Supreme Court of New Jersey

Docket No.

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
Plaintiff-Petitioner,	:	On Petition for Certification from a Final Judgment of the Superior Court of New Jersey,
v.	:	Appellate Division.
STEPHEN F. SCHARF,	:	Sat Below:
Defendant-Appellant.	:	Hon. Susan L. Reisner, P.J.A.D. Hon. Carmen H. Alvarez, J.A.D. Hon. Carol Higbee, J.S.C. (t/a)

PETITION AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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STATEMENT OF THE MATTER INVOLVED

"Not all criminal homicides involve perfect strangers, and so it is to be expected that, in many instances, there is a history - - often recorded by the victim's statements to others - - between victim and perpetrator which may shed light upon guilt, degree of guilt, intent, motive, or the background of the case." Commonwealth v. Moore, 937 A.2d 1062, 1081 (Pa. 2007) (Castille, C.J., concurring and dissenting in part).

This petition involves such a case: on September 20, 1992, Jody Ann Scharf was killed from a fall from the Englewood Cliffs. From his initial statement to a passing motorist to a succession of statements to various law enforcement officers, defendant claimed that Jody Ann's death was accidental. He asserted that the two, who were on their way to a comedy club in New York, happened to stop at the Cliffs, which, according to the defendant, was one of their favorite locations. While they were kissing on a rock formation shaped like a bench seat situated more than 100 feet from the base of the Cliffs, Jody Ann stood up and fell to her death.

Defendant also touched upon his relationships with other women and their pending divorce. Defendant contended that he and Jody Ann had reconciled and that he was breaking off his affair with another woman.

But statements Jody Ann made to her friends, to her

therapist, and to her divorce lawyer shortly before her death cast a markedly different light on their relationship and, necessarily, what occurred on the Cliffs. In June 1992, Jody Ann had filed for divorce; defendant was formally served in early September. Jody Ann never intimated to her lawyer that she wanted the divorce petition withdrawn. In August 1992, Jody Ann told Patricia Teague, her longtime therapist who treated her for depression related to defendant's abusive behavior, that defendant had invited her to a picnic at the Cliffs, which she had refused, telling defendant he was "crazy." She also told Ms. Teague that she had never been to the Cliffs, which was not surprising, given her life long fear of heights. Finally, just days before her death, Jody spoke to various friends about her fear that defendant would kill her because of the divorce.[1]

In 2009, defendant was indicted for Jody Ann's murder. In an opinion dated April 11, 2011, the Honorable Patrick J. Roma, J.S.C., concluded that the State would be permitted to offer into evidence Jody Ann's statements regarding her fear of defendant. Those statements were relevant and admissible because defendant claimed that Jody Ann's fall from the Cliffs was accidental. (Pa1 to 8).[2]

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[1]A full recitation of the facts is contained in the State's Appellate Division brief.

[2]Pa refers to the appendix to this petition.

Jody Ann's general statements about defendant's abusive conduct were admissible as relevant to Jody Ann's state of mind,[3] (Pa5), and her statements to Ms. Teague about a month before her death regarding defendant's "invitation" to accompany him to the Cliffs and her statement that she had never been to the Cliffs were directly related to the mosaic of the event, and the totality of Jody Ann's relationship with defendant. (Pa4 to 6).

The statements to Ms. Teague also were admissible under the medical treatment exception to the hearsay rule because Jody Ann's discussions with Ms. Teague about defendant, who was the source of her depression, were "inextricably intertwined and necessary to present . . . an accurate picture of [Jody Ann's] relationship with the defendant to her treating therapist." (Pa7). These statements were inherently reliable, as Jody Ann necessary believed that effective treatment for her depression was "largely dependent" upon the accuracy of her information. (Pa7 to 8).

In his instructions to the jury about this testimony, Judge Roma stated that,

> Testimony has been admitted into evidence regarding statements purportedly made by [Jody Ann] to various individuals about her

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[3]The court ruled that if the State provided specific accounts of abuse, the court would allow such testimony under a N.J.R.E. 404(b) analysis. (Pa5). During trial, such evidence was admitted and the court charged the jury on the limited use of such evidence. (20T161-1 to 163-3).

> fear of defendant, her abuse by the defendant, her intention to divorce the defendant, and her fear of heights. You must first determine whether or not [Jody Ann] made these statements. If you find that she made these statements then you may consider them only for the purpose of determining her state of mind at the time those statements were made and for no other reason. [20T15-20 to 156-5].[4]

Defendant was convicted of murder and sentenced to life imprisonment, 30 years without parole.

