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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL KAMIENSKI, Petitioner,	:	
v.	:	Civil No. 02-3091 (SRC)
ROY L. HENDRICKS, et al. Respondents.	:	CIVIL ACTION
ANTHONY ALONGI, Petitioner,	:	
v.	:	Civil No. 02-3090 (SRC)
ROY L. HENDRICKS, et al. Respondents.	:	

BRIEF ON BEHALF OF RESPONDENT, THE STATE OF NEW JERSEY

SAMUEL MARZARELLA,
ASSISTANT COUNTY PROSECUTOR,
Of counsel and on the brief

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1T designates transcript of proceedings dated 10/18/88.
2T designates transcript of proceedings dated 10/19/88.
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PROCEDURAL HISTORY

On October 7, 1987 Defendants Joseph Marsieno (Marzeno) a/k/a Michael Testa, Anthony Alongi and Paul Kamienski were indicted by an Ocean County grand jury for acts committed on September 19, 1987 in the Township of Dover. Said Indictment is numbered 0692-10-87. Count One charges Defendants with purposely or knowingly causing the death of Henry DeTournay, contrary to N.J.S. 2C:11-3a(1)(2). Count Two charges Defendants with purposely or knowingly causing the death of Barbara DeTournay, contrary to N.J.S. 2C:11-3a(1)(2). Count Three charges Defendant Marsieno alone with purposely or knowingly, by his own hand, killing Henry DeTournay, contrary to N.J.S. 2C:11-3a(1)(2). Count Four charges Defendant Marsieno alone with purposely or knowingly, by his own hand, killing Barbara DeTournay, contrary to N.J.S. 2C:11-3a(1)(2). Count Five charges Defendants with causing the deaths of Henry DeTournay and Barbara DeTournay while engaged in the commission of a robbery, in violation of N.J.S. 2C:15-1. Count Six charges Defendants with conspiracy, between August 1, 1983 and April 30, 1984, to commit the crimes of possession of cocaine with intent to distribute, in violation of N.J.S. 2C:21-19a; and/or robbery in violation

of N.J.S. 2C:15-1; and/or murder in violation of N.J.S. 2C:11-3. Count Seven charges Defendants with conspiracy between August 1, 1983 and April 30, 1984, with each other and with H.D., B.D. and S.J., unindicted coconspirators to possess cocaine with intent to distribute contrary to N.J.S. 2C:21-19a(1). (See A1-4)

On July 15, 1988 the Supreme Court of New Jersey Ordered that the matter be heard in Superior Court, Ocean County by a judge to be designated by Assignment Judge Richard J. Williams of the Atlantic vicinage. (A58) On September 20, 1988, the Honorable Steven P. Perskie, J.S.C., of the Atlantic vicinage, Ordered dismissal of Counts Three and Four of the indictment charging Defendant Marsieno alone with purposely or knowingly, by his own hand, killing Henry DeTournay and Barbara DeTournay. (A57)

Defendants were tried to a jury, in an 18 day trial, between October 18, 1988 and November 18, 1988. (A29-35; A38-A44; A48-a53)

On November 18, 1988 the jury returned its verdicts. Defendant Marsieno was adjudged as follows: on Count One guilty of the murder of Henry DeTournay; on Count Two guilty of the murder of Barbara DeTournay; [Counts Three and Four concerning Marsieno alone previously dismissed]; on Count Five guilty of murder during the

commission of a robbery; on Count Six guilty of conspiracy to possess cocaine with intent to distribute; not guilty of conspiracy to commit murder; and not guilty of conspiracy to commit robbery; and on Count Seven guilty of conspiracy to possess cocaine with intent to distribute. (A5; A29)

As to the murder charges, namely Counts One, Two and Five (felony murder), all Defendants were adjudged guilty; however, Defendant Marsieno was found guilty as the principal in the murders while Defendants Alongi and Kamienski were found guilty as accomplices to the murders. (A29)

Defendant Alongi was adjudged as follows: on Count One guilty of the murder of Henry DeTournay; on Count Two guilty of the murder of Barbara DeTournay; on Count Five guilty of murder during the commission of a robbery; on Count Six guilty of conspiracy to possess cocaine with intent to distribute, but not guilty of conspiracy to murder and not guilty of conspiracy to commit robbery; and on Count Seven guilty of conspiracy to possess cocaine with intent to distribute. Alongi was found guilty as an accomplice to the murders charged in Counts One and Two. (A9, A38)

Defendant Kamienski was adjudged as follows: on Count One guilty of the murder of Henry DeTournay; on Count Two

guilty of the murder of Barbara DeTournay; on Count Five guilty of murder during the commission or a robbery; on Count Six guilty of conspiracy to possess cocaine with intent to distribute, but not guilty of conspiracy to commit robbery and conspiracy to commit murder; and on Count Seven guilty of conspiracy to possess cocaine with intent to distribute. On the murder charges, Counts One and Two, Kamienski was found guilty as an accomplice. (A13, A47)

On December 21, 1988 Judge Perskie entered judgments of acquittal in favor of Defendants Alongi and Kamienski on Counts One, Two, and Five; the murder and felony murder charges. Judge Perskie denied Defendant Marsieno's motion for acquittal. (A37, A47, A28) The Order memorializing that decision was signed by Judge Perskie on February 16, 1989 and filed with the County Clerk on March 10, 1989. (A17) Judge Perskie supplied the parties with a written decision in support of this action in which judgments of acquittal were entered on the murder and felony murder charges. (A22)

Defendant Marsieno was sentenced as follows: Count Five, felony murder, was merged with the murder charges of Counts One and Two; on Count One, murder, first degree, Defendant was sentenced to life with 30 years without

parole and a $100 penalty; on Count Two, murder, first degree, Defendant was sentenced to life with 30 years without parole and a $100 VCCB penalty. Said sentence was consecutive to the sentence on Count One. On Count Six, conspiracy to possess cocaine with intent to distribute, Defendant was sentenced to 12 years with six years parole ineligibility and a $25 VCCB penalty, to run concurrent with the sentences imposed on Counts One and Two. On Count Seven, conspiracy to possess cocaine with intent to distribute, Defendant was sentenced to 12 years with six years parole ineligibility and a $25 VCCB penalty. Said sentence was to run consecutive to the sentence on Count Six, but concurrent to the sentence on Counts One and Two. (A5, A28)

Defendant Alongi was sentenced as follows: on Count Six, conspiracy to possess cocaine with intent to distribute, to 12 years with six years parole ineligibility, $25 VCCB penalty and credit for 435 days already served in jail. On Count Seven, conspiracy to possess cocaine with intent to distribute, to 12 years with six years parole ineligibility and a $25 VCCB penalty and 435 days credit for time served in jail. The sentence on Count Seven is to run consecutive to the sentence on Count Six. (A9, A37)

Defendant Kamienski was sentenced as follows: on Count Seven, conspiracy to possess cocaine with intent to distribute, to 12 years with four years parole ineligibility and a $25 VCCB penalty as well as a $25,000 fine with 35 days credit for time served. On Count Six, conspiracy to possess cocaine with intent to distribute, Defendant was sentenced to 12 years with six years parole ineligibility, a $25 VCCB penalty, as well as a $25,000 fine, and credit for 35 days in jail. Said sentence is to run consecutive to the sentence on Count Seven. (A13, A47)

By amended notice of appeal dated April 3, 1989, the State appealed the judgments of acquittal in favor or Defendants Alongi and Kamienski on the murder and felony murder charges. (A18-27)

The original judgment of conviction was dated December 21, 1988, at which time the Hon. Steven Perskie, J.S.C. entered judgments of acquittal notwithstanding the verdict in favor of Defendants Kamienski and Alongi on Counts One, Two, and Five; the murder and felony murder charges. (See A 17 contained in the State's July 10, 1989 appeal brief). In a reported decision, the Appellate Division reversed that judgment and reinstated the jury verdicts on Counts One, Two, and Five and remanded to the Law Division for

sentencing. State v. Kamienski, 254 N.J.Super. 75 (App. Div. 1992), certif. denied 130 N.J. 186 (1992)

On July 7, 1992 Petitioner Kamienski filed a post-conviction relief petition alleging ineffective assistance of trial counsel. On November 11, 1992, this motion was denied. The Appellate Division affirmed the appeal, a petition for certification to the New Jersey Supreme Court was denied on January 27, 1994, and certiori was denied by the United States Supreme Court on May 23, 1994.

