A-4181-02T4

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A- 004181-02T4

STATE OF NEW JERSEY Plaintiff-Respondent	:	CRIMINAL ACTION
v.	:	On Appeal From an Order Denying Defendant's Motion for Post-Conviction Relief in the Superior Court of New Jersey, Law Division, Ocean County
MICHAEL LASANE Defendant-Appellant	:	

Sat below:
Honorable James M. Citta, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Designated Counsel
On the Brief

PRESENTLY CONFINED

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PROCEDURAL HISTORY

Defendant, Michael LaSane was named in Ocean County Juvenile Delinquency Complaint FJ15-2863-96-5 and charged with acts of delinquency which, if committed by an adult, would have involved the crimes of theft, purposeful or knowing murder, felony murder, robbery and carjacking. Da1-3[1].

On January 14, 1997, 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. Da4.

On January 23, 1997, defendant waived indictment and trial by jury before the Honorable Peter J. Giovine, J.S.C. Da5. Defendant entered a plea of guilty to Ocean County Accusation Number 96-01-00076, charging him with felony murder, contrary to the provisions of N.J.S.A. 2C:11-3a(3). Da7-9.

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[1]References to the appendix are as follow:

Da	-	refers to defendant's appendix
1T	-	March 21, 1996 (probable cause hearing)
2T	-	April 15, 1996 (discovery motion hearing)
3T	-	January 14, 1997 (waiver hearing)
4T	-	January 23, 1997 (plea)
5T	-	February 28, 1997 (sentencing)
6T	-	March 24, 2000 (post-conviction relief proceeding)
7T	-	November 4, 2002 (evidentiary hearing)

Judge Giovine conducted sentencing proceedings on February 28, 1997. Judge Giovine sentenced defendant to life imprisonment with a thirty year period of parole ineligibility. Da10.

The Appellate Division affirmed defendant's conviction and sentence. Da14-19.

Defendant filed a petition for post-conviction relief. Da20. The Honorable James M. Citta denied defendant's petition on March 24, 2000. Da38.

The Appellate Division reversed Judge Citta's order and remanded the matter for an evidentiary hearing. Da39-46.

Judge Citta conducted hearings on November 4, 2002, and November 6, 2002. At the conclusion of the hearings, Judge Citta denied defendant's petition. Da47.

The Office of the Public Defender filed a Notice of Appeal on defendant's behalf. Da48.

8T - November 6, 2002 (evidentiary hearing)

STATEMENT OF FACTS

Defendant testified that he 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. Defendant entered a gold Camry parked in front of Palumbo's and told the woman inside to give him the keys. She complied and remained in the car as he drove from the parking lot to a wooded area in Manitou Park. 4T 23-2 to 24-25.

Defendant duct taped the woman's hands and ankles and left the car. The woman began to scream, and defendant covered her face with his hand to stop her from screaming. The woman stopped screaming, then stopped moving and ultimately stopped breathing. Defendant stated that he had not intended to kill her, and had not had a weapon with him. 4T 25-1 to 27-1.

A tape recording of the incident revealed that the victim requested to see the gun that defendant claimed he possessed. Defendant told the victim that he did not want to reveal the gun. 4T 28-4 to 25.

Sergeant Thomas Hayes testified that officers found the victim's vehicle outside defendant's home on March 17, 1996, after the discovery of the victim's body. Defendant's mother advised Hayes that defendant had been operating the vehicle.

Defendant claimed that Derrick Boswell sold him the vehicle. Boswell denied all contact with defendant and denied offering him a vehicle. Boswell also had a verifiable alibi for his whereabouts on the day of the victim's disappearance. 8T 82-13 to 19. Defendant provided conflicting explanations regarding his acquisition of the vehicle to several people interviewed by the police. 8T 86-13 to 21.

Defendant's explanation for his whereabouts on the day of the victim's disappearance was not supported by interviews with Charles Hester and Sherry Gains, the individuals he claimed to have been with. 8T 77-2 to 82-12. Several individuals who knew defendant as well as store employees placed him at several locations inside the shopping center the victim was last known to have visited prior to her disappearance. 8T 82-24 to 83-13. One witness stated defendant had been inside the restaurant where the victim had purchased a meal. 8T 86-13 to 21.

The tape recording made by the victim during the commission of the crime included the victim referring to the assailant repeatedly using defendant's first name. The assailant made numerous statements that referred to events from defendant's personal life. 8T 88-7 to 17.

The police recovered a roll of duct tape from the trunk of the car. The victim's husband stated there was no reason that the tape would have been in the vehicle. 8T 87-7 to 22.

Ocean County Assistant Prosecutor William Cunningham testified that he communicated to trial counsel that a plea agreement had to be reached prior to the waiver hearing. 8T 90-11 to 93-22.

The prosecutor summarized the plea agreement in which counts one, theft, two, purposeful or knowing murder, four, armed robbery, and five, 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 thirty year period of parole ineligibility. 4T 3-2 to 4-6.

Defendant stated that he had consented to the matter being waived to adult court freely and voluntarily. 4T 4-24 to 5-21. Defendant indicated that the matter had been discussed between he and his attorney and that they had discussed the possibility of a plea. 4T 7-23 to 11-20. The court reviewed the ramifications of the guilty plea with defendant, including the potential exposure defendant faced with respect to the five offenses, the plea recommendation and merger principles. Defendant indicated he was

satisfied with the services of his attorney and had had sufficient time to discuss the matter. 4T 11-21 to 21-14.

In sentencing defendant, the court found that no mitigating factors applied. The court found that aggravating factors included the nature and circumstances of the offense, the risk that defendant would commit another offense, the need for deterrence, and the fact that defendant used a stolen car while committing the offense. 5T 46-13 to 57-23.

On appeal, defendant argued that the sentence was excessive. Da16.

In defendant's petition for post-conviction relief, defendant maintained that his guilty plea had been the product of coercion and ineffective assistance of counsel due to an actual conflict of interest. Da21-36. Specifically, defendant maintained that trial counsel engaged in an affair with defendant's mother. Over the course of the relationship, counsel pressured defendant's mother to coerce defendant into accepting the plea. Da21-36. Both trial counsel and defendant's mother advised defendant to waive his right to indictment and trial by jury. Defendant's mother visited defendant around January 1997 and told him to accept the plea or his family would withdraw all support for him. Da37.

Defendant maintains that trial counsel advised him that waiving indictment would preclude the prosecutor from seeking the death penalty, and that without an indictment, the maximum punishment he would face would be a thirty year term with a ten year parole ineligibility period. Da33. Defendant maintains that had he known that he would have received the maximum sentence permitted by law, he would not have pled guilty and would have insisted on proceeding to trial. Da33.

Defendant's mother Vera Thomas signed an affidavit which indicated that in the fall of 1996, she commenced an intimate affair with trial counsel. She indicated that she did not want defendant to plead guilty, as he had theretofore maintained his innocence. However, once the affair began, trial counsel convinced Thomas to coerce defendant into accepting a plea bargain. Da37. Prior to sentencing, defendant indicated to Thomas that he wished to withdraw the guilty plea and seek new representation. Thomas told defendant that if he did so, neither she nor her family would continue to support him. Da37. Thomas also stated that trial counsel met with other family members, produced evidence, and claimed that defendant had confessed the crime to him, but was "confused and afraid to

tell." He requested that the other family members persuade defendant to accept the guilty plea. Da37.

Thomas testified at an evidentiary hearing that she and trial counsel had sexual intercourse once in July of 1996. 7T 33-6 to 34-1. She testified that on the date that trial counsel met with family members, produced evidence, and requested that they persuade defendant to accept the guilty plea, she left the room. 7T 38-25 to 40-9.

Kevin Daniels, defendant's trial counsel, acknowledged that he had sex with Thomas. He stated that he was not certain of the exact date, but claimed that it occurred at the end of January or early February in 1997. 8T 32-2 to 43-9; 8T 49-14 to 23. Daniels claimed that he was certain that it occurred after the date of the plea, January 23, 1997. 8T 49-21 to 50-10. He claimed that he did so because he was concerned that Thomas might take her own life if he did not consent. 8T 38-17 to 43-9. He acknowledged that he did not advise defendant of the affair nor did he withdraw from his representation of defendant. 8T 44-8 to 45-1.

Daniels also confirmed that he shared his concern that defendant should negotiate a plea with defendant's family, and that he shared some of the evidence with them. 8T 62-13 to 25.

Daniels denied pressuring Thomas to help convince defendant to do anything with respect to the case. 8T 71-2 to 6.

