IN THE SUPERIOR COURT, APPELLATE DIVISION
OF THE STATE OF NEW JERSEY

THE STATE OF NEW JERSEY,	Essex County Indictment # 12-09-02358
-against-	
ALTARIQ COURSEY, Defendant-Appellant.	Appellate Division Docket # A-2624-13 (T1)

BRIEF FOR DEFENDANT-APPELLANT

SAT BELOW: (Essex County Superior Court)
Hon. Michael L. Ravin, J.S.C. (at trial and sentence)

PATRICK MICHAEL MEGARO, ESQ.
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
North Carolina Bar ID # 46770
Florida Bar ID # 738913
BROWNSTONE, P.A.
Attorneys for Defendant-Appellant
201 North New York Avenue, Suite 200
Winter Park, FL 32789
(O) 407-388-1900
(F) 407-622-1511
Patrick@brownstonelaw.com

ORAL ARGUMENT REQUESTED

April 7, 2014

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PRELIMINARY STATEMENT

On January 18, 2012, New Jersey State Police officers executed a search warrant at 90 Fuller Place, Irvington, New Jersey, searching the first and third floors of the residence. The warrant was executed after police had conducted surveillance at the residence several weeks prior, watching Altariq Coursey occupy the third floor of the residence on several occasions. At the time the warrant was executed, Defendant-Appellant's brother was found on the second floor, but Defendant-Appellant was not at the premises. Cocaine, drug paraphernalia, and a firearm with ammunition were found on the third floor. An arrest warrant was issued for Defendant-Appellant two days later, and he voluntarily surrendered with an attorney thereafter. He was tried before a jury from October 8-17, 2013, convicted of the drug charges and acquitted of the firearms charges, and ultimately sentenced on January 6, 2014 to 22 years imprisonment.

In this appeal, Defendant-Appellant contends that the State's change of the theory of prosecution at the close of evidence deprived him of a fair trial; the State's introduction of expert witness testimony that was based upon hearsay and which improperly gave an opinion as to ultimate issue of the case deprived him of a fair trial; that he received ineffective assistance of counsel who failed to fulfill his promise to the

jury to prove Defendant-Appellant's innocence, was grossly unprepared, and as a result, introduced affirmatively harmful evidence that eviscerated the defense; the trial court's erroneous instruction that a defense witness violated the sequestration order likewise violated Defendant-Appellant's right to a fair trial; and the sentence was unconstitutional.

PROCEDURAL HISTORY

Indictment # 2012-09-2358 was filed on September 24, 2012 in the Essex County Superior Court charging Altariq Coursey with Count #1, Possession of a Controlled Dangerous Substance (cocaine), in violation of N.J.S.A. 2C:35-10a(1); Count # 2, Possession of a Controlled Dangerous Substance (5 ounces or more of cocaine) with Intent to Distribute in violation of N.J.S.A. 2C:35-5a(1), (b)((1); Count # 3, Possession of a Controlled Dangerous Substance with Intent to Distribute Within 1000 Feet of a School in violation of N.J.S.A. 2C:35-7, Count # 4, Possession of a Firearm in the Commission of a Narcotics Offense, in violation of N.J.S.A. 2C:39-4.1, Count # 5, Possession of Drug Paraphernalia with Intent to Distribute, in violation in violation of 2C:36-3, and Count # 6, Violation of the Regulatory Provisions Related to Firearms, in violation of N.J.S.A. 2C:39-10.

The case was tried before the Honorable Michael L. Ravin, J.S.C., and a jury from October 8, 2013 through October 17,

2013. At the conclusion of trial, Defendant-Appellant was convicted of all offenses except Counts #4 and #6, the two firearms charges.

Judgment was entered upon the Defendant-Appellant's sentencing on January 6, 2014. He was sentenced to concurrent terms of imprisonment of 22 years with 11 years of parole ineligibility on counts #1 and #2 (merged), 5 years imprisonment on Count #3, and 18 months imprisonment on Count #5, as well as fines and court costs.

A timely notice of appeal was filed on February 10, 2014, and an amended notice of appeal was filed on February 19, 2014, conferring jurisdiction upon this Court. This appeal follows.

STATEMENT OF FACTS

Opening Statements

In his opening statement, trial counsel argued as follows:

> Thank you, Judge.
> Ladies and gentlemen, as I told you all my name is Martin Champ Goldman. Everyone in the world calls me Champ. That's a nickname that I got when I was a kid. It has nothing to do with my legal skills.
>
> I represent the defendant, Altariq Coursey in this case who is unjustly accused in this case and I am going to prove it to. You can hold me to it. I am going prove it to you. I don't have to prove anything. The Judge will tell you that but I am going to prove to you that he's not guilty.
>
> ...

> The way this case is brought before you is with an indictment. The Judge told you an indictment has nothing to do with proof of any type. An indictment is merely a charging instrument, it means the same type of thing if you were in an automobile accident, you go to a lawyer, you hire a lawyer to sue someone, the lawyer prepares a summons and complaint and sends it out. Doesn't mean that you are guilty of hurting the other person that's suing you, it just means that you are being sued.
> That's what an indictment is. It means nothing with regard to guilt or innocence. The Judge has told you that and I am telling you that. This is what this means with regard to guilt or innocence in this case.
>
> (Defense Attorney rips up copy of indictment.)
>
> THE COURT: We don't rip up indictments in this courtroom. That's an affront to the Judiciary.
> MR. GOLDMAN: I apologize. I think it's a good example.
> THE COURT: It is not allowed in this courtroom.
> MR. GOLDMAN: It's just a piece of paper. I apologize if I offended someone by ripping it up but that's what it is: It's a piece of paper and nothing more. It's a charging document. Nothing more.

(2T:10)

Immediately after trial counsel's opening statement concluded, the trial court addressed the jury as follows:

> THE COURT: It is true that the State has to prove the charges in the indictment beyond a reasonable doubt but that indictment is a Court document. It's a document of the Judiciary. It is not to be torn up. It's an affront to the Judiciary to tear up a Court document by a lawyer.

(2T:18)

The State's Case

DETECTIVE TIMOTHY MEYERS of the New Jersey State Police testified, over objection, that he conducted a "look up" of 90 Fuller Place in Irvington, New Jersey, and determined that the registered owner was Jamal Coursey. (2T:20-23). He executed a search warrant for the first and third floors of that residence on January 18, 2012 after conducting surveillance at the location several times in the weeks leading up to January 18, 2012. (2T:24). He testified that he saw Altariq Coursey at 90 Fuller Place several times between December 18, 2011 and January 18, 2012, including Christmas week. (2T:27-28). The search warrant was issued on January 12, 2012, but not executed until six days later. (3T:40). During that six-day period, Defendant-Appellant was not seen near 90 Fuller Place. (3T:40).

