No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

DAVID MINOR,

Petitioner,

v.

BEVERLY HASTINGS; ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-2082

DAVID MINOR,
Appellant
v.

BEVERLY HASTINGS; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Appeal from the United States District Court
for the District of New Jersey
(District Court No. 1-13-cv-00558)
District Judge: Hon. Jerome B. Simandle

Argued
April 25, 2017

Before: SMITH, *Chief Judge*, McKEE, and RENDELL, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on April 25, 2017.

On consideration whereof, it is hereby ORDERED and ADJUDGED by this court that the District Court's order entered on March 29, 2016 be AFFIRMED. All of the above in accordance with the opinion of this court.

Attest:

s/ Marcia M. Waldron
Clerk

Dated: August 22, 2017

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 16-2082

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DAVID MINOR,
Appellant
v.

BEVERLY HASTINGS; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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Argued
April 25, 2017

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Before: SMITH, *Chief Judge*, McKEE, and RENDELL, *Circuit Judges*

(Opinion filed: August 22, 2017)

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OPINION*

McKEE, *Circuit Judge*.

Appellant David Minor appeals the District Court's order dismissing his habeas petition. For the reasons that follow, we will affirm the judgment of the District Court.[1]

I.

Minor appealed his conviction to the Appellate Division of the New Jersey Superior Court, arguing that the trial court had violated his constitutional rights when it concluded that he had not made out a prima facie showing of race discrimination in jury selection. He also argued that the prosecutor deprived him of his right to a fair trial by misstating the burden of proof in summation and effectively directing a guilty verdict. The court rejected the first claim, holding that Minor "did not make a prima facie showing that the jury was not drawn from a representative cross-section of the community."[2] The court also rejected Minor's second claim based largely on the trial court's curative instructions.

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* This disposition is not an opinion of the full court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

[2] App. at 294.

The New Jersey Supreme Court denied Minor's petition for discretionary review. Minor then filed a *pro se* application for habeas relief. The District Court denied Minor's application. Minor filed his notice of appeal and a *pro se* motion for a Certificate of Appealability, which we granted as to both of the aforementioned issues.

I.

We apply the same standard of review as the District Court pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[3] Under AEDPA, an application for habeas relief shall not be granted for any claim adjudicated on the merits in state court unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4]

"[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable."[5]

II.

[3] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[4] 28 U.S.C. § 2254(d)(1)-(2).
[5] *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Minor argues that (1) the state court unreasonably applied *Darden v. Wainwright*[6] when it did not find that the weakness of the State's evidence combined with the prosecution's improper summation concerning the standard of beyond a reasonable doubt deprived Minor of a fair trial; and (2) the state court unreasonably applied *Johnson v. California*[7] when it did not proceed to step two under a *Batson* analysis. We do not find the state court's determinations to be unreasonable, and thus, we must affirm the District Court's decision.

A. Prosecution's Summation

A petitioner is deprived of a fair trial where "the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."[8] In making this determination, the reviewing court "must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant."[9] "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it."[10]

[6] 477 U.S. 168 (1986).
[7] 545 U.S. 162 (2005).
[8] *Darden*, 477 U.S. at 181 (internal quotation marks omitted); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (same).
[9] *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001).
[10] *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

A petitioner is not prejudiced where prosecutor's comments are "invited by" [11] or are a "fair reply to defense counsel's" comments.[12] Further, curative instructions may correct an improper remark where "the judge direct[s] the jury's attention to the remark particularly challenged [], declare[s] it to be unsupported, and admonishe[s] the jury to ignore it."[13]

Here, although the prosecution's summation was troublesome, it did not so infect the trial with unfairness as to make the resulting conviction a denial of due process under our standard of deferential review. First, the prosecution's comments did not manipulate or misstate the evidence. Second, the comments were in response to defense counsel's arguments. Third, the trial court provided the jurors with curative instructions, including the correct explanation of the standard of proof beyond a reasonable doubt and instructed the jury to ignore any statement made by counsel regarding the law. In light of this, we cannot say that the state court's decision denying Minor's claim for relief because of the prosecution's summation "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

B. *Batson* claim

[11] *Darden*, 477 U.S. at 182.
[12] *United States v. Pungitore*, 910 F.2d 1084, 1128 (3d Cir. 1990).
[13] *Donnelly*, 416 U.S. at 644; *see also Pungitore*, 910 F.2d at 1128 ("[A]s appellants did not object to the curative instruction or request additional instructions, they apparently were satisfied with the district court's response and cannot now complain that comments gave rise to reversible error.").

Minor also argues that the state court did not comply with *Johnson v. California* when it held that Minor had not raised an inference of discrimination in jury selection. This claim is more troubling.

To establish a *Batson* challenge, the defendant must first "make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race."[14] If the defendant makes this showing, the burden then shifts to the prosecutor to present a race-neutral explanation for striking the jurors in question.[15] The trial court must then determine whether the defendant has met his burden of proving purposeful discrimination.[16] In *Johnson*, the Supreme Court clarified that the first step under *Batson* is not intended to "be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination."[17]

In determining whether a defendant has made the requisite showing, "the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."[18] This Court has identified the following five factors that are relevant

[14] *Hernandez v. New York*, 500 U.S. 352, 358 (1991) (citing *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986)).
[15] *Id.* at 359.
[16] *Id.*
[17] 545 U.S. at 163.
[18] *Batson*, 476 U.S. at 97.

when assessing whether a prima facie showing of discrimination has been made: "1) the number of racial group members in the panel; 2) the nature of the crime; 3) the race of the defendant; 4) a pattern of strikes against racial group members; and 5) the questions and statement[s] during the voir dire."[19] Once the defendant makes a prima facie showing, the prosecution bears the burden of providing "a neutral explanation for challenging black jurors."[20] "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal and will not be overturned unless clearly erroneous."[21]

We agree that this record is worrisome insofar as Minor's *Batson* claim is concerned. Yet, the trial court required the prosecutor to justify her challenges, and she did so. However, the prosecutor then complained that the State "now has run out of its challenges" and asked the court to excuse the jury and begin anew because "the majority

[19] *Holloway v. Horn*, 355 F.3d 707, 722 (3d Cir. 2004) (internal quotation marks omitted).
[20] *Batson*, 476 U.S. at 97.
[21] *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citation and internal quotation marks omitted). The Appellate Division and the District Court also seem to have erred in their application of *Miller-El* to this case. The Supreme Court's requirement for deference to a trial court's *Batson* finding is limited to the discriminatory intent prong of *Batson*, and not to the initial prima facie showing. *See Id.* at 339 ("[T]he court's finding of the *absence of discriminatory intent* is . . . accorded significant deference."). The District Court was incorrect in relying on *Miller-El* for the proposition that a trial court may consider the ultimate composition in the *first* step of *Batson*, as *Miller-El* addressed the denial of a COA after petitioner's *Batson* claim was denied at step three. The State in *Batson* had conceded that petitioner had satisfied Step One; the only issue was whether Step Three had been satisfied. *Id.* at 338.

of the individuals on the jury are African American."[22] The trial court denied the State's motion. Ultimately, the majority of jurors in Minor's trial were African American.[23]

Nevertheless, the prosecutor did offer race-neutral reasons for the strikes removing African American jurors, the record supports those nonracial reasons, and the trial court found that the prosecutor's reasons were credible. Therefore, although the prosecution's comments on the second day of voir dire are worrisome, given the ultimate composition of the jury, the credited race-neutral explanations for the challenged strikes, and the significant deference we afford to the trial court's finding, we cannot say that the state court's denial of Minor's *Batson* claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Although we may well have reached a different result if we were reviewing this record *de novo*, given the limitations of our appellate review under AEDPA, we must affirm the District Court's decision.

IV.

For the aforementioned reasons, we affirm the judgment of the District Court.

---

[22] App. at 812.

[23] The Appellate Division incorrectly focused on the ultimate composition of the jury at Step One. At that stage, all that matters is whether any juror was being removed because of race. Being required to defeat the ultimate composition of the jury at Step One would impose too high of a burden at that stage. *See Batson*, 476 U.S. at 95 ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions."); *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1338 (state court reached a decision "contrary to clearly established federal law . . . because the court increased [petitioner's] *prima facie* burden beyond what *Batson* requires.").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-2082

DAVID MINOR,
Appellant

v.

BEVERLY HASTINGS; ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY

(District Court No. 1-13-cv-00558)

PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and *RENDELL Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

*Judge Rendell's vote limited to panel rehearing only.

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Dated: October 31, 2017

kr/slc/cc: Anne M. Collart, Esq.
Frank J. Ducoat, Esq.
Barbara A. Rosenkrans, Esq.

*Judge Rendell's vote limited to panel rehearing only.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID MINOR, Petitioner, v. BEVERLY HASTINGS, et al., Respondents.	Civil Action No. 13-0558 (JBS) **OPINION**

APPEARANCES:

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SIMANDLE, Chief Judge[1]

David Minor filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction filed in the Superior Court of New Jersey, Law Division, Essex County, on January 30, 2004, and amended on March 22, 2004, and December 5, 2008, after a jury found him guilty of first-degree

[1] This case was reassigned to the undersigned following the death of the Hon. Dickinson R. Debevoise in August, 2015.

robbery, third-degree unlawful possession of a weapon, and second-degree possession of a weapon for an unlawful purpose. The State filed an Answer with the record and Minor filed a Reply. After carefully reviewing the state court record and the arguments of the parties, this Court will dismiss the Petition with prejudice and deny a certificate of appealability.

I. BACKGROUND

A. The Crime

Minor challenges a sentence of 19 years in prison with an 85% period of parole ineligibility, to run consecutively to the sentences imposed on five other New Jersey indictments, after a jury convicted him of first-degree robbery, third-degree unlawful possession of a weapon, and second-degree possession of a weapon for an unlawful purpose. (ECF No. 10-2 at 2.) Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), state court factual findings are presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). As Minor has not attempted to rebut the factual findings of the New Jersey courts, this Court will rely on those findings.

The Appellate Division found the following facts on direct appeal. See State v. Minor, 2008 WL 4377436 (N.J. Super. Ct., App. Div., Sept. 29, 2008). On January 11, 2002, at about 8:00 p.m., Lidwyn Cummings felt a handgun pressed to his side as he put the key into his truck door after exiting a drug store in Newark. The man threatened to shoot unless Cummings gave him money. Cummings gave the man $20 and a pack of cigarettes, the man asked for his wallet and keys, and Cummings handed them over. The man took money from the wallet, threw the keys in a lot across the street, and headed away on foot. Cummings picked up his keys, drove to the police station, and reported the crime, describing the perpetrator as 5'8" in height, 150 pounds, between the ages of 23 and 25, and wearing a black hooded sweater, gray pants and a cap. On January 16, 2002, Cummings identified Minor from a six-photo array which included persons who looked similar to the description given by Cummings. At trial, Cummings identified Minor in court, stating that he was 80% certain that Minor was the person who had robbed him and that he was 95%-100% sure when he had selected Minor's photo in the pretrial photo array.

B. The State Court Proceedings

The trial took place on April 9 and 10, 2003. The jury convicted Minor. On January 30, 2004, the trial judge sentenced him to 20 years, with a 17-year period of parole ineligibility. (ECF No. 7-2 at 2.) On March 22, 2004, the trial judge entered an amended judgment which also imposed a 20-year term, with 17 years of parole ineligibility. (ECF No. 8-2 at 2.) Minor appealed, and on September 29, 2008, the Appellate Division of the Superior Court of New Jersey affirmed the convictions and remanded for resentencing. See State v. Minor, 2008 WL 4377436 (N.J. Super. Ct., App. Div., Sept. 29, 2008). The New Jersey Supreme Court denied certification on November 19, 2008. See State v. Minor, 197 N.J. 16 (2008) (table). On December 5, 2008, the trial judge resentenced Minor to a 19-year term of imprisonment, with an 85% period of parole ineligibility. (ECF No. 10-2 at 2.)

Minor filed a petition for post-conviction relief in the trial court on December 16, 2008. (ECF No. 10-2 at 2.) On December 16, 2009, the trial judge denied the petition for post-conviction relief without an evidentiary hearing for the reasons set forth orally on the record. (ECF No. 11-3 at 2.) Minor

appealed, and on November 20, 2012, the Appellate Division affirmed. See State v. Minor, 2012 WL 5845637 (N.J. Super. Ct., App. Div., Nov. 20, 2012). The New Jersey Supreme Court denied certification on July 12, 2013. See State v. Minor, 214 N.J. 175 (2013) (table).

C. Procedural History of § 2254 Petition

On January 25, 2013, Minor signed his § 2254 Petition and presumably handed it to prison officials for mailing to the Clerk. (ECF No. 1 at 15.) The Petition raises the following three grounds:[2]

> Ground One: FAILURE TO CONDUCT GILMORE HEARING. THE TRIAL COURT MADE A DECISION THAT THE PROSECUTOR DID NOT USE HER CHALLENGES UNCONSTITUTIONAL[LY] WITHOUT EVEN ASKING [] HER TO EXPLAIN.

[2] The Court notified Minor of his right to amend the Petition to include all available federal claims in accordance with Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000), and he declined to do so. (ECF Nos. 2, 5.) The § 2254 Petition sets forth a fourth ground claiming that the judge improperly allowed a juror who was not a resident of Essex County to serve, but also stated, "So please disregard this issue. I won't be raising it." (ECF No. 1 at 10.) In the Mason Order the Court indicated that this ground would be considered to be withdrawn unless Minor responded that he wanted the Court to entertain the fourth ground and/or seek a stay in order to exhaust the fourth ground. In response, Minor indicated that he elected to have the Court entertain the three grounds and that he did not want to seek a stay. (ECF No. 5.)

> Ground Two: PROSECUTOR['S] MISSTATEMENT OF LAW. IN HER SUMMATIONS SHE TOLD THE JURY THAT 85 PERCENT WAS BEYOND A REASONABLE DOUBT. THIS WAS AFTER THE JUDGE HAD ALREADY TOLD HER THAT THIS STATEMENT WAS UNTRUE.
>
> Ground Three: FAILURE TO CONDUCT WADE [HEARING.] NEW JERSEY ATTORNEY GENERAL GUIDELINES RECOMMEND THAT THE INVESTIGATING OFFICER NOT BE INVOLVED IN THE IDENTIFICATION. IN MY CASE THE SAME OFFICER THAT WAS INVESTIGATING THE CRIME SHOWED THE VICTIM THE LINEUP. NEWARK POLICE DEPARTMENT HAS OVER 1000 OFFICERS. SOMEONE ELSE COULD HAVE CLEARLY CONDUCTED THE PHOTO ARRAY.

(ECF No 1 at 5, 7, 8.)

The State filed an Answer and the record, and Minor filed a Reply. (ECF Nos. 27, 33.)

II. STANDARD OF REVIEW FOR RELIEF UNDER § 2254

Section 2254 of title 28 of the United States Code sets limits on the power of a federal court to grant a habeas petition to a state prisoner. See Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011). Section 2254(a) permits a court to entertain only claims alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Where a state court adjudicated petitioner's federal claim on the merits,[3] as in this

[3] "For the purposes of Section 2254(d), a claim has been 'adjudicated on the merits in State court proceedings' when a

case, a court "has no authority to issue the writ of habeas corpus unless the [state c]ourt's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States', or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Parker v. Matthews, 132 S.Ct. 2148, 2151 (2012) (quoting 28 U.S.C. § 2254(d)). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." Woods v. Donald, 135 S.Ct. 1372, 1376 (2015). The petitioner carries the burden of proof, and review under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits. See Pinholster, 131 S.Ct. at 1398.

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state court has made a decision that 1) finally resolves the claim, and 2) resolves th[at] claim on the basis of its substance, rather than on a procedural, or other, ground." Shotts v. Wetzel, 724 F.3d 364, 375 (3d Cir. 2013) (citation and internal quotation marks omitted).

A court begins the analysis under § 2254(d)(1) by determining the relevant law clearly established by the Supreme Court. See Yarborough v. Alvarado, 541 U.S. 652, 660 (2004). "[C]learly established law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of t[he Supreme Court's] decisions," as of the time of the relevant state-court decision. Woods, 135 S.Ct. at 1376 (quoting White v. Woodall, 134 S.Ct. 1697, 1702 (2014), and Williams v. Taylor, 529 U.S. 362, 412 (2000)). A decision is "contrary to" a Supreme Court holding within 28 U.S.C. § 2254(d)(1) if the state court "contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a [different] result." Williams, 529 U.S. at 405-06. Under the "'unreasonable application' clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id., 529 U.S. at 413.

Where a petitioner seeks habeas relief pursuant to § 2254(d)(2) on the basis of an erroneous factual determination of the state court, two provisions of the AEDPA necessarily apply. First, the AEDPA provides that "a determination of a factual issue made by a State court shall be presumed to be correct [and] [t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 29 U.S.C. § 2254(e)(1); see Miller-El v. Dretke, 545 U.S. 231, 240 (2005). Second, the AEDPA precludes habeas relief unless the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

III. DISCUSSION

A. Failure to Conduct Gilmore Hearing

Minor argues, as he did on direct appeal, that the failure to conduct a hearing pursuant to State v. Gilmore, 103 N.J. 508 (1986), deprived him of due process and a fair trial by an impartial jury guaranteed by the Fourteenth Amendment of the United States Constitution. He asserts that he is African-American and on the first day of jury selection he challenged

the State's use of its first five peremptory challenges against five women, four of whom were African-American. Relying on Batson v. Kentucky, 476 U.S. 79 (1986), J.E.B. v. Alabama, 511 U.S. 127 (1994), State v. Gilmore, 103 N.J. 508 (1986), and State v. Fuller, 182 N.J. 174 (2004), Minor argued on direct appeal that the trial judge improperly found that Minor had not made a prima facie case and, accordingly, failed to require the State to provide reasons for its use of challenges.

The issue here is whether the Appellate Division's determination that Minor failed to establish a prima facie Batson claim was an unreasonable application of Batson or other Supreme Court holdings. The Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using a peremptory challenge to strike a prospective juror solely on account of race. See Batson, 476 U.S. at 88.

In Batson, the Supreme Court set forth the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of a peremptory challenge to exclude a person from the petit jury on account of race or ethnicity. James Batson was a Black man who was tried in Kentucky on charges of second-degree burglary and

receipt of stolen goods. After the prosecutor had used his peremptory challenges to strike all four Black persons from the petit jury and a jury composed only of White persons was selected, defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black people from the jury violated Batson's rights; defense counsel requested a hearing on the motion, but the judge denied the motion without further inquiry. After the Supreme Court of Kentucky had affirmed, the United States Supreme Court granted certiorari and reversed. Batson set forth the standard for establishing a prima facie case of purposeful discrimination:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury . . . raises the necessary inference of purposeful discrimination.

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

Batson, 476 U.S. at 96-97 (citations, internal quotation marks and footnotes omitted).

The Batson Court further held that, once a defendant makes a prima facie showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors . . . . The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." Batson, 476 U.S. at 97-98 (citations, internal quotation marks and footnotes omitted).

In Johnson v. California, 545 U.S. 162, 169-70 (2005), the Supreme Court emphasized that "Batson held that because the petitioner had timely objected to the prosecutor's decision to strike 'all black persons on the venire,' the trial court was in

error when it 'flatly rejected the objection without requiring the prosecutor to give an explanation for his action.'" (quoting Batson, 476 U.S. at 100). In Johnson, Johnson, a black male, was convicted of second-degree murder and assault on a White 19-month old child. After several jurors were removed for cause and 43 eligible jurors remained, the prosecutor exercised his three remaining peremptory challenges against the three remaining Black jurors. Defense counsel objected. The trial judge found that Johnson had not established a prima facie case because "there's not been shown a *strong likelihood* that the exercise of the peremptory challenges were based upon a group rather than an individual basis." Johnson, 545 U.S. at 165 (internal quotation marks omitted) (emphasis in original). Although the California Court of Appeal ruled that the trial judge had erred by requiring Johnson to establish a strong likelihood, the California Supreme Court reinstated the conviction, finding that the terms "strong likelihood" and "reasonable inference" were the same standard.

The Supreme Court reversed, holding that "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an

inference that discrimination has occurred." Johnson, 545 U.S. at 170. The Court emphasized that "the first two Batson steps govern the production of evidence," id. at 171, and only at the third step, after hearing the prosecutor's explanation, does the judge determine "whether it was more likely than not that the challenge was improperly motivated." Id. at 170.

The record in this case shows that jury selection occurred on April 8 and 9, 2003. On the first day, defense counsel moved the court to require the prosecutor to provide race neutral reasons for using four peremptory challenges against four Black female prospective jurors. (ECF No. 13-5 at 82.) The trial judge found that, at that point, the prosecutor had used five challenges, one against a White female and four against Black females. (ECF No. 13-5 at 83.) Then the following colloquy occurred:

> The Court: My next question to you, Ms. SanFilippo, is – I would have to find that there is a substantial likelihood that the peremptory challenges leading to the exclusion were based on assumptions about group bias as opposed to any indication of situation specific bias. Now it is here that I would like to know what you recall that would – what would your answer to that question be? Or put it more specifically, upon what should I – what can I base a conclusion that there is a substantial likelihood the peremptory challenges were based on assumptions about group bias?

Ms. SanFilippo: Your Honor – I would submit that the assumption of the , um, the bias would be that people who share the same race as the defendant in this case, the defendant being black and the, um, 80 percent of the challenged jurors being black, that they would somehow be sympathetic or more favorable to an outcome in favor of the defendant by virtue of them having the same race. And again nearly 80 percent – 80 percent were black as the defendant.

The Court: Well, then what of your argument about the female? You said two cognizable groups.

Ms. SanFilippo: Um – just that they possibly would be more sympathetic, I think it's – with respect to the bias would go more towards the race than the gender.

* * * *

The Court: In making my decision, is it of any relevance to the decision I have to make as to what gender or race or both the victim of this alleged crime is?

Ms. SanFilippo: Your Honor, I think that can be a factor but at this juncture, -- that hasn't been discussed with the jurors to any extent. Um – and I think I would base may arguments on – more so on the gender of – strike that, on the race of the defendant as opposed to the victim.

The Court: So your answer to my very direct question is that the race of the alleged victim is immaterial to any decision I have to make in this regard?

Ms. SanFilippo: I wouldn't say it's immaterial . . .

The Court: Then to the extent it is material, to what – what is the race of the victim?

> Ms. SanFilippo: I believe the victim is African American as well.
>
> The Court: Okay. And to what extent, if any, should – should that factor enter into my decision that I have to make? That the . . . defendant is a black male and the alleged victim is a black male also, correct?
>
> Prosecutor: Yes, Your Honor, he is.
>
> Ms. San Filippo: I would – not very significant, Your Honor . . . I think we need to focus on what my – the – uh – the race of my client and appropriately he is in court right now. And I think that is more apparent.
>
> The Court: Ms. SanFilippo, is the only thing the challenged jurors had in common was that they belonged to the group of – cognizable group of let's say, black people or black women – besides for juror number one?
>
> Ms. SanFilippo: Um – Your Honor that is primarily – they do – I had not noticed a specific trend with respect to employment . . . But I believe, again, that the motivation here deals primarily with them having a – being of the same racial group as the defendant.

(ECF No. 13-5 at 83-87.)

The prosecutor argued: "I just don't think enough challenges have been even exercised at that point – at this point to even show a pattern that race is the cri—the basis for the exclusions . . . So I don't believe any showing has been made, Your Honor, at this point for the State to be required to give reasons for their exclusion – for its exclusions." (ECF

No. 13-5 at 88-89.) The trial judge found that the defense had not made a prima facie showing:

> The Court: Okay. I think a close examination of the record would bear out what the prosecutor just said. I would – I would say the state of the law is that race is a cognizable class, and so is gender. I do believe. At any rate, I'm also taking into account that the victim is a – is also black, to the extent it's material. At any rate, I do not believe that the defense has made a prima facie case. I'll deny the motion.

(ECF No. 13-5 at 89-90.)

This Court notes that the defense did not renew its motion, even though jury selection went into the next day and the State ultimately used all of its peremptory challenges. However, the next day, the prosecution moved twice for the defense to show non-racial reasons for using peremptory challenges against White prospective jurors. At the time the State made the first motion, the defense had used five challenges, three against White persons and two against Black females. Noting these facts, the trial judge denied the motion. (ECF No. 14-1 at 6.) Later, the State made a second motion based on the exclusion of potential White jurors at the point when the defense had used 16 challenges, with 13 against White persons and three against African American jurors, and the State had no challenges left.

(ECF no. 14-1 at 74-82.) The trial judge required defense counsel to justify the 13 challenges and defense counsel set forth in detail her rationale for using each of the 16 peremptory challenges. The State argued that the reasons were pretextual and that, at that point, "the majority of the individuals on the jury are African American." (ECF No. 14-1 at 81.) The trial judge found that the defense had presented "genuine and reasonable grounds for believing the potential jurors might have situation[] specific biases. Motion denied." (ECF No. 14-1 at 82.) Then, when the defense used the next challenge against a prospective male juror named Ortiz, the State moved again arguing that the defense had challenged another White male. (ECF No. 14-1 at 85.) The trial judge denied the State's Gilmore motion.

On direct appeal, Minor argued that the trial court violated his equal protection rights by failing to require the State to give reasons to justify its initial five challenges where four of those challenged were African American females and the prosecutor ultimately excused a total of 10 women. (ECF No. 8-4 at 13-19.) In considering this claim, the Appellate Division noted that under the law in effect at the time of

Minor's trial, i.e., Gilmore, a prima facie showing required the movant to show that there was a "'substantial likelihood' that the peremptory challenges made by the prosecution were based on an assumption about group bias as opposed to situation-specific bias." State v. Minor, 2008 WL 4377436 at *3. The Appellate Division acknowledged that the Supreme Court had rejected a "more likely than not" standard in Johnson v. California, 545 U.S. 162 (2005), and held that a movant "is only required to produce evidence 'sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" Citing Snyder v. Louisiana, 552 U.S. 472, 477 (2008), the Appellate Division deferred to the trial court: "This deference is in large part attributable to the fact that the trial judge is able to make first-hand observations of the demeanor of the attorney exercising the challenge and the juror in question." State v. Minor at *5. The Appellate Division affirmed on this issue finding that, even under the new, lower standard, Minor had not produced evidence sufficient to permit the judge to draw an inference of discrimination against African Americans:

> There was no proof by the defense of an unfair or unreasonable under-representation of African-Americans or women. **Indeed, the record discloses that the majority of jurors who heard the case were African-**

> **Americans.** We have stated that the ultimate composition of the jury [ ] is relevant to the determination of whether the prosecutor's intent was discriminatory . . . **[T]he presence on the jury of a substantial number of the group alleged to have been discriminatorily excluded may support a finding that a questionable proffered reason for challenging a member of that group was not reflective of a discriminatory intent.** In this instance, the defense did not make a prima facie showing that the jury was not drawn from a representative cross-section of the community. Accordingly, we reject defendant's argument.

State v. Minor, 2008 WL 4377436 at *5 (citations and internal quotation marks omitted) (emphasis added).

This Court is required to presume the correctness of the Appellate Division's finding that the majority of jurors in Minor's trial were African-American, as Minor has not rebutted the presumption by clear and convincing evidence and he has not shown that this determination was unreasonable in light of the evidence presented. See 28 U.S.C. § 2254(d)(2) and (e)(1); Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (applying presumption of correctness under § 2254(e)(1) to state court's factual findings regarding Batson claim).

The Supreme Court has repeatedly emphasized that a state court's finding regarding a prosecutor's discriminatory intent under Batson must be accorded significant deference in a habeas case. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 339

(2003)("Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations.") Thus, the Appellate Division's decision to defer to the trial judge's judgment that Minor had not established a prima facie case is consistent with Supreme Court precedent. Moreover, like the Appellate Division, the Supreme Court has concluded that it is proper to consider the ultimate composition of the jury in determining whether the defendant has established a prima facie case under Batson. See Miller-El v. Cockrell, 537 U.S. at 322 ("In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.").

Minor has cited no Supreme Court holding that is inconsistent with the Appellate Division's determination that Minor failed to produce evidence supporting an inference of

discriminatory intent by the prosecutor's use of four peremptory challenges against African-Americans where the ultimate jury was composed of a majority of African-Americans. This Court holds that the Appellate Division did not unreasonably apply Batson or other Supreme Court holdings when it found, based upon the trial court findings and without conducting an evidentiary hearing, that Minor failed to establish a prima face case under Batson. See Johnson v. California, 545 U.S. at 169-70 ("Batson held that because the petitioner had timely objected to the prosecutor's decision to strike 'all black persons on the venire,' the trial court was in error when it 'flatly rejected the objection without requiring the prosecutor to give an explanation for his action.'") (quoting Batson, 476 U.S. at 100); Williams v. Beard, 637 F.3d 195, 214-15 (3d Cir. 2011) ("When the record does not illuminate the composition of the venire, there may be insufficient evidence with which to mount a successful collateral attack").

For all these reasons, this Court finds that the factual determinations regarding reasons for striking African-American jurors and regarding the composition of the trial jury were not unreasonable, and that the Appellate Division's determinations

of law were not contrary to, or an unreasonable application of, clearly established federal law. Minor is not entitled to habeas relief under Ground One.

B. Prosecutorial Misconduct

In Ground Two, Minor asserts that the prosecutor improperly told the jury during summation "that 85 percent was beyond a reasonable doubt . . . after the Judge had already told her that this statement was untrue." (ECF No. 1 at 5.) On direct appeal, Minor argued that the prosecutor misstated the law regarding the burden of proof when in her closing she stated that "80 percent is a very high percentage, ladies and gentlemen. That's beyond reasonable doubt. Preponderance of an evidence in civil cases is a little more than 50/50. Beyond a reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient." (ECF No. 8-4 at 20.)

The Appellate Division noted that the prosecutor was responding to the defense's comment in summation that at the time of Cummings' photo identification, he was 95% to 100% sure but at trial he was only 80% sure of his in-court identification. See Minor, 2008 WL 4377436 at *6. The Appellate Division found that, although the prosecutor had

misstated the law, this misstatement did not deny due process because the judge had instructed the jury to ignore the attorneys' statements regarding law and had given a proper burden of proof instruction:

> The comments by the prosecutor were obviously an incorrect statement of the law. However, the trial court properly instructed the jury on the meaning of reasonable doubt, and further instructed the jury to follow the instructions of the court and to ignore any statements by the attorneys on the law. Accordingly, we conclude that the erroneous statements by the prosecutor did not deprive the defendant of a fair trial.

Minor, 2008 WL 4377436 at *6.

As the Supreme Court has recently explained, "[t]he 'clearly established Federal law' relevant [to a prosecutorial misconduct claim] is [the Supreme Court's] decision in Darden v. Wainwright, 477 U.S. 168 . . . (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Parker v. Matthews, 132 S.Ct. 2148, 2153 (2012) (quoting Darden at 181 and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). It is not enough to show that the prosecutor's conduct was universally condemned. See Darden at 181. The quantum or

weight of the evidence is crucial to determining whether the prosecutor's statements before the jury were so prejudicial as to result in a denial of due process. Id. at 182; Donnelly, 416 U.S. at 644; accord Moore v. Morton, 355 F.3d 95, 111 (3d Cir. 2001).

Given the certainty of the out-of-court identification of Minor by Cummings, as well as the correct instructions by the trial judge regarding the legal standard of proof beyond a reasonable doubt, the Appellate Division was not unreasonable in its application of Darden, Donnelly or other Supreme Court precedent when it concluded that the prosecutor's comments did not so infect the trial with unfairness as to make Minor's conviction a denial of due process. Minor is not entitled to habeas relief on Ground Two.

C. Failure to Conduct Wade Hearing

In Ground Three, Minor asserts that he was entitled to an evidentiary hearing under United States v. Wade, 388 U.S. 218 (1967), on the admissibility of the out-of-court identification because the investigating police officer conducted the photo array with Cummings, contrary to the New Jersey Attorney General's guidelines.

The Supreme Court considered the claim that a defendant's pretrial identification by means of photographs was so unnecessarily suggestive and conductive to misidentification as to deny him due process in Simmons v. United States, 390 U.S. 377, 383 (1968). In that case, two men robbed a bank. The next day, the FBI separately showed five bank employees six group photographs which included defendants Simmons and Andrews; each of the five employees identified Simmons but not Andrews. The government relied on the in-court identification of Simmons but did not introduce the photographs or the pretrial identifications. The Supreme Court held "that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. at 384. Applying the standard, the Court concluded that the pretrial identification procedure used by the FBI did not violate due process where it was not suggested that the photo identification was unnecessary, there was "little chance that the procedure utilized led to misidentification of Simmons," and the evidence

did not show that the FBI agents suggested which persons in the photos were under suspicion. Id. at 385.

In Manson v. Brathwaite, 432 U.S. 98 (1977), a § 2254 petitioner challenged his Connecticut conviction for possession and sale of heroin, arguing that the admission of identification testimony of Glover, an undercover police officer, deprived him of due process. Two days after Glover purchased heroin from a Black man out of an apartment in Hartford, another police officer who suspected Brathwaite (based on Glover's description), obtained his photo from the Records Division and left the photo on Glover's desk. Glover identified the person in this photo as the person who had sold him heroin. Brathwaite challenged the identification on due process grounds in the state court and his § 2254 petition. The District Court dismissed the § 2254 petition but the Second Circuit reversed with instructions to issue the writ unless the State retried Brathwaite, finding that the examination of the single photograph was suggestive. The Supreme Court explained that "[t]he admission of evidence of a showup without more does not violate due process," id. at 106 (citation omitted), and "[t]he admission of testimony concerning a suggestive and unnecessary

identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." id. The Supreme Court held that admissibility of the unnecessarily suggestive one-photo identification testimony turned on balancing "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation," against "the corrupting effect of the suggestive identification itself." Id. at 114. Applying this test, the Court concluded that the "indicators of Glover's ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification itself[, even though] identifications arising from single-photograph displays may be viewed in general with suspicion." Id. at 116.

Most recently, in 2012 the Supreme Court granted certiorari on the New Hampshire Supreme Court's denial of Perry's motion to suppress identification testimony where the witness identified Perry at 3:00 a.m. under suggestive circumstances not arranged by law enforcement officers. See Perry v. New Hampshire, 132

S.Ct. 716 (2012). From her apartment window, the witness had seen someone breaking into a car in the parking lot and had called police; the police officer who arrived in the parking lot saw and stopped Perry, who was holding two car stereo amplifiers in his hands. While Perry was standing in the parking lot with another officer, the original officer went upstairs and asked the witness for a more specific description of the man she had seen. The witness "pointed to her kitchen window and said the person she saw breaking into [the] car was standing in the parking lot, next to the police officer." Id. at 722. However, a month later, when the police showed the witness a photographic array that included a picture of Perry, she was unable to identify him. Perry moved to suppress the one-person showup in the parking lot and the state court denied the motion on the ground that the police had not arranged the out-of-court identification. The New Hampshire Supreme Court affirmed and the Supreme Court granted certiorari on "the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police" id. at 723, answering the question in the

negative. The Court noted that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Id. at 723. As the Court explained,

> An identification infected by improper police influence . . . is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial.

Perry, 132 S.Ct. at 720-21.

In this case, Minor filed a pretrial motion for a Wade hearing on the pretrial identification by Cummings. The trial judge heard argument on the motion and denied it without taking testimony, finding that the photo identification procedure was not suggestive:

> This Court finds insufficient evidence to justify designated – designating the photographic identification procedure unfair and impermissibly suggestive even when viewing all the evidence in the light most favorable to the defense. That evidence includes S-1A through F. Those are the photographs of the photos that were shown that particular witness, Mr. Cummings, including the photograph of Defendant, which I believe is S-1F. In other cases, much more prejudicial conduct such as actually stating that the suspected Defendant was contained within the photo –

within the photo array did not justify a finding of impermissible suggestiveness. Here, the alleged impermissible practice was simply failing to state the procedures used for the photo identification process. However, these procedures were designated in the Newark Police Department photo display instructions and there is nothing to indicate that a deviation from these procedures occurred.

In addition, after the photos were shown to Mr. Cummings, he signed a photographic identification form and Detective Chirico signed a photo display report, neither of which indicated a divergence from the procedures stated in the photo display instructions. These instructions adequately addressed Defendant's contentions regarding the procedures used during the photo identification. Further, in terms of the photographs used, Mr. Cummings indicated on the photograph identification form that all of the pictures were pictures of the faces of "similar black males." Likewise, the photo display report, which is attached to the State's papers which I had reviewed and I incorporate by reference into this decision, even though they have not been technically marked into evidence, that display report indicates all the subjects were roughly within six years of Defendant's age. These documents also establish that the photo array was displayed to Mr. Cummings within five days of the incident.

In terms of Mr. Cummings' ability to – to view the perpetrator of the crime, he indicated that at the time of his initial incident report that he saw the individual approach him and that he was able to identify the perpetrator's attire from head to toe, the color of the gun used, as well as the perpetrator's height, weight, skin, color and age. This level of detail contained in this information satisfies the Court that Mr. Cummings' attention was properly focused on the perpetrator and the five day difference between the incident and the photo array

> suggests that Mr. Cummings had scant time for the perpetrator's appearance to fade from his memory. Therefore, although a reference to the amount of time that Mr. Cummings viewed the perpetrator was not provided, as suggested for an optimal identification, this Court finds that the photo identification did not rise to the level where an unfair procedure was conducted.

(ECF No. 13-3 at 14-15.)

On direct appeal, Minor asserted that Detective Chirico, who took Cummings' initial statement, also administered the photo array in which Cummings selected Minor's photo and this procedure was suggestive as it violated the applicable guidelines of the New Jersey Attorney General. Minor also argued that the photo array was suggestive because Chirico had targeted Minor as a suspect and "the photos all depicted moustaches and facial hair, because David Minor had a moustache and facial hair in the target photo, and yet the victim never included those references in his description." (ECF No. 8-4 at 25.) The Appellate Division noted that "there is no automatic right to a Wade hearing" and "[t]here must first be a showing by the defendant of impermissible subjectiveness in the identification procedure." Minor, 2008 WL 4377436 at *7. The Appellate Division found that "the trial judge determined that the photographic identification procedure was neither unfair nor

unduly suggestive" and "[h]is conclusion is buttressed by the fact that the defendant failed to pre[s]ent an adequate proffer of an impermissibly suggestive procedure." Id.

Minor has not cited Supreme Court precedent holding that a photographic identification procedure is unduly suggestive because the investigating officer conducts the photo array. See Coleman v. Alabama, 399 U.S. 1, 7 (1970) (holding that where "identifications were entirely based upon observations at the time of the [incident] and not at all induced by the conduct" of the pretrial identification procedures, the identification does not violate due process). Nor has he cited a Supreme Court case holding that the trial judge must conduct an evidentiary hearing including testimony before the judge determines that the procedure was not unnecessarily suggestive and there was no substantial likelihood of irreparable misidentification. In any event, Simmons and Brathwaite establish that even where the police use an unduly suggestive pretrial identification procedure, the identification is admissible so long as the reliability factors outweigh the corrupting effect of the suggestive procedures. The New Jersey courts' admission of the in-court identification of Minor was not contrary to, or an

unreasonable application of Supreme Court precedent. The trial court conducted an assessment of the suggestiveness and the reliability of the identification and considered the factors which the Supreme Court requires to be considered in evaluating the likelihood of misidentification. Because Minor has not shown that the adjudication was contrary to, or an unreasonable application of clearly established Supreme Court precedent, he is not entitled to habeas relief on Ground Three.

IV. Certificate of Appealability

Minor has not made a substantial showing of the denial of a constitutional right. Therefore, no certificate of appealability will issue pursuant to 28 U.S.C. § 2253(c)(1)(B). See Fed. R. App. P. 22(b)(1); 3d Cir. L.A.R. 22.2.

V. CONCLUSION

This Court denies the Petition with prejudice and denies a certificate of appealability. The accompanying Order will be entered.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief Judge

Dated: March 29, 2016

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6501-05T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

DAVID MINOR,

Defendant-Appellant.

Argued November 5, 2007 - Decided September 29, 2008

Before Judges A. A. Rodríguez and Collester.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Ind. No. 02-05-1845.

Amira R. Scurato, Assistant Deputy Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Ms. Scurato, of counsel and on the brief).

LeeAnn Cunningham, Assistant Prosecutor, argued the cause for defendant (Paula T. Dow, Essex County Prosecutor, attorney; Ms. Cunningham, of counsel and on the brief).

PER CURIAM

In the first of these back-to-back appeals, A-6501-05T4, defendant David Minor was tried to a jury and found guilty of first degree robbery, contrary to N.J.S.A. 2C:15-1, third degree

unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b), and second degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a). Defendant was sentenced to concurrent sentences aggregating twenty years with a parole ineligibility period of eighty-five percent pursuant to the No Early Release Act (NERA).

The facts as testified to at defendant's trial were as follows. At about 8 p.m. on January 11, 2002, Lidwyn Cummings was the victim of an armed robbery after he left a drugstore at the corner of Stuyvesant Avenue and 18th Avenue in Newark. As he walked from the drugstore to his pickup truck, Cummings noticed a man walking across the street heading in the same direction. After Cummings put his key into the truck door, the man pressed a chrome handgun to his side and demanded money. When Cummings replied that he had no money, and the man then threatened him saying, "Give me your fucking money or else I'm going to pop you one." Cummings then turned over $20 in cash and the pack of cigarettes he had just purchased. The robber then demanded that Cummings give him his wallet and the keys to the truck. The perpetrator took money from the wallet and threw the keys in a lot across the street. He then headed on foot down Valley Street.

Cummings retrieved his keys and drove to a Newark police substation to report the incident. A formal typed statement was later taken from Cummings by Detective Michael Chirico. Cummings described the man at about five feet, eight inches tall, weighing about 150 pounds, between twenty-three and twenty-five years old, and wearing a black hooded sweater, grey pants and a cap. Cummings later testified that the lighting conditions were good when he made his observations because of three streetlights in the immediate area. Cummings told Detective Chirico that he would be able to identify the individual who robbed him.

Two days later Cummings returned to the police station and reviewed photographs in six large mug books but did not recognize anyone as the person who robbed him. On January 16, 2002, Cummings returned and viewed a six-photo array, which included defendant and persons looking similar to defendant. Cummings selected a photograph of defendant David Minor and said that he was "really sure" he was the perpetrator who robbed him.

At trial the assistant prosecutor asked Cummings whether he could make an in-court identification, and the following colloquy took place:

> Q. I'm going to ask you to look around the courtroom at anyone in here. And I'm going to ask you if you can recognize anyone here or recognize the person who

did this to you? Look around the whole courtroom.

A. I'd say that gentleman over there.

Q. Okay. You're pointing to the man sitting here. What is he wearing, sir?

A. White suit.

Q. Alright. How positive are you, sir, that he is the person who robbed you?

A. This happened over a year ago. . . So the memory — but from remembering back, I would say about 80 percent.

Q. Okay.

A. I'm not going to say I am 100 percent certain now because this happened a way back.

Q. Well, how positive are you today that the person sitting in court is the person who did this?

A. I'd say about 80 percent.

Q. Alright. How about when you picked the picture out?

A. I was — then it was much fresher.

Q. Now you said that when you picked this picture out the image of the person who did this to you was fresh in your mind?

A. Yea.

Q. How positive were you when you picked this picture out?

A. About 95-100 percent.

The defendant did not testify, and no witnesses were presented by the defense. While the jury was deliberating, defendant left the courtroom and failed to return. A bench warrant was issued for his arrest. The jury returned a guilty verdict on all three counts of the indictment.

On appeal defendant makes the following arguments:

> POINT I - THE TRIAL COURT'S FAILURE TO CONDUCT A GILMORE HEARING DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND FAIR TRIAL BY AN IMPARTIAL JURY. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARAS. 1, 5, 9 & 10.
>
> POINT II - THE PROSECUTOR MISSTATED THE LAW AND HER BURDEN OF PROOF AND HER IMPROPER SUMMATION COMMENTS DEPRIVED DEFENDANT OF THE RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARAS. 1, 9 & 10. (Not Raised Below.)
>
> POINT III - THE POLICE FAILED TO FOLLOW ESTABLISHED ATTORNEY GENERAL PROTOCOL IN CONDUCTING THE PHOTO ARRAY. (Not Raised Below.)
>
> A. FAILURE TO CONDUCT A WADE HEARING WAS NOT HARMLESS.
>
> B. BRANCH AND BANKSTON WERE NOT FOLLOWED AND THE RESULTANT HEARSAY DEPRIVED THE DEFENDANT OF A RIGHT TO CONFRONT THE WITNESSES AGAINST HIM. (Not Raised Below.)
>
> C. CONCLUSION: THE TAINTED PHOTO ARRAY VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

POINT IV - THE DEFENDANT'S SENTENCE OF TWENTY YEARS WITH N.E.R.A. PAROLE INELIGIBILITY, VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY. U.S. CONST. AMENDS. VI AND XIV. (Not Raised Below.)

After jury selection concluded, defense counsel challenged the assistant prosecutor's exercise of five challenges, all women and all but one African-American and argued that the State impermissibly exercised its preemptory challenges in violation of State v. Gilmore, 103 N.J. 508 (1986) an Article I of the New Jersey Constitution. In Gilmore the Supreme Court held that the prosecution's use of preemptory challenges to remove potential petit jurors who are members of a cognizable group on the basis of presumed group bias violated a defendant's right to a trial by an impartial jury drawn "from a representative cross-section of the community." Gilmore, supra, 103 N.J. at 508, 526-27. See also State v. Johnson, 325 N.J. Super. 78 (App. Div. 1999); Georgia v. McCollum, 502 U.S. 1056, 112 S. Ct. 931, 117 L. Ed. 2d 103 (1992).

