SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003593-22T2

STATE OF NEW JERSEY, Plaintiff-Respondent, v. MICHAEL MITCHELL, Defendant-Appellant.	Criminal Action On Appeal from an Order Denying Post-Conviction Relief in the Superior Court of New Jersey, Law Division (Criminal), Middlesex County. Sat Below: Hon. Thomas J. Buck, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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State v. Michael E. Mitchell, A-0675-14T1, 2017 WL 1739633 (App. Div. May 4, 2017) Pa1-6

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On May 6, 2014, a Middlesex County Grand Jury returned indictment number 14-05-00525-I, charging defendant Michael Mitchell[1] with robbery, first-degree, contrary to N.J.S.A. 2C:15-1 (Count 1); conspiracy, second-degree, contrary to N.J.S.A. 2C:5-2 (Count 2); theft by unlawful taking, third-degree, contrary to N.J.S.A. 2C:20-3a (Count 3); unlawful possession of a weapon, third-degree, contrary to N.J.S.A. 2C:39-5b (Count 4); possession of a weapon for an unlawful purpose, second-degree, contrary to N.J.S.A. 2C:39-4a (Count 5); robbery, first-degree, contrary to N.J.S.A. 2C:15-1 (Count 6); conspiracy, second-degree, contrary to N.J.S.A. 2C:5-2 (Count 7); theft by unlawful taking, third-degree, contrary to N.J.S.A. 2C:20-3a (Count 8); unlawful possession of a weapon, third-degree, contrary to N.J.S.A. 2C:39-5b (Count 9); possession of a weapon for an unlawful purpose, second-degree, contrary to N.J.S.A. 2C:39-4a (Count 10); robbery, first-degree, contrary to N.J.S.A. 2C:15-1 (Count 11); conspiracy, second-degree, contrary to N.J.S.A. 2C:5-2 (Count 12); theft by unlawful taking, third-degree, contrary to N.J.S.A. 2C:20-3a (Count 13); unlawful possession of a weapon, third-degree, contrary to N.J.S.A. 2C:39-5b (Count 14); possession of a weapon for an unlawful purpose, second-degree, contrary to N.J.S.A. 2C:39-4a (Count 15);

[1] Co-defendants Mack Mitchell and Jane Doe were also charged in this indictment as co-conspirators, pursuant to N.J.S.A. 2C:5-2. Da1-6.

robbery, first-degree, contrary to N.J.S.A. 2C:15-1 (Count 16); conspiracy, second-degree, contrary to N.J.S.A. 2C:5-2 (Count 17); theft by unlawful taking, third-degree, contrary to N.J.S.A. 2C:20-3a (Count 18); unlawful possession of a weapon, third-degree, contrary to N.J.S.A. 2C:39-5b (Count 19); and possession of a weapon for an unlawful purpose, second-degree, contrary to N.J.S.A. 2C:39-4a (Count 20). Da1-6.

On November 2, 4, 5, 9, 10, 16, 17, 18, 19, 30, and December 1, 2015, defendant appeared with counsel before the Honorable Barry A. Weisberg, J.S.C., and a petit jury for trial. See (7T[2]-17T).

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[2] 1T refers to Transcript of Proceedings, June 5, 2012;
2T refers to Transcript of Proceedings, July 3, 2013;
3T refers to Transcript of Proceedings, April 29, 2014;
4T refers to Transcript of Proceedings, May 16, 2014;
5T refers to Transcript of Proceedings, October 9, 2015;
6T refers to Transcript of Proceedings, October 26, 2015;
7T refers to Transcript of Proceedings, November 2, 2015;
8T refers to Transcript of Proceedings, Volumes 1 & 2, November 4, 2015;
9T refers to Transcript of Proceedings, November 5, 2015;
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12T refers to Transcript of Proceedings, November 16, 2015;
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15T refers to Transcript of Proceedings, November 19, 2015;
16T refers to Transcript of Proceedings, November 30, 2015;
17T refers to Transcript of Proceedings, December 1, 2015;
18T refers to Transcript of Proceedings, March 4, 2016;
19T refers to Transcript of Proceedings, March 30, 2023; and
20T refers to Transcript of Proceedings August 11, 2015.

On December 1, 2015, the jury found the defendant guilty of counts 3, 7, 8, 10, 13, 16, 17, 18, and 20. Da19-24; (17T7-2 to 17-4). The jury found the defendant not guilty of counts 1, 2, 5, and 6. Ibid. Further, the jury was unable to reach a verdict on counts 11, 12, 15, which the State subsequently dismissed. Ibid.

On March 4, 2016, the defendant appeared before Judge Weisberg for sentencing. See (18T). Judge Weisberg granted the State's motion which sought a mandatory extended term for this defendant and sentenced the defendant to a custodial term of life without the possibility of parole. (18T19-7 to 34-24); Da25-27. Further, the court ordered that this sentence be served consecutively to the defendant's custodial sentence in Somerset County[3]. Ibid.

Defendant subsequently filed a Notice of Appeal. On March 26, 2019, the Superior Court, Appellate Division, affirmed the defendant's conviction and sentence in a per curiam opinion. See State v. Mitchell, A-3259-15T3; Da37-61.

Defendant thereafter filed a petition for certification with the Supreme Court. On March 5, 2019, the Supreme Court denied the defendant's petition for certification. Da62.

[3] On March 27, 2014, defendant was convicted by a Somerset petit jury of first-degree robbery. On May 30, 2014, defendant was sentenced to a custodial term of twenty-five years, subject to the "No Early Release Act," pursuant to N.J.S.A. 2C:43-7.2. Da32-36.

Prior to filing the instant petition for post-conviction relief, defendant filed a motion to correct an illegal sentence and a pro-se petition for post-conviction relief ("PCR"). The Honorable Joseph Rea, J.S.C., dismissed the defendant's pro-se PCR petition while the motion to correct an illegal sentence was litigated. Da63.

On November 1, 2021, defendant again filed a pro-se PCR petition, which was accepted as timely. Da64; Da161.

On May 19, 2023, the Honorable Thomas J. Buck, J.S.C., issued a written order and opinion denying the defendant's PCR petition. Da158-77.

On July 26, 2034, the defendant filed a Notice of Appeal with the Superior Court, Appellate Division. Da178-80. The State submits this brief in opposition.

COUNTERSTATEMENT OF FACTS

For purposes of this brief, the State will rely upon and incorporate by reference the facts delineated in the Appellate Division's per curiam opinion of the defendant's direct appeal of his conviction and sentence. Da37-61.

> On December 8, 2011, Amit Soni opened the T–Mobile store located on Route 1 South in Edison. According to Soni, shortly after opening, two men entered the store. Soni described one man as "mixed Spanish African American" and of a lighter complexion, and the other man as African American and of a darker complexion.
>
> Soni stated one of the men sat in a chair and asked Soni to help him find the cheapest cell phone because he had lost his. Soni stated he attempted to look up the man's cell phone number, but could not find the account. Then, the other man "took out a gun ... [h]ad it up to his chest and told [Soni] 'You know what it is? Go to the back.'"
>
> The man with the gun instructed Soni to go to the back room of the store and ordered him to lay face down on the ground. Soni testified the men asked him where the cash and tablets were, and Soni pointed at the safe where there was approximately $1300 in cash. Soni testified:
>
> [t]hen the third person came in and they just started filling up bags with the phones that were in here, and prepaid cards. Whatever they could find, they were just filling up. They also asked me where are the bags. And I told them the T–Mobile shopping bags are in the front of the store. So they grabbed some of those bags, which ... I could just see from the corner of my eye they were putting phones in there. I had a brown bag, which I had some food[ ] from the day before. They emptied that out, put the phones in there, and then they also ... grabbed ... garbage bags and they started putting phones in there too.

In total, the men stole approximately $40,000 worth of merchandise and prepaid cards. The robbery was captured on videotape and played for the jury.

Edward Perez was employed at a Radio Shack in South Brunswick. Perez testified that on December 19, 2011, between 10:00 and 11:00 a.m., two men entered the store and asked for help finding headphones. Perez attempted to show the men headphones when one of them took out a gun, pointed it at the back of his head, and ordered him to walk to the back room and lay face down on the ground.

Perez described both men as African American, and stated one man was approximately five feet and ten inches and of darker complexion than the other man, who was about five feet and eight or nine inches. Perez also stated both men were wearing jeans and baseball hats, one man's hat had a C logo on it, and one man had a hood over his hat.

Perez testified the men asked him for the keys to the inventory, and removed $24,573 worth of merchandise by placing it into clear garbage bags. Perez also stated "the lighter[complexion] guy, the shorter guy, he started putting on gloves. They looked like [white] latex gloves." The men left the store through the rear exit.

Hikanshi Upal was employed at the AT&T store on Route 1 North in Edison. Upal testified that on January 5, 2012, at approximately eleven o'clock in the morning two men walked into the store and one of them asked for a cell phone case. Upal stated one man had a lighter complexion and was wearing a hoodie and jeans. Upal stated the other man was a darker complexion, slimmer and was wearing a hoodie with red thread. Upal directed the men to the cell phone cases, but was suddenly grabbed and pushed by the slimmer man towards the back room of the store. Upal stated the man who grabbed him held a gun to the back of his head and ordered him to open the safe.

Thereafter, the men began collecting the cell phones and placing them in large black plastic bags. Upal recalled the men were wearing clear, translucent gloves. He also testified the slimmer man was on his cell phone, and he heard him say, "Okay, I'm hurrying up."

After filling the bags with cell phones, the men asked Upal where the cash was and took it. They then lead Upal to the back room, where they told him to remain until they left. Upal testified they exited from the rear of the store and he heard a car drive by as they left.

On January 12, 2012, Detective Frank Todd of the Edison Police Department was conducting surveillance near a T–Mobile store located on Parsonage Road in Edison. Detective David Salardino was conducting surveillance near a Radio Shack and Verizon Wireless in Wick Plaza in Edison. Detective Todd testified he observed a black Buick drive near the T–Mobile store. After a few minutes, the passenger, described as African–American, approximately five feet and eleven inches, wearing a black baseball hat and a black-hooded sweatshirt and black gloves, exited the car. A second man, also described as African–American, approximately five feet and eight inches, wearing a black baseball cap, black-hooded sweatshirt, and gray jacket, also exited the vehicle. Detective Todd stated he observed the taller man talking on his cell phone at the same time the driver was on his cell phone. Detective Todd believed they were speaking to each other.

Detective Todd also observed the Buick pull into a driveway adjacent to a building on Parsonage Road. He contacted Officer Steve Todd of the Edison Police Department, who was in plain clothes and operating an unmarked vehicle, to tail the Buick. Officer Todd testified the Buick began to back out of the parking spot, down the street, and into the driveway of the T–Mobile. Officer Todd stated the driver was on his cell phone and turned into a 7–Eleven parking lot. Officer Todd followed the

vehicle into the 7–Eleven parking lot, activated his lights, approached the vehicle, and asked the driver to hang up the cell phone. The driver, defendant, complied and was subsequently arrested.

The car defendant operated was towed and impounded. In the vehicle police found: a pair of blue jeans, a hat bearing the letter P, a Samsung T–Mobile Phone, a Nintendo DS3 in the box, an AT&T GoPhone in the box, a Nikon Coolpix Camera in the box, plastic gloves, deposit slips for defendant's bank accounts, defendant's cell phone, and paperwork associated with several cell phones, including co-defendant Mack Mitchell's.

As police were following defendant, Mariusz Dabrowski and Harold Eaddy were working at the T–Mobile store. Dabrowski testified two men entered the store wearing clothing he thought was too warm for the weather. Dabrowski stated he immediately dialed 9–1–1 on his phone, but did not place the call. The men asked about phone accessories, and Dabrowski helped the taller man at the front of the store. Dabrowski stated the taller man was on his phone and he could hear his conversation, including the person on the phone who stated, "I circled the store a couple of times." The shorter man then pulled a gun on Eaddy, and directed both Eaddy and Dabrowski to the rear of the store, where both were instructed to lie on the floor with their hands at their sides. The two men then emptied a secure storage cage of cell phones, mobile modems, accessories, and $10,000 in cash from the safe. Dabrowski stated the men were wearing black gloves.

Following defendant's arrest, he was read his Miranda rights. Defendant waived his rights and gave a statement to police. Defendant claimed he was on his way to New Brunswick for a memorial service and was on his telephone calling for directions. Defendant stated he did not know the men who had entered the T–Mobile store, co-defendants Mack Mitchell or Emendo Bowers, and denied dropping them off at the store. However, defendant

later admitted he dropped them off, but stated he did not know them. Defendant claimed he lived in Pennsylvania, did not know where Edison was, and claimed he purchased his iPhone from a flea market in Columbus.

Defendant was subsequently interviewed by Detective Drewrey Lea and Detective Theodore Hamer. The interview was recorded and played for the jury. At the beginning of the interview, defendant was read his Miranda rights and indicated he understood them. Defendant then questioned why his lawyer was not present. Detective Lea stated he was unaware defendant had a lawyer, but that defendant could stop talking at that point or waive his right to have a lawyer present. Defendant stated he would listen, and Detective Hamer further clarified whether defendant was willing to waive his rights. Defendant stated he was and that he understood Detective Hamer's instructions. Detective Lea began to question defendant when defendant stated "I ain't being recorded or nothing." Detective Lea then asked if defendant wanted to stop the recording, and defendant stated he did because "I never been informed that I was being recorded." Both Detective Lea and Detective Hamer indicated the recording would be turned off, but it was not.

Defendant then admitted he dropped off Mack Mitchell, but stated he did so because it was on his way to a memorial service and he would be in the area. Defendant repeated he became lost trying to find the memorial service. When police questioned defendant regarding the robbery, defendant stated "I don't know ... I do not know, I honestly don't know what they was gonna do, I don't know nothing, I don't know nothing about what they was gonna do, at all."

[Da39-46].

LEGAL ARGUMENT

POINT I[4]

THE PCR COURT APPROPRIATELY DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.

Defendant claims the trial court erred in denying his PCR petition because he established a prima facie claim for ineffective assistance of trial counsel. In arguing his trial attorney was deficient, defendant contends that his attorney counsel failed to ask the court a third-party guilt instruction to the jury; investigate and present his brother and co-defendant, Mack Mitchell as an exculpatory witness; failed to communicate a favorable plea offer; and failed to negotiate a global plea resolution between Somerset and Middlesex County. Db14-35. Because of these claims, defendant argues that he was entitled to an evidentiary hearing because trial counsel's performance fell below the standard of reasonableness under prevailing professional norms, and thus, prejudiced him. Defendant's contentions are simply wrong and find no support in the record. Contrary to defendant's argument, trial counsel competently represented the defendant throughout their attorney-client relationship and there is no credible evidence in the record to support the defendant's

[4] This POINT responds to POINT I, II, III, IV, VIII of defendant's brief. Db14-35, 40.

allegations. As such, the trial court's order denying the defendant's PCR petition should be affirmed.