On April 10, 1997, Petitioners Kamienski and Alongi filed a joint petition for post-conviction relief.(536a-555a) On August 1, 1997 the Court denied the petition. (774a-775a). Petitioners appealed and on March 19, 1998 the Appellate Division ordered a temporary remand to explore the issue of recusal of the post-conviction relief judge. On remand the Trial Court denied the motion. (748a-749a)

Petitioners appealed that decision and on May 9, 2000 the Appellate Division remanded the matter to the Law Division for the limited purpose of the State responding to the allegations that witness Duckworth was offered a pre-trial promise of Pre-trial intervention in exchange for her testimony. (507a-514a). (Regarding Petitioners' arguments concerning the grand jury, the Appellate Division found them to be meritless. (514a)) On remand the Law Division

denied relief, see 770a, having considered the certification of the assistant prosecutor who tried the case, who was then the county prosecutor, see 751a-753a. On January 11, 2002 the Appellate Division affirmed, see 795a-806a, and on June 12, 2002 certification to the New Jersey Supreme Court was denied.

This action followed.

COUNTER-STATEMENT OF FACTS

PHYSICAL EVIDENCE

On September 24, 1983, a body was recovered from Barnegat Bay. 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)

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)

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 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. (6T156-12 to 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, New Jersey with the number 201-483-9617. (7T112-12 to 112-23)

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

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.

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. (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 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)

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." 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 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 Septmeber 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' house that same

evening. Parenthetically, it should be noted that Henry, at some point on September 9th, 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 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, who owned a boardwalk concessions business in Seaside, New Jersey, and who knew Defendants socially and through drug use – Alongi being his "main supplier" (15T47-6 to 51-11) – testified on behalf of the State. After Spring 1983, Marsieno, Alongi and Kamienski, as well as Jackie Sullivan and Donna Duckworth,

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, Lehman visited Marsieno's house on previous instructions for the purpose of buying Cocaine. Marsieno 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 certain cocaine which he brought up 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 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, he 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. 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)

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 individual'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 relations, 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 Defendant 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 before Monday, September 19, 1983. 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 she 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 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).

At this time, there was a drastic change in 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 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, [see S-31 in evidence – a photo of Henry]

> 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)

[The trial judge limited this testimony to the case against Marsieno only. (See 16T33-5 to 33-7)] 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. [This statement was also limited to the case against Marsieno.] (16T34-1 to 34-10)

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.

Regarding the facts of Petitioners' post conviction relief applications, Respondents rely on the opinion of the Appellate Division found at 795a-806a.

POINT I

NONE OF THE STATE COURT DECISIONS NOW COMPLAINED ABOUT WERE CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ENNUNCIATED IN A HOLDING OF THE U.S. SUPREME COURT AS OF THE TIME OF THE RELEVANT STATE COURT DECISION, AND PETITIONERS HAVE NOT OVERCOME THE APPLICABLE STANDARD OF REVIEW.

In Williams v. Taylor, 529 U.S. 361, 383 (2000), the United States Supreme Court made clear that "habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." Williams v. Taylor interpreted 28 U.S.C. § 2254 (d) (1),

which provides that a state prisoner whose claim as been adjudicated on the merits in the state courts may obtain federal habeas relief only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The phrase "clearly established Federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Id. at 412.

According to the Court, a state court decision will be contrary to established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in the Court's cases" or "if the state court confronts a set of facts that are materially indistinguishable from" those underlying a Supreme Court decision and nevertheless arrives at a result different from Supreme Court precedent. Id. at 406; Jermyn v. Horn, 266 F.3d 257, 281-82 (3d Cir. 2001); Haymeen v. Delaware, 212 F.3d 226, 235 (3d Cir. 2000), cert. denied, 532 U.S 924 (2001). "[A] run-of-the-mill state-court decision applying the correct legal rule from [the Court's] cases to the facts of a prisoner's case would not fit comfortably within § 2254 (d) (1)'s 'contrary to' clause," however. Williams v. Taylor, 529 U.S. at 406.

To be deemed an unreasonable application of clearly established Supreme Court case law, the state court's application must be "objectively unreasonable." Id. at 409-10; Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001). A federal court may not grant habeas relief because in its independent judgment the state court decision applied the law "erroneously or incorrectly"; the application must also be unreasonable. Id. at 410; Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir.), cert. denied, 123 S.Ct. 660 (2002). An "unreasonable application of federal law is different from an incorrect application of federal law." Williams v. Taylor, 529 U.S. at 410. "Objectively unreasonable is not to be defined to mean only 'clear error' as this construction fails to give proper deference to the state courts; the application of law by the state courts must also have been unreasonable." Lockyer v. Andrade, __ U.S. __ 123 S.Ct. 1166, 1174-75 (2003); Williams v. Taylor, 529 U.S. at 410; Gattis v. Snyder, 278 F.3d at 228. Indeed, "'[a] contrary holding would amount to de novo review which [the Third Circuit Court of Appeals has] held is proscribed by the AEDPA.'" Gattis v. Snyder, 278 F.3d at 228 (quoting Werts v. Vaughn, 228 F.3d at 197); see Lockyer v. Andrade, 123 S.Ct. at 1172 (disagreeing with the approach of the Ninth Circuit which

required its federal habeas courts to review the state court decision de novo before applying to the AEDPA standard of review).

Finally, the state court's factual findings are presumed to be correct unless petitioner sustains his burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see Meyers v. Gillis, 93 F.3d 1147, 1149 n.l (3d Cir. 1996)

POINT II
THE STATE'S EVIDENCE WAS LEGALLY SUFFICIENT FOR PETITIONERS' CONVICTION FOR MURDER; THE PRESENT CLAIM TO THE CONTRARY IS NOT COGNIZABLE IN THIS COURT

Significantly, in the original and supplemental petition, as well as Point II of Petitioners' Joint Brief, it is claimed that "the evidence was not legally sufficient to establish Petitioners' guilt, as accomplices, of murder . . . . The Appellate Division's decision involved **an unreasonable application of the law** in that it drew inferences from the evidence to establish Petitioner's guilt as accomplices that no rational trier of fact would have drawn." (emphasis mine).(See Pb p. 32-33) Petitioners

conclude, "under New Jersey law, **the evidence was not legally sufficient** to establish Petitioner's accessorial liability. . . ." (Pb p. 48.) (emphasis mine)

The entirety of these arguments concerning sufficiency of the evidence present no federal issue at all. Petitioners are not arguing that the State produced no evidence on the question of accomplice liability. Rather they argue the inferences were "unreasonable" and not "legally sufficient" to establish accessorial liability.

