NEW
FOLDER
BEGINS

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March 9, 1988

FILED
SUPREME COURT
MAR 29 1988
Stephen W. Townsend
04 Clerk

TO THE HONORABLE JUDGES OF THE
NEW JERSEY SUPREME COURT
Hughes Hustice Complex
CN-970
Trenton, New Jersey 08625

Re: Letter Petition for Certification
State v. Eugene Berta
Supreme Court Docket No.
Appellate Division Docket No. A-2147-84T4

Dear Honorable Judges of the Supreme Court: 28,591

Defendant, Eugene Berta, hereby petitions this Honorable Court for certification with respect to the above matter. The defendant was sentenced to a term of life with a minimum of thirty years and the conviction and sentence was affirmed in all respects by the Appellate Division on January 22, 1988. Defendant relies upon the briefs submitted below in support of said petition.

It is hereby certified that this petition has merit and is not filed for purposes of delay or harassment.

Respectfully submitted,

PHILIP V. LAGO, ESQUIRE
Designated Counsel
On Behalf of the Public
Defender's Office

PVL/njm

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2147-84T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EUGENE BERTA,

Defendant-Appellant.

Submitted January 5, 1988 - Decided JAN 22 1988

Before Judges Bilder, Muir, Jr. and Skillman.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County.

Alfred A. Slocum, Public Defender, attorney for appellant (Philip V. Lago, Designated Counsel, of counsel and on the brief).

W. Cary Edwards, Attorney General of New Jersey, attorney for respondent (Jane F. Tong, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following a three-week jury trial, defendant Eugene Berta was convicted of murder, N.J.S.A. 2C:11-3, and possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4a. The weapons conviction was merged with the murder and he was sentenced to a term of life with a minimum of 30 years. On appeal he claims the trial judge erred with

respect to a number of evidential rulings and that the sentence was excessive. In his brief, he makes the following contentions:

POINT I

THE SENTENCE IMPOSED IS EXCESSIVE AND THEREFORE AN ABUSE OF DISCRETION.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF PHOTOGRAPHS OF THE VICTIM AND THE AUTOPSY SINCE THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE RISK THAT THEY WOULD CREATE SUBSTANTIAL DANGER OF UNDUE PREJUDICE.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO COMPEL DISCOVERY OF PRIOR AUTOPSIES PERFORMED BY THE MEDICAL EXAMINER.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF TESTIMONY CONCERNING THE VICTIM'S CUSTOM OF MARKING OFF CALENDAR DATES.

POINT V

THE TRIAL COURT ERRED IN PRECLUDING THE DEFENDANT FROM ADMITTING EVIDENCE OF THE VICTIM'S SEXUAL EXPLOITS PRIOR TO HER MARRIAGE TO MR. WARNER.

POINT VI

THE COURT ERRED IN ALLOWING THE ADMISSION OF HEARSAY STATEMENTS OF THE VICTIM CONCERNING HER RELATIONSHIP WITH THE DEFENDANT.

On July 16, 1983, the nude, partially decomposed body of Cathy Warner was found in the downstairs bathtub of her home in Metuchen, her hands folded on her stomach and

loosely bound. There was no evidence of forced entry. The doors and windows were all locked and intact, the house was neat. Two neatly packed suitcases containing belongings of the victim were found in her bedroom doorway. Her car was in the driveway; on the ground behind it were various grocery items.

An autopsy performed on July 17 revealed that Ms. Warner died as the result of a gunshot to the back of her head. At that time, the medical examiner estimated that death occurred three days before — or about July 14. However, subsequent entomological studies of larvae found on the victim's maggot-infested head led to an opinion that death might have occurred many days earlier. The medical examiner had not considered the studies in arriving at his original estimate and testified that he would have estimated an earlier time of death if he had the entomologist's report.

The time of Ms. Warner's death was a matter of dispute and important to the State's case. It was the prosecutor's theory that she had been murdered on July 8. Defendant admitted he had been with her on that date. To establish July 8 as the date of death, the State showed the victim had last been seen on that date; a calendar on Ms. Warner's kitchen table, open to the month of July, had the days (from the beginning of the year) up to and including July 7 crossed off; mail postmarked July 6 and July 7 was found in the mailbox; a travel agency itinerary indicating a July 8

flight were found in the victim's purse; and the wristwatch she was wearing displayed 3:03 a.m. and July 10. The watch was designed to run 48 hours without winding, tested accordingly and was presumably last wound sometime between July 8 and July 10.

Police investigation revealed a close romantic relationship between the victim and defendant. He was questioned early in the investigation because his last name appeared with the victim's on the itinerary found in her purse. Although admitting he knew the victim, defendant initially claimed they were merely casual acquaintances. He had last seen her on July 8 when he had driven her to the Metro Park station on her way to visit her sister in Virginia. He left the car at the station, went to Minnesota, came back three days later and returned the car to the victim's residence. He then went home and spent the next three days until July 14 with his wife at Seaside Heights. He admitted having a set of keys to the victim's car and house. When informed of Ms. Warner's death during the initial interview, defendant showed little reaction. Subsequently, defendant acknowledged a closer and more intimate relationship. He described the victim as bent on marrying him but characterized his own intentions as more casual.

The testimony of Ms. Warner's friends, family and co-workers evidenced an intimate relationship with defendant dating back to the death of her husband in 1980. She was

apparently deeply in love with him; wanted to marry him and have children; never talked about any other man in her life; and told one friend he was the only one who had a set of keys to her house.

Apparently her perception was beclouded. Other testimony evidenced that defendant had not left his wife and, indeed, was sharing his affection with others in addition to the victim and his wife. In early 1983, he began dating and sleeping with a third woman, Pat Bauer. And it was with Pat Bauer that he took the July 8 trip referred to in the itinerary in the victim's purse.

If the jury concluded that the murder took place on July 8, which it clearly had a right to do, there was substantial credible evidence showing the defendant had the opportunity and motive for the murder and for concluding beyond a reasonable doubt that he was the author of the terrible deed.

After a careful review of this matter, we are satisfied that defendant's contentions are all without merit. The photographs were, as the trial judge properly noted, probative of a critical issue in the case — the time of death. Their admission was no abuse of discretion. See State v. Carter, 91 N.J. 86, 106 (1982); State v. Thompson, 59 N.J. 396, 421 (1971). The medical examiner's prior autopsies were, again as the trial judge noted, irrelevant. Moreover, the circumstance at which defendant intended to direct this past opinion never occurred; the medical

examiner did not withdraw his earlier opinion as to time of death other than to agree that the entomologist's report would have changed his view. The handwriting on the calendars was properly authenticated and Dawn Farrell's testimony evidenced the victim's habit of crossing out the dates on a daily basis. See Evid. R. 50. Ms. Farrell's observations in this regard were more than sufficient authentication. In the light of Ms. Farrell's testimony and the mute testimony of the calendars themselves, we find no error in the admission of the testimony of victim's mother as to her similar habit, so well known to the victim and relevant and admissible as explaining the victim's own calendar habit. We agree with the trial judge that the victim's personal conduct prior to her marriage in 1980 was remote and irrelevant. We also agree with the trial judge that the hearsay related to the victim's state of mind and was admissible under Evid. R. 63(12). While the statement that only defendant had keys to the house may have been excludable, we are persuaded it was harmless. The evidence suggested Ms. Warner was killed by someone she knew; someone who could have gained access as readily by being let in as by letting himself or herself in. Insofar as the statement showed defendant's possession of the key, that fact was clearly evidenced by defendant's own statement and the keys themselves, which were found in defendant's house. We are satisfied the sentence was properly considered and imposed; that it is unexceptionable. See State v. Roth, 95 N.J. 334, 363-364 (1984).

Affirmed.

ALFRED A. SLOCUM
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2147-84T4

STATE OF NEW JERSEY, :

Plaintiff-Respondent, : Criminal Action

v. NOTICE OF PETITION FOR CERTIFICATION

EUGENE BERTA, :

Defendant-Petitioner. :

::::::::::::::::::::::::::::::::::::

TAKE NOTICE that the defendant, EUGENE BERTA,

confined at New Jersey State Prison, Trenton, New Jersey petitions for certification to this Court from its judgment of January 22, 1988

which affirmed his conviction of Murder

for which defendant is/was serving a sentence of Life with 30 years minimum parole eligibility; $1,000 to the V.C.C.B.

Defendant is in custody

ALFRED A. SLOCUM
Public Defender
Attorney for Defendant-Petitioner

BY: _____
FRANK J. SOLTIS
Assistant Deputy
Public Defender

Note:
This is a Public Defender designated counsel case and we hereby request a ten day extension to file a petition for certification.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A- 2147-84T4

STATE OF NEW JERSEY :

Plaintiff-Respondent, : Criminal Action

-v- : On Appeal from Judgment of Conviction of the Superior Court of New Jersey,

EUGENE BERTA, : Law Division, Middlesex County.

Defendant-Appellant :

Sat Below: Hon. Barnett E. Hoffman. J.S.C. and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Of Counsel and
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PRESENTLY CONFINED

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PROCEDURAL HISTORY

Defendant, Eugene Berta was charged in Middlesex County Indictment No. 1146-8-83 with murder, contrary to N.J.S. 2C:11-3 (Count 1) and possession of a weapon for an unlawful purpose, contrary to N.J.S. 2C:39-4(a) (Count 2). Da 1

On October 2, 1984, a jury convicted defendant of murder (count 1) and possession of a weapon for an unlawful purpose (Count 2). Da 12

On December 3, 1984, the Honorable Barnett E. Hoffman,J.S.C. who presided at the jury trial, sentenced defendant to life imprisonment with no parole eligibility for 30 years, Count 2 merging for purposes of sentencing. A $1,000 penalty was assessed payable to the V.C.C.B. and a fine of $10,000 was imposed. Da 2-5

On January 18, 1985, a Notice of appeal was filed with the Appellate Division. Da 6

STATEMENT OF FACTS

The defendant, Eugene Berta, was married to Gail Berta on December 18, 1975 in Metuchen, New Jersey. The defendant had an "open relationship" with his wife. This type of relationship, which they had agreed upon, permitted the defendant and his wife to see other people outside of their marriage. (23T130-13 to 17).[1] The defendant would come and go from his home as he pleased. He was free to carry on relationships with other women and his wife would not question his behavior, nor would the defendant inquire as to the personal life of his wife. (23T135-15 to 25).

This arrangement was satisfactory to both spouses. The Bertas had twins in 1978 and the defendant also adopted Gail Berta's two children from a previous marriage. (23T136-8 to 25). The defendant took full responsibility for support of these children. (23T142-1 to 3). Eugene Berta, Jr. is the defendant's son from a prior marriage; he never lived with his father, but spent every other weekend with him. (26T33-25).

The defendant rekindled an intimate relationship with Catherine Warner of Metuchen, New Jersey, shortly after her husband died in February, 1980. (20T30-18 to 23). They had previously dated for several years in the 1970s. Cathy Warner was very much in love with the defendant and discussed her feelings openly with her best friend, Joy Niemiera. (22T30-8

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[1] The transcript table appears on the following page.

"1T" refers to the transcript of April 19, 1984

"2T" " " " " " April 24, 1984

"3T" " " " " " May 2, 1984

"4T" " " " " " May 7, 1984

"5T" " " " " " May 29, 1984

"6T" " " " " " May 30, 1984

"7T" " " " " " July 13,1984

"8T" " " " " " July 31, 1984

"9T" " " " " " August 8, 1984

"10T" " " " " " September 4, 1984

"11T" " " " " " September 5, 1984

"12T" " " " " " September 6, 1984

"13T" " " " " " September 7, 1984

"14T" " " " " " September 10, 1984

"15T" " " " " " September 11, 1984

"16T" " " " " " September 12, 1984

"17T" " " " " " September 13, 1984

"18T" " " " " " September 14, 1984

"19T" " " " " " September 17, 1984

"20T" " " " " " September 18, 1984

"21T" " " " " " September 19, 1984

"22T" " " " " " September 20, 1984

"23T" " " " " " September 21, 1984

"24T" " " " " " September 24, 1984

"25T" " " " " " September 25, 1984

"26T" " " " " " September 26, 1984

"27T" " " " " " October 1, 1984

"28T" " " " " " October 2, 1984

"29T" " " " " " December 3, 1984

to 16). Cathy Warner loved the defendant very much and wanted to marry him. She told various friends and co-workers of her desire to have a family and a life together with the defendant. (22T30-20 to 23). She never spoke of other men in her life to her friends and only expressed the desire to be with the defendant. (22T32-3).

In 1983, Ms. Warner enrolled in a school in Jersey City, New Jersey which gave instruction on driving tractor trailer trucks. (22T67-1 to 9). She told Lee Cole, a classmate at the school that "me and my boyfriend are going to get married and we're going to drive a truck together." (22T70-6 to 8).

The relationship continued between the defendant and Ms. Warner into 1983. She often gave the defendant ultimatums regarding marriage. (22T35-7 to 9). They would often argue and end the relationship but, shortly thereafter, would begin to see each other again. (22T71-1 to 5).

On May 10, 1983, the defendant had an accident involving a van. (23T150-2). His wife and Ms. Warner both appeared at JFK Hospital at the same time to visit him. (23T154-3 to 10). When Mrs. Berta arrived home after this confrontation, she found some of her husband's possessions in a grocery bag on her front porch. (23T154-16 to 25). The bag had been brought to

the Berta home by Ms. Warner. Ms. Warner was told that the defendant had been living at home with his wife even though he had told her he and his wife had separated. (23T156-8 to 19). Ms. Warner broke off the relationship upon being advised of this fact.

Ms. Warner was very depressed after this break-up. (22T-50 to 23). She stated that all her plans to have a baby and settle down were now ruined; all she had ever wanted was to be happy and now she would never be happy. (22T50-7 to 22). She told her friend, Merelyn Daniel, that Mrs. Berta intended to return her house keys which the defendant had in his possession. Ms. Warner stated, "he was the only one who had a set of keys" to her home. (22T87-17 and 18).

Soon after the break-up, the defendant and Ms. Warner had a discussion. Ms. Warner indicated to a co-worker that they had "ironed things out." She maintained that their relationship would now be "on her terms" and gave the defendant a time limit to get "everything straightened out" with respect to the relationship with his wife. (22T89-19).

Ms. Warner scheduled her vacation from July 8 to July 15, 1983. (22T90-13 and 14). She planned to go to Minnesota with the defendant to look at property. (22T90-16 to 18). She was pleased to be going away and talked about it constantly for three weeks prior to the planned trip. (22T91-10 to 16).

Several weeks before the vacation, Ms. Warner loaned the defendant $5,000. (23T182-25). He told her it would go toward the purchase of a new van; the van he formerly owned was destroyed in an accident. (22T42-8 to 18). As the date of the vacation drew near, the defendant borrowed an additional $5,000. from Ms. Warner to be used as a down-payment on the property they were to look at in Minnesota. (23T183-10 to 12).

Ms. Warner was very excited about the planned trip and thought of it as a time for her and the defendant to decide on matters concerning their relationship. (22T80-23 to 25). Ms. Warner made all the travel arrangements and paid for the trip. (23T30-17). Travel plans, such as itinerary packages and plane tickets, were in her and the defendant's names. (23T30-12 to 13).

On the morning of July 8, 1983, the defendant drove Ms. Warner to work at Middlesex General Hospital. (23T31-7 to 9). Ms. Warner received a phone call at work at approximately 2:00 P.M. that day. She became extremely upset after the telephone conversation and requested permission to leave work early. (22T131-12 to 15). She told the head nurse her mother had suffered a heart attack and left work immediately thereafter. (22T131-18).

The defendant picked Ms. Warner up at the hospital and brought her to her home. (23T31-10 and 11). They began to argue over the fact that she would not be going to Minnesota with him. (23T31-12 and 13). According to the defendant, the quarrel was resolved and Ms. Warner decided to visit her sister in Virginia while the defendant was to go to Minnesota without her. (23T31-16 to 18).

The defendant indicated that he and Ms. Warner had sex and fell asleep. When he awoke, he had missed the flight to Minnesota. (20T28-2 to 17). He made preparations to take a flight the next day. The defendant then dropped Ms. Warner off at the Metro park Train Station in Iselin, New Jersey at approximately 10:00 P.M. (23T31-1 and 2).

On July 16, 1983, Richard Neal, Ms. Warner's father, received a phone call from Middlesex General Hospital. (16T8-5 to 8). He was advised that Ms. Warner had not shown up for work, nor had she called. (16T8-11). He and his son, Gary, went to Ms. Warner's home at 125 Durham Avenue, Matuchen, New Jersey to investigate. They found Ms. Warner's car parked farther into the driveway than normal. There were also packages of meat and bread behind her car. (16T9-11 to 13). The two men attempted to get into the house but were unable to gain entry. They called the police. (16T11-14 to 16).

