FILED, Clerk of the Appellate Division, February 27, 2023, **A-000527-20**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-527-20
IND. NO. 19-12-01952-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From A Judgment Of Conviction Of The Superior Court of New Jersey, Criminal Division, Ocean Vicinage
v.	:	
ANTHONY BARKSDALE JR.,	:	
Defendant-Appellant.	:	Sat Below: Hon. Guy P. Ryan, P.J.Cr. Hon. James M. Blaney, J.S.C., and a Jury
	:	

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

On August 1, 2018, Defendant-Appellant Anthony Barksdale Jr. and Sevon Hill were charged under Ocean County Indictment Number 18-08-1281-I with the robbery, murder, and felony murder of Steven Stallworth, as well as several weapons and controlled-dangerous-substance (CDS) offenses. (Da1-9)[1] Anthony Barksdale Sr. was also charged with some of these CDS offenses in the same indictment, but he was not charged with any offenses related to the murder of Stallworth. (Da1-9)

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[1] The following abbreviations are used:
Da Defendant-Appellant's Appendix
1T – May 7, 2018 (Buccal Swab)
2T – June 21, 2018 (Buccal Swab)
3T – Sept. 24, 2018 (Buccal Swab)
4T – Oct. 11, 2018 (Buccal Swab)
5T – Oct. 26, 2018 (Buccal Swab)
6T – July 23, 2019 (Suppress. Mot.)
7T – Aug. 2, 2019 (Decision)
8T – Oct. 31, 2019 (Hill's plea)
9T – Nov. 19, 2019 (Compel Disc'y)
10T – Dec. 16, 2019 (Discovery)
11T – Jan. 27, 2020 (Discovery)
12T – Feb. 12, 2020 (Discovery)
13T – Feb. 27, 2020 (Miranda)
14T – Mar. 3, 2020 (Miranda)
15T – Mar. 3, 2020 (Jury Selection)
16T – Mar. 4, 2020 (Jury Sel. AM)
17T – Mar. 4, 2020 (Jury Sel. PM)
18T – Mar. 4, 2020 (In Limine)
19T – Mar. 5, 2020 (Jury Sel. vol. 1)
20T – Mar. 5, 2020 (Jury Sel. vol. 2)
21T – Mar. 5, 2020 (Miranda)
22T – Mar. 10, 2020 (Jury Selection)
23T – Mar. 10, 2020 (Mot. Tattoos)
24T – Mar. 11, 2020, vol. 1 (trial)
25T – Mar. 11, 2020, vol. 2 (trial)
26T – Mar. 12, 2020 (trial)
27T – Mar. 17, 2020, vol. 1 (trial)
28T – Mar. 17, 2020, vol. 2 (trial)
29T – Mar. 18, 2020, vol. 1 (trial)
30T – Mar. 18, 2020, vol. 2 (trial)
31T – Mar. 19, 2020, vol. 1 (trial)
32T – Mar. 19, 2020, vol. 2 (trial)
33T – Mar. 23, 2020 (adjournment)
34T – June 22, 2020, vol. 1 (trial)
35T – June 22, 2020, vol. 2 (trial)
36T – June 23, 2020, vol. 1 (trial)
37T – June 23, 2020, vol. 2 (trial)
38T – June 24, 2020 (trial)
39T – June 25, 2020 (deliberations)
40T – June 26, 2020 (deliberations)
41T – June 29, 2020 (verdict)
42T – Aug. 29, 2020 (sentence)

After Defendant had been arrested, but prior to the indictment, the State filed a motion to compel a buccal swab on April 30, 2018. (Da112) After extensive litigation and a number of interlocutory orders, Defendant consented to a blood draw in lieu of a buccal swab, and the court entered a conforming order authorizing a blood draw on November 1, 2018. (Da113-126)

On June 4, 2019, superseding Indictment Number 19-06-31-I was issued, charging all three aforementioned defendants with the same twenty-six counts as in Indictment 18-08-1281-I and adding three certain persons counts against Defendant and Hill for possessing firearms contrary to N.J.S.A. 2C:39-7(b). (Da10-22) On June 24, 2019, the Court granted the State's motion to sever Hill from Defendant and Barksdale Sr. from Indictment 19-06-31-I. (Da23)

On October 29, 2019, Hill and his attorney met with the Ocean County Prosecutor's office to give a recorded statement against Defendant. Hill had previously given statements on: March 5, 23, and 13, 2018 (24T172-19 to 173-3; 25T206-2 to 5; 26T5-21 to 6-15). In the October 29, 2019 statement, Hill alleged for the first time that he had agreed to pay Defendant to murder Stallworth. (30T275-16 to 22) Two days later, on October 31, 2019, Hill pleaded guilty to first-degree manslaughter, N.J.S.A. 2C:11-4(a)(1) as well as two firearms offenses and two CDS offenses. (8T5-4 to 23; Da70) In exchange, the State left the sentence to the Court's discretion; the Court told

Hill it would impose a sentence of no more than twenty years with an eight-five percent parole disqualifier pursuant to the No Early Release Act (NERA). (8T5-24 to 7-5; Da72-74) A requirement of the plea agreement was that Hill testify against Barksdale Jr or the State would move to vacate the plea. (32T41-18 to 42-8; 8T6-5 to 16; Da72)

As a result of Hill's plea, the State obtained superseding Indictment Number 19-12-1952-I, solely against Defendant, on December 11, 2019. (Da24-27) This indictment charged him with first-degree murder-for-hire, N.J.S.A. 2C:11-3(a) (count 1); first-degree conspiracy to commit murder, N.J.S.A. 2C:11-3(a)/N.J.S.A. 2C:5-2 (count 2); second-degree unlawful possession of a handgun (9mm Ruger), N.J.S.A. 2C:39-59(b)(1) (count 3); second-degree possession of a firearm (9mm Ruger) for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count 4); and second-degree possession of a weapon by a certain person, N.J.S.A. 2C:39-7(b) (Count 5). (Da24-27)

The State moved before the Honorable Guy P. Ryan, J.S.C., to admit Defendant's two statements recorded at the police station: March 6, 2018 (Da138-152) and March 12, 2018 (Da153-399). The Court reviewed the statements and heard testimony on February 27, March 3, and March 5, 2022. (13T; 14T; 21T) The Court entered an order admitting the March 6 statement in full, admitting the first half of the March 12 statement, and suppressing the

second half of the March 12 statement after Defendant invoked his right to silence halfway through this statement. (21T50-23 to 61-17; Da128-130)

The State tried Defendant by himself on Indictment 19-12-1952-I, commencing before Judge Ryan on March 11, 2020. (24T) On June 29, 2020[2], the jury delivered a verdict of guilty on all four counts with which they had been presented.[3] (41T8-19 to 10-13; Da28-29) The jury also specifically found that Defendant committed the murder of Stallworth "as consideration for the receipt of, or in expectation of the receipt of anything of pecuniary value." (41T9-3 to 7; Da28-29)

On August 19, 2020, Hill was sentenced as promised to the aggregate sentence of twenty years with eighty-five percent pursuant to NERA. (Da78) On that same date, Defendant, was sentenced to life without parole. (Da30; 42T42-1 to 4). A Notice of Appeal was filed on October 22, 2020. (Da34)

On September 9, 2022. Defendant filed a motion for a new trial in the Criminal Division based on the newly discovered evidence of an affidavit from Sevon Hill swearing that he shot Steven Stallworth and Defendant had no knowledge of his plan to do so. (Da38-44) On September 19, 2022, Defendant filed a motion in the Appellate Division, requesting a limited remand of his

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[2] The case was adjourned midtrial from March 23 to June 22 due to COVID-19. (33T75-13 to 16; 34T)

[3] The State dismissed the certain persons charge (Count 5). (41T18-23 to 19-3)

case to the Criminal Division for a hearing on his motion for a new trial. (Da45) On October 13, 2022, the Appellate Division entered an order denying this motion. (Da45) The trial court thereafter dismissed Defendant's motion for a new trial without prejudice on October 18, 2022. (Da46) Defendant filed a motion for leave to appeal the Appellate Division's order denying a limited remand with the Supreme Court, which was denied on January 10, 2023. (Da47-48)

STATEMENT OF FACTS

On March 5, 2018, Keon Cooper, who lived in Hampton Garden Apartment D-3 in Toms River, heard "a small crack" between 8:40 and 9:00 p.m. (24T51-9 to 52-10) When he attempted to leave his apartment about twenty to twenty-five minutes later, he saw a man lying in a pool of blood on the sidewalk outside his apartment and he called 911. (24T52-19 to 53-12) Detective Stephen Capoano of the he Ocean County Sheriff's Department's Crime Scene Investigation (CSI) Unit arrived around 9:45 p.m. to process the crime scene. (24T93-3 to 8; 27T39-14) He located a 9mm shell casing within four or five feet of the victim, as well as two spots of saliva right near the shell casing; he photographed and collected both, swabbing the saliva with a sterile Q-tip. (27T41-17 to 42-1, 49-14, 42-11 to 20)

At 10:00 p.m., Toms River Police Department Detective Duncan MacRae arrived and heard on the radio that Patrolman Ruiz had seen Sevon Hill walking toward Hampton Gardens from the Park Ridge Apartments. (24T168-13 to 17) MacRae knew Hill from having previously arrested him for narcotics and possession of a handgun and described at trial him "as a mid to higher level narcotics dealer." (24T168-21 to 169-6; 26T5-10)

The victim was identified as Steven Stallworth, who had been part of a narcotics surveillance investigation conducted by the Ocean County Prosecutor's Office and the U.S. Drug Enforcement Administration. (24T86-16 to 21, 171-9 to 13) Stallworth's street name was "S-Dot," and he was "a higher level distributor." (24T171-1 to 17) Stallworth's died from a gunshot wound to the head at near-contact range with his right cheek. (27T135-13 to 18)

Hill was transported to the Toms River Police Department for a recorded statement, wherein he told MacRae that he was staying in Room 517 of the Ramada Inn in Toms River at that time. (24T174-1 to 5) Hill signed a written consent to search his hotel room, his white Infiniti, and his black iPhone. (24T174-9 to 177-6, 178-8 to 182-17; 30T233-7 to 20, 234-13 to 24) A search of Hill's phone revealed that between 5:16 and 5:18 p.m. that day, he had been conducting an internet search regarding how to operate a 9mm Ruger handgun—the gun that had been used to shoot Stallworth. (26T16-21 to 18-7)

Detective O'Neill and Detective John Murphy went to the Ramada Inn at around 11:45 p.m. to conduct a search of Room 517 pursuant to Hill's consent, where they encountered Anthony Defendant and Miguel Gonzalez in the room. (24T177-8 to 178-2; 27T148-5) During a search of Room 517, police found various illegal drugs in a safe; Hill testified at trial that all the drugs belonged to him. (27T155-7 to 156-5; 29T120-13 to 178)

Murphy asked Defendant to come with him to the Toms River Police Department to to give a statement. (27T153-7 to 16; 29T123-15) When asked to give a rundown of his day, Defendant said he and Hill had spent most of the day in the room except for going out to get lunch and alcohol. (27T166-24 to 167-2) He said Hill left between 10:00 and 10:30 p.m. to see his children at Daly's apartment before their bedtime. (27T168-14 to 23, 174-1 to 3) Defendant said he had not spoken to or seen Hill since. (27T172-10 to 13)

On March 12, 2018, Toms River Police took additional recorded statements from both Hill and Defendant, after which both defendants were arrested and charged with murder. (25T205-22 to 206-5, 213-1 to 14)

On March 13, after he was charged with the murder, Hill initiated a third conversation with the police in which he told them that that Defendant shot and killed Stallworth. Hill said he put the gun that had been used to kill Stallworth in a gold Mercury Grand Marquis parked at the Silver Ridge

Apartments about a mile from Hampton Gardens. (26T6-6 to 24, 19-11 to 13, 42-1 to 5; 30T268-18 to 270-8) Police obtained and executed a search warrant for the Marquis, finding a Ruger .357 handgun and a 9mm handgun wrapped in a Nike hat. Hill told MacRae he put the 9mm there after Defendant used the gun to shoot Stallworth. (26T6-25 to 7-21, 18-20 to 20-2; 27T57-3 to 12) A firearm and toolmark examiner opined that the shell casing found at the scene next to Stallworth's body and the bullet recovered from Stallworth's skull were fired by the 9mm Ruger found in the Grand Marquis. (34T158-14 to 16)

A DNA analyst testified that Defendant was the source of the DNA profile obtained from the two saliva swabs found near Stallworth's body. (31T48-17 to 25) Regarding the collection of Defendant's DNA, Officer Jillian Marin of the Ocean County Sheriff's Office testified that on June 21, 2018, she was directed to take oral buccal swabs from Hill and Defendant; Hill complied but Barksdale refused. (34T178-19 to 181-2) She testified that Defendant specifically said to her that "it would be worse for him if he did give a sample." (34T182-6 to 7) Although Defendant had ultimately consented to give a blood sample in lieu of a saliva sample (5T3-14 to 7-11), the stipulation read to the jury only stated, "The parties hereby stipulate that defendant's blood sample provided to the New Jersey State laboratory for a DNA analysis

was taken in a medically acceptable manner and stipulate to the chain of custody." (36T45-2 to 6)

Hill testified against Defendant at the trial. (29T; 30T; 32T) He acknowledged that, had he been convicted of murder, he could have been sentenced to life in prison. (29T169-7 to 9) In exchange for his testimony, Hill's murder charge was amended to first-degree aggravated manslaughter—for which he faced a maximum sentence of thirty years—and he expected to receive a sentence of twenty years. (29T165-16 to 168-10) He admitted that the plea agreement required that he testify against Defendant and that he would not get the reduced sentence if he did not testify. (32T41-18 to 42-8)

Hill was previously in prison for three drug charges and a gun charge for which he was sentenced on August 21, 2015, to a prison term of three years flat running concurrent to three and a half years. (29T163-22 to 165-7; Da82-93) In that case, he had originally been charged with first degree operating a CDS production manufacturing facility, among other charges, and could have received up to forty years in prison. (32T33-15 to 35-22) He ended up with the greatly reduced sentence of three and a half years because he cooperated with the State—specifically with Detective MacRae, the Detective that repeatedly interviewed him in this case. (32T33-15 to 35-25) During those interviews,

MacRae had told Hill that he liked him, thought he was a good guy, and that he "knew" that Hill was not the shooter. (26T10-2 to 4; 32T55-17 to 21)

Hill testified that in mid-January, Defendant was staying with him at the Ramada Inn in Toms River and helping him sell drugs. At one point Hill asked Defendant if knew any new suppliers. (29T183-15) Defendant introduced Hill to a new supplier in New York, whose heroin was cheaper and better quality because it was uncut and had not yet been packaged. (29T184-10 to 24)

As of March 5, 2018, Hill owed Stallworth $18,000—a debt that he was several weeks late in paying. (29T174-12 to 175-2) Stallworth was trying to collect the debt by repeatedly calling Hill and showing up at Hill's former residence—Apartment D-4 in Hampton Gardens—where Hill's wife Dayna Daly resided. (29T175-3 to 176-2, 187-1 to 3) At first, Hill intended to pay Stallworth the amount he owed him. (29T186-1) But after Stallworth paid a visit to Daly in Apartment D-4, Hill decided to ask Defendant to "take care of" the debt by killing Stallworth, and in exchange Hill would pay Defendant the $18,000 he owed to Stallworth. (29T186-9 to 189-8)

On March 5, Hill called and messaged with Stallworth using his "trap phone"—the phone he used to sell drugs—to set up the meeting at Hampton Gardens. (30T215-17 to 216-22) Hill testified that, at 7:24 p.m., he and Defendant left the Ramada to go to Hampton Gardens. Hill identified himself

and Defendant leaving the Ramada Inn in a still of a Ramada surveillance video. (30T205-23 to 206-14) Hill parked in a nearby apartment complex and he and Defendant walked to Hampton Gardens apartment D-4. (30T207-3 to 24 to 211-15 to 25, T281-25 to 282-2) Hill called Stallworth, who told Hill he would be right there. (30T212-14 to 213-5, 217-6 to 12, 282-4 to 7) Hill brought his car to the Hampton Gardens parking lot here he and Defendant waited for Stallworth to arrive. (30T211-15 to 213-5, 282-7 to 9)

Hill said he saw Stallworth arrive and enter a covered walkway that led to apartment D-4. (30T213-6 to 11) Defendant got out of the car and approached Stallworth; the two men began talking and then entered the tunnel. (30T214-9 to 14) At 8:39 p.m., Defendant's phone called Hill's personal phone. (30T221-1 to 14) Immediately after, Hill called Defendant six times in a row but could not get through to him. (30T221-15 to 222-16, 223-15 to 20) At 8:42 p.m., Hill finally got through to Defendant, who told Hill he was standing next to Stallworth and asked where Hill was located. (30T222-15 to 22, 293-15 to 294-22) During this thirty-three-second call, Hill heard Defendant tell Stallworth that Hill was on his way to pay the debt. (30T294-2 to 18) At 8:47 p.m., the call logs showed a missed call from Stallworth's phone to Hill's second personal phone (-1972). (30T295-4 to 295-13) The logs also showed a three-second call at 8:47 p.m. and a text message from

Stallworth's phone to Hill's trap phone; the text message said, "Open the door." (30T217-13 to 219-2; 295-17 to 296-13; 32T6-15 to 7-17)

Hill testified that after the call, Defendant came running from the side of the building, jumped into Hill's car, and they left. (30T229-17 to 230-2) Defendant said to Hill, "I got him." (30T230-3 to 7) Before Hill left the parking lot, he pulled up to where he could see a body lying on a porch stoop. (30T230-8 to 18) Hill drove to the Silver Ridge apartments to get rid of the 9mm murder weapon by putting it in the Marquis parked in that parking lot. (30T203-8 to 15, 231-17 to 22) Defendant handed the gun to Hill; Hill put the gun in a Nike watchman hat and then threw the hat into the trunk of his car in the parking lot. At 9:36 p.m., Hill and Defendant returned to the Ramada Inn; Hill identified himself and Defendant in a still of a Ramada surveillance video with that time stamp. (29T206-15 to 208-15)

Cell site location data from Hill's personal phone and trap phone was generally consistent with Hill's testimony about where he was at each point during the evening of March 5. (36T49-4 to 91-9) Hill testified that Defendant was in possession of his trap phone from around 7:30 p.m. onward, but Hill's word was the sole evidence regarding who possessed his trap phone. (30T231-23 to 232-9) Location data from Defendant's phone placed him at the Ramada Inn before 7:30 and after 9:15 p.m., showed the phone moving south from the

Ramada Inn at 7:33 p.m., but it had no location data from 7:33 p.m. until 9:15 p.m. (36T75-24 to 76-23, 81-15 to 82-13, 90-5 to 17) A radiofrequency expert opined that the absence of location data on Defendant's phone from 7:33 to 9:15 p.m. could indicate the phone was off, on airplane mode, or on Wi-Fi. (36T77-6 to 81-14)

On March 8, Hill picked up Defendant in Ewing and they went to New York to go shopping. (30T243-8 to 20) According to Hill, Defendant suggested that they get matching tattoos with the slogan "Loyalty is Royalty" on their forearms. (30T250-18 to 251-16) After they got the tattoos, they discussed that the slogan meant that they were loyal to their shared secret regarding the murder of Stallworth. (30T251-25 to 252-15) Hill showed his tattoo to the jury. (30T259-25 to 260-2) Defendant got another tattoo—teardrops on his face—which, according to Hill, he said symbolized the murder of Stallworth. (30T253-1 to 19) At trial, the State admitted a photo it alleged depicted Defendant's face on March 5, 2018, without the teardrop tattoo (S-113), as well as a second photo it alleged depicted Defendant's face on March 9 with the teardrop tattoo (S-114). (26T73-13 to 77-6, 83-15 to 19; 30T260-7 to 24)

