

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

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WILLIAM HILL,  
*Petitioner*

v.

STATE OF NEW JERSEY,  
*Respondent*

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APPENDIX VOLUME II  
ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF NEW JERSEY

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4544-19T1

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from a Judgment of
v.	:	Conviction of the Superior
WILLIAM HILL,	:	Court of New Jersey, Law
Defendant-Appellant.	:	Division, Hudson County.
	:	
	:	Indictment No. 19-09-00946-I
	:	Sat Below:
	:	Hon. Mark J. Nelson, J.S.C.

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**BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT**

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**PROCEDURAL HISTORY**

Hudson County Indictment No. 19-09-00946 charged Mr. William Hill with first-degree carjacking, N.J.S.A. 2C:15-2a(4) (Count One); and third-degree witness-tampering, N.J.S.A. 2C:28-5a (Count Two). (Da 1-2)<sup>1</sup>

After presiding over a Wade<sup>2</sup> hearing on June 14, 2019, the Honorable Mark J. Nelson, J.S.C., issued an oral ruling on July 8, 2019, denying the defense's motion to suppress the eyewitness identification. (1T 10-22 to 11-9)

On September 25, 2019, Judge Nelson also ruled, over the defense's objection, that the State would be permitted to introduce arrest photos of Mr. Hill at trial. (5T 39-16 to 42-1, 45-12 to 48-5, 46-1 to 47-19)

Mr. Hill stood trial before Judge Nelson, and a jury, between September 25, 2019, and October 2, 2019. At the close of

<sup>1</sup> Da - appendix to defendant's brief

PSR - presentence report

The transcript designations are as follows:

1T - hearing - June 14, 2019

2T - motion - July 8, 2019

3T - pretrial conference - July 29, 2019

4T - trial - September 11, 2019

5T - motion/jury selection - September 24, 2019

6T - motion/trial - September 25, 2019

7T - trial - September 26, 2019

8T - trial - September 27, 2019

9T - trial - October 1, 2019

10T - trial - October 2, 2019

11T - motion/sentence - June 10, 2020

<sup>2</sup> United States v. Wade, 388 U.S. 218 (1967).



the State's case, Judge Nelson denied the defense's motion for a judgment of acquittal on both counts. (8T 37-12 to 38-13, 41-13 to 42-14) The jury ultimately found Mr. Hill guilty of both carjacking and witness tampering. (10T 9-23 to 10-6, 10-20 to 11-5; Da 3-4) Judge Nelson denied the defense's motion for a new trial on June 10, 2020. (11T 3-23 to 12-12, 17-4 to 23-4, 36-17 to 40-25)

Also on June 10, 2020, Judge Nelson sentenced Mr. Hill to a twelve-year term of imprisonment, pursuant to an 85 percent period of parole ineligibility on the carjacking count, consecutive to a three-year term of imprisonment on the witness tampering count. (11T 66-4 to 67-13; Da 5-7)<sup>3</sup>

A notice of appeal was filed on August 21, 2020. (Da 8-11)

<sup>3</sup> N.J.S.A. 2C:28-5(e) requires that the sentences be run consecutive.

**STATEMENT OF FACTS**

At around 6:00 a.m. on October 31, 2018, Ms. Alessa Zanatta left her home to go to work. (7T 149-1 to 3) Upon realizing that she forgot her sweater, she went back home to pick it up.

(7T 149-3 to 9) She left her car running in front of her house while she ran inside. (7T 152-18 to 153-19) As she walked back to her car, she saw a person inside the car, sitting in the driver's seat. (7T 156-25 to 157-6, 158-12) Ms. Zanatta ran to her car, opened the driver's door, and yelled at the man inside, "[G]et the hell out of my car." (7T 157-5 to 6, 18-20 to 24)

The man immediately shifted the gear into reverse. (7T 160-1 to 5) When he did so, Ms. Zanatta was still standing facing him in the driver's seat and the driver's door remained open to her left. (160-15 to 161-7) Ms. Zanatta testified that, at this point, she had two options: either remain where she was and allow the car door to hit her as the car reversed, which would cause her to fall, or jump inside and fight for her car.

(7T 161-8 to 11) She decided to jump inside the car; she ended up partially on top of the suspect, with her stomach on his knees, her knees between the driver's seat and the door, and her feet hanging out of the car. (7T 161-13 to 25, 165-13 to 19, 169-17 to 18) Ms. Zanatta was holding onto the steering wheel and testified that she was looking up at the driver. (7T 169-22 to 170-13)

As soon as she jumped into the car, the man shifted the car into drive. (7T 162-12 to 13) He started driving erratically, speeding, and began hitting other cars, causing the driver's door to hit Ms. Zanatta's back. (7T 166-22 to 25, 170-19 to 171-7) Ms. Zanatta testified she was trying to yank out the keys, and was hitting "everything," to try to get the car to stop. (7T 185-5 to 10) After four-and-a-half blocks, Ms. Zanatta was able to shift the gear into neutral. (7T 167-1 to 7, 185-7 to 10) As the car slowed, the suspect hit the brakes, pushed her, jumped out of the car, and ran away. (7T 185-11 to 17, 186-7 to 18) Ms. Zanatta estimated that the entire incident lasted one or two minutes. (7T 188-12 to 13)

She realized the car had stopped right in front of a police station, so she went inside to report the incident. (7T 189-5 to 6) About thirty minutes after the incident, which had occurred at about 7:00 a.m., Ms. Zanatta provided Detective Joseph Sloan with a statement, where she explained what had happened and provided him with a description of a suspect. (7T 28-10 to 30-8, 34-6 to 17)<sup>4</sup> She repeated this description at trial and explained

<sup>4</sup> At trial, Detective Sloan had difficulty remembering her statement and incorrectly thought that she said the suspect was wearing a black jacket and work boots, and had a scar on his face and a thin beard. (7T 34-24 to 8, 90-7 to 92-7, 95-5 to 14) This description would have better matched the surveillance photos of the suspect and Mr. Hill's appearance than the description of the suspect Ms. Zanatta actually gave.

she got a good look at the man who was in her car and remembered that he was "very, very scruffy. Like he had hair all over his face, and it was not well maintained." (7T 179-8 to 15) She also said he had big eyes and was not "too dark or too light skinned." (7T 179-16 to 180-2) She remembered that the man was wearing faded jeans, a red skully cap, a type of winter hat, a grey hoodie, and an olive or brown vest. (7T 179-20 to 23) She said she could see the grey arms of the hoodie under the vest, and that the suspect was not wearing a jacket on top of the hoodie. (7T 215-12 to 15, 216-11 to 24) She did not estimate the suspect's height, weight, or age, or the color of the suspect's beard. (7T 211-17 to 213-2, 214-19 to 11) And, although Mr. Hill, the defendant-appellant, has a facial scar, Ms. Zanatta testified at trial that she did not see any scars on the man's face. (7T 214-14 to 19)

After Detective Sloan took Ms. Zanatta's statement, he started collecting video surveillance from the area, including video footage from Dunkin Donuts and Quick Chek. (7T 70-1 to 77-24) The video footage and stills were introduced as evidence at trial to show the suspect's trajectory and what the suspect was wearing. (7T 70-1 to 77-24; Da 42-45)

Ms. Zanatta came into the police station a second time on November 6, 2019, where she was shown a photo array to see if she could identify a suspect. (7T 107-4 to 10, 109-6) At that

point, another officer, Sgt. Schimpf, showed her six photographs. (7T 191-22 to 192-9; Da 12, 16-22) Although the officer handed Ms. Zanatta one photograph at a time and instructed her to stack them on top of each other as she reviewed them, she ended up looking at the photos simultaneously and comparing them, instead of looking at them sequentially.<sup>5</sup> (7T 128-2 to 129-4, 130-8 to 131-15, 227-2 to 229-3) The officer admitted that this was contrary to the Attorney General Guidelines, but he did not stop her. (7T 130-11 to 21) At one point, Ms. Zanatta told the detective that she "really thought" the perpetrator was the man in photo 4, a different man. (7T 224-21 to 225-1) Ms. Zanatta hesitated in making an identification. (Da 12)

Ms. Zanatta ultimately identified Mr. Hill as the man who had stolen her car, but explained that the pictures "didn't look up to date" because Mr. Hill did not have scruffy facial hair and his skin looked lighter than the suspect's. (7T 192-10 to 22) In fact, she remarked that "[t]here's no facial hair" in the lineup photo. (7T 194-19 to 20) She also said, "I feel like he's too white, but it -- but again, it was dark." (7T 114-6 to 7)

<sup>5</sup> In addition to playing the video of photo lineup procedure at trial, the prosecutor used a PowerPoint to show the jury which photos the eyewitness was reviewing at different times and how she was stacking them into groups to compare them. (7T 117-4 to 122-6; Da 71-118)

Notwithstanding, Ms. Zaratta testified she thought she had selected the right man because she remembered his eyes, mouth, and nose. (7T 195-1 to 6)

When asked how confident she was in her selection of Mr. Hill, Ms. Zaratta asked to review the photos again and ultimately said she was 80 percent sure she selected the correct person. (7T 225-5 to 18, 230-18 to 231-1; Da 12) The fact that she was only 80 percent certain was not written down in the report. (7T 137-18 to 19)

Defense counsel moved to suppress the identification procedure as suggestive and the identification as unreliable. (2T 4-4 to 4-25) After holding a hearing, the Court denied the motion, finding that the officer did not encourage her to compare the photos and that he did not try to stop her because the officer was understandably worried he would influence her identification. (5T 6-11 to 11-9) The Court found the procedure was not suggestive. (5T 11-3)

Detective Sloan arrested Mr. Hill on November 28, 2019. (7T 81-9 to 11) Upon his arrest, the detective took six photos of Mr. Hill, which were introduced into evidence at trial, over defense counsel's objection. (7T 81-15 to 17, 81-15 to 86-4, 84-10 to 85-12) In the arrest photos, Mr. Hill is wearing faded jeans, a black jacket, a grey hoodie, and a red skully cap. (Da 23-28) The arrest photos were not shown to Ms. Zanatta; she

never opined that the clothes resembled the clothes the suspect was wearing during the incident. (7T 86-10 to 14, 96-95-24 to 96-3) The prosecutor used the arrest photos to argue, in summation, that the clothes Mr. Hill was wearing at the time of the arrest -- a month after the carjacking -- resembled the clothes the suspect was wearing. (8T 67-7 to 24, 67-19 to 68-2, 85-13 to 16, 92-5 to 6; Da 35-45)

On April 8, 2019, Ms. Zanatta received a letter from Mr. Hill. (7T 195-11 to 197-5) A detective not involved in the investigation, Detective Buttimore, read a redacted version of the letter aloud at trial, as follows:

Dear Mrs. Zanatta[,]

Now that my missive had completed it's journey throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits. I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author, but please don't be startled, because I'm coming to you in peace. I don't want or need any more trouble. Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with carjacking upon you. You may be saying I have the audacity to write to you and you may report it, but I have to get this off my chest. I am not the culprit of the crime. Ms. Zanatta, I have read the reports and watched your videotaped statement, and I am not disputing the ordeal you have endured. I admire your bravery and commend your success for conquering a thief whose intention was to steal your vehicle. You go, girl. (smiley face) Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor, but God has created humankind so close to resemblance, that your eyes

will not be able to distinguish the difference without close examination of people at the same time, especially not while in the wake of such commotion you've endured. Ms. Zanatta, due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women. Therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However, I am sorry to hear about the ordeal you have endured -- you've had to endure, but unfortunately, an innocent man (me) is being held accountable for it.

Ms. Zanatta, I do know (sic) what led you -- I do not know what led you to selecting my photo from the array, but I place my faith in God. By his will the truth will be revealed and my innocence will be proven, but however, I do know he works in mysterious ways, so I'll leave it in his hands. Ms. Zanatta, I'm not writing to make you feel sympathy for me. I'm writing as a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise, please don't -- the truth, if your wrong, or not sure 100 percent. Ms. Zanatta, I'm not expecting a response from you, but if you decide to respond and want to reply, please inform you (sic) of it. Otherwise, you will not hear from me hereafter until the days of trial. But it's time I bring this missive to a close, so take care, remain focused, be strong, and stay out of the way of trouble.

Sincerely, Raheem.

[(7T 244-5 to 247-19)]

Ms. Zanatta testified that the letter made her scared to testify because it reminded her of what had happened and made her realize that Mr. Hill knew where she lived. (7T 199-10 to 19, 201-17 to 23)



During summation, the prosecutor used a PowerPoint and repeatedly showed the jury Mr. Hill's arrest photos and argued that the photos depicted Mr. Hill wearing clothes that resembled the clothes worn by the carjacking suspect. (8T 67-7 to 24, 67-19 to 68-2, 85-13 to 16, 92-5 to 6; Da 35-45) He also told the jury that the reason the surveillance stills appeared to show the suspect wearing black pants instead of faded blue jeans was due to poor lighting given the time of day (7:00 a.m.), even though the colors of the clothes the other people in the stills were wearing were clearly discernible. (8T 64-11 to 65-4; Da 13-15, 44-45) He also argued that Ms. Zanatta was mistaken when she said the man was wearing an olive or brown jacket, because the surveillance stills showed he was wearing a black one. (8T 65-16 to 23, 67-17 to 69-3; Da 13-15, 24-45) Further, the prosecutor argued that the black jacket worn by the suspect in the surveillance stills was the same black jacket that Mr. Hill was wearing when he was arrested because the zippers on the two jackets were identical. (8T 84-12 to 85-3; Da 42-45)

The prosecutor additionally used the PowerPoint to demonstrate how Ms. Zanatta compared the six lineup photos and the fact that she focused on Mr. Hill's photo. (Da 39) He argued that she was either reviewing or identifying his photo over 90 percent of the time. (Da 39)

Also during summation, the prosecutor told the jurors to sit in silence for 90 seconds and stare at his face. (8T 61-10 to 18, Da 32) He argued that, just like the jurors would not forget his face, Ms. Zannatta would not forget the face of the man who carjacked her. (8T 61-19 to 62-19) According to the prosecutor, Ms. Zannatta's identification was especially reliable because the carjacking was a moment in her life that she would not forget and, in turn, that the suspect's face was a face that she would not forget. (8T 60-6 to 16, 65-25 to 66-5, 69-4 to 15, 70-5 to 12)

**LEGAL ARGUMENT****POINT I**

**TO AVOID CONSTITUTIONAL INFIRMITY, THE WITNESS-TAMPERING STATUTE MUST BE INTERPRETED TO REQUIRE THAT THE DEFENDANT KNOW THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING. (PARTIALLY RAISED BELOW) <sup>6</sup>**

Courts must construe statutes to conform with Federal and State Constitutions. State v. Burkert, 231 N.J. 257, 277 (2017) (citing State v. Johnson, 166 N.J. 523, 540-41 (2001)). Statutes, especially statutes that potentially proscribe and chill constitutionally-protected speech, must sufficiently distinguish between innocent and criminally culpable conduct to avoid problems of unconstitutional overbreadth and vagueness. New York v. Ferber, 458 U.S. 747, 764 (1982). Unless the witness-tampering statute is interpreted to require the defendant intend for or know that his conduct, specifically his speech, would cause a witness to obstruct an investigation or proceeding, as delineated in paragraphs 1 through 5 of the statute,<sup>7</sup> the statute is unconstitutionally overbroad and vague.

<sup>6</sup> The court heard and denied Mr. Hill's motion for judgment of acquittal and motion for a new trial, where he argued that his conduct did not constitute witness tampering. (8T 37-12 to 38-12; 11T 38-21 to 39-7, 39-22 to 40-25)

<sup>7</sup> Under the plain-language of the statute, a defendant is guilty of witness tampering "if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, he knowingly engages in conduct which a

U.S. Const. amends. I, VI, XIV; N.J. Const. art. 1, ¶¶ 1, 6, 10.

To save the witness-tampering statute from constitutional infirmity, the statute must be construed to include this mens rea requirement. For these reasons, the term "knowingly" in the witness-tampering statute must be interpreted to modify both the conduct and the nature of the speech.<sup>8</sup>

In the present matter, the jury was not instructed that it must find the defendant knew that his speech would cause a witness to impede or obstruct an investigation or proceeding in order to return a guilty verdict; consequently, the jury did not find this element beyond a reasonable doubt. Mr. Hill's convictions must therefore be reversed. U.S. Const. amends. VI, XIV; N.J. Const. art. 1, ¶¶ 1, 10.

reasonable person would believe would cause a witness or informant to: 1) to testify falsely; (2) withhold any testimony, information, document or thing; (3) elude legal process summoning him to testify or supply evidence; (4) absent herself from any proceeding or investigation to which he has been legally summoned; or (5) otherwise obstruct, delay, prevent or impede an official proceeding or investigation." N.J.S.A. 2C:28-5(a).

<sup>8</sup> "When the law provides that a particular kind of culpability suffices to establish an element of an offense such element is also established if a person acts with higher kind of culpability." N.J.S.A. 2C:2-2(c)(2). At minimum, knowledge as to the nature of the speech -- that it is the kind of speech that would cause a witness to obstruct or impede a proceeding -- is constitutionally required. This means that intending this result is also sufficient.

**A. For the Witness-Tampering Statute to Be Constitutional, It Must Be Construed to Require Knowledge that the Speech or Conduct Would Cause a Witness to Impede or Obstruct an Investigation or Proceeding. Otherwise, the Statute Must Be Deemed Overbroad and Vague.**

The Federal and State Constitutions require that the witness-tampering statute be construed to require that a defendant know his speech or conduct is of the sort that would cause a witness to impede or obstruct a proceeding or investigation, or intend that result. Although statutes are generally interpreted in accordance with their plain language, “[w]hen a statute’s constitutionality is in doubt because of ambiguity in its wording, [courts] proceed ‘under the assumption that the legislature intended to act in a constitutional manner.’” Burkert, 231 N.J. at 277 (citing Johnson, 166 N.J. at 540-41). In those circumstances, provided that a statute is “reasonably susceptible” to an interpretation that will render it constitutional, courts must construe the statute to conform to the Constitution, thus removing any doubt about its validity. Id. at 277 (citing State v. Profaci, 56 N.J. 346, 350 (1970)).

“[T]he ‘general rule’” of criminal liability “is that a guilty mind is ‘a necessary element in the indictment and proof of every crime.’” Elonis v. United States, 135 S.Ct. 2001, 2009 (2015) (citing States v. Balint, 258 U.S. 250, 251 (1922)); see also Morissette v. United States, 342 U.S. 246, 252 (1952) (“[W]rongdoing must be conscious to be criminal.”). This is

often referred to as the presumption of scienter -- "a presumption that criminal statutes require the degree of knowledge sufficient to "'make[e] a person legally responsible for the consequences of his or her act or omission.'" Rehaif v. United States, 139 S.Ct. 2191 (2019) (citing Black's Law Dictionary 1547 (10th ed. 2014)).

Scienter requirements are necessary to "separate those who understand the wrongful nature of their act from those who do not." United States v. X-Citement Video, 513 U.S. 64, 72-73, n.3. (1994). "In some cases, a general requirement that a defendant act knowingly is an adequate safeguard." Elonis, 135 S.Ct. at 2010 (citations omitted). In other instances, a knowing-act requirement is not enough to protect innocent actors; a defendant must intend or have knowledge of the wrongful end. Id. Where the wrongfulness is inherent in the act itself, the former, general intent, is sufficient; where the wrongfulness depends on the actor's intent, the latter, specific intent, is required. Id. (comparing forceful taking with taking absent force, explaining the latter requires intent to steal).

The presumption of scienter is especially important where a criminal statute potentially impinges on constitutionally-protected speech. The First Amendment of the Federal Constitution and Article I, Paragraph 6 of the New Jersey

Constitution<sup>9</sup> protect the freedom of speech. "Our federal and state constitutional heritage 'serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals.'" State v. Borjas, 436 N.J. Super. 375, 389 (App. Div. 2014) (citing Schmid, 84 N.J. at 560). Therefore, statutes that implicate the First Amendment, must be strictly construed and clearly defined to ensure that they are not unconstitutionally overbroad or vague. Ferber, 458 U.S. at 764; see also Burkert, 231 N.J. at 262 ("Criminal laws targeting speech that are not clearly drawn are anathema to the First Amendment and our state constitutional analogue because they give the government broad authority to prosecute expressive activities and do not give fair notice of what the law proscribes.").

A statute is unconstitutionally overbroad if it unduly restricts constitutionally-protected speech by reaching further than permitted to fulfill State interests. Borjas, 436 N.J. Super. at 388-89. A statute is unconstitutionally vague if it does not give fair notice of the line between what is permissible and what is proscribed with "'appropriate definiteness.'" Burkert, 231 N.J. at 276 (citation omitted).

<sup>9</sup> The free-speech rights of New Jersey citizens under Article I, paragraph 6 of the New Jersey Constitution may be even broader than those recognized under the First Amendment. State v. Schmid, 84 N.J. 535, 560 (1980).

Vague and overbroad laws criminalizing speech may chill permissible speech, "causing speakers to silence themselves rather than utter words that may be subject to penal sanctions." Id. (citations omitted).

To ensure that constitutionally-protected speech is not curtailed or chilled, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." Ferber, 458 U.S. at 765 (citing Smith v. California, 361 U.S. 147 (1959); Hamling v. United States, 418 U.S. 87 (1974)). Put another way, to the extent a statute implicating the First Amendment cannot be interpreted to require scienter, the statute is unconstitutional.

For instance, in Smith, 361 U.S. at 150-55 (1959), the Supreme Court of the United States struck down an ordinance that made it illegal to possess obscene writing in bookstores because there was no scienter element. The Court pointed out the unique First Amendment concerns implicated by the statute and explained that statutes of this kind are subject to stricter scrutiny because of these concerns. Id. Statutes that "tend[] to inhibit constitutionally protected expression. . . cannot stand under the Constitution." Id. at 155.

In X-Citement Video, 513 U.S. at 68-73, the Supreme Court of the United States interpreted a statute contrary to its



plain-language to avoid due process and First Amendment problems. That statute punished:

(a) Any person who --

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if --

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if -

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct

[18 U.S.C. section 2252 (1988) (emphasis added).]

There, the United States Supreme Court noted that the “most natural grammatical reading . . . suggests that the term “knowingly” modifies only the surrounding verbs,” (i.e., “transports,” “ships,” “receives,” “distributes,” or “reproduces”), and “... not . . . the elements of the minority of the performers, or the sexually explicit nature of the

material, because they are set forth in independent clauses separated by interruptive punctuation.” Id. at 68.

Ultimately, however, the Court ruled that, to save the statute from constitutional infirmity, the word “knowingly” also modified the other statutory elements that criminalize otherwise innocent conduct -- the age of the performers and the nature of the material. Id. 68-73. The Court reasoned that because “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. . . . [and] nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment[,]” knowledge of these crucial elements was constitutionally required. Id. 72-73, 78. For these reasons, among others, the Court held that the term “knowingly” extended to the age of the performers and the sexually explicit nature of the material. Id. The defendant must knowingly receive/ship/transport material, and know the age of the performers and/or explicit nature of the material. Id. Therefore, where a criminal statute implicates First Amendment concerns, the statute should be carefully construed to require a sufficient scienter requirement.

Statutes that criminalize threats and therefore potentially encroach on constitutionally-protected speech must also require specific intent -- that the defendant either intend or have

knowledge of the wrongful objective to threaten -- because otherwise constitutionally-protected speech would be curtailed. See Virginia v. Black, 538 U.S. 343, 362-63 (2003); Elonis v. United States, 135 S.Ct. 2001 (2015). A true threat is a "statement[] where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" and is unprotected speech. Black, 538 U.S. at 359.

In Black, 538 U.S. at 347-48, the Supreme Court of the United States addressed the constitutionality of a cross-burning statute. The Court found the statute "unconstitutional in its current form," because it "treat[ed] any cross burning as prima facie evidence of intent to intimidate" -- thus impermissibly proscribing and deterring even protected expressive conduct. Id. at 347-48.

