SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1580-11T4

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	On Appeal from Judgment of
	:	Conviction of the Superior
Plaintiff-Respondent,	:	Court of New Jersey, Law
	:	Division, Bergen County.
v.	:	
	:	Sat Below:
STEPHEN SCHARF,	:	
	:	Hon. Patrick J. Roma, J.S.C.
Defendant-Appellant.	:	and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

The Bergen County Grand Jury returned Indictment 09-08-1485 charging defendant Stephen Scharf with a single count of purposeful/knowing murder, contrary to N.J.S.A. 2C:11-3a(1) and (2). (Da 1)[1] After a trial in April and May 2011 before the Honorable Patrick J. Roma, J.S.C., and a jury, defendant was convicted of murder. (Da 2) On October 21, 2011, Judge Roma sentenced defendant to life in prison, 30 years without parole. (Da 3 to 4) Defendant filed his notice of appeal on or about December 22, 2011, as within time, with the permission of this court. (Da 5)

STATEMENT OF FACTS

This appeal addresses defendant Stephen Scharf's conviction for the murder of his wife Jody. She and he were at the Englewood Cliffs in Bergen County when she plunged off the cliffs to her death in 1992. Defendant's immediate statements to police told a simple tale of an intoxicated woman who had misstepped in an area that was fenced-off and posted with no-trespassing signs indicating an extreme danger of falling to one's death. The State, however, in a theory that took many years to develop, culminating in defendant's 2008 arrest and 2011 trial, believed that defendant pushed his wife to her death. As is argued in the legal points which follow, a significant amount of inadmissible

[1] Da – defendant's appendix to this brief.

hearsay was introduced by the State to bolster that theory improperly. As is also argued, infra, no lesser-included homicide offenses were instructed to the jury, leaving jurors with an impermissible all-or-nothing choice of murder or acquittal when some of the evidence clearly supported a lesser homicide verdict. The State's case was as follows.

Palisades Parkway Police Officer Paul Abbott testified that, at about 8 p.m., when "it was dark" outside, on September 20, 1992, he was dispatched to the Rockefeller Lookout at the Englewood Cliffs to check on a report that a body had fallen from the cliffs. (10T 36-7 to 25) He responded quickly and, four minutes later, he arrived at that location. (10T 37-2 to 16) By then it was "pitch dark," he agreed. (10T 37-17 to 18) Abbott briefly described the layout of the area -- essentially a scenic turnout/parking area off the highway, overlooking the Hudson River to the east. (10T 38-19 to 39-16) He testified that defendant approached his car, flagging him down with extended hands. (10T 44-6 to 24) Defendant said, "My wife fell off the cliff." (10T 46-13 to 21) When Abbott asked where that had occurred, defendant responded that it was at the northern end of the lot and Abbott drove him up to that area, with Sergeant Lowell Tamayo following them in another vehicle. (10T 47-1 to 23) Abbott testified that defendant was "calm" and "controlled" at the time, not volunteering additional information. (10T 48-9 to

14) Abbott felt that this was "a very unique response to a stressful situation." (10T 48-18 to 19)

Defendant guided them into a "wooded area, down a path that went to the cliffs," Abbott testified. (10T 51-3 to 5) The "path" is "not a formal" one, Abbott stated. (10T 51-11) Rather, it has been "worn there" through use, but is "overgrown with foliage, various bushes" and downed limbs and was "very thick" with "overgrowth, undergrowth and vines" at the time. (10T 51-11 to 22) There is no artificial lighting at all and both officers carried flashlights, but defendant did not, Abbott testified. (10T 52-8 to 22) Defendant directed them down the path and eventually they came to a "green cable fence that runs along the cliff to keep people back," Abbott said. (10T 53-22 to 54-9)

The warning sign in that area reads: "Cliff and steep slopes are dangerous. For your safety, please observe park rules. Stay on designated trails. Do not climb cliffs or slopes. Alcoholic beverages are prohibited. Trails close one hour after sunset. Violators will be prosecuted." (10T 78-2 to 6) Abbott testified that there are other similar signs in the area as well. (10T 78-7 to 9) When they reached the cable fence, defendant pointed to a flat rock "that was basically clear," according to Abbott, and he responded to police questioning that that was the rock from which his wife had fallen. (10T 54-10 to 56-2) When Abbott looked over that ledge, he noticed another smaller ledge about eight feet

below where a "pocketbook" could be seen. (10T 56-3 to 9) Abbott called Jody's name over the cliff a number of times, but to no avail, while defendant waited behind the cable fence, as Abbott had instructed him to do. (10T 56-24 to 57-6) That was for defendant's safety because, according to Abbott, "unfortunately, we lose people every year off those cliffs, usually people getting too close or other things, different influences. They're hazardous." (10T 57-9 to 13)

Abbott testified that Officer Tamayo then walked defendant back to the parking lot, while a rappelling team descended the cliffs, trying to find Jody Scharf. (10T 57-15 to 58-19) They recovered her body in a manner described infra in this Statement of Facts. (10T 59-19 to 60-6) Thereafter, Abbott shone a flashlight into defendant's car and saw an empty wine-cooler bottle and a plastic cooler in the vehicle. (10T 62-25 to 63-15) On cross-examination, Abbott agreed that there is an area about eight inches down the cliff from the flat area where he has seen people sit previously and that it is "almost a natural seat" overlooking the Hudson River. (10T 101-3 to 102-20) He also agreed that there is another such "seat" directly to the south side of the flat rock providing views south in the direction of the George Washington Bridge. (10T 104-1 to 23) Abbott agreed further that, between the ledge where the purse was spotted and the bottom of the cliff there were "numerous trees, treetops and

branches that were obstructing" his view to the bottom. (10T 107-5 to 9) One member of the rappel team, Lt. Pagan, threw the purse up to Abbott, and Abbott did not recall seeing a credit card or makeup brush on the ledge at that time. (10T 113-1 to 116-7) Abbott also admitted that a number of possible witnesses at the scene were not properly identified and were lost to further investigation. (10T 134-2 to 16) Abbott further admitted that his 1992 report on the matter only mentions that defendant was "in control," not that he was "unemotional" and that while he and Tamayo were calling Jody's name over the cliff, he did not get to observe defendant's demeanor at that time. (10T 138-7 to 10; 10T 141-21 to 142-1)

Sergeant Lowell Tamayo testified that he allowed a bystander at the scene to leave without getting contact information from that person, as he also did with "six or seven cars" at the lookout which all left the area. (10T 179-10 to 180-7) When Tamayo led defendant back to the parking lot, he testified, he asked him to sit in the back of his patrol car. (10T 162-18 to 25) During that time, defendant was saying his wife's name and "at another point he kneeled by the car and appeared to be praying," Tamayo told the jury, but not crying. (10T 163-1 to 9) Later, at Lt. Pagan's instruction, Tamayo transferred defendant to Lt. Walter Siri's car. (10T 164-1 to 24)

Lt. Siri testified that at 8:08 p.m. he took a report from a

man who walked into police headquarters and said that a man at the cliffs had flagged him down and said his wife had fallen over the cliff. (11T 6-3 to 60) Unbelievably, although Siri could describe the man, he allowed the man to leave without getting his name or other contact information. (11T 6-12 to 14; 11T 25-1 to 9) When Siri got to the cliffs, he testified, there were about 15 non-emergency/non-police vehicles there, and he "cleared" them from the area without getting contact information from any of the occupants. (11T 10-2 to 11-4) Sergeant Pagan ordered him to transport defendant to police headquarters, and so he did. (11T 11-8 to 10)

Siri testified that defendant "seemed more nervous than upset," but also "at least in part. . . shaken." (11T 13-18 to 19; 11T 35-15 to 18) The ride to headquarters lasted ten minutes, and, less than a mile into it, defendant began reciting the Hail Mary. (11T 41-13 to 21) Then, about "halfway through the ride," according to Siri, defendant said to him, "We were walking and she said to me to go back to the car and get the blanket, and she slipped and I didn't see her anymore." (11T 15-1 to 7; 11T 41-22 to 24) They arrived at headquarters at about 8:30 p.m. (11T 17-20 to 22) Defendant asked to use a water fountain and splashed water on his face before sitting down on a bench. (11T 19-4 to 12) He showed no emotion, Siri claimed. (11T 19-23) Siri said defendant was never advised by him of Jody's death and never asked to

return to the scene, but he did ask if someone were going to rappel down the cliffs "to get her." (11T 21-17 to 23; 11T 37-3 to 12)

Detective Ronald Karnick testified that the "cable fence" is "approximately four-foot high, three-and-a-half feet, four-foot high. And right out here beyond the fence is the flat-rock area" where, he agreed, there is a "stone seat" at the edge of the cliff. (11T 58-6 to 18; 11T 60-17 to 20) When Karnick arrived at the scene, Officer Abbott gave him the purse that was found on the ledge below, and the rappel team went over the edge to find Jody Scharf. (11T 62-2 to 21) Karnick then returned to headquarters where he spoke with defendant at about 10 p.m. (11T 63-1 to 9; 11T 67-6 to 9) Karnick recounted that conversation as follows:

> He stated that he and his wife, Jody, were going to a comedy show over in New York City. They wound up on the Rockefeller Lookout, which he stated was their spot. They had been drinking in their vehicle. They left the vehicle. They went out to the cliff's edge, climbed through the fence. And Jody was sitting on his lap at -- at that flat rock. . . .
>
> [H]e said that they were kissing and hugging. . . .
>
> He told me that he was uncomfortable and he told Jody that he was going to get up and get a blanket and some wine from the vehicle. . . .
>
> He stated that, when Jody got up, he started to get up and she fell forward. He then said that he called out her name and he got no response from her. . . .
>
> She had told him, "No, don't go," [before she fell].

(11T 66-8 to 67-4)

Then, Karnick testified, defendant agreed to give a more formal written statement, which defendant wrote and signed at 10:11 p.m. (11T 68-9 to 71-19) That statement essentially mirrored the previous one, except that it also referred to going back to the vehicle for wine as well as blankets. (11T 70-22 to 71-4) Karnick described defendant's demeanor with him as "a little upset, not overly upset." (11T 73-14 to 15) Defendant also inquired whether Karnick knew if Jody were alive or not, but Karnick did not. (11T 73-19 to 74-6) After the statement, Karnick responded back to the scene, specifically to the "lower road" below the cliffs where the rescue team was removing Jody's body. (11T 74-22 to 25) She was pronounced dead at the scene at about 11:40 p.m. via a telephone conversation with the medical examiner. (11T 76-15 to 78-5) When Karnick then returned to headquarters, at about 12:30 p.m., defendant asked him if Jody were alive and Karnick said, "No, she didn't make it." (11T 79-1 to 9) Karnick testified that, in his view, defendant "didn't seem very upset." (11T 80-23 to 25) But defendant did become "very slight[ly]" emotional, Karnick told the jury. (11T 81-1 to 4)

Karnick then obtained written consent from defendant to search his car and to examine and photograph his body. (11T 82-21 to 89-13) Karnick admitted that defendant suffered no such injuries -- not even scratches -- on his face or elsewhere on his

body. (11T 141-14 to 143-4) The car search revealed a Coleman cooler containing a wine glass, two bottles of wine coolers -- one empty and one full --and a steak knife, and a nylon bag. (11T 93-19 to 94-2) In the bag, according to Karnick, were: a "green blanket, a couple of ace bandages, two white towels, a candle, plastic bag with a receipt for cheese, a box of wine crackers; there was a small gray jewelry box with a cross and gold-type chain on it; and at the bottom of the bag was a -- a Stanley clawhammer." (11T 94-3 to 10) There was also a full bottle of wine on the rear seat of the car. (11T 101-19 to 24) The parties stipulated that the hammer had no evidence on it when tested. (17T 3-19 to 25) Karnick testified that the purse that was found on the ledge was returned to defendant. (11T 90-5 to 7)By the time Karnick returned to headquarters, defendant had gone home, at Karnick's suggestion, by telephoning someone for a ride. (11T 105-20 to 106-1)On cross-examination, Karnick admitted that in both of his statements to Karnick, defendant had called the cliffs a favorite spot of theirs, connoting that they had been there previously. (11T 145-17 to 146-4)

Karnick further admitted that nowhere in his report is there a mention of defendant's demeanor, and that it should have been noted there. (11T 149-17 to 25) Likewise, he agreed that the medical examiner never saw Jody's body in the spot where it landed, and that the position of the body was not documented,

which he admitted was a violation of proper police procedure. (11T 153-3 to 9) Finally, Karnick agreed that defendant was never charged with possessing a weapon. (11T 151-15 to 18)

Detective James Lynam testified that a makeup kit and brush and a credit card belonging to Jody Scharf were found on the ledge below the flat-rock ledge at the scene. (11T 170-6 to 171-4) Lynam, along with Investigator Terry Alver, conducted an interview with defendant at the prosecutor's office at 9:56 a.m. on the 22nd. (11T 175-16 to 24) Defendant was first asked about his activities on September 19, the day before Jody's death. According to Lynam, defendant and Jody had decided to go to a comedy club in Fort Lee called Bananas, and, after working until 4 p.m. that day, defendant arrived home at 6 p.m. and found Jody suffering from a migraine. (11T 180-14 to 181-7) Eventually, she awoke from a nap and they, along with their then-ten-year-old son Jonathan, went to a sports bar in Hackettstown to get something to eat at about 11:30 p.m. (11T 181-11 to 19) The next day, Lynam said defendant told him, he and Jody were planning to go to a comedy club in New York City called Caroline's for an 8:30 p.m. show, and eat either before or after the show at a diner in Fort Lee. (11T 182-5 to 183-2) Jody had dropped their son off at a friend's house for the night and she had also gone to a local farm where she bought some apples and stopped "to chat." (11T 183-13 to 184-6)