The post-conviction relief court found as fact that a sexual liaison did occur between trial counsel and Thomas. The court found that it occurred in late January or early February, between the date the plea was entered and before the sentencing, rather than in July or the fall of 1996 as Thomas testified. 8T 122-24 to 123-5. The post-conviction relief court found that Thomas' testimony regarding the date of the sexual encounter was not credible, that trial counsel had not applied inappropriate pressure to defendant to accept the plea due to a conflict of interest, and that defendant had not shown that trial counsel gave him incorrect advice regarding his sentencing exposure. 8T 114-10 to 134-21. The post-conviction relief court also found there was no conflict after the plea and before the sentencing. 8T 133-10 to 12.

LEGAL ARGUMENT

POINT ONE

THE POST-CONVICTION RELIEF COURT ERRED IN FINDING THAT DEFENDANT FAILED TO DEMONSTRATE THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Criminal defendants are entitled to the assistance of reasonably competent counsel and if counsel's performance was so deficient as to create a reasonable probability that deficiencies materially contributed to the defendant's conviction, the defendant's constitutional right will have been violated. State v. Fritz, 105 N.J. 42 (1987).

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that counsel's performance was (1) deficient as measured by an objective standard of reasonableness under prevailing professional norms, and (2) that the deficiencies materially contributed to his conviction. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 2064-2065, 80 L.Ed. 2d 674, 693 (1984); Fritz, 105 N.J. at 58; State v. Marshall, 148 N.J. 89 (1997).

With respect to deficient performance, the Strickland court held that the defendant challenging assistance of counsel must demonstrate that the counsel's actions were beyond the range of professionally competent assistance.

466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed. 2d at 695; State v. Savage, 120 N.J. 594, 614 (1990). The errors must be so serious as to show that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Marshall, 148 N.J. at 156. Counsel is presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed. 2d at 695; Savage, 120 N.J. at 614. However, inadequate investigation of law or fact robs a strategic choice of any presumption of competence. State v. Davis, 116 N.J. 341 (1989).

The second prong of a meritorious claim under Strickland, the prejudice component, requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Marshall, 148 N.J. at 157. In order to satisfy the second prong, there must be a reasonable probability that these deficiencies materially contributed to defendant's conviction. Savage, 120 N.J. at 615. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed. at 699; Savage, 120 N.J. at 614. The ultimate focus of inquiry must be on

the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed. 2d at 699; Savage, 120 N.J. at 614.

In cases where counsel's performance is tantamount to a complete denial of representation, prejudice can be presumed. Strickland, 466 U.S. at 692, 104 S.Ct. at 2067, 80 L.Ed. 2d at 696; Savage, 120 N.J. at 614. In United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984), decided the same day as Strickland, the Court explained that when counsel's errors are so grave that "no amount of showing of want of prejudice could cure it", it is unnecessary for a defendant to demonstrate prejudice. 466 U.S. at 659, 104 S.Ct. at 2047, 80 L.Ed. 2d at 668; Savage, 120 N.J. 614-615.

The two-part Strickland test applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In order to satisfy the first half of the Strickland test in the context of a guilty plea, defendant must demonstrate that the advice of counsel was not "within the range of competence demanded of attorneys in criminal cases". Hill, 474 U.S. at 58, 106 S.Ct. at 370, 88 L.Ed.2d at 210; Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602,

36 L.Ed. 235 (1973). The second, or "prejudice" requirement, focuses on whether counsel's' constitutionally ineffective performance affected the outcome of the plea process. Hill, 474 U.S. at 59, 106 S.Ct. at 370, 88 L.Ed.2d at 210. 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 pled guilty and would have insisted on going to trial. Id.

The critical information in the context of a guilty plea is the period of possible confinement. State v. Howard, 110 N.J. 113 (1988). A voluntary guilty plea must be made with an understanding of the consequences. Id. at 122.

Often a defendant seeking to vacate his plea will find it difficult to prove affirmatively that he was misled. He may be able to do little more than assert that he was deceived. Thus, where from an objective standpoint, it appears that there is a significant possibility that misinformation imparted to the defendant could have directly induced him to enter the plea, he should be allowed to withdraw from the bargain. State v. Taylor, 80 N.J. 353, 365 (1979).

In the within case, the Appellate Division remanded the matter for an evidentiary hearing to determine specifically "whether there is a reasonable probability that defendant was improperly, although unknowingly, coerced into entering a guilty plea to felony murder, and that but for the misconduct of his counsel, defendant would not have entered a guilty plea." Da39-46.

Defendant submits that trial counsel's improper actions designed to coerce defendant to accept the plea agreement were beyond the range of professionally competent advice. Defendant submits that trial counsel coerced defendant into accepting the plea by providing defendant with incorrect information and by pressuring defendant's mother and family to persuade defendant to accept the plea. Trial counsel incorrectly advised defendant that he should waive indictment because it would preclude the State from seeking the death penalty. Da33. In fact, defendant was not eligible for the death penalty due to his minority status. N.J.S.A. 2C:11-3(g). Defendant also maintains that trial counsel advised him that his maximum sentencing exposure under the plea agreement would be thirty years with a ten year period of parole ineligibility. Furthermore, as noted by the Appellate Division, defendant faced "no greater sentence following a jury trial,

particularly if defendant was convicted only of felony (not purposeful or knowing) murder, with which the substantive charges would have merged." While the State had substantial evidence that placed defendant at the scene of the crime, the evidence only indicated that defendant killed the victim during the commission of a carjacking. The State did not describe evidence of knowing or purposeful murder. Thus, the sentencing exposure defendant realistically faced following a jury trial was identical to that he faced as a result of the plea bargain negotiated by trial counsel.

Trial counsel acknowledged that he spoke with defendant's family and presented evidence to them, in an effort to persuade them to pressure defendant to accept the plea agreement as well. 8T 62-13 to 25.

Trial counsel and defendant's mother each testified that trial counsel and Thomas engaged in a sexual affair prior to defendant's decision to accept the plea. Defendant maintains that trial counsel applied acute pressure to Thomas to coerce defendant to accept the plea agreement.

The relevant inquiry in potential conflict of interest situations is the potential impact the alleged conflict will likely have upon the defendant. 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).

Defendant submits that there is a significant likelihood that but for trial counsel's inappropriate actions connected with his conflict of interest, defendant would not have pled guilty and would have instead insisted on going to trial. The existence of the conflict of interest is clear. As pointed out by the post-conviction relief court, "there are ethical exposures beyond the confines of State v. Michael Lasane for any attorney in Mr. Daniels' circumstance to be involved as he was, not to mention the personal impact it may have on his life because he is a married man." 8T 122-8 to 13.

Defendant maintains that had he received correct information from trial counsel and had not been coerced by trial counsel through defendant's family, defendant would not have pled guilty and would have instead gone to trial. Defendant never faced the death penalty. Had he known that the plea agreement would expose him to the same sentence he would face even after a guilty verdict from a jury, it

simply defies logic to conclude that he would have accepted the agreement.

The post-conviction relief court focused upon the fact that the plea agreement was extremely favorable, given the maximum potential sentence defendant faced had he been convicted on all charges. 8T 131-22 to 134-19. It is worthwhile to note that in calculating defendant's maximum exposure, the post-conviction relief court included kidnapping among the offenses for which defendant could have been convicted, even though defendant had not been charged with this offense. 8T 134-6 to 14. The post-conviction relief court also took great pains to describe the "overwhelming" evidence against defendant. 8T 132-2 to 19. While defendant concedes there was substantial evidence to support a guilty finding on the felony murder charge, there was a dearth of evidence to support a guilty verdict on the murder charge. The State did not describe evidence that demonstrated a knowing or purposeful intent to kill the victim, rather, all of the facts indicated defendant killed the victim in the course of the carjacking. The fact remains that defendant received the maximum sentence that he realistically faced had he gone to trial and been convicted.

Defendant respectfully requests that the post-conviction relief court's order denying defendant's petition for post-conviction relief be reversed, defendant's conviction vacated and a new trial ordered.

CONCLUSION

Based on the arguments and cases cited herein, defendant submits that the lower court's decision to deny defendant's application for post-conviction relief should be reversed, defendant's conviction vacated and a new trial ordered.

Respectfully submitted,

YVONNE SMITH SEGARS
PUBLIC DEFENDER

ARTHUR J. OWENS, ESQ.
DESIGNATED COUNSEL

August 1, 2003

A-4181-02T4

Michael Lasane
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Defendant, Pro Se
PRESENTLY INCARCERATED

October 17, 2003

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff,	:	DOCKET NO. A-004181-02T4
	:	
v.	:	
	:	
MICHAEL LASANE,	:	
	:	
Defendant.	:	

PRO SE SUPPLEMENTAL BRIEF OF DEFENDANT

Honorable Judges of the Appellate Division,

Please accept this supplemental letter brief in lieu of a more formal brief appealing the denial of defendant's Petition for Post Conviction Relief.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant will rely upon the Procedural History and Statement of Facts as indicated in the Brief submitted by the Office of the Public Defender on his behalf.