At trial, Ronald Talley testified that he met Defendant at the Ocean County jail in March 2018. (34T29-7 to 15) At that time, Talley was in jail

charged with two counts of second-degree eluding; he had already pleaded guilty to both charges and was waiting to be sentenced to two seven-year prison terms consecutive to each other and consecutive to a resentence on third-degree charge for which he had violated probation (VOP). (34T45-7 to 46-15, 48-11 to 21, 74-19 to 76-6) After Talley offered to testify against Defendant, the prosecutor agreed to a new plea agreement wherein both second-degree eluding charges were amended to third-degree and Talley expected he would receive time served at sentencing with no probation. (34T45-24 to 52-15, 107-2 to 108-13) Talley also said the State dismissed a separate drug paraphernalia charge against in him exchange for his cooperation in a separate murder case. (34T53-21 to 56-10, 104-12 to 15) Talley had previously served four prison terms and had been convicted of more than ten indictable offenses. (34T57-19 to 62-17; Da98-111) Talley had previously lied to the police about his name upon being arrested, giving the police his twin brother's name instead. (34T109-3 to 115-21) He admitted that he would lie to avoid prosecution. (34T115-22 to 24)

Talley claimed that Defendant told him that his father was Barksdale Sr., whom Talley knew, and that Talley got Defendant transferred to his cell after Defendant sent him a letter. (34T35-3 to 38-6; Da94-97) Defendant was only in Talley's cell for about two weeks. (34T38-9) Talley alleged, however, that

during this time Defendant confessed to Talley that he had killed Stallworth with a single shot to the back of the head at the James Street apartments. (34T40-14 to 41-7) Talley alleged Defendant told him various details about the murder, such as the weapon and car used and where they parked. (34T67-14 to 69-5) Talley initially denied having read about the murder of Stallworth in the newspaper but admitted that on March 15, 2018, he had placed a call to his fiancée where he told her he read about the murder "in the paper." (34T86-25 to 89-9) Talley also authenticated a letter he had given the prosecutor that he alleged Defendant wrote to him. (Da94-97) The letter said that Hill killed Stallworth because Stallworth had been going to the apartment where Daly lived with Hill's children and threatening her. (34T96-5 to 97-1; Da95-97)

LEGAL ARGUMENT

POINT I

BOTH OF DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED IN THEIR ENTIRETY BECAUSE HE WAS IN CUSTODY WHEN QUESTIONED WITHOUT MIRANDA WARNINGS ON MARCH 6, WHICH RENDERED INEFFECTIVE THE WARNINGS GIVEN PRIOR TO HIS INTERROGATION ON MARCH 12. (21T50-23 to 61-17; Da128-130)

The police interrogated Defendant twice in March 2018: once on March 6 and once on March 12. Defendant was advised of his Miranda rights before the March 12 interrogation but not before the March 6 interrogation. The court held that defendant's March 6th statement was admissible in its entirety because defendant was not in custody. (21T50-23 to 61-17; Da128-130) For the March 12th statement, the court found that defendant was initially properly advised of his rights and knowingly, voluntarily, and intelligently waived them. The court further found, however, that defendant invoked his right to silence halfway through the statement which the police failed to scrupulously honor. Thus, the court ordered that the initial portion of the March 12th statement was admissible in the State's case-in-chief, but that the portion after defendant invoked his right to counsel was inadmissible. (Da128-130; 14T86-3 to 108-8) The State played both the March 6th statement and the first part of

the March 12th statement for the jury. (27T162-18 to 182-11; 29T19-15 to 117-20)

The trial court first erred in finding that Defendant was not in custody during the March 6th statement. The failure of the police to advise him of his Miranda rights during that custodial interrogation required suppression of that statement. Furthermore, because his March 12th statement was a product of his un-Mirandized March 6th statement, the trial court further erred in failing to suppress his March 12th statement in its entirety. This erroneous admission of these two statements violated Defendant's Federal and State privilege against self-incrimination. U.S. Const. amends. V, XIV; N.J.S.A. 2A:84A-19; N.J.R.E. 503; State v. O'Neill, 193 N.J. 148, 176 (2007) (treating "our state privilege as though it were of constitutional magnitude").

In Miranda v. Arizona, the Supreme Court held that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. 436, 471 (1966). These warnings must be given during any "custodial interrogation, which the Court defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. Warning suspects of their rights is necessary due to the pressure inherent in an "interrogation of

individuals in a police-dominated atmosphere[.]" Id. at 445. This is because "any police interview of an individual suspected of a crime has coercive aspects to it." Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam).

New Jersey Courts have held that "custody" under Miranda "does not necessitate a formal arrest, nor does it require physical restraint in a police station, nor the application of handcuffs, and may occur in a suspect's home or a public place other than a police station." State v. Godfrey, 131 N.J. Super 168, 175 (App. Div. 1974), aff'd o.b. 67 N.J. 267 (1975). See Orozco v. Texas, 394 U.S. 324 (1969) (police must give Miranda warnings to defendant arrested and questioned in his own bedroom). "Whether a suspect has been placed in custody is fact-sensitive and sometimes not easily discernible." State v. Stott, 171 N.J. 343, 364 (2002). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances," State v. P.Z., 152 N.J. 86, 103 (1997). Relevant circumstances include "the time and place of the interrogation, the length of the interrogation, the nature of the questions, the conduct of the police, the status of the interrogator, the status of the suspect, and other such factors." State v. Pearson, 318 N.J. Super. 123, 133 (App. Div. 1999).

The central inquiry to establish custody is whether "a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."

J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011) (quoting Thompson v. Keohane, 516 U.S. 99 (1995)). A defendant is in custody if "a reasonable person in defendant's position, based on the nature of the police encounter would not have believed that he was free to leave." State v. O'Neal, 190 N.J. 601, 615 (2007). Our Supreme Court has held in State v. Ahmad that "the moment defendant was placed in the back of a patrol car and transported to the Newark PD, having been told that he could not leave the hospital with his parents, . . . a reasonable 17-year-old would no longer have felt free to leave." 246 N.J. 592, 612 (2021).

In Howes v. Fields, the U.S. Supreme Court held:

> When a person who is not serving a prison term is questioned, isolation may contribute to a coercive atmosphere by preventing family members, friends, and others who may be sympathetic from providing either advice or emotional support. And without any such assistance, the person who is questioned may feel overwhelming pressure to speak and to refrain from asking that the interview be terminated.
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> [565 U.S. 499, 512-513 (2012).]

see also United States v. Griffin, 922 F.2d 1343, 1352 (8th Cir. 1990) ("A frequently recurring example of police domination concerns the removal of the suspect from the presence of family, friends, or colleagues who might lend moral support."); United States v. Carter, 884 F.2d 368, 372 (8th Cir. 1989)

(police domination demonstrated when suspect isolated from co-workers who may have provided moral support);

In this case, the interrogation of Defendant on March 5, 2018, arose under the following circumstance. As of March 5, 2018, Room 517 at the Ramada Inn was Defendant's residence. He had been staying there with Hill since January or February of 2018. (29T161-3 to 11, 176-14 to 23, 179-4 to 22, 183-1 to 13) Defendant did not have a car, so Hill had picked him up in New York in January or February and brought him to the Ramada in Hill's car. Defendant stayed with Hill in Room 517 for that entire period other than a "couple of days" when he returned to New York. (29T176-14 to 177-4) His only means of transportation at that time was Hill's car. (29T189-17 to 190-2)

On March 5, Detective John Murphy of the Ocean County Police Department arrived at the Ramada Inn close to midnight to conduct a search of Room 517 with Detective O'Neill, Detective Santora, and at least one but "probably two" uniformed police officers. (21T29-4 to 17, 40-9 to 10; 24T177-8 to 178-2; 27T148-5) At least three of them were present outside room 517 when they knocked on the door. (21T24-1 to 7, 29-18 to 22) After knocking, the officers had to wait for around ten minutes for Barksdale Jr to open the door. (27T149-19 to 140-13, 152-23) Murphy informed Defendant that he had obtained consent from Hill—the person to whom the room was registered—to

search the room. (27T153-5 to 11; Da136-137) Defendant was required to leave the hotel room and was not permitted to return. (21T35-16 to 36-13)

Murphy asked Defendant to come back to the Toms River Police Department for questioning. (21T31-6 to 7; 27T153-11 to 13) Murphy testified that Defendant was not a suspect (21T24-13 to 16) and if Defendant had told them he did not want to speak with them, they "weren't going to force him to do so," but he did not testify that he told this to Defendant. (21T30-21 to 22) Police also encountered Miguel Gonzalez in the room, a friend of Defendant's with whom he smoked marijuana; Gonzalez was also brought to the police station for questioning separately from Defendant. (Da169-170; 24T177-14 to 17, 186-15 to 19)

The police transported Defendant from the Ramada Inn to the police station in a police vehicle. (21T24-9 to 10, 38-16 to 23) Defendant could not remove any items from Room 517 and the police informed Defendant he could not return to the room. (Da177-178; 21T35-16 to 36-13, 39-3 to 12; 29T42-23 to 43-3) Defendant had no vehicle at the police station that he could later use to leave, although after the interrogation he was able to call his father to come pick him up. (21T31-8 to 15)

At the station, Detective Murphy and O'Neill interrogated Defendant for between thirteen and fourteen minutes without informing him of his Miranda

rights. (21T24-11 to 12, 27-15 to 20; Da138-152) During the interrogation, the police asked Defendant for a timeline of when and where he was that evening, what clothing he was wearing that evening, a timeline of his phone calls with Sevon Hill, and what car Hill was driving (21T31-22 to 33-20).

Under the totality of the circumstances, it is clear that Barsksdale Jr. "would not have believed that he was free to leave," O'Neal, 190 N.J. at 615 based on the "significant deprivation of the [his] freedom of action." Stott, 171 N.J. at 365. The police showed up at Defendant's residence, Room 517, and told him they had Hill's consent to search the room. He was not allowed to be present for the search, was not allowed to retrieve any items, and was not allowed to return to the hotel room. He was transported to the police station in a police vehicle and had no car he could use to thereafter leave the police station. Defendant's friend Gonzalez, the other occupant of the room, was also transported to the police department to be interrogated; the two were interrogated separately, isolated from each other.[4]

Finally, although Murphy insisted that they would not have forced Defendant to submit to interrogation if he refused, there was no testimony that Murphy told Defendant that he was "at liberty to decline to answer questions."

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[4] Indeed, the police seemed to acknowledge that such circumstances warranted Miranda warnings by mistakenly writing in the homicide Investigation Report that Defendant was advised of his Miranda rights. (Da135)

Griffin, 922 F.2d at 1350 (citing Minnick v. Mississippi, 498 U.S. 146, 156 (1990)). Because Defendant was in "custody" for Miranda purposes during the March 6th interrogation, the failure to advise him of his Miranda rights required suppression of his statement. 384 U.S. at 444.

Furthermore, because Barksdale's March 12 statement was a product of his un-Mirandized March 6th custodial statement, this statement must be suppressed under O'Neill. 193 N.J. 148. The Court in O'Neill held:

> when Miranda warnings are given after a custodial interrogation has already produced incriminating statements, the admissibility of post-warning statements will turn on whether the warnings functioned effectively in providing the defendant the ability to exercise his state law privilege against self-incrimination. In making that determination, courts should consider all relevant factors, including: (1) the extent of questioning and the nature of any admissions made by defendant before being informed of his Miranda rights; (2) the proximity in time and place between the pre- and post-warning questioning; (3) whether the same law enforcement officers conducted both the unwarned and warned interrogations; (4) whether the officers informed defendant that his pre-warning statements could not be used against him; and (5) the degree to which the post-warning questioning is a continuation of the pre-warning questioning.
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> [193 N.J. at 180–81.]

Here, right from the beginning of the March 12 interview, the detectives referenced what Defendant told them "the other night," meaning March 6. (Da157) Their first substantive question related to the investigation of

Stallworth's murder was to ask Defendant to tell them everything he did on March 5, to which Defendant responded that he had already told them what he did in his March 6 statement. (Da159) Defendant had asserted on March 6th that he did not leave the Ramada at all that evening (Da138, 142, 144), an assertion he was then stuck with in his March 12th statement even when police confronted him with surveillance video from the Ramada. (Da190) This proved critical, as the State argued in closing that the Ramada Inn surveillance proved that Defendant had lied about this assertion. (38T148-16 to 20) Additionally, in Defendant's March 6th statement, he admitted (1) that he bought drugs from Hill that he then sold and (2) that Hill obtained the drugs from "up North" (Da149)—assertions that ultimately served as a core component of the State's theory. (38T147-16 to 148-2, 186-12 to 17)

Based on an evaluation of the O'Neill factors, the second statement to the police should have been suppressed. Although there was a six day gap between the warned and unwarned statement (factor 2), Barksdale had already made a crucial admission about drug dealing in his March 6 statement (factor 1). Detective Murphy conducted both interrogations (factor 3) and did not warn Defendant that his March 6 statement could not be used against him (factor 4). Finally, much of the March 12 interrogation was a continuation of

the March 6 interrogation, challenging Defendant's assertion that he had never left the Ramada that evening (factor 5).

Beyond the O'Neill factors themselves, "courts must view the totality of the circumstances in light of the relevant factors and then determine," O'Neill, 193 N.J. at 181, whether the State has met its burden to show that Defendant's "waiver was knowing, intelligent, and voluntary beyond reasonable doubt." State v. Carrion, 249 N.J. 253, 284 (2021). One additional factor courts can consider in assessing the admissibility of a defendant's subsequent statement is whether police "affirmatively misled defendant as to his 'true status,'" State v. Diaz, 470 N.J. Super. 495, 518 (App. Div. 2022), although there is no bright line rule requiring suppression in such a case. State v. Sims, 250 N.J. 189 (2022). Here, Detective Santora acknowledged that they had probable cause to arrest Defendant for Stallworth's murder at the time of his March 12 statement. (14T28-21 to 25) Yet detectives affirmatively misled defendant as to his "true status," which weighs against finding a knowing and intelligent waiver.

For these reasons, this Court should reverse the trial court's March 10, 2020 order admitting the March 6 statement and first part of the March 12 statement and remand for (1) an order suppressing both statements in their

entirety and (2) a new trial during which the State would not be able to introduce either statement in its case-in-chief.

POINT II

JUROR 12 SHOULD HAVE BEEN DISMISSED BECAUSE SHE AND HER HUSBAND KNEW THE VICTIM'S FAMILY, A STATE'S WITNESS, AND THE CHIEF OF POLICE OF THE TOMS RIVER POLICE DEPARTMENT, AND BECAUSE SHE RECEIVED INFORMATION ABOUT THE CASE FROM HER HUSBAND. (Not Raised Below)

On the first day of trial, it became clear that Juror 12 was so enmeshed in the State's case that the risk of partiality had reached an unacceptable level, requiring her to be excused. Over two occasions on that day, the Court first learned that Juror 12 knew the victim's family members because their churches fellowshipped together and later learned that Juror 12 knew the State's first witness, Keon Cooper, who was crucial to the State's theory of the time of the murder. Furthermore, Juror 12 had disclosed during voir dire that her husband was close friends with the Toms River Police Chief and she knew him as well. She also revealed that her husband had received "all the information about the trial," and the judge failed to definitively ascertain the precise scope of the information Juror 12's husband in turn relayed to her. Because the court's failure to adequately question and excuse Juror 12 ran afoul of the court's independent obligation to ensure a fair and impartial jury, this Court should

reverse Defendant's convictions and remand for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10.

During voir dire, Juror 12 disclosed that her husband has a relationship with Mitch Little, the Chief of the Toms River Police Department. (16T92-1 to 16) She stated that she had met Chief Little a few times but that she did not have a relationship with him. (16T92-10 to 12) Juror 12 was seated without objection. (16T97-8 to 10, 132-22 to 134-12; 22T105-21 to 106-9)

The day before trial began, Juror 12 called the judge's chambers to report that "that she may have come into possession of information today, which may prevent her from continuing." (23T101-12 to 16) The following day, just before the jury was sworn, the judge called Juror 12 to sidebar to ask her what had come up. (24T6-1 to 7) Juror 12 stated,

> Yesterday on my way home I had a conversation with my husband. He found out, a friend of ours told him that I was potentially serving on this trial. Apparently one of the jurors that was excused early on is a friend of that, friend of ours, gave him all the information about the trial and then described me. . . . And then the second part of that was my husband knows about this case because of his employment at the church in Freehold.
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> [(24T6-8 to 24)]

Further inquiry revealed that Juror 12's husband knew about Stallworth's murder because of her husband's prior employment as a musician

at the church in Freehold that Stallworth's family attends, and that her husband personally knew some of Stallworth's family members because Juror 12's church "fellowshipped" with Stallworth's family's church "several times throughout the year." (24T7-17 to 8-9) Juror 12 said she also knew Stallworth's family members herself because their churches "fellowship[ped] a lot," although she said she did not know which of the members of Stallworth's family's church were Stallworth's family members. (24T9-2 to 7)

The Court failed to adequately ascertain the scope of what "information" that Juror 12's husband gave her:

> THE COURT: Did your husband tell you anything?
>
> JUROR NO. 12: I told him to stop giving me any information, I didn't want any information. I wanted to preserve whatever integrity that was --
>
> THE COURT: How much did he tell you, just that the family members attend the church?
>
> JUROR NO. 12: He was concerned now that he knew there was some kind of connection there, maybe an issue later down the line because apparently I know the people and they would be able to recognize me and vice-versa in the event they attended. The concern is I don't know if there's going to be an issue later on after the trial, but he didn't tell who they were, didn't want to know.
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> [(24T6-25 to 7-15)]

While the Court attempted to find out how much Juror 12 learned from her husband asked if it was limited to the fact that Stallworth's family members

attended the church at which he had been employed, Juror 12 never actually answered "yes" or "no" to that question, and the Court then moved on to assessing whether she felt her and her husband's connection to the victim's family would impact her impartiality. (24T7-5 to 15)

Juror 12 stated did not feel this connection prevented her from being fair and impartial, that she did not disclose it to her fellow jurors, and that it would not prevent her from voting not guilty if the State failed to prove its case beyond a reasonable doubt. (24T9-13, 10-6 to 24) Some of Stallworth's family members were in the audience that day, but Juror 12 did not recognize any of the people in the audience that day. (24T11-4 to 24) Defense counsel did not object to Juror 12 continuing to sit for the trial, and the court declined to excuse her. (24T13-3 to 14)

Later that same day, after the State's first witness, Keon Cooper, testified, Juror 12 then revealed that she knew Cooper because he attended Juror 12's church when Cooper was younger, that she knew his mother, and that one of his cousins worked closely in Juror 12's ministry. (24T111-19 to 112-8) Juror 12 said told the court that this did not change the answers to her prior questions about whether she could be fair and impartial to both sides. (24T112-12) Defense counsel did not voice any objection, and the court allowed Juror 12 to continue sitting for the trial. (24T114-6 to 14)

The Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to an impartial jury during trial. State v. R.D., 169 N.J. 551, 557 (2001). Criminal defendants are "entitled to a jury that is free of outside influences and [that] will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." State v. Williams, 93 N.J. 39, 60 (1983).

"[I]f during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." R.D., 169 N.J. at 557-58 (citing State v. Bey, 112 N.J. 45, 83-84 (1988)). As the Court stated in State v. Fortin, "We think it ill-advised, as a general rule, to seat any juror who is acquainted with a murder victim's loved ones, no matter how convincingly that individual proclaims his or her ability to remain impartial." 178 N.J. 540, 629 (2004). The Court continued, "It is better to err in favor of removing a juror where there is evidence of potential partiality or bias, than to permit that juror to sit in judgment, leaving the fairness of a capital trial in doubt." Id. at 630. The trial court in this case should have excused Juror 12 as soon as she revealed that she knew Stallworth's loved ones based on Fortin alone.