On appeal, the Appellate Division reversed defendant's conviction. While recognizing that a trial judge is vested with substantial discretion to admit or exclude evidence, the panel concluded that the trial court's decision to admit the testimony of Jody Ann's friends and therapist about her fear of defendant was neither relevant nor material and was highly prejudicial. State v. Stephen Scharf, Docket No. A-1580-11T4 (App. Div., Aug. 11, 2014), s.o. at 10-15. (Pa18 to 23).

The panel reached that decision by concluding that Jody Ann's state of mind was "not an issue in the case" because her "alleged fear" of defendant did not stop her from having dinner with defendant and their son, Jonathan, the night before her death and agreeing to go with defendant to a comedy club on the night of her death. Similarly, her fears were not a motive for defendant to kill Jody Ann nor admissible to prove defendant's

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[4]20T refers to the transcript of May 24, 2011.

state of mind or future conduct. Id. at 15. (Pa23).

The panel also concluded that Jody Ann's fear of defendant, even if based on their past history, did not "make it more or less likely that, once having gone to the Englewood Cliffs with defendant, while she was under the influence of alcohol, an accident could not have occurred." Ibid. The panel rejected the assertion that Jody Ann's fear of defendant would make her less likely to go to the Cliffs with him, since there was no evidence that he forced her to go with him or of a struggle at the scene. Id. at 15-16. (Pa23 to 24).

Similarly, the panel ruled that Jody Ann's statements to Ms. Teague about her abuse at defendant's hands and her fear of him were not relevant and her statement that she had never been to the Englewood Cliffs was inadmissible under N.J.R.E. 803(c)(4). Id. at 16. (Pa16).

In reversing defendant's conviction, the panel committed grave error. First, it ignored well established precedent in this State and around the country that when a defendant claims a homicide victim's death was accidental, the victim's state of mind becomes relevant and statements by the victim of fear become admissible. Second, it interpreted Jody Ann's decision to go out to dinner with defendant and Jonathan the day before the murder and her decision to go with defendant to a comedy club the night of her murder as conclusive evidence that Jody Ann did not truly

fear defendant. In doing so, the panel accorded no significance to the fact that, in both circumstances, Jody Ann would be in public places; that before agreeing to go out with defendant on the night of the murder, Jody Ann, as testified to by her son, Jonathan, initially said to defendant, "If I wanted to go out with you, I wouldn't be divorcing you," and that no evidence existed, except for defendant's self-serving statement, that Jody Ann willingly agreed to go to the Cliffs.

Concomitantly, the panel concluded that even if Jody Ann feared defendant, that fear did not make it less likely that, having accompanied defendant to the Cliffs, an accident could not have occurred. Again, the panel accepted as truth defendant's allegation that Jody Ann willingly accompanied him to the Cliffs, as well as his account of their conduct on the Cliffs, even though the evidence the panel disparaged showed that scenario to be unlikely, particularly given Jody Ann's well documented fear of heights, her fear of defendant and his history of abuse, which explained her submissive behavior, and that, absent defendant's statement, the testimony showed that Jody Ann agreed only to accompany defendant to the comedy club.

The panel's ruling entirely discounting the victim's fear of defendant was compounded by its misapplication of this Court's decision in State v. Calleia, 206 N.J. 274 (2011), a case discussing how a victim's state of mind might be relevant in

establishing a defendant's motive. Id. at 295-96. The inapplicability of this ruling to the present case is clear: the State did not elicit the statements to prove defendant's motive to kill Jody Ann but to disprove the accident claim. Moreover, the panel, in coupling its unduly crimped, selective and unrealistic view of the evidence regarding the victim's fear of defendant with an unarticulated but severe contemporaneousness requirement, exceeded the court's gate-keeping role; it has invaded the province of the jury. In so doing, it also has exhibited no appreciation for the rationale animating this hearsay exception, namely, that the victim's statements can aid the jury in assessing whether the victim's death was an accident or murder.

The panel's opinion has eviscerated the state of mind hearsay rule by failing to apply this Court's precedent and by selectively analyzing the record to achieve the result it wanted. This Court must grant certification and reaffirm that when a defendant alleges that the death of a victim was accidental, the statements of that victim are relevant and admissible to counter the defense theory.

QUESTIONS PRESENTED

1. Did the Appellate Division misapply N.J.R.E. 803(c)(3) and State v. Benedetto, 120 N.J. 250 (1990), in ruling that evidence of the victim's fear of defendant was irrelevant in a case in which the defense was accident?