On January 18, 2012, Detective Meyers executed the search warrant along with various members of the State Police, accompanied by two canine units. (2T:39-40). Upon entering the residence, he found Jamal Coursey on the second floor of the building. (2T:41). He was not arrested, but was "taken in for questioning." (3T:52-53). The first floor was searched, but no contraband was found. (2T:42). However, he testified that a police canine "alerted" to the second floor, which was not searched. (2T:43). On the third floor, outside of the door to

the apartment, a dresser was located in which a 9mm Taurus handgun was recovered. (2T:44). A search of the interior of the apartment produced a quantity of cocaine was found inside a stereo speaker, ammunition for the 9mm in the living room, and various documents. (2T:46-47, 49, 51). Inside the bedroom closet three bottles of Inositol powder were found, along with two digital scales; under the bed a box with drug paraphernalia was found. (2T:51-52, 55-56). The third floor had neither a bathroom nor a kitchen. (3T:55-56).

Detective Meyers found several documents purporting to belong to Defendant-Appellant throughout the apartment: a photograph of him at a wedding dated September 3, 2006, and other undated photographs depicting Altariq Coursey and others. (2T:63-74, 81). Various documents were found throughout the apartment bearing Defendant-Appellant's name, the majority of which were dated between 2006 and 2010, and which bore the Edgewater address. (2T:82-101).

Parked outside of the residence, was a Buick LaCrosse that was registered to Altariq Coursey. (2T:103). The keys to that car were found inside the third floor apartment. (2T:104). Detective Meyers testified that Defendant-Appellant's residence was 114 Colonial Road in Edgewater, New Jersey. (2T:28).

Two days after the execution of the search warrant, Detective Meyers applied for, and received, an arrest warrant

for Altariq Coursey. (T3t:75). Defendant-Appellant was arrested on February 1, 2012 when he surrendered, accompanied by an attorney. (2T:106, 3T:75).

Detective Meyers testified that none of the pieces of evidence recovered from the apartment were tested for fingerprints or DNA because it was "not our policy." (3T:15-17). He further testified that the name mentioned as the target of the search warrant was Rashad Perry, who was registered with Public Service Energy and Gas as the occupant of 90 Fuller Street. (3T:38-39). Defendant-Appellant's name was not listed in the search warrant. (3T:39).

On cross-examination, trial counsel elicited testimony from Detective Meyers that the Buick that was found in front of the house was towed and searched after the police canine alerted to the possible presence of drugs in the vehicle. (3T:58). He further elicited testimony from Detective Meyers that Meyers had conducted a computer Lexis/Nexis search, and the resulting report associated Altariq Coursey with 90 Fuller Place. (3T:60). Trial counsel then continued with his line of questioning on the Lexis/Nexis report, eliciting further testimony from Detective Meyers that the computer search indicated that Altariq Coursey was a resident of 90 Fuller Place, asking the witness to read from the report which was not in evidence. (3T:64-67). On redirect, Detective Meyers then

testified as to the contents of the Lexis/Nexis search report without objections, telling the jury that he ran the report on December 19, 2011, and that it listed Altariq Coursey's addresses as 90 Fuller Place from October 1999 through April, 2010, and 114 Colonial Road from 2004 through 2011. (3T:100).

After this testimony, trial counsel attempted to object, but the trial court ruled that he had opened the door by virtue of his cross-examination. (3T:104).

DETECTIVE REGINALD HOLLOWAY of the Essex County Sheriff's Office was called to testify as an expert in the field of narcotics distribution. (3T:117). His expertise was based, in large part, upon conversations with confidential informants and persons who have been arrested, and conversations with other law enforcement officers. (3T:115). When asked whether there was an objection to his proffered testimony as an expert to render an opinion as to "whether someone possessed an item for distribution purpose or personal use," trial counsel responded "No, he's a marvelous expert." (3T:117).

Detective Holloway went on to define for the jury what a "stash house" was (3T:118); that it is common for drug dealers to operate out of places that were not their residences (3T:119); that drug dealers use furniture with hidden compartments to hide their drugs (T3T:121-122); it was common for drug dealers to utilize more than one car to conduct

business to thwart law enforcement (3T:122); that firearms are often used in drug trafficking for protection (3T:124); that it was common for drug dealers to keep their money and drugs in different locations (3T:124), and generally regarding the use of paraphernalia and packaging materials. (3T:125-129).

Without objection, the prosecutor posed to the witness the following hypothetical:

> Q: I am going to give you a hypothetical. After I give you this hypothetical, I would like you to give me your opinion as to whether the individual, whoever that may be in my hypothetical, possessed the narcotics that would be in my hypothetical for personal use, distribution purposes or both.
> A: Yes.
> Q: Police conduct search of a residential apartment. Immediately outside the apartment is a draw containing a nine millimeter handgun. Inside of the apartment specifically in the living room the police are drawn to a speaker box. Inside of that speaker box is a bag. Inside of that bag are three large blocks of cocaine coming out to about two hundred and fifty grams or 10.38 ounces. Also inside of that room are fifteen nine millimeter rounds. Inside of the bedroom the police search a bedroom closet. Inside of the bedroom closet the police find bottles of Inositol powder, two digital scales and a small box containing another bag of about 88.99 grams or 3.13 ounces of cocaine. Also inside of that very same bedroom the police look under the bed and underneath the bed they find a presser. They find three bags of manufactured paper folds. They find three bags of small rubber bands. They find two razor blades, seven glass vials, eight glass tops. No money.
> Based upon the hypothetical I have just described to you, do you have an opinion as to whether the individual, whoever that may

be, possessed those items for personal use or distribution purposes or both?
A: I do have an opinion.
Q: What is your opinion?
A: It's my opinion the individual or the individuals possessed the items with intent to distribute for monetary gain.

(3T:131-132). No objection was raised to this "hypothetical."

Detective Holloway went on to theorize that the drugs in question were packaged a certain way "for the customer that either was on his or her way or was supposed to meet with the distributor at a later point in time but because of law enforcement officers interjecting that didn't take place," explicitly opining that law enforcement officers prevented crime from taking place. (3T:135). When asked to explain the absence of currency at the apartment, he hypothesized that "[m]aybe there wasn't money made yet because the drugs were just purchased with the currency. So there's also a beginning and maybe that beginning as far as the distribution point hadn't taken place yet." (3T:136). No objection was made to this testimony.

