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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4956-94T4

**REC'D**  
**APPELLATE DIVISION**  
JUN 28 1996

STATE OF NEW JERSEY :

CRIMINAL ACTION

Plaintiff-Respondent :

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

v. :

SAMMY MOORE, :

Sat Below:

Defendant-Appellant. :

Hon. William L'E. Wertheimer,  
J.S.C., and a jury

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BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT.

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### PROCEDURAL HISTORY

Union County Indictment number 94-06-0636, filed June 3, 1994, charged defendant Sammy Moore with knowing and/or purposeful murder, in violation of N.J.S.A. 2C:11-3a(1) and/or (2) (Count 1); attempted murder, in violation of N.J.S.A. 2C:11-3a(1) and N.J.S.A. 2C:5-1 (Count 2); two counts of first degree robbery, in violation of N.J.S.A. 2C:15-1 (Counts 3 and 4); felony murder, in violation of N.J.S.A. 2C:11-3a(3) (Count 5); second degree conspiracy, in violation of N.J.S.A. 2C:5-2 (Count 6); second degree possession of a firearm for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (Count 7); unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b (Count 8); and receiving stolen property, in violation of N.J.S.A. 2C:20-7 (Count 9). (Da 1-6)<sup>1</sup>

On December 12, 1994, the Honorable William L'E. Wertheimer, J.S.C., denied defendant's motion to exclude evidence of his oral statement. (1T 38-23 to 39-23) Defendant was tried before Judge Wertheimer and a jury from December 13 through 16, 1994. The jury returned verdicts of guilty on all counts charged in the indictment on December 16, 1994. (7T 55-1 to 56-3; Da 7)

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<sup>1</sup>"Da" refers to the appendix of this brief.

"1T" refers to the Miranda hearing transcript of December 12, 1994.

"2T" refers to the December 13, 1994 transcript of opening statements.

"3T" refers to the December 13, 1994 trial transcript.

"4T" refers to the December 14, 1994 trial transcript.

"5T" refers to the December 15, 1994 trial transcript.

"6T" refers to the December 15, 1994 transcript of summations.

"7T" refers to the December 16, 1994 trial transcript.

"8T" refers to the March 3, 1995 sentencing transcript.

On March 3, 1995, defendant again appeared before Judge Wertheimer and was sentenced to custodial terms as follows:

Count 1 (murder) - life imprisonment,  
30 years without parole

Count 2 (attempted murder) - 20 years,  
10 years without parole,  
consecutive to Count 1

Count 3 (robbery) - 20 years,  
10 years without parole,  
concurrent with other counts

Count 4 (robbery) - 20 years,  
10 years without parole,  
concurrent with other counts

Count 7 (possession of a firearm for an unlawful purpose)  
10 years, 5 years without parole,  
concurrent with other counts

The court merged Count 5 (felony murder) into Count 1 and Count 6 into Counts 3, 4 and 7. A Violent Crimes Compensation Board penalty totalling \$350 (\$50 per count) and a \$525 Safe Neighborhoods Service Fund (\$75 per count) were assessed. (8T 13-8 to 15-2; Da 8-9)

Defendant's notice of appeal was filed, by leave granted, nunc pro tunc on May 22, 1995. (Da 13-14)

## STATEMENT OF FACTS

### Introduction

In the early morning hours of December 5, 1993, Marcus Benjamin was shot dead while he was selling drugs on a street corner in Plainfield. (3T 4-14 to 16; 3T 6-10 to 13; 4T 27-14 to 15; 4T 106-24 to 107-5) Keith Staples was shot twice at around the same time. (4T 138-14 to 16; 4T 139-8 to 7; 4T 141-15 to 23) Marcus Benjamin's car was driven away from the scene. (4T 26-25 to 27-5; 4T 50-22 to 51-2) Briefly, the State's proofs against defendant Sammy Moore were this: Two witnesses identified defendant, who is also known as "Smiley," as one of several young men who were near the scene of the shooting just before it occurred. (3T 68-10 to 3T 71-9; 3T 102-7 to 103-16; 5T 127-17 to 18) Several of defendant's friends claimed that he told them that he had shot someone. (3T 34-5 to 6; 5T 16-11 to 13; 5T 36-21 to 37-2) Defendant had Marcus Benjamin's car on the day after the shooting. (4T 64-3 to 25; 4T 68-16 to 25) After his arrest defendant gave two statements to the police. In his second statement he admitted shooting two men. (5T 61-23 to 62-15; 5T 91-10 to 15)

At a pretrial hearing defendant's second statement was held admissible. (1T 39-12 to 20) Defendant disavowed it as involuntary at that hearing and at trial. (1T 26-22 to 27-21) He testified that he was with a number of people in an apartment in Newark when the shooting in Plainfield occurred. (5T 128-1 to 129-5) The

following testimony was adduced at the pretrial hearing and the jury trial.

Pretrial Miranda<sup>2</sup> Hearing

Detective Dean Marcantonio testified to the circumstances surrounding two conflicting statements given to him by defendant. Pursuant to a warrant, Marcantonio arrested defendant as he left 195 First Street, Newark, at 2:05 p.m., on December 13, 1993.<sup>3</sup> (1T 4-2 to 13; 1T 6-4 to 11) After a brief trip to the Newark Police Department for processing Marcantonio took defendant to the Plainfield Police Department, arriving there at 3:40 p.m. (1T 6-12 to 7-8) Defendant was booked there and placed in a holding cell for an hour before being taken to an interview room by Detective Gallagher. (1T 7-11 to 8-15)

Marcantonio testified that he and Detective Gallagher told defendant the charges against him and had defendant read them and the form containing Miranda rights out loud. (1T 21-1 to 4) Afterwards, defendant said that he understood his rights and agreed to give a statement, signing the waiver of rights portion of the form. (1T 8-21 to 22; 1T 10-2 to 12) According to Marcantonio, defendant did not request an attorney, never invoked his right to remain silent, and waived his Miranda rights at around 4:55 p.m. (1T 11-14

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<sup>2</sup>Miranda v. Arizona, 384 U.S. 1034, 104 S.Ct. 1304 (1966).

<sup>3</sup>The two high-rise apartment buildings at 175 and 195 First Street, Newark, each about 20 stories tall and containing 300 apartments, are called "The Spires" by many of the witnesses who either lived in or frequented those buildings. (3T 9-8 to 18; 3T 123-20 to 124-9; 5T 119-14 to 18; 5T 128-4 to 7)

to 12-4) Marcantonio and Gallagher talked to defendant for two and a half hours, receiving from him an oral statement in which he said that he was not in Plainfield but was in his friend Brenda Johnson's apartment at 195 First Street in Newark, with Traci Thomas on the night of December 4, 1993. (1T 13-10 to 25; 1T 19-12 to 24; 1T 20-16 to 23) According to Marcantonio, none of this was put into written statement form for defendant's signature because "it wasn't necessary" since defendant "was not giving [them] anything out of the ordinary that [they] thought was worth putting on paper." (1T 20-4 to 15)

When Marcantonio contacted Traci Thomas she disputed what defendant had said. (1T 13-23 to 14-4) On the next day, December 14, Marcantonio took defendant back into the interview room at around 2:10 p.m. (1T 14-5 to 24) Defendant was presented with a - Miranda form to read aloud again, and again he indicated that he understood his rights and, without asking to see an attorney, again agreed to waive his rights. (1T 14-25 to 16-10) He was then questioned for another hour, during which time he was told that his alibi was disputed. Ultimately he stated that he was responsible for the shooting. (1T 21-14 to 24)

Marcantonio denied that he or Gallagher threatened defendant, suggested that he would be sentenced to death, or said that defendant's friends would get into trouble if defendant did not admit to facts which Marcantonio described to him. (1T 22-10 to 23-16)



Defendant testified that he was not informed of the nature of the the charges against him and thought that he had been arrested for drug possession. (1T 24-17 to 25-5) When he was questioned by Marcantonio and Gallagher, he asked to see a lawyer but was told he could not until he was recommended for a public defender. Then he asked to make a phone call but was told that he could not until his charges were "taken care of." (1T 25-10 to 21) On the first day, he told them whom he was with on December 4, 1993, from whom he bought the car that was used in the robbery/homicide incident, and how much he paid for it. (1T 32-15 to 24) At first, they typed up his statement, but eventually stopped typing and tore it up, saying "That's not what we want." (1T 25-22 to 26-16) They said the same thing when they returned the following day after telling him that they had talked to Brenda Johnson and defendant's other friends. (1T 26-17 to 26-9)

Defendant acknowledged that he had signed a statement on the second day. He said that Detective Gallagher told him that they would make sure he got the death penalty if he did not sign it. The detectives also threatened to put in jail all of the young women who said that defendant was with them that night, and to have their children placed in foster homes. (1T 26-22 to 27-21)

Defendant stated that they questioned him for two to three hours on the second Jay, repeatedly trying to get him to confess to something that he did not do. He stated that eventually he grew tired of their "ragging on" him, so he "just went along with it" and said what they told him to say. (1T 28-9 to 21) The detectives

said that since he was 19 years old, he would serve his sentence in Jamesburg. They told defendant that they had spoken to the prosecutor about making a deal, and all that defendant had to do was to tell them where they could find the gun. Defendant told them that he had thrown the gun in a park. They said that the prosecutor wanted him to show them where the gun was. They took him out to look for it on the third day. (1T 27-22 to 28-7)

The trial judge credited the detective's testimony, found that defendant had knowingly, voluntarily and intelligently waived his rights, and held that the challenged statement would be admissible at trial. (1T 39-12 to 23)

### The Trial

Just before he was killed, Marcus Benjamin was standing in front of a house at 1102 West Third Street near the corner of Morris Street, where Quan Collier lived with his mother and his stepfather, Anthony Mack. (3T 8-7 to 10; 4T 26-16 to 22; 4T 33-11 to 18; 4T 52-20 to 53-3; 4T 106-10 to 19) On the porch of that house was 16-year-old Keith "Mook" Carson, who, along with Quan Collier, was helping Marcus sell drugs. (4T 24-2 to 3; 4T 26-13 to 24; 4T 27-16 to 17; 4T 40-6 to 9) From the porch Keith saw six or seven men wearing ski masks walk out from between two neighboring houses on Third Street. (4T 27-23 to 28-1; 4T 28-7 to 13) They surrounded Marcus, drew guns and pointed them at him. (4T 41-13 to 16; 4T 49-12 to 14; 4T 49-20 to 50-1)

Only one of the men Keith saw did not have his face covered with a ski mask. (4T 39-15 to 40-5) He was another drug dealer known to Keith as "Jimbo," whom the police later determined was named James Baines. Jimbo lived just down the street on West Third Street. Keith used to help Jimbo sell drugs in front of Quan's house on that same corner before Marcus started using that area. (4T 27-18 to 19; 4T 30-17 to 31-7; 4T 43-17 to 19; 4T 44-15 to 16; 5T 101-24 to 10) According to Keith, Jimbo was "right there up on" Marcus when Keith saw what was going on. (4T 30-8 to 9)

Fifteen-year-old Quan Collier had already taken in about \$1,000 in drug proceeds and turned it over to Marcus that night. He and Marcus's best friend, Ryland Robinson, saw Marcus place the money in the trunk of his car, a blue Honda Accord which was parked in front of the house. (4T 26-25 to 27-5; 4T 50-22 to 51-2; 4T 55-7 to 10; 4T 60-1 to 5; 4T 110-17 to 111-25; 4T 112-1 to 6; 4T 114-6 to 7) Quan was inside the house getting another supply of drugs to sell when Keith ran inside and told him that some men were outside "playing around with guns." (4T 28-1 to 3; 4T 42-7 to 18; 4T 107-12 to 15)

When the two boys went to the front door, Marcus was facing the house, his hands in the air, surrounded by the men. He told the boys to go back into the house. (4T 28-3 to 5; 4T 49-3 to 9; 4T 32-2 to 6) Within minutes, several shots rang out--three, according to Quan (4T 113-20 to 21), four or five, according to Keith (4T 32-13 to 32-23). A bullet broke through the window, and the boys hid in the basement until they heard a car drive away. (4T

28-5 to 6; 4T 32-16 to 33-6; 4T 50-18 to 21; 4T 108-4 to 8) Marcus Benjamin's car was gone when the boys looked back outside. (4T 26-25 to 27-5; 4T 50-22 to 51-2) Anthony Mack, who was also inside the house, called the police. (4T 47-18 to 48-16; 4T 79-15 to 16)

Keith Carson was sure that when the men approached Marcus Benjamin on the street no one else was outside with him. (4T 46-21 to 47-5) However, Keith Staple claimed that he was there, standing three or four inches away from Marcus Benjamin, asking him for a match, when three men, two of them wearing ski masks, walked up to them from between the houses. (4T 134-17 to 135-14; 4T 136-8 to 20) One of them held a gun to Keith Staple's left ear, and then to his right side, while the other two went through Marcus's pockets. (4T 137-13 to 14; 4T 138-5 to 8; 4T 138-22 to 24; 4T 155-6 to 13) None of the men went through Keith's pockets or tried to take anything from him. (4T 154-15 to 155-1) Soon, Keith heard the car start, and the man holding him shot him twice, once in the chest and once in the right arm. (4T 138-14 to 16; 4T 139-8 to 7; 4T 141-15 to 23)

Keith ran toward Manson Place, looking back long enough to see the three men get into the car and take off. (4T 142-4 to 251 4T 143-1 to 10) Then he collapsed. (4T 143-13 to 25) He had sustained four skin wounds in the arm and chest. He received emergency surgery to repair damage to his liver and diaphragm, by which time he had lost a large quantity of blood, which alone was considered life-threatening by the doctors. (5T 4-17 to 5-3; 5T 6-14 to 20; 5T 7-12 to 22; 5T 8-17 to 24) He remained on a respirator

for "a couple of days" and was discharged from the hospital on December 17, 1993. (5T 9-2 to 4; 5T 10-11 to 13)

Keith Staple never got a direct look at this person's face but knew that he was "light skinned." (4T 140-24 to 6) Much later, in 1994, when shown photographs by the police, Keith identified Tariq Diggs as the shooter. (5T 119-22 to 120-10) He testified at trial that he had the person he identified "just looked like the individual", but that he was "not positively sure" that he had identified the man who shot him. (4T 146-8 to 16)

During the early morning hours just after the shooting Detective Marcantonio took statements from several people. Charles Jackson had been using a phone at the corner of Manson and West Third when Keith Staple ran down the street and collapsed. (4T 96-23 to 98-14) Jackson flagged down a police car to help Staple and led Marcantonio to Kyewaghana Cook and Khahlia Hassenbey, who gave him statements later that day. (3T 152-2 to 19; 4T 99-18 to 100-3; 4T 105-6 to 19; 5T 45-25 to 46-6)

Fifteen-year-old Kyewaghana Cook and 12-year-old Jada Williams lived on South Second Street, not far from the scene of the shooting. (3T 57-14 to 25; 3T 87-12 to 13) On December 4, they and Madina Williams, then 11 or 12 years of age, were walking home on Second Street near a bridge when they saw a white car make a U-turn and park in front of number 1147 South Second, the house next door to theirs. (3T 58-5 to 61-14) Three young men got out of the car to talk to them. (3T 62-2 to 6) Seventeen-year-old Khahlia Hassenbey, who was in the house, went outside momentarily and saw

the boys. (3T 64-5 to 25; 3T 98-2 to 3) Jada remembered that they told the girls they were from Newark, and that their names were Tariq, Rock, and Smiley. (3T 90-10 to 20) Kyewaghana remembered only the names Smiley and Rock. (3T 62-7 to 63-4)

Kyewaghana and Khahlia identified defendant in court as the person who said his name was Smiley. (Kyewaghana, 3T 63-15 to 21; Khahlia, 3T 100-9 to 21) During their investigation the police learned that the other two young men were Tariq Diggs and David Diggs, who called himself "Rock." (See 5T 100-20 to 21; 5T 102-20 to 25) It was also discovered that the driver of the white car was Kenneth Brooks of Plainfield. (See 4T 140-11 to 22; 5T 101-4 to 10)

According to Khahlia Hassenbey, it was 8:30 or 9:00 p.m. when the boys parked in front of her house. (3T 98-11 to 15) They left, but, according to Kyewaghana, the car returned and blew the horn around 11:00 p.m. That time no one got out of it. (3T 65-14 to 18)

Later on, Kyewaghana and Khahlia went out, intending to go to a club. It was then around midnight, according to Kyewaghana (3T 65-22 to 66-7), 1:00 or 1:30 a.m., according to Khahlia (3T 101-15 to 17). They were on South Second Street, approaching its intersection with Morris Avenue, when they saw the white car again. This time it was across the street from them, parked on the corner of Morris and South Second. (3T 66-8 to 67-3)

Kyewaghana and Khahlia saw three or four boys, one of whom was defendant, get out of the car and walk down Morris toward its intersection with West Third. (3T 67-21 to 69-9; 3T 102-23 to



102-22) According to another witness, Ryland Robinson, Jimbo lived at Morris and South Second. (4T 57-7 to 11) Patrolman Michael Richards, the first officer to arrive at the scene, testified that it is possible to walk through the back yards of Morris Street houses, through an alley that separates 1102 and 1104 West Third Street, and emerge between those two houses on West Third Street, near where Marcus Benjamin was shot. (3T 4-2 to 21; 3T 5-10 to 11; 3T 19-5 to 21-14)

When Khahlia saw the boys get out of the white car she thought she saw one of them, but not defendant Sammy Moore, with a gun. (3T 102-17 to 20; 3T 111-19 to 112-5) Khahlia and Kyewaghana had continued down Second Street, passed Morris, and turned on the next street, Manson Place, when they heard about six gunshots coming from the direction of Morris and Third. (3T 71-1 to 13; 3T 103-11 to 12) They saw Keith Staple run down the street, calling for help and falling to the ground at Manson and Third Street. (3T 71-21 to 23; 4T 142-4 to 251 4T 143-1 to 10; 4T 143-13 to 25)) By the time Kyewaghana got to the phone booth on Monroe and West Third Street to call the police, Charles Jackson already had flagged down the police car. (3T 71-1 to 12; 3T 72-15 to 21; 3T 73- 21 to 74-1; 3T 152-2 to 19; 4T 96-23 to 98-1)

That morning Detective Marcantonio also talked to Kimberly Clark, a close friend of Marcus Benjamin. Shortly before 12:50 a.m., she had driven by Morris and West Third and seen Marcus there selling drugs, standing by his car. She knew that he was selling drugs at the time. She rolled down her window and called out to

Marcus that she would be right back. She was on her way to the bank to withdraw \$20. By the time she got back, about an hour later, the police had blocked off the area and Marcus was lying on the ground. (4T 12-2 to 18; 4T 15-17 to 20) She stayed at the scene for at least five minutes and then drove around the corner to West Fourth Street where she lived. (4T 13-24 to 14-11; 4T 19-14 to 16)

On West Fourth, she found herself right behind Marcus's blue Honda with what she thought were three people inside it. She recognized it as Marcus's car because of the customized large black bumpers Marcus had installed. It was moving "pretty fast," she said at trial, probably about 55 miles per hour. (4T 9-14 to 24; 4T 14-18 to 15-10)

Kimberly put Chanda Murphy, another close friend of Marcus, in touch with Marcantonio. Chanda was the registered owner of the blue Honda Marcus drove. She had agreed to put the car in her name because Marcus had no driver's license. She knew that Marcus kept the registration, title and insurance card inside the car. (4T 4-1 to 25; 4T 5-1 to 3; 4T 5-25 to 6-6)

On the evening of Sunday, December 5, Marcantonio Learned that the blue Honda had been found in Orange. (5T 46-17 to 47-2) On December 8, he spoke to Luciana and Elizabeth Wellman about how that car got in their back yard in a spot where it could not be seen from street. (5T 47-21 to 25; 4T 64-7 to 25) Luciana Wellman, then seventeen years old, met the person she knew as Smiley through her cousin, Natasha Levant, who lived at 195 First Street in

Newark. (4T 173-25 to 174-1; 4T 174-2 to 175-9; 5T 32-23 to 25) On Sunday, December 5, Smiley drove the Honda to Luciana's home and parked it in her back yard. Tariq was with him. (4T 177-7 to 14) Initially, he told her that he had bought the car from a man, whose name he did not tell her, in Plainfield. When he showed her the title to the car, she noticed a woman's name on it. He then said that it was his aunt's car. He said that he intended to sell it but he wanted to leave it in her back yard since the car had no alarm or other security device, and he did not want it to be stolen. (4T 177-20 to 178-25)

Although she had never mentioned it to the police before the day she testified, claiming at trial that she had forgotten it, Luciana told the jury that while Smiley and Tariq were at her home, Tariq asked her if she had any cleaning solution. She gave him some Glass Plus and watched him wipe down the inside door, the steering wheel and dashboard of the car before she stopped watching him and went inside. (4T 179-13 to 22)

Elizabeth Wellman, Luciana's mother, testified that defendant told her that he had gotten the car from his aunt, showed her the registration, title and insurance papers, and said that he did not want to leave it in the rough neighborhood where he lived. (4T 65-1 to 7; 4T 65-19 to 22; 4T 77-16 to 75-23) After he left, Elizabeth Wellman called the police and asked them to check the license plate number on the car. (4T 68-14 to 18)

Luciana and Elizabeth Wellman led Detective Marcantonio to Natasha Levant, defendant's neighbor, through whom Marcantonio

eventually was able to learn that Smiley's real name was Sammy Moore. After that, he compiled a photo array. (5T 31-5 to 6; 5T 47-22 to 49-1; 5T 128-4 to 7)

In the next several days, Natasha Levant identified defendant's photograph as that of her friend Smiley. (5T 38-2 to 23) Elizabeth and Luciana Wellman identified defendant as the person who left the blue Honda at their house. (Elizabeth, 4T 69-23 to 71-7; Luciana, 4T 183-15 to 184-16) Kyewaghana Cook identified defendant as the Smiley whom she had seen in Plainfield on the night of December 4 and the early morning of December 5. (3T 74-22 to 76-20) Defendant was arrested on December 13, 1993. (5T 52-16 to 19)

Several of defendant's friends, who claimed to have seen him on December 4 or spoken to him about this incident, testified. - Traci Thomas, 18 years old by the time of trial, had met defendant three weeks before the incident through Brenda Johnson and spent the night of December 4 at Brenda's apartment. Her friends, Ebony and Hassana Bennett, who lived with Brenda, were there as well. (3T 26-21 to 28-1; 3T 32-6 to 7; 3T 41-25 to 42-4) She testified initially that at around 9:00 p.m., defendant arrived there with Tariq. (3T 30-10 to 31-5; 3T 35-10 to 12) Later, she stated that she could not remember if defendant was already there when she arrived. (3T 44-24 to 45-8) She acknowledged having told the police several days after the incident that defendant was there already when she got there and that at some later time Tariq Diggs and Alexander Walker (also called "Pop") showed up. She conceded

that, if that was in her statement, it must have been true. (3T 45-9 to 46-10)

At trial, Traci also could not remember whether she was being accurate when she told the police that Alexander and Tariq left the apartment with defendant. She remembered that he left but could not remember what time that was. (3T 31-10 to 24; 3T 48-17 to 18) She testified that he was back at some time after midnight, and he told her that he had shot two people and had some money and a car. (3T 32-15 to 34-6; 3T 34-18 to 19)

Alexander "Pop" Walker was 15 years old at the time and lived at 175 First Street in Newark. He testified that on Saturday, December 4, 1993, Tariq Diggs asked him if he wanted to "go sticking," which meant to go out robbing people. (3T 126-6 to 14; 3T 131-1 to 16) Alexander did not go with Tariq because Shannelle Diggs, who is the mother of one of Alexander's babies, would not let him go. (3T 130-6 to 12; 3T 131-12 to 19)

Alexander had told Detective Marcantonio that after he had this conversation with Tariq, he saw defendant, Tariq, Rock, and "the driver," whom he knew was from Plainfield and drove a white Hyundai Elantra, in front of the apartment buildings. (3T 127-10 to 128-2; 3T 129-11 to 25; 3T 130-1 to 5) When pressed at trial to state that all of these young men were together in front of the buildings, he repeatedly insisted that he did not know if the



others were with defendant or simply hanging out.' (3T 126-18 to 24; 3T 127-3 to 6; 3T 128-23 to 24; 3T 143-23 to 15)

Alexander said that he saw Tariq and Rock again around 4:00 the next morning. Tariq gave Alexander a chain. (3T 132-2 to 133-6) Alexander, who had just been sentenced as a juvenile for acts amounting to aggravated assault and receiving stolen property, accepted the chain. He said at trial that he was aware that it had been stolen. (3T 143-5 to 16) He was never charged with receiving this particular stolen property. (3T 143-19 to 22)

When Alexander left Tariq's aunt's apartment, he visited Ebony Bennett, the mother of another one of his babies, in Brenda Johnson's apartment. (3T 133-13 to 134; 3T 134-3 to 4) Defendant was there, lying down with his head in Traci Thomas's lap, talking to her. (3T 134-7 to 24)

Natasha Levant testified that she became angry when she learned that defendant had gotten her cousin, Luciana Wellman, involved with a stolen car. She went to his apartment and confronted him. (5T 35-18 to 22) At first he acted surprised, but he finally told her that "[t]here was a body attached to [the car]." (5T 36-4 to 24) When she asked him what he meant by that, initially he replied that "he" had shot someone. Later, he changed this and said "we" shot someone. (5T 36-25 to 37-13)

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<sup>4</sup>The prosecutor tried to confront Alexander with his March 30, 1994, statement to the prosecutor's office. In it, he was asked, "Who was with Sammy Moore at that time?" He replied, "David, Tariq Diggs." (3T 127-10 to 128-2) This was held inadmissible, and the judge instructed the jury to disregard it. (3T 128-11 to 16)



Shay Walker, who had known defendant for about a year before this incident, testified that she had seen him with a gun "a lot of time[s]." (5T 12-12 to 16; 5T 26-4 to 7) Regarding the incident of December 5, 1993, Shay claimed that defendant told her that if the police could not find a gun, then they did not have any proof against him. (5T 15-16 to 18) She also stated that on December 5, 1993, defendant told her that "they" went to Plainfield, shot someone, and took his car. Shay made it clear that defendant did not say that "he" did this himself. (5T 15-19 to 16-22; 5T 24-4 to 12) She told the police that defendant was at her apartment on December 4, 1993, but left at around 11:00 p.m. (5T 23-6 to 12)

After defendant was arrested, Shay frequently set up telephone conference calls between him and third parties. (5T 13-7 to 14-4) She testified that she overheard a conversation between defendant and someone named Tanton Venerable, in which defendant asked, "What did you do with that?" Tanton replied, "I took care of it." (5T 14-5 to 25) Her statement to the police reflects that Shay thought two young men could have been talking about a gun. However, she conceded at trial that she did not really know what they were talking about and the notion that they were talking about a gun was suggested to her by Detective Marcantonio. (5T 24-15 to 26-1)

Detective Marcantonio's trial testimony was consistent with his pre-trial hearing testimony concerning the circumstances of defendant's two statements to him and Detective Gallagher. He stated that in the beginning he and Gallagher told defendant that he had been identified as having a car that was involved in a

murder and that witnesses had seen him in Plainfield that night. (5T 59-11 to 22) Defendant told them that he and Tariq had bought the Honda for \$1,000 from someone named Snoop at 195 First Street in Newark. He denied that he was in Plainfield on December 4 and stated that that night until the early morning hours of December 5 he was with Traci Thomas in Brenda Johnson's apartment at 195 First Street. He also said that he carried a .380 caliber automatic handgun when he sold drugs in front of 195 First Street. (5T 62-9 to 15) This initial interview took from 4:50 p.m. to 7:24 p.m. (5T 56-21 to 22; 5T 62-16 to 20)

On the next day Marcantonio spoke to Traci Thomas in Newark. Without speaking to Brenda Johnson herself, he talked to Ebony and Hassana Bennett, girls who lived with her. (5T 64-4 to 65-14) Back in Plainfield he re-Mirandized defendant and told him that Traci Thomas "did not agree with anything he said" and that Brenda Johnson "wasn't even there that night." (5T 66-13 to 67-17) The outcome of the next three hours (from 3:25 p.m. to 6:22 p.m.) was a lengthy, detailed statement in which defendant admitted shooting Marcus Benjamin and Keith Staple. (5T 67-18 to 68-3; 5T 86-20 to 87-1)

Defendant's second statement contained the following account of a shoot-out between him and several men in Plainfield: He, Tariq, Rock, and the person who owned the white car, whose name he did not know, left Newark at around 11:00 p.m., eventually driving into Plainfield. (5T 71-7 to 10; 5T 73-10 to 14) According to the statement, defendant was the only one of the group who had a

gun, a loaded six-shot .44 revolver, which he had traded for a brand new .380 automatic. (5T 73-15 to 74-9)

The statement further described how they were on Second Street near a bridge when they met and told their names to three girls, two of whom were "young," aged 15 or 16, and the other a "very light skinned" girl who looked Puerto Rican. (5T 74-12 to 75-4) Defendant, Rock and Tariq got out of the car but refused to go inside their house when the girls invited them in. At one point the "light skinned girl" went inside and brought out "brown skinned girl." (5T 76-22 to 77-7)

Defendant's statement went on to say that when he and his friends left these girls, they stopped and got out of the car again on Halsey and Third to talk to some other girls. It was then that some "kids with masks on" started yelling at them because they were talking to their girls. One of these individuals pulled out a gun, whereupon defendant and his friends got back into their car and took off, eventually ending up on South Second Street. (5T 78-1 to 14) When defendant commented that he would like to "get those guys and scare them," the driver told him that all he would have to do is cut through the back yards and he would end up near the house.

The statement indicates that driver then pulled over near a boarded up garage. Defendant left the car by himself, cut through the yards, and came out with his gun drawn. (5T 78-18 to 25) At that point, defendant saw a "fat guy" get out of a blue Honda Accord. Defendant asked him, "What's all this stuff you're talking about?" (5T 78-25 to 79-2) At that, someone who was on the porch

ran into the house and someone else crossed the street and approached defendant. Defendant grabbed him and held him while talking to the "fat guy." (5T 79-2 to 6)

Defendant stated that the person who had gone into the house returned to the porch with a gun in his hand. Defendant told the "fat guy" to "tell this boy to put the gun down" and asked him what he had put in his trunk. The "fat guy" replied that it was not his car. (5T 79-6 to 10) The fellow on the porch then raised his gun, the "fat guy" said something to the person on the porch, whereupon the person on the porch fired one round at defendant. When he did this, defendant shot the "fat guy" in the back from about two steps away from him. (5T 79-10 to 19; 5T 80-22 to 24)

At that, the person on the porch shot again. The person who defendant was still holding tried to break away, and defendant pulled him back. Then another person started running across the street, shooting at defendant. This person got hit by a car. Defendant then shot the man he was holding, who took off running. (5T 79-10 to 19) In all, defendant fired three shots. (5T 80-16 to 18) He estimated that about five shots had been fired at him. (5T 80-19 to 21)

The statement went on to say that the gun being fired by the person on the porch seemed to jam, whereupon this person ran back into the house. Defendant shot at the door. (5T 80-4 to 6) Defendant picked up the keys to the car from the ground and drove away in the blue Honda. When he saw his friends in the white car down the street, he stopped; Tariq got into the Honda and drove it

back to Newark by way of Route 22. (5T 80-4 to 15) He tossed the gun out of the car and into some bushes at the Bloy Street exit. (5T 81-25 to 82-3)

According to the statement, when he got back to Brenda's apartment, Traci asked him where he had been, but he did not tell her. (5T 82-11 to 19) He left the apartment long enough to drive the Honda to another street in Newark, and returned to spend the night with Traci. (5T 82-11 to 19) On the following day he and Tariq took the car to "Shana's" house and asked her if he could leave it there. He told her that it was not stolen. (5T 83-22 to 84-1) He told her mother that he wanted to leave the car there so that no one would steal it, and he left the registration and other papers with her. (5T 84-15 to 22)

Defendant's statement related that he told his girlfriend's brother, Tanton Venerable, that he had been involved in a shoot-out in Plainfield and had hit two people and taken a car. This was the only person he told about the incident. (5T 83-2 to 12) A handwritten sketch of the shooting scene, which Marcantonio said that defendant drew himself, was attached to defendant's statement. (5T 85-23 to 86-1; 5T 90-20 to 24)

Marcantonio testified that much of the statement was corroborated. For example, there was indeed an abandoned building on the corner defendant had described. (5T 93-13 to 16) The "fat boy" referred to in the statement was assumed to have been Marcus Benjamin, who was "very large," with a body weight of 275 pounds, according to the medical examiner. (4T 170-20 to 24; 5T 95-23 to

25) Kyewaghana Cook and the other girls with her did meet the descriptions defendant gave of them in the statement. (5T 75-6 to

20) Two bullets from a .44 caliber weapon had been found by police, one from Marcus Benjamin's body and the other from Keith Staple's jacket pocket. (5T 90-8 to 18)

On the other hand, based on the physical evidence, the police knew that the .44 mentioned in defendant's statement was not the only gun used in the incident. A .380 casing was found at the scene. (5T 90-4 to 6) It was discovered, and stipulated at trial, that the .44 caliber bullets from Keith Staple's jacket and the one removed from Marcus Benjamin's body were fired by the same weapon. (5T 126-14 to 24) The police never recovered the weapon, although they looked for it twice, once with the use of a metal detector, in the area where defendant's statement said it had been tossed. (5T 104-8 to 106-5) Another inaccuracy in defendant's statement had to do with the gunman who was hit by a car. The police had no information about anyone being hit by a car in that area that night. (5T 97-1 to 6)

Testifying on his own behalf, defendant repeated his original statement to the police and disavowed his second statement. He said that for most of the night of December 4 until the morning of December 5 he was in Brenda Johnson's apartment with Traci Thomas and Ebony Bennett. He made only a few brief trips to other areas in the apartment building during that time. (5T 128-1 to 130-2) Alexander Walker and Tariq visited Ebony, but he did not go anywhere with them. (5T 130-16 to 8) He testified that Brenda went



out to a club which did not open until midnight, so she left at around that time. (5T 130-8 to 10)

Defendant denied going to Plainfield on December 4 and denied that he told Traci Thomas or anyone else that he had shot someone there. (5T 131-22 to 132-13) He said that he did not know anyone named Jimbo but had met Kenneth Brooks ("the driver") through Tariq. (5T 132-18 to 20)

Concerning his possession of the blue Honda, defendant testified that he bought it for \$1,000 that Sunday morning from someone named Snoop, who frequently sold "tagged up" (reconditioned) cars at low prices. (5T 133-19 to 134-11) Snoop gave him the title and other papers and told him to go to Motor Vehicles to get it filled out. (5T 135-10 to 14) Defendant had not bought a car before, so he believed what Snoop said. (t% 135-15 to 20) He intended to fix it up and keep it. (5T 134-16 to 17; 5T 135-4 to 5) He took it to the home of Luciana Wellman (whom he called "Shana") to keep it from being stolen. (5T 134-23 to 135-3; 5T 135-21 to 136-1) He did not know that it was involved in any shooting until Natasha Levant said so, after she had been told that by Luciana. (5T 143-7 to 144-1) Defendant acknowledged that he did own a .380 caliber gun. (5T 144-12 to 16)

As he had in his pre-trial hearing, defendant described the pressure he felt to give the second statement to Marcantonio, including being threatened with the death penalty if he did not cooperate. He said that, except for the part about throwing the gun out of the car into some bushes, which he made up (5T 200-11 to

202-22), Marcantonio gave him all of the details contained in his statement, including a description of the girls in Plainfield and of Marcus Benjamin as a "heavy guy" (5T 139-16 to 141-22; 5T 179-17 to 180-8; 5T 183-19 to 185-10; 5T 196-8 to 21).

Regarding the sketch of the area, defendant explained that he copied a sketch that the detectives drew when they told him what they believed happened. (5T 142-13 to 143-6) Marcantonio had by then confirmed that when he questioned defendant the second time he had spoken to so many people that he had an idea how the incident occurred, although he denied suggesting any information to defendant. (5T 112-11 to 16) However, he did admit that he drew and labeled the streets on the sketch defendant purportedly prepared "in order to help him understand where he was because he [was] from out of town." (5T 98-4 to 9)

The following information was disclosed about various State's witnesses: Kyewaghana Cook had an outstanding charge of cocaine possession when this incident occurred. (3T 80-10 to 14) Before trial, the prosecutor had told her that she (the prosecutor) would "take care of it" on the day Kyewaghana testified. (3T 80-15 to 17) On October 14, 1994 (about two months before she testified), Khahlia was arrested for possession of cocaine with intent to distribute it. (3T 107-23 to 108-3) Quan Collier was arrested on December 4, 1994 (ten days before he testified) for possession of cocaine with intent to distribute it. (4T 107-2 to 4) Keith Carson was brought to court from juvenile detention. On the night before he testified he had been arrested for car theft. (4T 24-8 to

18) This was the third time he had been taken into juvenile custody. (4T 24-19 to 20)

Anthony Mack admitted to being a drug dealer during 1992 and 1993. (4T 93-9 to 12) He had prior convictions for possession of cocaine and an unrelated possession with intent to distribute it. Four months before trial he was arrested for possession of drug paraphernalia. (4T 84-14 to 85-6)

Keith Staple was a former drug dealer. He denied that he was either selling drugs or buying them from Marcus Benjamin that night. (4T 151-19 to 20; 4T 156-25 to 157-3) However, a hospital security officer found 10 vials of white powder in his clothing after he was admitted. (4T 121-15 to 122-6) He had been in jail since his release from the hospital and by the time of this trial he was serving a prison term of five years, three without parole, for possession of cocaine with intent to distribute it. (4T 144-15 to 145-10)

After denying that she had an intimate relationship with defendant, Traci Thomas conceded that she slept with him at Brenda Johnson's apartment that night. She would not admit that she told defendant she intended to "get even" with him for refusing to leave his girlfriend and move in with her. (3T 51-3 to 52-2)

Natasha Levant acknowledged that even at the time of trial, she continued to harbor anger and resentment toward defendant for having involved her cousin, Luciana Wellman, in this affair. (5T 41-1 to 25)

LEGAL ARGUMENT

POINT I

THE COURT ABUSED ITS DISCRETION AND DEPRIVED  
DEFENDANT OF A FAIR TRIAL BY REFUSING TO  
ADJOURN LONG ENOUGH FOR DEFENDANT'S ATTORNEY  
TO PRODUCE TWO SUBPOENAED WITNESSES.

Defendant testified on the third day of trial, after the State produced 26 witnesses. He stated that, but for a few brief trips to other areas in the building at 195 First Street, he was in Brenda Johnson's apartment with Traci Thomas, Brenda Johnson and Ebony Bennett all night long. (5T 128-1 to 130-2) He indicated that Tariq visited that apartment but he did not leave with Tariq. (5T 130-18 to 131-8) According to defendant's testimony, Brenda Johnson would have been able to confirm that he was in her apartment until around midnight, when she went out to a club. (5T 130-6 to 13)

During a break in defendant's cross-examination, defense counsel stated that he had subpoenaed Brenda Johnson and Ebony Bennett, but that they had not appeared as of then. (5T 189-15 to 20) Both witnesses had given statements to the police concerning defendant's presence in Brenda Johnson's apartment on December 4, 1993. Based on these statements, Ebony Bennett was expected to testify that defendant was in Brenda Johnson's apartment until she went to bed at 11:00 that night. (5T 190-8 to 13) Brenda Johnson's anticipated testimony would have placed defendant inside her apartment at least until midnight, when she left to go to a club. (5T 190-14 to 18)

REC'D  
APPELLATE DIVISION

MAR 14 1996

*R. Smith*  
Clerk of the Court

Counsel stated that the investigator who had served the subpoenas had learned that Ebony Bennett, a juvenile, had been arrested on the prior night and that Brenda Johnson, with whom Ebony lived, was most likely in the Essex County Courthouse trying to arrange for Ebony Bennett's release.<sup>5</sup> (5T 189-20 to 190-3) Counsel asked for additional time to secure these witnesses. (5T 189-20 to 190-7) However, for reasons apparently primarily related to his schedule, the trial judge wanted to complete summations that very day so that the jury could be charged the next morning. (5T 188-25 to 189-10)<sup>6</sup>

The trial judge denied the motion for additional time, stating:

I don't find the testimony at all significant in view of the fact that the alleged murder took place at a period of time where even if he was there until midnight, he had plenty of time to drive to Plainfield and commit the murder. The testimony is not dispositive. I will not grant your request to adjourn this case. This case was put on the calendar for a long time.

(5T 190-19 to 25) The court then asked whether counsel had a proof of service with him, which he did not, whereupon the court said, "If you don't have proof of service, your motion is definitely not

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<sup>5</sup>It is not known whether Ebony was arrested for conduct committed on the night of her arrest, or whether she was coincidentally picked up on the eve of her expected testimony in this case for acts committed at some time prior to December 14, 1994. Either way, her failure to appear, like Brenda Thomas's failure to appear, was unavoidable and in no way the fault of either of these witnesses or defendant.

<sup>6</sup>The judge indicated that the next day was a sentencing day. He wanted to charge the jury that day and then proceed directly to his sentencing calendar.

being granted." (5T 191-3 to 4) The cross-examination and re-direct examination of defendant was thereafter completed, and both sides gave closing statements that day.

The trial court's refusal to allow defense counsel the time to secure his witnesses, or indeed to assist the defense in this endeavor, constituted an abuse of discretion and deprived defendant of a fair trial. Every person accused of a crime has a constitutional right to present a defense against the State's charges. See California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984); see also Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146-47 (1986) [over-turning a state court decision in which the trial judge had withheld evidence from the jury after a separate pretrial hearing and finding that either the due process clause of the Fourteenth Amendment or the compulsory process or confrontation clauses of the Sixth Amendment guarantees a meaningful opportunity to present a complete defense, which would be "empty" if the court could exclude competent evidence central to defendant's claim of innocence]; In re Myron Farber, 78 N.J. 259, 271-74 (1978) [struck down journalist shield law's impediment to the free introduction of defense evidence]; State v. Harold, 183 N.J. Super. 485, 487-89 (App. Div. 1982) [improper restriction on introduction of defense evidence for judge to threaten witness's family and note his disbelief of her proffered testimony].

As part of the right to present a defense, criminal defendants have the right to call witnesses in their defense by virtue of the right to compulsory process guaranteed by the Sixth Amendment to



the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution. See State v. King, 164 N.J. Super. 330, 337 (App. Div. 1978), certif. den., 81 N.J. 54 (1979). R. 1:9-1 empowers attorneys for defendants and the State to issue subpoenas which order witnesses to appear in court to testify.

Defendant had every right to call Brenda Johnson and Ebony Bennett as witnesses, and, having been served with subpoenas, they had an obligation to testify:

It is the public duty of every person within the jurisdiction of the government to appear in court when commanded to testify.... This obligation is an incident to citizenship which cannot be ignored by one who believes that his time should be spent on better things, no matter what his profession may be . . . . Once subpoenaed, a witness is compelled to remain in attendance until excused by the court or by the party who has summoned him . . .

Reiman v. Breslin, 175 N.J. Super. 353, 357 (App. Div.), certif. den., 85 N.J. 147 (1980).

Moreover, defendant's constitutionally-protected right to compulsory process entitled him to the affirmative assistance of the court, if necessary, in enforcing his subpoenas. For example, in State v. King, 164 N.J. Super. at 334-37, this Court held that where a subpoenaed witness whose testimony would have been material to the case had failed to appear for trial, it was reversible error for the judge to deny defense counsel's request to issue a bench warrant to secure the witness. The court held that "implementation of defendant's constitutional right" to compulsory process "required not only his right to subpoena the witness but also the

exercise of the court's power to enforce the subpoena." Id. at 337.

Here, defendant's attorney asked for much less than bench warrants. The reason for the witnesses' absence having been explained on the record, a simple adjournment would have sufficed to secure their presence. To protect defendant's constitutional right to compulsory process, it should have been granted. See Dickerson v. Alabama, 667 F.2d 1364, 1369-71 (11th Cir. 1982), cert. den. 459 U.S. 878, 103 S.Ct. 173 (1982) [where police officer was properly subpoenaed to testify for defendant, and where his testimony would have been relevant and material, failure of trial court to grant continuance violated right of compulsory process].

The missing testimony in this case need not have been, as the judge implied, "dispositive" (5T 190-23) in order to be crucial to the defense. All that was required was that it be capable of raising a reasonable doubt about the State's evidence. To understand how pivotal this testimony might have been, recall that not one eyewitness was able to place defendant at the scene, firing shots or committing a robbery. Although Keith Carson and Keith Staple differed over how many gunmen there were, both of them said that all but one of the gunmen wore masks. The one without a mask was "Jimbo," not defendant. (4T 27-18 to 19) Although he seemed tentative about his prior identification of his shooter at trial, when Keith Staple shown a photo array by the police, he identified Tariq Diggs, not defendant, as the person he thought had shot him. (5T 119-22 to 120-10)

Partially disputing defendant's alibi, Traci Thomas testified that defendant left Brenda Johnson's apartment at some time that night. However, when pressed, she could not say at what time he left, she did not know whether or not he left with Tariq, and although she said he returned again after midnight, she did not know that time that was. (3T 31-8 to 33-8) Alexander Walker's testimony established that Tariq (the same person Staple identified) planned a robbery (3T 126-6 to 14; 3T 131-1 to 16), but Alexander flatly refused to testify that he ever saw defendant with Tariq that night. (3T 126-18 to 24; 3T 127-3 to 6; 3T 128-23 to 24; 3T 143-23 to 15)

Kyewaghana Cook and Khahlia Hassenbey were the only witnesses to place defendant near the scene of the shooting at around the time the shots were fired. They said that they heard the shots fired not long after they saw defendant near the corner of Morris and Third, heading toward the scene of the shooting. They were able to recognize him then from having seen him in front of their house on the night of December 4, according to Khahlia, at 8:30 or 9:00 p.m. (3T 98-11 to 15)

Through the testimony of Brenda Johnson and Ebony Bennett, defendant could have shown that he was in Newark until at least midnight and could not have been in Plainfield in front of the Cook/Hassenbey residence at 8:30 or 9:00 p.m. Defendant had every right, through the testimony of his own witnesses, to attack the credibility of Kyewaghana Cook and Khahlia Hassenbey in this way: If these girls had mistakenly identified defendant as the person

they saw getting out of the white car near their house at 8:30 or 9:00 p.m., then they also mistakenly identified him as one of the young men getting out of that same car on Morris Street and walking towards West Third Street not long before the shots were fired. Thus, contrary to the judge's finding, the testimony of defendant's missing witnesses would have been highly "significant" (5T 190-19 to 23) and should have been heard by the jurors.

