant argues that consecutive sentences on the two murder counts were not warranted because, although there were two victims, the two murders were "committed so closely in time as to indicate a single period of aberrant behavior." State v. Yarbough, 100 N.J. 627, 644 (1984), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986). However, other Yarbough factors, that "the crimes involved separate acts of violence" and that "the crimes involved multiple victims," do weigh in favor of consecutive sentences. Ibid. Consecutive sentences are ordinarily imposed in such circumstances. See State v. Carey, 168 N.J. 413, 430 (2001) ("[I]n vehicular homicide cases, the multiple-victims factor . . . should ordinarily result in the imposition of at least two consecutive terms when multiple deaths or serious bodily injuries have been inflicted upon multiple victims by the defendant."); State v. Johnson, 309 N.J. Super. 237, 271 (App. Div.)("Consecutive sentences do not constitute an abuse of discretion where there are separate acts of violence and separate victims."), certif. denied, 156 N.J. 387 (1998).

Defendant asserts that NERA was wrongly applied to the murder counts. NERA provides for a minimum term of eighty-five percent of a sentence for a violent crime. N.J.S.A. 2C:43-7.2. Sentencing is controlled by the version of NERA in effect when the offenses were committed. State v. Parolin, 171 N.J. 223, 232 (2002). Although NERA, now applies to murder, previously it did not. NERA does not apply to murder here. State v. Manzie, 335 N.J. Super. 267 (App. Div. 2000), aff'd, 168 N.J. 113 (2001). Accordingly, the sentences for murder must be modified. However, only one extended term can be imposed, N.J.S.A. 2C:44-5a(2). Therefore, defendant is exposed to a thirty-five-year parole bar on only one murder conviction.

Defendant also argues that NERA was wrongly applied to the kidnapping counts, because if NERA does not apply to murder, it should not apply to extended terms for other crimes. The unreasonable result would be a longer period of parole ineligibility for a less serious offense than for a more serious one. Here, longer for kidnapping than for murder. The State impliedly concedes this principle, although it advocates a period of parole ineligibility equal to the NERA sentence based on the maximum ordinary term that could have been imposed, rather than the minimum period applicable to an extended term.

In Manzie, supra, 335 N.J. Super. at 275 n.1, we said we had "reservations" regarding the assumption that NERA applied to "extended terms as well as ordinary terms," but found it

unnecessary to address the question. More recently, we opined, "It would be irrational if a defendant convicted of a first or second-degree 'violent crime' and given a discretionary or mandatory extended term sentence could be given less 'real time' than a required NERA sentence for an ordinary term." State v. Allen, 337 N.J. Super. 259, 272-73 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002). We held that the imposition of an extended term for a first or second-degree "violent crime," as defined in NERA, "must embody a parole ineligibility term at least equal to the [NERA] sentence applicable to the maximum ordinary term for the degree of crime involved." Id. at 273-74.

Defendant seems to argue that he should be sentenced to the mandatory minimum period of parole ineligibility for an extended term of life imprisonment, which is twenty-five years. N.J.S.A. 2C:43-7(b). We are satisfied that, following State v. Allen, defendant's life sentences for kidnapping should be subject to a parole ineligibility term equal to eighty-five percent of the maximum ordinary term for kidnapping, or thirty years. N.J.S.A. 2C:13-1(c)(1). That would be twenty-five-and-a-half years. We therefore remand for resentencing on the murder and kidnapping convictions.

Defendant argues that his counsel's failure to effectively challenge the jury selection process on the ground that it unfairly excluded Hispanics deprived him of his constitutional right to effective assistance of counsel. The State responds

that the Essex County jury selection process has been determined to meet constitutional standards, and that the judge properly determined that defendant failed to make a prima facie case of discrimination in the State's use of peremptory challenges. We agree with the State.

It is undisputed that defendant had a Sixth Amendment right to effective assistance of counsel. New Jersey has adopted the federal standard for ineffective assistance of counsel defined in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See State v. Fritz, 105 N.J. 42 (1987). In order to prevail in his claim for violation of his constitutional right, unless a case warrants a presumption of prejudice (not asserted here), defendant must show that his attorney's "performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction." Id. at 58. That is, he must show both professional deficiency and consequent prejudice. Judicial scrutiny of counsel's performance must be deferential, with the presumption that it falls within the wide range of reasonableness. State v. Martini, 131 N.J. 176, 322 (1993), cert. denied, 516 U.S. 875, 116 S. Ct. 203, 133 L. Ed. 2d 137 (1995). It is improper to second-guess counsel's reasonable adoption of defense strategy. State v. Perry, 124 N.J. 128, 153-54 (1991). The reasonable competence standard requires that an attorney was not "so ineffective as to make the idea of a

fair trial meaningless." State v. Prisco, 355 N.J. Super. 283, 290 (App. Div. 2002) (quoting State v. Davis, 116 N.J. 341, 351 (1989)).

Defendant contends that his trial counsel was ineffective because the jury array unfairly underrepresented Hispanics. Here, defense counsel joined in a challenge to the ethnic composition of the jury array, and the judge responded that Essex County's array selection process had previously withstood constitutional challenge. The trial judge correctly stated, "[t]he fact that a particular pool of jurors might or might not meet what the defendant's requirements or expectations are as to the ethnic makeup is not relevant as long as the system is as fair as it can be humanly made." In State v. McDougald, 120 N.J. 523, 549-50 (1990), and Ramseur, supra, 106 N.J. at 212-38, the Court affirmed the constitutionality of Essex County's grand and petit jury selection process.

There could be no professional deficiency in defense counsel's failure to further pursue this issue, where the trial judge correctly relied on legal precedent. Defendant impliedly concedes that the judge followed the law, but contends that his counsel's performance was deficient because he failed to gather demographic data to attempt to overrule that precedent. The reasonable competence standard does not require such Herculean efforts.

Defendant also contends that his trial counsel was ineffective because the State used its peremptory challenges to exclude only African-Americans and Hispanics from the jury, in violation of his constitutional right to an impartial jury. An impartial jury does not require the systematic inclusion of cognizable groups, but does preclude the State's use of peremptory challenges to unreasonably restrict the possibility that the petit jury will comprise a representative cross-section of the community. State v. Gilmore, 103 N.J. 508, 528-29 (1986).

The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. This protection, and the concomitant protection afforded by the New Jersey Constitution, N.J. Const. art. I, Para. 10, applies to the jury that is trying defendant. See State v. R.D., 169 N.J. 551, 557 (2001)(describing nature of right). It prohibits selective removal of jurors "who are members of a cognizable group on the basis of their presumed group bias." State v. Chevalier, 340 N.J. Super. 339, 353 (App. Div.), certif. denied, 170 N.J. 386 (2001). The proper remedy for such discriminatory peremptory challenges is to discharge the jury, dismiss the venire and begin jury selection anew. Id. at 354-55.

There is a rebutable presumption that the prosecution has exercised its peremptory challenges on permissible grounds.

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There is a rebutable presumption that the prosecution has exercised its peremptory challenges on permissible grounds.

Gilmore, supra, 103 N.J. at 535. Once a defendant has made a timely challenge to the prosecution's use of peremptory challenges, the defendant must make a prima facie showing that those challenges were exercised on grounds that were constitutionally impermissible. Ibid. This requires a showing that the potential jurors wholly or disproportionately excluded were members of a cognizable group within the meaning of the representative cross-section rule. The defendant then must show that there is a "substantial likelihood that the peremptory challenges resulting in the exclusion were based on assumptions about group bias rather than any indication of situation-specific bias." Id. at 535-36. "[T]he trial court should consider all the relevant circumstances." Ibid.

Once the defendant establishes a prima facie case, the burden shifts to the prosecutor to show evidence that the peremptory challenges were justified based on concern for bias specific to the situation. Id. at 537. Finally, the trial judge must weigh the evidence to determine whether the defendant has carried the ultimate burden of proving that the peremptory challenges under review were exercised on forbidden grounds. Id. at 539. This requires a judgment call by a trial judge "who was closely involved in the situation as it unfolded and upon whose sense of fairness and impartial judgment [the appellate court has] been adjured to depend." State v. Hughes, 215 N.J. Super. 295, 299-300 (App. Div. 1986).

Here, counsel for defendant Rodriguez moved for a mistrial based on Gilmore, supra, 103 N.J. 508. The judge responded that the defense had in part made a prima facie case [showing that the potential jurors wholly or disproportionately excluded were members of a cognizable group] by showing that the prosecution had exercised all of its peremptory challenges to exclude African Americans (15) and persons with Hispanic surnames (2). However, the defense had not satisfied the remaining part [showing a substantial likelihood that the peremptory challenges were based on assumptions of group bias rather than situation-specific bias]. The prosecution had not struck all, or most, members of either cognizable group cited, because the jurors seated so far were all either African American or Hispanic. Defense counsel acknowledged that there could be no issue of purposeful exclusion of non-whites where the potential jurors so far selected included only those groups.

Defense counsel returned to the argument that there were too few Hispanics in the jury pool, on which the judge had already ruled. Defense counsel objected that the prosecution had excluded two Hispanic jurors, but defendants had excluded two Hispanic jurors also. On appeal, defendant concedes that the judge correctly decided the Gilmore issue, but that Hispanics were underrepresented on the jury panel because they were underrepresented in the Essex County jury pool. We reject the argument that defendant's counsel's failure to pursue the

issue of the fairness of the overall jury selection process in Essex County constituted ineffective assistance of counsel. There is no basis for honoring defendant's request for a remand for consideration of that issue. We conclude that no ineffective assistance of counsel occurred in this context, and we reject defendant's claim that he was deprived of the right to an impartial jury.

Defendant argues that the judge erred, once she denied the joint motion for severance, by giving inadequate instructions concerning defendant's involvement. He claims this permitted the prosecutor to urge a finding of guilt by association. The State responds that the trial judge gave adequate jury instructions. Again, we reject defendant's claim.