Implicit in the Supreme Court's holding in Black was that the First Amendment requires proof of intent to threaten in order to constitutionally prosecute a defendant for burning a cross. 538 U.S. at 362-63. Otherwise, the statute would criminalize and chill constitutionally-protected speech. Id. In other words, in order to comport with the Constitution, it was not enough to mandate that the defendant intended to burn a cross. Id. Instead, the Court required that, to hold an individual criminally-liable under that statute, he or she must

also have specifically intended to threaten another. Id. The Court emphasized that crucial element multiple times:

Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. . . . The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate. . . . A ban on cross burning carried out with the intent to intimidate is. . . . proscribable under the First Amendment.

[Id. at 362-63 (emphasis added).]

Following Black, the United States Supreme Court granted certiorari in Elonis to resolve any doubt "whether the First Amendment requires" intent to threaten in other true threat prosecutions. 135 S.Ct. at 2004. There, the statute at issue criminalized the communication of a threat, but did not specify a mental state. Id. at 2011. The Court explained that the gap-filler mens rea requirement applied to both the communication, itself, and the communication of a threat. Id. "[T]he crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication. . . . The mental state requirement must therefore apply to the fact that the communication contains a threat." Id. (citing X-Citement Video, 513 U.S. at 73).

The Court reversed Elonis's conviction because it had been premised solely on account of how his posts would be understood by a reasonable person -- whether a reasonable person would regard the communication as a threat. Id. The Court explained

that this improperly allowed the jury to convict Elonis based on negligence and required reversal. Id.

Some courts have found that the First Amendment requires that the speaker must subjectively intend the speech as a threat. United States v. Bagdasarian, 652 F.3d 1113, 1117-18 (11th Cir. 2011); United States v. Heineman, 767 F.3d 970, 975, 979 (10th Cir. 2014); State v. Boettger, 450 P.3d 805, 806 (Kan. 2019). Others have focused on the listener's objective reaction to the threat. United States v. Alaboud, 347 F.3d 1293, 1296-97 (11th Cir. 2003); United States v. White, 670 F.3d 498, 509 (6th Cir. 2012). Elonis made clear, however, that, at minimum, a defendant's negligence to the nature of the speech is not enough to sustain a conviction. 135 S.Ct. at 2011-13.

This Court has also already interpreted Black to require something beyond recklessness before a true threat prosecution may survive First Amendment scrutiny. State v. Carroll, 456 N.J. Super. 520, 540-41 (App. Div. 2018). Carroll allegedly made Facebook posts targeted at a witness. Carroll, 456 N.J. Super. at 528. He was charged with violating N.J.S.A. 2C:28-5b,<sup>10</sup> witness retaliation. Id. On review, this Court found that, to

<sup>10</sup> "A person commits [witness retaliation] if he harms another by an unlawful act with purpose to retaliate for or on account of the service of another as a witness or informant." N.J.S.A. 2C:28-5(b).

constitute a true threat punishable under the Constitution, there was both a subjective and an objective element: a defendant must both “intend to do harm by conveying a threat that would be believed; and the threat must be one that a reasonable listener would understand as real.” Id. at 540-41.

While the Carroll Court ultimately found probable cause that the defendant intended to threaten or harass the witness, it instructed the State that it would need more evidence to prove the defendant’s intent beyond a reasonable doubt at trial. Id. at 544-45. The Carroll Court also noted that, while the defendant in that case was not prosecuted for terroristic threats, N.J.S.A. 2C:12-3(a),<sup>11</sup> that statute might not withstand constitutional scrutiny because it only required recklessness as to the nature of the speech, and “the Constitution may require a higher mens rea than recklessness.” Carroll, 456 N.J. Super. at 537 n.7.

These cases show that, at minimum, a general intent requirement is not adequate to safeguard constitutionally-protected speech. While there is room to debate whether

<sup>11</sup> “A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.” N.J.S.A. 2C:12-3(a) (emphasis added)

recklessness as to the nature of the speech is sufficient, or if knowledge or purpose is required, negligence is not.<sup>12</sup>

The statute at issue here is subsection (a) of the witness-tampering statute. N.J.S.A. 2C:28-5(a). Under the statute, a person is guilty of witness tampering if, believing an official proceeding is pending, "he knowingly engages in conduct which a reasonable person would believe would cause a witness" to falsely testify or obstruct a prosecution. N.J.S.A. 2C:28-5(a).

The witness tampering statute is similar to the true threats statutes discussed above, in that, unless it is strictly construed, it potentially criminalizes and chills constitutionally-protected speech. As the United States Supreme Court has held, a person cannot be not criminally responsible for speech unless he intends, or at least, understands the threatening nature of his speech, and the speech is, in fact, threatening. Applying these principles to our witness tampering statute, a person cannot be criminally responsible for sending a letter to a witness (or engaging in other speech) unless: (1) he intends to induce the witness to testify falsely or knows the contents of the letter would cause that effect; and (2) a

<sup>12</sup> The Supreme Court of the United States in Elonis refused to decide whether a finding of recklessness as to the threatening nature of the speech would satisfy the Constitution, or if the defendant needed to purposely or knowingly communicate the threat. 135 S.Ct. at 2012-13.

reasonable person would believe it would have that effect. The First Amendment and principles of vagueness and overbreadth require interpretation of the statute with both a subjective and objective element to save it from a constitutional challenge.

First, the witness-tampering statute is unconstitutionally overbroad unless it is interpreted to require the defendant intend for or know that his speech or conduct would cause a witness to testify falsely, withhold information, documents or things, elude the process, absent himself from a proceeding or investigation, or otherwise obstruct, delay, or impede a proceeding or investigation. As discussed above, a statute is overbroad if, “in proscribing constitutionally protected activity, it . . . reach[es] farther than is permitted or necessary.” Borjas, 436 N.J. at 389 (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 125 n.21 (1983)). Unless the statute is interpreted to require specific intent, it is unconstitutional because it allows a person to be punished for speech that he merely should have known could be interpreted as an attempt to induce false testimony -- a negligence standard prohibited by the United States Supreme Court in Elonis. The rationale of Elonis applies here because witness tampering is another crime where there is a concern that a person could be criminalized for innocent and constitutionally-protected speech. To ensure that innocent speech is not criminalized, proof of



specific intent (either purpose or knowledge) is constitutionally required.<sup>13</sup> The statute should be read in this way to save it from constitutionality infirmity and overbreadth.

Indeed, this case exemplifies why this scienter requirement is necessary to distinguish innocent from criminally culpable conduct. Mr. Hill sent a letter to the victim. That, in itself, though unwise, is not per se illegal. Mr. Hill wrote in the letter, "I have to get this off my chest. I am not the culprit of this crime." (7T 245-25 to 246-2) Mr. Hill did not threaten Ms. Zanatta; in fact, he told her he came to her in peace.

(7T 245-14 to 247-19) Moreover, he wrote, "I am writing as a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise, please don't (sic) -- [tell] the truth, if your [sic] wrong, or not sure 100 percent."<sup>14</sup> (7T 247-8 to 12) Unless Mr. Hill knew the letter was the type of speech or conduct that would cause a witness to testify falsely or

<sup>13</sup> The Alaska Supreme Court rejected a constitutional challenge to its juror tampering statute on the ground that the statute was "narrowly drawn and proscrib[e]d only speech intended to influence a juror in his or her capacity as a juror in a particular case[,]" such that "it [did] not reach speech protected by the first amendment, and thus [was] not impermissibly overbroad." Turney v. State, 936 P.2d 533, 541 (Alaska 1997) (emphasis added).

<sup>14</sup> The actual letter says, "[P]lease tell the truth." (Da 29-30) The officer misspoke at trial.

otherwise obstruct the prosecution, the letter constitutes expressive and constitutionally-protected speech.

Whether Mr. Hill knew that his speech had the capacity to cause a witness to impede or obstruct an investigation or proceeding, or intended this result, was not clear in this case. It is not at all apparent that Mr. Hill intended or knew his speech would cause such a result.

It is easy to think of other examples of where a specific intent requirement would be necessary to distinguish constitutionally-protected speech from constitutionally prohibitable witness-tampering. For instance, imagine a defendant decides to go on national television and explains he is innocent of an offense, or why the prosecution is unjust. His speech might be the sort that might make a witness nervous to testify, but the defendant's intent might be exclusively to express himself.

Or a defendant might write a song about his prosecution and talk about how the witness wrongly implicated him in the crime. Perhaps he laments the hardship he is experiencing because the witness implicated him in an offense, resulting in a wrongful prosecution. Again, this is constitutionally-protected speech, unless the defendant intends to cause a witness to impede or obstruct a proceeding, or knows that the speech is of the type that would cause this result, not just to express himself.

Finally, imagine a defendant sends a heartfelt letter to the victim or the victim's family apologizing that something so terrible had happened to the victim, and that causes the victim to refuse to testify against him. Again, that conduct is not criminally culpable unless the defendant's intent was to manipulate the victim and get him or her to obstruct the proceeding.

Moreover, unless the statute is interpreted to require specific intent, the witness-tampering statute would also be unconstitutionally vague because a person of ordinary intelligence would not know what kind of speech is proscribed, thereby chilling protected speech. If a person of ordinary intelligence must guess at the statute's meaning and application, the statute is unconstitutionally vague. State v. Mortimer, 135 N.J. 517, 532 (1994); see Borjas, 436 N.J. Super. 375 (explaining that a law is unconstitutionally vague when it fails to provide citizens and law enforcement with adequate notice of proscribed conduct).

In contrast, if a defendant knows his speech is of the kind that would cause witness tampering, he is on notice and the statute is not unconstitutionally vague.<sup>15</sup> This Court seemed to

<sup>15</sup> Other courts have also found that a specific intent requirement will save statutes from unconstitutional vagueness. Turney, 936 P.2d at 541-44, 543 n. 13 (citing federal and state cases for this proposition).

acknowledge this truth and rely on it in rejecting a constitutional challenge to the previous version of the witness-tampering statute in State v. Crescenzi, 224 N.J. Super. 142, 147-49 (App. Div. 1988). In Crescenzi, this Court found that the pre-2008 version of the statute stood up against a constitutional vagueness and overbreadth challenge, no doubt because the statute required specific intent, as applied to each element of the offense. Id. Under the old version of the statute:

A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he knowingly attempts to induce or otherwise cause a witness or informant to: (1) Testify or inform falsely; (2) Withhold testimony . . . (3) Absent himself from any proceeding."

[(Da 55)]

In upholding the older version of the statute,<sup>16</sup> this Court wrote, "The statute is not constitutionally vague because it is sufficiently definite, as interpreted, to give notice that no one may undermine enforcement of criminal justice by attempting to coerce or induce witnesses or informants not to cooperate with law enforcement." Id. (emphasis added) Moreover, that version of the statute, "provide[d] ample guidance to law enforcement authorities and full and fair warning of potential

<sup>16</sup> The Legislature modified the statute in 2008 to its current form. (Da 55-65)

criminality of the proscribed actions.” Id. The Court also found the statute was not constitutionally overbroad because it properly balanced First Amendment concerns with the harm posed by witness tampering. Id. The statute was thus constitutionally sound because of the requirement to prove specific intent. The elimination of this element throws the statute’s constitutionality into jeopardy.

The Connecticut Supreme Court addressed and rejected a similar constitutional challenge to its witness-tampering statute, relying on the statute’s specific intent requirement. State v. Cavallo, 513 A.2d 646 (1986). According to the statute, “A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely. . . .” Id. at 649. The Court rejected the defendant’s argument that the Connecticut statute was unconstitutionally vague, because that argument “assume[d] that tampering with a witness [was] a strict liability offense.” Id. at 651. To the contrary, under that statute, “a defendant is guilty of tampering with a witness only if he intends that his conduct directly cause a particular witness to testify falsely or to refrain from testifying at all.” Id. (emphasis added).

Members of the public therefore have no basis for concern that they might be subject to prosecution when their statements unwittingly cause a witness

to testify falsely. As long as intent is a necessary element of the crime. . . the statute casts no chilling effect on general exhortations concerning cooperation with judicial proceedings. . . . [and] it is not unconstitutionally vague.

[Id. (emphasis added).]

In contrast, here, unless the word “knowingly” is interpreted to modify all the elements in New Jersey’s statute, a defendant may be subject to prosecution for unwittingly causing a witness to testify falsely or abstain from testifying. Even assuming a person has knowledge of the law, he cannot be sure under what circumstances it would be criminal to write a letter to a witness or otherwise communicate with him or her. Therefore, to save the statute from constitutional infirmity, it must be interpreted to require specific intent -- that is, either the defendant know the speech is of the type that would cause a witness to impede or obstruct an investigation, or intend that result -- in addition to the requirement that the speech be of the kind that a reasonable person would believe cause a witness to impede or obstruct an investigation. If this Court does not interpret this statute in this manner, it must strike down the statute in its entirety on grounds of unconstitutional overbreadth and vagueness.

As discussed earlier, where a statute is “reasonably susceptible” to an interpretation that will render it constitutional, it must be so construed. Burkert, 231 N.J. at

277. Here, the New Jersey witness-tampering statute can and should be interpreted to require that the defendant had knowledge that the speech would cause a witness to impede or obstruct a proceeding or investigation, or intend that result; indeed, even ordinary principles of statutory interpretation militate in favor of this interpretation of the statute.

A statute's culpability requirement generally applies to all elements of a crime, "unless a contrary purpose plainly appears." Gandi, 201 N.J. at 177 (citing N.J.S.A. 2C:2-2(c)(1)).<sup>17</sup> Moreover, the "rule of lenity" requires that "any ambiguity with respect to the mens rea requirement must be resolved in defendant's favor." Grate, 220 N.J. at 329-30. See also State v. Eldakrouy, 439 N.J. Super. 304, 310 (App. Div. 2015). Accordingly, here the term "knowingly" should be interpreted to modify all the elements.

In Borjas, 436 N.J. Super at 388-401, this Court rejected a constitutional challenge to sections B and D of a statute that criminalizes the possession of false documents, N.J.S.A. 2C:21-2.1, finding that "knowingly" modified all the elements and that

<sup>17</sup> "When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears." N.J.S.A. 2C:2-2(c)(1).

the statute required specific intent. Under that statute, the person is guilty if he knowingly makes or possesses a document "which falsely purports" to be a government document. N.J.S.A. 2C:21-2.1. This Court found that the term "knowingly" modified the act and the attendant circumstances, such that specific intent was required under the possession of false documents statute. Borjas, 436 N.J. Super. at 390-91. Because it interpreted the statute in this way, the Court rejected an argument that the statute "fatally lack[ed] a specific intent requirement, and thus penalize[d] individuals with an innocent state of mind who may possess false documents inadvertently or for benign reasons." Id. at 390. So construed, the statute "sufficiently constricts the scope of criminal liability under subsections (b) and (d) to pass muster under constitutional principles." Id. at 394.

This Court should likewise find that the witness-tampering statute requires specific intent and thereby resolve problems of overbreadth and vagueness. In sum, in order to comport with our State and Federal Constitutions, the statute must be interpreted to require that the defendant intend for the witness to testify falsely or otherwise obstruct the investigation, or know that



the nature of his speech would cause such a result. Id.

"Knowingly" modifies all the material elements.<sup>18</sup>

**B. Mr. Hill's Convictions Must Be Reversed Because the Jury Was Not Instructed on and Did Not Find That the State Proved This Essential Element Beyond a Reasonable Doubt.**

As discussed, a witness-tampering conviction requires the State to demonstrate specific intent. Yet, here, the court failed to advise the jury that this was an essential element of the offense was clearly capable of affecting the result. U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. Mr. Hill's convictions must therefore be reversed.

It is well-settled that appropriate and proper jury charges are essential to a fair trial. State v. Collier, 90 N.J. 117, 122 (1982). A jury charge constitutes "a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). Where the jury is not instructed on and does not find an essential element, the conviction must be reversed. Grate, 220 N.J. at 333 (reversing because the jury was not instructed that "knowingly" modified all the material elements); Eldakroury, 439 N.J. Super. at 310 (finding the indictment was properly dismissed because "the State's instruction to the [grand] jury was 'blatantly wrong' and, in effect, relieved the State from

<sup>18</sup> As explained earlier, purpose also satisfies the knowing requirement.

having to establish defendant's mens rea as to a material element of the offense"); State v. Roberson, 246 N.J. Super. 597, 607 (App. Div. 1991) (reversing because the jury was not instructed on and did not find an essential element (the amount of cocaine), even though the evidence was uncontroverted). Moreover, erroneous jury instructions are generally poor candidates for rehabilitation, even under the plain error standard of review. State v. Burns, 192 N.J. 312, 341 (2007).

Here, the court did not tell the jury it had to find that the defendant intended to cause the witness to obstruct the proceeding or know his speech would cause this result. Instead, the court told the jury that the offense had two elements: (1) that the defendant believed an official proceeding was pending and (2) that the defendant knowingly engaged in conduct which a reasonable person would believe would cause a witness to testify falsely or otherwise obstruct the proceeding.<sup>19, 20</sup> (8T 140-7 to 142-4) (emphasis added)

<sup>19</sup> The Indictment accidentally included the language from the previous version of the statute. (Da 1-2; 8T 138-23 to 14) However, after the indictment was read to the jury, the jury was instructed on the elements in accordance with the plain language of the current statute. (8T 140-7 to 142-4)

<sup>20</sup> These instructions admittedly comported with the model jury charge. Our Courts, however, have not hesitated to order that model jury instructions be changed when need be.

The jury would not have known that it was an essential element of the offense that the defendant intended to cause the witness to obstruct or impede the proceeding or know that the speech would have this result. Tellingly, the trial court did not believe that the statute required specific intent. In denying the motion for a new trial, the trial court stated that whether the defendant intended his letter to cause the witness to testify falsely or obstruct the proceeding was beside the point:

Mr. Hill knew there was a proceeding pending . . . . and knowingly engaged in conduct. And it's easy to find that he engaged in conduct. He wrote the letter. Now we get to the next part, which is really the key: which a reasonable person would believe would cause a witness or informant to testify or inform falsely. Now, maybe Mr. Hill didn't intend that . . . she testify or inform falsely, but I have to use the word reasonable person.

[(11T 38-21 to 39-7)]

The court found that a reasonable person could conclude that the letter was asking her to or would cause her to testify falsely or otherwise obstruct the proceeding. (11T 39-22 to 40-25) In light of the court's misunderstanding of the elements, it also ignored the defendant's subjective mental state -- an element the State failed to prove beyond a reasonable doubt -- in denying the motion for a judgment of acquittal. (8T 37-12 to 38-13) While the statute does include language pertaining to the "reasonable person," an objective standard, the court failed to

recognize that a subjective, specific intent requirement must also be read into the witness-tampering statute to save the statute from constitutional infirmity.

The jury would not have known that this was an essential element that the State need to prove beyond a reasonable doubt in order for Mr. Hill to be found guilty of witness tampering. Moreover, it is far from clear that the jury would have found that the defendant intended for his letter to cause the witness to testify falsely or obstruct the investigation. As indicated by the communication, itself, Mr. Hill wrote the letter because he wanted to express himself -- he "ha[d] to get [it] off his chest." (7T 245-14 to 247-19) He wanted to proclaim his innocence. (7T 245-14 to 247-19) Where the letter the defendant sent to the victim was devoid of threats, expressed his innocence, and simply asked the witness to speak her truth, the court's failure to instruct the jury on an essential element clearly had the capacity to affect the result and deprived Mr. Hill of due process and a fair trial.<sup>21</sup> U.S. Const. amend. XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. Mr. Hill's witness-tampering conviction must be reversed.

<sup>21</sup> Indeed, even if this was not a close case, reversal would still be required because the jury was not instructed on an essential element. Roberson, 246 N.J. Super. at 607 (reversing for this reason even where evidence was uncontroverted).

Finally, because a jury may view witness-tampering as evidence of guilt on the underlying convictions, this error also warrants reversal of the carjacking conviction, as well. State v. Williams, No. A-0434-17T4, 2017 N.J. Super. Unpub. LEXIS 1377, at \*7-8 (App. Div. June 8, 2017) <sup>22</sup> (Da 66-70) (“[B]ecause a jury may fairly view witness tampering as evidence of a defendant’s guilt on the underlying offenses, we conclude that this trial error, together with the additional errors discussed below, warrants reversal of defendant’s conviction for robbery and the other associated offenses.”).

<sup>22</sup> This case has been cited in accordance with the Court Rules. R. 1:36-2 (“No unpublished opinion shall constitute precedent or be binding upon any court. . . . No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.”). Counsel has included the opinion in the appendix (Da 66-70) and is unaware of any contrary unpublished opinions. R. 1:36-2.

POINT II

THE PROSECUTOR MADE NUMEROUS MISLEADING ARGUMENTS CONTRARY TO LAW AND FACT AS A MEANS OF BOLSTERING THE WEAK IDENTIFICATION, DEPRIVING MR. HILL OF A FAIR TRIAL AND REQUIRING REVERSAL. (Partially Raised Below)<sup>23</sup>

The prosecutor repeatedly made misleading arguments contrary to law and fact to the jury. He told the jurors to sit in silence for 90 seconds -- the approximated length of time of the carjacking -- and then told them that just like they would not forget his face, Ms. Zanatta would not forget the perpetrator's face. (8T 61-10 to 22) He also argued, contrary to State v. Henderson, 208 N.J. 208, 261 (2011), that Ms. Zanatta's identification was particularly reliable because she would not forget such a stressful event. (8T 60-6 to 16, 69-4 to 15, 70-5 to 12) And, again contrary to Henderson, 208 N.J. at 234-35, he encouraged the jurors to engage in the fallacy of relative judgment -- to believe that because Ms. Zanatta thought Mr. Hill looked most like the suspect out of the men in the lineup, he was the suspect. (7T 232-4 to 235-8; 8T 79-14 to 24)

This prosecutorial misconduct deprived Mr. Hill of due process and a fair trial in this close case. The only evidence connecting Mr. Hill to the carjacking consisted of a single,

<sup>23</sup> The argument addressed in Section B, but not those in Section A, were raised below. (7T 232-10 to 21, 234-1 to 4)

questionable out-of-court identification by Ms. Zanatta, the victim. Ms. Zanatta spent almost nine minutes comparing six different photographs during a photo-lineup. (8T 79-14 to 15) In the end, she was only 80 percent confident in her identification and had initially identified someone else. (7T 138-23 to 25) Aside from the admission of problematic arrest photos from a month after the carjacking that showed Mr. Hill wearing clothes the prosecutor claimed resembled the clothing the suspect was wearing,<sup>24</sup> the weak identification was the only evidence tying Mr. Hill to the incident. This evidence was far from overwhelming; the State's case was relatively weak.

Accordingly, these improper prosecutorial tactics bolstering the credibility of the sole eyewitness identification had the "clear capacity to have led to an unjust verdict," State v. Frost, 158 N.J. 76, 87-89 (1999), and deprived Mr. Hill of his fundamental right to a fair trial and due process of law. Reversal of Mr. Hill's convictions is thus required. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

<sup>24</sup> These problems are discussed further in Point III.

**A. The Simulation Used by the Prosecutor in Summation to Argue that, Just Like the Jurors Would Not Forget His Face, the Victim Would Not Forget the Perpetrator's Face, Was Extremely Misleading. His Argument that the Stress of the Incident Made Her Identification More Reliable Compounded the Harm.**

The simulation and argument made by the prosecutor to convince the jury that Ms. Zanatta would not forget the face of the man who carjacked her was misleading, contrary to both the evidence in this case and case law codifying the social science on identification evidence, and wholly improper. This misconduct warrants reversal of both of Mr. Hill's convictions.

"[T]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." State v. Smith, 167 N.J. 158, 177 (2001) (quoting Frost, 158 N.J. at 83). Accordingly, a prosecutor "must refrain from improper methods[,] " Smith, 167 N.J. at 177 (citations omitted), and must "help assure that the accused is treated fairly . . . ." State v. Ramseur, 106 N.J. 123, 323-24 (1987).

