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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CRIMINAL PART
BERGEN COUNTY
INDICTMENT NO.: 09-08-1485
A.D. # A-1580-11T4

STATE OF NEW JERSEY,)
)
vs.) TRANSCRIPT
) OF
) TRIAL
STEPHEN F. SCHARF,)
)
Defendant.)

Place: Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601-7699

Date: April 7, 2011

BEFORE:

HONORABLE PATRICK J. ROMA, J.S.C. and JURY

TRANSCRIPT ORDERED BY:

HELEN GODBY, ESQ. (Assistant Deputy Public
Defender)
Office of the Public Defender, Appellate Section

APPEARANCES:

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DANIELLE R. GROOTENBOER, ESQ., (Assistant
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1 (Prospective jurors are not yet chosen)

2 THE COURT: All right.

3 MR. BILINKAS: Judge, if -- if I may, Mr.

4 Mello and I had agreed on that language you asked us to

5 --

6 THE COURT: Oh, could I see it?

7 MR. BILINKAS: -- (voice fades)

8 (Pause in proceeding)

9 (Sidebar)

10 MR. MELLO: -- (Speaking softly)

11 (Pause in proceeding)

12 MR. BILINKAS: Very gracious putting in --

13 (voice fades)

14 MR. MELLO: I always -- (voice fades)

15 (Microphone is now picking up voices)

16 THE COURT: This is true.

17 MR. MELLO: -- you know, I'm not talking --

18 MR. BILINKAS: -- with a drink in my hand. I

19 don't know about --

20 THE COURT: That's why --

21 MR. MELLO: Well, with the drank, yeah --

22 THE COURT: That's why the world was created

23 the way that it is, three-quarters water, one-quarter

24 land.

25 MR. MELLO: Exactly. Exactly.

1 THE COURT: What better evidence of the
2 divine intentions.

3 MR. BILINKAS: Right.

4 THE COURT: You know, this is a nice idea.

5 MR. MELLO: Thank you, Judge.

6 THE COURT: Okay. I -- I looked at it from
7 the standpoint of what's running through somebody's
8 mind when you read something like this. If there are
9 65 people in a room, 65 hands will go up.

10 MR. MELLO: Do you think so?

11 MR. BILINKAS: Yeah, I mean, every time --

12 MR. MELLO: --

13 MR. BILINKAS: -- that we don't do -- do
14 this, you know, they bring up 60 perspective jurors and
15 --

16 MR. MELLO: --

17 MR. BILINKAS: -- over half of them are --

18 MR. MELLO: --

19 MR. BILINKAS: -- excused and then you never
20 get --

21 THE COURT: Could you turn that off, Paul?

22 MR. BILINKAS: -- through them and you have
23 to redo everything.

24 THE COURT: Paul? Paul?

25 MR. MELLO: Judge, actually, I -- form now --

1 and each case that the two of them were cold-case r--
2 and two murders -- two days.

3 (Off the record. Back on the record.)

4 THE COURT: -- there's a bench warrant
5 cancellation that we could take care of real quick.

6 COURT CLERK: Yes, Your Honor.

7 (The Court moves on to another matter)

8 THE COURT: Next matter? We can go back to
9 Scharf with the juror questionnaire.

10 There are no other bench warrants, no other
11 matters, correct?

12 (Pause in proceeding)

13 THE COURT: Okay, preliminary juror
14 questionnaire.

15 This is a relatively new form. The presiding
16 judge would like us to use it. Presumably, what this
17 will allow Jury Management to do is to select those
18 people who are most able to sit with us for an extended
19 period of time.

20 I guess it's a good idea. I -- I -- I really
21 don't have any experience with this form, other than
22 the fact that, when people are here six weeks, I could
23 hear noises in the back of the courtroom, all right?
24 And I've handled that a different way by impressing
25 upon them the importance of jury duty, trying to

1 inculcate in them a sense of responsibility, telling
2 them that it's not somebody else's job; it's their job;
3 that they could be in the same position some day, but
4 for the grace of God.

5 So the bottom line is I let them understand
6 this is not a time to be quibbling over when they're
7 going to do other errands. And really that's what it
8 comes down to, an understanding that this is a
9 difficult time in everybody's life; you're lucky if you
10 have a job; that there are certain responsibilities
11 that we have in a free society.

12 It may sound a little hackneyed, but, you
13 know, the bottom line is that it's the truth; you want
14 the best possible jurors. We don't want the people
15 that are left over after they go to everyone and try to
16 get out of jury duty.

17 So we did away with the exemptions and we
18 made the system better. So, if this form helps us,
19 okay, but I don't know; I look at it and alarm bells go
20 up like somebody's going to look at this and say,
21 "Well, where's the door," you know, "I want to leave,"
22 "I don't know if I could sit here for six weeks," or
23 "It's murder; I don't like murder". Well, of course
24 you don't like murder, but, after you hear the charges,
25 can you be fair and impartial? That's what I want to

1 know.

2 So why don't we read the form. This is what
3 the presiding judge wants to use. And maybe we'll have
4 a good experience with it in this case.

5 MR. MELLO: Hopefully so. And, for the
6 record, both myself and Mr. Bilinkas have agreed on the
7 language of the form.

8 THE COURT: All right, the language is as
9 follows: "This is a criminal case in which the
10 Defendant, Stephen Scharf, is charged with the murder
11 of his wife, Jody Ann Scharf, in Englewood Cliffs, New
12 Jersey, on or about September 20th, 1992.

13 Mr. Scharf has pled not guilty to the charge.
14 It is estimated that the trial will last about six
15 weeks and will normally be heard three days a week on
16 Tuesdays, Wednesdays, and Thursdays, from 9 a.m. until
17 approximately 4 p.m..

18 Normally, you would not be required to be
19 present on Mondays and Fridays so that you can attend
20 to your usual activities on those days.

21 Is there anything about the length or
22 scheduling of this trial that would interfere with your
23 ability to serve?". Then there are two boxes: "No,"
24 "Yes". "If your answer is yes, please give a brief
25 description of the reason or reasons why you feel you

1 are unable to serve". And then the jurors sign.

2 That's the form that you've agreed upon?

3 MR. MELLO: Yes, Sir.

4 THE COURT: Okay.

5 MR. BILINKAS: Judge, I -- I just had one
6 question. When -- when they do answer, "yes," and they
7 do give a brief description, who will be deciding
8 whether or not they're excused or not excused?

9 THE COURT: Jury Management. That's my
10 understanding.

11 What they're doing is pre-screening the
12 jurors. And, for example, if somebody came in with a
13 doctor's note and said that they were having an
14 operation, they would be empowered to excuse that
15 person.

16 And, presumably, if someone is -- is going on
17 an anniversary trip, 50th anniversary, and they have
18 plane tickets, they'll present the information and, if
19 they have plane tickets, those are the sort of thing --
20 someone who is taking care of a close relative, a loved
21 one, the only person who can take care of that
22 individual, someone who has an operation coming up,
23 someone who -- out of the country, somebody who's on
24 business and they've already made multiple reservations
25 in order to go to different locations, those are the

1 sort of people we want to know about over a six-week
2 period.

3 But, beyond that, if they don't have some
4 very good reason, I -- I would assume that they're put
5 back into the jury pool that we will get.

6 MR. BILINKAS: That's -- that's my only
7 concern, Judge, is that someone is -- is -- is
8 legitimately screening these people and -- and -- and
9 --

10 THE COURT: Well --

11 MR. BILINKAS: -- their being excused is not
12 automatic --

13 THE COURT: Well, let me tell you something,
14 we don't excuse anybody.

15 MR. BILINKAS: Good --

16 THE COURT: We take a really tough line with
17 everyone, even people with doctor's notes and things
18 like that. They're still called in, and then, you
19 know, in many cases they have to present that
20 information to the judge.

21 I know for a fact that I take it seriously.
22 And I've had -- just to give you some understanding of
23 my philosophy, there's nothing more important than jury
24 duty. I mean, it's the cornerstone of our democracy.
25 You'll hear me say that.

1 seriously.

2 MR. BILINKAS: Understood, Judge, and we --

3 THE COURT: Okay?

4 MR. BILINKAS: -- we appreciate that.

5 THE COURT: All right. Are we ready to
6 proceed?

7 MR. BILINKAS: Yes, Judge.

8 MR. MELLO: We are.

9 Your Honor, we have concluded testimony in
10 the Miranda motions and, with respect to Miranda and
11 all other pending motions, we are prepared to proceed
12 with legal argument.

13 THE COURT: Okay. Mr. Bilinkas?

14 MR. BILINKAS: Judge, my co-counsel, Jason
15 Alterbaum, will be arguing some of the motions, and Ms.
16 McArdle will be arguing others.

17 THE COURT: Okay.

18 MR. BILINKAS: Between them, they --

19 THE COURT: Well, let's -- let's concentrate
20 on the Miranda. Who will be taking care of the
21 Miranda?

22 MR. BILINKAS: Mr. Alterbaum.

23 MR. ALTERBAUM: Good morning, Judge. Jason
24 Alterbaum.

25 THE COURT: Good morning. There are no other

1 witnesses from either side, correct?

2 MR. MELLO: Correct.

3 THE COURT: Okay.

4 MR. ALTERBAUM: Judge, before I begin, we
5 just want to make clear that the State does not intend
6 to produce additional statements made from our client
7 to Law Enforcement officers and they only intend to
8 introduce the statements that were testified to by the
9 witnesses during the Miranda hearings.

10 THE COURT: You're -- you're asking?

11 MR. ALTERBAUM: Yes, we're asking.

12 THE COURT: Oh.

13 MR. MELLO: No, that is not accurate. There
14 is a witness, Lowell(phonetic) Tomao(phonetic), police
15 officers from Palisade Interstate Park Police --

16 THE COURT: Tomao?

17 MR. MELLO: -- that --

18 THE COURT: And what will the officer testify
19 to?

20 MR. MELLO: That officer, if you recall,
21 Judge, was the officer that arrived at the Rockefeller
22 Lookout immediately following Patrolman Abbott. That
23 is the second officer on scene. That is the officer
24 that accompanied the Defendant and Officer Abbott to
25 the location where Mrs. Scharf fell to her death. That

1 is the officer who escorted Mr. Scharf from the cliff
2 edge back to the parking lot at the Rockefeller
3 Lookout. That is the officer in whose car Mr. Scharf
4 sat and awaited the arrival of police and emergency
5 units. That is the car that Officer Siri referred to
6 as the third officer responding to this location where
7 he found Mr. Scharf seated in the rear seat of Officer
8 Tamao's car, the rear seat door being opened. And
9 ultimately he was the officer who transported Mr.
10 Scharf to Headquarters.

11 It is Patrolman Siri's testimony that, during
12 the ride back to Headquarters, the Defendant
13 volunteered, if you will, the following statement, "We
14 were walking. She said for me to go back to the car,
15 get the blanket. She slipped. I didn't see her
16 anymore".

17 Now, that statement is bracketed by the first
18 officer on the scene, if you will recall, Patrolman
19 Abbott. Patrolman Abbott, first officer on scene,
20 first officer to encounter Mr. Scharf. Mr. Scharf is
21 in the parking lot, flags the officer down, informs him
22 my wife fell off the cliff. Patrolman Abbott asks him
23 to get into his car. The two immediately proceed to
24 the northern end of the lot. Tamao follows. The three
25 now go to the cliff face. Abbott will remain. Tamao

1 will escort him back. Tomao will ask him to sit in the
2 car. And that's when Siri will find him.

3 The simple statement that is bracketed by
4 officers one and three made to Officer Tomao -- and
5 this has been proffered in the motion briefs -- is the
6 following: That the Defendant claimed that the couple
7 were on the rock sitting and kissing when he decided to
8 go back to the car, get a blanket and some wine, and
9 when he got up he turned around and his wife was gone,
10 which is a one-sentence statement, if you will, that is
11 made by Mr. Scharf to Officer Tomao. And, in short,
12 that has been proffered. That is the subject of this
13 hearing, and, quite frankly, I think it's this kind of
14 a simple resolution, everything is in or it is not.

15 And, for the record, Officer Tomao would have
16 been called for purposes of this hearing as a simple
17 chronology, but for the fact that he is out of the
18 jurisdiction, he is out of the country, he had prepaid
19 plans to travel to a foreign destination, and therefore
20 is not present in court. And I represent and make that
21 representation to the Court as an officer of this
22 court.

23 That having been said, with the testimony
24 that has been proffered, I believe it is very simple to
25 factor in whether or not that statement, as well as any

Discussion - Alterbaum/Discussion - Mello

1 other or all other statements by the Defendant, ought
2 be admissible.

3 With that amendment, then I say to Counsel
4 that that completes the evidence of the statements made
5 by the Defendant to Law Enforcement.

6 THE COURT: I -- I have a question.
7 Obviously, each of you know far more about the case;
8 I'm learning about it. But is that statement really in
9 issue? In other words, that your client was there
10 kissing, I'll call her Jody Ann Scharf, and then went
11 to the car in order to get a blanket? Is -- is any of
12 that in dispute?

13 MR. ALTERBAUM: Judge, it's our position that
14 it's a separate statement, it's a different witness,
15 and a different contacts (phonetic) with our client.

16 And we, in light of --

17 THE COURT: You're telling me that it's in
18 dispute.

19 MR. ALTERBAUM: It's in dispute.

20 MR. MELLO: Judge, if I might respond. I --
21 I don't think that it can seriously be held in dispute.

22 THE COURT: Well --

23 MR. MELLO: You've heard --

24 THE COURT: -- that's what I'm hearing.

25 MR. MELLO: -- several different versions of

1 much the same. It is a one-sentence statement. And,
2 quite frankly -- and -- and Ms. Grootenboer will
3 address this -- but this is on scene, so we're really
4 parsing words here and we really should not be.

5 This statement, it is --

6 THE COURT: May I see that?

7 MR. MELLO: -- a one-page report. Well, I --
8 I don't have a blank copy, Judge. This has my notes.
9 I'll read it for you and then hand it up to the Court.
10 I hope my notes don't get in your way.

11 "Sharp stated he was sitting with his wife on
12 a rock by a cliff's edge hugging and kissing when he
13 went to get up to go to his car and get a blanket and
14 wine. He turned around; his wife was gone." That's
15 the statement.

16 (Pause in proceeding)

17 MR. MELLO: And, quite frankly, we have heard
18 a number of different versions of it. This is the
19 first encounter with the police. He has now told the
20 police his wife has tragically fallen from the cliffs.
21 And, quite frankly, I don't think in any way you can
22 honestly argue that those statements are in any wise
23 representative of a custodial situation incurring
24 Miranda.

25 And there's only one other reason to have any

1 testimony from this officer, and that's -- (walks away
2 from microphone) -- pre-trial deposition. But that's
3 the only real reason.

4 And I'm trying to -- and what I'd like to
5 have is an honest representation as to how this is
6 truly a material issue in dispute.

7 And one would -- one would ask -- one would
8 ask, Judge, this question: Isn't this his defense?
9 Isn't his defense is this was an accident? One would
10 ask the rhetorical question: Why don't you want it in
11 for?

12 MR. ALTERBAUM: Judge, we understand that the
13 police are allowed to conduct on on-scene investigation
14 and they did --

15 THE COURT: No -- no, but beyond that,
16 Counselor, beyond that. I've read through these papers
17 and my understanding was that this is not something
18 that was an issue that your client and the alleged
19 victim were out on this rock ledge. I mean, there
20 becomes a point at which there are hearings and then
21 there are matters that are held that I don't want to
22 call them unnecessary, but, if there's something else
23 that I should know about as to where you have indicated
24 that. I mean, this is the one central issue that this
25 was an accident. And, whether it was communicated by

1 your client or someone else or however it happened, I
2 never thought that that was an issue in dispute from
3 everything that I heard.

4 Am I hearing that it's an issue in dispute?

5 MR. ALTERBAUM: Judge, more than just the
6 statement, he was walking alone with our client on the
7 way back from the --

8 THE COURT: I'm only talking about the
9 statement. And, once again, let me say this: If you
10 say that you need a hearing, we'll have a hearing, but
11 I am not going to allow a hearing where you're going to
12 go through minutia and other detail, other than that
13 one statement. It'll be really strict. It will be --
14 it's not going to be like the hearings we had with the
15 other statements, because this is more akin to the fact
16 that he has not -- I never heard anything that
17 indicated that there was a dispute as to being on the
18 precipice and going back to the car to get something,
19 whether it's the blanket, what was referred to as the
20 wine.

21 MR. BILINKAS: Judge, if I may, and I don't
22 mean to interrupt -- (voice fades)

23 THE COURT: But I'm -- I'm hearing something
24 completely different and --

25 MR. BILINKAS: Well, Judge, again, this --

1 this is our position. As you can tell in our original
2 papers, we conceded Abbott's statement or the statement
3 to Abbott, okay. We were contesting Tomao. And -- and
4 the only reason why in good faith we did that, Judge,
5 was because, you know, Abbott's statement, from my
6 standpoint as we stated in our brief, is clearly an on-
7 scene investigation; he's allowed to converse with our
8 client, to ask him what happened.

9 Once he made that first statement to Abbott,
10 then Tomao gets involved. And it was our position,
11 Judge, that at that point in time any scene
12 investigation is over from an accident standpoint, you
13 know, this is where we fell, this is what happened,
14 anything from that point on is a different
15 circumstance.

16 And what the Prosecutor has done is, when we,
17 you know, we conceded that point in our brief, they
18 don't put on the officer that we were concerned about
19 and the one that put him in a car, and we -- we contend
20 at that point was, in fact, in custody, they put on
21 Abbott, you know, who basically says: Well, geez, he
22 was standing; I don't know where he was.

23 So, again, Judge, we -- we don't -- we don't
24 bring this up to -- to create a problem. We're doing
25 it with a good-faith basis. But from our standpoint

1 we're not disputing that --

2 THE COURT: But -- but just the statement --

3 MR. BILINKAS: Correct.

4 THE COURT: -- just the statement, "It was an
5 accident," or words to that effect, "I went back to the
6 car to get a blanket"?

7 MR. BILINKAS: We don't -- we don't dispute
8 that that statement was made, Judge. The only reason
9 why we wanted to have the opportunity to cross examine
10 Tomao was to try to establish a custody situation, him
11 placing him in the car after the initial scene
12 investigation was completed. And that was the only
13 purpose. And that's the only --

14 THE COURT: You're -- you're saying that,
15 when he was placed in the car, that he was in custody?

16 MR. BILINKAS: Yes, Judge, or that it could
17 be argued, Judge, at that point in time started a
18 series of events with regards to the subjective, you
19 know, mind set of a reasonable person under those
20 circumstances.

21 And so, for instance, when I'm asking Abbott
22 questions, "Well, he was free to leave or not free to
23 leave," you know, Abbott doesn't know; he wasn't there;
24 he wasn't watching him; he didn't put him in the car
25 and tell him, "Hey, sit here, do this, don't -- don't

1 leave". Tomao was the one who actually went out and --
2 and stood by him.

3 And -- and, again, why is he standing by him?
4 And, again, that was something I couldn't cross examine
5 Abbott, so.

6 THE COURT: So you -- again, if I'm wrong,
7 you tell me. You're conceding the statements being
8 made --

9 MR. BILINKAS: Absolutely.

10 THE COURT: -- but what you wanted was to ask
11 questions about whether the -- that your client's
12 placement in the vehicle, whether he was in custody.

13 MR. BILINKAS: Right. That's the only thing,
14 Judge. And, again, any time you have a Miranda, to me
15 sometimes the issue is, well, my client --

16 THE COURT: Not that the statements weren't
17 made --

18 MR. BILINKAS: Right.

19 THE COURT: -- but that they were made under
20 a certain circumstance.

21 MR. BILINKAS: Right. And -- and Miranda
22 isn't really based on whether the statements are made.
23 You know, many times clients confess --

24 THE COURT: --

25 MR. BILINKAS: -- every day --

1 THE COURT: Custodial interrogation that
2 triggers the Miranda.

3 MR. BILINKAS: Correct. So, again, that was
4 the only reason, Judge.

5 Until now, I didn't know that Tomao was out
6 of the country. I have absolutely no problems with the
7 Prosecutor's representation. And -- and, again,
8 perhaps with regards to that one issue, you know, if I
9 could just have, you know, five minutes with him out of
10 the presence of the jury before he testifies, that
11 would satisfy the Defense.

12 MR. MELLO: Judge, I believe that you can
13 make your rulings premised on all the testimony thus
14 far --

15 THE COURT: No, I don't -- I don't think so,
16 and I'll tell you why. It -- it would be like making a
17 ruling on three-quarters or 80 percent or 90 percent.
18 The issue has to do with whether there was a custodial
19 interrogation. And, while this would be a very short
20 hearing in my mind, it still has to be a hearing if
21 it's not agreed to.

22 This -- this testimony as to the placement of
23 the officer, the placement of the Defendant, I can't
24 say that, because 80 percent of it was testified to,
25 that I can somehow excuse another portion.

1 Counsel is looking for the -- whether the
2 statements that were triggered were, in fact, voluntary
3 under the circumstances.

4 MR. MELLO: Well, my point is you certainly
5 can rule on all other statements that have been made.

6 THE COURT: I -- I can do all other
7 statements but this statement.

8 MR. MELLO: And -- and I don't have an issue
9 with the suggestion by Counsel --

10 THE COURT: I want to g --

11 MR. MELLO: -- with respect to Officer --

12 THE COURT: -- I want to finish this before
13 we start --

14 MR. MELLO: -- Officer Tomao, but --

15 THE COURT: W -- w -- when is he first
16 available?

17 MR. MELLO: I believe his first availability
18 is the 15th.

19 MS. GROOTENBOER: Next Friday?

20 MR. MELLO: He -- he returns back to the
21 jurisdiction.

22 MS. GROOTENBOER: Oh, so then -- (voice
23 fades)

24 (Pause in proceeding)

25 MR. MELLO: And it would be obviously a very

1 brief examination.

2 (Pause in proceeding)

3 THE COURT: We would be picking the jury next
4 week.

5 MR. MELLO: Yes, Sir.

6 THE COURT: 12th, 13th, 14th. I guess what we
7 could do -- what about this? If it's only that one
8 officer, not swear in the jury and take care of this
9 April 18th, 1:30? That's a Monday.

10 MR. BILINKAS: And then open up --

11 THE COURT: And then, Tuesday, I'll swear in
12 the jury, give them the instructions, and have your
13 openings.

14 MR. BILINKAS: Perfect.

15 MR. MELLO: Perfect. Good.

16 THE COURT: And I -- I don't -- again, I
17 don't anticipate that this will take very long, but you
18 -- you pointed out a different area, the voluntariness
19 and what other circumstances would bear on that issue.
20 You have a right to examine that issue, whether it be
21 little or more or whatever.

22 MR. BILINKAS: And -- and, again, so -- so
23 I'm correct -- I was hoping that Mr. Mello and I
24 wouldn't have to raise to our feet today. We have no
25 objection again proceeding the way the Court has

1 instructed, but, as far as any other statement, this is
2 it; what's in is in --

3 THE COURT: Well, yeah, let's -- let's cover
4 that, because --

5 MR. BILINKAS: But for Tomao.

6 THE COURT: Are there any other statements?

7 MR. MELLO: I'm sorry, I -- I may have
8 misunderstood you. Are you asking the question that
9 Mr. Alterbaum asked: Are there any other statements of
10 the Defendant made to Law Enforcement?

11 MR. BILINKAS: That you seek -- you seek to
12 introduce.

13 MR. MELLO: No.

14 MR. BILINKAS: Perfect. Done.

15 MS. MC ARDLE: Judge, may I be heard on that
16 issue very briefly, not with regard to --

17 THE COURT: --

18 MS. MC ARDLE: -- Law Enforcement?

19 MR. MELLO: That's what we're dealing with
20 here, Judge.

21 UNIDENTIFIED: Right now, yeah.

22 MR. MELLO: That's what we're dealing with.

23 MS. MC ARDLE: (Speaking softly) -- with
24 regard to non-Law Enforcement --

25 THE COURT: Well, that's not a Miranda issue.

1 MS. MC ARDLE: It's not Miranda, Judge.

2 MR. MELLO: Well, that's what we're dealing
3 with right here.

4 THE COURT: I want to take care of Miranda
5 and only Miranda.

6 (Pause in proceeding)

7 THE COURT: So April 18th, 1:30. That'll be
8 the continuation of -- it's another aspect of the
9 Miranda.

10 We -- I don't see any problem in deciding the
11 Miranda but for Officer Tomao.

12 MS. GROOTENBOER: Mmm-hmm.

13 MR. MELLO: Absolutely not.

14 MR. ALTERBAUM: No problem. No objection.

15 THE COURT: All right, let's proceed.

16 (Pause in proceeding)

17 MR. ALTERBAUM: Any statements made by our --
18 our client, Mr. Stephen Scharf, to Law Enforcement
19 officers were obtained in violation of Mr. Scharf's
20 Constitutional Right against self-incrimination,
21 specifically he should have been Mirandized before he
22 did -- had given any statements to Law Enforcement
23 officers.

24 The burden is on the State to prove beyond a
25 reasonable doubt that the waiver of a right to remain

1 silent by Defendant was done with full knowledge of his
2 legal rights and with a voluntary -- with a voluntary,
3 knowing, and intentional relinquishment of those
4 rights. And that cite is State v. -- State v. Hartley,
5 at 103 N.J. 252.

6 Judge, Mr. Scharf was not advised of his
7 legal rights and he did not make a voluntarily,
8 knowing, and intentional relinquishment of those
9 rights. He did not make a waiver. And, therefore, any
10 statements he made to Law Enforcement officers were in
11 violation of his Miranda rights.