LEGAL ARGUMENT

POINT ONE

TRIAL COUNSEL'S REFUSAL TO ALLOW DEFENDANT TO PROCEED TO TRIAL AND TESTIFY ON HIS OWN BEHALF CONSTITUTED A VIOLATION OF DEFENDANT'S SIXTH, FOURTEENTH, AND FIFTH AMENDMENT RIGHTS

The right to counsel guaranteed by the 6th and 14th Amendments in criminal cases assures that a defendant will be given the effective assistance of counsel. Effectiveness of representation is measured against a standard of reasonable competence. Strickland v, Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984). State v. Fritz, 105 N.J. 42 (1987).

There is a vital need for a lawyers advice during the pre-trial phase in a defendant's case. Powell v. Alabama, 287 U.S. 45, 57, 71, 53 S.Ct. 55, 60, 65, 77 L.Ed. 158 (1992).

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that counsel's performance was (1) deficient as measured by an objective standard of reasonableness under prevailing professional norms, and (2) that the deficiencies materially contributed to his conviction. Strickland v, Washington, 466 U.S. 688, 687-688, 104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674, 693 (1984). State v. Fritz, 105 N.J. 42, at 58; State v. Marshall, 148 N.J. 89 (1997).

The right against self incrimination guaranteed by the 5th Amendment commends that no person... shall be compelled in any criminal case to be a witness against himself. Estelle v. Smith, 451 U.S. 464, 101 S.Ct. 1866 (1981), U.S.C.A. Const. Amend. 5.

The availability of the 5th Amendment privilege does not turn upon the type of the proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967) Estelle, 451 U.S. 464,

101 S.Ct. 1866 (1981).

This case is unusual because the defendant asserts that he was coerced into making incriminating statements not by a state agency or officer, but rather by counsel assigned to represent him.

Normally, in a claim against the validity of a confession or incriminating statement a defendant asserts that his fundamental rights protecting against self incrimination or right to representation were violated by an officer or agency representing the interests of the state. Miranda v. Arizona, 384. U.S. 436, 467, 88 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

However, the court has held in Miranda that a confession or incriminating statement must be given freely, voluntarily, and without any compelling influences. Id. Miranda v. Arizona

In a criminal prosecution, if the court deems that a defendant's confession or incriminating statement was not given voluntarily or was taken at an instant in which the defendant was not apprised of his 5th Amendment right against self-incrimination, the use of such statement may constitute a 5th Amendment violation. Estelle v. smith, 451 U.S. 468, 101 S.Ct. 1866 (1981).

Regarding pre-trial psychiatric evaluations where the defendant claims a 5th Amendment violation, the weight of consideration focuses upon whether the consequences of that statement is contained to the part of the prosecution for which it is intended and relevant.

In Estelle the court deemed that 6th Amendment rights attached because the court ordered psychiatric evaluation proved to be a "critical stage" in that case because the information gleaned from it was later used in critical trial proceedings for which the results of the evaluation was not intended. U.S. v. A.R., 38 F.3d 699 (3rd Cir. 1994); Estelle v. Smith, 451 U.S. 464, 101 S.Ct. 1866 (1981). And held that no 5th Amendment violation exists if the consequences of the information gathered during a pre-trial evaluation is contained to the proceeding for which it is intended. The defendant asserts that his comments to the psychiatrists in this case carried with them unforseen consequences more dire than the waiver hearing for which the evaluation was intended. In that because of his statements trial counsel refused to allow the defendant to proceed to trial or testify on his own behalf. 8T:54-21 to 55-13.[1] Which are rights that cannot be forcibly rested from a defendant.

At the evidentiary hearing trial counsel testified that defendant "confessed to the crimes" to harm him 8T:55. And furthermore because of this he refused to allow the defendant to proceed to trial or testify on his own behalf. However upon examination of the circumstances of this case along with trial counsel's actions and reasoning during the time period in question, it is unreasonable to conclude that counsel's conduct and advice reached a tolerable professional or ethical standard as required by the 6th Amendment.

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[1]Refers to Appendix
8T - November 6, 2003 (evidentiary hearing)

It should be noted that although trial counsel testified at the evidentiary hearing that he feared that defendant would commit perjury prompted him to refuse to allow him to proceed to trial, he offers no proof or explanation as to what lead him to believe defendant would do so. 8T:55-1 to 13.

Three factors should be considered in determining the likelihood of trial counsel's candor in this issue: (1) Trial counsel's allegation that defendant had confessed to committing the crimes should be examined in light of his own subsequent actions. If the defendant had confessed to committing the crimes to his attorney alone, such information would by law be considered privileged. Common sense would suggest that any competent attorney possessing such information would then seek to pursue a course of action which would best secure his clients interests and advise his client not to make statements which would likely expose him to greater judicial harm. It is inconceivable that an attorney possessing such knowledge would encourage his client to make further incriminating statements to doctors representing the interest of the state in an attempt to obtain an uncertain objective. However, this is precisely what trial counsel's testimony suggests.

(2)Trial Counsel testified that his actions and ultimatums were prompted in large part by the defendant's incriminating statement to the psychiatrists. It is worth note that counsel did not testify that he suggested to defendant that he not make such statements. The question must also be asked as to why

counsel, alleging that defendant had already confessed to him and the psychiatrist he hired, would allow defendant to be evaluated by the state's psychiatrist who would place into record anything the defendant might say that would be detrimental to him. The evaluations were conducted over a period of 2½ months. The report of defense's psychiatrist was submitted to trial counsel 45 days before defendant was even evaluated by the state's psychiatrist. Trial counsel had more than ample opportunity to discuss any apprehension or concern that he may have had about the statements defendant would make to the state's psychiatrist, however he did not. Neither counsel's diary or the court's record reflect that trial counsel took any steps to deter defendant from making such statements.[2] To the contrary defendant continued to insist upon his innocence to his family.

(3) Trial counsel's assurance to defendant that stating he was guilty of felony murder and showing significant remorse would cause him to prevail at his waiver hearing. This advice was misguided, at the least, and clearly of tantamount influence on defendant's legal standing. Although counsel's initial intent may be disputed, it is clear that defendant obtained absolutely no legal advantage or enjoyed any preferential treatment as a result of this course of action. Contrarily, the result of this course was the absolute opposite of that promised by trial counsel.

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[2]As cited by the PCR court, trial counsel had no legal duty to turn over the results of the psychiatrist's evaluations unless he intended to use it at the hearing.

Because statements made to the state's psychiatrist were no longer born under privilege this exposed defendant to great legal disadvantage and prejudice. There is also clear evidence by way of counsel's own admission that defendant's statements to psychiatrists carried with them dire consequences which extended far beyond the waiver hearing for which the evaluations were intended.

Pursuant to N.J.S.A. 2A:4A-29 "No testimony of a juvenile at a hearing pursuant to section 7 or 8 [transfer hearings] shall be admissible for any purpose in any hearing to determine delinquency or guilt of any offense."

As such, the situation facing a juvenile at a phase II hearing is somewhat analogous to the situation facing defendant who are offered plea bargains, a constitutionally permissible practice. Corbitt v. New Jersey, ___ N.J. ___, 439 U.S. at 216, 99 S.Ct. at 496, 58 L.Ed.2d at 472-473. The juvenile is merely faced with a choice and may voluntarily elect to waive the privilege in exchange for the possibility of favorable treatment. Moreover, the juvenile is clearly in a much better position than a plea bargaining defendant, whose admission of guilt automatically results in a criminal conviction. Rather than confronting this onerous choice, a juvenile's decision to admit guilt at a Phase II hearing is really **risk free** (emphasis added). There is no adjudication of guilt involved, and the testimony cannot be used to later incriminate him. It is inadmissible "for any purpose in any hearing to determine delinquency or guilt..."

N.J.S.A. 2A:4A-29.

The U.S. Supreme Court has consistently held that the offer of a lower sentence or more lenient treatment in exchange for a guilty plea does not impermissibly coerce a defendant to waive the 5th Amendment privilege. Likewise, the offer of more lenient treatment, remaining in family part, in exchange for the juvenile's admission of guilt and remorse, especially where the admission has no adverse legal consequences, does not violate the juvenile's self-incrimination rights. State in Interest of A.L., 271 N.J. Super 192.

It therefore defies reason to believe that while insisting he was innocent to family members defendant would incriminate himself to psychiatrists and the court if he did not believe that by doing so he would prevail in his waiver hearing.