Although Juror 12 stated that her and her husband's connection to Stallworth's family did not impact her ability to be fair and impartial, "it is not enough that the juror disclaimed any partiality for, as the court observed in [State v. Jackson], sincere as the disclaimer may be 'it runs counter to human nature.'" State v. Deatore, 70 N.J. 100, 105 (1976) (quoting State v. Jackson, 43 N.J. 148, 160 (1964)). "The sufficiency of a stated disclaimer of any partiality in circumstances such as here involved would not only seem to run 'counter to human nature' as above, but to fly 'in the face of the plain reality of the courtroom.'" Id. at 106 (quoting State v. Miller, 67 N.J. 229, 245 (1975) (Clifford, J., concurring and dissenting in part)).

The grounds for excusing Juror 12 despite her assurances of impartiality rose even higher after it was revealed that Juror 12 not only had connections to Stallworth's family, but also to the State's first witness, Keon Cooper. See Deatore, 70 N.J. at 106 (stating that trial courts should excuse jurors who have "connections with a party or witness"). In R.D., a "juror approached the court with his concern . . . based on his out-of-court knowledge of [a] witness." 169 N.J. at 562. "The juror stated that he did not recognize her name from the witness list and did not realize that he knew the witness until he saw her when she testified." Ibid. "After consultation with both counsel, the trial court excused the juror." Id. at 556. The facts of R.D. are similar to this case in that

Juror 12 did not realize she knew Keon Cooper until after he testified. However, while the tainted juror in R.D. was excused and did not deliberate, Juror 12 was a deliberating juror in this case.

Although defendant did not request that Juror 12 be excused, the Supreme Court in Deatore, held that a trial court should "handle the situation of a prospective juror having connections with a party or witness which might possibly affect impartiality is [by] excus[ing] the juror by consent at the outset, with that course suggested by the judge if counsel do not propose it." 70 N.J. at 106 (emphasis added). "A trial judge has an independent obligation to protect th[e] right [to a fair and impartial jury], regardless of inaction by counsel or the defendant." State v. Irby, 347 P.3d 1103, 1108 (Wash. App. 2015); Frazier v. United States, 335 U.S. 497, 511 (1948) ("[I]n each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality."); Williams, 93 N.J. at 62-63 ("[T]he court has an independent duty to act swiftly and decisively to overcome the potential bias of a jury from outside sources."). "Accordingly, the . . . trial judge has the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause." United States v. Torres, 128 F.3d 38, 43 (2d Cir. 1997).

The trial court failed to fulfill its independent duty to ensure a fair and impartial jury by failing to excuse Juror 12 when she revealed her husband's connection with Stallworth's family members and that she herself knew Stallworth's family members because their churches fellowshipped together a lot. Even if Juror 12's connection to Stallworth's family members was not sufficient by itself to trigger the trial court's independent responsibility to excuse Juror 12, the revelation that she also knew he Keon Cooper and his mother because he attended Juror 12's church when Cooper was younger, in combination with Juror 12's connection to Stallworth's family members, surely triggered this duty. And even if these two connections were insufficient by themselves, when considered along with Juror 12's connection to the Chief of the Toms River Police Department, it was clear that Juror 12 was too enmeshed with the State's case to be impartial, despite any assurances to the contrary. Cf. Jackson, 43 N.J. at 160 (The juror's "close relationship with members of the Elizabeth police department, particularly Detective Lynes, suggests inability to deal with the evidence with the measure of impartiality required by the law.").

Finally, even if the error in failing to sua sponte excuse Juror 12 did not, by itself, rise to the level of reversable error, reversal is required when the court's failure to excuse Juror 12 is considered in the context of the court's

additional failure to ascertain the "specific nature of the extraneous information" that Juror 12 learned from her husband. R.D. 169 N.J. at 560. In R.D., "[t]he juror informed the court that as the victim's mother's nurse he 'overheard things about her relationship with her family.' The court did not delve deeper into the matter." Id. at 563. Here, when Juror 12 told the Court she had spoken to her husband after a friend of theirs "gave him all the information about the trial," the Court attempted to find out what Juror 12's husband had told her but failed to actually get a clear answer on this. When the Court first asked whether Juror 12's husband told her anything, Juror 12 said she told him to stop giving her information but did not reveal what he had told her. (24T6-25 to 1) When the Court followed up to ask how much her husband told her and whether it was only that Stallworth's family members attended the church they fellowshipped with, Juror 12 ultimately said her husband "didn't tell who they were," but did not answer the Court's question about what else her husband might have told her or whether it was limited to the fact that Stallworth's family members attended that church. (24T7-5 to 15) Accordingly, the trial court failed to abide by its duty as set forth in R.D. that "[a]n appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous

information." 169 N.J. at 560. Here, the Court failed to definitively ascertain the full scope of the extraneous information conveyed to Juror 12.

Because Juror Twelve was a deliberating juror (41T11-11), her connection to the victim's family, witness Keon Cooper, and Chief of Police of Toms River had the capacity of influencing the jury in reaching its verdict. See Panko v. Flintkote Co., 7 N.J. 55, 61 (1951) (holding the test for whether a new trial should be granted because of an irregular influence is "not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so"). Accordingly, this Court should reverse and remand for a new trial.

POINT III

THE ADMISSION OF TESTIMONY THAT DEFENDANT REFUSED A BUCCAL SWAB AND ALLEGEDLY MADE A CONTEMPORANEOUS ORAL STATEMENT AS PROOF OF CONSCIOUSNESS OF GUILT VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE DEFENDANT ULTIMATELY CONSENTED TO A BLOOD DRAW AND HAD HONEST (THOUGH MISGUIDED) REASONS FOR OPPOSING THE BUCCAL SWAB. (Partially raised below, 18T27-20 to 32-5)

After a CODIS hit suggested Defendant was the source of the DNA in the saliva found at the scene, the State moved to compel a buccal swab from him. Defendant directed his attorney to file several briefs opposing the State's

application and refused to provide the swab, stating that he believed the State was acting nefariously because it had already obtained a buccal swab from him upon his arrest and that he had not seen any lab reports regarding the CODIS hit. After being provided with the desired lab reports, he consented to give a blood sample in lieu of a buccal sample. Despite this, the trial court allowed the State to present the testimony of Officer Jillian Marin of the Ocean County Sheriff's Office that Defendant had refused to give a buccal swab and had allegedly told her that "it would be worse for him if he did give a sample." (34T182-6 to 7) Although a stipulation was read to the jury that a blood sample was taken, the jury was never informed that Defendant consented to the blood draw. Moreover, the court did not give a limiting instruction to explain to the jury the circumstances under which it could or could not infer consciousness of guilt from this alleged statement and refusal, and gave only a partial instruction under State v. Hampton and State v. Kociolek. The admission of Marin's testimony, coupled with the failure to inform the jury that Defendant consented to the blood draw and the incomplete jury instructions, violated due process, fundamental fairness, and deprived Defendant of a fair trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; N.J.R.E. 404(b).

On April 19, 2018, the State filed motions to compel a buccal swab and "fingerprints/major case prints" from Defendant and Hill. (Da112-113) The parties argued the motion before the Honorable James M. Blaney, J.S.C., on May 7, 2018. (1T) Defendant himself raised an objection because a buccal swab was already was taken from him at the jail at the time of his arrest; while the record is not entirely clear, it appears that Defendant believed the reason the swab taken at the jail could not be used (and thus the reason the State was seeking to obtain another swab) was an improper method the State had used to obtain a buccal swab in the jail. (1T7-12 to 22) At Defendant's request, his counsel had served a subpoena on the jail demanding they turn over the video showing him being swabbed; Defendant wanted the Court to consider this video before deciding the State's motion, but video had not been obtained by May 7.[5] (1T4-10 to 20) Defendant tried to further explain his position but was cut off by the Court. (1T17-1 to 18-4)

Judge Blaney orally granted the State's motions on May 7, 2018. (1T16-2 to 3) On May 11, 2018, Judge Blaney entered written orders both granting the State's motions to compel buccal swabs from Defendant and Hill and orders staying these aforementioned orders to allow defendants to file motions for leave to appeal with the Appellate Division. (Da114-117) Hill's attorney

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[5] The record does not indicate whether the video was ever obtained.

filed a motion for leave to appeal but Defendant's attorney did not; on June 12, 2018, the Appellate Division denied leave to appeal. (Da118)

On June 21, 2018, the parties appeared before Judge Ryan, who vacated Judge Blaney's orders staying the order compelling the defendants to submit to buccal swabs and case prints reinstating these orders to compel. (2T6-24 to 7-6; Da119, 121) The Court went off the record so the exemplars could be taken; when the Court resumed proceedings on the record, the prosecutor stated that Sergeant Dugan from the Ocean County Sheriff's Department's Criminal CSI team attempted to take a buccal swab and major case prints from Defendant but Defendant "refused repeatedly to provide either of those two samples." (2T15-13 to 18) Defendant's counsel said that Defendant was continuing to raise his objection based on the fact that a buccal swab was previously taken from him at the jail. (2T15-20 to 24) The Court then entered an order reflecting Defendant's refusal and directing the State to "apply to the court for any appropriate relief to compel the defendant to cooperate." (Da120)

On September 24, 2018, after the State filed a motion for an order permitting the State to use reasonable force to obtain the buccal swab, the Court directed the State to file a brief setting forth the legal authority as well as what specific procedure would be used. (D1223; 3T7-1 to 10-25) Defendant's counsel indicated that Defendant still believed that the buccal

swab that was taken from him at the jail should be sufficient for the State and that it was unnecessary for them to take a second sample; it appeared Defendant believed that the State's request for a second sample meant something nefarious was going on. (3T5-16 to 24)

On October 11, when Defendant was allowed to speak, he explained his opposition as follows:

> [The prosecutor] didn't present a factual laboratory report saying he need my DNA for comparison to anything. For all I know is—it could be nothing. I could tell you anything, too, and you'd be convinced by what I'm saying. That's exactly what I explained to my lawyer.
>
> If he can print the laboratory report saying that this is what he found at the crime scene and they need to compare fingerprint, compare my DNA, I'll, I'll comply. Other than that, I'm not—if I stand for nothing, I'm not a fool for anything.
>
> [(4T30-3 to 13)]

After Defendant explained this to the Court, defense counsel, at the suggestion of the prosecutor, agreed to visit Defendant at the jail that week to review with him the following discovery, responsive to his stated request: "CIU reports which demonstrate that saliva was collected and actual photographs of saliva being collected next to the body, as well as a CODIS report stating that that saliva, when a buccal reference sample was submitted . . . [it] came back as matching a DNA profile of an Anthony Barksdale, Jr., from New York State."

(4T30-17 to 31-22) The Court granted the State's motion to use reasonable force to obtain the buccal swab but stayed the order to allow defense counsel to show Defendant the requested discovery so he could refusal to cooperate. (4T32-12 to 19; Da124-125)

On October 26, 2018, after Defendant reviewed the documents he had requested, he agreed to provide a blood sample in lieu of a buccal swab. (5T3-14 to 7-11) The Court issued a corresponding order (Da126-127; 5T8-20 to 23), and a blood sample was taken. (36T45-2 to 6)

The State filed a motion in limine to permit Officer Jillian Marin of the Ocean County Sheriff's Office as to a statement that Defendant allegedly made to her when she attempted to take a buccal swab. (18T4-6 to 13) The State's proffer was that Defendant "said in response to the request for the oral buccal that that would be bad for him to agree to that." (18T28-2 to 4) Defense counsel argued that this was not a statement against interest (18T27-20 to 23) and requested a testimonial hearing because she believed it would be unfair for the State to be able to ask the jury to assume that Defendant's statement "meant was he would be found guilty by that saliva" without allowing her to explain Defendant's actual concerns about taking saliva as opposed to the blood sample he ultimately consented to. (18T30-25 to 31-6) The court considered the arguments of the parties and issued a preliminary ruling that

"that sounds like it's coming in" as evidence of consciousness of guilt, but wanted to make sure he was not missing anything that would require a 104 hearing to ensure that Defendant would not be surprised by Marin's testimony at trial. (18T31-20 to 32-5) The court also ruled that what Marin would be allowed to testify to was

> going to be her recollection of what he said because his oral statement is going to come in with a cautionary instruction about an oral statement has to be reviewed with caution because of the possibility that even one word being changed could change the meaning of the statement.
>
> [(18T31-9 to 15)]

As the court had ruled that Marin's testimony regarding Defendant's statement was coming in so long as it was limited to that one statement, the only question left was whether a 104 hearing was needed. The following day, defense counsel and the State appeared to have reached an agreement wherein Marin would testify just to Defendant's alleged words, that no testimonial hearing was necessary because each party could proffer their respective interpretations at closing. (21T7-8 to 15) The State then indicated it wanted to elicit from Marin not only Defendant's alleged words, but also that Defendant refused to give a buccal swab. (21T7-16 to 24) Defense counsel objected to allowing Marin to testify that Defendant refused because it would be an impermissible opinion. (21T11-17 to 12-8) After further representations by the

State, defense counsel expressed confusion as to what precisely the State wanted to introduce and expressed concerns that Defendant's decision to continue to litigate the State's application to compel a buccal swab rather than simply submit could "introduce stuff that he discussed with his lawyer." (21T14-14 to 18) Defense counsel further protested, "you can't just leave it as he refused to give a sample, but, oh, well we won't mention that he did give a blood sample." (21T15-18 to 20) The court reassured counsel that the jury would hear that Defendant gave a blood sample because the State would have a DNA expert testify that there is a blood sample. (21T15-21 to 23) The court attempted to clarify and asked defense counsel whether she wanted to proceed with the 104 hearing, to which counsel responded, "I don't think that's necessary as long as it's just that one statement and not anything—her drawing an opinion as to what he meant." (21T17-12 to 18-7)

At trial, the court permitted Officer Jillian Marin of the Ocean County Sheriff's Office to testify that on June 21, 2018, when she was directed to take oral buccal swabs from Hill and Defendant, Hill complied but Barksdale refused. (34T178-19 to 181-2) She further testified that Defendant specifically said to her that "it would be worse for him if he did give a sample." (34T182-6 to 7) The State emphasized this point in closing; especially because Defendant's theory was that Hill, not Defendant, shot Stallworth, the State

emphasized twice that while Hill had agreed to give a buccal swab, Defendant had refused. (38T178-5 to 17, 191-2 to 3)

Although a stipulation was read to the jury regarding Defendant's blood sample, no facts were admitted into evidence informing the jury that Defendant had consented to give a blood sample in lieu of a saliva sample; Stipulation 3 only said, "The parties hereby stipulate that defendant's blood sample provided to the New Jersey State laboratory for a DNA analysis was taken in a medically acceptable manner and stipulate to the chain of custody." (36T45-2 to 6)

Our courts have long held that "[d]eclarations subsequent to the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence or tend to establish intent are relevant and admissible." State v. Rechtschaffer, 70 N.J. 395, 413 (1976). However, such statements must be analyzed under the four factors set forth in State v. Cofield to assess the admissibility of evidence under Rule 404(b): the "evidence 'must [1] be admissible as relevant to a material issue; . . . [2] [be] similar in kind and reasonably close in time to the offense charged; . . . [3] be clear and convincing; . . . [and 4] [t]he probative value of the evidence must not be outweighed by its apparent prejudice.'" State v. Goodman, 415 N.J. Super. 210, 233 (App. Div. 2010) (quoting Cofield, 127 N.J. 328, 338 (1992). This

Court has previously held that such evidence is only admissible when it "is intrinsically indicative of a consciousness of guilt, such as unexplained flight, or an unusual exhibition of remorse for the victim of the crime, or the switching of clothes while a cellmate before a lineup." State v. Phillips, 166 N.J. Super. 153, 159-160 (App. Div. 1979)

It is certainly true that the Supreme Court has held that a drunk-driving suspect's refusal to take a blood-alcohol test, after a police officer had lawfully requested it, was not testimony coerced by the officer and was therefore not protected by the suspect's Fifth Amendment right against self-incrimination. South Dakota v. Neville, 459 U.S. 553, 563-64 (1983). However, "[w]hether a refusal to provide forensic evidence would permit a rational inference of guilt depends (like flight) on the circumstances, and evidence of such a refusal might well be impermissible under some circumstances." United States v. Harris, 660 F.3d 47, 52 (1st Cir. 2011); cf. State v. Mann, 132 N.J. 410, 418-19 (1993) ("For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt.") (internal quotation marks omitted).

Here, there were decidedly not "circumstances present and unexplained which . . . reasonably justify an inference that [Defendant's refusal to give a buccal swab] was done with a consciousness of guilt." Mann, 132 N.J. at 418-19. Defendant repeatedly asserted his (albeit mistaken) belief that because the State had already obtained a saliva sample from him when he was arrested, and that the State's request for a second sample meant something nefarious was going on. (3T5-16 to 24) Defendant also explained that he had never seen any lab report indicating what had been found at the crime scene and justifying their stated need to compare his DNA. (4T30-3 to 13) Once Defendant had been provided with the requested lab report, he agreed to provide a blood sample in lieu of a buccal swab. (5T3-14 to 7-11) No matter how misguided the court may have found Defendant's opposition to the buccal swab, he repeatedly explained his reasons and ultimately consented to willingly give an alternative DNA sample—the blood sample that the State used to link Defendant to the saliva found at the crime scene. All in all, the circumstances of Defendant's refusal to give the buccal swab simply did not reasonably justify an inference that it was done with a consciousness of guilt.

Undoubtedly, the State will point to Marin's testimony that Defendant said to her that "it would be worse for him if he did give a sample" as evidence of consciousness of guilt. (34T182-6 to 7) But given Defendant's (albeit

mistaken) belief that the State was up to something nefarious or "shady" by requesting a second sample after they had obtained one at arrest, it is clear that any such statement was an expression of that belief, rather than evidence of consciousness of guilt. Furthermore, it is highly questionable whether this statement even occurred as Marin alleged it did. There is a transcript from the June 21 proceeding immediately before and after Marin alleges that Defendant made this statement, but nothing about any such statement was placed on the record and Marin's name was not even mentioned; the prosecutor asserted that when Defendant refused, it was Sergeant Dugan, not Marin, who had attempted to take the buccal swab. (2T15-13 to 18) At the very least, this discrepancy certainly undercuts the State's burden to present "clear and convincing" evidence of this alleged statement. Goodman, 415 N.J. Super. at 233.

Even if this Court were to find that Marin's testimony as to Defendant's words did reasonably justify an inference of consciousness of guilt, this Court should find that it failed to satisfy the fourth Cofield prong, which requires that "'[t]he probative value of the evidence must not be outweighed by its apparent prejudice.'" Ibid (quoting Cofield, 127 N.J. at 338). Here, any probative value was extremely limited in light of the explanations Defendant gave for his refusal (3T5-16 to 24; 4T30-3 to 13) and the fact that he

ultimately consented to give a blood sample instead. (5T3-14 to 7-11) This minimal probative value should have been weighed against the prejudice, wherein the State emphasized twice that while Hill had agreed to give a buccal swab, Defendant had refused, to rebut Defendant's theory that Hill, not Defendant, shot Stallworth. (38T178-5 to 17, 191-2 to 3) The prejudice of this testimony thus clearly outweighed any miniscule probative value.

