SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003753-21T4

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| STATE OF NEW JERSEY, | : | **CRIMINAL ACTION** |
| Plaintiff-Respondent, | : | On Appeal From Judgment of Conviction of the Superior Court of New Jersey, Law |
| v. | : | Division, Monmouth County |
| SCOTT A. KOLOGI, | : | Indictment No. 20-01-00067-I |
| Defendant-Appellant. | : | Sat Below: Hon. Marc C. LeMieux, J.S.C and Jury |

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# BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

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## PRELIMINARY STATEMENT

This appeal involves a conviction for four counts of murder and one count of possession of a weapon for an unlawful purpose after a jury trial. Scott Kologi was sixteen years old at the time of the homicides. Scott shot and killed his mother, father, sister and surrogate grandmother. After the shootings, sixteen year old Scott Kologi was interrogated by two detectives. In the early morning hours of January 1, 2018, Scott Kologi was interrogated by Detectives Andrea Tozzi and Michael Verdadeiro. Scott Kologi's brother, Steven, who owned the gun that was used in the shootings and just witnessed his family get murdered, acted as Scott's guardian and advised Scott to waive his Miranda rights and confess to the murders.

Scott was subsequently transferred to the Youth Detention Center ("YDC"). At YDC, Scott had several mental health evaluations and was diagnosed with autism and schizophrenia. Scott was subsequently waived to adult court.

Defendant filed a Miranda motion to challenge the admissibility of his statement to police. The Court denied Defendant's Miranda motion. At trial Scott Kologi presented a defense of Not Guilty by reason of insanity. The jury convicted Defendant of four counts of murder and one count of possession of a weapon for an unlawful purpose. Despite Scott Kologi having a documented

mental health history and being sixteen (16) years old at the time of the murders, Scott received a grossly excessive aggregate sentence of one hundred and fifty (150) years.

## PROCEDURAL HISTORY

On January 1, 2018, Scott Kologi was charged with four counts of Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3 and one count of Possession of a Firearm for an Unlawful Purpose, contrary to the provision of N.J.S.A. 2C:39-4(a). Scott Kologi was sixteen (16) years old at the time of the alleged offense. On November 13, 2019, the Honorable Richard W. English, P.J.F.P., entered an order involuntary transferring Defendant to Monmouth County Superior Court, Law Division, Criminal Part. On January 8, 2020, Scott Kologi was indicted for four counts of Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3 and one count of Possession of a Firearm for an Unlawful Purpose, contrary to the provisions of N.J.S.A. 2C:39-4(a); (Da3-6).

On December 7, 2020, Defense Counsel filed a motion to suppress Scott Kologi's statement. On January 27, 2021, the State's opposition was filed. On February 25, 2021, the Court conducted a Miranda hearing and heard the testimony of Monmouth County Prosecutor's Office Detective Andrea Tozzi and heard the oral arguments of the State and defense counsel. (1T:4-6 to 52-

16) [1]. On March 25, 2021, the Honorable Marc C. LeMieux, J.S.C. denied Appellant's Motion to Suppress Appellant's statement in violation of Miranda. (2T:3-20 to 83-21).

On April 13, 2021, Appellant filed an interlocutory appeal regarding the denial of the Motion to Suppress Appellant's statement in violation of Miranda. On May 17, 2023, the Appellate Division denied Appellant's interlocutory appeal. (Da8).

on January 14, 2022, Appellant went to trial before a Monmouth County jury. On February 23, 2022, the Jury found Appellant guilty of Count One, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing

[1] The following abbreviations will be used:
Da – Appendix for this brief
1T – Miranda Hearing dated February 25, 2021
2T – Miranda Decision dated March 25, 2021
3T – Jury Selection dated January 14, 2022
4T – Jury Selection dated January 18, 2022
5T – Jury Selection dated January 19, 2022
6T – Trial on February 9, 2022
7T – Trial on February 10, 2022
8T – Trial on February 11, 2022
9T – Trial on February 14, 2022
10T – Trial on February 15, 2022
11T – Trial of February 16, 2022
12T – Trial of February 17, 2022
13T – Trial on February 18, 2022
14T – Trial on February 22, 2022
15T – Trial on February 23, 2022
16T – Trial on February 24, 2022
17T – Trial of sentence on June 30, 2022

enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Three, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Four, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); and Count Five, Possession of a Weapon for an Unlawful Purpose, second degree, contrary to the provisions of N.J.S.A. 2C:39-4(a). (Da19).

On June 30, 2022, Appellant appeared before the Honorable Marc C. LeMieux, J.S.C. for sentencing. On Count One, Appellant was sentenced to the custody of the Commissioner of the Department of Corrections for a term of fifty (50) years pursuant to the conditions No Early Release Act and the Graves Act. (Da16-19). On Count Two, Appellant was sentenced to the custody of the Commissioner of the Department of Corrections for a term of fifty (50) years pursuant to the conditions of the No Early Release Act and the Graves Act. Id. Count Two was ran concurrent to Count One. Id. On Count Three, Appellant was sentenced to the custody of the Commissioner of the Department of Corrections for a term of fifty (50) years pursuant to the conditions of the No Early Release Act and the Graves Act. Id. Count Three ran consecutive to Counts One and Two. Id. On Count Four, Appellant was sentenced to the custody of the Commissioner of the Department of Corrections for a term of

fifty (50) years pursuant to the conditions of the No Early Release Act and the Graves Act. Id. Count Four ran consecutive to Counts Three (3) and One (1), and concurrent to Count (2). Count Five of the Indictment Merged into Counts One, Two, Three and Four for the purpose of sentencing. Id.

On July 14, 2022, the Court issued an amended Judgment of Conviction ("JOC") and instead of committing Appellant to the "Commissioner of the Department of Corrections," Appellant was sentenced to the "Custody of the Executive Director of the Juvenile Justice Commission (JJC)." (Da20). The remainder of the JOC stayed the same. (Da20-23).

On August 5, 2022, Appellant filed Notice of Appeal. (Da24-28). The following is submitted in support of his appeal.

## STATEMENT OF FACTS

On December 31, 2017, the Kologi family hosted a small gathering at 635 Wall Street in Long Branch, New Jersey to watch the ball drop New Years Eve. (6T:100-23 to 24); (6T:115-17 to 116-2). Scott Kologi, Steven Kologi, Brittany Kologi, Linda Kologi, Steven Kologi Sr., Adrian Kologi, Mary Shulz, Rafaella Bontempo, Richard Molyneaux and Michelle Molyneaux were present at the gathering. (6T:115-23 to 116-12).

Linda and Steven Kologi were the parents of Steven Kologi Jr., Brittany Kologi and Scott Kologi. (6T:101-2 to 104-18). Richard and Michelle

Molyneux are Scott Kologi's aunt and uncle that lived in a separate apartment in the basement of the Kologi home located at 635 Wall Street. (6T:107-6 to 108-1). Adrian Kologi is Scott Kologi's grandfather and Mary Shulz was Adrian Kologi's longtime girlfriend.[2](6T:108-3 to 8). Rafaella Botempto was Steven Kologi's girlfriend at the time. (6T:114-11 to 25). Scott Kologi had another sibling, Jonathan Ruiz, who did not live in the house at the time. (6T:105-3 to 9). Jonathan Ruiz was approximately five (5) years older than Steven Kologi Jr. (6T:105-10 to 11). On New December 31, 2017, Jonathan Ruiz was at the Kologi for approximately two hours during the day before leaving to go to a friend's house in Philadelphia later that night. (9T:196-16 to 197-7); (9T:198-23 to 24).

Between 9pm and 11pm, the entire family gathered in the living room and watched King Kong. (7T:137-23 to 128-8). At approximately 11:00PM, everybody was downstairs watching television or getting food in the kitchen waiting for the ball to drop on New Year's Eve. (6T:116-21 to 25). At some point, Scott went upstairs to work on a presentation for school on horticulture. (7T:308-19 to 309-5). As it got closer to midnight, Linda Kologi went upstairs to look for Scott. (6T:117-9 to 13).

[2] Mary Shulz is also referred to as Scott Kologi's grandmother although Adrian Kologi and Mary Shulz were never legally married. (_)

Scott Kologi loaded an AK-47 style firearm in his brother Steven Kologi's Jr. upstairs bedroom. (7T:313-6 to 315-1). Steven Kologi Jr. purchased the rifle from a firearms dealer approximately one year prior to the incident. (6T:123-17 to 124-2). Steven Kologi Jr. testified that he had a firearms ID card. (6T:124-4 to 6). Steven Kologi Jr. had a safe in his bedroom for the firearm, but he did not store the gun in the safe because it was starting to "rust the weapon." (6T:125-5 to 10).

Steven Kologi Jr. testified that after his mother went upstairs, he heard a gun shot and then a grunt or a moan. (6T:117-14 to 25). Scott Kologi shot his mother Linda Kologi five times. (7T:321-4 to 322-7); (9T:81-18 to 24). Linda Kologi died as a result of the gunshot wounds. (9T:82-14 to 20). After the first shot, Steven Kologi Jr. ran out the front door and Steven Kologi Sr. ran upstairs. (6T:118-6 to 11). As Steven Sr. ran upstairs, Richard and Michelle Molyneaux ran downstairs to their apartment and ran out the back door. (7T:144-13 to 145-1). As Steven Kologi Sr. was running upstairs, Scott shot his father once in the head and once in the back. (7T:324-24 to 325-3);(9T:35-12 to 21); (9T:37-21 to 38-6). Steven Kologi Sr. later died as a result of the gunshot wounds. (9T:42-1 to 25). Next, Scott went downstairs to the kitchen and shot Mary Shulz once in the abdomen and once in her wrist. (7T:322-8 to 15);(7T:325-7 to 12);(9T:65-16 to 23). Mary Shulz died as a result of the gunshot wound to the abdomen.

(9T:71-4 to 11). Brittany Kologi was sitting in a chair to the right of Scott in the kitchen. (7T:325-8 to 10). Scott turned the gun on Brittany and shot her once in the head and once in the chest. (7T:325-11 to 13); (9T:48-24 to 49-3); (9T:54-10 to 20). Scott pointed the gun at his grandfather and was going to shoot him, but Scott stated that he "snapped back to reality, so to speak." (7T:325-14 to 18). After Scott shot and killed his mother, father, sister and grandmother, he went upstairs put the gun down and waited for the police to come and arrest him. (7T:326-1 to 327).

During the shootings, Steven Kologi Jr. was standing outside the house by the front door but was able to see inside the house. (6T:118-6 to 11). Steven Kologi Jr. testified that he witnessed Scott shoot his sister Brittany Kologi three times and kill her. (6T:121-4 to 14). Steven Kologi Jr. testified that he ran from the house because Scott turned the gun in his direction. (6T:34-5 to 8);(6T:122-5 to 8). After escaping from the house, Steven Kologi Jr. called 9-1-1 for help. (6T:122- 19 to 20).

Shortly after the shooting, members from the Monmouth County Sherriff's Department and Long Branch Police Department arrived on scene. (6T:158-4 to 14). Scott was at the top of the stairs and the police asked him to show them his hands. (6T:164-11 to 15). Scott put his hands over the handrail and told the police that he did not have the rifle on him. (6T:165-8 to 11). The

police instructed Scott to walk forward to the top of the stairs; Scott complied. (6T:165-22 to 165-5). Next, Officer Wells from the Monmouth County Sherriff's Department and Officer Yoo from the Long Branch Police Department ran up the stairs and arrested Scott. (6T:166-6 to 13).

After Scott was arrested, he was taken to the Long Branch Police Department. (7T:265-19 to 266-15). Detective Tozzi testified that Scott's aunt and uncle, Richard and Michelle Molyneaux, were present at the Long Branch police station prior to a statement being taken. (1T:26-18 to 27-2). At some point on January 1, 2018, Scott's brother Jonathan Ruiz and his fiancé Tiffany Hollingsworth arrived at the Long Branch police department. (1T:28-16 to 18). Jonathan Ruiz was not present at the Kologi house at the time of the shootings. (9T:199-1 to 200-7). At approximately 2:05a.m., Detective Andrea Tozzi of the Monmouth County Prosecutor's Office and Detective Verdadeiro of the Long Branch Police Department, interrogated Scott regarding the shootings that occurred on December 31, 2022. (7T:269-22 to 270-3).

Detective Tozzi testified that, prior to interrogating Scott, she knew that Steven Jr., Scott's 20 year old brother, witnessed the shootings that took place earlier in the night. (1T 26:5-12). Despite this knowledge, Detectives Tozzi and Verdadiero asked Scott's twenty (20) year old brother Steven to sit with Scott

during the interview and act as his guardian. (1T:11-15 to 12-1)l;(7T:267-19 to 268-6).

Detective Tozzi testified that she explained to Steven that "he would be the next person in line to be the guardian for his brother" because their "parents were not with us in order to interview Scott." (1T 11:15-20). Detective Tozzi testified that prior to interrogating Scott she never gave Steven Kologi Jr. and Scott the opportunity to speak to each other in private, and she "knew that Scott had special needs" but she did not ask if Steven had special needs. (1T 30:21-25); (1T:35-8 to 11). Detective Tozzi testified that she never asked if other family members were available to act as guardian that were not present at the shooting, she never asked if there were other family members available to act as guardian who did not call 9-1-1 to report the shooting, and never asked if there were any family members who did not owned the gun that was used in the shooting that could sit and act as Scott's guardian. (1T: 31-14 to 32-1).

During the interrogation, Scott admitted to shooting and killing his mother, father, sister, and Mary Shulz. (7T:324-21 to 325-13);(8T:24-4 to 22). Scott told Detectives that "when everything was going down … it felt like I was further back in my mind." (8T:38-24 to 39-3). Scott also told Detectives that even though it felt like he wasn't physically in control, he was still able to see everything like he was watching a movie. (8T:24-11 to 15).

During the interrogation, Steven Kologi Jr. asked Scott if he would've shot him. (8T:193-21 to 25). Scott told Steven that he didn't know if he would have shot him. (8T:194-3 to 5). Scott never provided a rational explanation for why he killed his family and told Detectives that he "liked everyone." (8T:65-16 to 18).

On January 14, 2022, Scott Kologi went to trial before a Monmouth County jury. On February 23, 2022, the Jury found Appellant guilty of Count One, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Three, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); Count Four, Murder, first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1), with a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c); and Count Five, Possession of a Weapon for an Unlawful Purpose, second degree, contrary to the provisions of N.J.S.A. 2C:39-4(a). (Da9-15).

On June 30, 2022, Defendant appeared before the Honorable Marc C. LeMieux, J.S.C. for sentencing. (2T). Scott was given an aggregate sentence of one hundred and fifty (150) years. (Da 20-23).

## LEGAL ARGUMENT
## POINT I

**THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENT (1T:3-17 to 91-12); (2T:3-20 to 80 – 18)**

**A. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS BECAUSE STEVEN KOLOGI JR. HAD A CLEAR CONFLICT OF INTEREST AND COULD NOT SERVE AS DEFENDANT'S GUARDIAN UNDER THOSE CIRCUMSTANCES. (1T:29-23 to 30-7); (1T:31-14 to 32-1); (2T:50-4 to 54-11)**

"A parent or legal guardian should be present in the interrogation room, whenever possible." Presha, 163 N.J. at 315 (citing State in the Interest of S.H., 61 N.J. 108, 114-115 (1972). "Regardless of the juvenile's age, police officers must use their best efforts to locate a parent or legal guardian before beginning the interrogation." State v. Presha, 163 N.J. at 316. Courts have recognized that another level of protection is required with juvenile interrogations because a juvenile's immaturity limits their ability to make a knowing and intelligent waiver of his or her rights. State v. A.G.D. 178 N.J. 56 (2003). "In the context of a juvenile interrogation … the parent serves as advisor to the juvenile, someone who can offer a measure of support in the unfamiliar setting of the police station." State in re A.S. 203 N.J. 131 (2010) (citing Gallegos v. Colorado, 370 U.S. 49 (1962).

The Presha court held that the police must use their best efforts to locate a juvenile's parent or legal guardian before commencing interrogation, and the

adult's absence should be given added weight when balancing all factors to determine whether a waiver of rights and confession were knowing, intelligent, and voluntary in the totality of circumstances. Id. The Presha court stressed that the absence of a parent or guardian to protect the juvenile's rights was a "highly significant" factor in determining whether the juvenile's waiver was knowing and voluntary. Id. at 315. "Other factors include the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved and prior experience with the criminal justice system." State in the Interest of A.A. 455 N.J. Super. 492 (2018) (citing Presha, 163 N.J. at 313).

In State in re A.S., 203 N.J. 131 (2010), the Court found a patent conflict of interest in that juvenile's mother, who was also the grandmother of the victim had been the one advising the juvenile to confess to the police. Specifically, the A.S. Court stated, "the mere presence of a parent is insufficient to protect a juvenile's rights because presence alone cannot be said to provide the buffer between police and the juvenile that [the Court was contemplating] in Presha." Id. at 148. "In order to serve as a buffer, the parent must be acting with the interests of the juvenile in mind." Id. Although the court rejected "a categorical rule that an attorney must be present any time there is a perceived clash in the

interest," the Court cautioned that where the interrogating officers are aware of "competing and clashing interests," they should "strongly consider ceasing the interview when another adult, who is without a conflict of interest, can be made available to the child." Id. at 154-55. The Court recognized that a conflict that a conflict of interest may interfere with a parent's fulfillment of the role of buffer between a juvenile and the police. Id. at 154.

Here, Steven Kologi had a clear conflict of interest with respect to acting as Scott's guardian during the interrogation. (7T:270-4 to 326-13); (8T:18-7 to 66-9). Steven did not act as a buffer between Scott and the police as is required pursuant to Presha. Presha, supra; Id. Not only was Steven related to the victims in this case, but he was a victim in this matter. (1T:26-8 to 12). Detective Tozzi testified that the interrogation took place a mere two hours after Steven personally witnessed Scott Kologi murder his sister, mother, father, and grandmother. Id. Furthermore, Detective Tozzi testified that Steven Kologi had the gun turned in his direction, ran out of the house and called 911 to report this incident. (1T:34-5 to 8)(1T:33-11 to 13). Detective Tozzi also testified that the murder weapon that was used in this crime, belonged to Steven Kologi. (1T:24-1 to 25-8).

In this incident, Steven Kologi could've been charged with Endangering the Welfare of a Child, contrary to the provisions of N.J.S.A. 2C:24-4, for

leaving an unsecured rifle and ammunition in a house where a child had access to it. (6T:124-24 to 125-10). In the trial court's decision, the Court stated that there was no evidence that the police threatened to charge Steven Kologi with a crime. (2T:48-19 to 23). However, that does not change the fact that he could've been charged with a crime in this case. Additionally, Steven Kologi was a victim in this case who witnessed the crime. (1T:33-8 to 10). Prior to the confession, Steven told Scott to "just tell these guys everything." (1T:41-10 to 13);(7T:291-13 to 14). Steven had a clear conflict of interest and was not acting as a buffer between the Detectives and the juvenile. Presha, 163 N.J. at 315.

In addition, Detective Tozzi stated that Scott's aunt and uncle, Michelle and Richard Molyneaux, were at the police station at the time of the statement. (1T:26-18 to 27-9). In the trial court's ruling, the Court indicated that the aunt and uncle would've had the same conflict that Steven Kologi did. (2T:51-1 to 52-4). However, Detective Tozzi testified that Michelle and Richard Molyneaux did not witness the shooting. (1T:27-12 to 28-10). Moreover, Detective Tozzi testified that Michelle and Richard Molyneaux did not own the weapon that was used in the shooting. (1T:30-3 to 7). Similarly, Detective Tozzi testified that neither Michelle and Richard Molyneaux called 9-1-1 in this matter. (1T:29-23 to 30-2). Furthermore, Detective Tozzi testified that Scott Kologi's half-brother, Jonathan Ruiz arrived at the police station with his fiancé Tiffany Hollingsworth

at some point the day the statement was taken. (1T:28-16 to 29-7). However, in the trial court's ruling, the Court found that it was not clear when he arrived. (2T:53-8 to 51-1).

In A.S., the Court suggested that where the interrogating officers are aware of "competing and clashing interests," they should "strongly consider ceasing the interview when another adult, who is without a conflict of interest, can be made available to the child." 203 N.J. at 154-55. Detective Tozzi admitted in her testimony that she didn't call Jonathan Ruiz to act as Scott's legal guardian and she didn't ask if there were any other family members who were not present at the time of the shooting. (1T:28-16 to 29-7). The State should not be rewarded because of the fact that Detective Tozzi didn't bother to ask if there were any other family members who were not potential victims in the crime to act as Scott's guardian. Id.

Steven Kologi Jr. had a clear conflict of interest with respect to acting as Scott Kologi's guardian because he witnessed his family get murdered two hours before the interrogation, he called 9-1-1 on his brother Scott and owned the gun that was used in the shooting. (1T:33-1 to 13);(1T:24-1 to 25-8). Accordingly, the Court should've suppressed Scott Kologi's January 1, 2018, statement to detectives.

## B. THE TRIAL ERRED IN FINDING THAT AFTER ASSESSING THE TOTALITY OF THE CIRCUMSTANCES THAT SCOTT KOLOGI GAVE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER. (2T:62-17 to 72 -16)

Factors that the Court considers in determining whether a juvenile's waiver of his Miranda rights were knowing, and voluntary are suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated or prolonged in nature and whether physical punishment or mental exhaustion was involved and prior experience with the criminal justice system." State in the Interest of A.A. 455 N.J. Super. 492 (2018) (citing Presha, 163 N.J. at 313).

### a. The Trial Court Erred in Finding that the Defendant's Waiver was Knowing, Intelligent, and Voluntary and did not put Appropriate Weight on the Fact that the Defendant did not have an Opportunity to Consult with his Guardian in Private Prior to the Interrogation. (2T:55-4 to 57-14)

"To address the special concerns when a juvenile is brought into custody, police officers should advise the juveniles of their Miranda rights in the presence of a parent or guardian before the police question, or a parent speaks with, the juvenile." State in the Interest of A.A. 240 N.J. 341 (2020). Officers should give the guardian an opportunity to consult with the juvenile in private. Id.

Here, Scott Kologi was never given an opportunity to consult with his guardian in private. (1T:35-8 to 10). The trial court incorrectly found that a consultation occurred prior to the reading of the Miranda warnings. (2T:17-1 to

12). Prior to reading Scott his Miranda rights, the only thing Steven Kologi said to Scott Kologi was "Happy New Year Scott." (7T:278-17). After the Miranda warnings were given, the entire consultation which was in front of two detectives and not at all in private was:

Lieutenant Tozzi: "Ok. And Scott, you're okay with him talking to us?
Scott Kologi: "That's Steve."
Lieutenant Tozzi: "Steve; I'm sorry."
Lietenant Kologi: "Yes, I'm okay with that." You're okay with it?
Scott Kologi: "I think, pretty much."

[7T:291-3 to 9]

The aforementioned exchange is the entire consultation took a few seconds and took place in front of two detectives. Id. This cannot possibly be the type of private consultation with a parent or guardian that was discussed in A.S., 240 N.J. at 350. In the trial court's ruling, the Court stated that the "better practice" would be to allow the juvenile to consult with his parent or guardian in private. (2T:56-22 to 5). It was clear that did not occur in this case. The trial court clearly erred when the Court found the few second consultation where Steven asked Scott if he was "okay with that" and Scott said "I think, pretty much" was what was the consultation envisioned by the New Jersey Supreme Court. (7T:291-3 to 9).

The fact that Scott was not afforded the opportunity to consult with his guardian in private prior to the waiver of Miranda rights is a significant factor

and should've been given great weight. Accordingly, the State cannot prove beyond a reasonable doubt that Scott Kologi knowingly, intelligently and voluntarily waived his Miranda rights. 384 U.S. at 473-74.

**b. The Trial Court Erred in Finding that Defendant's Waiver was Knowing, Intelligent, and Voluntary and did not put the Appropriate Weight on the Fact that the Detectives Gave Incorrect Miranda Warnings to Scott Kologi. (1T:37-1 to 42-9) (2T:12-17 to 14-23); (2T:69-1 to 73-1)**

A custodial statement may not be admitted into evidence unless the State proves beyond a reasonable doubt that the defendant's waiver of these rights is knowing, intelligent, and voluntary. State v. A.M., 237 N.J. 384, 397 (2019). If the totality of the circumstances surrounding the interrogation does not reveal "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," a court should not conclude that the Miranda rights have been knowingly, intelligently, and voluntarily waived. Moran v. Burbine, 475 U.S. 412, 421 (1986); See also State v. Handy, 215 N.J. 334, 362 (2013). Because the understanding of the warnings is so crucial to the validity of a waiver, when "circumstances cast doubt on the knowing and intelligent quality of the alleged waiver, the doubt must be resolved in defendant's favor." State v. McCloskey, 90 N.J. 18, 28-29 (1982).

During Scott's statement with respect to his Miranda rights, he simply says yes to what the police say. (7T:281-25 to 291-9). When Scott was asked

whether he understood his right to remain silent and refuse to answer any questions his initial response was "not exactly, but I've heard of it." (7T:282-3 to 4). Next, the detective asked him to read it out loud and then asked the same question. Scott's response was "I don't know how to word it really." (7T:282-20 to 21). When asked what "you have the right to remain silent and refuse to answer any questions" means, Scott couldn't explain it. Id. Throughout his statement, Scott simply goes along with what the police say and agrees with them. (7T:270-4 to 326-13); (8T:18-7 to 66-9).

Here, it is clear that Scott Kologi did not understand his right to have an attorney present before and during questioning. (1T:39-18 to 41-1). Detective Tozzi testified at the Miranda hearing that when she asked Scott whether he understood his right to have an attorney present Scott said that he believed that he could have an attorney present before or after the "hearing." Id. However, those advisements were not correct. Scott had a right to have an attorney present before any questions were asked. Detective Tozzi did not ensure that Scott understood that. (1T:39-15 to 40-6). Accordingly, because Scott did not understand his Miranda rights the State cannot prove beyond a reasonable doubt that Scott Kologi knowingly, intelligently and voluntarily waived his Miranda rights. 384 U.S. 436, 473-74 (1966).

### c. The Trial Court Inappropriately Shifted The Burden On The Defendant To Establish That His Waiver Was Not Knowing, Intelligent And Voluntary. (2T:63-5 to 64-21)

"[F]or a confession to be admissible as evidence, prosecutors must prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances." Presha 163 N.J. at 313 (citing State v. Burris, 145 N.J. 509 (1996)). Some of the factors the Court should consider are the suspects age, education, and intelligence. Id. Other factors are the Court may consider is whether the defendant was given food, whether the defendant had adequate sleep and the time of day the interrogation took place. State v. Knight, 183 N.J. 449 (2005).

At the Miranda hearing, Detective Tozzi testified that Scott went to a school with children with autism and disabilities. (1T:41-21 to 42-9). During Scott's statement he stated that he did not have any friends, he did not have a girlfriend and despite being sixteen years old slept in the same bed as his parents. (7T:301-24 to 302-2); (7T:301-12 to 16); (8T:44-12 to 45-2). Detective Tozzi testified that during the course of the interview, Steven told her that Scott was bullied by his neighbor because he was "special." (7T:44-9 to 12).

After Scott was read his Miranda rights, he immediately began talking about hallucinations he had growing up. (7T:302-23 to 303-1). He told the Detectives that he would see and hear things that were not there. Id. He

described seeing faces in walls in his house, seeing an inkish mask staring through a window that disappeared, seeing a transparent woman who floated through the ceiling, and seeing a transparent woman on his neighbors' roof with gold lines on her. (7T:304-11 to 306-18). Scott also described seeing a floating white light outside his window that disappeared the prior to the incident. (8T:47-19 to 48-4).

The trial court did not put appropriate weight on the bizarre things Scott Kologi said during his interview. The court considered that Scott indicated that he had good grades in school but seemingly ignored the fact that the school was a school for children with autism and disabilities. (2T:67-4 to 25-1). Moreover, the State presented no evidence regarding the defendant's education and intelligence. (1T:4-15 to 21-25); (1T:48-4 to 51-25). However, in the Court's decision, the Court burden shifted and stated that there was no evidence in the record regarding the juvenile's education and intelligence to suggest that he didn't understand his Miranda rights. (2T:63-5 to 64-21).

The burden is on the State to prove that he did understand his Miranda rights and not on the defense to prove that he didn't. Presha 163 N.J. at 313. Here, the only evidence in the record was that the defendant went to a school with kids with disabilities, slept with his parents despite being sixteen (16) years old and saw transparent woman and glowing white lights that were not there

while growing up. (1T:42-1 to 6);(1T:43-25 to 44-4);(1T:45-25 to 46-4); (1T:45-13 to 19).

Accordingly, the Court incorrectly shifted the burden to the defense to prove that the defendant did not understand his Miranda rights rather than placing the burden on the State to prove that he understood his Miranda rights.

**d. The Trial Court Erred in Finding That Scott Kologi Did Not Make An Ambiguous Assertion Of His Right To Remain Silent Prior To Questioning (2T:68-18 to 80-18)**

Miranda v. Arizona, 384 U.S. at 473-74, clearly provides that if a defendant "indicates in any manner … during questioning, that he wishes to remain silent, the interrogation must cease." See also State v. Hartley, 103 N.J. 252, 263 (1986). When a defendant invokes his right to silence, it must be "scrupulously honored;" and the police may not simply continue with the questioning. Michigan v. Mosley, 423 U.S. 96, 103-04 (1975). A valid waiver "cannot be established by showing only that the defendant responded to further police initiated custodial interrogation. Smith v. Illinois, 469 U.S. 91 (1984)(quoting Edwards v. Arizona, 451 U.S. 477 (1981)). Moreover, "[i]f police are unsure whether a defendant is asserting his right to silence, they must either stop the interrogation completely or 'ask only questions narrowly directed to determining whether defendant was willing to continue." State v. Harvey, 151 N.J. 117, 121 (1997)(quoting State v. Johnson, 120 N.J. 263, 284 (1990)).

"The critical question is whether defendant's words or conduct could reasonably be viewed as an assertion of his right to remain silent; if they could be, the officers were obligated to cease their questioning or limit their questions solely to clarify that issue." State v. Burno-Taylor, 400 N.J. Super 581, 605-06 (App. Div. 2008). A suspect is not required to express a desire to terminate the investigation with the "utmost of legal precision." State v. Bey (I), 112 N.J. 45, 65 (1988). Instead, [a]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." State v. Bey (II), 112 N.J. 123, 136 (1988); see also State v. Johnson, 120 N.J. at 280-281 (199).

Here, when Scott is initially asked what happened, he says "I don't want to tell you much." (7T:302-10 to 13). Detective Tozzi says "What's that?" (7T:302-14). Scott responds by saying "I wouldn't say anything for the most part." (7T:302-19 to 20). Instead of following Johnson and clarifying that ambiguous invocation of the right to remain silent by Scott, Detective Tozzi asked him the same question again and said, "Ok well, tell me what happened?" 120 N.J. at 283; (7T:302-21 to 22). The statement "I won't say anything for the most part" is susceptible for interpretation and could be construed that he did not wish to speak with the detectives at this time. (7T:302-19 to 20). The

detectives never had Scott clarify if he was invoking his right to remain silent or whether he wished to continue speaking.

Similarly, when Detective Tozzi asked Scott to explain what happened that night he said "Well, I mean, I don't like to talk about it." (7T:321-8 to 9). "But – but just say, like, the rest is history pretty much." (7T:321-9 to 10). Again, neither Detective Tozzi nor Verdadeiro clarified whether Scott wished to continue speaking. Instead, Detective Verdadeiro simply said "Tell us what happened, buddy." (7T:321-19 to 20).

A valid waiver "cannot be established by showing only that the defendant responded to further police initiated custodial interrogation." Smith v. Illinois, 469 U.S. at 98. Here, the detectives ignored his statement and asked him to tell them what happened for the second time. (7T:321-8 to 20). Because the detectives did not clarify whether Scott was invoking his Fifth Amendment right to remain silent and continued questioning him, his statement must be suppressed under Johnson and Miranda.

## POINT II

## THE JURY SELECTION PROCESS VIOLATED THE RIGHTS AND PROTECTIONS AFFORDED TO THE DEFENDANT BY OUR SUPREME COURT'S ORDERS, JUDGE GRANT'S DIRECTIVES, AND THE SIXTH AMENDMENT (Not Raised Below) ; (3T:9-20 to 10-18).

The jury selection process employed by the Court violated the constitutional guarantee to a jury pool that was representative of a cross-section

of the community which did not categorically dismiss people without establishing cause. Specifically, State v. Williams, 171 N.J. 151, 170 (2002) states:

> Jury service is a civic duty that each individual owes to the community. Silagy, supra, 101 N.J. Super. at 461, 244 A.2d 542. Financial hardship associated with jury duty is an issue best resolved before the jury is sworn, and ordinarily it is. ***But a jury of one's peers requires inclusion of all members of the community, excluding no socio-economic group from potential service.*** Daily wage earners, or others who cannot serve on a jury for long because of salary or wage deprivation, **may not be excluded categorically.**

(Emphasis added). As such, the jury selection process in the case at bar unconstitutionally categorically excluded hundreds of jurors without further inquiry.

Since the pandemic started in March 2020, numerous Supreme Court Orders and corresponding Notices to the Bar authored by Judge Grant regarding jury trials have been issued. The selection process in this case violated same.

On July 22, 2020, our Supreme Court issued an Order, which Judge Grant supplemented with a Notice to the Bar dated the same date. (Da29-32). These directives note the clear intention of "Safeguarding Constitutionality." (Da30). Specifically, "The processes authorized by the Court in support of the incremental resumption of jury trials uphold the constitutional rights of parties, including criminal defendants. **As in standard in-person operations, attorneys**

**and parties will participate during all case-specific questioning of jurors**." Ibid. (Emphasis added).

Also on July 22, 2020, our Supreme Court published a "Plan for Resuming Jury Trials" which was updated on August 14, 2020. (Da33-38). This Plan was developed "based on the recommendations of the Judiciary's Post-Pandemic Planning Committee on Resuming Jury Trials," which considered national best practices and models introduced in other jurisdictions, including federal courts. (Da33). The "Committee" referenced includes representatives from the Prosecutor's Association, Public Defender's Office, and Civil & Criminal judges. (Da31). Moreover, the "Judiciary Stakeholder Coordinating Committee" which includes the Attorney General, Public Defender, and New Jersey State Bar Association members – also reviewed and assisted in finalizing the report. (Da33).

This 46-page Plan identifies numerous critical components to the post-pandemic jury selection process. (Da39-84). Specifically, there was supposed to be pre-selection prescreening process requires jurors who report an inability to serve to substantiate their hardship and those who express more generalized concerns to appear virtually before a judge. (Da60-61) This prescreening process serves the important purpose of '[e]liminating from the pool of jurors who could not report in person for the trial dates." (Da61) .

> "The Supreme Court is committed to ensuring representative and inclusive juries at every stage of the selection process." (Da64).
>
> "Virtual jury selection will start with a panel of **30 jurors** (***so that all jurors are visible in the Zoom courtroom***). (Da66); (Emphasis added). More specifically, "[t]he judge will hold two Zoom sessions (morning and afternoon) with 30 jurors at each session. The judge will provide the basic information about the trial and excuse jurors for cause." (Da69)
>
> "Following general and individualized questioning, the starting group of 210 jurors will be reduced to about 60-70 jurors who will be scheduled to report in person on consecutive days." (Da71)
>
> "Some degree of in-person questioning (including as to anything that has changed) will be conducted." (Da72)

On September 17, 2020, our Supreme Court issued another Order, which Judge Grant supplemented with a Notice to the Bar dated the same date. This Order provided additional guidance on post-pandemic jury trial procedures and also "clarifies and supplements the provisions of the Court's July 22, 2020 Order[.]" (Da86-94). The Order confirmed that where jury selection is conducted in a hybrid format, judges may permit attorneys to ask limited follow-up questions during the final in-person phase of selection. Ibid.

On May 11, 2021, our Supreme Court issued another Order, which Judge Grant supplemented with a Notice to the Bar dated the same date. The Order again highlighted critical components of the criminal trial jury selection process:

> "All case-specific questioning of jurors will be conducted during the virtual voir dire process in the presence of the judge, attorneys, and parties. Jurors will be excused for cause based on that questioning." (Da98). (Emphasis added).

> "After virtual questioning and for-cause excusals, the remaining small numbers of jurors will be directed to report in person to the courthouse in small groups for the final phase of selection, including the exercise of peremptory challenges." Ibid.
>
> "The Administrative Director of the Courts is authorized to promulgate additional protocols on jury operation relating to this resumption of in-person jury proceedings during the ongoing COVID-19 pandemic." (Da100)

On May 17, 2021, Judge Grant issued an 11-page Notice to the Bar, which "provided a comprehensive update on the resumption of in-person jury trials . . . pursuant to the Supreme Court's May 11, 2021 Order." (Da101). This Notice also superseded a prior September 2020 Notice. Ibid. This most recent Notice once again highlighted critical components to the post-pandemic jury selection process:

> "Jurors who do not meet the qualification criteria established by N.J.S.A. 2B:20-1 are required to contact the court and substantiate disqualification. Jurors who seek to be excused for any of the grounds set forth by N.J.S.A. 2B:20-10 also must contact the Jury Management Office and supply documentation as necessary to substantiate their claim." (Da102)
>
> "Consistent with N.J.S.A. 2B:20-9 and pre-COVID-19 practices, prereporting excusals are handled by the Assignment Judge or designee and other requests are handled during jury selection. For example, a juror who supplies a doctor's note substantiating that they are unable to serve based on a medical condition unlikely to change within one year would be excused before reporting for selection, without any new requirement to disclose their medical condition to the trial judge or attorneys. **In contrast, consistent with applicable law and Supreme Court Orders, a juror who does not supply documentation required for a pre-reporting excuse and instead requests an excuse during voir dire (questioning 3 of the panel) would be addressed at sidebar in the**

**presence of the judge, attorneys, and parties.**" Ibid. (Emphasis added).

"The Supreme Court in 2014 approved and promulgated the New Jersey Judiciary Bench Manual on Jury Selection." (Da105)

"As recommended by the Post-Pandemic Planning Committee on Resuming Jury Trials, the Judiciary Working Group on COVID-19 Jury Operations, and the Supreme Court Committee on Jury Selection in Civil and Criminal Trials, the Supreme Court has approved the following protocol as **mandatory for criminal trials** and encouraged for civil trials:

. . . Jury management staff will email the written questionnaire to all jurors on the last business day before their reporting date (e.g., Friday for a Monday selection; Monday for a Tuesday selection), along with instructions to have those questions available when they report to the virtual selection." (Da105-106) (Emphasis added).