On October 15, 1999, the judge denied a joint severance motion based on three grounds: antagonistic defenses, guilt by association and the length and complexity of the trial. She noted, "The danger by association that inheres in all joint trials is not in itself sufficient to justify a severance, provided that by proper instructions to the jury the separate status of co-defendants can be preserved." Defendant concedes that there was no objection below to the jury instructions concerning the separate status of defendants, but claims plain error. He contends that the trial judge overlooked the prejudicial effect of joinder, never specifying the individual role of each defendant.

The rules of court allow for joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." R. 3:7-7. They also provide for relief from prejudicial joinder, on motion, if "it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation . . . ." R. 3:15-2(b).

In State v. Freeman, 64 N.J. 66, 68 (1973), the Court recognized the danger of guilt by association that inheres in all joint trials, and the pains necessarily taken by judges to charge the individual nature of offenses. There, the Court found adequate jury instructions for two defendants that included the admonition, "First of all you are to make independent individual determination of the guilt or innocence of these defendants . . . ." Id. at 70. This was adequate even though the charge at the time failed to distinguish explicitly between separate defendants and separate indictments, because the charge read in its entirety avoided the potential for uncertainty. Id. at 71. More recently the Court affirmed that the danger of guilt by association inherent in all joint trials "is not in itself sufficient to justify a severance, provided that by proper instructions to the jury, the separate status of co-defendants can be preserved." State v. Brown, 118 N.J. 595, 605 (1990).

Here, the judge far exceeded the standard of Freeman, reminding the jury numerous times that it must determine guilt individually. She charged, "Each defendant is to have the evidence as to his innocence, his involvement considered by you separately." She then said:

> Now, again, there are separate offenses charged in the indictment. They are separate offenses by separate counts. Each defendant is entitled to have his guilt or innocence separately considered on each count by the evidence that is relevant and material to that particular charge based on the law as I will give it to you.
>
> You must also return separate verdicts for each defendant as to each charge being tried. In other words, you will have to decide each case individually. Whether the verdicts as to each defendant are the same depends on the evidence, and you will determine that evidence as judges of the facts.

Much later in the charge, she reminded the jury:

> Again, remember that each offense and each defendant in this indictment should be considered by you separately. The fact that you may find a particular defendant guilty or not guilty of a particular crime should not control your verdict as to any [other] offenses charged against that defendant, and it should not control your verdict as to the charges against any other defendant.

We are satisfied that the jury's determination to convict two of the defendants of lesser charges and to acquit them of other charges indicated that the jury followed the judge's instructions to consider separately each offense against each

defendant. See State v. Brown, 170 N.J. 138, 162 (2001) ("In this case, we know that the jury was able to consider the co-defendant's guilt separately from defendant because it convicted them of different crimes."). The judge's instructions were more than adequate on this issue.

We affirm defendant's convictions but remand for resentencing.

IV. State v. Manso - Docket No. A-0282-00T4

On appeal, defendant[2] asserts:

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SEVER DEFENDANT'S TRIAL FROM HIS CO-DEFENDANT'S BECAUSE THE PREJUDICE FROM "GUILT BY ASSOCIATION" WHICH RESULTED FROM THE JOINDER WAS NOT CURED BY THE TRIAL COURT'S CHARGE. (Raised In Part Below.)

POINT II

THE DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE PROSECUTORIAL MISCONDUCT DURING SUMMATION WAS "SIMPLY INEXCUSABLE."

POINT III

THE COURT'S CHARGE WAS PREJUDICIALLY DEFECTIVE BECAUSE IT FAILED TO PROVIDE ADEQUATE GUIDANCE TO THE JURY AS TO HOW IT SHOULD ASSESS THE TESTIMONY OF THE CO-DEFENDANTS WHO TESTIFIED AGAINST DEFENDANT PURSUANT TO A FAVORABLE PLEA AGREEMENT. (Not Raised Below.)

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[2] In this section of the opinion, defendant refers to Luis Manso.

Part 1

POINT IV

AFTER ANNOUNCING THAT IT HAD REACHED UNANIMOUS VERDICTS WITH REGARD TO FOUR DEFENDANTS, AND THEN ASKING THE COURT TO BE RECHARGED ON THE DEFINITION OF REASONABLE DOUBT, THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR BY FAILING TO VOIR DIRE THE JURY AS TO THE "REASONABLE DOUBT" STANDARD IT APPLIED IN REACHING ITS INITIAL VERDICTS. (Not Raised Below.)

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE ON THE CHARGES OF KIDNAPPING (COUNTS TWO, SEVEN, TWELVE, AND SIXTEEN).

POINT VI

IMPOSITION OF AN AGGREGATE SENTENCE OF SIXTY (60) YEARS WITHOUT PAROLE WAS MANIFESTLY EXCESSIVE AND AN ABUSE OF THE COURT'S DISCRETION.

A. The Court Abused Its Discretion In Finding That Aggravating Factors N.J.S.A. 2C:44-1(A)(1), N.J.S.A. 2C:44-1(A)(5), and N.J.S.A. 2C:44-1(A)(10) Were Present.

B. Running The Sentence Imposed On Count Nine Consecutive To Count Four Was Manifestly Excessive And An Abuse Of Discretion.

C. The Court Erred In Sentencing The Defendant To A NERA Period Of Parole Ineligibility On Counts Two And Seven.

In a supplemental pro se brief, Manso contends:

POINT I

ACTS OF MISCONDUCT ENGAGED IN BY THE PROSECUTION DURING THE INVESTIGATION OF THE CASE THROUGH THE ENTIRE PROCEEDINGS INCLUDING THE SUMMATION GIVEN AT THE TRIAL OF APPELLANT VIOLATED THE RIGHTS OF APPELLANT GUARANTEED PROTECTION UNDER THE EQUAL PROTECTION CLAUSES AND THE DUE PROCESS CLAUSES OF THE V AND XIV AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE FUNDAMENTAL FAIRNESS CLAUSE OF THE NEW JERSEY COMMON LAW AND DENIED APPELLANT A FAIR TRIAL.

A. The Affidavit of Inv. Patrick DeFrancisci Contained Palpably False And Material Misrepresentations Of Known Facts That Falsely Asserted That There Was A Conspiracy To Kidnap Juan Cortes, Jimmy Cabrera, Omar Wilmer Morante And Omar Danny Morante.

B. The Indictment Was Obtained By Presenting Known False Evidence Of Conspiracies To Kidnap And Murder Jimmy Cabrera, Omar Wilmer Morante And Omar Danny Morante And Improper Manipulation Of The Grand Jurors And The Grand Jury Process Which Deprived The Appellant Of Fundamental Fairness.

C. The State Through Its Witnesses Presented Known False And Misleading Testimony At Trial And Failed To Correct The Perjured Testimony Of Its Witnesses When It Appeared.

D. The Remarks Made By The Prosecution During Its Summation Denied Appellant Due Process Of Law In Violation Of The XIV Amendment To The Constitution Of The United States And The [Fundamental] Fairness Clause Of The New Jersey Common Law Which Deprived Appellant Of His

Defendant argues that the joint trial created the danger of guilt by association, which was not cured by the jury charge. We disagree.

Defendant joined in a motion to sever, which the judge denied. He now argues that failure to sever constituted error, and that the jury charge, to which he did not object, permitted the prosecutor to urge a finding of guilt by association. The issue of the adequacy of the charge was fully discussed earlier in this opinion, where we concluded that the judge's charge preserved the rights of all defendants by repeatedly reminding the jury that it must determine guilt individually. See Romero, supra.

When considering a motion to sever, a judge balances the interest of judicial economy against the potential prejudice to a defendant. State v. Brown, 118 N.J. 595, 605 (1990). A danger of guilt by association exists in all joint trials, but that is not in itself sufficient to justify a severance if the separate status of co-defendants can be preserved through proper jury instructions. State v. Brown, 170 N.J. 138, 162 (2001). Here, the instructions were appropriate and we conclude that the judge properly denied the motion to sever.

Defendant argues that in summation the prosecutor unfairly characterized defense counsel and improperly appealed to the jury to show courage. We are satisfied that any improprieties were cured by jury instructions. This issue is discussed

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earlier in this opinion where we concluded that none of the prosecutor's comments in summation that defendants complained of warranted reversal. See Romero, supra.

Defendant also quotes certain comments made by the prosecutor about justice for the victims, though without highlighting it or presenting legal support. The prosecutor said in pertinent part:

> We cannot give those victims and their families justice. We can't do that. Only you can do that.
>
> Other times in your life when you heard the word "justice," you were a spectator. Today justice is in your hands. People who care for justice, the people who cared for the victims look to you for justice.
>
> . . . .
>
> I submit to you the only just verdict is guilty, and if you find them guilty, we will all walk from this courtroom with our head held high.

It is improper for a prosecutor to encourage a jury to convict based on a societal duty. State v. Josephs, 174 N.J. 44, 125 (2002). However, unlike cases where a prosecutor told the jury that its duty was "to protect society from crime," see State v. Coyle, 119 N.J. 194, 230-31 (1990), or to send a message to the community, see State v. Rose, 112 N.J. 454, 520-21 (1980), here the prosecutor said that the jury's duty was to do justice.

However, the follow-up comment that a guilty verdict was the only just verdict was improper because it suggested that the prosecutor personally believed in defendants' guilt. It is improper for the prosecutor to express his personal belief as to the truth or falsity of any testimony of the defendant. Rose, supra, 112 N.J. at 519. The problem with such an expression of opinion is the danger of improper diversion of the jury's attention from the facts of the case. Id. at 520.

Prosecutorial misconduct requires reversal only if it was so egregious that it deprived the defendant of a fair trial. State v. Timmendequas, 161 N.J. 515, 588 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001). These comments, though improper, were made at the end of a long and detailed summation that did focus on the facts of the case. Moreover, none of the five defense counsels objected to these remarks below. They apparently did not find these comments worthy of objection, although all joined in a motion for mistrial based on several other comments made in summation. Generally, remarks are not deemed prejudicial where no objection was made, because that indicates that the defendant did not find the remarks prejudicial in context. Moreover, "[t]he failure to object deprives the judge of an opportunity to take curative

action." State v. Frost, 158 N.J. 76, 84 (1999). The comments here do not warrant reversal.