Of course Jackson v. Virginia, 443 U.S. 307 (1979) requires that States act on the basis of sufficient evidence. However;

> [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 mine)

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. (emphasis mine)

Thus, Petitioners have presented no federal claim with regard to their complaints of insufficient evidence.

Nevertheless, addressing the claim, the jury's verdicts of guilty to murder and felony murder were indeed supported by sufficient evidence as so found by the Appellate Division. 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). The State will rely on the Appellate Division's opinion and the following argument which is substantially similar to the argument contained in the state's brief on appeal submitted

herewith, factual statement at pp. 6-40, Point II, pp. 44-66, and Point III, pp. 67-83)

Accomplice Liability

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 or 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)

State v. Gelb, 212 N.J. Super. 582 (App. Div. 1986), certif. den. 107 N.J. 633 (1987), 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" [citing State v. Fair, supra, 45 N.J. at 95 (Emphasis omitted). Id. at 591.

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: 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 can show the existence of more than a scintilla of evidence, viewed favorably, of a purpose to promote or facilitate the crime of murder, shared intent, as well as indirect participation. At the very least, the State can show presence at the scene coupled with the required "other circumstances" from which permitted the jury to make the various inferences bearing

on a purpose to promote or facilitate and the requisite shared intent.

A) Presence at the Scene

Both Alongi and Kamienski 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. Moreover, viewed most favorably to the State, the jury could have believed Hunt, who said 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 also 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 intimate knowledge of the criminal episode by Kamienski. On the date this statement

was made, it was not possible for the Prosecutor's Office to know of a second body not yet discovered.

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 testimony. State v. Muniz, supra 150 N.J. Super. at 445.

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. (11T 67-20 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. (12T 114-10 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, it is easily concluded that Kamienski was present at the scene.

B) Other Circumstances

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

The drug deal was never intended to occur; Defendants duped the DeTournays into thinking it would occur by lying about having trouble getting the 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)

At the September 18th failed deal at the Holiday Inn, Marsieno told Yurcisin "he would be carrying." Inside Mariseno's briefcase was a gun without a "tumbler", similar to a 9mm semi-automatic parabellum pistol which likely 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)

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)

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 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 – which concerned more sinister

motives, while the DeTournays stood ready, willing and able to perform their part of the deal.

The record reveals Defendants' understanding of the word "deal" which apparently differed from the meaning the DeTournays ascribed to it. 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, absent discovery by the police. Had a robbery occurred, things would have not gotten hot since the DeTournays could not report it to the authorities. This "deal" was understood be 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 the Colombian suppliers.

Premeditation:

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) 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 Alongi, as well as the other 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" following the failed deal of September 18th and 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 by boat on September 5th. Rather, this relationship was based on distrust and suspicion, the respective parties having required a voucher from Kamienski.

Kamienski also exhibited premeditation. He knew this "deal" would be much more than a drug deal – he knew it would be murder in advance of its occurrence. His actiosn 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 well. He knew she would be devastated by 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 be being told 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) Having established the pattern, we observe the fact that 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,

compelled to drive, 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 away from a public to a private place – from the Holiday Inn, the site of the September 18th failed meeting – to Alongi's house 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 rather than having the driver meet her. (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 Defendants had an interest in keeping the Colombians or anyone else with the capacity to supply three kilos of Cocaine, 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) She had to have seen it before – perhaps at the previous day's failed meeting at which Alongi was present, (11T37-17 to 39-8) or when Kamienski took the DeTournays to Alongi's house by boat on September 5th when the vouchers were made, (11T23-12 to 25-6) or perhaps it was described to her. Nevertheless, 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, away from the Holiday Inn where the DeTournays were safe.

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 reactions resulted from adherence to Defendants' formulations; her description 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 or 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 most 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 until the 23rd when perhaps Marsieno came back from Newark and 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 intwined, 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. Parenthetically, Defendants were unlikely to execute those threats to remove a witness against them being mindful that the death of Kamienski's live-in girlfriend could, in effect, wash up on Kamienski's doorstep. Thus, Kamienski's inability to save Duckworth "or himself" may be seen in that context; since Kamienski had various interests in keeping his girlfriend alive, his claim to her that his life as well as hers could be jeopardized, was a most effective technique of keeping her a silent witness.

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 Alogngi 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 shared 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 supplied.)

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, apparently without complaint. 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 vodies.) (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, and as such, bears on the nature of the concerted action among all.

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 (11T37-17 to 39-8) and 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 may or may not have gotten a full share but if not, he may have been disinclined toward protest. He sought a grinder to make the rock into powder. (11T62-7 to 62-12)

It must be said that even without a favorable construction, the jury could have easily inferred that

Alongi and Kamienski, at least as accomplices, hunted with the pack, in order to share in the kill.

"ANY" RATIONAL FACTFINDER COULD HAVE PROPERLY FOUND PETITIONERS GUILTY OF FELONY MURDER AS ACCOMPLICES TO A ROBBERY

The State wishes to adopt the arguments set forth above in whole or in part, to the extent applicable to accomplice liability in the robbery and felony murder context. Of course the State needs to show, under a favorable construction, that any rational fact-finder could have found a purpose to promote or facilitate a robbery rather than murder; and shared intent; as well as a death of a non-participant. Thus we ask this Court to remain mindful of the arguments concerning presence at the scene; the intention of Defendants to pay the DeTournays no money and supporting argument; premeditation and supporting argument; plan and supporting argument; and concerted action and supporting argument. Some of these arguments will nevertheless be revisited below.

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 from) 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 supplied)

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 being done 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, and is murder committed in the perpetration of 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., N.J. Super (Law Div. 1989) 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 Jersey Penal 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'e 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, N.J. Super (Slip op. at 5-6)]

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 most recent pronouncement of this court in State v. Whitted, N.J. Super. (App. Div. 1989) (Slip Op.)

N.J.S.A. 2C:11-3a(3) – the New Jersey felony murder statute – begins with an element involving the commission fo 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.

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).

State v. Martin, supra, 213 N.J. Super. 426 (App. Div. 1986) states 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. In 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)

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) Defendant Alongi's number was also found in Henry DeTournay's wallet. (7T162-2 to 163-21). 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.

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 Mariseno. 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) Sidney Jeffrey was the courier who, in fact, delivered from Florida three kilos of Cocaine to the DeTournays shortly before their deaths. (8T152-7 to 155-24)

Defendants Marsieno and Alongi would also tell Arthur "Buddy" Lehman – who had complained about the lack of potency of Cocaine in previous purchases – that within a week they would have access to "kilo quality coke" for about one thousand dollars less an ounce that Lehman had been paying." (15T59-1 to 59-14)

Alongi described this coke to Lehman as South Florida coke. [15T60-2 to 60-8] Sidney Jeffrey, III, the courier of

the Cocaine, had brought it from Florida to Henry DeTournay for the purpose of sale and distribution. (8T136-12 to 136-17) It is obvious that Marsieno's reference to Yurcisin of a Cocaine deal involved a transaction in which Alongi, Marsieno and Kamienski would be participants.

Jean Yurcisin supplies the nexus for an understanding of the fact that the drug deal degenerated into 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, 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 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. Duckworth 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 sane 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.

