SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
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Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-3498-93T4

REC'D
APPELLATE DIVISION
SEP 22 1994
Clerk

CRIMINAL *ACTION*

ON APPEAL FROM
FINAL JUDGMENT OF CONVICTION
SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION, ESSEX COUNTY

SAT BELOW
THE HONORABLE EUGENE J. CODEY, JR., J.S.C., AND A JURY

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERTO SCABONE,

Defendant-Appellant.

FILED
APPELLATE DIVISION
SEP 22 1994
Clerk

BRIEF AND APPENDIX
FOR
DEFENDANT-APPELLANT

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CONFINED

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PROCEDURAL HISTORY

On April 2, 1981, Essex County Indictment No. 4225-8-80 was filed, charging defendant Alberto Scabone with the murder of Monica Scabone, contrary to N.J.S.A. 2C:11-3 (count one); the murder of Yannet Estevez, contrary to N.J.S.A. 2C:11-3 (count two); the murder of Norma Estevez, contrary to N.J.S.A. 2C:11-3 (count three); and second-degree arson, contrary to N.J.S.A. 2C:17-1a(2)(count four). (Da 1 to 5).

With the Honorable Eugene J. Codey, Jr., J.S.C. presiding, defendant was tried before a jury on November 9, 10, 12, 15, 16, 17 and 18, 1993. The jury convicted defendant as to the passion/provocation manslaughter of Monica Scabone, the Estevez murders and as to the arson charge. (Da 6).

On January 14, 1994, Judge Codey sentenced defendant as follows: 10 years' imprisonment with a five-year parole disqualifier as to the manslaughter conviction; 30 years' imprisonment with a 15-year parole disqualifier as to each of the murder convictions; and 10 years' imprisonment with a five-year parole disqualifier as to the arson conviction. Each of the terms were imposed to run consecutively with one another. Accordingly, defendant's aggregate sentence was 80 years' imprisonment with a 40-year parole disqualifier. A $30 Violent Crimes Compensation Board penalty was assessed on each of the four convictions. (Da 6;

8T 37-6 to 38-10[1]).

On March 14, 1994, defendant filed a Notice of Appeal with the Appellate Division. (Da 8).

[1] "1T" denotes transcript dated November 9, 1993.
"2T" denotes transcript dated November 10, 1993.
"3T" denotes transcript dated November 12, 1993.
"4T" denotes transcript dated November 15, 1993.
"5T" denotes transcript dated November 16, 1993.
"6T" denotes transcript dated November 17, 1993.
"7T" denotes transcript dated November 18, 1993.
"8T" denotes transcript dated January 14, 1994.

STATEMENT OF FACTS

On April 2, 1981, at 10:17 p.m., a fire alarm was sounded for 239 Bloomfield Avenue in Newark, a three-story frame building, containing a store in the first floor's front and an apartment in the floor's rear, one apartment on the second floor and one apartment on the third floor. (1T 27-20 to 28-22). Firefighters were dispatched to the scene and upon their arrival discovered in the bedroom of the first floor apartment, where the fire originated, the fully-clothed bodies of three women -- Monica Scabone, Yannet Estevez and Norma Estevez -- lying on twin beds. (1T 29-19 to 30-18).

A subsequent arson investigation of the fire-damaged apartment revealed that an undetermined flammable liquid had been used to accelerate the fire. (1T 61-8 to 19). Autopsies of the three women disclosed that they had died prior to the start of the fire, as there were no traces of carbon monoxide in their bodies. Multiple stab wounds, resulting in massive hemorrhaging, was the cause of death for each of the three women. (2T 84-14 to 92-1).

In April 1981, defendant resided with his wife, Monica, their son, Alberto, Monica's sister, Yannet, and Monica's mother, Norma, in the first-floor apartment. (2T 50-13 to 52-8). According to Ana Gonzalaz, another sister of Monica's, she often had witnessed defendant and Monica "fight[ing] about anything, everything." (2T 52-6 to 12). More particularly, defendant was "very jealous" of Monica, as "[h]e didn't want her to get made up. He didn't want her to get dressed up. He didn't let her have friends, male or

female." (2T 52-16 to 22). When they fought, Monica "defended herself" physically. (2T 55-5 to 9).

In March 1980, Gonzalaz was in the apartment when, she recalled, defendant hit Monica with a bottle and yelled that he was going "to burn the house." (2T 56-23 to 57-25). While Monica and defendant were visiting his parents in Uruguay in January 1988, defendant, according to Gonzalaz, threatened to kill Monica and her entire family. (2T 58-22 to 59-13). Gonzalaz also remembered that defendant had threatened to kill Monica "[m]any times" and "always said" that he would burn down their apartment. (2T 59-23 to 60-4). However, because Gonzalaz did not believe the threats, she never contacted the police. (2T 60-5 to 9).

Leopoldo Silva, who was married to a third sister of Monica's, frequently spent time with defendant. On one occasion, at an indeterminate date, when defendant, Monica and other relatives were at his house, Silva recalled defendant's saying, for no apparent reason, "I'm going to kill these three crazy women." Defendant obviously was referring to Monica, Yannet and Norma, who were in the kitchen. When Silva smiled, defendant responded that he was serious, adding that he would go to Mexico or to Uruguay after the killings. Still not taking defendant's threat seriously, Silva never reported it to the police. (2T 68-23 to 73-20).

In the evening of the fire, between 9:00 and 9:20, Jose German Delsid, an illegal alien using the name "Secundo Cunas" to conceal his true identity, arrived at defendant's apartment. Delsid worked with defendant at a factory that processed copper wire in West

Caldwell and hoped that defendant would drive him to work for their nightly shift, 11:00 p.m. to 7:00 a.m. However, when no one answered his knocking on the door, Delsid went to a nearby diner to eat. There he saw Gerardo Guerrero, another co-worker at the factory. A brief time later, Delsid, along with Guerrero, returned to defendant's apartment. About 10 to 15 minutes later, defendant, carrying a suitcase and television set, exited the apartment with his young son, Alberto. Using defendant's car, the four proceeded to the factory. (1T 98-14 to 102-12).

En route, Delsid asked defendant why he was bringing his little boy with him. According to Delsid, defendant replied that he was having problems with his wife, that she was very jealous. (1T 108-16 to 23). Defendant also mentioned that he did not have anyone to take care of his son and supposedly asked how much time it would take to get to "the border of Canada, Miami [sic]." (1T 108-23 to 109-3). Upon their arrival at the factory, at about 10:49 p.m., the "punch-in" time for Delsid (1T 103-12 to 104-4), the three men entered while Alberto stayed in the car (1T 109-6 to 7).

As Delsid began working, defendant and Guerrero spoke to their supervisor. A "real nervous" Guerrero and a "very quiet" defendant explained that defendant's wife had thrown him out of the apartment, that defendant was going to spend the night at Guerrero's house and that he needed his paycheck. The supervisor complied, handing defendant his paycheck, and the two men left the factory. A short time later, Guerrero returned, alone, to work.

The next morning, after completion of his shift, Guerrero offered Delsid a ride home in defendant's car. En route, they stopped off at Guerrero's apartment, where Guerrero picked up defendant and his son so that they could determine if Delsid's wife would take care of Alberto. However, without any inquiry as to his wife's being willing to take care of the boy, Delsid was dropped off in front of his building. (2T 12-3 to 18-11).

Later that day, at about 1:00 p.m., defendant went to a travel agency in Elizabeth and made plane reservations to Uruguay for two, one-way for Alberto and round-trip for himself. But because defendant did not have the money to purchase the tickets, he never received them. (3T 76-18 to 83-4).

During Easter week in April 1981, Elieth Camacho Alvarado, while on vacation in Mexico City, met defendant and his son in a park. Defendant introduced himself as "Alberto," and in response to her inquiry as to the whereabouts of the child's mother, defendant replied that he was a widower. Learning that Alvarado was going to return to her native Costa Rica, defendant volunteered that he was going to go there and asked for her phone number. She granted his request. (3T 40-2 to 43-3; 3T 71-12 to 14).

About a month after their meeting, defendant, along with his son, arrived in Costa Rica and contacted Alvarado. The two began dating one another, and Alvarado knew him as Marguerito Ramirez Rodriguez (defendant told her that he preferred "Alberto," his father's name) and to be of Mexican descent. She learned from him that his wife, sister-in-law and mother-in-law had died in an

automobile accident. During defendant's stay in Costa Rica, his mother visited him and took his son with her upon completion of the visit. (3T 39-20 to 23; 3T 43-9 to 45-7; 3T 71-18 to 24).

Defendant and Alvarado eventually settled together in Veracruz, Mexico, where they had disagreements because defendant was "very jealous. He wanted me to get pregnant later, and for that reason we had problems." (3T 45-16 to 46-4). Although Alvarado gave birth to defendant's child in 1983, problems continued, resulting in Alvarado's leaving defendant with their child and returning to Costa Rica to live with her parents. Defendant, however, followed her, and the two resumed living together. A second child was born to them in 1985, and defendant and Alvarado were married in 1987. Nevertheless, because defendant "went around with a lot of women," and "[h]e was always very jealous of everything, of things that he imagined," their marriage faltered. (3T 46-6 to 50-7).

Sometime after their marriage, defendant's parents visited them and Alvarado discovered Scabone to be defendant's surname, not Ramirez Rodriguez. Now suspicious of her husband's true identity, Alvarado contacted her girlfriend in Los Angeles and related her discovery. At about this time, as the marriage deteriorated further, Alvarado went to a lawyer to institute divorce proceedings. (3T 50-21 to 53-15).

Approximately the end of 1988, Alvarado learned from his Los Angeles friend that defendant was a fugitive, having been charged with killing his wife and his wife's family. A disbelieving

Alvarado contacted Interpol, the International police, who confirmed this information. Against her expressed wishes, defendant's name was publicized in the media. Subsequently, as a result of her children receiving inquiries and taunts about their "killer" father, Alvarado moved with them to Guadalajara, Mexico. (3T 57-18 to 60-7).

Months after their return to Mexico, defendant appeared at the residence, assured Alvarado that everything was going to be all right and announced that he was going to live with them. Alvarado accepted him into the home and, in the beginning, defendant behaved very well. However, the situation soon worsened dramatically, when defendant threatened to kill her. (3T 61-13 to 62-6). One Christmas, while Alvarado's mother and sister were visiting them, defendant threatened to kill them. At this time, Alvarado confronted him with the deaths of his previous wife and her family, asking him if he was going to do the same things that "you did that one day." According to her, defendant retorted, "If I have to do it, I'm going to do it again." (3T 62-8 to 23).

On a subsequent occasion, at an indeterminate date, defendant detailed the killings to her. According to her, he related his wife grabbing a knife from above the bed while they were fighting; his taking the knife away from her and wounding her with it; his then panicking and killing her; and his subsequently killing his wife's mother and sister when they arrived at the apartment. (3T 63-7 to 64-2).

With defendant's emotional state seemingly hitting rock-bottom

and certain that defendant eventually would attempt to kill her, Alvarado went to the Mexican police, who were disinterested because the killings had not occurred within their jurisdiction. Consequently, in January 1993, Alvarado went to the American Consulate in Guadalajara, where she spoke to Gilbert Alvarez, a special agent for the F.B.I. (3T 64-18 to 65-19). She recalled telling him that defendant had confessed the killings to her. (3T 71-4 to 6). However, Alvarez remembered, as corroborated by his notes taken during the Alvarado interview, that she believed defendant was wanted for the killings but that he was unaware as to her having knowledge of the killings. (5T 86-5 to 87-5). In any event, a telex between Alvarez and authorities in Newark confirmed defendant's wanted-status, and he was apprehended soon after the telecommunication. (5T 88-1 to 10).

Defendant, testifying in his own behalf, denied killing his wife, mother-in-law or sister-in-law. (5T 15-18 to 20). To the contrary, he professed his love for Norma and considered Yannet to be "like his little sister." (5T 56-17 to 57-9). He readily conceded using the word "kill" in reference to family members, though just as "an expression I always say," but denied ever threatening to burn his house down or telling Silva that he would go to Mexico or to his native Uruguay after "killing" the three women. (5T 39-3 to 40-3; 5T 47-10 to 13).

Regarding the evening of April 2, 1981, defendant told of returning to his apartment with his son at about 9:40, after having been shopping and in the company of a few friends, only to find

smoke in the apartment and the three women dead. (5T 20-15 to 24-16; 5T 69-3 to 4). Just after he attempted to extinguish the dying fire, Guerrero and Delsid (whom defendant knew as Cunas) arrived outside the apartment door and discouraged defendant from calling the police. (5T 24-7 to 10; 5T 27-9 to 25). Defendant, not carrying anything but his son from the apartment (a valise and television set had been placed in his car's trunk sometime before the incident, in an attempt to sell them at work) drove to work with his two co-workers and his son. (5T 28-2 to 29-3). En route, defendant mentioned that Monica and he "had a lot problems with other people." (5T 31-3 to 6). Thus fearing for his own safety and his son's -- having witnessed the remains of his wife and part of her family -- defendant fled to Mexico soon thereafter, and until the murders were solved. (5T 37-18 to 19; 5T 71-4 to 9). Because it was very difficult, if not impossible, for foreigners to obtain employment in Mexico, defendant received a birth certificate from his friend Marguerito Ramirez Rodriguez, prior to departing, and subsequently assumed his identity. (5T 18-13 to 20; 5T 37-15 to 16).

LEGAL ARGUMENT

POINT I - THE ADMISSION OF OTHER CRIMES, WRONGS OR ACTS EVIDENCE CONSTITUTES REVERSIBLE ERROR. (PARTIALLY RAISED BELOW)

A. Ana Gonzalaz and Leopoldo Silva Testimony

In opening to the jury, the prosecution stated, in pertinent part:

> Investigators start talking to relatives. They start talking to the relatives of Monica Scabone, Yannet Estevez and Norma Estevez. They talk to an Ana Gonzalaz, who was the sister of Monica Scabone, and they say, gees, do you know anything about where he is or what happened here?
>
> The relatives give a few leads which turn out to be nothing. But, more importantly, they tell that there were prior occasions where Alberto Scabone had threatened to kill Monica, his wife, and her family. [1T 9-16 to 24.]

Defense counsel objected at this point and requested a side bar, which was granted. At the side bar, counsel mentioned that the prosecution's comments regarding Gonzalaz's expected testimony "sounds like Rule 55 [sic] material to me." (1T 10-8). However, as to her testimony and regarding the similarly anticipated testimony of Leopoldo Silva, defendant's brother-in-law, counsel did not pursue his objection at this time, adding, "I really don't have any objection to the brother-in-law, and probably none to the sister, but I will raise it again when the time comes to testify if I need to." (1T 11-1 to 15).

The prosecution then resumed the opening to the jury:

> Again, you will hear the live testimony of Ana Gonzalaz, and what types of threats she heard, and what the exact nature of those threats

were.

You're also going to hear from Leopoldo Silva.

Now, Leopoldo Silva is the brother-in-law of Alberto Scabone, and the brother-in-law of Monica Scabone, Yannet Estevez and the son-in-law of Norma Estevez.

He will also testify as to the threats that Scabone made against the women, and he will tell you exactly when and where those threats were made, and why he did nothing about those threats. [1T 11-22 to 12-7.]

Prior to Gonzalaz's testifying before the jury, the prosecution made the following proffer to the court:

She will testify, or she's planning to testify in conjunction with her statement where she states that on prior occasions Alberto Scabone had threatened to kill her sister and had also threatened to burn the house down, burn the apartment down on Bloomfield Avenue.

She gives a specific time as to when the actual statement was made. She gives a second instance when she was down in Uruguay. The first instance is in March of 1980. The second instance is November of 1980, when the family was down in Uruguay where he had threatened to kill -- this defendant had threatened to kill his wife, and the other instance in March of '80, he had threatened to kill Monica Scabone, and he said he was going to burn the house down.

She will also testify as to the relationship. They were always arguing and fighting, and that he was always jealous of her, and that she would fight him back, and that she herself was a physically aggressive woman. [2T 39-10 to 40-1.]

Defense counsel objected to Gonzalaz's so testifying, citing N.J.R.E. 404(b) and adding that even if her testimony fell within one of the rule's exceptions, the testimony's probative value was

undermined "by attenuation in time" as to the crimes of April 2, 1981. (2T 40-21 to 43-11).

The trial court deemed the testimony admissible, ruling, in pertinent part:

> I am, in fact, going to allow the testimony of these two witnesses. I've weighed the prejudice possibly to Mr. Scabone. I find that the probative value of this information clearly outweighs any problem that it might cause for Mr. Scabone. [2T 46-7 to 11.]
>
> * * *
>
> There's a case which I think is exactly on point, State v. Engel, 249 N.J. Super., at Page 336, and that is a very similar case involving a husband who had prior evidence of threats and acts of violence against his former wife. It was admitted at that trial, and in that trial he had hired a hit man to murder his wife. The Court in that proceeding allowed all of that testimony in because it shows a continuing enduring hostility between the parties which I think is the underlying thing here.
>
> There was a severe situation between the parties based on the testimony we've already heard from a number of other witnesses.
>
> Mr. Scabone had informed other co-workers that he was -- he was very jealous of his wife, and he had been thrown out of the house, and that hostility obviously goes to the intent, to the motive of Mr. Scabone. It's definitely a relevant issue. How much weight a jury wants to give it, that's totally and entirely up to a jury. Likewise, the fact that the testimony is coming in from relatives of the decedents in the case is a factor that can be explored by [defense counsel]. It does not foreclose him in any way. Again, the jury can weigh the information and consider the sources from which it comes in, but the information in the interest of truth this jury should definitely have. So we're going to allow it all in. [2T 46-18 to 47-16.]

* * *

> Just supplementing my ruling on the 404 issue, I also want to make it clear that I find the factors that were specified in State v. Cofield to apply. The matters being discussed by the next two witnesses [Ana Gonzalaz and Leopoldo Silva] are relevant to a material issue, that being intent, motive and jealousy; that they're similar in nature and kind, and they've been reasonably proximately close in time, and that the evidence is more than clear and convincing beyond not only that standard but beyond a reasonable doubt that it should be allowed in. [2T 47-21 to 48-4.]

Ana Gonzalaz then proceeded to testify before the jury that she often had witnessed her sister Monica and defendant "fight[ing] about anything, everything." (2T 52-6 to 12). More particularly, defendant was "very jealous" of Monica, as "[h]e didn't want her to get made up. He didn't want her to get dressed up. He didn't let her have friends, male or female." (2T 52-16 to 22). When they fought, Monica "defended herself" physically. (2T 55-5 to 9).

In March 1980, Gonzalaz remembered being in the apartment when defendant hit Monica with a bottle and yelled that he was going "to burn the house." (2T 56-23 to 57-25). While Monica and defendant were visiting his parents in Uruguay in January 1981, Gonzalaz heard defendant threaten to kill Monica and her entire family. (2T 58-22 to 59-13). Gonzalaz also recalled defendant's threatening to kill Monica "[m]any times" and "always said" that he would burn down their apartment. (2T 59-23 to 60-4). However, because Gonzalaz did not believe the threats, she never contacted the police. (2T 60-5 to 9).

Silva followed Gonzalaz to the stand. He told the jury about

one occasion, at an indeterminate date, when defendant, Monica and other relatives were at his house, and defendant, for no apparent reason, said, "I'm going to kill these three crazy women." Defendant obviously was referring to Monica, Yannet and Norma, who were in the kitchen. When Silva smiled, defendant responded that he was serious, adding that he would go to Mexico or to Uruguay after the killings. Still not taking defendant's threat seriously, Silva never reported it to the police. (2T 68-23 to 73-20).

In summation to the jury, the prosecution recounted the Gonzalaz-Silva testimony. (6T 41-24 to 42-5; 6T 47-5 to 48-14).

As to this Gonzalaz-Silva testimony (and that of Elieth Camacho Alvarado, defendant's second wife), the trial court charged the jury, as follows:

> The State presented testimony during the course of this trial of a number of people. Some of those were Ana Gonzalaz, who is the sister of Monica Scabone and the sister of Yannet Estevez, and Leopoldo Silva, a brother-in-law of some of those individuals, pertaining to incidents and statements that were allegedly made and done by Mr. Scabone prior to the April 2, 1981 date set out in this indictment that brings us here for this trial.
>
> You also heard testimony from Mr. Scabone's present wife, Mrs. Alvarado Camacho [sic], regarding a threat that was allegedly made to her during the course of their marriage. This evidence was offered for a very limited and specific purpose.
>
> As I told you during the course of the trial [sic], evidence that a person committed a prior wrong on a specified occasion is inadmissible to prove his disposition to commit the crimes for which he has been indicted and is presently on trial. In other

words, such evidence from Ms. Gonzalaz, Mr. Silva and Mrs. Alvarado Camacho [sic] cannot be considered by you as disclosing any general propensity or predisposition on the part of Mr. Scabone to commit a crime or to commit the crimes with which he is now charged.

You cannot prove one crime by proving another crime. You may only consider the evidence of the arguments, the violence, and/or the threats allegedly made and committed by Mr. Scabone against his wife, Monica Scabone and her relatives and his present wife, Mrs. Alvarado Camacho [sic], if you believe that they were, in fact, made and done by Mr. Scabone, and solely to determine what Mr. Scabone's motive or intent was as to whether those words and actions disclosed an enduring hostility, an enduring jealously, malice or ill will that arose out of the marital relationship between himself and Monica Scabone that is directed toward the three victims in this case; that being Monica Scabone, Norma Estevez and Yannet Estevez.

You may consider such evidence solely for this purpose; that is, in determining a possible motive or intent on the part of Mr. Scabone.

You cannot consider that evidence for any other purpose. [Emphasis supplied; 6T 86-3 to 87-18.]

Despite the court's effort to provide an adequate limiting instruction, the admission of Gonzalaz's and Silva's testimony as to defendant's prior bad acts constitutes reversible error.

N.J.R.E. 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

This rule, the successor to Evid. R. 55, "prohibits the admissibility of other crimes simply to show that the defendant had a propensity to act in a certain way." State v. Stevens, 222 N.J. Super. 602, 614 (App. Div. 1988), aff'd 115 N.J. 289 (1989)(citing State v. Kociolek, 23 N.J. 400, 419 (1957)). It is designed to "protect defendants from the potentially great prejudice inherent in 'other like crimes' evidence, since the average jury will much more readily accept the belief that one is guilty of the crime charged where it is demonstrated that he has committed a similar crime." State v. Peltack, 172 N.J. Super. 287, 292 (App. Div. 1980), certif. denied, 84 N.J. 474 (1980); see also State v. Moore, 113 N.J. 239, 275 (1988); State v. Gibbons, 105 N.J. 67, 77 (1987); State v. Ortiz, 253 N.J. Super. 239, 242-43 (App. Div. 1992), certif. denied, 130 N.J. 6 (1992).

In State v. Cofield, 127 N.J. 328, 338 (1992), our Supreme Court identified the criteria for admitting other crime evidence:

> 1) The evidence of the other crime must be admissible as relevant to a material issue; 2) It must be similar in kind and reasonably close in time to the offense charged; 3) The evidence of the other crime must be clear and convincing; and 4) The probative value of the evidence must not be outweighed by its apparent prejudice. [Quoting Abraham P. Ordover, Balancing The Presumptions Of Guilt And Innocence: Rules 404(b), 608(b), And 609(a), 38 Emory L.J. 135, 160 (1989)(footnote omitted).]

To be sure, evidence of arguments or violence between a defendant and a homicide victim has been admitted under Evid. R. 55 or its precursor. See State v. Ramseur, 106 N.J. 123, 267

(1987)(evidence of prior beatings and threats admissible as to intent); State v. Mulero, 51 N.J. 224, 228-29 (1968)(evidence that the defendant beat his mother admissible to show his intent when he beat his daughter to death); State v. Donohue, 2 N.J. 381, 388 (1949)(evidence of the prior beatings of the defendant's wife, the murder victim, admissible to show malice when the defendant was accused of his wife's killing); State v. Lederman, 112 N.J.L. 366, 372-73 (E. & A. 1934) (evidence of beating by the defendant of her husband three days before she allegedly beat him to death admissible to show malice and common scheme); State v. Schuyler, 75 N.J.L. 487, 488 (E. & A. 1907) (evidence of altercation between the defendant and the homicide victim to show malice); State v. Slobodian, 120 N.J. Super. 68, 75 (App. Div. 1972), certif. denied, 62 N.J. 77 (1972) (evidence that the defendant threatened his wife with the pistol two months before he shot her admissible to how his state of mind); State v. Engel, 249 N.J. Super. 336, 372 (App. Div. 1991), certif. denied, 130 N.J. 393 (1992) (prior acts of violence and threats highly relevant with respect to the issue of motive).

Except for Engel, the common thread that ran through all the other cases was the defendant's intent, or state of mind; that is, there was no dispute that the defendant killed the victim, but rather in issue was the defendant's culpability for having committed the act. In the matter at bar -- notwithstanding the trial court's limiting instruction to the contrary -- defendant's intent never was in issue, as he denied being the killer. Therefore, the "trial court's failure to focus the jury's attention

on the limited purpose for which the evidence was admissible allowed the jury such free rein that it was clearly capable of confusing propensity" with the evidence as to the specific allegations, mandates a reversal of defendant's convictions. Cofield, supra, 127 N.J. at 342.

As to the admissibility of the Gonzalaz-Silva testimony of prior bad acts supposedly paralleling the "motive" or "enduring hostility" exception recognized in Engel, there the "reasonably close in time," Cofield, supra, 127 N.J. at 238, violence or threats were specified (the last being a couple of months before the killing). In the instant matter, only one of defendant's alleged prior violence or threats to his wife occurred within a comparable time frame (January 1981, three months preceding the killings), while the remaining threats and violence were, in one instance, too attenuated to the killings (occurring in March 19890), or, as in Silva's testimony and in much of Gonzalaz's nebulous testimony ("[m]any times," "always said"), lacking any time period whatsoever. Thus, at the very most, if one assumes the continued viability of Engel, in that two or three months is "reasonably close in time," only Gonzalaz's testimony as to her having heard defendant threaten to kill Monica and her family in January 1981 should have been admitted. See also Ramseur, supra, 106 N.J. at 266, "The temporal remoteness of a past wrong effects its probative value."

Absent the remaining acts of prior violence and threats alleged by defendant to his wife, the State's case against

defendant was grounded upon extremely tenuous circumstantial evidence: the alleged threat by defendant in January 1981 was testified to by Gonzalaz, Monica's vengeful sister, and even if one assumes the veracity of her testimony, defendant explained that he often used "kill" merely as "an expression" (5T 39-4 to 7), testimony supported by Gonzalaz's disbelieving the threat (2T 60-5 to 9); the alleged confession by defendant's estranged second wife, whose credibility, particularly as to the "confession," was obliterated by Gilbert Alvarez's testimony that, according to her belief, defendant was unaware that she knew of the killings (5T 86-5 to 87-5); defendant's "flight" to Central America, explained by defendant's fear that the person(s) who killed his wife and her family members also intended to get him, and that he would be accused unjustly of the killings (5T 37-18 to 19; 5T 71-4 to 9); the mysterious Jose German Delsid's paid testimony (1T 98-5 to 8) that he, an illegal alien and residing in the United States under a fictitious name (1T 98-14 to 99-1), saw defendant remove his suitcase and television set from the apartment and heard him say that he and his wife were having problems, testimony subsequently rebutted by defendant (5T 28-2 to 29-3; 5T 31-3 to 6).

"There is widespread agreement that other-crime evidence has a unique tendency to turn a jury against the defendant." State v. Stevens, 115 N.J. 289, 302 (1989). In the instant matter, there is little doubt that the prior bad acts' erroneous admission, individually, and compounded by the trial court's erroneous jury instruction, cumulatively, diverted the jurors "from a reasonable

and fair evaluation of the basic issue of guilt or innocence." State v. Moore, 122 N.J. 420, 467 (1991)(quoting State v. Sanchez, 224 N.J. Super. 231, 249-50 (App. Div. 1988), certif. denied, 111 N.J. 653 (1988)), and clearly was capable of producing the guilty verdicts. Therefore, defendant's convictions must be reversed. State v. Macon, 57 N.J. 325, 335-36 (1971); Cofield, supra, 127 N.J. at 341.

B. The Elieth Camacho Alvarado Testimony

Prior to the testimony of defendant's second wife, Elieth Camacho Alvarado, the prosecution proffered defendant's alleged acts of violence and threats to her, including, on one occasion, when defendant allegedly threatened to kill her, her sister and her mother, immediately followed by his admission as to the killings at bar. (3T 14-8 to 20-7).

Defense counsel objected strenuously to the admission of any "bad" acts which occurred in defendant's second marriage, stating, in pertinent part:

> We're just having people say bad things about him. Judge, if you let them keep saying enough bad things, the jury will convict him. That's the theory of the Prosecution. [3T 21-6 to 8.]
>
> * * *
>
> Now, in that context, we have another application under Rule 55 [sic] for prior conduct. It's very interesting to counsel that conduct seven years later could bear any relevance to intent with regard to an act that took place seven years prior.
>
> I don't understand how that works.
>
> What it does do, Judge, is it tells this jury

that Mr. Scabone is predisposed to prove that he is at disposition to do this kind of thing. We could bury him under six feet of mud, and then he would probably die, and we wouldn't have to have this trial.

But if this Court allows continuous mud slinging, inadmissible mud slinging, alleged prior bad acts, surely, he's going to lose. They're going to win their case. There's no doubt about it, if we keep it up. [3T 22-16 to 24.]

The trial court ruled, in pertinent part:

[Prosecutor], I agree with a lot of what [defense counsel] said here. I have no objection whatsoever in Ana Gonzalaz' testimony and also Mr. Silva's testimony because I do feel, and I am confident if it goes to the Appellate Division I'll be upheld on motive and intent as to the marital discord between Mr. Scabone and Monica Scabone. We're on firm ground there.

I don't think we're on as firm ground if you're looking to introduce a whole litany of subsequent events between Mr. Scabone and his present wife. I have no objection whatsoever if his present wife wants to testify that Mr. Scabone was very jealous; that there was marital discord, and then get into the specific reference to this particular case where a threat was made by Mr. Scabone that he was going to kill her and her family, and she came back with a question, the same as you did to your family, and the admission against interest by Mr. Scabone. [3T 25-16 to 26-7.]

In accordance with the court's ruling, Alvarado vaguely related her problem-filled relationship with defendant to the jury, but highlighted that "[o]nce at Christmas," while Alvarado's mother and sister were visiting, defendant had threatened to kill them. (3T 62-8 to 13). At this time, Alvarado who had learned at the end of 1988 that defendant was wanted for the killings of his first

wife and her family (3T 57-18 to 58-11), confronted him with this information, asking her if he was going to do the same things that "you did that one day." According to her, defendant replied, "If I have to do it, I'm going to do it again." (3T 62-18 to 23).

As previously set forth, the trial court in its limited instruction to the jury charged that defendant's alleged threat to Alvarado and her family -- uttered more than seven years after the killings at bar -- could be used to determine "Mr. Scabone's motive or intent" regarding the killings. (6T 87-3 to 6).

Obviously it is rare, if not unprecedented, for a crime or civil wrong perpetrated subsequently to the crime at bar to be admitted to show defendant's earlier motive or intent, particularly when there are different victims involved in the separate incidents. Cf. evidence of prior arguments or violence between a defendant and a victim deemed admissible pursuant to the cases cited heretofore. See also State v. Hasher, 246 N.J. Super. 495, 500 (Law Div. 1991), holding that evidence of a prior similar crime by the defendant on a victim in 1982 did not "fully and logically reveal reasons" why he may have committed a similar crime on another victim six years later (the trial court excluded defendant's intent as an issue because it did not "disclose[ ] the mental intention or purpose of a defendant when he committed a criminal offense," and also discounted the evidence as bearing upon the defendant's motive because it did not shed light on the reasons why the defendant committed the offenses at bar).

In any event, defendant's alleged threat to his second wife

and her family failed to satisfy the Cofield criteria: even if one assumes that it was admissible as being relevant to a material issue, thus meeting the first requirement -- a dubious assumption, at best -- it most certainly was not "reasonably close in time to the offenses charged," nor did its probative value outweigh its apparent prejudice. Cofield, supra, 127 N.J. at 338.

Indeed, the admission of defendant's threat to his second wife, her sister and her mother provided to the jury an irreparably prejudicial nexus to the killings of his first wife, her sister and her mother, impermissibly and inescapably allowing the jury to infer that defendant possessed the criminal disposition to fulfill his threats, and thereby subverted N.J.R.E. 404(b)'s prophylactic purpose.

This extremely inflammatory evidence, not extinguished by the limiting instruction which permitted the jury to apply the evidence erroneously as to defendant's "motive or intent," surely diverted the jurors "from a reasonable and fair evaluation of the basic issue of guilt or innocence," Moore, supra, and thus was clearly capable of producing the guilty verdicts independent of the wrongful admission of Ana Gonzalaz's and Leopoldo Silva's damaging testimony.

Aggregately, this avalanche of other crimes, wrongs, or acts evidence obscured the State's weak case and buried defendant's right to a fair trial, sealing his fate. Therefore, his

convictions must be reversed. Macon, supra; Cofield, supra, 127 N.J. at 341.

POINT II - THE ADMISSION OF THE INCULPATORY TESTIMONY OF DEFENDANT'S SECOND WIFE, GOVERNED BY AN EX POST FACTO LAW, CONSTITUTES REVERSIBLE ERROR.

Prior to defendant's second wife, Elieth Camacho Alvarado, testifying before the jury, defense counsel objected, citing marital privilege and contending "that these offenses took place while the state of the law was different; that he, in fact, has the privilege to prevent this testimony, and that if that is so that he would exercise that privilege." (3T 35-10 to 16).

The trial court overruled the objection, citing recently-adopted N.J.R.E. 509, which permits disclosure in a criminal proceeding of confidential communications between spouses if either spouse consents. (3T 36-1 to 8).

Accordingly, just before her jury testimony, Alvarado waived the marital privilege and agreed to testify against defendant, her current husband. (3T 34-19 to 35-8).

Alvarado, in her jury testimony, detailed her tumultuous relationship with defendant, including his threats to kill her, her mother and her sister, and his admission that he had stabbed to death his first wife, her mother and her sister. (3T 61-13 to 62-23; 3T 63-7 to 64-2).

The trial court erred in allowing Alvarado's testimony as to her marital communications with defendant, in that the law allowing either spouse to waive the privilege was ex post facto.

The Legislature amended the marital communications privilege by Act of November 17, 1992, L.1992, C.142. Evid. R. 28 (now

N.J.R.E. 509), N.J.S.A. 2A:84-22. The amendment substantially relaxes the privilege to permit disclosure of marital communications "in a criminal action or proceeding in which either spouse consents to the disclosure." (Emphasis added.) The amendment applies "to all criminal actions regardless of the date on which the offense was committed or the action initiated." Committee Statement to Senate, No. 10545, L.1992, C.142.

Ex post facto laws are prohibited by the United States and the New Jersey constitutions. U.S. Const. art. I, sec. 10, cl.1; N.J. Const. of 1947, art. IV, sec. 7, para. 3. Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S.Ct. 68, 70, 70 L.Ed. 216, 217-18 (1925), defined the prohibition as follows:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Accord State v. Jiminez, 266 N.J. Super. 560, 572 (App. Div. 1993).

In this regard, post-crime evidence rules have not been deemed ex post facto. See, e.g., Thompson v. Missouri, 171 U.S. 380, 386-87, 18 S.Ct. 922, 924, 43 L.Ed. 204, 207 (1898)(the Legislature enacted a rule that rendered admissible for comparison purposes documents indisputably handwritten by the alleged writer of a disputed handwritten document to establish the authenticity of the disputed document); State v. Bethune, 121 N.J. 137, 146 (1990)(the

Court stated that there is "a strong likelihood" that testimony would be admissible at a retrial pursuant to Evid. R. 63(33), the tender-years exception to the hearsay rule, enacted after the Bethune trial); State v. Gadsden, 245 N.J. Super. 93, 97 (App. Div. 1990)(the Legislature authorized use of a map in lieu of testimony to establish that a drug transaction occurred within 1,000 feet of school property).

However, an evidentiary rule enacted after the commission of a crime is ex post facto if it deprives a defendant of a "substantive right." Gadsden, supra, citing Thompson v. Missouri, supra. Such was the case herein, where the marital-communications privilege, unlike the aforecited cases, protects a "substantive right" -- the right to a peaceful marriage.

The privilege "has long been recognized as a protection of marital confidences. It stems from the strong policy of encouraging free and uninhibited communications between spouses, and consequently, of protecting the sanctity and tranquility of marriage." State v. Szemple, 135 N.J. 406, 414 (1994); accord Blau v. United States, 340 U.S. 336, 333, 71 S.Ct. 301, 302, 95 L.Ed. 306, 308 (1951); Wolfle v. United States, 291 U.S. 7, 14, 54 S.Ct. 279, 280, 7 L.Ed. 617, 620 (1934).

Consequently, as the retroactive application of N.J.R.E. 509 to the 1981 crimes alleged in the matter at bar, wherein Alvarado singularly was permitted to waive the privileged communications during her marriage to defendant, violated the prohibitions against ex post facto laws, the trial court erred in allowing her

testimony.

As set forth in POINT I, supra, the erroneous admission alone of defendant's alleged threats to Alvarado, her sister and her mother constitute reversible error. The erroneous admission of defendant's alleged confession regarding the killings at bar removes any lingering doubt as to their combined harmful effect. See State v. McCloskey, 90 N.J. 18, 31 (1982) (although finding that "the State has sufficient evidence so that a reasonable jury might convict him," the Court reversed, stating, in pertinent part, that "the improper use of incriminating statements made by a criminal defendant has great potential for prejudice. We can assume that inculpatory remarks made by a defendant have a tendency to resolve the jurors' doubts about defendant's guilt to his detriment.")

Therefore, defendant's convictions must be reversed. Macon, supra.

POINT III - DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.

A. Consecutive Terms Should Not Have Been Imposed.

The sentencing court, in imposing consecutive terms for the two murders (30 years with a 15-year parole disqualifier for each), the manslaughter (10 years with a five-year parole disqualifier), and the second-degree arson (10 years with a five-year parole disqualifier) -- the maximum possible sentence allowed by law in 1981 (8T 37-1 to 4) -- stated, in pertinent part:

> I've also reviewed the sentencing guidelines of State v. Yarborough [sic]. We've had a recent legislative change in the Yarborough [sic] rule, but that legislative bill did not address whether it would apply retroactively or prospectively. So rather than look for an appealable issue, I'm going to consider that Yarborough [sic] still applies to this situation, even though that statute is no longer in effect, and I am sentencing Mr. Scabone in accordance with the Yarborough [sic] guidelines.
>
> Those guidelines are number 1, that there are no free crimes in this system for which the punishment should fit the crime. Number 2, the reasons for imposing either consecutive or concurrent sentences should be separately stated on the record in our decision. And some of the reasons to be considered by the Court should include facts relating to the crimes included under Subsection A, the crimes and their objectives were predominantly independent of each other. B, that the crimes involved separate acts of violence or threats of violence. C, the crimes were committed at different times or separate places rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.
>
> Had any of the crimes involved multiple victims, E, the convictions for which the

sentences are to be imposed are numerous. And number 4, there should be no double counting the aggravating factors. Number 5, successive terms for the same offense should not ordinarily be equal to the punishment for the first offense. And number 6, there should be an overall outer limit on the accumulation of consecutive sentences for multiple offenses not to exceed the sum of the longer terms that could be imposed for the two most serious offenses.

Although Mr. Scabone's offenses may be construed as being committed so closely in time and place as to indicate a single period of aberrant behavior as recommended by [defense counsel], even conceding that point, if in fact it does exist, and I don't concede that fact because of the time periods in between the arrival of the separate victims into that apartment, these circumstances are vastly outweighed by the fact that these offenses involved numerous multiple victims. And separate and distinct the acts of violence, including what I characterize as the execution style murders of two totally innocent family members who had absolutely no contact with the initial dispute that arose into the stabbing of Monica Scabone and the passion/provocation manslaughter of Mrs. Scabone, as well as the second degree arson on the multiple family dwelling.

What is clear is the crimes committed were predominantly independent of one another and they involved separate acts of violence. And it was likewise apparent from the trial proofs that all 3 victims were fully clothed and stabbed to death individually at different times as they entered the apartment. The fire was then set after all of the deaths had been completed to conceal the evidence and to assist Mr. Scabone in making his get away. [8T 33-9 to 35-11.]

Indeed, as recited by the sentencing court, State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed. 2d 308 (1986), adopted guidelines to be applied by

sentencing courts on fashioning consecutive terms. However, the imposition of the consecutive terms in the instant matter violated the Yarbough guidelines.

The consecutive terms imposed obviously exceeded "the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses." Id. at 644.

Although our Supreme Court expressly provided for exceptions within the sentencing guidelines, a caveat was added:

> We recognize that even within the general parameters that we have announced there are cases so extreme and so extraordinary that deviation from the guidelines may be called for. Still we believe that we must strive for proportionality * * * It is a goal that we have pursued continually for over fifty years in New Jersey. [Id. at 647.]