In State v. Fuller, 182 N.J. 174 (2004) our Supreme Court detailed the meaning of "cognizable groups," stating:

> Indeed, in Gilmore we were quite clear as to the "floor" for that protection:
>
> Article I, paragraphs 5 and 1, define the core cognizable groups for purposes of impartial jury analysis under the representative cross-section rule, but are

> not necessarily definitive of those groups. That is, at a minimum, cognizable groups include those defined as the basis of *religious principles, race, color, ancestry, national origin and sex* (all of which are suspect or semi-suspect classifications triggering strict or intermediate scrutiny under federal equal protection analysis).
>
> [Id. at 195-96, quoting State v. Gilmore, 103 N.J. 508, 526-27 fn. 3 (1986).]

In Fuller the Supreme Court also delineated the standard to be followed by the trial judge in evaluating a Gilmore challenge. First, the Court stated there was a rebuttable presumption that the prosecution exercised its preemptory challenges on constitutionally permissible grounds. To rebut that presumption the defendant had to establish that potential jurors were members of a cognizable group that were disproportionately excluded by preemptory challenge. Next, the defendant was obliged to show that there was a "substantial likelihood" that the preemptory challenges made by the prosecution were based on assumptions about group bias as opposed to situation-specific bias. Fuller, supra, 182 N.J. at 196-97. If the defense made the requisite showing, the burden then shifted to the prosecution to show that the preemptory challenges were justified on the basis of situation-specific bias by articulating "clear and reasonably specific" explanations of legitimate reasons for exercise of the

preemptory challenges. Ibid. At that point the trial judge must determine whether the defendant met the burden of proof by a preponderance of the evidence that the prosecutor exercised preemptory challenges on the impermissible grounds of presumed group bias. Gilmore, supra, 103 N.J. at 539.

In Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005), the United States Supreme Court rejected the argument that a defendant was required to show that the prosecution's use of preemptory challenges "was more likely than not the product of purposeful discrimination" to establish a prima facie case and held that a defendant is only required to produce evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred." 545 U.S. at 170, 125 S. Ct. at 2417, 162 L. Ed. 2d at 139. We recently considered the applicability of Johnson v. California to the "substantial likelihood" test to establish a prima facie case as stated in Gilmore, supra, 103 N.J. at 536. In State v. Osorio, A-2067-06T4 (App. Div. August 4, 2008), we reached the following conclusion:

> The requirement that a defendant show a "substantial likelihood" of the discriminatory use of preemptory challenge to establish a prima facie case, which our Supreme Court adopted in Gilmore, is quite similar to the "more likely than not" standard for establishing a prima facie case, which the Supreme Court of the United

> States rejected in Johnson. In fact, the court in Johnson appeared to equate the "strong or substantial likelihood" and the "more likely than not" test for establishing a prima facie case. [Citation omitted.] Therefore, we conclude that the part of Gilmore dealing with the proof required to establish a prima facie case has been superseded by Johnson.
>
> [Id. at 11.]

In Osorio we applied the Johnson v. California test whereby defendant is only required to produce evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id. at 10, quoting from Johnson v. California, supra, 545 U.S. at 170, 125 S. Ct. at 2417, 162 L. Ed. 2d at 139. While the Osorio test for determination of a prima facie case is less stringent than in Gilmore, in this case we find that the defendant has not produced "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Osorio, supra, at p.10.

In State v. Watkins, 114 N.J. 259, 266 (1989), our Supreme Court delineated factors to be considered on the issue of whether the prosecutor impermissibly exercised preemptory challenges. The factors include the following:

> (1) That the prosecutor struck most or all of the members of the identified group from the venire;

> (2) That the prosecutor used a disproportionate number of his or her preemptories against the group;
>
> (3) That the prosecutor failed to ask or propose questions to the challenged jurors;
>
> (4) That other than their race, the challenged jurors are as heterogeneous as the community as a whole; and
>
> (5) That the challenged jurors unlike the victims, are the same race as defendant.
>
> [Id. at 266.]

In the instant case the prosecutor exercised all of the State's permissible preemptory challenges. Five preemptory challenges were made to women, and four of the five were African-American women. The challenged jurors were:

> (1) Joanna Diakos: a single attorney working for a law firm in New York City which represented defendants in white collar crime cases;
>
> (2) Calaza Hunter: a single college student;
>
> (3) Theresa Braswell: no detailed answer provided;
>
> (4) Lillian Cobb: a legal secretary working for the State of New Jersey, Division of Law, Bureau of Securities. She stated that she had a defendant arrested for "sitting in a stolen vehicle" in Newark five months earlier and thought that the matter had not been handled fairly although she denied bias for either side based on this incident. She also witnessed a shooting on a bus and knew the area where the crime took place.

> (5) Jacqueline Bass: a widow working as a paralegal for the State in non-criminal work. One of her sons worked for the Youth Consultation Services, and the others were unemployed.

In responding to the defense challenge under Gilmore, the assistant prosecutor gave the following argument:

> I would submit respectfully that with regard to the fact that they were African-American, the victim in this case is African-American.
>
> The state is – its clear from the answers that the jurors gave that are African-American that I have excluded form the basis of my decision and not because they are simply African-American.
>
> And as far as the fact that they were female – and I also want to make sure its noted – I have only exercised five challenges, one of the five was a white female.

The trial judge denied the defense motion for failure to make a prima facie case. In reviewing this determination we must extend substantial deference to the trial court's judgment as to whether the defendant has made the requisite prima facie showing that the prosecutor had a discriminatory intent in the use of the State's preemptory challenges. See Snyder v. Louisiana, U.S. , , 128 S. Ct. 1203, 1207-08, 170 L. Ed. 2d 175, 181 (2008); Gilmore, supra, 103 N.J. at 541 fn.12, 545; Osorio, supra, at 16; State v. Clark, 324 N.J. Super. 558, 571 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000). This

deference is in large part attributable to the fact that the trial judge is able to make first-hand observations of the demeanor of the attorney exercising the challenge and the juror in question. Snyder, supra, U.S. at , 128 S. Ct. at 1208, 170 L. Ed. 2d at 181; Osorio, supra, at 16.

Significantly, during the course of the voir dire of the respective jurors, the State made three Gilmore challenges to the claimed use of preemptory challenges by the defense to exclude white males from serving on the jury. The trial judge denied the State's application for a new jury panel finding that the defendant had genuine and reasonable grounds for believing potential jurors might have situation-specific bias. A similar ruling was made on the defendant's Gilmore motion at the conclusion of jury selection.

There was no proof by the defense of an unfair or unreasonable under-representation of African-Americans or women. Indeed, the record discloses that the majority of jurors who heard the case were African-Americans. We have stated that "the ultimate composition of the jury [] is relevant to the determination of whether the prosecutor's intent was discriminatory." Clark, supra, 324 N.J. Super. at 570. As we recently noted in Osorio, the presence on the jury of a substantial number of the group alleged to have been

discriminatorily excluded may support a finding that a questionable proffered reason for challenging a member of that group was not reflective of a discriminatory intent." Osorio, supra, at 21-22; Clark, supra, 324 N.J. Super. at 575. In this instance, the defense did not make a prima facie showing that the jury was not drawn from a representative cross-section of the community. Accordingly, we reject defendant's argument.

Defendant next argues that comments of the assistant prosecutor improperly misstated the law in her summation. Since there was no objection to the summation, our review is under the plain error standard wherein we will disregard an error unless "it is of such a nature to have been clearly capable of producing an unjust result." R. 2:10-2. See also State v. Macon, 57 N.J. 325, 336 (1971). The defense summation stressed that at the time of Cummings' photo identification he says he was ninety-five to 100 percent sure and at trial said that with the passage of time he was eighty percent sure in his in-court identification. The prosecutor responded:

> An that, ladies and gentlemen, that was the certainty I was talking about in my opening. That was the certainty of the identification. That's the beyond a reasonable doubt that you need to find the defendant guilty in this case, you firm belief. The judge will describe to you the definition of beyond a reasonable doubt. Are you firmly convinced that he is the perpetrator? And the victim was firmly

> convinced, if he was ninety-five to 100 percent sure within five days of looking at his face that he was the perpetrator, ladies and gentlemen, then you can feel confident that you would be making the right decision by finding the defendant the person who committed each and every count of the indictment, the robbery and the gun possession charges. . .
>
> Is it understandable a year later — memories fade — that there might be only an eighty percent? But eighty percent is a very high percentage, ladies and gentlemen, that's beyond a reasonable doubt. Preponderance of the evidence in civil cases is a little more than fifty percent. Beyond a reasonable doubt is eighty percent, ninety percent, 100 percent. That's all we need. That's sufficient. And if the victim is certain of his identification five days later, then that is certainly more than enough for the guilt to be determined in this case.

The comments by the prosecutor were obviously an incorrect statement of the law. However, the trial court properly instructed the jury on the meaning of reasonable doubt, and further instructed the jury to follow the instructions of the court and to ignore any statements by the attorneys on the law. Accordingly, we conclude that the erroneous statements by the prosecutor did not deprive the defendant of a fair trial. State v. Ramseur, 106 N.J. 123, 332 (1987); State v. Williams, 113 N.J. 393, 452 (1988); State v. Powell, 294 N.J. Super. 557, 566 (App. Div. 1996).

Defendant's next argument is that the police failed to follow the established Attorney General's protocol in conducting the photo array. The guidelines are contained in the Supreme Court opinion of State v. Herrera, 187 N.J. 493, 501-04 (2006). However, a review of the record indicates that there was substantial compliance with the Attorney General guidelines, and, in any event, the guidelines were designed to provide uniformity and do not constitute a legally mandated procedure.

The defendant also asserts that the trial judge's denial of a pretrial Wade[1] hearing was erroneous and requires reversal for a new trial. Our case law is clear that there is no automatic right to a Wade hearing. State v. Ortiz, 203 N.J. Super. 518 (App. Div.), certif. denied, 102 N.J. 335 (1985). There must first be a showing by the defendant of impermissible subjectiveness in the identification procedure. Here the trial judge determined that the photographic identification procedure was neither unfair nor unduly suggestive. His conclusion is buttressed by the fact that the defendant failed to prevent an adequate proffer of an impermissibly suggestive procedure.

The next argument presented by defendant is that the testimony from the detectives as to why defendant's picture was

[1] United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

included in the array violated the standard established in State v. Branch, 182 N.J. 338 (2005) and State v. Bankston, 63 N.J. 263 (1973). Here the detectives testified that the defendant's photograph was included in the array shown to the victim based upon the victim's description of the perpetrator given to the police. Nothing in the testimony before the jury indicates that the police had some other source of information that led them to include defendant's photograph. Accordingly, there was no error under Banks/Bankston.

Finally, the defendant asserts that his sentence of a twenty-year term subject to NERA must be vacated and the matter remanded for re-sentencing in light of State v. Thomas, 188 N.J. 137 (2007). We agree.

Affirmed as to convictions. Remanded for re-sentencing.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO CONDUCT A GILMORE HEARING DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARS. 1, 5, 9 & 10.

The defense specifically challenged the State's exercise of 5 out of 5 challenges being made to women and 4 of those same 5 challenges being African-American individuals. Despite 100 percent female exclusion and 80 percent African-American exclusion, especially where the defendant David Minor is African-American, the Court failed to require the State to give reasons to justify her challenges. It must be noted that the transcript of April 8, 2003 reveals that the sidebar microphone was not working and thus the sidebar discussions on that date were inaudible. (3T 3-1 to 2) We know that the defense went back up to sidebar after additional juror challenges by the prosecutor (3T 131-7) and may have renewed her Gilmore challenge. We also know that the prosecutor excused a total of 10 women, 1 unknown gender and 1 man.[4] The racial composition of

[4] The 5 specifically Gilmore-challenged jurors are detailed infra. The other 7 challenged jurors are noted as follows: Ms. Key (3T 93-20); Ms. Clark (3T 100-18); Ms. Reynolds (3T 103-16); "juror 12" (3T 130-13); sidebar (not audible) called by defense (3T 131-7); Ms. Forthberger (4T 20-17); "Ma'am"/Juror 6 (4T 31-20); Mr. Clement (4T 62-24).

the remaining jurors challenged by the state is unknown due to the inaudible sidebars and/or possibly the failure of defense counsel to place the matters on the record.

In State v. Gilmore, 103 N.J. 508 (1986), the Supreme Court found that the State Constitution provides greater protection for defendants in the jury selection process than is accorded under the Federal Constitution. Implicated therein is the defendant's constitutional right to trial by an impartial jury under various provisions of Article I of the New Jersey Constitution, including paragraph 5 ("No person shall be denied the enjoyment of any civil… right, nor be discriminated against in the exercise of any civil… right,… because of religious principles, race, color, ancestry or national origin."), paragraph 9 ("The right of trial by jury shall remain inviolate …."), and paragraph 10 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury….").

> Indeed, in Gilmore we were quite clear as to the "floor" for that protection:
> Article I, paragraphs 5 and 1 define the core cognizable groups for purposes of impartial jury analysis under the representative cross-section rule… includ[ing] those defined on the basis of religious principles, race, color, ancestry, national origin, and sex (all of which are suspect or semi-suspect classifications triggering strict or intermediate scrutiny under federal equal protection analysis).

State v. Fuller, 182 N.J. 174, 195-196 (2004), citing State v. Gilmore, 103 N.J. 508, 526-7 n. 3 (1986).

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court stated "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id. at 96. Under Batson, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Id. at 97.

J.E.B. v. Alabama, 511 U.S. 127 (1994) applied heightened scrutiny to the question of gender-based peremptory challenges. In J.E.B., the Court found race-based discrimination and gender-based discrimination to be rooted in a common theme--the systematic exclusion of both racial minorities and women from participation in the civic life of our country. Fuller, supra, 182 N.J. at 187.

The standard to be followed in Gilmore challenge situations is clearly delineated in Fuller:

1. We begin with the rebuttable presumption that the prosecution has exercised its peremptory challenges on grounds permissible…
2. [To rebut that presumption], the defendant initially must establish that the potential jurors wholly or disproportionally excluded were members of a cognizable group…
3. The defendant then must show that there is a substantial likelihood that the peremptory

> challenges resulting in the exclusion were based on assumptions about group bias rather than any indication of situation-specific bias…
>
> 4. [Once that showing has been made, t]he burden shifts to the prosecution to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias. To carry this burden, the State must articulate "clear and reasonably specific" explanations of its "legitimate reasons" for exercising each of the peremptory challenges.

Fuller, supra, 182 N.J. at 196-97 (numbering added).

After the prosecution has provided its explanations, "the trial court must judge the defendant's prima facie case against the prosecution's rebuttal to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias." Gilmore, supra, 103 N.J. at 539.

In sum, the court should carefully weigh the opposing contentions, determine whether the prosecution has impermissibly exercised its challenges, and set forth the reasons for that determination. State v. Watkins, 114 N.J. 259, 265 (1989). Unfortunately, that was not done in the present case.

In the present case, the challenged jurors' answers were similar to other non-challenged juror answers. Nothing is contained therein that would cause the prosecutor to find

situation-specific bias. One juror did not even have any responses to the proffered questions. Specifically, the challenged jurors were excused by the prosecutor as follows:

1: Joanna Diakos[5]- single; attorney in civil litigation; victim of a robbery; boyfriend is a State Trooper. (3T 61-2 to 63-6)

2: Calaza Hunter- single; college student. (3T 46-23 to 44-1)

3: Theresa Braswell- no answers to any of the questions. (3T 69-20 to 23)

[4: Wubalem Mammo[6]- clerk; has children. (3T 50-4 to 8)]

5: Lillian Cobb- legal secretary with the State Bureau of Securities; single; had an "unfair" impression of nephew arrested for sitting in a stolen car but would not be biased against the prosecutor (the judge asked her twice, which she denied and when asked if she would be biased for either side, she answered "No, no bias"); sister witnessed a shooting on a bus; knows the area of the crime. (3T 51-5 to 55-8)

6: Joyce Bass- widow; paralegal for the State but not doing criminal work; one son works in Youth Services and "the others"

[5] From later discussion, it appears this juror was a white female and the rest were African-American females. (3T 82-14 to 15)

[6] This juror appears to be a defense challenge. Although it is attributed to the prosecutor, it should have been the defense's turn to challenge a juror. For purposes of this brief this juror was not considered a prosecution challenge, thus leaving the 5 challenged jurors referenced in the argument.

are unemployed. (3T 80-2 to 20)

As can be seen, there were no obvious answers calling for the jurors to be excused, although a case could be made for Juror Cobb. The trial judge did not require reasons to be given by the State nor did he conduct a weighing of the challenges made by the State as he ruled that no prima facie case had been made by the defense. (3T 30-24 to 25) Curiously, the Court did require the defense to specifically give reasons for her challenges when the State later made a reverse-Gilmore motion. After the reasons were given the Court found the defense had "advanced genuine and reasonable grounds for believing the potential jurors might have situations specific biases." (4aT 19-11 to 13)

The present case involves an 80 percent African-American and 100 percent female gender exclusion at the time of the Gilmore motion. In a case where the prosecution exercised five of eight or 62.5 percent of its challenges to exclude prospective jurors who were either black or Hispanic, the fact that two black jurors remained on the jury was of no moment since the prosecution had not yet exhausted all peremptory challenges. State v. Zavala, 259 N.J. Super. 235, 239 (Law Div. 1992).

"[T]hat counsel could exclude a potential juror merely because the juror is a member of a cognizable group, is unthinkable. A courthouse has no room for invidious

discrimination." Watkins, supra, 114 N.J. at 267 (1989); see also State v. Alvarado, 221 N.J. Super. 324, 328 (Law Div. 1987) (exclusion of jurors by prosecutor or defense counsel could undermine confidence in our system of justice).

Although one remedy would be to remand the matter to the Law Division for a Gilmore hearing, at which the prosecutor should explain her reasons for peremptorily challenging the five jurors, it is unreasonable to think that such a record could be reconstructed with any accuracy well over two years after the selection process. The task is nearly impossible in light of the sidebars not being recorded on the first day of jury selection. Therefore, the only appropriate remedy is to remand for a new trial.

POINT II

THE PROSECUTOR MISSTATED THE LAW AND HER BURDEN OF PROOF AND HER IMPROPER SUMMATION COMMENTS DEPRIVED DEFENDANT OF THE RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10. (Not Raised Below)

In her closing argument the prosecutor was discussing that the victim had stated he was 80 percent certain that the person in court was the person who had committed the armed robbery. The prosecutor argued as follows:

> Is it understandable a year later — memories fade — that there might only be an 80 percent? But 80 percent is a very high percentage, ladies and gentlemen. That's beyond reasonable doubt. Preponderance of an evidence in civil cases is a little more than 50/50. Beyond a reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient.
> (5T 91-20 to 92-3)

The above is a gross misstatement of the State's burden of proof. To tie the proofs needed in a civil case to the proofs in a criminal case and to attach percentages to them could only have been designed to confuse the jury and cause it to believe that anything above an artificially-established number of 80 percent means the State has met its burden.

State v. Setzer, 268 N.J. Super. 553 (App. Div. 1993) sets forth the factors which should be considered in reviewing prosecutorial misconduct: whether defense counsel timely and

properly objected to the remarks; whether the remark was withdrawn promptly; and whether the court gave the jury curative instructions. State v. Zola, 112 N.J. 384, 426 (1988), cert. denied, 489 U.S. 1022 (1989); State v. Ramseur, 106 N.J. 123, 323 (1987).

Since defense counsel here did not make a timely objection to the prosecutor's statement, it must be determined whether the comment was "clearly capable of producing an unjust result." R. 2:10-2; State v. Macon, 57 N.J. 325, 336 (1971). Despite defense counsel's failure to move for a mistrial, the prejudice flowing from the comment was definitely of such constitutional dimension as to rise to the level of plain error. R. 2:10-2. Setzer, supra, 268 N.J. Super. at 566.

The Supreme Court has repeatedly expressed concern for prosecutorial propriety. "[B]ecause the prosecutor represents the government and people of the State, it is reasonable to say that jurors have confidence that he will fairly fulfill his duty to see that justice is done whether by conviction of the guilty or acquittal of the innocent." State v. Farrell, 61 N.J. 99, 105 (1972). Comments during opening and closing carry the full authority of the State. State v. Johnson, 31 N.J. 489, 511 (1960).

The prosecutor's role has been set forth as follows: "Canon 5 [now embodied in DR 7-106(C)] of the Canons of

Professional Ethics [states]: 'The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.'" State v. Spano, 64 N.J. 566, 568 (1974).

> [The prosecutor] may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (Footnote omitted)

Farrell, supra, 61 N.J. at 104-105, citing Berger v. United States, 295 U.S. 78, 88 (1935).

In a case which rested entirely on the eyewitness identification of a defendant whose photo was selected in a six-photo array, any comment from the prosecutor which diminishes her burden of proof cannot be said to be harmless. A watered down statement of the burden is plain error. The statements made by the prosecutor were sufficiently prejudicial to warrant reversal and thus the case must be reversed and remanded for a new trial.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-2082

David Minor,
Appellant
v.

Beverly Hastings; Attorney General of the State of New Jersey

(D. NJ No. 1-13-cv-00558)

ORDER

By order entered September 15, 2016, Steven G. Sanders, Esq. of Gibbons, P.C. was appointed under the Criminal Justice Act to represent appellant David Minor.

As Mr. Sanders is no longer with Gibbons, P.C., Anne M. Collart, Esq. is appointed to represent appellant in this matter.

For the Court,

Marcia M. Waldron

Marcia M. Waldron, Clerk

Date: September 6, 2017
JT/cc: Anne M. Collart, Esq.
Frank J. Ducoat, Esq.
Maria I. Guerrero, Esq.
Barbara A. Rosenkrans, Esq.
Steve Sanders, Esq.
David Minor

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-2082

Minor v. Hastings

ORDER

The Clerk having appointed Steven G. Sanders, Esq. as counsel for Appellant under the provisions of the Criminal Justice Act, it is hereby ordered that Mr. Sanders shall have a period of 60 days from the date of this order to review the record. Prior to the expiration of that 60 day period, counsel shall advise the Clerk whether additional documents or transcripts are necessary. If counsel does not need additional documents or transcripts, the Clerk will issue a briefing schedule immediately after the 60 day review period ends. Counsel shall file the entry of appearance form within 14 days of the date of this order.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: September 15, 2016
JT/cc: David Minor
Steven G. Sanders, Esq.
Maria I. Guerrero, Esq.
Barbara A. Rosenkrans, Esq.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION, CRIMINAL PART
INDICTMENT NO. 02-05-1845
02-05-1846
APP. DIV. NO. A-6210-03T4

STATE OF NEW JERSEY,

Plaintiff

v.

DAVID MINOR,

Defendant

TRANSCRIPT
OF
JURY SELECTION

Place: County Court House
50 West Market Street
Newark, NJ 07102

Date: April 8, 2003

BEFORE:

HONORABLE MICHAEL L. RAVIN, J.S.C.

TRANSCRIPT ORDERED BY:

DEBORAH U. BROWN, (Office of the Public Defender)

APPEARANCES:

DIANE P. MERCURIO, ESQ. (Assistant Prosecutor)
Attorney for plaintiff

DAWN R. SANFILIPPO, ESQ.
Attorney for defendant

TRANSCRIBER JEAN MIRZA
G & L TRANSCRIPTION OF NJ
40 Evans Place
Pompton Plains, NJ 07444
Audio Recorded
Recorded by: I. Smith

3T

now.

Who has got another questionnaire for me? Anyone? Thank you, I have got one, thank you.

Okay, listen to the questions carefully, please. Number one. What is your name and occupation? Number two, what is the occupation of other members of your household, including your spouse and/or adult children. For those now retired or unemployed what was their most recent and usual occupation.

Three, have you previously served on a jury of any kind? If so, what kind, where and did you reach a verdict. Do not tell what verdict you reached if you reached a verdict.

In that connection, the kinds these are the possible kinds of jury service that are of any relevance to what were are doing here.

You may have sat as a juror on a civil case, a petit juror on a civil case where you were told in order for the plaintiff to prove the defendant guilty they had to prove by a preponderance of the evidence that the defendant was guilty or liable.

Here, that is as a potential juror in a criminal case, the prosecutor has to prove the defendant guilty beyond a reasonable doubt. It's a

higher burden.

You may have served as a grand juror, in which you were told in order to secure an indictment, the State the state has to prove that a crime was probably committed and that the defendant probably committed it. Here, the standard of proof is higher; it's beyond a reasonable doubt. Okay.

Number four, have you or a relative or a close friend ever been convicted of a crime? If so, describe. Would that experience interfere with your ability to render a fair and impartial verdict? Would it in any way bias or prejudice you? This question may be answered at sidebar.

Now, questions five, six and seven -- apply to the same classes of people in relation to you, that is friends, relatives, you. But number five, the question is, anybody ever been accused of a crime? Accused but not convicted.

Number six. Anybody ever been a witness to a crime. And number seven, anybody ever been a victim of a crime.

Number eight. Do you have any relatives or close friends employed in or connected with the field of law enforcement? If so, describe. Would that relationship interfere with your ability to render a

fair and impartial verdict? Would it in any way bias or prejudice you?

And number nine, is there any reason why you would not be able to be a completely fair and impartial juror in this case. And that question as well as many of the others may be answered at sidebar.

If you hear your name called, please stand up. Bryan (phonetic). Burke (phonetic). Curren (phonetic). Dole (phonetic). Ebbers (phonetic). Foster. Lobeis (phonetic). Gross. Mack. Madanada (phonetic). Mundley (phonetic). Oates. Steiner (phonetic). Taylor. Walters (phonetic).

You are excused. Please return to the fourth floor. Have a great day. The rest of you please remain seated.

(Potential jurors exit courtroom)

THE COURT: Ms. Barcliff, where are you, Ms. Barcliff Baptista? How are you familiar with the location?

MS. BAPTISTA: I grew up in Newark and live -- (phonetic).

THE COURT: Listen to my question carefully. Is there anything about the fact that you are familiar with the location which would at all interfere with your ability to be a fair and impartial juror?

MS. BAPTISTA: No, sir.

THE COURT: Thank you. Ms. Chavis? Where are you, Ms. Chavis? There you are. Could you please tell me how you are familiar with the location?

MS. CHAVIS: Well, I live on West End Avenue (phonetic), which is off of -- 18 -- (phonetic).

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

MS. CHAVIS: No.

THE COURT: Thank you, ma'am. Bridgette Clark. Where are you, ma'am? How are you familiar with the location?

MS. CLARK: I used to live in the area on Smith Street (phonetic), but it's not far (phonetic).

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

MS. CLARK: No, Your Honor.

THE COURT: You may be seated, thank you. Mr. Johnson. Mr. Johnson, how are you familiar with the location?

MR. JOHNSON: I -- lived in Newark for 25 years -- (phonetic) --

THE COURT: Is there anything about that

circumstance which would interfere with your ability to be a fair and impartial juror?

MR. JOHNSON: No.

THE COURT: Thank you, sir. Okay, I'm going to tell you what's going to happen now. Because it's 25 after 12. Yes?

CLERK: Judge, I'm sorry, you had one more -- Walker (phonetic).

THE COURT: Right you are. Laverne Walker, where are you Laverne Walker? Ms. Walker, how are you familiar with the location?

MS. WALKER: I -- lived in Newark most of my life, I just know where it is.

THE COURT: Would that circumstance interfere with your ability to be a fair and impartial juror?

MS. WALKER: No.

THE COURT: Very good, thank you. There was a group of other people, yes, much like yourselves they were. They sat there, they listened to the same questions. Then I excused them so I could take a whole other panel and here you are. We had about 13 seated right there and I said, come back at 10 after 12.

Well, wasn't I wrong; 10 after 12 -- we

weren't really done with you. But it's not an exact science you understand.

So what I'm going to do is I'm going to call those people back in and then I'm going to excuse the bunch of you and have you come back here at 1:30.

I am sure that a few of those that I told to be back at 10 after 12, there probably will be a few raised eyebrows and they might be a little -- annoyed with me, but we do the best we can and try to convenience the greatest good at the earliest time.

Could you call those others back in, please? Who knows, maybe some of them will think it's good news.

(Potential jurors enter courtroom)

(Recording off)

MS. MERCURIO: -- sitting in the back of the courtroom, I noticed he's sitting with the jurors and he came here this morning with the defendant. I have been informed that he's a friend?

MS. SANFILIPPO: No.

MR. MINOR: He's just here for moral support.

MS. SANFILIPPO: Moral support, right.

MR. MINOR: -- family --

THE COURT: Anything else, Ms. Mercurio?

MS. MERCURIO: I would just ask the Court to instruct this individual not to have any contact with the jurors since he is sitting amongst them, not to speak with them about the defendant.

THE COURT: I have no reason to believe that this person is going to speak to the jury about the defendant. I'm not telling him anything.

MS. MERCURIO: Fine, Judge.

THE COURT: I tell the jurors if anybody comes and talks to them they are to tell me. People come into the courtroom, there is no presumption that they're going to deal with jurors. So that's that. Off the record.

(Recording off)

THE COURT: Let's try to fill seat number two. Next name, please?

CLERK: Hunter with an H (phonetic).

THE COURT: Ms. Hunter, you'll see the questionnaire right there. You can just answer the -- you don't need -- answer the questions from there. No, just stand up, please. Okay. Great. Give us your information.

MS. HUNTER: Number one, Calaza Hunter (phonetic), no job, I'm a college student. Two, that doesn't apply to me. Three, no. Four, no. Five, no.

Six, no. Seven, no. Eight, no. Nine, no.

THE COURT: Wonderful, please have a seat in seat number two. You can leave the questionnaire right on the bar there, thank you.

Okay. Potential juror number three, your information, please?

MR. MADANI: Kwansa Madani (phonetic), IT. N/A for number two. No for number three. No for number four. No for number five. No for number six. No for number seven. No for number eight. No for number nine.

THE COURT: That's great. Number four, potential juror number four, your information, please?

MR. O'NEIL: Edward O'Neil, I'm a sales manager. My wife is a decorative artist. No adult children. Number three, no. Number four, no. Number five, no. Number six, no. Number seven, yes.

THE COURT: Would you prefer to speak about that from your seat or at sidebar?

MR. O'NEIL: Seat is fine.

THE COURT: Listen to my questions carefully and only ask -- only answer what I ask you. What were you a victim of?

MR. O'NEIL: Robbery.

THE COURT: When?

MR. O'NEIL: Approximately 1981.

THE COURT: What town?

MR. O'NEIL: Atlanta, Georgia.

THE COURT: Is there anything about that experience which would interfere with your ability to render a fair and impartial verdict?

MR. O'NEIL: No.

THE COURT: Would it in any way bias or prejudice you?

MR. O'NEIL: No.

THE COURT: Continue answering the questions, please.

MR. O'NEIL: Number eight, no. Number nine, no.

THE COURT: Excellent. Potential juror number five, your information, please.

MR. URBANSKI: My name is Michael Urbanski. I'm a mechanical engineer -- working as a product manager for -- and Company. My wife is an artist (phonetic). My daughter is a high school student; my son is a middle school student.

Before I answer question number three, I have a question for Your Honor.

THE COURT: What's the question?

MR. URBANSKI: I am very fresh citizen of

this country. And most of my adult life I spend out of this country. Does the experience for that part of my life apply to the questions or not (phonetic)?

THE COURT: You mean to say you have done jury service in another country?

MR. URBANSKI: Yes.

THE COURT: Well, I --

MR. URBANSKI: Not only jury service -- excuse me -- but some of the questions --

THE COURT: Why don't you -- why don't you come to sidebar and we'll talk about these matters with counsel. Thank you.

(Sidebar discussion with juror not audible)

THE COURT: Potential juror number -- wasn't it three?

CLERK: Yes.

THE COURT: Potential juror number three, can you answer question number two again, please? Yes.

MR. MADANI: N/A (phonetic).

THE COURT: N/A.

MR. MADANI: Not applicable, I don't have a spouse or -- no children.

THE COURT: And you work in internet technology?

MR. MADANI: Uh hum.

THE COURT: Okay, thank you. Let's see, potential juror number six, your information, please?

MS. MAMMO: My name is Wubalem Mammo. Occupation, I'm a clerk. I have -- children (phonetic). Number three, no. Number four, no. Number five, no. Number six, no. Number seven, no. Number eight, no. Number nine, no.

THE COURT: Excellent. Potential juror number seven, your information, please?

MS. GRUNDY: Annie Grundy. Newly retired secretary. Number two, I'm the only one in my household. Number three, yes. Some time ago, I think it was petit criminal (phonetic).

THE COURT: Anything about your prior jury service, which would interfere with your ability to be a fair and impartial juror?

MS. GRUNDY: No.

THE COURT: Do you recall whether or not you reached a verdict in that case?

MS. GRUNDY: Yes.

THE COURT: What is your answer to question number four?

MS. GRUNDY: No.

THE COURT: Continue, please.

MS. GRUNDY: Five, no. Six, no. Seven, no. Eight, no. Nine, no.

THE COURT: Very good. Potential juror number eight.

MS. COBB: Lillian Cobb. Legal secretary.

THE COURT: You are a legal secretary in a firm that does what kind of work?

MS. COBB: It's --

THE COURT: More specifically, do they do any criminal work?

MS. COBB: No. I mean, I'm sure they do, I work with the state of New Jersey, Division of Law.

THE COURT: You work in the Division of Law.

MS. COBB: Yes. I work with Bureau of Securities.

THE COURT: Okay. Anything about that particular circumstance that would interfere with your ability to be a fair and impartial juror?

MS. COBB: No.

THE COURT: Anything about that circumstance which would cause you to be biased or prejudiced against or in favor of one side or the other side?

MS. COBB: No.

THE COURT: Continue answering the questions, please.

MS. COBB: Okay, number two -- I'm single. Number three, no. Number four, no. Number five, yes.

THE COURT: Do you prefer to answer that question at sidebar or from your seat?

MS. COBB: I have a nephew who --

THE COURT: One minute. Do you prefer to talk --

MS. COBB: Oh --

THE COURT: -- about that privately?

MS. COBB: No, that's fine. I can do it --

THE COURT: Okay. You have a nephew -- what was your nephew accused of?

MS. COBB: He was accused of sitting in a stolen vehicle.

THE COURT: When?

MS. COBB: Maybe five months ago.

THE COURT: Where?

MS. COBB: In Newark.

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

MS. COBB: No.

THE COURT: Do you have an impression as to whether or not your nephew was treated fairly or unfairly by the criminal justice system? Do you have

any impression either way?

MS. COBB: Yes.

THE COURT: What impression is that?

MS. COBB: The impression is unfair.

THE COURT: Unfair.

MS. COBB: Yes.

THE COURT: Okay. Now that unfair impression, would you hold that against a prosecutor in this case?

MS. COBB: No.

THE COURT: If you think your nephew was treated unfair, that you're going to hold it against the state of New Jersey in its prosecution in this case?

MS. COBB: No.

THE COURT: I will ask you again. Anything about that circumstance which would cause you to be biased or prejudiced against or in favor of one side or the other side?

MS. COBB: No, no bias.

THE COURT: Okay. Continue answering the questions, please, I think you're up to number eight. I'm sorry, number six.

MS. COBB: Number six is yes.

THE COURT: Okay. Do you prefer to answer

that from your seat or --

MS. COBB: I can answer from my seat.

THE COURT: Okay. What did you witness?

MS. COBB: I didn't witness anything; I have a sister who was a witness to a crime.

THE COURT: And what crime was she a witness to?

MS. COBB: She was witness to a crime on the bus -- bus transportation (phonetic) when a guy pulled a gun and shot another passenger.

THE COURT: How do you know she was a witness? She told you?

MS. COBB: She was there.

THE COURT: You discussed this with her.

MS. COBB: Yes.

THE COURT: Because you weren't the witness, she was.

MS. COBB: Absolutely.

THE COURT: Okay. Is there anything about that situation, that is your relative being a witness to a crime, which would interfere with your ability to be a fair and impartial juror?

MS. COBB: No.

THE COURT: Anything about that situation which would cause you to have any bias or prejudice

towards the state or the defendant in this matter?

MS. COBB: No.

THE COURT: Continue with number seven, please.

MS. COBB: Number seven is no. Number eight is no. And number nine -- is no.

THE COURT: Very good. Potential juror number nine, your information, please?

MR. TRUBENSTEIN: William Trubenstein. I'm a retired banker (phonetic). Two doesn't apply to me, I'm single. Three, yes. Four, no.

THE COURT: One moment, please.

MR. TRUBENSTEIN: Yes.

THE COURT: What kind of jury?

MR. TRUBENSTEIN: Petit -- crime (phonetic).

THE COURT: Is there any -- did you reach a verdict?

MR. TRUBENSTEIN: Yes.

THE COURT: Was there anything about your prior jury service, which would interfere with your ability to be a fair and impartial juror on this case?

MR. TRUBENSTEIN: No.

THE COURT: Okay, number four?

MR. TRUBENSTEIN: No.

THE COURT: Continue, please.

MR. TRUBENSTEIN: Number five, no. Number six, no. Number seven, no. Number eight, no. And nine, no.

THE COURT: Excellent. Potential juror number 10, your information, please?

MS. STEWART: Joyce Stewart, I'm a building coordinator (phonetic). Number two, single. Number three, petit jury criminal.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror in this case?

MS. STEWART: No.

THE COURT: Did you reach a verdict in that case?

MS. STEWART: Yes.

THE COURT: Number four?

MS. STEWART: Four is no. Five is no. Six is no. Seven, I have a cousin and close friend.

THE COURT: What, that were victims of a crime?

MS. STEWART: No. Seven -- oh, I'm sorry, I'm sorry. No.

THE COURT: The answer to number seven is no.

MS. STEWART: The answer to number seven is

no.

THE COURT: Okay. You have law enforcement.

MS. STEWART: Number eight --

THE COURT: Friends and relatives.

MS. STEWART: -- yes. Do you mind speaking about that from your seat or do you want to come to sidebar and talk about it?

MS. STEWART: No. I have a cousin and a family friend.

THE COURT: What -- what law enforcement agencies are they associated with?

MS. STEWART: State police.

THE COURT: Anything about those relationships, which would interfere with your ability to be a fair and impartial juror?

MS. STEWART: No. I also have friends who work for the same town.

THE COURT: Okay.

MS. STEWART: Same answer, no.

THE COURT: Very good. What's your answer to the final question?

MS. STEWART: No.

THE COURT: Excellent. Potential juror number 11, your information, please?

MS. PRICE: My name is Debbie Guzman Price,

I'm a lawyer.

THE COURT: What kind of law do you practice, Ms. Price?

MS. PRICE: Well, right now I am working on -- civil litigation -- (phonetic) --

THE COURT: Do you work for a law firm in the area?

MS. PRICE: No. I'm doing legal temp work.

THE COURT: Okay.

MS. PRICE: But I worked for the prosecutor's office for two years in law school.

THE COURT: Which prosecutor's office was that?

MS. PRICE: Miami Dade (phonetic). Number two, my --

THE COURT: You're not getting off that easy. Once I hear somebody is a lawyer with -- having something to do with law enforcement, you understand we have a duty to probe further.

To what extent was the fact that you used to work at a prosecutor's office -- have on your ability to be a fair and impartial juror in this case, any?

MS. PRICE: Uh, it may be slightly skewed.

THE COURT: Well, to the extent it's skewed, that's to the extent that I'm going to have to excuse

you. Okay? Thanks for bringing that to our attention. Have a great day. Please return to the fourth floor.

Let's try to fill seat number 11, next name, please?

CLERK: Stedacino, with an S (phonetic).

THE COURT: Ma'am, you can step right up, the questionnaires are there, you can answer the questions right from there.

MS. STEDASINO: My name is Patricia Stedasino. I'm a second grade teacher. My husband is a financial specialist and I have a one-year-old son. Number three is no. Number four is no. Number five is no. Number six is no. Well, actually number six and number seven are related because my father is --

THE COURT: One moment, please. Do you prefer to speak about that circumstance from there or at sidebar?

MS. STEDASINO: From here is fine.

THE COURT: Okay.

MS. STEDASINO: In reference to number six, my father is a retired police office, so he has certainly been witness to certain events.

THE COURT: What town, if I may ask?

MS. STEDASINO: Fairfield.

THE COURT: Anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

MS. STEDASINO: No.

THE COURT: Okay. Continue answering the question seven.

MS. STEDASINO: Seven is no. Again, eight would be my father. And I have a cousin in Nutley who is also a police officer.

THE COURT: And --

MS. STEDASINO: Number nine would be no.

THE COURT: -- one moment -- none of your police relationships would interfere with your ability to be a fair and impartial juror?

MS. STEDASINO: No.

THE COURT: And it goes without saying -- or I should say we already -- we have already established by our other question that the fact that just because somebody is a -- who testifies may be a law enforcement officer would not cause you to disbelieve or believe him just because of that fact. Correct? Continue answering the questions, please.

MS. STEDASINO: Number nine would be no.

THE COURT: Excellent. Please have seat in seat number 11. Potential juror number 12, your

information please?

MS. DIAKOS: My name is Joanna Diakos and I'm an attorney.

THE COURT: What kind of law do you practice, ma'am?

MS. DIAKOS: Civil litigation.

THE COURT: Where do you practice?

MS. DIAKOS: I work at a law firm in Manhattan.

THE COURT: Does that law firm do any criminal work?

MS. DIAKOS: We do white collar crime.

THE COURT: To what extent, if at all, would A, the fact that you are an attorney and/or B, the fact that you are in a law firm that does white collar criminal work -- to what extent would that interfere with your ability to be a fair and impartial juror?

MS. DIAKOS: I don't think it would.

THE COURT: To what extent would the fact that you are a lawyer interfere with your ability or willingness to apply the law as I tell you what the law is?

MS. DIAKOS: It wouldn't.

THE COURT: Continue, please.

MS. DIAKOS: I'm single. Haven't served on

a jury. Four is no. Five is no. Six is no. Seven is yes.

THE COURT: Do you prefer to speak about that at sidebar or from your seat?

MS. DIAKOS: From here is fine. My family was robbed about 10 years ago.

THE COURT: Where?

MS. DIAKOS: In Jersey City.

THE COURT: Anything about that circumstance which would interfere with your ability to render a fair and impartial verdict?

MS. DIAKOS: No.

THE COURT: Is there anything about that experience which would in any way bias or prejudice you?

MS. DIAKOS: No.

THE COURT: Number eight, please.

MS. DIAKOS: Number eight, my boyfriend is a police officer.

THE COURT: Where?

MS. DIAKOS: New Jersey State Police.

THE COURT: Is there anything about that relationship which would interfere with your ability to render a fair and impartial verdict?

MS. DIAKOS: No.

THE COURT: Would it in any way bias or prejudice you?

MS. DIAKOS: No.

THE COURT: And finally question number nine, your answer?

MS. DIAKOS: Nine is no.

THE COURT: Very good. Potential juror number 13, your information, please?

MR. ORTIZ: My name is David Ortiz and I'm a photographer. My wife is a computer consultant in Manhattan. Yes, I have served on a jury, Manhattan Criminal Court.

THE COURT: Did you reach a verdict?

MR. ORTIZ: Yes.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror in this case, sir?

MR. ORTIZ: No.

THE COURT: Continue, please.

MR. ORTIZ: Four is no. Five is no. Six is no. Seven is no. Eight is no. And nine is no.

THE COURT: Very good. Potential juror number 14, your information, please?

VLADAMIR: My name is Vladamir -- (phonetic). I have no children. The answer for

number three is no. Four, no. Five, no. Number six, no. Number seven, no. Number eight, no. And number nine, also no.

THE COURT: Excellent. State?

MS. MERCURIO: Judge, I didn't get the answer to number one, question number one for that --

THE COURT: Oh, can you -- can you repeat your name and occupation?

VLADAMIR: My name is Vlad -- Buford (phonetic), and I work Morris County Park Commission (phonetic) -- (phonetic).

THE COURT: Okay?

MS. MERCURIO: Yes, thank you, Judge.

THE COURT: Your challenge.

MS. MERCURIO: Your Honor, please thank and excuse juror number 12.

THE COURT: Potential juror number 12, you're excused.

MS. MERCURIO: No, I'm sorry --

THE COURT: That's Ms. Diakos?

MS. MERCURIO: Yes.

THE COURT: You're excused. Please return to the fourth floor. Have a wonderful afternoon. Next name, please?

CLERK: Killi Kelly (phonetic) with a K.

THE COURT: Good afternoon, ma'am.

MS. KELLY: Good afternoon.

THE COURT: Your information, please?

MS. KELLY: Killi Kelly -- Kelly (phonetic), program secretary, nonprofit agency. I have a husband, parking lot attendant, no children. Yes to number three. Civil --

THE COURT: What -- civil?

MS. KELLY: Yes.

THE COURT: Okay. Anything about that experience which would interfere with your ability to render a fair and impartial verdict in this case?

MS. KELLY: No, Your Honor.

THE COURT: Number four, please?

MS. KELLY: Yes to number four.

THE COURT: Do you prefer to explain that at the sidebar or from your seat?

MS. KELLY: From where I'm standing.

THE COURT: From where you're standing, I should say.

MS. KELLY: Yes.

THE COURT: Okay. Who was convicted of what, ma'am?

MS. KELLY: Brother, unpaid child support.

THE COURT: When?

MS. KELLY: Approximately three years ago.

THE COURT: Where?

MS. KELLY: New Jersey, East Orange.

THE COURT: To what extent do you believe he was treated fairly or unfairly by the criminal justice system?

MS. KELLY: I believe that he was treated fairly.

THE COURT: Is there anything about that circumstance which would interfere with your ability to render a fair and impartial verdict?

MS. KELLY: No, Your Honor.

THE COURT: Would it in any way bias or prejudice you?

MS. KELLY: No.

THE COURT: Okay. Continue, please?

MS. KELLY: Number five, no. Number six, no. Number seven, no. Number eight, yes.

THE COURT: Can you answer that from where you're standing?

MS. KELLY: Yes.

THE COURT: Who is connected to law enforcement?