2. Did the Appellate Division misapply N.J.R.E. 803(c)(3) in ruling that the victim's statements to her therapist that defendant had invited her to the Cliffs and that she had never been there before were irrelevant as part of the mosaic of the crime?

3. Did the Appellate Division misapply N.J.R.E. 803(c)(4) in ruling that the victim's statements to her therapist that defendant had invited her to the Cliffs and that she had never been there before were irrelevant?

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION ERRED IN REVERSING DEFENDANT'S MURDER CONVICTION SINCE EVIDENCE OF THE VICTIM'S STATE OF MIND WAS RELEVANT TO COUNTER THE DEFENSE OF ACCIDENTAL DEATH.

Even before he was formally charged with a crime, defendant claimed that his wife's death in a fall from the Cliffs was accidental. In a series of statements, defendant related how Jody Ann accompanied him to the Cliffs, a location they often visited, how she walked over a guardrail to sit with him on a bench seat suspended more than 100 feet above the base of the Cliffs, how they passionately kissed until defendant got up from the seat, and how Jody Ann rolled off the bench seat to her death.

But investigation by the police revealed the fantastical nature of defendant's account of Jody Ann's death. People close to Jody Ann described her fear of defendant, her fear of heights, his abusive character, her impending divorce and her never having been to the Cliffs. Because defendant raised the defense of accident, evidence of the victim's state of mind was relevant as it contradicted defendant's defense. After the evidence was admitted, the trial judge provided the jury with an instruction carefully limiting how this evidence could be used.

Notwithstanding that the trial judge merely applied

controlling precedent from this Court, the Appellate Division panel reversed defendant's conviction, concluding that the testimony was not relevant even though defendant placed the victim's state of mind into issue by asserting that her death was accidental. To reach its decision, the panel concentrated only on Jody Ann's conduct with defendant during the last two days of her life, ignored their long history, and viewed what happened on the Cliffs solely through the prism of defendant's self-serving account. For all these reasons, the State urges this Court to grant certification and reverse this deeply flawed opinion.

A. Because defendant claimed the victim's death was accidental, the victim's state of mind was relevant and her statements about her fear of defendant were admissible.

The state of mind exception to the hearsay rule, N.J.R.E. 803(c)(3), makes admissible into evidence hearsay statements 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" when the state of mind of the declarant is at issue. State v. McLaughlin, 205 N.J. 185, 205 (2011); State v. Long, 173 N.J. 138, 153 (2002); State v. Benedetto, 120 N.J. 250, 255-56 (1990); State v. Machado, 111 N.J. 480, 485 (1988).

All evidence must be relevant to be admissible. It must have a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401.

To be relevant to state of mind, the evidence must provide a "causal link" between the identity of the hearsay declarant and the party or issues at trial." State v. McLaughlin, 205 N.J. at 205-06. That is, the "declarant's state of mind must be in issue." Id. at 206.

Usually, out of court statements expressing fear of the defendant are inadmissible under the rule. State v. Benedetto, 120 N.J. at 256-57. That is because such statements merely reflect a victim-declarant's state of mind, an issue not generally material to the case. Id; State v. Machado, 111 N.J. at 485-89; State v. Downey, 206 N.J. Super. 382 (App. Div. 1986).

However, when a defendant claims that he acted in self-defense, or that the victim committed suicide, or that the victim's death was accidental, then the victim's state of mind becomes relevant and the victim's statements of fear become admissible. State v. Benedetto, 120 N.J. at 260 (victim's statements of fear of defendant not admissible under state of mind exception because defendant was not claiming that the victim's death was accidental, a suicide or self-defense); State v. Machado, 111 N.J. at 485-89 (same); State v. Downey, 206 N.J. Super. at 391-92 (same).

The rationale for the three exceptions in homicide cases is patent. In all three situations, the victim-declarant's state of mind is relevant as it casts light on the victim-declarant's

conduct, a material issue in such circumstances.

Courts throughout the country are in accord. See, e.g., People v. Kovacich, 133 Cal. Rptr.3d 924, 946 (Ct. App. 2011) (because defendant raised suicide, victim's statements of fear of defendant and fear for her children refuted defendant's claim that she acted in a way inconsistent with that fear); Peterka v. State, 640 So.2d 59, 69-70 (Fla. 1994) (evidence that victim would not confront defendant about theft because defendant carried weapon relevant to defense of accidental shooting); State v. Crawford, 472 S.E.2d 920, 927-28 (N.C. 1996) (statements that defendant threatened to kill victim, had physically abused her, and that victim feared defendant admissible under state of mind exception when defendant claimed self-defense and accident, rejecting defendant's claim that they seriously damaged his defense and portrayed him as the aggressor); West v. Commonwealth, 407 S.E.2d 22, 24 (Va. App. 1991) (testimony from victim's divorce attorney and her psychologist that the victim told them that defendant threatened to shoot victim if she gained custody of the children, and from a friend that the victim asked to keep a suitcase in her house should she decide to leave defendant, *would* have been relevant and admissible had defendant, who told people after her death that victim committed suicide, raised that defense at trial, but improperly admitted when defense at trial was alibi).

