IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

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

BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION FOR APPELLANT

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

SAT BELOW: (Appellate Division)
Hon. Carmen Messano and Hon. Mitchel Ostrer

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ORAL ARGUMENT REQUESTED

September 14, 2015

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PRELIMINARY STATEMENT

Appellant requests that this Court grant permission to appeal from an Order of the Appellate Division, Docket #A-2624-13, dated August 20, 2015, affirming a conviction entered against him in the Essex County Superior Court on January 6, 2014.

This petition is filed in good faith, presents substantial questions of basic Constitutional law and important legal issues of statewide significance, and is not filed for the purpose of any delay. For the reasons that follow, Appellant respectfully requests that this Court grant the relief requested in this application.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On January 18, 2012, New Jersey State Police officers executed a search warrant at a residence in Irvington, New Jersey, searching the first and third floors of the residence after police had conducted surveillance at the residence, watching Appellant occupy the third floor of the residence on several occasions. When the warrant was executed, Appellant's brother was found on the second floor, but 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 Appellant two days later, and he voluntarily surrendered.

Indictment #2012-09-2358 was filed in the Essex County Superior Court charging Appellant 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 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 8-17, 2013. In his opening statement, counsel argued as follows:

> 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)(emphasis added).

Immediately after counsel's opening statement concluded, the 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 primary evidence at trial was police officer testimony, which established that police conducted surveillance of the residence in question from December 2011 to January 2011 prior to execution of the search warrant, during which time the police allegedly saw Appellant frequent the residence on several occasions. Police determined that the owner of the house was Jamal Coursey, Appellant's brother. On the date the warrant was executed, Appellant was not at the residence, but Jamal Coursey was found on the second floor. A search resulted in various items found on the third floor, which included drugs, packaging material, a loaded handgun, various photographs and papers bearing Appellant's name and likeness. Outside of the residence was a parked vehicle that was registered to Appellant. Cross-examination by defense counsel elicited testimony the car found in front of the house was towed and searched after the police canine alerted to the possible presence of drugs in the vehicle. Counsel further elicited testimony from the lead detective that he had conducted a computer Lexis/Nexis search, and the resulting report associated Appellant with the residence in question, that Appellant was a resident at that address, and asked the witness to read from the report which was not in evidence. Expert testimony was presented by the State from a

law enforcement agent, whose expertise was based upon conversations with confidential informants, persons who have been arrested, and conversations with other law enforcement officers. 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," counsel responded "No, he's a marvelous expert." (3T:117). Without objection, this witness was permitted to offer his opinion that the drugs possessed by Appellant were not for personal use, but for distribution. This witness 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:136).

October 8, 2013, the following transpired when the 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).

After the close of the State's case, 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, 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, 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 the lead detective's testimony. Counsel indicated that in light

of the detective's testimony, the defense now intended to call Jamal Coursey as a witness. The State objected, arguing that the witness had violated the sequestration order. The court initially ruled that Jamal Coursey would not be permitted to be called as a witness by the defense, but reserved decision.

On October 10, 2013, the issue of Jamal Coursey's presence in the courtroom was revisited, and upon the State's application, the court ruled that it would administer an instruction pursuant to State v. Dayton, 292 N.J.Super. 76 (App. Div. 1996). Jamal Coursey testified as a defense witness, and testified 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 counsel, waited in the hallway of the courthouse. His testimony further established that police had asked him about a family member named Khalid Coursey, who they apparently suspected of possessing the items found in the house, and that Khalid Coursey had a prior Federal drug conviction. The State never cross-examined Jamal Coursey as to his knowledge of the sequestration order or its contents.

At the conclusion of Jamal Coursey's testimony, the court 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 court 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)(emphasis added).

The defense next called to the stand a witness who testified that she had was in the process of purchasing the same vehicle found in front of the residence in question in January 2012, and that Appellant had told her he had left the vehicle's keys and title with a family member so when she was ready she could take possession of it. She testified that she had obtained car insurance quotes for the same car prior to January 2012, in anticipation of the purchase. Counsel then elicited testimony from her that she had brought the insurance quote documents with her to court that day. These were the same documents counsel told the court he had not seen prior to the witness' testimony.

Using the documents, the State established that the insurance proposals for the car were from November 2012-

January 2013, and the witness was forced to concede that these insurance quotes were issued 10-12 months after January 2012- the date the car was seized by law enforcement. 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.

On re-direct, counsel elicited the following testimony from that same witness:

> **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).

At the charge conference, the 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.

On summation, the State argued that the defense witness was clearly lying about the purchase of the car, and highlighted the fact that it was the defense, not the State, that had presented such contradictory evidence. The State further argued:

> 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).