12 Law Enforcement officers are required to read
13 Miranda rights when a Defendant is in custody and he is
14 interrogated. Law Enforcement officers are required to
15 read rights, e -- these rights, even if the -- the
16 Defendant's in custody for a brief period of time.
17 Detention, even if brief, qualifies as a seizure, and
18 that is State v. -- State v. Dickey, 152 N.J. 468.

19 And then, when police con -- conduct --
20 conduct constitutes the functional equivalent of a
21 formal arrest, we have to look at the totality of the
22 circumstances, and that's Berkemer v. McCarty, 468 U.S.
23 420.

24 Ordering a person out of a car constitutes a
25 seizure; it restricts his liberty. And that's State v.

1 Davis, 104 N.J. 490.

2 When a defendant's interrogated, we have to
3 look if he was expressly questioned or the functional
4 equivalent, meaning any words or actions on the part of
5 the police that police should have known would elicit
6 incriminating responses. And that's Rhode Island
7 versus Innis, 446 U.S. 291.

8 (Pause in proceeding)

9 MR. ALTERBAUM: Judge, we conceded in our
10 brief that statements made to Officer Abbott were
11 obtained as a result of investigative procedure. We
12 understand that when police arrive on scene they have
13 time to investigate the incident. And they did that.
14 And Mr. Scharf cooperated with that investigation.
15 They asked him what happened, and Mr. Scharf told him
16 that his wife had fallen off a cliff. He pointed them
17 to the area where his wife had fallen and he assisted
18 with the investigation.

19 At that point, Judge, Officer Abbott noted in
20 his testimony that Mr. Scharf's appearance was not what
21 he would call normal after he had just lost a loved
22 one. He became -- as a result, he became suspicious.
23 Officer Tama(sic) -- and he also testified that Officer
24 Tomao was there on scene and noticed the same thing.
25 As a result, they placed our client, Stephen Scharf, in

1 the back of Officer Tomao's police car.

2 Judge, any reasonable person would believe
3 that when they are placed in the back of a police car
4 they are in custody or being seized.

5 (Pause in proceeding)

6 MR. ALTERBAUM: Officer Abbott claimed that
7 the reason for this was for Mr. Scharf's safety.
8 Clearly, Mr. Scharf's safety was not an issue. They
9 had brought him before to the scene, to the accident
10 scene, and he behaved fine. He was normal; he wasn't
11 out of control; he wasn't running around; he was fine.

12 They brought him to the car because they were
13 suspicious, clearly, and they placed him in that car.

14 THE COURT: Let me ask you something. There
15 was testimony to the effect that your client, Mr.
16 Scharf, went out trying to flag down a car raising his
17 hands.

18 MR. ALTERBAUM: Yes, Judge.

19 THE COURT: Wouldn't that seem to indicate
20 someone who's in an excited state?

21 MR. ALTERBAUM: Judge, yes, it does, but also
22 it indicates that he's trying to flag down someone to
23 get help immediately, to bring them to --

24 THE COURT: I don't think you would do that
25 calmly. A person that was excited or anxious or out in

1 the roadway, especially on the Interstate Parkway, that
2 could result in injury.

3 MR. ALTERBAUM: Yes, Judge, I understand, but
4 that was done initially. And, once he had flagged down
5 Law Enforcement, his emotions had changed and he had
6 become calm. And, at that point, he wanted to
7 insist(sic) -- assist them in the investigation.

8 And that was noted by Officer Abbott that he
9 was calm; his emotions were intact; and that he was, in
10 fact, suspicious of that. So, at that point, there was
11 no concern for safety, Judge. The only concern was --
12 was seizing our client and placing him in the back of a
13 car.

14 And, Judge, they -- Abbott testified that at
15 all times my client was free to leave, but that was not
16 the case, Judge. He was in the middle of a freeway in
17 a secluded area; he couldn't just get up and go.

18 And I understand his car was there, but
19 Officer Abbott was instructed by Headquarters to seize
20 that car. There was absolutely no way that our client
21 could take his car home that night.

22 With regards to the statements that he made
23 to Officer Siri, we are contesting those and we are
24 saying that they were in violation of his Miranda
25 rights and that they should be suppressed.

1 Judge, at the time Siri had arrived on scene,
2 our client was already in custody in the back of
3 Officer Tomao's police car -- I mean, in Officer
4 Abbott's police car. With Officer Tomao in close
5 proximity keeping an eye on him, clearly looking at an
6 objective viewpoint -- looking from a reasonable
7 person's point of view, he would not be able to just
8 get up and walk freely. There was a police officer
9 standing there in uniform and he was placed in the back
10 of a police car.

11 As soon as Siri got on the scene, he was
12 instructed to take our client from Officer Abbott's car
13 and place him in the back of his car. He requested it
14 and he was in uniform. Scharf, our client, obviously
15 felt he was obligated to do so. Any reasonable person
16 would feel they were obligated to follow Officer Siri.

17 Once again, there was nowhere for him to go.
18 He couldn't just wander down the highway. He wasn't
19 allowed to take his car. He had to go with Officer
20 Siri into that car and be taken to Headquarters.

21 With regards to the interrogation, Judge, he
22 did make a statement, but we feel that that statement
23 was as a result of interrogation. In Officer Siri's
24 report, he notes that my client was praying and then he
25 also noted that my client would stop and have a

1 conversation with him. Judge, this happened 18 years
2 ago and, once again, Officer Siri, his recollection was
3 fuzzy; he could not recall the specific events. Based
4 on that report and looking at that report, clearly he
5 had a conversation with him in the back of that car and
6 that, when he had that conversation, it should have
7 been known to him that that could have elicited a
8 criminal(sic) response -- I mean, a, excuse me, an
9 incriminating response, excuse me.

10 Then he was brought by Officer Siri to
11 Headquarters and he was placed on a bench. Mr. Scharf
12 didn't have his car at Headquarters; there was no
13 way(sic) -- where for him to go. He couldn't just walk
14 out the door; how would he get home; where would he go?
15 There was nowhere for him to go.

16 This is when Officer Karniak(phonetic) got a
17 hold of him and once again kept him in custody. Keep
18 in mind, Judge, that our client had been in back of a
19 police car since 8:10. He had been in constant police
20 custody. He was moved from -- he was placed in
21 Abbott's car, moved into Siri's car, and then brought
22 to Headquarters.

23 Once Karniak got to Headquarters, he told
24 Schar -- he asked Scharf to get up and come with him
25 into a secluded room, into an office. He arrived in

1 that office I believe around -- he arrived at
2 Headquarters I believe around 8:30, and then the next
3 note we have is that he gave a written statement at
4 10:11. That is two hours from when he arrived --
5 almost two hours from when he arrived at that office
6 til when he gave his written statement.

7 And Officer Karniak also noted that, before
8 he interviewed our client, he spoke with the Bergen
9 County Prosecutor's Office. Then the Bergen County
10 Prosecutor's Office asked him to take photos of his
11 person and to sign consent forms. And may I mention
12 that those consent forms expressly said that this is
13 part of a criminal investigation.

14 Based on the Officer's actions, it was
15 reasonable to believe that our client thought he was in
16 custody. He was being questioned for three hours.
17 From 10:11 until 1:20 in the morning, he was being
18 questioned by Officer Karniak. There is no mention
19 that he was allowed breaks or he was given water or
20 food. He was in custody; he was being interrogated; he
21 was being investigated.

22 He was asked to take his shirt off. He was
23 asked to sign consent forms. No reasonable person
24 would believe they could walk out of that office --
25 that room freely. He was being interrogated. So any

1 statements -- the written statement that was taken by
2 Officer Karniak and the oral statement must be
3 suppressed because they were a violation of his Miranda
4 warning(sic) -- right to Miranda -- be Mirandized and
5 his right against self-incrimination.

6 Also, Judge, after that interrogation,
7 Officer Karniak mentioned that he spoke with Washington
8 Township Police Department and he was advised that my
9 client had been involved in domestic-violence disputes
10 and there was a pending divorce. Judge, this is no
11 longer an investigation; this had become a criminal
12 homicide investigation with my client being the only
13 criminal suspect.

14 Th -- my client was finally allowed to leave
15 the station at night. He called his aunt and then he
16 was taken home. Once again, his car was seized, items
17 were seized out of his car. This was an investigation.
18 He was not -- once again, he was not allowed to take
19 his car home that night.

20 With regards to the statements made to
21 Officer Lynam(phonetic), we submit to you that any
22 statement made to Officer L -- the -- the statement
23 that was taken on 9/22/92 was in violation of his
24 Constitutional Rights against self-incrimination.

25 On 9/21/92, Officer Lynam asked Stephen

1 Scharf to take a polygraph. My client agreed to take a
2 polygraph; this was it, only a polygraph. They set up
3 the appointment for September 22nd, 1992. When he
4 arrived on that date, he wasn't there to just give a
5 polygraph. Officers Alver(phonetic) and Lynam took him
6 and said, "Come with us; we want you to give us a
7 statement". Obviously at that point Mr. Scharf felt
8 obligated to do so.

9 He was taken into custody. He was taken into
10 the Bergen County Prosecutor's Office, satellite
11 office, where he was sn -- put into a secluded room and
12 where he was proceeded to be interrogated. But he was
13 under the impression he was there to give a polygraph,
14 not to give a two-hour statement that started at 9:56
15 in the morning and ended at 11:56.

16 Once again, Judge, Officer Lynam had no
17 specific recollection of the questions that were asked.
18 For all we know, they -- these officers could have been
19 sitting in that room and screaming at him and forcing
20 him to give infor -- incriminating information. And
21 they weren't just asking him questions about what
22 happened that night, they were asking him questions
23 about domestic-violence incidents and relationships he
24 had with other women.

25 Once again, a person sitting in that seat

1 would feel that they had to sit in that seat, that they
2 weren't allowed to leave the office, that they had to
3 give a statement to police. He was in custody and he
4 was being interrogated; therefore, that statement given
5 to Officer Lynam and Detective Alver must be
6 suppressed.

7 THE COURT: Let me ask you one other
8 question. And I have some questions for the
9 Prosecutor. But there's only one wit -- actually, two
10 witnesses, one of which could not testify because she
11 plunged to her death for whatever the reasons, but --
12 and -- and your client. Given the fact that the police
13 only had one person to really speak to, that would be
14 the only way that they could get further information
15 about what had happened that evening.

16 MR. ALTERBAUM: I understand that, Judge, but
17 just because he was the only witness doesn't mean that
18 he has to surrender his rights.

19 THE COURT: I didn't say that. But, I mean,
20 to some extent one would have to agree that if your
21 client is the only witness that some form of
22 questioning would be proper in order to determine what,
23 in fact, had happened that evening.

24 MR. ALTERBAUM: I -- I understand, Judge, and
25 -- and Officer Lynam told our client that he was going

1 to be given a polygraph examination that morning, but,
2 when he arrived there that day, he wasn't there to give
3 a polygraph. They had spoken to each other beforehand
4 and we don't know what they had spoken to. He could --
5 Officer Lynam couldn't remember. They could have --
6 they could have talked about -- excuse me.

7 (Pause in proceeding while discussing something with
8 co-counsel)

9 MR. ALTERBAUM: Excuse me. My client had
10 already made various statements to Law Enforcement
11 officers. He had told them over and over and over what
12 had happened. And, at this point, this was a full-
13 fledged criminal homicide investigation. They were
14 speaking to other agencies. They had interviewed a
15 number of wit -- other witnesses, friends, family
16 members, and so forth, asking him about his background
17 and asking him his -- about his relationship with his
18 wife, his relationship with other women, about the
19 divorce. I mean, this wasn't just about to find out
20 what happened that night; this was to get a full
21 profile on my client.

22 And, that morning, clearly they -- whatever
23 interrogation tactics they used, they put him in
24 custody and they took an incriminating statement from
25 him, and that statement has to be suppressed. He

1 should have been Mirandized on that day. At no point
2 at all during that entire week was he ever Mirandized.
3 And for them to say that at that point he was not a
4 criminal -- the -- a criminal homicide suspect is
5 outrageous. Clearly, he was, based on the
6 investigation. And he wasn't free to leave for those
7 two hours.

8 (Pause in proceeding)

9 MR. ALTERBAUM: With regard to the polygraph,
10 at that point he was still in police custody and it is
11 our position that any statement that my client made to
12 Officer Harniak(phonetic) must be suppressed because
13 they are in violation of his right against self-
14 incrimination.

15 I understand that he signed a consent waiver,
16 but that, at that point, we believe that my client was
17 unable to make a knowingly and voluntarily and
18 intelligent waiver. And, once again, these consent
19 forms say that this is part of a criminal homicide
20 investigation. Clearly, he feels obligated to sign a
21 waiver like that, especially under these circumstances.
22 He had been in police custody since 9:56 in the
23 morning. We don't know -- once he -- we don't know if
24 he was offered bathroom breaks, food, water, and so
25 forth. His mind -- we don't know where his mind was at

1 that point.

2 And then, from there, he was taken from the
3 polygraph, he signed two consent forms, one to search
4 his house and one to search his vehicle. He was taken
5 -- we don't know how he arrived to his house, but we do
6 know that he walked up with the Bergen County
7 Prosecutor's Office to his door and let them in. The
8 police esc -- clearly, the police escorted Scharf to
9 his house to execute this warrant.

10 And may I remind you, just because he signed
11 a consent form to search his house, that is totally
12 different from taking a statement from him. He still
13 had the right against self-incrimination with regards
14 to his statements and he should have been Mirandized
15 before Officer Ernest (phonetic) and Detective -- I
16 mean, Officer Ehrenburg spoke to him that night at his
17 house.

18 It's -- I find it hard to believe that my
19 client would walk up randomly to Hones (sic) -- Officer
20 Herst (phonetic) and just offer information about a
21 door. Clearly, Officer Ernest (phonetic) asked him
22 about this door or started to ask him questions. Once
23 again, all of these Law Enforcement agencies are
24 speaking with each other. This was now the full-
25 fledged criminal homicide investigation. They were in

1 his house looking for evidence. They never let Mr.
2 Scharf out of his sight.

3 There was Bergen County Prosecutor's Off --
4 Law Enforcement from Bergen County Prosecutor's Office;
5 there was Law Enforcement from Washington Township
6 Police Department; there was Law Enforcement from the
7 Palisades Police Department. If this -- if this was
8 just a regular investigation, why would they have all
9 of these officers in his house.

10 And they were keeping an eye on him. He was
11 constantly in control; he was constantly in custody of
12 the Bergen County Prosecutor's Office; he was
13 constantly in custody of the Washington Township Police
14 Department.

15 And, with regards to Off -- Detective Ernest,
16 he did not memorialize the statement that my client
17 made to him in any report. The reli -- reliability of
18 this statement is totally called into question.
19 Because that statement was in violation of his right
20 against self-incrimination, it must be suppressed.

21 And, finally, with regards to the statement
22 made to Ted Ehrenburg, as I've stated before there were
23 numerous Law Enforcement agencies in that house that
24 night; they were conducting a full-fledged criminal
25 homicide investigation. He was under police watch. He

1 was not allowed to roam about the house freely as the
2 officers say he was. A person in Mr. Scharf's position
3 clearly would not believe that.

4 And then Officer Ehrenburg sat next to Mr.
5 Scharf and started talking to him about religion and
6 God. Clearly, this could solicit an incriminating
7 response. And, clearly, Ehrenburg should have known
8 so. And, beforehand, Ehrenburg had testified that he
9 had been speaking with other officers; he knew about
10 the entire investigation; he knew about the domestic
11 violence; he knew about the divorce complaint; he knew
12 about everything. To t -- Officer Ehrenburg was there
13 to interrogate my client and elicit an incriminating
14 response.

15 Judge, for those reasons, all the statements
16 that -- all of the statements that I mentioned that
17 were given by my client to Law Enforcement officers
18 must be suppressed as they are result -- they are the
19 result of -- excuse me -- they are in violation of his
20 right against self-incrimination. Thank you.

21 THE COURT: Thank you. Anything further?
22 All right.

23 From the Prosecutor, I would like your
24 response, but, in particular, there were two areas that
25 were brought up by Defense Counsel.

1 MS. GROOTENBOER: Yes, Judge.

2 THE COURT: How you get from the polygraph
3 appointment to a formal statement and also the form
4 that was referred to. In fact, I haven't seen the
5 form, but it indicates a criminal investigation, okay,
6 so I would like you to spend some time addressing those
7 points, in addition to your counterpoints and anything
8 else you deem relevant, okay?

9 MS. GROOTENBOER: Your Honor, if -- I'll
10 start with those points if you don't mind.

11 First of all, I don't think it could be
12 credibly said, based on the testimony that was
13 presented to you -- and I have to emphasize that
14 testimony is uncontroverted -- it can't be said that
15 the pol -- the invita -- the polygraph was a ruse to
16 really get Defendant to give a statement. We have to
17 start with that premise, Judge, because the De -- the
18 suggestion by the Defense is that the polygraph was
19 some sort of lure. And I have to remind you, Judge,
20 that it was the Defendant himself who volunteered to
21 take a polygraph. The police did not invite him to
22 take a polygraph; he volunteered it himself on the
23 night of September 20th, 1992.

24 Number two, it -- what happened and what
25 occurred was a conversation between the Defendant,

1 Detective Lynam, and Detective Alver when the Defendant
2 arrived of his own free will in his own car to the
3 satellite office of the Bergen County Prosecutor's
4 Office. It was a conversation where they asked
5 questions and the Defendant answered them. It was a
6 conversation in which the Defendant was not restrained
7 in any way. At no time did these Detectives challenge
8 or confront the Defendant in any way.

9 So, when Your Honor examines the totality of
10 the circumstances here, from the uncontroverted
11 testimony that has been presented to you, it leads to
12 the inexorable conclusion that the conversation that
13 occurred between these Detectives prior to the
14 admission of a polygraph was just that. It was not
15 formal inve -- it -- it was not a formal inves --
16 interrogation in any way, shape, or form. Because, as
17 the Court knows -- and I would hereby incorporate by
18 reference the pages in our omnibus brief, pages 42 to
19 50 that discuss this -- in order to trigger Miranda,
20 you absolutely need both custody and interrogation.
21 And it is our position, Judge, that neither of those
22 were present during the conversation that the Defendant
23 had with Detectives Alver and Lynam on the morning of
24 September 22nd, 1992.

25 The fact that the words, "Criminal

1 Investigation," appear on our consent forms, Judge, we
2 maintain is of no moment in this particular
3 circumstance. And the ult -- what I would do with
4 those words, Judge, is I would turn them sort of on
5 their head and back to the Defense.

6 This is a man who we know from the
7 uncontroverted testimony was employed as an engineer,
8 worked in the Army, was of sound mind, was not under
9 the influence of drugs or alcohol, was not -- had no
10 mental deficiencies whatsoever. This is a man who read
11 those forms, had those forms read aloud to him, and
12 still signed them. So, to say that those words in and
13 of themselves produced coercion or pressure, I think
14 Your Honor, given the panorama of circumstances here,
15 is untenable and I think that the insertion of those
16 words is of no moment, and, if they were, the Defendant
17 was free to refuse his consent.

18 Starting at the beginning of the argument,
19 Judge, the Defense would have you believe that this
20 accident investigation ended the moment that the
21 Defendant pointed to the rock seat and said, "That's
22 where we were". And, Your Honor, from a common-sense
23 perspective, that is just completely untenable.

24 What -- what is -- what is tenable is a
25 common-sense application of -- of facts to the law in

1 this particular circumstance. What is more believable
2 and more credible is that the Defendant, pointing to
3 the rock ledge, was the beginning of an accident
4 investigation that continued when Lieutenant Siri was
5 directed by Ser -- Sergeant Pagan to go and get a
6 rescue vehicle. That -- all of that was ongoing.

7 This was a rescue and recovery effort. Well,
8 it became a recovery effort once they discovered the
9 body, but it's a rescue effort, Judge. And the point I
10 make in that is that it's continuing, while the
11 Defendant is with the police, while the Defendant is
12 transported back to the Palisades Interstate Police.

13 The indication or the implication that the
14 moment he's in a police car he is in custody is not
15 born out by law. There is no case that says that
16 putting a person in a police car equals custody. It
17 just does not exist.

18 And, in this particular case, what you heard
19 from the officers from the stand, officers who I would
20 humbly submit to the Court all emerged from the
21 crucible of cross examination unscathed, what you heard
22 from them is that they have lots of Law Enforcement
23 experience and, in particular, when it comes to the
24 police from the Palisades Interstate Police Department,
25 they have lots of experience in dealing with calamity

1 at the cliffs. And what that means, Judge, is they've
2 seen it, they've lived through it, and, as a result of
3 that experience, they take certain precautions to make
4 sure that further calamity does not ensue.

5 And what I think is important here is that,
6 not only did the Defendant walk of his own free will
7 with the police to show them the place where he said
8 his wife went off the cliff, but he stands behind the
9 restraining fence. And that's important, because
10 that's the first indication that these officers were
11 employing safety measures.

12 These officers told you that this -- that he
13 was placed in the patrol car for safety, his own safety
14 and the safety of the rescuers, because, although --
15 and I think this is a clear and fair inference from the
16 testimony -- that, although the Defendant appeared calm
17 at that point, based on their experience they knew that
18 things could go bad in an instant. And, because of
19 that knowledge and because of that experience, they
20 simply asked him to go back and sit in a patrol car.

21 And here's another fact that's important:
22 Lieutenant Siri told you that, when he approached the
23 Defendant, the door was open. And, if we're talking
24 about alleged custody, alleged coercion, alleged
25 isolation, that doesn't exist here.

1 And the Defense also seems to indicate that
2 the fact that the De -- that the Defendant wasn't free
3 to leave because this lookout is on a somewhat isolated
4 area of parkway, quite candidly, Judge, the police are
5 not obligated to provide limo service to people and the
6 fact that he was on the lookout does not render -- does
7 not make him isolated.

8 And, again, when you ha -- review the
9 totality of the circumstances, it is clear to see that
10 this Defendant always maintained his liberty. Not only
11 did he have freedom of movement, he moved freely
12 throughout his encounter with the police during those
13 few days. And that's what -- that's what's important.

14 So I will emphasize it again: The facts of
15 this case show this Defendant moved freely, again and
16 again. He moved freely to a phone at the police desk
17 to call a relative to come get him the night of this
18 incident. He moved freely when he drove back to
19 Palisades Interstate Police the next day or had
20 somebody drive him back so he could get his car.

21 Remember what Lieutenant Siri(sic) said to
22 you -- not Lieutenant Siri; strike that. Remember what
23 Detective Lynam said to you -- and, when we talk about
24 compulsion and coercion, these are the facts; the
25 devil's in the details, so to speak -- these are the

1 facts that completely shatter and counter the Defense'
2 contention that there was ever custody. When Detective
3 Lynam first encounters the Defendant, the Defendant is
4 standing at the police desk waiting to retrieve his
5 vehicle back. He freely moved to the Palisades
6 Interstate Police to get his vehicle back so he could
7 be on his way.

8 Detective Lynam introduces himself and says,
9 "Are you still interested in taking a polygraph?". The
10 answer was, "Yes". And thus began a series of events
11 that culminated in the next encounter.

12 Well, what's important there, Judge, what's
13 important is that, after that conversation, the
14 Defendant left with his car, went back to his house
15 presumably or freely moved about the northern New
16 Jersey area. Defendant freely came back to the
17 Prosecutor's Office, the satellite office, the next day
18 and had a conversation with the detectives.

19 And, also, what's important to note here is
20 that -- what's important to note is -- I actually want
21 to go back to State versus Dickey, which is a case that
22 the Defense cited, which of course brought a smile to
23 my face because it's a Bergen County case -- and,
24 although I have a sentimental attachment to the Dickey
25 case, the fact is it is completely distinguishable from

1 what we have here -- State versus Dickey is a State
2 Police arrest on a highway in about two o'clock in the
3 morning. State versus Dickey dealt with individuals
4 pulled over for a motor-vehicle violation that were
5 held by the State Police while the police called for a
6 K-9 to do a drug sniff. State versus Dickey dealt with
7 a situation where the individuals not under arrest were
8 brought back to Headquarters and basically talked to
9 for about 45 minutes til they gave a consent to search
10 a vehicle.

11 And the reason why I highlight the facts of
12 State versus Dickey is just to underscore how
13 completely different they are from the facts of this
14 case.

15 Counsel said a couple of statements that were
16 of some concern, Judge, and I wanted to point them out
17 to you. And it -- this goes into the spontaneous
18 statement that the Defendant made to Lieutenant Siri.
19 The uncontroverted evidence shows that that statement
20 was spontaneous, was not elicited as a result of any
21 type of interrogation. Counsel said, "Well, you know,
22 you have to believe that there was a conversation, you
23 know, because why else would he say it," but that's not
24 what the law says. We can't manufacture facts.

25 The uncontroverted testimony here is that

1 there was no conversation, that the Defendant was
2 saying the Hail Mary and that he simply spontaneously
3 -- and Your Honor could even take judicial notice of
4 the fact that it's not the first time a defendant has
5 spontaneously uttered something. Most recently, Judge,
6 if you read the paper, we had a case where a young man
7 called 9-1-1 -- and I have to say allegedly, because it
8 hasn't been proved beyond a reasonable doubt -- but
9 called 9-1-1 and said, "I just shot my girlfriend, let
10 me tell you where she is". And I bring that up because
11 it's not uncommon. The Defense would have you believe
12 that this is such an unreal, unbelievable experience,
13 but it's not uncommon for people to unburden their
14 soul, so to speak. And what happens in the police car
15 is clearly a spontaneous utterance.

16 We can't insert facts here, Judge. We have
17 to take the facts that we have, and Lieutenant Siri, I
18 dare say, was one of those people that emerged from the
19 crucible of cross examination completely unscathed.
20 His testimony's credible. There's nothing about his
21 testimony that's incredible. I mean, we've had -- we
22 have references of -- you know, we just have to say
23 that who else -- you know, why else would my client do
24 this or this is what my client was thinking, but we
25 can't speculate on those things; we could only go with

1 the objective facts that are before us in this
2 particular case.

