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THE STATE OF NEW JERSEY,	BERGEN COUNTY SUPERIOR COURT CRIMINAL DIVISION
-versus-	
BARRY LORENZO CAREY, Defendant.	**VERIFIED PETITION FOR POST-CONVICTION RELIEF PURSUANT TO RULE 3:22**
	Indictment # 05-10-1905-I

Defendant, BARRY LORENZO CAREY, by and through undersigned counsel, hereby petitions this Court for relief from a judgment of conviction and sentence entered in the above-captioned case pursuant to Rule 3:22, the Constitution of the United States of America, and the Constitution of the State of New Jersey.

PRELIMINARY STATEMENT

1. Barry Carey moves this Court to vacate his conviction and sentences entered against him in this matter on October 6, 2006.

2. Pursuant to Rule 3:22-8, the following particulars are set forth:

(a) Indictment # 05-10-1905-I was filed on October 21, 2005 in the Bergen County Superior Court charging Barry Carey with Count #1, First degree kidnapping, in violation of N.J.S.A. 2C:13-1b;

Count # 2, and #3, First degree aggravated sexual assault in violation of N.J.S.A. 2C:14-2a(3); Count # 4, Second degree sexual assault in violation of N.J.S.A. 2C:14-2c(1), Count # 5, and #8, Second degree attempted kidnapping, in violation of N.J.S.A. 2C:13-1b and N.J.S.A. 2C:5-1, Count # 6, and #9, Second degree attempted aggravated sexual assault, in violation of N.J.S.A. 2C:14-2a(3), and N.J.S.A. 2C:5-1, and Count # 7, and #10, Second degree attempted sexual assault in violation of N.J.S.A. 2C:14-2c(1) and N.J.S.A. 2C:5-1.

(b) The case was tried before the Honorable Harry G. Carroll, P.J.Cr., and a jury from January 31, 2006 through February 15, 2006. At the conclusion of trial, Carey was convicted of counts one, two and four and was acquitted of counts six, seven, nine and ten. The State dismissed count three prior to trial. Judgment was entered upon Carey's sentencing on October 6, 2006. Count four was merged into count two. Carey was sentenced to twenty-five (25) years imprisonment, eighty-five (85) percent to be served without parole under the No Early Release Act (NERA) and five years parole supervision on count #1. He was sentenced to a consecutive four years imprisonment on Count #5. On count two he was sentenced to seventeen (17) years imprisonment, eighty-five (85) percent to be served without parole and five years of parole supervision to run concurrent. On count eight he was sentenced to four years imprisonment also to run concurrent. His aggregate term was

twenty-nine (29) years imprisonment, with twenty-one (21) years and three months to be served without parole. The court also imposed fines, Megan's Law registration, and community supervision for life. The judgment of conviction was entered on October 17, 2006.

(c) On November 27, 2006, Carey filed a notice of appeal. On appeal he alleged he was deprived of due process by the prosecutor's improper use of race-based peremptory challenges; he was denied a fair trial due to the prosecutor's improperly conducting an investigation of a potential juror; the trial court erred in not severing offenses for his trial; the trial court erred in admitting hearsay statements which impermissibly bolstered the testimony of the State's principal complaining witness; the trial court erred by permitting the jury to consider evidence that he had an alias; prosecutorial misconduct; that his convictions should be reversed because the prosecutor ordered witnesses not to speak with defense investigators; the trial court erred in denying his motion to permit its expert witness to conduct a psychiatric examination on the "victim;" cumulative errors required reversal; the trial court improperly found aggravating factors at sentencing; and the trial court abused its discretion in sentencing him to consecutive terms of imprisonment.

(d) On April 19, 2010, a three-judge panel of the court of appeals affirmed his conviction and sentence. On December 28,

2010 Carey filed a notice of petition for certification to the New Jersey Supreme Court. On April 14, 2011, Carey's Petition for Certification was denied.

(e) On October 17, 2011, Carey filed a timely First Petition for Post-Conviction Relief (PCR) that included a notice of motion to extend time to complete additional investigation, file an amended petition if warranted, and file a supplemental brief. He alleged his attorney was ineffective for failing to challenge the competency of a State witness; his attorney was ineffective for failing to request a Rule 104 hearing on the issue of whether the prosecutor's office unduly influenced witnesses to decline to speak with the defense; his attorney was ineffective for failing to object to inadmissible hearsay statements at trial; his attorney was ineffective for failing to object to numerous improper comments made by the prosecutor during summations; and his attorney was ineffective for failing to adequately advise him of his right to testify.

(f) On November 3, 2011, the Honorable Donald R. Venezia, J.S.C. entered an order dismissing defendant's PCR petition without prejudice to re-file pending additional investigation. On May 24, 2013, Carey filed an Amended PCR Petition, raising identical issues to those presented in his October 17, 2011 PCR petition with additional documents that included additional evidence.

(g) On November 22, 2013, Carey's amended PCR Petition was heard by the Honorable Edward A. Jerejian, J.S.C. On February 7, 2014, Judge Jerejian issued a Letter Opinion and Order denying defendant's amended PCR petition.

(h) On March 14, 2014, Carey filed a notice of appeal. On August 1, 2014 he filed his initial brief. On October 21, 2014, the State of New Jersey filed a reply brief. On November 21, 2014, Carey filed a reply letter in lieu of a brief.

(i) On October 1, 2015, the Appellate Division of the Superior Court of New Jersey affirmed the trial court's denial of post-conviction relief without an evidentiary hearing. On December 9, 2015, Carey moved for discretionary review to the Supreme Court of New Jersey. On February 17, 2016, the Supreme Court of New Jersey denied Carey's Petition.

(j) Carey is entitled to a second petition for post-conviction relief pursuant to Rule 3:22-4(b):

> A second or subsequent petition for post-conviction relief shall be dismissed unless:
> (1) it is timely under R. 3:22-12(a)(2); and
> (2) it alleges on its face either:
> (A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or
> (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable

> probability that the relief sought would be granted; or
> (C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

R. 3:22-4(b).

Here, Carey is alleging ineffective assistance of his appellate counsel, Lora B. Glick, Esq. for her representation of Carey on his first petition for post-conviction relief. Rule 3:12-12(2)(c) provides that second or subsequent petition seeking post-conviction relief must be filed within a year of "the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged." R. 3:12-12(2)(c).

This petition is filed within a year of the Appellate Division of the Superior Court of New Jersey's denial of post-conviction relief on October 1, 2015.

(k) From arrest to sentencing, Carey was represented by Wanda Akin, Esq., retained counsel. On direct appeal, Carey was represented by Lora B. Glick, Esq., retained counsel, in the Appellate Division and in the New Jersey Supreme Court.

(l) Carey remains in custody pursuant to the judgment of conviction at South Woods State Prison in the New Jersey Department of Corrections.

(m) Prior counsel Lora Glick, Esq. has been previously notified that this petition will raise a claim of ineffective assistance of counsel.

3. The following documents are attached to this motion and made a part hereof:

EXHIBIT A: - Affidavit of Barry Carey

EXHIBIT B: - Affidavit of Myrna Myers

EXHIBIT C: - Forensic Opinion of Dr. Joe B. Alexander

EXHIBIT D: - Consent to search form

EXHIBIT E: - Miranda rights form

EXHIBIT F: - Indictment

EXHIBIT G: - Superior Court of New Jersey Appellate Division decision of April 19, 2010

EXHIBIT H: - Supreme Court of New Jersey denial of Petition on April 14, 2011

EXHIBIT I: - Superior Court of New Jersey denial of first petition for post-conviction relief on February 7, 2014

EXHIBIT J: - Superior Court of New Jersey Appellate Division decision on October 1, 2015

EXHIBIT K: - Supreme Court of New Jersey denial of Petition on February 17, 2016

4. For the reasons that follow, Barry Carey respectfully requests that this Court grant this motion in its entirety, set aside the judgment of conviction and sentence, order a new trial in this action, and grant him such other and further relief as this Court may deem just, proper and equitable.

STATEMENT OF RELEVANT FACTS

Law Enforcement Investigation

5. On April 17, 2003, the Hackensack Police Department received a call from the Friendship House, a vocational rehabilitation agency regarding an allegation that an individual lured a woman to his car and raped her. The alleged victim of the sexual assault, M.C.S. described the vehicle as a red sports car. No further information was obtained about the suspect at that time.

6. The Police Department received another call from Helene Simms, a counselor at the Friendship House on August 19, 2003. She told the police that an individual in a Toyota Camry attempted to lure a woman outside the Friendship House into his car. She wrote down the license plate number and gave it to the police.

7. The registered owner of the Toyota Camry was Blessing Ocoby, who is the mother of Gisabelle Ocoby. Gisabelle Ocoby was Carey's girlfriend. After running a background check on Mrs. Ocoby and Carey, officers found Carey's home address. On January 22, 2004, officers went to Carey's home and asked if he and Mrs. Ocoby would go to the police station to answer questions. They both agreed.

8. At the station, officer Lustmann presented Carey with a Miranda form. (1T: p.16). He testified that he read aloud each of the constitutional rights and asked Carey if he understood them.

Id. at 18. He asked Carey to read the form and if he understood its contents to write "yes" and initial next to each question if he understood. Id. He testified that he saw Carey write the word "yes." Id.

9. Officer Lustmann then asked Carey to read the waiver of rights portion and if he understood the rights to sign his name. Id. at 19. He testified that he observed him sign his name. Id. at 19. The document was signed, "Barry Lorenzo Carey" at 7:40 a.m. on January 21, 2004. (Exhibit E). Officer Lustmann proceeded to interrogate Carey.

10. During the interrogation, Carey stated that his girlfriend was Gisabelle Colby. (11T: p.147). He stated that he worked as a driver for "Community Surgical" which is located in Kenilworth, New Jersey. Id. at 146. He told Officer Lustmann that as part of his job, he had previously driven to Bergen County to go to Hackensack University Medical Center. Id. The medical center is located near the Friendship House. Officer Lustmann testified that if Carey had done deliveries at the medical center, he would certainly be familiar with where the Friendship House was. (1T: p.25).

11. Officer Lustmann testified that Carey stated that Ms. Colby drives him to work every day in a 2000 Toyota Camry. (11T: p.147). At first Carey told officers that he never drove the Toyota Camry, but later stated to them that he occasionally drove

it. Id. at 148. During Mrs. Colby's conversation with Officer Lustmann, she said Carey used the car at least five to ten times when she was not with him at a variety of times and places including when she would go to work. (1T: p.24).

12. Officer Lustmann testified that during the interrogation, Carey began to degrade the mentally challenged females. (11T: p.153). Officer Lustmann testified, "[h]e looked at me and he said, do I look like I need to rape retarded women?" Id. at 153.

13. Officer Lustmann testified that Carey then got up and started banging on his chest. Id. Carey then asked him if he had seen his girlfriend and told Officer Lustmann that he had a "piece of that the first day." Id. at 154.

14. During the interrogation, and after supposedly reading the Miranda rights, Officer Lustmann asked Carey if he would consent to providing a DNA sample. (1T: p.32). Officer Lustmann had previously obtained a court order to obtain a DNA sample. Id. at 32. Carey first responded by telling him that he was not going to permit him to put anything in his mouth. Id. at 33. When Officer Lustmann said that he was going to take a DNA sample from him, Mr. Carey stated "this is bullshit." (11T: p.160).

15. When asked if he was ever in the company of M.C.S., Officer Lustmann testified that Carey denied it and stated that any DNA sample taken would not match. Id. Carey then denied that he ever got into a car with M.C.S. on April 17, 2003, and denied

having consensual relations with any of the women at the Friendship House. (1T: p.40).

16. At the end of the interrogation, Detective O'Boyle testified that he presented Carey with a "consent to search" form and explained it to him. Id. at 99. He stated Carey read the form and signed it. Id. at 101. The signature on the form reads, "Barry Carey" and was signed at 10:00 a.m. on January 21, 2004. (Exhibit D).

17. Officer Lustmann testified that after obtaining the consent to search, he went to Carey's home. There, he obtained registration information for a red Saturn from Carey's bedroom and various sports jerseys from his closet. (11T: p.120). After investigating the vehicle registration, he spoke to Patrick Aubontron, a detective in Leominster, Massachusetts who confirmed that Carey formally owned a 1997 Red four-door Saturn with Massachussetts registration 91HM20. Id. at 121. He found that Carey sold the vehicle to Jenny Inrosky in January, 2004. Id. Officer Lustmann testified that he spoke with Ms. Inrosky and was able to take pictures of the vehicle. Id. Those pictures were offered into evidence at trial. Id.

18. Carey was subsequently arrested and charged. He hired Wanda Akin Esq. to represent him. He advised her that he never signed, initialed, or wrote on the Miranda form, or the Consent to Search form. (Exhibit A).

Motion Hearing

19. The trial court held an evidentiary hearing on November 15, 2005 to hear Akin's motion to suppress statements, and evidence obtained at Carey's residence. (T1). At the suppression hearing she argued that officers told Carey he was signing a document to obtain his wallet and he did not know it was a document to permit a search of his residence. (T1: p.144). She argued the officers engaged in a form of trickery to get him to sign. Id.

20. She also argued his statements should be excluded in violation of Miranda because the circumstances of the interrogation were coercive in nature. Id. at 145. It was coercive because officers picked up Carey at his house early in the morning and waited until later in the interrogation to tell him why they were questioning him. Id. 145, 146. She informed the trial court it was her position that Carey never signed the Miranda form, but did not present any evidence to support that theory. Id. at 146. After the witnesses testified and during her argument to the court, she admitted she wanted to submit an affidavit from Carey stating he was coerced, but never did. Id. at 142.

21. The trial court held that it "accept[ed] the testimony of the officers that in fact Carey did sign that form after it had been read to him and also after he himself had the opportunity to read the Miranda form." Id. at 158. The court also found it accepted the officer's testimony that they read the consent to

search form to Carey, he read it, and he signed it. Id. at 165. The Court denied Carey's motion to suppress.

Trial

22. M.C.S. was a witness called by the State who testified that Carey raped her on April 17, 2003. She stated that she works at the Friendship House (6T: p.71). On April 17, 2003 she exited her bus to walk to the Friendship House. Id. at 74. While walking she saw a red car and thought the driver was her boyfriend, so she approached the car. Id. at 76. She later realized the person in the car was not her boyfriend. Id. at 77. She testified that the driver told her to get in the car and that he would drive her to the Friendship House. Id. at 78. After she got in the car, the driver parked and told her to take her pants down and she complied. Id. at 82. She then stated he had intercourse with her. Id. at 83-84. He took her to a driveway and let her out and she walked to the Friendship House. Id. at 84-85.

23. On cross-examination, M.C.S. testified that she takes several medications every day. (6T: p.93-94). She admitted that she takes these medications for mood and anger control, anxiety, and because she used to cut herself. Id. at 94, 95. She said the medications help keep her from having hallucinations and delusions. Id. at 106. After the incident, officers asked her to show them where she was allegedly raped. Id. at 111. She was unable to give them a location. Id.