See also State v. Louis, 117 N.J. 250 (1989), where the Court clarified Yarbough:

> When we said in State v. Yarbough that some cases might warrant a departure from guidelines, we did not intend that the sentences would wholly disregard the principles that relate to consecutive sentencing. Among the factors mentioned in Yarbough that the trial court declined to apply was whether the crimes and their objectives were predominantly independent of each other, whether the crimes were committed at different times or places, and whether there was any double counting of aggravating factors. [Id. at 254.]

The Court, though recognizing that the Louis crimes did involve separate acts of violence against multiple victims (including the attempted murder and robbery of a mother in her children's presence), upheld the Appellate Division's decision to

reduce the sentencing court's 130-year sentence with a 65-year parole disqualifier to a 60-year sentence with a 30-year parole disqualifier, reasoning that

> the crimes and their objectives did not seem to be predominantly independent of each other. Nor were they committed at different times or in separate places rather than being so closely in time as to indicate a single period of aberrant behavior. [Ibid].

Similarly, the killings and the arson in the matter at bar were not "predominantly independent of each other," as the killing of defendant's wife, according to defendant's alleged confession to his second wife (3T 63-7 to 64-2), precipitated the other crimes which occurred at the same site and at approximately the same time, "as to indicate a single period of aberrant behavior."

Cf. State v. List, 270 N.J. Super. 169, 176 (App. Div. 1993), where consecutive terms were warranted, because the murders were predominantly independent of each other and occurred at different locations and times (the defendant shot his wife in the head from behind while she was sitting at the breakfast table after the children went to school; he then went to the third floor where his mother-in-law lived in separate quarters and shot her; he then picked up one of his children from school and shot her; he subsequently picked up a second child from school and shot him; and when the remaining child returned home from school, the defendant shot and killed him).

B. Parole Disqualifier Should Not Have Been Imposed.

In imposing discretionary parole disqualifiers on each of the

four convictions[1], the court stated, in pertinent part:

> There obviously is a presumption of incarceration. We have 3 separate deaths. These are first degree offenses and also second degree offenses. I'm familiar with all of the facts of the case. I've also reviewed Mr. Scabone's eligibility for release on parole. The mitigating factors that do apply, I agree with [defense counsel], we heard mention during the course of the trial that Mr. Scabone has been involved with a number of international law enforcement bodies and a number of different countries. But not one iota of proof has been presented in the way of certified abstract. So as for [sic] as I'm concerned, Mr. Scabone has no prior record.
>
> Obviously, Mr. Scabone's conduct is the result of circumstances unlikely to reoccur [sic]. That's an obvious one when the victims are deceased. They're never going to be back on the earth with us again. In regard to mitigating factor number 11, Mr. Scabone has a kidney medical problem which will require attention in the institution, but that's something that can be addressed during his incarceration. In regard to the agggravating factors, I am mindful of the double counting requirement and criteria. So for these reasons, I am not going to count in aggravating factors 1 and 2 on our list concerning circumstances being heinous and cruel involving the stab wounds. Likewise, in fact, with Monica Estevez [sic] had been stabbed a number of times and that his mother-in-law Norma was 59 years of age.
>
> Again, I don't want to be accused of double counting any of the factors, so this sentence is not in any way based on aggravating factor number 1 or 2. Number 3, obviously the risk

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[1]At the time of the offenses, defendant, as a convicted murderer, was subject "(1) to a term of 30 years of which the person must serve 15 years before being eligible for parole, or (2) as in a crime of the first degree except that the maximum term for such a crime of the first degree shall be 30 years." N.J.S.A. 2C:11-3b.

> that Mr. Scabone will commit another offense. I think the likelihood is extremely high, if not a hundred percent certain that that aggravating factor applies to this case. Aggravating factor number 6, the seriousness of the ofense [sic].
>
> We have 3 separate victims plus the arson. So, easily other people could have been injured as a result of Mr. Scabone's conduct other than the 3 individuals of his own family who in fact were brutally murdered by him. And, aggravating factor number 9, the need for deterrence. The fact that 3 human lives were lost, I don't think needs to be stated anymore on the record that that obviously is conduct that someone cannot incur [sic]. It's clear that the aggravating factor [sic] clearly preponderate and I'm clearly convinced that these aggravating factors substantially outweigh the mitigating factors requiring consecutive discretionary minimum terms on this case. [8T 31-3 to 32-21.]

The sentencing court may impose a mandatory minimum term only if it is "clearly convinced" that the aggravating factors "substantially outweigh" the mitigating. N.J.S.A. 2C:43-6b. However, mandatory minimums, or parole disqualifiers, should not be routinely imposed, for they are "the exception and not the rule." State v. Kruse, 105 N.J. 354, 359 (1987) (quoting State v. Martelli, 201 N.J. Super. 378, 382 (App. Div. 1985). Therefore, in addition to its findings on the various aggravating and mitigating factors, the sentencing court must "describe the balancing process" and "explain how it determined defendant's sentence." Kruse, supra, 105 N.J. at 360. See also State v. Sainz, 107 N.J. 283, 290 (1987) (rejecting the State's argument that the three-year parole disqualifier "encompassed an implicit finding and weighing of aggravating and mitigating factors"; resentencing ordered); State

v. Vitale, 102 N.J. 350 (1985) (remanded for resentencing because "the sentencing transcript does not reveal an articulation of balancing of aggravating and mitigating factors required to establish the base or parole ineligibility terms."

The sentencing court, in the instant matter, though finding both aggravating and mitigating factors, failed to provide the balancing analysis on the record, thus mandating a resentencing on this ground alone. Moreover, the court compounded its sentencing error by doing what it feared doing: double counting the seriousness of the crimes as aggravating factors.

It is clear that where the Legislature has already taken certain aspects of the nature and circumstances of the offense into grading, the sentencing court may not consider those same aspects again as aggravating factors. State v. Pineda, 119 N.J. 621 (1990); see also State v. Reyes, 236 N.J. Super. 378, 387 (App. Div. 1989), aff'd 124 N.J. 113 (1991) (death of victim may not be considered an aggravating factor in sentencing for murder); State v. Abrams, 256 N.J. Super. 390 (App. Div. 1992), certif. denied, 130 N.J. 395 (1992) (death of victim cannot be used as an aggravating factor in a manslaughter case); State v.. Gardner, 113 N.J. 510 (1989) (where seriousness of risk of harm distinguishes second- from third-degree arson, it cannot be considered a factor aggravating an arson).

"The risk that defendant will commit another offense" (N.J.S.A. 2C:44-1a(3)), the first aggravating factor recognized by the sentencing court, almost always applies only if the defendant

has a prior, if not extensive, record. See, e.g., State v. Ghertler, 114 N.J. 383, 389-90 (1989); State v. Dunbar, 108 N.J. 80, 97 (1987). However, sentencing courts, in a few cases, have applied this factor to defendants who have never before been arrested or convicted of a crime. See State v. Toro, 229 N.J. Super. 215, 227 (App. Div. 1989), certif. denied, 118 N.J. 216 (1989) (the Appellate Division overruled a finding of this factor, noting that "[t]he fact that defendant had been gainfully employed for over two years, had no prior criminal record and was a respected member of the community militate against this conclusion," as did the fact that defendant was not charged with distribution of drugs on other occasions); State v. O'Donnell, 117 N.J. 210, 216-17 (1989) (where defendant, a police officer, was "almost boastful" of his conduct in beating the victim and the record supported the sentencing court's finding of risk of future offenses, notwithstanding that defendant had lost his job with the police department); State v. Mara, 253 N.J. Super. 204, 215 (App. Div. 1992) (risk of another offense deemed an aggravating factor in a drunk driving aggravated assault case where the defendant refused to admit to an alcohol problem); State v. Varona, 242 N.J. Super. 474, 491 (App. Div. 1990), certif. denied, 122 N.J. 386 (1990) (although defendant was "an established businessman" with no prior record, the fact that he was found with a kilogram of cocaine in his possession justified the sentencing court's finding of risk of future offenses); but cf. State v. Binns, 222 N.J. Super. 583, 596 (App. Div. 1988), certif. denied, 111 N.J. 624 (1988) (where

prediction of future offense is based on the instant conviction, there must be more shown than that the defendant stands convicted of a crime which is profitable and, therefore, he may commit the same crime again).

Consequently, the sentencing court herein improperly recognized the "risk" factor, basing its finding solely upon the seriousness of the crimes; no other reason was provided. Accordingly, this intrinsic aggravating factor, irrespective as to defendant's being sentenced for first- and second-degree crimes, constitutes a classic case of double counting.

Perhaps an even more egregious error was the sentencing court's citing "the seriousness of the offense" as an aggravating factor. Obviously "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted" (emphasis supplied, N.J.S.A. 2C:44-1a(6)) pertains only to prior convictions, of which defendant had none. And again, even if one applied this aggravating factor to the instant convictions, double counting would preclude it as an aggravating factor.

Regarding the remaining aggravating factor recognized by the sentencing court, the "need for deterring the defendant and others from violating the law" (N.J.S.A. 2C:44-1a(9)), this seemingly ubiquitous factor is primarily used where there is a special need to deter the defendant. See Martelli, supra, 201 N.J. Super. at 385-86 (resentencing ordered in part because the record did not disclose "what special need for deterrence or non-depreciation of the offense differentiates the case from other cases***" in its

class). No "special need for deterrence" was mentioned by the sentencing court in the matter at bar. Moreover, with the absence of a "special need," or specific deterrence, "general deterrence has relatively insignificant penal value." Gardner, supra, 113 N.J. at 520; State v. Jarbath, 114 N.J. 394, 405 (1989).

C. Maximum Base Terms Should Not Have Been Imposed.

Appellate courts are to modify sentences if the recognition of the sentencing court's aggravating factors are not supported by the credible evidence, or if the legislative policies involved in the use of aggravating factors are violated. State v. Roth, 95 N.J. 334, 364-65 (1984); accord, O'Donnell, supra 117 N.J. at 215-16; Jarbath, supra, 114 N.J. at 406-08; Ghertler, supra.

Such is the case in the instant matter, where scrutinization of the aggravating factors has revealed that if any imbalance existed between them and the recognized mitigating factors ("The defendant has no history of prior delinquency or criminal activity or has led a law-biding life for a substantial period of time before the commission of the present offense," N.J.S.A. 2C:44-1b(7); "The defendant's conduct was the result of circumstances unlikely to recur," N.J.S.A. 2C:44-1b(8); "The imprisonment of the defendant would entail excessive hardship to himself for his defendants," N.J.S.A. 2C:44-1b(11)), the latter may well have outweighed the aggravating factors.

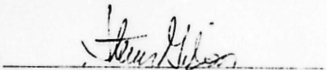
Consequently, the sentencing court erred in imposing the maximum base terms, which were predicated upon the aggravating factors outweighing the mitigating factors. N.J.S.A. 2C:43-6a(2), N.J.S.A. 2C:44-1f(1).

CONCLUSION

For the reasons stated herein, it is respectfully requested that defendant's convictions be reversed or, in the alternative, that his sentence be modified.

Respectfully submitted,

SUSAN L. REISNER
Acting Public Defender
Attorney for Defendant-Appellant

BY: 
STEVEN M. GILSON
Designated Counsel

DATED: August 24, 1994

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7534-81

Superior Court of New Jersey

ESSEX COUNTY

(Law Division — Criminal)

Filed April 2, 1981

4225— 1980 TERM

THE STATE OF NEW JERSEY

vs.

ALBERTO SCABONE

Defendant

INDICTMENT (4 Counts)

MURDER & SECOND DEGREE ARSON

A True Bill

.....
Foreman.

Plea:

Bail:

Presented:

GRAND JURY NO. 6239 thru 6239C

Ind 77942
WG 7794.

484

Dal

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did murder Monica Scabone

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

Essex County, to wit:

SECOND COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did murder Yannet Estevez

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

D0 3

Essex County to wit: THIRD COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981
at the City of Newark in the County of Essex
aforesaid and within the jurisdiction of this Court, did murder Norma Estevez

contrary to the provisions of N.J.S. 2C:11-3
and against the peace of this State, the government and dignity of the same.

Dq 4

FOURTH COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCARONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely destroy an occupied multiple family dwelling at 239 Bloomfield Avenue, Newark, N.J.

contrary to the provisions of N.J.S. 2C:17-1a.(2), a crime of the Second Degree and against the peace of this State, the government and dignity of the same.

GEORGE L. SCHNEIDER
COUNTY PROSECUTOR
BY: [illegible]

Ds 5

State of New Jerse

v.

ALBERTO SCABONE

Defendant (Specify Complete Name)

11/5/53 DATE OF BIRTH
904520A SBI #
2/3/93 DATE OF ARREST
4/2/81 DATE IND / ACC FILED
11/18/93 DATE OF ORIGINAL PLEA
☒ NOT GUILTY ☐ GUILTY ORIGINAL PLEA

New Jersey Superior Court
ESSEX County
Law Division - Criminal

☒ Judgment of Conviction
☐ Change of Judgment
☐ Order for Commitment
☐ Indictment/Accusation Dismissed
☐ Judgment of Acquittal

ADJUDICATION BY — DATE
☒ GUILTY PLEA — 11/18/93
☐ JURY TRIAL
☐ NON-JURY TRIAL
☐ Dismissed/Acquitted

ORIGINAL CHARGES

IND / ACC No.	Count	Description	Degree	Statute
4225-8-80	1	Murder	1st	2C:11-4b(a)
" " "	2	Murder	1st	2C:11-3
" " "	3	Murder	1st	2C:11-3
" " "	4	Arson	2nd	2C:17-1a(2)

FINAL CHARGES

Count	Description	P.D. / A.O.C. / PAROLE	Degree	Statute
Same as above				

It is, therefore, on 1/14/94 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows

Ct.#2 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligibl for parole.

Ct.#3 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligible for parole consecutive to Ct.#2.

Ct.#1 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2 & #

Ct.#4 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2,3,1

☒ It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority

☒ Defendant is to receive credit for time spent in custody (R 3:21-8) — 336 days (TOTAL NO DAYS) — 2/3/93 to 1/14/94 (DATES: From - To)

☐ Defendant is to receive gap time credit for time spent in custody (N J S A 2C:44-5b(2)) — (TOTAL NO DAYS) — (DATES: From - To)

Total Custodial Term 30 yrs. Institution Dept. of Corrections Total Probation Term

Administrative Office of the Courts
State Bureau of Identification

CPO106 (Rev. 1/92) Replaces ...

COPIES TO: CHIEF PROBATION OFFICER STATE POLICE AOC CRIMINAL PRACTICE DIVISION DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

State of New Jersey v _____ SBI # _____ IND ACC # _____

Total **FINE** $ _____

Total **RESTITUTION** $ _____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☒ Assessment imposed on count(s) 1,2,3,4 is $ 30.00 each.

Total **VCCB Assessment** $ 90.00

☐ Installment payments are due at the rate of $ _____ per _____, beginning _____ (DATE)

If any of the offenses occurred *on or after* Jul 987, and is for a violation of Chapter 35 or 36 of Title 2C.

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for *each* count. (Write in # times for each.)

___ 1st Degree @ $3000 ___ 4th Degree @ $750
___ 2nd Degree @ $2000 ___ Disorderly Persons or Petty
___ 3rd Degree @ $1000 ___ Disorderly Persons @ $500

Total **D.E.D.R. Penalty** $ _____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED ___ Offenses @ $50

Total **LAB FEE** $ _____

3) Name of Drugs Involved _____

4) A mandatory driver's license suspension of ___ months is ORDERED

The suspension shall begin today, _____ and end _____

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____ Driver's license # _____

☐ Your non-resident driving privileges are hereby revoked for _____ Months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a State Correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169)

NAME (Court Clerk or Person who prepares this form)	TELEPHONE NUMBER	NAME (Attorney for Defendant at Sentencing)
TERRY MONTEMURRO	(201) 621-4805	Kevin McLaughlin , Esq.

STATEMENT OF REASONS

The aggravating factors are the risk that the defendant will commit another offense, the seriousness of the offenses of which he has been convicted; and the need for deterring the defendant and others from violating the law.

The mitigating factors are the defendant has no history of prior delinquency or criminal activity or has had a law-abiding life for a substantial period of time before the commission of the present offense; the defendant's conduct was the result of circumstances unlikely to recur; and the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

HOLIDAY, SNOW & ICE DELAY

JUDGE (Name)	JUDGE (Signature)	DATE
EUGENE J. CODEY, JR.	Eugene J. Codey	1 20 9.

Administrative Office of the Courts
State Bureau of Identification

CPS108 (Rev. 1/93) Replaces CPS 108 & 109 (Rev. 9/1)

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AOC CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Da 7

SUSAN L. REISNER
Acting Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street
Box 46003, 9th Floor
Newark, New Jersey 07101
201-877-1200

Filed March [illegible] 1994

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO(S). 4255-8-80

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	NOTICE OF APPEAL
v.	:	
ALBERTO SCABONE,	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that the defendant, CONFINED at ESSEX COUNTY JAIL appeals to this Court from the final judgment of conviction of MURDER, ARSON entered on JANUARY 20, 1994 in the Superior Court, Law Division, ESSEX COUNTY, in which a sentence of 80 YEARS WITH A 40 YEAR PARole DISQUALIFIER, $90.00 VCCB PENALTY was imposed by the Honorable EUGENE J. CODEY, JR..

SUSAN L. REISNER
Acting Public Defender
Attorney for Defendant-Appellant

BY: Lisa A. Lynch
LISA A. LYNCH
Assistant Deputy Public Defender
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have been complied with by ordering the transcript(s) on March 9, 1994 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

Lisa Lynch

Da 8

A-3498-93T4

OFFICE OF THE COUNTY PROSECUTOR
ESSEX COUNTY

CLIFFORD J. MINOR
PROSECUTOR

PETER J. FRANCESE
FIRST ASSISTANT PROSECUTOR

JOHN S. REDDEN
DEPUTY FIRST ASSISTANT PROSECUTOR

FREDERIC R. McDANIEL
DEPUTY FIRST ASSISTANT PROSECUTOR

HAROLD J. MYNETT
DEPUTY FIRST ASSISTANT PROSECUTOR

NORMAN W. MENZ, JR.
DEPUTY FIRST ASSISTANT PROSECUTOR

STATE OF NEW JERSEY, Plaintiff-Respondent, v. ALBERTO SCABONE, Defendant-Appellant.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3498-93T4 CRIMINAL ACTION ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION AND SENTENCE ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY

SAT BELOW: HON. EUGENE J. CODEY, J.S.C.
AND A JURY

BRIEF ~~AND APPENDIX~~
ON BEHALF OF THE STATE OF NEW JERSEY

CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102

ELIZABETH A. DUELLY
ASSISTANT PROSECUTOR/DIRECTOR

BARBARA A. ROSENKRANS
ASSISTANT PROSECUTOR

OF COUNSEL AND ON THE BRIEF

OFFICE OF THE COUNTY PROSECUTOR
ESSEX COUNTY

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DEPUTY FIRST ASSISTANT PROSECUTOR

HAROLD J. MYNETT
DEPUTY FIRST ASSISTANT PROSECUTOR

NORMAN W. MENZ, JR.
DEPUTY FIRST ASSISTANT PROSECUTOR

April 26, 1995

REC'D
APPELLATE DIVISION
APR 26 1995

Emille R. Cox, Clerk
Appellate Division
Superior Court of New Jersey
Hughes Justice Complex, CN-006
Trenton, New Jersey 08625

RE: STATE v. ALBERTO SCABONE
DOCKET NO. A-3498-93T4

Dear Mr. Cox:

Pursuant to this Court's Order partially granting the State's motion to file an overlength brief, enclosed please find five copies of the State's revised answering brief which does not exceed 85 pages.

Also enclosed is a certification of service upon our adversary.

Very truly yours,

CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR
Elizabeth A. Duelly
ELIZABETH A. DUELLY
DIRECTOR
APPELLATE SECTION

Barbara A. Rosenkrans
BARBARA A. ROSENKRANS
ASSISTANT PROSECUTOR
APPELLATE SECTION

EAD/BAR:md
Enclosure
CC: Steven N. Gilson, Esq.
Designated Counsel

ESSEX COUNTY COURTS BUILDING, NEWARK, NEW JERSEY 07102
201-621-4700 FAX 201-621-5697

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COURT RULES

TRANSCRIPT DESIGNATION CODE

Da	Appendix to the defendant's brief (by counsel).
2Da	Appendix to defendant's brief (pro se).
Db	Defendant's brief (by counsel).
2Db	Defendant's brief (pro se).
Pa	Appendix to the State's brief.
T	Trial transcript dated November 8, 1993.
1T	Trial transcript dated November 9, 1993.
2T	Trial transcript dated November 10, 1993.
3T	Trial transcript dated November 12, 1993.
4T	Trial transcript dated November 15, 1993.
5T	Trial transcript dated November 16, 1993.
6T	Transcript dated November 17, 1993. (Summations & Jury Instructions).
7T	Transcript dated November 18, 1993.
8T	Sentencing transcript dated January 14, 1994.

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NEW JERSEY STATUTES

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PRELIMINARY STATEMENT

Solely out of jealousy and hatred, defendant Alberto Scabone, who claimed to routinely use the word "kill" just as an expression, even while making love, butchered his wife Monica by stabbing her 14 times. To save his own neck, he got rid of any witnesses to this carnage by slaughtering his 59 year old mother-in-law, Norma Estevez, and his 17 year old sister-in-law, Yannet Estevez, stabbing her 41 times, as they separately entered the apartment where he had already killed Monica. He inflicted 93 stab wounds. To further cover up this atrocity and to facilitate his flight, defendant then set fire to the apartment, risking the lives of other tenants and the responding firefighters. Defendant fled to Mexico, and soon began, in essence, to proposition a woman whom he would later marry. Despite having received threatening letters from the defendant before trial, she testified that, after years of deception, the defendant admitted, and later described these killings to her, in the context of threatening to do the same to her and her family.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On April 2, 1981, the Essex County Grand Jury returned Indictment No. 4225-80 against the defendant Alberto Scabone, charging him with the purposeful or knowing murders of Monica Scabone, Norma Estevez and Yannet Estevez, contrary to N.J.S.A. 2C:11-3 (Counts One, Two and Three) and second degree arson by purposely setting fire to the multiple family dwelling at 239

Bloomfield Avenue, Newark, in violation of N.J.S.A. 2C:17-1(a)(2) (Count Four). (Da1-5).[1]

Defendant was tried before the Honorable Eugene J. Codey, Jr., J.S.C. and a jury from November 9 through 18, 1993. A number of witnesses who at the time of the trial lived in South or Central American countries testified for the State. During trial, the court ruled that Ana Gonzalaz, the daughter of Norma and sister of Monica and Yannet, and Leopoldo Silva, Monica's former brother-in-law, were permitted to testify about the tumultuous relationship between the defendant and Monica as well as threats and fights defendant had with Monica, pursuant to N.J.R.E. 404(b). (2T46-7 to 48-4).

Prior to Elieth Camacho Alvarado, the defendant's second wife testifying, the trial judge held that the amended marital privilege, applied in this case and that Ms. Camacho was qualified to testify if she consented to do so. Also, the trial court ruled that Ms. Camacho was allowed to testify about the defendant's threat to kill Ms. Camacho and her family, as this threat was inextricably entwined with and provided the context for, his admission after years of deception, that he stabbed the three victims to death.

On November 18, 1993, the jury found the defendant guilty of the purposeful or knowing murders of Yannet and Norma Estevez, the passion/provocation manslaughter of Monica, and arson. (Da6-7; 7T36-15 to 38-3). The trial court, on January 14, 1994, sentenced the

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[1]The transcript designation code is on Page ix.

defendant to an aggregate sentence of eighty (80) years imprisonment with a forty (40) year parole disqualifier.[2] (Da6-7; 8T37-19 to 38-10).

COUNTER-STATEMENT OF FACTS

Defendant was a professional soccer player in his native land, Uruguay. (2T70-25 to 71-4). Defendant met and began to date Monica Estevez. Norma Estevez, Monica's mother, knew the defendant's family. In April, 1978, defendant and Monica were married in Newark. (2T51-6 to 14). Defendant and Monica lived at 239 Bloomfield Avenue, Newark, a three story frame building in the apartment behind the store on the first floor. There was one apartment on the second floor and another apartment on the third floor. (1T27-20 to 28-22).

Unfortunately, defendant and Monica's marriage was strained because of the defendant's uncontrollable jealousy and anger. As Ana Gonzalaz, Monica's sister, revealed, "They would fight about anything everything. ...He was very jealous." (2T52-12; 2T52-18). Defendant would physically and verbally fight with Monica. Defendant would "punch," "kick" and "attack" Monica, but Monica "defended herself." As Ana described, "{Monica} tried to hit {the defendant} but he's very strong ...but {Monica} had a strong character." (2T53-19 to 21; 2T55-5 to 13).

Because of his intense jealousy, defendant "didn't want {Monica} to get made up. He didn't want her to get dressed up. He didn't let

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[2]Defendant was sentenced in accordance with the statutes in effect in April, 1981, when these executions occurred. (8T32-24 to 33-1).

her have friends, male or female." (2T52-20 to 22). Monica and her sister Ana both worked at Stanley Tool in Newark. (2T53-1 to 5). Monica had a job "in the office" while Ana "worked (a) dirty, dirty job" "in the factory, production." (2T53-7 to 12). Since Monica worked "in the office," Monica "had to be fixed up, dressed up, and (the defendant) wouldn't let her wear make up." (2T53-13 to 14).

Defendant admitted that he cheated on Monica. Defendant even had the gall to admit that he used the money his mother-in-law Norma gave him to date other women behind his faithful wife's back. As the defendant boasted, "If I wanted to go out with the girls (Norma) would give me money. She was an excellent woman, my mother-in-law. Few mother-in-laws could anyone find like her." (5T56-18 to 21). Despite their tumultuous relationship, defendant and Monica had a son, named Alberto, nicknamed Tito.

In March, 1990, Ana went to the defendant and Monica's apartment because Monica was going to take Ana to the airport so she could fly to Uruguay to visit their ill father. Defendant and Monica were fighting. Defendant "hit (Monica) with the bottle that he was drinking from in the back." Monica and defendant "grabbed each other," then Norma "got in the middle to separate them." Defendant "insulted" Monica, then "yelled at her that he was going to burn the house." (2T57-1 to 58-7).

Monica and Ana's father died in November, 1980. Ana went to Uruguay in November and remained there. (2T58-17 to 23). In January, 1981, defendant and Monica along with Tito traveled to Uruguay. While Ana, defendant, Monica and Tito were visiting defendant's parents at their home in Uruguay, defendant and Monica "fought." "(Defendant) told (Monica) that he was going to kill her and the whole

family like he would always {tell} her." (2T59-9 to 14). Ana remembered that the defendant "many times" threatened to kill Monica and "always" menaced to burn down the house but she "never thought he was capable of doing that." (2T59-23 to 60-19).

Leopoldo Silva who had been married to Monica's sister Martha at the time of the murders had a friendly relationship with the defendant. Leopoldo was a former professional soccer player in Uruguay. Defendant and Leopoldo travelled together to several South American countries "for business with football, with soccer."[3] (2T68-23 to 70-15). They "went to put together some football games, soccer games with" the former Cosmos Soccer Club. (2T70-19 to 24).

Monica and the defendant went to the Silva home in Elizabeth many weekends for dinner. (2T71-19 to 72-4). During one of those weekend dinners, Monica, Yannet and Norma were in the kitchen talking with Martha. While the women were in the kitchen, the defendant, out of the blue, while watching television with Leopoldo, told Leopoldo, "{O}ne day I'm going to kill these three crazy women" and then "go to Mexico or Uruguay." Leopoldo "didn't give any importance to what {the defendant} said," and "smiled." Defendant then admonished, "{Y}ou're laughing, I'm talking seriously{.}" (2T72-5 to 73-5). Leopoldo knew that the defendant was referring to Monica, Norma and Yannet when he threatened to kill the "three crazy women."

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[3]Soccer is referred to as football in many European and South American countries.

In April, 1981, Norma and Yannet, Monica's 17 year old sister, were living with the defendant and Monica in their apartment. Defendant and Monica "were going to move" and Norma and Yannet planned on renting the apartment. (2T51-17 to 20). At this time, defendant was working at Nessor Alloy Corporation, a factory in West Caldwell that processed copper wire. (1T99-4 to 20). Jose German Delsid worked with the defendant at this factory. At the time, Mr. Delsid, who had since moved to Honduras, used the name Secundo Cunas because he was in this country illegally. He needed to support his family in Honduras and he could not work if it were known that he was here illegally. (1T98-14 to 99-5). Often, defendant, who had a distinctive black Camaro, would drive Delsid and another co-worker, Gerardo Guerrero, to work.

On April 2, 1981, Mr. Delsid took the bus from High Street, Newark, where he lived, to Mt. Prospect Avenue, then walked to the defendant's Bloomfield Avenue house so that the defendant could drive him to work for the 11:00 p.m. to 7:00 a.m. shift. Between 9:00 p.m. to 9:20 p.m., Mr. Delsid knocked on the door to the defendant's apartment, but no one answered. (1T100-17 to 101-1). As a result, Mr. Delsid walked to a nearby diner. The "Peruvian fellow," Mr. Guerrero, entered the diner and Mr. Delsid told him no one had answered when he knocked on the defendant's apartment door. (1T101-1 to 19).

Upon reaching the defendant's apartment, Mr. Guerrero loudly knocked on the door. Five minutes later, defendant answered. Defendant told his two co-workers, "{W}ait a minute, I'm coming back, I'm coming back." (1T101-20 to 102-2; 1T106-16 to 19). Ten to fifteen minutes later, defendant "came out, he came out with a

suitcase, a television and the child." Defendant disclosed to his co-workers that the boy was his son Tito. (1T101-23 to 102-7). Defendant put the suitcase and television in his Camaro. Then the three men and Tito drove to work in the defendant's Camaro between 9:55 p.m. and 10:02 p.m. (1T102-8 to 15; 1T107-18 to 108-10).

On the way to work, Mr. Delsid asked the defendant why he had his son Tito with him. Defendant retorted that "he had problems with his wife," "that the woman was very jealous." Then defendant asked if Mr. Delsid's wife "could take care of the little boy for him." Defendant mentioned that he {d}idn't have anywhere to take {Tito}," and "asked {Mr. Delsid} how much distance in time it would take to get to the border of Canada {or} Miami." (1T108-11 to 109-3). Also, defendant queried about the length of time it would take to get a passport for Tito. (2T3-17 to 20). After arriving at the factory at about 10:49 p.m., defendant and his co-workers entered while Tito was left in the car. (1T103-12 to 104-4; 1T109-6 to 7).

As soon as they arrived, defendant and Mr. Guerrero spoke to their foreman, Angelo Digiacomo, while Mr. Delsid went to work. Mr. Digiacomo found a "very quiet" defendant and a "real nervous" Mr. Guerrero in his office. (2T25-8; 2T28-21 to 29-4; 2T30-23 to 31-9). The "real nervous" Mr. Guerrero asked Mr. Digiacomo for his and the defendant's paychecks because "{the defendant's} wife {had thrown} him out of the house" and Mr. Guerrero "was going to take him to his house for the night." Mr. Digiacomo gave both men their paychecks. Mr. Guerrero said he would return to work afterwards. (2T29-5 to 30-20; 2T36-14 to 19). Defendant then holed up at Mr. Guerrero's apartment. Upon returning to work, Mr. Guerrero appeared very nervous the rest of the night. (2T37-23 to 25).

At 10:17 p.m., a fire alarm was sounded for the Scabone residence at 239 Bloomfield Avenue. (1T27-20 to 28-22). Firefighters were dispatched. Firefighter Joseph Lardiere, after the fire had been controlled, entered the first floor Scabone apartment and discovered in the bedroom, where the fire originated, the fully-clothed and stabbed bodies of Monica, Norma and Yannet who still had their shoes on, which was odd since the fire occurred at night. (1T30-8 to 24). The charred and stabbed bodies of 22 year old Monica and 59 year old Norma were on one bed, while the burnt and wounded body of 17 year old Yannet was on the other bed. Firefighter Lardiere recovered $1,908 in cash and some pieces of jewelry and letters from under one of the mattresses. (1T31-2 to 32-19).

Retired Battalion Chief Raymond Bishof opined that the fire was intentionally set. (1T93-23 to 25). "There was absolute evidence that an accelerant had been used to get this fire roaring and roaring quickly..." (1T61-11 to 13). Former Chief Bishof opined that the presence of a very definitive burn pattern on the bedroom floor showed that an accelerant was used to set this fire. (1T61-8 to 20). Former Chief Bishof explained that the fire originated in "the floor areas behind the beds..." damaging the underside of one of the beds' boxsprings "indicating without a doubt that the fire started at floor level and burned up into the beds." (1T64-21 to 65-1; 1T67-12 to 21).

The entire bedroom became engulfed in flames within two or three minutes. (1T68-8 to 16). The fire "almost simultaneous{ly}" extended into the kitchen. The fire then "vented itself out of the rear bedroom window, and engulfed...the rear of the

building...including the exterior porch leading to the second and third floor." (1T68-20 to 69-2).

Autopsies of Monica, Norma and Yannet revealed that all three had died prior to the start of the fire. (2T84-14 to 85-8; 2T87-18 to 88-1; 2T90-18 to 19). Yannet had third degree burns over most of her body. (2T81-4 to 10). Most of Yannet's scalp was burnt away and her bones were "charred." Also, Yannet's right arm was also completely burned off. (2T81-11 to 22). She had endured 41 stab wounds up to 5 1/2 inches in depth. (2T82-2 to 83-8).

Norma's body was also severely burned, including "third degree burns of the right side of the face and torso." (2T85-15 to 17). She had suffered 35 stab wounds. (2T88-d8 to 10; 2T85-15 to 17).

Monica's body was likewise severely charred. (2T94-23 to 24). Monica was stabbed a total of fourteen (14) times with wounds up to 4 1/2 inches in depth. (2T92-8 to 12). Dr. Tamburri opined that the cause of all three victims' deaths was massive internal bleeding. (2T85-9 to 18; 2T89-18 to 25; 2T90-22 to 91-2; 2T94-16 to 20).

After completion of their shift on April 3, 1981 at 7:00 a.m., Mr. Guerrero offered Mr. Delsid a ride home in the defendant's black Camaro. En route, they stopped at Mr. Guerrero's house where they picked up the defendant and Tito. Defendant entered the driver's seat and they then went to Mr. Delsid's High Street apartment to see if Mr. Delsid's wife "could take care of the little boy for him." Defendant dropped Mr. Delsid off at his apartment, then defendant suddenly left before Mr. Delsid could ask his wife about caring for Tito. (2T12-3 to 18-19).

Defendant collected his unemployment check. Then defendant returned to his apartment "to look for money" but did not enter

because "a lot of people" were there putting out the fire. (5T33-11 to 15; 5T34-12 to 3T-11). At about 1:00 p.m. defendant proceeded to see his travel agent Gloria DeMicco at Cruz del Sur Travel in Elizabeth. Tito was with the defendant, who looked "tired" and whose hair "was not straight". The Scabone family had been regular customers of Ms. DeMicco. (3T76-11 to 78-22). Defendant wanted to purchase tickets for himself and Tito to Uruguay on the 8:52 p.m. Land Chile flight. Defendant did not have enough money to buy them. (3T79-1 to 82-20), and he left the travel agency and never paid for the tickets. (3T82-21 to 83-19).

Extensive efforts were made to locate defendant, including surveilling parks when he would play soccer and various soccer and Spanish clubs. (4T10-3 to 13-14). Information was then disseminated to the wire service used by all law enforcement agencies in the United States. (4T13-16 to 20).

Elieth Camacho Alvarado, a native of Costa Rica, was on vacation in Mexico City during Easter week of April, 1981. (3T40-8 to 11). Easter Sunday was April 19, 1981. Around Good Friday, Ms. Camacho was in a park with some friends, and she saw Tito "playing with some pigeons." "{T}he little boy ran towards the street behind the pigeons," and Ms. Camacho "ran to stop the little boy so a car wouldn't run him over." At this point, defendant came up to Ms. Camacho and "said that it was his son." (3T40-23 to 41-4). Ms. Camacho queried where Tito's mother was. Defendant answered that "he was a widower." (3T42-22 to 43-3).

Defendant asked Ms. Camacho where she was from. She replied that she was from Costa Rica. Defendant told Ms. Camacho that "he was going to go there, if {she} would give him {her} number so that

when he arrived there he would call {her}; if {she} could help him somehow because he didn't know Costa Rica." (3T41-25 to 42-7). Ms. Camacho gave the defendant her telephone number and he left, entering his black Camaro. (3T42-8 to 21).

A month later, defendant came to Costa Rica with Tito and asked Ms. Camacho "if {she} could find a hotel for him..." (3T43-23 to 44-2). At some point, defendant's mother visited and took Tito with her. (3T44-3 to 5). Defendant told Ms. Camacho that his name is Marguerito Ramirez Rodriguez and that he is a Mexican. (3T39-23; 3T44-9 to 11). Ms. Camacho and the defendant then began to date.

After they began to date, defendant told Ms. Camacho that his first wife, mother-in-law and sister-in-law all were killed in an automobile accident. (3T44-8 to 45-7). Defendant was not working at this time, but he later had a job working on a ship, telling Ms. Camacho that "he was in the Navy, in the American Navy." (3T45-8 to 12). Defendant went to sea. Upon his return, defendant and Ms. Camacho settled in Veracruz, Mexico where they "went to make {their} life as husband and wife, to live together." (3T45-13 to 22).

Defendant and Ms. Camacho began to fight because he was "very jealous" and there was a dispute regarding the timing of her pregnancy. (3T46-1 to 3). Ms. Camacho gave birth to their baby boy Alberto Camacho Alvarado on January 31, 1983. (3T46-4 to 15). Defendant and Ms. Camacho continued to have marital problems. As a result, when the baby was about eight months old, Ms. Camacho moved in with her parents in Costa Rica. (3T46-16 to 25). Ms. Camacho and her father started a restaurant. (3T47-5 to 6). However, defendant

followed Ms. Camacho to Costa Rica and the two resumed living together. (3T47-5 to 12).

Defendant and Ms. Camacho still had a tumultuous relationship because "he went around with a lot of women" and "{h}e was always very jealous of everything, of things that he imagined." (3T47-13 to 21). Ms. Camacho gave up her restaurant in an attempt to get rid of the defendant. Defendant, however, was "always looking for Ms. Camacho," "didn't leave {her} alone," and Ms. Camacho took the defendant back. (3T47-22 to 48-1). On October 15, 1985, Ms. Camacho gave birth to a little girl. (3T50-6 to 7). Defendant and Ms. Camacho separated, then reconciled numerous times. (3T48-23 to 49-1)

Despite their stormy relationship, and the defendant's jealousy and philandering, defendant and Ms. Camacho married in June, 1987. (3T49-13 to 17). Ms. Camacho still loved the defendant. (3T50-16 to 17).

After their marriage, defendant's parents were going to visit the defendant and Ms. Camacho. When Ms. Camacho picked up the airline tickets for the defendant's parents, she noticed that their last name was listed as Scabone on their tickets. This made Ms. Camacho suspicious of the defendant's true identity "because before {the defendant} had told me... about a problem that he had had in the United States" regarding a fight over a girl. As a result, Ms. Camacho contacted her girlfriend in Los Angeles, Denise Rodriguez, and asked her to investigate. (3T50-21 to 52-2; 2Da14-15).

Once the defendant's parents arrived, the "whole thing turned into complete insanity." (3T52-15 to 16). Defendant and Ms. Camacho's marriage deteriorated further and she told the defendant "that the best thing was that we separated, that we got divorced."

(3T52-17 to 25). Divorce proceedings were instituted. (3T53-1 to 15). Once the defendant discovered this, matters "got worse, a lot." (3T56-18 to 24). Defendant was then arrested. (3T58-22).

At the end of 1988, a few days after the defendant's arrest, Ms. Camacho's friend Denise from Los Angeles warned Ms. Camacho that the defendant was wanted for killing "his wife and his wife's family" and was "a very dangerous person". (3T57-25 to 58-22). A disbelieving Ms. Camacho, "after a week of thinking about it and turning it over in {her} mind," contacted Interpol, the international police, which verified this information. Contrary to Ms. Camacho's express wish, Interpol broadcasted this information in the media, causing tremendous embarrassment to herself and children. (3T59-4 to 25). In 1989, after receiving information regarding the defendant's whereabouts, Investigator Ruben Contreras began to investigate if the case against the defendant was still viable and located a number of fact and expert witnesses. (4T21-23 to 32-22). Ms. Camacho remained in Costa Rica for about a year, then, while the defendant was still in prison, moved to Guadalajara, Mexico with her children. She only told a godparent of one of her children of the move. (3T60-1 to 61-7).

The child's godparent violated his promise to keep Ms. Camacho's move a secret because months later, "he came and knocked on {Ms. Camacho's} door, and there he was, Alberto." (3T61-10 to 16). Upon seeing the defendant, "the children went crazy seeing their father" and the defendant told Ms. Camacho that "everything was going to change like always, the same thing." (3T61-18 to 22). At first, defendant "behaved very well," but matters became worse "to the point in which he was threatening {Ms. Camacho}." (3T61-25 to 62-4).