3 (Pause in proceeding)

4 MS. GROOTENBOER: The other thing that's
5 important, Judge, is, when Lieutenant Siri goes back to
6 Headquarters, he directs the Defendant or tells the
7 Defendant or asks the Defendant to sit on a bench in
8 front of the police desk. He doesn't bring him to an
9 isolated area. He says, "Stay here," and then
10 basically is offset, so to speak, and goes back to
11 doing his other duties what -- when he's -- whatever
12 he's involved in with his shift that night.

13 He -- he's(sic) goes back -- oh, the car.
14 The car that he was in did not have a cage in it, which
15 is also I think a point that should be made when we're
16 talking about the issue of custody. It's a fact-
17 specific issue, Judge. It's a fact-specific inquiry
18 that has to be made here in this particular case, and
19 you need to recall the facts in order to make those
20 determinations.

21 And you need to make credibility calls,
22 Judge, because there's this inference here that somehow
23 the police aren't credible. But there's nothing about
24 their demeanor; there's nothing about the way they
25 testified that makes them anything but credible in this

1 particular case.

2 With regard to Detective Ernest, Judge,
3 there's this indication that he just doesn't want to
4 tell you that he was really interrogating the
5 Defendant. And, with all due respect, Judge, I have to
6 say that's just patently absurd. It's patently absurd
7 to say that Detective Ernest really was engaging in
8 interrogation. And what I want to do in an effort to
9 completely rebut that implication is recall the
10 testimony that you heard from Detective Ernest.

11 Detective Ernest presented as completely
12 honest and completely credible. What's the first
13 indication of that? When he candidly told the Court
14 that he could not identify the Defendant, because of
15 the passage of time, because of his limited
16 involvement. The bottom line is, Judge, he honestly
17 said that. He told you: I can't tell you if Stephen
18 Scharf is in the courtroom, in essence, but I can tell
19 you that on this day, September 22nd, 1992, I assisted
20 my fellow detectives and went to a house in
21 Hackettstown/Morris County and the house was owned by a
22 man -- man named Stephen Scharf and on that day a man
23 named Stephen Scharf talked to me.

24 It is clear that Detective Ernest was not an
25 interrogator at that time. Detective Ernest was there

1 to render assistance. And Detective Ernest candidly
2 told you that the only thing that sticks out about this
3 case, the only thing that intrigues him even to this
4 day, is why on earth did this man whom I had briefly
5 conferred with about shared military experience, why on
6 earth did this man at that moment point to a drawer and
7 tell me how he fixed it. Because Detective Ernest told
8 you he did not have the benefit, the panorama of
9 circumstances and facts, that the fellow detectives
10 had.

11 There can be no doubt from the way Detective
12 Ernest testified and how he testified and the
13 uncontroverted nature of his testimony that what
14 happened, what he says happened, is exactly how it
15 happened. That this moment -- again, this -- this
16 Defendant spontaneously p -- and I don't want to
17 speculate why; it doesn't matter. I don't need to
18 speculate why. All I need to present to the Court on
19 behalf of the State, we do, is that it happened. And
20 it did happen in this case. And it is -- it was
21 unusual. And I think the Court can, relying on common
22 sense and life experience, agree with Detective Ernest
23 that, yes, indeed, that encounter, that discussion,
24 that initiation by the Defendant is most unusual
25 indeed.

1 And what we can also agree on as a matter of
2 law is in no way, in no shape, and no form did
3 Detective Ernest violate any Miranda Rights when he
4 listened to that spontaneous, initiated comment by the
5 Defendant on that day.

6 The Defendant -- when we talk about
7 voluntariness, the Defendant was the one who freely,
8 willingly, voluntarily engaged in all these
9 discussions. And of course what the State will argue
10 as the trial progresses is it's clear why he did that.
11 He did that because he wanted to go out of his way to
12 convince the police that this indeed was an accident.

13 So there is no doubt -- and that's why he
14 talks. And he'll talk to anybody. He'll talk to
15 Detective Ernest, a veritable guy on the sidelines, if
16 you will, in the overall scheme of this investigation.
17 He will talk to Lieutenant Ehrenburg. And he will --
18 when he says those words to Lieutenant Ehrenburg --
19 freely, spontaneously tell Lieutenant Ehrenburg
20 something very important indeed, which again will be
21 born out more by the evidence at trial.

22 The fact that Lieutenant Ehrenburg decided to
23 talk about religion generally is not as a matter of law
24 compulsive, is not as a matter of law coercive.
25 Lieutenant Ehrenburg again -- or now former Chief

1 Ehrenburg -- remerged(sic) from the crucible of cross
2 examination really unscathed. He explained why he had
3 that conversation with the Defendant.

4 And it is clear from his testimony, Judge,
5 that he was not an investigator or interrogator during
6 the times he sat at the kitchen table with the
7 Defendant. What is clear is he was just a Law
8 Enforcement officer who happened to be conversing with
9 the Defendant or who the Defendant happened to choose
10 to converse with.

11 Remember what the Chief said; he was there in
12 a supporting capacity. He may have known certain
13 facts; he may have had certain facts told to him, but
14 that did not make him an interrogator. Because, once
15 again, in the house, the Defendant is not in custody.
16 And, in fact, the uncontroverted testimony from Chief
17 Ehrenburg is there were points when the Defendant I
18 think he used the word, "Roamed" -- was roaming about
19 his own house, was free and at ease in his own
20 proverbial castle, so to speak, to do what he wanted to
21 do.

22 We can't stop the fact that what he wanted to
23 do was talk to Lieutenant Ehrenburg at the kitchen
24 table. We can't stop the fact that what he wanted to
25 do was point out a kitchen drawer to Detective Ernest.

1 We -- he did those things. The police aren't required
2 to make somebody stop talking to them.

3 De -- Lieutenant Ehrenburg -- also, Judge, I
4 think -- I have to mention a case so I could
5 distinguish it on point. The case is Brewer versus
6 Williams, 430 U.S. 387. It is known colloquially as
7 the Christian burial speech. What happened there is
8 that a defendant was arrested and charged with the
9 murder of a young girl. Not only was he arrested and
10 charged, he was arraigned. And the reason why I
11 mention that is because, once he was arraigned, his
12 Sixth Amendment Right to counsel attached.

13 And what happened was, after the arraignment,
14 prior to him going back to police headquarters, he
15 invoked his right to remain silent. And the police in
16 that case made a promise to his attorney that they
17 would not speak to him at all.

18 But the police officer involved in this case
19 had some knowledge about this particular defendant. He
20 knew this particular defendant was a mental patient who
21 had been in and out of -- you know, who had mental
22 issues, had been in and out of mental hospitals. He
23 also knew that this particular patient was religious.
24 Using those two things, the Detective determined he was
25 going to find out where this little girl was buried,

1 because, although this defendant had been charged with
2 murder, he had not yet -- they had not yet recovered
3 her body.

4 So, on the way back, the Detective decides
5 he's going to talk to this particular prisoner who's
6 invoked his right to remain silent. He addressed him
7 as "Reverend" and says the following: Number one, I
8 want you to observe the weather conditions; it's
9 raining, it's sleeting, it's freezing, driving is very
10 treacherous, visibility is poor, it's going to be dark
11 early this evening, they are predicting several inches
12 of snow for tonight, and I feel that you, yourself, are
13 the only person that knows where this little girl's
14 body is, that you, yourself, have only been there once,
15 and, if you get snow on top of it, you may be unable to
16 find it. And, since we will be going right past the
17 area on the way into Des Moines, I feel that we could
18 stop and locate the body; that the parents of this
19 little girl should be entitled to a Christian burial
20 for the little girl who was snatched away from them on
21 Christmas Eve and murdered.

22 To no one's surprise, after that speech, the
23 defendant, in fact, told the police where the little
24 girl's body was buried. Of course the U.S. Supreme
25 Court suppressed that confession, because they said it

1 violated defendant's Sixth Amendment Rights. And it
2 was clear in that circumstance that the defendant was
3 in custody and being interrogated.

4 Now, the reason why I took the pains to go
5 through the facts of that case from long ago is because
6 it is clearly distinguishable from the facts of this
7 case, because, again, by reference of religion, Counsel
8 seems to be implying that they used that in an effort
9 to coerce statements from the Defendant.

10 Number one, our case is distinguishable
11 because Ehrenburg had no clue whether or not this
12 Defendant was religious. There's no indication
13 whatsoever. Lieutenant Ehrenburg told us that he,
14 himself, is somewhat spiritual; however, we have no
15 indication where the Defendant was, unlike Brewer
16 versus Williams.

17 Number two, the Defendant's not in custody;
18 he's not in custody. At the time Lieutenant Ehrenburg
19 is speaking with him, he has been moving about northern
20 New Jersey for two straight days.

21 Number three, Lieutenant Ehrenburg is not
22 interrogating the Defendant; he is not asking him
23 questions that are designed to elicit an incriminating
24 response. Ehrenburg is not part of the investigation.
25 He was there simply to assist and put the Defendant at

1 ease. How do we know that? Because that's what he
2 told you during direct and cross examination in this
3 particular case.

4 He want -- he knew that -- he knew that a
5 death had occurred. He knew that there was upset. He
6 knew, and he knew those things and still -- and,
7 despite that, the Defendant chose to talk to him
8 anyway.

9 This is not a case, Judge, where in any way,
10 shape, or form, anyone could conclude objectively that
11 the police during these three days engaged in coercive,
12 compulsive tactics, that they isolated the Defendant.
13 I don't think from a common-sense perspective you can
14 say that a person who drives back and forth and is in
15 his own house and then ultimately remains in his own
16 house when the police leave is ever in custody in any
17 way, shape, or form.

18 And the other counter I would give you to
19 that is a case called, State versus Knight. State
20 versus Knight is at 183 N.J. 449. And the reason why I
21 -- I tell you about State versus Knight is because the
22 defendant in that case was held incommunicado for over
23 20 hours and then subsequent(sic) -- subjected to more
24 than 12 hours of questioning and had allegedly been
25 deprived of sleep, food, and adequate clothing.

1 Well, in that case, I just told you those --
2 outline of those facts. And, in that case, with those
3 facts, the New Jersey Supreme Court still said that
4 that confession was voluntary.

5 Here, Judge, again, completely different
6 circumstance; no custody, no interrogation.

7 And I -- I remember and heard Counsel mention
8 Rhode Island versus Innis, a case that is also familiar
9 to me, the case that gives us the language about
10 functional equivalent of interrogation. And what was
11 interesting to me, Judge, was, first of all, the State
12 won Rhode Island versus Innis. Where we did -- where
13 the State did not win Brewer, the fact is the State won
14 Rhode Island versus Innis.

15 And the facts in those(sic) case were this:
16 That a defendant was in custody; he had shot a taxicab
17 driver to death; and he was arrested, charged, had
18 invoked his right to remain silent. And the two
19 officers were bringing him back to a headquarters for
20 processing. And, while -- during that transport, the
21 two officers were talking amongst themselves, not to
22 the defendant. The two officers were talking amongst
23 themselves, saying to themselves that wouldn't it be a
24 tragedy if some poor innocent schoolchild found the gun
25 that was used to murder this taxidriver and hurt

1 themselves. And it just so happened that, after the
2 defendant heard that conversation, he spontaneously
3 decided to tell them where the gun was.

4 And, in that case, the Supreme Court said
5 that what the police did was not the functional
6 equivalent of interrogation because they could -- they
7 could not have known that that would elicit an
8 incriminating response.

9 So I mention that because I think I heard
10 Rhode Island versus Innis from the Defense, Judge, and,
11 again, there's nothing here that -- nothing on these
12 facts that say that this Defendant was -- that these
13 police officers engaged in the functional equivalent of
14 interrogation.

15 And, even if they did, which we say they did
16 not, but, even if they did, the fact is he was never in
17 custody. The fact that p -- individuals come into
18 contact with the police does not automatically make
19 them in custody, Judge.

20 THE COURT: Did you say earlier -- I thought
21 you referenced a case where a statement was made but he
22 was in custody but was deemed to be admissible?

23 MS. GROOTENBOER: Um, State -- I believe I
24 mentioned State versus Knight, where, yes, the
25 individual --

1 THE COURT: What is -- what is the cite on
2 State versus Knight once more?

3 MS. GROOTENBOER: One moment, please. 183
4 N.J. 449, specifically page 468. It's a 2005 case.

5 THE COURT: All right. Continue.

6 MS. GROOTENBOER: Thank you, Judge.

7 (Pause in proceeding)

8 MS. GROOTENBOER: If I could just have one
9 moment please.

10 (Pause in proceeding)

11 MS. GROOTENBOER: Your Honor, I -- unless
12 Your Honor has any more questions of me, I would thank
13 you for your time. That concludes my argument on the
14 Miranda issue.

15 THE COURT: Thank you. Any follow up?

16 MR. ALTERBAUM: Yes, Judge, briefly.

17 With regards to the night of the incident, my
18 client was allowed to move, but only when the police
19 instructed him to do so, and that was from Officer
20 Abbott's car to Officer Siri's car. He was
21 specifically instructed to move from one car to the
22 other.

23 And it doesn't matter what the officers felt
24 or if the car had a cage or not. You have to look at
25 the viewpoint of a reasonable person. And the officers

1 can stand up on the stand all they want and say he was
2 free to leave, he wasn't in custody, he wasn't
3 arrested; that doesn't matter. We have to look at the
4 viewpoint for a reasonable -- reasonable person. And
5 any person in Mr. Scharf's position would feel they
6 were in custody at that moment.

7 And, that night, he was in custody from I
8 believe 8:10(sic) -- not -- excuse me -- 8:30 at night
9 until 1:20 in the morning. That is over -- that's
10 around five hours, Judge. And then, in the span of the
11 48 hours, he had been in custody for around 18 hours.
12 It's absurd that not at any point in that time was he
13 ever Mirandized.

14 With regards to the day of the polygraph,
15 clearly the polygraph was a ruse. Judge, like
16 Assistant Prosecutor Grootenboer said, these are
17 experienced Law Enforcement officers. They've had
18 numerous investigations and murder investigations,
19 whatever. At that moment, there's no question that
20 they suspected or that they thought he killed his wife.
21 Everything that they did that day was calculated. And
22 this -- this is the type of police behavior that we
23 feel Mirena(sic) is supposed to -- Miranda's supposed
24 to deter.

25 He was there. He went in the morning to take

1 a polygraph. He didn't take a polygraph at ten o'clock
2 in the morning. He was brought into a room where he
3 was given a -- he was forced to give a statement. He
4 was in custody. And a person in his position would
5 feel that he had to go into that room and give a
6 statement. He had to give statements previously, so he
7 felt obligated to give a statement then. Clearly, he
8 was in custody and clearly he was being interrogated.

9 If I could just have one moment.

10 (Pause in proceeding)

11 MR. ALTERBAUM: With regards to the night the
12 search warrant was conducted and Officer Ehrenburg,
13 Officer -- Officer Ehrenburg had been speaking to other
14 Law Enforcement officers during the investigation. He
15 had been in contact with the Bergen County Prosecutor's
16 Office. He had been in contact with Washington
17 Township Police Department. I'm sure he knew -- he had
18 been in contact with Palisades Parkway Police
19 Department. He probably knew everything that had gone
20 on before him.

21 He had spoken(sic) -- he had been speaking
22 to him for over an hour and they had been talking about
23 religion. Clearly by that point, he knew that he was a
24 religious man.

25 And then, when he asked the question, "It was

1 an accident, wasn't it," clearly that was asked to
2 obtain an incriminating response. And, at that point,
3 he was in custody; he had been in custody since 9:56 in
4 the morning that day. He had been in constant contact
5 with Law Enforcement officers. He -- and we don't know
6 how he got from the -- the time he took the polygraph
7 to his house; there is no testimony. For all we know,
8 the Bergen County Prosecutor's Office could have taken
9 him there -- him there.

10 What we do know is that he was escorted by
11 the Bergen County Prosecutor's Office up his porch and
12 to his front door where he let Bergen County
13 Prosecutor's office into that house and met -- once
14 again, I stress the fact that a consent to search a
15 house is totally different from taking a statement. At
16 that point, he was in constant -- during the search of
17 his house, he was in constant custody of the police.
18 Yes, he was free to roam around in the house and do
19 what he pleased as they say, but there was also
20 testimony that, when he was roaming around the house,
21 he was being followed by Bergen County Prosecutor's
22 Office. Ehrenburg specifically said that in his
23 testimony that, when he was out of Ehrenburg's custody,
24 he was with the Bergen County Prosecutor's Office. He
25 was in constant custody.

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(Pause in proceeding)

MR. ALTERBAUM: Nothing further.

MS. GROOTENBOER: I just have a quick rebuttal, Judge.

With regard to Lieutenant Ehrenburg, the further proof that the conversation that the Defendant had with him was voluntary comes in these particular facts: Number one, they talked for an hour; number two -- and this is also important, Judge, and it was a fact that was testified about -- Lieutenant Ehrenburg used the words that he had struck a chord with the Defendant or they struck a chord with each other or they were simpatico. And that was something that he discerned based on his experience, his vast Law Enforcement experience in dealing with individuals from all walks of life.

Common-sense approach, you know when you've clicked with somebody and you know when you haven't, and that's why the conversation continued, because the Defendant wanted it to. The Defendant wanted to get his story out.

And the other reason, the other fact why we know that his conversation with Lieutenant Ehrenburg was completely voluntarily is because of what happened when the Bergen County Prosecutor's detectives came

1 back to that area. And that is something that
2 Lieutenant Ehrenburg testified about very clearly. He
3 told you that, while he talked to the Defendant, the
4 Defendant was at ease, relaxed, they were conversing.
5 Lieutenant Ehrenburg very clearly told you that, when
6 detectives from the Prosecutor's Office joined them, he
7 saw how quickly the Defendant's demeanor changed.

8 And, of course, Judge, on behalf of the
9 State, I would argue the reason's obvious. The reason
10 why his demeanor changed is because he knows that the
11 detectives from the Prosecutor's Office are the ones
12 that are there to search for the truth, to investigate
13 and find out what really happened on the cliffs that
14 night. And that is very telling that that's -- that
15 his demeanor changed.

16 When he is in the Bergen County Prosecutor's
17 Office, Ca -- he is -- he speaks to Captain
18 Horniak(phonetic) -- and I hope Captain Horniak
19 forgives me for neglecting to mention him before -- but
20 you heard his testimony too. And he's another witness
21 that emerged unscathed from the crucible of cross
22 examination. And this goes to voluntariness. And it's
23 a point that I should mention what we have in evidence,
24 Judge, as "M-17" for purposes of this motion, is a form
25 that talks about polygraph consent and advice of

1 rights.

2 And you hear in here language about -- that
3 says the following: "I have the right to remain
4 silent, to refuse to answer any questions, that
5 anything I say during the polygraph exam can and will
6 be used against me in a court of law. I have the right
7 to consult an attorney before submitting to the
8 examination. If I cannot afford to hire one, one will
9 be appointed to represent me before any questioning or
10 examination. And, during the examination, I have the
11 right to stop answering questions, request an attorney,
12 of leave or terminate the examination. I waive those
13 rights."

14 And what is very telling to me, Judge, is he
15 never did any of those things, the Defendant. He read
16 that form. Again, it's a man who at the time of this
17 incident I believe is in his early-40's; he works as an
18 engineer; he was in the Army; he had these particular
19 assignments in the Army. He is not some poor,
20 downtrodden individual who's illiterate and has not
21 enjoyed any benefits in life. He reads this; he makes
22 his decision, Judge. And his decision is to talk. His
23 decision is, I would argue on behalf of the State, to
24 spin(phonetic). And that's what he does. And, because
25 he chooses to do that, we must say, we urge you to say

1 when you make your findings that everything he said was
2 voluntary.

3 And what else told you that it's voluntary?

4 That, even after being notified that he failed the
5 polygraph, he still continues to talk, he still
6 continues to talk to police, to Detective Ernest, to
7 Chief Ehrenburg.

8 Under all these facts and circumstances,
9 Judge, no one can credibly say: A) That he was ever in
10 custody; B) that the police ever interrogated him; and
11 C) that his will was overborne in any way.

12 This is a man, Judge, who made a calculated
13 decision of his own free will. And, for those reasons
14 and because of the law we cited in our brief, the
15 statements he makes should and ought come in at the
16 trial of this case. Thank you.

17 THE COURT: Anything further?

18 MR. ALTERBAUM: Yes, Judge, we just ask that
19 any reference to the results of the polygraph be
20 stricken from the record pursuant to your order.

21 THE COURT: What do you mean, "Results of the
22 polygraph"?

23 MR. ALTERBAUM: Assistant Prosecutor
24 Grootenboer just mentioned that he failed the polygraph
25 and that was never --

1 THE COURT: When we got to that point in the
2 questioning, I told Mr. Mello that he could ask any
3 question but the results, so the results are not part
4 of my consideration.

5 MR. MELLO: No objection to the application
6 by Counsel.

7 THE COURT: Okay. All right, the exhibits
8 that have been marked into evidence, would you collect
9 those, because I need to look over them.

10 (Pause in proceeding)

11 THE COURT: And are you in a position now to
12 proceed with the rest of the motions?

13 MR. BILINKAS: Yes, Judge, if we could have a
14 morning break though?

15 THE COURT: Okay, we'll take a ten-minute
16 break.

17 (15-Minute Break)

18 (Back on the record)

19 (Prospective jurors are not yet chosen)

20 THE COURT: All right, we're back on the
21 record. Just wanted to go over a couple of things with
22 regard to --

23 MS. GROOTENBOER: Yes.

24 THE COURT: -- the -- the trial. Number one
25 --

1 MS. GROOTENBOER: Oh --

2 THE COURT: -- the -- during the voir dire,
3 if it's my trial, I would have taken care of certain
4 things, so, if I go over something that has been done
5 already, you'll let me know, but the instruction that I
6 would have for both sides is, pursuant to W.A., the
7 procedure that we're going to utilize, that the
8 Defendant would be equipped with a set of -- an earbud
9 and there'd be a microphone at sidebar. And the way I
10 work it out and it's the procedure that we use here in
11 Bergen County, the Defendant would be able to see the
12 juror. I would position the jurors in such a way that
13 the juror would be facing the Defendant. That way,
14 with the use of the microphone and also viewing the
15 facial expressions of the jury, it would be the
16 electronic equivalent of being present at sidebar.

17 I might add that it's probable a better
18 procedure, because it might be a little chilling on the
19 ability to learn certain things from a juror and I find
20 that jurors will volunteer a lot of information. It's
21 actually a better procedure I think than physically
22 having the Defendant present at sidebar. Of course you
23 get into security concerns and things of that nature.
24 The whole idea is this is a procedure that is designed
25 to conform with the requirements of W.A.

1 I will allow Counsel for the Defense to show
2 a back and forth, so that, in addition to the Defendant
3 being able to see and hear the respective juror and the
4 conversations that occur, Counsel can go back and forth
5 so that the Defendant can participate in a meaningful
6 way in the jury selection process. All right?

7 Any objection to that procedure?

8 MR. BILINKAS: Absolutely none, Judge. And
9 we -- we appreciate that and my client doesn't have any
10 problems with -- (voice trails)

11 THE COURT: Okay.

12 MR. BILINKAS: -- (voice trails)

13 THE COURT: All right.

14 Now, let me cover a couple of other things;
15 we'll call them, "General housekeeping". I don't know
16 if I have a witness and exhibit list from both sides.
17 But, with jury selection, I'm going to need a list of
18 the respective witnesses to be able to read to them to
19 determine if, in fact, they know any of these people.
20 So what's the status of both sides' lists?

21 MR. MELLO: We've provided the Defense with a
22 witness list, and Mr. Bilinkas --

23 THE COURT: Do I have that copy?

24 MR. MELLO: I don't have a copy. Uh --

25 MS. MC ARDLE: I have a copy with me.

1 MR. MELLO: And, rather than hand up that
2 copy, there'll be some tweaking to it.

3 THE COURT: Well, let me --

4 MR. MELLO: So Mr. Bilinkas and I plan to --

5 THE COURT: Am I correct in assuming that I
6 do not have a copy from either --

7 MR. MELLO: You are --

8 THE COURT: -- side?

9 MR. MELLO: -- correct in assuming that, yes,
10 Sir. And we will have the witness list for both
11 parties available for you at jury selection.

12 MR. BILINKAS: Correct, Judge. And your --
13 your clerk -- clerk had mentioned --

14 THE COURT: I don't want to wait until jury
15 selection.

16 MR. BILINKAS: We'll -- we'll both have our
17 list and -- and get basically the -- (voice fades) --
18 notes --

19 THE COURT: You know --

20 MR. BILINKAS: -- exactly who we'll be
21 calling.

22 THE COURT: Is the jury list prepared -- it's
23 not in a final form?

24 MR. MELLO: It's not in final form. It's
25 prepared -- (voice fades)

1 THE COURT: What's the problem with -- with
2 getting that to me over the next couple of days?

3 MR. MELLO: Oh, okay, fine --

4 THE COURT: All right? You know, we like to
5 look over these things, read over it.

6 MR. MELLO: Sure.

7 THE COURT: Ideally --

8 MR. MELLO: No problem, Mr. Bilinkas --

9 THE COURT: -- ideally, if we could have a
10 combined list.

11 MR. BILINKAS: I would suggest that, Judge.

12 THE COURT: Well, the reason being I'm not
13 going to use anyone's letterhead, but what I'd like to
14 do is to combine those witnesses so that the jury will
15 have this -- or the prospective jurors will have it and
16 will be looking over it, and obviously they can't tell
17 if it's a Defense witness or --

18 MR. MELLO: Sure.

19 THE COURT: -- a Prosecution witness, so --

20 MR. MELLO: Sure.

21 THE COURT: -- that's the procedure that I
22 want to use, which is another reason why I need to see
23 it earlier rather than later.