The Introduction of the Lexis-Nexis Report

At the start of the proceedings on October 10, 2013, the State moved to introduce several items into evidence, including the Lexis/Nexis search report. (4T:5). Trial counsel objected on the grounds of hearsay and the lack of any exception to the rule prohibiting hearsay. (4T:5). The trial court initially

ruled that the testimony concerning the document would stand, but the document itself would not be admitted. (4T:6). Almost immediately, the trial court reversed itself, ruling that "this document you might say provided a reason for the detective to believe what he did or did not believe and one might say it goes to the state of the mind of the witness, not for the truth of the matter." (4T:7).

The Motion for a Judgment of
Acquittal at the Close of the State's Case

Defendant-Appellant then moved for a judgment of acquittal, arguing that the evidence was insufficient to establish constructive possession. (4T:8-12). The trial court denied the application. (4T:13).

The Proffer of Defense Witnesses

After the motion for a judgment of acquittal, the State requested a proffer of defense witnesses and evidence. (4T:14-16). In responding to a specific request by the State as to examine a document intended to be introduced by the defense contained, trial counsel stated as follows:

> MR. GOLDMAN: At this point I don't know if the witness brought it. As I told the Court in chambers this witness claims that she had prices quoted to her for insurance for a car and that she had proof in a document from the Insurance Agent **that I haven't seen yet**.
> THE COURT: What do you think I am going to let the witness get on the stand and you are going to show her some document that the Prosecutor has not even seen?
> MR. GOLDMAN: I am not objecting to the -

> MR. SEMPER: I would like to see that document.
> MR. GOLDMAN: -- prosecutor getting it. **But I have to get it**.

(4T:16-17) (emphasis added)

On October 9, 2013, at the start of court proceedings, trial counsel alerted the court to the fact that Jamal Coursey, a person listed by the State as a possible prosecution witness, had been present in the courtroom the day before during Detective Meyers' testimony. (3T:3-4). Trial counsel indicated that in light of Detective Meyers' testimony, the defense now intended to call Jamal Coursey as a witness. (3T:4). The State objected on the grounds that the witness had violated the trial court's sequestration order. (3T:4). The trial court initially ruled that Jamal Coursey would not be permitted to be called as a witness by the defense, but reserved decision. (3T:5, 148).

On October 10, 2013, the issue of Jamal Coursey's presence in the courtroom was revisited, and upon the State's application, the trial court ruled that it would administer an instruction pursuant to State v. Dayton, 292 N.J.Super. 76 (App. Div. 1996). (4T:14-18).

The Defense Case

JAMAL COURSEY, Defendant-Appellant's brother, testified that he lived at 90 Fuller Place, Irvington, for the past 17 years, and that the property was owned by his wife. (4T:18). Jamal Coursey testified that he was previously convicted of a

Federal drug conspiracy, for which he served 4 years and 3 months imprisonment, and had completed that sentence in 2005. (4T:20).

Defendant-Appellant resided at 114 Colonial Drive in Edgewater Park, did not live at the address, had not lived at that address since at least 2005, and had no ownership interest in the property. (4T:19, 22, 24). The third floor had a bedroom that was occupied by various people, including their cousin, Khalid Coursey, who was living on the first and third floors for several months prior to and on the day the police executed the search warrant. (4T:19-20, 25). Khalid Coursey was not present on the day of the search warrant execution. (4T:20). He explained that old junk mail belonging to Defendant-Appellant and photographs that belonged to Jamal Coursey were stored in a closet on the third floor. (4T:21). He testified that there were other pieces of mail addressed to other individuals on the third floor. (4T:34).

On January 18, 2012, he was in his bedroom on the second floor when police entered the residence. (4T:19). He was taken to a police station and interviewed by Detective Meyers. (4T:22). During that conversation, Meyers asked about Khalid Coursey. (4T:22).

Further testimony established that Jamal Coursey had no knowledge of the sequestration order. (4T:33). At the

conclusion of argument on the testimony, the trial court then read the entire sequestration order to the jury, and instructed the jury that it would instruct them on the significance of the order at the end of the case. (4T:38-39). Trial counsel objected at sidebar, prompting the trial court to issue a further instruction to the jury that it permitted Jamal Coursey to testify, and it would instruct the jurors further at the end of the case. (4T:40-41).

LIZETTE TINNEY testified that she knew Altariq Coursey for approximately 20 years, and was in the process of purchasing the 2005 Buick LaCrosse from him in January, 2012. (4T:41-42). She testified that he told her he would leave the car with the keys and the title at Fuller Place with a family member, who would effect the transfer. (4T:42). In preparation for this purchase, she requested and received several quotes for insurance for the car, settling upon a quote from the Bolinger Insurance Company. (4T:42-43). She was unable to purchase the car because it was impounded by police. (4T:43).

On cross-examination, Tinney testified that she had called the insurance company the day prior and requested documents to confirm the quotes, which she identified as Exhibit S-58. (4T:46-47). She testified that she brought them to court that day, and had given a copy of the same to defense counsel that day. (4T:47). Using the documents, the Prosecutor established

that the insurance proposals for the Buick were from November 2012 - January 2013. (4T:47-48). The witness was forced to concede that these insurance quotes were issued 10-12 months after January 2012 - the date the Buick was seized by law enforcement. (4T:48, 50). The State then introduced those documents into evidence without objection from the defense, and used them to illustrate that the witness had received the quotes some 11 months after the search warrant was executed and the car seized by law enforcement. (4T:49).

YAMINAH COURSEY, Defendant-Appellant's wife and companion of 22 years, testified that she and her husband purchased a home in Edgewater Park in 2004 and lived there since. (4T:55-56). She testified that he sold cars and managed investment properties for a living. (4T:56). She testified that he was with her and the family on Christmas Day, 2011. (4T:57).

MARY SIMMS, Defendant-Appellant's grandmother, testified that Altariq Coursey lived in Edgewater, New Jersey for approximately nine years. (5T:5). She testified that her grandson Jamal Coursey resided at 90 Fuller Place, Irvington (5T:5-6).

The Charge Conference

At the charge conference, the trial court announced sua sponte that it was going to read a charge of joint possession to the jury, ruling that the jury "could find that he and Khalid or

Khalif possessed it with intent to distribute. There are other people." (5T:12-13, 15). Trial counsel unsuccessfully objected, arguing there was no evidence of joint possession or shared intent, and the State should not be entitled to change its theory of prosecution. (5T:15-16). The trial court next warned both parties not to comment on the absence of Khalid Coursey in summations. (5T:13-14).