Defendant argues for the first time on appeal that the judge failed to provide adequate guidance to the jury on its assessment of the testimony of accomplices who pled guilty. The State responds that there could be no plain error where the judge issued the model jury charge on accomplice testimony, and moreover, the primary defense strategy was to question the credibility of those witnesses. Again, we agree with the State.

Accomplice testimony, even if uncorroborated, may alone support a conviction. State v. Hernandez, 170 N.J. 106, 125 (2001). Here, several accomplices corroborated each other's testimony, which was also confirmed in part by the two victims who survived, and other witnesses to part of the crimes. However, defendant is correct that the testimony of an accomplice must be closely scrutinized, because it is tainted with confessed criminality and often influenced by the strong motive of hope of favor or pardon. See State v. Spruill, 16 N.J. 73, 78 (1954). A judge cannot arbitrarily refuse to instruct the jury that the evidence of an accomplice must be carefully scrutinized and assessed in the context of special interest. Id. at 80.

Concerning a co-defendant or another witness who was involved in the crimes, the model jury charge on accomplice testimony provides:

> The law requires that the testimony of such a witness be given careful scrutiny. In weighing (his/her) testimony, therefore, you may consider whether (he/she) has a special interest in the outcome of the case and whether (his/her) testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal.
>
> If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on (his/her) testimony alone, provided, of course, that upon a consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendant's guilt.
>
> [Model Jury Charges (Criminal), Accomplice Testimony (revised 1/25/99).]

Here, the judge administered this charge. Moreover, the judge led up to this charge with ample additional cautions, beginning, "There were a number of witnesses that you were made aware testified in this case and also pleaded guilty and were given plea bargains or some exposure to lesser offenses and lesser terms of imprisonment than they would otherwise have faced had they gone to trial." The judge then named those witnesses and made specific comments about them. She continued:

> The general issue that all of these -- with regard to all these witnesses, whether they testified having received a plea

bargain, whether they testified and were not charged with offenses, is an issue that you may evaluate in deciding their credibility. If you find that a State's witness[] has some criminal involvement, you have the right to find his testimony may be colored by the fact [that] he hopes to receive favor or pardon for testifying in this case.

In determining the weight that you should give to the testimony of these witnesses, if you find that a witness has some criminal involvement, you should carefully scrutinize all the witnesses' testimony to see if it has been corroborated by other witnesses' testimony, and if you do not find any other credible corroborating testimony, you may disregard the testimony of a witness if you find it proper to do so.

. . . .

You should not find the defendant guilty on the basis of such a [witness's] testimony alone, unless you are convinced that the testimony is credible and sufficiently believable to convince you of a defendant's guilt beyond a reasonable doubt or unless you find that it has been corroborated by the testimony of other witnesses or other evidence offered by the State.

Thus -- a defendant may be found guilty solely on the testimony of such a witness, if you believe he was credible and worthy of belief sufficient to satisfy you of the defendant's guilt beyond a reasonable doubt.

Now, there were certain witnesses in this case who admitted their guilt to charges and testified on behalf of the State, and there were other witnesses whom, although they were not charged in the indictment, you may choose to believe, from what they said to you, that they had some involvement in the criminal situation out of which the indictment and trial of these defendants arose.

Defendant contends that the July 24, 1998, affidavit of Investigator Patrick DeFrancisci submitted in support of arrest, search and seizure of various defendants, contained the false and misleading assertion that defendants had participated in a conspiracy to commit kidnapping. However, that allegation was well supported by the evidence that had been collected. Indeed, despite the defense's attempt to show, through cross-examination, that the victims went willingly and were not constrained or coerced, the jury convicted defendant of conspiracy to commit a kidnapping, and kidnapping, based on the same evidence.

Defendant also asserts that the prosecutor presented false information to the grand jury. Prosecutorial error during grand jury proceedings may require dismissal of an indictment, but only when it is shown that the error was clearly capable of producing an unjust result. State v. Hogan, 336 N.J. Super. 319, 344 (App. Div.), certif. denied, 167 N.J. 635 (2001). Defendant Manso must show that, but for the error, the grand jury would have reached a different result. See ibid. Defendant falls far short of satisfying this standard. He fails to establish that the prosecutor made any error. See ibid. (when considering challenge to prosecutor's instructions on the law to a grand jury, cautioning against "review[ing] the prosecutor's decisions from the vantage point of twenty-twenty hindsight").

Defendant points to the prosecutor's question to Andre Palma whether he had told the police he "first spoke with Chin [Byrd] three to four months ago and that you saw Spanky [Luis Rodriguez] after the murders and that you told Spanky someone unknown had come to see him about a [sixty]-dollar debt owed to this person?" Palma denied this. There was a basis for this question, however, in the report of Police Investigator Patrick DeFrancisci, which noted that on September 4, 1998, Palma had "stated that he first spoke with Chin [three to four] months ago and that he did see Spanky after the murders and that he told Spanky someone unknown had come to see him, Mombo [Andre Palma] [,] about a [sixty-dollar] debt owed to this person."

Defendant asserts that another police report by State Police Officer John Quigley, recounted a different statement by Palma, denying that a conversation with another Latin King was connected to the murders or to defendant Byrd. However, there is no support for defendant's claim in the record. Inconsistent statements by Palma, not by the police or the prosecutor, could explain any inconsistency.

Defendant also quotes a statement of Luis Rodriguez from grand jury proceedings held on October 19, 1998. This transcript, however, has not been provided. According to defendant, the statement was that Luis Rodriguez saw defendant Perez struggling in the water with Morante. Defendant asserts that this was designed to give the false impression that

Morante's death was caused by drowning, which was contrary to the testimony of the medical examiner. Even if this statement gave such a false impression, no prosecutorial misconduct would be suggested. Moreover, nothing in the quoted statement addresses the cause of death. The evidence showed that there was a struggle in the water, but the actual cause of death was strangulation.

Defendant also contends that Luis Rodriguez's statement that he heard there were two shotguns was wrongly read to the grand jury, because it was false. However, nothing precluded the presentation to the grand jury of that hearsay statement.

Defendant also points to inconsistencies in trial testimony that he claims demonstrate that the State fabricated statements, and that its witnesses presented false and misleading testimony. These inconsistencies would provide a basis for a weight of the evidence argument, but do not support a claim of prosecutorial misconduct.

Defendant also argues that numerous comments in summation constituted prosecutorial misconduct. Much of this argument repeats the claims addressed earlier in this opinion when we decided Romero, supra.

In addition, for the first time on appeal, defendant points to a statement that he says unfairly commented on defendants' failure to testify. The prosecutor said, "I understand why nobody wanted to come to the box." The absence of any objection

below suggests that defendant did not believe the remark was prejudicial in context. Frost, supra, 158 N.J. at 84. Moreover, it appears from the context that this was a comment on the reluctance of many Latin Kings to testify, not necessarily defendants. The complete paragraph was

> What else is corroborated by the evidence? I understand why nobody wanted to come to the box. He [either Luis Rodriguez or Officer Rivera, it is not clear] said two people were shooting. If two people are shooting, how many kinds of bullets would you expect to have?

The larger context was the State's response to the defense position that all the State's witnesses were liars, a position that defense attorneys had introduced in their openings.

Defendant argues in addition that the prosecutor made an appeal to ethnic bias. The prosecutor said:

> These people, these defendants decided to bring these two men into this community to take their life in a horrible place in the nastiest manner known to man, and we've done everything we could do to bring them to justice. I submit to you the only just verdict is guilty, and if you find them guilty, we will all walk from this courtroom with our head held high.

Defendant contends that references to "this community" and "these people" had ethnic overtones.

When "considering whether to reverse a conviction based on prosecutorial misconduct, [a judge] examine[s] the severity of the alleged misconduct and its prejudicial effect on the right

to a fair trial." State v. Koskovich, 168 N.J. 448, 488 (2001)(quotations omitted). Reversal is not warranted based on comments in summation unless there was clear and unmistakable misconduct that substantially prejudiced the defendant's fundamental right to have a jury fairly evaluate the merits of the case. Ibid.

We disagree that the references cited by defendant were ethnic references. When the prosecutor referred to "this community," he did not mean the Hispanic community, but Newark, the community from which the jury was drawn. His point was not to focus on the ethnic background of defendants, but that defendants had offended the Newark community by traveling there to commit the murders. He made that clear earlier in his remarks when he said:

> You've heard about [Branch Brook] Park being in all states of disarray, glass, bottles. But you know what? Maybe they think that way about this community, but they're wrong if they think that people here don't care, if you think you can come to Newark, kill somebody here and leave them in a dirty pool of water and get away with it.

There was no prosecutorial misconduct to warrant reversal.

Defendant argues that it was plain error for the judge to fail to follow up on juror reports of improper contacts by questioning the entire panel. This issue was addressed earlier

in this opinion. See Romero, supra. There was no error in this context.

Defendant argues that the judge confused the jury concerning his culpability for certain conduct. We disagree. This argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Defendant cites an observation made by the judge during the charge conference, that defendant was "directing others to do things that he did not himself physically do."

Defendant argues that it was plain error for the judge to fail to instruct the jury, sua sponte, that being a member of the Latin Kings did not constitute other crimes evidence or show a propensity for crime. This argument is totally lacking in merit. R. 2:11-3(e)(2).

Absent a request for a limiting instruction on this subject, its absence is reviewed under the plain error rule, Rule 2:10-2, and the judge infers that counsel perceived the alleged error to be of no moment in the context of the trial. State v. Eatman, 340 N.J. Super. 295, 302 (App. Div.), certif. denied, 170 N.J. 85 (2001). Here it is reasonable to conclude that the five defense counsels either saw no need for the instruction now urged, or made a tactical decision not to draw attention to the common association of gangs with crime. Defendant does not make a persuasive argument that the omission

of this instruction was "clearly capable of producing an unjust result." R. 2:10-2.

We affirm defendant's convictions and sentence.