24 MR. MELLO: Sure, we'll get -- we'll get that
25 to you, Judge.

1 THE COURT: So in the next --

2 MR. BILINKAS: -- we'll have -- we'll have
3 that by Friday.

4 THE COURT: Okay, I -- is --

5 MR. MELLO: I think probably it's easier to
6 work with my list, and, anything that's not on mine,
7 you can add to.

8 THE COURT: Well, wait a minute, there's one
9 thing that Counsel should be aware of: Sometimes you
10 may call someone --

11 MR. MELLO: Yes.

12 THE COURT: -- or put the person on the list,
13 that does not necessarily mean that person will be
14 called.

15 MR. MELLO: Yes, Sir.

16 THE COURT: So you would have to issue your
17 own subpoenas if for some reason you want one of the
18 Prosecution's witnesses and they decide not to call
19 that person.

20 MR. BILINKAS: Judge, I understand that, and
21 one of the things that I wanted to -- (voice trails) --
22 with the Court for instance with regards to various
23 witnesses that have already testified. We attempted to
24 subpoena Detective Karnack(phonetic), but because he
25 was retired, we sent our investigator pursuant to the

1 Prosecutor's request to the police department, and
2 there was a little bit of a problem, so to speak. So
3 again, with regards to the witnesses that have tes --
4 testified, again the Prosecutor is not --

5 MR. MELLO: The Prosecutor will call each
6 witness. And, with respect to each of those witnesses
7 that have testified, I'll be happy to accept service.

8 THE COURT: All right? So by Friday I'll
9 have a combined list and you'll make whatever
10 arrangements you need to make in order to produce those
11 people on the list independently.

12 MR. MELLO: Yes.

13 THE COURT: Okay?

14 MR. BILINKAS: Perfect.

15 MR. MELLO: Thank you, Sir.

16 THE COURT: And let's see what else.

17 MR. BILINKAS: Judge, at -- at some point we
18 would request -- and I -- I've tried to resolve with
19 the Prosecutor but I -- I think he's holding firm to
20 his -- his decision -- he's been letting us know the
21 night before who he's going to call the next day, which
22 I appreciate. My concern with a case like this, 18
23 years old, and getting a witness list with 82 people on
24 it, some of which we attempted to contact and the
25 addresses --

1 THE COURT: There are 82 potential people
2 from --

3 MS. MC ARDLE: Eighty --

4 THE COURT: -- both sides?

5 MS. MC ARDLE: Eighty-four.

6 MR. BILINKAS: Eighty-four --

7 THE COURT: Eighty-four?

8 MR. BILINKAS: -- eighty-four --

9 MS. MC ARDLE: Plus.

10 MR. BILINKAS: -- from the Prosecutor's --

11 THE COURT: Is that the list I'll be reading
12 from?

13 MR. BILINKAS: Well, that's the list --

14 MR. MELLO: Yes, Sir.

15 MR. BILINKAS: -- that was provided to us.

16 MR. MELLO: That -- that's the list that
17 represents, as you well know, not just potential --

18 THE COURT: No, I un --

19 MR. MELLO: -- witnesses --

20 THE COURT: -- I understand.

21 MR. MELLO: -- but also witness -- you want
22 to advise the jury of names that may come up.

23 MR. BILINKAS: My -- my -- my concern, Judge,
24 is, in light of such a voluminous list, in light of the
25 fact that the Prosecutor's represented that his case

1 will take three weeks, nine days, it --

2 MR. MELLO: I actually said m -- let's give
3 it three to four to be safe.

4 MR. BILINKAS: Three -- three to four.
5 Irrespective, it's a relatively short period of time.
6 If he has any intentions of calling anywhere near 84,
7 we'll be here for six months, not six weeks.

8 So, at some point in time, Judge, and, again,
9 I know there's a certain amount of gamesmanship in
10 trial preparation, but, when we start picking the jury,
11 I would request that I get a realistic witness list.
12 And, again, not that we're going to hold him to it; he
13 could change his mind, but, again, because we're
14 dealing with 18 years, we're dealing with such a large
15 quantity of potential witnesses, I would request that
16 the Court intercede and -- and that I get a -- a what I
17 would consider a realistic list.

18 MR. MELLO: Well, I -- I -- I think that's a
19 fair request. And I think the way to deal with it is
20 the following: Mr. Bilinkas has kindly put on the
21 record that he understands that the list that I give
22 him can be expanded. And certainly we will not call 84
23 witnesses. I've also said to Mr. Bilinkas, and I think
24 over the next days and as we continue into jury
25 selection, you know, we both know how to conduct

1 ourselves and how to --

2 THE COURT: But, if there's the possibility
3 that a witness may be called, I need to give that name
4 to --

5 MR. MELLO: It needs to be --

6 THE COURT: -- the prospective jurors.

7 MR. MELLO: -- done. And --

8 MR. BILINKAS: Correct, and I --

9 MR. MELLO: -- and --

10 MR. BILINKAS: -- have no problem you
11 mentioning the 84 names, Judge. But, again, from the
12 Defense standpoint --

13 THE COURT: You want to know if you're
14 dealing with 84 the following day or 55.

15 MR. BILINKAS: Correct. And I need some
16 idea, Judge, just because of the volume that -- that
17 we're forced to deal with, you know, some reasonable
18 order as -- as --

19 MR. MELLO: Well, that I won't do.

20 MR. BILINKAS: -- much --

21 MR. MELLO: That, I don't believe I need to
22 do, should be required to do. My witness order, my
23 order of march(phonetic), my order of proofs is not
24 required to be divulged prior to trial. And it has
25 never been in my experience in any court, State or

1 Federal, required.

2 I will be happy to discuss the pared-down
3 list with Mr. Bilinkas. I will be happy, as is the
4 practice in this courthouse and is my own practice, the
5 night before or the day before tell him precisely who I
6 will call. And I will at that time be happy to tell
7 him: Tomorrow, we will have witnesses one through four
8 and they will testify in this order. That, I will
9 certainly do.

10 And I think --

11 MR. BILINKAS: --

12 MR. MELLO: -- with respect to -- to the
13 witness list, we can work on that together, and I --
14 I'm -- I'm sure that we will come to an amicable
15 resolution. And I -- I think I'm -- I'm sure of that.
16 But, in case we don't, then -- then we can have a chat
17 with -- with Your Honor and discuss it.

18 MR. BILINKAS: Judge, in most instances, I --
19 I think we can live with that -- that arrangement the
20 night before. All I'm concerned about, Judge, is, if
21 we can pare down the list to a reasonable number,
22 because, again, we've filed motions with regards to
23 various other witnesses and -- and part of that motion
24 has to do with the cumulative effect that may be
25 prejudicial to our client.

1 Again, I just want to be in a position to --
2 (voice trails) -- defend my client to the best of my
3 ability. And all I'm -- I'm not asking for him to show
4 his cards; I'm just asking -- and I believe, based on
5 his representations, we'll be able to do that -- that I
6 get a reasonably pared-down list.

7 He's got to know who he's not going -- going
8 to call.

9 MR. MELLO: I --

10 MR. BILINKAS: -- at least -- (voice trails)

11 MR. MELLO: -- I think we can do that.

12 And -- and Mr. Bilinkas knows, and we've even
13 discussed a number of witnesses, Mr. Bilinkas can
14 certainly ask me: Is this a realistic witness? So,
15 for example, I would use as an example we have recently
16 found out that a potential witness lives in Paris. And
17 it is highly unlikely that I will bring that witness
18 from Paris to testify at this trial. So we'll -- we'll
19 work on the list and -- and we'll -- we'll get it to a
20 position I think where we're both comfortable with it.

21 And -- and, if there's any particular witness
22 -- so, for example, there may be a witness that Mr.
23 Bilinkas thinks that he may need to prepare more for
24 than another witnesses, he can certainly ask me: When
25 do you expect this person to testify? And -- and I may

1 not be able to say the precise day, but I can certainly
2 tell him it won't be tomorrow. And I think with that
3 kind of conversation between the two of us -- we
4 certainly know and appreciate what you like to see and
5 we will I am sure get to your standard.

6 THE COURT: Yeah. What I'm trying to do --
7 because I've had cases with Mr. Mello; I've not had a
8 case with you, Mr. Bilinkas -- what I'd like to do just
9 go over some of the things that have caused problems in
10 the past. I'm not suggesting that it will happen in
11 this case, but just to make a more orderly progression.

12 One of the things that has always been a
13 problem, the production of street clothes and having
14 the clothes downstairs so that your client is dressed
15 for trial, okay.

16 For purposes of trial, he would not be
17 handcuffed obviously, so you'll have free access. I
18 assume that the arrangement that we had with the right
19 hand being free was acceptable?

20 MR. BILINKAS: It's still not free, Judge.

21 THE COURT: I thought -- thought we were
22 doing that.

23 MR. BILINKAS: It's still not free. We did
24 get the felt-tipped pen that couldn't harm -- couldn't
25 harm anyone --

1 THE COURT: Okay.

2 MR. BILINKAS: -- at this point --

3 THE COURT: I -- I was under the impression
4 that the Defend -- his right hand would be -- would be
5 free.

6 COURT OFFICER: We were told yesterday no,
7 Judge --

8 THE COURT: No, no, the right hand freed so
9 that he could write.

10 Now, I'm going to give you an opportunity to
11 be able to speak with your client to cover any aspect
12 dealing with these -- with this motion. During the
13 trial, he will be allowed to write and have a pad and
14 be able to speak with you. For the purpose of this
15 motion, I'll give you an opportunity to be able to
16 speak with him to see if there's anything that might be
17 helpful that you might want to point out.

18 MR. BILINKAS: Judge, one -- one other thing
19 that --

20 THE COURT: I assume up until now you've been
21 speaking to him.

22 MR. BILINKAS: Absolutely, Judge, and -- and
23 --

24 THE COURT: If he had something to say during
25 the course of the motion, he said it to you.

1 MR. BILINKAS: Absolutely. He's written
2 things down, you know, as cryptic as they are under the
3 conditions, but he's not been prejudiced in any
4 fashion.

5 THE COURT: Okay.

6 MR. BILINKAS: Although he's uncomfortable
7 and burdensome, the Defense has absolutely no -- no
8 problem up to this point.

9 One of the things I'd like to ask also,
10 Judge, is that Judge Carroll had written a letter to
11 the jail to allow Mr. Scharf to have access to the
12 library in the jail. And he did get some access, but
13 that's been -- been cut off.

14 During the trial, Judge -- and I guess a
15 number of other defendants have gotten orders allowing
16 them to go to the library. And one of the things they
17 can do in the library is converse with their attorneys
18 on an unsecured line. So, if there's any way that we
19 can get an order. And I realize you can't, you know,
20 control the -- the jail, but, if there's an order
21 allowing him to do that, then he could assist us --
22 (voice trails)

23 THE COURT: Counsel, I'd be happy to do
24 anything that would assist you. One of the problems
25 that we run into at the jail with -- with people saying

1 that they want to use the legal research or computer --
2 and, again, this -- I have to give you the whole
3 picture so that you can understand what happens over
4 there. Many of the defendants go there in order to use
5 the phones and they -- they're really not doing much
6 research, but they're using the phone. That's why I
7 defer to the sheriff and the under-sheriffs to see if
8 there's some way that can be worked out before getting
9 involved.

10 My suggestion would be to speak to the under-
11 sheriff, make those arrangements, make it known and
12 that your client needs that additional time in the
13 library. And then, if you run into some difficulty, to
14 let me know and then I would intervene.

15 MR. BILINKAS: Yes, Judge.

16 THE COURT: All right? I -- I don't want to
17 intervene until it's absolutely necessary.

18 MR. BILINKAS: Okay.

19 THE COURT: Street clothes, we covered;
20 you'll take care of that.

21 MR. BILINKAS: Judge, we did provide the
22 clothes to the jail, and my investigator brought them
23 to the jail and he tried them on, and he's gained a few
24 pounds in the last two -- two years, so we had to get
25 him different clothes. We had three sets of clothes,

1 and they basically said that he's only allowed one set.
2 So, again, we'll accommodate the jail --

3 THE COURT: Might(phonetic) --

4 MR. BILINKAS: -- (voice trails)

5 THE COURT: -- you know something, have a
6 couple of extra sets, because we've even had cases
7 where I had to send one of the attorneys over to Costco
8 to buy some clothes.

9 MR. BILINKAS: We have three sets, Judge,
10 and, again, we'll keep them in our car -- probably --

11 THE COURT: Whatever. And anticipate --
12 anticipate a problem and then we won't have a problem.

13 MR. BILINKAS: Okay.

14 THE COURT: It should -- it's something that
15 comes up so often. And what happens, it -- it's a
16 domino effect and it's going to lead into the next
17 thing that -- 18 days puts us about a week before the
18 Memorial Day weekend, because the last three days, not
19 counting the 18th, would bring us into 24th, 25th, 26th.
20 What I'm attempting to do is not run into that week,
21 try to -- is 18 days -- I'll just give you an idea of
22 where(sic) I'm thinking -- of how I'm thinking. The
23 12th, 13th, and 14th, especially if we have pre-screened
24 jurors, it seems reasonable that we could have a jury
25 panel in three days with pre-screened jurors. So that

1 brings us into opening on April 19th, starting on that
2 day. That gives us 15 days. So my question is is that
3 a realistic length of time to be able to conclude both
4 sides?

5 MR. MELLO: Yes.

6 MR. BILINKAS: Again, Judge, I have two
7 experts, one an engineer, which I expect no more than
8 two hours tops; I have a pathologist, Ceril(phonetic)
9 Weck(phonetic), which I assume the Prosecutor will take
10 half a day to cro -- to cross at most. I have one or
11 two witnesses that were in the discovery that -- that I
12 may call, depending on which witnesses the Prosecutor's
13 called, and the Defendant. So, from the Defense'
14 standpoint, I'm thinking three, tops four days of
15 actual trial work and the rest to me is on the
16 Prosecutor.

17 Right now, I have 84 witnesses -- depending
18 on how many he calls. So I'm telling you -- giving you
19 my best estimate as to what the Defense -- (voice
20 trails) will be. But I -- I wouldn't call that many if
21 I were him, and I know he's not going to, so.

22 THE COURT: Do you think it's realistic?

23 MR. BILINKAS: Again, it all depends on who
24 he calls.

25 MR. MELLO: Yes, I -- I think it's -- its'

1 realistic, Judge. What we've tried to do, I think, is
2 err on the side of estimating a longer term.

3 THE COURT: I'd rather have --

4 MR. MELLO: I think -- (voice trails)

5 THE COURT: -- tell them a little longer and
6 --

7 MR. MELLO: Exactly.

8 THE COURT: -- it turns out to be a little
9 shorter.

10 MR. MELLO: Exactly.

11 THE COURT: But I don't -- I don't want the
12 reverse.

13 MR. MELLO: No, you won't have the reverse.

14 MS. MC ARDLE: Judge, we have a list of, if I
15 may, 26 lay witnesses, with 34 statements.

16 THE COURT: So what's the point?

17 MS. MC ARDLE: The point is we have no idea
18 how many of these lay witnesses are going to be called
19 and whether or not -- it's our position, and we'll get
20 into that later, that many of these lay witnesses,
21 depending on what their testimony's going to be, we
22 need pretrial hearings on that, Rule 104 hearings.
23 So it's hard for us to estimate at this point.

24 We've asked for this information, and I
25 understand that the State has no obligation to give it,

1 but that could slow down the trial. And I just wanted
2 to be clear --

3 MR. MELLO: Judge, don't -- don't worry about
4 slowing down the trial. Some of these witnesses that
5 are being referred to are brief witnesses.

6 I'm telling you that my -- my estimate of
7 trial, in conjunction with my conversations with Mr.
8 Bilinkas as the lead attorneys in this case, we have
9 given you a realistic estimate of trial and we think we
10 can bring it in sooner, rather than later.

11 We both know that you would prefer to err on
12 the conservative side, and I am sure that we will be
13 able to accomplish what we need to do in the time that
14 you've allotted.

15 MR. BILINKAS: Good enough for me, Judge.

16 THE COURT: Okay. One of -- this would
17 require some assistance from the Sheriff's Department,
18 but it's something that I've noticed. It's not a
19 criticism; it's just that every moment is important.
20 We seem to have some difficulty in getting the prisoner
21 over here with our start times. What I want to do is I
22 want to have him seated in the courtroom by nine
23 o'clock so that we can start.

24 Counsel also has to be ready at nine o'clock.
25 And, once again, I've had situations, even in the last

1 case, where I didn't even get a phone call from the
2 attorneys. They had a legitimate reason, but no one
3 called, and everybody's sitting here waiting for an
4 hour wondering what -- what's happening.

5 I've had situations where an attorney has
6 left in the middle of the trial for a couple of days.
7 We took care of that separately. But my point is each
8 time I undertake a trial that is six weeks or longer I
9 have to do certain things so that we don't have
10 problems.

11 I can understand sometimes you're stuck,
12 you're someplace, you're, whatever, you're in traffic,
13 any number of things can happen; all that I ask is that
14 you call me and let me know through my chambers that
15 there's a problem.

16 If there's no problem and if you're not here,
17 then you may find yourselves walking into the courtroom
18 with the jury seated before you, okay? I -- I expect
19 that that will not be necessary, but I'm just telling
20 you what I have done in the past in order to make sure
21 that we move along.

22 MR. BILINKAS: Judge, from the Defense
23 standpoint, I pick these two up at the -- at the
24 offices. I'm driving them here every day.

25 THE COURT: Mmm-hmm. Mmm-hmm.

1 MR. BILINKAS: I'm up at three, four o'clock
2 in the morning. The Defense will definitely be here
3 ready to go by nine o'clock.

4 THE COURT: Okay. I mean no disrespect.
5 These are things that I've gone through and I've had
6 difficulties with, and I don't want to have any
7 difficulties in this trial.

8 MR. BILINKAS: Anything after 8:30, Judge,
9 you'd have a problem getting me there, but we -- (voice
10 trails)

11 THE COURT: Okay. I assume that, if -- if
12 for some reason there's some problem, you have a cell
13 phone, you'd call us and let us know.

14 And that's another thing; give us your cell
15 numbers so that we have that so that we can call you on
16 short notice and get in touch with you.

17 There was one other thing.

18 MR. BILINKAS: Your clerk had mentioned voir
19 dire questions, Judge --

20 THE COURT: Oh --

21 MR. BILINKAS: -- and we indicated we would
22 have --

23 THE COURT: -- thank you for reminding me.

24 MR. BILINKAS: We indicated to him we'd have
25 those on -- (voice trails)

1 MR. MELLO: -- if I can -- if I can get a
2 copy of that as soon as possible. I don't -- I don't
3 have any myself, Your Honor, but, if Counsel --

4 THE COURT: Well --

5 MR. MELLO: -- would be so kind as to --

6 THE COURT: -- I -- I had the standard form
7 questions, and, depending on what the questions are
8 that you would want to add, I don't call them
9 supplemental questions; I just go right into number 31,
10 32, 33. So, the sooner I have them, there's a lot of
11 typing and a lot of things that we have to do, so I
12 need them as quickly as possible.

13 MR. MELLO: I don't plan on having any
14 myself, but, if Mr. Bilinkas would be kind enough to
15 send them over to me as soon as possible.

16 MR. BILINKAS: Depending on Your Honor's
17 rulings with regards to various motions today -- (voice
18 trails) -- we'll have our questions by Monday or --
19 (voice trails) -- over to the Prosecutor.

20 One other issue, Judge: We called your
21 chambers with regards to the technical equipment the
22 Defense intends to use. And I've discussed that with
23 Mr. Mello and -- and I don't think he has any
24 objections. Basically, we just have a flat-screened
25 T.V., an Elmo, which is very small in nature. It's a

1 projector that depicts whatever photograph or document
2 you -- you display on it on that flat-screen. And
3 there's a interactive pen that's connected to the flat
4 screen -- any witness can just touch the screen and it
5 -- it'll draw a line or an arrow, a circle, whatever
6 you want on -- on that.

7 So what we would like to do is -- is bring
8 that equipment in here. We intend to place it on that
9 -- that cart right over there. And, based on my
10 discussions with Mr. Mello, he doesn't have any
11 problems with that and I'm hoping the Court doesn't --
12 (voice trails)

13 MR. MELLO: I certainly don't have any
14 problem with that, and then perhaps it might just be
15 the case that an old dog can learn some new tricks;
16 maybe I can use it if you don't have any problem with
17 that.

18 MR. BILINKAS: I just took \$2,000 out of my
19 pocket, Judge, but I'd be -- it'd be a pleasure to
20 allow Mr. Mello to use the equipment, with one
21 condition: If he breaks it, he owns it.

22 MR. MELLO: (Laughs) Fair enough. Fair
23 enough.

24 THE COURT: There -- there's one other thing.
25 And, once again, this is not directed at you, Mr.

1 Scharf, okay, but I -- I need to tell you these things,
2 because, in a six-week period, a lot of things come up.
3 And somebody may say something and you may get upset.
4 Please, please, no outbursts. Not -- and the reason
5 why -- this is what happens: If a defendant triggers
6 an outburst, then I have to excuse the jury, then I
7 have take you, then I have to talk with you, then I
8 have to interview all the jurors. All that that does:
9 A) It's not good for you; and, B) it will probably add
10 an extra hour or two for me to have to remedy the
11 situation. And it's completely unnecessary.

12 And, again, I'm not saying that you would do
13 it, but, having had people do things that are bizarre,
14 it's good to go through those experiences to make sure
15 we don't have a problem.

16 MR. SCHARF: I understood, and you'll have no
17 problem with me, Your Honor.

18 THE COURT: Okay. All right, I just --

19 MR. SCHARF: Thank you, Your Honor.

20 THE COURT: -- it's easier to talk about
21 these things, because you don't know me and I don't
22 know you.

23 MR. SCHARF: Thank you, Your Honor.

24 THE COURT: You know, anything we can use to
25 facilitate the trial, we'll try to do that. But it's

1 -- it's a little frustrating to have a situation where
2 there's an outburst and now you have to interview all
3 of the jurors in order to make sure that they can be
4 fair and impartial.

5 And we've had defendants get up and start
6 cursing at one of the witnesses and threatening a
7 witness, so --

8 UNIDENTIFIED: --

9 THE COURT: -- I'm just telling you that it's
10 -- it's been a real situation, okay? Please have a
11 seat.

12 MR. BILINKAS: How long -- how long did it
13 take to convict that defendant, Judge?

14 THE COURT: Well, I think the person who had
15 a problem was the co-defendant with him, because he was
16 very unhappy, but --

17 MR. BILINKAS: Well, Judge, I've -- I've
18 known Mr. Scharf for 18 years now, and -- and I can
19 assure the Court that you're not going to have a
20 problem with him -- (voice trails)

21 THE COURT: And I'm sure I won't, but it's
22 easier to take five minutes to do this than to take two
23 hours to correct the problem.

24 MR. BILINKAS: Understood.

25 THE COURT: Okay?

1 I thought about something while I was in
2 chambers and I was talking(sic) about the Miranda -- or
3 thinking about the Miranda motion. I thought I don't
4 know what testimony -- is it pronounced, "Tomao" or
5 "Tomio(phonetic)"?

6 MR. MELLO: Tomao, Sir.

7 THE COURT: Tomao, okay. Officer Tomao. I
8 probably can separate the Miranda motion, but maybe the
9 best procedure is I can look over all the information,
10 be prepared for that, and, whether Tomao's information
11 in any way affects anything, I'll know that as soon as
12 we have the hearing.

13 So what I'm saying in a nutshell is I can
14 give you the results of the Miranda hearing the 18th at
15 1:30.

16 MR. BILINKAS: We have no objection to that,
17 Judge, whatever you prefer.

18 MR. MELLO: Whatever you prefer, Judge.

19 THE COURT: Okay? All right, now that brings
20 us to the remainder of the motions. And what would you
21 suggest as far as those matters?

22 MS. GROOTENBOER: Your Honor, we would
23 suggest that the Motion to Dismiss be heard first.

24 THE COURT: Okay. Do you want to do this --
25 it's 12 o'clock, do you think it's something we can do

1 fairly quickly?

2 You've submitted papers.

3 MR. ALTERBAUM: Yes, Judge, we --

4 THE COURT: I -- I guess --

5 MR. BILINKAS: Judge, I think this will be
6 extremely quick.

7 THE COURT: I'm sorry?

8 MR. BILINKAS: I think this will be extremely
9 quick.

10 THE COURT: Okay.

11 MR. BILINKAS: -- (Speaking away from the
12 microphone) --

13 THE COURT: Counsel, you have the floor.

14 (Pause in proceeding)

15 MR. ALTERBAUM: Judge, Rule 3:25-3 states:

16 "If there is an unreasonable delay in the disposition
17 of an indictment or accusation, the judge may dismiss
18 the indictment on motion from the defendant".

19 The due-process clause protects the defendant
20 from oppressive pre-indictment delay. And that's U.S.
21 v. Lovasco, 431 U.S. 783.

22 In State v. Townsend, the New Jersey Supreme
23 Court laid out a two-prong test to determine whether
24 the delay from the indictment -- from the arrest -- or,
25 I mean, excuse me, from the incident to the indictment

1 is unduly prejudicial.

2 The first prong is whether the State's delay
3 for the indictment was a deliberate attempt to gain a
4 tactical advantage. The second prong was that the
5 delay in fact caused the defendant actual prejudice.
6 Judge, clearly the State -- the delay from the State
7 was an attempt to gain a tactical advantage.

8 In State v. Townsend, the Court said that one
9 way to determine whether the State intentionally
10 delayed seeking indictment is to compare the evidence
11 at the time of the incident to the evidence at the time
12 of the indictment. The State has the same evidence
13 today as they did 18 years ago. 18 years ago, they
14 investigated over 30 witnesses, and these witnesses are
15 all saying the same thing today.