In a case very similar to this one, the same trial prosecutor engaged in similar improper tactics to bolster the sole identification in that case. Williams, No. A-0434-17T4, 2017 N.J. Super. Unpub. LEXIS 1377, at 8 (Da 66-70). There, the prosecutor told the jurors to look at each other for two minutes, the amount of time the victim had observed the defendant during the robbery in that case. Id. at 8. He then



argued that, just as they would be able to recall each other's faces, the victim would be able to recall the perpetrator's face. Id.

This Court found this demonstration misleading and held that it constituted plain error:

There is no fair analogy between staring at a person with whom one has become familiar over several days of jury service, and staring at a complete stranger holding a knife. Where, as here, the victim's identification of defendant was a crucial issue, it was plain error to allow the prosecutor to have the jurors engage in this misleading exercise.

[Id. 8-9.]

The Court also found that the prosecutor's remarks that time "slowed down" for the victim during the robbery compounded the prejudice. Id. at 9.

This demonstration and prosecutorial tactics employed in Mr. Hill's case -- again, by the same prosecutor -- were extremely similar and likewise require reversal. Akin to Williams, during summation here, the prosecutor had the jurors sit in silence for ninety seconds and suggested that the jurors could decide the verdict based on how well they could recall the defendant's face after staring at him for that timeframe:

I want to show you how long she looked at the man sitting behind me. So, I'm going to apologize in advance, because it's going to get awkward. But if it's going to get awkward, imagine how much (sic) she saw the guy for. A minute or two minutes, that's what she said, right? Let's split the difference. Ninety seconds. Ninety seconds in silence. Look

towards me, look around me, you choose, but let's see how long it is.

[Silence]

Let me ask you a question. In the time that it takes to watch a Boy Meets World episode, would you be able to identify me? 33 minutes later, she described him.

[(8T 61-10 to 22)]

This line of argument was highly improper for two critical reasons. First, the jurors' simulated observations were outside the "evidence revealed during the trial." Smith, 167 N.J. at 178; see also State v. Harris, 156 N.J. 122, 195 (1998). "[P]rosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in . . . collateral improprieties of any type, lest they imperil otherwise sound convictions." Frost, 158 N.J. at 88. Whatever lay observations the jurors drew while sitting in silence for ninety seconds and staring at him under conditions created by the prosecutor was not evidence that could be used by the jurors to assess guilt. This simulation was a "collateral impropriety" that deprived Mr. Hill of a fair trial. Id.

Second, and more importantly, the simulation was patently misleading because it was based on a flawed premise: that the conditions under which the jurors observed the prosecutor were anything like the conditions under which the victim observed the perpetrator. As the Court concluded in Williams, No. A-0434-

17T4, 2017 N.J. Super. Unpub. LEXIS 1377, at 8 (Da 66-70), there is no analogy between a victim of a violent offense staring at a stranger-perpetrator while the offense is being committed and a juror staring at fellow juror he or she has come to know over the course of the trial during the trial. See also Henderson, 208 N.J. at 261 (internal citations omitted) (explaining that stress actually reduces reliability of identifications).

So here too; there can be no comparison between observing the prosecutor, whom the jurors had watched in the courtroom over the course of the trial, and viewing the perpetrator under the stress of being carjacked. In addition, the jurors observed the prosecutor during the simulation, as well as for many days throughout the trial and jury service. The victim had never seen the perpetrator before observing him for just a few moments during the carjacking.

If anything, the jurors were even more likely to remember the prosecutor's face in this case than the face of a fellow juror (as in Williams) because jurors stare at prosecutors for much of jury selection and trial, making this simulation especially misleading. Moreover, jurors are known to put prosecutors on a pedestal as a person serving an important and valuable societal purpose. See Berger v. United States, 295 U.S. 78, 88 (1935) (explaining the high regard that jurors have for prosecutors). Therefore, jurors are especially likely to

remember a prosecutor's face. Simply stated, the jurors' simulated observations were not reliable baselines for assessing the victim's ability to make an accurate identification.

The prosecutor acknowledged that the simulation differed from the conditions under which the victim observed the suspect, but instead of acknowledging that the stress and other conditions lessened the reliability of her identification, he repeatedly told the jury that Ms. Zanatta's identification was particularly reliable because she was in such a stressful situation:

And let's b[e] real about why she's looking at the face, right? Because here's the biggest difference about the 90 seconds that you and I just experienced and the 90 seconds she and Mr. Hill experienced. Ours was like an academic exercise, right? So, we were all like, how long can people look at each other without feeling awkward and uncomfortable and things like that? This woman literally was wondering if she was going to die.

[(8T 69-4 to 15)]

She is literally trying to figure out, how do I protect myself, what do I do to not get dislodged from this car? So she's looking towards the keys. She's looking towards the gears. She's looking at his eyes. She's looking [at him. This isn't, like, a time to take a quick nap. She's as engaged as she must be because it matters more than it could, right?

[(8T 70-5 to 12)]

The prosecutor even argued that misidentification -- and cross-racial misidentification, specifically -- is not a

significant concern when “you’re jammed into a 2 foot [area] with a person for four and a half blocks and you’re fighting for at least your car, if not perhaps, your life.” (8T 60-6 to 16) The prosecutor made a similar argument in his opening statement, as well, arguing that the victim’s identification is reliable because this is one of those moments a person remembers -- and remembers well -- forever. (7T 5-20 to 6-10) He stated that the carjacking would have overcome the ordinarily transient nature of memory and resulted in a “fixed memor[y].” (7T 5-20 to 6-10)

These arguments are contradicted by well-established case law and science detailing why such identifications often result in wrongful convictions. The science, and our Supreme Court, say the opposite: identifications made under high-stress conditions are less reliable, not more:

Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification. **The Special Master found** that ‘while moderate levels of stress improve cognitive processing and might improve accuracy, **an eyewitness under high stress is less likely to make a reliable identification of the perpetrator.**’ The State agrees that high levels of stress are more likely than low levels to impair an identification. **Scientific research affirms that conclusion.** A meta-analysis of sixty-three studies showed ‘considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details.’

[Henderson, 208 N.J. at 261 (internal citations omitted) (emphasis added).]

As our Supreme Court has recognized, the scientific consensus is that the extreme stress of being carjacked (or involved in another stressful situation) would cause someone to make a less accurate identification. Id. Yet, the prosecutor in this case told the jury the opposite. He then had the jury conduct the simulation in the low-stress jury box, and argued that the jury's ability to make observations mimicked the victim's ability to recollect observations under extreme stress. These assertions by the prosecutor were improper because the prosecutor was bolstering the essential identification testimony based on facts not in the record and because they directly contradicted the scientific consensus discussed in Henderson.

The prosecutor used a misleading simulation and made inaccurate legal and factual assertions to improperly bolster the victim's identification, seriously prejudicing Mr. Hill and demanding reversal of his convictions. State v. Bradshaw, 195 N.J. 493, 510 (2008) (a prosecutor may not argue that a victim had "heightened sensory ability[,] " "argue facts that are not in the record[,] " or "expressly or implicitly vouch for the credibility of the victim."); see also State v. Rivera, 437 N.J. Super. 434, 449-451 (App. Div. 2014) (prosecutor may not "bolster a State's witness").

Prosecutorial misconduct is especially prejudicial where it "relat[es] to key issues in the case." State v. Feaster, 156

N.J. 1, 61-62 (1998). Although defense counsel failed to object to the simulation and some of the prosecutor's remarks, reversal is still required, given the gravity of this misconduct and the closeness of this case. This Court should find this misconduct constituted plain error, as it did in Williams. R. 2:10-2.

Because "[a prosecutor's] comments during opening and closing carry the full authority of the State," courts "cannot sit idly by and condone prosecutorial excesses" that occur during these phases of trial. Frost, 158 N.J. at 87-88 (quoting State v. Spano, 64 N.J. 566, 568 (1974)). To effectively limit misconduct, "prosecutors and courts must know that when they commit egregious errors that mortally cut into the fair-trial rights of a defendant, there will be real consequences." State v. Trinidad, No. 081881, 2020 N.J. LEXIS 213, at \*60-61 (N.J. Mar. 18, 2020) (Albin, J., dissenting). Here, this prosecutor must have known that a similar simulation had been found improper and highly prejudicial; this trial occurred after Williams was decided. This Court should again remind him that there are consequences for his improper tactics,<sup>25</sup> which deprived the defendant of due process and a fair trial.

<sup>25</sup> This is not even the second time that such a reminder has proven necessary. This prosecutor has repeatedly withheld exculpatory evidence from defendants and has consistently chosen winning over justice. <https://www.nj.com/hudson/2019/02/lawyer-alleges-hudson-county-prosecutors-have-pattern-of-withholding-evidence.html>; <https://www.prosecutorialaccountability.com/>

**B. The Prosecutor Elicited Misleading Testimony and Made a Misguiding Argument Contrary to Fact and Law: that Because the Eyewitness Thought Mr. Hill Looked the Most Like the Suspect, He Was the Suspect.**

The prosecutor also elicited misleading testimony and made a misguiding argument that suggested to the jury that Mr. Hill was the right suspect because he looked the most like the man who carjacked her out of the six men in the photo array.

(7T 232-4 to 235-8; 8T 79-14 to 24) The flaw underlying this logic was that it failed to account for the problem of relative judgment. This misconduct also deprived Mr. Hill of due process and a fair trial, thus requiring reversal of his convictions.

As discussed in Henderson, relative judgment refers to the fact that, if the actual perpetrator is not in the lineup, a witness will choose the person in the lineup who looks most like the suspect. 208 N.J. at 234-35. This phenomenon enhances the risk of misidentification. Id. In one study cited in Henderson, 68 percent of witnesses shown six fillers (absent the perpetrator) misidentified a filler photo, even though they were told that the perpetrator might not be in the lineup. Id. at 235 (citing Gary L. Wells, What Do We Know About Eyewitness Identification?, 48 Am. Psychologist 553, 560 (1993)). Some experts believe that relative judgment explains why sequential lineups, as opposed to simultaneous lineups, has been found by

2019/03/20/prosecutors-continue-to-duck-brady-by-sitting-on-exculpatory-evidence-until-the-last-minute/



some to result in fewer, but more accurate, identifications; “with sequential lineups, witnesses cannot compare photos and choose the lineup member that best matches their memory.” Id. at 257 (citation omitted).

Here, the eyewitness compared the lineup photos for eight-and-a-half minutes, stacking them in groups and comparing them, before selecting Mr. Hill’s photo. (7T 128-2 to 129-4, 130-8 to 131-15, 228-25 to 3, 79-16 to 17) Although the officer attempted to conduct a sequential lineup by handing her the photos one at a time to review, he did not intervene when the eyewitness compared the photos anyway. (7T 130-11 to 13, 228-25 to 3) The eyewitness ultimately said she was 80 percent sure in her identification of Mr. Hill; she hesitated because she said the perpetrator had darker skin and a scruffier beard. (7T 225-5 to 18, 230-18 to 231-1)

Defense counsel moved to suppress the identification procedure as suggestive and the identification as unreliable. (2T 4-4 to 4-25) After holding a hearing, the Court denied the motion, finding that the officer did not encourage her to compare the photos and that he did not try to stop her because the officer was understandably worried he would influence her identification. (5T 6-11 to 11-9) The Court found the procedure was not suggestive. (5T 11-3)

At trial, the prosecutor played the video of photo lineup procedure and, in tandem, used a PowerPoint to show the jury which photos were being reviewed and compared by the eyewitness throughout the lineup procedure. (7T 117-4 to 122-6; Da 71-118) This PowerPoint forced the jury to focus on the amount of time the eyewitness spent reviewing Mr. Hill's photo relative to others and encouraged the jury to compare the photos, like the eyewitness had. This compounded the risk that Mr. Hill was wrongfully prosecuted and convicted because he looked most like the suspect.

The prosecutor also elicited testimony from the eyewitness, encouraging her to compare the photos and explain why she picked Mr. Hill's photos over the other photos.

[MR. FELDMAN]: Who has a darker complexion between 1 and 3?

[MS. ZANATTA]: One.

[MR. FELDMAN]: Who has a darker complexion between 2 and 3?

[MS. ZANATTA]: Two.

. . .

[MR. FELDMAN]: Which witness has a dark complexion to you, 4 or 3?

[MS. ZANATTA]: Four

[MR. FELDMAN]: Which witness -- which individual has darker complexion to you, 5 or 3?

[MS. ZANATTA]: Five.

[MR. FELDMAN]: Which individual has darker complexion to you, 6 or 3?

[MS. ZANATTA]: Six.

[MR. FELDMAN]: Why did you choose the lightest complexion person out of the six?

[MS. ZANATTA]: Because when I looked in his eyes, they were the same eyes that were looking at me in my car. And when I looked at 1, 2, 4, 5, and 6, number 1, his face is too round and his beard is completely black.

. . .

[MR. FELDMAN]: Why did you ultimately pick -- not pick number 4?

[MS. ZANATTA]: Because he was really thin. His lips weren't full and his eyes weren't big. He has very tinny, like almost -- very tiny eyes. His nose is too wide. It was -- and his lips are very tiny. And he looks small himself . . . Plus he's an older gentleman.

[(7T 232-4 to 235-8)]

At the prosecutor's invitation, Ms. Zanatta compared the features of the six men to explain to the jury why she chose one man over the others; she engaged in the fallacy of relative judgment and encouraged the jury to do so, as well. While the questions about the defendant's skin color suggested that Ms. Zanatta's identification was especially reliable because she chose him despite the lightness of his skin color, as a whole, this questioning suggested that Mr. Hill was the suspect solely because he looked most like the suspect.

The defense objected to this line of questioning. (7T 232-10 to 21, 234-1 to 4)

[DEFENSE COUNSEL]: Judge, I'm going to object to this. I'm not sure what -- this is a test of her --

[THE COURT]: So, what's this relevant to? I hate to say, aren't we doing what -- I don't want to say. Right? Aren't we doing what we're not supposed to be doing with the witness? It's like picking six pictures and saying is it this one, that one, or the other one?

[DEFENSE COUNSEL]: I have an objection, Judge, and that's what it is.

[(7T 233-10 to 19)]

Defense counsel and the Court seemed to initially agree that this line of questioning and testimony was problematic because the prosecutor was having her compare photos. (7T 232-10 to 21) But the Court ultimately allowed the questioning, only telling the prosecutor to not ask leading questions. (7T 233-2 to 5)

This encouraged the jury to engage in the same flawed reasoning the witness had used in making her identification; the prosecutor essentially told the jury to find Mr. Hill guilty because the eyewitness thought Mr. Hill looked more like the suspect than the other five men in the filler photos.

The prosecutor repeated this misleading and flawed argument at summation. He told the jury that the eyewitness looked at Mr. Hill's photo longer than the others. (8T 79-14 to 24) In fact, the prosecutor used a PowerPoint to argue that Ms. Zanatta was

either looking at Mr. Hill's photo or comparing it to other photos 91 percent of the time. (8T 79-14 to 24, Da 39) This line of argument is plainly rooted in relative judgment, is misleading, and contrary to Henderson, 208 N.J. at 234-35. See Williams, 244 N.J. at 617 (explaining that PowerPoint presentations may not be used to make improper or misleading arguments). Just because the eyewitness compared the photos and decided that Mr. Hill looked most like the perpetrator in no way means that he was the perpetrator.

This theory of relative judgment underlying this line of questioning and argument improperly bolstered an already problematic identification and encouraged the jury to engage in logical fallacy and come to erroneous conclusions. The prosecutor's arguments and the witness's answers to questioning involving relative judgment encouraged the jury to convict Mr. Hill of this crime because he looked most like the perpetrator, instead of because he was the perpetrator. Although defense counsel objected to this line of questioning, no tailored curative instruction was given, nor was any remedy provided. (7T 233-10 to 19)

In sum, given that the State's entire case rested on a single, weak identification, and the prosecutor's misconduct improperly bolstered that identification, the prosecutorial misconduct had the clear capacity to tip the scales and deprived

the defendant of a fair trial. The prejudicial impact of this prosecutorial misconduct is especially clear in this case, where the jury deliberated for over two days -- double the amount of time it took for the evidence to be presented -- and asked to review pieces of evidence three separate times. (9T 3-8 to 18, 6-17 to 24; 10T 3-11 to 12)

**C. The Cumulative Effect of the Repeated Prosecutorial Misconduct Deprived Mr. Hill of a Fair Trial.**

Each of the aforementioned prosecutorial errors are of sufficient magnitude to warrant reversal standing alone. However, even assuming arguendo that this Court were to disagree that one of these errors, on its own, warranted reversal, the cumulative impact of the pervasive prosecutorial misconduct deprived the defendant of a fair trial. See Rivera, 437 N.J. Super. at 465 ("the cumulative impact of the prosecutor's misconduct leaves us with significant doubt that defendant received a fair trial"); State v. Jenewicz, 193 N.J. 440, 474 (2008) (cumulative error requires reversal, notwithstanding even "powerful" evidence of guilt); State v. Orecchio, 16 N.J. 125, 129 (1954) (if all errors taken together denied defendant a fair trial, then the court must reverse). The prosecutor's improper remarks were never cured or stricken from the record. Therefore, the prosecutor's improper comments in summation were likely some of the last words the jury heard from either counsel before retiring to the deliberation room. In a case where the defense

hinged on the identity of the perpetrator, the prosecutor's pervasive misconduct pertaining to identification evidence likely tipped the scales in favor of an unjust conviction. For these reasons, reversal of both of Mr. Hill's convictions is required.

POINT III

**THE ARREST PHOTOS SHOULD HAVE BEEN EXCLUDED  
BECAUSE THEY WERE MINIMALLY PROBATIVE, HIGHLY  
PREJUDICIAL, AND CUMULATIVE. AT MINIMUM, A  
LIMITING INSTRUCTION SHOULD HAVE BEEN GIVEN.  
REVERSAL IS THUS REQUIRED. (5T 47-23 to 48-5)**

The arrest photos should have been excluded because they were minimally probative, highly prejudicial, and cumulative. Under N.J.R.E. 403, evidence "may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury; or (b) undue delay, waste of time, or needless presentation of cumulative evidence." In other words, a trial court is authorized to exclude even relevant evidence if its probative value "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue." State v. Thompson, 59 N.J. 396, 421 (1971). The admission of the arrest deprived Mr. Hill of a fair trial, requiring reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

The "more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it" under N.J.R.E. 403. State v. Medina, 201 N.J. Super. 565, 580 (App. Div. 1985). In determining whether evidence should be excluded under N.J.R.E. 403, trial courts are afforded a wide



range of latitude. Brenman v. Demello, 191 N.J. 18, 31 (2007). If such ruling constitutes a "clear error of judgment," however, reversal is warranted. Id.; State v. Koedatich, 112 N.J. 225, 313 (1988).

The six different arrest photos that were admitted into evidence were minimally, if at all, probative. The court allowed the photos in as evidence that Mr. Hill was wearing clothing somewhat similar to the clothing the victim said the suspect was wearing at the time of the carjacking. (5T 47-23 to 48-5) Specifically, the victim described the suspect as wearing faded blue jeans, a grey hoodie, a red winter hat, and an olive or brown vest on the date of the carjacking. (7T 179-20 to 23) When Mr. Hill was arrested a month later, he was wearing faded blue jeans, a grey hoodie, a red winter hat, and a black jacket. (Da 23-28) At trial, the surveillance footage established that, contrary to the victim's description, the suspect was wearing dark pants (not faded blue jeans), a black hat (instead of a red hat), and a black jacket (instead of an olive vest). (Da 13-15)

To the extent that the arrest photos were used to show that Mr. Hill owned clothing similar to clothing the victim said the suspect was wearing, they were minimally probative. First, Mr. Hill was arrested a month after the incident; it is not as though he was found wearing these items the same day. Second, faded jeans, a grey hoodie, and a red winter hat are not unique

items of clothing. Third, the victim said the suspect was wearing an olive or green vest, but Mr. Hill was wearing a black jacket on top of his hoodie when he was arrested. (Da 23-28) And, unlike the man who committed the carjacking, he was not wearing a vest. The arrest photos were therefore minimally probative.

Second, the surveillance footage showed that the victim was wrong about the clothing the suspect was wearing. Instead of a red hat, the videos show the suspect was wearing a black one. (Da 13-15) Instead of faded blue jeans, they show dark pants. (Da 13-15) And, whereas she said the suspect was wearing an olive vest and that the gray sleeves of the hoodie were showing, the suspect is clearly wearing a black jacket. (Da 13-15) Although the prosecutor tried to attribute these discrepancies to bad lighting, the colors in the stills are clearly discernible. (Da 13-15) Therefore, because the suspect was not wearing a red hat, or faded blue jeans in the video, among other items of clothing she said he was, it is not probative that Mr. Hill was wearing some similar items of clothing when he was arrested.

Moreover, the clothing that Mr. Hill was wearing when he was arrested does not uniquely match the clothing the suspect appears to be wearing in the surveillance footage. (Da 13-15, 23-28) Mr. Hill was arrested wearing a red hat and faded jeans,

but the video surveillance shows the suspect was wearing a black hat and dark pants. (Da 13-15, 23-28) While Mr. Hill and the suspect were both wearing grey hoodies and black jackets, it is universally-known that these items of clothing are extremely common. In sum, the arrest photos were minimally probative.

Finally, Mr. Hill himself was obviously at the trial and there was no allegation that he looked different at trial than he did during his arrest. As such, the photos were not necessary to show what Mr. Hill looked like close to the time of the incident. C.f. Lazo, 209 N.J. at 22 (the jury is capable of reviewing photos for itself when there is no change in appearance). That is, the jury was capable at looking at him during the trial and deciding whether he looked like the man the victim described.

At the same time, the six arrest photos were highly prejudicial and cumulative. The prosecutor's arguments, and the photos, themselves, repeatedly referenced and displayed in the PowerPoint in summation, repeatedly reminded the jury that Mr. Hill had been arrested and booked for this offense. (Da 35-45) Arrest photographs are generally inadmissible because they are so prejudicial. State v. Burton, 309 N.J. Super. 280, 288 (App. Div. 1998) ("probative value of the [arrest] photographs, particularly in light of the fact they were introduced only to enhance the reliability of the identification, was substantially

outweighed by the risk of undue prejudice in bringing to the attention of the jury the fact that defendant had previously been arrested and incarcerated"); see also State v. Cribb, 281 N.J. Super. 156, 160 (App. Div. 1995) ("[i]dentification of photos of a defendant as mug shots has resulted in reversal of convictions on appeal because they imply a criminal history"); State v. Taplin, 230 N.J. Super. 95, 99 (App. Div. 1988) (photograph of defendant "could reasonably be inferred by a jury to be a mug shot suggestive of a prior criminal record, and we perceive no purpose for its admission other than unfairly to permit the jury to draw the inference that defendant had a prior criminal record").

While, here, the jury was aware that the arrest photos were from this prosecution, and therefore they did not imply Mr. Hill had a criminal history, they were still prejudicial because they -- and the prosecutor's repeated reference to them during summation in a PowerPoint -- reminded the jury, again and again, that Mr. Hill had been arrested and incarcerated for this offense. (8T 67-7 to 24, 67-19 to 68-2, 85-13 to 16, 92-5 to 6)

Both the United States Supreme Court and the New Jersey Supreme Court have condemned the practice of presenting the accused to the jury in prison attire because the constant reminder of the fact that the accused has been incarcerated for this offense impairs the presumption of innocence and may affect

a juror's judgments. Estelle v. Williams, 425 U.S. 501, 504-05 (1976); State v. Maisonet, 166 N.J. 9, 17-19 (2001). Here, the repeated portrayal and discussion of the arrest photographs likewise reminded the jury of the fact that the defendant had been arrested and incarcerated for this offense, and thus, impaired the presumption of innocence.

Moreover, the admission of the six photos was needlessly cumulative. There is no reason that six of Mr. Hill's arrest photos were necessary. Hence, the trial court's ruling admitting the arrest photos constitutes a clear error of judgment. And, to the extent any of the photos were sufficiently probative to outweigh the prejudice, one photograph of the clothing would have sufficed.

