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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1266-17T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ERIC KELLEY and RALPH LEE,

Defendants-Respondents.

Argued February 12, 2018 – Decided March 12, 2018

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
93-10-1183.

Robert J. Wisse, Assistant Prosecutor, argued
the cause for appellant (Camelia M. Valdes,
Passaic County Prosecutor, attorney; Robert J.
Wisse, of counsel and on the briefs).

Vanessa C. Potkin argued the cause for
respondent Eric Kelley (The Innocence Project,
attorneys; Vanessa C. Potkin, on the briefs).

Paul Casteleiro, Legal Director, argued the
cause for respondent Ralph Lee (Centurion
Ministries, Inc., attorneys; Paul Casteleiro,
on the briefs).

PER CURIAM

This criminal matter arises out of the 1993 robbery and killing of a store clerk. After separate jury trials in 1996, defendants Eric Kelley and Ralph Lee were each found guilty of felony murder and other offenses arising out of the fatal attack.

One of the key items of evidence moved into evidence and discussed by the State's witnesses at both trials was a baseball cap found at the crime scene. One witness claimed to have seen defendant Lee wearing the cap at the store, although defendant Kelley told the police that he himself owned the cap and that he had been wearing it there. Using technology available at the time, DNA testing excluded Kelley as a contributor to the DNA found on the cap but found Lee could have been a contributor.

Defendants' convictions and sentences were upheld on direct appeal, and their attempts to gain collateral relief in post-conviction petitions through 2010 were unsuccessful.

In 2010, upon a motion by defendants, the trial court ordered DNA testing on the cap be performed again, using improved technology that had developed since 1996. The results of the retesting ruled out both defendants as contributors. The new testing instead matched the DNA on the cap to a third party from the same area, who had been previously convicted of a knife-point robbery and who had been released from prison only three months before the 1993 incident.

Based on the new DNA results, both defendants moved for a new trial. Following nine days of evidentiary hearings, the trial court granted defendants' motions. Both men were subsequently released from prison on bail.

On leave granted, the State appeals the new trial order. The State argues that the trial court abused its discretion in granting defendants' motions. Fundamentally, the State asserts there was ample other evidence at defendants' trials, including their confessions, to support their guilt, and that any error in admitting evidence of the cap at those trials was harmless.

For the reasons that follow, we affirm the order granting defendants' new trials. We agree with the court that the new DNA results provide substantial proof of third-party guilt, thereby justifying new trials at which such exculpatory proof can now be presented by defendants.

I.

Because the proofs presented at defendants' successive trials varied in some respects, we discuss them separately. Although our discussion is not comprehensive, we present the facts in considerable depth, in light of the State's "harmless error" claims.

A.

Facts Developed at Kelley's Trial

On the morning of July 28, 1993, twenty-two-year-old Tito Dante Marino ("Tito" or "the victim")¹ was working as a clerk at Victoria's Video, a video rental store on Union Avenue in Paterson. The store, which also sold VCRs, cameras, car radios, speakers, and video accessories, was owned by Miguel Victoria, Tito's uncle. Victoria was also working at the store that day. The store had a front area open to the public, plus several rooms in the back used for storage and other purposes.

Sometime around noon on July 28, Victoria left to run some errands, leaving Tito alone in the store. Shortly before 1:00 p.m., Victoria's sister, Guillermina Marin, who owned a travel agency next door, walked by the video store. She saw Tito standing on a yellow chair (also described in the record as a stool) working on the store's air conditioner.

At approximately 1:45 p.m., Marin, who was back at work next door, was summoned to the video store. She discovered Tito lying face-down surrounded by blood on the floor of a narrow storage area in one of the back rooms. Victoria and others rushed to the store. The store was in disarray, with videotapes scattered on

¹ We refer to the victim at times by his first name to distinguish him from his family members. We intend no disrespect in doing so.

the floor and the cash register open. Although the family called for help, Tito died before he could be taken to the hospital by emergency personnel.

Following an autopsy on July 29, the medical examiner, Dr. Rudolf Platt, determined that Tito had sustained six stab wounds: five to the upper body, including one that penetrated his heart, and others that perforated major organs. Dr. Platt also noted potentially-lethal blunt force trauma to the right side of Tito's forehead and the top of his head. The two blows to Tito's forehead and the three blows to the top of his head caused not simple cuts, but lacerations.

Dr. Platt also found abrasions on Tito's forehead, shoulders, and elbow. He suggested these could have been caused by the assailants pulling Tito from place to place. There were also superficial cuts and abrasions on Tito's hands and legs, which Dr. Platt thought were likely defensive wounds.

Dr. Platt concluded that Tito died from multiple stab wounds to his chest and abdomen, plus multiple blunt force trauma to the head. He was "partially" persuaded that Tito was stabbed before he was struck in the head. Dr. Platt thought so because there was much less bleeding from Tito's head, his hair was not matted with blood, and a stab wound to the heart would cause blood to immediately start draining from the body. Dr. Platt did not offer

an opinion as to why only a limited amount of blood was found behind the counter and down the hallway leading to the back rooms of the video store.

During its investigation, police determined that \$150 in cash, a VCR, three car radios, and five watches were missing from the store. An overturned yellow stool with blood on it was discovered in one of the back rooms. A green plaid hat and a bloody facial tissue also were recovered from the scene.

Detective Richard Reyes, an officer who then had eight months of experience in the Detective Bureau of the Paterson Police Department, served as the lead detective on the case. On July 29, Reyes spoke with Carmen Paredes, a customer who had stopped by the video store at approximately 1:20 p.m. on July 28. Paredes related that, upon entering, she nearly bumped into a black man and glanced up at his face. She recalled the man was between twenty-five and thirty years of age; taller than her height of five feet, five inches; and wearing a green sweater, jeans, and a green cap backwards on his head. Paredes confirmed that the green plaid cap found in the store was the one she had seen worn by the man. She looked through a large book of photos, but was unable at that time to identify the man she had seen.

The police also spoke with another customer, Majdi Mousa, who had stopped by the store to return a video at approximately 1:30

p.m. on July 28. Mousa recalled that, upon his arrival at the store, there was no one in the front room. Then, a person Mousa described as a roughly six-foot tall black male in his mid-twenties came out from the back area of the store. The man told Mousa to put his video on the counter and leave. Mousa observed that the man was not wearing a cap; had blood dripping from his ear; had blood and scratches on his right arm; and was mumbling and "acting nervous." Mousa saw no blood on the floor. Although Mousa viewed photos at the police station on July 28, he likewise was unable to identify the man he had seen in the store.

On July 30, Detective Reyes and several other detectives went to a nearby apartment building at the intersection of Union Avenue and Jasper Street, where they found defendant Ralph Lee, a young black man. Lee agreed to accompany the officers to the police station to answer some questions about an "incident" that had occurred.

While waiting outside of the apartment building, Reyes observed an approaching black man who he thought "fitted the description." The man hesitated and crossed the street upon noticing the police presence. Reyes and another officer stopped the man, told him they were investigating a crime, and asked him to come down to the police station. The man identified himself

as defendant Eric Kelley (also known to others as E.K.). He stated that he lived nearby, and agreed to go with the officers.

Kelley and Lee were transported to the police station in separate cars. Thereafter, they were each interviewed in separate rooms.

Reyes and another police detective, Michael Finer, first questioned Kelley. Kelley's prior record consisted of one juvenile conviction for assault, four non-violent municipal court convictions, and one out-of-state conviction for possession of cocaine with intent to distribute.

Kelley initially was untruthful to the officers about his whereabouts at the time of the murder. When the officers attempted to corroborate his story by calling his mother, he became depressed. Kelley then admitted that he was not telling the truth. Reyes thereupon placed Kelley under arrest.

After waiving his Miranda² rights, Kelley gave a statement that was neither recorded nor videotaped³ but was typed up by Reyes. In that written statement, Kelley initially stated that he was twenty-eight years old, had graduated from high school, and

² Miranda v. Arizona, 384 U.S. 436 (1966).

³ At the time of defendants' interrogations in 1993, our State did not yet have policies requiring such interrogations in homicide cases to be recorded.

was not under the influence of either drugs or alcohol. He related that at approximately 1:30 p.m. on July 28, he was with Lee and David Hancock (a white man) and they decided to rob Victoria's Video on Union Avenue. Kelley described in his written statement what thereafter occurred as follows:

I entered the video store and [Lee] came in behind me, while [Hancock] stayed outside as the look out. The guy [i.e., the victim] was behind the counter and I had the knife out already, so I went to him and stabbed him. [Lee] came behind me and when the guy grabbed me [Lee] started to beat him on the head. The guy wasn't fighting and when he went down we picked him up and put him in the back room. I had blood on my hands and I put the knife in my pocket. Me and [Lee] started to take the radios from the counter and we put it in a bag. We then left the store, to go sell the VCR and the car radio[s].

Kelley later clarified that Hancock did not help him and Lee deposit the body in the back room. He stated the three men stole "\$150" from the cash register, some tapes, several car radios, and a VCR. Kelley further stated the victim, whom he did not know, was Hispanic and "about twenty-two years old."

