To be argued by
Patrick Michael Megaro
(10 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION - SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

-against- Kings County

LEE WOODS, Indictment # 6797-2007

Defendant-Appellant A.D. # 2009-03819

BRIEF FOR DEFENDANT-APPELLANT

PATRICK MICHAEL MEGARO, ESQ.
Attorney for Defendant-Appellant
626 RXR Plaza, 6th Floor, West Tower
Uniondale, New York 11556
(o) 516-317-6660
(f) 866-617-7442
KC2QBN@yahoo.com

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LEE WOODS,

Defendant-Appellant

----------X

STATEMENT PURSUANT TO CPLR § 5531

Appellate Division Docket # 2009-3819

1. The indictment number in the court below was 6797-2007.

2. The full names of the original parties were the People of the State of New York against Lee Woods, Dexter Bostic, and Robert Ellis

3. These actions were commenced in the Supreme Court of Kings County, by the filing of the indictment listed above.

4. This is an appeal from a judgment of conviction upon a verdict after a jury trial, the Supreme Court, Kings County, rendered April 1, 2009, convicting Defendant-Appellant of the crimes of Aggravated Murder in the First Degree, Penal Law § 125.27(1), Attempted Aggravated Murder in the First Degree, Penal Law § 110/125.26(a)(1), and two charges of Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03(3), and sentences thereon of Life Without Parole on the first charge, consecutive to 40 years to Life on the second count, consecutive to 25 years to Life as a Mandatory Persistent Felony Offender on the third and fourth counts, rendered by Honorable Plummer Lott (at trial) and the Honorable Abraham Gerges (at sentence) thereon.

5. The Defendant-Appellant is appealing on the original record

Dated: Uniondale, New York
April 12, 2010

PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LEE WOODS,

Defendant-Appellant

Appellate Division
Docket #
2009-3819

----------X

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury:

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 9,649.

Dated: Uniondale, New York
April 12, 2010

PATRICK MICHAEL MEGARO

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction upon a verdict after a jury trial, the Supreme Court, Kings County, rendered April 1, 2009, convicting Defendant-Appellant of the crimes of Aggravated Murder in the First Degree, Penal Law § 125.27(1), Attempted Aggravated Murder in the First Degree, Penal Law § 110/125.26(a)(1), and two charges of Criminal Possession of a Weapon in the Second Degree, Penal Law § 265.03(3), and sentences thereon of Life Without Parole on the first charge, consecutive to 40 years to Life on the second count, consecutive to 25 years to Life as a Mandatory Persistent Felony Offender on the third and fourth counts, rendered by Honorable Plummer Lott (at trial) and the Honorable Abraham Gerges (at sentence) thereon.

Timely notices of appeal were served upon the District Attorney and filed with the Kings County Supreme Court.

No application for a stay of execution of sentence has been made, and Defendant-Appellant remains incarcerated pursuant to the judgments herein appealed. There were three original defendants in this Indictment. The two co-defendants, Dexter Bostic and Robert Ellis, were also convicted in a prior trial. The status of their appeals is unknown.

The Defendant-Appellant is appealing from the original record and is represented by Patrick Michael Megaro.

QUESTIONS PRESENTED

1. Was the Introduction of a Prior Consistent Statement Error Where There Was No Claim of Recent Fabrication and Where the Witness' Testimony on the Same Issue Was Crucial to the Jury's Determination of Whether Defendant-Appellant Acted in Concert with the Co-Defendants?

2. Did the Trial Court's Jury Confusing and Erroneous Instructions and Responses to Jury Questions During Deliberation Deprive Defendant-Appellant of a Fair Trial?

STATEMENT OF FACTS

The Trial[1]

Proceedings began on February 25, 2009 before the Honorable Plummer E. Lott. The People first called witness DETECTIVE STUART GOLDSTEIN of the NYPD Technical Assistance Response Unit, an expert in video surveillance systems. (T – 53). On July 9, 2007, he was called to the scene of the incident and arrived at approximately 4 a.m. (T – 55). Within the crime scene, he noticed two surveillance cameras on the exterior of a day care center, both which faced different aspects of the intersection where the incident occurred. (T – 57). Goldstein testified that when he entered the day care center he was able to observe footage of the scene stored within a digital video recorder. (T – 62). The first image he extracted was of a police car pulling up behind another vehicle and stopping behind it. (T – 62). The other shows a vehicle making a right-hand turn into the intersection where the incident occurred with the police car following behind. (T – 62). These two images were then admitted into evidence and shown to the jury. (T – 64).

The People then called DETECTIVE HERMANN YAN, who had been a detective for one and one-half years and a member of the NYPD

[1] This was the second trial on this Indictment. This first trial was a joint trial with three separate juries. A mistrial had been declared in a prior joint trial after a juror on Defendant-Appellant's jury became too ill to continue deliberations.

Intelligence Division. (T – 73). Yan testified that on the night of the incident he was in uniform and was wearing a bullet proof vest. (T – 76). As he and his partner Police Officer Russell Timoshenko were responding to a particular location, Yan decided to run a random license plate check on the dark colored BMW SUV in front of him. (T – 79). The computer returned a green Mitsubishi Outlander, at which point Yan turned on his lights and sirens to pull over the vehicle. (T – 81). The car did not immediately stop, but proceeded to the corner of Lefferts and Rogers Avenues, stopped at the red traffic light, turned onto Rogers Avenue, and then pulled over to the side of the road a few feet from the corner. (T – 82-83.) Yan then directed Timoshenko to get on his loud speaker and tell the driver to put the car in park, which it then was placed in park. (T – 83). Upon exiting the police car with Timoshenko, Yan approached the driver's side while Timoshenko approached the passenger side. (T – 84). As he approached the driver's side, Yan heard approximately four shots fired from inside the vehicle. (T – 86). After hearing the gunshots, Yan felt pain in his arm and stepped back, returning fire. (T – 86). Yan never saw the person who was sitting in the driver seat of the BMW. (T – 87). The BMW then drove northbound on Rogers Avenue and Yan stopped firing. (T – 88). At this point he was able to see Timoshenko lying on the ground next to the curb, unable to speak. (T

– 88). Yan radioed for help and two other unmarked cars with detectives arrived, one of which proceeded to take Yan to Kings County Hospital. (T – 89). Yan suffered two bullet wounds in his left arm and an abrasion on his upper left chest area where a bullet had struck his bullet-proof vest, failing to penetrate the vest. (T – 91). After showing the jury the images from the video surveillance of the BMW being pulled over, Yan then showed the jury the bullet-proof vest he was wearing on the night of the incident, along with the injuries he received. (T – 103).