16 The Prosecutor claims that they have two new
17 witnesses. The first is Dr. Bodden(phonetic). Judge,
18 we have letters from Dr. Bodden -- from this -- from
19 the Prosecutor's Office to Dr. Bodden in 2004 where the
20 Prosecutor was asking Dr. Bodden to analyze various
21 documents and come up with a report. We received that
22 report in 2008. It took four years for Dr. Bodden to
23 issue a report, four years.

24 And, with regards to Dr. Clayton, the State
25 is claiming that in 2007 Dr. Clayton cla -- changed

1 their opinion and the indictment was -- the reason they
2 presented the indictment in 2009 was the basis of Dr.
3 Clayton changing her opinion.

4 Judge, Dr. Clayton has been involved in this
5 case since 1992. She was at the scene in 1992. She
6 was at the scene in 1995. She could have clearly
7 changed their opinion then. I don't understand why it
8 took until 2007 for her to finally change her opinion.
9 Maybe it was because she spoke with Dr. Bodden, but Dr.
10 Bodden was in this case in 2004, so clearly that
11 conversation could have taken place in 2004. There was
12 no need for that length of delay.

13 Also, Judge, the State is claiming that this
14 case was reopened in 2003? This case had been going on
15 from 1992 until when Mr. Scharf was indicted. There
16 was no break in this case. It didn't matter that they
17 reopened this case. Off -- officers were still
18 investigating this case -- excuse me. And also the
19 insurance was claimed in -- they also claimed that the
20 fact that he claimed the life insurance also was new
21 evidence. The insurance that he -- Mr. Scharf claimed
22 was in 2002. That was six years from when he was
23 indicted.

24 Also, Judge, the State has used this length
25 of delay to pollute the minds of various witnesses, in

1 fact witnesses that were extremely close to my client,
2 Mr. Scharf. The first is his own son, Jonathan Scharf.

3 In 1992, Jonathan gave a statement to the
4 Bergen County Prosecutor's Office, and in that
5 statement he said that he didn't think his dad pushed
6 his wife off the cliff and he couldn't recall any
7 incidents of domestic violence. He said that there may
8 have been an incident where his father splashed a cup
9 of coffee into his mother's face, but he couldn't
10 recall if that was a dream or he couldn't recall the
11 specifics. His statement drastically changed in 2008.

12 May I just point out that he was being
13 interviewed by the Prosecutor's Office for nine hours.
14 In the beginning of that inter -- interview, he would
15 make statements like the Scharf -- that Mr. and Mrs.
16 Scharf did not have the best relationship; however, it
17 was not violent. But then the Prosecutor started
18 showing him pictures and telling him things like, "We
19 are working on behalf of your mother". All of a
20 sudden, Scharf -- I mean, Jonathan Scharf said things
21 like, "Get to the point; I want to help too; I want to
22 help her to". And then all of a sudden he started
23 recalling specifics with regards to domestic violence,
24 things that were not in his statement in 1992, closest
25 to the incident.

1 With regards to another witness, Paul
2 Connors(phonetic), Paul Connors, and I quote -- no,
3 excuse me -- said something along the lines of, "Before
4 speaking to the Prosecutor's Office, I would never have
5 imagined Stephen would do something like this".
6 Clearly, after the Prosecutor's interview, Paul Connors
7 had changed his mind about what had happened.

8 With regard to how my client was actually
9 prejudiced by this delay, first let's talk about the
10 destruction of evidence in this clase(sic) -- in this
11 case. The clothes that the victim was wearing the
12 night of the incident were destroyed. These clothes
13 could determine whether or not she hit any rocks or
14 branches or trees going down the cliff face. It's the
15 Prosecutor's expert opinion that the victim fell off
16 the cliff without hitting anything on the cliff face,
17 that it was -- that she fell straight down without
18 hitting anything. These clothes could rebut that
19 position.

20 Also, we submit to you that the State's
21 entire case is dirtying Mr. Scharf's character; it's
22 saying that, because he was adulterous and he was a bad
23 person, he must have pushed the victim off the cliff
24 that night.

25 Mr. Scharf said that he and his wife had an

1 open marriage. And the Prosecutor's clearly going to
2 try to rebut that position and say that he was the only
3 one committing infidelity. We found two matchmaker
4 profiles filled out by Jody Ann Scharf. We contacted
5 Matchmaker International and tried to obtain any
6 records that Jody Ann Scharf had, and this was done in
7 around 2006. We contacted Matchmaker and tried to get
8 Jody Scharf's records. We were told that all of those
9 records had been destroyed. There's no way of telling
10 how many men Jody dated or who she dated or where they
11 went or the type of relationship --

12 THE COURT: All records were destroyed or
13 specific records dealing with --

14 MR. ALTERBAUM: Excuse me, specific records
15 dealing with Jody Scharf were destroyed.

16 THE COURT: Well, how would they have that
17 if, in fact, they destroyed all the records? How could
18 they tell you that they had something, when it was
19 destroyed?

20 MR. ALTERBAUM: Well, we have -- for what --
21 we have two Matchmaker profiles in our possession that
22 were found in Mr. Scharf's house, so we know that she
23 was -- she had, in fact, contacted -- contacted
24 Matchmaker and used their services. Because we -- we
25 interview -- excuse me for one moment.

1 UNIDENTIFIED: We have two profiles.

2 MR. ALTERBAUM: Yeah, we have two profiles,
3 so we know that Jody Scharf was having contact and had
4 retained the services of Matchmaker International.

5 THE COURT: I guess my question -- I'm not as
6 familiar with some of these profiles, but just because
7 you might have a profile doesn't necessarily mean you
8 had a date is what I'm saying.

9 MR. ALTERBAUM: But the profiles are dated.
10 I mean -- excuse me, the profiles do have a date on
11 them.

12 MS. GROOTENBOER: No, I un -- I understand
13 what the Court's saying. You're saying just because a
14 profile exists doesn't mean --

15 MR. BILINKAS: --

16 MS. GROOTENBOER: -- the parties went out on
17 a date.

18 THE COURT: Exactly.

19 MS. GROOTENBOER: Right, that's what I
20 thought.

21 MR. BILINKAS: -- (speaking away from the
22 microphone) -- prospective suitor's name --

23 MR. ALTERBAUM: They have a prospective
24 suitor's name and address on them. And f -- on the
25 form, it contains hobbies and, you know, what they like

1 to do and what they do in their free and spare time.

2 THE COURT: All right.

3 (Pause in proceeding)

4 MR. ALTERBAUM: Also, Judge, with regard to
5 the loss of witnesses, when the defendant claims he was
6 prejudiced by the loss of witnesses, the defendant must
7 specify and provide evidence of how the witness'
8 testimony would have benefitted the defendant. And
9 that's in State v. Agere(phonetic), 287 N.J.S. 134.

10 Judge, with regards to Stephen Scharf's
11 parents, both of his parents are dead; however, before
12 they died, they were investigated by the Bergen County
13 Prosecutor's Office and they told the Bergen County
14 Prosecutor's Office that Mr. and Mrs. Scharf had gone
15 to Rockefeller Lookout on numerous occasions. And this
16 is going to be a point that is going to be well-
17 disputed whether or not that was the first time she had
18 actually been there.

19 You're going to hear statements from other
20 witnesses that Jody had a fear of heights and that she
21 would never go to the cliffs with him and that she was
22 afraid to go up there. However, we had two witnesses
23 that would be able to testify, and this is in a report,
24 that -- in a report by the Bergen County Prosecutor's
25 Office, that that was Mr. and Mrs. Scharf's spot and

1 they had been there on numerous occasions.

2 Also, the Prosecutor's going to try to claim
3 that Steve was the problem, Steve was the reason why
4 the marriage dissolved, or Steve was the sole reason
5 why the marriage had failed. Jody Scharf's own aunt,
6 who's now deceased, gave a statement to the Bergen
7 County Prosecutor's Office and she said in that
8 statement that, when Jody had to put her mother in a
9 home, she began to drink; she began to drink and she
10 started to develop a drinking problem.

11 Steve's Aunt Dolly, who's also deceased, gave
12 a statement to the Bergen County Prosecutor's Office,
13 and Aunt Dolly said to the Prosecutor that Jody's
14 drinking was a big reason why this marriage had
15 problems. This clearly rebuts the State's position
16 that Mr. Scharf was the sole reason for these marital
17 problems, that his infidelity caused these marital
18 problems.

19 (Pause in proceeding)

20 MR. ALTERBAUM: If I can just have one
21 moment.

22 (Pause in proceeding)

23 MR. ALTERBAUM: Nothing further.

24 THE COURT: Thank you.

25 MS. GROOTENBOER: Thank you, Judge.

1 First, I would incorporate by reference the
2 legal argument that we make on pages 50 to 62 of our
3 omnibus brief. This motion must ultimately fail for
4 the simple fact that the Defendant has completely
5 failed to show concrete prejudice to his ability to
6 defend this case. A shorthand reference that I made to
7 myself is two experts, plus a storage unit full of
8 evidence and other witnesses available, does not
9 concrete prejudice show.

10 And I have to now specifically comment on
11 this information from Matchmaker International. I
12 believe Counsel's mistaken when he says that it was
13 Jody Ann's records that were destroyed. I believe from
14 what I reviewed, Judge, that it was, in fact, that
15 Matchmaker International's entire database. So
16 basically the company --

17 THE COURT: That's why I asked that question.

18 MS. GROOTENBOER: Okay.

19 THE COURT: I mean, they -- if they deleted
20 all their records, that's one thing.

21 MS. GROOTENBOER: The company did,
22 independent, irrespective of anything to do with this
23 case. It wasn't -- I just wanted to be clear on that,
24 because there seemed to be an inference that only Jody
25 Ann's records were destroyed, when, in fact, the

1 company made a corporate decision for -- to --

2 THE COURT: To destroy all of them.

3 MR. GROOTENBOER: -- go electronic or

4 whatever, and their entire database.

5 The other thing I want to point out is that

6 --

7 THE COURT: Well, what about the profile that

8 was filled out?

9 MS. GROOTENBOER: Well, good question and

10 very well put, Judge, and I have an answer for you.

11 The Defense has in their position -- we've received

12 from reciprocal discovery these profiles. These

13 profiles contain the names and addresses of potential

14 dates for the victim. It's something they have access

15 to. They have the ability to interview these men. I'm

16 not going to ask whether they have or not, but the fact

17 that they have that in their position means their

18 argument of concrete prejudice must fail.

19 THE COURT: Do you --

20 MS. GROOTENBOER: They have --

21 THE COURT: -- do you -- do you have

22 addresses for --

23 MR. BILINKAS: Yes, Judge.

24 THE COURT: -- prospective individuals that

25 --

1 MR. BILINKAS: Yes. Yes, Judge, we have a
2 number of profiles, two. Again, this, according to Mr.
3 Scharf, had been going on for years.

4 THE COURT: My point is you're able to
5 contact those people.

6 MR. BILINKAS: Those two specific people,
7 yes, Judge. And the way we're prejudiced, Judge, is
8 that --

9 THE COURT: No, but have you done that?

10 MR. BILINKAS: We've located one; we're
11 trying to locate another.

12 THE COURT: So you're -- you're trying to
13 locate them.

14 MR. BILINKAS: We tr --

15 THE COURT: The answer is you have not
16 located them.

17 MR. BILINKAS: We've located one; we're
18 trying to locate the -- the other --

19 THE COURT: When you say, "Located," you have
20 spoken to that person?

21 MR. BILINKAS: I believe my investigator had
22 reached out for him. I don't know if he's actually
23 spoke to him yet. But the way we're prejudiced, Judge,
24 is that --

25 THE COURT: No, but this is important.

1 You're -- you're making assertions that there was
2 dating and -- you have the ability to -- to prove, to
3 some extent, whether it's true or not true, and I would
4 have the entire picture.

5 You have one person who's not been contacted,
6 one who has been contacted, and here we are on the eve
7 of trial and the investigator can't give you an answer
8 as to what they obtained from this person?

9 MR. BILINKAS: Again, Judge, we have 84
10 witnesses --

11 THE COURT: I understand that, but this is
12 important; this is something --

13 MR. BILINKAS: Judge, I realize --

14 THE COURT: -- that --

15 MR. BILINKAS: -- and, again, irrespective of
16 these two other people -- I'm not saying we're
17 prejudiced with regards to those two individuals. What
18 -- what the prejudice is, Judge, from day one --

19 THE COURT: But when is this information
20 going to be developed? If you have somebody that
21 you've contacted and found, it would seem to me that
22 that should have been done yesterday.

23 MR. BILINKAS: Judge, it -- we've been
24 attempting to do it for -- for weeks. And, again, when
25 we're talking --

1 THE COURT: Is the person not cooperative?

2 MR. BILINKAS: Well, to a certain extent,
3 yes, Judge.

4 THE COURT: --

5 MR. BILINKAS: And, again, you know, the way
6 we're prejudiced, and our whole point with regards to
7 this one aspect of the case is this: Mr. Scharf said
8 on day one they had an open marriage.

9 Bordino(phonetic) was -- testified in the grand jury
10 that that was a one-sided relationship. They haven't
11 discovered anything to indicate that Mrs. Scharf was
12 screwing around.

13 And -- and -- and, basically, had the
14 Prosecutor done an investigation appropriately in the
15 beginning of the case and determined that she was, in
16 fact, dating -- and -- and there is a statement
17 specifically that the Prosecutor took in I believe '92
18 or '93 that Jody Scharf was dating, that she was using
19 a dating service. They had access to that information
20 and they chose to delay indicting him up to that point.
21 We never had that statement. We couldn't go back in
22 '92 or '93 and subpoena all the records from Matchmaker
23 International to indicate what my client has indicated
24 to us, that she was dating 50, 60 different men over
25 the years, like he has.

1 What the Prosecutor has done is try to make
2 this a one-sided relationship to disparage my client.
3 And I submit it's a large portion of their case.

4 So thank God we have two profiles, Judge.
5 Thank God we've subpoenaed Matchmaker International
6 that'll say basically these are business records, but
7 sorry, because of the time that's gone by, all the
8 other records have been destroyed.

9 So we'll never know the full extent of Mrs.
10 Scharf's unfaithfulness or however the Prosecutor
11 wanted -- (voice trails)

12 THE COURT: The Prosecution has these two
13 names and addresses?

14 MS. GROOTENBOER: Judge, allow -- allow me to
15 clarify. First, I have to say most respectfully it's
16 absurd to think that we basically delayed a prosecution
17 in the hopes that records from some dating company
18 would disappear and go away.

19 Number two, I think we can all agree, based
20 on being folks of common sense and life experience,
21 that there's a big difference between a man and a woman
22 who are married to each other and say, "Let's not let
23 these wedding rings affect our ability to date and go
24 to Playto's Retreat," and stuff like that, and a woman
25 who maybe after she's decided to divorce her husband

1 starts and after she's decided that her marriage is
2 over just maybe decides she wants to do something to
3 better her life. There's a big difference between
4 those two things.

5 And, certainly, Judge, what we're talking
6 about here is not the debate of where this case
7 ultimately lies, but I -- I want you to note and -- and
8 examine the evidence through that prism. There's a big
9 difference between two individuals who of their own
10 volition say, you know, marriage is a certificate only,
11 let's go play, both of us, and a marriage where -- a
12 situation where one party says: I'll play; I don't
13 care what you're going to do, and a woman who
14 ultimately says: I've had enough; I want a divorce,
15 but, even though I know I've had enough and want a
16 divorce, maybe I begin -- I begin these seeds of the
17 new life I want and I'm going to do this thing, this
18 innocent innocuous matchmaking.

19 I don't know, Judge, and I don't want to get
20 into that discussion now, because the search for that
21 truth is the trial in front of the jury.

22 But certainly to suggest that season-
23 dedicated professionals such as we are in the BCPO, who
24 are dedicated to the cause of justice, just decided
25 amongst ourselves that we're going to wait for records

1 to dissipate and people to die before we bring this
2 charge is -- is, not only unfair, untrue, and absurd,
3 it's not borne out by the evidence in this case.

4 This is a situation where the Office never
5 waived in its commitment to bring justice. We have
6 been working, collectively, through the years to
7 analyze, to examine. And, as we say in our brief,
8 Judge, when we're analyzing a dismissal for due process
9 grounds, you don't criticize, you don't punish a
10 Prosecutor's Office simply because they want to delay
11 and wait until the evidence is ready to bring the
12 charge and to go forward. You don't want to punish an
13 Office for being circumspect.

14 And that's what happened here, Judge. There
15 is no -- I hear what they s -- they're saying to a
16 certain extent; I hear it, but it's not borne out by
17 the evidence and it's not borne out by the facts and
18 the chronology of this investigation.

19 This is not something where detectives and
20 prosecutors just cabel(sic) -- cavalierly decided it'll
21 be fun to just wait; quite the contrary, Judge, quite
22 the contrary.

23 The bottom line is this is a case where the
24 Prosecutor's Office has pursued it diligently, has gone
25 forward in -- throughout the years, and -- oh,

1 everything they say here, you know, why didn't they do
2 this, why didn't they do that, we did what the law
3 requires us to do. The law doesn't require us to
4 basically go after experts and say to the experts, "You
5 must meet on our timetable; you must write a report on
6 our timetable". And there is no -- as our -- as our
7 brief clearly states, there is no requirement that we
8 hire experts close in time to when a crime happens,
9 absolutely none. They're -- these -- not in the law,
10 and that's what our brief makes clear.

11 This is a complex case, as we said. It's
12 extraordinary. It's a veritable mountain of evidence,
13 which, like the cliffs themselves, are sometimes
14 onerous and treacherous to navigate. But the point is,
15 Judge, we did. And, when we did, we did so completely,
16 honestly, aboveboard, unlike cases we mentioned in our
17 brief, like Barker versus Howell or Howell versus
18 Barker where basically a Prosecutor's Office down in
19 North Carolina stood in front of the judge and said,
20 "Yeah, we just waited because we wanted to, because we
21 thought it would be a good idea to wait the charge
22 after -- you know, to charge this person til the
23 sentence was done". That absolutely is not what
24 happened here, Judge, not by any stretch of the
25 imagination.

1 And, of course, as Your Honor knows, what
2 happened during that time was that the Defendant lived.
3 And, again, freedom of movement? He lived, he
4 traveled, he did things. And the case nonetheless --
5 and as the case proceeded.

6 So actual concrete damage, Judge, simply is
7 not here. And it's a -- it's a bur -- very high burden
8 the Defense has in order to obtain a dismissal on this
9 grounds, a very high burden. The -- the New Jersey
10 Courts talk about it as the riggers of the Defense to
11 show that they have suffered concrete prejudice, and,
12 on balance, Judge, they simply have not.

13 THE COURT: Two questions: What was the date
14 of the profile?

15 MS. GROOTENBOER: The dates of the profile, I
16 -- if my memory serves me correctly, Judge, it is
17 sometime in 1992, I'm going to say -- and the reason
18 why I'm going to say it's in 1992 is for this reason,
19 Judge, because --

20 THE COURT: That's the date of the submission
21 of the profile?

22 MS. GROOTENBOER: I -- I don't know when the
23 profile was submitted. I'm -- I'm going by memory.
24 The memory is this: It's a pro -- it's a printout that
25 the customers would get from the company that says,

1 "Here's" -- and it lists, you know, the two people,
2 like for instance, in this case, Jody Ann Scharf and
3 the potential match.

4 Now, what's interesting, Judge, because
5 you've asked like what the time was, w -- I'm saying
6 it's 1992 for the simple reason, because Jody Ann
7 Scharf's age on these two profiles is listed as 44.
8 She was 44 in 1992. Specifically, her date of birth
9 was in February.

10 So that is what tells the State -- even if
11 the date that the profile wasn't generated is -- is on
12 there, that's what tells the State that it was
13 generated in 1992 and not some other time. That's what
14 supports the State's position that this profile was
15 some tentative step towards a new life and not *prima*
16 *facie* evidence of swinging, out of lack of better
17 phrase.

18 MR. BILINKAS: Judge -- Judge, if I may, with
19 regards to these pro -- profiles -- and I'm hoping the
20 Court un -- understands exactly what they are. They're
21 not something that was submitted at the time referenced
22 in that particular document.

23 THE COURT: They weren't submitted in 1992,
24 is that what you're saying?

25 MR. BILINKAS: Absolutely not, Judge. This

1 is a hook-up profile where she put --

2 THE COURT: No, but my point is, if you're 44

3 --

4 MR. BILINKAS: Right.

5 THE COURT: -- at that time and it's '92 when

6 you're forty -- you -- you don't become 44 in 1986 or

7 ni --

8 MR. BILINKAS: No, Judge, but periodically,

9 as my client did, they update their profiles. And, if

10 certain things don't work, they maybe tweak this, tweak

11 that, you know, maybe misrepresent something here or

12 there.

13 THE COURT: But you're speculating.

14 MR. BILINKAS: No, we're not speculating,

15 Judge. Again, our position is, if we had those records

16 -- and the Prosecutor should have gotten those records.

17 Why? Because the evidence that was provided to us

18 after the arrest was that they had talked to numerous

19 witnesses. And, when I say, "Numerous," I think

20 there's at least two, as opposed to 30 other people

21 that were saying, "Oh, Jody would never go out with

22 anybody"; "If he was screwing around, you know, she was

23 pure"; "She -- she was not dating other people". But

24 there's two people that were close to her that said she

25 was dating. As a matter of fact, the -- the week bef

1 -- the weekend before this accident, the woman tells
2 the Prosecutor that she had dated two different men on
3 one weekend, okay?

4 And so, if we had those Matchmaker documents,
5 Judge, it would have -- it would have told us -- and,
6 based on what our client has told us, would have
7 established a long history, a long history of her
8 dating other people, which would have corroborated his
9 statements about being an open marriage, okay, which
10 would have disputed various things that she said to
11 these 20 or 30 other people who supposedly she confided
12 in and told them everything that was going on.

13 THE COURT: Well, let me ask this question in
14 a different way. And, again, if we go over something a
15 second time, I'd rather do that. But what information
16 do you have to show that, in fact, the victim was
17 dating other men before 1992?

18 MR. BILINKAS: My client in his statement
19 said they had an open marriage.

20 THE COURT: Your client's statement.

21 MR. BILINKAS: The ones that --

22 THE COURT: But -- but what else, other than
23 your client's statement?

24 MR. BILINKAS: The only thing that's left
25 remaining, Judge, are profiles indicating --

1 THE COURT: The profile, would you agree, if
2 it's an age of 44, that's consistent with 1992?

3 MR. BILINKAS: Absolutely, and that's why
4 we're prejudiced. The only documents that exist --

5 THE COURT: Yeah, but, following -- just
6 follow what I'm saying.

7 MR. BILINKAS: Okay.

8 THE COURT: You don't have anything before
9 1992, but what you do have is a profile that correlates
10 to 1992.

11 MR. BILINKAS: Correct.

12 THE COURT: You're saying that there must be
13 information that exists.

14 MR. BILINKAS: We're -- we're saying that
15 we've been told --

16 THE COURT: Okay.

17 MR. BILINKAS: -- that the relationship
18 existed for a considerable period of time and that the
19 fact, Judge, you know, they -- my client was using a
20 dating service. They didn't find any records. He had
21 been using that dating service for a considerable
22 period of time. Both of these people had P.O. Boxes,
23 you know. And -- and that's how we are prejudiced,
24 Judge, because the Court's exact discussions, the --
25 the comments by the Prosecutor, you know, preclude us,

1 prejudice us from -- from uncovering the truth.

2 And, again, so the Prosecutor spent 18 years.

3 And, until those were turned over a month or so ago,
4 had never identified or talked to anyone that Jody
5 Scharf had dated. And -- and their testimony in the
6 grand jury gives the grand jurors the impression that
7 this philanthropy was one-sided, and -- and that's how
8 we're prejudiced, Judge.

9 THE COURT: Okay, thank you. I really
10 appreciate your input. It's a complex case; it's
11 substantial; and there's a lot of information to cover.

12 It's just about 12:30. We'll resume at 1:30?

13 MS. GROOTENBOER: Yes, Judge.

14 (Luncheon Break)

15 (Back on the record)

16 (Prospective jurors are not yet chosen)

17 THE COURT: Pick up where we left off, all
18 right?

19 (Pause in proceeding)

20 MR. BILINKAS: Judge, can we have the right
21 hand freed up?

22 THE COURT: Please.

23 (Pause in proceeding)

24 THE COURT: Ms. Grootenboer, I think it was
25 your reply.

1 MS. GROOTENBOER: Oh.

2 (Pause in proceeding)

3 MS. GROOTENBOER: Thank you, Judge.

4 As I indicated, we briefed this issue in our
5 omnibus brief, pages 50 to 62. I had -- I had said,
6 and I would incorporate those comments into the record
7 by reference, that the Defense here has failed to show
8 concrete harm to their defense.

9 This ind(sic) -- implication that the State
10 either A) delayed to gain a tactical advantage or B)
11 just engaged in outright misconduct is just not
12 supported by the facts of the case.

13 What they offer as alleged proof of the
14 misconduct is the interviews of two witnesses who they
15 want the Court to believe are the hapless victims of
16 mind pollution. And, in reality, Judge, these are
17 witnesses that were interviewed 14 years apart by two
18 different sets of detectives. And it defies logic to
19 say that the -- the charges in this case were delayed
20 just so we could hypnotize, out of lack of better
21 phrase, two out of 84 witnesses. That just simply
22 cannot hold water, Judge.

23 And, in fact, a close, fair, thorough review
24 of what these witnesses say support our position that
25 indeed there was no polluting of any minds going on.

1 These individuals had their own impressions, their own
2 understanding of what happened, independent of the
3 Prosecutor's Office.

