A-5079-99T4

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5079-99T4

STATE OF NEW JERSEY	:	
Plaintiff-Respondent,	:	
v.	:	**CRIMINAL ACTION**
MICHAEL LASANE,	:	On Appeal from a Denial of a Petition for Post Conviction Relief in the Superior Court of New Jersey Law Division, Ocean County
Defendant-Appellant.	:	
	:	**Sat Below:**
	:	Honorable James M. Citta, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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STATEMENT OF PROCEDURAL HISTORY

The defendant was originally charged in Juvenile Delinquency Complaint FJ15-2863-96-5 on March 18, 1996 in the Superior Court, Chancery Division, Family Part, Ocean County with acts of delinquency which, if committed by an adult, would have involved the crimes of theft, purposeful/knowing murder, felony murder, robbery and carjacking. (Da 1 to Da 3). On January 14, 1997, the defendant appeared before the Honorable Barbara Ann Villano, J.S.C. and voluntarily consented to the entry of an order waiving jurisdiction of the family court, and transferring the matter to the Law Division of the Superior Court. (Da 4).

On January 23, 1997, the defendant appeared before the Honorable Peter J. Giovine, J.S.C. and waived indictment and trial by jury. (Da 5). He then entered a plea of guilty to Ocean County Accusation No. 96-01-00076, charging him with felony murder, contrary to N.J.S.A. 2C:11-3a(3). (Da 6). According to the plea agreement, the State would recommend a life imprisonment term with a 30 year parole disqualifier. (Da 7 to Da 9).

On February 28, 1997, Judge Giovine imposed a life imprisonment term with a 30 year parole disqualifier. (Da 10 to Da 11). A Notice of Appeal was filed on the defendant's behalf on or about April 24, 1997 (Da 12), while an order was entered by the Superior Court, Appellate Division on May 5, 1997, permitting the Notice of Appeal to be filed nunc pro tunc. (Da 13). On June 15, 1998, the Superior Court, Appellate Division, in a 6 page per curiam opinion, affirmed the defendant's conviction and sentence

imposed below, concluding that the sentence imposed was not manifestly excessive. (Da 14 to Da 19).

The defendant thereafter filed a Notice of Motion for Post Conviction Relief on June 15, 1999. (Da 20 to Da 45). This resulted in a hearing before the Honorable James M. Cita, J.S.C. on March 24, 2000, at which time Judge Cita denied the defendant's petition for post conviction relief. (Da 46). A Notice of Appeal was filed from this denial on May 30, 2000. (Da 47).

STATEMENT OF FACTS

The defendant was originally charged in a juvenile delinquency complaint with acts of delinquency which, if committed by an adult, would have involved theft, purposeful/knowing murder, felony murder, robbery and carjacking. A hearing was subsequently conducted at which time defense counsel indicated his client intended to voluntarily waive jurisdiction, and have the matter transferred to adult court. As a result, the defendant and defense counsel had signed a consent order to waive jurisdiction. (TW 3-8 to 21).[1]

Defense counsel questioned his client regarding his decision to waive jurisdiction, as a result of which counsel requested that the court accept his client's application for a voluntary waiver. (TW 4-17 to 10-12). The court also questioned the defendant (TW 10-13 to 14-13), after which the court accepted the voluntary waiver so that the matter could proceed to adult court. (TW 14-14 to 15-17).

At the subsequent plea hearing, the prosecutor summarized the plea agreement in which Counts I, II, IV and V involving third degree theft, purposeful/knowing murder, armed robbery and carjacking would be dismissed in exchange for the defendant's plea to felony murder, with a sentence recommendation of a life imprisonment term with a 30 year parole disqualifier. (TP 3-2 to

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[1]TW refers to the waiver hearing transcript of January 14, 1997
TP refers to the guilty plea hearing transcript of January 23, 1997
TS refers to the sentencing transcript of February 28, 1997
TPCR refers to the petition for post conviction relief hearing transcript of March 24, 2000

4-6). The court questioned the 17 year old defendant, who indicated he had consented to the matter being waived to adult court, and had done so freely and voluntarily. He further indicated that no one had forced or threatened him in any way. (TP 4-24 to 5-21).

The defendant indicated the matter had been discussed between he and his attorney for some time, and that they had discussed the possibility of a plea. He understood the various rights that he was waiving as a result of the guilty plea. The court subsequently determined that the plea was being entered freely, voluntarily and intelligently upon the advice of counsel. (TP 7-23 to 11-20).

The court reviewed with the defendant various other ramifications of the guilty plea, involving the potential punishment with respect to all five offenses, the plea recommendation and merger principles. (TP 11-21 to 20-8). He indicated that he was thoroughly satisfied with the services of his attorney, and had had enough time to discuss the matter that day as well as prior thereto. (TP 21-3 to 14).

Defense counsel questioned the defendant regarding the factual basis, at which time the defendant indicated he had decided to steal a car at approximately 3:00 p.m. on March 14, 1996 at the Caldor shopping mall on Route 37 in Toms River. He saw a gold Camry parked in front of Palumbo's, and he entered the car, telling the woman inside to give him the keys. She did so, and she remained in the car as he drove from the parking lot to a wooded area in Manitou Park. He kept the victim confined in the car while

he thought about what to do. (TP 23-2 to 24-25).

He subsequently put duct tape on the victim's hands and ankles, and left the car. At one point she began screaming, so he put his hand over her face to stop her from screaming. She stopped screaming, and at some point she stopped moving and was not breathing. He realized she was dead, although he did not intend to kill her. He did not know how what appeared to be zipper marks had gotten on her face. (TP 25-1 to 26-22). He did not have a weapon with him, although the victim believed he had a gun. (TP 26-21 to 27-1).

The prosecutor then questioned the defendant, at which time he acknowledged receiving a copy of a tape provided in discovery, in which the only two people on the tape were the defendant and the victim. The tape noted that the victim essentially indicated that the defendant had threatened her with a gun, and she wanted to see the gun. On the tape, he told her he did not want to show her the gun because he would be in more trouble. (TP 28-4 to 25). Pursuant to questioning by the court, the defendant acknowledged that he had smothered the victim to death. (TP 32-14 to 24).

The court determined that the defendant understood the nature of the charge and had received the advice of competent counsel. The court concluded the defendant was entering his guilty plea freely and voluntarily, had voluntarily waived his right to a jury trial, and had provided an adequate factual basis. (TP 33-12 to 34-19).

The court referenced the excellent legal representation the

defendant had appeared to receive, further noting that "he's had the benefit of his mother all along the way here." The court added that counsel had spoken with the defendant's mother on many occasions, and that the defendant's mother had been present on several occasions when counsel spoke with his client as well. Accordingly, the court accepted the plea. (TP 35-1 to 7).

At sentencing, pursuant to questioning by the court, the defendant indicated he understood he was there to be sentenced as a result of his plea, and was satisfied with the representation of his attorney. (TS 2-8 to 15). Defense counsel disagreed with the assessment set forth by the probation officer in the presentence report, noting his client reaffirmed and stood by the factual basis which he had given to the court at the time of his guilty plea. As such, he disagreed with that part of the presentence report indicating that he had not fully informed the court of his involvement. The court indicated it would strike that part of the presentence report. (TS 3-15 to 4-14).

Defense counsel acknowledged certain aggravating factors existed but maintained various other aggravating factors relied upon by the prosecutor were not relevant. He further requested that the court consider various mitigating factors embodied in N.J.S.A. 2C:44-1b(7), (8), (9) and (13). He opined his client should not receive a life imprisonment term, since his client had expressed deep regret and remorse over what had occurred. (TS 13-9 to 18-22). The defendant's mother spoke on behalf of her son, requesting that the court show mercy, while the defendant further

expressed remorse to the victim's family. (TS 19-12 to 22-7).

After the prosecutor and various relatives of the victim spoke (TS 23-8 to 42-5), the court found no mitigating factors but various aggravating factors including the nature and circumstances of the offense, the risk the defendant would commit another offense, the need for deterrence, and the fact that the defendant had used a stolen motor vehicle while committing the offense to which he was pleading guilty. (TS 46-13 to 57-23). The court then imposed a life imprisonment term with a 30 year parole disqualifier on Count III, dismissing the other four counts of the juvenile complaint. (TS 57-24 to 60-23).

The only issue raised on the defendant's behalf on appeal involved the contention that the sentence imposed was manifestly excessive. (Da 16). In its six page per curiam opinion, the Superior Court, Appellate Division was satisfied the trial court's statement of reasons justified the imposition of the maximum sentence for felony murder, affirming the defendant's conviction and sentence imposed below. (Da 14 to Da 19).

In the defendant's petition for post conviction relief, he maintained his guilty plea had been the product of coercion and ineffective assistance of counsel due to an actual conflict of interest. (Da 31). The thrust of his petition was that he was denied the effective assistance of counsel, noting that it encompassed the right to representation free from actual conflict on the part of defense counsel. (Da 32).

The petition noted that in the fall of 1996, after defense

counsel was assigned to represent the defendant, counsel engaged in an affair with the defendant's mother which created a conflict of interest which affected the defendant's right to the effective assistance of counsel. Throughout the course of counsel's relationship with the defendant's mother, counsel utilized his mother to coerce the defendant in the direction defense counsel wanted to proceed. (Da 33).

Specifically, both counsel and the defendant's mother advised the defendant to waive jurisdiction, and both further advised him to waive his right to indictment and trial by jury. While that might had been an acceptable and tactical decision with respect to waiving jurisdiction, the defendant maintained it was inconceivable that he should waive indictment and pled guilty to a life imprisonment recommendation which was the maximum sentence permitted by law by virtue of the accusation. (Da 34).

The petition further maintained that around January 1997, the defendant's mother visited him the Ocean County Jail and told him to accept the plea offered by defense counsel, or his family would withdraw all support for him. As such, the defendant maintained that his guilty plea was induced by coercion through family members, as well as through the ineffective assistance of counsel. (Da 34).

The petition further maintained that coercion had been applied to the 16 year old defendant by a third party which rendered his guilty plea involuntary. The defendant could not be said to have made a voluntary decision to waive various rights when his mother

threatened to waive family support if he did not plead guilty. (Da 35).

The petition further indicated that defense counsel and the defendant's mother had worked closely together to represent the defendant. However, as a result of counsel's fear that his wife would learn of the affair, counsel convinced the defendant's mother to coerce her son into accepting the plea agreement, in which the defendant did not want to accept. Furthermore, ending the case provided defense counsel with the opportunity to break off his relationship with the defendant's mother before it could be discovered by his wife. As a result, the defendant was denied due process of law as well as the effective assistance of counsel since the guilty plea was the product of coercion and a conflict of interest. The defendant maintained counsel's advice to plea guilty was not based upon an evaluation of the case, but rather was a "ploy" to distance himself from the situation involving the defendant's mother, which served as a conflict of interest to the defendant. (Da 36).

The defendant's petition maintained that counsel erroneously advised him that he should waive indictment since it would preclude the prosecutor from seeking the death penalty, and that without an indictment, the maximum punishment would be a 30 year term with a 10 year parole disqualifier. However, the plea agreement essentially gave the defendant nothing in return for his guilty plea, and the State was permitted to recommend the maximum sentence. Had the defendant known he would have received the

maximum sentence permitted by law, he would never have pled guilty, and would instead have insisted upon proceeding to trial. (Da 38).

The defendant maintained that the advice given by counsel was erroneous since, as a juvenile, he was ineligible for and could not have been subjected to the death penalty. As a result, the trial court sentence the defendant to the maximum term possible, contrary to what had been told to him by defense counsel. (Da 38).

The defendant's petition further maintained that defense counsel showed various family members evidence of the crime, and told them the defendant had confessed, in violation of confidentiality principles. As a result, counsel had an unacceptable conflict of interest, and obvious avenues of a full defense were never pursued. (Da 39).

According to the petition, the defendant had informed the probation department investigator that he had not committed a murder, and this assertion was placed in the presentence report. However, during sentencing, defense counsel requested that it be stricken from the record, and it was so stricken by the court. (Da 40).

The defendant's statement to the investigator had been a sincere assertion of his innocence, and as a result there obviously existed a factual and legal dispute between the defendant and the State. Accordingly, the defendant maintained he was entitled to relief, and that the guilty plea should be set aside since he had been denied the effective assistance of legal representation as a result of an actual conflict of interest involving his attorney.

(Da 41).

The accompanying affidavit of the defendant's mother, Vera Thomas, indicated that in the fall of 1996, when her son was incarcerated due to various charges involving murder, she commenced an intimate affair with her son's court-appointed attorney. She did not want her son to pled guilty to any of the charges, since he had proclaimed his innocence and she believed in his innocence. However, once the affair with defense counsel started, she began to have very intimate feelings for counsel, and permitted counsel to convince her to coerce her son into accepting a plea bargain. Counsel instructed her to use any means whatsoever to make her son accept the plea, adding that if her son did not accept the offer, counsel would decline to represent her son at trial. He added that with any other attorney, her son would lose. (Da 42).

Prior to sentencing, the defendant told his mother that although he had already pled guilty, he wanted to attempt to withdraw his guilty plea and to seek new representation. (Da 42). She told him that if he did so, neither she nor her family would continue to support him. That was done as a result of the influence from the inappropriate relationship between her and defense counsel. (Da 42).

The defendant's mother further indicated that there were several other instances when defense counsel, other family members as well as herself utilized coercive suggestions in order to convince the defendant to pled guilty. Other family members were instructed to discourage the defendant from pursuing a jury trial.

Defense counsel met with several family members, and produced several items of evidence, claiming the defendant had confessed the crime to him, but was "confused and afraid to tell." He asked those present to use their influence to convince the defendant to accept the guilty plea. The defendant later told his mother that that had been false. (Da 42).

The defendant's mother believed she had been used, and that defense counsel acted in a totally unprofessional manner, during which time his misused his authority and influence, and compromised her son's constitutional rights. (Da 42).

At the post conviction relief hearing, defense counsel indicated his client maintained he had been pressured and coerced by his attorney and his mother to plead guilty. He was 16 at the time of the offense, 17 at the time of the guilty plea, and had relied heavily upon the advice of counsel. (TPCR 4-13 to 24).

As a result, his client had pled guilty, but believed at the present time the advice had been erroneous and not in his best interest. The defendant believed pressure had been placed upon him to plead guilty as a result of a relationship between his mother and counsel, as set forth in his mother's affidavit. (TPCR 4-25 to 6-2).

The defendant was requesting that the court permit him to vacate his plea and proceed to trial as a result of having received ineffective assistance of counsel. He further wanted to have new counsel assigned to weigh the evidence against him anew, before making a determination as to whether to proceed to trial or to work

out another plea agreement. (TPCR 6-3 to 23).

The court questioned counsel as to how the second prong of the Strickland standard had been satisfied, since his client wanted new counsel but might not actually proceed to trial. (TPCR 6-24 to 8-16). Defense counsel acknowledged that if the plea was vacated, his client could receive more time than he had originally received. However, it was his client's position that he had not entered a knowing and voluntary guilty plea, and wanted his guilty plea vacated. (TPCR 8-17 to 9-18).

Defense counsel acknowledged it was difficult to respond to the court's questioning, since there had been a guilty plea rather than a trial transcript where testimony and evidence could be reviewed. However, his client was confident that if he was permitted to withdraw his guilty plea, he would be proven innocent if he went to trial. The defendant had voiced this belief to counsel. (TPCR 10-10 to 11-18).

The defendant maintained he had not received adequate legal representation, and that the appropriate standard for relief had been met. Although the factual basis had been given, he maintained the factual basis had not been legitimate, but had been the consequence of improper influence. (TPCR 12-24 to 13-7).

When the court again questioned counsel regarding the second prong of the Strickland standard (TPCR 13-8 to 15-22), defense counsel noted that aspect of the defendant's petition which maintained that when there was a conflict of interest involving ineffective assistance of counsel, the second prong was not

applicable as in the normal situation. Specifically, the defendant maintained that based upon the conflict, he did not have to demonstrate that the outcome would be different. The defendant could demonstrate that the outcome would have been different in any event, since he would not have pled guilty. (TPCR 13-15 to 16-3).

The defendant requested that his petition be granted or, at the very least, that an evidentiary hearing be conducted to "discern these matters which you just brought to light." (TPCR 17-4 to 9).

In its ruling, after reviewing the defendant's contentions (TPCR 19-18 to 20-20), the court concluded that even if the allegation of the relationship between the defense counsel and the defendant's mother were true, it did not create a legal conflict of interest, and did not make defense counsel ineffective as a matter of fact. (TPCR 21-21 to 22-4). The court noted that the defendant acknowledged having no knowledge of this relationship at the time he entered his guilty plea. (TPCR 22-9 to 12).

The court further concluded there was no evidence in the record that defense counsel's activities outside the court room and unrelated to the present case created any conflict of interest between he and the defendant either at the juvenile level or at the adult level. Rather, he maintained defense counsel represented the defendant's in a vigorous manner, and was very capable in every legal and professional sense. (TPCR 22-19 to 23-1).

The court further characterized the plea bargain as "a good deal." It concluded that the first prong of the Strickland

standard had not been met, nor had the second prong been established. Specifically, the court found no ineffective assistance of counsel with respect to the first prong. Even assuming there was a scintilla of inappropriate behavior on defense counsel's part, it did not rise to the level of ineffective assistance of counsel which was so ineffective as to essentially deny to the defendant any counsel whatsoever. (TPCR 23-2 to 17).

Secondly, the court concluded there was no evidence to even speculate that there was the possibility of a different outcome, let alone conclude by a preponderance of the evidence that there was a substantial likelihood that the outcome would be different. Accordingly, the defendant's petition for post conviction relief was denied. (TPCR 23-18 to 25).

This appeal followed.

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LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In the present case, the defendant's petition for post conviction relief maintained that he had been denied the right to the effective assistance of legal representation at the trial level, as a result of an intimate relationship which existed between counsel and his mother, which resulted in the defendant being pressured and coerced into a guilty plea which he would not otherwise have entered. This conflict of interest was not known to the defendant until after he had pled guilty and was sentenced, and was supported not only by the defendant in his petition, but also by the defendant's mother in an accompanying affidavit.

At the post conviction relief hearing, the trial court concluded that neither prong of the Strickland standard had been established. Accordingly, it denied the defendant's petition, and it is respectfully submitted that the trial court erred in doing so without at least affording the defendant an evidentiary hearing to fully address this contention.

Rule 3:22-2 provides four grounds for post conviction relief, including the existence of a substantial denial in the conviction proceedings of a defendant's right under the State or Federal Constitutions. A defendant must establish the right to such relief by a preponderance of the credible evidence. State v. Mitchell,

126 N.J. 565, 579 (1992). However, post conviction relief is neither a substitute for a direct appeal (see Rule 3:22-3) nor an opportunity to relitigate cases already decided on the merits (see Rule 3:22-5). State v. Cerbo, 78 N.J. 595, 605 (1979). Consequently, a defendant may be procedurally barred from post conviction relief pursuant to Rule 3:22-4 if he could have, but did not raise the claim in a prior proceeding, unless one of three exceptions exists: (1) the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; (2) enforcement of the bar would result in fundamental injustice or (3) denial of relief would be contrary to the Federal or State Constitutions.

In State v. Preciose, 129 N.J. 541 (1992), our Supreme Court discussed at length the relationship of ineffective assistance of counsel claims and post conviction relief proceedings. It noted that under prevailing state case law, defendants were rarely barred from raising ineffective assistance of counsel claims on post conviction relief proceedings. Id. at 459-460. It noted that such contentions were "particularly suited for post conviction review because they often cannot reasonably be raised in a prior proceeding." Id. at 460. Thus, Courts had expressed a general policy against entertaining ineffective assistance of counsel claims on direct appeal since such claims generally involved allegations and evidence outside the trial record. Id.

In Preciose, the State conceded that the Appellate Division had incorrectly barred the defendant's ineffective assistance of

counsel contention on procedural grounds when it maintained that the defendant could have raised that claim on direct appeal. The State nevertheless maintained that the Appellate Division's denial of post conviction relief was appropriate since the Court had also discussed and dismissed the defendant's ineffective assistance of counsel claim on its substantive merits. Id. at 461.

In response, the defendant maintained that the trial court had erred by denying to him an evidentiary hearing on his ineffective assistance of counsel claim. The Court in Preciose noted that although Rule 3:22-1 did not require evidentiary hearings to be held on post conviction relief proceedings, judicial discretion existed to conduct such hearings pursuant to Rule 3:22-10. It noted that generally a defendant should develop a record at a hearing at the trial level at which time counsel could explain the reasons for his conduct and inaction, and at which the trial court could rule upon the claims including the issue of prejudice. Id. at 462. See also State v. Sparano, 249 N.J. Super 411, 419 (App. Div. 1991).

As a result, the Supreme Court held the following:

> Thus, trial courts ordinarily should grant evidentiary hearings to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of post-conviction relief. As in a summary judgment motion, Courts should view the facts in a light most favorable to a defendant to determine whether a defendant had established a prima facie claim. State v. Preciose, supra, 129 N.J. at 462-463.

The Court further noted that to establish a prima facie claim

of ineffective assistance of counsel, a defendant had to establish the reasonable likelihood of success under the test set forth in Strickland v. Washington, 466 U.S. 668, 80 L.Ed. 2d 674 (1984). In Strickland v. Washington, the United States Supreme Court addressed for the first time the appropriate standard by which to judge a defendant's contention that he was denied his constitutional right to the effective assistance of counsel. The Court noted that the benchmark for judging any claim of ineffectiveness was whether trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied upon as having produced a just result. As a result, the Court held that the proper standard for attorney performance was that of reasonably effective assistance. Strickland v. Washington, supra, 466 U.S. at 686, 80 L.Ed. 2d at 692.

Accordingly, the Supreme Court established a two prong test to determine whether counsel's assistance was so defective as to require the reversal of a defendant's conviction. Initially, the defendant had to identify those acts or omissions of counsel that were alleged not to have been the result of reasonable professional judgment. The reviewing court had to then determine whether, in light of all the circumstances, the identified act or omissions were outside the wide range of professional competent assistance. Strickland v. Washington, supra, 466 U.S. at 690, 80 L.Ed. 2d at 695.

Even if a defendant established the first prong, the Court held that the defendant also had to establish the second prong

since even a professionally unreasonable error by counsel did not warrant setting aside a conviction if the error had no effect upon the judgment. Strickland v. Washington, supra, 466 U.S. at 691, 80 L.Ed. 2d at 696. Accordingly, the defendant had to demonstrate that the deficient performance prejudiced the defense.

Specifically, an accused had to affirmatively prove prejudice, and it was not sufficient that the defendant demonstrated that the errors had some conceivable effect upon the outcome of the proceedings. Rather, a defendant had to demonstrate that there was a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." In this regard, a reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 466 U.S. at 694, 80 L.Ed. 2d at 698. As the Court further noted, although these principles were to guide the process of decision, the ultimate focus of inquiry had to be on the fundamental fairness of the proceeding whose result was being challenged. Strickland v. Washington, supra, 466 U.S. at 696, 80 L.Ed. 2d at 700.

Relying on state constitutional principles, our own Supreme Court adopted the Strickland standards in State v. Fritz, 105 N.J. 42 (1987). As a matter of state law, the Court held that if counsel's performance was so deficient as to create a reasonable probability that those deficiencies materially contributed to a defendant's conviction, the constitutional right to counsel would have been violated. Id. at 58.

It is acknowledged that there exists a presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable and professional judgment. Strickland v. Washington, supra, 466 U.S. at 690, 80 L.Ed. 2d at 695. Since prejudice is not presumed, State v. Fritz, supra, 105 N.J. at 64, a defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceedings. United States v. Cronic, 466 U.S. 648, 659 n. 26, 80 L.Ed. 2d 657, 668 n. 26 (1984). As such, any acts or omissions of counsel must amount to more than mere tactical strategy. Strickland v. Washington, supra, 466 U.S. at 689, 80 L.Ed. 2d at 694-695.

Accordingly, adequate assistance of counsel must be measured by a standard of "reasonable competence. State v. Fritz, supra, 105 N.J. at 53; State v. Jack, 144 N.J. 240, 248 (1996). As a result, judicial review requires a certain deference since the relevant standard does not demand "the best of attorneys", but rather requires attorneys be "(not) so ineffective as to make the idea of a fair trial meaningless." State v. Fisher, 156 N.J. 490, 500 (1998); State v. Davis, 116 N.J. 341, 351 (1989).

Finally, as recently noted by this Court with respect to the right of defendants to evidentiary hearings in post conviction relief proceedings, it is well settled the "trial courts should ordinarily grant evidentiary hearings to resolve ineffective-assistance-of-counsel claims if a defendant has presented a prima facie claim in support of post-conviction relief. State v. Garcia, 320 N.J. Super. 332, 338 (App. Div. 1999), quoting from State v.

Preciose, supra, 129 N.J. at 462. In determining the propriety of an evidentiary hearing, the trial court should ascertain whether the defendant would be entitled to post conviction relief with the facts reviewed "in the light most favorable to defendant." State v. Marshall, 148 N.J. 89, 158 (1997). If that inquiry is answered in the affirmative, the defendant is generally entitled to an evidentiary hearing in order to establish the allegations.