MS. KELLY: Uncle, mother's brother, California State Highway Patrol.

THE COURT: Anything about that relationship which would interfere with your ability to render a fair and impartial verdict?

MS. KELLY: No, Your Honor.

THE COURT: Would it in any way bias or prejudice you?

MS. KELLY: No.

THE COURT: Before you answer question number nine, in a general way, what is the nature of the nonprofit organization with which you are affiliated?

MS. KELLY: I can give you the name -- YWCA.

THE COURT: Okay. What is your answer to question number nine?

MS. KELLY: No.

THE COURT: Very good. Ma'am, please have a seat in seat number 12. Defense?

MS. SANFILIPPO: Your Honor, at this time, defense would like to thank and excuse juror number 11.

THE COURT: Ms. Stedasino, you are excused. Please return to the fourth floor. Have a nice afternoon. Next name, please?

CLERK: Taormina with a T.

THE COURT: Good afternoon, ma'am.

MS. TAORMINA: Good afternoon.

THE COURT: Your information, please?

MS. TAORMINA: Jean Taormina, I'm a -- supervisor for an envelope manufacturer. My husband is semi-retired. He works for a commercial photographer. I have never served on a jury. Number four, no. Number five, no. Six, no. Seven, yes.

THE COURT: Do you prefer to come to sidebar to answer that question?

MS. TAORMINA: No, it's fine here.

THE COURT: Okay. Who was a victim?

MS. TAORMINA: The first victim was my nephew was lost in 9/11 -- Twin Towers, and our house was robbed in 1998.

THE COURT: Anything about either of those circumstances, which would interfere with your ability to render a fair and impartial verdict?

MS. TAORMINA: No.

THE COURT: Would it in any way bias or prejudice you?

MS. TAORMINA: No.

THE COURT: Continue, please?

MS. TAORMINA: Yes to number eight. My nephew is a sergeant in the Nutley Police Department and his father, my brother in law, is a retired

sergeant from the Nutley Police Department. Number nine, no.

THE COURT: Would either of those relationships -- getting back to question eight -- interfere with your ability to render a fair and impartial verdict?

MS. TAORMINA: No.

THE COURT: Would that circumstance in any way bias or prejudice you?

MS. TAORMINA: No.

THE COURT: Very good, ma'am. Please have a seat in seat number 11. State?

MS. MERCURIO: Your Honor, please thank and excuse juror number two.

THE COURT: Ms. Hunter, you're excused. Please return to the fourth floor. Have a great day. Next name, please?

CLERK: Braswell, with a B (phonetic).

THE COURT: Yes, ma'am.

MS. BRASWELL: Theresa Braswell -- one, no. Two, no. Three, no. Four, no. Five, no. All of them really -- six, no. Seven, no. Excuse me, eight, no. Nine, no.

THE COURT: Well, thank you. Please have a seat in seat number two. Next name, please. Defense?

MS. SANFILIPPO: Your Honor, at this time, the defense would like to thank and excuse juror number nine.

THE COURT: Sir, you're excused, please return to the fourth floor. Have a nice afternoon. Next name, please?

CLERK: Boyle with a B (phonetic).

THE COURT: Yes, sir.

MR. BOYLE: Good afternoon.

THE COURT: Good afternoon.

MR. BOYLE: My name is John Boyle, I work in sort of a new client development area -- new contracts with clients for a medical products company. My wife is an administrative assistant. We have -- she has a daughter, my stepdaughter is a minister in a methodist church. We have a son, my stepson, is a medical researcher. We also have a ninth grade son and a seventh grade son who is in the seventh grade.

I once served on a jury for a civil case, it was -- we did reach a verdict.

THE COURT: Did you understand the distinction in the burden of proof as I explained it between the civil case and the criminal case?

MR. BOYLE: Yes.

THE COURT: Anything about your prior jury

service, which would interfere with your ability to be a fair and impartial juror in this case?

MR. BOYLE: No.

THE COURT: Continue, please?

MR. BOYLE: The answer to four is no. The answer to five is no. The answer to six is -- yes. My first wife was a witness to a -- an armed robbery in the restaurant in which she worked.

THE COURT: How long ago was that?

MR. BOYLE: Thirty years.

THE COURT: What town was that in?

MR. BOYLE: Decatur, Georgia.

THE COURT: Is there anything about that experience which would interfere with your ability to render a fair and impartial verdict?

MR. BOYLE: No.

THE COURT: Would it in any way bias or prejudice you?

MR. BOYLE: It would not.

THE COURT: Continue, please?

MR. BOYLE: The answer to seven is yes. My parents were the victims of a break in at their home -- some --

THE COURT: How long ago?

MR. BOYLE: -- 10 years ago or so.

THE COURT: Where was that?

MR. BOYLE: In Tucker, Georgia, just outside of Atlanta.

THE COURT: Would that experience interfere wit your ability to render a fair and impartial verdict?

MR. BOYLE: No.

THE COURT: Would it in any way bias or prejudice you?

MR. BOYLE: It would not.

THE COURT: Continue, please.

MR. BOYLE: The answer to eight is no. I have some acquaintance who are in the police department in Montclair -- or I have one, but it is not a close acquaintance.

THE COURT: Those relationships, would they interfere with your ability to render a fair and impartial verdict?

MR. BOYLE: No.

THE COURT: Would that circumstance in any way bias or prejudice you?

MR. BOYLE: No.

THE COURT: What's the answer to question number nine, sir?

MR. BOYLE: No.

THE COURT: Very good. Please have a seat in seat number nine. State?

MS. MERCURIO: Your Honor, please thank and excuse juror number two.

THE COURT: Ms. Braswell, you're excused. Please return to the fourth floor. Have a nice day.

MS. BRASWELL: You too.

THE COURT: Thank you. Next name?

CLERK: Burke with a B (phonetic). Burke? Otis (phonetic) Burke?

THE COURT: Otis Burke -- was excused. Next name?

CLERK: Bailey with a B (phonetic).

MR. MANN: I apologize to the Court, I was across the hall by mistake, Your Honor.

THE COURT: I didn't even notice it. No harm, no foul.

MR. MANN: My name is Robert Mann, I live in Caldwell.

THE COURT: One moment, didn't you say Bailey?

CLERK: Yes, Kenneth Bailey.

MR. MANN: Mann, M-A-N-N.

THE COURT: Well you're not Bailey. Thank you anyway. Are you -- is this gentleman in the right

place, Mr. Mann?

CLERK: Yes, he is.

THE COURT: Okay.

UNIDENTIFIED MALE: He was here this morning.

THE COURT: I'm glad we picked up on that. Okay. Mr. Bailey?

MR. BAILEY: Yes. Kenneth Bailey, truck driver. Two is no.

THE COURT: Two is -- there is nobody else at your house?

MR. BAILEY: No.

THE COURT: Okay. Continue, please?

MR. BAILEY: Three, no. Four, no. Five, no. Six, yes.

THE COURT: Would you prefer to speak about that from where you're standing or at sidebar?

MR. BAILEY: Sidebar.

THE COURT: Come right up with the attorneys.

(Sidebar discussion, not audible)

THE COURT: The potential juror is excused by the Court. Next name, please?

CLERK: Johnson with a J.

THE COURT: Good afternoon, sir.

MR. JOHNSON: Good -- my name is Donald Johnson. I live Newark -- I work for New Jersey Transit as a janitor. My wife, she's a home keeper. And we have two kids, my kids are married and grown. Two and three yes (phonetic). Four, no.

THE COURT: Getting back to number three, Mr. Johnson, what kind of jury did you sit on? Civil, criminal, grand jury?

MR. JOHNSON: Twice, Your Honor.

THE COURT: What kind?

MR. JOHNSON: Civil and criminal.

THE COURT: Okay. You understand the distinction and the burden of proof as I explained it?

MR. JOHNSON: That's correct.

THE COURT: Anything about your experience as a prior juror, which would interfere with your ability to render a fair and impartial verdict in this case?

MR. JOHNSON: No.

THE COURT: In that criminal case, did you reach a verdict?

MR. JOHNSON: It was dismissed (phonetic).

THE COURT: Answer question number four, please.

MR. JOHNSON: No.

THE COURT: Continue.
MR. JOHNSON: No -- number five. No.
THE COURT: No to number six?
MR. JOHNSON: That's correct.
THE COURT: What's number seven?
MR. JOHNSON: No.
THE COURT: Eight?
MR. JOHNSON: No.
THE COURT: And number nine.
MR. JOHNSON: No.
THE COURT: Very good, sir, please have a seat in seat number two.
(Recording off)
MS. MERCURIO: -- juror number six.
THE COURT: Ms. Mammo, you're excused. Please return to the fourth floor. Have a nice day, ma'am. Next name?
CLERK: Clark with a C.
THE COURT: Yes, ma'am.
MS. CLARK: My name is Bridgette Clark, I'm an administrative assistant. My husband is a supervisor for a fluorescent light company (phonetic). I have two minor children. Number three is, yes, petit jury criminal.
THE COURT: Did you reach a verdict?

MS. CLARK: Yes.

THE COURT: Anything about that experience which would interfere with your ability to render a fair and impartial verdict in this case?

MS. CLARK: No.

THE COURT: Continue answering the questions, please.

MS. CLARK: Number four is no. Number five is no. Number six is no. Number seven is no. Number eight is no. And number nine is no.

THE COURT: Very good, ma'am, please have a seat in seat number six. State?

MS. MERCURIO: Your Honor, please thank and excuse juror number eight.

THE COURT: Ms. Cobb, you're excused, please return to the fourth floor. Have a nice day, ma'am.

MS. COBB: Okay. Thank you, you too.

THE COURT: Thank you. Next name, please?

CLERK: Barcliff with a B (phonetic).

THE COURT: Yes, ma'am.

MS. BARCLIFF: Question number one -- is Lori Barcliff Baptista (phonetic). I'm a program coordinator for Humanities Research Institute at Rutgers University. My husband is a marketing manager for the Performing Arts Center here in -- (phonetic) -

- I don't have any children.

Number three, no. Number four, no. Number five, no. Number six, no. Number seven, yes.

THE COURT: Would you prefer to speak about that at sidebar?

MS. BARCLIFF: No, that's fine.

THE COURT: Okay.

MS. BARCLIFF: My sister was robbed.

THE COURT: When?

MS. BARCLIFF: About 10 years ago.

THE COURT: Where?

MS. BARCLIFF: On the front steps of her home (phonetic).

THE COURT: What town?

MS. BARCLIFF: Newark.

THE COURT: Anything about that experience which would interfere with ability to render a fair and impartial verdict?

MS. BARCLIFF: No.

THE COURT: Would it in any way bias or prejudice you?

MS. BARCLIFF: No.

THE COURT: Number eight, ma'am?

MS. BARCLIFF: Yes.

THE COURT: Can you tell me that from where

you're standing or do you prefer to come to sidebar?

MS. BARCLIFF: Sure. My father and brother work for the sheriff's department in corrections. And my cousin is a police director (phonetic).

THE COURT: Anything about those relationships, which would interfere with your ability to render a fair and impartial verdict?

MS. BARCLIFF: No.

THE COURT: Would it in any way bias or prejudice you?

MS. BARCLIFF: No.

THE COURT: And finally number nine, ma'am.

MS. BARCLIFF: No.

THE COURT: Very good. Please have a seat in seat number eight, which is outside of the box. Defense?

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number four.

THE COURT: Mr. O'Neil, you're excused. Please return to the fourth floor. Have a nice day, sir.

MR. O'NEIL: Thank you.

THE COURT: Next name?

CLERK: Bass, with a B (phonetic).

THE COURT: Good afternoon, ma'am.

MS. BASS: Good afternoon. Joyce Bass, I'm a paralegal with the state of New Jersey.

THE COURT: What kind of work do you do there as a paralegal, Ms. Bass? Or more specifically, have anything to do with any criminal work?

MS. BASS: No.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror?

MS. BASS: No.

THE COURT: Would it bias you or prejudice you in any way?

MS. BASS: No.

THE COURT: Continue, please?

MS. BASS: I'm a widower. One of my son's works at Youth Consultation Services. The others are unemployed. No jury experience. No for four. No for five. No for six. No for seven. No for eight. No for nine.

THE COURT: Very good, ma'am, please have a seat in seat number four. State?

MS. MERCURIO: Your Honor, please thank and excuse juror number four.

THE COURT: Ms. Bass -- you're excused,

please return to the fourth floor. Have a nice day.

MS. BASS: Thank you -- (phonetic).

MS. SANFILIPPO: Your Honor, may I be seen at sidebar?

THE COURT: Sure.

(Sidebar discussion, not audible)

(Recording off)

(Jury not present)

THE COURT: We're going to have some argument on this Gilmore challenge. The law in this regard is there is a rebuttable presumption that the prosecutor has exercised her peremptory challenges in a Constitutional manner.

To rebut it, the defense must make a prima facie showing that the prosecutor used her peremptory challenge in an unconstitutional manner.

To make a prima facie case the defense has to show, number one, that the potential jurors excluded wholly or disproportionately were members of a cognizable group within the meaning of the fair cross section rule.

Now, Ms. SanFilippo, which particular -- what cognizable group are you maintaining that the State has wholly or disproportionately excluded?

MS. SANFILIPPO: Your Honor, there are two

groups that I believe the State has disproportionally excluded. The first one would be female. As in all one, two, three, four, five of the challenges were females.

And second is members of the black or possibly African American race, um, in that four of the five were dark skinned or -- considered black and possibly African American.

THE COURT: Okay. My next question is this. I do -- I find that, first of all, that all five of the State challenges have been females. And that four of the five have been black females. My next question -- and I further find that either of those --

MS. MERCURIO: Excuse me, Judge, juror number one was a white female.

THE COURT: Yes. Four out of the five were black --

MS. MERCURIO: Oh, I'm sorry, I didn't hear you.

THE COURT: -- females.

MS. MERCURIO: I'm sorry, Judge.

THE COURT: One was a white female. My next question to you, Ms. SanFilippo, is -- I would have to find that there is a substantial likelihood that the peremptory challenges leading to the exclusion were

based on assumptions about group bias as opposed to any indication of situation specific bias.

Now it is here that I would like to know what you recall that would -- what would your answer to that question be? Or put it more specifically, upon what should I -- what can I base a conclusion that there is a substantial likelihood the peremptory challenges were based on assumptions about group bias?

MS. SANFILIPPO: Your Honor -- I would submit that the assumption of the, um, the bias would be that people who share the same race as the defendant in this case, the defendant being black and the, um, 80 percent of the challenged jurors being black, that they would somehow be sympathetic or more favorable to an outcome in favor of the defendant by virtue of them having the same race.

And again nearly 80 percent -- 80 percent were black as the defendant.

THE COURT: Well, then what of your argument about the female? You said two cognizable groups.

MS. SANFILIPPO: Um -- just that they possibly would be more sympathic, I think it's -- with respect to the bias would go more towards the race than the gender.

THE COURT: Is it of any relevance to any

decision I have to make in this regard as to what gender or race or ethnic background the alleged victim is? I'm asking Ms. SanFilippo. We'll get to you.

MS. SANFILIPPO: Can you -- I'm sorry, can you rephrase that?

THE COURT: In making my decision, is it of any relevance to the decision I have to make as to what gender or race or both the victim of this alleged crime is?

MS. SANFILIPPO: Your Honor, I think that can be a factor but at this juncture, the -- that hasn't been discussed with the jurors to any extent. Um -- and I think I would base my arguments on -- more so on the gender of -- strike that, on the race of the defendant as opposed to the victim.

THE COURT: So your answer to my very direct question is that the race of the alleged victim is immaterial to any decision I have to make in this regard?

MS. SANFILIPPO: I wouldn't say it's immaterial --

THE COURT: Okay.

MS. SANFILIPPO: -- Your Honor --

THE COURT: Then to the extent it is material, to what -- what is the race of the victim?

MS. SANFILIPPO: I believe the victim is African American as well.

THE COURT: Okay. And to what extent, if any, should -- should that factor enter into my decision that I have to make? That the --

MS. SANFILIPPO: I don't think --

THE COURT: -- the defendant is a black male and the alleged victim is a black male also, correct?

MS. MERCURIO: Yes, Your Honor, he is.

MS. SANFILIPPO: I would -- not very significant, Your Honor. I think that would be more significant if it was transgender or transracial type of situation whereas they share the same characteristics. I think we need to focus on what my -- the -- uh -- the race of my client and appropriately he is in court right now. And I think that is more apparent.

THE COURT: Ms. SanFilippo, is the only thing the challenged jurors had in common was that they belonged to the group of -- cognizable group of let's say, black people or black women -- besides for juror number one?

MS. SANFILIPPO: Um -- Your Honor that is primarily -- they do -- I had not noticed a specific trend with respect to employment. Um, but

unfortunately, I missed some of the employment, for example, Theresa Braswell, I'm not certain what her employment was or if she was employed. And, um -- I think for the -- at least one of the individuals was a student.

But I believe, again, that the motivation here deals primarily with them having a -- being of the same racial group as the defendant.

THE COURT: Okay. Ms. Mercurio? I'll hear you.

MS. MERCURIO: Your Honor, I would submit respectfully that the -- first with regard to the fact that they were African American, the victim in this matter is African American.

The State is -- it's clear from the answers that the jurors gave that are African American that I have excluded, form the basis of my decision and not because they are simply African American.

As far as the fact that they were female -- and I also want to make sure it's noted, and Your Honor did note this, we have only -- I have only exercised five challenges, one of the five was a white female. And I would like to note the defense has exercised four and three of her four are white -- the white race.

So I don't think that this has --

THE COURT: I have -- I have to interrupt you only to say that I don't regard that as relevant unless and until you -- you want to make your own particular challenge.

MS. MERCURIO: Well, I just don't think enough challenges have been even exercised at that point -- at this point to even show a pattern that a race is the cri -- the basis for the exclusions.

As far as the cognizable group argued by defense that it's -- they are females. I don't believe, unless I have overlooked any case law that the sex of the jurors, the fact that these are females, have anything or are a recognizable congnizable group that's meant to be addressed by this type of situation.

The defendant is a male. If the State had excluded males, the defense could just make the argument that the state is doing it because he's a man and I'm getting rid of men because they may be sympathetic to the defendant or can relate to him.

That's also a generalization by defense to say that females are more sympathetic. That's a generalization; there is no scientific evidence or any kind of studies that, in fact, show that. If

anything, a male might be more sympathetic toward another male.

So I don't believe any showing has been made, Your Honor, at this point for the State to be required to give reasons for their exclusion -- for its exclusions --

THE COURT: Ms. Mercurio, the challenged jurors, did they have anything in common other than the fact that they were either -- that five of them -- sorry, that four of them were black and there were four black women? In other words, do they have differences between them?

MS. MERCURIO: There were -- yes, there were differences between them. There was some that had -- there was some that had something in common as far as the -- for the reason for the State's exclusion. But they all had differences between them.

THE COURT: Okay. I think a close examination of the record would bear out what the prosecutor just said. I would -- I would say the state of the law is that race is a cognizable class, and so is gender. I do believe.

At any rate, I'm also taking into account that the victim is a -- is also black, to the extent it's material.

At any rate, I do not believe that the defense has made a prima facie case. I'll deny the motion.

Call in the jury, please -- potential jury I should say.

(Potential jurors enter courtroom)

(Recording off)

(Recording resumes mid-answer of next potential juror)

MS. WALKER: -- not married. Just -- small son for number two. Number three is no. Number four is no. Number five is no. Number six is no. Number seven is no. Number eight is no. Number nine is no.

THE COURT: Okay, please have a seat in seat number four, ma'am. Defense?

MS. SANFILIPPO: Your Honor, at this time, the defense would like to thank and excuse juror number eight.

THE COURT: Ms. Barcliff, you're excused. Please return to the fourth floor. Have a nice day. Next name?

CLERK: Callahan with a C (phonetic).

THE COURT: Yes, ma'am.

MS. CALLAHAN: My name is Susan Callahan. I'm a high school English teacher and media

specialist. My husband is a sales manager - or sales representative. And I have a minor son. Number three, I have previously served on a jury, it was a criminal case, and there was a verdict that was reached, it was a petit juror.

THE COURT: Anything about that experience which would interfere with your ability to reach a fair and impartial verdict in this case, ma'am?

MS. CALLAHAN: No, there was not.

THE COURT: Continue, please?

MS. CALLAHAN: Number four is no. Number five is no. Number six is no. Number seven is yes.

THE COURT: Do you prefer to speak about that at sidebar?

MS. CALLAHAN: I can speak about it here.

THE COURT: Sure.

MS. CALLAHAN: My home was robbed 10 years ago and my brother was robbed at knifepoint in Manhattan, and that was probably 10 years ago also.

THE COURT: The first victimization, what town was that in?

MS. CALLAHAN: Glen Ridge.

THE COURT: Would either of those experiences interfere with your ability to render a fair and impartial verdict, ma'am?

MS. CALLAHAN: No.

THE COURT: Would either of those experiences bias or prejudice you?

MS. CALLAHAN: No.

THE COURT: Number eight.

MS. CALLAHAN: I have many students, being a high school teacher, many students go into law enforcement so I have many current students (phonetic) in the district where I work -- one working at the high school currently where I teach (phonetic). Other -- (phonetic) --

THE COURT: Would those relationships interfere with your ability to render a fair and impartial verdict?

MS. CALLAHAN: No.

THE COURT: Would they in any way bias or prejudice you?

MS. CALLAHAN: No.

THE COURT: And number nine, ma'am.

MS. CALLAHAN: I have --

THE COURT: If the answer is -- if the answer to number nine, and this goes for everybody, if the answer to question number nine is anything other than no, I need to see you at sidebar.

MS. CALLAHAN: Okay. Because of your

anecdote earlier, I need to ask you a question.

THE COURT: Come right up.

(Sidebar discussion, not audible)

THE COURT: Ms. Callahan is excused by the Court. Next name, please?

CLERK: Key with a K.

THE COURT: Good afternoon.

MS. KEY: Good afternoon.

THE COURT: My name is Therese Key (phonetic). Student -- in -- (phonetic). My mother used to work at -- (phonetic). Number three, no. Number four, yes.

THE COURT: Would you prefer to speak about that at sidebar?

MS. KEY: No.

THE COURT: Okay, who was convicted of what?

MS. KEY: My brother was -- (phonetic).

THE COURT: When?

MS. KEY: About two years ago.

THE COURT: Do you have an impression one way or the other way as to whether or not your brother was treated fairly by the criminal justice system?

MS. KEY: -- was fair (phonetic).

THE COURT: Is there anything about that experience which would cause you to be biased or

prejudiced against or in favor of the prosecutor here or against or in favor of the defendant here?

MS. KEY: No.

THE COURT: Continue, please.

MS. KEY: Number five -- no. Number six, no. Number seven, no. Number eight, no. Number nine is no.

THE COURT: Very good, ma'am, please have a seat in seat number eight.

MS. MERCURIO: Your Honor, I do have a question.

THE COURT: What's that?

MS. MERCURIO: Was her brother -- was it as a juvenile or as an adult?

THE COURT: Your brother, was that as a juvenile or as an adult?

MS. KEY: Juvenile.

THE COURT: Thank you. Please have a seat.

MS. MERCURIO: Your Honor, I'm going to excuse this juror.

THE COURT: Okay.

MS. KEY: Thank you.

THE COURT: Ma'am, you're excused, thank you. Return to the fourth floor. Next name?

CLERK: Reynolds with an R.

MS. REYNOLDS: My name is Sandra Reynolds. I'm an attorney --

THE COURT: What kind of law do you practice, Ms. Reynolds?

MS. REYNOLDS: At the moment, I am not practicing law, I'm actually the chair of the -- Committee of the State Bar Association (phonetic). And -- I have doing writing (phonetic).

THE COURT: And when you were practicing, what area did you practice in?

MS. REYNOLDS: I have had a --

THE COURT: More specifically, did you do any criminal defense work or prosecution?

MS. REYNOLDS: No, the only time I did anything to do with criminal, at one point I was working in a public -- in Philadelphia on -- police abuse cases.

THE COURT: Is there anything about your vocation or your background, which would interfere with your ability to be a fair and impartial juror, ma'am?

MS. REYNOLDS: No.

THE COURT: Is there anything about your vocation or other jobs, which would cause you to be biased or prejudiced against or in favor of one side

or the other?

MS. REYNOLDS: No.

THE COURT: Okay, continue answering the questions, please.

MS. REYNOLDS: Okay. My husband is an attorney. Adult children, I have two --

THE COURT: What kind of law does he practice, Ms. Reynolds?

MS. REYNOLDS: Corporate.

THE COURT: Continue, please.

MS. REYNOLDS: I have -- let's see, two adult children, one is in college, the other is working in New York for the office of the special narcotics prosecutor as a legal assistant.

THE COURT: And to what extent would that compromise your ability to be a fair and impartial juror, Ms. Reynolds?

MS. REYNOLDS: Not at all.

THE COURT: Would it cause you to be biased or prejudiced against or in favor of one side or the other here?

MS. REYNOLDS: No.

THE COURT: Continue, please.

MS. REYNOLDS: I have not served ever on a jury. Four, no. Five, no. Six, no. Seven, other

than having a car stolen twice, no.

THE COURT: When -- when was that and where?

MS. REYNOLDS: This year, January, at my home. And then I think April at my home.

THE COURT: What town?

MS. REYNOLDS: Montclair.

THE COURT: To what extent would those experiences interfere with your ability to render a fair and impartial verdict?

MS. REYNOLDS: It would not interfere.

THE COURT: Would it in any way bias or prejudice you?

MS. REYNOLDS: No.

THE COURT: Number eight?

MS. REYNOLDS: Well, my daughter, who works for the special narcotics prosecutor and my brother is a defense attorney -- a criminal defense attorney in Philadelphia.

THE COURT: Okay. Would those relationships interfere with your ability to render a fair and impartial verdict?

MS. REYNOLDS: No.

THE COURT: Would it in any way bias or prejudice you?

MS. REYNOLDS: No.

THE COURT: Number nine?

MS. REYNOLDS: The answer is no.

THE COURT: Okay, ma'am, please have a seat in seat number eight, it's outside of the box. I believe it's the defense challenge.

MS. SANFILIPPO: Yes, Your Honor. At this time the defense would like to than and excuse juror number 11.

THE COURT: Juror number 11, you're excused, please return to the fourth floor. Have a nice day. Next name.

CLERK: Bryant with a B (phonetic).

THE COURT: Next?

CLERK: Mather with an M (phonetic).

MR. MATHER: Robert Mather. I'm a truck driver. I'm single. I live in the house by myself. Yes, I was a -- no. Number -- I'm sorry --

THE COURT: You're on number three.

MR. MATHER: No. Two and three, no. Number four, yes.

THE COURT: Do you prefer to speak about that at sidebar or --

MR. MATHER: Yes, I would.

THE COURT: -- from there? Sidebar? Come up, please.

(Sidebar discussion, not audible)

THE COURT: Mr. Mather is excused by the Court. Next name, please?

CLERK: Chavis with a C (phonetic).

MS. CHAVIS: Did you say Chavis or Davis (phonetic)?

THE COURT: Chavis.

MS. CHAVIS: My name is Geraldine Chavis. I work for New Jersey Division of Motor Vehicle Regional Service Center. I live alone. My daughter is unemployed, she doesn't live with me. Number three, is no. No.

THE COURT: Number four is no?

MS. CHAVIS: No -- number four is no. Number five is no. Number six is no. Number seven is yes and that includes me -- I'll answer here -- my house was broken in.

THE COURT: When?

MS. CHAVIS: In '98.

THE COURT: Where?

MS. CHAVIS: In Newark.

THE COURT: Anything about that experience which would interfere with your ability to render a fair and impartial verdict?

MS. CHAVIS: No.

THE COURT: Would it in any way bias or prejudice you?

MS. CHAVIS: No.

THE COURT: Continue answering the questions, please.

MS. CHAVIS: Eight is no. Number nine is no.

THE COURT: Very good, ma'am. Please have a seat in seat number 11. May I see counsel at sidebar, please?

(Sidebar discussion, not audible)

(Recording off)

THE COURT: Ms. Chavis, we're going to excuse you. Please return to the fourth floor. Have a nice day, ma'am. Next name, please?

CLERK: Clark with a C (phonetic).

THE COURT: Good afternoon, Ms. Clark.

MS. CLARK: Good afternoon.

THE COURT: Your information, please?

MS. CLARK: My name is Claudette Clark. And I'm analyst for a -- insurance company, New York. My husband is a carpenter. I have three children. My eldest daughter is a bank teller. The other two are in school. Yes -- number three is yes. I served as a petit juror on a civil case.

THE COURT: Did you understand the distinction and burden of proof as I explained it?

MS. CLARK: Yes.

THE COURT: Is there anything, which would interfere with your ability to be a fair and impartial juror in this case?

MS. CLARK: No.

THE COURT: Continue, please.

MS. CLARK: Number four is yes.

THE COURT: Do you prefer to answer that at sidebar?

MS. CLARK: Yes.

THE COURT: Come it sidebar, please.

(Sidebar discussion, not audible)

THE COURT: You come to seat number 11 (phonetic).

MS. MERCURIO: Judge, is this my turn? I'm going to excuse this juror --

THE COURT: Oh --

MS. MERCURIO: -- so she doesn't have to walk through everybody.

THE COURT: Okay, we're going to save you the trip, ma'am. You're excused. Please return to the fourth floor.

MS. CLARK: Okay.

THE COURT: Next name, please.

CLERK: Dungee with a D (phonetic).

MR. DUNGEE: Good evening, my name is Oliver Dungee (phonetic), I'm a computer operator. My wife is a secretary. I have -- I have a daughter that is in college. Answer for number three is no. Answer to number four is no. Answer to number five is no. Answer to number six is no. Answer to number seven is no. Answer to number eight is yes. My brother-in-law is a police officer in East Orange, New Jersey.

THE COURT: This is your answer to question number eight, right?

MS. CLARK: Yes.

THE COURT: The answer to number seven you said was no?

MS. CLARK: Yes.

THE COURT: The fact that you have a relative that is a police officer, would that interfere with your ability to be a fair and impartial juror?

MS. CLARK: No.

THE COURT: Continue answering the questions, please. Number nine.

MS. CLARK: Number nine is no.

THE COURT: Very good, sir, please have a

seat in seat number 11. Defense?

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number one.

THE COURT: Potential juror number one, you're excused. Please return to the fourth floor, ma'am. Have a nice day. Next name, please?

CLERK: Mann with an M (phonetic).

MR. MANN: My name is Robert Mann. I'm employed by a company that builds and manages private -- (phonetic). I'm single with a 14-year-old child by a previous marriage.

THE COURT: Let's get back to your occupation. The fact that you have a job that has something to do with prisons, does that have any capacity to interfere with your ability to be a fair and impartial juror?

MR. MANN: Not at all, Your Honor. It's on a construction site.

THE COURT: Continue, please.

MR. MANN: I have served on jury -- no, I have never served on a jury. No to number four. No to number five. To the best of my knowledge, no to number six. No to number seven. My ex-wife was the first deputy for the public defenders in the state of

New Jersey (phonetic).

THE COURT: Anything about that situation or that relationship which would interfere with your ability to render a fair and impartial verdict?

MR. MANN: No, not at all.

THE COURT: Would it in any way bias or prejudice you?

MR. MANN: Not at all.

THE COURT: What is your answer to number nine, sir?

MR. MANN: No. I could be fair and impartial.

THE COURT: Very good. Please have a seat in seat number one, it's outside of the box. State?

MS. MERCURIO: Your Honor, please thank and excuse juror number eight.

THE COURT: Potential juror number eight, Ms. Reynolds, you're excused. Please return to the fourth floor. Have a nice day. Next name?

CLERK: Manning with an M (phonetic).

THE COURT: Your information, please, ma'am.

MS. MANNING: My name is Barbara Manning. I am a lab technician. I live in East Orange. I'm a lab technician. I'm a widow. Answer to number three is yes, civil, and it did reach a verdict.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror in this case, ma'am?

MS. MANNING: No.

THE COURT: Continue, please.

MS. MANNING: Number four, no. Number five, no. Number six, no. Number seven, no. Number eight, no. Number nine, no.

THE COURT: Just getting back to the jury service. You understood the distinction and the burden of proof as I explained it between a civil case and a criminal case?

MS. MANNING: Yes.

THE COURT: Very good. Please have a seat in seat number eight, it's outside the box. Defense?

MS. SANFILIPPO: Just one moment, please, Your Honor.

THE COURT: Take your time, counselor.

(Pause in dialog, recording on)

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number nine.

THE COURT: Mr. Boyle, you're excused, please return to the fourth floor. Have a nice day, sir.

MR. BOYLE: Thank you, Judge.

THE COURT: Thank you. You can see for yourselves we don't have a jury yet. The jury selection process must continue. We're waiting for another panel. So the question becomes, what to do now.

Well, I'm going to excuse you until -- I'm going to say 10 to 4. That's my predication as to not only when I'll have that other panel here, but how long it will take me to go through the questions with them.

Could I be wrong as to the time I'll need you -- 10 to 4 -- absolutely. Will I probably be wrong? Yup. If something can go wrong, does it go wrong? Yup.

So I'm shooting for 10 to 4 and if the time is going to be different I'm going to let you know. Just be prepared to come back into the courtroom at about 10 to 4. Maybe a little earlier.

Okay. Don't discuss the case with each other or anyone else. Thank you.

(Recording off)

THE COURT: -- Judge Ravin, I am a Superior Court Judge of the state of New Jersey. You have been drawn as prospective jurors in this criminal case,

State vs. David Minor.

I recognize that serving as a juror is inconvenient, but jury service is an important duty of citizenship. Having jurors available to decide the facts in a case is fundamental to our entire system of justice. The courts cannot function without members of the public offering their time to serve as jurors.

The first job we have here is to select fair and impartial jurors. By that I mean those with open minds. That is those who can be fair to the defense and fair to the State, both sides.

The questioning is not meant to pry unnecessarily into your private affairs or lives when we explore your ability to be fair to both sides here. Answer with the sense of honesty and fairness; fairness to the State and fairness to the defendant. There are no right answers, there are no wrong answers.

Your goal should not be either to get on this jury or to get off this jury. You only have one job now for what is probably your $5 today -- and that is to be absolutely and completely honest in answering all the questions put to you.

After I have asked you a number of questions, which relate to your ability to hear and

decide this case with an open mind and with complete impartiality, the attorneys can exercise the right to excuse one or more of the jurors without giving any explanation or reason. Those judgments are not easy ones to make.

And if you're excused in that manner, please do not take it personally, no offense is intended. It does not mean that you wouldn't be fair in some other case.

The right to excuse jurors is important to both sides. Also, note that no one here can excuse you from jury service. If excused, you must return to the jury management office on the fourth floor to be scanned in by the jury staff.

And if you are excused from this courtroom during the jury selection process, please do not discuss the jury selection process which you experienced up here or the case which you heard just a little about up here with each other downstairs or anyone else downstairs.

Now, I'm going to be asking you a series of questions. If the answer to any question I ask is yes, please raise your hand. Don't stand up, just raise your hand. And when I point to you, in a loud, clear voice tell us your last name and the first

letter of your last name. That's your last name and the first letter of your last name. For example, Nelson with an N, Judge -- would be an appropriate answer if your name was Nelson.

If any question touches on a sensitive matter or for some personal reason you feel that you cannot be fair here, you must tell us or may tell us at sidebar -- over here to my left so that no one can hear. We do this over here at the side bar because there is the risk that your fellows could be influence by your answers if they heard them. Or maybe some of these questions you would prefer to answer in some degree of privacy rather than in front of everyone in the courtroom.

But make no mistake about it, whatever you say over here is on the record, like anything else spoken in this courtroom.

The attorneys and I expect this case to be over no later than - no later than April 17th, 2003. And probably sooner, but I can't guarantee it and you should not infer anything about the importance of the case to both sides from the length of the case.

The question is, would service on a trial of this length be an extreme personal hardship to any juror? Let me explain what I mean.

I assume that your being here today is a hardship to someone. I'm sure there maybe one or more of you that just feel put out by the fact that you have to be here. And I can understand that.

As a matter of fact, I was there just last week and, you know what? I have to tell you, I felt put out. I felt inconvenienced. I'm a Judge and I still felt inconvenienced. I said, I should be up there trying cases, not sitting down here about to go to some panel where I'll probably be excused anyway.

But you know what? I listened to some Judge like I tell the people, this is what it means to live in this country. This is what it means to have trial by jury. And this is what we all have to do.

So to that extent, that is what we must do. So you may feel put out. Okay, that's not an extreme personal hardship. You may have other things you'd rather be doing. That's not an extreme personal hardship.

It's also not an extreme personal hardship the fact that the -- people you supervise at work, they depend upon you for supervision, counseling and advice. That, as well, is not an extreme personal hardship. And how about those employers who count on you to get the work done. That is not an extreme

personal hardship.

The question I have is when jury service of the length that I have identified be an extreme personal hardship to any one of you. I'll see those hands at this time.

Shooting up just like the new leaves in the springtime. Yes, ma'am.

MS. MILLER: Miller, M.

THE COURT: Who else on this side? Yes, ma'am?

MS. TOMLINSON: Jean Thomas (phonetic).

THE COURT: Your last name is what?

MS. TOMLINSON: -- T (phonetic).

MS. MERCURIO: I'm sorry, Judge, how do you spell that?

THE COURT: How do you spell that?

MS. TOMLINSON: T-O-M-L-I-N-S-O-N (phonetic).

THE COURT: Thank you. Anyone else on this side? No one. Getting on to this side. Okay. Yes?

MS. BALE: Bale, B (phonetic).

THE COURT: In the front row?

MR. ORR: Orr, O (phonetic).

THE COURT: Okay. Yes, ma'am.

MS. ABRAMS: Can I ask a question?

THE COURT: What's the question?

MS. ABRAMS: Is Passover -- an extreme excuse --

THE COURT: Well, I think it would be fair to put the question this way. If for religious reasons anybody has to be in a particular place at a particular time, no matter what religion they are, no matter what holiday it is, we generally end here generally at 4:30.

To the extent that you cannot make it from here to wherever you have to be for your celebration of your religious holiday, in my book, that's an extreme personal hardship no matter what religion you are.

If you had to be somewhere on Good Friday and -- of course, nobody sits here Good Friday. So bottom line question is, we break here at 4:30 generally. To the extent that interferes with your ability to celebrate your religion, I would say the answer to the question is yes, it does.

So is your answer yes?

Yes.

THE COURT: Okay. What is your name?

MS. ABRAMS: Abrams with an A (phonetic).

THE COURT: Okay, sir?

MR. PEROLI: Peroli with a P (phonetic).

THE COURT: Anyone else? Yes? Yes, ma'am?

MS. CUADRADON: Cuadradon with a C (phonetic). I just have a question.

THE COURT: You don't need to -- okay, I'll take the question. What is the question?

MS. CUADRADON: Okay, um -- my husband and I are going on vacation next week. We are leaving on the Monday.

THE COURT: Next week meaning when?

MS. CUADRADON: April 14th.

THE COURT: Okay. Well, I can't say to an absolute certainty that you will not be here then. So you might as well say yes, you have an extreme personal hardship. We'll see what we do with that later.

All we need to know -- if you think you have an extreme personal hardship you just answer yes. Okay. So we have -- Cuadradon, right? I would rather you err on the side of you think you do have what is a hardship.

Okay, yes, ma'am?

MS. LUAGI: I'm Solidad "L" (phonetic).

THE COURT: What's your last name?

MS. LUAGI: Luagi.

THE COURT: Thank you. You may be seated. Thank you. Yes, sir?

MR. PARKER: Parker with a P (phonetic).

THE COURT: All the way in the back?

MR. SCHULMEISTER: Schulmeister, S (phonetic).

THE COURT: All the way in the back corner.

MR. PELC: Pelc with a P (phonetic).

THE COURT: Did you say Powell (phonetic)?

MR. PELC: P-E-L-C.

THE COURT: Oh, I got you, thank you. Yes?

MS. EPSTEIN: Epstein with an E (phonetic).

THE COURT: Anyone else on this side? All the way in the back, ma'am?

MS. PAULA: -- (phonetic).

THE COURT: What's your last name?

MS. PAULA: -- Paula -- with a P (phonetic).

THE COURT: Thank you. Yes?

MR. SCHACKTEL: Schacktel with an S (phonetic).

THE COURT: Anyone else on this side? Okay. Anybody on this side? We called that side already. Okay. The description of the charges in this case comes from the indictment, which charges the defendant, David Minor, with three crimes on January

11th, 2002 in Newark.

Count One is the armed robbery of Lidwin Cummings. Count Two is unlawful possession of a firearm, a handgun, without a permit to carry it. And number three is possession of a certain firearm, a handgun, with a purpose to use it unlawfully against a person or property of another.

Those are the three charges in the indictment and the indictment is no evidence of guilt. It is simply a step in the process by which a matter is brought to a jury for your ultimate decision. The defendant has pled not guilty to these charges and is presumed to be innocent unless and until each and every element of the offense or offenses charged is proven beyond a reasonable doubt.

The burden of proving each element of the charge beyond a reasonable doubt rests upon the State and never shifts to the defendant. It is not the defendant's obligation to prove his innocence or to offer any proof at all relating to his innocence.

Is there anything about the nature of these charges, which might affect your ability to be a fair and impartial juror? Not a hand raised. One hand raised so far. Your name?

MS. BALE: Bale with a B (phonetic).

THE COURT: Anyone else? No one else. Have you ever heard anything about this case, either from the media or from any other source? No hands raised there.

The assistant prosecutor will now introduce herself and tell you the location where the alleged crimes took place. Madam?

MS. MERCURIO: Thank you, Your Honor, counsel. Good afternoon, ladies and gentlemen, my name is Diane Mercurio, I'll be the assistant prosecutor presenting the evidence to you on this case.

The location of this incident is in the intersection or area of Stuyvesant Avenue, 18th Avenue and Valley Street, Newark, New Jersey. Thank you.

THE COURT: Thank you, Ms. Mercurio. Defense counsel will now introduce herself and her client. Madam?

MS. SANFILIPPO: Thank you, Your Honor, Ms. Mercurio. Good afternoon, ladies and gentlemen, my name is Dawn SanFilippo and I maintain my offices in Cedar Grove in this county.

At this time I would like to introduce to you Mr. Minor, who I have the pleasure of representing.

MR. MINOR: Good morning. Good afternoon, I'm sorry.

THE COURT: Thank you, Ms. SanFilippo. I am now going to tell you the names of persons whose names you might hear during the trial. These persons will not necessarily be called as witnesses.

From the Newark Police Department, Police Officer, Chris Freestone, Detective Michael Sherico, Detective Keith Hughes and Detective Michael DeFabio and Police Officer Ramon Negrone.

From Irvington, New Jersey there is Lidwin Cummings. From the Essex County Prosecutors office, Investigator John Campo. Walena Wheeler from Newark and Camice Henderson from Newton.

Because knowing someone who may have a relationship with this case might influence your independent and impartial judgment of the facts, I need to know if you recognize any of the names you just heard. Or if in fact you know any of the people whose names I just mentioned. Anyone? No hands raised.

How about the location? Does any juror know the location mentioned? Yes?

MS. BALE: I know 18th Avenue.

THE COURT: Your name, please?

MS. BALE: Bale.
THE COURT: Anyone else? Yes, sir?
MR. HEATH: Heath -- with an H (phonetic).
THE COURT: Did you say Hape?
MR. HEATH: Heath.
THE COURT: H-E-A-T-H, right?
MR. HEATH: Correct.
THE COURT: Thank you. All the way in the back.
UNIDENTIFIED MALE: -- with an E (phonetic).
THE COURT: Anyone else on this side? No. Yes, sir?
MR. WALSKIN: Walskin with a W (phonetic).
THE COURT: Yes, ma'am?
MS. DAVIS: Davis, D (phonetic).
THE COURT: Anyone else on this side? Okay. No one. Your determination as to the facts must be based solely upon the evidence admitted during this trial. This will consist generally of the testimony of the witnesses on the stand and any exhibits that are received into evidence. Each of us has a different role -- you and me. Jurors are the judges of the facts. When it comes to determining who is guilty and who is not guilty, that is the judges -- I'm sorry, that is the jury's job. The judge doesn't

do that.

When it comes to finding the facts, the jury does that. Weighing the testimony, jurors do that. Judging the credibility of the witnesses, that's what jurors do. The judge doesn't do that.

But when it comes to the law, the jurors must accept and be guided by the law as I explain it. I am the only one who can say what the law is.

So the question I must ask now is whether or not you would be willing to apply the law as I tell you the law is, even if it differs from what you thought the law was, or even if you think the law is wrong. No hands are raised.

Whether or not you, close friends or relatives are employed in or connected with law enforcement, would you be more likely to believe or disbelieve a witness simply because he or she is a law enforcement officer? Sir? Your name?

MR. WOLFSON: Wolfson, W (phonetic). Anyone else on this side? Anyone on this side? Yes?

MR. SCHULMEISTER: Schulmeister, S.

THE COURT: Anyone else? No one else. Are you involved in any social, religious or professional organization or activity, which might interfere with your ability to judge another person? Sir?

MR. PEROLI: Peroli with a P (phonetic).

THE COURT: Anyone else anywhere? No. Do you have any special problems, which might interfere with your ability to listen, pay attention or otherwise participate as a fair juror? I'm not trying to pry and want to protect confidentiality.

And I'm also willing to make accommodations to your special needs but only if you request reasonable accommodations. So it is up to you to ask. Anybody? Nobody.

If I call your name, please stand up. Ms. Abrams, Ms. Bell (phonetic). Ms. Quadrago (phonetic). Ms. Epstein. Okay, I'm going to -- it's easier to pronounce the first name than the last name, so indulge me. First name Solidad?

SOLIDAD: Here.

