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

Re: State v. Ebenezer Byrd,
Supreme Court Docket No. 089469
App. Div. Docket No. A-4941-18T5

Your Honors:

Please accept this letter in lieu of a more formal petition for certification on behalf of defendant-petitioner Ebenezer Byrd, who was convicted of felony murder and related offenses, and whose conviction and sentence were affirmed by the Appellate Division. (Pa 1 to 114)[1] Defendant urges that certification be granted for

[1] Pa – defendant's appendix to this petition
Da – defendant's appendix to his Appellate Division brief
Db – defendant's Appellate Division brief
DSb – defendant's supplemental Appellate Division brief raising Point VI after a

all the reasons set forth in his Appellate Division brief, which he adopts in full here regarding all points, plus the additional argument contained herein regarding Point I (addressing third-party guilt evidence) and Point VI (the juror-misconduct point raised in his supplemental brief after a limited remand).

The Appellate Division decision regarding Point I -- finding that while it was error for the trial court to exclude significant third-party-guilt evidence, that error was harmless beyond a reasonable doubt -- is so far off the mark from this Court's jurisprudence regarding proper harmless-error analysis that the severe conflict that the instant decision has with that body of law warrants a grant of certification. This Court has made it clear that when any pro-defense evidence is improperly excluded in a criminal trial -- let alone evidence, as here, that another person confessed four separate times to the commission of these crimes -- it is simply not the role of an appellate court to play "thirteenth juror" and weigh the value of the excluded evidence. With regard to Point VI, as will be demonstrated, the trial judge completely dropped the ball when it was called to his attention that a juror had told others mid-trial that she "already decided she's going to find them all guilty and going to burn their asses." The judge's subsequent voir dire of that juror simply did not address the allegation of misconduct, but only asked the blandest of questions, after which the judge refused to voir dire the other jurors at all -- a voir-dire

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limited remand.

procedure so completely lacking in substance that the Appellate Division's approval of it constitutes a clear conflict with established case law that should also be resolved via a grant of certification.

The homicide (and related crimes) at issue at trial were, admittedly, awful -- an innocent victim killed in a case of someone breaking into the wrong apartment[2] and killing the victim in a botched robbery. But the question for the jury was who committed those crimes. Undoubtedly, the State had some evidence[3] against defendant and his two, ultimately convicted, codefendants: Gregory Jean-Baptiste and Jerry Spraulding. But the "strongest" of that evidence came from two witnesses -- Narika Scott and Elizabeth Pinto -- whose testimony was either: (1) incredibly vague and fueled by a revenge motive from a prior failed romantic relationship with defendant (i.e., Ms. Scott, who claimed that defendant admitted to being involved in "something," but who also admitted her lingering fury that defendant was dating multiple women while involved with her), or (2) the product of extreme badgering by the investigating detectives who spent months cajoling the witness (Ms. Pinto) for an incriminating tale against defendant and the others, and rewarded her for her testimony with a functionally non-custodial deal when she was originally facing

[2] Allegedly the "right" apartment would have been one rented by a drug dealer named David James, who supposedly kept a lot of cash in his freezer.

[3] The trial was lengthy and defendant refers the Court to the Statement of Facts in his Appellate Division brief for a full recitation of the relevant testimony.

charges that could result in life in prison and deportation. Obviously the credibility of the testimony of both women could be easily called into question.

There was also no DNA or other forensic evidence tying defendant Byrd to the crime.

As addressed in Point I, below, what there also was -- but the jury never heard about it, because the judge improperly ruled it to be inadmissible -- were four separate statements in which another codefendant, James Fair, confessed to others that he committed the homicide and accompanying felonies, and, in three of those four statements, Fair specifically excluded defendant as one of his co-actors in those crimes, while in the other statement he did not say with whom he committed the crimes.[4]

Those four statements by Fair were all highly self-incriminatory. Fair told Clara Williams that he learned that drug dealer David James had money in his apartment and that he and Kevin Brown followed James home to learn where he lived, but Fair said that on the night of the crime he and Brown "got the wrong door" and killed the victim because "we wasn't leaving no witnesses." (Da 45 to 46) Fair also told Williams that he and Brown had used codefendant Jean-Baptiste's car