The Defense Summation

In his summation, trial counsel argued that the search warrant listed the first floor bedroom, Khalid Coursey's bedroom, to be searched for drugs. (5T:25). The State objected, and a lengthy recess was taken for trial counsel to search the record with the court reporter for evidence for that argument. (5T:27). Outside the presence of the jury, trial counsel argued that there was testimony in the record to support that argument. (5T:27-31). The trial court then brought the jury back into the courtroom and instructed:

> Ladies and gentlemen of the jury, Mr. Goldman in his argument told you that the evidence was that the police had a search warrant to search Khalid's bedroom. While it is so that it is the jury's recollection of the evidence that governs, the Court is instructing you as a matter of law that there was no such testimony, no such evidence.

(5T:33). Trial counsel went on to clarify his argument to the jury, and stated that he hoped he was able to "clear up this

little histrionic thing that we just heard." (5T:35). The trial court then asked him, in front of the jury, "You are referring to a ruling by the Court as 'histrionic?" Proceed." (5T:35).

The State's Summation

On summation, the Prosecutor addressed the defense evidence, specifically Tinney's testimony as follows:

> What about the car that was parked outside and registered to his name? A car that his wife said that he still possessed this year.
> . . .
> Let's talk about - again, Miss Tinney. Miss Tinney came in here and told you that she planned on buying the defendant's Buick LaCrosse that was found outside of that apartment. Same LaCrose (sic) that the police dog alerted had the presence of drugs in it.
> . . .
> Miss Tinney claims it was there, the car was there because she was going to buy it with her Tax Return from January. Okay. In order to make that point to prove she brings in an email that she claims she got from her insurance company.
>
> Remember Miss Tinney was not my witness. I didn't bring her on the stand. I didn't put her on the stand. Who brought in this email from Steven Clegg, Bolinger Insurance dated October 9th, 2013? Was it them? It's their witness. It wasn't me.
>
> What does this tell you? Ladies and gentlemen, I would submit that this document tells you all that you need to know about Miss Tinney and her willingness to be credible with you. You can have this and you can take this in the back.

> "I was able to locate prior proposals dating back to November 2012 and January of 2013 as you suggested."
>
> Ladies and gentlemen, we're not talking about November '12 and January of '13. We're talking about January 2012 and this is eleven months later. I gave her the opportunity.
>
> Did you talk to the defendant about this case? No, I didn't talk to him. I've known him for twenty years, yet this is what she brings in to corroborate her.
>
> Ladies and gentlemen, I would submit to you that Miss Tinney's testimony is totally discredited by the other evidence that the State admitted. She brought this in. Not us.
>
> ...
>
> There's a charge that the Judge is going to give you, false in one, false in all. I would submit to you that applies to Miss Tinney. I will submit to you that you can reject this testimony. There wasn't a car sale going to take place, not for the very same car that the defendant owned in January of this year, 2013. It's a document that his wife i.d.'d. That LaCrosse that was for sale he still had it in January.

(6T:25-36)

The Jury Instructions and Verdict

In the middle of the final instructions, the trial court took a lunch recess. (6T:89). At the start of the afternoon session, the trial court the trial court announced that

> I am going to, on my own accord, recharge the jury concerning sequestration of witnesses. Not only am I going to recharge them but I am reversing myself about putting in the Sequestration Order into the jury room.

(6T:90).

The trial court then recharged the jury on the sequestration order, inviting them to take into account Jamal Coursey's presence in the courtroom during Detective Timothy Meyers' testimony as a factor in evaluating his credibility. (6T:94-95). The jury retired to deliberate at 2:12 p.m. on October 17, 2013. (6T:106-107). At 3:37 p.m., the jury rendered a verdict of guilty on Counts #1-3, and #5, and not guilty on Counts #4 and #6.

The Sentencing

Sentencing was held on January 6, 2014. At the sentencing, the State sought an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6(f) based upon Defendant-Appellant's prior convictions. (7T:18-20). By so moving, the State sought to increase the mandatory minimum sentence from 10 years on a First Degree Crime to 20 years, and the maximum from 20 years to a maximum of life imprisonment. (7T:21). Over objection, the sentencing court ruled that it had no discretion, and that it was bound to impose an extended term of imprisonment. (7T:25-26).

The court then sentenced Defendant-Appellant to 22 years imprisonment on Count #2, with 11 years of parole ineligibility, 5 years imprisonment on Count #3, and 18 months imprisonment on Count #5, all counts to run concurrently. (7T:38-39).

ARGUMENT

POINT I - DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS AND RIGHTS TO BE PROSECUTED BY A GRAND JURY INDICTMENT WERE VIOLATED WHERE BOTH THE TRIAL COURT AND THE PROSECUTION IMPERMISSIBLY CHANGED THE THEORY OF PROSECUTION AT THE END OF TRIAL FROM CONSTRUCTIVE POSSESSION TO JOINT POSSESSION, A THEORY NOT PRESENTED TO THE GRAND JURY, GIVING THE JURY A NEW THEORY UPON WHICH TO CONVICT DEFENDANT-APPELLANT (Raised Below)

The Fifth Amendment of the United States Constitution and Article I, § 8 of the New Jersey Constitution require that a person charged with a felony be prosecuted upon an indictment returned by a grand jury. New Jersey Rule 3:7-4 permits amendments to an indictment unless "the defendant will not be prejudiced thereby in his or her defense on the merits." It is axiomatic that Due Process requires that an indictment give notice to the accused of what he or she is charged with and the theory of prosecution so that the defendant may defend against the accusations.

Variances and constructive amendments of indictments are similar in that both involve "variations between the charges in an indictment and the evidence at trial." United States v. Daraio, 445 F.3d 253, 259 (3d Cir. 2006). A variance occurs "where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment." Id.

The rule against constructive amendments arises under the Fifth Amendment, and protects the "constitutionally guaranteed

role of the grand jury." United States v. Vosburgh, 602 F.3d 512, 532 (3d Cir. 2010), quoting Daraio, 445 F.3d at 261. The rule against prejudicial variances exists to ensure "the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard." Ibid. Thus, "the variance rule, to the extent that it is constitutionally required, is more of a due process rule than is the flat fifth amendment prohibition against being tried on an indictment which a grand jury never returned." United States v. Vosburgh, 602 F.3d 512, 532 (3d Cir. 2010), quoting Daraio, 445 F.3d at 261-62.