In the middle of the final instructions, the court took a lunch recess. At the start of the afternoon session, the 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 court then recharged the jury on the sequestration order, inviting them to take into account Jamal Coursey's presence in the courtroom during the lead detective's testimony as a factor in evaluating his credibility.

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

Appellant was sentenced on January 6, 2014 to extended concurrent terms of imprisonment, the longest of which was 22 years with 11 years of parole ineligibility. The extended term of imprisonment was imposed based upon Appellant's prior criminal history.

Appellant appealed to the Appellate Division, raising the following issues:

POINT I – 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 APPELLANT

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

POINT III – 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

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

POINT V - THE SENTENCE IMPOSED VIOLATED THE 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

Oral argument was held on February 24, 2015, and the case was decided on August 20, 2015, in a 33-page written opinion. In that decision, the Appellate Division dealt primarily with Appellant's ineffective assistance of counsel claim and his claim with respect to the special instruction on sequestration.

The Appellate Division recognized that counsel's promise to assume the burden of proving Appellant innocent was "fraught with risk." (decision p. 13). The court further took notice of the fact that counsel appeared extremely ill-prepared, as he had not spoken with a witness he put on the stand or had examined her documents, which completely

contradicted her testimony. The Court then held:

> **Although we can fathom no reasonable strategic reason for defense counsel to have assumed the burden to prove defendant not guilty**, we decline to address that aspect of claimed ineffectiveness on direct appeal, separate from the other alleged instances of inferior performance.
> ...
> We are not prepared to foreclose the possibility of an explanation for defense counsel's apparent failure to review the insurance agent's document that undermined Tinney's testimony.

(decision, pp. 15, 16)(emphasis added).

In disposing of Appellant's claim regarding the instruction regarding Jamal Coursey's purported disobedience of the sequestration order, the Appellate Division agreed "that the court's instruction injected doubt into Jamal's testimony, without sufficient basis in the record." (decision p. 16). The Appellate Division flatly agreed that the instruction was erroneous. (decision p. 24). After reviewing the applicable case law and the various factors that should guide a trial court in the issuance of such an instruction, the Appellate Division held that:

> With these standards in mind, **we are persuaded the trial court abused its discretion in delivering its instructions on the sequestration order** — especially the first two — and overruling the defense objection to the State's comment in closing. Contrary to the suggestion in Tillman and Dayton, the

> court did not conduct a voir dire to elicit evidence, and make findings regarding the nature and extent of the violation.

(decision p. 27)(emphasis added).

Despite its extended discussion as to why the trial court's actions on this issue was unduly prejudicial and fundamentally wrong on many levels, the Appellate Division nonetheless found that it was not reversible error, reasoning that "[a] defendant is entitled to a fair trial but not a perfect one." (decision, p. 29-30). The court then disposed of Appellant's remaining claims briefly, finding no error.

This petition for certification follows.

ARGUMENT

POINT I - THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CAN BE PROPERLY REVIEWED ON DIRECT APPEAL WHEN THE RECORD CLEARLY DISCLOSES THE FACTS NECESSARY TO DETERMINE WHETHER A DEFENDANT RECEIVED EFFECTIVE ASSISTANCE, AND UNDER WHAT CIRCUMSTANCES MAY SUCH A CLAIM BE COGNIZABLE ON DIRECT APPEAL

This case presents a unique set of circumstances. Here, the record on appeal is clear that counsel was ineffective for many reasons, the most important of which was his assumption of a burden of proving Appellant innocent, and his those unfulfilled promises to the jury. The record is clear that he failed to interview potential defense witnesses and conduct any appropriate factual investigation into their

proposed testimony prior to trial. The record is clear that he simply threw a witness onto the witness stand with no preparation and no idea that he was presenting evidence that directly contradicted her testimony and made her, and by proxy, his client, look like a liar. He further affirmatively damaged Appellant's case by eliciting hearsay evidence from a State witness that tended to prove guilt, rather than innocence. And most unique of all, is that the Appellate Division apparently agrees that the record is clear that counsel was, in fact, ineffective.

What the Appellate Division has done is effectively created a new rule of law: that even in those rare instances where ineffectiveness is glaringly apparent on the record, where defense counsel's errors were so clear and objectively unreasonable, New Jersey's appellate courts will not recognize such a claim until and unless the defense lawyer is given the opportunity to utter the talismanic words "strategic" or "tactical" before a post-conviction relief trial court.

This new rule of law is simply wrong for many reasons. First, this rule directly contradicts the United States Supreme Court's decision in Massaro v. United States, 538 U.S. 500 (2003):

> We do not hold that ineffective-

> assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte.

Massaro v. United States, supra at 508.