"Other aspects of the voir dire process will remain consistent with in-person practices, with judges exercising substantial discretion as to how to question jurors. Among other matters, hardship requests will be handled as provided in Section 4.7.2 of the Bench Manual ("The questions regarding disqualification of a juror may be reviewed at the outset along with hardship issues. Jurors determined by the court to have reasons why they cannot serve can be excused immediately.") In the virtual setting, this means that where a judge grants a hardship excuse (whether in the presence of the panel or during individual questioning in a sidebar breakout room), the juror may be permitted to log out of the virtual session. Consistent with Section 4.8 "judges in their discretion may alter the sequence and wording of the questions as they determine appropriate, as long as the substance is not materially modified." The other provisions of the Bench Manual also will be followed during the virtual selection process." (Da106) (Emphasis added).

Here, these mandatory protocols were not been followed. First, the court brought more than thirty jurors in a single zoom session, contrary to our Supreme Court's Plan for Resuming Jury Trials (Da39-84);(3T:9-20 to 10-14).

As indicated in the Plan, the purpose of having 30 jurors brought into a zoom room at once is so that all jurors are visible on the screen. (Da66). This is a critical component to counsels' ability to view, observe, and assess the demeanor of the jurors. In the instant case, all of the jurors could not be seen on the screen. (3T:10-13 to 14).

Second, as a result of the 'raise-your-hand-if-you-can-serve' procedure, literally hundreds of jurors are being excused 'for cause' from this case without requiring these jurors to state their reasons for needing to be excused or their proposed hardship. (3T:9-20 to 10-18). This is contrary to our Supreme Court's 5-11-21 Order, which requires that such questioning be conducted "in the presence of the judge, attorneys and parties." (Da98). Even more specifically, Judge Grant's 5-17-21 Notice requires that "a juror who does not supply documentation required for a pre-reporting excuse and instead requests an excuse during voir dire would be addressed **at sidebar** in the presence of the judge, attorneys, and parties." (Da103) (Emphasis added).

Third, contrary to State v. Williams, supra, these jurors who claim they are unavailable to serve are being categorically dismissed, resulting in a significant population, the "daily wage earners" as identified by the Williams Court, to be excluded. This is contrary to our Supreme Court's commitment to

"ensuring representation and inclusive juries at every stage of the selection process." (Da64).

It was therefore a violation defendant's Sixth Amendment right to a fair trial, which includes a jury that is representative of an accurate cross-section of his community. Moreover, this process provided no accountability to the jurors who are able to excuse themselves without any explanation required. In essence, the Court usurped its own function by erroneously delegating its own authority to the jurors, who were excused simply by not raising their hands and without any accountability as to why they are purportedly unavailable or unable to serve.

For these reasons, defendant the jury selection process violated the Supreme Court Orders, Notices and the Sixth Amendment. (Da29-111). The requirements outlined and discussed therein were not optional or discretionary; they were mandatory. Id. As such, the above-discussed deviations from the permitted practices were an illegal application of the jury selection process.

Accordingly, for all of these reasons, defendant submits the jury selection process was flawed due to the lack of individual assessments of each juror's proposed hardship by the Judge, at sidebar, and in the presence of counsel. The jury selection process deprived the defendant of his constitutional right to a fair trial. As such, justice demands in this case that the defendant be afforded the utmost care and protection of his critical constitutional rights. Thus, Defendant's

conviction must be overturned due to the Court's error in the jury selection process.

## POINT III

## THE CUMULATIVE EFFECT OF THE PROSECUTORIAL MISCONDUCT MANDATE THAT SCOTT KOLOGI BE GRANTED A NEW TRIAL (17T:11-21 to 21-11) (Partially Raised Below)

Prosecutors are held to a high standard to see that justice is done both inside and outside the courtroom. State v. D'Ippolito, 19 N.J. 540, 549 (1955). See RPC 3.8. Prosecutors are tasked with the duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. 99, 105 (1972).

"The prosecutorial role is greater than simple advocacy, it encompasses that of the protector of justice." State v. Hawk, 327 N.J. Super. 276, 281 (App. Div. 2000). "A prosecutor must conscientiously and ethically undertake the difficult task of maintaining the precarious balance between promoting justice and achieving a conviction, ensuring that at all times his or her remarks and actions are consistent with his or her duty to ensure that justice is achieved." State v. Jackson, 211 N.J. 394, 408 (2012)(internal punctuation and citation omitted). "A prosecutor's opening statement should be limited to what the prosecutor will prove and not anticipate the prosecutor's summation." State v.

Ernst, 32 N.J. 567 (1960). In State v. Smith, 167 N.J. 158 (2001), the Court found prosecutorial misconduct and overturned the defendant's conviction where the State disparaged and insinuated that the defense expert was lying in his closing statement.

"[P]rosecutorial misconduct can be a ground for reversal where the prosecutor's misconduct was so egregious that it deprived the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999) (citation omitted). Accord State v. Gorthy, 226 N.J. 516, 540 (2016). When considering whether a prosecutor's summation constitutes misconduct, the reviewing court must consider the tenor of the entire trial. State v. Terrell, 452 N.J. Super. 226, 276-77 (App. Div. 2016).

A "Prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expression of personal or official opinion as to the guilt of the defendant, or [otherwise engage] in collateral improprieties of any type, lest they imperil otherwise sound convictions." State v. Thornton, 38 N.J. 380 (1962).

Our Supreme Court has disapproved of any expression of personal or official opinion or belief that a jury could understand as based on something other than the evidence, including a belief in the defendant's guilt …" Id. at 398. "The Court reasoned that in the minds of jurors such statements may add the weight of the prosecutor's official and personal influence and knowledge to the

probative for of the evidence adduced." State v. Rivera, 437 N.J. Super. 434 (2014)(citing Thorntorn, 38 N.J. at 398)). "For that reason, the Court conduced that such statements "create the possibility that the jury's consciously or unconsciously might adopt the prosecutor's view without applying their own independent judgment to the evidence." Id.

"The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law ..." State v. Rose, 112 N.J. 454, 521 (1988). "That being said, the assistant prosecutor's duty is to prove the State's case based on the evidence and not to play on the passions of the jury or trigger emotional flashpoints, deflecting attention from the hard facts on which the State's case must rise or fall." Stat v. Frost, supra, 158 N.J. 76, 82 (1999). "[P]rosecutors must limit their remarks to the evidence... and refrain from unfairly inflaming the jury. State v. Johnson, 31 N.J. 489, 511 (1960)." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008).

**a. The Trial Court Erred by Not Granting a Mistrial when the Prosecutor said "This is Murder" in her Opening Statement (6T:56-2 to 58-3); (6T:95-14 to 96-4); (17T:72-22 to 75-24)**

"A prosecutor's declaration of a defendant's guilt, at best, implies that it is the prosecutor's personal opinion." Rivera, 437 N.J. Super. at 449. "Our Supreme Court suggested that a prosecutor may state such a belief if he or she

makes it "perfectly plain" that the belief "is based solely on the evidence that has been introduced at trial." Id.

Here, the Prosecutor stated, "This is not simply an insanity case." (6T:34-4). "This is a murder trial." (6T:34-4 to 5). "This is about four victims, four people who were killed in an unprovoked attack in their own home when they should have been safe." (6T:34-5 to 7). Then then prosecutor proclaimed, "This is murder." (6T:34-7 to 8). In denying the motion for a mistrial the court made a false equivalence and stated that the defense made the same comments regarding insanity. (6T:58-4 to 11). However, in the defenses opening statement, the defense stated, "Because the evidence will show that this is insanity." (6T:40-17 to 18).

The Prosecutor telling the jury that this was not an insanity case in her opening statement was problematic. (6T:34-4). Likewise, a prosecutor telling a jury that "this is about four victims, four people who were killed in an unprovoked attack in their own home when they should have been safe", cannot be construed as anything other than the Prosecutor's opinion of the facts of the case. (6T:34-5 to 7). Nowhere in that statement does the Prosecutor make it perfectly plain to the jury that the statement was based on the evidence to be introduced in trial. 437 N.J. Super. at 449. Finally, if the Prosecutor's personal opinion wasn't clear enough, she then unambiguously said "this is murder."

(6T:34-7 to 8). These inflammatory and prejudicial opinions by the Prosecutor deprived Scott Kologi of a fair trial. (16T:11-21). Furthermore, the Court erred by not granting a mistrial or giving a curative instruction. (6T:57- 10 to 58-15).

**b. The Prosecutor committed Prosecutorial Misconduct by insinuating that Michelle Molyneaux was lying on Direct Examination (7T:153-19 to 155-13); (17T:75-25 to 78-21)**

In Rivera, the Court found that the prosecutor expressing his personal opinion that the defendant was lying in conjunction with other instances of prosecutorial misconduct warranted the reversal of the defendant's conviction and a remand for a new trial. Rivera, 437 N.J. Super. at 463 (citing State v. Marshall, 123 N.J. 1, 154 (1991)). The Appellate Division cautioned in Rivera, "[i]t is improper for a prosecutor to express his personal opinion on the veracity of any witness."

Here, the Prosecutor asked Ms. Molyneaux what Scott wanted to talk to his shrink about. (7T:154-1 to 2). Ms. Molyneaux replied, "well, he didn't say – he said – about his bad thoughts." (7T:154-3 to 4). When asked again, Ms. Molyneaux repeated "he just had bad thoughts." (7T:154-9). Instead of asking the next question, the Prosecutor says, "I know this is tough for you because you love Scott, don't you?" (7T:154-10 to 11). When asked again, Ms. Molyneux repeated for a third time "Definitely he was having bad thoughts, he wanted to talk to the doctor." (7T:154-23 to 24). Instead of accepting her answer, the

Prosecutor said "Okay. "What are the two rules about testifying?" (7T:155-8 to 9).

Here, the Prosecutor suggested that Ms. Molyneaux was being untruthful when she stated that Scott told his mother that he was having "bad thoughts." (7T:153-19 to 155-16). The Prosecutor inserting his opinion that Ms. Molyneaux was not telling the truth prejudiced Scott Kologi and deprived him of a fair trial. (16T:12-22 to 14-2).

**c. The Prosecutor committed Prosecutorial Misconduct by Excessively Disparaging the Defense Expert in his Closing Argument. (15T:193-14 to 196-2); (17T:14-3 to 16-17)**

In Smith, 167 N.J. 182-185, the Court found prosecutorial misconduct where the State disparaged and insinuated that the defense expert was lying in his closing statement. Here, the State improperly disparaged Dr. Santina in their closing argument. In summation, the Prosecutor said "Especially when you compare it to Dr. Santina … she lied to you from the beginning. (15T:147-8 to 9). The Prosecutor flat out called the defense expert a liar in his summation. Id. Later in his summation, the Prosecutor suggested to the jury that Dr. Santina may have been "testifying with an intent to deceive you." (15T:157-8 to 9).

The Prosecutor insinuated that because Dr. Santina did not record her evaluation, that she purposely withheld evidence from the jury. Specifically, the State said "Dr. Santina chose not to record any of her interviews." (15T:150-6

to 7). "She chose not to record them." (15T:150-7). "Never explained why." (15T:150-7 to 8). "She just wants us to trust her." (15T:15-8). The prosecutor continued and told the jury "She had the ability to provide that information, to not just the State, and to the defense attorneys but to you." (15T:151-3 to 5). The Prosecutor stated, "She had the opportunity so that you could see and hear everything she was saying." (15T:151-6 to 7). Furthermore, the Prosecutor told the jury "she could have provided you with that information." (15T:151-12). "And she chose not to." (15T:151-12).

The Prosecutor led the jury to believe that because the State's expert recorded his evaluation, he was telling the truth. (151T:150-1 to 151-2). Specifically, in summation, the Prosecutor said "[t]hat was information that Dr. Dietz thought was important, not just in this case, but in every case." (15T:150-22 to 24). He continued, "And he told you why, because it's about getting at the truth." (15T:15-24 to 25). Here, the State is suggesting that Dr. Santina was somehow being untruthful because she didn't record her evaluation when not only is there is no requirement to do so, it is not something that is routinely done. (16T:14-2 to 20); (15T:15-24 to 16-16).

However, the Prosecutor took it a step further and created a false equivalence between a forensic psychologist recording an interview and a police

officer recording an interrogation of a juvenile murder suspect as they are required to under the law. Specially, the Prosecutor told the jury:

> In this case you saw the statement of the defendant. We talked about it in the beginning. You got to see it again, every question that was asked, every answer that he gave. You know exactly how it all went down. What if instead of that Det. Tozzi testified and said he did it. He said he was hallucinating in parts. But he said that he did it. And I've got really good notes. What if Det. Tozzi had testified in that in person? Would you be skeptical? Yes. You absolutely would be skeptical. In fact if that's what happened, the Judge would give you an instruction telling you to be skeptical. But you saw the defendant's statement.

[15T:151-14 to 152-3]

The problem with the Prosecutor's statement is there is a Court Rule that required Detective Tozzi to record Scott's statement. R. 3:17. There is no court rule that requires a forensic evaluation to be recorded and they are routinely not recorded. R. 3:17 requires the State to record custodial interrogations of defendant's charged with murder. However, the State insinuated that the State recorded their interviews because they are honest, and the defense did not record interviews to purposely withhold information. Moreover, the Prosecutor continued disparaging the defense expert as prohibited by Smith, supra, 167 N.J. 182-85, and said "Dr. Santina chose to withhold that information from you." (15T:152-5). "I suggest that's not good enough in any criminal case, and certainly not good enough in a criminal case where you are deciding four criminal charges and one weapon's offense." (15T:152-5 to 9). Again, there's

no requirement for a psychologist to record a forensic evaluation and they routinely testify based on their report. However, the State persisted and said, "not good enough in any criminal case, and certainly not good enough in this one." (15T:152-8 to 11).

Here, The Prosecutor abdicated his duty of making sure justice was achieved by making these comments with knowledge that forensic evaluations are not required to be recorded and are in fact not recorded the majority of the time. State v. Jackson, 211 N.J. at 408. (15T:194-5 to 10). The Prosecutor's comments were inappropriate, prejudicial and so egregious that it deprived Scott Kologi of a fair trial. Smith, 167 N.J. 182-85.

**d. The Prosecutor Committed Prosecutorial Misconduct by Insinuating in the Closing Argument that Doctor Santina was a Treating Doctor who Fabricated her Initial Evaluation (17T:16-18 to 22)**

Similarly, the State's allegation that Dr. Santina was a treating doctor, so she somehow fabricated her evaluation was not supported by the record and inappropriate. Dr. Santina was never Scott Kologi's treating doctor. (10T:71-25 to 72-1). Dr. Santina testified on direct that her initial evaluation was done "to render a professional opinion as his diagnosis, to assess for any possible malingering or symptom exaggeration and to make recommendations for treatment needs." Id. Dr. Santina testified multiple times that the purposes of

her evaluation were to test Scott for malingering and to give treatment recommendations. (11T:6-25 to 7-7).

Scott's guardian ad litem, Joseph Suozzo, testified that he ordered several evaluations in concert with the court for the purposes of attempting to get Scott treatment. (12T:124-1 to 13). Mr. Suozzo testified that there was an evaluation conducted by Dr. Santina for a differential diagnosis. (12T:21-18 to 24). Mr. Suozzo also indicated the evaluation was specifically to test Scott for malingering and to make treatment recommendations. (12T:124-15 to 125-2).

However, in the State's summation, the Prosecutor ignored this and told an untrue narrative. Specifically, the State indicated:

> It wasn't the same for Dr. Santina. Dr. Santina had a clinical relationship with him. And then a forensic relationship with him. And not a word, you know, not just a form of words. You heard the testimony from both doctors, in a clinical setting the doctor is supposed to not question things. Right, just accept them as they come. And not push back and not question or probe. But that's not what a forensic interview is, where you're actually supposed to do that. And maybe the reason Dr. Santina didn't push back at all in 2020, is because of that relationship, she couldn't shift out of one mode to another, that dual agency. Or maybe it's because she couldn't.

[15T:152-21 to 153-9].

By undermining Dr. Santina's credibility based on facts not in the record, the State deprived Scott Kolgi a fair trial. There is no evidence anywhere in the record that Dr. Santina ever treated Scott Kologi. This case hinged on expert

testimony and the State's argument in summation crossed the line and was so egregious that it deprived Scott Kologi of a fair trial.

**e. The Prosecutor Committed Prosecutorial Misconduct by Questioning Dr. Santina about a Defense Expert Report Used at the Waiver Hearing. (12T:118-12 to 120-7); (17T:84-19 to 87-22)**

A prosecutor cannot question an expert on hearsay statements or reports the expert did not rely on. See generally State v. Farthing, 311 N.J. Super. 58 (App. Div. 2000). N.J.R.E. 403, requires the court to exclude evidence on the grounds that evidence is prejudicial or could lead to confusion. Furthermore, N.J.R.E. 401 and N.J.R.E. 402 allow the court to admit relevant evidence. Moreover, although the cross-examiner may inquire as to whether the expert relied upon certain hearsay evidence, upon receipt of a negative response, the details of that particular evidence may not be used as the basis for further cross-examination. State v. Spencer, 319 N.J. Super. 284, 299–300 (App. Div. 1999).

"A prosecutor is not permitted to cast unjustified aspersions on defense counsel or the defense." State v. Lockett, 249 N.J. Super. 428 (App. Div. 1991). It is a prosecutor's duty to refrain from improper methods calculated that could produce an unjust result. State v. Frost, 158 N.J. 76 (1999). Here, the Court allowed the Prosecutor questioned Dr. Santina about a report that she did not rely on. (12T:118-24 to 120-6). Specifically, the Prosecutor asked "Okay, they did not give you the Rushing/Perrine report, correct? You testified --."

(12T:118-24 to 25). The Prosecutor next asked "you were not given that report by the defense, correct? (12T:10-9 to 11). Dr. Santina responded "No." (12T:119-12). The inquiry should've ended there. Farthing, 331 N.J. Super. At 79. Dr. Santina did not have the report or rely on the report. (12T:119-10 to 12). The defense tried to object, and the Court refused to allow a sidebar and interrupted defense counsel mid-sentence and did not allow an objection. (12T:119-1 to 9). The State then asked Dr. Santina if she was aware of the report. (12T:119-13 to 14). At this point, Dr. Santina responded that "It was my understanding it was created for the purposes of the waiver hearing Scott was originally facing a wavier to adult court." (12T:119-15 to 17).

Due to the Court not allowing a sidebar and overruling defense's objection, the jury learned that there was a hearing that waived Scott to adult court. This information is prejudicial and irrelevant and should've never been presented to the jury. N.J.R.E. 401; N.J.R.E. 402; N.J.R.E. 403. In addition, the State intentionally insinuated to the jury that the defense was somehow hiding this report. Lockett, 249 N.J. Super at 435. This suggestion was unjustified aspersions on defense counsel before the jury. Id.

The State was aware that the Perrine/Rushing report was specifically used for the waiver hearing and was not introduced in the trial. Specifically, the Prosecutor stated "Okay, but they didn't choose to give it to you?" (12T:119-25

to 1). Then, the State asked a second time "Okay. You didn't receive it and you didn't ask them why you didn't receive it?" (12T:120-3 to 4). Dr. Santina indicated that she never received it. (12T:120-5). This was a bell that the Court could not unring. The State's assertion that the report was hidden was unfair, inappropriate and intruded on attorney work product as well as attorney client privilege. This was an improper and calculated move by the State. Frost, 158 N.J. at 83. Moreover, the Prosecutor should not have been able to cross examine Dr. Santina about a report she didn't have or rely on. Spencer, 319 N.J. Super. at 299–300. Asking Dr. Santina about a defense expert report used specifically for the waiver hearing elicited prejudicial information and deprived Scott Kologi of his constitutionally guaranteed right to a fair trial.

**f. The Prosecutor Committed Prosecutorial Misconduct by Telling the Jury that Scott Kologi was Lying and Improperly Expressed his Personal Opinion as to the Veracity of Witnesses in the Prosecutor's Summation (Not Raised Below)**

The duty of the prosecutor is as much to refrain from improper methods calculator to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. State v. Supreme Life, 473 N.J. Super. 165 (2022). "It is improper for a prosecutor to express his personal opinion on the veracity of any witness. Id. (citing State v. Rivera, 427 N.J. Super. 434 (App. Div. 2014). In Supreme Life, the Appellate Division ruled that a prosecutor's statement

during summation accusing the defendant being a liar and expressing his personal belief in defendant's guilt were reversible error.

Here, the Prosecutor called Scott a liar in his summation. (15T:160-25 to 161-17). Specifically, the Prosecutor told the jury that Scott was "looking for something to hang his hat on that makes it not his fault", "he's trying to get over on the charges" and that Scott's looking for "something else to blame." (15T:161-4 to 10). "And the cynical part of me would say that that's because he's trying to become Scott Free." (15T:161-2 to 3). However, the Prosecutor didn't stop there. Next, the Prosecutor continued and told the jury "[i]t's his tumor, it's the pills, it's the schizophrenia, it's whatever." (15T:161-11 to 12). "Again, I, my instinct as a Prosecutor might be to call it lying, but Dr. Dietz gave you a more broad way to look at it." (15T:161-12 to 14).

Here, the Prosecutor improperly expressed his personal opinion as to the veracity of the witnesses in his summation. Supreme Life, 473 N.J. Super. At 174. Specifically, the Prosecutor told the jury that Steven Kologi and Rafaella Bontempo were telling the truth because they witnessed what happened and Jonathan Ruiz and Michelle Molyneux were being dishonest because they did not. (15T:178-22 to 184-6). The Prosecutor stated that when Michelle Molyneaux testified, she was conflicted about here "affection toward her nephew and her obligation to tell the truth." (15T:183-4 to 6). Likewise, with

respect to Jonathan Ruiz, the Prosecutor said, "I think its pretty clear he testified with an agenda." (15T:184-5 to 6). "Is this somebody who just came here to tell you factually what happened, or was that somebody who was pushing a narrative?" (15T:184-9 to 11). "And again, I understand why, it's his brother." (15T:184-11 to 12).

Clearly, the Prosecutor was improperly expressing his personal opinion as to the veracity of these witnesses and infringed on Scott's constitutional right to a fair trial. Supreme Life, 473 N.J. Super. at 474.

## POINT IV

## A NEW TRIAL IS WARRANTED BASED UPON THE COURT'S COMMENTS AND INTERRUPTIONS DURING DR. SANTINA'S EXPERT TESTIMONY (Not Raised Below)

### a. Scott Kologi was Prejudiced During his Trial because during the Defense Expert's testimony, the Court consistently interrupted the Defense Expert and did not Interrupt the State's Expert in the Same Fashion (Not Raised Below)

"[A]n unwarranted comment by the judge can be as prejudicial, or more harmful, than one by [counsel]. After all, the judge is a 'neutral magistrate,' and not a mere adversary making a presentation to the jury. The jury looks to the judge for guidance and advice[.]" State v. Meneses, 219 N.J. Super. 483 (App. Div. 287). "The intervention of a trial judge in the questioning of a witness is both a power and duty, ad forms part of the judiciary's general obligation to ensure a fair trial conducted in an orderly and expeditious matter." State v.

Medina, 349 N.J. Super. 108 (2002) (citing State v. Riley, 28 N.J. 188(1958)). The intervention of a trial judge is a desirable procedure, but it must be exercised with restraint. Village of Ridgewood v. Sreel Inv. Corp, 28 N.J. 121 (1958). "There is a point at which the judge may cross that fine line that separates advocacy from impartiality." Id. at 131. Rule 611(a)(2) provides that the "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to … avoid wasting time."

"Expert testimony should be circumscribed by a limiting instruction to the effect that the jury should not consider the hearsay statement as substantive evidence relating to the question of guilt or innocence of the accused, but only as evidence tending to support the ultimate conclusion of the doctor on the question of insanity or diminished capacity." State v. Farthing, 331 N.J. Super. 58, 78 (2000)).

In the begging of cross examination, the Prosecutor asked Dr. Santina if she "edited out what [she] thought was important for the report and what wasn't." (11T:37-22 to 23). Dr. Santina replied that "I edited out things in the beginning such as … how is the food here, things like that." (11T:37-24 to 25). "You … typically, when you start …" (11T:37-23 to 38-1). Without an objection from the Prosecutor, the Court stated:

> Doctor, he just asked you whether you edited out certain things. He didn't ask you what you edited out. He asked you if you edited it

> out. That's the question being asked of you. Answer the questions that are being asked please."
>
> (11T:38-2 to 6).

In addition, on cross examination, Dr. Santina was asked:

Q – Did you rely on a family history of schizophrenia in your diagnosis of the defendant?

A – Did I rely on it? No, I relied on his presentation to me. I wouldn't just diagnose someone with schizophrenia because it's in their family history. There were other things in his family history to.

[11T:1181 to 7]

Instead of accepting this answer, the Prosecutor asked Dr. Santina again if it was part of her diagnosis. (10T:118 14 to 16). Dr. Santina answered "No." (11T:118-17). The prosecutor continued:

Q – Not in any way, shape or form?

A – It did not lead me to formulate a diagnosis of Scott.

Q – You diagnosed the defendant with schizophrenia, yes or no?

A – Yes.

[11T:118-17 to 24].

The Prosecutor proceeded to ask Dr. Santina for a third time:

Q – Did you use a family history of schizophrenia in any way?

> A – After I had made the diagnosis of him, I noted that there was a family history of schizophrenia with him. It did not factor into making the diagnosis.
>
> [10T:118-25 to 119-9]

At this point the defense objected that the question had been asked and answered. (10T:119-18 to 19). Despite Dr. Santina answering the question multiple times, the Court replied "No, it hasn't actually." (11T:119-20). This comment was made in front of the jury.

The State also asked Dr. Santina whether she was aware, from her review of the records, that other mental health professionals sorted out the difference between hypnagogic and hypnopompic hallucinations. (11T:188-21 to 191-13). Dr. Santina replied "Yes, and I'm aware of the difference and I take into account that if he had only had hypnopompic …"(11T:191-14 to 15). Again, the Court interrupted and said "Doctor … he just asked you are you aware that they … made differences ... that's the question … that's it. (11T:191-17 to 25).

Dr. Santina was asked on cross about whether Scott was able to "recall to the police the caliber of the bullets that were used." (12T:32-24 to 25). Dr. Santina responded, "Yes … [h]e would know that from – he had been seeing the gun multiple times before he --." (12T:33-2 to 3). Without an objection from the Prosecutor, the Court on it's own volition said:

> Doctor, the question he asked you was whether he knew the type of ammunition. He didn't ask you anything else. I'm asking you

> again, please answer the questions being asked. There is always the ability to answer a different question at another time. But answer the question that is being asked of you. The question was, did he, meaning the defendant, know the ammunition –- the caliber of the ammunition. What is the answer to that?
>
> [12T:33-4 to 12].

On redirect Dr. Santina was asked about the hallucinations that Scott was experiencing. (12T:91-7 to 13). Dr. Santina responded that these were not normal and "not all of the incidents that Scott reported at various times." (12T:91-17 to 16). The Court interjected and stated,

> Doctor. So we are going to try this one more time. We are on redirect, he didn't ask you whether there were other incidents. He asked you about the ones that are on – on this board there. Please answer the questions that are being asked of you. I have tried to do this several times with you. Mr. Nkwuo will ask you all the questions, I will guarantee he is going to ask you. So just answer what is being asked of you, okay?
>
> [12T:91-19 to 92-2].

In contrast, the State's expert, Dr. Dietz was allowed to give long narrative answers with no interjection from the Court. (12T:161-10 to 164-3). Moreover, when Dr. Dietz was asked whether it was a common practice to review the evidence the State has before rendering a report, he gave a nonresponsive answer talking about his first time as an evaluator on the Hinkley case and talked about how a famous psychiatrist in Chicago once looked at crime scenes. (13T:10-10 to 11-4). However, when Dr. Dietz gave answers like this, the Court did not

interject at all. Id. Throughout, his direct examination, Dr. Dietz would answer questions with long diatribes without the same interruption from the Court as Dr. Santina. (13T:207-2 to 208-10).

The disparate treatment of the two experts by the Court prejudiced Scott Kologi and deprived him of a right to a fair trial. N.J.R.E. 403.

**b. The Court Prejudiced Scott Kologi by Allowing Dr. Park Dietz to Testify about the Legal Definition of Insanity (17T:100-14 to 109-13)**

During cross examination, the Prosecutor on incorrectly stated the legal standard for insanity to Dr. Santina. (11T:120-11 to 13). Specifically, the Prosecutor stated "To qualify for a defense of not guilty by reason of insanity, a person has to suffer a mental disease or defect; is that correct? Id. "And, as a result, that mental health defense, there are two alternatives that are possible right?" (11T:120-16 to 17). "It could be … one or the other or both." (11T:120-19 to 20). The Prosecutor asked Dr. Santina if she wrote in her report whether or not Scott knew that his actions were wrong. (11T:122-16 to 17). Dr. Santina replied that "That's wording that was … he did not know or recognize the nature of his actions, the implication of those actions." (11T:122-18 to 22). "That implied in that is that he did not know that what he was doing was wrong." (11T:122-22 to 23). The Prosecutor then stated, "You know that's an important legal standard, right?" (11T:123-8 to 9). Dr. Santina replied "I didn't ask – the I did not say whether he knew right from wrong." (11T:123-14 to 15). "That's

actually not the standard." (11T:123-15 to 16). "Whether he knew whether the specific actions that he was engaged in were right from wrong, not whether he in a broader sense knew …" (11T:123-16 to 18). At that point the Court interrupted and said, "For the record purposes, Ladies and Gentlemen, I'll say what the standard is one way or another." (11T:123:22 to 24). "So—the witness can testify. (11T:123-24). "But, at the end of the day, I just want to remind you the law will come from me at the end of the case. Okay? Go ahead. (11T:123-24 to 124- 2).

On the other hand, The Court allowed the State's expert to give a narrative about the legal standard without interruption. (16T:22-16 to 22). The State's expert was able testify about an in depth analysis about the legal definition of insanity with no interruption or limiting instruction from the Court. (12T:209-1 to 210-2). Dr. Dietz testified that "Dr. Santina … seemed to think that a statement about the defendant, the defendant's knowledge of the nature and quality of his acts encompassed the issues of his knowledge or wrongfulness." (14T:101-17 to 22). "I think these are two completely separate issues that need to be treated separately and I think the law requires that we treat them separately as the Judge will instruct." (14T:101-23 to 102-1). Here, there was no limiting instruction or interjection from the court.

Furthermore, Dr. Dietz was incorrect. The Model Jury charge for insanity states that the to determine whether the defendant was insane at the time of the commission of the offense the defendant must prove that he was "laboring under such a defect of reason from disease of the mind as to not know the nature and quality of the act he/she was doing, or if defendant did know it, that he did know what he was doing was wrong." N.J.S.A. 2C:4-1. It is a two-prong test. Thus, if the defendant did not understand the nature and quality of his act, he met the standard and prong two (2) with respect to whether the defendant knew that his conduct was wrong need not be assessed.

Therefore, the Prosecutor questioned Dr. Santina on the incorrect legal standard. (111T:120-16 to 20). If the defendant does not understand the nature and quality of his actions, the analysis is over and there is no need to address whether or not the defendant knew what he was doing was wrong. Id. Therefore, the Prosecutor's assertion that "it could be both" was incorrect. (11T:120-19 to 20). Moreover, the Court's interjection led the jury to believe that Dr. Santina was wrong about the legal standard of insanity when she was only responded to a question that was asked by the Prosecutor. (11T:123-22 to 124-2). The manner in which the Court interrupted Dr. Santina when responding to a question about the legal definition of insanity while allowing Dr. Dietz to give an in depth

recitation of the legal definition of insanity prejudiced Scott Kologi and denied him to his right to a fair trial. N.J.R.E. 403.

## POINT V

## APPELLANT'S CONVICTION SHOULD BE OVERTURNED BECAUSE THE COURT ALLOWED THE PROSECUTOR TO INJECJECT EXCESSIVE AMOUNTS OF HEARSAY INTO THE CASE THROUGH EXPERT TESTIMONY (13T:45-3 to 44-16) (Partially Raised Below)

Under New Jersey case law, it is well established that an expert can testify as to hearsay statements made to him by the defendant. State v. Lucas, 30 N.J. 37 (1959). In State v. Farthing, the court noted that one of the main sources of proof of insanity or diminished capacity is the conduct of the defendant both at the time of the examination and earlier. 331 N.J. Super. at 77. The court explained:

> that the verbal conduct is as important as non-verbal conduct in the eyes of the psychiatrist or psychiatrist. The psychiatrist or psychologist may consider the defendant's statement in a variety of ways. He may be not so interested in the truth of what is said as he is in the fact it was said. Id. classic illustration is the man who claims he is Napoleon. The psychiatrist or psychologist considers such a statement as important not because of its truth or falsity, but because it is evidence of irrationality. Conversely, some statements of a patient may be considered important because they disclose a factual history that is relevant to the doctor's diagnosis. Stated somewhat differently, the doctor assumes the truth of such statements and considers the facts in terms of their impact upon the patient's mental health or mental disease.
>
> [Farthing, 331 N.J. Super. at 77].

The court in Farthing went on to delineate an analytical framework for the resolution of evidentiary questions pertaining to psychiatric evidence. Id.

> The first step is to determine whether the psychiatrist or psychologist actually relied upon the hearsay statement as a necessary element in the formulation of his opinion. In that event, the testimony should be circumscribed by a limiting instruction to the effect that the jury should not consider the hearsay statement as substantive evidence relating to the question of guilt or innocence of the accused, but only as evidence tending to support the ultimate expert conclusion of the doctor on the question of insanity or diminished capacity. If it further appears that the expert's opinion hinges upon the truth of the matter asserted, rather than the fact that it was said, then the jury should be instructed that the probative value of the doctor's opinion will depend upon whether there is, from all the evidence in the case, independent proof of the statement made by the accused. Thus, the second step in resolving questions relating to psychiatric testimony is to determine whether the psychiatrist or psychologist considered the hearsay statement as true in arriving at his diagnosis, and to instruct the jury accordingly.

[Id. at 78].

In Farthing, the defendant's claim of diminished capacity was presented through the testimony of Dr. Kleinman and Dr. Apolito. Both witnesses asserted that defendant was unable to harbor the requisite *mens rea* because she was suffering from post-traumatic stress disorder. Id. However, the witnesses differed in the manner in which they arrived at their conclusions. Id. Dr. Kleinman testified that the facts surrounding the crimes were not significant in arriving at his diagnosis. Instead, his conclusions were based on clinical tests and facts relating to defendant's childhood. Id. In contrast, Dr. Apolito, heavily

relied upon the operative facts pertaining to the crimes in arriving at his conclusions. To a large extent, he assumed as true most of the facts contained in defendant's confession. Id. He also relied upon portions of an acquaintance of the defendant's statement. This distinction between the methods by which the experts arrived at their diagnosis is important in assessing the propriety of the prosecutor's cross-examination of the witnesses. Id.

Vandeweaghe discussed N.J.R.E. 403 in depth. 351 N.J. Super. 467 (2002). In criminal cases, a trial court must be sensitive to the Confrontation Clause problems created by an over-reliance on hearsay evidence. Vandeweaghe, 351 N.J. Super. at 13. Thus, in State v. Vandeweaghe, the court concluded that a State psychiatric expert should not have been permitted to include in his testimony a series of anecdotes related to him by a number of former acquaintances of the defendant, detailing the defendant's prior crimes and antisocial behavior. 351 N.J. Super. at 481-483. The court reasoned that the testimony was far more prejudicial than probative. Id. at 483. Acknowledging that some of the testimony was necessary to rebut the defense contention that the defendant did not suffer from an antisocial personality disorder, the court suggested that the State expert be permitted to give his final diagnosis without the prejudicial hearsay references. Id. at 484. The court also suggested that the evidence could be excluded in its entirety under N.J.R.E 403. Id. The court also

noted that in any situation involving hearsay placed before the jury through expert testimony, the jury should be instructed that the probative value of the opinion is no greater than the hearsay statements on which it is based. Id. at 480-81.

Our courts have consistently held that a psychiatrist in a criminal case may testify as to what a defendant told him or her if the expert relied on the statements in formulating an opinion about the defendant's mental or psychiatric condition, and such hearsay declarations "constituted a necessary element in the formulation of [the] opinion." State v. Lucas, 30 N.J. at 79; Farthing, supra, 331 N.J.Super. at 77–78.

Of course, these hearsay statements are not admitted for their truth, and the expert's testimony must be circumscribed by an appropriate limiting instruction. State v. Burris, supra, 298 N.J.Super. at 512–13. A charge should be given "to the effect that [the evidence] should not be considered by the jury as substantive evidence relating to the question of guilt or innocence of the accused, but only as evidence tending to support the ultimate expert conclusion of the psychiatrist." Id. (quoting State v. Lucas, 30 N.J. at 79); State v. Vandeweaghe, 351 N.J. Super. at 467 (if the expert relied upon the "truth of the matter asserted in formulating an opinion rather than the fact that the statement was made, the jury should be instructed that the probative value of the opinion

is dependent upon, and no stronger than, those facts"). Moreover, if the psychiatrist's opinion hinges upon the truth of defendant's statement, the jury should be further instructed that the probative value of the psychiatrist's opinion will depend upon whether there is independent proof of the hearsay statement. State v. Burris, 298 N.J. Super. at 513.