V. State v. Rodriguez - Docket No. A5704-00T4

On appeal, defendant[1] contends:

POINT I

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL PREDICATED ON THE PROSECUTOR'S IMPROPER AND PREJUDICIAL STATEMENTS MADE DURING SUMMATION.

POINT II

THE COURT SHOULD HAVE DISMISSED THE JURY PANEL FOR POSSIBLE IMPROPER CONDUCT DURING A LUNCHEON BREAK.

POINT III

THE COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE KIDNAPPING CHARGES.

POINT IV

THE DEFENDANT WAS DEPRIVED OF HIS FEDERAL AND STATE DUE PROCESS RIGHTS BY THE COURT NOT CHARGING, SUA SPONTE, THE STATUTORY AFFIRMATIVE DEFENSE UNDER N.J.S.A. 2C:11-3a(3) AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S NOT SO REQUESTING SUCH A CHARGE. (Not Raised Below.)

POINT V

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[1] In this section of the opinion, defendant refers to Jesus Rodriguez.

THE DEFENDANT WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO A JURY ARRAY AND PETIT JURY THAT WAS A FAIR REPRESENTATION OF HIS ETHNIC GROUP.

POINT VI

THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S NOT EXHAUSTING HIS PEREMPTORY CHALLENGES TO PRESERVE HIS CLAIMS AGAINST THE UNDER-REPRESENTATION OF "HISPANICS" ON THE PETIT JURY. (Not Raised Below.)

POINT VII

THE DEFENDANT WAS NOT STATUTORILY ELIGIBLE FOR SENTENCING UNDER THE "THREE STRIKES LAW" AND THE "NO EARLY RELEASE ACT" DOES NOT APPLY TO HOMICIDE SENTENCING AND THEREFORE SUCH SENTENCES MUST BE VACATED.

POINT VIII

THE CONVICTIONS MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF THE ERRORS.

In a pro se supplemental brief, defendant asserts:

POINT I

DEFENDANT WAS DENIED A FAIR TRIAL CONTRARY TO HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS, AS WELL AS IN VIOLATION OF THE N.J. CONST. (1947), ART. I, ¶ 9 AND 10.

A. The Exclusion Of Hispanic Jurors Violated Defendant's Federal And State Constitutional Rights.

1. Federal due process implications.
2. Strict scrutiny test of the United States Supreme Court.

3. Lack of translation problems justifying a departure from the strict scrutiny test of Cleburne, differentiating this from Hernandez v. New York and Pemberthy v. Beyer.

B. Various Biases Leading To A Tainted Jury Pool.

C. The Incorrect Differentiation Of Qualification For A Non-Capital Prosecution.

1. Reasoning of our nation's highest court in Satterwhite v. Texas.

2. Satterwhite reasoning used by our Supreme Court in Bey and Timmendequas.

POINT II

INADMISSABLE HEARSAY EVIDENCE ADMITTED AT TRIAL COMPROMISED DEFENDANT'S RIGHT TO CONFRONTATION AND CROSS-EXAMINATION AND DUE PROCESS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDENT AND N.J. CONST. (1947), ART. I, ¶ 9 AND 10.

POINT III

THE VERDICTS RETURNED AND THE JURY INSTRUCTIONS PROVIDED AS A WHOLE VIOLATED DEFENDANT'S RIGHT TO FAIR TRIAL AND DUE PROCESS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND N.J. CONST. (1947), ART. I, ¶ 9 AND 10. ALTERNATIVELY, COUNSEL'S FAILURE TO SPECIFICALLY REQUEST INSTRUCTIONS VIOLATED HIS RIGHTS CONTRARY TO THE FEDERAL AND STATE CONSTITUTIONS.

A. The Constitutional Violations Had By Instructions Regarding Reasonable Doubt.

B. Faulty Felony Murder Instructions As To Statutory Affirmative Defense.
C. Failure To Instruct On Lesser Offenses As To Conspiracy To Murder, Conspiracy To Kidnap, And Attempted Murder Counts, Failure To Distinguish State Of Mind While Conspiring From State Of Mind, When Committing Substantive Offense.
D. Overall Effect On Charge.

We reject defendant's contentions with the exception of the claims involving the application of the Three Strikes Law, N.J.S.A. 2C:43-7.1, and NERA, N.J.S.A. 2C:43-7.2, to defendant's sentence. The State concedes these sentencing points. In all other respects we affirm.

Defendant argues that the prosecutor made improper and prejudicial statements in summation that rendered the trial unfair, and the judge erred by denying the defense motion for mistrial. We disagree given the context of the remarks and the judge's instructions. This issue has already been addressed earlier in this opinion. See Romero, supra, and Manso, supra. We need not repeat that discussion here.

Defendant also directs us to State v. Neal, 361 N.J. Super. 522, 537 (App. Div. 2003), in which the prosecutor, in summation, referred to the defendant as having a "lack of courage." The defendant, a member of the Asbury Park Board of Education, was convicted of perjury. Id. at 525. We found that

comment part of an impermissible theme pursued by the prosecutor in that case. Id. at 537-38.

In Neal, the prosecutor asked the jury to hold the defendant accountable for the betrayal of the children of the city, thereby diverting its attention from the facts and promoting a sense of partisanship. Ibid. The judge found the reference to "lack of courage," along with other comments, to be inflammatory and improper and together to have the capacity to deprive the defendant of a fair trial. Id. at 537-38. Neal has little in common with this case other than the prosecutor's use of the word "courage." The most salient difference is that here, the prosecutor did not apply it to defendant.

For the first time on appeal, defendant also cites the prosecutor's rhetorical question, "[I]sn't that a noble thing?" This is reviewable under the plain error standard, which requires that errors be disregarded unless they are "clearly capable of producing an unjust result." R. 2:10-2. In itself, the failure of the defense to object permits the inference that at the time of trial, defense counsel perceived the error now alleged to be of no moment. See State v. Baluch, 341 N.J. Super. 141, 186 (App. Div.), certif. denied, 170 N.J. 89 (2001).

Here, the prosecutor countered the defense criticism of the cooperating witnesses by asking whether it was not noble, rather

than reprehensible, to admit guilt. This was a reasonable response to the defense attempt to malign the State's witnesses. It did not amount to vouching for their credibility, as defendant asserts.

The remaining comments cited, like the "noble" comment, were not challenged below and are cited as plain error. Defendant points to the display of a victim's photograph. It was shown to demonstrate what might have motivated the cooperating witnesses to plead guilty, and to counter the defense characterization of them as liars. Defendant does not argue that the photograph was inadmissible, but that it was the equivalent of a victim impact statement, which is prohibited in capital cases. See State v. Pennington, 119 N.J. 547, 569 (1990). We are satisfied that the two are not sufficiently comparable to warrant application of the prohibition on victim impact statements.

Also for the first time on appeal, defendant objects to the prosecutor's argument that the medical examiner's testimony that it took five minutes to strangle the victims constituted proof of intent to kill. He said to the jury, "If anybody is starting to say they didn't mean to kill them, you take the watch, and you tell me what you think." Contrary to defendant's assertion, this question did not ask the jurors to put themselves in the

place of the victims. It asked them to conclude that keeping a stranglehold for five minutes implied an intent to kill, a legitimate inference.

Defendant also cites the prosecutor's plea to give the victims and their families justice. He concluded, "I submit to you the only just verdict is guilty, and if you find them guilty, we will all walk from this courtroom with our head[s] held high." Defendant cites to Pennington to support his contention that these comments invited the jury to ground the convictions on the characters of the victims, which is prohibited. Id. at 571. We have previously, in this opinion, discussed this point and will not address it again. See Manso, supra.

Defendant argues that the judge erred by failing to dismiss the jury panel because of possible taint from improper conduct during a lunch break. Again, this is an argument already addressed in this opinion and we need not address it again. See Romero, supra.

Defendant argues that the judge erred by denying the motion for acquittal of the kidnapping charges, because the facts supported a conviction of third-degree criminal restraint, at most. We disagree.

Defendant joined in the motion for an acquittal of the kidnapping charges. The judge denied the motion because the kidnappings, though committed to facilitate the murder, were sufficiently independent to support the kidnapping convictions. Defendant does not dispute that, but contends that because his participation began only after the planning meeting held at the New Houses, he could be found guilty of criminal restraint, at most. Defendant's argument is misplaced. His early absence did not insulate him from the kidnapping charges.

Pursuant to N.J.S.A. 2C:13-2(a), a person commits criminal restraint if he knowingly "[r]estrains another unlawfully in circumstances exposing the other to risk of serious bodily injury." Under N.J.S.A. 2C:13-1(b), a person commits a kidnapping if he "unlawfully confines another for a substantial period," with the purpose "[t]o facilitate commission of any crime or flight thereafter," or "[t]o inflict bodily injury on or to terrorize the victim or another." Criminal restraint is a "lesser included offense of kidnapping." State v. Savage, 172

N.J. 374, 398 (2002). The jury was so instructed, but convicted defendant of the greater crime in four counts.

The facts could have supported a conviction for either kidnapping or criminal restraint. Specifically, defendant's absence from the initial planning meeting did not preclude a finding that he had participated in the confinement of the victims with the purpose of facilitating the commission of murder or of inflicting bodily injury or terrorizing them. The judge properly denied the motion.

Defendant argues for the first time on appeal that the judge erred by not instructing the jury on what he calls "renunciation" or "abandonment" as an affirmative defense to the felony murder charges, and that counsel's failure to ask for the instruction constituted ineffective assistance of counsel. We are satisfied that no error occurred in this context.

The felony murder statute provides that whenever a defendant was not the only participant in a crime underlying felony murder

> it is an affirmative defense that the defendant:
>
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical

injury and of a sort not ordinarily carried in public places by law-abiding persons; and
(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

[N.J.S.A. 2C:11-3(a)(3).]

As noted, defendant refers to this defense as abandonment or renunciation of criminal purpose, but that is incorrect. It is sometimes known as the "non-slayer" defense. State v. Harrington, 310 N.J. Super. 272, 281 (App. Div.), certif. denied, 156 N.J. 387 (1998). A jury charge on this defense is proper if and only if there is some evidence supporting it. State v. Smith, 322 N.J. Super. 385, 396 (App. Div.), certif. denied, 162 N.J. 489 (1999).

