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December 15, 2022

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
PO Box 970
Trenton, NJ 08625

Re: State v. Kalil Cooper,
Supreme Court Docket No.
App. Div. Docket No. A-4975-18T1

Your Honors:

Please accept this letter in lieu of a more formal petition for certification on behalf of defendant-petitioner Kalil Cooper. Defendant urges that certification be granted for all the reasons set forth in Points I through IV of his Appellate Division brief, which he adopts in full here, plus the additional argument contained herein.

The issues in the case warrant a grant of certification for multiple reasons. First, the jury-instructions issues in Points II and III below address, inter alia, the crime of "promoting organized street crime," N.J.S.A. 2C:33-30 -- a RICO-style

offense that this Court has never addressed since the effective date of the statute in 2008, but also one which the Appellate Division impermissibly expanded beyond its clear statutory terms, allowing conspiracy to commit a substantive offense to be a predicate crime of a 2C:33-30 prosecution, when, plainly, conspiracies and attempts are not enumerated in the statute as predicate crimes. Secondly, as addressed in Point I below, in direct contravention of established case law, the Appellate Division approved of a trial judge's telling a deadlocked jury on a Thursday that jurors would need to be available for further deliberation from Tuesday through Friday the next week -- thereby conveying to that deadlocked jury that jurors would be stuck deliberating for at least another week unless they returned a verdict. Unsurprisingly, they reached a verdict very quickly. Finally, in Point IV below, the Appellate Division turned harmless-error analysis on its head when addressing the accidental playback during jury deliberations of a wiretapped phone call that was not in evidence. That court improperly required defendant to show the definite harm of the error, rather than requiring the State to show harmlessness beyond a reasonable doubt once the defendant showed the mere potential for harm.

Defendant was accused by the State of being the head of a group of Crips in Elizabeth and committing a litany of offenses, some of which were first-degree crimes. However, the jury did not believe most of the State's case, and acquitted defendant of the most serious charges. He ended up convicted of second-degree

"promoting organized street crime," third-degree conspiracy to distribute "heroin or cocaine," third-degree possession of cocaine, and simple assault. He received an aggregate 16-year sentence, half without parole, and the Appellate Division affirmed the convictions but remanded for resentencing. That latter aspect of the ruling is not challenged here.

"Promoting organized street crime" is defined in N.J.S.A. 2C:33-30 as follows: "A person promotes organized street crime if he conspires with others as an organizer, supervisor, financier or manager to commit any crime specified in chapters 11 through 18, 20, 33, 35, or 37 of Title 2C of the New Jersey Statutes; N.J.S. 2C:34-1; N.J.S. 2C:39-3; N.J.S. 2C:39-4; N.J.S. 2C:39-4.1; N.J.S. 2C:39-5; or N.J.S. 2C:29-9." But in this case, the "promoting organized street crime" count of the indictment (Count Four) strangely specified the crime that defendant allegedly conspired with others to "promote" as none of the ones listed in the statute, but rather: "a continuing series of crimes which constitute a pattern of racketeering activity under the provisions of N.J.S.A. 2C:41-1." (Da 7)

When it came time to discuss the jury instruction at the charge conference, the judge and counsel agreed that racketeering under Chapter 41 is simply not one of the predicate crimes listed in N.J.S.A. 2C:33-30a. Over defense objection, the court decided to charge the jury that any one of the crimes listed as part of the "pattern of racketeering" charged in Counts One and Two (of which defendant

was eventually acquitted) of the indictment could be the crime that the defendant sought to promote via a conspiracy "with others." (26T 6-19 to 11-12) Those crimes were: conspiracy to distribute CDS, conspiracy to commit murder, and the substantive crime of aggravated assault, and the judge instructed those three crimes to the jury as the predicate crimes that the State was alleging that the defendant conspired with others to promote in the "promoting organized street crime" count. (28T 197-11 to 200-17; 29T 11-2 to 20) Ultimately, when convicting defendant of "promoting organized street crime," the jury chose only third-degree conspiracy to distribute CDS as the crime that defendant conspired with others to promote under N.J.S.A. 2C:33-30. (Da 20)

In other words, the jury convicted defendant in the "organized street crime" count not of conspiring to distribute CDS, but rather of "conspiring to conspire" -- a nonsensical crime that does not exist because N.J.S.A. 2C:33-30 does not list conspiracy as one of the predicate crimes of that statute. Yet, as discussed in Point II(a) in the Appellate Division, the judge wrongly instructed the jury as if conspiracy is a predicate crime of 2C:33-30, and the Appellate Division's reasoning in upholding that conviction is clearly erroneous. That court reasoned that because 2C:33-30 addresses an overall conspiracy to commit any of a number of predicate substantive offenses, it also includes a conspiracy merely to conspire to commit those offenses. (Pa 19)

In so ruling, the Appellate Division ignored established case law. Where an inchoate offense, such as attempt or conspiracy, is not included in a list of predicate crimes in a criminal statute, that statute should be strictly read to exclude those inchoate offenses from its reach. In State v. Smith, 279 N.J. Super. 131, 143-144 (App. Div. 1995), the court held that the enhanced sentencing provisions for kidnapping under N.J.S.A. 2C:13-1(c)(2) applied only to the actual commission of the offenses listed in that statute, not to attempts to commit those offenses because the statute did not specifically name attempts as predicate crimes. Similarly, in State v. Staten, 327 N.J. Super. 349, 354-355 (App. Div.), certif. den. 164 N.J. 561 (2000), the court refused to apply the No Early Release Act (NERA) to a mere attempt to cause serious bodily injury when the NERA statute spoke only of the actual causing of such injury. Staten notes: "The failure to include the word 'attempt' is strongly indicative of the Legislature's intention that NERA does not apply to a mere attempt, without more, to cause serious bodily injury." Id. at 355. Thereafter, the legislature corrected the omission and amended the NERA statute to apply to a list of "crimes or an attempt or conspiracy to commit any of these crimes." N.J.S.A. 2C:7.2d (emphasis added).

Likewise, here the statute in question, N.J.S.A. 2C:33-30, simply does not specify attempts or conspiracies as predicate offenses included in the list of crimes that one must conspire with others to promote, N.J.S.A. 2C:33-30a, and

that is with good reason: a "conspiracy to conspire" is a ridiculous concept that is not in the Criminal Code; yet it was instructed to this jury. In keeping with Staten and Smith, the judge should not have charged the jury that defendant would be guilty of this crime if he conspired with others to promote a conspiracy to distribute drugs; rather only if he conspired with others to promote the actual distribution of (or possession with the intent to distribute) drugs would he be guilty under this statute. There is a significant difference between the two -- agreeing to actually commit a substantive crime versus merely "agreeing to agree," the latter being a far more tenuous "conspiracy." This Court should grant certification to address the clear conflict that the Appellate Division's resolution of Point II(a) has with Staten and Smith, and also to address, for the first time since its adoption in 2008, the parameters of N.J.S.A. 2C:33-30.