Here, evidence of Jody Ann's state of mind was relevant to this case because defendant claimed that her death was accidental, that they were reconciling, that they often went to the Cliffs, and that he was not abusive toward her during their marriage. As such, witnesses properly were permitted to testify about her fear of defendant, his abusive conduct toward her, and that she never had been to the Cliffs. All of these statements rebutted the defense assertions about her conduct on the Cliffs that purportedly led to her death, which conduct was inconsistent with her fears. People v. Kovacich, supra. Moreover, the need for such statements by the victim overcame almost any possible prejudice to the defendant. Finally, a limiting instruction was provided to the jury, making clear that the evidence was admitted solely to show the victim's state of mind and her intent and plans.

B. Statements made by the victim to her therapist about defendant's "invitation" to accompany him to the Cliffs, and her statement that she had never been there before were admissible to establish the nature of their relationship.

When the behavior of the victim and the defendant are part of the mosaic of the criminal event, their statements which relate to the quality of their acts or their state of mind are part of the scene and admissible. State v. Benedetto, 120 N.J. at 257-58; State v. Machado, 111 N.J. at 489; State v. Baldwin, 47 N.J. 379, 394, cert. denied, 385 U.S. 980 (1966); State v.

Dreher, 251 N.J. Super. 300, 318 (App. Div. 1991), certif. denied, 127 N.J. 564 (1992).

Here, testimony that Jody Ann refused defendant's invitation to go to the Cliffs and indicated that she had never been there before was part of the mosaic of Jody Ann's and defendant's relationship, refuted defendant's claim that the couple was reconciling, and contradicted defendant's contention that the victim willingly accompanied him to the Cliffs. These statements reflected the true nature of the couple's relationship and were necessary for the jury to deliberate fairly.

C. Statements made by the victim to her therapist were admissible as statements made for purposes of medical diagnosis or treatment.

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 are admissible into evidence. N.J.R.E. 803(c)(4).

This exception to the hearsay rule is based on the assumption that the declarant is more interested in obtaining a diagnosis and treatment culminating in medical recovery than in obtaining a favorable medical opinion culminating in a legal recovery. White v. Illinois, 502 U.S. 346, 355-56, 112 S.Ct. 736, 742-43 (1992); Matter of C.A., 146 N.J. 71, 99 (1996). They

have inherent reliability because the patient believes that the effectiveness of treatment received depends largely upon the accuracy of the information provided the practitioner. R.S. v. Knighton, 125 N.J. 79, 87 (1991).

New Jersey cases that apply the exception "demonstrate an unwavering adherence to that rationale." Id. Under the rule, the statements do not have to be made to a physician, but must be made for purposes of diagnosis or treatment and must be reasonably pertinent to either diagnosis or treatment, i.e., must be the type of statements relied upon by practitioners in the field in rendering a diagnosis or treatment.

While it is generally true that statements made in the course of treatment which identify the person who allegedly harmed a victim are inadmissible, courts have allowed psychologists and physicians to testify about the identity of the perpetrator if such statements were medically necessary for treatment or diagnosis of sexual abuse and other psychiatric or emotional disorders. See State v. Roberts, 622 A.2d 1225, 1233 (N.H. 1993) (victim's statements identifying defendant descriptive of cause/source of victim's symptoms and pertinent to doctor's treatment decision); State v. Grey, 491 S.E.2d 538, 552 (N.C. 1997) (victim's statement identifying defendant as person who tried to choke her admissible); State v. Moen, 786 P.2d 111, 120 (Or. 1990) (victim's statements to physician identifying

defendant as source of her anxiety and depression); Vallinoto v. DiSandro, 688 A.2d 830, 841-41 (R.I. 1997) (victim's statements about sexual activity with defendant were relevant to diagnosis of mental state and treatment she was receiving for the alleged mental anguish); State v. Saunders, 132 P.3d 743, 751 (Wash. App. 2006)(victim's statement identifying boyfriend as perpetrator properly admitted because relevant to potential treatment in domestic violence incident).

