IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4536

Paul Kamienski,

APPELLANT,

VS.

ROY L. HENDRICKS, Superintendent;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
OCEAN COUNTY PROSECUTOR'S OFFICE,

APPELLEES.

On appeal from the order of the U.S. District Court for the District of New Jersey D.C.NO. 02-cv-03091(SRC)

BRIEF FOR APPELLEES

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Appellee has been unable to reconcile this table of transcripts with Appellant's table, although we point out that the table below is identical to that filed in our appeal brief of July 10 1989 and used throughout the appeal process. State court rules are explicit about these citations, and about the fact that appellant in the State court constructs the table to be used by the parties in State court.

1T designates transcript of proceedings dated 10/18/88.
2T designates transcript of proceedings dated 10/19/88.
3T designates transcript of proceedings of 10/19/88, Vol. 2
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5T designates transcript of proceedings of 10/21/88.
6T designates transcript of proceedings of 10/25/88.
7T designates transcript of proceedings of 10/26/88.
8T designates transcript of proceedings of 10/28/88.
9T designates transcript of proceedings of 11/1/88.
10T designates transcript of proceedings of 11/2/99, further identified as "Duckworth testimony in separate volume."
11T designates transcript of proceedings of 11/2/88, further identified as "Direct of Donna Duckworth."
12T designates transcript of proceedings of 11/2/88, further identified as "Cross of Donna Duckworth."
13T designates transcript of proceedings of 11/3/88, further identified as "Testimony of Donna Duckworth."
14T designates transcript of proceedings of 11/3/88, further identified as "Duckworth Testimony in Separate Volume."
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21T designates transcript of proceedings of 11/17/88.
22T designates transcript of proceedings of 11/17/88 (afternoon).
23T designates transcript of proceedings of 11/18/88.
24T designates transcript of proceedings of 12/21/88.

Reference to the appendix is denoted "A (page number)"

PRELIMINARY STATEMENT

The appellant (also referred to as defendant) argues that his conviction should be vacated because no rational trier of fact could have found him guilty on the evidence adduced at trial. The State submits that under the standard of Jackson v. Virginia, 443 U.S. 307, 324 (1979) there was adduced sufficient evidence at trial that would permit any rational trier of fact to find proof beyond a reasonable doubt to support the convictions. Therefore the appellant's convictions should be affirmed by this court.

SUMMARY OF ARGUMENT

The evidence adduced at trial was circumstantial evidence which, when considered in its totality, could permit any rational trier of fact to find the defendant guilty beyond a reasonable doubt, therefore satisfying the federal standard of review. Appellant argues that some of the evidence permitted alternate inferences. However, even if true, this court must presume that the jury "resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson v. Virginia, supra, at 326. The defendant has failed to rebut by clear and convincing evidence the presumption that the factual determinations of the State court were correct.

The appellant also argues that the New Jersey Superior Court, Appellate Division erred when it reversed the decision of the trial court granting appellant's

motion j.n.o.v. However the appellate court's decision was in accord with the Jackson standard, and was not an unreasonable application of clearly established federal law.

For these reasons the relief sought by the appellant should be denied.

PROCEDURAL HISTORY

The procedural history in the State courts is recounted in the decision reported at State v. Kamienski, 254 N.J. Super 75 (App. Div. 1992). Additionally, the United States District Court for the District of New Jersey denied petitioner's request for a writ of habeas corpus on July 26, 2006. Appeal to this court follows.

STATEMENT OF FACTS

DISCOVERY OF THE BODIES AND OTHER PHYSICAL EVIDENCE

The State's theory was that the criminal episode at hand was completed on September 19, 1983.

On September 24, 1983, a body was recovered from Barnegat Bay in Dover Township, New Jersey. Richard Stevens, a member of the East Dover Fire Department Marine Unit, while on duty at the East Dover Marina, accompanied a boater to a location in the Barnegat Bay in which they came upon a body wrapped

in a blanket. An attempt was made to drag the body in by rope, however, it was discovered that the body was secured to a cement block by a rope beneath it. (4T12-7 to 126-17)

The following day, September 25, 1983, a second body was recovered. (4T131-4 to 131-19) This body was also found at a location in Barnegat Bay. (4T133-4 to 133-6) The bodies were identified as Barbara DeTournay and Henry "Nick" DeTournay by Thomas Boutsikaris, the brother of Barbara and the brother-in-law of Nick. (4T158-10 to 158-19) (Note that Henry is often referred to as "Nick" in the record.)

Jeffrey P. Thompson, a detective and a science officer in the Ocean County Sheriff's Department Criminalistics Unit, observed the bodies at the East Dover Marine where they were brought shortly following their discovery. Detective Thompson described the body of Henry DeTournay as being wrapped in a blue sleeping bag. (4T182-16 to 182-24) The blue sleeping bag was secured around the body by white clotheslines. (4T184-18) When the blue sleeping bag was removed, a rust colored blanket with a satin border or trim was next encountered and removed. (4T188-7 to 188-15; 4T186-9 to 186-10) When this rust colored blanket was removed a towel containing a flower or rose pattern was revealed. (4T185-7 to 185-10) Upon removal of the blue sleeping bag, blanket and towel, a number of items were recovered in the area of the knees of Henry DeTournay; a woman's

hairbrush with a wood grain plastic handle, a woman's red, white and blue blouse, and a pair of blue jogging pants. (4T185-17 to 186-1) It was noted that a shoe was missing from Henry's left foot. (4T188-20 to 188-22)

Detective Thompson described the body of Barbara DeTournay as wrapped in a rust colored blanket with satin trim secured in place by ropes. (5T24-11 to 24-33) When the wrappings were removed, Barbara was observed to be wearing deck-type corduroy sneakers known as the "Soda Pop" brand, as well as crew-type socks, shorts with a belt and a T-shirt with a pocket. She was also wearing jewelry and a wristwatch. Found inside the blanket was the man's shoe that had been missing from the foot of Henry DeTournay. (5T31-6 to 31-21) Spent projectiles were found inside the blanket, as well as in Barbara's sock. A small compact mirror as well as tape and a hash pipe were found inside Barbara's sock. (5T33-1 to 32-23)[1]

Both victims died from multiple gunshot wounds. (5T137-18 to 139-19; 131-14 to 131-18) The same type of rope secured the wrappings on both bodies. (5T109-6 to 109-12)

[1] The blankets which were used to wrap the bodies, with their specific patterns, were identified at trial as similar to those kept on Kamienski's boat, (11T69-10 to 72-7), and the sleeping bags were seen on defendant Alongi's boat, with Alongi and Kamienski present, with "something underneath". (11T 62-9 to 64-5). The rope that secured the blankets was tied in a peculiar "hitch" knot used by Kamienski to secure his boat. (11T 67-20 to 68-25)

Approximately ten days after the victims were discovered, a white Toyota with Florida license plates registered to the DeTournays was recovered at the Holiday Inn in Lakewood, New Jersey. (5T34-8 to 34-22) The vehicle was filled with personal effects including clothing and suitcases. A receipt from Beck's Department Store, dated September 19, 1983, was found in a bag with Soda-Pop brand deck sneakers, the same type that Barbara DeTournay was wearing. (5T35-18 to 36-12) No fingerprints of comparative value were obtained from the vehicle. (5T41-21 to 41-25; 42-11 to 42-20)

Detective Thompson testified as to the recovery of a 21 foot black marquis boat, bearing a specific hull number and New Jersey registration number. (5T47-9 to 47-15) (S-32) Fingerprint tests (5T45-1 to 45-3) and serological tests performed months after the murders which bear on the existence of such fluids as seminal stains, saliva, or blood, were negative. (5T46-6 to 46-21) However, a luminol spray test, which is used in an area that is believed to contain a blood stain, indicated blood stains over certain areas of the deck carpeting of the boat. (5T48-12 to 48-19) FBI laboratory test reports revealed insufficient quantities of blood, hair and fibers collected from the boat to be compared with those found on the blankets and towel that were found over the bodies. (5T52-5 to 53-13) In September 1983, this boat was owned by Defendant Alongi's then girlfriend's and present wife's brother. The wife's name was then Jackie Sullivan. (See 7T174-19 to 175-22)

With respect to ballistics, Detective Thompson testified that spent 9mm bullets, each of the same type, were recovered from the back of Henry DeTournay, the left sock of Barbara DeTournay, the right torso of Barbara DeTournay, the right forearm of Barbara DeTournay, as well as a bullet fragment recovered from the fold of the T-shirt of Barbara DeTournay. (See 5T64-21 to 67-14)

Saliendra K. Sinha, M.D.; F.C.A.P., Chairman and Director of the Pathology Department at Community Medical Center, certified in surgical and clinical pathology, and a consultant to the Ocean County Medical Examiner, performed the autopsies of the bodies of the DeTournays on September 26, 1983. (5T120-19 to 122-13; 5T124-13) (5T134-13 to 134-18) He testified as an expert in pathology. (5T123-24)

Photographs of the body of Henry DeTournay (S-49 and S-50 in evidence) revealed decomposition of the body and "two pressure marks, like two fingers, pressure marks on the side of the neck." (5T125-18 to 125-20) The pressure marks were "roundish" and "bluish" which resembled "a finger pressure. . .around the neck." (5T126-9 to 126-16) Doctor Sinha, during his testimony, indicated with his hand held up and his thumb and forefinger separated to form a "U" with his fingers. (5T126-18 to 126-20) Doctor Sinha had seen this type of mark before in cases which involved choking. These marks in particular indicated choke marks.

(5T127-1 to 127-10) The marks were caused before death since bruising does not occur after death. (5T130-16 to 130-23)

Autopsy findings on Henry DeTournay were as follows: two bullet entry wounds of the upper chest; one entry wound of the left neck; one superficial wound of the abdomen; two exit wounds of the right back; protruding bullets in the upper back beneath the skin; superficial wounds of the back; a depressed skull fracture occurring after death; compression or pressure marks of the neck; a very large laceration of the right lung with blood on both sides of the chest; fractured fourth and fifth right side ribs; and a severely decomposed body. (5T129-8 to 129-21)

The cause of death was a massive hemorrhage due to multiple bullet wounds. (5T131-14 to 131-18) It was Doctor Sinha's opinion that the body had been in the water for approximately one week before the autopsy was performed, (5T132-12 to 132-21) so that the body had been exposed to the water on approximately September 19, 1983.

Autopsy findings on Barbara DeTournay were as follows: an entry and exit wound of the left wrist; entry and exit wounds of the skull with entry on the right side and exit on the left side of the temple area; an exit wound of the right and left breast and left armpit and left chest; four entry wounds of the back causing left and right lung laceration; many puncture holes of the intestine; a punctured liver; a

laceration of the brain; an entry wound of the right elbow with a protruding bullet under the skin of the forearm which was recovered; a bullet protruding under the skin of the upper right side of the abdomen which was also removed and, with the other bullet, turned over to the detectives; fractured ribs; a wrist fracture; fractured right elbow; fractured left rib; all such fractures being caused from bullet wounds. Also revealed was a massive fracture of the skull caused by bullet wounds, as well as a severely decomposed body. The cause of death was multiple bullet wounds with lacerations of both lungs, intestines, liver and brain. This body also had been in the water for approximately one week. (5T147-1 to 147-7)

Gerald F. Wilkes, a special agent with the FBI assigned to the Firearms Unit at the FBI Laboratory in Washington, D.C., testified as a firearms expert. (6T149-16 to 150-3) Based on his examinations, he found that all four bullets recovered from the two bodies were fired from the same gun barrel. This specific bullet type, a 9mm parabellum jacketed bullet, is fired from 9mm parabellum semi-automatic pistols with some exceptions. (6T152-1 to 154-20) However, the 9mm parabellum semi-automatic pistol as well as all the other pistols that are capable of firing this bullet have a common design; a readily evident "movable slide" in place of a revolving or rotating cylinder found on weapons such as revolvers.[2] (6T156-12 to

[2] This type of gun was identified at trial as the same type defendant Marsieno had in his briefcase on September 18, 1983 at a meeting between Kamienski, Marsieno, Alongi, and the two victims. The meeting, which occurred a day before the robbery/murders, was held for the purpose of completing a drug

158-21) The semi-automatics contain a magazine which slides into the bottom of the gun, (6T160-14 to 160-17) and are capable of firing from eight to fourteen bullets per magazine. They may also be used with silencers. (6T160-24 to 162-19)

The State also presented two witnesses whose testimony concerned the existence of certain telephone calls among the Defendants and between the Defendants and their victims.

Suzanne Dell, an assistant manager for New Jersey Bell Telephone, testified about Defendant Kamienski's toll calls as revealed by telephone company records covering the period of September and October 1983. (7T91-12 to 93-9) Company records revealed phone activity for a number listed to A. Alongi, who resides at 617 Baron Street in Toms River, but the billing name is for a Ms. Jacqueline Sullivan. Alongi's number was 732-929-2646. (7T96-7 to 99-14) Company records also revealed the length of time in which the participants spoke. (7T107-4 to 107-5)

Francis Xavier Giesler, a member of the programming staff of New Jersey Bell Telephone, testified about certain calls made from a pay phone in Newark,

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transaction between the defendants, and the victims, who were to supply defendants with 3 kilos of cocaine. Marsieno's briefcase contained the gun, but no money. He stated after the meeting that the victims were not going to receive money, but instead he would kill them. Henry DeTourney himself stated after this meeting that the "people were having trouble" getting their money together to complete the prearranged transaction. These facts are developed further herein.

New Jersey with the number 201-483-9617. (7T112-12 to 112-23) (this phone was identified at trial as Henry DeTournay's "office").