Alongi and Kamienski had the requisite intent to commit the robbery; this may be inferred from Alongi's deman for his "share" for his participation – in which Marsieno accused him of not doing his job properly. [15T347-8 to 349-18; 16T34-1 to 34-10]

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. [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, N.J. Super. (App. Div. 1989) (Slip Op. at p.5) 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 . Williams, supra (Slip Op.) 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." (Slip Op. at 5)

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 technically still in progress when Alongi and Kamienski were seen by Duckworth at the crime scene. [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, (Slip Op. at 6)] (Emphasis supplied)

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 (Slip. Op. at 6) 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 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.

Petitioner further argues that the jury instruction on accomplice liability was improper. However, under federal law, "[a]s a general rule, jury instructions do not form a basis for habeas corpus relief." Williams v. Lockhart, 736 F.2d. 1264, 1267 (8th Cir. 1984)

Furthermore, as stated by the Appellate Division:

> The jury was instructed that, under the indictment and the evidence, the State contended that Marzeno was the triggerman who killed the Detournays and that Alongi and Kamienski acted as accomplices and/or conspirators. The jury was instructed further that for either one to be an accomplice, he must act with the purpose of promoting of facilitating the substantive crime of robbery, murder or felony murder regardless of whether the conduct under scrutiny occurred before, during or after the crime. The jury was instructed that the mere presence of Alongi and Kamienski at the scene of the Robbery and killings was ***not sufficient*** to convict, but such circumstances could be considered in conjunction with all other evidence. [Kamienski, at 85. (emphasis in original)]

The jury charge was not erroneous, the trial judge properly instructed the jury and took time to distinguish between conspiracy and accomplice liability through example. In assessing the jury charge the Appellate Division correctly concluded:

> Considering the jury instructions in their entirety, we conclude that the jury was not informed that it could convict Alongi or Kamienski of murder based solely on helping to dispose of the bodies. Indeed the charge always clearly informed the jury it was obligated to consider all of the evidence and the surrounding circumstances in deciding whether Alongi and Kamienski aided or assisted Marzeno in robbing and killing the

> Detournays and whether they acted with the same purpose as did Marzeno. [Kamienski, at 87.]

In any case, even if this Court were indisposed toward the view that Petitioner' are attempting an end run around Jackson v. Virginia, nevertheless, Petitioners have utterly failed to overcome the standard of review to be applied on this issue.

POINT III

THE JURY SELECTION PROCESS WAS PROPER

Petitioner, in his original petition, raises claims about the propriety of the jury selection process. The Appellate Division addressed each of Petitioner's arguments which were raised before it in a discrete manner; i.e., that the Judge conducted an improper voir dire; that the sequential method employed in the exercise of peremptory challenges was unfair because Defendants could not make a proper evaluation of which juror to challenge. These were the only claims raised before the Appellate Division and therefore the only claims cognizable here. The remaining claims are not exhausted.

Indeed, for a claim to be exhausted, the claim must be raised at all levels of the New Jersey courts. Moore v. Morton, 255 f.3d 95, 103 n. 7 (3d Cir. 2001). Thus the entire petition must be dismissed. Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999), quoting Rose v. Lundy, 455 U.S. 509, 510, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

Respondents attempt to show there was a violation of federal law on this issue via citation to lower federal court cases, many which were not written at the time of the decision in this case. This is fatal to his position. "[T]he phrase 'clearly established federal law as determined by [this] Court' refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 365 (2000) Petitioners have cited no relevant Supreme Court holdings.

In any case, Petitioners have not overcome the standard of review applicable to this issue. Petitioners have not shown that the state court rule which was applied "contradicts the governing law set forth in the [Supreme] Court's cases" or that a set of facts were "materially indistinguishable" from the underlying Supreme Court decision and nevertheless the state court reached a

different result. Williams v. Taylor supra, at 406; Jermyn v. Horn 266 F.3d 257, 281-282 (3d Cir. 2001).

Further, even if there were "clear error", Petitioners have failed to show that application of the rule was an "objectively unreasonable" application of a holding of a Supreme Court case. Lockyer v. Andrade, supra, 123 S.Ct. at 1174-1175; Williams v. Taylor, supra, at 410.

With respect to the arguments contained in Petitioner's original petition, Respondents rely upon part IV of the decision of the Appellate Division which ably disposed of the issues raised before it. Kamienski, supra at 107-113.

Regarding the additional argument contained in Petitioner's supplemental petition, These are state law questions. The decision as to whether to sequester a jury in a non-capital case is left to the trial judge's discretion. State v. Sullivan, 43 N.J. 209, 239-240 (1964), cert. denied., 382 U.S. 990 (1966). However, the purpose of voir dire was thoroughly explained to the jury and they were not tainted by statements made in open court. The Appellate Division's examination of the statements and its decision regarding them was well reasoned: "The alleged damaging responses given by prospective jurors during *voir dire* related to the experiences of family members with drug

problems, some of which were even fatal. But unfortunately, that is the reality of the society in which we live today." Kamienski, supra at 109.

As for the "sequential method" of jury selection, this is also a state law question and presents no federal issue for this Court. In any case, the judge made it clear that if an attorney passed on a challenge, he did not waive his right to exercise a peremptory challenge on the next round. The argument that the peremptory challenges then had to be used "in a vacuum, not knowing what is coming up next" is without merit. As stated by the Appellate Division, "the failure of counsel for Alongi and Kamienski to exercise more of their peremptory challenges during the 28th round when 14 prospective jurors were seated in the jury box, is clearly indicative that counsel did not truly feel that the procedure was prejudicial or that the jury was not impartial." Kamienski, at 112. The fact that Petitioner had a full jury panel with challenges remaining and did not exercise them illustrates the desperate nature of Petitioner's argument.

IV. PETITIONERS HAVE FAILED TO SHOW THAT BRADY MATERIAL WAS SUPPRESSED BY THE STATE AND HAVE NOT OVERCOME THE STANDARD OF REVIEW APPLICABLE TO THIS CASE

Petitioners claim that they presented "compelling evidence" that the witness Donna Duckworth had "at least an informal understanding, with a member of law enforcement" that she would receive leniency in her sentence on a prior drug plea for her testimony against Petitioners in the case at hand.

Petitioners contend that because Duckworth did in fact receive admission into a pre-trial intervention program, that she must have had some *quid pro quo* with the State. The State courts of New Jersey rejected this argument. Interestingly, although Petitioners cite federal law to the effect that promises made to a witness in exchange for the witness's testimony qualify as Brady material, Petitioners have yet to establish, after years of effort, that any promises were made.

The Appellate Division, considering one of Petitioners' motions for post conviction relief, remanded the matter to the Law Division to determine whether such an agreement existed. They did so only through "an excess of

caution" as they later explained. (see). In response to the remand, then Assistant Prosecutor E. David Millard submitted a certification regarding he matter. (751a-753a) In his certification he stated, "At no time did I make any promises, deal or otherwise induce Ms. Duckworth to testify against Kamienski and Alongi. I am further unaware of any deals, or promises made by anyone else to induce Dona [sic] Duckworth to testify." (752a) He also states:

> I agreed to Duckworth's entry into P.T.I. This decision was not based on any deal or prior agreement. Rather, on balance in the interests of justice, I believed it was the just course of action. Over the course of the prosecution we had come to understand the extent to which Kamienski had dominated and used Duckworth. I felt she was in a sense a victim of the overall situation.(see 753a)

The certification not only stated that he did not believe there were any agreements, but also gave reasons as to why she was admitted into P.T.I.