24. She also admitted that she was depressed and lonely, and when she was lonely she would leave the Friendship House and look for friends. Id. at 97; 98. She testified that she likes to talk to people, but does not know how to handle conversations. Id. at 99. Prior to April 17, 2003, her counselor had to advise her not to go into cars to talk to people. Id. at 102. M.C.S. testified that when she approached the vehicle on April 17, 2003, **she** asked the driver if he was going to the Friendship House and the driver responded yes, and agreed to drop her off. Id. at 128.

25. She admitted she did not have any bruises on her body as a result of the incident and that she was never threatened. Id. at 146; 148. When she was questioned by detectives she said that the driver seemed like a nice guy. Id. at 148.

26. After the incident, M.C.S. went to the hospital and was examined by Alexis Fitzsimmons, a nurse practitioner at the hospital who also acted as the Sexual Assault Nurse Examiner (SANE) coordinator for the Bergen County Prosecutor's office. (9T: p.190-91; 194). Fitzsimmons examined M.C.S.'s vagina and cervix. Vaginal and cervical slides were obtained and sent to the New Jersey State Police Office of Forensic Sciences for testing. Criminalist Karen Menser tested the slides and found them positive for semen. Both were submitted to the DNA Laboratory. (10T: p.189, 192-3). The State Police Laboratory later confirmed that Carey was the source of the semen. (11T: p.44;46; 55-56).

27. M.C.S. testified that she was a patient of Dr. Eugene Resnick. (6T: p.96). Dr. Resnick testified that he has evaluated M.C.S. over a twenty (20) year period. Id. at 156-57. She was diagnosed with a mental disorder caused by an organic brain disease. Id. at 159. He classified her as mildly mentally retarded. Id. He testified that she functions at the level of a four or five-year-old child and evaluates circumstances at that age level. Id. at 160.

28. I.G. testified that she was near the Friendship house on August 19, 2003 and was approached by a man in a parked Toyota Id. at 118, 119. He was wearing a sports jersey. Id. at 125. The man then asked her where blockbuster video was and she replied she did not know. Id. at 119-120. He then asked if she wanted to go to coffee and if she would get in his car. Id. at 120. She testified she ran to the Friendship House. Id. at 120-21.

29. K.R. testified that on August 19, 2003 she was near the Friendship House when a man wearing a sports jersey waived her over to his Toyota Camry. Id. at 148, 149, 152. She walked over to the car and the person asked if she knew where a good coffee shop was and if she would get in the car and show him. Id. at 149. She walked away. Id.

30. Helene Simms was at the Friendship House on August 19, 2003 and wrote down the license plate of the vehicle and called the police. Id. at 185.

Closing Argument

31. During closing argument, Akin argued Carey had consensual intercourse with M.C.S. She argued the central question in the case was whether or not M.C.S. and Carey had consensual sexual relations. (15T: p.120). She also argued Carey was at the Friendship House on August 19, 2003, but his actions did not constitute criminal activity.

32. The State argued Carey's statements to Sergeant Lustman at the police station on January 21, 2004 proved consciousness of guilt. She stated:

> When the Defendant spoke to Sergeant Lustman on January 22, 2004, it says it all about the defendant's criminal intent……
> First they talked about where he lives, where does he work, who does he live with and the very first question that he was confronted that had to do with this case was had you been to the area of the Friendship House in a Toyota Camry and do you use the Toyota Camry that belongs to your girlfriend. And what was his response to both of those questions? No way. He would not admit to using his girlfriend's car. He would not admit to being on Atlantic Street in August of 2003. Why? Why? Why does this defendant not admit to such innocent behavior, to being on Atlantic Street to using your girlfriend's car? Because it shows the consciousness of guilt. The defendant knew that he had committed a crime at the friendship House. The defendant knew that he had committed a crime in April of 2003 and raped [M.C.S.]. He knew that at that point it was going to be because he has no way of knowing. He has absolutely no way of knowing that we have DNA in this case.

(16T: p.12-13).

33. The State then argued that not only did Carey's statements to Officer Lustmann prove he was guilty of raping M.C.S. but also proves his intent towards I.G. and K.R.:

> So when he is interviewed his posture is one of it's their word against mine. It's their word against my word. What does he do? He doesn't admit to being at the Friendship House on Atlantic Street in August of 2003. Why not admit that you just approached two girls on Atlantic Street but that you weren't there to do anything wrong, that maybe they misconstrued what he was trying to do. He cannot admit it. He knows that he cannot admit to even being at Atlantic Street, let alone being in the Toyota Camry because he knows that he went there to commit a crime. And that's exactly what [I.G.] saw and that's exactly what [K.R.] saw.

Id. at 13.

Post-Trial

34. Myrna Myers, Carey's mother paid for all of Carey's legal expenses including $15,000 for Akin's services and all additional expenses that totaled approximately $27,000. (Exhibit B). The payment structure was such that Akin was paid $1,000 per month for the duration of time she represented Carey. Id. Myers never questioned what any of the expenses were for. Id. If it had included a fee for an expert, she would have paid it. Id.

35. In addition to telling his attorney that he never signed the forms presented to him by law enforcement, Carey also informed Myers. (Exhibit A). On her own initiative Mrs. Myers hired Dr. Joe Alexander to analyze Carey's signatures on both forms.

36. Dr. Alexander is a certified forensic document examiner and certified forensic physician. (Exhibit C). He examined the photocopies of the Miranda and consent to search forms and examined five pages of writings submitted from Carey as exemplars of his known genuine writing and signature. See Id. He concluded:

> After using methodology for comparison consisting of applying accepted forensic document examination tools, principles and techniques including the elements of style consisting of arrangement, connections, construction, design, dimensions, slant or slope, spacing, class, and choice of allograph(s)… **it is my professional opinion, as a Certified Forensic Document Examiner, that the author of the signature of Barry Carey on the Consent to Search is highly likely someone other than Barry Carey. Significant differences were found in all aspects of this signature when compared to the known signature of Barry Carey**.

Id.

Regarding the Miranda form, Dr. Alexander opined:

> The handwriting of the five recordings of the word "yes" and the initials "BC" shows dissimilarities in origin from the known handwriting of Barry Carey. **It is therefore highly unlikely that Barry Carey recorded the answers and affixed his initials to the City of Hackensack Police Department Advisement of Constitutional Rights-Miranda Rights**.

Id.

37. Dr. Alexander stated that he was unable to determine the method that the signature on the Miranda form was affixed to the document. Id. To make this determination he needed to examine the original and not a photocopy of the document. Id.

38. Akin did not contact an expert after Carey told her he did not sign the forms. After Glick was hired, she was informed that Carey never signed the forms and was given Dr. Alexander's report. Glick did not argue Akin was ineffective. Carey now moves this court to set aside the judgment of conviction and sentence and order a new trial.

POINT I – DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN APPELLATE COUNSEL DID NOT ARGUE TRIAL COUNSEL FAILED TO SECURE THE SERVICES OF AN EXPERT WITNESS WHICH WOULD HAVE PROVEN DEFENDANT NEVER WAIVED HIS MIRANDA RIGHTS OR CONSENTED TO A SEARCH BECAUSE HIS SIGNATURES WERE FORGED.

39. Both the Sixth Amendment of the United States Constitution and Article I, § 10 of the New Jersey Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

40. The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also State v. Nash, 212 N.J. 518 (2013). Under the Strickland standard, ineffective assistance of counsel

is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687, see also State v. Fritz, 105 N.J. 42 (1987).

A. The Defendant's Statements To Law Enforcement Should Have Been Excluded From Trial Because Officers Never Read Defendant His Miranda Rights.

41. "The Fifth Amendment privilege against self-incrimination, made applicable to the states through the Fourteenth Amendment, provides that '[n]o person ... shall be compelled in any criminal case to be a witness against himself.'" State v. P.Z., 152 N.J. 86, 100 (1997) (quoting U.S. Const. amend. V). In Miranda the Supreme Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. Miranda v. Arizona, 384 U.S. 436, 460–461, 467 (1966).

42. "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. Absent Miranda warnings, statements made by a defendant in custody, whether exculpatory or inculpatory, may

not be used in the prosecutor's case-in-chief. State v. Hartley, 103 N.J. 252, 275 (1986).

43. The Miranda court, presumed that interrogation in certain custodial circumstances, including station house questioning is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his Miranda rights and freely decides to forgo those rights. Miranda, supra 384 U.S. at 460–461, 467. The prophylactic Miranda warnings therefore are "not themselves rights protected by the Constitution but [are] instead measures to ensure that the right against compulsory self-incrimination [is] protected." Michigan v. Tucker, 417 U.S. 433, 444 (1974).

44. Requiring Miranda warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right. Michigan v. Tucker, supra at 444. "Confessions obtained ... during a custodial interrogation are barred from evidence unless the defendant has been advised of his or her constitutional rights." Id. citing Miranda, supra at 444.

45. Under New Jersey law, "the right against self-incrimination is founded on a common-law and statutory ... basis," but similarly establishes "no person can be compelled to be a witness against himself." State v. Reed, 133 N.J. 237, 250 (1993) (citation omitted). Attached to that right is the "absolute right to remain silent while under police interrogation...." Id.

46. In this case, Carey was never informed of his Miranda rights prior to giving a statement to officer Lustmann. Trial counsel moved to suppress Carey's statements, but failed to present any evidence to show his signatures were forged after Carey advised her they were. Dr. Alexander opined that it is "highly unlikely that Barry Carey recorded the answers and affixed his initials to the city of Hackensack police department advisement of Constitutional rights-Miranda rights." (Exhibit C).

47. Dr. Alexander confirmed Carey's position that he never signed the form and proved that he was never read his Miranda rights. The Miranda form contains five statements of Miranda rights. Below each statement is the question, "Do you understand that." (Exhibit E). Officer Lustmann testified that Carey wrote the answer "yes" and initialed after each question. Dr. Alexander's report disproves officer Lustmann's assertion. If Officer Lustmann had actually read Carey his rights, and Carey had answered "yes" and initialed, a forgery would have been unnecessary. Dr. Alexander confirmed someone other than Carey wrote his answers.

48. Akin never presented Carey's meritorious position to the court which denied him his right to competent representation. In this case, Carey was in custody and was clearly interrogated. Miranda required that officer Lustmann inform Carey of his rights. Not only did Officer Lustmann fail to read Carey his rights, which

is not permissible under Miranda, but he committed perjury when he testified that he observed Carey write on the Miranda form. Carey's statements should have been excluded at trial.

B. The Evidence Recovered From Defendant's Home Should Have Been Suppressed Because Officers Forged His Signature on the "Consent To Search" Form.

49. Both the United States Constitution and the New Jersey Constitution guarantee the right of people to be free of unreasonable searches and seizures in their homes. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "Indeed, 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" State v. Vargas, 213 N.J. 301, 313 (2013) (quoting United States v. U.S. Dist. Court of Eastern Dist. Of Michigan, 407 U.S. 297, 313 (1972)). Thus, New Jersey "jurisprudence expresses a clear preference for police officers to secure a warrant before entering and searching a home." State v. Brown, 216 N.J. 508, 527 (2014). Warrantless searches are presumptively invalid. Id.; State v. Frankel, 179 N.J. 586, 598 (2004).

50. Federal and New Jersey courts recognize the consent to search exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); State v. Domicz, 188 N.J. 285, 305 (2006). The Fourth and Fourteenth Amendments of the United States Constitution require that consent must be voluntarily given and not the result of duress or coercion, whether it is express or

implied. Schneckloth, supra, 412 U.S. at 248 (1973); Domicz, supra, 188 N.J. at 307. To determine whether a person voluntarily consented to a search, the focus of the analysis is "whether a person has knowingly waived [his or her] right to refuse to consent to the search." Domicz, supra, 188 N.J. at 308; see State v. Johnson, 68 N.J. 349, 353–54, (1975) (establishing standard of voluntary consent under state constitution "as knowing and intelligent waiver, which includes knowledge of right to refuse consent"). The State has the burden of proving consent was given freely and voluntarily. Schneckloth, supra, 412 U.S. at 248.

51. Dr. Alexander opined that the signature on the consent to search form was someone other than Carey. (Exhibit C). Carey advised his trial attorney that he never gave consent or signed the form. (Exhibit A). While Dr. Alexander confirmed Carey's position, his signatures on the Miranda form and the consent to search form are so glaringly different, an untrained expert can see the signatures were not written by the same person. (See Exhibits D and E). On the Miranda form, the signature includes Carey's middle name. On the consent to search form the signature does not include a middle name. It is incredibly suspicious that someone would sign their name in a different way on two occasions within a span of two and one-half hours. Further, the signatures themselves do not resemble one another if you compare them. There is an obvious difference to the cursive used.

52. Carey never consented to the search of his residence because he never signed the consent to search. Law enforcement also never obtained a warrant to search. Without valid authorization to search, all evidence obtained and any derivative evidence would have been excluded.

C. Counsel's Strategy Was Objectively Unreasonable

53. Effective assistance of counsel requires that an attorney do more than simply stand next to a client in court as a potted plant. The Supreme Court described the duty to provide effective assistance as follows:

> **The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing**. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, **neither is it a sacrifice of unarmed prisoners to gladiators.**" United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

United States v. Cronic, 446 U.S. 648, 656-657 (1984) (emphasis added).

54. Essential to the effective representation of a defendant is a duty of defense counsel to investigate and inquire thoroughly

into all potential defenses and evidence, and conduct a reasonable investigation into the facts of the case. See State v. Porter, 216 N.J. 343 (2013); State v. Chew, 179 N.J. 186 (2004); State v. Savage, 120 N.J. 594 (1990) United States v. Baynes, 687 F.2d 659, 668 (3d. Cir. 1982). "[I]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." State v. Russo, 333 N.J.Super. 119, 139 (App. Div. 2000).

55. Other courts have likewise held that effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance

of those claims, counsel fails to provide service within the expected range of competency).

56. Various courts have held that a failure on the part of an attorney to move to suppress evidence recovered in violation of a defendant's Constitutional rights constitutes ineffective assistance of counsel. Martin v. Maxey, 98 F.3d 844, 848 (5th Cir. 1996); Kirkpatrick v. Butler, 870 F.2d 276, 283 (5th Cir. 1989), cert. denied, 493 U.S. 1051 (1990); see also Thomas v. Varner, 428 F.3d 491, 495 (3d Cir. 2005) (ineffective assistance of counsel for failing to suppress unduly suggestive identification); Morrison v. Kimmelman, 752 F.2d 918, 922 (3d Cir. 1985) affirmed on other grounds 477 U.S. 365 ("proper norms of advocacy" required a "timely [motion] to suppress" where there was a valid basis for suppression), Rodriguez v. Young, 906 F.2d 1153, 1161 (7th Cir. 1990) (failure to move to suppress identification was "objectively unreasonable"), Cossel v. Miller, 229 F.3d 649, 654-655 (7th Cir. 2000) (holding ineffective assistance of counsel for failure to move to suppress the "pivotal evidence in the case").

57. Myers paid approximately $27,000 for expenses in this case and paid Akin on a continuing monthly basis. Akin never attempted to contact an expert; she never argued the trial court should compare the signatures at the suppression hearing that are clearly different; she never asked Carey for writing samples to

submit to the court for comparison; and did not offer Carey's testimony that he never signed the documents. The failure to act constituted deficient performance.