The prejudice of Marin's testimony was heightened by the fact that this occurred in the context of Defendant litigating the State's motion to compel a buccal swab—litigation that the record makes clear he honestly (though mistakenly) believed he had the right to continue to litigate. While a trial court would be well within its right to cut off further litigation of a motion once the court has decided the motion and finds there is no legal basis for any further litigation, the court in this case allowed further briefing to be filed by defense counsel. It violates principles of due process and fundamental fairness to allow as consciousness of guilt an event that transpires in the course of litigating a motion. Cf. Simmons v. United States, 390 U.S. 377, 394 (1968) (a defendant's testimony at a suppression hearing is not admissible at trial to prove his guilt); State v. Elkwisni, 384 N.J. Super. 351, 392 (App. Div. 2006) (a defendant's testimony at a Miranda hearing would not be admissible in the State's case-in-chief to prove guilt); Commonwealth v. Chapman, 136 A.3d 126, 131 (Pa.

2016) ("[T]he admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is problematic.")

Even when a post-offense statement is deemed admissible to prove consciousness of guilt, "the Court has mandated "a strong limiting instruction . . . informing the jury that it should not draw any inference of consciousness of guilt by defendant from his post-crime conduct unless it believes that defendant acted to cover up a crime." State v. Cole, 229 N.J. 430, 454 (2017) (quoting State v. Williams, 190 N.J. 114 (2007)); see also Cofield, 127 N.J. at 341 ("[B]ecause the inherently prejudicial nature of [404(b)] evidence casts doubt on a jury's ability to follow even the most precise limiting instruction," the instruction must be carefully crafted in order to "explain precisely the permitted and prohibited" use of the evidence.) (internal quotation marks omitted). The Court gave no such limiting instruction in this case.[6] (39T)

While the trial court did give a Hampton/Kociolek charge, the charge was only partial, and the final jury instructions entirely failed to direct the jury to apply that charge to the oral statement that Marin alleged Defendant made

[6] The trial court had prepared a proposed 404(b) limiting instruction but when the court asked defense counsel whether counsel wanted that instruction, counsel said, "No." (28T183-4 to 19) Counsel's explanation—that she was not requesting the charge because Barksdale Jr. had a reason for not giving a buccal swab—made absolutely no sense, especially because she (a) did not articulate to the court Barksdale Jr.'s actual explanations given at the time of the motion to compel and (b) did not elicit any evidence of any explanation from any witness.

to her. When an unrecorded, oral statement allegedly made by the defendant is introduced at trial, the jury must be given two instructions: (1) that the jury should receive, weigh, and consider such evidence with caution due to the risk of inaccuracy; and (2) that the jury must, if they determine the defendant's statement is not credible, disregard the statement completely. State v. Hampton, 61 N.J. 250 (1972); State v. Kociolek, 23 N.J. 400, 421 (1957); N.J.R.E. 104(c). The reason we require this jury instruction is due to "the generally recognized risk of inaccuracy and error in communication and recollection of verbal utterances and misconstruction by the hearer." Kociolek, 23 N.J. at 421.

Here, while the court gave a partial Hampton/Kociolek charge after Marin's testimony (34T184-7 to 185-1) and again during its final charge (39T25-7 to 23), the court omitted the following crucial portions of the model jury charge:

> In considering whether or not the statement is credible, you should take into consideration the circumstances and facts as to how the statement was made, as well as all other evidence in this case relating to this issue.
>
> If, after consideration of all these factors, you determine that the statement was not actually made, or that the statement is not credible, then you must disregard the statement completely. If you find that the statement was made and that part or all of the statement is credible, you may give what weight you think

> appropriate to the portion of the statement you find to be truthful and credible.
>
> [Model Criminal Jury Charge, "Statement of Defendant—Allegedly Made" (Rev. June 14, 2010).]

The court's final instructions also failed to include the portion of the model jury charge specifying the alleged oral statement to which the jury should apply the charge. (39T25-7 to 23) This likely confused the jury, as the court's charge on "Alleged oral statement of the defendant" immediately followed a charge regarding Defendant's recorded statement (39T22-16 to 25-7). By failing specify that the jury should apply this charge to Marin's testimony and failing to include the portion of the charge specifically directing the jury to completely disregard the statement if it found that the statement was not made, the trial court's "omission [wa]s 'clearly capable of producing an unjust result.'" State v. Jordan, 147 N.J. 409, 425 (1997) (quoting R. 2:10-2).

POINT IV

THE JURY INTRUCTIONS EMPHASIZING DEFENDANT'S RIGHT TO PROVIDE AN EXCULPATORY EXPLANATION FOR HIS TATTOOS VIOLATED DUE PROCESS AND HIS RIGHT TO REMAIN SILENT, AND THE DETECTIVE'S IDENTIFICATION OF THE PERSON WITH NO FACIAL TATTOO IN THE MARCH 5 PHOTOGRAH AS DEFENDANT WAS INADMISSIBLE LAY OPINION TESTIMONY. (Not Raised Below)

A central part of the State's theory that it claimed corroborated Hill's testimony that Defendant was the shooter concerned Defendant's tattoos. The prosecutor outlined the State's theory in his opening remarks:

> [T]he defendant and Mr. Hill travel to New York City a couple of days later where they get matching tattoos on their forearms, loyalty is royalty. Both get tattoos, but the defendant gets one additional tattoo. He gets a facial tattoo where he admits to killing Steven Stallworth and puts that billboard on his face. (24T35-18 to 36-2)

Hill testified that on March 8, after the homicide, he and Defendant got Hill picked up Defendant in Ewing and they went to New York to go shopping matching tattoos with the slogan "Loyalty is Royalty" on their forearms to signify loyalty to their shared secret regarding the murder of Stallworth. (30T243-8 to 20, 250-18 to 251-16, T251-25 to 252-15) Hill also testified that Defendant got teardrops tattooed on his face and said that symbolized his murder of Stallworth. (30T253-1 to 19) At trial, the State admitted a photo it

alleged depicted Defendant's face without the teardrop tattoo before the murder (S-113) as well as a second photo it alleged depicted Defendant's face with the teardrop tattoo after the murder (S-114). (26T73-13 to 77-6, 83-15 to 19; 30T260-7 to 24) The only witness to identify Defendant as the person in S-113, taken before the homicide, was Detective John Dotto. (26T73-1 to 5)

The prosecutor referenced Defendant's tattoos extensively in his summation, arguing they were "pillars of evidence," proved a conspiracy between Defendant and Hill, and were proof of Defendant's purposeful mens rea. (38T110-18 to 111-1, 113-16 to 18, 120-16 to 23, 136-17 to 137-21, 186-25 to 187-3, 190-24 to 191-1, 191-20 to 194-1)

The court twice gave the jury instructions in how to consider evidence of the tattoos—both immediately after Hill's testimony and again in its final instructions. The instructions told the jury: there was nothing unlawful about either tattoo; having either tattoo in general is not evidence of guilt by itself and did not mean Defendant was a bad person or likely to commit crime; the State alleged the Loyalty is Royalty tattoo was evidence that Defendant and Hill engaged in a conspiracy and that the teardrops tattoo was evidence of Defendant's consciousness of guilt; that Defendant "may, but is not required, to offer an alternative explanation for the" tattoos; and "if you accept any alternative explanation offered by the defense for the [tattoos], then you may

not consider said tattoo for any purpose and you shall completely disregard it in your deliberations." (30T254-3 to 259-18; 39T32-1 to 37-7) Defendant did not testify or present any evidence to offer any alternative explanation for the tattoos.

The court made both an evidentiary and an instructional error with respect to the tattoo testimony. First, the court's instructions to the jury to weigh the credibility of the State's proffered inculpatory explanation for the tattoos against Defendant's non-existent counter-explanation invited the jury to ask why Defendant has not offered a counter-explanation and made it more likely they would accept the State's explanation, thereby violating due process by diluting the State's burden of proof, shifting the burden to Defendant, and burdening Defendant's choice to remain silent at trial. U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10; N.J.S.A. 2A:84A-19; N.J.R.E. 503. Second, allowing Dotto to identify Defendant as the person in S-113 violated N.J.R.E. 701 because Dotto was not an eyewitness to the moment depicted in the photograph and had no personal knowledge of Defendant's appearance on March 5. These errors, individually and/or collectively, were clearly capable of producing an unjust result. R. 2:10-2.

A. Emphasizing Defendant's Right To Proffer An Alternative, Exculpatory Explanation For His Tattoos To Counter The State's Inculpatory Explanation, Violated Due Process By Diluting The State's Burden Of Proof, Shifting The Burden To Defendant, And Burdening Defendant's Choice To Remain Silent At Trial.

Due process of law mandates that the prosecution is required to prove each element of an offense beyond a reasonable doubt to sustain a conviction. State v. Hill, 199 N.J. 545, 558-59 (2009); State v. Anderson, 127 N.J. 191, 200 (1992) (citing U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1). The reasonable doubt standard "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" In re Winship, 397 U.S. 358, 363 (1970) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

Our courts have "always placed an extraordinarily high premium on the jury's correct understanding that defendants have no burden to clear themselves of guilt." State v. Grice, 109 N.J. 379, 395 (1988) (O'Hern, J., dissenting) (citing State v. Spano, 64 N.J. 566 (1974)). The New Jersey Supreme Court has thus condemned any "language that misstates or dilutes the State's burden to prove guilt beyond a reasonable doubt." State v. Medina, 147 N.J. 43, 59 (1996).

Further, it is also clear that defendants cannot be required to bear a burden of proof as to any defense which amounts to disproof of what is an element from a constitutional standpoint, that is, the conduct, circumstances, result and culpability which define the crime. State v. Delibero, 149 N.J. 90, 99-101 (1997); Mullaney v. Wilbur, 421 U.S. 684, 685 (1975); In re Winship, 397 U.S. at 361; Humanik v. Beyer, 871 F.2d 432 (3d Cir. 1989).

In State v. Jones, 364 N.J. Super. 376 (App. Div. 2003), the prosecutor urged the jury to question why the defendant had not "dusted the gun for prints to disprove that his fingerprints were on there." Id. at 382. In determining that the prosecutor's comment constituted reversible error, this Court explained:

> It is, of course, a basic tenet of our criminal jurisprudence that a defendant has no obligation to establish his innocence. That applies with equal force to the situation of a defendant assuming the stand to testify and the situation of a defendant proffering affirmative evidence on his own behalf. He has no obligation to do either, and his failure in either regard cannot affect a jury's deliberations.
>
> [Id. at 382.]

The Jones Court further noted that neither the prosecutor's comment acknowledging that "the defense never has any burden of proof," id. at 382, nor the trial judge's general instruction on the presumption of innocence could

erase "[t]he prejudice inherent" in the State's adverse-inference exhortation. Id. at 383-84; accord State v. Cooke, 345 N.J. Super. 480 (App. Div. 2001).

In light of these bedrock principles of Due Process, our Supreme Court has held that adverse inference charges from the failure to produce evidence—so called "Clawans" charges, named after State v. Clawans, 38 N.J. 162 (1962)—"generally should not issue against criminal defendants." Hill, 199 N.J. at 566. The Court reasoned,

> The inclusion in a criminal trial of a Clawans charge from the court risks improperly assisting the State in its obligation to prove each and every element of a charged crime beyond a reasonable doubt. . . . Indeed, any reference to a negative inference against a criminal defendant must be carefully scrutinized to ensure that the comment does not mislead or have the capacity to confuse the jury into believing that a defendant had an obligation to produce the witness and the substantive evidence that the witness would have provided.
>
> [Ibid.]

The Hill Court also cited a Washington Supreme Court case, State v. Montgomery, which noted that in addition to shifting the burden of proof away from the State, the adverse inference charge runs the risk of "infring[ing] on a criminal defendant's right to silence." 183 P.3d 267, 278 (Wa. 2008).

"A defendant's ability to invoke the privilege [against self-incrimination] at trial—generally by opting not to testify—reflects the well-established principle that the State is 'constitutionally compelled to establish guilt by

evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.'" State v. Camacho, 218 N.J. 533, 543 (2014) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964). Additionally, the prosecutor may not comment on a defendant's silence at or near the time of arrest in order to establish an inference of consciousness of guilt. Deatore, 70 N.J. at 108-09, 115-16; State v. Muhammad, 182 N.J. 551, 573 (2005). By the same token, a jury charge that links certain evidence with the State's proffered inculpatory purpose and then tells the jury the defendant has the right to offer a exculpatory explanation for such evidence—where defendant offered no alternative explanation—unfairly burdens the defendant's right to remain silent by inviting the jury to speculate as to why defendant did not testify as to an alternative explanation and perhaps also give greater weight to the State's explanation in the absence of any contrary explanation offered by the defendant.

Because the defendant never has any burden of proof and has the right to remain silent rather than testify in attempt to offer an alternative, exculpatory explanation for the State's evidence, there has never been a single instance where our courts have authorized a jury instruction that tells the jury the defendant has the right to respond to some seemingly inculpatory evidence by offering an alternative explanation for that evidence where defendant has not

actually proffered any alternative explanation. The only remotely analogous scenario is in the context of a flight charge, where our Supreme Court has authorized a trial court to instruct the jury that, "[i]f you find that the defendant, fearing that an accusation or arrest would be made against (him/her) on the charge involved in the indictment, took refuge in flight for the purpose of evading the accusation or arrest on that charge, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of consciousness of guilt." Mann, 132 N.J. at 420-21 (quoting Model Jury Charges (Criminal), "Flight" (Nov. 1991)). The Mann Court recognized that a defendant should be able to offer an explanation to rebut the charge that his conduct constituted "flight" and was evidence of consciousness of guilt, stating, "If a defendant offers an explanation for the departure, the trial court should instruct the jury that if it finds the defendant's explanation credible, it should not draw any inference of the defendant's consciousness of guilt from the defendant's departure." Id. at 421 (emphasis added). It is crucial to note that the Mann Court explicitly used the conditional when describing when a trial court should instruct the jury to consider defendant's explanation for his departure—the court should only so instruct the jury if defendant offers an explanation. Ibid.

Accordingly, the current model jury charge on flight, which includes a provision applicable if defendant offers an explanation, clearly states that this portion should only be used when the defendant actually offered an explanation for departing the scene:

> (THE FOLLOWING SHOULD BE USED WHERE THE DEFENSE HAS NOT DENIED THAT HE/SHE DEPARTED THE SCENE BUT HAS SUGGESTED AN EXPLANATION)
>
> There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defense has suggested the following explanation:
>
> (SET FORTH EXPLANATION SUGGESTED BY DEFENSE)
>
> If you find the defendant's explanation credible, you should not draw any inference of the defendant's consciousness of guilt from the defendant's departure.
>
> [Model Criminal Jury Charge, "Flight" (Rev. May 10, 2010).]

This portion of the charge is only given in cases where the defendant actually did offer an alternative explanation. See, e.g., State v. Townsend, 2020 N.J. Super. Unpub. LEXIS 1648, *22 (App. Div. Aug. 28, 2020) ("As to the omitted portion of the Model Charge, defendant failed to offer an explanation for his flight at any juncture during the trial.") (Da58); State v. Honore, 2019 N.J. Super. Unpub. LEXIS 997, *13 & n.4 (App. Div. May 1, 2019) (the trial court removed the explanation portion of the "instruction because he observed

that the defense did not have to suggest any explanation for the flight.").
(Da66)

Here, although Defendant invoked his right to remain silent, did not present any evidence, and thus did not offer any alternative explanation for the two tattoos at issue, the trial court twice instructed the jury that Defendant "may, but is not required, to offer an alternative explanation for the" tattoos; and "if you accept any alternative explanation offered by the defense for the [tattoos], then you may not consider said tattoo for any purpose and you shall completely disregard it in your deliberations." (30T254-3 to 259-18; 39T32-1 to 37-7) Defendant's theory was decidedly <u>not</u> that Defendant had offered a more compelling explanation his tattoos than Hill, but rather that Hill was a liar, had a motive to lie to avoid a harsher sentence, and thus none of his testimony should be believed. (38T33-24 to 34-2, 44-25 to 45-2, 49-14, 68-24 to 70-5, 77-19 to 21, 82-1 to 10, 85-1) By focusing the jury's attention on Defendant's ability to offer an alternative explanation where he offered none, the court's instruction naturally invited the jury to question why, if he was permitted to offer an alternative explanation, did Defendant decline to do so? Did Defendant decline to do so because he <u>could not</u> offer any alternative explanation, because the State's explanation was correct, and because he was in fact guilty? The court's instruction to the jury to weigh the credibility of the

State's proffered inculpatory explanation for the tattoos against Defendant's non-existent counter-explanation naturally invited the jury to ask these questions; the instruction thus diluted the State's burden of proof, shifted the burden to Defendant, and burdened his choice to remain silent at trial.

Just as a prosecutor's comment shifting the burden of proof to the defense, Jones, 364 N.J. Super. at 383-84, or comment on defendant's silence, Muhammad, 182 N.J. at 573, requires reversal, a judge's instructions directing the jury to assess Defendant's non-existent exculpatory explanation for evidence against the State's proffered inculpatory purpose requires reversal as well. "Erroneous instructions on matters material to a jury's deliberation are presumed to be reversible error" even where defense counsel did not object. State v. Jackmon, 305 N.J. Super 274, 277-278 (App. Div. 1997); State v. Sette, 259 N.J. Super 156, 189 (App. Div. 1992) (same). They are "presumed to be reversible error, and are thus poor candidates for rehabilitation under the concept of harmless error." State v. Diaz, 144 N.J. 628, 641 (1996).

B. Detective John Dotto's Identification Of Defendant As The Person In The March 5 Photograph With No Facial Tattoo Was Inadmissible Lay Opinion Testimony.

Crucial to the State's attempt to corroborate Hill's story that Defendant's tattoos commemorated the murder of Stallworth were two photographs it

alleged depicted Defendant's face—one taken March 5 before the murder with no teardrop tattoo (S-113) and one taken March 9 after the murder showing the teardrop tattoo (S-114). (26T73-13 to 77-6, 83-15 to 19; 30T260-7 to 261-6) Hill permissibly identified Defendant as the person in the March 9 photograph with the teardrop tattoo, as Hill both knew Defendant and testified he had seen Defendant get that tattoo depicted in the picture. (30T260-7 to 261-6) The only witness to identify Defendant as the person in S-113, however, was Detective John Dotto. (26T73-1 to 5) The admission of this testimony violated N.J.R.E. 701 because Dotto was not an eyewitness to the moment depicted in the photograph and had no personal knowledge of Defendant's appearance on March 5. N.J.R.E. 701; State v. Singh, 245 N.J. 1, 17 (2021); State v. Lazo, 209 N.J. 9 (2012); State v. McLean, 205 N.J. 438 (2011).

Under N.J.R.E. 701, a witness may offer a lay opinion only if the witness's opinion is (1) "rationally based on the perception of the witness," and (2) "assist[s] in understanding the witness' testimony or in determining a fact in issue." McLean, 205 N.J. at 456; N.J.R.E. 701. Under the first requirement, the testimony must be based on the witness's personal knowledge. McLean, 205 N.J. at 459. In Lazo, the Supreme Court held that it was error to allow a detective testify as to his opinion that the defendant's arrest photo closely resembled the sketch of the perpetrator drawn by a sketch

artist. 209 N.J. at 15. The Court held it was error for the detective to tell "the jury that he believed defendant closely resembled the culprit—even though the detective had no personal knowledge of that critical, disputed factual question." Id. at 22. The Detective's opinion "intruded on the jury's role" because "[i]n an identification case, it is for the jury to decide whether an eyewitness credibly identified the defendant." Id. at 22, 24. The Supreme Court recently applied Lazo to a detective's testimony identifying the suspect in a surveillance video as the defendant, concluding "it was error for [the detective] to refer to an individual depicted in the surveillance video as "the defendant" in his narration of that video. Singh, 245 N.J. at 17.