During Christmas, when Ms. Camacho's mother and sister visited, defendant threatened that "he was going to kill all three of them." Ms. Camacho confronted the defendant about the prior killings, and asked, "{Y}ou're going to do the same thing that you did that one day." Defendant retorted, "{I}f I have to do it, I'm going to do it again." (3T62-8 to 23).

At some later point, defendant revealed the details.

> He told me that one day he had had a fight with his wife; that they had a knife...above the bed where they slept; that she had grabbed it and that when they were fighting, he took it away from her, and he wounded her. And then he got very afraid, and he killed her.
>
> ...
>
> Then her mother and the girls' sister, they weren't there, and when the woman arrived he killed her also, and when the little girl arrived he killed her, too.
>
> (3T63-13 to 64-2).

Defendant stated to Ms. Camacho that Tito "was there seeing everything" and said "kill them, kill them." (3T64-9 to 14).

Defendant's emotional state was "very, very bad" and Ms. Camacho feared that the defendant was "going to kill {her}." (3T63-3 to 6). Later, defendant was committed to a sanitarium. (3T65-11 to 13). Fearing for her life, Ms. Camacho went to the Mexican police who were disinterested because the killings did not occur there. (3T64-23 to 65-1). In January, 1993, Ms. Camacho went to the American Embassy in Guadalajara and spoke with FBI Agent Gilbert Alvarez. Ms. Camacho asked Agent Alvarez to "help {her} because she was very afraid" and "knew he was going to kill {her}." (3T65-3 to 19). She told Agent Alvarez that the defendant confessed to murdering his first wife and in-laws and that if the defendant found out what {she} was doing, he would kill {her}." (3T66-5 to 9). In

light of the Interpol fiasco, Ms. Camacho feared that the information once again would be publicized. (3T66-10 to 13).

A telex between Agent Alvarez and law enforcement authorities in Newark confirmed the defendant's wanted status. Investigator Ruben Contreras went to the American Embassy after speaking with Agent Alvarez to take a statement from Ms. Camacho, which he did. (4T34-7 to 39-15). Arrangements were made to bring the defendant to Dallas, Texas, where he was arrested by Investigator Contreras. Defendant then was brought to New Jersey. (4T33-2 to 22). After the trial testimony was completed, the judge had to admonish the defendant to stop sending a "barrage" of terrorizing letters to his second wife, Ms. Camacho Alvarado in Mexico. (5T109-5 to 110-19).

Defendant challenges the credibility of the State's witnesses, but to no avail. The most important component of Ms. Camacho's testimony - her disclosure of the defendant's recounting of the killings - is corroborated by objective evidence. Firefighter Lardiere stated that it was unusual for an evening fire that all the women were still dressed and had their shoes on. This is consistent with the defendant's confession that he killed Monica during a fight; then, as Yannet and Norma arrived later, he killed them.

Defendant makes much of the fact that after his first meeting with Ms. Camacho, Agent Alvarez sent a telex which said that Ms. Camacho revealed that the defendant was not aware that she knew of the killings. (5T86-17 to 25). This does not in any way indicate that the defendant did not confess to the murders to Ms. Camacho. This same telex warns to protect Ms. Camacho's identity, which was included because of her concern for her safety. She may have been trying to avoid a re-run of the fiasco with Interpol, which dishonored her

wishes and broadcasted information. Also, Ms. Camacho had a total 4 to 7 later interviews with Agent Alvarez and another agent and could have given specific information about the defendant's realizing that she was aware of the defendant's murders at these later interviews. (5T89-25 to 90-25).

Mr. Delsid, who had a seasonal coffee business, was given $2,000 to make him whole and cover the financial losses incurred by his absence resulting from him testifying at trial. (1T96-6 to 98-12). The case was originally scheduled for trial in June, 1993, and Mr. Delsid's business was busiest from October through March. He did not request any money when it appeared the trial would be held off-season.

In contrast, defendant, who laughed countless times when he was on the witness stand (8T30-10 to 17), concocted an inherently incredible tale, undercut by the objective proofs. After playing soccer that day with Guerrero and Marguerito Ramirez, Ramirez, who "had a girl waiting to see him in Elizabeth," wanted the defendant to go with him. Defendant saw Monica, who told him to purchase milk. (5T19-19 to 20-6). Defendant told Monica he would do the errand, but lied to her, and said that Ramirez did not have a car to go to work thus, the defendant had to take him. (5T20-9 to 12). Defendant, Ramirez and Guerrero then went to Elizabeth where "they were quite a long time with the girls." (5T21-12 to 16).

Defendant testified that he arrived home at 9:40 p.m., apparently never encountering the "real" arsonist/murderer who, based on the objective evidence, had to have just set the fire. Defendant and Ramirez left the groceries by the door. Tito "started to drag

one of them." Defendant opened the front door, then went about fifteen feet and went inside the apartment.

Upon entering the apartment, defendant saw some fire and the bodies in the bedroom, poured milk and juice on the fire, touched each of the bodies, (one of which was in the kitchen, not the bedroom), in several places looking for a pulse or heartbeat at which time "there was just smoke. That's all...a little fire..." (5T22-25 to 24-12; 5T59-2 to 61-8; 5T64-19 to 66-6). "It was a flame like half a moon" by Norma's feet. (5T63-12 to 13). He then headed outside, and in doing so, encountered the "Italian guy," apparently referring to Mr. Mellilo, the owner of the building, who was going up to his own apartment, yet did not tell him about the fire! (5T67-1 to 25). It is interesting that defendant decided to, himself, make the determination that the victims were dead, rather than attempt to get them out, specifically since in his version the fire was only slight. After exiting the building, carrying his son, the defendant claims he then re-entered it with Mr. Guerrero, who had died before the trial (4T25-16 to 26-15), and put "a little milk" on the fire in the bedroom. When asked why he did not fill a cooking pot with water and throw it on the fire, defendant replied, "I don't know." (5T69-20 to 22). Defendant then left the apartment but re-entered it yet again to retrieve his son's passport. (5T68-15 to 70-12). At this time, in contrast to Chief Bishof's testimony, the defendant claimed "there wasn't any fire anymore...was just a little bit of smoke." (5T70-16 to 19).

Defendant asserted that he had a television and "bag with two suits" in the trunk of his Camaro. "It was two suits and a small television set. You could connect it to the cigarette lighter in the

car." Regarding the suits, defendant claimed, "I had it there for some time because sometimes when I didn't work I would go to a dance..." (5T74-20 to 25).

The defendant testified that this was such a "chaotic moment" for him that he "really couldn't make a decision," so deferred to the advice of two co-workers who suggested he wait until the next day to call the police to report the horrendous murders of his family. Defendant, however, never reported these incidents. (5T71-12 to 72-15). Rather than calling the police, ever, defendant went to work, got his paycheck, then hid overnight at the home of a co-worker. (5T71-12 to 72-15; 5T32-1 to 33-1). Two to three minutes after observing the horrendous site of the dead bodies of his beloved wife, the mother-in-law he loved and the sister-in-law whom he considered to be a little sister, defendant decided, "Let the police take care of it..." and left to get his check. (5T70-21 to 24). Yet, defendant, despite the chaos, had the presence of mind to go to work with his co-workers and pick up his paycheck then made arrangements to hole up in Guerrero's Harrison apartment overnight, and the next day, collected his unemployment check, returned to his house to get more money, but did not enter because there were a lot of people around, checked his travel agency to get the quickest flight (3T79-2 to 80-17) to Uruguay, and got Ramirez' birth certificate so he could work when he fled. (5T32-1 to 37-19).

According to the defendant, he left for Mexico at 5:00 p.m. The grieving widower claimed that he met Ms. Camacho at a night club in Gulfito, Costa Rica on April 17, 1981. (5T49-1 to 50-10).

Defendant contended that he "turned" himself in when authorities came to him on February 1, and gave them $300. (5T33-6 to 20). Ms.

Camacho allegedly told him to go to Acapulco. (5T53-22). Two days later, defendant was arrested.

In an attempt to explain away his statement to Mr. Silva that he would kill the victims, then go to Mexico or Uruguay, the defendant concocted the story that he uses the word "kill" as an expression. "I say that when I'm going to make love. The French say it when they make love also..." (5T46-11 to 24).

After providing a detailed, albeit incredible account of the events of the night in question, thirteen years later, defendant stated he "remember{ed} almost everything" because "{t}here are things that one doesn't forget..." (5T77-12 to 18). Yet, in a letter to Elieth Camacho Alvarado which defendant wrote while in the Essex County Jail, defendant stated "I don't remember what happened that night." (5T77-19 to 80-3).

LEGAL ARGUMENT

POINT I(A)

JUDGE CODEY PROPERLY EXERCISED HIS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S JEALOUSY TOWARD HIS WIFE MONICA, HIS THREATS TOWARD HER AND HER FAMILY (INCLUDING A THREAT TO BURN THE HOUSE DOWN), HIS ASSAULT UPON HER AND FIGHTS WITH HER, AND DEFENDANT'S STATEMENT THAT HE WOULD "KILL THESE THREE CRAZY WOMEN," THEN GO TO MEXICO OR URUGUAY; THIS EVIDENCE REVEALED HIS ENDURING HATRED AND HOSTILITY TOWARD THEM, AND PROVIDED HIS MOTIVE, AND ESTABLISHED HIS INTENT TO COMMIT THE PURPOSEFUL OR KNOWING MURDER OF THE THREE WOMEN

The defendant contends that the trial judge should not have allowed the State to produce evidence of defendant's relationship with his wife, Monica, which included his jealousy toward her, and threats, acts and statements of intended violence toward her and her family. Defendant argues these incidents were too temporally remote, not relevant toward his mental state since he denied the homicidal acts, overly prejudicial and not the subject of a proper limiting instruction.

The State submits that the trial judge properly exercised his discretion in admitting these incidents (while excluding others) which revealed defendant's enduring hostility toward the victims and established his intent and motive to kill his wife, Monica, her mother, Norma, and her sister, Yannet. The incidents were not overly remote particularly since they dealt with human emotions which are best proven when long-established, and since they were part of a continuing pattern. The State was entitled to marshall this evidence to shoulder its burden of proving three purposeful or knowing murders beyond a reasonable doubt and disproving passion/provocation (which was an issue since day one because of Elieth Camacho Alvarado's statement to police relating defendant's account of the

killings) and to establish defendant's motive to kill these women whom he professed to love. This evidence was not unduly prejudicial and the trial court's strong admonitions to the jury, which the defendant agreed to, precluded any potential for mis-use of this evidence.

The evidence at issue was the subject of extensive argument and a well-considered ruling by Judge Codey, before being related by witnesses Ana Gonzalaz (sister of Monica Scabone) and Leopoldo Silva (former brother-in-law of Monica Scabone). The day before the trial started, defendant's attorney stated that it had been agreed that some matters which ordinarily would have been argued pre-trial would be addressed "as they come up, when the necessity for them arises during the course of the trial...we have not forgotten the pretrial applications." (T3-8 to 19). In his opening statement, the prosecutor previewed evidence of defendant's threats to kill the victims, to be related by their relatives. (1T9-16 to 10-1).[4] After a brief colloquy between counsel, the defendant's attorney said he was "not necessarily withdrawing any objection" but would "hold off until a more appropriate time...I really don't have any objection to the brother-in-law and probably none to the sister, but I will raise it again when the time comes for them to testify if I need to." (1T11-9 to 15).

Before she testified,the prosecutor made a proffer as to Ana Gonzalaz' testimony regarding defendant's prior treatment of the victims. (2T39-7 to 40-19). Consistent with defendant's attorney's

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[4] This information was contained in materials which defendant had received in discovery. (1T10-24 to 11-12).

representation at the argument during the prosecutor's opening, he did not challenge the admissibility of Mr. Silva's testimony during counsels' debate over the admissibility of Ms. Gonzalaz' testimony. (2T43-15 to 16).

After the said debate, the Court ruled that the probative value of their proferred testimony outweighed its possibility of prejudice. Citing State v. Engel, in particular, the evidence was admissible to show "a continuing, enduring hostility between the parties which I think is the underlying thing here." (2T46-7 to 47-16). The Court specifically found the evidence admissible under State v. Cofield, 127 N.J. 328 (1992). (2T47-21 to 48-4).

In her testimony, Ms. Gonzalaz recalled the following that defendant and Monica "fought a lot" about "anything, everything," specifically because defendant "was very jealous" and didn't want Monica to "get made up" or "dressed up." He "didn't let her have friends, male or female." (2T52-6 to 24). She further stated that Monica "defended herself" physically during fights with the defendant. (2T55-5 to 9). During March of 1980, she observed a fight between defendant and Monica during which he hit her with a soda bottle, insulted her, and yelled "that he was going to burn the house." (2T56-23 to 57-25).

In January of 1981, when they were all in Uruguay, at the home of defendant's parents, defendant "told her that he was going to kill her and the whole family like he would always {tell} her." (2T58-22 to 59-13). She also recalled that she heard the defendant threaten "many times" to kill Monica and that "he always said" he would burn down the apartment. (2T59-23 to 60-4).

Leopoldo Silva, previously the husband of Monica's sister, Martha (2T68-21 to 24; 2T71-12 to 15), next testified that the defendant, with whom he was quite friendly (2T70-5 to 12; 2T71-19 to 25), once told him that at "any moment" he was going to "kill these three crazy women" (Monica, Norma and Yannet), then go to Mexico or Uruguay. (2T72-8 to 74-21).

The defendant contends that the foregoing evidence was admitted in violation of N.J.R.E. 404(b). However, the defendant's jealousy, that treatment of Monica which did not involve threats of violence, and his statement of intention to Leopoldo do not constitute "other crimes, wrongs, or acts," hence were not even encompassed by that rule.

In State v. Porambo, 226 N.J. Super. 416 (App. Div. 1988), this Court found that the defendant's possession of two loaded handguns upon arrest was "not in itself a crime" hence, "did not necessarily constitute other crimes evidence subject to Rule 55." Id. at 424-425. Likewise, in State v. Ribalta, 277 N.J. Super. 277 (App. Div. 1994), this Court held that evidence that defendant was seen giving a large sum of money to a known drug trafficker "does not fall under Evid. R. 55, because giving money to another person is not a crime in itself, and thus may not constitute other crimes evidence subject to Evid. R. 55." (citing Porambo) Id. at 293. Similarly, in State v. Brown, 138 N.J. 481 (1994), the Supreme Court stated, "Neither the testimony regarding defendant's sexual acts with another woman nor (the co-defendant's) testimony that defendant pointed the rifle at her the night before the murders and said 'stick 'em up' constituted evidence that implicates Evidence Rule 55, because those acts were neither criminal nor civil wrongs, as required by the Rule." (Citing Porambo). Id. at 534.

In adopting N.J.R.E. 404(b), our Supreme Court did not intend to broaden the exclusion of evidence provided for by Evid. R. 55. Rather, the intention was to conform to the language of the rule's federal counterpart, while maintaining/incorporating our State's interpretative case law. Contra Biunno, Current N.J. Rule of Evidence, Comment 7 to N.J.R.E. 404(b).

For example, N.J.R.E. 404 is conspicuously absent from mention in an "Analysis of Significant Rule Changes". (Pa1-13). Similarly, the accompanying "Summary Analysis of Evidence Rule Changes" states that N.J.R.E. 404 "generally follow{s} the federal formulation without substantial change in New Jersey practice except to render clearly inadmissible proof of a trait of character for the purposes of drawing inferences as to conduct on a specific occasion." (Emphasis added) (Pa16).

Similarly, the Report of the New Jersey Supreme Court Committee on the Rules of Evidence stated, "Frequently, language changes were made without intending any change in substance," and that "some important changes...are noted in the Comments." The Comment which follows N.J.R.E. 404, discusses several points of comparison among the new rule, the federal and the previous rule, and states regarding one that "This formulation is intended to encompass relevant New Jersey case law." See e.g. State v. Cofield, 127 N.J. 328 (1992); State v. Stevens, 115 N.J. 289 (1989)." Nowhere therein is the addition of the "or acts" language even mentioned, muchless deemed to broaden the rule's exclusionary breadth in contravention of existing state case law.

Even if a broader interpretation of the rule were to apply, State v. Kittrell, 279 N.J. Super. 225 (App. Div. 1995);

United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988)), the State maintains that the defendant's jealous state of mind toward Monica and his stated intent to kill the victims simply do not constitute "acts." Moreover, the feeling of jealousy, a common human emotion, can hardly be deemed to impugn one's character. For these reasons N.J.R.E. 404(b) was simply inapplicable to a portion of the disputed evidence.

In any event, its admission was proper and certainly did not constitute the abuse of discretion which is required to justify a reversal. State v. Brown, supra at 531; State v. Erazo, 126 N.J. 112, 131 (1991). It should be noted that in exercising this wide discretion afforded him, Judge Codey also excluded evidence offered by the State concerning abuse of Monica, when he deemed it appropriate.

For example, the defendant was allowed to place into evidence a photograph of Monica formally attired at a Uruguayan club to rebut the State's contention that defendant did not allow her to dress up. The State was not allowed to bring out the fact that after the picture was taken, the defendant became incensed that Monica danced with another man, kicked her in the stomach, beat her badly, and threatened to kill everyone in the club. (3T10-21 to 14-5; 4T2-5 to 3-15).

Moreover, a wider range of evidence is admissible to establish the purposes cited here - intent and motive - than is permitted in support of other issues. State v. Crumb, 277 N.J. Super. 311, 317 (App. Div. 1994). "Otherwise, there would often be no means to reach and disclose the secret design or purpose of the act charged in which the very gist of the offense may consist." Id.

In fact, evidence of arguments, violence and threats involving a defendant and the person he later is charged with killing, have long been admitted to show the defendant's motive and intent to kill. See, e.g., State v. Ramseur, 106 N.J. 123, 266-267 (1987) (defendant's threats and assaults on his girlfriend demonstrated his enduring jealousy and hostility toward her in trial for her murder); State v. Engel, 249 N.J. Super. 336, 372-374 (App. Div. 1991), certif. den. 130 N.J. 393 (1991) (evidence of defendant's assaults and threats against his wife deemed highly relevant as to motive for her murder); State v. Machado, 111 N.J. 480, 488-489 (1988); State v. Donohue, 2 N.J. 381, 388 (1949); State v. Schuyler, 75 N.J.L. 487, 488 (E.&A. 1907).

The defendant attempts to evade this firm precedent by arguing that in those cases, except for State v. Engel, "there was no dispute that the defendant killed the victim, but rather in issue was the defendant's culpability for having committed the act." (Db18). The State strongly disagrees with that interpretation. In State v. Stevens, supra, a prosecution for official misconduct based on the officer's sexual abuse of female citizens under the guise of body searches, the Supreme Court made it clear that the State can introduce other crimes evidence to meet its burden of proof even though the defendant does not specifically contest the element to be proved.

> Despite defendant's denial that the searches occurred, the State was required to prove both their occurrence and defendant's unlawful purpose in conducting the searches. Thus, defendant's unlawful purpose was a genuine issue in the case... Defendant's denial that the searches occurred did not relieve the State of its burden to prove that his purpose was to gratify his sexual desires, and not merely to discharge his official duties.

Accord United States v. Jones, 982 F.2d 380, 382 (9th Cir. 1992) (Prior bad acts admissible when defendant denies

participation in crime but does not contest knowledge and intent elements); United States v. Miller, 725 F.2d 462, 466 (1984) ("{T}he Government need not await the defendant's denial of intent...").

Indeed, in our State, evidence of a defendant's bad acts against the victim has been properly admitted even when the defendant denied committing the actus reus. For example, in State v. Machado, supra, where defendant's statement, "I'm going to kill that bitch," and his assault, and shouting at her were properly admitted, the defendant did not concede the homicidal act. Id. at 481. See also, State v. Engel, supra, (defendant denied hiring a hit man to kill his wife; defendant's prior threats and violence against her were properly allowed in); State v. Donohue, supra (defendant denied killing his wife; his prior beatings of her were appropriately admitted at trial for her murder); State v. Lederman, 112 N.J.L. 366 (E.&A. 1933) (defendant denied killing her husband; her earlier attack on him was properly received in evidence at trial for his murder); State v. Davidson, 225 N.J. Super. 1 (App. Div. 1988), certif. den. 111 N.J. 594 (1988) (defendant denied spray-painting racist graffiti on black family's home; evidence that he poured rice and sugar in the gas tanks of their two cars previously was properly admitted). Accord, State v. Lynch, 393 S.E.2d 811, 814-816 (N.C. 1990).

In the present case, the defendant certainly did not concede that he had a purposeful or knowing state of mind, hence the State was required to prove that. Cf. State v. Stevens, supra at 301 (Evid. R. 55 didn't permit admissibility of evidence on an issue which defendant concedes). Moreover, it was clear from a pre-trial

statement by Elieth Camacho Alvarado that the issue of passion/provocation was very much a part of the case (2Da18) and the State needed to bring out evidence of defendant's prior threats and violence toward her to disprove that the killing was committed in the heat of passion resulting from a reasonable provocation. See State v. Crumb, supra (On interlocutory appeal, this Court found defendant's white supremacist materials admissible in murder trial involving black victim; Court noted State's burden of proving purposeful or knowing murder and also noted the evidence was needed to disprove issues raised in defendant's pre-trial statements).

In fact, the defendant, in this case, in consultation with his attorney, did request that passion/provocation manslaughter be charged as to the killings. (5T99-3 to 7; 5T104-15 to 109-3). During summation, defendant's attorney argued for an outright acquittal while twice also reminding the jurors of the passion/provocation option - the best of both worlds. (6T20-12 to 20; 6T23-13 to 24).

The State was also entitled to bring out the disputed evidence to prove defendant's motive. While not an element of the offense, the defendant received the benefit of the standard jury charge which provided that while the State was not required to prove motive, the jury could consider the absence of a motive in determining defendant's guilt. (6T76-9 to 18). The defendant's denial of the murders was apparent even before trial from the lack of any notice of a defense implicating a diminished capacity, or similar defense. (5T103-1 to 8). The defendant did in fact testify, denied the killings (5T15-18 to 20), proclaimed attachment to a picture of his wife (5T40-14 to 19), and professed to love and care for the three women he was on trial for slaughtering. (5T55-25 to 57-13). The State was entitled to

use the disputed evidence to establish the defendant's motive and intent to commit the purposeful or knowing murders of the three victims.

Defendant also claims that the prior incidents were not, as provided in State v. Cofield, supra at 338, "reasonably close in time to the offense charged."[5] The State first observes that the Cofield factors are not intended as a sine qua non for admissibility - not an end in themselves but simply guides to prevent "the over-use of extrinsic evidence of other crimes or wrongs." Id.[6]

As quoted by defendant, the Supreme Court in State v. Ramseur, (which held prior acts of abuse which occurred 1 1/2 years before the murder to be admissible) stated, "The temporal remoteness of a past wrong affects its probative value." In so stating, the Court in Ramseur was citing State v. Schuyler, supra. The

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[5]The incidents which are the subject of a discrete time reference are defendant's hitting Monica with a bottle and threatening to burn the house, in March of 1980 (2T56-23 to 57-25), and telling her he would kill her and the whole family, in January of 1981 (2T58-22 to 59-13). Since other incidents did not have such a strict time frame, because they were continuous, the farthest they could relate back would be April of 1978 when defendant and Monica were married in Newark, after meeting in Uruguay - a period of three years. Ana Gonzalaz, who related the other incidents, had not known defendant in Uruguay. (2T51-6 to 14).

[6]By way of example, another factor enunciated in Cofield is that the other incident "must be similar in kind" to the offense charged. Id. Yet, in State v. Crumb, supra, a murder case, the other incidents involved racist writings and drawings. In State v. Brown, supra, a capital murder case, some of the other Evid. R. 55 evidence involved the co-defendant's putting up bail money for him on an unrelated offense, and defendant's alleged sexual relationship with another woman.

observations of our State's former highest court in Schuyler (which allowed evidence of a ten year old altercation between the defendant and the murder victim) are particularly germane to the present case:

> 'Long-continued animosity and ill will are better evidence of a state of mind which will ripen into deliberate murder than the hasty ebullition of passion. The theory of the law of murder is that it is done upon premeditation, and the motives for such an act are not less powerful because they are the result of ill feelings entertained for years.' (Citation omitted). (Emphasis added).

{Id. at 488}.

This observation is no less compelling today. For example, in State v. Engel, supra, at 374, the Court noted the defendant's previous violence against the victim was "in close temporal proximity to the killing and disclosed an enduring hostility toward the victim." (Emphasis added). In State v. Hasher, 246 N.J. Super. 495, 498 (Law Div. 1991), the Court suggested the applicability of a Sands[7] type analysis in the Evid. R. 55 context. This would of course mandate consideration of intervening incidents, occurring after the less recent ones. State v. Sands, supra at 144-145.

This "totality of circumstances" approach is in accord with the view of Professor Wigmore, who writes, "Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general admissible. What that limit of time should be must depend largely on the circumstances of each case, and ought always to be left to the

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[7] State v. Sands, 76 N.J. 127 (1978), mod., State v. Brunson, 132 N.J. 377 (1993).

discretion of the trial court." (Emphasis in the original) 2 Wigmore, Evidence sec. 396 (Chadbourn Rev. 1979). He goes on to observe:

> In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful they are to show the state of the feelings. A single expression and a single act of violence are most frequently the result of a temporary passion, as evanescent as the cause producing them. But a long-continued course of brutal conduct shows a settled state of feeling inimical to the object. (emphasis in the original) (Citation omitted).
>
> 2 Wigmore, Evidence, sec. 397 (Chadbourn Rev. 1979).

See also State v. Carroll, 242 N.J. Super. 549 (App. Div. 1990), certif. den., 127 N.J. 326 (1991) (in trial for murder of daughter of defendant's paramour, evidence of "stormy" relationship, involving constant arguments between defendant and paramour, and several separations apparently encompassing four year marriage was admissible); State v. Donohue, supra (prior beatings of defendant's wife, particularly one occurring eight years before her murder admissible at trial for her murder); State v. Myers, 7 N.J. 465 (1951) (defendant's stabbing, and separate assault upon his wife, both three years before her murder admissible at murder trial); State v. Lynch, supra at 816 ("When a husband is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will toward the victim" (citation omitted)). Accord, United States v. Burk, 912 F.2d 225, 228 (8th Cir. 1990).

This case involved the long-established antipathy which defendant harbored toward a discrete set of individuals which manifested itself on numerous occasions in the form of threats,

assaults, and statements of intended murder during his three year marriage, and the admission of this evidence was completely proper.

The defendant next claims that the introduction of the disputed evidence was overly prejudicial to his case. However, Judge Codey specifically found that the probative value of the evidence "clearly outweighs any problem that it might cause for Mr. Scabone." (2T46-7 to 11). This finding certainly did not constitute a "clear error of judgment" and should be upheld. State v. DiFrisco, 137 N.J. 434, 496 (1994). As stated in Stevens, supra at 308, quoting State v. West, 29 N.J. 327, 335 (1959):

> That evidence is shrouded with unsavory implications is no reason for exclusion when it is a significant part of the proof. The unwholesome aspects, authored by the defendant himself, if the evidence be believed, were inextricably entwined with the material facts.

{Stevens, supra at 308}.

The potential for prejudicial mis-use of this evidence was eradicated by Judge Codey's carefully drafted and unequivocal admonition to the jury. In complete contravention to his position at trial, the defendant now criticizes this limiting charge, yet does not specify the exact alleged deficiency.

After ruling the testimony of Ana Gonzalaz and Leopoldo Silva admissible (although defendant did not oppose Silva's testimony), Judge Codey offered to have defendant's attorney propose a jury instruction; otherwise, he would be receptive to any revisions the attorney requested to the one the court would prepare. (2T46-12 to 17). There is no indication defendant's attorney did in fact propose his own charge. Toward the beginning of Ms. Gonzalaz' testimony, the Court struck one of her responses which indicated that defendant

punched, kicked and attacked Monica. (2T53-19 to 21). The court then admonished the jury as to the use of the other incidents evidence:

> At the end of the case I'm also going to give you a limiting instruction in detail explaining the sole purpose for why these certain items are being allowed in. I'll ask you to accept that evidence and be prepared at the end of the evidence to factor it in for one particular area, the fact that Mr. Scabone, if you believe what the witness and other witnesses might say, had formerly maybe broken the law in regard to Mrs. Scabone or other family members, it's not in any way to be shown as a predisposition to commit a crime.
>
> Therefore, because he may have committed a crime before, then if he did that again he might as well be guilty of these charges, too. That's not the way the system works.
>
> (2T54-8 to 55-2).

At the conclusion of the testimony, the trial judge read his proposed charge to counsel and solicited their comments. (5T95-9 to 97-3). Defense counsel asked that the court directly state that the prior incidents could not be used as "substantive proof that he committed the crime," (which was already contained in the court's proposed charge in one form or another, four times) then said, "Your Honor, I don't really object to the charge as the Court has prepared it." (5T97-4 to 11).

During his charge to the jury, the Court stated:

> The State presented testimony during the course of this trial of a number of people. Some of those were Ana Gonzalaz, who is the sister of Monica Scabone and the sister of Yannet Estevez, and Leopoldo Silva, a brother-in-law of some of those individuals, pertaining to incidents and statements that were allegedly made and done by Mr. Scabone prior to the April 2, 1981 date set out in this indictment that brings us here for this trial.
>
> You also heard testimony from Mr. Scabone's present wife, Mrs. Camacho Alvarado, regarding a threat that was allegedly made to her during the course of their marriage. This evidence was offered for a very limited and specific purpose.

As I told you during the course of the trial, evidence that a person has committed a prior wrong on a specified occasion is inadmissible to prove his disposition to commit the crimes for which he has been indicted and is presently on trial. In other words, such evidence from Ms. Gonzalaz, Mr. Silva and Mrs. Camacho Alvarado cannot be considered by you as disclosing any general propensity or predisposition on the part of Mr. Scabone to commit a crime or to commit the crimes with which he is now charged.

You cannot prove one crime by proving another crime. You may only consider the evidence of the arguments, the violence, and/or the threats allegedly made and committed by Mr. Scabone against his wife, Monica Scabone and her relatives and his present wife, Mrs. Camacho Alvarado, if you believe that they were, in fact, made and done by Mr Scabone and solely to determine what Mr. Scabone's motive or intent was as to whether those words and actions disclosed an enduring hostility, an enduring jealousy, malice or ill will that arose out of the marital relationship between himself and Monica Scabone and her in-laws --- and his in-laws on the part of Mr. Scabone that is directed towards the three victims in this case; that being Monica Scabone, Norma Estevez and Yannet Estevez.

You may consider such evidence solely for that purpose, that is in determining a possible motive or intent on the part of Mr. Scabone.

You cannot consider that evidence for any other purpose.

(6T86-3 to 87-18).

The defendant made no objection to the charge as given.

The Court made it crystal clear to the jury that they were not to consider the other incidents to prove disposition to commit the present crimes - "the essential point to be made in the limiting instruction." State v. Stevens, supra at 309. The Court did not simply "relate the laundry list of abstract issues enumerated in the rule." State v. G.S., 278 N.J. Super. 151, 165 (App. Div. 1994). Rather, he targeted the two permissible issues - defendant's intent and motive - which they could use the evidence to determine, if they found that the words and actions alleged were in fact said and done by

defendant, and that they disclosed enduring hostility, jealousy, malice or ill will that arose out of the defendant's relationship with the three women. The charge did contain the clarity of purpose and appropriate relating of permitted usage of the evidence to the facts of the case which was contained in State v. Cusick, 219 N.J. Super, 452 (App. Div. 1987) and subsequently held out as a model for appropriate charges. See, e.g., State v. G.S., supra, at 164.

Having agreed to the charge as proposed by the court[8] (5T97-4 to 11), not having proposed his own charge, and failing to object to the charge as delivered (while in fact objecting to another portion - relating to identification, (6T98-4 to 7)), the defendant cannot now complain about the alleged (albeit unspecified) error which he himself created. State v. Scher, 278 N.J. Super. 249, 271 (App. Div. 1994). Cf. N.J.R.E. 105 (Court shall provide limiting charge "upon request" but party can waive). At the very least, defendant would have to establish that any deficiency rose to the level of plain error. R. 2:10-2.

Even if this Court finds there was some shortcoming in the judge's charge or in the admission of the evidence itself, this would not provide a ground for reversal. The concern about this type of evidence is that it can "turn a jury against a defendant." State v. Stevens, supra at 302. However, this jury carefully considered and sifted the evidence, making the effort to request read-backs of

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[8]The only suggestion defense counsel proposed was really a non-suggestion, since the proposed (and actual) charge made it absolutely clear the evidence could not be used as substantive proof of guilt.

testimony and/or clarification of instructions five times. (7T2-6 to 19; 7T15-3 to 5; 7T22-22 to 23-1; 7T25-2 to 7; 7T34-2 to 10). When all was said and done, the jury convicted defendant of only passion/provocation manslaughter as to his wife Monica, the very person to whom most of the disputed evidence related! In fact that verdict may indicate that the evidence benefited the defendant. Having heard about the long-standing instances of animosity between them, some involving "fighting" (which carries a connotation of mutuality) the jury may have felt the defendant simply "lost his head" at the time of his last encounter with Monica since it convicted him of the lesser charge. Clearly the jury was not so tainted by the disputed evidence that it viewed defendant as a bad person and was diverted from its role as impartial fact-finder.

Wholly apart from the testimony as to prior incidents, adduced from Ms. Gonzalaz, Mr. Silva and Ms. Camacho, the State presented additional, devastating proof that defendant killed Monica Scabone, Yannet Estevez and Norma Estevez.

As set out in more detail in the Counter-Statement of Facts, supra, such proof included the fact defendant never called the police (even anonymously) to report the carnage, immediately inquired about getting to "the border," high-tailed it out of the country, assumed his Merry Widower role (with accompanying lie about the victims' demise), shortly after the killings, then finally admitted, and described, the killings to his second wife in terms consistent with the objective facts. While defendant challenges the credibility of the State's witnesses, (refuted in Facts, supra), it was hardly surprising the jury believed them over a man who claimed that he, and "the French" use the term "kill" while making love! Any error in the

admission of the other incidents evidence was merely harmless. State v. Macon, 57 N.J. 325 (1971).

POINT I(B)

THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S THREAT TO KILL ELIETH CAMACHO AND HER FAMILY BECAUSE SAID THREAT WAS INEXTRICABLY ENTWINED WITH, AND PROVIDED THE CONTEXT FOR, HIS ADMISSION, AFTER YEARS OF DECEPTION, THAT HE COMMITTED THESE MURDERS

The defendant contends that the trial judge should not have allowed Ms. Camacho to testify as to their "problem-filled relationship," specifically, its culmination - a threat one Christmas-time (probably 1989) to kill Ms. Camacho, her mother and her sister. (Db22). The defendant argues that that evidence was not relevant, was too temporally remote, overly prejudicial and not properly limited by the court.

The State submits that the trial judge properly exercised his discretion in admitting this evidence (while excluding other, powerful proof of defendant's guilt). The rocky relationship between the defendant and Ms. Camacho, typified by his death threat to her and her family provided the context in which defendant, after his long relationship with Elieth (during which he had never even told her his real name and falsely told her the victims died in a car accident), finally admitted these killings.[9] That admission

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[9]The defendant does not challenge the admissibility of the admission itself. Nor could he. It did not implicate an "other crime, wrong or act" under N.J.R.E. 404(b) and was clearly admissible under N.J.R.E. 803(b)(1) and 803(c)(25).

and the context in which it was made (as well as defendant's later provision of the details of the killings, once the "ice was broken"), constituted proof that the defendant intended to kill the three victims. Since the admission was given long after the crime and after years of deception toward Elieth, it was that much more compelling that the full circumstances of its delivery be adduced. The context in which the admission was made was an integral part of the admission itself and essential for the jury's accurate assessment of its believability. The evidence was not unduly prejudicial and the trial court's strong admonition to the jury, which the defendant agreed to, precluded any potential for mis-use of this evidence.

During the hearing on the admissibility of testimony to be given by Elieth Camacho, the prosecutor sought to introduce evidence including defendant's jealousy of Elieth Camacho, his "numerous" threats to kill her and his threat to kill her and her family, linked with his confession to having killed his previous wife and her family, on a number of theories. (3T15-4 to 20-2).

The trial court allowed only some of the proffered evidence, for showing defendant's intent and motive, while excluding other evidence, including an incident in 1989 in which defendant chased Elieth with a knife and threatened to kill her and burn the house down. The Court ruled as follows:

> I don't think we're on as firm a ground {Note: in comparison with Ms. Gonzalaz' and Mr. Silva's testimony} if you're looking to introduce a whole litany of subsequent events between Mr. Scabone and his present wife. I have no objection whatsoever if his present wife wants to testify that Mr. Scabone was very jealous; that there was marital discord, and then get into the specific reference to this particular case where a threat was made by Mr. Scabone that he was going to kill her and her family, and she came back with a question, the same as

you did to your other family, and the admission against interest by Mr. Scabone.

...

So I am not going to allow all of that testimony.

(3T25-16 to 26-24).

Defendant accurately states that Ms. Camacho "vaguely related her problem-filled relationship with defendant to the jury." (Db22). This was to defendant's benefit. While Ms. Camacho stated, for instance, that defendant was "very jealous, and that they had problems during their marriage, See e.g. 3T45-23 to 46-3; 3T47-13 to 21; the witness, pursuant to the court's ruling, did not provide the particulars of these confrontations[10] or relate how defendant physically assaulted her.

Ms. Camacho testified that their relationship really went downhill when defendant found out she wanted a divorce. (3T56-21 to 24). Toward the end of 1988, Ms. Camacho found out that defendant was wanted by the authorities for these murders. (3T57-25 to 58-11). After contacting Interpol with poor results (3T59-7 to 25), she stayed in Costa Rica about a year (while defendant was in jail) then went to Mexico. The defendant tracked her down there and insisted on staying with her, saying "everything was going to change." (3T60-1 to 61-22). For awhile, things went well but then deteriorated to the point that defendant threatened to kill her.

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[10]The Court even struck from the record Ms. Camacho's testimony that after she consulted a divorce lawyer, the defendant accused her of being the lawyer's lover. (3T53-16 to 54-1).

The following colloquy reveals the culmination of the deteriorating relationship and indicates the context in which defendant's admission to the murders was made:

> Q: Did he threaten to kill anyone else besides you?
>
> A: Yes. Once at Christmas my mother, my sister came to be at my house. They didn't know that he was with me. I asked him -- I told him that I didn't want him to give me anything. I just wanted him to behave well with them. And he got in a bad mood when they came, and he said that he was going to kill all three of them. (meaning "us")
>
> Q: When he made that remark to you, did you confront him with anything?
>
> A: Yes. I reminded him of what had happened -- what I knew.
>
> Q: About what?
>
> A: About the deaths of his ex-wife and the family. Because of my heart, I couldn't believe it, that he could have done that at some time, and when he told me that he was going to kill us, he says you're going to -- I said you're going to do the same thing that you did that one day. He said if I have to do it, I'm going to do it again. (Emphasis added).
>
> (3T62-7 to 23).

Having "broken the ice" after all those years and confessed to these crimes, the defendant, "further in the future" provided details, indicating he killed Monica with a knife during a fight, then, when her sister and mother returned later, he killed them, too. (3T63-1 to 64-6).

The relevance of the disputed evidence did not lie in its intrinsic value; rather it was the precipitating factor for, and the vehicle which provided context and meaning for, defendant's admission to the murders. Cf. State v. Hasher, supra, cited by defendant (defendant's prior, unrelated sexual assault against a different woman six years before simply did not reveal defendant's intent or motive

vis a vis the present sexual assault charges). This was the first time, after years of deception, that defendant admitted these killings to Elieth (or to anyone, for that matter). The defendant's threat to "do it again," when things reached rock bottom in his second marriage, revealed his intent during the earlier killings, i.e. that they were purposeful or knowing murders, not the result of momentary passion/provocation. The defendant's poor relationship with Elieth, typified by his threat to kill her and her family, was inextricably inter-related with his intent-revealing confession of the earlier murders and could not be severed therefrom.

The need to provide all the contextual detail to the circumstances of a crime and to admit a defendant's intent-revealing statements, even when they implicate other crimes, has long been recognized. In State v. Carroll, supra, the defendant was tried for killing his second wife's daughter when his relationship with the second wife went sour. In an oral statement to the FBI, the defendant stated that he "had the same problem with his first wife" and that eleven years before the charged murder, he was jailed for assaulting his first wife because she, like his current wife, made (an)other person come out inside him and seek revenge..." Id. at 564. This Court found the "reference to his assault upon his former wife was so integral a part of his description of his state of mind at the time of his commission of this offense that it was admissible to show his intent in attacking his stepdaughter." Id.

Similarly, in State v. Erazo, supra, the Supreme Court found admissible defendant's statement, shortly before killing the victim, "I killed before and if I go after her I'll kill again." Id. at 130. The statement was "relevant to whether defendant killed (the

victim) purposely or knowingly, or whether he had been provoked and had killed her in the heat of passion." Id. at 131. Likewise, in upholding a death sentence in State v. Butler, 32 N.J. 166, 187 (1960), the Supreme Court held admissible for proving defendant's willful intent, his statement to an accomplice during the killing, "You got bad nerves. It ain't the first man I ever killed." See also United States v. Derring, 592 F.2d 1003, 1006-1007 (8th Cir. 1979) (admission of killing permissible because it was "inextricably bound up with the others and proof of the offense charged necessarily involved evidence of the other criminal conduct").