According to Kelley's statement, he and Hancock sold the watches and tapes to "Bob," the owner of nearby Bob's Supermarket. Bob bought everything except the VCR, which Kelley said had "blood all over it." Kelley cleaned the VCR, and the robbers sold it to the owner of a nearby bodega. Kelley stated that they used the

money they received in exchange for the stolen goods to buy four bags of drugs. The pair then met up with Lee "at his place" and "sniffed the dope."

According to Kelley, neither he nor the other two participants were injured in the robbery. Kelley told police he did not see any customers enter the video store during the incident. He claimed that he got the victim's blood on his hands and clothes. Kelley gave police permission to retrieve these clothes from a hamper at his home.

Of particular note for the present appeal, Kelley told police that he was wearing a green and purple plaid cap at the time of the robbery. Kelley further claimed the plaid cap police found at the store was his.

According to Detectives Reyes and Finer, Kelley also told them that he discarded the knife used to stab the victim, a folding knife with a black handle, in an alleyway. Police officers thereafter searched for both the stolen items and the knife, without success. The supermarket owner (Bob) and various bodega owners denied purchasing the stolen goods. Police did not recover Kelley's clothes, which Kelley's mother claimed to have washed.

The same day they arrested defendants, the police located and arrested Hancock and brought him down to the station. Detectives Finer and Hancock sat down at Finer's desk, which was about twelve

feet away from where Detective Reyes happened to be sitting with Kelley. After Kelley identified Hancock for Reyes, Reyes heard Hancock say something to Kelley. According to Reyes's testimony, Kelley waved his hand and responded, "Man, just give it up."

On July 31, Mousa returned to the police station and was shown two photo arrays, one which included Kelley and another which included Lee. Again, Mousa was unable to identify from the photos the man he had seen in the video store.

On August 4, Paredes was shown by Reyes two photo arrays, one which included Kelley and another which included Lee. This time, Paredes identified Lee as the man she had seen in the video store wearing the green cap.

Victoria told police that he knew Hancock, who would sometimes come in to rent videos. Victoria also told police he knew Lee, who lived with his father a block from the store. Victoria claimed he had seen both Hancock and Lee outside the video store on July 27.

DNA and Other Forensic Testing

Testing of the trace amounts of DNA on three cuttings from the inside lining of the cap revealed before Kelley's 1996 trial that: (1) Kelley was excluded as a contributor to the DNA on the cap; (2) Lee was excluded as a contributor to the DNA on the cap if the DNA was from only one person; and (3) Lee was not excluded

as a contributor to the DNA on the cap if the DNA was from two or more people.

The DNA analyst, FBI agent Harold A. Deadman, testified that, although possible, he would not expect "someone putting a hat on [and] taking it off, to transfer much of any DNA." Agent Deadman further stated that it was not possible to determine when DNA was transferred to, or how long it had been on, a particular object.

Other forensic testing done at the time revealed that there was blood from an unknown human source on the facial tissue recovered at the scene. There was blood, but no skin, on the fingernail clippings from the victim. Latent fingerprints found at the scene did not match either defendant.

Dennis Williams's Observations of Defendants Before and After the Robbery

On August 11, 1993, police spoke with Dennis Williams, another fact witness. Williams stated that, at approximately 1:15 p.m. on July 28, he and William Hanley picked up some free food at St. Mary's Church on Union Avenue, one block away from Victoria's Video. When they came out of the church, they spoke briefly with Kelley, Lee, and Lee's sister Lynn, who were also interested in getting some food. Williams then went off alone and tried unsuccessfully to sell some of the food at Bob's Supermarket.

When Williams rejoined Hanley at approximately 1:50 p.m., Hanley was trying to fix a broken-down van at a Union Avenue intersection four blocks from Victoria's Video. Williams noticed Kelley and Hancock were standing across the street. A few minutes later, Lee, who appeared to be coming from Lynn's house near the intersection, joined Williams and started teasing Hanley. Lee then walked back and forth several times between Lynn's house and the van.

According to Williams, at one point, Kelley and Hancock came over. While the men were "all goofing around the van," they noticed a number of police cars heading towards Victoria's Video with their sirens blaring. They asked some people what was going on, and were told "someone got shot"

Williams recalled that Kelley then said, initially to Hanley, and then to both Williams and Hanley, "Why you do that man for? . . . Why you do that? . . . Why we kill that man? Why we kill that man before for diesel (i.e., drugs)?" Later in his testimony, Williams alternately recalled Kelley's words as: "Why we do that man? Why you all do that? . . . Why you did that? Why did we do that? Why did we kill that man over a bag of dope? We shouldn't have shot the man over a bag of dope."

According to Williams, Kelley followed up these comments by stating, "So what, I married an ax murderer." Williams asked

Hanley what was wrong with Kelley. Hanley replied that Kelley "is bugging like that sometimes." Shortly thereafter, the group broke up, and Williams, Kelley and Hanley walked down to Victoria's Video and learned that someone had been stabbed. Williams did not see any blood or scratches on Kelley. Nor did Williams see Kelley holding any electrical equipment.

Defense Proofs at Kelley's Trial

Kelley declined to testify at his trial. He did present the testimony of Hanley, who related that between 12:30 and 1:00 p.m. on July 29, he and Williams had stopped at St. Mary's Church and got on line to pick up a free food package. According to Hanley, when they came out of the church at about 1:10 or 1:15, they ran into Kelley, Lee and Lynn, and Lee's father, who lived next door to the church. Hanley and Williams then tried unsuccessfully to sell the food at Bob's Supermarket.

According to Hanley, on their way home, at about 1:30 p.m., the group saw a man with a disabled van and Hanley offered his help. While Hanley was working on the van, he saw Kelley across the street talking to Williams and then Hancock. Lee showed up a few minutes later. Hancock and Lee then left the scene. At about 2:15 or 2:20 p.m., when Hanley was finished with the van, he saw the police cars heading towards the video store.

Williams, Kelley, and Hanley then walked down to see what was going on. While Kelley and Williams joined the crowd in front of the video store, Hanley spoke with a nearby shop owner, who told him that someone was shot or had his "neck cut." Hanley did not notice any blood on Kelley's clothes or body, or that Kelley had been injured.

The Summations⁴

In his summation, Kelley's trial counsel raised several factual questions bearing upon reasonable doubt. He argued that in light of Paredes's identification of Lee, the man seen by Mousa was not Kelley, but Lee. Counsel emphasized that Paredes had stated Lee was wearing the cap, and, moreover, Lee's DNA was potentially found on the cap. Counsel questioned why, as had been claimed by Williams and Hanley, Kelley would have returned to the video store where he allegedly had just "carved up" the victim. Counsel also wondered why no one saw blood on Kelley, despite the gory scene at the store.

Apart from these factual points, Kelley's attorney argued that Detective Reyes, with his limited experience, should not have been heading this allegedly "botched" investigation. He suggested

⁴ We describe the summations in detail because what counsel stressed to the jurors bears to some extent upon the State's harmless error claim.

that, if the police had done further testing, some of the blood at the scene might have belonged to the man seen by Mousa. Counsel noted the blood on the stool had not been tested to see to whom it belonged.

Kelley's counsel challenged the State's contention that Kelley had immediately confessed to police after they threatened to call his mother. He claimed that Reyes "fed" information in the typed confession to Kelley. In this regard, counsel argued it was unlikely that Kelley knew the victim was exactly twenty-two years old, and that exactly \$150 had been taken from the store's cash register. Counsel further asserted that police were aware of all of the information in the confession before they questioned Kelley.

In his own summation, the prosecutor argued that the State had amply proved Kelley's guilt by direct and circumstantial evidence. The prosecutor insisted that two killers and one lookout were needed to accomplish these crimes. He emphasized that Paredes saw Lee shortly thereafter at 1:20 p.m. or 1:25 p.m., and that Mousa saw a person who was presumably Lee at 1:30 p.m. with the victim's blood on his head. The prosecutor maintained that it was feasible for the men to have committed the murder, sold the items, purchased drugs, gotten high, and been back out on the streets, all in about twenty-five minutes.

The prosecutor theorized that Kelley's conscience had prompted his confession, which was replete with details. The prosecutor argued it was inconceivable that the police had framed Kelley. He emphasized that the officers would have had to have been morally depraved to do so, and that there would have been no need for them to have followed up on the information in Kelley's statement. The prosecutor pointed out that police had not then known that Lee and Kelley were seen near St. Mary's Church at 1:15 p.m., or that the three also had been seen in the area shortly before 2:00 p.m., as later confirmed by Williams and Hanley. The prosecutor further noted that Parades ultimately had independently and crucially identified Lee. He asserted the police "made efforts" with the cap, but could not really "draw any conclusions" from the DNA results. He also emphasized Kelley's self-incriminating statements made after the robbery, as reported by Williams.

B.