As noted in Preciose, a defendant's claim of ineffective assistance of counsel "is more likely to require an evidentiary hearing because the facts often lie outside the trial record and because the attorney's testimony may be required." State v. Preciose, supra, 129 N.J. at 462. As a result, an evidentiary hearing is generally required unless the court determines the hearing would not assist in its analysis of whether the defendant is entitled to post conviction relief, or where the defendant's allegations are too vague, conclusory or speculative as to warrant such a hearing. State v. Marshall, supra, 148 N.J. at 158. See also State v. Pyatt, 316 N.J. Super 46, 51 (App. Div. 1998), certif. denied 158 N.J. 72 (1999), in which this Court noted that a determination as to an ineffective assistance of counsel claim is best made through an evidentiary proceeding "with all its explorative benefits, including the truth-revealing power which the opportunity to cross-examine bestows."

In the present case, the defendant's petition not only made certain allegations about trial counsel, but contained an affidavit from the defendant's mother corroborating those allegations in

which a conflict of interest existed, which made it impossible for trial counsel to adequately represent the defendant's interests. Specifically, as the defendant's petition maintained, during the fall of 1996, after trial counsel was assigned to represent the defendant, he began an intimate relationship with the defendant's mother. (Da 33). Throughout the course of that relationship, defense counsel utilized the defendant's mother to coerce the defendant in the direction in which trial counsel wanted to proceed: a guilty plea. (Da 33). In January 1997, the defendant's mother visited him in the Ocean County Jail, and told him to accept the plea offered by the State and discussed with him by trial counsel, or the family would withdraw all support for him. (Da 34).

This resulted from trial counsel's fear that his spouse would learn of the illicit affair. Consequently, trial counsel convinced the defendant's mother to influence him into accepting the plea offer, despite the fact that the defendant did not want to enter a guilty plea. Such a guilty plea resulted in an early termination of the case, thereby affording trial counsel the opportunity to terminate the illicit relationship with the defendant's mother before it could be discovered by his spouse. (Da 36). As a result, the defendant was coerced into accepting a guilty plea in which he received the maximum punishment to which he was exposed. (Da 34 and Da 38).

These allegations contained in the defendant's petition were corroborated by the detailed affidavit submitted by the defendant's

mother and made apart of the petition's appendix. (Da 42). According to the affidavit, the defendant maintained his innocence to the various offenses, and his mother believed in his innocence. However, after beginning the affair with trial counsel, she allowed counsel to convince him to "coerce my son into accepting a plea bargain." Trial counsel told the defendant's mother to utilize any means available to convince the defendant to accept the plea. Counsel further told the mother that if the defendant did not accept the plea offer, he would refuse to represent him at trial, and that he would certainly be found guilty of all charges thereafter. (Da 42, paragraph 3).

As the affidavit further indicated, the defendant desired to withdraw his guilty plea prior to sentencing, and to seek new legal representation. However, because of the influence exerted by trial counsel over the defendant's mother, she told the defendant that if he pursued that avenue, neither she nor other members of the family would support him. As such, there were various times when trial counsel, the defendant's mother and other family members utilized "coercive suggestions" to convince the defendant to plead guilty. (Da 42, paragraphs 4 and 5).

In addition, trial counsel erroneously misled members of the family into believing that the defendant had confessed his criminal culpability. This tactic was utilized to convince members of the family to coerce the defendant into pleading guilty. (Da 42, paragraph 7). Finally, the affidavit indicated the defendant had no knowledge of these circumstances, and that trial counsel

utilized his influence over the defendant's mother to compromise her son's constitutional rights. (Da 42, paragraphs 6 and 8).

The defendant's assertions in his petition as well as the contents of his mother's affidavit were uncontroverted, and not challenged by the State. As such, it is respectfully submitted that, at the very least, the defendant presented a prima facie case of ineffective assistance of trial counsel based upon an impermissible conflict of interest.

In this regard, the United States Supreme Court has held that the standard set forth in Strickland v. Washington equally applies to challenges made to guilty pleas based upon ineffective assistance of counsel. Specifically, the first prong of the Strickland standard remains the same, while the second, or "prejudice", prong focuses upon whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Accordingly,

> In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 88 L.Ed. 2d 203, 209 (1985).

As a result, where a defendant maintains that his guilty plea was involuntary as a result of ineffective assistance of counsel, the voluntariness of the guilty plea depends upon whether counsel's advised "was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, supra, 474 U.S. 52, 56, 88 L.Ed. 2d at 207.

In Strickland, the court noted that in certain Sixth Amendment contexts prejudice was presumed, where there was the actual or constructive denial of the assistance of counsel. Strickland v. Washington, supra, 466 U.S. at 692, 80 L.Ed. 2d at 697. It noted that another type of actual ineffectiveness claim warranted a similar, although more limited, presumption of prejudice. Id. It referenced its previous holding in Cuyler v. Sullivan, 446 U.S. 343, 345-350, 100 S. Ct. 1708, 1716-1719 (1980), which held that prejudice was presumed when counsel was burdened by an actual conflict of interest. In those circumstances, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, supra, 466 U.S. at 692, 80 L.Ed. 2d at 696. However, it noted that the rule was not quite the "per se rule of prejudice" that existed for Sixth Amendment claims. Rather, prejudice was presumed in those situations only where the defendant demonstrated that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Id., quoting for Cuyler v. Sullivan, supra, 446 U.S. at 350, 100 S. Ct. at 1719.

In New Jersey, attorneys are required to comply with strict ethical rules concerning actual or possibly conflicts of interest. State v. Loyal, 164 N.J. 418, 428 (2000). The general rule is that an attorney is prohibited from representing a client when that representation would create a conflict of interest. Id. at 429. In fact, even an appearance of impropriety "alone may be sufficient to present an ethical problem even though no actual impropriety

exists." Higgins v. Advisory Commission on Professional Ethics, 73 N.J. 123, 129 (1977). The purpose of this doctrine is "to bolster the public confidence in the integrity of the legal profession." State v. Loyal, supra, 164 N.J. at 429, quoting from State v. Catanoso, 222 N.J. Super. 641,648 (Law Div. 1987).

Furthermore, in determining whether there is a reasonable basis for finding an appearance of impropriety, the conduct must be viewed as would an "ordinary knowledgeable citizen acquainted with the facts." Dewey v. R.J. Reynolds Tobacco Company, 109 N.J. 201, 216 (1988). When such an appearance of impropriety is found in a criminal case, the disqualification of that attorney is routinely required. State v. Loyal, supra, 164 N.J. at 430. As such, "if there is any doubt as to the propriety of an attorney's representation of a client, such doubt must be resolved in favor of disqualification." State v. Loyal, supra, 164 N.J. at 432, quoting from Reardon v. Marlayne, Inc., 83 N.J. 460, 471 (1980).

In the present case, it is respectfully submitted that once trial counsel was assigned to represent the defendant, his subsequent conduct of entering into an extramarital affair with his client's mother created an obvious conflict of interest. Even when viewed in a vacuum, it cannot fairly be denied that an ordinary knowledgeable citizen would readily conclude that there was an appearance of impropriety, warranting that attorney's removal as counsel for the accused because of a perceived inability to represent his client's best interests.

However, when viewed within the context of the allegations set

forth in the defendant's petition, corroborated in detail by his mother's affidavit, it becomes clear that there was not only an appearance of impropriety, but actual impropriety resulting from a clear conflict of interest. This conflict resulted in trial counsel's utilization of the defendant's mother and other members of the family to convince the defendant to enter into a plea agreement, despite the fact that the defendant did not wish to do so and wanted to plead guilty. Faced not only with his own attorney but also with his family members utilizing every possible means to convince him to plead guilty, the defendant understandably pled guilty but under circumstances which made the plea involuntary in nature.

As noted in Cuyler v. Sullivan, supra, prejudice for purposes of the Strickland standard is presumed if it is demonstrated that counsel represented conflicting interest which adversely affected his performance. As noted in Hill v. Lockhart, supra, the second prong of Strickland is satisfied if the defendant demonstrate there is a reasonable probably that, but for counsel's conduct, he would not have pled guilty.

Both situations clearly existed in the present case. Certainly, at the very least, the defendant presented a prima facie case with respect to the conflict of interest and an appearance of impropriety on his attorney's part, which resulted in inadequate legal representation by coercing the defendant into a guilty plea which would not otherwise have been made. Accordingly, the trial court erred in denying to the defendant an evidentiary hearing to

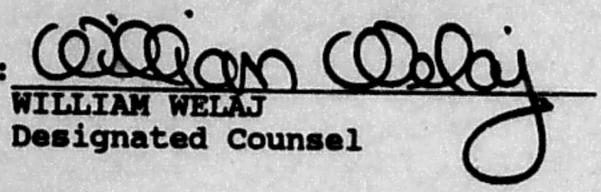
fully address this issue, and which would have enabled the defendant to testify and present witnesses as well as to cross-examine trial counsel. As a result, it is requested that the matter be remanded to the trial court to afford the defendant that to which he is entitled: an evidentiary hearing.

CONCLUSION

For the foregoing reasons, it is requested that the matter be remanded to the trial court for an evidentiary hearing to determine the merits of the defendant's contention that he was denied the right to the effective assistance of trial counsel.

Respectfully submitted,

IVELISSE TORRES, Public Defender
Attorney for Defendant-Appellant

By: 
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A-5079-9914

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-5079-9914

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Final Judgment Denying Post Conviction Relief,
v.	:	of the Superior Court of New Jersey, Law Division, Ocean County.
MICHAEL LaSANE,	:	Sat Below:
Defendant-Appellant.	:	Hon. James N. Citta, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On March 19, 1996, juvenile delinquency complaint FJ-15-2863-96-S was filed against defendant, Michael LaSane, born March 15, 1979, in Superior Court, Chancery Division, Family Part, Ocean County, charging him with conduct that if committed by an adult would constitute acts of purposeful or knowing murder of Kathleen S. Weinstein, contrary to N.J.S.A. 2C:11-3a(1) and (2); felony murder, contrary to N.J.S.A. 2C:11-3a(3); first degree armed robbery, contrary to N.J.S.A. 2C:15-1; first degree carjacking, contrary to N.J.S.A. 2C:15-2; and third degree theft, contrary to N.J.S.A. 2C:20-7. (Da1 to 3).

On January 14, 1997, defendant appeared before the Honorable Barbara Ann Villano, J.S.C., and, pursuant to a negotiated agreement, consented to the waiver of jurisdiction over the matter from the Superior Court, Chancery Division, Family Part, to the Superior Court, Law Division. (1T14-19 to 15-7).[1] On that date, Judge Villano entered a consent order waiving jurisdiction of the matter to the Law Division for further prosecution, as provided by N.J.S.A. 2A:4A-27 and R. 5:22-1. (Da4).

On January 23, 1997, Ocean County Accusation Number 97-01-

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[1] 1T refers to the transcript of waiver hearing, January 14, 1997;
2T refers to the transcript of guilty plea hearing, January 23, 1997;
3T refers to the transcript of sentencing hearing, February 28, 1997.
4T refers to the transcript of post-conviction relief hearing, March 24, 2000.

00076 was filed charging defendant with the felony murder of Kathleen Stanfield Weinstein, contrary to N.J.S.A. 2C:11-3a(3). (Da6). On that same day, defendant waived his rights to prosecution by indictment and trial by jury, and, pursuant to a negotiated agreement, he pled guilty to the accusation which charged him with felony murder. (Da5; Da7 to 9; 2T9-7 to 11; 2T18-22 to 20-11). Defendant also agreed to return to the State an audio tape recording of conversations between the victim and himself that had been provided to him in discovery. (Da9; 2T3-22 to 4-4). In exchange, the State agreed to dismiss the four remaining charges -- purposeful or knowing murder, first degree carjacking, first degree robbery, and third degree theft -- in the juvenile delinquency complaint. (Da8; 2T3-13 to 17). The State also advised defendant that it would recommend the maximum sentence for the felony murder offense, life imprisonment with a thirty year parole disqualifier. (Da8; 2T3-18 to 21). The Honorable Peter J. Giovine, J.S.C., took and accepted defendant's guilty plea. (2T33-12 to 35-7).

On February 28, 1997, Judge Giovine sentenced defendant to life imprisonment with a thirty year parole disqualifier on the felony murder conviction. (Da10; 3T58-15 to 20). The judge also ordered defendant to pay a $5,000 Victims of Crime Compensation Board penalty and a $75 Safe Neighborhood Services Fund assessment. (3T60-5 to 13; Da10 to 11).

By order filed May 5, 1997, this court permitted defendant to file a Notice of Appeal nunc pro tunc. On direct appeal to

this court, defendant argued that the life term imposed by the sentencing court was excessive. (Da16). In a per curiam opinion dated June 15, 1998, this court affirmed defendant's conviction and sentence. (Da14-19).

On June 15, 1999, defendant filed a pro se petition for post-conviction relief based primarily on a claim of ineffective assistance of counsel. (Da20-45). Counsel was appointed, and following a hearing held on March 24, 2000 before the Honorable James N. Citta, J.S.C., the petition was denied without an evidentiary hearing. (4T19-21 to 23-25). An order to that effect was entered on that same day. (Da46).

On May 30, 2000, defendant filed a Notice of Appeal from the denial of the petition for post-conviction relief. (Da47).

COUNTER-STATEMENT OF FACTS

The following version of the events surrounding the murder of Kathleen Weinstein was provided by defendant in giving the factual basis for his plea. On March 14, 1996, at approximately 3:00 p.m., defendant was at the Caldor Shopping Mall on Route 37 in Toms River. (2T23-2 to 7). While there, defendant decided to steal a gold-colored Toyota Camry automobile that was parked in the parking lot of the shopping mall. (2T23-8 to 19). Defendant then approached the Camry and told the occupant of the car, Kathleen Weinstein, to give him the keys to the car. (2T23-22 to 23; 2T24-12 to 15). Kathleen complied with defendant's demand. (2T23-24 to 25).

Then defendant, with Kathleen in the car, drove to a wooded area in Manitou Park, which was located "a substantial distance" from the shopping mall. (2T24-1 to 7). Defendant threatened Kathleen with a gun, but he claimed that he did not actually possess one. (2T26-21 to 27-1; 2T27-8 to 13; 2T28-10 to 25). Defendant drove to the park to "escape . . . with stealing the car." (2T24-8 to 11). Defendant kept Kathleen confined in the car while he pondered how to "get away" with stealing the car. (2T24-16 to 25). Thereafter, defendant wrapped duct tape around Kathleen's hands and ankles. (2T25-1 to 6). Defendant instructed her not to scream and then left Kathleen in the woods before driving away in her car. (2T25-7 to 12). But as he began to drive away, Kathleen began to scream. (2T25-13 to 15). Defendant returned and put his hand over Kathleen's mouth and

nose to stop her from screaming. (2T25-13 to 18; 2T31-19 to 25). Defendant claimed he did not pay close attention to Kathleen's reaction to his act of suffocating her because he was looking toward an electric powerline substation that was in close proximity. (2T32-1 to 10). Defendant did not want the people there to hear anything. (2T32-1 to 13). Defendant noticed that when Kathleen stopped screaming she also stopped breathing. (2T25-19 to 26-3). Defendant shook Kathleen and when she did not move he realized that she was dead. (2T26-26-4 to 12). Defendant admitted that his act of covering Kathleen's nose and mouth with his hand smothered her to death, but he claimed that he did not intend to kill her. (2T26-13 to 14; 2T32-14 to 24; 2T35-20 to 25).

At the sentencing hearing, further facts were fleshed out concerning the murder that established that defendant committed a far more heinous crime than the sanitized one he admitted to at the plea hearing. At sentencing, it was established that on the afternoon of Thursday, March 14, 1996, defendant, one day shy of his seventeenth birthday, took a hammer and a roll of duct tape with him to the Caldor shopping mall. (3T24-7 to 9; 3T33-13 to 15). Defendant loitered in the mall, wandering in and out of several stores without ever making a purchase. (3T24-16 to 25). Defendant then went outside to the mall's parking lot and saw a Toyota Camry "that really hit his fancy." (3T25-1 to 3). Defendant had recently told a friend that "he was going to get himself a Toyota Camry." (3T23-21 to 22). At about 3:08 p.m.,

defendant saw the five foot-three, one hundred and twenty-five pound Kathleen approach the Camry. (3T25-3 to 6; 3T25-14 to 19). As defendant forced his way into Kathleen's car, a witness heard Kathleen say, "please don't do this." (3T25-6 to 13).

Defendant then drove around with Kathleen in the car for about two hours. (3T25-22 to 26-22). At approximately 5:00 p.m., Kathleen activated a tape recorder which she had in her car.[2] (3T25-22 to 26-22). On the approximately forty-five minute tape, which had finished recording before defendant murdered Kathleen, Kathleen was heard saying to defendant, "You're telling me you got a gun. Let's see the gun."[3] (3T27-7 to 13).

Also on the tape, Kathleen was heard saying to defendant, "do you really want to have that on your head, hijacking a car and leaving somebody?" (3T27-14 to 19). Defendant responded, "[y]ou do what you got to do." (3T27-20). Defendant also said that he liked "to take chances." (3T28-2 to 6). Kathleen pleaded with defendant not to make a "deadly mistake," but defendant drowned out her pleas by turning up the volume to the car's radio. (3T28-7 to 15). Defendant "calmly discussed" with

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[2] Kathleen subsequently took the tape out of the tape recorder and put it in her pocket. (3T26-23 to 27-2). The police discovered the tape after a civilian reported finding Kathleen's abandoned body on the afternoon of March 17, 1996, in the wooded area where defendant had killed her. (PSR3; 3T26-23 to 27-2).

[3] The tape did not indicate whether defendant possessed a gun. (3T27-7 to 13).

her "the terms and conditions of the lease" of the car. (3T51-21 to 25). Kathleen sounded very nervous as she pleaded with defendant to leave the wooded area of the park, but defendant told her he could not. (3T28-19 to 24). Defendant told Kathleen that she had nothing to fear, but he told her that he might have to tie her up; defendant subsequently bound Kathleen's feet and ankles with duct tape. (3T28-16 to 18; 3T29-5 to 10). Kathleen sounded as if she knew defendant was going to kill her so she tried to leave a trail to him on the tape by calling him by his first name and asking him about his family. (3T29-18 to 30-3). Ultimately, the tape made it clear that defendant was going to wait until it was dark outside before he acted to "get rid of" Kathleen. (3T30-5 to 8). And despite Kathleen's pleas to defendant to take just the car and not her life, defendant killed her nonetheless. (3T39-13 to 18). Defendant covered Kathleen's body with a blanket and left her body in the woods. (PSR3).

After he murdered Kathleen, defendant returned to the shopping mall and purchased a new pair of sneakers. (3T33-6 to 12). Then, over the next three days, he drove his friends and family around in Kathleen's car. (3T33-13 to 24). He gave various stories to friends and family concerning how he came into possession of the car. (3T33-13 to 34-11). The police subsequently found Kathleen's body and found her car parked in front of defendant's home. (3T34-12 to 21). Defendant initially told the police that he had recently purchased the car. (3T36-16 to 37-9).

Defendant's claim at the plea hearing that he used only his hand to suffocate Kathleen was inconsistent with the evidence. (3T30-14 to 31-3). The autopsy report showed that Kathleen had been suffocated by an outside obstruction covering her mouth. (3T31-3 to 9). Kathleen was found lying on her back with the two sweaters and jacket which she had been wearing covering her face. (3T31-14 to 18). And impressed upon her face were impressions that matched her sweater and the zipper of her jacket. (3T31-19 to 22). In addition, there was a bruise on the right side of Kathleen's forehead. (3T31-11 to 13). The autopsy report indicated that the bruise was caused by either the struggle of trying to free herself from the "smother-grip" or the pressure exerted on her forehead by the perpetrator as he suffocated her. (3T31-23 to 32-1).

Pursuant to a negotiated agreement, defendant pled guilty to the felony murder of Kathleen. He was sentenced to life imprisonment with a thirty year parole disqualifier. Defendant's conviction and sentence were affirmed by this court on direct appeal. Thereafter, defendant filed a petition for post-conviction relief, which was denied without an evidentiary hearing. Defendant now appeals that denial to this court.

LEGAL ARGUMENT

POINT I

BECAUSE DEFENDANT, WHO RECEIVED AN EXTREMELY FAVORABLE PLEA BARGAIN WHERE THERE WAS OVERWHELMING EVIDENCE OF GUILT, FAILED TO SATISFY HIS INITIAL BURDEN TO SHOW THAT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WOULD SUCCEED ON THE MERITS, THE POST-CONVICTION COURT PROPERLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING.

Defendant's sole ground for post-conviction appeal is that the trial court should have granted him an evidentiary hearing with respect to his post-conviction claim that his attorney was ineffective because he was laboring under a conflict of interest throughout his representation of defendant at the plea bargain proceedings. The only proof defendant presented to the post-conviction court to support this allegation was his mother's hearsay statement in which she alleged, without any explanation, that in the "fall of 1996" (prior to the guilty plea hearing), she engaged in an "intimate affair" with defendant's attorney and that she "allowed him to convince [her] to coerce [defendant] into accepting a plea bargain." (Da42).

The post-conviction court accepted as true the allegations in defendant's mother's statement, and correctly found the information was insufficient to justify an evidentiary hearing on the issue because defendant showed no conflict of interest on the part of his counsel and no deficiency in counsel's performance. Moreover, as emphasized by the post-conviction court, defense counsel's representation epitomized effective, not ineffective

representation; he was able to negotiate an extremely beneficial plea bargain with the State which substantially limited the potential amount of mandatory minimum time defendant would serve. Under the circumstances, defendant's petition neither factually nor legally alleges grounds for relief. Thus, the post-conviction court properly refused to grant defendant an evidentiary hearing and denied defendant's request for post-conviction relief.

At the outset, defendant's challenge to the denial of an evidentiary hearing on a claim of ineffective assistance of counsel cannot be divorced from the factual situation with which defense counsel was confronted. It is obvious that the State had an overwhelming case of defendant's guilty conduct in the horrendous and notorious murder of Kathleen Weinstein. On March 14, 1996, forty-five year old Kathleen Weinstein was carjacked by defendant from the Caldor Shopping Mall in Toms River. For the next several hours, defendant drove around with Kathleen, a captive, in the car. He continually threatened her with a gun. While they were driving, unbeknownst to defendant, Kathleen activated a tape recorder that she had in her car; for about 45 minutes one could hear the chilling conversations between defendant and Kathleen.[4] As the prosecuting attorney below explained, Kathleen "decided to get involved in this tape ... to

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[4] The audio tape is a sealed exhibit to the record. (2T3-24 to 4-4; 2T36-19 to 37-3; 3T43-25 to 44-8). At the plea hearing, defendant acknowledged it was his voice on the tape. (2T28-4 to 9).

leave some trail behind ... [t]hat's why she asked him, calling h[illegible] Michael, what about your parents, recreating the fact .... [s]he's trying to get a dossier to identify this individual ... [t]hat's what that tape was all about." (3T29-18 to 30-2). The machine recorded Kathleen's courageous pleas for life. Defendant drove her into a wooded area of a park, bound her hands and feet with duct tape he had brought with him, and when night fell, he smothered Kathleen to death with her own clothes. Defendant left with Kathleen's car which he drove for the next couple of days until he was apprehended; Kathleen's car was parked in front of his house. The audio tape that vividly captured these ruthless crimes was found on Kathleen's abandoned body in the wooded area where defendant had killed her.

Defendant was facing trial on charges that included knowing or purposeful murder, felony murder, carjacking, kidnapping[5] and robbery. His guilt was not legitimately in doubt, particularly due to the existence of the audio tape. Needless to say, the prospects at a trial were obviously extremely dim and convictions on all counts seemed virtually inevitable. It is significant that defendant risked being sentenced to at least thirty years mandatory incarceration on the murder charge plus additional consecutive mandatory terms of imprisonment on carjacking and/or

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[5] The State recognizes that defendant was not charged with kidnapping in the juvenile complaint, but, under the facts of this case, the State certainly had the right to charge defendant with kidnapping in an indictment. Moreover, the accusation against defendant charged him with felony murder during the course of kidnapping, robbery, carjacking. (Da6).

robbery, and kidnapping, which were criminal acts separate and apart from the murder. (2T36-6 to 14). The severity of the conduct and the separate nature of the criminal acts certainly would have warranted imposing consecutive sentences under State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed. 308 (1986). As pointed out by the trial court below, defendant faced "life plus sixty years with no parole for sixty years," without a plea bargain. (2T15-25 to 16-1).

Defense counsel was able to negotiate a very advantageous plea bargain with the State which significantly limited the potential amount of mandatory minimum time defendant would have to serve. The plea bargain provided that in return for a plea of guilty to felony murder, the State would dismiss the remaining charges - first degree purposeful or knowing murder, first degree carjacking, first degree robbery, and third degree theft. The State indicated it would recommend a life term with a 30 year mandatory minimum term. However, what sentence defendant would ultimately receive remained within the discretion of the court. (2T12-11 to 13-8). Not surprisingly, defendant accepted the plea bargain and entered a plea of guilty to felony murder. Defendant's recitation of guilt to felony murder allowed him to sanitize or desensitize the hard callous facts of the crimes. See Counter-Statement of Facts, supra. The plea was accepted by the court only after an extremely thorough inquiry wherein defendant stated unequivocally that he had not been coerced into

pleading guilty, that he was pleading freely and voluntarily, and that he was satisfied with the services of his attorney. (2T5-19 to 21; 2T18-15 to 17; 2T21-3 to 6).

Moreover, defendant's attorney did not rest after the beneficial bargain had been struck. At the sentencing hearing, he vigorously argued against a life sentence and made a lengthy, impassioned plea for leniency. (3T5-20 to 18-22). Nonetheless, based upon the egregious circumstances of this crime, the sentencing court imposed a life sentence with a thirty year mandatory minimum term.