The remainder of Point II and Point III below also address other critical jury-instruction issues with relation to the "promoting organized street crime" count (Count Four) and the count charging conspiracy to distribute "heroin or cocaine" (Count Twenty-Three). The Appellate Division decision wrongly approves of jury instructions that allow for non-unanimity amongst the jurors regarding what drugs were the object of those two counts. The decision in State v. Gonzalez, 444 N.J. Super. 62, 70-78 (App. Div.), certif. den. 226 N.J. 209 (2016), requires that jury instructions make clear that a jury must agree unanimously on

the basics of what a defendant did wrong. But here, as set forth in Points II(b) and III below,[1] with respect to both Count Four and Twenty-Three, the jury was given so many "or" options in the jury instructions that -- especially considering the wealth of testimony about various possible drug sales involving various possible drugs (cocaine, heroin, marijuana, and prescription drugs) and various possible coconspirators -- it is impossible to know what the jury actually found defendant guilty of.

As noted, jurors acquitted defendant of the most serious charges. The Appellate Division was then left with verdicts on Counts Four and Twenty-Three that are so generic that no one could possibly determine what it is that the jury thought defendant did wrong, or, even more importantly, whether the jury unanimously agreed on whatever that thing was. The State chose a "shotgun" approach to its proofs -- figuratively spraying as much evidence at the jury as possible and hoping for convictions on all counts. That strategy failed terribly, and, because the jury instruction did not require unanimity to a degree that would allow a reviewing court to determine what it is that the jury unanimously concluded defendant did, or if they unanimously agreed on any coherent theory, the Appellate Division should have reversed. Its failure to do so ignores the fact that the reason for reversal in Gonzalez

[1] With respect to Point II(c) in the Appellate Division – which addresses the trial court's instructions that required a jury to be unanimous on a theory of acquittal on

was essentially identical: the "instructions were inherently ambiguous because the judge failed to explain in clear English what the jurors were required to decide and, as a result, generated numerous ways in which the jury could have convicted without a shared vision of what defendant did." 444 N.J. Super. at 77 (emphasis added). Certification should be granted to address that conflict with Gonzalez.

Point I below presents yet another basis for certification: to resolve the clear conflict that the Appellate Division decision has with cases like State v. Figueroa, 190 N.J. 219, 239-243 (2007), regarding what a judge may -- and may not -- say to a jury that has reported a deadlock. As detailed more specifically in Point I of defendant's Appellate Division brief, the jury reported a deadlock after deliberating for three days, including that day -- a Thursday. (32T 3-17 to 21; 32T 6-1 to 15) The judge responded first properly by reading the standard jury instruction from State v. Czachor, 82 N.J. 392, 405 n.4 (1980), that tells jurors to try to keep deliberating and not to hesitate to re-examine their views, but not to surrender honest convictions that they might have solely in order to reach a verdict. (32T 5-7 to 20) Then, because it was late in the afternoon, the judge determined that the next day of court would be Tuesday and defense counsel suggested that the judge should simply tell the jury that the next day of court would be Tuesday, when jurors could resume deliberations. (32T 14-18 to 25)

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Count Four – defendant will rely on what he presented in his Appellate Division brief.

The State agreed. (32T 15-2 to 12) If only the judge had abided by that request and told the jurors to return on Tuesday, there would not have been a problem.

But the judge suddenly chose to convey to the jurors not merely that they were coming back on Tuesday, but rather that they would be expected to deliberate the rest of that upcoming week if necessary. She asked: "Any issues next week, Tuesday, Wednesday, Thursday, Friday next week? So that is March 12, 13, 14, 15." (32T 16-6 to 8) (emphasis added) Then she reiterated: "So it's Tuesday March 12, Wednesday March 13, Thursday March 14, and Friday March 15." (32T 16-12 to 13) (emphasis added) When they returned on Tuesday, after hearing playback of recordings that they had requested, the jurors announced that they had a verdict, thereby avoiding the need to return for what the judge had told them would be the rest of the week if necessary. (33T 3-15 to 10-10)

The case law is very clear: what a trial judge says to a jury about scheduling during a trial is the trial judge's business, with one exception: when the jury reports that it is deadlocked. At that point, a judge must be significantly more careful. The jury must not be subtly pressured to reach a verdict, for instance by telling jurors a lengthy period of time that the court will expect them to stay to reach a verdict -- the very error that resulted in reversal in Figueroa, 190 N.J. at 239-243. Yet that is precisely what happened here.

The whole point of a Czachor instruction is to avoid coercion of a verdict

from a deadlocked jury. That instruction emphasizes that jurors should not surrender honest beliefs simply to reach a verdict. 82 N.J. at 405 n.4. The subsequent case law has made it clear, however, that reading the Czachor instruction is not a talisman that necessarily protects the resulting verdict from claims of error if something else is done to undercut the effectiveness of that instruction. In Figueroa, 190 N.J. at 227, the judge told the jury, "I got to be here tomorrow, I got to be here Friday. I got nothing going on Saturday, and Giants are playing away on Sunday, so we will be here as long as it takes you to go through this process," and that statement was seen as a "fundamental" violation of the spirit of Czachor which occurred, and which unduly coerced a verdict.

This Court in Figueroa made clear that the proper focus in analyzing the giving of such an instruction is whether, in the end, the jurors may have felt that the judge was telling them, in a subtle or not-so-subtle fashion, that they were going to have to stay until they return a verdict: "Based on our review of this record, we cannot agree that the jurors were not in fact under the impression that they would be required to continue to deliberate for as long as it might take to reach unanimity." Id. at 242. In such an instance, a trial judge effectively converts a benign Czachor instruction into a command to stay as long as is necessary to get a verdict. Id.

Yet, contrary to the Appellate Division decision here -- which just viewed

the judge's remarks as mere benign talk of "scheduling" (Pa 13) -- the error here was essentially the same as in Figueroa: telling a deadlocked jury they were going to be deliberating for at least another week unless they returned a verdict sooner. That clear conflict with Figueroa should lead to a grant of certification. Judges should not be telling deadlocked jurors that they will need to deliberate for at least a week more unless they return a verdict.

The final reason to grant certification arises from the Appellate Division's resolution of Point IV below. Both parties agreed on appeal that a recording of a phone call involving defendant and an alleged coconspirator was improperly played for the jury during deliberations even though that call was never in evidence. Everyone -- including the Appellate Division (Pa 29) -- also agreed that the State purported that the call was about two things: arranging bail for a Crip member named Kasib Ford, and getting three "bitches," which the State's expert could mean drugs or guns. (30T 29-4 to 32-3) The trial prosecutor had even argued to the jury and to the court that defendant's acts to help organize Ford's bail money were proof that he was a "financier" of criminal activity by the Elizabeth set of the Crips, and that his call with this alleged coconspirator about drugs or guns was proof of the same. (27T 118-24 to 119-20; 24T 107-16 to 23; 24T 106-21 to 107-1)

The rule from the case law could be no clearer: a "new trial will be granted

where jury misconduct or intrusion of irregular influences into the jury deliberation 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" State v. Grant, 254 N.J. Super. 571, 583 (App. Div. 1992), quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951) (emphasis added). "If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect." Panko, 7 N.J. at 61 (emphasis added). The test "is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so." Id. (emphasis added) Thus, "a new trial should be directed upon proof merely that evidence of this sort came irregularly before the jurors and was considered by them, without the court either speculating upon or inquiring into the actual effect of the matter upon their verdict." State v. Kociolek, 20 N.J. 92, 96 (1955). "Where the record does not show whether the irregularity was prejudicial, it will be presumed to be so." State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997); State v. Sachs, 69 N.J. Super. 566, 588 (App. Div. 1961) ("If the record fails to show whether or not the irregularity was prejudicial, it is presumed to be so anyhow and to be cause for reversal").