THE COURT: Okay. Please forgive me, I would have butchered the pronunciation of your last name. Miller. Orr (phonetic). Parker. Paula (phonetic). Pelk (phonetic). Peruli (phonetic). Shacktel (phonetic). Schulmeister. Wolski (phonetic). Tomlinson.

You are all excused. Please return to the fourth floor and have a wonderful evening. The rest of you please remain seated.

(Jurors exit courtroom)

THE COURT: You may be called upon to answer the following questions if your name is called, because we're in the middle of jury selection, we have 13 people sitting there already. They will be coming in shortly. But not before I go over the questions that you may be asked. They answered the same questions.

Number one, what is your name and occupation? By the way, you'll answer these questions if I ask you, you don't have to write them down on any paper.

What is your name and occupation? Number two, what is the name and occupation of other members of your household including your spouse and/or adult children. For those now retired or unemployed, what was their most recent and usual occupation.

About that question, if they don't live with you, they are not in your household, and what -- and you don't have to answer what their vocation is in connectin with that question anyway.

Number three. Have you previously served on a jury of any kind? If so, what kind, where and did you reach a verdict. Do not tell what verdict you reached if you reached a verdict.

When I say what kind of verdict, I mean was it a civil case, was it a criminal case. Was it a grand juror or were you a petit juror.

In civil juries and grand juries, the plaintiff has to prove the defendant guilty or liable by a preponderance of the evidence. In a criminal case, the petit jury, the State has to prove the defendant guilty beyond a reasonable doubt. It's a higher standard.

Number four, have you or a relative or a close friend ever been convicted of a crime? If so, describe. Would that experience interfere with your ability to render a fair and impartial verdict? Would it in any way bias or prejudice you? This question may be answered at sidebar.

Five addresses the same relationships to you, but the question is accused of a crime. Number six, witness to a crime. Number seven, victim of a crime.

Number eight is, do you have any relatives or close friends employed in or connected with the field of law enforcement? If so, describe. Would that relationship interfere with your ability to render a fair and impartial verdict? Would it in any way bias or prejudice you?

And nine is, is there any reason why you would not be able to be a completely fair and impartial juror in this case?

Please call in the jurors that are outside.

MS. MERCURIO: Your Honor, two jurors here said they knew something of the location and if we could just --

THE COURT: You are so right. Thank you so much. I have their names here. Thank you, Madam Prosecutor.

MS. MERCURIO: Thank you.

THE COURT: That would be Mr. Heath. Where are you Mr. Heath? How are you familiar with the location?

MR. HEATH: I live off of Stuyvesant.

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror, the fact that you have some familiarity with the location? Yes or no?

MR. HEATH: No.

THE COURT: Very good, sir, you may be seated. Then we had -- don't tell me, we had Ms. Davis. Where is Ms. Davis? Ms. Davis, how are you familiar with the location?

MS. DAVIS: Resident of Newark (phonetic).

THE COURT: Would that circumstance interfere with your ability to be a fair and impartial juror?

MS. DAVIS: No.

THE COURT: Thank you so much, ma'am. I think that covers it. Yes. Please call in the potential jurors from the hall.

(Jurors enter courtroom)

THE COURT: State and defense -- can I see you at sidebar, please?

(Sidebar discussion, not audible)

THE COURT: Mr. Mann (phonetic), I'm going to excuse you. Please return to the fourth floor. Have a wonderful evening.

MR. MANN: Thank you.

THE COURT: Let's try to fill -- I was five minutes off, maybe seven minutes. That's good for me really, I'm usually -- I told these folks we would be ready for them at 10 of.

Okay, let's try to fill seat number one.

CLERK: Smith with an S, first name Trina (phonetic).

MS. MERCURIO: Judge, we're missing a juror.

THE COURT: Okay. Another problem. One moment, Ms. Smith.

MS. MERCURIO: There's three empty chairs here.

MS. SANFILIPPO: Yeah, we should only have two.

MS. MERCURIO: Yes.

THE COURT: I think we're missing juror number two. Well -- you know what I'm doing about that? Counsel, when juror number two comes, I'm excusing him. Now we'll have three to fill. Okay? Ms. Smith, come back up, please. Officer, remember when Mr. Johnson comes, he is to be excused.

CLERK: Do you want to wait, Judge?

THE COURT: What?

CLERK: Do you --

THE COURT: No, he can just be sent back down to the fourth floor. Okay, what is your information there, please, Ms. Smith? The questionnaire is right up there.

MS. SMITH: My name is Trina Smith. I'm a senior clerk/typist for the Division of Consumer Affairs. My grandfather is a retired longshoreman and my grandmother is a retired banker. The answer to number three is no. Four is no. Five is no. Six is no. Seven is --

THE COURT: What's no?

MS. SMITH: Six.
THE COURT: Continue, please.
MS. SMITH: Excuse me?
THE COURT: Continue, please.
MS. SMITH: Oh. Seven is no. Eight is no. And I do feel I can be completely fair.
THE COURT: So the answer to number --
MS. SMITH: Nine --
THE COURT: -- nine is --
MS. SMITH: -- yes.
THE COURT: -- no.
MS. SMITH: Yes, I can be fair.
THE COURT: As you wish. Have a seat in seat number one. Let's try to fill seat number two.
CLERK: Herrera with an H (phonetic).
MR. HERRERA: My name is Fred Herrera. I'm currently unemployed. The occupation of my mother, she's a homemaker, my father, he works in a factory -- he -- (phonetic). No, I have never served on a jury. No relative or close friends --
THE COURT: If the answer to any particular question is no, just say no. So the answer to number four is no?
MR. HERRERA: Yes -- no.
THE COURT: Okay, continue, please.

MR. HERRERA: No, number five. Number six, no. Number seven, no. Number eight, no. Number nine, yes, I can be --

THE COURT: Have a seat in seat number two, Mr. Herrera. Thank you. Yes, inside the box here. Next name for seat number nine.

CLERK: Muscara with an M.

MR. MUSCARA: Paul Muscara (phonetic), sales manager ADP. I have a roommate that works for -- is in sales for Bloomberg. Three, no. Four, no. Five, no. Six, no. Seven, yes. Myself --

THE COURT: Do you prefer to speak about that from where you're standing or at sidebar?

MR. MUSCARA: Right here is fine. I have had, believe it or not, four cars stolen from me.

THE COURT: Where and when?

MR. MUSCARA: Various locations.

THE COURT: Any in Essex County?

MR. MUSCARA: Yes. Nutley, South Orange, all recovered in either Newark or Orange. All within the last 10 years.

THE COURT: Is there anything about that circumstance which would interfere with your ability to render a fair and impartial verdict?

MR. MUSCARA: I don't think so.

THE COURT: Would it in any way bias or prejudice you?

MR. MUSCARA: No.

THE COURT: Continue answering the questions, please.

MR. MUSCARA: Eight, no. Nine, no.

THE COURT: Okay. Have a seat in seat number nine. Now we have to try to fill seat number 11. Don't we?

MS. MERCURIO: Mr. Dungee (phonetic) is not here.

THE COURT: I don't see him.

MS. MERCURIO: He's not --

COURT OFFICER: -- nobody else out in the hall (phonetic).

THE COURT: He's gone, he'll be excused when he gets here. We can't wait. Next name.

MS. MERCURIO: Your Honor, may I be heard at sidebar?

THE COURT: Sure.

(Sidebar discussion, not audible)

THE COURT: Valerie, I need you to call down to the fourth floor, please. Dungee -- you might as well find out where -- who was the other one?

MS. MERCURIO: Um --

THE COURT: Wasn't there three? Mr. Johnson.

MS. MERCURIO: Mr. Johnson.

THE COURT: And -- Mr. -- that's two. Check your records, there are at least two.

MS. MERCURIO: Mr. Mann, you -- the Court excused Mr. Mann.

THE COURT: Right. Okay, can you call down there?

VALERIE: Yes (phonetic).

(Pause in dialog)

(Recording off)

THE COURT: The record should reflect that those two jurors must have thought I dismissed them for the afternoon. I told them to come back at 10 of 4.

At any rate -- yes, Ms. Davis?

MS. DAVIS: Adrian Davis, employment specialist. My mother is a regular housewife. The answer to number three is yes.

THE COURT: What kind?

MS. DAVIS: Criminal matter.

THE COURT: Reach a verdict?

MS. DAVIS: Yes, we did.

THE COURT: Anything about your experience

as a juror, which would interfere with your ability to be a fair and impartial juror in this case?

MS. DAVIS: No, it doesn't.

THE COURT: Continue answering the questions, please.

MS. DAVIS: Number four is no. Number five is no. Number six is no. Number seven is no. Number eight -- yes.

THE COURT: Who is that?

MS. DAVIS: My uncle.

THE COURT: What law enforcement agency?

MS. DAVIS: Here in the county.

THE COURT: Anything about that circumstance which would interfere with your ability to a fair and impartial juror?

MS. DAVIS: No.

THE COURT: Would it in any way bias or prejudice you?

MS. DAVIS: No.

THE COURT: What's the answer to question nine?

MS. DAVIS: No.

THE COURT: What law enforcement agency does your uncle work at? If you know.

MS. DAVIS: In the prison (phonetic).

THE COURT: Okay. Have a seat in seat number 11, Ms. Davis. Thank you.

MS. MERCURIO: Judge, may we approach sidebar?

THE COURT: Sure.

(Sidebar discussion, not audible)

THE COURT: Ms. Davis, could you come to sidebar, please?

(Sidebar with juror and attorneys, not audible)

THE COURT: Your challenge, Madam Prosecutor.

MS. MERCURIO: Thank you, Your Honor. The State would like to thank and excuse juror number 12.

THE COURT: Potential juror number 12, you're excused. Please return to the fourth floor. Have a nice afternoon. Next name, please?

CLERK: McGuire with an M (phonetic).

MR. MCGUIRE: Andrew McGuire --

THE COURT: Yes, sir.

MR. MCGUIRE: -- Andrew McGuire, media planner. Parents both dead. No.

THE COURT: What's no?

MR. MCGUIRE: Number three.

THE COURT: Okay.

MR. MCGUIRE: Number four, no. Number five,

no. Number six, no. Number seven, no. Number eight, no. Number nine, no.

THE COURT: Very good, sir, please have a seat in seat number 12. Your challenge, defense.

MS. SANFILIPPO: May I be seen at sidebar?

THE COURT: Sure.

(Sidebar discussion, not audible)

MS. SANFILIPPO: Your Honor, at this time, the defense would like to thank and excuse juror number 10.

THE COURT: Ms. Stewart, you're excused, please return to the fourth floor. Have a good evening. Next name, please?

MS. MERCURIO: Your Honor, I have an application at this time.

THE COURT: Ladies and gentlemen of the jury, we're going to break for the day. I'm going to ask you to be back tomorrow, not at 9 o'clock, so those of you who don't like rush hour traffic, that will be good for you.

I'm going to ask you to be back here at 9:45 sharp. I hope I'm ready to do business with you at 9:45 sharp, if not, please don't charge me too harshly. Please be ready to come in at 9:45 sharp.

Between now and then don't discuss this case

with each other or anyone else. I know you won't be discussing the evidence; you haven't heard any. Have a wonderful night and we'll see you tomorrow at 9:45.

Let me tell you one moment that -- I need to tell you that you may -- you don't have to return to the jury management office today to be scanned out. And this goes for the people in the gallery as well. But you have to repot back to the fourth floor tomorrow to be scanned in before reporting to my courtroom tomorrow.

So I'll see everybody in this courtroom tomorrow at 9:45. Thank you. Have a wonderful evening.

(Jurors exit courtroom)

(Recording off)

THE COURT: -- one, do the parties believe that we're going to need another panel tomorrow morning?

MS. MERCURIO: Judge, based on Ms. SanFilippo's challenges, I -- although I thought I was almost done, I probably plan to challenge a few more.

THE COURT: Okay. Well --

MS. MERCURIO: I only have --

THE COURT: -- we'll --

MS. MERCURIO: -- three left. So --

THE COURT: Okay, that's number one. Number two is, your application, we'll take that tomorrow at 9:35. Is there anything else anyone wants to place on the record?

MS. SANFILIPPO: No, Your Honor.

MS. MERCURIO: No, Your Honor.

THE COURT: Okay. Mr. Minor, we will see you tomorrow, April 9th, 2003 at 9:35. If you're not here at that date at that time a warrant will be issued for your arrest. Your bail will be revoked and the trial will proceed in your absence. Do you understand?

MR. MINOR: Yes, sir.

THE COURT: Good luck until then, Mr. Minor. Thank you, we're off the record for the day.

(Recording off, matter concluded)

I, Jean Mirza, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 11767 to 6890; tape number 2, index number 0001 to 6714; and tape number three, index number 0001 to 4325, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

August 17, 2006

Jean Mirza, AOC #541
G & L Transcription of NJ

(Part One)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CRIMINAL PART
ESSEX COUNTY
INDICTMENT NO. 02-05-1845
A.D. # A-6210-03T4

STATE OF NEW JERSEY,

Plaintiff,

vs.

DAVID MINOR,

Defendant.

TRANSCRIPT
OF
JURY SELECTION

Place: Essex County Courthouse
212 Washington Avenue
Newark, New Jersey 07102

Date: April 9, 2003

BEFORE:

HON. MICHAEL L. RAVIN, J.S.C.

TRANSCRIPT ORDERED BY:

DEBORAH U. BROWN, (OFFICE OF THE PUBLIC DEFENDER)

APPEARANCES:

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Attorney for the State of New Jersey

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THE COURT: This is the matter of State vs. David Minor, on Indictment 2-5-1845, appearances, please.

MS. MERCURIO: Good morning, Your Honor, Diane Mercurio for the State.

MS. SANFILIPPO: Good morning, Your Honor, Dawn Sanfilippo on behalf of Mr. Minor.

THE COURT: Mr. Minor was told to be here at 9:35 yesterday, he's not here, where is he?

MS. SANFILIPPO: Your Honor, he was seen by both the Prosecutor and some other people on the floor. I believe he --

THE COURT: Yes, ma'am.

MS. SANFILIPPO: -- may have gone into the men's room.

THE COURT: My officer said he checked the men's room and he wasn't there.

MS. SANFILIPPO: That's what other people in the hallway indicated though, that saw him walk into the men's room. I don't -- I checked the hall --

THE COURT: Okay.

MS. SANFILIPPO: -- the stairwell. I mean he's here in the building. One -- someone in the hall said they saw him pop in, his head in the court room and then go into the men's room.

THE COURT: Well, he's starting to come when he wants to come and it's not going to happen that way. I'm starting -- I'm taking Ms. Mercurio's ch -- you have an application that you wanted to make, yesterday, we're starting.

MS. MERCURIO: Yes, Your Honor, I --

THE COURT: What's your application?

MS. MERCURIO: Your Honor, my application is --

THE COURT: But let me just -- let me just say one more thing. He was told if he wa -- if he wasn't here when I told him to be here the proceedings would take place in his absence. Your objection is noted for the record, Ms. SanFilippo.

MS. SANFILIPPO: Thank you.

THE COURT: Yes, Ms. Mercurio.

MS. MERCURIO: Your Honor, I have an application based on the challenges the defense has made this far for the jury selection. I would submit that there's a prima facie case made that the defendant -- defense has also violated the --

THE COURT: What -- what cognizable classes are you alleging --

MS. MERCURIO: Afr --

THE COURT: -- were stricken?

MS. MERCURIO: -- the -- the white -- the white race, Your Honor, or -- every single one except for one of her challenges were white either male or female. I'm sorry two.

MS. SANFILIPPO: Two.

THE COURT: You need not respond Ms. SanFilippo. I've noted all the challenges thus -- thus far and at this particular -- at this particular posture, the number -- the third challenge was a black fe -- female. The fifth challenge was a black female. And I'm not prepared to find that the prima facie case has been made at this time. The motion's denied.

MS. MERCURIO: Judge, I'd like to further make a complete record, if I may.

THE COURT: Well, make a complete record.

MS. MERCURIO: Your Honor, pursuant State vs. Johnson, it is illegal for the defense as well the State to exclude a particular cognizable group based on race and in this particular matter the State would submit it -- the -- it is the White race. The defendant, there have been numerous African Americans put on the jury panel with relatives in law enforcement, with -- being victims of crimes, however, the defense has chosen not to exclude those individuals, but instead only the White jurors that

have been seated.

THE COURT: Continue. Were you done?

MS. MERCURIO: I'll let Your Honor finish, Judge.

THE COURT: No, I said continue speaking.

MS. MERCURIO: Your Honor, under State vs. Johnson, 325 New Jersey Super. an Appellate Division case in 1999, it's clear the defense is not permitted to do such a thing just as the State is not to do that. And, I submit other than just the two -- as a matter of fact, the last black female that the defense excluded I note that there was really no criteria for the defense to exclude and I would submit that that was just done on a pretense to make a showing that she was not being discriminatory in her jury challenge selections. There was absolutely nothing indicating from that juror that she would either be pro or against the defendant. And, she was just -- there -- appear to be no reason at all for her -- her exclusion other than to just throw her in the mix to show that the defense was not just excluding White people from the panel. And, I believe it's very clear, Your Honor, that the defense has been this -- there is a pattern here and I believe a prima facie case has been made, I don't believe there's a high burden for the State to show that. The State was

challenged based on its exercises of challenge. The State excluded two White individuals in its mix of black challenges and the Court did find there was a Gilmore (phonetic) violation and I don't see at this point what the difference is because it's clear from the jury panel since the majority of people being put in the box are African American, her selection of only White jurors to challenge is suspect at this point.

THE COURT: Thank you. I've ruled. Mr. Minor.

MR. MINOR: Yes, sir.

THE COURT: You have to come here when I tell you to be here, not when you want to come here.

MR. MINOR: The door was locked, sir, I was outside for quite a minute.

THE COURT: Well, my officers went and looked for you and so did your attorneys look in the hall and they didn't find you, what's your explanation for that?

MR. MINOR: I was out there, sir, I walked down to the bathroom --

THE COURT: Well, where exactly were you because your lawyer couldn't find you?

MR. MINOR: I was down the other end 'cause I didn't want to stand by the jury.

THE COURT: My officer checked the whole

hall, didn't you, Officer?

COURT OFFICER: Yes, Judge.

THE COURT: The point of the matter is this, you're developing a trend of being a little late, don't continue it, do you understand?

MR. MINOR: Yes, sir.

THE COURT: Okay. Thank you. You may be seated. I'm -- I am now ready to rule on the sanitization of the drug convictions. They will not be sanitized. They're not similar to the robbery. I will give you the option of submitting your own limiting instruction, Ms. SanFlippo, if your client is gonna testify --

MS. SANFILIPPO: Yes, Your Honor.

THE COURT: -- you submit to me, run it by the Prosecutor first, what, if any, limiting instruction you want concerning the use of the prior convictions to impeach. Okay.

MS. SANFILIPPO: Thank you, Your Honor. Anything else anybody want to place on the record?

MS. MERCURIO: Yes, Judge, I just need the name -- first name of juror number 6. First and last name.

COURT CLERK: Bridget Clark.

MS. MERCURIO: And, juror number 1.

COURT OFFICER: Trina Smith.

MS. MERCURIO: Trina?

COURT CLERK: Yes.

THE COURT: I think where we're at is we -- the seat that's not filled is seat number 10. Calls the jurors in, please, prospective jurors.

(Prospective jurors entering Court room)

MS. MERCURIO: Judge, may we approach?

THE COURT: Yes.

(off record)

THE COURT: Mr. Gungi (phonetic), you're excused, please report to the fourth floor.

(Off record)

THE COURT: What about potential juror number 8?

COURT CLERK: I believe that's the lady that had the flat.

THE COURT: That's the lady that had the flat tire. What time did she call?

COURT CLERK: She called about 20 minutes after and said that she was on her way.

THE COURT: Counsel, I have two choices, these are the choices, we either proceed with jury selection right now so that these good people don't have to wait. And then when potential juror number 8

gets here, I'll excuse her and tell her to report to the fourth floor or we can just wait. I'll hear either of you.

MS. SANFILIPPO: May we approach, Your Honor.

THE COURT: Sure.

(Sidebar)

MS. SANFILIPPO: I'm concerned that delaying the trial is going to upset the panel. I --

THE COURT: Is gonna what?

MS. SANFILIPPO: Is gonna upset the people that are sitting there, but don't even remember at this moment, so I'm not --

THE COURT: That's -- that's -- okay, well, it will wait, she's not here. So, what do you want to do?

MS. MERCURIO: I would like to wait, Judge, it's not that much late after you told it would be. This is like -- this is now the third juror that the State has denied attempt to excuse, the State is being prejudiced by the fact the jurors are being dismissed on a --

THE COURT: If -- if I --

MS. MERCURIO: -- and I don't believe there's --

THE COURT: -- if you were able to challenge

this I'm give and ask more challenges, what's your prejudice?

MS. MERCURIO: Judge, I don't think it's -- I don't think I'm gonna be allowed to have more challenges --

THE COURT: If I --

MS. MERCURIO: -- based on that reason --

THE COURT: -- if I give you --

MS. MERCURIO: -- and I don't want the record to be -- I --

THE COURT: I have wide discretion with regard to jury selection, the matter is to appear (phonetic) if that's a concern of yours, Ms. Mercurio.

MS. MERCURIO: It is, Judge, I mean, I think it's a legitimate concern. I mean --

THE COURT: I'm not saying --

MS. MERCURIO: -- so far.

THE COURT: -- it's legitimate but I -- it's also legitimate for me not to keep people waiting.

MS. MERCURIO: Well, Judge, yesterday when you excused Mr. Bungie (phonetic) and the other, John -- Mr. Johnson, we didn't know what happened to him. We do know she's on her way and she's making an effort to get here, so, I think the fact that she's gonna make the effort to get here at this point --

THE COURT: How --

MS. MERCURIO: -- she should be allowed to --

THE COURT: -- how long would you suggest -- how long would you suggest I wait --

MS. MERCURIO: I -- I don't know, Judge, I didn't take the call, so I don't know how -- how long ago it came in, but I don't think she's gonna be that much delayed.

THE COURT: I'm excusing her.

(End sidebar)

THE COURT: Ms. Mercurio, one more thing.

(Sidebar)

THE COURT: What is your position?

MS. SANFILIPPO: Your Honor, I like the juror and -- but I also don't want to upset the jurors that are here. So, it -- I -- I'm really -- I'll def -- I'll defer to the Court's ruling, I mean, he's -- she was a lab technician, a widow, I don't even have her race written down.

THE COURT: So, you both want me to wait.

MS. SANFILIPPO: I -- I don't even have her race written down, I just liked her, I don't know. I -- so, there is no more issue other than --

MS. MERCURIO: Is there anyway you can get in touch with her? Did she leave a cell phone or

something? If we can get an idea how long she'll be.

THE COURT: Patricia?

COURT CLERK: Uh hum.

THE COURT: When did -- again, what time did this person call?

COURT CLERK: It was 20 after 9 -- after 9 she said she got a flat tire, triple A was there and she was on her way.

THE COURT: Did she say where she was on her way from?

COURT CLERK: No.

THE COURT: Did she leave a telephone number?

COURT CLERK: I would have to ask Nora, 'cause Nora actually took the call.

MS. SANFILIPPO: She only comes from East Orange. What's the other juror that was picked?

THE COURT: Uh hum?

MS. SANFILIPPO: What the --

MS. MERCURIO: Is that Mr. Johnson?

THE COURT: Okay. I -- I -- he's -- here's the other -- here's another option. Either I can wait for this person --

MS. SANFILIPPO: I don't remember.

MS. MERCURIO: He's number two. I think the -- he -- he was in the seat yesterday, he sits in

number two.

THE COURT: Yeah, why is he here? Was that --

MS. MERCURIO: That's not Mr. Johnson.

MS. SANFILIPPO: Yeah, that's Johnson.

MS. MERCURIO: No, he -- he was excused.

(End sidebar)

THE COURT: You're Mr. Johnson, aren't you?

JUROR: No, Verdoti (phonetic).

THE COURT: Right.

(Sidebar)

MS. MERCURIO: Oh, three.

THE COURT: Yeah, well --

MS. MERCURIO: Oh, I think that juror there is sitting in the wrong seat.

THE COURT: Oh, okay.

COURT CLERK: She was on her cell phone, she was on her way, but she didn't leave a number.

THE COURT: She didn't leave the number?

MS. MERCURIO: She said Triple A was already there?

MS. MERCURIO: Yeah, she was on her way.

THE COURT: When are we gonna have that new panel?

COURT CLERK: They should be sending them up

in about 15 minutes, or 15 minutes from when I spoke to you the first time.

THE COURT: And how long ago was that?

COURT CLERK: Probably about 15 minutes ago.

THE COURT: Well, probably is. Folks, how about this idea? How I tell these folks to come back at eleven, because you people still have -- exhaust this panel.

MS. MERCURIO: Eleven. No, well, do you have a lot more?

MS. SANFILIPPO: I don't think so, I'm -- I can withdraw. I -- I think --

MS. MERCURIO: I think we're really close, Judge.

MS. SANFILIPPO: -- it's real close, Judge.

THE COURT: I called for a new panel.

MS. SANFILIPPO: Well, it's a close all, Your Honor, I --

THE COURT: Okay. Well, we'll have them here if we need them.

MS. SANFILIPPO: Who was that that just left? Was he was he one that was excused?

MS. MERCURIO: No.

THE COURT: I'm --

MS. MERCURIO: No, I didn't excuse that guy.

COURT CLERK: Judge, that one was Don Johnson sitting there in number 3.

THE COURT: So, is that straightened out --

MS. MERCURIO: Oh, he was the one that got --

COURT CLERK: -- down and Mr. McDonity (phonetic) brought --

THE COURT: Okay. So, we're all right now?

MS. MERCURIO: Yeah.

MS. SANFILIPPO: Okay. So, other than having the vacant seat which we have and -- and the flat tire.

MS. MERCURIO: But they -- do you want to wait, Judge?

THE COURT: Listen, if it were to me, I would -- I would go right ahead because I'm -- I'm saying I don't know how much that other juror really would -- would have disappointed that juror with -- prospective juror, would be if they got here and said, oh, your jury service is completely bingo (phonetic) --

MS. MERCURIO: What -- what --

THE COURT: -- I don't know how upset they would find it. You seemed to suggest that person wouldn't find it terribly upsetting.

MS. MERCURIO: Well, she said she --

THE COURT: My preference would be --

MS. MERCURIO: -- they already were there --

THE COURT: -- to go ahead.

MS. MERCURIO: -- and that they were done -- they -- they were working on it or --

THE COURT: Yeah, I -- I understand all of that.

MS. MERCURIO: I don't know how far she's away, but I think she's gonna be here momentarily, Judge.

THE COURT: Okay. You want to wait. We'll wait. How long do you want to wait?

MS. MERCURIO: Let's give it -- did she say where she was when it happened?

MS. SANFILIPPO: She can only be coming from East Orange.

MS. MERCURIO: She was in East --

MS. SANFILIPPO: No, no, no. She's from East Orange.

MS. MERCURIO: Oh, well, then why don't we --

THE COURT: So, she's probably --

MS. MERCURIO: How about let's just wait a half an hour. How's that?

THE COURT: And if -- let's -- what shall I do give this jury a break for 35 minutes now and I have an hour if she comes back in five minutes well, that's just -- I'll listen.

MS. SANFILIPPO: Here's another suggestion. I don't know -- why don't we just proceed with next round on filling that seat?

MS. MERCURIO: We could do that, Judge.

MS. SANFILIPPO: Are you -- you -- are you saying you like this woman?

MS. MERCURIO: I believe -- yes, I believe there was -- she was acceptable to me so --

MS. SANFILIPPO: Okay. She was acceptable to me. So, I don't have a problem with knowing that she's there -- or -- or actually, I mean, we know who she is, if at some point you wanted to challenge her, you just challenge without her not being there.

MS. MERCURIO: We could probably proceed, Judge.

MS. SANFILIPPO: And, just keep her chair.

MS. MERCURIO: Even if her chair is empty.

THE COURT: Okay.

MS. SANFILIPPO: I know who --

MS. MERCURIO: I -- I don't think it will be that long.

MS. SANFILIPPO: I know who she is.

THE COURT: Great.

MS. SANFILIPPO: Okay.

THE COURT: That's a great solution.

(End sidebar)

THE COURT: So, that worked, I just have to fill seat number 10, is that correct?

MS. MERCURIO: Yes, Your Honor.

THE COURT: Okay. We're gonna proceed. Call the next name, please.

COURT CLERK: Heath, with an H.

THE COURT: Heath.

COURT CLERK: Heath, Jerome Heath.

THE COURT: Heath is not here.

COURT CLERK: Forkburker (phonetic) with an F.

THE COURT: Good morning, ma'am.

JUROR: Good morning. My name is Lawrence Forthberger, I'm a social worker. My husband is a programer. I have two children in school. I have not served on a jury. The answer to number 4 is, no. Number 5 would be, no. Six would be, no. I had a car stolen probably around 9 years ago when I lived in Connecticut.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Would bias or prejudice you in

anyway?

JUROR: No. Um, -- for number 8, I'm a social worker, I work for a medical company and I'm contracted to work in the corrections facility (phonetic).

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Would it bias or prejudice you in anyway?

JUROR: No.

THE COURT: Finally, number 9, ma'am.

JUROR: No.

THE COURT: Okay. Please have a seat in seat number 10.

MS. MERCURIO: Your Honor, I'm gonna excuse this juror she's -- if it's my turn.

THE COURT: Oh, okay --

MS. MERCURIO: I believe it is, correct?

THE COURT: -- well, it is your turn. Saved you a few steps, ma'am.

JUROR: Okay.

THE COURT: Please report to the fourth floor, have a nice day.

JUROR: Thank you, you too.

THE COURT: Ms. Davis, do you have a question?

JUROR: May I approach sidebar, please?

THE COURT: Yes.

(Sidebar)

(Not speaking into microphone)

MS. DAVIS: -- wasn't in the hallway in the -- I --

THE COURT: Then I'll excuse you, have a nice day.

MS. DAVIS: I didn't --

THE COURT: Please report to the fourth floor, you're excused. Okay.

MS. DAVIS: -- and I -- he's -- recognized -- I -- didn't -- okay.

THE COURT: Ms. Davis is excused by the Court for cause.

(End sidebar)

THE COURT: Attempting to fill seat number 10. Next name, please.

COURT CLERK: Pezutto (phonetic), with a P. Pezzutto. Laura Pezzuto.

THE COURT: Next.

COURT CLERK: Graham, Andrew Graham.

THE COURT: Good morning, ma'am.

JUROR: Good morning. My name is Andrew Graham. I'm an East Orange firefighter. My fiancee, he's a on site (phonetic) investigator for the East Orange Fire Department.

THE COURT: Let me stop you right there. That's a law enforcement connection as far as I'm concerned.

JUROR: Yes, it is.

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

JUROR: Yes, sir.

THE COURT: I'll excuse you. Please return to the fourth floor.

JUROR: Okay.

THE COURT: Have a nice day.

JUROR: You too.

THE COURT: Listen ladies and gentlemen that are out there, you will note about me that I monitor what people say very, very closely and it's extremely important to the fairness of the proceeding that I not let anybody say something that in anyway in elaboration or explanation which could influence the rest of you if you heard it. So, when you hear me almost stop people

in mid sentence, never confuse that with your views (phonetic) my (phonetic) part. That's a personal matter, I'll talk to anybody that would talk to me about anything for as long as they want to talk. But insofar as my professional responsibility goes, my job is to ensure that nothing in -- infringes on what you folks have to have exist (phonetic). And that is open minds with complete impartiality. So, I eliminate any or try to that you will hear something that will taint you. And that is the reason why I tend not to allow explanations or things once I know where something's going. Just so you know how I'm operating. Okay. Let's see, next one, please.

COURT CLERK: Sarro, with an S.

THE COURT: Good morning.

JUROR: My name is Keith Sarro, I'm a 28 year old accounting for a publishing company. I'm engaged. My fiancee is also an accountant for a retail company. Answer to number 3 is, no. Answer to number 4 is, no. Answer to number 5 is, no. Answer to number 6 is, no. Answer to number 7 is, no. Answer to number 8 is, no. Answer to number 9 is, no.

THE COURT: Very good, sir, please have a seat in number 10 and let the record reflect that potential juror number 8 has arrived. These things

happen, ma'am. That would be Ms. Mainy (phonetic) for the record. Did I pronounce your name right?

JUROR: Yes.

THE COURT: Okay. Let's try to fill seat number 11, please.

COURT CLERK: Gilbert, with a G. Robert Gilbert.

JUROR: My name is Robert Gilbert, I'm an attorney I do defense work an insurance company --

THE COURT: Anything about the fact that you're an attorney, sir, which would interfere with your ability to be a fair and impartial verdict -- a fair and impartial juror?

JUROR: No.

THE COURT: Anything about the fact you're an attorney which would in anyway interfere with your ability or willingness to apply the law as I tell you the law is?

JUROR: No.

THE COURT: Proceed, please.

JUROR: I'm married, my wife's a homemaker. I have two children. I never served on a jury at any time. Number 4 is, no. Number 5 is, no. Number 6, is no. Number 7 is, yes.

THE COURT: Do you prefer to speak about that

at sidebar or from where you're standing?

JUROR: No, at sidebar.

THE COURT: Okay. Counsel.

(Sidebar)

JUROR: My first cousin was shot and killed two months ago by an estranged husband. He was in the house and the husband broke in and shot him.

THE COURT: Might that compromise your ability to be fair and impartial?

JUROR: It might. It's --

THE COURT: I'm going to excuse you.

JUROR: Okay. Thank you, very much.

THE COURT: Okay. Have a nice day, sir.

(End sidebar)

THE COURT: Okay. The juror's excuse by the Court. Next name, please.

COURT CLERK: Kozatek with a K, Raymond.

JUROR: My name is Raymond Kozatek, K-o-z-a-t-e-k. My occupation is a lithographer. My wife is a -- an accountant or a bookkeeper and accountant for a church. And, I'm married, I am employed. I previously -- I --

THE COURT: What do you do?

JUROR: Excuse me?

THE COURT: I'm sorry. You said you're, what

do you do for a living?

JUROR: A Lithographer, a printer.

THE COURT: Right. Continue, please.

JUROR: Printing commercial advertizing.

THE COURT: Uh hum.

JUROR: And, I have two children, a 23 year old and a 21 year old, one's attending college. Graduation this June and my son is in construction and they both live at home. And, I served on a jury several times before. We did reach a verdict, one was a civil and one was a criminal case.

THE COURT: So, you understand that the distinction in burden of proof, don't you?

JUROR: Yes.

THE COURT: Continue, please.

JUROR: Ah --

THE COURT: Did you reach a verdict in the criminal case?

JUROR: Yes.

THE COURT: Continue, please.

JUROR: No, for number 4. Number -- no, to number 5. Number 6 I would -- with a relative, I'd like to have sidebar.

THE COURT: Come right up, sir.

(Sidebar)

JUROR: My first cousin which was my best man at my wedding and also I grew up with the gentlemen, was brutally murdered in New York and stuck in the trunk of his car in 1983, so I'm very sensitive to the issue about firearms.

THE COURT: Then I'll excuse you. Please return to the fourth floor.

JUROR: Thank you very much.

THE COURT: Have a nice day, sir.

(End sidebar)

THE COURT: Potential juror is excused by the Court. Next name, please.

COURT CLERK: Gonzalez, with a G.

UNIDENTIFIED: Judge, a juror has their hand raised.

THE COURT: Yes, sir.

JUROR: Sidebar.

THE COURT: Yes, come right up.

(Sidebar)

JUROR: I was sleeping on it and I feel guilty, so I want to mention this.

THE COURT: I'll excuse you, please return to the fourth floor. Thank you. Have a nice day.

UNIDENTIFIED: Thank you.

(End sidebar)

THE COURT: Potential juror is excused by the Court.

(Off record)

THE COURT: Did we -- okay. Ms. Gonzalez.

JUROR: Good morning. My name is Angela Marie Gonzalez. I'm a genetic technologist. My husband is a sales representative for Sinoatrial (phonetic) which is a major security company. I have not previously served on a jury. The answer to number 4 is, no. The answer to number 5 is, no. Six is, no. Seven is, no. Eight is, no. Nine is, no.

THE COURT: Very good, Ms. Gonzalez, please have a seat in seat number 11. Let's call for seat number 2.

COURT CLERK: Brockston (phonetic) with a B.

JUROR: My name is Brockston, I'm semi retired and incorporated as a technical write. I have a nephew that lives with me. He's technical support for Comcast. I have served on a jury before. A criminal case we did reach a verdict.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Continue, please.

JUROR: And answer to number 4 is, no. The answer to number 5 is, yes.

THE COURT: Do you prefer to be heard at sidebar?

JUROR: Okay.

THE COURT: I'm sorry?

JUROR: Yes.

THE COURT: Okay.

(Sidebar)

THE COURT: Thank you.

UNIDENTIFIED: Sarro or Savo.

JUROR: I was once also accused of a crime of assault and battery of a -- a dry cleaner. And --

THE COURT: Would that affect your ability to be fair and impartial?

JUROR: Um, I don't think so. I have to say though, that the charge was initiated by a police officer.

THE COURT: Okay.

JUROR: And, the judge wanted to hear the case after they wanted to have it dropped and once he heard the case he threw it out. So, I don't know if I need to talk about it further.

THE COURT: No, you don't, I'm gonna excuse you.

JUROR: Okay.

THE COURT: Please return to the fourth floor. Have a nice day, ma'am.

JUROR: Thank you.

THE COURT: Thanks for your candor.

JUROR: Uh hum.

(End sidebar)

THE COURT: The potential juror is excused by the Court. Next name, please.

COURT CLERK: Rodriguez, with an R.

JUROR: Good morning.

THE COURT: Yes.

JUROR: Joseph Rodriguez, chemical operator. My wife is a manager of a retail firm. I have served on a previous jury, civil case, we reached a verdict.

THE COURT: You understand the distinction and burden of proof as I explained it?

JUROR: Yes, I do.

THE COURT: Continue, please.

JUROR: Number 4 is, no. Number 5, no. Number 6 is, no. Number 7 is, no. Number 8 is, no and number 9 is, no.

THE COURT: Very good, sir. Please have a seat in seat number 2. Defense challenge.

MS. SANFILIPPO: Your Honor, at this time the

defense would like to thank and excuse juror number 9.

THE COURT: Okay. Juror number 9, you're excused, please return to the fourth floor. Next name, please.

COURT CLERK: Moore (phonetic) with an M, Curtis Moore.

JUROR: My name is Curtis Moore, I'm a retired firemen. My wife's name is Betty Ann Moore. She's a retired supervisor for New Jersey Bell. I have two children, grown children, both married. And, three grandchildren. No, I never served on a jury before. Have you -- answer to 4 is, no. Five is, no. Six is, no. Seven is, no. Eight is, no. And, nine is, no.

THE COURT: Very good, sir, please have a seat in seat number 2. Seat number --

UNIDENTIFIED: 9.

THE COURT: -- 9, I'm sorry. State challenge.

MS. MERCURIO: Your Honor, please thank and excuse juror number 6.

THE COURT: Ma'am, you're excused, please return to the fourth floor, have a nice morning.

JUROR: All right, thank you, you too.

THE COURT: Thank you. Next name, please.

COURT CLERK: Merit (phonetic) with an M.

JUROR: My name is Charlotte Merit, I work for a major pharmaceutical company where I negotiate drug approvals of foreign governments. My husband is a chief information officer for a business services firm. I served on a jury about six years ago, criminal case, we did reach a verdict.

THE COURT: Do you understand the distinction of burden of proof?

JUROR: Yes.

THE COURT: Continue, please.

JUROR: Answer to 4 is, no. Answer to 5 is, no. Answer to 6 is no. The answer to 7 is, yes. We had a car broken into and a house broken into.

THE COURT: When?

JUROR: Um, the car was maybe three years ago and the house was five or six, I don't remember exactly.

THE COURT: Anything about either of those experiences which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Anything about those experiences which would bias or prejudice you?

JUROR: No.

THE COURT: Continue, please.

JUROR: Answer to 8 is, no. And, the answer to 9 is, no.

THE COURT: Okay. You may be seated in seat number 6.

JUROR: May I approach sidebar?

THE COURT: Okay. You mean, you have all no answers and you still want to approach sidebar?

JUROR: If you don't mind.

THE COURT: Okay.

(Sidebar)

JUROR: Yesterday when you were describing personal hardship you said that jobs weren't an excuse or even, but my job is driven by government deadlines that don't change and when I'm not in the office there's no one to do the work which means I've got 8 or 10 hours work to do when I leave here every day. And, I'm not sure for a case that's gonna run over a week that that wouldn't be a personal hardship for me.

THE COURT: I'll excuse you.

JUROR: Okay.

THE COURT: Please return to the fourth floor.

JUROR: Thank you.

(End sidebar)

THE COURT: Juror is excused by the Court.

You know what this means, ladies and gentlemen, don't you? And -- well one good thing is we don't have to wait for a panel to be sent up from downstairs 'cause they're already outside I'm told. The only issue is for me to try to predict how long it's gonna take between now and the time you come back into the court room. I am gonna call at 25 minutes, that's what I'm gonna say. To the extent, I'm wrong, I'll communicate with you if there -- if I can't get back to you after 25 minutes. That's what I'm thinking, my educated guess. Please don't discuss the case with each other or anyone else. See you ready to come back in the court room in 25 minutes. Thank you.

(Jurors exit the court room)

COURT OFFICER: Folks, please the floor because we have -- another panel of jurors --

THE COURT: How many do we have Lacretia (phonetic) out there? How many?

(Off record)

(On record mid sentence)

THE COURT: -- Court, my name is Michael L. Ravin, I am a Superior Court Judge with the State of New Jersey and you've been drawn as prospective jurors in this criminal case State vs. David Minor. I recognize that serving as a juror is inconvenient but

jury service is an important duty of citizenship. Having jurors available to decide the facts in the case is fundamental to our entire system of justice. The Courts cannot function without members of the public offering their time to serve as jurors. If it's any consolation to any of you who would prefer not to be here, I should tell you that I was called for jury duty just last week, I heard the orientation, I sat down there, I didn't get sent out, but we all have to -- we all have to go to jury duty, there's very few except -- exceptions these days. The first job we have is to select fair and impartial jurors, that is ones with open minds and therefore, we have to explore your ability to be fair to both sides here. The questioning is not meant to pry unnecessarily into your private affairs or lives. Answer with a sense of honesty and fairness to the defendant and to the State, because they are neither right nor wrong answers. Your goal must not be either to get on this jury or to get off this jury. Your only job now is to be absolutely and completely honest in answering all question put to you.

After I have asked you a number of questions which relate to your ability to hear and decide this case with an open mind and with complete impartiality the attorneys can exercise the right to excuse one or

more of the jurors without giving any explanation or reason. Those judgments are not easy ones to make. If you are excused in that manner, please do not take it -- take it personally, no offense is intended. It does not mean that you would not be fair in some other case. The right to excuse jurors is important to both sides. Also, note that no one here can excuse you from jury service. What does that mean? That means if you're excused during this jury selection process in my court room, you're only gonna be going back down stairs, get scanned in to be available for some other judge for some other case. I cannot excuse you from jury service.

Please, if you're excused during the jury selection process, please do not discuss this case with any -- between yourselves or anyone else when you get downstairs. I'm gonna be asking you a series of questions. If the answer to any question I ask would be yes, what I want you to do is simply raise your hand, you don't have to stand up, just raise your hand. I will point to you. In a loud, clear voice, please tell us your last name and the first letter of your last name, that's your last name and the first letter of your last name. You won't have to tell me why you're answering yes, we'll get into that later. If

your hand goes up, I'll point to you, you give me your last name.

Okay. Now, if any question touches on a sensitive matter, or for some personal reason you feel you could not be fair here, you may tell us at sidebar to my left, so that no one can hear. And we do this over at the side of the bench because there is the risk that your comment could influence the other jurors if they heard it. And, you also might feel more comfortable in responding to the questions in some degree of privacy rather than in front of everyone in the court room. This will be on the record the same as every other word that is spoken in the court room.

The attorneys and I expect this case to be over no later than April 17th, 2003. Notice the words I used, that is when we expect the case to be over. Could it be over sooner? Yes. Is it likely to be over sooner? Well, as a matter of fact it is likely, although you should not infer anything about the importance to -- of the case to both sides from the length of the trial. The part of the matter this, I'm calling this case over no later than April 17th, 2003. That's no guarantee though. This is the question. Would service on a trial of this length be an extreme personal hardship to any jury? Now, before you start

raising the hands, let me tell you what I mean by extreme personal hardship. As a matter of fact it probably more easily defined if I tell you what it does not include.

I assume that your being here today is a hardship to someone. For example, your being here today is a hardship on those whom you supervise who depend upon you for supervision, counseling and advice. Your being here today is a hardship on your bosses and employers who depend upon you to get the work done. I do not mean that those hardships, when I ask about extreme person hardships, I'm asking a jury service of the length I have identified would be an extreme personal hardship on you. And it is at this time that I will take that show of hands of any. Okay. Let's start on this side. Ma'am.

JUROR: Roland, R.

THE COURT: Next. Yes, ma'am.

JUROR: Kit (phonetic), K.

THE COURT: Okay. Yes, ma'am.

JUROR: Gentry (phonetic), G.

THE COURT: Yes.

JUROR: Dolive (phonetic), D.

THE COURT: What's your last name?

JUROR: Dolive.

THE COURT: Thank you. Anyone else on this side?

JUROR: Okay. Let's go to this side. Yes, sir.

JUROR: Willis, W.

THE COURT: Yes, ma'am, striped shirt.

JUROR: W. Clark.

THE COURT: What's your last name?

JUROR: Clark.

THE COURT: Clark with a C. W. Clark, okay. Yes, ma'am.

JUROR: Folga (phonetic), F.

THE COURT: Yes, sir.

JUROR: Ward, W.