See generally State v. Frost, 242 N.J. Super. 601, 620 (App. Div. 1990), certif. den. 127 N.J. 321 (1990) (evidence involving defendant's prior abuse of his wife was "part and parcel of the State's theory regarding the battered woman syndrome," and admissible to explain why the victim did not simply run away from the defendant); State v. Mulero, 51 N.J. 224, 228-229 (1968) (in trial for murder of defendant's paramour's daughter, his beatings of paramour were admissible because "the relations among all the members of the household were so entwined that the events of the fatal day could not be recounted intelligently without revealing the whole story"); United States v. Fortenberry, 971 F.2d 717, 721 (11th Cir. 1992), cert. den. ____ U.S. ____, 113 S.Ct. 1020 (1993) (evidence of defendant's participation in two murders was inextricably intertwined with evidence of firearm possession).

Likewise, in the present case, the defendant's threat to kill Ms. Camacho and her family, her responding question as to whether he would kill them like he killed the previous victims and his answer "If I have to do it, I'm going to do it again" were all inextricably

combined and his threat and her response gave the necessary meaning and context to defendant's admission. Hence this evidence was compellingly relevant.

Defendant appears to object to the admission of the disputed evidence because it came after the murders. (Db23). Yet the Supreme Court stated in State v. Cofield, supra at 340, "The order of the events is not dispositive of the issue of relevance."

Defendant's claim as to remoteness must also fail. As noted in Part (A), supra, this is simply one of several guidelines (See State v. Cofield, supra) to prevent the ultimate evil of over-use or mis-use of the evidence. It is not an end in itself. Here, Judge Codey excluded powerful proof involving other instances of (actually violent) conduct by defendant against Elieth, and strongly cautioned the jury not to consider the disputed evidence for propensity purposes. Also, see State v. Carroll, supra, (eleven year gap between assault on first wife, which gave meaning to defendant's statement in murder of later wife's daughter didn't bar admissibility). Moreover, here, the passage of time, and defendant's failure to "come clean" about these murders all the time he was living with, and married to Elieth, made it that much more essential that the jury understood why so many years later defendant would suddenly make this admission.

The defendant also claims this evidence was unduly prejudicial. The prejudicial quality of such evidence is insufficient to justify its exclusion. Stevens, supra. Actually, the jury was never able to hear that he assaulted Elieth - only that he threatened her and her family. The evidence of the threat in question was properly addressed by the prosecutor in summation, as a lead-in to discussing defendant's

admission, and was not cited as evidence of criminal propensity. (6T57-22 to 58-2). Also, proper limiting instructions were provided. Yet, contrary to defendant's position at trial, defendant now faults the court's instructions as inadequate. Having agreed to the charge as proposed by the court, not having crafted his own proposal and objecting to a different part of the charge, but not this one, defendant is in no position to complain about any alleged shortcoming in the charge. See, State v. Scher, supra. At the very least, defendant must establish that plain error resulted.

Between the earlier admonition rendered during Ms. Gonzalaz' testimony and the end-of-case charge, Judge Codey warned the jurors - using different phraseology - a total of six times that the jurors could not consider the prior incidents for criminal propensity. As cited supra the Court stated that as with the other evidence, if the jury believed the threat to Ms. Camacho was made by defendant, they could consider it "solely to determine what Mr. Scabone's motive or intent was..."

It would have been preferable for the court to have specified that the threat was to be considered insofar as it provided the context in which the defendant's intent-revealing admission was rendered. However, the court later in its charge told the jurors,

> In considering whether or not the statements allegedly made by Mr. Scabone are believable, you should take into consideration the circumstances and the facts surrounding the giving of the statements as well as all other evidence in the case.
>
> (6T90-8 to 12).

Jury charges must be considered as a whole. State v. Marshall, 123 N.J. 1, 135 (1991). When read together, the jury certainly understood not only that the threat could not be used as evidence of

criminal propensity, but that it was part of the context of defendant's admission and could be used in assessing the credibility of the admission. Certainly, one could not conclude that this jury, which requested read-backs of testimony or clarification of instruction on other issues five times, but not on this issue was "confused or misled." State v. G.S., supra at 167. In light of all the other violence against defendant, including defendant's prior threats and/or evidence against Monica and her family, and his stated intention to kill them all, as well as defendant's actual admission to the murders to Ms. Camacho, any error in the instruction or even in the reception of the evidence itself was completely harmless. See State v. DiFrisco, supra at 497. In sum, the defendant's well-deserved convictions should be affirmed.

POINT II

THE RULE THAT EVIDENTIARY RULE CHANGES ARE NOT EX POST FACTO LAWS HAS PREVAILED WITHOUT EXCEPTION SINCE TIME IMMEMORIAL, THUS APPLICATION OF THE AMENDED MARITAL PRIVILEGE, WHICH PLACED THE EXERCISE OF THE PRIVILEGE WITHIN THE ELECTION OF ONE SPOUSE, TO THE DEFENDANT'S TRIAL FOR THE MASSACRE HE COMMITTED BEFORE PASSAGE OF THIS AMENDMENT DID NOT VIOLATE THE EX POST FACTO PROHIBITION AS THE AMENDMENT MERELY REMOVED A LEGISLATIVELY IMPOSED TESTIMONIAL IMPEDIMENT AND ENLARGED THE CLASS OF PERSONS ELIGIBLE TO TESTIFY, BUT DID NOT CHANGE THE ELEMENTS OF THE CRIME, INCREASE PUNISHMENT OR ALTER THE DEGREE OR QUANTITY OF PROOF NECESSARY FOR CONVICTION

Defendant claims, "The admission of the inculpatory testimony of the defendant's second wife, governed by an ex post facto law, constitutes reversible error." This argument ignores that the rule that evidentiary changes are not ex post facto laws has prevailed without exception since time immemorial, thus application of the amended privilege, which placed the exercise of the privilege within the election of one spouse, to the defendant's trial for the massacre he committed before passage of this amendment did not violate the ex post facto prohibition as the amendment merely removed a legislatively imposed testimonial impediment and enlarged the class of persons eligible to testify, but did not change the elements of the crime, increase punishment or alter the degree or quality of proof necessary for conviction.

"An ex post facto law is a measure that imposes criminal liability on past transactions." 2 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, section 15.9(b) (2nd ed. 1992). The federal and state constitutions prohibit Legislatures from enacting ex post facto laws. U.S. Const., Art. I, section 10, Clause 1; N.J. Const., Art. IV, section VII, paragraph 3. As explicated by the United States Supreme Court

in Collins v. Youngblood, 497 U.S. 37, 41 (1990), "Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." A change in the evidence rules enacted after a defendant had committed the charged crime which disadvantages a defendant may be applied to the defendant's trial without violating the ex post facto prohibition.

Ex post facto law "was a term of art with an established meaning at the time of the framing of the Constitution." Collins, supra at 42. In Calder v. Bull, 3 Dall. 386, 390-392 (1798), the Supreme Court listed acts which would implicate the core concerns of the ex post facto clause:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. (emphasis in the original).

In 1884, the United States Supreme Court in Hopt v. Utah, 110 U.S. 574, 589 (1884), held that a statute removing a legislatively imposed testimonial bar preventing a class of persons (in that case, convicted felons) from testifying can be applied to a defendant's trial for a crime committed before the passage of the statute removing the legislatively created testimonial bar without running afoul of the prohibition against ex post facto legislation.

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done; nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Statutes removing testimonial bars on certain classes of individuals "relate to modes of procedure only," in which a defendant has no vested interest and the State can regulate at will. Id. at 588-589.

Every case decided since Hopt has held that evidentiary rules enacted after the commission of the crime are not ex post facto laws. In Thompson v. Missouri, 171 U.S. 380, 386-388 (1898), the United States Supreme Court held that an evidence rule, enacted after the defendant committed capital murder, that rendered admissible for comparison purposes documents indisputably handwritten by the alleged writer of a disputed written document could be applied to the defendant's capital murder trial consistent with the ex post facto clause. As the Thompson Court, supra at 387, declared:

> {W}e cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed.

So well accepted is the principle that changes in evidentiary rules are not ex post facto that, as early as 1925, the Supreme Court omitted the reference in Calder v. Bull to alterations in the "legal rules of evidence" when it summarized the meaning of the

ex post facto clause in Beazell v. Ohio, 269 U.S. 167, 169-170 (1925).

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

"The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins, supra at 43.

The Collins Court, supra at 43, n.4, noted the Beazell Court's omission of evidence rules and declared, "As cases subsequent to Calder make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." Dobbert v. Florida, 432 U.S. 282, 293 (1977).

Defendant complains that application of the amended marital privilege to his trial violated the prohibition against ex post facto laws. At the time the defendant butchered his first wife Monica and his 59 year old mother-in-law Norma, and 17 year old sister-in-law Yannet, an accused spouse unilaterally could prevent his or her partner from testifying. On November 17, 1992, about a year before the defendant was tried for this massacre, the Legislature amended these rules, L.1992, c.142. (Pa29-30), so that only one spouse had to consent to disclose a marital communication, and a defendant could not prevent a willing spouse from testifying. That

decision now lies with the testifying spouse. The amendment took place immediately "regardless of the date on which the offense was committed or the action initiated." (Pa30).

Defendant's argument ignores that "{c}hanges in evidentiary rules enacted after commission of the crime are not ex post facto..." State v. Gadsden, 245 N.J. Super. 93, 97 (App. Div. 1990), and that he did not have "a right to be tried, in all respects, by the law in force when the crime charged was committed." Dobbert, supra at 293. Consistent with the rule that a change in legislation which merely enlarges the class of persons able to testify can be retroactively applied, courts have consistently held that the application of amendments to statutes codifying the marital privilege to defendants' trials for crimes they had committed before the amendments were enacted did not violate the ex post facto prohibition. Freeman v. State, 786 S.W.2d 56, 58 (Tx. App. Ct. 1990); Medrano v. State, 768 S.W.2d 502 (Tx. App. Ct. 1989); Huckaby v. State, 557 S.W.2d 875 (Ark. 1977); People v. Bradford, 450 P.2d 46, 51-52, n.5 (Calif. 1969), cert. den., 399 U.S. 911 (1970). "{N}o one has a vested right in a procedure and...procedural matters can be changed at any time before trial and are binding on the defendant." State v. Keithley, 418 N.W.2d 212, 215 (Neb. 1988), post conviction relief denied, 463 N.W.2d 329 (Neb. 1990).

In State v. Szemple, 263 N.J. Super. 98 (App. Div. 1993), aff'd, 135 N.J. 406 (1994), both the Appellate Division and New Jersey Supreme Court implicitly assumed that the amended marital privilege, which placed the exercise of the privilege within the election of one spouse, would apply to the defendant's trial for a

murder committed before the passage of the amendment. These out-of-state cases holding that the amended marital privilege applies to trials for crimes committed before the amendments' enactments and Szemple's implicit recognition of the rule are consistent with the axiom that privileges are to be narrowly construed as they are "obstacles in the path of the normal trial objective of a search for ultimate truth." State v. Briley, 53 N.J. 498, 505-506 (1969).

Several opinions dealing with other evidentiary issues are supportive of the State's theory. In Gadsden, supra at 98, the Appellate Division held that an amendment authorizing the use of a map, rather than live testimony, to establish that the drug transaction took place within one thousand (1,000) feet of a school, which became effective several months after the defendant committed the crime, was not an ex post facto law.

In Murphy v. Sowders, 801 F.2d 205, 207 (6th Cir. 1986), cert. den., 480 U.S. 941 (1987), the Sixth Circuit ruled that application of a state statute repealing a law which prevented the uncorroborated testimony of an accomplice from being the sole evidence supporting a conviction was properly applied to the defendant's trial for a murder committed before the law's passage, citing to the reasoning of Hopt. Likewise, the Tumlinson v. State, 757 S.W.2d 440, 443-444 (Tx. App. Ct. 1988), Court held that admission of a psychotherapist's conversations with the defendant did not subject the defendant to an ex post facto law when the patient-psychotherapist privilege had been repealed before the defendant's trial but after he had committed the murder. Similarly, legislation enacted after the defendant committed the drug offenses for which he was tried which repealed restrictions on the

admissibility of intercepted oral communications did not constitute an ex post facto law. Smith v. State, 722 S.W.2d 853, 856-858 (Ark. 1987). See Toomey v. Bunnell, 898 F.2d 741, 745 (9th Cir. 1990), cert. den., 498 U.S. 960 (1990) (retroactive application of constitutional amendment permitting admission of evidence that would have been suppressed at the time of the defendant's arrest).

The plethora of cases holding that application of evidentiary rules allowing the hearsay statements of child sex abuse victims to be introduced in defendants' trials for child sex abuse offenses committed before the passage of the new evidentiary rules did not constitute ex post facto laws supports the State's theory. People v. Koon, 724 P.2d 1367 (Colo. App. 1986); Cogburn v. State, 732 S.W.2d 807 (Ark. 1987); People v. Edwards, 586 N.E.2d 1326 (Ill. App. 1992); Glendening v. State, 503 So.2d 335 (Fla. App. 1987), aff'd, 536 So.2d 212 (Fla. 1988), cert. den., 492 U.S. 907 (1988). In State v. Bethune, 121 N.J. 137, 146 (1990), the New Jersey Supreme Court, in holding that admission of fresh complaint testimony was harmless, noted that there was a "strong possibility" that testimony regarding comments the child made to a social worker would have been admissible at a retrial pursuant to the tender years exception to the hearsay rule, enacted after the defendant was tried.

In Dobbert, supra, when the defendant committed murder, Florida had a statute imposing a death sentence for that crime, which was later declared unconstitutional. A new statute for imposition of the death penalty was passed. Defendant was sentenced under the new statute. The Supreme Court held that the old statute gave the

defendant "fair warning as to the degree of culpability which the State ascribed to the act of murder," and the "new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." Id. at 293-294, 297. If a newly enacted death penalty statute devising new procedures to determine whether a death sentence should be imposed can be applied to a defendant without violating the ex post facto prohibition, certainly a statute permitting the introduction of different evidence to establish facts meets constitutional muster.

Defendant contends that the marital privilege protects a "'substantive right' - the right to a peaceful marriage."[11] (Db28). Thus, he claims, application of the amended privilege to his trial violated the ex post facto clause. Defendant supposedly is attempting to rely on language contained in United States Supreme Court cases that "a procedural change may constitute an ex post facto violation if it 'affect{s} matters of substance,' Beazell, supra, 269 U.S., at 171; by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' Duncan v. Missouri, 152 U.S. 377, 382-383 (1894), or arbitrarily infringing upon 'substantial personal rights.' Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Beazell, supra, 269 U.S., at 171...". Collins, supra at 45.

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[11]This is an ironic assertion considering the circumstances of the defendant's marriage.

The Collins Court, supra at 45, cautioned that "language from {these} cases has imported confusion into the interpretation of the Ex Post Facto Clause." Finding that "the best way to make sense out of {the} discussion in {these} cases is to say that by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause," the Collins Court, supra at 46, held that, "The references in Duncan and Malloy to "substantial protections" and "personal rights" should not be read to adopt without explanation an undefined enlargement of the Ex Post Facto Clause." Duncan dealt with the amendment to the Missouri Constitution creating two divisions of the Supreme Court, while Malloy implicated a change in the manner the death penalty was carried out.

In light of the strong language in Collins, defendant's vain attempt to enlarge the type of legislation prohibited by the ex post facto clause most be rejected. Since time immemorial, opinions have held without exception, that retroactive application of evidentiary rule changes do not constitute ex post facto laws as the clause does not "apply to procedural changes even when they disadvantage the offender." State v. T.P.M., 189 N.J. Super. 360, 367 (App. Div. 1983). The legislature's decision only halted the practice of allowing an accused spouse to act, in essence, as a dictator, by giving him or her the unilateral right to bar his or her otherwise willing partner from testifying. Application of the amended marital privilege to the defendant's trial for the slaughter he committed before the passage of the amendment did not violate the ex post facto prohibition as it merely "removed an obstacle arising out of a rule of evidence that withdrew from the consideration

of the jury testimony which...tended to elucidate the ultimate, essential fact to be established, namely the guilt of the accused," Thompson, supra at 387, but did not alter the degree or quantity of evidence necessary for a conviction.

POINT III

CONSIDERING THAT THE DEFENDANT BUTCHERED HIS FIRST WIFE MONICA, THEN LAID IN WAIT AND SLAUGHTERED HIS MOTHER-IN-LAW AND SISTER-IN-LAW AS THEY ENTERED THE APARTMENT AT SEPARATE TIMES, INFLICTING 93 STAB WOUNDS, THEN SET FIRE TO THE APARTMENT BUILDING WHERE THIS MASSACRE OCCURRED, AND THERE IS A STRONG RISK THAT THE DEFENDANT WILL KILL HIS SECOND WIFE IF HE WERE RELEASED, THIS CASE CRIED OUT FOR THE IMPOSITION OF THE HARSHEST POSSIBLE SENTENCE OF EIGHTY YEARS INCARCERATION WITH A FORTY YEAR PAROLE DISQUALIFIER

Defendant complains that his sentence is "manifestly excessive," claiming that the trial court erred in imposing consecutive sentences, parole disqualifiers and the maximum base terms. (Db30). This argument ignores that the defendant viciously executed three people at separate times then later risked the lives of others to facilitate his flight. Considering that the defendant butchered his first wife Monica, then laid in wait and slaughtered his mother-in-law and sister-in-law as they entered the apartment at separate times, then set fire to the apartment building where this massacre occurred, and there is a strong risk that the defendant will kill his second wife if he were released, this case cried out for the imposition of the harshest possible sentence of eighty years incarceration with a forty year parole disqualifier.

A defendant must meet a heavy burden of proof before a sentence is modified or overturned. Appellate review of a sentence is limited to determining whether the trial court correctly applied the sentencing guidelines, whether the court's findings of aggravating and mitigating factors were based on competent, credible evidence, and whether the sentence imposed was so unreasonable as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364 (1984). As the Roth Court emphasized, "we must avoid the substitution of appellate judgment for trial court judgment. What we seek by our

review is not a difference in judgment, but only a judgment that reasonable people may not reasonably make on the basis of the evidence presented." Id. at 365. The fundamental sentencing principle is that the punishment must fit the crime. State v. Jabbour, 118 N.J. 1, 9 (1990); State v. Johnson, 118 N.J. 10, 18 (1990).

- **PAROLE DISQUALIFIER AND BASE TERM**

In light of the heinous nature of the defendant's massacre of his first wife and in-laws, the trial court properly excercised its discretion and sentenced the defendant to 30 years imprisonment with a fifteen year parole disqualifier pursuant to N.J.S.A. 2C:11-3(b)(1) rather than a sentence appropriate for a crime of the first degree under N.J.S.A. 2C:11-3(b)(2) for his murder convictions and separate terms of 10 years incarceration with a 5 year period of parole ineligibility for his passion/provocation manslaughter and arson convictions. Defendant was convicted of two counts of murder, the most serious crime under our penal code as well as one count of passion/provocation manslaughter, and one count of arson.

Due to the seriousness of the defendant's crimes, the defendant's sentence must be strict. While the trial court noted the defendant's lack of a significant prior record, the trial court found that the risk that the defendant would commit another offense was an aggravating factor under N.J.S.A. 2C:44-1(a)(3). (8T31-11 to 13; 8T32-5 to 6). Defendant claims that this factor applies "only if the defendant has a prior, if not extensive, record," (Db36-37) and cannot be based solely on the seriousness of the crime. (Db38).

Defendant overlooks that the trial court found that "I think the likelihood is extremely high, if not a hundred percent certain that

(the) aggravating factor (that the defendant will commit another offense) applies to this case" because there is a strong likelihood that the defendant will kill Ms. Camacho if he were released. (8T32-6 to 8). Defendant had threatened to kill Ms. Camacho just like he killed his first wife Monica and his in-laws, leading to the conclusion that the defendant was not engaged in a "single period of aberrant behavior" but rather was willing to kill again. This finding was buttressed by proof that the defendant had sent Ms. Camacho, before and after she had testified against him, "a barrage" of threatening letters which terrorized her to the point where she no longer was able to live her life. (5T109-8 to 14). This factor is also supported by the defendant's complete lack of remorse, beginning shortly after the murders when he started to proposition Ms. Camacho and continuing through the trial during which defendant laughed countless times while testifying. (8T30-10 to 13; 80-13 to 17).

Additionally, the trial court found the seriousness of the offense to be an aggravating factor pursuant to N.J.S.A. 2C:44-1(a)(6). (8T32-8 to 9). Defendant not only killed Monica and his in-laws, but he butchered them to death by hacking at them with hatred a total of 93 times. (8T36-12 to 17). Additionally, as the trial court found, defendant cavalierly risked the lives of others when he set the apartment building on fire to facilitate his flight. (8T36-17 to 21).

This same evidence of the defendant's callousness and the defendant ferociously butchering his victims supports the aggravating factor that the defendant committed this massacre in an especially heinous manner, N.J.S.A. 2C:44-1(a)(1), and the aggravating factor regarding the "gravity and seriousness of harm inflicted...,"

N.J.S.A. 2C:44-1(a)(2). While the trial court feared that considering these aggravating factors would constitute "double counting," these factors apply if the defendant inflicted physical pain beyond that necessary to commit the offense. See State v. O'Donnell, 117 N.J. 210, 217 (1989); State v. Rivers, 252 N.J.Super. 142, 153 (App. Div. 1991). Defendant not only got rid of his first wife and in-laws, but they were forced to endure 93 stab wounds with a depth of up to 5 1/2". Hence, he "maximized the {victims'} pain..." O'Donnell, supra at 217.

The trial court additionally determined that deterrence was an aggravating factor under N.J.S.A. 2C:44-1(a)(9). Particularly in the domestic violence context, the message must be sent that the way to resolve differences is through the civil courts, not by butchering family members with whom one has a dispute.

The mitigating factors the trial court found are weak. While the trial court found that the defendant's conduct is the result of circumstances unlikely to recur, the trial court observed, "that's an obvious one when the victims are deceased. They're never going to be back on this earth with us again." (8T31-14 to 17). Even though the trial court noted that the defendant's "kidney medical problem" was a mitigating factor, the trial court declared that his condition "can be addressed during his incarceration." (8T31-17 to 20). On the judgment of conviction only, the trial court stated that the defendant's imprisonment would entail excessive hardship to himself and his dependents. Before this mitigating factor applies, there must be proof that the defendant and his dependents would suffer harm beyond that indigenous to imprisonment. There is not an iota of proof of that. In fact, Ms. Camacho is, most likely, happy that the

defendant, who caused her so much grief, is out of her life. Additionally, the trial court's finding that the defendant did not have a substantial record is undercut by Ms. Camacho's testimony that the defendant was in jail in Costa Rica.

Contrary to the defendant's representation that the trial court did not balance the aggravating and mitigating factors (Db36), the trial court ruled, "I'm clearly convinced that those aggravating factors substantially outweigh the mitigating factors requiring consecutive discretionary minimum terms on this case." (8T32-18 to 22). This finding supported the trial court's decision to impose the maximum base term and the maximum parole disqualifier. N.J.S.A. 2C:43-6(b). Regarding the defendant's two murder convictions, once the trial court decided to sentence the defendant to a 30 term of imprisonment under N.J.S.A. 2C:11-3(b)(1), the trial court was required to impose a 15 year parole disqualifier. The overwhelming nature of the aggravating factors justified the trial court's decision to sentence the defendant under N.J.S.A. 2C:11-3(b)(1) rather than sentencing the defendant for two execution style murders to a sentence appropriate for a first degree crime under N.J.S.A. 2C:11-3(b)(2). Also, the trial court's finding that the aggravating factors substantially outweigh the mitigating factors supports his decision to sentence the defendant to the maximum base terms and parole disqualifiers on his passion/provocation manslaughter and arson convictions.

- **CONSECUTIVE SENTENCES**

Defendant argues that he should not be punished for the two lives he snuffed out in order to get rid of any witnesses to his

slaughter of Monica nor punished for later cavalierly risking the lives of others by setting fire to the apartment building where this atrocity occurred, to facilitate his flight, claiming that the "killings and the arson...were not 'predominantly independent of each other.'" (Db33). This argument is belied by the proofs adduced at trial.

State v. Yarbough, 100 N.J. 627 (1985), cert. den., 475 U.S. 1014 (1986), the case which identified the standards to be applied in determining whether or not to impose consecutive sentences stated that, absent egregious circumstances, the maximum total sentence should not exceed the "sum of the longest terms that could be imposed for the two most serious offenses," was decided after the defendant committed this slaughter. Before the defendant's trial, the Legislature, on August 5, 1993, enacted legislation that, "There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses," reversing the Yarbough limitation on the length of the total sentence. Defendant neither at the time he butchered his first wife and in-laws nor at the time of sentencing reasonably could have expected a limitation on the length of his total sentence since no law provided for such a limitation at those times. The Yarbough limitation on the overall length of sentence, therefore, should not apply to the defendant's sentencing. In any event, Yarbough is not intended to "trammel all consecutive sentences..." State v. Mosch, 214 N.J. Super. 457 (App. Div. 1986), certif. den., 107 N.J. 131 (1987).

The trial court properly imposed consecutive sentences on the defendant for killing three different people at separate times and then setting fire to the apartment building to facilitate his flight.

Three separate victims were involved in three distinct massacres committed at different times. The evidence shows that the defendant first massacred Monica, stabbing her 14 times while in their apartment, then by his own admission, he laid in wait and slaughtered his 59 year old mother-in-law Norma and 17 year old sister-in-law Yannet as they entered the apartment they shared with the defendant and Monica at different times. Evidence that Norma and Yannet were fully clothed and had their shoes on at the time they were murdered corroborates that the killings involved separate acts of violence. (8T29-7 to 25).

Moreover, the objectives of the massacres were predominantly independent of each other. Defendant butchered Norma and Yannet to cover up his slaughter of Monica. Defendant's threat to kill his second wife, Ms. Camacho, just like he killed his first wife and his sending a barrage of threatening letters to her after she had testified leads to the conclusion that the defendant was not engaged in a "single period of aberrant behavior," but is willing to kill again.

Recently, the Supreme Court in State v. Brown, 138 N.J. 481, 559 (1994) held that the trial court, consistent with Yarbough, imposed consecutive sentences on the defendant for the two murders he had committed when the defendant shot his girlfriend's great uncle, then moments later, executed his girlfriend's great aunt who was in a nearby room. The Appellate Division in State v. List, 270 N.J. Super. 169 (App. Div. 1993) upheld the imposition of five consecutive life sentences where the proofs showed that the defendant first killed his wife while she was sitting at the breakfast table, then went upstairs and shot his mother, and later picked up two of his

children from school at different times and shot them when they arrived home, then killed the remaining child when he returned from school. See State v. Russo, 243 N.J. Super. 383, 413 (App. Div. 1990), certif. den., 126 N.J. 322 (1991); State v. J.G., 261 N.J. Super. 409, 426-427 (App. Div. 1993), certif. den., 133 N.J. 436 (1993).

Likewise, the trial court properly imposed a consecutive sentence on the defendant's arson conviction which crime occurred after and apart from the murders. After massacring his first wife and in-laws, defendant cavalierly risked the lives of the other apartment dwellers where this atrocity occurred and that of responding to facilitate firefighters his flight and conceal evidence. (8T50-11 to 51-9). As the trial court summarized, "(T)hese offenses involved...separate and distinct...acts of violence, including what I characterize as the execution style murders of 2 totally innocent family members who had absolutely no contact with the initial dispute that arose into the stabbing of Monica Scabone and the passion/provocation manslaughter of Mrs. Scabone, as well as the second degree arson of the multiple family dwelling." (8T34-21 to 35-3).

While Yarbough held that "there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms...that could be imposed on the two most serious offenses," the Yarbough Court recognized, "(t)here are cases so extreme and so extraordinary that deviation from the guidelines may be called for." Yarbough, supra. at 647. Hence, even absent the statutory amendment, the imposition of consecutive sentences for the three separate homicides, and arson, was

justified. In J.G., supra at 427, where the defendant and another engaged in homosexual acts in the presence of three children, the defendant had the children perform sexual acts with each other and with him, and compelled each child to sleep with him on a rotating basis at which time he engaged in various sexual activities, the Appellate Division held that the imposition of consecutive sentences totalling 55 years with a 27 1/2 year parole disqualifier was justified even though it was beyond the Yarbough limitation because the case was "so extreme and so extraordinary that deviation from the guidelines {was} appropriate." This case is likewise so extreme and so extraordinary as to allow for deviation from the Yarbough limitation on the maximum sentence. See List, supra.

As explained in State v. Serrone, 95 N.J. 23 (1983):

> The Legislature has not expressly or inferentially suggested an intent to reduce the punishments for those convicted of multiple murders. On the contrary, the Code's special and individualized treatment given to murder manifests the Legislature's intent that a defendant may be subject to a life term for every homicide of which he is found guilty.

Defendant would only be punished for one of the three lives he viciously snuffed out and not receive any punishment at all for his dangerous and selfish act of setting the apartment building on fire if his arguments were accepted. This would utterly ignore Yarbough's warning that "there can be no free crimes." As the trial court explained:

> {A}s the extent of Mr. Scabone's brutality and violence rises, obviously so too should the number of years that Mr. Scabone is locked up so he can't do any{} more damage to the community.
>
> (8T36-22 to 25).

POINT IV [12]

THE TRIAL COURT'S INSTRUCTION AND THE VERDICT SHEET MORE THAN ADEQUATELY APPRISED THE JURY THAT PART OF THE STATE'S BURDEN OF PROVING PURPOSEFUL OR KNOWING MURDER INCLUDED PROVING BEYOND A REASONABLE DOUBT THAT THE MURDERS WERE NOT COMMITTED IN THE HEAT OF PASSION RESULTING FROM A REASONABLE PROVOCATION (Not Raised Below)

For the first time, on appeal, defendant now complains that the charge regarding murder, and the verdict sheet, allowed the jury to find him guilty of murder without ever considering passion/provocation manslaughter. The defendant's allegations are as inaccurate as they are untimely. Both the court's oral instructions and the verdict sheet made it clear that the jury could not convict defendant of purposeful or knowing murder unless the State disproved one of the elements of passion/provocation beyond a reasonable doubt. The fact that the jury was not precluded from considering passion/provocation manslaughter is compellingly established by the fact that they did find defendant guilty of that crime with regard to one of the killings, that of Monica Scabone, and that they considered, and answered (in the negative), the question on passion/provocation on the counts involving the two other murder victims.

The court indicated its original inclination to only charge passion/provocation manslaughter. Defense counsel verified that that charge would reflect current case law (but posed no objection to the court's preview of part of the proposed language on that charge). Counsel and the court explained the possible charges (and respective

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[12] This Point is responsive to Point I of defendant's pro se brief.

sentences) to defendant in depth and he agreed with counsel's request to only ask for passion/provocation manslaughter, as a matter of strategy.[13] (3T89-25 to 91-3; 4T64-18 to 65-21; 5T101-12 to 102-16; 5T104-15 to 109-3). The court observed that that was the only other charge justified by the evidence. (5T111-8 to 112-6). Defense counsel posed no objection to the verdict forms.[14] (Pa27-28; 5T112-5 to 16).

The court began its instruction to the jury on murder as follows:

> A person is guilty of murder if he purposely causes death or serious bodily injury resulting in death or knowingly causes death or serious bodily injury resulting in death, and, number three, that he did not act in the heat of passion resulting from a reasonable provocation. If you find beyond a reasonable doubt that Mr. Scabone purposely or knowingly caused Monica Scabone, Yannet Estevez and Norma Estevez' deaths or serious bodily injury to those three individuals resulting in their deaths, and that Mr. Scabone did not act in the heat of passion resulting from a reasonable provocation, Mr. Scabone would be found guilty on count one, count two and count three. If, however, you find that Mr. Scabone purposely or knowingly caused death or serious bodily injury resulting in death and that he did act in the heat of passion resulting from a

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[13] The defendant's complaint that his attorney should have challenged the verdict sheet or charge because it didn't "{allow} the jury to consider all degrees of homicide charged in any sequence..." (2Db18, n.1), is confusing since only two types of homicide were charged. To the extent he is criticizing the absence of other offenses, the defendant, having discussed this issue in detail with counsel and the court, and expressing agreement with the submission of passion/provocation manslaughter as the only alternative to murder, is in no position to complain now, after his wishes were honored. See State v. Scher, 278 N.J. Super. 249, 271 (App. Div. 1994).

[14] Defendant claims that "the defense did not object to the verdict sheet in spite of defendant's request." (2Db18, n.1). While he did not hesitate to make other complaints to the court (5T2-23 to 3-19), the defendant at no time expressed dissatisfaction with the verdict sheet.

reasonable provocation, Mr. Scabone would be guilty of passion provocation manslaughter. In order for you to find Mr. Scabone guilty of murder the State is required to prove each of the following elements beyond a reasonable doubt. Number one, that the defendant caused the specific victim's death or serious bodily injury resulting in her death. Again, remember, three victims; three separate counts. Number two, that Mr. Scabone did so purposely or knowingly. Number three, that Mr. Scabone did not act in the heat of passion resulting from a reasonable provocation...

(emphasis added) (6T74-1 to 75-2).

After discussing purpose and knowledge, motive, use of a deadly weapon, serious bodily injury, and causation, the court detailed the concept of passion/provocation manslaughter:

> The third element that the State must prove beyond a reasonable doubt to find Mr. Scabone guilty of murder is that Mr. Scabone did not act in the heat of passion resulting from a reasonable provocation. Passion provocation manslaughter is a death that is caused purposely or knowingly that is committed in the heat of passion resulting from a reasonable provocation. Passion provocation manslaughter has four factors which distinguish it from murder. In order for you to find Mr. Scabone guilty of murder, the State need only disprove one of these factors beyond a reasonable doubt.

Then the trial court specified all four elements of passion/provocation manslaughter, from State v. Mauricio, 117 N.J. 402 (1990), and that these elements "must be applied to each one of the three {murder} counts." (6T78-23 to 80-20).

The court noted that if the State disproved any of these elements beyond a reasonable doubt, and proved that defendant purposely or knowingly caused death or serious bodily injury resulting in death, the jury must find defendant guilty of murder. (6T80-20 to 81-5). The court continued:

> If, on the other hand, you determine that the State has not disproven one of those four factors of passion provocation manslaughter beyond a reasonable doubt, but that the State has proven beyond a

reasonable doubt that Mr. Scabone purposely or knowingly caused death or serious bodily injury resulting in the death of these three individuals, then you must find Mr. Scabone guilty of passion provocation manslaughter.

(6T81-6 to 19)

The court provided further guidance for the jury's deliberations while discussing the verdict form, making it crystal clear that if the jury found purposeful or knowing murder they were required to consider passion/provocation:

> Count one states, as to murder, how do you find Mr. Scabone as to the charge on April 2, 1981 he did purposely or knowingly murder Monica Scabone? If you mark the box not guilty, you don't even have to go down to the second question. Someone cannot be guilty of a passion provocation unless you've already found it was a purposeful or knowing murder.
>
> If you mark the box not guilty, that's the end of your deliberations on count one.
>
> In the event you do find, yes, Mr. Scabone purposely and knowingly murdered Monica Scabone on April 2, 1981 you are required to go down to the second question. The second question as to passion provocation, in the event you found Mr. Scabone guilty of the murder on the above question, was it committed in the heat of passion resulting from a reasonable provocation? If you mark the box, yes, it's a passion provocation manslaughter. If you mark the box no, it stays as a murder.

(6T92-8 to 93-9)

The court repeated the same with regard to counts two and three. (6T92-8 to 93-18). See Pa27-28. The court concluded by telling the jurors they did not have to use the verdict sheet unless they wanted to, and that they could start with any count they wished. (6T94-4 to 13). No objection was interposed by the defense to the charge or to the verdict form.

During deliberations, the jury requested a read-back of passion/provocation, "specifically about a cooling off period."

[15] The court, without objection, re-read the entire murder charge. (7T25-20 to 33-25). Thereafter, the jury requested the four elements of passion/provocation manslaughter and asked if all four had to be present. (7T34-6 to 10). The court, again without objection, accurately answered their question, while reminding them "the burden of proof is on the State to disprove one of the four." (7T35-8 to 16).

Having raised absolutely no objection to the charge or verdict sheet below, defendant must now establish plain error. R. 2:10-2. The defendant cannot do so. See State v. Heslop, 135 N.J. 318, 322 (1994); State v. Erazo, 126 N.J. 112, 121-126 (1991).

The present charge suffered from neither infirmity condemned in State v. Coyle, 119 N.J. 194, (1990), State v. Erazo, and State v. Heslop, i.e. failure to state that the State has the burden of disproving passion/provocation beyond a reasonable doubt and saying the jury need only consider lesser offenses if it is found defendant failed to prove murder. The Court integrated the absence of passion/provocation into the elements of murder which the State had to prove beyond a reasonable doubt. The Court could not possibly have made it clearer that if the jury found purposeful or knowing murder they had to consider the passion/provocation aspect. That point was hammered home three times in the context of each count of murder.

The defendant's allegation to the contrary, that "the jury was told that if defendant were found to be guilty of (murder), 'go no

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[15] The defendant's representation in his brief as to the jury indicating "all members were not unanimous on a verdict" and his reference to "initiate (sic) dissenters" is completely baseless. (2Db19). The jury never stated or implied any such thing.

further in deliberations...'" (2Db13) is completely false. Nor was such a charge given as to their finding of aggravated manslaughter or reckless manslaughter. Cf. 2Db13. In fact, those offenses, consistent with defendant's own personal wishes, were not even charged. Certainly, the court never suggested the jury was "at the end of its task when it finds a purposeful or knowing homicide," as defendant alleges, 2Db14, nor that it was "not to consider the effect of passion/provocation if defendant was guilty of murder." Cf. 2Db14. The record indicates defendant's representations are completely false. Consistent with State v. Coyle, supra and State v. Erazo, supra, the jury understood from the charge (and verdict sheet) that the State had the burden of disproving passion/provocation beyond a reasonable doubt and that that charge had to be considered if the jury found a purposeful or knowing murder.

This fact is underscored by the verdict sheet (and verdict) itself. See Pa27-28. On Count One, the "guilty" line was checked for murder, and on the passion/provocation question, the "yes" line was checked. Defendant can hardly claim error when he was actually convicted of the charge which he claims the jury was precluded from considering. On Counts Two and Three, the jury did not stop after checking the "guilty" lines for murder, but considered, and answered, the next question, concerning the existence of passion/provocation. On those Counts, they checked "no" for that question.

Any error in the instructions vis a vis Monica is harmless since he was convicted of passion/provocation for her death. Any such error vis a vis Norma and Yannet is harmless because there was no evidence to support passion/provocation. The evidence including the defendant's own statement clearly established that the defendant

laid in wait for, and executed his two in-laws when they entered the apartment at different times after he had slaughtered Monica. See State v. McClain, 248 N.J. Super. 409 (App. Div. 1991), certif. den. 126 N.J. 341 (1991).

POINT V [16]

THE MURDER COUNTS IN THE INDICTMENT SUFFICIENTLY APPRISED DEFENDANT OF THE CHARGES AGAINST HIM

Defendant claims for the first time on appeal that the murder counts of the indictment failed to properly inform him of the charges against him because they did not contain the words "knowing" and "purposeful." He raises this issue as plain error. The State submits that this contention is without merit.

R. 3:10-2 bars defendant from raising this claim for the first time on appeal absent "good cause" which is not even alleged. If no motion is made pretrial regarding the indictment's language, any objection to it is waived.

An indictment does not fail on sufficiency grounds if it "1) adequately identifies and explains the criminal offense so that the accused can prepare a defense; 2) the language is sufficiently detailed to avoid the risk of double jeopardy; and 3) the language is specific enough to preclude the possibility that the petit jury will substitute an offense that is different from the crime which the grand jury considered and charged." State v. Ball, 268 N.J. Super. 72, 126 (App. Div. 1993), certification granted, 135 N.J. 304 (1994), citing Russell v. United States, 369 U.S. 749, 763-84 (1962); State v. LeFurge, 101 N.J. 404, 415 (1986). See also State v. Spano, 128 N.J. Super. 90, 92 (App. Div. 1973), aff'd 64 N.J. 566 (1974); State v. Gillison, 153 N.J. Super. 65, 68

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[16] This Point is responsive to Point II of defendant's pro se brief.

(App. Div. 1977). A review of the indictment here demonstrates that it stated and was based on the essential facts so that these requirements were met.

The defendant was apprised by the face of the challenged counts in the indictment of the crime he was charged with committing, the date of the crime, the place of the crime, and the victim of the crime. Each count includes citation to the murder statute which sets forth that the scienter element for murder is either knowing or purposeful conduct. This language in the indictment was sufficient to properly apprise defendant of the conduct he was charged with having committed so he could prepare an appropriate defense, and since the grand jury was properly instructed on the elements of murder, Pa 31-32, it is clear there were facts which satisfied the grand jury that the scienter elements of the murder statute had been satisfied. Moreover, defendant never suggested or argued either pretrial, during trial, or after trial that the language in the charge was inadequate to permit him to prepare his defense for trial. If there had been any such prejudice, surely it would have been raised or identified by now.