58. Even if counsel did not use an expert to support the theory that Carey did not sign the forms, she could have offered writing samples for the court to compare, just as Dr. Alexander did. Comparing handwriting samples does not require an expert in New Jersey. See State v. Carroll 256 N.J.Super. 575, 593 (1992).

59. Strickland holds that counsel may not make a "strategic" decision on a whim, but instead must make a **thorough investigation** of law and facts regarding his options. Strickland supra at 690-691 (emphasis added). The failure to find handwriting comparisons, or contact an expert constituted ineffective assistance of counsel.

60. Trial counsel's failure to act was objectively unreasonable, and not based upon any valid tactical or strategic decisions. She even had regret that she did not call her client to testify while arguing to the trial court. Counsel's choice in this case was the absence of strategy. Counsel chose to simply do nothing, except sacrifice an unarmed prisoner to gladiators and pray that they would show him mercy. This was objectively unreasonable, and a gross dereliction of the duty counsel had to Carey.

D. *Prejudice*

61. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

> The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Strickland, supra at 690.

62. The admission of Carey's statements abolished Akin's theory at trial. She argued that Carey had consensual intercourse with M.C.S. That argument was not credible given Carey's statement to Officer Lustmann that he never had intercourse with her, that she never got in his car, and in an ineloquent manner Carey stated, "do I look like I need to rape retarded women?" (11T: p.153). He also denied having any involvement with any of the women at the Friendship House, yet Akin argued that he went back to the Friendship House in August and spoke with I.G. and K.R. (15T p.149).

63. Carey's statements contradicted his own theory of defense, which prejudiced him in a significant way and the State capitalized on it and argued vociferously that Carey's defense did

not comport with his own statements. Akin could have had a viable defense if the statements were properly excluded. M.C.S. did not suffer any injuries; she repeatedly stated to police that she thought Carey was good looking; she told them he was a nice man; and she gave a rendition of all these events as someone who has the intellect of a five-year old. (15T: p. 122, 128-29, 133). If the statements had been excluded, Akin could have persuasively argued the intercourse was consensual.

64. The sports jerseys found in Carey's closet and the registration found in his room as a result of the search were evidence the State introduced to prove Carey was at the Friendship House on August 19, 2003. Officers investigated and found that Carey once owned a vehicle that the women claimed he was driving at the Friendship House and each of the women identified the perpetrator as someone who was wearing a sports jersey. Not only did this evidence establish identity, but it also contradicted Carey's statements that he was never at the Friendship House. The theory that he was present, but did not commit a crime on August 19, 2003 was not credible because the evidence tied Carey to the scene.

65. Akin's failure to do any investigation to show Carey did not sign the forms, permitted the admission of this evidence which assisted the State in proving him guilty. Glick was also aware of Dr. Alexander's report, and that Carey told her he never signed

either form, but did not address Akin's inaction on appeal or post-convction. As a consequence, this Court should find Carey received ineffective assistance of counsel, set aside the judgment of conviction and sentence, and order a new trial.

CONCLUSION

66. In United States v. Mejia, 545 F.3d 179, 199 (2d. Cir. 2008), the Second Circuit set forth the Federal standard of determining whether error is harmless:

> Several factors are relevant when evaluating the error's likely impact: (1) the strength of the Government's case; (2) the degree to which the testimony was material to a critical issue; (3) the extent to which the statement was cumulative; and (4) the degree to which the Government emphasized the inadmissible evidence in its presentation of its case. Though all of these factors are relevant, we have stated that the strength of the Government's case is "probably the single most critical factor."

Id., citing United States v. Reifler, 446 F.3d 65, 87 (2d Cir. 2006). This same test was adopted by the Third Circuit in United States v. Mastrangelo, 172 F.3d 288 (3d Cir. 1999).

67. The New Jersey standard is more stringent. The New Jersey Supreme Court has held that:

> Even if the evidence were overwhelming, that could never be a justifiable basis for depriving a defendant of his or her entitlement to a constitutionally guaranteed right to a fair trial. The impact of violating a defendant's right to a fair trial cannot be measured by, or weighed against, the quantum of evidence bearing upon his or her guilt.

State v. Frost, 158 N.J. 76, 87 (1999).

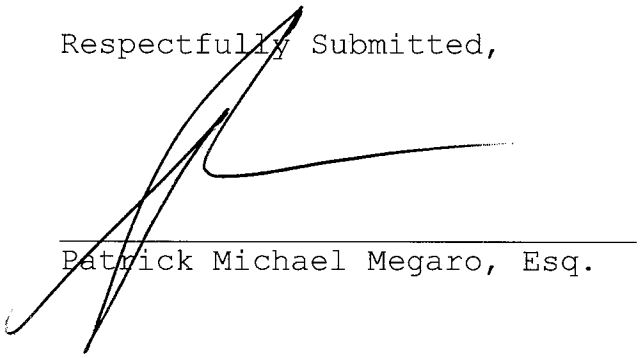
68. In applying this standard, the Superior Court of New Jersey has held that harmless error analysis requires a "determination of 'what should have (as opposed to what did) or should not have (as opposed to what did not) influenced a jury in any given case.'" State v. Pillar, 359 N.J.Super. 249, 279 (2003).

69. In the instant case, under both Federal and State standards, the errors were not harmless. The admission of the evidence not only aided the State and hurt the defense, but taken out of context, Carey's statements sounded insensitive towards the alleged victims when he said he did not need to have sex with them. Officer Lustmann testified that Carey's comments degraded the women. When that sentiment was combined with the fact that his statements contradicted his defense, the jurors were certainly influenced by that evidence that should not have been admitted. Without there admission, a reasonable juror would have found him not guilty.

70. Based upon the foregoing reasons, Carey urges this Court to reverse his convictions and grant him a new trial.

Dated: September 30, 2016

Respectfully Submitted,



Patrick Michael Megaro, Esq.

CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing Brief were served upon the following parties on the 30th day of September, 2016, via United States Postal Service:

Bergen County Prosecutor
10 Main Street
Hackensack, NJ 07601

Theresa Angela Blair, Esq.
Office of the Attorney General
PO Box 080
Trenton, New Jersey 08625-0080

Patrick Michael Megaro, Esq.

DEFENDANT'S VERIFICATION

I, BARRY LORENZO CAREY, have reviewed the Petition for Post-Conviction Relief and verify upon my personal knowledge that the facts and matters therein are true and correct.

Dated: 9/27/16

Barry Carey

EXHIBIT A

Patrick Michael Megaro, Esq.
Halscott Megaro, P.A.
33 East Robinson Street, Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
Florida Bar ID # 738913
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
North Carolina Bar ID # 46770
Texas Bar ID # 24091024
Washington Bar ID # 50050

THE STATE OF NEW JERSEY, -versus- BARRY LORENZO CAREY, Defendant.	BERGEN COUNTY SUPERIOR COURT CRIMINAL DIVISION **AFFIDAVIT OF BARRY LORENZO CAREY** Indictment # 05-10-1905-I

Defendant, BARRY CAREY, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Defendant in the above entitled action.

2. I was found guilty of kidnapping, first degree aggravated assault, second degree sexual assault, and two counts of luring an adult at a jury trial on Feburary 15, 2006. My trial court attorney was Wanda Akin.

3. Prior to trial, Mrs. Akin provided me with the discovery. It included a document entitled "City of Hackensack Police Department Advisement of Constitutional Rights - Miranda Rights" and a document entitled "Consent to Search Premises." When I reviewed the forms, I noticed someone signed them using my name,

my initials, and answered "yes" to questions that were asked on the form. I never signed or wrote on either document.

4. When I received these documents from Mrs. Akin, I advised her that I never signed them. She did not hire an expert to analyze the signature, she did not ask me to provide her with an original signature, and she did not ask me to provide her with other legal documents I have signed in the past.

5. I have since had family members hire a certified forensic document examiner, Joe Alexander who analyzed the Miranda form and consent to search form and compared them to prior signatures I made on other documents. After reviewing all documents, Mr. Alexander concluded it is highly unlikely the handwriting on the forms were mine.

WHEREFORE, your affiant respectfully requests that the motion be granted in its entirety, together with such other and further relief as this Court may deem just, proper and equitable.

Dated: 9/21/16

BARRY LORENZO CAREY

Sworn and subscribed to before me this 21ST day of September, 2016.

Notary Public of New Jersey

JACQUELINE L. ADAMS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 12/16/2019

EXHIBIT B

Patrick Michael Megaro, Esq.
Halscott Megaro, P.A.
33 East Robinson Street, Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
Florida Bar ID # 738913
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
North Carolina Bar ID # 46770
Texas Bar ID # 24091024
Washington Bar ID # 50050

THE STATE OF NEW JERSEY, -versus- BARRY LORENZO CAREY, Defendant.	BERGEN COUNTY SUPERIOR COURT CRIMINAL DIVISION **AFFIDAVIT OF MYRNA MYERS** Indictment # 05-10-1905-I

MYRNA MYERS, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am the mother of the Defendant, Barry Carey in the above entitled action.
2. I paid Mr. Carey's trial attorney, Wanda Akin $15,000 in attorney fees. I also paid her for expenses including, transcript fees, courier services, copying expenses and parking. I paid her approximately $27,000 for expenses. We agreed that after the majority of her retainer fee was paid, I would pay her $1,000 per month for expenses. From August of 2004 through February of 2006 I paid her $1,000

per month. After the trial, I paid for all trial related expenses.

3. Mrs. Akin was free to incur expenses with the understanding that I would pay for them. I timely made payments and did not question her about the expenses. At no point during her representation of my son did she ask or advise me she would hire an expert to analyze Mr. Carey's signatures. Like all other expenses I would have paid for an expert.
4. Mr. Carey advised me on a few occasions that he never signed a "Miranda form" or a "consent to search" form.
5. After Mr. Carey was convicted, on my own initiative, I hired a certified forensic document examiner, Joe Alexander to examine the forms Mr. Carey stated he did not sign. Mr. Alexander concluded it is highly unlikely the handwriting on the forms was Mr. Carey's.

WHEREFORE, your affiant respectfully requests that the motion be granted in its entirety, together with such other and further relief as this Court may deem just, proper and equitable.

Dated: 09/16/2016

Myrna Myers

Sworn and subscribed to before me this 16th day of Sept, 2016.

Notary Public of Virginia

EXHIBIT C

DocExaminer

FORENSIC DOCUMENT LABORATORY
1025 CYPRESS STREET ABILENE, TX 79601
OFFICE (325) 668-7474 FAX (325) 202-2869

April 9, 2014

Forensic Document Examiner Letter of Opinion

Subject: Examination of City of Hackensack Police Department Advisement of Constitutional Rights-Miranda Rights and Consent to Search Premises

I have examined the photocopies of City of Hackensack Police Department Advisement of Constitutional Rights-Miranda Rights and Consent to Search Premises purportedly signed by Barry Lorenzo Carey on January 21, 2004. These documents are attached hereto as Exhibit 2. Barry Carey denies answering any of the questions, initialing or signing either of the two forms. He did admit to writing his name and signing his name to a blank sheet of paper during his questioning by the Police Department on January 21, 2004. The purpose of my investigation was to determine if Barry Carey wrote the word "yes", initialed or originally signed either of these documents.

I examined five (5) pages of writings submitted from by Barry Carey as exemplars of his known genuine writing and signature. These exemplars are attached hereto as Exhibit 3 to this Letter of Opinion. The known writings were compared to the questioned writings.

After using methodology for comparison consisting of applying accepted forensic document examination tools, principles and techniques including the elements of style consisting of arrangement, connections, construction, design, dimensions, slant or slope, spacing, class, and choice of allograph(s); the elements of execution consisting of abbreviations, alignment, commencements and terminations, diacritics and punctuation, embellishments, line continuity, line quality or fluency (speed), pen control, writing movement, and legibility or writing quality; consistency or natural variations and persistency; lateral expansion and word proportions, when applicable, it is my professional opinion, as a Certified Forensic Document Examiner, that the author of the signature of Barry Carey on the Consent to Search is highly likely someone other that Barry Carey. Significant differences were found in all aspects of this signature when compared to the known signature of Barry Carey.

The signature of Barry Lorenzo Carey on the City of Hackensack Police Department Advisement of Constitutional Rights-Miranda Rights is consistent with the known signatures of Barry Carey, but since a photocopy was all that was presented for examination, I was unable to determine the method that this signature was affixed to this document. The photocopying process makes it impossible to determine if this form was originally signed or if the signature was transferred to this form by computer or manual process. Only the examination of the original document can determine the origin of this signature. The handwriting of the five recordings of the word "yes" and the initials "BC" shows dissimilarities in origin from the known handwriting of Barry Carey. IT is therefore highly unlikely that Barry Carey recorded the answers and affixed his initials to the City of Hackensack Police Department Advisement of Constitutional Rights-Miranda Rights.

The documents used to form these opinions were photocopies. The examination of the original documents would provide additional information regarding the authorship of these documents. I am

willing to perform these examinations in my laboratory and provide a "Chain of Custody" to protect the integrity of the contents.

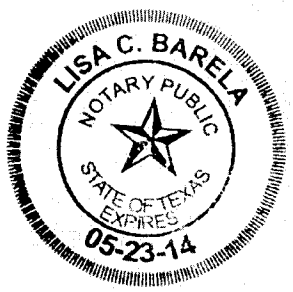
I declare under penalty of perjury under the laws of the State of New Jersey that the foregoing is true and correct.

Respectfully submitted,

Joe B. Alexander, M.D., CDE, CFP

SWORN BEFORE ME on this 9 day of April, 2014
Joe B. Alexander did appear before me.

STATE OF TEXAS S
S
S
COUNTY OF TAYLOR S



Notary Public – State of Texas

Exhibit 1

DocExaminer

Joe B. Alexander, M.D.

Certified Forensic Document Examiner, Certified Forensic Physician
1025 Cypress Street, Abilene, TX 79601
Office: (325) 668-7474 **FAX:** (325) 202-2869
E Mail: DocExaminer@aol.com http://www.docexaminer.com

HIGHER EDUCATION:

- University of Texas Medical Branch, Galveston, Texas, M.D.
- University of North Dakota School of Medicine, Grand Forks, North Dakota, B.S. Medicine
- McMurry College, Abilene, Texas, B.A.

POSTGRADUATE TRAINING:

- Neonatology Fellowship-St. Francis Hospital, Tulsa, Oklahoma
- Pediatric Residency-Scott & White Clinic, Temple, Texas
- Two Year Document Examination Apprenticeship, School of Forensic Document Examination
  - Mentor: Curtis Baggett and Donald Lehew
- Forensic Document Examination Conference. Dallas, TX. October 15-17, 2004.
- American Institute of Applied Science Forensic Document Examination Course-2005.
- Forensic Document Examination Conference. Dallas, TX. October 14-16, 2005.
- Forensic Document Examination Conference. Dallas, TX. October 13-15, 2006.
- National Association of Document Examiners 2007 Conference. May 16-20, 2007.
- Forgery Science: An Interactive Workshop, Bryan Found, PhD, May 18-19, 2007.
- Miami-Dade Police Department, Metropolitan Police Institute, Forensic Digital Imaging Enhancement Workshop, Brian Dalrymple, Ontario Provincial Police June 18-22, 2007.
- Association of Forensic Document Examiners Continuing Education Symposium, Tucson, AZ, September 26-29, 2007.
- National Association of Document Examiners 2008 Conference. Austin, TX. April 22-25, 2008.