THE COURT: Okay. Anyone else? No one else. What follows is a description of the charges in this case from the indictment. This indictment charges the defendant, David Minor with armed robbery upon Lidwin (phonetic) Cummings on January 11th, 2002 in Newark. Unlawful possession of a firearm, a handgun without first having obtained a permit to carry the same on January 11, 2002 in Newark. And the third count possession of a certain weapon, a handgun with the purpose to use it unlawfully against a person or property of another on January 11th, 2002.

Well, those are the charges in the indictment and having said that, this indictment, it's no evidence of guilt. The indictment is simply a step in the process by which a matter is brought to a jury for your ultimate decision. The defendant has pled not guilty to the charges and is presumed to be innocent unless and until each and every essential element of the offense or offenses charged is proven beyond a reasonable doubt. The burden of proving each element of the charge beyond a reasonable doubt rests upon the State and never shifts to the defendant. It is not the defendant's obligation to prove his innocence or to offer any proof at all relating to his innocence. Is there anything about the nature of these charges which might affect your ability to be a fair and impartial juror, just the charges alone? No hands, okay, we do have some hands raised. Yes, ma'am.

JUROR: Pilla (phonetic), P.

THE COURT: Okay. Continuing on this side, yes.

JUROR: Dault (phonetic), D.

THE COURT: Anyone else on this side?

JUROR: Walker, W.

THE COURT: Where are you? Okay. First, name start with an L, sir?

JUROR: Yes.

THE COURT: Thank you. On this side, anyone? No one, okay. Have you ever heard anything about this case either from the media or from any other source? No hands are raised. The assistant prosecutor will now introduce herself and tell you the location where the alleged crimes took place. Madam.

MS. MERCURIO: Thank you, Your Honor. Counsel, good morning, ladies and gentlemen, my name is Diane Mercurio, I'll present the evidence to you on behalf of the State. The location of this incident is the intersection of Styverson (phonetic) Avenue, 18th Avenue and Valley Street in Newark, New Jersey. Thank you.

THE COURT: Thank you, Ms. Mercurio. Defense counsel will now introduce herself and her client. Madam.

MS. SANFILIPPO: Good morning, ladies and gentlemen, my name is Dawn SanFilippo and I maintain my offices in Cedar Grove. I'd like to introduce you to Mr. Minor who I have the pleasure of representing.

MR. MINOR: Good morning.

THE COURT: Thank you, Ms. SanFilippo. I'm now going to tell you the names of persons whose names you might hear during the trial. These persons will

not necessarily be called as witnesses. From the Newark Police Department, Police Officer Chris Prestone (phonetic), Detective Michael Turico (phonetic), Detective Keith Hughes, Detective Michael DeFabio (phonetic), and Police Officer Ramon Negron (phonetic). From Irvington, New Jersey, Lidwin Cummings, from the Essex County Prosecutor's Office investigator John Campo (phonetic). From Newark Willena (phonetic) Wheeler (phonetic) and from Newton, New Jersey, Camise (phonetic) Henderson.

Because knowing someone who may have a relationship with this case might influence your independent and impartial judgment of the fact, I need to know if you recognize any of the names you've just heard or if you know any of these folks. Okay. No hands are raised. Is any juror familiar with the location as referenced by the assistant prosecutor? Okay. Ma'am.

JUROR: Roland, R.

THE COURT: Okay. Sir.

JUROR: Dolive, D.

THE COURT: Yes, ma'am.

JUROR: Pilla, P.

THE COURT: Yes, ma'am.

JUROR: Geffrey (phonetic), G.

THE COURT: All the way in the back.

JUROR: Walker, W.

THE COURT: And, again that is L. Walker. Okay. On this side. Okay. All the way at the back corner.

JUROR: Walter, W.

THE COURT: Walter?

JUROR: Moore, W.

THE COURT: Moore. Okay. That is first initial of the first name is W. Okay. Sir.

JUROR: Willis, W.

THE COURT: All the way in the back.

JUROR: Heath, H.

COURT CLERK: I'm sorry, Judge, I didn't get that.

THE COURT: Heath, H. Yes.

JUROR: Natali, N.

THE COURT: Anyone else? Yes.

JUROR: Reeves, R.

THE COURT: Anyone else? No one else. Your determination as to the facts must be solely upon the evidence admitted during this trial which will consist generally of the testimony of the witnesses on the stand and any exhibits that are received into evidence. Each of us has a different role. Jurors are the sole

judges of the facts. Jurors are the only ones who can weight the testimony. Jurors are the only ones who can judge the credibility of the witnesses. Jurors figure out the inferences to be drawn and when it comes to deciding the ultimate facts and conclusions that is the job of the jury, not the judge. The Judge's job is to say what the law is. Jurors must accept and be guided by the law as I explain it. I am the only one who can say what it is. So, the question becomes would you be willing to apply the law as I tell you it is, even if it differs from what you thought the law was or even if you think the law is wrong. No hands are raised. Whether or not you, close friends of relatives are employed in or connected with law enforcement, would you be more likely to believe or disbelieve a witness simply because he or she is a law enforcement officer? Okay. Let's start on this side. Ma'am.

JUROR: Mansfield, M.

THE COURT: Okay. Yes, ma'am.

JUROR: W. Carden (phonetic).

THE COURT: Okay. Yes, ma'am.

JUROR: Folger (phonetic), F.

THE COURT: Anyone? Okay. On this side.

JUROR: Dolive, D.

THE COURT: All the way in the back corner.

JUROR: Suris (phonetic), S.

THE COURT: What's your first name?

JUROR: Jody.

THE COURT: Thank you. Yes, in the back.

JUROR: Walker, W.

THE COURT: That's L. Walker. Okay. Anyone else on this side? Okay. Are you involved in any social religious or professional organization or activity which might interfere with your ability to judge another person? No hands are raised. Do you have any special problems which might interfere with your ability to listen, pay attention or otherwise participate as a fair juror? I am not trying to pry not to protect confidentiality and I'm also willing to make accommodations to your special needs, but only if you request reasonable accommodations so it is up to you to ask. No hands are raised.

If I call your name, please rise. Ms. Clark, first initial W, first letter of first name. Okay. Ms. Folga. Ms. Gentre (phonetic). Ms. George. Ms. Keit (phonetic). Ms. Massio (phonetic). Mr. Walter Moore. Mr. Dolive. Ms. Philip. Ms. Roland. Mr. Shivers. Leotis Walker. And Mr. Willis. You are all excused, please return to the fourth floor and have a nice day. The rest of you please remain where you are.

Yeah. Can I see counsel at sidebar, please?

(Sidebar)

THE COURT: Mr. Heath from yesterday left and never came back, something seems to have surfaced here again today.

MS. MERCURIO: Yes, I was gonna ask the Court to excuse him. I don't --

THE COURT: I'm excusing him.

MS. MERCURIO: Okay.

THE COURT: Okay.

(End sidebar)

THE COURT: Mr. Heath, where are you, Mr. Heath? Mr. Heath, you're excused by the Court, please return to the fourth floor. Have a nice day. Mr. Natale, where are you? You're familiar with the location, sir?

JUROR: Yes.

THE COURT: How are you familiar with the location?

JUROR: One of the county road inspectors I ride Springfield, Styverson and many other.

THE COURT: Please listen to my question carefully.

JUROR: Okay.

THE COURT: Is there anything about the fact

that you are familiar with the location which might interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Would that fact in anyway bias or prejudice you?

JUROR: No.

THE COURT: You may be seated, thank you. Mr. Reed, where are you?

JUROR: Here I am.

THE COURT: Sir, how are you familiar with the location?

JUROR: Well, I've used the street on occasions.

THE COURT: Is there anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

JUROR: Not at all.

UNIDENTIFIED: Your Honor, I didn't hear his answer.

THE COURT: He said not at all.

UNIDENTIFIED: No, he -- how he's familiar with it.

THE COURT: Would you repeat how you're familiar, sir?

JUROR: I pass the street periodically, I --

UNIDENTIFIED: Okay.

JUROR: -- use that route sometimes.

THE COURT: Is there anything about the fact that you're familiar with the location which would cause you to be biased or prejudiced in favor of or against one side or the other?

JUROR: Not at all.

THE COURT: Very good, sir, please be seated. Well, by my reckoning, counsel, I think that was it?

MS. MERCURIO: Yes, Judge.

THE COURT: We are ready to call in the other folks and have them resume their seats. Mr. Quasnnick, could you step up, please?

JUROR: Good morning, Judge.

(Off record)

(On record mid sentence)

THE COURT: -- see we're trying to fill one seat. These good people have been through what you've been through already. But now they're going to have to try to bear it while explain to you the questionnaire that you're gonna be called upon to answer.

Your name might be called and if so, you're going to please step up to the bar and you will see these questionnaires on either side. I'll ask you to

answer the questions on there one at time. Let me go over these questions briefly. All of you should assume that you will be called upon to answer these questions so all of you should pay attention. Number 1, what is your name and occupation. Number 2, what is the occupation of other members of your household including your spouse and/or adult children. For those now retired or unemployed, what was their most recent and usual occupation. Number 3, have you previously served on a jury of any kind. If so, what kind, where and did you reach a verdict? Do not tell what verdict you reached if you reached a verdict. Now in that connection when we ask what kind these are the important distinctions. There are civil juries and there are criminal juries, petit, juries they're called. If you ever sat as petit juror in a civil case you were told, undoubted, that in order for plaintiff to prove the defendant guilty or liable the plaintiff had to prove the guilt or liability by a preponderance of the evidence. Not so in a criminal case. In a criminal case the prosecutor has the burden of proof by -- beyond a reasonable doubt. So, it's a more powerful standard of proof. A higher burden of proof. There a -- another distinction between a petit jury and a grand jury, so you might have sat as a grand juror where you

were told that in order to secure an indictment the State had to prove to the grand jury that a crime was probably committed and that the defendant probably committed it. As a petit juror in a criminal case, again the prosecutor has the burden of proof beyond a reasonable doubt. So, those are the distinctions that I'm interested in. Number 4, Have you or a relative or a close friend ever been convicted of a crime? If so, describe. Would that experience interfere with you ability to render a fair and impartial verdict? Would it in anyway bias or prejudice you? This question may be answered at sidebar. It doesn't have to be, but if you're more comfortable bring -- talking about that at sidebar, then just say sidebar, Judge. Number 5, have you or a relative or a close friend ever been accused of a crime? If so, describe. Would that experience interfere with your ability to render a fair and impartial verdict? Would it in anyway bias or prejudice you? Obviously, that question may be answered at sidebar as well. Number 6 and 7 is the same -- are the same as number 5, but the question is witness to a crime for number 6 and number 7 is victim of a crime. You want to answer either of those questions at sidebar, just say sidebar, otherwise I'll ask you the questions from over there. Number 8, do

you have any relatives or close friends employed in or connected with the field of law enforcement? If so, describe. Would that relationship interfere with your ability to render a fair and impartial verdict, would it in anyway bias or prejudice you? That's different from that other question I asked about connections with law enforcement. That other question I asked earlier, I only wanted to know if you would believe or disbelieve a witness just because they were a police offer? This one, the intent of it is to find out whether or not you would have any bias or prejudice because of any law enforcement relationship that you may have. If you prefer, you can answer that at sidebar as well, it's up to you. Nine is the catchall question, is there any reason why you would not be able to be a completely fair and impartial juror in this case? And, for that question, if the answer is yes, meaning there -- there may be a reason, I will ask you to come to sidebar, you won't have a choice in the matter. If you say no, you can just say no from where you are.

When you're answering, these questions just answer them one at a time stating the number of the question first. As your answering the question, please don't read the question again as you're answering it.

For example, number 4, no, number 5, yes. Sidebar. Some people read -- read the question when they're answering the questions, which is the kind of think I would do, actually, so, I'm sharing it with you, try not to do that, we'll get through this quicker.

Okay. We are ready to call the next name to fill the last seat which is seat number 6. Name.

COURT CLERK: Halper, with an H.

THE COURT: Halper.

COURT CLERK: Halper.

JUROR: Yes.

THE COURT: Okay. Sir, the questionnaire is right over there. You can answer it right from there.

JUROR: My name Eric (phonetic) Halper, I'm retired. My children are fitness, owner of a fitness club, attorney, housewife, housewife, bookstore owner.

THE COURT: Mr. Halper, prior to your retirement what was your employment?

JUROR: I was an owner and sales person of a wholesale distributing business in New Jersey.

THE COURT: Okay. And, someone in your household is an attorney?

JUROR: My daughter.

THE COURT: Okay. What kind of law does your daughter practice?

JUROR: Entertainment law.

THE COURT: Does your daughter do any criminal work?

JUROR: No.

THE COURT: Is there anything -- no, I don't have to ask that question. Continue, please.

JUROR: I haven't appeared on any jury before. Number 4, no. Number 5, no. Number 6, no. Number 7, yes.

THE COURT: You prefer to speak about that at sidebar?

JUROR: Yes.

THE COURT: Come to sidebar, please, counsel.

(Sidebar)

JUROR: Just a very close friend of mine his son was murdered a couple of years ago.

THE COURT: Where?

JUROR: In Hudson County.

THE COURT: To what extent, if any, would that interfere with your ability to be a fair and impartial juror?

JUROR: Um, I don't think so.

THE COURT: Would it cause you to be biased or prejudiced against or in favor of the defendant or against and in favor of the State?

JUROR: No.

THE COURT: You're okay. Continuing answer the question, please, starting with question --

JUROR: All right.

THE COURT: -- 8. Yes, all right.

JUROR: No. 8 is no.

THE COURT: Uh hum.

JUROR: And, 9 is, no.

THE COURT: Okay. Thank you very much.

MS. SANFILIPPO: Judge, can I have how -- how the individual was murdered?

THE COURT: The individual was murdered, I'm sorry, what does that mean, you mean, you mean more specific.

MS. SANFILIPPO: How the -- you said the death was caused by a weapon.

JUROR: Yes. It was, it was murder.

THE COURT: Okay. Anything else, counsel, any other questions.

JUROR: All right.

THE COURT: Okay. Mr. Halper, you can have a seat in seat number 6.

JUROR: Okay. Thank you.

(End sidebar)

MS. SANFILIPPO: Your Honor, I -- it's my challenge, I'd like to thank and excuse Mr. Halper.

THE COURT: Well, Mr. Halp -- Halper, we can save -- save you some time, you don't have to sit down, you're being -- you're being excused. Okay. Thank you, sir.

MS. MERCURIO: Your Honor, a juror has his hand up.

THE COURT: Okay. Please return to the fourth floor, sir, have a nice day.

JUROR: May I approach sidebar?

THE COURT: Sure.

JUROR: Thanks.

THE COURT: For the record, the potential juror coming to sidebar is Mr. South (phonetic), juror number 10.

(Sidebar)

JUROR: I'm sorry, question number 7, I had answered no, but I remembered a couple of incidences. I was may -- my car was stolen about 5 years ago, it was found in New York. I just wanted to put it on the record.

THE COURT: To what extent would that interfere with your ability to be fair and impartial juror?

JUROR: It would not.

THE COURT: Would it bias or prejudice you in anyway.

JUROR: No.

THE COURT: What else did you want to say?

JUROR: Also recently my father was a victim of a hit and run. After he left (phonetic) his car. I just wanted to -- that was a month ago.

THE COURT: Would that cause you to be biased or prejudiced?

JUROR: No.

THE COURT: Would it affect your ability to be a fair and impartial juror?

JUROR: No. No, sir.

THE COURT: Anything else?

JUROR: I remember as a kid my grandmother had her house broken into. That is about it.

THE COURT: Would that interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Is there anything that would interfere with your ability to be a fair and impartial juror.

JUROR: No.

THE COURT: Any reason why you can't serve?

JUROR: No.

THE COURT: Okay. Mr. South, please return to your seat.

JUROR: Okay. Thank you.

THE COURT: Thank you for bringing that to my attention.

(End sidebar)

THE COURT: Number 6.

COURT CLERK: Hall, with an H. Fred Hall.

THE COURT: Not here.

COURT CLERK: Clement (phonetic), with a C.

THE COURT: Good morning, sir.

JUROR: Good morning, Judge, how are you?

THE COURT: Good, thank you.

JUROR: Mark Clement, I'm an attorney.

THE COURT: I have to stop you right there, sir. Do you do any -- well, I'll ask an opened question. What -- what kind of law do you practice, sir.

JUROR: Litigation.

THE COURT: Any criminal litigation?

JUROR: I have done criminal litigation.

THE COURT: Is there anything about that fact which would interfere with your ability to be a fair and impartial juror?

JUROR: I would say no.

THE COURT: Is there anything about that circumstance which would cause you to be biased or prejudiced?

JUROR: No, I have done defense, I've never done prosecution.

THE COURT: Okay. Continue, please.

MS. MERCURIO: Your Honor, could I ask how long ago, he did criminal litigation?

JUROR: Last fall, I tried a case in Pennsylvania. It was aggravated assault, simple assault, conspiracy and both.

MS. MERCURIO: Thank you.

JUROR: I've been called for jury duty, never served. Convicted of a crime, no. Accused of a crime, yes, number 5.

THE COURT: Okay. Do you prefer to be heard at sidebar?

JUROR: No, I represented nephews in various charged here and there, but they worked out okay.

THE COURT: Okay. Anything about that ex -- Mr. Clemente you want to come to sidebar, please?

(Sidebar)

THE COURT: Let the record reflect that Mr. Clemente and I went to law school together. Okay.

With -- with regard to the accusations what kind of crimes did they involve?

(Juror not speaking into microphone)

JUROR: It was just simple. One of my nephews -- lasted --

THE COURT: Any -- anything about that circumstance that which would interfere with your ability to be a fair and impartial juror?

JUROR: I don't think so.

THE COURT: Anything about that which would bias or prejudice you?

JUROR: No.

THE COURT: Is there anything about the fact that you're a lawyer and have done criminal defense would which would interfere with your ability or willingness to apply the law court says what it is?

JUROR: I can tell you yes. After that it's --

THE COURT: Okay. Let me get the --

JUROR: The -- the question.

THE COURT: Thank you. I think you're on the first 6 maybe.

JUROR: 7. 8 --

THE COURT: You gotta go -- you gotta go back to the other one. Aside from nothing violent, anything

nonviolent?

JUROR: Just the reason that I have --

THE COURT: Okay. How long ago?

JUROR: About 15, 20 years, I don't -- it's been a while.

THE COURT: Any -- anything about that circumstance which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Anything about it which would bias or prejudice you?

JUROR: No.

THE COURT: You're okay, with it, right (phonetic)?

(Juror not speaking into microphone)

JUROR: I might consider him (phonetic) Judge -- you know (phonetic) I don't have any --

THE COURT: Right.

JUROR: -- I have a buddy who (phonetic) --

THE COURT: Anything about that relationship which would interfere with your ability to be a fair and impartial juror and without that would it bias or prejudice you?

JUROR: No.

THE COURT: All right. Number 9.

JUROR: Believe (phonetic) --

THE COURT: Okay.

JUROR: I got court (phonetic) appearances (phonetic), we have to work on Friday (phonetic) --

THE COURT: I -- I'm not sure, but I could -- I could -- probably not.

JUROR: Okay. Then that's the only one problem that can't be dealt with is a motion (phonetic) --

THE COURT: I'm prepared to say we won't be doing this case on Friday.

JUROR: Because --

THE COURT: Yeah. But I -- I think there's a guarantee (phonetic) about that.

MS. MERCURIO: Right.

MS. SANFILIPPO: I have one that can't be dealt with on Friday.

THE COURT: I'm sorry?

MS. SANFILIPPO: I have an appearance on Friday that would be a major problem if I can't be there.

THE COURT: Okay. Well, that -- I -- I'll call off, but here -- here's the -- here's the situation. I -- I can't guarantee that that this jury will not be doing something on Friday, so I kind of

need to know from you whether or not if you had them here on Friday when you would call that a personal hardship.

JUROR: I mean, I can talk to the clerk (phonetic) down in Middlesex County, it's a motion. We would have to be --

(Judge and juror not speaking directly into microphone)

THE COURT: Okay. Well, this is my question to you. This -- it -- we probably will not -- but we might say the issue is can --

JUROR: Yeah, I can --

THE COURT: So, you can live with the --

JUROR: Okay.

THE COURT: Well, then I'm gonna ask you to move yourself whenever your comfortable by the jury box.

JUROR: Okay.

MS. MERCURIO: I'm gonna excuse --

THE COURT: You make that a --

MS. MERCURIO: It's my turn.

THE COURT: Okay.

(End sidebar)

THE COURT: Potential juror is excused by the Court. No, not by the Court, State challenge. Counsel, I need to see you again, please.

(Sidebar)

THE COURT: The last challenge I thought was supposed to have been the defense's challenge. Ms. SanFilippo, what's your recollection, because --

MS. SANFILIPPO: I have to get -- I don't have that sheet. Let me check.

THE COURT: What's your --

MS. MERCURIO: Yeah, I thought it was mine, Judge, I thought she --

MS. SANFILIPPO: You know what, I just challenged Mr. Halbrock (phonetic).

MS. MERCURIO: Yeah, no, she challenged Mr. Halbrock.

THE COURT: Okay.

MS. MERCURIO: So -- so, I used my last challenge, Judge.

THE COURT: All right. Okay. Thank you.

(End sidebar)

THE COURT: Next name, please.

JUROR: Orenika (phonetic) with an O.

JUROR: Good morning.

THE COURT: Good morning.

JUROR: My name is Elizabeth Orenika. I work for the State of New Jersey as residential inspectionist in Ridge (phonetic) Psychiatrist Hospital

in Morris Plains.

THE COURT: Was there anything about that circumstance, ma'am. Which would interfere with your ability to be a fair and impartial juror?

JUROR: No. Because in grace --

THE COURT: I just -- I -- I don't need to why.

JUROR: No.

THE COURT: Thank -- thank you for answering. Is there anything about the fact as to where you work which would in -- cause you to be biased or prejudiced?

JUROR: No.

THE COURT: Okay. Continue, please.

JUROR: My children are adults (sic) children. My son holds a bachelors degree in pre medic -- premedical from Rutgers, New Brunswick. He works -- he work for an office inventing (phonetic). And now he works for some company as a lab technician. And my daughter is a graduate of Felican (phonetic) college. She's going for a masters in -- in May, last year of -- after the introducing (phonetic) last. I was called to sat on this jury about six years ago but I never sat.

THE COURT: What kind of jury?

JUROR: I was -- I wasn't even called in, you know, we were dismissed after one day, we were not --

THE COURT: Do you remember if it was a civil case or a criminal case?

JUROR: No, they didn't tell us what case it was.

THE COURT: Is there anything about that experience whatever it was, which would interfere with your ability to be a fair and impartial juror in this case?

JUROR: No.

THE COURT: Continue, please.

JUROR: Number 4 is, no. Number 5 is, no. Number 6 is, no. Number 7 is, no. Number 8 is, no. Number 9 is, no.

THE COURT: Very good, ma'am, please have a seat in seat number 6. Defense challenge.

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number 10.

THE COURT: Potential juror number 10 you're excused, please return to the fourth floor. Next name, please.

COURT CLERK: Strickland (phonetic) with an S.

THE COURT: Good morning.

JUROR: Good morning. Question 1, I am Lauren Strickland. And I'm unemployed right now.

Question 2 the only person that works in my household is my dad and he's a printer. Question 3 is, no. Question 4, no. Five, no. Six, no. Seven, no. Eight, no. Nine, no.

THE COURT: All right then, ma'am, please have a seat in seat number 10. Defense challenge.

MS. MERCURIO: It's my -- it's mine, Your Honor.

THE COURT: Yes.

MS. MERCURIO: The jury is satisfactory.

THE COURT: Ms. SanFilippo.

MS. SANFILIPPO: Your Honor, at this time I'd like to thank and excuse juror number 10.

THE COURT: Ms. Strickland, you're excuse, please return to the fourth floor and have a nice day. Next name.

COURT CLERK: Glick -- Glickman (phonetic), with a G.

JUROR: My name is Linda Glickman. I'm a project manager. Number 2, my -- my husband is a real estate manager and my children are students. Number 3, I -- I previously served on a jury, it was a civil case in Maryland.

THE COURT: Did you reach a verdict?

JUROR: It was not guilty.

THE COURT: Don't tell us the verdicts, please.

JUROR: Oh, I'm sorry.

THE COURT: Anything about your prior jury service which would interfere with your ability to be a fair and impartial juror?

JUROR: No.

THE COURT: Did you understand the distinction of burden of proof as I explained it?

JUROR: Yes.

THE COURT: Continue, please.

JUROR: Number 4, no. Number 5, No. Number 6, no. Number 7, no. Number 8, no. Number 9, no.

THE COURT: Okay.

MS. MERCURIO: Your Honor, I just need a clarification was it a civil or a criminal case she served on?

JUROR: Civil she said. Didn't you ma'am?

JUROR: Yes.

THE COURT: Have a seat --

MS. MERCURIO: Thank you, Judge.

THE COURT: Have a seat in seat number 10, please. Defense challenge.

MS. SANFILIPPO: One moment, Your Honor.

MS. MERCURIO: Judge -- Judge, it's mine.

THE COURT: You're right, I'm so sorry.

MS. MERCURIO: The jury is satisfactory for the State, Your Honor.

MS. SANFILIPPO: One moment, Your Honor.

THE COURT: Take your time.

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number 10.

THE COURT: Glickman, you're excused, please return to the fourth floor, have a nice day. Next name, please.

COURT CLERK: Mazzio (phonetic), with an M.

THE COURT: Ms. Mazzio was excused.

COURT CLERK: Oh. Matrobola (phonetic), with an M.

JUROR: Good morning.

THE COURT: Good morning, sir.

JUROR: My name is Carlos Matrobola. I'm unemployed. My wife is a nurse. Number 3, is yes.

THE COURT: What kind?

JUROR: It's a petit jury.

THE COURT: Criminal or civil?

JUROR: Civil.

THE COURT: Did you reach a verdict?

JUROR: Yes.

THE COURT: Anything about that experience

which would interfere with your ability to be a fair and impartial juror in this case?

JUROR: No, sir.

THE COURT: Did you understand the distinction in burden of proof as I explained it between a civil case and a criminal case?

JUROR: Yes.

THE COURT: Continue, please.

JUROR: Number 4 is, no. Number 5 is -- is, no. Number 6, no. Number 7 is, no. Number 8 is, no. Number 9 is, no.

THE COURT: Great, have a seat in seat number 10, sir. State.

MS. MERCURIO: Your Honor, the jury is satisfactory to the State.

THE COURT: Defense.

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number 3.

THE COURT: Sir, you're excused, please return to the fourth floor. Have a nice day. Next name, please.

COURT CLERK: Ramkmahwah (phonetic), with an R.

JUROR: Ramkmahwah, D. I'm presently a student. My wife is an instructor to Horizon Blue

Cross and Blue Shield. I got three daughters. The eldest one is fine -- finally a premed in New York. My second daughter is a graphic designer. My third daughter is -- started a premed program last year at Topps (phonetic) University in Massachusetts.

THE COURT: And what are you studying?

JUROR: Um, about completing my -- American Certification my medical certification.

THE COURT: Continue, please.

JUROR: Answer to question 3, no. Question 4, no. Five, no. Six, no. Seven, yes.

THE COURT: Would you prefer to speak about that from where you're standing or at sidebar?

JUROR: At the sidebar, please.

THE COURT: Come right up, sir.

(Sidebar)

JUROR: It's my daughter. Eldest daughter, she was abused by her boyfriend, even terrorized by her boyfriend.

THE COURT: Were charges filed?

JUROR: Yes.

THE COURT: Okay. And, is there anything about that experience which would interfere with your ability to be fair and --

JUROR: Yeah, that experience traumatized

both me and my wife.

THE COURT: I'm gonna excuse you.

JUROR: Yes.

THE COURT: I -- I understood you to say that -- would that interfere with your -- I'm not -- would that interfere with your ability to be a fair and impartial juror?

JUROR: I'm not sure -- well --

THE COURT: Well, it's the court to take the chance, so it's best to excuse you. Have a wonderful day, please return to the fourth floor.

JUROR: Thank you very much, Your Honor.

(End sidebar)

THE COURT: The potential juror is excused by the Court. Next name.

COURT CLERK: Deprocia (phonetic), with a D.

JUROR: Good morning. My name is Ester.

MS. MERCURIO: I'm sorry, I didn't hear.

JUROR: My name is Ester Deprocia. I'm a home maker. My husband is retired.

THE COURT: From what line of work?

JUROR: He worked for GE. My son is a consultant. And, third question is, yes.

THE COURT: What kind?

JUROR: Civil.

THE COURT: Did you reach a verdict?

JUROR: Yes.

THE COURT: Did you understand the distinction and burden of proof as I explained it?

JUROR: What was that?

THE COURT: Did you understand the distinction and burden of proof between that criminal case and the civil case as I explained it?

JUROR: Yes.

THE COURT: Is there anything about your jury service in the past which would interfere with your ability to be a fair --

JUROR: No.

THE COURT: -- and impartial juror?

JUROR: No.

THE COURT: Continue, please.

JUROR: Ah, the fourth one is, no. No. Number 6, no. No, number 7. Number 8, is no. No.

THE COURT: Okay. Ma'am, please have a seat in seat number 3. State.

MS. MERCURIO: Your Honor, the jury is satisfactory to the State.

THE COURT: Defense.

MS. SANFILIPPO: Just one moment, Your Honor.

THE COURT: Take your time.

MS. SANFILIPPO: Your Honor, at this time the defense would like to thank and excuse juror number 3.

THE COURT: Potential juror number 3, you're excused. Please return to the fourth floor, have a nice day, ma'am.

JUROR: Thanks.

MS. MERCURIO: Your Honor, I'd like to approach sidebar, please.

THE COURT: Okay.

(Sidebar)

MS. MERCURIO: Your Honor, I believe at this time a prima facie case has been established by defense counsel.

THE COURT: I find that she --

MS. MERCURIO: She --

THE COURT: I find it White.

MS. MERCURIO: Yeah.

THE COURT: Justify.

MS. SANFILIPPO: Okay. Starting from the top.

MS. MERCURIO: The -- the last --

MS. SANFILIPPO: Okay.

THE COURT: One moment, please.

(End sidebar)

THE COURT: I'm giving you a 15 minute break,

ladies and gentlemen, please be ready -- come back in 15 minutes.

(Jury is excused)

(Off record)

THE COURT: On the record. Okay. Ms. SanFlippo, you're called upon to give -- the situation is specific reasons why you excused the White jurors.

MS. SANFILIPPO: First and foremost, Your Honor, I would ask that the Court take notice of the -- not only their race but the difference in that the fact that some are male and some are female it's a little diverse group and mix -- mixup as opposed to striking all one sex and predominately one race. But, from the top. My first objection was Ms. Patricia Sa -- Savicio (phonetic) she was a school teacher, she had connections with the police department in Fairfield and I have -- I know a lot of the Fairfield Police from riding on the rescue squad, about 7 of the top ranks of the Fairfield police are former rescue squad members, we see them all the time.

THE COURT: Thank you, next reason.

MS. SANFILIPPO: Mr. Trubenstein (phonetic) was a retired, um --

THE COURT: Mr. Minor you may be seated.

(Attorney's microphones are not on)

MS. SANFILIPPO: -- a retired banker and I was concerned about his age possibility his ability here and on a personal note, his -- he reminded me of my father's older brother whom -- whom my dad looked and that would be upset -- unnerving me (phonetic). The next person I have was a black female, she was slumped in her chair, she was looked a million miles away and I felt that she -- she just was very unhappy (phonetic). Very un -- and uninterested. Mr. O'Neil was the victim of a robbery. Mr. Nicklmarclif (phonetic), her sister was the victim of a robbery. Ms. Ta -- Tarane (phonetic) Jean, her -- her nephew was lost in 911 --

MS. MERCURIO: Excuse me, could you just go a little slower, please?

MS. SANFILIPPO: Oh, I'm sorry, I'm trying to do it quickly. Ms. Tar -- Tarane, Jean, her nephew was lost in 911. I have for a while not -- not having people on the jury who had suffered that significant of loss because of the -- the reaction -- the express reactions I saw on people from my squad who went over there. At this point, it -- I'm a little less concerned about it, but she also described herself as being a victim of a robbery. Jennifer Quick, was I believe sitting in juror number one, when asked in

response to whether she was ever a witness to a crime, her husband is a police officer and when asked if she ever was a witness to a crime, she said yes, or something -- something about car accident and I just didn't think it was appropriate to have someone who thought a car accident was a crime on a criminal jury. Mr. Boyle said his first wife was the victim of an armed robbery. Ms. Joyce Stewart had connections to the State. Mr. Miscara, called -- with -- with -- in response to whether he had been a victim of a crime, his response was that -- first of all, he started believe it or not, which was kind of -- his intention was strange. He had four cars stolen and they were all recovered in Newark and Orange or Newark and East Orange and he emphasized Newark or East Orange. Mr. Halper had the close friend's son who was murdered with a weapon. Mr. Scaro, I liked him until he came up at sidebar and recalled all those crimes, to me it seemed like he was trying to come with excuses not to be on the jury but didn't have the backbone to say it. And, I have a challenge, he's also an accountant and we -- we're in the final countdown to tax -- the end of tax season and I thought maybe that was his underlying reason. Elizabeth Strickland for similar to the reasons stated by the prosecutor with a number of her

challenges, she was very young, she was a student and I thought she lacked the life experiences. Ms. Glickman said she served on a civil case and found the person not guilty even though she responded that she knew the difference, I didn't have faith in that she understood it. I -- I cannot pronounce it -- the next individual's name. He was juror number 3, African American gentlemen from Short Hills. That -- that actually --

THE COURT: I didn't think you were being called upon to justify your --

MS. SANFILIPPO: Okay.

THE COURT: -- exclusion of it. Ms. Mercurio your challenge was not based on the exclusion of African Americans was it?

MS. MERCURIO: No, Your Honor.

THE COURT: Continue, please.

MS. SANFILIPPO: The last jury, Your Honor, I thought she couldn't hear, she was very soft spoken, very timid, I don't like timid people on my jury. And I thought she couldn't hear when we called her to excuse her, she looked around in a daze. So now I'm positive she couldn't hear.

THE COURT: Ms. Mercurio.

MS. MERCURIO: Your Honor, of the 16

challenges by defense counsel, 13 were white individuals most of them male. The last one, two, five, five or six challenges by the defense, most of them juror number -- who -- who sat in jury number 10 box. I -- I would submit that the defense explanations are completely basically just trying to -- she's just trying to -- or I would just say they're weak explanations, Judge. An elderly White woman whose meek would only benefit the defendant because she could be easily persuaded by the other jurors to go their way if in fact they wished to convict -- or not convict in this case. The -- of the 16 challenges she only ex -- exercised three challenges with -- of African Americans. Two of them had absolutely no strings in law enforcement or -- or didn't indicate they were victims of a crime. So, the second to the last challenge Mr. Mandani (phonetic), was a young black male, single male, the same age group as the defendant, totally his peer and the defendant -- the defense counsel just excused him. And he had answered no to most of the questions. It's clear that that was just done as a guise to show that she wasn't creating a pattern of just knocking off white people. And, the black female that she knocked off earlier the same thing that -- that black African American juror again,

gave no answers to indicate in anyway that she would be prejudicial to the defense.

All the three jurors that were in juror box number 10 of the last five challenges, Mr. Sarro, he said as an afterthought that minor -- minor crime was committed a car theft, that was really unrelated to a case like this. But said he could be totally fair, had no relatives in law enforcement. Ms. Strickland gave no to answer -- answered no to all the questions, white female. Mr. Glickman -- Ms. Glickman, again, just because she said she was on -- on a civil panel and said she -- she found not guilty, that's the explanation of getting rid of her. She's an elderly white weo -- woman, Judge with life experiences and I submit that it was only because she was white that she was excluding. Again for most of the other jurors, Judge, a couple of them might have said that they had relatives who were robbed, but they all said that they could be fair and impartial, but it's interesting that the African Americans that were on the panel how had been victims of a crime or had mentioned that they had -- crimes or have no -- in law enforcement, are not being excluded by the defense counsel and I think that's extremely significant, Judge. The -- the State now has run out of its challenges and the defense as it

was (phonetic) since I've run out of my challengers the last four -- three out of the four were all white people and again, the only black person excused out of that four was a single black, young male who fits right in the defendant's peer group. So, Judge, I -- I believe that a pattern has been established and I'd ask that this jury -- jury be excused.

MS. SANFILIPPO: Your Honor --

THE COURT: Well, the question is not whether I would have excused them.

MS. MERCURIO: Well, I'd ask that Your Honor find that there --

THE COURT: -- or not.

MS. MERCURIO: -- is -- has been a pattern that the defendant has excluded these jurors based solely on their race and I believe under State vs. Gilmore and State vs. Johnson, the remedy at this point is to excuse these jurors and the -- start again because I am now -- the majority of the individuals on the jury are African American, I -- I have no objection to that, I would like a mixed juror -- jury panel, but the State has now run out of challenges I cannot now, because she keeps on excluding white jurors who the State feel would make fair jurors, the State is now in a position where I can no longer challenge anyone,

that's not the reason that I want to do this, I just am making this application because she's now excluding the majority of the 16 challenges based on race alone. The panel now is made up of juror that the State does not feel were picked on a fair and impartial basis.

THE COURT: I find the defense's events genuine and reasonable grounds for believing the potential jurors might have situations specific biases. Motion denied. Call in the panel, please.

(Jury enters court room)

(Judge conferring with Clerk)

THE COURT: You may be seated, thank you. We're trying to fill seat number 3?

COURT CLERK: Vandyke, with a V.

JUROR: Good morning.

THE COURT: Good morning.

JUROR: My name is Regina VanDyke, I'm a human resource analysts. My husband is a textbook salesmen. I have no children. I have previously served on two juries. A criminal case and a medical malpractice. A verdict was reached in both cases.

THE COURT: Anything about that experience which would interfere with your ability to be a fair and impartial juror?

JUROR: Possibly.

THE COURT: Thank you, I'll excuse you.

JUROR: Thank you.

THE COURT: Have a nice day, ma'am, please return to the fourth floor. Next name, please.

COURT CLERK: Ellis, with an E. Phillis Ellis.

(Only Judge microphone is on)

JUROR: My name is Phillis Ellis. I am a -- full -- slash -- . My children, my daughter is a computer analyst (phonetic). My -- my son, he -- he works -- he's a con -- contractor for DMV (phonetic) Contractors. No.

THE COURT: What number is, no, ma'am?

JUROR: One second. Number 3.

THE COURT: Okay.

JUROR: No.

THE COURT: What's that number four?

JUROR: Number 4, yes. No, number 5. No -- number 6 is no. Number 7 is, no. Number 8, no. Nine, no.

THE COURT: Very good, ma'am, please have a seat in seat number 3. State.

MS. MERCURIO: Your Honor, the jury is satisfactory.

THE COURT: Defense.

MS. SANFILIPPO: One moment, Your Honor. Your Honor, at this time defense would like to thank and excuse juror number 13.

THE COURT: Jury number 13 --

MS. MERCURIO: Your Honor, I ask to go to sidebar, please.

THE COURT: Okay.

(Sidebar)

THE COURT: Yes, go ahead.

MS. MERCURIO: One moment, Judge.

THE COURT: What -- what is your schedule for Judge Flynn, what time is that scheduled?

MS. SANFILIPPO: They're usually at -- they're at 1:30. I can't do anything on them because I wasn't given discovery.

THE COURT: Oh, okay. So --

MS. SANFILIPPO: So, don't think they'll call here. They'll just not make me appear.

THE COURT: Okay. Yes.

MS. MERCURIO: Your Honor, this point this is getting to be --

MS. SANFILIPPO: He's Spanish.

MS. MERCURIO: -- absolutely --

THE COURT: One -- one moment. What is the cognizable class that you are saying?

MS. MERCURIO: He's -- he has the name Ortiz, Judge, but I would consider in the white race class and um, I looked at my notes, I see absolutely no reason to have excluded this particular juror. And, that coupled with the last 6 or 7 exclusions coupled with some of the earlier exclusions, Judge, is -- the defendant is only doing this, Judge, because there's a white male there. And, gain, it's another male.

THE COURT: Would you keep your voice down.

MS. MERCURIO: It's a male.

THE COURT: Can you -- can you -- can you keep your voice down.

MS. MERCURIO: It's a payoff (phonetic) Judge, it's a white male. Again, so I'd like to make it now on two grounds. White and the male gender and this -- this is now the fourth exclusion.

THE COURT: The --

MS. MERCURIO: I'm sorry, the seventh and we have white people being excluded and the majority male.

THE COURT: The -- the -- the male, the cognizable -- cognizable group of men that you say are being improperly excluded what are you saying is the forbidden presumption about men, what -- what are you saying is the -- the real reason why they -- those --

MS. MERCURIO: Well, Ms. SanFilippo -- Ms.

SanFilippo mentioned before that she excluded the elderly white woman because she was meek and she didn't think she could make a -- a decision.

THE COURT: Yes, but about men, you -- you say --

MS. MERCURIO: I --

THE COURT: -- men is one of the --

MS. MERCURIO: Right. She's excluding the males because she believes they can make decisions and then --

THE COURT: Okay.

MS. MERCURIO: -- this is a -- an important serious charge, it's not a minor charge, Judge.

THE COURT: Okay.

MS. MERCURIO: She -- there was absolutely nothing in my notes of why this juror should have been excluded, Judge. Neither of the other white peoples that were -- had sat in jury box number 10.

MS. SANFILIPPO: May I, Your Honor.

THE COURT: And I also want to note that juror number 8, keeps on looking over at Ms. SanFlippo and smiling, who's an African American male.

THE COURT: Well --

MS. SANFILIPPO: Whose juror number 8?

THE COURT: Well, first -- first of all, with

regard to the --

MS. MERCURIO: I'm sorry, 14.

THE COURT: -- the Gilmore challenge on -- the Gilmore challenge, that motion is denied. You want to be heard?

MS. MERCURIO: Judge, can I at least ask the court to give a warning and --

THE COURT: No.

MS. MERCURIO: At this point, I have no more challenges left, Judge --

THE COURT: No.

MS. MERCURIO: -- and she keeps on continuing on this pattern.

THE COURT: I answered that. If -- when and if I find -- when I find that there's been a violation, I'll make that ruling. Until then, I -- I won't.

MS. MERCURIO: Well, you just found before there was a prima facie case made, Judge --

THE COURT: That's --

MS. MERCURIO: -- and she just excluded another white person.

THE COURT: No, that's what your position is. That's not mine. I've ruled. This is -- this individual is -- I would not necessarily characterize him as cau -- Caucasian male, it could just as well be

Hispanic to me. Anyway the motion is denied. I've ruled.

MS. SANFILIPPO: Thank you.

(End sidebar)

JUROR: I'm excused?

THE COURT: Yes, sir, you're excused. Please return to the fourth floor and have a wonderful day, sir.

JUROR: Great, thank you.

THE COURT: Next name, please.

COURT CLERK: Cortez, with a C.

THE COURT: Yes, sir.

JUROR: My name is Anthony Cortez. I'm a banker. My exwife who lives with me is a waitress. My children are in school. Number 3, yes. A verdict was reached.

THE COURT: What kind of case, sir?

JUROR: Criminal.

THE COURT: Anything about your jury service which would interfere with your ability to be a fair and impartial juror in this case?

JUROR: No.

THE COURT: Continue, please.

JUROR: Number 4, no. Number 5, no. Number 6, no. Number 7, yes.

THE COURT: Would you prefer to speak about that at sidebar, sir?

JUROR: Ah, yeah.

THE COURT: Okay. Come up, please.

(Sidebar)

JUROR: Hi. My exwife at the time we were married had filed charges against someone for rape and it did go to the grand jury, but it never went further.

THE COURT: To what extent, if at all, would that have an impact on your ability to be a fair and impartial juror in this case?

JUROR: It wouldn't.

THE COURT: Would it in anyway cause you to be biased or prejudiced?

JUROR: No.

THE COURT: Continuing answering the questions, please.

MS. MERCURIO: Judge, I just wanted -- I didn't hear the whole answer why -- what happened with your wife?

JUROR: She -- at the time we were married we -- we're divorced now, but at the time we were married she had filed charges against someone for rape.

MS. MERCURIO: Oh.

JUROR: And it went to a grand jury.

MS. MERCURIO: Okay.

JUROR: Um. Number 8, no. Number 9, no.

THE COURT: Very good, Mr. Cortez, have a seat in seat number 13.

(End sidebar)

THE COURT: State.

MS. MERCURIO: Your Honor, the jury is satisfactory to the State.

THE COURT: defense.

MS. SANFILIPPO: One moment, please. Your Honor, at this time the defense would like to thank and excuse juror number 13.

THE COURT: Okay. Juror number 13, you're excused. Please return to the fourth floor. And, have a nice day. Next name, please.

COURT CLERK: Brash (phonetic), with a B.

THE COURT: Good afternoon, ma'am.

JUROR: Good afternoon. My name is Latioa Brash. I'm a cashier. No one else works in my house. I -- it's just me. I have no kids. Number 3 is, no. Number 4 is, no. Number 5 is, no. Number 6 is, no. Number 7 is, no. Number 8, is no. And, number 9 is, no.

THE COURT: Excellent, please have a seat in seat number 13, ma'am. State.

MS. MERCURIO: The jury is satisfactory.

THE COURT: Defense.

MS. SANFILIPPO: One moment, Your Honor. Your Honor, at this time the defense finds the jury satisfactory.

THE COURT: Thank you. I give jurors in my court room one last chance to bail out. I want to try to emphasize to you the seriousness with which I expect you to serve as a juror. If anything, anything at all might leave you to think that you might not be a completely fair and impartial juror, it is absolutely imperative that I know it now and not later. This is your last opportunity. Anybody need to raise their hand? Are we sure? Please swear in the jury.