Lynam testified that defendant stated that he had packed a cooler for their evening trip that included two wine coolers along with a blanket, cheese and an opener, plus a bottle of wine that was not placed in the cooler. (11T 184-8 to 21) Defendant allegedly told Lynam that he and Jody had been to the "lookout" 30 to 40 times and it was their "spot." (11T 185-5 to 14) They had last been there in May 1992, defendant told him. (12T 33-2 to 5) Defendant also told Lynam that Jody had a glass of wine at 11:30 a.m. that day and then drank more wine on the way to the lookout. (11T 186-18 to 25) According to Lynam, defendant told him they arrived at the lookout at "dusk," which was just before 7 p.m. (11T 186-8 to 10) They spent about 15 minutes in the car while Jody drank some more wine and defendant had "a little bit of hers," according to Lynam. (11T 186-13 to 16)

According to Lynam, defendant then said that he and Jody went for a walk, stopping along the way to kiss, whereupon he went through the cable fence first and then helped her through. (11T 187-8 to 25) They then sat down on the rock, with Jody facing south, she between his legs, and "engaged in some petting," Lynam recounted. (11T 188-1 to 8) Defendant was uncomfortable because he was sitting on his wallet, so he got up, fixed his pants, which were unzipped, and told Jody he was going to go back to the car to retrieve a blanket and some wine. (11T 188-16 to 23) Jody turned to defendant and said, "No, don't go,"

fell to her knees and went over the cliff. (11T 189-5 to 7) She was two to three feet from defendant when she fell and did not cry out, Lynam recounted from the statement. Defendant was unsure whether she had her pocketbook with her when she fell. (11T 190-9 to 10) Defendant told Lynam that he then called out Jody's name about ten times over the cliff, with no answer, and then ran to the car to get a flashlight, returned to the cliff and called her name further, but again to no avail. (11T 190-15 to 191-1) He then returned to the lot where he waved down a motorist and asked the man to get the police because his wife fell off the cliff. (11T 191-7 to 10)

Lynam testified that defendant also told him that his marriage had been in decline for some time, and that, about two weeks earlier, he had been served with divorce papers that alleged he was "unfaithful and abusive." (12T 4-2 to 15) Defendant denied ever being "abusive" to his wife, except on one incident, when he grabbed her arm to lead her into the garage where he chastised her for throwing out some magazines that he wanted to save. (12 5-20 to 23) Defendant also told Lynam that Jody was a heavy drinker, consuming four glasses of wine per day. (12T 6-3 to 5) He also described their marriage as an "open" one in which they both dated other people. According to Lynam, defendant estimated that he had dated 50 to 60 women during their 13-year marriage. (12T 6-13 to 23) Defendant also said that he

had hoped they could reconcile their marriage. (12T 7-15 to 17) Indeed, the trip that night to the lookout was part of an overall reconciliation attempt that he had planned. (12T 7-21 to 23)

According to Lynam, defendant identified two women that he had been seeing recently -- Kathy Scanlon and Terry Schofield -- and he said that he was breaking off both relationships, having told Schofield of that at Labor Day and Scanlon on September 18. (12T 8-18 to 22) Lynam testified that he and defendant also discussed items found in the car that night. Defendant told him the hammer was mistakenly left in the bag after defendant used it to repair a kitchen drawer. He had placed the hammer in the bag so he could put it back in the garage on the way out of the house, but he had forgotten about it when passing through the garage. (12T 9-9 to 15) Defendant also told Lynam that the gold chain that was found was going to be a reconciliation present for Jody. (12T 9-19 to 10-5) Defendant then signed another consent to search his car and a consent to search his house. (12T 11-15 to 15-22) Cross-examination of Lynam focused on many differences between Lynam's report of the statement and Alver's. (12T 20-19 to 25; 12T 21-1 to 25; 12T 52-15 to 25) Lynam also stated that it had not been his decision to fail to record the interview, and he did not know why it was not recorded on audio or video. (12T 26-11 to 27-18)

Lynam also could not explain why photos were not taken of

Jody's body when it was discovered, and said that he would have taken them if the decision were his to make. (12T 51-4 to 16) He also admitted that "we don't have the exact words [used by defendant] because [Lynam] can't remember exactly what he said." (12T 56-2 to 10) Further, Lynam admitted that no one checked the restaurant in Hackettstown to see if defendant and his family were there late on the night of the 19th. (12T 59-1 to 16) He also admitted that the discussion about the hammer is recounted in Alver's report, not Lynam's, and Lynam does not recall defendant's exact words. (12T 60-7 to 61-1) Finally, Lynam admitted that no one ever seized the drawer that defendant allegedly used the hammer to fix, even though police searched defendant's home thereafter. (12T 61-9 to 63-8)

Captain Joseph Hornyak of the prosecutor's office testified about yet another interview with defendant, also on September 22, 1992, in an interview room at the prosecutor's office. Hornyak testified that he asked defendant to tell him everything he did on the day of Jody's death, and his recitation of the responses at trial were solely from his notes, not from any recording. (12T 73-1 to 22) Hornyak said that defendant told him he had a catch with his son, planted some mums with Jody, showered, shaved and fixed a kitchen drawer, and then packed to go to the cliffs. (12T 74-18 to 24) Jody dropped off Jonathan at a friend's house, while defendant read and watched football, and then they "went to the

park" where "the accident happened," Hornyak testified. (12T 75-1 to 5) Then, Hornyak told the jury, defendant told him that he and Jody were kissing in the car, made their way to the rocks, where they engaged in further kissing and petting, and then defendant stated that he was uncomfortable and wanted to get a blanket and a bottle of wine out of the car. (12T 77-21 to 78-1) Jody "asked him not to, not to go and protested and attempted to get up, getting to a hip and then into a squatting position. And then she tripped forward over [the] cliffs," Hornyak recited. (12T 78-1 to 5) At the time of the fall, defendant allegedly said to Hornyak, defendant was already headed toward the car. (12T 78-8 to 11)

Hornyak testified that defendant told him that there was a pending divorce action and that his relationship with Jody was "improving but distant" and that he had been seeing other women and she was "possibly seeing another" man. (12T 78-17 to 23) Defendant told Hornyak about two women in particular, Schofield and Scanlon, and said that he had tried to break up with them on Labor Day weekend and September 18, respectively. (12T 78-22 to 79-14; 12T 99-1 to 17) He also said that he loved Jody and was hoping to reconcile with her. (12T 79-16 to 18)

Cross-examination of Hornyak focused extensively on the number of times defendant's son Jonathan was interviewed for hours by five detectives in 1992 in an apparently futile attempt to get the boy to incriminate his father, how Hornyak had been

waiting 16 years to arrest defendant, and how Hornyak told Jonathan in 2008 that defendant had gotten a "payday" from an insurance policy on Jody and a "pass" from prosecution all those years. (12T 85-17 to 92-25)

Lt. Ted Ehrenberg of the Washington Township Police testified that he assisted with the execution of the consent search at defendant's house on September 22, 1992, while defendant was present for that search. (12T 110-14 to 111-15) Ehrenberg told defendant that the search would go more smoothly if defendant did not follow the Bergen County prosecutor's people around as they searched, and so he, defendant and Sergeant William Gundersdorf, also of the Washington Township Police, remained in the kitchen. (12T 113-3 to 21) Ehrenberg claimed to be there with defendant at the kitchen table for about an hour, and, he testified, he had what he called a "friendly" conversation with defendant about how quickly life can change when one least expects it when "somebody has a different plan for us." (12T 114-1 to 22) They had some "back and forth" conversation, according to Ehrenberg, and then, he claimed, defendant said to him, "You don't believe this was an accident," to which Ehrenberg testified that he responded that he <u>did</u> so believe. (12T 114-25 to 115-3) But then, Ehrenberg claimed, defendant said, "No," and put his head down, and "shortly after that" defendant "asked to speak with a priest." (12T 115-13 to

18) This made Ehrenberg "basically stop[]" any further conversation, and, just thereafter, two Bergen County detectives walked into the room and, according to Ehrenberg, the "conversation basically stopped" at that point. (12T 116-7 to 15) Ehrenberg testified that he immediately reported this conversation to Bergen County detectives and their response was allegedly that they had already interviewed defendant and "were done at that point." (12T 117-13 to 17; 12T 134-1 to 9) Ehrenberg claimed that he then followed up with a phone call to the Bergen County Prosecutor's office and repeated the details of the conversation that he claimed to have had with defendant. (12T 118-3 to 18)

Ehrenberg stated on cross-examination that he specifically recalls defendant being "upset" when speaking about having to raise a son alone. (12T 128-3 to 25) He also said that he made no attempt to clarify defendant's seemingly cryptic "No" response because Ehrenberg was there only to "babysit[]" defendant during the search, and did not "think that this ["No"] was ever going to be stated." (12T 133-2 to 16)However, he admitted that if this were his case, he "absolutely" would have questioned defendant further to clarify what he meant by "No." (12T 136-10 to 15)

Sergeant Gundersdorf also testified to that same conversation between defendant and Ehrenberg, but he recalled defendant saying, "This was no accident," not merely the one-word

response ("No") to which Ehrenberg had testified. (12T 148-9 to 10) But then it was pointed out through cross-examination that the stenographer who took down Gundersdorf's 2003 recitation of his account of that kitchen-table conversation, wrote out defendant's remark as a question -- "It was no accident?" -- not a declarative statement, and that Gundersdorf reviewed that transcription and deemed it to have been accurate at the time. (12T 164-1 to 25)However, then on redirect the prosecution made it clear that a few lines up from the "question" version of the remark was a version of it that just contained a period for punctuation, not a question mark. (12T 165-4 to 10) Gundersdorf admitted, like Ehrenberg, that if it had been his investigation, he would have clarified the defendant's remark, and he further admitted that it was an "error" not to have done so. (12T 167-23 to 168-7) Gundersdorf also claimed to have written a full report in 1992, but cannot locate it now. (12T 149-18 to 22) In 2003, Gundersdorf described defendant as "upset" during the conversation, but not crying, whereas at trial he claimed defendant was merely "kind of out of it," not "overly" upset. (12T 162-12 to 163-6)

Police Officer Michael Cioffi testified that he arrived at the scene at 8:22 p.m. and led the two-man rappel team down the cliffs that night at 8:50 p.m. looking for Jody Scharf. (14T 97-16 to 98-25) On a ledge ten feet down from the rock shelf, he

found her pocketbook, credit cards, laminated I.D. and "a piece of makeup." (14T 26-19 to 25) It was dark at the time, but Cioffi testified that he saw no "indicia of human contact" on the lower ledge beyond the purse and other items found there. (14T 32-4 to 7)

Cioffi claimed that he and Lt. Pagan made their way down the cliff about "a foot and a half" from one another as they descended. (14T 24-22 to 24) The rappel down was "out of the ordinary" and "difficult" because the trees, bushes and branches on the way down kept them "hung up" as they descended. (14T 40-1 to 4) It took "an inordinate amount of time" to descend, which he originally estimated at 45 minutes. (14T 40-5 to 6; 14T 41-19 to 42-4) However, despite the conditions, Cioffi claimed he was able to note that there was nothing, like debris, clothing or blood, on the way down their route of travel, which allegedly followed a straight path down from where they had been told Jody left the cliff. (14T 40-9 to 12; 14T 49-4 to 6; 14T 72-5 to 73-1; 14T 157-4 to 7) When he reached the bottom of the steep portion of the cliff, he did not see Jody Scharf at first but found her to the north "about 40 feet away laying [sic] between a tree and a rock[,] face down" with "no sign of life." (14T 44-11 to 23; 14T 49-4 to 6) She smelled slightly of alcoholic beverages, he testified. (14T 151-10 to 11) He said her clothing was "intact," but torn, and that there appeared to be an impact point in that

tree about eight feet up, where he saw blood and tissue, but failed to note that fact to anyone until 2003. (14T 45-1 to 46-3; 14T 142-1 to 11; 14T 145-19 to 24) Cioffi admitted that he did no report that night and that his statement to a detective left out "the specifics of everything" that they discussed. (14T 59-20 to 63-25) He also admitted that it was a mistake not to have photographed the items found on the ledge before they were handed up to Officer Abbott. (14T 81-9 to 21)

Cioffi admitted moving the rock that was wedging Jody's body against the tree, but admitted that he never told anyone that and never photographed the rock. (14T 110-22 to 114-24) A later photo of the tree shows no such rock, he admitted. (14T 116-6 to 117-22) He also claimed, despite the fact that Jody suffered a "massive head wound" and her head was touching that rock, that the rock had no blood on it when he moved it. (14T 122-17 to 24) He also admitted that he would have photographed the body before it was moved if the decision were up to him, but no such photo was taken. (14T 127-3 to 23) Indeed, no photos were taken even of the tree that night, despite the fact that Lt. Pagan, who was in charge of the investigation, knew that there was blood in the tree. (14T 141-9 to 23)

Lieutenant Nelson Pagan testified that the foliage on the descent was "very heavy" and he saw no "debris path." (15T 43-6 to 24) He agreed, however, that it would have been hard to

observe much in the way of debris in the trees as they passed by them on the way down. (15T 71-7 to 72-21) He estimated that the trip down a 200-foot rappel normally would take "ten minutes, tops" but took what he initially estimated to be 50 minutes, and later corrected to 33 minutes, because of the foliage. (15T 73-1 to 8; 15T 79-16 to 21) Pagan claimed Jody was found only 30 feet north of their rappelling path. (15T 44-12 to 24; 15T 103-19 to 23) He also testified that when he dispatched officers to the scene, he told them to "locate potential witnesses," but admitted that, when he arrived and saw three cars at the scene, he never reminded officers to speak to witnesses. (15T 62-2 to 64-10) Pagan described defendant at the scene as "dazed, but in control." (15T 66-1)