[4] Fair was indicted for the felony murder and accompanying felonies but was not tried with defendant, Spraulding, and Jean-Baptiste because he accepted a plea deal from the State for a guilty plea to conspiracy to commit burglary, in exchange for dismissal of all other charges, and he was not called as a State witness.

that night and, when Jean-Baptiste learned about what Fair and Brown had done, he was angry. (Da 46) Similarly, Fair told Jenay Henderson that "it was set up as a robbery but. . . it was the wrong apartment" and when "the lady seen us. . . we had to do what we had to do," but he did not specify who was with him. (Da 46) Kevin Clancy said Fair told him that his "child's mother" had driven to the scene and Fair, plus two men named "G" and "Heim" ("or something with an H"), committed the murder after they "kicked in the wrong door" and needed to eliminate the victim as a witness. They killed her "execution style," Fair said. (Da 47) Finally, Fair told Kyre Wallace that he committed the crime with Darius Long, Kevin Brown, and Bonnie Ivery (a man), and that they intended to burglarize David James' apartment to steal money from his freezer when he was not home, but they broke into the wrong apartment, encountered a lady, and "fucked her up" when she started screaming and fighting with them. Fair denied that he shot the victim in that statement, however. (Da 47 to 49)

The Appellate Division ruling regarding this evidence, which was barred from the jury by the trial judge, is not merely confounding and in utter conflict with decisions of this Court and of the Appellate Division; it is beyond belief. That ruling ultimately agrees with the lengthy admissibility argument contained in defendant's brief below (Db 37 to 46) regarding Fair's four statements, so that argument is not repeated here at length. In other words, the Appellate Division held that the judge

wrongly excluded the evidence regarding James Fair's four confessions to having committed this murder with others (Pa 35 to 40), but then that same Court held that the improper exclusion of that evidence was harmless. (Pa 41 to 42)

If that sounds like the Appellate Division held that the third-party-guilt evidence was so inherently reliable that it should have been admitted as a statement against interest, N.J.R.E. 803(c)(25), but then absurdly held just pages later that no reasonable juror could have believed that same inherently reliable evidence, that is exactly what the Appellate Division did. On one hand, the Appellate Division properly castigated the trial judge for excluding such obviously admissible evidence, holding that the four statements of James Fair were, as direct confessions of criminal liability for homicide and underlying felonies, "inherently trustworthy and reliable" (Pa 39), and were obviously admissible as statements against interest because of their "self-incriminating character alone." (Pa 38); State v. Williams, 169 N.J. 349, 359 (2001). Indeed, that court's opinion seems to even briefly admit that that ought to be the end of the analysis -- i.e., that quibbling over the "extrinsic circumstances bearing on the general reliability or trustworthiness" of James Fair's statements against interest, State v. White, 158 N.J. 230, 240 (1999), is not the business of an appellate court in such a circumstance; quoting Williams, 169 N.J. at 361, the opinion agrees (albeit temporarily) that such matters "pertain solely to the weight to be given the statement by the jury." (Pa 38) The opinion below even admits that not

only did the four statements of Fair bear directly on defendant's innocence, but they also served to impeach the testimony of a detective who had claimed that the State had "nothing" in its possession to indicate that Kevin Brown, who was not charged, was involved in the crimes, when, in fact, the State knew that two of Fair's four statements against interest directly implicated Brown. (Pa 39 to 40)

But then, citing the fact that there are some factual contradictions in Fair's statements when they are compared against one another, the Appellate Division did exactly what it had just said a page or two earlier that an appellate court should never do: held the "inherently reliable" statements of James Fair -- which confessed to these crimes and, in three out of four statements, specifically excluded defendant as a perpetrator -- to be so inherently unreliable that their exclusion from the case before the jury was harmless error when balanced against what it deemed to be a strong case by the State. (Pa 41 to 42)

That ruling is not just wrong; it flies directly in the face of what this Court and other panels of the Appellate Division have said about the role of an appellate court in analyzing harmless error. Reversal of resulting convictions is necessarily required where, as here, the error has the potential to affect the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs, 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), citing State v.

Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Hedgespeth and Scott are clear that it is not for a reviewing court to determine the weight or worth of a particular piece of evidence when evaluating harmless error. That "is in the sole province of the jury. 'Judges should not intrude as the thirteenth juror.'" Hedgespeth, 249 N.J. at 253, quoting Scott, 229 N.J. at 485. The jury could have more readily accepted the defense arguments regarding reasonable doubt had the judge admitted Fair's statements against interest. When the judge was so clearly wrong to exclude that evidence and that error cannot be deemed harmless beyond a reasonable doubt, Hedgespeth, 249 N.J. at 253; Scott, 229 N.J. at 485, defendant's resulting convictions should have been reversed, and the matter remanded for retrial.

When the Appellate Division's ruling so directly conflicts with precedent -- in a highly-disputed murder case, no less -- this Court should grant certification to resolve that conflict and review that decision. The need for certification is also only underscored further by the utterly self-contradictory nature of the ruling below, which holds the improperly excluded evidence to be too "inherently reliable" to exclude, but yet too unreliable to warrant reversal.

Point VI, from defendant's supplemental brief below (DSb 1 to 10), raises no less important of a conflict with precedent, but with respect to the need for proper

voir dire of a juror, and the entire jury if necessary, when juror misconduct is alleged. Mid-trial the judge told counsel that "information. . . has been brought to certainly the Court's and counsel's attention with regard to Juror #8." (15T 123-9 to 130-1) No one stated on the record at the time what the "information" was, but the judge then conducted a cursory voir dire of that juror, at sidebar, that consisted only of the following questions about her actions: (1) whether any of her answers to the original jury voir dire questions had changed (answer: "No"); (2) whether she had "been in contact" with "any posting or newspaper articles" about the case (answer: No"); (3) again whether any of her answers to voir dire questions had changed (answer: "No"); (4)whether she could still be fair and impartial (answer: "I can"). (15T 125-19 to 126-20) Defense counsel objected that the judge failed to: (1) conduct individualized voir dire with each of the jurors to "see if they have talked to her" about the allegations (15T 123-23 to 124-4); (2) "inquire about some of the specific allegations," (15T 124-10 to 12); (3) "inquire as to whether she discussed this case at work" (15T 127-20 to 22); and (4) excuse the juror for cause. (15T 128-8 to 14) Defense counsel renewed their objections at the end of the day, to no avail. (15T 199-21 to 200-7)

Because the appellate record was unclear as to what the allegation of misconduct was, undersigned appellate defense counsel moved for, and was granted, a limited remand from the Appellate Division for the trial judge to make factual

findings in that regard. At that remand hearing (transcript 29T), defendant's trial attorney recalled that the allegation was that the juror discussed the case with someone at work and not only said the jury was "going to teach those three [defendants] a lesson," but also used a racial slur (the "N" word) against the defendants. (29T 10-16 to 21) The prosecutor insisted that there was no allegation of a racial slur, but that the claim was that the juror "had spoken with someone else about the case outside of. . . the courtroom." (29T 12-23 to 13-3) The judge resolved that factual dispute by first finding that the allegation of misconduct had "absolutely nothing to do with race or any type of derogatory term at all" (29T 17-2 to 5), and, second, by reading into the record the exact allegation that he had received, recounted in text messages from the judge's assistant to the court clerk. (29T 21-17 to 22-21)

The text messages that the judge read into the record stated that "Stephanie" at the Monmouth County Public Defender had reported to the court that she received a call from a "Ms. Worthy" who told her that Juror #8, who works at Monmouth Medical Center, "has been Googling the case, showing articles to and talking about it with other people and has already decided she's going to find them all guilty and going to burn their asses." (29T 22-7 to 17) (emphasis added) The judge then reiterated that there was "absolutely nothing" to indicate a racial angle to the allegations. (29T 22-22 to 23-7) But he had little to say about the remaining serious

allegation: that the juror in question had pre-decided the case and was going to "burn" the defendants by finding them all guilty.

On appeal, the Appellate Division -- in direct conflict with precedent that demands a highly fact-specific voir dire of the juror in question, and, if necessary, of the entire jury -- found the cursory voir dire that was conducted to have been sufficient, despite the fact that not once did the judge inquire of the offending juror regarding the allegation at hand. (Pa 98 to 104) Defendant urges that that severe conflict with precedent warrants a grant of certification.