Defendant contends that the testimony of Luis Rodriguez showed that defendant stopped his assault on Cabrera once the branch hit defendant in the face, and that happened before Diaz and defendants Romero and Perez had made the commitment to kill Cabrera. He contends that this would support the application of N.J.S.A. 2C:11-3(a)(3)(a) and (d), but he is not correct. Even if defendant's premise is accepted, that would not support a finding that defendant did not aid in the commission of the homicidal act, N.J.S.A. 2C:11-3(a)(3)(a), or that he "had no

reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." N.J.S.A. 2C:11-3(a)(3)(d).

Defendant further argues that N.J.S.A. 2C:11-3(a)(3)(b) and (c) apply because there was no evidence that he was armed or that he had a reasonable ground to believe that any other participant was armed. This is not correct because, in addition to the evidence concerning other weapons, the proofs showed that Cabrera was assaulted with a large branch, which was an instrument "readily capable of causing death or serious injury and of a sort not ordinarily carried in public places by law-abiding persons." N.J.S.A. 2C:11-3(a)(3)(b). In any event, it is necessary to determine the applicability of all four factors of N.J.S.A. 2C:11-3(a)(3), because they are conjunctive, so all four must apply. They do not apply here.

Moreover, because the felony murder convictions were merged with defendant's murder convictions, he cannot show prejudice unless the murder convictions are reversed. Defendant does not challenge those convictions.

Defendant argues that he was deprived of his right to due process of law because the jury did not include enough Hispanics to fairly represent his ethnic group. We reject this

contention. We have already discussed this issue earlier in this opinion. See Romero, supra.

Defendant argues that counsel's acceptance of the jury panel as satisfactory and failure to exhaust defendant's peremptory challenges deprived him of his constitutional right to effective assistance of counsel, because the issue was not preserved for direct appeal. We reject this contention. We have already discussed this issue earlier in this opinion and no further discussion is warranted. See Romero, supra.

Defendant argues that the judge erred by applying the Three Strikes Law and NERA and by imposing two consecutive life sentences for murder. The State concedes that neither the Three Strikes Law nor NERA was applicable, but responds that consecutive life sentences were not inappropriate. We agree with the State.

Both the consecutive sentencing argument and the NERA argument are discussed earlier in this opinion, where we concluded that no error in the imposition of consecutive life sentences occurred, but concluded that NERA was incorrectly applied. This matter must be remanded for resentencing.

The Three Strikes Law, which mandates an extended term of imprisonment for repeat violent offenders, N.J.S.A. 2C:43-7.1(b), does not apply unless the predicate convictions were

contention. We have already discussed this issue earlier in this opinion. See Romero, supra.

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Both the consecutive sentencing argument and the NERA argument are discussed earlier in this opinion, where we concluded that no error in the imposition of consecutive life sentences occurred, but concluded that NERA was incorrectly applied. This matter must be remanded for resentencing.

The Three Strikes Law, which mandates an extended term of imprisonment for repeat violent offenders, N.J.S.A. 2C:43-7.1(b), does not apply unless the predicate convictions were

imposed "on two or more prior and separate occasions." N.J.S.A. 2C:43-7.1(b)(1); State v. Livingston, 172 N.J. 209, 213 (2002). Here, the State relied on prior convictions imposed on one occasion. Therefore the sentence under the Three Strikes Law is vacated and the matter remanded for resentencing.

Defendant argues that the cumulative effect of errors requires reversal. We disagree. The doctrine of cumulative error requires the reversal of a judgment of conviction if several trial errors, in the aggregate, though not individually, were of such magnitude that they prejudiced a defendant's right to a fair trial. State v. Orecchio, 16 N.J. 125, 129 (1954). Here, in contrast, the judge's rulings were proper and the jury's verdict was consistent with the weight of the evidence. See State v. Conway, 193 N.J. Super. 133, 174 (App. Div.) (cumulative error doctrine does not apply when rulings are proper and the verdict consistent with the weight of the evidence), certif. denied, 97 N.J. 650 (1984).

Defendant argues that he was deprived of a fair trial because the composition of the jury under-represented Hispanics and several members were tainted by bias. There is no merit to this contention. R. 2:11-3(e)(2). We have already disposed of this issue earlier in the opinion. See Romero, supra.

Defendant also argues that the entire jury selection process was flawed, and that in its rush the judge failed to excuse for cause many jurors who were biased because those close to them had been crime victims or were involved in law enforcement. Defendant's argument seems to be based on the alleged general attitude of the judge, rather than objecting to particular members of the jury. However, the judge stressed that it was not her intention to rush jury selection, and that she had given counsel "unbelievable input into the selection of this jury" although it was not a capital case. We agree.

In his pro se statement of facts, defendant identifies numerous potential jurors as having some familiarity with victims, gangs or law enforcement. Most, however, were not among the sixteen eventually seated, but defendant makes a generalized argument that a majority of the panel indicated such familiarity. Even if we assumed that this is correct, it does not demonstrate a biased jury.

In his argument, the only seated juror defendant identifies as biased based on familiarity with crime is Mary Battle. One of Battle's brothers had been murdered several years before. The judge denied the request by counsel for defendant Romero to excuse Battle for cause. None of the five defense counsels exercised a peremptory challenge against her, and defendant

himself points out that his counsel did not exhaust his peremptory challenges.

"Voir dire procedures and standards are within the broad discretionary powers vested in the trial court." State v. Papasavvas, 163 N.J. 565, 595, corrected for unrelated reason, 164 N.J. 553 (2000). This deference is due in all cases, including capital jury voir dire proceedings. Ibid. Here, there was no abuse of discretion, because Battle's connection to a criminal event fell far short of the level of clear bias. Even a juror's own recent criminal victimization does not always implicate a risk of bias that would require excusal for cause. State v. Singletary, 80 N.J. 55, 63 (1979). We conclude that no jury bias was demonstrated here.

Defendant argues for the first time on appeal that certain statements by Omar W. Morante, expressing his fear that defendants intended to kill his brothers, and possibly Cortes and him, were inadmissible hearsay. This argument has already been discussed in Romero, supra. We need not discuss it further.

We note, however, in addition that defendant relies on State v. Long, 173 N.J. 138, 165 (2002), to support the proposition that even if the statements were properly admitted, a limiting instruction was necessary. Defendant's reliance is

misplaced. In Long, the Court found admissible extra-judicial declarations made by the accused and repeated by the victim before she was murdered, though the defendant argued that the statements constituted highly prejudicial other-crime evidence. Id. at 157. Because of the other-crime implications of the statements, the Court required a limiting instruction. It noted, however, that "generally no limiting instruction is necessary insofar as res gestae evidence is concerned." Id. at 165 (citing State v Martini, 131 N.J. 176, 242 (1993), cert. denied, 516 U.S. 875, 116 S. Ct. 203, 133 L. Ed. 2d 137 (1995)). Here, no other crime evidence was implicated, and the general Martini rule applies.

Defendant argues that defective jury instructions require reversal. All of these alleged errors must be reviewed under the plain error standard and we are satisfied that no error, plain or otherwise, occurred in this context.

Defendant claims that the judge incorrectly defined reasonable doubt. This argument is discussed earlier in this opinion. See Manso, supra.

Defendant contends that the judge erred by failing to instruct the jury on the affirmative defenses to felony murder set forth in N.J.S.A. 2C:11-3(a)(3), known as the "non-slayer" defense. Here, there was no basis to charge the non-slayer

defense. We gave a detailed discussion of this claim earlier in this opinion.

Defendant also contends that the judge erred by failing to instruct the jury, sua sponte, on conspiracy to assault, conspiracy to criminally restrain and unlawfully confine, and attempted assault, as lesser-included offenses of conspiracy to murder, conspiracy to kidnap, and attempted murder, respectively. Defendant cannot show prejudice from the conspiracy convictions, because they all merged with other convictions, but he argues that the failures to charge lesser-included offenses influenced other jury decisions.

In the absence of a request to charge on a lesser-included offense, the judge is obliged to do so only where the facts clearly indicate that it is proper. Savage, supra, 172 N.J. at 397; State v. Choice, 98 N.J. 295, 298-99 (1985); see N.J.S.A. 2C:1-8(e) ("The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.") The judge need not give a lesser offense charge where the defendant may have made a strategic decision not to request it. State v. Doss, 310 N.J. Super. 450, 455-56 (App. Div.), certif. denied, 155 N.J. 589 (1998).

Defendant does not identify the evidence supporting the specific lesser-included offense charges he now cites, but contends generally that they were required because the judge charged lesser-included offenses on the substantive counts. He complains that the judge failed to instruct the jury not to use a finding of state of mind at the time of a conspiracy as proof of an element of a substantive offense. He proposes that if the jury made its decisions in the order presented by the verdict sheet, the jury could have concluded it was obligated to convict on the attempted murder, murder and kidnapping counts once it had found the intent necessary to convict on the conspiracy counts.

This outcome is speculative, and rendered unlikely by the specific instructions to the jury to treat each offense separately. Defense counsel requested a charge that guilty pleas by other Latin Kings must not serve as evidence that other defendants were guilty of either conspiracy or substantive crimes, and the judge agreed. Contrary to defendant's contention, the judge also instructed the jury that each offense must be considered separately:

> The fact that a defendant may have pled guilty to a conspiracy offense, and the fact that you may find a particular defendant guilty of a particular crime should not control your verdict as to any other offense charged against that defendant, and it

should not control your verdict as to the charges against any other defendant. Each offense and each defendant on trial must be considered by you separately.

Defendant contends that, in the alternative, defense counsel's failure to raise these issues below deprived him of the effective assistance of counsel guaranteed by the Sixth Amendment. This would require a showing of deficient performance and consequent prejudice. State v. Fritz, 105 N.J. 42, 52 (1987). Where there was no error in the charge, there is no deficiency in counsel's failure to object to the charge.

We affirm defendant's convictions, but remand for resentencing.