Any error contained in the language of the indictment was rendered harmless by the petit jury's finding, beyond a reasonable doubt, that defendant was guilty of the crimes charged. See United States v. Mechanik, 475 U.S. 66, 70 (1986), (petit jury's subsequent finding of guilt meant not only that there was probable cause to believe defendants had committed the crimes charged, but also that they were in fact guilty beyond a reasonable doubt. Accord, State v. Ball, supra, at 122, (adopting Mechanik in the context of improper legal instructions). Accord, State v. Lee, 211 N.J.

Super. 590, 599-600 (App. Div. 1986) (Appellate Division also held that an irregularity in the grand jury proceeding was cured by the ultimate guilty verdict by the jury after trial of the case.)

The defendant also appears to argue that the grand jury received inadequate legal instructions, and hence may not have known whether it was indicting defendant for murder or manslaughter. However, prior to the presentation of any testimony, the grand jury was fully apprised of all the possible homicide charges. (Pa31-32).

Moreover, the fact that defendant was charged with purposeful or knowing murder was certainly apparent to him in advance of trial through the witness statements and other pretrial discovery materials. State v. Mancine, 124 N.J. 232, 258 (1991). Moreover, defendant made no claim of surprise or prejudice, raised no objection at trial, did not seek dismissal of the indictment before trial, did not object as the proofs unfolded, and did not even argue this point in a motion for new trial. Id.

The defendant also appears to complain that it is impossible to discern from the indictment that 12 grand jurors agreed that the murders he committed were purposeful, or knowing or both. The short answer to this claim is that under United States v. Mechanik, supra, any such error was cured by the trial verdict. Moreover, no such unanimity requirement exists, even at a capital murder trial, State v. Bey, 129 N.J. 557, 581 (1992), muchless at grand jury. The Bey Court observed that the United States Supreme Court "has held that jury unanimity on the mens rea element of an offense is not required when 'two mental states...supposed to be equivalent means to satisfy the mens rea element of a single offense...reasonably reflect notions of equivalent blameworthiness or

culpability,'" quoting Schad v. Arizona, ___ U.S. ___, 111 S.Ct. 2491 (1991). In Schad, the Court held that the trial jury in a capital case was not required to agree on either premeditated murder or felony murder.

In sum, the State submits that there was no irregularity in the grand jury proceeding or indictment which affords the basis for a reversal.

POINT VI [17]

DEFENDANT'S ARGUMENTS THAT THE STATE KNOWINGLY PRESENTED PERJURED TESTIMONY AND THE PROSECUTOR MADE IMPROPER COMMENTS IN HIS SUMMATION AND OPENING ARE PRODUCTS OF HIS FERTILE IMAGINATION AS THERE IS NO HINT THAT THE DEFENDANT'S SECOND WIFE AND FORMER SISTER-IN-LAW TESTIFIED FALSELY, LET ALONE THAT THE PROSECUTION WAS AWARE OF ANY ALLEGED FALSEHOODS AND THE PROSECUTOR, IN SUMMATION MERELY EXPLAINED WHY THE STATE'S WITNESSES WERE CREDIBLE AS WELL AS WHY THE FINGERS OF THE CREDIBLE EVIDENCE SQUARELY POINTED TO THE DEFENDANT'S GUILT AND IN HIS OPENING MERELY RELATED WHAT PROOFS HE IN GOOD FAITH INTENDED TO ESTABLISH

Defendant attempts to argue that the State knowingly presented perjured testimony when it allowed his second wife, Ms. Camacho, and his sister-in-law, Ana, to testify and that the prosecutor made improper comments during his summation and opening. (2Db29). Defendant's arguments that the State knowingly presented perjured testimony and the prosecutor made improper comments in his summation and opening are products of his fertile imagination as there is no hint that the Ms. Camacho and Ana testified falsely, let alone that the prosecution was aware of any alleged falsehoods, and the prosecutor in summation explained why the state's witnesses were credible as well as why the fingers of the credible evidence squarely pointed to the defendant's guilt and in his opening merely related what proofs he in good faith intended to establish.

Without providing any support whatsoever for his allegation, defendant claims that the testimonies of Ana and Ms. Camacho were false and that the State presented their testimonies knowing of the

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[17] This Point is responsive to Point III of the defendant's pro se supplemental brief.

falsehoods. (2Db36). Defendant implies that Ms. Camacho lied when she testified that the defendant confessed to killing Monica and his in-laws and boldly accuses Ana of being "willing to testify to whatever would convict" the defendant because Ana "hated {him} in a very profound and passionate way in the past and recented {sic} her sister even marrying {him}." (2Db28, 35, 36).

This argument is manufactured out of whole cloth. Before a defendant's conviction can be overturned because of the use of perjured evidence, the defendant must prove both that the State used false evidence and the State knew of its falsity. Napue v. Illinois, 360 U.S. 264, 269 (1959); State v. Taylor, 49 N.J. 440, 453 (1967); United States v. Scarfo, 711 F.Supp. 1315, 1322 (E.D. Pa. 1989), aff'd sub. nom., United States v. Pungitore, 910 F.2d 1084 (3rd Cir. 1990), cert. den., 500 U.S. 915 (1991). There is not an iota of proof that either Ana or Ms. Camacho uttered any falsehood. Critical aspects of Ana's testimony are corroborated by the testimony of the defendant's former brother-in-law Leopoldo, who revealed that the defendant threatened to kill "the three crazy women." While the defendant contends that Ana disliked or hated him, this allegation disintegrates like Alka-Seltzer upon contact with water as Ana testified that she "didn't have anything against {the defendant}." (2T66-23 to 67-4).

Ms. Camacho, despite the defendant's threat to kill her and her family, testified that she still loved the defendant. Additionally, the most critical component of the defendant's testimony - her disclosure of the defendant's recounting of the massacre - was corroborated. Likewise, as explained in Point II, infra,

allowing Ms. Camacho to testify did not violate the ex post facto prohibition.

Moreover, defendant ignores the record and argues that the only evidence linking the defendant to these crimes is the testimonies of Ana and Ms. Camacho. Defendant's own suspicious and calculated conduct immediately after he committed this massacre plus his flight and the independent evidence corroborating Ms. Camacho's testimony inextricably finger the defendant as the guilty party. See Statement of Facts, infra.

Defendant has utterly failed to prove that the State knew of any alleged falsehoods. Taken to its logical conclusion, the defendant's argument would usurp the jury's duty to judge credibility and make factual findings. Absent proof that the prosecution deliberately presented false evidence, "it is the jury, and the jury alone, that determines the facts." State v. Ingenito, 87 N.J. 204, 211 (1981). See State v. Forcella, 35 N.J. 168, 175 (1961), cert. den., 369 U.S. 866 (1962). The jury heard the defense theories that Ms. Camacho implicated defendant to get "the best divorce available" and that Ana was "willing to push the truth because she want{ed} some satisfaction for her dead family," and rejected them.

Defendant also creates out of thin air alleged improprieties in the prosecutor's opening and summation. The defendant appears to complain about the prosecutor's reference, during opening, to the evidence which would be produced through Ana Gonzalaz and Elieth Camacho, specifically prior threats and violent acts. Insofar as defendant quibbles about the admissibility of that evidence, suffice it to say that after extensive argument from counsel outside the jury's presence, the trial judge made a well-considered and accurate

ruling. Also, appropriate limiting instructions were provided. See Point I, supra. The prosecutor did not allude to any evidence, in opening, that he did not actually produce during trial. See State v. Hipplewith, 33 N.J. 300, 309 (1960). Defendant's characterizations of Elieth Camacho's and Ana Gonzalaz' testimony as perjured, and that Ms. Gonzalaz "disliked (him) from the onset..." (2Db28) are completely without substantiation.

Defendant's complaint that the "trial court erred in not granting counsel a Rule 55 hearing to determine the value of this testimony" (2Db29) is inexplicable. A defendant who does not ask for such a hearing cannot complain about its denial on appeal. State v. Lassiter, 197 N.J. Super. 2 (App. Div. 1984). It was agreed that certain matters which would usually be argued pre-trial would be addressed as they came up. (T3-8 to 19). After making an objection during the prosecutor's opening, defendant's counsel said he probably would not object to the testimony of Silva or Ana. (1T11-9 to 15). After making proffers of the anticipated testimony of Ana and Ms. Camacho, the defendant made no request for their live testimony, probably happy not to have to preview his cross-examination. Nor was he entitled to same. After extensive debate, the Court rendered rulings which allowed in some, and excluded other, portions of the evidence offered by the State. (2T46-7 to 47-16; 3T25-16 to 26-24). In short, the defendant received the full benefit of argument from counsel and consideration by the court on the N.J.R.E. 404(b) issue.

A prosecutor, in his summation, can discuss facts shown or reasonably suggested by the evidence. State v. Dixon, 125 N.J. 223, 259 (1991); State v. Hill, 47 N.J. 490 (1966); State v. Johnson, 31 N.J. 489, 510 (1960), cert. den., 368 U.S. 933

(1961). A prosecutor is entitled to "wide latitude" in his summation, and to sum up graphically and forcefully." State v. Perry, 65 N.J. 45, 47-48 (1974); State v. Mayberry, 52 N.J. 413, 437 (1968), cert. den., 393 U.S. 1043 (1969). See State v. Lynch, 177 N.J. Super. 107, 115-116 (App. Div. 1981), certif. den., 83 N.J. 347 (1981).

Defendant takes issue with the prosecutor's question whether the jury believed the defendant or Ana and his statement, "it's time to pay the piper," claiming that these comments "interfer{ed} with the jury's ability to consider the value of the testimony of the State's key witnesses" because the prosecutor told the jury that, based on his "own expert evaluation of this case," the defendant was lying. This argument is not even based on a distorted interpretation of the record, but is invented out of thin air.

When discussing why Ana's testimony that the defendant threatened to kill and burn down the house was credible because it was corroborated by Leopoldo's testimony, the prosecutor explained:

> Now, you had a chance to examine her demeanor, her credibility. Mr. McLaughlin certainly had a chance to cross-examine her. You rely on your conclusions whether that woman is believable or not because Alberto Scabone says she's lying. I never said that.
>
> Who are you going to believe, Ana Gonzalaz or Alberto Scabone?
>
> What that comment {about burning the house} is, it tells you that there's intent. He has an intention to burn the house down, and what happens is he does. She also gives you a lot of detail as to when that happens.
>
> ...
>
> Are you going to forget something like that? Are you going to let investigators sit you down and tell you that's what to say? Are you going to come into court 13 years later, put yourself under oath and sit in front of 14 strangers with a judge leaning over your

> shoulder and perjure yourself? Make your own conclusions as to Ana Gonzalaz.
>
> (6T47-24 to 48-20)

When put in its proper context, the record discloses that the prosecutor was merely explaining why Ana was a credible witness.

When explaining why the evidence showed that defendant purposely killed all three victims, the prosecutor urged:

> {This case is} about planned murder... These women are stabbed while fully clothed a total of 93 times. This is more than just a stabbing. This is more than just a homicide. This is hate involved with those 93 times. That's what this case is all about.
>
> Tell Alberto Scabone that that's what this case is all about. This case is all about murder. There's proof of murder. There's proof beyond a reasonable doubt. You had a good run. Twelve years on the lam, but now it's time to pay the piper.
>
> (6T64-2 to 13).

The prosecutor urged the jury that the evidence demonstrated that the defendant purposely killed his victims. Defendant's concoction that these comments inferred that the prosecutor knew the defendant was lying based on his personal belief and specialized "expert evaluation of this case as compared with others he had tried" is belied by the record and facetious, at best. The prosecutor never even uttered a word about his experience or other cases he had tried. Obviously a prosecutor during summation is going to discuss why the credible proofs show the defendant's guilt. Defendant's attempt to relegate the prosecutor to the status of a cigar store Indian when he makes his summation must fail. These arguments, supported by the defendant's fertile imagination and nothing more, must be rejected.

CONCLUSION

In light of the foregoing, the State respectfully urges that the defendant's well deserved convictions and sentence be affirmed.

Respectfully submitted,

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DATE: March 13, 1995
(Revised pursuant to Court Order April 25, 1995)
(SCABONEA.BRF)

A-3498-93T4

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STATE OF NEW JERSEY, Plaintiff-Respondent, v. ALBERTO SCABONE, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3498-93T4 **CRIMINAL ACTION** ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY

SAT BELOW: HON. EUGENE J. CODEY, J.S.C.
AND A JURY

APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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INDEX TO THE APPENDIX

ANALYSIS OF SIGNIFICANT RULE CHANGES

This analysis summarizes the principal changes in the Rules of Evidence proposed in the June 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence. I will also discuss significant comparisons with the Federal Rules of Evidence.

In many respects the proposed rules closely reflect the present state of New Jersey evidence law, but they have been organized and numbered according to the federal format. Overall, where differences exist substantively, the proposed rules are more akin to our present law than to the Federal Rules of Evidence. Previous amendments to the 1967 New Jersey evidence rules, such as to Rule 63(1)(a) (prior inconsistent statements) and Rule 56(2) (expert opinion), incorporated some concepts taken from the federal rules, and to a large extent the similarities in the present New Jersey rules and the federal rules are far more pervasive than their differences. It should be remembered that the New Jersey evidence rules, adopted in 1967, and the federal rules, adopted in 1975, derived, in different degrees, from the 1953 Uniform Rules of Evidence.

The following comments deal with significant differences from the federal rules and changes and additions to the 1967 New Jersey Rules of Evidence as amended to date, which are contained in the rules proposed in the Committee's June 1991 Report.

1. Prior inconsistent statements of a non-party witness.

In proposed Rule 803(a)(1) and Rule 607, we retain existing provisions of N.J.Evid.R. 63(1)(a) and N.J.Evid.R. 20. These rules had been amended in 1982, with 63(1)(a) borrowing a small part of the concept contained in federal Rule 801 (d)(1)(A). However, we then adopted a much broader rule than the federal rule, retaining the original form of the 1967 version of 63(1)(a) to admit for substantive use a prior inconsistent statement of a non-party witness made in any form so long as the witness was not called by the party offering the extra-judicial statement. The federal rule limits the substantive use of prior inconsistent statements to those made under oath at a trial, hearing, deposition or other proceeding, no matter which party offers the

prior statement. Under our proposed Rule 803(a)(1), a prior inconsistent statement made by a party's own witness can be used substantively only if it was made under oath or in writing made or signed by the declarant, or is contained in a sound recording.

In amending Rule 63(1)(a) in 1982 it was felt that the requirement that the prior inconsistent statement be made under oath was too narrow and limiting. A sound recording or written record made or signed by the declarant was deemed of sufficient reliability for the purpose, and a statement in any form, even an informal verbal statement, made in circumstances indicating reliability, should suffice as to another party's witness, since the witness can, in testimony, deny or explain the extra-judicial statement.

Thus, the Committee felt that our rule is and has been a better rule than its federal counterpart.

2. Attacking the credibility of a witness by a prior inconsistent statement.

Under N.J.Evid.R. 20, a party calling a witness may not neutralize his testimony by a prior inconsistent statement unless the statement is in a form admissible under Rule 63(1)(a) or the judge finds that the party calling the witness was surprised by his testimony. This reflects to some extent the common law "voucher" principle. This rule is continued in proposed Rule 607. It is narrower than federal rule 607 which permits the credibility of a witness to be attacked by any party, including the party who called the witness, without limitation on the use of prior inconsistent statements for the purpose. Whether the narrower New Jersey rule is better may be debated. A broader rule was proposed in the 1963 Report of the New Jersey Supreme Court Committee on Evidence ("The 1963 Report") but was rejected. See also a proposed amendment to Fed. R. Evid. 607 that would impose stricter conditions for admission of a prior inconsistent statement offered by the party calling the witness. A.B.A. Section of Litigation, Proposed Amendments to the Federal Rules of Evidence (1985) at p. 75.

Our Committee adhered to the present form of Rule 20, as it was broadened somewhat in 1982 to admit statements under oath, sound recordings or writings as in 63(1)(a) for this purpose. This modification of Rule 20 produced a comfortable compromise.

3. Supporting the credibility of a witness by character evidence.

N.J.Evid. 20, as adopted in 1967, provided that "[n]o evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of

testimony." Evidence of a witness' trait of character for truthfulness could not be offered generally unless the credibility of the witness had first been attacked. See The 1963 Report at 64.

The provision of N. J. Evid. R. 20 referred to above was literally too restrictive since corroborating evidence is frequently introduced which has the incidental effect of supporting the credibility of a witness. Thus, when N. J. Evid. R. 20 was amended in 1982, that sentence was revised to provide that "a prior consistent statement" of the witness could not be admitted to support his credibility except to meet an express or implied charge of recent fabrication (and except as otherwise provided by law, e.g., the fresh complaint rule and prior identification testimony under N. J. Evid. R. 63(1)(c)). Unfortunately, this amendment was given a broader reading than intended. See State v. Frost, 242 N. J. Super. 601, 613 (App. Div. 1990); Coddell v. Brown, 220 N. J. Super. 330, 336 (Law Div. 1987). Relevant evidence which incidentally supports the credibility of a witness is always admissible, but evidence of the witness' truthful character could not be offered unless the witness' credibility was first attacked. State v. Johnson, 216 N.J.Super. 588, 605-607 (App. Div. 1987).

While the provisions of N. J. Evid. R. 20 have been incorporated into proposed Rule 607, as discussed above, the prior history of N. J. Evid. R. 20 requires a change in proposed Rule 608 to provide that evidence of truthful character of a witness cannot be offered unless the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. This is not intended to alter the right of an accused in a criminal case to offer character evidence tending to rebut the likelihood that he would commit a crime. This amendment will clarify the confusion in interpreting N.J Evid. R. 20 and is consistent with Fed. Evid. R. 608(a) as well as the intent of N. J. Evid. R. 20 as adopted in 1967 and New Jersey practice prior to the 1982 amendment of that rule.

4. Public records, reports, and findings.

Proposed Rule 803(c)(8) retains the provisions of N.J.Evid.R. 63(15)(b) and rejects the provisions of federal Rule 803(8)(C) which are broader in scope (except as to evidence offered against an accused in criminal cases). The Committee also retained the present design of the 1967 New Jersey rules by including regularly conducted activities of governmental agencies in the business record rule, 803(c)(6), defining business in Rule 801(d) to include "activities of governmental agencies," as in N.J.Evid.R. 62(5). Thus, in Rules 803(c)(6) and 803(c)(8) we have retained the pattern of our present rules, 63(13) and 63(15), maintaining two rules through which governmental records

may be introduced in evidence. See State v. Matulewicz, 101 N.J. 27 (1985). The federal rules do not expressly include governmental activity within the definition of business contained in federal Rule 803(6). However, business records of government agencies are generally admissible under federal Rule 803(8).

The principal difference between our proposed Rule 803(c)(8) and federal Rule 803(8) is that we continue N.J.Evid.R. 63(15)'s limitation on the admissibility of findings in governmental investigations to "statistical" findings. Under the federal counterpart, Rule 803(8)(C), records, reports, statements or data compilations of public offices or agencies containing "factual findings resulting from an investigation made pursuant to authority granted by law," derived from trustworthy sources and circumstances, are admissible in civil cases and against the government in criminal cases. Thus, proposed Rule 803(c)(8), like N.J.Evid.R. 63(15), is narrower than the business record rule, and may serve no separate purpose unless broadened in the direction of the federal rule. This was not proposed by the Committee but is a matter for the Court's consideration. See Matulewicz, supra, in which the Court referred to the provisions of N.J.Evid.R. 63(15) which seem to exclude conclusions and opinions rather than observations or statistical findings as a "problematic exclusionary limitation." 101 N.J. at 32. Sculpting a rule that secures the benefits of governmental agencies' investigations while rejecting the impurities and disadvantages of such evidence is a difficult task. See Comment on Rule 803(c)(8) in the Committee's Report, referring to conflicts in federal decisions on the admissibility of opinions and conclusions in investigative records and evaluative reports.

5. Exclusion of expert opinion in otherwise admissible hearsay.

Proposed Rule 808 is a new rule not found in the current New Jersey or the Federal Rules of Evidence. It requires that expert opinion of a declarant who is not produced as a witness at trial be excluded from hearsay, such as business records, unless the circumstances in which the opinion was rendered, including motive, interest, contemplation of litigation, complexity of the subject matter, and likelihood of accuracy, tend to establish the trustworthiness of the opinion.

As an example, this rule would allow the exclusion of an opinion contained in a hospital record of a patient admitted for the treatment of cancer that the cause of cancer was a traumatic injury suffered in an auto accident, then in litigation, unless the medical expert is produced as a witness subject to cross examination. The rule incorporates principles expressed in State v. Matulewicz, 101 N.J. 27, 30 (1985), holding that the admissibility of a State chemist's laboratory report identifying a substance as marijuana would depend on the method and circumstances involved in the report's preparation, the complexity or routine nature of the analysis, the degree of objectivity or subjectivity involved, the motive for untrustworthiness, and the duty of the declarant to be accurate and reliable.

This rule has been developing over time. See State v. Martorelli, 136 N.J.Super. 449 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976) (blood alcohol report in hospital record) and dicta in Gunter v. Fischer Scientific American, 193 N.J.Super. 688, 694 (App. Div. 1984) and Lazorick v. Brown, 195 N.J.Super. 444, 451 (App. Div. 1984). Notwithstanding the complexity of the condition which is the subject of the expert opinion, many records containing such opinions, particularly hospital records, are routinely admitted without objection. However, where the conclusion expressed is a matter of dispute, and may be critical to the outcome of the case, judges should be aware of their discretion to exclude opinions of questionable trustworthiness unless the expert is produced as a witness. The rule is intended to embody principles found in case law and recognized by other authorities. See McCormick on Evidence (Cleary 2d ed. 1972), §313 at 732; 4 Weinstein's Evidence, par. 803(6)[06], 803-199 to 201 (1988).

6. Presumptions in civil cases.

The presumption provisions of proposed Rule 301 generally follow its federal counterpart and existing New Jersey law. The Committee considered adopting the "Morgan view" which was incorporated in Rule 301 of the Uniform Rules of Evidence (1974),

and was proposed to the United States Supreme Court by its Advisory Committee on Rules of Evidence, namely, that a presumption should not disappear in the face of evidence on the subject as in the classical "Thayer view," but should serve to shift the burden of persuasion to the party against whom the presumption operates. E.M. Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 Harv. L. Rev. 59, 83 (1933). That position was rejected by our Committee and is expressly rejected by federal Rule 301 as adopted by Congress. By contrast, the California Evidence Code, successfully or not divides all presumptions into those which affect the burden of producing evidence (§603) and those which affect the burden of proof, i.e., persuasion (§605), and undertakes the task of allocating a number of existing presumptions to one or the other of these categories. The New York State Law Revision Commission, in its 1982 Proposed Code of Evidence, recommended adoption of the "Morgan" view, shifting the burden of persuasion to the party against whom the presumption operated. §302, at 24 (West. Pub. Co.). But the Committee recognized that no one rule can ideally give the appropriate effect to all presumptions. Id. at 26.

The large number and variety of presumptions, their different purposes, and the differing probative force of the factual inferences on which they are based make it difficult to provide comfortably in one rule for all eventualities. For example, the presumption that a driver is the agent of a motor vehicle's owner may serve a purpose in the absence of any evidence on the subject, but in many circumstances it may be a highly unlikely inference. Should the presumption do more than shift the burden of producing evidence on the issue? It may be sufficient to provide, as in Rule 301, that the inferences that may be drawn from the evidence remain in the case, and to consider the presumed fact established from proof of the basic fact in the absence of contradictory evidence.

7. Presumptions against the accused in criminal cases.

Rule 303 is new. It deals with the effect of presumptions in criminal cases and incorporates principles of constitutional law enunciated in both federal and New Jersey cases. A proposed federal rule for presumptions in criminal cases was not adopted. The 1967 New Jersey rules did not contain a separate rule on the subject. As a result, N.J.Evid.R. 15 was adopted in 1982 as a stop-gap measure to assure that Rules 13 and 14 were not used against an accused in criminal cases by virtue of N.J.S. 2C:1-13(e). The Committee considers Rule 303 a useful addition to New Jersey law.

8. The residual hearsay exception in federal rules 803(24) and 804(b)(5).

A significant difference between the Committee's Report and the federal rules is the rejection of residual exceptions to the hearsay rules contained in the federal enactment that permit "other" unspecified exceptions to the hearsay rules in limited instances. A general rule permitting any evidence rule to be "relaxed" in civil cases in the interest of justice was proposed as Rule 2(4) in The 1963 Report, but it was not adopted.

Federal Rules 803(24) and 804(b)(5) are identical and are carefully crafted to meet rare exceptional needs. Ironically, a residual exception was made part of Rule 803 (which applies whether or not the extra judicial declarant is available as a witness) as well as Rule 804, which conditions the admission of hearsay statements of declarants only when they are unavailable as witnesses. There should be no need for a residual exception in Rule 803 if the declarant is available as a witness.

The federal residual exception rules contain strict criteria for admissibility in addition to advance notice to an adversary of an intention to introduce such hearsay evidence. The conjoined criteria for admissibility are:

a. the statement is offered as evidence of a material fact;

b. the statement is more probative on the issue that any other evidence reasonably available;

c. the interests of justice and the general purposes of the evidence rules will best be served by admission of the hearsay statement; and,

d. The statement is not covered by an express hearsay exception but has equivalent circumstantial guarantees of trustworthiness.

The federal courts have not been consistent in the application of these criteria, some being less strict than others. One general problem is whether the rule can be applied to admit a type of hearsay which is governed by an express exception if the conditions of that exception have not been satisfied. The terms of the rules suggest otherwise. Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 500 F.Supp. 1190, 1262-1263 (E.D. Pa. 1980); but cf. Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978), cert. denied., 439 U.S. 969 (1979) (concurring opinion).

In the search for truth there is often a gnawing temptation to use some seemingly reliable evidence of a material fact in the absence of other probative evidence or which appears superior to other available evidence on the issue. The case often used to prove the need for such a rule is Dallas County v. Commercial Union Assurance Co., Ltd., 286 F.2d 388 (5th Cir. 1961). The case was cited in The 1963 Report to support its relaxation proposal, and by the Report of Senate Committee on the Judiciary, in support of its amendment to add a residual exception rule to the proposed federal rules.

The issue in the Dallas County case was whether the county courthouse tower collapsed because it was struck by lightning, for which there was insurance coverage, or because of structural weakness and deterioration. There was evidence of charcoal and charred timbers present. However, the insurer offered in evidence an article published 56 years earlier in a local newspaper describing a fire in the courthouse while it was under construction. The court held that the article was admissible out of necessity as trustworthy hearsay, consistent with the rationale of the ancient document exception, but not admitted as such nor as a business record.

The federal rule is not as broad as Rule 2(4) proposed in The 1963 Report, and does require warning to an adversary in advance of trial, a condition not contained in proposed Rule 2(4). Advance notice to an adversary tends to reduce the fear of uncertainty that unspecified exceptions engender. The Court may wish to consider the possibility that within a state system greater discipline may be exercised to apply the criteria of the rule more strictly than in the far-flung federal court system.

9. Statements of a child concerning sexual activity.

NOT ADOPTED

Rule 804(b)(8) makes significant changes in N.J.Evid.R. 63(33) which was adopted in 1989 pursuant to authority of Joint Resolution No. 4, 1989, following principles announced in State v. D.R., 109 N.J. 348 (1988). The Committee's proposed rule is consistent with D.R.'s holding, but it contains important differences: (a) it limits the rule to statements of a child who is unavailable as a witness or cannot give full and cogent testimony; (b) the child must be of "tender years" rather than under 12 years of age; (c) the rule is not limited to criminal actions but may be applied in all actions and proceedings; and (d) it contains more detailed criteria for admissibility of the out-of-court statement.

Thus, the rule narrows N.J.Evid.R. 63(33) by excluding hearsay statements of an available witness who is able to give full and cogent testimony concerning the substance of the statement (see Rule 804(5)), since there is no need for such

hearsay to be used substantively in such cases, as distinguished from its use as a fresh complaint when appropriate. But it broadens N.J.Evid.R. 63(33) to make it applicable to all proceedings, civil as well as criminal.

There is no Federal Rule of Evidence on this subject.

10. Inadmissibility of plea discussions and withdrawn guilty pleas, and related statements.

Rule 410 generally follows Fed.R.Evid. 410 and contains provisions not present in our current rules of evidence. It protects against the use of guilty pleas that have been withdrawn and statements made in the course of the plea proceeding as well as during plea negotiations if a guilty plea was not effectively consummated. If adopted, it would supersede the holding in State v. Boyle, 198 N.J.Super. 64, 69-73 (App. Div. 1984). The rule is consistent with N.J.Evid.R. 52(2) (evidence that defendant offered to plead guilty to a lesser offense or upon terms is inadmissible against him in that criminal proceeding) and State v. Boone, 66 N.J. 38 (1974), but it covers more ground. This is a protective rule similar to but broader than Rule 52(2) as originally proposed in The 1963 Report. N.J.Evid. R. 52(2) was narrowed when adopted in 1967, and the Boyle case was faithful to that rule in the form in which it was adopted. Rule 310 would add broader protections in both civil and criminal actions for withdrawn guilty pleas and statements made during plea negotiations that were not consummated by effective guilty pleas, subject to exceptions, including use in a criminal proceeding for perjury. The federal rule was seen as a needed improvement to current New Jersey law.

11 Learned treatises.

Proposed Rule 803(c)(18) follows Fed. R. Evid. 803(18) and changes New Jersey practice. A similar rule was proposed in The 1963 Report as Rule 63(31) but was not adopted. As a result we have no rule governing learned treatises in our present rules of evidence, and our practice is more restrictive than the proposed rule.

Rule 803(c)(18) would allow the use of learned treatises as evidence, although not accepted as authoritative by a witness cross-examined on the subject, providing it is established as authoritative by other testimony or by judicial notice. The work may be read into evidence as substantive evidence although not received as an exhibit. Its use is not limited to the function of impeaching an expert on cross-examination who acknowledges the text as a recognized authority, as in Ruth v. Fenchel, 21 N.J. 171, 176-179 (1956).

The proposed rule has long had the widespread approval of scholars of the law of evidence. The 1963 Report, at 213. Adoption of this rule is overdue.

12. Declarations against interest.

The federal rules assign declarations against interest (extra-judicial statements against declarant's pecuniary or proprietary interest or which expose declarant to civil or criminal liability) to the category of hearsay which requires proof that declarant is unavailable as a witness. Fed. Evid. R. 804 (b)(3). Consistent with N.J.Evid.R. 63(10), the Committee rejected this principle and, in proposed Rule 803(c)(25), continued this hearsay exception whether declarant is available or not.

13. Testimony in Prior Proceedings.

Proposed Rule 804(b)(1) is similar both to its federal counterpart and N.J.Evid. R. 63(3) in a number of respects but differs from both rules. Unavailability of the declarant as a witness is a condition of admissibility of prior testimony, as in the present rule.

Proposed Rule 804(b)(1) is divided into two parts, respectively applicable to cases (A) in which the former testimony is offered against a party who was a party to the earlier proceeding and to cases (B) in which it is offered against a party who was not in the prior proceeding. In both instances the rule requires that the opportunity and motive to develop the earlier testimony by examination or cross-examination be the same or similar to that which the party against whom the evidence is offered has in the present proceeding. If the party against whom the evidence is offered was not a party to the earlier proceeding, it is admissible in civil cases and when offered by the defendant in criminal cases, provided the party who offered it or against whom it was offered in the prior proceeding had an interest as well as the opportunity and motive to develop the testimony identical or similar to that of the party against whom it is later offered.

The federal rule admits the testimony in a civil case if the party against whom it is offered was a party to the earlier action or proceeding or was a "predecessor in interest." This language is narrower than the proposed rule, tempting federal courts to read "predecessor in interest" broadly and not literally. Lloyd v. American Export Lines, Inc. 580 F.2d 1179 (3d. Cir.), cert. denied 439 U.S. 969 (1978); but cf. In re Screws Antitrust Litigation, 526 F. Supp. 1316, 1319 (D. Mass. 1981). The proposed rule would include predecessors in interest

in category (B), but that provision is not limited to such parties. Note that Rule 63(3) used the successor-in-interest criterion with respect to testimony offered by a party in the earlier proceeding. The proposed rule is also broader than N.J. Evid.R. 63(3)(a) with respect to the use of prior depositions in that the present rule applies only to de bene esse depositions. While the proposed rule is slightly more flexible than N.J.Evid. R. 63(3), the criteria must be carefully applied to assure a just result.

The proposed rule contains a limitation with respect to the admissibility of expert testimony given in a prior proceeding, namely, the requirement of a finding that experts of "like kind" are not readily available and that the interests of justice require admission of the prior testimony. See Thompson v. Merrell Dow Pharmaceuticals, Inc., 229 N.J.Super. 230, 252 (App. Div. 1988); cf. Sacawa v. Polikoff, 150 N.J.Super. 172, 177-179 (App. Div. 1977). This limitation is not contained in the federal or state analogues. But see Carter-Wallace, Inc. v. Otte, 474 F.2d. 529, 535-537 (2d Cir. 1972), cert. denied 412 U.S. 929 (1973), to the same effect.

14. Dying Declarations.

MODIFIED

Proposed rule 804 (b)(2) follows N.J.Evid. R. 63(5) but requires prior notice to an adversary of an intention to offer such hearsay, a condition not presently required. Cf. N.J.Evid. R. 64, making prior notice a condition for admitting hearsay under certain rules if the statement is in writing. Rule 804 (b)(2) differs in a number of respects from its federal counterpart. The present and proposed New Jersey rules are limited to criminal proceedings and to statements of victims who are dead. Cf. N.J. Evid. R. 63(32) and proposed Rule 804(b)(6) for admission in civil proceedings of trustworthy statements of declarants generally who are dead. The federal rule is limited to statements "concerning the cause or circumstances of what the declarant believed to be impending death"; and the only type of criminal case in which the evidence is admissible is a homicide case. The New Jersey rule is not so limited.

The federal rule stays close to the common-law origin of the rule, that the declarant be a victim of homicide, but it recognizes also that the declarant's psychological or religious impulse for veracity justifies admission in civil cases. It continues the limitation to homicide in criminal cases and the limitation on the subject matter of the declaration, namely, the cause or circumstances of declarant's impending death. The New Jersey rule, which requires the death of the declarant, does not limit the statement to the cause or circumstances of his impending death, which he believed was imminent. The statement may be on another subject, provided it was made voluntarily and

in good faith. As noted above, there is no need to apply the rule to civil cases in view of the broader state rule admitting trustworthy statements of persons who are unavailable as witnesses because of their death. N.J.Evid. R. 63(32) and proposed Rule 804(b)(6). But the proposed rule leaves one gap in criminal cases which is covered by the federal rule: dying declarations of declarants who survive the impending death but are, nevertheless, unavailable as witnesses. The Committee chose not to close this small gap.

15. Admissibility of Duplicates.

Proposed Rule 1003 alters our present "best evidence" rule by admitting duplicate writings without proof of the unavailability of the original, subject to an exception if the authenticity of the original is questioned or other circumstances make it "unfair" to admit the duplicate rather than the original. This is consistent with provisions found currently in many contracts making a duplicate the equivalent of an original.

CONCLUSION

In addition to substantive changes, some of which are discussed above, numerous language and organizational changes in the rules of evidence were made in an effort to improve the rules and their interpretation. A brief rule by rule summary has been prepared by Sylvia B. Pressler, P.J.A.D. and is attached as an appendix to this letter.

My references to positions taken by the Committee should not suggest that its members agreed unanimously with the Report as a whole or with all the individual rules contained in the Report. The rules of evidence will never be static or beyond debate; they will always be subject to varying judgments as to logic, need and fairness.

Almost 25 years have passed since this body of law was reviewed as a whole in New Jersey. We have our own experience to consider as well as the federal rules which followed, and the interpretation and controversy their adoption and application engendered. See, for example, A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence (1983). The Committee's Report will serve to stimulate discussion and improvement of the rules proposed here. Some will argue against change. Some attorneys, skilled in advocating their cause and partisan by habit, will argue against narrowing some rules or loosening others. At the very least, merging the New Jersey rules with the federal rules, selecting the best portions of each, with one set of numbers, should benefit New Jersey trial attorneys in state and federal courts and will expose the bench

and bar to a larger field of decisional law and academic comment. More than one-half of our sister states have adopted the federal rules.

More importantly, we hope this process will improve our body of evidence law and that not only logic but the quest for truth and justice will be better served.

Respectfully submitted,

Theodore I. Botter,
Chairman, New Jersey Supreme
Court Committee on Evidence

TIB/dd
Attachment

Summary Analysis of Evidence Rule Changes

ARTICLE I - GENERAL PROVISIONS

101 - Scope, Applicability

(a)(1) - privileges (no substantial change)

(a)(2) - relaxation: the proposed rule collects all the various proceedings and circumstances in which the rules of evidence may be relaxed, including small claims proceedings, statutory stipulations, sentencing and disposition proceedings, probable cause hearings and hearings to determine admissibility (present Rule 8, proposed Rule 104. While this rule accords with present practice, the only relaxation provision in the present rules is small claims, which this rule amends by making clear that the relaxation provision applies to all matters within small claims jurisdiction, whether or not brought there initially.

(a)(3) - administrative proceedings: the proposed rule clarifies and expands the present rule to include all administrative hearings: contested, uncontested, formal or informal.

(a)(4) - undisputed facts: the proposed rule extends the binding stipulation of fact provision of the present rule to criminal actions.

(b) definitions: the proposed rule preserves only three of the present fourteen definitions: burden of proof, burden of producing evidence, and writing. Relevance is defined by proposed 401 and some other definitions are provided by the hearsay rules. The omitted definitions were considered too obvious or unhelpful for inclusion.

102 - Purpose and Construction. Essentially unchanged

103 - Federal Rule 103 (rulings on evidence). Not adopted since this material is covered by rules of procedure.

104 - Preliminary Questions. Substantially unchanged, except for the addition of (d), taken from the federal rule and consistent with N.J. practice, providing that testimony by an accused on preliminary hearing does not subject him to cross-examination on other issues.

105 - Limited Admissibility. Changes present rule by requiring the party to request a limiting instruction and by expressly authorizing the judge to permit a party to waive the limiting instruction.

106 - Remainder of or Related Writings or Recorded Statements. The proposed rule follows the federal rule by permitting the adverse party to require the proferring party to introduce any other relevant portion of the statement or other writing bearing on the issue. There is no such present evidence

rule although the rules of procedure to some extent so provide. This accords with present practice.

ARTICLE II - JUDICIAL NOTICE

201 - Judicial Notice of Law and Adjudicative Facts. By and large the substance of the proposed rule follows the present rules more closely than the federal rule but the material has been reorganized consistently with the federal rule, replacing present Rules 9, 10, and 11. The main change is in 201(g) which provides, for sixth amendment confrontation purposes, that the judge's instruction as to the conclusiveness of judicially noticed fact is limited to civil cases. In criminal cases, the jury cannot be compelled to accept a judicially noticed fact.

202 - Judicial Notice in Proceedings Subsequent to Trial. The proposed rule follows the present N.J. rule in both substance and format rather than the analogous federal rule.

ARTICLE III - PRESUMPTIONS

301 - Effect of Presumption. Substantially unchanged.

302 - Choice of Law. - The proposed rule follows the federal rule; there is no New Jersey analogue. It provides that the law of existence and effect of presumption follows the law governing the claim or defense to which it relates. The rule expressly applies only to civil actions.

303 - Presumptions Against the Accused in Criminal Cases. There is no analogous state or federal rule. The proposed rule follows well-established New Jersey case law on the effect of statutory presumptions and instructions to juries where presumed facts are involved. The proposed rule follows, generally, the 1974 Uniform Rules of Evidence. The rule replaces N.J. Evid. R. 15, which was adopted as a stop gap measure.

ARTICLE IV - RELEVANCY AND ITS LIMITS

401 - Definition of Relevant Evidence. The proposed rule is substantially the same as the present rule, substituting however for the phrase "material fact", the phrase "fact of consequence to the determination of the action."

402 - Relevant Evidence Generally Admissible. Substantially unchanged.

403 - Exclusion of Relevant Evidence. Substantially the same as present rule with new introductory phrase cross referencing to other rules and statutes.

404 - Character Evidence Not Admissible to Prove Conduct. The proposed rule replaces present Rules 46,48, 55 and part of 47, generally following the federal formulation without substantial change in New Jersey practice except to render clearly inadmissible proof of a trait of character for the purposes of drawing inferences as to conduct on a specific occasion. Trait of character is consequently only admissible where it itself is in issue or to affect credibility in accordance with proposed Rule 608.

405 - Methods of Proving Character. Proposed paragraph (a)(reputation, opinion, or conviction of crime) is substantially unchanged, rejecting the federal provision permitting general inquiry on cross-examination into specific instances of conduct. Proposed paragraph (b)(specific instances of conduct when an essential element of a charge, claim or defense) follows the federal formulation without change in New Jersey practice.

406 - Habit, Routine Practice. The proposed rule generally follows present Rules 49 and 50. There is no federal analogue to paragraph (b).