The evidence rule authorizes statements made by the patient to the treating practitioner concerning "the inception or general character of the cause or external source thereof." For example, the homicide victim in Moen gave her physician information concerning the cause of her depression, which was defendant's moving into her house, and in doing so, identified defendant. That information was necessary to diagnose and treat the victim. State v. Moen, 786 P.2d at 120.

So too, in this case, Jody Ann described the person, defendant, who was causing her depression. That information was of the type that Ms. Teague needed to diagnose and treat Jody Ann. As such, testimony about defendant's identity was relevant to treatment and admissible into evidence.

In sum, in reversing defendant's conviction for murder based upon its belief that the trial court improperly admitted hearsay statements of the victim regarding her fear of defendant, his

prior invitation to go to the Cliffs and her assertion that she had never been there before, the Appellate Division committed error.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant its petition for certification and reverse the ill-considered opinion of the Appellate Division.

Respectfully submitted,

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BERGEN COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-PETITIONER

BY: Catherine A. Foddai

Catherine A. Foddai
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CERTIFICATION

I hereby certify that this petition is made in good faith and not for the purpose of delay.

Catherine A. Foddai

Catherine A. Foddai
Senior Assistant Prosecutor

DATED: September 5, 2014

April 11, 2011

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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

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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.

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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.

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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).

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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

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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.

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

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

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN F. SCHARF,

Defendant-Appellant.

Argued May 20, 2014 – Decided August 11, 2014

Before Judges Reisner, Alvarez and Higbee.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 09-08-1485.

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

Catherine A. Foddai, Senior Assistant Prosecutor, argued the cause for respondent (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Foddai, of counsel and on the brief).

PER CURIAM

Tried by a jury, defendant Stephen F. Scharf was convicted of first-degree purposeful and knowing murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2). On October 21, 2011, he was

sentenced to life in prison, subject to thirty years of parole ineligibility. Defendant appeals, and we reverse.

The facts are taken from the trial record. On September 20, 1992, defendant's wife Jody Scharf was found dead at the bottom of the Englewood Cliffs in Bergen County. On the evening in question, defendant guided the police over the top of the cliffs through a wooded area, beyond a green cable fence meant to keep visitors out, and, ultimately, to a flat rock, shaped like a bench, from which he told police that his wife had fallen. The victim's pocketbook was on a ledge about eight feet below.

It was some time before Scharf's body was located. Initially, although defendant was questioned, he was not taken into custody. One officer at the scene recalled seeing defendant kneeling by the patrol car and praying. As another officer drove defendant to the police station before the discovery of the body, defendant told him: "[W]e 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."

Later that evening, defendant told a third police officer that he and his wife had been headed towards a comedy show in New York City. They ended up at Rockefeller Lookout, which defendant described as "their spot." Defendant said that he and

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Scharf had been drinking in his car, left the vehicle, and walked to the cliff's edge, climbing through the fence onto the rock. The victim was sitting on defendant's lap, and the couple was kissing and hugging. Defendant became uncomfortable and told his wife that he was going to go to the car to get a blanket and some wine. He described seeing Scharf starting to get up and, then, falling forward, telling him, "No, don't go." In his oral and written statement, defendant claimed that after she fell forward, he neither heard nor saw Scharf again.

Once her body was located, Scharf was pronounced dead by the medical examiner over the telephone. She was later found to have a blood alcohol content of .12 percent.

After discovery of the body, defendant consented to the search of his vehicle, which was still parked at Rockefeller Lookout. In the back seat of the car, police found a red nylon bag, which contained a blue nylon bag and a Coleman cooler. Inside the cooler was a wine glass, one full and one empty bottle of wine coolers, and a steak knife. Inside the blue bag was a green blanket, ace bandages, two white towels, a candle, a plastic bag with a receipt, including one for cheese purchased that afternoon, a box of crackers, and a small jewelry box containing a chain and gold cross. At the bottom of the blue bag was a claw hammer.

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When defendant was interviewed on the following day, September 21, 1992, he reiterated that he and Scharf had intended to go to a nightclub and ended up at Rockefeller Lookout. The parties' son, Jonathan, who was ten years old when his mother died, corroborated that on that night his parents drove him to a friend's house because they planned to go to a comedy club in New York City. The night before, he accompanied his parents to a late dinner. His mother had asked him to join them because she did not want to be alone with defendant.

Returning to defendant's statement to police, he also acknowledged being served about two weeks earlier with divorce papers, in which Scharf alleged he was abusive and unfaithful. Defendant told the officers that he and Scharf had an open marriage but that he hoped that they could reconcile. The trip to Englewood Cliffs was part of his reconciliation plan.