VI. State v. Perez - Docket No. A-0834-00T4

On appeal, defendant[4] contends:

POINT I

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL WITH RESPECT TO THE PROSECUTOR'S IMPROPER AND PREJUDICIAL STATEMENTS MADE TO THE JURY DURING HIS SUMMATION.

POINT II

DEFENDANT'S CONVICTIONS SHOULD BE VACATED BECAUSE THE JURY DID NOT UNDERSTAND THE CONCEPT OF REASONABLE DOUBT. (Not Raised Below.)

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[4] Defendant in this section of the opinion refers to Jose Antonio Perez.

POINT III

THE TRIAL JUDGE SHOULD HAVE EXCUSED JUROR NUMBER 13 BECAUSE HE EXPRESSED FEELINGS OF FEAR AND DANGER AS A RESULT OF BEING FOLLOWED BY CERTAIN PERSONS ON A LUNCH BREAK AND BECAUSE THIS WAS DISCUSSED WITH OTHER JURORS.

POINT IV

DEFENDANT'S MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE AS TO THE KIDNAPPING COUNTS OF THE INDICTMENT SHOULD HAVE BEEN GRANTED.

POINT V

DEFENDANT'S CONVICTION AND SENTENCE FOR FELONY MURDER SHOULD BE VACATED AND DISMISSED.

POINT VI

THE COURT'S JURY INSTRUCTION WITH RESPECT TO THE CRIME OF FELONY MURDER WAS ERRONEOUS AND PREJUDICIAL BECAUSE THE COURT FAILED TO CHARGE THE JURY WITH RESPECT TO THE AFFIRMATIVE DEFENSE SET FORTH IN N.J.S.A. 2C:11-3. (Not Raised Below.)

POINT VII

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED CONSECUTIVE [SENTENCES] FOR MURDER AND FELONY MURDER UPON THE DEFENDANT.

POINT VIII

THE SENTENCE IMPOSED ON THE DEFENDANT WAS EXCESSIVE BECAUSE OF DISPARITY BETWEEN THE DEFENDANT'S SENTENCE AND A CO-DEFENDANT.

POINT IX

THE NO EARLY RELEASE ACT SHOULD NOT HAVE BEEN [APPLIED] TO DEFENDANT'S SENTENCES FOR MURDER AS TO COUNTS FOUR AND TEN.

With the exception of the claims involving the application of NERA to defendant's sentence and the requirement that only one conviction for conspiracy can be supported here, we affirm. The State concedes the conspiracy and NERA issues. We affirm defendant's convictions, but remand for resentencing.

Defendant argues that comments by the prosecutor in summation rendered the trial unfair because they impugned defense counsel and referred to the courage of a witness. We reject this claim and rely on our earlier discussion in this opinion on this subject. See Romero, supra.

Defendant argues that the judge erred by giving an inadequate recharge on the meaning of reasonable doubt. We reject this claim for the reasons set forth earlier in this opinion. See Manso, supra.

Defendant argues that the judge erred by failing to excuse juror thirteen after he expressed fear of four people who followed him at lunch time, which he had discussed with other jurors. Earlier in this opinion, we discussed this issue and concluded that the trial judge did not abuse her discretion in addressing the juror contact issue. See Romero, supra.

Defendant argues that the judge erred by denying the defense motion for acquittal on the kidnapping counts (counts two, seven, twelve and sixteen) because the confinement of the victims was merely incidental to the crimes of attempted murder and murder. We are satisfied that the evidence was sufficient to sustain the kidnapping charges. We agree with the State, but note that on count sixteen, defendant was convicted of the lesser-included offense of third-degree criminal restraint. This issue was rejected earlier in this opinion and we perceive no reason to address it again. See Manso, supra.

Defendant argues that if his conviction for kidnapping Cabrera (count seven) is reversed, his conviction for felony murder of Cabrera (count ten) must be reversed also because the Cabrera kidnapping was the predicate felony. We conclude that there is no basis to reverse defendant's conviction for kidnapping.

A defendant may not be convicted of felony murder without a conviction for commission of, or an attempt to commit, a predicate felony. State v. Grey, 147 N.J. 4, 16 (1996). However, if the evidence supports alternative felony theories, a jury need not designate which felony theory it relied on, as long as there was sufficient evidence to sustain each felony. State v. Harris, 141 N.J. 525, 562 (1995).

Here, count ten of the indictment identified "kidnapping" as the predicate crime. The evidence could support the theory that Cabrera was killed while defendant was engaged in the commission of, attempt to commit, or flight after committing, the kidnapping of Morante. We agree with the State that the felony murder conviction of defendant must be reversed only if the kidnapping convictions for both Cabrera and Morante were reversed. There is no basis here to reverse the kidnapping convictions.

Defendant argues for the first time on appeal that the judge erred by failing to charge the jury, sua sponte, with the affirmative defense set forth in N.J.S.A. 2C:11-3(a)(3) in connection with the charge of felony murder of Cabrera. We disagree.

Defendant argues that he was entitled to a jury instruction on the "non-slayer" defense because Diaz, not defendant, actually killed Cabrera. However, defendant presented no evidence to support the four factors of N.J.S.A. 2C:11-3(a)(3). On the contrary, there was ample evidence that defendant knew that the other participants "intended to engage in conduct likely to result in death or serious physical injury" to Cabrera. N.J.S.A. 2C:11-3(a)(3)(d). He was present at all the planning stages and at the scene of the crimes, and was unable

to participate in the killing of Cabrera only because he was in the process of killing Morante. We discussed this same issue earlier in Rodriguez, supra, and have no reason to change the result here.

Defendant argues that the judge abused her discretion by imposing consecutive sentences for murder and felony murder. We previously addressed the issue of consecutive sentences for murder. The trial judge did not mistakenly exercise her discretion in imposing consecutive sentences for the two murders.

Defendant argues that his sentence was excessive because of the disparity between it and the sentence received by defendant Manso and the sentencing exposure received by Diaz as a result of his plea bargain. Again, we reject defendant's claim.

The disparity between defendant and Diaz was well supported, because Diaz entered into a plea agreement and cooperated with the State. The judge offered a rationale for the disparity between defendant and defendant Manso. Moreover, that disparity is not significant when the proper parole ineligibility terms for both defendants are considered. Nevertheless, infra, we conclude that remand for resentencing on these counts is necessary because the judge erroneously applied NERA to defendant's murder sentences.

Defendant received two consecutive forty-year prison sentences, imposed on counts four (murder of Morante) and ten (felony murder of Cabrera). In contrast, defendant Manso received two consecutive thirty-year sentences, imposed on counts four (murder of Morante) and nine (murder of Cabrera). Diaz was exposed to a maximum twenty-year sentence.

Because uniformity is a crucial element of the sentencing procedures of the Code of Criminal Justice ("Code"), disparity in sentencing among co-defendants "may invalidate an otherwise sound and lawful sentence." State v. Roach, 146 N.J. 208, 232, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996). However, a sentence is "not erroneous merely because a co-defendant's sentence is lighter." Ibid. (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). The question is whether the disparity is justifiable. When a comparison between sentences reveals "grievous inequities," the greater sentence may be deemed excessive, and reduced. State v. Roach, 167 N.J. 565, 570 (2001).

The disparity of sentence between defendant and Diaz was well justified by Diaz's cooperation with the State. It is proper for a judge to take such cooperation into account when sentencing. State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999); State v.

Gonzalez, 223 N.J. Super. 377, 393 (App. Div.), certif. denied, 111 N.J. 589 (1988).

Here, the trial judge believed that the evidence against defendant was overwhelming, and that the jury "gave Mr. Perez a bit of a break" by not finding accomplice liability for the death of Cabrera. When sentencing defendant, she expressly recognized the similarities to defendant Manso, but noted significant differences:

> Mr. Perez i[n] some respects is similar to Mr. Manso. [It's] not that there's nothing good that can be said about him. [It's] not that he has the most horrible record that I have ever seen, nor is it that he has previous violence in his background. Mr. Manso and he are similarly situated as far as that is concerned. As far as their personal responsibility, in placing them in some relationship to each other as far as sentencing is concerned, Mr. Perez as far as the Court is concerned is in an enhanced position to Mr. Manso in some ways. His actual conduct led to the death of at least one defendant if I follow the jury's verdict, which I must.

The judge observed that:

> the mindset of a person who's willing to do whatever he's told to do for no other reason than loyalty to an organization is a dangerous mind. There was no personal offense committed against Mr. Perez. And yet in spite of that he was -- the acts attributed to him are brutal is the only way I can think of describing it. Whenever someone dies, there's brutality involved. But the strength and effort taken to murder someone with your own hands in this fashion.

> [It's] not like he had superior fire power or anything of that nature, this is a murder of his own hands. And it took some doing as described by everyone who was there to see it as well as the testimony of the medical examiner.
>
> There were multiple injuries inflicted. It was not a fast death. It was a slow death.

The judge thus found defendant more culpable than defendant Manso because he was personally responsible for the death of Morante, as well as legally responsible, and the killing was particularly brutal. In applying aggravating factor N.J.S.A. 2C:44-1(a)(1), she found the "slow death and death by personal hands to be cruel," and found this factor warranted by the killing of one sibling in the presence of another and the "degree of strength utilized against [Morante] and harm inflicted upon him while he clearly fought very hard for his life . . ."

"[T]he Code requires an inexorable focus upon the offense when formulating a sentence." State v. Roth, 95 N.J. 334, 367 (1984). The trial judge so focused here. Moreover, disparity in sentencing must be evaluated in terms of "real time," taking into consideration parole ineligibility terms. State v. Salentre, 275 N.J. Super. 410, 425 (App. Div.), certif. denied, 138 N.J. 269 (1994). Because NERA cannot be applied to these murder convictions, the parole ineligibility period will be the

same, thirty years on each count, for both defendant and defendant Manso. We conclude that when NERA is not applied, there is no basis for a disparity claim.

Defendant argues that the judge erred by applying NERA to his sentences for murder (counts four and ten). We agree. The matter must be remanded for resentencing on the murder convictions. NERA could not be applied here and, therefore, defendant must be resentenced. See Manzie, supra. Without the application of NERA, the parole ineligibility period for murder is thirty years. N.J.S.A. 2C:11-3(b)(1).