Further, the statements made by Millard in his June 15, 2000 certification are entirely consistent with the record that was made at trial in November 1988. Indeed, during the direct testimony of Duckworth, a side-bar conference was held with the Judge concerning evidence Millard wanted to present about Duckworth's plea to the drug charges. Specifically, Millard wished to present her testimony that the drugs were found on Kamienski's boat,

and that Kamienski pressured Duckworth into taking the "weight" for him. He argued before the Trial Judge, "Her answer is going to be that Paul told her to take the plea. . . .he told her to take the weight. . . .They were both charged with the drugs and she's taking the weight for him. . . . That's significant." Millard's persistence in the face of the Judge's hesitancy to admit the testimony is memorialized in 4 pages of transcripts. see 11T 75-16 to 78-22. Ultimately this testimony was not permitted. The only testimony that was received on direct was that Duckworth pled guilty to the drug charge, that she had not yet been sentenced on it, and that no promises whatsoever were made to her concerning her plea.

Significantly, the crux of Petitioners' present argument is that Millard's certification is insufficient because he certified "he" was unaware of any deals or promises made for Duckworth's testimony, which, it is claimed, does not foreclose the possibility of anyone else making such promises. Yet, had Petitioners consulted the trial record they would no doubt have taken comfort in a broader construction satisfying to them;

> Q. [By Mr. Millard] Has **the State** promised you anything or made any representations to you in any fashion

> as to what would happen or what they would do in terms of that?
>
> A. No
>
> Q. That plea?
>
> A. No, they haven't. [11T 79-5 to 79-12] (emphasis mine).

Duckworth was extensively cross-examined on this issue.

Millard's certification, made years after the trial, is consistent with the record made at trial; he always believed Duckworth was manipulated by Kamienski, that she was "dominated and used" by him, and that she was a victim in that sense. Thus, the Appellate Division decision was correct, the record was clear and relief should not be granted.

In any case the Petitioners have failed to overcome the standard of review applicable to this issue.

V. PETITIONER KAMEINSKI'S RIGHTS TO A FAIR TRIAL WERE NOT AFFECTED BY THE DENIAL OF HIS SEVERENCE OR MISTRIAL APPLICATION INASMUCH AS HIS PRESENT POSITION DOES NOT FALL WITHIN THE HOLDING OF BRUTON, HE HAS NOT DEMONSTRATED THAT SEVERENCE IS A CONSTITUTIONAL RIGHT THE DENIAL OF WHICH IS REMEDIABLE IN A HABEAS ACTION, AND THERE WAS NO PREJUDICE PER HIS OWN TESTIMONY

Petitioner Kamienski argues that the denial of his severance motion was fundamentally unfair based upon a Bruton problem. He complains;

> At the trial, Donna Sue Duckworth testified about a telephone conversation between Petitioner Kamienski and Nicholas DeTournay. . . . According to Duckworth, Petitioner Kamienski told DeTournay that "he didn't have a scale [to weigh drugs] and to get off [his] boat." (PB 70)

Petitioner points out that originally that statement included a reference to Alongi who was on the boat with Nick, but that the reference to Alongi was deleted. He claims the significance of the deletion to be that when Duckworth actually testified, Kamienski's Counsel, Thomas Cammarata, Esq., was unable to cross-examine Duckworth about another person being on the boat. Cammarata made a mid-trial severance motion claiming he was "in a severe bind" because he could not show "two people had access to the boat". (Pb 71).

Petitioner claims this was significant because Duckworth identified certain items, blankets, sleeping bag, and towel, "as items being **similar** to items" she had seen on Kamienski's boat. (Pb 71) He points out the Appellate Division mentioned that "Duckworth also testified that the

towel and blankets found wrapped around the bodies were **similar** to the one she had seen on Kamienski's boat before the murders." 254 N.J. Super. at 103. Thus, Petitioner argues, Kamienski could not, via cross examination,

> [r]ebut the inference about those items[.] Petitioner Kamienski needed to show that other persons, including Petitioner Alongi, had access to and boarded his boat without his permission and may well have taken those items from Petitioner Kamienski's boat. (Pb 72).

In Petitioner's view, this would have prevented the "circumstantial link" between the murders and Kamienski. (Pb 72) This "evidentiary linkage" approach to Bruton questions has been specifically rejected by the U.S. Supreme Court in cases which properly fall within the scope of Bruton—which ours does not. Indeed, evidence requiring linkage differs from evidence incriminating on its face and falls outside the scope of Bruton. Richardson v. Marsh 481 U.S. 200 (1987). Indeed, "when a codefendant's extrajudicial statement does not directly implicate the defendant. . . the Bruton rule does not come into play." United States v. Belle, 593 F.2d. 487, 493 (3d Cir. 1979) (en banc). We shall return to this in detail below.

For purposes of habeas corpus proceedings, the United States Supreme Court has identified for us the precise

holding of Bruton. In Nelson v. O'Neill 402 U.S. 622, 91 S.Ct. 1723 29 L.Ed. 2d 222 (1971) the Supreme Court said;

> The specific holding of the Court in Bruton was; "Plainly the introduction of (the codefendant's) confession added substantial, perhaps even critical, weight to the government's case in a form not subject to cross-examination, since (the codefendant) did not take the stand. Petitioner was thus denied his constitutional right of confrontation." [citing Bruton] 391 U.S. at 127-128, 88 S.Ct. at 1623. This Court has never gone beyond that holding. [Nelson v. O'Neill 402 U.S. 622]

This case presents no Bruton question; there was no non-testifying codefendant's confession naming Petitioner as a participant in the crime which was introduced at trial.

Assuming *arguendo* there is some argument with a measure of potency which could be pressed in the context of severance, the United States Supreme Court, in a long line of cases, has consistently recognized that the decision whether to grant a severance is a matter for the trial court's discretion, not a right of a criminal defendant, and the court's disposition of a motion for severance is reviewable only for an abuse of that discretion. See United States v. Marchant, 25 U.S. (12 Wheat.) 480, 486 (1827);(Story, J.) ("where two or more persons are jointly

charged in the same indictment. . . such persons have not a right, by the laws of this country, to be tried severally, separately, and apart. . . but such separate trial is a matter to be allowed in the discretion of the court before whom the indictment is tried.") See also United States v. Ball, 163 U.S. 662, 672 (1896); Stilson v. United States, 250 U.S. 583, 585-586 (1919); Opper v. United States, 348 U.S. 84, 95 (1954) United States v. Lane, 474 U.S. 438 (1986). Interestingly the case cited in petitioner's brief, Zafiro v. United States, 506 U.S. 534 (1993) is the latest addition in the line of cases cited above so it actually hurts rather than helps Petitioner. Indeed, that case does not suggest that denial of a severance motion is a right cognizable in a habeas corpus petition. Rather, it reaffirms the deference given a trial court on its finding regarding a severance motion. Further, Zafiro observes the "low rate of reversal" of these issues, even where there are "mutually antagonistic defenses" present. Id, at 538. Petitioner's position is meritless.

Again, assuming *arguendo* Bruton applied to this situation, the U.S. Supreme Court has decided a habeas corpus case involving "whether Bruton requires [reversal] when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is

nonetheless linked to the confession by evidence properly admitted against him at trial." Richardson v. Marsh, 481 U.S. 200 (1987). The U.S. Supreme Court observed that evidence requiring linkage differs from evidence incriminating on its face and falls outside the scope of Bruton. Richardson v. Marsh 481 U.S. 200 (1987). The rule crafted by the court is; "We hold that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. at 211. Thus, Bruton can not be applied here.