This rule is also completely at odds with this Court's decision and recognition of the same principle of law in State v. Allah, 170 N.J. 269 (2002). In Allah, the defendant's first trial ended in a mistrial. His attorney failed to move to dismiss based upon Double Jeopardy grounds, and he was retried and convicted. He directly appealed to the Appellate Division, arguing that his attorney was ineffective for failing to move to dismiss based on Double Jeopardy grounds. The Appellate Division affirmed his conviction, holding that his claims of ineffective assistance were premature and had to be raised in a post-conviction relief motion.

This Court granted certification, and reversed the Appellate Division. In reversing, this Court specifically held that the record clearly disclosed the facts essential to the ineffectiveness claim, obviating the need for the defendant to wait until the post-conviction stage to raise that claim. Id. at 285. That rule was again recognized by

this Court in State v. Castagna, 187 N.J. 293, 313 (2006).

It is inherently unfair to force a defendant to wait for years for the conclusion of his direct appeals to then file for post-conviction relief and suffer further delay in a case where the record is clear that he received ineffective assistance. This is particularly so where the Appellate Division's decision itself found serious fault with the conduct of trial counsel, and essentially found him ineffective. Why then should the appellate courts punt the case back down to the trial court for determination when the issue can be, and was, adequately addressed from the face of the trial record?

There is an additional consideration. Here, the trial court apparently already broadcast its decision on a future post-conviction relief motion, on the record, when it addressed one of the issues of ineffectiveness raised in this appeal:

> 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).

By sending this issue back down to a trial court that has already apparently made up its mind, Appellant will be

ensured that he will not receive due consideration of his ineffective assistance of counsel claims. A post-conviction relief motion is dead on arrival. The odds that he would prevail in an appeal from the denial of a post-conviction relief motion in the Appellate Division is slim, given that court's reluctance to deal with the issue thus far. This illustrates why this Court's review is all the more important. This Court is the only real chance for Appellant's Sixth Amendment claim to be heard in the New Jersey court system.

POINT II - THIS COURT'S REVIEW IS REQUIRED TO ESTABLISH THE PARAMETERS UNDER WHICH A TRIAL COURT MAY PROPERLY GIVE AN INSTRUCTION AS TO A WITNESS' CREDIBILITY WHERE AN UNINTENTIONAL VIOLATION OF A SEQUESTRATION ORDER OCCURS; ADDITIONALLY, THIS COURT'S REVIEW IS NECESSARY BECAUSE THE TRIAL COURT'S ERRORS UNDULY PREJUDICED THE DEFENSE

The Appellate Division conducted a thorough analysis of why the trial court's various instructions and rulings on Jamal Coursey's testimony and concluded that even though this was clearly erroneous and prejudicial, Appellant was not entitled to reversal because he was "entitled a fair trial, not a perfect one." (decision, p. 29-30).

This erroneous instruction was not an isolated incident in this trial. As outlined above, the court chastised a clearly ineffective defense lawyer during his opening statement, during trial while Jamal Coursey testified, during defense counsel's summation for arguing facts that were

apparently not in the record, and again in its final instructions. 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 counsel was to blame, and by extension, Appellant. The State seized upon this opportunity in summation, effectively arguing that the evidence presented by the defense was false and misleading.

This was fundamentally unfair. The jury was misled by both the court and the State into thinking that Jamal Coursey, counsel, and by extension, Appellant, committed acts of misconduct in order to subvert the integrity of the trial. The 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. (decision p. 16).

The only conclusion is that this unduly prejudiced the Appellant, because the court repeatedly chastised a bumbling defense attorney who appeared to be trying to deceive the jury. While the Appellate Division is correct that a defendant is not entitled to a perfect trial, in this case the trial was far from perfect or fair. By the various interactions between counsel and the trial court, the court clearly

signaled to the jury that it should discredit the defense at the expense of Appellant. And it clearly had that effect, as the damage was done. To write this clear error off with the dismissive statement that Appellant is not entitled to a perfect trial diminishes not only the impact of the error but Appellant's right to a fair trial.

If charging a defendant right out of the running in a trial is not reversible error, then what is?

POINT III - INCORPORATION OF ADDITIONAL POINTS RAISED BELOW

Because space in this brief is limited, Appellant incorporates by reference the additional claims raised in the Appellate Division, and asserts that this Court should grant review as to those issues as well, as they concern weighty Constitutional issues.

CONCLUSION

For the foregoing reasons, this Court should grant review of the instant appeal, and the decision of the Appellate Division should be REVERSED, and the Appellant's convictions should be vacated and a new trial ordered.

Dated: September 14, 2015

Respectfully Submitted,

PATRICK MICHAEL MEGARO

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I served a copy of the foregoing upon Deputy Attorney General Andrew Burroughs, Esq. via FedEx.

PATRICK MICHAEL MEGARO