On direct appeal, defendant argued only that the life term was excessive, a claim that was rejected by this court in a per curiam opinion dated June 15, 1998. (Da14-19). A year later, defendant petitioned for post-conviction relief arguing that he received ineffective assistance of counsel because his defense counsel had a conflict of interest resulting from an "intimate affair" with defendant's mother. (Da21-45). Defendant's only evidence in support of his petition was a hearsay statement[6] signed by his mother in which she stated that "on approximately

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[6] The State must point out that defendant's mother's statement is not an affidavit as he refers to it on appeal. Although the purported affidavit indicates a notary witnessed defendant's mother's signature, there is no indication that an oath was administered. An affidavit is defined as "[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." Blacks Law Dictionary 58 (6th Ed. 1990); State v. Knight, 549 P.2d 1397, 1401 (Kan. 1976). Thus, because the information was not provided under oath, the requirements for an affidavit are not met, and the statement is an unsworn declaration.

fall of 1996," she "engaged in an intimate affair" with defendant's attorney. (Da42). The nature and length of this vague relationship is unexplained. The statement went on to provide overly vague, conclusory assertions of coercion: "I began to have very intimate feelings for [defendant's attorney] and subsequently allowed him to convince me to coerce [defendant] into accepting a plea bargain ... [t]here were several other instances upon which [defendant's attorney] other family members, and myself used coercive suggestions in order to get [defendant] to plead guilty .... [o]ther family were instructed to discourage [defendant] from pursuing a trial by jury." (Da42). The statement lacks any specific information regarding these allegations. The statement also contains the hearsay assertion that "[defendant's attorney] instructed me to use any means necessary to make [defendant] accept the plea, and said that if [defendant] did not accept the offer, he would decline for representing [defendant] at trial, and with any other attorney [defendant] would surely lose." (Da42).

At the hearing, defendant's post-conviction counsel argued that, in hindsight, defendant "after looking back on the entire case and having received his sentence and had an opportunity to look back on the whole process, feels that based upon the relationship with his attorney, and the relationship that existed between his mother, as he alleged, and his trial counsel, that there was undue and inappropriate influence exerted on him to enter a plea of guilty." (4T5-20 to 6-2). He indicated that

defendant wanted the court to allow him to vacate his guilty plea, appoint new counsel who would "weigh the evidence against him anew, and make an election whether to proceed to trial or to work out another agreement." (4T6-11 to 16). The prosecutor, however, appropriately responded that "[w]hat's happened is, he's changed his mind ....[s]itting in jail, he's changed his mind ... [h]e doesn't like the deal he struck .... [b]ut he's offered no proof whatsoever to show that the plea wasn't voluntary at that time." (4T18-1 to 5).

The post-conviction court found that the allegations in defendant's mother's statement, even if true, did not "create a legal conflict of interest." (4T22-1 to 4). The court found defendant failed to demonstrate inadequate performance noting counsel "proceeded on [defendant's] behalf in a vigorous manner," negotiating an "extraordinary" plea bargain, "in the context of this crime." (4T22-24 to 23-5). The court emphasized that counsel's performance certainly fell within the range required by the law: "No reasonable attorney or judge with knowledge of the criminal law can look at these facts and this plea bargain and say [defendant's attorney] did not do a good job." (4T23-6 to 8). Additionally, the court found defendant's assertions insufficient to establish prejudice: "Secondly, there is no evidence before this Court to lead this Court to even speculate that there is even the possibility of a different outcome, let alone find by a preponderance of the evidence that there is a substantial likelihood that the outcome would be different."

(4T23-18 to 23). Thus, the court concluded defendant's allegations in his petition for post-conviction relief were insufficient to establish the existence of substantive grounds for relief which would entitle him to an evidentiary hearing prior to dismissal of his petition.

The relief defendant now seeks from this court is a remand for an evidentiary hearing. This court need not reach the merits of the claim because defendant has waived the issue of the voluntariness of his plea since the issue was known and available to him on direct appeal from his guilty plea. Under our post-conviction rules, an evidentiary hearing is not warranted for claims that could have been raised on direct appeal. R. 3:22-4; State v. Mitchell, 126 N.J. 565, 583-84 (1992). In that appeal, defendant failed to raise an issue about the voluntariness of his guilty plea, which is ultimately the basis of his post-conviction motion, despite being represented by new counsel. No explanation has been given as to why he waited long after his guilty plea had been accepted (more than two years) - and, indeed, a year after his direct appeal - to make a coercion claim. Certainly this argument should have been raised on direct appeal.

What is more, defendant's mother's statement is ambiguous as to when she supposedly told defendant about the alleged relationship: It states only that "[defendant] had no prior knowledge of the above stated situation." (Da42). And in defendant's brief, he asserts "[t]his conflict of interest was not known to the defendant until after he had pled guilty and was

sentenced." (Db16). No explanation has been given for failing to make the argument currently relied upon in the direct appeal. Thus, any issue concerning the voluntariness of the plea appears to be post-conviction afterthought, should have been raised on direct appeal from the guilty plea and is now waived. State v. Johnson, 43 N.J. 572, 591 (1965), aff'd, 384 U.S. 791, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Even if the claim is not waived, the making of this particular allegation at such a late hour casts doubt on the credibility of such an allegation.

In any event, it is familiar law that filing a post-conviction relief petition alleging ineffective assistance of counsel implicating facts outside the record does not automatically entitle a defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), certif. denied, 162 N.J. 199 (1999); State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999). Rather, the defendant seeking the hearing bears the burden of submitting evidentiary facts that establish that his claim will ultimately succeed on the merits. State v. Marshall (II), 148 N.J. 89, 158 (1997), cert. denied, 522 U.S. 850, 118 S.Ct. 140, 139 L.Ed.2d 18 (1997); State v. Cummings, 321 N.J. Super. at 170. All well-pleaded facts are to be viewed "in the light most favorable to defendant." State v. Marshall, 148 N.J. at 158. Dismissal of a petition without an evidentiary hearing is proper if the post-conviction court perceives that holding a hearing will not aid its analysis of whether defendant is

entitled to relief, or if defendant's allegations are too vague and speculative. Ibid. In reviewing whether a post-conviction court erred in denying a defendant's petition without a hearing, an abuse of discretion standard is applied. R. 3:22-10; State v. Marshall, 148 N.J. at 157-58 (trial court has discretion to conduct evidentiary hearing; State v. Flores, 228 N.J. Super. 586, 589-90 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989).

What facts would warrant a hearing based upon the petition is a matter of substantive law. A claim of ineffective assistance of counsel based on an attorney's conflict of interest is examined under a different standard than a traditional ineffectiveness claim. Federal constitutional law requires a defendant who has not objected to a conflict at trial to show that his attorney acted under an actual conflict of interest which adversely affected the adequacy of his representation. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); Burger v. Kemp, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987). To establish an actual conflict, a defendant must produce evidence to demonstrate that his defense attorney was "forced to make choices advancing other interests to the detriment of his client... [w]ithout a showing of inconsistent interests, any alleged conflict remains hypothetical, and does not constitute ineffective assistance." United States v. Alvarez, 137 F.3d 1249, 1252 (10th Cir. 1998) (citation omitted).

To establish that counsel's performance is adversely

affected by a conflict of interest, a defendant must produce evidence to demonstrate "(a) that some plausible alternative defense strategy or tactic might have been pursued, and (b) that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." United States v. Ryan, 23 F.Supp.2d 1044, 1053 (S.D. Iowa 1998), rev'd other grounds, 227 F.3d 1058 (8th Cir. 2000). Prejudice is presumed only in these limited circumstances where defendant can establish an actual conflict that adversely affected the adequacy of his representation. Cuyler v. Sullivan, 446 U.S. at 350, 100 S.Ct. at 1719, 64 L.Ed.2d at 347. Until a defendant has established that defense counsel actively represented conflicting interests, however, he has not established the constitutional predicate for his claim of ineffective assistance.

Our Supreme Court has addressed counsel's conflict of interest in the context of joint or multiple representation cases, and has used a "more protective" approach in addressing these conflicts of interest issues. State v. Norman, 151 N.J. 5, 25 (1997). In these cases, our Court has concluded that where circumstances "demonstrate a potential conflict of interest and a significant likelihood of prejudice, the presumption of both an actual conflict of interest and actual prejudice will arise, without the necessity of proving such prejudice." State v. Murray, 162 N.J. 240, 250 (2000); State v. Norman, 151 N.J. at 24-25; State v. Bell, 90 N.J. 163, 171 (1982). In State v. Pych, 213 N.J. Super. 446 (App. Div. 1986), this court applied this

standard to a case involving an alleged conflict stemming from the defense attorney's pending indictment at the time of defendant's trial.

No New Jersey case has presented facts where, as here, defendant asserts a conflict based on his attorney's alleged personal relationship with his mother. Illinois has applied a slightly different standard to this type of conflict of interest case. In cases involving personal relationships, the defendant must demonstrate that he suffered actual prejudice from his counsel's representation. People v. Davis, 452 N.E.2d 525, 532 (Ill. 1983) (rejecting defendant's allegation of conflict of interest where defense counsel was "a close personal friend" of the person whom defendant was charged with murdering in another case). The justification for treating alleged conflicts in personal relationship situations differently than conflicting professional commitments is that where personal rather than professional relationships are at issue, it is presumed "that an attorney will not undertake to represent a defendant if his professional duty will be hampered by emotional ties." Ibid.

The State notes that the Illinois standard is the most instructive in this case because defendant here asserts a conflict based on his attorney's personal rather than professional relationship. Moreover, the reasons for the "more protective" Bell standard for conflict claims involving issues of multiple representation are not applicable here. The dangers inherent in the dual or multiple representation situation are

simply not present here, i.e., counsel did not have two clients to whom he owed his undivided loyalty and there is no issue of confidentiality of information. Thus, the Bell standard should be limited to cases in which the claim is based on multiple representation, the situation present in Bell. The State urges that the federal standard, i.e., that an actual conflict adversely affected counsel's performance, that has been applied to many types of conflicts of interest, United States v. Patiwana, 928 F.Supp. 226, 235 n.15 (E.D.N.Y. 1996), aff'd 173 F.3d 845 (2nd Cir. 1999), is the more compelling standard to be applied in this case. There is simply no reason to depart from the federal standard in this context. However, when all is said and done, the distinction between actual or potential conflicts is not critical in this case because defendant has failed to present even a potential, prejudicial conflict.

It is apparent from the content of defendant's mother's statement that the trial court could have reasonably found that it lacked credibility due to the fact that the statements contained therein were based on hearsay information. R. 1:6-6. The statement is also overly vague and lacks any specific information regarding trial counsel's representation of defendant during the plea proceedings. Even were this court to assume, as the trial court did, that the allegations in defendant's mother's statement were factually true, defendant has not come close to establishing either a potential, prejudicial conflict or an actual conflict. First of all, defense counsel's representation

of defendant while allegedly having an "intimate affair" with defendant's mother does not implicate any rules of ethical conduct. See New Jersey Rules of Professional Conduct, RPC 1.1 to RPC 8.5. More importantly, defendant's mother's "affair" with his attorney is unexplained and is too vague to create anything but speculation as to an alleged conflict of interest. Of itself, the mere existence of an affair "on approximately fall of 1996" between defendant's mother and his attorney simply does not establish the possibility for conflict or an actual conflict of interest. (Db42). The statement provides only a vague assertion of a relationship at a time (Fall of 1996) prior to the entry of the guilty plea (January 23, 1997).

A conflict of interest, however, "denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties." State v. Reddick, 430 N.W.2d 542, 545 (Neb. 1988). Here, defendant has produced no evidence that this vague relationship, even if it had continued during the plea proceedings, was "inherently conclusive to divided loyalties." In other words, defendant has failed to show inconsistent interests.

There appears to be no precedent holding that a defense attorney's "illicit affair" with a client's mother raises a conflict of interest. However, no legal authority is necessary to conclude that given an alleged relationship between the attorney and a client's mother, the client's interest and that of

his attorney would be in harmony, not at odds. In fact, it is logical to conclude from the facts present here, that defendant's mother's interests were not adverse to defendant's as indicated by her expressed concern for his interests at the sentencing hearing. (3T19-12 to 21-18). Thus, defendant's and his attorney's interests were consistent and, if anything, it would appear that defendant's attorney had more than the usual incentive to vigorously defend his client. While this is speculation, but so is defendant's conclusory allegation that counsel's interests were adverse to his own. Even when accepted as true, the factual allegation offered by defendant does not surpass the hurdle of showing a potential or actual conflict of interest.

More than that, this court is left to speculate as to how the alleged affair resulted in a significant likelihood of prejudice or adversely affected defendant's representation. Defendant does not even begin to demonstrate that he had a serious defense to the charges. He has failed to show counsel would have performed differently absent the alleged affair with his mother. As explained previously, there is no question that defense counsel was confronted with overwhelming evidence of defendant's guilt; the most potent problem was how to deal with the audio tape found on Kathleen's body that vividly captured these crimes. A conviction on all charges appeared to be inevitable and defendant has utterly failed to show why a guilty plea that significantly reduced his penal exposure and allowed

him to face limited evidence at the sentencing hearing, was not in his best interest, given the circumstances in this case.

Defendant speculates that his attorney's "illicit affair" with his mother motivated his attorney to coerce defendant to plead guilty because "[s]uch a guilty plea resulted in an early termination of the case, thereby affording trial counsel the opportunity to terminate the illicit relationship with the defendant's mother before it could be discovered by his spouse." (Db23; Da36). Defendant makes this assertion completely unencumbered by any factual support. Thus, this is merely the hypothesis of defendant, not an established fact. Moreover, nothing in the record justifies such a hypothesis. Any conclusion that counsel had a potential or actual conflicting interest is based upon speculation and conjecture only, not upon the evidence.

Absent any showing of a conflict of interest, in order to obtain an evidentiary hearing on this post-conviction claim, defendant must establish a prima facie case of ineffective assistance of counsel under the highly demanding, two-pronged Strickland test, which governs general ineffectiveness claims. Defendant must first show that counsel's performance was so deficient that it fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); State v. Fisher, 156 N.J. 494, 499-500 (1998). In the context of a guilty plea challenge, he must then show that counsel's actions were

prejudicial to him that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); State v. DiFrisco, 137 N.J. 434, 457 (1994), cert. denied, 516 U.S. 1129, 116 S.Ct. 949, 133 L.Ed.2d 873 (1996). It is defendant's burden to surmount, by strong and convincing evidence, the presumption that counsel executed defendant's case effectively. State v. Paige, 256 N.J. Super. 362, 376-77 (App. Div. 1992), certif. denied, 130 N.J. 17 (1992). To warrant an evidentiary hearing, it is also defendant's burden to plead facts, not conclusions, which if true, would entitle him to relief. R. 3:22-8.

As stated previously, defendant's only evidence in support of his claim of ineffective assistance of counsel is the hearsay statement of his mother in which she vaguely states that she allowed defendant's counsel "to convince" her "to coerce" defendant "into accepting a plea bargain." (Da42). This proffer is not proof which is adequate to support a claim of ineffective assistance of counsel. It is based on hearsay, that is, the actions of defendant's attorney. R. 1:6-6. A court may discount self-serving affidavits from defendant's family members which rely on hearsay. State v. Moore, 651 N.E.2d 1319, 1323 (Ohio App. 1994), appeal dismissed, 649 N.E. 836 (Ohio 1995).

Even if established, these vague "coercive suggestions" would not amount to ineffective assistance of counsel. A claim of "coercion" without more, does not entitle one to an

evidentiary hearing. To the contrary, "[i]t is, of course, one of an attorney's most valuable functions to persuade his client to take that course which, to the attorney, in the light of his experience, appears to be the wisest." Devers v. People of State of California, 422 F.2d 1263, 1264 (9th Cir. 1970), cert. denied, 399 U.S. 913, 90 S.Ct. 2214, 26 L.Ed.2d 570 (1970), "Advice - even strong urging - by those who have an accused's welfare at heart, based on the strength of the State's case and the weakness of the defense, does not constitute undue coercion." Lunz v. Henderson, 533 F.2d 1322, 1327 (2d. Cir. 1976), cert. denied, 429 U.S. 849, 92 S.Ct. 136, 50 L.Ed.2d 122 (1976). See, e.g., Dean v. Superintendent, Clinton Correctional Facility, 93 F.3d 58, 63 (2d. Cir. 1996)(defendant alleging coercion by his counsel as basis for relief on collateral review must show that he objected to coerced action at that time and that his will was overborne by counsel), cert. denied, 519 U.S. 1129, 117 S.Ct. 987, 136 L.Ed.2d 868 (1987); United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (practice is coercive so as to render a plea involuntary only if it creates improper pressure likely to overcome will of innocent persons and cause them to plead guilty; physical harm, threats of harassment, bribes are examples of such practices), cert. denied, 506 U.S. 915, 113 S.Ct. 322, 121 L.Ed.2d 242 (1992); Gunn v. Kuhlman, 479 F.Supp. 338, 343 (S.D.N.Y. 1979) ("[t]he fact that counsel, upon a realistic appraisal of the situation, may have strongly impressed his view upon the petitioner is not in itself improper, in the absence of

any showing that [defendant's] will was overborne").

Moreover, pressure placed by family members, namely familial coercion, inducing a defendant to plead guilty has been deemed insufficient to vitiate a guilty plea. See, e.g., Wojtowicz v. United States, 550 F.2d 786, 791-92 (2d. Cir.), cert. denied, 431 U.S. 972, 97 S.Ct. 2938, 53 L.Ed.2d 1071 (1977). See also Stano v. Dugger, 921 F.2d 1125, 1142 (11th. Cir. 1991) ("unavoidable influence or pressure from sources such as codefendants, friends or family does not make a plea involuntary; [i]t is only where the plea is coerced by conduct fairly attributable to the state that the due process clause of the Fourteenth Amendment is offended"), cert. denied, 502 U.S. 835, 112 S.Ct. 116, 116 L.Ed.2d 85 (1991).

"[W]hile evidence of this stripe is probative of an accused's motivation for pleading guilty, it does not necessarily show coercion, duress or involuntariness. Criminal prosecutions are stressful experiences for nearly all concerned - particularly defendants and their families. It is to be expected that feelings will run strong within a family unit and that loved ones will advise, counsel, implore, beseech, and exhort defendants to take - or abjure - myriad courses of action." United States v. Pellerito, 878 F.2d 1535, 1541 (1st. Cir. 1989), cert. denied, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 145 (1991). As our Supreme Court aptly explained, "[w]hen a guilty plea is challenged as the product of coercion, the relevant question is not whether defendant was 'sensitive to external

consideration - many defendants are - but instead whether the decision to plead was voluntary, i.e., a product of free will.'" State v. Simon, 161 N.J. 416, 443 (1999), quoting United States v. Pellerito, supra.

Defendant's bare claim that the guilty plea was not a product of his free will is not anchored in any fragment of fact. His mother's statement does not contain any specific factual allegations to establish that defendant's plea was not a product of his free will. Even accepting her allegations as true, it does not provide factual support for a claim that defendant's will was overborne. That defendant's counsel allegedly involved defendant's mother and other unnamed family members to have them encourage defendant to plead guilty does not show that defendant's plea was involuntary. Because the statement is presented in the form of conclusions, this court is left to speculate upon its foundation.

Moreover, defendant's conclusory allegation flies in the face of his own sworn responses in his colloquy with the court at the plea proceeding. Indeed, at the proceeding, the trial court interrogated defendant at length, including asking him if he was entering a guilty plea "freely and voluntarily." (2T18-15 to 16). Defendant unequivocally and unhesitantly replied in the affirmative. (2T18-17). The court asked defendant whether he understood the nature of the charges, the consequences of his pleading guilty, and whether he was voluntarily pleading guilty. The court also asked defendant if he was satisfied with his

counsel's representation. The court asked defendant if he was in fact guilty of the charges. Defendant answered each of these questions clearly and affirmatively. (2T9-12 to 11-20; 2T12-17 to 21; 2T18-15 to 17; 2T19-2 to 20-19; 2T21-3 to 6). At sentencing, defendant confirmed that he was completely satisfied with his attorney. (3T2-13 to 15).

Against this detailed record evidencing defendant's voluntary guilty plea, defendant makes no more than broad assertions of coercion and ineffective assistance. Defendant has submitted no evidentiary matter to support his conclusory allegations or to refute the evidence set forth in the guilty plea. Defendant is bound by these statements unless he proves otherwise by clear and convincing evidence. State v. Simon, 161 N.J. at 444. Defendant offers no reason to disbelieve the statements he made at the plea hearing. In the absence of anything other than the allegation itself, defendant's petition presents only a conclusory allegation that did not require an evidentiary hearing.

Furthermore, the record leaves no room to doubt that defense counsel fully, fairly and competently represented defendant. Indeed, as already discussed, despite the viciousness of the crime, defense counsel was a vigorous advocate on defendant's behalf. Moreover, as explained already, the plea bargain was very advantageous to defendant. By virtue of the negotiated plea agreement, the carjacking, robbery and theft charges were dismissed and defendant was able to present a sanitized version

of the crime. See Counter-Statement of Facts, supra. There is no question that this plea bargain was the best choice that could have been made under the circumstances. What is more, by pleading guilty to felony murder, defendant was able to limit the presentation of the evidence to the sentencing court and to enable him to ask for leniency from the court. As explained by this court on direct appeal, "defendant can be considered guilty only of the felony murder to which he pled and we consider only the facts as developed in the record." (Da19). Defendant has failed to rebut the presumption that counsel's representation was well within the range required by Strickland. As the trial court at the plea proceedings aptly put it, defendant had the "benefit of excellent counsel under the circumstances." (2T34-20 to 21). At sentencing, the court commented that defense counsel spoke "so ably on behalf of [defendant]." (3T58-23 to 59-1). Defendant's presentation does not even begin to meet the first prong of the Strickland test.

Even assuming that counsel's representation of defendant was somehow deficient, before an evidentiary hearing is warranted, defendant must make a prima facie showing of the second prong of the Strickland test, prejudice. Defendant needs to make a prima facie showing that there was a reasonable probability that but for counsel's errors, he would not have plead guilty and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370,, 88 L.Ed.2d at 210. Defendant's assertions of prejudice are equally broad and vague. He has provided

nothing at all beyond his bare assertion to say that he would have gone to trial. (Db28). This too is contradicted by the record. At the plea hearing, defendant was thoroughly advised of his rights and acknowledged the rights that would be waived if he chose to plead guilty. (2T18-22 to 20-11). The trial court explained the possible sentencing ranges to defendant who stated that he understood his options and chose to plead guilty. (2T13-24 to 18-9). What defendant has set out in his petition simply does not begin to meet the necessary showing of prejudice as defined in Hill. At best, defendant merely asserts that absent the coercion he would have gone to trial instead of pleading guilty, but he advances nothing at all to support that likelihood. See Santos v. Kolb, 880 F.2d 941, 943 (7th. Cir. 1989), cert. denied, 493 U.S. 1059, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990) ("A specific explanation of why the defendant alleges he would have gone to trial is required."); United States v. Winston, 34 F.3d 574, 578-79 (7th. Cir. 1994). (Defendant failed to explain why he would not have pled guilty.). Defendant has failed to demonstrate any prejudice from counsel's representation.

Furthermore, any argument that defendant might have received a more favorable result had he gone to trial is, at best, a fantasy. As recognized by the post-conviction court, the plea bargain defendant received was simply "extraordinary" under the facts of this case. (4T23-3 to 5). See State v. Pulasty, 259 N.J. Super. 274, 279 (App. Div. 1992), aff'd, 136 N.J. 356

(1994), cert. denied, 513 U.S. 1017, 115 S.Ct. 579, 130 L.Ed.2d 494 (1994); State v. Chung, 210 N.J. Super. 427, 436 (App. Div. 1986).

Before concluding, a few additional points must be made. Defendant offers no explanation as to what he expects a fact-finding hearing would accomplish that would support his claim. The fact is that defendant's claim was fully heard through both his attorney and defendant himself (4T11-20 to 17-9; 4T18-25 to 19-17), and he has not specifically indicated what more he could produce. Furthermore, defense counsel did not request an evidentiary hearing at the post-conviction proceeding. (4T6-3 to 24). The only mention of an evidentiary hearing was by defendant who, at the end of the colloquy with the court, said "I would ask that if the petition not be granted, that at least an evidentiary hearing be granted to try to discern these matters that you just brought to light." (4T17-4 to 9). An evidentiary hearing is not meant to be a fishing expedition.

Moreover, defendant's bare assertion that he pled guilty because of nonspecific "coercive suggestions" by his attorney, mother, and unnamed family members cannot justify an evidentiary hearing. To accept such an empty assertion as a ground to justify an evidentiary hearing would eviscerate the post-conviction requirement that defendant must make a preliminary showing of the merits of his claim before obtaining an evidentiary hearing. And if that were the rule, every defendant's post-conviction claim of coercion would automatically

require an evidentiary hearing. In this case, the record shows that the trial court, before accepting the guilty plea, meticulously made all the appropriate inquiries to satisfy all constitutional requirements and no reason having been advanced to show otherwise, an evidentiary hearing on the issue would be a great waste of judicial resources.

To conclude, it is clear upon the record together with any supporting document that defendant has failed to meet his initial burden of proof of demonstrating that there are substantive grounds for relief upon his claim of ineffective assistance of counsel. Thus, the post-conviction court's denial of post-conviction relief without an evidentiary was a proper and fully justified exercise of discretion.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm the denial of post-conviction relief without an evidentiary hearing.