Pagan admitted that he should have photographed the purse on the ledge before moving it, and that he both missed items that were found the next day, and also could not recall how far from the cliff face the purse was found. (15T 82-19 to 89-23) He also claimed to have "[n]o doubt in my mind" that Jody's head was wedged "tight" between a rock and the tree, but he claimed, unlike Cioffi, that there was blood on the rock before it was moved, but he also said that he, not Cioffi, moved it. (15T 108-10 to 109-18). He also made clear that the so-called "bottom" of the cliff where the body was found is nevertheless a very steep slope where it is difficult to stand. (15T 104-4 to 105-2)

Indeed, there are "many rocks" and "huge boulders" over the 300 feet that lie between where the body was found and the lower roadway that runs near the river, according to Pagan. (15T 114-2 to 19) Pagan further admitted that the first time he was asked to take the medical examiner to the scene to point out the tree and the general area was two years after Jody's death. (15T 122-4 to 9; 15T 126-1 to 11) He does not recall seeing hair on the tree, and, while the report filed that day mentions a blood mark, it says nothing about human tissue in the tree. (15T 120-13 to 14; 15T 127-13 to 19) But he claimed to have actually touched blood and tissue six feet up the tree, yet not taken a photo of it. (15T 115-18 to 24) A surveyor, Renee Rouhart, testified that the vertical distance from the cliff edge, where Jody alleged left the cliff, to the tree where Jody's body was found is 119'2", and the horizontal distance is 52"5". (16T 53-12 to 19)

Jonathan Scharf, son of defendant and Jody, testified that he was born in August 1982, and his recall of what he first called September 19, 1992, but later clarified to be the next day, was that defendant asked Jody if she wanted to go out somewhere and her response was negative: "If I wanted to go out with you, I wouldn't be divorcing you." (7T 95-8 to 96-11) But Jonathan testified that she changed her mind when Jonathan suggested staying at his friend's house, where they (or she, according to a 2008 statement to prosecutors) eventually dropped

him off, whereupon the plan was for her and defendant to go to a comedy club in New York City. (7T 95-12 to 20; 7T 99-5 to 22; 7T 131-5 to 133-10) The night before, the three of them had gone to a late dinner in Hackettstown and, Jonathan testified, he had gone along because his mother had told him she did not want to be alone with defendant. (7T 96-16 to 24)

At the time, Jonathan claimed, his mother and father did not sleep in the same bedroom. (7T 100-14 to 18) And, he claimed, defendant had introduced him to other women that "he was seeing at the time." (7T 100-19 to 24) Jonathan testified that he was unaware of any dating relationships his mother had because she did not discuss those with him. (7T 101-8 to 10) But he admitted telling investigators in 2008: "I feel like they both had, you know, when I say, 'different lives,' they were both fucking seeing other people." (8T 46-9 to 16) Three months prior to her death, Jody told Jonathan that defendant was "hitting her, abusing her and seeing other people. . . [a]nd she couldn't take it anymore" and that that was the reason for the divorce papers that she had filed. (7T 102-11 to 104-18) However, he admitted never telling any of that to prosecutors despite lengthy interviews with them in 1992. (7T 129-7 to 10) Moreover, during those 1992 interviews he said that he had never seen his father strike his mother. (7T 129-15 to 21) Jonathan also admitted that his mother "enjoyed drinking wine and my father didn't condone

it." (7T 143-19 to 20) He could not recall an instance where she "reeked of alcohol," but, he said, "I know she drank." (7T 15 to 18)

Jonathan testified that, after his mother's death, defendant told him "that they were hugging and kissing on a ledge and he got up to get -- get something, wine or -- and blankets, and he turned around and my mother was gone." 7T 107-24 to 108-4) He described it as "unbelievable that my mother would ever go to such a place [i.e., the cliffs], considering she had such a fear of heights," and he related a tale from his childhood of his mother being terrified on a four-foot ladder. (7T 110-1 to 21) However, he admitted that his entire opinion about his mother's fear of heights was based upon that one episode. (8T 24-13 to 23)

Jonathan testified further that in 2003, in Jonathan's junior year in college, defendant told him that he had received a "sum of money" from an insurance policy on Jody. (7T 113-18 to 22) Defendant told him that "the State was basically forcing him to take the payout" and that he had not taken it previously because to do so would make him "look guilty" or look like he had a motive to kill Jody. (7T 113-24 to 114-4) Jonathan admitted however that he did not tell investigators who questioned him for eight hours in 2008 that defendant had made such a statement regarding motive or looking guilty. (7T 114-16 to 115-8)

Jonathan admitted that as detectives questioned him in 2008

when his father was arrested, all five of them told him that they believed defendant pushed Jody from the cliff. (7T 154-5 to 15) They also told him that an accidental-death rider had been purchased by defendant on Jody's life insurance just a few months prior to her death, when in fact it was purchased 16 months before she died. (7T 154-23 to 155-8) Nevertheless, Jonathan first claimed that his testimony, and 2008 statement which followed the detectives' expression of their opinion of defendant's guilt, were the truth, and that he did not really "start telling the truth" until defendant was arrested. (7T 151-19 to 22) Indeed, he admitted lying about multiple topics to investigators in his early (1992) statements to them. (7T 157-1 to 23) But then Jonathan admitted that even after defendant was arrested in 2008, he lied to investigators about at least one topic because he "needed some time to gather my thoughts." (7T 168-1 to 11) He also testified that his father was, in his estimation, "faking" any crying that he did after Jody's death, but he claimed that the reason that he did not say as much to investigators at the time (1992) was because he feared retribution from his father. (7T 146-6 to 150-14)

Jonathan claimed to be unaware that he was the secondary beneficiary on the insurance policy on his mother's life, but he admitted that it is his understanding that if defendant were convicted, Jonathan gets the insurance money. (7T 155-10 to 12;

7T 173-13 to 175-18) Jonathan also admitted, in somewhat tortured fashion that, prior to defendant's arrest, he tried to get defendant to change defendant's will to protect Jonathan's future inheritance from the defendant's then-new wife. (7T 159-4 to 160-25)

Jonathan further admitted that he told investigators in 2008 that his mother might have gone with defendant to the cliffs "to reconcile," and that she "often did what she saw fit." (8T 35-20 to 36-15) He also told them, "If she didn't want to go, she wouldn't have gone." (8T 35-20 to 36-2) Further, when asked to describe any corporal punishment that defendant might have inflicted on him as a child, in order to "explain" his stated fear of retribution in 1992 if he said anything damaging to police, Jonathan described it on cross-examination as being "smacked in the behind." (8T 35-10 to 14) But then he claimed on redirect that he was "in constant fear of getting yelled at or beat for, you know, just annoying [defendant] for the simplest things," and that he was sometimes hit with "objects" but that "it doesn't speak to what my mother had to go through with my father." (8T 49-9 to 24) He then claimed that he lied when he told police in 1992 that he had never seen his father hit his mother. (8T 58-1 to 10)

Jonathan also claimed to have written a 2011 "series of amendments" to his 2008 statement, intended to correct "40 or

more" alleged misstatements that he made in that 2008 interview, including numerous instances where, in the 2011 version, he claimed his father struck his mother when Jonathan was a child. (8T 67-3 to 75-22) He claimed that he "made a conscious decision to lie" to investigators even in 2008. (8T 83-10 to 14) Jonathan also admitted that, independent of the death of his mother, he "personally ha[s] certain issues with" defendant for what he called "how I was raised and whatnot." (8T 78-15 to 22)

The State also called two women that defendant dated during his marriage, Theresa Schofield and Kathleen Scanlon. Schofield described a relationship that began in 1989, with defendant claiming he was widowed, his wife having died in a car crash around 1979, and that his son was from another relationship. (8T 99-3 to 20) She described the relationship as a good one into 1992, when defendant was staying with her up to three days a week, and began to speak of marrying her, but that conversation fell "by the wayside" over concerns that one of them would have to move, and they both had children. (8T 104-20 to 105-25)

Schofield described, in detail, a rocky Labor Day weekend that they had in 1992, in which defendant arrived very late to meet her at a vacation condo and then told her that he was in a custody fight with Jonathan's mother and that he was under a lot of stress as a result. (8T 106-1 to 109-18) She claimed that when she tried to break up with him, defendant said, "Just give me to

the end of September and everything will be okay, the stress will be -- a lot of the stress will be gone." (8T 109-19 to 24) He repeated that remark to her that Tuesday, she claimed. (8T 113-9 to 15) Eventually, she testified, the next day she told him to "go do what you have to do and whatever. I'll talk to you whenever." (8T 113-23 to 114-13) Defendant sent her flowers the day after that, and, she claims, never suggested that he wanted to end their relationship. (8T 114-9 to 16)

Then, Schofield testified, she learned about Jody Scharf's death when her father read about it in the newspaper and asked her if she knew defendant was married, which she claimed she did not. (8T 115-12 to 25) When she spoke to defendant on the phone to confront him, she claimed, he hung up on her. (8T 119-7 to 9) She next saw defendant about six months later and, while at his house, she went "snooping" and found recent notes and cards from other women, which caused her to never see him thereafter. (8T 119-18 to 121-8) Schofield admitted that while she believes that she told state investigators in both 1992 and 2009 that she told defendant on September 8, 1992, the day after Labor Day, that she did not want to see him any longer, neither statement reflects that. (8T 140-5 to 22)

Scanlon told a somewhat different story. She met defendant in 1990, after responding to his personal ad, and, when they began dating in July of that year, he initially told her he was

divorced, with a son, but then, by August, he told her that he was married, but in a non-intimate relationship in which the couple had separate bedrooms. (8T 155-13 to 158-18) Defendant told her that "[t]hey sort of lived separate lives, outside of the marriage," Scanlon testified. (8T 158-18 to 20) Defendant also told her "that he was definitely planning on getting a divorce." (8T 158-23 to 24) In fact, during that time in 1990, Scanlon even got a phone call from defendant in which he put his wife Jody on the phone and Jody told Scanlon that, in fact, yes they were "no longer in a marriage and that they were going to file for divorce." (8T 159-12 to 22) Jody even told her that defendant "must care about you very deeply in order to ask for me to get on the phone like this," and Jody told her that her only concern was the safety of her son. According to Scanlon, Jody wished her luck and "hoped that I would have a better life with him than she did." (8T 160-3 to 10) Scanlon had no doubt that Jody knew defendant was dating other women and that they had an arrangement of some sort in their marriage. (8T 171-19 to 172-6) However, Scanlon, testified, Scanlon nevertheless ended the relationship with defendant Labor Day of 1990 because "the gentleman was married." (8T 160-16 to 25) According to Scanlon, the two remained in phone contact thereafter, however, and, by April 1992 they began to see each other again, with defendant telling her that Jody was going to file for divorce. (8T 162-10

to 164-4) In July 1992, defendant showed her divorce papers. (8T 164-5 to 6) Scanlon testified that she was "falling in love with" defendant at the time and that they were "serious" about their relationship into September of that year. (8T 164-18 to 165-8)

Scanlon testified that the last time she was in defendant's company was September 18, 1992, and that at no time that day did defendant indicate to her a desire to end the relationship with her. (8T 166-13 to 167-6) The next time Scanlon heard from defendant was on September 21, when, she says, he called her to say that Jody was dead, that she had fallen off the cliffs. (8T 168-1 to 21) Specifically, Scanlon testified that defendant told her they had gone to dinner, that Jody had been drinking, and they went to the Palisades, to a spot that they used to go to when they dated, where Jody felt comfortable, "to talk about the divorce settlement." (8T 168-1 to 14) Defendant allegedly told her that they had walked beyond the barrier together, and she fell; "one minute she was there and the next minute she was gone." (8T 168-14 to 21) Cross-examination focused on the wording used by Scanlon to describe defendant's statement to her about Jody's death when she told police about it. Specifically she told them that defendant said he and Jody sat down on a rock, whereupon Jody got up and some point and then "wasn't there." (8T 170-6 to 15) On cross-examination Scanlon also was clear that defendant had told her Jody was dating other men and that there

were messages on her answering machine from those men. (8T 173-1 to 8) She also agreed that in every instance that defendant mentioned a divorce, whether in 1990 or 1992, he never seemed to have a problem with getting divorced. (8T 178-13 to 21)

Scanlon testified further about incidents where defendant appeared to care about Jonathan's welfare, whereas Jody would leave him at home while she was out drinking or dating other men. (8T 177-10 to 178-11) She even said that defendant had told her Jonathan had overheard Jody's answering machine messages from other men. (8T 179-16 to 18) Scanlon testified further that she would hear Jody screaming at defendant while Scanlon and defendant talked on the phone, and that defendant told her Jody was an alcoholic who drank to excess on a daily basis. (8T 179-23 to 180-11) She agreed that defendant was always "romantic, loving [and] thoughtful" with her and when asked in 1992 by an investigator if defendant was capable of hurting Jody, she said, "Absolutely not." (8T 180-12 to 15; 8T 191-12 to 16)