Here, Detective Dotto was presented with S-113 and asked whether he had seen the item before:

> Q Again, Detective, I'm going to show you now what's been marked as S-113 and ask if you've seen that before?
>
> A Yes, sir, I've seen this picture before.
>
> Q And what is that?
>
> A It's a picture of Mr. Barksdale.
>
> [(26T72-25 to 73-5)]

The prosecutor attempted to correct Dotto's plainly inadmissible testimony by responding, "No, I don't want you to identify the picture." (26T73-6) However,

Dotto had already testified as to his opinion that S-113 depicted Defendant. The court did not strike the testimony or give a curative instruction.

Dotto's testimony was plainly inadmissible. Dotto was the detective in the Ocean County Prosecutor's Office who conducted forensic examinations of the cell phones in this case. (26T57-9 to 20) He had retrieved photograph S-113 by performing an extraction of the Apple iPhone X with phone number 732-288-5475; he had located a video on the phone created on March 5, 2018, at 5:45 p.m., and S-113 was a still frame from the video. (26T73-13 to 74-20) Dotto had not participated in any aspects of the investigation of Stallworth's murder other than performing an extraction and forensic examination of the cell phones. (26T88-8 to 23) Dotto was not present when S-113 was created on March 5, 2018 and had no personal knowledge of what Defendant looked like on that day; his opinion that the person in S-113 was Defendant was purely based on his review of the video and from what other witnesses had told him. Thus, without any personal knowledge to support his opinion as to who was shown in the video, Dotto's opinion was not "rationally based on the perception of the witness." N.J.R.E. 701; McLean, 205 N.J. at 457. As in Lazo, Dotto's opinion was inadmissible because it was "not based on prior knowledge." 209 N.J. at 24.

Dotto's improper opinion testimony was particularly harmful because Hill's credibility was the critical question for the jury to decide. The central piece of evidence the State claimed corroborated Hill's testimony were Defendant's tattoos—specifically the State's assertion that Defendant did not get the teardrop tattoo until after Stallworth's murder. S-113 was the only evidence the State introduced that it claimed showed Defendant (a) before the homicide and (b) without the teardrop tattoo. Dotto was the only witness who testified that the person in S-113 was Defendant. Thus, Dotto's testimony likely influenced the jury's determination as to whether S-113 depicted Defendant. This error was clearly capable of producing an unjust result, deprived Defendant of his rights to due process and a fair trial and requires reversal of his convictions. R. 2:10-2.

POINT V

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Each of the errors cited above is sufficient alone to require a new trial. If, however, the court should not concur, it is submitted that the cumulative effect of these errors requires reversal. State v. Orecchio, 16 N.J. 125, 129 (1954); U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. See also State v. Sanchez-Medina, 231 N.J. 452, 455 (2018) (reversing on

cumulative error where jury instruction omitted charge on "key issue" and where jury heard inadmissible, prejudicial testimony).

CONCLUSION

For all the aforementioned reasons, this Court should reverse the trial court's March 10, 2020 order admitting the March 6 and March 12 statements and remand for (1) an order suppressing both statements in their entirety and (2) a new trial.

Respectfully Submitted,

JOSEPH E. KRAKORA
Public Defender
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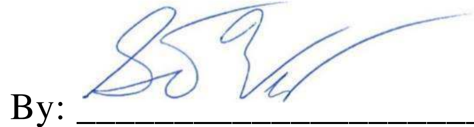

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June 30, 2023

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Anthony Barksdale Jr. (Defendant-Appellant)
Docket No. A-527-20

Indictment No. 19-12-1952

Criminal Action: Appeal from a Judgment of Conviction in the Superior Court of New Jersey, Law Division, Ocean County

Sat Below: Hon. Guy P. Ryan, J.S.C.
Hon. James M. Blaney, J.S.C.

Honorable Judges:

Please accept this brief on behalf of the State of New Jersey.

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PROCEDURAL HISTORY[1]

---

[1]" Da – Defendant-Appellant's Appendix
1T – May 7, 2018 (Buccal Swab)
2T – June 21, 2018 (Buccal Swab)
3T – Sept. 24, 2018 (Buccal Swab)
4T – Oct. 11, 2018 (Buccal Swab)
5T – Oct. 26, 2018 (Buccal Swab)
6T – July 23, 2019 (Suppress. Mot.)
7T – Aug. 2, 2019 (Decision)
8T – Oct. 31, 2019 (Hill's plea)
9T – Nov. 19, 2019 (Compel Disc'y)
10T – Dec. 16, 2019 (Discovery)
11T – Jan. 27, 2020 (Discovery)
12T – Feb. 12, 2020 (Discovery)
13T – Feb. 27, 2020 (Miranda)
14T – Mar. 3, 2020 (Miranda)
15T – Mar. 3, 2020 (Jury Selection)
16T – Mar. 4, 2020 (Jury Sel. AM)
17T – Mar. 4, 2020 (Jury Sel. PM)
18T – Mar. 4, 2020 (In Limine)
19T – Mar. 5, 2020 (Jury Sel. vol. 1)
20T – Mar. 5, 2020 (Jury Sel. vol. 2)
21T – Mar. 5, 2020 (Miranda)
22T – Mar. 10, 2020 (Jury Selection)
23T – Mar. 10, 2020 (Mot. Tattoos)
24T – Mar. 11, 2020, vol. 1 (trial)
25T – Mar. 11, 2020, vol. 2 (trial)
26T – Mar. 12, 2020 (trial)
27T – Mar. 17, 2020, vol. 1 (trial)
28T – Mar. 17, 2020, vol. 2 (trial)
29T – Mar. 18, 2020, vol. 1 (trial)
30T – Mar. 18, 2020, vol. 2 (trial)
31T – Mar. 19, 2020, vol. 1 (trial)
32T – Mar. 19, 2020, vol. 2 (trial)
33T – Mar. 23, 2020 (adjournment)
34T – June 22, 2020, vol. 1 (trial)
35T – June 22, 2020, vol. 2 (trial)
36T – June 23, 2020, vol. 1 (trial)

On August 1, 2018, Defendant, Anthony Barksdale Jr., was indicted along with co-defendants Sevon Hill and Anthony Barksdale Sr., by an Ocean County Grand Jury under Indictment 18-08-1281. Defendant's charges pertained to the robbery and murder of the victim, Steven Stallworth, as well as several weapons and CDS offenses. (Da 1-2).

On June 4, 2019, superseding Indictment 19-06-031 was issued containing the same offenses but including several additional weapons offenses. (Da 10-22).

On June 24, 2019, the Court granted the State's motion to sever the Defendant's trial from the trial of co-defendant Hill. (Da 23).

On December 11, 2019, superseding Indictment 19-12-1952 was issued against Defendant, charging him with first-degree murder, contrary to N.J.S.A. 2C:11-3a (Count One); first-degree conspiracy to commit murder, contrary to N.J.S.A. 2C:11-3a or b, and 2C:5-2 (Count Two); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b(1) (Count Three);

37T – June 23, 2020, vol. 2 (trial)
38T – June 24, 2020 (trial)
39T – June 25, 2020 (deliberations)
40T – June 26, 2020 (deliberations)
41T – June 29, 2020 (verdict)
42T – Aug. 29, 2020 (sentence)

second-degree possession of a firearm for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Four); and second-degree possession of a weapon by a convicted person, contrary to N.J.S.A. 2C:39-7b (Count Five). (Da 24-27).

Between March 11 and June 24, 2020, trial commenced before the Honorable Guy P. Ryan, J.S.C., and a jury. (24T-42T).

On June 29, 2020, the jury returned a verdict of guilty on counts 1-4 of the indictment. (41T 8-19 to 10-13; Da 28-29). Following the verdict, the State moved to dismiss the certain persons weapon charge in count 5 of the indictment. (41T 18-13 to 19-3).

On August 19, 2020, Defendant was sentenced by Judge Ryan to life without parole. (42T 42-1 to 42-4; Da 30)

On October 22, 2020, Defendant filed a notice of appeal. (Da 34).

On September 9, 2022, Defendant filed a motion for a limited remand, citing newly discovered evidence of a confession of his co-defendant, Sevon Hill, who had already been sentenced after receiving a plea bargain for his involvement in the murder. (Da 38-44).

On September 19, 2022, Defendant filed a motion with this Court for a limited remand of the matter to consider the newly discovered evidence motion. (Da 45).

On October 13, 2022, this Court denied Defendant's motion for a limited remand. (Da 47-48).

STATEMENT OF FACTS

On March 5, 2018, Keon Cooper, a resident of apartment D3 in the Hampton Gardens apartment complex in Toms River, was sleeping in his apartment when he was awakened by a "small crack" noise sometime between 8:40 and 9:00 p.m. (24T 51-16 to 52-14). Around 20 to 25 minutes later, Cooper decided to leave his apartment to get something to drink when he opened the door and discovered what appeared to be a dead man lying on his porch in a pool of blood. He immediately called 9-1-1. (24T 52-15 to 53-12).

Officers from the Toms River Police Department were dispatched to the scene at around 9:18 p.m. Upon arrival, they observed a deceased man, later identified as Steven Stallworth, lying in front of Cooper's apartment. (24T 73-5 to 73-9, 81-6 to 81-25). The evidence that was ultimately recovered from the scene included two cellphones near the body as well as one in the victim's pocket, (27T 65-5 to 65-24), a shell casing on the ground nearby, and samples from two areas of spit on the ground approximately four to five feet from the body. (27T 41-21 to 42-20). Later medical examination of Stallworth's body

revealed that he died of a gunshot wound to the back of the head. (27T 135-6 to 135-24).

At around 10:00 p.m., Duncan Macrae of the Toms River Police Department Special Enforcement Team responded to the scene. Macrae knew at the time that codefendant Sevon Hill, who he was familiar with as a mid-high level narcotics dealer who he had arrested previously for possession of a handgun, resided at apartment D4 of the apartment complex, near where the body was found (24T 167-5 to 167-25, 168-13 to 169-1). Shortly after arriving on scene, Macrae was informed that Hill was observed walking towards the complex from a nearby entrance so Macrae and another detective made contact with Hill to speak with him. (24T 169-24 to 170-2). As a result of that conversation, Macrae concluded that the victim was Steven Stallworth. (24T170-24 to 171-17). Hill was then transported to headquarters to give a formal statement. (24T 171-20 to 171-25). During the statement, Hill stated that he was staying at room 517 of the Ramada Inn in Toms River and he executed a consent to search form for that apartment as well as his vehicle (a white Infinity), and his Iphone. (24T 174-6 to 182-9).

At trial, Tiffany Merrill, a resident of nearby apartment D16, testified that earlier that day at around 7:00 p.m., she was waiting near the back of her apartment when she recognized Hill approaching with another African-

American man who was around Hill's age and who she had seen with Hill on a prior occasion. (24T 116-8 to 118-24, 156-22 to 158-19).

At approximately 11:45 p.m., officers responded to room 517 of the Ramada Inn to execute the consent search of Hill's hotel room. (27T 148-3 to 148-7). The officers knocked on the door but received no response. They could hear people talking inside the room so they knocked on the door again, but continued to receive no response. The officers did not attempt to force entry, but continued to try and make contact with the occupants until they were successful when Defendant opened the door himself at least ten minutes after the officers first knocked. (27T 148-25 to 150-13). The officers introduced themselves and explained that Hill had granted consent to search the hotel room. They then asked Defendant if he would be willing to come down to the station and talk with them, to which he agreed. (27T 153-2 to 153-19).

During the search of room 517, the officers located a safe which Hill had previously given them the code to open. Inside, the officers discovered various quantities of different types of CDS which Hill later admitted belonged to him. (27T 155-22 to 156-5; 30T 234-13 to 234-24). The later executed search of Hill's white Infinity did not result in anything of evidential value. (24T 182-19 to 182-23).

Detective John Murphy of the Ocean County Prosecutor's Office was one of the officers present during the search of Hill's room at the Ramada Inn. (16T 23-3 to 24-4). Murphy testified that when Defendant was transported to headquarters after agreeing to speak with the officers, he was not a suspect at that time, and in fact, the officers had no reason to believe he was involved in the homicide at all. (16T 24-13 to 24-16).

Upon arrival at the station, the detectives opened the interview by thanking Defendant for coming down to the station, explaining that they knew he wasn't expecting them, and told him they were "gonna get you out of here as fast we can." (27T 162-21 to 163-4). The interview lasted around 13 minutes, during which Defendant was primarily asked about Hill's whereabouts that night to which he responded that he believed Hill had left sometime between 10:00 and 10:30 p.m. to see his girlfriend, Dayna Daly. (27T 180-7 to 182-22). After the interview was over, Defendant left the station by getting a ride from his father, and the detectives witnessed him hand his father a large amount of cash. (27T 183-1 to 183-19).

Subsequently, the detectives were able to obtain the surveillance footage from the Ramada Inn. The footage revealed Defendant and Hill leaving the hotel at 7:20 p.m. on the night of the murder, arriving back at around 9:35-9:40 p.m., and Hill leaving by himself afterwards. (24T 192-4 to 193-21).

On March 12, 2018, Hill arrived at the Toms River Police Department because the officers had informed him he could pick up the keys to his room in the Ramada Inn. (25T 206-8 to 206-24). Defendant and his father had dropped Hill off at the police station, and the detectives followed the pair and conducted a motor vehicle stop of their vehicle to bring them to the station. (14T 62-22 to 63-10). Defendant executed a Miranda waiver form and agreed to speak to the detectives in a recorded statement. (29T 20-7 to 21-3). In his statement, Defendant first reiterated his position in the previous March 6 interview that he had stayed at the Ramada Inn during the entire time period of the murder. He claimed that after returning from some errands at latest around 6:00 p.m., he did not leave the room, but that Hill did without him. (29T 28-4 to 30-22). When repeatedly confronted by the detectives with the fact that they have surveillance footage and other evidence demonstrating he left the hotel with Hill, Defendant continued to deny this and stated he couldn't remember leaving with Hill nor was he involved with the murder. (29T 96-2 to 98-12).

At the same time Defendant was giving his statement, Hill was giving another statement to police as well. At the conclusion of their statements, both men were arrested and charged with the murder of Stallworth. (26T 6-1 to 6-5).

The next day on March 13, 2018, Hill expressed a desire to speak with the detectives. He provided a taped statement in which he stated that it was Defendant who killed Stallworth by shooting him. Hill told the detectives that he had provided Defendant with the murder weapon, and that they could find it in a Grand Marquis parked near the Silver Ridge Apartments in Toms River. (26T 6-18 to 7-3; 30T 270-2 to 271-11). Hill testified that the officers were under the impression that the shooting of Stallworth was a result of a robbery attempt, but he did not provide any details about it being a murder at that time. <u>See</u> (30T 275-11 to 275-21).

Upon execution of a search warrant for the Grand Marquis on March 14, officers recovered several items of evidentiary value from the trunk of the vehicle including a thousand decks of heroin and a loaded Ruger .357mm handgun in a Gucci bag, a loaded Ruger 9mm handgun in a Nike Watchman's hat, and a Colt .45mm magazine. There were thirteen shells inside the magazine in the Ruger 9mm which possessed the same stamp as the shell casing recovered near Stallworth's body. (27T 57-2 to 61-19). Ballistics analysis of the handguns revealed that the Ruger 9mm was the handgun which fired the round corresponding to the shell casing recovered near Stallworth's body and the round recovered from inside his skull. (3T 155-14 to 158-16, 159-7 to 160-14).

On October 29, 2019, Hill gave a fourth taped statement in order to obtain a plea deal to resolve his murder charges. In this statement, he said that Stallworth's death was not the result of a robbery, but a murder for hire. (30T 274-6 to 275-25). Ultimately, as part of his plea Hill received an amended charge from murder to first-degree aggravated manslaughter, with a maximum exposure of twenty years. (29T 165-16 to 168-10).

At trial, Hill testified that before the events of the murder, Defendant had been utilizing Hill's "trap phone" – the phone corresponding to a phone-number ending in 1702 – to sell drugs to Hill's customers for him. (29T 173-1 to 174-1). The victim, Stallworth, was Hill's supplier and would regularly sell him drugs for cash or on credit. (29T 171-1 to 172-1). By the time of the murder, Hill owed Stallworth $18,000 for drugs he had provided a couple of weeks prior. (29T 174-12 to 175-2). Stallworth had been trying to collect this debt by calling Hill repeatedly – which Hill ignored – and eventually making appearances at his girlfriend, Daly's, apartment at the Hampton Gardens. (29T 175-3 to 175-18).

According to Hill, Defendant was the one who came up with the idea to rob Stallworth after witnessing a large amount of cash exchanged during a drug transaction between Hill and Stallworth, but that Hill refused at first because Stallworth supplied him. (29T 179-1 to 182-2). However, Hill

obtained a new supplier in January of 2018 through Defendant's contacts (29T 182-23 to 185-22). As such, when Daly told Hill in the weeks leading up to the murder that Stallworth had visited her apartment, Defendant suggested that Hill pay him the $18,000 that Hill owed Stallworth and that Defendant would murder Stallworth in exchange. (29T 186-17 to 189-8). In discussing the plan for the murder, Defendant and Hill agreed not to conduct it at the Ramada Inn because there were many surveillance cameras there, so they decided on the Hampton Gardens as the murder location because Stallworth was familiar with this location as a place they had conducted business in the past. (29T 191-25 to 192-13).

Hill stated that he arranged by text message to meet with Stallworth on the night of March 5, 2018, for a supposed payment of his outstanding debt. (29T 193-2 to 193-21). The murder was to be carried out with a gun that Hill had previously provided to Defendant, a black Ruger handgun, for general protection. (29T 197-13 to 199-11). Hill was able to confirm that Defendant and he were the ones captured on several surveillance images introduced at trial depicting the pair leaving the Ramada at around 7:24 p.m. and returning at around 9:36 p.m. (30T 205-21 to 208-13).

Hill testified that he drove a Nissan Rogue to transport Defendant and himself to a nearby apartment where they walked to the Hampton Gardens at

7:24 p.m. He then went back to the vehicle and parked in the back of the Hampton Gardens. (30T 210-13 to 217-12, 281-25 to 282-24). Hill said that Defendant had Hill's "trap phone" with the number ending in 1702 at the time, and that this phone received a text message from Stallworth asking Hill to open the door. (30T 216-8 to 219-19). Hill narrated the contents of call records reflecting calls between Defendant and he immediately prior to the murder during which Hill was sitting in the Nissan and Defendant was watching Stallworth. In one such call, Hill called Defendant after Defendant had repeatedly tried to call him, and Defendant asked Hill when he would show up in person to which Hill lied and said he was nearby when he was actually in the back parking lot. (30T 220-14 to 223-23).

At around 9:00 p.m., Defendant returned to Hill, who was still in the Nissan, reporting that he "got" Stallworth, and the two of them drove back to the Ramada Inn. Hill said he could see Stallworth's body from the car as he was driving back. (30T 229-13 to 231-4). Before arriving at the Ramada, Hill remembered that he still had the gun in the vehicle, so he turned around and got gas nearby before driving the Nissan to another vehicle: the Grand Marquis parked near his parent's residence at the Silver Ridge apartments. He took the gun from Defendant without touching it using a skullcap and threw it in the

corner of the Grand Marquis before returning to the Ramada Inn with Defendant. (30T 202-3 to 204-1).

Afterwards, Hill received a call from Daly reporting the body outside her apartment. He decided to go to her against Defendant's protests and drove his car alone to the nearby Jamestown Apartments where he parked it and proceeded to the Hampton Gardens on foot. (30T 224-12 to 227-4).