LICENSURE:

- Texas Board of Medical Examiners License #E0780
- Oklahoma Board of Medical Licensure and Supervision License #10682

ACCREDITATION:

- American Board of Pediatrics
- American Board of Pediatrics--Sub-board on Neonatal-Perinatal Medicine
- Certificate of Completion American Institute of Applied Science-Document Examination
- Certified Document Examiner, School of Forensic Document Examination
- Certified Forensic Physician, American College of Forensic Examiners Institute
- Diplomate of the American Board of Forensic Medicine
- Diplomate of the American Board of Forensic Examiners

PROFESSIONAL SOCIETIES:

- Texas Medical Association
- Taylor-Jones-Haskell County Medical Society
- American College of Forensic Examiners (ACFEI)
- National Association of Document Examiners (NADE)
- Scientific Association of Forensic Examiners (SAFE)
- American Medical Forensic Specialists
- International Association for Standards of Testing & Materials (ASTM) Participating Member
    - Voting Member on Medical Informatics

PUBLICATIONS:

- Early onset non-Enterococcal group D Streptococcal Infection in the Newborn, *J Pediatr* 93 (3):489,1978. JB Alexander & GP Giacoia
- Gastric Response in Low Birth Weight Infants Fed Various Formulas, *Biol Neonate* 34:150, 1978. JA Pascale, LC Mims, MA Greenberg, JB Alexander
- Absence of Hepatic Uptake of Tc-99m Sulfur Colloid in an Infant with Coxsackie B_2 Viral Infection *Clin Nuclr Med* 8:246, 1983.
- Document Examiners Approach to Medical Record Alteration. Self-Published. 2009.

PRESENTATIONS:

- Expert witness testimony in deposition and the courtroom. Forensic Document Examination Conference. Dallas, TX. October 15-17, 2004.
- Radio Talk Show-on Satellite Radio and Go Daddy.com with Bob Parsons-Computer Alteration of Documents. October 12, 2005.
- Altered Medical Records. Forensic Document Examination Conference. Dallas, TX. October 14-16, 2005.
- Faculty, School of Forensic Document Examination 2005-2006.
- Texas Nurses Association, Abilene, TX. CSI: Medical Chart Alteration. March 2006.
- International Advanced Handwriting Conference, Dallas, Texas, The Impact of Neurological Diseases on Handwriting, June 2006.
- Document Examiners Approach to Medical Record Alteration, Forensic Document Examination Conference. Dallas, TX. October 2006.
- Developing Your Laboratory: A Primer for Beginning Document Examiners, Forensic Document Examination Conference. Dallas, TX. October 2006.
- Fax and Fundamentals: What You Can and Cannot Tell From a Copy, Forensic Document Examination Conference. Dallas, TX. October 2006.
- The Dark Side of Handwriting, Abilene Writers Guild, February 2007.
- Liven Up Your Case Presentation With Forensic Document Examination, 12th Annual Conference of National Alliance of Certified Legal Nurse Consultants, March 2007.
- Handwriting of the Elderly and Infirmed, Coalition of Handwriting Analysts International. Teleconference October 23, 2007.
- White Collar Crime, McMurry University. February 7, 2013.

LABORATORY EQUIPMENT

- Stereoscopic Microscope (10X-30X)
- Miscope Digital Video Microscope (40X-400X)
- 12" by 18" Light Box
- Opti-Visor with Multiple Lens
- Typewriter/Handwriting Grids/Protractor
- Digital Paper Micrometer/Vernier Caliper
- Magnifying and Measuring Devices/Gauges
- Macintosh MacBook Pro Laptop Computer
- Macintosh iMac 27" Computer
- OKI C5150n Color Laser Printer
- Brother 9200 Facsimile Transceiver
- Cannon CannoScan 5000F Flatbed Scanner
- Fujitsu S1500M ScanSnap Scanner
- Foster and Freeman Electrostatic Detection Apparatus (ESDA)
- Copy Stand
- Sony 12.0 Megapixil Digital Camera with Macro lens
- Infrared and Ultraviolet Light Sources

CASES EXAMINED AND/OR TESTAMONY RENDERED:

- I have rendered opinions and/or testified in cases in all 50 States and the District of Columbia in the US and Albania, Belize, Bermuda, Canada, Cayman Islands, Costa Rica, England, Ethiopia, Greece, India, Indonesia, Iran, Ireland, Jamaica, Japan, Laos, Macau, New Zealand, Northern Ireland, Palestine, Philippines, Poland, Portugal, South Africa, Slovenia, Switzerland, and Turkey.

CORPORATE CLIENTS:

- Boise Cascade Corporation
- Target Corporation
- U.S. Army Criminal Investigation Unit
- Bureau of Engraving and Printing, Department of Treasury
- American Indian College
- Cardiovascular Research Institute-University of Hawaii School of Medicine
- Corruna, Michigan Police Department
- Oklahoma Wesleyan University
- The Educational Centre of the Bahamas
- History Detectives, Lion Television
- Pacific Coast Imaging
- New Madison Homes
- Vickie Milazzo Institute
- Watt Navram Buddhist Temple
- California State Board of Nursing
- Global Financial Group
- AmerCom, LLC
- SLS Health

Exhibit 2

City of Hackensack Police Department

ADVISEMENT OF CONSTITUTIONAL RIGHTS

MIRANDA RIGHTS

Date: 1-21-04 Time: 7:40 AM Case #: 5C03-0117

Place: HACKENSACK POLICE DEPARTMENT

Before you are asked any questions, you must be advised of your constitutional rights.

1. You have the right to remain silent and refuse to answer any questions.
   Do you understand that? yes Initials: BC
2. Anything you say can and will be used against you in a court of law.
   Do you understand that? yes Initials: BC
3. You have the right to talk to an attorney at any time and to have one present with you while you are being questioned.
   Do you understand that? yes Initials: BC
4. If you can not afford an attorney, one will be appointed to represent you before any questioning, if you wish one.
   Do you understand that? yes Initials: BC
5. You may stop answering questions or request an attorney at any time.
   Do you understand that? yes Initials: BC

WAIVER OF RIGHTS

I have read the above statement of my rights and they have been read aloud to me. I understand what my rights are. I am willing to answer questions without an attorney present. No promises or threats have been made to me and no pressure or coercion has been used against me.

SIGNED: Barry Lorenzo Carey BARRY LORENZO CAREY

WITNESS: Det. O'Boyle

DATE: 1/21/04

TIME: 0740

Advising Officer: Lt. [illegible]

CONSENT TO SEARCH PREMISES

I, Barry Carey, hereby authorize Det. O'Boyle, who has identified himself as a law enforcement officer, and any other persons he may designate to assist him, to conduct a complete search of the property and premises located at 50 Lafayette Place Englewood, NJ including all buildings, structures, vehicles, papers and effects.

I further authorize the same officers to remove any and all papers, property and effects which they may consider pertinent to their criminal investigation.

I give this consent to search freely and voluntarily without fear, threat, coercion or promises of any kind, and with full knowledge of my constitutional right to refuse to give my consent to search, which I hereby waive. I am also fully aware that if I wished to exercise this right, it would be respected.

This consent to search is given by me this 21 day of Jan., 2004, at 1000 m.

SIGNED: Barry Carey
ADDRESS: 50 Lafayette Pl Englewood
PHONE:

WITNESS: Det. O'Boyle
ADDRESS: HPD
PHONE:

WITNESS:
ADDRESS: BCPO
PHONE:

Exhibit 3

CRAF C-19 Rev. 12-17-04

STATE OF NEW JERSEY
DEPARTMENT OF CORRECTIONS

CENTRAL RECEPTION & ASSIGNMENT FACILITY

P.O. BOX 7450
West Trenton, New Jersey 08628
(609) 984-6000

TO: _____ SBI # _____

FROM: _____ Administrator

DA: _____

RE: FIRST NOTICE: Disposition of Non-Permissible Personal Property

You are being notified that the Central Reception & Assignment Facility shall not store inmate non-permissible personal property for more than 60 days. Your non-permissible personal property shall inventory and package by CRAF personnel.

CHOOSE THE APPROPRIATE OPTION FOR THE DISPOSTION OF YOUR PERSONAL PROPERTY:

☐ **Request my personal property be sent to:**

_____
NAME

_____
ADDRESS

_____
CITY STATE ZIP CODE

☐ **Request my personal property be given to my visitor (CADRE & Jones Farm Inmates ONLY):**

_____
NAME

_____
ADDRESS

_____
CITY STATE ZIP CODE

☒ **Request my personal property be donated to a charitable organization at my expense.**

☐ **Request my personal property be destroyed.**

_____ _____ _____
INMATE PRINTED NAME INMATE SIGNATURE DATE

_____ _____ _____
WITNESS PRINTED NAME WITNESS SIGNATURE DATE

Number of Boxes / Items: _____ Total Weight: _____ Cost to Sender: $ _____

C: White: **File**
Canary: Attach to Property for Disposition
Pink: Inmate Copy

05-10-1965-I CK # 30

Superior Court of New Jersey
Bergen County
Bergen County Justice Center
Finance Division/Bail Unit - Room 119
10 Main Street
Hackensack, NJ 07601
(201) 527-2250

NEW JERSEY JUDICIARY
BAIL RECOGNIZANCE
With Waiver of Extradition

CONFIDENTIAL

PLEASE PRINT ALL REQUESTED INFORMATION

BAIL RECOGNIZANCE NUMBER 02 - 0010627
RECEIPT NUMBER
CABS NUMBER BER 28855

DOCUMENT ORIGINATION ☑ JAIL ☐ SUPERIOR COURT ☐ LAW ENFORCEMENT AGENCY ☐ MUNICIPAL COURT OF

AMOUNT OF BAIL SET $ 175,000
BAIL ☐ ROR ☐ 10% CASH ☐ FULL CASH ☑ BOND Pre-Apply
PAYMENT ☐ CASH ☐ CHECK NUMBER ☐ MONEY ORDER NUMBER ☐ CORP. SURETY

State of New Jersey
vs.

DATE OF BIRTH 12/10/72
SOCIAL SECURITY NUMBER 417-11-9165
STATE BUREAU OF INVESTIGATION NUMBER

DEFENDANT'S LAST NAME Carey | FIRST NAME Barry | MIDDLE INITIAL

ADDRESS 50 Lafayette Ave | APARTMENT NUMBER

$ 30 FEE ☐ CASH ☐ CHECK ☐ MONEY ORDER

CITY Englewood | STATE NJ | ZIP 07631 | PHONE NUMBER (201) 567 9339

TOTAL AMOUNT RECEIVED $

IND. / ACC. / COMPLAINT NUMBER 04-06-1259 | WARRANT / SUMMONS NUMBER (CDR) | PROMIS / GAVEL NUMBER

MUNICIPALITY WHERE OFFENSE OCCURRED Hackensack | MUNICIPAL COURT CODE 0223

CHARGE(S) Att. Agg Sex Asslt (2cts) Kidnapping (2cts)

BAIL SET BY McMeehan | DATE BAIL SET 2/28/05

NAME OF #1 SURETY / DEPOSITOR	LAST NAME, FIRST NAME, MI	NAME OF #2 SURETY / DEPOSITOR	LAST NAME, FIRST NAME, MI
	Baylor, Leeona		
ADDRESS	50	ADDRESS	SUPERIOR COURT OF NEW JERSEY FINANCE DIVISION BERGEN BAIL UNIT
ADDRESS	5 Lafayette Ave	APARTMENT NUMBER	ADDRESS
CITY	Englewood	STATE NJ	ZIP 07631	CITY	STATE	ZIP
PHONE NUMBER	(201) 567-9339	OCCUPATION	PHONE NUMBER ( )	OCCUPATION
DATE OF BIRTH	3/23/53	SOCIAL SECURITY NUMBER 577-49-5719	DATE OF BIRTH	SOCIAL SECURITY NUMBER
DRIVER'S LICENSE NUMBER	577-99-5719 DC	AMOUNT POSTED $	DRIVER'S LICENSE NUMBER	AMOUNT POSTED $

DATE: 12/01/06
CHECK: PR BO
REMARKS: Sent - P/C
SEARCHED BY: S.P.

INSURANCE COMPANY NAME AND N.A.I.C. NUMBER (Attach corporate proof of authority with corporate seal affixed.)
AGENT NAME (BONDSMAN) AND I.R. OR L.P. NUMBER
BAIL BOND AGENCY NAME AND I.R. OR L.P. NUMBER
POWER NUMBER / EXPIRATION DATE

As Surety / Depositor / Defendant / Bondsman, I have read, understand and agree to the conditions on the reverse side of this Bail Recognizance.

SURETY ID PRESENTED ☑ DRIVER'S LICENSE ☐ PASSPORT ☐ MV ID ☐ OTHER

FIRST SURETY'S / DEPOSITOR'S / BONDSMAN'S SIGNATURE Leona B Baylor | DATE 3-3-05
ADDITIONAL SPECIAL CONDITIONS OF BAIL ☑ NO ☐ YES (See reverse)

SECOND SURETY'S / DEPOSITOR'S / BONDSMAN'S SIGNATURE | DATE
SIGNATURE OF PERSON AUTHORIZED TO TAKE BAIL

DEFENDANT'S SIGNATURE X Barry Carey | DATE 3/3/05
PRINT NAME OF PERSON AUTHORIZED TO TAKE BAIL John J Rinkleback | DATE 3/3/05

OWNERSHIP for Cash Bail Deposited

I, the defendant, understand and agree that the owner of the bail posted in this case is _____.

X Barry Carey
DEFENDANT'S SIGNATURE | DATE

STATE OF NEW JERSEY
COUNTY OF _____ ss:

AFFIDAVIT OF OWNERSHIP FOR CASH BAIL DEPOSITED BY SOMEONE OTHER THAN THE DEFENDANT

I, _____, the depositor of the cash bail, being duly sworn upon my oath, according to law, depose and say that I am the lawful owner of the $ _____, deposited in lieu of bond on behalf of defendant, _____, in the above entitled case. I understand that, upon discharge, the full amount of the cash bail will be returned to me, unless otherwise ordered by the court.
Subscribed and sworn to before me this _____ day of _____, 20 ____.