Facts Developed at Lee's Trial

At Lee's trial several months later, the prosecutor called twelve of the same witnesses who had testified for the State at Kelley's trial. Their testimony was largely the same as to the circumstances of the homicide; the victim's cause of death; the police response; the various witness identifications; the DNA

evidence; the blood found on the victim's fingernail clippings; the failure to identify latent fingerprints found at the scene; defendants' conduct after the homicide; defendants' eventual arrest; Kelley's statement to Hancock at the police station; and Kelley's confession, which was also admitted into evidence at Lee's trial.

An additional witness for the State, Detective Louis Stell, testified at Lee's trial that he spoke with two other officers on July 30. Stell testified that, as a result of that conversation, he joined other officers at a certain apartment building at the intersection of Union Avenue and Jasper Street.

On July 29, 1993, the police received a phone call from a Paterson resident, Alice Nieves. Nieves reported that she was at a laundromat on Union Avenue when she had overheard three young black women talking about the homicide. According to Nieves, the women said that the victim had been killed by two black men and a white man. Nieves did not know these women, but believed that they lived in a certain nearby apartment building at the corner of Union Avenue and Jasper Street. Police tried without success to locate the women.

On July 30, the police received a tip from a confidential source, who had stated that two black men and a white man had been in front of Victoria's Video on July 28 around the time of the

homicide, and that two of the men, one known as "K.C.," and the other who was the son of Mr. Lee, could be found on the second floor of the apartment building at the corner of Union Avenue and Jasper Street.

According to Detective Stell, he went up to the second floor of the building and came upon Lee, who agreed to come down to the station. As Stell recalled it, Lee initially denied any knowledge of the murder. Stell was about to let him leave when Detective Reyes called him out and informed him that Kelley had confessed and implicated Lee.

The officers then arrested Lee and read him his Miranda rights. According to Stell, the officers thereafter started giving Lee "little bits of information" obtained from Kelley, admittedly to convince Lee that the authorities did, in fact, know of his involvement in the homicide. After some further discussion with the officers, Lee provided a confession similar to Kelley's, which was neither recorded nor videotaped but typed.

Lee's Confession

In his own confession, Lee stated that he was thirty years old, completed two years of college, and was not under the influence of either drugs or alcohol. Lee had no prior criminal record.

Lee told the officers that, on July 28, both he and Hancock agreed to participate in Kelley's plan to rob the video store. In his written statement, Lee described what occurred at the store as follows:

Me and [Kelley] went into the store, and [Hancock] stood outside as the look-out. I then stayed by the door and [Kelley] walked up to the counter. [Kelley] had a few words with the guy [i.e., the victim] behind the counter, then [Kelley] stabbed the guy over the counter. Then he walked over to the other side of the counter and kept stabbing the guy, that's when I ran to help [Kelley]. The guy was still moving and I hit him on the head with a car radio that was on top of the counter. I hit him on the head about three times because he was still trying to get up. He then tried to get up again, and fell hitting his head on a chair. I moved the chair to the back of the store because it had blood on it. Then me and [Kelley] picked up the body and carried it to the back room [leaving it face-down].

Lee later clarified that Kelley had initially stabbed the victim two times "from over the counter." He confirmed that the "chair" the victim hit his head upon was more precisely the bloody yellow stool found at the store.

According to Lee, after depositing the victim's body, Hancock came in and helped Kelley take some radios and a VCR. Meanwhile, Lee grabbed a "rag" that was in the store and attempted to wipe blood off the floor behind the counter. Kelley and Hancock then

departed, leaving Lee alone in the store, allegedly searching for anything else to take.

Lee claimed that, while he was in the store alone, a woman, whom he described as "a dark skin Spanish lady about forty years old medium buil[d] about 5'4"" came in asking for the owner. Lee said he told her that "no one was here right now." Thereafter, a man, whom Lee described as "Spanish about 18 or 20 years old slim build about 5'7"," also walked into the store with a videotape to return. Lee told the man to leave the videotape on the counter.

Lee then left the store. While heading to Lynn's nearby apartment, he caught up with Kelley and Hancock, who said that they were going to go sell the stolen items. About an hour later, Lee again met up with Kelley and Hancock, who had four bags of heroin. The three men went to Hancock's house to get high. According to Lee, Kelley and Hancock had not been able to sell all the stolen goods. They left some of the items "in the alle[y]way of the liquor store across the street from [Lee's] sister[']s house."

Lee told police that on the day of the robbery Kelley was wearing a white short-sleeved shirt, while he was wearing brown pants and a beige, green, and blue-striped shirt. Lee did not recall getting any blood on his clothes and said that his clothes were at his father's house.

Additional Testimony

Detective Reyes testified that, after Kelley had identified Hancock in the police station, Hancock said to Kelley, "I told you not to say anything." This is when Kelley allegedly responded by waving his hand and saying, "man, just give it up."

Reyes further stated that the officers who went looking for Kelley's clothes never found them, even without blood, and that Kelley's mother said she had washed the clothes in the hamper.

Reyes stated that he interviewed another man, James Thompson, the day after the homicide. Thompson had been in Victoria's Video on July 28. He told police he saw a black man behind the counter, whom he had never seen before. Thompson looked at police photos, but was unable to make an identification. Reyes did not take a statement from him.

Two days later, on July 31, Thompson returned to the station at Reyes's request and looked at the two photo arrays containing the defendants' photos. Thompson was again unable to identify the person he had seen.

Paredes once again testified for the State at Lee's trial. Notably, during her cross-examination, Paredes claimed that when she returned to the police station a second time on August 4 to look at photos, Detective Reyes told her that a suspect from the robbery had been arrested.

DNA Proof at Lee's Trial

The DNA analyst, Deadman, testified at Lee's trial and related the DNA results. Again, Deadman explained there were many variables as to why one person's DNA and not another's might show up on a cap, such as: (1) the length of time the cap was on the person's head; (2) the activity the person was involved in; (3) whether the person was perspiring; and (4) how frequently the person washed their hair.

Joselito Versoza, a forensic scientist, also testified for the State. She discovered blood, but no skin, on the victim's fingernail clippings. Versoza theorized that the absence of skin on the clippings could indicate the lack of a struggle.

As he had at Kelley's trial, the medical examiner, Dr. Platt, opined that he was reasonably certain that the victim had been stabbed first and then struck in the head. Dr. Platt explained that, although the lacerations were very significant, the victim's hair was not matted with blood. Dr. Platt believed the victim had already bled considerably from the stab wounds such that blood was no longer being pumped effectively to his head.

Lee's Testimony

Lee took the stand in his defense, and denied he had killed the victim. Lee claimed that he confessed to police because he had been threatened by someone the morning after the murder, and

that he was afraid of this person and fearful for his life and the lives of his family members. Lee claimed that he had been handcuffed before he was taken to the police station and that the police beat him up at the station.

According to Lee, the police told him the details of the crime, and he merely agreed with what they said. However, at the end of his cross-examination, Lee acknowledged that he volunteered to police that he saw Kelley stab the victim twice over the counter. On redirect, though, he insisted that nothing in his confession about the crime was true.

Lee testified that he was regularly in the area of Victoria's Video, because he lived there. He stated that, shortly after 1:00 p.m. on July 28, he tried to get free food at St. Mary's Church and then went to Lynn's house to watch a soap opera and have lunch. At approximately 1:50 p.m., he left Lynn's house and spoke with Hanley, who was attempting to repair a van.

Lee acknowledged that, in the summer of 1993, both he and Kelley abused heroin. He stated that Kelley had a plate in his head, was "kind of off" and that "[h]is head [wa]s not straight." Lee noted that Kelley had been in an accident and afterwards Kelley was so changed that "anybody can influence him to say anything."

Other Defense Witnesses and Proofs at Lee's Trial

Several other witnesses testified on Lee's behalf. Reverend Henry Speidell, Lee's sister Lynn, Hanley, and Ralph Lee, Sr., all testified about Lee's activities on July 28 regarding the food distributed at St. Mary's Church and the broken-down van. In particular, Lynn claimed that Lee had been with her at her house from 9:00 or 10:00 a.m. until 1:55 p.m. on July 28. Lynn admitted, though, that she did not inform the police of this at the time of the murder.

Hanley maintained that neither Lee nor Kelley was acting strangely while Hanley was working on the van, and that Lee did not have any blood on him and was not carrying any watches. Hanley recalled that Kelley was wearing a baseball cap. He also remarked that Kelley "always acted strange"

Summations at Lee's Trial

In his closing argument, Lee's trial counsel attempted to undermine the State's proofs in many respects. He stressed that the descriptions given by Paredes and Mousa of the man they allegedly saw were inconsistent. He also noted that, contrary to Lee's confession, Paredes never mentioned speaking to a black man in the store. Counsel suggested that Paredes's identification could have been the result of her seeing Lee on another occasion.

Lee's counsel argued that Lee's confession had been constructed by the police and that it was a "patchwork" of information with inexplicable omissions and errors. He noted that Detective Stell had admitted that he "fed" information to Lee. Moreover, the police allegedly had instilled fear in Lee.

Lee's counsel questioned how the murder and its sequelae could have happened in only twenty minutes. He noted how Kelley had not been seen with a bloody shirt during the twelve-block walk to his home. Counsel urged that the DNA evidence linking Lee to the cap did not necessarily mean that Lee had been involved. Finally, counsel stressed that Lee had no prior criminal record or history of violence.