Respectfully submitted,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: _____
Janet Flanagan
Deputy Attorney General

JANET FLANAGAN
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DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: December 16, 2000

A-5029-99T4

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
OCEAN COUNTY, DOCKET NO. 97-01-00076
A.D. #_____

STATE OF NEW JERSEY)
IN THE MATTER OF)
) TRANSCRIPT
) OF
M.L.) HEARING

PLACE: Ocean County Justice Complex
120 Hooper Avenue
Toms River, N.J. 08754

DATE: January 14, 1997

BEFORE:

HON. BARBARA ANN VILLANO, J.S.C.

TRANSCRIPT ORDERED BY:

DEBRA C. COLLINS, ESQ., (Office of the Public Defender)

APPEARANCES:

MADELINE F. EINBINDER, ESQ. (Office of the Public Defender)
Assistant Deputy Public Defender

KEVIN E. DANIELS, ESQ. (Daniels & Davis-Daniels)
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ORIGINAL

I N D E X

THE COURT: This is the matter of Michael LaSane. Your appearances, please, counsel?

MS. EINBINDER: Good morning, Your Honor. Madeline Einbinder. Assistant Ocean County Prosecutor on behalf of the State.

MR. DANIELS: Good morning, Your Honor. Kevin Daniels appearing on behalf of the juvenile, Michael LaSane.

THE COURT: Today was the day where we were set to commence trial in connection with a waiver, an involuntary waiver proceeding.

I have been advised by representatives of the Prosecutors Office, as well as by Mr. Daniels, that the involuntary waiver trial is not proceeding today. Is that correct?

MS. EINBINDER: That's correct, Your Honor. It's my understanding that Mr. LaSane intends to voluntarily waive today.

At this time the State would move to withdraw the waiver filed back on March 19th subject to the voluntary waiver going through. Mr. Daniels and myself have signed a consent order to waive jurisdiction. If I may approach with the order?

THE COURT: Sure.

This is now a 4A-27 proceeding, which will be a waiver at the request of a juvenile 14 years of age or older,

which Mr. LaSane is.

MS. EINBINDER: That's correct, Your Honor.

After the waiver hearing, Your Honor, the State has an application to make with regard to detention as well.

THE COURT: All right.

It seems to the court in connection with the voluntary waiver, the court should satisfy itself that the defendant is aware of the differential between the 2 proceedings, and the consequences of same. And I would like you to review that with your client, Mr. Daniels, on the record for the court, so that the court can be so satisfied before I sign this agreement and consent order.

So, Michael, if you would, if you would stand up. We're going to swear you in. And we're going to review some questions with you. Okay?

THE CLERK: Raise your right hand, please?

M I C H A E L L A S A N E, DEFENDANT'S WITNESS, SWORN

THE CLERK: And state your name, please.

MR. LaSANE: Michael LaSane.

THE CLERK: You can be seated. Thank you.

MR. DANIELS: If I may, Your Honor?

DIRECT EXAMINATION BY MR. DANIELS:

Q Michael, you and I have had an opportunity to discuss the proceeding that you are present at today. Is that correct?

A Yes.

Q And that the proceeding was scheduled, was a waiver proceeding in which you were to have an opportunity to oppose the prosecution's motion to have you tried as an adult. Do you understand that?

A Yes.

Q We discussed the charges that appear on the juvenile complaint. The first charge in the juvenile complaint was a theft charge. Do you remember discussing that?

A Yes.

Q And, as a juvenile this would be a third degree offense, and you had an exposure as a juvenile of 2 years. Do you remember discussing that?

A Yes.

Q Well, if you were an adult and you were convicted of a third degree theft offense, you could face 3 years to 5 years in state prison. Do you understand the difference?

A Yes.

Q In Count 2 of the juvenile complaint you were charged with knowing and purposeful murder. And, as a juvenile you could be exposed to juvenile detention of 20 years if convicted of that charge. Do you remember discussing that?

A Yes.

Q But as an adult, if you were waived up, and were

convicted of murder, you could be facing 30 years to life, in which 30 of those years you would have to serve without being eligible for parole. Do you remember us discussing that?

A Yes.

Q In Count 3 of the juvenile complaint you were charged with felony murder. And if convicted in the juvenile court you could face 10 years, if convicted of that charge. Do you remember us discussing that?

A Yes.

Q But as an adult, if you are convicted of felony murder, you could face a sentence of 30 to life, in which 30 years of that time you would have to serve without being eligible for patrol. Do you remember discussing that?

A Yes.

Q And, do you appreciate the difference between the 10 years and the 30 to life?

A Yes.

Q Count 4 of the juvenile complaint charges you with armed robbery, which is a first degree offense. As a juvenile you could face 4 years if convicted of the robbery.

That same offense, if you were convicted of it as an adult, you would be facing 10 to 20 years.

A Yes.

Q Do you remember us discussing that?

And then finally you are charged in Count 5 of the

juvenile complaint with car jacking, which is a form of robbery. And that if convicted of that charge in juvenile court, that's a first degree offense, and you could face 4 years in juvenile. Do you remember us discussing that?

A Yes.

Q But as an adult you could face 15 to 30 years --

A Yes.

Q -- if convicted of car jacking.

A Yes.

Q Now, we also discussed the factors that the court would have to consider if you were to remain, or ask the court not to relinquish it's jurisdiction over you as a juvenile. Do you remember us discussing the fact that the court would have to first be satisfied that you are 14 years are older --

A Yes.

Q -- at the time that you were charged with each of these 5 offenses? Do you remember us discussing that?

A Yes.

Q And also that the State would have to establish that there was sufficient probable cause to believe that you as a juvenile committed a delinquent act, that if committed by an adult would constitute criminal homicide. Do you remember that?

A Yes.

Q And also that you would have a burden to demonstrate

to this court the probability of your rehabilitation, before you reached the age of 19, using all of the resources available, available to the court.

A Yes.

Q Do you remember our discussions about that?

And finally the court would have to determine that you as a juvenile, whether in your particular case you've met your burden to demonstrate to the court the probability of your rehabilitation substantially outweighs the reasons for waiver. And one of the reasons for waiver is to punish. And the other one is a as a general deterrence.

In other words, the need of society to demonstrate to others that may want to do what you are accused of doing, that they should not do that. That that would be the purpose for a waiver. Do you understand that?

A Yes.

Q Also, we discussed that at the waiver hearing that you would have the opportunity if you wanted to to testify, to let the court know what your involvement was, if any, in the, in the crimes that you've been charged with. Of the delinquent acts that you were charged with. Do you remember us discussing that?

A Yes.

Q In view of the distinction between the amount of time that you would be exposed to in the juvenile court,

versus what you would be exposed to in the adult court, as well as all of the factors that the court would have to consider in whether or not to waive jurisdiction, or to transfer your case from the juvenile court to the adult court, is it still your intentions to voluntarily waive, or ask the court to grant your application for a voluntary waiver of the juvenile jurisdiction to the adult court?

A Yes.

Q After knowing the distinctions between the amount of time that you would be exposed to in juvenile court, versus the amount of time that you would be exposed to an adult court for the same 5 offenses that you are charged in the juvenile complaint, as well as considering the factors that the court would have to address and whether to waive you to the adult court, is it still your intention to ask the court to grant your application for a voluntary waiver to the adult court?

A Yes.

Q Has anybody forced you to make this decision? Or is this your decision?

A It's my decision.

Q Any body threaten you?

A No.

Q You understand this proceeding today and the consequences of this court waiving it's jurisdiction to allow the prosecution to present your case to a grand jury? Do you

understand what that will mean? Do you remember us talking about the prosecution after the court waives it's juris, it's jurisdiction, we would present your case to a grand jury? And if there is sufficient facts for that grand jury to find probable cause that you committed these offenses, that it could return an indictment against you?

A Yes.

Q And that in light of all of that it's still your intentions for this court to waive jurisdiction?

A Yes.

MR. DANIELS: I would ask that the court would accept my client's application for a voluntary waiver.

THE COURT: Michael, you've had an opportunity to speak with Mr. Daniels from, from, shortly after the time this actually happened up until today. Are you satisfied with the services that he's rendered to you in connection with the advice that he's given you, and the counsel he's given you throughout the course of this proceeding over time?

MR. LaSANE: Yes.

THE COURT: All right. And he's asked you a lot of questions today about what you're doing. You understand that there is a difference between the juvenile system and the adult system. Do you understand that?

MR. LaSANE: Yes.

THE COURT: And, you've been treated in this

courtroom up and until today, because you've under the age of 18. You understood that.

MR. LaSANE: Yes.

THE COURT: And you've been placed in the detention center as opposed to the county jail because you're under 18 and you're treated as a juvenile. Do you understand all that?

MR. LaSANE: Yes, ma'am.

THE COURT: And, you've been in the detention center -- I don't have my roster, but it's -- I do have my roster. As of yesterday you were in the detention center for 302 days. So you've been in the detention center for a substantial period of time.

And, during that time you've had an opportunity to speak with Mr. Daniels, and to think about this decision. And we were coming here today to have a trial as to whether or not the court would decide whether you should go to the adult court to face the charges. You knew that that was originally the reason we were coming together today. Correct?

MR. LaSANE: Yes, ma'am.

THE COURT: And now we're not going to have a trial about that. Do you understand that?

MR. LaSANE: Yes, ma'am.

THE COURT: And why is that we're not going to have a trial about that today?

MR. LaSANE: Because the prosecutor offered me a

plea bargain. And part of the bargain was to waive myself up to adult court.

THE COURT: And you understand what the consequences, both of the plea bargain or the plea arrangement that you've made, and waiving yourself and voluntarily agreeing to go up to adult court. Do you understand what those consequences are?

MR. LaSANE: Yes, ma'am.

THE COURT: Okay. And you know that the court would have received testimony today if you had stayed here, and, and we had had the trial. I would have received testimony today from, from people as to what your ability to rehabilitated would be. And, also I'd have to make a decision as to whether, if even you could be rehabilitated - as it's called under the statute - society, because of the nature of the crime, would demand that you face those charges in adult court with a jury trial, and with all of the consequences faced by an adult. And that that decision weighs heavily in favor of society's interest based upon the present state of the case law when there's a murder committed. Do you understand that?

MR. LaSANE: Yes, ma'am.

THE COURT: And you've taken away that decision from me by agreeing to go voluntarily to adult court.

MR. LaSANE: Yes, ma'am.

THE COURT: Do you have any questions for me about

your decision today?

MR. LaSANE: No, ma'am.

THE COURT: Any questions that you want to ask me about what you're doing?

MR. LaSANE: No, ma'am.

THE COURT: You're not taking any medications or anything like that, are you, Michael, since you've been in the detention center?

MR. LaSANE: No, ma'am.

THE COURT: Do you have any questions for Mr. Daniels about what's happening today?

MR. LaSANE: No, ma'am.

THE COURT: Any question for the Prosecutors Office?

MR. LaSANE: No, ma'am.

THE COURT: You've had a chance to talk to your mom? I know that your mom is here today. Have you had a chance to talk to her as well about your decision today, to go to adult court and face these charges as an adult?

MR. LaSANE: Yes, ma'am.

THE COURT: And, have you received advice from her about what you should do?

MR. LaSANE: Yes, ma'am.

THE COURT: And have you taken that advice into consideration when you came to this decision?

MR. LaSANE: Yes, ma'am.

THE COURT: Okay.

Prosecutor, did you have anything that you wished to have reviewed with the juvenile before this matter is finalized?

MS. EINBINDER: Just with regard to detention, Your Honor.

THE COURT: All right. You understand, Michael, in connection with the waiver, when someone voluntarily waives and, and decides to be treated as an adult, the court makes a determination pursuant to our rule whether they should remain in the detention center, or whether they should be removed to the county jail.

MR. LaSANE: Yes, ma'am.

THE COURT: And that I'm going to be asked to make that decision today in consideration of the statute and the provisions under our rule. I think the rule is 5:22-3.

So before we get to that let me, let me make my determination in connection with the order to waive.

This is presented to the court as a voluntary waiver. And as indicated by the court, the matter was set today for trial for the next day or so to receive information regarding the statutory criteria for an involuntary waiver.

That criteria has been reviewed by Mr. Daniels with the defendant in connection with what the court's responsibilities are. And the defendant understands that by

voluntarily agreeing to go to adult court he's giving up his right to trial, and, and removing that decision from the court, and requesting that he be forward i on to the adult court for treatment there.

It's my understanding from the information from the juvenile that he does this in light of a, an arrangement that has been made in connection with his charges. And he does this as part of a total understanding of what consequences he faces as a result of, of that decision. That will be reviewed again, I'm sure on the record with Judge Giovine at a later time. And indicates to the court that he has considered all of the consequences and knows exactly what consequences he may be facing as a result of this voluntary action.

So the court will accept the voluntary waiver and sign and affix it's signature to the consent order that's been presented allowing the matter to proceed to adult court for treatment there.

What is today's day? Is it the 14th?

THE CLERK: 14th.

MS. EINBINDER: Yes, Your Honor.

MR. DANIELS: 14th

THE COURT: Thanks.

THE CLERK: '97.

THE COURT: I know it's '97. That, that much I seem to remember.

So I'm not sure how that's handled.

SERGEANT GOMEZ: Your Honor, it's not necessary for us to transport him back. We can bring personal belongings here.

THE COURT: Bring them right here?

SERGEANT GOMEZ: Yes.

THE COURT: Okay. Thank you, Sergeant Gomez.

In light of all of the information, and despite the fact that his, his conduct and demeanor at the detention center has been as indicated model, it is the court's belief that the circumstances of this event and the nature of the, the charge now that the presumption is no longer abiding, based upon his waiver and the reasons therefore, that he be transferred and, and remanded to the Ocean County Jail to await further proceedings in connection with this case. So he will be transferred over from the detention center to the county facility.

And I'm sure he'll conduct himself the same while he's there. Okay?

All right. Thank you, everybody.

MR. DANIELS: Thank you, Your Honor.

MS. EINBINDER: Thank you, Your Honor.

THE COURT: Go with the officer, Michael.

* * * * *

Now, there's an application for removal of Mr. LaSane from the detention center to the adult jail.

MS. EINBINDER: That's correct, Your Honor. It's under also Statute 2A:4A-36 which provides a hearing must be held after the waiver hearing. It takes into consideration such circumstances as a juvenile's age, the nature and circumstances of the offense, and his prior offense history.

The State would submit that he's 17, going to be 18 in March. The nature and circumstances of the offense is it's a murder. First degree. The most serious charges under the criminal code. And he does have a prior offense history.

It's further my understanding that proceedings are schedule for Judge Giovine later today. At this time we would ask that he be remanded to the Ocean County Jail pending those proceedings.

THE COURT: Mr. Daniels?

MR. DANIELS: Your Honor, I would not oppose that application. I just wanted to note for the record since the court has waived jurisdiction, and for whatever it's worth, that I would submit to the court that Mr. LaSane has comported himself well in the juvenile detention center.

THE COURT: Yes, he has.

MR. DANIELS: As the court is aware on the occasions that he appeared before the court, that he was an honor detainee there at the institution. And even up until this day

he had remained as an honor detainee at that institution. So, just for the record I just wanted to point that out on the record.

THE COURT: The court's aware of Mr. LaSane's activities at the detention center. He has consistently been a recipient of honor roll status there. He has his green shirt which is the keeper shirt. And he has been without points and remained in the pods for his entire time there. So he has presented himself appropriately in the detention center. And has been a model there.

He's now, as part of his arrangement, involved in an admission to a very very, the most serious charge. And it is the court's belief that it is most appropriate for his transfer now to the adult facility. He's facing adult charges.

The detention center has people, juveniles in it who, who can be there for repetitive disorderly persons offenses. But it's generally not, not really suitable for the placement of people with this type of offense, now that the question of, of his presumption may soon be over. So I think it's in Michael's best interest that he be transferred out.

They will probably have to go back to the detention center to get a few personal things, or that can be brought over to him here by the detention staff.

I know he, he may have some personal property there.

CERTIFICATION

I, Lynn M. Barresi, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number BAV-023-97, index numbers from 2148 to 3789, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Lynn M. Barresi

Lynn M. Barresi AOC #216 June 23, 1997

COLE TRANSCRIPTION AND RECORDING SERVICE

A-5079-99T4

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY: LAW DIVISION
CRIMINAL PART
ACCUSATION NO. 97-01-00076
APPEAL NO. A-4812-96T4

STATE OF NEW JERSEY :

vs. :

MICHAEL LA SANE, :

Defendant. :

- - - - - - - - - - - - -

TRANSCRIPT OF
PLEA

PLACE: Ocean County Courthouse
118 Washington Street
Toms River, N.J. 08753

DATE: January 23, 1997

B E F O R E:

HONORABLE PETER J. GIOVINE, J.S.C.

TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER

A P P E A R A N C E S:

WILLIAM P. CUNNINGHAM, ESQUIRE
Assistant County Prosecutor
Attorney for the State

KEVIN E. DANIELS, ESQUIRE
Attorney for the Defendant

CAROLINE WOLGAST, C.S.R.
Official Court Reporter
118 Washington Street
Toms River, N.J. 08753

I N D E X

THE COURT: All right, Prosecutor.

MR. CUNNINGHAM: Good afternoon, Your Honor.

Judge, this is originally f·om Family Court Number FJ15-2863-96. We have a five count Complaint which was filed. The Court is aware that last week, I believe it was January fifteenth, on Wednesday, the counsel and the defendant went over to Judge Villano in Family Court and, in fact, waived jurisdiction of the Family Court. That was pursuant to a plea bargain.

The State has prepared at this time and the Court has before it Accusation 97-1-76. I believe you also have the signed and fully executed waivers regarding that. It's a first degree felony murder charge. The State has agreed that we will move for the dismissal of counts one, two, four and five. That includes third degree theft, purposeful and knowing murder, count two, counts four and five, armed robbery and carjacking, respectively.

There have been some additional agreements. It is agreed that the State is going to seek at the time of sentence, the maximum sentence provided by law, life, thirty without parole for murder.

There's also been an agreement -- and I commend counsel for agreeing -- the wish of the Weinstein family was that the tapes which had been provided in discovery be returned so that they can be returned to the family. It's

been agreed by all counsel that the State is going to keep one copy in the event that there is ever a post-conviction re'ief motion or an appeal of the sentence, for the purposes of our file, but it will remain confidential.

I believe that that encompasses the plea at this time and I have the LR form prepared, if I can approach the bench?

THE COURT: All right, please do.

This Court is in receipt of the waiver signed by Judge Villano waiving jurisdiction to this Court dated January fourteen, nineteen ninety-seven. Of course, this Court took no part in these proceedings and I'd ask counsel for the defense, are you satisfied that the requirements of the statute have been met and that the matter is properly before this Court for disposition?

MR. DANIELS: Good afternoon, Your Honor. Kevin Daniels appearing on behalf of Mr. Michael LaSane.

Your Honor, I am satisfied that all the conditions of the requirements to waive jurisdiction from the Juvenile Court were met by Judge Villano.

THE COURT: All right, sir. Thank you.

Let me have your client sworn in.

Please step up and be sworn in.

M I C H A E L L A S A N E, SWORN.

THE COURT: Keep your voice up so that I and

everyone in the courtroom can hear what you're saying.

EXAMINATION BY THE COURT:

Q Are you Michael LaSane?

A Yes.

Q How old are you, Michael?

A Seventeen.

Q What is your birthdate?

A March fifteen, nineteen seventy-nine.

Q There were proceedings held in Juvenile Court awhile back and your attorney represented you there and this matter was waived up to this Court so that this matter can be disposed of treating you as an adult. Do you fully understand that?

A Yes.

Q And you consented to the matter coming before this Court. Is that correct?

Q Did you do that freely and voluntarily?

A Yes.

Q Nobody forced you or threatened you in any way. Is that correct?

A Yes.

Q All right.

Now, are you taking any types of drugs or medication while you're in the Ocean County Jail?

A No, sir.

Q Sir, do you understand why you are here today?
A Yes.
Q As a matter of fact, the matter had been set down with regard to the possibility of a plea on an earlier date; correct?
A I'm not sure.
Q The matter was discussed by you and your attorney for quite some time?
A Yes.
Q In fact, you discussed it on the date of the waiver hearing; correct?
A Yes.
Q He's discussed the matter of a plea with you at length since that date. Is that correct?
A Yes.
Q As a matter of fact, I gave him the opportunity of speaking with you in the courtroom here yesterday with your Mom; correct?
A Yes.
Q There was a considerable period of time that was spent in doing that and then, at your attorney's request, you were allowed to go back to the jail, with the request being made that the plea be taken today. Is that all correct?
A Yes.
Q How do you feel today, are you all right?

A Yes.

Q Thinking clearly?

A Yes.

Q Do you understand the purpose of your being here is to enter a plea of guilty to the charges that the Prosecutor -- I should say, to the charge that the Prosecutor has just indicated. Do you understand that?

A Yes.

Q Do you understand if, at the conclusion of these proceedings, I accept that plea, if I find there is a factual basis for it and that it's appropriate for me to accept that plea, and that you have entered the plea freely and voluntarily, with full knowledge of the consequence that will follow from the entry of your plea, that you are not going to be able to take it back after today? Do you understand that?

A Yes.

Q You are not going to be able to change your mind if I accept your plea today. I just want to be sure you understand that. Do you understand that?

A Yes.

Q Okay.

Do you understand that now that the matter has been waived up to this Court, that the Constitution of the State of New Jersey and the Constitution of the United States says

that normally before you are required to answer a criminal charge with a plea of guilty or not guilty, you are allowed the right to be indicted. Do you understand that?

A Yes.

Q And you have signed what is known as a waiver of indictment and trial by jury.

Is that your signature, Mr. LaSane?

A Yes.

Q And has Mr. Daniels explained to you fully what's involved here?

A Yes.

Q And do you understand that by signing this document, you are giving up both your Federal and State constitutional right to be indicted with regard to this charge and you are allowing the matter to proceed by what's known as an accusation and I tell you that an accusation is merely a charge in writing by the Prosecutor that you committed a particular crime. Do you understand that?

A Yes.

Q And I say to you that if you had wanted the matter to go to an indictment, then the Prosecutor would have had to have presented evidence before a Grand Jury and at least twelve people out of twenty-three or a majority of twenty-three would have to have been able to conclude that you probably committed a crime before you could be indicted for

it. Do you understand that?
A Yes.
Q And you are giving up that right to be indicted and you've so indicated by signing this form. Do you understand that?
A Yes.
THE COURT: I'm satisfied that he's freely, voluntarily, intelligently, upon and with the advice of counsel, waived his right to indictment with regard to the charge that's set forth in the accusation and I'll file the form with the clerk at this time.
Q Sir, do you understand that the charge that you have waived your right to indictment with regard to is known as first degree felony murder. Do you understand that?
A Yes.
Q Let me just give you -- I'm sure your attorney has discussed this at great length with you, but let me give you a little run-down as to the differences and the various types of murder.
There can be knowingful and purposeful murder, for one thing. That means you must have had an intent and a purpose to kill somebody to be found guilty or to plead guilty to that offense. Do you understand that?
A Yes.
Q Now, there is also what's known as felony murder.

It's another type of homicide and that is also a crime of the first degree and it also carries with it the same types of penalties. Do you understand that?

A Yes.

Q But it calls for a different type of culpability, so to speak. You didn't even have to intend -- when I say you, anyone who is found guilty or pleads guilty to felony murder needn't have to necessarily intend to kill the person that's involved. Do you understand that?

A Yes.

Q And the law says if you are involved in the commission of a felony -- and I tell you that I would instruct the jury, if the matter were being tried, that kidnapping, for example, is a felony that could be used with the felony murder statute. Do you understand that?

A Yes.

Q And so is robbery and your attorney has explained this to you, hasn't he?

A Yes.

Q And he has told you that carjacking is a specific type of robbery; correct?

A Yes.

Q And that's where you steal a car from the person of another, a motor vehicle, as opposed to just trying to take a chain or something of that nature from the neck.

Do you understand that?

A Yes.

Q He's explained the nature and the elements of those various crimes to you, has he not?

A Yes.

Q All right.

And do you understand what's proposed is that today you plead guilty before me to the crime of felony murder, a crime of the first degree. Do you understand that?

A Yes.

Q And do you understand that the penalties that could be imposed with regard to that single crime -- and you are only pleading guilty to the one crime -- is that you must receive, first of all, as part of any sentence on that crime, thirty years in prison, less whatever time you may have done at the time of your sentence, without parole. Do you understand that?

A Yes.

Q And do you understand fully what I mean by that?

A Yes.

Q And do you understand that the Court could, under the terms of this plea agreement, and the State reserves the right here to seek what it calls the maximum sentence provided by law, which would be life in prison with no parole for thirty years. Do you understand that?

A Yes.

Q This Court has the option of imposing -- and this Court does not know what sentence it will impose, and I won't know that until such time as I have had the benefit of a full presentence report in this matter and until I have heard what the Prosecutor has to say at the sentencing and what you and your attorney have to say at the sentencing.

There is a tape recording that you are aware of made in this case shortly before the time of death; correct?

A Yes.

Q And the Court has already indicated to your attorney that I'm going to listen to that tape and consider that as being part of the presentence report with all of the facts that are involved in the case before I arrive at what I feel to be a fair and impartial sentence. Do you understand me?

A Yes.

Q Okay. And do you understand that the least sentence that you could receive under this plea agreement is thirty years in State's Prison with no parole for thirty years. Do you understand that?

A Yes.

Q That's the least you could receive. You could receive as sentence -- just as an example, I could impose a sentence of fifty years with no parole for thirty years. Do you understand that?

A Yes.

Q This Court has the option of imposing -- and this Court does not know what sentence it will impose, and I won't know that until such time as I have had the benefit of a full presentence report in this matter and until I have heard what the Prosecutor has to say at the sentencing and what you and your attorney have to say at the sentencing.