After his encounter with the detectives at the Hampton Gardens and subsequent interview at the station, he returned to the Ramada Inn, and Defendant and he received a ride from Defendant's father to the Comfort Inn in Toms River where they had rented a room. (30T 239-3 to 240-13). In the room, Defendant once again admitted that he killed Stallworth, and Defendant's father informed Hill that he had already told the police that Hill was distributing drugs from the Ramada Inn but that they should all stay silent about the murder. (30T 241-23 to 242-11). Although they agreed that Hill should get rid of the murder weapon, Hill decided to keep it in case something went wrong. (30T 242-9 to 242-23).

On March 6, 2018, Defendant left the Comfort Inn and Hill did not see him again until he picked him up in Ewing on March 8. (30T 243-8 to 243-23). Defendant and Hill drove to New York where they got matching tattoos, at Defendant's suggestion, with the words "Loyalty is Royalty". Hill said they

both knew implicitly at the time – but also later talked about explicitly – that the words meant that they were bonded by the secret of Stallworth's murder. (30T 250-15 to 252-23). Defendant also received a tattoo of teardrops on his face which he told Hill symbolized the murder of Stallworth. (30T 253-1 to 253-24). At trial, Hill identified Defendant in a picture extracted from Hill's cellphone where he can be seen with both tattoos, and he also identified these tattoos in other pictures of Defendant. (30T 260-7 to 262-16). The State also admitted into evidence a photo extracted from Hill's cellphone with a timestamp of March 5, 2018, at 5:45 p.m., which depicted Defendant's face without the teardrop tattoos. (26T 72-25 to 74-25).

After getting the tattoos, the pair received a ride from Defendant's father back to Hill's Nissan Rogue which Hill drove with Defendant back to the Comfort Inn room in New Jersey where they stayed until they were arrested on March 12. (30T 262-19 to 263-25).

The samples taken from the spit on the ground near Stallworth's body were sent to the New Jersey State Police forensic laboratory for DNA analysis. (27T 45-22 to 46-7). Ultimately, the samples returned a match to Defendant's DNA based on a sample he had previously provided to the New Jersey State Police. (1T 9-7 to 9-14). The State sought to obtain a new buccal swab sample from Defendant to confirm the match but Defendant refused to provide

one, even after multiple court orders. He eventually offered to give a blood sample instead of a saliva sample, which was accepted. (1T 16-2 to 16-3; 2T 15-20 to 15-24; 5T 6-22 to 7-12).

David Stern, a radiofrequency engineer expert, analyzed the cellphone data of the phones utilized by Defendant and Hill. Stern's analysis of the cellphone records essentially verified Hill's timeline of events. He testified that both Hill's and Defendant's phones were pinging off cell phone towers in the area of the Ramada Inn prior to the murder. Stern further testified that both phones tracked together immediately after the murder, as the two were tracked going to the location where the murder weapon was located in the Silver Ridge area of Toms River, and then back to the Ramada Inn. (36T 48-23 to 95-6). Stern further testified while both phones tracked together, Defendant's phone was shut off during the time period immediately surrounding the murder. (36T 120-13 121-7).

Carlos Morales, a DNA analyst with the New Jersey State Police Office of Forensic Sciences DNA Laboratory, testified that he analyzed and compared the spit samples with the DNA sample submitted by Defendant and concluded that they were a match. (31T 48-17 to 49-2). He also attempted to analyze samples taken from the two handguns recovered from the Grand Marquis, but

he was not able to obtain results because the samples were of insufficient quality for comparison. (31T 49-3 to 49-18).

Along with Hill's testimony, the State also called Ronald Talley to testify at trial. Talley shared a jail cell in the Ocean County Jail with Defendant after Defendant reached out to him via jailhouse letter. The letter was introduced into evidence trial. (34T 34-20 to 36-23; Da 94-97). Talley testified that Defendant admitted to him that he personally killed Stallworth. Talley was able to testify about details of murder that Defendant related to him, including where they parked for the murder, the type of vehicle they drove in, that the gun used was a 9mm semiautomatic, that the shot was to the back of the head, Hill's conversation with Daly on the night of the murder, and Hill's and Defendant's movements after the murder. (34T 40-5 to 43-9; 62-21 to 69-5).

LEGAL ARGUMENT

POINT I

DEFENDANT HAS FAILED TO ESTABLISH THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO SUPPRESS

Defendant argues that the trial court improperly determined that his March 6, 2018, statement was non-custodial and his March 12, 2018, statement should have been suppressed as the unlawful product of that previous statement. This argument is meritless because it ignores the substantial body of evidence that the trial court relied on in properly determining that the March 6 statement was non-custodial.

The Fifth Amendment to the United States Constitution provides, in part, "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Although no comparable privilege exists in the New Jersey Constitution, it "is firmly established as part of the common law of New Jersey and has been incorporated into our Rules of Evidence." In re Martin, 90 N.J. 295, 331 (1982); See also N.J.R.E. 503; N.J.S.A. 2A:84A-19.

To effectuate these constitutional protections, the police are required to give adequate warnings to a suspect in custody prior to conducting an interrogation. An interrogation subject must be told that he or she has "the right to remain silent. . . the right to the presence of an attorney, and that if he

[or she] cannot afford an attorney one will be appointed to him [or her] prior to any questioning." Miranda, 384 U.S. 436, 479 (1966). Finally, the suspect must also be told that he or she has the "opportunity to exercise these rights . . . throughout the interrogation." Ibid. In announcing the Miranda rule, Chief Justice Earl Warren further held that an accused may waive these rights, "provided the waiver is made voluntarily, knowingly, and intelligently." Ibid. If an accused has knowingly, intelligently, and voluntarily waived his or her Miranda rights, any subsequent self-incriminating statements by the accused are admissible at trial. Id. at 469

However, "*Miranda* warnings are required only when a person is subject to 'custodial interrogation.'" State v. Dispoto, 383 N.J. Super. 205, 214 (App. Div. 2006), aff'd as modified, 189 N.J. 108 (2007). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances, including the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such factors." State v. P.Z, 152 N.J. 86, 103 (1997). Courts must determine what a reasonable objective person would have believed in the suspect's situation and "not on the subjective views harbored by either the interrogating officers or the person being questioned." State v. Hubbard, 222 N.J. 249, 267 (2015). "[S]imply because someone is questioned at a police

station, by police officers, does not mean they are 'in custody.' Nor is it dispositive whether police consider someone a 'suspect,' 'person of interest,' or 'witness.'" State v. Erazo, ___ N.J. ___, ___ (2023)(slip op at 12)(internal citations omitted).

When a statement is properly elicited following Miranda warnings subsequent to a statement that was improperly elicited without Miranda warnings, courts should analyze several factors to determine whether the subsequent statement is admissible including:

> (1) the extent of questioning and the nature of any admissions made by defendant before being informed of his Miranda rights; (2) the proximity in time and place between the pre- and post-warning questioning; (3) whether the same law enforcement officers conducted both the unwarned and warned interrogations; (4) whether the officers informed defendant that his pre-warning statements could not be used against him; and (5) the degree to which the post-warning questioning is a continuation of the pre-warning questioning. The factual circumstances in each case will determine the appropriate weight to be accorded to any factor or group of factors.
>
> State v. O'Neill, 193 N.J. 148, 181 (2007)

Defendant's characterization of the record surrounding his March 6 interview as supporting a determination that his interview was "custodial" is incredible, and the primary case he relies on in support, State v. O'Neill, 193 N.J. 148 (2007), is completely factually inapposite. In, O'Neill, the defendant

was questioned while he was behind bars and by officers who knew he had a handgun at the time of a murder. He was interrogated for over an hour and a half about his precise whereabouts that night before being administered Miranda warnings. Id. at 169.

Here, the record clearly demonstrates that Defendant was not in custody during his March 6, 2018 statement. The police arrived at the Ramada Inn room where he was staying and knocked on the door. They did not force entry when no one answered, even though they could hear voices on the other side. Indeed, they continued to knock and wait until over 10 minutes had passed. (27T 148-25 to 150-13). When Defendant eventually opened the door, they asked him if he would accompany them to the station to give a statement and he agreed: there was no arrest. (27T 153-2 to 153-19). Detective Murphy's testimony at the Miranda hearing was consistent with the evidence at the time that the officers had no reason to believe Defendant was involved with the murder. See (16T 24-13 to 24-16). Indeed, the opening of the interview made it clear to Defendant, or any reasonable person in his situation, that this was an optional interview that he could have declined had he wanted to:

> DETECTIVE MURPHY: All right, have a seat. Thanks for coming down, man. We appreciate it, okay?
>
> ANTHONY BARKSDALE, JR.: (Inaudible).

> UNIDENTIFIED MALE: Sorry to give you such a stir at your door. I know you're not expecting somebody and -- you know?
>
> DETECTIVE MURPHY: It's all right, man. We're gonna get you outta here as fast as we can, okay?
> (27T 162-21 to 163-4)

It is plain that there would be no reason to thank Defendant for coming down and speaking with them if doing so was not optional. The interview lasted a mere 12-13 minutes, during which Defendant was not handcuffed nor was his freedom restricted in any way. (27T 180-7 to 182-22). The focus of the interview was clearly on Hill's whereabouts that night rather than Defendant's. See (162-21 to 182-10). After the interview was over, Defendant was picked up by his father, and the officers did nothing when they witnessed him give his father a large sum of cash. (27T 183-1 to 183-19).

The facts of this case are far more similar to the recent New Jersey Supreme Court case of State v. Erazo, ___ N.J. ___, ___ (2023). In Erazo, the Court held that the interview of a defendant who was escorted by police officers to the station after a body of a girl was found below the window of his apartment building was non-custodial in nature because he was treated more akin to a potential witness rather than a suspect:

> There is no evidence that defendant was forced to go to the police station or that he was handcuffed during the drive. Indeed, there is no reason to believe that the short trip was anything but voluntary. Moreover, when

> defendant arrived at the station, he sat on a bench -- unsupervised and unrestrained -- among other members of the public, including his neighbors from the apartment complex and members of A.S.'s family. In no way was defendant's freedom of action restrained to a "degree associated with" formal arrest. See Beheler, 463 U.S. at 1125, 103 S.Ct. 3517.
>
> The trial court did not attach significance to the detectives' escorting defendant to the second-floor interview room, and neither do we. There is no reason to believe defendant would have known where to go unless taken there. Defendant was in an unfamiliar place and was led by people familiar with the premises.
>
> Id. (slip op. at 13).

Like in Erazo, here, the trial court relied on a variety of evidence to find that the interview was non-custodial in nature including the fact that Defendant was allowed to utilize his cell-phone during the interview, the nature and tone of questioning as non-accusatory and polite, the state of the investigation as being focused on Hill at the time, the short duration of the interview, and the fact that he was allowed to leave with his father at the end of the interview:

> Although he's in a, in a, in a police department, there's nothing in there to indicate that his freedom of movement was restricted. He's using his cell phone which, as I said, was extremely significant. The duration is relatively short. The physical surroundings are a interview room.
>
> With respect to the nature and degree of pressure applied, I didn't see any pressure here. The only suggestion of pressure was during cross-examination and the officer credibly and consistently denied all of

> that. The language used by the police officers was polite and appropriate.
>
> . . . .
>
> All other objective indications in the case indicate to me that Mr. Barksdale was simply a person of interest that may have knowledge. Clearly the detectives indicated that Mr. Sevon Hill had provided information. If he simply provided information that of anything to indicate he was with or saw Mr. Barksdale that night, it'd be worth talking to Mr. Barksdale.
>
> This hearing established that the two of them were to some extent sharing the room at the Ramada, Room 517. So if that's the case, if it's rented in Hill's name, Hill's the suspect, certainly likely that the police want to talk to somebody else that may be staying in Room 517. So I conclude that in this case this is simply part of an investigatory procedure, that it's not a custodial interrogation.
> (21T 58-25 to 60-21).

Therefore, just as in Erazo, the trial court properly determined that the record reflects that Defendant was treated as a potential witness or person of information rather than a suspect at the time of the interview. See Erazo, ___ N.J. ___, ___ (2023)(slip op. at 13).

As the March 6 interview was properly deemed to be non-custodial, Defendant's argument that the March 13 interview was the unlawful product of this interview is meritless as the Erazo Court noted that analysis of O'Neill factors is irrelevant when the first interview is non custodial. Id. (slip op. at 13)("Having agreed with the trial court's finding that defendant was not in

custody at the time of his first interview, we need not consider whether the first interview constituted an interrogation, nor must we consider whether the second, Mirandized interview implicated O'Neill.")

Nevertheless, even if the March 6 interview was custodial, the March 13 interview took place over a week later and only after Miranda warnings were issued. (29T 19-17 to 21-3). As Defendant consistently denied any involvement with the murder on March 6, none of the statements of that interview in any way impacted the interview over a week later. Defendant's argument that his denial of leaving the Ramada on March 6 was relevant in this circumstance is meritless as he made no subsequent admission in the March 12 statement after being confronted with the evidence or his previous denial. (29T 96-2 to 98-12). In this regard, the O'Neill factors weigh against barring the March 12 statement on the basis of the March 6 statement. See O'Neill, 193 N.J. at 181.

Defendant also claims that the detectives improperly did not inform him of his "true status" pursuant to State v. Sims, 250 N.J. 189, (2022), because they had probable cause to arrest him for the murder prior to his interview on March 12. However, there was no arrest warrant at the time of the interview, and the detectives did not try to hide the fact that they were investigating the murder of Stallworth, which they informed Defendant of as far back as the

March 6 interview. In this regard, Defendant's "true status" was never hidden from him in accordance with Sims. Id. at 217 ("In short, we share Judge Susswein's reservations about the Appellate Division's new rule requiring officers to tell an arrestee, not subject to a complaint-warrant or arrest warrant, what charges he faces before interrogating him. We decline to adopt that rule."). Further cases to interpret the obligation of detectives to advise a defendant of his "true status" also focused on whether or not the detectives led the defendant to believe "they were there to investigate something else" other than the charge they had probable cause to arrest for. State v. Hahn, 473 N.J. Super. 349, 369 (App. Div. 2022). As the Hahn Court held in interpreting the import of the Sims decision, "in the absence of the issuance of a formal complaint-warrant, police were under no obligation to tell the defendant why he was arrested, even though he specifically asked, and police already knew he would be charged with attempted murder." Id. at 370. Similarly, here, Defendant's argument that the detectives "affirmatively misled" him as to his "true status" by not informing him that they had probable cause to arrest is entirely meritless in light of Sims.

<u>POINT II</u>

THERE WAS NO EVIDENCE OF BIAS FROM JUROR 12 AND TRIAL COUNSEL'S DECISION NOT TO USE A PEREMPTORY STRIKE OR ARGUE FOR HER RECUSAL DID NOT OBLIGATE THE COURT TO INDEPENDANTLY RECUSE HER

Defendant argues that Juror 12 was impermissibly biased by her husband's and her personal relationships with law enforcement and certain witness' family and that even though trial counsel did not move or otherwise advocate for her recusal in any way, the court should have independently removed the juror. This argument is meritless because the information Juror 12 received from her husband was minor, their relationship with the victim's family and law enforcement was minor and tangential, and the trial court's thorough inquiry of any potential bias that might result from these minor issues revealed nothing of significance.

"The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantee criminal defendants "the right to ... trial by an impartial jury." <u>State v. Brown</u>, 442 N.J. Super. 153, 179 (App. Div. 2015). In order to determine whether a jury has been tainted by extraneous information, the trial court must assess "the gravity of the alleged extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed ... and the overall impact of

the matter on the fairness of the proceedings." State v. R.D., 169 N.J. 551, 559 (2001). Ultimately, the trial court has the discretion to determine the qualifications of prospective jurors and conduct a "probing inquiry" to determine the potential for prejudice in having that juror serve. State v. Scherzer, 301 N.J.Super. 363, 487-88 (App. Div. 1997). When a juror indicates that he may remain impartial when questioned, a reviewing court must accord that statement a "great deal of weight" and must defer to the trial court's ability to assess the sincerity and credibility of the juror. State v. Singletary, 80 N.J. 55, 64 (1979).

Here, Defendant first takes issue with the fact that Juror 12 notified the Court during the biographical portion of voir dire that her husband knew Mitch Little, the Toms River Police Department Chief of Police, at one point when they trained in Karate together. However, the record revealed that juror 12 noted that she personally did not have a relationship with Chief Little and acknowledged that she would not be able to talk to him if she ran into him during the trial:

> [Juror 12] Well, my husband has a relationship with Mitch Little, I think he was at one point the Chief –
>
> [The Court] He is the Chief –
>
> [Juror 12] (indiscernible) he's the one, yeah. I don't have a relationship with him, I've met him a few times but my husband trained him at the karate school.

> [The Court] All right.
>
> [Juror 12] They share a karate school.
>
> [The Court] Do they still do that together or no?
>
> [Juror 12] My husband is no longer training there but yeah.
>
> [The Court] Okay and you understand you couldn't talk to him -- if you and your husband ran into him, you couldn't talk to him; right?
>
> [Juror 12] Absolutely.
>
> [The Court] All right. Did Mitch Little ever share anything with either you or your husband?
>
> [Juror 12] Never, never.
>
> [The Court] No, okay. Do you know anything about this case other than what you've heard here?
>
> [Juror 12] No.
> (16T 92-7 to 93-1).

This exchange clearly demonstrates that there was no capacity for prejudice due to juror 12's husband's past familiarity with Chief Little. Juror 12 had no personal relationship with Chief Little and acknowledged that she would not speak with him if she somehow encountered him during trial. As such, the trial court had no duty to recuse Juror 12 on this basis.

Defendant further claims that Juror 12's statement to the court later at trial that her husband had told her she might know members of the victim's

extended family because they attended a church which the couple occasionally had visited. However, the record reflects that her husband did not inform Juror 12 who those family members were, she did not recognize any of Stallworth's family members who attended the court proceedings, and she affirmed that it would not affect her impartiality:

> THE COURT: So does that make you feel, though, in terms of -- let me back up so I understand. So Steven Stallworth is the victim.
>
> JUROR NO. 12: Okay.
>
> THE COURT: So the family of Steven Stallworth you believe attends the church in Freehold?
>
> JUROR NO. 12: Yes.
>
> THE COURT: That's not your husband had current church –
>
> JUROR NO. 12: No, he was employed as a musician there, as was the friend, and that's how they came into the conversation.
>
> THE COURT: So it's not like, your husband currently doesn't go to that church?
>
> JUROR NO. 12: Correct.
>
> THE COURT: And he's not a pastor there?
>
> JUROR NO. 12: Correct. We had our churches fellowship together so several times throughout the year, that's how he knows the family members of the victim.

THE COURT: So how does that make you feel, do you feel that prevents you from being fair and impartial to –

JUROR NO. 12: I do not.

THE COURT: -- both sides?

JUROR NO. 12: I was disappointed and concerned because I don't want to interrupt the process. But I'm comfortable, you know, the main objective.

THE COURT: Does your husband understand that he can't be coming home and blurting things out to you now?

JUROR NO. 12: Yes, that's very clear.

. . . .

THE COURT: So let's say the evidence showed that the State just could not prove the charges beyond a reasonable doubt, at the end of the day, you're just not convinced.

JUROR NO. 12: Right.

THE COURT: Would you be able to vote not guilty knowing that perhaps through the churches there's some connection to the Stallworth family?

JUROR NO. 12: Absolutely. I'm able to follow whatever the evidence leads me. I have no problem with that.

THE COURT: All right. Any questions from counsel?

MR. ABATEMARCO: No, Judge.

THE COURT: Ms. Tobin?