The legal argument regarding this point is presented in full in defendant's post-remand supplemental brief (DSb 1 to 10), but suffice it to say that the rule is clear: When there is "the possibility of actual juror taint or exposure to extraneous influences (including jury misconduct and 'comments made to jurors by outside sources'), the judge must voir dire that juror and, in appropriate circumstances, the remaining jurors." State v. Bisaccia, 319 N.J. Super. 1, 13 (App. Div. 1999) (emphasis added), quoting State v. Scherzer, 301 N.J. Super. 363, 486-491 (App. Div.), certif. denied, 151 N.J. 466 (1997); see also State v. Bey, 112 N.J. 45, 89-90 (1988) That voir dire procedure is well-settled:

> An appropriate voir dire of a juror allegedly in possession of extraneous information mid-trial should inquire into the specific nature of the extraneous information, and whether the juror intentionally or inadvertently has imparted any of that information to other jurors. Depending on the juror's answers to searching questions

> by the court, the court must then determine whether it is necessary to voir dire individually other jurors to ensure the impartiality of the jury. This determination should be explained on the record to facilitate appellate review under the abuse of discretion standard.

State v. R.D., 169 N.J. 551, 560-61 (2001) (emphasis added).

If the influence has the capacity to prejudice the defendant, "the judge must conduct voir dire, preferably individually in camera, to determine whether any jurors were exposed to the information." Scherzer, 301 N.J. Super. at 487. "[T]he judge must make a probing inquiry into the possible prejudice caused by any jury irregularity, relying on his or her own objective evaluation of the potential for prejudice rather than on the jurors' subjective evaluation of their own impartiality." Id. at 488 (emphasis added).

None of that law was followed here. The misconduct allegation was appalling: that the juror had already decided the three men were guilty and that jurors would "burn their asses." (29T 22-14 to 17) Further allegations were that she was talking to "other people" about the case and "Googling" information about it as well. (29T 22-14 to 17) Yet the judge only asked three vague, generalized questions (one of them twice) of that juror: (1) whether any of her answers to the original jury voir dire questions had changed (asked twice, both answers: "No"); (2) whether she had "been in contact" with "any posting or newspaper articles" about the case (answer: No"); and (3) whether she could still be fair and impartial (answer: "I can"). (15T

125-19 to 126-20) None of those questions confronted the juror with the allegations, and nothing about that voir dire, or the judge's refusal to individually voir dire the other jurors, came close to meeting the Bey/R.D./Bisaccia standard of "specific" inquiry. The decision of the Appellate Division conflicts with a significant body of case law that makes it clear that, in such circumstances, failing to address allegations of misconduct through a specific voir dire will necessarily be reversible error. Bisaccia, 319 N.J. Super. at 11-15, citing Bey, 112 N.J. at 89-90, and Scherzer, 301 N.J. Super. at 486-491; see also State v. Weiler, 211 N.J. Super. 602 (App. Div.), certif. denied, 107 N.J. 37 (1986) (reversing for weak voir dire); State v. Phillips, 322 N.J. Super. 429 (1999), certif. denied, 182 N.J. 428 (2005) (same).

Another significant body of case law requires that, because Juror #8 could have influenced the other jurors if she had told anyone anything further about her views, the judge was required to voir dire all of the jurors to determine if Juror #8 had spoken to any of them regarding her views. R.D., 169 N.J. at 558; State v. Wormley, 305 N.J. Super. 57, 70 (App. Div. 1997); see also State v. Tyler, 176 N.J. 171, 181-183 (2003) (reversing convictions for improperly allowing a tainted juror merely to hear the case with other jurors even though she did not ultimately deliberate on it; because her presence may have influenced other jurors, prejudice was presumed); 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."). Only individual voir dire of the panel was likely to uncover such influence. Bey, 112 N.J. at 86 n.26

Here the trial judge failed badly in his role as "gatekeeper" of the impartiality of the jury and the fairness of the trial. Tyler, 176 N.J. at 181. The voir dire of Juror #8 was far too vague and failed to specifically address the substantial allegations of her bias and misconduct. Moreover, no effort was made to determine if other jurors had been tainted by the views or conduct of Juror #8. In each instance, trial defense counsel objected strenuously to the court's inaction. Because the contrary Appellate Division ruling significantly conflicts with precedent from both this Court and the Appellate Division, certification should be granted to resolve this conflict as well.

For all of the foregoing reasons, defendant's petition for certification should be granted, and undersigned counsel hereby certifies that this petition presents substantial issues and is not filed for purpose of delay.

Respectfully submitted,

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