Constructive amendments to an indictment are "per se reversible under harmless error review, [and] are presumptively prejudicial under plain error review." United States v. Vosburgh, 602 F.3d 512 (3d Cir. 2010), quoting United States v. Syme, 276 F.3d 131, 136 (3d Cir. 2002). A variance from the allegations in the indictment to the proof presented at trial "result[s] in a reversible error only if it is likely to have surprised or has otherwise prejudiced the defense." Id. at 262. A variance that misleads a defendant or unfairly surprises him at trial prejudices the defense. United States v. Vosburgh, 602 F.3d 512 (3d Cir. 2010).

The law recognizes three distinct forms of possession: actual, constructive, and joint. State v. Spivey, 179 N.J. 229, 236, 844 A.2d 512 (2004). A person has actual possession of "an object when he has physical or manual control of it." Ibid., citing State v. Brown, 80 N.J. 587, 597 (1979). Alternatively, a person has constructive possession of "an object when, although he lacks 'physical or manual control,' the circumstances permit a reasonable inference that he has knowledge of its presence, and intends and has the capacity to exercise physical control or dominion over it during a span of time." Id. at 237, quoting State v. Schmidt, 110 N.J. 258, 270 (1988).

Two persons have joint possession of an object when they "share actual or constructive knowing possession of" that object. State v. Morrison, 188 N.J. 2, 14 (2006). This Court has held that

> The legal concept of "joint possession" is premised upon a metaphysical event in which two or more persons simultaneously possess an entire object, without leaving any piece of it outside the joint possessors' control.

State v. Lopez, 359 N.J.Super. 222, 233 (App. Div. 2003).

Here, the Indictment charged Altariq Coursey alone with possession of a controlled dangerous substance, paraphernalia, and a firearm. The State's theory throughout the entire trial, from its opening statement through its cross-examination of the defense witnesses, was that the apartment on the third floor of

90 Fuller Place was exclusively occupied by Defendant-Appellant. Keeping true to this theory, the State successfully blocked the defense from introducing evidence or argument that the search warrant targeted Khalid Coursey. In line with the State's theory, the trial court warned both parties not to comment on the absence of Khalid Coursey on summation.

At the last minute, after the close of the evidence and immediately before summations, the trial court sua sponte introduced a new theory of prosecution - that Defendant-Appellant jointly possessed the drugs and the firearm with Khalid Coursey. The State readily agreed with the trial court. As trial counsel made clear, this came as a complete surprise. This new theory of joint possession was not charged in the Indictment or presented to the Grand Jury.

Not only did this new theory come as an unfair surprise, but there was no evidence in the record to support a theory of joint possession, as the State successfully argued against any inference that the drugs or the firearm belonged to Khalid Coursey. Because of the timing of the introduction of this new theory and the lack of notice, Defendant-Appellant had no opportunity to defend against it. The result was unfair prejudice, as the jury now had a new, uncharged theory upon which to convict Defendant-Appellant. As a result, this Court should find that this variance, or constructive amendment, and

the changing theory of prosecution deprived Defendant-Appellant of his right to be prosecuted by an indictment and his Due Process rights of notice and fundamental fairness. Reversal is therefore required.

POINT II - THE TRIAL COURT'S ERRONEOUS ADMISSION OF DRUG EXPERT TESTIMONY WAS PLAIN ERROR WHERE THE EXPERT WITNESS GAVE AN IMPROPER OPINION AS TO THE ULTIMATE ISSUE, AND WHERE THE PREJUDICIAL EFFECT FAR OUTWEIGHED THE PROBATIVE VALUE
(Not Raised Below)

Expert opinion is admissible if the general subject matter at issue, or its specific application, is one with which an average juror might not be sufficiently familiar, or if the trial court determines that the expert testimony would "assist the jury in comprehending the evidence and determining issues of fact." State v. Berry, 140 N.J. 280, 292-293 (1995).

The United States Court of Appeals for the Second Circuit recently held that expert testimony that relies upon hearsay and custodial interrogations violates the Confrontation Clause of the Sixth Amendment. United States v. Mejia, 545 F.3d 179, 198 (2d. Cir. 2008) (expert testimony violates Crawford if [the expert] communicate[s] out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion).

In Mejia, a law enforcement officer with extensive gang training was allowed to testify as an expert at trial regarding

his experiences dealing with the MS-13 gang. The Second Circuit reversed, holding that his testimony "went far beyond interpreting jargon or code messages" and "addressed matters the average juror could have understood." Id. at 195. Further, by reciting what he had read in books, websites, and his experience on the Task Force, the officer's testimony became merely factual by nature and had lost its expert character; that is, "those parts of his testimony that involved purely factual matters…fell far beyond the proper bounds of expert testimony." Id. at 196. Finally, since the expert in Mejia simply repeated information he had read, heard, or seen, and gathered from debriefings of inmates, gang members, and received from secondary hearsay sources, the court held that he should not have testified since he merely relied on hearsay without applying any degree of expertise, in violation of the Confrontation Clause pursuant to Crawford.

In State v. Deberal Rogers, 2013WL6799978, Docket # A-4248-10 (App. Div. June 11, 2013), this Court reviewed a conviction after trial for possession of a controlled dangerous substance with intent to distribute. The evidence at trial established that police executed a search warrant at the defendant's apartment after conducting surveillance, where 1.2 ounces of cocaine, digital scales, packaging material, and U.S. currency were found in the bedroom and kitchen. The State called a law

enforcement agent as a narcotics expert to testify, who opined that the quantity of drugs, together with scales and bags, indicated that the drugs were for distribution, not personal use.

Although there was no objection by trial counsel, this Court reversed, holding that the "manner in which the opinion testimony was admitted and addressed at trial was plainly improper." Id. at 9. This Court further found fault with the fact that the expert offered an opinion on the ultimate issue in the case - whether the drugs were possessed with the intent to distribute. Id. at 10. This Court further took issue with the fact that the expert's testimony "was framed to recite the critical statutory language." This Court reversed the conviction and remanded for a new trial, holding that the admission of the expert testimony was plain error, even the absence of an objection by trial counsel, and "was clearly capable of producing an unjust result." Id. at 12.