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A Yes.

Q Okay. And do you understand that the least sentence that you could receive under this plea agreement is thirty years in State's Prison with no parole for thirty years. Do you understand that?

A Yes.

Q That's the least you could receive. You could receive as sentence -- just as an example, I could impose a sentence of fifty years with no parole for thirty years. Do you understand that?

A Yes.

Q I could say seventy years, no parole for thirty years. Do you understand that?

A Yes.

Q Or I could give you the term of life in State's Prison with no parole for thirty years. Do you fully understand that?

A Yes.

Q Michael, do you have any question whatsoever with regard to the sentence that could be imposed in this case?

A No.

Q All right.

Now, in a few moments we are going to take a factual basis from you as to what you say occurred and it's up to the Court to make a determination as to whether I find what you say on the witness stand -- and I remind you you're under oath when you say these things to me -- whether I find those facts that you testify to are sufficient to make out the offense of felony murder. Do you understand that?

A Yes.

Q That's basically all I have to do to find that the factual basis is sufficient. Follow me?

A Yes.

Q Now, this is not to say, and I want to point out to you, that a jury could find more in the case if you went

to trial, and I assume that's one of the reasons that you are taking the plea, a jury could find more than what you are saying to be the case. You follow me?

A Yes.

Q In other words, you may say to me, Judge, I didn't intend to kill her, but a jury may make a determination, and it's the State's position, I take it, that there was a purposeful killing here and if the jury were to find that, you could found guilty of knowingful and purposeful murder. Do you understand that?

A Yes.

Q Knowingful and purposeful murder, if you are found guilty of that, is an offense that could give you again thirty years with no parole at minimum and up to life. Do you understand that?

A Yes.

Q The jury could find you guilty as well of the carjacking and they could find you guilty as well of the kidnapping. Do you understand that?

A Yes.

Q I tell you -- and your attorney and I have discussed this and I'm sure he has discussed it with you -- that if the jury were to do this -- I'm not saying that they would, but if they were to find you guilty of all of these three offenses, none of these three offenses would merge. The

kidnapping certainly would not merge with the knowingful and purposeful murder. Do you understand that?

A Yes.

Q And you could -- I'm sure your attorney again has gone over this with you at length -- you could receive, with regard to the carjacking, an additional sentence that could be anywhere from ten years to thirty years with a five year period of parole ineligibility. Do you understand that?

A Yes.

Q So if the Court even gave you the presumptive of fifteen years with regard to that and ran the matters consecutively and only gave you -- I don't want to confuse you -- only gave you thirty years on the knowingful and purposeful murder, you'd wind up with a sentence of forty-five years with thirty-five years no parole. Follow me?

A Yes.

Q I point out to you as well, if you were found guilty of the kidnapping, which has a penalty of fifteen to thirty years, there is a presumptive term of twenty years. Do you understand that?

A Yes.

Q So on the outside, assuming that just these two crimes were involved, the kidnapping and the carjacking, and if the jury found you guilty of knowingful and purposeful murder, you could receive sentences that would be as much

as life plus sixty years with no parole for sixty years. Do you understand that?

A Yes.

Q All right. But the most the Court can impose here is life with no parole for thirty years, which obviously is still a substantial period of time. Do you understand that?

A Yes.

Q Do you have any questions at all about what we have just discussed?

A No.

Q Your attorney has discussed with you what's known as a doctrine of merger. I know he has, but has he discussed that with you?

A Yes.

Q Do you have any questions in that regard as well?

A No.

Q Let me just hit one more aspect with regard to the exposure here.

In the event a jury were to find you guilty of the charges you are pleading to today, which is the felony murder charge, your exposure would be life over thirty and if a jury found you guilty of the other two offenses as well, the carjacking and the kidnapping, one of those charges would merge with the felony murder, but not the other, necessarily.

So it still would be an additional thirty years exposure to you, an additional fifteen years of no parole. Do you understand that?

A Yes.

Q Okay. Do you have any questions you want to ask me or your attorney at this point with regard to the potential sentence in this case?

A No.

Q Now, do you understand if you plead guilty to this count, there's going to be four charges that are set forth in the juvenile complaint -- one charges you with third degree theft of a motor vehicle; one charges you with the knowingful and purposeful murder; one charges you with first degree armed robbery; and one charges you with the carjacking -- all of those charges will be dismissed on the day I sentence you with regard to this felony murder plea. Do you understand that?

A Yes.

Q And you are agreeing, you understand -- and your attorney, I trust, has possession of it -- to return that tape we have been talking about to the State. Do you understand that?

A Yes.

Q It's all part of the plea here. All right.

You do understand the State's going to be asking

for what it calls and what's properly called the maximum penalty in this case. Do you understand that?

A Yes.

Q But again I tell you that the sentence that the Court imposes will be as a result of everything I have said before: what you have to say, what your attorney has to say and everything I know about the case and what I hear on the tape and all the rest. Do you understand that?

A Yes.

Q All right.

With regard to the felony murder charge, has your attorney explained to you the nature and the elements of that crime?

A Yes.

Q Are you entering your plea to that crime today freely and voluntarily?

A Yes.

Q And taking into consideration what he's told you about the crime and the nature of the crime, do you admit to me in open court today that you committed this offense?

A Yes.

Q And do you understand, very importantly, with regard to this charge, by pleading guilty in front of me today, you are giving up your right to a jury trial? Do you understand that?

A Yes.

Q Has your attorney thoroughly explained to you what a jury trial involves?

A Yes.

Q Do you understand that it would be up to the State to prove your guilt to all twelve jurors that decide the case? Do you understand that?

A Yes.

Q You would never have to prove your innocence. The burden would always rest on the State and it would never shift. Do you understand that?

A Yes.

Q You could present witnesses on your own behalf at the time of trial. Do you understand that?

A Yes.

Q You could testify yourself, if you want to at the trial. Do you understand that?

A Yes.

Q But if you elect not to, the Court would, at your request, tell the jury that they cannot hold that against you; it's your constitutional right not to testify. Do you understand that?

A Yes.

Q Do you have any questions about what's involved with the jury trial?

A No.

Q One of the other aspects of a jury trial is that you'd have the right to cross-examine the witnesses at the trial. Do you know what I mean by cross-examination?

A Yes.

Q And you are giving up that right as well because there won't be a trial. Do you understand that?

A Yes.

Q You are giving up the right to remain silent by speaking to me in open court now. Do you understand that?

A Yes.

Q You're telling me what happened?

A Yes.

Q Do you understand that?

A Yes.

Q Do you understand you'll have a criminal record, obviously, once I sentence you with regard to this matter. Do you understand that?

A Yes.

Q Do you understand the law provides that there's certain mandatory penalties I must impose. I must impose what's known as a $75 Safe Neighborhood Fund assessment and I have got to impose what's known as a Violent Crimes Penalty that must be anywhere from between $100 to $10,000 but no less than $100 because there was actually injury leading

to the death in this case. Do you fully understand that?
A Yes.
Q And very importantly, are you thoroughly satisfied with regard to the services that your attorney has given you in this case?
A Yes.
Q Have you had enough time to discuss the matter with him today and on prior days with regard to your entering your plea here today?
A Yes.
Q Do you have any questions you want to ask him up to this point with regard to anything that I have raised with you on the record here today?
A No.
Q Other than the dismissal of these four charges that remain and that your exposure is limited to thirty years with no parole with a sentence of at least thirty years, but no more than life in prison, have any other promises been made to you with regard to this matter that would lead you to enter into your plea?
A No.
Q Has your attorney told you exactly what sentence you are going to get?
A Yes -- no.
Q Go ahead.

A I guess he can't say because you're going to be the one that sentences me.

Q Right. That's what I'm asking you, but he did tell you you have got to get at least thirty years no parole; correct?

A Yes.

Q But did he tell you what we call the outside term would be? Did he indicate to you specifically what it would be or did he indicate to you it would be anywhere from thirty, forty, fifty all the way up to life?

A Yes.

Q Right?

A Yes.

Q So it's wide open. Do you understand that?

A Yes.

THE COURT: Gentlemen, other than the factual, is there anything else that I may not have addressed that you want to address at this time?

MR. CUNNINGHAM: I have nothing at this time.

MR. DANIELS: No, Your Honor.

THE COURT: All right. Who will elicit the factual? Will you do that, sir?

MR. DANIELS: Yes, I will, Your Honor. If you don't mind, Your Honor, I'll stay at counsel table.

THE COURT: Yes, sir.

DIRECT EXAMINATION BY MR. DANIELS:

Q Michael, I'm going to direct your attention to March fourteen, nineteen ninety-six. approximately 3:00 P.M. in the afternoon. Where were you at that time?

A I was at Caldor Shopping Mall, Route 37.

Q And is that here in Toms River?

A Yes.

Q And while you were at that shopping mall, did you make a decision about doing anything?

A Yes.

Q What was that?

A I decided to steal a car.

Q Now, while you were there, did you observe a car that you were going to take?

A Yes.

Q And what color car was that?

A It was a gold Camry.

Q Where was it in the shopping mall parking lot?

A It was parked in front of Palumbo's.

Q Was there anyone in there?

A Yes.

Q When you saw that car, what did you do?

A I got in the car and I told the woman, give me the keys.

Q Did she give you the keys?

A Yes.

Q And when she gave you the keys, did she remain in the car?
A Yes.
Q After she gave you the keys, what did you do?
A I drove a substantial distance from the parking lot.
Q And where did yo drive to?
A A wooded area in Manitou Park.
Q Why did you drive to that wooded area in Manitou Park?
A To escape from stealing the car -- with stealing the car.
Q Now, do you know that woman's name today?
A Yes.
Q And who was that?
A A Miss Kathleen Weinstein.
Q When you got to that wooded area in Manitou Park, was she still in the car
A Yes.
Q And did you keep her confined in that car while you're in the woods?
A Yes.
Q Why did you keep her confined in the car in the woods?
A While I thought about what to do to get away with the car.

Q Did there come a time when you decided what to do?
A Yes.
Q What was that?
A I put duct tape on her hands and ankles and I left with the car.
Q And did you say anything to her about screaming?
A Yes.
Q What was that?
A I asked her would she promise me not to scream.
Q And did she promise you she would not scream?
A Yes.
Q And did there come a point when she started screaming?
A Yes.
Q And what happened?
A I came back and I put my hand over her face, stop her from screaming.
Q And did there come a point when she stopped screaming?
A Yes.
Q When she stopped screaming, did you look to see if anything had happened to her?
A Yes.
Q Was she moving?

A No.

Q Was she breathing?

A No.

Q Did you do anything to determine if she was still alive?

A Yes.

Q What did you do?

A I shook her.

Q Did she move?

A No.

Q At that point did you realize that she was dead?

A Yes.

Q Did you intend to kill her?

A No.

Q Now, at the time that they discovered Miss Weinstein's body, she had what appeared to be zipper marks on her face. Do you know how those got there?

A No.

Q Keep your voice up.

A No.

Q Did you have any weapon with you?

A No.

Q Did Ms. Weinstein believe that you had a weapon?

A Yes.

Q What did she believe that you had?

A Gun.

MR. DANIELS: Your Honor, I would ask that in light of the factual basis that Mr. LaSane has provided to the Court, that the Court would accept his guilty plea to the crime of felony murder.

I have no more questions at this time.

THE COURT: Thank you.

Did you tell Mrs. Weinstein that you had a gun?

THE DEFENDANT: No.

THE COURT: You didn't mention it to her at all?

THE DEFENDANT: She asked me and I said I did.

THE COURT: You said you did?

THE DEFENDANT: Yes.

THE COURT: All right.

Michael, just as an example, let me just point out to you -- bear with me -- do you understand that to take a vehicle, for example, the jury may have determined, even just based upon what you have said, that the fact that she asked you if you had a gun and you told her that you had a gun, and so on, so forth, the jury could make a determination, as an example, that you put her in fear of immediate bodily injury merely by telling her that you had a gun. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right.

Do you have some questions?

MR. CUNNINGHAM: Yes.

CROSS-EXAMINATION BY MR. CUNNINGHAM:

Q Mr. LaSane, you acknowledge that that's your voice on that tape you were provided in discovery; correct?

A Yes.

Q The only two people involved in that tape was yourself and Mrs. Weinstein; correct?

A Yes.

Q Okay. On that tape she says words to the effect of, you know, hey, you threatened me with a gun, let me see the gun. Do you recall that?

You said something to the effect of, I don't want to show you the gun because then I'm going to be in more trouble if I show you the gun. Do you remember saying that on the tape?

A Yes.

Q Okay, so in effect, you were threatening her by telling her that you had a gun in your possession and you weren't going to show it to her, but you had a gun; correct?

A I didn't tell her, she asked.

Q But you let her know that you had a gun?

A Yes.

Q She was intimidated by that, wasn't she?

A Yes.

Q Now, with regard to these marks, I have a couple of photographs. Let me ask you something before I mark them.

Isn't it a fact, sir, that you didn't put your hand over her mouth just to quiet her, but the reason you put your hand over her mouth was you pulled up her sweater and her khaki jacket and put it over her face because you wanted to smother her because, in the event she got loose from you tying her up, she was going to tell on you and you were going to get in a lot of trouble; correct?

A No, sir.

Q That's not true?

A No, sir.

Q Are you familiar with the report of postmortem examination? Did you go over this with your attorney where it describes the impressions on the face of Mrs. Weinstein?

A Yes.

Q Have you had occasion to review the photographs involved?

A Yes.

MR. CUNNINGHAM: Judge, I'd ask to mark two photographs for identification, please.

THE COURT: S-1 and S-2 for I.D.

(The above mentioned photographs are received and marked S-1 and S-2 for identification.)

MR. CUNNINGHAM: Thank you.

Q Sir, I show you S-1 for identification. Can you identify that photograph?

A Yes.

Q That's Mrs. Weinstein, isn't it?

A Yes.

Q I show you S-2 for identification. Can you identify that photograph?

A Yes.

Q That's Mrs. Weinstein, isn't it, sir? Isn't it a fact, sir, that these photographs --

THE COURT: He didn't answer the question.

Is it her, sir?

THE DEFENDANT: Yes.

Q Isn't it a fact that these photographs show an impression across her forehead, from the right side through the nose, through the left side coming down, of the zipper mark?

A Yes. I said I don't know anything about that.

Q Isn't it also a fact, sir, that it shows an impression of a sweater mark on the lower -- below the chin area? Isn't that true?

A Yes.

Q You have no idea in the world how those marks got on her fact; is that correct?

A Yes.

Q Let me ask you this question: When you left her, were those marks on her fact?

A I don't know, sir.

Q You don't know.

By the way, after you left her and you knew she was dead, between then and when you got picked up several days later, you were out enjoying that car, weren't you, with your friends?

A No, sir. I wouldn't say enjoying.

Q You were having a good time?

THE COURT: Mr. Cunningham, did he use it?

Q You used it?

MR. CUNNINGHAM: That's all I have.

THE COURT: I'm here to get a plea.

MR. CUNNINGHAM: That's all I have.

I would like to submit to the Court as S-3 the report of postmortem examination and in addition, the death certificate, Judge, as S-4 for the purposes of the plea.

THE COURT: Sir, when you put your hand -- you say you put your hand across her mouth. Is that correct?

THE DEFENDANT: Yes.

THE COURT: I assume when you did that -- did you put -- you obviously put your hand on her nose as well; correct?

THE DEFENDANT: Yes, sir.

THE COURT: I would assume that there was a reaction on her part when you were doing this; correct?

THE DEFENDANT: Yes.

THE COURT: And the more she reacted, would it be honest to say that you held her tight?

THE DEFENDANT: Sir, I didn't realize that I was holding her. I can assume that I was holding her tight, but at the moment I was focusing on other things because there was a power line substation and I was focusing more on the people over at the substation than I was...

THE COURT: You didn't want them to hear anything that was going on, is what you're saying to me; right?

THE DEFENDANT: Yes, sir.

THE COURT: I don't want to put words in your mouth, but do you at least admit or are you at least admitting to me that putting your hand over her nose and her mouth in the fashion that you did, with her reacting, whether you were paying close attention or not, did this at least constitute a reckless act on your part which, in effect, led to her death because, in effect, she couldn't breathe?

THE DEFENDANT: Excuse me?

THE COURT: In effect, whether you meant to or not, you smothered her to death?

THE DEFENDANT: Yes, sir.

MR. CUNNINGHAM: I have nothing further.

THE COURT: Anything else?

MR. DANIELS: Your Honor, I would ask that the Court accept the fact that he was the agent that caused her death.

THE COURT: There's no question.

Any questions you want to ask me at this time?

THE DEFENDANT: No, sir.

THE COURT: You may step down.

(Defendant excused.)

THE COURT: Anything else, gentlemen?

MR. CUNNINGHAM: No, sir.

THE COURT: I find that he understands the nature of this very serious charge; he's received the advice of competent counsel, has knowledge of the maximum penalty that the Judge can impose as a result of his plea; he admits to this charge.

I find he understands he's pled guilty to the crime of first degree murder. He understands that his exposure is thirty years of no parole up to life in prison with thirty years of no parole.

He understands the nature of this plea proceeding today. He enters the plea freely and voluntarily. He's voluntarily waived his right to a jury trial, his right of confrontation and his right against self incrimination.

I have already made findings with regard to his

waiver of indictment.

This plea is not the result of threats, fear or coercion and I find there is a factual basis for the entry of the plea.

He understands that a Violent Crimes Penalty must be imposed.

Promises made to induce the plea are limited to what I set forth on the record and basically limited to the dismissal of the outstanding other four charges in the juvenile complaint.

He fully understands the perameters of the plea bargain here.

He understands that a Safe Neighborhood Act assessment must be made.

I'm thoroughly satisfied that he understands the import of the crime, its nature, its elements, his exposure.

I am further satisfied he's entered this plea freely and voluntarily with full knowledge of the consequences that can flow.

I'm satisfied as well that he's had excellent -- the benefit of excellent counsel under the circumstances I have been able to observe and the nature and extent of the communication back and forth between this attorney and his client by the number of times he goes into the jail and from the hours that he's spent discussing this.

I make further findings that he's had the benefit of his mother all along the way here. Counsel has spoken with her on many occasions and she's been with him on several occasions when he has spoken to the defendant as well.

Accordingly, I will accept the plea and I will enter the same, direct the clerk to enter the plea at this time.

He'll be held without bail hereafter and I'd like a sentencing date in approximately four weeks.

VOICE: February twenty-eighth.

THE COURT: Is that agreeable to the State?

MR. CUNNINGHAM: Yes, that's fine, Judge.

I'd like to mark S-3 and 4 just for the record.

THE COURT: What are they?

MR. CUNNINGHAM: S-3 is the report of postmortem examination. S-4 is the death certificate.

THE COURT: Any objection?

MR. DANIELS: No, Your Honor.

MR. CUNNINGHAM: Thank you.

THE COURT: Do you understand there has been no question as to this, but what your attorney just asked me that I recognize you as the agent of this, that the actions that you took that day, you don't question, led to the death of this woman; correct?

THE DEFENDANT: Yes.

THE COURT: All right. Thank you very much.

So there is a causal connection, obviously, between his behavior and I'm satisfied it occurred in the course of a felony, of the kidnapping and certainly of the carjacking, though primarily it would seem to me of the kidnapping and flight therefrom. I just indicate there are separate and independent crimes here, even if subsection (4) were used with regard to the carjacking -- bear with me -- and that he did operate or cause a vehicle to be operated with the person who was in possession or control remaining in the vehicle.

I am satisfied well over and above that that there was an additional holding of this victim unnecessarily which would certainly constitute kidnapping under the circumstances.

All right, gentlemen. Thank you very much.

MR. CUNNINGHAM: Thank you, Judge.

(The aforementioned documents are received and marked S-3 and S-4 for identification.)

THE COURT: I'm going to indicate, Mr. Prosecutor, with regard to the tape in this matter, I'd like that submitted to me with counsel's prior approval. I'm going to merely mark it -- may I see those other two exhibits? That tape should be considered as S-5 and the contents are incorporated in the presentence report. That is not to say that anybody but I shall hear the contents of the tape so

I can properly consider it and counsel may direct whatever remarks he may wish to do so in any presentence memo with regard to the tape.

MR. CUNNINGHAM: Fine.

THE COURT: Gentlemen, anything else?

MR. DANIELS: No, Your Honor.

THE COURT: Thank you very much. We are in recess.

I just want to acknowledge I understand the entire family is here of Mrs. Weinstein. I want to thank you very much for the -- I know how difficult this has been for you and I want to thank you for the comportment that you maintained in court today and I'll no doubt see you on sentencing day.

(RECESS.)

CERTIFICATION

I, Caroline Wolgast, C.S.R., License Number XI00316, 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.

Caroline Wolgast
, C.S.R.

Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey

Date: 6/9/97

A-5079-99T4

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION: OCEAN COUNTY
ACCUSATION NO. 97-01-00076
APPEAL NO. A-4812-96T4

STATE OF NEW JERSEY,

Complainant,

vs.

MICHAEL LaSANE,

Defendant.

FILED
APPELLATE DIVISION
OCT 26 2000
Clerk

STENOGRAPHIC TRANSCRIPT OF SENTENCE

Place: Ocean County Courthouse
118 Washington Street
Toms River, N.J. 08753

Date: February 28,1997

REC'D
APPELLATE DIVISION
OCT 26 2000
Clerk

BEFORE:

HON. PETER J. GIOVINE, J.S.C.

TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER

APPEARANCES:

WILLIAM P. CUNNINGHAM, ESQ.
Assistant County Prosecutor
Attorney for the State

KEVIN E. DANIELS, ESQ.
Attorney for the Defendant

CAROLINE WOLGAST, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, N.J. 08753

THE COURT: Gentlemen, please enter your appearance this morning.

MR. CUNNINGHAM: William Cunningham appearing on behalf of the State.

MR. DANIELS: Kevin Daniels appearing on behalf of Michael LaSane, Your Honor.

THE COURT: All right. Thank you.

This is the time and date set for the sentencing of Michael LaSane with regard to Accusation 97-1-76.

Mr. LaSane, do you understand you are here today to be sentenced as a result of your plea?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the representation of your lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you disagree with the sentence that the Court imposes, you have the right to appeal it, but you must do that within 45 days from today and if you can't afford the services of an attorney on your own to do that, the Court would again appoint the public defender to represent you? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand you've got the right to address me when your lawyer is through speaking on your behalf?

THE DEFENDANT: Yes.

THE COURT: All right.

Have you gone over the presentence report with your client?

MR. DANIELS: Good morning again, Your Honor.

Yes, Your Honor, I have had the opportunity to read as well as review the presentence report as well as the addendum to the presentence report with Mr. LaSane.

There is one area which I would like to bring to the Court's attention.

THE COURT: All right, sir.

MR. DANIELS: It's the section of the presentence report that deals with the case supervisor analysis.

THE COURT: Yes, sir.

MR. DANIELS: Within that analysis there is an assessment of factors contributing to the present offense.

On behalf of Mr. LaSane, I would disagree with the assessment that is set forth by the probation officer that provided this report. I would state for the record that Mr. LaSane reaffirms and stands by the factual basis that he gave to the Court at the time that he entered his guilty plea and I believe that he was very candid in relating his involvement to the Court.

So to the extent that it would suggest he has not informed the Court of his involvement in this matter, I would

disagree.

The other section --

THE COURT: In that regard, Prosecutor, do you wish to be heard at all?

Quite frankly, I saw the evaluation. I concur with what you have said on the record with regard to that. It's the Court's determination that really should govern here. While I appreciate the opinion that may have been given, it will be stricken from the report. I don't think it plays any part in the presentence report itself.

I'll hear what the State has to say within the purview of the facts of the case as the State alleges them to be and within the confines of the plea which was to a felony murder.

MR. CUNNINGHAM: I'll confine my remarks to my argument to the Court, Your Honor. I don't have any particular problem with what the Court just said.

THE COURT: Thank you, sir.

Your next matter?

MR. DANIELS: Below that section of the analysis there is a comment that Mr. LaSane has had two prior juvenile adjudications.

THE COURT: I picked that up as well. It would seem to me there is only one prior adjudication and a series of pending matters arising out of one incident. Is that correct?

MR. DANIELS: Well, the one matter that the Court speaks of, I don't believe there was ever an adjudication. That was dismissed as a result of a continuance that was granted in that case and technically, there would not have been an adjudication of delinquency.

THE COURT: Well, there's at least been a disposition.

MR. DANIELS: That I would agree with, Your Honor, but to that extent, we would disagree with the presentence report.

THE COURT: Yes, sir.

MR. DANIELS: Other than those areas that I have pointed out to the Court, I have no further areas which I wish to bring to the Court's attention with regard to the presentence report.

THE COURT: All right, sir. Are you prepared to speak on behalf of your client at this time?

MR. DANIELS: I am, Your Honor.

THE COURT: All right, sir.

MR. DANIELS: Your Honor, at this time the question of imprisonment has already been decided for the Court. It is mandated by the code and the code sets forth a list of aggravating and mitigating circumstances that this Court must determine in deciding on what sentence to impose. How the Court weighs those aggravating and mitigating circumstances

and arrives at an appropriate sentence is guided by the New Jersey Supreme Court cases of State v. Roth and State v. Hodge. It is against the backdrop of these legal principles that I plead for leniency for Mr. LaSane.

If the Court would permit me, I would just like to quote a short passage from State v. Roth --

THE COURT: Go ahead.

MR. DANIELS: -- cited at 95 N.J. 334, page 365. The New Jersey Supreme Court wrote, "Pronouncement of judgement of sentence is among the most solemn and serious responsibilities of a trial court. No word formula will ever eliminate this requirement that justice be done. There is no room for trial courts to consider the public perceptions of sentences: Judicial recognition of or action upon public opinion against a particular defendant cannot be tolerated in our criminal justice system."