Pursuant to R. 3:22-10(b), a petitioner is entitled to an evidentiary hearing "only upon the establishment of a prima facie case in support of post-conviction relief"; "a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record"; and "a determination that an evidentiary hearing is necessary to resolve the claims for relief." The petitioner must make a prima facie showing of "a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158, cert. denied, 522 U.S. 850 (1997).

In reviewing a PCR court's findings, a reviewing court "will defer to the PCR court's factual findings, given its opportunity to hear live witness testimony, and . . . 'will uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting State v. Nash, 212 N.J. 518, 540 (2013)).

In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was deficient, and (2) defendant was prejudiced by counsel's deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987); State v. Gaitan, 209 N.J. 339, 350 (2012). A defendant "must demonstrate a prima facie case

for relief before an evidentiary hearing is required, and the court is not obligated to conduct an evidentiary hearing to allow defendant to establish a prima facie case not contained within the allegations in his PCR petition." State v. Bringhurst, 401 N.J. Super. 421, 436-37 (App. Div. 2008). Moreover, the Strickland standard applies equally to assertions of ineffective assistance of counsel associated with the entry of guilty pleas as to trial derelictions. Gaitan, 209 N.J. at 350-51; see also, Hill v. Lockhart, 474 U.S. 52, 57 (1985).

The first prong of the Strickland test requires a defendant to show that his counsel's performance was deficient, that is, counsel's performance fell below the standard of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688; Gaitan, 209 N.J. at 350; State v. Echols, 199 N.J. 344, 358 (2009). The right to counsel only guarantees the right "to competent counsel." Gaitan, 209 N.J. at 350 (citing State v. DiFrisco, 174 N.J. 195, 220 (2002)). Deficient performance is established by proving that "counsel's acts or omissions fell 'outside the wide range of professionally competent assistance' considered in light of all the circumstances of the case." State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 690); Gaitan, 209 N.J. at 350; Echols, 199 N.J. at 358.

Judicial scrutiny of counsel's performance should be "highly deferential." Strickland, 466 U.S. at 689; see State v. Martini, 160 N.J. 248, 266 (1999)

(finding that a reviewing court must assess the performance of counsel with a "heavy measure of deference to counsel's judgments"); DiFrisco, 174 N.J. at 220. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Echols, 199 N.J. at 358 (quoting Strickland, 466 U.S. at 688-89). As a practical result, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Ibid. (quoting Strickland, 466 U.S. at 689); State v. Quixal, 431 N.J. Super. 502, 507 (App. Div. 2013); Castagna, 187 N.J. at 314.

The reasonableness standard under Strickland extends to counsel's performance associated with the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); State v. Taccetta, 351 N.J. Super. 196, 200 (App. Div.), certif. denied, 147 N.J. 544 (2002).

The duties and responsibilities of defense counsel during the plea-bargaining process are "difficult" to define. Missouri v. Frye, 566 U.S. 134, 144 (2012). "The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." Ibid. "[A]s a general rule, defense counsel has the duty to

communicate formal offers from the prosecution[,]" Id. at 145, State v. Powell, 294 N.J. Super. 557, 564 (App. Div. 1996), and to advise defendant of the sentencing exposure and consequences of accepting or rejecting a plea offer. Padilla v. Kentucky, 559 U.S. 356, 374 (2010); Gaitan, 209 N.J. at 380; Taccetta, 351 N.J. Super. at 200. As part of this advice, counsel "should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." Purdy v. United States, 206 F.3d 41, 44-45 (2d Cir. 2000).

The second prong of the Strickland test requires a defendant to establish that counsel's ineffectiveness prejudice him, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 690; Fritz, supra, 105 N.J. at 52.

A. The PCR Court Correctly Found that a Third-Party Guilt Instruction Would Have Been Improper in this Case.

Defendant initially contends that counsel was ineffective for failing to request a third-party guilt charge at the conclusion of trial. Db14-20. Specifically, defendant argues that the defense theory was third-party guilt and, as such, the instruction should have been given to the jury. Such a charge, however, would have undoubtedly confused the jury and was contrary to the evidence and the respective theories presented by both the State and defense. Therefore, the PCR court appropriately denied the defendant's claim without holding an evidentiary hearing.

Indisputably, accurate and understandable jury instructions are essential to a fair trial. State v. Savage, 172 N.J. 374, 387 (2002). Jury instructions should include an explanation of the law as it relates to the material facts of the case, operating like a roadmap to guide the jury. Ibid. Indeed, flawed jury instructions on material issues constitute reversible error. State v. Grunow, 102 N.J. 133, 148 (1986).

Proper jury instructions are at times necessary to ensure a defendant is afforded the opportunity to present a complete defense. A defense can include evidence of third-party guilt. State v. Cope, 224 N.J. 530, 551 (2016); see also State v. Jimenez, 175 N.J. 475, 486 (2003) (stating that a defendant is entitled to show that someone else committed the crime); State v. Koedatich, 112 N.J. 225, 297 (1988) (explaining standard governing admissibility of evidence of third-party guilt).

A third-party guilty doctrine is implicated when a defendant "seek[s] to prove that another agency" committed the crime with which he is charged. State v. Loftin 146 N.J. 295, 345 (1996) (citing State v. Studrivant, 31 N.J. 165, 179 (1959), cert. denied, 362 U.S. 956 (1960)). To be admissible, evidence of another's guilt does not need to be conclusive, and it "need not [constitute] substantial proof of a probability that the third person committed the act[.]" State v. Jimenez, 175 N.J. 475, 486 (2003). However, the evidence cannot be speculative. Sturdivant, 31 N.J. at 179. A trial court must engage in a fact-sensitive analysis to determine whether the evidence of third-party guilt meets this requirement. State v. Cotto, 182 N.J. 316, 333 (2005).

It bears repeating that a trial court has broad discretion to admit or preclude evidence of third-party guilt. Ibid.

It is undisputed in this case that the evidence at trial did not directly implicate the defendant as the individual who physically committed the armed robberies. Throughout the trial, the State presented a theory that the defendant was a co-conspirator and accomplice to his co-defendants. As aptly noted by the PCR court, "[t]he State never alleged that the [defendant] committed the crimes but alleged that the co-defendants (i.e. third parties) are the ones who committed the crimes, and the [defendant] was guilty through the theory of accomplice liability." Da165. Such an instruction would have only confused the jury, as it would have directly cut against the accomplice liability and conspiracy instructions to the jury. In one breath they would have been instructed that they must find the defendant guilty and hold him accountable for the conduct of another if they found the co-defendants were acting in consort with one another. But, in the next breath they would be instructed that they could find the defendant not guilty because another individual committed the crime for which he is charged. These concepts and instructions simply cannot coexist, especially in a trial where the State's entire case rested upon the notion that this defendant was guilty because he was an accomplice and co-conspirator and not the one who physically committed the armed robberies.

Furthermore, there was no evidence presented in the record that would have supported this charge at trial. By defendant's own admission, he dropped the co-defendants off, operated a motor vehicle which contained the co-defendant's belongings and proceeds from the robbery, and was in possession of an IPhone that was stolen from one of the stores. At the core of this case, the defendant is charged with his participation in the overall scheme. By allowing an argument that he should not be found guilty because another individual committed the crime would directly cut against the law of this State, the jury instructions, and the State's theory of the case. Thus, trial counsel can hardly be seen as ineffective for failing to request this specific jury charge. Because the defendant failed to establish that he was prejudiced by counsel's representation, the trial court appropriately denied the defendant's petition without an evidentiary hearing.

B. Trial Counsel Was Not Ineffective for Failing to Call Defendant's Brother and Co-defendant Mack Mitchell to Testify.

Defendant next contends that trial counsel was ineffective for failing to call his brother and co-defendant Mack Mitchell during the trial. Specifically, defendant contends that Mack Mitchell could have corroborated the testimony about "third-party planners" of the robberies and exculpated the defendant. Contrary to defendant's arguments, trial counsel competently represented the defendant throughout the trial and any decisions made by counsel were a matter of trial strategy.

Trial counsel's strategy is "virtually unchallengeable." Strickland, 466 U.S. at 690. When arguing that counsel conducted an inadequate pretrial investigation, a defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Ineffective assistance of counsel is not proven by showing, with the benefit of hindsight, that counsel's strategic decisions did not succeed. DiFrisco, 174 N.J. at 221; see State v. Drisco, 355 N.J. Super. 283, 290 (App. Div. 2002), certif. denied, 178 N.J. 252 (2003). Even if counsel could have performed better, defendant is not entitled to PCR relief if there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Even when counsel performs a limited investigation, his strategic choices are entitled to deference and assessed for reasonableness. State v. Petrozelli, 351 N.J. Super. 14, 22 (App. Div. 2002).

Furthermore, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington v. Richter, 562 U.S. 86, 111 (2011). "The quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." Castagna, 187 N.J. at 314.

Here, defendant provided certifications from his brother that he did not participate or commit the robberies for which he was convicted. Defendant's brother also indicated that counsel never spoke with him about this "exculpatory" evidence. As found by the PCR court, "Mack Mitchell's testimony alone would have contradicted the defendant's statement to police." Da166. Indeed, the defendant placed himself at the scene of the robbery while driving the suspect vehicle. Additionally, Mack Mitchell's alleged "exculpatory" testimony would have also contradicted his previous statement to police and sworn testimony that he told the truth to police. See (20T).

Furthermore, the physical evidence, which corroborated the defendant's initial statement to police and Mack Mitchell's statement to police – a statement that he testified under oath was truthful – would have contradicted any proposed "exculpatory" testimony. With the benefit of hindsight, defendant blanketly assumes that counsel's performance was deficient for failing to present this "exculpatory" evidence. However, defendant's hindsight ignores the real-life implications of this testimony. It is reasonable to conclude that Mack Mitchell's contradictory testimony would have had far reaching negative implications for the defendant, rather than lead to defendant's acquittal. Thus, it was entirely reasonable for counsel to reject the idea of presenting this testimony. Furthermore, defendant failed to establish how the introduction would have led to a different result. Therefore, failing to establish that

he was prejudiced in this case. As such, the PCR court appropriately rejected defendant's claims.

C. Defendant Was Apprised of and Rejected All of the State's Plea Offers.

Next, defendant contends that the trial court erred because he established that trial counsel was deficient for failing to communicate a favorable plea offer. Contrary to defendant's arguments, defendant knowingly and voluntarily rejected the State's plea offer that was even more favorable than the offer he asserts was never communicated to him. Thus, any notion that counsel failed to communicate official plea offers by the State is belied by the record.

The duties and responsibilities of defense counsel during the plea-bargaining process are "difficult" to define. Frye, 566 U.S. at 144. "The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." Ibid. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution[,]" Id. at 145, Powell, 294 N.J. at 564, and to advise defendant of the sentencing exposure and consequences of accepting or rejecting a plea offer. Padilla, 559 U.S. at 374; Gaitan, 209 N.J. at 380; Taccetta, 351 N.J. Super. at 200. As part of this advice, counsel "should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." Purdy, 206 F.3d at 44-45.

Ethical standards also provide guidance as to the level of care applicable to the representation of defendants in the plea negotiation process. Cortez v. Gindhard, 435 N.J. Super. 589, 601 (App. Div. 2014). Pursuant to R.P.C. 1.2(a), defense counsel in a criminal case "shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered ..." See also State v. Barlow, 419 N.J. Super. 527, 535 (App. Div. 2011). Further, R.P.C. 1.4(c), requires "a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Here, defendant failed to present any evidence that counsel neglected to convey a favorable plea offer. Again, and with the benefit of hindsight, defendant claims that counsel did not inform him of a State's offer based upon a June 3, 2014, E-Mail that was sent by Assistant Prosecutor Jospeh Surman. In the E-Mail, AP Surman states, "No go on the 25. If he were willing to take another 10 on top of the Somerset charge, I'd consider it." Da14. It is important to give this statement context. On March 27, 2014, the defendant was convicted of first-degree robbery in Somerset County. Da32-36. On May 30, 2014, the defendant was sentenced to 20 years subject to the NERA. Ibid.; Pa2. Furthermore, on May 16, 2014, the defendant appeared with counsel before the Honorable Joseph Paone, J.S.C., for arraignment. See (4T). At the hearing, the State formally placed its offer on the record – plead guilty for a sentencing recommendation of 20 years subject to NERA which would run consecutive to the Somerset County

conviction. (4T5-14 to 5-15). The defendant was also advised that if convicted at trial he faced a mandatory extended term of life without parole. (4T5-16 to 5-18). During the hearing, the court asked the State if it would consider any type of counteroffer where the Middlesex County file ran concurrent to the Somerset County Conviction. Again, the State stated "I would like something in the range of maybe a 30 concurrent." (4T9-18 to 9-19). The court then asked, "A 30 concurrent. Is your client willing to do a 30 concurrent?" (4T9-20 to 9-21). To which the defendant himself responded, "No." (4T9-22).

As noted by the PCR court, "[e]ven if the email is considered a 'formal offer' requiring communication to the [defendant], it was in fact turned down by the defendant." Da170. The defendant on the record at arraignment turned down the exact offer that was given to him before Judge Paone. What is certain is that the State rejected the defendant's counteroffer of a concurrent global term of 25 years between the Somerset County and Middlesex County matters. Da14. Instead, the State sought a global resolution of 30 years, or "10 on top of the Somerset charge." Thus, defendant cannot seriously argue that he was not advised of or unaware that the State would have likely resolved this matter for 30 years, especially after he expressly rejected the exact same offer on the record before Judge Paone. Therefore, the defendant cannot established that he was prejudiced in this case or that counsel's performance fell below the prevailing professional norms.

D. Defendant Failed to Establish that His Motion for Consolidation Would Have Been Meritorious.

Finally, defendant contends that trial counsel was ineffective for failing to present a meritorious argument. Specifically, counsel failed to consolidate the Somerset and Middlesex County matters so that he could have received a favorable plea deal. Defendant's contentions are belied by the record. Trial counsel provided adequate and effective representation and defendant cannot establish otherwise.

When an ineffective assistance of counsel claim is based on the failure to raise an argument or failure to file a motion, a defendant must establish that his claim is meritorious. State v. Goodwin, 173 N.J. 583, 597 (2002); see also, State v. O'Neal, 190 N.J. 601, 619 (2008) (holding "[i]t is not ineffective assistance of counsel for defense counsel not to file a meritless motion"); State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel"); State v. Fisher, 156 N.J. 494, 501 (1998) (citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)). Furthermore, "the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in the light of all the circumstances." Goodwin, 173 N.J. at 598 (quoting Kimmelman, 477 U.S. at 375).