Finally defendant maintains that he never confessed to committing any crime to trial counsel and that he would not have given incriminating statements claiming responsibility for felony murder to psychiatrists if trial counsel had not coerced him with threats and assured him that in doing so would result in a favorable outcome in his waiver hearing.

CONCLUSION

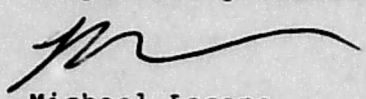
In conclusion, defendant asserts that (1) trial counsel's admission that he would not allow defendant to proceed to trial or testify on his on behalf does not reach the standard of efficiency as measured by an objective standard of reasonableness under prevailing professional norms, (2) and that these

deficiencies materially contributed to his conviction, in that he was (forcibly) deprived of his right to go to trial and be a witness on his own behalf.

Defendant respectfully submits this information to the court in support of his brief requesting vacation of his guilty plea based on the ineffective assistance of trial counsel due to an actual conflict of interest.

Defendant hereby requests that the conviction be vacated and a new trial ordered on the merits of his earlier submitted brief and asks that defendant's statements to the psychiatrists be regarded as inadmissible as evidence and prejudicial to defendant's ability to have a fair and impartial waiver hearing.

Respectfully submitted,



Michael Lasane
Defendant, Pro Se

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004181-02T4

STATE OF NEW JERSEY	:	AFFIDAVIT
	:	
Plaintiff,	:	OF
	:	
v.	:	MICHAEL LASANE
	:	
MICHAEL LASANE,	:	
	:	
Defendant.	:	

STATE OF NEW JERSEY:
: SS.
COUNTY OF MERCER:

MICHAEL LASANE, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the defendant in the above entitled matter.

2. While awaiting disposition of this matter, I was detained at the Ocean County Juvenile Detention Center.

3. I was represented in this matter by Kevin Daniels, Esquire. We had ample opportunity to discuss the considerable differences between having my case adjudicated in the juvenile system rather than as an adult in the Superior Court. Mr. Daniels impressed upon me, that it was in my best interests to be treated as a juvenile, and that the most optimistic course in doing so would be to prove certain elements to the court which would warrant such favorable treatment. He intimated that I could accomplish this by having psychiatric health experts present reports and testimony to the court on my behalf.

4. I did not believe that the doctor's evaluation would be detrimental to my legal standing nor my proclamations of my innocence. Therefore, I did not refuse to participate. Mr. Daniels impressed upon me my need to base my account of the circumstances of the crime on a false impression of guilt when undergoing the examinations.

5. His reasoning was that due to the substantial amount and weight of the State's evidence against me, my only possible chance to remain in the juvenile system was to give the psychiatrists the impression that I was guilty of the lesser of the two murder counts lodged against me and express considerable remorse. He conveyed to me his feeling that if I was successful in so doing, I would likely continue to be treated as a juvenile.

6. Due to the Ocean County Juvenile Detention Center's policy concerning resident's security, I was unable to retain the discovery in this matter in my possession. Although Mr. Daniels did review a very miniscule amount of the discovery with me, such as a few witness statements, I did not have the ability to understand the quantity or substantiveness of the evidence. I remained confined in this facility for 10 months during which time I was not given a bail hearing or opportunity for a conditional release (which is a practice which is conducive with the county's policy regarding juvenile detainees). My ability to aide in my defense was therefore severely handicapped and I was not afforded the opportunity to make decisions on my behalf based on my own assessement of the evidence. Due in part to these circumstances, I was totally dependent upon my attorney's desemination and interpretation of evidence to determine its substance and importance.

7. On August 29, 1996, I was interviewed by Dr. Edward J. Dougherty, Ph.D. at the request of my counsel. Dr. Dougherty submitted his report on October 2, 1996, for the intended purpose of presenting it to the court (Chancery Division) regarding a jurisdiction waiver hearing. Dr. Dougherty submitted his report regarding the psychiatric evaluation, concluding that "Michael Lasane can be rehabilitated by the age of 19 with services available to the court."

8. On November 15, 1996, I was interviewed by Dr. Alvin Krass, who conducted a psychiatric evaluation at the request of the Ocean County Prosecutor's Office. In his subsequent report, dated December 2, 1996, he states, "In the absence of apprehension or anxiety or remorse, it is hard to state that he is a candidate for psychotherapy or for rehabilitation efforts. He tends to not view himself as guilty of anything, and would express such comments only in the way of reducing his responsibility for what occurred, rather than taking responsibility for what occurred." He concluded, "I do not believe Michael Lasane is a likely favorable candidate for rehabilitation within a one year period."

9. Sometime in mid December, 1996, following the submission of the aforementioned reports, I met with Mr. Daniels in the Detention Center and he informed me that the Prosecutor's Office had presented him with a plea agreement. He informed me that in exchange for a plea of guilty to felony murder that the State would recommend a Life sentence with a 30 year parole disqualifier. I immediately made my desire to not accept this offer clear to Mr. Daniels and refused to go any further in portraying myself to be guilty of crimes I did not commit. Mr. Daniels persisted in trying to convince me to accept the plea offer. He went so far as to encourage my family members to use coercion through threats of withdrawal of family support, as well as threatening to withdraw his representation if I did not accept the plea offer.

10. In response to my inquiry as to why he would retract his representation, he insisted that the evidence against me was "overwhelming" and that he would not proceed to trial regardless of my desire. Due to my lack of legal access and knowledge, I believed that if Mr. Daniels refused to represent me that I would have to proceed to trial without representation. I believed that if I were to continue to refuse to accept the plea agreement offered by the State and insisted on going to trial that I would be forced to do so without an attorney and feared the grim and intimidating prospect of facing a life term in prison without the support of my family upon whom I depended on as a 17 year old adolescent.

11. In a Petition for Post Conviction Relief in the Superior Court of New Jersey, Law Division - Ocean County, I raised the issue of ineffective assistance of counsel in that Mr. Daniels represented me while burdened by an actual conflict of interest. During the course of representing me, Mr. Daniels participated in a relationship of an intimate nature, which included sexual intercourse, with my mother. He applied his influence gained through this unseemly and untoward relationship to convince my mother to join him in his efforts to coerce me into accepting the plea agreement. The court denied my petition and I appealed. The Superior Court of New Jersey, Appellate Division reversed this decision, remanding it back to the Law Division and ordered an evidentiary hearing.

12. At the evidentiary hearing, in November, 2002, Mr. Daniels testified that I did not want to accept the plea offer and acknowledged that he did threaten to withdraw his representation if I insisted on going to trial. He went on to say that he only threatened such action because I had confessed to committing the crimes to him and to the psychiatrists who had evaluated me in regards to the waiver hearing. This, however, is only true in part. Although I did give accounts to the psychiatrists giving the impression that I was responsible for the crime of felony murder, I never confessed that I was guilty to Mr. Daniels. I have always insisted that I was not guilty to him, and only agreed to infer that I was to the psychiatrists, in accordance with his suggestion, in the belief that in so doing I had a favorable chance to be tried as a juvenile.

13. Although Mr. Daniel's first intentions may be disputed as to whether they were knowingly insidious and misleading, as far as his suggestion about how it would have been best to proceed in regards to the waiver hearing. It is now clear that Mr. Daniels misrepresented these circumstances at the time of the PCR evidentiary hearing to distort the courts understanding of what actually occurred. Mr. Daniels lied when he testified that I had confessed to the crime to him. Moreover, he methodically misrepresented the circumstances concerning my incriminating dialogue with the psychiatrists.

14. Mr. Daniels actions, along with the State's demand to overstep every legal precaution and trial safeguard, were and continue to be detrimental to my ability to have a fair and unimpaired trial process.

15. I believe that Mr. Daniels' egregious conduct and wanton attitude, in this case, must be brought to the Court's attention. But for his inappropriate and unwarranted actions, I would not have plead guilty and would not have untruthfully accepted responsibility for the crimes I was charged with during the psychiatric evaluations.

Michael Lasane

SWORN AND SUBSCRIBED TO

BEFORE ME THIS 21 DAY OF

October 2003.

Notary Public of New Jersey

NOTARY PUBLIC
STATE OF NEW JERSEY
ANN M. DOHERTY
MY COMMISSION EXPIRES 01/02/2006

A-4181-02T4

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-004181-02T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Denial of the Post-Conviction Relief of the
v.	:	Superior Court of New Jersey, Law Division, Ocean County.
MICHAEL LASANE,	:	Sat Below:
Defendant-Appellant.	:	Hon. James M. 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. (3T14-19 to 15-7).[1] On that date, Judge Villano entered a consent order waiving jurisdiction of the matter to the Law Division for further

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[1] 1T refers to the transcript of the probable cause hearing, dated March 21, 1996.
2T refers to the transcript of the discovery motion dated April 15, 1996.
3T refers to the transcript of waiver hearing, January 14, 1997;
4T refers to the transcript of guilty plea hearing, January 23, 1997;
5T refers to the transcript of sentencing hearing, February 28, 1997.
6T refers to the transcript of post-conviction relief hearing, March 24, 2000.
7T refers to transcript of evidentiary hearing, November 4, 2002.
8T refers to transcript of evidentiary hearing, November 6, 2002.