Defendant told police that for that reason he had broken off his relationship with two women he had been seeing, K.S. and T.S. He allegedly ended his relationships, with T.S. on Labor Day, and with K.S. on September 18.

When the officer asked defendant about the presence of the hammer in the bag, defendant explained that he mistakenly left it there after repairing a kitchen drawer. He had put the hammer in the bag on his way out of the house so that he could

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put it back in the garage but had forgotten about it. He also told the officer that the gold chain was a reconciliation present for his wife.

An officer from Washington Township Police Department kept defendant company during the search of his home two days after the death. The officer reported that, at one point, defendant turned to him and asked: "[Y]ou don't believe this was an accident?" or "[Y]ou don't believe me?" The officer responded that he did believe that an accident had occurred, at which point defendant said "no" and put his head down. Shortly thereafter, he asked to speak to a priest. The officer reported the conversation, which was not followed up on by the investigators.

A surveyor measured distances from the point where Scharf's body was found. He testified that the fall from the cliff to the ground covered 119 feet, 2 inches vertically, and that Scharf's body landed, horizontally, a distance of 52 feet, 5 inches away from the face of the cliff. Defendant called as his expert a civil engineer who testified that Scharf's body had to have been projected out some 52 feet from the cliff to strike the tree through which her body travelled before it struck the ground. He testified: "[F]rom an engineering standpoint, I can't figure out any manner . . . that a body can get

accelerated to [thirteen] miles an hour and be projected out unimpeded to hit that tree. . . . I can't come up with anything." He speculated that her body had projected out that distance because of "deflect[ing] off the edges, and be[ing] projected out each time."

The parties' son Jonathan testified that, when his mother died, his parents no longer shared a bedroom. His father had introduced him to other women that he was seeing. Jonathan acknowledged that his mother drank, which his father did not condone. Jonathan also said that his mother was terrified of heights and that he therefore did not find believable his father's explanation of their presence on the cliff. Scharf's brother also testified about her fear of heights.

In 2003, defendant finally processed the paperwork to collect the payout on the life insurance proceeds on Scharf's life, a $300,000 policy with a $200,000 accidental death benefit. Since defendant did not initially claim the money, the insurance company actually paid the funds into the Unclaimed Property and Trust Fund of the State of New Jersey where they remained from 2000 to 2003, by which time the proceeds grew to $730,154.27. When defendant collected the money, the funds came to $770,650.83. Jonathan is the contingent beneficiary, meaning

that, if defendant is found guilty, Jonathan would have a claim to the money.

The matter was reinvestigated in 2004, including a visit by the medical examiner to the site where the body was found. As a result, she amended the death certificate to reflect that the cause of death was homicide, as opposed to "could not be determined." The State then retained a forensic pathologist, as did defendant.

The State's expert confirmed the medical examiner's opinion that the death could only have been the result of something other than an accidental fall. Defendant's pathologist testified to the contrary, that the unusual pattern of injuries that led to Scharf's death were the result of her striking only one side of her body at an "intermediary point" on the way down.

K.S. and T.S., the two women with whom defendant was romantically involved prior to his wife's death, denied his claim that he had told them that the relationships were over and that he wanted to reconcile with his wife. To the contrary, K.S. testified that defendant said he was considering a divorce. T.S. reported that defendant told her that he was under a lot of pressure but that if she would "give [him] to the end of September [] everything w[ould] be okay."

I.

The heart of the appeal is a challenge to the judge's admission of multiple hearsay statements made by Scharf's counselor and Scharf's friends. Pre-trial, the judge denied defendant's motion to suppress hearsay testimony regarding Scharf's statements, such as that if she were to be found dead, it would have been at defendant's hands, and that she was afraid of him. We summarize the relevant testimony. The admission of virtually all of the testimony we find to have been prejudicial error.

M.D., a friend of Scharf, testified that she had a conversation with her on September 19, 1992, after Scharf filed for divorce. According to Scharf, defendant had threatened her life. Further, Scharf told M.D. that defendant said that he "would see [her] dead before he'd . . . sign [the divorce papers]."

Scharf spoke with another friend, M.G., on September 19, 1992. That day, Scharf passed her a note indicating that defendant was unhappy about the divorce and that she was afraid.

M.H. testified that Scharf expressed that she "was frightened, very, very frightened of her husband," "that [defendant] was going to really hurt her," and that she was "very afraid for her life." On another occasion, Scharf told

M.H. that she was "frightened" that something was going to happen to her following service of the divorce papers because defendant "want[ed her] gone."