A chart designated as S-7 in evidence contains the following evidence compiled from phone records:[3]

> On September 9, 1983, Kamienski called the Boutsikaris residence at 10:38 PM.
> On September 13, 1983, Alongi called Kamienski's beeper number at 10:47 PM.
> On September 17, 1983, calls were made from a phone booth in Newark to Alongi at 2:40 PM; to Dunkin' Donuts in Toms River at 7:07 PM; and to Alongi at 8:01 PM.
> On September 23, 1983, Kamienski called Alongi at 2:17 AM; Kamienski called Alongi at 2:21 AM; Alongi called Kamienski's beeper at 6:17 PM; Kamienski called Alongi at 6:20 PM; Kamienski called Alongi at 11:16 PM.
> On September 24, 1983, Alongi called Kamienski's beeper at 4:13 PM; Alongi called Kamienski Funeral Home at 5:48 PM.
> On September 26, 1983, Alongi called Kamienski's beeper at 3:55 PM.
> On September 27, 1983, Alongi called Kamienski at 10:31 PM.
> On September 28, 1983, Alongi called Kamienski at 3:42 PM.
> On September 29, 1983, Kamienski called Alongi at 11:18 PM.
> On October 1, 1983, Kamienski called Alongi at 1:04 PM.
> On October 7, 1983, Kamienski called Alongi at 9:36 PM.
> On October 17, 1983, Kamienski called Alongi at 7:59 PM.

[3] The inferences made from these phone records are discussed infra.

> On October 27, 1983, Alongi called Kamienski at 10:02 PM.
> [See S-7 in evidence].

Captain James A. Churchill of the Ocean County Prosecutor's Office was, during the conduct of this investigation, a Lieutenant supervising the Major Crime Squad, specifically homicide cases. (7T142-12 to 143-7) As a result of an investigation conducted by the Ocean County Prosecutor's Office, Captain Churchill determined certain locations relevant to the investigation. (See 7T148-20 to 152-6)

Henry DeTournay's body was recovered in approximately four to five feet of water (S-2 in evidence) in Barnegat Bay just off of Goose Creek, approximately one-half mile from Defendant Alongi's Baron Street, Toms River lagoon front residence, in the area where Alongi's lagoon enters the bay. (See S-3 and S-4 in evidence).

Barbara DeTournay's body was recovered in approximately three to four feet of water (S-2 in evidence) in Barnegat Bay off Marsh Elder Island, approximately one-half mile from Ocean Beach Marine in Lavallette, where Defendant Kamienski kept his boat. (See S-3 and S-4 in evidence)

Henry DeTournay's wallet was recovered with his body. (7T155-3 to 155-13) It contained a picture Florida driver's license for Henry Nicholas DeTournay. (7T171-3 to 171-12) The wallet revealed a business card for Defendant Kamienski,

President of Kamienski Funeral Homes, Inc., and on the back, one notation read, "Apt. in Garfield (478-2034)"; also "Paul and Donna. Boat 793-0312." (7T158-14 to 159-3)

The wallet also contained a piece of yellow paper with directions as follows; "All right. Fisher, Oceanic and Petty." Captain Churchill indicated the significance of this notation to the Court;

> If you were coming from Seaside Heights area across the bridge, 'all rights', the first right would be Fisher Boulevard as indicated on this map, the next would be Oceanic which would be another right, and another right would be Petty, and that would take one who did follow these directions past Baron Street where Mr. Alongi lived. (7T160-3 to 160-8)

The wallet also revealed four pieces of white paper with notations and telephone numbers. (See S-17e) One slip revealed the name, "Tony, 929-2646" which was then the phone number of Defendant Alongi. Another slip contained the notation; "office 483-9617." This was the number of a telephone booth which was located in Newark, New Jersey just outside the apartment of Barbara DeTournay's family, the Boutsikaris's, who were Henry DeTournay's in-laws. The "office" number is the same number that appears on S-7 in evidence. The "Tony" number also appears on S-7. (7T162-2 to 163-21)

On the back of one of the four pieces of white paper is the notation, "Paul beep 201-570-2850." Captain Churchill knew that to be the number of Defendant

Kamienski's pager or beeper. That beeper number also appeared on S-7, the chart containing phone numbers. (7T163-23 to 164-22)

On the day Henry DeTournay's body was found, September 24, 1983, Captain Churchill called some of the numbers found in the wallet. Among the persons reached were Defendant Kamienski and a little boy at Defendant Alongi's residence. (7T170-10 to 172-12)

On the following day when Barbara DeTournay's body was found, Investigator Daniel Mahony, who was in charge of this case, had made contact with her family, the Boutsikaris family in Newark, at which time Investigator Mahony discovered that certain phone calls had been received by the family from Florida from a person interested in the whereabouts of Barbara and Henry. (7T173-5 to 173-21) The interested person was Sidney Jeffrey, III, courier of three kilos of cocaine delivered to the DeTournays shortly before their deaths. (8T152-7 to 155-24)

A vehicle bearing New Jersey registration 809 SIS was registered in September 1983 to Jackie Sullivan, Defendant Alongi's girlfriend/wife. Photographs S-69 through S-75 in evidence accurately reflected the physical appearance of the vehicle in September 1983. (7T176-2 to 176-21) S-71 showed that the vehicle contained a scrape and subsequent dent in the left, rear quarter panel which could also be seen in S-70. The right front also showed some denting

and rusting. (7T177-22 to 178-1) This vehicle was seen in Defendant Alongi's driveway, (8T45-2 to 45-4) at the time Prosecutor's investigators surveilled his house; between October 1, 1983 and October 31, 1983.[4] (8T48-8 to 49-19) A vehicle registered to Michael Testa (Defendant Marsieno) was present during the surveillance on October 9, 1983. (8T91-1 to 95-8)

NON-PHYSICAL EVIDENCE

Captain Churchill testified that shortly after the discovery of the bodies, certain interviews were conducted with various persons. Defendant Alongi himself voluntarily came to the Prosecutor's Office on September 27, 1983. Alongi had recognized Captain Churchill's name from newspaper accounts of the investigation as the person who had previously called Alongi's house and left a message with the younger boy who answered the phone. (7T194-15 to 194-25) Alongi indicated that he had met the victims earlier in the summer around Labor Day at the marina with his wife, Jacqueline Sullivan, that they exchanged telephone numbers, and that the DeTournays were driving a small white car. (7T199-1 to 199-15)

Captain Churchill interviewed Defendant Kamienski on September 24, 1983, at which time Kamienski identified Henry DeTournay from a photograph shown to him. (7T204-9 to 204-23) Captain Churchill was taken aback by

[4] The physical nature of Alongi's vehicle was unique enough that Barbara DeTournay knew from a description of the vehicle that Alongi had arrived to pick her and the cocaine up just prior to the robbery/murders.

Kamienski's attitude during this session and knew he would be interviewing Kamienski again based on his observations of Defendant. (8T66-9 to 66-21)

Captain Churchill also interviewed Kamienski on March 14, 1984, during which Kamienski revealed that the DeTournays arrived in the Ocean Beach area around September 10, 1983, and that they visited Defendant Alongi's house by boat at which time the DeTournays were introduced to Alongi. (7T206-12 to 207-2) Kamienski indicated he knew how to get to Alongi's house by boat. (8T80-1 to 80-6) Kamienski indicated that on September 24, 1983, the day Henry DeTournay's body was discovered, he was having dinner with friends at the Top O' the Mast in South Seaside Park. (7T208-22 to 209-5) Captain Churchill asked Kamienski why he felt it necessary, when the police arrived at the restaurant on that night, to make a phone call to Defendant Alongi prior to accompanying the police to the Dover Township Police Station. Kamienski indicated that he called Alongi to ask him what he should do about certain incomplete community service work about which he thought the police were there to arrest him. (7T213-5 to 213-23)

At an April 23, 1984, interview Kamienski told investigators that he had purchased drugs from the DeTournays prior to their deaths and that he knew they wished to sell cocaine prior to their deaths. (7T213-23 to 214-20) Kamienski had not admitted this at prior interviews. (8T81-15 to 82-3)

Captain Churchill also interviewed Kamienski on April 27, 1984, at which time Kamienski revealed that Henry DeTournay called him during the week prior to September 19, 1983 at his apartment in Garfield. DeTournay wanted to know whether Kamienski had a scale that he could use; Kamienski indicated he did not. (7T219-14 to 221-2)

Finally, Captain Churchill indicated that S-7, the phone number chart, contained a number of a Dunkin' Donuts coffee shop on Route 37 in Toms River, on September 17, 1983. Captain Churchill indicated that this number was from a pay phone. (8T14-23 to 15-8)

Christine Longo testified on behalf of the State. Longo was Barbara DeTournay's sister. She was living at her mother's house, the Boutsikaris residence, in September 1983. (5T172-9 to 172-20) The DeTournays were visiting the Boutsikaris family around Labor Day 1983. They were also interested in dealing cocaine at this time. (5T173-18 to 173-23)

Longo testified that around September 7th or 8th, 1983, the DeTournays left Newark for the New Jersey shore. They said they were going down to "a funeral director's boat" whose name was "Paul." (6T31-12 to 32-20) Defendant Paul Kamienski was president of Kamienski Funeral Homes. (7T158-14 to 159-3) When Barbara DeTournay came back from Paul's boat, where she attended a party and slept there, (6T70-10 to 70-18) she told her sister Christine that she was "going

to make a big drug deal." Christine stated, "She was ecstatically happy. She was very happy she was going to make this new deal." (6T33-20 to 34-24) Barbara told Christine that the people she would be dealing with were friends of her former husband, Bill Rispoli, also known as Bill Dickey. (6T35-2 to 37-10) Barbara described the deal to Christine as "A big deal. She was going to bet set for life." (6T37-15 to 37-19)

On September 17, 1983, while at the Boutsikaris residence, Christine observed Henry DeTournay receive a phone call downstairs at her mother's house. In response to that phone call he went to his "office." Henry's office was a phone booth on the corner just outside the family residence. When he came back from his office he said to Barbara, "Come on, pack. We are leaving for the shore." Barbara packed but the two did not leave immediately since they had to wait for another phone call. That call occurred approximately nine o'clock that night. At that time Henry said, "Come on, Barb, this is it. We are leaving." They told Christine they would see her in a few days and that they were going down to the shore. They were not seen after that. (6T37-21 to 40-5)

The following week Christine received phone calls from a fellow named "Jeff."[5] He called all week concerning the whereabouts of Barbara and Henry because he thought he "got ripped off by them." (6T88-1 to 88-15) She received

[5] Sydney Jeffrey, who supplied the 3 kilos of cocaine to the DeTournays, who were to supply it to defendants.

the last phone call from Jeff on the day Henry's body was found, September 24, 1983. She told Jeff that Henry had been found dead. (6T40-9 to 43-14)

Leonard Longo also testified on behalf of the State. Leonard was the husband of Christine Longo and Barbara DeTournay was his sister-in-law. Leonard testified that on September 17, 1983, a phone call was received at the Boutsikaris residence for the DeTournays. Henry stated to him that he had to go to his office. When Henry returned, the DeTournays started packing. Just prior to the DeTournays receiving the phone call, on that night, Henry told Leonard, "I got something big. I got something real big going." (6T199-7 to 200-19)

Doctor Fred Adams testified on behalf of the State. Doctor Adams was a veterinarian near Freehold, New Jersey. (6T207-1 to 207-19) The DeTournays visited Doctor Adams at his house on September 6, 1983. During this period, the DeTournays were depressed over a lack of money. "It was kind of a hand to mouth situation. . . ." (6T215-3 to 215-21) The DeTournays slept at the Adams's that night and left the next day, September 7, 1983.

Two days later, on September 9, 1983, Doctor Adams called Henry to ask him to help him buy a propeller for his boat. Henry declined due to a "business meeting" in Toms River. After the meeting, however, they called from Toms River for directions to Adams' house. (6T218-24 to 220-23) Henry and Barbara stopped by Adams's house that same evening. At some point on September 9th , Henry

placed a phone call to Kamienski's apartment in Garfield looking for a scale. Kamienski told him "he didn't have a scale and to get off the boat." (11T33-20 to 34-25) Kamienski's boat was located in Lavallette. (S-3 and S-4)

Doctor Adams stated that when the DeTournays arrived at their house on the 9th;

> The thing that was most evident was that there was a total flip flop in feelings here. They were no longer depressed. They were essentially elated, you know, and very, very up on the situation. And at that point they described that they had a meeting and that things had gone very well. . . .Nick and Barbara were both there and Barbara described the situation where the meeting was very cool and things did not look good at the beginning. But she said that we had a mutual friend or somebody amongst the people that they met with knew her ex-husband, and once they found that out, everything appeared to be going much smoother. (6T217-23 to 218-20)

Doctor Adams said that the men who had met with the DeTournays were interested in buying cocaine and that it was going to involve large quantities over a protracted period of time. Henry said he felt good about the meeting because "one guy was an older gentleman and a non-user." (6T218-24 to 220-23) This older male, non-user was described by Henry as the person "heading up this thing. . . ." (7T17-23 to 17-25)

Defendant Alongi was a non-user. (See 11T23-6 to 23-12) Doctor Adams stated that when the DeTournays had gone to Toms River to meet with these men, they had been requested to bring some cocaine. They brought a small amount; the

men were amused since they expected either pounds or kilos. The DeTournays indicated that they were going to make in excess of $100,000 on the deal. They indicated that their meeting had been with more than one person, since they referred to said persons in the plural. (6T221-1 to 222-14)

Katherine Adams, Fred Adams' wife, testified on behalf of the State. On September 6, 1983, when the DeTournays first visited the Adams residence, Barbara told Katherine, "they were broke and hoping to sell some coke to make enough money to get back to Florida with." (7T42-11 to 42-15) On September 9, 1983, when the DeTournays visited the Adamses after their Toms River meeting, they were much happier since they were in the process of making a big drug deal. (7T47-25 to 48-13)

Arthur "Buddy" Lehman testified on behalf of the State. Lehman owned a boardwalk concessions business in Seaside, New Jersey, and knew Defendants socially and through drug use – Alongi was his "main supplier" (15T47-6 to 51-11). Lehman stated that after Spring 1983, Marsieno, Alongi and Kamienski, as well as Jackie Sullivan and Donna Duckworth, Kamienski's live-in girlfriend, were extremely close. "They were hanging out together, almost a constant basis. . . .They were spending seven days a week together. . . ." (15T54-18 to 55-18)