Moreover, at a minimum, the court should have issued a limiting instruction telling the jury that the arrest photographs and the fact that Mr. Hill was arrested was not probative of guilt. "When a party challenges relevant evidence pursuant to N.J.R.E. 403, '[a]s an alternative to total exclusion of highly prejudicial but also probative evidence, trial courts may use the device of a limiting instruction under N.J.R.E. 105.'" Cole, 229 N.J. at 456 (citation omitted). Where a limiting instruction would provide

important guidance as the jury is presented with prejudicial evidence, it should be issued.<sup>26</sup>

Counsel repeatedly objected to the admission of and the prosecutor's use of the arrest photographs. (5T 39-16 to 41-1, 45-12 to 48-5; 7T 75-17 to 77-17, 82-10 to 16) The admission of these photos was extremely prejudicial and clearly could have tipped the scales in this close case, where the only testimony linking the defendant to the offense was a single, shaky identification by an eyewitness. For these reasons, Mr. Hill's convictions should be reversed.

<sup>26</sup> Although defense counsel denied the court's offer to include a jury instruction addressing photos taken by or used by the police for identification purposes, the parties were discussing whether that instruction was necessary to address the lineup photos, not the arrest photos. (8T 20-16 to 22-5) They mention that the photos are from the DMV, and therefore do not appear to be discussing arrest photos. (8T 20-16 to 22-5)

**CONCLUSION**

Mr. Hill's convictions must be reversed because the jury was not instructed on and did not find an essential element of witness tampering -- that the defendant intended for or knew that his speech or conduct was the type of speech that would cause a witness to impede or obstruct a proceeding. See Point I. Mr. Hill's convictions must also be reversed due to the repeated and egregious prosecutorial conduct that very well could have prompted the jury to return a guilty verdict in this close case. See Point II. Finally, reversal of both convictions is required because the court erred in admitting the six arrest photos and failing to issue a limiting instruction. See Point III.

Respectfully submitted,

JOSEPH E. KRAKORA  
Public Defender  
Attorney for Defendant-Appellant

By: /s/ Ashley Brooks  
Ashley T. Brooks  
Assistant Deputy Public Defender

Dated: July 19, 2021

SUPERIOR COURT OF NEW JERSEY  
HUDSON COUNTY  
CRIMINAL DIVISION

**AMENDED**

SEP 09 2019

A.D. 2020 TERM

1ST SESSION1 ST PANEL B-248

THE STATE OF NEW JERSEY

INDICTMENT NO. 19 09 0946

vs.

WILLIAM HILL

Prosecutor's File No. 18007078  
CDR No(s). SUPERCEDING INDICTMENT

CHARGE(S):

CARJACKING

(N.J.S.A. 2C:15-2a(1)) 1ST DEGREE;

WITNESS TAMPERING

(N.J.S.A. 2C:28-5a(1)) 1ST DEGREE

DEFENDANT(S)

THE GRAND JURORS OF THE STATE OF NEW JERSEY FOR THE COUNTY OF HUDSON UPON THEIR OATHS, PRESENT THAT, WILLIAM HILL, On or about the 31st day of October, 2018, in the Town of Harrison, County of Hudson, aforesaid, and within the jurisdiction of this Court, in an attempt to commit an unlawful taking of a motor vehicle, he knowingly, inflicted bodily injury or used force upon Alessa Zanatta, an occupant or person in control of a motor vehicle, that is, a red 4-door Jeep, and/or operated or caused the motor vehicle to be operated with the person who was in possession or control of the motor vehicle at the time of the taking remaining in the vehicle, contrary to the provisions of N.J.S.A. 2C:15-2a(1), against the peace of this State, the Government and dignity of the same.



## SECOND COUNT

And further PRESENT, That on or about the 1st day of April, 2019 in the place and in the jurisdiction set forth in the First Count herein, the said, WILLIAM HILL, believing that an official proceeding or investigation was pending or about to be instituted or had been instituted, knowingly did attempt to induce or otherwise cause Alessa Zanatta to testify/inform falsely, and/or withhold testimony/information/a document/some evidence, and/or elude legal process, and/or absent herself from a proceeding or investigation to which she had been legally summoned, and/or obstruct/delay/prevent/impede an official proceeding or investigation, contrary to the provisions of N.J.S.A. 2C:28-5a(1) against the peace of this State, the Government and dignity of the same.

DF/wb

ESTHER SUAREZ, PROSECUTOR

By: 

DAVID FELDMAN, ASSISTANT PROSECUTOR

A WHITE BILL

ASSIGNED TO THE SUPERIOR COURT

SEP 24 2019

20

PRESENTED:

AUG 28 2019

ASSIGNMENT JUDGE SUPERIOR COURT

STATE OF NEW JERSEY : SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION HUDSON COUNTY

v. :

WILLIAM HILL : INDICTMENT NO. 19-09-00946  
Defendant.

---

**JURY VERDICT SHEET**

---

**QUESTION 1**

Do you find that the State has proven beyond a reasonable doubt that on October 31<sup>st</sup>, 2018 William Hill Carjacked Alessa Zanatta.

Our verdict is :

NOT GUILTY \_\_\_\_ GUILTY ☒

If you answered "GUILTY," please go on to QUESTION 4

If you answered "NOT GUILTY", please go on to QUESTION 2.

**QUESTION 2**

Do you find that the state has proven beyond a reasonable doubt that Mr. Hill committed the Theft of Movable Property, that is a Motor Vehicle?

Our verdict is:

NOT GUILTY \_\_\_\_ GUILTY \_\_\_\_

If you answered "GUILTY," please go on to Question 4.

If you answered "NOT GUILTY," please go on to Question 3

**QUESTION 3**

Do you find that the state has proven beyond a reasonable doubt that Mr. Hill has engaged in the Unlawful Taking of Means of Conveyance?

Our verdict is:

NOT GUILTY \_\_\_\_ GUILTY \_\_\_\_

If you answered "NOT GUILTY," please go on to Question 4.

If you find the defendant "GUILTY," please answer the following:

Do you find that that the state has proven beyond a reasonable doubt that the defendant has engaged in Unlawful Taking of Means of Conveyance and Creating a Risk of Injury to Any Person or Damage to Property?

Our verdict is:

NOT GUILTY \_\_\_\_ GUILTY \_\_\_\_

Please go on to Question 4.

**QUESTION 4**

Count 2 of the Indictment charges that on or about April 1<sup>st</sup>, 2019 William Hill, knowingly engaged in Witness Tampering against Alessa Zanatta.

Our verdict is:

NOT GUILTY \_\_\_\_ GUILTY       /      

PLEASE ADVISE THE SHERIFF'S OFFICER THAT YOU HAVE REACHED A VERDICT.



# Judgment of Conviction & Order for Commitment

## Superior Court of New Jersey, HUDSON County

**State of New Jersey**
**v.**

 Last Name  
HILL

 First Name  
WILLIAM

Middle Name

Also Known As

RAHEEM HILL JOSEPH SANDERS RUSSELL JOHNSON ANDREW YOUNG

Date of Birth

06/30/1970

SBI Number

543941B

Date(s) of Offense

10/31/2018

Date of Arrest

11/27/2018

PROMIS Number

18 007078-001

Date Ind / Acc / Complt Filed

09/04/2019

Original Plea

☐ Not Guilty

☐ Guilty

Date of Original Plea

Adjudication By

☐ Guilty Plea

☐ Jury Trial Verdict

☐ Non-Jury Trial Verdict

☐ Dismissed / Acquitted

Date: 10/02/2019

### Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
19-09-00946-I	1	CARJACKING-INFLICT BI OR USES FORCE UPON OCCUPANT	2C:15-2A(1)	1
19-09-00946-I	2	WITNESS TAMPERING-TO CAUSE FLSE TESTMNY-NO NERA/FORCE	2C:28-5A(1)	3

### Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
19-09-00946-I	1	CARJACKING-INFLICT BI OR USES FORCE UPON OCCUPANT	2C:15-2A(1)	1
19-09-00946-I	2	WITNESS TAMPERING-TO CAUSE FLSE TESTMNY-NO NERA/FORCE	2C:28-5A(1)	3

### Sentencing Statement

 It is, therefore, on 06/10/2020 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

On October 2, 2019, defendant was found guilty on each count by Trial Jury Verdict and is sentenced as follows:

COUNT 1: Defendant is sentenced to the custody of the Commissioner of the Department of Corrections for a term of twelve (12) years. Pursuant to NERA, the defendant must serve 85% of the maximum term before being eligible for parole and must serve five (5) years of parole supervision. All fines imposed are payable through the Probation Division.

COUNT 2: Defendant is sentenced to the custody of the Commissioner of the Department of Corrections for a term of three (3) years. All fines imposed are payable through the Probation Division.

DISMISSALS: None

Sentences on each count are to run consecutive to each count.

Defendant shall have 45 days to appeal sentence.

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

Total Custodial Term

015 Years 00 Months 000 Days

Institution Name

CARE COMMISS/CORR

Total Probation Term

00 Years 00 Months

FILED, Clerk of the Appellate Division, July 19, 2021, A-004544-19, AMENDED

AMENDED

State of New Jersey v.  
HILL, WILLIAM

S.B.I. # 543941B Ind / Acc / Compl # 19-09-00946-I

<b>DEDR (N.J.S.A. 2C:35-15 and 2C:35-5.11)</b>		<b>Additional Conditions</b>																									
<p>A mandatory Drug Enforcement and Demand Reduction (DEDR) penalty is imposed for each count. (Write in number of counts for each degree.)</p> <p><input type="checkbox"/> DEDR penalty reduction granted (N.J.S.A. 2C:35-15a(2))</p> <table style="width:100%;"> <tr> <th></th> <th style="text-align: center;">Standard</th> <th></th> <th style="text-align: center;">Doubled</th> </tr> <tr> <td>1st Degree</td> <td style="text-align: center;">_____ @ \$</td> <td>_____</td> <td style="text-align: center;">_____ @ \$</td> </tr> <tr> <td>2nd Degree</td> <td style="text-align: center;">_____ @ \$</td> <td>_____</td> <td style="text-align: center;">_____ @ \$</td> </tr> <tr> <td>3rd Degree</td> <td style="text-align: center;">_____ @ \$</td> <td>_____</td> <td style="text-align: center;">_____ @ \$</td> </tr> <tr> <td>4th Degree</td> <td style="text-align: center;">_____ @ \$</td> <td>_____</td> <td style="text-align: center;">_____ @ \$</td> </tr> <tr> <td>DP or Petty DP</td> <td style="text-align: center;">_____ @ \$</td> <td>_____</td> <td style="text-align: center;">_____ @ \$</td> </tr> </table> <p style="text-align: center;"><b>Total DEDR Penalty \$</b> _____</p> <p><input type="checkbox"/> The court further ORDERS that collection of the DEDR penalty be suspended upon defendant's entry into a residential drug program for the term of the program. (N.J.S.A. 2C:35-15e)</p>			Standard		Doubled	1st Degree	_____ @ \$	_____	_____ @ \$	2nd Degree	_____ @ \$	_____	_____ @ \$	3rd Degree	_____ @ \$	_____	_____ @ \$	4th Degree	_____ @ \$	_____	_____ @ \$	DP or Petty DP	_____ @ \$	_____	_____ @ \$	<p><input type="checkbox"/> The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided (N.J.S.A. 53:1-20.20 and N.J.S.A. 53:1-20.29).</p> <p><input type="checkbox"/> The defendant is hereby sentenced to community supervision for life (CSL) if offense occurred before 1/14/04 (N.J.S.A. 2C:43-6.4).</p> <p><input type="checkbox"/> The defendant is hereby sentenced to parole supervision for life (PSL) if offense occurred on or after 1/14/04 (N.J.S.A. 2C:43-6.4).</p> <p><input type="checkbox"/> The defendant is hereby ordered to serve a <u>5</u> year term of parole supervision, pursuant to the No Early Release Act (NERA), which term shall begin as soon as the defendant completes the sentence of incarceration (N.J.S.A. 2C:43-7.2).</p> <p><input type="checkbox"/> The court imposes a Drug Offender Restraining Order (DORO) (N.J.S.A. 2C:35-5.7h). DORO expires _____</p> <p><input type="checkbox"/> The court continues/imposes a Sex Offender Restraining Order (SORO) if the offense occurred on or after 8/7/07 (Nicole's Law N.J.S.A. 2C:14-12 or N.J.S.A. 2C:44-8).</p> <p><input type="checkbox"/> The court imposes a Stalking Restraining Order (N.J.S.A. 2C:12-10.1).</p> <p><input type="checkbox"/> The defendant is prohibited from purchasing, owning, possessing, or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun (N.J.S.A. 2C:25-27c(1)).</p>	
	Standard		Doubled																								
1st Degree	_____ @ \$	_____	_____ @ \$																								
2nd Degree	_____ @ \$	_____	_____ @ \$																								
3rd Degree	_____ @ \$	_____	_____ @ \$																								
4th Degree	_____ @ \$	_____	_____ @ \$																								
DP or Petty DP	_____ @ \$	_____	_____ @ \$																								
<p>Forensic Laboratory Fee (N.J.S.A. 2C:35-20) _____ Total Lab Fee _____</p> <p>Offenses @ \$ _____ \$ _____</p>																											
<b>VCCO Assessment (N.J.S.A. 2C:43-3.1)</b>																											
Counts	Number	Amount																									
1	1 @	\$ 50.00																									
2	1 @	\$ 50.00																									
	@	\$ _____																									
	@	\$ _____																									
<b>Total VCCO Assessment \$ 100.00</b>																											
<b>Vehicle Theft / Unlawful Taking Penalty (N.J.S.A. 2C:20-2.1)</b>																											
Offense		Mandatory Penalty \$ _____																									
<b>Offense Based Penalties</b>																											
Penalty		Amount \$ _____																									
<b>Other Fees and Penalties</b>																											
<p>Law Enforcement Officers Training and Equipment Fund Penalty (N.J.S.A. 2C:43-3.3)</p> <p><input type="checkbox"/> \$ 30.00</p>		<p>Safe Neighborhoods Services Fund Assessment (N.J.S.A. 2C:43-3.2)</p> <p><input type="checkbox"/> 1 Offenses @ \$ 75.00</p> <p style="text-align: center;">Total: \$ 75.00</p>																									
<p>Probation Supervision Fee (N.J.S.A. 2C:45-1d)</p> <p><input type="checkbox"/> \$ _____</p>		<p>Statewide Sexual Assault Nurse Examiner Program Penalty (N.J.S.A. 2C:43-3.6)</p> <p><input type="checkbox"/> Offenses @ \$ _____</p> <p style="text-align: center;">Total \$ _____</p>																									
<p>Transaction Fee (N.J.S.A. 2C:46-1.1)</p> <p><input type="checkbox"/> _____</p>																											
<p>Domestic Violence Offender Surcharge (N.J.S.A. 2C:25-29.4)</p> <p><input type="checkbox"/> \$ _____</p>		<p>Certain Sexual Offenders Surcharge (N.J.S.A. 2C:43-3.7)</p> <p><input type="checkbox"/> \$ _____</p>																									
<p>Fine</p> <p>\$ _____</p>		<p>Sex Crime Victim Treatment Fund Penalty (N.J.S.A. 2C:14-10)</p> <p><input type="checkbox"/> \$ _____</p>																									
<p>Restitution Joint &amp; Several</p> <p>\$ _____ <input type="checkbox"/></p>		<p>Total Financial Obligation</p> <p>\$ 205.00</p>																									
<p>Details</p> <p>All fines are payable through the Probation Division.</p>																											

App 00232

**S.B.I. #** 543941B **Ind / Acc / Complt #** 19-09-00946-I

## Total Number of Days

9. The need for deterring the defendant and others from violating the law.

06/11/2020

App. 00233



New Jersey Judiciary  
Superior Court - Appellate Division  
**Notice of Appeal**

TITLE IN FULL (AS CAPTIONED BELOW)

**STATE OF NEW JERSEY****V****WILLIAM HILL**

ATTORNEY / LAW FIRM / PRO SE LITIGANT

NAME

**FRANK PUGLIESE, Esq.**

STREET ADDRESS

**31 CLINTON STREET P.O. BOX 46003**

CITY

**NEWARK**

STATE

**NJ**

ZIP

**07101**

PHONE NUMBER

**973-877-1200**

EMAIL ADDRESS

**intake.appellate@opd.nj.gov****frank.pugliese@opd.nj.gov (\*)**

ON APPEAL FROM

TRIAL COURT JUDGE

**MARK J. NELSON, JSC**

TRIAL COURT OR STATE AGENCY

**HUDSON**

TRIAL COURT OR AGENCY NUMBER

**19-09-00946-I**

Notice is hereby given that **WILLIAM HILL** appeals to the Appellate Division from a ☒ Judgment or ☐ Order entered on **06/11/2020** in the ☐ Civil ☒ Criminal or ☐ Family Part of the Superior Court ☐ Tax Court or from a ☐ State Agency decision entered on \_\_\_\_\_

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

**ON JUNE 11, 2020 DEFENDANT WAS SENTENCED TO 15 YEARS WITH A 10 YEAR 2 MONTH 12 DAY PAROLE DISQUALIFIER FOR CARJACKING, WITNESS TAMPERING**

This appeal is from a ☒ conviction ☐ post judgment motion ☐ post-conviction relief ☐ pre-trial detention

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other \_\_\_\_\_ specify

Is defendant incarcerated? ☒ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☒ No

If in custody, name the place of confinement:

**OTHER**

Defendant was represented below by:

☒ Public Defender ☐ self ☐ private counsel \_\_\_\_\_

specify



Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	<b>MARK J. NELSON, JSC</b>	<b>08/21/2020</b>
Trial Court Division Manager	<b>HUDSON</b>	<b>08/21/2020</b>
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to R. 2:5-1(a), (e) or (h)		

Other parties in this action:

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
<b>STATE OF NEW JERSEY</b>	<b>CAROL M HENDERSON, Esq.</b> <b>ATTORNEY GENERAL CRIMINAL JUSTICE</b> <b>25 MARKET STREET</b> <b>PO BOX 086</b> <b>TRENTON NJ 08625-0094</b> <b>609-376-2292</b> <b>hendersonc@njdcj.org,dcj-efile@njdcj.org</b>	<b>08/21/2020</b>

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service
Transcript Office	<b>APPELLATE TRANSCRIPT OFFICE</b>	<b>08/21/2020</b>
Clerk of the Tax Court		
State Agency		

Exempt from submitting the transcript request form due to the following:

☐

☒ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).

List the date(s) of the trial or hearing:

<b>09/26/2019</b>	<b>TRIAL</b>	<b>MARK J. NELSON, JSC</b>
<b>09/27/2019</b>	<b>TRIAL</b>	<b>MARK J. NELSON, JSC</b>
<b>09/24/2019</b>	<b>MOTION</b>	<b>MARK J. NELSON, JSC</b>

☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.

☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.



08/21/2020

Date

s/ FRANK PUGLIESE, Esq.

Signature of Attorney or Pro Se Litigant

BAR ID #

**002971989**

EMAIL ADDRESS .gov

**intake.appellate@opd.nj.gov, frank.pugliese@opd.nj**



New Jersey Judiciary  
Superior Court - Appellate Division  
Notice of Appeal

Additional appellants continued below

Additional respondents continued below

Additional parties continued below

Appellant's attorney email address continued below

**PARTY NAME: WILLIAM HILL ATTORNEY NAME: FRANK PUGLIESE, Esq.**  
intake.appellate@opd.nj.gov  
frank.pugliese@opd.nj.gov(CYNTHIA.VELOSO@OPD.NJ.GOV)

Respondent's attorney email address continued below

Additional Party's attorney email address continued below

"Da 12" refers to Ms. Zanatta's videotaped statement from the photo lineup, which was labeled as Exhibit "S-38" and admitted into evidence during the trial.

The DVD was submitted under separate cover.



Da 013





10-31-2018 Wed 07:09:21 (S)

App. 240

Da 014



S-21



STATE V. WILLIAM HILL  
19-9-496-SI  
PHOTO ARRAY COMPOSITION (11/6/18)