Whether the expert is testifying on behalf of the State or the defendant, the rule is the same. Jurors must be immediately instructed that the substantive information defendant provided is to be used by them only to assess the expert's opinion. It is not to be used as direct evidence of guilt. State v. Mesz, 459 N.J. Super. 309, 319 (App. Div. 2019). Whether the expert is testifying on behalf of the State or the defendant, the rule is the same. Jurors must be immediately instructed that the substantive information defendant provided is to be used by them only to assess the expert's opinion. It is not to be used as direct evidence of guilt. State v. Mesz, 459 N.J. Super. at 319. While a prosecutor may cross examine an expert on hearsay evidence, if the expert states that he or she did not rely on the hearsay evidence, it cannot be used as the basis for further cross examination. Spencer, 319 N.J. Super. at 299.

Here, Dr. Santina was cross examined about a report that she didn't have and didn't testify about. (12T:8-18 to 12-2). The State was allowed to impeach Dr. Santina using a report that she did not have and testified that she did not rely on. (12T:8-19 to 9-22). However, the Court allowed this testimony over the defense's objection. (12T:10-3 to 7). At no point on direct examination was Dr. Santina asked about the Perrine and Rushing report. When Dr. Santina indicated that she did not rely on the report, the Court allowed the questioning to continue because there was a summary of the report in the State's expert report. (12T:9-10 to 9-19). The defense argued that "it's a hearsay statement in a report she says she didn't read and she didn't rely on for a conclusion …" (12T:9-20 to 21). However, the Court allowed the Prosecutor to impeach Dr. Santina with a hearsay statement from a summary of a report in the State's expert report. The Prosecutor continued to impeach Dr. Santina about information that was not in other reports. (12T:12-25 to 16-25). When asking Dr. Santina about Scott's paranoid feelings, the Prosecutor asked "you read the report of Dr. Greenfield … is there anything in Dr. Greenfield's report where the defendant is expressing

feelings of paranoia to Dr. Greenfield." (12T:12-25 to 13-10). Again, the State is not cross-examining regarding hearsay statements she relied upon in rendering her opinion. Instead, the State is cross examining Dr. Santina using hearsay reports and information that she couldn't have relied upon because it's not in the report. The State also asked about information that was not in the reports of Dr. Wilder-Willis and Michael Zanotti, nurse practitioner. (12T:14-9 to 16-27). As this questioning continued, the defense objected. (12T:17-5 to 6). Specifically, the defense indicated "because he is asking the questions for the truth of the matter … in the reports." (12T:18-2 to 4). "He is asking – he is supposed to ask her what she relied upon, he is asking her what is not in the report to impeach her on another expert's – another doctor's report." (12T:18-4 to 8).

The defense pointed out that the paranoia Dr. Santina relied upon was from her clinical interview from the defendant which is admissible to form her opinion. Farthing, surpa. The State cross examined Dr. Santina extensively regarding hearsay statements in social worker Lauren Stillwell's report. (12T:78-19 to 83-11);(12T:84-5 to 85-25). The Prosecutor asked these

questions for the truth of the matter asserted as was cautioned against in Spencer, 319 N.J. Super. at 299. The Prosecutor also questioned Dr. Santina about hearsay statements in nurse practitioner, Michael Zanotti's report. (12T:83 12 to 84-4). In Vandeweaghe, the court cautioned against the overreliance of hearsay statements in the cross examination of an expert. 351 N.J. Super. at 481-483. Here, The State inappropriately interjected hearsay into the case through cross examination of the defense expert.

In his direct examination, Dr. Dietz testified that the school social worker, Maureen Robinson, believed that Scott was ready to move from Hawkswood School back to Long Branch Public School. (13T:24- 22 to 26- 6). Instead of using this information to formulate an opinion, the State created a motive for the shootings entirely based on hearsay. Maureen Robinson did not testify at trial. Id. Furthermore, Dr. Dietz testified that when the idea of Scott returning to Long Branch Public School was raised, "Scott got close to his mother's face, and stared at her." (13T:27-8 to 10). Again, Ms. Robinson did not testify at the trial and this information was never mentioned in the State's case. The court did not sua sponte give a limiting instruction as to how this evidence could be used. State v. Mesz, 459 N.J. Super. at 319.

Dr. Dietz testified about a hearsay test message from Steven Kologi. (13T:40-25 to 41-17). Steven Kologi was not asked about this phone record on

direct or on cross. In introducing this hearsay document for the truth of the matter asserted, Dr. Dietz stated:

> And what some of the witnesses had said changed over time. There were inconsistencies in what witnesses were saying. And, of course, human memory being fallible, that can happen. But this issue seemed to be quite important. Did he or didn't he talk about harming, shooting, or killing people before the incident. And instead of relying on someone's memory of events in the past, finding a phone record that captures exactly what words were used, was important evidence.
>
> [13T:42-3 to 13]

Dr. Dietz then confirmed that he was introducing this hearsay document that was presented nowhere in the trial before for the truth of the matter asserted. (13T:42-14 to 20). The defense objected as this was a text message of what Scott allegedly said to his grandfather, that was told to Steven Kologi, and then subsequently told to Linda Kologi via text message. (13T:46-3 to 46). However, the court overruled the objection and stated "if he's relying for it for the truth of the matter asserted … the jury has to decide whether it's truthful or not." (13T:44-12 to 16). Thus, essentially, the Court ruled that Dr. Dietz could interject as much hearsay into the case and leave it for the jury to decide whether it's true or not. Id. The court did not differentiate between hearsay statements made during a forensic interview, and multi-layered hearsay statements contained in social worker notes and text messages that were never introduced in the State's case in chief. Id. Dr. Dietz used multi-level hearsay text messages

that were never introduced in the State's case in chief to corroborate and bolster the testimony of Michelle Molyneaux. (13T:53-10 to 54-17); (13T:220-3 to 4).

Moreover, Dr. Dietz was able to testify regarding several hearsay documents and make a determination that Scott's grandfather did not have schizophrenia. (13T:96-15 to 101-9). Dr. Dietz never evaluated Adrian Kologi. Furthermore, Dr. Dietz did not rely on information that was in Adrian Kologi's medical records. He testified that because Adrian Kologi wasn't receiving treatment for schizophrenia at the nursing home, that he didn't have schizophrenia. (13T:100-2 to 6). Adrian Kologi never testified at the trial.

In addition, based upon a hearsay note in Scott's school therapist records, Dr. Dietz was permitted to testify that Scott could choose to calm himself or pump himself up with music. (13T:152-7 to 155-9). Similarly, Dr. Dietz testified regarding hearsay statements in Scott's school records that Scott wanted to fight or strangle bullies. (14T:42-21 to 13). Moreover, Dr. Dietz testified about hearsay in social worker notes to try and establish that Scott's brother Jonathan influenced Scott during his evaluations. (14T:53-9 to 54-3). Again, Dr. Dietz did not testify as to how this information formulated his opinion but instead offered hearsay for the truth of the matter asserted to suggest that Scott's brother suggested to him that he had schizophrenia. Id. At no point did Scott's school therapist or social worker testify.

Dr. Dietz used hearsay evidence, not to opine as to Scott's mental state at the time of the offense but to establish a motive that was never presented in the State's case in chief. (14T:176-20 to 178-20). There were records from Scott's school therapist that contained hearsay used in conjunction with a hearsay text message from Scott's brother Steven that were compared to establish a motive for killing. Id. The motive that Scott killed his family because he didn't want to leave Hawkswood school that was testified to by Dr. Dietz was never raised in the State's case in chief. (6T:59-1 to 9T:83-22). Furthermore, the source of that information never testified. Id.

Dr. Dietz's testimony was essentially to establish a motive for the shootings using hearsay under the guise of expert opinion. For example, Dr. Dietz testified that "[h]e worked himself up into a state of mind, armed himself, readied himself, to show the world that he is strong, not a victim anymore, not helpless and being picked on but now a figure worthy of Arnold Schwarzenegger or his dad or Chuck Norris, the powerful good guys who wouldn't be bullied." (14T:98-1 to 6). This was hearsay information taken out of context from Scott's school records that was subsequently used by Dr. Dietz as substantive evidence to provide a motive for the shootings. Id.

b. **The State Argued Inadmissible Hearsay Elicited by Dr. Park Dietz as Substantive Evidence in the State's Closing Argument (15T:193-14 to 195-2); (17T:27-21 to 28-23) (Partially Raised Below)**

Farthing, is clear that the State may not use hearsay evidence that a psychiatrist relied upon as substantive evidence of guilt or innocence. 331 N.J. Super. At 78. It is improper for a prosecutor in summation to refer to inadmissible evidence relied upon by a prosecution expert as if the evidence had been substantively admissible. State v. Scherzer, 301 N.J. Super. 363, 442-444 (App Div. 1997).

However, in the State's summation, the Prosecutor stated that Scott had been "researching abnormal psychology and mass murders and serial killers and whatnot." (14T:115-2 to 4). The State told the jury that Scott did research on mass murders and serial killers based on a hearsay document from notes from a social worker that never testified. (14T:118-3 to 11). This information was never introduced in the State's case in chief and was only testified to by the State's expert. The State told the jury that Scott did work at the Hawkswood school to learn to pump himself up or calm himself down. (14T:119-25 to 3). Again, this was information that was based on the records of a school therapist that did not testify in the trial. The State also quoted reports of medical

professionals as substantive evidence that Scott wasn't paranoid around the time of the shootings. (15T:154-10 to 24).

The Prosecutor relied upon hearsay notes from a social worker that didn't testify to try and discredit the testimony of Jonathan Ruiz. (15T:185-16 to 24). Specifically, the Prosecutor stated that the defendant told the social worker about cognitive dissonance and the splitting of his mind. (15T:185-20 to 23). This information was only introduced to the extent that either expert relied upon it to formulate their opinion. Farthing, surpa. Instead, the State used it as substantive evidence to discredit the testimony of Jonathan Ruiz and suggest that he planted ideas in Scott's head during a visit. (15T:185-23). If the State wanted to advance this theory, they could've called the social worker in their case in chief as the defense called Mr. Ruiz in the defense's case in chief. However, the State introduced this information in hearsay, thus infringing on the defendant's right of confrontation.

Similarly, the Prosecutor inappropriately argued hearsay opinions of non-testifying medical professionals as substantive evidence in his closing argument. (15T:174-17 to 23). Specifically, he told the jury that "other mental health professionals knew the difference." (15T:174-17-18). "You heard about the report of Mr. Zanotti, the nurse practioner." (15T:174-18 to 19). "He spoke with the defendant almost immediately after these crimes." (15T:19 to 20). The

Prosecutor offered the report of a nurse practitioner who didn't testify, whose opinion Dr. Santina didn't rely upon, as substantive evidence that Dr. Santina was wrong. (15T:174-17 to 175-5).

The State should not have been allowed to cross examine Dr. Santina on reports that she did not rely on and then argue it as substantive evidence in their closing argument. Mesz, 459 N.J. Super. at 319; Spencer 319 N.J. Super. at 299-300. Later in the summation, the Prosecutor stated "[r]emember he asked, I want to say it's Mr. Zanotti, if there was any press coverage about this?" (15T:190-23 to 3). "And when asked why, he said because everybody always thought I was shy." (15T:191-4 to 5). Mr. Zanotti never testified at Scott's trial. Again, the Prosecutor offered statements allegedly made by the defendant to a nurse practitioner not as material Dr. Dietz relied upon to reach his opinion, but as a motive for committing the offense. (15T:191-7 to 10). The Prosecutor said, "He didn't want to be shy, he didn't want to be small." (15T:191-7 to 8). "He wanted to be big and strong." (15T:191-8). "And he directed that anger at the people closest to him because they were the ones who were there." (15T:191-8 to 10). This information was taken from social worker records from Scott's school from a social worker who did not testify. (14T:41-14 to 42-13). Yet it was argued as substantive evidence.

The defense argued that "there were hearsay documents that were relied upon by Dr. Dietz, and they were somewhat argued for the truth of the matter in summation." (15T:193-21 to 24). The excessive amounts of hearsay that was interjected into this case by the State's expert, infringed on Scott Kologi's right to a fair trial. (16T:23-14 to 17);(16T:26-23 to 28-23). Using hearsay evidence elicited by the State's expert on rebuttal as substantive evidence is in direct violation of what the Court indicated that this evidence can be used for in Mesz, 459 N.J. Super. at 319.

Because the Court did not immediately give a limiting instruction to hearsay testimony as is required under Mesz, the jury was left trying to differentiate between the substantive evidence and the excessive amounts of hearsay elicited from the State's expert. Mesz, 459 N.J. Super. at 319. Here, allowed excessive amounts of hearsay to be interjected into the case through the State's expert and read a broad limiting instruction. The limiting instruction essentially told the jury that they could determine what is true or not. (10T:67-1 to 68-23). However, because the Court did not read this instruction every time hearsay was elicited, it became confusing for the jury and allowed them to choose what hearsay evidence they wanted to believe. This was further compounded by the State arguing hearsay as substantive evidence in summation. ((15T:193-14 to 195-2).

## POINT SIX

**APPELLANT'S CONVICTION SHOULD BE OVERTURNED BECAUSE THE COURT ALLOWED DR. DIETZ TO TESTIFY IN DEPTH REGARDING THE ULTIMATE ISSUE AND THE VERACITY OF WITNESSES IN THE CASE (13T:21-8 to 10)(14T:84-19 to 85-7); (14T:118-5 to 12)**

In State v. J.T., 455 N.J. Super. 176, (App. Div. 2018), the Court found that testimony from the state's expert witness usurped jury's role by making definitive declaration that defendant did not meet legal requirements to assert the insanity defense to the murder charge, and denied the defendant a fair trial.

In Cain, the Supreme Court reaffirmed its prior holding in State v. Reeds, 197 N.J. 280, 284–85, (2009), that an expert's "ultimate-issue testimony" usurps the "jury's singular role in the determination of defendant's guilt and irredeemably taints the remaining trial proofs." Cain, 224 N.J. 410 (2016), (citing Reeds, 197 N.J. 280 (2009)). Although defense counsel did not object at the time the expert gave this testimony, the Court ruled that "this colossal error was clearly capable of producing an unjust result." J.T., 455 N.J. Super. at 215 (citing Cain 224 N.J. at 424). In State v. Simms, 224 N.J. 393, 396 (2016), the Court reaffirmed its holding in Cain, holding that "an expert's opinion on the defendant's state of mind encroaches on the exclusive domain of the jury as trier of fact." Simms, 224 N.J. at 396.

In J.T., the prosecutor asked the expert to explain to the jury the concept of "legal insanity" and then to opine on whether defendant's conduct satisfied the elements of this affirmative defense. J.T. 455 N.J. at 215. The Court ruled that the State's expert witness' response usurped the jury's role by making a definitive declaration of this jury question:

> [Defendant] does not meet any of the prongs of the insanity defense. She does not have a significant mental illness. She was certainly upset and overwhelmed, but that's not [an] illness. She knew the nature of the act. That this was a bag. She knew what a bag could do. In fact, that was her specific intent. And she knew that what she was doing was wrong, even if she at that point thought she had good justification.
> [Id.]

"An expert witness may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder." State v. Rosales, 202 N.J. 539 (2010). "Expert witnesses may not, however, render an opinion on the defendant's veracity or reliability of a confession because whether a confession is reliable is a matter in the jury's exclusive province …" Id at 470. An expert witness cannot express opinion on the credibility of a witness or party. State v. Sowell, 213 N.J. 89 (2013).

Consistent with the holding of J.T., Dr. Dietz usurped the jury's role to determent whether the Scott Kologi satisfied his burden of proof. In the beginning of his direct Dr. Dietz was testified that Scott could deliberate and understand the nature and quality of his actions before during and after the

shootings. (13T:20 4 to 21-2). Dr. Dietz also testified on direct that "with reasonable medical certainty, as these other opinions have been, that at the time of the shootings, the defendant did know and appreciate the wrongfulness of his actions." (13T:21-8 to 10)(14T:84-19 to 85-7). When asked the question by the State, Dr. Dietz hesitated and said that he was unsure if he could opine on the ultimate issue in New Jersey. (14T:118-5 to 7). The Court instructed Dr. Dietz to answer the question. (14T:118-12). 455 N.J. Super. at 215. Not only Dr. Dietz give an opinion on the ultimate issue, but he also explained the law and testified as to Scott's state of mind during the homicide. This testimony was contrary to the holding of J.T. and Dr. Dietz usurped the jury's role. Id. The testimony by Dr. Dietz issue denied Scott Kologi of his right to a fair trial. (16T:23-21 to 26-2).

**a. Scott Kologi was Prejudiced by the Court allowing Dr. Park Dietz to Opine on the Veracity of Witnessess Testimony (Not Raised Below)**

An expert witness may not opine as to the veracity of a defendant's statement. Rosales, 202 N.J. at 567. Dr. Dietz testified about the defendant's state of mind in painstaking detail. Moreover, Dr. Dietz was permitted to hold the firearm and testify about Scott's state of mind when he loaded the weapon. (13T:169-10 to 171-2). Similarly, Dr. Dietz was permitted to testify as to why Scott wore sunglasses and earplugs. (13T:171-15 to 21).

Throughout his testimony, Dr. Dietz infringed on the jury's decision-making function by constantly opining on the veracity of Scott's statements to the police or other mental health professionals. (13T:184-20 to 185). Specifically, Dr. Dietz said, "having already viewed his statement to the police, and what he said the day after to mental health professionals, and what he has said every day for three years after that, before he gets to me, I know pretty much clearly which things aren't true, which things he's omitting, which things he's said different ways at different times, which things are brand new." (13T:184-20 to 185-2). Dr. Dietz further stated that he didn't believe Scott heard a voice in the shower on the date of the shootings. (13T:200-3 to 5). In addition, Dr. Dietz testified "I do think that he's protecting himself from a recognition from the terrible things he's done by adopting an explanation in which somehow mental illness did this to him, now that he's lost the brain tumor explanation for it." (13T:228-12 to 16). Dr. Dietz continued and testified "[t]hat it's important for him to be able to live with what he's done." (13T:228-17 to 18). "And if he can blame mental illness, that's easier on him than taking responsibility for it." (13T:228-18 to 20).

Dr. Dietz testified to the veracity of Michelle Molyneux's statement. Specifically, Dr. Dietz stated that he reviewed her statement with "a skeptical and discerning eye." (13T:53-5). He also testified that he was "trying to weigh

the likelihood of various events being true or not true." (13T:53-4 to 9). There is no scenario where Dr. Dietz's opinion as to the veracity of a witness's statement is admissible. Rosales, 202 N.J. at 567. Dr. Dietz stated that he believed the portion of her statement regarding Scott killing his family because it was corroborated by a hearsay text message that wasn't introduced in the State's case in chief. (13T:54-11 to 17). Specifically, Dr. Dietz stated that human memory is fallible, therefore, he relied on a hearsay text message that was never introduced in the State's case in chief to determine whether Scott talked "about harming, shooting, or killing people before the incident." (13T:41-23 to 42-9). Dietz stated, "instead of relying on someone's memory of events in the past, finding a phone record that captures what words were used, was important evidence." (13T:42-10 to 13). Furthermore, Dr. Dietz stated that he relied on this hearsay document for the truth of the matter. (13T:42-10 to 20). The Court introduced this evidence over the defense's objection. (13T:42-24 to 45-21). Despite Steven Kologi Jr. testifying, the State did not introduce this text message. (6T:99-8 to 150-11).

Ultimately, Dr. Dietz should not have been allowed to opine on the ultimate issue in the matter that he did. Dr. Dietz repeatedly testified about the ultimate issue in this case. (14T:110-8 to 16). In addition, Dr. Dietz gave an in-depth of Scott's State of mind and gave an analysis of what Scott did and why

he did it. (14T:110-21 to 112-9);(14T:115-20 to 23). For example, based on a thumbnail of an internet search that was on Scott's phone, Dr. Dietz testified that Scott was planning to get into a gun fight with the police. (14T:108-20 to 109-2). Dr. Dietz also gave in depth testimony regarding Scott's ability to appreciate the wrongfulness of his acts. (14T:113-25 to 114-6). In addition, Dr. Dietz took it a step further and called Scott a "mass murderer" and "family annihilator" in front of the jury. (14T:114-8 to 12). This type of testimony was unduly prejudicial and unable to be cured by any limiting instruction and was so prejudicial that it denied Scott Kologi his right to a fair trial.

## POINT VII

## THE JURY CHAGE DID NOT CORRECTLY INSRUCT AS TO THE RELEVANT LAW AND WAS MISLEADING WARRANTING A NEW TRIAL (17T:69-35 to 72-34)

"[I]t is critical that a trial court properly charge the jury in a criminal matter." State v. Jenkins, 178 N.J. 347, 361 (2004). See State v. Reddish, 181 N.J. 553, 613 (2004). Because legally erroneous jury instructions possess "the capacity to unfairly prejudice the defendant," State v. Grenci, 197 N.J. 604, 623 (2009)(citing State v. Bunch, 180 N.J. 534, 541-41 (2004)), defendant is entitled to reversal of his conviction. The model jury charge is "often helpful to trial courts performing this important function[,]" but in some cases, as here, the trial court must "mold the instruction in a manner that explains the law to the jury in

the context of the material facts of the case." State v. Concepcion, 111 N.J. 376, 379 (1988).

Here, the Court read an incorrect charge to the jury with respect to Possession of a Weapon for an Unlawful Purpose. (15T:242-8 to 245-8). The charge as it was originally read to the jury stated "a weapon is anything readily capable of lethal use or of inflicting serious bodily injury." (15T:242-8 to 9).

However, on the verdict sheet, there was a sentencing enhancer pursuant to N.J.S.A. 2C:43-6(c), which requires Scott Kologi to possess a firearm while in the course of or attempting to commit the foregoing crime. (Da9-15). When the charge was initially read to the jury, the Court never defined what a firearm was. (15T:242-8 to 9). Similarly, the charge did not define what possession meant. (15T:242-8 to 9). On February 24, 2022, the day after charge was initially read, the Court reread the charge on Possession of a Weapon for an Unlawful Purpose to include the definition of a firearm and the definitions of actual and constructive possession. (16T:7-23 to 16-1).

The erroneous charge couple with the rereading an additional charge the following day was confusing and warrants the Court granting the defendant's motion or a new trial. (16T:11-6 to 20).

## POINT VIII

## SCOTT KOLOGI'S SENTENCE WAS MANIFESTLY EXCESSIVE AND THE COURT INAPPROPRIATELY WEIGHT THE AGGRAVATING AND MITIGATING FACTORS. (17T:185-1 to 214-14)

Our Supreme Court has affirmed the wide-ranging authority of appellate courts to review sentencing determinations. In State v. Roth, 95 N.J. 334, 369 (1984), the Court held that "an appellate court ... can … review the aggravating and mitigating factors found below to determine whether these factors were based on competent, credible evidence in the record …" See also State v. Jarbath, 114 N.J. 394, 402 (1989) (appellate court should determine "whether the trial court failed to adduce sufficient evidence to support its findings with respect to aggravating and mitigating factors or failed to exercise sound discretion relating to the weighing of aggravating and mitigating factors"). Thus, the trial court's sentencing determination, as based on aggravating and mitigating factors, and the reasoning therefor, is broadly reviewable.

During Scott's sentencing, the Court highlighted hearsay facts that were detrimental for Scott and ignore or downplay any fact that was beneficial for Scott. Despite the countless mental health examinations and testimony regarding Scott's limitations at trial, at sentencing the Court stated "yes, he acted a little bit younger than his actual age at times." (17T:179-4 to 5). That is substantially downplaying a sixteen-year-old boy who slept in the bed with his

parents and still believed in Santa Claus. (9T:153-24 to 3); Furthermore, during sentencing the court called Scott a "cold blooded killer" and "mass murderer." (9T:177-11 to 24);(9T:178-4 to 12).

In addition, the Court significantly downplayed the fact that Scott asked his mother for help. The Court stated:

> [Y]es, the defendant's mother tried to protect her son. What's wrong with that? That she tried to protect him from himself. She wanted to try to help him and not lose him. What mother is wrong for wanting to do that? But this defendant decided the way he's going to handle that is going to put a few bullets into her face and chest. [17T:179-13 to 20].

First, this analysis implies that it would be completely reasonable for a mother whose son is telling her that he has homicidal thoughts and wanted help, to do nothing. Second, it completely ignores the testimony of Michelle Molyneaux. Michelle Molyneaux testified that Scott told his mother that he was having bad thoughts and wanted to see a shrink. (7T:241-8 to 14). Furthermore, Michelle Molyneux testified that Scott wanted to be on medication which his mother also forbade. (7T:242-3 to 15). Likewise, Ms. Molyneux indicated that Scott told his mother that he didn't want to hurt anyone and wanted the bad thoughts to stop. (7T:248-24 to 249-2). However, the Court ignored these facts and put all of the blame on the mentally ill sixteen-year-old boy. (17T:179-13 to 20).

The Court improperly considered aggravating factor three (3). Specifically, the Court did not address the fact that defendant had no incidents in the Youth Detention Center. In the Prosecutor's summation, the Prosecutor indicated:

> It will be five years since these crimes have occurred. The defendant graduated high school with mostly straight A's. He took college courses. No evidence of any outbursts, no evidence of any problems, no other acts of aggression or violence.

[15T:177-1 to 5]

In assessing aggravating factor three, the court simply noted that Scott had no remorse because he didn't speak at sentencing. (17T:198-24 to 198-13). The Court also misquoted and took out of context comments from Scott's social worker notes to place a greater emphasis on this factor. (17T:196-11 to 18). This information was based upon hearsay statements of a social worker that didn't testify at the trial. In the same note where the Court highlights that the defendant said that he knows how to "better cover his tracks," he says that he doesn't want to hurt anybody. (Da183). In the same note, Scott recanted his statement and said that it wouldn't happen again because he would have help. Id. In a later entry, Scott states that he has education about himself, and the next time he had violent thoughts he would tell his brother so this wouldn't happen again.. (Da180). In this case there were 83 pages of therapist notes from the Youth Detention Center. (Da112 - 194). However, the Court seemingly focused on a

few out of context lines to justify aggravating factors while ignoring the countless times Scott indicated that he wanted to get help and didn't want to hurt people.

The State's expert indicated that the Autism Spectrum Disorder, the dissociative state, "his clean record, the positive aspects of Mr. Kologi's character, and the thrwarting of his desire to seek help before the shootings would be appropriate considerations in sentencing and placement should he be convicted. (Da196-459). However, at sentencing, the Court focused on hearsay statements from the voluminous reports to justify an egregious sentence.

The Court further stated that Scott indicated that his sister was mean to him and alluded to the fact that she used to touch him inappropriately when they were young children. Scott's brother Jonathan testified that Scott had a regular relationship with Brittany, and he never thought he would harm her in any way. (9T:227-21 to 228-9).

The Court used the fact that Scott, who is autistic and has difficulty with social interactions, did not speak at his sentencing to give additional weight to aggravating factor three. (17T:197-24 to 198-7). The Court ignored the fact that Scott expressed remorse to the social workers and the pre-sentence report, and put significant weight on the fact that a young adult who suffers from autism,

could not give an eloquent apology at his sentencing in front of a courtroom full of people. (17T:198-8 to 13).

With respect to aggravating factor nine (9), the Court did not properly evaluate that factor in the context of State v. Zuber, 227 N.J. 440 (2017). The Court did not address how deterrence applies in the context of an autistic sixteen (16) year old boy. State v. Jarbath, 114 N.J. at 405. The Court did not address Scott's diagnosis of autism or schizophrenia at all in addressing this factor. (17T:202-7 to 16). Instead, the Court relied upon various hearsay passages from voluminous social worker notes that were cherry picked by the Prosecutor during expert testimony. These were notes from a social worker that did not testify. Moreover, the Court read the comments out of context. Specifically, the note says:

> He believes his brain is getting split. That his brain and body can take control of itself, almost like it went on autopilot. He reported that his scares him, because "I am not a bad guy" and "I don't want to hurt anybody." The other part of me knows the consequences now and will more carefully, and plan better how to cover his tracks. He describes auto pilot as calm, doesn't feel emotionally and evil.
>
> [Da183]

This note is clearly Scott talking about being scared of another mental health incident happening again. Id. He talks about being on "autopilot" and not in control. He says that he doesn't want to hurt anybody. In this note, Scott is clearly talking about being in a schizophrenic episode. However, the Court

skipped the part about not wanting to hurt anybody and only focused on "covering his tracks" to attribute more weight than necessary to aggravating factor nine (9).

The Court then stated, "In fact despite multiple evaluations, defendant's competency has never been mentioned." (17T:202-19 to 20). "Defendant's own desires and choices guided his actions, not any mental deficiency." (17T:202-20-21). This statement by the Court contradicts the testimony of both experts. When it came to applying weight to aggravating factors three (3) and (9), the Court stated that Scott had no remorse and called him a cold-blooded killer incapable of rehabilitation. (17T:178-4); (17T:197-19 to 13).

However, when it came time to mitigating factors, the Court stated "since his incarceration, the defendant has successfully, excuse me, has succeeded academically and has not claimed that incarceration harms his mental health." (17T:212-12 to 15). He's actually even obtained some college credits at YDC." (17T:212-15 to 17). "Therefore, for these reasons, this Court does not find the mitigating factor 11 applies because there is no hardship to the defendant." (17T:212-17 to 19). Thus, when applying aggravating factors, the Court found that Scott was a cold-blooded killer, incapable of rehabilitation. However, when the court did not want to apply a mitigating factor, Scott was doing great in detention and taking college courses. The Court only used Scott's evidence of

rehabilitation to not apply a mitigating factor. Id. These two narratives are diametrically opposed to each other but the Court's only considered facts with respect to place more emphasis on aggravating factors and less emphasis on mitigating factors.

With respect to mitigating factors, the Court put inappropriate weight on mitigating factor three (3). Dr. Santina testified that Scott suffered from schizophrenia whereas Dr. Dietz testified that Scott suffered from autism. (10T:120-9 to 121-14); (14T:99-7 to 19). Nobody testified that Scott didn't have mental health issues. Moreover, the State's expert report states "both his Autism Spectrum Disorder and the dissociative state into which he entered upon firing the first shot limited Mr. Kologi's ability to fully appreciate the gravity of his offenses on an emotional level." (Da458).

The Court stated that "there is no evidence that the defendant actually suffers from schizophrenia." (17T:206-12-14). However, in the State's own expert report, Dr. Dietz indicates "other evaluators have considered or diagnosed Schizotypal Personality Disorder, prodromal Schizophrenia, or Schizophrenia, each of which has overlapping symptoms with Autism Spectrum Disorder." (Da455). The State's expert conceded that other evaluators have diagnosed Scott with Schizophrenia. Id. Therefore, when the Court stated "this Court and what it has what it has heard so far finds at this point in time there is

no evidence that the defendant actually suffers from schizophrenia," it was not based on fact. (17T:206-11 to 14).

The Court substantially downplayed Scott's mental health issues with respect to mitigating factor three. Specifically, the Court stated "[a]t best, this defendant suffers from autism spectrum disorder." (17T:206-15 to 16). This suggests that Scott may not have any mental health issues. Every single mental health evaluator diagnosed Scott Kologi with mental health issues. (Da455). Therefore, it was a gross understatement for the Court to say, "at best, this defendant suffers from autism spectrum disorder." (17T:206-15 to 16). Scott's mental health was a focal point of this case, and this factor should've been given significant weight. Through the hallucinations, schizophrenia, dissociation and autism, this mitigating factor should've been given substantial weight and not downplayed.

Similarly, mitigating factor four (4) should've been given substantial weight. The State's expert never stated that Scott did not have a significant mental health issue. The Court downplayed the weight on this factor and only considered facts that supported placing less weight on the mitigating factor. For example, the Court stated, "he's not mentally challenged because he graduated from high school." (17T:27-14 to 15). The Court made no mention that at the time of the offense, Scott was at the Hawkswood School. (10T:81-11 to 21). Dr.

Santina testified that "[t]he Hawkswood School is an alternative school for individuals with significant disabilities." (10T:81-16 to 18). Similarly, the Court substantially downplayed autism and stated, "while this order exists and maybe to a certain extent it may have some effect on his emotions, there's nothing before me that shows that rose to any level that forced him or pushed him into doing this." (17T:207-18 to 22).

The Court should've place weight on mitigating factor eight. In the State's summation, the Prosecutor acknowledged that Scott did not have any violent outbursts or problems while in the Youth Detention Center. (15T:177-2 to 5). Moreover, at the time of the incident, Scott was not diagnosed with any mental health issue and his mother forbade him from getting treatment. (10T:151-18 to 152-4); (10T:241-22 to 25). However, Scott's mother was afraid they were going to put him in the "looney bin" and would not allow him to tell anybody about his issues. (10T:241-5 to 16).

The Court improperly considered mitigating factor number nine. Scott expressed remorse in his pre-sentence report. (Da463). In addition, one of the evaluations of Scott indicated "while he has expressed feelings of sadness and remorse verbally, he has not shown emotions that are congruent with these feelings." (Da354). Furthermore, Scott told the State's expert:

> There was a – remorse at what happened. I felt upset. I was wondering why I did it. I don't' know, just thoughts came out of

> nowhere and I thought they were out to hurt and kill me. That's some of what crossed my mind.
>
> [Da442].

Scott told the social worker Lauren Stillwell "I am sorry for what I did, I won't do that again." (Da311). Both experts at trial testified that Scott's mental health issues impact his ability to properly display emotions. Therefore, it was improper for the court to completely ignore Scott's autism and/or schizophrenia diagnosis and simply State "I do not find mitigating factor number nine because this defendant shows no remorse for his actions and that lack of remorse is sufficient to preclude this application." (17T:211-12 to 15).

With respect to mitigating factor fourteen, the Court completely misapplied the application of this mitigating factor. (17T:214-15 to 224-14). The Court focused strictly on the nature of the offense and significantly downplayed or ignored the majority of the Miller factors. Id.

## POINT IX

## THE COURT IMPROPERLY APPLIED THE MILLER FACTORS (17T:227-4 to 235-9)

Pursuant to the United States Supreme Court in Miller v. Alabama, 567 U.S. 460 (2012) and the New Jersey State Supreme Court in State v. Zuber, 227 N.J. 440 (2017), before the Court can impose the functional equivalent of a life sentence without parole the Court must consider the mitigating qualities of

youth, which the United States Supreme Court in Miller identified as: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [the juvenile offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation[.]" [Zuber, 227 N.J. at 445 (quoting Miller, 567 U.S. at 477-78).

The touchstones of the Miller decision are consideration of the offense and the corresponding punishment, the age of the defendant at the time of the offense, and the possibility of rehabilitation. The sentencing judge is required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Zuber, 227 N.J. at 446-47 (quoting Miller, 567 U.S. at 480). This applies with equal strength to a sentence that is the practical equivalent of life without parole. Id.

The Court reached this decision after a comprehensive review of the United States Supreme Court's recent, groundbreaking juvenile sentencing decisions, from Roper v. Simmons, 543 U.S. 551 (2005) (death penalty is disproportionate for juvenile offenders), to Graham v. Florida, 560 U.S. 48 (2010) (life in prison without parole is disproportionate for juvenile nonhomicide offenders), to Miller, 567 U.S. 460 (life in prison without parole is proportionate for a juvenile homicide offender only upon consideration of specific factors, and subsequent to a determination that the juvenile offender is incapable of reform), to Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (Miller applies retroactively). Zuber, 227 N.J. at 438-446. In these decisions, the Zuber Court noted, the United States Supreme Court recognized as a matter of Eighth Amendment law "'three general differences between juveniles under 18 and adults'": (1) "'[a] lack of maturity and an underdeveloped sense of responsibility'"; (2) that "'juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'"; and (3) that "the character of a juvenile is not as well formed as that of an adult. The personality traits are more transitory, less fixed.'" Zuber, 227 N.J. at 439 (quoting Roper, 543 U.S. at 569).

Zuber also adopted the Supreme Court's holding that a sentence of life without parole is a particularly harsh punishment for a juvenile because it

"'means denial of hope; it means that good behavior and character improvement are immaterial,'" and because "'[u]nder this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.'" Id. at 442 (quoting Graham, 560 U.S. at 70-71).

Zuber then discussed how, under Supreme Court precedent, the inherent developmental shortcomings of youth undermine the purposes of punishment (retribution, deterrence, incapacitation, and rehabilitation), making life without parole for a juvenile offender permissible only in extremely limited circumstances. Thus, the New Jersey Supreme Court recounted that "[r]etribution, which relates directly to the offender's personal culpability," cannot justify the worst punishments for juveniles because their innate shortcomings and vulnerabilities render them less culpable for their conduct. Id. 442-43 (citing Graham, 560 U.S. at 71-72). "Deterrence fails as a justification for a similar reason," the Court noted, because juveniles "'are less likely to take a possible punishment into consideration when making decisions.'" Id. at 443 (quoting Graham, 560 U.S. 72). The incapacitation rationale is also inadequate to justify such a lengthy sentence, Zuber recognized, because it entails a judgment that the juvenile offender "forever will be a danger to society," requiring sentencing courts to determine that the juvenile is "irreparably corrupt,'" a predictive assessment that escapes "even experts at the outset." Id.

at 443 (quoting Graham, 560 U.S. at 72). Finally, rehabilitation plainly cannot justify a sentence of life without parole, since juveniles so sentenced "are denied the right to reenter society." Id. at 443 (citing Graham, 560 U.S. at 74). This is why, Zuber noted, the United States Supreme Court forbade imposition of life without parole on a juvenile nonhomicide offender, highlighting "the twice diminished culpability'" of "'a juvenile offender who did not kill or intend to kill." Id. at 442 (quoting Graham, 560 U.S. at 69).

With regard to juvenile homicide offenders, Zuber explained that under Miller, the Eighth Amendment permits a sentence of life without parole only if, upon consideration of the mitigating factors of youth (i.e. the Miller factors, listed above), the sentencing court determines that the juvenile is incorrigible, or irreparably corrupt, a determination that should be "'uncommon.'" Id. at 445-46 (quoting Miller, 567 U.S. at 478-79).