It goes on to say, "We are confident that our judges are people of fortitude, able to thrive in a hardy climate."

I would just like to state to this Court, as this Court is aware that this case has attracted widespread media attention, and it is within that climate that this Court finds itself having to determine an appropriate sentence for Mr. LaSane. But I want you to know that I believe this Court and you, Your Honor, are a forthright individual and that you are such a judge that they speak of in this case.

I had an opportunity, Your Honor, when I reviewed the presentence report and the addendum, to review all of the letters that had been submitted on behalf of the Weinstein family and friends, as well as Michael LaSane.

THE COURT: Forgive me, sir, for interrupting you, but I did not receive a letter that you referred to yesterday.

MR. DANIELS: Oh, that's not forthcoming, Your Honor.

THE COURT: All right, sir. Forgive me. Go ahead.

MR. DANIELS: In all the time that I have been practicing, and I may not have been practicing as long as others, but I have never encountered such letters that speak of compassion on behalf of an individual and letters that were full of insight. It is clear from those letters that Ms. Weinstein was a beautiful person, a caring person who made a difference in all the lives of the persons that she came in contact with. What struck me about Ms. Weinstein was that she was a person that discussed often and reminded others that kindness deserved a place in this society. She was involved in a program called Random Acts of Kindness. To the extent that this case should have a long-lasting impact on her family, friends and other people that have been caught up in this tragedy, that that program should become a model and the motto Random Acts of Kindness hopefully should become a measure by which we would define our society for the next

millennium.

What occurred in this case, Your Honor, is a tragedy both for the Weinstein family as well as for Michael LaSane's family, the lives that have been forever changed by this act. I don't believe that there is anything that those of us who practice in this criminal justice system can do that can ever bring back the wonderful person that Ms. LaSane (sic) was. I am sure that her memory will endure. But I want this Court to know that nothing that I say today do I intend nor should it be interpreted to depreciate the seriousness of this offense. That's not my purpose for addressing this Court this morning. My purpose this morning is to plead for equitable justice on behalf of Michael LaSane, and what I mean by that, Your Honor, is that those similarly-situated offenders who commit such offenses as Michael has committed, they should all receive similar sentences.

To the extent, Your Honor, that the letters that I read and the comments that I may have had an opportunity to review in the media in which persons are asking this Court to punish Michael to the fullest extent of the law, I would just remind the Court that the Code of Criminal Justice has mandated what that punishment should be.

As I read the cases that have interpreted that code, one of the things that the code addressed was the need to instill more severe punishment for crimes that were committed

in New Jersey and the sentencing scheme, the length of time that a judge would sentence a person, those are all set forth and that part of that sentencing scheme was to re-instill punishment as one of the factors that the Court should consider in the sentence.

The code addressed murder and has said that 30 years, the minimum mandatory period for which a person would not be eligible for parole, is the fullest extent to which punishment can be meted out to such a convicted individual.

And to that extent, Your Honor, Michael LaSane has entered into a plea agreement in which he accepts that he shall be punished to the fullest extent of the law, which is 30 years before he will become eligible for parole. The amount of time that this Court is being asked to consider beyond that, I'd ask that the Court consider the aggravating and mitigating circumstances that are set forth in the code.

At the outset, Your Honor, I would ask that the Court would consider that there are aggravating circumstances in this case, consider aggravating factor number (9) which is listed in the code under 2C:44-1, that there is a need to deter Michael as well as any other individual that would be considering to commit the type of offense that he committed.

I'd ask that the Court would consider as an aggravating factor number (13), that while in the course of committing the crime of carjacking and the immediate flight

therefrom, he was in possession of a stolen vehicle.

I'm sure, although I don't argue the point, I'm sure that this Court will be asked to consider aggravating factor number (1), aggravating factor number (2), and I would like to diverge just for a moment, because as I read the legal principles set forth in Roth and Hodge, the single greatest factor that this Court should consider is the seriousness of the offense rather than considering the individual background or character of the defendant Michael LaSane and it is to that factor that these two aggravating factors, I think, need to be discussed and I will not be long in discussing them.

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

The cases that have interpreted that factor remind the Court that the death of the victim is an element of felony murder and should not be considered as an aggravating factor. However, the --

THE COURT: I didn't hear what you just said.

MR. DANIELS: That the death of the victim is an element of the offense of felony murder and that it should not be considered as an aggravating factor, but the nature of the offense and whether it was especially heinous, and to that aspect of that aggravating factor, I'd argue to this Court,

and it's my understanding, that Your Honor has had the opportunity to listen to that tape that has become part of the evidence in this case as well as a single piece of evidence that has generated interest on the part of the media; that I would argue to this Court I think that that tape represents more of a mitigating factor in support of the Court finding that this particular crime was not committed in an especially heinous, cruel, or depraved manner.

I'd ask that this Court take into consideration that you had a boy who was just shy of 17 years old who was obsessed with the need of obtaining a car.

I had the good fortune of reading an essay just recently in which the person in the essay says -- and this person was in their sixties -- that during his childhood, he came to realize that the children of his age were innocent or seemed to display more innocence than the children of today and that in his essay he went on to say that he felt that the children of today seemed to have something to prove.

I felt that that part of the essay at least accurately had defined Michael LaSane. I would argue to this Court that his need to take an automobile had a lot to do with his need to prove something and, unfortunately, in today's society there are youth who feel that in order for them to gain the respect of their peers, that committing an offense is something that will give them a greater sense of self-worth,

self-respect, acceptance by their peers. Misguided as that notion obviously is, it was a motivating factor that caused Michael LaSane to be seated before you today. Even though he acted out the need to attain a car, the Court is aware that Ms. Weinstein was not beaten. There was no intention on his part that day to go out and murder someone. His only intention was to take a car. There is nothing from that tape that indicates that while that tape was running, that he brutalized her. And that's not to minimize that at any time that you take an automobile with a person inside of it, the mere fact of that alone is terrifying.

Beyond that, Your Honor, I would argue that the particularly heinous nature that this Court must find in order for that aggravating factor to apply just doesn't fit this case.

The second factor dealing with the gravity and the seriousness of the harm inflicted, again, Your Honor, the Court has guided us that the death of the victim should not be considered.

And as to the other factors that are set forth in that particular section, I would argue to this Court do not exist in this case. From that tape we learn that Ms. Weinstein's a very feisty individual, Ms. Weinstein's a very caring and capable individual, and during that period of time in which she was in Michael's company, the single most thing

that stood out, from my review of that tape, was her courage.

I would ask that the Court consider that courage as well as consider that the second factor is not appropriate in this case.

I would ask the Court also to be mindful of aggravating factor number (6); that the converse is true here. Factor (6) speaks of the prior criminal record and we don't have that here.

I would ask the Court now to consider the mitigating factors and I would ask the Court to pay special attention to mitigating factor number (7). I would argue to the Court that there are no real adjudications of delinquency in Mr. LaSane's background, although there are those brushes with the juvenile justice system, and that except for the crime that he stands convicted of in front of the Court today, there is no criminal conviction in his past. That is not to say that he has led an exemplary, law-abiding life, but I'd argue to this Court that the difficulties that he's gotten into in the past have a lot to do with his immaturity, especially his age and that the Court take that into consideration.

I ask that the Court take mitigating factor number (8) into consideration, that his conduct was the result of circumstances unlikely to recur.

Again, as the Court is aware from the documents that have been furnished, psychological documents and the

presentence report, Michael, unfortunately, grew up without a father role model in his life. To whatever extent that that would contribute to the misguided notion that he had on March 14th to take an automobile, I would indicate to this Court that this experience has demonstrated to him that even though he may have grown up without a father, that is something that he's got to overcome and that things like that or activities or his own conduct, he's got to be totally responsible for that and to that extent, I would argue to this Court that's one of the circumstances that would indicate this offense or any other criminal activity is unlikely to recur.

I also believe and I would ask the Court to consider that about the time that Michael started to get into difficulties was during the time that a close family member of his passed, an aunt who played an instrumental role in rearing him, and that to the extent that that circumstance affected him and that he has had an opportunity to consider that effect on him, that's a circumstance that is unlikely to recur.

I ask the Court to consider factor number (9), the character and attitude of the defendant would indicate that he's unlikely to commit another offense, and the case law also reminds the Court, in considering that mitigating factor, to consider what Mr. LaSane has done that indicates that he's on his way to demonstrate to this Court that he is unlikely to commit another offense.

I would ask the Court to consider that during the time that he was in the Youth Detention Center, that he accomplished an academic record that very few have accomplished while they stayed at that institution. The Court is aware that he was on the honor roll and that he was given, back in May, the Honorable Student Award and as a mark of that honor, he was allowed to wear a particular T-shirt.

During the period of time that he was there, he had scrapes with other juveniles there, but I'm sure, without going into the context of those scrapes, that those are just part of the adjustment problems that children have in growing up.

But I'd ask that the Court would consider seriously the efforts that he made while he was in that detention center to demonstrate to this Court, as well as anyone that would care to look, that he was very serious about turning his life around and that he would ask the Court to consider that when it considers his character and his attitude.

Finally, Your Honor, I would argue that you would consider the mitigating circumstance number (13), the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.

I am sure that the Court, having read the psychologicals regarding Michael, that there were older friends that he associated with. He had an older brother. I

would ask the Court consider the influence that those individuals had on him and that to a very large extent, his need for taking an automobile, his need of proving his worth, was influenced by these others and that he shall be punished for what he has done in the case, but beyond that punishment of 30 years, that the Court consider the nature of this offense and that we sentence Michael to the same type of sentence that it would sentence another individual under similar circumstances.

Your Honor, I have come close to ending my address to you this morning. I would just like to give you my personal insights on Michael.

During the almost year period of time that I have associated with Michael, he's always been polite, which makes it so difficult to understand how he could involve himself in such a crime. He is a sensitive individual and a caring individual and I don't say that without a basis. I base that assessment of Michael on conversations that I've had with him and yes, during those conversations, he has expressed his deep sorrow and regret that he had taken the life of Kathleen Weinstein. He expressed his sorrow to the Weinstein family. He realized what it was going to be like for Daniel Weinstein to grow up without a father (sic) and during that period of time, he cried. There was no doubt in my mind, Your Honor, that Michael LaSane was truly sorry and remorseful for what he

had done, but he also realized that there was nothing that he could do, no amount of apologies, no amount of telling me that he was deeply regretful for what he had done would ever bring back her life.

I personally believe it was an unfortunate situation. He did not think out all the ramifications of taking an automobile, especially taking an automobile with a person in it.

As I said, I believe that that tape stands more in mitigation of the heinousness of having taken a person's life and what it really demonstrates to those who listen to it is that you had a young man who didn't know how to extricate himself from the situation that he had gotten himself in and so he just sat there and sat there and sat there.

It is hard for me, as well as those family members and friends that know Michael, to reconcile what he has done. It took me a long time, because I, too, like many of those, were in denial.

I wanted to share that with you because that is the effect that Michael LaSane had on me and I have seen that he's had that on others and to the extent that others may find that he may not have been remorseful, Your Honor, I would just ask you consider the circumstances under which they may have talked with Michael, the length of time that they may have spent with Michael, and any psychological evaluation that they

may have made regarding Michael. I found it interesting that in considering him a sociopath, having a sociopath personality disorder -- that's the test by which you measure an individual -- it says that the person must be at least 18 years of age. So I don't know to what extent that the tests that were performed would be evaluated, since that is one of the factors that must be considered.

Michael LaSane, Your Honor, stands in front of you. He's still 17 years old and he is still a boy. I would argue to this Court that that immaturity has a lot to do with not being able to appreciate the full consequences of one's act, but that does not excuse him for what he's done.

He stands before this Court a first-time offender and, like any other first-time offender, he should be treated similarly. I would just ask for that equitable justice, that he should be punished for no more than what he has done in the case. He should not receive a life imprisonment.

In my limited practice, I run into other murder cases that are more heinous. The depravity in those cases are obvious. He should not be sentenced to any greater length of time than the first-time offender, 17-year-old, who found himself in a situation that he had not anticipated.

Your Honor, I conclude my address to you this morning. With the Court's permission, there is someone that would like to speak on Michael's behalf and address you as to

leniency and, with your permission, I'd like to ask them to come forward.

THE COURT: Who would that be, sir?

MR. DANIELS: That would be his mother, Your Honor, Vera Thomas.

MS. THOMAS: Good morning, Your Honor.

THE COURT: Good morning.

MS. THOMAS: I stand before you asking you to have mercy --

THE COURT: I can't hear you, ma'am. You have to keep your voice up, if you will.

MS. THOMAS: I stand before you asking you to have mercy on my son Michael LaSane in sentencing him today.

Since March of 1996, my life has been another turmoil. During the above-mentioned time, I have been in rehabilitation once because I could not accept that my son could have done what he is being charged with. Also during that time, on Thanksgiving Day, a woman that raised me and Michael's grandmother passed away. At that time I was too stressed and shocked to even attend her funeral. I never got to say goodbye.

As to both of the families on both sides, they have been in tremendous pain. My faith in God is the only thing left me to give me some peace during this extremely unnerving time.

On behalf of my son and myself, I would like for you to know Michael was brought up in a religious household. He was active and had a firm belief in God and when you have a belief in God, when you strengthen your Commandments, then God takes charge to bring you back into himself.

I am begging you for mercy when you sentence my son, who is truly a gift from God to me. Michael comes from a praying and believing family who strives constantly to walk in the ways of the truth of the Almighty Living God because he comes from a family of law enforcement officials such as his uncle, who was a detective, and two correctional officers and an aunt who is a supervisor of the Ocean County Welfare Board. He also comes from several members who are preachers, missionaries. Most of all, he comes from a family that prays together.

No matter what, God will judge the just and the unjust. My prayer for you and all the parties concerned is peace of heart and mind for Christ to return. I pray that we will all be found among the justly enriched.

Judge Giovine, the only perfect man that walked on water is Christ. We know how he was accused and the outcome. I mention that to you to say this: We all for sure do sin, but there is a chance for redemption before a man dies and I am asking you to consider this wonderful gift of redemption during the sentencing of my son. As humans, we all foreshadow

the glory of God. God knows, whatever the people say or believe, Michael is a caring child, is respected in the community and church. He is also respected and loved by myself and his siblings.

As you preside over the life of another human being and what and how long that person must show to society they have paid for their sins and downfalls, please keep in your heart the real judge is God Almighty so that even your imperfect means are not questionable before God.

So in closing, I pray to the one and only true God for the strength to endure and to be made whole again, for truly I am torn. I, too, will lose the smile, caring devotion, understanding of a loved one. I, too, will miss the picture of his first prom, his graduation and, in two weeks, his happy birthday. I probably also will miss seeing him marry and to hold my grandchild upon my breast.

So, therefore, I, too, am being sentenced, but in God I trust and in God I shall be redeemed.

Thank you.

THE COURT: Thank you, ma'am, for your comments.

MR. DANIELS: Thank you, Your Honor.

THE COURT: Does the defendant wish to address the Court?

THE DEFENDANT: Your Honor, I'd like to thank you for this opportunity to address the Court.

First I would like to say to Mr. Weinstein and the Weinstein family, I can't begin to let you know how sorry I am for the loss of your loved one and I can't begin to understand your pain, but, with God, I am going to try to prove, whether behind bars or concrete, that I'm trying to change and that the influence that Miss Weinstein had on me is going to live inside me forever.

And I'd just like to say that... that I just want God to keep you all and that...

MS. THOMAS: Jesus is with you.

THE COURT: Ma'am, ma'am, if you are going to become upset, I'm going to have to ask you to leave the courtroom.

And, Counsel, if you prefer, I'll take a few minutes break, if you'd like. I leave it up to you. If you want to go ahead and proceed, I'll go ahead and proceed and hear from the prosecution. He may want to compose himself and continue to speak to the Court. I'll certainly be pleased to entertain his remarks if he wants to do that.

I appreciate everybody remaining composed and keeping order in this court.

Mr. Daniels, it's your call.

MR. DANIELS: I know, Your Honor.

Your Honor, we can proceed.

THE COURT: All right. If he wants to supplement his remarks before I commence sentencing, I'll allow him to do

that.

Can I then hear from the State at this time, sir?

MR. DANIELS: Yes, Your Honor.

THE COURT: All right.

Mr. Cunningham.

MR. CUNNINGHAM: Thank you, Judge. Good morning.

THE COURT: Good morning, sir.

MR. CUNNINGHAM: You know, this brings back memories to when I was 17 years old, because really what we got here is a carjacking that went way afoul and I remember when I was 17 years old, the car was the biggest thing in my life. I wanted a car. And this young man was one day before his 17th birthday and I imagine today, 30 years later, he was just like me. And I remember I bought a $10 '49 Chevy coupe and I had it before my 17th birthday and that was the biggest thing in the world to me at the time. We had college in the background, this and that, but to a kid who's 17, especially a guy, a car is everything.

Obviously, this man had his sights set a lot higher than I did. He apparently really liked Toyota Camrys, Judge, to the point where he told one of his pals in school, he told him he was going to get himself a Toyota Camry. That was his car of choice. He didn't tell him, yeah, I'm going to go out and hijack it down at the local mall. He said, no, his grandfather was going to help him finance the purchase of a

Toyota Camry.

Along those lines, he admitted to Dr. Docherty in the report that the Court has read, and now this is right on the heels of his 17th birthday, and with his role model, his older brother, that he was going to be a man and he was going to go out and get himself a Toyota Camry.

So with that in mind, what did he do? He packed his tools. What did he pack? He packed duct tape and a hammer to go car shopping. This same young man who sits here balling in front of the Court and apologizing to this family about how much Kathy Weinstein's tape meant to him and what she said and how he is going to remember that for the rest of his life, he packed his tools. He didn't know Kathy Weinstein, Judge. He was going shopping at the mall, hammer and duct tape in hand. He goes down to the mall.

Investigation revealed that just about every salesclerk in that strip mall saw him that day. Now, obviously, that's an exaggeration, but plenty of people saw him down there. And very interestingly, he didn't buy anything. Purchased nothing. He was in several shops, I believe in excess of five, in that mall. In two shops he asked for a bag. He wanted a bag. I think in Palumbo's, where Kathy Weinstein had been, he asked for a menu to look it over, but he never did purchase anything, and that will become significant because he didn't have any money, I submit to you.

So he goes out in the parking lot, the used-car shopping parking lot and apparently finds a late model Toyota Camry that really hit his fancy. And we can assume that he waited until such time as the owner came out and we can just imagine his delight when he saw a five-foot-three, middle-aged, hundred twenty-five pound female going to the car. And there was a witness who said they actually saw them and they overheard something to the effect of, please don't do this, was said by the middle-aged woman -- who would be Kathy Weinstein, the woman -- and it seemed like a young black man and middle-aged woman who seemed to be arguing about something, but they didn't take too much note of it at the time.

In any event, she gets in the car and they go away and that's sometime after three o'clock because we do know that the tape on the machine at Palumbo's, where she purchased the half of a sub sandwich before she was going to Toms River North, I believe it was, to high school to do a Rutgers class at 4:50, this was 3:08 in the afternoon. She had a test that night, Judge, and the tape at Palumbo's shows she purchased that item and that's why she was in the mall at 3:08 p.m.

Now, as the Court is aware, you have a tape that runs, I believe it was, 43-46 minutes, something like that. It's not important how long. But it's obvious that a lot of time went by. We are talking quarter after three is the

abduction. I picked up on the tape, in listening to it the other night, at some point -- I don't know if it's in the transcript -- at some point about six or seven minutes from the end she makes an offhanded comment, oh, it's 5:31. That's the time frame. So we are talking about 3:15, no tape, no tape, no tape, no tape up until sometime just before five o'clock. So there is an unusually long period of exchange involved here and I can only assume that the conversation ran along the same lines as the tape. But Kathy Weinstein had the wherewithal. She had one of those $20 specials from Radio Shack somewhere in her belongings. And boy, did this woman have belongings. You can almost argue she lived out of this car. She had clothes, she had bags. She's a typical woman and she had everything. And she had a tape recorder and obviously, she had a tape and somehow she got that tape and she turns it on. And she's got all kinds of bags in this car. So it wasn't just like she was sitting there with a business suit and couldn't move her hand; she had the wherewithal to do it, and obviously, the reason that she did it is because she was in that car with this young man for a period of time -- probably two hours, by rough estimation -- before she got that tape on, but she did it.

And another interesting thing, too: She had the smarts to take that tape out of the recorder and put it in her pocket. That's where we found that tape, was on her person

out in the woods, not in the tape recorder, not in any of her belongings which were off to the side.

In any event, we have a conversation on the tape -- and the Court's heard it -- and I'm contrasting it with this gentleman who says that he never meant to do anything, he meant just to cover her mouth because she was screaming.

Let's think about that. First of all, Kathy's got the brains to say, hey, you got a gun. You're telling me you got a gun. Let's see the gun. He wouldn't show it to her. He never says, no, I don't have a gun. He says, no, I can't show you the gun. But it's obvious from this tape, it is implicit in this tape that he has threatened her that he's armed. Whether or not he is is not important. Who cares?

She's talking about the gun. On page 2 she's talking about, hey, there's a helicopter overhead, something like that. Maybe they're looking for you. And she says to him, do you really want to have that on your head, hijacking a car and leaving somebody -- and it's emphasized -- leaving somebody?

His answer: You do what you got to do.

Very telling, Your Honor, as far as what's in this man's mind a long time before Kathy Weinstein dies.

THE COURT: What page are you reading from?

MR. CUNNINGHAM: Page 2, sir, right in the center.

THE COURT: Go ahead.

MR. CUNNINGHAM: Thank you.

Further on -- and I'm not going to go through this transcript -- further on he talks about he's always been luc../, he's a lucky guy, Michael LaSane, and then a pause and then he says, because I like to take chances. He's a chance-taker.

And in several points in this tape, Judge, obviously, Kathy Weinstein goes from trying to talk him out of it -- I guess, being a school teacher, she was a bit of a psychologist -- and perhaps a deadly mistake -- she tried to talk him out of what he was going to do. Every time she would get to something where she thought she was making a point, what was his reaction, this caring, young, compassionate man? He turned up the music. He changed the music so he can get another rap station on. He wouldn't respond to her.

He's telling her at some point in time, you got nothing to fear. You don't have to be afraid of me. He's telling her, well, maybe I'll tie you up.

At one point she gets real nervous, around the middle of the tape, and she says -- she's getting real antsy -- can't we get out of here? I'm getting nervous. This is scary. We're out in the woods. There's nobody around.

And he is very telling. Like, he says to her, I can't.

Why can't he? Because he knew, when he was out in

the parking lot, he knew, when he got the duct tape out of his house, what he was doing. He was going shopping and that was going to include, in his young, unsophisticated mind, getting rid of any witness who could identify him.

Who in the world would ever bring duct tape? I don't know if the Court's aware, she was bound and found on her feet and hands -- excuse me -- her ankles and wrists. The reason he took that duct tape, he wasn't going to a construction job, Judge, he was going to tie somebody up and he couldn't afford any witnesses.

Further on in the tape she's getting antsy again and she is talking about time and he makes another telling comment -- and Your Honor's aware he doesn't make a lot of comments in this tape -- this is 99 percent Kathy Weinstein talking -- he says, time makes all the difference right now, and this is shortly after he said he couldn't take her for a ride and it's getting dark.

It's been obvious to me from this tape that, in effect, Kathy Weinstein had made a decision that she may very well be a dead woman talking here and I submit to you, Judge, that that's why she decided to get involved in this tape, was to leave some trail behind. That's why she asked him, calling him Michael, what about your parents, recreating the fact. It wasn't like she asked new questions. She said oh, you said your parents came from Alaska, they were in the military, et

cetera, et cetera, et cetera. She's trying to get a dossier to identify this individual. That's what that tape was all about. We didn't hear anything morbid on there. That was for later.

But it's clear on this tape that that man has a plan and his plan is he wants that car at all costs; that he's going to wait until dark; that he is going to have to get rid of her.

And he doesn't want a problem. Remember, he's got a right-hand wrist that he can use, but he's got a brace on because he had injured it recently and she's a willing, submissive female and he talks about tying her up so that he won't have a problem with it.

Dr. Docherty's report -- you know, this one really cracks me up, Judge. This is his story. He talks about tying her up. He talks about tying her up. He sat her on a blanket. She tried to give me a cross her husband gave her. I left. And I submit to Your Honor he didn't leave. This story defies rational thought. I went down a little bit thinking what if nobody finds her? He's concerned for Kathy Weinstein. I came back and she was hysterical, she's crying, and I said, I thought you weren't going to yell? And he goes on to say, I put my hand over her mouth.

That's absurd. He would want her to be crying. He would want her to be found out if, in fact, he was just tying

her up so he could get away in the car.

This business about, I just put my hand over her mouth. The Court has before it the two photographs, exhibits -- I don't recall the numbers -- I believe they're 4 and 5 -- in any event, Judge, you will recall at the sentencing (sic) -- and I sent you a copy or I marked a copy of the autopsy report and I had occasion to talk with Dr. Park this morning to confirm the written word. She was suffocated and she had an outside obstruction covering her mouth. I confirmed with him there was nothing inside of her body cavity that was obstructing and there was also, importantly, a right temporal contusion, a bruise, if you will, on her right forehead.

Now, her hands were bound and she was laying on her back with her hands over her head and when the body was recovered, her bra was showing and her midriff was exposed. The bra was on her body and her two sweaters and her jacket were covering her head in a lying-down position on the back.