Here, the State called a law enforcement officer to testify as a narcotics expert. That expert clearly testified that his information and expertise derived from debriefing suspects and from information gathered from other law enforcement officers. Thus, his expert opinion was based upon things he had heard from others. Additionally, like in Rogers, his testimony "was framed to recite the critical statutory language" when he opined that

the manner in which the drugs were stashed inside the apartment were not for personal use, but for distribution purposes. Finally, the "hypothetical" question posed by the State was obviously not hypothetical at all because it mirrored the exact facts of the case. Thus, the expert was permitted to give an opinion that Defendant-Appellant was guilty of the crimes charged - an opinion buttressed with improper "explanations" based upon pure speculation as to why there was no money inside the apartment, and that there drugs were packaged a certain way because a sale might have been imminent. This testimony left the jury with the impression that by executing the warrant at the time the State Police did, they were able to prevent future crime.

The net effect of this testimony was to deny Defendant-Appellant his right to confront the witnesses against him, and to deny him a fundamentally fair trial based upon legally competent and admissible evidence. As a result, this Court must reverse the convictions and order a new trial.

POINT III - DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL ASSUMED A BURDEN OF PROVING DEFENDANT-APPELLANT INNOCENT IN HIS OPENING STATEMENT, FAILED TO DELIVER UPON HIS PROMISE TO PRESENT EXCULPATORY EVIDENCE, AND AFFIRMATIVELY DAMAGED THE CASE BY INTRODUCING EVIDENCE THAT DIRECTLY UNDERMINED THE DEFENSE (Not Raised Below)

Both the Sixth Amendment of the United States Constitution and Article I, § 10 of the New Jersey Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also State v. Nash, 212 N.J. 518 (2013). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to

deprive him of due process of law. Id. at 687, see also State v. Fritz, 105 N.J. 42 (1987).

A. Trial Counsel's Unfulfilled Promises of Exculpatory Evidence Made During His Opening Statement Was Constitutionally-Deficient Performance and Statements Made By Counsel Evinced an Utter Failure to Investigate the Facts Necessary to Form a Defense

> The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.

McAleese v. Mazurkiewicz, 1 F.3d 159, 166-167 (3d. Cir. 1993)

In Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988), the petitioner was charged with first degree murder of his wife in a fit of jealous rage. At trial, defense counsel delivered an opening statement to the jury, promising them testimony from psychiatric medical professionals that would establish that the petitioner was temporarily insane. However, trial counsel then rested without calling the doctors as promised, and Anderson was convicted. After unsuccessfully exhausting all appeals in the state courts, Anderson unsuccessfully petitioned for a writ of habeas corpus in Federal district court, raising ineffective assistance of counsel. The United States Court of Appeals for the First Circuit reversed, holding that trial counsel's failure to present the evidence he promised the jury was worse than if he had said nothing at all, recognizing that "little is more damaging than to fail to produce important evidence that had

been promised in an opening." Id. at 17. The First Circuit went on to hold that trial counsel's failure "went to the vitals of defendant's defense," and this action "was greatly to weaken the very defense he continued to assert." Id at 18-19. Finding that this error was neither a strategic choice nor plausible option, the First Circuit held that this failure so prejudiced Anderson as to warrant habeas relief.

In Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), the petitioner was convicted of murder after his trial attorney promised the jury that they would receive exculpatory evidence but then failed to deliver on that promise. In reversing and granting a writ of habeas corpus, the Seventh Circuit held that counsel was deficient where his "opening primed the jury to hear a different version of the incident. When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up the claims made in the opening." Id. at 879.

Here, trial counsel delivered an opening statement in which he affirmatively promised to prove Altariq Coursey's innocence. Repeating this promise, he pledged to present evidence to offer an innocent explanation as to why a car registered to Altariq Coursey was parked outside of the apartment where the drugs, paraphernalia, and pistol were found:

> While they claim this was his apartment, you are going to find out since 2006 that he has lived in Burlington County in Edgewater Park in a family home that he shares with his wife who he married, I believed in 2006, and his two children ages 17 and you are going to find out that he's in the business of buying and selling used cars.
>
> You are going to find out why there was a car there that was in his name and you are going to find out why a Title was upstairs. You are going find out that he was going to sell that car to someone who was supposed to come there and pay for it, get the keys, get the Title from his cousin and go. That's why that was there.

(2T:13).

Essential to the effective representation of a defendant is a duty of defense counsel to investigate and inquire thoroughly into all potential defenses and evidence, and conduct a reasonable investigation into the facts of the case. See State v. Porter, 216 N.J. 343 (2013); State v. Chew, 179 N.J. 186 (2004); State v. Savage, 120 N.J. 594 (1990) United States v. Baynes, 687 F.2d 659, 668 (3d. Cir. 1982). This Court has held that "[I]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." State v. Russo, 333 N.J.Super. 119, 139 (App. Div. 2000).

Other courts have likewise held that effective assistance of counsel requires that trial counsel conduct a reasonable

investigation into the facts of the case. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Scott v. Wainwright, 698 F.2d 427, 429-30 (11th Cir.1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims, counsel fails to provide service within the expected range of competency).

Here, it is blatantly obvious that trial counsel failed to conduct any appropriate investigation into the evidence that he placed before the jury as proof of Altariq Coursey's innocence. Revealingly, at the end of court proceedings on Day 1 of the trial, October 8, 2013, the following transpired when the trial court addressed the following day's schedule:

> THE COURT: Will the defense witnesses be ready for the afternoon?
> MR. GOLDMAN: Yeah.
> MR. SEMPER: Okay.
> MR. GOLDMAN: Not for the morning but for the afternoon, and I anticipate another witness that **we talked to today** and I am going to call his wife and I will probably call his grandmother. **I haven't spoken to the last lady but I will speak to her and find out when she's available**. I believe that she would be a good witness.

(2T:107) (emphasis added).

The record is clear that trial counsel had already promised the jury evidence and witnesses, but he had no idea what the witnesses would say since he had not even spoken with them until trial was already underway. On re-direct, trial counsel inquired as follows:

> Q: Prior to Tuesday afternoon of this week, did you ever meet me?
> A: No.
> Q: Have I ever seen you to the best of your knowledge?
> A: No.
> Q: Did there come a time on Tuesday afternoon that I did meet you?
> A: Yes.

(4T:31-32).

In his attempt to prove Defendant-Appellant's innocence, he called Ms. Tinney. The record establishes that trial counsel did not speak with her ahead of time to prepare her for her testimony, nor did he review the emails regarding the insurance quotes he directed her to bring to court. This lack of preparation had disastrous consequences. Taking advantage of

this lack of preparation, the State seized the opportunity to introduce the emails into evidence, and then used them to completely discredit the witness by showing that her testimony was factually impossible - and therefore, untrue.