> MS. TOBIN: That the only thing, maybe she can look at the family members in the audience and see.
>
> THE COURT: I didn't want to say that, you're okay with that?
>
> MS. TOBIN: Yeah.
> (24T 7-15 to 11-9)

This exchange differentiates the facts of this case with that of State v. Fortin, 178 N.J. 540 (2004), which Defendant relies on. In that case, the Court held that it was "ill-advised", but not forbidden, to seat a juror who was acquainted with the victim's loved ones because of a "common-sense concern that someone who had met and interacted with the young children of the victim of a heinous sexual assault and murder might be incapable of impartiality." Id. at 629-30. Here, Juror 12 was only informed by her husband that she would know some extended family members of the victim **if she met them**, but she did not even know who they were at the time of trial. Obviously, there could be no "common-sense concern" of deep empathy for people whose identities were unknown to her.

Later that day, Juror 12 notified the court that she knew witness Keon Cooper's mother, but that she didn't know that earlier because he had a different last name. Notably, Cooper only testified to calling 9-1-1 and finding the body, which was uncontroversial information and had no reason to

engender unnatural sympathy. Once again, she affirmed that this relationship would not affect her impartiality. (24T 111-14 to 112-24).

These exchanges clearly demonstrate that Juror 12's did not have any relationships of significance with respect to the State, the witnesses, or the victim. Her acquaintances were peripheral and not directly connected to any testifying witness. At best, the record demonstrates that she and her husband were active members of the community, but she repeatedly affirmed that she had not spoken to any family member of any person connected to the case during trial, she had not learned any outside information about the case, and she expressed a continued willingness and ability to remain impartial. Significantly, defense counsel did not have any objection to any of these revelations by Juror 12; her only concern was to ensure that Juror 12 did not recognize any of Stallworth's family in attendance which was confirmed by Juror 12. (24T 11-4 to 12-6).

As such, Defendant has failed to establish that it was an abuse of discretion for the trial court to refrain from independently excusing Juror 12.

POINT III

DEFENDANT'S STATEMENT REFUSING A BLOOD DRAW WAS PROPERLY ADMITTED AS CONSCIOUSNESS OF GUILT

Defendant argues that the trial court improperly permitted testimony of Jillian Marin, a courtroom officer with the Ocean County Sherriff's Office, with respect to Defendant's statement when refusing a buccal swab sample that "it would be worse for him if he did give a sample." (34T 182-6 to 182-7). This argument is meritless because the statement was clearly admissible as evidence of consciousness of guilt, and even if it was in error, defense counsel's acquiescence to its introduction would constitute invited error.

The record demonstrates that Defendant refused to provide a buccal swab after multiple court orders directing that samples be taken from him. In particular, the Honorable James M. Blaney, J.S.C., granted the State's motion to compel a buccal swab on May 7, 2018 (1T 16-2 to 16-3). The order was stayed pending appeal, but was reinstated on June 21, 2018, by Judge Ryan after Defendant failed to file an appeal, and although a recess was granted to take the samples, the parties came back on the record later that day to report that Defendant had refused the sample. (2T 15-20 to 15-24).

On October 11, 2018, the parties convened again after the State submitted legal authority on the ability of the Court to order reasonable force to obtain the buccal sample, and the Court granted the State's motion to use

reasonable force to compel the sample. However, the Court stayed the order for eight days to allow defense counsel to again go over the discovery with Defendant to show him that a buccal swab was necessary because saliva samples were found at the crime scene and gave an initial match to him. (4T 30-17 to 32-19).

On October 26, 2018, the parties reconvened and Defendant maintained his refusal to provide a buccal swab, and instead, offered to give a blood sample which was accepted. (5T 6-22 to 7-12).

Preliminarily, the State would note that defense counsel waived the opportunity to challenge the admission of this evidence at a N.J.R.E. 104 hearing. Although Defendant argues in his brief that the Court "had ruled that Marin's testimony regarding Defendant's statement was coming in so long as it was limited to that one statement," (Db 40) this is an inaccurate summary of the record. The transcript reveals that the Court simply indicated that it seemed likely that the evidence was admissible but left the question to defense counsel to determine if she wished to contest the admissibility of the evidence and in what manner:

> THE COURT: What I'm talking about is what Jill Marin is going to say. I'm trying to find out how much of that you're objecting to, do I need to have a 104 Hearing outside the presence of the jury. I mean, I can err on the side of doing a 104 Hearing on every disputed issue and this trial turns into nine weeks. So

> what I don't want to do is do all that and then you say, "Oh, I have no problem, Judge. I saw that report. I expected it." **So I'm just trying to -- you know, if there's a dispute as to its admissibility, there has to be a 104 Hearing. It doesn't always require testimony, but it sometimes does. So I'm just trying to -- you know, it's so much better to know in advance when you have to do that.**
>
> . . .
>
> The jury needs to decide the case on the merits. That's why I'm trying to do these things in advance. So if you don't feel comfortable telling me today, that's fine. Why don't you think about it overnight -- unless you want to answer now -- why don't you think overnight and tell me do you think we need a testimonial hearing with Jill Marin in advance outside the presence of the jury or are you satisfied addressing it based upon whatever report she wrote.
>
> (18T 29-10 to 30-24)(emphasis added).

Nowhere in the transcript does the Court say it was formally ruling that the evidence was admissible, and the Court gave every opportunity for counsel to make a decision as to whether or not she was contesting the admission of the evidence, and indeed, asked counsel to think about it overnight and inform the Court the next day whether she wished to submit a brief or have a testimonial hearing on the issue. (18T 32-3 to 32-21).

The next day, the Court addressed defense counsel and asked her if she would be contesting the admissibility of the statement and counsel indicated that she did not want to contest it and would address the statement in closing:

> THE COURT: Okay. And then we have Ms. Jill Marin, Detective Jill Marin on the saliva issue. Is there any objection to that testimony or do you want an 104 hearing on it, Ms. Tobin?
>
> MS. TOBIN: No objection, your Honor.
>
> THE COURT: All right. She's gonna be –
>
> MS. TOBIN: I think we agreed we can both address it at closing.
> (21T 7-8 to 7-15)

Similarly, defense counsel also acquiesced to the State’s oral motion to admit the testimony reflecting Defendant’s refusal to submit to buccal swabbing:

> MS. TOBIN: **I have no problem with her saying he told me he would not give a buccal swab**, but I'm not exactly sure where they're going with all this transcript stuff.
>
> . . . .
>
> THE COURT: All right.
>
> So, Ms. Tobin, do you want her to testify outside the presence of the jury or are you –
>
> MS. TOBIN: I don't think that's necessary as long as it's just that one statement and not anything -- her drawing an opinion as to what he meant or what he said in court on the record after that, which is a different --
>
> (21T 16-20 to 16-22, 18-2 to 18-9)(emphasis added)

In this regard, defense counsel deliberately chose to allow this evidence before the jury, apparently determining that she would have an adequate rebuttal to such evidence at summation which potentially could make the State look foolish for bringing the issue up. Indeed, defense counsel used this evidence to Defendant's **benefit** as she contrasted his refusal to provide a sample with Hill's, who she tried to argue was the true murderer:

> MS. TOBIN: One of the State's witnesses that they like the most is Jill Marin. She comes in to say, oh, well I buccal swabbed Sevon Hill and he gave me no problems. He obviously had nothing to hide because he gave me no problems. I would posit for you that Sevon Hill is not smart enough to know, Sevon Hill thinks he's smart enough, I got this beat, the gun, I know it doesn't have my DNA on it, I claim, but when we go through DNA, we'll hear about transference and how a gun in his car, in his hat could possibly have his DNA, but he didn't seem to think that or know it. And maybe he knew they were never going to test his DNA because they didn't bother to test the GSR they took from him because they were saying then he wasn't a suspect at all. But they want you to buy Anthony because he said that might not be in my interest or something along that lines. Therefore he's guilty because it's not in his interest.
>
> . . . .
>
> And it's not like he didn't give something. You heard a blood sample. We stipulated he gave a blood sample. His DNA was taken. It was tested. It matched the saliva. If you don't trust the police, do you think you might have been cautious if you know what they want to test the saliva and they want to take saliva, they're going to take them both on buccal swabs, which is

> basically a Q-Tip of some sort, and that's both of those are going to get sent to the DNA lab, that maybe you want to be cautious because how do you know that what gets sent to the DNA lab when somebody wants you to be the killer. It's hard to say that sometimes the police are not true and honest, and I'm not saying, a lot of police are very good and honest. I have relatives who are police officers. But my point is is here we have absolute facts that they had decided he was the murderer when they had no facts to support that. So why would he not be cautious? He gave them a sample. They did their DNA testing, and all it proves was that his saliva was at
> the scene.
> (38T 17-13 to 19-19).

By contrasting Hill's shrewd avoidance of DNA contamination with Defendant's innocent mistrust of police yet eventual acquiescence to a blood sample, counsel was able to paint a narrative of Defendant being manipulated into being in the wrong place at the wrong time and Hill as the mastermind who committed the murder. Even if unsuccessful, counsel's strategic motivation in acquiescing to the admittance of Defendant's refusal and contemporaneous statement was undeniable.

Therefore, her decision to admit this evidence rendered any error in its introduction to be immaterial as invited error. <u>See</u> <u>State v. A.R.</u>, 213 N.J. 542, 561 (2013)("Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal'"). Our Supreme Court has held that "[t]he

doctrine is implicated 'when a defendant in some way has led the court into error'" and that it "is meant to 'prevent defendants from manipulating the system." Ibid.

Defendant cannot refuse – plainly for strategic reasons – clear and repeated invitations from the Court for N.J.R.E. 104 hearings on the admissibility of his statement and refusal to submit to buccal swabs, then complain on appeal that such evidence should never have been admitted. Indeed, for this reason, Defendant's arguments on appeal contesting the reliability of the statement should not be permitted as the State could have refuted these arguments had Defendant not consented. (Db 45). This is precisely the sort of "manipulating of the system" that our courts have forbidden. See Ibid.

Nevertheless, it is clear that even if defense counsel had challenged the admissibility of this evidence, it was proper to admit it.

"Our jurisprudence regarding consciousness-of-guilt evidence derives from the principle that certain conduct may be 'intrinsically indicative of a consciousness of guilt,' and may therefore be admitted as substantive proof of the defendant's guilt." State v. Cole, 229 N.J. 430, 454 (2017). Our courts have held that an act demonstrating consciousness of guilt is admissible when it may "reasonably justify an inference that it was done with a consciousness

of guilt and pursuant to an effort to avoid an accusation based on that guilt." State v. Mann, 132 N.J. 410, 419 (1993). The evidence sought to be introduced must be intrinsically indicative of a consciousness of guilt but recently our Supreme Court has reaffirmed that such evidence need not unequivocally support such an inference, stating that "[t]here is no support in our jurisprudence for so high a bar to the admission of such evidence." State v. Randolph, 228 N.J. 566, 595 (2017).

Defendant contends that he had an alternative explanation for refusing to submit to buccal swab testing which rendered such evidence as overly prejudicial and inadmissible. He cites to his statements during the motions to compel the buccal swabs claiming that he refused because he didn't see a laboratory report saying that such samples are necessary. (Db 44, 4T 30-3 to 30-13). However, this explanation is entirely incredible considering the Court allowed counsel to go over the portions of discovery with Defendant which evidenced the spit samples found near Stallworth's body and the preliminary CODIS match to Defendant requesting a reference sample of his DNA. (4T 31-7 to 31-20). Thus, Defendant was provided with the laboratory reports he requested and then **still** refused to provide a saliva sample, instead opting for blood. (5T 6-22 to 7-12). These facts reflect a strong and intrinsic relationship between Defendant's refusal and his knowledge that the sample

would likely be used to link him with the murder. While such an inference may not have been unequivocal, the caselaw explicitly rejects such a requirement. Randolph, 228 N.J. at 595.

Furthermore, defense counsel rejected the issuance of 404(b) instruction at the time this testimony was introduced, stating "No, we don't want it. We don't want to give it because it's going to be, he has a reason why he didn't give it." (34T 183-11 to 183-13). Ultimately, the Court's instruction was a general credibility instruction for Marin's testimony regarding Defendant's statement. (34T 184-7 to 185-3).

POINT IV

DETECTIVE DOTTO'S STATEMENT IDENTIFYING DEFENDANT IN A PHOTO EXTRACTED FROM HILL'S PHONE WAS PLAIN ERROR (NOT RAISED BELOW)

Defendant argues that Detective Dotto's statement identifying him in a photo depicting him earlier on the day of the murder – before he obtained his teardrop tattoos – was an error clearly capable of producing an unjust result. This argument is meritless because Det Dotto's statement was a passing reference that was immediately retracted by the State, not objected to, subject to limiting instruction, and plainly harmless.

Lay opinion testimony is permissible "if it falls within the narrow bounds of testimony that is based on the perception of the witness and that will assist the jury in performing its function." State v. McLean, 205 N.J. 438, 456 (2011). Pursuant to N.J.R.E. 701, "[i]f a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue."

The transcript plainly reveals that the State did not intend to have Dotto identify Defendant in S-113 – a photo extracted from Hill's cellphone depicting him before he obtained his teardrop tattoos – as the prosecutor opened by confirming with Dotto that he was not providing any testimony as to the substance of the calls, and after Det Dotto's unintended statement the prosecutor clarified his question immediately:

> MR ABATEMARCO: Now, Detective, you're not testifying to the substance of these calls or messages; is that correct, sir?
>
> DET DOTTO: No, sir, I'm not.
>
> MR ABATEMARCO: You were not party to any of those?
>
> DET DOTTO: No, sir, I was not.
>
> MR ABATEMARCO: Again, Detective, I'm going to show you now what's been marked as S-113 and ask if you've seen that before?

> DET DOTTO: Yes, sir, I've seen this picture before.
>
> MR ABATEMARCO: And what is that?
>
> DET DOTTO: It's a picture of Mr. Barksdale.
>
> MR ABATEMARCO No, I don't want you to identify the picture. It's a picture --
>
> DET DOTTO: It's a photograph, yes, sir.
> (26T 72-19 to 73-8).

There was no objection by the defense after this statement, nor was there any objection to the subsequent request by the State to admit S-113 as well as another photo, S-114, which depicted Defendant after he obtained the teardrop tattoos, into evidence. Critically, the photos were not published to the jury at the time Det Dotto made the identifying statement. The trial court waited to allow the defense to cross-examine Det Dotto before granting the State's request to publish. (26T 97-21 to 97-22). Furthermore, the Court issued a limiting instruction directing the jury as to the permissible use of the photos and Dotto's testimony which appropriately narrowed the jury's focus to the fact that the photos were extracted from a cellphone:

> THE COURT: So, ladies and gentlemen, you're going to see two photographs that have been admitted into evidence, therefore, you're allowed to see them and that's why I'm permitting that. However, these photographs have been authenticated by this detective only to extent of his testimony, meaning that the

> current proofs are these are two photographs which he's testified he extracted from certain electronic devices. **He gave you the testimony that they were created at a certain date and as to at least one of them I believe at a certain place or the phone was in a certain area. That's the only information you have so far.** So that's to the extent they've been authenticated. If later in the case either side produces any additional information, then obviously it will be for you to consider.
>
> But at this point, remember you're the judges of the facts, it's for you to determine what the facts are, but that's the testimony you have thus far with respect to those two photographs.
>
> So with that in mind, I'll allow Mr. Abatemarco to show them to you
>
> MR. ABATEMARCO: Thank you.
>
> (Exhibits published to jury.)
>
> (26T 97-21 to 98-21)(emphasis added).

At worst, Det Dotto's statement was harmless error as there was significant circumstantial evidence of Defendant's identity in S-113 such as the fact that the photos were extracted from Hill's cellphone, the timeframe of the photos matching with Hill's testimony about when Defendant and he obtained the tattoos, and the fact that Hill was able to authenticate Defendant's identity in S-114 (the March 9 photo of Defendant with teardrop tattoos). <u>See</u> <u>State v. Singh</u>, 245 N.J. 1, 18 (2021)(holding that detective's identification of defendant in surveillance video was harmless error when the reference was

fleeting and circumstantial evidence corroborated the defendant's identity). In this regard, the circumstances surrounding Dotto's statement had no capacity to influence the jury's evaluation of the evidence and the statement's admission was not plain error as it was not "clearly capable of producing an unjust result." See R. 2:10-2.

POINT V

THE JURY INSTRUCTIONS REGARDING THE PERMISSIBLE USE OF THE TATTOO EVIDENCE WERE NOT ERRONEOUS (NOT RAISED BELOW)

Defendant argues that the trial court issued an improper limiting instruction regarding the permissible use of the evidence of Defendant and Hill's tattoos. He claims that the trial court improperly shifted the burden to the defense to provide an explanation for the tattoos prior to eliciting such testimony. This argument is meritless because defense counsel consented to the instruction as given and contrary to his argument on appeal, defense counsel did, in fact, provide an alternative explanation to why he obtained his tattoos.

"Plain error in the context of a jury charge is '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince

the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Torres, 183 N.J. 554, 564 (2005). "If a defendant fails to object to a trial court's instructions, the failure to challenge the jury charge is considered a waiver to object to the instruction on appeal." State v. Faucette, 439 N.J. Super. 241, 270 (App. Div. 2015)

Here, the trial court's instructions on the permissible use of tattoos did not create any potential for adverse inferences as Defendant alleges:

> THE COURT: All right. Ladies and gentlemen, at this time again it's my function to read you certain instructions. So I have two instructions, one is as to the arm tattoo, the other one is as to the facial tattoo.
>
> So first with respect to the arm tattoo, there's been some testimony in this case regarding whether the defendant and Mr. Hill obtained matching tattoos on their arms after March 5, 2018. The question of whether the defendant and Mr. Hill obtained matching tattoos and, if so, what those tattoos mean is another question of fact for your determination in this case. As you know, there's nothing unlawful about obtaining a tattoo. Further, there's nothing unlawful about obtaining a tattoo which says "Loyalty is Royalty."
>
> Having a tattoo in general is not evidence of guilt or innocence and you may not use it for that purpose. Moreover, having a tattoo which says Loyalty is Royalty by itself is not evidence of guilt or innocence on any of the counts in the indictment. Many factors may motivate or contribute to a person's desire to obtain a tattoo, including a Loyalty is Royalty tattoo.
>
> Having such a tattoo does not make someone a bad person, nor does it make that person likely to commit

any crime. You may not consider the tattoos for that purpose. There may be, there are many perfectly legitimate and lawful reasons why a person would obtain a tattoo including one which would say Loyalty is Royalty. However, the State has introduced evidence and claims the defendant and Mr. Hill obtained matching forearm tattoos depicting the phrase Loyalty is Royalty after the alleged murder.

In this case, the evidence was introduced to show whether the defendant and Mr. Hill engaged in a conspiracy, as I will define that for you at the end of the case in my final instructions. The State asserts defendant and Mr. Hill obtained these tattoos to solidify their conspiracy to commit the alleged murder of Steven Stallworth and to perpetuate their agreement to keep the killing a secret.

You may consider this evidence for those limited purposes only and nothing else. Whether this evidence does in fact show defendant and Mr. Hill engaged in a conspiracy is for you, the jury, to decide. You may decide that the evidence does not demonstrate or support a conspiracy and therefore is not helpful to you. In that case, you must disregard the evidence.

On the other hand, you may decide that the evidence does assist you in determining whether the defendant and Mr. Hill engaged in a conspiracy and you may use it for that specific purpose. The defense may, but is not required, to offer an alternative explanation for the Loyalty is Royalty tattoo.