In addition, N.J.S.A. 2C:5-2(c) precluded more than one conviction for conspiracy so long as the multiple crimes "are the object of the same agreement or continuous conspiratorial relationship." Therefore, the conspiracy counts not already merged with substantive counts, counts thirteen, fifteen and seventeen, must be merged into one conspiracy conviction, and the sentence modified accordingly.

VII. State v. Byrd - Docket No. A-4974-99T4

On appeal, defendant[3] contends:

POINT I

DEFENDANT'S CONVICTION FOR CONSPIRACY TO COMMIT KIDNAPPING MUST BE REVERSED.

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[3] In this section of the opinion, defendant refers to Charles Byrd.

A. The Lower Court Erred In Denying Defendant Byrd's Motion For Judgment Of Acquittal On His Four Counts Of Conspiracy To Commit Kidnapping, Because The Evidence Was Clearly Insufficient To Support A Conviction On Those Charges.

B. Assuming, Arguendo, That The Evidence Was Sufficient To Show That Byrd Conspired To Commit Kidnapping, That Conviction Must Still Be Reversed, Because A Person Can Be Guilty Of Only One Conspiracy Where Multiple Crimes Are The Object Of The Same Agreement, And, Here, Any Perceived Agreement To Kidnap Was An Integral Part Of The Principal Offense Charged, Which Was Conspiracy To Murder.

C. The Jury Charge was Improper Because it Did Not Contain an Instruction to the Effect That a Person Can Be Guilty of Only One Conspiracy Where Multiple Crimes Are the Object of the Same Agreement.

POINT II

DEFENDANT BYRD'S CONVICTION FOR CONSPIRACY TO COMMIT MURDER SHOULD BE REVERSED.

A. The Lower Court Erred In Denying Defendant Byrd's Motion For Judgment Of Acquittal On His Four Counts Of Conspiracy To Commit Murder, Because The Evidence Was Clearly Insufficient To Support A Conviction For Those Charges.

B. Reversal Of Defendant Byrd's Convictions For Conspiracy To Commit Murder Are Warranted By The

Improper Jury Charge Rendered By
The Lower Court.

POINT III

THE DENIAL OF CHARLES BYRD'S MOTION TO SEVER HIS TRIAL FROM HIS CODEFENDANTS RESULTED IN UNDUE PREJUDICE, AND HE SHOULD, THEREFORE, BE GRANTED A NEW TRIAL.

POINT IV

CHARLES BYRD'S CONVICTIONS SHOULD BE REVERSED AND HE SHOULD BE GRANTED A NEW TRIAL BECAUSE HIS CASE WAS PREJUDICED BY PROSECUTORIAL MISCONDUCT.

POINT V

DOCUMENTS, PURPORTED BY THE STATE TO BE "VOTING RECORDS" EVIDENCING MR. BYRD'S ELECTION AS THE "SUPREME" OR LEADER OF THE LATIN KINGS NATION, WERE IMPROPERLY ADMITTED INTO EVIDENCE, BECAUSE THEY CLEARLY CONSTITUTED INADMISSIBLE HEARSAY AND THERE WAS NO FOUNDATION AID JUSTIFYING THEIR ADMISSION.

POINT VI

CHARLES BYRD WAS IMPROPERLY SENTENCED TO SERVE CONSECUTIVE TERMS OF IMPRISONMENT FOR BOTH CONSPIRACY TO COMMIT MURDER AND CONSPIRACY TO COMMIT KIDNAPPING.

We reject defendant's contentions with the exception of his point that he can only be convicted of one conspiracy. The State concedes this point and we agree. We therefore remand for the merger of the conspiracy convictions and resentencing. In all other respects, we affirm.

Defendant argues that his convictions for conspiracy to commit kidnapping must be reversed because the evidence was insufficient to support them and the jury instructions were inadequate. He also asserts that N.J.S.A. 2C:5-2(c) precludes conviction for more than one conspiracy under these facts. We disagree that the evidence was insufficient, but agree that under the State's theory of the case, which posited a single agreement or continuous conspiratorial relationship, conviction for more than one conspiracy is statutorily precluded. See N.J.S.A. 2C:5-2(c).

A judge is authorized to order the entry of a judgment of acquittal before a case is submitted to the jury "if the evidence is insufficient to warrant a conviction." R. 3:18-1. The trial judge must determine

> whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.
>
> [State v. Reyes, 50 N.J. 454, 458-59 (1967).]

The same standard is applied by the appellate court. State v. Johnson, 287 N.J. Super. 247, 268 (App. Div.), certif. denied, 144 N.J. 587 (1996).

Defendant moved for a judgment of acquittal on the four counts for conspiracy to commit kidnapping, and the judge denied the motion. Defendant now argues that the denial constituted error. We disagree. The issue is moot, in part, in light of the conceded statutory bar to impose more than one conviction for conspiracy here. N.J.S.A. 2C:5-2(c) provides in part: "If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship."

Defendant also argues that the jury charge was defective because the judge did not give instructions on the statutory bar. That issue, however, is also moot in light of the State's concession. In any event, only convictions are subject to merger, not charges. State v. Martin, 335 N.J. Super. 447, 450-51 (App. Div. 2000). Whether or not multiple convictions may stand is an issue to be decided by the trial judge after the jury has made a finding of guilt. State v. Farrad, 164 N.J. 247, 265 (2000); N.J.S.A. 2C:1-8(a)(4) ("A determination barring multiple convictions shall be made by the judge after verdict or finding of guilt."). A jury should not be instructed that charges may merge, lest there be speculation or compromise. State v. Carswell, 303 N.J. Super. 462, 478-79 (App. Div. 1997).

Defendant's argument that the judge erred by denying his motion on the merits is also rejected. The Code of Criminal Justice (Code) defines conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> b. Scope of conspiratorial relationship. If a person guilty of conspiracy, as defined by subsection a. of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

[N.J.S.A. 2C:5-2.]

Under N.J.S.A. 2C:13-1(b), a person is guilty of kidnapping if he "unlawfully confines another for a substantial period," with the purpose "[t]o facilitate commission of any crime or flight thereafter," or "[t]o inflict bodily injury on or to terrorize the victim or another." Defendant contends that there was no evidence that he participated in, or was privy to, any

common plan to kidnap the victims, because any such plan was made after he left defendant Romero's house to go to work. We are satisfied that the judge correctly found there was sufficient evidence to support the charges of conspiracy to commit the kidnappings (and the charges of kidnapping), where there was testimony that defendant issued orders for the victims' murders.

The judge noted that a person need not be present to discuss plans directly with all co-conspirators in order to be guilty of conspiracy. N.J.S.A. 2C:5-2(b). Here, the evidence established that the overall scheme was to kill the victims in retaliation for the drive-by shooting, and their capture and restraint was a reasonably foreseeable predicate to murder.

The State argues that the evidence supported the convictions for false imprisonment, and we agree. This issue is raised because the trial judge merged the convictions for false imprisonment (counts two, seven, twelve and sixteen) with the convictions for second-degree conspiracy to commit kidnapping (counts one, six, eleven and fifteen). Apparently, because of this merger, defendant has not challenged the evidentiary support for those convictions.

Defendant's liability for false imprisonment is that of an accomplice under N.J.S.A. 2C:2-6(b)(3). Here, the jury was

charged on accomplice liability, which is established if, among other circumstances, a person solicits another to commit a crime. N.J.S.A. 2C:2-6(c)(1)(a). There was ample evidence that defendant solicited others to commit false imprisonment.

The Code requires the merger of a conspiracy conviction and its substantive offense. N.J.S.A. 2C:1-8(a)(2). That prevents the double conviction and sentencing that would otherwise occur because, under the Code, a conspiracy is punished in the same degree as the substantive offense. State v. Hardison, 99 N.J. 379, 386 (1985).

The State contends that when defendant is resentenced, the convictions for false imprisonment should be "unmerged" from the eight conspiracy convictions (now reduced to one conspiracy conviction), because the overall conspiracy had other criminal objectives in addition to false imprisonment, namely kidnapping and murder. The Code permits conviction of both a conspiracy and a completed offense committed pursuant to the conspiracy if the completed offense was not the sole criminal objective of the conspiracy. Id. at 386-87. Accordingly, defendant must be separately sentenced on the fourth-degree false imprisonment convictions in counts two, seven, twelve and sixteen.

Because the "theory of merger is the avoidance of double punishment for a single offense," the conviction that survives

merger should be the one that is the "most serious," or "provides the most severe sentence." Cannel, New Jersey Criminal Code Annotated, comment 9 on N.J.S.A. 2C:1-8 (2003). Here, that would be either of the two conspiracies to commit murder convictions.

During argument, defendant cited State v. Connell, 208 N.J. Super. 688 (App. Div. 1986), to support his position that the fourth-degree false imprisonment charges should not be unmerged. His reliance on that case is misplaced. Here, the conspiracy includes both kidnapping and murder.

Defendant argues that the judge erred by denying his motion for a judgment of acquittal on the conspiracy to commit murder charges, based on insufficient evidence, and by charging the jury incorrectly on this charge. We disagree. There was sufficient evidence to sustain the convictions. Although, as noted, the statute permits only one conspiracy conviction under the proofs here.

Defendant moved for a judgment of acquittal on the four counts for conspiracy to commit murder, and the judge denied the motion. Criminal homicide constitutes murder when the actor purposely or knowingly "causes death or serious bodily injury resulting in death." N.J.S.A. 2C:11-3a(1) and (2).

At a minimum, there was ample evidence to support the murder conspiracy charge concerning Morante. The proofs showed that defendant ordered the Orange Crush to break Morante's shooting arms, and then kill him. At the Turnpike stop, two witnesses overheard defendant Manso talking on the telephone to defendant. According to DeJesus, when defendant Manso hung up he said, "Chin [defendant] said we got to do this." Telephone records confirmed this telephone call. There was also an implication that defendant ordered the murders of all four victims, because that was the understanding of those who carried out the criminal acts. After the murders, defendant chided Martinez and Rivera for failing to kill Omar W. Morante and Cortes. Defendant later told Jose Torres that someone "ratted me out."