Considering the facts, it must be pointed out that all counsel consented to the redaction. (3T 64-4 to 68-19); (10T 96-18 to 98-5). Further, the redaction would have not influenced the link between Kamienski and the murders given the strength of the other evidence linking him to the murders as well as his own testimony on these issues. See discussion above. Finally, Kamienski himself testified directly on these matters. The testimony reveals there was no prejudice whatsoever on this point.

He insinuates now in hindsight that he was prejudiced because the removal of Alongi's name from the statement

prevented him from arguing that others had access to the boat---and therefore the items found on the bodies. In other words, he wanted to argue those items were stolen from his boat. Yet, at trial, he testified;

> Q. Did you have---showing you now, I think it's S-11A and B, if I'm not mistaken—
>
> * * * *
>
> Q. Did these blankets come from your boat?
> A. No they didn't. [18T 210-22 to 211-4].[1]

Certainly to take the position at trial that the items were stolen from his boat would be contrary in every respect to his testimony on direct; the items did not come from his boat. Thus, someone could not have taken them from the boat. We direct this Court to Marsh which cautions that in "linkage" cases such as ours, the practical effect of attempting to apply Bruton, "lends itself to manipulation by the defense." Id at 481 U.S. 209. Petitioner's present position is such an attempt.

Yet it gets even worse for Petitioner factually. Kamienski himself established the fact that others did indeed have access to his boat when he was not there;

> Q. And you don't like people to be on your boat when you're not there; is that correct?

[1] See 18T 230-12 wherein Kamienski denies that a certain towel, denoted S-8 in evidence, came off his boat. See also 19T 79 wherein he denies the blanket came from his boat or his funeral home. See also 19T116 were it is suggested that these types of blankets are used commonly—at Holiday Inns.

> A. No, I don't mind people being on my boat when I'm not there. [19T 47-6 to 47-9]

Finally, Kamienski foreclosed any possibility whatsoever of prejudice on this point;

> Q. [Prosecutor] Let me ask you one other question about that phone call that you got back up in Garfield regarding the scale. **Did Nick tell you who was with him?**
> **MR. RUSSELL: Objection Your Honor.**
> THE COURT: **Overrulled.**
> **A. No, he did not.** [19T52-11 to 52-24](emphasis mine)

Thus, Kamienski had been given a clear opportunity to tell the jury that Alongi was on his boat with Nick, if he was so disposed. He declined to do so and is foreclosed from complaint now. We note that no proffer of testimony contrary to the above was made, so there is nothing in the record to suggest error.

Regarding Petitioner's "lifestyle" argument, we contend that it is meritless. Everything elicited by the Prosecutor on cross examination was first brought forward by Kamienski on direct. Regarding the issue of money or income, see e.g. 19T 26-15 to 26-18. Regarding the issue of drugs, see e.g. 19T 19-4 to 19-13.

As for Petitioner's argument concerning whether the pre-AEDPA standard of review applies, that argument is easily disposed of via Marshall v. Hendricks, 307 F.3d, 36

(3d Cir. 2002), which observes that the pre-AEDPA standard only applies if the standards by which the question was originally measured are inconsistent with federal law. Such is not the case here. Petitioner has not met the applicable standard of review in this case.

VI PETITIONER HAS NOT SHOWN THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next contends that he was denied the effective assistance of trial counsel. It is clear, however, that petitioner is unable to establish this claim. A habeas petitioner seeking relief on the basis of alleged ineffective assistance of counsel must "'affirmatively prove prejudice.'" Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) (quoting from Strickland v. Washington, 446 U.S. 668, 693 (1984)). It is the petitioner's burden to establish "that the state court applied *Strickland* in an objectively unreasonable manner." Woodford v. Visciotti, 123 S. Ct. 357, 360 (2002). A state prisoner must establish not only that his attorney did not provide "reasonably effective assistance," Strickland v. Washington, 466 U.S. at 687, but that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694; Zettlemoyer v. Fulcomer, 923 F.2d 284, 297-98 (3d Cir.), cert. denied, 502 U.S. 902 (1991); Lewis v. Mazurkiewicz, 915 F.2d 106 (3d Cir. 1990); United States v. Gray, 878 F.2d 702, 710-11 (3d Cir. 1989). There is a strong presumption that defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. at 690; Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996); Jones v. Jerrison, 20 F.3d 849, 857 (8th Cir. 1994); Reese v. Fulcomer, 946 F.2d 247, 257 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). Habeas relief is not available unless a prisoner "affirmatively establishes the likelihood of an unreliable verdict." McAleese v. Mazurkiewicz, 1 F.3d 159, 166 (3d Cir.), cert. denied, 510 U.S. 1028 (1993); accord, United States v. Cronic, 466 U.S. 648, 659 n.26 (1984). "'Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.'" Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (quoting United States v. Cronic, 466 U.S. at 658); Strickland v. Washington, 466 U.S. at 689. Only the "rare"

claim of ineffective assistance of counsel will succeed. United States v. Gray, 878 F.2d at 711. Indeed, under 28 U.S.C. § 2254(d)(1), "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, [the petitioner] must show that the [state high court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843, 1846 (2002).

Finally, state court factual findings made in the course of deciding a claim of ineffective assistance are presumed to be correct, unless the state prisoner rebuts them by clear and convincing evidence. 28 U.S.C. § 2254 (e) (1); McAleese v. Mazurkiewicz, 1 F.3d at 166, 168; Deputy v. Taylor, 19 F.3d 1485, 1494-95 (3d Cir. 1994). Implicit findings of fact are tantamount to express findings and, thus, are entitled to the same presumption. Campbell v. Vaughn, 209 F.3d 280, 285-86 (3d Cir.), cert. denied, 531 U.S. 1084 (2000) (citing to Parker v. Raley, 506 U.S. 20, 35 (1992), Marshall v. Lonberger, 459 U.S> 422, 432-33 (1983), LaVallee v. Delle Rose, 410 U.S. 690, 692 (1973) (per curiam)).

Respondent shall rely upon its brief dated April 16, 1990 which is submitted herewith and which was filed as a

response by the State to Petitioner Alongi's appeal to the Appellate Division. Specifically, we rely on "Point I" of that brief found at pages 40 through 46.

The Appellate Division found this contention to be without merit. Thus, it is presumed that the Appellate Division's implicit findings of fact that Petitioner's claims were meritless are correct. Accordingly, petitioner has failed to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694; Zettlemoyer v. Fulcomer, 923 F.2d at 297-98; Lewis v. Mazurkiewicz, 915 F.3d 106; United States v. Gray, 878 F.3d at 710-11.

As for Petitioner's argument concerning whether the pre-AEDPA standard of review applies, that argument is easily disposed of via Marshall v. Hendricks, 307 F.3d, 36 (3d Cir. 2002), which observes that the pre-AEDPA standard only applies if the standards by which the question was originally measured are inconsistent with federal law. Such is not the case here. Petitioner has not met the applicable standard of review in this case.

KAMIENSKI'S "SUPPLEMENTAL PETITION"

Preliminary Matters

It must be noted that this Court has ruled that grounds 12E and 12F of Kamienski's amended petition be stricken.

Regarding Petitioner's supplemental petition, first, Petitioner cites no law in support of his petition—and he cites no facts either. Mere conclusory allegations of constitutional deprivation are insufficient to establish entitlement to federal habeas relief. James v. Borg, 24 F.3d. 20, 26 (9th Cir.) certif.. denied 513 U.S. 935 (1994); Schlang v. Heard, 691 F.2d 796, 799 (5th Cir. 1982), appeal dismissed and certif.. denied, 462 U.S. 951 (1983) McCoy v Lynaugh, 714 F.Supp. 241, 246 (S.D. Tex.), aff'd 874 F.2d 954 (5th Cir. 1989) This is not claimed to be a pro se petition. See Estelle v. Gamble 429 U.S. 97 (1976). Petitioner's broad non-specific assertions devoid of facts and law establish no claim for habeas relief.