At that point in the trial, the State called, over objection, five witnesses in a row who were allegedly intended to testify about Jody's state of mind before her death. See Point I, infra. Marion Hilferty, a friend of Jody's testified that "Jody was very afraid of her husband. . . who I thought sounded scary," and that Jody gave her a picture of defendant, allegedly so Hilferty would know what he looked like, and Hilferty told the

jury that the photo made defendant "look[] a little scary." (9T 9-16 to 25) Hilferty claimed that Jody talked "[c]onstantly" about being afraid that defendant "was going to really hurt her" and Hilferty advised her to leave him. (9T 11-10 to 18) Hilferty also claimed that while Jody and she frequently drank together, Jody "had a fabulous tolerance" for alcohol. (9T 11-21 to 12-21) Hilferty mostly denied that Jody was involved in relationships with other men, but appeared to acknowledge at least one instance where she met a man at a local hotel when she was there for cocktails. (9T 14-1 to 13) Jody had also laughingly talked with her about using a dating service. (9T 15-1 to 9) However, Hilferty admitted telling a detective in 1992 that Jody was dating two men, and "involved in" a dating service, but claimed at trial that she just meant "looking into." (9T 42-9 to 14; 9T 44-13 to 25)

Hilferty also claimed that, specifically around Labor Day 1992, Jody told Hilferty in a "visibly shaken" manner that she was "very afraid" that "something's going to happen to me" because divorce papers were about to be served on defendant, and Hilferty said that Jody told her, "[I]f something happens to me, you'll know who did it," because defendant "really -- he wants me gone. . . . [I]t's really bad." (9T 16-10 to 22; 9T 66-24) On cross-examination, Hilferty admitted that Jody discussed divorce with her for "a number of years" before actually filing a divorce

complaint in September 1992. (9T 18-10 to 17) She also admitted that she told a detective in 1992 that defendant had not actually threatened Jody, but that Jody nevertheless "felt threatened by his behavior toward her. She was afraid of him." (9T 32-16 to 33-3) Further, Jody had not told Hilferty when she expressed fear of defendant in September 1992 that defendant had actually seen the divorce papers months earlier. (9T 33-14 to 33-17) Hilferty's statement to detectives in 1992 also states that Jody had been alleged by an unknown female caller to her house to be "an unfit mother" and that Jody "had a drinking problem," both statements that Hilferty denied making at trial. (9T 23-17 to 31-21) Hilferty admitted, however, that, at Jody's wake, she saw no scratches or marks on defendant. (9T 49-20 to 50-4)

Patricia Teague was a therapist that counseled Jody Scharf. She was licensed only in New York at the time, yet saw Jody weekly in New Jersey beginning in July 1990, claiming that her New York license allowed her to do that, despite the fact that she later, in 1994, got a New Jersey license. (9T 76-2 to 77-7; 9T 83-5 to 86-1; 9T 81-16) She claimed to be treating Jody for "serious depression." (9T 77-12) Their sessions allegedly addressed "Jody Ann's feelings of abuse, mental, physical abuse which led to her feelings of serious depression," according to Teague. (9T 80-1 to 4) Teague testified that Jody told her the following: that defendant "made her feel worthless"; was "known

to hit her"; "could be very punitive"; that she was "very very fearful of him" and that she was "fearful of not doing whatever he wanted her to do." (9T 80-12 to 15) Jody also told her, she said, that defendant engaged in extramarital affairs, had a private phone to take calls from other women, "didn't make any secret about it" and had nude photos of women he had been with. (9T 80-16 to 81-5) Teague also testified that in August 1992, about a month before Jody's death, Jody told her that defendant had "come home and told her that he had climbed to the Palisades and overloooked a beautiful view and he would like to take her there. That she could pack a picnic basket and that they could enjoy a picnic on the cliffs overlooking the view." (9T 82-1 to 16) Jody also told her that she told defendant that he "was crazy" and that she would not go to the cliffs. (9T 82-19 to 22) Teague claimed, as part of the State's case, to "vividly" remember that conversation about the Palisades. (9T 118-2 to 7) Teague also claimed that Jody never discussed reconciling with defendant. (9T 82-23 to 25) Teague was difficult to cross-examine on her alleged treatment of Jody because she had destroyed all of her treatment notes. (9T 96-11 to 99-11)

Maureen Glennon, another friend of Jody's, testified that she worked at Schooley's Mountain Inn, where Jody would stop by, sometimes with her son, for food or drink. (9T 121-2 to 122-15) The day prior to Jody's death, Glennon testified, Jody stopped by

the restaurant in the late afternoon, and "seemed a little upset." (9T 123-19 to 124-3) But Glennon was very busy at the time, so Jody passed her a note that said that: defendant had been served with divorce papers; he was unhappy about it; she was "kind of afraid"; she "just wanted him out of the house" and that Glennon should call her later. (9T 124-4 to 18) Glennon threw the note away at the end of her shift. (9T 124-21 to 22) Glennon admitted on cross-examination that Jody never said defendant hit or verbally abused her. (9T 129-9 to 132-24) She also told detectives that Jody's alcohol consumption was "above average." (9T 137-15 to 21) Glennon testified that Jody had expressed a desire to start dating again, and that Glennon saw no scratches or marks on defendant at the wake when she spoke to him. (9T 138-20 to 139-21)

Maureen Durante worked at the same restaurant as Glennon and was also a friend of Jody's. (9T 144-3 to 17) She claimed to have a conversation with Jody at the restaurant on September 19, 1992, in which Jody told her: she had filed for divorce; defendant had "threatened her life"; he had "refused to sign" the divorce papers and said he would "see her dead before he'd let her -- before he would sign them"; there was a life insurance policy on her "that was signed and not by herself"; and that she feared for her life but stayed in the home "because her boy was at home." (9T 145-15 to 146-3) On cross-examination, Durante admitted that

Jody may not have referenced the life-insurance policy that day after all, and that Durante did not tell prosecutors about that aspect of the conversation. (9T 147-2 to 5) Finally, Durante claimed that she saw scratches on defendant's face at the wake, and what appeared to be an attempt to cover them with some sort of makeup, but she did not know that police had examined defendant and found no such marks on him. (9T 152-1 to 157-12)

Anna Rolfson Muller, another friend of Jody's, testified that, she was a bartender at a bar that Jody and a friend would frequent two or three times a week for lunch. (9T 156-3 to 21) Muller claimed that, only two days before Jody's death, Jody told her that she was scared and "afraid [defendant] was going to kill her because of the divorce." (9T 158-19 to 22) Further, Muller claimed, Jody had previously told her: defendant was "very abusive"; there were "different women calling on the answering machine; he "came and go [sic] as he pleased"; Jody "was scared of him," and she "didn't want to be in the marriage actually." (9T 157-10 to 15) Muller also testified that Jody also told her that she was filing for divorce and she showed Muller defendant's photo because, she said, she was so scared of him that she wanted Muller to call her if he ever came to the bar looking for her. (9T 157-20 to 25) On redirect, she repeated that on September 18, 1992, Jody told her she was afraid defendant would kill her "[b]ecause of the divorce. . . and him being so abusive before

that. She was scared." (9T 164-21 to 165-1)

John McCauliffe, Jody's brother, testified that he lived in California, and last spoke to his sister on the phone about a week to ten days before she died. (16T 23-18 to 19) She told him about the pending divorce and that she had met a guy she wanted to have McCauliffe meet. (16T 24-15 to 20) She did not discuss a possible reconciliation with defendant, he testified. (16T 24-24 to 25) McCauliffe claimed first that he learned of Jody's death when defendant called him and told that Jody "committed suicide." (16T 25-7 to 12) But both the prosecutor and defense counsel claimed to be surprised at that testimony; the prosecutor said he thought the content of that call was that Jody had "slipped and fell." (16T 25-16 to 26-5) Further direct examination then brought out that McCauliffe had told police at the time that defendant had told him that he and Jody had "stopped at the cliffs," which McCauliffe claimed to never have heard of before, and that "they were having drinks" and "Jody slipped," not that she committed suicide. (16T 30-2 to 18)

McCauliffe claimed that Jody was afraid of heights her entire life, but he also claimed she was afraid to fly, yet flew a number of times to visit him and elsewhere. (16T 20-15 to 16; 16T 31-1 to 22) McCauliffe denied alleged statements of his from the police report at the time, which said that he had not spoken to his sister for three years before the incident, and that she

drank wine in the morning and throughout the day. (16T 33-7 to 35-13) He also denied telling Jody's divorce lawyer that he and Jody had a falling out years earlier over her drinking. (16T 34-16 to 20) McCauliffe admitted that neither the prosecutor's investigator's report nor the report of the insurance investigator refers to him having had a conversation with Jody shortly before she died. (16T 36-11 to 17) Further, he did not recall telling the insurance investigator that Jody was contemplating divorce as early as 1989, but that is reflected in that person's report. (16T 37-4 to 18) None of the reports filed by anyone refer to him having said that defendant called the death a "suicide," but McCauliffe claimed he told a prosecutor's representative of that statement. (16T 43-19 to 44-7) But then he admitted that he "may not have used the word 'suicide,'" but still insisted that defendant used that word. (16T 44-23 to 24)

Benjamin Michel, Jody's divorce attorney, testified that Jody first consulted with him in March 1991. (10T 7-1 to 2) He claimed to be "not entirely clear" when the divorce complaint was filed, but he said that Jody signed it in July 1992, and it was served on defendant in "the first week or so of September" of that year. (10T 13-25 to 15-21) But, he also testified, as far back as February 1992, defendant would have known about the pending divorce because Michel's firm sent him a letter about it. (10T 23-18 to 24) Defendant was also mailed a copy of the

complaint in July 1992, long before "service" of it. (10T 24-12)

David Danchak, from USAA Life Insurance Company, testified that defendant was the owner of a policy on Jody's life and that he was the primary beneficiary, while Jonathan was the secondary beneficiary. (15T 9-1 to 7) The first contact made by defendant regarding the purchase of that policy was in February 1991, and his application was received in April 1991. (15T 9-8 to 10-1) The policy was for $300,000 with $200,000 additional accidental-death coverage. (15T 10-5 to 7) Jody took a physical exam on May 23, 1991, for the policy. (15T 11-11 to 14) Defendant also had two other policies on his own life through USAA, with Jody as the beneficiary. (15T 19-16 to 20) Claim forms were sent to defendant four times after the company learned of Jody's death, but none were returned. (15T 14-4 to 15-2) (16T 8-4 to 9; 15T 16-17 to 17-4) Danchak testified that there is an exception in the policy for murder, which would deny defendant the benefits if the company believed that to be the case, but after "extensive" discussions with the prosecutor, in 2000 USAA paid the claim to the New Jersey unclaimed-property fund. ((16T 8-4 to 9; 15T 16-17 to 17-4); 15T 13-6 to 9; 15T 20-23 to 22-10) The unclaimed-property fund sent defendant a claim package on September 13, 2002, and he returned the completed form on April 16, 2003, resulting in a payment of $770,650.83, including interest. (16T 10-5 to 11-20)

The State used three witnesses -- two experts and the

medical examiner -- to attempt to bolster its theory that Jody Scharf could not have died as she did without being propelled from the cliff, rather than simply falling. John Wright, an expert in crime-scene reconstruction, presented testimony regarding a 1995 "experiment" that the State conducted at the cliff involving hurling various bodyweight sandbags off the cliff. (16T 66-17 to 67-6) The details of those throws are fairly confusing and go on for quite a while in the transcript (16T 66-17 to 82-3) but they were intended to demonstrate that even the "big, strong guy" -- strapped into a harness and "tied off," so he would not fall off the cliff -- that Wright used could not propel the sandbags as far as Jody's body traveled. (16T 66-17 to 82-3; 16T 94-1 to 106-21) Additionally, at least three of the bags fell well short of where Jody's body was, and the fourth appears to be unaccounted-for in the testimony, although it is mentioned by the State in summation as also falling short of the tree. (16T 66-17 to 82-316T 96-14 to 109-8; 20T 122-6 to 15)) Whether that all actually helped to prove the State's theory seems questionable, more so when Wright admitted the following: he could have used bodyweight human-dummy bags, rather than sandbags, but they are "expensive" (16T 82-16 to 83-12); bodies and sandbags do not travel or bounce the same way when they strike something (16T 84-10 to 24); he was told by someone that there was no evidence that the body had hit the cliff face, when,

in fact, there were "parallel linear abrasions" on the body indicating the body hit a hard object and was "scraping along" it. (16T 87-1 to 89-14)

Dr. Maryann Clayton, the medical examiner, testified that she declared Jody Scharf dead on the night of the incident, via a phone call -- she was not at the scene -- at 11:40 p.m. (17T 9-5 to 9) The parties stipulated no foreign tissue was found in fingernail scrapings taken from Jody. (17T 3-13 to 18) Otherwise, Clayton recounted Jody's injuries: a laceration to the scalp serious enough to cause an "avulsion," a tearing away of the scalp from the head (17T 19-15 to 20-8); a "very complex pattern" of fracture to the top of the skull, exposing brain tissue (17T 20-16 to 25); scrapes on the face, broken right orbital bone, torn right eyeball, broken nose and cheekbones (17T 21-1 to 22); a "fairly large laceration" also described as a "big gaping opening" on the chest wall, about nine inches long and four inches wide from the right armpit to the left breast (17T 22-1 to 8); bruised lungs and a torn aorta (17T 25-3 to 21); a dislocated right shoulder (17T 22-25 to 23-3); fractures on every rib, the sternum and both collarbones and a torn pericardial sac as well as lacerations on the inner surface of the heart (17T 24-4 to 25); superficial lacerations of the liver and spleen (17T 25-1 to 5); more skull fractures at the base of the skull (17T 27-7 to 12); a fracture in the mid-spine (17T 28-1 to 4); "other scrapes

on the torso" and "bruises on her lower legs and on her hand." (17T 22-14 to 24) None of those injuries is consistent with a hammer strike, Clayton testified. (17T 103-2 to 4) The cause of death was listed as "multiple fractures and injuries," but, in 1992, Clayton was uncertain as to the "manner of death," listing it as "pending investigation," and then amending it in 1993 to: "could not be determined." (17T 33-20 to 34-13; 17T 45-20 to 24) Jody's blood-alcohol content was 0.120% in the blood and 0.121% in her brain tissue -- in other words, intoxicated, at a level 150% of the current 0.08% legal limit to drive a car. (17T 43-23 to 24) Her stomach content tested even higher -- 0.384% alcohol. (17T 44-2 to 3)