SIGNATURE OF PERSON AUTHORIZED TO ADMINISTER OATHS | TITLE | SIGNATURE OF DEPOSITOR OF CASH BAIL

DATE BAIL DISCHARGED | DATE BAIL FORFEITED

Please notify court of disability accommodation needs

CO-30 NEW JERSEY STATE PRISON Rev. 3/16/00

BUSINESS REMIT

(use for all disbursements ~~except postage~~ & store orders)

DATE: 12/22/11 LOCATION: CR #93

INMATE SBI # 161393D

INMATE NAME: CAREY
Print

INMATE SIGNATURE: Tom Carey

TO: BUSINESS MANAGER $ 4.xx

$ four and 00

PAY TO THE ORDER OF: "TWFYT"

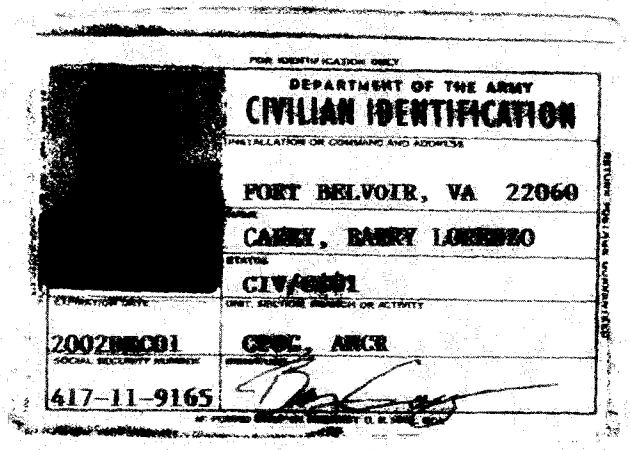
ADDRESS: PO BOX 5160
Alpharetta, GA
30023

PURPOSE: Fifties!

WITNESS: Print [illegible]
Signature

APPROVED BY: [illegible]

CHECK # DATE:



DEPARTMENT OF THE ARMY
CIVILIAN IDENTIFICATION

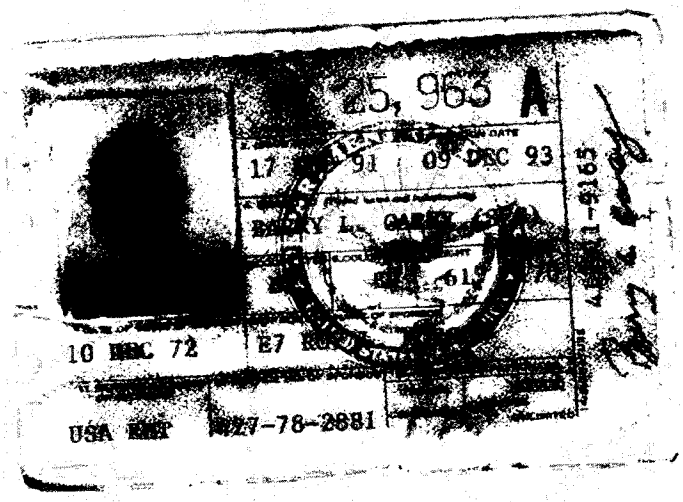
FORT BELVOIR, VA 22060

CAREY, BARRY LORENZO

CIV/GS01

2002 DPCO1 GPOC, ARCR

417-11-9165



25,963 A

17 91 09 DEC 93

BARRY L. CAREY

10 DEC 72 E7

USA 417-78-2881

417-11-9165

UNAUTHORIZED ALTERATION SHALL BE ALLEGIANCE

DATE OF BIRTH	WEIGHT	HEIGHT	COLOR HAIR
1972DEC10	170	71	BLK

COLOR EYES	SEX	DATE OF ISSUE
BRN	M	1996DEC02

SIGNATURE OF ISSUING OFFICER

Eugene A. Burke

RIGHT INDEX

WARNING

ISSUED FOR OFFICIAL USE OF THE HOLDER DESIGNATED HEREON. MISUSE OR POSSESSION EXCEPT AS PRESCRIBED IS UNLAWFUL AND WILL MAKE THE OFFENDER LIABLE TO HEAVY PENALTY. 18 U.S.C. 499, 506 AND 701

POSTMASTER

POSTAGE GUARANTEED

RETURN TO

THE ADJUTANT GENERAL
DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C.

CARD NUMBER

2667289

LEFT INDEX

PROPERTY OF THE UNITED STATES GOVERNMENT

EXHIBIT D

CONSENT TO SEARCH PREMISES

I, Barry Carey hereby authorize Det. T O'Boyle, who has identified himself as a law enforcement officer, and any other persons he may designate to assist him, to conduct a complete search of the property and premises located at 50 Lafayette Place Englewood, NJ including all buildings, structures, vehicles, papers and effects.

I further authorize the same officers to remove any and all papers, property and effects which they may consider pertinent to their criminal investigation.

I give this consent to search freely and voluntarily without fear, threat, coercion or promises of any kind, and with full knowledge of my constitutional right to refuse to give my consent to search, which I hereby waive. I am also fully aware that if I wished to exercise this right, it would be respected.

This consent to search is given by me this 21 day of Jan., 2004, at 1000 m.

SIGNED: Barry Carey
ADDRESS: 50 Lafayette Pl
Englewood
PHONE:

WITNESS: Det. O'Boyle
ADDRESS: HPD
PHONE:

WITNESS:
ADDRESS: BCPO
PHONE:

10 & 16

EXHIBIT E

City of Hackensack Police Department

ADVISEMENT OF CONSTITUTIONAL RIGHTS

MIRANDA RIGHTS

Date: 1-21-04 Time: 7:40 AM Case #: 5C03-0117

Place: HACKENSACK POLICE DEPARTMENT

Before you are asked any questions, you must be advised of your constitutional rights.

1. You have the right to remain silent and refuse to answer any questions.
   Do you understand that? yes Initials: BC
2. Anything you say can and will be used against you in a court of law.
   Do you understand that? yes Initials: BC
3. You have the right to talk to an attorney at any time and to have one present with you while you are being questioned.
   Do you understand that? yes Initials: BC
4. If you can not afford an attorney, one will be appointed to represent you before any questioning, if you wish one.
   Do you understand that? yes Initials: BC
5. You may stop answering questions or request an attorney at any time.
   Do you understand that? yes Initials: BC

WAIVER OF RIGHTS

I have read the above statement of my rights and they have been read aloud to me. I understand what my rights are. I am willing to answer questions without an attorney present. No promises or threats have been made to me and no pressure or coercion has been used against me.

SIGNED: Barry Lorenzo Carey BARRY LORENZO CAREY

WITNESS: Det. O'Boyle

DATE: 1/21/04

TIME: 0740

Advising Officer: Lt. Lindner

8 of 16

Barry L Carey Jr SB161393D 562890

EXHIBIT F

P.O. 319-04
/kkc
10/21/05
SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY - LAW DIVISION
JULY TERM A.D. 2005
FIRST STATED SESSION

THE STATE OF NEW JERSEY :

-vs- :

BARRY CAREY :
a/k/a
Lorenzo Carey :
a/k/a
Malik Carey :

DEFENDANTS :

S U P E R S E D I N G

Indictment No.

05-10-01905-I

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present as a

FIRST COUNT
(First Degree)

(No Early Release Act, N.J.S.A. 2C:43-7.2; N.J.S.A. 30:4-123.51b) that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about April 17, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did unlawfully remove M.C.S. a substantial distance from the vicinity where she was found and/or confine M.C.S. for a substantial period, with purpose to facilitate the commission of a crime or flight thereafter and/or inflict bodily injury on or to terrorize M.C.S. or another, and did fail to release the said M.C.S. unharmed prior to apprehension; contrary to the provisions of N.J.S.A. 2C:13-1b, and against the peace of this State, the Government and dignity of the same.

SECOND COUNT
(First Degree)

(No Early Release Act, N.J.S.A. 2C:43-7.2; N.J.S.A. 30:4-123.51b)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about April 17, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did commit aggravated sexual assault upon M.C.S., by performing an act of sexual penetration, to wit: vaginal intercourse upon the victim, the act having been committed during the commission of a kidnapping, as alleged in Count One herein; contrary to the provisions of N.J.S.A. 2C:14-2a(3), and against the peace of this State, the Government and dignity of the same.

THIRD COUNT
(First Degree)

(No Early Release Act, N.J.S.A. 2C:43-7.2; N.J.S.A. 30:4-123.51b)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about April 17, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did commit aggravated sexual assault upon M.C.S., by performing an act of sexual penetration, to wit: vaginal intercourse upon the victim, said victim being one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated; contrary to the provisions of N.J.S.A. 2C:14-2a(7), and against the peace of this State, the Government and dignity of the same.

FOURTH COUNT
(Second Degree)

(No Early Release Act, N.J.S.A. 2C:43-7.2; N.J.S.A. 30:4-123.51b)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 17, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did commit sexual assault upon M.C.S., by committing an act of sexual penetration, to wit: vaginal intercourse upon the victim, through the use of physical force or coercion, the victim not sustaining severe personal injury; contrary to the provisions of N.J.S.A. 2C:14-2c(1), and against the peace of this State, the Government and dignity of the same.

FIFTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to unlawfully remove K.R. a substantial distance from the vicinity where she was found and/or attempt to confine K.R. for a substantial period, with purpose to facilitate the commission of a crime or flight thereafter and/or inflict bodily injury on or to terrorize K.R. or another, and did fail to release the said K.R. unharmed prior to apprehension; contrary to the provisions of N.J.S.A. 2C:5-1/2C:13-1b, and against the peace of this State, the Government and dignity of the same.

SIXTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to commit aggravated sexual assault upon K.R., by attempting to perform an act of sexual penetration, to wit: vaginal intercourse upon the victim, the act having been committed during the commission of an attempted kidnapping, as alleged in Count Five herein; contrary to the provisions of N.J.S.A. 2C:5-1/2C:14-2a(3), and against the peace of this State, the Government and dignity of the same.

SEVENTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to commit sexual assault upon K.R., by attempting to commit an act of sexual penetration, to wit: vaginal intercourse and/or sexual penetration upon the victim, through the use of physical force or coercion, the victim not sustaining severe personal injury; contrary to the provisions of N.J.S.A. 2C:5-1/2C:14-2c(1), and against the peace of this State, the Government and dignity of the same.

EIGHTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to unlawfully remove I.G. a substantial distance from the vicinity where she was found and/or attempt to confine I.G. for a substantial period, with purpose to facilitate the commission of a crime or flight thereafter and/or inflict bodily injury on or to terrorize I.G. or another, and did fail to release the said I.G. unharmed prior to apprehension; contrary to the provisions of N.J.S.A. 2C:5-1/2C:13-1b, and against the peace of this State, the Government and dignity of the same.

NINTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to commit aggravated sexual assault upon I.G., by attempting to perform an act of sexual penetration, to wit: vaginal intercourse upon the victim, the act having been committed during the commission of an attempted kidnapping, as alleged in Count Eight herein; contrary to the provisions of N.J.S.A. 2C:5-1/2C:14-2a(3), and against the peace of this State, the Government and dignity of the same.

TENTH COUNT
(Second Degree)

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that BARRY CAREY a/k/a Lorenzo Carey a/k/a Malik Carey, on or about August 19, 2003, in the City of Hackensack, in the County of Bergen, and within the jurisdiction of this Court, did purposely attempt to commit sexual assault upon I.G., by attempting to commit an act of sexual penetration, to wit: vaginal intercourse and/or sexual penetration upon the victim, through the use of physical force or coercion, the victim not sustaining severe personal injury; contrary to the provisions of N.J.S.A. 2C:5-1/2C:14-2c(1), and against the peace of this State, the Government and dignity of the same.

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR

By: Assistant Prosecutor

A True Bill

Lois D. Ahrens, Foreperson

EXHIBIT G

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1783-06T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARRY LORENZO CAREY,
a/k/a LORENZO CAREY,
a/k/a MALIK CAREY,

Defendant-Appellant.

Submitted October 1, 2009 - Decided April 19, 2010

Before Judges Fisher, Sapp-Peterson and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 05-10-01905.

Dean R. Maglione, attorney for appellant.

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions and sentence on charges of kidnapping and the aggravated sexual assault of one

victim and his attempts to lure two other victims into a motor vehicle with the purpose of committing a crime against them. All of the victims were clients of Friendship House, a non-profit vocational rehabilitation agency in Hackensack that serves clients who are developmentally, emotionally or physically disabled. We affirm.

On April 17, 2003, M.C.S. was walking to Friendship House when a man pulled up in a car and called for her to come over. Believing that the man was another Friendship House client, her boyfriend David, she ran to the car and opened the front passenger door. When she saw that it was not David, she told the man that she did not know him. He replied that he knew her and that she went to Friendship House. He told her that he was a staff member and offered her a ride, which she accepted. However, the man, later identified as defendant by M.C.S., did not drive toward Friendship House. When M.C.S. asked where he was going, defendant responded, "I'm going to take you where I want to get what I want[.]" M.C.S. asked to get out of the car but defendant responded, "[N]ot until I get what I want." Fearing for her life, M.C.S. began banging on the car window in a fruitless attempt to escape. After driving in circles, defendant pulled the car into a driveway and parked close to a cement wall that prevented M.C.S. from opening her door. He

told her to stop trying to open the door because she would scratch the car door.

Defendant instructed M.C.S. to pull her pants down. After she refused twice, he threatened her by saying that he would only tell her to do so one more time. She complied at that point out of fear that he would hurt her. Defendant told M.C.S. to turn over on her stomach and, believing he would kill her if she refused, she did so. Defendant had sexual intercourse with her for approximately fifteen to twenty minutes, causing her to suffer pain. When he had finished, defendant told M.C.S. to pull her pants up. He drove around for a while, told her she was a "nice lady," and dropped her off.

M.C.S. found her way to Friendship House and entered, crying and shaking. The police were called. They took a statement from M.C.S. and transported her to Hackensack University Medical Center, where she was seen by a sexual assault nurse practitioner, Alexis Fitzsimmons. Very upset and angry, M.C.S. described the rape and complained of a lot of vaginal pain and pressure. Upon examination, areas of pain and redness were consistent with M.C.S.'s description of the rape. She also suffered a laceration. Fitzsimmons collected M.C.S.'s clothes and used a sexual assault evidence collection kit to obtain additional evidence.

After M.C.S. left the hospital, police drove her around Hackensack. She was eventually able to identify the location of the rape and assisted in the preparation of a composite sketch of her attacker.

Four months later, another Friendship House client, I.G., was walking to Friendship House when a man sitting in a parked, tan four-door 2003 or 2004 Toyota called out to her, stating that he was lost and claiming that he knew her. He asked her if she knew where a Blockbuster video store was. I.G. answered, "No." The man, later identified as defendant by I.G., told her that she was "hot" and asked her to get in the car and get some coffee with him. She refused and started to walk away. Defendant put his car into reverse and drove alongside her as she walked away. He opened the door to his car and asked her to get in but she continued to refuse.

I.G. was scared and hysterical when she ran into Friendship House. She told a counselor, Helene Sims, what had happened and pointed out the car. At that point, K.R., another Friendship House client was being approached by defendant in his car.

K.R. described a similar encounter. She was a few houses away from Friendship House when a Toyota pulled up on the opposite side of the street and the driver asked for help. K.R. later identified defendant as the driver. Defendant asked for

directions to Teaneck but K.R. was unable to help. Defendant told her that he remembered who she was and asked her to get in the car but K.R. did not remember him and backed away from the car. Defendant then asked where he could find a good coffee shop and, after K.R. told him, he asked her to get in and show him. K.R. became frightened and began to walk away.