4 And I have outlined for you in the State's
5 brief what those full facts are, and I do not wish,
6 unless the Court wants me to, to recount them here,
7 because they are fully set forth --

8 THE COURT: Well --

9 MS. GROOTENBOER: -- in the brief.

10 THE COURT: -- we could go over -- back over
11 a couple of areas: One has to do with the two
12 witnesses, the parents of the Defendant?

13 MS. GROOTENBOER: Your Honor, yes --

14 THE COURT: Statements were taken and
15 apparently there was some question as to whether the
16 victim was afraid of heights, whether she was drinking
17 or not drinking, and that might be helpful.

18 MS. GROOTENBOER: Well, certainly, Judge, I
19 can do that.

20 Those witness -- well, first, I'll start with
21 the parents of the Defendant. There is no indication
22 -- and I know that Trial Counsel will correct me if I
23 am c -- if I am wrong on this in any way -- but there
24 is no indication that those two witnesses that were
25 interviewed -- and I have to highlight the word,

1 "Interviewed," because Counsel said that the Office
2 investigated them. We weren't investigating the
3 Defendant's parents; they were interviewed as part of
4 --

5 THE COURT: It --

6 MS. GROOTENBOER: -- the case.

7 THE COURT: -- it sounded like -- and that's
8 why I wanted to go through this -- that there was some
9 type of statement taken from each of those two
10 witnesses, the -- the parents of the Defendant.

11 UNIDENTIFIED: There was.

12 MR. ALTERBAUM: There was. I -- I stand
13 corrected; I meant to say --

14 THE COURT: You --

15 MR. ALTERBAUM: -- "Interviewed".

16 THE COURT: -- you -- I was led to believe
17 that there were statements taken.

18 MR. ALTERBAUM: There was an interview
19 conducted.

20 THE COURT: I thought I heard, "Statements".

21 MR. ALTERBAUM: Well, d -- in the course of
22 the interview, they made statements that Mr. and Mrs.
23 Scharf had been to that lookout on numerous occasions.

24 THE COURT: Well, is it an interview or is it
25 a statement or both?

1 MR. ALTERBAUM: In my opinion, it's both,
2 Judge.

3 THE COURT: Do you have a copy of the
4 statement?

5 MS. GROOTENBOER: They're interview reports,
6 Your Honor; they're not statements that were
7 transcribed. There are reports --

8 THE COURT: They're not under oath?

9 MS. GROOTENBOER: They were not. And it's my
10 further understanding, Judge -- and this is what's
11 important about this point -- it's my further
12 understanding that what these witnesses told the
13 detective was, not that -- not that the witnesses
14 observed the victim go to the cliffs with the
15 Defendant, not that, but it was their general
16 understanding from the Defendant that that's what
17 happened, which would make any proposed testimony they
18 would have given right(phonetic) hearsay, not subject
19 to any exception.

20 And that's important -- and that's an im --
21 those are important facts for the Court to know in
22 evaluating the claim of concrete prejudice is that
23 these witnesses were not eyewit -- eyewitness who saw
24 Jody Ann go to the cliffs. The Defendant told them
25 things. Well, as Your Honor has already gotten a

1 glimpse from this case, the Defendant told lots of
2 people lots of different things.

3 Their testimony, if the Defense would have --
4 if they had lived and the Defense would have sought to
5 put them on the stand, we would have objected
6 vehemently, because what they offer is right hearsay.

7 THE COURT: What -- Counsel, what -- assuming
8 everything you've said to be correct and that the
9 parents were still here, other than -- they -- they
10 wouldn't be able to testify as to a statement, a
11 hearsay statement.

12 MR. ALTERBAUM: Judge, reading from -- first
13 of all, Judge, I want to point out that none of the
14 statements were taken under oath, including our
15 client's statements, but, looking at Roe (phonetic)
16 Scharf's interview and reading this word for word,
17 according to Ms. Scharf, it was not her son's custom to
18 confide in her on any issue. Mrs. Scharf stated that
19 she was aware that Stephen and Jody had been to the
20 cliffs at the Rockefeller Look --

21 THE COURT: But how did she become aware of
22 that information? That's my point.

23 MR. ALTERBAUM: Judge, we don't know.

24 THE COURT: The son told her this
25 information.

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MR. ALTERBAUM: One moment.

(Pause in proceeding)

MR. ALTERBAUM: Judge, Mrs -- Stephen's mother was aware of many instances where Steve and Jody would leave the house and go to these cliffs. And they -- our client made statements to those effect. And that is how she was aware that they went to the cliffs.

THE COURT: But she didn't have any firsthand knowledge.

MR. ALTERBAUM: --

THE COURT: Counsel, it's a straightforward question; it demands a straightforward answer.

MR. ALTERBAUM: Not that we're aware of, Judge.

THE COURT: Okay, thank you. Please continue.

MS. GROOTENBOER: So that -- that's my response to that, Judge, that that -- now as we've heard, now that the facts have been fully flushed out here, we again, our argument remains the same, that it -- it's a failure to show concrete harm to the Defense in this particular case.

The other witnesses that Counsel referred to in his oral argument, one of them is Dolly D -- Aunt -- Aunt Dolly, I'll call her for lack of better phrase,

1 the Defendant's Aunt, and the Aunt of Jody -- one of
2 the Aunts of Jody Ann Scharf. When you listen and
3 parse the information that was obtained from their
4 interview statements, Judge, again it is not based on
5 firsthand knowledge; it is based on belief.

6 And, again, Judge, their belief about what
7 led to the marriage's demise is not relevant. Had they
8 been called to testify, we would have vehemently
9 objected to those witnesses testifying about their
10 belief that the victim's drinking caused the demise of
11 the marriage. And of course their beliefs are
12 completely contradicted and -- by other evidence in the
13 case, to wit the divorce complaint that Jody Ann Scharf
14 obtained. She filed, not the Defendant in this case.

15 So, again, when you -- when we look at those
16 established facts as borne out in the discovery and as
17 we will establish at trial, you could easily see that
18 these two witnesses, now deceased, offer nothing,
19 nothing that could be testified to in front of a jury.

20 So, again, the argument that these deaths
21 have caused concrete harm to the Defense must be
22 defeated as well, because it's not testimony that would
23 have actually been presented to the jury in this
24 particular case.

25 MR. ALTERBAUM: Judge, the State intends to

1 introduce various hearsay statements made by the
2 victim, Jody Scharf, that she was afraid of heights and
3 she would never go to the cliffs with Mr. Scharf. This
4 testimony from the parents rebuts this position, saying
5 that they were aware that Mr. and Mrs. Scharf -- excuse
6 me -- that Mr. and Mrs. Scharf had visited the cliffs.

7 MS. GROOTENBOER: We disagree, Judge. As --
8 as we've already heard point blank, Your Honor
9 crystalized the issue and distilled it to its finest
10 elements; they didn't have firsthand knowledge, they
11 did not. And that's the only way their testimony would
12 have been warranted or allowed in front of a jury.
13 They did not have firsthand knowledge. They could not
14 testify about things that they may have been made aware
15 of by the Defendant. That's still the same issue. We
16 haven't advanced the ball, so to speak, in that regard.
17 It's still right hearsay.

18 MR. ALTERBAUM: Judge, no other witness has
19 any knowledge of whether or not they had ever been to
20 the cliffs. Their --

21 UNIDENTIFIED: --

22 MR. ALTERBAUM: That's okay.

23 That's all hearsay. And everything that
24 their(sic) intend to say that she was afraid of heights
25 and that she would never go to the cliffs is coming out

Argument - Grootenboer/Argument - Alterbaum/
Argument - Grootenboer

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of her mouth, and this is a way for us to rebut those hearsay statements.

MS. GROOTENBOER: But that -- we're not -- but, Judge, I have -- I have to hasten to remind the Court right now we are not addressing hearsay arguments; we're addressing very concrete issues of whether the Defense has been irreparably harmed in the case of a due-process dismissal.

I -- I -- I know that we have other arguments to hear here today, but I want to be able to keep us focused on the issues at hand. And the issue at hand, Judge, is whether or not the delay has materially disadvantaged the Defense. And we -- again, I say nothing I've heard here today changes the position we articulated in our brief.

THE COURT: Okay.

MR. ALTERBAUM: Does the Prosecutor intend to introduce various hearsay statements from Jody Scharf that she was afraid of heights and she would never go to the cliffs with our client?

MR. MELLO: (Speaking softly) -- exception to the hearsay --

MS. GROOTENBOER: Right. And b -- you're right. I mean, you know from our brief, we absolutely

1
2 intend to do that, but we intend to do it because we
3 have the appropriate exceptions under the hearsay rules
4 that allow us to do it. That's absolutely right.

5 MR. ALTERBAUM: And, Judge, and once she does
6 -- and, if those statements are in fact admissible into
7 evidence and they do intend to introduce them, then we
8 are permitted to use those statements in this interview
9 to rebut that position.

10 MS. GROOTENBOER: Oh, wait a minute, wait,
11 wait, I just heard something that confuses me. Is the
12 Defense saying that it would be their plan to have
13 somebody testify about the statements of people who are
14 deceased at trial?

15 MR. ALTERBAUM: No --

16 THE COURT: Counsel?

17 MR. ALTERBAUM: -- that's why we're --

18 THE COURT: Counsel?

19 MR. ALTERBAUM: That's why we're prejudiced,
20 Judge. We would have done, but they are deceased.

21 MS. GROOTENBOER: It's still incompetent
22 evidence, Judge, because, as they have acknowledged
23 before you now, these witnesses did not have firsthand
24 knowledge.

25 MR. ALTERBAUM: Neither d --

1 THE COURT: Let's move on. Let's move on.
2 This line of inquiry is no longer productive, all
3 right? You may continue.

4 MS. GROOTENBOER: Your Honor, I -- because I
5 was able to argue a substantial portion of the State's
6 position on this earlier, I don't have any further
7 arguments to make because I've already asked the Court
8 to incorporate by reference the arguments in our brief.

9 THE COURT: --

10 MS. GROOTENBOER: If Your Honor has any other
11 questions of me on this issue, I'll answer them, but I
12 do believe on behalf of the State we've completely
13 submitted our argument in this.

14 THE COURT: Do you want to continue with the
15 other motions?

16 By the way, you're handling all of these
17 motions?

18 MR. ALTERBAUM: No, Ms. McArdle --

19 THE COURT: When -- when we get to the trial,
20 what can I expect?

21 MR. BILINKAS: I'll be -- I'll be basically
22 doing --

23 THE COURT: The cross?

24 MR. BILINKAS: I'll be basically --

25 THE COURT: Direct and cross?

1 MR. BILINKAS: Direct, cross, opening,
2 closings, Judge. Again, any motions -- (voice trails)
3 -- that -- that involves co-counsel --

4 THE COURT: Legal argument?

5 MR. BILINKAS: Again, it depends, Judge. Ms
6 --

7 THE COURT: No, I --

8 MR. BILINKAS: -- McArdle, based on her
9 surgery, may or may not be available at certain times
10 --

11 THE COURT: Well, what did you expect her to
12 do, put it that way?

13 MR. BILINKAS: Judge, I -- I expected her to
14 handle a number of witness's cross --

15 THE COURT: Well, let -- let me be very clear
16 about this, okay? On the one hand, there's a not-so-
17 subtle complaint that the State is dragging its heels;
18 on the other hand, you have different attorneys on your
19 team and one of which, through no fault of her own, has
20 to go for treatment. I think it's in your best
21 interest and you're advised to -- to be prepared to
22 handle that testimony.

23 MR. BILINKAS: Judge, I --

24 THE COURT: No, I don't want a situation
25 where --

1 MR. BILINKAS: Absolutely not, Judge. I'm
2 prepared to handle the entire case --

3 THE COURT: Okay. Without prejudice, do --

4 MR. BILINKAS: Without prejudice. I mean,
5 again, it was kind of a kick in the teeth to find out
6 that she had cancer and needs sur -- surgery --

7 THE COURT: I understand that, but I'm also
8 looking at it from the standpoint of the Defendant's
9 rights.

10 MR. BILINKAS: Right, Judge.

11 THE COURT: And, if there's the preparation
12 of a witness, you have enough time to do that in
13 advance of the trial date.

14 MR. BILINKAS: Judge -- (voice trails)

15 THE COURT: And you fully are prepared to do
16 that.

17 MR. BILINKAS: Yes.

18 THE COURT: Okay.

19 MR. BILINKAS: We -- we hadn't made any
20 tactical decision as to who would do what. I'm
21 prepared to do everything. She was --

22 THE COURT: Okay.

23 MR. BILINKAS: -- assisting me and again to a
24 large extent on the -- on the motions, Judge.

25 THE COURT: I just wanted to be sure, because

1 it's not often that I have three attorneys handling one
2 case, so we need to define the responsibilities.

3 MR. BILINKAS: I'm the one responsible,
4 Judge.

5 THE COURT: Let's take care of the next
6 motion.

7 MS. GROOTENBOER: Your Honor, I was
8 wondering, as far as what the order should be, is the
9 Defense withdrawing the motion about privilege?

10 MR. ALTERBAUM: Judge, we have submitted our
11 brief.

12 THE COURT: Counsel, it's pretty clear-cut.

13 MR. ALTERBAUM: Yeah --

14 THE COURT: If there are no documents in
15 dispute.

16 MR. ALTERBAUM: I understand that. All I'm
17 going to say is we've submitted our brief; we rely by
18 our brief. And all we ask is that, if the privilege is
19 in fact waived, that -- in which Ms. --

20 THE COURT: The -- the privilege is waived.

21 MR. ALTERBAUM: Yes.

22 THE COURT: And you could see that from the
23 documents.

24 MR. ALTERBAUM: Yes, Judge.

25 THE COURT: I mean, what other proof would

1 you require?

2 MR. ALTERBAUM: No other proof, Judge. We
3 have just -- all I'm saying is we've submitted our --

4 THE COURT: I'm almost tempted to ask why
5 there would be an application when you had the
6 documentation.

7 MR. ALTERBAUM: We didn't have the
8 documentation.

9 THE COURT: Okay. All right. Next.

10 MS. GROOTENBOER: I'm sor -- just for the
11 record, did -- did Counsel say you did or did not have
12 the documentation about the waiver?

13 THE COURT: Did not have it at --

14 MS. GROOTENBOER: Didn't at the time --

15 THE COURT: -- the time that --

16 MR. ALTERBAUM: We did not --

17 THE COURT: -- filed the motion.

18 MR. ALTERBAUM: -- have the documentation at
19 the time we wrote the motion.

20 MS. MC ARDLE: -- wrote the motion.

21 THE COURT: That's what I under --

22 MR. ALTERBAUM: If we did have the
23 documentation, we would have never submitted the brief.

24 THE COURT: Okay.

25 MS. GROOTENBOER: Well, Your Honor, the next

1 ar -- there are -- is an argument about the admission
2 of testimony regarding the clawhammer and the p -- the
3 bloodstain in this particular case, Judge. If Your
4 Honor pleases, we could proceed with that.

5 THE COURT: Ready?

6 MR. ALTERBAUM: Any reference to the
7 clawhammer should be excluded in this trial. The
8 clawhammer is highly irrelevant and highly prejudicial.

9 In order for evidence to be relevant, it must
10 have a tendency to prove or disprove a fact and that
11 fact must be one of consequence. And that's New Jersey
12 Rule of Evidence 401.

13 This clawhammer has absolutely no bearing in
14 any aspect of this case. The clawhammer was tested by
15 the New Jersey State Police laboratory for blood and
16 the results of that test were not detected. There was
17 absolutely no indication of blood, human flesh, or
18 tissue on that clawhammer.

19 Where the clawhammer was found wrapped in
20 towels in a nylon bag in the back of Mr. Scharf's car,
21 once again there was no finding of any blood, human
22 flesh, or tissue.

23 In Dr -- in the two expert reports that were
24 submitted to us by the State, Dr. Bodden and Dr.
25 Clayton, they make absolutely no reference to the

1 clawhammer or it had any bearing on this case.

2 Clearly, the State intends to introduce this
3 evidence for the sole purpose of showing that Stephen
4 Scharf is a cold-blooded killer because he had a
5 clawhammer in the back of his car. This is going to
6 mislead the jury into assuming that the clawhammer was
7 used that night, and this is unduly prejudicial to our
8 client and it's speculative.

9 THE COURT: Counsel?

10 MS. GROOTENBOER: Thank you, Your Honor.
11 Yes, thank you very much.

12 First of all, I would incorporate by
13 reference the legal argument from our omnibus brief set
14 forth on pages 40 and 41.

15 As Your Honor is well aware, the State is
16 allowed to introduce evidence, direct and
17 circumstantial, and also the logical inferences that
18 can be drawn from that evidence that's introduced.

19 And, clearly, Your Honor, the clawhammer is extremely
20 probative in this particular circumstance.

21 And you need look almost no further than the
22 testimony of Detective Ernest from yesterday to see
23 that point, Detective Ernest who told you that how odd
24 he found it that the Defendant pointed to a kitchen
25 drawer to him which seemed bizarre. That -- that's not

1 his word, but that's what Detective Ernest said, that
2 this case from 18 years ago that still intrigues him
3 and his brief encounter with a man whose wife has just
4 died who sees fit to del(sic) -- to tell a Detective
5 from the Bergen County Prosecutor's Office, "Look at
6 the drawer that I had to fix".

7 What the Defendant didn't know, but what
8 Detective Ernest told you yesterday, was that Detective
9 Ernest had no idea why that was important. All he knew
10 what it was awfully odd that the Defendant went out of
11 his way to point that out.

12 But Your Honor has the full panorama of facts
13 and circumstances here and you know why the Defendant
14 pointed that out. It's because, when the police
15 questioned him about the clawhammer found in his
16 vehicle, he explained or claimed to them that he had
17 used it to fix a drawer in his kitchen and had intended
18 to bring it to his garage, but yet didn't and then just
19 decided to put it in the car on the night that his wife
20 dies.

21 And the reason why again, Judge, that is
22 going to be relevant and probative is that the State
23 should be free to argue, because it is a rational
24 inference that could be drawn from the evidence, that
25 this hammer played a role in the murder of Jody Ann

1 Scharf. It played a role because this woman who was
2 afraid of heights is found many feet below a ledge,
3 where we're going to argue at trial, based on all the
4 evidence we have, she would have never gone
5 voluntarily.

6 The State should be free to argue, because it
7 is probative and not unduly prejudicial, that the
8 Defendant used this hammer to threaten Jody Ann, to
9 make her go to the cliff, used this hammer as Dr.
10 Bodden testified it is possible that this was an
11 instrument that -- that could have been used to
12 bludgeon her into some sort of submission, but we won't
13 know pathologically because the extreme and severe
14 injuries she suffered from the fall would have masked
15 that.

16 Either way, Judge, we ought be free under the
17 Rules of Evidence and the case law and the facts of
18 this case --

19 THE COURT: Can I --

20 MS. GROOTENBOER: -- to argue that.

21 THE COURT: -- can I ask you a question?

22 MS. GROOTENBOER: You bet.

23 THE COURT: The drawer.

24 MS. GROOTENBOER: Yes.

25 THE COURT: I'm not sure what will be

1 presented, but somewhere during the course of these
2 proofs will there be some sort of examination of this
3 drawer?

4 MS. GROOTENBOER: If you say a physical
5 examination of --

6 THE COURT: No, no, I mean was the drawer
7 ever examined to determine if, in fact, any repairs
8 were made?

9 (Pause in proceeding)

10 MS. GROOTENBOER: The first thing I can tell
11 you, Judge, is what you know already from the testimony
12 of Detective Ernest who told you what he himself
13 observed a drawer that night, that it appeared normal
14 and fine and not like something that needed to be
15 fixed.

16 The other thing I can tell you, which you may
17 not be aware of, is that this drawer is something
18 that's in the custody of the Defense. We know, and we
19 -- I believe we submitted this in our statement of
20 facts, Your Honor, in the omnibus brief, I think I put
21 it in the portion of the statement of facts that talks
22 about the due-process dismissal -- we know that
23 sometime in 1994 the Defendant himself told an
24 acquaintance that that drawer had to be removed and
25 turned over to his attorney because it was part of an

1 alibi. We know that that -- that woman gave -- that
2 individual acquaintance gave us a statement to that
3 effect.

4 So we, ourselves, have not been able to
5 examine that drawer. It's in the custody of the
6 Defense, Your Honor. And I can't speculate as to what
7 the Defense may do on their case, but again I would say
8 that the Court and a jury could certainly take stock in
9 what Detective Ernest says, which is that the drawer
10 appeared perfectly normal to him.

11 And, again, Judge, lo -- the jury, with their
12 job -- their job as fact finders in sifting through all
13 the evidence, can say to themselves it's mighty odd --

14 THE COURT: I don't know what kind of repairs
15 were done to the drawer --

16 MS. GROOTENBOER: I don't think we need to
17 know, Judge. The point is --

18 MR. MELLO: -- (Speaking softly)

19 MS. GROOTENBOER: Here's the point -- here's
20 the point: The point is, Judge, I'm not suggesting and
21 the State's not suggesting that he ever used it to fix
22 the drawer. What the State's suggesting is that was
23 the excuse he offered up when he was asked about it by
24 the police.

25 The State is not maintaining he used it --

1 that he fixed the drawer in any way. I'm maintaining
2 the opposite -- the State, I'm sorry -- the State is
3 maintaining the opposite. We are maintaining that he
4 brought it there deliberately to intimidate, frighten,
5 beat -- I mean, I don't, you know -- the victim in this
6 particular case that day, to bring her to that cliff.
7 That's what we're saying.

8 We -- we know through the course of the
9 testimony that the Defendant gives this excuse. And
10 our position is going to be at trial that that excuse
11 is an attempt to cover up his criminality. That's what
12 we're going to say.

13 But I mentioned the comment about the drawer
14 because again it goes back to the State's position that
15 -- and I would -- I would argue, Judge, actually as a
16 parenthetical I would argue that the Defendant's
17 spontaneous discussion with Detective Ernest about the
18 drawer isn't a type of consciousness of guilt, because
19 he knows what he's already says, he knows the excuse
20 he's given, and he's trying to make it all fit in his
21 own way.

22 We're not dealing with somebody, Judge, who
23 is illiterate or undereducated or lacks savvy. We're
24 dealing with somebody, Judge, who the State will argue
25 and the evidence will show took a lot of steps to

1 engage in what I call, "Spin control". That's why he
2 wanted to talk to the police, because he wanted to tell
3 his story of accident to as many people as he could to
4 cover his own record, so to speak.

5 And, again, this falls into that. His claim
6 is I had an innocent use for the hammer. Our evidence
7 will show there was nothing of -- innocent about his
8 use of the hammer.

9 It is not unduly prejudicial in any way.
10 This is the exact type of fact-finding the jury needs
11 to engage in as they determine the guilt of the
12 Defendant: Was it innocent; do we want to believe what
13 he said; or do we want to believe what the State offers
14 here in that it was one of the methods and tools he
15 used to bring the victim to her doom?

16 So that's -- that's why, Judge, we argue most
17 strenuously that this clawhammer is absolutely
18 probative and relevant and ought be admissible.

19 MR. ALTERBAUM: What evidence do they have,
20 Judge? This clawhammer has absolutely no probative
21 value. It was tested by the New Jersey State Police
22 for blood; the results came back negative.

23 And, with regards to Dr. Bodden, Dr. Bodden
24 did testify before the grand jury that the hammer could
25 have been used. He did not testify with a scientific

1 certainty. And this was never contained in his expert
2 report that was submitted to us.

3 And, with regards to Mr. Scharf's comments to
4 Officer Ernest, they asked him earlier that day why he
5 had the clawhammer and he responded he used it to fix a
6 drawer, and then Officer Ernest saw the drawer and that
7 it was working properly. Clearly, the drawer was
8 fixed. There's absolutely no probative value to the
9 hammer. And, clearly, all they want to use it for is
10 to mislead the jury into thinking our client is a cold-
11 blooded killer, and we cannot have that; that is highly
12 prejudicial.

13 THE COURT: Anything further?

14 MS. GROOTENBOER: The hammer in itself -- in
15 and of itself is not inflammatory, Judge. That's the
16 only thing I want to point out; it's not inflammatory.
17 And, for all the other arguments I stated, it is highly
18 probative. Thank you.

19 THE COURT: All right, next?

20 MR. ALTERBAUM: It is inflammatory when they
21 make those types of --

22 THE COURT: Next, meaning the next motion.

23 MR. ALTERBAUM: Oh, excuse me; sorry, Judge.

24 MS. GROOTENBOER: Bloodstain?

25 MR. ALTERBAUM: Yeah.

1 (Pause in proceeding)

2 MR. ALTERBAUM: If I could just have one
3 moment, Judge; sorry.

4 THE COURT: Yeah.

5 (Pause in proceeding)

6 (Soft conversation is heard at Prosecutor's table)

7 MR. ALTERBAUM: Once again, the bloodstain
8 found on Mr. Scharf's pants that were seized the night
9 in question are highly irrelevant and highly
10 prejudicial.

11 THE COURT: Let me ask you one question:
12 Human blood?

13 MR. ALTERBAUM: Yes, Judge, it was tested by
14 the New Jersey State Police once again, and human blood
15 was detect --

16 THE COURT: But we don't know who it belonged
17 to.

18 MR. ALTERBAUM: No, we have absolutely no
19 idea whose blood that belonged to. The sample was so
20 small it was unable to be determined whose blood it in
21 fact was. And that's noted in a report --

22 THE COURT: Well, it was unable to be
23 determined because it wasn't tested --

24 MR. ALTERBAUM: No, it was --

25 THE COURT: -- or because the quantity was so

1 minute?