In 2004, the prosecutor's office announced that it was reevaluating the case. (17T 47-1 to 6) In 2005, Clayton reviewed the autopsy report with the other expert, Dr. Michael Baden. (17T 48-14 to 21). In 2006, Clayton went to the scene for the first time ever and discovered that the cliff-face was much more "three-dimensional" (i.e., sloped, "irregular" and rutted with "[m]any crevices and channels in the rock formation") than she had thought. (17T 50-7 to 25; 17T 55-22 to 56-4) Eventually, despite scratches on Jody's body and tears in her clothing -- some of which have "green vegetation marks" in them -- that seem to indicate additional contact with the cliff face or with other trees, and despite a failure to document via photo (or other

means) either any of those tears or the position of the body when it was found, Clayton nevertheless ultimately changed the manner of death to "homicide" in 2007 because, she concluded, all of Jody's injuries, except a few scrapes and bruises, were caused by a single, massive impact with the tree where she was found, not by ever impacting the cliff face. (17T 58-4 to 60-18; 17T 87-10 to 93-25) Clayton seems to have contrasted that pushed/single-impact theory with a competing theory that she described as involving "passively roll[ing] down the cliffs," but, of course the more middle ground of a passive initial fall and then subsequent hard impacts -- with the 119-foot-tall sloping, deeply foliated and rutted cliff face -- that were not mere "rolling", seems not to have entered her thought processes in making the evaluation. (17T 60-15 to 22) She concluded there "had to have been a propulsive force" that sent Jody off the cliff, never striking the cliff face. (17T 61-5 to 62-13; 17T 110-23 to 111-2)

Cross-examination was probing and telling. Clayton admitted that she failed testing to become board-certified in anatomic pathology" three separate times. (17T 65-16 to 25) She further admitted never measuring the angle from the flat rock down to the ledge below to see if that were consistent with a passive fall. (17T 97-19 to 22) She did not take a sample of the "thick" and "heavily" rutted bark on the alleged impact tree to see if the rutted area had actually left an imprint on Jody's skin, which

she agreed it might have done. (17T 100-9 to 101-2) Yet she assumed that bark was responsible for the linear vertical abrasion patterns on Jody's skin without doing such a test. (17T 101-5 to 102-16) She also disagreed, somehow, with the notion that the striking the heavy foliation on the way down could have contributed to the direction of the fall and the propelling force down the cliff. (17T 111-3 to 7) She disagreed with the same notion with regard to the cliff face itself -- actually disputing the fairly obvious notion that a bounce off the cliff face could have propelled the body away from it. (17T 138-7 to 11) Clayton also never calculated at what rate of speed the body would have stuck the tree under her theory. (17T 111-18 to 25) And she admitted that despite the alleged speed of the impact, the fracture on top of the skull is not depressed and there was no hemorrhaging found in the soft tissue under the scalp on the surface of the skull. (17T 17T 116-6 to 118-25) She also conceded what seems to be obvious -- that because the victim was not found with shoes, her choice of footwear that night could have made her fall. (17T 124-23 to 125-11) Finally, Clayton agreed that there was "virtually nothing" in the facts of the case that was not available to her in 1992; she was just "more experienced, she claimed, and "approached the case from a different perspective" when she finally developed her theory. (17T 134-16 to 25)

Dr. Michael Baden, a forensic expert from the O.J. Simpson

murder case, testified for the State that he agreed with all of Clayton's eventual conclusions. (17T 148-17 to 20) Like Clayton, he seems to have been considering the alternative to a propelled push off the cliff to have been a straw man of the other extreme, i.e., a fall and mere "roll" down the cliff -- which he then rejected because of the very rock outcroppings and heavy foliation that in fact supported the middle-ground, unconsidered theory of a fall and repeated bounce. (17T 156-13 to 20) His emphasis on the lack of a "clear path" for a "roll" merely begs the question regarding a fall and bounce. (17T 157-21 to 25) He even offered the possibility that Jody was knocked unconscious before being launched off the cliff because there was allegedly no scream heard, but that theory ignored the lack of evidence of any type of other blows to her body. (17T 160-4to 22) He also admitted that if the first fall were from cliff to the first ledge, Jody may have been knocked out by that, and thus failed to scream. ((17T 166-1 to 167-4) Such a fall could also explain the purse and other items found on that ledge. (17T 173-14 to 22)

Baden offered the same opinion at first as Clayton that striking the cliff on the way down could not propel the body outward, but then admitted that it could have. (17T 163-22 to 164-14) He also admitted that "there were a lot of trees in the way from the top to the bottom," that there are "endless variations with regards to what may have affected the body and

how it may have been propelled out further," and that if the body hit branches on the way down, it could have been propelled out further. (17T 181-13 to 17) Like Clayton, Baden believed all the "significant injuries" were cause by a single impact with the tree where the body was found. (16T 165-7 to 12)

Dr. Baden also claimed that the simple physics calculation of what speed a body would hit the tree at from that height was "above my pay grade." (17T 170-11 to 12) Further dismissing basic physics concerns, he said, "I am not basing my opinion on calculations," so he did not know what sort of force would be required to propel a body 50-some feet out from a cliff in one movement with no contact with the cliff face. (17T 177-5 to 10) Indeed, in the area of physics, he and defense counsel then both mistakenly "agreed" that "when a body is moving downward it goes 32 feet per second," as if that is its speed, when, in fact, one learns in first-year high-school physics that the "32" figure in regard to falling objects is that gravity causes an increase in speed of 32 feet per second per second -- i.e., every second an object falls it picks up 32 feet per second of velocity to terminal velocity -- which represents the level of acceleration of a falling body, not its mere speed. (17T 181-4 to 7) Baden further acknowledged: that a 0.12% BAC would "have impaired someone's balance," and could have impaired Jody's ability to assess the threat that the cliff edge presented (17T 177-22 to

25; 17T 182-16 to 20); that falling 119 feet, rather than being pushed, could have caused these injuries (17T 179-13 to 20), and that everything he reviewed "existed from the original investigation back in the early 1990s." (17T 181-20 to 24)

The defense presented three witnesses. First, Investigator Robert Hernest, of the prosecutor's office, testified that during the house search defendant actually pointed out the drawer that he had fixed with the hammer, but that no one seized the drawer as evidence. (18T 9-24 to 10-13) Stephen Schorr, an expert in civil engineering, took laser measurements of the cliff face, made, in part, by hiking the 300 feet above the lower road up to the tree where the body was found. (18T 26-8 to 29-15) a spot six feet up that tree is 51 feet out from the top of the cliff face and 126 vertical feet down, but, because the figures were close, for ease of discussion he used the measurements supplied by the State in his testimony. (18T 37-9 to 40-19) However, he noted that it is 13 feet down to that first ledge from the top, not a smaller distance. (18T 38-15 to 17) He noted that the speed necessary to propel a 167-pound person 50-some feet from the cliff would be 13 mph, and, for reference, he noted that the fastest human being in the world can sprint at only 22 miles per hour. (18T 42-1 to 23) He concluded that from "an engineering standpoint I can't figure out any manner. . . that a body can get accelerated to 13 miles per hour and be projected out there

unimpeded [which was the State's theory] to hit that tree. . . . I can't come up with anything," even if the person were pushed or the body thrown from the cliff. (18T 42-24 to 43-17) Indeed, he cited the videos of Wright's sandbag tosses as demonstrating that none of those bags went out to the tree even when swung around before they were thrown. (18T 43-15 to 24) And, he noted, that thrower was harnessed in. (18T 44-1 to 7) On the other hand, he testified, the body could get out that far simply by hitting trees, ledges or rocks on the way down. (18T 44-15 to 45-1) Indeed, a State's engineer concluded the same thing in 1993, he noted. (18T 45-6 to 25) "[A]nything she strikes [on the way down] has the opportunity to change her direction and push her further away from the cliff." (18T 49-21 to 23)

Dr. Cyril Wecht, a renowned forensic pathologist, testified for the defense that he disagreed with the notion that a single impact with the tree where the body was found was the source of the victim's significant injuries. (19T 18-10 to 14) In fact, he noted the location of the purse on the ledge seemed to point to the ledge as a likely point of impact to catapult the body outward. (19T 19-20 to 20-10) Then, further down, past that ledge, Wecht found rocks, one of which in particular, seemed to be at the perfect angle and dimension to cause Jody's gaping chest wound and catapult her body out further from the cliff face. (19T 20-11 to 26-13; 19T 50-1 to 17) Moreover, in his

opinion, Jody had "sliding" wounds to her face and legs consistent with multiple impacts on other rocks on the way down. (19T 29-6 to 31-15; 19T 37-22 to 43-17) Moreover, the bark of the tree where she was found would have caused horizontal abrasions to her face, not vertical ones, he noted, and if her body had hit the tree in the manner, and with the impact, alleged by the State, her breasts would have been injured with contusions, he opined, and they were not. (19T 33-10 to 34-18) Additionally, had the head hit the tree the way the State alleged -- in a single fall from the top -- the head injuries would have been much more severe, and her dura mater, the membrane covering the brain, would not have been intact as it was, Wecht testified; "it would burst open." (19T 44-14 to 45-23) The skull also would have had a depressed fracture on the top, and it did not. (19T 46-21 to 24) Additionally, the injuries to Jody's aorta, liver and spleen had to have occurred after some of the other injuries, not simultaneously with them, or else there would have been more blood than there was in her chest cavity. (19T 48-11 to 49-22) She was "already in the process of dying" when those injuries occurred. (19T 48-11 to 49-11) He believes those later injuries occurred when she hit the tree where she was found. (19T 14 to 25) Wecht sharply criticized Dr. Clayton for not preserving Jody's clothing for later examination. (19T 35-10 to 20) He also joked: "I would like to know what 600-pound sumo wrestler was

able to lift a 167-pound woman and hurl her out so that she lands 53 feet away." (19T 88-10 to 15) The death was, in his opinion, accidental, involving three or four separate general areas of impact on the way down -- possibly the lower ledge, then two area of the rocks below that and only then the tree where the body was found. (19T 88-10 to 90-11) Each of the earlier impacts forced the body out from the cliff face via a catapulting motion. (19T 51-12 to 15; 19T 88-10 to 90-11) He also agreed that tree branches, if large, also could have also contributed to pushing the body out from the cliff face. (19T 50-19 to 51-7) Wecht further admitted that his theory could be correct whether or not Jody fell or was pushed, but he noted that "to move from accident to homicide," as a pathologist, one has "to have something that takes me there," "something of a definitive nature that points to homicide," not just "a quantum leap". (19T 55-8 to 56-23; 19T 58-2 to 59-4)

LEGAL ARGUMENT

POINT I

DAMAGING HEARSAY STATEMENTS BY THE DECEDENT WERE IMPROPERLY ADMITTED INTO EVIDENCE OVER OBJECTION. THE DECEDENT'S STATEMENTS INDICATING FEAR OF DEFENDANT WERE PLAINLY INADMISSIBLE UNDER THE "STATE OF MIND" HEARSAY EXCEPTION; OTHERS OF HER STATEMENTS WERE SIMPLY HER INADMISSIBLE HEARSAY RECITATIONS OF DEFENDANT'S CONDUCT OR STATEMENTS; FINALLY, HER STATEMENTS TO HER THERAPIST WERE INADMISSIBLE UNDER THE "MEDICAL TREATMENT" HEARSAY EXCEPTION.

As noted in the Statement of Facts, the State called five

witnesses -- Marion Hilferty, Maureen Glennon, Maureen Durante Anna Muller and Patricia Teague -- each of whom testified in detail to hearsay statements of the decedent, Jody Scharf, that indicated Jody's fear of defendant, in some cases her belief that he would kill or harm her over their divorce, and also detailed Jody's version of defendant's conduct or statements of defendant. Prior to trial, the parties litigated the admissibility of this evidence in great detail (4T 150-13 to 189-4), and Judge Roma issued a written opinion (Da 8 to 14) admitting the evidence over the defense objections. Defendant urges that in each and every instance with respect to these witnesses, Judge Roma was wrong to admit this evidence. Damaging hearsay was admitted, contrary to the court rules, and then used by the State to sway the jury to its theory of the case. In addition to the clear violation of multiple evidence rules, defendant's rights to due-process and to confront[2] the witnesses against him, as set forth in the Sixth and Fourteenth Amendments, and the state constitution, were violated.

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[2] Defendant does not present an independent analysis, ala Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), or State ex rel. J.A., 195 N.J. 324 (2008), of a Confrontation Clause violation because it is fairly clear that if a declarant's non-testimonial statements are admissible under the hearsay rules they also will be deemed admissible under the Confrontation Clause and vice versa. See United States v. Hargrove, 508 F.3d 445, 448-449 (7th Cir. 2007); United States v. Inadi, 475 U.S. 387, 396, 106 S.Ct. 1121, 1126 (1986). The analysis of a violation of the hearsay rules in this case is at least as broad, if not broader, than any analysis of a violation of the state or federal constitutional right to confrontation, and, thus, no independent constitutional analysis is presented.