Impressed on her chin was the same impression of that sweater which would come in contact if one were to pull up the outer sweater and also across her face was a deep impression matching the zipper of the outer jacket.

The contusion, according to Dr. Park, was either in the struggle of trying to get out of the smother-grip or from pressure being exerted by hands coming down to block off the

air passages.

I ask the Court consider that with regard to what type of individual we're talking about with regard to, are we talking about a sociopath or are we talking about a little 17-year-old kid who got in a position that he couldn't handle?

You know, I'd have more respect for this gentleman as a human being, Your Honor, if he would have said, hey, like, things got out of hand; I panicked; I didn't know what to do; I killed her.

You know, I can live with that. That's acceptable. As far as human behavior, totally wrong, totally illegal, but that's a rational thought that a young 17-year-old might do.

That's not what happened here. That's the shame about this whole case. That isn't what happened here. This was a contrived plan in this young man's mind.

And he's no fool --

THE COURT: Make it clear, however, that the sentence here must be based upon the factual basis dealing with felony murder, under the circumstances.

MR. CUNNINGHAM: But I submit to Your Honor that you have to consider all the circumstances.

THE COURT: I am considering all of the circumstances, but it would be inappropriate for me to sentence this defendant based upon knowingful and purposeful murder.

MR. CUNNINGHAM: I'm not asking that at all.

THE COURT: I just want the record to be clear.

MR. CUNNINGHAM: Not at all.

THE COURT: Go ahead. We're at the same page.

MR. CUNNINGHAM: Fine. Thank you.

In any event, after he leaves, he's so overcome by grief, this man who is traipsing through the mall, doesn't buy a thing, asked a couple of store clerks for bags, so overcome by grief and the words of Kathy Weinstein, that he hightails it back to the mall at 8:36 p.m. and pays $50 cash at Herman's World of Sporting Goods for a brand new pair of sneakers, Nike Way-Ups, black basketball sneakers.

And then to further compound his grief, all weekend -- he takes the next day off. This was a Thursday night this happened, Judge, March 14th. March 15th, school records show, he never showed up for school. And what a small world it is in Toms River. Guess what? One of his high school teachers sees him at 2:30 in the afternoon driving around town in a late model Toyota Camry. Overcome with grief, he decided to drive all over the locale in his brand, spanking new car that I'm sure he was very proud of, his new car that he had earned, the new car that everybody in town that he ran into over that weekend, hey, wow, what a nice car; how do you get that? He gave six stories to family, friends and eventually police as to how he had gotten that car,

different prices, different financing, his grandfather did it, his friends did it, he paid this, he paid that. Over the weekend he had the boys in the car. One of his friends, one of the statements -- just like a 17-year-old -- he goes, hey, man, nice car. Is it fast? And what was his response? What did he say? He didn't say anything, he showed me. He took me and my buddies out in the car and we drove around. We went fast. We were having fun.

And Sunday, further in his grief over the horrible situation that he had created, he took family members to the mall, out to the Freehold Mall.

Now, being the young unsophisticated 17-year-old that he is, he didn't know that eventually, as happens in human life, that dead bodies get found and that investigators start investigating. As a matter of fact, he was so unsophisticated, that he had the car parked right outside of his house, which happened to be on the way into the woods where they found the body. This car was found literally by the detectives driving out of the crime scene, driving down the street. Hey, there's one fits the description. They look at the plate. Bingo. Right outside, a mile away.

Counsel talks about how, in the juvenile shelter, this man was an honor student. I went to the shelter to see exactly what that meant, that award that he received of being student of the week. All that was was who stayed out of the

most trouble that particular week.

But I would mention to the Court that in looking at the individual who you are sentencing and considering, is this man who weeps before you the contrite, young, unknowing individual or is he the sociopathic, antisocial personality that Dr. Motley speaks of? This man is charged with a notorious murder. He's in the juvenile shelter. He's under the looking-glass where he and the Court are aware that they take notes. They have everything written down of what he's doing. This is a shopping list of the type of things that he was doing while he was in the shelter: Disrespectful to staff, verbally abusive, threatening staff, disrespectful, threatening resident, inciting disruptive behavior, thrown out of unit, fighting, contraband, had to be physically restrained on two occasions.

Counsel would say he's had adjustment problems in growing up. I guess so. This kid, if he had any control, was any type of a normal, decent person, would have been at church keeping his nose clean as clean can be, knowing he was coming up here at some point in time to deal with these charges.

Judge, Dr. Motley's report I think is very important because it gives you, as the sentencing judge, a little bit of insight or, I should say, a lot of insight with regard to what type of individual you are passing sentence on. I think it's so important as to what happened here and what type of person

we're talking about -- that's what we are into here -- and he speaks about the fact that there was no difference, in effect, when he's talking about, say, his family history or talking about what happened that night. He wasn't upset. He wasn't emotional. He didn't express any remorse, no remorse whatsoever. He didn't, upon reflection, have any concern or didn't express any guilt in stealing the vehicle.

As a matter of fact, that brings to mind another comment that he made that tells us a little bit about this kid who sits here and, I submit to the Court, is very manipulative, by the way, a very bright individual. When he was admitted into that unit over at the juvenile section, he tested at a 12.5 grade level on verbal and 11th grade -- this is a 10th grade kid -- 11th grade mathematic skills, 12.5 verbal.

But imagine what he had been through in the sense of carjacking, stealing a car, having a woman plead for her life, deciding long since before he ever met her she was going down, spending the whole time that weekend having a good time with family and friends with his new possession. And then Lieutenant Mark Woodfield goes into his house to talk to Mrs. Thomas and the defendant and asks him, how did you get that car that's sitting out front? And he tells the famous story about how he bought the car and Woodfield says to him, ma'am, sir, could you come down to the station, we got to talk about

this because we think this vehicle may have been used in a homicide. And what is his response? Think about this now, manipulative, this kid's instant response: Involved in a homicide? I want to sign a complaint. I want my money back.

That's his response. It's almost comical. This kid is a quick-thinker, unsophisticated, yes, but he's sharp. He's no fool. And he goes down and he talks to the police and he tells them this contrived involved story about how he bought the car and everything else. Manipulative, Judge. That's what he's doing here today.

Judge, I have about had it. I'm not going to go on. There's two family members that want to speak. I had planned on reading Mrs. Stanfield's letter, but Dr. Charles Stanfield is going to read that in a second. You read all these letters and they're heart-wrenching. I must say one thing about the Stanfield and Weinstein family: Their compassion, that half of them said they pray to God to try to forgive this kid for what he did. And God bless them for that. But the underlying theme of all this is that, we are going to miss her so and she was such a good woman, but where does it all come back to? It all comes back to little Danny, little Daniel, who isn't here and probably doesn't even understand what we are all doing today. Little Daniel, six years old when this happened, he's not a lot younger than this man, 11 years, and some day little Daniel is going to be a big Daniel. He's going to be 36 years

old and what you do this morning is going to determine how he feels about the justice system back when he was a 7-year-old kid.

I submit to you, Judge, the right thing to do here -- they beg for forgiveness, I beg for justice. That's what I beg for. Give this man what he deserves. Think about what he gave Kathy Weinstein, how he thought about it for such a long period of time, calculated with the duct tape. From the minute he left there, he knew what he was doing. He might be a kid, but he's a very guilty kid. I submit to you he deserves a life sentence and that kid, when he's 36 years old, deserves to know that that man got a life sentence for taking his mother away, for when he learns to ride a bike and he's got no mother around.

THE COURT: All right, sir. Thank you.

MR. CUNNINGHAM: Thank you, Judge.

I call on Dr. Charles Stanfield who would like to speak and also call on Paul Weinstein, who is the husband of the victim.

MR. STANFIELD: My name is Charles Stanfield. I am Kathy's brother. I'd like to read a letter on behalf of my mother that she wrote.

Dear Judge Giovine: Thank you for taking the time to read my letter regarding the sentencing of Michael LaSane for the murder of my daughter Kathleen Stanfield Weinstein.

So many lives will never be the same again. We have all lost a beautiful, caring young woman and a wife, a mother, a daughter, a sister, an aunt, a niece, a granddaughter, a teacher, a friend, a compassionate, caring human being. There is a terrible void left in all of our lives and the world. One random act of violence has caused so many heartache and sorrow.

I have forgiven Michael LaSane as the Lord forgives us. I do believe he needs to be off the streets for a long, long time so he can never again have such disregard for human life. My mother's heart feels for his mother. How could anyone kill another person?

I know you listened to Kathy's tape. How brave and compassion she was. How hard she tried to save Michael's young life. She counseled him. She warned him of the danger and told him the trouble he was going to get himself into. She offered some solutions: Take the car, but not my life. He didn't listen.

Kathy knew Michael was going to kill her. She put her trust in the Lord. I know her life was not in vain. She was a very brave, compassionate and smart lady. She caught her own killer by her foresight.

We all miss her so terribly. We had no time to say goodbye. Kathy's father died in August, just five months after Kathy's murder. Depression, sorrow could not be dealt

THE COURT: Address your comments to me, sir.

MR. WEINSTEIN: Killing my wife and stealing her nice, new, shiny, gold Toyota just for you, just for your 17th birthday, killing her and driving around for four days with all your buddies having a blast in her nice, shiny, Toyota Camry, was it worth it?

My son wants to know why you just didn't take the car and leave his mommy in the woods? He said his mommy would have called his dad to come and pick her up.

Can't look up?

MR. DANIELS: I would object, Your Honor.

THE COURT: All right.

MR. WEINSTEIN: He wanted me to tell you that he wished you could trade places with his mom and he said that would be impossible because his mom is up there and he said you won't go up there, you would go down there.

Can't look up?

Just five months after you murdered my wife, my son's grandfather died of cancer. I think he died of a broken heart.

Two months after that, my son's great-grandmother died. She was old, but she, too had a broken heart.

What you have done to our family by killing my wife and my father-in-law and my wife's grandmother is unforgivable. We will do everything in our power to make sure

you never get out of jail. I'm sure you're real sorry, sorry that you got caught, and I'm sure you're in a big hurry to get back to jail. It's a great place to spend the rest of your life. And I'll see you in 30 years at the parole hearing.

And my son does understand what you did.

THE COURT: Thank you very much, sir.

MR. CUNNINGHAM: Thank you very much. That's all I have.

THE COURT: Mr. Daniels, anything else?

MR. DANIELS: Your Honor, to the extent that the State is asking this Court to sentence Michael to knowing and purposeful murder with regard to --

MR. CUNNINGHAM: No, I'm not.

MR. DANIELS: -- with regard to setting out with duct tape and a hammer to kill her, I would object. He's pled guilty to felony murder and to the extent they're asking this Court to consider that this was a knowing purposeful murder, I would object.

THE COURT: I want to make it clear that the defendant will be sentenced based upon the crime he's pled guilty to and the factual basis that he's laid, but this Court will not ignore other facts that have been brought to its attention, particularly, when they have come out of the mouth of the defendant to the doctors that examined him with regard to the prior hearing that was contemplated in this matter.

I want to make it clear, obviously, that I appreciate all of the comments that have been made by everyone. I am not going to say anything more about the letters that the family have directed to the Court other than to say, as Mr. Daniels has so eloquently said, that I have read thousands of letters over the 12 or so years that I have been sitting here as a Superior Court judge and I think that these letters are singular from the viewpoint of touching the person who was killed here and touching the Court from the viewpoint of what its obligations are and what its considerations are in a matter such as this.

I wish to acknowledge as well, however, the concern of Michael LaSane's mother and the correspondence that has been directed to me on his behalf.

The presentence report has already been corrected in appropriate places. The letters that I received have been from her husband, her sisters, her brothers, in-laws, nephews, nieces, friends, neighbors, teachers, students and another letter was just handed to me by my legal secretary in the course of this hearing and it is obvious, not to denigrate the senseless murder of others, that the life of someone very special has been snuffed out here.

For the record, I wish to acknowledge that I have listened to the entire tape which has been referred to. I neglected to mark it, Mr. Cunningham, before I return it to

you and I'll mark it after these proceedings. I believe it would be S-5.

MR. CUNNINGHAM: S-6.

THE COURT: S-6. I thought it was 5, but I'll mark it accordingly so that it becomes part of the record. I'm going to return it to you, as I have already, so that it's not available to anyone else but your office and in the event of an appeal, you would provide it.

I have also read the transcript of the conversation. I should make a finding, and I do, that the transcript was an accurate representation of what was said between Mrs. Weinstein and Michael LaSane. The conversation lasted some 40 to 45 minutes and I'm satisfied that it's accurate.

I want to make it clear as well that I have considered the four reports that were prepared in contemplation of the so-called waiver hearing in this matter and I preliminarily consider them not so much for any conclusions reached by the doctor as to the mental state or a diagnosis of a mental condition, I have considered them based upon what is set forth therein as to conversations that have been had between the doctor and the defendant in each of those cases. For the record, I want to refer to them. This would be the examination or the evaluation done by, first of all, by Dr. Docherty and that's dated September 11, 1996; the evaluation done by Karen D. Wells which bears a date of report

of 10/28/96; the report of Dr. Alvin Krass -- with a K -- dated December 2nd, 1996; and the report of Dr. Motley dated December 30, 1996.

I indicated at at least one point in the proceeding -- I believe two -- that the defendant is required, and properly so, to be sentenced based upon the crime that he has pleaded guilty to. It would be totally inappropriate for the State to lay a factual basis during a preproceeding to an offense that might be regarded as not as serious, not as culpable, if you will, as another type of offense and then ask the Court to sentence based upon the offense that was not pled guilty to. That's rudimentary and everybody realizes that and the Court doesn't intend to sentence the defendant on anything other than the felony murder. But it's clear, in light of the fact that the felonies merge into the felony murder count itself, it's clear that the Court is entitled to consider the facts that surround the felonies themselves in making a proper determination as to what would be an appropriate sentence for this defendant.

I'll say at the outset -- customarily, I should say it at the end, but I happen to be looking at the list of mitigating factors -- that I find no mitigating factors existing in this case. I can list them (1) through (13), but I have gone through them, I have considered them carefully, and I don't find any mitigating factors to consider here.

It should be noted that the finding of mitigating factors is optional, really on the part of the Court in the sense that it's not mandatory, but certainly my custom is, in fairness to any defendant sentenced before me, is that the mitigating factor, if found to exist by the Court, should be properly listed, weighed and considered. In this particular instance, the only one that I really had circled was that the defendant had no history of prior delinquency, but that's not the case; he did have a history of prior delinquency.

By the same token, I'm not going to list (6) on the aggravating side, that the defendant had a prior criminal record, because that's not the case.

So I'm not going to list either, and I think that's appropriate in some cases and this happens to be one of those. It's really basically not in the case, so far as this Court is concerned.

By far, the weightiest factor in this case is aggravating factor number (1) dealing with the nature and circumstances of this offense, that is, the facts of the case, and I point out now, and I will probably point it out when I'm through discussing this factor, that what I'm referring to, with regard to this particular factor, particularly with regard to the underlying felonies and the seriousness of those offenses has really nothing to do with who this defendant is or with whom the victim was in this particular case.

I want to make that clear because very often I think it's mistaken. In this particular case, when I'm listing these factors, the first aspect of it, I should say, it's clear that what I would say, it would seem to me, would apply no matter who the victim was and no matter who the defendant was and that is, first of all, that while the defendant pled guilty to felony murder, I note that there are two predicate crimes that were involved here, one as serious as the other. These two crimes are kidnapping and carjacking.

Now, it is to be noted that these are both crimes of the first degree; they are not crimes of the third degree. He could be standing here to be sentenced as a result of a felony murder arising out of a conviction of a burglary where no violence was involved, no robbery was involved, no taking was involved, no terror was involved, no fear was involved. But that is not the case here. It has nothing to do with him, it has nothing to do with the unfortunate victim in this case. Those are both first degree crimes. And I go a step further and say they are first degree crimes that the Legislature, who speaks for the people of this State, have graded by way of penalty above, in each case, what would normally be the crimes -- the penalties for crimes of the first degree. Crimes of the first degree are customarily punished by between 10 to 20 years in each of these cases -- and the carjacking statute is relatively new and I think it answers an outcry on behalf of

the public with regard to deterring this type of behavior -- and in each of these cases, the Legislature says, they're crimes of the first degree, all right, but we are going to give them a special penalty; 20 years won't do it.

Forget that there is a death for a moment, if you will, involved here. If he was found guilty just of these two crimes, he'd be looking at an outside 60 years, 10 to 30 years with regard to each of these two matters. And the Legislature goes one step further and says that any judge that imposes a sentence with regard to a carjacking must impose a five year period of no parole with regard to that, irrespective of who the defendant is again and who the victim might be in a particular case.

So this is the first factor which gives added weight to aggravating factor number (1) and I do say that this is the most important factor which gives weight to factor number (1) and that these particular crimes that are involved here, there are facts that deal with those as well which I'll get to in a moment.

It's difficult, quite frankly, for me as a judge, and probably difficult for those of you who are here in the courtroom, to weigh and ascribe, under the facts of this case, which is the more terrifying crime, the carjacking or the kidnapping?

Now we look at the facts of this particular case,

having said what I said with regard to the offenses that are involved here irrespective of the facts.

The hands and feet of the victim in this case were bound with duct tape. This could only contribute to the feeling of capture, helplessness and terror that the victim experienced shortly before her death in this case; it contributed to the psychological trauma inflicted upon the victim, and I am prepared to list that as factor number (2), but only to that extent dealing with the underlying felony murder, not with regard to harm done to the victim, but the psychological harm that's suffered by this victim in the course of these underlying felonies. It would be foolhardy, inappropriate, incorrect for this Court to ignore the facts that underlie those felonies which are part and parcel of the murder which occurred in the course of that felony.

Number three, the defendant took this duct tape with him when he left his home, from which it can be inferred that this was no last-minute act on the part of the defendant. I haven't heard any other explanation as to why one would use duct tape; rather, that it was, in effect, contemplated and premeditated carjacking where he intended or expected perhaps to take a victim under the circumstances.

And again I want to make it clear, referring to the facts of the underlying felonies, in the opinion of this Court, is totally appropriate, these matters being part and

parcel by way of an element of the offense. Had he pled guilty to the felony, it would have merged with the sentence in the felony murder, at any rate, thus being my reasoning.

Looking at and quoting now from Dr. Motley's report dated December 30, 1996, fourth paragraph, second page: "He had duct tape with him. He told her that he had to leave her there because he could not take her out on the road and let her go. I asked why he would not do that. He said because he thought she would go and call the police."

While I have got his report in my hand, he characterizes the defendant by saying he's got a spontaneous ability to concoct that is -- a lie that is remarkable and it should be at least referred to when we talk about how much one is -- how deeply one feels, having taken the life of another. There are those, quite frankly, that break down -- and I'm not faulting anybody, I'm merely stating a fact -- there are those that break down and say, I'm sorry I did what I did, so on and so forth.

Dr. Motley notes he's reviewed every statement that was given with regard to this matter. He notes the following: (1) He told -- speaking of the defendant now -- he told Sherrod Sills that his grandfather was going to help him get the car;

(b) He told Charles Hester that the car cost $15,000, but he paid $3,000 for it, his girlfriend helped him

finance it;

(3) He told Hester that he bought the car in Freehold for $16,000 and his grandfather helped him;

(d) He told Shirley Ginz that he purchased the car from the manager of a car dealership and owed an additional $1,500;

He told Erin Bigley that the money for the car came from a lawsuit against Berkeley Township Police Department and he told Amber Smith the same story;

(g) He told Everett Smith that the car was his aunt's.

Had he lied to the detective about knowing where Palumbo's Restaurant was?

The doctor notes and it's clearly on the audio tape of the cassette recorder which Mrs. Weinstein had in her possession, Michael very deliberately discussed his destruction of Mrs. Weinstein, including his fears she would identify him. That's more implicit in the tape than anything where he doesn't say things in answer to her questions and her observations.

The doctor notes -- this is the doctor's characterization on this tape -- without any emotion, he calmly discussed with her the terms and conditions of the lease -- that is the lease of a car -- and the location of the title to the car.

There is no question that he understood what he was doing.

I should say that, forget Dr. Motley's report, because it may be argued he was a State's examiner, but I'm sure nobody will deny those statements were made with regard to the duct tape to the doctor, but listen, if you will, to the statement that was made to his own evaluator, citing from the bottom of page 3: "We talked about taking stolen cars to Philadelphia. He said he made plans to get cars off the lot in Lakewood, but he never did it. He said that he had duct tape in his room. He got the duct tape and a hammer and put it in his bag. He said -- quote -- I went out. I was going to steal a car. I didn't want my brother to think I was a coward. He was on this man thing. He was always -- he has always talked to me about being a man."

So I'm going to consider the fact that he took the tape with him. This wasn't something he happened to have in the car and used as a last-minute act.

The fourth aspect of the first aggravating factor is that in taking into consideration in sentencing the defendant, based upon his factual basis, that this was in several senses a totally avoidable death. There are deaths that occur in felony murders, and I have sentenced people for them, somebody reacts, the defendant reacts, he shoots and, so forth, so on. This is not what happened here.

First I say that the victim did not resist in any way. The tape makes that very clear. It cannot be said that the defendant -- quote -- reacted -- end quote -- to any action or actions on the part of this victim which was threatening his domination or his role as the dominator in this unfortunate chain of events. He could have put the duct tape on her mouth if she presented a threat with regard to other people hearing. He had taped her hands, he had taped her ankles. Why not tape her mouth?

Second, the victim spent almost an hour on the tape that I listened to -- and I'm sure much unrecorded -- appealing to the defendant in a very real and logical way to call the whole thing off and let her go and I would cite part of the tape after part of the tape after part of the tape and it's obvious from the letters -- I read every letter and every word -- that the family has heard it and there is no sense putting you through that again and all those concerned in these proceedings have heard it as well.

Again, she made requests to him -- for lack of a better phrase -- appeals to him to call the whole thing off and advice that nothing would happen to him. She'll let him go. I won't tell anybody. I'll drop you off so you can do something else, so on, so forth. Yet, he says no to all of this.

So there was an out. This didn't have to happen, in

that sense. She talked to him so calmly and for such a long period of time, that she was addressing him by his first name. That may have been to drop clues, as Mr. Cunningham suggests. I think she was really talking to him as one person to another. For what it's worth, I really believe that, and it's gratuitous and perhaps unnecessary to these proceedings, but I don't believe she felt he was capable of doing this. By God, had she done that, she could have jumped out of the car. There were ways -- she was familiar with the area. There were ways she could have gotten the attention of others. I think she really thought she could save him and have him do the right thing and, obviously, that isn't what occurred here.

It's ironic and sad that a woman known for her Random Acts of Kindness program should have her life snuffed out by a random act of violence that was committed by the very type of young student that she devoted her life to helping. Life is unbelievable sometimes, but that's the way it came down here.

While the defendant admitted at the time of the plea -- and that's what he is being sentenced here based upon that factual basis -- that the victim was reacting as a result of him putting his hand over her mouth, it is difficult to believe that he didn't know that he was causing her death at the time. I am entitled to draw that conclusion, but I have got to accept what he says for the purpose of the plea. This

is true particularly if one views the autopsy, particularly the face and the neck areas showing where the zipper and the sweater made indentation marks along the face which could may well be interpreted as showing that the victim's sweater and coat were pulled up over her head to smother her with the pressure of the defendant's hand or hands, but he denied that on the stand and I'm prepared to accept it.

So I give this factor very substantial weight -- and underline the words very substantial. I list it with regard to the underlying felonies, not with regard to the felony murder itself, the psychological harm that was done in the course of these crimes.

With regard to aggravating factor number (3), the risk that the defendant would commit another crime, it's a difficult determination. I do think, Mr. Daniels, your comments are appropriate in the sense that -- and I'm not going to get into the psychology of it -- who am I to prognosticate if and when 30 plus years from now he would commit another offense? The prosecutor points out that his behavior, between the time of the plea and the time of the sentence, was far from exemplary under the circumstances, but that factor, even if listed, would be given very, very little weight.

I have already indicated the factor number (6) is out.

Factor number (9) -- and defense concedes it's in the case -- the need to deter this defendant and others from violating the law and I want to indicate here that customarily this factor is not one which I give a great deal of weight to because it's certainly arguable by counsel that the penalty ascribed in a particular case takes into consideration the Legislature's conclusion that the deterrence is what will deter, 30 years, 20 years, so forth, so on. True, there is still latitude here on the part of the Court: Thirty years in State's Prison with 30 years no parole up to life, 50 years, 60 years, 70 years, so forth, so on.

So there is latitude here and looking at the factor number (1), the issue is, would it be appropriate, listing no mitigating factors in the case, would it be appropriate to sentence the defendant to the flat 30 years? This Court has concluded that that would be inappropriate under the circumstances. The only basis, it would seem to me, that that could be argued is that because of his age under the circumstances, but we have got to keep in mind that he appears now before this Court for sentencing as an adult and I am entitled to consider his age, but I'm not -- it would be, in effect, an aberration of my duty as a judge and an aberration of my duty to list all of these aggravating factors, merely to say, well, he was young at the time. It's not even, basically, a place for that under the circumstances. I'm

considering that, but I'm also considering the facts of the case and the nature of these underlying crimes.

Certainly, there is a need to deter him -- counsel acknowledges that -- but I think especially in this case there is a need to deter others with regard to these types of crimes. This is the more important aspect, the facet of that need to deter, the Court's needs and society's need to deter others from violating the law.

The carjacking statute, it's to be noted, if I didn't note it already -- and I may have -- is a statute of relatively recent vintage and the Legislature and the people have spoken in this regard.