Nor is it certain that the jurors would have found defendant guilty based on the other evidence against him. The purported confession could not have been accepted in its entirety by the jurors because while some of it comported with the evidence, it contained fairly glaring inaccuracies as well.<sup>7</sup> The jurors might have had some doubt whether the details in this statement were in fact supplied by defendant after they considered Shay Walker's testimony that Marcantonio had used his powers of suggestion during his interview with her (5T 24-15 to 26-1) and Marcantonio's admission that the drawing he initially attributed to defendant was actually drawn in part by himself. (Compare 5T 85-23 to 86-1; 5T 90-20 to 24 with 5T 98-4 to 9)

Defendant understands that the grant of an adjournment is discretionary on the part of the trial court. State in the Interest of D.P., 232 N.J. Super 8, 19 (App. Div. 1989); State v. Barron,

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<sup>7</sup>For example, defendant claimed to have been the only gunman (5T 74-7 to 9; 5T 86-2 to 4) when the police knew otherwise (5T 90-22 to 25). His statement that he was the only one of the several passengers to get out of the white car and walk to the scene (5T 78-21 to 25) was belied by the eyewitness testimony of both Keith Carson (4T 27-23 to 28-13) and Keith Staple (4T 134-17 to 135-18; 4T 136-8 to 20), each of whom saw at least three gunmen.

214 N.J. Super. 46, 50 (App. Div. 1986); State v. Kyles, 132 N.J. Super. 397, 403 (App. Div. 1975). It is also true that the refusal of an adjournment request "will not lead to reversal absent manifest wrong or injury to the defendant by reason of such refusal." State v. (Frank R.) Smith, 66 N.J. Super. 465, 468 (App. Div. 1961), aff'd, 36 N.J. 307 (1962); accord State v. (Daniel) Smith, 87 N.J. Super. 98, 105 (App. Div. 1965).

In this case, the trial judge stripped defendant of his right to a fair trial by refusing to take minor steps to ensure the presence of Ebony Bennett and Brenda Johnson and forcing this trial to continue without these critical defense witnesses, even though the consequences (a possible conviction for murder) were harrowing.

In State v. Smith, 66 N.J. Super. at 468, this Court made clear that "where the circumstances entitle a defendant to the issuance of process requiring the attendance of an absent witness the defendant should be allowed a reasonable time for making process effectual; otherwise his constitutional right would be of little value to him." Even before the Smith opinion, this Court found that a trial court had abused its discretion and committed reversible error when it refused to issue a bench warrant to compel the attendance of an alibi witness where that witness's testimony "was a link in the chain of defendant's alibi." State v. Maxwell, 50 N.J. Super. 298, 306 (App. Div. 1958).

Many years later, this Court was confronted with the question of whether the lower court erred in not giving the defense time, after the state had rested, to produce jail records indicating that



the victim had visited the defendant in jail after she had accused him of the crimes he was ultimately convicted of having committed. In State v. Rodriguez, 254 N.J. Super. 339, 346 (App. Div. 1992), this Court found that "the judge's refusal to grant additional time to produce the documentary evidence was error. It would have been better to have discharged the jury for the balance of the day and concluded the trial the next trial day." The Rodriguez Court found the error to have been harmless given the circumstances of that case, where "examination of the victim in regard to visits could have resulted in the jury learning that Rodriguez's brother was currently under indictment for terrorizing the victim." Id. There are no such considerations in the instant case.

In State v. Barron, 214 N.J. Super. 46, the court found no prejudice from the denial of a defense request for an adjournment to afford time to prepare for trial, where there was no evidence that defendant's attorney failed to function effectively. Similarly, in Kyles, 132 N.J. Super. at 403, this court found no abuse of discretion where the defense had not requested a bench warrant or taken other steps to compel the appearance of subpoenaed alibi witnesses, and where there was no showing what these witnesses would have said had they appeared. Id. at 403. In the instant case, the anticipated testimony was thoroughly explained to the judge.

Furthermore, the trial court in Kyles already had done what the court in the instant case refused to do. It had adjourned the trial from Thursday to the following Monday when, on Thursday, the



defense attorney stated that the witnesses, the defendant's brother and sister, were not available. Id. at 401. On that Monday, the court waited until 10:30 a.m. before denying a defense request for an adjournment. Id. at 402. In finding no prejudice, the appeals court noted that where the crime is serious, the unexplained failure of the defendant's siblings raised "serious doubt" whether they would have supported his case. Id. at 403. In contrast, in the instant case, without agreeing to wait even an hour, the court insisted on moving forward with the trial even though the absent witnesses could not be in court, through no fault of their own.

In Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049 (1973), the Supreme Court noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Here, the defendant had subpoenaed two witnesses capable of raising a reasonable doubt about the identification of him by key State witnesses. The judge's refusal to give defendant's attorney the opportunity to produce these witnesses was a gross abuse of discretion and a clear violation of defendant's constitutional rights to compulsory process and a fair trial. Accordingly, his convictions should be reversed and a new trial ordered.

## POINT II

DEFENDANT'S SECOND STATEMENT TO THE POLICE WAS NOT MADE VOLUNTARILY AND SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE. U.S. CONST. AMENDS. V, XIV.

After hearing the testimony given at defendant's pre-trial Miranda hearing, the trial judge held that defendant's second statement to the police, in which he stated that he shot two men, was admissible at trial. However, the circumstances surrounding this statement demonstrate that it was not given voluntarily, as is constitutionally required. U.S. Const. Amends. V, XIV. Admitting the confession also violated New Jersey's common law privilege against self-incrimination. State v. Hartley, 103 N.J. 252, 260 (1986). Therefore, the statement should have been suppressed.

A confession is not admissible unless it is voluntary. Oregon v. Elstad, 470 U.S. 298, 306-307, 105 S.Ct. 1285, 1292 (1985); Jackson v. Denno, 378 U.S. 368, 385-86, 84 S.Ct. 1774, 1785 (1964); State v. Wade, 40 N.J. 27, 35, cert. den. 375 U.S. 846, 84 S.Ct. 100 (1963). If a statement is not voluntary, its use at trial violates due process. Brown v. Mississippi, 297 U.S. 278, 285-86, 56 S.Ct. 461, 464-65 (1936). State v. Wade, 40 N.J. at 35.

In New Jersey, the State must prove the voluntariness of a confession beyond a reasonable doubt. State v. Bey, 112 N.J. 123, 134 (1988); State v. Kelly, 61 N.J. 283, 294 (1972); State v. Franklin, 52 N.J. 386, 405 (1968); State v. Yough, 49 N.J. 587, 600-601 (1967). The State has a "heavy burden" of demonstrating that a defendant's waiver of his privilege against self-incrimination was made "voluntarily, knowingly, and intelligently." State

v. Hartley, 103 N.J. at 260, quoting Miranda, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). Where a confession has been admitted into evidence, a "wide and penetrating," "searching and critical," appellate review is necessary to assure that the fundamental fairness of due process is met. State v. Cook, 47 N.J. 402, 405-06 (1966); accord State v. Pickles, 46 N.J. 542, 577 (1966); Miranda, 384 U.S. at 464, n. 33, 86 S.Ct. at 1622.

An involuntary confession may result from either physical or psychological coercion. See, e.g., Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279 (1960) ["A number of cases have demonstrated, if demonstration were needed, that the efficacy of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'"] The Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), recognized that modern interrogation can often be psychologically rather than physically coercive. The Court stressed that through its decision it was attempting to curtail police practices which disable the defendant from exercising his free will:

" . . . [T]he compelling atmosphere of the in-custody interrogation, rather than an independent decision on his part can cause the defendant to speak." Id. at 465.

The Court went on to state:

" . . . it is not just the subnormal or woefully ignorant who succumb to an interrogator's implications, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is

itself damning and will bode ill when presented to a jury." Id. at 468.

The ultimate question for a court's consideration in determining the voluntariness of a confession is whether, under the totality of the circumstances, a defendant's will was overborne and his capacity for self-determination seriously impaired. Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879 (1961); see Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir.), cert. denied 479 U.S. 989, 107 S.Ct. 585 (1986) (opinion after remand); State v. Galloway, 133 N.J. 631, 655 (1993); State v. Driver, 38 N.J. 255, 282 (1962). Because every case turns on its particular facts, consideration must be given both "to the characteristics of the suspect and the details of the interrogation." State v. Miller, 76 N.J. at 402. The court must consider the degree and mode of pressure applied by the police and the susceptibilities of the particular defendant to such pressure at the time it was applied. Relevant factors include the defendant's age, education and intelligence, the advice given concerning his constitutional rights, and whether the questioning was repeated and prolonged or involved physical punishment or mental exhaustion is also critical. State v. Bey (II), 112 N.J. at 135; State v. Miller, 76 N.J. 392, 402 (1978).

In the instant case, defendant accepted that Miranda warnings were given to him twice, and twice he agreed to talk to the police. However, beyond that threshold issue, the State failed to meet its "heavy burden" of establishing beyond a reasonable doubt that defendant's second statement was indeed a voluntary one. State v.

Kelly, 61 N.J. at 294; State v. Hartley, 103 N.J. at 260. Defendant testified credibly that his will was overborne by unrelenting accusations, by threats that the prosecutor would seek the death penalty, and that assorted legal difficulties would befall his alibi witnesses if he did not confess. Finding the detective's testimony credible, the judge stated that he did not believe that defendant's "recollection" was "accurate." (1T 39-12 to 15) However, it was not disputed that defendant was subjected to a total of five and one-half hours of questioning on two occasions over a period of two days by two detectives who either destroyed, or did not bother to prepare, a typewritten version of defendant's first, exculpatory statement.

Nor was it disputed that defendant's second, inculpatory statement was taken down in minute detail, while the substance of defendant's initial statement concerning his whereabouts on December 4 and 5, 1993, and how he acquired the car--matters which took him two and a half hours to relate to the detectives--were buried somewhere on page 16 of Detective Marcantonio's police report. (1T 29-19 to 25; 1T 19-25 to 20-3) Explaining this, Detective Marcantonio said that the first statement was not "out of the ordinary," and they did not think it was "worth putting on paper." (1T 20-4 to 15) His use of this phraseology strongly implied that the only type of statement the detectives were prepared to fairly memorialize, or to accept at all from defendant, was one that was "out of the ordinary," that is, an inculpatory one. This substantially heightened defendant's credibility with



respect to the voluntariness of his second statement. At the very least, it militated against a finding that defendant's statement was voluntary "beyond a reasonable doubt." State v. Bey, 112 N.J. at 134 (emphasis supplied).

Because the finding below was not based on credible evidence in the record, this Court, having reviewed the record, may make its own findings on this issue. State v. Johnson, 42 N.J. 146, 161-162 (1964). The detailed statement, the admission of which did much to seal defendant's fate, should have been suppressed. Because its admission violated defendant's due process rights, defendant's conviction should be reversed.



POINT III

BECAUSE THERE WAS NO THEFT OR ATTEMPTED THEFT  
OF PROPERTY FROM KEITH STAPLE, DEFENDANT'S  
CONVICTION OF FIRST DEGREE ROBBERY OF KEITH  
STAPLE MUST BE VACATED. (Not Raised Below)

Defendant was charged with and ultimately convicted of committing a first degree robbery upon Keith Staple. Because the State did not produce any evidence which remotely suggested that a theft from Keith Staple occurred, the State failed to prove all of the essential elements of robbery as to him. Because of this, defendant's conviction of the first degree robbery charged in Count IV of the indictment must be reversed.

In a criminal case, the State bears the burden of proving the defendant guilty of the charge beyond a reasonable doubt. In In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 1073 (1970), the United States Supreme Court held that ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Accord Mullaney v. Wilbur, 421 U.S. 684, 700, 95 S.Ct. 1881, 1890 (1975); State v. Beigenwald, 106 N.J. 13, 59 (1987); State v. Thomas, 132 N.J. 247, 253 (1993); State v. Anderson, 127 N.J. 191, 200-201 (1992); State v. Bullock, 264 N.J. Super. 419, 422 (App. Div. 1993). This standard has been codified in N.J.S.A. 2C:1-13a, providing, in part:

No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt.

Under the Code of Criminal Justice, a robbery has occurred if a person (1) inflicts bodily injury or uses force; (2) threatens

another with or purposely puts him or her in fear of immediate bodily injury, or (3) commits or threatens immediately to commit any crime of the first or second degree, in the course of or in the immediate flight from committing a theft or attempted theft. N.J.S.A. 2C:15-1a.

Theft, or attempted theft, from the victim of a robbery is a critical element in a robbery offense. In State v. Carlos, 187 N.J. Super. 406 (App. Div. 1982), the defendant threatened four individuals with a gun, but took money from only two, during a gas station hold up. This Court held that only two robberies were committed because "each conviction must involve a separate theft or attempted theft unless there are special circumstances not here involved."<sup>a</sup> Id. at 410. The defendant "could not have been properly found guilty of robbery of each person subjected to force or intimidation unless a theft or attempted theft from that person was proved." Id. at 414.

In State v. Sewell, 127 N.J. 133 (1992), the defendant took a bucket of coins from a woman in a casino. As he fled, he collided with three other women and caused them "bodily injury." At trial, defendant was found guilty of three counts of second-degree robbery. Affirming this Court's opinion, the Supreme Court held that the facts supported only one robbery conviction. "Defendant . . .

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<sup>a</sup>An example given by the Court of "special circumstances" permitting a robbery conviction absent a theft or attempted theft would be where an offender "threaten[s] to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere. Carlos, 187 N.J. Super. at 414, quoting II New Jersey Penal Code: Commentary, Final Report of the New Jersey Criminal Law Revision Commission, 214 (1971).

could be convicted of only one robbery because he had committed only one theft, namely, that entailed in taking [one woman's] coins." Id. at 137-138. "[E]ach robbery is a separate crime, which entails a discrete theft from a single victim together with accompanying injury or force." Id. at 137. See also State v. Lawson, 217 N.J. Super. 47, 51 (App. Div. 1987) ["A robbery conviction must be premised upon a separate theft."]

In some cases, an individual's joint or constructive possession of property stolen has been enough to sustain a robbery conviction where that individual is threatened. For example, in Carlos, adequate evidence existed for the jury to conclude that the robbery victim's wife, who was present during the robbery, was in joint constructive possession of the money which her husband surrendered to the defendant from his person. However, because the trial judge had not instructed the jury on joint constructive possession, this Court held that this issue had not been considered by the jury and could not support a conviction of robbery of the wife. State v. Carlos, 187 N.J. Super. at 417. In the instant case there was no claim that Keith Staple had possession--actual, joint or constructive--of Marcus Benjamin's property.

State v. Mirault, 92 N.J. 492 (1983), established that, for a robbery conviction to lie, the victim of the theft need not be the same individual upon whom bodily force is used. There, a homeowner believed that her home had been burglarized and called the police before entering it. A police officer entered her home, and the defendant leaped at him, grabbed his revolver and threatened to

kill him in the ensuing struggle. The homeowner's property was found on the defendant's person. The defendant in Mirault was convicted of robbery of the homeowner even though force was used, not against her, but against the officer. Id. at 497-499. Thus, for robbery to be shown, "the person threatened need not be the victim of the theft." Id. at 497 n. 4.

This is not to say that the police officer who was threatened could have become the victim of a robbery any more than the bystanders in Carlos became victims of robbery by virtue of being present and threatened during the robbery of someone else. See id. ["In Carlos, the presence of two threatened bystanders during theft from two other persons did not convert two thefts to four robberies."] However, that is precisely what occurred in the instant case--evidence sufficient to show robbery of one individual and force against that individual as well as a bystander, resulted in two robbery convictions.

As mentioned above, there was no suggestion that Keith Staple jointly or constructively possessed with Marcus Benjamin either the money in the trunk or the car taken during the incident. Staple was merely standing there, asking Benjamin for a match, when the gunmen came upon them. He testified that there was no theft or attempted theft from him. In fact, defense counsel elicited testimony to the contrary during Staple's cross-examination:

[DEFENSE COUNSEL] Was anything taken from you --

A. No.

Q. -- during this robbery?

A. No.

Q. In fact nobody even went through your pockets, right?

A. No.

Q. Nobody tried to take anything from you; is that right?

A. No.

Q. And other than you telling them that you didn't have anything on your person, they didn't actually go into your pockets, right?

A. No.

(4T 154-15 to 155-1)

After intentionally eliciting this testimony, counsel inexplicably failed to request a judgment of acquittal on Count IV and the judge did not sua sponte grant one, perhaps because both shared a misunderstanding of the law evident in the jury instructions described below, which led the jurors to believe that they could find defendant guilty of first degree robbery of Keith Staple if they found that he was threatened while a theft was perpetrated on Marcus Benjamin:

In order for you to find the defendant guilty of robbery, the State is required to prove that he was in the course of committing a theft and that while in the course of committing a theft he either knowingly inflicted bodily injury, used force upon, count three Marcus Benjamin, court four Keith Staple; threatened with or purposely put, count three Marcus Benjamin, court four Keith Staple, in fear of immediate bodily injury or committed or threatened immediately to commit the crime of murder with Marcus Benjamin or aggravated assault or attempted murder of Keith Staple.



7T 24- 4 to 13) Nowhere did the charge instruct the jury, as the case law requires, to consider whether there was a separate theft committed against Keith Staple. See State v. Lawson, 217 N.J. Super. at 51. Indeed, had they considered this they would have concluded that there was not. Very likely, it was the conspicuous absence in the evidence of any taking or attempted taking of property from Keith Staple which was confusing the jurors when, after deliberations began, they asked the judge to "please define the charges against S. Moore regarding robbery of Keith Staple." (7T 50-17 to 18). As lay people, they must have been aware that robbery usually involves some sort of taking of property from the victim.

In recharging them, the judge again said that robbery required that defendant was in the course of "a theft" (7T 51-13 to 21), again implying that a theft against Benjamin Marcus while using force against Keith Staple could create a robbery against Keith Staple. Clearly, this was the equivalent of permitting a conviction of robbery against the policeman in Mirault and the bystanders in Carlos.

Because the State failed to meet its burden of proving robbery of Keith Staple, the conviction of robbery charged in Count IV of the indictment violates defendant's due process rights under the United States Constitution and the New Jersey Constitution. U.S. Const. Amend. XIV; N.J. Const. (1947) Art. I, para. 1. Although trial counsel did not make a motion for a judgment of acquittal, refusal of this Court to review this issue would clearly perpetuate



an unwarranted conviction, an "unjust result." R. 2:10-2. Stat.  
v. Macon, 57 N.J. 325 (1971). Accordingly, the Court must vacate  
defendant's conviction and enter a judgment of acquittal on this  
count of the Indictment.

POINT IV

**BECAUSE THE PROSECUTOR EXCEEDED ALL BOUNDS OF  
FAIR PLAY IN SUMMATION, DEFENDANT WAS DENIED A  
FAIR TRIAL. (Not Raised Below)**

In her closing remarks the prosecutor violated settled case law by overstepping the bounds of propriety and fairness required to insure a just result. This deprived defendant of his due process right to a fair trial.

Canon 5 of the Canons of Professional Ethics states that "[t]he primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done." In Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935), Justice Sutherland said in part:

The [prosecuting] attorney is the representative not of any ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that just shall be done . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88, 55 S.Ct. at 633, cited in State v. Farrell, 61 N.J. 99, 104-05 (1972); see also State v. Zola, 112 N.J. 384, 426 (1988); State v. Ramseur, 106 N.J. 123, 320 (1987). The Berger Court described the danger involved when a prosecuting attorney abuses his or her authority:

[T]he average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations,

and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

295 U.S. at 88, 55 S.Ct. 633.

The prosecutor in this case began what turned out to be a pattern of ridicule and name-calling during defendant's cross-examination, in which the following exchange occurred as Traci Thomas was being discussed:

Q. But as far as getting along with her, you didn't have angry words around the time of your arrest, did you?

A. No.

Q. Okay. You didn't have a fistfight with her around the time of your arrest, did you?

A. I don't hit girls. So I walk away.

Q. You just shoot people in the back?

A. See, that's dirty. No I don't shoot people.

(5T 165-22 to 166-4) Astoundingly, defense counsel sat mute after the prosecutor's nasty, unfair and unprofessional retort, leaving defendant on his own to state how "dirty" it was.

In summation, the prosecutor picked up on the same theme by implying that, unlike a State's witness, defendant did not take his oath seriously when he testified. Speaking of Shanelle Diggs, the prosecutor said, "But when she took the oath in this case, she took it serious [sic], unlike Mr. Moore . . . . (6T 19-2 to 3)

Thereafter, she repeatedly referred to defendant as a "killer" and called him a "sociopath," beginning with her discussion of Kyewaghana Cook's identification, in which she pointed out that

defendant was so fearsome to the young girl that she had hesitated to testify:

Do you remember when Kyewaghana testified? Do you remember how we actually had to wait for her to come out of the back room? She is sixteen years old. She lives in one of the worst sections of Plainfield that you can imagine and she knew that guy. She knew on that night she knew the face of that killer and if anything should show you how certain she is of her identity, she couldn't come out here and do it.

(6T 20-13 to 19; emphasis supplied) Later on, she said:

So if anything should prove to you the accuracy of the identity of the case it's not so much what Kyewaghana said, it's how she acted. She didn't want to face that killer again.

(6T 20-23 to 21-1; emphasis supplied)

According to defendant's second statement to Marcantonio, Marcus told defendant that the Honda was not his car. Discussing this, she took the opportunity to comment:

That's probably why Marcus got shot. He probably said to Marcus is that your car and Marcus probably said, no, it's not my car. Probably angered this sociopath with the gun.

(6T 26-14 to 16; emphasis supplied)

Our courts have repeatedly admonished prosecutors to refrain from using derogatory epithets or calling an accused any name that might inflame the jury. State v. Williams, 113 N.J. 393, 455-56 (1988); State v. Siciliano, 21 N.J. 249, 262 (1956).

In State v. Stewart, 162 N.J. Super. 96, 99 (App. Div. 1978), among the prosecutorial excesses warranting reversal and the Court's "stern condemnation" was reference to the defendant as a

"young punk." In State v. Von Atzinger, 81 N.J. Super. 509 (App. Div. 1963), the prosecutor's use of the terms "hood," "punk," and "bum" were deemed reversible error. These designations were mild in comparison to the invectives--"killer" . . . "sociopath with a gun"--used in this case. (6T 26-16)

Clearly, the type of ridicule and name-calling which occurred in this case was inappropriate and grossly inflammatory. Although not objected to, it could not fail to prejudice defendant's fundamental right to have a jury fairly evaluate the merits of his case and lead them to a result they might otherwise not have reached. State v. Macon, 57 N.J. 325 (1971). Accordingly, his convictions should be reversed as plain error.



POINT V

**THE SENTENCE OF LIFE IMPRISONMENT FOLLOWED BY  
A CONSECUTIVE TWENTY YEAR TERM WITH A TOTAL OF  
FORTY YEARS OF PAROLE INELIGIBILITY IS  
MANIFESTLY EXCESSIVE.**

Defendant's convictions arising from this case are his first indictable ones. Like several of the State's witnesses in this case, he had been involved with drugs, and his record contained one juvenile adjudication for possession of controlled dangerous substance with intent to distribute it. (PSR 5) Juvenile charges of aggravated assault and weapons possession and an adult burglary charge were pending at the time of his sentencing. (PSR 5-6)

Defendant was merely eighteen years old at the time of these offenses and twenty years old at sentencing. He was sentenced to serve a term of life imprisonment, thirty years without parole, for the murder of Marcus Benjamin, and a consecutive term of twenty years, ten without parole, for the attempted murder of Keith Staple. (8T 13-8 to 17) All of the other sentences are concurrent to these two sentences. Each of the two controlling terms are the lengthiest ones, with the longest parole disqualifiers, which could have been imposed, N.J.S.A. 2C:11-3b; N.J.S.A. 2C:43-6a, and they are consecutive. Together, they insure that defendant will be age sixty, beyond any hope of a life which is at all productive, when he reaches parole eligibility.

A thirty-year parole bar was mandatory in this case. N.J.S.A. 2C:11-3b. However, a life sentence was not statutorily required. State v. Kinney, 108 N.J. 189 (1987) (mem.). Judicial discretion to impose a term of life upon conviction of murder "is in no sense



unfettered but remains subject to the sentencing framework established by the Code" of Criminal Justice. State v. Maguire, 84 N.J. 508, 530 (1980). It has been emphasized that the "statutory criteria which bear directly on the decision whether to sentence a defendant convicted of murder [to the maximum term] are the aggravating and mitigating circumstances provided in section 2C:44-1," id. at 532, and, in particular, that "the imposition of a life sentence for murder should be reserved for those cases where the aggravating circumstances substantially outweigh the mitigating circumstances," id. at 533.

Here, the judge made such a finding. (8T 13-5 to 7) However, this was based on a very questionable use of at least one aggravating factor and a disregard of a mitigating factor. Recited at sentencing were statutory aggravating factors "1, 2, 3, and 9." (8T 13-5 to 7) These are the nature and circumstances of the offense, N.J.S.A. 2C:44-1a(1); the gravity and seriousness of harm inflicted upon the victim, N.J.S.A. 2C:44-1a(2); the risk that defendant will commit another offense, N.J.S.A. 2C:44-1a(3); and the need to deter, N.J.S.A. 2C:44-1a(9). Because the judge did not find separate aggravating factors for each crime, it must be presumed that these factors were applied in imposing each sentence.

Of course, the harm done to Marcus Benjamin was an element of the offense of which defendant was convicted and ought not have been counted as a separate aggravating factor. State v. Jarbath, 114 N.J. 394, 404 (1989) [death of victim cannot be an aggravating factor in manslaughter case because it is an element of the crime].

To the extent that this improperly found factor contributed to the imposition of a life sentence, that sentence is excessive and not in accordance with case law interpreting the Code.

Nor were consecutive sentences required in this case. Although, as the judge below noted, there was injury to two separate individuals (8T 12-24 to 13-1), sentencing courts are directed to consider additional factors in deciding whether to impose consecutive sentences, among them whether "the crimes and their objectives were predominantly independent of each other" and whether they "were committed at different times or separate places, rather than . . . so closely in time as to indicate a single period of aberrant behavior." State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. den. 475 U.S. 1014 (1986); see also State v. Louis, 117 N.J. 250, 254 (1989).

These factors weigh in favor of concurrent sentences in the instant case since the crimes were all part and parcel of one transaction, a single robbery. Moreover, as the Supreme Court has fairly recently held, in determining whether to sentence a defendant to consecutive terms, "the focus of the court should be on the fairness of the overall sentence." State v. Sutton, 132 N.J. 471, 485 (1993). In an analogous context, that of imposing an extended term, the Court has said that a defendant's relative youth ordinarily should inure to his benefit. State v. Dunbar, 108 N.J. 80, 96 (1987). This Court, too, has said that age should be considered in sentencing even though it is not a statutory mitigating factor. State v. Pindale, 249 N.J. Super. 266, 289

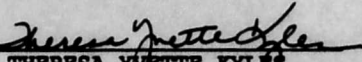
(App. Div. 1991); State v. Tanksley, 245 N.J. Super. 390, 397 (App. Div. 1991). Where a defendant is just past the age of eighteen when his offense is committed, his age surely should be considered, both in determining whether to impose the length of a term and in deciding whether consecutive sentences are justified. Defendant urges this Court to reduce his sentence to the thirty-year mandatory minimum term for murder, with a concurrent presumptive fifteen years for first degree attempted murder.

**CONCLUSION**

For the reasons stated in Points I, II and IV, defendant respectfully requests that this Court reverse his convictions and order a new trial. Alternatively, for the reasons stated in Point V, defendant requests a reduction in his sentence. In either event, for the reasons stated in Point III, defendant urges the Court to vacate his conviction on Count IV of the indictment.

Respectfully submitted,

SUSAN L. REISNER  
Public Defender

BY:   
THERESA YVETTE KYLES  
Assistant Deputy Public Defender

DATED: June 28, 1996

PROSECUTOR'S DOCKET NO. 93004614  
C.D.R. NO. W657534; W095192; W095190;  
W657523; W657521; W657510;  
W657511; W657524

ANDREW K. RUOTOLO, JR.  
Prosecutor of Union County  
Union County Administration Building  
Elizabeth, New Jersey 07207  
(908) 527-4500  
Attorney for the State of New Jersey

THE STATE OF NEW JERSEY

v.

SAMMY MOORE,  
DAVID DIGGS,  
JAMES BAINES,  
TARIK DIGGS -and-  
KENNETH RAHEEM BROOKS

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - UNION COUNTY

CRIMINAL

94-06-00636 I

:  
: INDICTMENT NO.  
:  
:  
: N.J.S.A. 2C:11-3a(1) and/or (2)  
: MURDER  
: (FIRST DEGREE)  
:  
: N.J.S.A. 2C:11-3a(1) and 2C:5-1  
: ATTEMPTED MURDER  
: (FIRST DEGREE)  
:  
: N.J.S.A. 2C:15-1  
: ROBBERY  
: (FIRST DEGREE)  
:  
: N.J.S.A. 2C:11-3a(3)  
: FELONY MURDER  
: (FIRST DEGREE)  
:  
: N.J.S.A. 2C:5-2  
: CONSPIRACY  
: (SECOND DEGREE)  
:  
: N.J.S.A. 2C:39-4a  
: POSSESSION OF A FIREARM FOR  
: AN UNLAWFUL PURPOSE  
: (SECOND DEGREE)  
:  
: N.J.S.A. 2C:39-5b  
: UNLAWFUL POSSESSION OF A HANDGUN  
: (THIRD DEGREE)  
:  
: N.J.S.A. 2C:20-7  
: RECEIVING STOLEN PROPERTY  
: (THIRD DEGREE)

1a



COUNT 1

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did, purposely and/or knowingly cause the death of Marcus Benjamin, and/or did purposely and/or knowingly cause serious bodily injury to Marcus Benjamin resulting in his death, contrary to the provisions of N.J.S.A. 2C:11-3a(1) and/or (2), and against the peace of this State, the government and dignity of the same.

COUNT 2

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did purposely attempt to cause the death of Keith O. Staple, contrary to the provisions of N.J.S.A. 2C:11-3a(1) and 2C:5-1, and against the peace of this State, the government and dignity of the same.

COUNT 3

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, JAMES BAINES, TARIK DIGGS and KENNETH RAHEEM BROOKS, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did, while in the course of committing a theft, purposely put Marcus Benjamin in fear of immediate bodily injury and/or did commit a crime of the first degree, to wit:



murder, in violation of N.J.S.A. 2C:11-3a(1) and/or (2), and/or did purposely inflict serious bodily injury upon Marcus Benjamin, and/or was armed with, and/or used and/or threatened the immediate use of a deadly weapon, contrary to the provisions of N.J.S.A. 2C:15-1, and against the peace of this State, the government and dignity of the same.

COUNT 4

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, TARIK DIGGS, JAMES BAINES and KENNETH RAHEEM BROOKS, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did, while in the course of committing a theft, purposely put Keith O. Staple in fear of immediate bodily injury, and/or did purposely inflict serious bodily injury upon Keith O. Staple, and/or was armed with, and/or used and/or threatened the immediate use of a deadly weapon, contrary to the provisions of N.J.S.A. 2C:15-1, and against the peace of this State, the government and dignity of the same.

COUNT 5

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, TARIK DIGGS, JAMES BAINES and KENNETH RAHEEM BROOKS, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did, acting alone or with one or more persons, cause the death of Marcus Benjamin during the commission of, or attempted commission of, or flight after the commission of the

crime of robbery, contrary to the provisions of N.J.S.A. 2C:11-3a(3), and against the peace of this State, the government and dignity of the same.

COUNT 6

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, TARIK DIGGS, JAMES BAINES and KENNETH RAHEEM BROOKS, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did, with the purpose of promoting or facilitating the commission of the crimes of robbery, and/or possession of a weapon for an unlawful purpose, agree that one or more of them knowingly would engage in conduct which would constitute the aforesaid crimes, in the planning, solicitation or commission of said crimes, that is:

- 1) did, in the course of committing a theft, purposely put Marcus Benjamin in fear of immediate bodily injury, and/or did commit a crime of the first degree, to wit: murder, in violation of N.J.S.A. 2C:11-3(1) and/or (2) and/or did purposely inflict serious bodily injury upon Marcus Benjamin, and/or was armed with, and/or used or threatened the immediate use of a deadly weapon, contrary to the provisions of N.J.S.A. 2C:15-1;
- 2) did, in the course of committing a theft, purposely put Keith O. Staple in fear of immediate bodily injury, and/or did purposely inflict serious bodily injury upon Keith O. Staple, and/or was armed with, and/or used or threatened the

immediate use of a deadly weapon, contrary to the provisions of N.J.S.A. 2C:15-1;

- 3) did, possess a firearm with the purpose to use it unlawfully against another person, contrary to the provisions of N.J.S.A. 2C:39-4a;

all in violation of N.J.S.A. 2C:5-2, and against the peace of this State, the government and dignity of the same.

COUNT 7

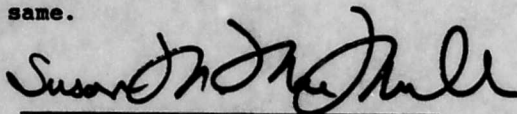
The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, TARIK DIGGS, JAMES BAINES and KENNETH RAHEEM BROOKS, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did possess a firearm with the purpose to use it unlawfully against the person of another, contrary to the provisions of N.J.S.A. 2C:39-4a, and against the peace of this State, the government and dignity of the same.

COUNT 8

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS and JAMES BAINES, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did knowingly possess a handgun without having first obtained a permit to carry same as provided in N.J.S.A. 2C:58-4, contrary to the provisions of N.J.S.A. 2C:39-5b, and against the peace of this State, the government and dignity of the same.

COUNT 9

The Grand Jurors of the State of New Jersey, for the County of Union, upon their oaths present that SAMMY MOORE, DAVID DIGGS, TARIK DIGGS and JAMES BAINES, on or about December 5, 1993, in the City of Plainfield, in the County of Union, aforesaid, and within the jurisdiction of this Court, did knowingly commit theft by receiving or bringing into this State movable property of Chanda Murphy, that is, a 1986 Honda Accord, New Jersey Registration CD827U, Vehicle Identification Number JHMBA7430GC011414, knowing the same to be stolen or believing that it had probably been stolen, contrary to the provisions of N.J.S.A. 2C:20-7, and against the peace of this State, the government and dignity of the same.



SUSAN M. MACMULLAN  
COUNTY PROSECUTOR

ENDORSED:

Erin Lynn Babin  
FOREMAN

130 pm

VERDICT SHEET  
STATE V. SAMMY MOORE  
INDICTMENT NO.: 94-06-636

1) MURDER [MARCUS BENJAMIN]	<input checked="" type="checkbox"/> GUILTY GO TO #4	<input type="checkbox"/> NOT GUILTY GO TO #2
2) AGGRAVATED MANSLAUGHTER [MARCUS BENJAMIN]	<input type="checkbox"/> GUILTY GO TO #4	<input type="checkbox"/> NOT GUILTY GO TO #3
3) RECKLESS MANSLAUGHTER [MARCUS BENJAMIN]	<input type="checkbox"/> GUILTY GO TO #4	<input type="checkbox"/> NOT GUILTY
4) ATTEMPTED MURDER [KEITH STAPLE]	<input checked="" type="checkbox"/> GUILTY GO TO #6	<input type="checkbox"/> NOT GUILTY GO TO #5
5) AGGRAVATED ASSAULT [KEITH STAPLE]	<input type="checkbox"/> GUILTY GO TO #6	<input type="checkbox"/> NOT GUILTY
6) ROBBERY [MARCUS BENJAMIN]	<input checked="" type="checkbox"/> GUILTY GO TO #7	<input type="checkbox"/> NOT GUILTY
7) ROBBERY [KEITH STAPLE]	<input checked="" type="checkbox"/> GUILTY GO TO #8	<input type="checkbox"/> NOT GUILTY
8) FELONY MURDER	<input checked="" type="checkbox"/> GUILTY GO TO #9	<input type="checkbox"/> NOT GUILTY
9) CONSPIRACY	<input checked="" type="checkbox"/> GUILTY GO TO #10	<input type="checkbox"/> NOT GUILTY
10) POSSESSION OF A FIREARM FOR AN UNLAWFUL PURPOSE	<input checked="" type="checkbox"/> GUILTY GO TO #11	<input type="checkbox"/> NOT GUILTY
11) UNLAWFUL POSSESSION OF A HANDGUN	<input checked="" type="checkbox"/> GUILTY GO TO #12	<input type="checkbox"/> NOT GUILTY
12) RECEIVING STOLEN PROPERTY	<input checked="" type="checkbox"/> GUILTY	<input type="checkbox"/> NOT GUILTY

70a

~~STATE V. SAMMY MOORE~~



RECEIVED AND FILED  
SUPERIOR COURT  
UNION COUNTY  
Criminal Case Management Office

UNION County  
Law Division - Criminal

v.

SAMMY MOORE

MAR 8 1995

Defendant (Specify Complete Name)

ANDREA FERRARO  
Criminal Division Manager

- Judgment of Conviction
- Change of Judgment
- Order for Commitment
- Indictment/Accusation Dismissed
- Judgment of Acquittal

8/17/74  
900079B  
12/15/93  
6/3/94  
6/20/94  
 NOT GUILTY  GUILTY

DATE OF BIRTH  
S.B.I. #  
DATE OF ARREST  
DATE IND / ACC FILED  
DATE OF ORIGINAL PLEA  
ORIGINAL PLEA

ADJUDICATION BY: DATE  
 GUILTY PLEA  
 JURY TRIAL 12/16/94  
 NON-JURY TRIAL  
 Dismissed/Acquitted

ORIGINAL CHARGES

IND / ACC No.	Count	Description	Degree	Statute
94-06-00636-I	Counts 1 through 9			See Attached

FINAL CHARGES

Count	Description	Degree	Statute
Counts 1 through 9			See Attached

For sentencing purposes, Count 5 [Felony Murder] merges into Count 1 [Murder]. Count 6 [Conspiracy] merges into Counts 3 and 4 [Robbery] and Count 7 [Possession of a Firearm for an Unlawful Purpose].

It is, therefore, on MARCH 3, 1995 ORDERED and ADJUDGED that the defendant is sentenced as follows:

**COUNT 1:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for the remainder of his life, but must serve at least thirty [30] years without being eligible for parole.

**COUNT 2:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of twenty [20] years, ten [10] years of which he will be ineligible for parole, consecutive to Count 1, and until released in accordance with law.

**COUNT 3:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of twenty [20] years, ten [10] years of which he will be ineligible for parole, concurrent to all other counts, and until released in accordance with law.

**COUNT 4:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of twenty [20] years, ten [10] years of which he will be ineligible for parole, concurrent to all other counts, and until released in accordance with law.

**COUNT 7:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of ten [10] years, five [5] years of which he will be ineligible for parole, concurrent to all other counts, and until released in accordance with law.

Continued on reverse

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

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

446 DAYS 12/13/93 - 3/3/95  
TOTAL NO DAYS DATES (From / To)

DATES (From / To)

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

TOTAL NO DAYS DATES (From / To)

Total Custodial Term LIFE Institution STATE PRISON Total Probation Term \_\_\_\_\_

8a



Total FINE \$ \_\_\_\_\_  
 Total RESTITUTION \$ \_\_\_\_\_

If the offense occurred on or after December 23, 1991, an assessment of \$50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is \$30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is \$25 if offense is before January 9, 1986.)

Assessment imposed on  
 count(s) 1, 2, 3, 4, 7, 8, 9  
 is \$ 50.00 each.  
 Total VCCB Assessment \$ 350.00

Installment payments are due at the rate  
 of \$ \_\_\_\_\_ per \_\_\_\_\_  
 beginning \_\_\_\_\_ (DATE)

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

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)  
 \_\_\_ 1st Degree @ \$3000 \_\_\_ 4th Degree @ \$750  
 \_\_\_ 2nd Degree @ \$2000 \_\_\_ Disorderly Persons or Petty  
 \_\_\_ 3rd Degree @ \$1000 \_\_\_ Disorderly Persons @ \$500  
 Total D.E.D.R. Penalty \$ \_\_\_\_\_

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

2) A forensic laboratory fee of \$50 per offense is ORDERED. \_\_\_\_\_ Offenses @ \$50.  
 Total LAB FEE \$ \_\_\_\_\_

3) Name of Drugs Involved \_\_\_\_\_

4) A mandatory driver's license suspension of \_\_\_\_\_ months is ORDERED.  
 The suspension shall begin today, \_\_\_\_\_ and end \_\_\_\_\_  
 Driver's License Number \_\_\_\_\_  
 (IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)  
 Defendant's Address \_\_\_\_\_  
 Eye Color \_\_\_\_\_ Sex \_\_\_\_\_ Date of Birth \_\_\_\_\_

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

Your non-resident driving privileges are hereby revoked for \_\_\_\_\_ Months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a State Correctional facility, a transaction fee of up to \$1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169)

NAME (Court Clerk or Person who prepares this form)	TELEPHONE NUMBER	NAME (Attorney for Defendant at Sentencing)
ELLEN HUSVAR	(908) 527-4373	THOMAS M. RUSSO, ESQ.

**STATEMENT OF REASONS**

**SEE ATTACHED SHEET FOR STATEMENT OF REASONS**

Sentence [continued]:

**COUNT 8:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of five [5] years, two and one-half [2 1/2] years of which he will be ineligible for parole, concurrent to all other counts, and until released in accordance with law.

**COUNT 9:** Defendant is remanded to the custody of the Commissioner of the Department of Corrections for a period of five [5] years, two and one-half [2 1/2] years of which he will be ineligible for parole, concurrent to all other counts, and until released in accordance with law.

- \$50.00 VCCB assessment as to each count for a total of \$350.00.
- \$75.00 assessment for the Safe Neighborhoods Services Fund as to each count for a total of \$525.00.
- All sums to be collected through the Department of Corrections.

JUDGE (Name)	JUDGE (Signature)	DATE
HON. WILLIAM L'E. WERTHEIMER	<i>William L'E. Wertheimer</i>	3/3/95

MAR 8 1995

ANDREA FERRARO  
Criminal Division Manager

Original Charges

94-06-00636-I	1	MURDER	1ST	2C:11-3(a)(1)
	2	ATTEMPTED MURDER	1ST	2C:11-3(a)(1)/5-1
	3 & 4	ROBBERY	1ST	2C:15-1
	5	FELONY MURDER	1ST	2C:11-3(a)(3)
	6	CONSPIRACY	2ND	2C:5-2
	7	POSS. FIREARM FOR UNLAWFUL PURPOSE	2ND	2C:39-4(a)
	8	UNLAWFUL POSSESSION OF A HANDGUN	3RD	2C:39-5(b)
	9	RECEIVING STOLEN PROPERTY	3RD	2C:20-7

Final Charges

	1	MURDER	1ST	2C:11-3(a)(1)
	2	ATTEMPTED MURDER	1ST	2C:11-3(a)(1)/5-1
	3 & 4	ROBBERY	1ST	2C:15-1
	5	FELONY MURDER	1ST	2C:11-3(a)(3)
	6	CONSPIRACY	2ND	2C:5-2
	7	POSS. FIREARM FOR UNLAWFUL PURPOSE	2ND	2C:39-4(a)
	8	UNLAWFUL POSSESSION OF A HANDGUN	3RD	2C:39-5(b)
	9	RECEIVING STOLEN PROPERTY	3RD	2C:20-7

For sentencing purposes, Count 5 [Felony Murder] merges into Count 1 [Murder]. Count 6 [Conspiracy] merges into Counts 3 and 4 [Robbery] and Count 7 [Possession of a Firearm for an Unlawful Purpose].

STATE V. SAMMY MOORE

INDICTMENT NO.: 94-06-00636

This 20 year old defendant was convicted by a jury on December 16, 1994 of Murder, Attempted Murder, two counts of Robbery, Felony Murder, Conspiracy, Unlawful Possession of a Handgun, Possession of a Firearm for an Unlawful Purpose and Receiving Stolen Property. Count 5 [Felony Murder] merges into Count 1 [Murder]. Count 6 [Conspiracy] merges into Counts 3 and 4 [Robbery] and Count 7 [Possession of a Firearm for an Unlawful Purpose]. Even with that, plaintiff faces a potential life term with a maximum 70 year period of parole ineligibility. Defendant, a mere 18 years old at the time of this offense, conspired with four other confederates to drive from Newark to Plainfield "to do sticky", e.g., hold-up a drug dealer.

Defendant was directed to an area where drug dealers commonly did their bidding, and in the course of completing the planned robbery, shot and instantly killed Marcus Benjamin, an alleged drug dealer, and shot and seriously wounded a passer-by, Keith Staple. This defendant represents an alarmingly increasing number of young people who live each day without concern, conscience, or fear of the consequences for their actions.

Too many young people appear before our courts devoid of scruples or a sense of social or civic responsibility. They live their lives without concern for themselves or others. They are nothing more than unguided malevolent missiles of mayhem and destruction, and if society does not address this phenomenon soon, the carnage that will be visited upon our sidewalks and streets will know no bounds.

11a

Defendant is a pre-eminent example of this threat. He took the life of Marcus Benjamin, and would have taken that of Keith Staple, had he been a better marksman, as easily as one turns a television channel. Clearly, he is too dangerous an individual to be permitted to walk among the law-abiding. A stiff sentence will solve society's difficulties with him, but the larger problem that creates this type of soulless person remains to be addressed.

Marcus Benjamin's family wrote to this Court to attempt to quantify their loss and grief, but no parent can adequately put into words the profound nature of the loss of a child. No parent should have to outlive a child. No sister should lose a brother in this manner. Unfortunately, there is a danger inherent in the activity attributed to Marcus Benjamin. If his death is to have any meaning, perhaps it can serve as a warning to those with his alleged proclivities that the risks of same are too great. As for those with defendant's proclivities, let them know that their punishment will be swift, severe and substantial. Even wayward souls, as Marcus Benjamin, should have the potential to be saved rather than slaughtered by a predator like Sammy Moore.

As defendant chose separate victims, through separate acts, for separate reasons, his punishment for the murder and attempted murder should be consecutive. Arguably, more Counts could be consecutively punished, but this sentence as designed will hold defendant in custody with certainty until he is too old to be wild and still give the Parole Board the discretion to keep him incarcerated forever. Aggravating factors 1, 2, 3 and 9 clearly, convincingly and substantially outweigh the non-existent mitigating factors.

120

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ORIGINAL FILED

MAY 22 1995

A-415C-94J4

Emilia R. Cox, Esq.


SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
IND. NO(S). 94-06-00636

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

PLEASE TAKE NOTICE that the defendant, Confined at New Jersey State Prison appeals to this Court from the final judgment of conviction of murder, attempted murder, robbery, possession of a weapon for an unlawful purpose entered on March 8, 1995 in the Superior Court, Law Division, Union County, in which a sentence of life imprisonment plus 20 years with a 40 year parole disqualifier, \$350 VCCB penalty, \$525.00 safe neighborhoods services fund was imposed by the Honorable William L'E. Wertheimer.

SUSAN L. REISNER  
Public Defender  
Attorney for Defendant-Appellant

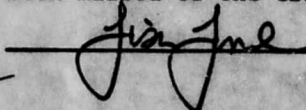
BY:

  
LISA A. LYNCH

Assistant Deputy Public Defender  
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have been complied with by ordering the transcript(s) on May 10, 1995 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

13a





A-4956-94T4

STATE OF NEW JERSEY  
VS  
SAMMY MOORE

*4/23/95*  
*1510-95*

**RECORDED**

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ORDER GRANTING LEAVE TO FILE  
NOTICE OF APPEAL NUNC PRO TUNC

**FILED**  
APPELLATE DIVISION

JUN 1 1995

*Emille R. Cox*  
Clerk

An application to file a notice of appeal nunc pro tunc having been submitted to this Court by the Office of the Public Defender on behalf of the appellant, and it appearing that the preconditions established by the Supreme Court in its Notice To Appellate Bar, 100 N.J.L.J. 1208 (1977), identified and explained in State v. Altman, 181 N.J. Super. 539 (App. Div. 1981) have been met;

It is **HEREBY ORDERED** that the above appeal is filed nunc pro tunc.

**WITNESS**, the Honorable Herman D. Michels, Presiding Judge for Administration, at Trenton, this 01 day of June, 1995.

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

*Emille R. Cox* *Emille R. Cox*

Clerk

**EMILLE R. COX**  
**CLERK OF THE APPELLATE DIVISION**

JUDHD

UNN CU. # 94-06-00636

*14a*



A-4956-9474

REC'D  
APPELLATE DIVISION  
NOV 14 1996

FILED  
APPELLATE DIVISION

NOV 14 1996

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No. A-4956-94T4

THE STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	<u>Criminal Action</u>
v.	:	On Appeal From a Final
SAMMY MOORE,	:	Judgment of Conviction of the
Defendant-Appellant.	:	Superior Court of New Jersey
	:	Law Division, Union County
	:	Sat Below:
	:	Honorable William L'E. Wertheimer
	:	Judge of the Superior Court
	:	and a jury

**BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT**

ANELISE SIEBER  
Special Deputy Attorney General/  
Assistant Prosecutor  
Of Counsel  
and  
On the Brief

Dated: November 13, 1996

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COUNTER-STATEMENT OF PROCEDURAL HISTORY<sup>1</sup>

On June 3, 1994, a Union County Grand Jury returned Indictment No. 94-06-00636 which charged defendant with the purposeful and/or knowing murder of Marcus Benjamin, a first degree offense, in violation of N.J.S.A. 2C:11-3a(1) and/or (2) (count one); attempted murder of Keith Staple, a first degree offense, in violation of N.J.S.A. 2C:11-3a(1) and N.J.S.A. 2C:5-1 (count two); first degree robbery of Marcus Benjamin, in violation of N.J.S.A. 2C:15-1 (count three); first degree robbery of Keith Staple, in violation of N.J.S.A. 2C:15-1 (count four); felony murder, a first degree offense, in violation of N.J.S.A. 2C:11-3a(3) (count five); second degree conspiracy, in violation of N.J.S.A. 2C:5-2 (count six); second degree possession of a firearm for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a (count seven); unlawful possession of a handgun, a third degree offense, in violation of N.J.S.A. 2C:39-5b (count eight); and receiving stolen property, a third degree offense, in violation of N.J.S.A. 2C:20-7 (count nine). (Da1-6).

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<sup>1</sup>1T refers to Miranda hearing transcript of December 12, 1994.

2T refers to trial transcript of opening statements of December 13, 1994.

3T refers to trial transcript of December 13, 1994.

4T refers to trial transcript of December 14, 1994.

5T refers to trial transcript of December 15, 1994.

6T refers to trial transcript of summations of December 15, 1994.

7T refers to trial transcript of December 16, 1994.

8T refers to sentencing transcript of March 3, 1995.

Da refers to defendant's brief and appendix.



On December 12, 1994, the Honorable William L'E. Wertheimer, J.S.C. denied defendant's motion to preclude the admissibility of defendant's written statement at trial. (1T38-23 to 1T39-23). Defendant was tried before Judge Wertheimer and a jury from December 13 through December 16, 1994. The jury returned verdicts of guilty on all counts charged in the indictment on December 16, 1994. (7T55-1 to 7T56-3; Da7).

On March 3, 1995, defendant was sentenced by Judge Wertheimer to the following custodial terms:

- Count One (murder) - life imprisonment,  
30 years without parole
- Count Two (attempted murder) - 20 years,  
10 years without parole,  
consecutive to Count One
- Count Three (robbery) - 20 years,  
10 years without parole,  
concurrent with other counts
- Count Four (robbery) - 20 years,  
10 years without parole  
concurrent with other counts
- Count Seven (possession of a firearm for an unlawful  
purpose) - 10 years, 5 years without  
parole, concurrent with other counts
- Count Eight (unlawful possession of a handgun)  
5 years, 2-1/2 without parole,  
concurrent to all other counts
- Count Nine (receiving stolen property)  
5 years, 2-1/2 without parole,  
concurrent to all other counts

The court merged count five (felony murder) into count one (murder) and count six (conspiracy) into counts three and four

(robbery) and count seven (possession of a firearm for an unlawful purpose). (8T11-2 to 5). A Violent Crimes Compensation Board penalty totalling \$350 (\$50 per count) and a \$525 Safe Neighborhoods Service Fund (\$75 per count) were assessed. (8T13-8 to 8T4-10; Da8-9).

Defendant's notice of appeal was filed, by leave granted, nunc pro tunc on May 22, 1995. (Da13-14).

COUNTER-STATEMENT OF FACTS

The State adopts the defense's statement of facts with the following changes:

After a proper foundation was laid by the prosecutor, Alexander Walker admitted that his statement refreshed his recollection that defendant was with Tariq, Rock and the driver. (3T129-3 to 25).

Traci Thomas repeatedly denied that she wanted defendant to move in with her and denied that she said she would "get even" with defendant. (3T51-15 to 3T52-2).

Natasha Levant acknowledged that at the time of trial that she still had "bad feelings" toward defendant and not that she continued to harbor anger and resentment toward defendant. (5T42-1 to 3).

## LEGAL ARGUMENT

### POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S APPLICATION FOR AN ADJOURNMENT OF THE TRIAL.

Defendant contends that the trial court abused its discretion and deprived defendant of a fair trial by refusing defendant's request for an adjournment of the trial in order to produce two witnesses. The State submits that the court properly denied this request.

It is well-established case law that adjournments are ordinarily within the discretion of the trial court. State v. Gallegan, 117 N.J. 345, 354 (1989); State in Interest of D.P., 232 N.J. Super. 8, 19 (App. Div. 1989); State v. Kyles, 132 N.J. Super. 397, 402 (App. Div. 1975), State v. Lamb, 125 N.J. Super. 209 (App. Div. 1973). In State v. Gallegan, the Supreme Court stated that the reviewing court should not invade the "wide scope of discretion intrusted to the trial judge" unless it is manifestly necessary. Id. at 354 quoting State v. Farmer, 48 N.J. 145, 173 (1966), cert. den. 386 U.S. 991 (1967).

In State v. Lamb, 125 N.J. Super. 209 (App. Div. 1973), the court ruled that the "granting of a continuance is a matter exclusively within the province of the trial judge, and should not be upset unless it appears from the record that the defendant suffered manifest wrong or injury." Id. at 213. Absent "manifest wrong or injury," the refusal of an

adjournment will not lead to reversal. State v. Smith, 87 N.J. Super. 98 (App. Div. 1965); State v. Smith, 66 N.J. Super. 465, 468 (App. Div. 1961).

In the present case, defendant requested an adjournment of the trial to produce two witnesses, Brenda Johnson and Ebony Bennett. Neither appeared in court on the day they were scheduled to testify. The only information supplied to the court in an attempt to explain their absence was information provided by defense counsel that his investigator had learned that Ebony Bennett, a juvenile, had been arrested the night before and was being detained in Essex County. To try to explain Ms. Johnson's failure to appear, defense counsel indicated that it was "most likely" that Ms. Johnson was somewhere in the Essex County Courthouse trying to secure Ms. Bennett's release from detention. (5T190-1 to 3). No proof, however, was provided that that in fact was the case. Furthermore, defense counsel did not have proof of service of the subpoenas. Prior to ruling on defense counsel's request for an adjournment, the court questioned him as to the witnesses' anticipated testimony. The court learned that although Ms. Bennett and Ms. Johnson were expected to testify that defendant was in Newark until 11:00 p.m. according to Ms. Bennett and midnight according to Ms. Johnson, providing defendant with a partial alibi at best, neither witness could provide testimony regarding defendant's whereabouts at the time of the murder and attempted murder. In denying the request for



an adjournment, the court stated that it did not find the testimony to be dispositive. The court further indicated that it was denying the request since defense counsel did not have proof of service of the subpoenas and the trial had been scheduled for a long time.

The trial court did not abuse its discretion in denying the motion for an adjournment. The contention that a simple adjournment would have sufficed to secure the presence of the two defense witnesses is pure speculation on the part of defense. No information exists in the record below as to the specific whereabouts of Brenda Johnson on December 15, 1994. Additionally, the defense had an opportunity to present any evidence of the whereabouts or availability of either of these witnesses the following morning on December 16, 1994. Although testimony and summations were completed on December 15, 1994, the court did not instruct the jury until the following morning on December 16, 1994. Defense produced neither witness nor did it present proof of service of the subpoenas on either or both of witnesses prior to the jury instructions and before deliberations began in the case. Nor did it take any additional steps to produce the witnesses or to compel their appearance by requesting the court to issue a warrant.

Furthermore, even if the judge erred in not granting an adjournment, there was no reversible error. The testimony of Ebony Bennett and Brenda Johnson would not have provided defendant with an alibi for the time of the murder and



attempted murder. Courts have held that even where the trial court has erred in not allowing an alibi witness to testify, there is no reversible error where the testimony would not have supported a defendant's alibi. See State v. Harris, 117 N.J. Super. 83 (App. Div. 1971). In Harris, the defendant wanted to call his mother to testify to his whereabouts at the time of the robbery. The trial court did not allow the testimony because the defendant did not file the required notice of alibi. Harris, 117 N.J. Super. at 88. The court held that even though it was error for the judge to have precluded the testimony, there was no reversible error, because the proposed testimony could not have reasonably exculpated the defendant. Id. at 93. In Harris, the robbery occurred between 10:00 p.m. and 10:30 p.m. Defendant's mother would have testified that she, the defendant and others were together at approximately 10:15 and drove for about fifteen minutes. Id. Defendant then left the car alone. Id. She could say nothing about his whereabouts once he left the car. Id. When defendant left his mother, he was about a block and a half from the location of the robbery. Id. Thus, the court concluded that the mother's testimony could not have reasonably exculpated defendant. Id.

Similarly, in this case, the testimony of Ebony Bennett and Brenda Johnson could not have reasonably exculpated defendant. The murder and attempted murder occurred after midnight and defendant would have had sufficient time to go to

Plainfield to commit the murder of Marcus Benjamin and the attempted murder of Keith Staple.

Defendant fails to show that there has been an abuse of discretion leading to a manifest wrong or injury. Absent such manifest wrong or injury, the denial of the request for an adjournment does not constitute reversible error. State v. Smith, 87 N.J. Super. 98, 105 (App. Div. 1965). Consequently, defendant's request must be denied.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT VOLUNTARILY WAIVED HIS MIRANDA RIGHTS AND THAT HIS STATEMENT WAS ADMISSIBLE AT TRIAL.

Defendant contends that his second statement to the police was not given voluntarily and therefore the statement should have been suppressed. The State submits that the trial court properly ruled that defendant made a voluntary, knowing and intelligent waiver of his rights and consequently his statement was admissible at trial. Therefore, defendant's contention is clearly without merit.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court ruled that the State could not introduce at trial a statement of a defendant unless the State could demonstrate that certain procedural safeguards designed to protect defendant's privilege against self-incrimination were followed. These rights have been commonly referred to as Miranda rights. The New Jersey Supreme Court in State v. Melvin, 65 N.J. 1, 11 (1974), ruled that a defendant may waive his Miranda rights.

The United States Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) defined waiver as follows:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case,

including the background, experience, and conduct of the accused.

In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme Court determined that to be valid, a waiver must be made "voluntarily, knowingly and intelligently." The State bears the burden of proof. Id. at 475. In State v. Miller, 76 N.J. 392, 404-405 (1978), the New Jersey Supreme Court ruled that the State bears the burden of proving the admissibility of a confession beyond a reasonable doubt.

In determining whether a defendant has made a statement voluntarily, the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), ruled that courts have to examine the totality of the circumstances surrounding the making of the statement. Courts should consider the characteristics of the accused, as well as the details of the interrogation. Relevant factors include the defendant's age, education, intelligence, advice concerning his constitutional rights, the length of detention, whether the questioning was repeated or prolonged in nature and whether it involved physical punishment or mental exhaustion such as the deprivation of food or sleep. Id. at 226; State v. Bey, 112 N.J. 123, 135 (1988); State v. Miller, 76 N.J. at 402.

In State v. Miller, 76 N.J. 392 (1978), the New Jersey Supreme Court noted in determining the voluntariness of a statement that even psychologically-oriented techniques are not inherently coercive, and that their use is not improper merely because they cause a suspect to change his mind and confess.

"The real issue is whether the change of mind was voluntary and not an overbearing of suspect's will." Id. at 405.

In the present case, defendant was arrested on December 13, 1993 on a murder warrant. Initially, he was transported to Newark Police Department and then was taken to Plainfield Police Department for processing on the warrant. He arrived at Plainfield Police Department at approximately 3:40 p.m. He was then processed at headquarters, i.e., photographed, fingerprinted, etc. This lasted approximately one-half hour to forty-five minutes and thereafter he was placed in a holding cell. At 4:40 p.m., he was removed from his cell and taken to an interview room. Detective Marcantonio and Detective Gallagher were present along with defendant. Prior to questioning defendant on December 13, 1993, defendant was read his Miranda rights and waiver portion of those rights by Detective Marcantonio. Defendant also read each right out loud, initialed each right, indicated he understood each right by placing a "yes" next to each right and then signed the waiver form. (1T10-4 to 12). Defendant, in his testimony at the Miranda hearing admits this all occurred prior to his questioning. (1T29-19 to 20; 1T30-1 to 2; 1T30-9 to 10). After waiving his rights, defendant agreed to be questioned and provided an oral statement to the police regarding an alibi. Defendant provided this statement between 4:55 p.m. and 7:24 p.m. (1T13-10 to 13). He was thereafter returned to his cell



and the police began to investigate his alibi. (1T13-14 to 20).

The following day, on December 14, 1993, defendant was again removed from his cell. This was at 2:10 p.m. (1T13-5 to 18). He was taken to the same interview room and the same procedure was utilized with respect to the advisement of rights and the waiver of those rights. (1T33-13 to 23; 1T33-3 to 1T34-2). Defendant then waived his rights and told detectives he committed the shooting on the night in question. (1T16-11 to 14). After he orally admitted his involvement in the shooting, the detectives took an eight-page written statement from defendant. (1T16-17 to 1T17-4).

At the Miranda hearing, defendant acknowledged that he understood his rights and waived them. However, he alleges that the only reason he gave the written statement to police on December 14, 1993 is because he was threatened by the police. He claimed that the police threatened to make sure that he got the death penalty and that his friends would be locked up and their kids placed in foster care if he didn't sign the statement. (1T27-8 to 17). Detective Marcantonio denies defendant's allegations. (1T22-13 to 18; 1T23-5 to 15).

At the conclusion of the testimony by Detective Marcantonio and defendant at the Miranda hearing, the court ruled that the statement was admissible. The court found Detective Marcantonio's testimony to be credible (1T39-12) and further indicated that it didn't believe defendant's version to

be accurate. (1T39-13 to 15). The court found it "inconceivable that somebody who is threatened with the death penalty would confess to a murder thereby giving the State all the ammunition they need ... ." (1T38-23 to 25). The court concluded by stating that defendant understood his rights and knowingly, voluntarily and intelligently waived those rights. Consequently, he ruled the statement to be admissible.

The court's ruling that defendant's written statement was admissible at trial was a proper one. Under the totality of the circumstances, defendant knowingly, voluntarily and intelligently waived his Miranda rights. Defendant, age nineteen (at the time of his arrest), had an eleventh-grade education. He was informed of his rights and clearly indicated he understood them. The questioning of defendant was neither prolonged nor repeated. Nor is there any evidence that the questioning of defendant involved physical punishment or mental exhaustion such as deprivation of food or sleep.

The trial court's decision regarding the admissibility at trial of defendant's written statement was based upon sufficient credible evidence present in the record and pursuant to State v. Johnson, 42 N.J. 146, 162 (1964) these findings should not be disturbed. Therefore, defendant's request that the conviction be reversed must be denied.

POINT III

DEFENDANT'S CONVICTION OF FIRST DEGREE ROBBERY OF KEITH STAPLE WAS PROPER AND SHOULD NOT BE VACATED.

Defendant contends for the first time on appeal that his conviction of first degree robbery must be vacated because the State failed to prove all of the essential elements of the robbery of Keith Staple. Defense contends that the State failed to prove an attempted theft or theft of Keith Staple and consequently the robbery conviction must be reversed. Defendant's contention is meritless.

N.J.S.A. 2C:15-1 defines robbery as follows:

A person is guilty of robbery, if in the course of committing a theft, he:

- (1) Inflicts bodily injury or uses force upon another; or
- (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
- (3) Commits or threatens to commit any crime of the first or second degree.

The statute further defines "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

In the present case, defendant was charged in count four of the indictment with a first degree robbery upon Keith Staple. In its instructions to the jury regarding this count, the court first read the count of the indictment to the jury and then proceeded to define all of the elements of the offense

which the State must prove beyond a reasonable doubt. The court properly charged the jury that "an act is considered to be in the course of committing a theft if it occurs in an attempt to commit the theft, during the commission of the theft itself or in immediate flight after the attempt or commission." (7T24-16 to 20). The court had previously defined "attempt" for the jury in its instructions.

Defendant argues that the jury found him guilty of the robbery of Keith Staple because the court "implied" that the theft against Marcus Benjamin while using force against Keith Staple constituted a robbery against Keith Staple. This is pure speculation on the part of defendant. Nowhere in the jury instructions does the court imply any such thing.

Defense argues that the State failed to prove all of the elements of the robbery of Keith Staple and cites State v. Carlos, 187 N.J. Super. 406 (App. Div. 1982) as support for its position. In State v. Carlos, defendant entered a gas station office brandishing a gun and demanded money from four individuals that were present. He ordered all four of them to the ground and took money from two individuals. Defendant was convicted by the jury of four counts of robbery. The appellate court reversed two of the robbery convictions and found that defendant could not have been found guilty of robbery of each person subjected to theft or intimidation, unless a theft or attempted theft from that person was proved. Id. at 414. The two robbery convictions were set aside not because the State

failed to prove the robberies, but because the court failed to instruct the jury as to attempted theft from the two additional victims.

In the case at hand, the trial court did properly instruct the jury with respect to the attempted theft of Keith Staple. There is sufficient evidence presented to the jury that warrants a finding of an attempted theft from Keith Staple. The evidence produced at trial, with respect to the robbery charges, included the testimony of Alexander Walker, Keith Carson and the victim, Keith Staple. Alexander Walker testified that he observed defendant with Tariq, Rock and the driver of the white Hyundai in front of the building at 195 First Street. (3T129-21 to 3T130-5; 3T126-18 to 22). He further testified that Tariq approached him and asked him if he wanted to go "sticking" which means robbing people. (3T126-9 to 14; 3T131-12).

Keith "Mook" Carson testified that he observed a whole bunch of people come from behind the houses and all of them, with the exception of one, had ski masks on. (3T27-24 to 25; 3T28-7 to 8). He "saw Marcus facing the house with his hands up and the stick-up kid." (3T28-4 to 5).

Keith Staple also testified that he observed three individuals, two with ski masks on, approaching with guns. (4T136-8 to 14). His first reaction to the masked men with guns was to freeze because he figured they were coming to rob people. He further testified that he volunteered information



to his assailants that he didn't have anything but by the time he said this one of his assailants had already placed a pistol in his left ear. (4T137-4 to 14). While he had a gun to his head, he observed the others "shaking" Marcus down or going through Marcus's pockets. (4T138-5 to 8).

Certainly any reasonable person under these circumstances would conclude that a robbery was taking place against Keith Staple. Attempt is defined in N.J.S.A. 2C:5-1 as follows:

A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for the commission of the crime, he:

(1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be. (Emphasis added)

In sum, the jury was not only properly instructed by the court with respect to attempted theft, but it had sufficient evidence before it to have concluded that defendant did commit a robbery against Keith Staple. Consequently, defendant's request that the first degree conviction for robbery be reversed must be denied.

#### POINT IV

THE PROSECUTOR PROPERLY COMMENTED UPON THE EVIDENCE IN THE SUMMATION.

Defendant contends for the first time on appeal that the prosecutor used inflammatory and inappropriate language to describe defendant and that these comments so prejudiced the jury that it could not fairly evaluate the merits of the case. Defendant's claims are totally meritless.

The principles which set forth the permissible bounds of a prosecutor's summation are by now well known. The State is permitted wide latitude in advocating its position before the jury. State v. Dixon, 125 N.J. 223, 259 (1991); State v. Williams II, 113 N.J. 393, 455-56 (1988). This is so "in order that justice and right be done." State v. Bogen, 13 N.J. 137, 140 (1953). This broad latitude is available during summation so long as counsel stays within the evidence and the legitimate inferences to be drawn therefrom. State v. Koedatich, 112 N.J. 225, 325 (1988); State v. Ebron, 122 N.J. Super. 552, 559 (App. Div. 1973), certif. den. 63 N.J. 250 (1973); cf. State v. Marks, 201 N.J. Super. 514, 534 (App. Div. 1985). The rule that a prosecutor is limited to commenting upon the evidence and the reasonable inferences to be drawn therefrom does not, however, preclude a forceful presentation of the State's case, State v. Zola, 112 N.J. 384, 426 (1988), State v. Pratt, 226

N.J. Super. 307, 323 (App. Div. 1988), which "may be couched in trenchant terms." State v. Bucanis, 26 N.J. 45, 56 (1958) cert. den. 357 U.S. 910 (1958). The prosecutor is not expected "to present the State's case in a manner appropriate to a lecture hall." State v. Johnson, 31 N.J. 489, 510-511 (1960), cert. den. 368 U.S. 933 (1961); see also, State v. Marks, supra ("It is ... unreasonable to expect that criminal trials will be conducted without some show of feelings."). Rather, the prosecutor may quite properly use rhetoric, figures of speech and descriptive language in support of his theory of the case. State v. Cioffe, 128 N.J.L. 342, 354 (Sup. Ct. 1942), aff'd 130 N.J.L. 160 (E. & A. 1943). Such comments, by way of denunciation or appeal, will afford no grounds for reversal if derived from the proofs adduced at trial. State v. Mayberry, 52 N.J. 413, 437 (1968), cert. den. 393 U.S. 1043 (1969); State v. Hill, 47 N.J. 490, 499 (1966); State v. Bogen, supra; State v. Marks, supra. On the other hand, not every deviation from perfection in the course of a prosecutor's summation will justify reversal of a conviction. State v. Smith, 27 N.J. 433, 460 (1958), cert. den. 361 U.S. 861 (1959); State v. Vaszorich, 13 N.J. 99, 119 (1953). To compel such a drastic remedy, the infraction must be "clear and unmistakable and must substantially prejudice the defendant's fundamental right to have the jury fairly evaluate the merits of his defense." State v. Bucanis, supra at 56, accord, State v. Ramseur, 106 N.J. 123, 322 (1987).

The State's summation in the present case represents fair comment upon the evidence and the legitimate inferences which can be drawn therefrom. Defendant was charged with the murder of one victim, Marcus Benjamin, and the attempted murder of a second victim, Keith Staple. Both victims were unarmed when shot by defendant. The surviving victim was shot as he was attempting to flee to safety. The other victim was not as fortunate. He was shot dead at the scene. The references to defendant as a "killer" and as a "sociopath with a gun" are fair comment upon the evidence and are totally appropriate under these circumstances.

Evan assuming arguendo that the State overstepped its bounds, the defense must prove not only that the remarks rise to the level of prosecutorial misconduct, but that they so inflamed the jury that it could not properly weigh the evidence against defendant. Defense fails to prove its assertion.

Prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious that it deprived the defendant of a fair trial. State v. Marshall, 123 N.J. 1, 153 (1991); State v. Williams, 113 N.J. 393, 454 (1988); State v. Ramseur, 106 N.J. 123, 322 (1987); State v. Biegenwald, 106 N.J. 13, 40 (1987). The determination of whether prosecutorial misconduct denied a defendant the right to a fair trial must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to the improprieties when they occurred. State v. Marshall,

supra at 153; State v. Ramseur, supra at 323. "In determining whether prosecutorial misconduct is prejudicial and denied defendant a fair trial, [a reviewing court] will consider whether defense counsel made a timely objection to the conduct and whether the court instructed the jury to disregard the improper conduct." State v. Marshall, supra at 153; State v. Ramseur, supra at 322-23.

In the case at hand, defense counsel did not object to the State's remarks. "Ordinarily a defendant will not be heard to claim prejudice if defense counsel does not make a timely objection to improper remarks." State v. Farrell, 61 N.J. 99, 106 (1972). In the absence of a timely objection, the reviewing court must determine whether the comment was "clearly capable of producing an unjust result." State v. Macon, 57 N.J. 325, 336 (1971); State v. Setzer, 268 N.J. Super. 553, 566 (App. Div. 1993).

"To justify reversal, the prosecutor's conduct must have been clearly and unmistakably improper, and the improper conduct must have resulted in substantial prejudice to the defendant's fundamental right to have a jury fairly assess the persuasiveness of his case." State v. Hightower, 120 N.J. 378, 411 (1990); State v. Williams, supra at 452, quoting State v. Bucanis, 26 N.J. 45, 56, (1958), cert. den. 357 U.S. 910 (1958).

In sum, the State's comments were neither inappropriate nor inflammatory. Furthermore, they clearly did not result in



substantial prejudice to the defendant's fundamental right to have the jury fairly assess the evidence against defendant. Consequently, defendant's contention that his convictions be reversed as plain error must be denied.

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POINT V

THE SENTENCE IMPOSED WAS NEITHER EXCESSIVE NOR BASED UPON IMPROPER CRITERIA.

Defendant challenges the sentence imposed by the trial court as manifestly excessive. Defendant argues that the trial court's imposition of a minimum of forty years to life is improper for two reasons. First, defendant claims the trial court incorrectly assessed the aggravating and mitigating circumstances and second, that the court erred in imposing twenty years with a ten year parole disqualifier consecutive to the imposition of thirty years to life. An examination of the record below and the applicable law demonstrates that the trial court properly sentenced defendant and therefore, the sentence should not be reduced.

Sentences will not be reduced upon appellate review absent a finding of a clear abuse of judicial discretion. State v. Roth, 95 N.J. 334, 363 (1984); State v. Ellis, 280 N.J. Super. 533, 552 (App. Div. 1995); State v. Kotter, 271 N.J. Super. 214, 228 (App. Div. 1994) certif. den., 137 N.J. 313 (1994). If the sentencing court's findings of facts are grounded in competent, reasonably credible evidence and the court has applied correct legal principles in exercising its discretion, then the reviewing court may modify the sentence only if the application of the facts to the law is such a clear error of judgment that it "shocks the judicial conscience." State v. Roth, 95 N.J. at 363-65. Accord, State v. Hodge, 95 N.J. 369

(1985); State v. Grey, 281 N.J. Super. 2, 11-12 (App. Div. 1995). The test "is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review." Id. at 388. Accord, State v. Johnson, 118 N.J. 10, 15 (1990); State v. O'Donnell, 117 N.J. 210, 215-16 (1989); State v. Kotter, supra, 271 N.J. Super. at 228.

It is critical to understand, in undertaking an analysis of the reasonableness of a sentence, that the New Jersey Penal Code "requires an inexorable focus upon the offense when formulating a sentence." State v. Roth, supra at 369. "The sentence imposed must reflect the Legislature's intention to focus on the degree of the crime itself as opposed to other factors personal to the defendant." State v. Hodge, supra at 377.

As this court recently stated,

The question before us is not whether we would have increased the presumptive term or whether we would have imposed a parole disqualifier. ... [w]e cannot "second guess" the sentencing judge ... and must uphold the sentence even if there is "room for reasonable disagreement" as to whether it is the appropriate one. [State v. Kotter, supra, 271 N.J. Super. at 228, quoting State v. Roth, supra at 365].

"Thus, an appellate court should ordinarily affirm the sentence of the trial court, unless the trial court failed to follow the sentencing guidelines, made factual findings not

supported by the record, or if the sentence shocks the judicial conscience." State v. Grey, *supra*, 281 N.J. Super. at 12.

In the present case, the court considered the applicable aggravating and mitigating factors. (8T13-5 to 7). The court found the following aggravating factors existed: the nature and circumstances of the offense, N.J.S.A. 2C:44-1a(1); the gravity and seriousness of harm inflicted on the victim, N.J.S.A. 2C:44-1a(2); the risk that defendant will commit another offense, N.J.S.A. 2C:44-1a(3); and the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1a(9). The trial court found the aggravating factors "clearly, convincingly and substantially outweigh the nonexistent mitigating factor." (8T13-5 to 7).

Defendant's argument that the court mistakenly found the existence of aggravating factor (2), *i.e.*, the seriousness of harm inflicted on the victim, is not persuasive. The harm to the victim is normally considered jointly with the nature of the offense under N.J.S.A. 2C:44-1a(1). Cannel, Criminal Code Annotated, Comment N.J.S. 2C:44-1a(2), (Gann). The comments to the New Jersey Criminal Code Annotated with respect to aggravating factor #2 further indicates that it is unlikely that the harm to the victim could be considered separately from the nature and circumstances of the offense.

Defendant's next argument that the court erred by failing to consider defendant's age as a mitigating factor is equally unpersuasive. The court was clearly aware of defendant's age

and did consider his age in the sentencing analysis. The court makes repeated reference to defendant's age in his sentencing remarks: "this is a 20 year old defendant ... convicted of murder, attempted murder ... (8T10-23 to 24); defendant "a mere 18 years old at the time of this offense ... " (8T11-8 to 9); this defendant represents an alarmingly increasingly number of young (emphasis added) people who live each day without concern, conscience or fear of the consequences for their actions." (8T11-16 to 19). It is quite evident that the court considered defendant's young age and equally evident from the above comments that he didn't find this to be a mitigating factor.

Defendant's argument for the imposition of a minimum mandatory term of thirty years for murder and a presumptive fifteen years for the attempted murder would require a finding by the sentencing court that the aggravating factors are in equipoise with the mitigating factors. This argument must fail especially when one considers the presence of the nature and circumstances of the offense which has been held to be the single most important factor in the list under both subsections a and b of N.J.S.A. 2C:44-1. Cannel, Criminal Code Annotated, Comment N.J.S. 2C:44-1a(1), (Gann). When that factor is added to all of the other aggravating factors that the court found to exist, defendant's request for a reduction of sentence must be denied.



Defendant's remaining argument that the court should have imposed a concurrent sentence for the attempted murder as opposed to a consecutive sentence is equally meritless. The sentencing court found that the defendant "chose separate victims through separate acts for separate reasons," (8T12-24 to 25) and therefore his punishment for the murder and attempted murder should be consecutive. The court below properly followed the sentencing analysis set forth in State v. Yarbough, when it sentenced defendant to a consecutive term. State v. Yarbough, 100 N.J. 627, 630 (1985), cert. den. 475 U.S. 1014 (1986). The criteria set forth in State v. Yarbough include whether or not the crimes involved separate acts of violence and/or whether any of the crimes involved multiple victims. Clearly they do, and consequently the court properly sentenced defendant to a consecutive term.

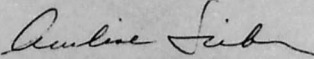
In sum, defendant has failed to establish on appeal that his sentence constituted a "clearly mistaken" exercise of sentencing discretion. State v. Jabbour, 118 N.J. 1, 6 (1990), quoting State v. Jarbath, 114 N.J. 394, 401 (1989). Absent a showing that defendant's sentence manifests such a clear error in "judgment as to shock the judicial conscience," appellate intervention is not required. State v. Ghertler, 114 N.J. 383, 393 (1989). Defendant's sentence must therefore be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of conviction and sentence be affirmed.

Respectfully submitted,

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By: ANELISE SIEBER  
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APPELLATE DIVISION

NOV 27 1996

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November 27, 1996

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Of Counsel and  
On the Reply Letter-Brief

REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Honorable Judges of the  
Superior Court of New Jersey  
Hughes Justice Complex  
CN 006  
Trenton, New Jersey 08625

Re: State v. Sammy Moore  
Docket No. A-4956-94T4

Criminal Action: On Appeal from  
Judgment of Conviction in the  
Superior Court, Law Division, Union County

Your Honors:

This letter is being submitted in lieu of a formal reply  
brief on appeal in accordance with Rule 2:6-2(b). Respondent's  
brief was served on November 15, 1996.

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### REPLY TO COUNTER-STATEMENT OF FACTS

Defendant acknowledges that, after the judge instructed the jury to disregard Alexander Walker's statement to the police, Alexander testified that his recollection was refreshed by his statement to police to the effect that defendant was with Tariq, Rock and "the driver" in front of the apartment buildings. This much is reflected in the last paragraph of page 16 of defendant's brief. However, it is clear that in his trial testimony Alexander rejected the suggestion in that statement that defendant was outside in the company of the other young men. He testified repeatedly that although he saw them outside at the same time, he did not know if they were together. (3T 126-18 to 24; 3T 128-23 to 24; 3T 143-23 to 15)

If the State's paragraph regarding Traci Thomas's denials is intended to suggest that defendant's brief omitted this information, please refer to the last paragraph, page 26 of defendant's brief.

Natasha Levant's testimony that she had continued to have "bad feelings" toward defendant included that she was "angry" with him for having involved her cousin in this episode. (5T 41-18 to 42-3) This "bad feeling" and "anger" encompassed "resentment" -- a "feeling of displeasure or indignation at someone or something regarded as the cause of injury or insult." Webster's College Dictionary, 1991.



## POINT I

**THE COURT ABUSED ITS DISCRETION AND DEPRIVED  
DEFENDANT OF A FAIR TRIAL BY REFUSING TO  
ADJOURN LONG ENOUGH FOR DEFENDANT'S ATTORNEY  
TO PRODUCE TWO SUBPOENAED WITNESSES.**

The State argues that the trial court did not abuse its discretion in denying defense counsel's motion for adjournment in order to procure defense witnesses Brenda Johnson and Ebony Bennett because their testimony would not have supported defendant's alibi for the time of the incident in Plainfield. (SBr 7-8) This argument misses the point. Defendant does not argue that these witnesses would have provided an airtight alibi for the shootings. Therefore State v. Harris, 117 N.J. Super. 83 (App. Div. 1971) is not applicable. Defendant argued this point primarily as a deprivation of the right to present a defense because the overriding purpose of the testimony of Johnson and Bennett would have been to dispute the eyewitness identification testimony of Kyewaghana Cook and Khahlia Hassenbey. (See DBr 32 to 33)

Because the point is a crucial one, in the event it escaped the State because it was stated unclearly in defendant's brief, defendant will now reiterate it so that it is clear to the Court: Cook and Hassenbey, who were the only witnesses to place defendant near the scene of at around the time of the shootings, said that they recognized defendant when they saw him near the scene because they had seen him earlier that night, at 8:30 or 9:00 p.m. The Johnson and Bennett testimony would have been that defendant could not have been seen in Plainfield at 8:30 or 9:00

p.m. because he was in Newark with them until at least 11:00 p.m. The point to be made to the jury was simple: If Cook and Hassenbey had mistakenly identified defendant as someone they saw at 8:30 or 9:00 p.m. and indeed saw someone else at that time, then they also saw that same person later on near the scene and mistakenly identified defendant as one of the young men they saw there. Consequently, defendant argues, the Johnson and Bennett testimony was necessary to dispute the eyewitness identification.

The State also implies that defense counsel was somehow at fault by failing to produce Johnson and Bennett on the following day, before the court charged the jury. (SBr 7) Mindful of the trial judge's opinion, expressed a day earlier, that the testimony of these witnesses was not "at all significant" (5T 190-19 to 21), defense counsel very likely discerned that it would be fruitless to request to reopen on the day after summations in a trial presided over by a judge who had already expressed his desire to spend no more than an hour on this case that day so that he could proceed with his sentencing calendar. (5T 189-6 to 10)<sup>1</sup>

The fact that defense counsel did not seek a warrant for these individuals (SBr 7) on the day they were to testify simply

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<sup>1</sup>On the previous day, after interrupting the prosecutor in the midst of cross-examining defendant, to ask if she would be "much longer" (5T 188-18 to 19), the judge had explained to the jury that he wanted to complete summations that very day because he had a full sentencing calendar on the following day: "I want to get the summations done because I have a sentencing day tomorrow. I will spend the first hour of the sentencing day talking to you but then I have a full calendar. (5T 188-6 to 10)

implies that counsel wisely desired an adjournment as an alternative to a procedure which would frustrate and alienate them as well as risk that they would decline to cooperate with him. Furthermore, given the judge's remarks reflecting his view of the worth of the testimony and his own calendar, it is not likely that he would have issued a bench warrant even if asked to do so.

If this Court concludes that counsel was derelict in failing to request a warrant or to produce Johnson and Bennett on the following day, then defendant asserts that this failure constituted deficient performance, in the absence of which the result of the trial would have been different, and this rises to the level of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65 (1984), and State v. Fritz, 105 N.J. 42, 58 (1987).

Whether the error was counsel's or the court's, defendant's convictions should be reversed. If this Court believes that this issue presents less than reversible error on this record, defendant requests at the very least a remand for the taking of the proffered testimony and a determination by the trial court whether defendant was deprived of this constitutional right to due process and/or to effective assistance of counsel.

### POINT III

BECAUSE THERE WAS NO THEFT OR ATTEMPTED THEFT OF PROPERTY FROM KEITH STAPLE, DEFENDANT'S CONVICTION OF FIRST DEGREE ROBBERY OF KEITH STAPLE MUST BE VACATED. (Not Raised Below)

The State's position in Point III is that the conviction of robbery of Keith Staple must stand because jury reasonably could have found that an attempted theft was committed against him. In light of State v. Carlos, 187 N.J. Super. 406 (App. Div. 1982), State v. Sewell, 127 N.J. 133 (1992), ("[E]ach robbery is a separate crime, which entails a discrete theft from a single victim together with accompanying injury or force," id. at 137), and considering all of the evidence presented in this case, this position advanced by the State is astonishing.

The State correctly maintains that a robbery conviction in Carlos, 187 N.J. Super. (App. Div. 1982), certif. den. 93 N.J. 297 (1983), was overturned because the court failed to instruct the jury as to attempted theft from an individual who was threatened with a gun but had not yielded any money when the defendant unequivocally demanded it from everyone present. Id. at 410, 415-416. (SBr 16-17) However, the real question in Carlos involved the interpretation of the robbery statute-- whether, under N.J.S.A. 2C:15-1, "the person who is threatened must also be the victim of a theft or attempted theft." Carlos, 187 N.J. Super. at 409.

Unmentioned by the State is the Carlos Court's finding of error in the trial judge's supplemental charge to the jury. It misled the jury into believing that the "threat" in a robbery

"could be directed against 'a person who was present during the commission of a theft, but from whom no money was taken.'" Id.

This error led this Court to hold:

[E]ach conviction for robbery must involve a theft or attempted theft from the possession or custodial care of the same person who is intimidated, threatened or injured, except in a limited number of special circumstances no here involved.

Id. The trial court in the instant case committed a similar error by failing to make clear to the jury that at least an attempted theft of Keith Staple would have to be found in order to convict defendant of robbery of him. Under Carlos, a theft or attempted theft of Marcus Benjamin would not suffice to convict defendant of first degree robbery of both Benjamin and Staple.

In testimony set out in defendant's brief at page 46, Keith Staple denied that anyone went through his pockets or tried to take anything from him. (4T 154-15 to 155-1) Thus, even Staple's testimony is contrary to the notion that he was the victim of a theft or attempted theft. In his panic and anticipation that there might be a robbery, Staple's blurting out that he did not have anything (4T 137-4 to 14) did not convert what occurred to him into a robbery, even if a gun was held to his head to keep him from interfering with what was happening to Marcus Benjamin.

Surprisingly, the State asserts that what Keith "Mook" Carson saw could have supported a conviction of robbery against Staple when, in fact, according to Keith Carson, Staple was not even there at the scene to be robbed: When asked, Keith Carson



expressed certainty that when he saw the men approach Marcus Benjamin on the street no one else was outside with Marcus. (4T 46-21 to 47-5)

As the Court is aware, defendant and the State disagree over whether Alexander Walker testified that he saw defendant outside of the apartment buildings with Tariq, Rock and the driver, or at the same time, but not necessarily with them. The State's position seems to be that Alexander adopted his statement to the police as it was read to him. Defendant believes he merely acknowledged what was written by the person taking the statement, but did not vouch for the truth of its contents. In either event, it is clear that it was Tariq alone who asked Alexander if he wanted to "go sticking," and this was not in defendant's presence. (3T 126-6 to 14; 3T 131-1 to 16) Finally, all that this testimony shows is that Tariq had an intent to "go sticking." It does not show that Keith Staple ultimately became an intended victim of that very general purpose.

Because there was clearly no theft or attempted theft of Staple proved by the State, the conviction of robbery of Keith Staple must be vacated as a matter of plain error.

**CONCLUSION**

For the foregoing reasons, and for those expressed in defendant's initial brief, defendant urges this Court to reverse his convictions and grant him a new trial.

Respectfully submitted,

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Public Defender  
Attorney for Defendant-Appellant

BY: *Theresa Yvette Kyles*  
THERESA YVETTE KYLES  
Assistant Deputy Public Defender

A-4956-9474

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION : UNION COUNTY  
(CRIMINAL)  
INDICTMENT NO. 94-06-00636  
APP.DIV.DKT.NO.

A-4956-9474

STATE OF NEW JERSEY :  
v. :  
SAMMY MOORE, :  
Defendant. :  
\_\_\_\_\_ X

Transcript  
of  
Trial

FILED  
APPELLATE DIVISION

SEP 18 1995

DATE: December 12, 1994  
PLACE: Union County Courthouse  
Elizabeth, New Jersey

*R. Mullen* ON

B E F O R E:

THE HONORABLE WILLIAM L'E. WERTHEIMER, J.S.C.

TRANSCRIPT ORDERED BY:

LISA A. LYNCH, OFFICE OF THE PUBLIC DEFENDER

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

SUSAN M. MacMULLAN, ASSISTANT PROSECUTOR  
FOR THE STATE

THOMAS RUSSO, ESQ.  
FOR THE DEFENDANT

REC'D  
APPELLATE DIVISION  
SEP 18 1995  
*R. Mullen* Clerk

EILEEN A. DUNNE, C.S.R.  
Official Court Reporter  
Union County Courthouse  
Elizabeth, New Jersey

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
FOR THE STATE: DEAN MARCANTONIO	3	18		
FOR THE DEFENSE: SAMMY MOORE	24	28		

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
S-74	Marcantonio report	5	
S-75	Miranda form	9	
S-76	Miranda form	15	
S-77	Statement	16	
S-78	Diagram	17	

1 (Jury selection is not included in this transcript.)

2 THE COURT: Okay. We have a Miranda hearing?

3 MISS MacMULLAN: Yes, Judge. Can I have a few seconds  
4 to get the witness?

5 THE COURT: Yes.

6 (Pause.)

7 MISS MacMULLAN: The State's one witness is Detective  
8 Dean Marcantonio of the Plainfield Police Department.

9 THE COURT: Okay. Detective Marcantonio, please come  
10 up here. Thank you.

11 D E A N M A R C A N T O N I O, State's witness,  
12 sworn.

13 DIRECT EXAMINATION BY MISS MacMULLAN:

14 Q Good afternoon, detective.

15 Sir, are you presently employed by the Plainfield  
16 Police Department?

17 A Yes.

18 Q As a detective?

19 A Yes.

20 Q Approximately how long have you been employed as a  
21 detective?

22 A Approximately five years.

23 Q Prior to that were you a patrolman?

24 A Yes.

25 Q How many years?



1 A Three years.

2 Q Referring your attention, sir, to December 10, 1993,  
3 Friday, did you obtain an arrest warrant from Judge Barisonek  
4 for a Sammy Moore of Newark, New Jersey?

5 A Yes.

6 Q And that arrest warrant was for the murder of Marcus  
7 Benjamin from Plainfield occurring on December 5th, 1993?

8 A Yes.

9 Q Directing your attention, sir, to Monday, December  
10 13th, 1993 did you attempt to arrest Sammy Moore at that time?

11 A Yes.

12 Q Where did you go to arrest Sammy Moore?

13 A 195 First Street, Newark, New Jersey.

14 Q And when you arrived there, did you see the  
15 defendant --

16 A Yes.

17 Q -- Sammy Moore?

18 Incidentally, do you see Sammy Moore in court today?

19 A Yes, I do.

20 Q Please indicate him for the court.

21 A Sitting at the defense table in the multi-colored shirt.

22 THE COURT: Identifying the defendant for the record.

23 MISS MacMULLAN: Thank you, your Honor.

24 Q When you got to 195 First Street in Newark,  
25 approximately what time was it. if you can recall, that you saw

1 the defendant?

2 THE WITNESS: For specific times I would have to refer  
3 to my notes, your Honor.

4 THE COURT: Okay. You can do that if it refreshes  
5 your recollection. We have to mark it for identification.  
6 Let's mark it because you premarked your exhibits, have you  
7 not?

8 MISS MacMULLAN: Yes, sir.

9 THE COURT: You haven't marked that, have you?

10 MISS MacMULLAN: No.

11 THE COURT: Miranda hearing exhibit S-1. What is  
12 easier for you, Ms. Dunne? Keep it going? All right. That  
13 would be S-74.

14 (Report of Detective Marcantonio marked S-74 for  
15 identification.)