In State v. Rountree, the Appellate Division noted that the Supreme Court recently modified R. 3:25A-1 "to enable a defendant to request consolidation of charges pending in multiple counties for purpose of offering pleas and for sentencing," and to recommend that such applications be made "prior to the offer and entry of guilty pleas." 399 N.J. Super. 190, 210 (App. Div. 2006) (quoting State v. Pillot, 115 N.J. 558, 577 (1989)). The court in Rountree noted, "the emphasis of the decision in Pillot was upon consolidation of plea bargaining and sentencing in order to avoid sentencing disparity." Rountree, 399 N.J. Super. at 210.

In this case, those concerns are not implicated here. While on its face there is certainly a disparity between the life sentence the defendant received in Middlesex County and the 20-year custodial sentence the defendant received in Somerset County, it is not a true depiction of what actually occurred in this case.

First and foremost, the defendant was tried and convicted in Somerset County before he was arraigned on the Middlesex County charges, thus rejecting the State's offer in Middlesex and instead opting to proceed to trial. Second, the Middlesex County Prosecutor's Office attempted to resolve this case globally. Indeed, the State only sought ten additional years on top of the 20 years the defendant was sentenced to in Somerset County for four additional robberies. It is unclear to the State how much more favorable of a plea the defendant could

have received if they were, in fact, consolidated. Between both counties, defendant was charged with five first-degree robberies. Each of those charges alone carried a statutory sentencing maximum of 20 years. The defendant was offered and rejected a global resolution of 30 years, which is far less than the statutory minimum for five first-degree robberies. See, supra, POINT I-C. Instead, the defendant opted to go to trial in Somerset County prior to his arraignment in Middlesex County and still rejected a favorable global resolution. Thus, defendant cannot establish that counsel's performance fell below the prevailing professional norms or that he was prejudiced in this case. As such, the PCR court appropriately rejected the defendant's argument.

POINT II[5]

THE DEFENDANT RECEIVED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Defendant contends that appellate counsel was ineffective for failing to raise the denial of his motion to dismiss the indictment during his direct appeal. A review of the record clearly establishes that the self-serving and contradictory affidavits of Mack Mitchell and Emendo Bowers were not clearly exculpatory. As such, any appeal of that decision would have been unsuccessful. As such, the PCR court appropriately rejected the defendant's argument.

A defendant has a right to the effective assistance of counsel on a direct appeal. State v. Guzman, 313 N.J. Super. 363, 372 (App. Div.), cert. denied, 156 N.J. 424 (1998). In judging a claim of ineffective assistance of appellate counsel, the two-pronged test of Strickland applies. Id. at 374; State v. Morrison, 215 N.J. Super. 540, 545-46 (App. Div.), certif. denied, 107 N.J. 642 (1987); State v. Gaither, 396 N.J. Super. 508, 516-17 (App. Div. 2007), certif. denied, 194 N.J. 444 (2008).

Under the Strickland standard, an appellate attorney need not advance every argument which the defendant urges, even if non-frivolous. Jones v. Barnes, 463 U.S. 745, 751 (1983). "Experienced advocates since time beyond

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[5] This POINT responds to POINT VI of defendant's brief. Db37-40.

memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues." Id. at 751-52. See also, State v. Love, 233 N.J. Super. 38, 45 (App. Div.), certif. denied, 118 N.J. 188 (1989) (counsel will not be found to be ineffective "for failing to make every conceivable motion that can be made on behalf of his client").

Here, any argument that the trial court abused its discretion in denying the defendant's motion would not have meritorious, thus it was not ineffective for appellate counsel to disregard this argument by defendant.

Indictments are presumed valid. State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div.), certif. denied, 151 N.J. 77 (1997). Because of the independence of the grand jury, courts should be reluctant to intervene in the indictment process. State v. Hogan, 144 N.J. 216, 228 (1996). While dismissal of an indictment is left to the discretion of the trial court, this discretion should be exercised only on "the clearest and plainest ground" and where the "insufficiency is palpable." Id. at 228-29; State v. Graham, 284 N.J. Super. 413, 416 (App. Div. 1995), certif. denied, 144 N.J. 378 (1996); State v. Morrison, 188 N.J. 2, 12 (2006).

"[A] prosecutor enjoys broad discretion in presenting a matter to the grand jury." State v. Smith, 269 N.J. Super. 86, 92 (App. Div. 1993), certif. denied,

137 N.J. 164 (1994). "In seeking an indictment, the prosecutor's sole evidential obligation is to present a prima facie case that the accused has committed a crime." Hogan, 144 N.J. at 236. This evidential obligation carries with it a limited duty to present to the grand jury evidence that both "directly negate guilt and must also be clearly exculpatory." Id. at 237; State v. Scherzer, 301 N.J. Super. 363, 426-27 (App. Div.), certif. denied, 151 N.J. 466 (1997); State v. Cook, 330 N.J. Super. 395, 410 (App. Div.), certif. denied, 165 N.J. 486 (2000).

This obligation does not, however, require the prosecutor to "construct a case for the accused or search for evidence that would exculpate the accused," but instead presentation of such evidence only in the "exceptional case" where the prosecutor's file actually contains evidence meeting both requirements. Hogan, 144 N.J. at 237-38. "Only when the prosecuting attorney has actual knowledge of [the] ... evidence ... must such evidence be presented to the grand jury." Id. at 238.

In order to satisfy the first requirement, directly negating guilt, the exculpatory evidence must "squarely refute[] an element of the crime in question." Hogan, 144 N.J. at 237; Scherzer, 301 N.J. Super. at 427; see e.g., Smith, 269 N.J. Super. at 97-98 (three witness statements putting defendant "at a different location and intoxicated some one and one-half hours before the robbery" did not negate guilt); State v. Gaughran, 260 N.J. Super. 283, 290-91

(Law Div. 1992) (prosecutor mislead the grand jury by withholding medical report which directly contradicted victim's claims of sexual assault).

Satisfaction of the second requirement, clearly exculpatory, "requires an evaluation of the quality and reliability of the evidence," "in the context of the nature and source of the evidence, and the strength of the State's case." Hogan, 144 N.J. at 237; Scherzer, 301 N.J. Super. at 427. Clearly exculpatory evidence must be "capable of complete consideration by the grand jury without the need of any extrinsic information" and not "require the grand jurors to engage in any extensive weighing of credibility factors that could substantially affect the value of the evidence." State v. Evans, 352 N.J. Super. 178, 194 (Law Div. 2001); see e.g., Scherzer, 301 N.J. Super. at 427-28 (prosecutor not obligated to present testimony of defense experts that negated guilt as the evidence would require grand jury to make a credibility judgment and, therefore, was not clearly exculpatory).

Judicial evaluation of such motions to dismiss must "give due regard to the prosecutor's own evaluation of whether the evidence in question is 'clearly exculpatory.'" Hogan, 144 N.J. at 238; Evans, 352 N.J. Super. at 188. Because "[a]scertaining the exculpatory value of evidence at such an early stage of the proceedings can be difficult[,] ... courts should act with substantial caution before concluding that a prosecutor's decision in that regard was erroneous."

Hogan, 144 N.J. at 238-39; State v. Hogan, 336 N.J. Super. 319, 341 (App. Div.), certif. denied, 167 N.J. 635 (2001). Further, a "motion to dismiss is addressed to the discretion of the trial court, and that discretion should not be exercised except for 'the clearest and plainest ground.'" State v. Feliciano, 224 N.J. 351, 380 (2016).

As aptly noted by the PCR court, "the trial court considered the affidavit along with the other evidence and decided the affidavits were not exculpatory evidence that needed to be provided to the Grand Jury." Da176. In this case, the self-serving affidavits contradict the defendant's own statements and each of the statements that the affiants provided to police prior. The introduction of these statements would have required the grand jury to engage an extensive weighing of credibility given that they are conflicting with the evidence of this case. Thus, establishing that they are not "clearly exculpatory." As pointed out by the PCR court, "the affidavits lack any Indicia of reliability or credibility in that they are identical blankets of denial for [defendant]'s involvement that offer no detail or explanation." Da176. Thus, it was appropriate for the State to exclude them from presentation, it was proper for the trial court to deny the defendant's motion, and it can hardly be seen as ineffective for appellate counsel to raise on direct appeal. As such, the PCR appropriately denied the defendant's claim.

POINT III[6]

THERE IS NO CUMULATIVE ERROR.

Defendant contends that even if this Court finds that none of the alleged errors rise to the level of ineffective assistance of counsel alone, the cumulative impact of the alleged ineffectiveness nonetheless warrants reversal of his conviction. Db31-32. Contrary to this argument, defendant received effective assistance of counsel. See, POINT I & II. Because the individual alleged errors complained of by petitioner do not alone rise to the level of ineffective assistance of counsel, they do not amount to ineffective assistance of counsel in the aggregate.

[6] This POINT responds to POINT V of defendant's brief. DB35-37.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully submits the order denying defendant's petition for post-conviction relief should be affirmed.

Respectfully submitted,

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Date: July 8, 2024

c/ Kayla Rowe, Esq.

Superior Court of New Jersey
Appellate Division

STATE OF NEW JERSEY Respondents, -v- MICHAEL MITCHELL, Defendant	**DOCKET NO.** A-0003593-22 ***Criminal Action*** ON APPEAL FROM FINAL ORDER DENYING POST CONVICTION RELIEF. LAW DIVISION MIDDLESEX COUNTY Sat Below: Honorable Buck J.S.C

PRO SE BRIEF

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DEFENDANT IS CONFINED

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Cad Incident Report ..... Da 52-53

Mr. Surman Email .....Da 54

PROCEDURAL HISTORY

Defendant hereby relies upon the Procedural History as outlined in Counsel's Primary Brief submitted in this within matter.

PRELIMINARY STATEMENT[1]

Petitioner asserts Rule: 2:6-2(a)(6), assents that he is filing a supplemental pro se as held in Hanes v. Kerner, 404 U.S. 519, (1972); whereas the Court has directed those who are unschooled in law, making pleadings.... "**Shall** have the court look at the substance of the pleading rather than the form." Royce v. Hahn, 151 F.3d 116, 118 (3rd Cir. 1989); Lewis v. Attorney General, 878 R.2d 714, 221 (3rd Cir. 1989); Estelle v. Gamble, U.S. 97, 106 (1979). I hereby seek the indulgence, patients and respectfully ask the Court to liberally construe the elements, facts, law, evidence and the form of this pro se petition for Post-Conviction-Relief.

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[1]Da refers to defendant's appendix
1T refers to August 7, 2015 Trial Transcript
2T refers to November 10. 2015 Trial Transcript
3T refers to November 17. 2015 Trial Transcript
4T refers to November 5, 2015 Trial Transcript. p.m. session
5T refers to March 24. 2014 Motion
6T refers to March 13, 2014 Motion
7T refers to November 09. 2015 Trial Transcript. VI & VII
8T refers to November 30. 2015. Trial Transcript
9T refers to November 04. 2015. Trial Transcript. VI & VII
10T refers to November 2. 2015. Trial Transcript
11T refers to March 04. 2016 Sentencing Transcript
12T refers to June 06. 2012 Grand Jury Transcript
13T refers to April 29. 2014 Grand Jury Transcript
14T refers to November 16. 2015. Trial Transcript
15T refers to November 18. 2015. Trial transcript

The petitioner adopts by reference Rule: 1:4-3 as to germane his legal arguments and appendix within his pro se brief to Kayla Rowe , Esq. plenary brief, appendix, and procedural history.

STATEMENT OF FACTS

Four robberies occurred on December 8th, 2011, December 19th, 2011, January 5th, 2012 and January 12th, 2012, at various cell phone stores in Middlesex County. The State alleged that the four robberies involved the same defendants: Emendo Bowers, Mack Mitchell[2], defendant Michael Mitchell and Jane Doe. Because the manner of the execution shared similarities, the State's theory was that the three men who were arrested after the January 12th, 2012 robbery were responsible for the previous three robberies. At the time of the January 19th robbery, Michael was arrested parked in his car in a nearby 7-Eleven. The State's theory largely rested on cell- phone records of Bowers and Michael and the testimony of co-defendant Bowers, who testified as a cooperating witness in exchange for a plea deal to 15 years imprisonment.

The jury rejected significant aspects of the State's case. With respect to the December 8th robbery, it found Michael not guilty of armed robbery and conspiracy; with respect to the December 19th robbery, it found Michael not guilty of armed robbery, but guilty of conspiracy to commit robbery. The jury was hung

[2] Mack Mitchell refers to defendant's half brother

on the armed robbery and conspiracy to commit robbery charges relating to the January 5th, 2012 incident. It convicted Michael of the counts relating to January 12th, 2012, robbery as charged.

A. December 8th, 2011 Robbery

Amit Soni testified that he was working at the T-Mobile store located at 691 Route 1 in South Edison on December 8th, 2011. (10T 47-9 to 11) The store is located in a strip mall among five or six other businesses. He opened the store at 9:50am. (10T 48-6 to 11) Two men entered the store shortly after its opening. One of them sat in a chair and sought help finding an inexpensive cell-phone. He gave Soni a cell number to look up. The number was not on file. (10T 49-12 to 19) Soni testified that suddenly the other man pulled out a gun and said, "You know what it is? Go to the back." (10T 49-19 to 21) Soni proceeded to the back of the store and was instructed to lay face down, which he did. Soni was only able to provide a vague description of the men: he described one as a Hispanic and "mixed Spanish African American. (10T 50-4 to 9) In referring to them throughout the incident, he identified them by their relative skin color. Soni testified that the darker skinned man pulled out the gun, which Soni believed was real, and asked for the money. (10T 63-8 to 23) Soni pointed at the safe, which contained cash of about $1300. (10T65-15 to 17) Soni also directed the darker skinned man to the phones and the tablets in the safe. (10T 66-20 to 25)

According to Soni, a third robber entered the store. (10T 67-6 to 8) He could not even provide even the vaguest description of the third person because he was lying face down. (10T 69-4 to 8) He testified that the robbers asked for bags; it did not appear that they had brought bags with them but they did bring brown gloves with them. Soni directed them to the T-Mobile shopping bags at the front of the store. They filled the bags with phones and prepaid cards. (10T 67-9 to 19) According to Soni, he did not overhear any conversations between the people. (10T 69-21 to 70-1) He believed that he overheard the third person on his cell phone asking, "Where she at?" Where she at?" (10T 70-8 to 13) The third person asked for the stores surveillance tape. When Soni responded that there was no tape, simply DVR, he was asked to unplug the DVR, which stops the tape. (10T 70-18 to 71-2) The men asked where the backdoor was located and fled. Soni immediately called the police. (10T 79-16 to 19)

The store estimated that $40,000 worth of merchandise was taken, consisting of tablets, prepaid data cards, smartphones, and refill cards for prepaid phones, etc. (10T 81-12 to 15) Soni was never asked to participate in a lineup or provide information for a composite sketch. (10T 89-1 to 7) The police did not find any usable fingerprints. (10T 103-7 to 24)