(Jury selection complete)

Certification

I, Eileen M. Zakrzewski, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Tape Number T-1, Index Number from 0028 to 6766, and Tape Number T-2, Index Number from 0017 to 2740, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Eileen M. Zakrzewski, AOC NO. 529
G&L TRANSCRIPTION OF NJ

Date: August 17, 2006

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION - CRIMINAL PART
INDICTMENT NOS. 02-05-1845
02-05-1846
02-04-1208
A.D. NO. A-6210-03T4

THE STATE OF NEW JERSEY,

vs.

DAVID MINOR a/k/a DAVID SMITH,

Defendant.

TRANSCRIPT OF PROCEEDINGS

TRIAL

Place: Essex County Courthouse
50 West Market Street
Newark, New Jersey 07102

Date: April 9, 2003

B E F O R E:

HON. MICHAEL L. RAVIN, J.S.C. and a Jury

TRANSCRIPT ORDERED BY:

LOUIS G. GONNELLA, ESQ.
(Office of the Public Defender)

46T

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SHEET 2

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SHEET 3

THE COURT: This is the matter of State versus David Minor on Indictment 2-5-1845.

Appearances, please?

MS. MERCURIO: Good morning, your Honor. Diane Mercurio for the State.

MS. SANFILIPPO: Good morning, your Honor. Dawn SanFilippo on behalf of Mr. Minor.

THE COURT: Mr. Minor was told to be here at 9:35 yesterday. He's not here. Where is he?

MS. SANFILIPPO: Your Honor, he was seen by both the prosecutor and some other people on the floor. I believe he --

THE COURT: Yes, ma'am.

MS. SANFILIPPO: -- may have gone into the men's room.

THE COURT: My officer said he checked the men's room and he wasn't there.

MS. SANFILIPPO: That's what other people in the hallway indicated; that they saw him walk into the men's room. I don't -- I've checked the hall, the stairwells.

THE COURT: Okay.

MS. SANFILIPPO: I mean, he's here in the building. One -- someone in the hall said they saw him pop in -- his head in the courtroom and then go into

the men's room.

THE COURT: Well, he's starting to come when he wants to come. And it's not going to happen that way. I'm sorry.

I'm taking Ms. Mercurio's -- you have an application you wanted to make yesterday? We're starting.

MS. MERCURIO: Yes, your Honor. I --

THE COURT: What's your application?

MS. MERCURIO: Your Honor, my application is --

THE COURT: Well, let me just -- let me just say one more thing. He was told if he wasn't -- if he wasn't here when I told him to be here, the proceedings would take place in his absence.

Your objection is noted for the record, Ms. SanFilippo.

MS. SANFILIPPO: Thank you.

THE COURT: Yes, Ms. Mercurio?

MS. MERCURIO: Your Honor, I have an application based on the challenges that the defense has made thus far for the jury selection.

I would submit that there's a prima facie case made that the Defendant -- defense has also violated the --

THE COURT: What -- what cognizable classes are you alleging --

MS. MERCURIO: African --

THE COURT: -- were stricken?

MS. MERCURIO: The -- the white -- the white race, your Honor. Every single one except for one of her challenges were white, either male or females. I'm sorry. Two.

MS. SANFILIPPO: Two.

THE COURT: You need not respond, Ms. SanFilippo. I've noted all the challenges thus -- thus far. And at this particular -- at this particular posture, the number -- the third challenge was a black female -- female. The fifth challenge was a black female. And I'm not prepared to find that a prima facie case has been made at this time. The Motion is denied.

MS. MERCURIO: Judge, I'd like to further make a complete record, if I may?

THE COURT: Well, make a complete record.

MS. MERCURIO: Your Honor, pursuant to State versus Johnson, it is illegal for the defense as well as the State to exclude a particular cognizable group based on race. And in this particular matter, the State would submit it the -- it is the white race.

The Defendant -- there have been numerous African-Americans put on the jury panel with relatives in law enforcement, with -- being victims of crimes. However, the defense has chosen not to exclude those individuals but instead only the white jurors that have been seated.

THE COURT: Continue. Were you done?

MS. MERCURIO: I'll let your Honor finish, Judge.

THE COURT: No. I said continue speaking.

MS. MERCURIO: Your Honor, under State versus Johnson, 325 New Jersey Super, an Appellate Division case in 1999, it's clear the defense is not permitted to do such a thing, just as the State is not to do that. And I submit other than just two -- as a matter of fact, the last black female that the defense excluded, I note that there was really no criteria for the defense to exclude. I would submit that that was just done in a pretense to make a showing that she was not being discriminatory in her jury challenge selections. There was absolutely nothing indicating from that juror that she would either be pro or against the Defendant and she was just -- there's -- appears to be no reason at all for her -- her exclusion other than to just throw her in the mix to show that the defense

was not just excluding white people from the panel. And I believe it's very clear, your Honor, that the defense has been -- there is a pattern here. And I believe a prima facie case has been made. I don't believe there's a high burden for the State to show that.

The State was challenged based on its exercises of challenge. The State excluded two white individuals in its mix of black challenges, and the Court did find there was a violation. And I don't see at this point what the difference is because it's clear from the jury panel, since the majority of people being put in the box are African-American, her selection of only white jurors to challenge is suspect at this point.

THE COURT: Thank you.

I've ruled.

Mr. Minor?

MR. MINOR: Yes, sir.

THE COURT: You have to come here when I tell you to be here, not when you want to be here.

MR. MINOR: The door was locked, sir. I was outside for quite a bit.

THE COURT: Well, my officers went to look for you and so did your attorney look in the hall and

they didn't find you. What's your explanation for that?

MR. MINOR: I was out there, sir. I walked down to the bathroom.

THE COURT: Well, where exactly were you because your lawyer couldn't find you?

MR. MINOR: I was down at the other end because I didn't want to stand by the jury.

THE COURT: My officer checked the whole hall.

Didn't you, Officer?

COURT OFFICER: Yes, Judge.

THE COURT: The point of the matter is this. You're developing a trend of being a little late. Don't continue it. Do you understand?

MR. MINOR: Yes, sir.

THE COURT: Okay? Thank you. You may be seated.

I'm -- I'm now ready to rule on the sanitization of the drug convictions. They will not be sanitized. They're not similar to the robbery.

I will give you the option of submitting your own limiting instruction, Ms. SanFilippo. If your client is going to testify, --

MS. SANFILIPPO: Yes, your Honor.

THE COURT: -- you submit to me -- run it by the prosecutor first -- what, if any, limiting instruction you want concerning the use of the prior convictions to impeach. Okay?
MS. SANFILIPPO: Thank you, your Honor.
THE COURT: Anything else anybody want to place on the record?
MS. MERCURIO: Yes, Judge. I just need the name -- the first name of juror number six. First and last name.
THE CLERK: Bridget Clark.
MS. MERCURIO: And juror number one?
THE CLERK: Trina Smith.
MS. MERCURIO: Trina?
THE CLERK: Yeah.
THE COURT: I think we were at is we -- the seat that's not filled is seat number ten.
Call the jurors in, please. Prospective jurors.
(JURY SELECTION CONTINUES)
MS. MERCURIO: Your Honor, I'd like to approach sidebar, please.
THE COURT: Okay.
(SIDEBAR ON THE RECORD)
MS. MERCURIO: Your Honor, I believe at this

time a prima facie case has been established by defense counsel.
THE COURT: I find it.
MS. MERCURIO: She --
THE COURT: I find it. White.
MS. MERCURIO: Yeah.
THE COURT: Justified?
MS. MERCURIO: Okay.
MS. SANFILIPPO: Okay. The only thing to try --
MS. MERCURIO: The last --
MS. SANFILIPPO: Okay.
THE COURT: One moment, please.
(SIDEBAR CONCLUDED)
THE COURT: I'm giving you a 15 minute break, ladies and gentlemen. Please be ready -- that goes for you as well. Please come back in 15 minutes.
(OFF THE RECORD)
(Please note only the Court's microphone is on.)
THE COURT: Okay, Ms. SanFilippo. You're called upon to give the situation -- your specific reasons why you excused the white jurors.
MS. SANFILIPPO: First and foremost, your Honor, I would ask that the Court take notice of the -- not only their race but the difference in that -- the

fact that some are male and some are female. It's a little diverse group and a mixup as opposed to striking all one sex and predominantly one race.

But from the top, my first objection was Ms. Patricia Sedicino (phonetic). She was the school teacher. She had connections to the police department in Fairfield. And I have -- I know a lot of the Fairfield Police from riding on the Rescue Squad. About seven of the top brass at the Fairfield Police are former Rescue Squad members. We see them all the time.

THE COURT: Thank you.

Next reason?

MS. SANFILIPPO: Mr. Trubenstein (phonetic) was a retired --

THE COURT: Mr. Minor, you may be seated.

MS. SANFILIPPO: -- a retired banker. And I was concerned about his age, possibly his ability to hear. And on a personal note, he -- he reminded me of my father's older brother who -- whom my dad looks like and that was unnerving me.

The next person I have is a black female. She was slumped in her chair. She looked a million miles away. And I felt that she -- she just was very -- very unfocused and uninterested.

Mr. O'Neil was the victim of a robbery. Ms. Arclift (phonetic), her sister was the victim of a robbery. Ms. Taramina, Jean, her -- her nephew was lost in 9/11.

MS. MERCURIO: Excuse me. Could you just go a little slower, please?

MS. SANFILIPPO: Oh, I'm sorry. I'm trying to do it quickly.

Ms. Tera -- Teramina, Jean, her nephew was lost in 9/11. I had for awhile a policy of not -- not having people on the jury who had suffered that significant loss because of the -- the reaction -- the stress reactions I saw in people from my squad who went over there. At this point, I'm a little less concerned about it, but she also described herself as being a victim of a robbery.

Jennifer Quick was, I believe, sitting in juror number one. When asked in response to whether she was a witness to a crime, her husband is a police officer. And when asked if she was ever witness to a crime, she said yes or something -- something about car accidents. And I just didn't think it was appropriate to have someone who thought a car accident was a crime on a criminal jury.

Mr. Boyle said his first wife was the victim

of an armed robbery. Mr. Joyce Stewart (phonetic) had connections to the State Police.

Mr. Mascera (phonetic), Paul with request -- with -- in response to whether he had been a victim of a crime, his response was that -- well, first of all he started, "Believe it or not." Just kind of -- intonation was strange. He had four cars stolen. And they were all recovered in Newark and Orange or Newark or East Orange and he emphasized Newark or East Orange.

Mr. Halper had the close friend's son who was murdered with a weapon.

Mr. Mascera, I liked him until he came up at sidebar and recalled all those crimes. To me, it seemed like he was trying to come up with excuses not to be on the jury but didn't have the backbone to say it. And I had some extra challenges. He's also an accountant and we are -- we're in final countdown to tax -- the end of tax season and I thought that was maybe his underlying reason.

Elizabeth stricken for similar to the reasons stated by the prosecutor with the number of her challenges. She was very young. She was a student. And I thought she lacked the life experiences.

Ms. Glickman (phonetic) said she served on a civil case and found the person not guilty. Even

though she responded that she knew the difference, I didn't have faith in that she understood it.

I -- I cannot pronounce the -- the next individual's name. He was juror number three. African-American gentleman from Short Hills. That -- that actually --

THE COURT: I didn't think you were being called upon to justify your --

MS. SANFILIPPO: Okay.

THE COURT: -- exclusion --

Ms. Mercurio, your challenge was not based on the exclusion of African-Americans, was it?

MS. MERCURIO: No, your Honor.

THE COURT: Can -- can you --

MS. SANFILIPPO: The last juror, your Honor, I thought she couldn't hear. She was very soft spoken, very timid. I don't like timid people on my juries. And I thought she couldn't hear. And we called her, it confused her. She looked around in a daze. So, now I'm positive she couldn't hear.

That's my reasons.

THE COURT: Ms. Mercurio?

MS. MERCURIO: Your Honor, of the 16 challenges by defense counsel, 13 are all white individuals, most of them male. The last one, two,

five -- five or six challenges by the defense, most of them juror number -- who -- who sat in juror number ten box, I -- I would submit that the defense's explanations are completely basically just trying to -- she's just trying to -- I -- I would say they're weak explanations, Judge.

An elderly white woman who's meek would have only benefited the Defendant because she could easily be persuaded by the other jurors to go their way if, in fact, they wished to convict or not convict in this case.

Of the 16 challenges, she -- she only exercise -- exercised three challenges with -- of African-Americans. Two of them had absolutely no friends in law enforcement or didn't indicate that they were victims of a crime. The second to the last challenge, Mr. Vandame (phonetic), was a young black male, single male, the same age group as the Defendant, totally his peer, and the Defendant -- and the defense counsel just excused him. And it -- he had answered no to most of the questions. It's clear that that was just done as a guise to show that she wasn't creating a pattern of just knocking off white people.

And the black female that she knocked off earlier, the same thing. That -- that black

African-American juror, again, gave no answers to indicate in any way that she would be prejudicial to the defense.

All the three jurors that were in juror box number ten of the last five challenges, Mr. Saro (phonetic), he said as an afterthought that minor -- minor crimes committed, car thefts, that are really unrelated to a case like this, but said that he could be totally fair. Had no relatives in law enforcement.

Ms. Strickland gave no -- answer -- answered no -- no to all the questions; white female.

Mr. Glickman or Ms. Glickman, again, just because she said she was on -- on a civil panel and said she found not guilty, that's the explanation of getting rid of her? She's an elderly white women -- woman, Judge, with life experiences. And I submit that it was only because she was white that she was excluded.

Again, for most of the other jurors, Judge, a couple of them might have said they had relatives who were robbed. But they all said that they could be fair and impartial. But it's interesting that the African-Americans that are on the panel who have been victims of a crime or mentioned that they had been victimized or know someone in law enforcement are not

being excluded by the defense counsel. And I think that's extremely significant, Judge.

The State has now run out of its challenges and the defense, out of the last -- since I've run out of my challenges, the last four -- three out of the four were all white people and, again, the only black person excused out of that four was a single, black, young male who fits right in the Defendant's peer group.

So, Judge, I -- I believe that a pattern has been established and I'd ask that this jury -- this jury be excused.

MS. SANFILIPPO: Your Honor, --

THE COURT: Well, the question is not whether I would have excused them or not.

MS. MERCURIO: I would ask that your Honor find that there is -- has been a pattern that the Defendant has excluded these jurors based solely on their race. And I believe under State versus Gilmore, and State versus Johnson, the remedy at this point is to excuse these jurors and we start again, because I now -- the majority of the individuals on the jurors are African-American. I -- I have no objection to that. I would like a mixed juror -- jury panel. But the State has now run out of challenges. I cannot now,

because she keeps on excluding white jurors who the State feels would make fair jurors, the State is now in a position where I can no longer challenge anyone. That's not the reason that I want to do this. I just -- I'm making this application because she's now excluded the majority of the 16 challenges based on race alone. The panel is now made up of jurors who the State does not feel were picked on a fair and impartial basis.

THE COURT: I find that the defense has advanced genuine and reasonable grounds for believing the potential jurors might have situations, specific biases. Motion denied.

Call in the panel, please.

(JURY SELECTION CONTINUES)

MS. MERCURIO: Your Honor, I'd like to go to sidebar, please.

THE COURT: Okay.

(SIDEBAR ON THE RECORD)

THE COURT: Yes, ma'am.

THE CLERK: One moment, Judge.

THE COURT: All right.

What -- what -- what is your schedule for Judge Flynn? What time is that scheduled for?

MS. SANFILIPPO: They're usually -- they're

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-- they're at 1:30. I can't do anything on them because I wasn't given discovery.

THE COURT: Oh, okay. So, --

MS. SANFILIPPO: So, maybe if you can call him, he'll just not make me appear.

THE COURT: Okay.

Yes?

MS. MERCURIO: Your Honor, at this point this is getting to be absolutely --

THE COURT: One -- one moment.

What -- what is the cognizable class that you are saying --

MS. MERCURIO: He's -- he has the name, Ortiz, Judge. But he's still I would consider in the white race class. And I looked at my notes. I see absolutely no reason to have excluded this particular juror. And that coupled with the last six or seven exclusions, coupled with some of the earlier exclusions, Judge, is -- the Defendant is only doing this, Judge, because there's a white male there. And, again, it's another male.

THE COURT: Please keep your voice down.

MS. MERCURIO: It's a male.

THE COURT: Can you -- can you keep your voice down?

MS. MERCURIO: It's a male, Judge. It's a white male again. So, I'd like to make it now on two grounds; white and the male gender. And this -- this is now the 14th exclusion.

THE COURT: The --

MS. MERCURIO: I'm sorry. The 17th. And we have white people being excluded and the majority male.

THE COURT: The -- now, the -- the -- the male -- the cognizable -- cognizable group of men that you say are being improperly excluded, what are you saying is the forbidden presumption about men? What -- what are you saying is the -- the real reason why Ms. SanFilippo --

MS. MERCURIO: Well, Ms. SanFilippo -- Ms. SanFilippo mentioned before that she excluded the elderly white woman because she was meek and she didn't think she could make a decision.

THE COURT: Yes. But what about men? You -- you said men is one of the --

MS. MERCURIO: Right. She's excluded the males because she believes they can make decisions. And then this is an important serious charge. It's not a minor charge, Judge.

THE COURT: Okay.

MS. MERCURIO: There is absolutely nothing in

my notes of why this juror should have been excluded, Judge. Neither of the other white people that had sat in juror box number ten.

MS. SANFILIPPO: May I, your Honor?

MS. MERCURIO: And I also want to note that juror number eight keeps looking over at Ms. SanFilippo and smiling, who's an African-American male.

THE COURT: Well,

MS. MERCURIO: Who's juror number eight?

THE COURT: One moment, please.

First of -- first of all, with regard to the --

MS. MERCURIO: I'm sorry. 14.

THE COURT: -- the Gilmore challenge on -- the Gilmore challenge, that Motion is denied.

You want to be heard?

MS. MERCURIO: Judge, can I at least ask the Court to give a warning --

THE COURT: No.

MS. MERCURIO: -- at this point? I have no more challenges left, Judge, --

THE COURT: No.

MS. MERCURIO: -- and she keeps on continuing on this pattern.

THE COURT: No. I answered that. When and

if I -- when and if I find -- when I find that there's been a violation, I'll make that ruling. Until then, I -- I won't.

MS. MERCURIO: Well, you just found before there was a prima facie case made, Judge, and she just excluded another white person.

THE COURT: No. That's what your position is. That's not mine. I've ruled. This individual -- I would not necessarily characterize it as a Caucasian male. He could just as well be Hispanic to me. Anyway, the Motion is denied. I have ruled.

MS. MERCURIO: Thank you.

(SIDEBAR CONCLUDED)

(JURY SELECTION CONTINUES)

THE COURT: Please swear in the jury.

THE CLERK: Can you please stand?

(JURY SWORN)

THE COURT: You may be seated. Thank you. Thank you.

The remainder of the jury panel may return to Jury Control. And I thank you for your service.

Please remember my remarks earlier about the importance of jury service to the court system. We appreciate your availability to serve as jurors.

(PANEL EXITS)

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THE COURT: Our next order of business concerns my instructions to you after you've been sworn, but we're not going to do that now because it's getting around lunchtime.

I'm going to excuse you until 1:30 on the courtroom clock. Please be back ready to come in at 1:30 p.m. Between now and then, don't discuss this case with each other or with anyone else. We'll see you at 1:30.

(JURY EXITS)

THE COURT: Ms. SanFilippo, I would suggest that between now and 12:30, which gives you seven minutes, that you go up to Judge Flynn and explain to him that you need -- will not be able to do whatever he expects you to be doing at 1:30 because you haven't gotten what you received.

See you here at 1:30.

Mr. Minor, 1:30, not 1:40. Got it?

MS. MERCURIO: Your Honor, my witness, Mr. -- Detective Chirico had to do a search warrant. He's been sitting here all morning. He has to get a search -- I think he has to go to Plainfield, New Jersey. He has to be there at 1:00. I would -- I would -- planned to put on -- I was going to put him on first. I'd like to check with him to see if he'd

like to wait to be put on first and then go get it. But if not, I'd like permission to have him excused. I might get -- only get to one witness today instead of two --

THE COURT: Okay.

MS. MERCURIO: -- since he'll have to leave.

THE COURT: We'll do the best that we can.

We're off the record until 1:30.

(RECESS)

THE COURT: I spoke, Ms. SanFilippo, to Judge Flynn with regard to your Megan's Law matters --

MS. SANFILIPPO: Yes.

THE COURT: -- for which you told me that you didn't get any discovery.

MS. SANFILIPPO: Yes, your Honor.

THE COURT: Mr. -- Judge Flynn suggested that I tell him what time we will have our afternoon break and you would report there immediately and get your adjournments. So there's only one thing to do and that is to decide on the time of that break.

There -- there are a couple of options, the way I see it. I understand from Ms. Mercurio that she's got three witnesses and could take us the entire afternoon. One of our two options is decide what time we're going to take the break now. And we're going to

with anyone else. I know you won't be discussing the evidence. You haven't heard any. See you ready to come back in at quarter of 3. Thank you.

(JURY EXITS)

THE COURT: We're off the record.

(RECESS)

THE COURT: Madam Prosecutor, ready for your first witness?

MS. MERCURIO: Yes, your Honor.

THE COURT: Proceed, please.

MS. MERCURIO: Your Honor, the State now calls Detective Michael Chirico.

COURT OFFICER: Raise your right hand.

DETECTIVE M I C H A E L C H I R I C O, STATE'S WITNESS, SWORN.

COURT OFFICER: State your name, spell your last name.

THE WITNESS: Detective Michael Chirico, C-H-I-R-I-C-O.

THE COURT: Proceed, please, Ms. Mercurio.

MS. MERCURIO: Thank you.

DIRECT EXAMINATION BY MS. MERCURIO:

Q. Detective, where are you presently employed?

A. The Newark Police Department.

Q. And you said you're a detective?

A. Correct.

Q. And how long have you been a detective with the Newark Police Department?

A. Approximately seven years.

Q. And how long have you been a police officer?

A. 13.

Q. Now, where are you presently assigned in the Newark Police Department as a detective?

A. I'm presently assigned to the Homicide Section.

Q. Okay. Now, I'm going to direct your attention, sir, to January 11th of last year, 2002. Were you in the Robbery/Homicide Unit at that time?

A. I was.

Q. And on that date in the evening -- early evening hours approximately 8:00, were you on duty?

A. I was.

Q. And on that date, did you have occasion to become involved in a robbery investigation where the victim's named was -- name was Lidwyn Cummings?

A. I did.

Q. Okay. And what was your role that evening with regard to that investigation?

A. At that time I just took a statement.

Q. Okay. And when you say you took a statement, was that a oral statement or a written statement from

the victim?
A. A written statement.
Q. Now, could you describe to the members of the jury what that entailed, that procedure of taking a statement? What kind of --
A. The statement was taken in question and answer form about what he was reporting.
Q. Okay. So, did you have a typewriter? Did you have the victim write it out? Or did you write it out or was it typed?
A. I -- I typed it. I asked him questions and typed it and I typed his reply.
Q. Okay. And were you -- do you remember what time you started taking that statement?
A. Some time after 8, I believe.
Q. Okay. If you saw the statement, would that refresh your memory?
A. Yes.
MS. MERCURIO: Your Honor, may I approach the witness?
THE COURT: Yes, ma'am.
BY MS. MERCURIO:
Q. Sir, I'd like to show you what's been marked S-3 for identification previously. Do you recognize that?

A. Yes. It's the statement I took that night.
Q. Okay. Now, does that refresh your memory, sir, of what time the -- you started taking the statement from Mr. Cummings?
A. Yes.
Q. Okay. And what time was that?
A. I started at 8:44 hours.
Q. And how -- how long did it take to complete that statement?
A. Maybe about 12 minutes.
Q. Did you take a lengthy statement from him or a brief statement as to what happened?
A. Brief statement.
Q. Okay. And what time did you conclude?
A. 8:52.
Q. Was this a voluntary statement by Mr. Cummings?
A. Yes.
Q. And -- now, do you recall whether you could get further involved in the investigation that night?
A. It was -- about all I did that night was take a statement.
Q. All right. Now, after speaking with Mr. Cummings, to your knowledge would he have been able to identify the suspect?

victim -- he claimed to be a victim of a robbery."
MS. MERCURIO: Right.
THE COURT: Yes.
MS. MERCURIO: That's all he said so far anyway. That's all -- I didn't want --
THE COURT: He started talking about going to the drugstore and things like that.
MS. MERCURIO: Yeah. I -- I will not get into that.
THE COURT: Okay.
MS. MERCURIO: However, if the defense does try to attack the credibility of the victim regarding recent fabrication, --
THE COURT: Then that's a different story.
MS. MERCURIO: -- then I will want to introduce the statement. That's why I'm asking him if was it a voluntary statement, --
THE COURT: Well, that's not what's objected to.
MS. MERCURIO: -- what happened.
Okay.
THE COURT: Okay?
(SIDEBAR CONCLUDED)
THE COURT: The objection is sustained insofar as the witness was saying what Mr. Cummings

said happened to him at this point. That is hearsay at this particular point.
Next question, please.
MS. MERCURIO: Okay.
BY MS. MERCURIO:
Q. You did ask Mr. Cummings what happened to him, correct?
A. Correct.
Q. Did he tell you what happened?
A. He did.
Q. And did you -- after -- and did he give a description of the person that allegedly committed this offense?
A. He did.
Q. And -- now, based on the investigation thus far and the statement from Mr. Cummings, what kind of person were you looking for as far as attributes were concerned, physical attributes?
A. Black male, 5 foot 8 inches in height, between 150 and 160 pounds. He described clothing; a winter hat, black coat and a sweater, and gray pants.
Q. Okay. Now, did you -- after that date -- again, now, you just testified that you possibly had told him or had given him instructions about possibly coming in to look at photo books. Did there come a

color photos or black and white?
A. Color.
Q. All of them are color?
A. Correct.
Q. Do the individuals appear to be approximately the same age in each photo?
A. I mean, to me they -- they look about the same.
MS. MERCURIO: Thank you, Judge. I have nothing further at this time.
Thank you, sir.
THE COURT: Ms. SanFilippo?
MS. SANFILIPPO: Nothing additional, your Honor.
THE COURT: You may step down, sir. Thank you.
Are you prepared to call your next witness, Ms. Mercurio?
MS. MERCURIO: Yes, your Honor. I would like to now call Mr. Lidwyn Cummings.
THE COURT: Okay.
COURT OFFICER: Remain standing, raise your right hand.
L I D W Y N C U M M I N G S, STATE'S WITNESS, SWORN.
COURT OFFICER: State your full name.
THE WITNESS: Lidwyn Charles Cummings.

COURT OFFICER: Have a seat.
THE COURT: Proceed, please.
MS. MERCURIO: Thank you.
DIRECT EXAMINATION BY MS. MERCURIO:
Q. Mr. Cummings, approximately how old are you?
A. 52.
Q. And are you presently employed? Are you presently working?
A. Yes.
Q. Where at?
A. University of Medicine and Dentistry of New Jersey.
Q. And in what capacity, sir?
A. Construction.
Q. Okay. And how long have you worked there?
A. Almost four years.
Q. All right. And on the -- what town do you live in, sir? What town do you live in?
A. Irvington.
Q. How long have you lived there?
A. Past 10 years.
Q. Okay. And are you married or single?
A. Married.
Q. Now, sir, I want to direct your attention to January 11th of last year, 2002. On that date, January

11th, had you been working that day?
A. Yes.
Q. And did there come a time when your time -- work shift end -- ended?
A. I was working overtime --
Q. Okay.
A. -- until 8.
Q. What time did work end for you?
A. 8.
Q. Okay. At night or in the morning?
A. 8 in the evening -- night.
Q. Now, did there come a time when you left your place of employment?
A. Yes.
Q. And after you left your place of employment, did something happen to you?
A. Yeah.
Q. Okay. By the way, when you left your place of employment, where did you proceed or where did you go?
A. My wife wanted me to pick up some medication for her at the drugstore.
Q. For who?
A. My wife.
Q. Okay. And where is that drugstore located?

A. It's located right on the corner of Stuyvesant and 18th Avenue.
Q. In what town?
A. That's Newark.
Q. Okay. Was that close to your job that location?
A. No. It's close to home.
Q. It's closer to home?
A. Right.
Q. Okay. How did you get to the drugstore?
A. I drove there.
Q. Continue.
A. I parked on the -- right across from the post office. If you're familiar with the area, a street called Valley Street going down. Went in the drugstore and asked the pharmacist for the drugs. He said the doctor didn't call it in. So I bought a pack of cigarettes. Going back out to the --
Q. You what? I'm sorry. You what?
A. I bought a pack of cigarettes --
Q. Okay.
A. -- and was going back to my pickup.
Q. Okay. Where is your pickup in relation to the drugstore? Was it right up next to the corner?
A. It was -- it's across from the like (accent).

Q. Okay.
A. So, coming out of the drugstore, I noticed there was a gentleman going across the street going towards my pickup. So, I walked up fast and then we crossed and almost bumped into each other.
Q. Bumped by who?
A. No.
Q. Who bumped you? Who bumped you?
A. We didn't really bump. We almost bumped.
Q. Oh. You almost bumped. Okay.
A. Yeah. So, --
Q. Was this the person you saw walking toward your vehicle?
A. Yeah.
So, I take -- I had my keys out to go open the door to go back to -- start the pickup to go back to work when as soon as I put the key in the door I feel something in my side. He says --
Q. Now wait. You felt something in your side?
A. Right.
Q. What did you do?
A. I looked down.
Q. What did you see?
A. A gun.
Q. You saw a gun?

A. Yeah.
Q. Was it a real gun?
A. From my point of view, it was.
Q. Okay. Continue.
A. I wasn't going to take a chance to find out.
Q. Okay. After you looked at the gun, where did you look?
A. I looked at the person. He said, "Give me your money." I said, "I ain't got no money." So, he said, "Give me your fucking money or else I'm going to pop you one." I says, "I ain't got no money." This time I got about $20 and some change in my pocket and the cigarettes. Reach in and take it out.
Q. What? I'm sorry?
A. No. The $20, some change and cigarettes that I just bought. I reach in and take it out.
Q. What pocket are you pointing to?
A. My right pocket.
Q. Front pocket?
A. Yeah.
Q. Okay.
A. It was in a coat.
Q. It was in your front coat pocket.
A. Yeah.
Q. Right side?

A. Right side.
Q. Okay. And so it was about $20 and your cigarettes?
A. Yeah.
Q. Okay. What happened next?
A. Then he says, "Give me your wallet." I says, "I ain't got no money in my wallet." He says, "I ain't joking. Give me your wallet." So I reach in my back pocket to take out my wallet. Then he take the money out of it. Then he says, "Give me your keys." I says, "No. I ain't giving you my keys because I got to go back to work." He says, "Give me your keys." I says, "No. I ain't giving you my keys because I need my pickup." So, he says, "Give me your keys." So I gave him the keys. I said, "Look. Start -- don't throw the keys because I got to get back to work."
Q. Were you going to go back to work after the drugstore --
A. Yeah.
Q. -- that night?
Okay. Continue.
A. So, there's a parking lot right across where that drugstore is. He throw the keys into the parking lot.
Q. Okay. What happened next, sir?
A. Then I run through the gate to retrieve my keys.

So, I retrieved my -- my keys. Went in back to my pickup. I then go down the street where he was heading down. Reverse back out and come around Stuyvesant from 18th. And then stopped at the -- there's a substation -- sub police station (accent) Chelsey. I stopped there and filed a report. And the officer says he'll have a car pick me up to take me downtown. I says, "No. Have him meet me at work because I'm heading back to work."
So, the officer meet me at work. Picked me up from there and sent me downtown to Franklin Street.
Q. Okay.
A. That's where I filed another report down there.
Q. All right. And when you got to Franklin Street, what -- what did you do there? Did you talk to anybody?
A. Yeah. The officer who take me down, he take me upstairs. Sit me down. Then after about 10 minutes, detective came and take my statement.
Q. Okay.
A. And he says to me, "We want you to come back", -- this was on a Friday -- he says, "on Monday so you can go through the mugshot books." I said, "Okay."
Q. Did you do that?
A. Yeah.

Q. Okay. How many days after you went -- how many days after the night this happened did you go back? Do you remember how many days?
A. This happened Friday and I went back Monday. And they showed me a couple books. I went through them. I didn't see any.
Q. Now, when you say a couple books, could you describe for the jurors what these books looked like or how many --
A. Big books --
Q. Okay.
A. -- with photographs.
Q. And you went through a couple you said?
A. No. It was about six or more.
Q. Six books?
Okay. Do you recall approximately how many photos were in each book approximately. I know you probably weren't counting. But --
A. No. There was a lot.
Q. -- a hundred or --
A. They were big books.
Q. Okay.
A. They were like this high.
Q. Do you recall approximately how many photos you were looking at that one day?

A. A lot.
Q. Okay. Did you recognize anybody in any of those photos as far as the person who did this to you?
A. No.
Q. Okay. Now, you said you gave a statement the night of -- that this happened.
A. Right.
Q. Was it a written statement, typed or was --
A. He was -- he was typing.
Q. Okay. I'm going to show you what's been marked S-3 for identification. Do you recognize this?
A. Yeah. This was the statement I gave that Friday night.
Q. Okay. Do you recognize anything?
A. My -- my signature.
Q. Okay. Now, after you gave a statement to the police officer, did you go back to work that night?
A. No.
Q. You did not go back? Why not?
A. Well, he -- he dropped me back at work the officer who picked me up. Returned me back to work. And I pick up my van from there and went home.
Q. All right. Now, you just gave a -- an account of what occurred to you that night. And what I'd like you to do is, first of all, there's white

paper behind you. And I'd like you to take this magic marker and I'd like you to draw all those streets that you mentioned and the drugstore, the parking lot you said the keys were thrown into, and the route that you -- if you recall, the route you took after you got your keys back.
A. Oh, okay.
This would be --
Q. You can draw as big as you want.
A. Yeah. This would be Stuyvesant.
Q. Okay.
A. This -- this would be 18th Avenue. And as I was coming from the left, --
Q. Is there a street named Valley Street near there?
A. Right. Valley would be around here coming out around this way.
Q. Okay. Could you write Valley?
A. And the drugstore would be right here, right on the corner. And I would be around here. The parking lot would be about here.
THE COURT: Do you know what would be helpful, if you don't mind? Draw an arrow or -- or label, if you can, if you didn't make that too small, where -- where you were and where -- where the

drugstore was because I want the -- I want to be clear.
MS. MERCURIO: Actual -- actually, Judge, if I may?
BY MS. MERCURIO:
Q. Sir, if -- if you don't mind, could I -- use another paper. Could you just draw it a little bigger? This way we'll be able to --
THE COURT: Can you label that S-9A, that -- this piece of paper that the witness just drew on? I want it labeled S-9A because that would be your next exhibit I believe, wouldn't it?
BY MS. MERCURIO:
Q. No. The --
A. Oh.
Q. That's okay. That's okay. Could you just put your initials on there, sir? Thank you.
A. I'm sorry.
Q. Today's the 8th? No. 9th?
MS. SANFILIPPO: The 9th.
BY MS. MERCURIO:
Q. Put 4/9/03.
THE COURT: And, Ms. Mercurio, just please write S-9A on there.
MS. MERCURIO: I will.
THE COURT: Okay?

BY MS. MERCURIO:
Q. Okay. Now, just -- if you could, just draw those streets a little bigger so maybe you could draw little boxes to show the drugstore and the parking lot? Okay. That's better.
A. This would be 18th and --
Q. Okay. Now, you can draw where the drugstore was approximately in relation to those streets.
A. The drugstore is right around here.
Q. Okay. Could you put D.S. for drugstore? Okay. Good.
All right. And where was your car parked? You said your car was parked across the way.
A. Right here.
Q. Okay. Could you put a circle and put C for car? Okay.
Now, I would like you to take the pointer stick that -- oh, by the way. Could you draw the parking lot, if you could see it on that diagram?
A. The parking lot would be like right here. Just to the side right there.
Q. Okay. Draw an arrow coming down pointing to that line you just drew. And above that arrow put parking lot. Above it. Right above it. P for parking lot. Okay. Great.

Now, there's a stick there -- under there. See that stick?
A. Yeah.
Q. All right. I'd like you to stand off to the side so the jurors can see.
A. Okay.
Q. And I would like you to show the jurors as -- how you -- when you came out of the drugstore where -- where you went.
A. Okay. The drugstore here. I came out and going toward the vehicle here -- the pickup which is just right across the street from it. And he was coming from this end over.
Q. Where did you first notice him when you said you saw him walking?
A. I was about right -- just as I came out of the drugstore.
Q. Okay. And where was he when you first noticed him?
A. About here.
Q. Okay. I'm going to --
THE COURT: Ms. Mercurio, when -- when your witness is -- when your witness uses words like right here and --
MS. MERCURIO: Yes.

THE COURT: -- such and such, I need you to describe for the record where your witness is pointing to --

MS. MERCURIO: Yes, Judge.

THE COURT: -- at least in your estimation of things.

MS. MERCURIO: That's what -- I was going to have him mark in a different color where right here was.

BY MS. MERCURIO:

Q. Sir, in this green -- with this green magic marker, I want you to draw the route you saw the man that robbed you -- where you first saw him and draw a line where you saw him go where he met up with you.

A. Okay.

Q. So where you first saw him. You said he was across the way walking.

A. Okay.

Q. Start there with the --

A. The truck's right here.

Q. Right.

A. My vehicle is right here. He was coming towards me.

Q. Is -- is that working?

A. Yeah.

Q. Okay. All right. Good.

A. Right.

Q. So he was walking towards your vehicle?

A. Right.

Q. Okay. Continue.

A. I came down to the vehicle. Go around to open the door to go in the pickup. And he come around from (accent) and as soon as I go to put the key in the door, that's when I feel the -- the pain in my side and I looked down and saw the gun.

Q. Okay. And I think you previously testified then you looked at him?

A. Right.

Q. What part of him did you look at?

A. His face because he was like right up to me.

Q. Okay. The man who put the gun to your side, is he the same man you first saw walking toward your vehicle?

A. Yeah.

Q. All right. Now, were there any other people walking around him as he was walking towards your vehicle?

A. No.

Q. When you saw him walking toward your vehicle, were you looking at -- what part of his body were you

looking at?
A. Well, just like the shoulder because I didn't see straight up then.
Q. Okay. When did you first see his face before he came up to you, if you did, before he came up to you?
A. Just about to cross paths when he come across and I crossed path with him to go to my pickup.
Q. Is that when you saw -- looked at his face?
A. That's when I first saw him -- his face.
Q. Okay. Now, after you almost bumped into him, between that time and he came up to you and put the gun, how much time passed?
A. Not -- not even 30 seconds.
Q. Okay.
A. I was right by the pickup to go in -- to go up to the door.
Q. All right. I would like you to tell the members of the jury what the lighting conditions were light?
A. The lighting was good.
Q. All right. What kind of --
A. Right at the parking lot there's a light post. Across the post office -- there's a post office right on the other side. There's a light here. And there's

light over on the other side on 18th Avenue which reflect back over.
Q. Okay. Now, when you say lights, are these -- what kind of lights?
A. Street lights.
Q. Street lights?
A. Street lights.
Q. Okay. Were they all working that night?
A. As far as I can remember, yes.
Q. Okay. Did you have any trouble seeing at all?
A. No.
Q. All right. Could you please, with the yellow for -- for lights, could you please mark where you believe the lights were that assisted you in seeing?
A. Right about here. There was one light post right here.
Q. Now, you've -- is that coming -- is the yellow coming out, sir?
A. Yeah.
Q. Yeah. Could you make like a circle?
All right. Now, for the record, that's -- you're kind of putting it near Valley Street kind of near your vehicle?
A. Yeah. It wasn't far from the vehicle.

Q. Okay. Continue.
A. There's another one right up here on the corner.
Q. Okay. And you said there was a third one?
A. Yeah. You have the street lights over here on 18th and Stuyvesant and --
Q. Is there a traffic light there, sir?
A. Yeah.
Q. Red light/green light?
A. Red, green, yellow right on the corner of 18th and Stuyvesant.
Q. Okay. Was -- and were there any lights on in the drugstore?
A. Yeah. There was light on in the drugstore.
Q. All right.
A. But they didn't have an outside light.
Q. Okay. Were there any other businesses next to the drugstore or was it just houses, people's homes?
A. No. There's a bar just half a block up the street from the drugstore, which is right across Stuyvesant from the post office.
Q. Okay. Good.
All right. You can put the caps on those magic markers and --
Now, I would like you to step down one step. You testified that after the man put the gun to your

side and took your money and had that conversation about taking the money, he took your keys and threw them into a lot.
A. The parking lot.
Q. Okay. The parking lot. Again, with the pointer, show the jurors where that lot is.
A. That would be like right here.
Q. Okay. Was your car facing the lot or was your car facing the other way?
A. No. My car was facing towards the street.
Q. The other way, opposite --
A. Yeah.
Q. -- the lot -- the parking lot.
A. Right.
Q. So, you were parked on Valley Street?
A. Right.
Q. Okay. Now, I'd like you to, with the pointer, show the jurors, after the man left you, after he took your money and cigarettes and left you, you said he threw the keys in the lot?
A. In the lot.
Q. And then where did he go? Show the jurors by --
A. He went down Valley Street.
Q. Okay. What did you do?

A. I come around. Go through the gate to retrieve my keys.
Q. Okay.
A. Come back. Reverse back here. And go to Stuyvesant and turn on 18th.
Q. Do that again?
A. I reversed back after I retrieved my keys. Reversed back and turn around, --
Q. Uh-huh.
A. -- go on Stuyvesant and come down 18th.
Q. All right. And where did you go -- showing -- using the stick -- pointer, show where you went down 18th Street.
A. I went down 18th to Vermont. Turned left on Vermont or to Orange Avenue. And just up from Vermont is about half a block where the sub police station is. I stopped there and made the report. My first report was made there. The officer called downtown and they was going to have a cruiser pick me up there. So, I told him no. "Have him pick me up at work." So, he meet me at work. By the time I reached there, the cruiser was there waiting for me.
Q. So, you had -- there was a cruiser waiting for you at work --
A. Right.

Q. -- and brought you to what street?
A. Franklin Street, the police station down there.
Q. Okay. Now, did you try to follow the man that robbed you?
A. No.
Q. Okay.
A. I reversed. I didn't go the direction he was going.
Q. Say that again.
A. I didn't -- that's why I reversed back. I -- he was going down Valley Street.
Q. Yes.
A. And I reversed back to go Stuyvesant onto 18th.
Q. To meet him?
A. No.
Q. Oh.
A. No. He was going down Valley Street.
Q. Okay. Where on Valley Street did you last see him before you lost sight of him or before you turned your attention away?
A. It would be like about here, not too far off.
Q. Okay. Good.
A. (Accent) pickup when he took my cars, I come back out. He was going down Valley Street.
Q. All right. And did -- were you able to give

the police that night a description of him?
A. Yeah.
Q. And what was your description, if you recall, as far as his clothing? First let's talk about clothing. Do you remember what he was wearing?
A. He was wearing a black hooded sweater, gray pants, and he had on a cap.
Q. Okay. What about his height, weight, approximate age? Did you give any description like that to the police?
A. Yeah. His height was about the same as mine.
Q. How tall are you?
A. 5-8.
Q. Okay.
A. And his age was about 25, 23. His height was about -- his weight was about 150.
Q. Okay. Now, how much did you -- did you weigh at that time?
A. I was weighing about 195.
Q. Okay. So he appeared to be thinner than you or --
A. Yeah.
Q. -- weighed a little less than you?
Okay. You may put that pointer back, sir. Thank you.

And could you put your initials on there, too, and today's date.
MS. MERCURIO: Judge, for the record, that will be S-9B?
THE COURT: Right.
BY MS. MERCURIO:
Q. Sir, did you feel that you got a good enough look at the suspect, the man that did this to you, that you would be able to make an identification?
A. At the time, yes.
Q. Okay. Now, after looking through those books, you testified you didn't see -- recognize any of the persons pictured in any of those photographs as the person who did this to you, correct?
A. Right.
Q. Did there come a time after that Monday that you again looked at some photos?
A. Yes.
Q. Okay. Do you remember where that took place?
A. Franklin Street.
Q. Okay. And what kind of photos were shown to you and how many about?
A. I think -- I don't know. There were quite a bit. There -- they just wasn't -- they weren't in a book.
Q. They weren't in a book?

A. No.
Q. Okay. The first -- the first one was books. But these one were -- they weren't in a book. And they were --
Q. For the record, you're doing this with your hands.
A. Yeah.
Q. Like a stack?
A. There was a stack like -- but I didn't count them or anything.
Q. Okay.
A. And there were different photos.
Q. Do you remember who showed them to you?
A. I know it was a detective.
Q. Okay.
A. I didn't get his name.
Q. Was he white, black?
A. White.
Q. White guy.
A. Right.
Q. All right. When you looked at the photos, -- as you were looking through the photos, did you recognize anybody?
A. Yeah.
Q. Okay. Who did you -- who was it?

A. The person who robbed me.
Q. How positive were you?
A. I was really sure.
Q. All right. Did you tell that to the detective?
A. Yeah.
Q. All right. Did you do anything to the photo of the person who you picked out?
A. I think I put my initials on the back.
Q. Okay. By the way, sir, you've been sitting here for quite a few minutes. I'm going to ask you to look around the courtroom at anyone in here. And I'm going to ask if you can recognize anyone here or recognize the person who did this to you? Look around the whole courtroom.
A. I'd say that gentleman over there.
Q. Okay. You're pointing to the man sitting here. What -- what is he wearing, sir?
A. White suit.
Q. All right. How positive are you, sir, that he's the person who robbed you?
A. This happened over a year.
Q. Uh-huh.
A. So the memory -- but from remembering back, I would say about 80 percent.