The Supreme Court has relied on an overwhelming consensus in the fields of psychology and neuroscience, as well as "what 'any parent knows,'" Miller, 567 U.S. at 471 (quoting Roper, 543 U.S. at 569), in holding that juveniles are categorically less mature and more irresponsible relative to adults, "qualities that often result in impetuous and ill-considered actions and decisions," Roper, 543 U.S. at 569 (internal citation omitted). These characteristics — heightened thrill-seeking with poor impulse control — combine catastrophically, helping to

explain why, as the Supreme Court recognizes, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" Roper, 543 U.S. at 569.

In assessing the first Miller factor, the Court solely relied upon the nature of the offense. Furthermore, the Court selected the points of Michelle Molyneux's testimony where Scott told his mother that he would kill the family but ignored the part of the same statement where Scott told his mother that he wanted to tell his therapist about his bad thoughts because he didn't because he didn't want to hurt anybody. (7T:211-22 to 212-5); (17T:19-219-12 to 15). In the same statement, Michelle testified that Scott's mother told him that they're going to put him in the "looney bin" if he told anybody. (7T:241-15 to 16). In the court's analysis of the first Miller factor there was zero mention of Scott wanting help and only mentions of the fact that Scott wanted to kill his family. (17T:218-23 to 220-11). Furthermore, instead of analyzing Scott's age, undiagnosed mental illness and as Dr. Dietz stated "the positive aspects of his character … and the thwarting of his desire to seek help before the shootings," the court called Scott "an evil man with an evil spirt." (17T:220-7 to 8)(Da458).

Similarly, the Court inappropriately applied Miller factor two. By all accounts Scott had a mental illness. The State's expert Dr. Park Dietz wrote "his grandfather and mother – two trusted people in whom he confided such

thoughts – instructed him not to share such thoughts or the thoughts of harming others with his therapist or anyone else, depriving him of the opportunity to receive useful feedback or intervention and depriving others of the opportunity to explore and assess his fears, thoughts, risk and access to weapons to avert tragedy." (Da455). While nobody is debating that Scott was loved or didn't have a caring home life, the fact that he was expressing concerns to his mother that he was having thoughts of killing his entire family and was never given help is dysfunctional. (8T:241-5 to 18). Furthermore, Scott tried to talk to his grandfather about it who also ignored it. (8T:40-8 to 17). Michelle Molyneaux testified that she was so concerned that she confronted Scott's mother. (7T:245-8 to 15). Ms. Molyneaux also testified that she was afraid that if she told anybody that Scott's mother was going to kick her out of the house. (7T:245-8 to 19). Therefore, the Kologi household may have not been dysfunctional in the traditional sense but failing to provide help for a mentally ill sixteen-year-old boy who was desperately requesting it, is brutal and dysfunctional. If Scott had a physical illness instead of a mental illness, this factor would not be debatable. There were adults in Scott Kologi's life that let him down. However, the Court failed to acknowledge it and placed one hundred percent of the blame on the mentally ill sixteen-year-old boy. (17T:220-16 to 20). The Court stated, "It is unfortunate the defendant did not receive the help he asked for." (17T:220-16 to

17). "However, the failing of his dependent mother and grandfather and understanding the mental health, does not overcome the rest of the defendant's supportive home environment." (17T:220-17 to 20). The Court engaged in an oversimplified analysis of what transpired. Id. Scott did not need a supportive home environment; he needed mental health counseling. Scott needed the same mental health counseling he in the Youth Detention Center where he's caused zero problems. (Da112-194). This entire case is a result of the failing of his family to provide the help that Scott asked for. While nobody would say argue the family in in way deserved what happened to them, it is shortsighted to ignore the fact that Scott was begging for help in the time period leading up to the shootings. (7T:241-1 to 242-7). Furthermore, on top of the family knowing that Scott was expressing homicidal ideations, his brother left an unsecured assault rifle in the house with a mentally ill child. (6T:124-24 to 125-10).

A schizophrenia or autism diagnosis required Scott to see a mental health professional. The Court noted that "defendant was in control of his emotions and thoughts" with no mention of the undiagnosed mental illness and the fact that the State's own expert stated, "his Autism Spectrum Disorder and the dissociative state into which he entered upon firing the first shot limited Mr. Kologi's capacity to fully appreciate the gravity of his offenses on an emotional level." (Da458). The Court's refusal to acknowledge or substantially

downplaying Scott's mental illness at sentencing is contrary to all the testimony at trial. (17T:221-4 to 15).

That fact that Scott's offense conduct was impulsive is undeniable. Scott was sixteen years old and by all accounts had an undiagnosed mental illness. (10T:208-12 to 210-17). Whether it's autism or schizophrenia, he had an undiagnosed and untreated mental illness. Id. One second Scott was downstairs watching Kong Skull Island with his family and shortly thereafter this horrific tragedy happened. (7T:137-23 to 138-8). During Scott's statement to the police, he said that it just "popped up his head." (8T:37-5 to 10). Scott also told the police that it was like I was watching a movie, so to speak." (8T:142-25). Thus, Scott's chronological age, and impetuosity—particularly as exacerbated by his undiagnosed mental illness — was a significant causative factor in his involvement in the offenses at issue.

Every witness testified that Scott was immature for his age. His brother Steven testified that he "would actually have trouble differentiating the ages of other younger kids because they wouldn't act the same as he would, even though he might be older." (6T:132-10 to 9). Scott's Aunt Michelle Molyneaux testified that Scott would make inappropriate jokes at times. (6T:243-20 to 7). At one point during his interrogation just hours after shooting his family, Scott made a masturbation joke. (8T:130-4 to 15). At another point of the interview, he made

a joke about the electric chair scene in the movie the Green Mile. (8T:176-7 to 10). His brother Jonathan testified that Scott had a low maturity level and did not act like other kids his age. (9T:145-13 to 146-2). Jonathan also testified that despite being sixteen (16) years old, Scott still slept in the bed with his parents at night. (9T:177-6 to 178- 10). Jonathan Scott's Uncle Richard Molyneaux testified that Scott acted younger than kids his age. (9T:228-18 to 21). Scott's grandmother Carole Zawacki-Kologi testified that when Scott was younger "he was socially awkward and much less mature" than other children. (10T:20-15 to 21-1). The Court ignored the fact that Scott was wholly immature for his age and simply focused on the offense itself.

In addition, the Court's analysis that Scott stated that he would've shot his dog was a complete mischaracterization of what was said in Scott's statement. (17T:221-8 to 20). The Court choose portions of the dialogue to justify not applying the second Miller factor. The actually dialogue states:

> LIEUTENANT TOZZI: How come you didn't shoot the dog?
>
> SCOTT KOLOGI: He wasn't doing anything to me.
>
> LIEUTENANT TOZZI: But he wasn't doing anything to you?
>
> SCOTT KOLOGI: He didn't do anything to me …
>
> [8T:63-13 to 20]

LIETANANT TOZZI: Before any of the initial … could you have shot the dog first?

SCOTT KOLOGI: I don't know.

LIEUTANANT TOZZI: You don't know?

DETECTIVE VERDADEIR: (indiscernible).

SCOTT KOLOGI: I probably wouldn't.

LIEUTENANT TOZZI: You probably would or you probably wouldn't have.

SCOTT KOLOGI : I wouldn't have noticed him.

LIETENANT TOZZI: You wouldn't have noticed him? So would you say that your dog was on the agenda for you to shoot or no?

SCOTT KOLOGI: No, no --

[8T:64-3 to 17]

LIEUTENANT TOZZI: How come you didn't shoot the dog?

SCOTT KOLOGI: Well if he tried to attack me, I would have.

LIEUTENANT TOZZI: So, if the dog tried to attack you would –

[8T:64-20 to 25]

LIEUTENANT TOZZI: You wouldn't have shot him?

SCOTT KOLOGI: I would doubt it.

LIEUTENANT TOZZI: And how come?

SCOTT KOLOGI: (No audible response.

LIEUTENANT TOZZI: Do you love your dog?

SCOTT KOLOGI: Yeah, I like my dog.

LIETENANT TOZZI: Okay, so you like your dog. You wouldn't have shot your dog?

SCOTT KOLOGI: No.

LIEUTENANT TOZZI: Okay. Do you like your parents?

SCOTT KOLOGI: Yeah. I liked everyone.

[8T:65-6 to18].

During the exchange, despite repeated questions from Lieutenant Tozzi, Scott ultimately said he wouldn't have shot his dog and that he liked his dog. (8T:65-6 to 15). Scott also said he liked his family. (8T:65-16 to 18). However, somehow at Scott's sentencing, this exchange got warped into:

> Defendant was even asked at one point in time if the, if his dog had, if his dog did anything under the circumstances, what would he have done to the dog? He said I didn't shoot the dog because he wasn't doing anything to me but if he did, he would have shot the dog also. To me that's just further indication of this defendant's mindset. He has the mindset of a defenseless animal that he even thought about in his mind if the dog did something, then I would have taken the dog out too.

[17T:221-8 to 18].

The courts analysis in the aforementioned exchange was taken grossly out of context. The majority of the exchange was Lieutenant Tozzi asking Scott

leading questions trying to get him to state that he would've shot the dog. (8T: to 63-13 to 65-14). Despite Lieutenant Tozzi's repeated questions, Scott says that he wouldn't have shot the dog. (8T: (8T:65-6 to 15). However, the Court somehow used this exchange where Scott said that he wouldn't shoot his dog as a reason to put no weight on the second Miller factor. (17T:221-8 to 20). Here, the Court took various facts out of context and did not place the appropriate weight on the Miller factors to justify a grossly excessive sentence for a sixteen-year-old.

In assessing the third Miller factor, the Court did not place appropriate weight on the fact that Scott's family refused to get him help and that his brother left a loaded American variant AK-47 next to his bed. (6T:124-25 to 125-20). During trial, Dr. Dietz testified extensively about Scott being bullied in school. (14T:39-21 to 41-6). Furthermore, Michelle Molyneux testified about Scott trying to ask his mother for help for the bad thoughts he was having. (14T:211-14 to 212-5). Both experts testified that Scott was undiagnosed at the time of the shootings. Despite all of these factors, the Court simply focused on the fact that Scott loaded the gun and fired fourteen times in finding the third Miller factor should not receive any weight. (17T:221-21 to 222-6).

The Court also improperly applied the fourth Miller factor. The Court stated that "there is no indication the result would have been different had the

defendant not offered a confession." (17T:222-9 to 10). However, this is contrary to the fact that the State's entire case was built upon the defendant's confession which was played ad nauseum at trial. Furthermore, as stated in the sentencing argument, with respect to assisting in his defense, Scott spent the majority of the trial writing Roman numerals on a legal pad. (17T:169-20 to 23). Moreover, after one of the days of testimony, the Prosecutor indicated that "during the course of all the testimony today defendant sat slumped with his face down, head and shaking and rocking." (7T:336-20 to 22). "But I've also noticed today him literally slumped over with his shoulders almost to the table, and rocking in a pretty marked fashion that we've not seen yet."(7T:339-11 to 14). In response, the defense indicated "During jury selection, Scott had his head down on the table and wrote more Roman Numerals than I could possibly say, and that was when no one was in here to watch him." (7T:340-14 to 17). "He's been doing it the whole time." (7T:340-17). "This is how he presents." (7T:340-18 to 19). "Sometimes he's alert, sometimes he's not." (7T:340-18-19). This dialogue was in response to the Prosecutor trying to imply that Scott was purposely rocking in his chair during the trial. The Court acknowledged that it was seen but never made a ruling that Scott was doing it for any particular reason. (7T:341-2 to 5). This dialogue was not in response to a Miller factor. These were legitimate concerns raised during the trial. Thus, during the trial it

was discussed that Scott had difficulty assisting in his own defense. (7T:340-11 to 22). However, this was ignored by the Court at sentencing.

The Court indicated "during the course of this case, there was discussions of a potential plea agreement but there could be no agreement under these circumstances, so the defendant was involved in discussions with his attorney." (7T:222-20 to 24). However, logically this fails. There are usually plea discussions to a certain extent in virtually every case. Under the Court's analysis that the fourth Miller factor shouldn't apply to any case where the attorneys engage in plea negotiations. Thus, this factor would never apply.

In addition, the Court mentioned that this factor couldn't apply because defendant engaged in plea negotiations therefore, he was competent to understand what was going on. (17T:222-20 to 223-6). However, this analysis is flawed. It a defendant was incompetent to stand trial, there wouldn't be a trial or sentencing. Thus, under the Court's interpretation, this Miller factor could never apply. In order to apply a Miller factor, the defendant would either need to plead guilty or be found guilty at trial. If the defendant was incompetent, there wouldn't be a trial. N.J.S.A. 2C:4-4. Therefore, under the Court's application, the fourth Miller factor could never apply, because if the Court is at a sentencing for a defendant, then the defendant is competent. Furthermore, much of what the Court talks about, regarding the specific facts of the shooting

came directly from Scott's statement. (17T:230-25 to 231-25). Nobody witnessed what happened upstairs. (8T:35-25 to 36-23).

The Court did not put the appropriate amount of weight on the fifth Miller factor. The Court acknowledged "defendant has earned straight A's, has had zero disciplinary infractions and has been on the honors unit at YDC." (17T:223-17 to 19). The Court also noted that Scott was currently taking college courses. (17T:223-19 to 20). However, the Court then stated he "the record lacks any indication that the defendant is remorseful for his actions, even years after the offense." (17T:223-24 to 224-1). However, Scott repeatedly expressed remorse to the social worker while in YDC. (Da311). Furthermore, the Court ignored the part of the Pre-Sentence report where Scott said "he reported he is sorry for what happened." (Da463). The Court was aware that Scott had a disability that made social interactions and expressing emotion difficult. (14T:73-20 to 23). The State's expert testified:

> One of the most noticeable features of autism spectrum disorder is the persistent difficulty he had with communication and this limited amount of social interaction. He has had that his entire life. It arose very early in development as it does in an autism spectrum discovery. and one component of it, the speech disorder was treated with some success over the course of many years. But it still remains difficult for him to engage in conversation. He has taught himself to make eye contact which does not come naturally to him.
>
> [14T:73-20 to 74-5].

Dr. Dietz also testified that people with Autism Spectrum Disorder can display inappropriate affect or display of emotion that doesn't fit the situation. (14T:73-4 to 8). Yet, the Court used that disability against him to enhance aggravating factors and improperly apply the Miller factors. Due to his disability, it would've been difficult if not impossible for Scott to give a speech before a Courtroom full of people at his sentencing.

With respect to rehabilitation, while the Court acknowledged that Scott has mental health issues and autism, the Court simplified it and simply stated "autism doesn't make you murder." (17T:179-23). Furthermore, while recognizing that Scott has autism, the Court then said that Scott can't be rehabilitated because he did not say sorry during his sentencing. (17T:181-20 to 23). Both experts testified that Scott Kologi had difficulty with social interaction. (14T:73-20 to 23). Dr. Santina testified that Scott had difficulty showing emotions dating back to when he was a child. (10T:93-22 to 94-2). Thus, to expect Scott Kologi who is autistic to give a speech in front of a courtroom full of people at his sentencing was not reality. The Court seemingly ignored page three (3) of the pre-sentence report which clearly stated "he reported he is sorry for what happened." (Da463).

The Court also put an inappropriate emphasis on the notion that Scott was going to write a tell all book called "Scott Free." (17T:181-16 to 23). The only

testimony in the trial was that "Scott Free" was a joke. (7T:206-18 to 22). His brother Jonathan testified that Scott Free was "completely absurd and ridiculous" and that he "didn't take it seriously at all." (9T:218-23 to 219-2). The State's own expert did not put significant weight on this. (14T:50-17 to 51). However, at sentencing, this insignificant joke became the focal point of the courts analysis as to why Scott Kologi cannot be rehabilitated. (17T:181-16 to 23).

Based on the foregoing, the Court misapplied the Miller factors. The imposition of an aggregate sentence of one hundred and fifty years to a mentally ill sixteen-year-old boy is grossly excessive, shocks the conscious and is contrary to everything discussed in Miller, Zuber and Comer.

## POINT IX

## THE COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES (17T:228-23 to 235-9)

In State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 104 (1986), the Court adopted the following criteria to be followed when sentencing for multiple offenses at the same time:

(1) there can be no free crimes …
(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
(3) ….the sentencing court should [consider]… whether or not (a)the crimes and their objectives were predominantly independent of each other;

(b)the crimes involved separate acts of violence or threats of violence;
(c)the crimes were committed at different times or separate places, rather than being committed so closely in time to indicate a single period of aberrant behavior; [and]
(e)the convictions for which the sentences are to be imposed are numerous;

(4) there can be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term if eligible) that could be imposed for the two most serious offenses.

Id., 100 N.J. at 643-44.

In State v. Sutton, 132 N.J. 471, 485 (1993), the Court added that in determining whether the terms should be concurrent or consecutive, the focus of the court should be on the fairness of the overall sentence. And in Yarbough, 100 N.J. at 646, the Court citing State v. Cloutier, 596 P.2d 1278, 1284 (Or. 1979), stated that although a defendant's conduct may have constituted multiple offenses, the sentencing phase concerns the disposition of a single, not multiple human being."

Accordingly, the Zuber Court concluded that in sentencing juveniles to potentially lengthy periods of incarceration, courts must consider the Miller factors alongside the traditional sentencing considerations, i.e., "the nature of the offense, the juvenile's history, and relevant aggravating and mitigating

factors." Id. at 450. Moreover, "a sentencing court must consider not only the factors in [State v.] Yarbough[, 100 N.J. 627 (1985),] but also those in Miller when it decides whether to impose consecutive sentences on a juvenile which may result in a lengthy period of parole ineligibility." Id. Zuber further stated that in light of the "overriding importance" of Miller, "we direct trial judges to exercise a heightened level of care before imposing multiple consecutive sentences on juveniles." Id.

In State v. Candelaria, the Court noted that the Code's general purposes "still include 'the safeguard[ing of] offenders against excessive, disproportionate or arbitrary punishment,'" and holding that imposition of six consecutive sentences shocked the judicial conscience). 311 N.J. Super. 437, 454 (App. Div. 1998). The judge must still consider "whether the crimes and their objectives were predominately independent of each other, whether the crimes were committed at different times or separate places, and whether there was any double-counting of aggravating factors." State v. Louis, 117 N.J. 250, 254 (1989). In Louis, where the defendant, an adult, stabbed a mother and her child, raped the mother, and then started a fire in their apartment, the Court held that "the crimes did involve separate acts of violence against multiple victims, but the crimes and their objectives did not seem to be predominantly independent of each other." Id. at 254. In addition, the Court suggested that the

offenses were "committed so closely in time and place as to indicate a single period of aberrant behavior." Id. The Court upheld a decision of the Appellate Division reducing an adult's 130-year sentence with a 65-year parole disqualifier to a 60-year sentence with a 30-year sentence with a mandatory minimum. Id. at 255-58. The imposition of the sentences in this case constituted impermissible double counting.

Accordingly, the Zuber Court concluded that in sentencing juveniles to potentially lengthy periods of incarceration, courts must consider the Miller factors alongside the traditional sentencing considerations, i.e., "the nature of the offense, the juvenile's history, and relevant aggravating and mitigating factors." Id. at 450. Moreover, "a sentencing court must consider not only the factors in [State v.] Yarbough[, 100 N.J. 627 (1985),] but also those in Miller when it decides whether to impose consecutive sentences on a juvenile which may result in a lengthy period of parole ineligibility." Id. Zuber further stated that in light of the "overriding importance" of Miller, "we direct trial judges to exercise a heightened level of care before imposing multiple consecutive sentences on juveniles." Id. It is against this backdrop that the Court must evaluate Scott's sentence. The trial court should consider the Miller factors when it determines the length of his sentence and when it decides whether the counts of conviction should run consecutively. [Zuber, 227 N.J. at 453 (quoting

Miller, 567 U.S. at 477-78).] In short, the court should consider factors such as defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences"; "family and home environment"; family and peer pressures; "inability to deal with police officers or prosecutors" or his own attorney; and "the possibility of rehabilitation." Id.

The Zuber Court then turned to the question of how this jurisprudence applied in a case like Scott's, in which the court could impose a sentence that is not formally designated life without parole for a single offense, but instead a term-of-years effectively assuring Scott's death in prison for aggregate offenses. Applying the Supreme Court's "clear message" that "'children are different' when it comes to sentencing," Id. at 429 (quoting Miller, 567 U.S. at 480), Zuber held that under both the Eighth Amendment to the United States Constitution and article 1, paragraph 12 of the New Jersey Constitution:

> The focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence. To that end, judges must evaluate the Miller factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense. They must do the same when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times—when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence. [Id. at 447.]

In addition, Zuber held that considering the "overriding importance" of Miller, "we direct trial judges to exercise a heightened level of care before imposing multiple consecutive sentences on juveniles." Id. at 450.

Here, the Court improperly considered the Yarbough factors. First, the Yarbough factors must be considered in conjunction with the Miller factors. Zuber, 227 N.J. at 450. In the present case the crimes arose out of one incident; the crimes occurred as part of one five-minute series of events; the events occurred in rapid succession as to indicate a single period of aberrant behavior. (7T:322-7 to 15). Furthermore, both experts agreed that Scott was in a dissociative state during the shootings. (10T:122-10 to 123-21); (Da458). The Court did not address the dissociative state, mental health or the Miller factors when imposing consecutive sentences. (17T:228-23 to 235-9).

Furthermore, the Court stated that Scott shot his mother and father because he was not happy with the way school was going. (17T:232-14 to 17). However, that information was introduced in trial through based upon a hearsay statement of a counselor that didn't testify. (13T:49-15 to 51-16). Furthermore, there was no evidence in the case that Scott was going to be transferred to another school or that he was so upset that it provided a motive to kill his parents. This information is mentioned zero times in Scott's statement to the police. (7T:270-20 to 326-12); (8T:18-13 to 66-9).

Furthermore, the Court incorrectly distinguished between the shooting of his mother and father upstairs and the shooting of his sister and Mary Shulz downstairs. The incident happened within the same house at the same time. There was no break in time between Scott shooting his parents and then going downstairs. (7T:324-18 to 326-7). It all happened as part of the same event while Scott was in the dissociative State. (7T:322-7 to 326-7).

The Court improperly considered the Miller factors and put zero weight on the fact that Scott was a mentally ill sixteen-year-old boy who begged his mother for help and never got it. Instead, the Court said Scott's "acts were acts of a 16-year-old man, not a child, acts of an evil man, one that caused immeasurable harm to everyone involved." (17T:233-18 to 19). Then the Court imposed a grossly excessive one hundred and fifty (150) year sentence subject to the No Early Release Act. (17T:234-2 to 9).

## CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the Court reverse the instant convictions and order a new trial. In the alternative, he respectfully requests the Court reduce his sentence and/or run his sentences concurrently.

Respectfully submitted,

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Dated: April 2, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3753-21T4

INDICTMENT NO. 20-01-00067-I
CASE NO. 19004640

| | | |
|---|---|---|
| STATE OF NEW JERSEY, | : | |
| | | CRIMINAL ACTION |
| Plaintiff-Respondent, | : | |
| | | ON APPEAL FROM A FINAL |
| v. | : | JUDGMENT OF CONVICTION |
| | | IN THE SUPERIOR COURT OF |
| SCOTT A. KOLOGI, | : | NEW JERSEY, LAW DIVISION |
| | | (CRIMINAL), MONMOUTH |
| | | COUNTY |
| Defendant-Appellant. | : | |

SAT BELOW: Honorable Marc C. LeMieux, J.S.C.,
and a Jury

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

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## COUNTERSTATEMENT PROCEDURAL HISTORY

On January 8, 2020, a Monmouth County Grand Jury returned Indictment Number 20-01-0067, charging the defendant, Scott Kologi, with the first-degree intentional murders of his mother Linda Kologi, his father Steven Kologi, Sr., his 18-year old sister Brittany Kologi, and family friend, 70-year old Mary Schulz, contrary to N.J.S.A. 2C:11-3a(1) and/or (2) (counts one, two, three, and four). (Da3-5). Each count of intentional murder contained a sentencing enhancer based on defendant's use or possession of a firearm while in the course of committing or attempting to commit the murders or in the immediate flight therefrom, contrary to N.J.S.A. 2C:43-6c. (Da3-5). Defendant was also charged with one count of second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (count five). (Da6).

Defendant was tried before the Honorable Marc C. LeMieux, P.J.Cr., and a jury from February 9, 2022 to February 24, 2022. (6T to 16T). On February 24, 2022, the jury found defendant guilty as charged, as well as finding applicable the sentencing enhancers. (16T26-5 to 29-18; Da9-15).

On June 30, 2022, defendant appeared for sentencing before Judge LeMieux. The judge found that count five (possession of a firearm for an unlawful purpose) merged into the four homicide counts. (17T225-16 to 227-3, 234-10 to 11; Da19). On counts one (first-degree murder of Linda Kologi), two (first-degree murder of Steven Kologi, Sr.), three (first-degree murder of Britanny Kologi), and four (first-degree murder of Mary Schulz), the court sentenced defendant to four maximum custodial term of 50 years, with mandatory NERA and Graves Act parole disqualifiers. (17T227-9 to 228-15; Da16). Count two (first-degree murder of Steven Kologi, Sr.) was imposed

concurrent to count one (first-degree murder of Linda Kologi). (17T233-20 to 23; Da16). Counts three (first-degree murder of Brittany Kologi) and four (first-degree murder of Mary Schulz) were imposed consecutively to each other and consecutively to counts one and two. (17T232-23 to 234-1; Da16). Defendant's maximum custodial term is 150 years, subject to NERA and a five-year parole supervision period on each count. (17T234-2 to 9, 235-2 to 3).

On or about August 5, 2022, defendant filed a Notice of Appeal. (Da24).

## COUNTERSTATEMENT OF FACTS

On December 31, 2017, while the Kologi family was preparing to ring in the New Year at their home at 635 Wall Street in Long Branch, sixteen-year-old Scott Kologi was planning to slaughter them. Defendant's father Steven Kologi Sr. (age 42), his mother Linda Kologi (age 44), his brother Steven Kologi, Jr. (age 20), Steven's girlfriend Rafaella Bontempo, his sister Britanny Kologi (age 18), his grandfather Adrian Kologi, Adrian's long-term girlfriend Mary Schulz (age 70), and his Aunt Michelle and Uncle Richie Molyneaux were "hanging out and watching TV, talking, laughing. Linda was passing out party hats and glasses and stuff for the New Year." (6T66-20 to 24). There was food, champagne, and party decorations. (6T66-25 to 67-4). Brittany, Adrian, and Mary were sitting by the dining room table; Rafaella, Steven Sr., Steven Jr., Michelle, and Richie were on the couch watching the movie "King Kong." (6T67-5 to 12; 7T255-7 to 17). Defendant "was smiling, everything was okay. He had his chicken in one hand, his soda in the other, and he said he wanted to

eat." (7T255-13 to 17). When the movie ended, defendant went upstairs to the bedroom he shared with Steven Jr.[1]

Just before midnight, Linda went upstairs to find defendant so he could celebrate the New Year with his family. (6T67-12 to 13, 116-21 to 117-13). Steven Jr. and Rafaella heard a "pop" from what they mistakenly thought was a party popper. (6T68-7 to 14; 7T143-6 to 13). Then they heard Linda scream or grunt as more gun shots rang out. (6T68-14 to 15; 7T143-21 to 144-2). Steven Jr. smelled gunpowder and there were bullet holes in the living room ceiling. (6T68-20 to 25, 117-14 to 118-5; 7T145-2 to 10). Defendant had shot his mother five times with his brother Steven Jr.'s Century Arms American Variant AK-47 semi-automatic rifle. (7T79-11 to 23; 9T81-18 to 82-4). One bullet entered the left side of Linda's face and ripped through the soft tissue of her neck and jaw. (9T76-6 to 77-5). A second bullet struck her left collarbone, tearing through bone and soft tissue in her upper shoulder. (9T77-19 to 78-16). A third bullet grazed her skin. (9T78-21 to 79-4). A fourth bullet left gun residue on her clothing, indicating the rifle was fired in close range to Linda's body. (9T79-6 to 80-19). A fifth bullet entered through Linda's right arm and exited through her armpit. (9T80-20 to 81-6). Linda died from the significant bleeding caused by the multiple gunshot wounds. (9T82-14 to 20).

Steven Sr. ran up the stairs to help his wife. (6T68-15 to 17; 7T147-16 to 148-4). More gunshots rang out as defendant shot his father four times. (7T85-13 to 23). One bullet entered the top of Steven Sr.'s head, travelled downward, and exited at the midline of his jaw. (9T35-9 to 36-19). The force and kinetic

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[1] Although he shared a bedroom with Steven Jr., defendant slept in their parents' room. (6T110-1 to 14).

energy of the bullet fractured Steven Sr.'s skull and the bones in his face. (9T33-15 to 17, 37-10 to 20). A second bullet sliced through Steven Sr.'s upper back, traveled through his right scapula and right fifth rib, entered his right chest cavity, and injured the upper lobe of his right lung, the arch of his aorta – the main artery supplying blood to the heart – and his trachea, before exiting the front of his chest. (9T37-21 to 39-8). A third bullet entered through the left side of Steven Sr.'s mid-back, striking his left posterior rib, the top of his left kidney, his stomach, and the left side of his liver before exiting. (9T39-9 to 40-8). A fourth bullet went through Steven Sr.'s upper left arm, entered his right chest, struck his right ribs, the middle of his right lung, the right ventricle of his heart, and his anterior ribs before exiting. (9T40-9 to 41-4). Steven Sr. died from multiple gunshot wounds, although any one of the wounds would be fatal by itself. (9T42-8 to 19).

Holding the AK-47 semi-automatic assault rifle by his right hip, defendant casually walked past his parents' bloody and lifeless bodies and down the stairs. He was wearing sunglasses, earplugs, and a black jacket from a "Terminator" costume he wore the prior Halloween. (6T70-9 to 11, 71-7 to 9, 86-4 to 11, 118-19 to 120-6, 120-2 to 5, 122-9 to 18, 150-2 to 4, 181-16 to 182-1; 8T88-19 to 23, 224-8 to 11). Defendant "looked stern, cold" "with a blank expression." (6T84-10 to 12, 87-18, 144-25 to 145-8). He did not speak or scream, nor did he show any emotion. (6T84-10 to 21).

Defendant stopped at the entrance to the kitchen and aimed the rifle at Mary. A bullet pierced Mary's wrist and abdomen as she sat with her hands at her waist. (7T82-3 to 83-21). The bullet tore through her spleen, her stomach,

the edge of her liver, both kidneys, her colon, and her aorta. (9T68-6 to 69-16). Mary died from the single gunshot wound to her abdomen. (9T70-15 to 21).

Defendant then turned and fired three times at his younger sister Brittany, striking her twice. (6T70-11 to 71-6, 71-10 to 17, 120-7 to 11, 120-17 to 23; 7T39-16 to 19, 83-22 to 85-12). One bullet pierced Brittany's left cheek, traveled through her airway, through the right main carotid artery supplying blood to the right side of the head, through the right upper lobe of her lung, and through the posterior rib before exiting. (9T49-24 to 51-11). A second bullet pierced Britanny's left upper chest, traveled through the middle lobe of her right lung, and exited through her lower right chest. (9T51-12 to 52-12). Each wound was fatal by itself; Brittany died from the gunshot wounds to her neck and chest. (9T54-5 to 15).

Defendant then pointed the semi-automatic rifle at his grandfather Adrian who was on the floor, cowering over Mary's dead body with his hands blocking his face to protect himself. (6T71-19 to 20, 71-23 to 72-11, 120-13 to 14, 121-22 to 122-1). Adrian pleaded with defendant not to shoot. (6T120-13 to 14, 121-15 to 21). Steven Jr.'s girlfriend Rafaella, who was hiding behind the refrigerator, saw Scott's shadow as he surveyed the room and walked away, leaving Mary's and Brittany's bodies lying in pools of their own blood. (6T71-18 to 22). A total of 14 shots were fired; 12 of the bullets struck defendant's intended victims. (7T86-2 to 12, 87-9 to 12).

As defendant walked away from the kitchen, Steven Jr. ran out of the house and called 9-1-1 to report the murders. (6T122-2 to 4, 122-19 to 123-4). He did not know where defendant went. (6T72-25 to 73-6). Rafaella also called 9-1-1; she told the 9-1-1 operator she could not talk because defendant

was still in the house. (6T73-8 to 9, 75-1 to 7). Rafaella tried to rouse Britanny, but Brittany did not respond. Rafaella had to step over Mary's and Brittany's bodies as she fled into the backyard through the kitchen door. (6T75-19 to 25). Adrian, who could not walk very well, stayed on the floor next to Mary's body. (6T76-6 to 8). Aunt Michelle and Uncle Richie ran to their apartment in the basement. (6T69-1 to 7, 118-6 to 17; 7T144-2 to 147-4).

At 11:50 p.m., Monmouth County Sheriff's Officer Charles R. Wells, III, was dispatched to the Kologi home. (6T151-20 to 152-10,154-14 to 156-23). He and other officers entered the house wearing body armor and carrying bulletproof shields. (6T160-2 to 20). Inside, Steven Sr.'s body lay on the landing at the bottom of the stairs. (6T163-18 to 164-4). His wife's body lay on the landing at the top of the stairs. (6T181-16 to 182-1). Wells heard a male voice say, "I'm upstairs." (6T164-4 to 10). Wells ordered defendant three times to, "Show me your hands." (6T164-12 to 15). Defendant responded, "I don't have the rifle." (6T164-19 to 165-11). Wells ordered defendant to put his hands on the railing, and then on the wall. (6T176-11 to 17). Defendant understood and followed the officer's commands. (6T165-22 to 166-5, 172-10 to 16). Wells and a Long Branch police officer placed defendant on the ground face down and handcuffed him behind his back. (6T166-6 to 10, 166-19 to 20).

Asked where the rifle was, defendant said it was behind him. (6T166-22 to 23). The murder weapon was recovered in one of the upstairs bedrooms, with one bullet in the chamber. (6T171-5 to 15; 7T37-2 to 16). Inside of a backpack was a magazine for the rifle fully loaded with fifteen bullets, as well as two full boxes of ammunition and ten loose bullets. (7T50-1 to 52-8). Steven Jr. had legally purchased the Century Arms American Variant AK-47

one year earlier through a licensed firearms dealer. Steven Jr. had taken the firearm out of his gun safe because "the safe was starting to rust the weapon" and stored the rifle in his bedroom closet. (6T123-16 to 125-10, 125-19 to 21, 126-10 to 16). He owned two magazines for the rifle, each holding fifteen rounds of 7.62 millimeter caliber bullets. (6T124-13 to 20). He kept the rifle, the ammunition, and the magazines in separate areas. (6T124-21 to 125-4). To Steven Jr.'s knowledge, his brother had never handled the firearm before that night. (6T124-7 to 12).

The trigger of the semi-automatic rifle required five pounds of pressure to release the firing mechanism. (8T233-4 to 234-6). A single bullet is fired each time the trigger is pulled. (8T226-15 to 19). As the bullet travels out of the barrel, the next cartridge in the magazine automatically loads and the weapon is ready to be fired by another pull of the trigger. (8T225-7 to 21). The rifle was equipped with a safety mechanism which required the user to manually push the lever all the way down before the rifle can be fired. (8T226-20 to 227-8).

Defendant was transported to the Long Branch Police Department where he was interviewed at 2:05 a.m. on January 1, 2018, by Lieutenant Andrea Tozzi of the Monmouth County Prosecutor's Office and Long Branch Detective Michael Verdadeiro. (7T259-1 to 14, 265-5 to 267-15, 268-7 to 24). Defendant was under age 18 and required the presence of a guardian before the police could speak with him. (7T267-16 to 268-1). With both parents dead, defendant's brother, 20-year old Steven Jr., was his next of kin. (7T268-1 to 6, 271-23 to 272-6). Steven Jr. was comfortable with defendant speaking to the police. He advised defendant that he and his parents still loved him: "Just tell

these guys everything. We've all got your back." (7T291-10 to 17). Defendant understood the Miranda warnings and initialed each right. He and his brother signed the Miranda form at 2:18 a.m. (7T281-6 to 291-2; 8T13-2 to 16-4).[2]

Defendant was in the 11th grade at the Hawkswood School in Eatontown. (7T272-8 to 13, 279-17 to 25). Defendant had been bullied in elementary school, so his mother homeschooled him until he enrolled in Hawkswood, a school for students with Autism and special needs. (6T80-3 to 8, 111-23; 7T256-6 to 13). Defendant told the officers that he earned good grades at Hawkswood, never got into trouble, and always completed his school work. (7T296-12 to 298-6). He was responsible for locking up the school library each afternoon because he was trustworthy and knew that stealing was wrong. (7T280-1 to 281-2). Defendant also assisted with school events, including selling gifts at the Christmas bazaar, and he was trusted to handle cash for purchases. (7T294-1 to 295-12). Defendant was currently reading Stephen King's "The Shining," but enjoyed reading "different types of genres." (7T299-11 to 15). He planned to attend college after graduating high school to study abnormal psychology and horticulture. (7T293-1 to 12).

Defendant's demeanor was "matter of fact." (8T129-15 to 20). He told the police that twice in his life he heard or seen "stuff that wasn't there," but it rarely happened and lasted for only "a few seconds." (7T302-23 to 303-4, 303-24 to 304-2). When he was seven or eight years old, defendant thought he heard a teacher's and friend's voices on the stairs of his house, even though they were not there. (7T303-6 to 12). He told his grandfather about this

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[2] The audio- and video-recorded interview (S-76) was played for the jury. (7T268-25 to 269-14, 270-20).

incident. (7T303-19 to 22). Another time at his neighbor's house he saw a "inkish" mass, staring through the window before it disappeared." (7T304-13 to 21). Once he was lying in bed falling asleep when he felt a jolt on his chest, like from a defibrillator, and saw a transparent women floating through the ceiling. (7T304-23 to 305-10). Another time, he saw a transparent woman with gold lines on his neighbor's roof. (7T305-12 to 305-18; 8T137-23 to 138-1). And once he saw faces on his bedroom wall while he was asleep. (7T306-5 to 12).