Around September 10 to September 15, 1983, Lehman attempted to purchase cocaine from Defendants Marsieno and Alongi. Lehman had complained

about the lack of potency of previous purchases. Defendant assured him that within the week they would have access to "kilo quantity coke for you at about one thousand dollars less an ounce than you're paying now. . . ." (15T59-1 to 59-14) Alongi offered to extend Lehman credit on what Alongi described as "a ton[of] South Florida Coke. . . ." (15T60-2 to 60-8)

By Sunday, September 18, 1983, (the same day as the first meeting between defendants and the victims at which time the drug transaction was to be completed), Lehman visited Marsieno's house on previous instructions for the purpose of buying cocaine. Marsieno could not comply with his previous instructions to Lehman because he did not have the Cocaine on the 18th, but assured Lehman that he would "have it within a few days for you." (15T61-9 to 61-22)

On Monday, September 19, 1983, Lehman tried to contact Marsieno, to no avail. He was unable to contact Marsieno on Tuesday as well. Instead of Marsieno, he finally contacted Alongi on Wednesday or Thursday of that week. Alongi told him, "Don't worry. I have the product. My partner's up in Newark. He'll be back in a few days, and we'll meet you at Harrah's down Atlantic City the middle of next week." (15T62-11 to 62-19)

On September 24th, when Henry's body was recovered and before Barbara's body was recovered, Alongi contacted Lehman and instructed him to meet

Kamienski at the Holiday Inn to find out what was going on. At that time, Kamienski told him, using the plural, that "my friends from Florida have been murdered. The Prosecutor's Office is questioning me in regard to the murders." (15T63-3 to 64-22) Later, Lehman went to Alongi's house and told him that Henry and Barbara were killed. Alongi replied, "well, who cares about them. . . they're scum bag drug dealers anyway. Nobody's going to care if they're dead." (15T65-7 to 65-12)

Around the first week of October 1983, Lehman received what was described as "kilo quality rock coke." While in Atlantic City, Lehman was invited to the room of Alongi and his girlfriend Sullivan, where he observed Sullivan with a coat lined with ten to twelve ounce bags of cocaine. Alongi told Lehman he could take whatever he wanted, he could take them all on credit. Lehman took one ounce on credit. The cocaine's potency was excellent, its texture was rock, and it was colorful and flaky. (15T65-20 to 67-12)

During the first week of October, Lehman purchased cocaine from Marsieno as well as Alongi. On one occasion, he questioned Alongi about Marsieno. Alongi said, "we're not friends any more. He owes me 25, 30 thousand dollars. We're mad at one another. I'm pissed off at him. . .I'm upset with him." (15T68-1 to 68-10)

Sidney Jeffrey, III, testified under the veil of immunity. Jeffrey was the courier of the cocaine brought from Florida to be dealt by the DeTournays in New

Jersey. Jeffrey first brought approximately twelve ounces to New Jersey before the Labor Day weekend 1983. It was decided that he would actually carry the drugs from Florida because Henry DeTournay "looked like the type of person that would be doing it." (8T126-1 to 127-2)

On September 11, 1983, Jeffrey was told that the DeTournays were unable to sell the whole of the twelve ounces of cocaine that was brought up; about half remained. However, Barbara DeTournay told Jeffrey she had contacted persons she had known in New Jersey who wanted three kilos of cocaine. Barbara said she had known these people when still living with her ex-husband. Barbara specifically referred to those interested in the plural; as "people."

The DeTournays mentioned to Jeffrey that they sold some of the twelve ounces to a veterinarian, among others. (8T135-1 to 137-10) Jeffrey did, in fact, obtain three kilos in Florida. Henry DeTournay told Jeffrey to come up to the Holiday Inn in Toms River because that was "close to where the deal was going to take place." On September 17, 1983, Jeffrey arrived in New Jersey by car and checked into the Toms River Holiday Inn at 6:25 PM. (8T135-1 to 137-10)

Once checked in, Jeffrey called Henry DeTournay at Barbara's parent's house, the Boutsikaris residence in Newark. Henry asked Jeffrey for the number from which he was calling and told Jeffrey that he was going to go to a pay phone and he would call Jeffrey back immediately. Jeffrey had placed the call from a

Dunkin' Donuts phone and Henry called him back shortly. (8T137-12 to 138-4) Henry told Jeffrey that he was going to be staying in a Howard Johnson's and that he would meet with him the next day.

The next day, September 18, 1983, Henry called and told Jeffrey that he would be by to pick him up. (8T138-5 to 138-24) When Jeffrey got in Henry DeTournay's car that day, DeTournay told Jeffrey that he had "just come from the people that were getting the money together" and that "the people still weren't ready and they were getting their money together." (8T139-9 to 140-21) Henry said the people were having trouble getting the money. (9T16-8 to 16-23) Henry told Jeffrey that the deal was postponed until the next day at three o'clock. Henry told Jeffrey that he would drop Barbara off to pick up the Cocaine and then he would pick her up. However, he had no intention of going into the hotel where Jeffrey was staying because of "the way he looked." (8T139-9 to 140-21)

On September 19, 1983, Henry DeTournay called Jeffrey and told him that the deal was postponed from three o'clock to six o'clock that day. Barbara arrived at Jeffrey's hotel around five o'clock in the afternoon. She told Jeffrey that there was a change in plans, Henry was not going to pick her and the cocaine up because he would be busy counting money. (8T142-7 to 144-12) Barbara told Jeffrey the deal would take three hours because the parties had to count the money and check

the weight on the kilos. (8T152-2 to 152-6) She told Jeffrey that a "very distinguished man" was going to be picking her up instead. (8T142-7 to 144-12)

From Jeffrey's third floor front window at the Toms River Holiday Inn, he would see a car arrive. A man was driving who stayed in the car. Jeffrey asked Barbara if that was the car and she indicated that it was. Barbara went down to meet the car. (8T145-2 to 146-3)

Jeffrey saw Barbara DeTournay get into the car and leave with the man driving. The car pulled out of the parking lot and made a left heading east in the direction of Defendant Alongi's house (see S-4 in evidence; car headed toward black X on S-4). Jeffrey, observing the car from the third floor, described it as a "large American car, older car, and I noticed the paint was faded a little bit from the sun." The car was either dark blue or green in color (see 9T60-5 to 60-10) and "it had a big dent in the rear quarter panel." Jeffrey indicated that photographs S-69 through 75 showed a car with "a dent exactly in the same place that the car I saw Barbara leave in had a dent." He described the car in the State's photographs as "the same type of car, four door, large American car." Jeffrey described the paint as "fading on the top, on the hood and roof I think it was. I noticed the sun had faded the paint." Jeffrey described the paint as the same on the car as in the photographs S-69 through 75. (8T147-18 to 151-3) He described the dent on the car as the "same size and shape" as the dent in the pictures. (9T211-1 to 211-6)

When the DeTournays never returned or contacted him, Jeffrey became worried. The next day he shaved off his beard and checked out of the hotel. Jeffrey "continuously called Barbara's mother and her sister" asking if they had heard from the DeTournays. During one of these calls to the Boutsikaris residence, he discovered that Henry's body had been found. Jeffrey returned to Florida. (8T152-7 to 155-24)

Jeffrey described the three kilos of cocaine as wrapped and taped and contained in a small green bag of Barbara's.[6] Each kilo was approximately half the size of a football. The cocaine was "called rock" and consisted of "mostly. . .little pieces, hard pieces." (8T146-4 to 147-15) The DeTournays were to return $150,000.00 to Jeffrey or $50,000.00 per kilo of cocaine. Jeffrey was to receive $15,000.00 for the transport of the cocaine from Florida. Jeffrey received no money since he never again saw Henry and Barbara DeTournay. (8T151-8 to 151-24) On cross examination, it was revealed that Jeffrey obtained the cocaine from certain Colombians, this for the purpose of resale. (8T171-14 to 172-22) Jeffrey had agreed with the DeTournays to bring approximately three kilos per month to New Jersey for distribution. (8T211-12 to 211-23)

[6] As discussed infra, Jeanne Yurcison, Marsieno's companion, testified Marsieno possessed, after September 19, 1983, "three blocks" of cocaine contained in a green nylon bag. (15T 352-21 to 352-13) Marsieno provided cocaine from this supply—ounces at a time--to Kamienski and Alongi without receiving money in return. (15T 353-25 to 356-7)

In September 1983, George F. Hunt, Jr., lived at 616 Baron Street, directly across the street from Defendant Alongi's house. Hunt testified as to certain observations he made on September 19, 1983. (9T229-1 to 231-25; 236-25 to 237-2) Hunt was working in his office in his house which overlooked the Alongi residence across the street (9T233-11 to 233-23), somewhere between 3:00 and 6:00 PM on that date. (9T242-24 to 243-5) Hunt's office was on the top floor of his house over the garage with a view into the street. His desk was in front of a window. (9T270-12 to 270-13; 9T301-7 to 302-15) Hunt, while working at his desk, heard a car door slam and looked up. He observed an individual with very red hair and a red beard approaching Defendant Alongi's house. The individual arrived in a white Toyota with Florida license plates. (9T245-23 to 246-8) Alongi appeared from around the back of the house, greeted the individual, they spoke, and then went to the back of the house together. (9T243-6 to 244-4) Hunt never saw the individual again (9T245-21), until he noticed the individual's picture in the newspaper. At that time, he contacted the authorities. Hunt identified the individual as the same individual depicted in S-31 in evidence, Henry DeTournay. (9T244-5 to 244-22)

Hunt identified the vehicle that Defendant Alongi was driving at the time and that he saw parked in front of Alongi's house on that day, September 19th. (9T248-1 to 248-3) S-69 through 75 in evidence were noted by Hunt to depict "the

same vehicle that Mr. Alongi owned at the time." Among the vehicle's distinguishing features were "indentations from accidents, et cetera." (9T246-9 to 246-25; 247-19 to 247-25)

Hunt never saw Defendant Alongi operate a boat in the two to three years in which he lived across the street with two exceptions. Within ten to fourteen days of September 19, 1983, Hunt saw Alongi operate a boat in the bay twice. (9T250-1 to 251-2) Hunt and Alongi had a conversation after September 19th (but before Hunt saw the red haired, red bearded Henry DeTournay's picture in the newspaper) about Alongi installing a new rug in the garage of his house. (9T253-9 to 255-3)

Donna Sue Duckworth, the then live-in girlfriend of Defendant Kamienski, testified on behalf of the State. (11T4-13 to 5-15); 41-7 to 41-12) Duckworth lived with Kamienski at 207 Ray Street in Garfield, New Jersey and on Kamienski's boat, the For-Play III. During their six-year relationship, they were "together every day, all the time, about 24 hours a day. . . ." (11T5-10 to 6-19) Kamienski was a regular user of quaaludes, cocaine and speed and the two "partied almost every night." Kamienski supplied the drugs to be used by both. (11T12-11 to 13-15)

Duckworth first met Defendants Alongi and Marsieno in the summer of 1983 on Kamienski's boat. On that occasion, Kamienski and Duckworth purchased cocaine from Alongi and Marsieno. After that first meeting, the four kept in touch "almost every day." The frequency of this contact did not vary, but was consistent.

She described the contact as social and for the purpose of buying cocaine. (11T14-9 to 15-25) Duckworth described Defendant Alongi as a non-user of cocaine. (11T23-6 to 23-12)

Duckworth had known Henry and Barbara DeTournay since the summer of 1982 since they docked their boat at the Ocean Beach Marina, the same marina at which Defendant Kamienski's boat, the For-Play, was kept. Kamienski kept his boat in the same slip in 1983. Kamienski, Duckworth and the DeTournays had social contact and used cocaine together. (11T16-12 to 17-10)

On September 3, 1983, Henry DeTournay visited Kamienski and Duckworth at Kamienski's boat. DeTournay asked Kamienski if he knew anyone that wished to purchase cocaine; Kamienski replying affirmatively, and DeTournay said he would return later that day. (11T17-14 to 19-3) DeTournay returned that night at which time Kamienski purchased cocaine. DeTournay said that he was interested in selling a large quantity of cocaine. Kamienski said that he might know someone who would purchase that quantity. (11T20-8 to 20-14) Still later that night, after DeTournay left, Defendant Alongi and his girlfriend, Jackie Sullivan, visited them. (11T20-18 to 23-11)

Two days later, on September 5, 1983, Defendant Kamienski, Duckworth, and Henry and Barbara DeTournay took a boat ride over to Defendant Alongi's house where Henry and Barbara were introduced to Alongi. [The parties discussed

a "cocaine deal." This was stricken from the record. (11T26-17)] It was discovered that Alongi and Barbara DeTournay had a mutual acquaintance, Bill Dickey, (a/k/a Bill Rispoli, see 6T35-2 to 37-10) who was Barbara's ex-husband. (11T23-12 to 25-6) There was a conversation among Kamienski, Alongi, and the DeTournays (11T26-8 to 26-17), in which Henry DeTournay "wanted to know if Paul [Kamienski] would vouch for Tony [Alongi]. And Tony wanted to know several times whether Paul would vouch for them [the DeTournays]." (11T29-1 to 29-4) Kamienski vouched for the respective parties. Defendant Marsieno arrived at Alongi's house as Kamienski and Duckworth were pulling away in their boat. (11T29-6 to 30-17)

After September 5th, Duckworth and Kamienski went to Garfield to attend a funeral. On September 9, 1983, while at the apartment in Garfield, Duckworth noted that Kamienski received a phone call from Henry DeTournay, during which she heard Kamienski say, "No, he didn't have a scale and to get off the boat." (11T33-20 to 34-25) Kamienski and Duckworth left Garfield for the New Jersey shore late on the 9th of September. (11T35-15 to 35-21)

Less than two weeks after the September 5th introductions, there was a party at Defendant Alongi's house on September 17, 1983, during which there was talk of "a good deal coming down" and "good coke. . .coming into town." It was Marsieno and Alongi who spoke of this "good deal." (11T36-13 to 37-16)

The next day, September 18, 1983, Marsieno, Alongi, Kamienski, Jackie Sullivan and Duckworth met at the Holiday Inn. (11T37-17 to 39-8) On the following day, Monday, September 19, 1983, Kamienski told Duckworth that she would be left at a friend's house for the day. This was unusual since Kamienski "never let me really out of his sight, so I had a chance to spend some time alone, away from him, I was going to indulge on it."