407 - Subsequent Remedial Measures - The proposed rule, in addition to streamlining and clarifying the verbiage of present Rule 51, also makes clear that proof of subsequent remedial measures is admissible for purposes other than proof of negligence such as control, routine maintenance, feasibility and credibility. This comports not only with the federal analogue but with New Jersey case law.

408 - Settlement Offers and Negotiations - The proposed rule follows the formulation of the federal analogue which is more felicitously phrased than the New Jersey rule, also making clear its applicability to statements and conduct of the parties' attorneys as well as those of the parties themselves. It also expands the issues as to which such proof may be introduced from "accord and satisfaction" only, as at present, to a purpose other than validity or amount of the claim. It expressly provides that otherwise relevant evidence to be admitted despite its disclosure during settlement negotiations.

409 - Payment of Medical and Similar Expenses The proposed rule follows the federal rule which is consistent with the principles of N.J. Evid. R. 52(1), although expressed in different terms.

410 - Inadmissibility of Pleas, Plea Discussions and Related Statements - The proposed rule expands the formulation of the present New Jersey rule, also overruling case law which permitted admissibility of statements made by defendant during unconsummated plea negotiations. The verbiage generally follows the federal analogue.

411 - Liability Insurance The proposed rule follows the federal formulation and changes the N.J. Evid. R. 54 by making clear that while evidence of insurance is not admissible to prove negligence or wrongdoing, it may be admitted for other purposes such as proof of ownership, agency, control or bias.

412 - Federal Rule 412 (rape shield law). Not adopted. This subject is covered by N.J.S.A. 2A:2C: 14-7, which is not proposed to be changed at this time. Note, however, that recent decision (see State v. Budis) challenge a literal interpretation of 2C:14-7(c), suggesting that a future change may be necessary depending on the substantive nature of Supreme Court review.

ARTICLE V - PRIVILEGES

No change is suggested in any of the statutory formulations constituting the rules of privilege. The statutes are merely restated in this draft.

ARTICLE VI - WITNESSES

601 - General Rule of Competency - The proposed rule reflects current practice, collecting the cognate provisions of present Rules 7(a) and (b) and 17 (a) and (b). It adds a sentence to accommodate questioning of a child of tender years as to sexual activity pursuant to proposed Rule 804(b)(8) notwithstanding the child may be incompetent to testify as a witness. See present Rule 63(33).

602 - Lack of Personal Knowledge - The proposed rule follows the federal formulation, making no substantial change in New Jersey practice.

603 - Oath or Affirmation - The proposed rule makes no substantial change in the present rule.

604 - Interpreters - The proposed rule codifies the practice of requiring the interpreter to take an oath or affirmation that he will interpret accurately. It rejects, as confusing, the federal stipulation that the interpreter is subject to "qualification as an expert," leaving the qualifications of the interpreter to be determined by the judge.

605 - Restriction on Judge as Witness - The proposed rule follows the federal formulation which is not substantially different from the present New Jersey rule.

606 - Restrictions on Juror as Witness The proposed rule is substantially the same as both the analogous federal and present state rule.

607 - Credibility and Neutralization - The proposed rule follows, almost verbatim, present Rule 20, whose formulation was deemed preferable to the federal rule.

608 Evidence of Character for Truthfulness or Untruthfulness - The proposed rule generally follows the federal formulation, remaining consistent with N.J.Evid. R. 47.

609 - Impeachment by Evidence of Crime - There is no present New Jersey rule, but rather a statute N.J.S.A. 2A:81-12, which was interpreted by State v. Sands. For completeness, the substance of that statute is followed by this rule and the federal formulation is rejected in favor of Sands, which is intended to be incorporated into the rule by its reference to the judge's discretion. The proposed rule, by its silence on the subject, follows New Jersey case law and rejects the contrary provision of the federal rule respecting the inadmissibility for impeachment purposes of a conviction pending appeal.

610 - Religious Beliefs or Opinions - There is no present New Jersey rule other than the privilege of N.J.S.A. 2A:84A-24 (reiterated by present Rule 30 and proposed Rule 512). The proposed rule follows the federal rule and is not inconsistent with the privilege.

611 - Mode and Order of Interrogation and Presentation - The proposed rule follows the federal rule almost verbatim. While there is no New Jersey analogue, the provisions of the proposed rule follow accepted New Jersey practice.

612 - Writing Used to Refresh Recollection - While there is no present New Jersey rule, the proposed rule is consistent with New Jersey practice. It generally follows the federal rule but omits the Jencks Act reference (whose substance is covered by R.3:17), makes clear that the writing used to refresh recollection has no substantive evidential import, omits the reference to preservation of excised portions (covered by R. 1:7-3), and omits the reference to sanctions (covered by various rules of practice).

613 - Prior Statements of Witnesses - The proposed rule generally follows both the federal and state analogues.

614 - Calling and Interrogation of Witnesses by Judge - The proposed rule generally follows the federal rule. While there is no New Jersey analogue, the rule comports with present New Jersey practice.

615 - Sequestration of Witnesses - While there is no present New Jersey evidence rule, there is a body of New Jersey case law on the subject. For purposes of completeness, the proposed rule merely cross-references to that body of law, thus rejecting the federal formulation.

ARTICLE VII --OPINIONS AND EXPERT TESTIMONY

701 - Opinion Testimony of Law Witness
702 - Testimony by Experts
703 - Bases of Opinion by Experts
704 - Opinion on Ultimate Issue
705 - Disclosure of Facts or Data Underlying Expert Opinion

The text of these proposed rules is substantially the same as both their New Jersey and federal analogues. Only clarifying language changes have been made as well as those format changes necessary to conform to the federal rules. Note that proposed 704 rejects the recent amendment of federal analogue barring an expert from testifying on the mental state of defendant in a criminal case.

706 Court Appointed Experts - Federal rule 706 was not adopted since the subject is well-covered both by New Jersey case law and rules of practice. There is no New Jersey evidence rule analogue.

ARTICLE VIII --HEARSAY

801 - Definitions - The proposed rule defines six terms: statement, declarant, hearsay, business, writing and public official. The definitions of the first three make no change in the present New Jersey analogues. The definition of "business" follows the New Jersey analogue which, unlike the federal rule, includes governmental agencies. The definition of "writing" substantially broadens the form of expression included thereby. The definition of "public official" has been broadened to include federal officials. The omission of officials of the federal government from the definition in Rule 62(3) appears to have been an oversight since Rule 63(15) as initially proposed included public officials of the United States as well as state officials.

802 - Hearsay Rule - The formulation of the proposed rule follows the federal rule, broadening the New Jersey analogue by excepting not only hearsay exceptions provided for by rules of evidence but also those provided for by law generally.

803 - Hearsay Exceptions Not Dependent on Declarant's Unavailability. As a general matter, the proposed rule, together with proposed Rule 804, represents a significant format change in the rules and something of a format change from the federal rules as well. First, these rules separate exceptions which are not dependent on unavailability (Rule 803) and those which are (Rule 804), a formal distinction not made by present Rule 63, which

collects all exceptions. Secondly, 803(a) and 803(b)(prior statements of witnesses and statement by party-opponents) are treated differently from the federal rules. The federal rules do not consider these statements as hearsay, but rather expressly excludes them from the hearsay definition (Federal rule 801(d)). The New Jersey rules continue to regard such statements as exceptions to the hearsay rule rather than as exclusions from it. In order to maintain parallelism with federal enumeration, these two types of statements were designated as 803(a) and (b), respectively. All other hearsay exceptions not dependent on unavailability are grouped together in Rule 803(c) in the same order as in the federal rule 803.

803(a) - Prior Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules, which are here reorganized. Subsection (1), dealing with the substantive use of prior inconsistent statements, is broader than the federal rule, which admits such statement sonly if they were made under oath.

803(b) - Party Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules which are here reorganized.

803(c) - Hearsay Exceptions Not Dependent on Unavailability

(c)(1) - Present Sense Impression - The proposed rule includes elements of both the analogous federal and state rule, adding to the latter the provision for admissibility of a statement made immediately after the observation if the declarant had no opportunity to deliberate or fabricate. This is the standard employed by the excited utterance rule as well.

(c)(2) - Excited Utterances - The proposed rule follows the federal formulation with no substantial change in the New Jersey rule.

(c)(3) - Then Existing Mental, Emotional or Physical Condition - The proposed rule follows the federal formulation with little substantial change in but considerable streamlining of the present New Jersey Rule. This rules, however, does add the provision respecting a declarant's will for the purpose of proving probable intent.

(c)(4) - Statements for Purposes of Medical Diagnosis or Treatment. The proposed rule follows the federal formulation, substantially streamlining the present New Jersey rule with one change in substance. The present rule requires the statement to be made to a physician. In light of present-day medical practice, that restriction was deemed too narrow and was consequently deleted. Statements made in good faith to anyone for purposes of diagnosis and treatment are included in the exception.

(c)(5) - Recorded Recollection - The proposed rule is substantially the same as both the state and federal analogues, but adds to the state rule the provision permitting exclusion of the statement if made in circumstances indicating that it is not reliable.

(c)(6) - Records of Regularly Conducted Activity - The proposed rule combines provisions of both the federal and present New Jersey rule. Added to the present New Jersey rule is the provision that the record not only be made in the regular course of business but that it also be the regular practice of the business to make the record. Also added is the provision permitting admission of opinions and diagnoses contained in business records subject to Rule 808, a new provision hereafter referred to. Records prepared in anticipation of litigation are not expressly excluded as a class; that fact of preparation goes to the issue of trustworthiness. Unlike the federal rule, the rule continues to include government records. It also rejects the federal requirement that the record must be introduced by its custodian or other qualified purpose. Thus the present New Jersey practice of a general trustworthy criterion is continued.

(c)(7) - Absence of an entry in records of regularly conducted activity - The only change the proposed rule makes in the present New Jersey rule is the addition of the express provision permitting exclusion of the evidence if the sources of information or other circumstances indicate that the inference of nonoccurrence is not trustworthy.

(c)(8) Public Records, Reports , and Findings - The proposed rule follows the present New Jersey rule, rejecting two key provisions of the federal rule. First, the federal rule excludes from criminal cases statements of observations by law enforcement personnel. The proposed rule does not. Second, the federal rule includes, except against the accused in criminal cases, "factual findings resulting from an investigation." The proposed rule permits only "statistical findings" but in both civil and criminal cases.

(c)(9) - Records of Vital Statistics - The proposed rule follows the federal formulation, replacing present New Jersey Rule 63(16), which was intended, although not expressly so stated, as a "vital statistic" rule. No change in practice is intended.

(c)(10) - Absence of Public Record or Entry - The proposed rule follows the federal formulation, adding to the present New Jersey rule the express provision that the failure to discover an official record is admissible to prove not only the non-existence of the record itself but also the nonoccurrence or nonexistence of the fact not recorded.

(c)(11) - Records of Religious Organizations - The proposed rule follows the federal rule. There is no New Jersey analogue. Thus religious records may be admissible, if otherwise reliable, even if the information was not provided by a person in the regular course of that person's business.

(c)(12) Marriage, Baptismal and Other Records - The proposed rule follows the federal rule, enlarging the present New Jersey rule, which includes only marriage certificates.

(c)(13) - Family Records - The proposed rule, admitting family records contained in Bible, genealogies, inscriptions and the like, follows the federal rule. There is no New Jersey analogue

(c)(14) - Records of Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(15) - Statements in Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(16) - Statements in Ancient Documents - The proposed rule follows the federal formulation, substituting a 30-year period for the federal rule's 20 year period. Although there is no New Jersey analogue, New Jersey has followed the 30-year common-law rule on ancient documents. Hence no practice change is made.

(c)(17) - Market Reports, Commercial Publications - The proposed rule follows the federal formulation, broadening the present New Jersey rule by including commercial publications relied on by the general public, not just by persons engaged in a particular field.

(c)(18) - Learned Treatises - The proposed rule follows the federal rule, adding the proviso respecting the display of graphics to the jury. There is no New Jersey analogue. Hence this rule changes New Jersey practice by admitting learned treatises established as authoritative even if not so acknowledged by an expert witness on cross-examination.

(c)(19) - Reputation of Personal or Family History - The proposed rule follows the federal formulation, modifying the present New Jersey rule by eliminating the requirement of Rule 63(27)(c) that the person whose history is being proved be "resident in the community at the time of the reputation."

(c)(20) - Reputation of Boundaries or General History - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

(c)(21) - Reputation as to Character - The proposed rule follows the federal rule with no substantial change in the present New Jersey rule.

(c)(22) - Judgment of Previous Conviction of Crime - The proposed rule follows the present New Jersey rule, rejecting the federal provision which permits substantive use of prior convictions in criminal cases as well as civil cases to prove facts essential to the judgment.

(c)(23) - Judgments as to Personal, Family or General History - The proposed rule follows the federal formulation. Although there is no New Jersey analogue, the rule follows the common law exception recognized by case law in this jurisdiction.

(c)(24) Other Exceptions - The federal rule is not proposed.

(c)(25) - Statement Against Interest - The proposed rule generally follows the present New Jersey rule but deletes, as imprecise, the phrase "social interest," which is not included in the federal rule. The proposed rule rejects the federal provision which conditions admissibility on unavailability and also rejects the federal requirement of corroborating circumstances indicating trustworthiness of statements against penal interest made by another which exculpate the accused in a criminal case.

(c)(26) - Judgments Against Persons Entitled to Indemnity - The proposed rule makes no substantial change in the present New Jersey rule. There is no federal analogue.

804 - Hearsay Exceptions: Declarant Unavailable

(a) - Definition of Unavailable - The proposed rule is an amalgam of the federal and present New Jersey rules. Paragraphs (1), (2), and (3) generally follow the formulation of the federal rule without substantial change in New Jersey practice. Paragraph (4) modifies both federal and state practice by limiting the requirement that depositions first be taken or be attempted to be taken to 804(b)(4) and (7) only (personal and family history and voter statements). Paragraph (5) is included to implement the requirements respecting the admissibility of a statement by a child of sexual conduct under 804(b)(8) (present 63(33)).

(b)(1) - Testimony in Prior Proceedings - The proposed rule follows the federal formulation, differing, however, in some respects both from that rule and the present New Jersey rule in format and substance. Subsection (A) applies to testimony against a party who was a party to the prior proceeding. Such testimony is admissible if the party had the same motive and opportunity to develop the testimony in the prior case as in the

instant case. Subsection (B) applies to testimony against a party who was not a party to the prior action. Such evidence is limited to civil actions and, in criminal actions, only if offered by the defendant. The criterion of similarity of motive and opportunity to develop is the same even though they may be motive and opportunity of different persons. The requirement of "predecessor in interest" of both the federal and state rule is not retained. The rule applies to depositions as well as trial testimony but excludes prior testimony of expert witnesses if similar experts are available, subject to exceptions.

MODIFIED

(b)(2) - Statement Under Belief of Impending Death - The proposed rule, applicable to all criminal cases, follows the present New Jersey rule, rejecting the federal rule, which applies only to homicide cases but also to civil cases and also applies if the declarant survives. Statements by deceased declarants are admissible in civil cases under 804(b)(6), which follows N.J. Evid. R. 63(32).

(b)(3) Statement against Interest - Adopted in these proposed rules as 803(c)(25)(unavailability not required).

(b)(4) - Statement of Personal or Family History - The proposed rule follows the formulation of the federal rule, making no substantial change in present Rule 63(24). It modifies present Rule 63(25), however, by eliminating the requirement of unavailability of both declarants.

(b)(5) - Other exceptions - The federal rule is not proposed.

(b)(6) - Trustworthy Statement by Deceased Declarants - The proposed rule, applicable to civil cases only, follows the present New Jersey rule. There is no direct federal analogue. See note to proposed 804(b)(2), supra.

(b)(7) - Voters' Statements - The proposed rule follows the present New Jersey rule adding the notice requirement of Rule 807. There is no federal analogue.

NOT ADOPTED

(b)(8) - Statements by a Child Concerning Sexual Activity - There is no federal analogue. The proposed rule makes several important changes in present Rule 63(33). It makes its provisions applicable to all types of proceedings. It substitutes the phrase "tender years" for the strict 12-year old stipulation. It does permit the hearsay admission if the declarant is able to testify fully and cogently. It permits the statement of other declarants who are physically available only if an adverse party who so requests has the opportunity to question the child. It clarifies the general standards of admissibility. Finally, it permits the adverse party to introduce other parts of the statement and other relevant statements made by the child.

805 - Hearsay Within Hearsay - The proposed rule follows the present New Jersey rule, which is consistent with the federal rule.

806 - Attacking and Supporting Credibility of Declarant - The proposed rule follows the formulation of the federal rue adding to the present state rule the provision, consistent with current state practice, that if the party against whom a hearsay statement has been admitted calls the declarant as a witness, he may examine the declarant as if under cross-examination.

807 - Discretion of the Judge to Exclude Evidence under Certain Exceptions - The proposed rule follows the present New Jersey rule which requires advance notice of an intention to offer hearsay admissible under certain designated exceptions. There is no direct federal analogue.

808 - Included Expert Opinion - The proposed provision appears in neither the federal nor the New Jersey rulesss. It permits the admission of included expert hearsay under designated indicia of trustworthiness.

ARTICLE IX - AUTHENTICATION AND IDENTIFICATION

901 - Requirement of Authentication or Identification - The proposed rule makes no substantial change in the present New Jersey rule, rejecting the detailed formulation of the federal rule.

902 - Self-Authentication - While the proposed rule follows federal formulation and format, it makes little substantial change in the New Jersey rules. Note, however, that following the federal rule, the categories of newspapers and periodicals, trade inscriptions and the like, acknowledged documents, commercial paper and statutorily presumed authenticity have been added.

903 - Testimony of Subscribing Witness Unnecessary - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

ARTICLE X- CONTENTS OF WRITINGS AND PHOTOGRAPHS

1001 - Definitions - The proposed rule follows the federal format and formulation with no substantial change in New Jersey sources.

1002 - Requirement of Original - The proposed rule follows the federal format with no substantial change in the present New Jersey rule.

1003 Admissibility of Duplicates - The proposed rule follows the federal rule. There is no New Jersey analogue. and the

provision that a duplicate is admissible as an original under the circumstances specified in the rule.

1004 - Admissibility of Other Evidence of Contents - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule other than eliminating the preference for written secondary sources over oral testimony.

1005 - Public Records - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

1006 - Summaries - The proposed rule follows the federal rule, eliminating from the present New Jersey rule the requirement that the underlying data be routinely produced in court. This rule requires only that they be made available and produced in court only when ordered.

1007 - Testimony of Written Admission of Party - The proposed rule follows the federal rule with no substantial change in the New Jersey rule.

1008 - Functions of Judge and Jury - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

ARTICLE XI- MISCELLANEOUS RULES

1101 - Applicability of Rules - The federal rule is not proposed for adoption as it overlaps proposed Rule 101.

1102 - Amendment of Rules - The federal rule is not proposed for adoption. See N.J.S.A. 2A:84A-33, et seq.

1103 - Citation of Rules - The proposed rule is based on the federal rule, providing an approved citation form.

JURY VERDICT FORM

State vs. Alberto Scabone
Indictment #80-4225

COUNT ONE - MURDER —

How do you find the defendant, Alberto Scabone, as to the charge that on April 2, 1981, he did purposely or knowingly murder Monica Scabone?

____NOT GUILTY X GUILTY

PASSION/PROVOCATION . Murder (2C: 11-4 b(2))

In the event you have found the defendant, Alberto Scabone, guilty of murder on the above question, was it committed in the heat of passion resulting from a reasonable provocation?

X YES ____NO

COUNT TWO - MURDER

How do you find the defendant, Alberto Scabone, as to the charge that on April 2, 1981, he did purposely or knowingly murder Yannet Estevez?

____NOT GUILTY X GUILTY

PASSION/PROVOCATION

In the event you have found the defendant, Alberto Scabone, guilty of murder on the above question, was it committed in the heat of passion resulting from a reasonable provocation?

____YES X NO

State vs. Alberto Scabone
Indictment #80-4225

COUNT THREE - MURDER

How do you find the defendant, Alberto Scabone, as to the charge that on April 2, 1981, he did purposely or knowingly murder Norma Estevez?

____NOT GUILTY X GUILTY

PASSION/PROVOCATION

In the event you have found the defendant, Alberto Scabone, guilty of murder on the above question, was it committed in the heat of passion resulting from a reasonable provocation?

____YES X NO

COUNT FOUR - SECOND DEGREE ARSON

How do you find the defendant, Alberto Scabone, as to the charge that on April 2, 1981, he purposely and knowingly started a fire at 239 Bloomfield Avenue, Newark, New Jersey with the purpose of destroying a building or occupied structure of another?

____NOT GUILTY X GUILTY

If you have found the defendant not guilty on the above question, please consider the following:

THIRD DEGREE ARSON

How do you find the defendant, Alberto Scabone, as to the charge that on April 2, 1981, he purposely and knowingly started a fire at 239 Bloomfield Avenue, Newark, New Jersey, thereby recklessly placing another person in danger of death or bodily injury, or thereby recklessly placing a building or occupied structure of another in danger of damage or destruction?

____NOT GUILTY ____GUILTY

OF 1992

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BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. There is appropriated to the Department of Corrections from the "Correctional Facilities Construction Fund of 1987," created pursuant to the "Correctional Facilities Construction Bond Act of 1987," P.L.1987, c.178, the sum of $3,000,000 for Statewide ongoing maintenance and emergency renovations.

2. The expenditure of the sum appropriated by this act is subject to the provisions and conditions of P.L.1987, c.178 and any rule or regulation promulgated by the department pursuant thereto.

3. There is also appropriated from the "Correctional Facilities Construction Fund of 1987" such items as may be necessary to meet any expense incurred by the issuing officials under P.L.1987, c.178 for advertising, engraving, printing, clerical, legal or other services necessary to carry out the duties imposed upon them by the provisions of that act.

4. In order to provide flexibility in administering the provisions of this act, the Commissioner of Corrections may apply to the Director of the Division of Budget and Accounting in the Department of the Treasury for permission to transfer a part of any item to any other item within the respective department accounts in the Correctional Facilities Construction Fund. The transfers shall be made in a manner consistent with section 29 of P.L.1987, c.178.

5. This act shall take effect immediately.

Approved November 16, 1992.

CHAPTER 142

AN ACT concerning certain testimony in criminal proceedings and amending P.L.1960, c.52.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 17 of P.L.1960, c.52 (C.2A:84A-17) is amended to read as follows:

C.2A:84A-17 Privilege of accused.

17. Rule 23. Privilege of accused.

(1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.

(2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse consents, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

(3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

2. Section 22 of P.L.1960, c.52 (C.2A:84A-22) is amended to read as follows:

C.2A:84A-22 Marital privilege - confidential communications.

22. Rule 28. Marital privilege--Confidential communications.

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding in which either spouse consents to the disclosure, or in a criminal action or proceeding coming within Rule 23(2). When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

3. This act shall take effect immediately and, to the fullest extent consistent with constitutional restrictions, shall apply to all criminal actions regardless of the date on which the offense was committed or the action initiated.

Approved November 17, 1992.

PA30

AN ACT concerning
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BE IT ENACTED *by*
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CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURT BUILDING
NEWARK, NEW JERSEY 07102

STATE OF NEW JERSEY, Plaintiff-Respondent, vs. ALBERTO SCABONE, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3498-93T4 **CRIMINAL ACTION** **AFFIDAVIT**

STATE OF NEW JERSEY)
) SS.
COUNTY OF ESSEX)

I, **NORMAN W. MENZ, JR.**, of full age and sound mind, being duly sworn upon my oath, depose and say:

1. I am a Deputy First Assistant Essex County Prosecutor and have served in that capacity since December 1994.

2. From 1978 through February, 1995, I served as the Director of the Homicide Unit of the Essex County Prosecutor's Office. Part of my responsibilities included the presentation of the case of State v. Alberto Scabone, Indictment No. 4225-80, to an Essex County Grand Jury.

3. On August 13, 1981, I presented the testimony of Dr. Thomas Santoro, Battalion Fire Chief Raymond Bishof, and Secundo Cunas to the grand jury in the above case.

4. Prior to the presentation of this case to the grand jury, I informed them of the six possible types of homicide offenses which they could consider, namely, purposeful murder, knowing murder, felony murder, aggravated manslaughter, reckless manslaughter and passion/provocation manslaughter and provided their definitions.

5. At that time, unlike current practice, this discussion of the law to the grand jury was not recorded by the stenographer.

The foregoing is true to the best of my knowledge and belief.

Norman W. Menz

NORMAN W. MENZ, JR.
DEPUTY FIRST ASSISTANT PROSECUTOR

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 7TH DAY
OF MARCH, 1995.

Austin J. Taylor

ATTORNEY AT LAW - STATE OF NEW JERSEY

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
OFFICE OF THE PUBLIC DEFENDER
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NEWARK, NEW JERSEY 07101
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PAUL M. KLEIN
MATTHEW ASTORE
CLAUDIA VAN WYK
MANAGING ATTORNEYS
LISA A. LYNCH
INTAKE UNIT
ELLEN SHIEVER
DESIGNATED
COUNSEL SECTION

October 26, 1994

RECD
APPELLATE DIVISION
OCT 27 1994
Clerk

Emille R. Cox, Esq.
Clerk – Superior Court of New Jersey
Appellate Division
CN 006
Trenton, New Jersey 08625

Re: State v. Alberto Scabone
Docket No. A-3498-93T4

Dear Mr. Cox:

Enclosed please find five copies of the Pro Se Supplemental brief on behalf of defendant in the above-captioned appeal.

Kindly file and present it to the Court.

The State has been served, pursuant to the enclosed certification of service.

Very truly yours,

Ellen Shiever

ELLEN SHIEVER
Assistant Deputy Public Defender

ES/er
Enclosure

cc: Essex County Prosecutor
Steven Gilson, Esq.
Alberto Scabone, #258208

A-3498-93T4

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3498-93T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

FILED
APPELLATE DIVISION
OCT 27 1994
Clerk

ALBERTO SCABONE,
Defenant-Appellant.

Criminal Action

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY

Sat. Below:
Hon. Eugene J. Codey, J.S.C.
and a jury.

RECD
APPELLATE DIVISION
OCT 27 1994
Clerk

& appendix

SUPPLEMENTAL BRIEF IN SUPPORT OF COUNSEL'S BRIEF AND APPENDIX IN BEHALF OF DEFENDANT-APPELLANT

Alberto Scabone #258208
New Jersey State Prison
CN - 861
Trenton, New Jersey 08625

Defendant presently confined
Pro Se on Supplemental Brief

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APPENDIX

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TABLE OF CASES CITED (Con't.)

TABLE OF CASES CITED (Con't.)

TABLE OF STATUTES CITED

RULES GOVERNING NEW JERSEY COURTS

RULES OF EVIDENCE

NEW JERSEY AND UNITED STATES CONSTUTION

OTHER

STATEMENT OF PROCEDURAL HISTORY

On April 2, 1981, the Essex County Grand Jury filed Indictment No. 4225-80, charging defendant Alberto Scabone with the murder of Monica Scabone, contrary to the provisions of N.J.S.A. 2C:11-3 in Count One; the murder of Yannet Estevez, contrary to the provisions of N.J.S.A. 2C:11-3 in Count Two; the murder of Norma Estevez, contrary to the provisions of N.J.S.A. 2C:11-3 in Count Three; and second-degree arson, contrary to the provisions of N.J.S.A. 2C:17-1a(2) in Count Four.

With the Honorable Eugene J. Codey, J.S.C. presiding, the defendant was tried before a jury on November 9, 10, 12, 15, 16, 17 and 18, 1993. The jury convicted the defendant in Count One as to the passion/provocation manslaughter of Monica Scabone, murder in Count Two and Count Three of Yannet Estevez and Norma Estevez, and as to the arson offense. (Da 8, 9)

On January 14, 1994, Judge Codey imposed a sentence of ten (10) years imprisonment with a five-year parole disqualifier in the manslaughter conviction in Count One; thirty (30) years imprisonment with a fifteen (15) parole disqualifier in the murder convictions in Counts Two and Three; and ten (10) imprisonment with a five-year parole disqualifier in the arson conviction in Count Four. Each of the terms imposed are to run consecutively with one another. Accordingly, defendant's aggravated sentence was 80 years imprisonment with a 40 year parole disqualifier. A thirty Dollar ($30) Violent Crimes Compensation Board penalty was assessed on each of the four convictions. (Da-8; 8T 37-6 to 38-10)

On March 14, 1994, defendant filed a Notice of

Appeal with the Appellate Division. (Da-I3)

"1T" denotes transcript dated November 9, I993.
"2T" denotes transcript dated November I0, I993.
"3T" denotes transcript dated November I2, I993.
"4T" denotes transcript dated November I5, I993.
"5T" denotes transcript dated November I6, I993.
"6T" denotes transcript dated November I7, I993.
"7T" denotes transcript dated November I8, I993.
"8T" denotes transcript dated January I4, 1994.

STATEMENT OF FACTS

On April 2, 1981, at 10:17 p.m., a fire alarm was sounded for 239 Bloomfield Avenue in Newark, a three-story frame building containing a store in the first floor's front and an apartment in the floor's rear, one apartment on the second floor and one apartment on the third floor. (1T 27-20 to 28-22). Firefighters were dispatched to the scene and upon their arrival discovered in the bedroom of the first floor apartment, where the fire originated, the fully-clothed bodies of three women, Monica Scabone, Yannet Estevez and Norma Estevez, lying on twin beds. (1T 29-19 to 30-18).

A subsequent arson investigation of the fire-damaged apartment revealed that an undetermine flammable liquid had been used to accelerate the fire. (1T 61-8 to 19). Autopsies of the three women disclosed that they had died prior to the start of the fire, as there were no traces of carbon monoxide in their bodies. Multiple stab wounds, resulting in massive hemirrhaging, was the cause of death for each of the three women. (2T 84-14 to 92-1).

In April 1981, the defendant was residing with his wife, at that time, Monica, their son, Alberto, Monica's sister, Yannet and Monica's mother, Norma, in the apartment on the first floor. (2T 50-13 to 52-8). According to Ana Gonzalaz, another sister of Monica, she often had witnessed the defendant and Monica " fighting about something." (2T 52-6 to 12). More particularly, the defendant was " very jealous " of Monica, as " he didn't want her to get made up. He didn't want her to get dressed up. He didn't let her have

friends, male or female." (2T 52-16 to 22). When they fought Monica " defended herself " physically. (2T 55-5 to 9).

In March of 1980, Gonzalaz was in the apartment when she recalled the defendant hit Monica with a bottle and yelled that he was going " to burn the house. " (2T 56-23 to 57-25). While Monica and the defendant were visiting his parents in Uruguay in January 1988, the defendant, according to Gonzalaz, threatened to kill Monica and her entire family. (2T 58-22 to 59-13). Gonzalaz also remembered that the defendant had threatened to kill Monica " many times " and " always said " that he would burn down their apartment. (2T 59-23 to 60-4). However, because Gonzalaz did not believe the threats, she never contacted the police. (2T 60-5 to 9).

Leopoldo Silva, who was married to a third sister of Monica's, frenquently spend time with defendant. On one occasion, at an indeterminate date, when defendant, Monica and other relatives were at his house, Silva recalled that the defendant's saying, for no apparent reason, " I'm going to kill these three crazy women. " The defendant obviously was referring to Monica, Yannet and Norma, who were in the kitchen. When Silva smiled, the defendant responded that he was serious, adding that he would go to Mexico or to Uruguay after the killings. Still not taking defendant's threat seriously, Silva never reported it to the police. (2T 68-23 to 73-20).

In the evening of the fire, between 9:00 and 9:30, Jose German Delsid, an illegal alien using the name of " Secundo Cunas " to conceal his true identity, arrived at the defendant's apartment. Delsid worked with the defendant at a factory that

processed copper wire in West Caldwell and hoped that the defendant would drive him to work for their nightly shift, II:00 p.m. to 7:00 a.m. However, when no one answered his knocking on the door, Delsid went to a nearby diner to eat. There he saw Gerardo Guerrero another co-worker at the factory. A brief time later, Delsid, along with Mr. Guerrero, returned to the defendant's apartement. About IO to I5 minutes later, the defendant carrying a suitcase and a television set, came out of the apartment with his young son, Alberto. Using defendant's car, the four proceeded to the factory. (IT 98-I4 to I02-I2).

It was while they were en route to the factory that Delisid asked the defendant why he was bringing his little bot with him. According to Delsid, the defendant replied that he was having problems with his wife, that she was very jealous. (IT I08-I6 to 23). Defendant also mentioned that he did not have anyone to take care of his son, according to Delsid, and he supposingly asked how much time it would take to get to " the border of Canada, Miami (sic.)" (IT I08-23 to I09-3). Upon their arrival at the factory, at about IO:49 p.m., the " punch-in " time for Delsid (IT I03-I2 to I04-4), the three men entered while Alberto stayed in the car. (IT I09-6 to 7).

As Delisd began working, the defendant and Guerrero spoke to their supervisor. A " real nervous " Guerrero and a " very ouiet " defendant explained that the defendant's wife had thrown him out of the apartment, that the defendant was going to spend the night at Guerrero's house and that he needed his paycheck, and the two men left the factory. Shortly there after, Guerrero returned alone, to work.

The next morning after the completion of his shift,

Guerrero offered Delsid a ride home in the defendant's car. En route, they stopped off at Guerrero's apartment, where Guerrero picked up the defendant and his son so that they could determine if Delisd's wife would take care of Alberto. However, without any inquiry as to his wife's being willing to take care of the boy, Delsid was dropped off in front of his building. (2T I2-3 to I8-II).

Later that same day, at about I:00 p.m., defendant went to a travel agency in Elizabeth and made plane reservations to Uruguay for two, one-way for Alberto and round-trip for himself. But because the defendant did not have the money to purchase the tickets, he never received them. (3T 76-I8 to 83-4).

Elieth Camacho Alvarado, was on vacation in Mexico City during the Easter week in April I98I, and it was then that she met the defendant and his son in a park. The defendant introduced himself as " Alberto," and in response to her inquiry as to the whereabouts of the child's mother, the defendant replied that he was a widower. Learning that Alvarado was going to return to her native Costa Rica, the defendant volunteered that he was going to go there and asked for her phone number. She granted his request. (3T 40-2 to 43-3; 3T 7I-I2 to I4).

About a month after their meeting, the defendant along with his son, arrived in Costa Rica and once again contacted Alvarado. The two began dating one another and Alvarado knew him as " Marguerito Ramirez Rodriguez ", but the defendant told her that he preferred " Alberto," his father's name, and to be of Mexican descent. She learned

from him that his wife, sister-in-law and mother-in-law had died in an automobile accident. During the defendant's stay in Costa Rica, his mother visited him and tokk his son with her upon completion of the visit. (3T 39-20 to 23; 3T 43-9 to 45-7; 3T 7I-I8 to 24).

Defendant and Alvarado eventually settled down together in Veracruz, Mexico. where they had disagreements because defendant was " very jealous. He wanted me to get pregnant later, and for that reason we had problems. " (3T 45-I6 to 46-4). Although Alvarado gave birth to defendant's child in I993, problems continued, resulting in Alvarado's leaving the defendant with their child and returning to Costa Rica to live with her parents. Defendant, however, followed her, and the two resumed living together. A second child was born to them in I985, and the defendant and Alvarado were married in I987. Nevertheless, because the defendant " went around with a lot of women, " and " he was always very jealous of everything, of things that he imagined, " their marriage faltered. (3T 46-6 to 50-7).

It was sometime after their marriage that the defendant's parents visited them and Alvarado discovered " Scabone " to be defendant's surname, not Ramirez Rodriguez. Now supsicious of her husband's true identity, Alvarado contacted her girlfriend in Los Angeles and related her discovery. At about this time, as the marriage deteriorated further, Alvarado went to a lawyer to institute divorce proceedings. (3T 50-2I to 53-I5).

It was approximately at the end of I988, that Alvarado learned from her Los Angeles friend that the

defendant was a fugitive, having been charged with the killing of his first wife and his wife's family. A disbelieving Alvarado contacted Interpol, the International Police, who confirmed this information. Against her expressed wishes, the defendant's name was publicized in the media. Subsequently, as a result of her children receiving inquiries and taunts about their " killer " fater, Alvarado moved with them to Guadalajara, Mexico. (3T 57-I8 to 60-7).

Months later after their return to Mexico, the defendant appeared at the residence, assured Alvarado that everything was going to be all right and announced that he was going to live with them. Alvarado accepted him into the home, and in the beginning, defendant's behaved very well. However, the situation soon worsened dramatically, when the defendant threatened to kill her. (3T 6I-I3 to 62-6). One Christmas, while Alvarado's mother and sister were visiting them, the defendant threatened to kill them. At this time, Alvarado confronted him with the deaths of his previous wife and her family, asking him if he was going to do the same things that " you did that one day. " According to her, the defendant retorted, " If I have to do it, I'm going to do it again. " (3T 62-8 to 23).

On a subsequent occasion, at an indertermine date, the defendant detailed the killings to her. According to her, he related his wife grabbing a knife from above the bed while they were fighting; his taking a knife away from her and wounding her with it; his then panicking and killing her; and his subsequently killing his wife's mother and sister when they arrived at the apartment. (3T 63-7 to 62-2).

With the defendant's emotional state seemingly hitting rock-bottom and certain that defendant eventually would attempt to kill her, Alvarado went to the Mexican Police, who were disinterested because the killings had not occurred within their jurosdiction. Consequently, in January 1993, Alvarado went to the American Consulate in Guadalajara, where she spoke to Gilbert Alvarez, a special agent for the F.B.I. (3T 64-18 to 65-19). She recalled telling him that the defendant had confessed the killings to her. (3T 71-4 to 6). However, Alvarez remembered, as corroborated by his notes taken during the Alvarado interview, that she believed the defendant was wanted for the killing but that he was unaware as to her having knowledge of the killings. (5T 86-5 to 87-5). In any event, a telex between Alvarez and authorities in Newark confirmed defendant's wanted-status, and he was apprehended soon after the telecommunication. (5T 88-1 to 10).

Defendant, testifying in his own behalf, denied killing his wife, mother-in-law or sister-in-law. (5T 15-18 to 20). To the contrary, he professed his love for Norma and considered Yannet to be " like his little sister. " (5T 56-17 to 57-9). He readily conceded using the word " kill " in reference to family memebrs, though just as " an expression I always say, " but denied ever threatening to burn his house down or telling Silva that he would go to Mexico or to his native Uruguay after " killing " the three women. (5T 39-3 to 40-3; 5T 47-10 to 13).

Regarding the evening of April 2, 1981, the defendant told of returning to his apartment with his son at about 9:40, after having been shopping and in the company of a

few friends, only to find smoke in the apartment and the three women dead. (5T 20-I5 to 24-I6; 5T 69-3 to 4). Just after he attempted to extinguish the dying fire, Guerrero and Delsid, whom the defendant knew as Cunas, arrived outside the apartment door and discouraged defendant from calling the police. (5T 24-7 to I0; 5T 27-9 to 25). Defendant, not carrying anything but his son from the apartment, a valise and television set had been placed in his car's truck sometime before the incident, in an attempt to sell them at work, drove to work with his son and two co-workers. (5T 28-2 to 29-3). En route, defendant mentioned that Monica and he had a lot of problems with other people. (5T 3I-3 to 6);

Thus fearing for his own safety and his son's and having witnessed the remains of his wife and part of her family, the defendant fled to Mexico soon thereafter, and until the murders were solved. (5T 37-I8 to I9; 5T 7I-4 to 9). Because it was very difficult, if not impossible for foreigners to obtain employment in Mexico, the defendant received a birth certificate from his friend Marguerito Ramirez Rodriguez, prior to departing, and subsequently assumed his identity. (5T I8-I3 to 20; 5T 37-I5 to I6).

LEGAL ARGUMENTS

POINT I

THE WRITTEN VERDICT SHEET HERE, COUPLED WITH THE INSTRUCTIONS FOR ITS USE, PRECLUDED THE JURY FROM CONSIDERING DEFENDANT'S PASSION/PROVOCATION DEFENSE IN MITIGATION OF HIS GUILT FROM MURDER TO MANSLAUGHTER (NOT RAISED BELOW)

It is defendant's position that the criminal homicide instructions here given to the jury by the trial court were fatally flawed and deficient in one critical respect. Simply stated, the jury through the court's improper charge and verdict sheet may well have determined defendant's guilt of murder without ever, in the course of its deliberations, reaching the question of passion/provocation as mitigating that guilt and reducing it to manslaughter. For this reason, and to prevent a manifest injustice to the defendant, a new trial must be granted pursuant to R. 3:20-I.

Under Count One, Count Two and Count Three of the Indictment, defendant was charged with the murder of his wife, Monica Scabone, sister-in-law, Yannet Estevez, and his mother-in-law, Norma Estevez on April 2, 1981, contrary to the provisions of N.J.S.A. 2C:II-3. At trial, the trial counsel refused to request, the jury was instructed on the lesser offense of manslaughter defined at N.J.S.A. 2C:II-4b (2), as follows:

> " A homicide which would otherwise be murder under section 2C:II-3 (constitutes manslaughter when) committed in the heat of passion resulting from a reasonable provocation."