2 MR. ALTERBAUM: The quantity was so minute
3 that they were unable to determine whose blood it was.

4 This blood could have c --

5 THE COURT: But it could have been -- could
6 have been the blood of any person, including the
7 victim.

8 MR. ALTERBAUM: And we don't even know if
9 that blood got on his pants that night.

10 THE COURT: All right.

11 MR. ALTERBAUM: And they -- the State wants
12 to paint a picture that that was Jody's blood, that he
13 used the hammer to bludgeon her to death, and somehow
14 that blood got on her(sic) pants. And that is
15 incredibly prejudicial.

16 THE COURT: Prosecutor?

17 MS. GROOTENBOER: But yet highly probative,
18 Judge. And I -- for all these same arguments that I
19 used with the clawhammer, they all equally apply here.

20 Let the jury decide. The Defense is going to
21 have their counter-argument; let the jury decide, let
22 them, as we always do. They are going to be the
23 finders of fact, let's give them the evidence they need
24 to make a sound and reasoned decision in this
25 particular issue.

1 Certainly, Judge, the inference is there and
2 it's fair to be -- for us to be able to say that it was
3 -- got -- it got on his pants on the night of September
4 20th, 1992 --

5 THE COURT: But was there any way of being
6 able to date this sample or to --

7 MS. GROOTENBOER: There --

8 THE COURT: In other words, the -- the length
9 of time it was on the -- the pant --

10 MS. GROOTENBOER: I don't know if there was
11 ever -- Your Honor, I don't know if there was ever any
12 way to do that.

13 And the other thing I know is this; that,
14 back in 1992, the quality and the type of testing was
15 not as advanced as it is now, so that I can't even tell
16 you the size of it because -- of the size of the blood,
17 because, once that -- sample was cut and sent to the
18 State Police, it was entirely subsumed in the testing
19 that was done to determine whether it was human blood
20 or not.

21 I know, generally, based on my work in the
22 Office -- and I know Your Honor has tried enough cases
23 to know this generally about biological evidence --
24 that, when it goes to the State Police, the first step
25 is it goes to Criminalistics so they can determine

1 whether it is a biological material in the first place,
2 be it saliva, blood, semen, et cetera.

3 The next step after that would be that they
4 extract certain DNA samples and those samples go to the
5 DNA lab for testing.

6 That type of dynamic, that type of
7 advancement in testing had not yet occurred in 1992.
8 In fact, from what I remember, parenthetically, I mean,
9 we were having Frye hearings in this courthouse about
10 DNA in general in a particular homicide case, State
11 versus Morey Marcus.

12 My point in that is that the testing was --
13 available, and the only test that could have been done
14 was to determine whether it was human blood or not.
15 That was done, and then the sample was subsumed and we
16 didn't have anything else to test.

17 THE COURT: Where exactly was the -- the
18 blood found on the pant?

19 MR. ALTERBAUM: Uh.

20 (Pause in proceeding)

21 MR. ALTERBAUM: B -- hold on. According to
22 Alver's (phonetic) report, it says the blood was located
23 on the lower front right leg of Stephen Scharf's jeans.

24 MS. GROOTENBOER: Mmm-hmm.

25 THE COURT: Okay.

1 MR. ALTERBAUM: But, once again, Judge, there
2 was no other blood found on any part of Mr. Scharf's
3 body or on his clothes. We don't know how that blood
4 got there or whose blood it was. There can be no --
5 absolutely no logical inference made. This is purely
6 speculative.

7 THE COURT: Okay. Next?

8 (Pause in proceeding)

9 MS. GROOTENBOER: Next, Your Honor, would be
10 the statement -- state-of-mind statements, Your Honor.

11 (Pause in proceeding)

12 THE COURT: Counsel?

13 MS. MC ARDLE: Good afternoon, Your Honor.

14 Before we begin discussing the state-of-mind
15 statements, I think you need to know, Your Honor, what
16 type of statements we're talking about generally.

17 There is a diary that I'm understanding is
18 not going to be the focus of -- is not going to be
19 presented into evidence.

20 MS. GROOTENBOER: Your Honor, I -- I didn't
21 mean to interrupt, but I just want the record -- for
22 the Court to be entirely clear. We're not going to be
23 talking about the diary at all during --

24 MS. MC ARDLE: Okay.

25 MS. GROOTENBOER: -- these discussions.

1 MS. MC ARDLE: Okay.

2 MS. GROOTENBOER: Or at -- or at the trial
3 ultimately.

4 MS. MC ARDLE: Okay. There are notes to the
5 attorney that were in Jody Scharf's penmanship
6 supposedly. There are statements taken by the police
7 and statements taken by an insurance company -- or a --
8 a detective firm for the insurance company. I believe
9 it's BZ(phonetic) Investigations. And there are I
10 believe -- my calculation is 26 statements by
11 individuals, 34 -- 26 people with 34 individual
12 statements, Your Honor.

13 Of those 26 -- of those 34 statements, I'm
14 sorry, Your Honor, only one I believe -- maybe two were
15 taken under oath. The rest are investigative reports
16 done by either the Bergen County Police Department,
17 possibly one or two from the Washington Police
18 Department, and several from this private insurance
19 company.

20 None of them are sworn to, except for a
21 statement by a man named, Paul Connors. I believe
22 that's the only sworn one.

23 And that's what we're talking about when
24 we're talking about all these statements that were
25 given, many of which are hearsay statements that were

1 given to individuals by Jody Scharf, okay?

2 I recognize, and it's pointed out in our
3 brief, that -- let me back up. 803C(3) is the state-
4 of-mind exception. Is that what you want to speak
5 about, Ms. Grootenboer, first?

6 MS. GROOTENBOER: Certainly, Judge.

7 MS. MC ARDLE: Okay, that's fine.

8 In order -- obviously, generally a victim's
9 state of mind does not come into a case. However, the
10 Defense acknowledges that where accident is the defense
11 it may become probative. However, when you're talking
12 about state of mind, Your Honor, the statements must be
13 made in good faith. And, at this point, given that
14 there are 34 statements, we have no idea which
15 statements the Defense(sic) intends to use and --

16 MS. GROOTENBOER: --

17 THE COURT: Prosecutor.

18 MS. MC ARDLE: I'm sorry. The Prosecutor
19 intends to use and which statements they don't intend
20 to use. And our position is it's very hard to argue --
21 I don't think you want me to stand here and argue many,
22 many, many statements.

23 THE COURT: Well, there -- there are 34
24 statements?

25 MS. MC ARDLE: There are 34 statements, and

1 some of have many m -- pieces to them.

2 THE COURT: So I don't know what to tell you,
3 but there are 34 possibilities.

4 MS. MC ARDLE: Well, there are probably 50
5 possibilities.

6 THE COURT: Yeah.

7 MS. MC ARDLE: And, therefore, what we would
8 a -- what we think has to happen is we think there has
9 to be 104 hearings for this Court to determine whether
10 or not the statements were made in good faith.

11 I can't argue -- I'd love to stand up here
12 and argue that none of them are admissible. I don't
13 think I can argue that none of them are admissible
14 because --

15 THE COURT: All right, why don't we do this;
16 we --

17 MS. MC ARDLE: -- of accident.

18 THE COURT: -- we'll reverse everything for a
19 moment. Prosecutor --

20 MS. GROOTENBOER: Thank you, Judge.

21 THE COURT: -- why don't you take a position
22 as to why the statements should be admissible.

23 MS. GROOTENBOER: Certainly, Judge.

24 This -- and I would incorporate by inference
25 the pages from the State's omnibus brief, pages 27 to

1 30.

2 These statements are absol -- and what I'm
3 going to focus on, Judge, for the Court's and Counsel's
4 edification and for the record, are statements from the
5 following individuals: Maureen Dorandy(phonetic), and
6 that information is contained on pages 13 to 14 of the
7 State's omnibus brief; Maureen Glennon(phonetic), that
8 information is contained on page 14 of the State's
9 omnibus brief; Nancy -- I'm going to mispronounce the
10 last name, but I'll spell it, H-U-I-Z-E-N-G-A --
11 contained on pages 14 to 15 of the State's omnibus
12 brief; Maryann(phonetic) Hillferty(phonetic), contained
13 on page 15 of the State's omnibus brief;
14 Laurie(phonetic) Beam(phonetic), information contained
15 on page 15 of the State's omnibus brief; Anna
16 Ralson(phonetic), information contained on page 16 of
17 the State's omnibus brief.

18 These individuals were interviewed by
19 detectives from the Prosecutor's Office, and their
20 statements were provided in discovery, Judge.

21 Let me get to Counsel's threshold inquiry.
22 Counsel has said that a Rule 104 hearing needs to be
23 conducted. And, Your Honor, that is not accurate in
24 this particular case. We absolutely do not need to
25 bring in the witnesses who will testify about what Jody

1 Ann said.

2 When Counsel says that the statements must be
3 made in good faith, the requirement of the Evidence
4 Rules is that they must have been made in good faith by
5 the declarant, meaning Jody Ann Scharf, not by the
6 people who will testify about the hearsay. And that is
7 found in the decision of State vor(sic) -- versus
8 Thornton, 38 N.J. 380, 390.

9 I know it's a 1962 case, Judge, but sometimes
10 they say the classics are better for a reason, and, in
11 this particular case, what we have is solid legal proof
12 that the good faith portion goes to the declarant and
13 not to the individual who will be reporting what the
14 declarant says.

15 The other thing we have is the plain meaning
16 of Evidence Rule 104A, Judge. It says that questions
17 of admissibility of evidence are issues to be
18 determined by the trial judge. That's what we're doing
19 now, we're bringing an issue to the Court.

20 The other thing I have is State versus Long,
21 which is 173 N.J. 138. It's a 2002 case. It was cited
22 by the State in its brief, and it's one of what I would
23 call the leading cases on this state-of-mind exception.

24 The -- the procedural history of the case is
25 important, because it proves conclusively the State's

1 position that we need not conduct testimonial hearings
2 in this particular instance. This case was brought to
3 the Supreme Court by way of an interlocutory appeal.
4 And, in his -- the beginning of his decision, Justice
5 Coleman starts by mentioning that the statement of
6 facts presented to the Supreme Court had been gathered
7 from testimony presented to the Monmouth County grand
8 jury and facts revealed at a probable-cause hearing.

9 Your Honor can take judicial notice of the
10 fact that probable-cause hearings are always very
11 limited in scope and only designed to establish
12 elements of an offense from the statutes, i.e. murder.
13 This is very important, Judge.

14 The other thing that's important is in Long
15 the Court mentions when talking about the procedural
16 history that the State made a motion *in limine* to bring
17 in the hearsay statements that are the subject of the
18 case. That motion *in limine* did not involve testimony
19 by the witnesses.

20 That is a very important point here, Judge,
21 and it's an important point because it proves we need
22 not have this hearing and bring in these witnesses on
23 -- you know, outside the presence of the jury. It
24 wasn't done in Long. The Long Court doesn't say, you
25 know, as a -- that, as a matter fact, make sure you

1 have hearings. That is not what it says and we need
2 not do that here.

3 Because, again, when the -- when the jury or
4 the Court in this oral argument is analyzing the motion
5 and analyzing whether or not these statements come in,
6 it's the facts and circumstances as they pertain to the
7 declarant, who is the victim, and not in this
8 particular case the people who are going to testify
9 about what the victim told them at various points.

10 So those are -- those are the threshold
11 arguments I would make in this particular instance,
12 Judge.

13 These witnesses that I've outlined, these six
14 witnesses, as I have indicated by providing recitation
15 of the pages of the State's brief, as I've indicated,
16 these are witnesses that the Defense has known about,
17 these are witnesses we've -- we've talked about in our
18 brief, so it's not -- it's not shrouded in mystery.
19 The implication is that, you know, people are wandering
20 aimlessly, not knowing what the State's going to do,
21 and that's simply not the situation in this particular
22 case.

23 The other -- this is just a parenthetical --

24 THE COURT: Just one question.

25 MS. GROOTENBOER: Oh.

1 THE COURT: One of the sta -- Nancy
2 Huizengry(phonetic) -- I'm having the same difficulty
3 pronouncing her name.

4 MS. GROOTENBOER: Yes.

5 THE COURT: She would testify about an
6 assault in, if I recall correctly, 1992, August of -- a
7 month before the victim plunged to her death.

8 MS. GROOTENBOER: If you -- Your Honor gives
9 me one moment so I can have the -- my finger on the
10 exact facts.

11 (Pause in proceeding)

12 MS. GROOTENBOER: Yes. It -- it starts at
13 the bottom of page 14, "Approximately two weeks before
14 her death, Jody Ann confided in another friend that
15 Defendant told her, quote, if she ever got rid of him,
16 it would be over for her. Jody Ann also said that --
17 that the Defendant physically assaulted her sometime in
18 August 1992, which would be one month before her
19 murder," yes.

20 THE COURT: Do I understand correctly that
21 you intend to -- there are six witnesses?

22 MS. GROOTENBOER: Yes, who will testify --

23 THE COURT: Not -- not 34.

24 MS. GROOTENBOER: Correct.

25 THE COURT: Okay.

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MS. GROOTENBOER: Correct.

(Pause in proceeding)

THE COURT: Is there anything else that you wish to add?

MS. MC ARDLE: Yes, Judge. I think the state of mind of the victim has to be explored. Obviously, it's not the state of mind of the people taking the witness stand, but it is the state of mind of the victim that needs to be explored.

There's a reason they say there has to be good faith -- good faith. State versus Long involved a murder of a woman who basically -- the reason for the murder was that the defendant was covering up the fact that there hadn't been a previous murder. I'm sure the Court is aware of the case. At -- in State versus Long, there was an excited utterance from the victim to her mother upon hearing from the defendant that her mother had died. The -- the -- in Long, it was absolutely contemporaneous with the phone call from the defendant to the victim, "My mother just died". The victim said to her own mother: Oh, my goodness, the victim -- the defendant's mother died. The defendant -- the victim then goes to the defendant's house and finds out that the mother has not died yet, because the mother did die the next day, and she kills the victim.

1 And, at that point, they -- they talk about
2 excited utterance and the ability to fabricate. And
3 the fact that the -- the victim immediately told her
4 mother what was relayed to her -- her -- I'm sorry --
5 over the telephone was why the state-of-mind exception
6 came in in the Long case.

7 In this case, we don't have that situation.
8 We don't know when the issue occurred. We don't know
9 whether the statements were made contemporaneous with
10 when Jody Ann Scharf experienced the -- for example the
11 physical abuse. We don't know anything like that in
12 this case.

13 And I think -- and I would submit to this
14 Court this Court has to make a finding that what Jody
15 Ann Scharf said to these witnesses were made -- were
16 made in good faith.

17 And, with regard to the witnesses, there are
18 many statements that Jody Ann Scharf made, some of
19 which may have been effected by alcohol, some of which
20 were not contemporaneous to w -- to when the incidents
21 occurred.

22 Jody Ann Scharf says, "He beat me up". Well,
23 th -- we don't know who, when, where, how. We don't
24 know what the basis for those statements are.

25 THE COURT: Let me ask this question: The

1 statement referring to Nancy Huizenga --

2 MS. GROOTENBOER: Mmm-hmm.

3 THE COURT: -- in the 1992 incident --

4 MS. GROOTENBOER: Yes.

5 THE COURT: -- is that the statement?

6 MS. GROOTENBOER: Yes, that's in the

7 interview report, yes, Your Honor.

8 THE COURT: Interview report.

9 MS. MC ARDLE: It's an interview report.

10 THE COURT: You -- you've read the interview

11 report.

12 MS. MC ARDLE: I have, Judge. I'm well aware

13 of what the statements are. I still believe that this

14 Court has an obligation to find that these -- that what

15 Jody Ann Scharf said to Nancy Huizenga was made in good

16 faith, was made contemporaneous with the incidents that

17 Scharf was relating -- was made contemporaneous with

18 that -- with the incident.

19 THE COURT: So I don't know if I understand

20 you correctly, but let me try it. Are you saying that

21 this conversation should have occurred in close

22 proximity to the assault?

23 MS. MC ARDLE: Yes. And -- and there should

24 be the tanz(phonetic) of the assault, not just, "My

25 husband beat me". There's no proof of that. There's

1 no bruises on Jody Ann Scharf that Nancy Huizenga saw.
2 She's telling her when she's at Nancy Huizenga's bar
3 drinking. I think this Court has an obligation to the
4 Defendant to ensure that these statements were made in
5 good faith.

6 And may they come in because of accident?

7 Per -- because the -- the Defense in this case is
8 accident? Perhaps, but I think this Court has an
9 obligation to make that determination before we let all
10 kinds of prior bad acts and allegations by the victim
11 come in -- come in on the record.

12 THE COURT: Do you want to detail those six
13 statements once more?

14 MS. GROOTENBOER: That's -- yes, Judge, I
15 have absolutely no problem doing that.

16 If -- and I will use --

17 THE COURT: And, if you would, just a -- a
18 synopsis of what each statement will be utilized for.

19 MS. GROOTENBOER: Certainly, Judge. And I
20 will be relying of course again on the pages in our
21 omnibus brief, start at page 25 and go to page 30, all
22 of the case law that says that the statements made by
23 the victim to her friends, colleagues, and therapists,
24 even about her general fear of the Defendant, his abuse
25 during their marriage, his -- her intention to divorce

1 him, and her fear of heights are all relevant because
2 they negate and rebut this claim of accident. They are
3 completely relevant.

4 And what Counsel talked about as far as
5 circumstances under which these statements may have
6 been made, I don't know why we had to talk about a bar.
7 I mean, bars are legal, lots of people go to bars. I
8 don't know why we have to insert that here. I know
9 from the case, and one of things you'll know from the
10 case, is that two days or a day before she died, Jody
11 Ann Scharf went to an establishment that served
12 alcohol, not to eat and drink, but to drop off clothes
13 that she was donating to Goodwill. So I don't like
14 this implication that being in a bar makes something in
15 and of itself unreliable or makes the person
16 unreliable, Judge.

17 But we don't need to do that here. The case
18 law says we don't do that here. Everything she talks
19 about are things that I would imagine the Defense is
20 going to cross examine these witnesses about. Okay,
21 have at it at cross examination, and I'm sure Mr. Mello
22 will make objections as he sees fit. But those things
23 are not grounds for a preliminary 104 hearing and State
24 versus Long tells us so.

25 But, as Your Honor indicated, you gave me a

1 specific directive and I want to follow it, Maureen
2 Dorandy, starting on page 13 of the State's brief --

3 MR. BILINKAS: Which one are you referring
4 to, Counsel?

5 MS. GROOTENBOER: Maureen Dorandy, let's go
6 to the bottom of the State's brief, page 13, tells the
7 detectives about a conversation she has with Jody Ann
8 Scharf on September 19th, 1992, in other words one day
9 before her murder. Gee, I don't think it gets any more
10 contemporaneous than that.

11 And, in that statement, the -- Jody Ann
12 Scharf reports to Maureen Dorandy that, after the
13 Defendant was served with divorce papers, he said,
14 quote, you won't get anything; I'll see you dead first,
15 end quote.

16 Your Honor, certainly you -- you can make
17 these determinations as a matter of law that that
18 statement was made on -- with good faith by Jody Ann
19 Scharf, the declarant, in this particular circumstance.

20 I'm going to skip over Maureen Dorandy and
21 the what I will call encounter at the funeral parlor,
22 because it's not really pertinent to this particular
23 motion right now.

24 Then, again, September 19th, 1992, a day
25 before her murder, Jody Ann Scharf passes a note to her

1 friend, Maureen Glennon, while Maureen is working at
2 the Schooley Mountain Inn. The note says words to the
3 effect of, "Divorce papers had been served; Defendant
4 was not happy about it". Jody Ann repeatedly during
5 the course of their friendship told Ms. Glennon she was
6 afraid Defendant would harm her because she had filed
7 for divorce. The divorce, the filing in question,
8 occurred two weeks before her death. Gee, I don't
9 think it gets any more contemporaneous than that.

10 Approximately one week before her death, Jody
11 Ann confides in Ms. Glennon that all she wanted was
12 custody of her son, Jonathan. She was reluctant to
13 file for a domestic-violence restraining order because
14 she feared reprisal from the Defendant.

15 When she was interviewed by detectives, Ms.
16 Glennon told them, based on her friendship with the
17 Defendant(sic) and the conversations and confidences
18 they shared, there was no way Jody Ann Scharf would
19 ever contemplate reconciling with the Defendant,
20 contrary to what the Defendant wanted the detectives to
21 believe.

22 We've already talked about Nancy Huizenga's
23 statement. Maryann Hillferty is on page 15. Maryann
24 Hillferty was another friend of Jody Ann Scharf's.
25 Jody Ann repeatedly told Mary -- Ms. Hillferty she was

1 terrified of the Defendant and did not want to spend
2 any more time with him.

3 Ms. Hillferty told detectives that Jody Ann
4 showed her the divorce complaint approximately two to
5 three weeks before Labor Day or about a month before
6 the murder. During this conversation, Jody Ann Scharf
7 told Ms. Hillferty she was afraid of the Defendant
8 close in time to her murder. She also told Ms.
9 Hillferty, "If anything happens to me, you know who did
10 it".

11 The next statement, Laurie Beam, one day in
12 August 1992, again approximately a month before the
13 murder, Jody Ann tells another friend, Laurie Beam, "My
14 life will be over soon". When Ms. Beam asked her how
15 she knew, Jody Ann replied, "Because my husband told me
16 so," direct quote.

17 Anna Ralson, page 16 of the State's omnibus
18 brief, Jody Ann told Ms. Ralson Defendant hit her on
19 several occasions, flaunted his adultery, et cetera.
20 Ms. Ralson said, "Based on her friendship with the
21 victim and knowledge, no way would Jody Ann ever
22 consider reconciling with the Defendant".

23 Ms. Ralson saw Jody Ann two days before her
24 murder, September 18th, 1992. At that time, Jody Ann
25 told Ms. Ralson that the divorce papers had been

1 served. She told Ms. Ralson she was very afraid of
2 Defendant's reaction and that Defendant would probably
3 try to kill her in order to get custody of Jonathan.

4 If I may have a moment.

5 (Pause in proceeding)

6 MS. GROOTENBOER: Rose(sic) Teague -- I'm not
7 -- I don't know if Rose is the right name, sorry. Ms.
8 Teague -- I'm sorry, Ms. Teague is the therapist. And
9 I didn't want to forget her, Judge, but certainly Ms.
10 Teague has very important statements and information to
11 impart to this jury in their search for the truth.

12 Ms. Teague's statements are throughout the
13 statement of facts. Jody Ann tells Ms. Teague that she
14 is afraid of heights. She tells Ms. Teague about the
15 agonizing and repeated episodes of abuse she endured
16 throughout her marriage. She tells Ms. Teague she was
17 very afraid of the Defendant and became increasingly
18 reluctant to spend any time with him. She also, Ms.
19 Teague, emphatically denies that Jody Ann was
20 considering reconciling with the Defendant.

21 Patricia Teague is a therapist that was
22 treating Jody Ann for depression. She knows as a
23 result of that therapeutic relationship the source of
24 the depression was Stephen Scharf. So any statement
25 that Jody Ann makes regarding fear of the Defendant and

1 all those -- and the -- the fear and everything else --
2 and we'll get into one specific statement a little
3 later on, but I don't want the Court to think I'm
4 forgetting about it -- anything said in that
5 relationship goes to state of mind. It is inherently
6 reliable and trustworthy. And we need not -- we need
7 not have a 104 hearing on that.

8 The other point I wanted to make in
9 connection with these statements, Judge, is that the
10 Court says, not only the statements themselves are to
11 be admissible, but accompanying remarks which explain
12 the reasons which motivated that intention may be
13 admissible if they appear to have been integrally and
14 naturally related to the declared purpose, to have an
15 actual association with it, and to have been uttered as
16 a normal, unsuspecting incident of it. That also is
17 from Thornton, the case I cited before, and more
18 recently probably also discussed and affirmed again in
19 State versus Long.

20 So that -- all of those reasons, Judge,
21 that's the law, those are the statements, that's the
22 outline, but those s -- those individuals will also be
23 testifying generally about their relationship with Jody
24 Ann and what Jody Ann told them in connection with her
25 fear of the Defendant, the fact that she was determined

1 to end her marriage in 1992.

2 And the other things that I -- the fact that
3 I don't mention them here doesn't mean I forgot about
4 them or they're not part of the State's case. I have
5 already incorporated by reference the State's brief in
6 this particular inci -- incident and everything that we
7 have laid out and spelled out that we want to introduce
8 for the jury to consider, Jody Ann's statements to
9 those six individuals, to her therapist, Ms. Teague.

10 THE COURT: You have Huizenga, Glennon,
11 Hillferty, Keith(sic). Who are the other two?

12 MS. GROOTENBOER: I'm sorry. Ms. Maureen
13 Dorandy, Ms. Maureen Glennon, Ms. Nancy Huizenga, Ms.
14 Mary Ann Hillferty, Laurie Beam, Anna Ralston(phonetic)
15 --

16 THE COURT: Beam?

17 MS. GROOTENBOER: -- Patricia Teague.
18 Patricia Teague was the therapist. And I just want to
19 --

20 THE COURT: Right.

21 MS. GROOTENBOER: -- consult for --

22 THE COURT: Yes.

23 MS. GROOTENBOER: -- one second.

24 (Pause in proceeding)

25 MS. GROOTENBOER: Those are the individuals,

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Judge.

THE COURT: I'm missing one.

MR. MELLO: (Speaking softly) --

MS. GROOTENBOER: All right, Judge, I can go
through them a little more slowly.

MR. MELLO: D --

THE COURT: Huizenga, Glennon, Hillferty,
Teague, Keith(sic), Dorandy?

MS. GROOTENBOER: Dorant -- Anna Ralson.

MR. MELLO: Beam.

MS. GROOTENBOER: Anna Ralson and Laurie
Beam.

MR. MELLO: -- (Speaking softly)

MS. GROOTENBOER: He said that.

THE COURT: Okay. All right, your reply?