(1) FILLER	(2) FILLER	(3) WILLIAM HILL
(4) FILLER	(5) FILLER	(6) FILLER





App. 243





App. 244





App. 245





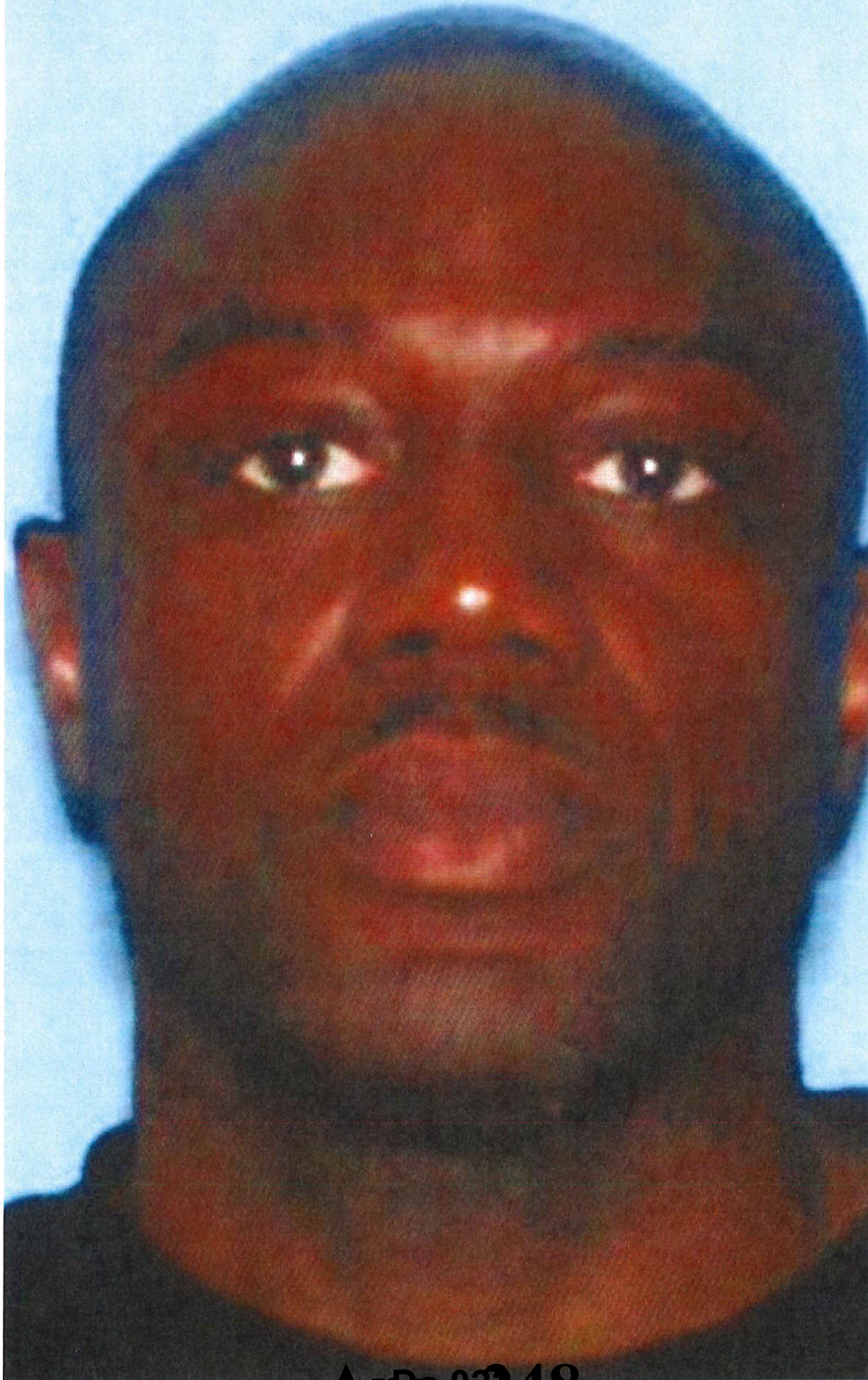
App: 246





App. 247





App. 248





Da 023

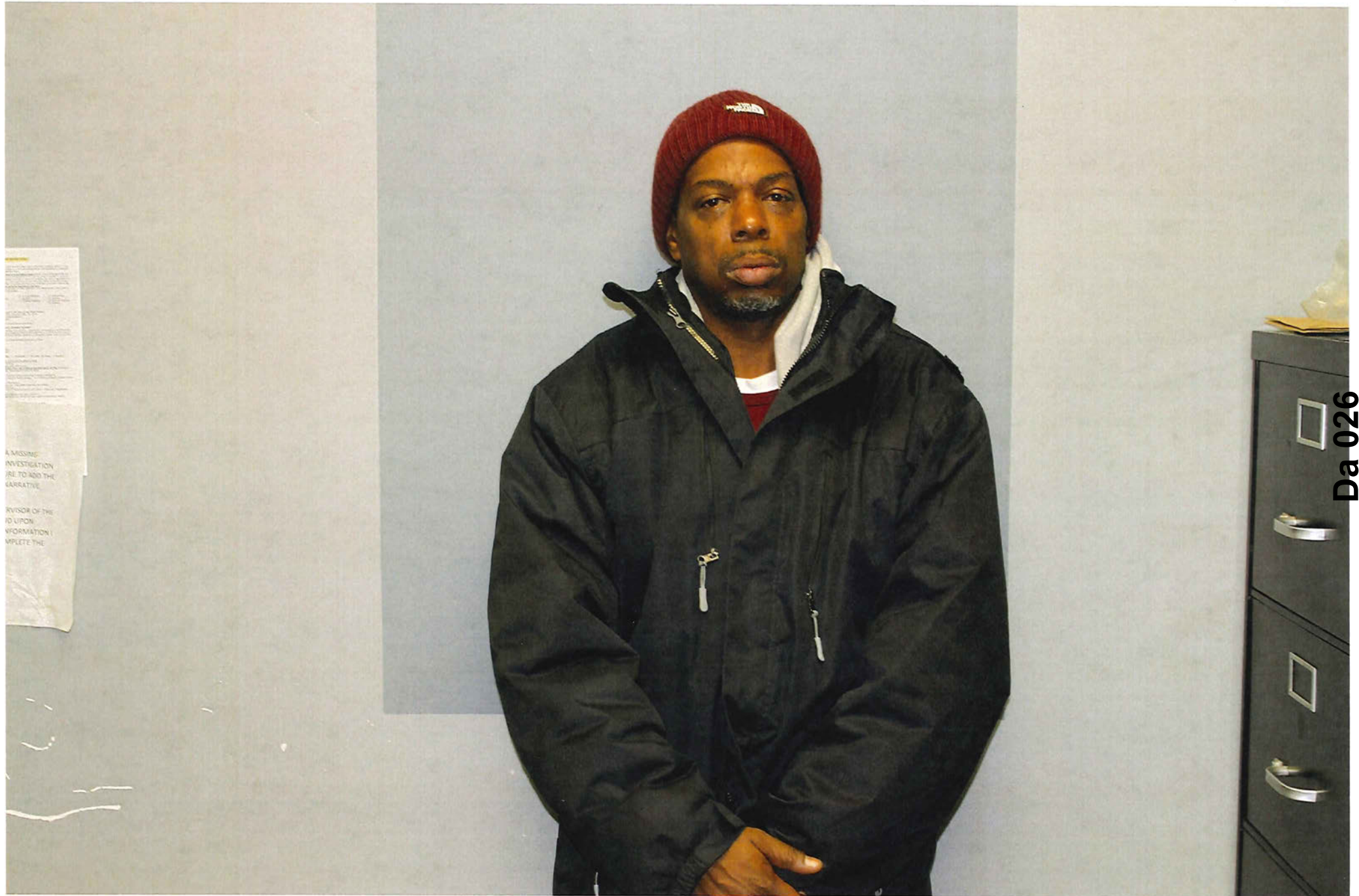




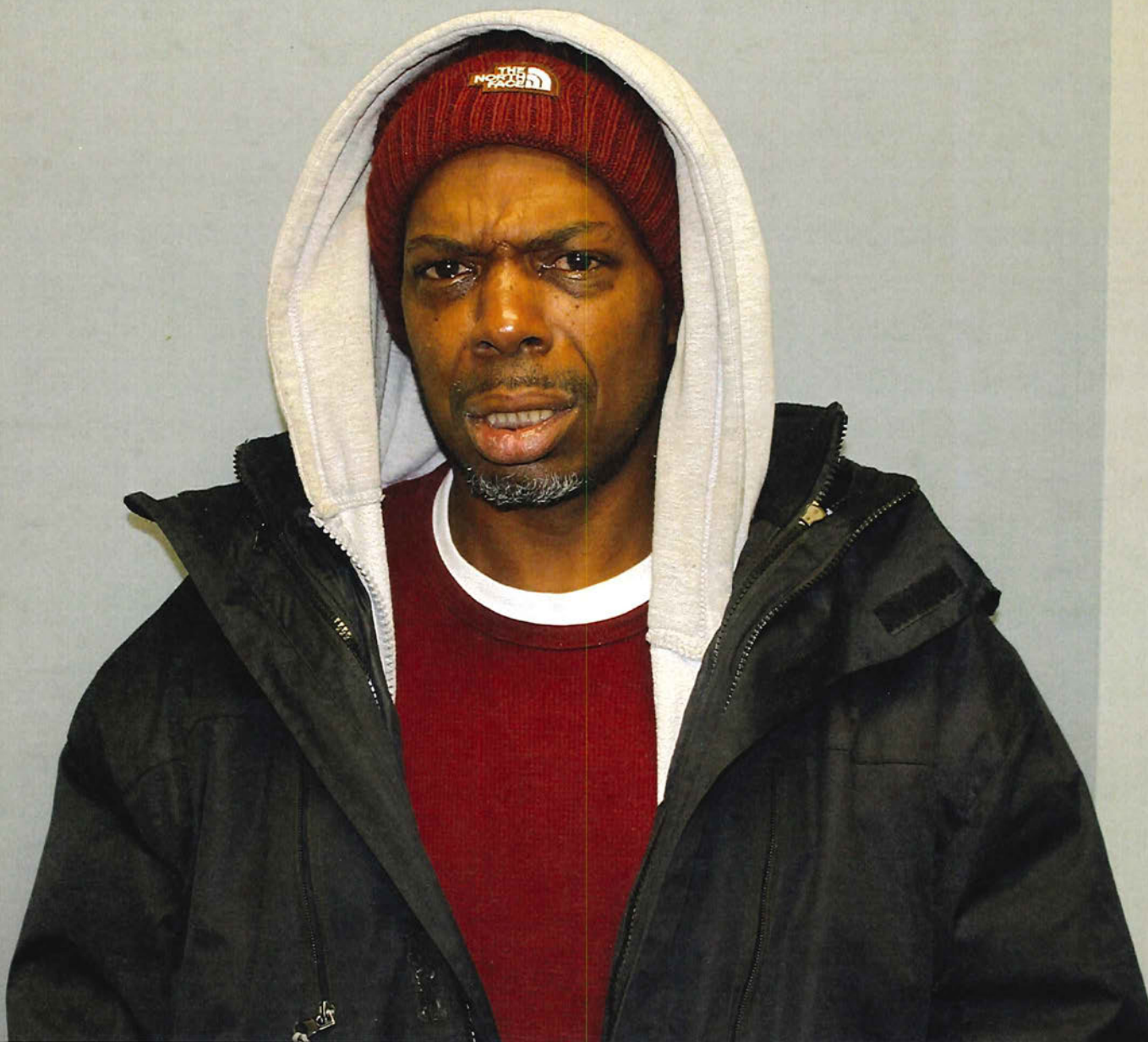


Da 025





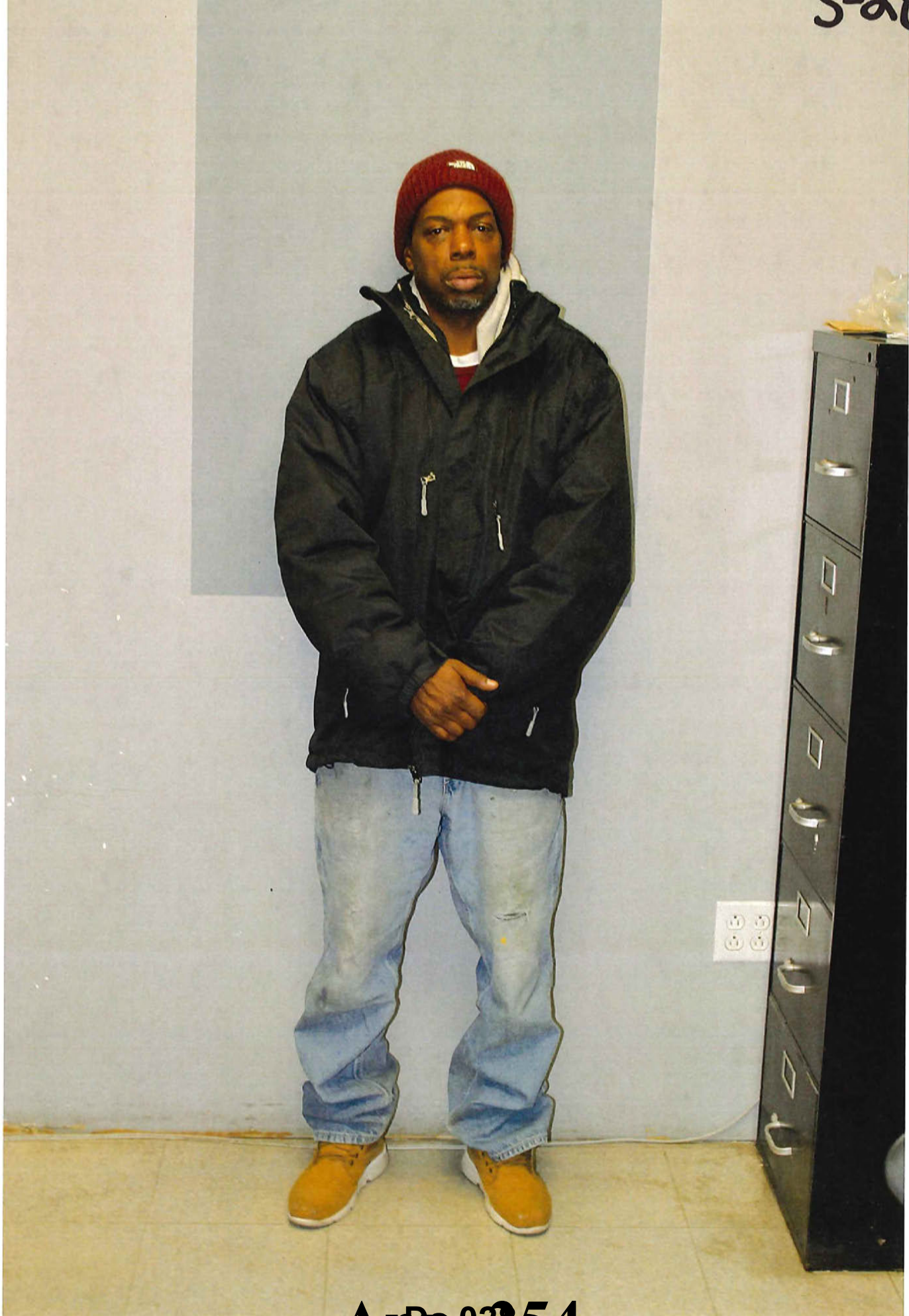
Da 026



Da 027



S-28



App. 254



April 1<sup>st</sup> 2019

S-36

To: Mr. Zarrata

I am that my message had completed its journey through out the atmosphere and reached its proper destination. I hope and pray it finds its recipient in the very best of health, mentally as well as physically, and in high spirits.

I know you're feeling uneasy to be a recipient of a correspondence from an unfamiliar author but please don't be startled because I'm coming to you in peace. I don't want to cause any more trouble.

Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with carjacking upon you. You may be saying I have the audacity to write to you and you may report it but I have to get this off my chest. I am not the culprit of this crime.

Mr. Zarrata, I've read the reports and watched your videotaped statement and I'm not disputing the order you've concluded. I admire your bravery and commend your success with conquering a thief whose intention was to steal your vehicle. You go girl!

Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor but God has created humankind so close in resemblance that your eyes will not be able to distinguish the difference without close examination of people at the same time. Especially not while in wake of such commotion you've endured!

Mr. Zarrata, I'm not an angel. I've had my share of living the crime life but a couple of years ago after serving a prison sentence, I decided to forsaken that lifestyle. Besides, carjacking a person was never my repertoire.

One thing about me, when I'm caught doing wrong (a sin), I confess my guilt and accept my punishment because I rather pay for my sins now in this lifetime instead of the Afterlife where the punishment is more severe and last to eternity. But this crime I have to say, I'm actually innocent of. Unintentionally. I'll have to remain incarcerated until the truth is revealed and my innocence is proven.

Mr. Zarrata, due to a woman giving me the opportunity to live life instead of alerting me, I have the utmost regards for women. Therefore, if it was me you arrested, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. However,



I am sorry to hear about the ordeal you had to endure but unfortunately, an innocent man (me) is being held accountable for it.

Ms. Zaretsky, I don't know what kind of justice selecting my photo from the array but I give my faith in God. By His will, the truth will be revealed and my innocents will be proven. But however, I do know He works in mysterious ways so I'll leave it in His hands.

I must say that this mishap had caused me to lose what little I've accumulated (my job, my car and my possessions within my residence). I have no more to lose except my freedom. The prosecutor for the state is trying to negotiate a plea offer with me but, I'm not going to accept anything for something I didn't do for if I do, the culprit would get away with a free crime. I have no other option but to take this case to trial, it seems as if it's the only way I will be cleared of this crime. If found guilty as charged in trial, I'll face from 35 yrs to life behind bars for a crime I had no parts of. I have no children. I guess the name stops here. My deceased grandmother is a "Seneca", my deceased father is a "Turner" and I'm the "third". I may not be deceased yet but life imprisonment is similar to being deceased because I can't produce a "truth" to carry on the name.

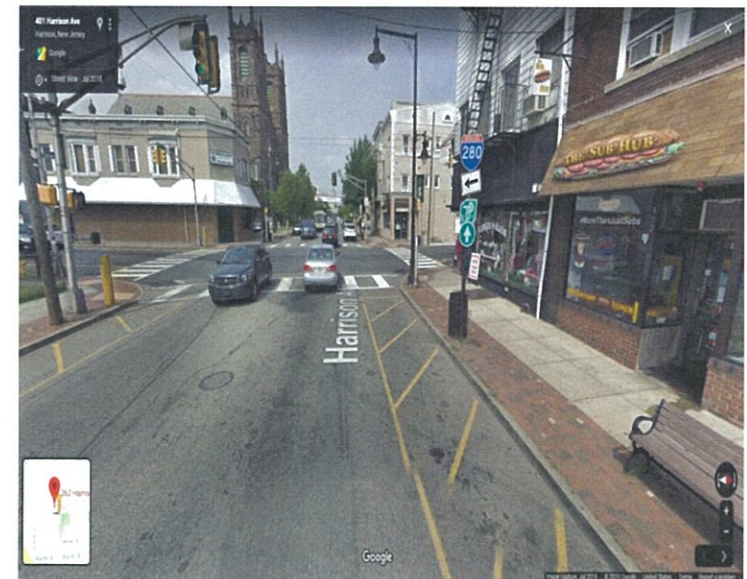
Ms. Zaretsky, I'm not writing to make you feel sympathy for me, I'm writing a respectful request to you. If it's me that you're claiming as the actor of this crime without a doubt, then disregard this correspondence. Otherwise please tell the truth if you're wrong or not arise. 100%.

Ms. Zaretsky, I'm not expecting a response from you but if you decide to respond and want a reply, please inform me of it. Otherwise you will not hear from me hereafter until the day of trial.

Well it's time I bring this missive to a close so take care, remain focus, be strong and stay out the way of trouble.

Sincerely,  
Chadron





- TIMER 90 SECONDS

Da 032



S-31



3

App. 259

Da 033



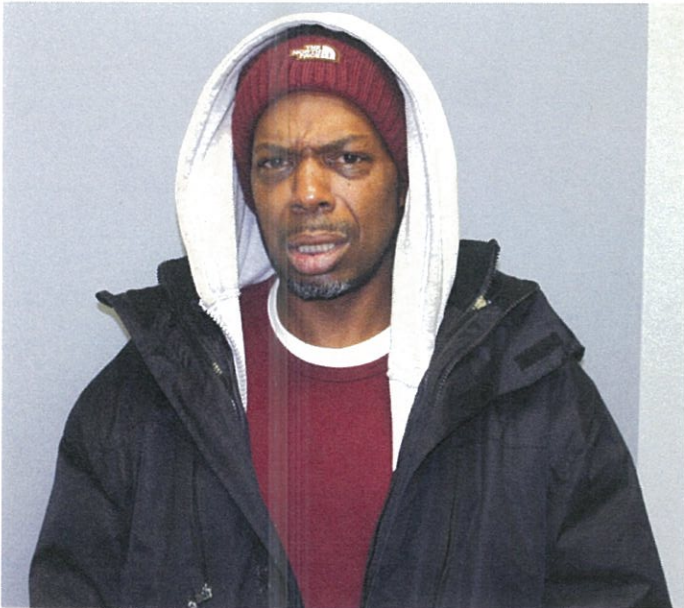
**ALESSA ZANATTA'S DESCRIPTION (10/31/18)**

PHYSICAL	CLOTHING
Male	Gray Hoodie
Black; Dark, but not extremely dark	Red Skully; Winter hat
Dark brown eyes	Jeans; Faded blue
Scruffy beard; Unkempt, growing everywhere	Gloves
No facial tattoos	Olive/brownish vest

ALESSA ZANATTA’S DESCRIPTION (10/31/18)

CLOTHING
Gray Hoodie
Red Skully; Winter hat
Jeans; Faded blue
Gloves
Olive/brownish vest

S-27



S-28





S-26



App. 262

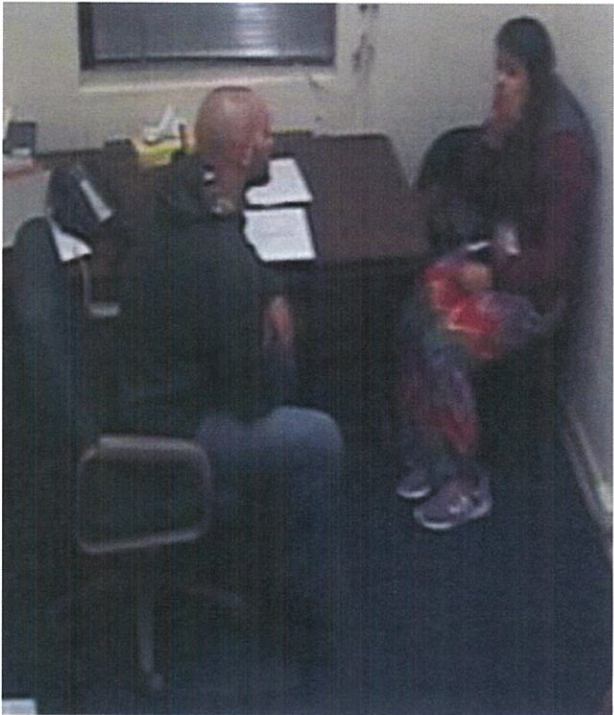
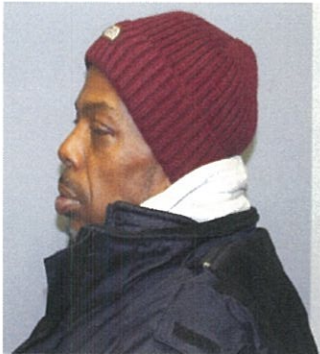
Da 036



RECAP

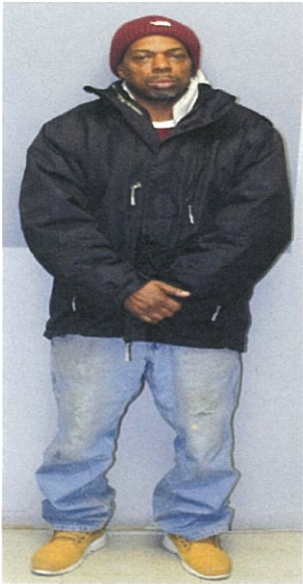


PHYSICAL
Male
Black; Dark, but not extremely dark
Dark brown eyes
Scruffy beard; Unkempt, growing everywhere
No facial tattoos



ALESSA ZANATTA'S DESCRIPTION (10/31/18)

CLOTHING
Gray Hoodie
Red Skully; Winter hat
Jeans; Faded blue
Gloves
Olive/brownish vest

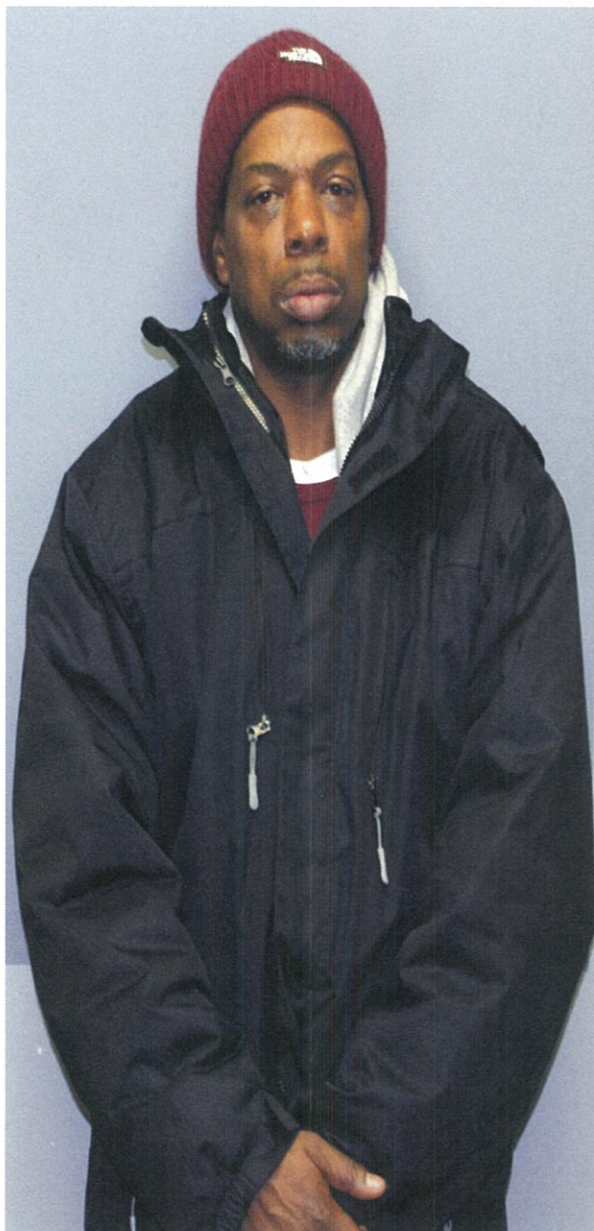




S-34



S-26



S-24



S-25



8

App. 264

Da 038

## PHOTO ARRAY MATH

- ONE-HUNDRED AND SIXTY (160) SECONDS AFTER BEING SHOWN HIS PHOTO FOR THE FIRST TIME, ALESSA ZANATTA IDENTIFIED THE DEFENDANT AS THE MAN WHO CARJACKED HER SIX (6) DAYS EARLIER
- SIXTY-ONE (61) SECONDS AFTER ASKING TO SEE THE PHOTOS AGAIN, ALESSA ZANATTA IDENTIFIED THE DEFENDANT AS HER ASSAILANT A SECOND TIME
- THE DEFENDANT'S PHOTOGRAPH WAS FIRST PRESENTED TO MRS. ZANATTA AT THE 3:10 MARK. OVER THE COURSE OF THE REMAINING THREE-HUNDRED AND FORTY-FOUR (344) SECONDS, ALESSA ZANATTA WAS EITHER REVIEWING OR IDENTIFYING THE DEFENDANT'S PHOTOGRAPH FOR THREE-HUNDRED AND TWELVE (312) OF THEM.

$$312/344 = 90.69\%$$



## OUT-OF-COURT-ID (Select Portions of Model Jury Charge)

### IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY

In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. . . .