B. December 19th, 2011 Robbery

On December 19th, 2011, Edward Perez was working as the manager of the Radio Shack in Kendell Park, South Brunswick. (9T 83-2 to 8; 84-11 to 12) Between 10 and 11 a.m., two customers entered the store, inquiring about Beats by Dre headphones. When Perez walked form behind the counter to show them the selection of headphones, one of the customers pulled out a black Glock, pointed it at the back of his head and said, "Don't move, turn around and head to the back." (9T 99-12 to 100-2) Perez described the men as black, one was taller than the other. The taller man was around 5'10 and darker than the other man, and the shorter man was about 5'8 or 5'9. (9T 101-20 to 102-1) Perez testified that the taller man pulled the gun. (9T 102-1 to 2) Both men were wearing jeans and a baseball cap, one was wearing a black hat with what appeared to a C logo for Cincinnati. (9T 102-4 to 8) The shorter man was wearing a hood over his baseball cap. (9T 102-14 to 16)

Perez testified that the taller man ordered him to the back of the store to the inventory room and get on the floor. (9T 112-15 to 23) After grabbing the keys to the cage, where the expensive inventory is stored, from Perez's back pocket, the men started stuffing merchandise in clear plastic bags. (9T 113-24 to 114-5, 115-16 to 116-7) Perez recalled that the shorter man was wearing white latex cloves. (9T 114-21 to 25) Perez testified that while he was on the ground, one of the men,

he was uncertain which, was having a phone conversation, but Perez could not discern the substance of the conversation. (9T 118-17 to 25) When the men ran out of the store, Perez tried to follow them. Perez did not see a car waiting and when one of the men noticed that they were being followed, he ordered Perez to go to the front of the store. (9T 117-24 to 118-8; 120-25 to 121-1) The total loss to the store from the robbery was over $24,000. (9T 148-4 to 7)

Though the robbery occurred in December 2011, the police did not memorialize Perez's statement until October 30th, 2015, several weeks before trial. (9T 126-24 to 127-121, 127-25 to 128-7) At trial, Perez admitted that before the police recorded his statement, one of the officer's asked if he heard a robber "on the phone asking for a getaway car and if the phone call was made." (9T 128-7 to 21) In his October 30th statement, Perez said that the short light skinned man was making a call but that he was not able to hear the call or see what the robbers were doing. (9T 129-12 to 120-3) Perez never participated in a photo array or provided information for a composite sketch. (9T 132-8 to 15) The police recovered nothing of evidentiary value from the location of the robbery.

C. JANUARY 5TH, 2012 ROBBERY

On January 5th, 2012, Hikanshi Uppal was working at the AT&T store at 894 Route 1 North in Edison. (9T 25-25 to 26-13) Around 11:00am, two men walked in. One of the men asked for a phone case for the IPhone 4S. Uppal

described one man as lighter skinned and the other darker skinned. (9T 35-24 to 36-12) He said that the lighter skinned man was wearing a hoodie and jeans and the hood was covering his head. The darker skinned man was wearing a hoodie with red thread, and he was slimmer of the two. (9T 37-23 to 38-7) Uppal testified that he directed the men to the middle of the store where the cases was kept. (9T 38-22 to 39-5) The darker skinned man grabbed Uppal and pushed him towards the safe in the back room of the store. (9T 39-17 to 22) The man held a gun to the back of Uppal' head. (9T 40-11 to 15) They ordered him to open the safe and they started collecting phones. (9T 41-13 to 17) Uppal testified throughout the robbery, he kept his eyes looking down. Uppal was ordered to remain standing in the storage area with the men as they filled the large black plastic bags with the phones. (9T 42-9 to 13) Uppal said that he did not know if the plastic bags came from the store. (9T 45-6 to 10) The darker skinned man kept the gun pointed at him. (9T 43-2 to 9) Both men were wearing clear translucent gloves. (9T 44-11 to 16) Uppal recalled that the darker skinned man was on the phone telling someone, "Okay, I'm hurrying up."(9T 45-20 to 23) Uppal testified that he was not paying attention to any of the ongoing conversation. (9T 46-1 to 10) After they collected the phones, the men asked about cash. They emptied out the cash from the store; led Uppal to the back room and told him to get on the floor and count to 200. (9T

47-17 to 48-11) The men left from the back of the store. Uppal claimed that he heard a car zoom past the back of the store. (9T 49-17 to 22)

D. JANUARY 12, 2012 ROBBERY

Detective Frank Todd of the Edison Police Department testified that because of the robberies in the area, the police department decided to set up surveillance at the three stores in the area, along Route 1 corridor. (9T 154-10 to 19) F. Todd testified that he was working the day shift on January 12, 2012, surveilling the T-Mobile store at 32 Parsonage Road. (9T 157-22 to 158-13) F.Todd testified that after about a half hour of surveillance, he observed a black Buick drive up. F.Todd testified that the black Buick never entered the parking lot of the T-Mobile store. The passengers sat in the car for a few minutes. The first passenger who got out of the car was a black male of about 5'11, wearing a black baseball hat and a black hooded sweatshirt and black gloves. The second man who got out of the rear passenger seat was a black man about 5'8, wearing a black baseball cap, a black hooded sweatshirt and grey jacket. (9T 161-11 to 162-5)

Frank Todd testified that one of the men appeared to be talking on his cell phone the same time as the driver, leading F. Todd to speculate that they were in communication with each other. (9T 162-8 to 10) According to F. Todd, the black Buick pulled into the drive way adjacent to a building at 10 Parsonage Road. (9T 162-17 to 21)

Inside the store, F. Todd saw the taller man of the two walk towards the cash register, still on his cell phone. The shorter man remained in the front. F. Todd eventually lost sight of the men in the store. (9T 163-2 to 9, 165-20 to 23) He contacted Steve Todd from the Edison Police Department to trail the Buick. (9T 163-10 to 14) S. Todd testified that when he first saw the Buick, it was parked in the back of the office building at 10 Parsonage Road. (9T 204-15 to 19) S. Todd was wearing plain clothing and was driving an unmarked Taurus. (9T 156-23 to 157-8)

S. Todd testified that as he approached the Buick, the car started backing out of the parking space; the two cars passed each other; the Buick continued to back down the street into the driveway of the T-Mobile. (9T 207-13 to 208-9) The car then made a right onto Parsonage Road. (9T 208-10) The driver was on his cell phone. S. Todd followed him. (9T 209-12 to 15) The car pulled into the parking lot of 7-Eleven. (9T 212-14 to 22) At that point, S. Todd parked directly parallel behind the car, blocking it. He activated his lights and approached the driver. (9T 214-5 to 215-4) The driver complied with S. Todd's request to put the phone down and hang up. (9T 215-23 to 216-1) The driver provided his Pennsylvania driver's license identifying himself as Michael Mitchell and an envelope with paperwork pertaining to the car. Although the tag on the car was not on file, the police eventually determined that the car was validly registered to Theresa Mitchell,

Michael's mother. (9T 216-7 to 19) Michael was immediately arrested. (9T 217-1 to 4) No weapons were found in the car or on Michael. (9T 217-13 to14) Michael's phone rang after he hung it up. S. Todd relayed the phone number of the incoming call. The police were not able to determine the identity of the caller. (9T 233-2 to 9)

Theresa Mitchell's car was towed and impounded. (9T 218-22 to 24) In the car, police found: a pair of blue jeans, hat with the letter P, a Samsung T-Mobile phone; a Nintendo DS3 in the box, an AT&T Go Phone in the box; A Nikon Coolpix camera in the box. (9T 223-11 to 224-6) The police also found Michael's birth certificate and social security card, a pair of clear plastic gloves, and five deposit slips for a bank account belonging to Michael which documented deposits ranging from $900-2100 between December 16th, 2011 and January 8, 2012. (7T 142-18 to 143-9; 151-14 to 152-23; 148-24 to 149-2) They found paperwork associated with various cell phones; two sets of T-Mobile paperwork for Mack Mitchell for an electronic pin for phone number 267-467-9326; and paperwork associated with Tyree Moore at 267-467-2078, the telephone number belonging to Michael's Samsung Galaxy found on the front passenger seat of the car. (7T 145-23 to 146-7, 146-20 to 147-8, 147-12 to 25)

While S. Todd was following the Buick and arresting Michael, at the T-Mobile store on Parsonage Road, Mariusz Dabrowski was working with Harold

Eaddy. (4T 6-7 to 25) Dabrowski testified that he was in the back room when the two men entered the store. Dabrowski noted that the men were wearing what he considered clothing too warm for January morning. (4T 13-8 to 20) Immediately upon seeing the men, Dabrowski dialed 9-1-1 on his phone, but did not place the call. (4T 17-10 to 19) The two men asked about phone accessories. Dabrowksi testified that he assisted the taller man, who was in the middle of a phone conversation, at the front of the store. Dabrowski was certain that the men were going to commit a robbery, he claimed that he could overhear the conversation, although the man's phone was not on speaker. He claimed that the person on the other end of the phone call said, "I circled the store a couple times." (4T 20-12 to 21-8) Dabrowski admitted that "he couldn't hear too much of the conversation that was coming through the phone. (4T 21-9 to 12) While Dabrowski was helping the taller man with the accessories, the shorter man pulled a gun on his co-worker Eaddy. Eaddy and Dabrowski were directed to the back of the store, told to lie on the floor, and put their hands by their sides. (4T 21-19 to 22-9) One of the men, wearing black gloves, emptied the cage of cell phones, mobile modems and accessories and emptied the safe of $10,000 in cash. (4T 30-1 to 3, 33-11 to 20) Based on his subsequently acquired knowledge of the investigation, Dabrowski filled in the gaps in the conversation that he claimed he could overhear on the phone during the robberies. Dabrowski testified that: "the gentlemen in the car had

mentioned on the phone to the gentlemen in the store that he is being followed by what I assumed is now the state or, I know FBI was involved so he was giving them a description of what was going on outside." (4T 31-13 to 18) According to Dabrowski, the man in the store told the person he was on the call with to remain calm; he was directing the person he was talking to head towards the mall parking lot and they would meet there. (4T 32-1 to 4, 34-20 to 23) The two robbers fled, leaving the bags in the store. One of the men took out Dabrowski's phone and slammed it on the floor, and fled with his wallet. (4T 35-12 to 24)

The police arrived shortly thereafter. (4T 36-13 to 20) At trial, the surveillance video from the robbery, which did not have audio, was played. Although Dabrowski maintained that the robber in the store was in constant communication with another person, relating to the robbery, after viewing the video, Dabrowski admitted that there was five separate occasions where the robber in the store was not on the phone. (4T 49-14 to 19, 51-11 to 13) In his interview with the police immediately following the robbery, Dabrowski had a different recollection of what he overheard on the phone. Then, he told the police, "Really most of it was just low." I tried to keep it distant but most of it was just you know, just planning something, something seemed really shady and most of the conversation was just fake to kill time." (4T 52-53 to 53-3)

Detective F. Todd, who had been maintaining surveillance on the store, saw the two men who had entered the store flee through the back of the store and run along the fence line parallel to Parsonage Road. Todd drove to the end of the fence line and cut off the shorter of the two men, later identified as Emendo Bowers. (9T 167-11 to 18) At the time of his arrest, Bowers was 5'9 and weighed 132 pounds. (7T 175-15 to 22) The taller man identified as Mack Mitchell, jumped the fence and was arrested a week later in Pennsylvania. (9T 181-16 to 21) Mack was 6'1. (7T 175 -11 to 14) F. Todd testified that during the search following the arrest, the police found an air gun on Bowers and a chrome handgun in his pocket, some garbage bags inside his sleeve, a cell-phone, and some latex gloves. (9T 169-16 to 170-5) There was a Phillips-head screwdriver protruding out of the bottom of the gun. (9T 170-22 to 171-3)

Detective Mark Matthews, the ballistic expert, testified that both weapons were pellet guns. (4T 118-13 to 16; 123-3 to 9, 129-6 to 7) The first pellet gun was capable of discharging a projectile; however, when the gun was recovered, there was no magazine inside, which is necessary for its operability. (4T 128-12 to 18) The first gun would have been operable only if the user was strong enough to turn the cylinder and had carbon dioxide as well as pellets. (4T 130-23 to 131-5) Matthews had to use pliers to get the gun to function. The second pellet gun, in the

condition it was recovered, would not have been operable. Matthews had to charge the carbon dioxide and insert pellets. (4T 132-2 to 12)

E. Michael's Post-Arrest Statements

Following his arrest in the 7-Eleven parking lot, Michael gave a statement to the police. He denied being at the T-Mobile store. (7T 40-17 to 25) He said that he was in the area, by himself, to attend a vigil for Eugene Lockhart, the brother of the father of his sister's children. He got lost and was on the phone trying to get directions to the vigil. (7T 43-20 to 44-9) He finally pulled into the 7-Eleven parking lot to ask for directions. (7T 44-11 to 18) Confronted with implicating his brother in the robbery, he denied knowing Bowers or Mack. (7T 119-6 to 17) Michael said that he purchased his iPhone from a flea market in Columbus, New Jersey. (4T 61-21 to 62-7) During the South Brunswick robbery, an iPhone was stolen with an IMEI number matching the number of Michael's phone. (7T 28-8 to 12, 29-12 to 20, 30-1 to 31-8)

Michael was interviewed a second time on February 2nd, 2012, while he was in jail on the instant charges. (7T 178-22 to 179-7) By the time of the interview, Mack had been apprehended and arrested for his involvement in the robberies. Mack and Michael are stepbrothers. (7T 173-1 to 3) Mack's stepmother and Michael's mother, Theresa, told the police that Mack gave her the stolen phone that she turned over to the police. (7T 176-8 to 22, 177-21 to 178-8) During the

second interview, Michael admitted that Mack knew that he was going to be in the area to attend the memorial, so Mack asked Michael to drop him off at a specific location to meet his friend. (7T 219-8 to 20) Michael said that he dropped Mack off and Mack assured him that he was going to get a ride home. As Michael continued on his way to the memorial, he got lost and in the process of trying to figure out the directions to the memorial, the police stopped him. (7T 220-11 to 15) Michael said that he did not know Bowers personally; Bowers was Mack's friend. (7T 261-20 to 24) Police found surveillance tape from a nearby McDonald's where it appeared that Mack had jokingly pulled an object that looked like a gun on Michael. Michael denied that any such incident occurred at the McDonald's. (7T 221-11 to 222-9) With respect to the robbery that occurred shortly after he dropped off Mack and Bowers, Michael said: "I don't know . . . I do not know, I honestly don't know that they was going do, I don't know nothing, I don't know nothing about what they was going do, at all." (7T 191-24 to 192-12)