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 97-01-00076 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; 4T9-7 to 11; 4T18-22 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; 4T3-13 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; 4T3-18 to 21). The Honorable Peter J. Giovine, J.S.C., took and accepted defendant's guilty plea. (4T33-12 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; 5T58-15 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. (5T60-5 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. (Da20-37). 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. (6T19-21 to 23-25). An order to that effect was entered on that same day. (Da38).

On May 30, 2000, defendant filed a Notice of Appeal from the denial of the petition for post-conviction relief. In a per curiam opinion dated October 22, 2001, this court remanded the matter for an evidentiary hearing. (Da39-46).

On November 4 and 6, 2002, An evidentiary hearing was conducted before Judge Citta. On November 6, 2002, Judge Citta denied the petition for post-conviction relief. (8T114-10 to 134-21). An order to that effect was filed on or about February 3, 2003. (Da47).

On April 21, 2003, defendant filed a Notice of Appeal from the denial of the petition for post-conviction relief. (Da48).

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. (4T23-2 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. (4T23-8 to 19). Defendant then approached the Camry and told the occupant of the car, Kathleen Weinstein, to give him the keys to the car. (4T23-22 to 23; 4T24-12 to 15). Kathleen complied with defendant's demand. (4T23-24 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. (4T24-1 to 7). Defendant threatened Kathleen with a gun, but he claimed that he did not actually possess one. (4T26-21 to 27-1; 4T27-8 to 13; 4T28-10 to 25). Defendant drove to the park to "escape . . . with stealing the car." (4T24-8 to 11). Defendant kept Kathleen confined in the car while he pondered how to "get away" with stealing the car. (4T24-16 to 25). Thereafter, defendant wrapped duct tape around Kathleen's hands and ankles. (4T25-1 to 6). Defendant instructed her not to scream and then left Kathleen in the woods before driving away in her car. (4T25-7 to 12). But as he began to drive away, Kathleen began to scream. (4T25-13 to 15). Defendant returned and put his hand over Kathleen's mouth and

nose to stop her from screaming. (4T25-13 to 18; 4T31-19 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. (4T32-1 to 10). Defendant did not want the people there to hear anything. (4T32-11 to 13). Defendant noticed that when Kathleen stopped screaming, she also stopped breathing. (4T25-19 to 26-3). Defendant shook Kathleen and when she did not move he realized that she was dead. (4T26-4 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. (4T26-13 to 14; 4T32-14 to 24; 4T35-20 to 25). Defendant claimed he had no knowledge as to how the zipper marks appeared on Kathleen's face. (4T30-14 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. (5T24-7 to 9; 5T33-13 to 15). Defendant loitered in the mall, wandering in and out of several stores without ever making a purchase. (5T24-16 to 25). Defendant then went outside to the mall's parking lot and saw a Toyota Camry "that really hit his fancy." (5T25-1 to 3). Defendant had recently told a friend that "he was going to get

himself a Toyota Camry." (5T23-21 to 22). At about 3:08 p.m., defendant saw the five foot-three, one hundred and twenty-five pound Kathleen approach the Camry. (5T25-3 to 6; 5T25-14 to 19). As defendant forced his way into Kathleen's car, a witness heard Kathleen say, "please don't do this." (5T25-6 to 13).

Defendant then drove around with Kathleen in the car for about two hours. (5T25-22 to 26-22). At approximately 5:00 p.m., Kathleen activated a tape recorder which she had in her car.[2] (5T25-22 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] (5T27-7 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?" (5T27-14 to 19). Defendant responded, "[y]ou do what you got to do." (5T27-20). Defendant also said that he liked "to take chances." (5T28-2 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. (5T28-7 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. (5T26-23 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; 5T26-23 to 27-2).

[3] The tape did not indicate whether defendant actually possessed a gun. (5T27-7 to 13).

her "the terms and conditions of the lease" of the car. (5T51-21 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. (5T28-19 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. (5T28-16 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. (5T29-18 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. (5T30-5 to 8). And despite Kathleen's pleas to defendant to take just the car and not her life, defendant killed her nonetheless. (5T39-13 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. (5T33-6 to 12). Then, over the next three days, he drove his friends and family around in Kathleen's car. (5T33-13 to 24). He gave various stories to friends and family concerning how he came into possession of the car. (5T33-13 to 34-11). On March 17, 1996, the police found Kathleen's body and subsequently found her car parked in front of defendant's home. (1T22-14 to 15; 5T34-12 to 21). Defendant initially told the police that he had recently purchased the car. (5T36-16 to 37-9).

Defendant's claim at the plea hearing that he used only his hand to suffocate Kathleen was inconsistent with the evidence. (5T30-14 to 31-3). The autopsy report showed that Kathleen had been suffocated by an outside obstruction covering her mouth. (5T31-3 to 9). The cause of death was determined to be asphyxia due to airway obstruction. (1T21-11 to 12). Kathleen was found lying on her back with the two sweaters and jacket which she had been wearing covering her face. (5T31-14 to 18). And impressed upon her face were impressions that matched her sweater and the zipper of her jacket. (5T31-19 to 22). In addition, there was a bruise on the right side of Kathleen's forehead. (5T31-11 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. (5T31-23 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. On appeal, this Court remanded the matter for an evidentiary hearing. Following an evidentiary hearing, defendant's petition for post-conviction relief was denied. Defendant now appeals that denial to this court.

LEGAL ARGUMENT

POINT I

THE RECORD OVERWHELMINGLY SUPPORTS THE CONCLUSIONS OF THE POST-CONVICTION COURT AND ITS FINDINGS THAT DEFENDANT FAILED TO ESTABLISH EITHER THAT TRIAL COUNSEL WAS INEFFECTIVE OR THAT HE WAS PREJUDICED THEREBY.

A post-conviction evidentiary hearing was conducted, pursuant to this court's directive, to determine "whether there is a reasonable probability that defendant was improperly, although unknowingly, coerced into entering a guilty plea to felony murder, and that but for the misconduct of his counsel, defendant would not have entered a guilty plea." (Da45). Defendant's post-conviction allegation was that his trial counsel "[u]ndertook a course of action to engage in an intimate affair with the [defendant's] mother ..." and that "defense counsel used his mother to coerce him in the direction defense counsel wanted to proceed." (Da40). The post-conviction court made an appraisal of the credibility of the witnesses at the evidentiary hearing and determined, as a matter of fact, that the one-time sexual encounter between defense counsel and defendant's mother occurred after defendant had already pled guilty. Thus, as most properly found by the post-conviction court, the one-time sexual encounter could not have influenced defendant's decision to plead guilty, and there was no conflict between defendant and his counsel.

The relevant evidence produced at the post-conviction

evidentiary hearing is as follows. Defendant's trial counsel, Kevin Daniels, testified at the evidentiary hearing. He testified that he had been asked by the Office of the Public Defender to represent defendant in March 1996. (8T26-21 to 27-8). He indicated that in 1996 he had been practicing law for fourteen years, with an emphasis in criminal defense work. (7T51-15 to 20). He testified that he filed a motion to compel discovery and prepared for the juvenile waiver hearing as defendant was one day shy of his 17th birthday at the time of the crime. (8T27-21 to 23; 8T51-21 to 24). In preparation for the juvenile waiver hearing, Daniels obtained a psychiatrist who concluded that defendant could be rehabilitated. (8T27-23 to 28-6).

Daniels testified that he reviewed all the discovery, including the tape, photographs, police reports, psychiatrists' reports, defendant's statements, and then reviewed the discovery with both defendant and defendant's mother. (8T28-14 to 17; 8T30-1 to 15; 8T52-10 to 52-8). Daniels also noted that defendant had confessed his guilt to him as well as to both the State's and defendant's psychiatrists. (8T54-20 to 55-2).

Daniels testified that at some point prior to the waiver proceeding, the prosecutor, William Cunningham, approached Daniels about a plea offer. (8T57-12 to 14). Daniels testified that in his professional opinion, he felt it in defendant's best interest to accept the plea bargain agreement and so advised defendant and his mother. (8T31-11 to 14). At the evidentiary

hearing, Daniels explained the bases of his opinion: "My position that he should take the deal was based on my assessment of the case, my experience, the strength of their case against him, and that was not going to change....[i]t didn't change then....[i]t doesn't change now....[i]t'll never change." (8T48-22 to 49-1). He emphasized that his opinion was based solely on the strength of the State's case against defendant: "All of it was based on the strength of the State's case....[t]he case was overwhelming against him." (8T53-2 to 5).