The trial court ruled that trial Counsel clearly opened the door to the Lexis/Nexis report being admitted as evidence by his conduct on cross-examination. This error had no tactical or strategic reason. Further, trial counsel's failure to object to the narcotics expert testimony was also a grave error. These combined errors deprived Defendant-Appellant of effective assistance of counsel.

In State v. Lebron, 2006WL2844404 (App. Div. October 6, 2006), this Court defined "opening the door":

> The 'opening the door' doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection. State v. James, 144 N.J. 538, 554, 677 A.2d 734 (1996). "The doctrine ... allows a party to elicit otherwise inadmissible evidence when the opposing party has made unfair prejudicial use of related evidence." Ibid. (citation omitted). It "operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its

> proper context." Ibid. (citing United States v. Lum, 466 F.Supp. 328, 334-35 (D.Del.1979), aff'd, 605 F.2d 1198 (3rd Cir.1979)).

It is clear that the Lexis/Nexis report was inadmissible hearsay. However, trial counsel elicited affirmatively damaging testimony from Detective Meyers that Meyers had conducted a computer Lexis/Nexis search, and the report associated Altariq Coursey with 90 Fuller Place as a resident - proving the exact point that the State was trying to make. Trial counsel then had the detective read from the report, which was not in evidence, which the trial court ruled opened the door to the report being entered as evidence by the State. Trial counsel then attempted to object, but it was too little, too late. He then again compounded the problem by withdrawing his objection to the introduction of the report at the end of the evidence, prompting the trial court to opine:

> That would put that nail into the coffin of that argument on a P.C.R. so tight, it's so uncompromising, there will be nothing that anybody could really say. I gave the attorneys here all the options, right?

(6T:4)

Further, for the reasons set forth in Point II above, trial counsel's failure to object to the expert witness testimony was also ineffective.

C. Prejudice

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, supra at 690.

The cumulative errors prejudiced Defendant-Appellant in a significant way. Admittedly unprepared, trial counsel failed to fulfill his promises of proving Defendant-Appellant innocent - rather, his errors assisted the State in proving him guilty by eliciting affirmatively harmful evidence, failing to object to inadmissible evidence, and by discrediting his own defense witness. As a consequence, this Court should find Altariq Coursey received ineffective assistance of counsel, and reverse and remand for a new trial.

POINT IV - THE TRIAL COURT'S INSTRUCTION THAT A DEFENSE WITNESS HAD INTENTIONALLY VIOLATED THE SEQUESTRATION INSTRUCTION WAS PREJUDICIAL AND CONSTITUTED PLAIN ERROR WHERE THE RECORD ESTABLISHES THAT THE WITNESS, WHO WAS INITIALLY LISTED AS A PROSECTION WITNESS, INADVERTANTLY VIOLATED THE SEQUESTRATION ORDER, THERE WAS NO PREJUDICE TO THE STATE, AND THE STATE FAILED TO QUESTION THE WITNESS ABOUT THE VIOLATION (Raised Below)

Here, the record establishes that Jamal Coursey, who was initially included on the State's witness list and was not contemplated as a defense witness, was in court for part of Detective Meyers' testimony. It was defense counsel who brought it to the trial court's attention that Jamal Coursey was in the courtroom after Meyers gave certain testimony, and that in light of that testimony, the defense intended to call Jamal Coursey as a defense witness. Leaving the issue open for several days without making a final determination, immediately before he took the stand, the trial court informed the attorneys that it would read a special instruction to the jury that Jamal Coursey violated the sequestration order. The reading of the order and the manner in which it was read to the jury was error.

In State v. Dayton, 292 N.J.Super 76 (App. Div. 1996), this Court held that where a witness violates a sequestration order, a trial court may, in its discretion, call the jury's attention to the disobedience of the order. Id. at 90. However, this Court held that "[i]n such case the parties may interrogate the

witnesses as to what occurred and may comment thereon in their summations." Id.

In the instant case, the trial court initially stated that it would read the special instruction concerning violation of the sequestration order at the end of the case with the final charge. (4T:17-18). On re-direct, trial counsel elicited testimony from Jamal Coursey that he did not know what a sequestration order was, let alone that he was not permitted to be in the courtroom, and that upon being so notified by trial counsel, waited in the hallway of the courthouse. (4T:33-34). The State never cross-examined Jamal Coursey about his knowledge or disobedience of the sequestration order.

At the conclusion of the testimony, the trial court then felt "constrained to advise the jury about [the sequestration order]" immediately, reversing its decision to wait until the end of the case. (4T:37-38). The trial court then proceeded to read the entirety of the order to the jury, prefacing it with the following:

> THE COURT: Ladies and gentlemen of the jury, in Mr. Goldman's questioning of the witness he alluded to a Sequestration Order. I will tell you now that 10:45 a.m. on October 2nd, 2013 I signed a document C-3 which said State vs. Altariq Coursey, Sequestration Order. **It was given to the Prosecutor. It was given to the Defense. It is their obligation to advise their witnesses of the contents of it**.

(4T:38).

This was misleading for several reasons. At the outset, Jamal Coursey was listed as a State witness, not a defense witness. Therefore, it was the State's duty, not Defendant-Appellant's duty, to notify its witnesses of the existence of the order and how to comply with it.

Second, it was trial counsel, not the State, who actually did notify the trial court that Jamal Coursey was in the courtroom during Detective Meyers' testimony. It was trial counsel who advised Jamal Coursey to wait outside of the courtroom. Third, neither the trial court nor the State told the jury the truth: that it was the State who listed Jamal Coursey as a witness, not the defense, and therefore it was incumbent upon the Prosecutor to oversee compliance of its witnesses, or that it was trial counsel who brought it to the court's attention and directed the witness to wait outside. Finally, it was an unintentional violation, as the State did not challenge Jamal Coursey was ever notified of the existence of the order.

However, by giving this instruction immediately after Jamal Coursey testified, with a comment that it was defense counsel's fault that the court's order was violated, this left the jury with the impression that trial counsel was to blame, and by

extension, Defendant-Appellant. The State seized upon this opportunity in summation, arguing:

> What else do we know about Jamal Coursey. You are going to hear from the Judge before this trial began there was a Sequestration Order put out. It was meant for all the witnesses so we could have fairness. No one was allowed to come in and listen to the testimony of other witnesses so then that person can come in and give testimony based upon their own recollection, their own knowledge.
> Jamal Coursey doesn't follow that instruction. Jamal Coursey just sat there.
> ...
> That order was not obeyed. Jamal Coursey was in this courtroom for three hours when Det. Meyers gave his testimony. You have to listen to that, weigh that fact against whether or not Coursey came in here and gave honest testimony to you.