POLICE OFFICER MICHAEL MCDERMOTT testified next for the People. McDermott had been a member of the New York City Police Department for 21 years before retiring as a second grade detective shortly after this case to work as a police officer in Annearundel, Maryland. (T – 120, T-121). McDermott testified that while riding in the back of a patrol car on Lefferts Avenue at approximately 2:15 a.m. on the July 9, 2007 he heard the sound of gunfire, about 15 to 20 shots coming from the direction in front of him. (T – 123 – T-125). After approaching the scene and exiting the patrol car, McDermott observed a uniformed officer with his handgun in the air yelling that he had been shot, later determined to be Yan. (T – 126). As he ran towards the officer, he noticed another uniformed officer laying face-up in the street with his head on the curb, Officer Timoshenko. (T –

127). Another marked car arrived at the scene, and Officer Timoshenko was placed in a patrol car and taken to the hospital. (T – 128). After several more patrol cars arrived, a crime scene was established. (R – 133). On Saturday, July 14, 2007 McDermott had learned that Timoshenko had passed away as a result of the shooting. (T-135).

Next to testify for the People was DETECTIVE GREGORY ANZALONE, who has been a member of the New York City Police Department for 19 years and part of the Crime Scene Unit for two and a half years at the time of the incident. (T-137). Anzalone testified that he was called at his home to arrive at the scene, which he did at approximately 6:15 a.m. on July 9, 2007. (T-139). At that point, he prepared a handwritten sketch of the scene, photographed the crime scene, and collected and packaged the evidence. (T-141). The jurors were then shown two computerized renditions of his sketches detailing the scene of the incident and the location of evidence, including the location of blood on the street, then shown a series of eighteen photographs of the crime scene taken by Anzalone. (T-145, T-147). He then testified that he was directed to enter an apartment on the second floor of 422 Rogers Avenue, where he observed several bullet holes and a bullet within the north bedroom wall. (T-155). Ballistics trajectory rods were then used to determine the angle of impact

and the trajectory of the bullets. (T – 155). The jurors were then told where each of the bullet casings were found on the scene and the points of bullet impact and the location of any bullet holes. (T – 160-167). Anzalone testified that, in total, he examined the scene for approximately 15 hours. (T – 171).

The following day, the People called DETECTIVE TIMOTHY O'BRIEN, who has been a member of the Brooklyn South Homicide Squad for 12 years. (T – 181). O'Brien testified that at approximately 2:20 a.m., he received communication that an officer had been shot and proceeded to head to the location. (T – 182). Upon arriving, he observed a police officer – later known to be Timoshenko – lying on the street. (T – 183). O'Brien and other officers placed Timoshenko in the back seat of his car and took him to Kings County Hospital. (T – 183). While at the hospital, O'Brien learned that another officer had been shot and that he was also present in the hospital, who he later learned was Officer Yan. (T – 184, T-185). Yan told O'Brien the license plate number of the vehicle involved in the incident, which O'Brien then transmitted the Central Communication Division over the police radio. (T – 191). While helping Yan remove his bullet-proof vest, he noticed a bullet lodged inside, which was then vouchered along with other items of clothing. (T – 192).

DETECTIVE TIMOTHY O'GORMAN testified next for the People. O'Gorman is a member of the Joint Terrorism Task Force and has been a detective with the New York City Police department for eleven years. (T – 194). At approximately 2:30 a.m. on July 9, 2007, he heard on the police radio that an officer had been shot at Rogers Avenue and Lefferts Boulevard, to which he then proceeded with his supervisor in an unmarked car. (T – 197). He was then told the license plate number of the vehicle and that it was a dark-colored Outlander Mitsubishi. (T – 198). While traveling on Empire Boulevard, he observed a dark-colored BMW SUV with rear tail-lights on going in the opposite direction of traffic, about four blocks from the scene of the incident. (T – 200). The license plate number matched that which he was looking for. (T – 201). He exited the patrol car, approached the running vehicle, and noticed that it was empty and parked against traffic. (T – 203). He walked to the driver's side, where he noticed an open door and a box of Popeye's Chicken on the ground. (T – 204). The rear passenger window was shattered and the driver's side had two marks on it. (T – 204).

The People then called DETECTIVE ANDREW VIOLA, who had been a member of the New York City Police Department for over 15 years and assigned to Technical Assistance Response Unit (TARU) for four years.

(T – 213). He testified that he was called to the scene for the purpose of retrieving a video taken from the exterior of an apartment building. (T – 214). Viola noticed that the timestamp on the images retrieved was 55 minutes slow from real time. (T – 217). The video was played for the jury and showed a vehicle going down Kingston in the wrong direction followed by a police vehicle. (T – 220).

DETECTIVE JEAN PIERRE, a detective with the New York City Police Department, then testified that, at around 3:30 a.m. on July 9, 2007 he went into the basement of 438 Kingston Avenue and retrieved video footage taken from a camera located on the exterior of the building. (T – 224). Later he went to 573 Lefferts where he located 3 surveillance cameras, from which he was able to extract video footage and store it on mini DVD's. (T – 227). These video images were then shown to the jury. (T – 230).

TAMIKA BUGGS, a twenty-two year old student from Springfield Gardens, Queens County, testified that she knew Defendant-Appellant as her aunt's boyfriend and that she had known him for several years, but thought of him as an uncle rather than a friend. (T -236). After getting into a prior unrelated altercation with her landlord and another male, Buggs did not feel safe in her apartment and asked Defendant-Appellant through her aunt to assist her in moving out. (T-237, T-238). According to Buggs, Defendant-

Appellant asked co-defendants Dexter Bostic and Roger Ellis to go to her apartment and help her pack her bags and leave, which they did do on July 7-8, 2007. (T-237, T-239, T-242). They then took her to their apartment on 182nd Street in Queens by car. (T – 242). Once there, she went to sleep at a bedroom in a bedroom and shared a bed with co-defendant Ellis, and ended up having sex with Ellis when she awoke the next morning. (T-247).