At that point, Sims arrived and wrote down the Toyota's license plate as it drove away. She told K.R. about I.G.'s experience and called the police. After the Toyota's registration was traced to his girlfriend's mother, defendant was identified as a driver of the car. When defendant was interviewed by police, he denied attacking any of the women. However, a DNA sample taken from defendant matched a sample taken from M.C.S. during her rape examination.

Defendant was indicted on the following charges: first-degree kidnapping of M.C.S., N.J.S.A. 2C:13-1(b) (count one); first-degree aggravated sexual assault of M.C.S., N.J.S.A. 2C:14-2(a)(3) (counts two and three); second-degree sexual assault of M.C.S., N.J.S.A. 2C:14-2(c)(1) (count four); second-degree attempted kidnapping of K.R., N.J.S.A. 2C:13-1(b) and N.J.S.A. 2C:5-1 (count five); second-degree attempted aggravated sexual assault of K.R., N.J.S.A. 2C:14-2(a)(3) and N.J.S.A. 2C:5-1 (count six); second-degree attempted sexual assault of

K.R., N.J.S.A. 2C:14-2(c)(1) and N.J.S.A. 2C:5-1 (count seven); second-degree attempted kidnapping of I.G., N.J.S.A. 2C:13-1(b) and N.J.S.A. 2C:5-1 (count eight); second-degree attempted aggravated sexual assault of I.G., N.J.S.A. 2C:14-2(a)(3) and N.J.S.A. 2C:5-1 (count nine); and second-degree attempted sexual assault of I.G., N.J.S.A. 2C:14-2(c)(1) and N.J.S.A. 2C:5-1 (count ten). Count three was dismissed on the State's motion.

Defendant filed several pre-trial motions, including one to have a psychiatrist examine the victims. Another motion sought either a severance of the counts as to each of the victims or, in the alternative, to sever the charges regarding M.C.S. Both motions were denied.

During jury selection, the court asked all potential jurors if they or anyone in their family had either been arrested or convicted of a crime or had been the victim of a crime. The State asked the court to discharge an African-American juror, S.J., for cause based upon information it had obtained after she was seated that she had, in fact, been arrested and charged with assault. The State did not challenge S.J. when she was originally seated and, in fact, announced that the jury was acceptable on several occasions after S.J. was seated, including after other challenges were exercised by both the State and defendant. As part of her duties, the prosecutor had been

screening all the cases that were referred to the prosecutor's office from the municipalities and S.J.'s name sounded familiar to her. Upon investigation, the prosecutor discovered that S.J. had been arrested and charged with assault in 2000. The basis for the State's request that she be excused for cause was that she had lied on the jury questionnaire and on voir dire and because the prosecutor was concerned as to how a peremptory challenge at that point might be perceived by the jury. Upon examination, S.J. acknowledged that she had been arrested and had filed criminal complaints against others but did not believe that information pertinent because the criminal charge against her had been dismissed. She maintained that she could be fair and impartial as a juror. The court denied the motion to excuse for cause; the State exercised a peremptory challenge. Defendant objected and moved for either a dismissal of the indictment or a new jury. The motion rested upon the arguments that the State's inquiries regarding S.J. violated Rule 1:16-1 and therefore constituted prosecutorial misconduct and further, that the State improperly exercised peremptory challenges to S.J. and T.W. on the basis of their race.[1] Defendant's motion was denied.

[1] On the previous day, the State had exercised a peremptory challenge to dismiss an African-American who was involved with (continued)

Defendant did not testify at trial. The defense presented was that the intercourse with M.C.S. was consensual; that his interactions with K.R. and I.G. were innocent conversations about locations and directions; and that he did not take any substantial step to kidnap or rape them by asking them to get in his car.

The jury convicted defendant of first-degree kidnapping of M.C.S., N.J.S.A. 2C:13-1(b) (count one); first-degree aggravated sexual assault of M.C.S., N.J.S.A. 2C:14-2(3) (count two); second-degree sexual assault of M.C.S., N.J.S.A. 2C:14-2(c)(1) (count four). On counts five and eight, the jury convicted defendant of the lesser-included offense of luring K.R. and I.G., N.J.S.A. 2C:13-7 and N.J.S.A. 2C:5-1. Defendant was acquitted on counts six, seven, nine and ten.

At sentencing, the court merged count four into count two. In addition to imposing appropriate fines and penalties, the court sentenced defendant as follows: on count one, twenty-five years, subject to the No Early Release Act (NERA), with 85% of the sentence to be served prior to parole eligibility; on count two, a term of seventeen years, subject to NERA, to be served concurrent to count one; on count five, a term of four years; on

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(continued)
someone being prosecuted for a crime.

count eight, a term of four years. The sentences on counts five and eight were ordered to be served concurrent to each other but consecutive to the sentences imposed on counts one and two.

Defendant raises the following issues on appeal:

POINT I

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS BY THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS ON THE BASIS OF RACE IN VIOLATION OF STATE V. GILMORE, 103 N.J. 508, 511 (1986).

POINT II

THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE THE PROSECUTION IMPROPERLY CONDUCTED AN INVESTIGATION OF A POTENTIAL [JUROR].

POINT III

THE TRIAL COURT ERRED IN NOT SEVERING THE OFFENSES FOR TRIAL.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS WHICH IMPERMISSIBLY BOLSTERED THE TESTIMONY OF COMPLAINING WITNESS (PARTIALLY RAISED BELOW).

POINT V

THE TRIAL COURT ERRED BY PERMITTING THE JURY TO CONSIDER EVIDENCE THAT DEFENDANT HAD AN ALIAS THEREBY PREJUDICING DEFENDANT'S RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

POINT VI

PROSECUTORIAL CONDUCT DURING CLOSING ARGUMENT DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

POINT VII

THE DEFENDANT'S CONVICTION MUST BE REVERSED DUE TO MISCONDUCT BY THE PROSECUTOR IN ORDERING WITNESSES NOT TO SPEAK WITH DEFENSE INVESTIGATORS.

POINT VIII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO PERMIT ITS EXPERT WITNESS TO CONDUCT A PSYCHIATRIC EXAMINATION ON THE "VICTIM".

POINT IX

CUMULATIVE ERRORS REQUIRE REVERSAL (NOT RAISED BELOW).

POINT X

THE TRIAL COURT IMPROPERLY FOUND AGGRAVATING FACTORS (NOT RAISED BELOW).

POINT XI

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO CONSECUTIVE TERMS OF IMPRISONMENT.

We do not find any of these arguments to have merit.

I

We turn first to defendant's claim that the State improperly used peremptory challenges to exclude potential jurors based upon their race. There were three potential jurors who were African-American. The State exercised a peremptory challenge against T.W. because he was friendly with a person being prosecuted by the Bergen County Prosecutor's Office. A

second African-American venireman was excused for cause by the court with the consent of both the State and defendant because he stated that he could not be fair and impartial. The third African-American was S.J. Initially, the State had found S.J. to be acceptable to be seated on the jury. However, on the following day of jury selection, the State asked that S.J. be excused for cause after learning that she had been arrested in conjunction with a domestic violence matter, had filed several complaints against others, and had failed to disclose these facts. In this appeal, defendant limits his argument of improper challenge to S.J.

Defendant argues that the reasons offered by the State for excusing S.J. were pretextual and that she was singled out for "investigation" by the State because of her race. To support the pretext argument, defendant contends that the State did not object to another juror remaining on the jury despite his failure to advise the court that he had been a witness to a sexual assault and reported the incident to the police.

Defendant's timely objection is subject to the rebuttable presumption that the challenge has been exercised on constitutionally permissible grounds, State v. Osorio, 199 N.J. 486, 501 (2009), and prompts the three-step inquiry that guides

the determination whether the prosecutor has exercised peremptory challenges in a discriminatory manner:

> Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered, and the burden then shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.
>
> [Osorio, supra, 199 N.J. at 492-93.]

See also Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 973-74, 163 L. Ed. 2d 824, 831 (2006); State v. Gilmore, 103 N.J. 508, 535-39 (1986).

To make a prima facie showing, defendant must "produc[e] evidence sufficient to permit the trial judge to draw an

inference that discrimination has occurred." Johnson v. California, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417, 162 L. Ed. 2d 129, 139 (2005); see Osorio, supra, 199 N.J. at 502. Applying the standard then applicable, the trial court concluded that defendant failed to make a prima facie showing that the exercise of the peremptory challenges against S.J. and T.W. was not based upon a neutral reason specifically related to the trial.[2]

We agree that, in light of the unusual circumstances in which the peremptory challenge to S.J. was exercised, defendant failed to present sufficient evidence to raise an inference of discrimination. The record clearly shows that, at a time when her race was apparent but her involvement with law enforcement was unknown, the State had no objection to S.J. serving as a juror in this trial. The State repeatedly declared that the jury as constituted was acceptable after she was seated and other jurors were challenged, both by the State and defendant. It was not until the next day of jury selection, after the State discovered that S.J. had failed to disclose an arrest and her

[2] This case was tried to conclusion before Osorio was decided. Although the trial court applied the standard for prima facie case identified in Gilmore, supra, 103 N.J. at 535-39, the record is sufficient to permit a review of this issue pursuant to the standard for a prima facie case adopted in Osorio following the United States Supreme Court's decision in Johnson, supra.

own complaints to the police, that the State moved for her to be excused for cause and exercised the peremptory challenge.

Our conclusion is unaffected by the argument that the State selectively investigated S.J., purportedly as a result of her race. In making the request to have her excused for cause, the prosecutor stated that she had initiated an inquiry because the juror's name was familiar to her. At the same time, she disclosed that she had made a similar inquiry regarding another veniremen with an Irish surname to determine if he was a member of a family she knew. Therefore, the record refutes the characterization of the "investigation" as selective, based upon S.J.'s race. Moreover, the inquiries made did not include an interview of S.J. and so, defendant's contention that the State violated Rule 1:16-1 also lacks merit.

II

Defendant alleges that the trial court erred in failing to grant his motion to sever the counts so that a separate trial would be conducted as to each victim or, in the alternative, that the charges involving M.C.S. be severed from those concerning the other victims.

The decision whether to grant a motion for severance rests within the discretion of the trial judge and is entitled to great deference on appeal. State v. Morton, 155 N.J. 383, 451-

52 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001); State v. Brown, 118 N.J. 595, 603 (1990); State v. Pitts, 116 N.J. 580, 601 (1989). Joinder is permitted when two or more offenses "are of the same or similar character or are based on . . . [two] or more acts or transactions connected together or constituting parts of a common scheme or plan." R. 3:7-6. Central to the inquiry is "whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges." State v. Chenique-Puey, 145 N.J. 334, 341 (1996) (quoting Pitts, supra, 116 N.J. at 601-02).

A review of the allegations and evidence here supports the conclusion reached by the trial court that evidence of the separate offenses would be admissible at trial pursuant to State v. Cofield, 127 N.J. 328, 338 (1992) and N.J.R.E. 404(b). In each incident, the victim was approximately twenty years older than defendant and was a client of Friendship House. Defendant approached each victim in the same manner, seated in a car near Friendship House and claimed to know each victim in an apparent effort to gain her trust. This evidence demonstrated a common plan and intent, an admissible purpose under N.J.R.E. 404(b) that satisfied the first prong of the Cofield test. Cofield,

supra, 127 N.J. at 338. The charged offenses occurred within four months of each other and were, therefore, reasonably close in time, satisfying the second prong of the Cofield test. Ibid. The evidence regarding each offense, which included the testimony of the victims, was clear and convincing, satisfying the third Cofield prong. Ibid. Finally, because defendant contended that M.C.S. had consented to having intercourse with him, the issue of intent was critical. As a result, the probative value of the evidence to determining his intent was substantial and clearly outweighed any claim of prejudice by defendant. See ibid.

III

Defendant argues that reversal is required because, he contends, the State instructed witnesses not to speak to his representatives. This issue arose prior to jury selection when the prosecutor advised the court that, after being contacted by defendant's representatives, M.C.S. had called her counselor and stated that she did not want to speak to them. The prosecutor asked the court to order defendant's representatives not to contact M.C.S. again. When defense counsel agreed that no further efforts would be made to contact M.C.S., the court considered the matter closed but stated that a hearing would be held if there was a problem of prosecution interference with

defense efforts to interview witnesses. Defense counsel then stated that witnesses had told her investigator that the prosecutor's office had issued a blanket order that they should not speak to defense investigators. This was adamantly denied by the prosecutor.

On the following morning, defense counsel brought investigator Alexander Saavedra to court to recount what the witnesses had said to him. The prosecutor asked for the investigator to be placed under oath and questioned. Rather than delay jury selection by holding a hearing at that juncture, the court stated that, if counsel thought it would solve the problem, he would direct that someone from the prosecutor's office contact the witnesses and advise them "that they are allowed to speak to the investigator and it's their decision whether or not they wish to do so." The court stated that if counsel thought a further hearing was required, it would be scheduled after jury selection.

Although skeptical that this would encourage the witnesses to speak to the defense investigator, defense counsel agreed to try this procedure before holding a hearing. Pursuant to a request made by defense counsel, the trial court asked the prosecutor to contact the Friendship House representative to advise their clients that the "defense does have the right to

speak with them and it's up to them individually whether they wish or do not wish to speak to the defense investigators."

On the following day, defense counsel informed the court that several potential witnesses from Friendship House and the building where M.C.S. had previously lived had advised her investigator that they could not speak to him. The prosecutor denied that she or anyone from her office had told any potential witness not to speak to a defense representative. The court instructed the prosecutor to send someone to M.C.S.'s previous address and instruct the residents that they were free to speak to defendant's representatives if they wished to do so. The prosecutor stated that she had spoken to the Friendship House counselor the prior evening and had asked her to convey such information to staff and clients. The court asked the prosecutor to contact Friendship House once again and reiterate that message.

This issue arose again during trial when the prosecutor advised that I.G. had called her office and stated that she did not want to be contacted by defense representatives. Another resident at M.C.S.'s former residence, Michael Morabito, told the defense investigator that he had been instructed not to speak to defense representatives and had not received any instruction from the prosecutor's office that he was free to

speak if he chose to do so. However, in a handwritten statement, Morabito stated that it was the Friendship House clinical director who had told him not to speak to defense representatives. Having concluded that the prosecutor's office had complied with its directives, the court stated that defense counsel was free to subpoena Morabito but that the State had no further obligation to contact him and advise him of his right to speak to a defense representative.

The principles applicable to this issue were summarized as follows:

> Witnesses belong neither to the prosecution nor to the defense. Both sides have an equal right, and should have an equal opportunity to interview them. However, while it is true that a witness is not to be prevented from speaking to the defense by the prosecution, it is equally true that a witness cannot be required to speak to an investigator or an attorney. The matter rests, or at least it should rest, entirely with the witness.
>
> [United States ex rel. Trantino v. Hatrak, 408 F. Supp. 476, 481 (D.N.J. 1976) (citations omitted), aff'd, 563 F.2d 86 (3d Cir. 1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1499, 55 L. Ed. 2d 524 (1978).]