At the hearing, Daniels made clear that he never pressured defendant's mother or defendant to plead guilty. (8T62-21 to 25; 8T70-18 to 71-1). In fact, Daniels noted that he "could care less whether he took the deal." (8T48-3 to 9). Daniels also pointed out that there was never any discussion with defendant about the death penalty because he was well aware that "people [defendant's] age are not subjected to the death penalty." (8T56-22 to 57-4).

Daniels testified that defendant himself made the decision to accept the plea bargain agreement. (8T61-1 to 18; 8T63-13 to 19). Daniels pointed out that the juvenile waiver proceeding took place on January 14, 1997, but the guilty plea proceeding did not occur until January 23, 1997. (8T57-18 to 58-2). Daniels explained that, despite the urging of the prosecutor that the guilty plea commence immediately after the waiver proceeding, he "didn't want the case to move that quickly....[he] wanted to give [defendant] an opportunity to first go through the ordeal of

his being waived up and [they] still needed to discuss - and [he] still wanted to make sure that [he] went over with [defendant] the offer for the adult - what was being offered to [him] by the Prosecutor's Office and make sure that [defendant] understood it." (8T58-8 to 15). Daniels also noted that after the waiver proceeding but before the guilty plea, with the consent of defendant's mother and at the request of a family member, he met with some of defendant's extended family members because they had some questions about the case and were interested in privately retaining him. (8T64-9 to 65-3; 8T72-17 to 19).

At the evidentiary hearing, Daniels admitted having a one-time sexual encounter with defendant's mother, Vera Thomas. (8T32-9 to 12). Daniels was "absolutely positive" that it occurred the "end of January, early February" 1997, after defendant had already pled guilty. (8T32-16 to 18; 8T49-14 to 23; 8T59-23 to 60-3). Daniels testified that the encounter, which occurred after defendant had already pled guilty, had nothing to do with his advice to defendant to plead guilty. (8T49-24 to 50-2; 8T59-24 to 60-1). At that point, the case was "basically over" except for sentencing. (8T32-19 to 21). He noted that the day after the one-time encounter, Thomas telephoned him and requested that he put the encounter "out of [his] mind and forget that it ever happened and she wanted [him] to continue to represent her son." (8T50-15 to 22). Daniels emphasized that what happened on that one occasion between him and Thomas had "absolutely nothing to do with [defendant]."

(8T44-19 to 22). He acknowledged that he did not tell defendant about the one-time encounter. (8T44-8 to11). Daniels testified that he never used the one-time sexual encounter to pressure defendant's mother to convince defendant to "do anything." (8T71-2 to 6).

Vera Thomas, defendant's mother, also testified at the evidentiary hearing. (7T4-16 to 20). She admitted that the sexual encounter with Daniels was a one-time occurrence, but she claimed it happened in July 1996, "right after [she] got out of rehab." (7T7-10 to 14; 7T11-8 to 10). She claimed that she "got out of rehab" on July 4th. (7T7-20). She noted that she was in rehabilitation for an alcohol problem and a nervous breakdown related to her son's situation in the case. (7T8-12 to 18). She indicated that at the time of the sexual encounter that she was "pretty lit up," meaning intoxicated. (7T10-18 to 25). Thomas refused to acknowledge that her written statement in support of the post-conviction application had insinuated a continuing sexual relationship ("intimate affair" in the "Fall of 1996"), when in fact it was a one-time encounter, which she claimed at the hearing occurred in July 1996. (7T11-8 to 10; 7T35-2 to 36-21). She did acknowledge that they did not have a romantic relationship. (7T11-15 to 19).

According to Thomas, Daniels asked her to "try to get [defendant] to admit that he was guilty." (7T8-25 to 9-1). She claimed that after the one-time sexual encounter, Daniels started "pushing [her] harder to make [defendant] say he was guilty."

(7T11-15 to 12-1). She claimed that she did not want defendant to plead guilty. (7T17-16). She also denied that Daniels went over the evidence with her. (8T8-1 to 6). According to her testimony, defendant only pled guilty because she asked him to plead guilty. (8T24-18 to 20). Yet, she acknowledged that at the time defendant was "grown ...[and] knows what he wants to do, he always did know what he wanted to do." (8T7-18 to 19).

Thomas testified that the Ocean County Prosecutor himself had offered defendant a plea bargain on the night of defendant's arrest in March 1996. (7T5-6 to 11; 7T24-12 to 15). She admitted that Daniels explained to her the consequences of going to trial. (8T7-5 to 25). However, she denied knowing anything about the waiver proceeding, despite the fact that she was in court with defendant that day. (7T27-17 to 19; 7T29-24 to 30-1; 8T14-14 to 17). She also testified that Daniels told her that he would not take the case to trial because he "couldn't win it." (7T31-19 to 21). She claimed that he never explained why he could not win it. (7T31-24). She claimed that after defendant was sentenced, Daniels would not take her phone calls. (7T14-11 to 16).

Sergeant Thomas Hayes of the Ocean County Prosecutor's Office testified at the hearing. He was a lead investigator in the murder of Kathleen Weinstein. (8T77-21 to 24). At the hearing, he described "the course the investigation took from the time that Ms. Weinstein's body was found," and recounted the overwhelming evidence against defendant that began accumulating

as a result of the investigation in the case, including the cassette tape found in Kathleen's jacket pocket wherein Kathleen addressed her assailant by the name, "Michael," defendant's first name, and referred to numerous aspects of defendant's personal life; the discovery of the victim's car directly outside of the apartment where defendant lived; the receipt for Palumbo's Restaurant; the multiple witnesses who placed defendant at the shopping mall and at Palumbo's at the relevant time; the duct tape found in Kathleen's Camry; defendant's statements to friends that he was going to get a Camry for his birthday; and the reports of Drs. Dockerty and Motely to whom defendant had confessed killing Kathleen. (8T78-1 to 89-25). Hayes also related that on March 17, 1996, he had played the tape for defendant's mother and she "said that the tape upset her stomach, she felt it was [defendant's] voice on there, and she demanded that [they] play the tape for [defendant]." (8T84-24 to 85-4).

Senior Assistant Ocean County Prosecutor William Cunningham testified that he handled the prosecution of defendant. (8T90-25 to 91-6). He testified that in his opinion, Daniels was a "methodical attorney who knew what he was doing"; he was "very competent" with a high level of professional ability. (8T91-20 to 23; 8T98-8 to 13). Cunningham explained that he initiated plea discussions with Daniels. (8T92-16 to 93-3). When asked if Daniels ever "press[ed] him to put a plea through in this matter," he responded, "Absolutely not ....[t]o the contrary, [Cunningham] was the one who was bugging [Daniels], so to speak,

with regard to what are we going to do." (8T93-4 to 8). During preplea discussions, Cunningham pointed out, he told Daniels that either they reach an agreement before the waiver hearing or "all bets are off." (8T94-2 to 4). Cunningham noted that Daniels tried to persuade him to offer a plea less than life with 30 years of parole ineligibility. (8T94-10 to 13).

Cunningham indicated that if defendant had not pled guilty, he would likely have been waived to adult court and have been indicted for purposeful and knowing murder, felony murder, carjacking, armed robbery, kidnapping, and theft of a motor vehicle. (8T96-11 to 17). He also pointed out that the State would have preferred that defendant enter a guilty plea immediately after the juvenile waiver proceeding, but that Daniels asked for two separate dates because he felt it would be "a lot for [defendant] to go through on one day." (8T97-24 to 25). Cunningham acceded to Daniels' request. (8T98-1). Cunningham explained that Daniels did not rush to complete the case; rather, "[i]f anything, he wanted more time". (8T98-2 to 4).