She spent the day in the apartment, watching television, and then went to sleep that night in Bostic's bed, whereupon she was abruptly awoken by Ellis at approximately 5:00 a.m. on July 9, 2007 telling her to hurry up and get dressed. (T-247, T-253, T-254). Ellis appeared to be extremely nervous and sweating. (T-254, T-257). Buggs packed up some of her belongings and walked with Ellis to a nearby McDonald's restaurant on Farmer's Boulevard and North Conduit where Buggs had once worked, noticing a small black case leaning up against the wall in the apartment, which she identified as People's Exhibit #41, a firearms case. (T-249, T-260, T-265). During the walk to McDonald's, Buggs kept asking Ellis what was going on, and Ellis replied that he couldn't tell her until he watched the news. (T-260). When they reached the McDonald's, the two ordered some food and sat down to watch the morning news on a television inside the dining area. (T-261). While the news was on, Buggs engaged her former manager in conversation

until the newscast announced that two police officers had been shot the night before, whereupon Ellis tried to change the channel but couldn't get another channel to work. (T-262 – T-263). While there, Ellis tried to change the channel of the television upon seeing news footage reporting that two police officers had recently been shot. (T – 262). Ellis ordered Buggs to stop talking to the manager because he did not want her to identify him if his picture came up on the television. (T-267). While the newscast was playing, Ellis received a call on his cell phone, and was relaying the information from the newscast to the other party on the phone. (T-264). After a few minutes, he ended the call and left the McDonald's with Buggs, telling her they had to meet someone on Jamaica Avenue. (T-265).

Ellis and Buggs took a bus to Jamaica Avenue in Queens where they were later picked up in a green truck driven by Nicole Bostic, Dexter Bostic's sister, along with Bostic's teenage daughter who was sitting in the front seat and Defendant-Appellant a the back seat passenger. (T-269). They drove around for about five minutes before locating Dexter Bostic, who got into the car. (T – 271). Buggs testified that, while in the car, Defendant-Appellant stated in response to a question by co-defendant Dexter Bostic, that he was not able to retrieve the guns upon going back for them because of a large police presence. (T – 272). This testimony was

significantly at odds with her prior testimony and prior statements. On cross-examination, Buggs was impeached with her prior Grand Jury testimony, and testimony she gave at a previous trial, where she had testified that it was Dexter's sister and her daughter, along with Defendant-Appellant, who had gone back to the crime scene to pick up the guns. (T – 309):

> Q: Now, do you recall testifying in the grand jury in this case, back in July 2007, right?
> A: Yes.
> Q: And in the grand jury you were asked questions by Mr. Hale and Miss Nicolazzi?
> A: Mr. Hale
> Q: When you were asked questions before you started testifying in the grand jury, you took an oath. You were sworn in by a member of that grand jury, correct?
> A: Yes.
> Q: And it is pretty much the same oath you took here in court today, right?
> A: Yes.
> Q: And you were asked questions by Mr. Hale about this case that you are testifying about today, right?
> A: Yes.
> Q: And you gave answers to those questions, right?
> A: Yes.
> Q: And in the grand jury, back in July of 2007, isn't it a face, you were asked these questions and you gave these answers. Page 14, lines 15 through 25. Page 15, line one. I'm sorry page 15, lines one through five.
>
> "Question: Was there any conversation in the truck between the individuals, specifically between Lee Woods and Robert Ellis?
> Answer: At that point, no.
> Question: Is there any conversation between any of the other individuals, like Dexter's sister?
> Answer: Yes.
> Question: Tell us what that was.

Answer: **She** said that **she** had went back to the crime scene to pick up the guns from where it all happened.3
Question: Who is **she** saying this to?
Answer: To Roger.
Question: What did Roger say back to that?
Answer: What happened? **Nicole** was explaining, at the time, that there was too many cops, so they couldn't get the guns."

Do you remember giving those answer (sic)?
A: Well, sir, it is two years ago. I am not going to remember everything I said.
MR. MEGARO: Will the District Attorney conceded (sic) that I read from the transcript correctly?
MR. HALE: Yes.
Q: I know this is a while ago, right?
A: Yes.
Q: Now, back to – as you said before, you gave prior testimony in a prior proceeding in this particular case back on November 19, 2008, about four months ago, five months ago?
A: Yes.
Q: And again, you were asked questions by Mr. Hale, under oath, about this particular case?
A: Yes.
Q: And do you recall being asked these questions and giving these answers? Page 1125, lines 16, back on November 19, 2008?

"Question: Do you recall what was said by **Miss Bostic**?
Answer: Yes.
Question: What was said?
Answer: **She** said **she**, her, and Mr. Woods, and her daughter tried to go back to the crime scene to pick up the guns, but it was too many cops on the scene, so they couldn't get it.
Question: **She** says that to who?
Answer: Her brother, Mr. Bostic.
Question: In the front seat?
Answer: Yes.
Question: But she was in the car with Mr. Woods, and her daughter, and they tried to go back to get the guns, but there was too many police in the area, and they couldn't?
Answer: Yes.
Question: Did Mr. Woods say anything at that point and time?

Answer: No.

Do you recall being asked those questions and giving those answers?
A: Yes. (T-306 – T-310) (emphasis added)

The conversation inside the car included both Bostic and Ellis stating that they believed they had shot somebody, but were unsure of whom. (T-273). Dexter Bostic and Robert Ellis then began to concoct a story about the BMW being stolen from Ellis, and discussed live rounds of ammunition that Ellis had in his possession, and the fact that these rounds of ammunition didn't fit any of the guns. (T-277, T-310). Defendant-Appellant took no part in this conversation, but did state after a while that he had nothing to worry about because he did not shoot anybody. (T-273, T-310). Neither Dexter Bostic nor Robert Ellis interjected or disputed Defendant-Appellant's statement that he had nothing to worry about. (T-272, T-311).

Buggs, Bostic and Ellis were then dropped off at Buggs' old address in Springfield Gardens, Queens County. (T-275). Buggs testified that upon arriving at her old residence, Ellis left a brown bag in the car that contained the bullets that did not match any gun. (T-277). Defendant-Appellant remained in the car with Nicole Bostic, and told Buggs to keep her mouth shut or she might be next. (T-311, T-312). Buggs was not threatened by this statement at all; rather, she took it as advice to watch Ellis and Bostic.

(T-312). Buggs admitted on cross-examination that several months later, she visited Defendant-Appellant with her aunt. (T-312).