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.

- (1) **The Witness's Opportunity to View and Degree of Attention:** In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following:
  - (a) **Stress:** . . . you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.
  - (b) **Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. . . .
  - (c) **Weapon Focus:** The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face.
  - (d) **Distance:** A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

(e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.

(f) **Intoxication:** The influence of alcohol can affect the reliability of an identification. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.

(g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification. Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.

- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator.
- (3) **Confidence and Accuracy:** [A] witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.
- (4) **Time Elapsed:** Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.
- (5) **Cross-Racial Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

### CARJACKING

In order for you to find the defendant guilty of carjacking, the State is required to prove each of the following elements beyond a reasonable doubt:

1. that the defendant **was in the course of committing an unlawful taking of a motor vehicle;**

AND

2. that while in the course of committing an unlawful taking of a motor vehicle the defendant
  - a. knowingly inflicted bodily injury or **used force upon an occupant or person in possession or control of a motor vehicle**

OR

- b. knowingly **operated or caused said vehicle to be operated with the person who was in possession or control or was an occupant of the motor vehicle at the time of the taking remaining in the vehicle.** ...

**[A]n act is considered to be "in the course of committing an unlawful taking of a motor vehicle" if it occurs during an attempt to commit the unlawful taking, during the commission of the unlawful taking, or during an immediate flight after the attempt** or commission.

An unlawful taking of a motor vehicle is defined as the taking, operation or exercise of control over the motor vehicle, without consent of the owner or other person authorized to give consent, with the purpose of either permanently depriving the owner of the motor vehicle or temporarily withholding the motor vehicle from the owner or other person in control of the motor vehicle.

The phrase "bodily injury" means physical pain, illness, or any impairment of physical condition. **"Force" means any amount of physical power or strength used against the victim to take control of the motor vehicle. The force need not entail pain or bodily harm and need not leave any mark.**



S-19





S-19



S-20

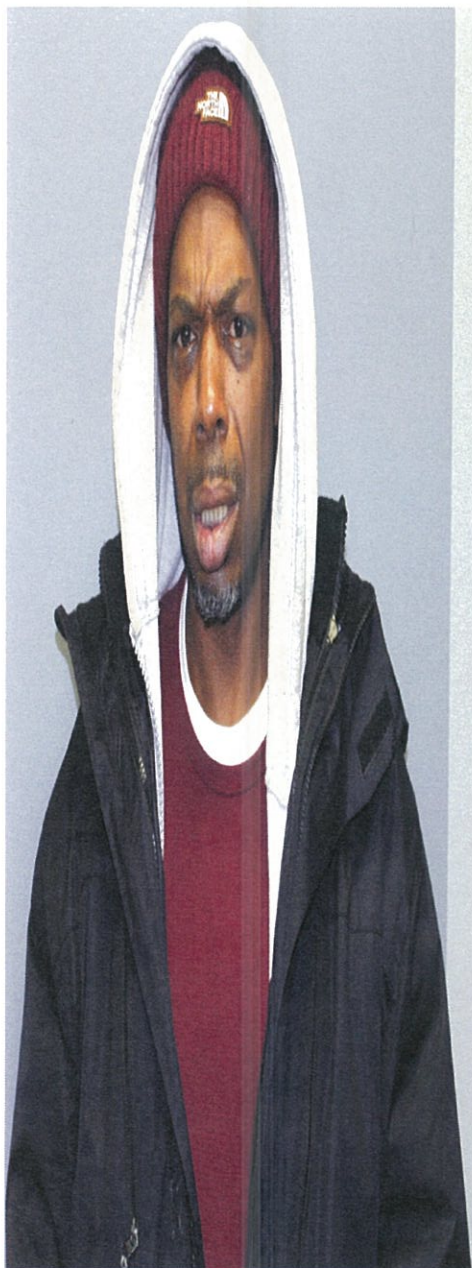


S-21





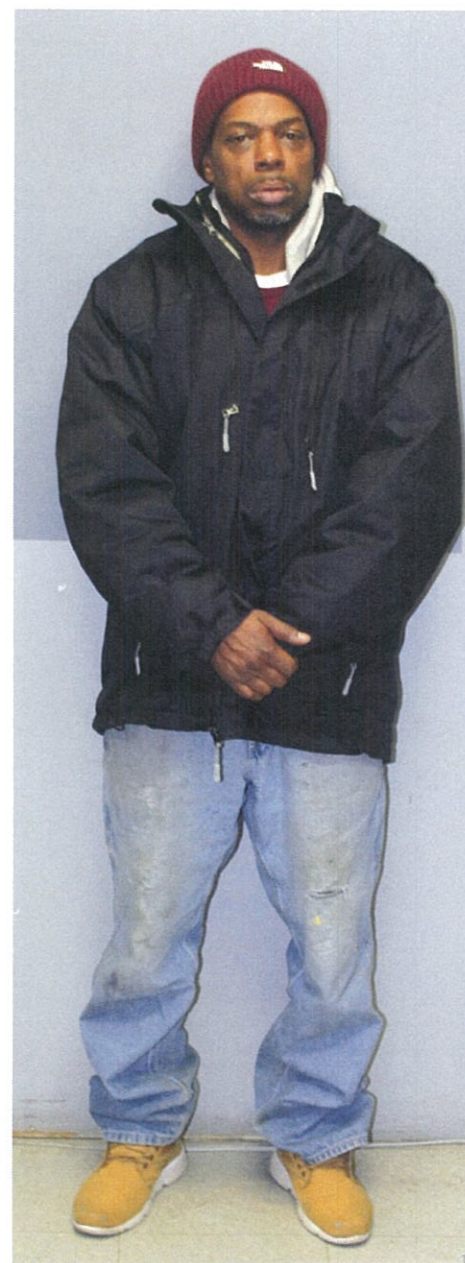
S-27



S-21



S-28



14

App. 270

Da 044



## RECAP



11/6: Falsely ID'd by A. Zanatta 2X who also accurately predicts how the photos shown to her will differ from your appearance upon arrest.

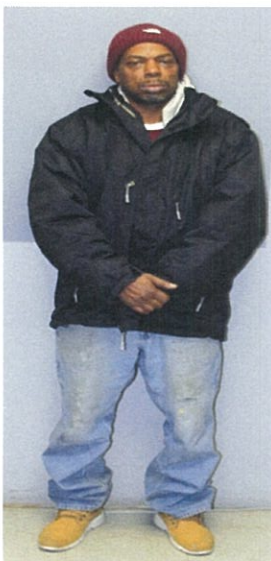


ALESSA ZANATTA'S DESCRIPTION (10/31/18)

CLOTHING
Gray Hoodie
Red Skull; Winter hat
Jeans; Faded blue
Gloves
Olive brownish vest



In those same arrest photos you'll happen to be wearing clothes consistent with those Ms. Zanatta put you in on the day of the crime.



Cameras 3.5 blocks South will capture an individual fitting that same clothing description walking, South, then East, 3.5 blocks South from where the suspect was seen leaving the scene in a Southward direction.

### REASONABLE DOUBT

The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him/her not guilty.

S-36

Da 047

*[Faint, mostly illegible handwritten text, likely bleed-through from the reverse side of the page.]*

*[Faint, mostly illegible handwritten text, likely bleed-through from the reverse side of the page.]*



*[Handwritten text, mostly illegible due to blurriness]*

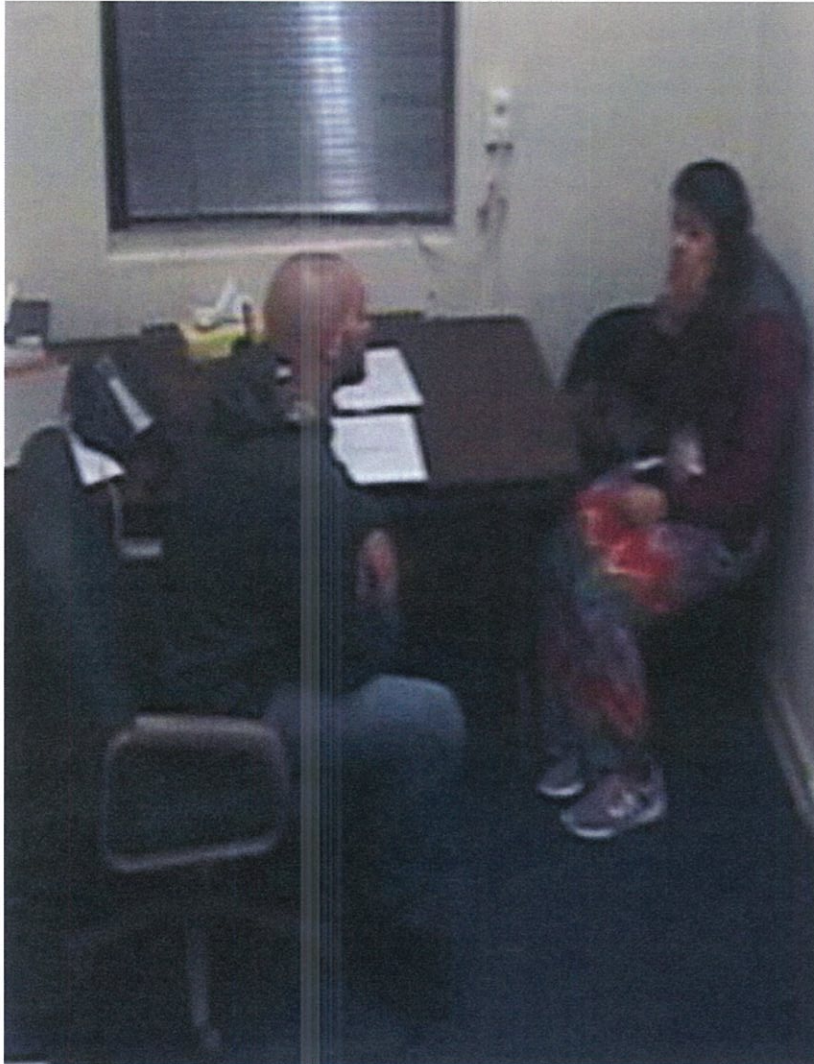
*[Handwritten text, mostly illegible due to blurriness]*

Ms. Zanatta, due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost regards for women, therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts.

“ . . . as soon as my eyes perceived my  
being in a vehicle belonging to a  
beautiful woman,”

S-33

S-38; 1.33



“God has created humankind so close in resemblance that your eyes will not be able to distinguish the difference without close examination of people . . .”



S-36

*[Handwritten text, mostly illegible due to blurriness. A small portion of text is highlighted in yellow.]*

I admire your bravery and commend your success with conquering a thief whose intention was to steal your vehicle. You go girl 🤔

S-36

"had completed its journey throughout the atmosphere . . . I hope and pray . . . very best of health, mentally as well as physically and in high spirits. I know you're feeling inept to be a recipient of a correspondent from an unfamiliar author . . ."

Handwritten text, heavily redacted with black bars. Visible fragments include: "I hope and pray", "very best of health", "mentally as well as physically", "in high spirits", "I know you're feeling", "inept to be a recipient", "of a correspondent", "from an unfamiliar", "author . . ."

Handwritten text, heavily redacted with black bars. Visible fragments include: "I hope and pray", "very best of health", "mentally as well as physically", "in high spirits", "I know you're feeling", "inept to be a recipient", "of a correspondent", "from an unfamiliar", "author . . ."

"but I place my faith in God. By his will, the truth will be revealed and my innocents will be proven. . . He works in mysterious ways so I'll leave it in His Hands."

Handwritten text, heavily redacted with black bars. Visible fragments include: "I hope and pray", "very best of health", "mentally as well as physically", "in high spirits", "I know you're feeling", "inept to be a recipient", "of a correspondent", "from an unfamiliar", "author . . ."

S-36

"I don't want or  
need an more  
trouble."

"You may be  
saying I have the  
audacity to write  
to you and you  
may report it . . ."

"Ms. Zanatta, I'm not writing to make  
you feel sympathy for me. . . If it is me  
that your claiming is the actor of this  
crime without a doubt than disregard  
this correspondence.. Otherwise tell the  
truth if you're wrong or not 100%."

"remain focus, be  
strong and stay out  
of trouble."

## TAMPERING WITH WITNESSES

**S-35**

In order for you to find defendant guilty of violating this statute, the State must prove beyond a reasonable doubt each and every one of the following elements:

- (1) that defendant believed that an official proceeding or investigation was pending or about to be instituted or has been instituted; and
- (2) that defendant knowingly engaged in conduct which a reasonable person would believe would cause a witness or informant to:
  - (1) Testify or inform falsely;
  - (2) Withhold any testimony, information, document or thing;
  - (3) Elude legal process summoning him/her to testify or supply evidence;
  - (4) Absent himself/herself from any proceeding or investigation to which he/she had been legally summoned;

OR

- (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.



S-31



S-3;  
2:02



S-13



S-14



P.L. 2008, CHAPTER 81, *approved September 10, 2008*

Senate Committee Substitute for

Senate, Nos. 367 and 503

1 AN ACT concerning witness or informant tampering and amending  
 2 N.J.S.2C:28-5, N.J.S.2C:29-3 and N.J.S.2C:29-9.

3  
 4 **BE IT ENACTED** *by the Senate and General Assembly of the State*  
 5 *of New Jersey:*

6  
 7 1. N.J.S.2C:28-5 is amended to read as follows:

8 2C:28-5. a. Tampering. A person commits an offense if,  
 9 believing that an official proceeding or investigation is pending or  
 10 about to be instituted or has been instituted, he knowingly **[attempts**  
 11 **to induce or otherwise cause]** engages in conduct which a  
 12 reasonable person would believe would cause a witness or  
 13 informant to:

- 14 (1) Testify or inform falsely;  
 15 (2) Withhold any testimony, information, document or thing;  
 16 (3) Elude legal process summoning him to testify or supply  
 17 evidence; **[or]**  
 18 (4) Absent himself from any proceeding or investigation to  
 19 which he has been legally summoned; or  
 20 (5) Otherwise obstruct, delay, prevent or impede an official  
 21 proceeding or investigation.

22 **[The offense]** Witness tampering is a crime of the first degree if  
 23 the conduct occurs in connection with an official proceeding or  
 24 investigation involving any crime enumerated in subsection d. of  
 25 section 2 of P.L.1997, c.117 (C.2C:43-7.2) and the actor employs  
 26 force or threat of force. Witness tampering is a crime of the second  
 27 degree if the actor employs force or threat of force. Otherwise it is  
 28 a crime of the third degree. Privileged communications may not be  
 29 used as evidence in any prosecution for violations of paragraph (2),  
 30 (3) **[or]**, (4) or (5).

31 b. Retaliation against witness or informant. A person commits  
 32 **[a crime of the fourth degree]** an offense if he harms another by an  
 33 unlawful act with purpose to retaliate for or on account of the  
 34 service of another as a witness or informant. The offense is a crime  
 35 of the second degree if the actor employs force or threat of force.  
 36 Otherwise it is a crime of the third degree.

37 c. Witness or informant taking bribe. A person commits a  
 38 crime of the third degree if he solicits, accepts or agrees to accept  
 39 any benefit in consideration of his doing any of the things specified  
 40 in subsection a. (1) through **[(4)]** (5) of this section.

**EXPLANATION** – Matter enclosed in bold-faced brackets **[thus]** in the above bill is  
 not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

## SCS for S367

2

1        d. Bribery of a witness or informant. A person commits a  
2 crime of the second degree if he directly or indirectly offers,  
3 confers or agrees to confer upon a witness or informant any benefit  
4 in consideration of the witness or informant doing any of the things  
5 specified in subsection a. (1) through (5) of this section.

6        e. Notwithstanding the provisions of N.J.S.2C:1-8, N.J.S.2C:44-5  
7 or any other provision of law, a conviction arising under this section  
8 shall not merge with a conviction of an offense that was the subject  
9 of the official proceeding or investigation and the sentence imposed  
10 pursuant to this section shall be ordered to be served consecutively  
11 to that imposed for any such conviction.

12 (cf: P.L.1991, c.33, s.1)

13  
14        2. N.J.S.2C:29-3 is amended to read as follows:

15        2C:29-3. Hindering Apprehension or Prosecution. a. A person  
16 commits an offense if, with purpose to hinder the detention,  
17 apprehension, investigation, prosecution, conviction or punishment  
18 of another for an offense or violation of Title 39 of the New Jersey  
19 Statutes or a violation of chapter 33A of Title 17 of the Revised  
20 Statutes he:

21        (1) Harbors or conceals the other;

22        (2) Provides or aids in providing a weapon, money,  
23 transportation, disguise or other means of avoiding discovery or  
24 apprehension or effecting escape;

25        (3) Suppresses, by way of concealment or destruction, any  
26 evidence of the crime, or tampers with a witness, informant,  
27 document or other source of information, regardless of its  
28 admissibility in evidence, which might aid in the discovery or  
29 apprehension of such person or in the lodging of a charge against  
30 him;

31        (4) Warns the other of impending discovery or apprehension,  
32 except that this paragraph does not apply to a warning given in  
33 connection with an effort to bring another into compliance with  
34 law;

35        (5) Prevents or obstructs, by means of force, intimidation or  
36 deception, anyone from performing an act which might aid in the  
37 discovery or apprehension of such person or in the lodging of a  
38 charge against him;

39        (6) Aids such person to protect or expeditiously profit from an  
40 advantage derived from such crime; or

41        (7) Gives false information to a law enforcement officer or a  
42 civil State investigator assigned to the Office of the Insurance Fraud  
43 Prosecutor established by section 32 of P.L.1998, c.21 (C.17:33A-  
44 16).

45        **[The]** An offense under paragraph (5) of subsection a. of this  
46 section is a crime of the second degree, unless the actor is a spouse,  
47 domestic partner, partner in a civil union, parent or child to the

1 person aided who is the victim of the offense, in which case the  
2 offense is a crime of the fourth degree. Otherwise, the offense is a  
3 crime of the third degree if the conduct which the actor knows has  
4 been charged or is liable to be charged against the person aided  
5 would constitute a crime of the second degree or greater, unless the  
6 actor is a spouse, domestic partner, partner in a civil union, parent  
7 or child of the person aided, in which case the offense is a crime of  
8 the fourth degree. The offense is a crime of the fourth degree if  
9 such conduct would constitute a crime of the third degree.  
10 Otherwise it is a disorderly persons offense.

11 b. A person commits an offense if, with purpose to hinder his  
12 own detention, apprehension, investigation, prosecution, conviction  
13 or punishment for an offense or violation of Title 39 of the New  
14 Jersey Statutes or a violation of chapter 33A of Title 17 of the  
15 Revised Statutes, he:

16 (1) Suppresses, by way of concealment or destruction, any  
17 evidence of the crime or tampers with a document or other source of  
18 information, regardless of its admissibility in evidence, which might  
19 aid in his discovery or apprehension or in the lodging of a charge  
20 against him; or

21 (2) Prevents or obstructs by means of force or intimidation  
22 anyone from performing an act which might aid in his discovery or  
23 apprehension or in the lodging of a charge against him; or

24 (3) Prevents or obstructs by means of force, intimidation or  
25 deception any witness or informant from providing testimony or  
26 information, regardless of its admissibility, which might aid in his  
27 discovery or apprehension or in the lodging of a charge against him;  
28 or

29 (4) Gives false information to a law enforcement officer or a  
30 civil State investigator assigned to the Office of the Insurance Fraud  
31 Prosecutor established by section 32 of P.L.1998, c.21 (C.17:33A-  
32 16).

33 **[The]** An offense under paragraph (3) of subsection b. of this  
34 section is a crime of the second degree. Otherwise, the offense is a  
35 crime of the third degree if the conduct which the actor knows has  
36 been charged or is liable to be charged against him would constitute  
37 a crime of the second degree or greater. The offense is a crime of  
38 the fourth degree if such conduct would constitute a crime of the  
39 third degree. Otherwise it is a disorderly persons offense.  
40 (cf: P.L.1999, c.297, s.1)

41

42 3. N.J.S.2C:29-9 is amended to read as follows:

43 2C:29-9. a. A person is guilty of a crime of the fourth degree if  
44 he purposely or knowingly disobeys a judicial order or protective  
45 order, pursuant to section 1 of P.L.1985, c.250 (C.2C:28-5.1), or  
46 hinders, obstructs or impedes the effectuation of a judicial order or



4

b. Except as provided below, a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered under the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States when the conduct which constitutes the violation could also constitute a crime or a disorderly persons offense. In all other cases a person is guilty of a disorderly persons offense if that person knowingly violates an order entered under the provisions of this act or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States. Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of P.L.1991, c.261 (C.2C:25-29) or substantially similar orders entered under the laws of another state or the United States shall be excluded from the provisions of this subsection.

27

29

30

31

32

33 Upgrades penalties for tampering with witnesses and informants;  
34 upgrades hindering apprehension or prosecution under certain  
35 circumstances.

**SENATE, No. 503**

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**STATE OF NEW JERSEY**

**213th LEGISLATURE**

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PRE-FILED FOR INTRODUCTION IN THE 2008 SESSION

**Sponsored by:**  
**Senator SHIRLEY K. TURNER**  
**District 15 (Mercer)**

**SYNOPSIS**

Upgrades the offenses of tampering with witnesses and informants and hindering apprehension under certain circumstances.

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel



## S503 TURNER

2

1 AN ACT concerning witness or informant intimidation or tampering  
2 and amending N.J.S.2C:28-5 and N.J.S.2C:29-3.

3  
4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6  
7 1. N.J.S.2C:28-5 is amended to read as follows:

8 2C:28-5. **【Tampering With Witnesses and Informants】** Witness  
9 or Informant Intimidation or Tampering; Retaliation Against  
10 Them.

11 a. **【Tampering】** Intimidation or tampering. A person **【commits**  
12 **an offense】** is guilty of the crime of witness or informant  
13 intimidation or tampering if, believing that an official proceeding or  
14 investigation is pending or about to be instituted or has been  
15 instituted, he knowingly **【attempts to induce or otherwise cause】**  
16 engages in conduct which would cause a witness or informant or a  
17 potential witness or informant to:

18 (1) Testify or inform falsely;

19 (2) Withhold any testimony, information, document or thing;

20 (3) Elude legal process summoning him to testify or supply  
21 evidence; or

22 (4) Absent himself from any proceeding or investigation to  
23 which he has been legally summoned.

24 It shall not be a defense that at the time the conduct occurred, no  
25 official proceeding or investigation had commenced, if a reasonable  
26 person would believe that, if the facts known to the potential  
27 witness or informant were made known to others, those facts would  
28 assist in an official proceeding or investigation.

29 The offense of witness or informant intimidation or tampering is  
30 a crime of the **【second】** first degree if the actor employs force or  
31 threat of force **【Otherwise】**. If the actor's conduct does not involve  
32 force or threat of force but involves the offering or providing a  
33 benefit of \$200 or more, it is a crime of the second degree. If the  
34 actor's conduct does not involve force or threat of force but  
35 involves offering or providing a benefit less than \$200, it is a crime  
36 of the third degree, provided, however, that the presumption of non-  
37 imprisonment in subsection e. of N.J.S.2C:44-1 for persons who  
38 have not been previously convicted of an offense shall not apply.

39 Privileged communications may not be used as evidence in any  
40 prosecution for violations of paragraph (2), (3) or (4).

41 b. Retaliation against witness or informant. A person commits a  
42 crime of the **【fourth】** first degree if he harms another by an  
43 unlawful act with purpose to retaliate for or on account of the  
44 service of another as a witness or informant resulting in serious

EXPLANATION – Matter enclosed in bold-faced brackets **【thus】** in the above bill is  
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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3

1 bodily injury. A person commits a crime of the second degree if he  
2 harms another by an unlawful act with purpose to retaliate for or on  
3 account of the service of another as a witness or informant resulting  
4 in significant bodily injury. Otherwise it is a crime of the third  
5 degree, provided, however, that the presumption of non-  
6 imprisonment in subsection e. of N.J.S.2C:44-1 for persons who  
7 have not been previously convicted of an offense shall not apply.