In this case, the issues involving access to witnesses concerned victims M.C.S. and I.G., and certain persons associated with Friendship House, all of whom were unidentified in the record except for Michael Morabito. As noted, the issue

was first raised by the prosecutor after M.C.S. was approached by a defense investigator and had communicated her desire that she not be contacted further by the defense. In response, defense counsel did not refute this version of events and represented that no further efforts would be made to contact M.C.S. A similar request was made by I.G. after she was contacted by a defense investigator. Again, defense counsel acknowledged that the victim's request came after the defense investigator attempted to interview I.G., and, in recognition of the witness's right to decline to be interviewed, counsel represented that no further effort would be made to contact I.G. Morabito identified the clinical director of Friendship House, rather than anyone associated with the State, as the person who had told him not to speak to the defense. The court repeatedly stated that the defendant had a right to attempt such interviews and directed the prosecutor to inform the Friendship House personnel and other potential witnesses that they were free to speak to defense representatives if they wished to do so.

The waters were unnecessarily muddied here by the role the prosecutor assumed in acting as an advocate for the position that the defense should not contact witnesses. We find no fault in the prosecutor merely communicating information received from witnesses regarding their desire not to be contacted. However,

just as the witness does not belong to either the State or the defense, the prosecutor should not attempt to represent the interests of witnesses who choose not to speak to the defense. To the extent that there was any factual issue as to the role, if any, the prosecutor played in the witnesses' decision to decline to be interviewed by the defense, this could easily have been resolved by a brief hearing. The court repeatedly offered to hold such a hearing and advised defense counsel that Morabito could be subpoenaed to court to be interviewed by the defense investigator.

Defendant did not make any further request for a hearing or seek to subpoena Morabito to court for an interview. Although Jean O'Connor, the senior counselor at Friendship House, with whom the prosecutor communicated regarding the court's directives, testified at trial, no effort was made to question her about those communications or any instructions given by Friendship House to staff or clients regarding interviews with the defense. Similarly, no effort was made to question the victims, each of whom testified, about their decision to decline to speak to the defense. It may well be that there was little to gain from a hearing. Based upon the defense investigator's attempts to interview M.C.S. and I.G., counsel was aware that those victims did not want to speak to the defense. The defense

made no complaint that the third victim, K.R., refused to speak to defense investigators. The information regarding Morabito revealed that it was the clinical director of Friendship House who had told him not to speak to the defense. The State was, of course, obliged to provide defendant with any information from potential witnesses that was exculpatory in nature, see State v. Marshall, 148 N.J. 89, 284 (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963)) cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997), and no argument has been made that any other witness who declined to speak to the defense had information that would have substantially benefited defendant. We therefore conclude that the record here does not support a conclusion that the State "use[d] its influence to discourage witnesses from speaking to counsel or counsel's agents." See ibid.

IV

Defendant also argues that it was error to admit certain hearsay statements of M.C.S. After she was assaulted, M.C.S. went to Friendship House, where she told Karen Reining, an employee, what had occurred. Reining testified as to this "fresh complaint" evidence and defendant does not challenge the admissibility of her testimony. Defendant argues, however, that it was reversible error to permit the testimony of Alexis

Fitzsimmons, a sexual assault nurse practitioner, and Officer Niamh McGuinness as to M.C.S.'s statements.

Officer McGuinness responded to Friendship House within minutes after the police were called about a suspected rape. She found M.C.S. crying, with puffy eyes, and extremely upset. She was so concerned about M.C.S.'s physical condition that she had an emergency medical technician check her vital signs. She was permitted to testify over objection to M.C.S.'s description of what had happened to her. The trial court ruled that such testimony was admissible pursuant to N.J.R.E. 803(c)(2). We grant substantial deference to the trial judge's discretion on evidentiary rulings, Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 430 (App. Div. 2009), and find no abuse of discretion here.

Defendant did not object to Fitzsimmons' testimony at trial. Fitzsimmons testified that she responded to the emergency room to examine M.C.S. on the day of the assault. Before examining her, she interviewed M.C.S. and memorialized her version of the event on the sexual assault examination report. The testimony complained of now is:

> [M.C.S.] had said that she had been raped, that she didn't have very good vision and had gotten into a car thinking that she knew who the person was or they knew her, and that she realized she didn't know the person

> and tried to get out, wasn't allowed to get out and was then raped, sexually assaulted.

The State contends that this testimony was admissible hearsay pursuant to N.J.R.E. 803(c)(4), which permits the admission of:

> Statements in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

Statements that are not reasonably pertinent to diagnosis and treatment are inadmissible, Palmisano v. Pear, 306 N.J. Super. 395, 400-01 (App. Div. 1997), and should be redacted from statements otherwise admissible under N.J.R.E. 803(c)(4). See Cestero v. Ferrara, 57 N.J. 497 (1971) (applying Evidence Rule 63(12)). While M.C.S.'s statements to Fitzsimmons that she was raped are reasonably pertinent to diagnosis and treatment, the State has not presented persuasive argument as to why her statements about poor vision and mistaking her attacker for someone she knew met that standard. Nonetheless, we find no error, let alone plain error, in the admission of that statement as it was made at a time when M.C.S. was still "under the stress of excitement caused by" her assault and was, therefore admissible pursuant to N.J.R.E. 803(c)(2). Moreover, M.C.S.

testified and was subject to cross-examination on the statements attributed to her.

V

Defendant argues that the court committed reversible error in denying his motion, made on the day that pretrial motions were heard, to have the victims, and M.C.S. in particular, examined by a psychiatrist. Defendant does not contend that any of the victims was incompetent to testify, but argues that he made a showing of "substantial need" that warranted such an examination and that such discovery was necessary for an effective cross-examination of the psychiatrist presented by the State. The authorities relied upon by defendant to support his argument that a "substantial need" was shown, State v. R.W., 104 N.J. 14 (1986) and State v. Hass, 218 N.J. Super. 133 (App. Div. 1987), are inapposite as they concern challenges to a witness's competency to testify. The record also belies defendant's contention that his defense was prejudiced by the court's ruling. Defendant was provided with discovery regarding M.C.S.'s mental condition. The court stated that defendant could have an expert review the discovery, observe the victims in court, prepare a report and testify regarding his review and observations. Defendant's expert also received a copy of the report prepared by the State's expert and was in court during

his testimony. Defense counsel vigorously cross-examined the State's expert, who conceded that M.C.S. was subject to delusions, even on medication; that she had a history of cutting herself, a symptom of anger, anxiety or depression; that M.C.S. has paranoid trends; that she tries to present herself as a fully functioning adult and will not admit that she is "mentally retarded." After the State's expert testified, the court expanded the parameters of testimony that would be permitted from the defense expert, specifically allowing an opinion that M.C.S. was capable of misinterpreting the events that occurred involving defendant. The legitimate interests of defendant in pursuing discovery regarding the victims' mental condition, cross-examining the State's expert and presenting his own expert testimony were, therefore, all met and the court did not err in denying the motion.

VI

Defendant argues that the trial court abused its discretion in imposing consecutive sentences and committed plain error in finding aggravating factors.

The kidnapping and aggravated sexual assault of M.C.S. occurred as part of a continuing criminal episode and the sentences imposed for those sentences were concurrent to each other. The luring of I.G. and K.R. occurred on a single day

approximately four months later. The sentences imposed for those offenses were concurrent to each other and consecutive to the sentence imposed for the offenses committed against M.C.S. Although defendant argues that all sentences should have been concurrent, these were separate offenses against separate victims, with the passage of four months between the kidnapping and rape of M.C.S. and the efforts to lure I.G. and K.R. The factors set forth in State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986) support the trial court's decision to impose a consecutive sentence here. See State v. Cassady, 198 N.J. 165, 181-182 (2009).

In stating the reasons for sentence, the court identified four aggravating factors: (1) the seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or substantially incapable of exercising normal physical or mental power of resistance, N.J.S.A. 2C:44-1(a)(2); (2) the likelihood that the defendant would commit another offense, N.J.S.A. 2C:44-1(a)(3); (3) the extent of defendant's prior criminal record, N.J.S.A. 2C:44-1(a)(6); and (4) the need to deter the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). Defendant challenges the

court's finding of these aggravating factors for the first time on appeal. The court found no mitigating factors. Defendant does not cite any mitigating factor that the trial court erroneously failed to consider.

The evidence supported a conclusion that defendant targeted clients of Friendship House, choosing victims who he had reason to believe were developmentally disabled and therefore substantially incapable of exercising normal mental power of resistance. His efforts to lure I.G. and K.R. after raping M.C.S. strongly supports a conclusion that it was likely that he would commit another offense. It is true that defendant had no prior convictions. However, although prior arrests may not be given the same weight as convictions in making this determination, the trial court was permitted to consider his prior arrests and pending charges as support for a finding that N.J.S.A. 2C:44-1a(6) applied. State v. Jones, 179 N.J. 377, 407 (2004); State v. Green, 62 N.J. 547, 571 (1973). Therefore, each of these findings, as well as the finding of a need to deter, had ample support in the record. Because "the trial court properly identifie[d] and balance[d] aggravating and mitigating factors that are supported by competent credible evidence in the record," its sentencing decision is entitled to our deference. Cassady, supra, 198 N.J. at 180; State v.

O'Donnell, 117 N.J. 210, 215 (1989). We see no reason to disturb the sentence imposed.

VII

Defendant's arguments regarding evidence of defendant's alias, the prosecutor's summation and cumulative errors were not presented to the trial court and therefore are not properly before us for review, State v. Robinson, 200 N.J. 1, 20 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We are satisfied, however, that these arguments lack any merit.

Defendant contends that the trial court committed plain error in failing to strike his aliases from the indictment and from Sergeant Thomas Salcedo's testimony and in failing to give a curative instruction. Defendant was indicted as "Barry Carey a/k/a Lorenzo Carey a/k/a Malik Carey." His aliases were read to the jury at the time the trial court read the indictment and were included in the testimony of Sergeant Salcedo as he described the steps taken by the police to identify defendant. We note that there is nothing inherently prejudicial in the names themselves; they are not pejorative and do not suggest any criminal association. Defendant was identified by tracing the motor vehicle used to approach each victim to his girlfriend, who referred to him as "Lorenzo" and said that he liked to be called "Malik." The names used by defendant were, therefore,

relevant to the evidence against him. Even if the admission of a defendant's alias is irrelevant, such admission "will not afford a basis for reversal unless some tangible form of prejudice is demonstrated, i.e., where such names have been intentionally offered as indicia of guilt." State v. Salaam, 225 N.J. Super. 66, 73 (App. Div.), certif. denied, 111 N.J. 609 (1988). Where, as here, the references to a defendant's aliases were limited and did not "suggest an element of criminal association or bad character on the part of defendant[,]" the references "neither compromised defendant's right to have the jury evaluate the merits of his defense nor prejudiced his right to a fair trial." Id. at 76. The proof of defendant's guilt was compelling and included the testimony of the three victims who were able to identify him as the man who approached each of them as they walked to Friendship House. The notion that references to wholly innocuous nicknames could have caused the jury to reach a result it otherwise might not have reached is speculative at best.

Defendant also alleges as plain error that certain comments made by the prosecutor in summation deprived him of a fair trial. The comments complained of include references to defendant as "the proverbial wolf in sheep's clothing," and that "defendant had already gotten a taste of the victim from the

Friendship House" when he raped M.C.S. These comments were brief and fleeting in nature. Moreover, in light of defendant's method of approaching the victims, there was support in the record for the characterization of defendant's conduct as a wolf in sheep's clothing. Therefore, we conclude that the comments fell within the wide latitude accorded the prosecutor in summation, see State v Wakefield, 190 N.J. 397, 457 (2007); State v. Mayberry, 52 N.J. 413, 437 (1968), cert. denied, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 2d 593 (1969), and did not substantially prejudice defendant's fundamental right to have a jury fairly assess his case. State v. Timmendequas, 161 N.J. 515, 575 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001).

Affirmed.

EXHIBIT H

H
(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)

Supreme Court of New Jersey
State
v.
Barry Carey

NOS. C-871 SEPT.TERM 2010, 067435
April 14, 2011

Disposition: Denied.

N.J. 2011.
State v. Carey
205 N.J. 520, 16 A.3d 385 (Table)

END OF DOCUMENT

EXHIBIT I

SUPERIOR COURT OF NEW JERSEY

EDWARD A. JEREJIAN
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STATE V. BARRY LORENZO CAREY
Indictment No. 05-10-1905-I

MOTIONS FOR POST CONVICTION RELIEF

INTRODUCTION & PROCEDURAL HISTORY

Before the Court is petitioner, Barry Lorenzo Carey, for post-conviction relief, under the theory of ineffective assistance of counsel regarding Indictment No. 05-10-1905-I.

On October 21, 2005, petitioner was charged on Indictment No. 05-10-01905-I with first degree kidnapping, contrary to the provisions set forth in N.J.S.A. 2C:13-1B; first degree aggravated sexual assault, contrary to the provisions set forth in N.J.S.A.

2C:14-2A(3); first degree aggravated sexual assault to a victim whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated, contrary to the provisions set forth in N.J.S.A. 2C:14-2A(7); second degree sexual assault through the use of physical force or coercion, the victim not sustaining severe personal injury, contrary to the provisions set forth in N.J.S.A. 2C:14-2C(1); two counts of second degree criminal attempt to kidnap, contrary to the provisions set forth in N.J.S.A. 2C:5-1 and 2C:13-1B; two counts of second degree criminal attempt to commit aggravated sexual assault, contrary to the provisions set forth in N.J.S.A. 2C:5-1 and 2C:14-2A(3); and two counts of second degree criminal attempt to commit sexual assault through the use of physical force or coercion, the victim not sustaining severe personal injury, contrary to the provisions set forth in N.J.S.A. 2C:5-1 and 2C:14-2C(1).

On February 15, 2006, petitioner was found guilty at trial of first degree kidnapping (count one), contrary to the provisions set forth in N.J.S.A. 2C:13-1B; first degree aggravated sexual assault (count two), contrary to the provisions set forth in N.J.S.A. 2C:14-2A(3); second degree sexual assault through the use of physical force or coercion, the victim not sustaining severe personal injury (count four), contrary to the provisions set forth in N.J.S.A. 2C:14-2C(1); and two counts of the lesser-included charge third degree criminal attempt to lure or entice an adult into a motor vehicle (counts five and eight), contrary to the provisions set forth in N.J.S.A. 2C:5-1 and 2C:13-7.

On October 7, 2006, petitioner appeared before the Honorable Harry G. Carroll, J.S.C. and was sentenced to 25 years imprisonment with 85% to be served without parole under the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2, and five years of parole

supervision on the first-degree kidnapping conviction, under count one. On the first-degree aggravated sexual assault conviction under count two, petitioner was sentenced to a concurrent 17-year term of imprisonment with an 85% parole disqualifier under NERA and five years of parole supervision. The sentencing court merged count four into count two. On the third-degree luring convictions under counts five and eight, petitioner was sentenced to two concurrent terms of four years without parole disqualifier, both of which were made consecutive to the sentences on counts one and two. Petitioner was ordered to register as a sex offender pursuant to N.J.S.A. 2C:7-2a, to provide a DNA sample and to be placed on community supervision for life pursuant to N.J.S.A. 2C:43-6.4a.