Buggs then parted ways with Ellis and Bostic and left for work at a beauty salon in Queens, where she later encountered about 20 police officers in suits who began to follow her around. (T-287). She was then approached by some detectives who began to ask her questions. (T-279, T-288). At first, Buggs denied knowing anything. (T-288). After a short time, the detectives came into the salon and began asking her direct questions about whether she knew Defendant-Appellant, Dexter Bostic, and Robert Ellis, and about her cell phone use. (T-289). The detectives also began harassing other people in the salon by questioning them. (T-289). Again, Buggs denied knowing anything, and asked them to leave her alone. (T-289). The detectives then placed her in handcuffs inside the salon, and took her to a precinct in Brooklyn and ultimately released her to her aunt several hours later. (T-291). The next day, July 10, 2007, detectives came back to her grandmother's house, kicked down the door, claimed they had a warrant for her arrest, and took her into custody, but did not place her in handcuffs because her grandfather begged police not to handcuff Buggs in front of her 3-year old son. (T-291 – T-292). The detectives then took her into custody against her will and kept her in custody for an entire day, telling her she was

in big trouble for lying to police, and threatened with prosecution. (T-295, T-296). She was then taken to the Kings County District Attorney's Office, where she met with Assistant District Attorneys Mark Hale and Alfred DeIgeniis, administered an oath, and gave a tape-recorded statement. (T-297). Tamika Buggs was never prosecuted for lying to police. (T-298). She was, however, given money for a hotel, a cash payment, and given assistance to relocate. (T-298 – T-299).

On redirect examination, the People were permitted to introduce Tamika Buggs' prior statements from the audiotaped statement that were consistent with her trial testimony. (T-322). Defense objections at sidebar were overruled.

DOCTOR ROBERT KURTZ, an expert in trauma and surgical intervention at Kings County Hospital and a medical doctor with 32 years experience, testified that Officer Yan had received a gun shot wound in his left forearm requiring immediate surgery to prevent loss of the entire arm. (T-335, T-336, T – 341). He also suffered nerve damage in the arm which require subsequent surgery and a skin graft. (T – 341-342). Yan also suffered from blunt trauma to the chest due to the impact of the bullet on his bullet-proof vest. (T – 343).

With respect to Officer Timoshenko, Kurtz testified that he suffered from two bullet wounds, one in the upper left mouth, and another in the left nostril, causing the bullet to pierce the upper portion of Timoshenko's mouth. (T – 344). Due to the gunshots, Timoshenko's spine had been severed from his brain. (T – 345). Kurtz testified that Timoshenko had lost about two full body amounts of blood by the time he arrived at the hospital. (T – 347). Several days later, Timoshenko was pronounced brain dead, the legal equivalent of cardiac death, and his ventilator was disconnected. (T – 350).

The People then called POLICE OFFICER MICHAEL GERBASI, a10 year- veteran of the NYPD and member of the Highway Division. (T – 351). On July 9, 2007, his patrol car was equipped with a license plate reader that automatically detects license plates and determines if the vehicle is wanted. (T – 353). If the vehicle is not wanted, the information is stored in the police database for an unspecified amount of time. (T – 354). Upon capturing an image of the license plate, a map is generated, depicting exactly where the vehicle's plate was captured and stored. (T – 355). As part of canvassing the area, Gerbasi captured the image of the vehicle's license plate at Kingston and Lefferts on July 9, 2007. (T – 238).

DETECTIVE KAREN NEWMAN testified that on the night of the incident, she was directed to Kingston and Lefferts to process a BWM as part of a crime scene. (T – 362). Once there, she and her partner looked for latent fingerprints and any potential DNA. (T – 364). The vehicle was then moved to the precinct by tow truck and, once there, photographs were taken of evidence recovered from the interior. (T – 366). She testified that she did not know who towed the vehicle or if any officers were present while it was being towed. (T – 422). The jury was then shown photographs of the crime scene, the interior of the vehicle, the driver's seat, a Popeye's chicken box recovered from next to the vehicle, ballistic impact marks on the vehicle, shell casings, and ballistics rods, and bullet holes. (T – 367-383). With respect to serological evidence, Newman testified that four chicken bones, a Popeye's chicken box, and a white napkin were recovered from around the vehicle. (T – 389-390). Swabs were also used to check for DNA on the license plate, several objects from the interior of the vehicle and glove compartment, as well as from the key that was left in the ignition. (T – 392-394). Many of the recovered items were then sent for chemical latent print enhancement and others were collected as investigatory evidence. (T – 401-403). Several days later, Newman returned to the BMW for ballistics

processing. (T – 406). Photographs of bullet holes and impact marks were then shown to the jury. (T – 412).

The People then called DETECTIVE JOSEPHINE CURRY, a detective for five years and member of the New York City Police Department for 12 years. (T – 434). Curry testified that she was directed to assist with processing a crime scene and pieces of evidence from the driveway and backyard of 591 Kingston and the area between 591 and 598 Kingston Avenue. (T – 436). Once there, she photographed a white bag inside a garage that contained handguns. (T – 445). A hat and a jacket were also found in the garage and a photograph was shown to the jury of the same. (T – 448). A Popeye's chicken box, a chicken bone, a biscuit, and a folding knife were also found inside the bag. (T – 448).

Serological samples were taken from items found within the jacket and the three firearms. (T – 451). Over defense counsel's objection, the judge then admitted into evidence X-rays depicting the location of the bullets within Officer Timoshenko's body and the severing of his spinal chord, claiming that they would help to determine the mindset of the perpetrators. (T – 466-467).

The People then called DETECTIVE DANIEL PERRUZZA, a member of the New York City Police Department for 27 years and a

detective for 24 years, specializing in latent print analysis. (T – 483). Perruzza received a series of latent prints that were taken from the crime scene. (T – 489). Out of the 16 lifts received, nine were determined to be of no value. (T – 491). Five prints were also received from a laboratory, with only one – from the Popeye's chicken box – being of value. (T – 494). With respect to the Defendant-Appellant in particular, Perruzza testified that his left thumb fingerprint was identified on the rear operator door of the vehicle and from the Popeye's chicken box. (T – 497).

SERGEANT LAWRENCE ZACARESE testified that on July 9, 2007 he was sent to the crime scene along with his trained Blood Hound dog in order to attempt to track the occupants of the BMW SUV. (T-510). Zacarese had his dog obtain a scent leather seat of the abandoned vehicle at the scene, and commanded him to track. (T-510-511, T-513). The dog made his way into a garage on Lefferts Avenue on two occasions, but his tracking ultimately proved to be unsuccessful in locating anybody. (T – 520). However, law enforcement returned to the garage the following day and discovered firearms inside a white plastic bag. (T – 521).