16 Q Showing you what has been marked S-74, referring your  
17 attention to the signature at the bottom, is that your  
18 signature, sir?

19 A Yes, it is.

20 Q Is that the report you wrote in this case?

21 A Yes.

22 Q Referring your attention, sir, to page fifteen of what  
23 has been identified as your report, does that refresh your  
24 recollection as to what time it was when you first got to the  
25 housing complex at 195 First Street?

1 A Yes, it does.

2 Q What time did you get there?

3 A 1330 hours. 1:30 p.m.

4 Q Did you see the defendant at that time?

5 A No. It was approximately 45 minutes later when he exited  
6 the building at 195 First Street.

7 Q Once he exited the building, did you then arrest the  
8 defendant?

9 A Yes.

10 Q And that would be approximately 2:05 p.m.?

11 A That's correct.

12 Q Once he was arrested, where was he taken?

13 A He was taken to the Newark Police Department's North  
14 District.

15 Q And exactly how far away is that from the area where  
16 he was arrested?

17 A I would say about five to ten minute ride.

18 Q Did he go directly there?

19 A Yes.

20 Q And once he arrived at the North District Police  
21 Department, what happened next?

22 A He was processed on our warrant and paperwork was filed by  
23 the Newark detective regarding same.

24 Q After he was processed at the North District, was he  
25 then transported to Plainfield Police Department?

1 A Yes.

2 Q Approximately what time was it that you left Newark  
3 North District?

4 A About three o'clock p.m.

5 Q Did you go straight to Plainfield headquarters?

6 A Yes.

7 Q What time did you arrive there?

8 A 3:40 p.m.

9 Q Was any statement taken of the defendant at this time?

10 A No.

11 Q Once you arrived at Plainfield headquarters, where was  
12 the defendant taken?

13 A Into the booking area.

14 Q Was he processed there, detective?

15 A Yes, he was.

16 Q And how long did the booking process last  
17 approximately?

18 A Approximately half an hour to 45 minutes.

19 Q Where was he placed after the booking process was  
20 completed?

21 A Into a cell, holding cell.

22 Q And was he ever taken out of that holding cell that  
23 day, December 13th?

24 A Yes.

25 Q And who was that person that took him out of the

1 holding cell?

2 A It was Detective Gallagher.

3 Q Do you know what time it was he was taken out of the  
4 cell?

5 A Specifically I know I have the time in my notes. I have to  
6 refer to my notes again here, my report.

7 THE COURT: Okay.

8 Q Referring your attention to page fifteen, the bottom  
9 paragraph, does that refresh your recollection?

10 A Sure. At 1640 hours.

11 Q So that would be 4:40 p.m, sir?

12 A Yes.

13 Q Where was he taken at that time?

14 A He was taken to the Criminal Investigation Bureau to an  
15 interview room.

16 Q And how far away is the interview room from the cell?

17 A It's on the second floor. So it's one flight of stairs up.  
18 Right above the jail cell.

19 Q Was he placed in the interview room?

20 A Yes.

21 Q Who was with the defendant at that point in time?

22 A Myself and Detective Gallagher.

23 Q How big is the interview room approximately?

24 A I would say approximately eight foot by eight foot square.

25 Q At that point in time did you read him what is



1 commonly referred to as Miranda rights?

2 A Yes.

3 Q And do you as a law enforcement officer understand the  
4 purpose of Miranda rights?

5 A Yes.

6 Q What is the purpose, sir?

7 A To advise the defendant of their rights which are if they  
8 need an attorney present or their right to remain silent.

9 Q And prior to this day you've read the rights to other  
10 defendants in other cases?

11 A Yes.

12 Q Did you read Sammy Moore what is commonly referred to  
13 as his Miranda rights?

14 A Yes.

15 Q At that time did you use any form or any paper to help  
16 you?

17 A Yes.

18 Q What did you use, sir?

19 A Miranda rights waiver form.

20 Q Showing you, sir -- which will be marked S-75.

21 (Miranda form marked S-75 for identification.)

22 Q Is this the form you used to read Sammy Moore his  
23 Miranda rights?

24 A Yes, it is.

25 Q How do you recognize it, sir?

1 A It is my handwriting and signature as the advising officer.

2 Q Could you please explain to the Court how you used  
3 that form in forego Sammy Moore of his Miranda rights?

4 A Sure. Each right as it's stated I had Mr. Moore read  
5 outloud the actual right, number one through five, and after  
6 each right I would ask him do you understand this. At which  
7 point he would indicate or he did indicate yes by writing yes  
8 and his initials on each line. At the bottom of the form is a  
9 waiver of the rights which I also had Mr. Moore read outloud.  
10 Asked him again if he understood the waiver portion of the  
11 rights. Again he stated yes and signed the form indicating he  
12 wished to waive his rights.

13 Q When this was done, it was you, the defendant and  
14 Detective Gallagher in that room?

15 A Yes.

16 Q And does it have the time of when you began to read  
17 him his Miranda rights?

18 A Yes.

19 Q What time, sir?

20 A 1650 hours.

21 Q And at what time did you conclude reading him his  
22 rights?

23 A 1655 hours.

24 Q And at the time you were reading him his Miranda  
25 rights did you ever have him read outloud?

1 A Yes, I just stated so. He would read each right outloud.

2 Q That is his signature on the bottom of the form?

3 A Yes.

4 Q And he read outloud the waiver of rights portion?

5 A That's correct.

6 Q Did he appear to understand when you were reading his  
7 rights?

8 A Yes.

9 Q Did he ever stop you or question you for any  
10 explanation as to the rights?

11 A No.

12 Q Was his speech coherent at that time?

13 A Yes.

14 Q During this time did he ever invoke the right to  
15 remain silent?

16 A No.

17 Q Did he ever ask for an attorney?

18 A No.

19 Q Did he ever refuse to answer any questions after he  
20 waived his Miranda rights?

21 A No.

22 Q Did he in fact agree to waive his Miranda rights and  
23 talk to you about the case in question?

24 A Yes.

25 Q Okay. Approximately what time was it after he waived

1 his Miranda rights that you began to talk to him about the case  
2 at hand?

3 A It would be shortly thereafter. Shortly thereafter. 1655  
4 hours.

5 Q Okay. Do you have an independent present recollection  
6 of his specific words that he used to tell you what he knows  
7 about this case?

8 A No.

9 Q Did you, however, write down his oral statement to you  
10 at that time in your report which has been marked S-74?

11 A Yes.

12 Q And at the time you wrote that report was it fresh in  
13 your mind?

14 A Yes.

15 Q At the time you wrote the report you wrote it  
16 yourself?

17 A Yes.

18 Q And it's accurate?

19 A Yes.

20 Q And does it have what Sammy Moore said to you about  
21 where he was on the night in question?

22 A Yes, it does.

23 MISS MacMULLAN: Okay. Your Honor I offer that as  
24 recollection recorded to the extent the officer does not have  
25 sufficient present memory.

1 THE COURT: Okay.

2 Q Detective, referring you to page sixteen of your  
3 report, could you please read what Sammy Moore's oral statement  
4 was when you discussed the case at hand?

5 THE COURT: I am just wondering why I have to go into  
6 what the contents of the statement was in a Miranda hearing to  
7 determine if he was given his rights or not.

8 MISS MacMULLAN: Yes, your Honor. I will withdraw the  
9 question at this time.

10 Q Did he give an oral statement after 4:55 p.m?

11 A Yes, he did.

12 Q Was that between 4:55 p.m. and 7:24 p.m?

13 A Yes, it was.

14 Q And after he gave this oral statement during that time  
15 period was he then returned to his cell?

16 A Yes.

17 Q And what did you do next briefly in the investigation  
18 based on his oral statement?

19 A We began to follow-up on his alibi.

20 Q Did he say that he was with a particular person on the  
21 night in question?

22 A Yes, he did.

23 Q Did you actually speak to that person?

24 A Later that night, yes.

25 Q Would that be Traci Thomas?



1 A Yes.

2 Q Did Miss Thomas corroborate or dispute what Mr. Moore  
3 said?

4 A It was disputed.

5 Q And after it was confirmed that Traci Moore -- Traci  
6 Thomas disputed what Mr. Sammy Moore said, did you speak to the  
7 defendant again the next day, December 14th, Tuesday?

8 A Yes.

9 Q And at that point in time did you remove him from the  
10 cell?

11 A Yes.

12 Q And do you recall what time you removed the defendant  
13 from the cell?

14 A Not offhand. I would have to refer to my report for  
15 specific times.

16 Q It would be on page -- referring your attention to  
17 page 18.

18 A Right. 1410 hours. 2:10 p.m.

19 Q Did you remove Sammy Moore from the cell?

20 A Yes, I did.

21 Q Did you bring him to the Detective Bureau?

22 A Yes.

23 Q Was he placed in the same interview room?

24 A Yes.

25 Q Did you readvise him of his Miranda rights?

1 A Yes.

2 Q Did you use a form when you did that, sir?

3 A Yes, I did.

4 Q Showing you what will be marked S-76 for  
5 identification.

6 (Miranda form marked S-76 for identification.)

7 Q Is this the second Miranda form that you used at that  
8 time when you spoke to the defendant on December 14th?

9 A Yes, it is.

10 Q I wonder if you could again briefly explain the  
11 circumstances how you used that form?

12 A Once again, I had Mr. Moore read outloud his rights one  
13 through five and ask him do you understand this at which time  
14 he indicated yes by writing yes and putting his initials after  
15 each statement and reading the waiver of rights on the bottom  
16 portion outloud again and after he finished reading that again  
17 asked him if he understood the waiver of his rights in which he  
18 indicated yes and he signed the form.

19 Q And that's his signature on the bottom of the form,  
20 sir?

21 A Yes, it is.

22 Q Did he appear to understand all the rights at that  
23 time?

24 A Yes.

25 Q Did he ask you for any explanation at that time?

1 A No, he didn't.

2 Q Did he ever ask for an attorney at any time?

3 A No, he didn't.

4 Q Did he ever remain silent in face of a question that  
5 you asked him?

6 A No, he didn't.

7 Q At this point in time after he agreed to waive his  
8 Miranda rights, did he speak to you again about the case at  
9 hand?

10 A Yes, he did.

11 Q Is it after that time, after you read him his Miranda  
12 rights, that he told you that he in fact did the shooting on  
13 the night in question?

14 A Yes, he did.

15 Q He told you that in an oral statement?

16 A Yes, he did.

17 Q Once he orally admitted to you that he in fact did the  
18 shooting in this case, did you then take a written statement  
19 from him?

20 A Yes, I did.

21 MISS MacMULLAN: I would like to have this marked  
22 S-77.

23 (Statement of Sammy Moore marked S-77 for  
24 identification.)

25 Q Showing you what has been marked S-77, eight-page

1 document, is that the written statement Sammy Moore gave to you  
2 on December 14th after he had agreed to waive his Miranda  
3 rights?

4 A Yes, it is.

5 Q And are those the questions that were asked of Mr.  
6 Moore?

7 A Yes, they are.

8 Q Those are his answers?

9 A Yes.

10 Q Did he read over each page?

11 A Yes, he did.

12 Q Did he sign or initial each page?

13 A Yes, he did.

14 Q And after he gave you a written statement, did he then  
15 draw for you a diagram as to how the shooting occurred in the  
16 City of Plainfield that night?

17 A Yes.

18 Q I would like to show you what will be marked S-78 for  
19 identification.

20 (Diagram of Sammy Moore marked S-78 for  
21 identification.)

22 Q Detective, is that the diagram that Sammy Moore wrote  
23 himself as to how the shooting occurred in Plainfield?

24 A Yes, it is.

25 Q And is that his handwriting that has the legend A

1 through J?

2 A Yes, it is.

3 Q Is that his markings indicating A through J on the  
4 diagram?

5 A Yes.

6 Q Is that his signature where he dated it December 14th,  
7 1993?

8 A Yes, it is.

9 Q And are they in the same condition as they were at the  
10 time he gave the statement?

11 A Yes.

12 Q And at any time when you spoke to Sammy Moore, did you  
13 ever promise him anything in exchange for any of these  
14 statements?

15 A No.

16 Q Did you ever threaten him or coerce him in any way?

17 A No.

18 Q To the best of your knowledge did he freely and  
19 voluntarily give these statements?

20 A Yes.

21 THE COURT: Excuse me one second.

22 (Pause.)

23 THE COURT: Sorry.

24 Q Detective, have you ever been in the presence based on  
25 your responsibilities as law enforcement officer of someone



1 under the influence of alcohol or narcotics?

2 A Yes.

3 Q And did Mr. Moore appear to be under the influence of  
4 any narcotic or alcohol at any time he gave you a statement or  
5 waived his rights?

6 A No.

7 MISS MacMULLAN: Thank you, Judge. No further  
8 questions.

9 THE COURT: Cross-examine.

10 MR. RUSSO: Thank you, your Honor.

11 CROSS-EXAMINATION BY MR. RUSSO:

12 Q Detective, referring to page sixteen of your report,  
13 you indicated that you initially questioned Mr. Moore on the  
14 13th; is that right?

15 A Let me get to that page, counsel. I'll be with you in a  
16 minute. Page sixteen. Which paragraph? The initial  
17 questioning?

18 Q Yes.

19 A Yes.

20 Q And how long did that questioning last?

21 A Let me see here. Well, after Miranda at 1655, I believe it  
22 lasted until 1924 hours.

23 Q And in laymen's terms how much time is that?

24 A It's approximately two and a half hours.

25 Q And in that two and a half hours that you questioned

1 Mr. Moore, the substance of the information he gave you was  
2 contained in that page of your report; is that right?

3 A Yeah, that's a summation of it, yes.

4 Q Wasn't there any written statement prepared at that  
5 point?

6 A No.

7 Q Why is that?

8 A It wasn't necessary at the time. He was not giving us  
9 anything out of the ordinary that we thought was worth putting  
10 on paper.

11 Q So you made a determination that that statement  
12 wasn't -- that he made at that point wasn't important and you  
13 just kept notes; is that it?

14 A Not that it wasn't important. It was important enough to  
15 take notes on, yes, but not for a typewritten statement.

16 Q And that the information that he gave you at that time  
17 was that he was not in Plainfield and he discussed an alibi?

18 A Sorry. Can you repeat the question?

19 Q Yes. The information that he gave you at that time  
20 was that he was not in Plainfield?

21 A That's correct.

22 Q And he discussed an alibi?

23 A Yes.

24 Q And that took two and a half hours; is that right?

25 A Yes.

1 Q And during that time did you give Mr. Moore any  
2 information as to how you thought this event occurred?

3 A Well, briefly, yes. He was given his charges. He read the  
4 charges. He understood them. We started to touch upon things.

5 Q Now, let me refer to page 18 of your report. This  
6 indicates that you questioned Mr. Moore again. This was on  
7 the -- was this on -- how many days had elapsed?

8 A This is the following day.

9 Q The following day?

10 A Yes, sir.

11 Q And that's after you had obtained additional  
12 information?

13 A Yes.

14 Q And let me refer you to the bottom of that last  
15 paragraph of that report where it says, "After approximately  
16 one hour of questioning Sammy Moore orally admitted to the  
17 shooting, the murder in Plainfield"?

18 A Yes.

19 Q What happened during that hour?

20 A That was mostly his alibi, which was not corroborated by  
21 the witness he stated would be able to do that.

22 Q In other words, you provided him with the information  
23 that his alibi was not going to hold up?

24 A Absolutely, yes.

25 Q And at that point he agreed to make a statement?

1 A Yes.

2 Q Did you provide Mr. Moore with any -- with facts as  
3 you knew them as to what happened?

4 THE COURT: I am having a tough time ascertaining how  
5 some of the questions, quite frankly, assist me in determining  
6 whether Mr. Moore was given his rights before custodial  
7 interrogation, were they waived knowingly and voluntarily. We  
8 are beyond the rights. We are into the body of the statement.  
9 That seems to go beyond the purpose of a Miranda hearing.

10 Q Detective, was Mr. Moore ever threatened during  
11 questioning?

12 A Was he ever sorry?

13 Q Was he threatened?

14 A No.

15 Q Was it suggested to him that -- that -- that the --  
16 that you or anyone else would suggest to the State that they  
17 should seek a death penalty?

18 A No.

19 MR. RUSSO: One moment, your Honor.

20 THE COURT: Sure.

21 (Pause.)

22 Q Detective, did you indicate to Mr. Moore that if he  
23 did not cooperate, that others of his friends that you had  
24 spoken to would get into trouble?

25 A Other of his friends?

1 Q Yes. For example, when you went to Newark you spoke  
2 to several persons. Traci Thomas, Brenda Johnson, didn't you?

3 A Oh, I spoke to those persons. I don't see how they would  
4 get in trouble by speaking with me. That was never mentioned.

5 Q Didn't you indicate to Mr. Moore that if he didn't  
6 cooperate, you would see to it that his friends would be locked  
7 up?

8 A Oh, no.

9 Q Didn't you indicate to Mr. Moore that if he didn't  
10 admit to the facts as you laid them out, that both his friends  
11 in Newark would get locked up and you would suggest to the  
12 State that they should seek the death penalty?

13 A No, absolutely not.

14 Q Did the other detective who was present make those  
15 suggestions to Mr. Moore?

16 A No.

17 Q Did detective -- didn't you suggest to Mr. Moore the  
18 facts and draw a diagram that he later copied?

19 A No.

20 MR. RUSSO: Nothing further.

21 THE COURT: Anything?

22 MISS MacMULLAN: No, your Honor.

23 THE COURT: Thank you, detective. You may step down.  
24 Please watch your step.

25 MISS MacMULLAN: That is the State's final witness on



1 the Miranda hearing, your Honor.

2 THE COURT: Any witnesses, Mr. Russo?

3 MR. RUSSO: Yes, your Honor.

4 THE COURT: Who are you calling?

5 MR. RUSSO: The defendant, Sammy Moore.

6 S A M M Y M O O R E, sworn.

7 DIRECT EXAMINATION BY MR. RUSSO:

8 Q Mr. Moore, do you remember the date of your arrest?

9 A Yes.

10 Q And where were you?

11 A 195 First Street.

12 Q Is that in Newark?

13 A Yes.

14 Q And where were you -- what time of day was it when you  
15 were arrested?

16 A It was around twelve. Twelve in the afternoon.

17 Q And what happened after you were arrested? Where did  
18 you go?

19 A They first took me to Essex County, a precinct in Essex  
20 County.

21 Q And were you questioned there?

22 A Yeah. When I was in the car with all Plainfield police, at  
23 first I didn't know who they were 'cause they ain't really tell  
24 me anything at first and I was asking them. I thought it was  
25 locking me up for narcotics 'cause that's what they had locked

1 me up for. They had caught me with narcotics and when they  
2 took me to the car, they said we gonna get rid of this 'cause  
3 we want you for something else. Then they took me to the car,  
4 took me to the precinct and from there they took me to  
5 Plainfield.

6 Q And when you got to Plainfield, were you questioned?

7 A Yes, I was.

8 Q How long were you there before you were questioned?

9 A I'd say an hour.

10 Q Were you questioned by the detective who you saw up on  
11 the stand a few minutes ago?

12 A Yes.

13 Q And was there someone else present, also?

14 A Officer Gallegher.

15 Q And what happened during that questioning?

16 A At first I asked could I see a lawyer and he told me that I  
17 don't see no lawyers until I come in the county jail and he  
18 recommended for a public defender. Then I asked him could I  
19 make a phone call and they told me you not allowed to make a  
20 phone call from the precinct until after your charges is taken  
21 care of.

22 From there they took me upstairs and start questioning  
23 me. When I told them I was with this girl named Traci over my  
24 friend Brenda house, they said okay. They went -- they said  
25 they went and talked to her and they say I found out that you

1 was with Traci. They said that I found out that you was with  
2 Traci and we received that you was telling the truth, that tell  
3 me who you bought the car from. I told them I bought the car.  
4 Who you bought the car from? I told them the guy name was  
5 Snoop. I didn't know him like to tell them where he live or  
6 whatever. They said all right. Then they took me to the cell  
7 and came back and got me the next day. They said, well, we --  
8 that's not what we want to hear. They said that's not what we  
9 want to hear.

10 Q Sammy, did they -- was there a typewritten statement  
11 made that first time?

12 A Yeah, the first time it was a typewritten statement but  
13 they stopped it. One of them, the one that was sitting here,  
14 tore it up and said that's not what we want.

15 Q So then -- and that was the first time?

16 A The first day. That was the first day I got arrested.

17 Q What happened the second day?

18 A They came back and said that they went out to see Brenda  
19 Johnson and everybody. They said that so far I be telling the  
20 truth about who I was with and everything and they was like  
21 that's not what they want to hear.

22 Q Well, you remember you gave a statement on that second  
23 day, right?

24 A Yeah.

25 Q And that was a typewritten statement that you signed,

1 right?

2 A Yes.

3 Q And you know what's in that statement, don't you?

4 A Yes.

5 Q Why did you sign that statement?

6 A 'Cause they forced me to sign it.

7 Q Well, what to you mean by that?

8 A These -- all right. One of them kept saying if you don't,  
9 if you don't sign this statement --

10 Q Which one?

11 A Officer Gallegher.

12 Q Said what?

13 A If you don't sign this statement, that we's gonna make sure  
14 you get the death penalty. That we's gonna make the paper make  
15 you look worse than John Dillenger and that all the girls that  
16 say that you was with them kids be locked up. I mean they get  
17 locked up and their kids put in a foster home.

18 Q And so those statements to you were made by whom?

19 A Huh?

20 Q Who made those statements to you?

21 A Officer Gallegher.

22 Q What about the other detective?

23 A The other detective said that the prosecutor had talked to  
24 him about making a deal and all I got to do is tell them where  
25 the gun was. They said -- they said -- I told them I threw the

1 gun on the highway. Then they said -- I told them I threw the  
2 gun in a park and that the prosecutor told them all I got to do  
3 is show them where the gun was at in the park, which they took  
4 me out the third day. I was in the precinct. They took me to  
5 the park the third day and went looking for the gun and saying  
6 the prosecutor said that being that I was 19, that I do my time  
7 in Jamesburg.

8 Q Well, let's go back.

9 Now, I am talking about the statement, not what  
10 happened the next day. How long were you questioned on that  
11 second day when you signed the statement?

12 A Like two, two to three hours.

13 Q And when did you decide to go along -- when did you  
14 decide to give this statement?

15 A I'd say a good -- not really sure.

16 Q Well, you're saying that you just went along with what  
17 they told you to say; is that it?

18 A After awhile 'cause, you know what I am saying, I got tired  
19 of them ragging on me and kept making me say something I did  
20 but I didn't do. So I got tired of it and just went along with  
21 it.

22 MR. RUSSO: I have no further questions.

23 THE COURT: Cross-examine.

24 CROSS-EXAMINATION BY MISS MacMULLAN:

25 Q What is your age, Mr. Moore?



1 A Twenty.

2 Q What is the highest grade of education?

3 A Excuse me?

4 Q What is your highest grade of education?

5 A Eleventh grade.

6 Q Where did you go to school?

7 A Central High.

8 Q And prior to you signing these forms and I am holding  
9 up S-75, 76 and your sworn statement, S-77, can you read, write  
10 and understand English?

11 A Yes, I can.

12 Q Okay. Isn't it true that when the officers spoke to  
13 you the first time on December 13th, isn't it true that they  
14 did read to you these Miranda rights?

15 A Yes.

16 Q And isn't it true that they took the time to put the  
17 date and the time, correct?

18 A Yes.

19 Q Okay. Did they ever have you read outloud the rights?

20 A Yes.

21 Q Okay. They wanted you to understand your rights?

22 A Yes.

23 Q And is that your initial right there, Mr. Moore,  
24 "S.M."?

25 A Yes.

1 Q Is that your initial on all five of these?

2 A Yes, it is.

3 Q When it got to this part here, the waiver of rights,  
4 did the detectives also have you read that part outloud?

5 A I'm not really sure. They might have did.

6 Q They might have. It's possible they could have had  
7 you read that outloud, right?

8 A Yes.

9 Q And after they took the time to do that, then you  
10 signed this, correct?

11 A Yes.

12 Q Okay. And then Detective Gallagher signed it and also  
13 Detective Marcantonio?

14 A Yes.

15 Q Okay. So they did in fact before they started to talk  
16 to you use this form, S-75, right?

17 A Yes.

18 Q Okay. And after you signed this form -- let me ask  
19 you something. Prior to this day have you ever heard of the  
20 concept of Miranda rights?

21 A No.

22 Q Have you ever watched on a T.V. show and when the cop  
23 arrests the guy he reads him his rights? The right to remain  
24 silent, right to an attorney. Have you heard that before?

25 A Yes.

1 Q Before this day that is not the first time you heard  
2 those rights, right?

3 A No.

4 Q Okay. And you knew that you had the right to an  
5 attorney, correct?

6 A Yes.

7 Q Okay. Now, is it your understanding, sir, that you  
8 and the detectives spoke about your whereabouts on the evening  
9 of December 4th into the morning of December 5th?

10 A Yes.

11 Q Okay. Now, isn't it true, sir, that you told them  
12 that you bought the car from Snoop; is that correct?

13 A Yes.

14 Q And that you were with a girl named Traci Thomas?

15 A Yeah, Brenda Johnson house.

16 Q All right. Brenda Johnson's house. Right. You gave  
17 them Traci Thomas's name and phone number; isn't that correct?

18 A No, I just gave them a name. I just gave them the name.

19 Q You just gave them the name?

20 A Uh-huh.

21 Q Do you know how they would have known it's Traci  
22 Thomas, which her house was, what her phone number was unless  
23 you told them?

24 A They got -- they came back and told me her phone number and  
25 where her apartment was at 'cause I didn't know the street

1 where she live at. I didn't know exactly where she live at  
2 'cause I just met Traci.

3 Q Did you ever talk to Traci on the phone prior to  
4 December 14th?

5 A I just talked to her and told her that I was locked up.

6 Q No. Before you got locked up when you knew Traci, did  
7 you ever talk to Traci on the phone?

8 A Yeah, called her before.

9 Q And that's because you knew her number at that time  
10 right?

11 A Yeah.

12 Q Okay. Is it possible you might have given Traci's  
13 number to the detectives?

14 A No, I didn't.

15 Q Okay. Now, at that point in time you say the  
16 detectives ripped up your statement?

17 A Yes.

18 Q Okay.

19 A The first statement that I made.

20 Q The first statement that you made. What was in that  
21 first statement?

22 A The date that I seen the guy who I bought the car from, how  
23 much money I gave him, who was there.

24 Q Okay. Anything else you told him in that first  
25 statement?

1 A That's about it.

2 Q That's about it. Okay.

3 Now, isn't it true the next day they came and spoke to  
4 you again on December 14th, the next day? Isn't that true?

5 A Yes.

6 Q Okay. And they kept you in the jail overnight,  
7 correct?

8 A Yes.

9 Q And showing you what's been marked S-76 for  
10 identification. Now, is that the form they used before they  
11 sat down and took this typewritten statement from you, S-77?

12 A Yes.

13 Q Okay. They did again read you your Miranda rights  
14 again, right?

15 A Yes.

16 Q They had you sign the form, also?

17 A Yes.

18 Q Okay. And you understood what that form said; is that  
19 right?

20 A Yes.

21 Q You understood that you could remain silent and you  
22 didn't have to give the statement, correct?

23 A Yeah.

24 Q Okay. But even though you understood that, you did  
25 decide to give a sworn statement and I am holding it, S-77,



1 right?

2 A Yes.

3 Q I direct your attention, sir, to this document, S-77.

4 This is the statement you gave that night, right?

5 A Yeah.

6 Q Okay. This is your signature on each page, right, Mr.

7 Moore?

8 A Yeah.

9 Q And in this statement, sir, they asked you your name  
10 and where you live and so forth?

11 A Uh-huh.

12 Q All that information is correct?

13 A Yes.

14 Q Okay. Then they asked you about what happened that  
15 night in Plainfield; isn't that true?

16 A Yeah.

17 Q Okay. And after you gave this eight-page statement  
18 isn't it true, Mr. Moore, that you then drew a diagram as --

19 A That's -- well --

20 Q Excuse me, Mr. Moore. Isn't it true that this is your  
21 handwriting?

22 A Yes, it is, but I only drew from what I saw them drawing.

23 Q I see. So they drew this diagram and then you just  
24 copied it?

25 A Exactly.

1 Q Let me ask you something. Part here, J, the car that  
2 hit the kid that was shooting, where did they get that  
3 information from or is that you telling them that there was  
4 another kid out there shooting?

5 A All the information I said there was information that they  
6 was telling me.

7 Q Okay. But J here, this one in particular, the kid  
8 that was shooting. Now, the detectives didn't tell you that  
9 part, isn't that true? Isn't that true that you told them  
10 about that kid?

11 A But they said who was the guy that got hit by a car. I  
12 said I guess the guy that was shooting.

13 Q Okay. You told them about a kid that was out there  
14 shooting that got hit by a car, right?

15 A Yeah.

16 Q And this is A, B, C and D. These are all your  
17 initials, right?

18 A Uh-huh.

19 Q And are you saying that there was an assistant  
20 prosecutor at the Plainfield headquarters?

21 A No, I didn't say that. I said that they said they called  
22 the prosecutor and they said that he was helping him out with  
23 this.

24 Q Uh-huh. And did this assistant prosecutor make any  
25 agreement with you?

1 A No. I didn't speak to him.

2 Q Okay. There was nothing in writing between you and  
3 this assistant prosecutor who supposedly made this promise to  
4 you; is that correct?

5 A Yes.

6 Q Now, isn't it true that in your statement you tell the  
7 police officers that after you shot and killed Marcus Benjamin  
8 that you threw the gun on the side of the road in Newark?  
9 Isn't that true? Isn't that true that's in this statement?

10 A Yeah, that's in the statement.

11 Q I think it's Boyd Avenue where you say you threw it?

12 A Huh?

13 Q Isn't it true in this statement you say you threw it  
14 near Boyd Avenue? Sorry. Boyd Street exit?

15 A Yes.

16 Q Okay. And isn't it true that the next day on December  
17 15th you actually had the Plainfield police detectives  
18 searching in the woods near that particular area where you say  
19 you threw it; isn't that true?

20 A Yeah, but why would they go to a park if they said I threw  
21 it on the highway?

22 Q Isn't it true, sir, that you then told them to go to  
23 Wequahic Park when they couldn't find it?

24 THE COURT: Aren't we going far in the Miranda  
25 hearing?

1           MISS MacMULLAN: Just as to the issue of whatever he  
2 had told the detectives on the 15th after he --

3           THE COURT: I don't care what he said. I care if he  
4 voluntarily waived his rights.

5           MISS MacMULLAN: Thank you. No further questions,  
6 your Honor.

7           THE COURT: Mr. Russo.

8           MR. RUSSO: No, your Honor.

9           THE COURT: Okay. Step down, Mr. Moore. Please watch  
10 your step, sir.

11           Anything further, Mr. Russo?

12           MR. RUSSO: No, your Honor.

13           THE COURT: Miss MacMullan?

14           MISS MacMULLAN: Nothing, Judge.

15           THE COURT: The primary question in a Miranda hearing  
16 is if there was a custodial interrogation and admittedly here  
17 there was a custodial interrogation with the rights given  
18 before the interrogation and, if so, were they waived before  
19 the statement was given and were the rights waived knowingly  
20 and voluntarily and intelligently? Is that not the issue, Mr.  
21 Russo?

22           MR. RUSSO: Yes, your Honor, it is.

23           THE COURT: I'll hear you on your argument.

24           MR. RUSSO: Your Honor, I think Mr. Moore's version of  
25 what happened is credible. That on the 13th, on the day he was

1 questioned and he agreed to make a statement and he did make a  
2 statement and it was -- he was questioned for two and a half  
3 hours and that statement was reduced to writing but destroyed.  
4 The only thing that remains of that statement -- because Mr.  
5 Moore said the police didn't want to hear that. All that  
6 remains of that statement is a few lines in Detective  
7 Marcantonio's report.

8 The next day he says he made another statement. That  
9 took about three hours. That became an eight-page typewritten  
10 statement. Mr. Moore made a previous statement and that was  
11 disregarded. The next day the statement he agreed to tell the  
12 police what they wanted to hear. That's the statement that  
13 they then reduced to writing to have him sign.

14 But only after, as he testified, he was threatened.  
15 Not only was he threatened but it was suggested to him that his  
16 friends and their families would also suffer if he did not go  
17 along with this. Obviously based on his testimony he says that  
18 he was threatened with severe -- the most severe psychological  
19 coercion possible. That being that he was threatened that he  
20 would face the death possibly.

21 And under those circumstances, your Honor, it's  
22 inconceivable that the statement could have been voluntary.

23 THE COURT: I find it inconceivable that somebody who  
24 is threatened with the death penalty would confess to a murder  
25 thereby giving the State all the ammunition they need to. I



1 suppose in his mind thinking he might get the death penalty  
2 although that is not true. Even if there were psychological  
3 techniques used, the use of psychological techniques does not  
4 render a statement inadmissible. Even if they use subterfuge  
5 or trickery. Was the statement voluntary. Was the will of the  
6 subject overborn.

7 I am referring to State v. Mang, 165 N.J. Super. 19,  
8 1978 decision by the Appellate Division. Of course, if the  
9 method used is calculated to produce an untruthful confession,  
10 it would be offensive to due process or if it was offensive to  
11 due process for another reason the statement must be barred.

12 I find the testimony of the detective to be credible  
13 evidence in this case and don't believe that based upon the  
14 totality of the circumstances here that Mr. Moore was -- Mr.  
15 Moore's recollection of the event is accurate. I find the  
16 rights were given to him. He was asked to read them aloud.  
17 Asked to read them to himself. Asked to initial them.  
18 Evidence of the fact that they were given to him. He  
19 understood them. Asked to sign the waiver which was read aloud  
20 and signed on both occasions.

21 Therefore, the statement was made knowing, voluntary  
22 and intelligent waiver of his rights and is admissible in this  
23 trial.

24 MISS MacMULLAN: Thank you, Judge.

25 THE COURT: Anything else before we break for the

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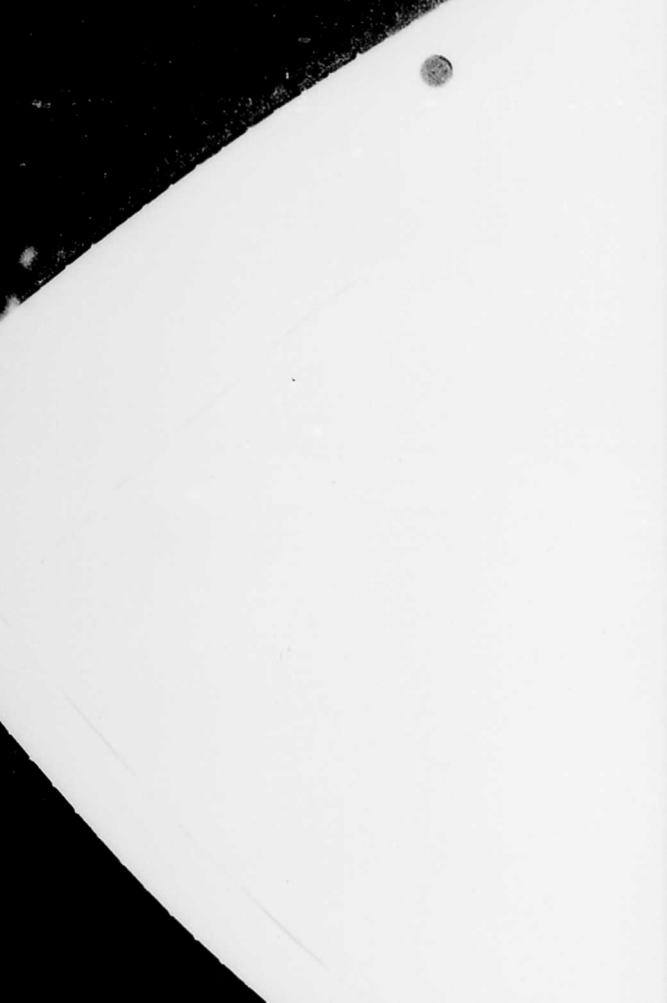
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 20 and signed on both occasions.

21 Therefore, the statement was made knowing, voluntary  
 22 and intelligent waiver of his rights and is admissible in this  
 23 trial.

24 MISS MacMULLAN: Thank you, Judge.

25 THE COURT: Anything else before we break for the



1 evening? I want to start promptly at nine o'clock. Be here.  
2 Have all your witnesses lined up.

3 MISS MacMULLAN: Yes, Judge.

4 (Matter concluded.)  
5  
6  
7  
8

9 I, EILEEN A. DUNNE, C.S.R., License Number XI01022,  
10 an Official Court Reporter in and for the State of New Jersey,  
11 do hereby certify the foregoing to be prepared in full  
12 compliance with the current Transcript Format for Judicial  
13 Proceedings and is a true and accurate transcript of my  
14 stenographic notes taken in the above matter to the best of my  
15 knowledge and ability.  
16  
17  
18

*Eileen A. Dunne*

EILEEN A. DUNNE, C.S.R.  
Official Court Reporter  
Union County Courthouse  
Elizabeth, New Jersey

19  
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23 DATE: August 12, 1995  
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A 4956-94T4

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CRIMINAL PART  
UNION COUNTY  
INDICTMENT NO. 94-06-00636  
APP.DIV.DKT.NO. A-4956-94T4

STATE OF NEW JERSEY )  
 )  
 v. )  
 )  
 SAMMY MOORE, )  
 Defendant. )

Transcript  
of  
Trial

REC'D  
APPELLATE DIVISION  
APR 8 1996

*R. Romilio*  
Clerk

FILED  
APPELLATE DIVISION

APR 8 1996

*R. Romilio*  
Clerk

Place: Union County Courthouse  
Two Broad Street  
Elizabeth, New Jersey

Date: December 13, 1994

B E F O R E:

THE HONORABLE WILLIAM L'E. WERTHEIMER, J.S.C.

TRANSCRIPT ORDERED BY:

LISA A. LYNCH, OFFICE OF THE PUBLIC DEFENDER

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

SUSAN M. MacMULLAN, ASSISTANT PROSECUTOR  
FOR THE STATE

THOMAS M. RUSSO, ESQ.  
FOR THE DEFENDANT

EILEEN A. DUNNE, C.S.R.  
Official Court Reporter  
Union County Courthouse  
Elizabeth, New Jersey



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I N D E X

PRELIMINARY REMARKS BY THE COURT PAGE 3

OPENING STATEMENTS

BY MISS MacMULLAN PAGE 11  
BY MR. RUSSO PAGE 26

1 THE COURT: There is a sequestration order in effect.  
2 Any witnesses in the courtroom?

3 Bring out the jury. I don't care if the State is here  
4 or not.

5 (In the presence of the jury.)

6 THE COURT: Good morning. If you would be kind enough  
7 to rise, we will swear you in as jurors at this time.

8 (Jury sworn.)

9 THE COURT: Thank you. You may be seated, ladies and  
10 gentlemen.

11 You now are what I indicated you would be. You are an  
12 integral part of the criminal justice system and you are judges  
13 of the facts. Now, your determination of the facts in this  
14 case is to be based solely upon the evidence admitted during  
15 the course of this trial.

16 When I use the term evidence, I have specific regard  
17 to the testimony you will hear from the witness stand and the  
18 exhibits that are entered into by the parties and any  
19 stipulations between the parties. Statements by the attorneys  
20 and statements by me are not evidence and cannot be treated as  
21 such by you. In point of fact, questions by the attorneys  
22 aren't evidence. It's the answers to the questions from the  
23 witnesses that are evidence.

24 During the course of this trial an attorney may make  
25 an objection or address a motion to me. I want you to

1 understand that an attorney who makes an objection is not being  
2 objectionable. What that attorney is doing is bringing to my  
3 attention the need for me to rule on questions of law because I  
4 have the responsibility of ruling on questions of law and the  
5 admission and rejection of evidence. Comments of counsel on  
6 those matters are not evidence.

7 In ruling I will decide questions of law and whatever  
8 my ruling might be in a particular instance, you should  
9 understand that it is not an expression or an opinion by me on  
10 the merits of the case. Neither should my other rulings during  
11 the trial be taken as favoring the State or Mr. Moore because  
12 each motion will be decided purely on its own legal merit.

13 Now, this case is going to go over several days. I  
14 don't think it lends itself to this type of temptation but I  
15 want to caution you against it. Least any of you be tempted, I  
16 don't want anybody opening up there own east coast, independent  
17 branch office of Magnum P.I. during the course of this trial  
18 and going out and checking out the scene of the alleged events  
19 or police reports or looking for witnesses or anything like  
20 that obviously because you are to decide the case purely on the  
21 evidence admitted during the course of this trial in this  
22 courtroom.

23 As judges of the facts it's very important that you be  
24 able to hear what's going on in the courtroom. I indicated  
25 yesterday sometimes the acoustics in here are not that great.

1 Sometimes we get drowned out by sirens going down Broad Street  
2 or planes going into Newark Airport or trains going down the  
3 mainline of Amtrack. If you can't hear during the trial for  
4 any reason, raise your hand and we will speak louder or more  
5 clearly or wait for the noise to pass.

6 You are not permitted to take notes during the course  
7 of the trial. I think Judge Beglin probably explained that to  
8 you yesterday. Basically the reason is that few jurors would  
9 take complete notes and that fragmentary notes would tend to  
10 place undue weight and influence to the facts to the slight or  
11 disregarding of other facts of equal significance. Basically  
12 experience has shown that it is better to depend upon the  
13 combined recollection of all of you than notes taken by anyone  
14 of you.

15 As the judges of the facts you are not to associate in  
16 any way with the parties to the case, the lawyers or any of the  
17 witnesses. The best way to avoid that contact is to wear that  
18 blue juror badge which we have given you here today. I ask you  
19 to wear it in and around the courthouse complex during the  
20 trial.

21 You might find one unfortunate side effect of wearing  
22 that badge around here is that from time to time people tend to  
23 avoid you like you had the plague. Don't take it personally.  
24 It merely means that we have a lot of cases being tried in the  
25 Courthouse complex and people see a juror badge and they are

1 not so sure if you are on their case or not and everybody tends  
2 to get quiet. Nothing wrong with you if that happens. If you  
3 kill a conversation in an elevator, don't worry about it. Just  
4 because you are wearing that juror badge. If anyone does  
5 attempt to discuss the case with you or influence your  
6 decision, please report it to me and I will take it from there.

7 As indicated yesterday you are not even to discuss the  
8 case with yourselves until you go into the juryroom to  
9 deliberate. The reason for that is obvious. Each case  
10 proceeds witness by witness. Indeed, question and answer by  
11 question and answer and you haven't heard all the evidence in  
12 the case until you heard all the answers to all of the  
13 questions. You might think that a specific witness makes the  
14 most sense but later another witness might change your mind.  
15 Your thoughts may have a tendency to flow with the evidence.  
16 We ask you not to discuss the case or make up your mind until  
17 you go into the juryroom to deliberate.

18 If you've never served as a juror before you might  
19 wonder what the job description is. There really isn't one but  
20 if I had to draft a job description, I suggest you have to be a  
21 good listener. You have to be a patient listener. In short,  
22 you should be the same type of fair and impartial juror you  
23 would want sitting on your case if you were either a defendant  
24 in a criminal matter or the victim of a crime.

25 One of your jobs in the case is to judge the



1     credibility of the various witnesses and in determining whether  
2     a witness is credible and, therefore, worthy of your belief,  
3     you may want to take into account such things as the appearance  
4     and demeanor of the witness; the manner in which he or she may  
5     have testified; their interest in the outcome of the trial, if  
6     any; their means of obtaining knowledge of the facts; their  
7     power of judgment, discernment or understanding; their ability  
8     to reason and observe; the possible bias, if any, in favor of  
9     the side for whom the witness has testified; the extent to  
10    which, if at all, the witness is either supported or  
11    contradicted by other evidence; whether the witness testified  
12    with an intent to deceive you; the reasonableness or  
13    unreasonableness of the story the witness has related and any  
14    and all other matters in evidence which serve to highlight  
15    their testimony to you.

16            Through that process you, as the judges of the facts,  
17    weigh the testimony of each witness and then you determine the  
18    weight to be accorded to it. By that process you may accept  
19    all of the testimony of a given witness, a portion of it or  
20    none of it.

21            No one expects you to be perfect or superhuman as you  
22    sit here as a judge of the facts. If you were, you would be  
23    the only judge in the courtroom who was. Be yourselves but be  
24    yourselves with one common, unifying desire and that is the  
25    goal to do that which is just, fair and correct.

1           Now, you know how cases proceed and develop but let me  
2 remind you. Because the State has the burden of proof, Miss  
3 MacMullan has an opportunity to speak to you first in opening  
4 statements and last in summations. After Miss MacMullan gives  
5 her opening statement, there is an opportunity for Mr. Russo to  
6 give his opening statement but he doesn't have to and I told  
7 you why. There is no burden of proof imposed upon Mr. Moore.  
8 He is not obliged to prove his innocence. He sits in this  
9 courtroom assumed to be innocent. Neither he nor Mr. Russo  
10 need do anything during this trial. I suspect, however, that  
11 Mr. Russo will give an opening statement.

12           After he does, the State puts on its witnesses. There  
13 is an opportunity for the defense to cross-examine them. After  
14 the State puts on its case, there is an opportunity for the  
15 defense to put on a case, if it chooses to do so, but it  
16 doesn't have to for the reasons I just indicated. If it does,  
17 those witnesses are subject to cross-examination by the State.

18           Then we sum up in reverse order, I instruct you as to  
19 the law and then we do something that Mr. Kenyon kind of  
20 touched on yesterday but we do it a little differently in the  
21 State of New Jersey. There's 14 of you in the jury box and you  
22 know the name of the book and movie was Twelve Angry Men. Two  
23 extra people there. We don't know who those two people are.

24           During the winter particularly and particularly during  
25 longer trials and, quite frankly, in any case I use 14 seats up

1 there because the State of New Jersey gave me more than two  
2 because if I only began the trial with twelve jurors and  
3 something befell a juror during the trial, say the last day of  
4 the trial, I would have to declare a mistrial and start the  
5 case all over again from where we began yesterday afternoon  
6 around two o'clock.

7 Now, that costs money. I don't think it is a very  
8 effective or efficient use of your hard-earned and paid tax  
9 dollars to only have 12 jurors. So we have two extra jurors  
10 right now on the jury. We don't know who those two jurors are,  
11 however. What we do at the end of the case is we pick out two  
12 names at random and those will be the alternates at that time.  
13 So anybody can be an alternate juror. Anybody can be a  
14 deliberating juror. Therefore, it is incumbent upon everybody  
15 to pay careful attention to the evidence during the trial.