During his own closing argument, the prosecutor⁵ insisted that the police had competently investigated the case, and that Lee's guilt had been clearly proven. The prosecutor emphasized that Williams and Hanley were able to place Lee near the video store only minutes before the murder, and again in the area about twenty minutes after the murder. He emphasized that Paredes had identified Lee. He argued that there could have been a second "Spanish" woman who came into the video store, with whom Lee allegedly spoke.

⁵ The same prosecutor had appeared earlier for the State at Kelley's trial.

The prosecutor argued that Lee had confessed truthfully because of his guilty conscience. He submitted that the confessions of Lee and Kelley were not inconsistent on the main points. As he had at the Kelley trial, the prosecutor maintained the police would have had to have had "moral depravity" to frame Lee. He also questioned why the police would have continued with the investigation if they were "framing" Lee.

II.

In February 1996, the jury at Kelley's trial found him guilty of felony murder, conspiracy, robbery, and two weapons offenses. The trial court sentenced Kelley to life in prison, with a thirty-year parole disqualifier. This court affirmed his conviction in an unpublished opinion. State v. Kelley, No. A-6192-95 (App. Div. June 5, 1998). The Supreme Court denied certification. 157 N.J. 545 (1998). Subsequent collateral applications by Kelley in both the state and federal courts were unsuccessful.

In April 1996, a separate jury convicted defendant Lee of murder, felony murder, robbery, conspiracy, and two weapons offenses. The trial court⁶ sentenced Lee to life in prison, with a thirty-year parole disqualifier, on the murder charge, plus a

⁶ The same judge presided over both trials and sentenced both defendants.

consecutive sentence of twenty years with a ten-year parole disqualifier on the robbery charge. This court affirmed Lee's conviction in an unpublished opinion. State v. Lee, No. A-5752-96 (App. Div. June 22, 1999). The Supreme Court denied certification. 162 N.J. 487 (1999). Collateral applications by Lee in both the state and federal courts were likewise unsuccessful.⁷

III.

After a motion by defendants pursuant to N.J.S.A. 2A:84A-32a, the trial court ordered that certain evidence from the 1996 trials be retested for the presence of DNA, using updated technologies. After receiving the results of this retesting, which implicated a third party, both defendants moved for new trials based on newly-discovered evidence.

The trial court presided over a nine-day evidentiary hearing that intermittently spanned from September 2016 to January 2017. During that lengthy hearing, defendants presented extensive testimony from several experts and two fact witnesses. The State called Detective Reyes. The State did not contest the credentials

⁷ A third defendant, Hancock, was also indicted for participating in these offenses. However, apparently the State ultimately dismissed those charges against Hancock and he was released.

of defendant's expert witnesses, although it did unsuccessfully object to the court's consideration of some of the defense's proffered testimony.

The Retested DNA and Other Forensic Evidence

For the purposes of our present analysis, the most significant witness who testified at the new trial hearing was Charles Alan Keel, an expert in forensic DNA testing and analysis. Keel has worked for over thirty years for various law enforcement agencies and in private laboratories in various states. He has performed DNA and other forensic analysis in over 2,000 cases, and has testified as an expert witness more than seventy times.

Keel testified that, as of 1994 when this murder was investigated, DNA testing from a sample could either eliminate a contributor or include him or her as part of a possible group of contributors. Currently, according to Keel, DNA testing can discriminate individual sources of biological evidence. Unknown DNA profiles can be identified by searching the Combined DNA Index System ("CODIS"), a database of over fifteen million DNA profiles of known criminals and others, for a match.

Keel explained that current technology allows for the recovery of DNA from samples that were merely touched by a person for a brief period of time. In some cases, ten to fifteen seconds is all that was needed. He confirmed that a sample of skin cell

DNA can be obtained from dried sweat, where skin cells have accumulated. Keel expected to find biological material from the person who wore the cap, recovered from the video store, during the commission of the crime.

Keel tested seven areas known to be repositories of biology that would be left by the habitual wearer of the cap. This "owner biology" would be DNA imparted by someone who repeatedly wore a particular article of clothing, such as the cap in this case, which was not frequently laundered. Such owner biology would be generally distributed in places where an item was normally handled, or where there was rubbing of skin.

According to Keel, in each of the seven spots on the cap tested in this case, at least 99.9% of the DNA found belonged to one individual. There were two to four other minor contributors on five of the spots, while two spots essentially produced a single-source result.

Notably, the retesting revealed no DNA from either defendant Kelley or Lee found on the cap. Keel searched the CODIS database, and determined that the habitual wearer of the cap was a known criminal named Eric Dixon.

Keel also evaluated the facial tissue from the crime scene that appeared to have blood on it. Testing revealed that the non-stained portion of the tissue solely contained the DNA of a woman

who was related to the victim. Keel found no DNA from either defendant on the non-stained portion of the tissue. The blood on the tissue was determined to be from the victim.

Keel also retested the fingernail clippings from the victim, and he confirmed that no DNA foreign to the victim was found on the fingernail specimens.

Attempts to Interview Dixon

Joseph H. Aronstamn, a private investigator called to testify by the defense, was hired in 2015 through the Innocence Project organization to contact Dixon. Aronstamn traveled to Dixon's home in Virginia, where he spoke to him in December 2015. Dixon confirmed to Aronstamn that he had been living in Paterson in July of 1993, but denied that he knew of Victoria's Video or had heard of the murder. Aronstamn showed him a photo of the cap. Dixon insisted that he did not recognize it, that it was not his, and that he did not know to whom it belonged. Aronstamn did not tell Dixon that his DNA was found on the cap.

Aronstamn visited Dixon again two weeks later and asked if he would sign a statement. After leaving the room for ten minutes, Dixon returned and said that his attorney told him not to sign anything.

Blood-Stain Analysis by Palmbach

Another defense expert, Timothy Palmbach, a forensic scientist specializing in crime scene reconstruction and blood-stain analysis, testified at the hearing. Palmbach is a professor and the chair of a college forensic science department. He worked for the Connecticut State Police for twenty-two years and ultimately served as Director of that state's forensic laboratory.

Palmbach was asked to determine whether the evidence in this matter was consistent with the victim being struck and stabbed in the front room of the video store and then carried into the back room. Palmbach concluded that it was not. Palmbach was able to develop a contrary theory that was consistent with the evidence. According to Palmbach, his theory conformed with present-day understanding of blood-stain analysis.

Specifically, Palmbach opined that the victim in this case had been struck in the head behind the counter, ran down the hallway dripping blood from his head, and then was stabbed in the back room where he put up a fight and sustained defensive wounds. Notably, Palmbach believed that the victim was struck with a partially or totally cylindrical object, having a diameter of one and one-half inches.

In support of his theory, Palmbach noted that there was only a minimal amount of blood by the counter and only small scattered

droplets of blood in the hallway between the front and back of the store. Because of the distance between the droplets, he believed that they fell from the victim's head as he was moving quickly down the hallway. The evidence showing two lines of blood running down the victim's face also indicated to Palmbach that his head remained upright for a period of time.

Palmbach's opinion that a confrontation and the ultimate stabbing occurred in the back room was supported by several factors. These included the lack of additional blood drip in the front room and hallway; the extensive amount of blood in the middle of the back room; and the bloodstains on the yellow stool indicating that it "changed its orientation during the bloodshedding event." More blood had accumulated in the back room because the victim had now been stabbed, was no longer running, and remained in the back room longer. It appeared to Palmbach that blood fell onto the stool first when it was upright, and then again after the stool had been knocked over. That is because there were stains that were not consistent with the stool in its final position.

Palmbach testified that the height of the bloodstains on the wall in the small area where the victim's body was found supported his conclusion that the victim had staggered into this area and then collapsed face-down onto the floor. Palmbach noted that the

area was so small that it was difficult to see how two people could have carried him in.

Palmbach acknowledged that Dr. Platt, the medical examiner, had testified to the contrary that the victim had been stabbed before he was struck. According to Palmbach, the bloodstains supported a different conclusion. Palmbach noted the victim's hair was not matted because there was no impact spatter from the weapon striking a large blood source and projecting the blood outward. According to Palmbach, repeated blows also would not create impact spatter if there was not a lot of bleeding; rather, the repeated blows would create a vertical drip.

Police Interrogation and Investigation Experts

Defendants also presented at the hearing several expert witnesses on issues of police interrogation and investigation.

Dr. O'Connell

The first such expert, Dr. Michael O'Connell, was a forensic psychologist, who has testified as an expert in cases involving false confessions. Dr. O'Connell was asked by defense counsel in this case to determine whether Kelley's personality traits and level of cognitive functioning made it possible for Kelley to have given a false confession in 1993.