F. Co-defendant Emendo Bowers' Trial Testimony and Post-Arrest Statement

Pursuant to a plea deal, Bowers testified as a witness for the State. In exchange for testifying against Michael, Bowers received a plea offer of 15-years' imprisonment for his guilty plea to three of the four robberies. (2T 104-11 to 24, 105-1 to 19) Bowers was facing at a minimum 80 years in prison if he were convicted of the four robberies. Bowers had three prior convictions: a first-degree

conviction from 2014 for which he was sentenced to thirteen years, 85% to be served without parole; a third-degree conviction from 2009; and another third-degree conviction from 2014, for which he was sentenced to five years. (2T 105-20 to 106-21) Bowers admitted that because of his status as a sex offender, he was particularly concerned about being among prison population. (2T 148-8 to 149-14) The State, in the plea deal, specifically reserved the right to recommend more jail time if Bowers did not testify truthfully, specifically consecutive sentencing. (2T 156-6 to 12)

Bowers testified that on December 8th, 2011, Ariel, Michael's girlfriend, picked him up outside his home in Franklin Township. (2T 23-5 to 25) Michael was in the front seat and Mack, whom Bowers referred to by his nickname "Nutty," was in the backseat. (2T 24-10 to 18) Bowers testified that he referred to Michael by his nickname, "Philly." (2T 25-2 to 9) According to Bowers, the December 8th, 2011, robbery was a spontaneous event. He went inside the T-Mobile store with Mack to purchase a cell-phone. Mack was standing next to him in the cell-phone store and suddenly decided to rob the store. (2T 25-13 to 26-5) Mack orchestrated the robbery, telling Bowers what to do. (2T 31-18 to 21) Bowers claimed that he simply went along with the robbery. He identified the two people on the surveillance tape from the store, during the robbery, as him and Mack. He identified the moment in which they were putting on the gloves but he

was unsure of whose idea it was to wear gloves or where the gloves came from. (2T 30-6 to 12) They collected the items from the robbery in T-Mobile bags found in the store. (2T 32-4 to 9) Bowers testified that Mack pulled out a BB gun at some point during the robbery. (2T 28-16 to 20) Michael entered the store as they were leaving and he was on his phone just "chitchatting." (2T 32-18 to 21)

Bowers testified that he kept one phone from the robbery and he sold some of the phones that were taken. (2T 33-2 to 7, 36-7 to 9) According to Bowers, he had two phones numbers saved as "Philly" in his phone. The State introduced a series of text messages between Bowers and a 267-467-2078 phone number, which belongs to Michael. (2T 46-9 to 23) Although the messages were sent to Michael's phone, Bowers testified that he was communicating with Mack. (2T 49-3 to 7) In the messages, there is a discussion about "people asking for phones." Mack said that he is looking at a car; and that "we might hit something later," (2T 48-4 to 49-2) Bowers specifically recalled that Mack was trying to rent a car. (2T 49-3 to 7)

Bowers exchanged another set of texts on December 17th, 2012, with the 2078 cell-phone number. Bowers claimed that the text messages amounted to a conversation about the time the store opened and that the two agreed that the recipient would be "out there at 9:00 tomorrow." (2T 53-1 to 54-7) With respect to the December 19th robbery, Bowers testified that Mack, Ariel, and Michael picked him up at school and they drove to the Radio Shack. (2T 57-12 to 19) Mack and

Bowers went into the store and executed the robbery, during which Mack was on his cell-phone. (2T 58-22 to 25) Bowers said that Michael and Ariel stayed in the car and Ariel drove them from the scene. (2T 59-1 to 7) Bowers testified that Mack gave him a television from the robbery "to keep my mouth shut," but Mack did not share in the cash proceeds. (2T 59-25 to 60-2) Bowers admitted that the morning of the robbery, he sent a text message to a person listed as "Jay" in his phone, telling him, "Yo, all I got was AT&T phones and Verizon." (2T 60-13 to 23) Bowers also admitted that he sent a text message to the 2078 number associated with Michael, stating "They didn't have cameras." (2T 61-2 to 16) However, he maintained that he was communicating with Mack – not Michael – about whether the store they had just robbed had any surveillance cameras. (2T 61-13 to 16) With respect to December 27th, 2011, text messages between Bowers and the 2078 number, Bowers claimed that those text messages were between him and Michael. Bowers testified that in those text messages, they were looking for something on Google Maps; they discussed a Princeton store and Lawrenceville store and one of the stores Bowers mentioned was located at 32 Parsonage road. (2T 65-17 to 66-20; 74-23 to 75-8)

Bowers testified that he participated in the January 5th 2012 robbery at the AT&T store. (2T 69-6 to 18) According to Bowers, Michael, Ariel, and Mack picked him up that morning; Ariel drove. During the robbery, Mack was on his

cell-phone either talking to Ariel or Michael, Bowers speculated. (2T 71-3 to 12) Bowers did not overhear any portion of the conversation. (2T 71-8 to 12)

Bowers sent a number of text messages to Michael at the 2078 phone number, listing four T-Mobile stores that were currently hiring. (2T 73-15 to 74-4) Bowers testified that he received the list of addresses from his employer. (2T 74-4 to 11) Bowers testified that he did not know that Mack intended to commit a robbery on January 12th until it was already in progress. (2T 82-22 to 25) He testified that Mack and Michael picked him up at his house that morning; they went to a McDonald's at the Menlo Park Mall in Edison. Bowers identified himself, Mack and Michael from a surveillance video of the McDonald's that morning. (2T 79-24 to 80-3) Bowers testified that while they were at the McDonald's, there was no discussion of a robbery; Michael discussed his daughter's upcoming birthday and his plans for celebrating. (2T 81-25 to 82-89)

After the McDonald's, they went to the cell-phone store. Bowers testified that Mack wanted to go to the T-Mobile to "just check some more phones" and that he went with him because he wanted to pay his phone bill.(2T 82-17 to 21) According to Bowers, as they were entering the store, "[t]hat's when [Mack] said we was going do it." (2T 85-12 to 15) Mack allegedly called Michael but Bowers could not hear any of the conversation until towards the end. (2T 87-6 to 9) Bowers identified himself and Mack on the surveillance footage from the store.

(2T 85-25 to 86-11) He claimed that Mack gave him the BB gun immediately before the robbery. (2T 91-16 to 19) Bowers speculated that Mack may have had the guns in the car with them. He also claimed that the car Michael was driving that day had been never used in any of the prior robberies. (2T 91-22 to 23)

Bowers testified that, just as he was about to purchase a phone case from the T-Mobile, Mack gave him a nod to execute the robbery. Bowers hesitated, shaking his head "no" and Mack insisted. (2T 94-20 to 95) Mack pulled out the gun and pointed it at the first employee and when the second employee showed up, Bowers did the same. (2T 95-2 to 6) Bowers received a text message from a phone number ending in 8662, registered to Michael, at 10:41 a.m. that said "go ahead and do it." (2T 96-3 to 97-8) Bowers testified that he never received the text, (2T 95-16 to 22) and his cell phone call details records do not reflect it. (Da 14) He alleged that the only portion of the conversation he could overhear between Mack and whoever he was on the phone with during the robbery was "I think they're following me." (2T 98-23 to 99-5)

Following his arrest after the January 12th 2012 robbery, Bowers provided a statement to the police. That statement conflicted in significant respects with his trial testimony. He told the police that the January 12th 2012 robbery was the first he had participated in and that his participation was to repay an outstanding debt to a gang member named Fel. (2T 114-7 to 115-8; 120-22 to 24) Bowers claimed to

not be familiar with Mack or to know the identity of the person who drove them to the location of the robbery. He told the police that a person named Animosity was "lining up these jobs" and that Fel "picks these robberies off the internet." (2T 121-3 to 6; 121-18 to 20)

About an hour or two into the interrogation, Bowers finally admitted that he was involved in two robberies, followed by a further admission that he was involved in a third. (2T 122-24 to 123-13) He denied involvement in the Edison T-Mobile robbery. (2T 123-16 to 22) He implicated Mack and Animosity, as the drivers, in the AT&T robbery, and a third person, whose identity he did not know. (2T 124-7 to 16) He swore to the police that he, Mack, and Animosity robbed the store on December 8th 2011. (2T 124-25 to 125-2) A women, whom he identified as Mack's "girl," Ariel, drove them from the scene. (2T 125-3 to 17)

Bowers admitted that his goal in talking to the police on January 12th, 2012 was to be released and to that end, he told the police that "he'd be willing to set people up." (2T 135-14 to 20) After being confronted with his status as a sex offender and the police's promise to help protect him if he were to go to jail, the interrogation turned to a discussion of Michael. (2T 148-4 to 149-18)

Bowers said that on January 12th, 1012, there was a discussion about a memorial for an individual who had been shot in New Brunswick. (2T 146-25 to 147-3) He told police that Michael was traveling to the memorial. (2T 147-5 to 7)

His statement to the police corroborated his trial testimony that Mack would frequently use Michael's phone to contact him: "I don't have him in my phone. Like I said, [Mack] always calls me from [Michael's] number." (2T 147-8 to 10, 188-2 to 4) He testified that Mack was the person who told him what to do, where they were going to rob, and the person who sent the store locations. (2T 158-3 to 19) Bowers did not have Mack listed in as a contact in his phone. (2T 180-11 to 19) On January 19th, 2012, Bowers signed an affidavit, swearing that Michael Mitchell "had no knowledge and did not commit any robberies on January 12, 2012." (2T 157-1 to 7) Bowers admitted that he wrote the affidavit "freely and voluntarily." (2T 157-5 to 7)

G. CELL-PHONE-RECORDS EVIDENCE.

In addition to the text messages introduced during Bowers' trial testimony, the State introduced additional text messages exchanged between Michael's cell-phone and Bowers' cell phone. However, Bowers testified that he exclusively communicated with Mack through Michael's cell-phone. The cell phone records evidence did not establish who was actually using the phone to send messages. On December 17th, 2011, Michael's phone sent a text message to Bowers' stating, "We going to do it Monday," to which Bowers' responded, "I then." (14T 28-12 to 17) Later that evening, Bowers sent a message to Michael's phone, referring to Michael in the third person: "I told you my GMAX acting dumb, I'm trying to rush

Philly." (14T 31-21 to 23) As Bowers' testified, Philly is Michael's nickname. On December 19th, 2011, Bowers sent a message to Michael's phone: "If you still got them phones left, don't forget them, and I need gloves too." (14T 29-3 to 12) On several dates towards the end of December 2011, text messages were sent to Michael's phone asking about phones. For example, "Yo, can I get that phone today?" "Do you have more phones? What kind of phone name?" and "You get anymore Sprint phones?" (14T 44-18 to 45-14, 51-7 to 12, 52-18 to 53-3, 55-13 to 18)

H. Cell-Tower-Map Evidence

The State introduced in evidence maps purportedly depicting the cell towers that Michael's cell phone utilized at or around the time of the robberies. Joseph Sierra, a custodian of records at T-Mobile explained the cell tower technology. (3T 4-1 to 9) He testified that T-Mobile keeps records of the first and last cell-towers that each cell-phone call utilizes. (3T 23-1 to 4) A cell tower is "essentially an antenna that provides a connection to the T-Mobile network." (3T 23-6 to 7) Under perfect conditions, when a cell phone call is placed, the call will connect to the nearest tower. Each T-Mobile cell-tower provides a maximum coverage area of 2.5 miles; essentially the first and last tower that a cell phone call pings must be within a 2.5. Miles radius of the cell phone. (3T 23-13 to 15) Sierra admitted that this cell phone technology does not reveal who made a particular call and there are

variables at issues that may affect the precise tower utilization, other than the caller's location. (3T 73-5 to 74-14) Although each phone call should utilize the closest tower to the caller that is not always the case. (3T 25-8 to 18) The geography of the area, the weather, and general obstruction factor into which cell-tower is utilized for a phone call. (3T 25-19 to 26-21)

Detective Matthew Domanic plotted the maps of the call details relating to Michael's phone. He testified that on December 19th, 2011, Michael's phone placed calls at 9:14a.m., 9:46a.m., 9:50a.m., 9:51a.m., and 9:52a.m. And 10:16a.m. Which used a cell tower within several miles of Kendall Park robbery. (3T 95-13 to 25, 98-3 to 25) On January 5th, 2012, Michael's phone placed a call to Mack's phone; the call utilized a cell-tower whose coverage area was "just outside" the location of an AT&T store on Route 1. (3T 104-13 to 105-4, 106-3 to 107-7) On January 12th, 2012, Michael's phone placed a call to Bower's phone, which utilized a cell-tower at 12 Van Dyke Avenue, New Brunswick New Jersey. (3T 110-14 to 111-8) Domanic admitted that the cell-tower was not within the 2.5 to 3 mile radius of the location of the robbery that morning. (3T 112-5 to 14) Mitchell's phone made a phone call that lasted 18.53 minutes that morning to Mack's phone number, which originated at a tower at 100 Menlo Park and ended at a street address in Metuchen. (3T 113-25 to 114-20, 115-15 to 25) Mack's cell phone tower pings were never obtained nor were they ever shown to the jury. Mack cell

phone records was never subpoenaed. Domanic conceded that the tower coverage area depicted on the maps does indicate where within the area a specific call was placed. (3T 118-14 to 23)

LEGAL ARGUMENT

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL (U.S. CONST., (AMEND. VI, XIV; N.J. CONST., (1947), ART I, PAR. 10), AND BECAUSE HE WAS PREJUDICED THEREBY. THE COURT SHOULD GRANT HIS PETITION FOR POST CONVICTION RELIEF. IN THE ALTERNATIVE, BECAUSE THE PETITIONER HAS PRESENTED AT LEAST PRIMA FACIE PROOF THAT HE HAS BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, THE COURT SHOULD GRANT HIM AN EVIDENTIARY HEARING ON THESE ISSUES.

The Petitioner asserts that his attorneys failed to provide him with effective assistance of counsel. He further asserts that because he was prejudiced thereby, and because there is no evidence that his attorneys had any valid strategic reason for the apparent failures, the Court should grant his motion for Post-Conviction-Relief.

The right to counsel is guaranteed by both the State and Federal Constitutions. U.S. Const., (Amend VI, XIV: N.J. Const., (1947), Art. I, par 10). The right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 688 (1984), quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); State v. Davis, 116 N.J. 341, 351 (1989). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance

was deficient as measured by an objective standard of reasonableness under prevailing professional norms, and that defendant was prejudiced thereby. Strickland, 466 U.S. at 687-88; State v. Fritz, 105 N.J. 42, 58 (1987). The defendant must also overcome the strong presumption that counsel's actions might be considered sound trial strategy. Id. at 689.

To the extent this Court finds that any arguments made herein should have been raised on direct appeal, then the petitioner asserts that he received ineffective assistance of appellate counsel. The Strickland, standard applies to appellate counsel as well as trial counsel. See State v. Morrison, 215 N.J. Super. 540, 546 (App. Div.), certif. den. 107 N.J. 642 (1987). "[I]n applying the Strickland standard to assess a claim of ineffective assistance of appellate counsel, defendant must show not only was his attorney's representation fell below an objective standard, but also that he was prejudiced, i.e., but for counsel's unprofessional errors, the results would have been different. Id. at 546.