In this instance, the capacity for prejudice was extreme. As noted, the prosecutor had argued to the jury and to the court that defendant's actions in

organizing bail for Kasib Ford made him a "financier" in the GSC, and the prosecutor had also argued to the court specifically that the discussion regarding defendant providing "three bitches" to Ibn Spivey also made him a "financier." Moreover, whether "bitches" meant drugs or guns in this instance, obviously the call bore upon many of the charged crimes, particularly Counts Four and Twenty-Three. Playing a call to the jury that was not in evidence, but which went straight to some of the charged crimes clearly had the capacity to affect the verdict, deprived defendant of his ability to confront that evidence, and violated his right to an impartial jury. As a result, defendant's resulting convictions should have been reversed, and those counts remanded for retrial.

Instead, the Appellate Division wrongly acted as a 13th juror – deciding that because other calls that were in evidence also touched upon some of the same themes, there was no showing that the error actually affected the result. (Pa 31 to 32) But, as noted, the actual effect is not the relevant test; rather, it is the mere capacity for the improperly-admitted evidence to affect the result that dictates the need for a reversal. Simply put, could evidence about financier-style activities and arranging drug or gun sales affect a verdict on counts that address "organized crime" activities about those very subjects? Of course it could, especially with a jury that otherwise disbelieved so much of the State's case. It may well have been this improperly-played call that tipped the jury's verdict. The clear conflict of the

Appellate Division decision with that substantial body of case law regarding improperly admitted evidence is further reason to grant certification.

For all the foregoing reasons, certification should be granted to review the decision of the Appellate Division.

Respectfully submitted,

Joseph E. Krakora
Public Defender
Attorney for Defendant-Appellant

/s/Stephen W. Kirsch
STEPHEN W. KIRSCH
Designated Counsel
Attorney I.D. No. 034601986

Cc: Milton S. Leibowitz, A.P., Union Co.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4975-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KALIL COOPER, a/k/a
KALIL M. COOPER and
KHALIL COOPER,

Defendant-Appellant.

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Argued October 24, 2022 – Decided December 2, 2022

Before Judges Whipple, Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 16-04-0286.

Stephen W. Kirsch, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, on the brief).

Milton S. Leibowitz, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Milton S. Leibowitz, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Kalil Cooper appeals from his June 4, 2019 conviction and sentence for promoting organized street crime, N.J.S.A. 2C:33-30(a); conspiracy to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:5-2(a)(1); possession of cocaine, N.J.S.A. 2C:35-5(a)(1); and simple assault, N.J.S.A. 2C:12-1(a)(1).

Defendant lived in Camden County, but was alleged to have been a member of the Grape Street Crips (GSC) in Elizabeth, Union County. A wiretap investigation of defendant's phone began on October 23, 2015, and ended on November 24, 2015, the date of his arrest.

On April 22, 2016, a Union County grand jury charged defendant and twenty others in a twenty-eight-count organized crime indictment. A jury trial was held from January to March 2019.

At trial, the State presented testimonial evidence in the form of Union County Prosecutor's Office Detective Alex Lopez, who testified about the wiretap investigation, and Elizabeth Police Sergeant Gary Webb, who testified as an expert in the distribution of narcotics via street gangs.

Webb opined that GSC was one of the most active street gangs in New Jersey. In Elizabeth, the gang was referred to as the Eastwick Grapes. Webb further testified that defendant had previously disclosed he was a member of the GSC in both 2008 and 2015, and that this was confirmed by his tattoos, purple clothing (GSC's preferred color), and social media posts.

The State's case was primarily presented through roughly 300 wiretapped phone calls and text messages to show that defendant, speaking in a code, was the leader of the Elizabeth arm of the GSC.

The following was established: On October 23, 2015, defendant appeared to be in North Carolina. He discussed the transportation of guns and "dog food" (heroin), then sent a text asking what the text recipient would charge for "D-block" (also heroin). In another call that same day, defendant referred to "empties" (packaging material) and "Arm and Hammer" (baking soda used to dilute drugs). Defendant was also heard discussing bricks (bundles of heroin) and the need to break it up. At one point, an alleged GSC associate complained to defendant about the gang discipline being inflicted upon him.

The State also presented evidence that, on a call with an alleged GSC associate named Ibn Spivey, defendant said he had "some white bitch"

(cocaine), and that he was waiting for "like three and a half bands" ($3,500). Similarly, he told another alleged associate, Hasonna Porter, that "I'ma give 'em to you without no shirt," which Webb testified meant "not packaged for individual sale." Additionally, on a call with Shawntee Mitchell, defendant stated that his "homies jumped the 60s n****s," which Webb testified meant a rival Crips gang.

There were several phone calls wherein defendant discussed the arrest of Kasib Ford, a GSC member, for possession of a firearm, and that Ford's bail amount was $100,000. Defendant was recorded calling the Elizabeth Police Department and asking how much Ford's bail would cost, then asking that each of the "homies" contribute to the bail amount.

Elizabeth Police Officer Michael Nicolas was dispatched to Porter's home on October 27, 2015, in response to a conversation between defendant and Porter about a drug transaction. He observed defendant pull up to Porter's residence, after which he saw Porter walk over to defendant's vehicle. She then received an item from defendant, stuffed it in her bra, and returned to her residence and defendant drove away.

On another occasion, a member of another gang, the Latin Kings, called defendant to complain that someone had robbed one of that gang's female

members; defendant responded that robber was not a member of the GSC. Defendant also took part in calls wherein he claimed another GSC member, Naim (Na) Franklin, Jr., had lied to him and someone was going to "break Na's ass" over the lie.

Other calls established defendant and Mitchell discussed the purchase of more cocaine and that defendant was heard telling Franklin he wanted "a Roxy," which Webb testified referred to Roxicet prescription pills.

During another call, defendant asked Na's father to bring Na to him. Based on the call and ensuing texts, law enforcement officials observed defendant and the Franklins travel to an apartment complex in Newark that evening. Officer Nicolas conducted surveillance of the apartment complex and observed Na's father drive Na from the apartment complex to the hospital. Na's face was bleeding, and he was holding a rag to his face to stop the bleeding. Na suffered swelling of his face and scalp, bleeding from his ear, and a broken eye socket.

Franklin's father texted defendant, "y'all ain't have to do him like that," to which defendant replied, "Nah, bra, we ain't do him that bad." Defendant then texted photos of his own injuries, claiming they were more severe than Na's injuries. In a later conversation with Na, defendant told him "I had to do

something to you though . . . I was just beating ya body up though . . . I was really hitting you with the body shots."