Although defendant "liked everyone," including his parents, he had thoughts over the past year about hurting his family "like what happened tonight." (7T305-15 to 307-9; 8T65-16 to 18). Defendant claimed he had mood swings; one moment he would be happy and then suddenly he would feel angry and sad. (7T307-14 to 308-3; 8T99-24 to 100-4). "It would just be on and off." (7T308-5 to 6). But he did not know if he felt that way before shooting his family. (7T308-7 to 20).

Defendant was sitting with his family and getting ready to ring in the New Year when he felt the need to go upstairs. (7T308-11 to 24). He worked on a presentation for class, then thought about a neighborhood bully who once held a knife to him and about someone else in school who hit him in his stomach so hard he fell to his knees. (7T308-25 to 311-22; 8T100-4 to 9). These memories made him feel "not good." (7T312-1 to 4). Defendant said he kept his emotions to himself: "I don't want to push problems onto other people, and so it kind of, like, builds up until I cry or I move on from it." (7T312-5 to 18). Immediately before the murders, defendant's thoughts were

building up: "It was like basically everything coming together and I was just tired of it." (7T312-19 to 313-2).

Defendant started thinking about the murders one year before and had thoughts all that day about shooting his family with Steven Jr.'s semi-automatic rifle. (8T39-15 to 40-6, 99-11 to 23). Defendant took the AK-47 out of its case in his brother's room. (7T313-20 to 23). Although defendant had not fired a gun before, this was not the first time he had handled his brother's rifle. (7T315-22 to 25; 8T42-1 to 4, 104-20 to 105). The bullets were also in the closet, but in a separate case. (7T313-24 to 314-3). One of the two magazines was in a backpack next to the closet; the other was attached to the rifle. (7T314-10 to 22). Defendant searched on his phone that day and the week before for YouTube videos demonstrating how to load and use an AK-47. (7T316-17 to 317-4; 8T42-7 to 15, 56-16 to 57-19, 59-5 to 60-1; 8T78-22 to 79-21, 100-15 to 18). Defendant manually loaded a total of thirty 7.62 millimeter bullets in both magazines until each was full. (7T314-4 to 9, 314-23 to 315-1; 8T27-24 to 28-13). He could not stop loading the magazines because "subconsciously I had to do it." (8T38-13 to 17). He was nervous, though, that he would get caught loading the rifle. (8T104-6 to 10) (8T32-25 to 33-8).

After readying the AK-47, defendant turned the lights off in his room, because he was concerned that if his mother realized what he was about to do, he would be "snapped out of it." (8T36-5 to 23, 104-11 to 19). Defendant claimed he saw a stationary, glowing white light outside of his window which disappeared, but he did not hear hearing voices commanding him to "do it." (8T46-21 to 48-11). He put on his leather jacket, sunglasses, and earplugs to

muffle the noise of the firearm, turned out the bedroom light, and waited. (7T317-24 to 319-14).

Defendant heard his mother calling his name. (7T319-15 to 20). When his mother opened defendant's bedroom door, defendant shot her five to seven times in the torso and chest. (8T24-23 to 25-12). Defendant felt himself "shutting off more and more," "like it wasn't me really" and he "was watching a movie." (7T319-20 to 24, 321-21 to 25). When defendant's father Steven Sr. came up the stairs, defendant shot him in his back. (7T324-24 to 325-4; 8T25-13 to 18). He fired at both parents multiple times "until they stopped moving, I was aiming at the head and whatnot" because he did not want them to feel any pain. (8T24-12 to 22, 105-2 to 21).

Defendant then walked downstairs with the loaded rifle, entered the kitchen, and shot his sister Brittany three times in the chest. (8T25-19 to 26-8). He thought he shot Mary four times, but he was unsure because the earplugs muffled the sound. (8T26-9 to 17). Defendant then pointed the rifle at his grandfather intending to shoot him, but his grandfather's emotional reaction to seeing his long-term girlfriend getting shot "snapped [defendant] back to reality, so to speak." (7T325-14 to 18; 8T33-22 to 34-25). He heard Rafaella telling him to stop and Steven Jr. yelling, "Scott, what are you doing?" (8T55-21 to 13, 325-20 to 24). When he heard Rafaella calling 9-1-1, he shook his head and went upstairs. (7T326-4 to 7). He knew the police were coming and did not want to get shot, so he put the rifle aside, and planned to allow the police to arrest him. (7T326-10 to 12; 8T21-8 to 11).

Defendant had not ingested alcohol or drugs the evening of the murders. (8T60-3 to 10). He felt he should be placed in a mental institution "because I

might have some problems." (8T21-12 to 16). Defendant knew the difference between right and wrong and knew that shooting and killing someone was "very wrong." (8T21-21 to 22-2, 39-9 to 11). He once considered shooting the occupants of a house a few blocks away while they were asleep, but did not act on it. (8T48-23 to 50-8). Defendant had never even harmed an animal, including his four pet cats, before murdering his parents, sister, and family friend. (8T50-17 to 51-9). Defendant understood that killing his family was wrong, but he "felt like it wasn't me," (8T38-20 to 39-3). "Even though I cared for these people, I don't feel a thing." (8T22-3 to 13, 23-21 to 25, 24-9 to 10).

Defendant said that the police treated him well and did not threaten him. (8T60-13 to 22). While defendant was on a bathroom break, Steven Jr. told Detective Tozzi that his brother is "very distant," spends his time in his room playing videogames, and is affectionate only with his grandfather. (8T29-20 to 24, 30-17 to 31-13). Steven Jr. had never heard defendant discuss hallucinations before. (6T113-15 to 114-2; 8T29-25 to 30-3). Steven Jr. thought that defendant did not understand emotionally what he did, but admitted that defendant is not "dumb" and understood what he did intellectually. (6T146-23 to 25,147-11 to 17).

Lieutenant Tozzi found defendant was "quite articulate" and used words that were advanced for a 16-year-old. (8T66-15 to 67-7). Defendant recalled all the events of the evening, including who he had shot and the order in which he shot them. (8T70-15 to 71-14, 100-10 to 14). Defendant repeatedly denied to the police that he had any visual or aural hallucinations commanding him to commit the murders. (8T106-2 to 108-7). Defendant never expressed any fear of his family or the need to protect himself from them. (8T112-15 to 113-8).

Defendant gave the police consent to search his iPhone. (8T78-22 to 79-14, 80-2 to 7). Analysis of the iPhone showed recent searches on how to use an AK-47. (8T81-16 to 82-3). At 7:32 p.m. on the evening of the murders, defendant queried whether a round from the AK-47 could pierce body armor. (8T82-9 to 83-17, 87-24 to 88-15). The officers who responded to the murder scene were wearing bullet-proof vests. (8T88-16 to 18). At 7:43 p.m., defendant searched a YouTube link called "London Terror Rampage Hoax Flat Earth Concerns." (8T93-19 to 95-5). "London Terror Rampage" referred to a 2017 terrorist attack in London. (8T95-6 to 8). Also located on defendant's phone was a link to an animated video; a still shot taken from the video show a very big man and his face blown up behind him wearing sunglasses, with music playing. (8T96-3 to 99-2, 185-15 to 22).

Steven Jr.'s girlfriend Rafaella told the jury that the Kologi family was very close, always ate dinner together, and the parents were involved in their children's lives. (6T65-6 to 65-14). Defendant he had a good relationship with his family and loved his parents. (6T80-9 to 11, 81-8 to 82-19, 85-18 to 24). Rafaella, who had been dating Steven Jr. for three years at the time of the murders, had a "very brotherly/sisterly" bond with defendant. (6T6T61-16 to 24, 64-3 to 12). When speaking with defendant, defendant never indicted that he was confused or could not follow the conversation. (6T64-13 to 65-1). Defendant never told Rafaella he was seeing or hearing things. (6T64-2 to 5).

Defendant once put his hands around Rafaella's neck and joked that he could kill her, but she did not take defendant seriously. (6T87-19 to 88-11, 92-2 to 8). Defendant watched violent and gory television shows and video games. (6T88-12 to 88-20). One of the videos defendant watched was the cartoon

"Anime Berserk," which was "very violent, hard to watch anime with a lot of killing and twisted stuff" with "a lot of blood. (6T88-24 to 89-5, 92-4 to 9, 92-19 to 93-1). Defendant nonetheless was gentle, and still slept with his parents and believed in Santa Claus at age 16. (6T85-10 to 14).

Defendant's aunt, Michelle Molyneaux, was Linda Kologi's younger sister. (7T118-13 to 20). She told the jury that defendant was a smart kid who did well in school. (7T252-1 to 12). Defendant and his mother were very close and he had a loving relationship with everyone in his family. (7T246-14 to 247-6). Once in a while when defendant had a bad day in school, he would tell Linda he wanted to be put on medication or talk to a school therapist because he was having bad thoughts about hurting a neighborhood kid. (7T152-12 to 155-7, 216-2 to 9). Linda told defendant "no" out of concern defendant would be placed in a "looney bin." (7T211-22 to 216-1, 241-8 to 25, 248-4 to 23, 251-8 to 25). Defendant had a "flat personality" and did not show emotion. (7T245-22 to 246-3). But defendant never got violent or acted out when he was angry; instead he would make a face and leave the room. (7T216-23 to 217-18; 246-8 to 13).

In October 2017, two months before the murders, defendant was playing the board game Clue with his Aunt Michelle and Uncle Richie at the house. (7T217-24 to 218-13, 220-11 to 16). Defendant picked up the game piece shaped like a gun, pointed it at Michelle and Richie, and said "I'm going to kill you." (7T218-14 to 219-6). Defendant then said "I'm gonna kill Mom and Dad." (7T219-13 to 14). Michelle thought defendant was joking at the time. (7T219-21 to 25, 243-14 to 224-10). Around the same time defendant started rocking more and his eyes were twitching. (7T242-16 to 20).

Prior to the murders, defendant never told Michelle he was hearing voices or seeing things. (7T249-12 to 21). Michelle spoke to her nephew frequently after the murders, in person when she visited him in jail and over the phone. When she asked him why he killed his family, defendant giggled and said, "you'll have to read the book." (7T221-10 to 25, 224-3 to 225-3). Defendant said the title of his book would be "Scot-Free," which was a play on words because his name is Scott. (7T226-24 to 227-4, 244-23 to 245-7).

Defendant waived his right to testify at trial, but did present several family member witnesses on his behalf: Jonathan Thomas Ruiz, Richard Molyneaux, and Carole Kologi-Zawacki. (12T129-1 to 134-20). These witnesses generally testified about defendant and his family life, with Ruiz opining that he believed defendant is disconnected from reality. (9T220-2).

Defendant also presented testimony from Doctor Maureen Santina, a forensic and clinical psychologist. (10T47-5 to 13). Dr. Santina opined that during the time preceding the murders, defendant was showing evidence of psychosis and schizophrenic symptoms and was delusional at the time of the murders. (10T121-21 to 122-4, 189-20 to 25, 208-12 to 18). Dr. Santina opined that defendant was laboring under the mental disease of early onset schizophrenia and was actively in a psychotic, dissociative state at the time of the murders and, therefore, was not capable of understanding the nature of his actions or to appreciate the wrongfulness of his conduct. (11T24-7 to 27-9).

The State presented the testimony of Doctor Park Dietz, an expert in forensic psychiatry, in rebuttal. (12T198-23 to 200-14). Dr. Dietz opined that while defendant did suffer from Autism Spectrum Disorder, he did not have schizophrenia, delusions, hallucinations, or suffer from psychosis. (13T13-2 to

15-1; 14T57-4 to 71-9, 86-1 to 109-12, 117-20 to 23). Dr. Dietz further opined that defendant knew and appreciated the nature and quality of his actions at the time of the murders and was able to appreciate the wrongfulness of his actions. (13T20-17 to 21-11; 14T84-4 to 85-7, 107-4 to 118-14).

## LEGAL ARGUMENT

### POINT I

### THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENT.

In his lengthy, detailed oral decision, Judge LeMieux addressed each of the arguments raised by the defendant then, and which are reiterated on appeal before this Court: 1) that Steven, Jr., was not an appropriate legal guardian pursuant to State v. Presha, 163 N.J. 304 (2000) and defendant was not given a sufficient opportunity to consult with Steven, Jr.; 2) that the Miranda warnings given as to defendant's right to counsel were incorrect; 3) that defendant ambiguously invoked his right to silence, which was not properly clarified by detectives; and 4) that defendant did not and could not knowingly and intelligently waive his Miranda rights. (2T23-20 to 25-15). Judge LeMieux noted that all four issues related to what happened inside the interrogation room, all of which was video recorded.[3] (2T8-23 to 9-11). The court found as

[3] The finding of facts contained in the lower court's opinion are supported by citations to time stamps in the video recorded statement, which was moved into evidence as S-1, that support each finding. (2T23-18 to 19). The State believes it is important for this Court to have S-1 to review so it can see what the lower court saw. As such, the State will provide S-1 to this Court in its appendix as Pa1.

follows:

First, the lower court found Steven, Jr., was a proper guardian, as defined in Presha, State in the Interest of A.S., 203 N.J. 131 (2010), State in the Interest of S.H., 61 N.J. 108 (1972), and State in the Interest of Carlo, 48 N.J. 224 (1966). Judge LeMieux rejected defendant's contention that Steven, Jr., was conflicted from serving as a guardian because he witnessed defendant's criminal conduct, and therefore could be considered a victim, and because he was a relative of defendant's victims, citing to as persuasive the factually analogous out-of-state precedent State v. Whisenant, 711 N.E.2d 1016 (Ohio Ct. App.), appeal not allowed, 698 N.E.2d 1005 (Ohio 1998) and In Re I.F., 20 Cal.App.5th 735 (Cal. Ct. App. 2018). To that end, the judge also noted that those relatives proffered by defendant as proper alternative guardians, defendant's aunt and uncle and stepbrother, were factually similarly situated to Steven, Jr.

Judge LeMieux rejected defendant's contention that defendant's use of Steven, Jr.'s rifle subjected him to criminal liability, thus precluding him from serving as defendant's guardian. Judge LeMieux found "zero evidence" of even a threat of criminal charges against Steven, Jr., or of any coercion.

From its review of the video-recorded statement, the "only evidence" before it, the court found Steven, Jr., did not act in a manner to protect himself, but instead acted as any family member would – with the best interests of the defendant at heart. The court found Steven, Jr., acted as a "supportive brother" during the entire interview; he never interrogated the defendant or pressed him to confess.

Judge LeMieux further found that despite what had occurred at the residence, Steven, Jr., was alert and engaged during the entire interview. To that end, the court found it "significant" that Steven, Jr., only allowed his emotions to come to the surface when defendant was out of the interrogation room on a bathroom break. It was only when he was alone that Steven, Jr., was seen crying. Moreover, the judge noted that Steven, Jr., was depicted on the video "immediately" putting that emotion to the side when the defendant re-entered the room. At that time, the court found that Steven, Jr., returned to being a support for the defendant. This "showed" to the Court that Steven, Jr., could, in fact, put aside his emotions and act as both a supportive brother and guardian and be the "20-year-old adult in the room" for the defendant.

Judge LeMieux rejected defendant's contention that his stepbrother, Jonathan Ruiz, should have been chosen to serve as his guardian as both legally and factually unsupported. Legally, the judge noted that Presha and its progeny did not mandate that law enforcement select the "best" or "right" guardian, but instead an appropriate guardian who can act in the best interests of the juvenile; Steven, Jr., met this actual legal standard. Judge LeMieux also noted a complete absence of facts – "zero evidence" – suggesting that Ruiz was available to serve as defendant's guardian or with regard to what Ruiz's emotional state was at that time. The court refused to "speculate" that Ruiz would have been a better guardian that Steven, Jr., under Presha in the absence of such evidence.

Judge LeMieux found defendant and Steven, Jr., were given the opportunity for consultation after the Miranda waiver and prior to the start of interrogation. Steven, Jr., confirmed that defendant was "ok" with his decision

to waive his Miranda rights, provided words of love and encouragement, and hugged the defendant and put his arm around defendant's shoulder. Judge LeMieux acknowledge that this consultation did not occur in private, which the judge found would have been the "better practice." While the court considered the absence of private consultation as part of the totality of the circumstances and gave it "some weight," the court did not consider it a "fatal flaw" here as the consultation that did occur was sufficient as it led to the defendant being comfortable and able to move forward.

Judge LeMieux also addressed a two-minute period during the interrogation when Steven, Jr., went to the bathroom. Judge LeMieux found that while Detective Verdadeiro did speak alone with the defendant, it was nothing more than "small talk" and/or questions "previously asked" in Steven, Jr.'s presence, involved nothing of "significance," was not the product of coercion or threats and was initiated by the defendant. The court found this distinguishable from the circumstances presented in State in the Interest of Q.N., 179 N.J. 165 (2004). (2T6-25 to 8-22; 16-15 to 18-7; 34-5 to 34-10; 43-8 to 62-11).

Second, Judge LeMieux addressed and rejected defendant's contention that the Miranda warnings provided were deficient in any way. Judge LeMieux read into the record the exchange between Detective Tozzi and the defendant with regard to defendant's right to the presence of counsel and found it sufficient to ensure that defendant understood he had a right to have counsel present during interrogation. While the court noted that more "clarification" could have taken place, nothing said by the detectives misled or deceived the defendant in any way.

Significant to the court's finding that defendant understood that he could have counsel present during questioning was the colloquy that followed with regard to appointed counsel. During that colloquy, Detective Tozzi advised defendant: "If you cannot afford an attorney, one will be provided if you so desire prior to any questioning." Defendant stated that he understood this advisement.

As such, the court concluded that the State established beyond a reasonable doubt that defendant fully understood his right to have counsel present during questioning. Judge LeMieux noted he had "looked at the case in every direction" to see if he had any "honest uncertainty" and could find none with regard to this claim. (2T10-1 to 16-14; 31-5 to 34-15; 68-8 to 72-10; 72-12 to 73-1).

Third, Judge LeMieux found that the detectives appropriately handled what defendant characterized to be an ambiguous invocation. From its view of the video-recorded statement, the lower court found as a matter of fact that neither Detective Tozzi, nor Detective Verdadeiro heard the defendant mumble, "I don't want to tell you much," in response to the question, "Can you tell me what happened?" The court noted that this was "clear" from the video because both detectives immediately reacted to defendant's mumbled statement by leaning forward and concurrently asking the defendant to repeat what he had said. The court found defendant's response to this request for clarification, "I said I couldn't say for the most part," indicated a willingness by the defendant to speak with detectives and not a desire to remain silent.

Defendant's statement that he does not "like to talk about it, let's just say like the rest is history pretty much," was also found not to be an invocation

of silence. The court found defendant was speaking about having an "out of body experience" and that this was simply part of the dialogue about the criminal conduct with the detectives. Judge LeMieux found the detectives scrupulously honored the defendant's right to silence. (2T19-9 to 20-4; 76-7 to 80-18).

Fourth, Judge LeMieux found that this defendant, who was 16 years and 4 months old at the time of his confession, was capable of, and did in fact, knowingly and intelligently waive his Miranda rights and provide a statement to police. The court noted that many of the facts defendant had relied upon before it to establish the contrary – e.g., defendant did not have a learner's permit, did not have a girlfriend, was reclusive, and slept in the same bed as his parents – did not a fortiori mean defendant could not knowingly and intelligently understand and waive his Miranda rights. The court noted that reclusiveness did not mean the defendant was incapable of speaking to police and that while defendant did not have a girlfriend, his joking response to that question established that he had an awareness of sexual acts. The judge also found that many of these facts were subject to several possible meanings and/or causes. Without evidence as to what meaning should be gleaned from these facts, the court refused to speculate that any of these facts evidenced a lack of intelligence or knowledge. The judge found the video recording of the confession presented a defendant who acted in an age appropriate manner and was fully capable of making decision, with the assistance of his older brother.

While the court accepted representations that defendant attended a "special" school, the court noted the record before it was devoid of any testimony establishing that defendant's attendance at that school evidenced a

disability or that defendant had any disability that rose to a level that would allow it to say that defendant did not have the ability to knowingly and intelligently waive Miranda. Moreover, what was before the court demonstrated the contrary, particularly defendant's discussions with the detectives regarding his schooling, course work, job, and social interests. The court found that rather than support a lack of education or low intelligence, defendant's college aspirations, his reported good grades, his employment at his school, and his discussion of "The Shining," all proved, in the totality of the circumstances, that defendant had the ability to understand and voluntarily waive Miranda.

The judge found that the interrogation lasted one hour and 13 minutes – from 2:05 a.m. until 3:18 a.m. – and, therefore, was no prolonged such that it could be said that defendant was subjected to physical or mental exhaustion. The court saw no evidence of exhaustion in the video, noting that while defendant may have been tired, he was not unresponsive or lethargic. The court noted the defendant was given water and a bathroom break.

The court found defendant to be alert, awake and responsive in his conversation with the detectives and his banter with his brother. The defendant was seen by the court to lean forward to talk with the detectives and sit back and look to his brother. To the extent that defendant spoke about hearing voices and seeing things that were not there, the court found these admissions clearly referred to past matters; the court found no evidence that defendant was suffering from any delusions or voices at the time he waived Miranda and provided a statement.

The court ultimately concluded that when the defendant responded yes to the detectives' questions with regard to his Miranda rights, the defendant was giving a positive indication that he understood the advisements. Judge LeMieux rejected defendant's arguments that he was unaware and simply "yes-ing" the detectives based on the totality of the circumstances. (2T9-20 to 10-21; 18-8 to 19-8; 20-4 to 22-18; 62-17 to 68-7). The defendant's re-raising of these same alleged Miranda violations before this Court on appeal neither imbues these same arguments with new merit, nor establishes reversible error.

An appellate court reviewing a lower court's grant of suppression need not defer to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Township Comm. Of Twp. Of Manalapan, 140 N.J. 366, 378 (1995); State v. Stott, 335 N.J. Super. 611, 620-21 (App. Div. 2000), rev'd o.g., 171 N.J. 343 (2002); State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif. denied, 182 N.J. 148 (2004). "Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." Cleveland, 371 N.J. Super. at 295 (citing State v. Sailor, 355 N.J. Super. 315, 320 (App. Div. 2001)); State v. Gandhi, 201 N.J. 161, 176 (2010).

The standard governing review of factual finding is different, requiring this Court to "uphold the trial court's factual findings ... 'so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hagans, 233 N.J. 30, 37 (2018)(quoting State v. Gamble, 218 N.J. 412, 424 (2014)); State v. S.S., 229 N.J. 360, 374 (2017). This high standard accords substantial deference "to those findings of the trial judge which are

substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007)(quoting State v. Johnson, 42 N.J. 146, 161 (1964)); see also State v. Locurto, 157 N.J. 463, 472 (1999)(quoting Trusky v. Ford Motor Co., 19 N.J. Super. 100, 104 (App. Div. 1952))(even "the best and most accurate record" "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried").

"Acknowledging that a trial court's factual findings are entitled deference" admittedly "does not mean that appellate courts must give blind deference to those findings." S.S., 229 N.J. at 381. "Deference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record" or "when factual findings are so clearly mistaken – so wide of the mark – that the interests of justice demand intervention." Ibid.; Elders, 192 N.J. at 245; Hagans, 233 N.J. at 37-38. However, deference does not end "merely because '[the appellate court] might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162). "A disagreement with how the motion judge weighed the evidence in a close case is not a sufficient basis for an appellate court to substitute its own factual findings to decide the matter." Id. at 245.

Deference likewise does not end because a lower court's factual findings are based upon video evidence; "[v]ideo-recorded evidence is reviewed under the same standard." Hagans, 233 N.J. at 38; S.S., 229 N.J. at 379-81; State v. A.M., 237 N.J. 384, 395-96 (2019). "When more than one reasonable inference

can be drawn from the review of a video recording ... then the one accepted by a trial court cannot be unreasonable." S.S., 229 N.J. at 380. "In such a scenario, a trial court's factual conclusions reached by drawing permissible inferences cannot be clearly mistaken, and the mere substitution of an appellate court's judgment for that of the trial court's advances no greater good." Ibid.

"Miranda sets forth a balance between the rights of the government and those accused of criminal activity." State v. M.L., 253 N.J. Super. 13, 20 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992). This balance requires a defendant be advised of the specific rights set forth by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation. See also State v. Nyhammer, 197 N.J. 383, 400-01 (2009); M.L., 253 N.J. Super. at 20.

"[P]olice must warn [a] suspect (1) of the right to remain silent; (2) that any statement made may be used against him ...; (3) that the person has a right to an attorney; and (4) that if the person cannot afford an attorney, one will be provided." State v. Knight, 183 N.J. 449, 461 (2005)(quoting Miranda, 384 U.S. at 444); State v. A.M., 237 N.J. 384, 396-97 (2019). The State bears the burden of proving beyond a reasonable doubt that the defendant has waived these rights. State v. Galloway, 133 N.J. 631, 654 (1993); State v. Kelly, 61 N.J. 283, 294 (1972); State v. Cook, 179 N.J. 533, 562 (2004).

A valid waiver requires a knowing, voluntary and intelligent decision not to exercise the right to remain silent or to an attorney. State v. Burris, 145 N.J. 509, 534 (1996); State v. Burno-Taylor, 400 N.J. Super. 581, 588 (App. Div. 2008); State in the Interest of A.S., 203 N.J. 131, 146 (2010). In

determining whether a defendant made a valid waiver and provided a voluntary statement, a "court must look at the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation." State v. Timmendequas, 161 N.J. 515, 613-14 (1999), cert. denied, 534 U.S. 858 (2001); Nyhammer, 197 N.J. at 402 (citing State v. Dispoto, 189 N.J. 108 (2007); State v. O'Neil, 193 N.J. 148 (2007)); A.S., 203 N.J. at 146.

Factors to be considered include: "'the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved,' 'as well as the suspect's previous encounters with the law.'" A.S., 203 N.J. at 146 (quoting State v. Presha, 163 N.J. 304, 313 (2000); State v. Miller, 76 N.J. 392, 402 (1978)); Nyhammer, 197 N.J. at 402; State v. Carpenter, 268 N.J. Super. 378, 385 (App. Div.), certif. denied, 135 N.J. 467 (1994); (defendant's I.Q. "merely a factor in the totality of the circumstances to be considered" and, therefore, facts establishing that defendant was illiterate, had an I.Q. of 71, and was attending special education classes when he left school at 18 were "not dispositive of whether he understood the meaning of the Miranda warnings"); State v. Ordog, 45 N.J. 347, 360 (1965).

"[I]n order for a juvenile's confession to be admissible into evidence it must satisfy the same standard that applies to adult confessions: that is, it must be made knowingly, intelligently, and voluntarily." A.S., 203 N.J. at 146. However, in addition to the above factors, also to be considered in the totality of the circumstances analysis is the "role" of the juvenile's parent, guardian or trusted adult, which is a "highly significant factor." Id. at 147; Presha, 163 N.J.

at 314-15; State in the Interest of A.A., 240 N.J. 341, 354-57 (2020). The role for such an adult is not "mere presence," but service as an "advisor," "buffer," and "offer[er] of a measure of support in the unfamiliar setting of the police station;" someone "acting with the interests of the juvenile in mind." A.S., 203 N.J. at 147-52 (finding the 14-year-old[4] juvenile's adoptive mother abdicated this role, rendering the juvenile's confession involuntary and inadmissible, where she effectively served as an agent of the police by incorrectly advising the juvenile of her Miranda rights and actively interrogating the juvenile and directing her to talk); Presha, 163 N.J. at 314-15; A.A., 240 N.J. at 354-57.

Acting with the "interests of the juvenile in mind" does "not ... say that a parent cannot advise his or her child to cooperate with the police or even to confess to the crime if the parent believes that that child in fact committed the criminal act." A.S., 203 N.J. at 148; State in the Interest of Q.N., 179 N.J. 165, 177 (2004); State in the Interest of A.W., 212 N.J. 114, 132-33 (2012). Acting in the interests of the juvenile also does not require the parent, guardian, or trusted adult be conflict free:

> [The Supreme Court] decline[s] to embrace a categorical rule that an attorney must be present any time there is a perceived clash in the interests of a parent based on a familial relationship with the victim or another involved in the investigation. Even in cases of such apparent clashing interests, a parent may be able to fulfill the

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[4] It bears noting, though not relevant to the facts before this Court, that for "a juvenile under the age of fourteen," the totality of the circumstances evaluation is different in order to account for the juvenile's youth. Presha, 163 N.J. at 315. For such juveniles, the role of a parent, guardian or trusted adult is of paramount import, such that the absence of such an adult renders such the juvenile's confession "inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable." Ibid.

> role envisioned in Presha. And, in those cases where a parent is truly conflicted, another adult – not necessarily an attorney – may be able to fulfill the parental assistance role envisioned by Presha. Moreover, when it is apparent to the interrogating officers that a parent has competing and clashing interests in the subject of the interrogation, the police minimally should take steps to ensure that the parent is not allowed to assume the role of interrogator, and, further, should strongly consider ceasing the interview when another adult, who is without a conflict of interest, can be made available to the child.

A.S., 203 N.J. at 154-55.

Waiver of one's Miranda rights is, of course, revocable. Invocation by a suspect of the right to silence during a custodial interrogation must be "scrupulously honored" if the invocation is "clear and unambiguous." State v. Diaz-Bridges, 208 N.J. 544, 565 (2012); State v. Maltese, 222 N.J. 525, 545 (2015), cert. denied, 577 U.S. 1182 (2016); State v. Chew, 150 N.J. 30, 61 (1997), cert. denied, 528 U.S. 1052 (1999); State v. Melendez, 423 N.J. Super. 1, 29 (App. Div.), certif. denied, 210 N.J. 28 (2012). In such situations, "interrogation must cease." Maltese, 222 N.J. at 545; Chew, 150 N.J. at 61.

Where the invocation is "ambiguous" – it "leav[es] the investigating officer 'reasonably unsure whether the suspect was asserting that right'" or is "susceptible to two different meanings" – clarifying questions "narrowly directed to determining whether defendant [is] willing to continue" are necessary before interrogation can continue. Maltese, 222 N.J. at 545 (quoting State v. Johnson, 120 N.J. 263, 284 (1990)); Diaz-Bridges, 208 N.J. at 569; State v. S.S., 229 N.J. 360, 382-83 (2017). The "[w]ords used by a suspect are not to be viewed in a vacuum, but rather in 'the full context in which they were

spoken.'" S.S., 229 N.J. at 382 (quoting State v. Roman, 382 N.J. Super. 44, 64 (App. Div.), certif. dismissed, 189 N.J. 420 (2007)).

This is so because "[w]hether a suspect has invoked his right to remain silent requires analysis of the totality of the circumstance, including consideration of the suspect's words and conduct." Maltese, 222 N.J. at 545; Diaz-Bridges, 208 N.J. at 568. "[T]he court's inquiry necessarily demands a fact-sensitive analysis to discern from the totality of the circumstances whether the officer could have reasonably concluded that the right had been invoked." Diaz-Bridges, 208 N.J. at 565.

Admittedly, "[t]o invoke the right to remain silent, a suspect does not have to follow a prescribed script or utter talismanic words." S.S., 229 N.J. at 383. "Suspects are mostly lay people unschooled in the law," who "often speak in plain language using simple words" and "not in the parlance of a constitutional scholar." Ibid. That being said, our Court has always distinguished between "plain language" that clearly conveys an unambiguous intent to invoke silence – e.g., repeatedly telling interrogators, "No, that's all I got to say. That's it," see S.S. 229 N.J. at 368-69, 383-84 – from statements conveying hesitation, reticence or avoidance of specific questions, which do not invoke silence. See State v. Kucinski, 227 N.J. 603, 622-23 (2017).

Applying this distinction, the Kucinski Court found that defendant's responses to certain questions – "let's not talk about that part;" "we'll forget about that part;" "it doesn't matter;" and "I don't remember" – did not constitute invocations of the right to silence. Ibid. "By making those remarks at specific moments during interrogation, defendant exhibited hesitation to provide police with some details about [his brother's] death. Nevertheless,

considered in context, defendant's refusal to answer certain questions was not an attempt to end dialogue, but rather was 'part of an ongoing stream of speech,' which included information about the altercation and defendant's family disputes." Id. at 623; cf. Johnson, 120 N.J. at 267, 284 (finding defendant's repeated response of, "I can't talk about it," was ambiguous, being susceptible of interpretation as an admission of guilt or the "desire to cut off questioning," which, therefore, required clarification).

Unlike the defendant's arguments before this Court, which parse out the relevant facts for individual examination and skewed analysis, the lower court conducted a thorough, unedited, holistic review of the evidence presented to it, particularly what the court could see for its own eyes in the video-recorded interrogation. In doing so, the lower court saw before it a defendant able to knowingly, intelligently, and voluntarily waive his Miranda rights, unhampered by any of the impediments defendant now claims. This Court should similarly find and affirm.

For example, while the defendant relies upon his attendance at a special school and Autism diagnosis as evidence of his mental limitations, the video recording showed the lower court a contrary picture of the defendant – one which established his intelligence and ability to understand what was being presented to him. As the lower court noted, defendant discussed with the detectives his affinity for math, psychology and horticulture. He talked about his plan to go to college and study abnormal psychology. He bragged about the jobs he had at school, given to him because he was trustworthy and would not engage in bad conduct such as stealing. Defendant told the detectives about his interest in reading (science fiction in particular) and cogently discussed the

different character development between the lengthy book he was currently reading and its movie adaptation.

While defendant highlighted his lack of a girlfriend at 16 years old as somehow so unique for a 16 year old as to be indicative of his inability to comprehend rights explained to him at length, the lower court found such a conclusion to be wholly unsupported by any evidence before it. In doing so, the lower court noted that after admitting to not having a girlfriend, defendant joked with the detectives about masturbation being a substitute for a girlfriend. This clearly evinced for the lower court a knowledge at least on par with that of his 16-year-old compatriots.

Defendant presents to this Court, as he did to the lower court, the idea that he just "yes-ed" the detectives, as though use of the word yes in response to a yes or no question was somehow indicative in the abstract of his lack of knowledge or voluntariness. The lower court correctly found this to be patently absurd. In watching the video recording of defendant's statement, the lower court was able to see for itself that his responses were wholly appropriate and responsive. The lower court saw a defendant fully engaged in his conversation with the detectives and saw that this conversation reached its goal of ensuring the defendant understood, and thereafter, knowingly and voluntarily waived his rights. Relying on the video recording, the lower court correctly found the defendant fully understood each and every Miranda right.

The lower court also correctly found that the detectives provided the defendant with accurate explanations as to each Miranda right. The detectives read each of the rights to the defendant, had the defendant read some of the right aloud himself, asked the defendant if he understood the rights and

explained each in accurate language the defendant could understand until comprehension and understanding were reached.

The lower court was able to view the detectives' conduct and demeanor during these advisements and the interrogation as a whole. The lower court saw and found that the detectives offered the defendant water. It saw the detectives speaking to the defendant in calm, friendly tones. The lower court was able to see and thereafter find that the detectives took the time to ensure that defendant's waiver of his Miranda rights (and the interrogation as a whole) was knowing and voluntary. The lower court correctly found the defendant's waiver knowing, intelligent and voluntary beyond a reasonable doubt.

The lower court also similarly found, beyond a reasonable doubt, that Steven, Jr., met the requirements of a trusted adult as set forth in Presha and its progeny. The lower court did not view this requirement in the abstract, but in the context of the totality of the circumstances. Thus, the lower court took note of Steven, Jr.'s interactions with Detective Tozzi prior to defendant's interrogation. The lower court noted Steven, Jr., expressing his desire to assist the defendant. Relying upon its own review of Steven, Jr.'s casual, appropriate pre-interrogation conversations with the detective, the lower court was able to find that despite being only 20 years old and despite what had occurred earlier that evening, Steven, Jr., was fully capable of providing the defendant with the support required by New Jersey law. In the face of this, the lower court correctly refused to speculate on whether others would have been better or more "right" than Steven, Jr.

Importantly, the lower court was also able to view the obvious care, concern and support provided to the defendant by Steven, Jr., both physically and verbally. After the defendant was brought into the room and throughout the Miranda warnings, the lower court noted that Steven, Jr., put his arm around the defendant and hugged the defendant. The lower court found that Steven, Jr., treated the defendant as a big brother would treat a little brother; he did not treat the defendant as the person who had just murdered four family members.

Steven, Jr.'s physical demonstrations of care and support for the defendant were mirrored by what he said to the defendant. After the defendant expressed his desire to waive his Miranda rights and speak with the detectives, the lower court found that Steven, Jr., first checked with the defendant to ensure defendant was "OK with that?", before Steven, Jr., signed off on the waiver. Once defendant confirmed his decision, but before any questions were asked by the detectives, Steven, Jr., was allowed to speak with the defendant, though admittedly not alone. That this consultation was not private was a factor appropriately considered by the lower court and found not to outweigh for the substance of the consultation. See A.A., 240 N.J. at 358-59; State in the Interest of M.P., 476 N.J. Super. 242, 293 (App. Div. 2023). Steven, Jr., told the defendant that he was loved, not to worry, and that, "[w]e all got your back buddy." He advised the defendant to tell the detectives "everything." Defendant responded by telling Steven, Jr., "I know." The lower court correctly found that the totality of the circumstances before it proved beyond a reasonable doubt that Steven, Jr., was an appropriate helper as defined by

Presha and its progeny. With Steven, Jr.'s assistance, the defendant knowingly, voluntarily, and intelligently waived his Miranda rights.

Defendant's arguments to the contrary – that Steven, Jr. was too conflicted to serve the role of a trusted adult during the interrogation – failed both factually and legally for the lower court and should continue to do so before this Court. Most easily debunked is defendant's suggestion that Steven, Jr., was somehow a potential codefendant because the defendant used his weapon. As he did below, defendant suggests Steven, Jr., is subject to be charged with violations of N.J.S.A. 2C:24-4 and/or N.J.S.A. 2C:58-15.