At the conclusion of the evidentiary hearing, the post-conviction court denied defendant's application for post-conviction relief. The post-conviction court included in its ruling a lengthy oral decision that contained explicit credibility findings. The post-conviction court insightfully explained why it found the testimony of Kevin Daniels credible and the testimony of Vera Thomas not believable. The court first

noted that on direct examination, "there were many critical factors that [Thomas] was uncertain about." (8T118-19 to 21). The court, however, found it "most telling" that Thomas' testimony and demeanor on cross-examination indicated a "very selective memory" and that she was "cagey about what to answer and what not to answer" . . . . [n]ot forthright on cross-examination . . . . [d]emeanor is combatant, and uncooperative, argumentative, very defensive; voice raised." (8T118-21 to 119-4). The post-conviction court pointed out "[m]ajor inconsistencies" between her testimony at the hearing and her written affidavit in support of the post-conviction relief application:

> While we all as human beings recall things in our memory and generally relate them to important times in our life to recall specific time frames -- and I do not fault Ms. Thomas to say on her testimony here, "Well, I knew it was right after I got out of rehab," because that would have been an event in her life that she may have recalled.
>
> But if she could recall that here today in her testimony -- or Monday in her testimony, rather -- why didn't she recall that when she had the time to consider and write and review what she put in her affidavit? In her affidavit which has been marked S-1 into evidence, she approximated even more than that and more broadly, she says, "On approximately fall of 1996 during which my son was incarcerated, I engaged in an intimate affair with my son's Court appointed attorney, Kevin Daniels."
>
> Why couldn't she recall then that it was in July right after she got out of rehab as she so clearly and selectively, I might add, could testify very pointedly in these proceedings?
>
> Clearly, she says that she engaged in an intimate affair. She doesn't say, "I had sex with him on one occasion in my house when I

> was drunk." She says she engaged in an intimate affair.
>
> Now, maybe I'm playing with semantics. It could be argued that an intimate affair is one sexual liaison between parties, but I think that the more logical and common parlance with the word, "intimate affair," gives rise to a longstanding or more than one night situation in anybody's common understanding of the language.
>
> She says further, "I began to have very intimate feelings for him and subsequently allowed him to convince me to coerce my son into accepting a plea bargain."
>
> Her testimony in these proceedings was that there were no feelings, that it is something that was initiated by her ingestion of alcohol beverages, in facts and circumstances of the happening and, "One thing led to another," I believe were her words, and they wound up upstairs in her bedroom.
>
> Again, a substantial inconsistency with her written affidavit in support of these proceedings in this motion when she obviously had time to sit, write, rewrite, reflect, refer to calendars, refer to time frames. It was a very important document. This is the document that caused the Appellate Division to say to the trial Judge, which happened to be me in the initial post-conviction relief hearing, "Judge, you just cannot assume for the circumstances of this analysis that all of the allegations are true."
>
> These are very serious allegations. And the timing of these allegations, if true, are critical. I find there are serious questions in this Court's view of Ms. Thomas' credibility, for all of the reasons that I stated, raises serious questions in this Court's view of her truthfulness and the veracity of her entire testimony. [8T119-8 to 121-16].

On the other hand, the post-conviction court specifically found defendant's trial counsel to be the substantially more credible witness. The court found Daniels was "clear," "concise" and "forthright" in his testimony and that "every aspect of his

testimony has a high degree in giving great weight as to his credibility and his recollection of the timing of these events." (8T121-24 to 122-23).

The post-conviction court then found explicitly that (1) there was a "sexual liason," a "one night circumstance or a one-time event" between Daniels and Thomas; (2) that "it happened at a time in January, late January, early February, between the date this plea was entered and before the sentencing, not in July, not in the fall of 1996 as Ms. Thomas would have us believe" (3) that Thomas called Daniels "immediately the next day to contact him to say, "Let's forget about it....[l]et's act as if it didn't happen....[i]t was inappropriate....[i]t shouldn't have happened....I apologize for my actions....[p]lease continue to represent my son" (4) that the one-time encounter had "no bearing whatsoever at any point on Mr. Daniels' advice to his client", and (5) "[a]t no time did Mr. Daniels . . . use that intimate relationship with Vera Thomas to get an upper hand or any added pressure on [defendant] to get him to do anything" (6) that Daniels "reviewed the discovery painfully, piece of evidence by piece of evidence, not only with [defendant], but with [defendant's] mother" (7) that Thomas' testimony that the Prosecutor himself was at the police station in the early morning hours of March 17th making plea bargains was "the most frivolous testimony" the court had ever heard. (8T122-24 to 123-5; 8T123-6 to 20; 8T125-5 to 126-5; 8T130-18 to 131-2).

The post-conviction court found that Daniels' and Thomas'

sexual encounter could not give rise to a conflict of interest at the time of the plea. (8T127-10 to 128-21). As expressly found by the court, at the time of one-time incidental sexual encounter in "late January or early February of 1997," defendant had already pled guilty. Thus, it could not possibly have affected defendant's decision to plead guilty. The court found that "[t]he incidental sexual event between Mr. Daniels and Ms. Thomas had no impact, no influence, no pressure, and had nothing to do with this case in any way." (8T133-12 to 15).

The post-conviction court concluded that Daniels "acted as any experienced competent criminal attorney would act....[h]e didn't even breathe plea bargain until he had evaluated and investigated every possible plausible defense in this case that might exist on his client's behalf." (8T124-9 to 17). Needless to say, the court found no deficient performance.

The court found the second prong of Strickland had also not been proven. The court concluded that defense counsel was extremely effective as to the result obtained. He 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 court commented on the overwhelming nature of the evidence against defendant: "He confessed....[h]e confessed to Dockerty, he confessed to his own attorney, he confessed to his mother, he confessed to authorities....[t]he entire incident is recorded on tape in his voice...[t]he evidence in this case is overwhelming,

overwhelming." (8T132-2 to 6). As the court pointed out, if defendant had not pleaded guilty and gone to trial, the overwhelming evidence against him would have clearly produced convictions on all charges (knowing or purposeful murder, kidnapping, carjacking, armed robbery, theft, felony murder), and he could have faced, "without talking about the doctrine of merger," "life plus 150." (8T134-6 to 20). That, compared with a life sentence with a 30 year minimum, would have been a much worse outcome than what he received as a result of the plea bargain. (8T134-19). Consequently, as the post-conviction court concluded, if defendant had gone to trial, the result would have likely been far worse for defendant. The post-conviction court concluded that defendant had utterly failed to satisfy the prejudice prong of the Strickland test.

The post-conviction court's ruling must be upheld on appeal. At the outset, it is clear that the argument raised is procedurally barred. 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, post-conviction relief is not available where the issues could have been raised on direct appeal. R. 3:22-4; State v. Mitchell, 126 N.J. 565, 583-84 (1992). In his direct 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. Defendant

offers no justification or explanation 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 and a direct attack on that issue is inappropriate now. The issue is barred by application of R. 3:22-4.

Putting the procedural hurdle aside, defendant has utterly failed to show that he is entitled to post-conviction relief. A post-conviction defendant bears the burden of establishing grounds for relief by a preponderance of credible evidence. State v. Goodwin, 173 N.J. 583, 593 (2002); State v. Preciose, 129 N.J. 451, 459 (1992). On appeal from the denial of a petition for post-conviction relief, an appellate court neither reweighs the evidence nor judges the credibility of the witness. In other words, on review of an application for post-conviction relief, an appellate court is bound by the trial court's determination concerning credibility. State v. Locurto, 157 N.J. 463, 474 (1999). Further, the decision of a post-conviction court should not be disturbed unless the court abused its discretion. State v. Flores, 228 N.J. Super. 586, 589-90 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989).

In a claim of ineffective assistance of trial counsel predicated on an alleged conflict of interest under the Federal Sixth Amendment conflict of interest test, defendant bears the burden of satisfying a two-pronged test. Defendant must first demonstrate that counsel actively represented conflicting

interests and second that an actual conflict of interest adversely affected his lawyer's performance. 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).

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 federal constitutional predicate for his claim of ineffective assistance.

Under the New Jersey Constitution, when considering an alleged conflict of interest that does not involve multiple representations,[4] our courts evaluate the potential or actual conflict to determine if there is a "significant likelihood of

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[4] Because defendant's attorney did not represent multiple defendants, he only represented defendant, the stricter standard set forth in State v. Bellucci 81 N.J. 531 (1980) with regard to multiple representation is not applicable here.

prejudice." State v. Murray, 162 N.J. 240, 250 (2000); State v. Norman, 151 N.J. 5, 25 (1997); State v. Drisco, 355 N.J. Super. 283, 292 (App. Div. 2002).

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. However, when all is said and done, the distinctions between the Federal, New Jersey and Illinois standards are not critical in this case because defendant has failed to present either the existence of a conflict or any resulting prejudice therefrom under any standard.

If there was any question about whether defense counsel's one-time sexual encounter with defendant's mother had any effect

on defendant's decision to plead guilty, it was resolved at the post-conviction evidentiary hearing. The patent deficiency in defendant's assertion that the one-time sexual encounter between Daniels and Thomas created a conflict of interest with regard to defendant's decision to plead guilty is that, as explicitly found by the post-conviction court, the one-time sexual encounter occurred after defendant had already pleaded guilty. The post-conviction court's credibility determination that the one-time encounter occurred after defendant had already pleaded guilty was uniquely within the post-conviction court's province. The post-conviction court's choice of Daniel's testimony over Thomas' will not be disturbed on appeal. Our standards of review dictate that this court give appropriate deference to the post-conviction court's credibility determinations. State v. Locurto, 157 N.J. at 474. Thus, the sexual encounter could not have influenced defendant's decision to plead guilty, as it did not happen until after defendant had plead guilty.