On cross examination, it was revealed that Duckworth always drove Kamienski's car because Kamienski was not permitted to drive. (12T76-15 to 76-23) His license had been suspended. However, on this particular day, Kamienski drove her to her girlfriend's house. (12T114-10 to 115-18) Duckworth spent the day at her friend's and Kamienski picked her up later around dusk. They went to Alongi's house. (11T40-18 to 42-3) When they entered the house, Kamienski directed Duckworth to "wait here." Duckworth waited in an upstairs kitchen with Alongi's girlfriend/wife Sullivan.

When Sullivan attended to a phone call, Duckworth went downstairs looking for Kamienski. She walked down the sidewalk where she saw Kamienski standing by the dock. Kamienski was looking toward the boat. As Duckworth approached the boat,

> I saw Tony in the boat and I saw what appeared to me to be a body shape in the sleeping bag and he [Alongi] started lunging out of the boat and. . .I turned around and

started going back into the house real fast. (11T42-4 to 43-8)

Duckworth was approximately four feet away when she made those observations. (12T147-1) At that time, Duckworth also saw a brown blanket and a blue sleeping bag on the boat. She stated that Defendant Alongi frightened her, but Kamienski assured him, "she's alright." She stated that the boat was wet, and that "everything appeared wet." (11T43-9 to 44-1) Alongi and Kamienski followed Duckworth into the house. Sullivan then took Duckworth to the mall and, upon their return, all were having drinks.

Alongi took Duckworth to his upstairs bedroom for a talk. Duckworth testified that Alongi pointed to a phone which said "Hit Man" on the handle and a gun in his drawer telling her "If I didn't be quiet I'd end up like my friends." Alongi also told Duckworth, "Paul wouldn't be able to save me if I opened my mouth. . . ." (11T44-4 to 46-18) After the conversation with Alongi in the upstairs bedroom, Duckworth had a conversation with Marsieno in which Marsieno only said, "Only the strong survive, and I was a tough kid, and hang in there." (11T48-7 to 48-13) A phone containing the words "Hit Man" was removed from Alongi's residence on October 9, 1987, pursuant to search warrant. (16T271-20 to 274-24)

When Duckworth and Kamienski left Alongi's house that night, Duckworth questioned Kamienski about what she had seen. Kamienski said "that he couldn't control what happened. . . ." Kamienski also stated, "Nick went first, Barbara

didn't suffer. . . ." Finally, Kamienski said, "If we didn't shut up that he wouldn't be able to save me or himself." (11T47-11 to 47-16)

Duckworth and Kamienski returned to the Ocean Beach Marina to Kamienski's boat, which she noticed was more difficult to board. She explained that a teak box was kept on the catwalk to the boat in which cleaning rags and other supplies were kept. It was used as a step. On this night, the teak box was missing and the boat had been moved forward. (11T48-14 to 49-14)

On September 24, 1983, the day Henry's body was found, Duckworth and Kamienski, while dining at the Top O' the Mast restaurant in Seaside Park, were informed that the police were there for Kamienski. Just before Kamienski left the table, he had a conversation with Duckworth which caused her to call Defendant Alongi who arrived within ten minutes. Duckworth told Alongi that the police were there because they had found a body and that Paul's phone numbers were found with it. Alongi told Duckworth to drive Kamienski to the police station. (11T51-21 to 54-5)

Around October 1, 1983, there was a meeting at the Top O' the Mast. Marsieno, Kamienski, Alongi and Sullivan, Duckworth and Jeannie Yurcisin, Defendant Marsieno's companion, were present. Yurcisin was waitressing that night. There was a conversation at the table in which Marsieno said that the bodies were found. Duckworth heard Marsieno state, "They were like scared puppies. . .it

was easy." (11T57-1 to 57-23) Duckworth left the table with Yurcisin to ingest cocaine on Marsieno's instructions because Duckworth was "getting nervous." (See 15T350-3)

When she returned Marsieno asked her whether the cocaine was good enough for her. She told him not at the price it cost. Marsieno said "they were nobodies, and they weren't really my [Duckworth's] friends." Marsieno said that "I should straighten up or I could end up like them. . . ." He then grabbed her jaw saying she should wise up. He told her he thought she was a stronger kid than that. (11T58-13 to 59-23)

Between September 19, 1983 and September 24, 1983, both Alongi and Kamienski threatened Duckworth's life. (13T141-14 to 141-16; see also 136-2). Also between September 19 and September 24, there was a drastic change in the supply of cocaine. Duckworth stated, "It went from like none to a lot. I don't know how much, but a lot." She was obtaining her Cocaine from Kamienski. (11T60-3 to 60-17) The cocaine available was unusual in that; "It was stronger. It was rock form. It was just not what you would find around here." (11T61-10 to 61-11) During this time, Kamienski was looking for a cocaine grinder used to grind up rock cocaine so that it would become a powder. (11T62-7 to 62-12)

Duckworth identified S-34 in evidence as the sleeping bag seen on the boat at Defendant Alongi's house on September 19th . S-34 in evidence depicted a

blanket with some rope wrapped around it. Duckworth saw that blanket that night over the side of the boat with something underneath. (11T62-9 to 64-5) S-37 in evidence depicted a towel recovered with the bodies – one seen before in the teak box on Kamienski's boat where rags were kept for the boat. Also, the blankets recovered with the bodies were similar to those on Kamienski's boat. (11T69-10 to 72-7)

Duckworth had been boating since age five and was familiar with how to secure boats and the knots boaters used to secure them. Kamienski used a peculiar "hitch" knot to secure a boat, rather than that taught to Duckworth. S-35 in evidence depicted the bodies wrapped and secured by rope in hitch knots, the same knots that Kamienski tied. (11T67-20 to 68-25)

In September 1987, Duckworth, who had also been living in Florida, returned to New Jersey for a family reunion. The Prosecutor's Office questioned her while she was here, and later she decided to contact the Prosecutor's Office to tell her complete story. (11T80-5 to 82-23)

Jean Yurcisin, who was a companion of Defendant Marsieno, testified on behalf of the State. (15T336-21 to 336-25; 16T23-1 to 23-4) Yurcisin testified that on September 16th or 17th, 1983, she was at a party at Defendant Alongi's house where she had a conversation with Defendant Marsieno. Marsieno told her that he was expecting to get a great deal of cocaine, and that it was good quality,

"supposed to burn at 88 to 92%, and it was coming up from Florida from friends of Paul [Kamienski] and Donna's [Duckworth]." (15T338-20 to 341-16)

On September 18, 1983, Marsieno told Yurcisin to pick him up at the Holiday Inn on Route 37. "[H]e said specifically to be there at eight o'clock, not to be a minute late because he would be carrying." (15T342-13 to 342-25) When she met him, Defendant Marsieno stated, "those lousy m.f'ers." He told her "they wanted to see the money first, and that he – he had no intention of paying them any money, that he would kill them before they got any of his money." (15T343-1 to 343-14) Marsieno was carrying a briefcase with him. Later, Marsieno opened the briefcase and Yurcisin saw a gun inside but no money. The gun was described as flat without "a round bullet thing on it. . ." or without "a tumbler." (15T343-15 to 344-17)

On Monday, September 19, 1983, about 10:30 PM, Yurcisin received a phone call from Marsieno who told her that "the deal went down" and that he would be leaving town because things were "going to be getting pretty hot." (15T345-5 to 345-20)

On September 24, 1983, Yurcisin was working as a waitress at the Top O' the Mast restaurant. Kamienski, Duckworth and later Alongi were present. Alongi asked Yurcisin where Marsieno was. Alongi said that a body was found and it was

very important that he reach Marsieno. (15T345-18 to 346-22) This was the same night police questioned Kamienski at the Top O' the Mast. (11T51 to 54-5)

Some time around September 29, 1983, on a Saturday night, [Duckworth says around October 1st . (11T57-1 to 57-23)] Marsieno, Alongi, Kamienski, Jackie Sullivan and Donna Duckworth were at the Top O' the Mast. Yurcisin overheard part of their conversation. Defendant Alongi stated that "he wanted his share"; Alongi was angry with Marsieno. Marsieno said Alongi "wouldn't be getting all of his share, because he hadn't done the job properly. He hadn't weighed the bodies down. They would have never come up if he had." (15T347-8 to 349-18; also 16T34-1 to 34-10) At one point, Marsieno handed Yurcisin a bag of cocaine and told her to take Donna into the bathroom to ingest cocaine. Jackie Sullivan also indulged. (15T349-24 to 350-8)

Upon returning home, Marsieno had another conversation with Yurcisin in which he expressed concern about Duckworth "not being a stand-up person." (15T351-6 to 351-17) Yurcisin testified that in October 1983, she saw three blocks of cocaine in Marsieno's possession. Two were wrapped in a thick plastic and the third was open. The three packages were approximately eight inches wide and were contained in a nylon green flight bag, (15T352-21 to 353-13) as described by the courier Sidney Jeffrey. (8T146-4 to 147-15) Other items in the green nylon flight bag were a derling, which is a cocaine grinder, and a jar of inositol which

was used to cut cocaine. (16T25-13 to 26-7) Marsieno sold some of the cocaine, ingested some, and gave some to Alongi and Kamienski. Yurcisin revealed that Marsieno would give Kamienski and Alongi ounces at a time but not take money in return. (15T353-25 to 356-7)

In early November 1983, Yurcisin was present at Alongi's house when Defendants Alongi and Marsieno began arguing about Alongi's proper share of the cocaine. Marsieno once again told Alongi "he had not done the job properly, he had not weighed the two bodies down or it would never come up like this." (16T29-13 to 29-23) [The trial judge limited application of this testimony to Defendants Alongi and Marsieno. (See 16T30-23 to 31-1)]

In late November or early December 1983, Yurcisin had another conversation with Marsieno.

> He told me that, as we were driving – as I was driving, he had told me that he was going to tell me about the biggest drug deal that he ever made, and he had told me that it involved a long haired, red bearded hippie, and he actually didn't think the drug deal would go down because he didn't like the gentleman that he was describing did not look like he could be trusted. But they had a first meeting, he had told me, and there was no drugs at the meeting and he didn't intend to pay him, anyway.
> At the second meeting, the gentleman did have the drugs with him, and Mr. Marsieno had told me that he had to teach him a lesson. He choked him, brought him to his knees and shot him, and then after he told me that, he told me that if I ever told anybody this, that myself and

> my daughter would be killed, if not by him, by someone he knew or a family of his. (16T32-4 to 32-21) [7]

Marsieno told Yurcisin that the woman with long brown hair was sent out of the room and that after he shot the hippie he had hoped he could give the woman money to keep her quiet. (16T 32-4 to 34-1)

Investigator Robert Peck of the Ocean County Prosecutor's Office, served Joseph Marsieno with a copy of the indictment in this matter on October 16, 1987. At that time, Marsieno stated, "do you have a couple bimbos talking to you that I was screwing around with?" (14T39-1 to 40-2) [The trial Judge limited use of this statement to the charges against Defendant Marsieno. (14T41-7 to 41-8)]

Defendants' case begins at 17T18-19. Defendants Alongi and Marsieno did not testify. However, Defendant Kamienski testified. His testimony appears at 18T159-10 to 19T124-7. Kamienski's testimont amounted to a blanket denial. He denied meeting with the Detournay's at the Holiday Inn or any where else on September 18, 1983. He denied that he had any discussions of a drug deal involving three kilos of cocaine with anyone. (18T202-22 to 203-16) Kamienski admitted that he did not drive in September of 1983 because he lost his license and did not want to get caught and that Duckwoth primarily drove him around, but denied that he ever drove Duckworth at any time to Janet O'Donnell's house, and

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[7] [The trial judge limited this testimony to the case against Marsieno only. (See 16T33-5 to 33-7)]

specifically denied having driven her there on September 19, 1983. (18T205-25 to 209-12) He also denied being at the scene of the murders at Alongi's house on September 19, 1983, or having anything to do with the murders. Specifically he denied witnessing the murders, or having helped dispose of the bodies. (18T209-24 to 211-4)

LEGAL ARGUMENT

POINT I: DEFENDANT HAS FAILED TO MEET HIS BURDEN BY CLEAR AND CONVINCING EVIDENCE THAT THE EVIDENCE ADDUCED AT TRIAL SHOWS THAT "NO RATIONAL TRIER OF FACT COULD HAVE FOUND PROOF BEYOND A REASONABLE DOUBT" FOR THE CRIMES OF MURDER AND FELONY MURDER

A State criminal conviction shall not be reversed in federal court unless "it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979) This Court reviews the record in the light most favorable to the prosecution. Ibid. "[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences **must presume**-even if it does not affirmatively appear in the record- **that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."** Jackson at 326 (emphasis added)

> A claim that the verdict is against the weight of the evidence is essentially a matter of state law, and does not raise a federal constitutional question unless the record is

> completely devoid of *436 evidentiary support in violation of Petitioner's due process. *See United States ex rel. Cunningham v. Maroney,* 397 F.2d 724, 725 (3d Cir.1968), *cert denied,* 393 U.S. 1045, 89 S.Ct. 663, 21 L.Ed.2d 594 (1969). Only where no rational trier of fact could have found proof of guilt beyond a reasonable doubt should a writ issue. *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979); *Singer v. Court of Common Pleas, Bucks County,* 879 F.2d 1203, 1206 (3d Cir.1989). Factual issues determined by a state court are presumed to be correct, and the **Petitioner bears the burden of rebutting this presumption by clear and convincing evidence.** *Werts v. Vaughn,* 228 F.3d 178, 196 (3d Cir.2000) (*citing* U.S.C. § 2254(e)(1)).
> **[**Douglas v. Hendricks 236 F.Supp.2d 412, 435-436 (D.N.J.,2002) (emphasis added)

Indeed, "State law means what state courts say it means." Id. at 102, citing Garner v. Louisiana, 368 U.S. 157, 166 (1961) "A petitioner cannot obtain a second opinion on the meaning of state law through the maneuver of making a claim under Jackson." Ibid.