Consequently, defendant's murder conviction should be reversed and the matter remanded for retrial.

The testimony of those witnesses is recited in detail in the Statement of Facts, supra. But, in its most basic form it was: first, a repeated recitation by all five women of statements that Jody made indicating her fear of the defendant[3], and secondly, from all five women, Jody's hearsay accounts of defendant's abusive conduct or of his alleged statements of an intent to harm her[4]. Judge Roma admitted them into evidence for two separate reasons. With respect to all five witnesses, he ruled that there

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[3] Hilferty: "Jody was very afraid of defendant" and talked "[c]onstantly" about her fear that defendant "was really going to hurt her (9T 9-16 to 25; 9T 11-10 to 18); Jody told her she was "very afraid" of defendant and said that "if something happens to me, you'll know who did it." (9T 16-10 to 22; 9T 66-24) Teague: Jody "felt worthless" because of defendant; and was "very very fearful of him" and "fearful of not doing whatever he wanted her to do." (9T 80-12 to 15) Glennon: Jody was "kind of afraid" of defendant. (9T 124-4 to 18) Durante: Jody "feared for her life" because of defendant. (9T 145-15 to 146-3); Muller: Jody was "scared of him" (9T 157-10 to 15) and "afraid [defendant] was going to kill her because of the divorce" (9T 158-19 to 22; 9T 164-21 to 165-1); Jody was so afraid of defendant that she wanted Muller to call her if defendant ever came to the bar looking for her, and she gave Muller and Hilferty photos of him to allow for easy identification. (5T 157-20 to 25; 9T 9-16 to 25) Hilferty even threw in her own assessment that the photo made defendant "look[] a little scary." (9T 9-16 to 25)

[4] Hilferty: In the context of the "fear for her life" statement, Jody told her that defendant "really -- he wants me gone. . . . [I]t's really bad." (9T 16-10 to 22; 9T 66-24) Teague: Jody said: defendant "hit" her, "could be very punitive," and told her he planned to take her to the Palisades. (9T 80-12 to 15; 82-1 to 16) Glennon: Jody told her defendant was unhappy about the divorce. (9T 124-4 to 18) Durante: Jody told her that defendant; "had threatened her life," had "refused to sign" divorce papers, and had said he would "see her dead" before they were divorced. (9T 145-15 to 146-3) Muller: Jody told her that defendant was "very abusive." (9T 157-10 to 15)

is a broad exception -- any case involving a defense of "accident" -- to the rule that the decedent's statements of fear of the defendant are usually inadmissible under the "state of mind" hearsay exception, N.J.R.E. 803(c)(3). (Da 10) He then also admitted the statements to Teague, Jody's therapist, even more broadly -- as statements made in order to get medical treatment, under N.J.R.E. 803(c)(4). (Da 12 to 14) The judge never specifically ruled how any of Jody's statements that did not express her state of mind, but rather recited tales of defendant's conduct or statements, were admissible. He simply let them all into evidence under the state-of-mind ruling or the medical-treatment ruling, depending on the witness. (Da 6 to 14)

The state-of-mind hearsay exception in N.J.R.E. 803(c)(3) -- the one urged by the State as the primary basis for admitting all of Jody's statements -- permits the admission, if relevant, of a "statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." (Emphasis added). The State sought, and the judge issued, a ruling that Jody's statements were admissible as expressions of her state of mind -- fear of the defendant killing or harming her -- and that her state of mind was relevant to the case. But that ruling was in

clear contravention of New Jersey law.

Hearsay declarations of an alleged victim's fear of a defendant are generally not admissible because, very simply, the decedent's fear -- or often her state of mind of any sort -- is not relevant to prove any matter at issue in a homicide trial, where the principal question is whether the defendant killed with the requisite state of mind; the decedent's state of mind is irrelevant to that inquiry, yet highly prejudicial if it raises in the jurors' minds the specter of a frightening defendant worthy of the decedent's fear. See State v. Machado, 111 N.J. 480, 489 (1988); State v. Benedetto, 120 N.J. 250, 260-261 (1990); State v. Downey, 206 N.J. Super. 382, 391 (App. Div. 1986); State v. Prudden, 212 N.J. Super. 608, 613 (App. Div. 1986). Indeed, the first question in any case involving N.J.R.E. 803(c)(3) is whether the state of mind of the declarant is even probative of an issue in the case. State v. McLaughlin, 205 N.J. 185, 198-212 (2011); State v. Calleia, 206 N.J. 296-297 (2011).

Thus, New Jersey criminal-law decisions in applying this hearsay exception to a statement by a non-defendant are fairly predictable. None of the decedents' statements of fear of the defendants in Benedetto, Downey, Prudden or Machado were deemed relevant to the issues in those cases, and hence those statements were deemed inadmissible hearsay. Similarly, in McLaughlin, when a declarant coconspirator told his girlfriend that he and

defendant were planning a robbery, that hearsay statement was deemed inadmissible because the declarant was not on trial; the defendant was, and the declarant's state of mind could not be imputed to the defendant. 205 N.J. at 198-212. In contrast, in Calleia the Court held the victim's hearsay statement regarding her intent to file for divorce to be admissible -- because her intent/state of mind in that regard demonstrated her likely future conduct, i.e., that she would file for divorce, which, if known to the defendant (and there was proof that he knew) would provide the defendant with a motive to murder her. 206 N.J. at 296-297. In Calleia, the proffered evidence of someone else's intent truly shed light the defendant's motive -- because the declarant's intent provided defendant a motive for murder. Id.

The ruling here -- that somehow there is a broad New Jersey state-of-mind hearsay exception admitting a decedent's statement of fear whenever "accident" is claimed as a defense [5]-- is simply

[5] Judge Roma seems to have gotten that notion from dicta in Downey, which does, indeed, note that it is possible for a declarant's stated fear of a defendant to be admissible if it actually logically negates a defense of self-defense, accident or suicide. See Downey, 206 N.J. Super. at 391. That language is no more than a statement of the later-adopted rule of McLaughlin and Calleia: that the state-of-mind of the declarant needs to actually be relevant to the State's case. The most obvious proof that the Downey opinion is merely giving an illustrative list of possibilities, rather than laying down an absolute rule, is that the Appellate Division, post-Downey, excluded a declarant's hearsay statement of fear of the defendant in a self-defense case because, in that case, the state-of-mind of the declarant did not bear on the self-defense claim. State v. Chavies, 345 N.J. Super. 254, 273 (App. Div. 2001). Compare State v. Thornton, 38 N.J. 389-390 (1963), where the victim's statement regarding why she went to defendant's home -- she was visiting him because she thought he was sick, not to attack
(footnote continued)

not in keeping with the careful relevance analysis of McLaughlin and Calleia. Those cases -- and the Benedetto/Downey/Prudden/Machado line of decisions preceding them -- take a careful look at the reality of the situation, particularly focusing on whether the declarant's state of mind as expressed in the proffered statement actually proves any matter in dispute, or whether it simply inflames the jury. Here, Jody Scharf's fear of defendant did not negate his defense of accident; it had nothing to do with it[6]. Its insertion into the case was a bold attempt to inflame the jury against him in a case where there was precious little direct proof of what happened on the night in question. Indeed, one has to wonder the following in light of McLaughlin: if, as in that case, a co-conspirator's declaration to his girlfriend that he intends to commit a robbery with defendant is not deemed relevant to prove defendant's intent to commit the robbery despite the fact that the statement addresses the future actions of two people (declarant and defendant) -- because the New Jersey Supreme Court will not sanction imputing a defendant's state of mind from a declarant's -- how in the world can a

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him -- was admissible as a "state of mind" declaration that actually bore on the issue of self-defense.

[6] In complete contrast, prior instances of abuse -- if proved by admissible evidence -- plainly can be used by the State to attempt to prove a defendant's intent to harm. As noted, infra, the problem with that proof from these five witnesses is that it was hearsay, not direct evidence of the abuse.

declarant's statement of fear of a defendant be used to impute a criminal state of mind to a defendant's actions as here? The obvious answer is that it cannot. Under McLaughlin and all the other cited cases, Jody Scharf's statements about her fear of defendant were inadmissible hearsay with an extreme potential to inflame the jury. And because they were used in summation by the prosecutor to urge the return of a guilty verdict (20T 90-15 to 91-25), the error of their admission cannot possibly be harmless and defendant's conviction should be reversed as a result.

Moreover -- other than the "medical treatment" exception, as it pertains to Teague, which is addressed herein infra -- no hearsay exception beyond "state of mind" was ever offered regarding the numerous references to statements that Jody made to these five witnesses about defendant's conduct (e.g., "abusive" behavior) or statements (his dismay at the divorce, the numerous alleged threats to kill Jody over the divorce, his alleged plan to go to the cliffs). Every one of those accounts was hearsay from Jody, and neither the judge nor the State offered any justification for admitting them. They were statements of a declarant (Jody) offered to prove the truth of the matter asserted (that defendant said or did certain things), N.J.R.E. 801(c), and, thus, blatantly inadmissible hearsay under N.J.R.E. 802. And their admission from five different witnesses was likewise not harmless beyond a reasonable doubt because the only

witness who then actually provided admissible recollections of prior abuse (and, notably, nothing about threats to kill) was Jonathan, who, as cross-examination demonstrated, could easily be disbelieved because he had the veracity of his testimony brought into immediate question by the rather extreme monetary motive that he had to lie -- i.e., a conviction meant that he got the insurance money. Their erroneous admission and its plain effect on the verdict is another reason for reversal.

Moreover, the broad ruling that anything Jody Scharf said to Patricia Teague in her role as a therapist was a preposterous misreading of the relevant case law, particularly in a criminal case. While a patient's complaints of symptoms to a treating practitioner which are relevant to a diagnosis or treatment are admissible under N.J.R.E. 803(c)(4), because they are often spontaneous and trustworthy, the rule could not be any clearer that a statement as to the cause of the symptoms is likely to be seen as irrelevant to diagnosis or treatment, quite possibly self-serving, and, thus, inadmissible. See R.S. v. Knighton, 125 N.J. 79, 87 (1991); State v. McBride, 213 N.J. Super. 255, 273 (App. Div. 1986); Cestero v. Ferrara, 57 N.J. 497, 503 (1971). Teague was treating Jody Scharf for depression. The myriad of complaints about defendant's conduct, behavior, etc., especially when Jody was contemplating, or in the midst of a divorce, were precisely the type of self-serving/accusatory declarations that

the case law prohibits sneaking into evidence as alleged statements in the course of medical treatment. McBride, supra.

The trial of this case should have been a close call for the jury, in an evidential sense, but the State grossly tipped the scales in its favor when, lacking actual proof of defendant's conduct on the night in question, it chose to smear him with inadmissible hearsay from five witnesses. As a result, his conviction should be reversed and the matter remanded for retrial.

POINT II

THE NEED FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF RECKLESS MANSLAUGHTER WAS CLEARLY INDICATED FROM THE RECORD. (Not Raised Below)

As noted in the Statement of Facts, the State's argument to the jury was that the victim was pushed by defendant to her death. The defense, on the other hand, was that the fall was an accident. But, despite crystal clear proof in the record that even the "accident" theory involved defendant's conscious disregard of a substantial and unjustifiable risk that leading his drunk, alcoholic wife -- who was afraid of heights to a degree so paralyzing that a four-foot step ladder caused her dismay -- past prominent, stern warning signs to the edge of a 100-plus-foot cliff might cause her demise, there was never any discussion in any form about providing the jury with the lesser-included-offense option of reckless manslaughter.

Defendant urges on appeal that there was a clear indication of a basis for a jury instruction on reckless manslaughter, and, thus, the failure to give such an instruction was plain error which should result in a reversal of defendant's murder conviction and a remand for a retrial. Defendant's Fourteenth Amendment and state-constitutional rights to a fair trial and due process were violated by the absence of any instruction on the lesser-included offense of reckless manslaughter.

Even when not requested, the trial judge has a duty to instruct the jury on any lesser-included offense for which a rational basis is "clearly indicated" by the record. State v. Thomas, 187 N.J. 119, 132 (2006); State v. Jenkins, 178 N.J. 347, 361 (2004); State v. Choice, 98 N.J. 295, 299 (1985); State v. Powell, 84 N.J. 305, 318-319 (1980). In the Third Circuit, the failure to charge an appropriate lesser-included offense is a violation of the constitutional guarantee of due process. Vujosevic v. Rafferty, 844 F.2d 1023, 1027-1028 (3rd Cir. 1988). So strong is that duty that, a failure to give an instruction on a clearly-indicated lesser-included offense is reversible error even where defense counsel has objected to the giving of such an instruction as long as the trial judge has also indicated that he or she does not see an evidentiary basis for the instruction. Jenkins, 178 N.J. at 359-364; State v. O'Carroll, 385 N.J. Super. 211, 234-235 (App. Div.), certif. den. 188 N.J. 489 (2006).Here,

as noted, there was no mention of lesser-included offenses at all. Yet, the evidence clearly indicated a basis for charging reckless manslaughter as a lesser-included offense.