In November 2015, defendant spoke to Mitchell, who was in North Carolina. Mitchell told defendant someone named "Little Cuz" had been robbed and that the robber was the same person who had stolen from Mitchell on a prior occasion. Mitchell told defendant the robber "got a tag now," meaning a bounty for his murder. Defendant then called an unknown male to ask what price he would charge to handle the "situation." Defendant then called Mitchell and told him the bounty was $10,000 or $12,000.

Later, defendant again called Mitchell and asked whether "it's a go" if he came down to North Carolina. Defendant spoke to another unknown male and told him he "could get down there tomorrow." The male told defendant to come to North Carolina and "[w]e got the cash, ain't no problem." Defendant then said, "I'll be down there tomorrow."

After this conversation, the police arrested defendant and conducted a search of defendant's residence. Among other items, they recovered a digital scale, a plastic bag containing quinine, an empty plastic bag that contained heroin residue, and numerous glassine bags labeled "it's hot" with a picture of a miniature devil on them. The police also found empty glassine bags labeled

"venom" with a picture of a scorpion, a plastic bag with rubber bands, twenty-one boxes of Scotch tape and a box for a digital scale. Another box contained empty glassine bags labeled "4 of a kind" with a picture of a skull with a top hat and four playing cards. The police also found two purple bandanas with gang references on them. Under defendant's bed, the police found a clear plastic bag containing 3.806 grams of cocaine, numerous glass vials, a plastic bag with cocaine residue, a razorblade, and a box of baking soda. Defendant's residence in Camden was within 500 feet of a public park.

That evening the police searched Porter's residence, where they found a scale, empty vials, and twenty glassine folds.

Shanita Baker, defendant's girlfriend, testified for the defense that the $300 found in the apartment she shared with defendant was hers, and defendant had received a personal injury settlement in May 2014 for $263,500.

At the conclusion of the trial, the jury found defendant guilty of second-degree promoting organized street crime, third-degree possession of cocaine, third-degree conspiracy to distribute cocaine and/or heroin, and simple assault. Defendant was acquitted of the other counts. He moved for a new trial, which was denied.

Defendant was sentenced as a persistent offender to an extended ten-year term with five years parole ineligibility on the promoting organized street crime conviction, a consecutive six-year extended term with three years parole ineligibility on the conspiracy to distribute conviction, a concurrent five-year term on the possession of cocaine conviction, and a concurrent six-month term on the simple assault conviction. Judgment of conviction was entered on May 31, 2019. This appeal followed.

Defendant raises the following arguments on appeal.

> POINT I.
> THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR WHEN SHE TOLD THE JURY -- IN RESPONSE TO AN ANNOUNCEMENT ON THE THIRD DAY OF DELIBERATION OF THE JURY'S INABILITY TO REACH A VERDICT ON SOME COUNTS -- THAT JURORS WOULD BE EXPECTED TO DELIBERATE THROUGH THE END OF THE FOLLOWING WEEK, IF NECESSARY. SUCH AN INSTRUCTION WAS UNDULY COERCIVE AND IN DIRECT VIOLATION OF THE SUPREME COURT'S DECISION IN STATE V. FIGUEROA.[1] (Not Raised Below).
>
> POINT II.
> NUMEROUS JURY INSTRUCTIONAL ERRORS TAINTED THE VERDICT ON COUNT FOUR IN THIS CASE (SUBPOINT A Partially Raised Below; SUBPOINTS B AND C Not Raised Below).

[1] 190 N.J. 219 (2007).

A. The Jury Instruction Improperly Compelled the Jury to Consider a Crime -- Conspiracy to Distribute a [CDS] – That Is Not One of the Predicate Offenses Listed Under N.J.S.A. 2C:33-30. (Partially Raised Below).

B. Even if Conspiracy to Distribute CDS Were a Proper Predicate Offense for N.J.S.A. 2C:33- 30, the Lack of Specificity in the Jury Verdict Regarding What Particular Drug was the Object of That Conspiracy Requires That the Degree of Defendant's Conviction for Count Four Be Reduced. (Not Raised Below).

C. The Jury Instruction Not Only Failed to Inform the Jury How the Burden of Proof Beyond a Reasonable Doubt Applied to the "Yes/No" Question That Was Posed Regarding the Predicate Crime for Count Four, But Actually Misinformed the Jury That Either Answer – "Yes" or "No" – Would Have to Be Found Beyond a Reasonable Doubt. (Not Raised Below).

POINT III.

THE JURY INSTRUCTIONS ON COUNTS FOUR AND TWENTY-THREE – THROUGH THE USE OF "AND/OR" LANGUAGE AND OTHERWISE – FAILED TO REQUIRE JURY UNANIMITY REGARDING WHAT CRIMINAL ACTS DEFENDANT COMMITTED TO A DEGREE THAT, TO QUOTE THIS COURT IN STATE V. GONZALEZ,[2] THE INSTRUCTIONS "GENERATED NUMEROUS WAYS IN WHICH

[2] 444 N.J. Super. 62 (App. Div. 2016).

THE JURY COULD HAVE CONVICTED WITHOUT A SHARED VISION OF WHAT DEFENDANT DID." (Partially Raised Below).

POINT IV.
THE COURT PLAYED A RECORDING OF A TELEPHONE CALL FOR THE JURY DURING DELIBERATIONS THAT WAS NOT EVER PLAYED AT TRIAL AND WAS NOT IN EVIDENCE IN THE CASE; BECAUSE THAT ERROR WAS CLEARLY CAPABLE OF CAUSING AN UNJUST RESULT AND NOT HARMLESS BEYOND A REASONABLE DOUBT, DEFENDANT'S CONVICTIONS SHOULD BE REVERSED. (Not Raised Below).

POINT V.
THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE AND PARTIALLY ILLEGAL.

Defendant raises the following arguments in his pro se supplemental brief:

POINT 1.
THE COURT IMPROPERLY AMENDED (Count [four]) OF THE INDICTMENT.

POINT 2.
ON ADDING DEFENDANT (Count [twenty-three]).

I.

On appeal, defendant argues the trial court erred by telling the jury they could continue to deliberate for the entirety of the following week, after the jury informed the court it was having difficulty reaching a verdict on some counts. This argument was not raised below. Therefore, this issue is raised as

plain error. In the context of a jury trial, plain error is error sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached. State v. Macon, 57 N.J. 325, 336 (1971).

The judge's precise actions were as follows. On the third day of deliberations, Thursday, March 7, 2019, the jury sent the judge a note stating that they had reached a verdict on some of the charges but were "unable to reach a verdict on others with no sign of resolution, how should we proceed?" The court gave the jury a Czachor[3] charge, and the jurors resumed deliberations.

A short while later, the jury inquired as to whether they would be deliberating the following day, March 8, as well as the following Monday, March 11. The judge told the jury: "I know I told you you sit every Friday and Monday once you start deliberating. I cannot have you sit tomorrow, Friday, March 8. I can have you sit on Monday, March 11." The court also told them that they could "stay until five today."