In addition to the defense of general denial,

much of the evidence at trial was designed to show defendant's state of mind, assuming he was responsible for the killing, in mitigation of the charge of murder. The jury was precluded from considering this mitigating evidence during its deliberations, through the trial court's improper written verdict sheet and instructions for its use. The manslaughter defense based on passion/provocation is recognized by the Appellate Division in reversing the first and second conviction, was not adequately and fairly charged. See State v. Bishop, 225 N.J. Super. 596 (App. Div. 1988); State v. Bishop, 247 N.J. Super. 382 (App. Div. 1991).

A written verdict sheet may, in the discretion of the trial court, be submitted to the jury " to facilitate the determination of the grade of the offense " or otherwise simplify the determination of a verdict when multiple charges are submitted. " R. 3:19-1(b). Where the stated non-substantive purposes of the written verdict sheet are served, there can be no quarrel with its use. But where a written verdict sheet may be seen as impinging in any way upon the deliberative process, its use will not be countenanced. Cf. State v. Simon, 79 N.J. 191 (1979) (Written interrogatories to be used with caution, in view of their potentially prejudicial effect upon the course of a jury's deliberations). The written verdict sheet here, copuled with the court's instructions concerning its use, posed a clear danger to the deliberative process.

In its instructions to the jury, the trial court mandated that a sequential-pattern of deliberation be

followed. After defining the elements of murder, the jury was told that if defendant were found to be guilty of that offense, " go no further " in deliberations. If not guilty, then the jury would consider the offense of aggravated manslaughter. If the defendant was found to be guilty of that offense, the jury was again instructed to " go no further." If not guilty of aggravated manslaughter, then the jury must consider the offense of manslaughter, and the two variants of that particular offense - - " reckless " and " passion/ provocation " manslaughter -- were defined for the jury. This same sequential-pattern of deliberation was reiterated in the written verdict sheet. In one of the last comments to the jury in his charge, the trial judge informed the jury that the verdict sheet " might be of assistance " and provides an " outline of the questions you are being asked to decide. "

The trial court here recognized the charge of murder to be the highest offense charged under the criminal homicide alleged in Counts One, Two and Three, and a verdict of guilt on the highest offense would presumably eliminate the need for deliberation upon such lower offenses as may be components of the criminal homicide charge, i.e., aggravated manslaughter and manslaughter. Such lesser offenses, in the court's view, should be considered seriatum by the jury only in the event of progressive downward acquittals. Cf. State v. Landeros, 32 N.J. Super. 168 (App. Div. 1954), rev'd. o.g. 20 N.J. 69 (1955). The written verdict sheet and the trial court's instructions expressly so provided. If defendant were found guilty of murder, as defined by the

trial court, the jury need not consider defendant's culpability under the lesser offenses of aggravated manslaughter and manslaughter. Only if defendant were found guilty of murder would the jury have to consider defendant's guilt or innocence of aggravated manslaughter and manslaughter. In the event, the jury would then proceed to determine defendant's guilt or innocence of aggravated manslaughter as defined by the court. Only if defendant were found not guilty of aggravated manslaughter would the jury need to consider defendant's guilt or innocence of manslaughter.

The defect inherent in the verdict sheet and the instructions pertaining to its use is that passion/provocation manslaughter is not a lesser included offense of murder, but is murder mitigated by an additional factor, proof of passion/provocation. N.J.S.A. 2C:II-4b(2); State v. Crisantos (Arriagas), I02 N.J. 265 (I986). Any instruction suggesting that the jury us at the end of its task when it finds a purposeful or knowing homicide (i.e., murder) is seriously deficient. Such instruction deprives defendant of his right to have the jury determine whether, notwithstanding its finding of a purposeful or knowing killing, defendant's guilt should be reduced or mitigated to manslaughter. In every case where passion/provocation is sufficient to go to the jury, the jury must not be precluded from considering the effect of that defense on the murder charge. Yet this is precisely what occurred here, the trial court directed a sequence of deliberations and told the jury not to consider manslaughter, i.e., not to consider the effect of passion/provocation, if defendant was

guilty of murder.

There was nothing in the written verdict sheet or instructions which suggested to the jury that it had the option to consider the questions on the sheet in any order it chose, and need not be wedded to the court's chronology. See also State v. Bishop, 225 N.J. Super. 596 (App. Div. 1988); State v. Bishop, 247 N.J. Super. 382 (App. Div. 1991); Cf. State v. Grunow, 102 N.J. 133, 146 (1986). The written verdict sheet here, as elucidated by the trial court in its charge, was more than the jury aid or guide to deliberation envisioned by R. 3:19-1(b)... it was, in fact, a straight-jacket wielding a coercive effect on the manner in which deliberation would occur.

The decision in State v. Zola, 112 N.J. 384 (1988), relied upon by the trial court as approving the sequential verdict sheet and jury charge utilized here, is not apposite. The Court in Zola did not address the argument, made here, that sequential resolution of a murder charge implicating the mitigating factor of passion/provocation would tend to impermissibly deter the jury from considering a proper available verdict. The passion/provocation issue was not raised in Zola, and the unique aspect of passion/provocation manslaughter; i.e., that it is not a lesser offense of murder but rather murder mitigated by an additional element, was not addressed by the Court. What the Court in Zola, says about sequential deliberation instructions and verdict sheets generally, and the potential danger associated with their use, is however germane and supports defendant's position:

> This concept of sequential resolution poses its own internal problems. See People v. Boettcher, 69 N.Y.2d 174, 513 N.Y.S.2d 83, 505 N.E.2d 594 (1987) (juries should not be permitted to consider lesser included offenses until after they have unanimously found defendant not guilty of the greater crime). The premise is " that it is the duty of the jury not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render a just verdict by applying the facts to the law as it is charged. " Boettcher, Supra 69 N.Y.2d at 183, 513 N.Y.S.2d at 87, 505 N.E.2d at 597. But in advancing that premise care must be taken to avoid the stratification of thought that would deter a jury from returning the proper available verdict. State v. Zola, supra, 112 N.J. at 405.

Other jurisdictions recognizing the danger noted in Zola, have disapproved jury instructions establishing an order for consideration of possible verdicts, where the jury has received the impression that it must acquit on one charge before considering another. See e.g. State v. Allen, 717 P.2d 1178 (Sup. Ct. Ore. 1986); People v. West, 408 Mich. 332, 291, 424 N.E.2d 48 (1980); People v. Pastorino, 90 ILL. App.3d 921, 424 N.E.2d 54 (1980), rev'd. o.g. 91 ILL.2d 178, 435 N.E.2d 1144 (1982). The decision in United States v. Lofton, 776 F.2d 918 (10th Cir. 1985), in on point. In Lofton, the defendant was charged with murder, and the evidence adduced at trial supported a heat of passion defense, which the trial court charged in part as follows:

> If you find that the defendant is not guilty of first degree murder then you must consider whether or not she is guilty of the lesser included offense

> of second degree murder. If you have determined that the defendant is not guilty of that offense then you are required to consider whether or not the defendant is guilty of a lesser included offense known in the law as manslaughter. Lofton, supra, 776 F.2d at 921.

The trial court provided the jury with a written verdict sheet, which informed the jury that it need consider manslaughter only if defendant were found not guilty of murder. On appeal, the Tenth Circuit reversed, finding plain error in the heat of passion instructions. In language equally applicable to the instant case, the appellate court said:

> (T)he very structure of the charge precluded the jury from considering the effect of (defendant's) heat of passion defense on the murder count. (The jury instruction) advised the jury that if it found the defendant not guilty of first-degree murder, it must then consider if she was guilty of second-degree murder; if it found that she was not guilty of second-degree murder, it must then determine if she was guilty of manslaughter. Thus, the jury was instructed to consider manslaughter only if it found (defendant) not guilty of murder. The verdict form followed this same format. United States v. Lofton, supra, at 922.

The decision in United States v. Lofton, supra, also discerns lucidly the dangers associated with sequential deliberation instructions where the elements of passion/provocation is involved. Whatever the merits of such instructions where lesser included offenses are at issue, they totally undermine the deliberative porcess and mislead the jury by expressly withholding the element of passion/

provocation from jury consideration when the elements of murder have been found.

Perhaps the most widely cited opinion reviewing the legality of jury instruction directing a certain order of deliberations is United States v. Tsanas, 752 F.2d 340 (2 Cir. I978), cert. den. 435 U.S. 995 (I978). In Tsanas, the Second Circuit upheld a federal jury instruction that required an unanimous acquittal on the greater offense before the jury should proceed to consider the lesser offense. Id. at 346. The court found that, absent a request for an alternate charge by the defense, an instruction requiring the jury to first acquit of the greater offense was not incorrect as a matter of law and thus did not constitute plain error. Id.*

The Tsanas, court based its conclusion on a detailed consideration of the disadvantages of the instruction to both the defense and the prosecution. With respect to possible coercion of the jury to find defendant guilty of the greater offense, Tsanas, noted that the requirement of an unanimous acquittal before a jury starts deliberations on a lesser offesne has some potential advantages for the defendant. This charge may prevent any conviction at all, because a jury unable to unanimously agree on the greater

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* In the instant case, the defense did not object to the verdict sheet in spite of the defendant's request, nor the charge requiring sequential deliberation by the jury, and deprived defendant a fair deliberation by not requesting an alternative form of verdict sheet allowing the jury to consider all degrees of homicide charged in any sequence they deemed warranted and appropriate.

charge, consecuently, may also be unable to reach accord on a lesser offense on which it might have agreed. Id. at 346.

On the other hand, Tsanas, recognizes that insisting on acquittal on the greater offense before a jury can move to the lesser presents very real danger to the defense. For instance, if the jury is leaning heavily in favor of conviction on the greater offense, dissenters favoring the lesser may " throw in the sponge " rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser. Id.

During the course of deliberation in the instant case, the jury informed the trial court that all members were not unanimous on a verdict, and desired a rereading of the charge defining murder committed in the heat of passion. (8T 25-2 to 35-I8). It is now apparent that the initiate dissenters capitulated, and unanimity was achieved on the murder offense. Under the trial court's instructions and jury verdict sheet, the jury had to unanimously acquit on the murder charge before giving any consideration to lesser manslaughter offenses. Perhaps to avoid the risk of mistrial perceived in Tsanas, the dissenters ultimately voted in favor of conviction on the murder charge. Once unanimity was achieved on that charge, the jury sheet and the trial court's charge expressly informed the jury that its task was complete. Not only did this process of jury deliberation required by the trial court preclude the jury's responsibility to determine whether the State had proved beyond a reasonable doubt that the murder was not committed

in the heat of passion on reasonable provocation; it also obviated the jury's responsibility from consideration of lesser offenses.

The error infecting the jury's verdict through the improper sheet and instruction related thereto is manifest, mandating the award of a new trial. Only by setting aside the jury's verdict and awarding a new trial can the miscarriage of justice otherwise accuring be avoided.

For the reasons herein stated, defendant respectfully submits that the jury verdict must be set aside and a new trial ordered.

POINT II

THE VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO BE TRIED ONLY FOR AN OFFENSE FOUND BY THE GRAND JURY (NOT RASIED BELOW)

Defendant submits that by failing of seeking to combine in Count One, Count Two, and Count Three, the two offenses of purposeful and/or knowing murder in the Indictment as worded by the prosecutor failed to validly charge either offense, preventing the jury from considering the defense of the elements. The N.J.S.A. 2C:II-3 constitutes only the " murder" element of the statute. The Indictment was impermissibly vague. On April 2, I98I, the Essex County Grand Jury returned Indictment No. 4225-80 charging the defendant, Alberto Scabone, in Four Counts with murder, murder, murder and second-degree arson. In the particular, Counts One, Two and Three that charged: * (Da-3, 4 & 5)

> The Grand Jury of the State of New Jersey, for the County of Essex, upon their oath present that Alberto Scabone on the 2nd day of April, I98I, at the City of Newark in the County of Essex Aforesaid and within the jurisdiction of this Court, did murder, Monica Scabone, contrary to the provisions of N.J.S. 2C:II-3 and against the peace of this State, the government and dignity of the same.

The language of the indictment fails to establish that twelve Grand Jurors concurred in finding defendant indictable for violation either subsection (a)(I) or subsection (a)(2) of the murder statute. Article I, Paragraph 8 of the New Jersey Constitution mandates that, " No person

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* All Counts read the same, except for the victim's name, Monica Scabone, Yannet Estevez, and Norma Estevez.

shall be held to answer for a criminal offense, unless on the indictment of the grand jury. " The distinctive safeguard of the right is the undisputed proposition that a defendant cannot be convicted of an offense that was not charged in the indictment and that is not an included offense of one charge in the indictment. This constitutional requirement goes beyond the guarantees of due process and fair notice.

As explained by the Supreme Court of New Jersey:

> " A charge must sufficiently identify the criminal event to enable the accused (I) to defend and (2) to defeat a subsequent prosecution for the same offense. This is so with respect to every mode of charging a crime whether by accusation or indictment, by reason of the demands of due process of law and the guarantee against multiple exposure for the same offense. The constitutional right to indictment adds another, distinctive safeguard, to wit, that no man shall be brought to trial for a crime unless a grand jury shall first find sufficient cause for the charge. " State v. La Fera, 35 N.J. 75, 8I (I96I) (per Weintraub, C.J.) (Citation omitted).

Counts One, Two and Three of the Indictment against the defendant because of its framing of the charges failed to establish that a majority of the 23 grand jurors found that there was the requisitic probable cause to indict defendant either for " purposeful murder " in violation of N.J.S.A. 2C:II-3a(I), or for " knowing murder " in violation of N.J.S.A. 2C:II-3a(2). The voting and return of a " True Bill " on a count so worded cannot show that there were I2 or more grand jurors who concurred in finding either offense.

The defendant argues that the record does not establish, of the twelve concurring grand jurors whose

votes were necessary to have returned Count One, Count Two, and Count Three against the defendant, six may have voted to indict in the Counts because they found that the prosecutor had established the elements of " knowing " but not of " purposeful " murder, while another six grand jurors may have voted to indict because they found that the elements of " purposeful " murder had probably been shown. In that event, a majority of the grand jurors would not have concurred if finding a true bill for either offense, as Article I, Section 8 requires.

Similarly, the requisite majority for either offense would be lacking if under the (and)"or" form of charge in Counts One, Two and Three, or if four jurors had found " purposeful " murder, four had found " knowing murder " and four had found both purposeful " and " knowing murder.

In accordance with the Title 2C Criminal Code Annotated, the charge of murder must be provided with a subsection to establish what degree of murder the accuse is being charged with. The Indictment in the instant case clearly reads that the defendant was charged with murder in violations of the provisions of N.J.S. 2C:II-3, leaving out any subsection to establish what he is being charged. (Da-3, 4, & 5)

" Purposeful murder " under subsection (a)(I) of the statute requires proof of different elements than in " knowing murder " under subsection (a)(2) of the statute. See State v. Gerald, I13 N.J. 40, 80-8I (I988). The record clearly shows that the defendant was not charged under

neither statute.

The defendant recognizes that the Supreme Court held, sua sponte, that it is error to instruct a jury on purposeful murder when the Grand Jury's Indictment if for knowing murder, however, neither were presented to the jury in the instant case in the frame wording of the Indictment, but was presented to the jury in its instruction as a result of a prejudicial violation of the defendant's constitutional right to a fair trial. Crisantos, 102 N.J. at 268 n.6 (1986). See also State v. Arriagas, 198 N.J. Super. 575, 581 & n.2 (App. Div. 1985), aff'd sub nom. State v. Crisantos, 102 N.J. 265 (1986), which held that the trial court should instruct the jury to return separate verdicts on " purposeful murder " and " knowing murder " allegations. If one subsection of the murder statute defined a lesser included offense of the other, then such separate verdicts would of course not be required or appropriate.

Defendant contends that the instant indictment failed to establish that he had been charged by a majority vote of the 23 grand jurors for, but to what degree and to which offense. Consequently, as a result of not showing how this proceeding was produced the defendant's constitutional right to an indictment by grand jury was not safeguarded, and his convictions must therefore be reversed on Counts One, Two and Three, with directions to dismiss those counts on the indictment.

It is imposiible to ascertain for which offense (if any) the grand jurors agreed to indict in all the

Counts. The instructions show that the prosecutor never told the grand jurors to distinguish between these separate offenses, but rather failed to instruct them at all, other than using the words " did murder." He also did not tell the jurors what purposeful murder was, what knowing murder was or what murder degree of the offenses. So it's reasonable to assume that the jurors thought that they were indicting the defendant on reckless manslaughter or just manslaughter. Thus, under the prosecutor's so-called instructions, it is quite possible also that I2 or more grand jurors might have voted to indict for " knowing murder " alone, but not for " purposeful murder,"

The defendant herein acknowledges the fact that the Court can not engage in a post-hoc review of the evidense before the grand jury in order to determine the offenses for which the grand jurors found probable cause. See State v. Catlow, 206 N.J. Super. I86, I95 (App. Div. I985) (in reversing a conviction for an offense not charged in the indictment, the Court held that " there can be no determination by a reviewing court as to whether or not the grand jury, although hearing sufficient evidence, accepted or rejected such evidence "), cert. denied, I03 N.J. 465 (I986).

However, it should be noted that in a somewhat similar factual pattern, our Courts have dismissed indictments presented to the Grand Jury in this fashion. See State v. Chandler, 98 N.J. Super. 24I, 25I (Essex County Law Div. I967); State v. Costa, I09 N.J. Super. 243, 248 (Law Div. I970), and the cases therein.

The defendant definitely did not waive his right to the indictment as so governed by Rule 3:10-3 which expressly provides that a challenge to the indictment for failure to charge an offense may be raised for the first time on direct appeal. The trial counsel did not object to the frame wording of the indictment at trial, and the appeal counsel did not raise it as an issue on his brief, which resulted in the defendant bringing it to the court's attention in his Pro Se Supplement Brief. The challenge asserted by the defendant, if well taken, establishes that Count One, Count Two, and Count Three of the indictment did fail to charge an offense within the meaning of R. 3:10-3.

As argued above, Count One, Count Two, and Count Three of the instant indictment is so uncertain that it is impossible to say that the grand jury validly charged the defendant with a violation of either subsection of the murder statute, and the language of the State's indictment makes it impossible to determine that the required 12 grand jurors voted for either homicide offense. Thus, defendant's constitutional right to be indictment by a majority of a grand jury was not safeguarded, and pursuant to Rule 3:10-3 the defendant is entitled to seek relief in this Court from such a failure validly to charge an offense. State v. Newell, 152 N.J. Super. 460 (App. Div. 1977) (failure of an indictment to charge an offense may be rasied for the first time on appeal.) See also United States v. MacKenzie, 170 F. Supp. 707 (1959); in similar provisions see Fed. R. Crim. P. 12(b).

Furthermore, defendant contends that under Rule 3:7-2, the defendant's constitutional right to indictment

by a grand jury, abrogated in this case because of the State's defective framing of the charges for consideration by the grand jury, cannot be waived for an offense punishable by death, as was not the case in the instant matter. However, it is recognized that even for non-capital offenses, that constitutional right could only be waived upon a written submission signed by the defendant. Id.; See State v. Wagner, 180 N.J. Super. 564 (App. Div. 1981), and there was no such submission present in the hereto.

The trial judge, as the prosecutor and trial counsel had a firm ruling on the records which is to charged violating the defendant's constitutional right to be tried by a true Indictment, with:

> Counts One, two and three all charge Mr. Scabone with the knowing and purposeful murder, and the Counts in -- in Count One it was Monica Scabone. Count Two it was her sister Yannet Estevez, and in Count Three it was their mother, Norma Estevez, Mr. Scabone's mother-in-law. (7T 73-14 to 18)
>
> Just so that we'll have a firm ruling on the record, reckless manslaughter under our statute, which is 2C:11-4(b)(1), and aggravated manslaughter under section 2C: 11-4(a) are both lesser-included offenses of purposeful and knowing murder. (6T 110-20 to 24)

According, no waiver of defendant's challenge to the indictment can be found in the record and Count One, Count Two and Count Three should therefore be ordered dismissed.

POINT III

THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ERRED IN HIS KNOWINGLY ALLOWING THE FALSE AND PREJUDICIAL TESTIMONY OF THE KEY WITNESS FOR THE STATE AT TRIAL AND INFECTED THE TRIAL PROCEEDINGS AND DID INTERFERE WITH THE JURY'S ABILITY TO WEIGH THE TESTIMONY (NOT RAISED BELOW)

Defendant's conviction rest largely on the false and prejudicial perjured testimony of Elieth Camacho Alvarado, the second wife of defendant, as well as, the testimony of Ana Gonzalaz, the sister of the victim, Moniva Scabone. The prosecution knowingly permitted the testimony of these two witnesses which were false and perjured, as was the trial court's ruling. (3T 25-I6 to 26-7). This erroneous admission of allowing her testimony concerning the defendant's alleged acts of violence, the admission of defendant's threats to his second wife, provided to the jury an irreparably prejudicial nexus to the killing of his first wife, her sister and her mother, impermissibly and inescapably allowing the jury to infer that defendant did possess the criminal disposition to fulfill his threats, and thereby subverted N.J.R.E. 404(b)'s prophylactic purpose.

There were no physical evidence linking the defendant to the crimes that he was being charged. There was no one to whom can actually point a finger at him, except from their own personal feelings and belief that he di this crime. The only evidence is the avalanche of other crimes, wrongs or acts, evidence obscured the State's weak case, and the State using the false and perjured testimony of defendant's sister-in-law, Ana Gonzalaz, who disliked the defendant from the onset and who was willing to testify to whatever would convict him, and

the testimony of defendant's second wife, Elieth Camache Alvarado, which buried the defendant's right to a fair trial and violated his constitutional right.

The prosecutor was in misconduct on the onset of the trial in his opening argument to the jury, which surely damaged the fairness to the defendant. The trial counsel objected to the prosecutor's comments in regards to what Ana Gonzalaz was going to testify and the testimony's probative value. The trial court erred in not granting counsel a Rule 55 Hearing to determine the value of this testimony.

At the trial the only evidence linking the defendant with the crimes were the testimony of Ana Gonzalaz and Elieth Camacho Alvarado, which should have been impeached if for no other purpose. The primary contention on this argument is that the prosecutor made improper remarks during opening arguments which prejudiced the defendant. It is error for a trial judge to permit a prosecutor in opening or otherwise, to comment on facts not shown or reasonably inferable from the evidence in the case. State v. Hill, 47 N.J. 490, 499 (1966); State v. Johnson, 31 N.J. 489, 510 (1960); State v. Bogen, 13 N.J. 137, 140-141 (1953). During his opening the prosecutor made the following remarks:

> Investigators start talking to relatives. They start talking to the relatives of Monica Scabone, Yannet Estevez and Norma Estevez. They talked to Ana Gonzalaz, who was the sister of Monica Scabone, and they say, gees, do you know anything about where he is or what happened here?
>
> The relatives give a few leads which turn out to be nothing. But, more importantly they tell that there were prior occasions where Alberto Scabone had threatened to kill Monica, his wife, and her family. (1T 9-16 to 24)

Defense counsel objected at this point and requested a side bar, and after a discussion in regards to having a Rule 55 Hearing, the prosecutor resumed the opening to the jury with:

> Again, you will hear the live testimony of Ana Gonzalaz, and what types of threats she heard, and what the exact nature of those threats were. (IT II-22 to I2-7)

It is also error to permit the prosecutor to declare his personal belief of a defendant's guilt in such a manner that the jury may understand that belief to be based upon something which the prosecutor knows outside the evidence. State v. Thornton, 38 N.J. 380, 398 (I962). The prosecuror continued to violate the defendant with his comments which included in his summation, in pertinent part:

> Who are you going to believe, Ana Gonzalaz or Alberto Scabone?
>
> What that commet is, it tells you that there's intent. He has an intention to burn the house down, and what happens is he does. (7T 48-4 to 8)
>
> You had a good run. I2 years on the lam, but now it's time to pay the piper. (7T 64-II to I3)

The prosecution has the defendant guilt even before the jury has the chance to weigh the testimony, and in which infected the trial proceedings. The prosecutor was in violation in interfering with the jury's ability to consider the value of the testimony of the State's key witnesses. Here the prosecutor went beyond an argumentive evaluation of the State's proof and sought to add to that proof some special expertise that he claimed in this area.

The defendant contends that it clearly shows the prosecutor in his summation disregarded the guidelines set forth in the Court's cases cited above. It is apparent from the num-

ber of instances recently brought to the Appellate Court's attention that improper comments by prosecutors are becoming much too prevalent. Our Courts have reminded prosecutors again and again, hopefully for the last time, of their function in the role of State's attorneys:

> Prosecutors have been admonished by the Court for going beyond the bounds of proper summation on many occasions in the past. See, e.g., State v. Siciliano, 2I N.J. 249, 262-263 (I956); State v. D'Ippolito, I9 N.J. 540, 543 (I955); State v. Bogen, I3 N.J. I37, I39 (I953).

Canon 5 of the Canons of Professional Ethics sets forth this function:

> " The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. "

The canon summarizes Mr. Justice Sutherland's words in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. I3I4, I32I (I935):

> The ***(prosecuting) attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Con-

> sequently, improper suggestions, instructions and especially, assertions of personal knowledge are apt to carry much weigh against the accused when they should properly carry none.

As Mr. Justice Sutherland observed in Berger, cited above, because the prosecutor represents the government and the people of the State, it is reasonable to say that jurors have confidence that he will fairly fulfill his duty to see that justice is done whether by conviction of the guilty or acouittal of the innocence. His comments in summation whether proper or improper carry with them the authority of all he represents. State v. Johnson, supra, 3I N.J. at 5II. It is unlikely a juror will believe a prosecutor would intentionally mislead him.

Statements by the prosecutor of his personal belief aside from the evidence about defendant's guilt are also likely to have a damaging impact. Where those statements are repeatedly made as in this case the damage is compounded. The prosecutor here in effect told the jury he knew that Mr. Scabone was telling and lie and that mr. Scabone was guilty, not on the basis of what the record, but rather through his own expert evaluation of this case as compared with others he had tried.

Accordingly, just before the second wife's testimony, Alvarado waived the maritial privilege and agreed to testify against the defendant, her current husband. (3T 34-I9 to 35-8). The trial court erred in allowing Alvarado's testimony as to her marital communications with defendant, in that the law allowing either spouse to waive the privilege was ex post facto.

The Legislature amended the marital communications privilege by Act of November I7, I992, L.I992, c.I42. Evid. R. 28 (now N.J.R.E. 509), N.J.S.A. 2A:84-22. The amendment

substantially relaxes the privilege to permit disclosure of marital communications " in a criminal action or proceedings in which either spouse consents to the disclosure. " (Emphasis added). The amendment applies to all criminal actions regardless of the date on which the offense was committed or the action initiated. Committee Statement to Senate, No I0545, L.I992, C.I42.

Ex post facto laws are prohibited by the United States and the New Jersey constitutions. U.S. Const. art. I, sec. I0, cl.I; N.J. Const. (I947), art. IV, sec. 7, par. 3. Beazell v. Ohio, 269 U.S. I67, I69-70, 46 S.Ct. 68, 70, 70 L.Ed. 2I6, 2I7-I8 (I925), defined the prohibition as follows:

> Any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one who is charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Accord State v. Jiminez, 266 N.J. Super. 560, 572 (App. Div. I993). A discussion of the common law antecedents of the Rule 23(2), now N.J.R.E. 50I(2) may be found in the case of Trammel v. United States, 445 U.S. 40 (I980); State v. Briley, 53 N.J. 498, 36 A.L.R.3d 8II (I969); State v. Ospina, 239 N.J. Super. 645, 649 (App. Div. I990), certif. den. I27 N.J. 32I (I992); and In re Vitabile, I88 N.J. Super. 6I, 66 (App. Div.), certif. den. 94 N.J. 506 (I983). In re Vitabile, supra. Another rationale that has been offered for the privilege is the " natural repugnance in every fairminded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation

of being comdemned by the words of his intimate life partner. " State v. Ospina, supra at 649-650; State v. Santoro, ouoting 8 Wigmore, Evidence, sec. 2228, at 217 (1961).

The current thinking seems to be that if one spouse is prepared to testify against the other, " their relationship is almost certaintly in dispair; there is probably little in the way of marital harmony for the privilege to preserve.

Unless one of the exceptions in Rule 23(2) is applicable, the spouse of the accused in a criminal action may not testify about anything other than the fact of marriage. Defendant also recognizes that although the language of the rule is broad enough to allow the spouse of an accused to defy a subpoena to testify on his behalf, such an interpretation is said to be warranted by any valid public policy considerations. State v. Santoro, supra. The factors which originally were regarded as justifying such an interpretation have been described as " a long-discarded mix of medieval concepts which disqualified an accused from testifying in his own defense because of his interest in the case, and precluded his wife from doing so because of the theoretical legal unity of husband and wife. "

Setting the scenario, Ana Gonzalaz hates the defendant and her sister dies by stab wounds and then the house is set on fire, so the scene is set for her and now all she has to do is lie that the defendant told her sister in past that this was going to happen. There was never any such detail description of such, and the prosecutor knew that there wasn't any tales of such nature, but this is what he wanted to hear. He allowed this witness to lie on the stand and knowingly allowing her perjured testimony to be presented to the jury. It was never

disclosed to the jury that this sister hated the defendant in a very profound and passionate way in the past and recented her sister even marrying the defendant. This vital information should have been presented to the jury. The defendant argues that cases in which the undisclosed information indicates that the conviction is based on false evidence or perjured testimony which the prosecution knew and should have known wa false. Such a conviction is fundamentally unfair and must be set aside, " if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. " United States v. Agurs, supra, 427 U.S. at I03, 96 S.Ct. at 239.

The long-settled rule has been that the knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of the due process. A conviction obtained by the use of such evidence cannot be permitted to stand.

> In United States v. Anderson, I65 U.S. App. D.C. 390, 405, 509 F.2d 312, 327 (I974), cert. denied, 420 U.S. 99I S.Ct. I427, 43 L.Ed.2d 672 (I975), the court suggested " there is respectable authority for the proposition that a new-trial motion on the ground of false testimony even without the claim that the prosecutor knew of the falsity, should under some conditions be granted," citing Newman v. United States, 238 F.2d 86I n.I (5th Cir. I956). Given our assumptions and reasoning, we need not consider the " knowledge " issue. See Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Col. L. Rev. 858 86I-65 (I960). See generally Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. I36 (I964); Comment, Materiality and Defsne Requests; Aids in Defining the Prosecutor's Duty of Disclosure, 59 Iowa L.Rev. 433 (I973); Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 I.Chi. L.Rev. I-2 (I972).

The defendant contends that the same rule applies if the prosecution, although not actively soliciting false evidence, passively but knowingly allows it to go uncorrected or allows the jury to be presented with a materially false impression. Napue v. Illinois, supra; Alcorta v. Texas, supra. See Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967); Link v. United States, 352 F.2d 207 (8th Cir. 1965). The same result may obtain even though the false nature of the evidence concerns only the credibility of an important witness, rather than the ultimate issue of guilt or innocence. Brady v. Maryland, supra; Williams v. Dutton, supra.; Luna v. Beto, 395 F.2d (5th Cir. 1968) (en banc), cert. denied, 394 U.S. 966, 89 S.Ct. 1310, 22 L.Ed.2d 586 (1969); United States v. Jakalaski, 237 F.2d 503 (7th Cir. 1956).

A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when there is a reasonable likelihood its verdict might have been different. The defendant contends that this Court must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects. United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976). But also see United States v. Butler, 567 F.2d 885 (9th Cir. 1978).

Defendant wish to establish on the record that here the prosecutor knowing allowed, Ana Gonzalaz and Elieth Camacho Alvarado to testify falsely that the defendant openingly admitted that he killed his wife and her family members. Even given this extreme an assumed scenario the Court could not conclude

that Anderson was denied the fair trial guaranteed him by the Due Process Clause of the Fifth Amendment. See United States v. Anderson, 574 F.2d 1347, 1357 (1978); State v. CaHill, 125 N.J. Super, 493, 499 (1973). Even assuming it was admissible, See Fed. R. Evid. 613, 801(d)(2)(e), made Ms. Gonzalaz' and Ms. Alvarado's testimony or their credibility so important as to require reverseal here.

The principal thrust of defendant's argument is that the State knowingly failed to correct false statements made by two of its witnesses by neglecting to bring to the attention of the jury a prior inconsistent statement and exculpatory statement by the witnesses, and further, by failing to correct certain statements made by the said witnesses on cross-examination that were know to prosecutor to be false.

The prosecutor permitted these testimonies to rest unchallenged before the jury and did not attempt to correct, dilute or effect the same. He did not attempt or bring to the attention of the witnesses before the jury the prior inconsistent exculpatory statements. Additionally, certain testimony is the same vein elicited during cross-examination of the witnesses that is hereafter set forth, was permitted to rest unmolested, thus giving rise to the crucial question on this argument.

The issue herein is whether the prosecutor is under an affirmative duty to disclose to the court and jury any prior inconsistent statement of his own witnesses, and further, whether the prosecutor is under an affirmative duty to correct any false statements or testimony made by his own witnesses before a jury where both counsel are aware of the falsity.

It is uncontrovertedly the law in New Jersey and all

the states that the supression of exculpatory evidence or use of perjured testimony by the State, whether willful or merely negligent, deprives the defendant of a fair trial. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. II94, IO.L.Ed.2d 2I5 (I963); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. I1-73, 3 L.Ed.2d I2I7 (I959).

There can be no denial of the fact that the witnesses prior to their damaging testimony, gave the prosecutor an exculpatory statement; further there can be no denial that during the cross-examination the witnesses testified falsely to a highly material fact; and still further, there can be no denial that the prosecutor did not attempt to correct these matters before the jury. This action or inaction was highly prejudicial to the defendant for it not only pertained directly to the cedibility of the witnesses but also to the highly meterial issue of whether defendant was ever the perpetrator of the offense charged.

It therefore remains for this Court to decide the third element, namely, whether the prosecutor participated in the falsity through design or neglect. The conclusion is inevitable. No charge has been fostered that the prosecutor acted designedly, nor has any such thought been considered by the court. He plainly erred.

In Mooney v. Holohan, 294 U.S. I03, 55 S.Ct. 340, 79 L.Ed. 79I (I935), the Supreme Court held that knowing use by the State of perjured testimony to obtain a conviction, and the deliberate suppression of evidence to impeace that testimony, constituted a denial of due process of law. In People v. Faulkner, 7 ILL. App.3d 22I, 287 N.E.2d 243 (App. Ct. I972),

the Illinois court held that it is also the prosecutor's duty as a representative of the people to see that defendant receives a fair trial, and when he learns his witnesses has made an untrue statement, even if only as to a collateral issue, he is duty-bound to inform the court and jurt of its incorrectness.

Further, the United States Supreme Court held that the good or bad faith of the prosecutor is irrelevant where false testimony is concerned. A new trial is required in a criminal case if false testimony by a state witness is allowed to go uncorrected when it appears that it could in any reasonable likelihood have affected the judgment of the jury. Whether the nondisclosure was a result of negligence or design, it is the prosecutor's responsibility to disclose the incorrectness of the witness's statement. Giglio v. U.S., 405 U.S. I50, 92 S.Ct. 763, 3I L.Ed.2d I04 (I972).

This State has cited with approval, in State v. Taylor, supra, the principle set forth in People v. Sauvides, I N.Y.2d 554, I54 N.Y.S.2d 885, I36 N.E.2d 853 (Ct. App. I956), that:

> It is of no consequence that the falsehood bore upon the witness's credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. (at 557, I54 N.Y.S.2d at 887, I36 N.E.2d at 854 (Emphasis added)).

It is the defendant's argument that this principle is so deeply rooted in the fair trial concept that the fact that defendant and his counsel were aware of its falsity does not relieve the prosecutor of an affirmative duty to come forward with the truth, especially in this case since the only possible alleged linking the defendant to this offense is the

false and perjured testimonies of the two State's witnesses.

Defendant also argues that it seems manifestly unjust on these facts to require defense counsel to seek any rebuttal witnesses when the prosecutor has the truth at his fingertips.

In light of the totality of the circumstances as herein set forth, the defendant request that this Court find that there was a manifest denial of justice and therefore, in the interest of justice, this Court must vacate the judgment and grant the defendant's brief for a new trial.

CONCLUSION

Based upon the foregoing reasons it is requested respectfully that Appellant-Defendant, Alberto Scabone's, convictions be vacated and defendant be afforded a new trial.

Respectfully submitted,

Alberto Scabone #258208

Alberto Scabone #258208
New Jersey State Prison
CN - 861
Trenton, New Jersey 08625.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3498-93T4

STATE OF NEW JERSEY,
Plaintiff,

v.

ALBERTO SCABONE,
Defendant.

Criminal Action

CERTIFICATION
OF
SERVICE

I, ALBERTO SCABONE, of full age, hereby certifies:

I.) On the 13th day of October, 1994, I served by Certified Register Mail, one Orginal and three (3) copies of the defendant's Supplemental Letter Brief and Appendix in support of Brief filed by counsel, to, Deborah Poritz, Esq., Attorney General of New Jersey, and the Superior Court of New Jersey, Appellate Division, Richard J. Hughes Justice Complex, CN - 970, Trenton, New Jersey 08625.

2.) I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment under the New Jersey Law.

Alberto Scabone #258208

P610

WARRANT UPON INDICTMENT

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION - CRIMINAL

THE STATE OF NEW JERSEY
VS
ALBERTO SCABONE
Defendant

WARRANT
(ON INDICTMENT)
no. 4225-80

To the Sheriff of the County of Essex, or any other Authorized person.

You are hereby commanded to arrest ALBERTO SCABONE and bring him before the Superior Court, Essex County, in the Essex County Courts Building, at Newark, in the County aforesaid to answer an indictment charging him with MURDER & SECOND DEGREE ARSON (4) in violation of N.J.S. (CT. #1), 2C11-3; (CT. #2, 2C:11-3; (CT. #3, 2C:11-3, (CT. #4, 2C:17-1a(2), A CRIME OF THE SECOND DEGREE

Witness, JUDGE RONCO
Judge of said Court at Newark, in the County of Essex aforesaid the 27th day of AUGUST, 19 81.

(L.S.)
Leonard D. Ronco
Judge

Nicholas V Caputo
Clerk

8-20

DA-1

4225

Superior Court of New Jersey

ESSEX COUNTY

(Law Division — Criminal)

1980 TERM

THE STATE OF NEW JERSEY

vs.

ALBERTO SCABONE

Defendant

INDICTMENT (4 Counts)

MURDER & SECOND DEGREE ARSON

FILED

AUG 27 1981

NICHOLAS V. CAPUTO
Clerk

A True Bill Robert W. Hall
Foreman.

Plea:

Bail:

Presented: AUG 27 1981

GRAND JURY NO. 6239 th
6239C

13

WG 77942
WG 77941

84

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did murder Monica Scabone

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

[redacted] SECOND COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex

aforesaid and within the jurisdiction of this Court, did murder Yannet Estevez

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

[redacted] THIRD COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex

aforesaid and within the jurisdiction of this Court, did murder Norma Estevez

contrary to the provisions of N.J.S. 2C:11-3

and against the peace of this State, the government and dignity of the same.

[redacted] FOURTH COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that ALBERTO SCABONE

on the 2nd day of April, 1981

at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did purposely destroy an occupied multiple family dwelling at 239 Bloomfield Avenue, Newark, N.J.

contrary to the provisions of N.J.S. 2C:17-1a.(2), a crime of the Second Degree and against the peace of this State, the government and dignity of the same.

GEORGE L. SCHNEIDER
COUNTY PROSECUTOR
BY: Norman W. Frey Jr.

DA-6

PATRICIA S. KAY, ESQ.
DEPUTY PUBLIC DEFENDER-ESSEX REGION
ATTORNEY FOR DEFENDANT, ALBERTO SCABONE
BY: JOSEPH E. KRAKORA, ESQ.
31 CLINTON STREET
NEWARK, NEW JERSEY 07102
(201) 648-6200

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION (CRIMINAL)
COMP.# N/A
IND. NO. 4225-8-80
DOB: 11/5/53
SS #: N/A

STATE OF NEW JERSEY, :

Plaintiff, :

v. :

ALBERTO SCABONE :

Defendant. :

NOTICE OF MOTION

FOR

THE SETTING OF BAIL

TO: HON. CLIFFORD J. MINOR
PROSECUTOR OF ESSEX COUNTY
NEW COURTS BUILDING
50 W. MARKET STREET
NEWARK, NEW JERSEY 07102

SIR:

PLEASE TAKE NOTICE that on Wednesday, the 24th day of February 1993, at 9 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned, counsel for the defense, will move before the Hon. Joseph A. Falcone, A.J.S.C. on a Notice of Motion for the Setting of Bail in the within-entitled matter in which the defendant is charged with homicide. Defense will rely on oral argument.

PATRICIA S. KAY, ESQ.
DEPUTY PUBLIC DEFENDER

BY: Joseph E. Krakora
JOSEPH E. KRAKORA, ESQ.
DEPUTY PUBLIC DEFENDER II

DATED: FEBRUARY 23, 1993

State of New Jerse

v.