16 If the newspapers cover any case, they cover criminal  
17 cases. I haven't seen a reporter here. I have no reason to  
18 suspect they will cover the case but I caution you not to read  
19 accounts of this case if you see them in the newspaper. In  
20 point of fact, I ask you not to read any criminal case during  
21 the course of this trial.

22 If you are a person that feels compelled to read those  
23 things, I ask you to put the newspapers aside and pick them up  
24 again when the case is over. Each case is different and I  
25 don't think you would be but I don't want anybody to be

1 improperly influenced by what goes on in other cases because  
2 this case has to be decided on its own merits.

3 One final instruction. During the trial please  
4 concentrate on the witnesses and the attorneys. Don't be  
5 looking up here to me because I am not going to be sending you  
6 any secret signals. I don't even have to listen to the  
7 testimony in the case. Those are facts for you to determine.

8 Now, I am going to give you a little hint today. Some  
9 knowledge you might not know. Unless an attorney says the word  
10 objection, the judge doesn't even have to be thinking about the  
11 case. Objection is a secret legal term for me to engage my  
12 brain because now there is a question of law that's come up.  
13 So while facts are going on you might look up here and see an  
14 expression on my face and say the judge has an opinion about  
15 what is going on and I might be thinking about the Giants  
16 qualifying for the play-offs. I doubt it but it's possible, I  
17 suppose. When you look up here and think I have an opinion on  
18 the case, you couldn't be further from the truth. I don't do  
19 your job, you don't do mine and that's the way the system works  
20 and it works pretty well.

21 We are going to have the opening statements by the  
22 attorneys now. The opening statement by the State is what they  
23 believe the facts of the case may be. Whether the facts are  
24 the way the State indicates it is, I don't know. It's going to  
25 be something for you to determine at the conclusion of the

1 trial.

2 Miss MacMullan.

3 MISS MacMULLAN: May it please the Court, thank you,  
4 your Honor, defense counsel, ladies and gentlemen of the jury,  
5 good morning. How are you? I just would like to reintroduce  
6 myself again. My name is Sue MacMullan. I am an Assistant  
7 Prosecutor and I represent the State of New Jersey in the case  
8 of the State versus Sammy Moore, that man in the blue shirt  
9 with the stripes.

10 Now, as you can tell from the Court's opening  
11 comments, there are more than one defendant in this case. This  
12 case, ladies and gentlemen, by the time we are done you are  
13 going to be all over the State of New Jersey and you will have  
14 heard probably between 20 and 30 names mentioned in this case.  
15 The fact pattern is somewhat complicated. So with that in mind  
16 before I start, if you just let me, I would like to write some  
17 key names up on the board for you along with the victims. If  
18 you just give me one second, I would like to do that.

19 (Pause.)

20 MISS MacMULLAN: Okay. For the record I have written  
21 seven names on the board. For the record I am now turning the  
22 board to the extreme left of the jury so hopefully everybody  
23 can see. I know the gentleman in the back has trouble seeing  
24 and I will try and speak up nice and loud.

25 Okay. In a nutshell what happened on the early



1 morning hours of December 5th, Sunday, 1993 in the City of  
2 Plainfield these five men, Sammy Moore, the defendant,  
3 nicknamed Smiley, from Newark; Tariq Diggs, nicknamed Tariq,  
4 Newark; David Diggs, nicknamed Rock, Newark, with the help of  
5 their friend in Plainfield, Ken Brooks. We will hear him only  
6 called the driver. He was driving the car at the time. He is  
7 from Plainfield. I will talk about him later. James Baines,  
8 you will hear the name Jimbo, that's him. He is from  
9 Plainfield.

10 What happened is that they went from Newark, came into  
11 Plainfield looking for drug dealers to rob. They found them.  
12 That's the victim, Marcus Benjamin. You will hear him called  
13 Benji. He was out on the street corner selling drugs. They  
14 surrounded him with guns.

15 Second victim, Keith Staples. If ever there was a man  
16 in the wrong place at the wrong time, he was out late Saturday  
17 night. He was walking by and just as they were surrounding  
18 Benji, the defendants come by, Sammy Moore grabs and puts a gun  
19 to his side. Keeps him there while they are robbing Marcus  
20 Benjamin of his blue Honda.

21 Mr. Benjamin was shot once in the back with a .44.  
22 Died probably before he hit the ground. Keith Staples is also  
23 shot with a .44. Miraculously, he survived. The car of the  
24 victim, Benji, was taken. Blue Honda. It was recovered the  
25 next day. That's the case.

1           Now, what you are going to hear is this: Okay. Now,  
2           the case starts -- the witnesses -- it starts Saturday night,  
3           December 4th. In Newark Mr. Moore is with Tariq Diggs, David  
4           Diggs and the driver. We know that because a friend of the  
5           defendant, he is going to come in here and tell you that he  
6           knows the defendant and saw the defendant with those men. The  
7           first four men together outside the building where he lived.  
8           He lived at 195 First Street in Newark.

9           You will hear, ladies and gentlemen, it's a huge  
10          apartment complex. It's two huge buildings. Each 20 stories  
11          high. Hundreds of people that live there. But they amongst  
12          all the hundreds of people were together outside that Saturday  
13          night.

14          Now, Alexander Walker sees them together. When do we  
15          next see these people? The next time we see these people,  
16          meaning the defendant, Tariq Diggs, David Diggs and Ken Brooks  
17          were in Plainfield now, it's Saturday night. The next State's  
18          witnesses that will testify, and for the record I am putting  
19          S-22, appears to be a tax map of Plainfield, the area in  
20          question.

21          Now, where I am pointing is on Second Street in  
22          Plainfield. The next time we see these men, it's Saturday  
23          night, a little later and it's in Plainfield. You are going to  
24          hear from young women, Kyewaghana Cook, Jada Williams, Khahlia  
25          Hassenbey. They are young ladies and they live in this

1 particular section of South Second Street.

2 Now, Kyewaghana Cook, her younger cousin Jada and Didi  
3 were walking to a Chinese restaurant on Front Street. That's  
4 near Clinton Avenue. I don't know if you are familiar with  
5 that section of Plainfield. As they are coming back from South  
6 Second Street, a white Hyundai Elantra gets their attention.  
7 This particular section has some residential homes but on the  
8 other side where I am pointing is just a factory area. Factory  
9 with open space. Not many cars come and go and the white  
10 Hyundai Elantra pulled up in front of a ladies' home as they  
11 were walking back with their Chinese food.

12 Some of the men in the car get out. The ones that you  
13 are going to hear that got out, they identified themselves as  
14 Smiley, they identified themselves as Tariq, they identified  
15 themselves as Rock. Mr. Moore has been positively identified  
16 by Kyewaghana Cook as being one of the men that was in that  
17 white Hyundai Elantra.

18 You will also hear, ladies and gentlemen, that the  
19 driver at the time never got out of the car. The girls never  
20 saw him but they remember there being a driver. You'll hear,  
21 ladies and gentlemen, that Kenneth Brooks lives very close to  
22 where these girls live. You will hear that Kenneth Brooks  
23 lived at the time at 1311 West Third Street, which is a very  
24 close distance from where the murder was. I will explain the  
25 significance of that later.

1           Now, what happens next? The girls and the men in that  
2 car speak a little. They talk a little. The girls aren't  
3 interested. They go back inside the house. The car takes off.  
4 They drive around a bit. The car comes back later on, honks  
5 for them to come out. Nobody comes out. They leave.

6           Now, at this point in time we are now into Sunday  
7 morning. Now, on Sunday morning, Kyewaghana Cook was about 16,  
8 17 years old and her friend, Khahlia Hassenbey, she is  
9 approximately 18 years old, they are the girls that first made  
10 contact with them. They leave at about the time of the  
11 shooting to go to a club in Plainfield.

12           Now, as they're walking down South Second Street, as  
13 they're coming to the intersection of Morris Avenue -- sorry.  
14 Morris Street and South Second Street they see that same car  
15 again. That car, ladies and gentlemen, you will hear stopped  
16 right at the intersection of Morris Street and South Second  
17 Street.

18           Here's the important part. When the girls were  
19 walking closer, the car stopped. Numerous men got out. They  
20 believed four, approximately five men got out. As they were  
21 walking, they saw one of them had a gun and you can imagine  
22 what those young girls thought at that time. They were  
23 petrified. They kept walking down South Second Street and they  
24 cut over on the next street. Manson Place. The girls will  
25 tell you the last time they saw those men in the white Hyundai

1 Elantra, they were walking down Morris Avenue.

2 Now, let's pick it up what happens next. Down here  
3 where this red X is on West Third Street here, the intersection  
4 of West Third Street and Morris Street now, Benji is selling  
5 drugs at the corner. Benji at this point in time is out here  
6 out on the street on the porch at the home right there. You  
7 will hear this address a lot, 1102 West Third Street, is a  
8 young boy named Keith Carson. Keith Carson is helping Marcus  
9 sell drugs.

10 Keith Carson you will hear said he saw all of a sudden  
11 a group of men come from this direction, some from the street  
12 and some from between these two homes on 1104 and 1102 West  
13 Third Street and he saw them with ski masks and guns and you  
14 can imagine what that young boy did, Keith Carson, who is only  
15 about 15, 16 years old. He goes running back into the house to  
16 tell the people, to tell his friend Quan that there's people  
17 outside with guns. Quan tells him run, go back outside and  
18 tell Benji to come in.

19 By the time Keith Carson, his nickname is Mook, Benji  
20 is surrounded with his hands up. It's too late. They run back  
21 inside. The gunshots start and they hear.

22 At this point in time, ladies and gentlemen, when the  
23 men came out with their guns, the second victim, Keith Staples,  
24 is walking up McDowell Street. At that point in time Keith  
25 Staples will tell you that he stopped to talk to the man on the



1 street, Benji, and at that point in time he too saw the men  
2 coming with the ski masks and the guns. One of them grabs  
3 Keith Staples and keeps a gun at the side of his head. You can  
4 imagine how petrified he is.

5 At this point in time Mr. Staples is praying to God  
6 that the guy doesn't blow his head off. He moves the gun from  
7 his head to his side. At that point in time they try and take  
8 Marcus Benjamin's blue Honda, which is parked right out there.  
9 Keith Staples begins to run away down West Third Street. He is  
10 shot once in the right chest in the back. The bullet actually  
11 comes out and is in his jacket when the medical personnel are  
12 working on him. They retain that slug. Wait until you see the  
13 size of the slug. It is a .44. You can feel the weight of it  
14 in your hands. It is a miracle that Mr. Staples is alive.

15 What happens to Marcus Benjamin? Marcus Benjamin was  
16 shot in the back with the .44. The force of this gun is so  
17 powerful the bullet ricocheted off his vertebrae, came out his  
18 throat and entered his chin. You will see the photographs of  
19 the deceased in this case.

20 At that point in time Mr. Staples is running for his  
21 life down here with a gunshot, Marcus Benjamin is dead probably  
22 before he hits the ground and the men here, we know from  
23 circumstantial evidence is the car is now gone. It takes off  
24 going this way down West Third Street.

25 Down here at a phone booth is a man named Charles

1 Jackson, an older gentleman. He hears the gunshot and looks  
2 down the street. It's dark, the weather is bad and what he  
3 sees coming down the street is what is later identified as  
4 Keith Staples. Mr. Staples staggered down a block and dropped  
5 right here at the corner of Manson Place and West Third Street.

6 At this point in time Mr. Jackson sees he needs help  
7 and at this point in time patrol in the area were dispatched.  
8 He flags down the police. The police tend to Mr. Keith  
9 Staples. Also, at this point in time Kyewaghana Cook and  
10 Khahlia Hassenbey are down here. Mr. Jackson sees that they're  
11 there and sees they are in the area.

12 Now, at this point in time Keith Staples is taken to  
13 Robert Wood Johnson Hospital and there's emergency surgery  
14 performed on him. That's where they retrieved the .44 slug.  
15 He is in the hospital for weeks. He is on a respirator.

16 Marcus Benjamin was pronounced dead at the scene at  
17 approximately 1:47 a.m.. The police responded at 1:35 a.m.

18 Now, that's basically what happens here in Plainfield.  
19 Now, what happens to that car? What happens to Mr. Moore?  
20 Where does he go? We know he goes back to Newark. He goes  
21 back to where his friends are. He goes back to where Alexander  
22 Walker sees him.

23 Now, Alexander Walker will tell you that at  
24 approximately four a.m. on Sunday morning he saw Tariq. Tariq  
25 was with David Diggs. He spoke with them. After speaking with

1       them he sees Sammy Moore in another apartment. He sees Sammy  
2       Moore with Sammy Moore's girlfriend at the time, a young woman  
3       named Traci Thomas. Don't forget that name in this trial.  
4       Traci Thomas. It is a name that we didn't have until Mr. Moore  
5       gave it to us.

6               What is Mr. Moore doing with Traci Thomas? Traci  
7       Thomas will tell you that when Traci Thomas saw Mr. Moore that  
8       early morning on Sunday, he comes in and tells her I shot two  
9       guys, I got a car, I got money. Mr. Moore told his friend  
10      Traci Thomas that. Traci Thomas didn't believe him.

11             So what happens with the car, ladies and gentlemen?  
12      Now, you're Sammy Moore. You have a car that's been taken at  
13      gunshot where two people are shot. What do you think Mr. Moore  
14      did? What Mr. Moore did is very smart. Mr. Moore had to get  
15      that car away from where he was.

16             At this point in time, as I told you, this case is  
17      going to take you over the State of New Jersey. When Mr. Moore  
18      woke up that Sunday afternoon, he called a good friend of his  
19      named Luciana Wellman. She is another young lady that is being  
20      flown in from her school in Detroit. She will testify in this  
21      case.

22             Luciana Wellman will tell you that Sammy Moore called  
23      her up and said can I come over and she said sure. Hadn't seen  
24      him since the summer. They talk on the phone. He comes over  
25      with a friend. He comes over at that point in time with a car.

1 He asks her can I leave this car here?

2 We have a photograph of the Wellman residence. It's a  
3 perfect place to hide a car. When you look at the Wellman  
4 residence, their backyard garage is behind the house. When you  
5 pull up the driveway and you pull the car into the parking  
6 space, you will not be able to see this car from the road.  
7 That's where Mr. Moore took the car.

8 The car was parked there and Luciana kept asking him,  
9 well, what's wrong with the car? He kept saying nothing.  
10 First Mr. Moore told her I got it from a friend in Plainfield.  
11 Then he tells her I got it from my aunt and I need to keep it  
12 here because where I live cars are stolen all the time. That's  
13 why I have to keep it here.

14 Luciana Wellman is suspicious and so more importantly  
15 for this case and thank God for this woman in this case,  
16 Luciana Wellman's mother is Elizabeth Wellman. Elizabeth  
17 Wellman will tell you that when she met Sammy Moore and, by the  
18 way, Luciana Wellman and Mrs. Wellman have positively  
19 identified Sammy Moore as being the man that brought that blue  
20 Honda, Marcus Benjamin's blue Honda, to their home that Sunday  
21 just a short time after the murder.

22 Mrs. Wellman, Elizabeth Wellman, will tell you she had  
23 motherly instincts. She kept asking him why are you selling  
24 this car so cheap? It's a perfectly good car. And he kept  
25 telling her, well, I got it from my aunt and I want to get the

1 papers right before I sell it again. He leaves in a cab with  
2 his friend.

3 Her daughter, Luciana, leaves for church. Mrs.  
4 Wellman takes matters into her own hand and thank God for us  
5 she called the police and said, you know, this boy left a car.  
6 Smiley is his name. He left a car in my house. Could you  
7 check it out? She is suspicious. Sure enough, when the police  
8 get to the house and they run the plate, it comes back a hit as  
9 stolen out of Plainfield from just a few hours before.

10 Now, at that point in time, ladies and gentlemen, it's  
11 Sunday night. The police now have the car Sunday night.  
12 Where's Mr. Moore Sunday night? Mr. Moore went back to 195  
13 First Street and stayed with his girlfriend, Danni Venerable.

14 Now, this is complicated. The girl in orange, Luciana  
15 Wellman, when she finds out that the car in fact was stolen,  
16 when she finds out that the police are involved, Luciana  
17 Wellman calls her friend Natasha, who lives in the building  
18 where the defendant is now with his girlfriend, she calls up  
19 Natasha and tells her, look, Smiley dropped a car at my house  
20 and it was stolen. What's this all about?

21 Natasha, who knows the defendant, who has positively  
22 identified the defendant, goes looking for him. At that point  
23 in time it's Monday morning and bangs on the door of Danni  
24 Venerable and demands to speak to Sammy Moore. She says what's  
25 this all about? She confronts him. The defendant doesn't



1 believe her. What do you mean the cops have the car? And  
2 Natasha tells him the cops have the car, it's a stolen car, why  
3 did you leave it at that girl's house. Then he says there's a  
4 body attached to it. You will hear, ladies and gentlemen, that  
5 when Mr. Moore told that to Natasha, that's the slang for it's  
6 a murder. There's a body attached to it.

7 Now, at that point in time the police investigation  
8 continues. All they have at this point is a nickname named  
9 Smiley and he's from Newark and from their investigation they  
10 get a photograph of Mr. Moore and in a photo array, you will  
11 see it. They show it to Natasha Levon. She positively  
12 identified him. They show it to Luciana Wellman and Elizabeth  
13 Wellman. They positively identify him.

14 They take the photograph to Kyewaghana Cook. Now,  
15 remember Kyewaghana Cook is the girl that was on South Second  
16 Street talking to them when they're flirting with the girls  
17 just a short time before that murder. Kyewaghana Cook  
18 positively identified Sammy Moore as being one of the men,  
19 Smiley, outside that white Elantra. The police then  
20 subsequently arrested the defendant on December 13th. That's a  
21 Monday.

22 I am sorry the case is so complicated but I thought  
23 for this opening I am going to try to be as brief as I can and  
24 I am sorry it is a little longer than I anticipated.

25 But after they get the arrest warrant, he is arrested

1 in 195 First Street in Newark. When they arrest him, they read  
2 him what's commonly referred to as his Miranda rights. After  
3 he waives his Miranda rights, he says this. He says I was  
4 never in Plainfield that night. I don't know anything about a  
5 murder and I got this car from a friend of mine named Snoop.  
6 You know what he tells them? He says I was with Traci Thomas  
7 at the time of that murder. I was with her all night Saturday  
8 night. That's what he tells the police. So the police say  
9 fine. Who is Traci Thomas? The defendant gives them her name,  
10 the defendant gives them her phone number.

11 What you'll see at the end of the case is that Mr.  
12 Moore gambles and he takes big risks and when Mr. Moore gave  
13 them Traci Thomas' name and gave them her phone number with the  
14 information that she's his alibi, he took a risk that what?  
15 That Traci would cover him.

16 Thank God for Traci Thomas because when the police  
17 went to her residence based on the phone number that he gave  
18 them, they said to her, Traci, was Sammy Moore with you all  
19 night? And Traci Thomas told them, as she will tell you in  
20 this case, that she was with Sammy Moore on Saturday but he  
21 left. And he left for a period of time. And when he came  
22 back, the first thing that Sammy Moore said to her that Sunday  
23 morning when she saw him is that I shot two people, took a car  
24 and have money.

25 After the police completely disputed the defendant's

1 alibi, they went back to Sammy Moore. They said, Mr. Moore,  
2 your alibi just said not only were you not with her all night,  
3 but she says that you told her that you shot two people and you  
4 have a car as a result of this.

5 After Sammy Moore was told the witnesses against him,  
6 that his alibi was no good, it's at that point that Mr. Moore  
7 gave an eight-page typed confession. In addition to the  
8 confession that he was there that night, that it was he that  
9 shot these men and in addition to that he also drew a diagram  
10 showing exactly the way he did this.

11 And what he tells the officers is that in fact he did  
12 get out of this car on South Second Street, that he did cut  
13 behind the houses here. We have photographs of the area. The  
14 officers will tell you what this area is like. It is very easy  
15 to cut behind the houses on Morris Street and come up here.  
16 Mr. Moore confessed they came out here.

17 But Mr. Moore takes one last chance to back out of  
18 this case. In his confession he says that he was by himself  
19 with the gun, with the .44. That he alone brought the gun and  
20 that the men that were inside this house were shooting at him.  
21 They were all shooting at him. He had no choice and he had to  
22 shoot these men.

23 There is only one problem with that with Mr. Moore.  
24 Again, like I said, he's a gambler and he takes big risks. One  
25 problem. We know from the witness Keith Carson that he was not

1 by himself. We also know from the forensic evidence that in  
2 addition to the .44 caliber that was taken out of the body of  
3 Marcus, in addition to the .44 projectile that was from the  
4 body of Mr. Keith Staples, the other victim, there was a .380  
5 casing found in the middle of the street.

6 So we know that although Mr. Moore would hope to God  
7 that you think it's self-defense and he was by himself, we know  
8 from that .380 casing there was another gun used.

9 Now, that's basically, ladies and gentlemen, the  
10 State's case. Now, the witnesses you are going to hear from,  
11 ladies and gentlemen, some of the witnesses you are going to  
12 hear come from some of the worst sections in Newark, worst  
13 sections in Plainfield. They come from extreme poverty. They  
14 are in drug-infested areas and as a result of that, ladies and  
15 gentlemen, you will see for yourself that they have criminal  
16 records themselves. They have drug convictions themselves.  
17 Some of them are actually doing prison terms as we speak.

18 Now, the judge in his opening remarks told you that  
19 this is not like Perry Mason where we speak for a few minutes  
20 and then we take a commercial break. What this case is like is  
21 the real thing. It's nothing like what you see, how smooth it  
22 is on T.V. and I ask you please just disregard anything you've  
23 ever seen on T.V. and just please bring all your efforts and  
24 concentration to the witnesses.

25 My opening here, although it was longer than I hoped

1 it to be, I did not speak of all the evidence. This is not the  
2 entire case. I hoped just to give you a brief overview, to  
3 help you follow along with the case. If I left out anything  
4 you think is important, it's not that we are trying to hide it  
5 from you, ladies and gentlemen. You will hear all the  
6 evidence. This is an abbreviated version of what the State's  
7 proofs should be.

8 I thank you very very much for your attention. I ask  
9 that you just bear with us in this case and that the case will  
10 be tried to you as best as possible and, most important, you  
11 have to hear all the evidence. If I speak too low or if the  
12 witnesses speak too low and you can't hear, please immediately  
13 raise your hand so we will repeat the question or repeat the  
14 answer for you.

15 Thank you very much.

16 THE COURT: Thank you, Miss MacMullan.

17 Mr. Russo.

18 MR. RUSSO: Thank you, your Honor.

19 Ladies and gentlemen, what you've just heard is what  
20 the State hopes to prove, hopes the evidence will show.  
21 Despite the suggestion that there were miracles at work here or  
22 that by the grace of God certain things happened, obviously  
23 neither God nor the Court is on one side or the other. You  
24 haven't heard any evidence yet and what you will hear as  
25 evidence will be those items that are determined to be evidence



1 and the testimony that you hear from witnesses.

2 There are a few things that I want you to keep in mind  
3 as you hear this case and I know that you understand that it's  
4 obviously the most serious type of criminal trial that you  
5 could be asked to sit on and determine. I just want to touch  
6 on a few of the points that the judge has earlier indicated to  
7 you.

8 First, the presumption of innocence, like freedom of  
9 speech or religion or any other of the aspects of rights that  
10 we are entitled to under the Constitution and Bill of Rights,  
11 which are obviously the bedrock of our democracy. The  
12 presumption of innocence could not be more important and that  
13 presumption remains with the defendant, Sammy Moore, throughout  
14 the trial until you've heard all the evidence up to the point  
15 that you have an opportunity to confer with your fellow jurors  
16 and to share their points of view.

17 So I ask you not to prejudge this case based on any  
18 single piece of evidence but to consider it as a whole and  
19 you'll be able to determine at the conclusion of the trial  
20 whether what the State has presented to you makes sense and  
21 then at that point at the conclusion of the trial before you  
22 have an opportunity to actually confer with your fellow jurors,  
23 I will have an opportunity to address you and to suggest to you  
24 what I believe the evidence showed.

25 As the judge pointed out to you, the burden of proof

1 is on the State and the burden is on the State because that's  
2 the way we've determined as a society that we want it to be.  
3 It only makes sense that if a person is accused of something,  
4 that the accuser should have the burden of showing what makes  
5 that person guilty.

6 And as the judge indicated to you, I don't have to ask  
7 any questions. I don't have to make an opening statement on  
8 behalf of Mr. Moore. I don't have to present any evidence  
9 whatsoever because the defense has absolutely no burden and  
10 unless -- even if I did nothing, even if I sat down and didn't  
11 stir or move a muscle during the whole trial, which is unlikely  
12 because we should be here for a few days, that burden wouldn't  
13 shift. It's still the State's burden.

14 This is something that's a bit unusual because it's  
15 not something that you come across in everyday life. The  
16 courts have different rules than what you might experience in  
17 everyday life. If you had a dispute with a neighbor, for  
18 example, and your neighbor called you a liar, the first thing  
19 you would say is I'm not a liar. You would defend yourself.  
20 But the courts don't operate that way. The courts have  
21 different rules.

22 You heard the judge refer to an indictment and read  
23 that indictment to you. That indictment isn't evidence. In  
24 fact it serves an important purpose in our system. What it  
25 does in effect is let's the defendant know what he's being

1 accused of. But it's not any -- it's not evidentiary in any  
2 manner. But there are different rules that the courts and  
3 procedures that the courts use and in this case, as in any  
4 other criminal case, there's a procedure called arraignment at  
5 which the defendant, Sammy Moore, pleaded not guilty to these  
6 charges and if he hadn't done that, we wouldn't be here trying  
7 the case.

8 So in the eyes of the law he's already -- he doesn't  
9 have to come to court and tell you he didn't do it because he's  
10 already done that. That's the way the court procedure works.

11 The burden of proof is on the State. Weigh the  
12 testimony of each witness carefully based on your own common  
13 sense and everyday experience to determine whether it's  
14 believable and at the end of the case you'll have an  
15 opportunity to judge that credible or believable evidence.  
16 It's the quality and not the quantity of the evidence that's  
17 important. And remember that the State has to convince you of  
18 each and every element of each offense charged.

19 Thank you for your attention.

20 THE COURT: Thank you, Mr. Russo.

21 Ladies and gentlemen, I have to take a short recess so  
22 we can get our witnesses in order. I will take a fifteen  
23 minute recess to give you an opportunity to  
24 get coffee or something, come on back and then we'll go on with  
25 the morning session. Please don't discuss the case, however.

1 Either stay in the juryroom or go down to the basement and come  
2 right back.

3 Thank you.

4 (Recess.)

5  
6  
7  
8 CERTIFICATION

9  
10  
11  
12 I, EILEEN A. DUNNE, C.S.R., License Number XI01022,  
13 an Official Court Reporter in and for the State of New Jersey,  
14 do hereby certify the foregoing to be prepared in full  
15 compliance with the current Transcript Format for Judicial  
16 Proceedings and is a true and accurate non-compressed  
17 transcript to the best of my knowledge and ability.

18  
19  
20 Eileen A. Dunne  
21 Official Court Reporter  
22 Union County Courthouse

3/22/96  
Date

23  
24  
25

A-4956-9474

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION : UNION COUNTY  
(CRIMINAL)  
INDICTMENT NO. 94-06-00636  
APP.DIV.DKT.NO.

STATE OF NEW JERSEY :  
v. :  
SAMMY MOORE, :  
Defendant. :  
\_\_\_\_\_ x

Transcript  
of  
T

REC'D  
APPELLATE DIVISION  
JUN 28 1996

DATE: December 13, 1994  
PLACE: Union County Courthouse  
Elizabeth, New Jersey

B E F O R E :

THE HONORABLE WILLIAM L'E. WERTHEIMER, J.S.

FILED  
APPELLATE DIVISION  
JUN 28 1996

TRANSCRIPT ORDERED BY:

DOLORES D. MANN, DEPUTY PUBLIC DEFENDER II

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

SUSAN M. MacMULLAN, ASSISTANT PROSECUTOR  
FOR THE STATE

THOMAS M. RUSSO, ESQ.  
FOR THE DEFENDANT

EILEEN A. DUNNE, C.S.R.  
Official Court Reporter  
Union County Courthouse  
Elizabeth, New Jersey



I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
<b>FOR THE STATE:</b>				
MICHAEL RICHARDS	3	22	24	
TRACI THOMAS	25	42	53	
KYEWAGHANA COOK	57	81		
JADA WILLIAMS	87	92	96	
KHAHLIA HASSENBAY	97	108	118	
ALEXANDER WALKER	121	143	147	
SHANNELLE DIGGS	148			
VINCENT TORRE	151	159	160	
GREGORY LORDI	160	168		

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
D-1	Thomas Statement	46	
D-2	Williams Statement	94	
D-3	Hassenbey Statement	108	
S-79	Walker Statement	127	

1 A (Preliminary remarks by the Court and opening  
2 statements are not included in this transcript.

3 THE COURT: Call your first witness.

4 MISS MacMULLAN: Thank you, Judge.

5 The State's first witness is Police Officer Michael  
6 Richards of the Plainfield Police Department.

7 M I C H A E L R I C H A R D S, State's witness, sworn.

8 DIRECT EXAMINATION BY MISS MacMULLAN:

9 Q Good morning, Officer Richards.

10 Sir, are you presently employed by the Plainfield  
11 Police Department?

12 A Yes.

13 Q In what capacity?

14 A Police officer.

15 Q How long have you been a police officer?

16 A About seven and a half years.

17 Q Referring your attention, sir, to December 5th,  
18 Sunday, 1993 at approximately 1:35 a.m. were you working as a  
19 patrolman at that time?

20 A Yes, I was.

21 Q Do you recall which shift you were working on that  
22 night?

23 A The midnight to eight shift.

24 Q You would start Saturday night and work on into Sunday  
25 morning?

1 A Yes.

2 Q And do you recall which district of Plainfield you  
3 were patrolling?

4 A It's known as 101.

5 Q And what does that encompass?

6 A It's basically the west end of Plainfield.

7 Q Would that include 1102 West Third Street?

8 A Yes, it would.

9 Q You're familiar with that district?

10 A Yes.

11 Q Do you recall what the weather was like that day at  
12 that time?

13 A It had been raining, about 40, 45 degrees.

14 Q At approximately 1:35 a.m. did you receive a radio  
15 dispatch to go to the area of 1102 West Third Street?

16 A Yes.

17 Q Were you with anyone at the time you received the  
18 dispatch?

19 A Yes, I was with Officer Steven Huff.

20 Q That would be your partner?

21 A Yes.

22 Q At the time were you dressed in uniform as you are  
23 today, sir?

24 A Yes, I was.

25 Q Were you in a marked unit?

1 A Yes

2 Q When you got the call, do you recall where you were  
3 when you received the dispatch?

4 A We were somewhere in the 700 block of West Third Street.

5 Q You were actually on West Third Street yourself?

6 A Yes.

7 Q After receiving the call, did you go to the area of  
8 1102 West Third Street?

9 A Yes, we did.

10 Q How long did it take you to get there?

11 A Approximately 30 seconds.

12 Q When you arrived, what did you find?

13 A We found an individual lying on the ground bleeding  
14 profusely from the neck area. He didn't show any signs of  
15 life.

16 Q Where, if you can recall, was he lying in relation to  
17 the homes?

18 A He was lying on the sidewalk in front of 1102 West Third  
19 Street.

20 Q Which way were his feet pointing in relation to 1102  
21 West Third Street?

22 A His feet were in a western direction.

23 Q And his arms?

24 A His arms were out to the sides.

25 Q And he was on his back you said, sir?

1 A Yes.

2 Q At that point in time when you saw that he was  
3 bleeding profusely and did not appear to be breathing, what did  
4 you do next?

5 A We checked for any vital signs, which there were none.

6 Q Were medical personnel called to the scene?

7 A Yes.

8 Q And did they arrive in a short time?

9 A Yes, they did.

10 Q Was the victim pronounced dead at the scene?

11 A Yes, he was.

12 Q Would that be at 1:47 a.m.?

13 A That's correct.

14 Q And were you the first officers to respond to that  
15 scene?

16 A Yes.

17 Q And after you responded and medical personnel  
18 responded, did you what is commonly referred to as secure the  
19 crime scene?

20 A Yes.

21 Q Could you tell the jury what that encompasses?

22 A It encompasses keeping all persons not involved out of the  
23 scene away from the area to preserve any evidence that might be  
24 in that immediate area, securing it off with crime scene tape  
25 is what we normally call it. Roping off the area.



1 Q Is that what they call that yellow tape?

2 A Yes.

3 Q That was used?

4 A Yes, it was.

5 Q When you secured the scene, did you look in the street  
6 area where the body was for any potential evidence?

7 A Yes.

8 Q What, if anything, did you find?

9 A We found one spent shell casing.

10 Q And do you recall what kind of shell casing it was?

11 A I don't recall.

12 Q And was it your duty to retrieve it or was that  
13 another officer's?

14 A It was another officer's. We just marked it and let it  
15 remain where it was.

16 Q When you say "marked it", what do you mean?

17 A We placed a cone over it just so it would not be disturbed  
18 and left it in the position we found it in.

19 Q And were other officers called to the scene to take  
20 photographs of the area?

21 A Yes.

22 Q And were you present when those photographs were  
23 taken, sir?

24 A Yes, I was.

25 Q And do you know if there was another shooting victim

1 involved in this case?

2 A Yes, there was.

3 Q Do you know where in relation to where the first  
4 victim was the second victim was found?

5 A It was about a block west -- correction, east of our  
6 location.

7 Q Let's talk about that area in question, 1102 West  
8 Third Street. Could you tell me what the side street is on  
9 that particular corner?

10 A It's Morris Street.

11 Q And as of the day in question had you ever patrolled  
12 that area before?

13 A Yes.

14 Q Approximately how many times and for how long have you  
15 been patrolling that area?

16 A I patrolled that area on a regular basis for several years.

17 Q And what is the street south of West Third Street, if  
18 you can tell us?

19 A That runs parallel to West Third Street?

20 Q Yes.

21 A South would be West Fourth Street.

22 Q And north of that?

23 A South Second Street.

24 Q And have you patrolled South Second Street?

25 A Yes.

1 Q And you are very familiar with that, also?

2 A Yes.

3 Q Could you describe for the jury that area behind 1102  
4 West Third Street that runs alongside Morris Street? If you  
5 could describe it for the jury?

6 A It's a residential area. West Third Street is very well  
7 lit. Morris Street is not that well lit. South Second Street  
8 is also very well lit.

9 Q Is it possible for a person to enter the driveways on  
10 Morris Street to walk in the backyard and come out near the  
11 area of 1102 West Third Street?

12 A Yes.

13 Q Have you done that yourself, sir?

14 A Yes, I have.

15 Q What I would like to do at this point in time is show  
16 you some exhibits. First showing you what has been marked S-22  
17 for identification.

18 MISS MacMULLAN: For the record it is in front of the  
19 jury and hopefully the witness can see it.

20 Q Can you, sir?

21 A Yes.

22 Q What does S-22 show?

23 A It is a street map of the west-end portion of Plainfield.

24 Q I wonder with the Court's permission, sir, if you  
25 could come down with the pointer? We will have you explain

1 what this map shows. If you could step back here so all the  
2 jurors could see.

3 Let's start first where the body was found?

4 A Okay. The body was found right here where this red X is.

5 Q Did you put that red X here?

6 A Yes.

7 Q And did you write the words "Body of Marcus Benjamin"?

8 A Yes.

9 Q Is that your initials, "M.R."?

10 A Yes.

11 Q And that would be the approximate location where the  
12 body was found?

13 A Yes.

14 Q And I wonder if you can just explain the streets on  
15 S-22?

16 A Okay. Where the red writing is is West Third Street.  
17 Along here is Morris Street, which runs north and south and  
18 this here is South Second Street, which runs east and west.

19 Q This particular street here, South Second Street, sir,  
20 did you say it is a well-lit area?

21 A Yes, it is.

22 Q How well lit is it, sir? If you could describe it for  
23 the jury?

24 A This is more of an industrial area. There are a lot of  
25 factories and there are quite a few street lights every few

1 feet. Very well illuminated.

2 Q And down here where the shooting occurred on West  
3 Third Street, what's the lighting like at this particular  
4 corner here at Morris Street and West Third Street?

5 A On the corner it's also very well lit. There's a street  
6 light right on the corner of Morris and Third and just a short  
7 distance on the other -- down from the location of the victim  
8 there's also what we kind of refer to as an anti-crime light.  
9 It's brighter than normal light which shines on the whole area  
10 itself.

11 Q Thank you.

12 Does this accurately reflect the location of the  
13 streets on the night in question?

14 A Yes.

15 Q If you can just hold on for one second, officer. I  
16 would like to show you another exhibit that has been marked  
17 S-23 for identification. What does that show, sir?

18 A It's an aerial photograph of the same map which we just  
19 saw.

20 Q I wonder if you could look at it and explain for the  
21 jury the streets in question here that you were just talking  
22 about on the previous exhibit?

23 A Okay. Once again this is West Third Street running along  
24 here. This would be Morris Street going up to here and this  
25 would be South Second Street coming across.



1 Q Where the words "West Third Street, Morris Street and  
2 South Second Street" are written, does that accurately identify  
3 the streets?

4 A Yes.

5 Q And where there is a red X there, sir, do you know who  
6 made that red X?

7 A I did.

8 Q What does that indicate?

9 A That's where the victim was approximately located at.

10 Q Is that again your writing, "The body of Marcus  
11 Benjamin"?

12 A Yes.

13 Q And your initials, "M.R."?

14 A Yes.

15 Q Let's talk about also, if we could, some of the other  
16 streets that are indicated on S-23. I wonder if you could tell  
17 the jury the rest of the streets on the map?

18 A Okay. This is McDowell street. Again, this is West Third  
19 Street continuing down to Manson Place. Manson also runs all  
20 the way out to Second. If you continue down West Third Street,  
21 you come to Monroe Avenue, which runs all the way across Third  
22 coming out to Second as well.

23 Q Okay. Does this accurately reflect what the streets  
24 looked like on the day in question?

25 A Yes.

1 Q Okay. Sir, you can take a seat. I will show you some  
2 photographs. Thank you very much.

3 I would like to show you, sir, what has been marked  
4 S-35 for identification. What does that show?

5 A That's a front view of 1102 West Third Street. It also  
6 shows the victim on the sidewalk and the cone in the street is  
7 indicated where the spent shell casing was found.

8 Q And was this photograph taken on the night in  
9 question?

10 A Yes.

11 Q What does S-36 show, sir?

12 A That shows the position of the victim when we found him.

13 THE COURT: What is the number of that?

14 MISS MacMULLAN: S-36, your Honor.

15 THE COURT: Thank you.

16 Q Does that accurately show what he looked like when you  
17 first arrived at the scene?

18 A Yes.

19 Q Showing you what has been marked S-37 for  
20 identification, what does that show?

21 A That is also a close-up of the victim in the position found  
22 and the clothing he was wearing.

23 Q Showing you what has been marked S-38 for  
24 identification, what does that show?

25 A That's the -- that's also 1102 West Third to the right and

1 that is the space in between the two houses. The house to the  
2 left would be 1104 West Third Street.

3 Q On the day in question is there a space alongside 1102  
4 West Third Street for someone to walk from behind?

5 A Yes.

6 Q And is this how it looked on the day in question?

7 A Yes, it is.

8 Q Showing you what has been marked S-39 for  
9 identification, what does that show?

10 A That's a close-up of the space in between the two houses.

11 Q Showing you what has been marked skipping to S-43 for  
12 identification, what does that show?

13 A Again, that's 1102 West Third Street.

14 Q Is this what the house looks like during the day with  
15 sunlight?

16 A Yes.

17 Q Now, you previously talked about -- talking about the  
18 intersection of Morris Street and West Third Street, that's a  
19 well-lit area?

20 A Yes.

21 Q I would like to show you what has been marked S-44 for  
22 identification. Do you see in this photograph the street  
23 lights near where the body of Marcus Benjamin was found?

24 A Yes.

25 Q I wonder if you could with a red pen, why don't you

1 circle those lights and put a red X in the street where Marcus  
2 was found?

3 A (Witness complies.)

4 Q Okay. Thank you, sir.

5 I wonder if you could explain to the jury what you've  
6 now marked on S-44?

7 A Okay. I circled the street light on the northwest corner  
8 of Morris and Third and also what I referred to earlier as the  
9 anti-crime light, which is on the south side of West Third  
10 Street. And the X here is approximately where the victim was  
11 located.

12 Q And I wonder, sir, if you could put your initials M.R.  
13 to indicate that you've drawn these marks.

14 A (Witness complies.)

15 Q Thank you, sir.

16 MISS MacMULLAN: Witness has done so for the record.

17 Q We talked about before in the other photographs that  
18 there is a side that one can walk through between the homes of  
19 1102 West Third Street and 1104 West Third Street. I would  
20 like to show you what is marked S-45 for identification. Is  
21 that another shot of that particular section between the homes?

22 A Yes.

23 Q And is that how it looked on the day in question?

24 A Yes.

25 Q Okay. Unfortunately, I have a few more photographs

1 for you, officer.

2 Now, are you familiar with South Second Street and  
3 Clinton Avenue?

4 A Yes.

5 Q Okay. How many times have you patrolled that area?

6 A Like I said before, several. It's all part of the same  
7 area I am assigned to on a regular basis.

8 Q Were you familiar with that area on the night in  
9 question?

10 A Yes.

11 Q I would like to show you what has been marked S-49 for  
12 identification. What does that show?

13 A It's the intersection of Clinton Avenue and South Second  
14 Street.

15 Q And as far as lighting, how is that area lit?

16 A That's very well lit. There are several street lights all  
17 about the area.

18 Q Showing you what has been marked S-50 for  
19 identification, what does that show, sir?

20 A That's just a different angle. Also Clinton Avenue and  
21 South Second Street.

22 Q Where are the lights on South Second Street in this  
23 particular section of South Second Street?

24 A The street lights?

25 Q Yes, sir.



1 A They're all up and down the street, both sides of the  
2 street.

3 Q And showing you what's marked S-51 for identification,  
4 what does that show?

5 A That's also South Second Street.

6 Q Any particular section?

7 A The 1100 block.

8 Q Okay. And specifically does that photograph show the  
9 lights in the area?

10 A Yes, it does.

11 Q And how would you describe the volume of light in that  
12 area?

13 A Very high. There's quite a few lights in the area.

14 Q Showing you what has been marked S-52 for  
15 identification, what does that show?

16 A That again is the 1100 block of South Second Street.

17 Q Does this photograph show any other buildings in the  
18 area of South Second Street?

19 A Yes, it shows a building on the corner of Morris Street and  
20 South Second Street.

21 Q I'd like to show you another photograph, S-54 for  
22 identification. What does that show?

23 A That's where Morris Street and South Second Street meet.

24 Q Now, where they meet, Morris Street and South Second  
25 Street, what's the lighting like in that area?

1 A It's very well highly illuminated.

2 Q And what does S-56 show, sir?

3 A That's Morris. That's the corner of Morris and West Third  
4 Street looking northbound towards South Second Street.

5 Q Just one more here in this section.

6 Showing you what's been marked S-57 for  
7 identification, what does that show?

8 A That's Morris Street and South Second Street looking  
9 southbound.

10 Q And for the record all these photographs I've shown  
11 you do they accurately and fairly depict what they've been  
12 labeled as?

13 A Yes.

14 Q Now, you said, sir, earlier that you've walked behind  
15 the houses on Morris Street and you've walked behind the houses  
16 of 1102 and 1104 West Third Street?

17 A Yes.

18 Q Okay. Last two groups of photographs for you.

19 Showing you what has been marked first S-67 for  
20 identification, what does that show?

21 A That's the corner of West Third and Morris and it indicates  
22 1102 West Third Street and 224 Morris Street.

23 Q Okay. And is that the house behind 1102 West Third  
24 Street on Morris Street?

25 A Yes.

1 Q What does that show, sir, S-68?

2 A That's the front of 224 Morris Street and the rear of 1102  
3 West Third.

4 Q What does S-69 show, sir?

5 A It's the front of 224 Morris Street and the space in  
6 between the next house north of that.

7 Q Now, you've been in this area in the photograph?

8 A Yes.

9 Q Around the time of the incident?

10 A Yes.

11 Q And are you able to walk down this driveway?

12 A Yes.

13 Q What happens when you walk down this driveway off of  
14 Morris Street?

15 A You end up in the rear of those houses, which you can see  
16 the back of 1102 West Third Street.

17 Q Okay. When you enter off of Morris Street, you can  
18 actually start to enter the backyards of 1102 and 1104 West  
19 Third Street?

20 A Yes.

21 Q Is that because their backyards back into each other?

22 A Right, they are adjoining.

23 Q Showing you what has been marked S-70 for  
24 identification, what does that show?

25 A That's the back view of 1102 West Third Street looking

1 towards Morris, the rear of 224 Morris.

2 Q And showing you what has been marked S-71 for  
3 identification, what does that show?

4 A Again, that's the rear of 1104 West Third Street looking  
5 towards 1102 West Third Street.

6 Q And is this once you're in the backyards of Morris  
7 Street looking at the backyard of 1102 and 1104 West Third  
8 Street?

9 A Right.

10 Q And, again, all these photographs accurately depict  
11 what they've been labeled as?

12 A Yes.

13 Q Okay. Last group of photographs here.

14 Now, have you been in the backyard of 1104 West Third  
15 Street, the house next to where the body of Marcus Benjamin was  
16 found?

17 A Yes.

18 Q Okay. Showing you, sir, what has been marked S-63 for  
19 identification, what does that show, sir?

20 A That's the portion of fence that's alongside of 1104 West  
21 Third Street in the front and it also shows the side of 1102  
22 West Third.

23 Q Now, once you enter, get past that fence on the house  
24 next door to 1102 West Third Street, are you now walking  
25 alongside that house, 1104 West Third Street?

1 A Yes.

2 Q I would like to show you what has been marked S-64 for  
3 identification.

4 A That's what you just described. 1104, the side walking  
5 towards the rear.

6 Q On the day in question was this particular section of  
7 1104 West Third Street open?

8 A Yes.

9 Q Is it possible for somebody to come from the backyards  
10 of Morris Street alongside 1104 West Third Street?

11 A Yes, it is.

12 Q And that would bring you out in front of the house  
13 where the body what is found?

14 A That's correct.

15 Q Showing you what has been marked S-65 for  
16 identification, what does that show?

17 A That's also -- that's the view from 1104 West Third Street  
18 looking back.

19 Q Okay. Would that show the open space behind 1104 West  
20 Third Street?

21 A Yes.

22 Q And the last photograph, I promise, what has been  
23 marked S-66 for identification. What does that show, sir?

24 A That's the rear of 1104 West Third Street, if you're in the  
25 back of like 224 Morris.



1 Q And, again, sir, all these photographs I have just  
2 showed you accurately reflect what they've been labeled as?

3 A Yes.

4 MISS MacMULLAN: One moment, your Honor.

5 (Pause.)