> [W]hat is essential to establish an element, like a question whether a given element is necessary, is a question of state law. **To say that state law "rightly understood" requires proof of [a certain element] and that the evidence is insufficient because the prosecution failed to establish this, is to use Jackson as a back door to review of questions of substantive law.**
> [Bates v. McCaughtry, 934 F.2d 99, 103 (1991)(emphasis added)]

The jury's verdicts of guilty to murder and felony murder were indeed supported by sufficient evidence such that it cannot be shown—by clear and

convicing evidence—that no rational trier of fact could have made the decisions below. The appellate division found as much. Further,

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 U.S., at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979)] (emphasis in original)

This issue was explored thoroughly in the State's July 10, 1988 brief on appeal and in the well-reasoned, published opinion of the Appellate Division. State v. Kamienski, et al., 254 N.J.Super. 75 (App. Div. 1992), and in the State's brief to the District Court of New Jersey. The State will rely on the Appellate Division's opinion, the District Court's opinion, and this brief, including its statement of facts.

Accomplice Liability Generally

Defendants Alongi and Kamienski promoted or facilitated – as accomplices – the crime of murder; hence, the conduct of these Defendants is commensurate with accomplice liability status in terms of murder.

The New Jersey accomplice liability statute, N.J.S.A. 2C:2-6b(3), reads as follows:

> Liability for conduct of Another; Complicity. b. A person is legally accountable for the conduct of another person when: (3) He is an accomplice of such other person in the commission of an offense…

Thus, a person is an accomplice of another in the commission of an offense if:

> (1) With the purpose of promoting or facilitating the commission of the offense; he
> (a) Solicits such other person to commit it;
> (b) Aids or agrees or attempts to aid such other person in planning or committing it; or
> (c) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so…
> [N.J.S.A. 2C:2-6c(1)]

The accomplice "must be a person who acts with the purpose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice." State v. White, 98 N.J. 122, 129 (1984) See State v. Hammock, 214 N.J. Super. 320, 322 (App. Div. 1986) The prosecution must convince the jury that defendants had the requisite purpose of promoting or facilitating the offense's commission. State v. Sullivan, 77 N.J. Super. 81, 89 (App. Div. 1962). However, the term "accomplice" should be employed as the "broadest and least technical [term] available to denote criminal complicity." New Jersey Criminal Law Revision Commission 57 (1971)

In State v. Gelb, 212 N.J. Super. 582 (App. Div. 1986), certif. den. 107 N.J. 633 (1987), the court presented the unified legal requirements for inculpating defendants under a theory of accomplice liability:

> Hence, for defendants to be found guilty of a crime under a theory of accomplice liability "it is essential that they shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act. Mere presence at the scene of the crime, however, is insufficient to render a defendant guilty." [Id. at 591 (citing State v. Fair, 45 N.J. at 95 (Emphasis omitted)].

The Gelb case goes on to further establish the parameters for accomplice liability. While establishing that "indirect[] participat[ion]" in the underlying crime suffices, it explains:

> [a]lthough mere presence at or near the scene of the crime, or the failure to intervene, does not make one a participant in the crime, presence at the commission of a crime without disapproving or opposing it is evidence which, in connection with other circumstances, permits the inference that he asserted [sic] thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same." Citing State v. Newell, supra. 152 N.J. Super. at 469 (citing State v. Smith, 32 N.J., 501, 521 (1960), cert. den., 364, 81 S.Ct. 383, 5 L.Ed.2d, 367 (1961)]. (Emphasis omitted)

> Concerted action need not be proved by direct evidence of a formal plan to commit a crime, which was verbally agreed to by all who were charged. Rather the proof may be circumstantial and participation and acquiescence may be inferred from conduct, as well as spoken words. State v. Smith, supra. 32 N.J. at 522.

Our Supreme Court has held that an accomplice may be guilty of armed robbery, even though he did not personally possess or use the firearm in the course of a robbery "if the accomplice had the purpose to promote or facilitate th[e] crime." State v. White, supra. 98 N.J. at 130.

The present complicity statute itself provides that a defendant may be guilty of an offense, as an accomplice, if, with the intention or promoting or facilitating the commission of a crime, he "[a]ids or agrees or attempts to aid" another person in committing it. N.J.S.A. 2C:2-6c(1)(b) Thus, by the very terms of the statute, accomplice liability will attach if an individual merely attempts to aid in the commission of a crime; such an attempt need not actually facilitate the commission of the offense to support a finding of liability. As recognized by the New Jersey Criminal Law Revision Commission:

"The Code includes in § 2C:2-6c(1) not only those who command, request, encourage, provoke or aid but also those who agree or attempt to aid in the planning or execution. It also includes one who had a legal duty to prevent the crime who fails to make proper effort to do so. This represents an exhaustive description of the ways in which one may purposely enhance the probability that another will commit a crime. There being a purpose (i.e., a "specific intent") to further or facilitate, there is no risk of innocence." Citing to the New Jersey Penal Code: Final Report of the New Jersey Law Revision Committee, supra. at 59 (Emphasis omitted).

N.J.S.A. 2C:2-6 imposes accomplice liability whenever an intention to further or facilitate a crime is found, regardless of the fact that such an intention may have manifested itself in an incomplete "attempt to aid." [Gelb at 591-593]

Accomplice Liability for the crime of Murder

The jury found defendants Alongi and Kamienski guilty of murder as accomplices in violation of N.J.S.A. 2C:1-3a(1) and (2). The statute reads as follows:

> 2C:11-3. Murder. a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:
> (1) The actor purposely causes death or serious bodily injury resulting in death; or
> (2) The actor knowingly causes death or serious bodily injury resulting in death…

With respect to the mens rea of this crime the statute must be construed in light of N.J.S.A. 2C:2-2 which provides definitions for kinds of culpability:

> (1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof it if is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.
> (2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

Thus, a "murder conviction based on 'knowing' conduct can result from conduct which is practically certain to cause serious bodily injury when death is a result of the injury caused…[and] [s]imilarly, a murder conviction based on

'purposeful' conduct can result from the purposeful causing of serious bodily injury when death is a result of the injury caused." State v. Martin, 213 N.J. Super. 426, 433 (App. Div. 1986).

Purpose can be inferred from circumstantial evidence within the context of attendant circumstances. See, State v. Moll, 206 N.J. Super. 257, 260 (App. Div. 1986). Hence, a purposeful or knowing murder can be inferred from defendant's conduct. The jury is always free to accept or reject the inference. State v. Beard, 16 N.J. 50, 61 (1954)

With respect to accomplice liability, inferences are allowed to show intent and the jury is allowed the rational benefit of such inferences. As our Supreme Court stated in State v. Thomas, 76 N.J. 344, 359 (1978), "We simply conclude that the jury is the finder of facts. As the Court of Criminal Appeals of Alabama properly observed:

> Intent to take life may be shown by inference, via the character of the assault, the use of a deadly weapon, and other attendant circumstances…The jury may give to this evidence, as with all evidence, such emphasis and weight as they alone think proper in arriving at their verdict…[Smith v. State, 344 So.2d 213, 216 (Ala. Cr. App. 1977); citations omitted]

Another Alabama case, Connell v. State, 318 So.2d 782, 792 (Ala. Cr. App. 1974), held that a jury could draw a reasonable inference from "the secretive huddle over the victim that the defendant was an accomplice to the homicide."

Most importantly, since the verdict of the jury in regard to these matters was guilty, the evidence must be viewed in a light most favorable to the State.

In State v. Thomas, supra, the New Jersey Supreme Court engaged in further analysis regarding establishing the intent element for first degree murder for an accomplice who was not armed with, and did not use a weapon. The court established that the permissible presumption of intent to kill from using a firearm to shoot at a person, is applicable to an accomplice who was both not armed and did not use a weapon. Thomas at 358-359.

The review of the record in this situation "is governed by the same standard irrespective of whether the evidence is circumstantial or direct, (citation omitted) and the veracity of each inference – including one related to culpability or intent – need not be established beyond a reasonable doubt in order for the jury to draw the inference. (citation omitted) Circumstantial evidence need not preclude every other hypothesis in order to establish guilty beyond a reasonable doubt." State v. Martin, supra, 214 N.J. Super. at 434 (App. Div. 1986)

Here the jury, at the very least, could conclude, among other things, that Defendants shared the trigger man's intention, were present during the actual act, and through this shared intent and presence, "lent approval to the act and supplied encouragement" State v. Thomas, 140 N.J. Super. at 446 (1976) rev'd on other

grounds, 76 N.J. 244, and, that presence as the trigger man's friend in those circumstances, "constituted aiding and abetting." Thomas at 446.

Thus, there existed a "community of purpose" between these codefendants. See, State v. Nunez, 209 N.J. Super. 127, 131 (App. Div. 1986) Of course, presence alone is not enough to lead to criminal liability; purpose to promote or facilitate and shared intent are needed elements which lead to such liability. State v. Bass, 221 N.J. Super. 466, 486-487 (App. Div. 1987)

In any case, the State presented sufficient evidence at trial which viewed in a light most favorable to the prosecution established a purpose to promote or facilitate the crime of murder, shared intent, as well as indirect participation. In other words, the State presented evidence of the defendant's presence at the scene coupled with the required "other circumstances" from which a rational juror could make the various inferences to find the defendant had a purpose to promote or facilitate the crimes and the requisite shared intent.

A) Presence at the Scene

All three defendant's were present at the scene of the criminal episode.

Alongi was present at the scene of the murders. On the day of the murders, September 19, 1983, Alongi's car containing Barbara and the cocaine, left the Holiday Inn around five o'clock headed for Alongi's house. (8T 148-12 to 148-19) Alongi installed a new rug in his house after September 19th , but before the

newspapers reported the deaths. (9T 352-9 to 255-3) (We already know the murders occurred indoors since Marsieno sent the woman "out of the room" while he shot the hippie. 16T 34-1 to 34-10 limited to Marsieno only)).

Not only was it Alongi's house in which the murders occurred, but an eyewitness saw Alongi present just before the murders. Neighbor Hunt saw Henry arrive at Alongi's house between three o'clock and six o'clock on the day of the murders (9T 242-24 to 243-5) Alongi was present, greeting Henry upon the latter's arrival. (9T 243-6 to 244-4)

Another eyewitness, Duckworth, saw Alongi with Kamienski at the scene around dusk preparing the bodies for concealment, (11T 42-4 to 43-8) and she observed that "everything appeared wet," (11T43-9 to 44-1) indicating that Defendants attempted to hose away evidence of blood. Thus, Alongi's presence was noted by two eyewitnesses both immediately before and immediately after the murders. Parenthetically, the murders had to have occurred some time after five o'clock on September 19th, when Barbara left the Holiday Inn, but some time before dusk when Duckworth saw the bodies already partially prepared for concealment. However, Hunt testified that Henry was greeted by Alongi as late as six o'clock, which would narrow the time of the murders to between six and some time before dusk.

Kamienski was present at the scene. On September 24, after Henry's body had been discovered but before Barbara's body had been discovered, Alongi sent Buddy Lehman to meet with Kamienski to find out what was going on about the discovery of the body. Kamienski told Lehman that "**my friends** from Florida have been murdered. The Prosecutor's Office is questioning me in regard to the **murders.**" (Emphasis supplied.) (15T 63-3 to 64-22) This knowledge that there was another body out there before it had been discovered reveals at the very least an intimate knowledge of the criminal episode. On the date this statement was made, even the Prosecutor's Office did not know of a second body since it had not yet been discovered.

Significantly, Kamienski, explaining the events of September 19th to Duckworth said to her that "he couldn't control what happened…Nick went first, Barbara didn't suffer…" (11T 47-11 to 47-16) It is easily inferred that Kamienski was present and was at least an eyewitness to the murders. It should be noted that since Kamienski testified on his behalf, the jury was free to consider the implausibility of his testimony that he "could not control" what happened or any other of his blanket denials. State v. Muniz, supra 150 N.J. Super. at 445. The jury could easily disbelieve Kamienski's testimony on this point in light of the fact that Kamienski was present at the September 18 meeting at which Marsieno brought a gun but no money.

Eyewitness Duckworth put Kamienski at Alongi's house, assisting Alongi in preparing the bodies for concealment, (11T 42-4 to 43-8) – shortly after the murders had taken place – as stated above. Kamienski used blankets and towels which were similar to those used on his boat. (11T67-20 to 68-25) Kamienski removed his boat from the water during the week after the murders. (11T50-1 to 51-3)

Importantly, Kamienski knew this would be no mere drug deal since he found in necessary to send Duckworth, who was constantly with him, to a friend's house for the day. (12T114-10 to 115-28) Though the two were never apart, (11T5-10 to 6-19) it was necessary to send Duckworth away because Kamienski planned to be present at the scene and participated in the crime, sharing the intent of the others. (It should be noted that this argument will be extensively developed infra concerning premeditation of the murders). Therefore, any rational juror could have easily concluded that Kamienski was present at the scene.