Next to testify was DOCTOR LARA GOLDFEDER, Deputy Medical Examiner for New York City, assigned to the borough of Manhattan. (T – 528). Goldfeder, an expert in pathology, testified that an autopsy of Officer

Timoshenko revealed that he had received two gunshot wounds to the face. (T – 535). In her opinion, the gun had to be at least two or three feet away from the face at the time it was fired, but could have been as far as 50 feet. (T – 536). She concluded that Officer Timoshenko died from a gunshot wound to the head. (T – 542).

DETECTIVE MICHAEL CUNNINGHAM, a 23 year veteran of the New York City Police Department and eight year member of the Crime Scene Unit, testified next. (T – 543). Cunningham testified that on the night of July 9, 2007 he was called to the scene to aid in reconstruction, the process of using forensic evidence and measurement techniques to piece together what occurred. (T – 545). At the scene, he examined two bullet holes and performed an analysis of their respective bullets' trajectories. (T – 547).

DETECTIVE EDWARD DINGMAN, a member of the Crime Scene Unit testified that two months after the shooting, he was assigned to assist in the reconstruction of the scene by creating a model reflecting his opinion regarding the shooting. (T – 555). The model was then shown to the jury, reflecting his opinion\, where the shots were fired from and their respective trajectories. (T – 562). He concluded that several shots originated from inside the vehicle. (T – 566).

DETECTIVE GERARD AHEARN, testified that on July 10, 2007, he obtained a warrant to search a two-family house on 182nd Street in Queens, the residence of both co-defendants Dexter Bostic and Robert Ellis. (T – 578). Once he entered the premises, he noticed a black firearms box against the wall (People's Exhibit #41), which he then opened and discovered a live 12-gauge shotgun shell. (T – 580). Several other documents, including utility bills, were seized, none of them which had Defendant-Appellant's name on them, but which bore the names Dexter Bostic and Robert Ellis. (T – 581).

DETECTIVE RICHARD COLUCCI testified that on July 9, 2007, he was assigned to retrieve video footage obtained from Popeye's restaurant on Empire Boulevard in Brooklyn. (T-585). From the video footage, 20 still images were obtained and burned onto a CD, which was then shown to the jury. (T – 591). These images were of Defendant-Appellant and co-defendant Robert Ellis purchasing fast food.

MISONARA AHMED, a criminologist in the Forensic Biology Unit of the Office of the Chief Medical Examiner, testified next as an expert in DNA testing and examination. After the incident, she was provided with biological samples of Officer Yan and Officer Timoshenko as well as Defendant-Appellant and the two other co-defendants. (T – 599). The only

items to reveal the presence of Defendant-Appellant's DNA were a baseball cap and a multi-colored jacket. (T-617).

DETECTIVE MICHAEL HABERT of the Brooklyn South Homicide Division testified next. On the morning of July 9, 2007, Detective Habert was directed to the Five Towns Mitsubishi dealership in Inwood. (T-627). While there, he was informed that a gray BMW SUV was missing, as well as license plates from a Mitsubishi Outlander. (T-628). After obtaining information about co-defendant Bostic, Detective Habert was directed to 1430 Gateway Boulevard in Far Rockaway. (T-628). Upon knocking on the door, Habert, accompanied by 10-11 other detectices, was met by two males, one of whom was Defendant-Appellant, the other was Nicole Bostic's teenage nephew. (T-632, T-637, T-643). Detective Habert entered the apartment with his pistol drawn, pointed at Defendant-Appellant, and physically put Defendant-Appellant down onto the floor. (T-638). After frisking Defendant-Appellant and finding no weapons, Detective Habert placed Defendant-Appellant on the couch and began to question him about Dexter Bostic's whereabouts. (T-639). According to Habert, Defendant-Appellant told him that he had not seen co-defendant Bostic since the Saturday prior. (T-634). According to Detective Habert, Defendant-Appellant was not a suspect in the shooting at this point. (T-640). In spite

of this, according to Detective Habert, Defendant-Appellant asked to be handcuffed and placed in the back of a police car to be transported back to the 67th Precinct in Brooklyn to assist the police in locating Dexter Bostic. (T-642 – T-643). agreed to come back to Brooklyn to help locate Dexter Bostic. (T-635). Habert then saw Defendant-Appellant 14 hours later where he was still in custody in the interview room at the precinct. (T – 646).

DETECTIVE LUIS YERO, a member of the Brooklyn Homicide Squad, testified that on July 9, 2007, he was directed to the 67th Precinct where he met with Defendant-Appellant in the interview room. (T – 654). Yero asked him a few questions and then proceeded back to the crime scene. (T – 657). While gone, Yero spoke with co-defendant Bostic and then returned to continue speaking with Defendant-Appellant over 8 hours later. (T – 659). After telling Defendant-Appellant that he knew he had not been entirely truthful earlier, Defendant-Appellant indicated that he had been at the scene of the shooting, but in a different car. (T – 660). Defendant-Appellant was then Mirandized. (T – 665). He related to the police that he had been driving in a Lexus while Bostic and Ellis were in a BWM and they had all met at Popeye's Chicken and proceeded to eat it inside the BWM. (T – 669). Once they finished, Defendant-Appellant followed Bostic and Ellis and witnessed them getting pulled over. (T – 669). He then said he made a

U-turn on Rogers Avenue after passing the police car and waiting on the opposite corner where he witnessed the shootings. (T – 670). However, Yero testified that Rogers Avenue is a one-way street and, after watching a video of the scene, concluded that there were no other vehicles on the street at the time of the shooting. (T – 672). Defendant-Appellant memorialized his statement in writing, and then conceded that he, in fact, had been driving the BMW, but never fired any shots. (T – 678). This statement was never signed and was allegedly written outside of the presence of any police officers while Defendant-Appellant was in the precinct. (T – 704). Several hours later a new statement was memorialized in which Defendant-Appellant stated that he was driving and that Bostic and Ellis had told him not to pull over. (T – 681). Once the officers came to the vehicle, Defendant-Appellant claimed that Ellis, holding two guns, and Bostic, holding one gun, began shooting at the officers. (T – 681). They then fled the scene to the nearest train station. (T – 681).

DETECTIVE MATTHEW WALKER testified next. Walker has been a member of the New York City Police Department for 18 years and has been a detective for seven years. (T – 721). Walker testified that he was asked by Detective Yero to monitor Defendant-Appellant while he was in the interview room of the precinct. (T – 723). While Defendant-Appellant

was initially free to leave at around noon, Walker testified that, after speaking with Yero nearly 10 hours later, Defendant-Appellant was no longer free to go. (T – 725). After learning Defendant-Appellant was officially under arrest, Walker told Defendant-Appellant to remove his clothes, which were then searched. (T – 727). A receipt from Popeye's Chicken was found therein. (T – 728).