In addition to the arguments raised by the petitioner in his pro se brief, it is respectfully requested that the Court consider the following arguments in his P.C.R. appellate attorney's brief. Independently as well as cumulatively.

(A) MR. MITCHELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MS. MARSHALL FAILED TO RAISE AN OBJECTION TO THE TRIAL COURT'S AMENDMENT OF THE INDICTMENT OF THE ROBBERY COUNTS THEREBY VIOLATING HIS RIGHT'S TO THE PRESENTMENT OF THE INDICTMENT TO THE GRAND JURORS. N.J. CONST. ART I PARA 8, FAIR TRIAL AND DUE PROCESS UNDER N.J. STATE AND FEDERAL

CONSTITUTION.

A Middlesex County Grand Jury indicted Mitchell on multiple counts of robbery, conspiracy, and weapon possessions under indictment 12-06-897. (12T) On April 29th, 2014, Mr. Surman returned to the Grand Jury for a superseding 14-05-525-I adding theft by unlawful taking which was omitted from the original indictment. (13T) Mr. Mitchell proceeded to trial whereas he was found guilty and sentenced to life without parole. (11T)

The "degree" is an essential element that must be included in the indictment Rule. 3:7-3(A) [1.1]. See also State v. Catlow, 206 N.J. Super, 186, 194-95, 502 A. 2d 48 (App. Div. 1985). In Catlow, the defendant was charged with robbery in the indictment that did not provide "any degree of the offense," and over the defendant's objection, the trial court instructed the jury on first degree robbery. Ibid. The Appellate Division reversed because it "consider[ed] determination of the degree of a crime an essential element of the Grand Jury function," and it found even though the State presented evidence that the Grand Jury heard testimony relating to a first degree offense, the robbery count provided no degree. Id. at 195, 502 A.2d 48.

Rule. 3-10-2(c) (d) requires objections to indictments or accusations that fails to charge an offense before trial. Here Ms. Marshall should have objected to the first degree robbery jury instruction because the "**Grand Jury transcripts"** under both

indictment(s) 12-06-897 and 14-05-525-I were "barren of any degree" for robbery. (12T 44-45-7 to 24; 13T 3-1 to 6; 30-31-25 to 5).

In conjecture with Ms. Marshall's failure to object to the trial court's jury instruction on first degree robbery, she allowed the Court to bypass the grand jury's function in which, permitted the court to amend the indictment to reflect a higher degree of robbery, without first consulting with the grand jury. Such amendment violated R: 3-7-4 because an amendment that relates to the substance or essence of an offense cannot be amended. It is furthered asserted that Mr. Mitchell can make a plausible showing that the amendment prejudiced him and would have made a difference in the outcome had Ms. Marshall objected. The indictment never alleged defendant Michael Mitchell went into any stores and pointed any weapons. The State conveyed a 10 year offer. (Da 54) Defendant's penal exposure would've ranged of 5-10 years. And it would not have subjected Mr. Mitchell to a mandatory life without parole sentence pursuant to N.J.S.A. 2C:43-7.1(a).

Ms. Marshall's failure to object constituted a prime facie case of ineffective assistance of counsel pursuant to Strickland's two-prong test and/or Cronic/Davis per se analyses and violated Rule 1:7-2. This matter should be remanded to the trial Court for resentencing to second degree robbery.

(B) MS. MARSHALL'S AND/OR APPELLATE COUNSEL FAILED TO RAISE AN OBJECTION TO THE JURY INSTRUCTIONS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE JURORS WERE PRECLUDED FROM CONSIDERING A LESSER INCLUDED OFFENSE OF SECOND

DEGREE ROBBERY.

The defendant maintains that the jury believed that it was precluded from finding him guilty of second degree robbery, because the jury instructions created a substantial probability that it directed them to assess punishment equally for principles and accomplices.

The testimony of the State's key-witness Emendo Bowers is evidence of itself that the jury could reasonable believe defendant was guilty of a lesser included offense of second degree robbery. On direct examination concerning the January 12th, 2012 T-Mobile robbery, Bowers testified that there was no discussion about a robbery at all that morning. (9T 81-82-25 to 4; 83 24-25) In fact Bowers said he had no idea it was going to be a robbery until it started happening (9T 82-22-24). Bowers testified that he freely and voluntarily signed an affidavit on January 9th, 2012 (Da 27-28) attesting that defendant had no knowledge and did not commit any robbery on January 12th, 2012. (9T 156-157-23 to 7) On cross examination concerning the January 12th, 2012 robbery: Bowers reaffirmed that there was no discussion of a robbery prior to entering the T-Mobile and that the robbery was decided inside the store. (9T 143-11 to 16)

The trial Court instructed the jury in relevant part: in order to find defendant guilty of robbery, the State must prove beyond a reasonable doubt each of the following elements: 1) "That Mack Mitchell and Emendo Bowers committed the

crime of robbery." 2) That Michael Mitchell did aid or attempt to aid Mack Mitchell and Emendo Bowers in planning and committing the robberies. **3)** That Michael Mitchell's purpose was to promote or facilitate the commission of the offenses. **4)** That Michael Mitchell possessed the criminal state that is required to be proved against the person who actually committed the criminal acts. (15T 145-146-15 to 3)

While the jury always heard testimony that Mack and Emendo would be armed, the jury instruction to the jurors that they had to find that "Mack and Emendo committed the crime of robbery" created a substantial probability a reasonable juror may thought they could not find defendant guilty of robbery even if the evidence established a lesser included existed. It is further asserted that the trial court failed to incorporate the facts of the case to the jury instructions on accomplice liability, which would have explained the possible difference in intents between the principle and accomplice concerning robbing the victim. State v. Tucker, 280 N.J. Super. 149, 153, 654 A. 2d 1014 (App. Div. 1995) (reversing defendant's conviction for robbery where the trial court failed to give the jury instructions which incorporated the facts of the case in which explained the possible difference in the intent between the principle and the accomplice concerning robbing the victim.)

The trial Court's instructions on accomplice liability in Mr. Mitchell's case only defined accomplice and discussed the sharing of the same purpose but only

spoke in generalities. The trial Court failed to charge the facts of the case. For example, when the Court gave the instructions on accomplice liability, it never explained to the jury surrounding the evidence presented at trial on how they could find defendant guilty of second degree robbery while co-defendants Mack Mitchell and Emendo Bowers are guilty of first degree robbery. "[I]t is not always enough simply to read the applicable provisions of the criminal code, define the terminology, and set forth the elements of the crime... Ordinarily, the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case R: 1:8-7 [8.1]". State v. Concepcion, 111 N.J. 373, 545 A.2d 119 (1988). Id.

By the judge merely charging the jury in general terms as to accomplice liability, he did not really give the jury the proper guidance. The jury should have been told that if they believed that defendant merely had the intention to commit robbery, and other participants unbeknownst to him would be armed, defendant could not be convicted of armed robbery since the State had not offered any evidence that defendant passed out any weapons, possessed any weapons physically nor made any plans or had discussed any use of a weapon relating to any of the robberies. In addition, the jury should had been told, it could find defendant guilty of robbery even if they found Mack and Emendo committed the crime of armed robbery.

When there is conflicting testimony in a trial, incorporating specific evidentiary facts into the jury instructions is helpful in guiding the jury in its task of determining defendant's guilt or innocence. State v. Parker, 33 N.J. 79, 94, 162 A.2d 568 (1960); State v. Concepcion, Supra. 111 N.J. at 380, 545 A.2d 119. Trial Courts should be mindful of their duty to provide correct and comprehensible jury instructions in criminal cases, which duty includes "incorporating [therein], the evidentiary context of persons, places and thing[s] and events disclosed at trial." Id. at 379, 545 A.2d 119 (quoting Schwarzer, Communicating with the Juries: problems and remedies, 69 Cal. L. Rev. 731, 741 (1981). [654 A.2d 1017]

In describing the prejudice to a defendant, the Supreme Court has stated: [A] Jury is reluctant to acquit a defendant or might compromise on a verdict of guilty on the greater offense. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve the doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 1997-98, 36 L. Ed. 2d 844, 850 (1973). State v. Soloane, 111 N.J. 293, 299, 544 A. 2d 826 (1988). See also State v. Sinclair, 49 N.J. 525, 540-43, 231 A. 2d 565 (1967).

What is more troubling is the fact that the jury was not instructed regarding the essential element of accomplice liability-"the shared purpose to commit robbery with a weapon". At trial, the state argued to the jury its theory against

defendant Michael Mitchell is accomplice liability. The instruction to the jury in respect to accomplice liability charge were: In this case, the state alleges that the defendant is equally guilty of the crime committed by his co-defendants Mack Mitchell and Emendo Bowers because he acted as their accomplice with the purpose that the" robberies" be committed. (15T 145-12 to 16) The court further instructed the jury: in order to find defendant guilty of "robbery", the state must prove beyond a reasonable doubt each of the following elements. 1) That Mack Mitchell and Emendo Bowers committed the crime of "robbery". 2) That Michael Mitchell did aid or agree or attempted to aid Mack Mitchell and Emendo Bowers in planning or committing the "robberies". 3) That Michael Mitchell's purpose was to promote or facilitate the commission of the offense. 4) "That Michael Mitchell possessed the criminal state of mind that is required to be proved against the person(s) who actually committed the criminal acts." (15T 145-146-16 to 3) The charge did not, however, equally relate those principles to the degrees of robbery involved. The jury was told: if you find that Michael Mitchell aided, agreed to aid or attempted to aid another person(s) in the commission of a "robbery", then you must consider him equally guilty. Hence, nowhere in the instruction on accomplice liability charge did it require the jury to find that Michael Mitchell had shared the purpose to commit a robbery with a weapon.

The trial court erred in entering a judgment of conviction for first degree robbery on count sixteen because the jury was not instructed regarding the essential element of accomplice liability charge-that the defendant shared the purpose to commit armed robbery with a weapon. Thus, the robbery charge submitted to the jury on accomplice liability was a second degree offense. Defendant's sentence is illegal and he must be resentenced to a term within the second degree range.

For arguments sake, a judgment of conviction for armed robbery could not be sustained based upon the jury's findings relating to other charges against the defendant. State v. Smith, 279 N.J. Super. 131, 141-42, 652 A.2d 241, 246-47 (App. Div. 1995) although defendant did not object to the trial court's failure to instruct the jury on the essential element of accomplice liability-"shared purpose to commit an armed robbery," our Supreme Court has repeatedly indicated that the failure to charge a jury of an element of an offense is prejudicial error, even in the absence of a request by defense counsel." State v. Frederico, 103 N.J. Super 176, 510 A.2d at 1151; see also State v. Burgess, 154 N.J. 181, 186, 712 A.2d 631, 633 (1998); State v. Afanador, 151 N.J. 41, 56, 697 A.2d 529, 576 (1997).

As such, the trial Court's jury instructions on accomplice liability was capable of producing an unjust result, and by counsels failure to object to the instructions constituted a prima facie case of ineffective assistance of counsel

pursuant to the Strickland's two-prong test and/or the Cronic/Davis per se analyses, this matter must be remanded.

(C) MS. MARSHALL AND/OR APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY ARGUE A MOTION TO DISMISS THE INDICTMENT BECAUSE OF PERJURED TESTIMONY AND FALSE EVIDENCE ADMITTED BY THE STATE AND DETECTIVE HAMER THAT MISLEAD THE GRAND JURORS, THUS VIOLATING DUE PROCESS UNDER N.J. AND FEDERAL CONSTITUTION.

A Middlesex County Grand Jury heard testimony presented by the State and Det. Hamer on June 5th, 2012, indictment 12-06-897 and again on April 29th, 2014, superseding indictment 14-05-525-I concerning multiple robberies alleging defendant, co-defendant Mack Mitchell, Emendo Bowers and Jane Doe. (12T; 13T)

The traditional function of a grand jury is to safe guard citizens against arbitrary, oppressive, and unwarranted criminal prosecution. State v. Lefurge, 101 N.J. 404, 418 (1986). It is a well settled principle of law once a grand jury has acted, an indictment should not be disturbed but only on the clearest and plainest grounds when the indictment is manifestly deficient or palpably defective. State v. Hogan, Supra. 144 N.J. at 228-29.

In making a determination as to whether an indictment is valid, a grand jury must independently examine whether the State has presented proof to support each element of the offense charged, and whether each of those elements have been charged in the indictment. State v. Fortin, 178 N.J. 540, 633 (2004) (Citing Hogan,

supra 144 N.J. at 277). In the absence of such proof, the indictment is subjected to dismissal.

The State's presentation under indictment 12-06-897, relied heavily on Detective Hamer whom gave perjured testimony before the Grand Jury. For example, he testified as to December 8th, 2011, T-Mobile robbery, that "Mack Mitchell and the defendant" entered the store first and then Emendo comes in and locks the door behind himself. (12T 42-20 to 23) But the T-Mobile video depicts Emendo Bowers and Mack Mitchell entering the store first and then comes in third unknown suspect. (Da 1) Detective Hamer's improper opinion of the T-Mobile video surveillance violated N.J.R.E. 701. A lay opinion testimony maybe admitted if it: (A) is rationally based on the witness' perception; (B) will assist in understanding the witness' testimony or determining a fact in issue.

Here, Detective Hamer should not have narrated the video to the grand jury because he did not personally observe the events. He had no familiarity of defendant's appearance when the crime was committed; his perception of defendant and co-defendant Mack Mitchell seen entering the store first clearly contradicts the surveillance video; and his testimony was not helpful to the grand jury other than misleading them to believe it was "the defendant" in the video. The grand jury never saw the video and/or a picture of defendant. Apparently, Det. Hamer was someone who never watched the video and just came up with his own conclusion. His

testimony included the ultimate determination as to defendant's guilt and assisting the jurors in determing the identity of the alledged robbers. This testimony was very prejudicial as to meet plain error standard. His references to it was "defendant" and Mack whom was depicted on video entering the store first and then Emendo comes in and locks the door, conveyed to the grand jury his opinion that the defendant was the person in the video. Especially, when the video depicts Emendo and Mack entering the store first and then comes a third unknown suspect with their hood up.

In spite of the December 19th, 2011, Radio Shack robbery, Det. Hamer was asked did South Brunswick charge Emendo and the defendant. Det. Hamer indicated that his notes reflects it was Emendo Bowers and defendant. (12T 43-9 to 14) But his notes only indicate that defendant is at question. (Da 2) In Fact, concerning the December 19th, 2011, robbery. The victim stated that two males entered the store that day and pointed weapons. Emendo and Mack admitted to the Radio Shack robbery and they both were charged. (Da 3-4) The defendant was never charged until Det. Hamer's perjured testimony.