Second, Petitioner has not met his burden to demonstrate that his claims in his supplemental petition have been exhausted. O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, (1999); Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002). His entire petition must therefore be dismissed.

Regarding the standard of review to be applied to Petitioner's claims, see Point I of Respondent's brief. Petitioner has not overcome the standard of review to be applied to his claims, and he does not argue that he has. He therefore has failed to establish a federal claim.

THE MERITS OF THE SUPPLEMENTAL PETITION

12A (1) and 12A (2). Regarding the claim of insufficient evidence and improper jury charge, see Point II (A) and Point II (B) of Respondent's brief, along with the statement of facts in that brief, as well as the Appellate Division's reported decision in State v. Kamienski, 252 N.J. Super 75 (1992).

12A (3) Petitioner Kamienski, in his supplemental petition, claims that the trial court failed to charge a lesser-included offense as well as a defense to felony murder. Significantly, these claims have not been raised in any State court proceeding and therefore have not been exhausted. Thus, the claims cannot be raised in this petition. In any case, Petitioner's claims are meritless.

At for the argument that the trial judge erred because he did not charge "the lesser included offence of accessory after the fact; an offense termed hindrance (sic) under New Jersey's criminal code", first, Hindering Apprehension is

not a lesser-included offense of murder or felony murder based on a robbery, see N.J.S.A. 2C:1-8d, and second, a trial court need not "scour the statutes to determine whether there are some uncharged offenses of which the defendant may be guilty." State v. Sloan 11 N.J. 293 302 (1988).

In any case, assuming arguendo there is a lesser included offense which may have been charged in this case, the claim fails to raise an issue of constitutional dimension cognizable in a habeas corpus proceeding since it is based on state law. Indeed, there is no federal constitutional requirement that all lesser-included offenses in a non-capital case must be charged to avoid a due process violation. In Scad v. Arizona, 501 U.S. 624 (1991) the Supreme Court rejected the contention of a state capital murder defendant that the "due process principles underlying Beck v. Alabama, 447 U.S. 625 (1980)] require that the jury in a capital case be instructed on every lesser included non-capital offense supported by the evidence. . . ." Schad at 646. In a non-capital case, where there is no "all or nothing" situation where a jury has a choice only between capital murder and aquittal, Beck is not implicated. In non-capital cases, as here, failure to give a lesser included offense instruction does not present

a constitutional question. Montoya v. Collins, 955 F.2d 279 285-86 (5th Cir.) cert. denied, 113 S.Ct. 820 (1992); Pitts v. Lockhart 911 F.2d 109, 112 (8th Cir. 1990) cert. denied 11 S. Ct. 2896 (1991) and cases cited therein (a pre-Schad case agreeing with the Fifth, Ninth, Tenth, and Eleventh Circuits that this type of claim will rarely if ever present a constitutional question.) Thus Petitioner cannot establish entitlement to habeas relief in these circumstances.

As to the claim regarding the omission of the non-slayer participant affirmative defense for felony murder, Petitioner did not qualify for it. That defense provides;

> In any prosecution under this subsection,, in which the defendant was not the only participant in the un derlying crime, it is an affirmative defense that the defendant;
> (a) Did not commit the homicidal act or in any way solicit, request command, impotune, cause or aid the commission thereof; and
> (b) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
> (c) Had no reasonable ground to believe any other participant intended to engage in conduct likely to result in death or serious physical injury.

Kamienski's attendance at the September 18th meeting at the Holiday Inn with the other defendants in which Defendant Marzeno had a brief case with no money, but which contained a gun, his aiding in the commission of the robbery, his isolating Duckworth who was a potential witness, is alone enough to take him out of the defense.

In any case, whether evidence is sufficient to justify the submission of the affirmative defense to the jury is strictly a matter of state law, and, as such, is not cognizable in a habeas corpus proceeding. Kontakis v. Beyer, 19 F.3d at 119; Sanabria v. Morton 934 F.Supp. at 144; Bush v. Stephenson, 669 F.Supp. at 1327. "As a general rule, jury instructions do not form a basis for habeas corpus relief." Williams v. Lockhart, supra, at 1267.

Again, the claims presented under this section have not been exhausted.

12A (5). Petitioner Kamienski claims in 12A section 5 of his supplemental brief that the undersigned submitted a "false and misleading brief on appeal" and by "willfully or recklessly violating the doctrine of judicial estoppel" thereby mislead the appellate division. Neither the jury nor the appellate lawyers are bound by what trial counsel might suggest in a closing argument. Indeed, the jury had a

different view of the evidence then Petitioner claims the Prosecutor had. And the view of the evidence the Petitioner claims the Prosecutor had, is not the view the Prosecutor in fact had. Given his entire closing, it is clear the Prosecutor thought Petitioner shared in the intent to murder, and to commit a felony murder based upon a robbery. The record supports each and every argument made on appeal--as the Appellate Division so ably found, in a decision written by a then future Justice of the New Jersey Supreme Court, Judge Coleman, and the current Presiding Judge of the Appellate Division, Judge Stern. Certainly the distinguished appellate panel that decided the case was not so easily "misled" as Petitioner claims.

As for "judicial estoppel", Petitioner clearly fails to support that argument. We are confounded by his point, if any. This was not a civil case, and it is not a case which is appropriate for that doctrine.

This case presented the jury with complex evidence over 18 days of trial. The State is entitled to present the best interpretation of the evidence it can. All the facts argued on appeal were in evidence---Petitioner does not---and absolutely can not claim the contrary. Obviously, there were two separate lawyers who analyzed this complex evidence. Assuming arguendo the two lawyers had different

views of the evidence, Petitioner has cited no cases in support of his position that an appellate lawyer is bound by the argument of a trial attorney in circumstances where the evidence is subject to differing interpretations. This is not a case where the same lawyer took an inconsistent position before the same court. Appellate lawyers often do not see cases as trial attorneys see them. This is no surprise given the differing standards applicable to trials and appeals. In any case, see Bradshaw v. Stumpf, 125 S. Ct. 2398, 2407-08 (2005), where the Supreme Court gave short shrift to the argument that the same prosecutor took inconsistent positions in co-defendants' prosecutions. Further, application of estoppel in a criminal case is inappropriate. Standefer v. United States, 447 U.S. 10 (1980).

12B, see Point III above.

12C, The standard for granting habeas relief because of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." Greer v. Miller, 483 U.S. 756, 765 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643

(1974)). To constitute a due process violation, however, the prosecutorial misconduct must be substantial enough to effectively deny the state defendant's right to a fair trial. Greer v. Miller, 483 U.S. at 765. Moreover, any instance of alleged misconduct must be viewed in context. Id. at 766.

Petitioner Kamienski argues in his amended petition that the prosecutor improperly "vouched" for the witness Donna Duckworth. (12C section 1) This was invited via the attack by all defense counsel in their closing arguments on her credibility and must be seen in that context. See Marshall v. Hendricks 307 f. 3d 36 (3d Cir. 2002), cert. denied 538 U.S. 911 (2003), and cases cited therein.