As the post-conviction court found, there was no conflict of interest in defendant's trial counsel serving as counsel to defendant. Counsel's representation of defendant was never materially adverse to his representation of defendant, particularly when he represented defendant at the time of his plea. "An appearance of impropriety must be 'something more than a fanciful possibility' and 'must have some reasonable basis'" State v. Jimenez, 175 N.J. 475, 493 (2003).

As defendant established no potential or actual conflict,

this court need not consider whether defendant was adversely affected or there was a "substantial likelihood of prejudice. But clearly defendant has utterly failed to show any adverse effect on his representation by counsel's alleged conflict.

Absent any showing of a conflict of interest, in order to obtain post-conviction relief, defendant must establish ineffective assistance of counsel under the highly demanding, two-pronged Strickland test, which governs general ineffectiveness claims in New Jersey. State v. Fritz, 105 N.J. 42 (1987). 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).

Defendant's claim that his trial counsel pressured him to accept the plea bargain agreement is entirely contradicted by the

record, especially by the testimony of defendant's counsel at the post-conviction hearing as well as defendant's own statements at the time he entered his plea. The post-conviction court, after hearing testimony on this issue, found no evidence that defendant was coerced into pleading guilty. The testimony of defendant's trial counsel was accredited by the post-conviction court. It established that defendant himself made the choice to plead guilty after numerous consultations, and that there was absolutely no pressure upon him to plead guilty. When asked if he recalled trying to convince defendant and defendant's mother "that it was in his best interest to enter a plea of guilty and negotiate," defendant's counsel replied, "No, that was my position .... I wasn't trying to convince them of that....[t]he discussion I had with them is that they were not giving me an answer one way or another ....I could care less whether he took the deal." (8T48-3 to 9). Defendant's claim of coercion is woefully inadequate and was thoroughly impeached at the evidentiary hearing. The conduct by defendant's attorney that defendant claimed to have been coercive amounted to nothing more than the attorney's professional opinion on the strength of the case and sound advice to plead guilty.

In any event, defendant's contention of coercion is irrelevant because, as a matter of law, a claim of "coercion" without more, does not demonstrate ineffective assistance. 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"); Jones v. Wainwright, 604 F.2d 414, 416 (5th Cir. 1979) (a guilty plea will

not be set aside as coerced "if an attorney determines, in his professional judgement, that a guilty plea is in his client's interest"). Thus, even if counsel, using his professional judgment, advised defendant to plead guilty, such advice is insufficient to support a claim that the guilty plea was involuntarily coerced.

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). 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.

In this connection, it is important to realize that defendant's conclusory allegation flies in the face of his own sworn responses in his colloquy with the court at the plea proceeding, which firmly establishes that defendant knowingly and voluntarily pleaded guilty. Indeed, at the proceeding, the trial court interrogated defendant at length, including asking him if he was entering a guilty plea "freely and voluntarily." (4T18-15 to 16). Defendant unequivocally and unhesitantly replied in the affirmative. (4T18-17). 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. (4T9-12 to 11-20; 4T12-17 to 21; 4T18-15 to 17; 4T19-2 to 20-19; 4T21-3 to 6). Thus, defendant's response to all of the trial court's inquiries demonstrated the constitutional validity of the plea. At

sentencing, defendant explicitly confirmed that he was completely satisfied with his attorney. (5T2-13 to 15).

As to defense counsel's alleged misrepresentations with regard to the plea process, defendant is in the same position as he is with respect to his claim of coercion. Defendant claims counsel erroneously told him that he faced the death penalty if he did not plead guilty. However, defense counsel's testimony at the evidentiary hearing directly contradicts that claim. In fact, defense counsel specifically denied giving defendant such advice because defense counsel was well aware that defendant, being a juvenile, was not subject to the death penalty. (8T56-22 to 57-2). This court gives deference to the post-conviction court's ability to assess the credibility of witnesses. The post-conviction court resolved the issue of credibility against defendant and upheld the voluntariness of the plea.

Furthermore, the record leaves no room to doubt that defense counsel fully, fairly and competently represented defendant at both the plea proceeding and sentencing. 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. As pointed out by the sentencing court, the State was "confine[d] in its presentation

of the case to the plea which was a felony murder." (5T4-11 to 14; 5T32-17 to 25; 5T42-10 to 25; 5T45-4 to 14; 5T54-19 to 55-7). There is no question that this plea bargain was the best choice that could have been made under the circumstances. To reiterate, 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. (5T5-20 to 18-22). At sentencing, defense counsel argued vigorously for leniency. What is more, as explained by this court on direct appeal, "[d]efendant 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." (4T34-20 to 21). Indeed, before pronouncing sentence, the court felt compelled to remark that defense counsel spoke "so ably on behalf of [defendant]." (5T58-23 to 59-1). Defendant's presentation does not even begin to meet the first prong of the Strickland test. As the post-conviction court found, trial counsel was not ineffective in any way. Defendant fails to point to any error counsel made as a result of the alleged "conflict of interest," much less an error that fell below an objective standard of reasonableness. Hill v. Lockhart, 474 U.S. at 57.

Even assuming that counsel's representation of defendant was somehow deficient, defendant must meet the second prong of the Strickland test, prejudice. Defendant needs to show 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. 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. (4T18-22 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. (4T13-24 to 18-9). What defendant has set out 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. (6T23-3 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). Defendant also fails to recognize that even assuming a conviction of merely felony murder, only one felony would have merged with the felony murder conviction. See State v. Manning, 234 N.J. Super. 147, 164 (App. Div. 1989), certif. denied, 117 N.J. 657 (1989). In other words, defendant would have risked being sentenced to additional consecutive mandatory terms of imprisonment on carjacking and/or robbery and/or kidnapping. The severity of the conduct and the separate nature of the criminal acts certainly would have warranted consecutive sentencing under State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). Moreover, contrary to defendant's beliefs, taking a person to a deserted area where she will have no chance for help and suffocating that person are actions describing purposeful murder. In other words, the evidence showed that defendant knowingly and intentionally committed the act of suffocation which caused Kathleen's death. He would most likely have been convicted of knowing or purposeful

murder but for his guilty plea.

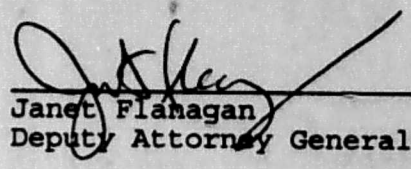
To conclude, it is clear upon the record that defendant has utterly failed to meet his burden of proof of demonstrating that there are substantive grounds for relief upon his claim of ineffective assistance of counsel. Thus, the post-conviction court's denial of post-conviction relief was a proper and fully justified exercise of discretion.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm the denial of post-conviction relief.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: 
Janet Flanagan
Deputy Attorney General

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DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: November 26, 2003

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

-4181-0274

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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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 forwarded 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-4181-02T4

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. : TRANSCRIPT OF PLEA

MICHAEL LA SANE, :

Defendant

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 from 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 relief 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 these 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 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-4111-02T4

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
AUG 20 2003
CLERK

STENOGRAPHIC TRANSCRIPT OF SENTENCE

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

Date: February 28,1997

BEFORE:

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

RECEIVED
APPELLATE DIVISION
AUG 20 2003
SUPERIOR COURT
OF NEW JERSEY

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
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Toms River, N.J. 08753

4/97D

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 lucky, 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

with along with his illness.

Kathy's grandmother died in October of '96 of a broken heart. She could not understand. She kept asking why did he have to kill her?

How much we all loved Kathy. How much we all miss her. Will we ever feel the same again? I feel like part of my body has been scooped out and the pain of losing someone you love so dearly is unexplainable, so senseless, only someone who has been through this can know. I feel so sad for her husband Paul and little Daniel. He is such a precious child. Kathy was at a point in her life when all her dreams had been fulfilled. She had a loving husband, a beautiful little boy, a home, a family, a good job, good friends and she loved her students.

We had no time to say goodbye, no time to tell Kathy how much we all loved her. I know Kathy loved us all so much, too. If I could speak to her today, I'd say, my precious, precious daughter, I miss you so much.

Sincerely, Elizabeth Stanfield.

Thank you.

THE COURT: Thank you.

MR. CUNNINGHAM: Judge, now I call on Paul Weinstein.

MR. WEINSTEIN: Was it worth it?

MR. DANIELS: I would object to that.

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 on 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