So before you give any weight to this evidence, you must be satisfied that the State has proven, one, defendant and Mr. Hill obtained the matching Loyalty is Royalty tattoos after the alleged murder; and, two, the defendant and Mr. Hill obtained the matching tattoos for the purpose of solidifying their conspiracy or perpetuating their agreement to keep the alleged

> killing a secret. If you find the State has not proven these two things, then you may not consider the matching tattoos for any purpose and you shall completely disregard them in your deliberations.
>
> Further, if you accept any alternative explanation offered by the defense for the Loyalty is Royalty tattoo, then you may not consider said tattoo for any purpose and you shall completely disregard it in your deliberations.
> (30T 254-3 to 256-24).

The Court issued a similar instruction with respect to the teardrop tattoos after this instruction. (30T 256-25 to 259-18).

Critically, the day before this instruction was first issued, there was an extensive colloquy regarding the form of this instruction in which both parties offered suggestions, and defense counsel expressed no dissatisfaction with any portion of the instruction referring to the defense's potential alternative explanation for the tattoos. (29T 147-8 to 156-25). Particularly when Defendant now alleges that the primary prejudice resulting from this instruction was to pressure him to provide an explanation for the tattoos that he might have been unwilling to provide otherwise, the failure of counsel object to the instruction underscores the futility of this argument on appeal.

These instructions did not require the jury to draw an adverse inference from Defendant's potential decision not to provide an explanation for the tattoos; indeed, they did the opposite by instructing the jury to disregard the

tattoos if the State failed to prove that the tattoos symbolized the murder, and they clearly stated that while Defendant might offer an explanation for the tattoos, he was not required to do so. In this regard, Defendant's reliance on cases condemning Clawans instructions such as those issued in State v. Hill, 199 N.J. 545, 565-70 (2009), is entirely inappropriate as the charges in those cases instructed the jury that they were **permitted** to draw adverse inferences from the fact that the defense failed to call a witness. Indeed, the Hill court held that the error of a Clawans charge was forcing the defendant into "the Catch-22" of deciding whether to call an adverse witness "or else submit to a jury charge where the court informed the jury that it may find an adverse inference against [the defendant] for failure to call [the adverse witness]." Id. at 569. Here, such an adverse inference was not only absent, but specifically **condemned** by the trial court's instruction. See (30T 256-6 to 256-8).

Moreover, the fact remains that trial counsel did, in fact, provide an explanation for the tattoos in closing: they were simply tattoos with no hidden significance:

> MS TOBIN: The biggest thing the State is going to say, they're gonna ask you to jump to Anthony got a tattoo and this is because to corroborate the, the murder.
>
> . . .
>
> The State is then also going to say because Sevon says, well, the defendant got three teardrops and that

> means something. There are actors, actresses, if you in your common experience know any musician or anyone else, you know anyone on the street who may have teardrops on their face, are they all murderers or could it mean something else? The only one who's saying, oh, Sevon says Anthony said it was because of the murder. He got it to represent the murder. Again, Sevon's not reliable. Sevon, if you can't believe Sevon, false in one, false in all.
> (38T 84-2 to 84-25)

Thus, the defense's theory for the jury was that the tattoos were simply interesting tattoos that anyone would get for any reason, and that Hill's suggestions that they were symbolic were entirely incredible.

As such, Defendant has failed to establish any error with the trial court's limiting instructions on this issue.

CONCLUSION

For the aforementioned reasons, Defendant's conviction should be affirmed002E

Respectfully Submitted,

/s Shiraz Deen

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-527-20

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Judgment Of Conviction of the
v.	:	Superior Court of New Jersey, Criminal Division, Ocean Vicinage
ANTHONY BARKSDALE JR.,	:	Indictment No. 19-12-01952-I
	:	Sat Below:
Defendant-Appellant.	:	Hon. Guy P. Ryan, P.J.Cr. Hon. James M. Blaney, J.S.C.,
	:	and a Jury

Your Honors:

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

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FILED, Clerk of the Appellate Division, July 18, 2023, **A-000527-20**, **AMENDED**

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant relies on the procedural history, statement of facts contained in his initial brief.[1]

LEGAL ARGUMENT

Defendant submits this reply brief to reply solely to a few issues that arose in the State's response to Defendant's initial Points I, II, and III. Defendant otherwise relies on the legal arguments in his initial brief.

POINT I

BOTH OF DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED IN THEIR ENTIRETY BECAUSE HE WAS IN CUSTODY WHEN QUESTIONED WITHOUT MIRANDA WARNINGS ON MARCH 6, WHICH RENDERED INEFFECTIVE THE WARNINGS GIVEN PRIOR TO HIS INTERROGATION ON MARCH 12. (21T50-23 to 61-17; Da128-130)

In arguing that Defendant was not in custody during the March 6 Statement, the State primarily relies on State v. Erazo, ___ N.J. ___ (2023). The Erazo Court, in finding defendant was not in custody, relied heavily on the trial court's findings that "(1) defendant rode voluntarily and unrestrained with officers to the police station; [and] (2) defendant expressed the desire to

[1] Defendant uses the same abbreviations used in his initial brief along with the following additional abbreviations:
Sb – State's Response Brief
Db – Defendant-Appellant's initial brief

cooperate in the investigation;" the Court concluded that there was "no evidence that defendant was forced to go to the police station or that he was handcuffed during the drive" and that there was "no reason to believe that the short trip was anything but voluntary." Id. (slip op. at 26-27).

In this case five police officers showed up at Defendant's residence, Ramada Inn Room 517, and told him they had Hill's consent to search the room, that he was not allowed to be present for the search, was not allowed to retrieve any items, and was not allowed to return to the hotel room. (21T29-4 to 17, 35-16 to 36-13, 39-3 to 12; 27T153-5 to 11; 29T42-23 to 43-3, 161-3 to 11; Da136-137, 177-178) This was the context of Detective Murphy's "request" that Defendant come down to the Toms River Police Station; he was ordered out of his residence and not allowed to return. Thus, even before the request to come to the police station, there was "a significant deprivation of [Defendant's] freedom of action based on the objective circumstances," State v. P.Z., 152 N.J. 86, 103 (1997). This stands in stark contrast to Erazo, where the defendant was not ordered out of his house or prohibited from returning. The motion court in this case did not consider these facts in its opinion, instead finding that "[o]ne has the ability to retreat into their room and close the door and lock it . . . "Defendant could have backed into the [hotel] room". (21T54-24 to 13) In light of the record, this finding by the trial court is "clearly

mistaken" and as such "'the interests of justice demand intervention' by an appellate court." State v. L.H., 239 N.J. 22, 47 (2019) (quoting State v. S.S., 229 N.J. 360, 381 (2017)).

Additionally, unlike the defendant in Erazo, once Mr. Barksdale Jr. was transported to the Toms River Police station it appears that he was immediately escorted to the interrogation room where Detectives O'Neill and Murphy interviewed him rather than being allowed to sit unrestrained in the waiting room with other members of the public as in Erazo. (slip op. at 27) (21T24-9 to 25-6) additionally, whereas Erazo was not isolated from any friends or family, Mr. Barskdale Jr. was isolated from his friend Miguel Gonzalez, the other occupant of the Room 517, who was separately transported to the police department to be interrogated and was interviewed separately from Mr. Barksdale Jr. (24T177-14 to 17, 186-15 to 19; Da169-170) Thus, unlike Erazo, a reasonable person in Mr. Barksdale Jr.'s position, "based on the nature of the police encounter would not have believed that he was free to leave." State v. O'Neal, 190 N.J. 601, 615 (2007).

The State also responded in its brief to Defendant's argument that police "affirmatively misled defendant as to his 'true status'" during the March 12 interview because he was not informed that the police were questioning him with respect to a homicide investigation although they admitted they had

probable cause to charge him with homicide at the time they commenced the March 12 interrogation. State v. Diaz, 470 N.J. Super. 495, 518 (App. Div.), leave to appeal denied, 251 N.J. 8 (2022). (Db24; Sb24-25; 14T28-21 to 25) The State argued that "the detectives did not try to hide the fact that they were investigating the murder of Stallworth, which they informed Defendant of as far back as the March 6 interview." (Sb24-25) This assertion is factually incorrect. At no point during the March 6 interview did detectives inform Defendant they were investigating the homicide of Stallworth or that they were investigating a homicide at all. (Da138-152) Nor did Detective Murphy testify that he informed Defendant they were investigating a homicide prior at any point prior to the initiation of the recorded statement. (21T23-3 to 43-6)

The detectives did not inform Defendant they were investigating a homicide before or during the March 12 interview until an hour and eleven minutes into the March 12 interrogation. (Da153 at 16:22:06 to 17:44:00; Da155-244; 14T62-22 to 64-15) Neither detective "indicated during the waiver colloquy what the interrogation was about. Nor did they specify the potential criminal charges that defendant was facing." Diaz, 470 N.J. Super. at 507. At an hour and eleven minutes into the interrogation, detectives finally revealed that they were investigating a homicide:

> DETECTIVE: We're with the guy who can save himself, and he's not -- he's not taking our advice.

. . .

> DETECTIVE: [T]he guy who put all this thing together is the one ultimately responsible for what happens. And I don't think you put this whole thing together.
>
> MR. BARKSDALE: I don't even know what you talking about.
>
> THE DETECTIVE: You don't know what we're talking about?
>
> MR. BARKSDALE: No --
>
> THE DETECTIVE: We're talking about --
>
> MR. BARKSDALE: You talking about putting this thing together.
>
> THE DETECTIVE: We're put -- we're talking about --
>
> MR. BARKSDALE: What was put together?
>
> THE DETECTIVE: We're talking about --
>
> THE DETECTIVE: We're talking about somebody set up that dead guy, and I'm believing in you.
>
> THE DETECTIVE: That's exactly right; that's what we're talking about.
>
> THE DETECTIVE: I mean, let's -- let's clear the air here. Let's -- let's talk about the elephant in the room. That's what we're talking about.
>
> [(Da243-244; Da153 at 17:43:00 to 17:44:00)]

This exchange makes eminently clear that the detectives had not told Defendant they were investigating a homicide before that point. Defendant told the detectives he did not know what they were talking about. After one of the detectives clarified that they were talking about "somebody set up that dead guy," he noted that this was "the elephant in the room"—i.e. something that

had not been previously mentioned—and that his mention of somebody "set[ting] up the dead guy" served to "clear the air."

"[T]he record shows that the tenor and substance of the stationhouse interrogation changed after" the moment where detectives first mentioned "the dead guy." Diaz, 470 N.J. Super. at 508. The motion court ultimately found that Defendant did not invoke (at least ambiguously) his right to remain silent until page 132 of the transcript of the interrogation, when he said, "I don't even want to talk no more, bro. I don't know whose phone that is. That's it." (Da286-285; 14T99-13 to 100-10) However, Defendant had been making similar statements as early as transcript page 104, very shortly after the detectives finally told him what the interrogation was about on transcript page 90. (Da243; Da258) For example, on transcript page 104, Defendant said, "I can't tell you nothing, so I guess I can't help myself. Whatever ya'll going to do from this point, you have to do, all right." (Da258) He then repeatedly stated to the police, "I can't tell you something I don't know." (Da259, 261) He soon after again protested the officers' repeated questions: "I don't know what to tell you , man. I can't keep – you asking me questions I can't keep – I can't tell you what I don't know or what I don't remember. . . . So that's just that." (Da263) He again seemed to attempt to end the conversation on page 128, stating, "I don't know about the phone, so if y'all want to keep asking

about the phone, whatever y'all going to do, y'all going to do. . . . So that's it. . . . I don't know about the phone. . . . Whatever y'all going to do, y'all going to do." (Da282) While the trial court did not find that any of these statements amounted to the invocation of a right to silence it later found at page 132 of the transcript, they are all in the same vein as Defendant's statement on page 132, and they all occur after the detectives finally informed Defendant they were questioning him in connection with their investigation of a homicide.

Similar to Diaz, the question before this Court is "whether the State proved beyond a reasonable doubt that defendant knowingly waived his right against self-incrimination in view of the detectives' stratagem to withhold the fact that someone had died" and that the detectives were investigating a homicide. 470 N.J. Super. at 518. Also like Diaz, neither detective here "indicated during the waiver colloquy what the interrogation was about. Nor did they specify the potential criminal charges that defendant was facing." Diaz, 470 N.J. Super. at 507. Yet the detectives had probable cause to arrest Defendant for the homicide at the time the initiated the interrogation. (14T28-21 to 25) Given the fact that the detective's very belated disclosure that they were investigating a homicide resulted in a series of verbal protests from Defendant that ultimately resulted in a verbal protest found by the trial court to be at least an ambiguous invocation of his right to remain silent, this

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Court should find that the detectives' strategy to deliberately withhold that they were investigating a homicide until an hour and eleven minutes into the interrogation entailed that Defendant did not knowingly waive his Miranda rights during the Miranda colloquy.

POINT II

JUROR 12 SHOULD HAVE BEEN DISMISSED BECAUSE SHE AND HER HUSBAND KNEW THE VICTIM'S FAMILY, A STATE'S WITNESS, AND THE CHIEF OF POLICE OF THE TOMS RIVER POLICE DEPARTMENT, AND BECAUSE SHE RECEIVED INFORMATION ABOUT THE CASE FROM HER HUSBAND. (Not Raised Below)

Defendant argued in his initial brief that the trial court's failure to adequately question and excuse Juror 12 deprived defendant of a fair and impartial jury principally because Juror 12 knew the victim's family members through their respective churches and because her husband had received "all the information about the trial," and the judge failed to definitively ascertain the precise scope of the information Juror 12's husband in turn relayed to her. (Db25) In response, the State argues that "the information Juror 12 received from her husband was minor" and "she did not recognize any of Stallworth's family members who attended the court proceedings." (Sb26, 29) This is not an accurate characterization of the record.

Juror 12 informed the court hat a friend of theirs gave her husband "all the information about the trial" and that her husband knew "about this case because of his employment at the church in Freehold" that some of Stallworth's family members attend. (24T6-12 to 24) When the trial court asked Juror 12 whether her husband told her anything, Juror 12 said "I told him to stop giving me any information," but did not state what information her husband had given her. (24T6-25 to 7-3) When the court attempted to follow up by asking how much her husband told her and whether it was limited to the fact that Stallworth's family members attend the Freehold church, Juror 12 did not give a clear response; she never stated that the information her husband gave her was limited to the fact that the family members attend the Freehold church nor described the information at all, instead describing her and her husband's concerns. (24T7-5 to 14) Thus, there is simply no basis in the record to conclude that the information Juror 12's husband conveyed to her was "minor," as the court failed to ascertain the "specific nature of the extraneous information" that Juror 12 learned from her husband. State v. R.D., 169 N.J. 551, 560 (2001).

Moreover, while it is true that Juror 12 did not recognize anyone in the audience on March 11, 2020, the date of the aforementioned colloquy, the record does not reveal: (1) whether any of Stallworth's family members were

actually present at the time Juror 12 was asked whether she recognized anyone in the audience or (2) whether Juror 12 recognized any audience members on any future dates as members of the Freehold church with which she had fellowshipped. (24T11-4 to 24) The State tries to distinguish State v. Fortin, 178 N.J. 540 (2004) on the basis that Juror 12 did not know which of the members of the Freehold church that she had met were in fact Stallworth's family members. (Sb31) The fact that she did not know who among her acquaintances were Stallworth's family members does not change the fact that she knew that acquaintances of her and her husband, members of the Freehold church with whom Juror 12's church "did fellowship a lot," were family members of Stallworth. (24T9-6) And at the time of the trial she knew she would be seeing the family again in May at "a speaking engagement at the ministry." (24T9-11 to 14)

Thus, although juror 12 did not know which of her acquaintances from the Freehold church were Stallworth's family members, she knew that some of her acquaintances were Stallworth's family members, that her husband knew which of the Freehold church members were Stallworth's family members, and that those family members likely would recognize her. And it appears her contacts with these family members were more numerous than the contacts of the Fortin juror with the victim's family members in that case. Moreover, the

Fortin juror did not actually deliberate—the juror was ultimately excused via a peremptory challenge. In contrast, Juror 12 was a deliberating juror in this case.

Because Juror Twelve was a deliberating juror (41T11-11), her connection to the victim's family, witness Keon Cooper, and Chief of Police of Toms River had the capacity of influencing the jury in reaching its verdict. See Panko v. Flintkote Co., 7 N.J. 55, 61 (1951) (holding the test for whether a new trial should be granted because of an irregular influence is "not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so"). Accordingly, this Court should reverse and remand for a new trial.

POINT III

THE ADMISSION OF TESTIMONY THAT DEFENDANT REFUSED A BUCCAL SWAB AND ALLEGEDLY MADE A CONTEMPORANEOUS ORAL STATEMENT AS PROOF OF CONSCIOUSNESS OF GUILT VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE DEFENDANT ULTIMATELY CONSENTED TO A BLOOD DRAW AND HAD HONEST (THOUGH MISGUIDED) REASONS FOR OPPOSING THE BUCCAL SWAB. (Partially raised below, 18T27-20 to 32-5)

In his initial brief, Defendant argued that the testimony of Officer Jillian Marin of the Ocean County Sheriff's Office that Defendant had refused to give a buccal swab and had allegedly told her that "it would be worse for him if he did give a sample" coupled with the failure to inform the jury that Defendant consented to the blood draw and the incomplete jury instructions under State v. Hampton and State v. Kociolek, violated Defendant's right to a fair trial. (Db35) violated due process, fundamental fairness, and deprived Defendant of a fair trial.

Regarding the admission of Marin's testimony, the State cites State v. A.R., 213 N.J. 542 (2013) to argues that this was invited error. (Sb38) The alleged error in A.R. was that the jury was given unfettered access to take into the jury room and replay unsupervised the video of defendant's statement that had been admitted into evidence. Id. at 552. The Court noted that while this

procedure did not comport with the Court's prior precedent, this procedural impropriety "simply did not implicate either defendant's right to confront evidence or witnesses against him or to assure a fair trial process." Id. at 559. And the Court found that any error was invited because "defense counsel actively encouraged the jury to review the video-recorded statements and urged the trial court to submit the video recordings to the jury." Id. at 561. In this case, conversely, defense counsel neither requested that Marin's testimony be admitted nor encouraged the jury to consider Marin's testimony as evidence of Defendant's innocence. Notwithstanding the State's attempt to mischaracterize defense counsel's reference to Marin's testimony in closing as "strategic," defense counsel's statements were clearly an attempt to minimize the prejudice from Marin's testimony—not a strategic use of Marin's testimony to further the defense theory.

Moreover, the Supreme Court has very carefully defined invited error as occurring only "when a defendant asks the court to take his proffered approach and the court does so." State v. Jenkins, 178 N.J. 347, 358 (2004) (emphasis added) The State, not defense counsel, was clearly the proponent of Marin's testimony in this case, arguing for its admissibility. Defense counsel objected to the admission of this testimony on March 4, 2020, although she later acquiesced on March 5. (18T27-20 to 23; 21T 16-20 to 16-22) But at no point

did defense counsel ask or invite the court to admit Marin's testimony. The doctrine of invited error is clearly inapplicable.

CONCLUSION

For all the aforementioned reasons as well as the reasons set forth in Defendant's initial brief, this Court should reverse the trial court's March 10, 2020 order admitting the March 6 and March 12 statements and remand for (1) an order suppressing both statements in their entirety and (2) a new trial.

Respectfully submitted,

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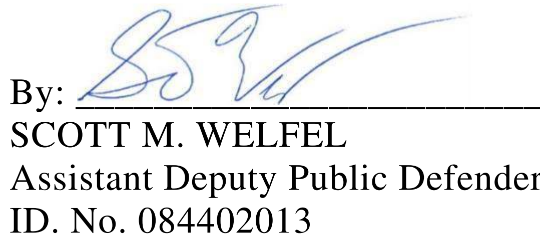
By: 
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