8 c. Witness or informant taking bribe. A person commits a crime  
9 of the ~~third~~ second degree if he solicits, accepts or agrees to  
10 accept any benefit of \$200 or more in consideration of his doing  
11 any of the things specified in subsection a. (1) through (4) of this  
12 section. Otherwise it is a crime of the third degree; provided,  
13 however, that the presumption of non-imprisonment in subsection e.  
14 of N.J.S.2C:44-1 for persons who have not been previously  
15 convicted of an offense shall not apply.

16 d. Notwithstanding the provisions of N.J.S.2C:1-8, N.J.S.2C:44-  
17 5 or any other provision of law, a conviction arising under this  
18 section shall not merge with a conviction of an offense that was the  
19 subject of the official proceeding or investigation and the sentence  
20 imposed pursuant to this section shall be ordered to be served  
21 consecutively to that imposed for any such conviction.

22 (cf: P.L.1991, c.33, s.1)

23  
24 2. N.J.S.2C:29-3 is amended to read as follows:

25 2C:29-3. Hindering Apprehension or Prosecution. a. A person  
26 commits an offense if, with purpose to hinder the detention,  
27 apprehension, investigation, prosecution, conviction or punishment  
28 of another for an offense or violation of Title 39 of the New Jersey  
29 Statutes or a violation of chapter 33A of Title 17 of the Revised  
30 Statutes he:

31 (1) Harbors or conceals the other;

32 (2) Provides or aids in providing a weapon, money,  
33 transportation, disguise or other means of avoiding discovery or  
34 apprehension or effecting escape;

35 (3) Suppresses, by way of concealment or destruction, any  
36 evidence of the crime, or tampers with a witness, informant,  
37 document or other source of information, regardless of its  
38 admissibility in evidence, which might aid in the discovery or  
39 apprehension of such person or in the lodging of a charge against  
40 him;

41 (4) Warns the other of impending discovery or apprehension,  
42 except that this paragraph does not apply to a warning given in  
43 connection with an effort to bring another into compliance with  
44 law;

45 (5) Prevents or obstructs, by means of force, intimidation or  
46 deception, anyone from performing an act which might aid in the  
47 discovery or apprehension of such person or in the lodging of a  
48 charge against him;



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4

1 (6) Aids such person to protect or expeditiously profit from an  
2 advantage derived from such crime; or

3 (7) Gives false information to a law enforcement officer or a  
4 civil State investigator assigned to the Office of the Insurance Fraud  
5 Prosecutor established by section 32 of P.L.1998, c.21 (C.17:33A-  
6 16).

7 【The】 An offense under paragraph (5) of subsection a. of this  
8 section is a crime of the second degree. Otherwise, the offense is a  
9 crime of the third degree if the conduct which the actor knows has  
10 been charged or is liable to be charged against the person aided  
11 would constitute a crime of the second degree or greater, unless the  
12 actor is a spouse, parent or child of the person aided, in which case  
13 the offense is a crime of the fourth degree. The offense is a crime  
14 of the fourth degree if such conduct would constitute a crime of the  
15 third degree. Otherwise it is a disorderly persons offense.

16 b. A person commits an offense if, with purpose to hinder his  
17 own detention, apprehension, investigation, prosecution, conviction  
18 or punishment for an offense or violation of Title 39 of the New  
19 Jersey Statutes or a violation of chapter 33A of Title 17 of the  
20 Revised Statutes, he:

21 (1) Suppresses, by way of concealment or destruction, any  
22 evidence of the crime or tampers with a document or other source of  
23 information, regardless of its admissibility in evidence, which might  
24 aid in his discovery or apprehension or in the lodging of a charge  
25 against him; or

26 (2) Prevents or obstructs by means of force or intimidation  
27 anyone from performing an act which might aid in his discovery or  
28 apprehension or in the lodging of a charge against him; or

29 (3) Prevents or obstructs by means of force, intimidation or  
30 deception any witness or informant from providing testimony or  
31 information, regardless of its admissibility, which might aid in his  
32 discovery or apprehension or in the lodging of a charge against him;  
33 or

34 (4) Gives false information to a law enforcement officer or a  
35 civil State investigator assigned to the Office of the Insurance Fraud  
36 Prosecutor established by section 32 of P.L.1998, c.21 (C.17:33A-  
37 16).

38 【The】 An offense under paragraph (3) of subsection b. of this  
39 section is a crime of the second degree. Otherwise, the offense is a  
40 crime of the third degree if the conduct which the actor knows has  
41 been charged or is liable to be charged against him would constitute  
42 a crime of the second degree or greater. The offense is a crime of  
43 the fourth degree if such conduct would constitute a crime of the  
44 third degree. Otherwise it is a disorderly persons offense.  
45 (cf: P.L.1999, c.297)

46  
47 3. This act shall take effect immediately.

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STATEMENT

1  
2  
3       This bill amends and upgrades the penalties for the following  
4 offenses: tampering with a witness or informant, retaliating against  
5 a witness or informant, and witnesses or informants who take  
6 bribes. This bill also upgrades the penalties for the offense of  
7 hindering apprehension or prosecution, N.J.S.A.2C:29-3.

8       Witness or Informant Intimidation or Tampering. Currently,  
9 subsection a. of N.J.S.A.2C:28-5 makes it a crime to tamper with a  
10 witness or informant if, believing that an official proceeding or  
11 investigation is pending or about to be instituted, a person attempts  
12 to induce or otherwise cause a witness or informant to provide false  
13 testimony, withhold testimony or evidence, or avoid testifying or  
14 supplying evidence required in an official proceeding or  
15 investigation. Tampering is a crime of the second degree if the  
16 actor employs force or threat of force; otherwise tampering is a  
17 crime of the third degree.

18       This bill would upgrade the penalties for witness or informant  
19 intimidation or tampering as follows: it would be a crime of the first  
20 degree if the actor employs force or threat of force; if the actor’s  
21 conduct does not involve force or threat of force but involves the  
22 offering or providing a benefit of \$200 or more, it would be a crime  
23 of the second degree; and if the actor’s conduct does not involve  
24 force or threat of force but involves offering or providing a benefit  
25 less than \$200, it would be a crime of the third degree, provided,  
26 however, that there would be no presumption of non-imprisonment  
27 for the third degree crime.

28       This bill also amends subsection a. by adding potential  
29 witnesses or informants to the list of people encompassed by this  
30 statute.

31       Subsection a. would also be amended to provide that it would  
32 not be a defense that no official proceeding had commenced at the  
33 time of the alleged tampering or intimidating, if a reasonable person  
34 would have believed that, if the facts known to the potential witness  
35 or informant were known to others, those facts would assist the  
36 prosecution in an official proceeding or investigation.

37       Subsection b. of N.J.S.A.2C:28-5 currently makes it a crime of  
38 the fourth degree to retaliate against a witness or informant by  
39 harming another by an unlawful act with purpose to retaliate for or  
40 on account of the service of another as a witness or informant. This  
41 bill would upgrade the penalties for the crime of retaliation against  
42 a witness as follows: it would be a crime of the first degree if the  
43 actor’s conduct results in serious bodily injury; it would be a crime  
44 of the second degree if the actor’s conduct results in significant  
45 bodily injury; otherwise it is a crime of the third degree, provided,  
46 however, that there would be no presumption of non-imprisonment  
47 for the third degree crime.

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1        Subsection c. of N.J.S.A.2C:28-5 currently makes it a crime of

2        the third degree for a witness or informant to solicit, accept, or

3        agree to accept any benefit in consideration of his doing any of the

4        things specified in subsection a. (1) through (4) of this section.

5        This bill would upgrade the penalties as follows: it would be a

6        crime of the second degree for a witness or informant to solicit,

7        accept, or agree to accept any benefit of \$200 or more in

8        consideration of his doing any of the things specified in subsection

9        a. (1) through (4) of this section; otherwise it would be a crime of

10       the third degree, provided, however, that there would be no

11       presumption of non-imprisonment for the third degree crime.

12       This bill further adds a new subsection d. to N.J.S.A.2C:28-5,

13       which is a non-merger provision and requires the sentence for

14       tampering to be served consecutively to the sentence for the

15       underlying offense.

16       Hindering Apprehension or Prosecution. This bill also amends

17       the hindering statute, N.J.S.A.2C:29-3, by upgrading the penalties

18       set forth therein. Currently, hindering the detention, apprehension,

19       investigation, prosecution, conviction or punishment of another

20       under subsection a. of N.J.S.A.2C:29-3 is a crime of the third

21       degree if the conduct which the actor knows has been charged or is

22       liable to be charged against the person aided would constitute a

23       crime of the second degree or greater, unless the actor is a spouse,

24       parent or child of the person aided, in which case the offense is a

25       crime of the fourth degree. The offense is a crime of the fourth

26       degree if such conduct would constitute a crime of the third degree.

27       Otherwise it is a disorderly persons offense. This bill would make

28       it a crime of the second degree for a person to prevent or obstruct,

29       by means of force, intimidation or deception, anyone from

30       performing an act which might aid in the discovery or apprehension

31       of such person or in the lodging of a charge against him, pursuant to

32       paragraph (5) of subsection a. of N.J.S.A.2C:29-3.

33       Currently, hindering a person’s own detention, apprehension,

34       investigation, prosecution, conviction or punishment under

35       subsection b. of N.J.S.A.2C:29-3 is a crime of the third degree if the

36       conduct which the actor knows has been charged or is liable to be

37       charged against him would constitute a crime of the second degree

38       or greater. The offense is a crime of the fourth degree if such

39       conduct would constitute a crime of the third degree. Otherwise it is

40       a disorderly persons offense. This bill would also make it a crime

41       of the second degree for a person to prevent or obstruct by means of

42       force, intimidation or deception any witness or informant from

43       providing testimony or information, regardless of its admissibility,

44       which might aid in his discovery or apprehension or in the lodging

45       of a charge against him, pursuant to paragraph (3) of subsection b.

46       of N.J.S.A.2C:29-3.

47       The primary purpose of this bill is to promote the safety of

48       witnesses and informants who assist in official proceedings and

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- 1 investigations and holding criminally accountable those who would
- 2 seek to harm such individuals or place them at risk.





**User Name:** Ashley Brooks

**Date and Time:** Wednesday, July 7, 2021 11:04:00 AM EDT

**Job Number:** 147789099

## Document (1)

1. [\*State v. Williams, 2017 N.J. Super. Unpub. LEXIS 1377\*](#)

**Client/Matter:** -None-

**Search Terms:** State v. Williams, No. A-0434-15T4, 2017 N.J. Super. Unpub. LEXIS 1377

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Cases

**Narrowed by**  
-None-

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## State v. Williams

Superior Court of New Jersey, Appellate Division

April 25, 2017, Submitted; June 8, 2017, Decided

DOCKET NO. A-0434-15T4

### Reporter

2017 N.J. Super. Unpub. LEXIS 1377 \*; 2017 WL 2472361

STATE OF NEW JERSEY, Plaintiff-Respondent, v.  
DESHAUN J. WILLIAMS, Defendant-Appellant.

**Notice:** NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY [RULE 1:36-3](#) FOR  
CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** [\*1] On appeal from the Superior Court  
of New Jersey, Law Division, Essex County, Indictment  
No. 14-09-2178.

### Core Terms

identification, robber, robbery, feet, witness tampering,  
tall, credibility, arrest, jurors, incident report, summation,  
minutes

**Counsel:** Joseph E. Krakora, Public Defender, attorney  
for appellant (Daniel S. Rockoff, Assistant Deputy Public  
Defender, of counsel and on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor,  
attorney for respondent (LeeAnn Cunningham, Special  
Deputy Attorney General/ Acting Assistant Prosecutor,  
of counsel and on the brief).

**Judges:** Before Judges Reisner, Koblitz and Mayer.

### Opinion

PER CURIAM

Defendant DeShaun Williams appeals from his  
conviction for first-degree robbery, [N.J.S.A. 2C:15-1](#),  
disorderly persons simple assault, [N.J.S.A. 2C:12-1\(a\)](#),  
fourth-degree unlawful possession of a weapon,  
[N.J.S.A. 2C:39-5\(d\)](#), third-degree possession of a  
weapon for an unlawful purpose, [N.J.S.A. 2C:39-4\(d\)](#),  
and third-degree witness tampering, [N.J.S.A. 2C:28-](#)

[5\(a\)\(1\)](#).<sup>1</sup>

On this appeal, defendant presents the following  
arguments:

#### POINT I

THE PROSECUTOR'S IMPROPER TACTICS  
UNFAIRLY BOLSTERED THE CREDIBILITY OF  
THE SOLE EYEWITNESS IDENTIFICATION OF  
THE PERPETRATOR. (Not Raised Below)

In Summation, The Prosecution Improperly  
Directed Jurors To Stare At Each Other While  
Imagining Themselves Being Robbed, Then Urged  
Them To Use Their Experiences From This  
Emotionally-Charged, Non-Record, Flawed  
Simulation To Assess The Credibility [\*2] Of The  
Real Victim's Identification Of The Perpetrator  
The Prosecution Improperly Bolstered The Victim's  
Identification When He Argued That Time Slowed  
Down For Her, She Experienced Elevated  
Awareness, And She Constantly Relived The  
Attack

The Prosecution Improperly Emphasized The  
Impact Of The Robbery On The Victim's Life,  
Despite Its Utter Irrelevance

The Prosecution Unnecessarily Denigrated  
Defense Counsel's Attempts to Cross-Examine The  
Victim On Her Identification

#### POINT II

THE COURT ERRED BY NOT OFFERING ANY  
GUIDANCE TO THE JURY ON THE MEANING OF  
THE PHRASE "TO TESTIFY FALSELY" AFTER  
THE JURY SENT A NOTE TO THE COURT  
EXPRESSING ITS CONFUSION ABOUT THIS  
ESSENTIAL ELEMENT OF THE TAMPERING  
CHARGE

<sup>1</sup> Defendant was sentenced to an aggregate term of twelve  
years, subject to the [No Early Release Act, N.J.S.A. 2C:43-7.2](#)  
for the robbery conviction, with a consecutive term of three  
years for witness tampering. The other sentences were  
imposed concurrent.

## POINT III

COUNSEL FOR WILLIAMS, WHO IS AT LEAST SIX FEET TALL, REPEATEDLY TRIED TO SHARE WITH THE JURY AN INCONSONANT STATEMENT THAT THE PERPETRATOR WAS FIVE FEET, FOUR INCHES TALL. THE COURT ACCEDED TO THE PROSECUTOR'S HEARSAY OBJECTIONS, AND BARRED DEFENSE COUNSEL FROM SHARING THIS STATEMENT WITH THE JURY. BUT THE STATEMENT SHOULD HAVE BEEN ADMITTED AS NONHEARSAY, BECAUSE IT WAS NOT BEING OFFERED FOR THE TRUTH. IN ADDITION, THE DOCTRINE OF COMPLETENESS COMPELLED THE STATEMENT'S ADMISSION, EVEN [\*3] IF IT WOULD HAVE OTHERWISE BEEN INADMISSIBLE. [N.J.R.E. 106](#)

We agree with defendant that the trial was infected with prejudicial errors, requiring that we reverse the conviction and remand for a retrial.

I

The essential facts concerning the crime were largely undisputed. We will summarize them briefly here, and discuss additional pertinent trial developments when we address the legal issues.

The victim, a home health aide, testified that she was robbed right after leaving a client's home at about 11:00 a.m. on the morning of March 24, 2014. According to the victim, the client's son accompanied her as she left the house but left quickly thereafter. As the son departed, a slender young black man approached the victim, nicked her hand with a knife, and then robbed her while holding the knife to her chest. The robber was wearing a black hat that covered his hair, leaving only his face visible. The victim testified that the robbery lasted perhaps five minutes and that she spent two minutes looking at the robber's face. She spent the rest of the time struggling unsuccessfully to comply with his demand that she remove her wedding ring. She testified that the robber fled after a bus pulled up nearby.

Within [\*4] two hours after the robbery, the police showed the victim two books of photographs. In the second book, she picked out defendant's photo and identified him as the robber. She also identified defendant in court as being the robber. There were no other witnesses to the robbery. Defendant was arrested several weeks after the crime occurred. He insisted he was innocent, and there was no evidence connecting

him to the robbery, other than the victim's identification.

II

In addressing defendant's appellate arguments, we conclude that the trial court erred in excluding evidence that the victim initially described the robber as five feet, four inches tall. The victim's statement, contained in a police incident report, was not admissible for its truth as to the robber's actual height. See [N.J.R.E. 801\(c\); N.J.R.E. 802](#). However, it was admissible for other purposes. Because defendant was at least six feet tall<sup>2</sup>, the victim's description, which was documented in the incident report, was relevant to the thoroughness of the police investigation and to the victim's credibility.<sup>3</sup> See [State v. James, 144 N.J. 538, 561-62, 677 A.2d 734 \(1996\)](#) (recognizing that problems with a victim's identification can be critical to the defense). It was also relevant to the credibility of defendant's [\*5] testimony about the witness tampering charge. Because the victim's statement about the robber's height was contained in a public record, [N.J.R.E. 803\(c\)\(8\)](#), and because the fact that she *made* the statement was relevant, it was admissible for the three purposes we have just described. See [N.J.R.E. 805](#) (addressing the admissibility of included hearsay).

We turn to defendant's arguments concerning witness tampering. Defendant was charged with third-degree witness tampering, which does not require proof of force or threats against the witness. Rather it only requires proof that defendant knew that an "official proceeding or investigation" was pending, and "knowingly engage[d] in conduct which a reasonable person would believe would cause a witness or informant to . . . [t]estify or inform falsely." [N.J.S.A. 2C:28-5\(a\)\(1\)](#).

The tampering charge was based on a letter defendant, who was not yet represented by counsel, sent to the victim. Along with the letter, defendant enclosed a copy of the police incident report listing the robber's height as

<sup>2</sup> The booking report lists his height as six feet, while the arrest report lists his height as six feet, one inch.

<sup>3</sup> In the final charge to the jury, the judge gave the identification instructions mandated in [State v. Henderson, 208 N.J. 208, 27 A.3d 872 \(2011\)](#), including an instruction to consider the accuracy of the witness's description of the perpetrator before she identified the defendant, and whether that description matched the person she later identified. Absent the inconsistent information on the police report, however, the jury had no context in which to consider those factors.

five feet four inches, and the arrest report documenting that defendant was six feet, one inch tall. In the letter, defendant sought to portray himself as a hard-working, good person who was the victim of misidentification, [\*6] and he asked the victim to look at the incident report and the arrest report attached to his letter and consider whether she had correctly identified him. The charge was also based on phone calls that defendant's relatives made to the victim, begging her to meet with them because, as they expressed it, they believed defendant was a victim of misidentification. However, the jury only saw defendant's letter to the victim, and did not see the incident report or hear a description of its relevant content, which would have put defendant's letter to the victim in context. We agree with defendant that the additional information was not excludable hearsay and should also have been admitted under the doctrine of completeness. See [N.J.R.E. 106](#); [Alves v. Rosenberg](#), 400 N.J. Super. 553, 562, 948 A.2d 701 (App. Div. 2008); [State v. Underwood](#), 286 N.J. Super. 129, 140, 668 A.2d 447 (App. Div. 1995).

Due to the judge's strong admonition to defense counsel precluding her from eliciting information about the police report, defense counsel could not have her client explain why he believed the victim had made a mistaken identification of him.<sup>4</sup> The police report, with its description of the robber as five feet four inches tall, when defendant was at least six feet tall, was central to the defense against witness tampering - i.e., that defendant had a good faith [\*7] reason to contact the victim, even if he should not have done so, and was only trying to get her to truthfully acknowledge a mistake.

Further compounding the prejudice to the defense, during his summation the prosecutor exploited the lack of that evidence, criticizing defendant for sending the letter to the victim without proof that he had been misidentified. He argued: "Why would you need to play on [the victim's] emotions if you weren't the person who did it? Why wouldn't you show them that you're not the person who did it?" The prosecutor also told the jury that if defendant really wanted to convince the victim he was innocent, "[h]e could have pulled out a thousand documents to corroborate anything he's saying." That

was fundamentally unfair because, as the prosecutor well knew, the defense had been precluded from presenting the evidence of misidentification.<sup>5</sup>

Because the excluded information bore on defendant's credibility as well as his substantive defense, its improper exclusion was harmful error and warrants reversal of the witness tampering conviction. See [State v. Garron](#), 177 N.J. 147, 168-69, 827 A.2d 243 (2003), cert. denied, N.J. v. Garron, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). Additionally, because a jury may fairly view witness tampering as evidence of a defendant's guilt on the underlying [\*8] offenses, we conclude that this trial error, together with the additional errors discussed below, warrants reversal of defendant's conviction for robbery and the other associated offenses.

We next address defendant's argument that the prosecutor improperly caused the jurors to engage in a misleading demonstration during summation. This was the context. The prosecutor argued to the jurors that the victim must have been able to identify defendant accurately because she was looking at him for two minutes during the robbery. In order to demonstrate that point, during his summation, the prosecutor directed the jurors to form pairs, in which each pair of two jurors would stare at each other for two minutes while the prosecutor made summation remarks. He then asked them to conclude that, after staring at each other for two minutes, they would recall each other's faces, and asked them to apply that conclusion to the victim's identification as well.

We agree with defendant, that this demonstration was misleading. There is no fair analogy between staring at a person with whom one has become familiar over several days of jury service, and staring at a complete stranger holding a knife. Where, as [\*9] here, the victim's identification of defendant was a crucial issue, it was plain error to allow the prosecutor to have the jurors engage in this misleading exercise. See [State v. Rivera](#), 437 N.J. Super. 434, 455-56, 99 A.3d 847 (App. Div. 2014). The error was compounded by the prosecutor's statement to the jury, unsupported by any testimony, that while the victim was looking at the robber, time "slowed down." See [State v. Bradshaw](#), 195 N.J. 493, 510, 950 A.2d 889 (2008).

<sup>4</sup> The first time this issue arose, it would have been the better practice for the judge to allow the attorneys to come to sidebar to argue the prosecutor's objection, instead of immediately sustaining the objection. That would have given defense counsel an opportunity to explain why the information was admissible and for what purposes.

<sup>5</sup> During deliberations, the jury asked a question about the witness tampering charge, which suggested that they were having some difficulty reaching a verdict on that issue. This further leads us to conclude that this trial error was prejudicial.

For completeness and for the guidance of the trial court and counsel, we also note additional errors which should not be repeated at the retrial. Defendant had no prior convictions and therefore was able to testify without concern that the jury would hear highly prejudicial information about any prior brushes with the law. See [N.J.R.E. 404\(b\)](#); [State v. Cofield, 127 N.J. 328, 340-41, 605 A.2d 230 \(1992\)](#). However, for reasons we cannot comprehend, defense counsel unnecessarily mentioned in front of the jury the fact that her client's photo, which was in a photo book shown to the victim, came from a group of prior "offenders."

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End of Document

And, although her client freely admitted that he was in New Jersey on March 24, 2014, the date the robbery was committed, counsel elicited from defendant the fact that he was arrested and "incarcerated" in New Jersey in 2013. She presented this testimony ostensibly for the purpose of impeaching a prosecution [\*10] witness's marginally relevant testimony concerning defendant's whereabouts in 2013. Moreover, counsel did not even attempt to mitigate the prejudice from that information by eliciting from her client the fact that his 2013 arrest did not result in a conviction. The judge gave the jury an instruction in the final charge, concerning the limited purpose for which they could consider defendant's prior arrest and incarceration. However, there did not appear to be any rational strategic basis to place this highly prejudicial information before the jury in the first place.

Finally, in his testimony, the officer who showed the victim the books of photos testified to his opinion that an identification made within two hours of a crime was more likely to be reliable. The officer was not qualified as an expert witness, and that improper testimony should not be repeated at the retrial.