Scharf's counselor, Patricia Teague, said that in August 1992, approximately one month before Scharf's death, Scharf told her that she had refused defendant's invitation to accompany him to a picnic at the Palisades. Scharf also said that she had never been to that spot before. Teague repeated that Scharf was afraid of defendant and that he assaulted her in the past.

The judge admitted the friends' statements in reliance upon State v. Benedetto, 120 N.J. 250 (1990), and N.J.R.E. 803(c)(3). He opined that the victim's state of mind was relevant and admissible to refute the defense of accident. He also ruled that Teague's testimony was admissible hearsay in reliance on the N.J.R.E. 803(c)(4) exception for statements made by a declarant "for purposes of medical diagnosis or treatment." Additionally, he considered Teague's statements regarding the relationship between defendant and Scharf to be admissible as part of the "mosaic" of the event, pursuant to State v. Machado, 111 N.J. 480 (1988), and State v. Dreher, 251 N.J. Super. 300 (App. Div. 1991), certif. denied, 127 N.J. 564 (1992).

II.

Defendant raises the following points of error:

> 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.
>
> 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).

We do not address defendant's second point, made moot by this reversal.

III.

Generally, a trial court is vested with substantial discretion to admit or exclude evidence. State v. Torres, 183 N.J. 554, 567 (2005); State v. Nelson, 173 N.J. 417, 470 (2002). On appeal, such decisions are reviewed for abuse of discretion. State v. Rose, 206 N.J. 141, 157 (2011). This means that the ruling will be sustained "unless it can be shown that the trial court['s] . . . finding was so wide [of] the mark that a manifest denial of justice resulted." State v. Lykes, 192 N.J.

519, 534 (2007) (second alteration in original) (internal quotation marks omitted).

The first question, of course, is whether the evidence is relevant. As formulated in N.J.R.E. 401, relevant evidence is evidence "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Next, in this context, we ask whether the proffered evidence is hearsay and if so whether it is admissible under an exception to the hearsay rule. See State v. Coder, 198 N.J. 451, 463-68 (2009). N.J.R.E. 801(c) defines hearsay in the familiar language: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

In a case similar to this one, State v. Calleia, 206 N.J. 274, 277-78 (2011), the Supreme Court revisited the admissibility of hearsay statements made by a deceased victim about her relationship to the defendant charged with her murder. In Calleia, the hearsay statements at issue were the victim's discussions regarding her intent to end the marriage and obtain a divorce from defendant. Id. at 284, 286. The Court specifically declined to adopt a per se rule "that hearsay statements by a deceased victim may never be admitted under the state-of-mind exception to prove motive." Id. at 295.

In Calleia, the Court described in some detail the analysis to be followed in deciding whether to admit a victim's hearsay statements as motive evidence. See id. at 288-95. The Court began its discussion by stating that bald statements of fear, when introduced "in conjunction with a defendant standing trial for a violent crime, [] create an unsubstantiated inference that violence permeated the relationship between the victim and the defendant." Id. at 292. The Court differentiated that situation, however, from one in which hearsay statements were being introduced purely to establish a defendant's motive. See id. at 295. Motive evidence is admissible where "it remains a material issue in a case." See id. at 293-94.

Nevertheless, even in those circumstances, such evidence may be excluded upon a strong showing of prejudice under the balancing test contained in N.J.R.E. 403, which states: "[R]elevant evidence may 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." See Calleia, supra, 206 N.J. at 296-97. In making that separate determination, the party urging exclusion must establish that the potential for prejudice "substantially" outweighs the potential probative value. State v. Morton, 155 N.J. 383, 453

(1998). The evidence can be excluded when its probative value "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issues of the case. See State v. Thompson, 59 N.J. 396, 421 (1971). In sum, "trial courts should remain vigilant to ensure that an evidentiary submission's probative value is not substantially outweighed by prejudicial effect." Calleia, supra, 206 N.J. at 297.

In order to bear its burden to demonstrate admissibility in light of N.J.R.E. 403, the State must show that "the accused probably knew the facts that are alleged to have given rise to the motive." Calleia, supra, 206 N.J. at 296. Only then does the "statement satisf[y] the threshold for relevance." Id. at 296. So long as the State can demonstrate that an accused was aware of the information included in hearsay statements of the decedent, it will have met its burden. Ibid. The evidence is then subject to the balancing test found in N.J.R.E. 403. Id. at 296-97.