After receiving further queries from the jurors asking not to sit on March 11, the court stated that it would try to work out the issues it had with sitting on March 8. One juror stated that March 8 was not good because of a work

[3] State v. Czachor, 82 N.J. 392 (1980).

obligation. Defendant's attorney then suggested that the jury come back on Tuesday, March 12, and the prosecutor agreed. The court told counsel at side bar that it wanted to make sure none of the jurors had an issue deliberating the rest of that week. It then asked the jurors:

> Any issues next week, Tuesday, Wednesday, Thursday, Friday of next week? So that is March 12, 13, 14, 15. Does anyone have an issue being able to be here next week? . . . . Other than what we've already discussed. So it's Tuesday, March 12; Wednesday, March 13; Thursday, March 14; and Friday, March 15.

One juror expressed concern with March 15; the court told the juror to "[h]old off for now." The court then told the jury that deliberations would resume on Tuesday.

In Czachor, 82 N.J. at 405 n.4, the New Jersey Supreme Court directed trial judges to advise a jury reporting a deadlock that the verdict must represent the considered judgment of each juror and, during their deliberations, not to hesitate to reexamine their own views and change their opinion. Defendant does not challenge the propriety of the Czachor charge given in this case. Instead, relying on two cases, he claims the court's remarks about continuing deliberations the following week constituted plain error.

Defendant cites Figueroa, 190 N.J. at 221, 239-43, and State v. Adim, 410 N.J. Super. 410, 420 (App. Div. 2009), arguing the court's remarks were coercive. We find neither persuasive. Here, we are satisfied the trial judge properly exercised her discretion in instructing the jury. The court was merely trying to determine whether any of the jurors would be unable to deliberate for the remainder of the following week.

We discern nothing coercive in the court's remarks. Unlike in Figueroa, the court did not tell the jury that they should, or could, deliberate "as long as it takes" to reach a verdict. 190 N.J. at 227. In addition, unlike in Figueroa, defendant did not object to the court's remarks. Finally, there was no Czachor error as there had been in Figueroa, and the remarks in this appeal in no way resembled the Adim court's direction to "continue to deliberate with a view towards reaching a verdict," 410 N.J. Super. at 420. Defendant has not established plain error.

II.

Defendant next asks us to conclude the court erred in its charge under N.J.S.A. 2C:33-30, promoting organized street crime (count four), because the statute does not encompass conspiracy to distribute CDS or racketeering as a predicate crime. We disagree.

The indictment charged defendant with

> purposefully conspir[ing] with others as an organizer, supervisor, manager or financier to commit a continuing series of crimes which constitute a pattern of racketeering activity under the provisions of N.J.S.A. 2C:41-1, contrary to the provisions of N.J.S.A. 2C:33-30 . . . .

N.J.S.A. 2C:33-30(a) makes it a crime to promote organized street crime by "conspir[ing] with others as an organizer, supervisor, financier or manager to commit any crime specified in chapters [eleven] through [eighteen], [twenty], [thirty-three], [thirty-five], or [thirty-seven] of Title 2C," as well as prostitution and certain weapons offenses. The racketeering chapter, N.J.S.A. 2C:41-1 to -6.2, is not encompassed by this statute. "Promotion of organized street crime is a crime of one degree higher than the most serious underlying crime referred to in subsection (a)," except where the underlying offense is itself a first-degree crime. N.J.S.A. 2C:33-30(b).

Defendant objected to charging the jury on count four, arguing that even if they found him guilty of just one offense, they could find him guilty of promoting organized street crime under N.J.S.A. 2C:33-30 because it was at variance with the language of the indictment, which charged defendant with racketeering. A pattern of racketeering activity requires the defendant engage in at least two incidents of racketeering conduct. N.J.S.A. 2C:41-1(d)(1). The

State conceded that count four, as written, wrongly stated that N.J.S.A. 2C:33-30 covered a pattern of racketeering activity.

The trial court agreed it would be confusing and inconsistent with N.J.S.A. 2C:33-30 to require the jury find a pattern of racketeering activity. Instead, the court informed the jury that it had to find defendant guilty of one of three underlying offenses alleged by the State in order to find defendant guilty under N.J.S.A. 2C:33-30. The court found defendant was on notice that the State was alleging promotion of organized street crime under N.J.S.A. 2C:33-30, and thus presented an interrogatory on the verdict sheet requiring the jury to choose which of the three underlying offenses, if any, defendant had committed.

Consistent with the same argument, defendant filed a motion for a new trial on the grounds that the court improperly amended count four. The court rejected defendant's argument it erred in "permitting the jury to consider the commission of individual offenses to serve as the predicate offense when the grand jurors found that a pattern of racketeering was the predicate offense." It stated:

> N.J.S.A. 2C:33-30, the promoting statute under which the defendant was indicted, only required him to . . . have engaged in a single predicate crime. Therefore, the defendant was indicted on a higher standard,

> promoting all three racketeering crimes, than which the State would normally be required to prove at trial. Here, the jury was presented with ample evidence and did, in fact, conclude that the defendant promoted organized street crime as prohibited by N.J.S.A. 2C:33-30 by conspiring to distribute CDS.
>
> So it is, therefore, immaterial that the grand jury found probable cause to believe the defendant also committed the other two predicate crimes that are set forth in this indictment, conspiracy to commit murder and aggravated assault, because the State was only obligated to demonstrate that the grand jurors found probable cause through a single predicate offense. Also, the verdict sheet . . . specifically set out each of those three predicate offenses.

A trial court's ruling on a motion for a new trial will not be reversed on appeal unless a clear abuse of that discretion has been shown. State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016). Questions of law, however, are reviewed de novo. State v. Miles, 229 N.J. 83, 90 (2017) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The issue presented here is one of law.

Appropriate and proper jury instructions are essential to a fair trial. State v. Savage, 172 N.J. 374, 387 (2002). Under Rule 3:7-4:

> The court may amend the indictment or accusation to correct an error in form or the description of the crime intended to be charged or to charge a lesser included offense provided that the amendment does not charge another or different

> offense from that alleged and the defendant will not be prejudiced thereby in his or her defense on the merits. Such amendment may be made on such terms as to postponing the trial, to be had before the same or another jury, as the interest of justice requires.

Thus, a trial court has the authority to amend an indictment for the purpose of charging a lesser included offense or correcting an error in the description of the crime. State v. Saad, 461 N.J. Super. 517, 529-30 (App. Div. 2019). Lesser included offenses are offenses that: (1) can be "established by proof of the same or less than all the facts required" to prove the offense charged in the indictment; (2) "consist[] of an attempt or conspiracy to commit the offense charged" in the indictment; or (3) that only differ from the offense charged in the indictment by involving a less serious injury, risk of injury or culpability. N.J.S.A. 2C:1-8(d). However, an error in the indictment that goes to the essence of the offense, such as the degree of a crime, cannot be corrected by an amendment charging a more serious offense. State v. Dorn, 233 N.J. 81, 94-96 (2018). Whether an amendment to an indictment is appropriate "hinges upon whether the defendant was provided with adequate notice of the charges and whether an amendment would prejudice defendant in the formulation of a defense." Id. at 96.