Sergeant Pasqual Sardone arrived a short time later and found Mr. Neal and his son at the house. (16T24-14 to 6). Sergeant Sardone found all the doors and windows locked; he also observed flies in the windows all around the house. (16T25-16 to 17).

Mr. Neal's son broke the basement window and unlocked the back door. (16T26-11 to 13). Sardone and he ran upstairs to the bedroom. Suddenly, Mr. Neal summoned them downstairs by banging on the wall. (16T27-7 to 11). Sardone came downstairs and into the bathroom and found the nude, decomposed body of Ms. Warner. (16T28-4 to 12).

Edward Jones, a neighbor, had entered the house after Sergeant Sardone had gone to the upstairs bedroom. (16T27-16). He had discovered the body along with Mr. Neal. (16T27-17). When they entered the bathroom, the body was in the tub, partially obscured by the shower curtain; only the knees were visible. (16T28-2).

Sergeant Sardone pulled back the shower curtain to fully reveal the body of Ms. Warner in the bathtub. Her head was in an advanced state of decomposition and maggots covered her eye and nose. (16T28-8 to 10). Her hands were folded over her stomach and there was approximately three or four inches of blood and water in the tub. (16T28-10 to 12).

Sergeant Sardone radioed for assistance and secured the house. (16T30-6 and 7). Sergeant Salamone arrived and noted the condition of the body and house. It had not been disturbed, nor had anything else in the house been touched. (16T32-7 to 11). At this point, the police officers noticed an open calendar on the kitchen table. The days in the calandar were marked off; the last date to be marked off was July 7th. (16T32-12 to 14). Several unpaid bills and a letter to her tenant were also found on the kitchen table. (16T32-16 to 18).

Further inspection revealed mail in Ms. Warner's mailbox postmarked July 6 and 7th. (16T32-21 to 24). The upstairs bedroom was neat and undisturbed. Two suitcases were found near the bedroom doorway. (16T34-1 to 4).

Detectives Haley, Zimmerman and Watson arrived from the Middlesex County Prosecutor's office to investigate the premises. (16T45-13 and 14). Photographs of the bathroom were taken, as were photos of the interior and exterior of the home. (16T46-6 to 16).

The body was removed and an autopsy was performed on July 17, 1983. (16T71-14 to 19). The victim died as a result of a gunshot wound to the head. (16T72-2 and 3). A diligent examination of the house was undertaken, but the bullet was

never found. (16T77-4). However, a hole was found behind a chair in the basement. This hole penetrated a piece of plywood and several cardboard boxes. An indentation was found in the concrete wall directly behind the boxes. (16T75-14 to 18). The entire basement was searched but no bullet was found.

Lieutenant Zimmerman investigated the decedent's bedroom. Among Ms. Warner's personal belongings he discovered a folder for airline tickets, an itinerary which indicated a flight number with an ultimate destination of Minnesota. It was dated July 8, 1983. The names Warner/Berta were written on the ticket folder. (20T14-11 to 20).

Lieutenant Studnicki of the Metuchen Police recognized the name Berta. He believed it was the same Eugene Berta who was attached to the Edison Rescue Squad. (20T17-1 to 4). Studnicki requested that the defendant come down to police headquarters on July 16, and he complied. (20T17-6 to 9).

The defendant arrived at police headquarters and was interviewed by Lieutenant Zimmerman. (20T35-10 to 13). After several questions, the defendant wanted to know the reason for being interviewed. He was advised that Cathy Warner was dead. The defendant had very little reaction to this news. (20T35-21 to 25).

The defendant admitted he had taken a trip to Minnesota but was not accompanied by Ms. Warner. (20T17-16 to 21). He reluctantly supplied the name of Pat Bauer (who was married) as his female travelling companion. (20T18-1). The defendant described his relationship with Ms. Warner as casual, but admitted borrowing $5,000 from her on June 24 and an additional $5,000 on July 7. He said he did electrical work for the victim but was merely a friend. (20T19-2 to 6).

The defendant told the police that on the evening of July 11, 1983, he and Pat Bauer returned from Minnesota and she drove him from Newark Airport to the Metro Park Railroad Station. He then drove the decedent's car to her home, (20T19-10 to 17); he had parked the car there on July 8, after driving the decedent to the Metro Park train station to catch a train. (20T19-22 to 25). He had his own set of keys for Ms. Warner's home and car. (20T21-1 to 2).

After the memorial services for Ms. Warner, on July 20, 1983, Zimmerman and Salamone had another conversation with the defendant. (20T21-20 to 23). During this discussion the defendant asked if he could have access to the Warner home to get his shotgun and a cartridge of film that he had left in the house. (20T22--2 to 25). The defendant was told the shotgun had already been retrieved. He said he had put the film in a bedroom dresser of the Warner house the night he

returned from Minnesota. (20T23-5 to 23).

The defendant conceded that he and Ms. Warner were "a little bit more than friends." (20T25-12 to 14). He stated he had stayed at her home on occasion and had borrowed $10,000 from Ms. Warner to purchase a farm in Minnesota. (20T25-14 to 20). Ms. Warner knew of his plans and knew that he intended to move out of the New Jersey area by 1985 either with or without her. (20T25-20 and 21).

He also related to police how he had spent the day before his trip with Ms. Warner by picking her up from work, their subsequent argument and her decision to leave for Virginia. (20T27-4 to 28-21).

A third interview with the defendant was conducted by the police on July 23, 1983. He supplied the police with details of his relationship with his wife and Cathy Warner. (20T30-2 to 23). He told the police he had decided to divorce his wife and move to Minnesota. (20T31-12 and 13). The defendant indicated that he did not want to move in permanently with Ms. Warner, even during the period of time he and his wife were separated. (20T31-17 to 32-4). Ms. Warner was obsessed with marrying him and at one point he went to a psychiatrist with her to help her with this fixation. (20T32-4 to 11).

The investigating team involved in the Warner murder met prior to August 10, 1983. The conference committee consisted of both attorneys and detectives (23T72-15 to 22). The evidence was discussed during the meeting and, as a consequence of that meeting, the defendant was placed under arrest and charged on August 10, 1983. (23T72-24 to 73-3).

POINT I

THE SENTENCE IMPOSED IS EXCESSIVE AND THEREFORE AN ABUSE OF DISCRETION.

Although the sentence imposed, life imprisonment with parole ineligibility for 30 years, was within the court's statutory limits of discretion, it was excessive under the circumstances and therefore an abuse of discretion. The New Jersey Code of Criminal Justice provides for a standard of appellate review of actions of sentencing courts even where, as here, the sentence is within the court's limits of discretion. The relevant statute, N.J.S.A. 2C:44-7, provides:

> Any action taken by the court in imposing sentence shall be subject to review by an appellate court. The court shall specifically have the authority to review findings of fact by the sentencing court in support of its findings of aggravating and mitigating circumstances and to modify the defendant's sentence upon his application where such findings are not fairly supported on the record before the court.

See also State v. Bess, 53 N.J. 10 (1968)(where the court reduced a sentence statutorily authorized but found excessive under the circumstances). It should also be noted that the Supreme Court of New Jersey has interpreted the sentencing provisions set forth in the Code as delineating definite limitations on the unfettered sentencing discretion exercised by trial courts. State v. Maguire, 84 N.J. 508 (1980).

State v. Hodge, 95 N.J. 369,375 (1984) held sentences imposed under the Code must be based upon the new sentencing philosophy of the Code which is offense-oriented and does not focus on the rehabilitation of offenders. As clarified in Hodge and State v. Roth, 95 N.J. 334,366 (1984), appellate review of the sentence is available. The sentence imposed cannot stand where any of the following circumstances are found:

(a) The sentencing Court failed to follow the sentencing guidlines of the new Code ;

(b) The aggravating and mitigating circumstances found by the sentencing Court were not based upon competent credible evidence in the record; or

(c) The application of guidelines to the facts of the case makes the sentence clearly unreasonable and shocks the judicial conscience.

Roth, Supra at 364-364. Thus, in imposing sentences, the Court observed that the overall thrust of the new Code is its focus upon the gravity of the offense and not the blameworthiness of the offender.

The Trial Court in the present matter had limited discretion in imposing sentence. The Code provides for a minimum sentence of 30 years with no parole eligibility for 30 years. The maximum sentence which the Court could have imposed in the present case was that which was, in fact, imposed - life imprisonment with parole ineligibility for thirty years. It is respectfully submitted that, in light of the specifically enumerated purposes of sentencing as established by the Code, which encompasses the rehabilitation of offenders as well as prevention and condemnation of the commission of offenses, the sentence imposed was manifestly

excessive and an abuse of the Trial Court's discretion. N.J.S.A. 2C:1-2(d).

In imposing sentence, the Trial Court was required to examine and weigh mitigating and aggravating factors listed in N.J.S.A. 2C:44-1(a) and (b). Dependent upon the preponderance of aggravating or mitigating factors, the Trial Court could impose a sentence ranging from the mandatorily required 30 years without parole eligibility to life imprisonment without parole eligibility for 30 years, as was actually imposed.

In reviewing the aggravating and mitigating circumstances as set forth in N.J.S.A. 2C:44-1, the Trial Court cited "the nature and circumstances of the offense, and especially the cruel and heinous way it was committed..." as an aggravating factor. (29T 48-12 218). See N.J.S.A.2C:44-1a(1). In finding as an aggravating factor the nature and circumstances of the offense the Court noted,

> "What distinguishes this case from other non-capital murder cases are all of the surrounding circumstances. Because although Catherine Warner breathed her last breath on July 8, 1983, the defendant was killing her little by little over several years of their relationship. He treated the victim during her lifetime in the way no-one would treat a cur. And only when he had milked her out of her money and her spirit did he take the final step to eliminate Catherine Warner from his life."

However, the Trial Court was misguided in citing the alleged mistreatment of the victim by defendant for years preceding the actual murder. The evidence demonstrated

that defendant was married while dating the victim, a circumstance of which she was fully aware. The prosecution presented no testimony or evidence that the defendant had ever beaten or physically harmed Catherine Warner in any way, shape or form. Indeed, if the defendant murdered Cathy Warner, then the evidence clearly demonstrates this was the first and only time he physically abused her.

The evidence did show that the defendant's relationship with Cathy Warner was "on again, off again" affair. There was evidence that both the victim and the defendant dated others during their relationship, both before and after Cathy's marriage to Warner. Indeed, there were strong indications that Ms. Warner was dating several other individuals up until the time of her death notwithstanding her representations to the contrary. In any event, Ms. Warner was aware of the fact that the defendant was a married man, residing with his wife and she clearly could not expect ironclad fidelity from him.

It is difficult to identify the alleged mistreatment to which the sentencing court referred. The evidence showed that the defendant appeared in social gatherings with the victim on many occasions and no instances of mistreatment were witnessed by any individual who testified at trial. Moreover, Ms. Warner consistently spoke highly and lovingly of her relationship with the defendant. It is of no small moment that the prosecution failed to elicit one instance of alleged mistreatment from any witness notwithstanding the Court's liberal allowance of the admission of hearsay

testimony of statements by the victim. Simply stated, the victim was never quoted as citing any instance of mistreatment by the defendant.

The defendant readily admitted that he borrowed money from the victim. It is difficult to see, however, how this circumstance can constitute evidence of an aggravating factor. The sentencing court stated of the defendant: "Only when he had milked her out of her money and her spirit did he take the final step to eliminate Katherine Warner from his life." (29T49-527).

It is respectfully submitted that the sentencing court grossly misrepresented the facts in concluding that the defendant had "milked" the victim of her money. The evidence clearly demonstrated that the victim had loaned the money to the defendant for particular purposes. There was no evidence that the defendant defrauded the victim of her money or that he refused to pay her back. Quite the contrary, the evidence showed that the victim willingly loaned the money to the defendant, and that the money was used by the defendant for his stated purposes.

In short, there was no evidence that the defendant mistreated the victim. Quite the contrary, the evidence showed the victim and defendant had a warm, intimate relationship spanning many years. At times, their relationship may have been less intimate than at other times. Nonetheless, throughout the many years of their relationship, there was no evidence that the defendant ever mistreated the victim in any way.

The Trial Court's finding of mistreatment preceeding the murder is clearly without support in the evidence.

A second aggravating factor found by the Trial Court was the "risk that the defendant will commit another offense." (29T50-122). In so finding, the Court dismissed the fact that the defendant was a first time offender. The Court found that the "manner in which the crime was covered up" enhanced the risk that another offense would be committed. (29T50-325). Similarly, the Court found that the circumstance did not constitute a mitigating factor "because of the gravity of the offense and the fact that the first offense he committed was the worst that can possibly be committed...". (29T51-227).

In fact, the presentence report indicates that defendant's only prior criminal arrest was for simple assault and malicious mischief in 1973. Those charges were dismissed. PSR5. As stated in the report "mitigating circumstances include defendant has led a law abiding life for a substantial period of time before the instance of the offense." PSR2.

The presentence report and the evidence introduced at trial confirm the steadiness of defendant's employment history and his devotion to community service. Indeed, the investigating officers knew the defendant, who had worked with the Edison Rescue Squad for many years. (20T16-17 - 17-5).

Clearly, the Trial Court failed to follow the sentencing guidelines of the new Code by virtue of its failure to recognize defendant's crime-free past as a mitigating factor and as tending to reduce the likelihood of the commission of another

crime. As mandated by Roth, the Appellate Court cannot uphold the sentence where, as here, the Trial Court has failed to follow the sentencing guidelines of the new Code. Roth, Super, at 364-365. The Court cannot simply refuse to ignore the defendant's past history in imposing sentence. Some recognition must be given to past behavior in terms of the mitigating factor as well as a diminishment of the likelihood of the commission of another crime.

The Court found a third aggravating factor, which it described as follows:

> "The third aggravating factor is the need for deterrence. This factor speaks for itself. In this regard, special attention again must be paid to the relationship of the parties. For some of the time prior to her death the defendant and the victim lived together. Virtually in many respects they were like husband and wife. The criminal and family sections of the courts are beseiged and constantly being bombarded with matters dealing with domestic violence, which clearly because of fortuitous circumstances have not risen to the level of murder cases. That's not to say this case was one of abuse. However, this Court wants to sound a clear warning to all of those persons in society, whether they be spouse abusers or child abusers, but persons who dominate a personal relationship by physical force, that such conduct will be dealt with only in its harshest fashion."

(29T50-9 251-1).

First, it must be noted that the Court's recitation of this "third aggravating factor" belies the first aggravating factor cited by the Court. Judge Hoffman concedes the defendant and the victim had a relationship which "in many respects they were like husband and wife." (29T50-14 215). Moreover,

the Court recognized that the relationship did not involve abuse; it is interesting to observe that the Court's statement is diametrically opposite to those statements concerning "mistreatment" made in support of the finding of the first aggravating factor. Clearly, the Court's comments regarding this factor undercut the reasons given for a finding under the first aggravating factor.

Moreover, the Court's finding of a need for deterrence is speculative at best. Defendant and the victim were not husband and wife. They had an intimate sexual and social relationship which may, or may not, have eventually culminated in marriage. They did live together at certain times, but they were not living together on the date that Ms. Warner was murdered. The defendant was living with his wife and while the victim and the defendant may have spoken of a possible marriage, no wedding arrangements or plans had been made.

Nor had any evidence been adduced during the trial, as previously noted, that the defendant had engaged in physical abuse of the victim. It is therefore difficult to conceive of how a harsh sentence could impact upon the possible "spouse abusers or child abusers" as cited by the Court. (29T50-21 to 51-1). Nor was there any evidence that the defendant dominated his relation with the victim "by physical force". Clearly, the Court made findings in support of the deterrence aggravating factor which were not supported in the evidence. There was nothing in either the presentence report or the evidence

adduced at trial to indicate that the defendant engaged in physical abuse of the victim at any time prior to her death. It is difficult, if not impossible, to determine how the Court concluded that physical abuse had occurred. The statements by the Trial Court in this regard are mere speculation.

Where the record supports the Trial Court's determination regarding the existence of mitigating or aggravating factors, the validity of the sentence is not to be impugned on appeal. See State v. Davis, 175 N.J. Super 130,137-138 (App. Div. 1980), certif denied, 85 N.J. 136 (1980). Where, however, as here, the record does not support the determinations made by the Trial Court, and the findings appear to be based only upon the speculation of the Court, it is respectfully submitted that an abuse of discretion has occurred and the sentence must, therefore, be reduced or this matter must be remanded for resentencing.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF PHOTOGRAPHS OF THE VICTIM AND THE AUTOPSY SINCE THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE RISK THAT THEY WOULD CREATE SUBSTANTIAL DANGER OF UNDUE PREJUDICE

The State wished to introduce into evidence certain photographs which were taken of the decedent at the scene as well as photographs of the autopsy subsequently conducted. The photographs were particularly gruesome since the victim had been discovered several days after death. She had remained in the bathtub partially immersed in blood and water for several days, the exact amount of days having been hotly contested during the trial. Maggots had covered a substantial portion of the body which was not immersed. The eyes of the victim had been eaten out and substantial decomposition had taken place. As the Court readily found, "the pictures were certainly unpleasant and gruesome...". (13T84-18 to 22).

The Court heard a pretrial hearing in accordance with N.J. Court Rule 8 to make a preliminary determination as to the admissability of the proffered photographs. The defense called as an expert witness Dr. Robert Buckout, whose testimony was offered as "an expert pyschologist

and specifically in the area of the effect of photographs." (13T21-21 to 23).

Dr. Buckout opined that the proffered photographs, including those which the State eventually intended to display on a projector, would have a disruptive effect on the jurors' memory for evidence presented simultaneously as well as the strong emotional reaction to be elicited from the jurors.

> Q. Do you have an opinion as to what effect the jury seeing slides of these photographs which are -- three-by-five, Mr. Kapsak?
>
> MR. KAPSAK: They look more like --
>
> MR. FERENCZ: Four-by-six?
>
> THE WITNESS: These are four-by-sixes.
>
> Q. Four-by-six? Particularly if they're seen on a projector in color, do you have any opinion as to what effect it may have on a jury?
>
> A. It is my opinion that the stage of research that we've done is that it would have a disruptive effect on memory for information presented at the same time, detailed information at the same time.
>
> Q. Would --
>
> A. To the best of our knowledge at this time.
>
> Q. Would there be a substantial possibility of confusing the issue to the jury if the jury is thinking of slides as opposed to what has been testified to, for example?
>
> A. The completeness of memory as we are able to measure it is the thing that gets affected. People don't remember as much in the way of denial, and it would be my opinion that barring other techniques for ameliorating the effects, that that's what I would expect just on a raw showing of the pictures as you've shown me.
>
> Q. I want to show you an item marked State's Exhibit 151.
>
> A. Yes.

Q. That is a blow-up of, a color blow-up of a picture that I think you have in front of you. Is that correct?

A. Yes.

MR. FERENCZ: And the size of this, Mr. Kapsak, can you help me?

MR. KAPSAK: Sixteen inches by twenty inches.

Q. It's sixteen inches by twenty inches. Is that correct?

A. Yes.

Q. I show you what's been marked State's Exhibit 153. Now, Doctor, for the record, could you describe the three exhibits I've just given to you? I don't know if it's necessary in real specific detail, but in some detail.

A. Well, these three marked S-153, S-152 and S-151 are blow-ups of fairly close-up pictures of a dead person in advanced stages of putrefaction, and they are in color and quite large.

Q. Could you turn them over when you're done.

A. Yes.

Q. Doctor, in your expert opinion what effect if any would photographs such as that have on a jury's ability to remember testimony before, during and after the showing of those photographs?

A. I would have to limit my opinion to, again, the research findings that I've found, and the best evidence we have is that it would tend to have a disruptive effect on memory considering the gruesome contents of the material which research has shown produces fairly strong emotional reactions at the time.

(13T44-22 to 47-4).

Having heard testimony from Dr. Buckout and having reviewed the photographs and considered the argument of counsel, the Trial Court ruled that, as an initial matter, the photographs were relevant and generally admissible. (13T85-6 to 8).

The photographs could be shown to the jury in color and in the form of slides and 16" x 20" blow-ups. (13T85-9 to 86-20). The Court then went on to consider the prejudicial effects of the photographs under N.J. Evid. Rule 4.

> "So I will deal generally with what he said in terms of vis-a-vis whether it's such that it would create a Rule 4 problem, and I found that based upon the totality of his testimony that no Rule 4 problem is created. I don't think that any of the conditions set forth in Rule 4 as to the prejudicial effect being so far outweighing the probative value is present in this case. Even assuming the validity of what Dr. Buckout said as to the effect of memory loss, retrograde or anterograde amnesia after seeing the slides, given all that, if anything, it would have only to deal with the issue of weight rather than admissibility of these particular photographs.
>
> So, assuming the proper foundation is laid, these photographs will be admitted."

(13T87-18 to 88-9).

Defense counsel thereafter objected to the admission of photographs S-31 through S-35 which depicted the victim's body in the bathtub. "My objection to the jurors seeing the photographs of the body and the slides and the other exhibits showing the maggots and the state of decomposition would of course extend to the photographs being given to them by way of evidence."(17T15-2 to 7). The State thereafter sought to admit into evidence blow-ups of certain of the photographs and defense counsel once again objected. Specifically, objection was made as to the admission of photographs S-151 through S-153. (19T60-9 to 62-10). Each of the photographs again depicted the partially decomposed

body fraught with maggots. The Court's description of S-153 is most enlightening: "All right, 153 is a blow-up - have it upside down - showing a woman, the head, face's totally unrecognizable, nothing but the eye sockets left. The face is much darker and there's maggots all over her." (19T-64-15 to 19). Nonetheless, the defense objection was denied. (19T66-3 to 4).

It was defendant's position that the Trial Court should have excluded admission of the photographs and blow-ups under Evidence Rule 4 (b). That Rule states:

> "The Judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will...(b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury."

Defendant concedes that a number of cases have held admissable photographs of murder and accident victims notwithstanding claims of undue prejudice. See State v. Belton, 60 N.J. 103(1972); State v. Thompson 59 N.J. 396 (1971); State v. Conklin, 54 N.J. 540 (1969); Lamendola v. Mizell, 115 N.J. Super 514 (Law Div. 1971). It is also generally recognized that the Trial Court is afforded wide discretion in performing the weighing process called for by Rule 4. State v. Sands, 76 N. J. 127 (1978).

In State v. Thompson, Supra at 421 the Court noted that photographs become inadmissible only where "their probative value is so significantly outweighed by their inherently inflammatory potential as to have

probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence." Similarly, the Supreme Court stated in State v. Smith, 32 N.J. 501, 525 (1960): " Admission of photographic evidence, properly proved and having probative value, even if somewhat inflammatory, in color and only cumulative, is mainly within the discretion of the Trial judge.."

Nonetheless, the discretion of the Trial Court is not unfettered. Defense counsel cited State v. Polk, 164 N.J. Super 457(App. Div. 1977) affirmed per curiam, 78 N.J. 539(1979). In Polk the Trial Court had admitted into evidence a photograph which indicated the severity and intensity of the attack upon the victim. It was the State's contention that the killing was willful and premeditated and the photograph was admiited as evidence of that fact.

The Appellate Division in Polk, noting that the matter had to be retried, recommended that the photograph not be used unless the Trial Court, after a clear and precise statement from the prosecutor as to its probative value, concluded that "the other evidence as a whole does not adequately demonstrate the facts sought to be proved by the photograph." Id. at 464

Thus, the Appellate Division recognized in Polk that a Trial Court should consider excluding a photograph notwithstanding its relevance where the facts sought to be proved could be proved by other means. That is precisely the situation which occurred in the present case.

The prosecutor contended that the photographs had to be admitted into evidence in order to demonstrate the stages

of decomposition of the body as well as the appearance of the maggots thereon. It was contended by the prosecutor that the jury would have to view the photographs in order to understand the expert testimony concerning the precise date of death.

The information which the photographs allegedly supplied could have been, and in fact were, supplied through oral testimony. Both the defense and the State expert testified as to the appearance of the body, as seen from the photographs as well as the existence and stage of development of the maggots.

The State's argument was misleading at best. Laymen could not make a determination as to the developmental stage of the maggots on the basis of the photographs presented. Indeed, it is questionable whether the experts themselves would have been able to make such a determination. Dr. Louis Vasvary, the State's expert entomologist testified concerning the developmental stage of the maggots based on specimens taken from the body shortly after its discovery. (18T19-7 to 20-18). The experts did not make a determination of the developmental stage of the maggots on the basis of any photographs. Rather, the determinations were made from the specimens recovered from the body shortly after its discovery. Accordingly, the photographs did nothing more than depict the maggots in their grotesque setting.

The actual stage of the development of the maggots and the appearance of the body were not in dispute. The only dispute between the State and defense experts were the

conclusions as to the time of death to be drawn from the basic information depicted in the photographs. Accordingly, there was no reason to show the photographs, as nothing depicted therein was in dispute.

The facts in the present case are akin to those in State v. Walker, 33 N.J. 580(1960). In Walker the Trial Court had admitted into evidence three photographs of the decedent's brain and one of the victim's head showing where the bullet had penetrated the skull. The Court held their relevance was substantially outweighed by their predujicial value and ruled that they were not to be admitted at the retrial. Id at 596. In so holding, the Court took particular note of the fact that the information sought to be provided in the photographs was, as here, uncontested.

> "It is true that ordinarily a Trial Court has the discretion to admit in evidence a photograph in spite of its inflammatory nature if it is sufficiently probative of some material fact and regardless of whether it constitutes cumulative evidence. [Citations omitted.] But the fact that a photograph may have some probative force is not alone determinative of its admissability. Its relevance to an issue in the case may be overbalanced by its prejudicial quality. In the present case, the photograph could only have been introduced to establish a cause of death. But there was ample testimony by the medical examiner and the pathologist as to the cause of death. Indeed, it was uncontested."

Walker, 33 N.J. at 596.

Since the admission of the photographs depicting the victim's decomposed corpse encrusted with maggots could only tend to inflame the jury and since its probative value was minimal and related to issues not in dispute, the Trial Court committed reversible error in allowing its admission.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO COMPEL DISCOVERY OF PRIOR AUTOPSIES PERFORMED BY THE MEDICAL EXAMINER.

All parties conceded that the time of Ms. Warner's death was a significant issue in the case. As the court recognized, "the whole issue or significant issue in this case is the time of death." (12T50-14 to 15). Indeed, a great deal of the evidence adduced at trial by both sides concerned this very issue. Both the defense and the state presented expert testimony in an effort to persuade the jurors as to the date of death.

The original autopsy report had been prepared by Dr. Shuster, who had placed the time of death as two days prior to the discovery of Ms. Warner's body. The state's evidence and, indeed, the thrust of its case revolved around its demonstration that Ms. Warner had been killed several days prior to the date of death as originally estimated by Dr. Shuster. In connection therewith, and in anticipation of Dr. Shuster's attempt to rescind his prior determination, defense counsel sought prior autopsy reports prepared by Dr. Shuster for bodies discovered under similar circumstances. (5T52-2 to 2). As explained by defense counsel,

> "I'm not interested in a death that occurred where there was an immediate finding of the body, so to speak. I'm interested in those where the body is a day or two old, so really it's just like homicide or limited to homicides, because that's usually where that happens, but that's, it could occur with a heart attack victim in a home or something of that nature. I'm interested in his autopsies, what he's done, how his findings have been, what he looks at."

(5T53-9 to 18).

A long colluquy between Court and counsel followed the defendant's request. The Court expressed some reservation in providing the prior autopsy reports in light of the fact that their use on cross examination might raise collateral issues which would confuse the jurors and needlessly prolong the trial. As explained by defense counsel,

> "I just want to be able to go in and have a record, a record is available of what the expert opinion has been of the state's proposed expert previously, it is available."

(5T57-22 to 25).

The Court, recognizing that the defendant's argument was "clever" reserved on the request. (5T58-1 to 1).

The Court reviewed the prior autopsies and ruled that they could not be used by defense counsel on cross examination.

> "I went through all those autopsies, and I think the last time I said I culled out about twenty. I've looked again at the twenty, and I think actually the number was more like about fifteen, and after relooking, since relooking at them since we last met, I find that only five would fall into the perview of what Mr. Ferencz is asking for.
>
> Basically what he was asking for was autopsies performed by Dr. Shuster in that key issue in this case is one of time of death, that Mr. Ferencz wanted to see other autopsies by Dr. Shuster where he may have put on an autopsy report the time of death. Of course, there is no specific rule under the discovery rules requiring these matters be turned over to the defense.
>
> After reviewing these five, I've come to the conclusion that what Mr. Ferencz is asking for is irrelevant because the autopsy reports in and of themselves merely state an estimated time of death. In order to have these reports have any meaning one would need the entire file that is coordinated with this. I think it's, the autopsy reports, in and of themselves are irrelevant. Although we are dealing with a discovery motion and Rule 4 does not apply, I want to make it clear this is not a Rule 4

> situation, but it would certainly seem to be in terms of guidance of what would be done down the line. This certainly would cause incredible side issues, collateral issues, confusion to the jury.
>
> Again, I repeat, this is not a Rule 4 issue, because Rule 4 deals with relevant evidence, and I find these autopsy reports are not relevant evidence. I feel that what the defense counsel wants to do can be established through proper cross examination and through the production of his own expert witnesses should he desire to produce them."

(9T33-20 to 35-6).

The defendant has a basic constitutional right to confront and cross examine witnesses offered by the prosecutor. Pointer v. Texas, 380 U.S. 400 (1965). The defendant must have the opportunity to cross examine the witness in order to elicit facts which may reflect on the witnesses' bias or motivation. Davis v. Alaska, 415 U.S. 308 (1974). Accordingly, the defendant is generally granted wide latitude in cross examining adverse witnesses, such as a co-conspirator who is testifying on behalf of this state. State v. Curcio, 23 N.J. 521 (1957); State v. Spruill, 16 N.J. 73 (1954). Similarly, thorough cross examination must be permitted a defendant in cross examining a state's witness who has been granted immunity from prosecution as to the scope and extent of the immunity. State v. Swillman, 112 N.J. Super 6 (App. Div. 1968), certif denied, 57 N.J. 603. In State v. Smith, 101 N.J. Super 10 (App. Div. 1968), certif denied, 53 N.J. 577 (1969), a conviction was reversed where the defendant was not permitted to fully cross examine concerning an investigation conducted by the State Division of Civil Rights of a state's witness. Morever, in State v. Mathis, 47 N.J. 455 (1966),

a conviction was reversed where the right to cross examine a state's witness concerning the nature of four criminal charges against him was improperly restricted. Similarly,our Supreme Court observed in State v.Spano, 69 N.J. 231, 234 (1976) that even a status short of criminal conviction would justify cross examination where it can affect a prosecution witnesses' credibility.

The defense sought to marshall discovery which would clearly benefit the defense on cross examination. This information was particularly necessary to the defendant since a crucial issue, if not the crucial issue, of the case was the victim's time of death. The Trial Court's ruling severely limited defendant's ability to cross examine Dr. Shuster, the Chief Medical Examiner in Middlesex County, on this most crucial issue.

Indeed, the issue was so crucial that it is respectfully submitted that in the context of the trial below the Court's error in this regard was sufficiently harmful to justify a reversal of the defendant's conviction. State v. Macon, 57 N.J. 325 (1971). In State v. Balthrop, 179 N.J. Super 14, 22 (App. Div. 1981),a conviction was reversed based upon the inability of the defense counsel to cross examine prosecution witnesses' and to attack their credibility based upon prior convictions. The present case stands in the same light, as the defendant was totally deprived of the opportunity to cross examine the Chief Medical Examiner based upon prior autopsy reports.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ADMISSION OF TESTIMONY CONCERNING THE VICTIM'S CUSTOM IN MARKING OFF CALENDAR DATES.

The state sought to admit into evidence certain calendars found in the house of the decedant which had dates crossed out; presumably, the decedant had crossed out each date in the 1983 calendar up to the date of her death.

The Court conducted a Rule 8 hearing in which evidence was presented as to the victim's custom in striking off the calendar dates. The victim's mother testified that she had always had calendars in her house and that she had consistantly marked off the previous day's date upon awakening each morning. Significantly, however, the victim's mother had no knowledge as to the specific routine, if any, engaged in by her daughter.

> "Q. Did you have any knowledge whatsoever prior to seeing these books that she struck off various days?
>
> A. No, I really didn't. I did the same thing, and I imagine she must have picked that up from me.
>
> Q. Alright. Well, you have no direct knowledge that she struck off every day. Is that correct?
>
> A. No, I don't."

After the state had established that the victim's mother had absolutely no knowledge as to the routine used by her daughter, the Court then allowed the state to elicit testimony as to the routine used by the victim's mother. The defendant strenuously objected to the admission of this testimony. (11T6-22 to 7-22).

The Court, however, ruled that the mother's custom in striking off calendar dates was admissable, apparently on the basis that her daughter had seen her habit and would naturally pick up the same habit. The Court's ruling in this respect is as follows.

> "I don't think it's irrelevant. I think children pick up a lot of things from their parents. I think that we're trying to do here, which is basically a Rule 8 hearing, to see whether habit or custom testimony should be admitted. We do have in evidence a series of calendars showing these strike offs for about a period of three to four years prior to her death, and I think a fact finder can draw a inference that a person could pick up such a habit from their parent, from his or her parent. So the objection is overruled."

(11T7-12 to 22).

The mother's testimony concerning her own custom was admitted over the objection of the defendant despite the fact that the mother candidly admitted that she had no knowledge concerning her daughter's custom. She reiterated her lack of knowledge of her daughter's habit on cross examination. (11T15-4 to 15-3).

The state also offered the testimony of Dawn Farnell, who had lived with the victim for approximately a six week period in 1980 or 1981. (11T19-12 to 19). Ms.Farnell did recall that the victim had maintained a calendar at her apartment and that she had struck off prior dates on "a fairly regular basis, almost like every morning." (11T20-20 to 21-3). On the basis of the foregoing testimony, the Trial Court found that the evidence presented a sufficient number of instances to warrant admissability under Rule 50 as a habit or custom. (11T31-9 to 34-25).

The Trial Court's ruling in this respect was reversible error. Evidence Rule 50 provides "evidence of specific instances of conduct is

admissable to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom." Thus, a Trial Court should admit into evidence proof of specific instances of conduct which have been observed "many" times and which tend to establish a habit. Burd v. Vercruyssen, 142 N.J. Super 344 (App. Div.1976).

In the present case, however, there was no showing by the state of "many" instances of a particular conduct. The victim's mother could not testify as to the routine used by her daughter in marking off calendar dates; her roomate was only able to testify that the victim marked off the calendar dates "on a fairly regular basis". She was not able to say that the act was performed every morning of the six weeks in 1980 in which she resided with the victim; indeed, she was only able to state that the victim marked off the calendar "almost like every morning" during the six week period.

Moreover, it must be noted that the roomate's experience with the victim's alleged custom occurred three years prior to the victim's death. Significantly, there was no evidence as to the victim's habit during the three years immediately preceding her death.

Since the evidence of habit or custom produced by the state fell far short of that necessary in order to prove a custom existed, it is respectfully submitted that the Trial Court erred in allowing admission of custom or habit testimony and evidence under Rule 50.

POINT V

THE TRIAL COURT ERRED IN PRECLUDING THE DEFENDANT FROM ADMITTING EVIDENCE OF THE VICTIM'S SEXUAL EXPLOITS PRIOR TO HER MARRIAGE TO MR. WARNER

The defense sought to admit into evidence past sexual exploits of the victim in order to demonstrate her accessibility to other men, and her vulnerability. (11T57-11 to 13). Additionally, the testimony was offered in order to rebut the state's contention that the defendant and the victim enjoyed a close, intimate relationship for a number of years before her death and that the victim fully intended to marry the defendant and acted in accordance with her intentions.

> "I would indicate to your Honor that by way of testimony,my belief is that the testimony will show that Catharine Warner led a double life, that she was fine at the hospital, that she was a hard-working person, and that she may go out with girlfriends and say I don't want to see anybody but Gene or I don't want to see anyone because I have a boyfriend, but there was another side to her that a variety of people did see, not everybody,not the people that may testify for the state. But the people that would testify for the defense would testify about that other side, and that other side did not end in 1980 but continued."

(11T58-11 to 23).

Unquestionably, the state attempted to present the victim as very much in love with the defendant and expectant of eventual marriage.

The defense was prepared to offer evidence showing that the victim had slept with many of the men at the Edison First Aid Squad. (11T61-21 to 62-1). Evidence would show that in approximately 1978 she

slept with several members of the Edison First Aid Squad at a party. (11T66-13 to 67-13). Ms. Farnell was prepared to testify that the victim had approached her in an effort to have her engage in lesbian activity with her. (11T68-3 to 22). Moreover, Ms. Farnell was prepared to testify that the victim was "a very loose woman and that she was readily available for sexual relations." (11T68-3 to 11). The victim's exploits included several episodes of multiple partner sex. (11T68-24 to 69-21; 11T71-5 to 17; 11T73-9 to 18; 11T74-17 to 75-3).

There was ample evidence indicating that Ms. Warner would readily and routinely engage in sexual exploits with individuals on a very casual basis. Her behavior in this respect could make her more accessible to a variety of man or woman who could have conceivably ended her life. Moreover, many of the sexual exploits occurred during the time when the victim was supposedly dating the defendant; her behaviour in this respect undercut the state's position that the victim fully intended to marry the defendant and acted in accordance with her intentions. The Trial Court apparently acknowledged the relevancy of the proffered evidence but limited the defense to presenting evidence of the victim's promiscuous activities which occurred after the death of her husband in 1980.

> "I find that based upon the evidence that's before me at the present time, there is a hiatus of approximately three years running from 1977 to February of 1980 when the decedant was married to John Warner, who died, I believe, in February 1980 and there is no evidence of any promiscuity during this period. Counsel for defense points to a couple of remarks in notes in the psychological record. I think that falls far short of even a glimmer of promiscuity. I feel there is a clean

> break in what went on with the victim before her marriage to John Warner and after his death.
>
> The important thing is to look to see under what issue would the sexual activity of Catherine Warner in the 1970's be relevant. What as a judge can I tell a jury they could infer from these acts?
>
> I find it would be unreasonable to allow a jury to infer that sexual acts in the 1970's with members of the First Aid Squad are relevant to the issue of access to her in July of 1983. There is simply no relevance between her sex acts in the 1970's and access of people killing her in July of 1983. It is totally unreasonable to assume or to let a jury infer that just because Catherine Warner may have had sex, oral sex with two people in the basement of the First Aid Squad building in 1976, that that's relevant to her access of somebody killing her in 1983. Since I've already stated that the relationship of the defendant and the victim in the 1970's I find to be too remote, I find that the sex acts between Catherine Warner and others would be irrelevant to show that her love of the defendant was exclusive.
>
> Lastly, I find there is no relevance between the sexual conduct of the victim in the 1970's and the attitude or mental state of mind of the defendant vis-a-vis the victim in the 1980's. There is nothing in the present to show a continuum of sexual promiscuity that would permit a jury to reasonably infer that the acts of the 70's are relevant to the issue of who caused her death in July of 1983."

(11T118-12 to 120-3).

The Court's ruling clearly prevented the defense from presenting any testimony concerning the victim's promiscuity prior to February 1980. Indeed, the defense was precluded at trial from presenting any such evidence. (20T9-19 to 10-1).

The Trial Court erred in precluding the defendant from offering evidence concerning the victim's sexual behaviour prior to 1980.

Evidence Rule 7 (f) provides, "except as otherwise provided in these rules or by other law of the state...all relevant evidence is admissable." The Court, however, held that the proffered evidence was "irrelevant and too remote" (11T120-4 to 5). Moreover, the evidence was precluded under Evidence Rule 4 due to the substantial danger that it would create undue prejudice and confuse and mislead the jury. (11T120-6 to 16).

Initially, it must be noted that the Trial Court's determination that the proffered evidence is irrelevant is questionable at best. The Court did not have any problem admitting into evidence testimony concerning the victim's sexual exploits from 1980 until her death.

> "Now,with regard to all of the statements that defense counsel seeks to introduce of the post-John Warner's death era, they may very well be relevant and admissable on two issues at least. One is if the state is going to put in all of this evidence under Rule 63 (12) of her undying love for Eugene Berta, certainly the defense is entitled to contradict that during the critical period, which is the 1980's.
>
> Likewise, since the defense thinks, as far as I know, is it's not me, somebody else,it may be very well be relevant to show other people had access to the home of Catherine Warner on those issues.
>
> So, therefore, the ruling is that any evidence of sexual acts of the decedant prior to the death of John Warner would be inappropriate in this case. With regard to incidents of matters that arise after the death of John Warner, we have to take them on a one-by-one basis. It appears they may very well be relevant, and when the time comes for someone to come in, we'll have to see what that person is going to say."

(11T121-9 to 122-4).

In limiting the defense to presenting the evidence of sexual exploits subsequent to the death of John Warner, the Court conceded that it was making "an arbitrary call of a particular date." (11T121-2 to 8). Indeed, the cutoff date was arbitrary and prejudicial to the defendant. The victim had a long history of casual sex with a variety of persons. She continued to engage in casual sexual activity from a point in time several years prior to her marriage to John Warner in 1977 and it continued after his death in 1980. There was, quite literally, no change in the victim's sexual behaviour with the possible exception of the three year period during which she was married to Warner. It is therefore arbitrary to have limited the defense's presentation to those years subsequent to the death of Warner.

Clearly, the evidence offered by the defense was relevant. Indeed, evidence of the same sexual activity on the part of the victim after February 1980 was held relevant by the Trial Court. There is no reason why the same type of evidence should become irrelevant simply because it refers to activity which predated the marriage to Warner.

Nor is the profferred evidence too remote. The victim maintained a relationship with the defendant during the 1970's, as she subsequently maintained during the period between the death of Mr. Warner and her own death. The type of activities she engaged in during these relationships were clearly relevant to demonstrate her understanding of her relationship with the defendant as well as accessability of other men and women to her.

In connection with this matter, it must be stressed that the victim apparently knew her killer. She was killed in her own home and, when the police arrived, it appeared that the murderer had had access to a set of keys since all doors and windows were locked. It is therefore readily conceivable that Ms. Warner was a victim of some casual crazed lover. Under these circumstances, the defense should have been granted sufficient leeway to allow the admission of all relevant evidence concerning Ms. Warner's sexual habits and her vulnerability to other casual acquaintances.

POINT VI

THE COURT ERRED IN ALLOWING THE ADMISSION OF HEARSAY STATEMENTS OF THE VICTIM CONCERNING HER RELATIONSHIP WITH THE DEFENDANT

The state desired to utilize numerous hearsay statements made by Ms. Warner, allegedly demonstrating the close intimate relationship between herself and the defendant. These statements included remarks made by Ms. Warner concerning her and the defendant's intention to marry, her fidelity to him and, most significantly, statements indicating that the defendant was "the only one who had keys to her house." (11T48-12 to 49-20). A Rule 8 hearing was held by the Court in order to make a determination as to the admissability of these statements. Since these statements were wideranging, the Court held the hearing to determine their general admissability under Evidence Rule 63 (12) as an exception to the hearsay rule.

During the Rule 8 hearing, the prosecutor set forth examples of the type of hearsay statements he sought to be admitted.

> "Next I have a Marilyn Daniels:
>
> She was very much in love with Gene Berta. She talked about him constantly, and her whole world seemed to revolve around him. He constantly made promises to marry her but never kept his promise. She was very upset after he had an accident and was in the hospital and was returning to his wife. After he got out of the hospital, he met with her and talked with her, and she said that everything seemed to be all right and she was going to see him again. At this time she was going to set a time limit. She was very determined.
>
> She also told her that they were going away together for a whole week. They were going down to the shore and lie on the beach together, and she was very excited about it. Everything was under control. In fact, she told Marilyn that Gene had a set of keys to her house and that he was the

only one who had keys to her house.

> When he appeared to be returning to his wife in May, she talked about getting her keys back." (11T48-12 to 49-6).

As explained by the prosecutor, the State offered this type of testimony in order to demonstrate "the relationship between Warner and Barta as told by Warner to other people." (11T52-17 to 21). The trial court agreed with the State's position and held as follows.

> "So as a general proposition, I find that the statements offered by the State regarding the decedent's state of mind of her relationship to the defendant from a point after the death of her husband is relevant and are generally admissible on the issue of relationship of the decedent and the defendant, more particularly as it converges on the issue of what happened on July 7, 1983, or thereabouts." (11T117-17 to 24).

Notwithstanding the Court's ruling with respect to the general admissibility of the victim's hearsay statements, the trial court appeared to harbor some reservations concerning the statements to the effect that the defendant was the only person who had a set of keys to the victim's house.

> "OK. There is only one statement in there I'd like to hear argument on. It's a statement that says in the last paragraph in fact she told Marelyn that Gene had a set of keys to her house and he was the only one who had keys to her house.
>
> All right. That is a statement made by the victim to Marelyn Daniel, I don't really know when, but as to the general admissibility of it, I'd like to hear from [the prosecutor]." (20T89-22 to 90-2).

The State's position with respect to the admissibility of the statement concerning the keys was set forth by the prosecutor as follows.

> "... the part of Marelyn Daniels statement to which you made reference helps to explain the nature of that relationship. To say that she loved him and she told a lot of people she loved him encompasses the fact that he had access and he had sole access to her house. We already know from witnesses that he slept overnight with her, that he visited her on a regular occasion, that they traveled together.
>
> And we also know, incidentally, that he had keys to her house. We know that from Detective Haley and we also know that from Lieutenant Zimmerman. So we've surrounded the issue about the subject issue, if you will, about whether anybody else had keys to the house, and I think if in fact other people had keys to the house it would diminish the argument that she loved him and solely him. It's clearly relevant. Certainly if there was any suggestion that somebody else had a key to the house that would be in the case because that would diminish my argument that she loved him and only him. So conversely the fact that he was the only one who had a key to the house, according what she told one of her very close friends, is relevant, and I think it says a lot about her state of mind with regard to Gene Barta which is exactly what the subject of 63(12) is. So I would offer it on the subject of her state of mind, her love, her love for Eugene Barta only." (20T91-9 to 92-13).

Notwithstanding the victim's statement concerning the keys, the prosecutor conceded at oral argument that discovery had revealed that there were other individuals who had keys to the victim's house. For instance, it appeared that several workers who had been performing repairs on her house had been given keys to the knob lock of her entrance door.

> "During the course of the work that was being done on her house the keys that were given out were the keys to the knob lock. All the statements - and I've talked to all the witnesses and I think the evidence is consistent. The way she work it is that when she knew workmen were coming to her house she would not lock the deadlock, she would only lock the knob and she only gave out the keys to the knob lock during the course of time when work was being done on the house." (20T94-11 to 21).

As pointed out by the defense, however, the victim's statement concerning the keys never referred specifically to either the deadbolt lock or the knob lock. (20T95-1 to 6).

The court initially reserved decision on the issue. The court's subsequent ruling was terse, indeed. "With regard to the statement made by Mrs. Meralyn Daniel as to the fact that the victim told her that she had given her keys and her only set of keys to the defendant, I will admit that as a state of mind under Rule 63(12)." (22T26-9 to 13).

As a consequence of the court's ruling regarding the admissibility of the victim's statements under Rule 63(12), an endless string of hearsay statements were admitted into evidence against the defendant. These statements included the fact that the victim would date no one else, (22T31-22 to 32-3), that the victim intended to marry the defendant and had been upset that he was still living with his wife, (22T34-7 to 14), and, most significantly, that the defendant was the only person who had a set of keys to her house. (22T87-10 to 18).

Evidence Rule 63(12) provides, in relevant part, "A statement is admissible if it was made in good faith and it ...described the declarant's then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief, to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant..." Thus, in Woll v. Dugas, 104 N.J. Super. 586 (Ch.Div. 1969), aff'd. 112 N.J. Super. 366, (App. Div. 1970), an attorney was permitted to testify concerning his conversations with the decedent since the testimony demonstrated the decedent's intention concerning a future testamentary disposition. Hearsay statements of the plaintiff concerning his ailments are generally admissible under Rule 63(12) as evidence of his mental and emotional condition. Evers v. Dollinger, 95 N.J. 399, 410 N.6(1984). Prior statements concerning an incompetent's wishes concerning the withdrawal of life sustaining treatment is admissible under the Rule in determining whether such treatment should be withdrawn. Matter of Conroy, 98 N.J. 321, 361-362 (1985).

The State maintained throughout the trial that it needed to admit the hearsay statements of the victim in order to demonstrate the true nature of the relationship between the victim and the defendant. An endless string of such statements were admitted, allegedly for this purpose. Arguably, most of the statements did, in fact, demonstrate

the victim's then-present state of mind concerning her relationship with the defendant. However, the statement concerning the keys had the potential for being misused and abused by the jury. The inference to be drawn from the statement was not, as the state maintained, that the victim and the defendant must have enjoyed a close, intimate relationship; rather, the statement concerning the keys clearly had the potential to be used by the jury as evidence that the defendant was the only person who had keys to the victim's house. Indeed, the state never intended to use the statements concerning the keys in order to prove the relationship between the victim and the defendant. In actuality, the prosecutor used the statement for another purpose; the statement was used to prove that the defendant was the only person who had a set of keys to the victim's house. The state's true intent is abundantly clear upon review of the prosecutor's closing argument.

> "You haven't heard too much lately about the keys. Let me just remind you of the significance of those keys. When we got to that house it was locked from the outside. The only way it can be locked from the outside, the deadbolt lock, that is, is with a key. There's only one man during this entire trial whom you heard has a key to that house , and that man is Gene Barta, not John Bauer, not Patrolsman Sebasti, not Mr. Jones, not Sam Harris next door, not all the other people the defense throughout the case tried to suggest to distract you from the truth. The only man was Gene Barta, and the murderer had to have a key to lock the door from the outside...
>
> There's only one person who had a motive, only one person who had a key." (27T176-9 to 22; 27T177-7 to 8).

Thus, it is clear that the state's motive in admitting the statements concerning the key was other than represented at oral argument on the motion concerning the admissibility of the statement. The closing argument of the state makes it abundantly clear that reliance was placed upon the statement in order to prove that the defendant was the sole person who had keys to the victim's house. There was no other evidence adduced at trial which would justify the prosecutor in describing the defendant as the "only one person who had a key."

Further evidence of the state's true motive in proffering the hearsay statements of the victim are to be found in the state's closing argument. In discussing the theory that John Bauer might have been the true murderer, the prosecutor noted "He had no key". (27T176-8). In fact, there was no evidence adduced at trial indicating that John Bauer did not have a key to the victim's house. The only support to be found for such a statement in the record is the inference which arises from the hearsay statements of the victim concerning the key. Again, it is abundantly clear that her statements concerning the key were not admitted in order to prove her intimate relationship with the defendant; rather, the statements were admitted in order to show that the defendant was the only person with a set of keys to the victim's house.

It is clear that the state's motive in seeking admission of the hearsay statements of the victim was other than represented at trial.

The statements with respect to the keys were not admitted in order to show the close relationship the victim had with the defendant; rather the statements were admitted in order to show that the defendant was the sole person who had a set of keys to the victim's house. In light of the fact that the house was locked when the body was discovered, this was a most crucial and damaging piece of evidence. It was clearly inadmissible as a hearsay statement. The trial court's error in admitting the statement and in allowing its use for purposes other than showing the victim's state of mind was highly prejudicial to the defendant and constitutes clear error. For this reason the defendant's conviction must be reversed.

CONCLUSION

In light of the foregoing statements of fact and law, it is respectfully submitted that the conviction of the defendant must be reversed; alternatively, the sentence should be reduced.

4/1/86

Respectfully submitted,

Philip V. Lago

INDICTMENT filed 8/16/83

MURDER - N.J.S. 2C:11-3
POSSESSION OF WEAPON FOR UNLAWFUL PURPOSES - N.J.S. 2C:39-4(a)

83 AUG 16 P1:52

NEW JERSEY SUPERIOR COURT

MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

THE STATE OF NEW JERSEY

vs.

EUGENE BERTA

Defendant.

FILE No. 83080797
INDICTMENT No. 1446-8-83
FIRST GRAND JURY
JULY 1983 **Stated Session**

JULY 1983 **Term**

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT EUGENE BERTA, between the 8th and 16th days of July, 1983, in the Borough of Metuchen, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, did murder Catherine Warner by purposely causing the death of Catherine Warner and that he committed the homicidal act by his own conduct, contrary to the provisions of N.J.S. 2C:11-3, and against the peace of this State, the government and dignity of the same.

SECOND COUNT

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT EUGENE BERTA, between the 8th and 16th days of July, 1983, in the Borough of Metuchen, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, knowingly and unlawfully did possess a certain weapon, to wit, a firearm, with a purpose to use it unlawfully against the person or property of Catherine Warner, contrary to the provisions of N.J.S. 2C:39-4(a), and against the peace of this State, the government and dignity of the same.

A True Bill:

Vivian Brill
Vivian Brill, Forelady

COUNTY PROSECUTOR

by: Thomas J. Kapsak
Assistant Prosecutor

JUDGMENT OF CONVICTION
filed 12/3/84

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION — CRIMINAL

THE STATE OF NEW JERSEY)
)
vs.)
)
EUGENE THOMAS BERTA)
"Gene" Defendant.)

S.B.I. No. 188272A

DATE OF ARREST 8/10/83

JUDGMENT OF CONVICTION
AND
ORDER FOR COMMITMENT

The defendant on August 16, 1983 was indicted on Indictment # 1146-8-83

The defendant on August 17, 1983 entered a plea of not guilty to the Indictment/Accusation for the crime(s) of:

(Please include Title, Statute and Degree)

Ct.1 Murder, N.J.S. 2C:11-3; Ct.2 Possession of weapon for unlawful purpose N.J.S. 2C:39-4(a)

and the defendant having on 9/4/84-9/7/84; 9/10/84-9/14/84; 9/17/84-9/26/84; 10/1/84-10/2/84

☐ RETRACTED PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO:

☒ BEEN TRIED ~~WAIVED~~ with A JURY AND A ~~PLEA~~ verdict OF GUILTY TO:

Ct. 1 & Ct. 2

It is, therefore, on December 3, 1984 Ordered and Adjudged that the defendant be and is sentenced on Ct.1 to the Commissioner of Corrections to serve a sentence of life imprisonment and that you be ineligible for parole for 30 years. Defendant is to pay VCCB penalty of $1,000.00 and a fine of $10,000.00. He is to receive credit for 70 days. Ct.2 is merged with Ct. 1. for sentencing.

A penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1.

☒ penalty imposed on count(s) one is $ $1,000.00 respectively.

Total Fine $10,000.00, Total Restitution , Total VCCB Penalty $1,000.00

Installment payments, if applicable, are due at the rate of $ per

ATTORNEY FOR DEFENDANT
Upon Entry of Guilty Plea or Conviction

At Time of Sentencing
Bradley Ferancz

Defendant to receive R. 3:21-8 credit for time spent in custody
From 8/10/83 to 8/16/83
Days Credit 70 days
10/2/84 -12/3/84

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e)
APPEARS ON THE REVERSE SIDE

STATEMENT OF REASONS, R. 3:21-4(e)

SEE ATTACHED SHEETS

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

.....Renicia Trevisano.....
acting County Clerk

.....December 3, 1984.....
Date

Barnett E. Hoffman, JSC
Judge

ME: Chief Probation Officers
AOC Sentencing Research Project
Department of Corrections (where defendant sentenced to state correctional institution)
County Penal Institution (where defendant sentenced to county penal institution)

A.O.C., Form No. LR-35 1/76 Rev. 2/81

SC-63

State v Eugene Berta
Indt.# 1146-8-83

REASONS

This is a case where defendant was convicted of murdering his long time paramour, Catherine Warner. He was also convicted of a weapons offense.

We are no longer dealing with the question of whether the defendant is guilty--the jury has answered that question after a long well tried case.

Murder is the most heinous and vile offense proscribed by our criminal laws. The taking of a human life is the extreme violation of all principles of ethics and morality of our society. Unlike the mere snuffing out of a candle, no science or technology exists to rekindle a human life.

N.J.S. 2C:11-3 gives the judge discretion of sentencing a defendant convicted of murder from 30 years to life with a 30 year parole disqualifier, under any circumstance. In determining the direction of the sentence the aggravating and mitigating circumstances of 2C:44-1 must be consulted.

I find the nature and circumstances of the offense and the especially cruel and heinous way it was committed to be an aggravating factor. Of course, the fact that this is a murder is built into the sentence already and there was no testimony as to the actual shooting. All we know is that the victim was shot once in the back of the head. What distinguishes this case from other non-capital murder cases are all of the surrounding circumstances. Because although Catherine Warner breathed her last breath on July 8, 1983, the defendant was killing her little by little over the several years of their relationship. He treated the victim during her lifetime in a way no one would treat a cur, and only when he had milked her of her money and her spirit did he take the final step to eliminate Catherine Warner from his life. Whether the plan to kill Catherine Warner was conceived long before her death or on the date of her death, we may never know. However, the jury found the defendant guilty of a purposeful murder. It is clear that after her death he went to great lengths to cover his crime. He cleaned up the scene, disposed of the evidence, moved the body, and went cavorting off on vacation with first another girlfriend and then his wife, all within one week. It is the total lack of humanity with all its coolness and deliberateness that makes this homicide exceptionally cruel and heinous. Although not necessarily part of the aggravating factor, I do note that the decedent's body lay in her hot home rotting and decaying for 8 days. The decomposition was so bad that her facial features were beyond recognition. Thus, the final indignity was cast upon Catherine Warner by the defendant.

The second aggravating factor is the risk that the defendant will commit another offense. Briefly, although defendant is a first offender the manner in which the crime was covered up would make the risk of commission of another crime great. But for the exceptional police work done on the case, the defendant would never have been apprehended and available to strike again.

The third aggravating factor is the need for deterrance. This factor speaks for itself. In this regard special attention again must be paid to the relationship of the parties. For some of the time prior to her death, the defendant and victim lived together virtually in many respects that were like husband and wife. The criminal and family sections of the Courts are constantly and even frequently dealing with matters of domestic violence which merely because of for fortuitous circumstances have not risen to the level of murder cases. This Court wants to sound a clear warning to all these persons in society whether they be spouse abusers or child abusers—but persons who dominate a personal relationship by physical force that such conduct will be dealt with only in its hardest fashion.

There are two potential mitigating factors. First, this is defendant's first criminal offense. However because of the gravity of the offense and the fact that the first offense is the worst that can be committed I have given this little weight. Second, imprisonment would entail excessive hardship on his dependents. I have likewise given this slight weight because defendant must serve at least 30 years regardless and alternate financial plans must be made anyway. It should also be noted that even when defendant was living at home, during bad times, the family availed themselves of assistance.

I am clearly convinced that the aggravating factors substantially outweigh the mitigating factors and that defendant is a danger to society.

As to the second count of possession of a weapon with the purpose to use it unlawfully, there is a question of merger. There is a dearth of information as to the elements of time, distance and sequence of events. The recent case of State v Truglia 97 N.J.S. 13 (1984) listed in detail the various tests and considerations in determining the issue of merger. Truglia was a plea and this case was a trial and I will give the benefit to the defendant resulting from the lack of the above information and merge this count. INTO the first count for sentencing.

HON. JOSEPH RODRIGUEZ
Public Defender
20 Evergreen Place
East Orange, New Jersey 07018
(201) 266-1800

NOTICE OF APPEAL
filed 1/18/85

A-2147-84T4

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
INDICTMENT NO. 1146-8-83
ACCUSATION NO.
DOCKET NO.

STATE OF NEW JERSEY,

Plaintiff-Respondent

-v-

EUGENE BERTA

Defendant-Appellant

ORIGINAL FILED
JAN 18 [redacted]
ELIZABETH McLAUGHLIN
Clerk

Criminal Action

NOTICE OF APPEAL

TAKE NOTICE THAT the defendant, EUGENE BERTA

confined/~~awaiting~~ at Trenton State Prison

appeals to this Court from the final judgment of conviction of Murder

entered on December 3, 1984 in the Superior Court,

Law Division, Middlesex County, in which a sentence of life with 30 years minimum parole eligibility, $1,000 to the Violent Crimes Compensation Board and $10,000 fine was imposed by the Honorable Barnett E. Hoffman.

Honorable JOSEPH E. RODRIGUEZ
Public Defender
Attorney for Defendant-Appellant

BY: Bruce J. Kaplan
BRUCE J. KAPLAN
Assistant Deputy Public Defender

The undersigned certifies that the requirements of R. 2:5-1(a) have been complied with by ordering the transcript(s) from Deanna Jancsek, Susan DeFrancisco, Daye Fenton, Linda Urbaniak and Isaac Cittone

on January 16, 1985 Court Reporter(s)

and that a copy of this Notice has been mailed to the tribunal designated above.

I Hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

Bruce J. Kaplan
BRUCE J. KAPLAN
Assistant Deputy Public Defender

DOCKETED HISTORY

MIDDLESEX COUNTY. SUPERIOR AND COUNTY COURT CRIMINAL RECORD

Date: I.1146-8-83 8/16/83

Name of Case: State of New Jersey vs. Eugene Berta

Offense(s): Murder
Possession of Weapon for Unlawful Purposes

ATTORNEYS

For State: T. Kapsak

For Defendant(s):

Judge:

Reporter:

Clerk:

(If a different judge, reporter or clerk presides or attends at any proceeding indicate names below against the date or dates thereof)

DATE	PROCEEDINGS
9-6-84	NON-JURY MIRANDA HEARING (Cont'd.) EXHIBITS FOR STATE: S-7 thru S-150 (Various exhibits marked for I'd. only.) Motion to dismiss Indictments is --WITHDRAWN. Motion to permit Dr. Roagoff to testify--RESERVED. COURT OFFICERS: G. Nonfria, W. Richardsen & L. Consalvo.
9-7-84	NON-JURY EXHIBITS FOR STATE: S-151 thru 153 photo'd. Motion to allow S151 to 153 photo'd to Jury--GRANTED and slide carousel--heard previously. MIRANDA HEARING--Statement of Mr. Berta referred to is statement #4--Not Admissable. Statement 1, 2 & 3 are admissable. WITNESSES FOR DEFENSE: Dr. Robert Buckhout COURT OFFICERS: G. Nonfria, W. Richardsen & L. Consalvo.
9-10-84	JURY SELECTION COURT OFFICERS: G. Nanfria, S. Hondo & L. Consalvo.
9-11-84	JURY SELECTION (CONT'D). COURT OFFICERS: G. Nanfria, S. Hondo,Jr. & L. Consalvo
9-12-84	JURY SWORN 1. Agnes Nemergut 2. Melburn Carter 3. Robert Nash 4. Florence Nenninger 5. Gracie Paulden 6. Peter Kiczula 7. Theresa LaFalce 15. John Rutowski 8. Howard Dickhut 9. Charles Belenski 10. Anthony Cassano 11. Allen Tandyrak 12. Thomas G. Jones 13. Hortencia Natale 14. Kenneth Kronenberger 16. Vivan Kish WITNESSES FOR STATE: Richard Neal, Sgt. Pasqual & Det. John Haley EXHIBITS FOR STATE: S-11 thru S-56 Photo'd Evid. EXHIBITS FOR DEFENSE: D-9 statements of Mr. Neal COURT OFFICERS: G. Nanfria, W. Richardsen, S. Hondo, Jr. & L. Consalvo

CRIMINAL RECORD

Number:

Date:

DATE	PROCEEDINGS
(Con't.)	
-13-84	JURY SWORN Motion to exclude S-31 thru S-35 going to the Jury--DENIED. WITNESSES FOR STATE: Det. John Haley (cont'd.), Dr. Marvin Shuster, & Dr. Louis Vasvary. EXHIBITS FOR STATE: S-154 thru S-157 I'd. WITNESSES FOR DEFENSE: Stipulation of Weather conditions. EXHIBITS FOR DEFENSE: D-10 thru D-13. COURT OFFICERS: G. Nanfria, S. Hondo, Jr., L. Consalvo & W. Richardsen.
-14-84	JURY SWORN WITNESSES FOR STATE: Dr. Louis Vasvary, Sgt. Casimer Smerecki, Det. John Haley, Ellen Bump, Vivian Heamy, Gloria Neal EXHIBITS FOR STATE: S-169 thru S-171 I'd. S-172 thru 174 samples of handwriting. Exhibits FOR DEFENSE: D-17 thru D-34 Photo's. D-55 Statement. COURT OFFICERS: G. Nanfria, W. Richardsen & L. Consalvo.
-17-84	JURY SWORN WITNESSES FOR STATE: Donald R. Wells, Donnie R. Moorefield, Phillip Beesley, Christine Pringle, Stephen Andrews, Det. John Haley, Dr. Werner Spitz, Paul Wuthrich EXHIBITS FOR STATE: S-179, S-151, 152, 153 & 169 EVID. & S-180 EXHIBITS FOR DEFENSE: D-36 thru D-39. COURT OFFICERS: G. Nanfria, W. Richardsen, L. Consalvo, & S. Hondo
-18-84	JURY SWORN WITNESSES FOR STATE: Lt. J.L. Zimmerman, Mary E. Neal & Shirley Jones EXHIBITS FOR STATE: S-181 COURT OFFICERS: S. Hondor, Jr., G. Nanfria, W. Richardsen & L. Consalvo
-19-84	JURY SWORN: Juror #3 Robert Nash excused from this panel. WITNESSES FOR STATE: Patricia Bauer, Edward Jones, & Samuel Harris. EXHIBITS FOR STATE: S-182 EXHIBITS FOR DEFENSE: D-40 COURT OFFICERS: G. Nanfria, W. Richardsen, S. Hondo,Jr., & L. Consalvo
-20-84	JURY SWORN WITNESSES FOR STATE: Samuel Harris, Joy Niemiera, Donna Tokar, Lee Cole, Mary Ann Burns, Merelyn Daniel, Rhonda Lane, Eric Greenwood, Janina Stephens, Rosemary Cascella EXHIBITS FOR STATE: S-175A & B & S176A EVID. S-183 COURT OFFICERS: G. Nanfria, W. Richardsen, L. Consalvo & S. Hondo, Jr.
-21-84	JURY SWORN WITNESSES FOR STATE: Dawn Farnell, Lt. Frank Kraft & Det. Dennis Watson J#1--EVID. Statement (typed) by Gloria Neal (Not to go to Jury.) WITNESSES FOR DEFENSE: Gale Berta, Colleen Duffy, Kenneth Schrek, Ann Marie Reagan EXHIBITS FOR DEFENSE: D-42 thru D-62 I'd.
-24-84	COURT OFFICERS: G. Nanfria, G. Bernhart, L. Conslavo & St Hondo, Jr. JURY SWORN EXHIBITS FOR STATE: S-184

MIDDLESEX COUNTY, SUPERIOR AND COUNTY COURT CRIMINAL RECORD Date: 8/16/83

Name of Case:	State of New Jersey vs. Eugene Berta
Offense(s):	Murder Possessio of weapon for Unlawful Purposes

ATTORNEYS

For State: T.Kapsak

For Defendant(s): Morris Brown

Judge: G.J.Nicola

Reporter: Joyce Mangino

Clerk: L.Doninger

(If a different judge, reporter or clerk presides or attends at any proceeding indicate names below against the date or dates thereof)

DATE	PROCEEDINGS
8-26-83	The defendant being placed at the bar and charged on the above indictment entered a Plea of not guilty.
8-17-83	Judge: George J. Nicola Clerk: Lori Doninger Reporter: Joyce Mangino Prosecutor: Tom Kapsak Attorney: Morris Brown Motion: REDUCE BAIL: GRANTED $150,000 (no 10%) No motion papers filed. Order to be submitted.
8-25-83	Notice of Motion to Reduce bail, Heard.
9-16-83	Judge: G. Nicola Reporter: D. Fenton Clerk: L. Doninger Motion: Dismissed. Motion filed; Order to be submitted.
11-3-83	Judge: Nicola Clerk: Doninger reporter: Defrancesco Motion by state to preserve the notes of the defenses investigator of the witbesses-DENIED.
11-30-83	It is ORDERED that the State's motion to compel the defense investigator to preserve his notes is hereby DENIED.
12-22-83	Notice of Motion to be relieved of counsel. filed Judge: Nicola Clerk" Doninger Reporter: De Francesco Motion to be relieved of counsel - GRANTED
1-12-84	It is ordered that the firm Wilentz, Goldman & Spitzer is hereby permitted to w/draw as counsel for Eugene Berta in above case.
4-25-84	It is ORDERED AND ADJUDGED that the prosecutor's expert witness shall not be required to speak with the defendant's counsel or his representatives, except upon such conditions as the witness imposes.

CRIMINAL RECORD

Number:

Date:

DATE	PROCEEDINGS
4-19-84	Judge: Hoffman Clerk: Harper Reporter: DeFrancesco Motion for defense to speak to NJSP-lab who examined evidence in private DENIED.
5-2-84	Judge: Hoffman Clerk: Harper Reporter: DeFrancesco Motion to adjourn trial date to Sept-DENIED. Motion to suppress Evidence-GRANTED to locker and van.
5-18-84	It is ORDERED that the motion for leave to appeal is denied..
05-21-84	It is ORDERED that on this day or any other day within 10 days therafter, defendant Eugene Barta submit to the takeing of hair samples from his head in the presence of a representative of the Middlesex County Prosecutor's OFFICE.
5-29-84	Notice of Motion for Additional Discovery, filed.
7-13-84	Judge: B. E. Hoffman Court Clerk: J. Harper Reporter: S. DeFrancesco Notice of Motion for Additional Discovery Disposition DISMISSED, and filed.
8-8-84	Judge: B. e. Hoffman - Court Clerk: J. Harper - Reporter: S. DeFrancesco Notice of Motion to Recuse the Judge DENIED, and disposition filed.
8-8-84	Judge: B.E. Hoffman - Court Clerk: J. Harper - Reporter: S. DeFrancesco Notice of Motion to Review Autopsy Reports performed by Dr. Shuster DENIED, disposition filed.
8-8-84	It is ORDERED that for good cause shown the State would provide all discovery to the defendant. Order filed.
9-7-84	Disposition of Motion to Dismiss Indictment WITHDRAWN. Judge: B. Hoffman - Court Clerk: J. Harper - Reporter: D. Jancsek
9-4-84	Judge: B. Hoffman Pros: T. Kapsak Atty: B. Ferencz Reporter: D. Jancsek Clerk: J. Harper MIRANDA HEARING (Lt. Joseph Zimmerman) HABIT & CUSTOM HEARING (Det. John Haley) EXHIBITS FOR STATE: S1 thru S2 Evid. Motion to disqualify Pros. Reserved by Defense & Court. Motion to permit pictures form Wedding--GRANTED Motion to permit blood type of victim-Reserved to time of trial. EXHIBITS FOR DEFENSE: D-1 & D-2 I'D. Motion to introduce prior statements of the victim regarding relationship W/deft. Cont'd.
9-5-84	Motion to permit testimony of victims prior sexual conduct.-Cont'd. HABIT & CUSTOM HEARING (Con't)--1. Gloria Neal, 2. Dawn Farnell Habit & Custom--Calendars may be admitted. Motion to introduce prior statements of the victims relationship W/deft.--GRANTED as to statements made after the death of her husband. Motion to permit testimony of victims prior sexual conduct--DENIED as to the 1970's prior to the death of John Warner--Reserved as to after the death of John Warner. Motion to sequester all witnesses joined by both attorney's--Granted. COURT OFFICERS: W. Richardson, L. Consalvo & S. Hondo, Jr. .

(CON'T. PAGE 135A)

MIDDLESEX COUNTY. SUPERIOR AND COUNTY COURT CRIMINAL RECORD I.1146-8-

Date: 8/16/83

Name of Case: State of New Jersey
vs.
Eugene Berta

Offense(s): Murder
Possession of Weapon for Unlawful Purposes

O = here
8-28-85

ATTORNEYS
For State: T. Kapsak

For Defendant(s):

Judge:

Reporter:

Clerk:

(If a different judge, reporter or clerk presides or attends at any proceeding indicate names below against the date or dates thereof)

DATE	PROCEEDINGS
(Cont'd.)	WITNESSES FOR DEFENSE: Frank Boccippo, Lewis Poh, James Smith, Robert Hyre EXHIBITS FOR DEFENSE: D-63 thru D-68 & D-32 & D-68 EVID. COURT OFFICERS: G. Nanfria, W. Richardsen, S. Hondo, Jr., & L. Conslavo.
9-25-84	JURY SWORN WITNESSES FOR DEFENSE: Joan Rupchis, Carol Taylor, Mary Bacorn, Charles Favorite, Gary Neal, Antonio Cataldi EXHIBITS FOR DEFENSE: D-70 EVID. D-71 COURT OFFICERS: G. Nanfria, W.Richardsen, S. Hondo, Jr., & L. Consalvo.
9-26-84	JURY SWORN: EXHIBITS FOR STATE: J-2 & J-3 EVID. WITNESSES FOR DEFENSE: Eugene Berta, Jr. & Eugene Berta, Sr. EXHIBITS FOR DEFENSE: Items moved into Evidence D-11, D-52 thru D-58. D-60, 63, 64, 65, 68, 32, 69 & 70. D-59 & D-59D EVID. COURT OFFICERS: G. Nanfria, W. Richardsen & S. Hondo, Jr. & L. Consalvo.
10-1-84	JURY SWORN
10-2-84	JURY SWORN (Juror # 3, 8 & 13 Alternate's.) Motion by the State to revoke bail---GRANTED. Evidence returned to evidence officer (R. Boll) C-1 jurors note Evid. C-2 jurors note Evid. JURY OUT: 10: 43 2:02 2:34 (Query) (Query) JURY IN: 1:58 2:32 4:05 DECISION: Guilty to Both Counts COURT OFFICERS: G. Nanfria, S. Hondo, L. Consalvo & R. Sesa

(OVER)

I.1146-8-83

MIDDLESEX COUNTY. SUPERIOR AND COUNTY COURT CRIMINAL RECORD Date: 8/16/83.

Name of Case:	State of New Jersey vs. Eugene Berta	ATTORNEYS For State:	T. Kapsak
Offense(s):	Murder Possession of Weapon for Unlawful Purposes	For Defendant(s):	
		Judge:	
		Reporter:	
		Clerk:	

(If a different judge, reporter or clerk presides or attends at any proceeding indicate names below opposite the date or dates thereof)

DATE	PROCEEDINGS
(Cont'd.)	WITNESSES FOR DEFENSE: Frank Boccippo, Lewis Poh, James Smith, Robert Hyre
	EXHIBITS FOR DEFENSE: D-63 thru D-68 & D-32 & D-68 EVID.
	COURT OFFICERS: G. Nanfria, W. Richardsen, S. Hondo, Jr., & L. Conslavo.
9-25-84	JURY SWORN
	WITNESSES FOR DEFENSE: Joan Rupchis, Carol Taylor, Mary Bacorn, Charles Favorite, Gary Neal, Antonio Cataldi
	EXHIBITS FOR DEFENSE: D-70 EVID. D-71
	COURT OFFICERS: G. Nanfria, W.Richardsen, S. Hondo, Jr., & L. Consalvo.
9-26-84	JURY SWORN
	EXHIBITS FOR STATE: J-2 & J-3 EVID.
	WITNESSES FOR DEFENSE: Eugene Berta, Jr. & Eugene Berta, Sr.
	EXHIBITS FOR DEFENSE: Items moved into Evidence D-11, D-52 thru D-58. D-60, 63, 64, 65, 68, 32, 69 & 70. D-59 & D-59D EVID.
	COURT OFFICERS: G. Nanfria, W. Richardsen & S. Hondo, Jr. & L. Consalvo.
10-1-84	JURY SWORN
10-2-84	JURY SWORN (Juror # 3, 8 & 13 Alternate's.)
	Motion by the State to revoke bail---GRANTED.
	Evidence returned to evidence officer (R. Boll)
	C-1 jurors note Evid. C-2 jurors note Evid.
	JURY OUT: 10: 43 2:02 2:34
	(Query) (Query)
	JURY IN: 1:58 2:32 4:05
	DECISION: Guilty to Both Counts
	COURT OFFICERS: G. Nanfria, S. Hondo, L. Consalvo & R. Seset

(OVER)

C1035 SEP 1987

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
25 MARKET STREET
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ATTORNEY GENERAL

DONALD R. BELSOLE
FIRST ASSISTANT ATTORNEY GENERAL
DIRECTOR

Arpil 12, 1988

FILED
SUPREME COURT
APR 12 1988
Stephen W. Townsend
Clerk

Honorable Chief Justice and
Associate Justices
New Jersey Supreme Court
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State v. Eugene Berta
Docket No. A-2147-84T4

Your Honors:

This office is in receipt of defendant's Petition for Certification in the above-captioned matter.

The State opposes the Petition and relies upon its brief below and the opinion of the Appellate Division. Please find enclosed herewith nine copies of the State's Appellate Division brief in the above-captioned matter. We urge that the Petition be denied since no substantial question is raised.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: Jane F. Tong
Jane F. Tong
Deputy Attorney General

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-2147-84T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Final Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Middlesex County.
EUGENE BERTA,	:	
Defendant-Appellant.	:	Sat Below:
		Hon. Barnett E. Hoffman, J.S.C. and a jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
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OF COUNSEL AND ON THE BRIEF

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

RULES CITED

COUNTER-STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 1146-8-83 charged defendant Eugene Berta with murder contrary to N.J.S.A. 2C:11-3 (count one) and possession of a weapon for an unlawful purpose contrary to N.J.S.A. 2C:39-4(a) (count two). (Da1).[1]

Between April 19, 1984, and September 7, 1984, the Honorable Barnett E. Hoffman, J.S.C., heard preliminary motions in this matter. The trial, presided over by Judge Hoffman, began on September 10 and concluded on October 2, 1984, at which point the jury found defendant guilty as charged. (Da2).

On December 3, 1984, defendant moved for a new trial

1

Da refers to defendant's appendix.
"1T" refers to the transcript of April 19, 1984
"2T" refers to the transcript of April 24, 1986
"3T" refers to the transcript of May 2, 1984
"4T" refers to the transcript of May 7, 1984
"5T" refers to the transcript of May 29, 1984
"6T" refers to the transcript of May 30, 1984
"7T" refers to the transcript of July 13, 1984
"8T" refers to the transcript of July 31, 1984
"9T" refers to the transcript of August 8, 1984
"10T" refers to the transcript of September 4, 1984
"11T" refers to the transcript of September 5, 1984
"12T" refers to the transcript of September 6, 1984
"13T" refers to the transcript of September 7, 1984
"14T" refers to the transcript of September 10, 1984
"15T" refers to the transcript of September 11, 1984
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"18T" refers to the transcript of September 14, 1984
"19T" refers to the transcript of September 17, 1984
"20T" refers to the transcript of September 18, 1984
"21T" refers to the transcript of September 19, 1984
"22T" refers to the transcript of September 20, 1984
"23T" refers to the transcript of September 21, 1984
"24T" refers to the transcript of September 24, 1984
"25T" refers to the transcript of September 25, 1984
"26T" refers to the transcript of September 26, 1984
"27T" refers to the transcript of October 1, 1984
"28T" refers to the transcript of October 2, 1984
"29T" refers to the transcript of December 3, 1984

before Judge Hoffman, who subsequently denied the motion. (29T). The judge then sentenced defendant to a term of life imprisonment with no parole eligibility for 30 years as to the murder count. Count two, the possession count, was merged with count one. The judge also imposed a V.C.C.B. penalty of $1,000, and a $10,000 fine. (Da2).

Notice of Appeal was filed January 18, 1985.

COUNTER-STATEMENT OF FACTS

On July 8. 1983, defendant Eugene Berta murdered his girlfriend Cathy Warner by shooting her once through the back of the head. The facts surrounding the offense are recited below.

After Cathy Warner's husband, John Warner, died in February 1980, defendant and the victim began going together on a regular basis and developed an intimate relationship. (22T30-1 to 15). At the same time, defendant was married to Gail Berta. Cathy discussed her relationship with the defendant with many of her friends. She told them that she loved the defendant and that they were planning to get married, that she looked forward to having a family with him and a life together. (22T30-1 to 31-4; 22T46-13 to 47-19; 22T86-11 to 87-5; 22T135-19 to 24). They went on trips together and attended social functions together. (22T31-17 to 21; 22T49-15 to 50-7; 2T77-22 to 79-9; 20T62-5 to 63-7; 20T64-3 to 20). Defendant frequently stayed at Cathy's house. (20T32-3 to 4). She did not talk to her friends about any other men, (22T31-22 to 32-1; 22T87-6 to 9; 22T135-25 to 136-3), and according to Rosemary Cascella, one of her friends, Cathy did not date any other men. (22T136-4 to 6). Joy Niemara, Cathy's best friend, tried to get her to date other men but she refused because of her feelings for defendant. (22T31-22 to 32-3).[2]

In April 1982, Cathy Warner paid $2,100 to attend a

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[2] According to Niemara, Cathy did go out with a Dr. Breeden. However that was before her relationship in 1980 with defendant began, and Niemara characterized Cathy's relationship with Breeden as a friendly one only. (22T40-1 to 16).

truck driving school. According to one of her classmates, she wanted to learn because her boyfriend the defendant could drive a truck. They planned to get married and drive a truck together. (22T31-5 to 13; 22T70-4 to 8).

In December 1982, and January 1983, defendant and his wife briefly separated for a few weeks and defendant moved out of his house. (23T147-23 to 148-7). He told Cathy Warner that he was leaving his wife completely. (20T31-17 to 21). In May 1983, however, defendant was in an accident. When the victim went to the hospital to visit, she saw defendant's wife there and found out that he had not in fact left his wife. (20T32-13 to 34-18; 22T33-11 to 34-21; 22T47-8 to 48-11; 22T79-10 to 81-1; 22T98-2 to 13). Cathy was very upset because defendant had said that he was going to marry her and they were making wedding plans. (22T34-8 to 21; 22T47-10 to 48-11). She felt that defendant did not love her and that he had lied to her. (22T79-10 to 80-11). She returned all of defendant's clothes to his house (20T33-10 to 13; 22T88-2 to 18), and stopped seeing him. (22T36-8 to 9; 22T89-4 to 9).

Subsequently, however, Cathy met with defendant. She told her friend Merelyn Daniel that she and defendant had "ironed things out," that "things were going to be on her terms now and that she had given him a time limit to get everything straightened out." (22T89-14 to 20). Cathy gave defendant $5,000 on June 24 and an additional $5,000 on July 7 to be used as a downpayment on a property in Minnesota to which they might relocate. (20T18-8 to 20). Thereafter, she told friends that

she was going on vacation with defendant the weekend of July 8. They were going to Minnesota to look at properties. She indicated to one friend, Mary Ann Burns, that they were "going to decide their relationship" at weekend. (22T80-19 to 81-5). She made all the travel arrangements and paid for the trip. (20T34-24 to 35-9). The travel itinerary was in her name and defendant's name. (20T14-1 to 16-15).

Unbeknownst to the victim, however, defendant had also asked his other girlfriend, Pat Bauer, to go with him on the trip. (21T99-9 to 104-8). Defendant told Bauer that he loved her and was going to get a divorce from his wife, but he never told her about the victim. (21T98-4 to 22). He told Bauer that he wanted to look at property out in Minnesota to possibly relocate out there with her. (21T99-9 to 100-17).

On July 8, after staying with Cathy the night before, defendant drove her to work at Middlesex General Hospital where she was a nurse. (21T26-4 to 13). When later questioned by the police, defendant claimed he told her the night before that she was not going with him on the trip. (21T27-14 to 20). However, at work that day, Cathy was very happy and excited about going away. (22T90-3 to 91-20; 22T112-12 to 23; 22T130-20 to 24). According to her friends, she was "on top of the world." (22T112-16). Around 2:00 p.m., that day, Cathy got a phone call from a man. When she got off the phone, she was very upset. (22T111-13 to 112-11). She said that she had been told that her

mother had a heart attack.[3] She asked the head nurse if she could leave work right away, and then she left. (22T131-12 to 25). None of her friends heard from her again.

According to defendant, he picked her up at work, and they went to her house. She was still giving him "grief" about not going, according to him. (20T27-14 to 24). Defendant claimed that they then resolved the argument, went up to the bedroom, had sex and fell asleep. (20T27-25 to 28-4). According to defendant, he woke up about 7:00 p.m., and realized that he missed the flight to Minnesota, so he made preparations to take another plane the following day. He claimed the victim decided to go visit her sister in Virginia, so he drove her to the train station, parked her car in a 50¢ per day parking space and left to meet Pat Bauer. (21T28-5 to 21; 20T19-20 to 20-9).[4]

According to Pat Bauer, however, defendant called her several times on July 8. He had not as yet told her what time they were leaving. He called her at 9:00 a.m., 11:00 a.m., 1:00 p.m., 2:00 p.m., but still did not tell her when they were to leave. At 3:20 p.m., he called her again but this time he was whispering. He said that he would call her back and tell her

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3 It is implicit in the record that her mother had not, in fact, suffered a heart attack.

4 The victim's sister, Mary Neal, later testified at trial that she was in the process of moving from Virginia that weekend to Pennsylvania, and that her sister was aware of that fact. (20T67-14 to 25). Ms. Neal also stated that her sister always called before visiting her, and that she never received a call from her. (20T76-17 to 25).

what time they were leaving. She had trouble hearing him, and had to ask him to say it again. He called her back at 3:50, this time speaking in a normal voice, and told her to meet him at 4:00 p.m. at the Durham Cafe, near Cathy Warner's house. She went there, but he never appeared. (21T104-8 to 113-25).

After she got home some time later, he called her and said he could explain everything, that he would call her at 7:30 p.m. At 7:30, he called her, asked her if she had calmed down, and if she would still go with him. He said that he had to clean up. At 8:30 p.m., he called and said that he had changed the flight and made reseverations at a hotel for the night for them. He said also that he had to finish cleaning up. At 9:00 p.m. he called and asked her whether she was excited to be going, whether she had calmed down, and said "everything would be okay." (21T114-1 to 116-24). He finally called her about 9:20 p.m., and told her to meet him at the Metro Park train station in ten minutes. She met him there and they drove to a hotel near the airport in Newark. (21T114-25 to 119-21). As they drove, defendant asked Ms. Bauer if she believed that he loved her. She said no. He responded, "I just killed three people and you better believe I love you or I'll blow your God damn brains out." (21T118-20 to 119-9).

In the morning, defendant and Ms. Bauer flew to Minesota. (21T119-25 to 120-16). When they arrived, they met with a realtor and looked at properties. Defendant asked Ms. Bauer which one she liked, talked of everything in terms of "we" and actually put a down payment on one of the properties.

(21T121-22 to 123-1). While they were in Minnesota, he also showed her a big handgun. (21T126-13 to 127-13). When they drove back to the airport to leave, they turned in the rental car. As Ms. Bauer was cleaning it out, she found the rental agreement and it was in the name of Warner. She asked defendant how he could take her on the trip, and have somebody else make the reservations. She thought that he planned on taking someone else. She told him that she could not tolerate a relationship with him if he were seeing someone else. He responded, "Well, you don't have to worry about her (referring to Cathy Warner), she's completely out of the picture." (21T124-15 to 126-12).

Defendant and Bauer returned on the evening of July 11. Bauer drove defendant to the train station, where, defendant claimed, he got into the victim's car, which was still parked where he left it, and drove it back to the victim's house. (20T19-6 to 15). He went inside, dropped off some film and took the garbage out. (20T23-19 to 24-17).[5] Later, when the police investigated, they found blood on the trash can liner. (19T42-14 to 15; 19T57-9 to 18). According to defendant, he then went back to his home and left on vacation with his wife Gail Berta to Seaside Heights until July 14. (20T20-16 to 19).

On July 16, Richard Neal, the father of the victim, received a call from Middlesex General Hospital. The hospital

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[5] Defendant admitted that he had keys to the regular locks and the deadbolt locks, as well as the keys to the victim's car. According to Merelyn Daniel, Cathy told her that defendant was "the only one who had a set of keys." (22T87-5 to 10).

wanted to know why Cathy had not shown up for work; her vacation was supposed to be up on July 15. Richard Neal became alarmed, so he and his son Gary drove over to the victim's house. The found her car parked much further back in the driveway than normal. They knocked and rang the bell, but no one answered and they could not get in because all the doors were locked. They called the police, who came and helped them break into the house through a basement window. While Gary Neal and Sargeant Sardone, the officer who arrived, searched upstairs, Mr. Neal stayed downstairs and looked in the downstairs bathroom. There, lying in the downstairs bathtub, he found the nude, decomposed body of his daughter, Cathy Warner. (16T8-1 to 14-8). She lay in a few inches of blood and water. Maggots covered parts of her body. (16T27-25 to 28-12). The autopsy conducted the next day revealed that Cathy had been shot in the back of the head. (17T71-12 to 72-3).

When the police searched the house they found a calendar and some unpaid bills on the kitchen table. The calendar was marked off up to and including July 7. They also found mail in the mailbox post marked July 6 and July 7. (16T32-8 to 24;16T40-3 to 24)). Investigating upstairs, they discovered two packed suitcases as well as the victim's pocketbook in her bedroom. (16T48-12 to 20). In her pocketbook, they found an airplaine itinerary to Minnesota dated July 8, with the names Warner/Berta. (20T14-12 to 15).

The police questioned defendant as to his relationship with the victim. They told him that she was dead and he did not react or appear to be surprised. (20T35-10 to 36-3). He

initially told them that the victim was just a friend, then he admitted that he had an intimate relationship with her. (20T18-24 to 19-6; 20T25-9 to 15). He was subsequently arrested for the crime.

LEGAL ARGUMENT

POINT I

DEFENDANT'S SENTENCE WAS MANIFESTLY PROPER.

Defendant argues that his sentence is excessive and should be reduced because the trial court abused its discretion by not properly considering the aggravating and mitigating factors in the instant case. The State submits that defendant's sentence was proper in all respects and should be affirmed.

Appellate review of a sentence requires this Court to determine whether the trial court correctly applied the sentencing guidelines, whether the aggravating and mitigating factors found were suggested by competent, credible evidence and whether the lower court applied the correct legal principles in excercising its discretion. State v. Roth, 95 N.J. 334, 363-364 (1984). A sentence will be modified only when so "clearly unreasonable" that it shocks judicial conscience. Id. at 365. "When conscientious trial judges exercise discretion in accordance with principles set forth in the Code and defined here today, they need fear no second-guessing." Id.

Initially, because this was a murder case, the trial court was not required to employ its discretion in determining whether or not to deviate from a presumptive sentence, or in imposing a term of parole ineligibility, as it would normally be required to do with other first-degree crimes. If a defendant is convicted of murder and he does not receive the death penalty, the court has two sentencing options. The court may impose (1) a sentence of 30 years without parole or (2) a

sentence between 30 years and life imprisonment, with a mandatory minimum 30 year term of parole ineligibility. N.J.S.A. 2C:11-3(b); State v. Biegenwald, 96 N.J. 630, 635 (1984). There is no presumptive sentence for murder. See State v. Maguire, 84 N.J. 508, 532-533 (1980).

In any event, the trial court did not abuse the discretion it had in imposing defendant's sentence. Here, after reviewing the presentence report and listening to the arguments of counsel, the trial court sentenced defendant to life imprisonment with a 30 year term of parole ineligibility. (29T51-18 to 21). In fashioning this sentence, the court specifically found the following to be aggravating factors: (1) the nature and circumstances of the offense, that it was committed in an especially cruel and heinous matter; (2) the risk that defendant would commit another offense and (3) the need for deterence. (29T48-13 to 51-1; Da4 to 5). See N.J.S.A. 2C;44-1(a)(1), (3), and (9). The court also considered as mitigating factors that (1) defendant had no prior record and (2) that imprisonment would entail excessive hardship upon his dependents. (29T51-2 to 14). However, the court expressly held that the aggaravating factors substantially outweighed the mitigating factors. (29T51-15 to 17).

Defendant argues that the trial court erred in citing the alleged mistreatment of the victim as an aggravating factor. Defendant cites the following statement of the trial court:

> What distinguishes this case from other non-capital murder cases are all of the surrounding circumstances. Because although Catherine Warner breathed her last breath on July 8, 1983, the defendant was killing her little by little over several years of their relationship. He treated the victim during her lifetime in the way no-one would treat a cur. And only when he had milked her out of her money and her spirit did he take the final step to eliminate Catherine Warner from his life. (29T48-23 to 50-7).

Defendant maintains that there is no evidence that that defendant physically abused Cathy Warner during their relationship.. However, the court in the passage cited by defendant does <u>not</u> refer to physical mistreatment in any way. What the court is referring to is the nature of the relationship between the defendant and the victim - that defendant would make promises to leave his wife and marry the victim, yet never fulfill those promises; that he lied to her about leaving his wife, that he would take money from her that was to be for a house or property they would jointly own and visit that property with another woman, and that he would take the other woman to Minnesota to see the property on tickets that Cathy Warner paid for and arranged. The court at no time characterizes the relationship as one in which defendant physically abused Ms. Warner. Rather the court states the opposite, that this is not such a situation. (29T50-20 to 21).

Defendant submits that the court "grossly misrepresented the facts" by concluding that defendant had "milked" the victim of her money. (Db18). Defendant maintains

that the victim "had loaned the money to defendant for particular purposes," and that there was no evidence that defendant defrauded the victim of her money or that he refused to pay her back. Defendant neglects to mention that the loan was for the purpose of buying the property in Minnesota which was meant to be for the defendant and the victim, and not for the defendant and another woman, Pat Bauer, whom he took to see the property on tickets for which the victim paid. The characterization by the court therefore, with this in mind, would seem to be highly appropriate.[6]

Defendant objects to the court's finding that there was a risk that he would commit another offense. However, as the court below noted, defendant went to great lengths to cover or disguise his participation in the crime. He cleaned up the scene, disposed of the evidence and moved the body. Thereafter, he went on vacation with his other girlfriend, Pat Bauer, and then his wife. It was this cool and deliberate attitude which the court below felt, and the State here submits, shows the risk of defendant committing another offense. (29T48-15 to 49-25).

Defendant maintains that his lack of a prior record should have been considered as a mitigating factor, and as diminishing the likelihood that he would commit another crime. In fact, the court did cite the fact that this was defendant's first criminal offense as a mitigating factor. (29T51-21 to 7)

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[6] Defendant also borrowed $4500 to buy a van in 1980 or 1981, and $1,000 to bail him out of jail for non-support in December 1982. He never paid his money back to the victim. (23T185-2 to 187-2).

However, because this was the worst possible offense that can possibly be committed, the court accorded it little weight. (29T51-4 to 7). The ultimate balancing of aggravating and mitigating factors is committed to the trial court's discretion. State v. Davis, 175 N.J. Super. 130, 142 (App. Div. 1980), certif. den. 85 N.J. 136 (1980). The fact that the court did not consider a factor especially mitigating does not constitute an abuse of discretion. Defendant has offered no cogent evidence that the trial court improperly weighed the factors.

Defendant claims that he was steadily employed and performed community service as a member of the Edison Rescue Squad. Defendant's employment and service with the Rescue Squad was brought forth at trial and detailed in the presentence report which the court considered prior to sentencing. Thus, the court was fully aware of defendant's background. The decision not to count it as especially mitigating is within the court's discretion. State v. Davis, supra.

Finally, defendant claims that the trial court incorrectly cited a need to deter physical abuse in a spousal or domestic situation as an aggravating factor. As was noted above, however, it is clear that the court did not equate this situation with a continued physical abuse case. The court specifically notes that this case is not one of such abuse. (29T50-20 to 21). Nevertheless, defendant certainly could be characterized as having "dominated the personal relationship" by

killing the victim with whom he had an intimate relationship. Because defendant has not beaten the victim up to begin with over a period of time does not negate that fact.[7]

For the foregoing reasons, the State submits that defendant has failed to show the trial court abused its discretion in imposing this sentence upon the defendant. Therefore, the sentence should be upheld.

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[7] Defendant maintains that their intimate relationship suggested by the court in citing this factor somehow belies the first aggravating factor, that of the nature and circumstances of the offense and the treatment of the victim. The State fails to see how the imtimate sexual realationship they shared negates the fact that defendant emotionally mistreated the victim. Nor is it apparent how it negates the coolness and deliberateness of the murder itself and its subsequent cover-up.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE PHOTOGRAPHS OF THE BODY OF THE VICTIM.

Defendant contends that the trial court abused its discretion by admitting the photographs of the body of the victim. Defendant claims that the pictures were too gruesome and inflammatory to show the jury because they depicted the partially decomposed body of the victim covered by maggots. (Db30).[8] Defendant maintains that the prejudicial effect outweighed the probative value of the pictures. The State disagrees, and submits that the court below properly admitted the photographs because the pictures were vital in assessing the key issue in the case, i.e. the time of death, and any possible prejudicial effect did not outweigh the probative value.

The pictures depicted the body of the victim in the bathtub as she was found at the crime scene.[9] (13T83-5 to 25). There were maggots on her body, principally around her head and face, and her body was partially decomposed. Defendant argued below that the photographs were too gruesome and should be excluded. Defendant called a psychologist, Dr. Robert Buckout, to attest to the effect that such pictures could have on the jury. As defendant states in his brief, Dr. Buckout

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8 Contrary to defendant's assertion (Db23), the State did not offer any pictures of the "autopsy subsequently conducted" upon the victim, nor were any such pictures admitted by the court. (19T63-18 to 21).

9 One of the pictures, S-153, was taken of the body in a metal container after it was removed from the tub. (19T61-3 to 5).

concluded that the pictures could have a disruptive effect on the memory of the jurors. The trial court, however, did not find Dr. Buckout to be a qualified expert in this area. (13T86-24 to 87-7). The court court also found that while Buckout's studies might have some validity in the future, they had not yet reached the degree of general acceptibility in the scientific community such that one could conclude with certainty what effect the photographs might have on the jurors. (13T87-8 to 13). After careful and lengthy consideration, the trial judge ruled that the photographs were admissable because they were probative of the key issue in this case - the time of death. (13T84-9 to 88-9; 19T64-20 to 66-4).

It is well-settled in New Jersey that the admission of photographs of crime victims that have some probative value, even if inflammatory in nature, rests solely within the discretion of the trial judge. State v. Belton, 60 N.J. 103, 109 (1972); State v. Conklin, 54 N.J. 540, 545 (1969); State v. Smith, 32 N.J. 501, 525 (1960), cert. den. 364 U.S. 936 (1961); State v. Bucanis, 26 N.J. 45 (1958) cert. den. 357 U.S. 910 (1958). Unpleasant or gruesome photographs of a murder scene are not objectionable because of their gruesome nature alone. State v. Huff, 14 N.J. 240, 251 (1954). Further, the fact that such photographs may constitute cumulative evidence does not preclude their admissibility. State v. Walker, 33 N.J. 580, 596 (1960), cert. den. 371 U.S. 850 (1962); State v. Smith, supra. Gruesome photographs are inadmissible only when their probative value is so substantially outweighed by their "inherently inflammatory potential" that the jurors will probably be unable

to make a fair and reasonable evaluation of guilt or innocence. State v. Thompson, 59 N.J. 396, 421 (1971). The judge's decision to admit the photographs should not be reversed unless defendant proves that the jury's inability to fairly decide the defendant's guilt or innocence was unquestionable. State v. Belton, supra; State v. Smith, supra.

Here, the trial court clearly did not abuse its discretion in deciding to admit the photographs. The time of the victim's death was the key issue in this case. If the victim actually was murdered on July 8, 1983, then the defendant had the opportunity to commit the crime. The issue was hotly contested, and the expert called by the State disagreed with defendant's expert as to the precise number of days that Cathy Warner had been dead. Dr. Spitz, the expert solicited by the State, testified that in his opinion the victim had been dead approximately eight days. (19T104-13 to 105-10). Dr. Roh, the defense expert, concluded that the victim had been dead two to four days before being found. (24T78-16 to 23). Since both doctors did not personally examine the body, they had to rely upon the pictures and the autopsy reports in drawing their conclusions.

The State submits that the jury could not draw its own conclusions as to which expert was correct without viewing the photographs upon which the experts, in large measure, based their determinations. Furthermore, the pictures would aid the jury's understanding of the testimony of the experts.

Defendant relies upon State v. Polk, 164 N.J. Super. 457 (App. Div. 1977), aff'd 164 N.J. Super. 457 (App. Div. 1977), aff'd 78 N.J. 539 (1979). In Polk, the trial court admitted a photograph which indicated the severity of the attack upon the victim and was corroborative of the State's contention that the killing was willful, deliberate and premeditated. Id. at 464. The Appellate Division recommended that since the case had to be retried for other reasons anyway, the photograph not be used unless the trial judge, after a clear and precise statement from the prosecutor as to its probative value, concluded that the evidence as a whole did not adequately demonstrate the facts sought to be proved by the photographs. Id. However, as previously noted, the pictures in this case were vital to an understanding of when the victim died. Moreover, even if the pictures were not highly probative or were merely cumulative, Polk does not state that admission of them would constitute reversible error.

Defendant also relies upon State v. Walker, supra, in which the court found that photographs should not have been admitted. In Walker, however, the photographs would have been introduced only to show the cause of death, which was uncontested, and as to which there was ample testimony that did not require buttressing. In the case at bar, the time of death was hotly contested, and the photographs were an essential part of the State's proof. Thus, Walker is distinct from the instant case.

Defendant has failed to show that the probative value of the pictures was so significantly outweighed by their inherently inflammatory nature to divert the juror's minds from a reasonable and fair evaluation of his guilt. Consequently, defendant has failed to show that the trial court abused its discretion in admitting the photographs. The trial court's determination should therefore be upheld.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO COMPEL DISCOVERY OF AUTOPSIES DONE IN OTHER CASES BY THE MEDICAL EXAMINER WHO PERFORMED THE AUTOPSY IN THIS CASE.

Defendant argues that the trial court erred in refusing to compel the production of autopsy reports, done in other cases by the medical examiner who performed the autopsy in this case. The State submits that the court correctly refused to compel discovery of those autopsies. The original autopsy report was prepared by medical examiner Dr. Marvin Shuster. In that report, he estimated that the time of death was approximately two days before the victim was found. (17T129-7 to 9).[10] Defendant argues that he should be able to discover prior autopsies done by Dr. Shuster on victims who were not found immediately in order to cross-examine Dr. Shuster as to his estimate of the time of death in this case.

The State submits that the other autopsies done by Dr. Shuster are simply irrelevant. They have nothing to do with the instant case. As the trial court noted, the time of death in the autopsies was merely estimated, in some cases the time the body was found was merely put down as the time of death. In order to make any sense of the reports, the trial court continued, one would need the entire file on the case. Although the court noted that this did not constitute an Evid. R. 4 situation because defendant's motion was a discovery motion,

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10 In making this estimate, however, Dr. Shuster did not take into consideration the reseults of the entomologist's report done by Dr. Vasvary. At trial, Dr. Shuster testified that if he had recieved the entomological report beforehand, he would have revised his estimate to a longer time. (17T129-19 to 180-20).

and the reports were not relevant, the court found that they would certainly add collateral issues and confuse the jury. (9T33-16 to 35-6). The State also adds that this would result also in prolonging the trial for something, the relevance of which was highly questionable at best.

Beyond that, some of the autopsies which defendant requested pertained to open homicide investigations, information which, if unrelated to defendant's case, defendant should not be entitled to view. (9T35-7 to 37-14).

Finally, the State notes, the defendant had the opportunity to cross-examine Dr. Shuster and did in fact vigorously cross-examine him. (17T130-25 to 145-1). That the trial court disallowed defendant's attempt to discover irrelevant material did not unfairly limit defendant's ability to cross-examine the medical examiner. As the court noted, what defendant wanted to do with these reports "can be established through proper cross- examination and through the production of his own expert witnesses should he desire to produce them." (9T35-4 to 6). Defendant was not precluded from cross-examining Dr. Shuster as to his estimate of the time of death.

Therefore, the State submits the trial court did not err in refusing to compel discovery of the prior autopsies, and the court's decision should be upheld.

POINT IV

THE TRIAL COURT PROPERLY PERMITTED TESTIMONY AS TO THE VICTIM'S HABIT OF MARKING OFF EACH DAY ON THE CALENDAR THE NEXT MORNING.

Defendant contends that the trial court erred in permitting testimony as to the victim's habit of marking off each day on her calendar the next morning. The State submits that the trial court properly allowed the testimony.

Defendant argues that the testimony at the Evid. R. 8 hearing on this issue was insufficient to demonstrate the victim's habit of marking off each day on her calendar because the testimony did not provide proof of "many instances" of this particular conduct as required in Burd v. Vercruyssen, 142 N.J. Super. 344 (App. Div. 1976). This argument is patently fallacious.

Initially, the State notes that in Burd v. Vercruyssen, supra at 351 to 352, the court did not require that "many instances" of a particular conduct be shown; what the Burd Court said in fact was that because there were many instances, the trial court erred in not allowing the testimony. Evid. R. 50 which pertains to habit or custom simply states:

> Evidence of a specific instances of conduct is admissible to prove habit or custom if the evidence is of a sufficient number of such instances as to warrant a finding of such habit or custom.

Here, the testimony presented clearly showed a sufficient number of instances to prove habit. The victim lived with Dawn Farnell for six weeks toward the end of 1980. During

that time Dawn Farnell observed the victim cross off each day on the next morning. Defendant contends that Farnell's testimony did not prove a sufficient number of instances because Farnell said that the victim marked the calendar off on a "fairly regular basis, almost like every morning." (11T21-2 to 22-18). Defendant maintains that Farnell was not able to say that the victim did it every morning. However, even if Farnell did not observe the victim do it every morning, the State submits on "a fairly regular basis, almost like every morning" connotes a sufficient number of instances. In any event, the State submits that defendant's argument does not go to the admissability of the testimony, but rather to the weight which the jury would accord it.

Similarly, defendant's attack on the testimony of the victim's mother, Gloria Neal, is of no merit. Defendant maintains that Mrs. Neal could not testify as to the specific routine used by her daughter in marking off calendar dates. However, that was never disputed; Mrs. Neal testified specifically that she had no knowledge of her daughter's particular routine. (11T6-17 to 19). What Mrs. Neal did testify to was that the calendars were in fact her daughter's and that certain events written on the calendar were in her daughter's handwriting. (11T6-4 to 12). She also testified that she had a habit of striking off each day, that the victim was exposed to this daily for all the years that she had lived at home with her mother and that they had discussed her mother's habit. (11T6-20 to 14-20). The State submits that Mrs. Neal's testimony is relevant and admissible because it tends to make

Dawn Farnell's testimony more credible; it tends to show that the victim acquired the habit from her mother.

In any event, even if the trial court erred in permitting the testimony of Gloria Neal, the State submits that her testimony is harmless in the light of the testimony of Farnell.

Defendant finally argues that Farnell's testimony is too remote because it pertained to a period approximately three years prior to the crime. The judgment as to whether conduct is too remote, however, is within the court's discretion. See Comment 1, Evid. R. 50. Here, there was not only Farnell's and Neal's testimony, but there were also the calendars presented by the State from 1980 to 1983, with each day marked off and daily events recorded. These calendars showed that the victim continued to mark off days after her period of rooming with Dawn Farnell. (17T40-3 to 44-22).

The State submits therefore that the court did not abuse its discretion in permitting testimony pertaining to the victim's habit of marking off calendar dates.

POINT V

THE TRIAL COURT PROPERLY PRECLUDED EVIDENCE PERTAINING TO THE VICTIM'S SEXUAL RELATIONSHIPS PRIOR TO HER MARRIAGE TO JOHN WARNER.

Defendant argues that the trial court erred in precluding evidence of the victim's sexual relationships prior to her marriage to John Warner in 1977. The State submits that the trial court properly refused to admit the evidence because it was wholly irrelevant to the question of who had access to murder her in July 1983.

At the hearing below, defendant represented that he had witnesses who would testify that Ms. Warner, the victim, had many sexual encounters in the early and mid-1970's.[11] Defendant sought to introduce these allegations to rebut the State's evidence that the victim loved only the defendant, and to show who might have access to kill her. However, the trial court correctly noted below that these allegations of events in the 1970's were irrelevant and too remote to the issue of who had access to kill her in July 1983. The trial court noted that after 1977, when she married John Warner, there appeared to be no continuum of promiscuity. The trial court also found that

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[11] The representations made by defense below to which defendant cites now in his appellate brief are inaccurate in at least two respects. First, defendant claims that there were "several episodes of multiple partner sex." (Db39). However, as the State evaluates the representations to which defendant refers, it appears that the offer of proof is only as to two episodes - one which took place in the Garcia household, and one in the basement of the first aid station. Secondly, the alleged lesbian proposition by the victim of Ms. Farnell was supposedly in 1982. Thus, the defendant had the opportunity to present that; he chose not to do so.

even if this evidence were remotely relevant, it would be precluded under Evid. R. 4 because it would create a substantial danger of undue prejudice, as well as confuse and mislead the jury, and it would also involve an undue amount of time. (11T117-25 to 120-16). The State submits that the trial court's judgment was entirely correct.

Defendant argues that if the court permitted evidence of sexual encounters after the death of her husband in 1980, the acts in the 1970's are also relevant. The court however did not make a blanket ruling that everything after 1980 was admissible; it stated that such acts had to be evaluated on a case-by-case basis to determine their relevancy. (11T120-17 to 122-4).[12] Furthermore, the acts in the 1970's differ because they are unrelated to who might have had access to kill her in July 1983. They also do not pertain to the critical period in the relationship between the victim and defendant, 1980 to 1983, during which time the victim professed her love only for defendant and her desire to marry him.[13]

Defendant makes general statements that the victim's promiscuity in the 1970's continued until her death, with the

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[12] Defendant also seems to assert that at trial that the court would not permit any evidence of promiscuity. (Db40). However, this is plainly wrong, as the part of the transcript to which defendant cites reveals. (20T9-19 to 10-1). Defendant had the opportunity; he did not use it.

[13] Defendant maintains that 1980 was an arbitrary cut-off date. The State submits that it clearly was not, as it pertained to this critical period. Moreover, even if it were, it is a date which benefits defendant, allowing him to present anything that he could three years before the victim was actually killed.

possible exception of her marriage to John Warner from 1977 to 1980. (Db42). However, the record reflects only representations made by defense counsel during a hearing on the matter; defendant never presented any testimony as to sexual encounters after 1980 during the trial.

Defendant claims that many of the sexual encounters of the victim occurred when the victim was supposedly dating the defendant, and that this undercuts the State's position that Cathy Warner intended to marry the defendant. (Db39). Defendant's assertion is a misleading perversion of the facts. Although defendant and the victim dated in the 1970's, the victim also dated other people. She did not maintain an exclusive relationship with defendant. She did not tell her friends that she loved him and only him, and that they intended to get married. During the time that the victim did maintain that she loved defendant, 1980 to 1983, defendant was not able to present any testimony to the court as to other sexual relationships.

In sum, the State sumbits that the trial court was entirely correct in precluding allegations of defendant's supposed promiscuity during the early and mid-1970's.

POINT VI

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS OF THE VICTIM CONCERNING HER RELATIONSHIP WITH DEFENDANT.

Defendant aruges that the trial court erred in admitting statements the victim made to her friends about her relationship to the defendant. The State submits that these statements were admissable under Evid. R. 63(12) and showed the intimate realtionship between the victim and defendant. Therefore, the statements were properly admitted.

The trial court admitted statements made by the victim to her friends under Evid. R. 63(12). That rule provides in petinent part that:

> A statement is admissible if it was made in good faith and it (a) described the declarant's then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief, to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of defendant.

The trial court found that these statements showed the state of mind of the victim about her relationship with the defendant, and were therefore admissible. (11T115-24 to 117-24). The State agrees. These statements tended to show that the victim loved only the defendant and wanted to marry him.

Although defendant initially objects to all the statements, his true objection appears to be as to the victim's statement to Merelyn Daniel, one of her friends, that defendant was the only one to whom she [the victim] gave a set of keys to

her house. Defendant claims that although the prosecutor offered the statement as evidence of her close, intimate relationship to defendant, the prosecutor's intent was to show that defendant had sole access to the house. Defendant cites to the prosecutor's closing statement, in which the prosecutor refered to the defendant's having keys.

> "You haven't heard too much lately about the keys. Let me just remind you of the significance of those keys. When we got to that house it was locked from the outside. The only way it can be locked from the outside, the deadbolt lock, that is, is with a key. There's only one man during this entire trial whom you heard has a key to that house, and that man is Gene Berta, not John Bauer, not Patroleman Sebasti, not Mr. Jones, not Sam Harris next door, not all the other people the defense throughout the case tried to suggest to distract you from the truth. The only man was Gene Berta, and the murderer had to have a key to lock the door from the outside . . .
>
> There's only one person who had a motive, only one person who had a key." (27T176-9 to 22; 27T177-7 to 8). (Db49).

However, the prosecutor does not have to rely upon the victim's statement to assert that that defendant had keys; Lieutenant Zimmerman testified that defendant admitted that he had his own set of keys to the victim's house and her car. (20T20-20 to 1-2). Moreover, the police, upon searching the defendant's house, discovered keys that opened the knob locks and the deadbolt locks. (17T66-14 to 67-4). There was no

testimony that anyone else had a key to the deadbolt lock.[14] Thus, there was ample evidence apart from the victim's statement to Merelyn Daniel from which the prosecutor could fairly draw the inference that defendant was the only one who had access to the house. So long as the prosecutor confines himself in summation to the facts and the reasonable inferences therefrom, "what he says in discussing them, by way of denunciation or appeal, will afford no ground for reversal." State v. Johnson, 31 N.J. 489, 510 (1960). The prosecutor is not precluded from summing up graphically and forcefully. State v. Hill, 47 N.J. 490, 499 (1966).[15]

In sum, therefore, the State submits that these statements were properly admitted, and that the prosecutor did not improperly utilize the victim's statement to Merelyn Daniel.

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[14] As defendant notes (Db46 to 47), there was testimony as to the victims giving a knob lock key to workmen who were repairing her house. However, there was no testimony that they were given a deadbolt key.

[15] The State draws this Court's attention to State v. Prudden, (decided October 1, 1986), which is signed, but has not yet been approved for publication. In that case, the Appellate Division found that the admission of the victim's note in which the victim named defendant as the probable guilty party in the event the victim was killed constituted inadmissable hearsay and reversible error. In so holding, the Appellate Division found that the letter did not fall within the purview of the state of mind exception of Evid. R. 63(12) because the state of mind of the victim was not a relevant issue, and the letter was not relevant to prove the declarant (the victim's) conduct.

The situation in the case at bar is wholly distinguishable, however. In this case, the victim's statements clearly showed the state of mind of the victim, that she loved only the defendant. The victim's decision to give only the defendant keys to her home was pertinent to her state of mind. Moreover, unlike Prudden, the victim's state of mind in this case was obviously relevant to this prosecution.

CONCLUSION

For the foregoing reasons, the State respectfully urges this court to affirm the conviction and sentence below.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: October 24, 1986

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