The "prohibition against vouching does not forbid prosecutors from arguing credibility, which may be central to the case; rather, it forbids arguing credibility based on the reputation of the government office or on evidence not before the jury." [United States v. Hernandez, 921 F.2d 1569, 1573 (11th Cir.1991); accord State v. R.B. 183 N.J. 308 (2005).] When the government voices a personal opinion but indicates this belief is based on evidence in the record, the comment does not require a new trial. United States v. Adams, 799 F.2d 665, 670 (11th Cir.1986). Similarly, the the defense attorneys invited the

Prosecutor's comments concerning Sgt. Mahony "working hard on this case" since Mahony's credibility was attacked for failing to keep notes of interviews of witnesses. Thus, Petitioner's complaints are meritless inasmuch as these comments were not improper, and they did not affect the result of the trial such to rise to the level of a due process violation.

Regarding the comment on the immunity granted to Sid Jeffrey, this came out in Jeffrey's direct testimony as well as cross examination at trial and is proper comment.

12C (2). Petitioner argues that the Prosecutor misstated the record by stating that the prosecutor had told the jury that Anthony Alongi told Donna Duckworth her boyfriend was just as involved as the others in the murders.[2] The trial judge addressed this statement, recognized that it was not in evidence, that it had come from a report which had been redacted, and decided to give the jury a curative instruction regarding that statement. The Judge found "I do not perceive, in the context of all the evidence, that with an appropriate instruction from me, there is substantial prejudice. . . ." (20T 311-312.)

[2] The actual statement by the Prosecutor in summation was "And he says and your boyfriend's just as involved, comment about Paul- - -"(20T at. 275) There is no claim that it was intentional on the Prosecutor's behalf. Indeed, even Defense Counsel said it was unintentional. (20T at 305)

"In evaluating allegations of prosecutorial misconduct alleging improper statements during closing argument, this court asks: (1) whether the prosecutor's comments were improper; and (2) if so, did such remarks prejudicially affect the defendant's substantial rights in obtaining a fair trial." United States v. Karam, 37 F.3d 1280, 1289 (8th Cir. 1994) In this case, as in Karam, the alleged misstatement was corrected for the jury, the remarks did not substantially affect Petitioner's rights in obtaining a fair trial. The Judge found a curative instruction would prevent any prejudice in light of the evidence as a whole.

Petitioner also complains about the Prosecutor's comments to the jury that Kamienski pulled his boat out of the water on the day after the murders. The Prosecutor's remarks were as follows; "He knew those bodies were dumped out in the Bay and he was going to get his boat out of the water as fast as possible because he didn't know of those bodies were going to be found or not. . . and he's be able to say don't talk to me, my boat was out of the water." (20T 279). The trial Judge stated, "Ladies and gentlemen, there's been no testimony about any of that. **You may consider the remarks of Mr. Millard as argument and not, of course, of any recitation of any evidence."** Ibid. (emphasis mine). This claim is without merit.

12C (3). Petitioner also argues that the prosecutor misstated the law regarding accomplice liability bolstering the allegedly improper jury charge. Specifically, Petitioner claims the Prosecutor told the jury that a murder does not end with the death of a victim, but continues through the disposal of the body; that the Prosecutor "defined murder as a continuing crime." This argument is disingenuous and inaccurate; the Prosecutor took the language of his argument from the then recently decided case State v. Gelb, 212 N.J. Super. 582 (App. Div. 1986, certif. den. 107 N.J. 633 (1987), as well as the doctrine of res gestae which is discussed above and which makes clear that the robbery was not complete at the time the bodies were being disposed of, making the felony murder ongoing at the point Duckworth observed the bodies being prepared for disposal.

The Prosecutor made a point to show, as is required by the case law of this state, that Kamienski was an accomplice to the murders and shared in the intent to murder, not by merely being present at the scene, but by doing more. Hence, the Prosecutor argued in part, after Duckworth was threatened by Alongi, and she and Kamienski had left to return home;

> "and they get out in the car. . .and he doesn't want to talk about it. And she persists and she persists and she persists. And what does he say? He says I couldn't control the situation. Nick went first, Barbara didn't suffer. I'm telling you that's an eyewitness account of what occurred.
>
> Paul Kamienski was there when they were murdered. Paul Kamienski was there because he had put this deal together, and he had brokered it, the DeTournays trusted him, he was the person they trusted. They weren't going to turn over a hundred and fifty thousand dollars worth of cocaine to somebody even if they knew Barbara's ex-husband, without him being there. He was there.
>
> And I'm going to say does Paul Kamienski necessarily know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. Paul Kamienski is there because he is part and parcel, he put this drug deal together, he made it work, he was there.
>
> * * *
>
> And Kamienski was there and that didn't end the murder, a bullet through the head or through the chest did not end a murder, a murder is finished and the murder ended when that body is disposed of. And I submit to you that what occurred at that point in time was that **Paul Kamienski assisted Marzeno and Alongi in getting rid of the bodies. That he assisted, he helped, he rendered his countenance to that in getting rid of the bodies. He was there.** (November 16, 1988 p 276-277). (emphasis mine)

Comparing the emphasized language above to the emphasized language in the rule in Gelb set out below, it is obvious that the Prosecutor did not misstate the law;

rather he took his argument almost directly from the language of the Gelb case. Gelb says that for accomplice status, a defendant must share in the intent to commit the crime, that indirect participation is enough and;

> [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 assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.** [Gelb at 591-593.]

The trial record reveals there was no objection to this argument due to the fact that, when seen in context, it is obvious that the Prosecutor was arguing that Kamienski's presence at the scene, coupled with other factors, support his accomplice liability status. Further, since Kamienski testified at trial, and he testified specifically that he did not "have anything to do whatsoever, in any way, shape, or form with the murder of Barbara and Nick DeTournay." (18T at 210) He also testified that he did not "ever. . .enter into a plan to rip off Nick and Barbara DeTournay of three kilos of cocaine". (18T at 232). He claimed he never "shared in the drugs that were taken from Nick and Barbara DeTournay after September of

1983". (18T at 241). (At the conclusion of his direct testimony, Judge Perskie called a sidebar; "May I see counsel please? You hear the one about the three greatest lies in the world?" (18T at 241-242)). In any case, the jury was free to disbelieve any or all of his testimony. Indeed they did disbelieve him.

More importantly, since Kamienski testified on his behalf, "comparatively slight evidence on the part of the prosecution will be accepted because of the readiness with which the defendant(s) could supply the exculpatory evidence, if it exists." State v. Muniz, 150 N.J. Super. 436, 445 (App. Div. 1977). The United States Supreme Court is in accord with this rule and has specifically held; "We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself, he may not stop short in his testimony **by omitting and failing to explain incriminating circumstances** and events already in evidence, in which he participated and concerning which he is fully informed, **without subjecting his silence to the inferences to be naturally drawn from it."** Caminitti v. United States, 272 U.S. 470, 494 (1917). Kamienski failed to explain away much of the testimony against him. His blanket denials of his

involvement may be held against him in addition to the testimony and other evidence produced against him by the state.

The Appellate Division addressed this issue extensively. As discussed in the Appellate Division's opinion and above, the accomplice liability charge was proper. Furthermore, the judge instructed the jury on the law to be considered. There was no misstatement of law by the prosecutor, but if there was, it was cured by the trial courts extensive jury instruction. (21T14-18 to 95-1)

CONCLUSION

Based upon the discussion herein, as well as the answers to the Petitions, and the record, the Petitions should not be granted.

Respectfully, August 18, 2005

s/ Samuel Marzarella

Samuel Marzarella,
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Of counsel, and on the brief