Dr. O'Connell found several aspects of Kelley's background to be noteworthy. He first noted Kelley had been diagnosed in

1988 with a traumatic brain injury after being in a serious car accident and thrown from the vehicle. In 1991, Kelley was deemed eligible for Supplemental Security Income ("SSI") after he was diagnosed with organic brain syndrome, i.e., an organic injury that caused a decreased ability to function both cognitively and emotionally, such that he was deemed disabled and unable to work. Further, Kelley's mother was designated as Kelley's representative payee for SSI benefits, because he was found to be incapable of handling his own money.

Dr. O'Connell administered several tests to Kelley, which revealed that Kelley was in the fourth percentile (i.e., the borderline range of cognitive functioning) with ninety-six percent of the population functioning at a higher level. Dr. O'Connell stated that persons who fell below the second percentile are considered intellectually disabled.

In addition, Dr. O'Connell opined that Kelley had difficulties with reasoning, social judgment, working and verbal memory, information processing, and reading recognition. Kelley's test results were consistent with someone who had had a significant brain injury and was suffering from organic brain syndrome. The expert believed that Kelley had lost twenty IQ points due to his car accident.

Dr. O'Connell had Kelley complete a "suggestibility test" that was specific for interrogation. The expert explained that suggestibility is a risk factor for giving a false confession. Other risk factors include the extent to which the person being interrogated feels: (1) pressured; (2) helpless; (3) that he or she has no control; and (4) that the experience is so unpleasant that the benefit of stopping the interrogation outweighs the long-term consequences of admitting to doing something he or she has not done.

Given that Kelley displayed he was highly suggestible in a non-stressful setting with merely negative feedback, Dr. O'Connell found it was reasonable to conclude that Kelley would be even more suggestible when experiencing the pressure of what the defense contends was an inherently-coercive interrogation. The expert opined that Kelley would have had a marked difficulty making decisions during an interrogation. That difficulty would stem from his cognitive deficits, his limited reasoning ability, as well as his inability to pay close attention to the proceedings, process information quickly, and remember what was going on. According to Dr. O'Connell, Kelley could easily become overstimulated and respond impulsively.

In addition, Dr. O'Connell further noted Kelley stated he was using heroin on the day of his interrogation, and that jail records

confirmed that Kelley was experiencing withdrawal symptoms on July 31. According to the expert, drugs and alcohol can affect someone suffering from organic brain syndrome more than a member of the regular population. Kelley's drug use therefore would have further impaired his ability to think clearly during the interrogation.

Dr. O'Connell opined that, if the police officers in this case were "forceful" with Kelley, i.e., confident in their assertions and dismissive of his denials, Kelley would have had a tendency to "fold[.]" In particular, Kelley would have been susceptible to leading or misleading questions, scare tactics, and attempts to lull him into a false sense of security. If the officers provided him with fabricated evidence, he would likely have accepted it as true. According to Dr. O'Connell, Kelley could have said the cap was his because someone else said it was. His memory was "malleable."

On the whole, Dr. O'Connell concluded that, to a reasonable degree of psychological certainty, Kelley was at a heightened risk for making a false confession during his 1993 interrogation.

Interrogation Expert Trainum

Former police detective James L. Trainum, an expert in interrogation techniques, also testified at the hearing as a defense expert. Trainum observed that, for years, the common belief was that people would not confess to a crime that they had

not committed unless they were being tortured or they were mentally ill. However, according to Trainum, it has now been documented that false confessions occurred in approximately thirty percent of the cases where there had been DNA exoneration.

Trainum explained that an interrogation did not have to be lengthy for certain suspects to yield to their questions. Coercive interrogation tactics – such as falsely stating there was conclusive evidence of guilt, that a conviction was inevitable, and that a confession offered the only hope of leniency – will have more of a psychological impact on some people versus others. According to Trainum, people who are more susceptible to this type of high-pressure approach could become convinced that there were only two options before them, and that they had to pick the "lesser of the two evils." Those individuals who were at particular risk for making false confessions included juveniles, people with limited social maturity, and people with lower IQs.

According to Trainum, studies of false confession cases have shown that when law enforcement officers obtain false confessions, whether intentionally or inadvertently, they tend to involve these circumstances: (1) erroneously identifying an innocent person as a suspect; (2) using coercive interrogation techniques to convince the suspect that it was a good idea to admit to something he did not do; and (3) unintentionally contaminating the confession by

providing the suspect with information, such as details about the crime scene, that he could not know since he was not actually guilty. Trainum further opined that a false confession was more likely if the police failed to test its reliability by verifying and corroborating the information provided.

Trainum believed that police officers often secure false statements or fabricate evidence unintentionally. He suggested that "tunnel vision," i.e., being so convinced of a suspect's guilt that contrary information was disregarded, could play a "very powerful" role. According to Trainum, officers who are so focused on what they think is important can have a selective memory as to what a suspect actually said.

Trainum questioned the reliability of the confessions in this case in light of the information provided to defendants, the evidence of contamination and the absence of thorough follow-up. He noted in particular: (1) the apparent disregard of Thompson's statement; (2) the new DNA evidence; (3) Paredes's failure to mention a look-out; (4) the odd coincidence of Kelley correctly stating the victim's exact age; (5) the unlikelihood that the victim's head trauma was caused by a car stereo; (6) the leading questions in both statements, such as the police asking Lee whether "anyone wiped up"; (7) the conflict as to where drugs were consumed; (8) Lee's inaccurate inclusion of Paredes in the timeline

of events; and (9) Paredes's description of the perpetrator browsing in the store did not match the claimed "blitz" attack on the victim.

Trainum did not believe that the evidence supported defendants' claim that the entire fatal assault occurred behind the store counter. He found it unusual and unlikely that the victim's body was carried face-down and then wedged into the cramped area where it was found. Trainum further questioned the failure of the police to obtain a search warrant to search Bob's Supermarket for the stolen goods and to seize Kelley's hamper to check for residual blood. He also noted that the photo of Lee contained in the photo array stood out, as it had different characteristics than all of the other photos.

Trainum found it "difficult to understand" how defendants would have accomplished everything they said they did in the short window of time between the murder and when they were seen by Williams and Hanley shortly before 2:00 p.m. During this twenty to thirty minute period, defendants claimed to have left the store, avoided being seen with bloody clothes and stolen goods, walked to two different stores to fence the items, hid the murder weapon and unsold items, walked home to change, returned, purchased drugs, used the drugs, and gone back out onto the street.

Lastly, Trainum noted it was unusual that the police were currently doing nothing to investigate Dixon. He believed that this continued disinterest in Dixon further exemplified the "tunnel vision" in this case.

Dixon's rap sheet was admitted into evidence at the hearing, along with his judgment of conviction. Those records revealed that approximately three years before this murder, Dixon had entered a Paterson storefront about a mile from Victoria's Video, pretended to be a customer, pulled out a knife, demanded money and, with the knife at her throat, threatened to kill the owner. Dixon was apprehended and sent to prison for three years. He was twenty-eight years old when he was released. He returned to Paterson a few months before the murder in this case.

Thompson

Thompson was called by defendants at the hearing as a fact witness. He testified that, in 1993, he lived in Paterson and knew the owner of Victoria's Video. Thompson stated that he went into the store around 2:00 or 3:00 p.m. on July 28. A black man was squatting down behind the counter and said "we're closed," so he walked out. Thompson explained that he only saw the man's upper body and head, and could not really describe him, except to say that he appeared somewhat stocky. Thompson claimed to have never seen this man before. He said he was surprised to see a

black man working in the store, since the owner, who was Hispanic, typically hired only family members.

The day after the incident, Thompson heard about the murder. He told Victoria that he was willing to speak to the police about the man he had seen in the shop the day before. He said Victoria asked him to do so. Thompson accordingly went down to the police station and looked through a "big book with a lot of photos," but he did not recognize anyone or see the man from the day before.

Two days later, the police called in Thompson again and showed him two "sheets" of photos. He again did not see a photo of the man from the shop, but told police when asked that he did know two of the men pictured, Kelley and Lee. These men were not his friends, but he knew them from the neighborhood. Thompson never heard from the police again.

The State's Rebuttal Testimony from Detective Reyes

As its sole witness at the evidentiary hearing, the State called Detective Reyes, the lead detective. Reyes generally described the investigation undertaken by police. Reyes confirmed that he had destroyed all of his notes pertaining to this case during the two intervening decades, and that his formal report from 1993 was all that was left.

Reyes stated that, on July 29, 1993, he received a phone call from a Paterson resident, Alice Nieves. As we noted earlier in

this opinion, Nieves reported that she was at a laundromat on Union Avenue when she had overheard three young black women talking about the homicide. In particular, the women allegedly said that the victim had been killed by two black men and a white man. Reyes explained that he tried without success to locate the women.

Reyes related that, the next day, July 30, the police received another tip from a confidential source, who had stated that two black men and a white man had been in front of Victoria's Video on July 28 around the time of the homicide, and that two of the men, one known as "K.C.," and the other who was the son of Mr. Lee, could be found on the second floor of the apartment building at the corner of Union Avenue and Jasper Street. Because of this information, the police were able to locate Kelley and Lee and bring them down to the station. Reyes acknowledged that he pursued these two tips, even though none of the eyewitnesses at the video store described seeing more than one black man.