Murder is the purposeful or knowing infliction of either death or serious bodily injury which results in death. N.J.S.A. 2C: 11-3a(1) and (2). A homicide is manslaughter if committed recklessly, not purposely or knowingly, and whether the offense is an aggravated manslaughter ("probability"), N.J.S.A. 2C:11-4a, or a reckless manslaughter ("possibility"), N.J.S.A. 2C:11-4b(1), is determined by whether the risk that the defendant disregards is of a probability of death or a mere possibility of death. State v. Galicia, 210 N.J. 364, 378 (2012), citing with approval State v. Curtis, 195 N.J. Super. 354, 364 (App. Div.), certif.. den. 99 N.J. 212 (1984). Thus, the critical question when a judge must decide whether to charge reckless (or aggravated) manslaughter as a lesser-included offense of murder is whether the jury could have had a reasonable doubt whether defendant acted recklessly -- i.e., consciously disregarded a substantial and unjustifiable risk of a possibility (or probability) of death. O'Carroll, 385 N.J. Super. at 229, citing Jenkins, 178 N.J. at 363. The question on appeal, where no request for such an instruction was made, is whether the need for the instruction was "clearly indicated." Defendant urges that it most certainly was.

First of all, the jury could have doubted the State's claims

that defendant pushed the victim. Then if the "accident" theory was accepted to the degree that the jury had at least a reasonable doubt that Jody Scharf fell to her death, "What then?" a reasonable juror could ask. Perhaps, as the defense urged, that meant an acquittal. But that was no certainty. The jury could easily have substantially accepted defendant's theory of the case -- or at least doubted the State's -- and still believed that defendant consciously disregarded a substantial risk of the possibility that Jody would die from a fall off those cliffs. The evidence was clear that: it was defendant's idea, not hers, to go to the cliffs (9T 82-1 to 22); she was so terrified of heights that a four-foot step ladder was a source of great anxiety (7T 110-1 to 21); she was a heavy drinker who was drunk that night (9T 137-15 to 21; 9T 11-21 to 12-21; 8T 179-23 to 180-11; 12T 6-4 to 5; 17T 43-23 to 24); defendant led her to the cliff's edge past a barrier fence with a sign that read: "Cliff and steep slopes are dangerous. For your safety, please observe park rules. Stay on designated trails. Do not climb cliffs or slopes. Alcoholic beverages are prohibited. Trails close one hour after sunset. Violators will be prosecuted." (10T 78-2 to 6), and, as Dr. Baden agreed, her 0.12% BAC would have left Jody with impaired balance. (17T 177-22 to 25) The prosecutor also argued to the jury what Dr. Baden had also told them: that Jody's intoxicated condition negatively affected her ability to assess

the threat the cliffs presented (20T 136-6 to 8; 17T 182-16 to 20) And, after all, as the prosecutor also argued, Jody was drunk while defendant "[wa]s not." (20T 99-19 to 20) Indeed, even the alleged admission by the defendant to Lt. Ehrenberg and Sgt. Gundersdorf that Jody's death was no "accident" -- a fact highlighted by the State in summation as a reason to return a murder conviction (20T 137-20 to 138-23) -- could, if believed, easily have been seen by the jury merely as an admission of some level of criminal culpability, for instance recklessness, not a full-blown confession to purposely pushing Jody off the cliff. (12T 115-13 to 18; 12T 148-9 to 10)

Based upon the foregoing evidence, this jury easily could have doubted the State's "pushed" version of the case, yet still thought that defendant's version of events nevertheless did not warrant acquittal because he exhibited a conscious disregard of an extreme risk to the safety of his intoxicated, acrophobic wife when he took her past barrier cables to the edge of a very steep, very high cliff, at dusk, with impaired balance, to drink more alcohol in an area where the signs indicated no one should be going at all because of the risk, let alone drinking alcohol. See, e.g., State v. Campfield, 212 N.J. 218, 236-237 (2013) (recklessly placing a victim with diminished capacities in a dangerous/vulnerable situation leading to death is reckless manslaughter).

And this court should reject any notion that charging manslaughter would have somehow prejudiced the defense case. Indeed, the manslaughter theory actually works best with much of the defense case. The jury could believe the defense that there was no push (or at least doubt the State's theory of a push), yet still believe defendant to have consciously disregarded the risk that his drunk, acrophobic wife would fall from a steep cliff while drinking alcohol when he led her to the edge of that cliff at dusk. As this court noted in State v. Cook, 300 N.J. Super. 476, 488 (App. Div. 1996), the jury's job was not to accept one extreme version of the case versus another, but, rather, to correctly assess legal liability under proper principles of law. But those principles, as they pertained to manslaughter, were not instructed. As noted, the trial judge has a duty to instruct the jury on any lesser-included offense for which a rational basis is "clearly indicated" by the record. Thomas, 187 N.J. at 132; Choice, 98 N.J. at 299 (1985); Jenkins, 178 N.J. at 361; Powell, 84 N.J. at 318-319. Plainly here, if the jury doubted the State's theory, manslaughter was a clearly-indicated viable option. But, without a lesser-included-offense instruction on reckless manslaughter, the jury was left with an improper all-or-nothing choice between the State's murder theory and acquittal -- a choice that the jurors will nearly always resolve in favor of conviction rather than acquittal if they believe defendant to

have been in the wrong, yet not as severely as the State believed. See Keeble v. United States, 412 U.S. 205, 212-213, 93 S.Ct. 1993, 1997-1998 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (emphasis in original)); State v. Sloane, 111 N.J. 293, 299 (1988) (same).

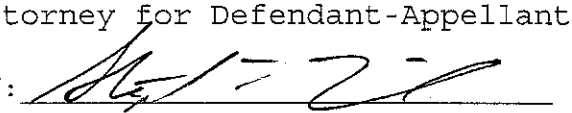
Consequently, defendant's murder conviction should be reversed and the matter remanded for retrial.

CONCLUSION

For all of the reasons herein, the defendant's conviction should be reversed and the matter remanded for retrial.

Respectfully submitted,

Joseph E. Krakora
Public Defender
Attorney for Defendant-Appellant

BY: 
STEPHEN W. KIRSCH
Assistant Deputy Public Defender

DATED: August 7, 2013

P.O. 3467-08
ea
8/13/09
SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY - LAW DIVISION
JULY TERM A.D. 2009
FIRST STATED SESSION

THE STATE OF NEW JERSEY :

-vs- :

:

STEPHEN SCHARF :

:

DEFENDANT : Indictment No. 09-08-01485-I

(First Degree)

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present that

STEPHEN SCHARF

on or about September 20, 1992, in the Borough of Englewood Cliffs, in the County of Bergen, and within the jurisdiction of this Court, did purposely and/or knowingly cause the death or serious bodily injury resulting in the death of Jody Ann Scharf; contrary to the provisions of N.J.S.A. 2C:11-3a(1) and N.J.S.A. 2C:11-3a(2), and against the peace of this State, the Government and dignity of the same.

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR

By: Supervising Assistant Prosecutor

A True Bill

Evan Stosz Foreperson

And

By: Assistant Prosecutor

5/27/11

SUPERIOR COURT OF NEW JERSEY
INDICTMENT NO. S-1485-09

STATE OF NEW JERSEY	:	
	:	
vs.	:	**JURY VERDICT SHEET**
	:	
STEPHEN SCHARF	:	

Jury Verdict

COUNT ONE

1. ON THE CHARGE OF THE MURDER OF JODY ANN SCHARF OUR VERDICT IS:

A. NOT GUILTY----------/____/

B. GUILTY----------/__X__/

YOUR VERDICT IS FINISHED. SIGN AND DATE THE VERDICT FORM BELOW.

JURY FOREPERSON:_____

DATE:_____

Judgment of Conviction & Order for Commitment

Superior Court of New Jersey, BERGEN County

State of New Jersey v.

Last Name	First Name	Middle Name
SCHARF	STEPHEN	F

Also Known As

Date of Birth	SBI Number	Date(s) of Offense
01/23/1951	671087A	09/20/1992

Date of Arrest	PROMIS Number	Date Ind / Acc / Complt Filed	Original Plea	Date of Original Plea
	08 003467-001	08/13/2009	☐ Not Guilty ☐ Guilty	

Adjudication By ☐ Guilty Plea ☑ Jury Trial Verdict ☐ Non-Jury Trial Verdict ☐ Dismissed / Acquitted Date: 05/27/2011

Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
09-08-01485-I	1	MURDER - PURPOSELY	2C:11-3A(1)	1
		MURDER - KNOWINGLY	2C:11-3A(2)	

Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
09-08-01485-I	1	MURDER - PURPOSELY	2C:11-3A(1)	1
		MURDER - KNOWINGLY	2C:11-3A(2)	

Sentencing Statement

It is, therefore, on 10/21/2011 ORDERED and ADJUDGED that the defendant is sentenced as follows:

COUNT 1: LIFE NJSP WITH 30 YEARS PAROLE INELIGIBILITY.

DEFENDANT HAS 45 DAYS TO APPEAL THIS JUDGMENT OF CONVICTION, AND, IF INDIGENT, CAN APPLY TO THE PUBLIC DEFENDER PURSUANT TO R.3:21-4(f).

DNA NEEDED

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

Elsa

☑ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

Total Custodial Term	Institution Name	Total Probation Term
888 Years 00 Months 000 Days	CARE COMMISS/CORR	00 Years 00 Months

New Jersey Judiciary, Revised Form Promulgated by Directive #14-08 (
Copies to: County Probation Division Defendant Defe e Parole Board Dept of Corrections or County Penal Institution

State of New Jersey v.
SCHARF, STEPHEN F

S.B.I. # 671087A Ind / Acc / Complt # 09-08-01485-I

Time Credits

Time Spent in Custody
R. 3:21-8

Date: From	To
12/17/2008	10/21/2011

Total Number of Days 1039

Gap Time Spent in Custody
N.J.S.A. 2C:44-5b(2)

Date: From	To

Total Number of Days

Rosado Time

Date: From	To

Total Number of Days

Prior Service Credit

Date: From	To

Total Number of Days

Statement of Reasons - Include all applicable aggravating and mitigating factors

AGGRAVATING FACTORS

1. The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner.

2. The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable or exercising normal physical or mental power of resistance.

3. The risk that the defendant will commit another offense.

4. A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense.

6. The extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted.

9. The need for deterring the defendant and others from violating the law.

MITIGATING FACTORS

7. The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense.

11. The imprisonment of the defendant would entail excessive hardship to himself or his dependants.

Form Prepared By	Preparer Telephone Number
ELISA AMARI	(201) 527-2490

Attorney for Defendant at Sentencing	Public Defender
EDWARD J BILINKAS	☐ Yes ☑ No

Prosecutor at Sentencing	Deputy Attorney General
WAYNE MELLO	☐ Yes ☑ No

Judge at Sentencing
PATRICK J. ROMA

Judge (Signature)	Date
	10/28/2011

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
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P.O. Box 46003
Newark, New Jersey 07101
(973) 877-1200

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO(S). 09-08-1485

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	NOTICE OF APPEAL
v.	:	
STEPHEN F. SCHARF,	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that the defendant, Stephen F. Scharf, confined at New Jersey State Prison, appeals to this Court from the final judgment of conviction of murder entered on October 28, 2011 in which a sentence of Life with 30 year parole disqualifier, was imposed in the Superior Court, Law Division, Bergen County, by the Honorable Patrick Roma, J.S.C.

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: _____
HELEN C. GODBY
Assistant Deputy Public Defender
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have been complied with by ordering the transcript(s) on December 21, 2011 indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

_____

SUPERIOR COURT OF NEW JERSEY

PATRICK J. ROMA
JUDGE

BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
(201) 527-2490

THE STATE OF NEW JERSEY,

vs.

STEPHEN SCHARF,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

INDICTMENT #09-08-1485

ORDER

THIS MOTION, coming before the Honorable Patrick J. Roma, J.S.C., on April 7, 2011, Assistant Bergen County Prosecutor Wayne Mello appearing on behalf of the State, and Mr. Edward Bilinkas, Esq. representing defendant Stephen Scharf, the Court having considered the oral and written arguments of the parties, for good cause shown and for the reasons stated in the written opinion dated April 11, 2011:

IT IS on this April 11, 2011

ORDERED that: (1) the motion to exclude evidence of the claw hammer and blood stain is denied; (2) the motion excluding statements regarding defendant's relationship with other women and alleged domestic abuse is denied; (3) the motion to exclude statements by Jody Ann Scharf regarding her fear of the defendant is denied; (4) the motion to exclude statements made by Jody Ann Scharf to her therapist is denied;

HON. PATRICK J. ROMA, J.S.C.

April 11, 2011

Mr. Edward J. Bilinkas, Esq.
415 Rt. 10 East
Randolph, New Jersey 07869

A.P. Wayne Mello
Bergen County Prosecutor's Office
10 Main Street
Hackensack, New Jersey 07601

State v. Stephen Scharf
Indictment No.: S-1485-09

INTRODUCTION

Mr. Edward Bilinkas, Esq., on behalf of the defendant, Stephen Scharf, brought several motions before this Court. These include a motion to exclude physical evidence, specifically a claw hammer and blood stain, a motion to exclude oral statements made by Ms. Scharf to friends, a motion to exclude statements made by Ms. Scharf to her therapist, and a motion to exclude evidence of the defendant's relationship with other women. The defendant was indicted with first-degree murder contrary to the provisions of N.J.S.A. 2C:11-3a(1) and 2C:11-3a(2). This Court heard oral arguments as to these

motions on Tuesday, April 5, 2011, Wednesday, April 6, 2011, and Thursday, April 7, 2011.

Motion to Exclude Statements Made by Jody Ann Scharf

During the course of investigating the death of Jody Ann Scharf, detectives interviewed several people known to both the defendant and the victim. Several individuals provided statements to investigators.

First, Ms. Maureen Durante spoke with Jody Ann Scharf one day prior to her death. Ms. Durante told detectives that on September 19, 1992 she had a conversation with Ms. Scharf. Ms. Scharf allegedly told Ms. Durante that after being served with the divorce complaint, the defendant said, "You won't get anything, I'll see you dead first." Ms. Durante later told detectives that Ms. Scharf was terrified of the defendant and would never willingly have gone with him to the Palisades.