6 Q Officer Richards, before this day have you ever heard  
7 of a man named Sammy Moore?

8 A No.

9 Q He was a complete stranger to you?

10 A Yes.

11 MISS MacMULLAN: Thank you. No further questions.

12 THE COURT: Any questions?

13 MR. RUSSO: Yes, your Honor.

14 CROSS-EXAMINATION BY MR. RUSSO:

15 Q Officer, you testified it took you 30 seconds to get  
16 to the scene from the time you heard the call; is that right?

17 A That's correct.

18 Q From where you were when you got that call, did you  
19 hear the shots?

20 A No, I did not.

21 Q So is it fair to say that you don't know how long  
22 after the actual shooting that you arrived there; is that  
23 right?

24 A That's correct.

25 Q When you arrived at the scene, were there other people

1 around?

2 A No, there were not.

3 Q There was no one around other than you and the officer  
4 that was with you?

5 A That's correct.

6 Q And the victim?

7 A Right.

8 Q There were no people out on the street looking to see  
9 what had happened?

10 A Not when we first arrived, no.

11 Q Would it be fair to say that you don't know whether  
12 any evidence or potential evidence might have been moved before  
13 you got there?

14 A I wouldn't know, sir.

15 Q Nor would you know whether the victim's body might  
16 have been moved?

17 A I wouldn't know that either.

18 Q Did you know the victim, Marcus Benjamin, before this  
19 incident?

20 A I'd have to say no.

21 Q Did you know Keith Staple?

22 A No, sir.

23 Q You indicated that you had been in this area before,  
24 though?

25 A Yes.

1 Q You indicated you had been in the backyards of these  
2 houses before; is that right?

3 A That's correct.

4 Q How close in time to this incident were you actually  
5 in those yards?

6 A I don't recall when the last time I was in the yards prior  
7 to this incident.

8 Q Do you recall -- so you're unable to estimate how  
9 close in time it was?

10 A Within a few months.

11 MR. RUSSO: No further questions.

12 MISS MacMULLAN: If I may have a couple?

13 THE COURT: Sure.

14 REDIRECT EXAMINATION BY MISS MacMULLAN:

15 Q Officer, did you see anyone moving any of the evidence  
16 retrieved?

17 A No.

18 Q Did you see anyone moving the body?

19 A No.

20 Q The area where that bullet casing was found, is that  
21 the area where the area you first saw it?

22 A Yes.

23 Q No one moved it once you got on the scene?

24 A No, they did not.

25 MISS MacMULLAN: Thank you. No further questions.

1 THE COURT: Thank you, Officer Richards. You may step  
2 down. Please watch your step.

3 Call your next witness.

4 MISS MacMULLAN: Your Honor, may I show the jury the  
5 one aerial photograph, judge?

6 THE COURT: Any objection?

7 MR. RUSSO: No objection.

8 THE COURT: Move it in evidence. S-23 in evidence.

9 (S-23 marked in evidence.)

10 THE COURT: You will have that in the juryroom with  
11 you. You don't have to commit it to memory.

12 (Jury views the photograph.)

13 THE COURT: Collect the photograph, Miss MacMullan.

14 MISS MacMULLAN: Thank you, Judge.

15 THE COURT: Call your next witness.

16 MISS MacMULLAN: Yes, your Honor. The State calls  
17 Miss Traci Thomas from Montgomery, Alabama.

18 T R A C I T H O M A S, State's witness, sworn.

19 DIRECT EXAMINATION BY MISS MacMULLAN:

20 Q Good morning, Miss Thomas.

21 Miss, what's your age?

22 A Eighteen.

23 Q And where do you go to school?

24 A Sidney Leclare.

25 Q Where is that located?

1 A Montgomery, Alabama

2 Q What grade are you in?

3 A Twelfth.

4 Q And who do you live with?

5 A My mother and father.

6 Q And are they in the courtroom today?

7 A Yes.

8 Q And how long have you lived in Alabama?

9 A For about 11 months.

10 Q Prior to moving to Alabama where did you live?

11 A 50B North Third Street, Newark, New Jersey.

12 Q How long did you live there for?

13 A For about 13 years.

14 Q Traci, incidentally, have you ever testified in a  
15 courtroom like this before?

16 A No.

17 Q Are you nervous?

18 A Yes.

19 Q Okay. Try and concentrate and throw out your voice so  
20 everyone can hear you.

21 Miss Thomas, when you lived in Newark, did you know a  
22 man by the nickname of Smiley?

23 A Yes.

24 Q How did you come to know Smiley?

25 A Going to Brenda house.



1 Q Excuse me?

2 A Going to Brenda house.

3 Q Where was Brenda's house?

4 A 195 First Street.

5 Q Do you remember the apartment number?

6 A 20N.

7 Q And what's 195 First Street like? Could you tell the  
8 jury what it looks like?

9 A Bad area.

10 Q It's a bad area?

11 A Uh-huh.

12 Q How big is it?

13 A Tall buildings, two tall buildings.

14 Q And do a lot of people live in those buildings?

15 A Yes.

16 Q And how long did you know this man by the nickname  
17 Smiley?

18 A For about three weeks.

19 Q And at that time what was your relationship with him?

20 A Friends.

21 Q Were you close friends?

22 A Kind of.

23 Q Kind of. Did you know Smiley's real name?

24 A Yes.

25 Q What is his real name?

1 A Sawvy Moore.

2 Q Traci, when you look around the courtroom today, could  
3 you tell us if you recognize anybody?

4 A Yes.

5 Q Could you please point to where the person you  
6 recognize is sitting and tell the Court and the jury what he is  
7 wearing?

8 A Striped shirt and jeans.

9 THE COURT: Identifies the defendant for the record.

10 Q Now, you said you were kind of close friends with the  
11 defendant?

12 A Yes.

13 Q Has he ever been to your home when you lived in  
14 Newark?

15 A Yes.

16 Q About how many times has he been to your home?

17 A About five or six.

18 Q And would he ever call you on the phone?

19 A No.

20 Q Has he ever called you on the phone?

21 A Not that I remember.

22 Q Did you ever give him your phone number?

23 A I don't remember that either.

24 Q You don't remember that either.

25 At the time you knew him would you have given him your

1 phone number?

2 A Yes.

3 Q And would you say you were just friends or were you  
4 boyfriend and girlfriend?

5 A Just friends.

6 Q Just friends?

7 A Uh-huh.

8 Q Now, could you tell the jury where Sammy Moore used to  
9 hang out? Where the defendant used to hang out?

10 A At the Spires.

11 Q What is the Spires?

12 A 195 First Street.

13 Q Is that another name for 195 First Street, the Spires?

14 A Uh-huh.

15 Q Do you know the full name of that apartment complex?

16 A I don't remember.

17 Q Okay. The nickname was the Spires?

18 A Uh-huh.

19 Q And when Sammy Moore was at the Spires, who would he  
20 come to visit, if you can recall?

21 A Brenda.

22 Q Was she a close friend of his?

23 A Uh-huh.

24 THE COURT: Excuse me. You have to answer yes or no,  
25 ma'am. You have to speak verbally so the lady in front of you

1 can write it down. Okay?

2 THE WITNESS: Okay.

3 Q He would come to visit Brenda that lived at the  
4 Spires, 195 First Street?

5 A Yes.

6 Q Would he visit anybody else there?

7 A No.

8 Q No. Not that you can think of?

9 A No.

10 Q Okay. Traci, I am going to refer your attention last  
11 December to the evening of December 4th, Saturday night. Do  
12 you remember where you were that Saturday night?

13 A I was at Brenda house.

14 Q That would be the friend of the defendant's?

15 A Yes.

16 Q Okay. When you were at Brenda's house, did you see  
17 the defendant there?

18 A Yes.

19 Q Okay. And when you saw the defendant there, do you  
20 remember what part of the evening you saw him there?

21 A It was around nine o'clock.

22 Q Okay. When you saw him around nine at Brenda's  
23 apartment, did anybody else show up at Brenda's apartment?

24 A Pop, Alexander and Tariq.

25 Q Okay. Let's talk about Tariq. Who is Tariq?

1 A I guess he's a friend of Smiley's.

2 Q Why do you say I guess he's a friend of Smiley's?

3 A He came there with Smiley.

4 Q Excuse me?

5 A He came there with Smiley.

6 Q With Smiley. Do you know Tariq's last name?

7 A No.

8 Q And did you see Tariq when he came into the apartment?

9 A Yes.

10 Q After he came in with Pop and Tariq, did he leave with  
11 them?

12 A I can't remember.

13 Q Did he ever leave the apartment that night?

14 A Yes.

15 Q About what time did the defendant leave the apartment?

16 A I don't remember.

17 Q Was it soon after he came to the apartment?

18 A A little while after.

19 Q And could you give us an estimate a little while  
20 after?

21 A No.

22 Q How about a T.V. show? Was it longer than a half hour  
23 T.V. show?

24 A I don't remember what I was watching.

25 Q Okay. So he left you that Saturday night?



1 A Uh-huh.

2 Q Was he with you the whole time Saturday night?

3 A No.

4 Q So he left, right?

5 A Yes.

6 Q Now, what did you do after he left?

7 A I was talking to Hassana and Brenda.

8 Q Hassana, who is that?

9 A My friend.

10 Q Does she also live with Brenda at that apartment?

11 A Yes.

12 Q Okay. Did you stay up all night that night or did you  
13 go to sleep?

14 A I went to sleep.

15 Q And did you after you went to sleep, did you see Sammy  
16 Moore, the defendant, at any time later after you went to sleep  
17 that Saturday night?

18 A Yes.

19 Q Now, would that be Sunday morning when you saw him?

20 A No.

21 Q Do you know what time it was?

22 A It was that night like after twelve.

23 Q After twelve. Okay. Do you know how much longer  
24 after twelve it was?

25 A No.

1 Q Could it have been an hour after twelve?

2 A I don't know.

3 Q Excuse me?

4 A I don't know.

5 Q Could it have been two hours after twelve?

6 A I don't know.

7 Q But it was after twelve?

8 A Uh-huh.

9 Q Okay. When you saw him, where was it that you saw  
10 him?

11 A He was with -- in Brenda's living room.

12 Q When he was at Brenda's living room, did you talk to  
13 him?

14 A Not at the time. Not at first.

15 Q Excuse me?

16 A Not at first.

17 Q Okay. Was there any time that you talked to him after  
18 he came back to the apartment?

19 A Yes.

20 Q Okay. And when was that?

21 A I don't remember.

22 Q Do you remember where it was in the apartment you had  
23 this conversation with him?

24 A Yes.

25 Q Where was it?

1 A In Brenda's room.

2 Q Okay. When he was in Brenda's room with you, did you  
3 two have a conversation about where he went?

4 A Yes.

5 Q What did he tell you about when he was gone?

6 A That he had shot two people and he had money and a car.

7 Q Traci, have you ever gotten into an argument with the  
8 defendant since this happened?

9 A No.

10 Q Have you ever had a reason to be angry with each other  
11 after this happened?

12 A No.

13 Q Are you positive that he told you he shot two people,  
14 had money and stole a car?

15 A Yes.

16 Q Any doubt in your mind he told you that?

17 A No.

18 Q What did he tell you he was going to do with the car?

19 A He said he was gonna sell it.

20 Q Did he tell you where he kept it at that point when he  
21 was talking to you?

22 A It was in front of 195.

23 Q Excuse me?

24 A In front of the building, 195.

25 Q Did you ever see the car, Traci?



1 A I don't know.

2 Q Would it be in the morning?

3 A It was during the day but I don't remember the time.

4 Q When you left, was the defendant still there?

5 A Yeah.

6 Q Okay. Now, on the evening of December 13th, Monday  
7 night, did the police contact your house?

8 A I don't remember.

9 Q You don't remember. Okay.

10 On the day of Tuesday, December 14th did you speak to  
11 detectives from the Plainfield Police Department?

12 A Yes.

13 Q Did they ask you about where Sammy Moore was on the  
14 evening of December 4th, that Saturday night?

15 A Yes.

16 Q Did you tell them what you told this jury today?

17 A Yes.

18 Q Incidentally, Traci, where did you live at that time?

19 A 50B North Third Street.

20 Q Is that anywhere near Third and Dickerson?

21 A Yes.

22 Q For the record the defendant has been to your home; is  
23 that correct?

24 A Yes.

25 Q Tell the jury what your phone number was at that time?



1 A 483-6946.

2 Q Would that be area code 201?

3 A Yes.

4 Q And before this date, December 14th, Tuesday, is that  
5 the first time you ever met those detectives from Plainfield?

6 A Yes.

7 Q Okay. Now, the next day, December 15th, 1993,  
8 Wednesday, did you give a sworn statement to the police as to  
9 what the defendant told you from that night?

10 A Yes.

11 Q At that time did they show you a photo array?

12 A Yes.

13 Q And what did they say to you when they showed that  
14 photo array to you?

15 A They asked me did I notice anybody in the picture.

16 Q Did they point or try and hint which one to pick out  
17 for you?

18 A No.

19 Q And who did you recognize from that first photo array?

20 A Smiley.

21 Q Smiley. Any doubt in your mind that was Smiley in the  
22 photo array?

23 A Excuse me?

24 Q Is there any doubt that was Smiley in the photo array?

25 A No.

1 Q And what did you do after you picked out his  
2 photograph in the photo array?

3 A He told me to sign the back of it and put my initials on  
4 the other pictures.

5 Q Did you in fact do that, Traci?

6 A Yes.

7 Q I would like to show you what has been marked S-17 for  
8 identification. Is this the photo array they showed you?

9 A Yes.

10 Q And which picture is the defendant's in S-17?

11 A Number three.

12 Q And turning to the back of photo number three, is that  
13 your signature there, "Traci Thomas", with the date "December  
14 15, 1993"?

15 A Yes.

16 Q And are these your initials on the other five  
17 photographs, "T.T. 12/15/93"?

18 A Yes.

19 Q And this is in the same condition as it was when you  
20 saw it when the detectives showed it to you?

21 A Yes.

22 Q Now, did they also ask you about this other person  
23 Tariq?

24 A Yes.

25 Q Did they show you a photo array, second photo array,

1 after they showed you Sammy Moore's photo array?

2 A Yes.

3 Q What did they say to you about that second array?

4 A They asked me did I notice anybody in the picture.

5 Q And did you recognize anybody?

6 A Yes.

7 Q Who did you recognize?

8 A Tariq.

9 Q For the record do you know Tariq's last name?

10 A No.

11 Q Do you know where he lives or hangs out?

12 A No.

13 Q You just saw him that one night with the defendant?

14 A Yes.

15 Q And did you write your name on the back of Tariq's  
16 photograph in this array?

17 A Yes.

18 Q Did the police try and hint to you which one to pick  
19 out?

20 A No.

21 Q I would like to show you what's been marked S-18 for  
22 identification. Is that the photo array, second one they  
23 showed you?

24 A Yes.

25 Q Which photograph is Tariq's?

1 A Number four.

2 Q Okay. This was the guy that was with the defendant on  
3 Saturday night?

4 A Yeah.

5 Q Okay. Turning to the back of the photograph, is that  
6 your signature and date there, Traci?

7 A Yes.

8 Q And is that your initials "T.T." on the other five  
9 photographs?

10 A Yes.

11 Q And is this in substantially the same condition as it  
12 was when the police officer showed it to you?

13 A Yes.

14 Q Incidentally, how did the police officers act to you?  
15 Did they ever threaten you or coerce you in any way?

16 A No.

17 Q Were they polite to you?

18 A Yes.

19 Q And did they offer you any money in exchange for any  
20 of the information you've given?

21 A No.

22 Q Traci, that Saturday night when he was in Brenda's  
23 apartment, did you ever see the defendant with a gun?

24 A Yes.

25 Q Tell the jury was it that same Saturday?

1 A I can't remember.

2 Q Was it a time close to that Saturday?

3 A Yes.

4 Q Now, you say you only knew him for three weeks; is  
5 that correct?

6 A Uh-huh.

7 Q It would be in that three weeks before this incident?

8 A Yes.

9 Q And what did that gun look like that the defendant  
10 had?

11 A It was big. I don't know the name of the gun.

12 Q Do you know the color, Traci?

13 A I don't remember the color.

14 Q Could you just with your fingers show the jury how big  
15 the gun was about?

16 A About --

17 THE COURT: Indicate, counsel.

18 MISS MacMULLAN: Witness indicating with her index  
19 fingers approximately seven to eight inches.

20 THE COURT: Mr. Russo.

21 MR. RUSSO: Yes.

22 THE COURT: Okay.

23 Q You positive you saw that gun?

24 A Yes.

25 Q Traci, did the Prosecutor's Office fly you and your



1 parents up from Montgomery, Alabama, for this trial?

2 A Yes.

3 Q Okay. We paid for those plane tickets?

4 A Yes.

5 Q In addition to that have you received any promise of  
6 reward or promise of any money in exchange for your testimony?

7 A No.

8 Q Did you know before this day a Keith Staple?

9 A No.

10 Q Did you know before this day a Marcus Benjamin?

11 A No.

12 MISS MacMULLAN: Thank you. No further questions.

13 THE COURT: Cross-examine.

14 MR. RUSSO: Thank you, your Honor.

15 CROSS-EXAMINATION BY MR. RUSSO:

16 Q Miss Thomas, you didn't have any difficulty  
17 identifying Sammy Moore from this picture, did you?

18 A No.

19 Q Because you knew him personally, right?

20 A Yes.

21 Q Okay. You were easily able to see that his picture  
22 appeared here, right?

23 A Yes.

24 Q And the same is true of Tariq. You had seen him many  
25 times before, too?

1 A No.

2 Q Didn't you testify earlier that you saw him come to  
3 Brenda's apartment --

4 A Yes.

5 Q -- that evening?

6 A Yes.

7 Q So you had seen him before. He wasn't a stranger to  
8 you?

9 A Yes, he was.

10 Q You had just -- you had seen him at Brenda's  
11 apartment?

12 A That one time.

13 Q That one time?

14 A Uh-huh.

15 Q And he was in Brenda's apartment for a period of time?

16 A Yes.

17 Q While you were there?

18 A Yes.

19 Q How long?

20 A About ten, 15 minutes.

21 Q Now, when was it that you arrived at Brenda's  
22 apartment that evening?

23 A I don't remember.

24 Q You don't remember the time at all?

25 A No.

- 1 Q Do you remember what you did earlier that evening?
- 2 A No.
- 3 Q Did you go there for any particular purpose?
- 4 A See my friends.
- 5 Q To see your friends?
- 6 A Uh-huh.
- 7 Q And other than Brenda what friends were those?
- 8 A Hassana and Ebony.
- 9 Q And how did you know them?
- 10 A 'Cause we lived on the same block.
- 11 Q Where did they live?
- 12 A 48th and Third Street.
- 13 Q And did you make plans for them to meet you at  
14 Brenda's or did you just know they would be there?
- 15 A I just knew they was gonna be there.
- 16 Q Had you met them there before?
- 17 A Yes.
- 18 Q How long had you known Brenda?
- 19 A For about a month, month and a half.
- 20 Q How many people were at Brenda's when you arrived?
- 21 A Six.
- 22 Q And who were they?
- 23 A Hassana, Brenda and Ebony and Brenda's three kids.
- 24 Q And wasn't Smiley also there when you arrived?
- 25 A I think so. I don't really remember.

1 Q You don't remember?

2 A No.

3 Q Earlier you testified that he, Sammy Moore, arrived  
4 later; is that right? Isn't that what you just said? That he  
5 arrived with Tariq some time later? You don't remember whether  
6 he was there before you arrived or whether he arrived later  
7 day, do you?

8 A No.

9 Q Do you remember giving a statement to police  
10 detectives?

11 A Yes.

12 Q And that was -- that was on December 15th of last  
13 year?

14 A Yes.

15 Q And do you remember what you said in that statement?

16 A Yes, most of it.

17 Q Do you remember being asked who was in the apartment?

18 A Yes.

19 Q And do you remember saying me, Smiley, Brenda,  
20 Hassana, Ebony and Brenda's three kids?

21 A Yes.

22 Q You remember saying that?

23 A Yes.

24 Q Now you remember that?

25 A Yes.

1 Q And do you remember indicating that at sometime later  
2 Tariq and Alexander showed up?

3 A Yes.

4 Q So Sammy Moore was with you and the other people in  
5 the apartment before Tariq and Alexander arrived; isn't that  
6 right?

7 A I can't remember.

8 Q But that's what you said in your statement. Do you  
9 remember saying that?

10 A Well, that's true then. I just don't remember.

11 Q You don't remember. Okay.

12 MR. RUSSO: Can I ask that it be marked?

13 THE COURT: D-1.

14 (Thomas statement marked D-1 for identification.)

15 Q I am now showing you what's been marked D-1 for  
16 identification. You see at the top it says, "Union County  
17 Prosecutor's Office" and the date, "December 15, 1993"?

18 A Yes.

19 Q Is that right?

20 A Yes.

21 Q And does it have your name and former address there as  
22 well?

23 A Yes.

24 Q And can you recognize this? Have you seen it before?

25 A Yes.



1 Q What is it? ou

2 A Statement.

3 Q Is it a typed up version of a statement that you gave  
4 to the detectives?

5 A Yes.

6 Q And do your initials appear on the bottom of each  
7 page?

8 A Yes.

9 Q And does your signature appear on the last page?

10 A Yes.

11 Q And did you have an opportunity to read the statement  
12 and make any corrections you thought were necessary, right?

13 A Yes.

14 Q Now, let me direct you to page two of this statement,  
15 near the bottom of the page. Do you remember being asked, "Can  
16 you tell us who else was in the apartment 20N besides you and  
17 Sammy Moore?" And you answered that question, correct?

18 A Yes.

19 Q How did you answer that?

20 A "Me, Smiley, Brenda, Hassana, Ebony and Brenda's three  
21 kids".

22 Q And then when you -- later in the statement you were  
23 asked, "At any point in time after nine p.m. while you were in  
24 the apartment did anybody else show up at the apartment?"

25 A Yes.

1 Q And what was your answer to that?

2 A "Tariq and Alexander".

3 Q And this statement was made almost a year ago; is that  
4 right?

5 A Yes.

6 Q And would it be fair to say that your memory was  
7 better of the events -- was better at that time than it is  
8 today?

9 A Yes.

10 Q At some point that evening did Mr. Moore or anybody  
11 else leave?

12 A Yes.

13 Q Who left?

14 A Smiley, Tariq and Alexander.

15 Q The three of them left together?

16 A Uh-huh.

17 Q Do you remember what time that was?

18 A No.

19 Q And you indicated that Mr. Moore came back later that  
20 evening, right?

21 A Yes.

22 Q Who was with him when he came back, if anyone?

23 A Just Alexander.

24 Q Tariq was not with him?

25 A No.

1 Q You sure about that?

2 A I didn't see him.

3 Q Now, you say that when Mr. Moore came back, he told  
4 you that he had shot some people; is that right?

5 A Yes.

6 Q And he told you that he got money and a car?

7 A Yes.

8 Q And how many people were present when he said that?

9 A Four.

10 Q And did he whisper this to you or did he say it so  
11 that everyone could hear?

12 A He said it so everyone could hear it.

13 Q He wasn't addressing you alone but he was letting  
14 everyone know that he did the shooting; is that your testimony?

15 A Yes.

16 Q And you indicated you had known him for three weeks?

17 A Yes.

18 Q And how did you meet him?

19 A Coming to Brenda house.

20 Q He had known Brenda before that?

21 A Yes.

22 Q As far as you know?

23 A Uh-huh.

24 Q Did you -- did Mr. Moore tell you where this shooting  
25 took place?

1 A Yes.

2 Q He did?

3 A Uh-huh.

4 Q Do you remember what he said?

5 A I don't remember where it was at.

6 Q You don't remember where it was at?

7 A No.

8 Q When you were questioned by the police almost a year  
9 ago, did you tell them then what he had said?

10 A No.

11 Q So even on December 15th, 1993 you didn't remember  
12 where this shooting took place, right?

13 A Right.

14 Q What -- when you heard this, did you believe him?

15 A No.

16 Q No. You weren't shocked by what he had to say?

17 A No.

18 Q And in fact you stayed there in the apartment with Mr.  
19 Moore, right?

20 A Yes.

21 Q And you've indicated that even after he said that he  
22 had shot two people, at one point he had his head in your lap;  
23 is that right?

24 A Yes.

25 Q So you were pretty good friends; isn't that fair to

1 say?        +ve.        2

2 A Yeah.

3 Q Isn't it a fact that you had an intimate relationship  
4 with Mr. Moore?

5 A Not really, no.

6 Q No? Didn't you sleep with Mr. Moore that very  
7 evening?

8 A Yes.

9 Q You did?

10 A Uh-huh.

11 Q And you had done so previously, hadn't you?

12 A No.

13 Q You hadn't been with Mr. Moore before then?

14 A No.

15 Q Isn't it a fact that you wanted Sammy Moore to move in  
16 with you?

17 A No.

18 Q Didn't you tell him that you wanted him to live with  
19 you?

20 A No.

21 Q Isn't it a fact that you were angry with Mr. Moore  
22 because he refused to move in with you?

23 A No.

24 Q Didn't you have a conversation with Mr. Moore in the  
25 presence of Brenda Johnson in which you said that you would get



1 even with him? 30

2 A No.

3 Q Isn't it a fact, Miss Thomas, that at some point you  
4 tried to give Mr. Moore the keys to your house but he refused  
5 to take them?

6 A No.

7 Q You knew that Mr. Moore had another girlfriend, didn't  
8 you?

9 A Yes.

10 Q And isn't it a fact that he refused to leave this  
11 other girlfriend and live with you; isn't that right?

12 A Not live with me.

13 Q But you wanted him to leave this other girlfriend and  
14 have a relationship with you, didn't you?

15 A No.

16 Q No? What did you mean when you said not live with  
17 you? What did you mean?

18 A Not live with me. Stay in my house.

19 Q What's that?

20 A Live, stay in your house with you.

21 Q What did you want from him in your relationship with  
22 him?

23 A Nothing.

24 Q Nothing?

25 A No.

1 Q So you weren't interested in having a romantic  
2 relationship with Mr. Moore?

3 A No.

4 Q But you did sleep with him on the evening that this  
5 happened?

6 A Yes.

7 MR. RUSSO: Nothing further.

8 MISS MacMULLAN: Few questions.

9 REDIRECT EXAMINATION BY MISS MacMULLAN:

10 Q Traci, at the time where did you live on that Saturday  
11 night?

12 A Where what?

13 Q Where did you live on that Saturday night?

14 A Live on Third Street.

15 Q Who did you live with?

16 A My mother and my father.

17 Q And did you ever ask your mother and father if Sammy  
18 Moore could live with you?

19 A No.

20 Q Did you want Sammy Moore to live with you?

21 A No.

22 Q Would your parents have let Sammy Moore live with you?

23 A No.

24 Q And before the defense counsel asked this question did  
25 you ever have a discussion with the defendant about him living

1 with you?

2 A No.

3 Q So the first time you ever heard this is from the  
4 question of the defense attorney?

5 A Yes.

6 Q Now, Traci, are you testifying as a scorned woman in  
7 front of this jury?

8 A What you mean by scorned?

9 Q Sorry. That a woman has feelings for a man but he  
10 doesn't have feelings for her and so the woman gets angry?

11 A No.

12 Q Is that how you're testifying?

13 A No.

14 Q No. And why did you come up all the way from  
15 Montgomery, Alabama to testify in this case?

16 A I was asked.

17 Q Excuse me?

18 A I was asked.

19 Q By who?

20 A Susan McMillan.

21 Q Is that me?

22 A Yes.

23 Q And did I ask you to come up and testify in this cases  
24 based on your sworn statement?

25 A Yes.

1 Q And prior to you giving this statement did you ever  
2 have a fight with Sammy Moore about him being your boyfriend or  
3 not being your boyfriend?

4 A No.

5 MISS MacMULLAN: Thank you. No further questions.

6 THE COURT: Mr. Russo?

7 MR. RUSSO: I have no questions.

8 THE COURT: Thank you, Miss Thomas. You may step  
9 down. Please watch your step.

10 Call your next witness, please.

11 MISS MacMULLAN: Thank you, Judge. The State calls  
12 Kyewaghana Cook of Plainfield, New Jersey.

13 A JUROR: Your Honor, can I go to the ladies' room?

14 THE COURT: Sure.

15 Just hold the witness for a second, please.

16 (Pause.)

17 MISS MacMULLAN: The State calls Kyewaghana Cook from  
18 Plainfield.

19 (Pause.)

20 MISS MacMULLAN: Your Honor, may I have a sidebar?

21 THE COURT: Sure.

22 (Discussion takes place at sidebar.)

23 MISS MacMULLAN: Your Honor, Kyewaghana Cook is in the  
24 back. She is in tears. She is shaking. She is absolutely  
25 petrified. For the record she gave a statement to the police

1 identifying the defendant and a short time after that her house  
2 was shot-up on December 12th.

3 THE COURT: Shot up?

4 MISS MacMULLAN: Shot in a drive-by shooting. She is  
5 afraid if she testifies she'll be seriously harmed or killed.  
6 The defendant was arrested the next day, the 13th.

7 At this point in time, Judge, I would just ask the  
8 Court's assistance with the staff to bring her out here to put  
9 her on the stand to testify.

10 THE COURT: What do you want me to do? She's not  
11 coming out. Nothing I can do about it. Should I have Ernie  
12 carry her out?

13 MISS MacMULLAN: No. If I may have a few minutes with  
14 the witness, your Honor?

15 THE COURT: All right. Take a five-minute recess.

16 MISS MacMULLAN: Thank you, Judge.

17 (Discussion at sidebar is concluded.)

18 THE COURT: Ladies and gentlemen, we will take a quick  
19 five-minute recess. I ask you to go back into the juryroom.  
20 We will be with you shortly. Don't discuss the case. Thank  
21 you.

22 (Recess.)

23 MISS MacMULLAN: Your Honor, can I put the witness on  
24 the stand now?

25 THE COURT: Sure. You can bring the jury out, too.



(In the presence of the jury.)

K Y E W A G H A N A C O O K, State's witness, sworn.

DIRECT EXAMINATION BY MISS MacMULLAN:

Q Kyewaghana, is your full name Kyewaghana Cook?

A Yeah.

Q Could you please make sure you speak into the mike please so everybody on the jury can hear you? Okay?

Kyewaghana, are you afraid right now?

A Yeah.

Q Have you ever been in a courtroom before like this?

A No.

Q Louder, please.

A No.

Q Kyewaghana, what's your age?

A Sixteen.

Q What town do you live in?

A Plainfield.

Q How many years have you lived there?

A All my life.

Q Put your hand down. Kyewaghana, back on December 4th, Saturday night, last year did you live at 1143 South Second Street in Plainfield?

A Yes.

Q Who did you live there with?

A My aunt and my cousins.

1 THE COURT: Kyewaghana, do me a favor. Sit right next  
2 to that microphone. You don't have to talk loud. You can  
3 whisper. Whisper as low as you want but if you get right next  
4 to the microphone everybody can hear you.

5 Q Okay. Kyewaghana, that Saturday night did you ever  
6 leave your home?

7 A Yeah.

8 Q About what time did you leave, if you remember?  
9 Withdraw the question.

10 Did you leave your house that Saturday night?

11 A Yeah, I left my house Saturday night.

12 Q Who did you leave with?

13 A My cousin, Khahlia.

14 Q Louder, please.

15 A My cousin, Khahlia.

16 Q Before that did you leave the house with anybody else?

17 A Yeah.

18 Q Who did you leave with?

19 A My cousins, Didi and Jada.

20 Q Who?

21 A Didi and Jada.

22 Q What is Jada's full name?

23 A Jada Williams.

24 Q How old is Jada?

25 A She 13 now.

1 Q She is 13 now. Last year she would have been about  
2 12?

3 A Uh-huh.

4 Q Who else did you leave with?

5 A Didi.

6 Q What is her full name?

7 A Madina Williams.

8 Q How old is she?

9 A She 13 now.

10 Q Where did you guys go when you left 1143 South Second  
11 Street?

12 A To the Chinese store.

13 Q To the Chinese store. Where is the store located?

14 A On Front Street.

15 Q Excuse me?

16 A On Front Street.

17 Q Did you go to the Chinese store?

18 A Yeah.

19 Q Did you buy some food?

20 A Uh-huh.

21 Q Which way did you walk back, Kyewaghana?

22 A The same way I went there.

23 Q Which is how? What streets did you take to get to  
24 the --

25 A Second Street and Clinton.

1 Q Excuse me?

2 A Second and Clinton.

3 Q Where Clinton and Second meet, is there any bridge in  
4 the area?

5 A On Clinton Ave.

6 Q There is a bridge on Clinton Ave?

7 A Uh-huh.

8 Q What is that bridge for? Is that a train bridge?

9 A Uh-huh.

10 Q Okay. Now, when you were coming off Clinton Avenue,  
11 which has that train bridge onto South Second Street on your  
12 what I home with the Chinese food, did you see any car in the  
13 area?

14 A Yeah.

15 Q What car did you see, Kyewaghana?

16 A A white car.

17 Q Do you remember what kind of white car?

18 A No.

19 Q All right. When you saw the white car, did the white  
20 car stop to try and talk to you ladies?

21 A No, they just rolled up the street and they turned around.

22 Q Excuse me?

23 A They rolled up the street and they turned around.

24 Q When you say, "rolled up the street and turned  
25 around", what does that mean?

1 A They went to the corner and I guess they made a u-turn and  
2 came back.

3 Q When you say -- which corner are you talking about?

4 A Clinton Ave.

5 Q And South Second?

6 A Uh-huh.

7 Q Okay. When they made the u-turn at Clinton and South  
8 Second, where did the car go next?

9 A It parked in front of 1147.

10 Q Excuse me?

11 A It parked in front of 1147.

12 Q Okay. That would be the house next door to where you  
13 lived, Kyewaghana?

14 A Uh-huh.

15 Q Okay. When they parked there in front of 1147, the  
16 house next door, what did you do with the Chinese food?

17 A I went in the house and put it on my bed.

18 Q Excuse me?

19 A I went and put it on my bed.

20 Q And when you went inside the house, did you see your  
21 cousin, Khahlia Hassenbey?

22 A Yeah.

23 Q Did you tell her about that white car?

24 A Yeah.

25 Q What did you tell her?



1 A I told her there was some boys outside.

2 Q By that time had the people in that white car gotten  
3 out to talk to you ladies?

4 A Yeah.

5 Q Okay. How many men got out of that car?

6 A About three.

7 Q About three. Okay. When you put the food, Chinese  
8 food, on the bed and you told your cousin Khahlia there were  
9 boys outside, did you then go out again?

10 A Yeah.

11 Q When you went outside again, was Jada still out there?

12 A Yeah.

13 Q And that's your twelve year-old cousin at the time?

14 A Uh-huh.

15 Q Was Jada talking to the boys?

16 A Yeah.

17 Q Did you talk to the boys?

18 A No.

19 Q Did you stay outside, though, and watch for a little  
20 while?

21 A No.

22 Q Did you see the boys when they were outside the car?

23 A Yeah.

24 Q And when you saw the boys outside the car when they  
25 were talking to Jada, did you hear what some of their names

1 were?

2 A Yeah.

3 Q What were some of their names?

4 A Smiley and Rock.

5 Q Excuse me?

6 A Smiley and Rock.

7 Q Smiley and what?

8 A Rock.

9 Q Rock. Now, did you see Smiley?

10 A Yeah.

11 Q Did you see his face?

12 A Yeah.

13 Q Did you get a good look at him?

14 A Uh-huh.

15 Q Look around the courtroom, Kyewaghana. Do you see  
16 Smiley in the courtroom?

17 A Yeah.

18 Q Okay. Kyewaghana, point to where he's seated and tell  
19 the jury what he's wearing?

20 A He sitting right there. He got a striped shirt on.

21 THE COURT: Identifies the defendant for the record.

22 A A striped shirt and some blue jeans.

23 Q Okay. Are you positive that that man was the Smiley  
24 outside the car?

25 A Yeah.

1 Q Excuse me?

2 A Yeah.

3 Q Are you positive?

4 THE COURT: She just said she was.

5 Q Kyewaghana, how long did you stay outside with the  
6 defendant and Rock and the other boy?

7 A Not too long.

8 Q No?

9 A Like five minutes.

10 Q Excuse me?

11 A Like five minutes.

12 Q Did they say what town they're from?

13 A No, not that I know of.

14 Q Excuse me?

15 A No, not that I know of. I didn't talk to them.

16 Q You didn't talk to them. Okay. Did you go back  
17 inside the house?

18 A Uh-huh.

19 Q After you went back inside the house, was Jada still  
20 out there?

21 A Yeah.

22 Q Did Khahlia ever come out to take a look at --

23 A She came out and went right back in.

24 Q But she did come out, also?

25 A Uh-huh.

1 Q When you went inside the house, what did you do for  
2 the rest of the night, Kyewaghana?

3 A What did I do?

4 Q Yeah. Did you stay inside your house all night?

5 A No, I stayed in there till like 12 o'clock.

6 Q To about 12 o'clock. Are you positive about the time?

7 A Uh-huh.

8 Q Did you have a watch on that night?

9 A I don't wear watches.

10 Q Okay. Now, when you left the house that night --  
11 excuse me, Kyewaghana. Before that did the boys ever come back  
12 to the house?

13 A Yeah.

14 Q And about what time was that that they came back to  
15 the house?

16 A Like 11 something.

17 Q And what did they do when they came back to the house?

18 A They blew the horn.

19 Q They blew the horn. Did anybody from inside your  
20 house come out to talk to them again?

21 A No.

22 Q Okay. Now, getting back to the point where you left  
23 the house that night a second time, where were you going?

24 A What? Twelve o'clock that night?

25 Q Yes.

- 1 A I was going to a club.
- 2 Q Where was that located?
- 3 A On Front Street.
- 4 Q Who did you leave your house with?
- 5 A Khahlia.
- 6 Q That would be Khahlia Hassenbey?
- 7 A Uh-huh.
- 8 Q And which direction did you walk outside your house?
- 9 A I went out and we went towards the right way.
- 10 Q Excuse me?
- 11 A I was going towards Morris.
- 12 Q Morris what?
- 13 A Morris Ave.
- 14 Q Morris. Is Morris Avenue, does that run off South  
15 Second Street?
- 16 A Do it run off?
- 17 Q Excuse me?
- 18 A What you say? Do it run off?
- 19 Q Does Morris intersect into South Second Street?
- 20 A Uh-huh.
- 21 Q When you were on South Second Street walking towards  
22 Morris, did you see that white car again?
- 23 A Yeah.
- 24 Q Tell the jury where it was when you saw it again?
- 25 A It was parked on the other side of the street.



1 Q Where?

2 A On the other side of the street on Second Street, Second  
3 and Morris.

4 THE COURT: You have to say that again or get closer  
5 to the mike.

6 Q Kyewaghana --

7 THE COURT: Sit up on the edge of your chair,  
8 Kyewaghana. Come right up next to the microphone.

9 Q All right. I'll ask you the question again. Where  
10 did you see the white car again?

11 A On the other side of Second and Morris, on the side of the  
12 street.

13 Q Is that the intersection of South Second and Morris?

14 A Uh-huh.

15 Q Okay. And where were you in relation to the car when  
16 you saw it? Were you on the same side of the street with it or  
17 were you across the street?

18 A On the other side.

19 Q Excuse me?

20 A On the other side.

21 Q So you were across the street from the car. Okay.  
22 What happened after that car stopped there?

23 A About three or four boys got out.

24 Q Did you see them carrying anything?

25 A No.

1 Q Do you know if Khahlia saw them carrying anything?

2 A She said they was.

3 Q What did she say?

4 MR. RUSSO: Objection.

5 A They looked like they had a gun.

6 THE COURT: Sustained. Hearsay.

7 Q Okay. Now, approximately how many boys walked out of  
8 the car?

9 A About three or four.

10 Q Were they the same three or four that you saw outside  
11 the car before?

12 A Uh-huh. I only noticed one that was outside the car  
13 before.

14 Q Excuse me?

15 A I only noticed one that was outside the car before.

16 Q Who is that?

17 A Smiley.

18 Q The man in court today?

19 A Uh-huh.

20 Q Did you see him leave that car when it parked on the  
21 side of South Second Street and Morris?

22 A Yeah.

23 Q You positive Smiley got out at that time?

24 A Yeah.

25 Q And which way did Smiley and the rest of the boys that

1 got out of that car go?

2 A Down Morris.

3 Q Walking down Morris?

4 A Uh-huh.

5 Q Is that anywhere near where Morris and West Third  
6 Street meet?

7 A Yeah.

8 Q Were they walking towards that direction?

9 A Uh-huh.

10 Q Whatever happened to that white car? Did it stay  
11 there all night?

12 A No, it pulled off after they got out.

13 Q How long did the car stop at that part on South Second  
14 Street and Morris Street?

15 A Just stopped and they got out and left.

16 Q The boys got out and then the car took off?

17 A Uh-huh.

18 Q Which way did the car drive towards?

19 A Going towards Clinton Ave.

20 Q Okay. That would be the opposite direction of Morris  
21 Street?

22 A Yes.

23 Q What did you and Khahlia do?

24 A We slowed down.

25 Q Where did you go to next?

- 1 A We kept going.
- 2 Q Excuse me?
- 3 A We kept going.
- 4 Q Did you go down Morris Street after them?
- 5 A No.
- 6 Q Why not?
- 7 A 'Cause we was scared.
- 8 Q Why were you scared at that point?
- 9 A 'Cause they looked suspicious.
- 10 Q Excuse me?
- 11 A They looked suspicious.
- 12 Q Why did they look suspicious to you?
- 13 A 'Cause why would you get out the car and the car pull off  
14 and they go down the street?
- 15 Q Well, when you were on South Second Street near Morris  
16 Street, did you look down Morris Street?
- 17 A Yeah.
- 18 Q By the time you got to the corner on Morris Street,  
19 did you see them on Morris Street?
- 20 A No.
- 21 Q They were gone?
- 22 A Uh-huh.
- 23 Q Do you know where they went?
- 24 A No.
- 25 Q What did you do, Kyewaghana?

1 A We turned -- I turned down Manson.

2 Q Is that the next street over from Morris?

3 A Yeah.

4 Q When you turned down Manson, did you hear anything?

5 A Yeah.

6 Q What did you hear, Kyewaghana?

7 A Gunshots.

8 Q How many gunshots did you hear?

9 A About six.

10 Q Which direction were the gun shots coming from?

11 A From bottom of Morris.

12 Q Morris?

13 A And Third.

14 Q Morris and Third. After you heard the six gunshots,  
15 what did you and Khahlia do?

16 A We ran.

17 Q Which way?

18 A Towards Third Street.

19 Q Manson and Third Street?

20 A Uh-huh.

21 Q When you got to Manson and Third Street, what did you  
22 see there, if anything?

23 A A man running down the street saying help.

24 Q And where did that man that was running down the  
25 street yelling help go?



1 A He fell on the other side of Manson. He fell in the middle  
2 of the street.

3 Q Did you go to him?

4 A Yeah.

5 Q What did you notice about him?

6 A I ain't notice nothing.

7 Q Did he appear to be okay?

8 A He ain't look like he was okay.

9 Q Why do you say that?

10 A 'Cause he couldn't talk.

11 Q What was he doing?

12 A He wasn't doing nothing but holding his chest.

13 Q What did you do when you saw him down on the ground  
14 holding his chest?

15 A I went to call the police.

16 Q Where did you go to call the police?

17 A Monroe.

18 Q Is there a phone booth there?

19 A Yeah.

20 Q Would that be at Monroe and West Third Street?

21 A Yeah.

22 Q Kyewaghana, when you were out there, did you notice  
23 anybody else in the area near the phone booth of Monroe and  
24 Manson Place?

25 A Yeah.

- 1 Q Who did you see?
- 2 A Popcorn.
- 3 Q Who is Popcorn?
- 4 A The old guy that was out there.
- 5 Q And how do you know Popcorn?
- 6 A 'Cause it's my father friend.
- 7 Q And what's Popcorn's real name, if you know it?
- 8 A I don't know his real name.
- 9 Q What does Popcorn look like?
- 10 A An old man. I don't know.
- 11 Q Okay. Is he white or black?
- 12 A He black.
- 13 Q Is he tall or short or average?
- 14 A Average.
- 15 Q Okay. Did you see him?
- 16 A Did I see Popcorn? Yeah.
- 17 Q Did he have the opportunity to see you out there?
- 18 A Yeah.
- 19 Q Okay. What happened after you saw Popcorn and you saw  
20 the man and you went to call the police? What happened next?
- 21 A Nothing. The police was coming already.
- 22 Q How quick after -- how quick did the police get to the  
23 scene?
- 24 A I ain't never make it to the phone booth.
- 25 Q You never even got a chance to call them?

1 A No, 'cause they was already coming.

2 Q Did you stick around to tell the police what you saw?

3 A No. I stayed there for a little while.

4 Q Well, did you tell the police officers what you saw?

5 A No, I told them I ain't want to have nothing to do with it.

6 Q Excuse me?

7 A I told them I ain't want to get involved with it.

8 Q Why didn't you want to get involved with it?

9 A 'Cause I ain't never been involved with nothing like this  
10 before.

11 Q Were you afraid at that point?

12 A Uh-huh.

13 Q But even though you didn't want to get involved with  
14 it did the police come to your house later that Sunday at  
15 about nine in the morning?

16 A Yeah.

17 Q And did they bring you back to Plainfield headquarters  
18 and take a statement from you?

19 A Yeah.

20 Q Did you tell them about what you told the jury today?

21 A Yeah.

22 Q And a couple days after that on December -- just check  
23 one second. On December 9th, 1993 did the police officers show  
24 you any photo array?

25 A Yeah.

1 Q And did they ask you to take a look at the photo  
2 array?

3 A Yeah.

4 Q And did they tell you to pick out anybody?

5 A Yeah.

6 Q Did they tell you which one to pick out?

7 A No.

8 Q Did they give you any hints which one to pick out?

9 A No.

10 Q Okay. When you looked at the photo array, did you  
11 recognize anybody?

12 A Yeah.

13 Q Who did you recognize?

14 A Smiley.

15 Q And after you recognized Smiley's picture, did you  
16 write your name on the back of the picture?

17 A Yeah.

18 Q And the date?

19 A Yeah.

20 Q And did you also initial and date the other  
21 photographs?

22 A What other photographs?

23 Q In the photo array?

24 A I don't remember that.

25 Q No. Okay. I would like to show you what has been

1 marked S-17 for identification. Is this the photo array they  
2 showed you that day on December 9th?