SERGEANT DERRICK JOHNSON, assigned to the Brooklyn South Warrants unit, testified on July 9, 2007 On the day of the he and approximately 15 other officers were directed to Kingston and Lefferts, where they arrived at about 5 a.m. (T – 736). While there, his job was to perform a grid search of the area, which includes searching all buildings, sidewalks, and driveways. (T – 737). During the course of the search Johnson discovered a plastic bag with three guns and a knife located in a nearby garage. (T – 738).

DETECTIVE JOHN KRALJIK, a 15-year member of the New York City Police Department, testified next. As an expert firearms examiner, his job entails identifying ammunition and firearms for operability and conducting microscopic examinations of fired ballistic evidence. (T – 749). Based on his examinations of various guns and ballistic evidence received from the scene of the incident, Kraljik was able to determine that the

ballistic evidence obtained from the scene matched both the 45 and .9mm guns found in the garage. (T – 773).

DETECTIVE PETER MARGRAF, a 23-year member of the New York City Police Department, testified next. (T – 777). Margraf testified that, after the arrest of Nicole Bostic, the co-defendant's sister, he was assigned to interview her for pedigree information. (T – 781). Marsgarf, as lead investigator, arrested Defendant-Appellant on July 10, and the two co-defendants on Route 80 in Pennsylvania on the following two days. (T – 786).

The People then called REBECCA MIKULASOVICH, an expert in forensic biology and employee of the Office of the Chief Medical Examiner Department of Forensic Biology. After stating her conclusions as to what items of evidence contained DNA samples of the two co-defendants, Mikulasovich testified that, with respect to the plastic bag found, Defendant-Appellant's DNA profile was excluded. (T – 860).

The final person to testify for the People was TATYANA TIMOSHENKO, mother of Officer Russell Timoshenko. She identified her son by a photograph taken by a medical examiner at the morgue. (T – 864).

The defense called no witnesses and did not otherwise put on a defense case.

The Court's Charge To The Jury

During the jury charge, defense counsel objected to the mentioning of the automobile presumption, believing it to be unsupported by the evidence and confusing to the jury. (T – 995). The application was denied. (Id.)

The Deliberations and the Court's Re-Charge on Acting in Concert

During deliberations, the jury first asked for a specific explanation of whether a defendant in a car in which a gun is present must have knowledge of the gun's presence to be guilty of criminal possession, thus re-affirming defense counsel's initial concerns regarding these charges. (T – 998). Defense counsel claimed that the jurors were asking a particularly pointed question that did not necessitate a re-reading of the entire charge, something that would perhaps invite the jurors to find guilt on alternative theories. (T – 1000). The jury was then sent back to clarify their question. (T – 1003). The trial court then agreed to re-read the charges to reflect the element of knowing possession and eliminated the automobile presumption. (T – 1010). The jury was then informed about the theories of actual and constructive possession. (T – 1013). The trial court also explained that two or more individuals can jointly constructive possess property and that knowing possession means awareness of such possession. (T – 1013).

The jury then submitted another note asking whether Defendant-Appellant could be considered to be acting in concert regarding the underlying murder if he hid the murder weapons after the shooting. (T – 1037). Defense counsel argued that the court should not answer that particular question because doing so would suggest that they should be using a particular piece of evidence and how to use it, thus invading the province of the jury. (T – 1038). The People argued that the Court was obligated to answer not with reference to any specific facts, but by explaining that the jurors can consider events the took place before, during, and after the shooting to establish acting in concert with intent. (T – 1041).

Defense counsel then argued that the jurors were not asking for definitions of intent or acting in concert, whereupon the trial court disagreed, stating that he would be giving the jurors the elements necessary for convicting Defendant-Appellant of murder and attempted murder with respect to acting in concert, as well as the definition of intent with respect to those issues. (T – 1042). The trial court then proceeded to provide the definitions of "acting in concert" and "intent." (T – 1047-49).

The jury then returned another note shortly after, asking, similarly, whether acting in concert with the shooters can entail assisting the shooters escape even if Defendant-Appellant did not knowingly and willingly

participate in the actual shooting itself. (T – 1051). The trial court, following defense counsel's initial proposal, agreed that since it was not his job to make factual determinations, he would only provide the law to which they are to apply the facts. (T – 1053).

Verdict and Sentencing

After several days of deliberations, reinstructions on the law, readbacks of testimony, the jury found Defendant-Appellant guilty of Aggravated Murder, Attempted Aggravated Murder, and two counts of Criminal Possession of a Weapon in the Second Degree. The jury found him not guilty of one count of Criminal Possession of a Weapon in the Second Degree. (T – 1061). Thereafter, Defendant-Appellant was sentenced on April 1, 2009 to Life Without Parole on the first charge, consecutive to 40 years to Life on the second count, consecutive to 25 years to Life as a Mandatory Persistent Felony Offender on the third and fourth counts by the Honorable Abraham Gerges.

ARGUMENT

POINT I - THE ADMISSION OF TAMIKA BUGGS' PRIOR CONSISTENT STATEMENTS WAS ERROR IN THE ABSENCE OF ANY CLAIM OF RECENT FABRICATION

A witness' trial testimony may not be bolstered with consistent pre-trial statements. People v. McDaniel, 81 N.Y.2d 10, 16 (1993). This rule rests on the rationale that otherwise untrustworthy testimony does not become more trustworthy merely by repetition. People v. McClean, 69 N.Y.2d 426, 428 (1987). However, a well-established exception to the rule against bolstering testimony through prior consistent statements exists when the prior consistent statement is being used to rebut a charge of "recent fabrication" by counsel on cross-examination. People v. Davis, 44 N.Y.2d 269, 277 (1978). Under these circumstances, the prior consistent statements are admissible to repel the charge of fabrication if they were made at a time when there was no motive to falsify. Id. The prior consistent statement is thus used not to prove the truth of a fact at issue, but for the purpose or rehabilitating the witness and establishing his credibility. McLean, 69 N.Y.2d, at 428. The logical consequence, then, is that if the same motive to falsify which exists at the time of the testimony existed at the time the prior consistent statement was made, then the statement remains inadmissible. Id. It is crucial, therefore, to identify when the fabricating motive arose since, if

it existed at the outset then rehabilitation with prior consistent statements would be impossible. McDaniel, 81 N.Y.2d, at 18 (emphasis added); see also Davis, 44 N.Y.2d, at 277, supra.