Reyes recalled that Kelley was cooperative during his interrogation and had no difficulty communicating with him. Reyes denied that anyone had threatened Kelley or Lee, told either of them what to say, or carelessly disclosed details to them about the crime scene. According to Reyes, Kelley never said that he was afraid of Lee, or that Lee had forced him to admit to involvement in the murder. Reyes acknowledged that he never asked

Kelley how the victim was carried face-down into such a small space. Other than Hancock's name, Reyes could not specify what new evidence he got from Kelley that the police did not already have.

Reyes explained that he had not taken a formal statement from Thompson because he did not make an identification and his information seemed "very basic." Reyes acknowledged that he took statements from everyone else who was in the video store around the time of the homicide, including people who had not seen the perpetrator. Ultimately, Reyes could not say exactly why he did not take Thompson's statement.

Reyes denied asking Thompson if he knew anyone in the two photo arrays. Reyes insisted that, if Thompson had told Reyes he recognized Lee or Kelley, Reyes would have included that information in his report. Reyes also denied that Thompson ever said that he had never previously seen the man behind the counter before.⁸

Reyes denied that he would have told Paredes that a suspect had been arrested before she looked at the photo arrays. He acknowledged that Mousa said the black man he saw was bleeding from his ear and had blood on both his arms and his shirt. Reyes

⁸ However, at Lee's trial, Reyes testified that Thompson did say this.

believed that the person who committed this crime did get blood on him, but acknowledged that there was no proof either Kelley or Lee did. Reyes could not recall why Kelley's clothes were not located and taken, even though they had been washed. He did not know whether anyone had asked Kelley's mother if the clothes were bloodstained.

Reyes stated that, to his knowledge, the police had not reopened the investigation or spoken to Dixon since the time his DNA was found on the cap. Reyes insisted, though, that the DNA evidence did not conclusively mean that Dixon had committed the murder, and that he would need to review the case and obtain more information before he would talk to someone about an incident that happened more than twenty years ago.

According to Reyes, if he had known in 1993 that the DNA of Dixon, a black twenty-eight-year-old resident of Paterson who, in 1989, had committed a knife-point robbery in a storefront a few blocks from Victoria's Video, was on the cap, he would not have viewed this proof alone as conclusive evidence and charged Dixon. However, he agreed he would have questioned Dixon as part of the investigation.

Upon being asked what he would do today, whether the case was worth investigating given all the new information, including

Dixon's recent denial of ownership of the hat, Reyes responded, "At this point, I still don't have enough information."

IV.

The Trial Court's New Trial Ruling

After considering these proofs from the nine-day evidentiary hearing, and extensive briefing and argument, the trial court issued a lengthy oral decision on September 15, 2017, granting both defendants Kelley and Lee a new trial. Although the court discussed numerous grounds for its decision, its core focus was upon the retested DNA evidence from the baseball cap. The court found that evidence indicative that a third party, i.e., Dixon, had attacked and killed the victim, rather than either defendant.

Among other things, the court found that, given that the identity of the perpetrator was in question here, the DNA on a cap found so close to the victim and identified by an eyewitness was material evidence. The court was persuaded by the "comprehensive" proof that apparently Dixon, and not Lee, owned the cap. This proof was established through the use of new and enhanced technology and was of a type that would "probably change" the jury verdicts here. In the court's view, this proof was strong evidence that was clearly and convincingly "capable of raising a reasonable doubt as to the guilt of both defendants and [creating] a link between a third party and the crime."

In addition, the court found that the new DNA evidence called into doubt Paredes's identification of Lee as the man she had seen wearing the cap. The strength of this evidence of third-party guilt was magnified by the fact that Dixon had committed a similar crime not far from the video store. Moreover, the court found it significant that as of July 1993, Dixon had been recently released from prison, was then residing in Paterson, and was twenty-eight years of age. The new evidence of Dixon's potential guilt was not merely cumulative, impeaching, or contradictory.

Alluding to Keel's un rebutted expert testimony, the court observed that had either Kelley or Lee been wearing the cap during the crime, they would have left sufficient DNA on the cap for identification purposes, given the sensitivity of current DNA technology. Since the cap only had to have been worn for ten to fifteen seconds for a transfer of DNA to occur, the court reasoned that Paredes's testimony about the length of time she and the man wearing the cap had been together in the store confirmed that the man who wore the cap was identifiable. The court determined that the new DNA evidence thus could lead a jury to conclude that the portion of Kelley's confession, in which he claimed to be the owner of the cap, was false.

The court also found "compelling" certain other arguments made by defense counsel, "in the totality of the circumstances and

in the shadow of the new DNA evidence," even though those arguments did not alone meet the criteria for a new trial. In particular, the court was troubled by the way Reyes had presented the photo array to Paredes, which the court noted was inconsistent with current standards under State v. Henderson, 208 N.J. 208 (2011), and highly suggestive.

Additionally, the court was concerned about the police's decision to abandon its theory that one man had committed the crimes – which was based upon the testimony of three eyewitnesses – in favor of a theory that there were three perpetrators, which was premised solely upon "double hearsay" from two informants.

The court also found Trainum's testimony regarding alleged "tunnel vision" and confession "contamination" to be of "great significance." The court was troubled that Reyes had "testified in essence that, even if he had the same quality of evidence regarding the latest DNA of Eric Dixon that was found on a hat described by [Paredes] as being worn by Lee, [Reyes] still would not have considered investigating Mr. Dixon."

The court disagreed with the State that the new evidence of Dixon's DNA and his similar crime would not be admissible before a new jury. It was satisfied that Dixon's judgment of conviction would be admissible under the rules of evidence, and also that the

victim or the investigating officers would be able to testify as to the facts of the case that resulted in Dixon's conviction.

The court found that there was other testimony that now had to be considered potentially more significant, in light of the new DNA evidence. In particular, the court noted: (1) the absence of any witnesses who saw the defendants soon after the homicide with blood on their clothes; (2) the apparent inconsistency between the facts set forth in the defendants' confessions and Palmbach's version of events, based upon the bloodstain evidence; (3) the failure to recover Kelley's bloodstained clothes; and (4) the manner in which police had handled the potential testimony of Thompson.

Lastly, the court noted the State's heavy reliance on the defendants' confessions, and greater current awareness in society that false confessions can occur.

For all these reasons, the trial court granted the motions of both defendants for a new trial.

Subsequent Procedural Events

Following the new trial ruling, the State moved for leave to appeal, which we granted. The trial court ordered defendants released on bail, pending the court-ordered new trials. The State filed an emergent application to overturn the bail order, which, after a short interim stay and briefing, this court upheld. The

Supreme Court ultimately denied the State's request for emergent relief.

V.

In its brief, the State argues that the trial court's new trial order must be set aside as a "clear abuse of discretion" for numerous reasons. The State generally asserts that the court misunderstood the significance of the DNA retest results, and failed to mention or adequately consider significant other evidence pointing to defendants' guilt.

Specifically, the State contends the court failed to consider properly: (1) the eyewitness testimony of Williams and Hanley placing defendants in the vicinity of the video store on the date of the killing; (2) the expert testimony of the coroner and Joselito Versoza; (3) the inculpatory statements made by Kelley to third parties and the police; (4) the confessions of both Kelley and Lee; and (5) inconsistencies in Lee's trial testimony and that of his alibi witness.

The State further argues the trial court misunderstood Keel's testimony and gave it undue weight. In addition, the State maintains the court did not appropriately consider Reyes's testimony and mischaracterized critical portions of it.

Further, the State argues the court erred in declaring that evidence of Dixon's third-party guilt would be admissible at new

trials. It emphasizes that no eyewitnesses had observed Dixon at the video store, and that Dixon's DNA was not found on any other items from the crime scene apart from the cap. In addition, the State notes that defendants both unsuccessfully pursued "third party guilt" theories, albeit without reference to Dixon, at their 1996 trials. The State also faults the trial court for other assorted legal errors.

A.

In order to qualify as newly-discovered evidence entitling a party to a new trial, the new evidence must be: "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981) (citations omitted); State v. Sullivan, 43 N.J. 209, 233 (1964); State v. Armour, 446 N.J. Super. 295, 312 (App. Div.), certif. denied, 228 N.J. 239 (2016). As to the last element, the test is a probability, not a mere possibility, there will be a contrary result on retrial. Sullivan, 43 N.J. at 233 (citations omitted). All three elements must be met before the evidence can justify a new trial. State v. Ways, 180 N.J. 171, 187 (2004) (citations omitted); Carter, 85 N.J. at 314 (citations omitted).

"[E]vidence that supports a defense, such as alibi, third-party guilt, or a general denial of guilt would be material" under the first prong of the Carter test, where the focal issue at trial is the identity of the perpetrator. Ways, 180 N.J. at 188. In particular, DNA testing showing that another person was the source of the crime scene evidence attributed to defendant would be "material to the issue [of the perpetrator's identity] and not merely cumulative or impeaching or contradictory." State v. Peterson, 364 N.J. Super. 387, 398 (App. Div. 2003) (brackets in original) (citations omitted). DNA test results that "not only tended to exculpate defendant but to implicate someone else" would qualify as proof of the type "that would probably change the jury's verdict if a new trial were granted." Id. at 398-99 (citations omitted); see also State v. DeMarco, 387 N.J. Super. 506, 517 (App. Div. 2006).