3 A Uh-huh.

4 Q Okay. Let me refer you to the back of photograph  
5 number three. Is that your signature there?

6 A Uh-huh.

7 Q "Kyewaghana Cook 12/9/93". Did you write that?

8 A Yeah.

9 Q Now, I am going to direct your attention to the other  
10 five photographs. Do the initials "K.C." on the other  
11 photographs, are those your initials?

12 A Uh-huh.

13 Q Is that the date?

14 A Uh-huh.

15 Q Did they have you initial the other photographs after  
16 you signed your name on the back of Smiley's?

17 A Yeah.

18 Q Okay. Is that what you believe to be Smiley's  
19 photograph, number three?

20 A Yeah.

21 Q And is this in pretty much the same condition as it  
22 was when you saw it?

23 A Like that, yeah.

24 Q Yes. Okay.

25 Kyewaghana, what I am going to ask you to do at this



1 point in time is I am going to ask you to take a look at a  
2 couple of items and ask you to make some markings on the items  
3 for us.

4 Okay. Let's start first with S-23 in evidence. Okay?  
5 Now, S-23, do you recognize what that shows?

6 A Yeah.

7 Q What does S-23 show? Nice and loud.

8 A I don't see 23.

9 THE COURT: I can't hear a word you said.

10 Q Please speak into the mike.

11 Showing you the exhibit, this is the exhibit I have to  
12 tell the Court what it is, S-23, what is this? Is this a  
13 photograph?

14 A Yeah.

15 Q Okay. Is that a photograph of the area that we've  
16 been talking about?

17 A Yeah.

18 Q Okay. Now, on this photograph can you please find  
19 where Morris Street and South Second Street meet?

20 A Right here (indicating).

21 Q Okay. You are pointing right here in the left side of  
22 the photograph? Is that where it says, "Morris Street and  
23 South Second Street"?

24 A Uh-huh.

25 THE COURT: Is that photograph already named and

1 marked? Aren't the street names on there?

2 MISS MacMULLAN: Yes, sir.

3 THE COURT: Doesn't the photograph speak for itself?

4 MISS MacMULLAN: I was going to have the witness mark  
5 the particular section.

6 THE COURT: It's already identified and in evidence.

7 MISS MacMULLAN: Okay. I will withdraw the question.

8 THE COURT: I don't know how a 13 year-old can read  
9 aerial photography. I couldn't read it in the Army and I was  
10 older than 13.

11 MISS MacMULLAN: Very briefly, your Honor. I have a  
12 few photograph. My apologies. I withdraw the question.

13 Q Real quick. Some photographs.

14 S-49, what does that show, Kyewaghana?

15 A Clinton Ave.

16 Q And what?

17 A Second.

18 Q Okay. And does that show the bridge that's on Clinton  
19 Avenue?

20 A Yeah.

21 Q Is that the route you took back from the Chinese  
22 restaurant?

23 A Yeah.

24 Q Okay. And S-51 for identification, what does that  
25 show?

15

1 A My house.

2 Q Okay. Does that show the area where the white car was  
3 parked when Smiley was out of the car?

4 A No.

5 Q No. Okay. Let me show you another photograph. Show  
6 you what's been marked S-52 for identification. What does that  
7 show, Kyewaghana?

8 A That show it.

9 Q Does that show the area?

10 A Yeah.

11 Q Does this show your house?

12 A Yeah.

13 Q Could you with a red X put where the car was parked on  
14 the night in question? Can you do that for us?

15 A (Witness complies.)

16 Q Okay. First of all, is this your house here, 1143  
17 South Second Street?

18 A Right.

19 Q Where was the car parked in relation to this house?

20 A In front of 1147.

21 Q Okay. I would like to show you another photograph  
22 marked S-53. Does this show both 1143 and 1147 in this  
23 photograph, S-53?

24 A Yeah.

25 Q Okay. Now, does that show a place where you can put

1 this red X where the car was parked?

2 A Yeah.

3 Q Okay. Do that now. Put a red X where the white car  
4 was parked.

5 A (Witness complies.)

6 Q Okay. Do me a favor. Please just put your initials  
7 "K.C." to indicate where the car was parked.

8 A (Witness complies.)

9 Q Those are your initials. All right. Thank you.  
10 Kyewaghana, do you presently have a pending possession  
11 of cocaine charge?

12 A Yeah.

13 Q Out of Plainfield. Is that pending?

14 A Yeah.

15 Q Okay. And have I made any promises to you about that  
16 charge in exchange for your testimony?

17 A You say we would take care of it today.

18 Q But are you testifying because your charge will be  
19 taken care of today or are you testifying from the truth?

20 A I am testifying because it's the truth.

21 Q And when was that charge, Kyewaghana?

22 A That cocaine charge?

23 Q Yeah?

24 A '92.

25 Q So it's an old charge? SLB

1 A Yeah.

2 Q And did the cops talk about that charge when you  
3 originally gave your statement or did they not know about it?

4 A No.

5 Q Excuse me?

6 A They ain't talk to me about it.

7 Q Okay. So they didn't know about that charge at that  
8 time?

9 A No.

10 Q Prior to this date did you know the defendant?

11 A No.

12 Q No. Prior to this day did you know Marcus Benjamin?

13 A No.

14 Q Prior to this day did you know Keith Staple?

15 A Who?

16 Q Keith staple?

17 A No.

18 MISS MacMULLAN: Okay. Thank you. No further  
19 questions.

20 THE COURT: Cross-examine.

21 MR. RUSSO: Thank you, your Honor.

22 CROSS-EXAMINATION BY MR. RUSSO:

23 Q You indicated when you got back with the Chinese food  
24 you went into the house; is that right?

25 A Yeah.



1 Q And three men got out of the car?

2 A Yeah.

3 Q And was this person that you identified as Smiley one  
4 of the people who got out of the car?

5 A Yeah.

6 Q Were you outside at that time when they got out?

7 A Yeah.

8 Q And there was someone else also outside; is that  
9 right?

10 A Yeah.

11 Q Who was that?

12 A Jada Williams and Madina Williams.

13 Q And they were talking to these people, right?

14 A Yeah.

15 Q But you weren't talking to them?

16 A Uh-huh.

17 Q Is that right?

18 A They was talking to them. I wasn't.

19 Q So they didn't tell you what their names were, did  
20 they?

21 A No.

22 Q Is that something that Jada and Madina told you later?

23 A No, I heard them say the name.

24 Q You overheard the conversation?

25 A Yeah.

- 1 Q You weren't far away?
- 2 A No.
- 3 Q How close were you to the conversation?
- 4 A Not too close. I was close enough to hear.
- 5 Q Were you as close as I am to you now?
- 6 A No.
- 7 Q Further away than that?
- 8 A A little bit closer.
- 9 Q And do you recall what these men were wearing?
- 10 A No.
- 11 Q Do you remember anything about what the man you said  
12 identified himself as Smiley was wearing?
- 13 A No.
- 14 Q When these three men got out of the car, were there  
15 others still in the car?
- 16 A Yeah, I think so.
- 17 Q Do you know how many?
- 18 A No.
- 19 Q You indicated that when they -- when the car came back  
20 around 11 o'clock and blew the horn; is that right?
- 21 A Yeah.
- 22 Q Did anybody go out?
- 23 A No.
- 24 Q Did you look out the window to see who-it was?
- 25 A Yeah.

1 Q By looking out the window you could tell it was the  
2 same car?

3 A Yeah.

4 Q When you looked out the window, were you able to see  
5 inside the car to see how many people were in it?

6 A No.

7 Q You just recognized the car and --

8 A Yeah.

9 Q You said you left your house at midnight to head  
10 towards this club on Front Street?

11 A Yeah.

12 Q And that's when you saw this white car again?

13 A Yeah.

14 Q And when you said midnight, was that an approximate  
15 time or did you notice the time when you left home?

16 A No, I don't really know what time it was. I know it was  
17 like twelve something.

18 Q So that was just a guess?

19 A Yeah.

20 Q When you got to South Second, you said you saw these  
21 guys get out of the car; is that right?

22 A Yeah.

23 Q How many people got out of the car?

24 A About three or four.

25 Q Three or four. Were they the same people who got out

1 of the car in front of your house?

2 A I only noticed one.

3 Q You only noticed one. Who was that?

4 A Smiley.

5 Q And the other people were others -- were not the  
6 people that you had seen before?

7 A I ain't really see them.

8 Q So you're not sure whether they were the same persons  
9 or not?

10 A I ain't sure.

11 Q And when you saw them get out of the car, you started  
12 walking in another direction; is that right?

13 A No, I just kept walking.

14 Q You kept walking where you were headed; is that right?

15 A Yeah.

16 Q And how far had you walked when you heard these shots  
17 start?

18 A I was on Manson.

19 Q How far is that?

20 A I was in the middle of Manson.

21 Q Well, had you walked a block, half a block, two  
22 blocks? Do you remember?

23 A Did I walk a block from Manson?

24 Q From the time you saw --

25 A No, I only walked one block.

1 Q About a block. And you indicated you heard about six  
2 shots; is that right?

3 A Yeah.

4 Q Was there a period of time between each shot?

5 A I just kept hearing gunshots. Just kept going.

6 Q One after another?

7 A Yeah.

8 Q And were these shots -- how long was it between the  
9 first shot and the last shot that you heard?

10 A I don't know.

11 Q You never saw anyone in the car with the gun, did you?

12 A No.

13 Q And in fact you never saw anybody get out of the car  
14 with a gun, right?

15 A No.

16 MR. RUSSO: No further questions.

17 MISS MacMULLAN: Nothing, your Honor.

18 THE COURT: Thank you, Kyewaghana. You may step down.  
19 Please watch your step.

20 Call your next witness.

21 MISS MacMULLAN: Yes, Judge. The State's next witness  
22 is Jada Williams.

23 J A D A M A R I E W I L L I A M S, State's witness,  
24 sworn.

25 DIRECT EXAMINATION BY MISS MacMULLAN:



1 Q Good afternoon, Miss Williams. Have you ever  
2 testified in a courtroom before?

3 A No.

4 Q Are you nervous?

5 A Yes.

6 Q Are you scared?

7 A Yes.

8 Q Okay. You have to say yes or no. You have to speak.  
9 You can't shake your head. Please speak into the mike.

10 Jada, how old are you?

11 A Thirteen.

12 Q And back on December 4th, 1993 where did you live?

13 A 1145 South Second Street.

14 Q Okay. That's next door to 1143?

15 A Uh-huh.

16 THE COURT: Is that a yes?

17 THE WITNESS: Yes.

18 Q Okay. Is that the house behind 1143 South Second  
19 Street?

20 A Yes.

21 Q How long have you lived in Plainfield for?

22 A Thirteen years.

23 Q All your life?

24 A Uh-huh. Yes.

25 Q Okay. Jada that Saturday night, December 4th, did you

1 leave the house to go for Chinese food with your cousin?

2 A Yes.

3 Q Who did you leave with?

4 A Madina and Kyewaghana.

5 Q Would that be Kyewaghana Cook?

6 A Uh-huh. Yes.

7 Q The lady that just left the courtroom?

8 A Yes.

9 Q Now, that Saturday night when you were walking back  
10 from the Chinese store, did you see any car in the area?

11 A Yes.

12 Q What kind of car did you see, Jada?

13 A A white car.

14 Q Do you remember what kind of car it was?

15 A No, it looked like a new one.

16 Q Excuse me?

17 A It looked like one of the new cars, you know, back in '93.

18 Q Excuse me?

19 A Back in '93 it looked like one of the new cars.

20 Q Okay. Did you talk to any of the people in that  
21 white, new looking car?

22 A Yes.

23 Q Where did you talk to them?

24 A 11 -- between 1143 and 1147.

25 Q Did the car stop there?

1 A Yes.

2 Q Why did the car stop there, if you know?

3 A Because when we was coming back from the Chinese  
4 restaurant, we turned around to look who it was 'cause it was a  
5 lot of boys in the car and then they turned around, you know,  
6 and they was talking to us and Kyewaghana was like we got to go  
7 in the house 'cause, you know, at that time I was twelve.

8 Q Okay. Did Kyewaghana say what your age was to the  
9 boys?

10 A Yes.

11 Q And how old was Madina back then?

12 A Twelve.

13 Q Now, the first time you had contact with the men, the  
14 boys in the car, where was it exactly, if you can recall?

15 A Like it was the house, then the driveway, then a little bit  
16 by the driveway and by the house. By 1147.

17 Q Excuse me?

18 A By 1147, in between.

19 Q Okay. Did any of the boys get out of the car?

20 A The ones in the back seat.

21 Q How many got out of the car, if you can remember?

22 A Three.

23 Q And when they got out of the car, did you ever talk to  
24 them?

25 A No.

1 Q Well, did Kyewaghana talk to them?

2 A No.

3 Q Who talked to them, if anybody?

4 A Nobody.

5 Q Well --

6 A Nobody. We ain't really say nothing to them, you know.

7 Q Was anything said between the boys and you?

8 A Yeah. They, you know, was -- they was talking to us and,  
9 you know, they told us they names.

10 Q What did they tell you their names were?

11 A One said their name was Smiley. The other said Rock and  
12 Tariq.

13 Q What was the third one?

14 A Tariq.

15 Q What was the second one?

16 A Rock.

17 Q Did they say what town they're from?

18 A Yes.

19 Q What town did they say they were from?

20 A Newark.

21 Q Did you ever see them before that day?

22 A No.

23 Q Do you remember which one said his name was Smiley?

24 A No.

25 Q Did you look at the boys when they were out of the

1 car?

2 A A little bit.

3 Q Enough to recognize them again if you saw them?

4 A No, no, not really.

5 Q Not really? When you look around the courtroom today,  
6 do you recognize anybody?

7 A No, not really.

8 Q Not really?

9 A No.

10 Q You don't recognize anybody. Okay. How long did you  
11 stay outside, Jada?

12 A For about about five, five to seven minutes say.

13 Q Okay. Did you go back inside the house?

14 A Yes.

15 Q And when you went back inside the house, do you know  
16 if the boys ever came back to the house?

17 A No.

18 Q You don't know?

19 A No, they didn't.

20 Q Did you hear any honk outside at any time after you  
21 went in your house?

22 A No.

23 Q What did you do for the rest of the night that  
24 Saturday night?

25 A Well, I stayed at 1143 for like ten minutes. Then my aunt



1 told me to go home.

2 Q Did you go home?

3 A Yes.

4 Q Jada, did you want to come to court to testify today?

5 A No.

6 Q And did I come to your house and subpoena you?

7 A Yes.

8 Q Did I subpoena your mother?

9 A Yes.

10 Q And because of that is that why you're in court today?

11 A Yes.

12 MISS MacMULLAN: Thank you. No further questions.

13 THE COURT: Cross-examine.

14 CROSS EXAMINATION BY MR. RUSSO:

15 Q Have you talked to Kyewaghana about this incident,  
16 what happened?

17 A A little bit.

18 Q Did you discuss it with her or the next day or around  
19 the time that it happened?

20 A What you talking about? The boys, talking to the boys?

21 Q Right.

22 A No, not --

23 Q How about with Khahlia?

24 A No.

25 Q But you talked to her about it since then, right?

1 A Yeah.

2 Q Now, you testified you didn't personally talk to these  
3 guys, right?

4 A Yes, not personally. All of us outside.

5 Q You were all outside?

6 A Yeah.

7 Q When you say all of you --

8 A Me, Madina and Kyewaghana.

9 Q And all three of you were outside together the whole  
10 time?

11 A Yes.

12 Q And how long was that?

13 A About five to seven minutes.

14 Q Did Kyewaghana talk to them?

15 A She didn't really have nothing to say to them.

16 Q How about the other person you were with? Did she  
17 talk to them either?

18 A No.

19 Q So this really wasn't much of a conversation then,  
20 right?

21 A No.

22 Q That was when you first saw them; is that right?

23 A Uh-huh. Yes.

24 Q Did there -- there came another point when they came  
25 back; is that right?

1 A No.

2 Q No?

3 A No.

4 Q You never saw them again that evening?

5 A No.

6 Q Do you remember making a statement to the police?

7 A Yes.

8 MR. RUSSO: Can I have this marked?

9 THE COURT: D-2.

10 (J. Williams' statement marked D-2 for  
11 identification.)

12 Q I'm showing you what's been marked D-2 for  
13 identification. Do you recognize what this paper is?

14 A Yes.

15 Q Is it a voluntary statement that you gave to the  
16 police?

17 A Yes.

18 Q On December 9th, 1993?

19 A Yeah.

20 Q And did you sign the bottom of each page of the  
21 statement?

22 A Yes.

23 Q And you were given an opportunity to read the  
24 statement and make sure it was accurate before you signed it,  
25 weren't you?

1 A Yes.

2 Q And did you indicate there was anything wrong with the  
3 statement the way it was typed up?

4 A No.

5 Q Let me show you page two of the statement. You were  
6 asked, "Can you tell me in your own words what you know about  
7 the case?" You remember that?

8 A Yes.

9 Q And you had a response; is that right? Do you  
10 remember making a statement?

11 A Yes.

12 Q And did you indicate in answer to that question that  
13 when you first -- "When they first pulled up, Kyewaghana talked  
14 to them and told them that we were only twelve years old and  
15 after that -- but they didn't care and after that they just  
16 road off", is that right?

17 A Uh-huh.

18 Q And you said then about two hours later the same car  
19 pulled up in front of your house; is that right?

20 A Yes.

21 Q And you said, "My two cousins, Kyewaghana and Khahlia,  
22 were talking to the boys in the car for about ten minutes in  
23 front of the house"?

24 A No, Khahlia wasn't there at that time. She wasn't, you  
25 know, she wasn't in it, you know, up with what was going on.

1 Q But that's what you said in the statement; isn't that  
2 right?

3 A Yeah.

4 Q That isn't accurate you're saying now, right?

5 A Yes.

6 Q You weren't out talking to these boys in the car, were  
7 you, at that point?

8 A No.

9 MR. RUSSO: No further questions.

10 MISS MacMULLAN: Just a couple.

11 REDIRECT EXAMINATION BY MISS MacMULLAN:

12 Q Jada, were you ever outside the house when the boys  
13 were out of the car?

14 A Excuse me?

15 Q Were you ever outside your house when the boys parked  
16 the car in front of your house and the boys were out of the  
17 car?

18 A Yes.

19 Q Okay. Is that when you heard them say their names,  
20 Smiley, Rock and Tariq?

21 A Uh-huh.

22 THE COURT: Is that a yes?

23 THE WITNESS: Yes.

24 MISS MacMULLAN: Thank you. No further questions.

25 THE COURT: Thank you, Jada. You may step down.



1 Please watch your step.

2 All right. Ladies and gentlemen, we will take our  
3 luncheon recess at this time. I ask you to come back at 1:30  
4 ready to continue the trial. When you come back at 1:30, come  
5 right into the juryroom. The door should be open, I trust. If  
6 it isn't, just wait there. Enjoy your lunch. Please don't  
7 discuss the case.

8 Remain seated until the jury clears the floor, please.

9 (Luncheon recess.)

10

11 A F T E R N O O N S E S S I O N

12

13 THE COURT: Anything before we bring out the jury?

14 MISS MacMULLAN: No, your Honor.

15 THE COURT: Bring out the jury, please.

16 (In the presence of the jury.)

17 THE COURT: Call your next witness, please.

18 MISS MacMULLAN: Thank you, Judge.

19 The State calls Khahlia Hassenbey.

20 K H A H L I A H A S S E N B E Y, State's witness,

21 sworn.

22 DIRECT EXAMINATION BY MISS MacMULLAN:

23 Q Good afternoon, Miss Hassenbey.

24 Miss, have you ever testified in a courtroom like this  
25 before?

1 A No.

2 Q How old are you?

3 A Eighteen.

4 Q And what town do you live in?

5 A Plainfield.

6 Q How long have you lived in Plainfield?

7 A All my life.

8 Q Referring your attention last year to December 4th,

9 1993, Saturday night, where did you live at that time?

10 A 1143 South Second.

11 Q And that Saturday night did a group of men park in  
12 front of your house that night?

13 A Yes.

14 Q About what time was that about?

15 A About 8:30, nine o'clock.

16 Q And when they parked in front of your house, did you  
17 have any family members in the house come in at that time?

18 A Yes.

19 Q Who was that?

20 A Kyewaghana.

21 Q Kyewaghana what?

22 A Cook.

23 Q And when she came into the house, did she talk to you?

24 A Yes.

25 Q And without repeating what she said, did you then go

1 outside?

2 A Yes.

3 Q Why did you go outside?

4 A Because she told me was some guys out there and I wanted to  
5 see.

6 Q And did you go outside?

7 A Yes.

8 Q And what were the guys doing when you looked outside?

9 A Just standing around.

10 Q And were they near any car?

11 A Yes.

12 Q What kind of car?

13 A A white Elantra, Hyundai Elantra.

14 Q And where were the guys in relation to the Elantra?

15 A Excuse me?

16 Q Where were the guys standing? Were they near the  
17 Hyundai?

18 A Yes.

19 Q What were they doing?

20 A Just standing around.

21 Q How many guys out there?

22 A Three.

23 Q Did they say their names to you when you were out  
24 there?

25 A No.

1 Q Do you know if they said their names to Khahlia -- to  
2 Kyewaghana or anybody else out there?

3 A No.

4 Q You don't know?

5 A I don't know.

6 Q When you were out there, did you look at the faces of  
7 any of the men?

8 A Yes.

9 Q Did you get a good look at the faces of any of the  
10 men?

11 A Yes.

12 Q When you look around the courtroom today, do you  
13 recognize anybody?

14 A Yes.

15 Q Who do you recognize?

16 A Excuse me?

17 Q Who do you recognize? What's he wearing?

18 A What is he wearing?

19 Q Yes.

20 A A striped shirt.

21 THE COURT: Identifies the defendant for the record.

22 Q The defendant was out there that night in front of  
23 that white Elantra?

24 A Yes.

25 Q Are you positive?

1 A Yes.

2 Q When you looked at the defendant and the other men  
3 with him, what did you do next?

4 A Go in the house.

5 Q Why did you go in the house?

6 A 'Cause I -- they wasn't -- I didn't want to stay out and  
7 talk.

8 Q Were you interested in talking to them?

9 A No.

10 Q And after you went inside the house, did you stay  
11 inside the house the whole night?

12 A No.

13 Q What did you do for the rest of the night?

14 A Me and Kyewaghana Cook went to the club later that night.

15 Q Do you know what time it was when you left to go to  
16 the club?

17 A One o'clock, 1:30.

18 Q That would be one o'clock, 1:30 Sunday morning?

19 A Yes.

20 Q And when you left to go to the club, which way did you  
21 go?

22 A Towards Morris Ave and Second Street.

23 Q And when you were walking towards Morris Avenue on  
24 South Second Street, did you see that car again?

25 A Yes.



1 Q Where did you see the car?

2 A I seen it parked on Morris Ave, across the street from  
3 Morris Ave on Second Street.

4 Q Was it parked there a long time?

5 A No.

6 Q What did you see?

7 A I seen some boys get out of the car.

8 Q Were they the same boys that were in front of the  
9 house?

10 A Yes.

11 Q Could you see who got out of the car?

12 A Yes.

13 Q Did the defendant get out of the car?

14 A The defendant?

15 Q The man you picked out in court today?

16 A Yeah.

17 Q Did you see any of them with a gun?

18 A Yes.

19 Q Could you tell which one had a gun?

20 A No.

21 Q Which way did they go once they got out of the car?

22 A Toward down Morris Avenue.

23 Q And did you see where they went once they went on  
24 Morris Avenue?

25 A No.

1 Q Where did you and Kyewaghana go?

2 A We walked -- we ran -- we walked to the next block and  
3 turned down Manson.

4 Q Why didn't you go down Morris Street?

5 A 'Cause we thought something -- we thought something was  
6 gonna happen 'cause we seen them get out with the gun.

7 Q Were you scared at that point?

8 A Yes.

9 Q And after you walked down to Manson Place, what  
10 happened next?

11 A We got to the middle of Manson Place and we heard gunshots.

12 Q How many gunshots, if you can remember?

13 A About six.

14 Q How much time passed from the time they got out of  
15 that white Hyundai to the time you heard the gunshot?

16 A Five minutes.

17 Q A short time?

18 A Excuse me?

19 Q Was it a short time?

20 A Yes.

21 MR. RUSSO: Objection, your Honor.

22 THE COURT: Asked and answered.

23 Q After you heard the gunshot, what did you and  
24 Kyewaghana do?

25 A We started running.

1 Q Which way did you run?

2 A Towards Third Street down Manson.

3 Q When you got to the area of Third Street and Manson,  
4 did you see anybody?

5 A I seen the man running. He had been shot.

6 Q How do you know he had been shot?

7 A Because he was hollering I been shot, I been shot.

8 Q And did he stop running at any point?

9 A Yes, he passed out on -- between Third and Manson, Third  
10 and Fourth Street on Manson.

11 Q He stopped on Manson and did you go over to the man?

12 A Yes.

13 Q What did you see when you went over to him?

14 A A little blood, some blood on his jacket.

15 Q Did you know who he was?

16 A No.

17 Q What did you do next?

18 A We walked towards the other man that had been shot.

19 Q Where was that?

20 A On Morris and Third.

21 Q Do you know who the man was that got shot?

22 A Yes.

23 Q Who was it?

24 A Marcus Benjamin.

25 Q Do you know if the police came in the area any time

1 after the shots?

2 A Yes.

3 Q How soon after all this happened did the police show  
4 up?

5 A About five minutes. Three to four minutes.

6 Q Did you talk to the police and tell them what you saw  
7 and what you knew?

8 A No.

9 Q Why not?

10 A 'Cause I was scared.

11 Q After the police showed up, what did you do?

12 A We left.

13 Q You left?

14 A Yes.

15 Q Okay. Later on that same day on December 5th at  
16 approximately 10:30 a.m., did you give a sworn statement to the  
17 police about what you knew?

18 A Yes.

19 Q About what you saw?

20 A Yes.

21 Q Okay. And once you gave that statement did the police  
22 show you some photo arrays?

23 A Yes.

24 Q Were you able to pick anybody out?

25 A No.

1 Q Khahlia, did you pick out the man in court today  
2 because he is seated at the table or because you actually  
3 recognize him from that night?

4 A I recognize him.

5 Q And, Khahlia, during this investigation did you ever  
6 tell the police that you didn't want to cooperate?

7 A Yes.

8 Q Why did you tell them that?

9 A 'Cause I didn't want to be involved.

10 Q Why didn't you want to be involved?

11 A 'Cause we was scared.

12 Q Khahlia, I would like to show you what's marked S-22  
13 for identification, a map?

14 A Yes.

15 Q Right before you took the stand in this courtroom  
16 today did you make a mark on this map, S-22?

17 A Yes.

18 Q Okay. Tell the jury what that mark represents and  
19 where it is?

20 A What it represents? Where the car was.

21 Q When was that?

22 A When?

23 Q Yes.

24 A The night of December the 4th.

25 THE COURT: What is the mark?



1 Q Could you please point to the jury where the mark is  
2 and what is that mark?

3 A Where the car was.

4 Q Okay. Is that --

5 THE COURT: Is it a line, circle or square?

6 Q Is it a red X?

7 A Yes.

8 Q Next to the red X what else did you put next to it?

9 A My initials.

10 Q Okay. And does that represent where the car pulled  
11 over before the boys --

12 A Got out.

13 Q -- got out? Is that right near Morris Street and  
14 South Second Street?

15 A Yes.

16 Q Khahlia, has anybody threatened you into coming into  
17 court to testify?

18 A No.

19 Q Has anybody made you any promises in exchange for your  
20 testimony?

21 A No.

22 Q Do you have -- just a second.

23 Khahlia, were you arrested recently on October 14th of  
24 this year, about two months ago, for drug charges?

25 A Yes.

1 Q And you were charged with possession of cocaine with  
2 intent to distribute?

3 A Yes.

4 Q And is that charge pending?

5 A No.

6 Q Excuse me?

7 A Yes, yes.

8 Q Okay. It's still pending against you?

9 A Yes.

10 Q Have I ever made any offer or deal in exchange for  
11 your testimony?

12 A No.

13 Q Prior to this day did you know the defendant?

14 A No.

15 MISS MacMULLAN: Thank you. No further questions.

16 THE COURT: Any questions?

17 MR. RUSSO: Yes, I do.

18 I would like this item marked D-3, your Honor.

19 THE COURT: D-3.

20 (Statement marked D-3 for identification.)

21 CROSS-EXAMINATION BY MR. RUSSO:

22 Q Your testimony when you initially saw these men they  
23 were in the car in front of your house?

24 A Yeah.

25 Q And did you see them get out of the car?

1 A In front of my house?

2 Q Yes.

3 A I didn't see them get out in front of my house, no, I  
4 didn't.

5 Q Okay. When they were out of the car, did you see  
6 them?

7 A Yes.

8 Q Did you speak to them?

9 A No.

10 Q You were there with two other friends; is that right?

11 A Yes.

12 Q And did you hear them speak to these men?

13 A No.

14 Q So you didn't hear any of these men say who they were?

15 A No.

16 Q What time of day was it when you first saw them?

17 A When I first saw them?

18 Q Yes.

19 A About eight or nine o'clock, I guess.

20 Q And then did they come back at a later time?

21 A Yes.

22 Q And what happened at that point?

23 A We didn't go back outside.

24 Q No one went outside?

25 A No.

1 Q At that point they pulled up in front of your house  
2 but nobody talked to them; is that right?

3 A No, nobody talked to them.

4 Q You didn't leave the house, right?

5 A Not at that point.

6 Q And did you see any of the men get out of the car at  
7 that point?

8 A No.

9 Q And then you saw them a third time; is that right?

10 A I didn't see them that second time.

11 Q Okay. But then there was another time you saw the  
12 car, right?

13 A Yeah.

14 Q That was up at the corner when you were leaving?

15 A Yes.

16 Q And what time was it that you saw them?

17 A One, 1:30.

18 Q And how many of them got out of the car?

19 A Four.

20 Q Now, you indicated that you saw a gun; is that right?

21 A Yeah.

22 Q Could you describe the gun?

23 A No.

24 Q Was it a big gun?

25 A Yes, it was big.

1 Q It was big? How big?

2 A About like this. The nose was like this (indicating).

3 THE COURT: Indicating, counsel.

4 THE WITNESS: Excuse me?

5 THE COURT: I am asking Mr. Russo to indicate.

6 Q Can you put up your fingers again?

7 A Like --

8 MR. RUSSO: Indicating about seven to eight inches.

9 Q Although you saw this gun, you couldn't tell who had  
10 the gun?

11 A No.

12 Q You saw the gun very quickly; is that right?

13 A Yes, just quickly.

14 Q And were there other people in the car who didn't get  
15 out of the car?

16 A Yes.

17 Q You hadn't seen that gun before?

18 A No.

19 Q Now, you indicated that you saw the defendant that  
20 evening; is that right?

21 A Yeah.

22 Q Do you remember what he was wearing?

23 A Black jacket, some jeans, some boots.

24 Q And is he one of the people that you saw get out of  
25 the car?



1 A At what point? The third time?

2 Q The time that you saw him the last time?

3 A Yeah.

4 Q But you never saw him with a gun, isn't that right?

5 A Never saw him with a gun.

6 Q Now, you indicated that you saw one of these victims  
7 and he said something to you?

8 A Did I say that?

9 Q Did you say that?

10 A No, I never said that.

11 Q I am talking now about the victims, people who were  
12 shot. Did you indicate in your earlier testimony that one of  
13 them -- you heard one of them say I've been shot?

14 A Yeah.

15 Q Help me, something like that?

16 A Yeah.

17 Q And was that person running towards you?

18 A No.

19 Q Where was he when you heard him say that?

20 A We were like on the corner. He was like in the street. We  
21 was coming up and he was running the other way.

22 Q And did you know who that person was?

23 A No.

24 Q Had you seen him before?

25 A Nope, no.

1 Q When -- after you heard the shots, you headed in the  
2 direction of the shots; is that right?

3 A Yeah.

4 Q And at some point you got to the point where there was  
5 a person in the street who had been shot?

6 A Yes.

7 Q And you indicated that that person was Marcus  
8 Benjamin; is that right? Did you actually see where he had  
9 been shot?

10 A I don't know. I didn't see where he had been shot, not  
11 Marcus Benjamin.

12 Q Did you see Mr. Benjamin that evening?

13 A That evening?

14 Q Yes.

15 A Yeah.

16 Q Did you see him after the shooting?

17 A Yeah.

18 Q You did? You went to the scene of the shooting?

19 A Yes.

20 Q Did you see the police arrive?

21 A Yes.

22 Q And were you there alone or were you with the other  
23 two girls?

24 A I was with Kyewaghana, just one girl.

25 Q Was there anybody else in the street?

1 A A couple people.

2 Q And did the police see you --

3 A Yes.

4 Q -- when they arrived?

5 A Yes.

6 Q But they didn't ask you any questions at that point?

7 A Yes, they asked me do we know anything and we said no.

8 Q Did they ask you how long you had been there?

9 A No.

10 Q I am going to show you what's been marked as D-3 for  
11 identification. I ask if you can identify this document? Have  
12 you seen it before?

13 A Yes.

14 Q What is it?

15 A A statement.

16 Q Is this a voluntary statement that you gave to the  
17 police on December 5th, 1993?

18 A Yes.

19 Q And does your name appear on the bottom?

20 A Yes.

21 Q Did you sign it?

22 A Yes.

23 Q Did you have an opportunity to read it and make any  
24 corrections if you thought something was wrong?

25 A Yes.

1 Q And did you indicate on the last page that you didn't  
2 wish to make any corrections?

3 A Yeah.

4 Q So at the time you gave this statement you believed  
5 that everything in this statement was accurate, correct?

6 A Yes.

7 Q Now, I am showing you page two of that statement. Do  
8 you see where you were asked, "Tell me in your own words what  
9 you know about this incident." Do you remember that?

10 A Yes.

11 Q And you gave a lengthy answer; is that right?

12 A Excuse me?

13 Q You gave a fairly long answer about what happened,  
14 right?

15 A Yes.

16 Q Okay. Now, in that answer you indicated that about  
17 10:30 at night you were in your house when Kyewaghana told you  
18 that there were some guys in the car from Newark and she wanted  
19 you to go talk to them; is that right?

20 A Yes.

21 Q And you said that you left the house but you decided  
22 that you didn't want to talk to them, so you went back in the  
23 house; is that right?

24 A Yes.

25 Q And then you indicated that around 1:30 in the morning

1 you went out with Kyewaghana, you were walking towards the club  
2 on Front Street; is that right?

3 A Yes.

4 Q And that's when you saw this white car again, right?

5 A Yes.

6 Q But in your statement on December 5th, 1993 when you  
7 were asked what you saw, you indicated you saw four guys get  
8 out of the white car; isn't that right?

9 A Yes.

10 Q And you said that you saw one of the guys had a gun,  
11 right?

12 A Yes.

13 Q And you also said that you saw him put it in his  
14 waistband, right?

15 A Yes.

16 Q But you couldn't tell which guy it was; is that right?

17 A Yes.

18 Q Later in the statement you were asked if any of the  
19 victims said anything to you after they were shot. You  
20 remember that question?

21 A Yes.

22 Q And you indicated, "No, they didn't say anything"; is  
23 that right?

24 A Yeah.

25 Q But today you remember that somebody said that -- this



1 man told you he had been shot; is that right?

2 A Yes.

3 Q But you didn't remember that when you made the  
4 statement a year ago; is that right? Right?

5 A Yes.

6 Q And last year in December you were asked to describe  
7 the gun that you saw last year. You said it was small, right?  
8 You said it was a small handgun; is that right?

9 A I don't remember saying it.

10 Q That's what it says in your statement?

11 A That's what it says.

12 Q Now, you remember the police asked you if you could  
13 describe what these people these guys looked like? You  
14 remember that? Yes or no?

15 A Yes.

16 Q And remember when you -- when they asked you that and  
17 you said that you thought you could pick them out by their  
18 faces; is that right?

19 A Yes.

20 Q But when the time came for the police to show you  
21 pictures, you weren't able to identify anyone; is that right?

22 A I didn't want to.

23 Q Didn't you testify a few minutes ago that you were  
24 unable to identify anybody?

25 A Yeah.

1 Q So even though you told the police that you thought  
2 you could identify them in December of last year, when they  
3 showed you the pictures --

4 A They didn't show me no pictures December of last year.  
5 They showed me this year.

6 Q And you couldn't identify them when they showed you  
7 the pictures?

8 A I didn't identify anyone.

9 Q But you come to court today and you're certain that  
10 the man sitting next to me is the person you saw; is that  
11 right?

12 A Yes.

13 MR. RUSSO: Nothing further.

14 THE COURT: Redirect.

15 REDIRECT EXAMINATION BY MISS MacMULLAN:

16 Q Referring your attention to -- I have a copy of D-3,  
17 page four, in this statement -- sorry. Page three.

18 In this statement do you say to the police back then  
19 on the day, "I can pick out two of them by their faces". Did  
20 you say that?

21 A Yes.

22 Q And is that because you had the opportunity to see  
23 their face when you saw them outside the car?

24 A Yes.

25 Q And when counsel referred your attention to page two

1 on that lengthy statement, I would just like to just finish  
2 that part that he started with.

3 Did you also say, "I left the house with her" --  
4 meaning Kyewaghana -- "and I walked off the porch and I saw the  
5 car parked in front of my neighbor's house, the house towards  
6 Clinton Avenue. When I got outside I saw three of the guys  
7 standing next to the car and I saw the guy behind the wheel  
8 sitting in the car. After I looked at them I decided that I  
9 didn't want to talk to them. So I went in back inside the  
10 house." Is that what you said back on December 5th?

11 A Yes.

12 Q So you saw three guys the first time.

13 Now, when you saw the car again when you positively  
14 identified it as being the same car on Morris Street and Second  
15 Avenue, how many men got out at that time?

16 A Four.

17 Q And whatever happened to the car? Did it stay there?

18 A No.

19 Q What happened to the car?

20 A It rolled off.

21 Q Meaning?

22 A It left.

23 Q Which direction?

24 A Towards Clinton Avenue, yeah.

25 Q So four guys got out. There had to be at least one

1 more in that car?

2 A Yes.

3 Q And, incidentally, although you say you didn't see the  
4 defendant with a gun when he left at that time, could you see  
5 under his jacket or in his pockets?

6 A No.

7 MISS MacMULLAN: Thank you. No further questions.

8 THE COURT: Anything?

9 MR. RUSSO: No questions.

10 THE COURT: Thank you, Miss Hassenbey. You may step  
11 down. Please watch your step.

12 Call your next witness, please.

13 MISS MacMULLAN: The State calls Alexander Walker from  
14 Newark, New Jersey.

15 May we approach?

16 THE COURT: Yes.

17 (Discussion takes place at sidebar.)

18 MISS MacMULLAN: Judge, I intend to seek from this  
19 witness the following: That, one, he had a conversation on  
20 that Saturday in Newark with Tariq, who he has identified as  
21 Tariq Diggs. That he will say he had a conversation with  
22 Tariq, just he and him, this witness, to go sticking and he'll  
23 explain that means robbing people. He will also say he saw the  
24 defendant outside with the other parties and that when it came  
25 time for Tariq to get him to go, that he changed his mind.

1 I would like to elicit that conversation with Tariq as  
2 a co-conspirator's exception to the hearsay rule.

3 THE COURT: Any objection?

4 MR. RUSSO: Let me see if I understand you. He says  
5 that he had a conversation with Tariq and they planned to --

6 MISS MacMULLAN: Tariq and he at that time.

7 THE COURT: To go rob people.

8 MISS MacMULLAN: To go sticking. That's what he will  
9 say. He will say the defendant was not there at that time.  
10 However, when it came later on in the day he will say Tariq,  
11 the defendant, David Diggs and the driver from Plainfield all  
12 were outside waiting. He will say he, the witness, went  
13 inside. Tariq came to get him to go out and he said, no, he  
14 changed his mind. He didn't want to go.

15 THE COURT: Statement made in furtherance of a  
16 conspiracy, isn't it? Your client doesn't have to be present  
17 at that point if he is later found to be part of the  
18 conspiracy.

19 MR. RUSSO: Correct.

20 THE COURT: Okay. No objection then?

21 MR. RUSSO: No objection.

22 A L E X A N D E R W A L K E R, State's witness, sworn.

23 DIRECT EXAMINATION BY MISS MacMULLAN:

24 Q Mr. Walker, how old are you, sir?

25 A Sixteen.



1 Q Where do you live?

2 A 175 First Street.

3 Q Where is that?

4 A In Newark.

5 Q And have you ever testified in a courtroom like this  
6 before, Mr. Walker?

7 A No.

8 Q Mr. Walker, referring your attention last year to  
9 December 4th, 1993, Saturday, were you living at 175 First  
10 Street, apartment 6F?

11 A Yes.

12 Q And who do you live there with?

13 A My grandmother.

14 Q And at that time did you know a man whose nickname was  
15 Smiley?

16 A Yes.

17 Q How long at that time had you known Smiley?

18 A Like a year.

19 Q A year. And how would you describe your relationship?

20 A Friend.

21 Q Excuse me?

22 A A friend.

23 Q A friend. Okay. And do you know Smiley's real name?

24 A Yes.

25 Q What's his real name?

1 A Sammy Moore.

2 Q When you look around the courtroom today, do you  
3 recognize anyone?

4 A Yes.

5 Q Who do you recognize?

6 A Sammy Moore.

7 THE COURT: Identifies the defendant for the record.

8 MISS MacMULLAN: The witness has identified the  
9 defendant.

10 Q At that time did you also know someone named Tariq?

11 A Yes.

12 Q What is Tariq's full name?

13 A Tariq Diggs.

14 Q Where does Tariq -- where did Tariq Diggs live back  
15 then?

16 A I don't know.

17 Q Did he ever come to visit people at 195-175 First  
18 Street?

19 A Yes.

20 Q First of all, could you explain to the jury what those  
21 two addresses look like? 195 First Street and 175 First  
22 Street?

23 A It's two tall buildings. Two tall projects.

24 Q About how many floors are each of the buildings?

25 A Twenty in each building.

- 1 Q In each building?
- 2 A Yes.
- 3 Q Are 195 and 175 near each other?
- 4 A They facing each other.
- 5 Q They face each other?
- 6 A Yes.
- 7 Q It is merely walking across the street to get from one  
8 to the other?
- 9 A Yes.
- 10 Q Would Tariq come to that area to visit anyone?
- 11 A Yes.
- 12 Q Who would he come to visit?
- 13 A His aunt.
- 14 Q Where did she live?
- 15 A In 195.
- 16 Q 195 First Street?
- 17 A Yes.
- 18 Q And who would the defendant, Sammy Moore, come to  
19 visit?
- 20 A His girlfriend.
- 21 Q Who is his girlfriend?
- 22 A Danni.
- 23 Q Danni who?
- 24 A I don't know her -- Danni Venerable.
- 25 Q Would the defendant visit anybody else there?

1 A Brenda.

2 Q Do you know Brenda's last name?

3 A No.

4 Q And how long had you known Tariq Diggs at this time?

5 A Like two years.

6 Q How would you describe your relationship to Tariq  
7 Diggs?

8 A Friend.

9 Q Are you close friends with him?

10 A Yes.

11 Q Would you consider him like a brother?

12 A Yes.

13 Q Did you also know at this time a man nicknamed Rock?

14 A Yes.

15 Q What is Rock's real name?

16 A David Diggs.

17 Q Did David Diggs come to visit anybody at 195-175 First  
18 Street?

19 A Yes.

20 Q Who would he come to visit?

21 A His aunt.

22 Q His aunt?

23 A Yes.

24 Q Where did she live?

25 A At 195.

1 Q Were Tariq Diggs and David Diggs related?

2 A Yes.

3 Q What is their relationship?

4 A Cousins.

5 Q Cousins. Okay.

6 Referring your attention, Alexander, back to December  
7 4th, 1993, Saturday, did you see your friend Tariq that day?

8 A Yes.

9 Q Did you have a conversation with him that day?

10 A Yes.

11 Q What did that conversation consist of?

12 A Going sticking.

13 Q What does "going sticking" mean?

14 A Going robbing people.

15 Q And after you had this conversation with Tariq, did  
16 you later see the defendant anywhere near 195 First Street?

17 A Huh?

18 Q After you had this conversation with Tariq, did you  
19 later see the defendant in the area of 195 First Street?

20 A Yes.

21 Q Where did you see the defendant?

22 A In front of the building.

23 Q Who was he with?

24 A By himself.

25 Q Was anybody outside there were him?



1 A I don't know if they was with him but there was people  
2 outside.

3 Q Was Rock outside with him?

4 A Yes.

5 Q Was Tariq outside with him?

6 A With him? I don't know if they was together.

7 Q Do you recall giving a statement to Detective Dean  
8 Marcantonio on March 30th of 1994, this year?

9 A Yes.

10 Q Do you recall giving that statement at the Union  
11 County Prosecutor's Office?

12 A Yes.

13 MISS MacMULLAN: If I may have an exhibit marked?

14 THE COURT: S-79.

15 (Statement of A. Walker marked S-79 for  
16 identification.)

17 Q Mr. Walker, I would like to show you a statement  
18 marked --

19 MR. RUSSO: Objection. Your Honor, Mr. Walker doesn't  
20 seem to be having any trouble with his recollection.

21 THE COURT: Sustained.

22 Q Mr. Walker, do you remember giving a statement to the  
23 Prosecutor's Office on March 30th?

24 A Yes.

25 Q At that time did you say in response to the question,

1 "Who was Sammy Moore with at that time", you said "David, Tariq  
2 Diggs" --

3 MR. RUSSO: Objection.

4 THE COURT: Sustained.

5 THE WITNESS: Yes.

6 MISS MacMULLAN: Prior inconsistent statement, your  
7 Honor.

8 THE COURT: Your witness. He's your witness.

9 MISS MacMULLAN: In a writing. The State would submit  
10 that it comes in.

11 THE COURT: Whatever this witness particularly said at  
12 that time during that meeting with regard to who was there is  
13 not evidential in this forum yet in the case. I ask you to  
14 disregard that when you discuss the case inside the last  
15 question and answer. It is not admissible in this way.  
16 Therefore, you can't use it to discuss the facts of the case.