As we stated earlier, defendant was charged in count four with conspiring with others "as an organizer, supervisor, manager or financier to commit a continuing series of crimes which constitute a pattern of racketeering activity under the provisions of N.J.S.A. 2C:41-1, contrary to the provisions of N.J.S.A. 2C:33-30." However, also as noted, chapter 41 is not encompassed by N.J.S.A. 2C:33-30. Therefore, count four was legally incorrect.

Nonetheless, defendant was aware that he was charged with various drug-related offenses, aggravated assault, and conspiracy to commit murder, all of which could constitute the predicate offense for promotion of organized street crime as set forth in the jury charge and the verdict sheet. Thus, he was provided with adequate notice prior to the court amending count four to specifically include a conspiracy to distribute CDS offense. In addition, defendant did not show how he was prejudiced by the amendment of count four, as he was aware of all the counts and was able to present a defense against them.

Defendant cites State v. Staten, 327 N.J. Super. 349 (App. Div. 2000), arguing inchoate crimes like attempt or conspiracy which are not included in a list of offenses in a statute cannot be encompassed by that statute. However, in Staten, the statute in question, N.J.S.A. 2C:43-7.2 (No Early Release Act),

"clearly and unambiguously" applied only to violent crimes in which the actor actually caused death or serious bodily injury or threatened the use of a deadly weapon. Id. at 354. Therefore, the statute did not apply to an attempt to do the same. Id. at 354-55. Here, N.J.S.A. 2C:33-30 specifically prohibits conspiracy to commit a wide range of chapters and a wide range of offenses, including conspiracy to distribute CDS.

Defendant further argues that because the jury was not asked to determine what CDS defendant was conspiring to distribute, he may have been subject to a third-degree sentence (marijuana) under N.J.S.A. 2C:33-30, not second-degree (heroin or cocaine). The court charged the jury to consider heroin and cocaine in counts four, eleven, twelve, thirteen, and twenty-three. Nowhere in the charge did the court mention marijuana.

Finally, defendant argues the court committed plain error by failing to instruct the jurors on count four of the verdict sheet that they had to find defendant not guilty if they had a reasonable doubt as to the predicate crime. Question ten of the verdict sheet asked the jury whether they found defendant guilty or not guilty of promoting organized street crime. If the jury answered guilty, which they did, they were to proceed to question 10B, which stated:

> INDICATE WHICH CRIME AND OR CRIMES THE DEFENDANT PROMOTED AS CONTAINED IN COUNT FOUR OF THE INDICTMENT?
>
> a. CONSPIRACY TO DISTRIBUTE A CONTROLLED DANGEROUS SUBSTANCE?
>
> Yes ___ No ___

The same format was used for conspiracy to commit murder and aggravated assault. The jury answered "yes" to subsection a, and "no" to the other two charges.

A verdict sheet is intended for recordation of the jury's verdict and is not designed to supplement oral jury instructions. State v. Gandhi, 201 N.J. 161, 196 (2010); see also State v. Reese, 267 N.J. Super. 278, 287 (App. Div. 1993) (judge intended to focus the jury's attention on the verdict sheet for the recordation of the verdict not for the elements of the offense).

In discussing the verdict sheet, the court instructed the jury:

> Question [ten]. How do you find with respect to the allegation contained within [c]ount [four] of the indictment that between October 23 and November 25, 2015, the defendant promoted organized street crime? Not guilty or guilty?
>
> . . . . If you answered not guilty to question [ten], you will move on to question [eleven]. So if you answer guilty to question number [ten], question 10B is your next question which says, "indicate which crime and/or crimes the defendant promoted as contained in

> [c]ount [four] of the indictment. A, conspiracy to distribute a controlled dangerous substance . . . .["]
>
> Even though it says yes or no, ladies and gentlemen, it's still your finding beyond a reasonable doubt, okay?

In its general charge, the court told the jury that in order to convict defendant on count four, the State must prove each of the three elements of the offense beyond a reasonable doubt. Specifically, the court instructed: "The second element the State must prove beyond a reasonable doubt is that the purpose of the conspiracy was to commit the crime of . . . conspiracy to distribute a controlled dangerous substance, which must be proven beyond a reasonable doubt . . . ." It concluded: "If the State has proven each of these elements beyond a reasonable doubt, then you must find the defendant guilty. If the State has failed to prove beyond a reasonable doubt any element of this offense, then you must find the defendant not guilty." Moreover, at the beginning of the charge, the judge told the jury: "The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to prove his innocence or offer any proof relating to his innocence."

In Gandhi, 201 N.J. at 195-96, the verdict sheet failed to list all of the elements of the stalking offense on which the defendant was charged, and any of the elements of the lesser-included offense of harassment. Despite this, the Court found no reversible error because the trial judge instructed the jury on all the elements of stalking and harassment. Id. at 196. It stated: "Where we conclude that the oral instructions of a court were sufficient to convey an understanding of the elements to the jury, and where we also find that the verdict sheet is not misleading, any error in the verdict sheet can be regarded as harmless." Id. at 197. The Court noted there was nothing to indicate that the jury did not understand its duty or the court's instructions. Id. at 197-98. Therefore, it was presumed the jury abided by those instructions. Id. at 197.

Here, the oral instructions given by the court were sufficient to convey the burden of proof on count four. Nothing indicates the jury did not understand these instructions or the verdict sheet. Moreover, the verdict sheet explicitly stated it was not a substitute for the instructions in the jury charge, as it did not contain all the elements that the State needed to prove beyond a reasonable doubt. Therefore, the use of "yes/no" by the court was not clearly capable of producing an unjust result and did not constitute plain error.

Defendant was on notice of the conspiracy to distribute CDS charge; and the court did not err by instructing the jury accordingly. Similarly, the court did not err in not specifying the CDS at issue, because the instruction and verdict sheet referred to heroin or cocaine, both of which are the basis for third-degree crimes under N.J.S.A. 2C:35-5(b)(3). Additionally, while it may have been inartful for the court to use "yes/no" answers on count four of the verdict sheet, the court sufficiently instructed the jury it had to find guilt beyond a reasonable doubt on that count.

III.

Defendant next argues the court committed plain error by failing to have the jury determine which CDS, heroin or cocaine, defendant was found guilty of conspiring to distribute under count twenty-three, third-degree conspiracy to distribute a CDS (cocaine and/or heroin), N.J.S.A. 2C:5-2 and N.J.S.A. 2C:35-5.

The error, according to defendant, lies in the court utilizing an "and/or" instruction in its charge. The question on the verdict sheet as to count twenty-three asked whether defendant was guilty or not guilty of engaging in a conspiracy to distribute a controlled dangerous substance or substances.

During trial, defendant did not object to the instruction or the question on the verdict sheet.

The plain error standard applies when a defendant fails to object to a particular jury charge. State v. Singleton, 211 N.J. 157, 182 (2012). In the context of a jury charge, plain error requires the defendant to demonstrate "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous" to convince the reviewing "court that of itself the error possessed a clear capacity to [produce] an unjust result." State v. Hock, 54 N.J. 526, 538 (1969).

Count twenty-three of the indictment charged defendant, and others "whose identities are known and unknown to the Grand Jurors," with conspiracy to commit third-degree distribution of CDSs, "namely Cocaine, Schedule II and/or Heroin, Schedule I."