Defendant questions the credibility of his alleged accomplices. However, their credibility was an issue thoroughly explored at trial, and the assessment of witness credibility is the unique province of the jury. See State v. Frisby, 174 N.J. 583, 594-95 (2002). Because the conspiracy convictions must merge into one, the sufficiency of evidence to murder the other victims is moot. However, we conclude that there was sufficient evidence to warrant the denial of defendant's motion with

respect to the other victims because the order to retaliate for the drive-by shooting was not limited to the murder of Morante.

Defendant also argues that his convictions for conspiracy to commit murder must be reversed because the judge failed to instruct the jury that, where multiple crimes form the object of the same agreement, the actor can be found guilty of only one conspiracy. He contends that there is no way to determine whether the jury found more than one distinct agreement or only one agreement. In light of the statutory requirement that only one conspiracy conviction is possible under these circumstances, N.J.S.A. 2C:5-2(c), we need not address this point.

We remand this matter so that all the conspiracies may be merged into one, the conspiracy to murder Morante, and defendant shall be resentenced on that conviction, along with the convictions on the lesser-included offenses of false imprisonment.

Defendant argues that the judge erred by denying two motions for severance, one made by defendant alone, and one made jointly by all defendants. Our review of the record convinces us that both motions were properly denied.

On February 10, 2000, defendant moved to sever his case, because defendant was not present at the scene of the murders and was not an accomplice or conspirator and defendant Romero

would be willing to testify on defendant's behalf. The judge denied the motion, finding that the State did not allege that defendant was present, nor was that a basis for the charges against him, and that the proposed testimony by Romero would not provide evidence to exculpate defendant because accomplice liability and conspiratorial liability were legal determinations to be made by the jury. She found that there was no reason to engage in the balancing process set forth in State v. Sanchez, 143 N.J. 273, 290 (1996), because defendant had not satisfied the predicate by proffering any credible and substantial exculpatory evidence. She said:

> To summarize, there simply is not a record, a record that is sufficient to permit the Court to even engage in the weighing process that is required by Sanchez. I have placed on the record what my ruling would be if Mr. Romero were to produce an affidavit saying exactly what you said he was going to say, that the result would be the same. The -- part of my ruling is that there has not been established a record.
>
> The second prong of my ruling was, if you were to produce today a certification from Mr. Romero saying exactly what is in your [defense counsel's] certification, that it would not make a difference because, viewing the statements at their best, they are not specific in one instance, ambiguous and certainly not exculpatory in the context of this case.

We have previously discussed, in this opinion, the legal principles for joinder of defendants. See Romero, supra. In

Sanchez, supra, 143 N.J. at 293, the Court held that where a defendant seeks severance based on a co-defendant's conditional offer to testify, severance is warranted:

> if the court is reasonably certain that (1) the defendant will call his codefendant as a witness in a separate trial; (2) the codefendant, although unwilling to testify at a joint trial, will testify at a separate trial either prior or subsequent to his own trial; and (3) the codefendant's proffered testimony will be credible and substantially exculpatory.

In Sanchez, severance was not warranted because the defendant made an insufficient showing that his brother would testify at a separate trial, nor was the proffered testimony credible or substantially exculpatory. Id. at 294.

Here, defendant failed to satisfy the Sanchez standard. Defense counsel reported to the judge that, while in a holding cell, defendant had heard defendant Romero say that defendant was not present in Jersey City, and had nothing to do with the murders. Defendant proffered no statement from defendant Romero, but only counsel's statement that defendant Romero's attorney told him defendant Romero would testify in a separate trial. Further, the proffered testimony was neither credible nor substantially exculpatory. To satisfy that requirement, defendant Romero would have to acknowledge that he was involved or was at the meeting or at the scene. Defendant Romero never

took such a position.

We previously discussed, earlier in this opinion, the joint motion for severance. See Romero, supra. We have nothing to add but that the judge did not err in denying the motion.

Defendant argues that he was deprived of a fair trial by three improper comments the prosecutor made during summation. Our careful review of the record convinces us that none of the comments clearly had the capacity to create an unjust result. R. 2:10-2.

The three statements are that: it was defense counsels' job to get their clients off; the jury would have to show courage at some point; and defense counsel had conducted lengthy cross-examinations. Defense counsel moved for a mistrial based on those references, which the judge denied. We have previously discussed, in this opinion, the first two claims of prosecutorial misconduct. See Romero, supra.

In the third statement complained of, the prosecutor told the jury: "Remember, cross-examination of these victims was about -- you get up, ask him questions for an hour, 45 minutes. We would sit down 10:00, 11:00, 12:00, 1:00, 2, 3, 4, sometimes the next day, they kept asking these young men the same questions." Defendant contends that this comment impugned the integrity of defense counsel.

Put in context, this statement did not impugn the integrity of defense counsel. The prosecutor called attention to the length of the cross-examination and the repeated questions expressly to explain and excuse certain testimony.

Immediately before the comment cited by defendant, the prosecutor said, "Did he say Indio [Rivera] one time by mistake? He sure did, but we know Indio is -- every other reference is he's not there." Then, immediately after saying, "they kept asking these young men the same questions," the prosecutor said:

> One place in the transcript somebody said the wrong name. Let's put [ourselves] in that situation. Everybody here filled out a jury questionnaire. You didn't take eight hours to fill it out. Anybody make any little mistakes, anything they had to explain to the Judge? Sure, they did. Sure, they did. It's human nature.

This entire comment was obviously intended to explain the witness's mistake, and in context that is the way the jury would ordinarily have received it. No reversible error occurred here.

Defendant argues next that the judge erred by admitting into evidence documents that the State asserted were ballots, or voting records, of defendant's election as "Supreme" of the Latin Kings, because they were inadmissible hearsay not subject to any exception. We disagree.

The State sought to introduce what it characterized as voting records of defendant's election, including two ballots

seized from the home of defendant Manso, and defendant objected based on hearsay. The judge refused to admit the documents because they had not been authenticated. The State recalled Omar W. Morante and DeJesus for the purpose of laying a foundation. They both identified their signatures and testified that, at the election of the Supreme, they and other Latin King members had voted for either defendant or the other candidate by signing their names, by tribe, on a yellow ballot passed among them.

The judge determined that two writings from among the exhibits offered, which it described as tallies of the votes of the Jersey City tribe and the Newark tribe, had been authenticated by a signer from each tribe. The judge admitted the tallies, finding them relevant to the issue of whether defendant was elected Supreme as the State alleged.

Hearsay evidence is generally not admissible. N.J.R.E. 802. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by him as an assertion." N.J.R.E. 801(a).

We are satisfied that the two ballots, or vote tallies, were not hearsay, because they were not offered to prove the truth of the matter asserted. To the extent that they qualified as statements, they asserted only that those whose signatures appeared on them cast votes for a particular candidate. This evidence was not introduced to prove who voted for whom, or even who the candidates were, but as physical evidence to support the testimony of several state witnesses that there had been a state-wide election. They also tended to prove that defendant was named on the ballots and therefore deeply involved in the Latin Kings, contrary to his defense.

Defendant argues that the judge erred by making his sentences on the two conspiracy convictions run consecutively. This issue is moot because the State concedes that the convictions for conspiracy to commit kidnapping must merge with the convictions for conspiracy to commit murder. As noted above, the State agrees that N.J.S.A. 2C:5-2(c) precludes defendant from being convicted of more than one conspiracy. The State argues, however, that the judge erred by merging the four convictions for false imprisonment with the convictions for conspiracy to commit murder. We agree with the State.

The convictions for false imprisonment should survive because the overall conspiracy had other criminal objectives in

addition to false imprisonment. See Hardison, supra, 99 N.J. at 386-87 (conviction for completed offense survives if it was not the sole criminal objective of the related conspiracy). Although the State argues in addition that consecutive sentences should be imposed, we leave that issue for the trial judge in the first instance.

We affirm defendant's convictions; remand for merger of the conspiracy convictions, reinstatement of the convictions for false imprisonment, and resentencing.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION

Pa118

YVONNE SMITH SEGARS
Public Defender
Office of the Public Defender
31 Clinton Street
Newark, New Jersey 07101

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-0834-00T4

STATE OF NEW JERSEY :

Plaintiff-Respondent, :

-v- :

JOSE ANTONIO PEREZ, :

Defendant-Petitioner. :

Criminal Action
AMENDED
NOTICE OF PETITION FOR CERTIFICATION

TAKE NOTICE THAT the defendant, JOSE ANTONIO PEREZ confined at New Jersey State Prison, Trenton, New Jersey, petitions for certification to this Court of the Appellate Division decision of April 12, 2004 which affirmed his conviction of kidnapping, murder, felony murder, conspiracy to commit kidnapping, and conspiracy to commit murder. Defendant was sentenced to 80 years with a 85% parole disqualifier. Defendant is in custody.

Remanded to the trial court for re-sentencing. (NERA was not applicable to the murder counts and the unmerged conspiracy counts should be merged

YVONNE SMITH SEGARS
Public Defender
Attorney for Defendant-Petitioner

BY: _____
HELEN C. GODBY
Assistant Deputy Public Defender

NOTE:
***This is a Public Defender designated counsel case and we hereby request a ten day extension to file a petition for certification.**

C-125 SEP 2004

State of New Jersey
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May 18, 2004

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Honorable Chief Justice and
Associate Justices
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State v. Jose Antonio Perez
App. Div. Docket No. A-834-00T4 56,316

Your Honors:

This office is in receipt of defendant's Petition for Certification in the above-captioned matter.

The State opposes the Petition and relies upon its brief below and the opinion of the Appellate Division. Please find enclosed herewith nine copies of the State's Appellate Division brief in the above-captioned matter. We urge that the Petition be denied since no substantial question is raised.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: Linda K. Danielson
Linda K. Danielson
Deputy Attorney General

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FOLDER
BEGINS