The January 5th, 2012, AT&T robbery, the state placed heavy reliance on Det. Hamer testimony that a phone found in defendant's mother car was stolen from the store, in which Hamer testified that his knowledge was limited to a police report filed by Det. Kenney. (12T 34-7 to 15) which excludes any evidence that defendant committed armed robbery himself. When Hamer conveyed information concerning

the January 5th, 2012 robbery to the grand jury from Det Kenney who did not testify violated defendant's rights under New Jersey Constitution article I para 10 and the Six Amendment under the federal constitution. In State v. Bankston 63 N.J. 263, 268-69, 271-73, 307 A.2d 65 (1973); the court held that when an officer testifies about information from someone else either directly or by inference and the information incriminates the defendant, the confrontation clause and hearsay rule is implicated because the officer never testified before the grand jury and was not subjected to cross-examination.

On April 29th, 2014, assistant prosecutor Joseph Surman returned to the Middlesex County Grand Jury for a superseding indictment 14-05-525-I to add theft by unlawful taking which was omitted from the original indictment. The State and Detective Hamer continued to provide perjured testimony before the grand jury. In vouching the case for the State, Det. Hamer testified that the maps presented by the State to the grand jury allegedly placed defendant in the area of the robberies. The colloquy of Det. Hamer follows: [The State]: Were there cell phone records obtained for defendant's phone? [Hamer]: Correct. [The State]: And did those records place him in the area of the Menlo Park T-Mobile robbery where he was arrested as well as the AT&T robbery in Edison and the Radio Shack? [Hamer]: That's correct. [The State]: And it was the cell phone towers basically that his phone was hitting off of,

were within a mile or two of those locations; correct? [Hamer]: Correct. (13T 29-30-15 to 9)

In spite of the testimony of Det. Hamer indicating that the maps placed defendant at the robbery locations, it was later determined that the maps (Da 5-9) the State and Det. Hamer presented to the grand jury weren't the correct cell sites pursuant to the call detail records. (Da 10-23) On August 7th, 2015, the State recognized which he calls a "small error" with the maps, whereas the address to the cell sites were wrong. (1T 5-13 to 20). Their testimony clearly mislead the grand jury because they were unaware that the cell sites were incorrect, which had a great impact on their decision to indict. Their testimony also concerning the one to two miles radius was improper because they provided no measurements as to the height of the tower, data as to factors that could have influenced the estimate coverage area and/or range of the towers. They are not experts by knowledge, skill, experience, training or education to offer any scientific, technical, or specialized opinions of cell towers pings that will assist the trier of the fact, and their opinion was not based on actual fact or data. Clearly, their testimony violated N.J.R.E. 702 and N.J.R.E. 703.

The January 12th, 2012, T-Mobile robbery. Det. Hamer indicated that while the defendants were in the McDonald's prior to the robbery, Mack puts a gun to defendant's head. (12T 31-22 to 23; 13T 25-20 to 21) At trial, Det. Hamer testified that he did not know what Mack had in his hand at the McDonald's. (7T 264-7 to

15) Det. Hamer's narration that alleged co-defendant Mack Mitchell put a gun to defendant's head on the McDonald's video surveillance mislead the grand jury and violated N.J.R.E. 701 because if the State shown the grand jury the video, they would have witnessed it was not a weapon. Besides, "they were as competent as he was to determine what it showed. N.J.R.E. 403 guards against the risk of "{u] ndue prejudice, confusion of issues.... Misleading the grand jury. {and] needless presentation of cumulative evidence".... Det. Hamer's misperception of the McDonald's video and overall evidence "invaded the province of the grand jury. The Grand Jury heard Det. Hamer indicate that defendant was observed pulling into the parking lot (T-Mobile at 32 Parsonage Rd) as Mack and Emendo exited the Buick, put their hoods up and walk in the store. (13T 17-17 to 21) He indicated when Steve Todd came into the area, defendant maneuvered around the parking lot, became suspicious of the police and drove out the parking lot. (13T 19-13 to 24) But in his affidavit in support of the search warrant under oath, he swore that the Buick pulled into the parking lot of "10 Parsonage Road at 10:56am" and back into a parking space, two black males exited the Buick, pulled their hoods over their heads and entered the T-Mobile located at 32 Parsonage Road. (Da 36) What's even more compelling is Hamer's affidavit was the surveillance observation of Sgt. Frank Todd, which contradicts Sgt. Frank Todd's grand jury testimony where he indicated that the two black males were dropped off at the intersection of Parsonage Road, and the

two occupants exited the Buick. (12T 15-16-3 to 5). Det Ted Hamer testified that he relies on F.Todd and S.Todd reports when making his affidavit. (6T 87-1 to 12) Det. Steve Todd police report indicates that he stopped defendant at 7-Eleven on "Route 27 & Parsonage Road at 10:53am" and placed defendant under arrest at 10:56am, (Da 36) but the C.A.D. incident report indicates that defendant was stopped on "Oakwood & Parsonage Road at 10:53am". (Da 52)

The grand jury relies upon the prosecutor to initiate and prepare criminal cases and investigate which come before it. The prosecutor is present while the grand jury hears testimony: he/she calls and questions the witnesses and draws the indictment. With great power and authority there is a correlative duty, and that is not to permit a person to stand trial when he/she knows that perjury permeates the indictment. At which point the prosecutor learned of the perjury before the grand jury, the prosecuting attorney has a duty to notify the grand jury to correct the cancer of justice. To permit the defendant to stand trial of perjury before the grand jury only allows the cancer to grow. Here, the State and Det. Hamer investigated the case prior to the grand jury, so they had knowledge of the facts of the case, the perjured testimony was not corrected and only continued on at other proceedings, there is a reasonable likelihood that the perjured testimony affected the judgment of the grand jury under both indictments. In Napue v. Illinois, 360 U.S. 264 (1959) held that using false testimony to obtain a conviction by representatives of the State, falls under the

fourteenth amendment. The Court said the same result must obtain when the State allows a defendant to stand trial on an indictment which it knows is based "in part upon perjured testimony". The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective way of cross-examining or rebutting the perjured testimony given before the grand jury, as he might in court. The Court is to give a curative instruction when the jury has heard a statement from a witness that was improper and has the capacity for prejudice. Rule 1:8-7 [9.2]. In this case, the judge was not present at the June 9th, 2012 or April 24, 2014 grand jury proceedings to overcome the prejudicial misleading testimony that the state and Det. Hamer presented.

However, while the Grand Jury heard testimony that Mack and Emendo admitted their involvement in some or all robberies, but they did not hear the same implicating defendant to the same. The omission of an element cannot be supplied by inference, implication or left to intendment. State v. Newell, 152 N.J. Super. 460, 466 (App. Div. 1977). R: 3-7-3(a). Also, where it is no difficulty in producing the victims because they are of local people, an indictment based solely on hearsay testimony of the investigating officer would be dismissed. State v. Costa, 109 N.J. Super 243, 262 A.2d 917 (1970); see also State v. Chandler, 98 N.J. Super. 241, 236 A.2d 632 (1970). Here, the victims were local but not produced, and the indictment

was solely based on the investigating officers. The assessment of guilt is not the Court's function, but the grand jury's. State v. Vick, 117 N.J. 288, 291 (1989)

Ms. Marshall's failure to raise in a motion to dismiss the original indictment 12-06-897 and make a motion to dismiss the superseding indictment 14-05-525-I violated defendant's right's under N.J. and federal constitutional to a grand jury, fair trial, due process and to preserve the issue for appellate review constituted a prima facie case of ineffective assistance of counsel pursuant to Strickland two-prong test and/or Cronic/Davis per se analyses. If appellate counsel should have appealed defendant's motion to dismiss the original indictment (12-06-897) Strickland applies to appellate counsel as well. Due to the perjured testimony on June 5th, 2012 and April 29th, 2014, the State failed to present any evidence to the Grand Jury of any element of any crime charged to establish a prima facie case that defendant himself committed and/or conspired to commit any of the enumerated offenses on December 8th, 2011, December 19th, 2011, January 5th, 2012 and January 12th 2012. The cumulative effect of the misleading testimony and evidence within the presentation under both indictments rendered it deficient and palpably defective. This matter should be remanded for the Court to explore Mitchell's claim. Preciose, supra, 129 N.J. at 464.

(D) MS. MARSHALL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE THE SURROUNDING FACTS OF THE ROBBERIES WHICH ALLOWED THE STATE TO BRING IN INCONSISTENT STATEMENTS OF THE DETECTIVES

WHICH LEAD TO DEFENDANT'S CONVICTION.

Lead detective Ted Hamer presented testimony concerning the robberies before the Middlesex County grand jury. There he testified that on December 8th, 2011, T-Mobile video surveillance depicted, "Mack and defendant entering the store first and then in comes Emendo and locks the door. (12T 42-20 to 23). He testified that his notes indicated (Da 2) South Brunswick charged Emendo and defendant for the December 19th, 2011, Radio Shack robbery (12T 43-9 to 14) and; He testified that on January 12th, 2012 prior to the robbery while the defendants were in the McDonald's, "Mack puts a gun to defendant's head," (12T 31-22 to 23; 13T 25-20 to 21) And after leaving the McDonald's defendant was observed pulling into the T-Mobile parking lot as Mack and Emendo exited the Buick, put their hoods up and walk into the store, (13T 17-17 to 21) He testified upon Steve Todd arriving into the area, defendant maneuvered around the parking lot, became suspicious of the police and drove out of the parking lot." (13T 19-13 to 24) He further testified on April 29th, 2014, that cell maps placed the defendant in the area of the robberies. (13T 29-30-15 to 9)

N.J.R.E. 607[7] is certainly one of the most important rules for the trial attorney embodying the right to cross-examine witnesses which carries constitutional implications and has been often referred to as the "greatest legal engine ever involved for discovery of the truth. State v. Silva, 131 N.J. 438, 444

(1993) (quoting California v. Green, 399 U.S. 149, 158 (1970) The primary concern of the confrontational clause is to ensure the reliability of the evidence against the accused by subjecting it to "rigorous testing" in an adversarial proceeding. State v. Miller, 170 N.J. 417, 425 (2002), quoting Maryland v. Craig, 497 U.S. 836, 845 (1990) Here, Ms. Marshall failed to confront Det. Hamer about inconsistencies in his grand jury testimony, affidavit of probable cause for a search warrant and trial testimony. In revelations, Ms. Marshall did not confront Hamer about his grand jury testimony concerning his observations of the December 8th, 2011, T-Mobile surveillance video depicting Mack and defendant entering the store and then in comes Emendo locking the door behind himself (12T 42-20 to 23) which contradicts the T-Mobile video surveillance showing Mack and Emendo entering the store, and in comes an unknown suspect with their hood up. (Da 1) However, she never questioned him about how he arrived to the conclusion that his notes (Da 2) indicated that South Brunswick charged the defendant with the December 19th, 2011 Radio Shack robbery (12T 143-9 to 14) when his notes indicated that defendant was questionable. (Da 2) When it was Mack and Emendo that South Brunswick had charged. (Da 3-4) She never cross examined Hamer about his testimony on June 5th, 2012 and April 29th, 2014, at the grand jury, that on January 12th, 2012, he observed Mack pointing a gun at defendant's head on the McDonald's video surveillance, (12T 31-22 to 23; 13T 25-20 to 21) but then at trial why did he change his testimony of

not knowing what the object was Mack had in the McDonald's video. (7T 264-7 to 15)

Ms. Marshall never questioned Hamer of his assertions that he testified about on April 29th, 2014, concerning defendant dropping Mack and Emendo off in the T-Mobile parking lot located at 32 Parsonage Road, (13T 17-17 to 21) but wrote in his affidavit in support of probable cause for a search warrant, that defendant dropped Mack and Emendo off at "10:56am in the parking lot of 10 Parsonage Road" whereas the suspects exited the Buick and walked up to the store, (Da 48) which contradicts Frank Todd's police report of the Mack and Emendo being dropped off at the intersection of Parsonage & Mason Street, (Da 30) and/or Todd's March 13th, 2014 testimony that he observed the Buick go into the T-Mobile parking lot, where the suspects got out and entered the store. (6T 7-21 to 22) His affidavit contradicts Frank Todd's observation that defendant was leaving the area at 10:44am, S. Tood's location of the traffic stop and arrest time of defendant that was allegedly conducted on "Rt. 27 & Parsonage Road at 10:56am", (Da 36) and the C.A.D. report that indicates defendant was stopped at "Oakwood and Parsonage Road at 10:53am". (Da 52) Ms. Marshall failed to cross examine him about his knowledge of the faulty maps he cosigned on April 29th, 2014, that allegedly placed defendant in the area of the robberies, (13T 29-30-15 to 9) which the State withdrew on August 7th, 2015, because they were not the correct cell sites. (1T 5-13 to 20) Likewise, Ms. Marshall

passed up the chance to question Hamer about his statement to Officer Kelli Anne Fronk that a large silver air soft/pellet gun was found in the Buick upon a search of it, which was a lie. (Da 49-50) cross examination of Det. Hamer's inconsistencies could have raised major concerns as to the truthfulness of his, Det. Frank Todd and Steve Todd testimonies. In fact at March 13th, 2014 hearing Det. Hamer testified that he relies on the reports of Det. Steve and Frank Todd, along with other information he conducted himself when making his affidavit. (6T 87 1 to 12)

Detective Frank Todd's observation on January 12th, 2012 indicates that: On January 12th, 2012, approximately 10:35am a black Buick drove down from Judson Street on Mason Street and stopped at the intersection of Parsonage Road. Approximately 10:38am, two occupants exited the vehicle wearing hoodies, jeans and gloves. Approximately 10:39am, he contacted detective Salardino and Steve Todd. Approximately 10:43am, detective Salardino and Steve Todd arrived into the area. Approximately 10:44am, detective Steve Todd advised that the Buick was leaving the area turning onto Parsonage Road. Approximately 10:45am, the two black males fled out the rear of the T-Mobile on foot. (Da 30-31)

Ms. Marshall failed to confront detective Frank Todd of his inconsistencies in his testimony, because on March 13th, 2014 he testified that he observed the Buick going into the T-Mobile parking lot and the suspects getting out of the car, and walk up to the front of the T-Mobile store, (6T 7-21 to 22) but in his police report he saw

the suspects being dropped off at the intersection of Parsonage Road. (Da 30) Ms. Marshall did not challenge Frank Todd's observations of Mack and Emendo fleeing out the rear of the T-Mobile at "10:45am," (Da 31-32) while the T-Mobile video surveillance shows them still inside the store at "10:55am." (Da 32)

Mr. Bowers testified for the State concerning the robberies. The prosecutor asked him on direct examination about a text sent to him on January 12, 2012 at 10:41am, "go ahead and do it." (2T 96-97-22 to 10) Ms. Marshall did not question Bowers about the disconnect between his call detail records and the alleged text sent from defendant. Although, Bowers testified that he never received the text because his phone died at McDonald's, (2T 95-16 to 22) the call details records do not reflect the text. (Da 39)

Officer Fronk nor Mack was ever interviewed or called by Ms. Marshall on behalf of defendant's defense. Officer Fronk's report contained vital information to defendant's case, such as, but not limited to detective Hamer telling her upon the search of the Buick a "silver air soft/pellet gun was found inside," and during an attempted traffic stop of the Buick, it resulted in a suspect fleeing from the car on foot, identified as Mack Mitchell. The driver was apprehended and identified as defendant Michael Mitchell. The police found the employees/patrons bound with tape. (Da 51) Further officer Fronk testimony would have showed motive and bias as to the detective's character because none of that information was true. Ms.