The court read the language of the indictment for the jury including that the CDS in question were "cocaine and/or heroin." It added that the State must prove beyond a reasonable doubt that "defendant's purpose was to promote or facilitate the commission of the crime of distribution of a controlled dangerous substance . . . ." In addition, the court instructed: "cocaine and heroin are controlled dangerous substances prohibited by the statute." The prosecutor

told the court that the count covered both heroin and cocaine, although it was phrased "and/or."

The question on the verdict sheet as to count twenty-three asked whether defendant was guilty or not guilty of engaging in a conspiracy to distribute a controlled dangerous substance or substances. Defendant did not object to the instruction or the question on the verdict sheet.

Use of the phrase "and/or" has been criticized for its imprecision. Gonzalez, 444 N.J. Super. at 71-72. In Gonzalez, the trial court used "and/or" in charging the jury on robbery and aggravated assault on several occasions, including as to accomplice liability. Id. at 72-75. In reversing, we stated:

> The repeated use of the offending phrase rendered these instructions ambiguous. Even if we could somehow assume that, in navigating these instructions, the jury accurately guessed when "and/or" should have been "and" and when "and/or" should have been "or" or, even, when "and/or" meant both . . . we are further struck by the spectre of a verdict that may have lacked unanimity or may have lacked a finding on one or more elements of the offenses for which defendant was convicted.
>
> [Id. at 75.]

Using the problematic phrase, therefore,

> conveyed to the jury that it could find defendant guilty of either substantive offense—which is accurate—but left open the possibility that some jurors could have

> found defendant conspired in or was an accomplice in the robbery but not the assault, while other jurors could have found he conspired in or was an accomplice in the assault but not the robbery.
>
> [Id. at 76.]

Thus, the court concluded that "[t]he repeated use of 'and/or' wrung from the charge any clarity it might have otherwise possessed." Id. at 77.

Here, "and/or" was not used to differentiate between crimes but to differentiate between "instrumentalities" of the same offense. Heroin and cocaine are both CDSs. It is unlawful to knowingly or purposely possess a CDS or its analog. N.J.S.A. 2C:35-5(a)(1). "Heroin, or its analog, or coca leaves" are included as CDSs. N.J.S.A. 2C:35-5(b)(1). Such a substance, whether Schedule I or II, when a defendant possesses less than one ounce, is a third-degree crime. N.J.S.A. 2C:35-5(b)(5). Thus, conviction of one was no different than conviction of the other for purposes of the conspiracy statute. Evidence was introduced that defendant was involved in trafficking both heroin and cocaine. Moreover, the prosecutor stated "and/or" should have been read as "and" since count twenty-three covered both heroin and cocaine.

The court specifically instructed the jury the underlying crime in question was distribution of a CDS, and that cocaine and heroin are CDSs. In addition, the verdict sheet referred to a CDS. Despite the language of the

indictment read to the jury, the jury was not asked to determine whether the CDS in question was heroin or cocaine, only whether there was a CDS. There was no error, let alone plain error.

IV.

In his pro se brief, defendant asserts the court erred in denying his motion for a new trial because the court erred in amending count twenty-three to include Hasonna Porter as part of the conspiracy to distribute CDS. Defendant also objected to the reference during trial testimony that heroin had been found in Porter's apartment, because she was not named in count twenty-three. In response, the prosecutor told the court he included people in count twenty-three "who I felt there was enough evidence conspired with each other to distribute both cocaine and/or heroin".

Porter was included in a separate conspiracy to distribute cocaine count, count twenty-four. The prosecutor stated he "did that for purposes of efficiency. [B]oth counts include the conspiracy to commit distribution of CDS with each other and others. Count [twenty-four] would include [defendant, by implication]. Count [twenty-three] would include Hasonna Porter [by implication]."

As part of its ruling, the court explained "[t]his is a complex matter with [twenty-two] people named in the indictment and the State made efforts to craft the indictment to make it less confusing." It continued:

> [I]t is not an unfair interpretation of "other persons whose identities are known to the grand jury" to find that that language includes Porter . . . even though [she is] not specifically named in [c]ount [twenty-three]. This . . . determination does not charge [defendant] with a new or different crime. Defendant had ample notice that he was charged with a third-degree conspiracy to distribute CDS . . . . This court believes based on all the information before it that the defendant was on notice of this information and that he is not prejudiced in this matter . . . .

Defendant moved for a new trial on count twenty-three. The court again rejected defendant's argument that the count was improperly amended because Porter was not specifically named as a co-conspirator:

> Porter . . . [was] named in connection with conspiracies to distribute CDS within the same indictment. While not named specifically alongside the defendant in [c]ount [twenty-three], these were certainly individuals whom the jury knew to be engaged in the same type of conduct with the defendant's other co-conspirators; and, thus, were subsumed in the language indicating . . . others whose identities were known to the grand jurors.
>
> . . . .
>
> This court finds . . . it did not engage in the amendment of the indictment, as the defendant

> alleges, but, rather, reviewed the indictment and applied a plain (inaudible) approach to the language used in the count, while considering the facts known to both the grand jury and the defendant.

The court did not err. Contrary to defendant's assertion, the court did not amend count twenty-three. Count twenty-three included "other persons whose identities are known and unknown to the Grand Jurors." Thus, Porter was included by reference by the broad scope of this count, and the indictment. Defendant offers no precedent to support a contrary view.

V.

Defendant next asserts that plain error occurred when a telephone call not admitted into evidence was replayed for the jury during deliberations. The State concedes playing the non-admitted recording was improper but asserts that doing so was not clearly capable of producing an unjust result.

During deliberations, the jury requested the playback of numerous phone calls. The phone call in question, call 8,784, was between defendant and Ibn Spivey. The discussion involved Ford's $100,000 bail, which required two more cosigners. Also mentioned was the fact that defendant "might be able to get us three bitches," which Sergeant Webb had testified during trial referred to weapons. The court reporter noted in the transcript there was no record of

the call being played at trial. However, no objection to playing this call was made.

As we said, when the claimed error is raised for the first time on appeal, the party raising the issue must establish that the error was clearly capable of producing an unjust result. Macon, 57 N.J. at 336.

Trial courts have the obligation to protect jurors and their deliberations from outside influences that threaten to taint the verdict. State v. Morgan, 217 N.J. 1, 11 (2013). Any "improper intrusion into the deliberations of a jury that 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge' is a ground for a mistrial." State v. Hightower, 146 N.J. 239, 266-67 (1996) (quoting Panko v. Flinkote Co., 7 N.J. 55, 61 (1951)). Thus, a jury's verdict must be solely based on the legal evidence received in open court, and any extraneous considerations and influences are presumed to be prejudicial. Id. at 267. Any improper influence on the jury that may have "tipped the credibility scale" may constitute plain error. State v. Frisby, 174 N.J. 583, 596 (2002).

In State v. W.B., 205 N.J. 588, 622 (2011), the defendant argued it was error for his videotaped confession to be played back to the jury even though it had not been admitted into evidence. The Court noted the playback did not

constitute an abuse of discretion because the defendant said that it had been admitted into evidence in his summation, and it had already been played for the jury during the State's case, although not admitted into evidence. Id. at 623.