This suggestion is not rooted in fact or law. Even a cursory review of these statutes makes it abundantly clear that neither applies to Steven, Jr. N.J.S.A. 2C:24-4(a) applies to those who "having a legal duty for the care of a child or who has assumed responsibility for the care of a child." Steven, Jr., is not such a person in relation to the defendant. N.J.S.A. 2C:58-15 creates a disorderly persons offense for leaving firearms unsecured in a household with minors; however, that statute defines minors as those under 16 years of age. N.J.S.A. 2C:58-15(c). Because the defendant was not under 16 years of age, this too does not apply to Steven, Jr. Moreover, as the lower court found, there was no evidence before it to suggest that potential legal charges were on Steven, Jr.'s mind. There was simply no evidence the lower court could find suggesting the threat of criminal charges was made or used to coerce Steven, Jr.'s cooperation. The lower court correctly found that Steven, Jr. was motivated solely by the care and concern he had for his brother, as demonstrated throughout the video-recorded interrogation.

This argument was likewise correctly found by the lower court to be unsupported by law. The lower court found the facts here bore no identity to those in A.S., 203 N.J. at 131. Contrary to defendant's claim, the lower court found that A.S. did not adopt any per se rule precluding relatives of victims from assisting juveniles in the Miranda context. The A.S. Court specifically refused to adopt any per se rules in this context. See A.S., 203 N.J. at 154-55. While the relationship between the victim, parent and juvenile was a factor the A.S. Court considered in determining suppression was warranted, it was neither the only factor, nor the predominant factor. In fact, the first factor mentioned by the Court in its totality of the circumstances analysis was not this conflicting relationship, it was the juvenile's age – only 14. Id. at 148.

When discussing the role the parent played, the A.S. Court did not particularly focus on the static fact of the parent's relationship with both the victim and the juvenile, but the dynamic role the parent played in the interrogation. A.S.'s mother usurped the role of the police. Id. at 149-151. She, and not the police, provided A.S. with the Miranda warning and did so incorrectly; this error was later exacerbated by advice from the detective that was in conflict with the Miranda warnings. Ibid. A.S.'s mother did not just encourage her to speak with the police; she questioned the juvenile herself. As the Court describes it, she "badger[ed]" the juvenile into speaking, even when the juvenile was imperfectly trying to invoke her own rights, becoming "a de facto agent of the police." Id. at 136. The lower court correctly concluded that nothing like that which occurred in A.S. occurred here. For the lower court, the video recording showed that Steven, Jr., clearly acted in support of the defendant and the 16-year-old's choice to waive his Miranda rights. Steven,

Jr., provided defendant with care and the offer of help; he did not badger the defendant into speaking.

The testimony and evidence presented to the lower court also proved for it, beyond a reasonable doubt, that the defendant did not invoke his right to silence and, therefore, the interrogating detectives did not violate any of the defendant's rights. Like in Kucinski, 227 N.J. at 622-23, the lower court here correctly determined that the defendant's statement, "I don't want to tell you much," made in response to the detective's question, "Can you tell me what happened?", could not be viewed as an unambiguous invocation of the right to silence. The lower court found that the plain language used by the defendant simply did not convey a desire not to speak with the detectives at all; defendant wanted to speak with the detectives, but was reticent to tell the detectives everything about his criminal conduct, in light of the nature of the admissions he soon would make.

The lower court found it was not left to speculate that this was the defendant's intended meaning. That this was, in fact, the intent of defendant's words was confirmed by the defendant himself. Clarification was sought by detectives because the manner in which defendant said that sentence was unclear – the lower court found the defendant had mumbled. The recording of the statement proved for the lower court that what defendant said was neither clearly spoken, nor clearly understood by the detectives. Both detectives immediately and instinctively reacted, not only immediately asking defendant what he said, but also immediately engaging in physical behavior well recognized as evidencing a failure to hear what someone has said: both immediately leaned forward as they ask defendant to repeat what he had said.

When the defendant did so, the lower court found that defendant confirmed that what he wanted to convey to the detectives was not a desire not to speak with them, but a reluctance, or inability, to answer their broad question regarding what happened: "I said, I couldn't say for the most part." This clarification by the defendant was unambiguous. The lower court found it in no way expressed to the detectives an intent or desire not to speak with them. Defendant wanted to speak with police, but was putting the detectives on notice that he was having trouble verbalizing his answer. That this is the correct interpretation was only further supported for the lower court by what defendant told the detectives next, when again asked, "what happened." Defendant told the detectives about something he "never really talked about" – "that certain times in [his] life [he] would ... kind of like see or like hear stuff that wasn't there." For the lower court, the totality of the circumstances demonstrated defendant did not invoke his right to silence. The totality of the circumstances demonstrated instead that the detectives' conduct in response to that one sentence fully comported with New Jersey law.

The lower court simply did not err in rejecting all of defendant's claims as unsupported by the evidence before it. In so finding, the lower court expressed no doubt that while the burden of proving the admissibility of defendant's confession was on the State, the State had met its burden. The lower court never shifted that burden onto defendant. The lower court simply refused to rely upon speculation where there existed no facts of record supportive of defendant's arguments. The lower court relied upon its eyes and ears – not only what was testified to by Detective Tozzi, but also more importantly what it could see and hear for itself in defendant's video-recorded

confession – in rendering its factual findings. This Court should defer to these factual findings and, as the lower court did, find that there is simply no merit to defendant's request for the suppression of his confession. This Court should affirm.

## POINT II

## DEFENDANT'S JURY WAS LAWFULLY EMPANELED.

Judge LeMieux commenced the virtual jury selection process in this case by addressing the venire panel in three large groups and asking each group to answer to pre-selection questions. The first question was geared towards finding prospective jurors "that would be able to sit for the length of time of this particular case," which, the judge explained, would take place over the course of two months, but "in reality … the actual time that we're asking … from you, is probably somewhere in the area of 10 to 12 days of total time." Those prospective jurors that could not sit for the required trial time on the trial dates, identified for the prospective jurors both verbally by the judge and visually through the display of a color-coded calendar on the screen, were asked by the judge to raise their hands physically or through use of Zoom's raise your hand function. (3T4-19 to 9-19, 16-2 to 20-14, 26-6 to 29-16, 31-6 to 32-22).

Prospective jurors that did not raise their hands, indicating that they were not available on the anticipated dates or for the anticipated duration of the trial, were excused. Prospective jurors that did raise their hands, indicating that they were available on the anticipated dates and for the anticipated duration of the trial, were then asked a second question by the judge,

specifically if they could be fair and impartial based on a limited recitation of the facts of the case. This limited recitation included an acknowledgment that this case had received past "media attention" and advised the jury of the name of the defendant, his victims, and their relationship to him, the date and location of the crime, the nature of the crime, and the nature of defendant's proposed defense. Like with the first question, the judge asked those venire members who answered yes, indicating they could be fair and impartial to raise their hands. Those prospective jurors who did not raise their hands were excused from service. (3T9-3 to 12-22, 20-15 to 22-7, 29-17 to 31-1).

Once pre-selection qualification was completed, Judge LeMieux provided the prospective jurors with "preliminary instructions," which included explanation of the court's COVID precautions, the hybrid jury selection process, and an explanation of the jury questionnaire and the questions contained therein. Question 2 on the questionnaire addressed hardship excusals:

> Question 2, this trial is expected to last till … February 16th, 2022. We've already discussed (a), so everybody here is fine on that one. We'll go to 2(b), do you have any medical, personal, or financial problem that would prevent you from serving on this Jury? If the answer is yes, you would mark yes. If not, you'll say no[] and then [2](c), do you have any special need, or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise serving on this Jury? If your answer is yes to 2(b) or 2(c), you would mark down ye. Otherwise, you would mark down no.

(3T50-22 to 51-9). The judge further instructed the prospective jurors about what a hardship meant: "Please know that there is a big difference between an inconvenience and a hardship. As the Presiding Judge of this case, I will be

required to balance your hardship with my need to select a jury." (3T35-12 to 25). Following the provision of these instructions, the court broke the venire panel into smaller groups of 30, released group(s) the court would not reach that day, and then from these smaller groups individually spoke to each prospective juror about his/her responses to the questionnaire, biographical information, and some of the agreed upon voir dire questions. (3T58-13 to 63-6); see, e.g., (3T65-5 to 236-12).

Judge LeMieux stated that the purpose of the procedure used, which included the two pre-selection questions, was "to save [the prospective jurors] as much time as we possibly can." (3T10-13 to 19). Counsel for defendant did not object to this procedure. (3T25-2 to 11). To the contrary, when asked, "Is there anything about the way that the process was today that is objectionable … to the defense," defense counsel stated no. (3T236-14 to 22).

Now on appeal, after the selection of a jury using this un-objected-to procedure, the holding of an 11-day trial, and a jury verdict of guilty, defendant has an objection to how his jury was selected. Now, according to defendant, this procedure violated the Supreme Court's orders[5] for hybrid jury selection, as well as the dictates of cherry-picked portions of State v. Williams, 171 N.J. 151 (2002), resulting in a constitutionally infirmed jury that was not "representative of a cross-section of the community." (Da25-26). Now, for the first time, defendant hypothesizes that the lower court's excusal of those

[5] Defendant provides this Court with numerous orders related to the resumption of criminal jury trials during the COVID pandemic. However, as the Supreme Court's May 11, 2021 order expressly "supersede[d]" its prior, September 2020 orders, and defendant's trial occurred in 2022, the only orders relevant here are those contained in Da94-111.

prospective jurors who were not available for the scheduled trial dates "without any explanation required" and without any "individual assessment of each juror's proposed hardship" resulted in the exclusion of "daily wage earners." (Db31-32). This Court should not be swayed by defendant's post-conviction complaints and instead should find, as defendant believed pre-trial, that the hybrid jury selection process employed here was fair and constitutional. This Court should not reverse defendant's conviction on this basis. It should affirm.

"Jury-selection processes are presumed valid and a defendant challenging a jury-selection process 'must show by a preponderance of the believable evidence that the attacked process is fatally flawed.'" State v. Dangcil, 248 N.J. 114, 141 (2021) (quoting State v. Long, 204 N.J. Super. 469, 485 (Law Div. 1985)). Challenges to the representation of the community contained within a jury pool require a defendant to:

> (1) identify a constitutionally-cognizable group, that is, a group capable of being singled out for discriminatory treatment; (2) prove substantial underrepresentation over a significant period of time; and (3) show discriminatory purpose either by the strength of his statistical showing or by showing the use of racially non-neutral selection procedures to support the inference of discrimination raised by substantial underrepresentation.

Ibid. (quoting State v. Dixon, 125 N.J. 223, 232 (1991)). Our Supreme Court has found that "constitutionally-cognizable group" "'at a minimum … include[s] those defined on the basis of religious principles, race, color, ancestry, national origin, and sex.'" Id. at 142-43 (quoting State v. Gilmore, 103 N.J. 508, 526 n.3 (1986)).

"Federal courts have … declined to recognize those of modest means as a cognizable group." Dangcil, 248 N.J. at 144; But see Williams, 171 N.J. at 170 ("a jury of one's peers requires inclusion of all members of the community, excluding no socio-economic group from potential service. Daily wage earners, or others who cannot serve on a jury for long because of salary or wage deprivation, may not be excluded categorically"). In Dangcil, 248 N.J. at 144, our Court declined "to determine … whether …financial means … might be a cognizable group for purposes of a challenge to a jury venire" where defendant "failed to make a showing that any cognizable group – however identified or classified – has been excluded from the jury venire in this case" simply because of the use of the hybrid jury selection procedure put in place to address the COVID pandemic.

Defendant similarly fails here. There is simply no support in this record for defendant's current claim that excluding jurors unable to sit for the ten to 12 specifically identified trial dates scheduled over a two-month period in early 2022 during a global pandemic and resulting jobs/economic crisis resulted in the categorical exclusion of the specific, cognizable group of "daily wage earners." A prospective juror's unavailability on specifically identified dates could have a range of supporting reasons, particularly in early 2022, which while inclusive of the financial hardships related to missing work, could also have included childcare or other familial responsibilities, other work-related responsibilities, vacations, scheduled medical procedures, health concerns, etc. See N.J.S.A. 2B:20-10(c); Williams, 171 N.J. at 165 (quoting Richard K. Willard, What is Wrong With American Juries and How to Fix it, 20 Harv. J. L. & Pub. Pol'y 483, 486-87 (1997)).

Even assuming the financial hardship of jury service was the motivating factor behind some of the juror exclusions resulting from the judge's question regarding availability on scheduled trial dates, a finding of discriminatory exclusion of a constitutionally-protected group still could not be found here. In excluding jurors who stated they were unavailable for the scheduled trial dates, Judge LeMieux was acting in accord with the direction of our Supreme Court, which has empowered trial courts with the "discretion to excuse a juror on the basis of financial hardship" and to do so liberally when the issue of the "[f]inancial hardship associated with jury duty" is addressed when it is "best" to do so: "before the jury is sworn." Williams, 171 N.J. at 164-65, 170; see also Id. at 164 ("Courts have had no difficulty recognizing that a prospective juror may be excused for financial hardship"). "When … brought into focus at an early stage of a criminal proceeding, the balancing of interests allows greater flexibility favoring the prospective juror with the asserted hardship." Ibid.

Judge LeMieux neither abused his discretion, nor discriminated against a protected class when he liberally excused jurors who reported they were unavailable for the numerous scheduled trial dates. Defendant's lack of objection below makes clear that, at least then, he too did not see any abuse of discretion or discrimination in the judge's pre-screening of the venire panel. Defendant's post-conviction change of heart does not provide a basis for reversal of his conviction.

By utilizing pre-screening questions on defendant's venire panel, Judge LeMieux similarly and appropriately exercised the discretion afforded to him by our Court. In its May 11, 2021 Notice to the Bar, which "provide[d] a

comprehensive update on the resumption of in-person jury trials," (Da101), the section titled, "Protocol for Virtual Jury Selection," contained the following direction:

> Other aspects of the voir dire process will remain consistent with in-person practices, with judges exercising substantial discretion as to how to question jurors. Among other matters, hardship requests will be handled as provided in Section 4.7.2 of the Bench Manual ("The questions regarding disqualification of a juror may be reviewed at the outset along with hardship issues. Jurors determined by the court to have reasons why they cannot serve can be excused immediately.") In the virtual setting, this means that where a judge grants a hardship excuse (whether in the presence of the panel or during individual questioning in a sidebar breakout room), the juror may be permitted to log out of the virtual session. Consistent with Section 4.8 "judges in their discretion may alter the sequence and wording of the questions as they deem appropriate, as long as the substance is not materially modified."

(Da106)(emphasis added).

This language gave Judge LeMieux the authority to pre-screen out of the venire panel prospective jurors that were unavailable for the scheduled trial dates or could not be fair and impartial in light of the nature of the case. Following this pre-screening process, to which defendant did not object, Judge LeMieux assiduously followed the hybrid jury selection protocol, individually reviewing the jury questionnaire with prospective jurors (who had been broken down into groups of 30) and seeking input from counsel on responses to these biographical and case-specific questions that gave counsel pause. Nothing about the procedure employed warrants the reversal of the defendant's conviction.

## POINT III

### THERE WAS NO PROSECUTORIAL MISCONDUCT AT DEFENDANT'S TRIAL.

Defendant argues that the assistant prosecutors (APs) below engaged in numerous instances of misconduct which deprived him of a fair trial. To the contrary, the APs committed no error at, let alone error warranting a new trial. Emotions run high in all criminal trials, but this is especially true in a trial, like this one, where a 16-year-old murdered four members of his immediate family. Cf. State v. Blakney, 189 N.J. 88, 96 (2006) (death of a child). The Supreme Court of New Jersey has thus "specifically rejected a per se rule" that rhetorical excesses by the State justify reversing a jury's verdict. State v. Smith, 212 N.J. 365, 409 (2012). "A prosecutor is not expected to conduct himself in a manner appropriate to a lecture hall. He is entitled to be forceful and graphic in his summation to the jury, so long as he confines himself to fair comments on the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999) (quoting State v. DiPaglia, 64 N.J. 288, 305 (1974) (Clifford, J., dissenting). The APs in this case hewed closely to these guidelines. When the APs' remarks are properly considered in the context of the trial as a whole, as they must be, State v. Morton, 155 N.J. 383, 416 (1998), it is clear that each was fair comment on the evidence revealed during trial and the reasonable inferences to be drawn from that evidence, State v. Mahoney, 188 N.J. 359, 376 (2006), and in direct response to defense counsels' remarks at trial. State v. Williams, 317 N.J. Super. 149, 158 (App. Div.), certif. denied, 157 N.J. 647 (1998).

A. State's reference on opening to the indicted crimes of murder.

In her opening statement, the AP outlined defendant's conduct on New Year's Eve 2017 as he methodically killed his mother, father, sister, and the woman he considered to be his grandmother with his brother's semi-automatic rifle. (6T24-8 to 28-18, 31-18 to 33-20). Based on defendant's actions, the AP informed the jury, defendant had been indicted on four counts of murder. (6T28-19 to 25). She refuted the defense theory that defendant was not guilty by reason of insanity: "This is not simply an insanity case. This is a murder trial. This is about four victims, four people who were killed in an unprovoked attack in their own home when they should have been safe. This is murder. The defendant, in all of the actions you see and you hear about him in this case, the defendant appreciated what he was doing at the time he was doing it. And he knew it was wrong." (6T29-1 to 31-17, 34-4 to 12).

Defendant moved for a mistrial based on the AP's use of the phrase "This is murder." (6T56-2 to 18). The AP countered that "defendant is standing for trial for murder…. Those are actual facts with relation to the case." (6T56-21 to 57-2). The AP also noted the multiple references throughout defendant's opening statement that he was not guilty by reason of insanity. (6T57-3 to 9). The judge denied defendant's mistrial motion, finding "zero problem" with the AP's statement that "this is murder" because that was the crime for which defendant was standing trial. (6T57-10 to 58-1). Defendant raised the issue again, arguing that the AP offered her personal opinion that defendant was guilty of murder, thereby usurping the jury's function. (6T95-14 to 21). The judge reiterated that defendant was in fact charged with murder

and, therefore, there was no prosecutorial misconduct. (6T95-22 to 96-3). Defendant's mistrial motion was denied, (6T95-22 to 96-4), and properly so.

"A mistrial is an extraordinary remedy," State v. Mance, 300 N.J. Super. 37, 57 (App. Div. 1997), and should not be declared unless the trial court finds that, as a result of the error alleged, "manifest injustice would result from continuation of the trial." State v. Hogan, 297 N.J. Super. 7, 14 (App. Div.), certif. denied, 149 N.J. 142 (1997). "The trial court's decision is granted great deference on appeal. Unless manifest injustice would result, the trial court's decision will be affirmed." Id. at 15 (citing State v. LaBrutto, 114 N.J. 187, 207 (1989). As there was no manifest injustice below requiring the extraordinary remedy of a mistrial, Judge LeMieux acted within his judicial discretion in denying defendant's motion.

Defendant was indicted on four counts of intentional murder. (Da3-5). Before opening statements even began, potential jurors were instructed that the State alleged defendant killed his family with a semiautomatic rifle and the defense denied legal responsibility due to mental disease or defect and/or insanity. (3T11-19 to 7, 21-5 to 16, 29-21 to 30-7, 43-3 to 16). The judge explained that "in this criminal case, you will consider four counts of murder and one count of possession of a weapon for an unlawful purpose." (3T40-9 to 15). Thus, the AP conveyed in her opening remarks factual information of which the jurors who ultimately sat on the jury were already aware. A prosecutor may state in her opening facts she intends in good faith to prove by competent evidence. State v. Echols, 199 N.J. 344, 360 (2009).

Unlike the AP in State v. Rivera, 437 N.J. Super. 434, 447 (App. Div. 2014), who used a PowerPoint slide during opening statements which read in

bright red letters "Defendant *GUILTY OF:* ATTEMPTED MURDER," here the AP neither a declaration of defendant's guilt, nor offered her personal opinion that defendant was guilty. She simply told the jurors what the case was about and the crimes for which defendant was indicted. As Judge LeMieux found in denying defendant's motion for a new trial on this allegation of prosecutorial misconduct, "The State only said what the Grand Jury already found…. There was no declaration of guilt or an opinion expressed by the prosecutor. The prosecutor was only explaining what the Grand Jurors had ultimately decided. Her remarks during her opening statement did not rise to any level of prosecutorial misconduct." (17T72-24 to 75-25).

Further, the seated jurors were twice instructed that "what is said in opening statements is not evidence." (6T9-16 to 17; 15T202-18 to 25). They were further instructed that they were the sole judges of facts. (6T14-14 to 15; 15T202-6 to 17). Jurors are presumed to follow the court's instructions. State v. Loftin, 146 N.J. 295, 390 (1996).

B. State's questioning of Michelle Molyneaux on direct examination.

Michelle Molyneaux, who was Linda Kologi's sister and defendant's maternal aunt, testified for the State. Michelle spoke to the police twice after the murders. During her first interview, which was immediately after the shootings, Michelle thought Linda was still alive and she did not tell the police that Linda did not want defendant to speak to a psychiatrist. Only after she found out that her sister had died and "knew [Linda] was not going to hurt me," did Michelle feel safe to speak truthfully to the police about Linda and defendant. (7T150-21 to 151-25).

Michelle testified that she accompanied Linda every Friday to drop defendant off at school and run errands. (7T152-12 to 153-18). During these weekly car rides, she heard defendant tell his mother that he wanted to "talk to a shrink" at school because he was having his "bad thoughts" about hurting the family or a neighborhood kid. (7T153-19 to 154-9). Michelle was clearly conflicted about testifying on this subject in defendant's presence:

> AP: I know this is tough because you love Scott, don't you?
>
> MICHELLE: Oh, yeah.
>
> AP: Okay. Do you love what he did?
>
> MICHELLE: No.
>
> AP: But you still love him.
>
> MICHELLE: Yes. That's the only reason I talked to anybody because I thought I was protecting him.
>
> AP: When he was talking to you in the car on these Fridays about hurting the family, was it just general, or was he specific?
>
> MICHELLE: I'm not sure.
>
> AP: Okay.
>
> MICHELLE: Definitely he was having bad thoughts, he wanted to talk to the doctor.
>
> AP: Okay.
>
> MICHELLE: But that was between him and her. He didn't say it to –

> AP: Right. Again, he wasn't talking to you, but you were in the car, yeah?
>
> MICHELLE: Yup.
>
> AP: And you heard him.
>
> MICHELLE: I heard him.
>
> AP: Okay. What are the two rules about testifying?

(7T154-10 to 155-12, 156-1 to 2). Michelle's response of, "I know, tell the truth" was "almost inaudible." (17T76-20 to 77-4). Defense counsel's objection was sustained. (7T155-14). He did not request a limiting instruction.[6]

The rationale for the AP's line of questioning was that Michelle had told the police in her second statement that she gave after she knew her sister had died that defendant told Linda that he had thoughts about "killing," not "hurting," his family. (7T155-22 to 166-19). The judge understood what the AP was trying to do: "I see the difficulty with the witness." (7T156-7 to 8). It was apparent to the trial judge that Michelle had some sort of disability, as he was unsure whether 50-year old Michelle could read her own statement to the police. (7T118-23, 168-20 to 169-2; 17T77-16 to 19). The judge further noted that Michelle, "was struggling emotionally with testifying about damaging information she previously supplied to law enforcement days after the killings[.]" (17T76-20 to 25).

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[6] The judge recalled immediately giving a limiting instruction, (17T13-22 to 24 88-88, 78-18 to 19), but the transcripts do not reflect that a limiting instruction was in fact given.

Defendant argued in his motion for a new trial that the AP improperly insinuated that Michelle was lying on direct examination. (17T12-23 to 14-3). Judge LeMieux rejected defendant's claim because "it was clear Michelle Molyneaux did not want to testify regarding anything damning against the defendant." (17T76-20 to 78-9). The judge found that "[t]his conflict was the issue that led the prosecutor to ask the question regarding the first rule of testifying. This court does not find that this question, nor how the prosecutor handled the witness, in any way effected the jurors' function of assessing her credibility or to determine the believability about her testimony." (17T78-10 to 16). This ruling was correct. The AP was dealing with a witness who was visibly reluctant to testify in front of her nephew, the defendant, whom she still loved. The AP did no more than cautiously remind Michelle of her sworn obligation to tell the truth.

C. State's reference on summation regarding Dr. Santina's failure to record her forensic examination of defendant.

Defendant alleged at trial and in his motion for a new trial that the State inappropriately argued on summation that Dr. Santina withheld information from the jury because she did not video tape her forensic interview of defendant. (15T193-25 to 194-16; 17T14-2 to 16-14). Put in its proper context, the State was not claiming that Dr. Santina violated a non-existing rule requiring her to videotape her interview with defendant. The AP was arguing instead that the jurors could see and hear for themselves what defendant said during his videotaped interviews with Dr. Dietz and with Lt. Tozzi, but had to blindly trust Dr. Santina's say-so as to what defendant told her during her unrecorded interview with him. (15T150-5 to 152-11; 17T37-14 to 38-11). Dr.

Santina admitted on cross-examination that her ten-page written evaluation of defendant's mental state was an edited version of her unrecorded interview with defendant. (11T37-19 to 38-16). Her report was based on notes she took during the unrecorded interview, but these notes were stored in a box in her attic and were never turned over to the State and or presented to the jury. (11T33-13 to 38-16; 17T38-20 to 39-3).

Judge LeMieux rejected defendant's claim: "The State never argued Dr. Santina was required to video record her conversation and/or evaluation of the defendant. The State argued that based upon the testimony it would have been more informative to know the defendant's demeanor and the actual words he said during the evaluation. The State compared the two experts to show how you can look at the defendant's original statement to the police and what he said during Dr. Dietz's interview." (17T80-22 to 81-6). The State's argument was thus fair comment on the evidence at trial. (17T81-17 to 82-6). See Mahoney, 188 N.J. at 376.

Further, the AP's remark on summation that Dr. Santina "lied to you from the beginning" was directed at Dr. Santina's testimony on voir dire regarding an entry on her curricula vitae (CV) that she was a current member of the American College of Forensic Examiners in Springfield, Missouri. (10T52-19 to 54-2). On cross-examination, Dr. Santina admitted that the organization shut down in 2017 because it promoted "junk science," but she never bothered to delete the entry from her CV. (10T61-15 to 64-6). It was in this context that the AP argued that Dr. Santina "lied to you from the beginning" of her testimony because she did not disclose the error on her CV and in fact relied upon the very same uncorrected CV when testifying "many

times since 2017" as an expert witness in other cases. (15T147-8 to 148-9). The State's remark was fair comment on Dr. Santina's own admission that her CV was incorrect. Mahoney, 188 N.J. at 376.

D. State's reference on summation to defense expert witness Dr. Santina.

On summation, the AP contrasted the roles of defense expert witness Dr. Santina with the State's expert witness Dr. Dietz:

> Another difference is their evaluations is one of bias and objectivity. Dr. Dietz testified that he had no prior relationship with the defendant, no prior interest in any of this. And he told you he doesn't give anybody a sneak peek. He doesn't say, well, you know, tell me the story and I'll tell you where I think I'm going to go. No. Once he gets the work in, once he does his homework, then he'll tell you what the answer is according to him.
>
> It wasn't the same for Dr. Santina. Dr. Santina had a clinical relationship with [defendant]. And then a forensic relationship with [defendant]. And not just a word, you know, not just a form of words. You heard the testimony from both doctors, in a clinical setting the doctor is not supposed to question things. Right, just accept them as they come. And not push back and not question or probe. But that's not what a forensic interview is, where you're actually supposed to do that.
>
> And maybe the reason Dr. Santina didn't push back at all in 2020, is because of that relationship, she couldn't shift out of one mode to another, that dual agency. Or maybe it's because she couldn't.
>
> But here's another thing about that, and we heard a lot about this on defense. That the 2019 interview was, you know, the court picked her, we didn't pick her. We didn't pick her, that was her opinion. Flip that around. That when the defense was looking for doctors in 2020, they picked the one how had already given them, that defendant wasn't malingering, and the defendant was schizophrenic.

> She had already decided what her opinion was. With wildly incomplete information. She had already given them the answer.

(16T152-12 to 153-9). Defendant lifts the underlined portion of the AP's summation to allege that the State improperly argued that Dr. Santina had a clinical relationship with defendant. (Db42). Notably, defendant did not object to this portion of the State's summation. (17T40-21 to 41-2). His decision not to do so strongly suggests that he did not find these remarks prejudicial at the time they were said. State v. Smith, 212 N.J. 365, 409 (2012).

The likely reason why defendant chose not to object is because Dr. Santina herself testified on direct examination that she conducted a clinical interview of defendant on February 16, 2018, at the request of defendant's guardian ad litem to render an opinion as whether there was evidence that he was exaggerating or fabricating mental illness. (10T69-1 to 70-11, 89-3 to 24; 17T39-8 to 40-13). This clinical evaluation was conducted prior to the time defendant's criminal attorneys retained Dr. Santina as an expert in forensic psychology to determine whether defendant met the legal definition of insanity. (10T148-21 to 149-8). The State's expert, Dr. Dietz, explained the difference between clinical and forensic psychiatry: "It's a very sharp distinction. So clinical psychiatry involves the assessment and treatment of patients for the benefit of the patient. Forensic psychiatry is the evaluation of people who are not patients … And that is for the benefit of their lawyers or the State or the Federal government of whoever is seeking the evaluation." (12T42-10 to 23). Dr. Dietz stated, "You can't be both the patient's advocate and sponsor and helper and also be objectively analyzing for some third party. They are two very separate roles," which "creates conflicts, and sometimes insurmountable ethical conflicts. So, to avoid ever reaching one of those cases

with an insurmountable ethical conflict, best practice is never to see someone for both clinical and forensic purposes." (12T162-4 to 8; 13T69-11 to 70-21).

As the AP argued in response to defendant's motion for a new trial, the State's summation questioned whether Dr. Santina's initial role as clinical psychologist on behalf of the guardian ad litem colored her later role as a forensic evaluator on behalf of the defense: "And the idea of bias was presented at that point. And that was fleshed out both with Dr. Santina on cross-examination and it was fleshed out on direct examination with Dr. Dietz. That was something that the jurors were privy to, they heard testimony about, and they heard that there was a potential for bias as it pertains to treating someone and getting a rapport and relationship with them and then later on having to be a forensic evaluator and the difference in those roles." (1739-8 to 25). Further, as the judge found in denying defendant's motion for a new trial, the State never insinuated that Dr. Santina fabricated her first evaluation of defendant. (17T82-7 to 19).

E. State's reference at trial to the juvenile waiver hearing.

Defendant's claim that that the State impermissibly elicited testimony that defendant was waived up from Family to Criminal Court skews the facts at trial. First, defense counsel in his opening statement raised the fact that defendant was initially in juvenile court. Regarding the psychiatric evaluations conducted for the juvenile waiver hearing, counsel told the jury, "When Scott was in juvenile court, the juvenile judge –." (6T41-7 to 11). The AP immediately objected to defendant's reference to the juvenile waiver process. (6T41-16 to 42-1). Defense counsel explained that, "[t]his is what happened, it's why those evaluations were ordered. It's a fact." (6T42-2 to 5). The judge

gave a curative instruction to the jury to disregard any information dealing with the process of waiving defendant up from juvenile to adult court. (6T49-17 to 50-13). It is disingenuous for defendant to complain that the AP elicited "prejudicial and irrelevant" information about the juvenile waiver hearing when defendant himself brought it up in his opening statement.

Second, as the judge found in denying defendant's motion for a new trial, the AP's question on cross-examination of defense expert witness Dr. Santina did not mention the juvenile waiver hearing. (17T17-22 to 18-10, 87-10 to 17, 87-10 to 22). The AP asked whether Dr. Santina had received from defense counsel a specific report as part of the documentation she considered in reaching her opinion that defendant met the legal definition of insanity. (12T118-12 to 119-12). It was Dr. Santina's responses, not the AP's question, that referenced the waiver hearing:

> AP: You are aware that [there] was a report created much like your 2020 report, at the request of the defense?
>
> SANTINA: It was my understanding that it was created for the purposes of the waiver hearing.
>
> AP: So the answer to my question is yes. It was prepared for the defense in a matter similar to yours?
>
> SANTINA: Not in the matter similar to mine. It was prepared for the defense for the purposes of the waiver hearing. It's a different evaluation, it's a different type of evaluation.

(12T119-13 to 24). Defendant neither objected to Santina's unsolicited responses, nor requested a curative instruction. (12T119-25 to 120-5). His lack of a timely objection strongly suggests that defendant found nothing prejudicial about Santina's response. Frost, 158 N.J. at 84. The judge,

however, sua sponte gave a curative instruction to the jury, warning in no uncertain terms not to consider for any purpose testimony about a waiver hearing. (12T121-3 to 122-3). "That the jury will follow the instructions given is presumed." Loftin, 146 N.J. at 390.

Third, as also discussed in Point V, infra, defense counsel established on direct examination of Dr. Santina that she reviewed the written report by the State's expert, Dr. Dietz. (10T101-5 to 18). On cross-examination, Dr. Santina testified that she wrote a letter to defense counsel (S-81) informing them that "I reviewed the report of Prosecution expert Park Dietz, M.D., dated 10/18/21. The report submitted by Dr. Dietz does not alter my opinions in the matter." (11T79-16 to 81-18).

Dr. Dietz's report, dated October 18, 2021, included detailed summaries of the mental health records he reviewed, including a post-event evaluation of defendant by Megan Perrin, Ph.D., M.P.H., and Susan E. Rushing, M.D., J.D. (Da356-369). In order to reject Dietz' conclusion that defendant did not meet the legal definition of insanity, Dr. Santina would have necessarily familiarized herself with the reports included in Dr. Dietz' report. It was in this context that the AP asked Santina on cross-examination whether the defense gave her the Rushing/Perrine report to review. (12T118-12 to 120-5). Dr. Santina said she did not receive it. (12T118-12 to 119-12). On redirect, defense counsel established with Dr. Santina that the defense did not send her the Rushing/Perrine report because it did not address defendant's state of mind and was prepared for the waiver hearing "which is an entirely different purpose." (12T120-9 to 20).

Defendant argued in his motion for a new trial, as he does here, that it was improper for the State cross-examine Dr. Santina about the Rushing/Perrine report. (17T16-23 to 19-5). The State responded that, given the fact that the Rushing/Perrine report was included in Dr. Dietz' written report, which was turned over to the defense, the State was unaware that the defense did not separately provide the Rushing/Perrine report to Dr. Santina. (17T36-15 to 37-6). As the judge found in denying defendant's motion for a new trial, there was no bad faith by the State in asking Dr. Santina about reports outlined in the State's expert's report which Dr. Santina testified she reviewed. (17T84-19 to 85-24).

F. State's reference on summation to defendant's veracity (not raised below).

Defendant argues that the AP improperly expressed his personal opinion of defendant's veracity during summation. But when read in its proper context, as it must be, Morton, 155 N.J. at 416, it is evident that the AP was explaining why it would be wrong for the jurors to conclude that the reason why defendant's stories changed over time was because he was lying:

> The next area I want to talk about is, something I'm going to call rationalization. Dr. Santina and Dr. Dietz may have strong opinions about me using that word in this context, so I'm not using it medically, I'm using it to describe something.
>
> The defendant understandably is looking for something to hang his hat on that makes it not his fault. And the cynical part of me would say that that's because he's trying to become Scott Free. That he's trying to get over on the charges…. But Dr. Dietz even said that that's not necessarily so. That it could be that he just honestly wants to believe that, despite the fact that [the shootings] were

> entirely within his control, that he might want to believe it was something else. So he looks for something else to blame.
>
> It's his tumor, it's the pills, it's schizophrenia, it's whatever. Again, my instinct as a Prosecutor might be to call it lying, but Dr. Dietz gave you a more broad {sic} way to look at it. That maybe it's not. That maybe [defendant] is just searching for that meaning, which is perfectly understandable for the defendant to do.
>
> And we've seen examples of the defendant's family even joining in that and encouraging that. That's perfectly natural and normal for them to do that, too. Not faulting them for that.

(15T160-20 to 61-21). The AP was referring to Dr. Dietz's testimony that "the central theme is that the story evolves in a direction in which the defendant is less responsible for what occurred and less blameworthy and that's a self-protective feature that I understand will happen because of various influences on the defendant including internal thought processes." (14T22-3 to 21). Dr. Dietz did not believe that defendant was lying to him or making up stories: "I do think that he's protecting himself from a recognition of the terrible things he's done by adopting an explanation in which somehow mental illness did this to him[.] (13T228-3 to 16). Defendant's evolving explanations for his horrific actions, Dr. Dietz explained, was "a normal, human protective function to want to explain this to oneself and to not have to live with the burden of guilt for what one has done." (14T23-2 to 8; see also 13T228-17 to 20). Referencing Dr. Dietz's testimony, the AP told the jury why his own initial conclusion that defendant was lying was proven wrong by the State's expert witness. Compare State v. Supreme Life, 473 N.J. Super. 165, 175 (App. Div. 2022) (AP repeatedly argued that defendant's trial testimony was unworthy of belief because defendant lied before, was lying again and was, simply put, a liar).

It was also appropriate for the AP to suggest bias towards defendant by his Aunt Michelle and half-brother Ruiz by virtue of their familial relationship to defendant. State v. Pierre, 223 N.J. 560, 586 (2015). Michelle agreed on direct examination that testifying was difficult for her because she still loved defendant despite what he did. (7T154-10 to 15). Michelle testified that "the only reason I talked to [the police was] because I thought I was protecting" her nephew. (7T154-16 to 17). Ruiz testified that he was "extremely close" to defendant, frequently visited defendant at the correctional facility until the Covid shutdown, and attended his court appearances. (9T174-15 to 16, 202-2 to 14, 213-13 to 214-4). These remarks were also in direct response to defendant's summation, in which he replayed for the jury Michelle's and Ruiz's trial testimony that they still loved defendant despite what he did. (15T91-5 to 95-1).

Moreover, the testimony established that neither Michelle, nor Ruiz witnessed the actual murders. Michelle raced out of the Kologi house as soon when she heard the "pop" of the gun and heard her sister Linda grunt from upstairs. (7T142-14 to 147-4). Ruiz had visited his family on New Year's Eve, but left the house before the murders. (9T196-16 to 199-1). The AP thus properly raised the inference that, unlike Steven Jr., and Rafaella who both witnessed the murders, Michelle's and Ruiz's perceptions of defendant were unchanged by the horrific events. (15T1739-4 to 184-13). Mahoney, 188 N.J. at 376.