So I'm going to give that considerable weight under the circumstances.

I'm going to list number (13) as well -- and counsel concedes -- with regard to the stolen vehicle again, not obviously as part of the carjacking, but it would apply as to the underlying felony of kidnapping and this would not be a double counting, in the opinion of this Court, but because I put so much stress with regard to aggravating factor number (1) as to the underlying felonies being kidnapping and carjacking, here I'm going to give relatively light weight to this factor here.

I should indicate to you that having made a determination that 30 years flat over a 30-year period of

parole ineligibility would be an inappropriate sentence, I made inquiries of the State Parole Board and their counsel advises me, with regard to my inquiry as to imposing a term of years as opposed to life in prison, that there is really basically no effect with regard to parole eligibility in that regard. I haven't researched this. That's a matter for the executive. I certainly am entitled to rely upon -- because I took the trouble and time to do it -- since he's extremely qualified, in my opinion, to rely upon the opinion given to me. So that being the case, I am not going to get involved with a specific term of years and saying 50 or 60 is parole will be considered. That would be irrelevant, as far as the Parole Board is concerned, whether I impose life or impose 70 years or 80 years under the circumstances.

That having been said and having weighted the factors as I have, the sentence of the Court in this case then is to impose a sentence of life in prison against this defendant -- upon this defendant with no parole for 30 years, as required by the statute, for the reasons that I have stated.

With regard to -- let me just, if I can, review my notes for a moment.

I just want to parenthetically say very rarely have I been struck with the eloquence that I have in this particular case by both sides, and Mr. Daniels particularly.

You have spoken so ably on behalf of your client and, having said that to you, I say to the State in this case that the prosecution is to be credited with securing a plea in this case, allowing the Court the latitude that it did in this particular case, without putting the family through the psychological trauma of trying this case, a case which, if tried, rarely goes away. There are appeals and appeals and appeals and we could have come back, had it gone to trial, and maybe trying it three years again from now. So I hope this matter now comes to closure. I can never erase what's occurred here. The defendant acknowledges that, his attorney acknowledges that, the family knows that, the State realizes that, the Court has considered that. But at least for now let the matter be at an end.

The purpose of this statement is to inform the public of the actual period of time that this defendant is likely to spend in jail or prison as a result of this sentence. That actual period of jail or prison time is not determined by me, but by the State of New Jersey as applied to the sentence by the State Parole Board. In this case that period of estimated actual custody would be at least 30 years, and this being according to the period of parole ineligibility imposed by the Court. Furthermore, if at defendant's parole eligibility date the Parole Board determines there is a substantial likelihood defendant will commit a crime if

released, parole will be denied at that time.

Defendant should not rely at all on this estimate, and in particular, cannot rely on it on appeal. It is intended solely to inform the public.

The Court hereby imposes a Violent Crime penalty in this matter. I'm not going to impose the minimum in light of his jail time. I'm going to impose a Violent Crime penalty of $5,000 under the circumstances. This money, it will be stated in the Judgment of Conviction, part of it will be paid out, to the statute limit allowed by law, of any money that's earned by this defendant while he's in prison.

There is a $75 Safe Neighborhood Act assessment to be made as well.

No bail is posted in this matter, so there is no bail to be discharged.

The credit for time served in this case is 347 days.

All right. Is there anything else to come before me at this time?

MR. CUNNINGHAM: Judge, I stand corrected. If you want to mark the copy of the statement, it would be S-5.

THE COURT: Let me have that, if you will.

The juvenile charges, Counts One, Two, Four and Five set forth in FJ15-2863-96-5 are hereby dismissed.

Let the record reflect I'm marking the tape S-5 with today's date, the 28th.

All right, Prosecutor.

MR. DANIELS: If I may, Your Honor, I'm returning the copies of the tape that were supplied to me during discovery to the State.

THE COURT: Thank you, gentlemen.

Anything else to come before me at this time?

MR. CUNNINGHAM: Did we dismiss the juvenile complaint?

THE COURT: Yes.

MR. CUNNINGHAM: I have nothing further, Your Honor. Thank you.

THE COURT: We stand in recess. Thank you very much everyone.

(Recess.)

CERTIFICATION

I, CAROLINE WOLGAST, C.S.R., License Number XI00316, 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.

Caroline Wolgast

CAROLINE WOLGAST, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey

Dated: June 19, 1997

DMA BIF 10/26

A-5079-97T4

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY - LAW DIVISION
CRIMINAL PART
ACCUSATION NO. 97-01-00076
A.D.# - A-005079-97T4

STATE OF NEW JERSEY)
-v-)
MICHAEL LA SANE,)
Defendant.)

FILED
APPELLATE DIVISION
JUN 22 2000
Clerk

TRANSCRIPT
OF
MOTION

Place: Ocean County Courthouse
118 Washington Street
Toms River, New Jersey

Date: March 24, 2000

REC'D
APPELLATE DIVISION
JUN 22 2000
Clerk

B E F O R E:

HONORABLE EDWARD J. TURNBACH, J.S.C.

TRANSCRIPT ORDERED BY: Deborah C. Collins
(Office of the Public Defender)

A P P E A R A N C E S:

ROBERT J. ARMSTRONG, ESQ.,
Assistant County Prosecutor,
Attorney for the State.

KEVIN E. YOUNG, ESQ.,
Assistant Deputy Public Defender,
Attorney for the Defendant.

GAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter
118 Washington Street
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Toms River, NJ 08753

THE COURT: Michael LaSane.

THE DEFENDANT: Yes, your Honor. Just to start off, I'd like to say that my attorney isn't present, and--

MR. YOUNG: I am here. I'm here, Mr. LaSane. I'm all ready.

THE DEFENDANT: Oh.

MR. YOUNG: We have spoken on video conference, and probably distorts how we look, 'cause I can tell your Honor he doesn't look the same on the video conference.

THE DEFENDANT: Okay, I didn't--

THE COURT: You didn't recognize Mr. Young?

THE DEFENDANT: No, I didn't recognize him. Sorry, your Honor.

MR. YOUNG: I think it makes us look thinner.

THE COURT: We're waiting for Mr. Cunningham. Or are you handling this, Mr. Armstrong?

MR. ARMSTRONG: It's my understanding from your law clerk that we were going to conference the matter today.

MR. YOUNG: If your Honor wants to conference, I have no problem with that at all.

THE COURT: I'd be happy to conference the matter if it's going to be meaningful; but if the

conference is going to mean that I'm going to go in there and listen to legal argument from you, Counsel, and you, Mr. Armstrong, and that means that I have to listen to the legal argument twice, I'd rather do it just once on the record and be done with it.

I am prepared to hear the motion.

MR. YOUNG: Fine, Judge. We're ready to go.

THE COURT: I'm listening.

MR. YOUNG: Thank you, Judge. Let me just say procedurally Mr. LaSane prepared a very thorough and well-researched -- and appears to me cites the accurate, correct law, with regard to the request that he's seeking. He did that and filed this petition back in July of '99.

And I thank the Court and its staff for allowing me the opportunity to have several adjournments of some length so that I could meet with his family, talk to him via video conference, which we have done several times, to try to frame the issues and determine not only does he want to proceed with it, but what issues are we going to proceed with, and to do a little investigation into some of the allegations that are contained in the petition.

We have done all that. And at some point, Mr. LaSane indicated to me, and I relayed this to the

Court, that he wished to have his motion withdrawn. Subsequent to that, I was contacted, and he had a change of heart and elected to proceed. And that's why we are here today, months after the initial filing of the petition.

I just wanted to establish the procedural history for the record. The Court is, I'm sure, well-aware.

Substantively, Judge, the allegation -- and, of course, as the Court is aware, he pled guilty, received a sentence of life over thirty years. It was not a trial. It was plea of guilty.

And the allegation is, and what he wants the Court to consider here today is his petition and the attachments thereto, and the contention that Mr. LaSane has made that at the time of his plea, that he felt pressured and coerced by the -- by his attorney and by his mother.

And he was sixteen at the time of the offense. At the time of the plea, he was seventeen or eighteen. He was still a young man. And his position is that he relied, obviously, as anybody would do, young man or otherwise, heavily on the advice of counsel.

Based on that, upon that reliance on counsel,

he pleaded guilty. But he feels, based upon the allegations contained in the petition and in retrospect, that that advice was erroneous and was not in his best interest.

And he feels that the pressure that was brought to bear on him was the result of a relationship that his attorney had with his mother. And she has filed an affidavit, attached that to his petition.

Now, I am simply indicating to the Court this: That information is contained in a petition filed by Mr. LaSane; and it's his position, based upon that on its face, that he should be -- would not have pled guilty if he would not -- had not received that unfair, undue influence and pressure from both his mom, who is here today in the courtroom, and his counsel-of-record at the time.

I was not counsel-of-record. I don't know what went on in terms of investigation or preparation of the case.

But Mr. LaSane, after looking back on the entire case and having received his sentence and had an opportunity to look back on the whole process, feels that based upon the relationship with his attorney, and the relationship that existed between his mother, as he alleged, and his trial counsel, that there was undue

and inappropriate influence exerted on him to enter a plea of guilty.

Now, that is his contention. What relief he is asking the Court here today is to consider allowing him to vacate his plea, proceed to trial. It's his position that this influence rises and arose to the level of ineffective assistance of counsel; that he would, in fact, had that relationship not existed, that pressure not existed, would have elected to proceed to trial.

That's his contention here at this time. He would like your Honor to consider vacating his plea of guilty, allowing him to have new counsel assigned, weigh the evidence against him anew, and make an election whether to proceed to trial or to work out another agreement.

I am not taking the position on whether what was done below was a good deal, a bad deal or otherwise. I am simply indicating to the Court why he wants -- what the relief that he seeks is, and that it's to vacate the prior plea of guilty; and whatever happens with the case will be the decision he makes then.

THE COURT: Well, Mr. Young, let's assume for the purposes of this argument and presentation that I

were to find that the first prong of Strickland has been met. And I am not agreeing necessarily that that's my finding.

Let's assume for the purposes of this argument that the first prong of Strickland has been met, because it certainly is not illogical to make that inference if one were to follow Mr. LaSane's thinking to the nth degree, if I assume that he was so influenced because of that factor as it's set forth.

How do we even approach, given this plea and the thorough nature by which our presiding judge, Judge Giovine, went through not only the informed, consensual and voluntary aspects of the plea, and the wide-open sentencing parameters in the discretion of the sentencing judge, who was going to be Judge Giovine--

MR. YOUNG: That's right.

THE COURT: And I have read this transcript several times, and again this morning, at seven a.m., I was in my chambers reviewing it again in preparation for this argument and the factual basis that's laid here.

How do we even approach accomplishing the second prong? Putting aside whether or not it's in Mr. LaSane's best interest or not in his best interest, okay -- and I'm the one who likes to say very often you

have to be careful what you wish for.

And I don't think I even have to get to part of the argument, because when we look at -- and I asked you to address this particular issue, Mr. Young, 'cause you said you're not getting involved, and he wants new counsel, and maybe renegotiate a deal and look at the thing again, and so on, and you, as his attorney in this motion, are not going to address the issues as to whether it was a good deal or a bad deal.

But that's being rather naive and trying to look at this case with blinders, because the second prong of the standard that I am required by State vs. Fritz, as has been adopted by our Court, to consider as a matter of law and as a matter of fact, is that there has to be a substantial likelihood that the outcome would be different.

MR. YOUNG: Right. Right. And I don't think in any way that I am naive about the aspect of what could happen, for example, if he were successful. In fact, we have addressed that, and you know and I know what the Court has advised people in terms of don't, you know, that what you wish for, and, you know, may come true.

We have talked about that. But he will be facing, if this motion is granted, a wide-open

sentencing and perhaps more time than he received.

But it's his position that at the time of the plea, based upon the relationship that we already talked about assuming to be true for purposes of this argument, that the factual basis he provided was not voluntary and that, in fact, if this Court vacates the plea and allows him to go back, he doesn't care what the possibilities are, whether they're the same, worse or otherwise.

And I have made that very clear to him, that that's -- if you're successful, are you sure that that's exactly what you want? You want to be successful in this motion and then face the possibility of perhaps even more time?

And he understands that. He said: No, that's why I want to proceed. And that's why I took care, by the way, to indicate to your Honor that we spent time talking about this.

THE COURT: Yeah, but you haven't addressed my question.

MR. YOUNG: Right.

THE COURT: I understand he wants to proceed. I understand he now says: Damn the torpedoes, full speed ahead, regardless of whether or not I can get two life terms, three life terms, a hundred years more than

I've already got, consecutive to one another. Three separate and distinct first-degree crimes, run consecutive to one another. Despite that exposure, I want to proceed.

But that's not the test. That's not the law. Just because he wants a do-over is not the law. He has a burden of proving to me, by a preponderance of the evidence, that there is a substantial likelihood that the outcome would be different.

MR. YOUNG: And let me say this preliminarily. It's certainly much more difficult when you have a plea of guilty as opposed to a trial, where you can pore over transcripts and look at trial strategy, make a determination that perhaps the strategy was ill-advised, maybe even ineffecti e.

We have a plea here. I have acknowledged that from the beginning. That makes our task, I think, even more difficult. But what he has said and what he believes firmly, and he has no -- we have no witnesses to line up here in terms of new evidence. We don't want to try his case here at this hearing.

But he is confident that if he's allowed to have a trial, this Court vacates it, that even it is-- in fact, he would be proven innocent. That's what he's asserted to me. And he has indicated to me in prior

video conferences that if this issue arises, he can present to the Court what he thinks and why he thinks it would be different.

THE COURT: Well, now's the time, Counsel, because as I sit here today, and I have reviewed these pleadings, and I have listened to your argument, and I have reviewed the limited records that I have in this matter, and the limited knowledge I know about this case, based upon the record, there isn't a scintilla of suggestion, let alone evidence, that would lead me to conclude that he's even met one hundredth of a burden to convince me by a preponderance of the evidence that there is a substantial likelihood of a differing outcome.

MR. YOUNG: Judge, on that, then, I would, as I have indicated to Mr. LaSane on earlier occasions, I'd allow him to address that, with the Court's permission.

THE COURT: Mr. LaSane.

THE DEFENDANT: Yes, sir. Thank you, your Honor. I would just like to add to the record and ask for the Court's consideration, that the Court take into consideration the totality of the circumstances.

And when I say the totality of the circumstances, I mean the circumstances that lie within

the brief that was submitted and also outside the brief, which I will present right now.

Prisoners awaiting pretrial, and post-trial prisoners, have a right to access to the courts. Unfortunately, given the totality of the circumstances at my time of arrest, which I was a juvenile, I was not given the full extent or the opportunity to exercise my rights to full access to the courts.

By that I mean, my attorney was my sole access to the court, through my attorney and my family. So for the Court to say that it doesn't see grounds to preponder (sic) that, given that the circumstances are legitimate, I would not have pled guilty, the Court would also have to consider the fact that given -- or just for a minute, taking into consideration, or just for argument's sake, that counsel's assistance was ineffective, that would leave myself at a point where I would have no legitimate access to the court or resources to understand my rights as such.

Therefore, I will say that, um, the Court -- I would just ask that the Court consider the totality. I believe that the brief does meet the requirements of Strickland, of Fritz, of Cuyler and of U.S. vs. Tatum.

In regards to the minutes, the sentence and plea minutes, Judge Giovine, yes, he did accept the

factual basis. Yes, there was a factual basis given. But as sentencing -- at sentencing, Judge Giovine again questioned the facts of the case, the factual basis that was given at time of plea.

Needless to say that I do contend that the factual basis is not legitimate and was a consequence of the plea and is therefore --

THE COURT: When I say, Mr. LaSane, that there has to be a showing by a preponderance of the evidence that there is a substantial likelihood of the outcome, I say that in the context that absent the factual basis, separate and apart, you have a showing -- and let's assume that I disregard the factual basis.

You still have an obligation to show by a preponderance and convince me by a preponderance of the evidence that, absent your discussion on the record with Judge Giovine, with regard to the factual basis of this incident, that there would be a substantial likelihood in a difference in the outcome if you went to trial.

And that's what's lacking here. If I assume, and I have assumed for the purposes of this discussion on the record, that the first prong of the Strickland test has been met, that counsel was ineffective, now

you've got the burden to convince me -- and that's what Mr. Young has set down for you and asked you to supplement here, and you haven't addressed it yet, sir.

You have to show me, if you went to trial, how would the outcome be different, less severe, than the conviction for felony murder?

THE DEFENDANT: Well--

THE COURT: Recognizing that when you go -- if I were to, if I were to allow you to unwrap this plea bargain, and grant your application here today, that you would be facing a multiple-count indictment involving kidnapping, a crime of the first degree; carjacking, a crime of the first degree; robbery, a crime of the first degree; and knowing and purposeful murder, a crime of the first degree; not one count, but at least those four counts and, more than likely, several other counts that I can't think of right now, if the matter was presented to the grand jury by the prosecutor's office.

Given those factors, you have the burden here, sir, in this application, to convince me by a preponderance of the evidence that there is a substantial, not just some possibility, mere possibility of a different outcome, but a substantial likelihood that the result, the outcome, would be

different.

Now, I recognize as a young man you stand here before this Court facing 26 more years before you are eligible for parole, and you have been sentenced to life in prison, serve thirty. You still have not shown me any evidence that there would be a different outcome, based on the facts as this Court knows them.

Now is your chance to show me. Show me some evidence, other than the fact that what's contained in your brief, and I'm not going to get into the details of those certifications that are attached to that, because that deals with the first prong of the test.

MR. YOUNG: Judge, one thing he pointed out in his brief, and I am not certain the Court has addressed this, is that if there is a claim of a conflict of interest, of some ineffective assistance, and based upon conflict, that second prong is not applicable under where it would be ordinarily.

In fact, what he's saying here, and I think there's obviously other investigation that he could bring to this Court's attention if the Court granted him a full hearing, but what he's saying is, based upon the allegation of this conflict, that he doesn't have to meet this or demonstrate that the outcome would be different.

What he can demonstrate is that -- that the outcome would be different, essentially, he would not have pled guilty.

THE DEFENDANT: Your Honor, I would just also like to say that within the factual basis, on the basis that you just said, regarding the standard, there was no indictment, there was no grand jury testimony, there was--

THE COURT: I recognize there wasn't. There was a plea to an accusation, based upon the deal. I understand that.

THE DEFENDANT: So--

THE COURT: But if I were able to, if I were to grant your application, there would be an indictment.

THE DEFENDANT: Absolutely.

THE COURT: Okay. You understand that?

THE DEFENDANT: At this point, there is no factual basis. There are no minutes. There's just a factual basis that was presented at the time of plea.

THE COURT: I know that.

THE DEFENDANT: And that, like, as I stated before, it was brought into question by the sentencing judge, Judge Giovine. And I'm standing before the Court right now saying that that factual basis is

invalid, due to the involuntary nature of the plea.

THE COURT: Anything else you want to tell me?

THE DEFENDANT: No, given that, and just asking the Court to consider the totality of the circumstances, I would ask that if the petition not be granted, that at least an evidentiary hearing be granted to try to discern these matters that you just brought to light.

THE COURT: Okay. Thank you.

THE DEFENDANT: Thank you.

THE COURT: Mr. Armstrong?

MR. ARMSTRONG: Yes, your Honor. The point I was going to touch on, your Honor's already addressed. The defendant was facing extreme penal exposure. The proof is overwhelming against him. He took a deal. Judge Giovine painstakingly went through a 37-page plea transcript to make sure this defendant understood the parameters of his plea, his exposure, and that his plea was voluntary and knowing.

The Judge even asked him at some point in the transcript: Are you aware that if you -- if I find the factual basis in the pleas is entered, you won't be able to take it back? And he said: Yes, I understand that, Judge.

What's happened is, he's changed his mind. Sitting in jail, he's changed his mind. He doesn't like the deal he struck. But he's offered no proof whatsoever to show that the plea wasn't voluntary at that time.

Any allegations or statements he makes now are completely belied by that 37-page transcript, where the Judge went through and made sure that he understood, and that the plea was voluntary; that he never mentioned anything of coercion or anything along those lines at the time of the plea.

And I agree with your Honor that there's been -- no showing of ineffective assistance has been offered. So I would submit otherwise.

THE DEFENDANT: Your Honor, if I may address the Court again.

THE COURT: I am aware of the fact that you allege in your papers that you weren't aware of the relationship between your mother and your defense attorney, and you were not aware that it was for that reason, as you submit now, that so much pressure was being put upon you to accept the plea.

I am aware of your position in that regard, Mr. LaSane.

THE DEFENDANT: Your Honor, just to address

the Court, what the State just said about the evidence being overwhelming, I feel that that is out of bounds. No evidence was ever presented to a court, no evidence was ever presented to a jury. And for the prosecutor to make the assumption that it was overwhelming in the point that it would have led to conviction, is out of bounds.

There was no -- there are no grand jury minutes. There is no anything submitted in court. The prosecutor, as my attorney just at the beginning of this proceeding said, this petition was submitted to the Court months ago. The prosecutor never raised any claims, never submitted a brief, never made any motion in regards to these claims.

And I would just say that, to re-touch on what my attorney said, that the standards do change when a conflict of interest is brought to light.

THE COURT: All right. Thank you. The application here is to retract the guilty plea based on ineffective assistance of counsel.

The basis for the ineffective assistance of counsel, as maintained and alleged in the memorandum, certification and argument of Mr. LaSane, as well as counsel, is that there was a relationship of an intimate nature that Mr. LaSane was unaware of between

his mother and his defense counsel and, as a result of that, his mother was subjected to undue influence by defense attorney, who was encouraging Mr. LaSane to plead guilty, as well as Mr. LaSane was subject to this undue level of persuasion.

And he argues coercion, undue influence, and it was all attributed to this relationship between his mother and his then-defense attorney.

He maintains that that is -- in fact constitutes a conflict of interest, legal term, conflict of interest, in that Mr. Daniels, his then-counsel, utilized this relationship with his mother to coerce Mr. LaSane to plead guilty to felony murder, which is something that he otherwise, absent those pressures of Mr. Daniels as well as his mother, would have been loath to do, and would not have done under any circumstances whatsoever, it's alleged now.

The standard here is the Strickland standard, as you have recited. And it's a two-prong test. First of all, let me address that.

I have reviewed the transcript; and Mr. LaSane's argument, while it's eloquent and it's interesting for a young man to be able, under these pressures, without the benefit of a legal education, to stand before this Court and quite eloquently argue his

position in an understandable and logical sense, it's rather disingenuous when he says to this Court that there was no evidence whatsoever, before any court ever, that would substantiate anything, other than the words that came from his mouth.

I reviewed the transcript, and there were photographs and a pathologist's report from the autopsy with regard to the death of Mrs. Weinstein in this circumstance that was before the Court, marked into evidence by Prosecutor Cunningham at the time of the plea.

So there was at least that, as well as a tape recording that I didn't have the benefit of listening to, but was made reference to on the record, and Judge Giovine alluded to on the record at the plea, that he intended to listen to, with the consent of both counsel and the acknowledgment, and voluntary acknowledgment, of Mr. LaSane, that Judge Giovine intended to listen to that tape recording prior to the imposition of sentencing.

While I find, if it is true -- and I don't find that it's true. I merely find that the allegation is made, supported by a certification by Mr. LaSane's mother, that this affair happened between she and defense counsel -- and I am not finding that it's true,

I am finding that the allegation is made that it's true -- even if it were true, does not create a legal conflict of interest, does not make Mr. Daniels' counsel ineffective to Mr. LaSane as a matter of fact.

The issues in this case of a legal nature and of a factual nature are not intertwined with the personal relationship of Mr. Daniels or Mr. LaSane's mother in any way, shape or form.

And in fact, at the time he entered the plea, by his own admission, he had no knowledge of this relationship between Mr. Daniels and his mother at the time, finds out about it afterwards, says: Oop, foul.

Mr. LaSane, I have given you ample opportunity to address the Court. I am now entering my finding on the record. If you disagree with what I am saying, you have a right to file an appeal with the Appellate Division. But I will not entertain any further argument in this matter.

There is no evidence in the record that Mr. Daniels' activities outside the courtroom and unrelated to this matter created any conflict of interest between Mr. Daniels' representation of Mr. LaSane -- and the record is replete, both at the juvenile level and at the adult level at the time of the waiver, Mr. Daniels proceeded on Mr. LaSane's behalf in a vigorous manner,

very capably, in every legal and professional sense.

And I further cannot avoid the fact that the deal, in the context of this crime, the plea bargain that was negotiated here, in the context of this crime, was extraordinary. It was a good deal. No reasonable attorney or judge with knowledge of the criminal law can look at these facts and this plea bargain and say Mr. Daniels did not do a good job.

The first prong of Strickland has not been met. The second prong of Strickland has not been met. I find that there is no ineffective assistance of counsel in the first prong. And if there is any scintilla of inappropriate behavior on the part of Mr. Daniels, it does not rise to the level of ineffective assistance of counsel which is so ineffective that it, for all intents and purposes, denied Mr. LaSane of any counsel whatsoever.

Secondly, there is no evidence before this Court to lead this Court to even speculate that there is even the possibility of a different outcome, let alone find by a preponderance of the evidence that there is a substantial likelihood that the outcome would be different.

For all of those reasons as stated on the record by this Court, the application is denied.

(Matter concluded.)

* * *

C E R T I F I C A T I O N

I, GAYLE L. GARRABRANDT, C.S.R., License Number XI00737, 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 non-compressed transcript to the best of my knowledge and ability.

Gayle L. Garrabrandt

6-14-00

GAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter
118 Washington Street
Ocean County Courthouse

Date

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