In State v. Onysko, 226 N.J. Super. 599, 601-02 (App. Div. 1988), a photograph of the defendant, on trial for burglary, that had been received in evidence and examined by at least one juror during deliberations, contained information on its reverse side indicating the defendant had an alias and listed his occupation as "burglar." The defendant, who did not testify, only discovered this information after trial, and moved for a new trial, which was denied. Id. at 602-03. We held that by having his probation officer testify, the jury could assume defendant had a criminal record, but the information on the back of the photo stating his occupation as burglar and that he had used an alias could have, by itself, led the jury to convict regardless of the evidence. Id. at 604-05. Therefore, the trial court erred in not granting defendant's motion for a new trial. Id. at 605.

Here, there was nothing particularly unique about the phone call to separate it from the numerous other calls introduced into evidence. Although there was a reference to weapons, defendant was not convicted of any weapons

offense. Defendant argues the potential for prejudice was extreme because the State maintained that defendant's action in organizing bail for Ford made him a "financier." However, the reference to the bail money was merely cumulative, since a separate call properly introduced into evidence contained a reference for the need for "signers" in order for Ford to make bail. The error in playing the call for the jury was not clearly capable of producing an unjust result.

VI.

Defendant next argues the court erred in imposing a six-year term on the conspiracy to distribute CDS count because the sentence was outside the range for a third-degree crime. He also asserts imposing consecutive sentences was improper and that no statement as to the fairness of the overall sentence was provided.

We remand for resentencing because the court erred in imposing more than one extended term. Otherwise, we affirm.

In its sentencing decision, the trial court initially granted the State's motion to impose an extended term. The sentencing judge found the following aggravating factors: The risk defendant would commit another offense, the extent of defendant's criminal record and the seriousness of the offenses, and the need to deter defendant and others. N.J.S.A. 2C:44-1(a)(3), (6), (9). The

court found no mitigating factors and that the aggravating factors substantially outweighed the non-existent mitigating factors, which warranted the imposition of a period of parole ineligibility. As for consecutive sentences, the court stated "the promoting statute requires that the underlying crime, the conspiracy to distribute CDS, must run consecutively."

In reviewing a sentence, we must evaluate 1) whether the findings of fact on the aggravating and mitigating factors were based on competent and credible evidence in the record; 2) whether the court applied the correct sentencing guidelines enunciated in the Code; and 3) whether the application of the facts to the law constituted such an error of judgment as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 363-65 (1984).

Upon application of the prosecutor, a court may impose an extended term on persons convicted of crimes of the first, second, or third-degree if the court finds the defendant is a persistent offender. N.J.S.A. 2C:44-3(a). The permissible sentencing range for an extended term "starts at the minimum of the ordinary-term range and ends at the maximum of the extended term range." State v. Pierce, 188 N.J. 155, 169 (2006). The choice of a sentence within that range is within the trial court's "sound judgment," and will be reviewed for abuse of discretion. Id. at 169-70.

Defendant does not claim error in the length of the sentence imposed on the promoting organized street crime conviction; rather he claims that the court erred in imposing more than one extended term.

The State concedes the court erred by imposing two extended terms, one for promoting organized street crime and the other for conspiracy to distribute CDS. N.J.S.A. 2C:44-5(a)(2) limits the number of extended terms a defendant may receive to one. State v. Robinson, 217 N.J. 594, 608 (2014). An extended term for a third-degree conviction is between five and ten years. N.J.S.A. 2C:43-7(a)(4). An ordinary term of imprisonment for a third-degree offense is between three and five years. N.J.S.A. 2C:43-6(a)(3). Thus, the six-year term on the third-degree conspiracy to distribute cocaine conviction should be vacated and the matter remanded for resentencing.

Defendant also asserts the court erred in determining it was obligated to impose consecutive sentences. He argues that because he was convicted for conspiracy under N.J.S.A. 2C:5-2, consecutive terms were not required under N.J.S.A. 2C:33-30(b). We disagree.

N.J.S.A. 2C:33-30(a) provides that "[a] person promotes organized street crime if he conspires . . . to commit any crime specified in chapter 35 . . . of Title 2C of the New Jersey Statutes . . . ." (emphasis added). In addition,

under N.J.S.A. 2C:33-30(b), "[a] sentence imposed upon conviction of the crime of promotion of organized street crime shall be ordered to be served consecutively to the sentence imposed upon conviction of any underling offense referred to in subsection [(a)] of this section." N.J.S.A. 2C:33-30(b).

Defendant was convicted of conspiracy to distribute CDS under N.J.S.A. 2C:35-5(a)(1). Since conspiracy convictions under chapter 35 are explicitly a predicate offense under N.J.S.A. 2C:33-30(a), the court was required to impose a consecutive term.

Finally, defendant claims the court gave no statement on the fairness of the overall sentence. An explicit statement explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding or in multiple sentencing proceeding is essential to a proper analysis when imposing consecutive sentences. State v. Yarbough, 100 N.J. 627, 643-44 (1985); State v. Torres, 246 N.J. 246, 268 (2021). When a court fails to give proper reasons for imposing consecutive sentences, ordinarily a remand is required for resentencing. State v. Cuff, 239 N.J. 321, 348 (2019).

However, such a requirement presupposes that the court had the discretion as to whether to impose such a sentence. Sentencing courts have discretion to impose consecutive sentences in appropriate cases. Torres, 246

N.J. at 269. As noted, in this instance, the court had no such discretion. Consecutive sentences were mandated by N.J.S.A. 2C:33-30(b). Therefore, the lack of fairness statement was not required, as the judge's discretion was not implicated.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

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SUPREME COURT OF NEW JERSEY

APP. DIV. # A-004975-18
SUPREME COURT #

CRIMINAL ACTION

STATE OF NEW JERSEY
V.
KALIL COOPER

**NOTICE OF PETITION FOR CERTIFICATION**

**Offense and sentence imposed by the trial court:**

PROMOTING ORGANIZED STREET CRIME /SIMPLE ASSAULT, POSSESSION OF CDS AND CONSPIRACY TO COMMIT CDS OFFENSE

THE DEFENDANT WAS SENTENCED TO 16 YEARS WITH AN 8 YEAR PAROLE BAR

**Appellate Division judgment date:** 12/02/2022

**Appellate Division disposition:**

AFFIRMED

**Relief sought from the Supreme Court:**

SEEKING REVIEW OF APPELLATE DIVISION OPINION WHICH AFFIRMED DEFENDANT-PETITIONER'S CONVICTION AND SENTENCE
** THIS NOTICE OF PETITION EXCLUDES THAT PART OF THE OPINION WHICH WAS REMANDED TO THE TRIAL COURT.

**Defendant in custody:** YES

**Place of confinement:** SOUTH WOODS STATE PRISON

Please take notice that, Defendant-Petitioner, KALIL COOPER, shall petition the Supreme Court of New Jersey for an Order certifying the judgment of the Superior Court of New Jersey, Appellate Division as described above.

Dated: 12/15/2022

S/ JODI LYNNE FERGUSON