The Davis exception to the prior statements rule specifies the use of such statements to rebut a charge of "recent fabrication." See Davis, supra (emphasis added); Tome v. United States, 513 U.S. 150, 157 (1995). The word "recent," however, has a relative meaning and applies when the defense is charging the witness not with mistake or confusion, but "with making up a false story well after the event." People v. Singer, 300 N.Y. 120, 124 (1949). Thus, "recent fabrication" means "fabricated to meet the exigencies of the case." Id. If, in response to this charge, opposing counsel can demonstrate that the witness spoke similarly outside the influence of such alleged motive or biasing event that provided an incentive to testify falsely, then courts have held it would be unjust not to allow the negating of such charge through an independent consistency. Mere impeachment through the use of inconsistent statements, however, does not necessarily constitute a charge of fabrication and not every inconsistency elicited on cross-examination implies that the witness has been perjurious. McDaniel, 81 N.Y.2d 10, 18.

In Davis, the defendants were charged with selling four glassine envelopes of heroine to an undercover police officer for the amount of $19. During direct examination, the undercover officer testified that he had paid $19 for the heroine and that the UF-61 report was the source of his recollection. Davis, 44 N.Y.2d, at 277. During cross-examination, defense counsel raised the fact that during a preliminary hearing and before the Grand Jury, the officer repeatedly testified that he had made the purchase with a single $20 bill and not with at least 6 bills needed to constitute $19. Id. On redirect, however, the People were permitted to introduce into evidence, over objection, a document containing a statement that the officer had received $19 on the prosecution's theory that the officer's story had been attacked as a recent fabrication. Id. However, the Court of Appeals held that the introduction of such report was erroneous and not harmless error since the officer's motive to fabricate was not "recent," but existed from the very inception of the case itself. Id, at 278. The UF-61 report, as originally urged by defense counsel, could not have been made prior to the time when the charged motive to falsify arose. Id. The decision of the Appellate Division was therefore reversed.

Similarly, in McDaniel, supra, the Court of Appeals also reversed on the grounds that prior consistent statements were erroneously admitted. In

that case, the defendant was being charged with crimes relating to the molestation of his girlfriend's 11-year-old daughter, Mary, in the middle of the night. Defense counsel argued that Mary had been influenced by her stepfather, the police, and the DA to accuse the defendant of various sexual acts. On direct examination, Mary testified, over objection, that she told the police and the DA that defendant had rubbed her breasts and vagina. McDaniel, 81 N.Y.2d, at 14. On cross-examination, defense counsel impeached Mary with prior inconsistent statements, including statements she made to police two days after the incident that defendant had touched only her chest and lower stomach, as well as her statements to the physician that defendant had only touched her over her clothing. Id, at 15. On re-direct, however, the prosecutor elicited a series of prior statements made by Mary, including her statement to the DA and police that defendant rubbed his penis against her vagina. Id. This statement was admitted for the purpose of rehabilitating the witness despite defense counsel's objection that there was no charge of recent fabrication to rebut. Id. With respect to these statements, the Court of Appeals held that it was error to admit them as evidence of prior consistent statements since those statements were made after the existence of some motivating or biasing event – in this case, the DA accusing the child of lying after she initially told them she had not been

raped. Id, at 19. The Court held that her statements about being raped were inadmissible and could not be used to rehabilitate because they were made "subsequent to the alleged influencing forces." Id. Since there existed little evidence against the defendant with respect to the rape charges, the Court of Appeals held that the introduction of these statements was harmless error and reversed the decision of the lower court. Id, at 20.

The case at bar, specifically with respect to People's witness Tamika Buggs, presents a factually similar scenario. As described in the Statement of Facts, supra, Buggs was visited by approximately 20 police officers at the salon in which she worked the day after the incident. After asking her about the murder, she responded, "I don't know, don't ask me nothing, leave me alone." (T – 289). They then placed her in handcuffs and took her to the precinct for about 7 hours. (T – 290). The following day, the police kicked down the door to Buggs' grandmother's home (without knocking or announcing their presence) and executing a warrant for Buggs' arrest. (T – 291). At the precinct, the police accused her of lying and stated that she would be prosecuted, thereby leading her to give a sworn, tape-recorded statement. (T – 297). Buggs stated, on the tape, "Dexter had asked Lee what happened with the guns[.] Lee had said to Dexter, that he tried to go back and get him, and Nicole tried to go back and get them, but the police

were sitting on the crime scene and they couldn't, they couldn't take them." (T – 316). On direct examination, Buggs' testimony was consistent with this recorded statement:

> Q: Was there any conversation in the car after the car went into motion?
> A: Yes.
> Q: Who said what to whom?
> A: Dexter asked Lee Woods, did they get that?
> Q: Did Lee Woods answer him?
> A: Yes.
> Q: What did Lee Woods say?
> A: That he couldn't get the guns because it [sic] was too many police on the scene. (T – 271-72).

On cross-examination, however, defense counsel elicited seemingly inconsistent statements that Buggs made before a Grand Jury in July 2007. The relevant portions of those proceedings included the following:

> Q: Was there any conversation in the truck between the individuals, specifically between Lee Woods and Robert Ellis?
> A: At that point, no.
> Q: Is there any conversation between any of the other individuals, like Dexter's sister?
> A: Yes.
> Q: Tell us what that was.
> A: She said that she had went back to the crime scene to pick up the guns from where it happened. (T-308).

In response to the eliciting of this inconsistent statement, the prosecutor then sought to rehabilitate Buggs' testimony by introducing her tape-recorded statement to the police and the DA made several days after they arrested her at her workplace. At a sidebar, the prosecutor stated, "I am

taking conversations which are in a different context, where she does, in fact, say, in fact, predates what he claims to be the inconsistent statement, or statements that are now inconsistent with her trial testimony, again, rehabilitating what her testimony is now." (T – 315). Defense counsel objected, however, on the grounds that this prior consistent statement not being used for the purpose of rebutting a charge of recent fabrication, stating, "I am not arguing recent fabrication, **I am arguing fabrication from the start**." (T – 317) (emphasis added). Under defense counsel's theory, "[Buggs] has been consistent all the way along from her tape recorded sworn statement. But that is where the fabrication occurs." (T – 318). In other words, since Buggs' motive to lie – being threatened with prosecution for denying any knowledge about the case – arose before the tape-recorded statement, such statement cannot be admitted as a prior consistent statement because the statement itself was also made under the influence of the very motive sought to be rebutted. Defense counsel's position all along had been that Buggs' testimony had been fabricated ab initio since she was both under the intimidating threat of police presence and threatened with criminal action, something that was ultimately not undertaken once she provided a statement inculpating Defendant-Appellant. Despite this, however, the prior tape-recorded statements were allowed into

evidence. In light of the relevant case law, however, particularly Davis and McDaniel, these statements were improperly admitted.