As a procedural matter, we are cognizant that defendants, who were convicted in 1996, did not move to have the DNA from the cap retested until 2010 and did not move for new trials until 2016 after the retested DNA results revealed exculpatory information. Generally, under Rule 3:22-12(a)(1), a motion for post-conviction relief must be filed within five years of a defendant's conviction, subject to certain exceptions. One of those exceptions, of great importance here, is where "enforcement of the time bar would result

in a fundamental injustice" if there is "a reasonable probability" that a "defendant's factual assertions were found to be true" R. 3:22-12(a)(1)(A). Where, as here, the application for post-conviction relief is a second or subsequent petition, such applications must be made no more than a year after the factual predicate was discovered or could have been discovered through reasonable diligence. R. 3:22-12(a)(2)(B).

A recognized basis for excusing these general time bars, is where a defendant offers newly-discovered evidence that raises substantial doubts about his guilt and which could not have been obtained sooner with reasonable diligence. See, e.g., State v. Nash, 212 N.J. 518, 546-49 (2013) (addressing claim of newly-discovered evidence in the context of a PCR application); State v. Armour, 446 N.J. Super. 295, 304 (App. Div. 2016) (where defendant sought new trial based on ineffective assistance of PCR counsel, relying on newly-discovered evidence).

The State also cites Rules 3:22-4 and 3:22-5, intimating that defendants' present arguments for a new trial were either rejected previously, or could have been raised in previous appeals.

Although the trial court here did not expressly address these alleged procedural bars under Rule 3:22 in its oral ruling, it implicitly treated defendants' motion for relief to be timely. We concur with that approach.

The DNA retesting methods that Keel discussed in his 2017 report did not exist when defendants' cases were tried two decades earlier. Indeed, the DNA testing statute itself, N.J.S.A. 2A:84A-32a, contains no time bar.

The newly-discovered DNA retesting results did not exist within five years of defendants' convictions, nor within the one-year supplemental period for second or subsequent petitions under Rule 3:22-12(a)(2). Defendants moved for an evidentiary hearing and a new trial with reasonable diligence after the retesting indicated Dixon's potential third-party guilt. The new evidence was not a subject of defendants' direct appeals or their prior collateral attacks, nor could it have been. Hence, Rules 3:22-4 and 3:22-5 do not apply.

Absent the DNA retesting results, we are uncertain about whether the additional proofs presented by defendants at the evidentiary hearing (such as the expert testimony concerning alleged false confessions, flawed eyewitness identification, and so on) would have provided a sufficient basis to surmount the procedural bars under Rule 3:22. We need not resolve that question, however, because the DNA retesting results and Keel's unrebutted expert testimony explaining those results, provide an ample basis to qualify as newly-discovered evidence that could not have been discovered sooner. Once that proof was presented, the

trial court had the prerogative to consider the testimony of defendants' additional witnesses as relevant to whether the non-DNA evidence in the State's case sufficiently demonstrated their guilt so as to render the DNA evidence insignificant or its omission from the 1996 trials, as the State asserts, harmless.⁹ In sum, there are no procedural barriers here to preclude consideration of defendants' new trial motion on its merits.

VI.

We turn now to the substantive heart of the matter: the impact of the DNA retesting results here on the soundness of the verdicts that produced defendants' convictions. In considering the copious record before us, we are mindful of our scope of review.

A motion for a new trial generally "'is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse [of discretion] has been shown.'" State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)). Appellate review of such rulings is ordinarily limited to a determination "'whether the

⁹ Indeed, as defense counsel has pointed out, the DNA testing statute allows the court, when considering whether to grant such a request to consider in its discretion "any evidence whether or not it was introduced at trial" N.J.S.A. 2A:84A-32a(d)(5).

findings made by the trial court could reasonably have been reached on sufficient credible evidence present in the record.'" Ibid.

Here, the situation is a mixed one because the judge who presided over the evidentiary hearing and who granted defendants' new trial motion in 2017 is not the same judge who presided over the jury trials of both defendants in 1996. To the extent the new trial ruling is based on the testimony adduced at the lengthy evidentiary hearings, we accord substantial deference to that judge and his first-hand opportunity to consider the weight of that testimony, particularly Keel's expert forensic testimony. However, insofar as the motion judge's ruling is based upon an evaluation of the records of the 1996 trials, we owe his evaluation no special deference and consider those materials de novo.

Having thoroughly considered the trial court's ruling, in light of these principles and the substantive law, we affirm the order granting both Kelley and Lee new trials. Our affirmance rests fundamentally on the substantial evidence of Dixon's potential third-party guilt that was revealed through the DNA retesting.

A.

A criminal defendant is entitled to introduce evidence that another person committed the crime with which he has been charged, subject to exclusionary considerations under N.J.R.E. 403. State

v. Cook, 179 N.J. 533, 566 (2004) (citation omitted). As Keel's expert testimony persuasively explained, the evidence of Dixon's DNA found on the cap and the absence of DNA from either defendant on the cap is – at the very least – substantial evidence of third-party guilt that justifies new trials for both defendants.

The DNA evidence here did not have to conclusively establish Dixon's third-party guilt and totally exonerate Kelley and Lee in order to support a meritorious request for a new trial based upon newly-discovered evidence. Rather, the evidence simply had to show that another person was the source of important crime scene evidence attributed to defendants where, as here, the identity of the perpetrator was a central issue in the case.

Among other things, the relevance of the new DNA evidence was magnified here by: (1) the doubt it cast upon the accuracy of Paredes's identification of Lee, proof which was heavily relied upon by the State at both trials; (2) Kelley's apparently-false statement in his confession that he owned the cap; (3) the testimony of multiple eyewitnesses who saw only a single black man in the video store; (4) Keel's testimony that, with current technology, mere seconds of wear of a cap can transfer sufficient DNA for identification purposes; (5) Thompson's testimony that he told police that he saw someone other than Kelley or Lee; and (6) Dixon's age in 1993, which was consistent with the estimated age

of the killer(s), his presence in Paterson around the relevant time, and his prior commission of a similar crime.

As to Kelley, individually, the State stresses he had already been excluded as a contributor of the DNA evidence on the cap at the time of his trial in 1996. But that is not the same as revealing to a jury that the cap belonged to a third party who might well be the real perpetrator. Kelley had already linked himself to the cap through his confession. Kelley's confession that he and Lee committed the crime was echoed by Paredes's (now-questionable) identification of Lee and the then-inconclusive DNA evidence as to Lee.

We agree with the State that the retested DNA evidence does not conclusively establish that Kelley and Lee were not present at the video store and were not guilty of participating in any offenses there. It is conceivable that, at retrial, the State will persuade new jurors that, despite the new DNA results, one or both defendants were guilty beyond a reasonable doubt of one or more of the crimes charged. For instance, the State may now attempt to prove that Dixon, along with one or both defendants, committed the robbery and murder, although that revised theory would clash with certain details within the narratives of the eyewitnesses and defendants' confessions.

We need not forecast here what might occur at any new trials. All we need decide is whether the trial court erred in granting those trials. We discern no such error.

We categorically reject the State's position that the omission of the now-revealed DNA retesting evidence at defendants' 1996 trials was merely "harmless." See State v. Macon, 57 N.J. 325, 340-41 (1971) (regarding harmless error). To the contrary, such exculpatory proof, had it been presented, could easily have engendered reasonable doubt and produced contrary verdicts of acquittal.

DNA evidence concerning the cap was presented in the State's case at both trials, and the cap itself was admitted as a State's exhibit. We recognize that the State did not assert at Kelley's trial that his DNA was found on the cap. But the State did present Kelley's written confession stating that he owned the cap. Moreover, the State maintained at both trials that evidence concerning the cap served to link, directly or indirectly, both defendants to the crime scene. The retesting of the cap now places that evidence in a markedly different light. Indeed, even if no DNA proof had been presented by the State at either 1996 trial, the present DNA results alone would supply an adequate basis for new trials, as critical exculpatory evidence.

The State argues the trial court failed to properly consider the compelling other proofs of defendants' guilt presented at the 1996 trials. For instance, the State maintains that the trial court failed to consider the eyewitness testimony of Williams and Hanley placing Kelley and Lee in "close proximity to the scene of the murder at the relevant times" However, the fact that Kelley and Lee had been seen near Victoria's Video was hardly surprising, since both defendants lived in the neighborhood.

Moreover, neither Williams nor Hanley stated that either defendant did anything to suggest that they were about to commit, or had just committed, a crime. Rather, defendants allegedly were initially at St. Mary's Church seeking to receive some free food. When Williams and Hanley saw defendants after the murder had been committed, neither man was bloodied, acting unusually, nor seen in possession of stolen goods.