Q. Okay.
A. I'm not going to say I'm 100 percent certain now because this happened a way back.
Q. All right. Well, how positive are you today that the person sitting in court is the person who did this?
A. I'd say about 80 percent.
Q. All right. How about when you picked the picture out?
A. I was -- then it was much fresher.
Q. Okay. I'm going to show you S-5A for identification. Do you recognize these photos?
A. I think I picked out this one.
Q. Okay. Do you recognize all of them? Do you they look familiar to you?
A. I don't remember.
Q. Okay.
A. There was a lot of pictures I looked at.
Q. Okay.
A. To be honest with you, I don't remember looking at all of them.
Q. All right. You said this is the picture you picked out?
A. Yeah.
Q. All right. Do you recognize anything on the

back of it?
A. My signature.
Q. Okay. And you have the date -- is there a date there that you put on there?
A. 16th of the 1st, '02.
Q. Okay. Now, did anyone force you to pick that picture out?
A. No.
Q. Okay. Did anyone threaten you in any way to pick that picture out?
A. No.
Q. Anyone promise you anything to pick that picture out?
A. No.
Q. Okay. Now you said when -- when you picked this picture out, the image of the -- of the person who did this to you was fresh in your mind?
A. Yeah.
Q. Okay. How positive were you when you picked this picture out?
A. About 95 to 100 percent.
Q. Okay. Does he appear to look the same today in the picture as he is in the courtroom?
A. A little.
Q. Okay. What's -- what's different at this

time, if any?
A. I think he had more hair at the time.
Q. Okay. All right.
Now, with regard to the gun, you said it appeared to be a real gun to you?
A. It appeared to be.
Q. Okay. Did you have any familiarity with guns before that date?
A. No.
Q. All right. Had you ever seen a real gun before in any kind of respect?
A. I've seen a real gun before.
Q. Before that date?
A. Yeah.
Q. Okay. The gun that he put to you, did it -- was it a metal gun, plastic -- did it look metal or plastic or --
A. Well, the handle like I -- the police had a gun that looked similar to that one --
Q. Uh-huh.
A. -- with a chrome handle.
Q. Okay.
A. And I told the police that the gun that I saw looked similar to the one that he was wearing.
Q. As the police officer was wearing?

A. Right.
Q. Okay. And did you see that gun that night, that the policeman had, the one that you said looked like his gun?
A. Yeah. Because it was in his holster.
Q. So, you saw the policeman's gun right after you saw the gun that was put to you, correct?
A. Correct.
Q. Now, you said that the Defendant --
MS. MERCURIO: By the way, your Honor, for the record, let the record reflect he's identified the Defendant, the white suit.
THE COURT: The record will so reflect.
BY MS. MERCURIO:
Q. You said that the Defendant said he was going to pop you?
A. Right.
Q. What did you believe that to mean, sir?
A. That he would shoot. He didn't say shoot but that's what I figured it meant.
Q. Okay.
MS. MERCURIO: I have no further questions, your Honor.
THE COURT: Okay. Before there's cross examination, what I would like to do -- can I see those

photographs that were within S-8? How many of them are there?
MS. MERCURIO: S-5A, Judge.
THE COURT: S -- oh, S-5A.
MS. MERCURIO: Six.
THE COURT: Okay. Okay. These -- these are already marked S -- S-1A through F, correct?
MS. MERCURIO: Actually, Judge, I had them in the envelope. They're just marked S-5A, all six.
THE COURT: Well, the backs -- the backs of these photographs are not marked S-5. They're marked S-1.
MS. MERCURIO: That was from a prior hearing, Judge.
THE COURT: Okay. Well, we're not going to do it now, but before we end I need these marked a little more specifically.
MS. MERCURIO: Yes, your Honor.
THE COURT: Okay?
Cross examination.
If you need these photos, you can see them.
MS. SANFILIPPO: Thank you, your Honor.
THE COURT: Can you put these in front of the witness, please?
MS. SANFILIPPO: Your Honor, may I request

permission to cross examine the witness from here?
THE COURT: Yes.
MS. SANFILIPPO: Thank you.
CROSS EXAMINATION BY MS. SANFILIPPO:
Q. Mr. Cummings, my name is Dawn SanFilippo and I represent Mr. Minor. I have a few questions for you regarding your -- your testimony.
A. Right.
Q. You stated that you had approximately the -- you stated the incident occurred on -- for approximately 20 seconds, is that correct?
A. The incident?
Q. Yes. Where -- where you looked at the --
A. No. I said -- no. The bump -- when we bump -- when I walked to open my car door was about 30 seconds, not more.
Q. 30 seconds.
A. Not more.
Q. And initially your attention was focused on what you believed the gun to be, correct?
A. Well, I seen a gun. So I had to believe it was real.
Q. But that drew your -- your attention, is that correct? You looked at it?
A. Yeah.

Q. And did --
A. Because when I feel it in my side, I looked at it.
Q. Did you become nervous?
A. Of course I was.
Q. And your heart started to race?
A. Well, yeah.
Q. Do you recall after the incident giving a statement to the police, correct?
A. Yeah.
Q. And in that statement, you describe the incident as you remembered it at the time, correct?
A. Right.
Q. And do you recall the description that you gave to the police officer on the date of the incident of the alleged actor? Do you remember how you described the suspect?
A. Right. He was about 5-8, which I told you was about my height. He was wearing a dark -- a black hooded sweater and gray pants. His height (sic) was about 150. I mean, his weight was about 150.
Q. Do you recall if he had on -- anything on his head?
A. He had a tam on.
Q. A what, sir?
A. A tam.

Q. And can you describe that?
A. It's one of these (accent) like (accent) tams.
Q. And you testified that the suspect took $20 from you, is that correct?
A. That was in my coat pocket with my cigarettes. And then $40 out of my wallet that I took out of my pocket when -- and he took the money out.
MS. SANFILIPPO: Your Honor, I'd like at this time to present to the Defendant (sic) what's been marked S-3 for -- strike that --
MS. MERCURIO: The witness.
MS. SANFILIPPO: -- the witness. I'm sorry. May I approach the witness?
THE COURT: Yes.
BY MS. SANFILIPPO:
Q. Sir, I'm placing before you a document that has been marked S-3. Do you recall that document?
A. Yeah.
Q. And on the bottom right hand corner, is that your signature?
A. That's my signature.
Q. And can you just state what this is this document?
A. This is a report that I gave to the detective downtown.

Q. Okay. And I ask you to review that briefly.
A. Okay.
Q. When you're ready, sir.
A. Okay.
Q. Do you recall, sir, telling the police officers that $64 was taken from you?
A. I said it was about 64. I remember there was some change in my pocket which he took as well. I didn't exactly know how much it was. So, I said it was -- it was about.
Q. After you gave this statement to the police, --
A. Right.
Q. -- did you go back to the area of 18th Street and Stuyvesant with the police officers to look for the individual?
A. No.
Q. And that happened on Friday, correct?
A. It happened on a Friday evening.
Q. And on Monday you went back to the police station and viewed the photograph books, correct?
A. Correct.
Q. And you said there were several large books, six of them?
A. Yeah. Maybe six or eight. I didn't count them. I

know they give me a bunch of books to look through.
Q. And just approximately how many photographs? A couple dozen?
A. No. There was a lot of photographs in them books. A lot.
Q. Maybe a few hundred?
A. Could be thousands. I don't know. There -- there was a lot. I didn't count.
Q. Okay, sir.
And then on the 16th, you returned to the police station, correct?
A. Correct.
Q. What made you go back to the police station on the 16th?
A. The detective called me down. I went down. They called -- they called my house. I wasn't home. I was at work. They leave a message for me to come down. So I went down and see them. They says they want me to look at some more photographs. So then --
Q. And then they gave you additional photographs to look at?
A. Right.
Q. Did you inquire as to why you were looking at these photographs?
A. No.

Q. Was anything said about these -- these new photographs?
A. No.
Q. And were they similar or dissimilar to the photographs you had seen before?
MS. MERCURIO: Judge, I'm going to object to the form of the question. Perhaps defense counsel could be more specific.
THE COURT: Do you understand the question?
THE WITNESS: No. Not really.
MS. SANFILIPPO: Okay.
THE COURT: Rephrase the question, please.
MS. SANFILIPPO: I'll rephrase it.
BY MS. SANFILIPPO:
Q. Do --
MS. SANFILIPPO: Your Honor, do you have the photographs?
THE COURT: The witness has the photographs.
BY MS. SANFILIPPO:
Q. Do you -- you have the photographs, sir?
A. No. The photographs are right here.
MS. SANFILIPPO: Your Honor, if I may approach?
THE COURT: Yes.
MS. SANFILIPPO: Okay.

THE COURT: You may.
BY MS. SANFILIPPO:
Q. These are Polaroid type photographs. Are -- the -- are the -- are these Polaroid type photographs similar to the photographs you viewed in the books or were -- were they Polaroids as well?
A. Like I says, there was a lot of photographs in them books. And they were paste to the thing. I didn't even look at who was -- what was Polaroid, what was a regular photograph. I not -- I just flipped. It wasn't him. Keep flipping. I didn't check what was Polaroid. I didn't check what was a regular photograph. Or what was done with a different camera or a different angle or anything like that.
Q. And these -- all of these, sir, though are Polaroids, correct?
A. Well, I would assume.
Q. And you said on the 16th, when you went back to the police station, you were given a stack --
A. Right.
Q. -- and you held up your hands approximately four to six inches apart, is that correct?
A. Yeah. Because I didn't count them. I was just given a stack of photographs to look through, which I did.

Q. And all those were Polaroids?
A. I -- to my mind -- best of my knowledge, yes.
Q. Sir, you said that you -- you testified that you were going back to work.
A. Right.
Q. Do you recall what time it was you went to the drugstore?
A. It was about 7:30, 7:35.
Q. And so this -- the sun had gone down on a January --
A. Right.
Q. -- on a January night?
Do you recall if you had on a hat, sir?
A. Yeah. I have on a caplet. It was different cap but I had on a caplet.
Q. And do you recall what the weather was that evening? Was it --
A. It wasn't snowing. It was cold but it wasn't snowing.
Q. And you said you were working overtime that evening, is that correct?
A. Right.
Q. If you remember, what time did you start working that -- that morning?
A. 7:30.

Q. So you had, by the time of this incident, put in approximately a 12 hour day?
A. Almost.
MS. SANFILIPPO: I have nothing additional, your Honor.
THE COURT: Redirect?
MS. MERCURIO: Yes.
REDIRECT EXAMINATION BY MS. MERCURIO:
Q. Mr. Cummings, defense counsel asked you about your wallet that was taken. Could you just step down here so the jurors can see better where you were describing where that was located?
A. Okay.
Q. Just step over here and face the jurors rather. Could you just show the first pocket you had the money taken out of your pocket by the Defendant?
A. This is a different coat. Not this coat. It's the pocket on this side.
Q. All right. And now where was the wallet?
A. The wallet was in the right back pocket.
Q. Okay. Now, I'm going to pretend I'm -- I'm going to pretend I'm the Defendant, the person who robbed you. Would you -- your -- would you position me where he was when he had the gun to your side? Tell me where to stand and where he was --

A. Okay.
Q. -- when he was talking to you. Should I stand here or over there or --
A. This way. Come this way. Because, see, my van would be like here. I'm going to open the door. And you'll come close.
Q. How close did he get to you? Should I go --
A. Yes.
Q. -- closer or back further?
A. No. Up close.
Q. Closer than this?
A. Yeah.
Q. Okay.
A. Because were face to face like that. Even closer. Right.
Q. So for the record, am I as close as he was to you that night?
A. No. He was closer.
Q. He was closer than that?
A. Yeah.
Q. Toward the front of you?
A. Yeah.
Q. Okay.
A. Not -- no. I was going to open my door. He came up. And then when I turned around, it was a reflex.

Q. Okay.
A. And we were face to face.
Q. About this far apart?
A. Yeah.
Q. Okay.
MS. MERCURIO: For the record, your Honor, a foot, maybe less.
THE COURT: Do you stipulate that that's the difference between the two, Ms. SanFilippo?
MS. SANFILIPPO: Give or take. I think everyone's observations -- they can see what it is.
THE COURT: You do stipulate?
MS. SANFILIPPO: Your Honor, I -- I can't tell distance. I can't stipulate. I'll say that that's how close they were.
THE COURT: Okay. Well, what appears to be about a foot to the Court.
MS. MERCURIO: Okay.
BY MS. MERCURIO:
Q. Now, you testified about a conversation that was going on between the two of you, correct?
A. Right.
Q. Now, that whole time that conversation took place when he was demanding your money and you refused, was he this close to you?

A. Yeah.
Q. Okay.
A. He was still there with the gun in my side.
Q. Okay. From the time he put the gun to your side to the time he finally left you, how much time passed approximately?
A. Roughly three, four minutes.
Q. Three or four minutes?
Okay. So that's not counting the time when you first saw him crossing --
A. No.
Q. -- the street.
You may sit down, sir.
THE COURT: By the way, if any of the attorneys question the distances, I have a tape measure right here because when the Court said, "What appears to be a foot to me", I'm not the finder of fact. I got a tape measure right here. If either of you want to use it, there it is.
BY MS. MERCURIO:
Q. Okay. Sir, do you wear glasses?
A. For driving.
Q. For -- for driving?
A. Yeah.
Q. Is that for distance?

A. Yeah.
Q. Okay. Do you need glasses to see someone up close to you?
A. No.
Q. Okay. Do you have your glasses with you?
A. Yeah.
Q. Okay. Could you put them on?
Can you see this far away, sir, without your glasses clearly?
A. Yeah.
Q. Okay. Can you put them on, please?
All right. I'd like you to look at the Defendant. Has that changed your mind in any way as far as your identification?
A. No.
Q. Okay. Thank you.
MS. MERCURIO: No further questions.
THE COURT: Recross?
MS. SANFILIPPO: Yes.
RECROSS EXAMINATION BY MS. SANFILIPPO:
Q. Mr. Cummings, you said that -- you testified that you were approximately a foot away from the suspect.
A. No. I didn't say I was a foot. The prosecutor says that.

Q. Okay.
A. I said we were close.
Q. You were close.
A. Right.
Q. As demonstrated.
A. Right.
Q. Okay. And you stated that you looked directly at him?
A. Right.
Q. Did you notice anything about the suspect's teeth or --
A. Well, somebody got a gun in your side, you're not going to look at their teeth.
Q. Did you notice any --
A. No.
Q. -- any other facial features?
A. No. You don't -- I don't think you understand. Look. I've never been in that situation before; find myself looking down at a gun. When somebody with a gun, I don't care who it is, I'm not going to look at their features, try to remember if they look -- what they look like or who they look like. No. I'm terrified.
Q. So, you were nervous and focused on the gun?
A. Right.

Q. Okay. Thank you, sir.
REDIRECT EXAMINATION BY MS. MERCURIO:
Q. Sir, were you looking at the gun the whole time or were you looking at his face also?
A. Both. Because the gun was in my side.
Q. Okay. I need to clarify.
A. I did not have to look at the gun all the time. I was looking at his face. I saw his face. The gun was in my side all the time. Never come out of my side.
Q. All right. After you looked at the gun for the first time, how long did you look at it before you looked away from the gun?
A. I would say 15 seconds, --
Q. Okay. After --
A. -- 20 seconds.
Q. -- after you -- 15 seconds you then looked where?
A. At him.
Q. At him where?
A. His face.
Q. Okay. Now, when you said you weren't looking at features, what do you mean by that? Were you look -- you were looking at his face, correct?
A. Like distinguish mark or anything like that. I wasn't --

Q. Okay.
A. -- going to --
Q. You weren't looking at his teeth?
A. No.
Q. Okay. Did he have his mouth wide enough so you could see all his teeth?
A. No. His mouth wasn't open.
Q. Okay.
MS. MERCURIO: I have nothing further.
THE COURT: Anything else, Ms. SanFilippo?
MS. SANFILIPPO: I have nothing additional, your Honor.
THE COURT: You may step down, sir. Thank you.
THE WITNESS: Thank you, sir.
THE COURT: Ladies and gentlemen, that's going to conclude the testimony for today. I'm going to ask you to be back here tomorrow at 9 a.m. ready for continued -- continued work on your part.
Between now and then, do not discuss the case with each other or anyone else. Do not visit the scene. Don't do your own detective work. Don't look anything up on the Internet. Don't do any of the things that I told you not to do. All of the instructions I gave you just a few hours ago are in

full force and effect.
Have a wonderful evening. See you tomorrow at 9.
JUROR: Thank you.
(JURY EXITS)
THE COURT: I am holding in my hand six photographs that are within S-5A, the testimony is. If there's no objection, I would like -- and, by the way, each of those photographs, on the backs of them, there are numbers, number one through six in the lower right hand corner. I would like the clerk to mark these S-5A-1 through S-5A-6, those numbers corresponding to the numbers already written in black pen on the lower right hand side. Any objection? I think for posterity's sake it's essential.
MS. MERCURIO: No, your Honor. No objection.
MS. SANFILIPPO: That's fine.
MS. MERCURIO: And I would be -- offer them in evidence at this time since we're marking them.
THE COURT: Okay. Any objection to those photographs going into evidence?
MS. SANFILIPPO: No, your Honor.
THE COURT: They are -- will be admitted into evidence.
MS. MERCURIO: As well as S-5 and S-5A,

Judge; the envelopes.
MS. SANFILIPPO: I have no objection, your Honor, to the envelopes.
THE COURT: I'm sorry. What -- I got S-5A-1 through 6 into evidence without exception --
MS. MERCURIO: S --
THE COURT: -- objection. What else?
MS. MERCURIO: S-5A, the envelope.
THE COURT: That's in evidence without objection, correct?
MS. SANFILIPPO: Yes, your Honor.
THE COURT: Anything else?
MS. MERCURIO: And S -- and S-5, --
THE COURT: Which is?
MS. MERCURIO: -- the larger -- the larger envelope, --
MS. SANFILIPPO: The larger.
MS. MERCURIO: -- property in evidence envelope.
THE COURT: Anything else at this time?
MS. MERCURIO: And the two diagrams, Judge.
THE COURT: S-9A and S-9B?
MS. MERCURIO: Yes.
MS. SANFILIPPO: No objection, your Honor.
THE COURT: They will be in evidence as well

without objection.
Anything else?
MS. MERCURIO: No, your Honor.
THE COURT: Okay.
You can let the jurors out.
MS. MERCURIO: Actually, I'd like to have the photo ID forms, if there's no objection, S-7 and 8.
THE COURT: Any -- and -- you know what? Let -- let them go home.
Any objection?
MS. SANFILIPPO: No, your Honor.
THE COURT: S-7 and S-8, correct? Is that what you said, Ms. Mercurio?
MS. MERCURIO: Yes. S-7 and --
THE COURT: Each -- each of them are one page, right?
MS. MERCURIO: Yes.
THE COURT: S-7 and S-8.
MS. MERCURIO: That's it, Judge.
THE COURT: Okay. Is there anything else that anyone wants to place on the record?
MS. MERCURIO: No, your Honor. There is something, Judge.
THE COURT: Wait.
MS. MERCURIO: Yeah.

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION - CRIMINAL PART
INDICTMENT NOS. 02-05-1845
02-05-1846
02-04-1208
A.D. NO. A-6210-03T4

THE STATE OF NEW JERSEY,

vs.

DAVID MINOR a/k/a DAVID SMITH,

Defendant.

TRANSCRIPT OF PROCEEDINGS

TRIAL

Place: Essex County Courthouse
50 West Market Street
Newark, New Jersey 07102

Date: April 10, 2003

B E F O R E:

HON. MICHAEL L. RAVIN, J.S.C. and a Jury

TRANSCRIPT ORDERED BY:

LOUIS G. GONNELLA, ESQ.
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done.
MS. MERCURIO: Oh, that's -- I definitely would do that, Judge, if he did that.
THE COURT: So, that's up to the parties. Okay. Now, anything else?
MS. MERCURIO: No, your Honor.
MS. SANFILIPPO: Nothing.
THE COURT: Okay. Let's call in the jury.
MS. MERCURIO: Judge, I'll just be -- can I just, before you call them in, I --
THE COURT: Don't call in the jury.
MS. MERCURIO: I'll be just a minute.
(OFF THE RECORD)
THE COURT: We're ready to proceed. Ms. Mercurio, please call your next witness.
MS. MERCURIO: Your Honor, the State called Detective Keith Hughes.
(OFF THE RECORD)
DETECTIVE K E I T H H U G H E S, STATE'S WITNESS, SWORN.
COURT OFFICER: State your full name.
THE WITNESS: My name is Keith Hughes. And the last name is spelled H-U-G-H-E-S.
COURT OFFICER: Be seated.
THE COURT: Proceed, please.

MS. MERCURIO: Thank you, your Honor.
DIRECT EXAMINATION BY MS. MERCURIO:
Q. Good morning, sir.
A. Good morning.
Q. Where are you presently employed?
A. I'm employed by the City of Newark. I'm currently assigned to the South District Detective Squad.
Q. And how long have you been assigned to that squad?
A. Approximately a year.
Q. Okay. How long have you been a police officer with the City of Newark?
A. 14 years.
Q. Now, Detective, I'd like to direct your attention to January 11 -- January of 2002. Where -- were you working in that district at that time?
A. No, I was not.
Q. Where were you working?
A. I was assigned to the Robbery/Homicide Division.
Q. Okay. And what street is that on?
A. That's located at 22 Franklin Street, City of Newark.
Q. Okay. Now, did you have occasion as a detective in the Robbery/Homicide Squad in January of 2002 to become involved in an investigation of a

robbery of a Lidwyn Cummings in Newark on January 11th, --
A. Yes, I did.
Q. -- 2002?
When did you get assigned to that case?
A. I was assigned to that investigation approximately January 14th.
Q. Now, when you get assigned to the case, is that after it's been initially reported by the victim?
A. That's correct.
Q. Okay. And to your knowledge, what -- had Mr. Cummings already reported this incident before you got assigned?
A. That's correct.
Q. Now, did you prepare a report in this matter regarding this incident?
A. Yes, I did.
Q. I'm going to show you what's marked -- previously marked for identification S-2. Do you recognize this, sir?
A. Yes, I do.
Q. And what is that?
A. This is the report that I typed after investigating this matter.
Q. Okay. And what is -- is every case assigned

a case number, sir?
A. Yes, it is.
Q. And what was the case number assigned to this case?
A. Case number affixed to this case is 3964 followed by the prefix year, 02.
Q. Okay. Now, when you got assigned to this case on January 14th, 2002, were you able to meet with the victim on that date or thereafter?
A. Thereafter I interviewed the victim.
Q. Okay. And as a result of -- and, by the way, were you able to review any prior reports filed in this matter by other officers?
A. Yes, I was.
Q. And did you review the statement by the victim?
A. That's correct.
Q. And to your knowledge, based on the information given up to the point you got assigned, did you believe a suspect could be identified?
A. That's correct.
Q. Now, as a result of that knowledge, what, if anything, did you do or obtain?
A. I obtained a photograph from the detective assigned to the Robbery/Homicide Division.

Q. What was his name?
A. That's Detective DeFabio.
Q. Okay. First name?
A. Michael DeFabio.
Q. And the photograph that was obtained, who -- whose photograph was that?
A. That was the photograph depicting Mr. David Minor.
Q. Okay. And what was the basis of obtaining that photograph?
A. The basis of obtaining that photograph, it was facsimiles where in which the individual as far as information provided, descriptive information as far as possibly height, weight information, complexion and general description of the individual possibly involved in the crime.
Q. And was that information obtained from the victim in this matter?
A. That's correct.
Q. All right. So, what, if anything, did you do with this picture of David Minor?
A. That photograph was inputted with additional photographs and provided --
Q. Who selected those photographs?
A. I selected the photographs.
Q. And what did you base those other photographs

on, their --
A. The characteristics based on the description provided by the victim.
Q. Okay. Now, what -- what did you do with -- how many -- do you remember how many pictures you selected to put with Mr. Minor's picture?
A. I believe there was an additional five pictures.
Q. Okay. And what did -- what, if anything, did you do with them?
A. After selecting these photographs, Detective Mike Chirico, also assigned to the Robbery/Homicide Division, was asked to show these photographs to the victim.
Q. Okay. And did you give the photos to him to do that?
A. I did.
Q. Okay. Now, did you stay there while he did that or did you go anywhere else?
A. No. I was not in direct contact with Detective Chirico or the victim at the time.
Q. And did there come a time after you had given Detective Chirico these photos that you again saw them and did something with them?
A. Yes, I did.
Q. What was that?

A. That's correct.
Q. Okay. Now, does it have the date that Mr. Cummings selected it?
A. Yes, it does.
Q. What date is that?
A. It has the date of January the 16th, 2002.
Q. Okay. Thank you.
Now, again, these -- with regard to the other photos, you stated you selected the photos based on characteristics. Is that the procedure utilized by the Newark Police Department --
A. Yes, it is.
Q. -- to -- when you do photo arrays?
A. That's correct.
Q. Okay. Were these -- do these photos appear to look in substantially the same condition they did as -- when you selected them?
A. Yes, they do.
MS. MERCURIO: Your Honor, I'd like to publish these to the jurors?
THE COURT: Any objection?
MS. SANFILIPPO: No, your Honor.
THE COURT: You may.
MS. MERCURIO: Thank you, your Honor.
(OFF THE RECORD)

DIRECT EXAMINATION BY MS. MERCURIO CONTINUED:
Q. Detective, did you -- after identification was made by Mr. Cummings and after reviewing the statement, did you then on the 16th arrest and slate David Minor for the offenses as described by the victim?
A. Yes, I did.
Q. Now, did you -- as a result -- when you arrest someone, do you obtain the personal information from the person arrested?
A. That's correct.
Q. And did you do that in this case?
A. Yes, I did.
Q. Now, do you put that on some kind of a report?
A. Yes, you do.
Q. What -- what kind of report is that?
A. That's the Newark police arrest report.
Q. And was that done in this case?
A. Yes, it was.
Q. I'm going to show you what's been previously marked S-6 for identification. Do you recognize that, sir?
A. Yes, I do.
Q. And what is that?

A. This is the arrest sheet submitted -- related to this investigation.
Q. All right. I'd like to go through just the personal information with you regarding the information obtained from the -- the -- by the way, do you see the -- David Minor in court today, sir?
A. Yes, I do.
Q. Could you please point him out and describe what he's wearing?
A. The gentleman sitting at the table. White shirt, blue/black pants.
MS. MERCURIO: Your Honor, for the record, he has described the Defendant.
THE COURT: The record will so reflect.
MS. MERCURIO: Thank you.
BY MS. MERCURIO:
Q. Sir, what address did Mr. Minor give at that time on the 16th?
A. The address related to this arrest is 444 18th Avenue, City of Newark.
Q. Okay. And did he -- what age -- what age did he give -- date of birth and the age?
A. The age is related to this as being 29 years of age. The date of birth is 12/6 1972.
Q. What height did he give?

THE COURT: I'm sorry. What -- what did you say the age was -- the date of birth?
THE WITNESS: 12/6/72.
THE COURT: Thank you.
BY MS. MERCURIO:
Q. And what --
THE COURT: Next question.
BY MS. MERCURIO:
Q. -- what height?
A. The height is listed as 5-7.
Q. And the weight?
A. Approximate weight, 165 pounds.
Q. And hair and eyes?
A. Black hair, black eyes.
Q. Okay. And -- and as far as scars or marks or other descriptive data, was any seen -- any distinctive scars or marks seen by you?
A. No.
Q. And did you indicate that in your box?
A. Yes, I did.
MS. MERCURIO: Your Honor, at this time I'd like to introduce the gun permit search in the name of David Minor --
THE COURT: I don't think that --
MS. MERCURIO: -- obtained by the State.

THE COURT: Right. Yeah. No.
MS. MERCURIO: Okay.
THE COURT: He can't be an alternate. My -- my point is I'm letting you know when I intend to excuse him and it's not right now. Any objection?
MS. SANFILIPPO: No objection.
THE COURT: Okay.
All right. Are you going to call another witness or --
MS. MERCURIO: I'm done.
(SIDEBAR CONCLUDED)
THE COURT: Don't even sit down. Just come up here for a second.
(SIDEBAR ON THE RECORD)
THE COURT: How long should I excuse the jury for?
MS. SANFILIPPO: 15 minutes?
THE COURT: All right.
(SIDEBAR CONCLUDED)
THE COURT: Ms. Mercurio?
MS. MERCURIO: Your Honor, at this time the State rests subject to putting the following on the record. I have introduced S-10 into evidence, the gun permit search; S-9A and B, the two diagrams; S-7 and 8, the two -- the photo identification forms; and the

photo display report. Also I have introduced in evidence the photographs, S-5, S-5A-1 through 6. I believe that's it, Judge.
THE COURT: Those were -- have been offered into evidence without objection.
Ladies and gentlemen, I'm going to give you a 15 minute break at this time. Don't discuss the case with each other. Don't discuss the case with anyone else. Remember all of my other instructions concerning where to gather, where not. Remember what I said about embarrassing contacts. And that's it. See you in 15 minutes. That's 10:45 on the courtroom clock.
(RECESS)
MS. SANFILIPPO: Yes, your Honor.
THE COURT: I'll -- I'll hear you.
MS. SANFILIPPO: Your Honor, at this time the defense moves to dismiss all counts of the indictment.Specifically with respect to the robbery, I -- I don't believe that the State has proved with the testimony -- the only testimony as to the actual identification came from Mr. Cummings who acknowledged that he wasn't sure even with the in-court identification who Mr. Minor was. I believe he gave a percentage of about 80 percent, which in -- with respect to a criminal case is not -- not sufficient.

With regard to the gun possession, there was no gun recovered and the witness stated that he believed that it was a gun. So, on possession of a weapon, clearly the weapon must -- it must be a weapon. Unlawful possession of a weapon. Any person who knowingly has in his possession any handgun, including an antique handgun, without first having obtained a permit to carry same.

Again, even by the -- by the witness' -- Mr. Cummings' testimony, he said it looked like a real gun and I believe he made the comment that he didn't hang around to find out. He didn't conclusively say that it was a gun and I ask that that be dismissed.

And, again, possession of a weapon for an unlawful purpose. Any person who has in his possession any firearm with the purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. Again, the -- the -- the State's only witness with respect to the weapon could not acknowledge whether it was real. He said himself he wasn't sure. So, I believe that that would have to be dismissed.

And with respect to the robbery, at this point the identification by the witness' own testimony is so weak that I do not believe that this should be

submitted to the jury.

THE COURT: Ms. Mercurio?

MS. MERCURIO: Your Honor, pursuant to State versus Reyes, the State -- as your Honor knows, the Court can give and the jury can give all reasonable inferences to all the favorable evidence that was educed at trial.

The main identification in this case, Judge, obviously was within five days of the incident where the victim stated on the stand that he was 95 to 100 percent sure of his identification of the photograph of the Defendant. Your Honor has seen the photograph. It is an exact depiction of the Defendant. It's a very closeup photograph of his face. It's not a photo from a distance. And I would submit under State versus Reyes, the -- the jurors certainly can infer, based on that identification within five days of the incident and as well as looking at the photograph, that the Defendant is, in fact, the perpetrator of the crimes listed in the indictment.

With regard to the firearm, your Honor, again, giving the State all favorable inferences to all the favorable evidence educed at trial, the victim, I believe, testified he had seen a real gun prior to that date. He believed it was a real gun. It looked like a

real gun. As a matter of fact, he even pointed to the detective's gun and said it's -- "that appeared to be just like yours."

So, that would be up to the jurors --

THE COURT: With a chrome -- with a chrome handle, I would add.

MS. MERCURIO: With a chrome handle.

I would submit that that -- that -- those counts should not be dismissed. The jurors -- let them give whatever weight they can to his testimony as far as determining whether it is, in fact, a real firearm.

Also, we have the evidence of the Defendant's own words or -- that, "I'll pop you." So, that's evidence that, in fact, a real weapon was being utilized. Otherwise, why make such an idle threat?

The other matter is, Judge, even if the defense -- the jury does not find it's a real firearm with regard to count one, again, I submit the identification was certainly proper. Even his in-court he said 80 percent, Judge. And probably -- probably -- in a civil case, by a preponderance of the evidence is just a little bit more than 50/50. Here, this victim said 80 percent, which I would submit, meets the standard of beyond a reasonable doubt.

THE COURT: Actually, I don't believe I've

read any cases or statutes yet which define reasonable doubt in terms of percentage --

MS. MERCURIO: Percentages.

THE COURT: -- of certainty.

But be that as it may, continue.

MS. MERCURIO: So, I submit when the jurors put everything together, your Honor, the State -- at least it should go to the jury to make that determination. And under 2C:11-1, a first degree robbery can be committed if the victim -- by a deadly weapon even if they don't find it is a firearm. And a deadly weapon is defined as any instrument which in the manner it's used or intended to be used is known or capable to be of producing death or serious bodily injury or -- and this is the relevant part -- which in the manner it is fashioned would lead the victim reasonably to believe to be capable of producing death or serious bodily injury.

So, even if the Defendant did not, in fact, have a real firearm, he certainly got something that looked exactly like -- like one and led -- led the victim to believe, based on his own testimony, that he was in grave danger or -- of injury or death. So, -- and he testified to the fact of how frightened and terrified he was.

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Based on all those reasons, Judge, and State versus Reyes, I would ask the Court to deny the Defendant's application.

Thank you.

THE COURT: Thank you.

Mr. Minor, you can sit down.

MR. MINOR: Thank you.

THE COURT: You're welcome.

New Jersey Rule 3:18-1 provides in pertinent part that at the close of the State's case or after the evidence of both parties has been closed, the Court shall, on Defendant's Motion or its own initiative, order the entry of a Judgment of Acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction.

The test, according to the comment to the rule, is found in State versus Reyes, or I should say an amplification concerning the standard to be applied is found in State versus Reyes, 50 N.J. 454 at 458, 459, 1967, which reads in pertinent part, "That the broad test for determination of such an application is whether the evidence at that point is sufficient to warrant a conviction of the charge involved. More specifically, the question the trial judge must

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determine is whether viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as of -- as well as the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt."

Number one, I incorporate the remarks made by the prosecutor in my decision to deny the Motion.

Number two, I have considered all of the elements of all of the offenses charged and have considered the evidence from the witness stand. I'm satisfied at this point that the jury could convict the Defendant of all the counts of the indictment beyond a reasonable doubt.

Just a -- the -- the -- the witness testified that he was 90 to 90 percent -- I think the prosecutor said in court that he said he was 95 to 100 percent certain. I remember him saying 90 to 100 percent certain. Well, the -- for purposes of my ruling now, whether it was 90 or 95, is not material to me. When -- when counsel makes their remarks to the jury, I'm sure they'll tell them that the jury's recollection in that connection will control. If they don't, I will.

There was -- there -- there was nothing so

MS. SANFILIPPO: That theft should -- from person --
THE COURT: -- theft from the person is the only appropriate --
MS. SANFILIPPO: -- should be charged?
THE COURT: -- lesser included offense?
MS. SANFILIPPO: Yes, your Honor.
THE COURT: That would be charged.
Before -- is there anything else related to the charge? I will show you the -- I'll get you another copy of the robbery charge. We're going to -- we will not be going into the charge from the summations anyway. So you'll have time. We'll probably do that after lunch, the charge, --
MS. MERCURIO: Thank you.
THE COURT: -- so you'll have time in between. Okay?
How -- you can review those notes, Ms. SanFilippo. How much more time do you need?
MS. SANFILIPPO: 10 -- 10 minutes, your Honor.
THE COURT: Okay. In the meantime, I'll go make a copy of the robbery in the first degree charge.
We're off the record.
(RECESS)

THE COURT: Defense rest?
MS. SANFILIPPO: Yes, your Honor.
THE COURT: Do you wish to give your summation?
MS. SANFILIPPO: Yes, your Honor.
THE COURT: Proceed, please.
MS. SANFILIPPO: Good morning, ladies and gentlemen. Your Honor, Ms. Mercurio.
I'd like to thank you for your time and attention with respect to this case and ask you to indulge me for a few more moments as we go through the trial as you've heard it.
Now, the judge will charge you. But I'd just like to remind you that these summations -- I will discuss the testimony and statements given; however, it is your collective recollection that controls.
Ladies and gentlemen, this case is based on a moment in time, a single moment in time that Mr. Lidwyn Cummings saw the actor that evening in January 2002. His testimony -- he indicated he saw the actor for approximately 20 or 30 seconds and it was in that time that he formed his impression of that actor's physical attributes. Now, that's not a lot of time. But before I get into that, let's set the scene.
We know it was a cold January evening. Mr.

Cummings testified to that. We know that he was 12 or 13 hours into a day where he worked in construction. He said he had a hat on and presumably a coat, being it was cold. He came out of the drugstore and he observed at a distance an individual who's walking across his path or towards him. But he stated very candidly that he didn't take notice of his face. He said he had his keys out and he was walking towards his truck. And if you recall, he motioned that he was looking down at his keys; again, focused on where he was going and what he was doing.

At some point, an actor approaches him and nearly bumps into him. It's then that this actor places something in Mr. Cummings' side. From the demonstration that Mr. Cummings gave in court, he said that he looked over and -- his shoulder at the actor. So, the actor came up from behind him.

When asked, Mr. Cummings said his attention was immediately drawn to whatever was in his side, which he said felt like a weapon. He also, however, indicated that he believed it was a weapon and that he thought it was a weapon, a gun, but he wasn't certain. At that point, there was a colloquy between the actor who insisted on receiving Mr. Cummings' money and apparently threatened him to "pop him".

Mr. Cummings stated that he looked at the actor's face. But when asked if he perceived any particular facial features, Mr. Cummings testified, "No." He said, "You don't understand. I was worried about what I thought was" -- what he thought was the gun.

So, the description he gave was limited to height as an approximation off of his, weight as an approximation off of his, clothing and the description of black male, possibly an approximate age. Ladies and gentlemen, I submit to you that 5-8, 150 to 160 pounds, black male in this county is descriptive of a lot of people. He didn't have any distinguishing facial -- facial features.

When asked if he noticed anything distinctive about the actor, particularly did he have any -- was he missing any front teeth, the witness testified that he could not see that. Ladies and gentlemen, I submit to you that if someone is this close to you and you had a really good opportunity to look at them, you would notice a feature like that. Not possibly if they're far away, but if they're that closely, absolutely.

Mr. Cummings testified after this incident and retrieving his keys, he proceeded to report this to the police. That was the closest in time to the actual

incident. And, again, he gave that very limited description which included some clothing. At that point, did the police do anything about it? They took a report. Did they get in their squad cars and go down to the area of Stuyvesant and 18th and Valley where Mr. Cummings testified that he watched the individual walk away and canvas the area for someone who was -- fit that description with that clothing description? No, they didn't. And I submit to you, the clothing description, within a couple hours, was not helpful information. It was useless. We all change every day.

Now, with respect to the description, we have to be mindful that Mr. Cummings was nervous. He testified to that. He said he was worried about that gun. Did his heart race? Did he get excited? Absolutely. And you are all entitled and we encourage you to use your common knowledge and experience as individuals. We have all experienced the flight or fright. Quite frankly, I'm going through it right now. You're a little nervous. Your heart's racing. It draws your attention away. And he flat out told us he was not sticking around to find out if that gun was real. That tells us he was focused on survival. He told me and you he was not looking for specific details in the person's face.

After giving the initial report -- it was a Friday -- Mr. Cummings presumably returned to his regular routine traveling the streets of Newark and Irvington, going back to work, spending time with his family. It wasn't until Monday that he returned to the police station where he testified he looked through not one or two but six or eight large books; hundreds, thousands possibly of photographs. Now this image -- this brief image, to the extent that he had one, is 48 hours old and he's looking through hundreds and hundreds and hundreds of photos. Ladies and gentlemen, I submit to you that is additional information that has now been taken in, incorporated and tainting his original image.

Again, I ask you to draw on all of your experiences. We've all done this. Clothes shopping, furniture shopping. You think you see something. "Oh, for sure that blazer will go with my pants. It's the right color." You bring it home. No. Because your mind isn't exactly accurate.

I do this every year, at least twice a year, if you'll indulge me in anecdote. Particularly for Father's Day or for my father's birthday, I will undoubtedly end up in Home Depot looking at something because the man has every took known to man. It

becomes a challenge to find something new. So I'll see something. My most recent example was I saw a battery for a drill that my father had for his DeWalt drill. Of course I have to consult with my sister. "Ellen, did he buy this in the last few weeks?" "No." So, I go back to the store to buy this. Well, I know my tools pretty well. And I'm standing there and I'm describing it to the clerk and I'm saying, "You know, I saw it. It was here. It'll go with his -- it'll go with his DeWalt drill." And if I'm remembering correctly, DeWalt colors are yellow and black. And the sales person looks at me after I give him the price and he goes, "Oh, I know what you're talking about." And he walks me two feet down the aisle where there's the part I'm looking for to a Milwaukee drill whose colors are red. I didn't do this intentionally. Certainly I didn't make myself take another trip to Home Depot. But your mind plays tricks on you.

After time, things become confused. And five days had passed before Mr. Cummings was shown that photo array. Five days isn't an awful long time, but I ask you to bear in mind that on Monday he looked through thousands of photos. And he testified that those photos were all different. Some were Polaroids. Some weren't Polaroids. They were pasted into the

book.

Now he gets called back to the police station to look at a limited number of photographs. He recalls a stack. He was holding his hands some four to six inches apart. What he was shown is not a stack but just six photographs. Again, we bear in mind his identification; black male. Other than that, primarily dealt with attributes to the entire structure of an individual, height and weight. But he's shown photographs, ladies and gentlemen, which were published to you, of just head shots. And you'll have a chance to review them. But I will submit to you that two of them have very thin faces and are very distinct.

What I submit Mr. Cummings did was he came and he looked at a much more limited group. Brought back solely for the purpose of looking at not hundreds or thousands but six. And intuitively, I submit, he either figured or thought the person's probably in this six and then picked from the six an individual that reminded him or so he thought was the most like the actor. And he was candid. He said he wasn't 100 percent sure. He gave only 95 to 100. But that's after a taint.

Now here in court, he was down to 80 percent, only 80 percent. Now the judge will charge you with

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the definition of proof beyond a reasonable doubt. And 80 percent, when I was growing up and taking classes, an 80 percent was a B. That was fine. When I was in college and I had the poor sense to take physics, I would have been thrilled with an 80 percent. But not today, ladies and gentlemen. This isn't a grade on a test. This is a statement about Mr. Minor. This will be with him. It is important to him. And we need, as the State stated even in her opening, proof beyond a reasonable doubt.

She says she wanted you to be even more sure than proof beyond a reasonable doubt. And I submit to you, ladies and gentlemen, we cannot be sure. Certainly not sure beyond -- to the point of proof beyond a reasonable doubt. It's a qualitative statement. But I would submit that 80 percent, a low B, is not proof beyond a reasonable doubt, not when the victim acknowledges being nervous, acknowledges being focused -- focused on what he believes to be a gun and isn't even sure that it was really a gun when that was drawing most of his attention, not when he was shown thousands of pictures before he made an ID, not when he came in here to court and looked around the court and said, "Yeah. Yeah. I think that's him."

And, again, just to show you the differences

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in identity and perception, the first officer that testified, Detective Chirico, on Thursday stated that Mr. Minor was wearing beige. Mr. Cummings stated that he was wearing white. Now, again, this isn't the biggest difference in the world, but it shows us how difficult it is to identify and to characterize.

Ladies and gentlemen, I believe in my opening I asked you to listen to not only the evidence that was presented but what we don't have in this case. We don't have any instrument. We don't have a gun. We don't have something fashioned as a gun. We don't know this could have been some metal object that was completely innocuous. This could have been a can of peas.

Detective Hughes testified that Mr. Minor didn't have a gun permit in the State of New Jersey. Well, I'll tell you. Mr. Minor doesn't have a gun permit here or anywhere nor does he have a gun nor was he outside of the drugstore on Stuyvesant and 18th on January 11th of 2002.

Ladies and gentlemen, I submit to you that Mr. Minor is here because unfortunately he fits the very, very general description of being a black male, not specifically African-American or Jamaican American or possibly Dominican, just generally black, of a

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similar height based in reference off of the victim's height. I don't doubt -- and I feel sorry for Mr. Cummings because I do believe that he was victimized but not, I submit, by Mr. Minor.

And I am confident that when you look at the limited description given, the photographs presented, when you take into consideration the hedging of Mr. Cummings and the procedures before, specifically looking through thousands of pictures, and the fact that the clothing description was useless, you will return a verdict in favor of Mr. Minor as not guilty.

Thank you, ladies and gentlemen.

THE COURT: Thank you, Ms. SanFilippo.

Assistant Prosecutor Mercurio, are you ready?

MS. MERCURIO: Yes, your Honor. I am.

THE COURT: Proceed, please.

MS. MERCURIO: Thank you.

Counsel, your Honor, ladies and gentlemen, good morning.

As I told you in my opening statement, ladies and gentlemen, this case is going to rest on identification and -- and that is exactly what we've come down to, isn't it? The identification of the perpetrator, the person who robbed Mr. Cummings, who threatened to pop him, who took his property, who took

his $64, took his cigarettes.

Now, ladies and gentlemen, we know now from all the evidence that on January 11, 2002 at about 7:30, 7:45 in the evening in Newark by Stuyvesant Avenue, 18th Avenue and Valley Street, Mr. Cummings, an employee at U.M.D.N.J., 52 years old or at that time 51, 50 years old, had gone -- left his job at U.M.D.N.J. in Newark to go to a drugstore which was located here on 18th Avenue to pick up some medicine from his wife -- for his wife.

Now, Mr. Cummings was not out looking to get robbed. He was not planning to be a victim that night. He was just trying to go get his wife some medicine from the drugstore. So, we know that he -- because it was January. It was evening -- early evening hours. But we do know from the location as testified to by him that these yellow marks represent street lighting where this robbery took place.

So, when the judge charges you about whether the victim was able to have an opportunity view the perpetrator, that is evidence that you can take into account that, sure, Mr. Cummings definitely had the opportunity to view the perpetrator who did this to him.

Now, we know that -- I asked Mr. Cummings --

because he was unsuccessful in picking up the medicine from the drugstore, he left. He had to go to his car across the street, which was parked on Valley Street. And as he's walking out of the drugstore, ladies and gentlemen, he sees the Defendant -- the person later identify -- he identifies as the Defendant across the street by Valley Street by his car, kind of walking in the direction toward his car as he's walking towards this individual.

Now, defense says that clothing description is not important. Everything that Mr. Cummings saw about the Defendant that night is important. Mr. Cummings not only saw the black sweater, the hoody, he also noticed it was gray pants. So the judge is going to ask you to consider when you deliberate as to whether the victim made a reliable identification was was the victim -- was his degree of attention sharp or was -- did he have a strong degree of attention.

Well, I would submit Mr. Cummings did. He was noticing the sweater, the dark jacket, the sweater, the hoody, the gray pants. He just didn't say he had pants on or dark pants, light pants. He said they were gray. So, Mr. Cummings' degree of attention was focused that night.

And he walks out and he sees this individual.

And he said there were no other -- other individuals around him. So, that also assisted Mr. Cummings' degree of attention. He was not distracted by other people in the area.

Now, Mr. Minor didn't just pass Mr. Cummings. He just didn't walk past. And in the charge to you, the judge will mention about a casual passing of somebody. Was that the facts of the case? Was -- was that the evidence? Was somebody just casually passing somebody?

When you came into jury duty the first day and you casually passed somebody by in the hallway, your attention is not directed to that person. You're -- you're just casually passing. So you're probably not going to notice anything really about them except maybe that they're either a male or a female or white or black or Asian. But no. No. That's -- that is not the evidence here, ladies and gentlemen.

Now, if you came into the hallway your first day of jury duty and someone came up to you downstairs, put a metal object -- put a gun into your waist, got within a foot of you and said, "Give me your money", and spent a few minutes with you and then walked away, well, you know what? Maybe four or five days later you're not going to know the name of that person.

You're not going to know, you know, maybe very specifics of whether there was a gold cap on a tooth or anything. But you're going to know that person. You'll know who that is.

So, the evidence that we have, ladies and gentlemen, is that Mr. Minor was not just a casual passerby of Mr. Cummings. The strongest evidence against Mr. Minor, ladies and gentlemen, is what he did himself. It's what he did himself. He chose to pass the victim once. Could have tried to rob him right then. Popped him on the head. Grabbed his wallet. Ran and made this whole encounter just a few seconds encounter.

But Mr. Minor chose to kind of scope Mr. Cummings out. Sees him coming out of a store. Well, coming out of a drugstore, you might have money. This is a potential victim. "Let me scope him out some more." So he walks by him.

Then he sees him getting into his car. Mr. Minor sees the Defendant (sic). And he almost bumps into him. And Mr. Cummings realizes that and notices that and his degree of attention is on Mr. Minor. He says, "This man almost bumps into me." And I specifically said, "The man that almost bumped into you that you saw walking in your direction toward your car,

is he the same man that put the gun in your side and took your property?" "Yes."

Within seconds, Mr. Cummings is now trying to get into his vehicle and the Defendant, the same person that Mr. Cummings first notices, now comes up and puts this gun into his side. Again, he didn't -- this isn't a blindside robbery in a dark alley, pitch black alley where someone comes up behind you or you're -- a woman walking with your purse and a someone runs up behind you and scoops your purse off of you, kind of pushes you away and runs away. Beat and feet with their back to you so you don't really see their face.

When Mr. Cummings first saw the Defendant, his side -- he was at a side angle. But then as he almost bumps into him, he's not at a side angle. And when he comes up and puts the gun into his side, he's not at a side angle. So, picture this. This is all happening because Mr. Minor chose it to happen this way.

Now, Mr. Minor goes up, puts the gun in his side and says, "Give me your money." The victim said, "I looked down and I saw the gun." And he was very descriptive of the gun. And I would submit that the State has proven beyond a reasonable doubt that this was a real gun because (a) the victim described it as a

real gun -- he said he had been familiar or had seen a real gun before that date -- and (b) the Defendant's own words. "I'm going to pop you."

Because what happened at that point? The victim chose not to give his property up right away. Now, a perpetrator -- the Defendant, Mr. Minor, did not expect that. You would expect, if you put a gun to someone, they are going to turn over their money. If you shove that gun in their pocket -- in their side, they will turn over that money and this will be a brief encounter and you're going to hope and pray that this victim (a) will not report it because you threatened to kill them or shoot them; or (b) that the moment was so fleeting, they won't be able to recognize you because you did use a gun and you are -- you did make it quick by using that gun instead of just going up and saying, "Give me your money or I'm going to punch you in the face." Because if you just do that, then the -- then the victim might not turn over the money. "Punch me in the face? Hey. I can take you on. You ain't taking my money."

But what did Mr. Cummings do? He refused to give the money over. Well, that what -- what that causes -- what that causes by the victim not doing that is it causes the victim to have more of an opportunity

to look at Mr. Minor's face.

Now, he saw him as he almost bumped into him. He's not frightened or terrified at that time, Mr. Cummings. He now has -- within a foot he is looking right at him. He doesn't see any distinguishing features or specific details about his face. What evidence do you have there's no teeth in his mouth? And if there's no teeth in his mouth today, does that mean a year -- or a tooth -- does that mean a year ago there was or wasn't? Did he open his mouth wide enough for a -- a victim to even see that?

And the officer said the day of the arrest, January 16th, there were no distinguishing visual features, scars or marks or like. And there aren't. There aren't.

Mr. Minor is not a tool you buy in Sears because tools can all look alike. He is a unique special individual. He has a unique face, like we all do. We all have a unique presence, essence of our face. And so does he. He's no different than anyone else. And he put that face, his special face, within a foot of the victim. And the victim caused that face to stay there even longer because the victim refused to turn over that money.

Well, now Mr. Minor's plans aren't going

exactly as planned. But he wants that money. He's going to take that money from the victim. And he says, "Give me your money or I'm going to pop you." Now he threatens to commit an aggravated assault. He threatens to shoot the victim.

So, this wasn't just a 20 second observation of the victim as mentioned by defense counsel and your Honor -- and, ladies and gentlemen, your recollection controls. But he had the opportunity to see him from the side. He had the opportunity to see him when they almost bumped. He had the opportunity -- and I said to him, "From the time that he stuck the gun or when you saw him where he almost bumped you to where the robbery ended, how much time passed?" He said, "Two to three minutes." That's a long time. Even if it's a minute, even if it's two minutes. Sit -- go in the jury room and time it. Stand in front of someone. Look at their face right in front of you and look at them for a minute. And you will remember that face four or five days later.

Of course you all have seen each other for the last couple days. But if someone was brought into that jury room and you had to stare at them and look at them during a confrontation, if they come in and say something threatening to you or put their face within a

foot, you're going to be scared. You'll be frightened. But you're also going to be looking at them.

So, this whole encounter initiated by the Defendant and further lengthened by the victim was more -- was at least two to three minutes long. If you gather all the evidence together, ladies and gentlemen, he had an opportunity to look at the Defendant's face based on the lightening, based on the distance between them.

And let -- let's talk about the description given, because the judge will talk to you about the accuracy of the description given by the victim. Mr. Cummings described that the perpetrator was about 5-7, 5-8, about his height, around 150 to 160 pounds, around 25 -- approximately 25 years old.

Remember, Mr. Cummings did not have a yardstick or a measuring tape like the judge has on his bench. He didn't have -- he wasn't looking at his watch and timing how long this incident took place. He didn't have a scale to weigh the person. But he said, "I'm about 190. He was about my height." The Defendant is."

You heard the officer testify about the information given at the day of the arrest of the Defendant. 5-7, 165. And you'll have the reports in

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evidence.
20 -- he was 20 -- he was 29, but if you look at the Defendant, any -- age is hard to determine. If you all had to guess what my age is, I'm sure there would be years off as to how old I am; if I had to guess how old you are. It's very hard to determine age. It depends on how well they take care of their skin, if they smoke, if they drink. You know, so age is -- you know, at least we had a range here. We had the -- the 20's. Okay? Black male in the 20's.
The victim said that the perpetrator, the suspect, and he told the officers, was between 150, 160. "Less than me", he said. And he weighed around 195. Well, that would make a very slender person, 150, 160. And it is. The Defendant is a slender man. And at the time of his arrest, he was also.
So, we have the Defendant at 165, 5-7, 29 at the date of his arrest. No distinguishing marks or scars. So why is that important? Well, it's important because the victim really got a good look at -- at Mr. Minor. It was almost exact in -- in fitting his description.
The other thing is defense counsel -- remember all those books he -- the books he looked at and all the photographs? Defense counsel submits if

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you go out in Newark or here in Essex County, you'll find a lot of black males that are around -- in their 20's, 5-7, 5-8, 165. Well, you would assume that in those books he looked through, -- two, three hundreds of photos -- that there were probably many black males that fit that description.
And, by the way, the victim, Mr. Cummings, said to the police that night, "I can identify my perpetrator, the suspect in this case." And he took the time out of his schedule to go back there on Monday and look through those books because he wanted to be certain. And he looked through two, three -- one, two, three books because he wanted to be certain. He could have picked out anybody's photo, -- that if there's so many people that fit that description, he would have -- he -- like a kid in a candy store, he would have had so much to choose from as far as picking someone out. Young black male in his 20's, 5-7, 5-8, 165. There would have been plenty of people to pick out. But he didn't do that because he wanted -- he knows -- he knew who he saw and he wanted to make sure he picked the right person out.
How about the photos shown to him five days later? Defense attorney pointed out two pictures of two of the individuals pictured here as being thinner.

And the victim said, "The -- the perpetrator, suspect, was thinner than me. He was around 150." Well, why didn't Mr. Cummings pick out the individuals that appear to be thinner?

Now, again, you have to look at the fact that maybe the photograph -- the persons depicted might have been closer to the camera, mid way or further away. But, you know, pick the thinner of the guys. Pick one of the thinner of the guys because, "That's what I told the police. He was thin. He was 150, 160." He didn't. Wouldn't that picture have jumped out at him? No. He didn't pick out -- he only picked out the Defendant because there's only one David Minor in this world. There is only one who presented himself within inches, feet -- within a foot of the victim's face.

And that, ladies and gentlemen, that was the certainty I was talking about in my opening. That was the certainty of the identification. That's the beyond a reasonable doubt that you need to find the Defendant guilty in this case, your firm belief. The judge will describe to you the definition of beyond a reasonable doubt. Are you firmly convinced that he is the perpetrator? And if the victim was firmly convinced, if he was 95 to 100 percent sure within five days of looking at his face that he was the perpetrator, ladies

and gentlemen, then you can feel confident that you would be making the right decision by finding the Defendant the person who committed each and every count of the indictment, the robbery and the gun possession charges.

Detective Chirico said, when he looked at the photographs, there was no hesitated or he hesitated a half a second or a second. He went by -- before he picked out the Defendant's photo. He wasn't there looking and hemming and hawing and, you know, like he did with the books. Remember the books? One book, two book, hundreds of photos. Detective Chirico said, "Within a second, he picked him out. No hesitation." The victim said he was positive when he picked out the photograph.

Now, did the victim have any motive? There's no motive that the victim would want to blame an innocent man. No animosity, no malice. He only wanted to do the right thing and pick out the right person and take his time out from his schedule to do that. Is it understandable a year later -- memories fade -- that there might be only an 80 percent? But 80 percent is a very high percentage, ladies and gentlemen. That's beyond reasonable doubt. Preponderance of an evidence in civil cases is a little more than 50/50. Beyond a

reasonable doubt is 80 percent, 90 percent, 100 percent. That's all we need. That's sufficient. And if the victim is certain of his identification five days later, then that is certainly more than enough for his guilt to be determined in this case.

You have to understand it's a year later that the victim is in court. The Defendant's dressed differently. He's in a different environment. That's okay, ladies and gentlemen. The main identification you want to rely on is the one that was done when the victim -- when the Defendant's face was fresh in the victim's mind right after the incident took place, within five days.

Now, the Defendant also, from his information that he gave the police, -- the -- the judge will ask -- will talk about in his charge to you about, "Well, was there an opportunity to commit this offense?" Certainly. And the victim -- the Defendant, I submit to you, he had to put his face very close to the victim because he's not going to stand across the other side of the car with the gun showing in a three way intersection there and say, "Hey, give me your property." There's people around because if there's anyone else coming out of the drugstore might see this. He had to get really close and put his face close to

the victim.

And also you heard from the evidence from the police officer that the Defendant lived on 18th Avenue in Newark. He didn't live in East Orange, Irvington, other side of Newark. He lived in that area. So he had an opportunity to commit this crime and know the area, know where to go to get away.

So, based on all the evidence, ladies and gentlemen, are you firmly convinced, are you firmly convinced that David Minor committed this crime, David Minor used a firearm, used a handgun, by his own words, "I'll pop you", and did it with the purpose to commit the robbery of Mr. Cummings?

The judge will charge you as to the difference between first and second degree robbery. Ladies and gentlemen, even if you conclude that this is not a real firearm or you don't feel there was enough evidence it was a real fire -- firearm, I would submit to you respectfully that under the definition of robbery first degree, if he had an instrument which led Mr. Cummings to reasonably believe that it was capable of proof -- producing death or serious bodily injury, it's a first degree robbery.

He produced this gun and the victim said, "It was just like the cop's gun -- the officer's gun."

Chrome. Okay. He didn't put a can of soup or anything like that. The victim said it was a gun. It was a chrome gun just like the officer's. The victim, Mr. Cummings, reasonably believed that this object, instrument being put to him, was a real firearm, was -- and he said he was frightened and he was terrified because of that, not just because the Defendant just said, "Hey, can I have your property?" So, if he -- if Mr. Minor used that instrument in that way and said those words, then it is a first degree robbery, respectfully I submit to you, as the judge will charge you.

Ladies and gentlemen, thank you very much for your -- again, for your time and attention to this case.

And I just would like to submit that, based on all the evidence collectively together, the -- the victim's testimony, the photographs, the -- the evidence of the short period of time between the crime and the identification of the Defendant, that we have -- the State has proven this case beyond a reasonable doubt as to each and every count in the indictment and as to each and every element.

Thank you again.

THE COURT: Thank you, Ms. Mercurio.

Will counsel please come to sidebar?

(SIDEBAR ON THE RECORD)

THE COURT: This -- this is what I want to do between now and 12:30. I want -- I want the charge nailed down and you can edit your first degree robbery charge and look at my charge. I'll give you my book. And if there's an -- and I told you what I'm going to do. But you can see the book for yourselves so you can make any changes or suggest any changes.

I also want the -- you both to consider whether you want the so-called Hampton charge? I have it. I think it's in -- but I'll let you look at it when you go back to your tables.

MS. SANFILIPPO: Okay.

THE COURT: Also, I -- I'm going to send the jury into the jury room right now. Ask Mr. Gonzalez to come out and I want to excuse him right now because I don't want to make the man sit through a jury charge when he's -- we both know -- we all know he's not going to deliberate.

MS. SANFILIPPO: Uh-huh.

THE COURT: I don't think it's fair to him. So, I would send them all in, call him out, excuse him, tell the jury -- then send the jury out for lunch.

MS. MERCURIO: And when they do come back,

THE COURT: Ms. Mercurio, we don't need a N.E.R.A. charge, do we?
MS. MERCURIO: No, your Honor. This was -- the incident occurred on January 11th of 2002. And I believe the effective date of the new statute was June of 2001.
THE COURT: Ms. SanFilippo, your position, please?
MS. SANFILIPPO: I concur.
THE COURT: Thank you.
Off the record.
(OFF THE RECORD)
THE COURT: Counsel, your suggested language for the third degree theft from the person, underneath that language, third degree theft from the person, the verdict form, as you both acquiesced to, recites as follows: "Unlawfully takes or exercises unlawful control over movable property of another with the purpose to deprive him thereof", which I suppose would be fine and good if it were a theft of movable property. But this is theft from the person of another.
MS. MERCURIO: Of movable property.
THE COURT: And I believe that has to be -- yes. But it has to be reflected. Since you insist on

putting the definition of the crime within the verdict form, I do believe -- and I'll hear you -- that it should say, "Unlawfully takes or exercises unlawful control over movable property from the person of another."
MS. MERCURIO: Yes, Judge.
THE COURT: That's what it should say. Any objection?
MS. SANFILIPPO: No, your Honor.
THE COURT: Wait. John, let me give it back to you.
THE CLERK: I already know where it goes.
THE COURT: "The person of." Okay?
Okay. I'm going to call the jury out. When you're done with that, just bring out the copies. Give them to me. Give one to Capricia. Okay? Bring the jury out, please.
(OFF THE RECORD)
THE COURT: -- the evidence in this case has been presented and the attorneys have completed their summations. We now arrive at that time when you, as jurors, are to perform your final function in this case.
At the outset, let me express my thanks and appreciation to you for your attention to this case. I

would like to commend Assistant Prosecutor Mercurio and Ms. SanFilippo for the professional manner in which they have presented their respective cases and for their courtesy to the Court and jury during the course of this trial.

Before you retire to deliberate and reach your verdict, it is my obligation to instruct you as to the principles of law applicable to this case. You shall consider my instructions in their entirety and not pick out any particular instruction and overemphasize it.

You must accept and apply this law for this case as I give it to you in this charge. Any ideas of what you have the law is or what the law should be or any statements made by the attorneys as to what the law may be must be disregarded by you if they are in conflict with my charge.

During the course of the trial, I was required to make certain rulings on the admissibility of the evidence either in or outside of your presence. These rulings involve questions of law. The comments of the attorneys on these matters were not evidence. In ruling, whatever the ruling may have been in any particular instance, you should understand that was not an expression or opinion by me on the merits of the

case. Neither should my other rulings on any other aspect of the trial be taken as favoring one side or the other. Each side was decided -- sorry -- each matter was decided on its own merits.

When I use the term, "evidence", I mean, the testimony you have heard and seen from the witness box and the exhibits that have been admitted into evidence. What was the testimony you have heard and seen from this witness box? It came from Detective Michael Chirico, Lidwyn Cummings and Detective Keith Hughes. What were the exhibits that have been admitted into evidence? S-5, photo envelope; S-5A-1 through S-5A-6, a smaller envelope with six photographs in it; S-7, a page of the Newark Police Department photo identification form; S-8, another page of the Newark Police Department photo identification form; S-9A, Lidwyn Cummings' first in-court diagram; S-9B, Lidwyn Cummings' second in-court diagram; and S-10, certification concerning no permit to carry a handgun for David Minor.

Any testimony that I may have had occasion to strike is not evidence and shall not enter into your final deliberations. It must be disregarded by you. And this means that even though you may remember the testimony, you are not to use it in your discussions or

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deliberations.

Further, if I gave a limiting instruction as to how to use certain evidence, that evidence must be considered by you for that purpose only. You cannot use it for any other purpose.

As jurors, it is your duty to weigh the evidence calmly and without passion, prejudice or sympathy. Any influence caused by these emotions has the potential to deprive both the State and the Defendant of what you promised them; a fair and impartial trial by fair and impartial jurors. Also, speculation and conjecture and other forms of guessing play no role in the performance of your duties.

The Defendant stands before you on an indictment returned by the grand jury charging him with armed robbery, unlawful possession of a firearm and possession of a firearm for unlawful purpose. The indictment is not evidence of the Defendant's guilt on the charge or charges. An indictment is a step in the procedure to bring the matter before the Court and jury for the jury's ultimate determination as to whether the Defendant is guilty or not guilty of the charges stated in it.

The Defendant has pleaded not guilty to the charges. The Defendant is presumed to be innocent.

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And unless each and every essential element of the offense charged is proven beyond a reasonable doubt, the Defendant must be found not guilty of that charge.

The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the Defendant. The Defendant in a criminal case has no obligation or duty to prove his innocence or offer any proof relating to his innocence.

The prosecution must prove its case by more than a 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 case, 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 or crimes charged, you must find him guilty. If, on the other hand, you are not firmly convinced of the Defendant's guilt, you must give the Defendant the benefit of the doubt and find him not guilty.

In my preliminary charge when we started the case, I explained to you that you are the judges of the facts. And as judges of the facts, you are to determine the credibility of the various witnesses as well as the weight to be attached to their testimony. You and you alone are the sole and exclusive judges of the evidence, of the credibility of the witnesses and the weight to be attached to the testimony of each witness.

Regardless of what the attorneys said, regardless of what my -- what I may have said

recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence. They must not be treated as evidence. Although the attorneys may point out what they think important in this case, you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial.

Whether or not the Defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all the evidence presented during the trial. Any comments made by the attorneys are not controlling. It is your sworn duty to arrive at a just conclusion after considering all the evidence which was presented during the course of the trial.

The function of the Court is separate and distinct from the function of the jury. As I told you in the beginning, it is my responsibility to determine all questions of law arising during trial and to instruct you as to the law which applies in this case. You must accept the law as given to you by me and you must apply it to the facts as you, the jury, to find the facts to be.

I have sustained objections to some questions

asked by counsel which may have contained statements of certain facts. The mere fact that an attorney asks a question and inserts facts or comments into the question in no way proves the existence of those facts. You will only consider such facts which, in your judgment, have been proven -- proven by the testimony of witnesses or from exhibits admitted into evidence by the Court.

The fact that I may have asked questions of a witness in the case must not influence you in any way in your deliberations. The fact that I asked such questions does not indicate that I hold any opinion one way or the other as to the testimony given by the witness. Any remarks made by me to counsel or by counsel to me or between counsel are not evidence and should not affect or play any part in your deliberations.

Evidence may be either direct or circumstantial. What is direct evidence? Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact.

On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be

drawn.

An inference is a decision of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. Whether or not inferences should be drawn is for you to decide using your own common sense, knowledge and every day experience. Ask yourselves is it probable, is it logical, is it reasonable.

A simple illustration may be helpful to you in understanding the difference between direct and circumstantial evidence. The problem is proving that it snowed during the night. Direct evidence would be testimony from the witness indicating that the witness observed snow falling during the night. Circumstantial evidence would be testimony from the witness indicating that there was no snow on the ground before the witness went to sleep and that when the witness arose in the morning it was not snowing but the ground was snow covered. The former directly goes to prove the fact that snow fell during the night while the latter establishes facts from which the inference that it snowed during the night can be drawn.

It is not necessary that all facts be proven by direct evidence. They may be proven by direct

evidence, circumstantial evidence, or by a combination of direct and circumstantial evidence. All are acceptable means of proof. Why, in many cases, circumstantial evidence may be more certain, more satisfying and more persuasive than direct evidence. However, direct and circumstantial evidence should be scrutinized and evaluated carefully.

A verdict of guilty may be based on direct evidence alone, circumstantial evidence alone or a combination of direct evidence and circumstantial evidence provided, of course, that it convinces you of the Defendant's guilt beyond a reasonable doubt.

Of course, the reverse is true as well. A Defendant may be found not guilty by reason of direct evidence, circumstantial evidence or a combination of the two, or a lack of evidence if it raises in your mind a reasonable doubt as to the Defendant's guilt.

As the judges of the facts, you are to determine the credibility of the witnesses. And in determining whether a witness is worthy of belief and, therefore, credible, you may take into consideration: the appearance and demeanor of the witness; the manner in which the witness may have testified; the witness' interest in the outcome of the trial, if any; the witness' means of obtaining knowledge of the facts;

the witness' power of discernment, meaning the witness' judgment or understanding; the witness' ability to reason, observe, recollect and relate; the possible bias, if any, in favor of the side for whom the witness testified; the extent to which, if at all, each witness is either corroborated or contradicted, supported or discredited by other evidence including prior inconsistent statements; whether the witness testified with an intent to deceive you; the reasonableness or unreasonableness of the testimony the witness has given; and any and all other matters in the evidence which serve to support or discredit his or her testimony.

Through this analysis, as the judges of the facts, you weigh the testimony of each witness and then determine the weight to give to it. Through that process you may accept all of it, a portion of it or none of it.

If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case with intent to deceive you, you may give such weight to his or her testimony as you deem it is entitled. You may believe some of it or you may, in your discretion, disregard all of it.

The Defendant chose not to be a witness. It

is the constitutional right of a Defendant to remain silent. I charge you that you are not to consider for any purpose or in any manner in arriving at your verdict the fact that the Defendant did not testify nor should that fact enter into your deliberations or discussions in any manner or at any time. The Defendant is entitled to have the jury consider all of the evidence and he is entitled to the presumption of innocence even if he does not testify as a witness.

There are three offenses charged in the indictment. They are separate offenses by separate counts in the indictment. The Defendant is entitled to have his guilt or innocence separately considered on each count by the evidence which is relevant and material to that particular charge based on the law as I will give it to you.

The Defendant is charged with the crime of robbery. The indictment reads in pertinent part as follows: "That David Minor, on the 11th day of January, 2002 in the City of Newark in the County of Essex and within the jurisdiction of this court did knowingly commit an act of robbery upon Lidwyn Cummings and in the course of committing said robbery was armed with or used or threatened the immediate use of a deadly weapon contrary to certain provisions of our

laws."

The pertinent part of the statute on which this count of the indictment is based reads as follows: "A person is guilty of robbery if, in the course of committing a theft, he (a) threatens another with or purposely puts him in fear of immediate bodily injury; or (b) threatens immediately to commit any crime of the first or second degree."

In order for you to find the Defendant guilty of robbery, the State is required to prove each of the following elements beyond a reasonable doubt: one, that the Defendant was in the course of committing a theft; two, that while in the course of committing that theft, the Defendant (a) threatened another with or purposely put him in fear of immediate bodily injury; or (b) threatened immediately to commit the crime of aggravated assault by threatening to cause serious bodily injury by shooting the victim, Lidwyn Cummings, with a handgun.

As I have said, the State must prove beyond a reasonable doubt that the Defendant was in the course of committing a theft. In this connection, you are advised that an act is considered to be "in the course of committing a theft" if it occurs in an attempt to commit the theft, during the commission of the theft

itself, or in immediate flight after the attempt or commission.

Theft is defined as the unlawful taking or exercise of unlawful control over property of another with purpose to deprive him thereof.

I have used the phrase, with purpose. You may hear me use that phrase or the word, purposely, again. I shall now explain what that means. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.

In addition to proving beyond a reasonable doubt that the Defendant was in the course of committing a theft, the State must also prove beyond a reasonable doubt that while in the course of committing that theft the Defendant threatened another with or purposely put him in fear of immediate bodily injury. The phrase, "bodily injury", means physical pain, illness or any impairment of physical condition. Although no bodily injury need have resulted, the prosecution must prove that the Defendant either threatened the victim with or purposely put him in fear of such bodily injury.

In addition to proving beyond a reasonable

doubt that the Defendant was in the course of committing a theft, the State must also prove beyond a reasonable doubt that while in the course of committing that theft the Defendant threatened immediately to commit aggravated assault by threatening to cause serious bodily injury by shooting the victim with a handgun while in the course of committing a theft. Serious bodily injury will be defined for you momentarily.

The State maintains that the evidence shows that the Defendant threatened to "pop" Mr. Cummings and that, under the circumstances, the State alleges, "pop" meant to shoot the victim with a handgun. The Defendant, of course, maintains that he possessed no handgun and that he was totally -- he was misidentified.

Now, to reiterate slightly, there are two alternatives, if you will, in connection with the robbery. The first one, as I said, is in the course of committing a theft the Defendant threatened another with or purposely put him in fear of immediate bodily injury. The other alternative is that the Defendant threatened immediately to commit aggravated assault by threatening to cause serious bodily injury by shooting the victim with a handgun. They don't both have to be

proved. You could find one or the other. Of course, you could find neither. That's totally up to you.

A section of our statute provides that robbery is a crime of the second degree except that it is a crime of the first degree if the robber is armed with or uses or threatens the immediate use of a deadly weapon. In this case, it is alleged that the Defendant was armed with, used or threatened the immediate use of a deadly weapon while in the course of committing the robbery.

In order for you to determine the answer to this question, you must understand the meaning of the term, "deadly weapon". A deadly weapon is any firearm or other weapon, device, instrument material or substance, whether animate or inanimate, which in the manner it is used or intended to be used is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury.

I told you before I would define serious bodily injury for you. Now I will. "Serious bodily injury" means bodily injury -- and I've already defined that -- which creates a substantial risk of death or which causes serious permanent disfigurement or

protracted loss or impairment of the function of any bodily member or organ.

To summarize, if you find that the State has not proven beyond a reasonable doubt any element of the crime of robbery as I've defined that crime to you, then you must find the Defendant not guilty. If you find that the State has proven beyond a reasonable doubt that the Defendant committed the crime of robbery as I have defined that crime to you, but you have reasonable doubt as to whether the Defendant was armed with or used or threatened the immediate use of a deadly weapon at the time of the commission of the robbery, then you will find the Defendant guilty of robbery in the second degree.

If you find beyond a reasonable doubt that the Defendant committed the crime of robbery and was armed with a deadly weapon or used or threatened the immediate use of a deadly weapon at the time of the commission of the robbery, then you will find the Defendant guilty of robbery in the first degree.

If you find the Defendant not guilty of robbery, you should then consider the lesser included offense of theft from the person. One of our statutes reads in pertinent part: A person is guilty of theft if he unlawfully takes from the person of the victim or

exercises control over movable property of another with purpose to deprive him thereof. "Movable property", means property the location of which can be changed. "Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property.

You cannot find the Defendant guilty unless you determine that the State has proven the following three elements beyond a reasonable doubt: first, the State must prove that the Defendant unlawfully took the property. In order to prove an unlawful taking, the State need not prove that the property was carried out of the place in which it was kept but only that it was moved or taken from its original location.

With regard to the requirement of proof of a purpose to deprive another of his property, I have already defined purposely. In order for you to find that the Defendant acted purposely, the State must prove beyond a reasonable doubt that at the time the Defendant took the property, it was his conscious object to deprive the owner of his property.

Second, the State must prove that at the time the Defendant took this property his purpose was to

deprive the owner of the property. "Deprive" means; one, to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value or; two, to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

Third, -- this is the third element for the lesser included offense of theft from the person; that's where we are -- the State must prove that the theft was "from the person of another". The phrase, "from the person", includes instances where property is taken from the physical person of the victim as well as instances where property is taken from the custody of or constructive possession of or which is protected by the victim. The property stolen must, at the time of the theft, be within the immediate custody and control of the victim. Custody is defined as the act of guarding property.

Theft from the person also includes instances where a danger of confrontation between thief and victim was present and the victim's person and privacy were invaded.

To summarize, the three elements the State must prove in order for you to find the Defendant

guilty of theft from the person are: one, the Defendant unlawfully took the property; two, when the Defendant took the property, his purpose was to deprive the owner of the property; three, the theft was "from the person", as I have defined already.

Thus, if you find after a careful consideration of all the evidence that the State has proven beyond a reasonable doubt each of the elements as I have explained them, then your verdict must be guilty. However, if the State has not proven each of the elements described above to your satisfaction beyond a reasonable doubt, then your verdict must be not guilty.

Defendant is charged in count two of the indictment with unlawful possession of a handgun. I will read actually the indictment in that regard. It recites that, "David Minor, on the 11th day of January, 2002 in the City of Newark, in the County of Essex and within the jurisdiction of this court knowingly and unlawfully did possess a certain firearm, a handgun, without first having obtained a permit to carry the same contrary to certain provisions of our law."

The statute upon which this count is based reads as follows: Any person who knowingly has in his possession any handgun without first having obtained a

permit to carry the same is guilty of a crime.

In order to convict the Defendant, the State must prove each of the following elements beyond a reasonable doubt: one, there was a handgun; two, that the Defendant knowingly possessed the handgun; and, three, that the Defendant did not have a permit to possess such a weapon.

The first element that the State must prove beyond a reasonable doubt is that there was a handgun. Under our law, a handgun is any pistol, revolver or other firearm originally designed or manufactured to fire or eject any solid projectile, ball, slug, pellet, missile or bullet or any gas, vapor or other noxious thing by means of a cartridge or shell or by action of an explosive or the igniting of flammable or explosive substances by the use of a single hand.

The second element that the State must prove beyond a reasonable doubt is that the Defendant knowingly possessed the handgun. I have already defined knowingly.

Knowledge, much like the word, purpose or intent, is a condition of the mind that cannot be seen and that can be determined only by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be

inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said he had a certain state of mind when he engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of the Defendant's acts and conduct and from all that he said and did at the particular time and place and from all surrounding circumstances.

I will now define possession. The word, "possess", as used in criminal statutes signifies a knowing, intentional control of a designated thing accompanied by knowledge of its character. Thus, the person must know or be aware that he possesses the item -- in this case, a firearm -- and he must know that what he possesses or controls that it is a firearm.

A person knowingly with -- a person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature or that such circumstances exist or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. Knowing, with knowledge or equivalent terms

have the same meaning.

A person may possess a firearm or a handgun even though it was not physically on his person at the time of the arrest if he had, in fact, at some time prior to his arrest had control and dominion over it.

The third element that the State must prove beyond a reasonable doubt is that the Defendant did not have a permit to possess such a handgun. If you find that the Defendant knowingly possessed the handgun and there is no evidence that the Defendant had a valid permit to carry such a handgun, then you may infer, if you think it appropriate to do so based upon the facts presented, that the Defendant had no such permit.

Note, however, that as with all other elements, the State bears the burden of showing beyond a reasonable doubt the lack of a valid permit and that you may draw the inference only if you feel it appropriate to do so under all the facts and circumstances.

If you find that the State has failed to prove any of the elements of the crime beyond a reasonable doubt, your verdict must be not guilty. On the other hand, if you are satisfied that the State has proven all the elements of the crime beyond a reasonable doubt, your verdict must be guilty.

The third count of the indictment charges the Defendant with possession of a firearm with the purpose to use it unlawfully against the person or property of another. I'll read you what the indictment says in that connection in count three. That "David Minor on the 11th day of January, 2002 in the City of Newark, in the County of Essex and within the jurisdiction of this court knowingly and unlawfully did possess a certain firearm, handgun, with a purpose to use it unlawfully against the person or property of another contrary to the provisions of one our statutes."

That statute on which this count of the indictment is based reads in pertinent part: "Any person who has in his possession any firearm with the purpose to use it unlawfully against the person or property of another is guilty of a crime."

In order for you to find the Defendant guilty of this charge, the State has the burden of proving beyond a reasonable doubt each of the following four elements of this crime: one, there was a firearm; two, the Defendant possessed the firearm; three, Defendant possessed the firearm with the purpose to use it against the person or property of another; four, Defendant's purpose was to use the firearm unlawfully.

A "firearm" means any handgun, rifle,

shotgun, machine gun, automatic or semi-automatic rifle or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectible ball, slug, pellet, missile or bullet or any gas, vapor or other noxious thing by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances.

It shall include without limitation any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air or is ignited by compressed air and ejecting a bullet or missile smaller than 3/8ths of an inch in diameter with sufficient force to injure a person.

The second element that the State must prove beyond a reasonable doubt is that the Defendant possessed the firearm. I have already defined possession.

The third element that the State must prove beyond a reasonable doubt is that Defendant's purpose in the possessing the firearm was to use it against the person or property of another. As I said before, purpose is a condition of the mind which cannot be seen

and can only be determined by inferences from conduct, words or acts.

In determining the Defendant's purpose in possessing the firearm, you may consider that a person acts purposely with respect to the nature of his conduct or a result of his conduct if it is the person's conscious object to engage in conduct of that nature or to cause such a result. That is, a person acts purposely if he means to act in a certain way or to cause a certain result. A person acts purposely with respect to attendant circumstances if the person is aware of the existence of such circumstances or believes or hopes that they exist.

The Defendant's purpose or conscious objective to use the firearm against another person or the property of another may be found to exist at any time he is in possession of the object and need not have been the Defendant's original intent in possessing the object.

The fourth element that the State must prove beyond a reasonable doubt is that the Defendant had a purpose to use the firearm in a manner that was prohibited by law. I have already defined purpose for you. This element requires that you find that the State has proven beyond a reasonable doubt that the

Defendant possessed a firearm with the conscious objective, design or specific intent to use it against the person or property of another in an unlawful manner as charged in the indictment and not for some other purpose.

In this case, the State contends that the Defendant's unlawful purpose in possessing the firearm was to facilitate his robbery of Lidwyn Cummings. You must not rely upon your own notions of the unlawfulness of some other undescribed purpose of the Defendant. Rather, you must consider whether the State has proven the specific unlawful purpose charged. The unlawful purpose alleged by the State may be inferred from all that was said or done and from all of the surrounding circumstances in this case.

The defense, on the other hand, contends that the Defendant possessed no firearm and was misidentified by Lidwyn Cummings.

If you are satisfied beyond a reasonable doubt that the State has proven each of the elements of this offense as I have defined them, then you must find the Defendant guilty. If, however, you find the State has failed to prove beyond a reasonable doubt any of the elements of this offense as I have defined them, then you must find the Defendant not guilty.

The Defendant, as part of his general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense or offenses. The burden of proving the identity of the person who committed the crime is upon the State. For you to find this Defendant guilty, the State must prove beyond a reasonable doubt that this Defendant is the person who committed the crime.

The Defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt but also whether the State has proved beyond a reasonable doubt that this Defendant is the person who committed it.

The State has presented the testimony of Lidwyn Cummings. You will recall that this witness identified the Defendant in court as the person who committed the armed robbery, unlawful possession of the weapon and unlawful possession -- I'm sorry -- the possession of the weapon for an unlawful purpose.

The State also presented testimony that on a

prior occasion before this trial, this witness identified the Defendant as the person who committed these offenses. According to the witness, his identification of the Defendant was based upon the observations and perceptions that he made of the perpetrator at the time the offense was being committed and it's your function to determine whether the witness' identification of the Defendant is reliable and believable or whether it is based on a mistake or for any reason it is not worthy of belief.

You must decide whether it is sufficiently reliable evidence upon which to conclude that this Defendant is the person who committed the offense or offenses charged. In evaluating the identifications, you should consider the observations and perceptions on which the identifications were based and the witness' ability to make those observations and perceptions.

If you determine that the out-of-court identification is not reliable, you may still consider the witness' in-court identification of the Defendant if you find it is reliable. Unless the in-court identification resulted from the witness' observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification

procedure, it should be afforded no weight. The ultimate issues of the trustworthiness of both the in-court and out-of-court identifications are for you to decide.

To decide whether the identification testimony is sufficiently -- sufficiently reliable evidence upon which to conclude that this Defendant is the person who committed the offense or offenses charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you.

In addition, you may consider the following factors: one, the witness' opportunity to view the person who committed the offense at the time of the offense; two, the witness' degree of attention on the perpetrator when he observed the crime or crimes being committed; three, the accuracy of any description the witness gave prior to identifying the perpetrator; four, the degree of certainty expressed by the witness in making any identification; five, the length of time between the witness' observations of the offense or offenses and the first identification; six, discrepancies or inconsistencies between identifications, if any; seven, the circumstances under which any out-of-court identification was made;

eight, any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identifications were reliable.

If, after consideration of all the evidence, you determine that the State has not proven beyond a reasonable doubt that the Defendant was the person who committed this offense or offenses, then you must find the Defendant not guilty. If, on the other hand, after consideration of all the evidence, you are convinced beyond a reasonable doubt that the Defendant was correctly identified, you will then consider whether the State has proven each and element of the offense or offenses charged beyond a reasonable doubt.

One moment, please.

I don't think John gave me the verdict form. Can you go ask him for it, please? If he did, I don't have it and I need it. Thank you very much, sir.

COURT OFFICER: You're welcome.

THE COURT: There is in evidence a photograph that was used to identify the Defendant in this case. With reference to the photograph submitted into evidence, you will notice that it appears to have been taken by a law enforcement agency or some other government entity.

I'll repeat what I told you when that photograph was first testified to. You are not to consider the fact that the agency obtained a photograph of the Defendant as prejudicing him in any way. The photograph is not evidence that the Defendant has ever been arrested or convicted of any crime. Such photographs come into the hands of law enforcement from a variety of sources, including but not limited to driver's license applications, passports, A.B.C. identification cards, various forms of government employment, private employment requiring state regulation, including but not limited to casino license applications, security guard applications, et cetera or from a variety of other sources totally unconnected with criminal activity.

That concludes my instructions as to the principles of law regarding the offenses charged in the indictment. There is nothing different in the way a jury is to consider the proof in a criminal case from which all reasonable persons treat any questions depending upon evidence presented to them. You're expected to use your own good common sense.

Consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your knowledge of

how people behave. It is the quality of the evidence not simply the number of witnesses that controls.

Anything that has not been marked into evidence cannot be given to you in the jury room, even though it may have been marked for identification. Only those items marked in evidence can be given to you.

Very shortly, you will go into the jury room to start your deliberations. You are to apply the law as I've instructed to the facts as you find them to be for the purpose of arriving at a fair and correct verdict.

The verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means all of you must agree if the Defendant is guilty or not guilty on each charge.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous but do not

surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans. You are judges, judges of the facts.

In this case, you may return on each charge a verdict of either not guilty or guilty. This is a criminal case and, therefore, your verdicts, whatever they may be as to the offense or offenses charged, must be unanimous. All 12 who are ultimately chosen as the deliberating jury must agree as to the verdict.

To assist you in reporting a verdict, I have prepared a verdict sheet for you. You'll have it in the jury room. It is not evidence. Let me briefly go over it. It gives the name of the case, the indictment number and it says, "Count one, second degree robbery. While in the course of committing a theft, threatened another with or purposely put another in fear of immediate bodily injury and/or threatened immediately to commit a crime of the second degree." And then there's a box for you to check not guilty and a box for you to check guilty.

Then the verdict form says, "If guilty of second degree robbery, then consider the following: first degree robbery. Armed with, used or threatened

the immediate use of a deadly weapon." Once again, you can check off either not guilty or guilty.

The verdict form goes on to say, "If not guilty of second degree robbery, then consider the following: third degree theft from the person. Unlawfully takes or exercises unlawful control over movable property from the person of another with the purpose to deprive him thereof." You can check off not guilty or guilty.

Then it goes on to count two, unlawful possession of a weapon. A space for not guilty and a space for guilty.

And finally count three, possession of a weapon for unlawful purpose. A space for you to check off not guilty and a space for you to check off guilty.

And then there is a line for the signature of the foreperson and, underneath that, the date.

This verdict is not evidence. Sorry. This verdict form is not evidence. It is only meant to assist you in reporting a verdict.

If, during your deliberations, you have a question or feel that need further assistance or instructions from me, write your question on a piece of paper. You must write it on a piece of a paper. That is, you can't just communicate with the sheriff's

officer orally. It must be in writing.

You write your question on a piece of paper or, even if it's not a question, if it's a comment or some communication with me, it's got to be in writing. Anyway, after you've written that question or whatever communication you want to make, turn on the light switch on the inside of the jury room by the door which will cause a red light to go on in the courtroom. The sheriff's officer will come in. Give the note to the sheriff's officer. The sheriff's officer will give it to me. I will then go over the communication with the lawyers and I will try to address it as quickly as possible. Please be patient. If you do send out a question or a communication, do not disclose where you stand on your deliberations. Do not, as an example, tell us that you are 10 to 2 or 8 to 4 on a given charge.

If you've reached a unanimous verdict on each charge, communicate with us by turning on the red light, tell the sheriff's officer you've reached a verdict. We will bring you into court as soon as possible to receive your verdict.

I have come to the end of my charge.

May I please see counsel at sidebar?

(SIDEBAR ON THE RECORD)

THE COURT: (Inaudible) defense (inaudible). Thank you.

(SIDEBAR CONCLUDED)

THE COURT: We will now reduce the jury to 12. The alternate will be selected at random.

Madam Clerk?

THE CLERK: Juror number six.

THE COURT: Juror number six. Ma'am, please have a seat in the first row of the courtroom. I'll give you further instructions shortly.

Ms. Smith, you know what this means? Well, it means, Ms. Smith, that you are the foreperson of the jury. Why is that? Because of your position in the jury box. Your vote as foreperson does not carry any greater weight than that of any juror in the jury room. We simply designate one of you as foreperson for administrative reasons to preside over the deliberations and tell us the results. It will be your responsibility, Ms. Smith, to lead deliberations. It is also your responsibility, Madam, to tell us what the verdict is when the jury has decided it.

Ladies and gentlemen of the jury, when we ask you to come out with the verdict, please resume the seats you now have. The court clerk will call the roll for the court record to make sure that everyone is in

when to be. And I will -- he -- he decided at 3:10 he was going to do something else and never came back. So, bench warrant is granted.

Now, reference the revocation of the bail on Indictment 2-12-1208 and 5-5-1846, Ms. SanFilippo.

MS. SANFILIPPO: Your Honor, I -- I ask that the bails remain. Those are -- well, at least with respect to the drug charges, they are unrelated, and he should -- because they're unrelated, he should be able to maintain a bail on those.

THE COURT: He's now facing 20 years in jail having been convicted of armed robbery. His actions in leaving the courtroom at 3:10 and never comes back sheds some light on his -- in -- in the -- our ability to ensure his appearance for all future appearances. The bail is revoked with regard to 2-2-1208 and 5-5-1846.

If there comes a point in time when you want to make an application to address his bail again, Ms. SanFilippo, you know I'll always be happy to hear you.

MS. SANFILIPPO: Thank you, your Honor.

THE COURT: Okay. Any -- anything else?

MS. MERCURIO: No, your Honor.

THE COURT: Okay. We're off the record for the day.

Thank you, all.

MS. MERCURIO: Thank you, Judge.

MS. SANFILIPPO: Thank you.

(ADJOURNED)

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