ALBERTO SCABONE

Defendant (Specify Complete Name)

New Jersey Superior Court

ESSEX County

Law Division - Criminal

- [XX] Judgment of Conviction
- [ ] Change of Judgment
- [ ] Order for Commitment
- [ ] Indictment/Accusation Dismissed
- [ ] Judgment of Acquittal

11/5/53	DATE OF BIRTH
904520A	S.B.I. #
2/3/93	DATE OF ARREST
4/2/81	DATE IND / ACC FILED
11/18/93	DATE OF ORIGINAL PLEA
[XX] NOT GUILTY [ ] GUILTY	ORIGINAL PLEA

ADJUDICATION BY	DATE
[XX] GUILTY PLEA	11/18/93
[ ] JURY TRIAL	
[ ] NON-JURY TRIAL	
[ ] Dismissed/Acquitted	

ORIGINAL CHARGES

IND / ACC No.	Count	Description	Degree	Statute
4225-8-80	1	Murder	1st	2C:11-4b(a)
" " "	2	Murder	1st	2C:11-3
" " "	3	Murder	1st	2C:11-3
" " "	4	Arson	2nd	2C:17-1a(2)

FINAL CHARGES

Count	Description	P.O.	Degree	Statute
Same as above		A.O.C.		
		PAROLE		

It is, therefore, on 1/14/94 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows

Ct.#2 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligib for parole.

Ct.#3 - Commit to the Commissioner of the Department of Corrections for the term of thirty years of which he must serve fifteen years before being eligible for parole consecutive to Ct.#2.

Ct.#1 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2 &

Ct.#4 - Commit to the Commissioner of the Department of Corrections for the term of ten years of which he must serve five years consecutive to Cts. #2,3

[XX] It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority.

[XX] Defendant is to receive credit for time spent in custody (R. 3:21-8) 336 days (TOTAL NO. DAYS) 2/3/93 to 1/14/94 (DATES: From ... To ...)

[ ] Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)) (TOTAL NO. DAYS) (DATES: From ... To ...)

Total Custodial Term 30 yrs. Institution Dept. of Corrections Total Probation Term

Administrative Office of the Courts
State Bureau of Identification

CPB106 (Rev. ...)

COPIES TO CHIEF PROBATION OFFICER STATE POLICE AOC CRIMINAL PRACTICE DIVISION DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

State of New Jersey v ______ SBI # ______ IND ACC # ______

Total **FINE** $ ______

Total **RESTITUTION** $ ______

If the offense occurred on or after December 23, 1991 an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☒ Assessment imposed on count(s) 1,2,3,4 is $ 30.00 each.

Total **VCCB Assessment** $ 90.00

☐ Installment payments are due at the rate of $ ______ per ______.

beginning ______ (DATE)

If any of the offenses occurred on or after Ju[illegible] 987, and is for a violation of Chapter 35 or 36 of Title 2C.

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

___ 1st Degree @ $3000 ___ 4th Degree @ $750
___ 2nd Degree @ $2000 ___ Disorderly Persons or Petty
___ 3rd Degree @ $1000 Disorderly Persons @ $500

Total **D.E.D.R. Penalty** $ ______

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED ______ Offenses @ $50

Total **LAB FEE** $ ______

3) Name of Drugs Involved ______

4) A mandatory driver's license suspension of ______ months is ORDERED

The suspension shall begin today, ______ and end ______

Driver's License Number ______

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address ______

Eye Color ______ Sex ______ Date of Birth ______

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction ______ Driver's license # ______

☐ Your non-resident driving privileges are hereby revoked for ______ Months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a State Correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169)

NAME (Court Clerk or Person who prepares this form)	TELEPHONE NUMBER	NAME (Attorney for Defendant at Sentencing)
TERRY MONTEMURRO	(201) 621-4805	Kevin McLaughlin , Esq.

STATEMENT OF REASONS

The aggravating factors are the risk that the defendant will commit another offense, the seriousness of the offenses of which he has been convicted; and the need for deterring the defendant and others from violating the law.

The mitigating factors are the defendant has no history of prior delinquency or criminal activity or has had a law-abiding life for a substantial period of time before the commission of the present offense; the defendant's conduct was the result of circumstances unlikely to recur; and the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

HOLIDAY, SNOW & ICE DELAY

JUDGE (Name)	JUDGE (Signature)	DATE
EUGENE J. CODEY, JR.	[signature]	1 20 [illegible]

Administrative Office of the Courts
State Bureau of Identification

CP8108 (Rev 1/93) [illegible]

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AOC CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

ADULT PRESENTENCE REPORT

Superior Court of New Jersey Criminal Division
Case Management Office UCMP-H

DEFENDANT'S NAME: SCABONE, Alberto

COUNTY: Essex

PROSECUTOR/PROMIS NUMBER: P81007533-001

INDICTMENT/ACCUSATION/COMPLAINT NO.: I 4225-08-80

FILE/SPN: 093844

CONFIDENTIAL

This report shall remain confidential and copies thereof shall not be made nor the disclosure of the contents of such report be made to third persons except as may be necessary in subsequent court proceedings involving the sentence imposed or disposition made.

A.K.A.	BIRTHDATE:	AGE:	SEX:
Escabone, Alberto; Romero, Alberto	11-5-53	40	☒ Male ☐ Female

RACE:	BIRTHPLACE:	SOCIAL SECURITY NUMBER:	SBI NUMBER:	FBI NUMBER:
Hispanic	Uraguay	140-68-4534	904520A	904347V6

ADDRESS:	ZIP CODE:	TELEPHONE NUMBER:
485 C. Matamoras - Guadulajara, Mexico		None

ORIGINAL CHARGES:
1. 1st Deg. Murder (Passion/Provocation 2C: 11-4b(a)
2. 1st Deg. Murder 2C: 11-3
3. 1st Deg. Murder 2C: 11-3
4. 2nd Deg. Arson 2C: 17-1a(2)

FINAL CHARGES:
1. 1st Deg. Murder Passion /Provocation 2C: 11 4B (a)
2. 1st Deg. Murder 2C: 11-3
3. 1st Deg. Murder 2C: 11-3
4. 2nd Deg. Arson 2C: 17-1a(2)

SEE OVER

PLEA AGREEMENT / SPECIAL FACTORS:
No limiting recommendations for sentencing.

MANDATORY MINIMUM SENTENCE PURSUANT TO N.J.S.A. 2C:

☐ 11-3 ☐ 11-5 ☐ 12-2 ☐ 13-1
☐ 14-6 ☐ 20-11 ☐ 29-6 ☐ 35-3
☐ 35-4 ☐ 35-5 ☐ 35-6 ☐ 35-7
☐ 35-8 ☐ 43-6 ☐ 43-7

☐ Pending Charges ☐ Detainers

ARREST DATE:	OFFENSE DATE:
2-3-93	4-2-81
CONVICTION/PLEA DATE:	SENTENCE DATE:
11-18-93	1-14-94

☐ Plea ☒ Trial

CUSTODIAL STATUS: ☒ Jail ☐ ROR ☐ Bail

BAIL AMOUNT: N/A DATE BAIL RECEIVED: N/A

JUDGE'S NAME: Hon. Eugene J.Codey Jr.

ATTORNEY NAME: Kevin mc. Laughlin ☒ Public Defender ☐ Private ☐ Assigned

ADDRESS: 31 Clinton St., Newark, N.J. TEL. NUMBER:

ASSIST ANT PROSECUTOR'S NAME: Thomas Huth

JAIL TIME CREDIT

FROM (DATE):	TO (DATE):	NUMBER OF DAYS:	TOTAL JAIL TIME CREDIT
2-3-93	1-14-94	336	336 days

OK

COMMENTS:

CASE SUPERVISOR:	DATE PREPARED:	TEAM LEADER:	DATE APPROVED
Kenneth Mc Gill, P.O.		Ellen Quinn	1-11-94

Criminal Practice

UNIFORM DEFENDANT INTAKE

Superior Court of New Jersey - Criminal Division
Case Management Office

(Page 2 of 3) (UDIR-A)

PROS / PROMIS:	DEFENDANT'S NAME:
P81007533-001	SCABONE, Alberto
INDICTMENT / ACCUSATION / CDR NUMBER:	**FILE / SPN:**
I 4225-08-80	093844

III. DEFENDANT'S HEALTH STATUS

PRESENT PHYSICAL HEALTH: ☐ Good ☒ Poor	PROBLEM: Kidney problems.
MENTAL HEALTH: ☐ Good ☒ Poor	PROBLEM: Depression
PRIOR TREATMENT: ☐ Mental Illness ☐ Drug/Alcohol	SUBSTANCES USED: / FREQUENCY: / DURATION: / PROBLEM:
TREATMENT FACILITY (Name, Location): Treatment in Mexico and Costa Rico	TREATMENT DATES:
PHYSICAL APPEARANCE / COMMENTS:	

IV. EMPLOYMENT

CURRENT EMPLOYER (Name & Address): Incarcerated	OCCUPATION: Taxi driver	HOW LONG: 2 years	PHONE: / SALARY: $500. p/m
PREVIOUS EMPLOYER'S NAME AND ADDRESS: Taxi driver while in Mexico.			FROM: / TO:
IF UNEMPLOYED, HOW LONG:	HOW SUPPORTED:	SKILLS:	
EMPLOYER'S COMMENTS:			

APPLICATION TO ESTABLISH INDIGENCY (CERTIFICATION R. 1:4-4(B))

I wish to be represented by ☐ Public Defender ☐ Private Counsel

V. MONTHLY INCOME

	SOURCE	AMOUNT	ASSETS	AMOUNT
INCOME	Salary - (Take Home) Alimony Child Support Public Assistance Agency: Case No. Other (Specify)	0	House/Land Value Vehicle Market Value Year: Make: Model: Savings Investments	0
	TOTAL INCOME:		TOTAL ASSETS:	
	SOURCE	**AMOUNT**	**DEBTS**	**AMOUNT**
PAYMENTS	☐ Mortgage ☐ Rent Alimony Child Support Pay through Probation? Dept. Vehicle Other (Specify)	0	Mortgage Loan Balance Vehicle Loan Balance Support Arrearage (if any) Other (Specify)	0
	TOTAL PAYMENTS:		TOTAL DEBTS:	
COMMENTS:				

CERTIFICATION

I certify that the foregoing statements made by me in the application to establish indigency (SECTION V Monthly Income) are true. I am aware that if any such statements made by me are wilfully false, I am subject to punishment.

DEFENDANT'S SIGNATURE:		DATE:
INTERVIEWER'S SIGNATURE:	TITLE:	PHONE NO:

Criminal Practice

CASE SUPERVISOR ANALYSIS

D

Superior Court of New Jersey
Criminal Division
Case Management Office UDIR-I

DEFENDANT'S NAME:	
SCABONE, Alberto	
COUNTY: Essex	PROSECUTOR/PROMIS NUMBER: 81007533-001
INDICTMENT/ACCUSATION/COMPLAINT NUMBER: I 4225-08-80	FILE/SPN NUMBER: 093844

ASSESSMENT OF FACTORS CONTRIBUTING TO PRESENT OFFENSE (2C:44-1):

The defendant described his physical health as poor. He stated that he has kidney problems. Additionally, he described his medical health as poor, stating that he suffers from depression. He received treatment for this depression in Mexico and Costa Rico. The defendant stated that his childhood was relatively normal. He stated that he was never sexually or physically abused as a child. His second wife during a voluntary statement given to the American Consulate in Guadalajara, Mexico described Alberto as a very agressive and physically/psychologically abusive individual. During his pre-sentence investigation interview he did not exhibit any of these character traits. He answered all questions to the best of his ability and declared his innocence.

ASSESSMENT OF DEFENDANT'S PERSONALITY, PROBLEMS, AND POTENTIAL IN ASSOCIATION WITH THE USE OF PROBATION AS A DISPOSITION INCLUDING AVAILABLE RESOURCES FOR POTENTIAL ASSISTANCE:

'Standing before the court for sentencing is one Alberto Scabone, age 40. The present indictment would appear to be the defendant's only indictable conviction. He has one prior arrest which resulted in dismissal of charges back in 1980.

Alberto Scabone, prior to his incarceration, resided in Guadalajara, Mexico with his wife and children. He resided in Essex County for approximately 3½ years. He was born in Uruguay to the union of Estella Cirila Escabone Romero and Alberto Escabone Jiosa.

He has been married twice and has a total of three children ages 9 through 16. While he was living in Mexico he was a taxi driver.

According to the defendant he suffers from kidney problems and depression. He has received treatment for his physical and mental impairments. He stated that he completed his 6th grade education while living in Uruguay.

Alberto Scabone was found guilty by verdict of jury of Ct. 1. Murder Passion/Provocation, Ct. 2. Murder, Ct. 3. Murder and Ct. 4 2nd Degree Arson of Ind. 4225-08-80. Alberto Scabone will be sentenced in the New Jersey Superior Court of Essex County by the Honorable Codey on 1-14-94. He is presently awaiting sentencing at the Essex County Jail. He is entitled to receive a total of 336 days jail time credit. There are no limiting recommendations for sentencing.

CASE SUPERVISOR NAME:	CASE SUPERVISOR (SIGNATURE):	DATE:
Kenneth Mc Gill, P.O.		
TEAM LEADER NAME:	TEAM LEADER (SIGNATURE):	DATE:
Ellen Quinn		

Administrative Office of the Courts

CAN 9 (3/91)

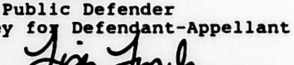
SUSAN L. REISNER
Acting Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street
Box 46003, 9th Floor
Newark, New Jersey 07101
201-877-1200

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
IND. NO(S). 4255-8-80

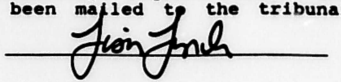
STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	NOTICE OF APPEAL
v.	:	
ALBERTO SCABONE,	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that the defendant, CONFINED at ESSEX COUNTY JAIL appeals to this Court from the final judgment of conviction of MURDER, ARSON entered on JANUARY 20, 1994 in the Superior Court, Law Division, ESSEX COUNTY, in which a sentence of 80 YEARS WITH A 40 YEAR PAROLE DISQUALIFIER, $90.00 VCCB PENALTY was imposed by the Honorable EUGENE J. CODEY, JR..

SUSAN L. REISNER
Acting Public Defender
Attorney for Defendant-Appellant

BY: 
LISA A. LYNCH
Assistant Deputy Public Defender
Intake Unit

The undersigned certifies that the requirements of R. 2:5-3(a) have been complied with by ordering the transcript(s) on March 9, 1994 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.



1-E

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY — NEWARK, N. J.

DATE	TIME	PLACE	FILE NUMBER
2-24-93	12:50P.M.	American Consulate, Guadalajara, Mexico	62,63,64-81

VOLUNTARY STATEMENT OF		AGE
Elieth Alvarado Camacho	D.O.B. 9-2-55	37

RESIDENCE	PHONE
Morelos 497, Colonia Tlaquepaque, Tlaquepaque, Jalisco, Mexico	011-52-3-617-6170

OCCUPATION	EMPLOYER
Self employed	Novedades Gun-Gun, Alvaro Obregon 218, Sector Libertad, Guadalajara, Mexico.

STATEMENT MADE TO: Investigator Ruben T. Contreras of the Essex County Prosecutors Office/Homicide Squad

1 Q. Mrs. Alvarado Where and when were you born?
A. In Mexico City, 9-2-55. NO ES COSTA RISENCE
Q. Can you read, write and understand English?
A. No.
Q. Can you read, write and understand Spanish?
A. Yes.
Q. What is the extent of your education?
A. I am a College graduate in Bussines Adminastration. NO — ESTUDIE PERO NO TERMINO
5X Q. Where did you go to school?
A. In the Costa Rican University. NO
Q. Mrs Alvarado, Iam going to type the questions in English, then ask you the question in spanish and type your answer in English. At the end of the statement Mr. German Zuniga of the American Consulate will read the statement back to you in Spanish. Do you agree wi that and would you give me a Statement?
A. yes
Q. Do you know Alberto Scabone?
8 A. Yes, he is my husband but not with that name?
Q. Under what name did you knew him?
A. Margarito Ramirez Rodriguez. NO
Q. Can you tell me where and when did you meet him?
9 A. I met him in Mexico City in April of 1981. Idont remember the exact date but it was arou "Good Friday" and I think that it was in a weekend. NO EN COSTA RICA Golfito
Q. How did you meet him?
10 A. I met through his son. I was in a park with my girlfriends, when this black car pulled over and parked and this child got out and started playing with the pigeons. The little boy then ran over to the midle of the street and I went over and got him. His father Alberto, came over and we started to talk. I asked him why wasn't the boy's mother watching him. And he said that he was a Widower. He asked me where was I from and when I told him Costa Rica, he said that he was going to visit Costa Rica and he asked for my phone number. I gave him the number and then I left, because I was in Mexico on vacation and I was going back home the next day.
Q. Do you remember what kind of car was Alberto and the boy in?
A. Yes a black Camaro, later when he came to Costa Rica I noticed it had American plates.
Q. When you first met Alberto, what did he tell you his name was?
A. Alberto, no last name.
Q. When is the next time you see or hear from Alberto?
13 A. Approximately a month later he called me and he told me that he was in San Jose, Costa Rica and that he wanted to see me.
Q. Did you see him?
A. Yes he came over to my store with the little boy, and told me that he was on vacation, and asked me to recomend a hotel. I did and then we started seen eachother.
Q. Did you ever asked him how his wife died?
A. Yes. He told me that when the boy was very little, his wife, sister in-law and mother in-law died in a car accident somewhere in the United States.
Q. What was the little boy's name? NO
A. His name is Alberto but they call him "Tito".
17 Q. Did Alberto and his son stayed in Costa Rica?
A. Yes they stayed and I fell in love with Tito, and Alberto was visiting daily my store. About 15 days Alberto's mother arrived and stayed with him about 10 days then she took the boy with her, and at that time I thought to Mexico, because he told me he was mexican.
18 Q. Did any thing happened while his mother was in Costa Rica?
A. Yes, one weekend we all went to the beach in Golfito and I noticed that his mother used to cry all the time and she was very quiet. I asked her what was wrong and she said, nothing. Later Alberto told me that he had a problem when he was living in the U.S.A.

Cont. on page 2

SWORN TO AND SUBSCRIBED BEFORE ME THIS 24 DAY OF Feb. 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 33 OF THE LAWS OF 1983

Plate #3

2-F

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY — **NEWARK, N. J.**

DATE:	TIME:	PLACE:	FILE NUMBER:
2-24-93	1:47P.M.	American Consulate Guadalajara,Mexico	62,63,64-81

VOLUNTARY STATEMENT OF: Elieth Alvarado Camacho — AGE: 37

RESIDENCE: — PHONE:

OCCUPATION: — EMPLOYER:

STATEMENT MADE TO: Inv. Ruben T. Contreras

Cont- that he had a fight with a man over some girl and that he had punched the man, and the man fell and hit his head on the sidewalk and that he believes that the man had died. I told him that if the story was true that he should go to the Police and solve the problem. He said that it was different in the U.S.A. and that no body would believe him and he would go to jail.

19 Q. Was there any other conversations between Alberto and his Mother?
A. Well, most of the conversations that they had were in private, but when she arrived, Alber asked if she brought the money, and she said yes.
Q. What was Alberto's mother's name?
A. They call her "Cata" but her name is Estela.
21 Q. Did Alberto tell you what kind of work he did?
A. Yes, he was a baylor and that he was waiting for a new contract to go to work.
22 Q. Did he ever get the contract?
A. I don't know, for he left in August of 1981 and din't return untill December of the same year.
23 Q. What happened then?
A. When he came back, he told me that he had a contract for 2 to 4 years and he asked me to marry him right away. I told him that I couldn't, and he started crying and convinced me to leave with him. I left with him and we went to Mexico (Veracruz) were we started living together. Then he left in the boat and returned about 3 months later and we moved to Mexico city where I started working in a Real State office.
Q. How was you relationship with Alberto at that time?
A. Well we were living together as husband and wife and the relationship started to get bad. He was insanely jealous and he wanted me to get pregnant right away. He used to watch me, every minute of the day and hated when I had to work late. In May of 1983 I got pregnant and he used to say that he din't think that it was his baby. He started abusing me verbally because of jealousy or money, because he was not working and when he was working he never brought any money home.
25 Q. When was the baby born?
A. He was born January 31,1983.
26 Q. What did you name the baby?
A. Alberto Alvarado Camacho. That is why Alberto got so mad with me when he found out, that Alberto Jr. was born his father was no where to be found, so I decided later round to give my son my last names. When I returned from the civil register with the birth certificate he got very upset after he read it, he punched me in the neck and knocked on top of the bed. I started screaming that he was killing me and my friend Francisca that was in the living room knocked on the door and told him to leave me alone that she had called the police. When he heard that he ran out of the apartment. My friend then took me to a clinic and they found me that I had Concussion and my blood pressure was very low. After that I moved out of the apartment and went to stay with Francisca's mother.
Q. Why did you give your son your last name?
A. Because we were having a lot of problems and when I told him that I was going to leave him he said that he was going to take my baby from me.
Q. What happened after you moved out?
A. He came over and begged me and he cried and told me that he was going to change and things would be better if I took him back.
Q. Did you take him back?
A. Yes, and we decided to go backto Costa Rica and borrow money from my father and open a restaurant. Around September of 1983 I opened the restaurant and I had my two brothers and a sister working with me. About 2 or 3 months later Alberto started to do the same type of life that he was doing in Mexico. Did not work and he was expending money on prostitutes in fact he transmited some type of infection to me that the doctor told me he got from one of this women. That is when again I talked to him and told him that I din't wanted anything else with him, and for him to leave. At that time is when he started crying and when he saw that I did not reactioned to that, he became very violent and destroyed the house. Cont-

SWORN TO AND SUBSCRIBED BEFORE ME THIS 24th DAY OF Feb 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 96 OF THE LAWS OF 1983

Plate 78

3E

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY **NEWARK, N. J.**

DATE:	TIME:	PLACE:	FILE NUMBER:
2-24-93	3:00 P.M.	American Consulate Guadalajara, Mexico	62,63,64-81

VOLUNTARY STATEMENT OF: Elieth Alvarado Camacho — AGE: 37

RESIDENCE: — PHONE:

OCCUPATION: — EMPLOYER:

STATEMENT MADE TO: Inv. Ruben T. Contreras

Page 3

Cont-He broke everything in the bathroom, the bed and other furniture in the bedroom ,the doors ,etc..After that I left him again and to Limon to my mother's house.

Q. What happened to Alberto ?

A. He left and I think that he went to Golfito.

Q. At that time by what name did you knew him? EDUARDO BERG[illegible]

A. I knew him by Alberto ,but his passport said Margarito Ramirez Rodriguez.

Q. What happened next?

A. Alberto again came looking for me and started to put pressure on me and my family and make promisses that he would be good, So we went back together. At that time he had a problem with a car that he had bought and put in my name,because the import taxes were not paid on the car so he put me in a big problem. This problem went on for about 4 months and I had to hire lawyers and pay a fee for a document that Alberto was responsible for. After all this I allways fell embarrassed and din't wanted my family to see the type of life tha I was living and decided that if we went back to Mexico ,maybe Alberto could find a Job. And Alberto pressioned me to leave Costa Rica and go to Mexico.

Q. When did you go back to Mexico?

A. I don't remember the exact date ,but in October 15 of 1985 my daughter Charythin Ramirez Alvarado. Alberto started to work as a "Coyote" and I was working in a office and I was goi to school . Alberto started again to misstreat me verbally and psycologically,and started to have problems with the police. WAS BORN - E.

Q. What kind of problems?

A. A Coyote is a person that hangs outside a pawn shop ,and waits for people that need money and they buy theese people's pawn tickets or the articles that they are trying to sell ,and then they sell it for more money. Many times they deal with stolen property and that is why he was in and out of jail.Because of that and because that year it was a big Earthquake in Mexico we movedto Acapulco .

Q. When did you go to Acapulco? 19[illegible] DESPUES DEL MUNDIAL

A. Around the end of the year in 1985,and all the threats and abuse continued there,every time I wanted to do some thing about it he would threaten me with taken my kids away. On one ocassion I had to go to Costa Rica because my father was very sick,when I returned ,I found that he had a prostitute living in my house with him.Later round on 1987 I waited for the right oportunity and left the house with my kids and the clothes that we were wearing and went to Costa Rica. My father puts me in charge of his store,it was variety store that had all kind of articles for sale.Two months later Alberto showed up and talked to my father and convinced him to talk to me into marrying him so he could have the residence papers so he could work. In June of 1987 we got married and short time later Alberto's parents add son Tito came to live with us and that is when the major problems started. They would lock themself in a room and talk and argue and if would walk in they change the subject. There was a lot of fights between Alberto and his father and mother ,verbally and physicall and finally they go backto Uruguay.

Q. Did you know then that they came from Uruguay?

A. Yes because when I went to buy the plane tickets he told me that they were in Montevideo. Then is when I found out the last name, which was Escabone and I became suspicious. I then called my girlfriend in Los Angeles. I asked her to check all the names that I I had to see if what he had told me was true. Then on August 14,1988 my father died and Alberto mistreated worse than before. He was very jealous of everybody and I went to get help with a psychologist for both of us and he accused me having an affair with the psychologist. The arguments continued and on one occasion he became very violent because I was going to a fifteenth birthday party and he told me that he was going to kill me and was going to set the house on fire. I went to the party and when I returned I found him in the living room in a drug like stupor with containers of my tranquilizers strewn on the floor. I want to emphasize that the containers were empty. He had also killed all the fish that my father had given me before he died. He used insecticide to kill the fish.

Q. What happened to Alberto that night?

A. He left on his bicycle and was later arrested by the police because they thought that he was drunk. The police called me and I responded and later took him to the hospital.

Cont'd page 4

SWORN TO AND SUBSCRIBED BEFORE ME THIS 24th DAY OF Feb 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 38 OF THE LAWS OF 1933

Plate #8

0A-16

4-E

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY — NEWARK, N. J.

DATE:	TIME:	PLACE:	FILE NUMBER:
2-24-93	3:45 P.M.	American Consulate Guadalajara,Mexico	62,63,64-81

VOLUNTARY STATEMENT OF: Elieth Alvarado Camacho — AGE: 37

RESIDENCE: — PHONE:

OCCUPATION: — EMPLOYER:

STATEMENT MADE TO: Inv. Ruben T. Contreras

A. cont. He was in the hospital for two or three days and was then released.

Q. Is there anything else that happened that you want to tell me?

A. Yes. He used to come to the store with me every morning and just sit and cry because I wanted to divorce him. The only time that he didn't want to drive to the store with me, I got in the car and put it in reverse and when I tried to stop the brakes did not work. I almost got in an accident. I took the car to the mechanic and he later called me and asked me if I had any enemies? He also asked where I had my car parked, because he found that someone had put sand and pebbles in the brake fluid. I forgot to mention this but on another occasion I had problems with the brakes while taking my mother and my kids to my sister's house. The same mechanic told me that the brake line had been cut purposefully. Finally around the middle of the year of 1989, my brother, Emilio, came over to me and said that Alberto had told him that he was going to kill me. Shorly after that, Alberto comes to the store and he looked very upset more than on any other occasion, he was crying and talking to himself saying everything will be over today. In the afternoon, he went to the back of the store and was sitting there crying with a machete in his hand. Then he released the dog that we kept in the rear of the store and I had to restrain the dog because it was a guard dog and it was vicious. When I was returning from tying the dog, I had to walk in fro of Alberto, he came after me with the machete and I became scared and I began screaming and I ran out of the store. I was in a state of panic and I went to see my lawyer to see what I could do about my situation. When I returned to my store, I found my mother and my sister Mida outside the store crying. That is when I discovered that Alberto had broken the desk and the glass inside the store and had taken jewelry and money. Mida told me that Alberto had told her that she would never see her niece or nephew again and to tell me that I would never see my kids again.

Q. What happened after that?

A. My brother, Emi[illegible] arrived in a Taxi and told me that he had seen Alberto at the gas station where he ordered him and his wife out of the car and which he then entered and drove off with my children and his son Tito. My brother had picked up my children and was bringing them over to me. I then went to make a complaint with the police. They then started looking for him. He returned to my house with the kids and asked for money. I tol him that I would give him money if he would give me my kids back. He agreed and I gave him a thousand dollars, but he only returned Charytin to me because she was very frightened. He then left with my son and Tito. At that time I ran to the car and tried to stop him. My son became very frightened and told Alberto that he did not want to be with him and told him to let him out of the car. He left with Tito and later that day he was arrested. A few days after that incident, I received information from my friend in Los Angeles that the person that I had inquired about was a very dangerous person and told me what he was wanted for and the city that he was wanted at. I went to San Jose and reported this information to the police at Interpol. I told them that I wanted no publicity for fear of retaliation toward my kids and my family. A few days later, Interpol publicized all the details of the crime on television and radio and newspaper which went out to the entire country. It was very upset becaus later the children started having problems in school. I though that he was going to be extradicted right away but as it turns out he remained in jail for nine months until he escaped.

Q. Did you visit him in jail?

A. Yes. He called me daily and put pressure on me to visit him. In addition, I receive family pressure to visit him because he was my husband. The children also wanted me to visit their father. I did not want him to know that I was the one that turned him in because I was very scared. He threatened me whenever he called me that if I did not help help him he would escape and hurt me. He also asked me for money and I gave him some.

Q. When was the last time you visited him in jail?

A. On the day he escaped.

Q. Was on March 1,1990?

A. I don't recall.

Q. Did you help him escape?

A. No.

SWORN TO AND SUBSCRIBED BEFORE ME THIS

Continued on page 5.

24th DAY OF Feb 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 35 OF THE LAWS OF 1933

Page #3

5-E

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY — **NEWARK, N. J.**

DATE:	TIME:	PLACE:	FILE NUMBER:
2-24-93	4;50P.M.	American Consulate Guadalajara, Mexico	62,63,64-81

VOLUNTARY STATEMENT OF:	AGE:
Elieth Alvarado Camacho	37

RESIDENCE:	PHONE:

OCCUPATION:	EMPLOYER:

STATEMENT MADE TO: Inv. Ruben T. Contreras

Q. When did you find out that he had escaped.
A. The next day.
Q. When is the next time that you saw or heard from him?
A. Approximately one month later. He called and wanted to know how the kids were and wanted to know if I would get together with again.
Q. Did he ever tell you where he was when he talked to you?
A. No. He never told me.
Q. HOw many times did he call you?
A. Approximately four or five times.
Q. Did you get together again?
A. I had previously planned to return to Mexico even prior to his escape. I had to resolve the problem with Tito. I wanted to send him to his grandmother in Uruguay. After I did that I cane to Guadalajara. I did not want to go to Mexico City where he might find me. I started working and I bought a car and rented a taxi license. He later found out where I lived though my "compadre". Apporximately six months later he locates me in Guadalajara. My compadre only advised him that I lived in Guadalajara and that I had a Taxi. He found me by looking at all the taxis and after seeing my brother he followed him to where I lived. After that we started living together again. The children were very happy to see their father again and I still loved him though I feared him too. He still did not know that I had turned him in to the police in Costa Rica. The situation at home deteriorated to the point where he became extremely jealous and in November of 1992 I started looking for someone to help me in order to report his wanted status. I went to the local police and I got no results. In December of 1992, my mother and my sister came to visit me and were surprised to see Alberto living with me. It should be noted that I had not told my family that he had returned. He started making life miserabl for my mother and my sister. At that time I was informed by the taxi union that one of the drivers that I had fired and was close friends with Alberto repo rted that Alberto was planning on murdering me and kidnapping my children. I also found out that Alberto was having an affair with a fourteen year old employee of mine. I later fired her not for having an affair but for holding information on anothr employee that had fired by Alberto. Alberto began turning people against me and was making my life impossible not only by threatning me but also my children. On one occasion he threatened to kill me and my family. That is when I confronted him and I asked him if he is going to do to me what he did to his former wife and in-laws. He answered,"if I have to, I will do it again." He then began to cry and requested that I take him to a psychiatrist because he was afraid that he was going to kill me if he stayed there. I immediately tohim to the a clinic tha has a psychiatrist on duty. The psychiatrist recommended that Alberto be taken to a hospi for treatment. He refused and was consequently treated at home with medication. Inasmuch as this was the first time he had admitted to killing his former wife and in-laws, I bega asking questions. He began talking to me about the murders that he had committed. He was trying to make me forgive him and thus he started talking to me about the murders. I told him that I was very scared of him and afraid that he was going to kill me like he killed his first wife. He told me that he would not do that to me because I was not like her. He said that his first wife was very aggressive and used to fight him. I then asked him if he did kill them. He answered yes. He then described to me how he killed them, one by one. He said he had quarreled with his wife and consequently stabbed her and killed her. He then waited for his mother-in-law. He beat her and then stabbed her. He did the same with his sister-in-law. He also told me that Tito was present when this all happened and said that Tito was telling him to kill them repeatedly. He then said that he burned them and left with his son.
Q. What did you do then?
A. The next day he had an appointment to see the psychiatrist and I told him that he was very dangerous. He suggested that Alberto be confined in a sanitarium. He was thus confined at the Sanitarium Provedencia. He stayed two days and then escaped and returned home.

cont. page 6.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 24th DAY OF Feb. 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 38 OF THE LAWS OF 1953

P-3 - Plate #3

0A-18

6-E

OFFICE OF THE PROSECUTOR OF ESSEX COUNTY

NEWARK, N. J.

DATE:	TIME:	PLACE:	FILE NUMBER:
2-24-93	6:00 P.M.	American Consulate Guadalajara, Mexico	62,63,64-81

VOLUNTARY STATEMENT OF: Elieth Alvarado Camacho — AGE: 37

RESIDENCE: 5 HORAS 10 MINUTOS — PHONE:

OCCUPATION: — EMPLOYER:

STATEMENT MADE TO: Inv. Ruben T. Contreras

After contemplating what I could do, I decided to seek help at the American Consulate in Guadalajara. I spoke to Mr. Gilbert Alvarez about my fears that he was going to kill me and requested that he help me. Finally on February 3, 1993, he had an appointment to see the department of Immigration to resolve his residency status. He was subsequently arrested. Prior to this, agents of Mexican immigration had come to the house and wanted to talk to him about his status in the country. HE requested that he be allowed to make a phone call and after entering the house, he escaped, jumping a twelve foot wall.

Q. Do you still love Alberto?
A. Yes I do.
Q. Why did you turn him in?
A. I was sure that he was going to kill me and my children.
Q. Is there any other reason that you turned him in.
A. I and the children were suffering as a result of his behavior. After he admitted that he had killed his first wife, I believe that he should pay for what he did and to protect myself and my kids.
Q. If it is necessary, will you travel to New Jersey to testify against him.
A. Yes.
Q. Is there anthing else you would like to add to this statement?
A. I would like to read it first before I comment.
Q. After this statement is translated to you and you find that it contains what you have told me. Will you sign it.
A. Yes.
Q. Were there any threats or promises made to you to obtain this statement?
A. NO. I am doing it voluntarily.

SWORN TO AND SUBSCRIBED BEFORE ME THIS

24th DAY OF Feb 19 93

SIGNATURE

THIS AFFIDAVIT TAKEN PURSUANT TO CHAPTER 75 OF THE LAWS OF 1953

Page 06

OA-19

2-F

SUFFERS FROM PARANOIA AND OF LATE HE HAS BEEN TAKING
SUFRE DE PARANOIA Y EL TENER
TRANQUILIZERS PRESCRIBED BY A DOCTOR. ACCORDING TO ELIETH,
TRANQUILIZANTES PROSCRIPTA POR UN DOCTOR SEGUN A ELIETH
SUBJECT IS NOT AWARE THAT SHE KNOWS OF THE AFOREMENTIONED
ASUNTO ES NO ENTERADO ESE ELLA SABEM DE LOS MENCIONADOS
KILLINGS.
ASESINATOS

ELIETH ADVISED THAT SHE HAS KNOWN HER HUSBAND BY THE NAME
ELIETH AVISO ESO ELLA CONOCER SU ESPOSO POR EL NOMBRE
OF ARMANDO BUSTAMANTE ROMERO WITH A BIRTHDATE OF 7/19/58. HER
DE ARMANDO BUSTAMANTE ROMERO CON UN CUMPLEAÑOS/FECHA DE SU
HUSBAND HAS NO RELATIVES IN MEXICO AND THAT HIS FAMILY IS IN
ESPOSO TENER NO RELACION EN MEXICO Y ESE SUS FAMILIARES ES EN
URUGUAY, POSSIBLY IN THE CITY OF MONTEVIDEO. ACCORDING TO
URUGUAY POSIBLE EN LA CIUDAD DE MONTEVIDEO SEGUN A
ELIETH, SHE MET CAPTIONED SUBJECT IN COSTA RICA.
ELIETH ELLA REUNIRSE SUJETO EN COSTA RICA

ELIETH DESCRIBED HER HUSBAND AS BEING ABOUT 173 CM IN
ELIETH DESCRIBIR SU ESPOSO
HEIGHT, WEIGHS ABOUT 80 KILOS, BROWN HAIR, BROWN EYES-STANTED
KILOS PELO CHAFES OJOS

She

OJO

A 3498-93T4

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY
INDICTMENT NO. 4225-80
APP. DIV. NO. 3498-93T4

THE STATE OF NEW JERSEY,

Complainant

vs.

ALBERTO SCABONE,

Defendant.

TRANSCRIPT
OF
TRIAL

RECD
APPELLATE DIVISION
JUL 11 1994
Clerk

Place: Essex County Courts Bldg.
Newark, New Jersey 07102

Date: Monday, November 8, 1993

BEFORE:

HONORABLE EUGENE J. CODEY, JR., J.S.C.,
and a Jury.

FILED
APPELLATE DIVISION
JUL 11 1994
Clerk

TRANSCRIPT ORDERED BY:

LISA LYNCH, ESQ.

APPEARANCES:

THOMAS HUTH, ESQ., Assistant Prosecutor
For the State.

KEVIN MC LAUGHLIN, ESQ., Deputy Public Defender
For the Defendant.

FRANCES L. GILLEN, C.S.R.
Official Court Reporter
Room 111 Essex County Courts Bldg.
Newark, New Jersey 07102

THE COURT: For the record, this is State of New Jersey vs. Alberto Scabone. Mr. Scabone is present in court. He's represented by Kevin McLaughlin. From the Prosecutor's Office is Thomas Huth of the Homicide Squad.

Mr. Scabone does not speak English, but we have the services of an interpreter approved by the court system hired by the Public Defender's Office present in court.

Can we just have the interpreter's full name so that we'll be able to put it on the record?

MS. COHEN Yes, Your Honor.

My name is Sarah Cohen, C-o-h-e-n.

THE COURT: Sarah Cohen is present.

Can you tell us what language you're translating?

MS. COHEN: Spanish.

THE COURT: Spanish. English to Spanish for Mr. Scabone.

Does he understand what's going on?

MS. COHEN: Yes, Your Honor.

THE COURT: Okay. Have a seat.

Mr. McLaughlin, is there anything you'd like to place on the record?

Have you advised Mr. Scabone that we're going to have some other matters that will be addressed during the course of the proceedings regarding the testimony that's going to be allowed in and also concerning testimony from his present wife,

whether she wants to assert the privilege against him to testify against her husband?

MR. MC LAUGHLIN: Yes, Your Honor.

I just wanted to make it clear on the record because Mr. Scabone had indicated a concern to me.

There was a question in which he inquired is this pretrial or is this the trial? I indicated to him the truth is it is both. There may well be the necessity for some hearings outside the presence of the jury which might under other circumstances be done prior to the jury selection, but because of the circumstances in this matter, the fact that we have many witnesses here who are from South and Central America, the State and the defense have agreed that with the permission of the Court that we will address those matters as they come up, when the necessity for them arises during the course of the trial.

I just wanted Mr. Scabone to know that we have not forgotten the pretrial applications; that they will, in fact, be heard perhaps during the course of the trial.

THE COURT: Okay.

As I also understand it, there's a stipulation between the attorneys that there will be a sequestration order for the witnesses with the exception of Investigator Contreras from the Homicide Squad. He is not subject to the provisions of that rule, and he will be allowed to sit at counsel table with Mr.

Huth.

MR. MC LAUGHLIN: Your Honor, that's correct.

We anticipate that the investigator will be a witness in the matter, either at the behest of the State or potentially at the behest of the defense.

But because Mr. Contreras is the person that essentially worked this case up from its infancy in this decade, Your Honor, I certainly have no objection to Mr. Contreras being present, and I'm sure he understands that there are certain limitations that his presence is permitted so that he can assist Mr. Huth, and that he should not allow anything that he might hear during the course of the trial to in any way affect what his testimony would be or would have been.

THE COURT: Investigator, do you understand the ground rules?

MR. CONTRERAS: Yes, I understand, Your Honor.

THE COURT: Anything else we have to put on the record?

MR. HUTH: No, sir.

(The jury is brought into the courtroom.)

(The jury is partially selected and then Court is adjourned until Tuesday, November 9, 1993.)

* * *

CERTIFICATION

I, FRANCES L. GILLEN, C.S.R., License No. XI01085, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.

Frances L. Gillen

FRANCES L. GILLEN, C.S.R.
Official Court Reporter
Rm. 111 Essex County Courts Building
Newark, New Jersey

Date: April 5, 1994

State of New Jersey
DEPARTMENT OF STATE
DIVISION OF
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