In conclusion, based on our careful consideration of the trial record, we are persuaded that due to cumulative error, defendant did not receive a fair trial. [R. 2:10-2](#); [State v. Weaver, 219 N.J. 131, 155, 97 A.3d 663 \(2014\)](#); [Rivera, supra, 437 N.J. Super. at 444-45](#). Because the case hinged on a contested eyewitness identification and on witness credibility, we cannot conclude that the errors were harmless. See [State v. J.R., 227 N.J. 393, 417, 152 A.3d 180 \(2017\)](#). Accordingly, [\*11] we reverse defendant's conviction, vacate the sentence, and remand for a new trial.<sup>6</sup>

Reversed and remanded.

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<sup>6</sup> In light of our disposition of this appeal, we do not address defendant's additional appellate arguments.



## PHOTOGRAPHIC LINE-UP FORM

SUBJECT: William D. Hill 3rd (Robbery)  
 (Specify suspect's name and crime under investigation)

THE FOLLOWING PHOTOGRAPHS HAVE BEEN COMPILED FOR USE IN A PHOTOGRAPHIC LINE-UP

NAME	CBI/SBI#	DATE OF PHOTO
A. Jones, Timothy	101450C	NJ DL
B. Jones, Desmond	589322B	NJ DL
C. Hill, William	543941B	NJ DL
D. Davis, Ronald	596172A	NJ DL
E. Lewis, Shelton	851269B	NJ DL
F. Davis, Samuel	586831B	NJ DL

Photo Line-up Prepared by: Detective Joseph Sloan #975

Name (print)

*[Signature]* #975  
 Name (sign)

HARRISON POLICE DEPARTMENT

Agency

11/06/2018

Date

A



B



C



D



E



F



# A. ZANATTA (11/6) STMT.

## :01 – 1:20

### HARRISON POLICE DEPARTMENT

Memorialization of Recorded Victim / Witness Interview

Case # 18-20031

Officer Preparing Report:

DETECTIVE SERGEANT SCHIMPF #880

Nature of Investigation (Type of Crime):

ROBBERY

Victim or Witness:

ALESSA ZANATTA

Date and Time of Interview:

11/06/2018

12:55

Victim / Witness Consent to Electronic Recordation of Interview.

I have been informed that the interview that I am about to participate in will be electronically recorded by the Harrison Police Department and I am voluntarily participating in the interview knowing that an audio and video recording of the interview will be made.

  
Victim / Witness Signature

11/06/2018  
Date

  
Officer's Signature

  
Supervisor's Signature

# A. ZANATTA (11/6) STMT.

## 1:21 – 2:23

### PHOTOGRAPHIC IDENTIFICATION FORM

Instructions to be read to the person viewing the lineup:

1. You will be shown a series of photographs. The perpetrator's photograph may or may not be among those photographs you are shown.
2. Regardless of whether you make an identification, the police will continue to investigate the incident.
3. The individuals in the lineup photos may not appear exactly as they did on the date in question because features such as head and facial hair are subject to change.
4. You will be viewing photographs one at a time. You may take as much time as you need to make a decision about each photo before moving to the next one.
5. All photos will be shown to you, even if you make an identification prior to viewing all of the photos.
6. The identification procedure requires you to state in your own words how certain you are of any identification you make.
7. Please do not discuss this identification procedure or its results with the other witnesses involved in this case.

Lineup Administrator:  
Please shuffle and list  
photos in order shown:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

Lineup Administrator:  
If 2<sup>nd</sup> viewing is requested,  
reshuffle and list photos  
in order shown:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

Lineup Administrator:  
If 3<sup>rd</sup> viewing is requested,  
reshuffle and list photos  
in order shown:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

If an identification is made, the witness should circle the letter of the photo he or she identified on the above list and sign a copy of the actual photo.

\_\_\_\_\_  
Name and Signature of Person Viewing Lineup

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name, Signature and Agency of Lineup Administrator

\_\_\_\_\_  
Date

A. ZANATTA (11/6) STMT.  
2:24 – 2:48

**BLANK TABLE**

# A. ZANATTA (11/6) STMT. 2:49 – 2:57

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A





# A. ZANATTA (11/6) STMT. 2:58 – 3:00



# A. ZANATTA (11/6) STMT. 3:01 – 3:09



# A. ZANATTA (11/6) STMT. 3:10 – 3:13

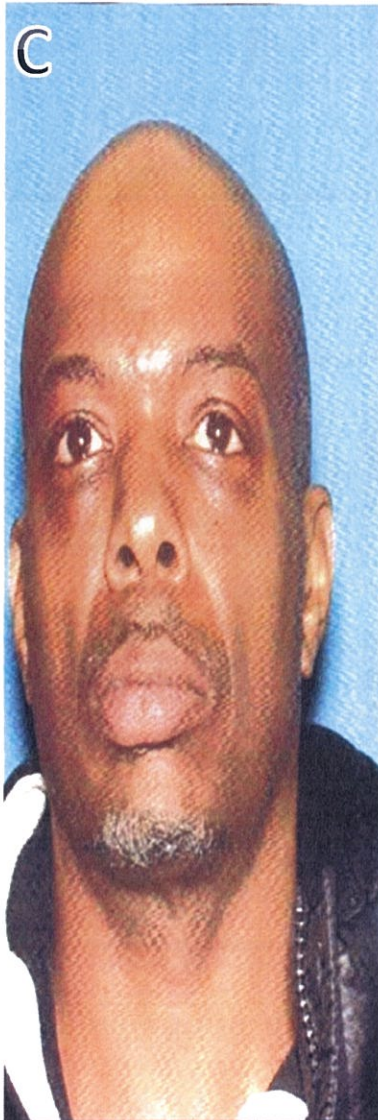




# A. ZANATTA (11/6) STMT. 3:14 – 3:21



# A. ZANATTA (11/6) STMT. 3:22– 3:25

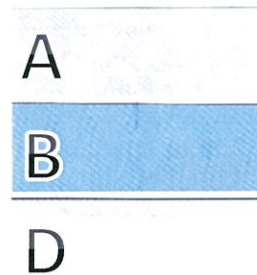




# A. ZANATTA (11/6) STMT. 3:26– 3:41



# A. ZANATTA (11/6) STMT. 3:42– 3:44





# A. ZANATTA (11/6) STMT. 3:45– 3:49

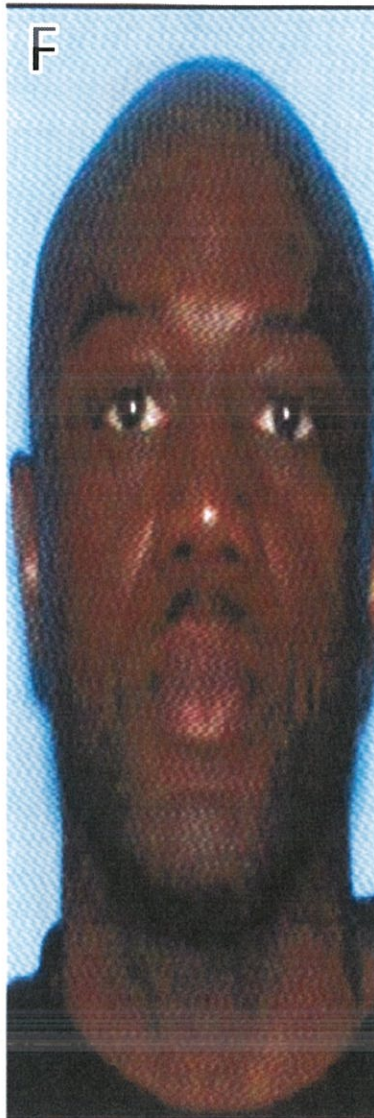


# A. ZANATTA (11/6) STMT. 3:50– 3:52





# A. ZANATTA (11/6) STMT. 3:53– 3:55

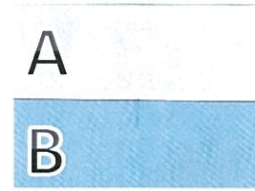
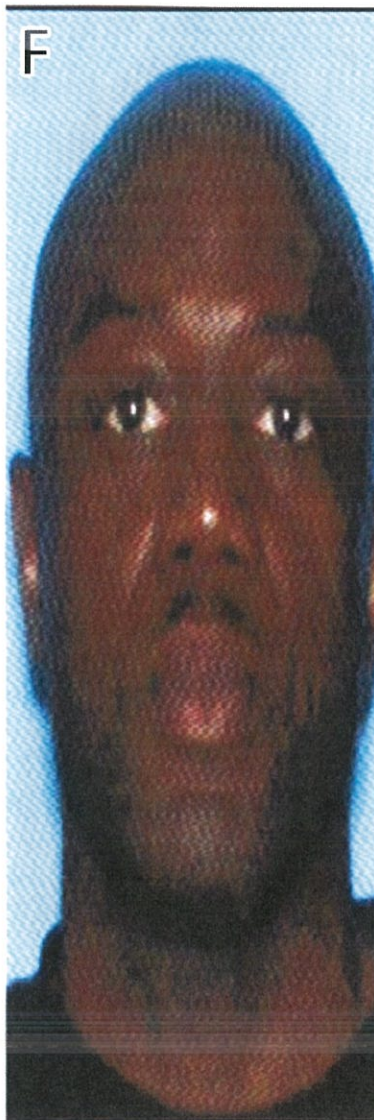




# A. ZANATTA (11/6) STMT. 3:56– 3:57



# A. ZANATTA (11/6) STMT. 3:58– 4:03

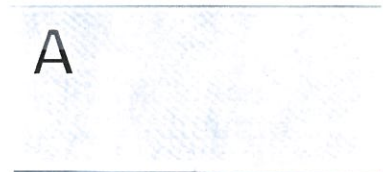




# A. ZANATTA (11/6) STMT. 4:04– 4:08



# A. ZANATTA (11/6) STMT. 4:09– 4:10

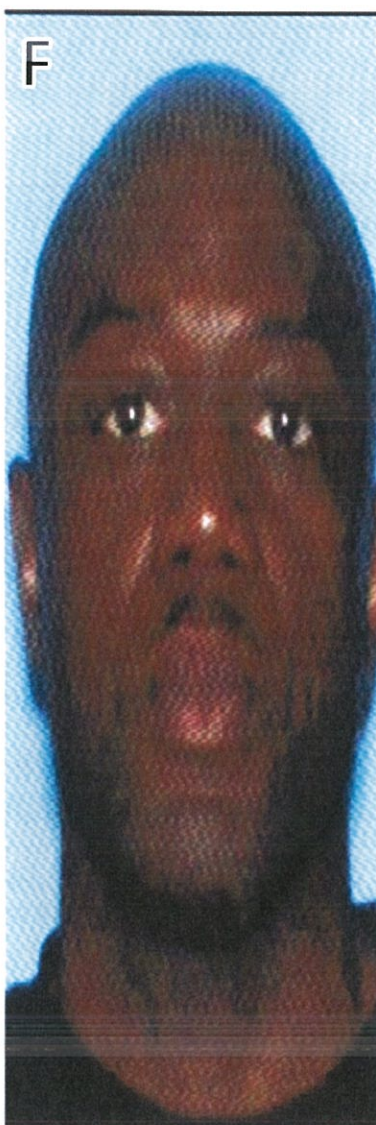




# A. ZANATTA (11/6) STMT. 4:11– 4:21



# A. ZANATTA (11/6) STMT. 4:22– 4:23





# A. ZANATTA (11/6) STMT. 4:24– 4:40



# A. ZANATTA (11/6) STMT. 4:41– 4:53

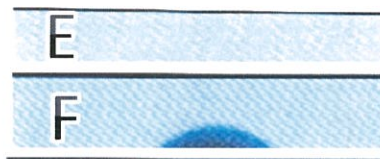




# A. ZANATTA (11/6) STMT. 4:54– 4:55



# A. ZANATTA (11/6) STMT. 4:56– 5:15

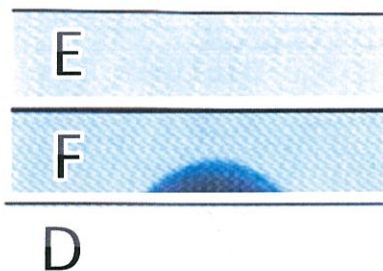
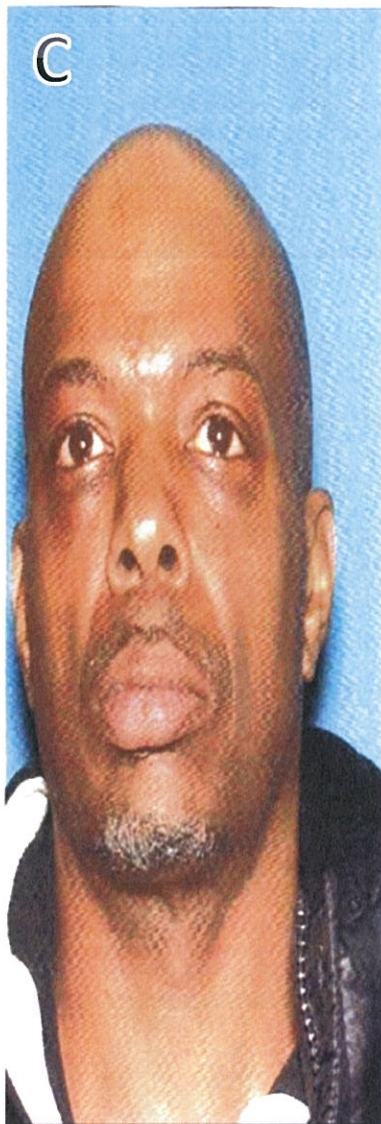


D

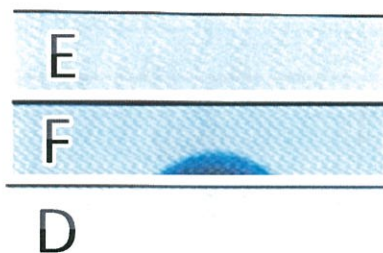




# A. ZANATTA (11/6) STMT. 5:16– 5:17

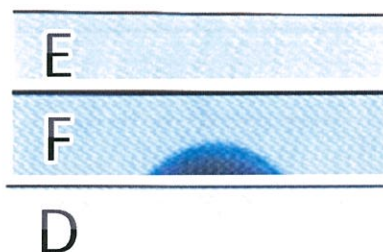


# A. ZANATTA (11/6) STMT. 5:18– 5:23

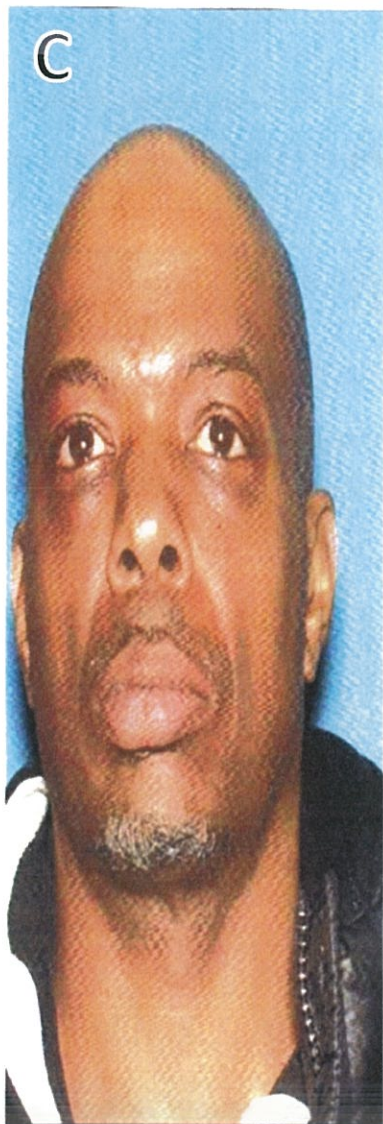




# A. ZANATTA (11/6) STMT. 5:24– 5:30



# A. ZANATTA (11/6) STMT. 5:31– 5:31



D



A





# A. ZANATTA (11/6) STMT. 5:32– 5:40



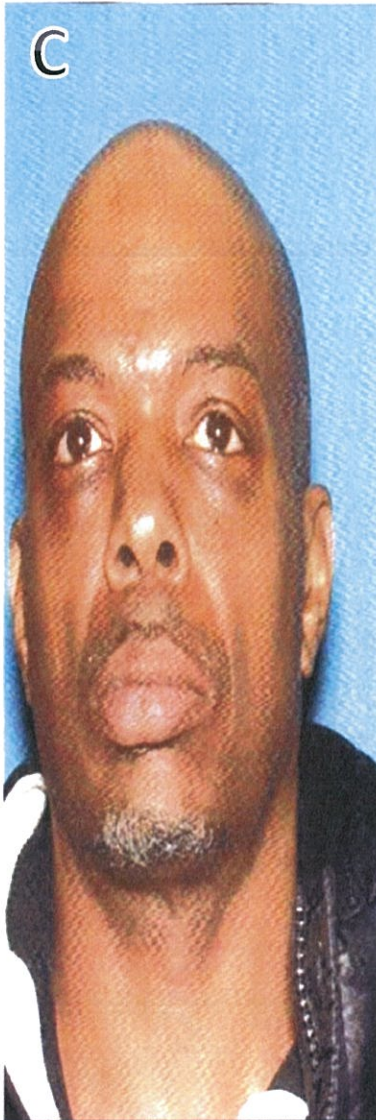


# A. ZANATTA (11/6) STMT. 5:41– 5:41





# A. ZANATTA (11/6) STMT. 5:42– 5:43



D

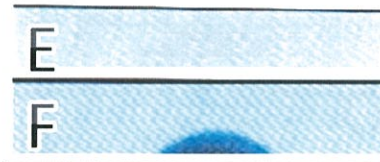


A

B



# A. ZANATTA (11/6) STMT. 5:44– 5:46

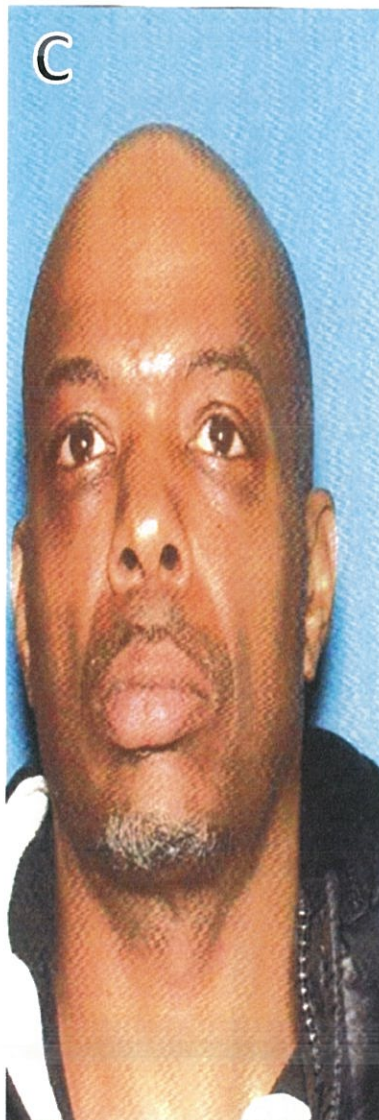




# A. ZANATTA (11/6) STMT. 5:47– 5:49



# A. ZANATTA (11/6) STMT. 5:50– 5:54





# A. ZANATTA (11/6) STMT. 5:55– 7:06



# A. ZANATTA (11/6) STMT. 7:07–7:09



# A. ZANATTA (11/6) STMT. 7:10–7:12





# A. ZANATTA (11/6) STMT. 7:13–7:15

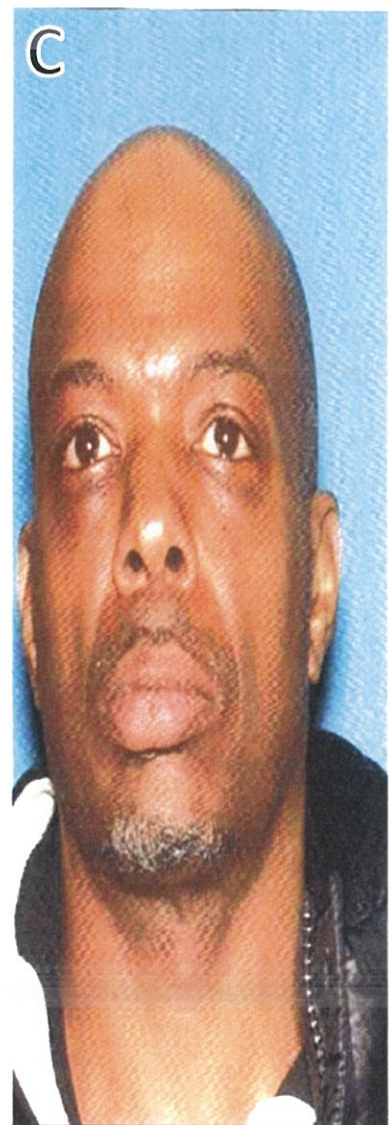




# A. ZANATTA (11/6) STMT. 7:16–7:19

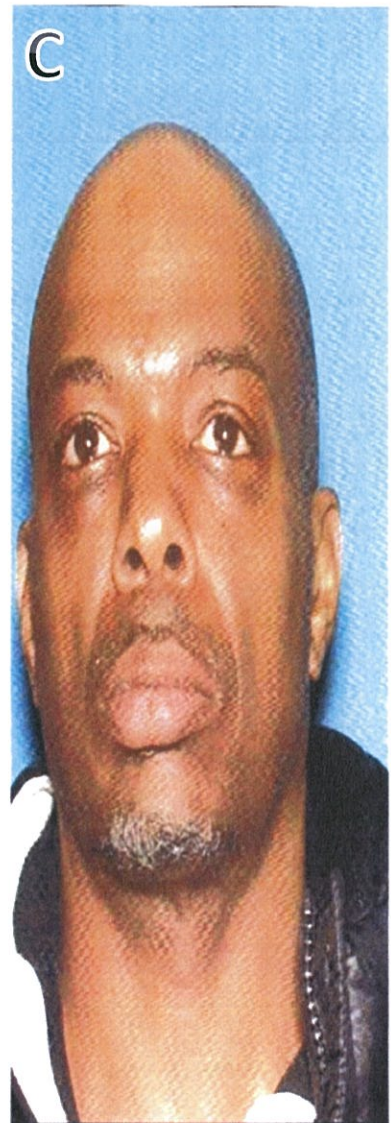


# A. ZANATTA (11/6) STMT. 7:20–7:26

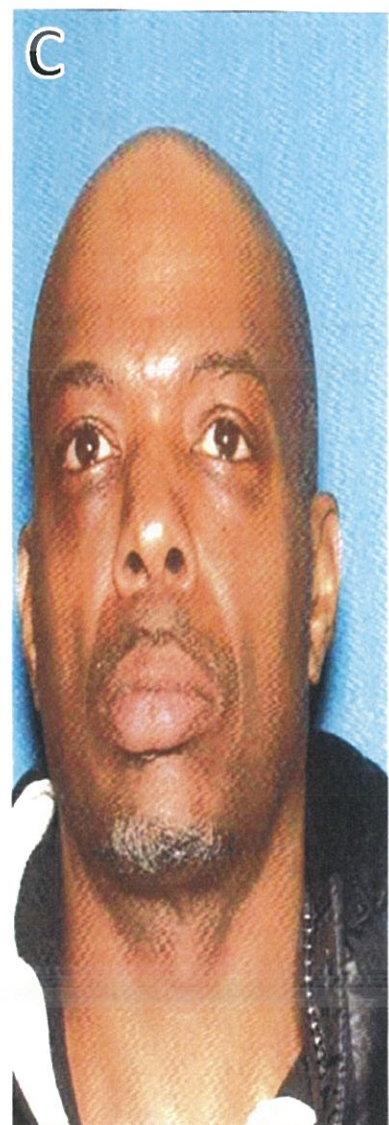




# A. ZANATTA (11/6) STMT. 7:27–7:32



# A. ZANATTA (11/6) STMT. 7:33– 7:37





# A. ZANATTA (11/6) STMT. 7:38– 7:39



D



A



C



# A. ZANATTA (11/6) STMT. 7:40– 7:56

D



A



C





# A. ZANATTA (11/6) STMT. 7:57– 8:07

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D



C



# A. ZANATTA (11/6) STMT. 8:08– 8:54