Finally, defendant did not object to these particular remarks at the time they were made or raised them as grounds for a new trial, see R. 2:10-2; R. 3:30-1. Defendant did not believe that the AP overstepped his bounds at the

time the remarks were made. Smith, 212 N.J. at 409. In sum, as there was no prosecutorial misconduct, the APs' remarks, whether considered individually or cumulatively, did not deprive defendant of a fair trial. State v. T.J.M., 220 N.J. 220, 238 (2015).

## POINT IV

## THE TRIAL COURT TREATED BOTH PARTIES' EXPERTS EVEN-HANDEDLY; THE JURY WAS NOT MISINFORMED ABOUT THE LEGAL DEFENSE OF INSANITY.

### A. The trial judge exercised sound discretion in reining in Dr. Santina's answers to "yes" or "no" questions.

Defendant argues that the trial court improperly interrupted his expert witness, Dr. Santina, during cross-examination by the State. As the State argued in opposition to defendant's motion for a new trial, Judge LeMieux treated both expert witnesses equally: "I listened to the audio recordings of the entirety of the trial. And there were points where when both Dr. Dietz and Dr. Santina went off course on a question, Your Honor stopped it, whether there was an objection or not. And I would say the tone in the Court, there was never anyone raising their voice, they were told that they needed to stay on track and answer the questions." (17T46-23 to 47-5). The AP noted that both witnesses offered very long answers. (17T47-6 to 9). Dr. Santina, however, often gave two- to three-minute answers that "went wildly off course" and were not responsive to the questions asked. (17T47-6 to 15).

Judge LeMieux agreed with the State's assessment:

> The doctor testified over the course of the next two days and there were multiple times that Dr. Santina's testimony went far beyond the question asked…. [T]his Court felt obligated to keep Dr. Santina on track with answering the questions. The Court's treatment of Dr. Santina was the same as it was with all witnesses who testified during this trial.
>
> …
>
> The Court record of Dr. Santina's testimony will clearly show multiple, and I mean multiple times where she decided to testify about topics not asked of her. A good example is the prior topic discussed earlier here today concerning the Perrine/Rushing report. Instead of just answering yes or no, she decided to insert the waiver hearing into her answer [as] the purpose of their report. The answer was either yes or no. Dr. Santina consistently went afield of the question posed to her in her answers.
>
> Complying with [N.J.R.E.] 611, this Court kept Dr. Santina, along with all witnesses, on track with answering questions that were asked.

(17T92-12 to 15). The judge noted that Dr. Dietz "was more responsive to questions presented by both the state and defense." (17T95-4 to 5). When Dr. Dietz did go off-topic, however, "this Court sustained defense counsel's objection." (17T94-18 to 22, 95-10 to 13).

"It is … well established that a trial judge has broad discretion in controlling the scope of cross-examination to test credibility." State v. Sands, 76 N.J. 127, 140 (1978). To this end, N.J.R.E. 611(a) provides, "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to … avoid wasting time." Here, the judge appropriately reined in defendant's expert's answers when the question asked required a simple "yes" or "no" response or the expert's answer went beyond

the scope of the question. (10T59-1 to 22, 100-24 to 101-1, 161-16 to 162-6, 169-14 to 171-11; 11T38-2 to 6, 111-6 to 24, 191-17 to 25; 12T24-1 to 5, 33-4 to 13, 91-19 to 92-2).

Contrary to defendant's claim, Judge LeMieux consistently allowed Dr. Santina to give lengthy, uninterrupted narrative answers on direct examination. See e.g., (10T72-20 to 74-7, 78-19 to 79-17, 79-25 to 80-19, 88-10 to 89-2, 89-25 to 90-21, 91-2 to 92-5, 94-22 to 98-2, 99-19 to 100-23, 122-8 to 123-4, 146-18 to 147-14, 177-16 to 178-18, 185-17 to 186-14, 203-9 to 204-10, 210-18 to 211-19; 11T9-14 to 10-21, 14-23 to 16-17). Judge LeMieux exercised sound discretion in managing the conduct of the trial in a manner that facilitated the orderly presentation of competent evidence. State v. Bitzas, 451 N.J. Super. 51, 76 (App. Div. 2017).

B. The jury was not misinformed on the legal standard of insanity.

Insanity is an affirmative defense that a defendant must prove by the preponderance of the evidence. State v. Delibero, 149 N.J. 90, 99 (1997). In New Jersey, "[a] person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." N.J.S.A. 2C:4-1 (emphasis added). This standard "provides two distinct paths for a defendant to demonstrate that he was legally insane at the time he committed an act and therefore not criminally responsible for his conduct." State v. Singleton, 211 N.J. 157, 174 (2012).

> First, a defendant can show that "he was laboring under such a defect of reason, from disease of the mind as to not know the

> nature and quality of the act he was doing." N.J.S.A. 2C:4-1. Second, even if the defendant did know the nature and quality of the act, he can still establish legal insanity if, because of "disease of the mind," "he did not know what he was doing was wrong." Ibid.

Singleton, 211 N.J. at 174-75.

Dr. Santina testified on direct examination that, to a reasonable degree of psychological certainty, in her professional opinion, defendant was laboring under the mental disease of early onset schizophrenia and was actively in a psychotic state and a dissociative state at the time he killed his family. (11T24-7 to 22). Dr. Santina concluded that: (1) defendant was "not capable of understanding the nature of his actions" and (2) defendant "did not understand the wrongfulness of his actions." (11T24-23 to 25-17, 26-3 to 7, 121-14 to 20).

On cross-examination, the AP questioned Dr. Santina about her written report (D-6) in which she concluded only that defendant "was laboring under a defective reason to the extent that he did not know or recognize the nature or quality of his actions," thus meeting the first prong of the insanity defense. In contrast to her trial testimony, Dr. Santina's written report did not address the second prong of the insanity defense, that is, that defendant did not know his actions were wrong. (11T120-2 to 123-10, 124-4 to 20). Dr. Santina testified that it was implied in her report that defendant did not know that he was doing was wrong. (11T122-18 to 123-4, 124-20 to 22).

The AP asked Dr. Santina, "And you did not choose to spell out your findings in this report, as it relates to whether [defendant] knew right from wrong?" (11T123-11 to 13). Dr. Santina replied, "I did not say whether he knew right from wrong. That's actually not the standard. Whether he knew whether the specific actions that he was engaged in were right from wrong, not

whether he in a broader sense knew right from wrong. That's not the standard." (11T123-14 to 20).

Defendant misinterprets this exchange between the AP and Dr. Santina to argue that the AP articulated the wrong standard for the insanity defense. Contrary to defendant's claim, however, the AP was not suggesting that defendant had to meet both prongs of the insanity defense, namely, (1) that he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, and (2) if he did know the nature and quality of the act he was doing, that he did not know it was wrong. The AP was instead contrasting Dr. Santina's oral testimony at trial, in which she concluded in no uncertain terms that defendant met both prongs of the insanity defense, with her written report, in which she concluded in no uncertain terms that defendant met the first prong of the insanity defense, but merely "implied" that he met the second prong as well.

Defendant further argues that the State's expert, Dr. Dietz, misstated the law of insanity when he refuted Dr. Santina's findings. This claim is baseless. Dr. Dietz did not err when explaining to the jury his opinion that Dr. Santina conflated the two prongs of the insanity standard: "[Dr. Santina] seemed to think that a statement about the defendant's knowledge of the nature and quality of his acts encompassed the issue of his knowledge or wrongfulness. I don't think that's true at all. I think these are two completely separate issues that need to be treated separately and I think the law requires that we treat them separately as the Judge will instruct." (14T101-16 to 102-1). Dr. Dietz's testimony was accurate, because N.J.S.A. 2C:4-1 defines two separate prongs to the insanity defense (as defendant concedes, see Db54). Dr. Dietz was not

suggesting that defendant must meet both prongs of the test. He was instead offering his opinion that defendant's expert failed to treat each prong separately. (14T101-23 to 102-1).

Notably, defendant did not raise any objection below, signaling that he did not find Dietz's testimony erroneous or prejudicial. Frost, 158 N.J. at 84. In any event, any confusion regarding the standard for the insanity defense as testified to by either expert was cured by the trial court's final instructions to the jury giving the legal definition of insanity. (15T215-5 to 221-10). See State v. Winter, 96 N.J. 640, 649 (1984). It is presumed that the jury followed the trial court's instructions. Loftin, 146 N.J. at 390.

## POINT V

### THE COURT'S INSTRUCTIONS INSURED THAT THE JURORS UNDERSTOOD THEIR ROLE IN EVALUATING HEARSAY STATEMENTS REPLIED UPON BY BOTH THE STATE AND DEFENSE EXPERTS IN REACHING THEIR RESPECTIVE CONCLUSIONS.

Defendant acknowledged below that expert witnesses are permitted to testify about the hearsay statements they relied upon in reaching their conclusions. (17T13 to 15). Statements for the purposes of medical diagnosis or treatment are not excluded by the rule against hearsay, regardless of whether the declarant is available to testify. N.J.R.E. 803(c); N.J.R.E. 803(c)(4). A statement made for purposes of medical diagnosis or treatment is one that is (a) "made in good faith for purposes of, and is reasonably pertinent

to, medical diagnosis or treatment" and (b) "describes medical history; past or present symptoms or sensations; their inception; or their general cause." N.J.R.E. 803(c) (4). "It has long been the law in New Jersey that 'hearsay statements upon which an expert relies are admissible, not for [the purpose of] establishing the truth of their contents, but to apprise the jury of the basis of the opinion reached.'" State v. Farthing, 331 N.J. Super. 58, 77 (App. Div.), certif. denied, 165 N.J. 530 (2000) (quoting State v. Humanik, 199 N.J. Super. 283, 305 (App. Div.), certif. denied, 101 N.J. 266 (1984)).

"One of the main sources of proof of insanity or diminished capacity is the conduct of the defendant both at the time of the examination and earlier." Ibid. When a psychiatrist or psychologist relies upon a hearsay statement as a necessary element in the formulation of his opinion, "the testimony should be circumscribed by a limiting instruction to the effect that the jury should not consider the hearsay statement as substantive evidence relating to the question of guilt or innocence of the accused, but only as evidence tending to support the ultimate expert conclusion of the doctor on the question of insanity or diminished capacity." Id. at 78; State v. Vandeweaghe, 351 N.J. Super. 467, 480-81 (App. Div.), aff'd, 177 N.J. 299, 238 (2003).

In arriving at her conclusion that defendant met the legal definition of insanity, Dr. Santina relied on reports prepared by multiple educational, medical, and psychiatric professionals who did not testify at trial, (10T74-12 to 76-2, 76-6 to 13, 28-19 to 79-21, 87-2 to 87-13, 87-19 to 88-9, 165-20 to 166-9). Because Dr. Santina relied on others' reporting in reaching an opinion that defendant met the definition of legal insanity at the time of the murders, Judge

LeMieux gave this instruction to the jury during defendant's direct examination of Dr. Santina:

> Ladies and gentlemen, so when in this case, Dr. Santina, when she relies on certain information, you're allowed to evaluate that information, and I'm going to give you a longer charge later, but to give you a basic understanding of it right now is that the Doctor can rely upon information that has an effect on her ultimate decision, she has the ability to do that.
>
> Now, if she's relying upon this information for the truth of what is being said, well then it's for you to make the determination whether or not that information is true or not. If she's relying on the information, not necessarily for the truth but for the actual information as it's just being relayed to her, well then she can do that for purposes of her diagnosis in certain ways.
>
> But what I'm trying to explain to you right now based on what's in front of us, and I'm going to get into that a little bit later in that charge, but what I'm trying to explain to you right now, the Doctor just testified to somebody else's diagnosis.

(10T200-22 to 202-13); compare State v. Mesz, 459 N.J. Super. 309, 319 (App. Div. 2019) (absence of limiting instruction addressing expert's reliance on hearsay in reaching opinion regarding insanity was prejudicial).

The judge gave limiting instructions on the definition of hearsay and the experts' reliance on hearsay eight additional times during trial: at the end of defendant's direct examination of Dr. Santina (11T28-5 to 30-19); at the end of the State's cross-examination of Dr. Santina (12T87-17 to 89-11); immediately prior to the State's direct examination of Dr. Dietz (12T199-1 to 200-10); at the end of the State's direct examination of Dr. Dietz (14T120-8 to 122-11); at the end of defendant's summation (15T103-17 to 104-20); and three times in the final charge (15T205-1 to 9, 223-19 to 224-20; 16T7-1 to

21). At no time did defendant object to the content or wording of the court's charge. To the contrary, defense counsel expressly approved of the court's final charge: "I believe that it's important to define hearsay as it pertains to the expert as there's voluminous documents in this case. Both experts relied a lot on out of court statements, as well as prior reports. I don't have an issue with the way that this is, this reads. It is in line with the case law and it's in line with the Model Jury Charge so I have no objection to the way that it's written right now in the final charge." (14T15-2 to 14). It is presumed that jurors follow the court's instructions. Loftin, 146 N.J. at 390.

Defendant argues that it was improper for the State to cross-examine Dr. Santina about reports she did not have and to which she did not testify on direct examination. (Db60). As discussed in Point III, subsection e., supra, defense counsel established on direct examination of Dr. Santina that she reviewed the written report by the State's expert. (10T101-5 to 18). Dr. Dietz's report, dated October 18, 2021, included detailed summaries of the mental health records he reviewed, including post-event evaluations by clinical social worker Lauren Stillwell (Da289-291), psychiatric nurse practitioner Michael Zanotti (Da291-327), Dr. Daniel Greenfield (Da338-342), Dr. Kelly Wilder-Willis (Da350-369), and Drs. Megan Perrin and Susan E. Rushing (Da356-369). Dr. Santina testified on cross-examination that she wrote a letter to defense counsel (S-81), informing them that "I reviewed the report of Prosecution expert Park Dietz, M.D., dated 10/18/21. The report submitted by Dr. Dietz does not alter my opinions in the matter." (11T79-16 to 81-18).

Dr. Santina would have necessarily familiarized herself with the reports included in Dr. Dietz's report before she could reject Dr, Dietz's conclusion

that defendant did not meet the legal definition of insanity. It was in this context that the AP questioned Dr. Santina on cross-examination about the findings of Zanotti, Greenfield, and Perrin and Rushing, all of which were included in Dr. Dietz's report. As the judge found in denying defendant's motion for a new trial, there was no bad faith in asking Dr. Santina about reports outlined in the State's expert's report which Dr. Santina testified she considered and rejected. (17T84-19 to 85-24). Compare State v. Spencer, 319 N.J. Super. 284, 300-02 (App. Div. 1999) (improper for State to cross-examine defendant's expert witness with the inadmissible hearsay opinion of a different defense expert, who did not testify, which was consistent with the State's expert); Vandeweaghe, 177 N.J. at 238 (where defense and state's expert agreed at trial that a diagnosis of antisocial personality disorder was irrelevant to defendant's capacity to act purposely or knowingly, state's expert should not have offered testimony in respect of his opinion that defendant suffered from antisocial personality disorder)..

On summation, defendant referred to multiple hearsay statements relied upon by the experts to support the insanity defense, so much so that the AP noted that a limiting instruction was required due to "a plethora of inadmissible hearsay referred to, for the truth of the matter asserted. I lost count of the number of times that happened." (15T97-19 to 98-1). An instruction was given at that time. (15T103-17 to 104-20). Defendant asked that the charge be repeated after the State's summation:

> So there was a lot of hearsay in the State's summation. I understand that there was hearsay as well that was in the defense's summation. By I would ask that the Court read the same limiting instruction that was read after our summation as it pertains to the

> State. There was a couple of them, the mass murder/serial killer, some of those from Hawkswood. Those were hearsay documents that were relied upon by Dr. Dietz and they were somewhat argued for the truth of the matter asserted.

(15T193-13 to 24). The judge gave a more comprehensive limiting instruction in his final charge to the jury:

> [I]f I gave a limiting instruction as how to use certain evidence, that evidence must be considered by you for that purpose only. You cannot use it for any other purpose.
>
> As … an example of that, hearsay information as I pointed out to you before, hearsay is not being offered for the truth of what is being said. It's offered to assist you in, or with the experts, in assisting them to come to their diagnosis but it cannot be considered for the truth of those particular statements.
>
> …
>
> The experts may have also testified about statements allegedly made by other lay witnesses or other mental health professionals that were considered by them in coming to their diagnosis and conclusions. In this case, however, such statements were deemed admissible for the limited purpose of how the experts might have considered such statements in coming to their diagnosis and conclusions.
>
> As I have instructed during the course of this trial, some of those statements relied upon by the experts may have been made by persons who testified as witnesses in this trial. Some of those witnesses may have denied, changed, or added to that out-of-court statement when they testified as witnesses in this courtroom.
>
> The in-court testimony of those witnesses is substantive evidence. Any other out-of-court statements you may hear through testimony of those expert witnesses can only be considered by you through the lens of how the experts analyzed or relied on them in coming to their expert opinions and not for the truth of the statements in and of themselves. If the doctor has testified that he or she accepts as true certain facts or statements on which the doctor bases his or

> her opinion, your acceptance or rejection of the doctor's opinion will depend to some extent on your findings as to the truth of those statements.

(15T205-1 to 9, 223-19 to 224-20; 16T7-1 to 21). The following day, before deliberations began, the judge reminded the jury of this concept:

> [A]s part of the insanity charge, and I've explained this to you several times already, but just to confirm, I talked to you about what hearsay is. And I want to make sure that I tell you this one more time. And again this is the written charge that you'll have with you.
>
> I have explained the definition of hearsay for you a few times now, but I will explain it again now. A hearsay statement is an out of court statement offered for the truth of the statement. Because such statements are not made in court under oath, are not subject to cross examination by either party, and are unable to be observed by you the jurors to discern the speaker's demeanor and tone, hearsay evidence is generally precluded.
>
> So I explained that to you and then I said how experts are allowed to use hearsay statements for the purposes of their diagnosis. And the rest of the charge remains exactly the same.

(16T7-1 to 19). The final charge also included this caution: "Arguments, statement, openings and summation of counsel are not evidence and must not be treated as evidence." (15T202-18 to 203-14). Again, it is presumed that jurors follow the trial court's instructions. Loftin, 146 N.J. at 295. These charges insured that the jury understood how it was to evaluate the experts' conclusions and the State's summation.

## POINT VI

## THE STATE'S EXPERT'S OPINIONS WERE PROPERLY ADMITTED AT TRIAL.

### A. The State's expert's opinion that defendant did not meet the legal definition of insanity was properly admitted under the doctrine of curative admissibility.

Defendant argued in his motion for a new trial that it was improper for the State's expert witness, Dr. Dietz, to offer a detailed explanation of the affirmative defense of insanity and to testify to the ultimate issue whether defendant did or did not meet the legal definition of insanity. (17T22-8 to 24-1). As Judge LeMieux rightly pointed out in denying defendant's motion, defense counsel posed the same questions to his own expert witness, Dr. Santina. (17T24-2 to 3). Defense counsel conceded he had done so, but argued that Dr. Deitz "took it a whole step further." (17T24-4 to 5). The judge explained that when defendant elicited inadmissible ultimate fact questions from his own expert, "the reality is, is that by doing that, the only remedy that I could do under the circumstances, was to allow the State to ask the exact same question" in rebuttal under the doctrine of curative admissibility. (17T25-10 to 26-3, 108-1 to 18). This ruling was correct.

Defense counsel specifically asked his own expert witness, Dr. Santina, "[w]hen [defendant] shot his father, Steven Kologi, his mother, Linda Kologi, his sister, Brittany Kologi, and his grandfather's longtime girlfriend, Mary Schulz, was he insane at the time?" (11T27-4 to 8). Santina responded, "Yes." (11T27-9). Dr. Santina's testimony usurped the jury's role as fact-finder by making a definitive declaration on the ultimate issue of fact, namely, whether

defendant met the legal definition of insanity. State v. J.T., 455 N.J. Super. 176, 215 (App. Div.), certif. denied, 235 N.J. 466, 467 (2018).

Under the doctrine of "curative admissibility," "when one party introduces inadmissible evidence, thereafter the opposing party may introduce otherwise inadmissible evidence to rebut or explain the prior evidence," State v. James, 144 N.J. 538, 555 (1996) (emphasis in original), in order "to remove any unfair prejudice which might otherwise have ensued from the original evidence." Vandeweaghe, 177 N.J. at 238. Here, the defense introduced evidence deemed inadmissible under J.T., supra. To ameliorate the prejudice of Dr. Santina's response, the State asked its expert witness on rebuttal whether or not defendant was insane at the time he killed four members of his family with a semi-automatic rifle. (14T118-8 to 11; 17T47-21 to 50-21). Dr. Dietz responded that, in his opinion, "defendant was sane at the time of these four charged homicides and the weapons charge." (14T118-13 to 14). Notably, defendant did not object to the AP's question or Dr. Dietz's answer.

B. The State's expert did not opine on the veracity of witness testimony.[7]

Defendant argues for the first time that he was prejudiced by the State's expert's opinion on the veracity of the State's witnesses. This claim is meritless. Because credibility determinations are the sole province of the jury, expert witnesses may not comment upon the veracity of other trial witnesses. State v. J.R., 227 N.J. 393, 411 (2017). But this is not what occurred below. Indeed, the fact that defendant did not timely object shows he had no problem

[7] This subpoint responds to subpoint a. of Point VI of defendant's brief on appeal.

with Dr. Deitz's testimony at the time it was elicited. State v. Irving, 114 N.J. 427, 444 (1989). Because defendant did not raise this issue at trial, "any error or omission shall be disregarded by [this] appellate court[.]" R. 2:20-2. Here, there was no error at all, much less error clearly capable of producing an unjust result. See ibid.

Much of Dr. Dietz's testimony centered on the critical differences among defendant's statement to the police on January 1, 2018, the day after the murders; his statements to mental health professionals, including Dr. Santina; and defendant's statements to him on May 24 and 25, 2021. Dr. Dietz noted that defendant's narrative "changed pretty dramatically" from the one defendant gave to the police immediately after the murders to the one he gave to him. (13T185-1 to 4). When interviewed by the police, defendant described in vivid detail the sequence of events, including the number of times he shot each victim and where he shot them. (13T193-22 to 194-6). Three years later, when interviewed by Dr. Dietz, "all of this became vague…. It's an extremely different story. And the one he told me is vague, disjointed, with a great many omissions, compared to the story told to the police." (13T194-7 to 14).

Dr. Dietz testified that defendant told the police he had heard voices only twice in his life, and that was between the ages of six and eight. (13T194-15 to 25). Dr. Dietz noted that the first time defendant mentioned hearing a male voice was in January 2019, when he was interviewed by Dr. Greenfield, but defendant did not describe anything "creepy" about the voice. (13T195-1 to 4). Three months later, in April 2019, during his interview with Dr. Rushing, defendant first described hearing a male voice saying "something ominous." (13T195-4 to 8). Dr. Dietz noted that by the time defendant "gets to

Dr. Santina, he says he heard a voice in the shower on the day of the incident, saying, 'Welcome to the side of evil,' which is the first and only time [defendant] said that." (13T195-9 to 12, 195-24 to 196-2). On May 25, 2021, during the interview with Dr. Dietz, defendant said he heard a voice in the shower, but defendant did not recall what the voice said. (13T195-13 to 15, 196-3 to 6, 196-11 to 18). Defendant later suggested to Dr. Dietz "that [he] check whether Dr. Santina wrote it down." (13T195-13 to 17, 197-7 to 198-16).

Dr. Dietz testified that had defendant heard a voice on the day of the shootings, "I think he would have told the police, because he was very eager to tell them about hallucinations. Telling them about hallucinations that happened ten years ago is hardly as important as hallucinations that occurred less than 24 hours ago…. So, I think we eliminated the possibility that he heard a voice in the shower the day of the shooting." (13T199-14 to 25). Given the evolution of defendant's story of the male voice in the shower, Dr. Dietz testified, "I do not believe it to be historic truth that he heard a voice in the shower on the day of the shootings." (13T200-1 to 5). Dr. Dietz explained his reasoning: at the time defendant spoke to the police, "his memory is clear. There are no gaps. There is no amnesia. There is no hallucination of a voice in the shower the day of the shooting. Years later the story changes." (13T200-6 to 23).

But Dr. Dietz never commented on defendant's credibility. To the contrary, Dr. Dietz specifically told the jury, "I am not saying that [defendant] is lying to me or making this up." (13T228-10 to 12). Dr. Dietz explained that defendant was "protecting himself from a recognition of the terrible things he's done by adopting an explanation in which somehow mental illness did this

to him…. It's important for him to be able to live with what he's done. And if he can blame mental illness, that's easier on him than taking responsibility for it." (13T228-12 to 20). Defendant's evolving explanations for his horrific actions, Dr. Dietz testified was "a normal, human protective function to want to explain this to oneself and to not have to live with the burden of guilt for what one has done." (14T23-2 to 8; see also 13T228-17 to 20).

Nor did Dr, Dietz comment on Michelle Molyneiux's credibility. When he reviewed Michelle's January 2, 2018, statement to the police on, Dr. Dietz did so with "a skeptical and hopefully discerning eye" as he would any statement made by anyone that he reviewed. (13T52-22 to 53-4). Dr. Dietz understood "that not everything that people are quoted as saying is quoted accurately. Not everything that they're saying is true. Of course. And so I'm trying to weigh the likelihood of various events being true or not true." (13T53-4 to 9). Dr. Dietz was explaining the approach he applied generally in reviewing every witness statement provided to him. He was not commenting specifically on Michelle's or any other witnesses' credibility.

As to the October 1, 2017, text messages to Linda Kologi from Steven Jr., that "Grandpa says all Scott talks about is killing people. He says he's losing it," (13T40-10 to 48-12), Dr. Dietz explained that he considered them, not for the truth of their content, but for "[t]he fact that these words were said when they were electronically recorded to have been said. (13T40-24 to 42-19). Counsel objected, at which time the AP explained that Dr. Dietz's testimony was not opining as to the truth of the content of text message, but how the text message related to his "coming to his opinion." (13T43-2 to 44-4). Defense counsel responded to this explanation, "Yes, I see where you're

going and I do appreciate that. I think that that is what he's saying." (13T44-5 to 745-8). The court then mentioned that this would all be addressed by the curative instruction that would be given regarding how the jury is to view hearsay contained within an expert's testimony, to which defense counsel responded, "Yes. And I think the charge does satisfy. We talked about it. But yes, that's why I wanted to bring it up." (13T45-14 to 16).

The AP had to revisit this testimony after the sidebar due to a failure by the trial court to "unmute." Defense counsel did not object to Dr. Dietz's testimony this time, allowing the doctor to testify that this text message, along with "all of the other pieces of evidence" allowed him to "build [his] own time frame around what's happening with the defendant in the months leading up to the crime." (13T47-10 to 48-23). Thus, the totality of this testimony made clear that Dr. Dietz relied upon these text messages, along with all of the evidence he reviewed, to form his opinion. As all of defendant's current challenges to Dr. Dietz's testimony are factually unsupported, they should be rejected by this Court as a basis for reversal. Defendant's conviction should be affirmed.

## POINT VII

### THE TRIAL JUDGE PROPERLY SUBMITTED A CORRECTED INSTRUCTION TO THE JURY PRIOR TO DELIBERATIONS.

In his final charge to the jury, the judge gave an instruction on the crime of possession of a weapon with the purpose to use it unlawfully against the person or property of another. (15T241-13 to 225-8). At the end of the final

charge, the AP alerted the judge that the instruction given on count five was incorrect: instead of charging unlawful possession of a firearm, N.J.S.A. 2C:39-4a, the judge charged unlawful possession of a weapon, N.J.S.A. 2C:39-4d. (15T254-13 to 25). Defense counsel asked that the charge be clarified the following day. (15T254-20). Due to the late hour, the judge advised the jury that he would modify the charge in the morning. (15T255-16 to 21). The next day, Judge LeMieux noted that he omitted the definition of "firearm" in the charge on count five and he would read the correct charge to the jury. (16T4-16 to 5-6). The proposed corrected charge was provided to defense counsel, who lodged no objection. (16T5-8 to 15). The judge then read the corrected charge to the jury. (16T7-22 to 16-1). Again, defense counsel raised no objection. (16T20-20 to 21-1). The jurors began deliberations at 9:27 a.m. (16T21-10) and reached a verdict less than six hours later. (16T25-14 to 22).

Defendant has never argued that the substance or wording of the resubmitted charge was erroneous. Instead, in his new trial motion, defendant argued that reading the charge in "the bifurcated matter was confusing to the jury[.]" (17T11-8 to 20). Judge LeMieux rejected this claim, noting that the corrected charge was submitted to the jury before deliberations began:

> The Court went into painstaking details with the jurors to make sure that it was abundantly clear that the jurors did not have any questions before they started to deliberate. The Court also made sure the jurors had a clear understanding after a verdict on counts one through four as to the definition of a firearm when in the course of committing or attempting to commit these murders.
>
> The record and the physical charge that was presented to the jury will show exactly what was read. As such, this issue was not capable of producing an unjust result. Similar to [State v.] Palmer,

> the Court misspoke when it read the incorrect possession of a weapon for an unlawful purpose charge, however there was no prejudice because the jurors had not started to deliberate. Therefore the motion for a new trial as to that issue is denied.

(17T52-23 to 53-23, 69-24 to 71-23). This ruling was entirely correct. In State v. Palmer, 221 N.J. Super. 349, 352 (App. Div. 1986), certif. denied, 108 N.J. 654 (1987), this Court found no error by the trial judge who misspoke with respect to a portion of the jury instruction but later recharged the jury with the correct version. See also State v. Heslop, 135 N.J. 318, 324 (1994).

Defendant claims without tangible evidence that "the erroneous charge coupled with the rereading an additional charge the following day was confusing[.]" (Db76). But the jury never indicated any confusion created by the corrected jury charge. In fact, no notes asking for clarification of any issue were sent by the jury to the judge at all during deliberations. See State v. Parker, 124 N.J. 628, 639-40 (1991).

Finally, count five merged into counts one through four for sentencing purposes (17T226-24 to 227-3, 234-10 to 11; Da19) and a separate custodial sentence was not imposed on count five. Prejudice to defendant thus was substantially, if not fully, mitigated by the merger of count four with the murder convictions. State v. Johnson, 287 N.J. Super. 247, 263 (App. Div.), certif. denied, 144 N.J. 587 (1996).

## POINT VIII[8]

THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING THREE CONSECUTIVE CUSTODIAL TERMS OF FIFTY YEARS EACH FOLLOWING DEFENDANT'S CONVICTIONS FOR FOUR SEPARATE FIRST-DEGREE MURDERS.

This Court must affirm the aggregate sentences imposed because 1) the lower court followed the sentencing guidelines; 2) its assessment of aggravating and mitigating factors was based on competent credible evidence in the record; and 3) the sentence does not shock the judicial conscience. See State v. Fuentes, 217 N.J. 57, 70 (2014). This Court's review of the trial court's sentencing decision is limited to the abuse of discretion standard. State v. R.Y., 242 N.J. 48, 73 (2020). This Court may not substitute its judgment for that of the trial court. Ibid. The record below shows no abuse of discretion.

A. Defendant's sentence is legal.

The sentence imposed was legal. Following his convictions of first-degree murder, defendant faced a sentence of 30 years without parole eligibility or a sentence of a specific term of years between 30 years and life imprisonment with a 30-year parole ineligibility period on each count. N.J.S.A. 2C:11-3b(1). Defendant does not argue that his sentence falls outside the guidelines.

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[8] This POINT responds to POINTS VIII, IX, and X of defendant's brief.

B. The lower court's analysis of the sentencing factors was based on competent and credible evidence.

Judge LeMieux found four applicable aggravating factors: One, the nature and circumstances of the murders and defendant's role in committing the offenses, including whether or not they were committed in an especially heinous, cruel, or depraved manner, N.J.S.A. 2C:44-1a(1). The judge considered that defendant shot his parents and his sister multiple times, "far in excess of what was necessary" and beyond what was "minimally required to satisfy the element of the crime." (17T187-16 to 189-17). Defendant continued to shoot at the victims after they "were already on the ground, completely helpless, and shot them again[.]" (17T189-17 to 23). That defendant chose not to shoot his grandfather "is vitally important to this Court' ultimate determination here today … It shows if nothing else he knew exactly what he was doing." (17T193-5 to 14). The judge gave aggravating factor one "significant weight." (17T186-12 to 13). Defendant conceded below that this factor applied to him and he does not argue otherwise on appeal. (17T152-9 to 14).

Two, the risk exists that defendant will commit another offense, N.J.S.A. 2C:44-1a(3). The judge referred to defendant's own words that he "feels something like this would happen again or worse" and would be "more careful" next time to cover his tracks. (17T195-13 to 196-22). The court found that these are not the words of someone who is or could be rehabilitated. (17T196-22 to 197-18). Defendant's utter lack of remorse also factored into the judge's finding this aggravating factor. (17T197-19 to 198-11). The judge gave aggravating factor three "significant weight." (17T198-11 to 13).

Three, the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1a(9). It was clear to the judge "that this defendant, if given the opportunity, would strike again." (17T202-17 to 203-5). Defendant conceded below that this factor applies to him. (17T159-18 to 21). The judge gave aggravating factor nine "significant weight." (17T199-9 to 203-5).

Four, defendant committed the offense against a person who he knew or should have known was 60 years of age or older or disabled, N.J.S.A. 2C:44-1a(12). Murder victim Mary Schulz was 70 years old, which defendant should have known as Mary was his grandfather's girlfriend and part of the Kologi family for over 30 years. (17T203-18 to 204-10). Defendant conceded at trial that this aggravating factor applied. (17T159-18 to 20). The judge gave aggravating factor twelve "some weight." (17T203-16 to 17).[9]

Judge LeMieux found four applicable mitigating factors. The judge gave "some weight" to mitigating factor four, N.J.S.A. 2C:44-1b(4) (substantial grounds tending to excuse or justify defendant's conduct, though failing to establish a defense), because defendant suffered from Autism Spectrum Disorder, although this diagnosis did not create substantial ground tending to excuse or justify defendant's conduct. (17T206-1 to 209-4). He gave "limited weight" to mitigating factor seven, N.J.S.A. 2C:44-1b(7) (defendant has no history of prior delinquency), because defendant was 16-years old at the time of the crimes and thus "had minimal life behind him to incur any criminal activity." (17T209-16 to 210-16). He gave "minimal weight" to mitigating

[9] The judge found aggravating factors two, four, five, six, seven, eight, eleven, thirteen, fourteen, and fifteen inapplicable. (17T194-12 to 195-12, 198-14 to 199-8, 203-9 to 12, 204-11 to 17).

factor 12, N.J.S.A. 2C:44-1b(12) (defendant's willingness to cooperate with law enforcement), because although he gave a statement to the police, "defendant minimized his responsibility in the killings." (17T212-20 to 214-10). He gave "some weight" to mitigating factor 14, N.J.S.A. 2C:44-1b(14) (defendant was under 26 years of age at the time of the commission of the offense), because "even though he's young in age, which is a number, he's not young in his evil intent on the day that he committed these offenses." (17T214-15 to 216-21).

Judge LeMieux rejected mitigating factor one, N.J.S.A. 2C:44-1b(1) (defendant's conduct neither caused nor threatened serious harm), because "it is without a doubt that defendant shot and killed four individuals, three of them were his family members." (17T205-1 to 7). He rejected mitigating factor two, N.J.S.A. 2C:44-1b(2) (defendant did not contemplate that his conduct would cause or threaten serious harm), because "it is clear that this defendant did contemplate for up to a year in time before making this decision on this night to commit the acts that he was going to commit against his family." (17T205-8 to 19). He rejected mitigating factor three, N.J.S.A. 2C:44-1b(3) (defendant acted under a strong provocation) because "the facts adduced at trial do not indicate that the defendant acted under any provocation." (17T205-20 to 25). He rejected mitigating factor six (defendant has compensated or will compensate the victims) because "defendant has not indicated that he will compensate the victims." (17T209-9 to 15). He rejected mitigating factors eight, N.J.S.A. 2C:44-1b(8) (defendant's conduct was the result of circumstances unlikely to recur) and nine, N.J.S.A. 2C:44-1b(9) (defendant's character and attitude indicate that defendant is unlikely to commit another

offense) because the judge had already given significant weight to aggravating factor three (the risk exists that defendant will commit another offense). (17T210-17 to 211-16). He rejected mitigating factor ten, N.J.S.A. 2C:44-1b(10) (defendant is particularly likely to respond affirmatively to probationary treatment), because defendant was convicted of crimes which carried the presumption of incarceration. (17T211-17 to 23). He rejected mitigating factor 11, N.J.S.A. 2C:44-1b(11) (imprisonment would entail excessive hardship to defendant or his dependents), because defendant had no dependents, was doing well academically in jail, and did not claim that incarceration harmed his mental health. (17T211-24 to 211-19). He rejected mitigating factor 13, N.J.S.A. 2C:44-1b(13) (defendant was substantially influenced by another person more mature than defendant), because there were no facts supporting this factor. (17T214-11 to 14). Engaging in a qualitative balancing of the sentencing factors, Judge LeMieux found that "the aggravating factors outweigh the mitigating factors. (17T217-3 to 7).

On appeal, defendant challenges a multitude of the sentencing court's findings. Mere disagreement with these findings, however, is insufficient to overturn a sentence which is firmly supported by competent credible evidence in the record. R.Y., 242 N.J. at 78. One: Defendant claims that the judge did not consider his immaturity. (Db77-79). That defendant may have slept with his parents and believed in Santa Claus at age 16 does not overcome the facts of this quadruple homicide. The judge recounted the multiple and deliberate steps defendant undertook in planning the murders, including researching how to use and prepare the firearm, loading each of the 30 bullets individually into the magazines, racking the gun, dressing like The Terminator, protecting his

ears with earplugs, turning off the lights in his room, and calmly executing his mother, father, sister and grandmother. (17T218-16 to 220-4). The judge found "[s]uch sophistication goes beyond the characteristics of a youth." (17T220-5 to 6).