B) Other Circumstances

Intent to promote or facilitate murder, participation, and shared intent:

Defendants never intended for the drug deal to have occurred. Defendants duped the DeTournays into thinking it would occur by lying about having trouble getting the nonexistent money. This is shown by the fact that there was never any

money intended to be paid to the DeTournays. Marsieno admitted he "didn't intent to pay him anyway." (16T32-4 to 32-21; admissible against Marsieno only, but see 15T 343-1 to 343-14 instead)

Duckworth testified that all three defendants attended the September 18th failed deal at the Holiday Inn. Prior to the meeting Marsieno told Yurcisin "he would be carrying." Inside Mariseno's briefcase Yurcisin saw a gun without a "tumbler", similar to a 9mm semi-automatic parabellum pistol which killed the DeTournays – but no money. Indeed Marsieno admitted he would "kill them before they got any of his money." (15T343-1 to 343-14) After the September 18 meeting, Henry DeTournay told Sid Jeffrey "he just came from the people that were getting the money together", and that "the people still weren't ready", and that they were having "trouble" getting the money, so that the deal had to be postponed to the next day—September 19, 1983. (11T 37-17 to 39-8; 8T 139-9 to 140-21; 9T 16-8 to 16-23; 8T 139-9 to 140-21)

Between September 10th and September 15th, well before the murders, Defendants assured Buddy Lehman that he could have "kilo quality coke" for $1,000 less per ounce than he was presently paying on credit. (15T59-1 to 60-8) Apparently, Defendants anticipated no cash flow problem – well before the murders took place – even though they told the DeTournays they were having trouble raising the money for their deal. After the murders, in October, the same

credit was extended Lehman, specifically by Alongi, as was promised before. (15T65-20 to 67-12)

Significantly, Lehman testified that Marsieno had prearranged with him for Lehman to come to Marsieno's house on September 18 to pick up cocaine he was to deal Lehman. (15T 61-9 to 62) Yet, on the 18th , at the Holiday Inn, we know the DeTournays were ready to perform their part of the deal but Defendants did not intend to perform their part. We know the DeTournays were ready because on that day Sidney Jeffrey waited with the cocaine, having checked into the Holiday Inn the day before. He was in the very building at which this September 18th failed deal took place, (8T135-1 to 137-10) though apparently Jeffrey's location was unknown to defendants. Thus, defendants' excuses as told to Jeffrey by Henry DeTournay himself, that the "people still weren't ready and they were getting their money together," and that they were having "trouble" getting the money, (8T139-9 to 140-21; 9T16-8 to 16-23) were lies designed to conceal Defendants' actual intent – to lure the DeTournays to a location where the crimes would be easy to commit. The DeTournays stood ready, willing and able to perform their part of the deal.

The record reveals Defendants' understanding of the word "deal". On September 19th at 10:30 PM, after the murders took place, Marsieno told Yurcisin "the deal went down" and that he would be leaving town because things were

"going to be getting too hot." (15T345-5 to 345-20) Had the drug deal occurred, things would have not "gotten hot" so that he would have to have left town. Had a robbery occurred, things would have not "gotten hot" since the DeTournays could not report it to the authorities. This "deal" was understood by Defendants to be murder – not a drug deal and not a robbery. Indeed, Defendants could not afford to merely rob – they needed insurance against the possible retaliation of Sidney Jeffrey's Colombian cocaine suppliers.

Premeditation:

The defendants showed premeditation. We know Marsieno showed premeditation. On September 18th, the day before the murders, he said the DeTournays would be killed before they ever got his money. (15T342-13 to 342-25) Also, he had "hoped" to give Barbara some money to keep her quiet. (16T34-1 to 34-10; limited to Marsieno only) This was probably because Defendants were friends with Barbara's ex-husband, Bill Rispoli. (6T35-2 to 37-10; 11T23-12 to 25-6)

All defendants attended the September 18 meeting in which there was a gun but no money—and the talk at the table as told by Henry himself to Sid Jeffry after the meeting was that the defendants were having "trouble" getting it. Kamienski and the others in attendance of course knew this was a lie. Thus, the inference is that defendants talked about this situation and in effect all premeditated about this

murder. In any case, the fact that directions to Alongi's house were found on Henry's body (7T160-3 to 160-8) creates an inference that defendants, intended to use Alongi's house, which backed onto a lagoon, as the scene of the murders. The directions were likely produced as a result of the abrupt "change in plans" described by Barbara to Sid Jeffrey following the failed deal of September 18th. The site was no doubt suggested by defendants. The directions were produced because Alongi's house was going to be the site of the "deal." They would serve no other purpose since it can not be said that Alongi was social with the DeTournays, having met them only fourteen days earlier at his house when they arrived with Kamienski at Alongi's house by boat and not by car, on September 5th. Rather, this relationship was based on distrust and suspicion, the respective parties having required vouchers from Kamienski, who in fact vouched for them.

Defendant Kamienski knew this "deal" would be much more than a drug deal – he knew it would be murder in advance of its occurrence. His actions are subtle.

Duckworth, his live-in girlfriend, was with him "all the time…twenty-four hours a day…" (11T5-10 to 6-19) Both regularly used drugs. They "partied almost every night" on Kamienski's supply. (11T12-11 to 13-15) It was not unusual for her to be present during drug deals. (See e.g. 11T20-8 to 20-14; also 11T23-12 to 29-4) Yet Kamienski knew Duckworth would be devastated by something as

serious as murder, as she ultimately was – falling "out of love" with him after she discovered the murders. (12T130-11 to 130-23) Thus, though always together, she was sent away whenever defendants had murder on their minds.

She was sent away from the table at the Top O' the Mast while the defendants mulled over the aftermath of the murders because she was "getting nervous." (15T350-3; also 11T58-13 to 59-23) She was kept away from the bodies while they were being prepared for disposal and concealment at Alongi's house via instructions to wait in the kitchen. (11T42-4 to 43-8) She was whisked away to the mall by Alongi's girlfriend Sullivan when she inadvertently discovered the bodies. (11T44-4 to 46-18) Significantly she was shipped off to a caretaker friend's house, before the murders, on the very day the murders were planned to occur, September 19th, driven there by an unlicensed Kamienski, who never drove but was compelled to drive on this occasion, even though Duckworth "always" drove his car. Kamienski also picked her up at dusk when the shootings were finished. (11T40-18 to 42-3; 12T76-15 to 76-23) Thus, Kamienski premeditated about the murders and executed part of the murderous plan through the removal of a possible witness, Duckworth, before the murders occurred on the 19th .

Defendant's Plan:

Because there was no money, an important part of Defendants' plan to murder bearing heavily on premeditation as well as plan, was for them to lure the

DeTournays to a location where murder and robbery would be easier. They certainly could not murder the DeTournays at the Holiday Inn though they could rob them there by brandishing the gun and the DeTournays could not report the robbery.

The trouble was that Defendants did not know where the DeTournays kept the cocaine. We note the care in which the DeTournays kept the cocaine hidden from Defendants. This provided the DeTournays with leverage over Defendants. At the September 18th failed deal at the Holiday Inn, Defendants did not know Sidney Jeffrey had checked in the day before with the cocaine. On September 19th Barbara would spy Alongi's car from the safety of Jeffrey's third floor Holiday Inn window, and go down to meet the driver. (8T145-2 to 146-3) Even the new "change in plans" after the 18th in which Henry would be busy counting money at Alongi's house left Barbara the custodian of the cocaine. (8T142-7 to 144-12) Thus, given the care of the DeTournays to isolate the Defendants from the cocaine, defendants, as part of their plan, lured the DeTournays to an isolated place where the DeTournays had to bring the cocaine with them. That was accomplished by lying to the DeTournays – that plans needed to be changed because Henry would be busy counting money – money that did not exist. Instead of Henry picking Barbara up at the Holiday Inn, a man would be picking her up – with the cocaine – instead. (8T142-7 to 144-12) Once at Alongi's house, it was planned that the

DeTournays would be killed. We know this because at Alongi's house defendants could have completed a mere robbery easily; an unreportable robbery. But where 3 kilos of cocaine were at issue, defendants had an interest in keeping the Colombian cocaine suppliers, off their backs.

Defendants' plan was detailed. Part of the paln was for Barbara to be picked up at the Holiday Inn by Alongi's car. We know this because Barbara knew exactly which car to look for in the parking lot that day. She identified the car to Jeffrey from Jeffrey's window on the third floor of the Holiday Inn. (8T145-2 to 146-3) It was Alongi's distinct faded, dented car identified by Jeffrey (8T147-18 to 151-3; 9T211-2 to 211-6) seen by Prosecutor's personnel in Alongi's driveway at the time, (8T48-8 to 49-19) and according to neighbor Hunt, owned by Alongi at the time. (9T246-9 to 246-25; 247-19 to 247-25) It is a potent inference indeed that Alongi was driving that car on the 19th . This "change in plans" which necessitated Barbara being picked up by Alongi's car completed the luring of the DeTournays and the cocaine, to Alongi's house.

It should be noted as well that Barbara spoke in terms of plans, in terms of changes in plans, and with reference to specific dates and times that each meeting would take place, as well as the function that each participant would perform during these meetings. (i.e. Henry would be "busy counting money" so another person would pick her up, the weight on the kilos needed to be checked, the deal

would be postponed from three o'clock to six o'clock, the deal would take three hours). (8T142-7 to 144-12 also 152-5 to 152-6)

Barbara's descriptions of the functions of the participants provides a glimpse into the type of detail the parties considered and discussed. Defendants needed to have Henry "busy counting money." However, under the most favorable construction, the jury could have inferred that in actuality, Henry was purposely isolated from Barbara and was under threat, perhaps at gunpoint, since no money existed, and was forced to allow Barbara to be picked up at the Holiday Inn, perhaps by prearranged call.

Concerted Action

One only need ponder S-7 in evidence and consider some of the other communications between the persons involved in this case to see evidence of concerted action between defendants. S-7 is the chart of phone activity of defendants and the victims. The State submits the evidence, viewed favorably, permitted the following inferences.

On September 9, 1983, Kamienski called the DeTournays at the Boutsikaris residence (S-7) about their meeting in Toms River. The DeTournays met with Kamienski in Toms River because Henry DeTournay was actually on Kamienski's boat later that day. (11T33-20 to 34-25)

On September 17th, Henry, from his "office," made three phone calls. He called Alongi, just before three in the afternoon, who was "heading up this thing" to tell him that the cocaine would be available that day (S-7). Four hours later, after the courier, Sidney Jeffrey, checked into the Holiday Inn at 6:25 PM and called Henry to tell him so, (8T137-12 to 138-4) Henry called Jeffrey back five minutes later at 7:07 at the Dunkin' Donuts phone to confirm that the cocaine was ready (S-7). One hour later, at 8:01, having confirmed with Jeffrey that the cocaine was available, Henry called Alongi (S-7) and told him he was ready to deal and a meeting for the next day, the 18th, was scheduled. This meeting, in fact, occurred at the Holiday Inn where Jeffrey waited in his room with the cocaine, but the deal failed and plans were changed.

On September 19th, the murders occurred and Defendants laid low—in the words of Marsieno things were going to "get hot" so he was leaving town. Only on the 23rd do we see increased phone activity. (See 15T 61-19 to 62-19)

On September 24th, the first body is discovered. Alongi calls Kamienski twice before Kamienski is questioned at the Top O' the Mast. (S-7) Kamienski has Duckworth call Alongi before he leaves the Top O' the Mast with the police. (11T51-21 to 5405) Alongi arrives at the restaurant telling Yurcisin it was very important that he reaches Marsieno. (15T345-18 to 346-22) Kamienski is questioned later that night. Lehman tells us that Marsieno sent him to check on

Kamienski the same night. (15T63-3 to 64-22) At the meeting with Lehman, Kamienski refers to his "friends" having been murdered at a time when only one body had been recovered. (15T63-3 to 64-22) Alongi and Kamienski called each other on each of five out of six days following Kamienski's interview with the Prosecutors, September 26th, 27th, 28th, 29th, October 1st (S-7) perhaps concerned about the interview. On October 1st, Kamienski called Alongi in the afternoon (S-7) perhaps about the meeting of the partners for that night at the Top O' the Mast. The meeting, in fact, occurred at which there was an argument over proper shares of cocaine. (15T347-8 to 349-18) Thus, since defendants' interests were intertwined, their communications were also intertwined at critical junctures of the criminal episode and investigation.

Another form of concerted action is seen. Duckworth's conscience was bothersome to all Defendants. Marsieno's threat that she "could end up like them" (11T58-13 to 59-33) and Alongi's similar threat that she could "end up like my friends" (11T44-4 to 46-18) as well as Kemienski's threats, (13T141-14 to 141-16; also 136-2) were meant to keep Duckworth silent. Alongi explained that unless she remained silent, "Paul wouldn't be able to save me," [Duckworth] (11T44-4 to 46-18) and Kamienski explained, "he wouldn't be able to save me [Duckworth] or himself." (11T47-11 to 47-16) The point is that defendants engaged in similar threats toward Duckworth for similar purposes and to protect similar interests.

Kamienski's claim to Duckworth that his life as well as hers could be jeopardized, was an attempt at keeping her a silent witness, as were his and the others' threats toward Duckworth.

There is further evidence of concerted action. Marsieno was the triggerman. (16T32-4 to 32-21; limited to Marsieno only) (But see, 11T57-1 to 57-23 instead.) Alongi was Marsieno's "partner" having specifically referred to Marsieno as such only two or three days after the murders. (15T62-11 to 62-19) This is known because Buddy Lehman was pressing Alongi and Marsieno for some of the cocaine they had promised him. When Lehman could not reach Marsieno, Alongi assured him, "Don't worry. I have the product. My partner's up in Newark. He'll be back in a few days and we'll meet you [in Atlantic City]" (15T 61-19 to 62-18)

Moreoever, Marsieno, referring to the discovery of the bodies, told Alongi that "everything was [fine until] you took over." (11T57-12 to 57-16) Alongi received a share of Cocaine without paying for it. (15T353-25 to 356-7) This was the DeTournays' "rock" cocaine. (15T65-20 to 67-12) But Marsieno told Alongi,

> That he wouldn't be getting **all of his share** because he hadn't done **the job** properly. He hadn't weighed the bodies down. They would have never come up if he had. (15T349-14 to 349-18) (Emphasis added.)

The implication, since Alongi would receive a partial share, was that Alongi did other parts of the "job" right. (e.g. driving his car to pick Barbara up, using his house for the "deal") Kamienski also received his "share" without paying for it. No

doubt his share was also based on the job he performed (e.g. setting up the deal, vouching for the parties, removing a witness on the day of the murders, concealing the bodies in blankets Duckworth said were similar to those she had seen on his boat, and tying the clothesline around the bodies with his peculiar half hitch knot with which Duckworth was familiar.) (15T353-25 to 356-7; 15T354-1 to 354-4; 11T60-3 to 62-12)

The withholding of a partial share precipitated a financial dispute between Marsieno and Alongi of approximately 25 to 30 thousand dollars causing their friendship to end. (15T68-1 to 68-10) The murders, on the other hand, did not strain their friendship. Alongi, as evidenced by the nature of the argument between he and Marsieno, felt his share to be an entitlement. Significantly, the shares were determinable to a share certain, Alongi wanting "all" of his share and Marsieno not willing to give "all" his share to him. Apparently, 25 to 30 thousand dollars of Alongi's share was withheld. This fact not only bears on concerted action, but on plan as well.