The State contends the trial court improperly disregarded Williams's testimony about the inculpatory statements made by Kelley shortly after the murder; and Reyes's testimony that he heard Kelley tell Hancock at the police station to "just give it up." However, the significance of Williams's testimony is undercut by the DNA evidence pointing to another possible perpetrator, and also by Dr. O'Connell's testimony as to the magnitude of Kelley's head injury and cognitive decline. Indeed, Dr. O'Connell's expert

opinion bolstered Williams's claim that Kelley was a "strange" person who made odd jokes and was not taken seriously. Likewise, the significance of Reyes's trial testimony was arguably diminished by the new DNA evidence, Dr. O'Connell's testimony, and Trainum's testimony about Kelley's susceptibility to coercive interrogation techniques.

The State further argues that the trial court failed in its ruling to consider the testimony of Dr. Platt and Versoza, which allegedly contradicted Palmbach's reconstruction of the murder. However, Dr. Platt never offered an opinion about why there was not more blood behind the counter and in the hallway. Moreover, Versoza testified at Lee's trial only that the absence of skin on the victim's fingernail clippings reflected a lack of any significant struggle.

The trial court did not definitively conclude that Palmbach was necessarily correct. The court simply recognized that, as noted above, defendants would be able to present at their respective new trials Palmbach's alternate theory of what had occurred at the crime scene.

Next, the State argues that the trial court erred in considering Paredes's identification of Lee in light of the new standards for eyewitness identification announced by the Supreme Court in State v. Henderson, 208 N.J. 208 (2011). As the State

correctly notes, the Court in Henderson expressly ruled that its modification of the standards of eyewitness-identification evidence was not to be given retroactive effect. Id. at 220, 302. Even so, we are unpersuaded the trial court here was engaging in an improper retroactive application of Henderson. Rather, the import of the trial court's ruling is that the evidentiary aspects of Henderson (such as the new Model Criminal Jury Instruction¹⁰ on eyewitness identification and the right to present expert testimony on the subject) would apply at any new trials in this case. That is because defendants' original trials would be rendered nullities, and the parties would be required to proceed at the new trials as though there had been no prior trials at all.¹¹

The finality of any decision or ruling reached in a trial is negated when a new trial is mandated, such as by a declaration of mistrial. All matters decided at the first trial, such as the admissibility of evidence or the voluntariness of a confession, may be revisited at the second trial. State v. Munoz, 340 N.J. Super. 204, 220 (App. Div. 2001); State v. Hale, 127 N.J. Super.

¹⁰ Model Jury Charges (Criminal), "Identification: In-court and Out-of-court Identifications" (rev. July 19, 2012).

¹¹ We agree with the State that the non-evidentiary aspects of Henderson (such as the new required police practices) would not govern this matter.

407, 412-13 (App. Div. 1974). The first trial is deemed a nullity and the parties must proceed as though there had been no trial at all. Hale, 127 N.J. Super. at 412 (citations omitted).

The parties are thus returned to their original positions, and at the new trial, can introduce new evidence and assert new defenses not raised at the first trial. Ibid. (citations omitted). The admissibility of such evidence is generally governed by the law now in effect, and not the rules of admissibility that were in force at the time of the first trials in 1996. See generally N.J.R.E. 101 (regarding the application of the Rules of Evidence).

The State further emphasizes the detailed confessions provided by Kelley and Lee. However, the motion judge was entitled to accept Trainum's testimony that the reliability of the confessions was at least questionable. Kelley's confession may well have been influenced by his diminished mental capabilities. In addition, Lee's confession may have been derivatively tainted by him being advised about Kelley's confession.

We reject the State's argument that the trial court did not appropriately consider Detective Reyes's testimony at the evidentiary hearing. We are mindful that Reyes denied posing leading questions to Kelley, or disclosing information to him, or revealing to Paredes that a suspect had been arrested. Even so, the motion judge had the right as a fact-finder at the hearing to

accord Reyes's assertions limited credible weight. State v. Locurto, 157 N.J. 463, 470-71 (1999). The judge apparently found Trainum's competing testimony to be more impressive. Although the State insists that Reyes did not say he would never investigate Dixon, Reyes did display at the hearing a persistent reluctance to acknowledge that Dixon might be a culpable party.¹²

We also reject the State's argument that the trial court did not assign appropriate significance to Lee's inconsistent trial testimony and that of his alibi witness. Even if Lee and his defense witnesses were not believed at trial, that does not require the court to ignore the powerful import of the newly-discovered exculpatory DNA evidence and of Dixon's potential third-party guilt.

In conclusion, we are unpersuaded by the State's arguments that the State's other evidence at the 1996 trials is so unassailable to deprive these defendants a second chance to be tried fairly before juries, now with the benefit of the newly-discovered exculpatory DNA evidence. The trial court did not abuse its discretion, nor did it misapply the law in ordering new trials.

¹² That said, we do not offer a view on whether or not Reyes or the other police involved in the investigation engaged in "tunnel vision." That question remains to be evaluated by new juries, if presented by the parties and the evidence.

All other issues raised by the State lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

VII.

We end our analysis by briefly addressing the State's argument that the trial court mistakenly ruled that proof of Dixon's prior "bad acts" and his 1989 conviction for robbery would be admissible as third-party guilt evidence at defendants' new trials. We disagree with the State's position.

As we have already noted, a defendant may be entitled to introduce evidence that another person committed the crime with which he or she has been charged. Cook, 179 N.J. at 566 (citation omitted). In that context, the standard for introducing defensive "other-crimes" evidence under N.J.R.E. 404(b) is lower than the standard imposed on the State when it seeks to use such evidence to incriminate a defendant. Id. at 566-67 (citation omitted); State v. DeMarco, 387 N.J. Super. 506, 520 (App. Div. 2006). This is because the defendant is offering the proof for an exculpatory purpose and there is no risk to him or her. Cook, 179 N.J. at 567 (citation omitted). As such, the standard of admissibility is simple relevance to guilt or innocence, subject to offsetting exclusionary factors under Rule 403. Ibid.

"[A] defendant may use similar other-crimes evidence defensively if in reason it tends, alone or with other evidence,

to negate his guilt of the crime charged against him." State v. Garfole, 76 N.J. 445, 453 (1978) (citations omitted). Importantly, a "lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively" Id. at 452. There must simply be some link or thread between the third party and the victim or crime that bears on the State's case. State v. Forin, 178 N.J. 540, 591 (2004); State v. Koedatich, 112 N.J. 225, 300 (1988). A defendant need only "engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt." Garfole, 76 N.J. at 453.

When a prosecutor attempts to present other-crimes evidence against a defendant, a rigorous four-factor test of admissibility must be satisfied under the criteria of State v. Cofield, 127 N.J. 328, 338 (1992). But as the Supreme Court more recently explained in State v. Weaver, 219 N.J. 131, 150-51 (2014), a "more relaxed" admissibility standard governs so-called "reverse 404(b)" proof of a third-party's prior bad acts. Trial courts need only determine that "the probative value of the evidence is not substantially outweighed by any of the Rule 403 factors," which are "undue prejudice, confusion of issues, or misleading the jury," and "undue delay, waste of time, or needless presentation of cumulative evidence." See Cook, 179 N.J. at 567.

The State maintains that evidence of Dixon's prior conviction would not be admissible at a new trial, because there is allegedly no "factual nexus" tying that conviction to the current crime. We disagree. Dixon's earlier crime of robbery was sufficiently similar in nature to warrant consideration at a new trial. His intervening incarceration made it irrelevant that three years had passed between the two crimes.

Moreover, Dixon's age at the time of the instant murder and the DNA evidence pointing to his presence at the murder scene, warrants a jury's consideration of his criminal background at the new trials. Given the low threshold for the admissibility of third-party guilt evidence, we discern no abuse of discretion in the trial court's prescriptive evidentiary ruling. The parties shall be guided accordingly at any new trials.¹³

VIII.

We conclude this lengthy opinion with some thematic observations. Our system of criminal justice fundamentally depends upon the soundness of the evidence presented to jurors at trial. When, as here, the soundness of that evidence and the resulting verdicts is seriously undermined by newly-obtained DNA

¹³ We need not decide here, however, whether any of the "other crime" proof concerning Dixon would need to be restricted or sanitized under N.J.R.E. 403. The precise scope of the evidence is for the judge who presides over any retrials to determine.

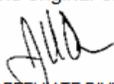
evidence of third-party guilt, we cannot turn a blind eye to the revelation and the probability that defendants, who have been incarcerated since 1996, would have been acquitted.

We are very mindful that over two decades have passed since defendants' trials, and that it now will be challenging for the State to locate witnesses and reactivate a stale case, and distressful for the family of the victim. But, despite those challenges, the rule of law justifies such new trials, with new jurors evaluating a more complete and informative record with fresh eyes and the benefit of current scientific technologies. We by no means comment here on the State's decision about whether to proceed with such new trials, and defer to the prosecutor's sound discretion in that regard.

In sum, we have not decided these men are innocent. We only conclude the trial court did not err in granting them another opportunity, with the insight of new DNA results, to make the State prove their guilt beyond a reasonable doubt. Simple justice requires no more, and no less, than that.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION