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TITLE: STATE OF NEW JERSEY v ALBERTO SCABONE

OPINION FILED

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SENDER BM

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A1491-96T4

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
APPELLATE SECTION
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NEWARK NJ 07101

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REC'D
APPELLATE DIVISION
JUL 31 1997
Clerk

July 31, 1997

ABBY P. SCHWARTZ
Assistant Deputy
Public Defender

Of Counsel and
On the Letter-Brief

FILED
APPELLATE DIVISION
JUL 31 1997
Clerk

LETTER-BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1491-96T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondant,	:	On Appeal from an Order Denying Post-Conviction Relief of the
v.	:	Superior Court of New Jersey, Law Division, Essex County.
ALBERTO SCABONE,	:	Sat Below:
Defendant-Appellant.	:	Hon. Eugene Codey, J.S.C.

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY

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

On November 9, 1993, trial commenced before the Honorable Eugene J. Codey, Jr, J.S.C., and a jury. On November 18, 1993, defendant was found guilty of passion/provocation murder as to Monica Scabone, murder as to Yannet and Norma Estevez, and of the second-degree arson. (Da 6)

On January 14, 1994, the court imposed upon defendant the following sentence: 10 years' imprisonment with a five-year parole disqualifier as to the manslaughter conviction; 30 years' imprisonment with a 15-year parole disqualifier as to each of the murder convictions; and 10 years' imprisonment with a five-year parole disqulifier as to the arson conviction. Each of the terms were imposed to run consecutively with one another. Accordingly,

---

[1] "Da" refers to defendant's appendix.
"MT" designates the transcript of the post-conviction relief proceedings held on September 19, 1996.
"1T" refers to the trial transcript of November 9, 1993.
"2T" refers to the trial transcript of November 10, 1993.
"3T" refers to the trial transcript of November 12, 1993.
"4T" refers to the trial transcript of November 15, 1993.
"5T" refers to the trial transcript of November 16, 1993.
"6T" refers to the trial transcript of November 17, 1993.
"7T" refers to the trial transcript of November 18, 1993.
"8T" refers to the trial transcript of January 14, 1994.

defendant's aggregate sentence was 80 years' imprisonment with a 40-year parole disqualifier. (Da 6 to 7)

On March 14, 1994, defendant filed a notice of appeal with this court. (Da 8)

This Court affirmed the convictions and sentences in a written opinion filed on November 14, 1995. (Da 9 to 24) The Supreme Court denied defendant's petition for certification on January 31, 1996. (Da 25)

On February 21, 1996, defendant filed a pro se petition for post-conviction relief in the Essex County Superior Court. (Da 26 to 81) Judge Codey heard the motion on September 19, 1996 and by a written opinion denied the petition on September 23, 1996. (Da 82 to 89) A Notice of Appeal was filed on defendant's behalf on November 13, 1996. (Da 90)

STATEMENT OF FACTS

The facts adduced at trial regarding the events surrounding defendant's convictions for the passion\provocation killing of his wife, the murder of his sister-in-law and mother-in-law, and the arson of his apartment, were described as follows in the Appellate Division opinion of November 14, 1995. At the time of the incident, Mr. Scabone lived with his wife, Monica Estevez, her mother Norma and her sister Yannet. At 10:17 p.m. on April 2, 1981, the Newark Fire Department was called to the apartment. Upon entering, the bodies of the three women were found severely burned. The autopsies showed, however, that they did not die from the fire but rather, from massive internal bleeding caused by multiple stab wounds. It was determined that the fire was deliberately started.

By the morning after the fire, Mr. Scabone was considered a suspect and a search for him ensued. The police determined that he was no longer in the county and a copy of the case was transmitted to Interpol in Washington. Mr. Scabone remained at large for the next twelve years until his second wife, Elieth Alvarado Camacho, went to the police upon the belief that he was wanted for this crime.

Monica's Estevez's remaining sister and brother-in-law testified at trial that Mr. Scabone fought extensively with Monica and often threatened to kill her. Apparently, Mr. Scabone told Monica's brother-in-law that he would kill all three women one day. Mr. Scabone's second wife testified that her marriage was peppered by discord and that she did not know Mr. Scabone's true identity

for several years. Although she knew that his first wife had died, she did not know any details. Ms. Comacho learned that Scabone was wanted for these three killings.

At one point, Comacho testified that Scabone threatened to kill her mother and sister and when Camacho confronted him with her knowledge of the deaths of his first wife and her family, he told her that if necessary, he would do it again. At a later point, Scabone apparently told Comacho that he and his first wife had been fighting when she grabbed a knife that they kept above their bed. He took it from her, wounded her, panicked and killed her. When her mother and sister came home, he killed them as well.

At trial, Mr. Scabone indicated that he was not guilty. He testified that on the day in question, he played soccer until 6:15, went home and then went to Elizabeth with some friends. When he came home at 9:40, the apartment was on fire and splattered with blood. He found the three women and when he saw that they were dead, he grabbed his son and fled to Mexico.

At the motion for post-conviction relief, Mr. Scabone alleged ineffective assistance of counsel for failure to conduct an adequate investigation. At the motion, Mr. Scabone indicated that his lawyer should have produced his son to testify at the trial. (MT 24-15)[2] Judge Codey denied the petition both on procedural

---

[2] In his petition, Mr. Scabone raised ineffective assistance of appellate counsel, as well as other incidents of ineffective assistance of trial counsel. Further, he raised as error, the charge on passion\provocation manslaughter and the lack of a charge on "imperfect self-defense." (Da 26-81) Judge Codey denied Mr. Scabone's petition for post-conviction relief on these grounds as well, and defendant does not raise these issues herein.

grounds as well as on the merits, finding that:

> The claimed errors do not overcome the presumption that trial counsel's conduct was within the wide range of acceptable, reasonable professional assistance, nor do they demonstrate prejudice to defendant sufficient to undermine confidence in the outcome of the trial.

(Da 88)

POINT I

THE COURT BELOW ERRED IN DENYING THE PETITION FOR POST-CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING TO ALLOW THE DEFENDANT TO ESTABLISH THAT HE HAD RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Alberto Scabone sought post-conviction relief on the basis of several allegations of ineffectiveness of his trial attorney. These claims not only presented a prima facie case of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65 (1984), and State v. Fritz, 105 N.J. 42, 58 (1987), but they were also dependent for their resolution on evidence outside of the trial record. Thus, they were particularly appropriate to be resolved at an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992). The PCR judge erred in denying Mr. Scabone such a hearing, which was specifically requested by defendant in his pro se petition.

The trial court's first ruling was that Mr. Scabone's claims were procedurally barred by R. 3:22-4. The trial judge wrote:

> Petitioner did not previously raise his ineffective assistance of trial counsel claim. ...It is now only after Mr. Scabone has commenced serving his lengthy prison sentence does he have a change of heart as to his attorney's trial efforts. All such claims should have and could have been raised at that time, and are thus barred procedurally as all information necessary to raise such claims was available to petitioner when he made his direct appeal.

(Da 87 to 88) The procedural bar which the trial court apparently relied on is set forth in Rule 3:22-4:

> Any ground for relief not raised in a prior proceeding under this rule, or in the

> proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

The trial court, however, ignored the fact that:

> Under New Jersey case law, petitioners are rarely barred from raising ineffective-assistance-of-counsel claims on post-conviction review. Such claims may fall within Rule 3:22-4(c), which affords post-conviction review for constitutional claims that could have been raised earlier, because those claims are grounded in the Sixth Amendment and the New Jersey Constitutions. [citations omitted]
>
> Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding. [citations and quote omitted]
>
> Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record. [citations omitted]

Preciose, 129 N.J. at 459-60; see also State v. Sloan, 226 N.J. Super. 605, 612 (App. Div. 1988). There would have simply been no way for Mr. Scabone to raise, as part of his appeal, his numerous allegations of ineffective assistance of counsel and these issues were not in the trial record. As in Preciose, trial counsel's "alleged failings lay outside the trial record and could not be presented on direct appeal." 129 N.J. at 461.

In addressing the merits of petitioner's claims, the trial court stated, regarding Mr. Scabone's numerous claims of ineffective assistance of counsel:

> The record does not support or even give rise to a fair inference that trial or appellate counsel's performance was in any way inadequate or below a level of reasonable competence.

(Da 88) While PCR counsel was not able to offer the trial court information regarding petitioner's claims, Mr. Scabone himself explained to the court where counsel had failed and these allegations, standing alone, required the trial judge to hold a hearing.

Both the United States and New Jersey Constitutions secure a defendant's right to counsel in criminal prosecutions. U.S. Const. Amends. VI, XIV; N.J. Const. Art. I, para. 10; State v. Sugar, 84 N.J. 1, 5 (1980). Since both the State and Federal Constitutions require the assistance of counsel and not merely his presence, counsel must be effective as well as available. Sugar, 84 N.J. at 17.

In order to prove a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984). See Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370 (1985); State v. Preciose, 129 N.J. 451, 463-64 (1992); State v. Fritz, 105 N.J. 42, 58 (1987). First, the defendant must demonstrate that his lawyer's performance fell below the standard for a reasonable attorney. Strickland, 466

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U.S. at 668, 106 S.Ct. at 2068. Second, there must exist a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

At the PCR hearing, Mr. Scabone stated that, "I could have had my son come here to testify." (MT 21-15) That statement must be examined along with Mr. Scabone's general allegation that:

> Trial counsel also failed to investigate the case. If trial counsel would have been more adequately (sic) in his investigation he would have had far more specific information to cross-examine the State's witnesses. Trial counsel's only strategy was to finish the case, and showing disregard to the results which would and was in violation of the defendant.

It is well-settled that the failure of defense counsel to conduct adequate pretrial preparation renders him/her ineffective, regardless of the quality of his/her performance at trial. State v. Fritz, 105 N.J. at 63-64. Thus, said the Court in Fritz, even "[t]he exercise of utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their assistance." Id. at 63-64, quoting Moore v. United States, 432 F.2d 730, 739 (3rd Cir. 1970).

In State v. Savage, 120 N.J. 594 (1990), the leading New Jersey case on ineffectiveness by failing to conduct an adequate pretrial investigation, the Supreme Court reversed the defendant's conviction for capital murder on the grounds that he was denied the effective assistance of counsel in both the guilt and penalty

phases of his trial. Noting that there was overwhelming evidence that defendant suffered from serious mental problems, the Court found that defense counsel's failure to conduct a reasonable investigation into defendant's mental state rendered his representation deficient. Id. at 625. See also Lawrence v. Armontrout, 900 F.2d (8th Cir. 1990) (counsel ineffective for failing to investigate and interview alibi witnesses); accord Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989); accord Rice v. United States, 580 A.2d 119 (D.C.App. 1990); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989) (conviction reversed on showing defendant was prejudiced by counsel's ineffectiveness for failure to contact and interview witnesses).

In this case, the only possible witness to the murder, accepting the State's version of the facts, would have been Mr. Scabone's son. On the night at issue, the witness Jose Delsid saw defendant with his son coming out of the apartment at about 9:30 p.m. Mr. Scabone apparently brought his son to work with him that night and left the country with him afterwards. (1T 98-14 to 102-12; 3T 40-2 to 43-3) According to Elieth Alvarado Camacho , Mr. Scabone's second wife, when petitioner told her the "details" of the deaths, he indicated that his son was present while it was happening - according to Ms. Alvarado, the boy saw everything. (4T 64-7 to 17)

Mr. Scabone's son never testified in this case. Notably, he did not testify for the State. He is an obvious missing witness. Mr. Scabone was entitled to a hearing to elicit the extent of trial

counsel's pre-trial investigation of the various witnesses including the investigation of this son. This testimony could have been vital to Mr. Scabone's defense and trial counsel's failure to present this witness mandated an in-depth hearing. Counsel's failure to investigate and therefore present a proper defense, deprived defendant of his right to the effective assistance of counsel. See State v. Savage, 120 N.J. at 625, quoting Strickland v. Washington, 466 U.S. at 695, 104 S.Ct. at 2068. Consequently, the failure of the trial court to hold a hearing to determine trial counsel's effectiveness was erroneous and the matter must be remanded for an evidentiary hearing on this issue.

CONCLUSION

For the reasons set forth herein, the denial of petitioner's motion for post-conviction relief must be reversed and the matter remanded for a full hearing.

Respectfully submitted,

IVELISSE TORRES
Public Defender
Attorney for Defendant-Appellant

BY: _____
ROBY P. SCHWARTZ
Assistant Deputy Public Defender

I 7534-81

Superior Court of New Jersey

ESSEX COUNTY

(Law Division — Criminal)

Filed April 2, 1981

4225 — 1980 Term

THE STATE OF NEW JERSEY

vs.

ALBERTO SCABONE

Defendant

INDICTMENT (4 Counts)

MURDER & SECOND DEGREE ARSON

A True Bill

[illegible] *Foreman.*

GRAND JURY NO. 0239 thru 0239C

Plea:

Bail:

Presented:

Ind 7942
MG 7794.

284

Essex County, to wit:

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

on the 2nd day of April, 1981

at the City of Newark in the County of Essex

aforesaid and within the jurisdiction of this Court, did murder Monica Scabone

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

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

[redacted] SECOND COUNT

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

on the 2nd day of April, 1981

at the City of Newark in the County of Essex

aforesaid and within the jurisdiction of this Court, did murder Yannet Estevez

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

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

THIRD COUNT

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

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

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.

FOURTH COUNT

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

on the 2nd day of April, 1981

at the City of Newark in the County of Essex

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

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

GEORGE L. SCHNEIDER
COUNTY PROSECUTOR
BY: [redacted]

State of New Jersey

v.

ALBERTO SCABONE
Defendant (Specify Complete Name)

New Jersey Superior Court
ESSEX County
Law Division - Criminal

[XX] Judgment of Conviction
[ ] Change of Judgment
[ ] Order for Commitment
[ ] Indictment/Accusation Dismissed
[ ] Judgment of Acquittal

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

ADJUDICATION BY — DATE
XX [ ] GUILTY PLEA — 11/18/93
[ ] JURY TRIAL
[ ] NON-JURY TRIAL
[ ] Dismissed/Acquitted

ORIGINAL CHARGES

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

FINAL CHARGES

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

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

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

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

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

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

[XX] It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority

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

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

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

Administrative Office of the Courts
State Bureau of Identification

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

Total FINE $ ____________

Total RESTITUTION $ ____________

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

☐ XX Assessment imposed on

count(s) 1,2,3,4

is $ 30.00 each.

Total VCCB Assessment $ 90.00

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

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

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

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

Total D.E.D.R. Penalty $ ____________

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

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

Total LAB FEE $ ____________

3) Name of Drugs Involved ____________

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

The suspension shall begin today, ________ and end ________

Driver's License Number ____________

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

Defendant's Address ____________

Eye Color ________ Sex ________ Date of Birth ________

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

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

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

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

STATEMENT OF REASONS

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

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

HOLIDAY, SNOW & ICE DELAY

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

Administrative Office of the Courts
State Bureau of Identification

CPS105 (Rev. 1/93)

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

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

Filed March 14, 1994

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

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

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

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

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

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

Lisa A. Lynch

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3498-93T4

FILING DATE
APPELLATE DIVISION
NOV 14 1995

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERTO SCABONE,

Defendant-Appellant.

Submitted: September 19, 1995 - Decided: NOV 14 1995

Before Judges A.M. Stein and Cuff.

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

Susan L. Reisner, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, of counsel and on the brief).

Alberto Scabone, appellant, submitted a supplemental brief pro se.

Clifford J. Minor, Essex County Prosecutor, attorney for respondent (Elizabeth A. Duelly, Assistant Prosecutor/Director and Barbara A. Rosenkrans, Assistant Prosecutor, of counsel and on the brief and supplemental letter brief).

PER CURIAM

Defendant was found guilty of the passion/provocation manslaughter of Monica Scabone, his wife; of the purposeful and knowing murders of Yannet Estevez, his sister-in-law, and Norma Estevez, his mother-in-law; and of second degree arson. The trial judge sentenced defendant to an aggregate prison term of

eighty years with a forty-year parole ineligibility period: a ten-year prison term with a five-year parole disqualifier for the passion/provocation manslaughter; a thirty-year prison term with a fifteen-year parole ineligibility period for each of the two murders; and a ten-year prison term with a five-year parole ineligibility period for the arson. All terms were to run consecutively. We affirm.

Defendant met and began dating Monica Estevez in his native land of Uruguay. They were married in Newark in April 1978, where they resided in a first floor apartment on Bloomfield Avenue. At the time of the murders, Monica's mother, Norma Estevez, and her 17-year old sister, Yannet Estevez, were sharing the apartment with defendant, Monica and their three-year old son.

At 10:17 p.m., April 2, 1981, the Newark Fire Department answered a fire alarm call for the apartment. In the bedroom, firefighters discovered the severely burned, fully clothed bodies of Monica, Yannet and Norma. Autopsies revealed their deaths were not caused by the fire, but from massive internal bleeding caused by multiple stab wounds. Approximately 90 stab wounds were inflicted, many in the victims' backs, with Yannet receiving forty-one, Norma thirty-five and Monica approximately fourteen.

Raymond Bishof, then a detective in the Newark Arson Squad, determined that the fire was deliberately started. By the morning after the fire, defendant was considered a suspect and an extennive search for him followed. The police determined that

defendant was no longer in the United States, and sent a copy of the case file to the United States Department of Justice Interpol section in Washington.

Defendant remained unapprehended until twelve years later, when Elieth Alvarado Camacho, defendant's second wife, went to the American Consulate in Guadalajara, Mexico and informed Gilbert Alvarez of the F.B.I. that she believed her husband was Alberto Scabone. Defendant was then arrested and brought to the United States where he was indicted for murder and arson.

Ana Gonzalez, Monica's sister, testified that defendant and Monica "fought a lot . . . about anything, everything . . . he was very jealous," and that in March 1980, she saw defendant hit Monica in the back with a bottle during a fight, then heard him threaten to burn their house down. She also testified that while visiting defendant's parents in Uruguay in January 1981, she heard defendant tell Monica during a fight that "he was going to kill her and the whole family like he . . . always told her." Gonzalez testified that she had heard defendant threaten to kill Monica "many times" and that although he "always" threatened to burn down the apartment, she never believed him.

Leopoldo Silva, Monica's brother-in-law, testified that defendant once told him "one day I'm going to kill these three crazy women," referring to Monica, Yannet, and Norma who were in another room. When Silva smiled at this statement, defendant said "you're laughing. I'm talking seriously." Silva testified

that defendant said he would go to Mexico or Uruguay after killing the women.

Camacho testified she first met defendant and his son in a Mexico City park the weekend before Easter of April 1981. Defendant told Camacho he was a widower and asked for her home phone number in Costa Rica. Defendant went to Costa Rica and began dating Camacho, who then knew him as Marguerito Ramirez Rodriguez. He told her that his wife, sister-in-law, and mother-in-law had died in a car accident in the United States. Thereafter, defendant and Camacho married and moved to Mexico.

Camacho testified she and defendant began having marital problems due to defendant's jealousy. Camacho tried to leave him on several occasions. Each time he followed her and each time she took him back. Camacho and defendant returned to Costa Rica.

Camacho first became suspicious of defendant when his parents came to visit. She discovered their names were listed on the plane tickets as Scabone, not Ramirez Rodriguez. Camacho later learned defendant was wanted for the three murders. She did not learn how the women were killed. While defendant was in prison in Costa Rica for an unrelated matter, Camacho contacted Interpol to verify the information and requested they not publish her name. They did not honor her request and she moved back to Mexico. Several months later, defendant found Camacho in Mexico and she allowed him to return to her.

According to Camacho, it was during this reconciliation that defendant threatened to kill her, her mother and her sister.

Camacho testified she told defendant that she knew about the deaths of his ex-wife and her family. She said "you're going to do the same thing that you did that one day" and he replied "if I have to do it, I'm going to do it again."

He later told Camacho that he had been fighting with his first wife when she grabbed a knife they kept above their bed. He said that he took it from her, wounded her with it, panicked and killed her. He then waited for Monica's mother and sister to come home and killed them as they separately arrived at the apartment.

Camacho went to the Mexican police. Because they did not seem interested in her story, she went to the American Embassy in Guadalajara and spoke to Gilbert Alvarez. When she met with Alvarez a second time, she revealed defendant's confession. Defendant was ultimately taken into custody.

Defendant asserted his innocence at trial. He testified that on the day of the murders he played soccer with some friends until 5:30 or 6:15 p.m. He returned home briefly and then went to Elizabeth with two friends. According to defendant, he returned home around 9:40 p.m.

Defendant testified that when he entered the apartment, the apartment was on fire and splattered with blood. He tried to put out the fire with some milk. According to defendant, "[e]verything was thrown around," there were "knives everywhere," and the apartment "smelled like gas." He testified he found the three women in the bedroom. After touching them to see if they were

dead, he grabbed his son and left. Shortly thereafter, he fled with his son to Mexico.

Defendant denied threatening to burn the house down. He explained that when he said he would "kill" Monica, it was "just an expression." On cross-examination, he added, "I just--I say that when I'm going to make love, too. The French say it when they make love also. That doesn't mean you're going to kill."

Defendant raises the following contentions in his main brief on appeal:

POINT I - THE ADMISSION OF OTHER CRIMES, WRONGS OR ACTS EVIDENCE CONSTITUTES REVERSIBLE ERROR.

A. The Ana Gonzalez-Leopoldo Silva Testimony.

B. The Elieth Camacho Alvarado Testimony.

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

POINT III - DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.

A. Consecutive Terms Should Not Have Been Imposed.

B. Parole Disqualifiers Should Not Have Been Imposed.

C. Maximum Base Terms Should Not Have Been Imposed.

Defendant raises the following additional contentions in his pro se supplemental brief:

POINT I - THE WRITTEN VERDICT SHEET HERE, COUPLED WITH THE INSTRUCTIONS FOR ITS USE, PRECLUDED THE JURY FROM CONSIDERING

DEFENDANT'S PASSION/PROVOCATION DEFENSE IN MITIGATION OF HIS GUILT FROM MURDER TO MANSLAUGHTER (NOT RAISED BELOW).

POINT II - THE VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO BE TRIED ONLY FOR AN OFFENSE FOUND BY THE GRAND JURY. (NOT RAISED BELOW).

POINT III - THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ERRED IN HIS KNOWINGLY ALLOWING THE FALSE AND PERJURED TESTIMONY OF THE STATE'S KEY WITNESS AT TRIAL AND INFECTED THE TRIAL PROCEEDINGS AND DID INTERFERE WITH THE JURY'S ABILITY TO WEIGH THE TESTIMONY (NOT RAISED BELOW).

We affirm. We find the contentions raised by defendant's pro se supplemental brief to be clearly without merit, R. 2:11-3(e)(2), and discuss the issues raised in the main brief.

We reject defendant's contention that the testimony of Gonzalaz, Silva and Camacho was inadmissible under N.J.R.E. 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.
>
> [N.J.R.E. 404(b).]

The rule excludes such evidence "when offered solely to prove a defendant's propensity to commit crime." State v. Stevens, 115 N.J. 289, 299 (1989). Its purpose is to ensure that defendants are not convicted merely because the other acts give the jury the impression that they are "bad people in general." State v. DiFrisco, 137 N.J. 434, 498 (1994).

The list of purposes enumerated in N.J.R.E. 404(b) for which other bad-act evidence may legitimately be introduced is "not exhaustive, . . . such evidence is admissible so long as it is relevant to a material issue in dispute and not offered to prove a defendant's disposition." Ibid. (citing State v. Stevens, supra, 115 N.J. at 300). When seeking to introduce other crimes evidence, the prosecution must show the evidence meets the four-part test formulated by the New Jersey Supreme Court in State v. Cofield, 127 N.J. 328, 338 (1992): (1) the other wrong must be relevant to a material issue in genuine dispute; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence must be clear and convincing; and (4) the probative value must not be outweighed by the prejudice to the defendant. Id. at 338.

The trial judge properly permitted Gonzalaz's and Silva's testimony, ruling that it could be used to show a "continuing enduring hostility between the parties" and to show defendant's intent and motive.

The judge correctly relied upon State v. Engel, 249 N.J. Super. 336, 372-74 (App. Div.), certif. denied, 130 N.J. 393 (1991). In Engel, defendant was accused of hiring someone to murder his wife. The trial judge permitted testimony that defendant had a stormy relationship with his wife, that he was extremely jealous of her and that his jealousy "often manifested itself in fits of rage during which he confronted [her] with unfounded suspicions, and verbally and physically abused her."

Id. at 348. The judge permitted the victim's mother to recount two incidents in which the defendant repeatedly struck his wife and accused her of being unfaithful. Ibid.

Defendant contends that because he denied committing the murders, his motive and intent was never in issue. In a homicide case, the State may always, though it need not, prove motive as part of its case-in-chief. See Morss v. Forbes, 24 N.J. 341, 359 (1957). Defendant was charged with the knowing or purposeful murders of the three women. Intent to kill was an integral and necessary part of the State's case.

We agree with the trial judge that the acts testified to by Gonzalaz, Silva and Camacho were reasonably close in time to the actual murders as required by State v. Cofield, supra.

In State v. Ramseur, 106 N.J. 123, 266 (1987), the New Jersey Supreme Court held "[t]he temporal remoteness of a past wrong affects its probative value." The Court concluded that arguments between defendant and the murder victim one and one-half years prior to his stabbing the victim to death "evidence[d] an enduring hostility toward [the victim] and to that extent cast[] doubt on his claim that the stabbing . . . was unknowing." Id. at 267. Accord, State v. Donohue, 2 N.J. 381, 388 (1949) (evidence of prior beatings by defendant of his wife, and particularly of an incident that occurred eight years before her murder, was admissible "to show malice or ill will on the part of the accused toward the victim"); State v. Schuyler, 75 N.J.L. 487, 488 (E. & A. 1907) (evidence of an altercation between

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defendant and the murder victim that occurred ten or eleven years before the murder admissible to show malice); State v. Carroll, 242 N.J. Super. 549, 564 (App. Div. 1990) (while being questioned for the murder of his step-daughter, defendant referred to an assault on his first wife eleven years earlier. This reference was held "so integral a part of his description of his state of mind at the time of his commission of this offense that it was admissible to show his intent in attacking his step-daughter."), certif. denied, 127 N.J. 326 (1991).

The fact that Camacho described events which occurred after the killings does not render her testimony inadmissible. Evidence of other wrongs admitted under N.J.R.E. 404(b) need not predate the offense at issue. "Evidence of the commission by defendant of the same or similar acts prior to, contemporaneous with, or subsequent to the offense in question may be properly admissible." State v. M.L., 253 N.J. Super. 13, 22 (App. Div. 1991), certif. denied 127 N.J. 560 (1992). In State v. Cofield, supra, 127 N.J. at 339-41, the Supreme Court held that if the State provided an appropriate limiting instruction, it could properly give evidence that the defendant possessed illicit drugs in September to prove that there was no mistake about his possession one month earlier. "The order of the events is not dispositive of the issue of relevance." Id. at 340.

The judge limited Camacho's testimony to a general description of defendant's jealousy and to specific threats made by defendant in one incident when his threat to kill her was made in

conjunction with an admission about his first wife. Defendant's primary argument is that his threat to Camacho, "If I have to do it, I'm going to do it again," was improperly used to prove his intent to kill his first wife. The purpose of the testimony was not to show a threat to Camacho, but because he was admitting to the crimes in response to Camacho's question: "You're going to do the same thing that you did that one day." Because the admission cannot be severed from the threat, the trial judge properly permitted the testimony.

We reject defendant's contention that the trial judge's limiting instruction was inadequate. No objection was made to the instruction. The judge said: "I will give a curative instruction if [defense counsel] prepares one, and if he wants any special wording other than the one I would prepare, I'm free to accept whatever he would have and review it with him." The standard of review is plain error. R. 2:10-2. See also State v. Scher, 278 N.J. Super. 249, 271 (App. Div. 1994) ("defendant expressed his general satisfaction with the judge's principal charge and cannot now condemn the very principles he urged, claiming them to be error and prejudicial"), certif. denied, 140 N.J. 276 (1995). There is no plain error.

When other bad act evidence is admitted under one of the exceptions to N.J.R.E. 404(b), the jury must be given an appropriate limiting instruction. State v. Cofield, supra, 127 N.J. at 340-41. This instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the

evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." State v. Stevens, supra, 115 N.J. at 309.

During Gonzalaz's testimony, the trial judge instructed the jury:

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

In his final instructions, the judge charged the jury:

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

Alvarado Camacho cannot be considered by you as disclosing any general propensity or predisposition on the part of Mr. Scabone to commit a crime or to commit the crimes with which he is now charged.

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

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

You cannot consider that evidence for any other purpose.

The judge added:

There's also for your consideration in this case certain oral statements alleged to have been made by Mr. Scabone to Mrs. Camacho Alvarado, to Ana Gonzalez and Leopoldo Silva. It is your function to determine whether or not those statements were, in fact, actually made by Mr. Scabone, and if they were made, whether such statements or any portions thereof are believable.

As to Gonzalez's and Silva's testimony, the charge was neither unspecific nor otherwise defective. The judge instructed the jury that it could consider the testimony as proof of defendant's possible motive or intent, and not for any other purpose.

The trial judge did not correctly explain the purpose of Camacho's testimony, instead instructing that all the testimony was probative of motive and intent. That was not reversible

error. A proper instruction characterizing the threat as an admission would have probably harmed defendant's case, particularly because defendant proclaimed his innocence throughout the trial. The jury was told it could only consider Camacho's testimony as relevant to defendant's intent or motive, and not as probative of his guilt. The error was harmless. R. 2:10-2.

Defendant argues that the marital communications privilege, as it existed in 1981, prohibited Camacho's testimony without his consent. The trial judge properly rejected this argument.

Before it was amended in 1992, the marital-communications privilege prevented a spouse from disclosing confidential communications made during the marriage unless the other spouse consented. State v. Szemple, 135 N.J. 406, 414 (1994). The privilege was amended by the Legislature on November 17, 1992. N.J.S.A. 2A:84A-22, as amended by L. 1992, c. 142. The amended rule now permits disclosure of confidential communications "in a criminal action or proceeding in which either spouse consents to the disclosure." N.J.R.E. 509. The Legislature provided: "This act shall take effect immediately and, to the fullest extent consistent with constitutional restrictions, shall apply to all criminal actions regardless of the date on which the offense was committed or the action initiated." L. 1992, c. 142 (emphasis added). This plain language makes the meaning of and intent behind the rule quite clear.

The marital-communications privilege, as an evidentiary rule which merely goes to the exclusion or inclusion of evidence, is

not subject to the constitutional prohibition against ex post facto laws. State v. Bethune, 121 N.J. 137, 145-46 (1990). The amended marital-communications privilege was properly applied in a 1993 trial for a crime committed in 1981.

We reject defendant's contention that the sentence imposed upon him was excessive. A sentence will be upheld unless it deviates so far from the guidelines as to "shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984).

In imposing consecutive sentences, the trial judge applied the sentencing guidelines set forth by the New Jersey Supreme Court in State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). The trial judge carefully considered all of the Yarbough factors and adequately explained how he applied them. He balanced the mitigating factors—defendant's lack of a prior record and his kidney problems—against the aggravating factors. He was careful not to double count as aggravating factors the viciousness of the multiple stabbings. He did, however, consider defendant's total lack of remorse throughout and after the trial; the "extremely high, if not a hundred percent" likelihood defendant would commit another offense; there were multiple victims; the fire could have harmed others; and the need for deterrence.

The judge rejected the argument that the offenses were committed so closely in time and place as to indicate a single period of aberrant behavior, noting the time defendant spent waiting for the three victims to come home, and the fact that

Norma and Yannet "had absolutely no contact with the initial dispute that arose into the stabbing of Monica Scabone." See State v. List, 270 N.J. Super. 169, 176 (App. Div. 1993) (consecutive sentences upheld where "[e]ach [of the five killings] was committed at a different time on successive victims in separate circumstances.").

The balancing of aggravating and mitigating factors which was the basis for imposing consecutive terms for all four convictions was also properly applied in sentencing defendant to maximum base terms and parole ineligibility periods for each conviction.

Affirmed.

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

Clerk

SUPREME COURT OF NEW JERSEY
C-593 September Term 1995
41,377

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ON PETITION FOR CERTIFICATION

ALBERTO SCABONE,

Defendant-Petitioner.

FILED
JAN 31 1996
Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3498-93 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of January, 1996.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

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

Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
INDICTMENT NO. I-4225-08-80

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

ALBERTO SCABONE,
Defendant-Petitioner.

Criminal Action

ON PETITION FOR POST CONVICTION RELIEF OF APPEAL OF FINAL JUDGMENT ON CONVICTION OF APPELLATE DIVISION

PETITION FOR POST CONVICTION RELIEF AND

APPENDIX IN BEHALF OF DEFENDANT-PETITIONER

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

FORM 1
Rule 3:22 Post Conviction Relief

STATE OF NEW JERSEY:

The petitioner being duly sworn according to law, upon the oath depose and say:

1. I desire to petition for post conviction relief under Rule 3:22 et, seq.

2. I was convicted of the offense(s) of Murder passion/provocation, 1st Degree Murder, Murder & Arson, 2nd Degree by the Essex County Court. I was sentenced by Judge Eugene J. Codey, Jr., J.S.C. on the date of January 11, 1994 and I am presently confined at New Jersey State Prison.

3. I am unable to obtain funds from anyone, including my family and friends and represent I am a poor person and that the following statements are true to the best of my information and belief:

a. Money (here state whether you have money in any account, bank, institutional account or any other place. State if you owe any money to anyone and amount.)
NONE

b. Automobile (state whether you own a car, if so give the year, make and how much you owe on it. Give location of automobile.)
NONE

c. Real Estate (here specify if you own any real estate, it's value, location and mortages or liens thereon.)
NONE

d. Insurance (specify whether you have any insurance which has a cash value. Give amount of cash value and company name.)
NONE

e. Other Property (specify any other property, excluding clothing and personal effects you own and it's value.)
NONE

f. Marital Status (specify here whether you are married, the income of your spouse, name and ages of your children.)
Divorced

g. Prior Employment (state here the employment you last held before conviction and salary earned.)
Taxi Driver

h. Social Security Number I40-68-4534

i. Previous Representation (the name of private, or court appointed counsel who represented you in the case convicted of and any subsequent appeal counsel.)
~~Kevin McLaughlin, Esq. (Court appointed at trial)~~

4. If you desire to have counsel appointed to represent you in this post-conviction proceeding check either. Yes [✓] No [ ]

5. The petitioner has read the foregoing affidavit and knows the contents thereof to be true to the best of his knowledge, information and belief. Petitioner is aware of the penalty for false swearing made herein.

Signature

Sworn and subscribed to before me this 21 day of February 1996.

Notary Public - State of New Jersey

EMORY GRIFFIN
Notary Public of New Jersey
My Commission Expires On 10/31/1998

FORM 2
(Rule 3:22 Post Conviction Relief)

STATE OF NEW JERSEY	:	Essex COUNTY COURT
	:	PETITION FOR POST - CONVICTION
V.	:	RELIEF
	:	
ALBERTO SCABONE		

1. Petitioner was charge with offense(s) of Muredr Passion/Provocation, Ist degree, Murder, Murder & Arson, 2nd degree

on indictment(s) I-4225-08-80

dated April 2, I98I
in the County of Essex

2. Petitioner was convicted of the crime of Murder Passion/Provocation, Ist degree, Murder, Murder & Arson, 2nd degree

AND ON THE DATE OF January II, I994 was SENTENCED by Judge Eugene J. Codey, Jr., J.S.C. to a term of 80 yrs. with a 40 yr. parole disqualifier

3. (here indicate any appeals taken from the conviction to the Appellate Courts or Supreme Court or Both. Attach copies of any opinion of those courts. If there no appeal, state so.
Superior Court Appellate Division; NJ Supreme Court (Both Affirmed

4. (here indicate any prior post - conviction proceedings, other than appeal, relating to the conviction. Give dates of each, the appeal taken and the claims raised in them. State whether there was any appeal taken from any prior post - convictions. Attach copies of any trial or Appellate Court decisions.

NONE

5. (here indicate if petitioner was represented by counsel in any of the above proceeding, give counsels name and state whether he was private or court appointed counsel.)
Steven M. Gilson, Esq. on both levels (Appointed Counsel)

6. If petitioner desires to have counsel represent him on this post - conviction relief check either
Yes [#] No [ ]

7. Petitioner is presently confined at New Jersey State Prison

8. (here state with specificity the facts upon which the claim for relief is based, legal arguments and all claims. Use extra paper if needed. Arguments, citations shall be ommitted from this petition but you may submit them in a separate memorandum and attach hereto.)
To ratify any and all constitutional violations that were not recognized or considered below and are outside the trial Court's records.

STATE OF NEW JERSEY :
ss:
COUNTY OF Essex :

The petitioner being duly sworn according to law, upon his oath depose and say:

1. I am the petitioner in this action.

2. I have read the foregoing and know the contents thereof and the same are true to the best of my information and belief, except as to matters relating to other persons and as to those matters I believe them to be true.

3. In making this affidavit I am aware that false swearing could subject me to punishment for the same.

Signature

Sworn and subscribed to before me this 21 day of FEBRUARY 1996.

Notary Public - State of New Jersey

EMORY GRIFFIN
Notary Public of New Jersey
My Commission Expires On 10/31/1998

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
INDICTMENT NO. I-4225-08-80

STATE OF NEW JERSEY,)
Plaintiff - Respondent,)
)
) O R D E R
ALBERTO SCABONE,)
Defendant - Petitioner.)

THIS MATTER, having been brought before this Court on a Petition for Post Conviction Relief filed by defendant, Alberto Scabone, to be represented by, _____, Esq. with the State of New Jersey in opposition represented by, _____, Esq., Assistant Prosecutor.

AND THE COURT, having considered the papers submitted and the arguments of counsel made at a hearing conduced on the date of _____, 1996;

AND THE COURT, having found that all of the contentions raised by defendant have any merits;

IT IS, on this _____ day of _____, 1996, HEREBY ORDERED that defendant's Petition for Post Conviction is granted.

_____
Hon. J.S.C.

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
INDICTMENT NO. I-4225-08-80

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

ALBERTO SCABONE,
Defendant-Petitioner.

Criminal Action

Please find that the defendant, Alberto Scabone, have stated with specificity to the best of his ability the facts upon which his claim for relief is based. Defendant will rely upon a Supplemental Memorandum of Law to be filed by his appointed counsel on his behalf within 25-days after assignment, pursuant to Rule 3:22-9.

Rule 3:22-9, directs that amendments of Petition for Post Conviction Relief shall be liberally allowed. As a matter of course, the Public Defender may serve and file an amended petition within 25-days after the referral of the first petition to him/her. It is of advantage to the judicial system to have the Post Conviction raise all issues in existence at the time the Post Conviction Relief filed pursuant to Rule 3:22-I, et, esc..

Defendant is requesting compliance with Rule 3:22-I, requiring the Court to resolve this petition with specific reasoning provided within the findings of facts and conclusion of law.

STATEMENT OF PROCEDURAL HISTORY

On April 2, I98I, the Essex County Grand Jury filed Indictment No. 4225-08-80, charging defendant Alberto Scabone with the murder of Monica Scabone, contrary to the provisions of N.J.S.A.2C:II-3 in Count One; the murder of Yannet Estevez, contrary to the provisions of N.J.S.A.2C:II-3, in Count Two; the murder of Norma Estevez, contrary to the provisions of N.J.S.A. 2C:II-3, in Count Three; and Arson, 2nd degree, contrary to the provisions of N.J.S.A.2C:I7-Ia(2), in Count Four.

The defendant was tried before a jury with the Honorable Eugene J. Codey, J.S.C. presiding, on November 9, IO, I2, I5, I6, I7 and I8, I9993. The jury convicted the defendant in Count One as to the passion/provocation manslaughter of Monica Scabone, murder in Count Two and Count Three of Yannet Estevez and Norma Estevez, and as to the arson offense.

On January I4, I994, Judge Codey imposed a sentence of ten (IO) years imprisonment with a five-year parole disqualifier in the manslaughter conviction in Count One; thirty (30) years imprisonment with a fifteen (I5) year parole disqualifier in the murder convictions in Count Two and Three; and ten (IO) years imprisonment with a five (5) year parole disqualifier in the Arson conviction in Count Four. Each of the terms imposed are to run consecutively with one another. Accordingly, defendant's aggravated sentence was eighty (80) years imprisonment with a forty (40) year parole disqualifier. A thirty dollar ($30) Violent Crime Compensation Board Penalty was assessed on each of the four convictions.

On March I4, I994, defendant filed a Notice of Appeal with the Apellate Division.

STATEMENT OF FACTS

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

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

In April 1981, the defendant was residing with his wife, at that time, Monica, their son, Alberto, Monica's sister, Yannet and Monica's mother, Norma, in the apartment of the first floor. (2T 50-13 to 2T 52-8) According to Ana Gonzalas, another sister of Monica, she had often witnessed the defendant and Monica " fighting about something or another. " (2T 52-6 to 12) More particularly, the defendant was " very jealous " of Monica, as " he didn't want her to get made up. He didn't want her to get dressed up. He didn't let her have any friends, female and especially male. " (2T 52-16 to 22) When they fought Monica

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" defended herself " physically. (2T 55-5 to 9)

In March of 1990, Gonzalaz was in the apartment when she recalled the defendant hitting Monica with a bottle and had yelled that he was going " to burn the house. " (2T 56-23 to 2T 57-25) While Monica and the defendant was visiting his parent's house in Uruguay in January 1988, the defendant, at least according to Gonzalaz, threatened to kill Monica and her entire family. (2T 58-22 to 2T 59-13) Gonzalaz also claimed to remember that the defendant had threatened to kill Monica " many times " and " always said that he would burn down their apartment. " (2T 59-23 to 2T 60-4) However, because Gonzalaz did not believe the threats, she never contacted the police. (2T 60-5 to 9)

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

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

copper wire in West Caldwell and hoped that the defendant would drive him to work for their nightly shift, from II:00 p.m. to 7:00 a.m. However, when no one answered his knocking on the door, Delsid went to a nearby diner to eat. There he saw Gerardo Guerrero another co-worker at the factory. A brief time later, Delsid, along with Mr. Guerrero, returned to the defendant's apartment. About I0 to I5 minutes later, the defendant carrying a suitcase and a television set, came out of the apartment with his young son, Alberto. Using the defendant's car, the four of them proceeded to the factory. (IT 98-I4 to IT I02-I2)

It was while they were en route to the factory that Delsid asked the defendant why he was bringing his little boy with him. According to Delsid, the defendant replied that he was having problems with his wife, that she was very jealous. (IT I08-I6 to 23) The defendant supposingly mentioned that he did not have anyone to take care of his son, according to Delsid, and that he supposingly asked how much time it would take to get to " the border of Canada, and Miami (sic.). " (IT I08-23 to IT I09-3) Upon their arrival at the factory, at about I0:49 p.m., the " punch-in time " for Delsid (IT I03-I2 to IT I04-4), the three men entered while Alberto Jr. stayed in the car. (IT I09-6 to 7)

At this point Delsid began working, and the defendant and Guerrero spoke to their supervisor. Guerrero was " real nervous " where the defendant being " very quiet " explained the defendant's wife had thrown him out of the apartment, that the defendant was going to spend the night at Guerrero's house and that he needed his paycheck, and the two men left the factory. Shortly there after, Guerrero returned alone, to work.

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

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

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

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

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

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

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

It was approximately at the end of I988, that Alvarado learned from her Los Angeles friend that the defendant was a fugitive, having been charged with the killing of his first wife

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

Defendant testified in his own behalf, denying killing his wife, mother-in-law or sister-in-law. (5T I5-I8 to 20). To the contrary, he professed his love for Norma and considered Yannet to be " like a little sister. " (5T 56-I7 to 5T 57-9) He readily conceded using the word " kill " in reference to the family members, though just as " an expression I always say, " but denied ever threatening to burn his house down or telling Silva that he would go to Mexico or to his native Uruguay after " killing " the three women.(5T 39-3 to 5T 40-3; 5T 47-I0 to I3)

Regarding the evening of April 2, I98I, the defendant told of returning to his apartment with his son at about 9:40, after having been shopping and in the company of a few friends only to find smoke in the apartment and the three women dead. (5T 20-I5 to 5T 24-I6; 5T 69-3 to 4) Just afetr he attempted to extinguish the dying fire, Guerrero and Delsid, whom the defendant knew as Cunas, arrived outside the apartment door and discouraged the defendant from calling the police. (5T 24-7 to I0; 5T 27-9 to 25) The defendant not carrying anything except his son, valise and television set from the apartment, having previously placing those items in the truck of his car sometime before the incident, in an attempt to sell them at work, he then drove to work with his son and two co-workers. (5T 28-2 to 5T 29-3)

En route, the defendant mentioned that Monica and he had a lots of problems with other people. (5T 3I-3 to 6) Thus fearing for his son's safety and his safety, and having witnessed the remains of his wife and part of her family, the defendant fled to Mexico soon thereafter, and decided to wait there until the murders were solved. (5T 37-I8 to I9; 5T 7I-4 to 9) His reasoning was because it was so very difficult, if not impossible for foreigners to obtain employment in Mexico, the defendant received a birth certificate from his friend Marguerito Ramirez Rodriquez, prior to departing, and subsequently assumed his identity. (5T I8-I3 to 20; 5T 37-I5 to I6)

LEGAL ARGUMENT

POINT ONE

THE DEFENDANT'S PETITION IS NOT PROCEDURALLY BARRED BECAUSE THE ISSUES RAISED THEREIN WERE NOT EITHER PREVIOUSLY RAISED ON APPEAL, OR COULD NOT HAVE RAISED ON DIRECT APPEAL.

R.3:22-5 prohibits a defendant from raising a previously adjudicated ground for relief at a later proceeding. The Rule states that:

> A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding that is brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.

R. 3:22-5 (emphasis added). Significantly, " it is well settled that an issue, even of constitutional dimension, once decided, may not be relitigated. " State v. Rosen, 110 N.J. 216, 219 (App. Div. 1969), aff'd, 56 N.J. 89 (1970), (citing State v. Smith, 43 N.J. 67, 74 (1964); R. 3:22-5; State v. White, 260 N.J. 531, 538 (App. Div. 1992), certif. den., 133 N.J. 436 (1993).

Additionally, R. 3:22-4 prohibits a defendant from raising issues in post-conviction proceedings that could have been raised on direct appeal. The Rule states in relevant part:

> Any ground for relief not raised in a prior proceeding under this rule, or in the proceeding resulting in the conviction .... or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the constitution of the United States or the State of New Jersey.

R. 3:22-4.

In the case at bar, the defendant raises several grounds as the basis for relief. First, the defendant is claiming that his Sixth Amendment right to the effective assistance of counsel was violated. The defendant is contending that trial counsel failed to investigate properly. The defendant is contending that trial counsel failed to utilize a proper trial strategy. In essence, the defendant maintains that his defense counsel did not have a trial strategy. The defendant maintains that trial counsel negligently tried to force him to relinquish his constitutional right to testify. The defendant maintains that trial counsel failed to interview potential witnesses, and finally, the defendant maintains that trial counsel was negligent because he failed to subpoena key witnesses.

The above claims are completely different from the grounds raised in the defendant's direct appeal. The defendant did try to raise the ground of ineffective assistance of counsel on his direct appeal. However, this claim was not adequately addressed on his direct appeal. Appellate counse did not have a sufficient record to fully delineate all of trial counsel's error.

Futhermore, appellate counsel did not fully specify as to all of trial counsel's errors and deficiencies. The defendant would like to have a full evidentiary hearing so that he can more fully establish the glaring deficiencies of his trial counsel. Therefore, said claims clearly are not barred pursuant to R. 3:22-4/ By the way of summary, the defendant's claims differ sunstantially from those raised on direct appeal, and said claims are clearly not barred pursuant to R. 3:22-4.

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A. THE PETITION RAISES CLAIMS DEFENSE COUNSEL COULD NOT HAVE REASONABLY RAISED IN PRIOR PROCEEDINGS. (R. 3:22-4(a))

In the case at bar, the defendant alleges facts in demonstrating that the specific issues raised in his petition could not reasonably have been raised on appeal. See also Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 647 (1984); U.S. v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d. 657 (1984); State v. Fritz, 105 N.J. 42, 519 (1987).

(1) The ineffective assistance of counsel claim could not be adequately raised on direct appeal because these claims were based on evidence not contained in the record. State v. Preciose, 129 N.J. 451 (1992). There is not a sufficient record ro explain why trial counsel did not call one witness in support of the defendant's case. (2) There is not sufficient record as to why the trial counsel erroneously exposed the jury to the defendant's prior recodr when there was none. (3) There is not sufficient record to explain why trila counsel failed to make a motion to set aside the verdict on the grounds that the verdict was against the weight od the evidence. (4) There is not a sufficient record to explain why trial counsel failed to make an objection as to the prejudicial comments made by the prosecutor.

B. THE PETITION PRESENTS EXCEPTIONAL CIRCUMSTANCES RESULTING IN A " FUNDAMENTAL INJUSTICE. " R.3:22-4(b)

The second exception to R. 3:22-4, which provides that a bar of a claim would result in a " fundamental injustice, " may be applied only in special circumstances. State v. Mitchell, 126 N.J. 587 (1992). In order to prove a " Fundamental injustice " the defendant must show that the prosecutor or the judiciary

abused the adversary process. Id. at 587. In the alternative, the defendant can demonstrate that inadvertent errors impacted the deliberation process or otherwise caused a miscarriage of justice. The defendant must establish the existence of a " fundamental injustice " by a preponderance of the evidence. Id. at 587.

In the matter sub judice, the defendant presents evidence to suggest that barring his petition would result in a miscarriage of justice. The defendant has a very strong claim of receiving ineffective assistance of counsel. The Appellate Division decided this issue based on a very sparse record, and without the ability to review a detailed record that carefully delineated trial counsel errors and negligence. With respect to the ineffective assistance of counsel claim, there is a strong indication that the actions of the defendant's trial counsel and the appellate counsel were entirely deficient. The defendant claims his basis for alleging ineffective assistance of counsel will be more fully developed in forthcoming legal arguments. By way of summary, any bar to the defendant's ineffective assistance of counsel claim would constitute a " fundamental injustice. "

Throughout the defendant's advertsarial process, the defendant received the ineffective assistance of counsel. The imposition of a bar upon these claims pursuant to R. 3:22-4 would constitute a fundamental injustice upon the defendant. The defendant would suffer " fundamental injustice " if these viable issues are porcedurally barred. The defendant must not be prejudiced merely because counsel failed to represent him adequately.

C. THE PETITION DEMONSTRATES AN INFRINGMENT OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS. R. 3:22-4(a)

The final exception to R. 3:22-4 provides that the petition cannot be barred if doing so would result in a violation of the State or Federal Constitutions. A court must scrutinize asseptions of consttituional violation to ascertain whether the defendant's constitutional rights are at stake. See Mitchell, Supra, I26 N.J. at 586 (citing State v. Tarantino, 60 N.J. I76, I80 (I972)).

The case at bar, a careful review of the substance of the defendant's allegations reveal that all have constitutional dimensions. The ineffective assistance of counsel claims violated the defendant's Sixth Amendment Constitutional Rights. Therefore, the defendant's excessive claim raised in his petition for Post Conviction Relief, clearly demonstrate an infringment of his constitutional rights.

POINT TWO

THE DEFENDANT IS ENTIRED TO A HEARING TO ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The defendant is entired to a full hearing to establish the merits of his petition. The claims based in the defendant's petition are based on issues that are fully addressed in the trial transcripts. Futhermore, the defendant's allegations of ineffective assistance of counsel also depend on facts and evidence that are not fully contained in the records. In sum, a record is required to enable the defendant to more fully substantiate his claims.

The case at bar, is clearly analogous to the seminal case of State v. Preciose, I29 N.J. 45I (I992). In Preciose, the Supreme Court of New Jersey held that a claim for post conviction relief, based upon an allegation of ineffective assistance of counsel, is not procedurally barred by the failure to raise this claim on direct appeal. It stated that if a defendant could have, but did not, raise the claim on direct appeal, one of the following exceptions must be satified; that the ground for relief not previously asserted could not reasonably have been asserted in the prior proceeding, or that enforcement of the bar would result in fundamental injustice, or that the denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

The Court went on to state that claims of ineffectiveness of counsel are particularly suited for post conviction relief because these claims can not be reasonably raised in prior proceedings. The Courts of New Jersey have expressed a general policy

against entertaining ineffective assistance of counsel claims on direct appeal, because the allegations and evidence lie outside the trial record. See State v. Dixon, 125 N. J. 221, 262 (1991); State v. Walker, 80 N.J. 187, 194 (1979). A defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction, and at which the trial judge can rule upon claims of ineffective assistance of counsel. See also State v. Spatano, 249 N.J. Super. 411, 419 (App. Div. 1991).

Specifically, defendant's claim of ineffective assistance of counsel depends upon facts not contained in the transcripts and thus, could not be raised in a direct appeal. There is not sufficient yesyimony in the transcripts to simply waive an evidentiary hearing in the instant matter. In State v. Preciose, Supra, 129 N.J. 451, the New Jersey Supreme Court held that " (i)neffective assistance of counsel claims are particularly suited for post conviction review because they often cannot be raised in a prior proceeding. " Id. at 460.

The defendant's ineffetcive assistance of counsel claim clearly falls within the purview of R. 3:22-2(a). The defendant's rights under the Constitution of the United States and under the Constitution of the State of New Jersey were clearly violated, because the defendant received the ineffective assistance of counsel. Ineffective assistance of counsel claims are particularly suited for post conviction relief because they often cannot reasonably be raised in a prior proceeding. See, R. 3:22-4(a). As the United States Supreme Court observed;

> Because collateral review will frequently be the only means through which an accused can effectuate the right of counsel, restricting

> the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will oridinarily be unable to recognize counsel's errors and to evaluate a counsel's professional performance; consequently, a criminal defendant will rarely know that he has not been represented competently until after the trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel of direct appeal. Kimmelman v. Morrison, 477 U.S. 365, 378, 106 S. Ct. 2574, 2584, 91 L. Ed. 2d 305, 321 (1986).

By way of summary, the defendant's ineffective of assistance of counsel claim, most certainly can be raised in this post conviction relief proceeding. Futhermore, courts have actually encouraged defendants to raise ineffective assistance of counsel claims in post conviction proceedings. United States v. Birges, 723 F.2d 666, 670 (9th Cir. 1983), cert. den., 466 U.S. 943, 104 S. Ct. 1926, 80 L. Ed.2d 472, and 469 U.S. 943, 104 S. Ct. 1926, 80 L. Ed.2d 472, and 469 U.S. 863, 105 S. Ct. 200, 83 L. Ed.2d 131 (1984). Accordingly, the defendant is entitled to have an evidentiary hearing to further establish the claim in his petition.

POINT THREE

THE DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The defendant submits that he was denied the effective assistance of counsel, in violation of the Sixth Amendment of the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed.2d 674 (1984); State v. Fritz, 105 N.J. 42 (1987). He further submits that as a direct result of his denial of the effective assistance of counsel, he was denied a fair trial.

It has long been held that the consitituionally guaranteed right to counsel is the right to the " effective assistance of counsel. " In Strickland, the United States Supreme Court set forth a two part test that a criminal defendant must meet in order to demonstrate ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires the showing that counsel made errors so serious that counsel was not functioning as counsel guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This reburies showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is relieble. Strickland v. Washington, Supra, 466 U.S. 687, 80 L. Ed. 2d at 693.

In determining whether counsel's performance was deficient, the Strickland Court held there to be a " strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance....." It placed the burden on the defendant to demonstrate that counsel's actions fell beyond that range of " professionally competent assistance. " In order to demonstrate that counsel's deficient performance prejudiced

the defendant, there must be a " reasonable probability that, but for counsel's unprofessional errors, the result of the proceedin would have been different. A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, Supra, 466 U.S. at 694, 80 L. Ed. at 698.

In the seminal case of United State v. Cronic, 466 U.S. 648, 80 L. Ed. 2d 657 (I984), decided the same day as Strickland, the United States Supreme Court held that when counsel's errors are so serious that " no amount of showing of want of prejudice could cure it, " prejudice to the defendant may be presumed, and the defendant need not demonstrate prejudice. Id. at 659, 80 L. Ed. 2d at 668.

In the landmark case of New Jersey Supreme Court case of State v. Fritz, the Court adopted the same two-part test enunciated by the United States Supreme Court in Strickland and Cronic for determining the claims of ineffective assistance of counsel pursuant to the United States Constitution. The Fritz Court held:

> " That under Article I, paragraph IO of the State Constitutuion of criminal defendant is entitled to the assistance of reasonable competent counsel, and that if counsel's performance has been so deficient as to create a reasonable probability that these deficiecies materially contributed to defendant's conviction, the constitutional right will have been violated. " State v. Fritz, IO5 N.J. 58 (I987).

A. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO DEVELOP AN ADEQUATE TRIAL STRATEGY.

(1) The defendant received the ineffective assistance of counsel because counsel failed to develop an adequate trial strategy. By way of summary, trial counsel simply did not have a strategy. Instead trial counsel merely haphazardly represented the defendant. Trial counsel's erroneously advised defendant that it would be useless to even testify because all the evidence pointed to him. (2) Trial counsel also failed to investigate the case. If trial counsel would have been more adequately in his investigation he would have had far more specific information to cross-examine the State's witnesses. Trial counsel's only strategy was to finish the case, and showing disregard to the results which would and was in violation of the defendant. (3) Trial counsel's extreme negligence is evident by his failure to request a Wade hearing or file adequate post-trial motions. Worst of all, trial counsel was very unprepared for the defendant's case.

Trial counsel simply did not adequately pursue any legitimate trial strategy. An illustrative case is United States ex. rel. Kleba v. McGinnis, 796 F. 2d 947, 958 (7th Cir. 1986), the Court recognized that the cumulative effect of individual act or omissions " may be substantial enough to meet the Strickland test. "

Another similar case is Crisp v. Duckworth, 743 F. 2d 580 (1984). In Crisp, the Court held, " though each individual error or mistake in strategy may not be egregious enough to label an attorney incompetent, the sum of all together may be. " Id. at 585. In this case, the defendant alleged that his trial attorney was ineffective because he inadequately investigated

the case, did not adequately prepare the case, and committed error at trial. Id. at 583. In the matter sub judice, the defendant has alleged the same grounds as alleged in Crisp. See also United States v. Brown, 739 F. 2d 1136 at 1145 (7th Cir. 1984) (holding that even if individual acts or omissions are not so grievous as to merit a finfing of imcompetence, their cumulative effect may be substantial enough to meet the Strickland test, United States v. Hammonds, 425 F. 2d 597,.6094 (D.C. Cir. 1970).

Another case on point is Smith v. State, 511 N.E. 2d 1042 (Ind. 1987). In this case, the Supreme Court of Indiana reversed the denial of post-conviction relief based on an accumulation of error and omissions which together amounted to the ineffective assistance of counsel. The errors and omissions included the failure to utilize available evidence such as the police reports, failure to interview and call witnesses, failure to effectively pursue a theory of defense through cross-examination, and the failure to object to prejudicial inadmissible evidence. In the case at bar, the defendant has raised almost the same grounds to establish his grounds for ineffective assistance of counsel.

In Williams v. State, 508 N.E. 2d 1264 (Ind. 1987), the denial of post convcition relief was reversed due to " the compilation of errors and omissions by counsel, " each of which standing alone may not have been sufficient to prove ineffective representation. In this case, counsel failed to interview any of the State's witnesses, failed to investigate and prepare, and failed to present witnesses who might have substantiated defendant's alibi. In the matter sub judice, the defendant has raised

the same grounds as the petition in Williams v. State..

Finally, in the seminal case of State v. Savage, the New Jersey Supreme Court found that counsel's failure to pursue a plausible defense strategy, due to his inadequate investigation and consultation with his client constituted deficient performance.

By way of summary, trial counsel's failure to pursue a plausible defense strategy due to his inadequate investigation and preparation clearly constituted deficient performance. In accord with the above reference authority the compilation of the trial counsel's errors and omissions amounted to the ineffective assistance of counsel.

POINT FOUR

THE TRIAL COURT'S FAILURE TO CHARGE THE JURY AS TO THE IMPACT OF THE IMPERFECT SELF DEFENSE DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL. U.S. CONST. XIV, VI; N.J. CONST. ART. I, PAR. 10.

In State v. Bowens, 108 N.J. 622, 626 (1987), our State Supreme Court held that the Code of Criminal Justice " does not provide an independent category of justification, excuse or any mitigation under the concept of imperfect self-defense. " Therefore courts are not required, as was the case prior to the adoption of the Code, State v. Powell, 84 N.J. 305, 311-13 (1980), to instruct that " imperfect self-defense would serve to reduce murder to an unspecified degree of manslaughter. " State v. Bowens, 108 N.J. at 637; State v. Coyle, 119 N.J. 194, 228 (1990); State v. Pitts, 116 N.J. 580, 605-06 (1989). However, in Bowens, the Court also held that imperfect self-defense " is frequently relevant to the presence or absence of the essential elements of Code offenses. " 108 N.J. at 626. The Bowens Court held:

> The Appellate Division correctly concluded that sufficient evidence existed in the record to have the jury consider whether the defendant overreached to the perceived menace, stabbing the victim without purposely or knowingly causing death or serious bodily harm resulting in death, but with reckless disregard of the substantial risk of death or under circumstances manifesting extreme indifference to human life.

Id. at 640. The Court thus held that an honest but unreasonable belief in the need for force might affect a defendant's culpability, " thereby warranting only an aggravated manslaughter or manslaughter conviction. " State v. Pridgen, 245 N.J. Super. 239, 246 (App. Div. 1991). More importantly, the Court went on to note that imperfect self-defense may also in some circumstances " bear

upon the question of whether the defendant who committed a homicide in the heat of passion was reasonably provoked. " State v. Bowens, 108 N.J. at 641. It was thus necessary for the court to have explained how the evidence of an honest but unreasonable belief that force was necessary to protect defendant might relate to passion/provocation manslaughter on the defendant's wife, Monica Scabone.

In State v. Martin, 119 N.J. 2, 18 (1990), the Supreme Court found that a charge on causation was deficient because the trial court failed to relate the facts to the legal issues. In State v. Concepcion, 111 N.J. 373, 380-81 (1988), the Court found that the trial judge discussed the facts too selectively, limiting himself to mentioning only one part of the critical events. Here the trial court erred in failing to relate any of the facts to the elements of reckless manslaughter or imperfect self-defense. There was just no way for the jury to know that the evidence of provocation by the victim, Monica Scabone, towards the defendant was relevant to any of the elements of the crimes which the jury was instructed to consider. As in Concepcion and Martin, the jury's request for re-instruction on all charges, to which the court responded by re-reading the model charges, confirms that the charge was deficient.

In this case the court instructed the jury on murder of Monica Scabone, and passion/provocation of the mother-in-law and siste-in-law, and did not instruct aggravated manslaughter, reckless manslaughter, manslaughter or imperfect self-defense, but as in State v. Pridgen, 245 N.J. Super. at 245, " nothing was ever mentioned regarding the principle of imperfect self-defense as developed in Bowens." Defendant submits that as in

upon the question of whether the defendant who committed a homicide in the heat of passion was reasonably provoked. " State v. Bowens, 108 N.J. at 641. It was thus necessary for the court to have explained how the evidence of an honest but unreasonable belief that force was necessary to protect defendant might relate to passion/provocation manslaughter on the defendant's wife, Monica Scabone.

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Pridgen, " the trial court failed to charge the impact of imperfect self-defense to an extent authorized in Bowens. " Id. at 246-47.

Trial counsel failure to request that the jury be instructed on an imperfect self-defense theory as it related to the murder and the passion/provocation manslaughter charges as discussed in Pitts and Bowens. The court in Pridgen held that the jury should have been instructed on the impact of an unreasonable but honest belief in the need to use force in self-defense with respect to the murder charge but since the defendant was convicted of aggravated manslaughter, it was deemed harmless error. In the case at bar, the d fendant was convicted of murder and it was plain error not to charge a lesser included offense of imperfect self-defense.

Our Courts are not gambling hall but forums for the discovery of truth. Truth may lie neither with the defendant's protestations of innocence, nor with the prosecutor's assertion that the defendant is guilty of the offense charged, but as a point between these two extremes; the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution, nor the defense should be allowed, based on their trial strategy to preclude the jury from considering guilty of a lesser offense included in the crime that is charged. To permit this would force the jury to make an " all or nothing " choice between convicting the defendant of the crime charged or complete accuittal, thereby denying the jury the oppor-

unity to decide whether the defendant is guilty of a lesser included offense established by the evidence. If there is reason to believe the truth lies somewhere in between the defendant's and the State's theories of the case, the jury must be given the opportunity to consider that possibility.

The question of sua sponte instructions on defenses presents different consideration. Failure to so instruct will not deprive the jury of the opportunity to consider the full range of criminal offenses established by the evidence. Nor is the prosecution denied the opportunity to seek conviction on all offenses included within the crime charged. Moreover, to require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts, but would also create a potential of prejudice to the defendant. Sound policy considerations underlie the distinction that drew between a trial court's relatively broad duty to instruct on lesser included offenses and its less expensive duty to instruct on defenses. These considerations have not changed, because the record contained substantial evidence from which a jury would reasonably conclude that the defendant was not guilty of murder, but only of voluntary manslaughter. The trial court must instruct on lesser included offenses when there is substantial evidence to support the instruction, regardless of the theories of the case proffered by the parties.

However, in the case at bar, in light of the error in the overall charge, the erroneous verdict and the jury's request to be completely recharged on all offenses, such an error cannot be deemed harmless. A jury properly instructed on the impact of

an imperfect self-defense might have convicted defendant of passion/provocation manslaughter of Monica Scabone. Thus, the defendant's convictions must be reversed.

POINT FIVE

THE DEFENDANT RECEIVED THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The defendant was also ineffectively represented on his direct appeal. Appellate counsel failed to raise the defendant's Sixth Amendment issues on direct appeal. Appellate counsel failed very viable grounds that were negligently ommitted on direct appeal. First, the appellate counsel failed to adequately raise the ground that the defendant's Sixth Amendment right to the effective assistance of counsel was violated. Instead, appellate counsel simply focused on trial counsel's error, by exposing the jury to the defendant's son and his knowledgement of the facts surrounding the events of the crime on the said mentioned night, and not calling his as a witness in the defendant's behalf. The appellate counsel should have more exhuastively delineated all of trial counsel's tragic errors. Furthermore, appellate counsel have added a provision in his brief, that presented Mr. Scabone's right to raise ineffective assistance of counsel under Preciose, in a full evidentiary hearing in a subsequent petition for Post Conviction Relief.

The standards for an ineffective assistance of counsel claim is the same for appellate counsel as it is for trial counsel. In the landmark case Evitts v. Lucey, 469 U.S.387, 83 L. Ed. 2d 82I, I05 S. Ct. 830 (I985), the United States Supreme Court held that a criminal defendant is entitled to the effective assistance on the first appeal. The Court in Evitts v. Lucey, Supra, 468 U.S. 387, 83 L. Ed. 2d 82I, I05 S. Ct. 830, held that, " A first appeal as of right therefore is not adjudicated in accord with due process or law if the appellate does not have the effective assistance

of an attorney. " In light of the above, the defendant's first appeal was not adjudicated in accord with due process, because the defendant did not have the effective assistance appellate counsel. See also, Strickland v. Washington, Supra, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; State v. Fritz, Supra, 105 N.J. 42.

An illustrated case is State v. Morrison, 215 N.J. Super. 540 (App. Div. 1987), certif. den. 107 N.J. 642 (1987). In the Morrison Court, it held that due process guarantees a criminal defendant the effective assistance of counsel on direct appeal. By way of summary, the Morrison Court held that appellate counsel has an obligation to raise meritorious issues on direct appeal.

The case at bar is very simliar to the issues raised in Morrison. The defendant as in Morrison was denied the ineffective assistance of appellate counsel. According to the rationale of Morrison, the defendant can not be barred from raising any of these meritorious issues, merely because he was prejudiced from receiving ineffective appellate counsel. Id. at 540. Accordingly, the court must fully consider all of the claims that he raises in his petition.

The United States Supreme Court in Strickland c. Washington, 466 U.S. 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), set forth the criteria to be utilized in determining when a defendant's conviction must be reversed because he did not receive the effctive assistance of counsel guaranteed by the Sixth Amendment. The benchmark for judging such a claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the defendant must prove there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

With respect to the performance prong of the Strickland test, the Court noted that client loyalty, adequate consultation and legal proficiency are relevant in determining whether assistance was effective. However, the Court stopped short of a more specific test, " No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. " There is a " strong presumption " that counsel 's conduct falls within a wide range of reasonable professional assistance.

The second prong of the Strickland test requires that prejudice must be proved, it is not presumed. Id. at 692-693, 104 S. Ct. at 2067, 80 L. Ed. 2d 696-697. Specifically, a defendant alleging actual ineffectiveness must show that there is a " reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been differnt. A reasonable probability is a probability sufficient to undermine confidence in the outcome. " Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Here, it is submitted based on the arguments and law advanced in Point Three, Supra, that, but for appellate counsel's failure to raise the issue of the denial of ineffective assistance of trial counsel, the result of the appellate proceeding would have been different. Based on State v. Kounelis, 258 N.J. Super. 420 (App. Div. 1992), defendant contends a reasonable probability exists that the result of the direct appeal would have been dif-

ferent. Defendant thus requests a reversal of his convictions.

CONCLUSION

Based upon the foregoing reasons, the defendant Alberto Scabone, respectfully request that this Court vacate his convictions or grant the defendant a new trial. Alternatively, the defendant requests that this Court reduce his sentence or his parole ineligibility stipulation.

Respectfully submitted,
Defendant-Petitioner

Alberto Scabone #258208

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX XOUNTY
INDICTMENT NO. I-4225-[illegible]8-80

STATE OF NEW JERSEY,
Plaintiff-Respondenet,

ALBERTO SCABONE,
Defendant-Petitioner.

Criminal Action

CERTIFICATION
OF
SERVICE

I, ALBERTO SCABONE, of full age, sworn by oath, hereby certify:

I.) On the 28th day of FEBRUARY, 1996, did serve by Certified Register Mail, one Original and two copies of the defendant-petitoner's Petition for Post-Conviction Relief to Hon. Eugene J. Codey, Jr., J.S.C.; Thomas Muth, Assistant Prosecutor, Essex County, and the Office of the Public Defender, Essex Region, in the City of Newark, New Jersey.

2.) I certify that the foregoing statements made by me are true to the best of my knowledge. I am fully aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment under the New Jersey Law.

Alberto Scabone #258208

Sworn abd subscribed to before
me this 21 day of FEBRUARY, 1996

Notary Public of New Jersey

EMORY GRIFFIN
Notary Public of New Jersey
My Commission Expires On 10/31/1998

63a

SUSAN L. REISNER
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Newark, New Jersey 07101
201-877-1200

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

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

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

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

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

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

Lisa A. Lynch

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3498-93T4

FILING DATE
APPELLATE DIVISION
NOV 14 1995

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERTO SCABONE,

Defendant-Appellant.

Submitted: September 19, 1995 - Decided: NOV 14 1995

Before Judges A.M. Stein and Cuff.

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

Susan L. Reisner, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, of counsel and on the brief).

Alberto Scabone, appellant, submitted a supplemental brief pro se.

Clifford J. Minor, Essex County Prosecutor, attorney for respondent (Elizabeth A. Duelly, Assistant Prosecutor/Director and Barbara A. Rosenkrans, Assistant Prosecutor, of counsel and on the brief and supplemental letter brief).

PER CURIAM

Defendant was found guilty of the passion/provocation manslaughter of Monica Scabone, his wife; of the purposeful and knowing murders of Yannet Estevez, his sister-in-law, and Norma Estevez, his mother-in-law; and of second degree arson. The trial judge sentenced defendant to an aggregate prison term of

eighty years with a forty-year parole ineligibility period: a ten-year prison term with a five-year parole disqualifier for the passion/provocation manslaughter; a thirty-year prison term with a fifteen-year parole ineligibility period for each of the two murders; and a ten-year prison term with a five-year parole ineligibility period for the arson. All terms were to run consecutively. We affirm.

Defendant met and began dating Monica Estevez in his native land of Uruguay. They were married in Newark in April 1978, where they resided in a first floor apartment on Bloomfield Avenue. At the time of the murders, Monica's mother, Norma Estevez, and her 17-year old sister, Yannet Estevez, were sharing the apartment with defendant, Monica and their three-year old son.

At 10:17 p.m., April 2, 1981, the Newark Fire Department answered a fire alarm call for the apartment. In the bedroom, firefighters discovered the severely burned, fully clothed bodies of Monica, Yannet and Norma. Autopsies revealed their deaths were not caused by the fire, but from massive internal bleeding caused by multiple stab wounds. Approximately 90 stab wounds were inflicted, many in the victims' backs, with Yannet receiving forty-one, Norma thirty-five and Monica approximately fourteen.

Raymond Bishof, then a detective in the Newark Arson Squad, determined that the fire was deliberately started. By the morning after the fire, defendant was considered a suspect and an extensive search for him followed. The police determined that

defendant was no longer in the United States, and sent a copy of the case file to the United States Department of Justice Interpol section in Washington.

Defendant remained unapprehended until twelve years later, when Elieth Alvarado Camacho, defendant's second wife, went to the American Consulate in Guadalajara, Mexico and informed Gilbert Alvarez of the F.B.I. that she believed her husband was Alberto Scabone. Defendant was then arrested and brought to the United States where he was indicted for murder and arson.

Ana Gonzalez, Monica's sister, testified that defendant and Monica "fought a lot . . . about anything, everything . . . he was very jealous," and that in March 1980, she saw defendant hit Monica in the back with a bottle during a fight, then heard him threaten to burn their house down. She also testified that while visiting defendant's parents in Uruguay in January 1981, she heard defendant tell Monica during a fight that "he was going to kill her and the whole family like he . . . always told her." Gonzalez testified that she had heard defendant threaten to kill Monica "many times" and that although he "always" threatened to burn down the apartment, she never believed him.

Leopoldo Silva, Monica's brother-in-law, testified that defendant once told him "one day I'm going to kill these three crazy women," referring to Monica, Yannet, and Norma who were in another room. When Silva smiled at this statement, defendant said "you're laughing. I'm talking seriously." Silva testified

that defendant said he would go to Mexico or Uruguay after killing the women.

Camacho testified she first met defendant and his son in a Mexico City park the weekend before Easter of April 1981. Defendant told Camacho he was a widower and asked for her home phone number in Costa Rica. Defendant went to Costa Rica and began dating Camacho, who then knew him as Marguerito Ramirez Rodriguez. He told her that his wife, sister-in-law, and mother-in-law had died in a car accident in the United States. Thereafter, defendant and Camacho married and moved to Mexico.

Camacho testified she and defendant began having marital problems due to defendant's jealousy. Camacho tried to leave him on several occasions. Each time he followed her and each time she took him back. Camacho and defendant returned to Costa Rica.

Camacho first became suspicious of defendant when his parents came to visit. She discovered their names were listed on ... plane tickets as Scabone, not Ramirez Rodriguez. Camacho later learned defendant was wanted for the three murders. She did not learn how the women were killed. While defendant was in prison in Costa Rica for an unrelated matter, Camacho contacted Interpol to verify the information and requested they not publish her name. They did not honor her request and she moved back to Mexico. Several months later, defendant found Camacho in Mexico and she allowed him to return to her.

According to Camacho, it was during this reconciliation that defendant threatened to kill her, her mother and her sister.

Camacho testified she told defendant that she knew about the deaths of his ex-wife and her family. She said "you're going to do the same thing that you did that one day" and he replied "if I have to do it, I'm going to do it again."

He later told Camacho that he had been fighting with his first wife when she grabbed a knife they kept above their bed. He said that he took it from her, wounded her with it, panicked and killed her. He then waited for Monica's mother and sister to come home and killed them as they separately arrived at the apartment.

Camacho went to the Mexican police. Because they did not seem interested in her story, she went to the American Embassy in Guadalajara and spoke to Gilbert Alvarez. When she met with Alvarez a second time, she revealed defendant's confession. Defendant was ultimately taken into custody.

Defendant asserted his innocence at trial. He testified that on the day of the murders he played soccer with some friends until 5:30 or 6:15 p.m. He returned home briefly and then went to Elizabeth with two friends. According to defendant, he returned home around 9:40 p.m.

Defendant testified that when he entered the apartment, the apartment was on fire and splattered with blood. He tried to put out the fire with some milk. According to defendant, "[e]verything was thrown around," there were "knives everywhere," and the apartment "smelled like gas." He testified he found the three women in the bedroom. After touching them to see if they were

dead, he grabbed his son and left. Shortly thereafter, he fled with his son to Mexico.

Defendant denied threatening to burn the house down. He explained that when he said he would "kill" Monica, it was "just an expression." On cross-examination, he added, "I just--I say that when I'm going to make love, too. The French say it when they make love also. That doesn't mean you're going to kill."

Defendant raises the following contentions in his main brief on appeal:

POINT I - THE ADMISSION OF OTHER CRIMES, WRONGS OR ACTS EVIDENCE CONSTITUTES REVERSIBLE ERROR.

A. The Ana Gonzalez-Leopoldo Silva Testimony.

B. The Elieth Camacho Alvarado Testimony.

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

POINT III - DEFENDANT'S SENTENCE WAS MANIFESTLY EXCESSIVE.

A. Consecutive Terms Should Not Have Been Imposed.

B. Parole Disqualifiers Should Not Have Been Imposed.

C. Maximum Base Terms Should Not Have Been Imposed.

Defendant raises the following additional contentions in his PRO SE supplemental brief:

POINT I - THE WRITTEN VERDICT SHEET HERE, COUPLED WITH THE INSTRUCTIONS FOR ITS USE, PRECLUDED THE JURY FROM CONSIDERING

DEFENDANT'S PASSION/PROVOCATION DEFENSE IN MITIGATION OF HIS GUILT FROM MURDER TO MANSLAUGHTER (NOT RAISED BELOW).

POINT II - THE VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO BE TRIED ONLY FOR AN OFFENSE FOUND BY THE GRAND JURY. (NOT RAISED BELOW).

POINT III - THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ERRED IN HIS KNOWINGLY ALLOWING THE FALSE AND PERJURED TESTIMONY OF THE STATE'S KEY WITNESS AT TRIAL AND INFECTED THE TRIAL PROCEEDINGS AND DID INTERFERE WITH THE JURY'S ABILITY TO WEIGH THE TESTIMONY (NOT RAISED BELOW).

We affirm. We find the contentions raised by defendant's pro se supplemental brief to be clearly without merit, R. 2:11-3(e)(2), and discuss the issues raised in the main brief.

We reject defendant's contention that the testimony of Gonzalaz, Silva and Camacho was inadmissible under N.J.R.E. 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.
>
> [N.J.R.E. 404(b).]

The rule excludes such evidence "when offered solely to prove a defendant's propensity to commit crime." State v. Stevens, 115 N.J. 289, 299 (1989). Its purpose is to ensure that defendants are not convicted merely because the other acts give the jury the impression that they are "bad people in general." State v. DiFrisco, 137 N.J. 434, 498 (1994).

The list of purposes enumerated in N.J.R.E. 404(b) for which other bad-act evidence may legitimately be introduced is "not exhaustive, . . . such evidence is admissible so long as it is relevant to a material issue in dispute and not offered to prove a defendant's disposition." Ibid. (citing State v. Stevens, supra, 115 N.J. at 300). When seeking to introduce other crimes evidence, the prosecution must show the evidence meets the four-part test formulated by the New Jersey Supreme Court in State v. Cofield, 127 N.J. 328, 338 (1992): (1) the other wrong must be relevant to a material issue in genuine dispute; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence must be clear and convincing; and (4) the probative value must not be outweighed by the prejudice to the defendant. Id. at 338.

The trial judge properly permitted Gonzalez's and Silva's testimony, ruling that it could be used to show a "continuing enduring hostility between the parties" and to show defendant's intent and motive.

The judge correctly relied upon State v. Engel, 249 N.J. Super. 336, 372-74 (App. Div.), certif. denied, 130 N.J. 393 (1991). In Engel, defendant was accused of hiring someone to murder his wife. The trial judge permitted testimony that defendant had a stormy relationship with his wife, that he was extremely jealous of her and that his jealousy "often manifested itself in fits of rage during which he confronted [her] with unfounded suspicions, and verbally and physically abused her."

Id. at 348. The judge permitted the victim's mother to recount two incidents in which the defendant repeatedly struck his wife and accused her of being unfaithful. Ibid.

Defendant contends that because he denied committing the murders, his motive and intent was never in issue. In a homicide case, the State may always, though it need not, prove motive as part of its case-in-chief. See Morss v. Forbes, 24 N.J. 341, 359 (1957). Defendant was charged with the knowing or purposeful murders of the three women. Intent to kill was an integral and necessary part of the State's case.

We agree with the trial judge that the acts testified to by Gonzalaz, Silva and Camacho were reasonably close in time to the actual murders as required by State v. Cofield, supra.

In State v. Ramseur, 106 N.J. 123, 266 (1987), the New Jersey Supreme Court held "[t]he temporal remoteness of a past wrong affects its probative value." The Court concluded that arguments between defendant and the murder victim one and one-half years prior to his stabbing the victim to death "evidence[d] an enduring hostility toward [the victim] and to that extent cast[] doubt on his claim that the stabbing . . . was unknowing." Id. at 267. Accord, State v. Donohue, 2 N.J. 381, 388 (1949) (evidence of prior beatings by defendant of his wife, and particularly of an incident that occurred eight years before her murder, was admissible "to show malice or ill will on the part of the accused toward the victim"); State v. Schuyler, 75 N.J.L. 487, 488 (E. & A. 1907) (evidence of an altercation between

defendant and the murder victim that occurred ten or eleven years before the murder admissible to show malice); State v. Carroll, 242 N.J. Super. 549, 564 (App. Div. 1990) (while being questioned for the murder of his step-daughter, defendant referred to an assault on his first wife eleven years earlier. This reference was held "so integral a part of his description of his state of mind at the time of his commission of this offense that it was admissible to show his intent in attacking his step-daughter."), certif. denied, 127 N.J. 326 (1991).

The fact that Camacho described events which occurred after the killings does not render her testimony inadmissible. Evidence of other wrongs admitted under N.J.R.E. 404(b) need not predate the offense at issue. "Evidence of the commission by defendant of the same or similar acts prior to, contemporaneous with, or subsequent to the offense in question may be properly admissible." State v. M.L., 253 N.J. Super. 13, 22 (App. Div. 1991), certif. denied 127 N.J. 560 (1992). In State v. Cofield, supra, 127 N.J. at 339-41, the Supreme Court held that if the State provided an appropriate limiting instruction, it could properly give evidence that the defendant possessed illicit drugs in September to prove that there was no mistake about his possession one month earlier. "The order of the events is not dispositive of the issue of relevance." Id. at 340.

The judge limited Camacho's testimony to a general description of defendant's jealousy and to specific threats made by defendant in one incident when his threat to kill her was made in

conjunction with an admission about his first wife. Defendant's primary argument is that his threat to Camacho, "If I have to do it, I'm going to do it again," was improperly used to prove his intent to kill his first wife. The purpose of the testimony was not to show a threat to Camacho, but because he was admitting to the crimes in response to Camacho's question: "You're going to do the same thing that you did that one day." Because the admission cannot be severed from the threat, the trial judge properly permitted the testimony.

We reject defendant's contention that the trial judge's limiting instruction was inadequate. No objection was made to the instruction. The judge said: "I will give a curative instruction if [defense counsel] prepares one, and if he wants any special wording other than the one I would prepare, I'm free to accept whatever he would have and review it with him." The standard of review is plain error. R. 2:10-2. See also State v. Asher, 278 N.J. Super. 249, 271 (App. Div. 1994) ("defendant expressed his general satisfaction with the judge's principal charge and cannot now condemn the very principles he urged, claiming them to be error and prejudicial"), certif. denied, 140 N.J. 276 (1995). There is no plain error.

When other bad act evidence is admitted under one of the exceptions to N.J.R.E. 404(b), the jury must be given an appropriate limiting instruction. State v. Cofield, supra, 127 N.J. at 340-41. This instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the

evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." State v. Stevens, supra, 115 N.J. at 309.

During Gonzalaz's testimony, the trial judge instructed the jury:

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

In his final instructions, the judge charged the jury:

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

Alvarado Camacho cannot be considered by you as disclosing any general propensity or predisposition on the part of Mr. Scabone to commit a crime or to commit the crimes with which he is now charged.

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

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

You cannot consider that evidence for any other purpose.

The judge added:

There's also for your consideration in this case certain oral statements alleged to have been made by Mr. Scabone to Mrs. Camacho Alvarado, to Ana Gonzalez and Leopoldo Silva. It is your function to determine whether or not those statements were, in fact, actually made by Mr. Scabone, and if they were made, whether such statements or any portions thereof are believable.

As to Gonzalez's and Silva's testimony, the charge was neither unspecific nor otherwise defective. The judge instructed the jury that it could consider the testimony as proof of defendant's possible motive or intent, and not for any other purpose.

The trial judge did not correctly explain the purpose of Camacho's testimony, instead instructing that all the testimony was probative of motive and intent. That was not reversible

error. A proper instruction characterizing the threat as an admission would have probably harmed defendant's case, particularly because defendant proclaimed his innocence throughout the trial. The jury was told it could only consider Camacho's testimony as relevant to defendant's intent or motive, and not as probative of his guilt. The error was harmless. R. 2:10-2.

Defendant argues that the marital communications privilege, as it existed in 1981, prohibited Camacho's testimony without his consent. The trial judge properly rejected this argument.

Before it was amended in 1992, the marital-communications privilege prevented a spouse from disclosing confidential communications made during the marriage unless the other spouse consented. State v. Szemple, 135 N.J. 406, 414 (1994). The privilege was amended by the Legislature on November 17, 1992. N.J.S.A. 2A:84A-22, as amended by L. 1992, c. 142. The amended rule now permits disclosure of confidential communications "in a criminal action or proceeding in which either spouse consents to the disclosure." N.J.R.E. 509. The Legislature provided: "This act shall take effect immediately and, to the fullest extent consistent with constitutional restrictions, shall apply to all criminal actions regardless of the date on which the offense was committed or the action initiated." L. 1992, c. 142 (emphasis added). This plain language makes the meaning of and intent behind the rule quite clear.

The marital-communications privilege, as an evidentiary rule which merely goes to the exclusion or inclusion of evidence, is

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The marital-communications privilege, as an evidentiary rule which merely goes to the exclusion or inclusion of evidence, is

not subject to the constitutional prohibition against ex post facto laws. State v. Bethune, 121 N.J. 137, 145-46 (1990). The amended marital-communications privilege was properly applied in a 1993 trial for a crime committed in 1981.

We reject defendant's contention that the sentence imposed upon him was excessive. A sentence will be upheld unless it deviates so far from the guidelines as to "shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984).

In imposing consecutive sentences, the trial judge applied the sentencing guidelines set forth by the New Jersey Supreme Court in State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986). The trial judge carefully considered all of the Yarbough factors and adequately explained how he applied them. He balanced the mitigating factors—defendant's lack of a prior record and his kidney problems—against the aggravating factors. He was careful not to double count as aggravating factors the viciousness of the multiple stabbings. He did, however, consider defendant's total lack of remorse throughout and after the trial, the "extremely high, if not a hundred percent" likelihood defendant would commit another offense; there were multiple victims; the fire could have harmed others; and the need for deterrence.

The judge rejected the argument that the offenses were committed so closely in time and place as to indicate a single period of aberrant behavior, noting the time defendant spent waiting for the three victims to come home, and the fact that

Norma and Yannet "had absolutely no contact with the initial dispute that arose into the stabbing of Monica Scabone." See State v. List, 270 N.J. Super. 169, 176 (App. Div. 1993) (consecutive sentences upheld where "[e]ach [of the five killings] was committed at a different time on successive victims in separate circumstances.").

The balancing of aggravating and mitigating factors which was the basis for imposing consecutive terms for all four convictions was also properly applied in sentencing defendant to maximum base terms and parole ineligibility periods for each conviction.

Affirmed.

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

Clerk

SUSAN REISNER
Public Defender
Office of the Public Defender
31 Clinton Street
P.O. Box 46003
Newark, New Jersey 07102

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

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	NOTICE OF PETITION FOR CERTIFICATION
-v-	:	
ALBERTO SCABONE,	:	
Defendant-Petitioner.	:	

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

TAKE NOTICE THAT the defendant, ALBERTO SCABONE, confined at New Jersey State Prison, Trenton, New Jersey, petitions for certification to this Court from the Appellate Division decision of November 14, 1995 which affirmed his conviction(s) of murder, arson, for which defendant is serving a sentence of 80 years with a 40 year parole disqualifier, $90.00 V.C.C.B. penalty. Defendant is in custody.

SUSAN REISNER
Public Defender
Attorney for Defendant-Petitioner

BY: Ellen Shiever
ELLEN SHIEVER
Assistant Deputy Public Defender

NOTE:

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

SUPREME COURT OF NEW JERSEY
C-593 September Term 1995
41,377

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v. ON PETITION FOR CERTIFICATION

ALBERTO SCABONE,

Defendant-Petitioner.

FILED
JAN 31 1996
Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3498-93 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of January, 1996.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

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

Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
EUGENE J. CODEY, JR.
JUDGE

ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102

September 23, 1996

Mr. Jack Gerber, Esq.
60 Watson Avenue
Elizabeth, N.J. 07202

Mr. Alberto Scabone
258208
New Jersey State Prison
CN - 861
Trenton, N.J. 08625

RE: State v. Alberto Scabone
Ind. # 4225-08-80
Motion for Post-Conviction Relief

Dear Mr. Gerber and Mr. Scabone:

Pursuant to State v. King, 117 N.J. Super. 109, 111, (App. Div. 1971) and Rule 3:22-6(a) the petitioner was entitled to and has been granted assignment of counsel and an opportunity to be heard.

I have reviewed the following documents regarding the above matter prior to the issuance of this opinion and also considered the arguments presented in my Court on September 19, 1996.

1. Case File
2. Judgment of Conviction
3. Trial Notes
4. Sentencing File
5. Petition for Post-Conviction Relief
6. Appellate Opinion Docket A-3498-93T4
7. Defense Appellate Brief
8. Pro Se Appellate Brief
9. State's Responsive Brief and Appendix
10. Petition for Certification

11. Order denying Certification
12. Pre-Sentence Report
13. Transcripts numbered to conform to Appellate Division Briefs and Petition Pre-Trial Matters, Transcripts 1-T through and inclusive of 8-T.
14. Copy of Indictment 4225-08-80
15. Sentencing Transcript 9-T

The petitioner, herein, primarily grounds his post-conviction relief motion on the following issues:

1. The defendant's petition is not procedurally barred because the issues raised therein were not either previously raised on appeal, or could not have been raised on direct appeal.

2. The defendant is entitled to a hearing to establish his claim of ineffective assistance of trial counsel.

3. The defendant's Sixth Amendment rights were violated because he was denied the effective assistance of counsel as his attorney failed to develop an adequate trial strategy.

4. The trial court's failure to charge the jury as to the impact of imperfect self defense deprived defendant of due process and a fair trial.

5. The defendant received ineffective assistance of Appellate counsel.

STATEMENT OF FACTS

Defendant met and began dating Monica Estevez in his native land of Uruguay. They were married in Newark in April 1978, where they resided in a first floor apartment on Bloomfield Avenue. At the time of the murders, Monica's mother, Norma Estevez, and her 17-year old sister, Yannet Estevez were sharing the apartment with defendant, Monica and their three-year old son.

At 10:17 p.m., April 2, 1981, the Newark Fire Department answered a fire alarm call for the apartment. In the bedroom, firefighters discovered the severely burned, fully clothed bodies of Monica, Yannet and Norma. Autopsies revealed their deaths were not caused by the fire, but from massive internal bleeding caused by multiple stab wounds. Approximately 90 stab wounds were inflicted, many in the victims' backs, with Yannet receiving forty-one, Norma thirty-five and Monica approximately fourteen.

Raymond Bishof, then a detective in the Newark Arson Squad, determined that the fire was deliberately started. By the morning after the fire, defendant was considered a suspect and an extensive search for him followed. The police determined that defendant was no longer in the United States, and sent a copy of the case file to the United States Department of Justice Interpol section in Washington.

Defendant remained unapprehended until twelve years later, when Elieth Alvarado Camacho, defendant's second wife, went to the American Consulate in Guadalajara, Mexico, and informed Gilbert Alvarez of the F.B.I. that she believed her husband was Alberto Scabone. Defendant was then arrested and brought to the United States.

Ana Gonzalez, Monica's sister, testified that defendant and Monica "fought a lot, . . . about anything, everything . . . he was very jealous," and that in March 1990, she saw defendant hit Monica in the back with a bottle during a fight, then heard him threaten to burn their house down. She also testified that while visiting defendant's parents in Uruguay in January 1981, she heard defendant tell Monica during a fight the "he was going to kill her and the whole family like he . . . always told her." Gonzalez testified that he had heard defendant threaten to kill Monica "many times" and that although he "always" threatened to burn down the apartment, she never believed him.

Leopoldo Silva, Monica's brother-in-law, testified that defendant once told him "one day I'm going to kill these three crazy women," referring to Monica, Yannet, and Norma, who were in another room. When Silva smiled at this statement, defendant said "you're laughing. I'm talking seriously." Silva testified that defendant said he would go to Mexico or Uruguay after killing the women.

Camacho testified she first met defendant and his son in a Mexico City park the weekend before Easter of April 1981. Defendant told Camacho he was a widower and asked for her home phone number in Costa Rica. Defendant went to Costa Rica and began dating Camacho, who then knew him as Marguerito Ramirez Rodriguez. He told her that his wife, sister-in-law, and mother-in-law had died in a car accident in the United States. Thereafter, defendant and Camacho married and moved to Mexico.

Camacho testified she and defendant began having marital problems due to defendant's jealousy. Camacho tried to leave him on several occasions. Each time he followed her and each time she took him back. Camacho and defendant returned to Costa Rica.

Camacho first became suspicious of defendant when his parents came to visit. She discovered their names were listed on the plane tickets as Scabone, not Ramirez Rodriguez. Camacho later learned defendant was wanted for the three murders. She did not learn how the women were killed. While defendant was in prison in Costa Rica for an unrelated matter, Camacho contacted Interpol to verify the information and requested they not publish her name. They did not honor her request and she moved back to Mexico. Several months later, defendant found Camacho in Mexico and she allowed him to return to her.

According to Camacho, it was during this reconciliation that defendant threatened to kill her, her mother and her sister. Camacho testified she told defendant that she knew about the deaths of his ex-wife and her family. She said "you're going to do the same thing that you did that one day" and he replied "if I have to do it, I'm going to do it again."

He later told Camacho that he had been fighting with his first wife when she grabbed a knife they kept above the bed. He said that he took it from her, wounded her with it, panicked and killed her. He then waited for Monica's mother and sister to come home and killed them as they separately arrived at the apartment.

Camacho went to the Mexican police. Because they did not seem interested in her story, she went to the American Embassy in Guadalajara and spoke to Gilbert Alvarez. When she met with Alvarez a second time, she revealed defendant's confession. Defendant was ultimately taken into custody.

Defendant asserted his innocence at trial. He testified that on the day of the murders he played soccer with some friends until 5:50 or 6:15 p.m. He returned home briefly and then went to Elizabeth with two friends. According to defendant, he returned home around 9:40 p.m.

Defendant testified that when he entered the apartment, the apartment was on fire and splattered with blood. He tried to put out the fire with some milk. According to defendant, "everything was thrown around, "there were 'knives everywhere,' and the apartment "smelled like gas." He testified he found the three women in the bedroom. After touching them to see if they were dead, he grabbed his son and left. Shortly thereafter, he fled with his son to Mexico.

Defendant denied threatening to burn the house down. He explained that when he said he would "kill" Monica, it was "just an expression." On cross-examination, he added, "I just--I say that when I'm going to make love, too. The French say it when they make love also. That doesn't mean you're going to kill."

PROCEDURAL HISTORY

Defendant was found guilty of the passion/provocation manslaughter of Monica Scabone, his wife; of the purposeful and knowing murders of Yannet Estevez, his sister-in-law, and Norma Estevez, his mother-in-law; and of second degree arson. The defendant was sentenced to an aggregate prison term of eighty years with a forty-year parole ineligibility period: a ten-year prison term with a five-year parole disqualifier for the passion/provocation manslaughter; a thirty-year prison term with a fifteen-year parole ineligibility period for each of the two murders; and a ten-year prison term with a five-year parole ineligibility period for the arson. All terms were to run consecutively.

DISCUSSION

Post-conviction relief is a collateral attack on a criminal judgment which seeks to set aside or vacate that conviction and provides a means for reviewing claims that by their nature could not have been asserted at trial or on direct appeal. Pursuant to Rule 3:22-2, a petition for post-conviction relief is cognizable if based upon a substantial denial in the conviction proceedings of defendant's constitutional rights, lack of jurisdiction of the court, excess sentence, or any ground available as a basis for collateral attack upon a conviction by habeas corpus or any other common law or statutory remedy.

PROCEDURAL BAR

Rule 3:22-4 provides that any ground for relief not raised in a prior proceeding under this rule or in the proceedings resulting in the conviction or in any appeal taken in such proceedings is barred, unless the court finds that such relief could not previously be asserted, that enforcement of the bar would result in fundamental injustice, or it would be unconstitutional. A finding of fundamental injustice is only warranted in exceptional circumstances. State v. Corbo, 78 N.J. 595, 605 (1979). No such exceptional circumstances exist here. Petitioner did not previously raise his ineffective assistance of trial counsel claim.

It is worthy to note that Mr. Scabone on lines 17-18 of page 18 of 9-T on day of sentencing stated:

> "I think Mr. McLaughlin defended me in the right way that it should have been done."

It is now only after Mr. Scabone has commenced serving his lengthy prison sentence does he have a change of heart as to his attorney's trial efforts. All such claims should have and could have been raised at that time, and are thus barred procedurally as all information necessary to raise such claims was available to petitioner when he made his direct appeal.

Additionally, Rule 3:22-5 provides that a prior adjudication upon the merits of any ground for relief is conclusive. Point four (4) of defendant's petition regarding the alleged imperfect self-defense issue was previously adjudicated in Point One of defendant's Pro Se supplemental brief to the Appellate Division. It was found by the Appellate Division to be "clearly without merit." An opinion with which I totally agree and will not relitigate here.

LEGAL DISCUSSION

Notwithstanding the dismissal of petitioner's motion for procedural deficiencies petitioner's motion must also fail for lack of a meritorious claim.

Defendant now complains that the jury charge allowed the jury to find him guilty of murder withcut ever considering passion/provocation manslaughter. The petitioner's allegations are as inaccurate as they are untimely. Both the Court's oral instructions and the verdict sheet made it clear that the jury could not convict defendant of purposeful or knowing murder unless the State disproved one of the elements of passion/provocation beyond a reasonable doubt. The fact that the jury was not precluded from considering passion/provocation manslaughter is compellingly established by the fact that they did find the defendant guilty of that crime with regard to one of the killings, that of his wife, Monica Scabone, and that they considered and answered in the negative the question on passion/provocation on the counts involving the two other murder victims. Counsel and the Court explained the possible charges and respective sentences to defendant in depth and petitioner agreed with counsel's request to only ask for passion/provocation manslaughter as a matter of trial

strategy. The defendant having discussed this issue in detail with counsel and the Court, and expressing agreement with the submission of passion/provocation manslaughter as the only alternative to murder, is in no position to complain now after his wishes were honored.

Petitioner's argument regarding ineffective assistance of trial and appellate counsel is likewise clearly without merit. Petitioner has not shown how trial or appellate counsel's conduct prejudiced him within the meaning of the effective assistance of counsel standard. The claimed errors do not overcome the presumption that trial counsel's conduct was within the wide range of acceptable, reasonable professional assistance, nor do they demonstrate prejudice to defendant sufficient to undermine confidence in the outcome of the trial. Moreover, and of equal importance, thorough study of the record shows that defendant was provided a rigorous, viable defense and appeal and that his counsels' performance were not unreasonable or inadequate. Defense and appellate counsel were conscientious and zealous in their representation of the petitioner. The record does not support or even give rise to a fair inference that trial or appellate counsel's performance was in any way inadequate or below a level of reasonable competence.

Finally, even assuming that trial counsel's performance could in some way be characterized as deficient, which I do not find, his conduct was not so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction. State v. Fritz, 105 N.J. 42 (1987) see also Strickland v. Washington, 488 U.S. 668.

In short, petitioner has failed to meet the heavy burden of proof that, but for counsel's performance the result would have been any different.

CONCLUSION

For the reasons stated above, petitioner's Motion for Post-Conviction Relief is hereby denied.

Very truly yours,

EUGENE J. CODEY, JR.
J.S.C.

THE STATE OF NEW JERSEY

VS.

ALBERTO SCABONE

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION - CRIMINAL

INDICTMENT # 4225-8-80

ACCUSATION #

COMPLAINT #

ORDER

On Motion ( ) : Post Conviction Relief
( )
(to reduce sentence)

The Court having considered the testimony presented and arguments of counsel for the State and counsel for the defendant, and good cause having been shown:

It is on this 20th day of September 19 96, ORDERED

that the Motion ( ) be and the same is hereby
( )
(to Reduce Sentence) granted
Post Conviction Relief denied xx

EUGENE J. CODEY, JR.
J.S.C.

SUSAN L. REISNER
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, New Jersey 07102
(201) 877-1200 - Fax (201) 877-1239

ORIGINAL FILED
NOV 13
A 1491-96T4
Emilie R. Cox, Esq.
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
INDICTMENT NO(S.) 4225-8-90

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

PLEASE TAKE NOTICE that the defendant, confined at New Jersey State Prison appeals to this Court from the final Order of the Honorable Eugene J. Codey, Jr. which was entered on September 20, 1996 in the Superior Court, Law Division, Essex County denying defendant's petition for post-conviction relief.

SUSAN L. REISNER
Public Defender
Attorney for Defendant-Appellant

BY: Deborah Collins
DEBORAH C. COLLINS
Assistant Deputy Public Defender

The undersigned certifies that the requirement of R. 2:5-3(a) have been complied with by ordering the transcript(s) on 11/1/96 as indicated on the accompanying transcript request form(s) and that a copy of this Notice has been mailed to the tribunal designated above.

Deborah Collins
DEBORAH C. COLLINS
Assistant Deputy Public Defender

A-1491-96T4

OFFICE OF THE COUNTY PROSECUTOR
ESSEX COUNTY

CLIFFORD J. MINOR
PROSECUTOR

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FIRST ASSISTANT PROSECUTOR

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DEPUTY FIRST ASSISTANT PROSECUTOR

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NORMAN W. MENZ, JR.
DEPUTY FIRST ASSISTANT PROSECUTOR

CHARLOTTE L. SMITH
DEPUTY FIRST ASSISTANT PROSECUTOR

JOSEPH P. DONOHUE
DEPUTY FIRST ASSISTANT PROSECUTOR

HAROLD GIBSON
CHIEF OF COUNTY INVESTIGATORS

RECD
APPELLATE DIVISION
DEC 02 1997
Clerk

RECD
APPELLATE DIVISION
DEC 04 1997
Clerk

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiff-Respondent,	:	DOCKET NO. A-1491-96T4
v.	:	**CRIMINAL ACTION**
ALBERTO SCABONE,	:	**ON APPEAL FROM AN ORDER DENYING POST-CONVICTION RELIEF ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY**
Defendant-Appellant.	:	

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

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

DONALD C. CAMPOLO
DEPUTY ATTORNEY GENERAL/
ACTING ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102

BARBARA A. ROSENKRANS
SPECIAL DEPUTY ATTORNEY GENERAL
APPELLATE SECTION
OF COUNSEL AND ON THE BRIEF

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N.J.R.E. 404(b)	3,38

PRELIMINARY STATEMENT

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

Defense counsel vigorously asserted that the police had engaged in a witch hunt and did a shoddy investigation of the murders. Defendant, who at sentencing expressed satisfaction with counsel's performance at trial, now takes issue with this defense and nitpicks counsel's decision not to present the defendant's son as a witness even though there is not a shred of proof that the defendant's son could have provided exculpatory testimony.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On August 3, 1981, the Essex County Grand Jury returned Indictment No. 4225-80 against the defendant Alberto Scabone, charging him with the purposeful or knowing murders of Monica Scabone, Norma Estevez and Yannet Estevez, contrary to N.J.S.A. 2C:11-3 (Counts One, Two and Three) and second degree arson by purposely setting fire to the multiple family dwelling at 239 Bloomfield Avenue, Newark, in violation of N.J.S.A. 2C:17-1(a)(2) (Count Four). (Da1-5).[1]

Defendant was tried before the Honorable Eugene J. Codey, Jr., J.S.C. and a jury from November 9 through 18, 1993. A number of witnesses who at the time of the trial lived in South or Central American countries testified for the State. During trial, the court ruled that Ana Gonzalaz, the daughter of Norma and sister of Monica and Yannet, and Leopoldo Silva, Monica's former brother-in-law, were permitted to testify about

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[1]The transcript designation code is as follows:

Da Appendix to defendant's brief.
Db Defendant's brief.
T November 8, 1993 trial transcript.
1T November 9, 1993 trial transcript.
2T November 10, 1993 trial transcript.
3T November 12, 1993 trial transcript.
4T November 15, 1993 trial transcript.
5T November 16, 1993 trial transcript.
6T November 17, 1993 transcript. (Summations & Jury Instructions).
7T November 18, 1993 transcript.
8T January 14, 1994 transcript. (Sentencing).
9T September 19, 1996 transcript. (Post-Conviction Relief).

the tumultuous relationship between the defendant and Monica as well as threats and fights defendant had with Monica, pursuant to N.J.R.E. 404(b). (2T46-7 to 48-4).

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

On November 18, 1993, the jury found the defendant guilty of the purposeful or knowing murders of Yannet and Norma Estevez, the passion/provocation manslaughter of Monica and arson. (Da6-7; 7T36-15 to 38-3). The Honorable Eugene J. Codey, J.S.C., on January 14, 1994, sentenced the defendant to an aggregate sentence of eighty (80) years imprisonment with a forty (40) year parole disqualifier.[2] (Da6-7; 8T37-19 to 38-10).

Defendant's convictions and sentence were affirmed by the Appellate Division on November 14, 1995. (Da9-24). The

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

Supreme Court, on January 31, 1996, denied the defendant's petition for certification. (Da25).

On February 21, 1996, defendant filed a petition for post-conviction relief. (Da26-81). Judge Codey heard argument on the motion on September 19, 1996. He denied the petition, by a written opinion, on September 23, 1996. (Da82 to 89). Defendant now appeals the denial of post-conviction relief. (Da98).

COUNTER-STATEMENT OF FACTS

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

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

Because of his intense jealousy, defendant "didn't want {Monica} to get made up. He didn't want her to get dressed up. He didn't let her have friends, male or female." (2T52-20 to 22). Monica and her sister Ana both worked at Stanley Tool in Newark. (2T53-1 to 5). Monica had a job "in the office" while Ana "worked {a} dirty, dirty job" "in the factory, production." (2T53-7 to 12). Since Monica worked "in the

office," Monica "had to be fixed up, dressed up, and {the defendant} wouldn't let her wear make up." (2T53-13 to 14).

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

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

Monica and Ana's father died in November, 1980. Ana went to Uruguay in November and remained there. (2T58-17 to 23). In January, 1981, defendant and Monica along with Tito traveled to Uruguay. While Ana, defendant, Monica and Tito were visiting defendant's parents at their home in Uruguay, defendant and Monica "fought." "{Defendant} told {Monica} that he was going to kill her and the whole family like he would always {tell} her." (2T59-9 to 14). Ana remembered that the defendant

"many times" threatened to kill Monica and "always" menaced to burn down the house but Ana "never thought he was capable of doing that." (2T59-23 to 60-19).

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

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

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

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

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

Upon returning to the defendant's apartment, Mr. Guerrero loudly knocked on the door. Five minutes later, defendant answered. Defendant told his two co-workers, "{W}ait

a minute, I'm coming back, I'm coming back." (1T101-20 to 102-2; 1T106-16 to 19). Ten to fifteen minutes later, defendant "came out, he came out with a suitcase, a television and the child." Defendant disclosed to his co-workers that the boy was his son Tito. (1T101-23 to 102-7). Defendant put the suitcase and television in his Camaro. Then the three men and Tito drove to work in the defendant's Camaro between 9:55 p.m. and 10:02 p.m. (1T102-8 to 15; 1T107-18 to 108-10).

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

As soon as they arrived, defendant and Mr. Guerrero spoke to their foreman, Angelo Digiacomo, while Mr. Delsid went to work. Mr. Digiacomo found a "very quiet" defendant and a "real nervous" Mr. Guerrero in his office. (2T25-8; 2T28-21 to 29-4; 2T30-23 to 31-9). The "real nervous" Mr. Guerrero asked Mr. Digiacomo for his and the defendant's paychecks because "{the defendant's} wife {had thrown} him out of the house" and

Mr. Guerrero "was going to take him to his house for the night." Mr. Digiacomo gave both men their paychecks. Mr. Guerrero said he would return to work afterwards. (2T29-5 to 30-20; 2T36-14 to 19). Defendant then holed up at Mr. Guerrero's apartment with Tito. Upon returning to work, Mr. Guerrero appeared very nervous the rest of the night. (2T37-23 to 25).

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

Retired Battalion Chief Raymond Bishof opined that the fire was intentionally set. (1T93-23 to 25). "There was absolute evidence that an accelerant had been used to get this fire roaring and roaring quickly..." (1T61-11 to 13). Former Chief Bishof opined that the presence of a very definitive burn pattern on the bedroom floor showed that an accelerant was used to set this fire. (1T61-8 to 20). Former Chief Bishof explained

that the fire originated in "the floor areas behind the beds..." damaging the underside of one of the beds' boxsprings "indicating without a doubt that the fire started at floor level and burned up into the beds." (1T64-21 to 65-1; 1T67-12 to 21).

The entire bedroom became engulfed in flames within two or three minutes. (1T68-8 to 16). The fire "almost simultaneous{ly}" extended into the kitchen. The fire then "vented itself out of the rear bedroom window, and engulfed...the rear of the building...including the exterior porch leading to the second and third floor." (1T68-20 to 69-2).

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

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

Monica's body was likewise severely charred. (2T94-23 to 24). Monica was stabbed a total of fourteen (14) times with wounds up to 4 1/2 inches in depth. (2T92-8 to 12). Dr. Tamburri opined that the cause of all three victims' deaths was

massive internal bleeding. (2T85-9 to 18; 2T89-18 to 25; 2T90-22 to 91-2; 2T94-16 to 20).

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

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

Extensive efforts were made to locate defendant, including surveilling parks where he would play soccer and

various soccer and Spanish clubs. (4T10-3 to 13-14). Information was then disseminated to the wire service used by all law enforcement agencies in the United States. (4T13-16 to 20).

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

Defendant asked Ms. Camacho where she was from. She replied that she was from Costa Rica. Defendant told Ms. Camacho that "he was going to go there, if {she} would give him {her} number so that when he arrived there he would call {her}; if {she} could help him somehow because he didn't know Costa Rica." (3T41-25 to 42-7). Ms. Camacho gave the defendant her telephone number and he left, entering his black Camaro. (3T42-8 to 21).

A month later, defendant came to Costa Rica with Tito and asked Ms. Camacho "if {she} could find a hotel for him..." (3T43-23 to 44-2). At some point, defendant's mother visited and took Tito with her. (3T44-3 to 5). Defendant told Ms.

Camacho that his name is Marguerito Ramirez Rodriguez and that he is a Mexican. (3T39-23; 3T44-9 to 11). Ms. Camacho and the defendant then began to date.

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

Defendant and Ms. Camacho began to fight because he was "very jealous" and there was a dispute regarding the timing of her pregnancy. (3T46-1 to 3). Ms. Camacho gave birth to their baby boy Alberto Camacho Alvarado on January 31, 1983. (3T46-4 to 15). Defendant and Ms. Camacho continued to have marital problems. As a result, when the baby was about eight months old, Ms. Camacho moved in with her parents in Costa Rica. (3T46-16 to 25). Ms. Camacho and her father started a restaurant. (3T47-5 to 6). However, defendant followed Ms. Camacho to Costa Rica and the two resumed living together. (3T47-5 to 12).

Defendant and Ms. Camacho still had a tumultuous relationship because "he went around with a lot of women" and "{h}e was always very jealous of everything, of things that he

imagined." (3T47-13 to 21). Ms. Camacho gave up her restaurant in an attempt to get rid of the defendant. Defendant, however, was "always looking for" Ms. Camacho, "didn't leave {her} alone." Ms. Camacho took the defendant back. (3T47-22 to 48-1). On October 15, 1985, Ms. Camacho gave birth to a little girl. (3T50-6 to 7). Defendant and Ms. Camacho separated then reconciled numerous times. (3T48-23 to 49-1)

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

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

Once the defendant's parents arrived, the "whole thing turned into complete insanity." (3T52-15 to 16). Defendant and Ms. Camacho's marriage deteriorated further. She told the defendant "that the best thing was that we separated, that we got divorced." (3T52-17 to 25). Divorce proceedings were instituted. (3T53-1 to 15). Once the defendant discovered this,

matters "got worse, a lot." (3T56-18 to 24). Defendant was then arrested and imprisoned. (3T58-22).

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

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

matters became worse "to the point in which he was threatening {Ms. Camacho}." (3T61-25 to 62-4).

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

At some later point, defendant revealed the details.

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

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

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

going to kill {her}." (3T65-3 to 19). She told Agent Alvarez that the defendant confessed to murdering his first wife and in-laws and that if the defendant "found out what {she} was doing, he would kill {her}." (3T66-5 to 9). In light of the Interpol fiasco, Ms. Camacho feared that the information once again would be publicized. (3T66-10 to 13).

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

The most important component of Ms. Camacho's testimony - her disclosure of the defendant's recounting of the killings - is corroborated by objective evidence. Firefighter Lardiere stated that it was unusual for an evening fire that all the women were still dressed and had their shoes on. This is consistent with the defendant's confession that he killed Monica during a fight, then, as Yannet and Norma arrived later, he killed them.

While Agent Alvarez sent a telex which said that Ms. Camacho revealed that the defendant was not aware that she knew

of the killings (5T86-17 to 25), this does not in any way indicate that the defendant did not confess to the murders to Ms. Camacho. This same telex warns to protect Ms. Camacho's identity, which was included because of her concern for her safety. She may have been trying to avoid a re-run of the fiasco with Interpol, which dishonored her wishes and broadcasted information. Also, Ms. Camacho had a total of four (4) to seven (7) later interviews with Agent Alvarez and another agent and could have given specific information about the defendant's realizing that she was aware of the defendant's murders during these later interviews. (5T89-25 to 90-25).

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

Defendant, who laughed countless times when he was on the witness stand (8T30-10 to 17), concocted an inherently incredible tale, undercut by the objective proofs. After playing soccer that day with Guerrero and Marguerito Ramirez, Ramirez, who "had a girl waiting to see him in Elizabeth," wanted the defendant to go with him. Defendant saw Monica who told him to purchase milk. (5T19-19 to 20-6). Defendant told Monica he would do the errand, but lied to her and said that Ramirez did not have a car, thus, the defendant had to drive him

to work. (5T20-9 to 12). Defendant, Ramirez and Guerrero then went to Elizabeth where "they were quite a long time with the girls." (5T21-12 to 16).

Defendant testified that he arrived home at 9:40 p.m., apparently never encountering the "real" arsonist/murderer who, based on the objective evidence, had to have just set the fire. Defendant and Ramirez left the groceries by the door. Tito "started to drag one of them." Defendant opened the front door, then walked about fifteen feet and went inside the apartment.

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

When asked why he did not fill a cooking pot with water and throw it on the fire, defendant replied, "I don't know." (5T69-20 to 22). Defendant then left the apartment but re-entered it yet again to retrieve his son's passport. (5T68-15 to 70-12). At this time, in contrast to Chief Bishof's testimony, the defendant claimed "there wasn't any fire anymore...was just a little bit of smoke." (5T70-16 to 19).

Defendant asserted that he had a television and "bag with two suits" in the trunk of his Camaro. "It was two suits and a small television set. You could connect it to the cigarette lighter in the car." Regarding the suits, defendant claimed, "I had it there for some time because sometimes when I didn't work I would go to a dance..." (5T74-20 to 25).

The defendant testified that this was such a "chaotic moment" for him that he "really couldn't make a decision," He deferred to the advice of two co-workers who suggested he wait until the next day to call the police to report the horrendous murders of his family. Defendant, however, never reported these incidents. (5T71-12 to 72-15). Rather than calling the police, ever, defendant went to work, got his paycheck, then hid overnight at the home of a co-worker. (5T71-12 to 72-15; 5T32-1 to 33-1). Two to three minutes after observing the horrendous site of the dead bodies of his beloved wife, the mother-in-law he said he loved and the sister-in-law whom he considered to be a little sister, defendant decided, "Let the police take care of it..." and left to get his check. (5T70-21 to 24). Despite the chaos, the defendant had the presence of mind to do all of the

following: go to work with his co-workers, pick up his paycheck then make arrangements to hole up in Guerrero's Harrison apartment overnight, and the next day, collect his unemployment check, return to his house (which he did not enter because there were a lot of people around) to get more money, check his travel agency to get the quickest flight (3T79-2 to 80-17) to Uruguay, and get Ramirez' birth certificate so he could work when he fled. (5T32-1 to 37-19).

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

Defendant contended that he "turned" himself in when authorities came to him on February 1, and gave him $300. (5T33-6 to 20). Ms. Camacho allegedly told him to go to Acapulco. (5T53-22). Two days later, defendant was arrested.

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

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

defendant wrote while in the Essex County Jail, defendant stated "I don't remember what happened that night." (5T77-19 to 80-3).

LEGAL ARGUMENT

POINT I

THE LOWER COURT PROPERLY DENIED THE DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING BECAUSE THE DEFENDANT RECEIVED A "MILLION DOLLAR{} DEFENSE" WHEN COUNSEL URGED THE JURY THAT THE POLICE HAD ENGAGED IN A WITCH HUNT AND DID A SHODDY INVESTIGATION OF THE MURDERS AND A REVIEW OF THE RECORD ESTABLISHES THAT THE DEFENDANT'S CLAIMS OF INADEQUATE REPRESENTATION DO NOT SATISFY THE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

Defendant contends that the lower court erred in denying his petition for post-conviction relief without conducting an evidentiary hearing. (Db6). This argument is devoid of any merit because the record discloses that defense counsel gave the defendant what Judge Codey described as a "million dollar{} defense." He zealously represented the defendant.

Defendant's allegations of inadequate representation are grounded on nothing more than rank speculation. Even when pressed at the post-conviction relief hearing, the defendant did not provide any information, much less details, regarding his allegations of ineffective assistance. Pure conjecture does not satisfy the defendant's burden of proving the ineffective assistance of counsel.

* **DEFENDANT IS BARRED, PURSUANT TO R. 3:22-4, FROM NOW RAISING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT COULD HAVE BEEN RAISED ON DIRECT APPEAL**

"{P}ost-conviction proceedings are not a substitute for direct appeal." State v. Cerbo, 78 N.J. 595, 605 (1979); State v. Marshall, II, 148 N.J. 89, 146 (1997); State v.

McQuaid, 147 N.J. 464, 482 (1997). In keeping with this truism, an issue which could have been but was not raised on direct appeal will not be considered on post-conviction relief. R. 3:22-4; State v. Mitchell, 126 N.J. 565, 576 (1992); State v. Culley, 250 N.J.Super. 558, 563 (App. Div. 1991), certif. den., 126 N.J. 587 (1991); State v. Moore, 273 N.J.Super. 118, 126 (App. Div. 1994), certif. den., 137 N.J. 311 (1994).

Defendant was represented at trial by Kevin McLaughlin, a seasoned trial attorney admitted to the bar in 1983. Now on appeal, defendant claims that trial counsel was ineffective for not calling the defendant's son, Tito, as a witness and failing to interview potential witnesses and gather information with which to cross-examine the State's witnesses. Defendant could have raised these claims on direct appeal but chose to wait until he filed his post-conviction relief petition to do so.

To circumvent the procedural bar of R. 3:22-4, defendant "attire{s}" his claims "in ineffective assistance of counsel clothing." Moore, supra at 125. Defendant's futile attempt to raise these alleged issues which are apparent from the trial record four years after his conviction must be rejected. R. 3:22-4 serves the State's strong interest in finality and avoids piecemeal litigation which wastes valuable court resources. Mitchell, supra at 577.

Defendant's allegations regarding the production of witnesses and gathering information on which to cross-examine the State's witnesses were far too speculative to justify

conducting an evidentiary hearing, much less the granting of post-conviction relief. The phantom witnesses the trial attorney should have interviewed and subpoenaed were never identified prior to argument on the petition for post-conviction relief. The lawyer representing the defendant on post-conviction relief explained, "I have asked Mr. Scabone who that witness might be, so therefore I can go out and conduct a necessary investigation and perhaps it might be quite material. Unfortunately, I have no further information as to that forthcoming." (9T7-16 to 20). In the midst of argument, defendant said that his son and supposedly his friend, Marguerito Ramirez, who had given him the Mexican birth certificate, should have testified. (9T24-15 to 18). Regarding additional fodder for cross-examination, counsel revealed, "Unfortunately, my communications with Mr. Scabone ha{ve} not been fruitful in telling me what additional investigation was necessary. (9T13-7 to 11).

Defendant must establish a denial of one of his constitutional rights which impaired the fairness of his trial before his conviction will be disturbed on collateral review. "Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus. It is a safeguard to ensure that a defendant was not unjustly convicted." State v. Afanador, 151 N.J. 41, 49 (1997).

Defendant has failed to allege specific facts which, if believed, would demonstrate the denial of "fundamental fairness in a constitutional sense" if his petition were barred.

State v. D.D.M., 140 N.J. 83, 101 (1995); Mitchell, supra, at 587; State v. Laurick, 120 N.J. 1, 11 (1990).

> In defining fundamental injustice, the courts will look to whether the judicial system has provided the defendant with fair proceedings leading to a just outcome. "Fundamental injustice" will be found if the prosecution or the judiciary abused the process under which the defendant was convicted or, absent conscious abuse, if inadvertent errors mistakenly impacted a determination of guilt or otherwise "wrought a miscarriage of justice for the individual defendant."
>
> Mitchell, supra, at 587.

The Mitchell Court, supra, at 586-587, warned, "Although the standard by its very nature precludes mechanical application, we have stressed that it should be applied only in exceptional cases." As discussed infra, a review of case law and the record demonstrates that counsel diligently represented the defendant.

Judge Codey properly invoked R. 3:22-4's procedural bar. In his written opinion, the judge observed:

> It is worthy to note that Mr. Scabone on lines 17-18 of page 18 on 9-T on {the} day of sentencing stated:
>
> > "I think Mr. McLaughlin defended me in the right way that it should have been done."
>
> It is now only after Mr. Scabone has commenced serving his lengthy prison sentence does he have a change of heart as to his attorney's trial efforts.
>
> {Da88}.

The State urges this Court to make a plain statement that its ruling rests on R. 3:22-4's procedural bar. Harris v. Reed, 489 U.S. 255, 261-263 (1989); See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Hull v. Freeman, 991 F.2d 86, 88-89 (3rd Cir. 1993); United States ex. rel. Caruso v. Zelinsky, 689 F.2d 435, 439-440

(3rd Cir. 1982); Hall v. Wainwright, 733 F.2d 766, 777-778 (11th Cir. 1984).

* **COUNSEL WAS NOT ONLY EFFECTIVE, BUT OUTSTANDING.**

The record bespeaks of an attorney who vehemently mounted the defense and all promising arguments which assisted the defense.

> I don't see anything that Mr. McLaughlin has done during the course of this case other than to represent {the defendant's} interest a hundred percent. He's done an excellent job presenting your case. There's a strong circumstantial case against you.
>
> (5T5-5 to 9).

> We will not second-guess counsel's reasonable adoption of one of the countless ways to provide effective assistance in any given case.
>
> State v. Perry, 124 N.J. 128, 153 (1991), quoting Strickland v. Washington, 466 U.S. 668, 589 (1984).

In order to succeed on an ineffective assistance of counsel claim, defendant must establish that "counsel's performance was deficient" and that this allegedly deficient performance "prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Marshall, II, 148 N.J. 89, 156 (1997); State v. Jack, 144 N.J. 240, 248-249 (1996); State v. Fritz, 105 N.J. 42, 58 (1987). Defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, supra, at 687. "The yardstick for measuring any claim of ineffective assistance is whether the counsel deprives the defendant of his or her constitutional right to a fair trial". Herman v. Butterworth, 744 F.Supp. 1128, 1136 (S.D. Fla. 1989),

aff'd, 929 F.2d 623 (11th Cir. 1991); Lockhart v. Fretwell, 503 U S. 364, 369-370 (1993).

> (A)n analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart, supra at 369-370.

Defendant now on appeal only presses the contention that his attorney was inadequate for failing to present his son, Tito, "the only possible witness to the murder," as a witness. (Db10). The Achilles' heel of the defendant's allegation is that the linchpin of this claim - that Tito could have exculpated the defendant - is hinged on nothing but mere speculation. On direct examination, the defendant testified that Tito was merely inside the apartment and that the defendant "grabbed" Tito after the defendant had discovered the bodies. (5T23-23 to 24; 5T25-21 to 24). Defendant, on cross-examination, asserted that Tito was in the bedroom where the bodies were and that the defendant had Tito "under (his) arm" as the defendant checked if any of the victims had a pulse. (5T65-25 to 66-21). Ms. Camacho revealed that the defendant told her that Tito had seen him stab Tito's own mother, aunt and grandmother to death. (3T64-9 to 14).

Even if the defendant's bizarre allegation that he was toting the child under his arm as the defendant checked the pulse of each victim is accepted, there is no indication that

Tito had any exculpatory testimony to offer. There is no hint that Tito, who was just about three years old at the time of the murders, saw, comprehended or recollected, twelve years after the fact, something of an exculpatory nature.

Defendant is no shrinking violet. Throughout trial, he made his concerns and wishes known. Defendant knew enough to plot ways to manufacture grounds for appeal in the event he was found guilty.

During trial, defendant wrote a note to Judge Codey which stated:

> THE COURT: Judge Eugene Codey, Judge, Your attorney, Kevin McLaughlin, did not represent you to the best of his abilities. He only visited you on three occasions prior to trial. There was no internal investigation done by Mr. McLaughlin or his staff{,} {O}ffice of the Public Defender, 31 Clinton Street, fifth floor, a{t} the Post Office Box, Newark, New Jersey. For compound abuse the State was allowed to have my wife testify against me. My wife -- and it looks like -- we were married twice once in Costa Rica, 1987, and Mexico, 1990.
>
> According to New Jersey rule my wife isn't supposed to testify against no fact other than our marriage. So, accordingly, Mr. McLaughlin violated State vs. Fritz, State v. Savage -- and then in parentheses, (Roy Savage). Strickland vs. Washington United States, U.S. vs. Crowie, United States.
>
> "Please review my case at your earliest convenience and then not extradition the Mexico date legal," and then it's signed Alberto Scabone and dated October 15, 1993.
>
> (5T3-3 to 19).

Defendant elaborated, "I'm not saying that Mr. McLaughlin didn't try to defend his best. ... In his way, I think he wants to

defend me his way, but my son and myself enter in that place..." (5T6-23 to 7-2).

Judge Codey found that the defendant was attempting to create a ground for appeal out of whole cloth.

> It's just this Court's opinion that Mr. Scabone in a blatant and desperate attempt to preserve an appealable issue because I feel that his confidence is waning as to his likelihood of not being found guilty by this jury is just trying to preserve an appealable issue for the Appellate Division. I see absolutely no merit in his complaint regarding the services of Mr. McLaughlin, who is an experienced attorney {and} has done an excellent job for him during the course of this case, has kept out large portions of evidence under various rulings that have been issued by the Court, and he's done a good job for Mr. Scabone. So I see absolutely no merit in his request.
>
> (5T10-5 to 16).

Defendant was in the best position to know whether his son could provide exculpatory evidence. It is far-fetched to believe that this defendant who took an active role in discussing his defense with counsel would not have informed and pressed his lawyer about presenting Tito as a witness if, in fact, he could have exculpated the defendant. Also, it is far-fetched to believe that this defendant would have given his attorney rave reviews at the time of sentencing if he had dropped the pursuit of Tito's allegedly exculpatory testimony like a hot potato.

The compelling evidence showed that the defendant stabbed his wife, mother-in-law and sister-in-law. If Tito were present, he saw his loved ones killed at the hands of his own father. The specter of the defendant's son recounting his

observation of his own father butchering Tito's mother, grandmother and aunt to death would have sickened the jury.

Regarding the alibi, even post-conviction relief counsel had "not been able to determine {from the defendant} who these alibi witnesses were." (9T14-24 to 15-7). Likewise, there is not a hint of evidence that the defendant ever advised his trial lawyer before or during trial of the alibi witnesses. Thus, his claim must fail. State v. Gonzalez, 223 N.J.Super. 377, 391 (App. Div. 1988), certif. den., 111 N.J. 589 (1988). As was stated in Fritz, supra at 64, "We can dispose of defendant's claim based on absent witnesses fairly easily. The witnesses have never been identified and their potential testimony has never been disclosed. The case law makes clear that such purely speculative deficiencies in representation are insufficient to justify reversal." Also, presenting an alibi "in this case in which there were no eyewitnesses connecting {the defendant} to the crime" may have "caused the jury to focus its attention on {a} defense that seemed contrived rather than on the possible weaknesses of the State's case." Diggs v. Owens, 833 F.2d 489, 446 (3rd Cir. 1987), cert. den., 485 U.S. 979 (1989).

The same can be said of the phantom witnesses the trial lawyer allegedly should have interviewed - "purely speculative deficiencies in representation are insufficient to justify reversal." Fritz, supra, at 64. A defendant must demonstrate "how specific errors of counsel undermined the

reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659, n. 26 (1984).

It strains credibility that defense counsel, who had retained an arson expert and presented Agent Alvarez as a witness, would not have interviewed all available witnesses possessing potentially helpful information to the defense. Regarding Mr. Ramirez, there is no hint of evidence, including the defendant's own testimony, that Mr. Ramirez was with him at the time the defendant claimed to have discovered the bodies or the time shortly after that. Defendant has expressly decided not to assert the other allegations of inadequate representation which underpinned his ineffective assistance of counsel claim at the trial level. (Db4, n. 2).

Defense counsel and Judge Codey painstakingly discussed with the defendant his right to testify and not to testify. Mr. McLaughlin examined both options with the defendant. (5T2-5 to 22; 5T6-6 to 24; 5T7-7 to 8-12). Defendant decided to testify.

Defendant portrayed himself as a wily character who collected unemployment benefits while he was working, cheated on his wife and used money his mother-in-law had given him to date other women. Defendant made himself unlikable. The defense attorney used this to the defendant's advantage and urged in his summation:

> {H}e's a stupid, tricky, artful deceitful man.
>
> ...

> If he's lying to you, why isn't he smart enough not to tell you those things? Could be because he's trying to tell you the truth as he remembers it. It could just be that way.
>
> (6T24-19 to 20; 6T25-4 to 6).

Asserting any other defense, especially one which was necessarily hinged on the factual predicate that the defendant killed the victims, would have eviscerated the defense that some phantom interloper who escaped because of sloppy police work killed the victims. The underpinning of the defendant's argument - that his attorney was obliged to assert meritless claims - is eviscerated by case law which has stood without exception for eons that he was not entitled to have his lawyer assert frivolous arguments on his behalf. "The likelihood of success of {an argument}...is directly relevant to the question of whether the failure to make it constitutes inadequate assistance of counsel." United States v. Madewell, 967 F.2d 301, 304 (7th Cir. 1990). "No party has the right to have advanced on his behalf contentions that are palpably and clearly unmeritorious." State v. Kyles, 132 N.J.Super. 397, 401 (App. Div. 1975); State v. Love, 233 N.J.Super. 38, 45 (App. Div. 1989), certif. den., 118 N.J. 188 (1989).

Courts examine the overall performance of counsel in determining whether or not he or she was effective. State v. Martini, 131 N.J. 176, 322-323 (1992) (counsel made several pretrial motions, engaged in a fruitful voir dire with jurors, presented evidence, including expert testimony, to support defenses); State v. Orlando, 136 N.J.Super. 116, 136-137 (App.

Div. 1993), certif. den., 136 N.J. 30 (1994) (counsel conducted extensive cross-examination, zealously argued for the exclusion of the pre-trial photo identification and argued that the gun used was not real).

In this case, defense counsel urged that the police had engaged in a witch hunt and did a shoddy investigation of the murders.

> What has happened is the State has accumulated a mass of gossip for you, a mass of angry statements from relatives, people who have reasons to want to cut corners on you, and they haven't given you any proof.
>
> They've thrown a lot of mud at Mr. Scabone, and you have anger, and anger and anger as the mud started to splash off them.
>
> (6T6-16 to 22).

Building on this theme of comparing the defendant's trial to the Salem witch burnings and the McCarthy hearings (6T7-25 to 8-17), the defense lawyer maintained:

> Give (Mr. Silva) a chance to trash Mr. Scabone hours after you've been told he's the one who did it, and they did, and they did. Don't ever get your sister a little mad at you because she could be sitting in that chair. It's just that easy. You could be burning at the stake in the 1700's. It's just that easy.
>
> (6T23-1 to 6).

Regarding the so-called shoddy investigation, defense counsel asserted:

> I said to you these three women weren't good enough to get a decent investigation. They were immigrants from another country.
>
> ...
>
> They lived on Bloomfield Avenue in Newark. They didn't live at some address in Short Hills. They got the bargain basement investigation. They got

everything bargain basement until it was time to get these witnesses involved in here and get Mr. Scabone convicted, and then the purse strings opened up. Amazing, isn't it?

(6T11-9 to 25).

Later, the defense attorney observed, "These people are gone. There's a guy that lives there with them and he's gone. End of case. Another case solved by the crack Homicide Unit or the crack Arson Squad. Close the books on it." (6T21-7 to 10). "Another case solved in minutes, minutes." (6T22-1). On cross-examination of arson investigator Captain Joseph A. Perez, counsel established that no other suspects were investigated. (9T18-18 to 24).

Defense counsel attempted to besmirch the credibility of Mr. Delsid and Deputy Chief Bishof primarily by urging the jury that they were money hungry and more than willing to take from the cash cow, the State. (1T76-3 to 78-16; 1T115-5 to 117-17; 6T12-1 to 14). "Boy again, they're throwing mud at the guy. They're paying people to do it, and you're mad at {the defendant}." (6T12-16 to 17). The defense lawyer additionally pointed out that the illegal alien, Mr. Delsid, lied because he was fearful of deportation. (1T114-12 to 115-14; 1T119-12 to 120-12; 1T121-5 to 123-25; 2T8-7 to 10-18; 6T19-12 to 5). On cross-examination, Mr. Delsid said, "I told {the police} what they wanted to hear about." (1T12-25).

To further undercut Mr. Delsid's testimony, defense counsel highlighted the testimony that he elicited from Mr. Digiacomo that the defendant was quiet when he and Mr. Guerrero

asked for their paychecks to advance his argument that the defendant was still in shock as a result of discovering his loved ones' dead bodies and to attack Mr. Delsid's testimony. (4T36-17 to 38-2; 6T13-2 to 14; 6T33-9 to 16). On cross-examination, the defense lawyer attempted to establish that Ms. Gonzalez and Mr. Silva were distraught relatives of the victims who never took the defendant's threats seriously nor reported them to the police but wanted justice "wherever it is." (2T65-25 to 62-3; 2T65-7 to 67-18; 2T74-24 to 75-8; 6T24-2 to 16).

Defense counsel portrayed Ms. Camacho as a liar who wanted to divorce the defendant and place him in jail to avoid paying any support to him.

> You want a divorce from your husband. You know that he's wanted in the United States. What kind of financial settlement is he going to get from you from an American jail? You have a business, and he's not doing so well. What kind of custody and visitation is he going to get from an American jail? Boy, that's the best divorce available, isn't it? You send him to jail, and you get to keep my business, my money, my kids and everything else I want.
>
> (6T9-20 to 10-3).

Agent Alvarez testified for the defense and revealed, in contrast to Ms. Camacho, that the defendant was not aware that Ms. Camacho knew of the killings and Ms. Camacho told the agent of her intention to divorce the defendant. (3T71-4 to 6; 3T72-5 to 9; 5T86-2 to 25).

> I don't want to linger too much on Ms. Camacho. There's no doubt about it, Ms. Camacho put in a very good performance. It was touching. But it was lies, and I can't demonstrate anything any more forcefully than after all that what possible reason could she

have for telling the FBI agent he doesn't know that I know.

(6T30-24 to 31-4).

In sum, "She knew it all along. It wasn't until she got tired of this guy that she decided to act on it." (6T31-25 to 32-2).

Beyond that, counsel consulted with an arson expert (1T3-1 to 15), and successfully convinced Judge Codey to severely limit the amount of N.J.R.E. 404(b) other bad acts evidence which the State could elicit from Ms. Camacho. (3T20-9 to 32-8). Also, for at least one hour, defense counsel discussed with the defendant the lesser-included offenses and whether it is advisable that the defense request that they be charged (5T103-21 to 109-3), and argued that the marital privilege should prevent Ms. Camacho from testifying. (3T35-10 to 22).

Judge Codey observed, "Mr. McLaughlin is a very vigilant, and experienced trial attorney. I know he has conferred with you at every one of our breaks. He's always in the holding cell going over all the facts in your testimony." (5T4-18 to 21). Courts must "avoid second-guessing defense counsel's tactical decisions and viewing those decisions under the distorting effects of hindsight." Marshall, supra, at 157 (internal quotations marks omitted).

* **NO EVIDENTIARY HEARING WAS NECESSARY BECAUSE ALL OF THE ISSUES RAISED BY THE DEFENDANT WERE ABLE TO BE RESOLVED BY REVIEWING THE TRIAL RECORD ARE TOO SPECULATIVE.**

Defendant overlooks that all of his claims of ineffective assistance of counsel are grounded on what

transpired at trial, thus no evidentiary hearing was necessary. An evidentiary hearing is not to be held unless there is a dispute of fact respecting matters which are not of record. State v. Preciose, 129 N.J. 451, 462 (1992). As was explained in State v. Flores, 228 N.J.Super. 586, 589 (App. Div. 1988), certif. den., 115 N.J. 78 (1989), "{W}e find nothing in R. 3:22-1 et seq. requiring that a hearing be conducted on a post-conviction relief petition."

As detailed supra, defendant has not sustained his burden of proving by a preponderance of the credible evidence that he is entitled to post-conviction relief, thus he was not entitled to an evidentiary hearing.

> To sustain that burden, specific facts must be alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision. A court reviewing a petition that does not allege facts sufficient to sustain that burden of proof should not jump to its own conclusions regarding the factual circumstances of the case.
>
> State v. Mitchell, 126 N.J. 565, 579 (1992).

No evidentiary hearing was necessary as all issues raised by the defendant on post-conviction relief were able to be resolved by reviewing the trial record or were simply too speculative. As was explained in Marshall, II, supra at 158:

> We observe, however, that there is a pragmatic dimension in the PCR court's determination. If the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, then an evidentiary hearing need not be granted.
>
> (Citations omitted).

It is unjust to microscopically examine trial defense counsel's actions four years after conviction, then nitpick his strategic decisions and elevate any phantom error into a constitutional violation impairing the fairness of the trial. As was explicated in State v. White, 260 N.J.Super. 531, 540 (App. Div. 1992), certif. den., 133 N.J. 436 (1993):

> It would tear at the very roots of trial counsel's responsibility were we to routinely question the soundness of strategic decisions long after they were made. An attorney's strategic and tactical determinations must have consequences. If such decisions can later be challenged by a disgruntled litigant and a reversal obtained, trial counsel will have little motivation to carefully consider the alternative courses he or she may take. Indeed, the client, and derivatively the attorney, may ultimately derive a benefit by virtue of a tactical blunder.

"Every book must have its final chapter. This saga too must end." Id. at 591. Defendant's own epic, authored by the defendant's own handiwork the day he mercilessly stabbed his wife, mother-in-law and sister-in-law a total of 93 times must also end. As Judge Codey observed:

> Mr. McLaughlin gave {the defendant} a million dollar{} defense in this case. The only person {to blame}, Mr. Scabone is looking for someone to blame{,} for a guilty verdict in this case is his own testimony from the witness stand because if anybody sunk his own ship, Mr. Scabone did an admirable job in front of the jury laughing and joking his way to a long custodial sentence and he will have a long time to think about what he did during the course of this trial and what he did back in 1981.
>
> (8T30-19 to 31-2).

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Law Division's order denying post-conviction relief be affirmed.

Respectfully submitted,

DONALD C. CAMPOLO
DEPUTY ATTORNEY GENERAL/
ACTING ESSEX COUNTY PROSECUTOR

Barbara G. Rosenkrans

BARBARA A. ROSENKRANS
SPECIAL DEPUTY ATTORNEY GENERAL
APPELLATE SECTION

BAR:md
DATE: December 1, 1997

(SCABONE2.BRF/briefs.d)

A 1491-96T4

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
IND. NO. 4225-80
APP. DIV. NO. A-1491-96T4

STATE OF NEW JERSEY, :

Complainant, :

-vs- :

ALBERTO SCABONE, :

Defendant. :

- - - - - - - - - - - - - - - - :

TRANSCRIPT
OF
POST CONVICTION
RELIEF MOTION

FILED
APPELLATE DIVISION
NOV 27 1996

DATE:
Thursday, September 19, 1996
PLACE:
Essex County Courthouse
Newark, New Jersey 07102

B E F O R E :

THE HONORABLE EUGENE J. CODEY, JR., J.S.C.

TRANSCRIPT ORDERED BY:

DEBORAH C. COLLINS, ESQ.

REC'D
APPELLATE DIVISION
NOV 27 1996

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

THOMAS HUTH, ESQ.
Assistant Prosecutor
For the State.

JACK GERBER, ESQ.
For the Defendant.

LAUREN EGBERT, Interpreter

REPORTED BY:
FRANCES L. FORBES, C.S.R.
Official Court Reporter

FORM 89A PENNSYLVANIA 1-800-631-6989

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I N D E X

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THE COURT: Mr. Scabone, why don't you have a seat.

Our official Interpreter, do you need the headphones on? Is that what you're requesting?

MS EGBERT: Yes.

THE COURT: We're going to put a caption on. This is State versus Alberto Scabono on Indictment Number 4223-80. It's a motion for post conviction relief.

Representing Mr. Scabone is Mr. Jack Gerber, private attorney retained by the Essex County Public Defender's Office Appellate Section, to handle this matter.

Representing the Essex County Prosecutor's Office, Thomas Huth, who tried the case for the State of New Jersey.

Mr. Scabone was found guilty after a jury trial in front of me of the passion provocation manslaughter of his wife, Monica Scabone, and the purposeful and knowing murder of his sister-in-law, Yannet Esteves, and his mother-in-law, Norma Esteves.

He was also found guilty of second degree arson. I sentenced Mr. Scabone to the maximum under the pre-2C Criminal Code, 50 years in State Prison, with a 40 year period of parole ineligibility. All the sentences that were imposed ran consecutively to each other.

The matter went up on appeal, and the verdict was upheld by the Appellate Division.

This post conviction relief motion raises five

points. Number one, that his petition isn't procedurally barred, because the issues were not previously raised on appeal, or could not have been raised on direct appeal.

Mr. Scabone also feels he's entitled to a hearing to establish a claim of ineffective assistance of his trial counsel, Mr. McLaughlin.

Point three is that his Constitutional rights were violated because his attorney failed to develop an adequate trial strategy.

Point number four was that the Court did not charge the jury as to the impact of imperfect self-defense, and Mr. Scabone also feels he was denied the effective assistance of his counsel on appeal.

Jack Gerber, I guess this is your petition. Anything you'd like to supplement the record with, in the way of any other testimony or records, supplemental briefs, motions?

MR. GERBER: That's addressed to me, Judge?

THE COURT: Well, I guess to you and to Mr. Scabone.

MR. GERBER: Judge, I have reviewed the file in the matter, the trial transcripts, the petitions, all the matters on direct appeal. The only thing that I would add to the Court's review of the procedural history is that the sentence was also affirmed, and the matter then went to the petition for certification, and that was denied.

I've communicated with Mr. Scabone in terms of ar-

ticulating anything more specifically, and have not been able to attain anything more articulate than the brief and the petition that he submitted. So, therefore, I will have to address the matters that are set out there; notwithstanding under State versus Morrison I also have a duty to make an independent analysis and evaluation of the case, and I find nothing from my perspective in there that seems not to have been raised on direct appeal that would have been under the standard of Strickland versus Washington, or even more importantly, under United States versus Cronic, where prejudice is presumed because of the nature of the defect, such as something in the charge, which is hardly found to be saved by harmless error, and analysis under State versus Reddick, and a whole bunch of other cases the Court is aware of.

With that, I would have nothing to add to these moving papers, except to the extent of addressing them to the Court orally, and perhaps I could ask Mr. Scabone whether he had anything since our last communication.

THE COURT: That would be fine.

MR. GERBER: Thank you for your courtesy, Judge.

Thank you, Judge, for that courtesy.

I've been advised by my client, Judge, that notwithstanding that Mr. Scabone has difficulty speaking English; nonetheless, he is quite capable of reading English. So,

therefore, certain matters that were addressed to Mr. Scabone in my correspondence with him in English, he has personally, physically read those letters personally in English, as well as having had those letters read to him by someone else. That's quite important because the question then becomes whether the contents of the petition for post conviction relief are matters to which he consents, and his knowledge and -- of, although it is the work of someone else, notwithstanding he had the capacity to participate in the contents of that petition and to have read it. Therefore, to have assented to its contents. That's quite material in terms of my being effective, as well as the representation which he's entitled to.

With that, Judge, if I may address the contents of the petition?

THE COURT: Go right ahead.

MR. GERBER: Under point one, beginning at page nine, and following the petition through, because I think perhaps that's the best footpath through the matter. Mr. Scabone raises the issue at page nine that not procedurally barred, certainly this is the five years, and I see no procedural bar in terms of the time limitations as to whether there will be a substantive limitation that would be a matter to be seen at the end of the case in terms of the Court's findings of facts and conclusions of law. Nonetheless, within the rubric

of ineffective assistance of counsel, we think there's a wide latitude under Preciose in terms of addressing the merits of the case.

At page 11, more specifically, Judge, he raises under essentially the second paragraph, the ineffective assistance of counsel claim, that essentially the failure to call one witness -- and in reading that sentence, unfortunately, in the communicating with Mr. Scabone, and I think it's important in my little predicate statement, that he is able to read my letters, and notwithstanding, although he may not be able to write English or speak English, he can certainly then articulate in terms of my writing to him a response, a responsive response, if I may use the word.

So that the indefinite article one, the defendant, unfortunately, has failed to provide at least to that, who that one witness would be. I have asked Mr. Scabone who that witness might be, so that therefore I can then go out and conduct a necessary investigation and perhaps it might be quite material. Unfortunately, I have no further information as to that forthcoming. So perhaps sometime in the future that may materialize, and we would reserve for a subsequent petition for post conviction relief, that matter.

The second point, Judge, there was no sufficient record as to why the trial counselor erroneously exposed the jury to the defendant's prior record, when there was none I'm

aware of, having read this case, that there is any record that was ever introduced in this matter as to any prior convictions. There's no Sands. Certainly there was testimony that he was --

MS. EGBERT: Sorry. The Interpreter is getting about three sentences behind.

MR. GERBER: My apologies, Judge. I'll go slower.

MS. EGBERT: The Interpreter is going to need repetition of the last little piece.

MR. GERBER: Sure.

THE COURT: We can do it from your memory, or have it read back.

MR. GERBER: Have it read back.

(Reporter reads back the last couple of sentences.)

MR. GERBER: In jail in Mexico, and it was through that that he was subsequently extradited into the United States. And the story of how that came about is fully set forth in the record.

The materiality of that, Judge, is in terms of whose work this petition is, and it is in conjunction with other inmates who have a lot of ideas of what the rules say. Hopefully, going through the rules and through the law, something might stick on the juris-prudence law, as distinct from Mr. Scabone's knowledge, and to be able to articulate this petition. Accordingly, I don't know how that argument can be

sustained. Certainly, I'm not arguing against my client, but certainly I have to be responsive to the record as well, and I'm not aware of anything in it.

Additionally, on that same page, Judge, he raises a third point. There's not sufficient record to explain why trial counsel failed to make a motion to set aside the verdict on the ground that the verdict was against the weight of the evidence. However, in my reading of the transcript, counsel did make such a motion. It appears in what I've numbered page 62 -- page 62, line 14 through page 64, line 11, which is followed immediately upon the State's resting its case.

Again, someone having read the transcript would have been thoroughly familiar with the fact that that appears in the record. That raises, in addition to what I've just said, as to whether someone else is preparing this petition who has never read the case and is looking for things to argue, as versus someone who has read the record and recognizes things which cannot be supported from the record.

There was, additionally, in that same paragraph, Judge, the closing sentence: There is not a sufficient record to explain why trial counsel failed to make an objection to the prejudicial comments made by the Prosecutor.

He does not set out in particularity as, of course, is well-rehearsed and well-reviewed in Ramseur and a whole

bunch of other cases, particular statements when were so prejudicial that warranted reversal.

Unfortunately, Mr. Scabone has not come forward to focus on that, and having read the summation, I don't recall any that would have reached that criteria. Under B, the petitioner represents exceptional circumstances resulting in a fundamental injustice. Certainly, he cites the right case, State versus Mitchell under the standard of ineffective assistance of counsel, Strickland versus Washington, I believe that's 466 U.S., as adopted in State versus Fritz at 105 N.J. 42, 1987.

There's a two-prong test. One, that the defendant must show some conduct that counsel should have done or did not do, being either the case, and that that conduct was prejudicial.

Certainly in all the cases that raise ineffective assistance of counsel, as well as required by Rule 3:22, the defendant must set out with particularity what it is that counsel has done.

Under United States versus Cronic, often what is done is so clearly noted on the record in and of itself for there to request a Wade hearing, the failure to investigate is an insanity defense when there's a long history of psychosis; those matters in and of themselves stand for prejudice of the -- unfortunately, Mr. Scabone has not been able to

articulate to me that matter which I can present to the Court; and, therefore, argue with specificity was prejudicial. Therefore, I must leave it to the matter as set out.

Clearly, the person who has prepared the legal matters in this case, reviews them rather closely. However, they do not follow with the particularity that's necessary to set out the facts which aren't at issue. I, unfortunately, have not been able to adduce from Mr. Scabone, or to whoever he participates in the preparation, any more particularity than is set out in the petition.

Under point two, defendant claims, as the Court has stated, is entitled to a hearing to assess the claim of ineffective assistance of trial counsel. Clearly, in State versus Preciose, the Supreme Court addressed that there needs to be at least some certification, or affidavits from the individuals who would testify as to the standards that they would apply at that trial. That would provide at least a prima facie basis for an evidentiary hearing.

Unfortunately, Mr. Scabone has provided no affidavits, nor certifications, nor a listing of witnesses, where they can be found, who they are, so that I can then go out and take statements from those individuals who might therefore come before the Court and adduce testimony that would be relevant and material in seeking the reversal of his conviction. Therefore, I would then have to go on to what is set

out in the petition itself.

Certainly, the statements of the law are correct, but the factual foundation upon which this Court could then rule to hold the evidentiary hearing, I believe somewhat wanting at this point, and we reserve sometime in the future, when that material would materialize, to file a subsequent petition.

Under the third point, the denial of ineffective assistance of counsel, Mr. Scabone addresses the failure to have a trial strategy. Interestingly enough, although I'll address that under the self-defense, because the Court specifically was concerned at the time of trial about the insanity defense, and specifically addressed the record on that.

The strategy in this matter, of course, was to attack the credibility of the witnesses. Mr. Scabone testified on his own behalf. The issue of alibi, if that were to have been an issue, would have been extremely close, because he did, at his own testimony, admittedly go into the house at the time of the blaze. However, he stated that he was in Elizabeth on another matter at the time allegedly when the blaze or the fire -- the arson would have been started.

However, an alibi defense was not introduced, having himself testify to being at the scene of the crime.

The other strategy, which I will address in a moment, the other defenses such as incapacity or incompetency,

were not viable in this case. Although he claims not having an effective strategy, the strategy in this case, as on most and many defense cases, are to attack the credibility, and perhaps during the course of the trial there might be a flaw that might open up the crack of the Grand Coulee Dam. That did not materialize.

Secondly, this would be at page 17, as the argument set out there, the failure to adequately investigate the case to be more effective cross examination. Unfortunately, my communications with Mr. Scabone has not been fruitful in telling me what additional investigation was necessary. I believe there's adequate voir dire, as well as discussion between the Court and counsel, as well as the outside arson expert in this case putting it together many years later, all the material witnesses turned out to be, notwithstanding, they were far-flung over the Western Hemisphere, all alive. The original investigating fire expert was still alive, retired, and now in private consultation, and apparently came to the trial and recalled the case quite specifically.

Unfortunately, I have not been provided with anything that I could have investigated so that I could then bring to the Court in terms of meeting my burden for a new trial.

Third, the petitioner says that counsel is ineffective for failure to conduct a Wade hearing.

Having gone through this case -- and I am hard-put t[illegible]ind out what the Wade issue would be. Clearly, the people who knew testified in this case were working companions of him; people whom he had known for years. Certainly, some I think, for months and weeks in terms of co-workers.

This is not a case about photographic identification. This is not a case where we're trying to find out whether the street lights were on or off, so that the vision of the victim and so forth could be better than it otherwise might be.

There is no undue suggestiveness as Simmons and all the other identification cases where a Wade issue would have been required under suggestiveness by the State in terms of proffering a candidate for being the suspect and the defendant in this case. He has not been able to -- having explained that to him, I've not been forthcoming in terms of articulating exactly what he had in mind. I don't see that issue in this case. Certainly, somebody saw it and read the law about it, because it indicates or suggests that perhaps they hadn't read the transcript, or if they had, they didn't understand what Wade was all about in terms of the context of the case. That would have been page 20, Judge, to the failure to present alibi witnesses.

Unfortunately, my communications with Mr. Scabone have not been able to provide who these alibi witnesses might

have been. Certainly, from time to time and from case to case, there are witnesses out there who can be found. Unfortunately, the State found all of the witnesses on their behalf; notwithstanding, that they were far-flung over the Western Hemisphere, as the Court is well aware of.

I have not been able to determine who these alibi witnesses were.

Additionally, Mr. Scabone, in his own testimony, admits being at the scene. The question then becomes the sliver of the time frame in which he was there at the time the incident started. Certainly, from the testimony, he was there shortly after trying to put it out with a splash of milk, as the Court will recall. Notwithstanding that comment, I have not been provided, unfortunately, so that I can meet my burden to him to investigate those matters further.

The defendant cites page 21 of his petition State versus Savage. Certainly, I'm aware, as the Court was, the case of insanity being introduced at trial, and communicated with Mr. Scabone.

The problem with insanity, as the Court is aware, as anybody familiar with criminal law, is that in order to introduce the insanity as a defense, defendant admits the wrongdoing.

The question then is, does he meet the standard of insanity? Does he understand the nature of the quality of

the act? And if he did, the difference between right and wrong.

Mr. Scabone, of course, never admitted criminal liability for the act. So the foundation for an insanity defense, therefore, is never breached. So the first step with moving into that as a defense, which is really what State versus Savage is about, because of the psychosis and the manner of suitcases and body and everything else, and counsel's failure to investigate material which apparently existed for a long time, thoroughly well-documented, and a reasonable attorney having been put on the trail, would have followed through, and that was the basis of reversal in terms of ineffective assistance of counsel in that case.

In this case because it presents great problematic issues in terms of Mr. Scabone's view of the case, his own testimony, and therefore directly would conflict with the law that would be available to him.

The Court itself was particularly concerned about that, in the remarks as it drew to the end of the case, specifically addressing that in not one word of insanity, but about this case; although he had heard that it was he -- he being the Court -- the Court heard matters about being in a psychiatric hospital in Central America. Nothing else was further developed by that, and of course, from the strategic point of view, certainly counsel would have advised Mr.

Scabone that in order to enter the insanity, he would have to admit this.

Now, if you are acquitted of the case, it doesn't mean that you go home. It means you go to perhaps the Forensic Psychiatric Hospital, formerly known as the Vroom Building. I think it's still called that, something -- and until you recover, you may or may not go home.

Point number four was the failure to charge diminished capacity.

Unfortunately, the argument and the presentation as to diminished capacity is mixed. In fact, here again my introductory remarks are remarks as to whether this is Mr. Scabone's work or somebody else's work, becomes quite poignant at this point, because he addresses, on page 23, as to the passion provocation, and reverses the order of who exactly was the victim in the passion provocation, which turns out to be Mr. Scabone's wife. It is the mother and the sister-in-law who are the victims in the knowing or purposeful murder.

The petition, as it presents us, is exactly the opposite, which raises a question of whether the person who prepared this had ever read the transcripts; and if they had ever read them, understood them.

Clearly, that was the essence of one of the most powerful pieces of testimony, I think, that anybody had ever

presented on their own behalf, and the jury actually did find credible Mr. Scabone's testimony as to the knife being above the bedboard, and an argument being thereabouts, which induced the lowering of a knowing or purposeful murder to a passion provocation first degree. It was quite a powerful piece of testimony. Obviously, the jury was satisfied as it being beyond a reasonable doubt sufficient to lower that.

The problem then becomes with diminished capacity, is a particular element which applies not only to certain kinds of offenses, not to knowing and purposeful murder, but to the elements that would go to that, and; namely, to the reckless conduct of -- that it might occur in the causation essentially, as well as the precipitating matters that resulted in the death, converting it from murder into an aggravated manslaughter.

The Court did charge, in fact, passion provocation as to Monica, and the jury did find as a fact that the passion provocation manslaughter did apply as to her.

The passion provocation manslaughter was never addressed in his testimony, nor in summation, or, in fact, in the entire facts of the case as to the two other victims, because there was never any altercation. There was never any passion provocation or self-defense, or any other matter directed with them to which Mr. Scabone testified, or any other evidence adduced at trial that would provide a factual

basis as to a charge as to them, even with Mr. Scabone himself having testified.

Again, I have addressed the fact that the passion provocation manslaughter, knowing and purposeful murder victims in this petition are reversed, which raises certain suspect quality as to who wrote it, and responsibility.

Notwithstanding, the Court having given me the courtesy previously, Mr. Scabone acknowledges that he has read this petition and he assents to its contents.

The issue on page 24 as to the imperfect self-defense, I believe the law, unfortunately, in this case there was no evidence in the case to support even a perfect self-defense, much less an imperfect self-defense.

My understanding of the law -- and I'm sure the Court will correct me in its comments at the end, is that when there is an incorrect appraisal of the harm coming to the defendant, it misperceives the capacity of the actor in terms of either the severity of the injury he's about to inflict; whether or not the provocation in itself rises to the level of something higher than mere words, and that has been softened somewhat on the edges; whether the weapon that the actor has itself the capacity to inflict serious bodily injury, whether the weapon that the defendant himself uses is of a higher degree or order than that which the actor uses against him; all of these things, I believe, are part of the

calculus in determining whether the imperfect self-defense can be raised. So that it would lessen the severity of the offense to which the defendant might be found, as well as the Court's burden and obligation to charge lesser included offenses.

There is no evidence in this case of self-defense except insofar as it might be considered in terms of the passion provocation. But, clearly, that was resolved in his favor.

There's no evidence in this case, nor has Mr. Scabone been able to articulate to me the foundation for that self-defense, as it might apply to the two other victims; namely, his sister-in-law and the mother.

Finally, as to point five, the ineffective appellate counsel, and that the appellate counsel failed to raise ineffective assistance claims. Unfortunately, although he does cite State versus Morrison, which applies Strickland versus Washington then to appellate counsel, he has not come forward with any particularities as to what claims or what issues counsel failed to raise.

Myself having gone through this case, and the defendant, of course, having testified, I could not find any on my own that are arguable. Certainly, the rules for petition for post conviction relief do not place on me the burden to argue meritorious claims. They only place upon me the

burden to argue at least claims that Mr. Scabone advances.

Under Morrison I would have the independent duty to look through there and find, I think, meritorious claims in addition to anything that he would have.

I find not only no meritorious claims, but I do not find any arguable claims. However, the comment that I addressed to Mr. Scabone is, unfortunately, was from his perspective a sufficient basis of testimony that he could have continued his testimony as to passion provocation as it applied to Monica, so he could have benefited from the same kind of testimony as to the two remaining victims. That would have been a quantitative leap in terms of sentencing reduction. However, apparently that was not in the case. He testified under oath to tell the truth. Accordingly, he did that, as to his perspective.

There's no evidence to support, in his testimony, those charges to lesser included offenses.

May I have a moment with my client, Judge?

THE COURT: Jack Gerber, back to you.

MR. GERBER: Thank you for your courtesy. I think that adequately sets out defendant's position. Thank you, Judge.

THE COURT: Thomas Huth, anything for the Essex County Prosecutor's Office?

MR. HUTH: Judge, I'm going to rely on my brief that

was submitted to the Court. I'll just very briefly, Judge, lay out basically the case law on ineffective assistance of counsel.

Clearly, in this case there was a defense strategy from the beginning of the trial through the end. Witnesses were cross examined primarily as to the credibility; specifically, the family members of the defendant -- strike that.

Of the decedents' were cross examined as to their bias, possible bias against the defendant, because of the fact that they did lose family members, allegedly at the hands of the defendant.

In addition, Judge, you also had a lay witness, who, in order to procure his testimony because he was a Honduran citizen, a Honduran national, he refused to come to the United States unless we compensated him for the monetary loss that he would sustain because of a lost coffee crop. So, essentially, the Essex County Prosecutor's Office had to give him $2,000 in order for him to come up and to testify. That was all laid out to the defense, and I remember my adversary had quite a bit of cross examination on that point as to how that would affect his credibility. So from the getgo, Judge, that was clearly, clearly a strategy in this particular trial. It was to attack the credibility of the witnesses, to break down their believability, and then to build in the jury's minds a reasonable doubt as to the guilt of this par-

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ticular defendant.

It should also be noted that this defendant testified at his own trial, and when he testified at his own trial, for whatever reason he did place himself at the scene of the triple homicide, at the scene of the arson. He acknowledged actually being there and seeing the actual flames. He said that he tried to douse the fire with a quart of milk that he had just bought at the store.

Given that, Judge, the defense lawyer then had to substantially shift gears in presenting a plausible argument to the jury, and he did, in fact, present a plausible argument to the jury; gave a fine summation. In fact, he kept the jury out for two and a half days. So, Judge, I submit that a careful examination of the trial record in this case could lead to no other conclusion than that this particular defendant did, indeed, have an effective legal counsel. All avenues of defense were explored. All witnesses were cross examined. Defense counsel was very careful with the Rule 55 issue. There was a lot of information that came from the defendant's second wife as to prior threats and prior spousal abuse. He was able to effectively keep the Rule 55 evidence that I sought to bring into the case, the Court would not allow me to bring it into the case because of what defense counsel did in his strategy.

So, Judge, based upon the law, when you see what

Strickland says; when you see what Cronic says; when you see what all the relevant cases involving ineffective assistance of counsel, it's clear that this defendant did have an effective assistance of counsel at his trial.

So I would respectfully request that the Court deny the post conviction relief motion. Thank you.

THE COURT: Okay. Mr. Scabone, anything you want to say?

MR. SCABONE (through Interpreter Lauren Eybert): I think that I never said that Mr. McLaughlin was a bad lawyer, but in my case he didn't do a good defense.

My wife lied about everything, and that could have been proven by documents. There were many things that were not touched upon.

First, I could have had my son come here to testify, and I could have presented other witnesses also, like Marguerito; like Marguerito who had given me the Mexican birth certificate.

There were many points that could have been proven by papers, not just talking.

I never -- I never said that he was a bad lawyer, and I say that again. In my case he didn't represent me well. There were dates to mention. There were dates that my wife said that were wrong. They were wrong, and that could have been shown with papers. The passport itself said that.

Um, truthfully, I don't know if you yourself checked any passport, you could see that the dates were mistaken. That's my point. That's what I believe. That's what I feel. Yes.

And when Mr. McLaughlin, he defended me well, but in this case he didn't do what he had to have done. I don't say that I was going to wind up going free, but I would have desired something more in a defense. I don't know if I am expressing myself well, because I knew who was lying and who wasn't.

My wife said when --

MS. EGBERT: I'm sorry. The Interpreter is going to ask for a repetition, please.

MR. SCABONE: To question -- to mention something my wife could send me a letter saying she lied. She didn't want to come. She's the one who sends me money in prison and all that, and I never wrote to her again. I never wrote to her again but she send money. She still does.

If you think I'm lying here, I have papers. I have the checks. But the point is this: I think that Mr. McLaughlin in my defense, he wasn't very -- he wasn't very strong. And the points that you could obtain through papers -- I don't know. And you also have to look at the fact that he only saw me three times in nine months when I was in the jail. I don't know really if they limit him. I don't know if the Court really limits him.

I'm telling the truth, what I feel. Like I'm saying -- I'm not saying that I would have wound up going free. Right? I'm sincere. Right?

THE COURT: Okay. Mr. Scabone, why don't you have a seat.

Mr. Scabone, I'm going to do some work on this. We're going to issue an opinion, and you can expect to receive it sometime next week. We'll have it all typed up. I'll work on it over the weekend. We'll get it out Monday, Tuesday, next week. Once you get it, you can call Mr. Gerber up and he'll let you know what the next step would be, depending on what the opinion is.

MS. EGBERT: Your Honor, the Interpreter would request repetition of who he's supposed to call.

THE COURT: Mr. Gerber.

MS. EGBERT: Okay. Thank you.

THE COURT: And we're going to let you go back with the State men today. Thank you, men. Sorry to keep you so late. Thank you very much.

MR. HUTH: Thank you, Judge.

MR. GERBER: Thank you for your courtesy.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
IND. NO. 4225-80
APP. DIV. NO.

STATE OF NEW JERSEY, :
Complainant, :
-vs- : CERTIFICATION
ALBERTO SCABONE, :
Defendant. :
- - - - - - - - - - - - - - - - :

I, FRANCES L. FORBES, C.S.R., License No. XI01085, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript to the best of my knowledge and ability.

Frances L Forbes

FRANCES L. FORBES, C.S.R.
Official Court Reporter
Rm. 111 Essex County Courts Building
Newark, New Jersey

Date: November 21, 1996

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