Two: Defendant claims that the judge found aggravating factor three based solely on the fact that defendant showed no remorse because he did not speak at sentencing. (Db79-81). Contrary to defendant's claim, this finding was based on defendant's lack of remorse at any time during the five years between the murders and the date of sentence. As the judge noted, even in his statement to the police just hours after the shootings, defendant said that he knew he should feel sad, but he had no feelings about killing his family. (17T197-24 to 198-7). It was defendant's lack of remorse over the preceding five years that informed the judge's finding. The judge also considered defendant's own words that "this would happen again or worse" and he would be "more careful" next time to cover his tracks. (17T195-13 to 196-22). The court found that these are not the words of someone who is or could be rehabilitated. (17T196-22 to 197-18). See State v. Rivera, 249 N.J. 285, 299 (2021) (lack of remorse satisfies aggravating factor three).

Three: Defendant claims that the judge did not evaluate aggravating factor nine in the context of State v. Zuber, 227 N.J. 422 (2017). (Db81-82). Notably, defendant conceded below that this factor applies to him. (17T159-18 to 21). Regardless, the judge properly found the need for general deterrence of homicide and related weapons offenses. (17T202-1 to 3). As for specific deterrence, that court found that defendant acknowledged in his statement to the police that he knew what he did and understood that it was wrong, yet he

wanted to write a book entitled "Scott Free" and would better cover his tracks the next time:

> It is clear to this Court that this defendant, if given the opportunity, would strike again. Defendant's own desires and choices guided his actions, not any mental deficiency. There is a strong factual basis here that this defendant acted out of retaliation for what he felt were wrongs committed upon him. And because there's still people in this world that he feels had wronged him, including the neighbor and others, that there is specific deterrence to this defendant from violating the law in the future.

(17T202-7 to 1). Contrary to defendant's claim (Db81), the judge expressly addressed deterrence in the context of defendant's Autism, finding that, unlike the defendant in State v. Jarbath, 114 N.J. 394 (1989), whose mental and emotional deficiencies precluded her from understanding that she had committed a crime, this defendant was capable of understanding his actions and knew they were wrong. (17T202-7 to 10). The judge's finding that defendant was succeeding academically while incarcerated is not "diametrically opposed" (Db83) to the need to deter defendant from engaging in future homicidal behavior.

Four: Defendant argues that the judge placed too little weight on mitigating factor three (defendant acted under a strong provocation) by "substantially downplaying [defendant's] mental health issues." (Db83-84). But, just as the jury could properly rejected the insanity defense, the sentencing judge could accept or reject the testimony of either party's qualified expert, in full or in part, Brown v. Brown, 348 N.J. Super. 466, 478 (App. Div. 2002), in reaching his conclusion that "there is no evidence that the defendant actually suffers from schizophrenia." (17T206-11 to 14). Defendant's

diagnosis of Autism Spectrum Disorder, the judge found, did not justify defendant's conduct. (17T206-15 to 20). Nonetheless, the judge found that mitigating factor three existed, although not to the degree that defendant prefers.

Five: Defendant argues that the judge placed too little weight on mitigating factor four (substantial grounds tending to excuse or justify defendant's conduct, though failing to establish a defense). (Db84-85). Here, the judge found that while defendant's diagnosis of Autism "may have some effect on his emotions, there's nothing before me that shows that that rose to any level that forced him or pushed him into doing this." (17T207-11 to 17). That defendant attended a school for students with learning disabilities does not establish that defendant suffers from a significant mental health issue tending to excuse or justify his conduct in killing four family members with a semi-automatic rifle. Again, the judge found that mitigating factor four existed, although not to the degree that defendant prefers.

Six: Defendant argues that the judge should have found the existence of mitigating factor eight (defendant's conduct was the result of circumstances unlikely to recur) because defendant's mother forbade him from getting mental health treatment. (Db85). As the AP argued at sentencing, however, Linda Kologi's concern that defendant would be taken away from her if he reported homicidal thoughts to a psychiatrist does not change defendant's responsibility or excuse his behavior: "He made the choice to kill four people." (17T155-1 to 8). The judge agreed:

> Mental health is real. There is no question. And while this defendant does have issues that he is dealing with, there is nothing

> here that justifies his behavior in any way, shape or form. Yes, the defendant's mother was trying to protect her son. She wanted to try to help him and not lose him. What mother is wrong for wanting to do that? But this defendant decided the way he's going to handle that is going to put a few bullets into her face and chest.
>
> Autism doesn't make you murder.

(17T179-10 to 23).

Seven: Defendant argues that the judge improperly rejected mitigating factor nine (defendant's character and attitude indicate that defendant is unlikely to commit another offense). (Db85-86). Having already given significant weight to aggravating factor three (the risk exists that defendant will commit another offense) (17T210-17 to 211-16), the judge's rejection of mitigating factor nine was consistent and not an abuse of discretion. State v. O'Donnell, 117 N.J. 210, 216 (1989).

Eight: Defendant argues that the court "completely misapplied the application of mitigating factor" 14 (defendant was under 26 years of age at the time of the commission of the offense) by focusing strictly on the nature of the offense. (Db86). The judge gave this "some weight" due to defendant's chronological age. (17T214-15 to 216-21). In any event, the judge carefully considered the five Miller factors (17T217-3 to 224-14) in imposing sentence and nothing in those findings suggest that mitigating factor 14 is entitled to any greater weight than what the court gave it.

C. The lower court properly applied the Miller factors.

Miller v. Alabama, 567 U.S. 460, 480 (2012), instructs courts in sentencing a juvenile "to take into account how children are different and those

differences counsel against sentencing them to a life in prison." (17T217-3 to 13).[10] In State v. Zuber, 227 N.J. 422 (2017), the Supreme Court of New Jersey required sentencing court to apply the five Miller factors where, as here, a juvenile convicted as an adult faces an aggregate sentence that is the practical equivalent of life without parole. Zuber, 227 N.J. at 447. "To that end, judges must evaluate the Miller factors when they sentence a juvenile to a lengthy term of parole ineligibility for a single offense. They must do the same when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times – when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence." Ibid. When a juvenile is found guilty as an adult of multiple homicides, the sentencing court must apply the Miller and Yarbough factors when imposing consecutive terms. Id. at 450. The Zuber Court recognized that, after applying the Miller factors, some juveniles "will receive lengthy sentences with substantial periods of parole ineligibility, particularly in cases that involve multiple offenses on different occasions or multiple victims." Id. at 451.

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[10] The United States Supreme Court declared unconstitutional under the "cruel and unusual punishment" clause of the Eighth Amendment sentencing regimes that impose capital punishment on juvenile offenders, Roper v. Simmons, 543 U.S. 551, 568-70 (2005); life without parole on juveniles convicted of non-homicide offenses, Graham v. Florida, 560 U.S. 48, 82 (2010); and mandatory life without parole on juveniles convicted of homicide offenses, Miller, 567 U.S. at 489. Miller does not rule out, however, the possibility of life without parole for a juvenile convicted of homicide. State v. Comer, 249 N.J. 359, 387 (2022).

Judge LeMieux's findings on the Miller factors are supported by competent credible evidence in the record, see State v. Comer, 249 N.J. 359, 408 (2022), and are entitled to deference, Fuentes, 217 N.J. at 57. As to the first Miller factor (defendant's chronological age and its hallmark features, among them immaturity, impetuosity, and failure to appreciate risk and consequences), the judge made these findings, which weighed against defendant:

> At the time of the commission, defendant was 16 years old, just two years away from adulthood. Although there is evidence that indicates defendant acted younger than his age, defendant did not exhibit immaturity and impetuousness, the hallmark characteristics of youth, in the commission of this crime.
>
> Before the murders, defendant researched how to use and prepare the firearm. Immediately prior to the murders, defendant removed the weapon from the closet, loaded the weapon as I've pointed out many times now, putting over 30 bullets into two different magazines. He took one of the magazines and he put it into the actual gun correctly. He then racked the gun. He then placed the other magazine into a backpack. Dressed himself like the Terminator while protecting his ears with ear plugs. He turned off the lights so his mother would be caught unaware and he further indicated that he did not want to be snapped out of it, indicating thoughtfulness towards the situation.
>
> In fact, defendant shot multiple victims at multiple times to their deaths. Of the four victims, defendant indicated to his aunt, the possibility and the reason for killing the three of them. He stated that if he killed his mother, he would have to kill his father to ease the father's sadness and he would kill his sister because of his hatred towards her[.]
>
> After the fact, defendant indicated that he killed his grandmother because he believed his grandfather hated her. Defendant was

> aware of the risk of his actions as evidence by his research and a bulletproof vest wherein he wanted to see if he shot his gun, the assault rifle at a bulletproof vest whether it would penetrate it or not. When he realized that it would not penetrate, that's when he made the decision of laying his weapon down when he was going to be confronted by the police.
>
> Such sophistication goes beyond the characteristics of a youth. These acts that the defendant was involved with are clearly to this Court the acts of an evil man with an evil spirit with an intention to kill as many people in his path. Therefore, the first [Miller] factor weighs against defendant.

(17T217-14 to 18, 218-15 to 220-11). Contrary to defendant's claim on appeal (Db91), the court did not simply recount the nature of the offense, i.e., that four family members were brutally murdered. The court instead focused on defendant's deliberate and discrete acts leading up to the shootings. Defendant's careful planning is amply supported by the evidence and weakens any claim of immaturity, impetuosity, or failure to appreciate the risks and consequences of his actions.

The second Miller factor (defendant's home and family environment) also weighed against defendant. (17T217-18 to 22, 220-12 to 13).

> The testimony reveals and both parties admit defendant was part of a supportive caring home environment. The family was neither dysfunctional nor brutal. It is unfortunate defendant did not receive the help he asked for. However, the failing of his dependent mother and grandfather and understanding the mental health, does not overcome the rest of defendant's supportive home environment.
>
> He was loved. He was taken care of. His mother made him his chicken and Sprite. She would make him his special dinners. His brother would make sure that he would win some basketball games to try to make him feel more loved and supported. He had a love in

> his family that a lot of people in this world would beg to have, to have the ability to have parents that love them so much and love them unconditionally.
>
> This defendant took that love and he put a bullet through it many times. Defendant was in control of his emotions and thoughts. He decided his actions. He had a motive and he successfully methodically achieved his goals on December 31st, 2017. Defendant was even asked at one point in time if his dog did anything under the circumstances, what would he have done to the dog? He said, 'I didn't shoot the dog because he wasn't doing anything to me, but if he did, he would have shot the dog also. To me, that's just further indication of this defendant's mindset…
>
> Again, all of this weighs against the second factor of Miller.

(17T220-13 to 221-20). The record is plain that defendant was raised in a loving and supportive household, surrounded by family members who nurtured and coddled him. Finding so was not an abuse of the court's discretion

The third Miller factor (the circumstances of the homicidal event and the way familial and peer pressures may have affected him) also weighed against defendant. (17T217-23 to 218-1, 221-21 to 22).

> Defendant was the only perpetrator of this crime. There was no pressure to commit these murders. While the weapon should not have been left unsecured with ammunition near it, defendant was the sole force in choosing to remove it from the closet, loading it, loading the magazine with 30 projectiles, securing the magazine into the assault firearm and pulling the trigger with a five-pound pull, not once, not twice, but 14 separate times. The third factor weighs against the defendant.

(17T221-22 to 222-6). These facts are amply supported by the record. Defendant committed his heinous acts on his own; he was not influenced by an

older relative, he was not pressured by his peers, and he was not an accomplice to felony murder. He alone is responsible for murdering his family.

The fourth Miller factor (whether defendant might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, including his inability to deal with police officers and prosecutors, including on a plea agreement, or his incapacity to assist his own attorneys) also weighed against defendant. (17T218-1 to 7, 222-7 to 8).

> There is no indication the result would have been different had defendant not offered a confession. Similarly, there is no indication the defendant's youth made him incapable of assisting his own attorneys. While defense counsel argues [he cannot] disclose confidential attorney/client information, more evidence needs to be offered if they wish to make such a claim. Defendant's characteristics at trial do not lend support to the idea that he would have been tried with a lower offense, that he would have tried to obtain a plea bargain, or that he was incompetent to understand what was going on.
>
> As a matter of fact, during the course of this case, there were discussions of a potential plea agreement but there could be no agreement under these circumstances so the defendant was involved in discussions with his attorney. I don't know exactly what they were nor am I asking. But I know as the Judge presiding over this case, that that did occur.
>
> And defense counsel talked about incompetencies. They're not talking about the word competent to stand trial. That's not what the mean under Miller. It was that he had an inability to be involved in his defense.
>
> The reality is the evidence against this defendant, even if you take out the statement, even if you do that, there was clearly enough evidence in this record through defendant's cell phone and other

> information that was supplied during the course of this trial that the defendant could have been found guilty of all of these crimes.

(17T222-8 to 223-13). Defendant intimates that his demeanor throughout trial raised legitimate concerns regarding his ability to assist in his defense. (Db99-100). Yet at no time did defendant argue this at trial, despite on-the-record discussions that defendant often sat at defense table with his head down, writing out Roman numerals during court proceedings. (7T336-14 to 342-3).

The fifth Miller factor (mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it) was found by Judge LeMieux to "slightly weigh" in defendant's favor. (17T218-8 to 11, 223-15 to 17).

> Since the offense, defendant has earned straight A's, has had zero disciplinary infractions, and has been on the honors unit at the YDC. In addition, he currently attends college classes.
>
> So I will take into account these things that the defendant has done while he has been in jail. However, defendant knew killing was wrong at the time of the crime. In addition, the record lacks any indication that the defendant is remorseful for his actions, even years after the offense. Alarmingly, even today he shows no sign of remorse at all. And by listening to the family today, if he's not going to show today, he's never going to show remorse in the future.
>
> At this juncture, this Court does not find that there is a significant possibility of rehabilitation. While he has had a lot of time to reflect and to understand that he, something that he already knew, which his acts were wrong, it still has not triggered within him that he will ever show remorse. So with that being said, the only Miller factor that this Court gives some weight to is the fifth factor.

(17T223-17 to 224-14). Defendant argues that defendant did not express remorse at the sentencing hearing due to his disability, which made it "difficult

if not impossible" for him to speak in front of a courtroom of people. (Db102). There is absolutely no evidence, however, to support this claim. Indeed, defendant had no difficulty speaking with the police or to the many mental health professionals who interviewed him after the murders. Moreover, the way the trial court room is laid out, most of the spectators would be seated in the benches behind him, out of his view, when he stood to address the court.

In fashioning an appropriate sentence, the judge found that count five (possession of a firearm for an unlawful purpose) merged into the four homicide counts (17T225-16 to 227-3, 234-10 to 11; Da19). On counts one (first-degree murder of Linda Kologi), two (first-degree murder of Steven Kologi, Sr.), three (first-degree murder of Britanny Kologi), and four (first-degree murder of Mary Schulz), the court sentenced defendant to four maximum custodial term of 50 years, with mandatory NERA and Graves Act parole disqualifiers. (17T227-9 to 228-15; Da16). The judge did not abuse his discretion in coming to that sentence following its evaluation and application of the Miller factors.

D. The lower court properly applied the Yarbough factors.

To determine whether the custodial sentences on the four murder counts should run concurrently or consecutively, the judge looked to the guidelines set forth in State v. Yarbough, 100 N.J. 627 (1985). (17T228-19 to 22). The judge found that there were multiple victims and that the three of the murders and their objectives were independent of each other and involved separate acts of violence:

Defendant shot and killed four different people. Each time defendant pointed the weapon and fired was a separate act. The killing of one victim did not impact the killing of another.

However, defendant has indicated previously that in the event the defendant murdered his mother, he would murder his father to ease the sadness. Although occurring within a short span of time, the events were separated enough as not to indicate a period of aberrant behavior with the exception of the father's murder. Defendant first killed his mother after waiting for her with the lights off. In a short period of time thereafter, defendant shot his father.

Instead of discontinuing his actions, defendant left the room, as I pointed [out], went down the steps, the 13 or 15 steps. He then made another left turn, another 13 to 15 steps and he made conscience {sic} choices. At first, he decided to take his sister out with chase a separate motive than what he had for Mary Schulz. He fired at her and he killer her.

He then had a break in his decision-making process. He stopped when it came to his grandfather, makes the conscious choice not to shoot him. That breaks the event from the shooting of Brittany Kologi to then turning the gun onto Mary Schulz. That is significant to this Court in the Yarbough analysis. The defendant then points the gun at Mary Schulz and decides to fire again. That is another separate distinct act and with a separate motive because according to this defendant, he did not believe that his grandfather liked Mary Schulz anymore. All of this is taken into consideration here.

The only issue is the incident that occurs upstairs. The act that was committed against the defendant's mother and father this Court finds was too close in time wherein it was a single act that happened so quickly there was no intervening event so therefore those two shootings are to be concurrent to each other.

(17T230-15 to 233-10). The Miller factors did "not change this Court's overall decision here today because defendant's acts were acts of a 16-year old man, not a child, acts of an evil man, ones that caused immeasurable harm to everyone involved." (17T233-11 to 19).

Given these findings, the judge ordered count two (first-degree murder of Steven Kologi, Sr.) concurrent to count one (first-degree murder of Linda Kologi). (17T233-20 to 23; Da16). Counts three (first-degree murder of Brittany Kologi) and four (first-degree murder of Mary Schulz) were imposed consecutively to each other and consecutively to counts one and two. (17T232-23 to 234-1). Consecutive sentences are appropriate here because defendant intentionally murdered multiple victims. State v. Carey, 168 N.J. 413, 428-29 (2001). "[B]y virtue of their impact on multiple lives, crimes involving two or ore victims are particularly suited for the imposition of consecutive sentences, so that 'the multiple-victims factor is entitled to great weight and should ordinarily result in the result in at least two consecutive terms.'" State v. Liepe, 239 N.J. 359, 375-76 (2019) (quoting State v. Molina, 168 N.J. 436, 442 (2001). "Even if the murders occurred in close sequence, consecutive sentencing is not improper." State v. Roach, 146 N.J. 208, 231 (1996). Consistent with Yarbough and Carey, Judge LeMieux acted within his discretion in finding that the deaths of four multiple victims warranted three consecutive sentences. Liepe, 239 N.J. at 377; Roach, 146 N.J. at 230.

Defendant's aggregate custodial term is 150 years, subject to NERA and a five-year parole supervision period on each count. (17T234-2 to 9, 235-2 to 3). Defendant must serve 127 years, six months, and four days before becoming parole-eligible. (17T235-6 to 9). The court's stated intention is for

this defendant to "never see the light of the outside of a jail cell ever again." (17T234-4 to 6). The State acknowledges that defendant's aggregate period of parole ineligibility of 127 years amounts to the equivalent of life without parole. See Zuber, 227 N.J. at 447 (55-year parole ineligibility period is the equivalent of life without parole). As evidenced by Judge LeMieux's 60-page sentencing decision (17T175-13 to 235-9), the court exercised a heightened level of care before imposing multiple consecutive sentences resulting in a lengthy jail term. Id. at 429-30; See also State v. Torres, 246 N.J. 246, 270 (2021) (requiring sentencing court to explain its evaluation of the fairness of the overall sentence). The judge properly evaluated the Miller factors when sentencing defendant to a lengthy period of parole ineligibility in a case involving multiple homicides. Zuber, 227 N.J. at 447. His decision is supported by competent credible evidence in the record. Comer, 249 N.J. at 408.

Defendant is not without recourse. Juvenile offenders waived to adult court, convicted of murder, and sentenced to mandatory 30-year parole disqualifiers have the opportunity after 20 years to petition the court for a reduction of the parole ineligibility period, as well as the total sentence, based on a demonstration of maturity and rehabilitation. Defendant may petition the court to review his sentence after 20 years. Comer, 249 N.J. at 370, 401.

Finally, the sentence imposed does not shock the judicial conscience. Defendant was convicted by a unanimous jury of four counts of first-degree murder. He could have been sentenced on each count to life imprisonment with a 30-year parole disqualifier. N.J.S.A. 2C:11-3b(1). Instead, defendant was sentenced to a specific term of 50 years on each count. And, the judge could

have imposed four consecutive sentences, not three, because there were four separate murder victims. Defendant's lengthy prison sentence is the product of his intentional criminal acts and not an abuse of discretion by the sentencing court. This Court should affirm.

## CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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MONMOUTH COUNTY PROSECUTOR

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| **STATE OF NEW JERSEY,** | : | **SUPERIOR COURT OF NEW JERSEY** |
| | : | |
| **Plaintiff-Respondent** | : | **MONMOUTH COUNTY** |
| | : | |
| | : | **APP. DIV. DKT NO.: A-3753-21T4** |
| | : | **INDICTMENT NO.: 20-01-00067-I** |
| **v.** | : | |
| | : | |
| | : | **Criminal Action** |
| **SCOTT A. KOLOGI,** | : | |
| **Defendant-Appellant** | : | |
| | : | **Sat Below:** |
| | : | **Hon. Marc C. Lemieux, J.S.C.** |
| | : | |

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# LETTER BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT IN REPLY TO THE STATE'S RESPONSE BRIEF

***Defendant is Confined***

**Honorable Judges of the Appellate Division:**

**Pursuant to Rule 2:6-2(b), please accept this letter-brief on behalf of defendant Scott Kologi in reply to the State's Response Brief.**

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## PRELIMINARY STATEMENT

In the present case, the State failed to properly consider the fact that juveniles receive heightened protections when it comes to custodial interrogations. Moreover, the State substantially downplayed the fact that juveniles are different from adults for the purposes of determining the admissibility of confessions given to the police. The majority of the State's proof's in the present case came from defendant's statement to the police. Here, the Trial Court failed to assess the factors qualitatively. Assessing the totality of the circumstances it is clear that Scott Kologi's statement was unconstitutional, involuntary and should not have been admissible in his trial.

## PROCEDURAL HISTORY

The defendant relies on the procedural history outlined in his original brief, filed May 2, 2023.

## STATEMENT OF FACTS

The defendant relies on the facts explained in his original brief, filed May 2, 2023.

# LEGAL ARGUMENT

## POINT I

### THE STATE IMPROPERLY ASSESSED THE TOTALITY OF THE CIRCUMSTANCES REGARDING WHETHER SCOTT KOLOGI KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS

The right against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution, the New Jersey Constitution and N.J.R.E. 503. State v. Nyhammer, 197 N.J. 383 (2009). N.J.R.E. 503 states "every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate." In Miranda, the United States Supreme Court held that before law enforcement subjects a suspect to custodial interrogation, the suspect must be advised: (1) "that he has the right to remain silent"; (2) "that anything he says can be used against him in a court of law"; (3) "that he has the right to the presence of an attorney"; and (4) "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda imposes a fifth requirement: "that a person must be told that he can exercise his rights at any time during the interrogation." State v. Tillery, 238 N.J. 293 (2019)(citing Miranda v. Arizona, 384 U.S. 346 (1966).

The burden is on the State to prove beyond a reasonable doubt that the defendant waived his Miranda rights. O.C.A. – C, 250 N.J. 408, 420 (2022). In determining whether the State has proven the defendant waived his Miranda rights beyond a reasonable doubt, courts assess the totality of the circumstances concerning the interrogation, including, the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved and prior experience with the criminal justice system." State in the Interest of A.A. 455 N.J. Super. 492 (2018). Whether a statement is voluntary is assessed qualitatively, not quantitatively and "the presence of even one of those factors may permit the conclusion that a confession was involuntary." State v. L.H., 239 N.J. 22, 43 (2019).

### A. The State's Argument is Legally Inaccurate Regarding Whether Steven Kologi Jr. could have had Criminal Liability Regarding the Incident and whether he was the Appropriate "Guardian" for Scott during the Interrogation

Under New Jersey law, juveniles "receive heightened protections when it comes to custodial interrogations. A.A. 240 N.J. 341 (2020). Therefore, prior to the interrogation of a juvenile, "a parent or legal guardian should be present in the interrogation room, whenever possible." State v. Presha, 163 N.J. 304 (citing State in the Interest of S.H., 61 N.J. 108, 114-115 (1972). "In the context of a juvenile interrogation … the parent serves as advisor to the juvenile,

someone who can offer a measure of support in the unfamiliar setting of the police station." State in re A.S. 203 N.J. at 315 (citing Gallegos v. Colorado, 370 U.S. 49 (1962). Specifically, the A.S. Court stated, "the mere presence of a parent is insufficient to protect a juvenile's rights because presence alone cannot be said to provide the buffer between police and the juvenile that [the Court was contemplating] in Presha." Id. at 148. "In order to serve as a buffer, the parent must be acting with the interests of the juvenile in mind." Id.

In State in the Interest of M.P., 476 N.J. Super. 242 (2023), the court failed to adopt a rule that would require an attorney to be appointed in all interrogations of a minor. However, in A.S. the Court stated:

> [i]n circumstances such as those existing in the present matter, where the adult advisor is known to have a close family relationship to both the victim and the alleged perpetrator, the prudent approach would be to require the presence of an attorney capable of advising the juvenile with respect to her rights and her potential culpability, a procedure adopted elsewhere.
>
> [203 N.J. at 154]

In addition, the Court cautioned that where the interrogating officers are aware of "competing and clashing interests," they should "strongly consider ceasing the interview when another adult, who is without a conflict of interest, can be made available to the child." Id. at 154-55.

Here, Steven Kologi Jr. had a clear conflict of interest acting as Scott's guardian during the interrogation. Steven owned the rifle that was used in the

case, called 911, had the gun turned on him and witnessed three of his family members brutally murdered by the defendant two hours prior to the interrogation. (1T:33-1 to 13);(1T:24-1 to 25-8). Furthermore, the State is still arguing the absurd notion that it is legal to leave an unsecured assault rifle in a house with a mentally ill child. Specifically, N.J.S.A. 2C:24-4(a)(2), states "any person having a legal duty for the car of a child or has assumed responsibility for the car of a child who causes the child harm that would make the child abused or neglected … is guilty of a crime of a second degree." However, the State ignores the second sentence which states "**any other person** who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree." Therefore, the "legal duty" only pertains to the grading of the offense. If Scott would've shot himself with the rifle instead of his family, the State would not argue that Steven Jr. was not guilty of endangering because he didn't have a legal duty to care for Scott. The absurd argument that one can endanger children as long as they are not their own has no basis in law or fact.

### B. The State's Argument is Incorrect because they place the Burden on the Defense and Ignore All of the Facts Regarding Scott's Intellectual, Educational and Cognitive Limitations

In M.P., the Court stated that "when determining whether the State has proven the waiver of rights was knowing, intelligent, and voluntary beyond a reasonable doubt, M.P.'s undisputed cognitive limitations and mental conditions must be

accounted for in addition to the circumstances outwardly displayed in the video." 476 N.J. Super. at 289. The court further stated "[t]he ultimate fact-sensitive issue … is whether M.P. actually knew, understood, and voluntarily waived his rights, not just whether he appeared willing, if not eager, to speak to police." Id. The State in M.P. argued that "relying on personal characteristics, such as IQ and educational background, M.P. is attempting to turn Miranda into an unworkable subjective doctrine." Id. at 289-90. However, the Appellate Division indicated that "the critical issue was not what police knew about M.P. and whether they could be expected to know about his intellectual and educational challenges." Id. at 290. "[T]he critical issue [was] whether, considering the totality of the circumstances, M.P. knowingly, intelligently, and voluntarily waived his constitutional right against self-incrimination." Id. The Court specifically rejected the notion that "a reviewing court can disregard circumstances deemed relevant under the case law on the grounds those circumstances were not known by or 'noticeable' to police." Id.

"The law is settled that intelligence and education, are relevant factors." Nyhammer, 197 N.J. at 402. "It also bears noting that reviewing courts do not employ a purely objective test when determining whether the State proved voluntariness beyond a reasonable doubt." Id. The voluntariness of the juvenile's confession must be evaluated from the juvenile's perspective. State in the Interest of Q.N., 179 N.J. 165 (2004). Thus, the M.P. court held "the motion court should have

considered the unrebutted defense testimony regarding M.P.'s personal intellectual, educational, and cognitive limitations.

Here, the uncontradicted testimony was that Scott went to a school for children with autism and multiple disabilities. (1T:42-3 to 6). Furthermore, at 16 years old, he still slept in the same bed with his parents at night. (1T:43-25 to 44-3). In addition, Scott still believed he was going to college and the military after killing four people. (1T:44-5 to 8). Furthermore, an honest review of Scott's statement clearly displays that he had cognitive limitations. Scott spent much of his statement speaking about hallucinations, and seeing and hearing things that were not there. (1T:51-2 to 6). Scott told Detectives that he saw a glowing white light outside of his window the day of the homicide. (1T:45-25 to 4).

It is clear that the State minimized Scott's limitations that were told to the Detectives by Steven Kologi Jr. and were clearly visible on tape. While Detective Tozzi testified that she learned about Scott's autism after the Miranda warnings were given, M.P. was clear that the critical issue is not what police knew about the juvenile's intellectual and educational challenges." 476 N.J. Super. at 290. Accordingly, the fact that Scott was an autistic teenager who went to a school for children with disabilities should be afforded heavy weight in determining whether to admit his statement.

### C. The State's Argument is Incorrect because the State Substantially Downplays the fact that Scott was Never Afforded the Opportunity to Consult with his "Guardian" in Private

The State seemingly ignores the fact that Scott was never afforded the opportunity to consult with his "guardian in private at all. The A.A. court found that the failure of the police to provide an opportunity for private consultation after Miranda warnings are administered should "weigh heavily" in a reviewing court's totality of the circumstances analysis." 240 N.J. at 359.

> The protections outlined in Presha remain good law. To reinforce them and avoid what took place here, we add the following guidance. The police should advise juveniles in custody of their Miranda rights—in the presence of a parent or legal guardian—before the police question, or a parent speaks with, the juvenile. Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights.
>
> [A.A., 240 at 358]

In M.P. the Court put heavy weight on the fact that the juvenile and his mother were not afforded the opportunity to consult in private after the Miranda warnings were given. 476 N.J. Super. at 291. In M.P. the juvenile and his mother were given the opportunity to consult in private before the Miranda warnings were given. Id. The Appellate Division held that because the consultation occurred before the Miranda warnings were given, it "weighted heavily against a finding the waiver of rights was knowing, intelligent, and voluntary." Id. at 294.

Here, Scott was never given an opportunity to consult with his "guardian." Unlike M.P., Scott didn't even have the opportunity to consult with his guardian in private prior to the reading of the Miranda warnings. Id. Instead, no private consultation took place at all. The extent of the consultation was:

> Lieutenant Tozzi: "Ok. And Scott, you're okay with him talking to us? Scott Kologi: "That's Steve." Lieutenant Tozzi: "Steve; I'm sorry." Lietenant Kologi: "Yes, I'm okay with that." You're okay with it?
> Scott Kologi: "I think, pretty much."
>
> [7T:291-3 to 9]

There was no private consultation at all and the extent of the consultation that occurred was two seconds in front of two detectives where Steven Jr. asks Scott if he was "Okay with it." To which Scott simply replied, "I think, pretty much." M.P. put heavy weight on a private consultation that occurred before the Miranda warnings were given, whereas, here, the State puts very little weight that a private consultation did not occur before or after the Miranda warnings. 476 N.J. Super. at 294.

### D. The State Improperly Assessed the Fact that Scott had No Time to Process his Rights

In M.P. the Court was "concerned that M.P. took almost no time to process the information and contemplate the meaning of the warnings. Id. at 298. The Court found that it was problematic because M.P. had a history of ADHD. Id. "Furthermore, the problem was compounded by the fact that M.P. and his mother

did not consult privately to consider the warnings that had just been administered." Id. The Court found that the "interrelated circumstances, viewed collectively and in light of M.P.'s intellectual and cognitive limitations, [supported] his argument that he did not comprehend his right against self-incrimination and the implications of waiving that right." Id.

Here, the majority of Scott's answers with respect to whether he understood his Miranda rights were "yeah." (7T:281-25 to 291-9). Similar to M.P., Scott took almost no time to process the information. 476 N.J. Super. at 298. While the State takes issue with this characterization, it is exactly what happened and what is portrayed on the video of Scott's statement. When Scott was asked whether he understood his right to remain silent and refuse to answer any questions his initial response was "not exactly, but I've heard of it." (7T:282-3 to 4). Next, the detective asked him to read it out loud and then asked the same question. Scott's response was "I don't know how to word it really." (7T:282- 20 to 21). When asked what "you have the right to remain silent and refuse to answer any questions" means, Scott couldn't explain it. Id. Scott agrees with Detectives but had great difficulty explaining anything. Even when the Detectives explained Scott's rights to him, he couldn't explain them back. Scott could agree with the Detectives but whenever he was asked to explain any of his rights, he could not do it.

As aforementioned, he was never given the opportunity to consult with his "guardian" in private. Scott had autism, went to a school for children with special needs, still slept in the bed with his parents and was wholly immature. Moreover, the State's argument that Scott joking about masturbation as a substitute for his girlfriend, is evidence that he had some knowledge on the level of his 16-year-old compatriots is absurd. The context of the conversation was that he was being interrogated by two Detectives after killing four family members for no reason. The argument that a typical 16-year-old would make a masturbation joke under those circumstances is preposterous. Furthermore, Scott spent a large part of the interrogation talking about hallucinations. The State's Detective did not dispute the fact that Scott had autism and went to a special school for kids with disabilities. (1T:3-17 to 91-12). The fact that Scott could answer a leading question and say that he knew that stealing was wrong, does not mean that he understood his Miranda rights and knowingly waived them. Thus, this should weigh against a finding that Scott's waiver was knowing, intelligent and voluntary.

### E. The State is Incorrect in the Assertion that Steven Kologi Jr. Served as a Buffer During the Interrogation

In M.P, M.P.'s mother told him to speak with the police and tell them that although he witnessed the murder while holding a gun, he was not the shooter. 476 N.J. Super. at 298. The Court found that M.P.'s mother did not serve as a buffer during the interrogation process. Id. at 299. The Court found M.P.'s mother's

participation or lack thereof, did not support the motion court's finding that M.P. knowingly, intelligently, and voluntarily waived his right to remain silent." Id. at 300.

Here, After the two second consultation did not occur in private, Steven told Scott to "just tell these guys everything. (1T:41-10 to 13);(7T:291- 13 to 14). Clearly, Steven Kologi Jr. did not act as a buffer during the interrogation process. Therefore, as in M.P., Steven's comments prior to the interrogation coupled with the lack of a private consultation, weigh against the trial Court's finding that Scott knowingly, intelligently and voluntarily waived his Miranda rights.

### F. The Totality of the Circumstances Demonstrate that Scott Kologi did not Knowingly, Intelligently and Voluntarily Waive his Miranda Rights

In M.P., the Court stated that "proof of voluntariness is analytically distinct proof of knowledge in applying the 'knowing, intelligent, and voluntary' test for waiving constitutional rights. 476 N.J. Super. at 300. In M.P. the Court did put some weight on the fact that M.P. was provided food and drink and the fact that the interrogation was not prolonged. Id. However, the Court found that viewing the circumstances collectively, in the context with M.P.'s intellectual deficits, weighed heavily against the State. Id. at 301. The Court considered that M.P. "took very little time without speaking to his mother and under the watchful gaze of police interrogators – to initial the individual rights and sign the form after it was read to

him. Id. at 300 - 301. The Court found that the motion court's finding that "M.P. knowingly, intelligently, and voluntarily waived his Miranda rights [was] not supported by the sufficient and credible evidence in the record." Id. Therefore, the State failed to carry it's heavy burden of proving a valid waiver of constitutional rights beyond a reasonable doubt." Therefore, the Court reversed the finding that M.P.'s statement was admissible at trial. Id.

Unlike M.P., Scott's interrogation took place at 2:18AM. (1T:13-17 to 18). Similarly, Detective Tozzi was unaware if Scott slept or if he was given any food. (1T:42-14 to 43-1). As aforementioned, there was no private consultation with his guardian whatsoever. (1T:35-8 to 11). Scott was an autistic sixteen-year-old who went to school for children with disabilities. (1T:42-3 to 6). When the State argues that this is "speculation" they are improperly placing the burden on the defense. This was in fact the uncontradicted testimony at the Miranda hearing that was agreed to by their Detective. Id. As in M.P. Scott took no time and under the watchful eyes of two Detectives to initial the Miranda form after it was read to him. 476 N.J. Super. at 300-301. Steven Jr. and Scott never spoke in private. In fact, they barely spoke at all prior to the interrogation. The Miranda waiver consisted of a brief diagloue:

> Lieutenant Tozzi: "Ok. And Scott, you're okay with him talking to us?
> Scott Kologi: "That's Steve." Lieutenant Tozzi: "Steve; I'm sorry."
> Lietenant Kologi: "Yes, I'm okay with that." You're okay with it?
> Scott Kologi: "I think, pretty much."
>
> [7T:291-3 to 9]

Scott's response to the waiver of these very crucial rights which ultimately resulted with a 150-year sentence for a sixteen (16) year old, mentally ill child was "I think, pretty much." Id. Scott's developmental delays and disabilities were more severe than M.P.'s. Furthermore, it is abundantly clear from the video of Scott's statement that he suffered from intellectual deficits and cognitive delays. As stated in M.P. the crucial determination is not whether the Detectives were aware of Scott's delays but rather whether he had them. Id. at 290. A sixteen year old, autistic child, who made inappropriate jokes while being interrogated about killing his family for no reason should weigh against a finding that he knowingly, intelligently and voluntarily waived his rights. In addition, his guardian was his twenty (20) year old brother who watched the murder of his family two hours earlier, owned the gun, escaped the house and called 911 on Scott. Furthermore, there was no evidence whatsoever presented by the State to rebut the testimony regarding Scott's mental health issues. It is clear from Scott's statement that he functioned at an intellectual capacity far less than an average sixteen (16) year old. Accordingly, followingly the holding from M.P. the Court must find that the State failed to carry its heavy burden of proving a valid waiver of constitutional rights beyond a reasonable doubt.

## CONCLUSION

For the reasons stated herein, along with the reasons stated in defendant's original submission, the court must reverse the motion court's ruling that Scott's

statement was admissible, reverse the judgment of conviction, and the matter remanded for a new trial.

Respectfully submitted,

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