Second, on September 19, 1992, a day before her death, Ms. Scharf spoke with her friend, Ms. Maureen Glennon. Ms. Scharf allegedly told Ms. Glennon that divorce papers had been served on the defendant and that the defendant was "not happy about it." Ms. Scharf further told Ms. Glennon that she was afraid the defendant would harm her because she filed for divorce. Ms. Glennon also told detectives that Ms. Scharf confided that she was reluctant to file for a domestic violence restraining order because she feared reprisal from the defendant. Ms. Glennon added that Ms. Scharf never contemplated reconciling with the defendant.

Third, two weeks before her death, Ms. Scharf told Ms. Nancy Huizenga that the defendant told her that if she "ever got rid of him, it would be over for her" and that the defendant physically assaulted her in August 1992.

Fourth, Ms. Marion Hilferty stated that Ms. Scharf said she was terrified of the defendant and did not want to spend time with him. Ms. Scharf also allegedly added, "if anything happens to me, you know who did it."

Fifth, in August 1992, Ms. Scharf told her friend Ms. Lori Beam that "my life will be over soon." Ms. Scharf elaborated that she knew this "because my husband told me so."

Sixth, on September 18, 1992, two days before her death, Ms. Scharf told Ms. Anna Rolfson that divorce papers were served, that she was afraid of the defendant's reaction, and that defendant would "probably" try to kill her.

The defendant seeks to exclude these statements as irrelevant, prejudicial, and hearsay. The State counters that such statements' probative value is not substantially outweighed by any prejudice to the defendant. Further, the Start contends that the statements are admissible under N.J.R.E. 803(c)(3), the state of mind exception to the general ban against hearsay.

As a preliminary matter, the defendant noted that approximately twenty six individuals gave approximately thirty four statements. The defendant argued that he failed to receive adequate notice of which statements the State seeks to admit. However, at the April 7, 2011 hearing on this motion, the number of statements in question was narrowed down to the statements of only six individuals.

N.J.R.E. 803(c)(3) provides an exception to the general bar against hearsay. It allows a statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily injury). This exception allows for statements to be admissible to show the state of mind of the declarant when it is at issue in a case. State v. McLaughlin, ___ N.J. ___ (Mar. 3 2011), s.o. at 15, 24; State v. Long, 173 N.J. 138 (2002); State v. Benedetto, 120 N.J. 250 (1990); State v. Machado, 111 N.J. 480 (1988).

New Jersey courts have recognized that when a defendant claims that the victim's death was accidental, then the victim's state of mind becomes relevant and the victim's statements of fear becomes admissible. Benedetto, 120 N.J. at 257 (citing State v. Downey, 206 N.J. Super. 382 (App. Div. 1986)).

Here, it is clear the defendant claims the Ms. Scharf's fall was accidental. Thus, this Court finds that evidence of her state of mind is highly probative and admissible. The witnesses should be permitted to testify about the fear of the defendant, abusive conduct toward Ms. Scharf, her intent to continue with the divorce and fear of heights. All these statements would directly counter the defendant's assertions.

Still, the defendant argues that the statements were not made in good faith or made contemporaneously with the attendant circumstances. The defendant notes that the "existence of a time lag between the onset of the sensation and the actual verbal statement of the condition" is relevant in analyzing good faith. State v. Williams, 106 N.J. Super. 170 (App. Div. 1969). However, the requirement of being contemporaneous has been modified and broadened. Evidence of declarations need not be strictly contemporaneous with the exciting stimulus. See Cestero v. Ferrara, 57 N.J. 497 (1971).

Here, all statements were made close in time to the events of September 20, 1992. Further, it is clear that during this brief period, events clearly affecting the state of mind of Ms. Scharf had just occurred. Specifically, Ms. Scharf had only recently filed for divorce from the defendant a few weeks prior to her death. Accordingly, this Court finds that there is a reasonable basis for a finding of continuity between the circumstances which affect Ms. Scharf's state of mind and her declarations.

Moreover, intertwined with the above statements are references to defendant's alleged assaultive behavior toward Ms. Scharf. In State v. Ramseur, 106 N.J. 123 (1987), the New Jersey Supreme Court found that Ramseur's prior assaultive behavior against his wife "evidence[d] an enduring hostility" toward her and was relevant to his state of mind.

In the present case, this Court finds that general descriptions of alleged domestic violence are admissible as they go to the state of mind of Ms. Scharf. Instead of specific accounts, a general review of domestic violence can be elicited for this singular purpose. This avoids the need for a Cofield analysis. However, if the State provides clear and convincing evidence, the Cofield analysis would be satisfied.

Finally, the Court is keenly aware that such statements may not be used to prove the defendant's motivation or conduct. See Machado, 111 N.J. at 489. These statements are solely admissible to show Ms. Scharf's state of mind. Therefore, the attorneys are directed to prepare a limiting instruction which shall be provided to the jury to make this point clear.

Statements to Ms. Teague

First, the State seeks to introduce a statement by Ms. Scharf to her therapist, Ms. Teague, during an August 1992 session, approximately one month prior to Ms. Scharf's

death. One statement in particular refers to Ms. Scharf telling Ms. Teague that she refused the defendant's invitation to accompany him on a picnic at the Palisades while mentioning she had never been to that spot before.

Ms. Scharf's statement directly relates to the relationship between Ms. Scharf and the defendant and is under the "mosaic" of the event. State v. Machado, 111 N.J. at 489; State v. Dreher, 251 N.J. Super. 300, 318 (App. Div. 1991), certif.. denied, 127 N.J. 564 (1992).

This Court finds that this statement is admissible under the state of mind exception to the hearsay rule. Ms. Scharf's statement that she had never been to the Palisades is part of the totality of her relationship with the defendant and placed in issue the defendant's version of their marital relationship.

Second, the State seeks to admit statements made by Ms. Scharf to Ms. Teague under N.J.R.E. 803(c)(4).

N.J.R.E. 803(c)(4) provides an exception to hearsay for:

> Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment

This exception is based on the assumption that the declarant is more interested in receiving medical diagnosis than in obtaining a favorable medical opinion culminating in a legal recovery. White v. Illinois, 502 U.S. 342 (1992); Matter of C.A., 146 N.J. 71 (1996). Such statements have inherent reliability.

The State claims that not only statements for purposes of diagnosis and treatment are admissible, but so are statements which identify the defendant as the source of Ms. Scharf's difficulties and conditions.

While it is true that declarations of an injured person as to his condition, symptoms and feelings for purpose of diagnosis and treatment are admissible, generally statements as to the cause of such symptoms are inadmissible. Pinter v. Parsekian, 92 N.J. Super. 392 (App. Div. 1966).

However, "in a criminal case where a person's life or liberty is at stake and guilt must be proved beyond a reasonable doubt, a court should be reluctant to broaden the scope of an exception to the hearsay rule unless the type of statement sought to be admitted carries with it strong and convincing indicia of trustworthiness." State v. Taylor, 46 N.J. 316. (1966)[1]. This reluctance is great when the declarant is available and able to testify at the trial. Taylor, 46 N.J. at 332.

Here, Ms. Scharf is not available to testify at trial. Indeed the question at trial is whether the defendant, the very person whose identity would be shielded as the source of Ms. Scharf's depression and emotional difficulties, caused Ms. Scharf's death.

Here, all the factors Ms. Scharf presumably discussed with Ms. Teague, including relationships with other individuals and alleged abuse are inextricably intertwined and necessary to present of an accurate picture of Ms. Scharf's relationship with the defendant to her treating therapist. Thus, where the emotional condition is so linked with external source causing this problem, namely the defendant, this Court finds that statements identifying the defendant were reasonably pertinent to diagnosis or treatment.

[1] The Court acknowledges that the hearsay rule exception in Taylor was not N.J.R.E. 803(c)(4). However, this Court finds that the analysis is the same.

Moreover, the statements relating to both the cause and symptoms of Ms. Scharf's depression carry with them inherent reliability because Ms. Scharf would necessarily have believed that effective treatment for her depression was largely dependent upon the accuracy of the information she provided to Ms. Teague.

This Court is convinced that the statements to Ms. Teague were not only medically necessary for effective treatment, but they also are inherently reliable. Further, as Ms. Scharf's death is the subject of this case a broadening of the hearsay rule to allow Ms. Teague to testify as to cause, symptoms, and feelings Ms. Scharf conveyed to her while she was treating Ms. Scharf for depression is appropriate.

Further, an appropriate limiting instruction should be prepared by the attorneys.

The defendant's motion to exclude statements by Jody Ann Scharf to her therapist, Ms. Teague, is denied.

Motion to Exclude the Claw Hammer and the Blood Stain

During the consent search of the car, officers found on the rear seat a red nylon bag with a blue tote bag inside. Inside the blue tote bag were towels, ace bandages, a blanket, candle, corkscrew, and jewelry box. Located at the bottom of this bag was a Stanley claw hammer. The defendant later told officers that he had used the hammer earlier the day of September 20, 1992 to fix a drawer and simply threw the hammer in the bag and then placed the tote bag in the nylon bag. When the hammer was tested no evidence of human tissue, blood, and trace elements were found.

As for the blood stain, detectives were able to find blood on the clothes the defendant wore on September 20, 1992. When tested, the blood was determined to be human blood, but such testing exhausted the sample.

The defendant argues that the introduction of the claw hammer and blood stain would be highly prejudicial to the defendant and confusing to the jury. The State counters that the hammer and the blood are highly probative and should be presented at trial with the State's alternative theory explaining the hammer's presence in a bag containing items for the picnic as well as how the blood got on the defendant's clothing

N.J.R.E. 401 defines relevant evidence as evidence "having a tendency in reason to prove or disprove any fact or consequence to determination of the action." This fact to proved or disproved must be of consequence in the matter. State v. Burr, 195 N.J. 119 (2008); State v. Castagna, 400 N.J. Super. 164 (App. Div. 2008). This two-part test "favors admissibility." State v. Deatore, 70 N.J. 100,116 (1976).

N.J.R.E. 403 allows for relevant evidence to be excluded "if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

First, as for the blood, a jury could find as a reasonable inference that the blood came from an incident with the victim. Thus, this Court finds that the probative value of this evidence is not substantially outweighed by the possible prejudice to the defendant.

Second, in isolation, the probative value of a claw hammer in the car is not incredible. However, here it is not just leaving a claw hammer in a bag. Here, the hammer was located at the bottom of the blue tote bag. Located above the hammer in the

tote bag included items like a candle, corkscrew, jewelry box, and blanket. Presumably these items were items to be used at the planned romantic interlude with Ms. Scharf. Moreover, the tote bag was placed in a nylon bag.

Further, the probative value of the claw hammer is increased as the defendant twice specifically volunteered information about the drawer and claw hammer to law enforcement officers. According to testimony from the Miranda hearing, officers found this to be strange given the circumstances surrounding the encounters. The State should be free to argue a plausible reason for the hammer being in the tote bag with items for the picnic.

While "all damaging evidence is prejudicial," State v. King, 215 N.J. Super. 504 (App. Div. 1987), here, given the totality of the circumstances surrounding the evidence in question, this Court finds that the probative value of the claw hammer is not substantially outweighed by any prejudice to the defendant. Thus, the claw hammer is admissible.

Accordingly, the defendant's motion to exclude evidence of the claw hammer and blood stain is denied.

Motion to Exclude Evidence of Defendant's Relationship With Other Women

At the time of incident, the defendant was allegedly involved with two women, Ms. Kathy Scanlon and Ms. Terry Schofield. Both women knew the defendant was in an "open marriage." The defendant claimed that the last time he saw Ms. Schofield was on September 7, 1992, thirteen days before his wife's death. The defendant last met with Ms. Scanlon on September 18, 1992, just two days before his wife's death. At each of

these meetings, the defendant claims to have told both women that their relationships were over and he wished to reconcile with his wife on September 20th.

Contrary to what the defendant stated, Ms. Scanlon told detectives that the defendant said he was amenable to a divorce. Ms. Schofield said the defendant previously claimed that his wife died ten years earlier in a car accident in Georgia.

Further, Ms. Schofield told detectives that on September 7, 1992, that the defendant claimed to be under a lot of pressure from his job and wife. She also claimed she last saw the defendant on September 9, 1992. She claims the defendant said, "Give me until the end of September, the pressure will be off."

The defendant now brings this motion to exclude evidence of his relationships with other women as irrelevant and prejudicial. The State disagrees and argues that these relationships are probative as it directly contradicts the purported reason the defendant was with his wife at the Palisades.

The analysis this Court must engage in is the same as with the motions concerning the claw hammer and blood stain. Therefore, in the interest of brevity, this Court will not recount the same law and rules of evidence cited above.

This Court finds that evidence as to the "open marriage" and the defendant's relationship with other women is highly probative. This probative value is especially enhanced due to the fact that the defendant only allegedly ended his relationship with Ms. Schofield and Ms. Scanlon but weeks prior to his wife's death. The defendant's claim that he was going to reconcile with his wife, and the statement he made to Ms. Schofield about pressure in his life is highly probative.

Accordingly, the motion to exclude evidence of defendant's relationships with other women is denied.

Motion to Exclude Statements Due To Psychologist-Patient Privilege and Attorney-Client Privilege

At the hearing for all pre-trial motions conducted by this Court from April 5, 2011 until April 7, 2011, the defendant withdrew these motions.

Hon. Patrick J. Roma, J.S.C.