In Calleia, to establish that the victim intended to divorce the defendant, several of her statements to others were admitted. Id. at 297-300. They were admitted because they established her state of mind and were, therefore, probative of

the declarant's conduct, i.e., that she intended to file for divorce. Id. at 301. Additionally, the defendant himself admitted to police and friends that he knew his wife was unhappy and considering a divorce. Ibid. As the Court observed, "it takes no great leap of intuition to understand that divorce could motivate a person to kill." Ibid. And, it is a proper jury consideration whether a defendant "might be driven to kill to avoid a divorce, with its attendant costs, or whether the prosecution has failed to show that the asserted motivating factors could in fact drive the defendant to commit the acts alleged." Ibid.

In its discussion, the Court noted that "the victim's hearsay statements [did] not contain otherwise unfounded statements of fear, which would be prejudicial and could potentially inflame jurors." Ibid. The hearsay statements in Calleia did not include language regarding the victim's fear of the defendant, which would have raised prejudice while having no probative value. See id. at 301-02. Even when such statements are relevant, and do have probative value, they are potentially so prejudicial that rigid, strict limitations including clear limiting instructions are necessary in order to avoid the possibility that a defendant's "ability to be assessed fairly by a jury" not be prejudiced. See id. at 302.

In this case, the Court's cautionary language implicates virtually all of the testimony we have described given by the victim's friends and therapist. Scharf's expressions of fear of defendant were neither relevant nor material. The statements were highly prejudicial and clearly cumulative.

The statements were not relevant because Scharf's state of mind was not an issue in the case. Her alleged fear did not keep her from spending time with defendant, as the parties' son testified that his parents had gone to dinner with him the night before her death and that the night that she died she told him they planned to go to a comedy club in New York City. In other words, her state of mind was not relevant to her conduct. Scharf's fears were not a motive for defendant to kill his wife, nor were they admissible to prove something about his state of mind and future conduct.

Contrary to the trial judge's view, Scharf's fear of defendant, even if based on their past history, simply does not make it more or less likely that, once having gone to the Englewood Cliffs with defendant, while she was under the influence of alcohol, an accident could not have occurred. There is no reason that the victim's fear of defendant would have made it less likely that an accident occurred. The State cannot explain how Scharf's fear in any way logically

compromised defendant's defense or bolstered its own case. The State argues that Scharf's fear of defendant would make her less likely to go to the Cliffs with him, but there is no evidence that he forced her to go with him, and there was no evidence of a struggle at the scene. The prejudicial impact of this evidence outweighed its probative value.

We reach the same conclusion as to the counselor's testimony with regard to Scharf's fear of defendant and any history of domestic violence. It is not admissible under N.J.R.E. 803(c)(4), nor were the statements relevant in the first place. Scharf's state of mind, her fear, and the alleged abuse inflicted by defendant were not probative on any issue in the case. See N.J.R.E. 401, 403. Scharf's statement to her counselor that she had never been to Englewood Cliffs is not admissible under N.J.R.E. 803(c)(4) either.

The State's evidence was by no means overwhelming, and we find that the error in this case was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. We have "a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." State v. Macon, 57 N.J. 325, 338 (1971).

Reversed and remanded for retrial.

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SUPREME COURT OF NEW JERSEY
DOCKET NO.
APP. DIV. DKT. NO. 1580-11T4

STATE OF NEW JERSEY,	:	
Plaintiff-Petitioner,	:	CRIMINAL ACTION
v.	:	NOTICE OF PETITION FOR CERTIFICATION
STEPHEN F. SCHARF,	:	
Defendant-Respondent	:	

PLEASE TAKE NOTICE that the State of New Jersey, by John L. Molinelli, Bergen County Prosecutor, Catherine A. Foddai, Senior Assistant Prosecutor appearing, hereby petitions the Supreme Court of New Jersey for certification to the Superior Court, Appellate Division, from its opinion of August 11, 2014, by the Honorable Susan L. Reisner, Carmen H. Alvarez, J.J.A.D., and Carol E. Higbee, J.S.C. (t/a), which reversed defendant's conviction for first degree murder on the ground that the State improperly was permitted to introduce evidence of the victim's state of mind.

Defendant was sentenced to life imprisonment, 30 years without parole, and ordered to pay $100 to the Victims of Crimes Compensation Board, $75 to the Safe Neighborhoods Services Fund

and $30 to the Law Enforcement Officers Training and Equipment Fund.

Respectfully submitted,

JOHN L. MOLINELLI
Bergen County Prosecutor
Attorney for Plaintiff-Petitioner

By: Catherine A. Foddai
Catherine A. Foddai
Senior Assistant Prosecutor

DATED: August 29, 2014

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