MS. MC ARDLE: Your Honor, first of all, Ms
--

THE COURT: We're not -- we're not dealing
with 34 anymore.

MS. MC ARDLE: I'm sorry?

THE COURT: We're not dealing with 34.

MS. MC ARDLE: That's good, Judge. I'm happy
to hear that. (Laughs)

MR. BILINKAS: Thank you, Judge.

MS. MC ARDLE: With regard to Ms. Dorandy,

1 Your Honor, and the dropping off of the clothes, and
2 one of the statements were made, "After dropping off
3 the clothing -- clothing, Mrs. Scharf had one or two
4 glasses of wine and left at 5 or 5:30".

5 We're not dealing with 34 statements, Your
6 Honor, and you're only dealing with six. And our
7 position is that you, as the Court, must make a
8 determination whether the statements were made in good
9 faith.

10 This is in -- the statements were made in the
11 arena of a divorce case. They were made in the arena
12 of a woman fighting for the custody of her child. And
13 the fact that she was frightened, quite frankly because
14 she could lose custody of her child because of her
15 issues with alcohol and because of issues of her
16 leaving this child alone in a house at a very young
17 age, different -- during different periods of time.

18 I think that her statements may well have
19 been motivated by the desire to make sure that she had
20 witnesses available to testify so that she would gain
21 custody and control of her son.

22 And we -- I believe that it's the Court's
23 responsibility to make sure that these statements were
24 made in good faith and in a timely manner close to the
25 time when these, quote, incidences occurred.

1 THE COURT: Well, you also have a
2 responsibility. You now have six people who may
3 testify and you should make arrangements to speak with
4 them, okay? Next matter.

5 (Pause in proceeding)

6 MR. BILINKAS: Judge, just for the -- for the
7 record, at least with regards to some of these women
8 that we attempted to contact, we were specifically told
9 that I'm a friend of Jody Scharf's; I'm going to be a
10 hostile witness, so --

11 THE COURT: This is not to say that any
12 particular will cooperate with you.

13 MR. BILINKAS: Understood.

14 THE COURT: And may not want to talk to you.

15 MR. BILINKAS: Understood.

16 THE COURT: But --

17 MR. BILINKAS: Again, we have --

18 THE COURT: -- you should -- you should make
19 the attempt to speak with them.

20 I tried to assist you in narrowing down the
21 scope --

22 MR. BILINKAS: And I appreciate --

23 THE COURT: -- so that you know who --

24 MR. BILINKAS: -- that, Judge.

25 THE COURT: -- who will be testifying.

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MR. BILINKAS: Thank you.

THE COURT: Okay?

MS. MC ARDLE: Judge, also with regard to Laurie Beam, that statement was never taken by anybody from the Prosecutor's Office. That's a statement taken by --

THE COURT: That's even more of a reason for you to speak to --

MS. MC ARDLE: -- PC investigators.

THE COURT: -- the witness.

(Pause in proceeding)

MS. GROOTENBOER: That's what the crucible of cross exam is for. That's -- that's then.

THE COURT: I understand.

MS. GROOTENBOER: Judge, what I want to do is because there's no need to re-invent the wheel, our brief, if I do say so myself -- and I can say it because I wasn't the person that authored this portion -- very magnificently sets forth the compelling case law which supports our position that all of these statements come in.

First of all, the Evidence Rule 803C(3), I've already argued and I would ask the Court to find there can be no doubt that these statements were made by the declarant in good faith.

1 We know that the state-of-mind exception is a
2 -- of a long proud lineage in this state; that, in
3 order to be relevant, all evidence must be admis -- I'm
4 sorry -- all evidence must be relevant in order to be
5 admissible, which this clearly is. We are prosecuting
6 a murder case here and we need evidence that will rebut
7 accident.

8 And, Judge, one of the other things that the
9 case law says is that this type of evidence is
10 increasingly important when there is no other evidence
11 that will support the same positions. That's the way
12 we find ourselves at this particular juncture, because
13 the best witness is dead, so this is another reason why
14 -- a heightened reason why all of this evidence comes
15 in.

16 When a defendant claims that he act(sic) --
17 either acted in self-defense, not applicable, or the
18 victim's death was accidental, it becomes relevant and
19 admissible. State versus Downey(phonetic) stands for
20 that proposition. State versus Chauvi(phonetic) stands
21 for that proposition.

22 And there could be no -- State ver -- the
23 other cases from other states also clearly support and
24 enhance the position that we have here. That is
25 persuasive authority that this Court should take into

1 account, because, nationwide, Courts are allowing this
2 particular type of evidence where a defendant claims
3 either accident or self-defense.

4 And you can see from the recitation in our
5 brief all the different types of evidence and(sic) --
6 that is allowed in under the state-of-mind exception.
7 It's important and even -- I -- oh, I will highlight
8 specifically a ca -- the case from South Dakota,
9 Asoff(phonetic), which is cited on pages 27 and 28 of
10 our brief. That Court allowed in testimony about
11 statements the victim made, that the defendant would
12 kill her, that, if he killed her, he'd make it look
13 like an accident, that she felt threatened by him and
14 that he verbally abused her. All things that the Court
15 found relevant and probative and ultimately admissible.

16 The similar principle applies here to the
17 evidence that we have set forth before you. The moment
18 he argued -- and we -- as we know from the Miranda
19 testimony, he started arguing it minutes after the
20 death -- the moment he argued it was accidental, he
21 placed the victim's state of mind at issue. And all of
22 this is re(sic) -- admissible to rebut the claim of
23 accidental death.

24 The case out of Oregon in 2003 cited on page
25 29, deceased victim's letters, as well as testimony

1 from her attorney and sister-in-law, to show that the
2 victim looked forward to life with a new man, to refute
3 defendant's contention made to police and others that
4 she had abandoned her plans to dissolve the marriage.
5 Again, the evidence that we have outlined for you in
6 our brief and both -- brief and both again today
7 relevant and probative to those points as well.

8 These witnesses need to be able to testify
9 about her fear of the Defendant, his abuse of conduct
10 generally toward her, her intent to continue with the
11 divorce, and her fear of height, because all of these
12 will counter the Defense' assertions, and we know that
13 they have mounted a very formidable defense in this
14 regard to support their claim of accident.

15 The statements reflect the true nature of the
16 couple's relationship and are necessary for the jury to
17 deliberate fairly.

18 And, finally, Judge, even though you -- it's
19 not necessarily part of this argument per se, we assure
20 you that we will provide the appropriate limiting
21 instruction so that this jury will know that this
22 evidence is only being admitted to show the victim's
23 state of mind and her intendant plans.

24 I do have other arguments regarding the
25 specific statements to the therapist. I didn't know if

1 Your Honor wanted me to continue with those now or not.

2 THE COURT: Well, what arguments with respect
3 to the therapist?

4 MS. GROOTENBOER: Well, certainly, Judge,
5 anything that the victim said in relation to her fear
6 of the Defendant generally, and her intention to end
7 the marriage, and fear of heights is relevant,
8 admissible, probative under state of mind, and also
9 under the other Evidence Rule that we cited about
10 diagnosis and treatment.

11 The -- here's the statement that I want to
12 highlight specifically --

13 THE COURT: Well, do you -- are you still
14 objecting to that aspect?

15 MS. MC ARDLE: Yes, Your Honor.

16 THE COURT: Okay.

17 MS. GROOTENBOER: Okay. Starting on page 31
18 of the brief, what we set forth is that, during a
19 therapy session in August of 1992, again about a month
20 before the murder, Jody Ann tells her therapist that
21 the Defendant recently invited her to a picnic on the
22 Palisades. Jody Ann relates to her therapist that the
23 Defendant said he found an opening in a fence which
24 showed off the view and suggested that Jody Ann bring
25 wine coolers.

1 Jody Ann told Ms. Teague, her therapist, she
2 refused the invitation because she had never been to
3 the cliffs before, and specifically further says she
4 wouldn't go there; she's -- she's not -- that's not the
5 place for her; she's afraid of heights.

6 This is admissible under the state-of-mind
7 exception to establish the nature of the relationship
8 between Defendant and Jody Ann. It is part of the
9 mosaic of the criminal event and relates to the quality
10 of their acts and their state of mind. It's
11 admissible. State versus Benedetto, 120 N.J. 257, 58,
12 State versus Baldwin; it's cited in our brief, but like
13 I said, Judge, no need to re-invent the wheel.

14 It als -- State versus Long also -- also
15 stands for that proposition as well, very important
16 relevant evidence in this particular case. It rebuts
17 the Defendant's claims to the police that this was
18 their special place, they had been there over and over
19 again. What we have is in the context of a therapeutic
20 relationship where the victim's seeking the help she
21 needs. She confides that this most unusual invitation
22 is being made to her by a man who she's going to
23 divorce, that is a place that she had never been to.

24 State versus Long also stands for the
25 proposition that this statement is admissible as well

1 to show the victim's state of mind. And I already
2 cited for you State versus Long.

3 (Pause in proceeding)

4 MS. GROOTENBOER: And, again, Judge, because
5 our brief says it so well, I don't want to re-invent
6 the wheel, unless the Court has any other questions for
7 me.

8 THE COURT: Your reply?

9 MS. MC ARDLE: Your Honor, this is exactly
10 what we're talking about; the -- the State is seeking
11 to introduce hearsay statements from Jody Ann Scharf
12 regarding her intent about going to the cliffs.

13 This was -- this was --

14 THE COURT: It actually goes to state of mind
15 and also treatment.

16 MS. MC ARDLE: Well, I'm not sure it goes to
17 treatment, Your Honor. The fact -- how is the fact
18 that she wants to -- he wants to take her to the cliffs
19 relevant to treatment?

20 THE COURT: -- my point -- this is -- these
21 are statements made during the course of treatment.

22 MS. MC ARDLE: I understand, but, during the
23 course of treatment --

24 THE COURT: Why else would you go to this
25 individual?

1 MS. MC ARDLE: Why else would she go? She
2 could go for many reasons, Judge. Maybe she has --

3 THE COURT: Is going to treatment.

4 MS. MC ARDLE: Yes, but it might not be about
5 her husband. I mean --

6 THE COURT: No, no, but, for whatever the
7 reason, she was going to treatment.

8 MS. MC ARDLE: Correct.

9 THE COURT: --

10 MS. MC ARDLE: That's correct. But there are
11 no notes about this. She didn't keep notes. There's
12 nothing in the -- there's no proof that she said this.
13 I believe that she didn't say this the first time she
14 gave her statement; she said it the second time she
15 gave her statement. I -- I have to review, Your Honor,
16 quite frankly.

17 And it seems to me, Your Honor, that that's
18 exactly why we needed the Scharf, the senior Scharfs'
19 statements to rebut what Jody Ann Scharf said about
20 going to the cliffs. And that's how we're prejudiced
21 by the time that went by between the date of the crime
22 and the date of the indictment. People disappeared who
23 could have said that Jody Ann Scharf had been to the
24 cliffs with Mr. Scharf many times. So that's our
25 problem with these statements.

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MS. GROOTENBOER: Judge --

THE COURT: What else?

MS. GROOTENBOER: -- the one thing I want to represent to you most clearly, and I conferred briefly with Mr. Mello about it, is that I want the record to be crystal clear on this: Ms. Teague told the detectives about this particular episode in August of 1992 where Jody Ann relayed the invitation to the cliffs during her initial interview. She absolutely said it during her initial interview back in 19-9 -- whenever she was interviewed. It would have been 1993 --

THE COURT: Counsel, does that refresh your recollection?

MS. MC ARDLE: If I could have a minute, Judge, I'll check it. Thank you.

THE COURT: Where does that leave us? The last -- Defendant's relationship with other women during his marriage?

MS. MC ARDLE: And domestic violence, Your Honor.

THE COURT: And domestic violence.

MS. GROOTENBOER: While Counsel's looking for that, Judge, I could certainly talk about the Defendant's relationship with other women. We've

1 already cited it in our brief. And absolutely it --
2 I'm going to just -- if I could have one moment to pull
3 up the exact page from our brief -- 35.

4 (Pause in proceeding)

5 MS. GROOTENBOER: State versus Bakka, 176
6 N.J. 533, State versus Darby, 174 N.J. 509. The
7 evidence of the Defendant's ina(sic) -- infidelity is
8 relevant and probative because it counters his claims
9 about why he took the trip to the Palisades the day of
10 Jody Ann's murder. He claimed it was to reconcile.

11 He went further; he claimed to the police
12 that he had broken off the relationships with those two
13 women, Ms. Scandlin(phonetic) and Scofield(phonetic).
14 Lo and behold when we interview them, we learn a much
15 different story.

16 So, again, these things are completely
17 relevant and probative to show that the Defendant again
18 was manufacturing these statements to support his claim
19 of accident.

20 And a -- we set it forth in our brief and --

21 (Pause in proceeding)

22 MS. GROOTENBOER: -- yes, it's in his
23 statements to the police those things.

24 I -- I -- I thank Your Honor again. I -- I
25 don't want to tamper with, you know, success or

Argument - McArdle/Argument - Grootenboer

1 magnificence as it's already set forth in the brief.

2 And again I can say that because I didn't write that
3 part, but it's -- sometimes it really is that simple.

4 THE COURT: Your response?

5 MS. MC ARDLE: Your Honor, with regard to
6 statements that the Defendant supposedly made to
7 Scofield and Scandlin, clearly under 802B, I believe,
8 if I may, he ha -- the State has to p -- give a
9 pretrial hearing with regard to those statements.
10 There has to be a hearing with regard to those
11 statements, because any time an oral statement of a
12 criminal defendant is going to be used there has to be
13 a hear -- a 104 hearing, the Rule requires it.

14 So, if there are oral statements that
15 Scofield or Scandlin are going to testify to, the --
16 there must be a hearing. And that's I believe 8-0 --
17 802B, right?

18 (Pause in proceeding)

19 MS. GROOTENBOER: You know, Your Honor, the
20 -- again, these are two witnesses that will be
21 presented at trial and will then be in the crucible of
22 cross examination. And that's -- they're statements by
23 party's opponent. There absolutely is no reason to
24 have a 104 hearing on this. These are things that are
25 litigated in the heat of trial all the time. There is

1 no -- absolutely no basis whatsoever to do that.

2 Again, this -- they know the statements
3 because they've gotten them in discovery, the
4 statements as reflected in Detective' investigative
5 reports. And any arguments they have about
6 reliability, shall I say, is best played out in front
7 of the jury and not now.

8 MS. MC ARDLE: Judge, there has to be a
9 hearing and there has to be a coseal(phonetic) charge.
10 And, I'm sorry, Your Honor, it was 803B, not 802.

11 THE COURT: Are there any other --

12 MS. MC ARDLE: Yes.

13 THE COURT: -- issue -- t --

14 MS. MC ARDLE: Yeah, there's --

15 THE COURT: Did you know what I was going to
16 say?

17 MS. MC ARDLE: (Laughs) Are there any other

18 --

19 MS. GROOTENBOER: I don't read minds, Judge

20 --

21 THE COURT: I was halfway out with it, but,
22 if you --

23 MS. GROOTENBOER: I'm sorry, Judge.

24 THE COURT: -- want to complete it, let me
25 know.

1 MS. MC ARDLE: (Laughs) You have the floor.

2 THE COURT: Those aspects, those motions that
3 you've presented, have they been addressed?

4 MS. MC ARDLE: I'm sorry, I don't understand.

5 THE COURT: The motions that you had filed.

6 MS. MC ARDLE: No. No, there's one more.

7 THE COURT: Go ahead. Which one is that?

8 MS. MC ARDLE: Oh, there's the domestic-
9 violence issue, Your Honor.

10 THE COURT: Okay.

11 MS. MC ARDLE: There's all kinds of
12 statements made by Glennon and -- I assume those are
13 the same people you're going to use?

14 (Pause in proceeding)

15 MS. GROOTENBOER: Hold on --

16 UNIDENTIFIED: Certainly.

17 MS. GROOTENBOER: (Speaking softly) Okay.

18 Okay, all right, well -- go ahead.

19 MS. MC ARDLE: Same --

20 THE COURT: Did you hear the question?

21 MS. MC ARDLE: Same six people?

22 THE COURT: Could you repeat the question
23 please, Counsel?

24 MS. MC ARDLE: Yes, I'm asking if they are
25 the same six people they're going to use to bring out

1 domestic violence.

2 (Pause in proceeding)

3 MS. GROOTENBOER: We've addressed that point
4 under 803C, Judge, that they will be talking generally
5 about what the victim told them, generally.

6 MS. MC ARDLE: Well, Judge, you have to
7 decide -- if -- if there's 404B evidence coming in, you
8 have to make a decision that the incidents, in fact, he
9 -- have heard, by clear and --

10 THE COURT: How do you talk about --

11 MS. MC ARDLE: -- convincing evidence --

12 THE COURT: -- domestic violence in a general
13 way?

14 MS. GROOTENBOER: Judge, I -- I -- I would
15 answer it this way: We're going to -- the case law
16 says and the -- the brief says we could talk about are
17 what the victim said generally about the abusive
18 relationship to establish the mosaic of the dynamic of
19 the relationship at the time of the murder.

20 As far as specific incidents -- and that's
21 why I wanted to confer with Counsel -- it is my
22 understanding, and I'm very familiar with 404B and the
23 four-part of analysis of Cofield(phonetic), but it is
24 my understanding that the State will not be offering
25 witnesses to testify about specific episodes of abuse.

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Therefore, we need not have that hearing.

The -- what we're saying, and we've already articulated it in the brief and in our argument, that these six witnesses can testify generally -- about what the victim told them generally regarding her fear, regarding abuse. That's our position. The case law supports that we can have -- we can have those witnesses testify about that generally because it goes to state of mind.

MS. MC ARDLE: Therefore, it's my understanding that there'll be no specific instances raised with regard to domestic violence.

MS. GROOTENBOER: That's correct -- I'm sorry, I'm sorry, I'm sorry.

THE COURT: I thought he --

MS. MC ARDLE: No photographs --

MS. GROOTENBOER: I'm s -- hold on --

THE COURT: Well, his anger --

MR. MELLO: --

MS. GROOTENBOER: -- hold on.

THE COURT: -- his anger was a specific incident in August of 1992, which would have been almost a month before -- a month before her -- her plunge to her death.

(Pause in proceeding)

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THE COURT: Yes? No?

MS. GROOTENBOER: Just one moment, Judge.

(Pause in proceeding)

MS. GROOTENBOER: Your Honor, the evidence is going to be introduced under the state of mind, 803C(3), and it's going to be that this is again under the ambit of state of mind, this is what Jody Ann said in August of 1992. And we believe, for the reasons we've argued, that it is per -- it is allowable and permissible, besides what else Nancy Huizenga says or will testify that the victim told her.

THE COURT: But that's a specific incident --

MS. MC ARDLE: Yes.

THE COURT: -- August of 1992. That's not a general incident.

(Pause in proceeding)

MS. GROOTENBOER: I agree, Your Honor, it is a specific incident, but again it is within the context of the state-of-mind exception. And it --

(Pause in proceeding)

MS. GROOTENBOER: -- that's our position.

THE COURT: Your reply?

MS. MC ARDLE: Your Honor, it's 404B evidence; there has to be a hearing; you have to determine that something happened by clear -- that this

1 incident happened by clear and convincing evidence.

2 I'm sure the Court is aware of --

3 THE COURT: Okay.

4 MS. MC ARDLE: -- its responsibilities.

5 THE COURT: Anything else?

6 MS. MC ARDLE: Are there any pictures or

7 anything else of that --

8 MR. MELLO: --

9 MS. MC ARDLE: Okay, anything --

10 THE COURT: Is that --

11 MS. MC ARDLE: -- about pictures with regards

12 --

13 THE COURT: Okay, let me finish with --

14 MS. MC ARDLE: -- to -- Judge.

15 THE COURT: -- my questions, all right?

16 MS. MC ARDLE: Oh. (Laughs)

17 THE COURT: Did we finish your motions?

18 MS. MC ARDLE: Except for the insistence of

19 prior relationships. I don't think we dealt with that

20 as much as I want to deal with it, Your Honor.

21 THE COURT: Well, what do you mean --

22 MS. MC ARDLE: Well --

23 THE COURT: -- relationships?

24 MS. MC ARDLE: -- I -- I --

25 THE COURT: Defendant's relationships with

1 other women?

2 MS. MC ARDLE: With the women, yeah. I don't
3 believe it's probative or -- in this case. It's not
4 the reason -- nobody's advancing that this is the
5 reason that he -- you know, that he may have pushed his
6 wife off of -- you know, that he pushed his wife off
7 the cliff. That's not the reason that the Defendant --
8 that the State has advanced for why they believe that
9 Mr. Scharf committed this act, not because of -- that
10 he was jealous or that he wanted to get rid of his wife
11 for this reason. The reason they're advancing is
12 insurance or custody or money, but not due to -- not
13 due to prior -- because he had a bunch of girlfriends.

14 So we feel that this is probative -- not
15 probative; that it will be -- reflect poorly on him,
16 that the jury will be influenced by that, and we feel
17 that this type of evidence is not admissible.

18 Now, I understand that they -- that the State
19 is going to -- may produce Scandlin or --

20 THE COURT: Scofield?

21 MS. MC ARDLE: -- Scofield to prove that I
22 guess he -- he lied to the police. What relevance that
23 has, I don't know, but bottom line is, Your Honor, we
24 don't believe that it's relevant, we don't believe it's
25 probative, we don't believe it has any place in this --

1 in this case.

2 (Pause in proceeding)

3 THE COURT: There was --

4 MS. MC ARDLE: --

5 THE COURT: -- there's an alleged statement
6 to Terry Scofield?

7 MS. MC ARDLE: There's an alleged statement
8 by --

9 THE COURT: That --

10 MS. MC ARDLE: -- the Defendant --

11 THE COURT: -- that Defendant was under a lot
12 of pressure --

13 MS. MC ARDLE: Yes.

14 THE COURT: -- which would be cleared up by
15 the end of the month.

16 MS. MC ARDLE: Correct.

17 (Pause in proceeding)

18 MS. MC ARDLE: And, again, that -- our
19 position is that has to be the -- the scope of a Rule
20 104 hearing --

21 THE COURT: This -- this here was -- can -- I
22 assume that statement was made sometime in August of
23 1992?

24 MS. GROOTENBOER: I'm sorry, which statement,
25 Judge?

1 THE COURT: The --

2 MS. GROOTENBOER: Defendant's --

3 THE COURT: -- his comment --

4 MS. GROOTENBOER: -- statement to Terry
5 Scofield?

6 THE COURT: -- to Terry Scofield.

7 MS. GROOTENBOER: My understanding, Judge,
8 and I would defer to Mr. Mello who is more familiar
9 with the facts, but it's my understanding that the
10 statement was made the very last time the Defendant
11 spoke to Ms. Scofield, which was two -- which was the
12 day after Labor Day, which was September 9th, 1992.
13 That's my understanding. And he said, "The end of the
14 month". And I think, you know, c -- the folks in the
15 jury will be able to say that September 20th would
16 qualify as like the end of the month.

17 And, of course, Judge, I know Your Honor
18 knows this from the briefs and from the tenor of the
19 testimony thus far, but the reason why we want to bring
20 in this infidelity is because -- not because it's
21 infidelity and not to say, "Look, he's a guy that, you
22 know, went outside his marriage," but it's because he
23 actually himself puts it in issue when he tells the
24 police he had this open marriage and he complains that
25 there was an open marriage that both parties were

1 involved in, et cetera, et cetera.

2 He puts it in issue when he claims that he
3 wanted to reconcile with his wife and yet these
4 witnesses offer counter testimony and counter
5 statements that say no. You know, Ms. Scandlin said,
6 "No, I -- he was divorcing his wife and I had every
7 reason to think he'd be with me". And Ms. Scofield
8 said, "I had every reason to believe his problem would
9 be over in a month and the pressure would be off".
10 That's why we're showing it.

11 And, yes, Judge, those lies are relevant and
12 probative to the proofs in the Sta -- of the State's
13 case in this particular instance, most definitely.

14 MS. MC ARDLE: But the -- but they're oral
15 statements made by the Defendant and they have to be
16 tested prior to their admission.

17 MS. GROOTENBOER: Mo -- respectfully
18 disagree; it's statements by party' opponents. And,
19 again, the test will come under cross examination. If
20 they want to fully examine the witnesses in an effort
21 to show the jury that these witnesses are making up the
22 statements, if that's how they choose to proceed,
23 Judge, they're free to do it at the appropriate time,
24 in the appropriate venue, which would be trial.

25 THE COURT: All right, I -- I think pretty

1 much you've gone over most of the arguments.

2 I think what we'll do is Monday, 1 -- 1:30,
3 I'll take care of everything, other than the Miranda
4 issue. A couple of things that I want to go over. I
5 want to go over your briefs once more.

6 So we'll take care of everything, other than
7 Miranda. And, as I indicated, because of the fact that
8 Tomao may add something to the Miranda motion, and I --
9 I don't know if that's the case, we're holding off on
10 that until the 18th, April 18th, at 1:30. All right?

11 MR. MELLO: Thank you, Judge.

12 MS. GROOTENBOER: Thank --

13 THE COURT: Thank you.

14 MS. GROOTENBOER: -- you, Judge.

15 UNIDENTIFIED: Thank --

16 THE COURT: Have a good evening.

17 MS. MC ARDLE: Thank you, Judge.

18 MR. ALTERBAUM: Thank you, Judge.

19 (Trial adjourned for the day)

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CERTIFICATION

I, Sonia Undseth, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Video CD No. 1, from index number 9:17:57 to 9:20:02, and from 9:23:09 to 9:23:14, and from 9:34:15 to 10:57:19, and from 11:15:01 to 12:13:43, and from 1:27:57 to 2:47:04, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/s/ Sonia Undseth Date: June 24, 2013
Sonia Undseth AOC # 590

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