Another aspect of concerted action was that Alongi was referred to by the DeTournays as the "non-user" (11T23-6 to 23-12) from Toms River (7T148-20 to 152-6; S-3 and S-4 in evidence) who "headed up this thing." (7T17-23 to 17-25) Since Alongi was a non-user, Marsieno "cut" Alongi's cocaine gotten from him because Alongi wouldn't "know any better if it was cut." (16T27-10 to 27-11) In

any case, "this thing" was designed to have a "head" as well as "partners" (See 15T62-16) in order to effectuate Defendants' plans.

Further, it need barely be mentioned that Kamienski and Alongi were seen by eyewitness acting in concert – preparing the bodies for concealment. (11T42-4 to 43-8)

As for Kamienski, he brokered this "deal" which was never a deal at all. He conceived of the deal among the parties. (11T17-14 to 19-3; 20-8 to 23-11) He introduced the parties (11T23-12 to 25-6) and vouched for the parties. (11T29-1 to 29-4) Kamienski was present at the September 18th failed meeting in which there was a gun but no money ever existed, and he no doubt heard the lies told to Henry DeTournay that the parties were merely having trouble getting the money together, thereby luring DeTournay into the belief that the parties fully intended to complete the deal they had arranged. (11T37-17 to 39-8) Kamienski took part in the subsequent change in plans. He was at least an eyewitness to the murders. ("Nick went first, Barbara didn't suffer…") (11T47-11 to 47-16) He engaged in concerted communications as well as concerted threats to protect his as well as the others' interests.

Kamienski, like Alongi, shared in the cocaine (11T60-3 to 60-17) getting ounces at a time in which no money was exchanged. (15T353-25 to 356-7) This was the DeTournay's unusual and potent "rock" cocaine which was "just not what

you would find around here." (11T61-10 to 61-11) Kamienski sought a grinder to make the rock into powder. (11T62-7 to 62-12)

DEFENDANT HAS NOT MET HIS BURDEN BY CLEAR AND CONVINCING EVIDENCE THAT NO RATIONAL FACTFINDER COULD HAVE FOUND PETITIONER GUILTY OF FELONY MURDER AS AN ACCOMPLICE TO A ROBBERY

The State wishes to adopt the arguments set forth above to the extent applicable to accomplice liability in the robbery and felony murder context. Of course the defendant's burden is a heavy one--to show by clear and convincing evidence that no rational factfinder could have found defendant guilty of felony murder as an accomplice to a robbery, and giving the State the benefit of all favorable constructions.

We ask this Court to remain mindful of the arguments made above, but nevertheless, some of these arguments will be revisited in this new context.

In New Jersey, a defendant is guilty of felony murder when that defendant "acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of any such crime or of immediate flight therefrom, any person causes the death of a person other than once of the participants…" N.J.S.A. 2C:11-3.a(3). The elements of felony murder are as follows: A death occurs – the victim

must not be a participant in the commission of the felony; the felony involved in the attempt or commission of the crime must be one of the enumerated felonies, i.e. robbery, sexual assault, arson, burglary, kidnapping or criminal escape; felony murder also falls within the temporality of a flight, after the commission of one of these enumerated felonies; lastly, a causation test is imposed with respect to felony murder. See State v. Smith, 210 N.J. Super. 43, 55-56 (App. Div. 1986), certif. den. 105 N.J. 582 (1986).

In short, "[f]elony murder requires only a showing that a death was caused during the commission of (or attempted commission or flight therefrom) one of the crimes designated in the statute. The State need not prove that the death was purposely or knowingly committed; a wholly unintended killing is murder if it results from the commission of the underlying felony…a felony murder i.e., a death caused neither knowingly or purposely, is by definition not a result which is purposely planned." State v. Darby, 200 N.J. Super. 327, 331 (App. Div. 1984, certif. den. 101 N.J. 226 (1985) Therefore, there need only be an intent to commit the underlying crime, and not the intent to kill. State v. Gerald, 113 N.J. 40, 88 (1988)

The two legal prongs for the causation test, as applied to the doctrine of felony murder are as follows:

> N.J.S.A. 2C:2-3. causal relationship between conduct and result; divergence between result designed, contemplated

> or risked and actual results. a. Conduct is the cause of a result when: (1) It is an antecedent but for which the result in question would have occurred; and…
> e. When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.
> (Emphasis added)

Thus, the two pronged test, under N.J.S.A. 2C:2-3.a and N.J.S.A. 2C:2-3.e, demands "The antecedent but/for [and]…a finding that the result was a probable consequence of the actor's conduct." State v. Smith, supra at 55-56.

Under this legal scheme, the State must prove that Defendants Alongi and Kamienski promoted or facilitated the robbery and shared an intent to rob and that the victim's death was causally linked to defendant's conduct via the perpetration of the crime. Accordingly, in New Jersey, the felony murder rule "depends upon a theory of transferred intent; intent to commit the felony is enough even though there is not an intent to kill." State v. Stentson, 174 N.J. Super. 402, 407 (Law Div. 1980), aff'd o.b. 188, N.J. Super. 361 (App. Div. 1982), certif. den. 93 N.J. 268 (1983). State v. Smith, supra at 50. In essence, the felony murder rule allows the recognition that the intent to commit the underlying felony is a per se adequate mens rea for the homicide.

The res gestae of the underlying felony remains important in the felony murder doctrine. The "in the course of" language of N.J.S.A. 2C:11-3.a(3) is

reminiscent of the res gestae approach used by State v. Holland, 59 N.J. 451, 458 (1971):

> [C]learly a killing which occurred, as could readily be found here, sometime within the course of the robbery including its aftermath of escape and concealment efforts, constitutes a felony murder…see, State v. Turco, 99 N.J.L. 96, 103 (E&A 1923).
>
> In State v. Gimbel, 107 N.J.L. 235 (E&A 1930), the court, in rejecting a contention that a killing during escape efforts after termination of the robbery itself was not a felony murder, summarized the holding in Turco as follows:
>
> "In the Turco case we held that when, incident to a robbery, one of the robbers kills a third party after the goods have been taken out of the possession of the owner (or his agent), while the robbery is complete, so as to render the perpetrators liable to conviction for it, if the killing beingdone in an attempt to conceal the crime, protect the robbers in the possession of the loot, and facilitate their flight, is so closely connected with the robbery as to be part of the res qestae thereof, which may be an emanation of the act of robbery, and although an act committed after the fact of robbery it still constitutes part of the res gestae of that act, andis murder committed n the perpetrationof a robbery within the meaning of a robbery within the meaning of our statute [felony murder], and consequently, murder in the first degree…" [107 N.J.L. at 240-241.] (Emphasis supplied)

Of course, under the Code, the res gestae of the offense must be limited to the immediate flight of the felons. A New Jersey case State in the Interest of J.R. and H.O., 234 NJ.Super. 388 (Ch. Div. 1988) gives the history of the evolution of the res gestae doctrine in New Jersey:

> Prior to the enactment of the Criminal Code in 1979, New Jersey followed the res gestae theory of felony murder. Under this theory, a killing amounted to murder when committed in an attempt to conceal the crime, to protect the criminals in the possession of the loot or to facilitate their flight. In these instances, the killing was deemed so closely connected with the original offense as to be part of the underlying criminal act. N.J.S. 2A:113-1, 2A:113-2 (repealed); State v. Holland, 59 N.J. 24 (1970); State v. Hauptmann, 115 N.J.L. 412 (E.&A. 1935); State v. Gimbel, 107 N.J.L. 235, (E.&A. 1930)
>
> The new Code eliminated many of the categories created by the res gestae theory and restricted the application of the felony murder concept to killings committed during "The course of" or "during immediate flight" from one of six serious and violent crimes. This change from prior law made it clear that causing a death during immediate flight from the underlying crime would constitute murder. In enacting this statute the New Jersey Law Revision Commission which proposed the felony murder rule that is now 2C:11-3a(3), follows an almost identical provision found in the New York Penal Code. See, The New JerseyPenal Code, Final Report of the New Jersey Law Revision Commission, Vol II: Commentary p. 157 (1971), New York Penal Law, 125-15, subd. 3., (L. 1965, Ch. 1.030). Although neither New Jersey nor New York's Penal Code defines the term "immediate flight," the New York courts have had occasion to address this issue in varying contexts. People v. Gladman, 41 N.Y. 2d 123, 359 N.E. 2d 420 (1976); People v. Donovan, 53 A.D. 2d 27, 385 , 53 A.D. 2d 27, 385 N.Y.S. 2d 385 (1976); People v. Irby, 61 A.D. 2d 386, 402 N.Y.S. 2d 847 (1978). [State of New Jersey in the Interest of J.R. and H.O., supra, at 394]

Under our facts all the elements of felony murder – including the casual elements – have been fulfilled. But for the robbery the victims would not have died and their deaths were the probable consequence of the robbery. Of course, it is

imperative that this causation test of N.J.S.A. 2C:2-3a and e – as mandated by State v. Smith, supra at 55-56 – be linked to the "in the course of" language of N.J.S.A. 2C:11-3a(3). It is imperative because causation questions of conduct and result revolve around completion of the crime as a whole and "[c]ausation is an essential element for jury determination." See, State v. Smith, supra 210 N.J. Super. at 51, See also, the pronouncement in State v. Whitted, 232 N.J. Super. 384 (App. Div. 1989).

N.J.S.A. 2C:11-3a(3) – the New Jersey felony murder statute – begins with an element involving the commission for the underlying felony, i.e. robbery. N.J.S.A. 2C:15-1 defines robbery using the following elements: an actual theft is attempted or committed; bodily injury is inflicted or force upon another is used; threats are used to facilitate the commission of the theft; and – finally – the bodily injury or threat activity must happen in the course of the theft's commission or in immediate flight after the theft's attempt or commission.

The defendants intended to rob the cocaine from the DeTournays. However, at some points we must use circumstantial evidence and inferences in order to arrive at that conclusion. Therefore, "the veracity of each inference – including one related to culpability or intent – need not be established beyond a reasonable doubt in order for the jury to draw the inference. State v. Brown, 80 N.J. 587, 592 (1979); State v. DiRenzo, 53 N.J. 360, 376 (1969) Circumstantial evidence need not

preclude every other hypothesis in order to establish guilty beyond a reasonable doubt. State v. Mayberry, supra, 52 N.J. at 436. See also, State v. Smith, 210 N.J. Super. 43, 49 (App. Div. 1986).

The court in State v. Martin, supra, 213 N.J. Super. 426 (App. Div. 1986) stated that inference and circumstantial evidence will also fulfill the legal dictates of the elements of felony murder. After all, "[c]oncerted action does not have to be proved by direct evidence of a plan to commit a crime, verbally concurred in by all who are charged. The proof may be circumstantial. Particpation and acquiescence can be established or inferred from contact as well as spoken words." State v. Smith, 32 N.J. 501, 522 (1960) cert. den. 364 U.S. 936.

On September 3, 1983, Henry DeTournay indicated to Defendant Kamienski that he was interested in selling a large quantity of cocaine. Kamienski replied that he might know someone who would purchase that large quantity. (11T20-8 to 20-14) Later that night, Defendant Alongi and his girlfriend Sullivan visited with Kamienski and Duckworth. (11T20-18 to 23-11) On September 5, 1983, Kamienski with Duckworth took a boat ride with the DeTournays to Defendant Alongi's house where the DeTournays were introduced to Alongi. Marsieno arrived later. (11T23-12 to 25-6) The parties wanted vouchers, and Kamienski provided them.

Less than two weeks after the September 5th introductions, Marsieno and Alongi spoke of a "good deal" and "good coke…coming into town." (11T36-13 to 37-16) The cocaine was "called rock" and consisted of mostly…little pieces, hard pieces." (8T146-4 to 147-15) The same kind of "quality rock coke" that Alongi would – later after the murders – give to Lehman on credit. (15T65-20 to 67-12).

Christine Longo testified that the DeTournays told her that they were going down to a "funeral director's boat" whose name was "Paul" on September 9, 1983. (6T31-12 to 32-20) Kamienski's first name is Paul and he is a funeral director. Kamienski's business card, address and phone numbers were found on the dead body of Henry DeTournay. (7T158-14 to 159-13) When Barbara DeTournay came back from Kamienski's boat on September 11th, she told Christine Longo that she was "going to make a big drug deal." (6T33-20 to 34-24) Barbara also told Christine that the people she would be dealing with were friends of her former husband, Bill Rispoli, also known as Bill Dickey. (6T35-2 to 37-10) Additionally, Barbara goes on to say – to Longo – that this would be "a big deal" and that she would be "set for life." (6T37-15 to 37-19) Marsieno and Alongi describe the "deal" in similar terms. (11T36-13 to 37-16) There can be no doubt as to the mutual drug deal contemplated by these parties and the fact that Kamienski brokered the deal and vouched for the parties.