17 Q Mr. Walker, was Sammy Moore with Tariq Diggs?

18 MR. RUSSO: Objection.

19 THE COURT: No. Not asking anything about the  
20 statement.

21 MISS MacMULLAN: Excuse me?

22 THE COURT: I will permit it.

23 Q Was Sammy Moore with Tariq Diggs?

24 A I don't know.

25 Q If you read your statement, would that refresh your

1 memory?

2 A I said I saw him in front of the building.

3 Q No. The question is, Mr. Walker, you just said you  
4 don't know and I asked you if you read your statement would  
5 that refresh your memory. Would it?

6 A Yes.

7 Q Okay.

8 MISS MacMULLAN: At this time if I may approach?

9 THE COURT: A foundation has been laid.

10 MISS MacMULLAN: Thank you, Judge.

11 Q Now, referring your attention to S-79, page three and  
12 I will point. Don't read it outloud. Read it to yourself. Do  
13 you see where I am pointing?

14 A Uh-huh.

15 Q Do you see the answer?

16 A Yeah.

17 Q Now, does that refresh your memory?

18 A Uh-huh.

19 Q Could you please take that out of your mouth when you  
20 are testifying? I am afraid you will swallow it.

21 Okay. Who was Sammy Moore, the defendant, with at  
22 that time?

23 A Tariq and Rock.

24 Q Anyone else?

25 A And the driver.

1 Q When you say, "the driver", what can you tell us about  
2 the driver? Where is he from?

3 A Plainfield.

4 Q And did this driver drive any particular car?

5 A A white Hyundai Elantra.

6 Q And when you saw the defendant with Tariq, Rock and  
7 the driver from Plainfield who usually drives a white Hyundai  
8 Elantra, where did you go next?

9 A In the house.

10 Q When you say, "in the house", what are you talking  
11 about?

12 A My grandmother house.

13 Q That would be?

14 A 175.

15 Q First Street, apartment 6 --

16 A F.

17 Q And when you were there, was anyone else with you?

18 A Yes.

19 Q Who was that?

20 A My baby mother.

21 Q Who is that?

22 A Shannelle Diggs.

23 Q And after you went to your home, did anyone come to  
24 the door looking for you?

25 A Tariq.

1 Q And what did Tariq ask you at that point?

2 A I don't remember.

3 Q Did you talk to Tariq at that point?

4 A When he came to my door?

5 Q Yes.

6 A Yes.

7 Q And do you remember what he said to you?

8 A Yes.

9 Q What did he say?

10 A He said -- asked me did I want to go.

11 Q Excuse me?

12 A He asked me did I want to go with him.

13 Q With who?

14 A With him.

15 Q And what did you tell him?

16 A No.

17 Q Why didn't you go with Tariq?

18 A My baby mother wouldn't let me out of the house. She  
19 wanted me to stay home.

20 Q And did you stay home with Shannelle that night?

21 A Yes.

22 Q Did Tariq leave?

23 A Yes.

24 Q Now, later on that night going into the next morning  
25 did you see Tariq again?



- 1 A Yes.
- 2 Q About what time did you see Tariq?
- 3 A Around four a.m.
- 4 Q When you saw Tariq, where was he?
- 5 A At his aunt house.
- 6 Q Which is where?
- 7 A 195 2K.
- 8 Q 2K. Whose house was that again?
- 9 A His aunt.
- 10 Q His aunt's. Okay. Did you speak to Tariq?
- 11 A Yes.
- 12 Q Without repeating the conversation, did Tariq give you
- 13 anything?
- 14 A Yes.
- 15 Q What did he give you?
- 16 A A chain.
- 17 Q A chain. Was anybody else with Tariq at that time?
- 18 A Rock.
- 19 Q Excuse me?
- 20 A Rock.
- 21 Q Did you notice anything about Rock?
- 22 A His leg.
- 23 Q Tell the jury what was wrong -- what was it about his
- 24 leg that you noticed?
- 25 A It was scraped.

1 Q Was he in pain?

2 A No.

3 Q Did he appear to be in pain?

4 A Yes.

5 Q Was it bleeding?

6 A A little bit.

7 Q Was his leg like that before you saw him out in front  
8 of 195 First Street?

9 A No.

10 Q After you saw Rock and Tariq, did you leave that  
11 apartment?

12 A Yes.

13 Q Where did you go to next?

14 A To my baby mother house.

15 THE COURT: Sorry. Where?

16 MISS MacMULLAN: To his baby's mother's house.

17 Q Where was that, Alexander?

18 A Upstairs.

19 Q Where?

20 A To Brenda house.

21 Q Do you have a baby with another girl?

22 A Yes.

23 Q And this was the other woman's house you went to?

24 A Yes.

25 Q What's the other woman's name who you have a baby

1 with?

2 A Ebony.

3 Q Where does Ebony live?

4 A With Brenda.

5 Q Which is where?

6 A 195 at 20N.

7 Q Okay. 20N. When you went to 195 20N, did you see the  
8 defendant there?

9 A Yes.

10 Q Who was the defendant with?

11 A Traci.

12 Q Do you know Traci's name?

13 A No.

14 Q What was the defendant and Traci doing when you saw  
15 him?

16 A He was just laying down talking to her.

17 Q Where was he laying down in relation to Traci?

18 A On her lap.

19 Q Excuse me?

20 A On her lap.

21 Q He was lying on her lap?

22 A Yes.

23 Q And they were talking, he and Traci?

24 A Yes.

25 Q Now, after this incident, Mr. Walker, were you

1 subpoenaed to come to the Grand Jury on March 30th with your  
2 grandmother?

3 A Yes.

4 Q Did you come to the Grand Jury?

5 A Yes.

6 Q Did you speak to Detective Dean Marcantonio at that  
7 time?

8 A Yes.

9 Q And did you give him a sworn statement about what you  
10 knew from that night?

11 A Yes.

12 Q And when you were there giving a statement, did  
13 Detective Dean Marcantonio show you any photo arrays?

14 A Yes.

15 Q And in those photo arrays did you recognize anybody?

16 A Yes.

17 Q The first photo array you were shown, who did you  
18 recognize?

19 A Tariq.

20 Q You were shown Tariq first?

21 A I don't remember them in line, like in order. I don't  
22 remember them in order.

23 Q Okay. Let me ask you. Were you shown a photo array  
24 which you identified as having Tariq's picture?

25 A Yes.

1 Q And after you selected Tariq's picture, did you write  
2 your name on the back of the photo?

3 A Yes.

4 Q Did they show you another photo array at that time?

5 A Yes.

6 Q Whose photograph did you recognize also on that date?

7 A Rock.

8 Q Well, did they ever show you a photograph containing  
9 the picture of Sammy Moore?

10 A Yes.

11 Q And was that on March 30th?

12 A Yes.

13 Q Okay. Did you also sign your name on the back of that  
14 photograph?

15 A Yes.

16 Q That was also the same day you selected Tariq Diggs'  
17 photograph?

18 A Yes.

19 Q Now, did the police officers tell you which photograph  
20 to pick out?

21 A No.

22 Q Did they hint in any way which one for you to pick  
23 out?

24 A No.

25 Q I would like to show you first what has been marked



1 S-17 for identification. Do you recognize anyone in this photo  
2 array?

3 A Yes.

4 Q Who do you recognize?

5 A I recognize two people.

6 Q Who do you recognize?

7 A Sammy Moore and Shakil.

8 Q Which one is Sammy Moore?

9 A Number three.

10 Q Which one is Shakil?

11 A Four.

12 Q Who is Shakil?

13 A My friend.

14 Q Where does Shakil live?

15 A I don't know. I just see him in the buildings.

16 Q Okay.

17 Now, Sammy Moore's photograph that you selected, is  
18 that the Sammy Moore you've been telling us about today?

19 A Yes.

20 Q Okay. I would like to show you the back here. Is  
21 that your signature where it says "Alexander Walker 3/30/94"?

22 A Yes.

23 Q Okay. Did you put your initials on the other  
24 photographs, "A.W." also?

25 A Yeah.

1 Q And also on that date you said you picked out Tariq's  
2 photograph from an array?

3 A Yes.

4 Q I would like to show you what has been marked S-18 for  
5 identification. Do you recognize it?

6 A Yes.

7 Q Whose photograph do you recognize here?

8 A Tariq, number four.

9 Q Number four?

10 A Yes.

11 Q Is that your signature, sir, on the back of number  
12 four?

13 A Yes.

14 Q It says "Alexander Walker"?

15 A Yes.

16 Q And this is your initials on the other five  
17 photographs, "A.W."?

18 A Yes.

19 Q With the date of March 30th?

20 A Yes.

21 Q Are these in the same condition pretty much as they  
22 were when they showed them to you that day?

23 A Yes.

24 Q Also, Mr. Walker, were you shown two more photo  
25 arrays?

1 A Yes.

2 Q By Lieutenant Edward Johnson of the Union County  
3 Prosecutor's Office?

4 A Yes.

5 Q Okay. Was that on December 8th, 1994? Actually last  
6 week?

7 A Yes.

8 Q Did he show you two photo arrays at that time?

9 A Yes.

10 Q Do you remember whose photographs you recognized at  
11 that time?

12 A Rock.

13 Q Rock?

14 A Yeah.

15 Q And anybody else?

16 A No.

17 Q Not at this time. Okay.

18 Let me show you some photo arrays then. First I will  
19 start with S-21 for identification. Do you recognize what that  
20 is?

21 A Yes.

22 Q What is that?

23 A Rock.

24 Q Which picture is Rock?

25 A Number five.

1 Q And is this the photo array that Lieutenant Johnson  
2 showed you last week?

3 A Yes.

4 Q Okay. And let's turn to the back here. Is that your  
5 signature?

6 A Yeah.

7 Q Where it says, "Alexander Walker" on December 8th?

8 A Yeah.

9 Q Is that your initials on the other five photographs?

10 A Yes.

11 Q And I show you another one, another photo array marked  
12 S-19 for identification. Take a look at those six photographs.  
13 Do you recognize anybody?

14 A Yes.

15 Q Who do you recognize?

16 A Number two.

17 Q Who is number two?

18 A I don't know his name.

19 Q Who is he in relation to -- you've talked about  
20 Smiley, Tariq and Rock. Who is this person that you recognize  
21 to be?

22 A The one that had the white Elantra.

23 Q Excuse me?

24 A The one that had the white Elantra.

25 Q Is that the driver, the person you've been talking

1 about as the driver?

2 A Yes.

3 Q He was there that day on Saturday with the defendant  
4 and Tariq and Rock?

5 A In front of the building?

6 Q Yes.

7 A Yes.

8 Q Okay. And is that your signature on the back of the  
9 photograph there, "Alexander Walker" on December 8th?

10 A Yes.

11 Q And your initials on the other five?

12 A Yes.

13 Q Are these two photo arrays in substantially the same  
14 condition as you they were when you saw them last week?

15 A Yes.

16 Q Okay. Mr. Walker, do you have a pending charge --  
17 sorry. Do you have a sentence as a juvenile from Essex County  
18 Family Court from November 19, 1993 for receiving stolen  
19 property?

20 A Yes.

21 Q And at that time you also have a charge for aggravated  
22 assault also at that time?

23 A Yes.

24 Q Okay. And you were placed on probation for a year?

25 A Yes.



1 Q Mr. Walker, has anyone threatened you into testifying  
2 or giving any of the information that you have in this case?

3 A No.

4 Q Has there been any deal made in exchange for your  
5 testimony by anyone?

6 A No.

7 Q Did you know a Marcus Benjamin?

8 A No.

9 Q Did you know a Keith Staple?

10 A No.

11 Q And incidentally, Mr. Walker, were you -- did we have  
12 you stay at a hotel room last night with Shannelle Diggs last  
13 night?

14 A Yes.

15 Q And we picked you up this morning and brought you to  
16 court?

17 A Yes.

18 Q And prior to your testimony today have you ever gotten  
19 into a fight or assault with Sammy Moore?

20 A No.

21 Q And do you still consider him a friend?

22 A Yes.

23 MISS MacMULLAN: Thank you. No further questions.

24 THE COURT: Cross-examine.

25 MR. RUSSO: Yes.

1 CROSS-EXAMINATION BY MR. RUSSO:

2 Q Mr. Walker, last year at the time of this incident you  
3 were fifteen years old, right?

4 A Yes.

5 Q And you indicated in November of last year about a  
6 month before this happened you were sentenced in the juvenile  
7 court for receiving stolen property and aggravated assault; is  
8 that right?

9 A Yes.

10 Q And put on probation?

11 A Uh-huh.

12 Q And it's your testimony that at the time of this  
13 incident early in December of 1993 just a few weeks after that  
14 sentencing you received a chain that you know -- which you knew  
15 had been stolen from your friend Tariq; is that right?

16 A Uh-huh.

17 THE COURT: Is that a yes, sir?

18 THE WITNESS: Yes.

19 Q Now, have you been -- you haven't been charged with  
20 receiving stolen property as it relates to that chain, have  
21 you?

22 A No.

23 Q When you saw Sammy Moore outside the building -- by  
24 the way, you've known him for sometime, right?

25 A Yes.

1 Q You wouldn't have a problem identifying his picture  
2 when it was shown to you, right?

3 A Yes.

4 Q Because you know him personally, right?

5 A Uh-huh.

6 Q When you saw him outside the building, you testified  
7 earlier that he was alone; is that right?

8 A Yes.

9 Q So even though you saw Tariq and Rock outside the  
10 building as well, you didn't know if they were together; is  
11 that right?

12 A Yes.

13 Q You didn't know whether the three of them were  
14 together or whether Sammy was with them or not, right?

15 A Yes.

16 Q It was only you and Tariq that had this conversation  
17 about sticking up people?

18 A Yes.

19 Q And how old is Tariq, by the way?

20 A I don't know.

21 Q Is he older than you?

22 A Yes.

23 Q Whose idea was it to do this sticking up?

24 A Both ours.

25 Q You thought that doing this, robbing people, would be

1 a good idea?

2 A Yes.

3 Q And you knew that sticking up meant that there would  
4 be weapons involved?

5 A Yes.

6 Q Had you done that before with Tariq?

7 A No.

8 Q This just came to you?

9 A Yes.

10 Q And even though you planned this or had this  
11 conversation with Tariq planning this robbery, when your baby's  
12 mother told you not to go, you decided not to go; is that  
13 right?

14 A Yes.

15 Q And the baby's mother that you mentioned, her name is  
16 Shannelle Diggs, right?

17 A Yes.

18 Q Is she any relation to Tariq Diggs or --

19 A Yes.

20 Q She is? What is the relationship?

21 A Cousin.

22 Q And instead of going with Tariq, you went then to see  
23 the mother of your other child; is that right?

24 A No, I was in the house.

25 Q What?

1 A I was in the house. The next day I went over my other baby  
2 mother house.

3 Q What day was that?

4 A The next day.

5 Q You remember what day of the week that was?

6 A No.

7 Q When you weren't to -- that other person is Ebony?

8 A Yes.

9 Q Is that right? And Ebony lives with someone else; is  
10 that right?

11 A Yes.

12 Q And that person she lives with is named Brenda?

13 A Yes.

14 Q And you had seen Ebony at Brenda's place before,  
15 right?

16 A Yes.

17 Q When you -- what time was it when you got there to  
18 Brenda's and Ebony's place?

19 A I don't know.

20 Q Was it in the evening?

21 A I don't remember.

22 Q Well, when you got there, you saw Mr. Moore and you  
23 also saw Traci Thomas; is that right?

24 A Uh-huh.

25 Q They were both there?



1 A Yes.

2 Q And they were together, weren't they?

3 A Yes.

4 Q Do you know Traci well?

5 A Huh?

6 Q Do you know Traci well?

7 A No.

8 Q How did you know her at the time?

9 A From Ebony. I just knew her name really.

10 Q Had you seen her there before?

11 A No.

12 Q Do you know whether she knew Tariq?

13 A No.

14 MR. RUSSO: I don't have anything further.

15 MISS MacMULLAN: One question, your Honor.

16 REDIRECT EXAMINATION BY MISS MacMULLAN:

17 Q Were Traci and Ebony friends?

18 A Yes.

19 MISS MacMULLAN: Thank you. No further questions.

20 THE COURT: Thank you, Mr. Walker. You may step down,  
21 sir. Please watch your step.

22 MISS MacMULLAN: I have a very short witness, your  
23 Honor.

24 THE COURT: All right.

25 MISS MacMULLAN: The next witness is Shannelle Diggs.

1 S H A N N E L L E D I G G S, State's witness, sworn.

2 DIRECT EXAMINATION BY MISS MacMULLAN:

3 Q Miss Diggs, how old are you?

4 A Eighteen.

5 Q Where do you live?

6 A 515 Elizabeth Avenue.

7 Q And is that in Newark?

8 A Yes.

9 Q Do you know a man named Alexander Walker?

10 A Yes.

11 Q Who is he?

12 A My daughter's father.

13 Q And referring your attention, Miss, last year on  
14 Saturday night, December 4th of last year, were you with  
15 Alexander Walker that night?

16 A Yes.

17 Q And where were you when you were with Alexander Walker  
18 that night?

19 A In his grandmother's house. 175 First Street.

20 Q Do you remember which apartment that was?

21 A 6F.

22 Q At any time after Alexander Walker was with you in the  
23 apartment did anyone come to the door looking for him?

24 A Yes.

25 Q Who was that?

- 1 A Tariq Diggs.
- 2 Q Who is Tariq Diggs?
- 3 A My cousin.
- 4 Q Your cousin?
- 5 A Yes.
- 6 Q And do you know what Tariq and Alexander Walker talked  
7 about when he came looking for Alexander?
- 8 A No, 'cause they were out in the hallway.
- 9 Q And did you want Alexander to leave with Tariq?
- 10 A No.
- 11 Q Why not, Shannelle?
- 12 A I just wanted him to stay in the house that night.
- 13 Q And did he leave with Tariq Diggs that night?
- 14 A No.
- 15 Q What did Alexander Walker do?
- 16 A Came back in the house.
- 17 Q Where did Tariq Diggs go, if you know?
- 18 A I don't know.
- 19 Q Did he leave at that point?
- 20 A Yes.
- 21 Q That night did you go to sleep with Alexander Walker?
- 22 A Yes.
- 23 Q Did you fall asleep?
- 24 A Yeah, around two, three o'clock in the morning.
- 25 Q Was Alexander Walker still with you at that point?

1 A When I went to sleep, yes.

2 Q And do you know if he stayed with you the whole night  
3 after that?

4 A I don't know. I was asleep.

5 Q Do you know the defendant in court?

6 A Yes.

7 Q Who is that?

8 A It's Smiley.

9 Q Prior to this date did you ever have a fight or bad  
10 words with Smiley?

11 A No.

12 MISS MacMULLAN: Thank you. No further questions.

13 MR. RUSSO: No questions.

14 THE COURT: Thank you, Miss Diggs. You may step down.  
15 Please watch your step.

16 MISS MacMULLAN: Can I have a short recess, your  
17 Honor?

18 THE COURT: Yes. We will take our afternoon recess at  
19 this time. Take ten minutes. If you want to go downstairs and  
20 have some more coffee, feel free to do so. Otherwise wait in  
21 the juryroom. Please don't discuss the case. Thank you.

22 I want to see counsel up here off the record.

23 (Discussion held off the record.)

24 (Recess.)

25 THE COURT: Okay. Bring out the jury.

1 (In the presence of the jury.)

2 THE COURT: Call your next witness.

3 MISS MacMULLAN: Thank you, Judge.

4 The State calls Police Officer Vincent Torre,  
5 Plainfield Police Department.

6 V I N C E N T T O R R E, State's witness, sworn.

7 DIRECT EXAMINATION BY MISS MacMULLAN:

8 Q Good afternoon, officer. Are you employed by the  
9 Plainfield Police Department?

10 A Yes, I am.

11 Q What capacity?

12 A Police officer.

13 Q How long have you been a police officer?

14 A Six and a half years.

15 Q Referring your attention to December 5th, Sunday, at  
16 approximately 1:35 a.m., were you working on patrol at that  
17 time?

18 A Yes, I was.

19 Q Do you recall what your district was?

20 A District 2.

21 Q What does that encompass?

22 A That's the west area of Plainfield between Grant Avenue and  
23 Plainfield Avenue.

24 Q And at approximately 1:35 a.m. did you receive a  
25 dispatch?



1 A Yes, I did.

2 Q After receiving the dispatch did you respond towards  
3 the 1100 block of West Third Street in Plainfield?

4 A Yes, I did.

5 Q Do you recall where you were when you received the  
6 dispatch?

7 A No, I do not.

8 Q Do you recall how long it took you to get there?

9 A Under a minute.

10 Q And did you in fact arrive in that area of West Third  
11 Street?

12 A Yes, I did.

13 Q Where did you go to first once you were driving on  
14 West Third Street?

15 A While on route to the scene we were flagged down in the  
16 thousand block, which is approximately one block away from 1102  
17 by an individual.

18 Q Do you recall that individual's name?

19 A Charles Jackson.

20 Q Could you give a brief description of what he looks  
21 like?

22 A Black male about late 50's, early 60's.

23 Q Where was he when he was flagging you down?

24 A He was in the middle of the intersection of Manson and West  
25 Third Street flagging us down.

1 Q Once you saw this man later identified as Charles  
2 Jackson flagging you down, what did you do next?

3 A We stopped to ascertain what he wanted.

4 Q Did you speak to Mr. Jackson?

5 A Yes, we did.

6 Q Without repeating what was said, what did you do after  
7 you spoke to him?

8 A We went to the area that he was pointing to and found the  
9 victim.

10 Q Where did you find this victim?

11 A He was lying on the corner of Manson and Third, 25 feet  
12 south of West Third Street.

13 Q What did he look like this victim that was lying  
14 there?

15 A Black male, about 25 to 30 years old.

16 Q Did you recognize him?

17 A No, I didn't.

18 Q Did you ever learn that second victim's name?

19 A No, I did not.

20 Q What other descriptions could you give us about what  
21 he looked like at that time? Was he coherent?

22 A He was coherent -- incoherent and fairly combative. He had  
23 a gunshot wound in what appeared to be his abdomen.

24 Q Did you in fact at the scene see the gunshot wound?

25 A Yes, I did.

1 Q Was he bleeding?

2 A Yes, he was.

3 Q Do you know while if he was in this state said  
4 anything?

5 MISS MacMULLAN: The State would offer, if permitted,  
6 as an excited utterance.

7 THE COURT: Any objection?

8 MR. RUSSO: No objection.

9 Q Do you recall if he said anything at that time?

10 A Yes, I do.

11 Q What did he say?

12 A He said the people that shot him were in a blue car.

13 Q And did he give any further description?

14 A His only statement.

15 Q And once you saw this man in this present state what  
16 did you do next?

17 A We attempted to ascertain where the gunshot wound was so we  
18 can render aid.

19 Q Was he then taken from the area?

20 A Yes, he was.

21 Q Where was he taken, if you know?

22 A Robert Wood Johnson Trauma Center in New Brunswick.

23 Q After he was taken from the area did you maintain the  
24 crime scene at the intersection of West Third and Manson?

25 A Yes, I did.

1 Q When you say maintain the crime scene, what exactly  
2 does that mean?

3 A We just maintain security until we can get an I.D. group  
4 down there to take some photos.

5 Q Around the area where the second victim was found did  
6 you notice any items?

7 A Yes, I did.

8 Q What did you notice?

9 A A red baseball cap just to the west of his head.

10 Q I would like to show you what has been marked S-48 for  
11 identification. Showing you what's been marked S-48 for  
12 identification, what does that show?

13 A A red baseball cap.

14 Q And that was the cap near the second victim?

15 A Yes, it was.

16 Q And showing you another photograph, S-46 for  
17 identification, do you know what that shows?

18 A The intersection of Manson and Third.

19 Q And in this photograph can you see the house 1102 West  
20 Third Street in the foreground? Sorry. In the background?

21 A Yes, I do.

22 Q Is that properly labeled in the photograph?

23 A Yes, it is.

24 Q That is one block between the intersection of West  
25 Third and Morris and West Third and Manson?

1 A That is correct.

2 Q And where it says, "Manson Place" here, does that  
3 properly mark the location of Manson Place?

4 A Yes, it is.

5 THE COURT: What house is that?

6 MISS MacMULLAN: 1102 West Third Street.

7 MR. RUSSO: Can I have the number of that exhibit?

8 THE COURT: S-46.

9 Q Did you retrieve this red cap?

10 A Yes, I did.

11 Q Who did you give it to?

12 A I believe -- I don't recall who I gave it to.

13 Q Did you give it to the evidence technician in the  
14 case?

15 A Yes, I did.

16 Q And the evidence technician, what's their job  
17 description?

18 A To take photos and collect evidence.

19 Q Showing you what has been marked S-8A, which is inside  
20 a brown bag S-8, I ask you if you recognize this red cap?

21 A Yes, I do.

22 Q How do you recognize it, sir?

23 A It's the same in appearance. It's the same hat I recovered  
24 from the scene.

25 Q This is the same hat you recovered?



1 A Yes, it is.

2 Q And is it in substantially the same condition as it  
3 was that night?

4 A Yes.

5 Q Was it wet that night?

6 A Yes, it was.

7 Q What was the weather like that night after you arrived  
8 at the scene?

9 A After we arrived at the scene there was a torrential  
10 downpour all night long.

11 Q I would like to show you also two more exhibits.  
12 First S-22 for identification. Prior to your testimony today  
13 did you make any markings on S-22?

14 A Yes, I did.

15 Q What was that mark you made?

16 A The position of victim two at the corner of Manson and  
17 Third, which I initialed.

18 Q Exactly what did you put there?

19 A I put an X and a V2 indicating victim two and my initials  
20 and circled it.

21 Q And this accurately reflects the approximate location  
22 of the second victim when you arrived at the scene?

23 A Yes, it does.

24 Q That is one block over from the intersection of West  
25 Third and Morris Street?

1 A That is correct.

2 Q I would like to show you the last exhibit which has  
3 been marked S-23 for identification. Do you recognize first  
4 what S-23 shows?

5 A Yes, I do.

6 Q Sorry. That's in evidence. Do you recognize what  
7 that shows?

8 A Yes, I do.

9 Q What does that show?

10 A An aerial shot of the 1100 block of West Third Street area  
11 and Manson and Monroe.

12 Q Have you made a marking?

13 A Yes, I have.

14 Q What did you make?

15 A I made the X indicating victim two and my initials at the  
16 corner of Manson and Third.

17 Q And does that accurately reflect where the victim was  
18 found?

19 A Yes, it does.

20 Q Officer Torre, at any time during your part of the  
21 investigation was there any report about one of the shooters  
22 involved in this case being hit by a car?

23 A No.

24 Q You didn't have any of that information?

25 A Not to my knowledge.

1 Q And any other police officer that night, did they have  
2 that information about one of the shooters being hit by a car?

3 A Not to my knowledge, no.

4 MISS MacMULLAN: Thank you. No further questions.

5 THE COURT: Any questions?

6 MR. RUSSO: Just a couple questions.

7 CROSS-EXAMINATION BY MR. RUSSO:

8 Q Officer, you indicated that this person who you saw  
9 who was shot made a statement to you about people shooting  
10 him -- who shot him being in a blue car; is that correct?

11 A That is correct.

12 Q Do you recall his exact words? Were those his exact  
13 words?

14 A I believe they were.

15 Q You said he said that the people who shot him were in  
16 a blue car, not the person who shot him; is that right?

17 A He indicated that the persons that were involved in the  
18 shooting were in a blue car.

19 Q You don't remember exactly what he said?

20 A Exactly what he said?

21 Q Yes.

22 A I asked him what happened and who shot him. He said they  
23 were in a blue car.

24 Q Earlier didn't you testify that he said the people who  
25 shot him were in a blue car?

1 A I believe that was my testimony.

2 Q So at that point based on his statement to you you  
3 didn't know how many shooters were involved, right?

4 A No, I did not.

5 MR. RUSSO: Nothing further.

6 REDIRECT EXAMINATION BY MacMULLAN:

7 Q Did you know the color of the car that was taken in  
8 this particular robbery?

9 A I don't recall.

10 MISS MacMULLAN: Thank you. No further questions.

11 THE COURT: Thank you, officer. You may step down,  
12 sir. Please watch your step.

13 Call your next witness, please.

14 MISS MacMULLAN: The State's last witness for the day  
15 is Police Officer Gregory Lordi of the Plainfield Police  
16 Department.

17 G R E G O R Y L O R D I, State's witness, sworn.

18 DIRECT EXAMINATION BY MISS MacMULLAN:

19 Q Good afternoon, Officer Lordi.

20 Sir, are you presently employed by the Plainfield  
21 Police Department?

22 A Yes.

23 Q In what capacity?

24 A Police officer.

25 Q How many years have you been a police officer with

1 Plainfield?

2 A Since February of 1990.

3 Q Referring your attention, sir, to Sunday morning,  
4 December 5th, 1993 at approximately 1:30 a.m. were you working  
5 as a police officer at that time?

6 A Yes.

7 Q And do you recall where you were at that time?

8 A Yes.

9 Q Where were you, sir?

10 A I was working a clubhouse detail.

11 Q And what does that mean?

12 A It's an extra duty job.

13 Q And while you were working the extra duty job did you  
14 have your radio with you?

15 A Yes.

16 Q And did you hear any dispatch over the radio?

17 A Yes.

18 Q Without repeating what you heard, did you leave that  
19 club detail and go to the area of 1102 West Third Street?

20 A Yes.

21 Q Once you got there, could you give a description of  
22 what you saw when you arrived?

23 A An individual was laying on the ground. Emergency 6 had just  
24 pronounced him as deceased.

25 Q Was that person Marcus Benjamin?



1 A Yes.

2 Q And what were your duties once you arrived at the  
3 scene?

4 A To secure the scene.

5 Q When you say, "secure the scene", what does that mean  
6 exactly? what is your understanding?

7 A Preserve any evidence and keep anybody from coming into the  
8 area.

9 Q As part of your duties as preserving and maintaining  
10 the scene did you subsequently retrieve any evidence from the  
11 scene?

12 A Yes.

13 Q What did you retrieve?

14 A A spent casing.

15 Q Do you recall where that spent casing was?

16 A Yes, it was in the street.

17 Q And do you know if there were any photographs taken  
18 from the crime scene that night?

19 A Yes, there were.

20 Q Were you present when the photographs were taken?

21 A Yes.

22 Q I would like to show you what has been marked first  
23 S-35 for identification and ask you if you can recognize what  
24 that shows?

25 A Yes.

1 Q What does it show sir?

2 A The cone was placed right here was the bullet casing on the  
3 ground.

4 MISS MacMULLAN: Witness indicating the front of the  
5 cone in S-35

6 Q That's where the casing was?

7 A Yes.

8 Q Okay. Could you tell us in relation to the body where  
9 that bullet casing was?

10 A The body was up over by the sidewalk approximately 15 feet  
11 away.

12 Q And does this accurately and fairly show what it  
13 looked like on the night in question?

14 A Yes.

15 Q And you say you retrieved that shell casing from the  
16 street?

17 A Yes.

18 Q Did you put it in any particular container?

19 A Yes, I did.

20 Q And what did you put it in?

21 A A clear plastic bag.

22 Q Did you make any markings on the bag?

23 A Yes, I did.

24 Q What kind of markings did you put?

25 A I wrote the victim's name and I wrote my name on it, also,

1 and my badge number.

2 Q Who did you subsequently give that to once you marked  
3 it and placed it in the plastic bag?

4 A Detective Keith Pagash.

5 Q Showing you, sir, what has been marked S-1 for  
6 identification, I ask you do you recognize what S-1 is?

7 A Yes.

8 Q What is S-1?

9 A That is the bullet casing, spent casing.

10 Q And how do you recognize it, sir?

11 A It's in the same package I put it in.

12 Q Is this your handwriting?

13 A Yes.

14 Q Your markings?

15 A Yes.

16 Q As you look at it I wonder if you could inspect it, if  
17 you could. Is it in substantially the same condition as it was  
18 when you picked it up off the street?

19 A Yes, it has some writing on it.

20 Q That would be evidentiary writing?

21 A Yes.

22 Q And where you picked it up from the exact spot on this  
23 photograph, S-35, right from the cone?

24 A Yes.

25 Q And as best as you can see did anyone move that that

1 you could see once you were at the scene?

2 A No.

3 Q While you were at the scene did you inspect the  
4 windows of 1102 West Third Street?

5 A Yes.

6 Q And why did you inspect the windows of that house?

7 A Because the citizen that lived there said a bullet came  
8 through his window.

9 Q And did you walk with that citizen and look at that  
10 particular bullet hole?

11 A Yes.

12 Q Do you recall where exactly that bullet hole was?

13 A It was in the north wall.

14 Q In the north wall?

15 A Right above a clock.

16 Q And once you saw that bullet hole in the window, did  
17 you enter the home?

18 A Yes.

19 Q And once you were in the home, did you see any other  
20 bullet holes?

21 A Yes, in the wall, the north wall.

22 Q Did those two bullet holes line up? The bullet hole  
23 through the window and the bullet hole through the living room  
24 wall?

25 A Yes, they were in line with each other.

1 Q Were photographs taken of those bullet holes?

2 A Yes.

3 Q I wonder if I could at this time ask you to make some  
4 markings on some photographs. First, I'd like to show you  
5 what's been marked S-40 for identification. What does that  
6 show?

7 A That's the window.

8 Q Is that the window where the bullet hole was?

9 A Yes, right up top.

10 Q And does this accurately show where the bullet hole  
11 was on that day in question?

12 A Yes.

13 Q I wonder if you could circle the bullet hole for the  
14 jury?

15 A Sure.

16 Q And just put bullet hole and your initials.

17 A (Witness complies.)

18 MISS MacMULLAN: Witness has done so for the record.

19 Q Let's go back to S-35, the picture that has the body  
20 in the position of the casing. I wonder if you could circle in  
21 this photograph which window would have the bullet hole?

22 A (Witness complies.)

23 Q Officer, in this photograph on S-40 it is the second  
24 window over?

25 A It's -- yes, it is.



1 Q Have you circled the second or first window there?

2 A I mistakenly circled the first window.

3 Q That's all right. Would you now put an X through that  
4 circle and put a circle around the window?

5 A (Witness complies.)

6 Q And does that accurately reflect which window had the  
7 bullet hole?

8 A Yes.

9 Q And showing you what has been marked S-42 for  
10 identification, what does that show?

11 A That's the bullet hole in the wall.

12 Q That's inside the home?

13 A Yes.

14 Q I wonder if you could circle that and put bullet hole  
15 inside?

16 A (Witness complies.)

17 Q Okay. Last photograph, S-41 for identification. I  
18 wonder if you could in this photograph circle where the bullet  
19 hole would be?

20 A (Witness complies.)

21 MISS MacMULLAN: Witness has circled and put the words  
22 bullet hole and his initials.

23 Q And all these photographs accurately and fairly depict  
24 what the premises looked like on the day in question?

25 A Yes.

1 Q Officer, at any time when you were at the scene was  
2 there any information given to the police about one of the  
3 shooters being hit by a car?

4 A No.

5 Q Any information you received that night?

6 A No.

7 MISS MacMULLAN: Thank you. No further questions.

8 THE COURT: Any questions?

9 MR. RUSSO: Yes, your Honor. I just need one moment,  
10 your Honor.

11 THE COURT: Sure. Take your time.

12 (Pause.)

13 CROSS-EXAMINATION BY MR. RUSSO:

14 Q Officer, I am showing you S-42. This is the  
15 photograph which shows the bullet hole just above a clock,  
16 right?

17 A Yes.

18 Q This is inside the premises at 1102 West Third Street?

19 A Yes.

20 Q Is that clock fastened to the wall?

21 A I don't recall, to tell you the truth.

22 Q You recall the height of the ceiling?

23 A Approximately 15 feet. Approximately 20 feet. I didn't  
24 measure it.

25 Q Fifteen foot ceiling in the room?

1 A It's probable, yes.

2 Q How far up the wall was that bullet hole? Do you  
3 remember?

4 A I would say approximately seven feet, eight feet.

5 Q And let me show you S-35, which shows the front of  
6 1102 West Third Street.

7 A Yes.

8 Q And you indicated with an X -- with a circle the  
9 window where you found the bullet hole, correct?

10 A Yes.

11 Q Now, I think we have a better picture of that window.  
12 Now, showing you S-40, did you also circle -- make a circle in  
13 that picture as well?

14 A Yes.

15 Q And does that indicate the same bullet hole that  
16 appears in the other photograph which is a little more  
17 difficult to see?

18 A Yes.

19 Q This is a close-up of that window?

20 A Yes, it is.

21 Q The bullet hole appears to be right near the top of  
22 the window; is that right?

23 A Yes.

24 Q Now, is there any indication from what you saw that  
25 the bullet struck anything other than that window and the wall

1 inside the house?

2 A No.

3 Q Would you agree with me that the window in this house  
4 is not at street-level?

5 A No, it's not at street-level.

6 Q In fact there's -- there are steps in front of the  
7 house, aren't there?

8 A Yes.

9 Q And do you recall approximately how many steps there  
10 are?

11 A I'd say approximately six or seven. I never counted them.

12 Q Let me show you S-43. Does this refresh your memory?

13 A Yes.

14 Q This is 1102 West Third Street, right?

15 A Yes, 1102.

16 Q And would you agree with me that there are five steps  
17 going from the walk up to the house and then another two steps  
18 down to the sidewalk; is that right?

19 A Yes.

20 Q So that window is somewhere elevated from the  
21 street-level, right?

22 A Yes.

23 Q Now, what did you mean when you indicated that the  
24 bullet hole in the wall lined up with that in the window?

25 A 'Cause it was kind of in line. When you looked at the hole

1 in the window and the hole in the wall, it was like in line  
2 with each other.

3 Q Well, you are referring to just two points. The hole  
4 in the wall and the hole in the window, right?

5 A Yes.

6 Q Wouldn't it be fair to say that you can draw a line  
7 between any two points?

8 A Yes.

9 MR. RUSSO: I don't have any other questions.

10 THE COURT: Thank you, officer. You may step down.  
11 Please watch your step.

12 MISS MacMULLAN: Judge, may I approach off the record?

13 THE COURT: Sure.

14 (Discussion held off the record.)

15 THE COURT: We are moving so fast we ran out of  
16 witnesses. That's nine witnesses today. That's a lot of  
17 witnesses in one day. We are on a pace now that this case will  
18 probably get to you no later than Friday. Okay? We have to  
19 play it a little bit by ear but the pace is a good pace. Try  
20 to get it to you this week. You owe me about 42 minutes there,  
21 if we have to stay late one of these other nights. Enjoy these  
22 42 minutes.

23 Don't discuss the case. See you tomorrow ready to  
24 work at nine o'clock. Please don't discuss the case. Enjoy  
25 your evening.



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(Jury excused.)

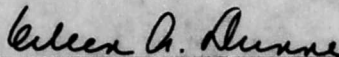
THE COURT: Before you leave I want to meet in chambers to figure out where we are going.

MISS MacMULLAN: Okay.

(Recess.)

#### CERTIFICATION

I, EILEEN A. DUNNE, C.S.R., License Number XI01022, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.



**EILEEN A. DUNNE, C.S.R.**  
**Official Court Reporter**  
**Union County Courthouse**  
**Elizabeth, New Jersey**

**DATE: December 18, 1994**



State of New Jersey  
DEPARTMENT OF STATE  
DIVISION OF  
ARCHIVES AND RECORDS MANAGEMENT

# TITLE TARGET

TITLE OF RECORDS: Docket Brief Transcripts

FIRST RECORD: A-459-93 Continued from Reel #SR 13593

LAST RECORD: A-4956-94 Continued on Reel #SR 13595

FILMED FOR (use name of agency): Judiciary Superior Court Appellate Div.

REDUCTION RATIO: 25x FILM TYPE: 16mm  35mm

TYPE CAMERA: Planetary CAMERA NUMBER: DAR-8

BATCH # \_\_\_\_\_ JOB # \_\_\_\_\_ BOX # \_\_\_\_\_ OF \_\_\_\_\_ TIME \_\_\_\_\_ SF 6/22/98

IMAGES \_\_\_\_\_

CONTAINERS USED \_\_\_\_\_

## ROLL #

SR 13594

# CAMERA OPERATOR'S CERTIFICATE

DATE FILMED 6/23/98 REEL NUMBER SR13594

THESE RECORDS WERE FILMED FOR (name of agency): \_\_\_\_\_

Judiciary Superior Court Appellate Div.

RECORDS TITLE Transcripts

NUMBER OF IMAGES 2637

## INDEXING DATA

BEGINS WITH A-459-93 Continued from Reel # SR 13593

ENDS WITH A-4956-94 Continued on Reel # SR 13595

## MISSING DOCUMENTS

CAMERA NUMBER DAR-8

The above records were microfilmed by the (name of agency)

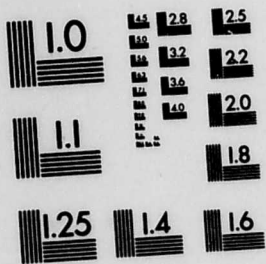
D.A.R.M.

I hereby certify that the microphotographs appearing in this reel of film are true and accurate copies of the original documents described above.

Kuldip Singh

Signature of Camera Operator

Batch # 26073  
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 (ANSI and ISO TEST CHART No. 2)

**BACKGROUND DENSITY  
TARGET**









# START OF RETAKES

## CERTIFICATION

THE MICROPHOTOGRAPHS APPEARING BETWEEN "START OF RETAKES" AND "END OF RETAKES" ARE TRUE COPIES OF THE ORIGINAL DOCUMENTS WHICH ARE ILLEGIBLE OR WERE OMITTED DURING THE FILMING.

REEL \* SR 13594

JOB \* 002-002

BATCH \* 26073-06

Kuldip Singh

Signature of camera operator

Agency: D.A.R.M.

A459-9374

SUPERIOR CO

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
IND. NO. 91-05-0667-1

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THE STATE OF NEW JERSEY :

vs

MURRAY WHITFIELD, EUGENE  
JONES, OGBONNA KHALFANI,  
KEITH BOWMAN, WILLIAM E.  
JONES, EUGENE BELTON and  
GERALD MANCE,

Defendants. :

FILED  
APPELLATE DIVISION

JUL 12 1994

*S. Miller*  
Clerk

STENOGRAPHIC TRANSCRIPT

OF

TRIAL PROCEEDINGS

Place: Mercer County Courthouse  
Trenton, New Jersey

Date: June 21, 1993

**BEFORE:**

HONORABLE CHARLES A. DELEHEY, J.S.C.  
and a Jury

REC'D  
APPELLATE DIVISION

JUL 12 1994

*S. Miller*  
Clerk

Transcript Ordered By:

Lisa A. Lynch, Assistant Deputy Public Defender

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

MARYANN BIELAMOWICZ, PROSECUTOR OF MERCER COUNTY  
BY: RANDOLPH D. NORRIS, ASSISTANT PROSECUTOR  
For the State of New Jersey

SCOTT KRASNY, ESQ.  
Attorney for Defendant, Whitfield

Susan Miller, C.S.R.  
Certified Shorthand Reporter

D

1 A Correct.

2 Q And what you're looking for is to attempt to make  
3 comparison between a known print and a found print; correct?

4 A In this case here, I was -- we developed the prints first.  
5 If a print was developed, then we would compare them to a known  
6 subject.

7 Q Well, the purpose of your job is to develop prints and  
8 then compare it to a known print; correct?

9 A Correct.

10 Q And the way you do that is to look for points of  
11 comparison; do you not?

12 A Yes.

13 Q He -- and when you're looking for points of  
14 comparison, the more points of comparison you find the better  
15 you're able to distinguish that print matches a known print;  
16 correct?

17 A Yes.

18 Q And would you agree with me that some surfaces are  
19 better for the taking of fingerprints than others?

20 A Yes, sir.

21 Q And obviously some of the surfaces that you examined  
22 were better for fingerprints; correct, in this case?

23 A Yes, sir.

24 Q And in fact in this case some of the types of surfaces  
25 that you checked out were, in fact, the type of surfaces that



1 you want to use to try to lift prints; correct?

2 A No, sir, they were -- it could be obtainable on those  
3 surfaces, yes, but it's not the perfect surface that we like to  
4 work with.

5 Q Oh, but it also wasn't something that would not have  
6 yielded a print; correct?

7 A The table that I did December 11th, what we look for is  
8 something non, a non-porous surface. The table had no  
9 treatment on it. It was painted which would actually absorb  
10 any, any perspiration that would be transferred onto that.

11 Q Disregard the table totally. Let's talk about the  
12 knives.

13 A Okay.

14 Q Knives are a non-porous subject; are they not?

15 A Except for the one with the masking tape, yes, sir.

16 Q The other non-porous areas. Now, let me ask you this,  
17 if I can. When -- do you know what a smudge print is?

18 A Yes, sir.

19 Q What is a smudge print?

20 A A smudge print is an arch -- the transfer of that  
21 perspiration -- if the subject, as he touched the surface, had  
22 any type of movement on that surface, that would smudge the  
23 ridged detail.

24 Q So if a person was perspiring a lot or their hand was  
25 moving, you wouldn't get a good print? It would be a smudge

1 when you -- when the ridges came up after your test; correct?

2 A Correct.

3 Q And if someone had picked it up and not handled it  
4 very gently for the State of New Jersey, they might have  
5 smudged the prints; correct?

6 A It's possible, yes, sir.

7 Q But you still might have picked up some ridges if, in  
8 fact, that had happened; correct?

9 A Yes.

10 Q You just wouldn't be able to have been -- to tell the  
11 amount of ridges for purposes of making a comparison?

12 A Number of characteristics, yes, sir.

13 Q Yeah. Did you find any of those on any of the these  
14 alleged weapons?

15 A I didn't have any ridge detail at all.

16 Q Now, you indicated that two of these homemade knives  
17 were approximately nine inches in length; did you not? Or  
18 excuse me, one was? I believe you said number 36, lab number  
19 36 was approximately nine inches in length?

20 A Yes, sir. Yes, sir.

21 Q How many other of these homemade knives that were  
22 submitted to you were approximately nine inches in length?

23 A All of them were in that, that immediate length.

24 Q All of them were in that general area; correct?

25 A Yes, sir.

# END OF RETAKE

## CERTIFICATION

THE MICROPHOTOGRAPHS APPEARING BETWEEN "START OF RETAKES" AND "END OF RETAKES" ARE TRUE COPIES OF THE ORIGINAL DOCUMENTS WHICH ARE ILLEGIBLE OR WERE OMITTED DURING THE FILMING.

*Kuldip Singh*

\_\_\_\_\_  
Signature of camera operator

Agency: *S. A. R. M*