(6T:27-28). Trial counsel's objections were overruled, and the trial court gave another instruction regarding the sequestration order. (6T:27-28). At the end of the case, the trial court gave yet another instruction regarding the sequestration order.

This was fundamentally unfair. The jury was misled by both the trial court and the State into thinking that Jamal Coursey, trial counsel, and by extension, Defendant-Appellant, committed acts of misconduct in order to subvert the integrity of the trial. The trial court compounded the problem by adding judicial weight to the State's argument by repeatedly issuing instructions directing the jury's attention to Jamal Coursey's "disobedience," and entering the order into evidence to

corroborate the State's summation. The net effect of the above deprived Defendant-Appellant of a fair trial by denigrating the defense.

Accordingly, the reading of the sequestration order, its introduction, and the State's and the trial court's misleading statements deprived Defendant-Appellant of a fair trial. This Court must reverse as a result.

POINT V - THE SENTENCE IMPOSED VIOLATED THE DEFENDANT-APPELLANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL WHERE HIS SENTENCE WAS ENHANCED BASED UPON AN ADDITIONAL ELEMENT NOT CHARGED IN THE INDICTMENT, NOT CONCEDED AND NOT SUBMITTED TO OR FOUND BY THE JURY BEYOND A REASONABLE DOUBT (Not Raised Below)

The Sixth Amendment to the United States Constitution and Article I, § 10 guarantee a criminal defendant's right to trial by jury. In a line of cases beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that the right to trial by jury extends to sentencing, and prevents judges from engaging in fact-finding that increases a defendant's punishment.

Recently, in Alleyne v. United States, 133 S.Ct. 2151 (2013), the Supreme Court specifically held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Id. at 2156. The Court explained that this holding was consisting with its holding in Apprendi, where the Court opined

that "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Allenye at 2160, quoting Apprendi at 490.

Here, the Indictment contained no enhancement allegation concerning Defendant-Appellant's prior criminal record as an additional element of the crimes charged. The additional element of Defendant-Appellant's prior convictions was not submitted to the jury, or found by them beyond a reasonable doubt, or found by them under any standard of proof. It was the sentencing court that made the judicial finding of fact, and then used that to double the mandatory minimum sentence. Further, there was no notice given to Defendant-Appellant that the State would even seek an extended term of imprisonment until after the verdict, where the State filed a motion pursuant to N.J.S.A. 2C:43-6(f). Thus, Defendant-Appellant had no notice prior to trial what the true extent of the allegations against him were, and the sentencing exposure he faced.

In light of Supreme Court's clear holding in Allenye, this Court should reverse and remand for resentencing.

CONCLUSION

In United States v. Mejia, 545 F.3d 179, 199 (2d. Cir. 2008), the Second Circuit set forth the Federal standard of determining whether error is harmless:

> Several factors are relevant when evaluating the error's likely impact: (1) the strength of the Government's case; (2) the degree to which the testimony was material to a critical issue; (3) the extent to which the statement was cumulative; and (4) the degree to which the Government emphasized the inadmissible evidence in its presentation of its case. Though all of these factors are relevant, we have stated that the strength of the Government's case is "probably the single most critical factor."

Id., citing United States v. Reifler, 446 F.3d 65, 87 (2d Cir. 2006). This same test was adopted by the Third Circuit in United States v. Mastrangelo, 172 F.3d 288 (3d Cir. 1999).

The New Jersey standard is more stringent. The New Jersey Supreme Court has held that:

> Even if the evidence were overwhelming, that could never be a justifiable basis for depriving a defendant of his or her entitlement to a constitutionally guaranteed right to a fair trial. The impact of violating a defendant's right to a fair trial cannot be measured by, or weighed against, the quantum of evidence bearing upon his or her guilt.

State v. Frost, 158 N.J. 76, 87 (1999).

In applying this standard, this Court has held that harmless error analysis requires a "determination of 'what should have (as opposed to what did) or should not have (as

opposed to what did not) influenced a jury in any given case.'" State v. Pillar, 359 N.J.Super. 249, 279 (2003).

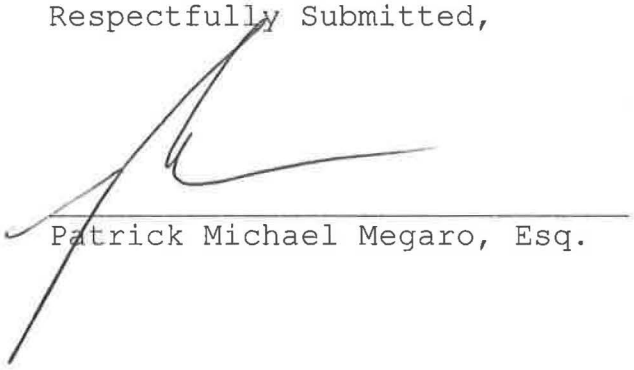
In the instant case, under both Federal and State standards, the cumulative errors were not harmless. Trial counsel stumbled through the trial, committing inexplicable tactical and strategic errors that were clearly based upon his lack of preparation. He further committed basic errors of courtroom decorum, drawing the trial court's public reprimand in front of the jury for making misguided arguments in his opening, ripping up the indictment, and making clearly-objectionable arguments on summation. According to the trial court, he "chose for very good reasons, I am sure, to spend about an hour looking over the court reporter's shoulder and searching the record for your alleged or your perceived references to the fact that the jury heard that the police had a search warrant for Khalid's bedroom..." (6T:6-7). This misconception resulted in an extended break during his summation, and another scolding by the trial judge in front of the jury. Trial counsel even objected to a copy of the written jury instructions being given to the jury - drawing another puzzled comment from the trial court, which informed him that court rules required written instructions being given to the jury. Trial counsel could only respond that he was unaware of the rule. (6T:93-94).

The trial court's errors in issuing repeated instructions on the sequestration order, admitting the expert witness testimony, and finally, by sentencing Defendant-Appellant in violation of his Sixth Amendment rights further constituted reversible error that was far from harmless.

Based upon the foregoing reasons, Defendant-Appellant urges this Court to reverse his convictions and grant him a new trial.

Dated: April 7, 2014

Respectfully Submitted,



Patrick Michael Megaro, Esq.

CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing Brief were served upon the following parties on April 7, 2014, via United States Postal Service:

Essex County Prosecutor
50 West Market Street
Newark, New Jersey 07102

Theresa Angela Blair, Esq.
Office of the Attorney General
PO Box 080
Trenton, New Jersey 08625-0080

Patrick Michael Megaro, Esq.