Marshall also never interviewed Mack concerning his affidavit he wrote negating defendant having knowledge of the robbery nor did he have any participation in the robbery on January 12th, 2012. (Da 40)

Defense counsel "has a duty to make reasonable investigation to interview witnesses, cross examine witnesses and investigate witnesses." United States v. Grey, 878 F.2d 702 (3rd Cir.) See also Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. "A lawyer who fails to adequately investigate and to introduce into evidence that raises sufficient doubts as to that question to undermine confidence in the verdict, render deficient performance." Lord vs. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999) (quoting Hart vs. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999) (internal quotation marks omitted and second alternations in original). In particular, counsel's failure to investigate possible methods of impeachment constitutes ineffective assistance of counsel. See Tucker vs. Ozmint, 350 F.3d 43, 444 (7Th Cir. 2003) ("Trial counsel has the duty to investigate possible methods for impeaching prosecution witnesses and failure to do so may constitute ineffective assistance of counsel.

"Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first obtaining the information necessary to make such a decision Strickland, 466 U.S. 668, 80 L. Ed.. 2d 674, 104 S. Ct. 2052. See Riley v. Payne,

352 F.3d 1313, 1324 (9th Cir. 2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not "be presumed to have made a tactical decision: not to call that person as a witness. Cf Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994) (Counsel could not have made a strategic choice when s/he has not yet obtained the facts on which such a decision could be made)."

The cumulative prejudice of Ms. Marshall's failure to interview, investigate, cross examine the Detectives and Bowers of their inconsistencies and call officer Fronk and Mack as witnesses prejudiced defendant. Attacks on their credibility would have established their real incentive to lie and explaining why their testimony may have been fabricated. The failure to adduce such evidence, or even to question the witnesses about their inconsistencies, undermines the confidence in the jury's verdict and establishes a reasonable probability that, but for counsel's failure to elicit the reason for the witnesses to fabricate their testimony, the result would have been different.

Therefore, Ms. Marshall's failures constituted a prima facie case of ineffectiveness pursuant to Strickland's two-prong test and/or the Cronic/Davis per se analyses. This matter should be remanded for a new trial.

(E) MS. MARSHALL WAS INEFFECTIVE BY FAILING TO HAVE THE COURT ISSUE A CAUTIONARY INSTRUCTION AS TO DETECTIVE FRANK TODD'S TESTIMONY

Mr. Mitchell argues detective Frank Todd's repeated testimony that the first suspect whom exited the black Buick on January 12th, 2012, had gotten on the phone with the defendant, (9T 162-8 to 10; 173-22 to 25; 189-5 to 6; 13 to 15) was unduly prejudicial and gave the jury the impression that he had personal knowledge that defendant and one of the suspects were on the phone with each other prior to and during the robbery. His testimony was speculative because there was no evidence offered of him possessing any personal knowledge of defendant's and/or Mack Mitchell's phone number, call records or cell tower pings at the time of his observations, he testified that he had no prior knowledge of suspects being on the phone while committing a robbery, (9T 174-1 to 13) he also testified that he was across the street with his windows rolled up and couldn't hear any of the suspects conversations. (9T 190-1 to 9) Detective Todd gave an inappropriate lay opinion because he lacked personal knowledge of what the phone records revealed, in violation of N.J.R.E. 404 (b). "Lay witnesses are permitted to describe "what [they] did and saw, "but not about what they believe, thought or suspected." State v. McLean, 205 N.J. 438, 460 (2011). The Court has cautioned that "if the lay opinion is a police officer, courts should exercise discretion to prevent the jurors from unduly relying on the views of that law enforcement official. "State v. Gerena, 465 N.J. Super 548, 568 (App. Div. 2021)." The lay witness should not cross into the realm of an expert opinion that entails... specialized knowledge. "Ibid. A witness testifying

about his belief as to what happen 'strongly suggests" that the witness is providing an expert opinion subjected to N.J.R.E. 702. McLean, 205 N.J. at 462. Detective Frank Todd's testimony on this issue was highly improper. His opinion that he knew defendant and one of the suspects were on the phone with each other exceeded the bounds of an appropriate lay opinion, see McLean, 205 N.J. at 460, and his insinuations that the first guy whom got out the car, paused and looked back to make sure they were on the phone together was speculative. (9T 174-11 to 14)

When considered in combination with detective Frank Todd's lack of knowledge of the T-Mobile call detail records at the time of his observations, detective Frank Todd's comments that he could "tell it was a black male on the phone with the first guy that got out the car, (9T 174-5 to 6; 162-8 to 10; 173-22 to 25; 189-5 to 6; 13 to 15) suggested that he knew defendant was on the phone with one of the suspects and that he had personal knowledge of the call details records prior to obtaining any warrants for the phones, clearly implied that defendant was on the phone with one of the suspects and likely committed the robbery.

Ms. Marshall's failure to ask the court to issue a cautionary instruction constitutes a prima facie case of ineffective assistance of counsel pursuant to the Strickland's two-prong test and/or the Cronic/Davis per se analyses. This matter should be remanded to the court for a new trial.

(F) MS. MARSHALL PROVIDED INEFFECTIVE ASSISTANCE BY FAILURE TO OBJECT TO THE TRIAL COURT'S DISPOSAL OF THE JURY FOR TEN

DAYS DURING JURY DELIBERATIONS.

The jury began deliberations on the afternoon of November 18th, and deliberations continued the next day. There was then a ten day break in deliberations. The break occurred over the week of Thanksgiving. However, the holiday was not the sole reason for the adjournment. Although the judge did not explain to the jury why it could not deliberate over the course of ten days, it was ostensibly because of judicial college. Traditionally judicial college is held on the first three days of the week of Thanksgiving. Thus, the judge was unavailable for deliberations on Monday, November 23rd, 2015 through Wednesday November 25th, and the court was closed for the Thanksgiving holiday on Thursday and Friday. When the jury reconvened on November 30th, 2015, it immediately announced that it was deadlocked on 15 counts of the indictment. (8T 4-10 to 13) The next morning, the jury returned a verdict on 17 of the 20 counts.

The defendant asserts that he was prejudiced by Ms. Marshall failing to object and being in agreement with the ten day adjournment in the mist of jury deliberations, in which denied him the afforded remedy of review by the trial and appellate court, and violating his rights to a fair trial and due process. Given the circumstances, and pursuant to R. 1:8-6, which governs the sequestration of juries, a judge is permitted to disperse a jury during deliberations. The rule provides, in pertinent part:

"Following the instructions of the jury by the court and during the course of deliberations, the court may, in its discretion, in both civil and criminal actions, permit dispersal of the jury for "the night, for meals and during other authorized intermissions in the deliberations."

Thus according to Rule. 1:8-6, gives the trial court the discretion to disperse a deliberating jury for the night. (24 hours) In the instant matter, the jury had a 10 day break during the course of deliberations, there should have been no impediment for Ms. Marshall to objecting to the dispersal of the jury for 10 days during deliberations.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). In People v. Santamaria, where the jury deliberations were adjourned for 11 days, the Court of appeals of California found that "the trial court acted to undermine due process requirements by releasing the jurors into the community for 11 days." 280 Cal. Rptr. 43, 50 (Cal. Ct. App. 1991). The Court explained the inherent risk of prejudice engendered by long interruption in jury deliberations. A long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and

from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become dulled or confused instructions.

[Id. at 277-78 (Citations omitted).]

A risk of prejudice exists any time a jury is dispersed during deliberations, even for a few days. See, e.g., United States v. Stratton, 779 F.2d 820, 832, (2d Cir. 1985) (affirming trial court's "conclu[sion] that an adjournment of 4 1/2 days would be less desirable than an eleven-juror verdict" because [a]adjournment would have risked dulling the jurors' recollections of the evidence and summations and heightened the danger that the jurors would discuss the case with outside persons." Naturally, the longer the adjournment the greater the risk of the prejudice.

Thus, in order to preserve the integrity of the jury's verdict, the adjournment of deliberations should be short as possible. In New York CPL 310.10(2), for instance, court rules prohibit the court from adjourning jury deliberations for more than "twenty-four, except that in a case of a Saturday, Sunday or holiday, such separation may extend beyond such twenty-four hour period." See, supra N. 8.

Ms. Marshall's failure to raise an objection to the ten day break prejudiced the defendant which deprived him of his right to a fair trial, counsel, due process under the N.J. and Federal constitution. Her failures also failed to preserve his claim for proper appellate review. Therefore, counsel was ineffective pursuant to the

Strickland's two-prong test and/or Cronic/Davis per se analyses. This claim should be remanded to the court for a new trial.

(G) MS. MARSHALL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE TWO (2) STATEMENTS MADE BY THE STATE'S KEY-WITNESS EMENDO BOWERS.

The defendant asserts that Mr. Bowers spoke to South Edison police on January 12th, 2012, at 11:50 am at the Edison police department. (Da 24) Then again to South Brunswick detectives on January 16th, 2012, at the Middlesex County Jail. (Da 26) Officer Makras whom transported Bowers in a marked police cruiser was equipped with a mobile vehicle recorder. Upon arrival and prior to signing and giving his 11:50am statement, Det. Lisa Cimmino collected Bowers clothes at the police station around 11:30am on January 12th, 2012. (Da 25) Ms. Marshall on cross-examination elicit testimony from Mr. Bowers about speaking with the police on January 12th, 2012, concerning the robberies. [Ms. Marshall]: Okay. Looking at them, is this the Miranda form you signed on January 12th, 2012? [Bowers]: Yes. [Ms. Marshall]: They did not record your statement of whatever when you spoke to them at 11:50am; correct? [Bowers]: No. [Ms. Marshall]: And did you discuss the robbery at 11:50am [Bowers]: Yeah, they were interrogating me at that time. [Ms. Marshall]: And you read and voluntarily read and signed those with those officers; correct? [Bowers]: Yes. (2T 111-17 to 19; 2T 112-14 to 22)

On January 16th, 2012, approximately 4:30pm South Brunswick detectives went to the Middlesex County Jail to speak with Mr. Bowers.[3] However, Bowers nevertheless voluntarily desired or requested to talk to South Brunswick detectives and authorized the warden to call him from his cell for the purpose of the requested interview. (Da 26) Bowers printed and signed his name to speak with them. This statement was not fully investigated by Ms. Marshall.

In State v. Savage, 120 N.J. 594 (1990), echoing Strickland, If counsel thoroughly investigates law and facts considering all possible options, he/her trial strategy is "virtually unchallengeable" But strategy decisions made after less than complete investigations are subjected to close scrutiny. Indeed, counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. A failure to do so will render the lawyer's performance deficient. [Id. at 617-18 (Citations omitted).] Accord State v. Chew, 179 N.J. 186, 217 (2004) ("'[C]ounsel has a duty to make particular investigations unnecessary.") (Quoting Strickland, Supra, 466 U.S. at 691). Indeed, given that Bower's testimony compromised the core of the State's case, his additional statements - perhaps

[3] Detective Ted Hamer testified concerning video recordings at the Middlesex County Jail and the reasons they are to be recorded because: In jails "everything is recorded for a defendant's safety, so that accusations aren't made to say that we did something to somebody. Also, during an interview to know exactly what was said and how it was done so I don't get accused of violating somebody's rights or they don't get accused of saying something that they didn't say,
And video interviews are required accordingly to the Attorney Generals guidelines. (7T V.II 272-273-11 to 3)

exculpating defendant and/or for impeachment purpose - might well have resulted in his acquittal.

Therefore, because Ms. Marshall's failure to fully investigate Bower's January 12th, 2012, 11:50am statement (Da 24) and his January 16th, 2012, 4:30pm statement constitutes a (Da 26) a prime facie case of ineffective assistance pursuant to Strickland's two-prong test and/or Cronic/Davis per se analyses, this matter should be remanded to the Court to explore defendant's claim. State v. Preciose, supra, 129 N.J. at 464.

POINT III

CUMULATIVE ERROR DEPRIVED THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRAIL. U.S. CONST. AMENDS V, VI, XIV; N.J. CONST. (1947) ART I, PARS. 1, 9, 10.

It is argue that the errors presented above, which independently may have been harmless, but when viewed cumulatively, deprived the petitioner of a fair trial and due process. As the New Jersey Supreme Court has recognized, even when "an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal, "State v. Jenewicz, 193 N.J. 440, 474 (2008). In State v. Orecchio, 16 N.J. 125 (1954), the New Jersey Supreme Court upheld the Appellate Division's reversal of the defendant's conviction on three counts of a 35 count indictment. The reversal was based on the cumulative effect of numerous errors made throughout the

trial. In affirming the Appellate Division, the Court observed, the sound administration of criminal justice in our democracy requires that both the end and the means be just. The accused, no matter how abhorrent the offense charged, not now seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries. This, of course, does not mean that the incidental legal errors, which creep into trial did not prejudice the rights of the accused or make the proceedings unfair, or may be invoked to upset an otherwise valid conviction... [Citations omitted]. Where, however, the legal errors are of such magnitude as to prejudice the defendant's right's, or in their aggregated have rendered the trail unfair, our fundamental constitutional concepts dictate the granting of a new trial before impartial jury. [Emphasis added]. Id. at 129.

Additionally, in State v. Allen, 308 N.J. Super. 421 (App. Div. 1998), the Appellate Division found that the cumulative effect of errors in the charge to the jury warranted reversal of the defendant's conviction for drug charges. The court noted that although simple errors may be harmless, the cumulative nature of them may render a result unfair. Id. at 427.

CONCLUSION

The petitioner asserts that he was denied his rights to effective assistance of counsel, a fair trial and due process in violation of U.S. Const. Amend. V, VI, XIV

and N.J. Const. ART. I, PAR. 1, 9, & 10. The petitioner respectfully requests the Court grant him relief. Alternatively, it is respectfully submitted that based upon the factual allegations and legal arguments raised, an evidentiary hearing is warranted. The petitioner should at the very least be given the opportunity to develop his claims by presenting whatever relevant testimony he can and by testifying on his own behalf about the issues, if he so decides.

Respectfully Submitted, Dated: 5-15-24

Michael Mitchell
Pro-se