On September 16th or 17th, 1983, Jean Yurcisin was at a party with Marsieno at Alongi's house where she had a conversation with Defendant Marsieno. Marsieno told her that he was expecting to get a great deal of cocaine, and that it was good quality, "supposed to burn at 88 to 92%, and it was coming up from Florida from friends of Paul and Donna's." (15T338-20 to 341-16)

Jean Yurcisin's testimony shows how the criminal episode can be properly thought of as a robbery and felony murder. The day before the murders, September 18th, Marsieno, Alongi and Kamienski met at the Holiday Inn. (11T37-17 to 39-8) On September 18th , the day of the meeting, but before the meeting was held, Marsieno had told Yurcisin that "he would be carrying." (15T342-13 to 342-25) He was armed because he, Alongi and Kamienski wanted to rob the DeTournays, who were also at the Holiday Inn to meet Sidney Jeffrey as well as the defendants. (8T139-9 to 140-21)

Marsieno indicated to Yurcisin that "they wanted to see the money first, and that "…he had no intention of paying them any money, that he would kill them before they got any of his money." (15T343-1 to 343-14) Yurcisin goes on to testify that Marsieno was carrying a briefcase and Yurcisin saw a gun inside but no money. (15T343-15 to 344-17) The gun provides the instrumentality whereby, under N.J.S.A. 2C:15-2, a theft, N.J.S.A. 2C:20-3.a of movable property becomes legally subsumed into the New Jersey robbery statute. The gun would purposely

put the DeTournays in fear of immediate bodily injury via its threatening presence. The transaction was postponed to the next day, and Duckworth testified that she heard Marsieno state that the DeTournays "were like scared puppies…it was easy." (11T57-1 to 57-23) Kamienski and Alongi also participated in the commission of the robbery. Defendants may be culpable of robbery via the possession of a weapon by one of their confederates. See, State v. White, 98 N.J. 122 (1984); State v. Gantt, 101 N.J. 573 (1986). Defendants' purpose was, under N.J.S.A. 2C:20-3, to exercise unlawful control over the cocaine of the DeTourneys with the purpose of depriving them thereof. The instrumentality of the gun – among other things – upgrades the theft to a robbery. N.J.S.A. 2C:15-1

The fact that a robbery was contemplated is also illustrated by a sequence of facts, which give rise to very potent inferences of a design to commit robbery. On September 19th , Barbara DeTournay told Jeffrey that the cocaine deal had been postponed from three o'clock to six o'clock that day and Barbara had arrived at Jeffrey's motel around five o'clock in the afternoon. (8T142-7 to 144-12).

She told Jeffrey that a "very distinguished man" was going to pick her up and take her to the site of the deal. (8T142-7 to 144-12) Jeffrey saw Barbara DeTournay get into the car and leave with the man driving. The car headed east, toward Defendant Alongi's house (see S-4 in evidence). Jeffrey described the car as a "large American car, older car, and I noticed the paint was faded a little bit

from the sun…[and] it had a big dent in the rear quarter panel." [8T147-18 to 151-3] Hunt would also identify this vehicle. [9T248-1 to 248-3] The vehicle was seen in Alongi's driveway. [8T45-2 to 45-4] Jeffrey describes this car as the same type of car that arrived for Barbara DeTournay. [9T211-1 to 211-6] When Barbara got into Alongi's car, Defendants had completed that part of their plan to lure the victims away from the Holiday Inn to an isolated place.

Defendants used Alongi's house for the robbery and Alongi used his car to pick Barbara up at the Holiday Inn. Kamienski also had an allocated "job" in the robbery/murder; it may be inferred that the hitch knots secured by rope around the DeTournay bodies were the same kind of knots that Kamienski tied, and that the blankets came from his boat. [11T67-20 to 68-25]

Kamienski set up this deal, introducing and vouching for the parties as well as removing a possible witness on the day of the murder. Indeed – after the robbery/murders Marsieno gave some of the cocaine to Alongi and Kamienski and would not take money in return. [15T353-25 to 356-7] The inference is clear – this was their reward for participation in the robbery/murders.

Duckworth places Kamienski, Alongi and Marsieno at the robbery/murder scene on the boat; she also sees a body shape in a sleeping bag. [11T42-4 to 43-8] Alongi frightened Duckworth but Kamienski assured Alongi that "she's alright." The inference is clear – Duckworth will conceal what she saw so that Defendants –

still in the course of their crime – may make their immediate flight therefrom. N.J.S.A. 2C:11-3a(3)

Kamienski knew this would be more than a drug deal. Kamienski had wanted Duckworth out of the way on the day of the robbery/murders even though Duckworth was present at plenty of other drug deals. Duckworth always drove Kamienski's car because Kamienski was not permitted to drive since his license had been suspended, but on the day of the murder – in order to remove a possible witness – Kamienski drive Duckworth to her girlfriend's house. (12T114-10 to 115-8) Kamienski had told Duckworth that she would be left at a friend's house for that day. He picked her up later around dusk at which time they went to Alongi's house. [12T114-10 to 115-18; 11T40-18 to 42-3] Clearly, Kamienski did not want Duckworth with him because the robbery/murders would occur on that day. Despite Kamienski's attempt to keep Duckworth in the Alongi residence, she sees the results of the robbery/murders. [11T42-4 to 43-8]

Kamienski stated to Duckworth that "he couldn't control what happened." [11T47-11 to 47-16] Even if the killings were unintended via Alongi and Kamienski, the commission of the underlying felony of robbery by these confederates is enough to prove felony murder. State v. Darby, supra at 331. The two-pronged test – applicable to felony murder – of the antecedent but/for and that the result was a probable consequence of the actor's conduct. N.J.S.A. 2C:2-3a&e

provide the "causal link" between the conduct of Alongi and Kamienski and the death of the DeTournays. See State v. Smith, supra at 210 N.J. Super. 50. Their conduct, incident to the underlying felony of robbery, yielded a probability that during a robbery – where one of the confederates possessed a deadly weapon – the results could be just as deadly.

Here, felony murder will result because a killing occurred during the commission of the robbery; this includes the time when Alongi and Kamienski were attempting to conceal the crime in order to protect Marsieno and themselves and to facilitate their flight so that they could carry the stolen goods to safety. This was not – as Judge Perskie indicated – "the old 'accessory after the fact' theory." (See A-22) This was all part of the same criminal transaction involving the res gestae of the underlying felony of robbery. That is the way the jury called it on a matter particularly within their province. Hence, "the crime of robbery is not completed by the taking of property by force, but continues into the immediate flight after such an act." State v. Williams, 232 N.J. Super. 432, 436 (App. Div. 1989) Judge Perskie was incorrect about his "old accessory after the fact theory" and hindering apprehension because hindering apprehension as well as accessory after the fact "assumes a completed crime." See, N.J.S.A. 2C:39-2a; State v. Sullivan, 77 N.J. Super. 81, 90 (App. Div. 1962); Warton's Criminal Law, (14

ed. 1978), §33 at 171, State v. Williams, supra. Judge Perskie found that the robbery and murders had already been completed and that Defendants' conduct was "consistent with a purpose to hinder apprehension rather than a purpose to promote or facilitate the commission of the robbery and murders."

The following analysis from State v. Williams, supra, will illustrate the error of Judge Perskie's positon:

> Defendant's contention, that he could be liable for hindering apprehension because he was involved only in the after-the-fact facilitating of the escape, ignores that under the Code robbery is not completed by taking of property by force, but continues into the immediate flight after such an act. By contrast, the Code offense of hindering the apprehension, like the common law crime of accessory after the fact, assumes a completed crime." Id. at 436.

The Court continued, quoting the D.C. Court of Appeals:

> The very definition of the crime [accessory after the fact] also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense…[United States v. Barlos, 470 F.2d 1245, 1252-1253 (D.C. Cir. 1972)]

Thus, the robbery was still in progress when Alongi and Kamienski were seen by Duckworth at the crime scene concealing the bodies and hosing down the area. [11T42-4 to 43-8] Having participated in the robbery, felony, felony murder – under our facts – would be the legal result.

In the New York case People v. Donovan, supra, which State of New Jersey in the Interest of J.R. and H.O., supra., quotes with approval since in New Jersey the felony/murder statute N.J.S.A. 2C:11-3a(3) is almost identical to the one found in the New York Penal Code, sets forth the meaning of "in the course of immediate flight."

> Distance and time alone…are not determinative of the issue of immediate flight. Moreover, the determination of when a predicate crime ends and whether a killing is committed in the course of immediate flight, is a matter properly left to the trier of fact, citing People v. Donovan, 385 N.Y.S. 2d 385, 389; and State v. Smith, 210 N.J. Super. 43, 40-51 (App. Div. 1986), certif. den. 105 N.J. 582.] [State in the Interest of J.R. and H.O., supra] (Emphasis added)

Also, flight from a robbery will be found "to be subject to the felony murder rule where defendant was in constructive possession of the fruits of the crime after the killing." State of New Jersey in the Interest of J.R. and H.O., supra citing People v. Irby, 61 A.D. 2d 386, 402 N.Y.S. 2d 847 (1978)

On our facts, there can be no doubt that Alongi, Kamienski and Marsieno were in possession of the fruits of the crime after the killing. [11T61-10 to 61-11]

Since Barbara DeTournay did not leave Jeffrey's hotel until after five o'clock [8T142-7 to 144-12], this would mean that the DeTournays were executed some time after five o'clock p.m. on the day that Barbara was picked up by the car linked to Alongi. Significantly, Kamienski only picks up Duckworth around dusk

when he knows that the DeTourneys are dead; he takes her to Alongi's house. [11T40-18 to 42-3] Significantly, neighbor Hunt sees Henry alive as late as six o'clock. (9T243-3 to 243-24) Kamienski tells Duckworth to wait in the house [11T42-4 to 43-8] because the robbery was ongoing and in progress. Concealment efforts by the felons were still ongoing at that point and bringing the fruits of the crime after the killing to a place of safety as well as concealment of the bodies is germane to the issue of concealment and to furtherance of immediate flight from the robbery/felony murders.

Clearly, the concealment efforts indicate a crime not yet complete. Alongi and Kamienski's behavior – for which they would later be rewarded – occurred in the course of the robbery. Therefore, Judge Perskie's hindering apprehension theory has no rational basis. See State v. Williams, supra.

In conclusion, Defendants' participation in the robbery/murders fulfilled all of the legal elements for felony murder. Under favorable construction, it was reasonable for a jury – on the basis of credible, inferential and circumstantial evidence to find the elements of felony murder as accomplices.

Further, even the trial judge, Judge Perskie, had no problem with the requirement of factual sufficiency regarding the murder and felony murder counts. The trial judge entered a judgment of acquittal in favor of Petitioners on the murder and felony murder charges only because he thought—erroneously

according to the Appellate division--that the verdicts were inconsistent, and that he erroneously charged the jury. Yet in his written opinion in support of his judgment of acquittal, he acknowledged that Petitioners' actions were "consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder". In fact, the judge also denied motions for acquittal elsewhere in the case, and he also found that a "rational basis" existed in the evidence to charge the jury on these crimes. The State refers this Court to Point I of its July 10, 1989 appellate brief at pages 40-43 on this issue.

This case involves several inferences from the facts adduced at trial. However, this is not a case where a fact finder was asked to speculate as to a single fact to create an inference of guilt with no other supporting evidence, where even after viewing the evidence in favor of the prosecution the evidence failed to preponderate in favor of the State. See Cosby v. Jones, 682 F. 2d 1373, 1383 (11th Cir. 1982) Rather, as thoroughly discussed above, this case contained a multitude of evidence which when viewed in its totality, in the light most favorable to the prosecution, permitted a rational juror to have found the defendant guilty beyond a reasonable doubt. Clearly defendant has not met his heavy burden to show otherwise.

POINT II: THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION'S REVERSAL OF THE TRIAL COURT'S J.N.O.V. WAS NOT AN UNREASONABLE APPLICATION OF FEDERAL LAW.

This court has thoroughly outlined the standard of review to be applied by this court to a State court decision in Jacobs v. Horn, 395 F.3d 92 (3rd Cir. 2005**):**

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d); *Marshall,* 307 F.3d at 50. A federal habeas court must presume that a state court's findings of fact are correct. *See* 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.*
>
> A state court decision is contrary to Supreme Court precedent under § 2254(d)(1) where the state court reached a " 'conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' " *Marshall,* 307 F.3d at 51 (quoting *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court decision is an unreasonable application under § 2254(d)(1) if the court "identifies the correct governing

> legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Gattis v. Snyder,* 278 F.3d 222, 228 (3d Cir.2002) (citing *Williams,* 529 U.S. at 407, 120 S.Ct. 1495). The unreasonable application test is an objective one-a federal court may not grant habeas relief merely because it concludes that the state court applied federal law erroneously or incorrectly. *Wiggins v. Smith,* 539 U.S. 510, 520-21, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Gattis,* 278 F.3d at 228.
>
> AEDPA's deferential standards of review do not apply "unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States." *Everett v. Beard,* 290 F.3d 500, 508 (3d Cir.2002). In cases where the AEDPA standards of review do not apply, federal habeas courts apply pre-AEDPA standards of review. *Id.* Prior to AEDPA, federal habeas courts conducted a de novo review over pure legal questions and mixed questions of law and fact. *Appel v. Horn,* 250 F.3d 203, 210 (3d Cir.2001). In such circumstances, the state court's factual determinations are still presumed to be correct, rebuttable upon a showing of clear and convincing evidence under § 2254(e)(1). *Id.*
> [Ibid.]

When arriving at its decision on the question of the sufficiency of the evidence, the appellate division relied on the standard announced in Jackson v. Virginia, supra. See, State v. Kamienski, 254 N.J.Super 75, 99 (App. Div. 1992) The State appellate court concluded "that the evidence against Alongi and

Kamienski was sufficient for any rational jury to find them guilty of felony murder and murders." Id. at 107.

> A federal habeas court may not grant relief under the "unreasonable application" clause unless a state court's application of clearly established federal law was objectively unreasonable; an incorrect application of federal law alone does not warrant relief. Keller v. Larkins 251 F.3d 408, 418 (C.A.3 (Pa.) 2001)

Therefore, for the reasons stated in the appellate division's decision, and for the reasons articulated above in this brief, the State court's decision must be given deference and was not an unreasonable application of federal law.

CONCLUSION

The evidence provided to the jury at trial in this case would permit any rational juror to have found the appellant guilty beyond a reasonable doubt, and the appellate division's decision finding the same was not an unreasonable application of established federal law. Therefore, the ruling of the United States District Court, District Court of New Jersey should be affirmed.

Respectfully submitted,

/s Samuel Marzarella

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that the lawyer listed below is admitted to practice before this Court.

/s Samuel Marzarella

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I hereby certify that this brief as provided to the Court in electronic form includes the same text as the hard copies of the brief filed by regular mail with the Court.

I hereby certify that the electronic version of this brief was scanned with Barracuda anti-virus software.

/s Samuel Marzarella

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Date: January 15, 2008 /s Samuel Marzarella

_____

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, I served two copies of the State's brief via electronic mailing and via regular mail to:

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