This error was not harmless. Buggs' testimony was critical to the jury's determination as to whether Defendant-Appellant acted in concert with the co-defendants and shared the same culpable mental state, the People's theory of prosecution. The issue of whether Defendant-Appellant took the guns from the scene and attempted to retrieve them was the crux of the case against him. This was one of the few hotly contested issues in the case. There was evidence on the video recordings that Defendant-Appellant did not take the guns from the vehicle as claimed by the prosecution, that the co-defendants were carrying the guns as they fled the BMW SUV. Further, Tamika Buggs' was extensively impeached with her prior testimony, that it was Nicole Bostic, not Defendant-Appellant, who had tried to retrieve the guns that were used in the shooting from the garage. That this was the crux of the case is demonstrated by the number of jury notes and questions asked by the jury to the trial court which dealt with definition of acting in concert specifically as it pertained to Tamika Buggs' testimony, and the number of requests for Buggs' testimony to be read back. These notes, along with the trial court's responses, demonstrate that the jurors clearly relied on Buggs' testimony that Defendant-Appellant took the guns from the scene and

attempted to retrieve them, issues that were hotly contested, to make their determination that Defendant-Appellant acted in concert with the co--defendants. The trial court's erroneous admission of the witness' prior consistent statements permitted the jury to consider inadmissible evidence in finding the facts as to this critical issue. Consequently, a new trial should be ordered.

POINT II - THE TRIAL COURT'S INSTRUCTIONS AND CHARGE TO THE JURY WERE SUFFICIENTLY CONFUSING AND ERRONEOUS SUCH AS TO DEPRIVE DEFENDANT-APPELLANT OF A FAIR TRIAL

Jurors are prone to afford the trial judge's finals instructions great weight and, particularly in criminal trials, the "judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 611 (1946). Thus, when a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Id., at 612-613; see also United States v. Rossomando, 144 F.3d 197 (2d Cir. 1998) (explaining the judge's duty to clarify the source of the jurors' confusion). When the trial court's instructions are confusing and erroneous, however, reversal is required. People v. Moran, 84 A.D.2d 753 (2nd Dep't 1981). Furthermore, courts of appeals can reverse sua sponte when doing so is in "the interest of justice." See People v. Fuller, 108 A.D.2d 822 (2d Dep't 1985) (reversing judgment in court's own discretion when trial court failed to properly charge jury on

the issue of justification); People v. Muniz, A.D.2d 576 (2d Dep't 1994) (reversing judgment in own discretion when trial court's instructions with respect to felony-murder were erroneous and confusing).

The automobile presumption is generally properly provided to the jury prior to deliberations. See, e.g., People v. Anthony, 21 A.D.2d 666 (1st Dep't 1964) (applying the presumption). However, there are certain circumstances in which the automobile presumption is improperly charged. See, e.g., People v. Scott, 53 A.D.2d 703 (2d Dep't 1976) (holding automobile presumption improper in the face of undisputed evidence that weapon in question was observed in actual possession of person other than defendant just prior to defendant's apprehension).

In the case at bar, defense counsel immediately objected to the automobile presumption charge, claiming that it was both inapplicable to the facts at hand and confusing to the jury, an objection that was overruled. (T – 995). However, a little more than an hour into deliberations, the jury returned a note asking for clarification of charges three, four, and five, all of which related to the possession charges and thus invoking the automobile presumption. (T – 998). The note also asked for clarification regarding the knowledge element of the automobile presumption, further underscoring the jury's confusion. Defense counsel again objected to the charge of the

automobile presumption and further argued that charges three, four, and five should not be re-read to the jury in their entirety, but only the specific sections related to knowing possession. Ultimately, the charges were re-read in their entirety, but the automobile presumption was not mentioned in the re-read charge. However, the jury's confusion still lingered and they were now faced with two different charges, one involving the presumption and another without it. The continued confusion was evidenced by yet another note some time after, requesting further clarification of "knowing possession." Lastly, this case is unlike that of Anthony, supra and more akin to Scott, supra since Defendant-Appellant was not apprehended in or near his vehicle and the guns were located in a garage several blocks away and not inside the vehicle, or even near the vehicle. Thus, as trial counsel originally argued, the automobile presumption instruction was improper and proved only to add an element of confusion to the jurors' deliberations.

Some time later, the jury returned another note, asking: "If the defendant hid the murder weapons after the shooting, can he be considered acting in concert regarding the underlying murder?" (T – 1037-38). A dialogue then ensued between defense counsel and the court regarding what, in particular, the jury was asking in the note:

> MR. MEGARO: Judge, they have not asked for a definition of intent, or acting in concert.
> THE COURT: I beg to differ with you, sir. By asking this question, they are asking for a definition of acting in concert. (T – 1042).
> [...]
> MR. MEGARO: There is nothing in the note that says anything about intent, only acting in concert. I understand what the court is saying.
> THE COURT: Yes, but in giving acting in concert, I am trying to give them some guidance as to what mental state is requires [sic]. It is intentional conduct. [...]
> MR. MEGARO: The defense takes exception. (T – 1043).

The Judge then proceeded to read the definition of intent over defense's objection, leading the jurors to then return yet another note, asking essentially the same thing in different language (T – 1051). The Judge acknowledged that their job is to apply the facts to the law and that he could only provide the relevant law (T – 1056). However, providing the intent instruction may have led the jurors to take the specific fact of taking the guns and to apply it to intent formed subsequently to the shooting; by suggesting that they do this, even implicitly, the judge thereby invaded the province of the jury. Furthermore, the repeated notes were indicative of the jury's confusion because of the Judge's instructions. "The jury's request that the court clarify the definition of intent is the surest signal that the jurors were indeed confused." Rossomando, 144 F.3d at 202.

Accordingly, Defendant-Appellant was deprived of a fair trial and a reversal is warranted.

CONCLUSION

For all of the foregoing reasons, Defendant-Appellant's conviction should be reversed and a new trial ordered.

Dated: Uniondale, New York
April 12, 2010

Respectfully Submitted,

PATRICK MICHAEL MEGARO
Attorney for Defendant-Appellant