Petitioner filed a direct appeal of his conviction and sentence on numerous grounds, including allegations that the petitioner was denied a fair trial due to improper prosecutorial conduct. On October 1, 2009, the Appellate Division affirmed petitioner's conviction and sentence.

Petitioner filed a Petition for Certification in the New Jersey Supreme Court, which was denied on April 14, 2011.

On October 17, 2011, petitioner filed a first petition for post-conviction relief for Indictment No. 05-10-1905-I.

On November 3, 2011, the Honorable Donald R. Venezia, J.S.C. entered an Order denying petitioner's Motion to Extend Time to File an Amended Petition that includes additional investigative documents, and dismissing petitioner's timely filed petition for post-conviction relief without prejudice.

On May 24, 2013, petitioner filed this Amended Petition for Post-Conviction Relief. Oral argument was heard on November 22, 2013.

ARGUMENTS

Petitioner argues that he is entitled to post conviction relief based on ineffective assistance of counsel in that his trial counsel, Wanda M. Akin, Esq., failed to make certain decisions and advise the petitioner properly during trial. Specifically, the petitioner contends that trial counsel made the following errors which denied him of his constitutional right to counsel:

A. Trial counsel's failure to challenge the competency of the State's principal complaining witness, M.C.S.

B. Trial counsel's failure to request a Rule 104 evidentiary hearing on the issue of whether the Prosecutor's Office unduly influenced the witnesses to decline to speak with defense investigators.

C. Trial counsel's failure to object to hearsay statements at trial.

D. Trial counsel's failure to object to numerous improper comments made by the Prosecutor during summation.

E. Trial counsel's failure to take an interest in the case and failing to conduct an adequate investigation prior to trial.

F. Trial counsel's failure to adequately advise the petitioner of his right to testify.

The State argues that petitioner was not deprived of the effective assistance of counsel because petitioner cannot meet the two-prong Strickland test, which is the standard necessary to establish a claim of unconstitutional, ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

LEGAL ARGUMENT

Petitioner's Petition for Post-Conviction Relief Is Time-Barred

Post-conviction relief is intended to permit a petitioner to challenge the legality of a conviction on a ground which could not have been raised on direct appeal. State v. Milne, 178 N.J. 486, 491 (2004); State v. Afanador II, 151 N.J. 31, 49 (1997); State v. McQuaid, 147 N.J. 464, 482 (1997). It is not, however, a substitute for direct appeal or an opportunity to litigate matters which should have been raised on direct appeal. State v. Afanador II, 151 N.J. at 50. A petitioner must establish his entitlement to relief by a preponderance of the evidence. State v. Mitchell, 126 N.J. 565, 579 (1992).

R. 3:22-12 provides that:

> (a)(1) No petition shall be filed pursuant to this rule more than 5 years after the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there was a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice.

A court should relax the time limitations of the rule only under exceptional circumstances, considering the cause and extent of the delay, the prejudice to the State and the importance of the defendant's claim in determining whether there has been an "injustice" which would justify applying the time bar. State v. Afanador II, 151 N.J. at 52. The burden to justify filing a petition after the five year period increases with the extent of the delay, since "[a]s time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgment increases." Id. (Citation omitted.

The five year time bar commences from the time of the judgment of conviction, State v. Milne, 178 N.J. 491; State v. Goodwin, 173 N.J. 583, 594 (2002); State v.

Murray, 162 N.J. 240, 249 (2000); State v. Afanador II, 151 N.J. at 53. While the time bar is not absolute, it is relaxed only if the petitioner alleges facts demonstrating that the delay was due to the defendant's excusable neglect or that the interests of justice demand relaxation. State v. Milne, 178 N.J. at 492.

Defendant filed his first petition for post-conviction relief on October 17, 2011, together with a Notice of Motion to extend time to complete additional investigation. In an Order dated November 3, 2011, Hon. Donald R. Venezia denied defendant's Motion to Extend Time and dismissed defendant's petition for post-conviction relief without prejudice subject to re-filing at a later date.

Because defendant's first petition for post-conviction was dismissed without prejudice, this amended petition for post-conviction relief should be treated as a First Petition under Rule 3:22-12(a)(1). Defendant's amended petition for post-conviction relief, which was filed on May 24, 2013, challenges a judgment of conviction signed on October 17, 2006. Therefore, defendant's amended petition is time-barred under the five-year rule set forth in Rule 3:22-12.

Although defendant's petition for post-conviction relief is time-barred, this Court will now address the merits of petitioner's argument to avoid any potential injustice to petitioner.

Petitioner Fails to Make a Prima Facie Showing of Ineffective Assistance of Counsel

In order to establish a case of ineffective assistance, defendant must establish that: (1) "counsel's performance was deficient," and (2) that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Strickland v. Washington, 466 U.S. 668, 694, (1984). A petitioner asserting ineffective assistance of counsel on post conviction relief bears the burden of proving his or her right to relief by a preponderance of the evidence. See State v. Echols, 199 N.J. 344, 357 (2009); State v. Goodwin, 173 N.J. 583, 593 (2002). Under the first prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. Deficient performance is established by proving that "counsel's acts or omissions fell 'outside the wide range of professionally competent assistance' considered in light of all the circumstances of the case." State v. Castagna, 187 N.J. 293, 314 (2006). The second prong of the Strickland test requires the defendant to show that counsel's performance prejudiced the defense to the extent that the defendant was deprived of a reliable result. Strickland v. Washington, 466 U.S., at 694, 104 S. Ct. at 2068, State v. DiFrisco IV, 174 N.J. 195, 218-219 (2002), cert. denied, 123 S.Ct. 1323 (2003).

Petitioner argues that various acts and/or failures to act by his trial counsel ultimately denied petitioner his constitutional right to counsel. Each alleged instance of ineffective assistance of counsel will be addressed in turn.

First, petitioner claims that trial counsel's failure to challenge the competency of complaining witness, M.C.S., resulted in ineffective assistance of counsel. Petitioner further states that although counsel did file a motion to have M.C.S. examined by a psychiatrist, she did not contend that any of the victims, including M.C.S., were incompetent to testify. At trial, both the State and defense counsel called experts to testify as to the psychiatric state of the complaining witness. Further, both the State and defense counsel engaged in cross-examination of each expert witness, as well as M.C.S. There is

no indication that M.C.S. was incompetent to testify, and trial counsel did in fact make a motion to have the witness examined by a psychiatrist. Therefore, petitioner fails to make a prima facie claim of ineffective assistance of counsel under Strickland because counsel's conduct was not 'deficient', nor is there a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Nunez-Valdez, 200 N.J. 129, 138-39 (2009) (quoting Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. 2052, 2068, 80 L.Ed. 2d 674, 698 (1984)).

Second, the petitioner claims that trial counsel's failure to request a Rule 104 evidentiary hearing on the issue of whether the Prosecutor's Office unduly influenced witnesses to decline to speak with defense investigators resulted in ineffective assistance of counsel. Defense counsel cites the analysis on this issue discussed in the Appellate Division decision, dated October 1, 2009. However, there is nothing in the record that supports a conclusion that the State improperly prevented Friendship House witnesses from speaking with the defense team. Further, the State, defense counsel and trial judge engaged in a specific colloquy on the record regarding this matter, deeming it unnecessary for trial counsel to request an additional Rule 104 hearing on this matter. 18T36-3 to 37-25. Therefore, petitioner fails to make a prima facie claim of ineffective assistance of counsel under Strickland because counsel's conduct was not 'deficient', nor is there a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Nunez-Valdez, 200 N.J. 129, 138-39 (2009) (quoting Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. 2052, 2068, 80 L.Ed. 2d 674, 698 (1984)).

Third, petitioner contends that trial counsel's failure to object to hearsay statements at trial resulted in ineffective assistance of counsel. Petitioner states that the testimony given by Detective Thomas Salcedo concerning petitioner's girlfriend Chizeba Okobi contained inadmissible hearsay statements. Specifically, petitioner refers to Detective Salcedo's testimony concerning what Ms. Okobi told him about her boyfriend and the Toyota Camry involved in the case. 10T49-1 to 50-25. However, as the State represents in its brief, this testimony is not inadmissible hearsay because it was not offered for the truth of the matter. Instead, the statements from Chizeba Okobi were offered to show what steps the police took in furtherance of an investigation, as evidenced by the context of the testimony. Therefore, trial counsel's failure to object to these statements as hearsay was not 'deficient', and petitioner fails to make a prima facie claim of ineffective assistance of counsel under Strickland.

Fourth, petitioner claims that trial counsel's failure to object to numerous improper comments made by the assistant prosecutor during summation resulted in ineffective assistance of counsel. Although a prosecutor has considerable leeway presenting a summation, State v. Williams (Williams II), 113 N.J. 393, 447 (1988), she may not exceed the parameters of "permissibly forceful advocacy" established by decisional law. State v. Marshall, 123 N.J. 123, I, 160-61 (1991); State v. Acker, 351 N.J. 351, 356 (App. Div. 1993). In reviewing the trial transcript of the alleged improper statements made during summation, this Court finds that the assistant prosecutor employed "permissible forceful advocacy" and did not engage in any "improper and egregious" comments, as alleged by the petitioner. 16T10-1 to 7; 16T35-6 to 19; 16T37-4 to 7. Therefore, counsel's failure to object to these statements during the State's

summation was not a "deficiency" under the Strickland test, and petitioner fails to make a prima facie claim of ineffective assistance of counsel under Strickland.

Fifth, petitioner claims that trial counsel failed to take an interest in the case and failed to conduct an adequate investigation prior to trial, which resulted in unconstitutional, ineffective assistance of counsel. Petitioner lists trial counsel's decision to present a "consent" defense, as well as counsel's failure to make adequate pre-trial investigation as evidence of deficient performance. However, these allegations are unfounded. The decision to present a consent defense is a trial tactic, and is not prima facie evidence of inefficient assistance of counsel. Therefore, trial counsel's trial strategy does not show "deficiency" under the Strickland test, and no evidentiary hearing is warranted.

Sixth, petitioner alleges that trial counsel failed to adequately advise him of his right to testify, and therefore ineffectively assisted him at trial. Petitioner contends that the trial counsel "advised him that he should not testify because the jury would never believe him and he will only further incriminate himself...[and] petitioner does not recall counsel ever informing him of his right to testify." Carey Cert. at ¶3-5. However, in a colloquy on the record, trial counsel asks the Court for the opportunity to confer with petitioner about his right to testify, and then represents to the court that petitioner elected not to take the stand. 15T76-16 to 21. Further, defendant's decision not to testify is a strategic trial tactic, and and is not evidence of inefficient assistance of counsel. Therefore, the strategic decision made by counsel and petitioner for the petitioner not to testify is not a "deficiency" under the Strickland test, and petitioner fails to make a prima facie claim of ineffective assistance of counsel under Strickland.

Based on the foregoing, this Court finds that the evidence is insufficient to determine that defendant's attorney was deficient in making the abovementioned decisions during the course of the trial. Therefore, this Court determines that defendant has not met his burden of proving a prima facie case of ineffective assistance of counsel.

CONCLUSION

Based on the foregoing, this Court denies defendant's petition for post-conviction relief for ineffective assistance of counsel with regards to Indictment Number 05-10-1905-I.

Date: February 7, 2014

Hon. Edward A. Jerejian, J.S.C.

EXHIBIT J

A-2988-13T4

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2988-13T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARRY LORENZO CAREY, a/k/a LORENZO CAREY, a/k/a MALIK CAREY,

Defendant-Appellant.

Submitted September 22, 2015 – Decided October 1, 2015

Before Judges Fisher and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 05-10-1905.

Lora B. Glick, attorney for appellant.

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Defendant was convicted of kidnapping, the aggravated sexual assault of one victim and his attempts to lure two other victims into a motor vehicle with the purpose of committing a crime against them. All of the victims were clients of Friendship House, a non-profit vocational rehabilitation agency in Hackensack that serves clients who are developmentally, emotionally or physically disabled. In his direct appeal, he raised the following issues:

> POINT I
>
> THE DEFENDANT WAS DEPRIVED OF DUE PROCESS BY THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS ON THE BASIS OF RACE IN VIOLATION OF STATE V. GILMORE, 103 N.J. 508, 511, A.2d 1150 (1986).
>
> POINT II
>
> THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE THE PROSECUTION IMPROPERLY CONDUCTED AN INVESTIGATION OF A POTENTIAL [JUROR].
>
> POINT III
>
> THE TRIAL COURT ERRED IN NOT SEVERING THE OFFENSES FOR TRIAL.
>
> POINT IV
>
> THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS WHICH IMPERMISSIBLY BOLSTERED THE TESTIMONY OF COMPLAINING WITNESS (PARTIALLY RAISED BELOW).
>
> POINT V
>
> THE TRIAL COURT ERRED BY PERMITTING THE JURY TO CONSIDER EVIDENCE THAT DEFENDANT HAD AN

ALIAS THEREBY PREJUDICING DEFENDANT'S RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

POINT VI

PROSECUTORIAL CONDUCT DURING CLOSING ARGUMENT DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL (NOT RAISED BELOW).

POINT VII

THE DEFENDANT'S CONVICTION MUST BE REVERSED DUE TO MISCONDUCT BY THE PROSECUTOR IN ORDERING WITNESSES NOT TO SPEAK WITH DEFENSE INVESTIGATORS.

POINT VIII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO PERMIT ITS EXPERT WITNESS TO CONDUCT A PSYCHIATRIC EXAMINATION ON THE "VICTIM."

POINT IX

CUMULATIVE ERRORS REQUIRE REVERSAL (NOT RAISED BELOW).

POINT X

THE TRIAL COURT IMPROPERLY FOUND AGGRAVATING FACTORS (NOT RAISED BELOW).

POINT XI

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO CONSECUTIVE TERMS OF IMPRISONMENT.

We affirmed his convictions and sentence in an unpublished opinion. State v. Carey, No. A-1783-06 (App. Div. Oct. 1, 2009), certif. denied, 205 N.J. 520 (2011). The facts

underlying his convictions are set forth in our opinion and need not be repeated here.

Defendant filed a timely PCR petition in 2011 that was dismissed without prejudice. He filed this petition in May 2013. The PCR judge denied the petition, finding it time-barred pursuant to Rule 3:22-12(a)(1) and inadequate to present a prima facie showing of ineffective assistance of counsel.

On appeal, defendant presents the following arguments:

> POINT I
>
> BECAUSE DEFENDANT PRESENTED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS PCR PETITION, THE COURT BELOW ERRED IN DENYING HIS REQUEST FOR AN EVIDENTIARY HEARING AND ITS RULING SHOULD BE REVERSED.
>
> A. DEFENDANT'S COUNSEL WAS INEFFECTIVE, IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, FOR FAILING TO OBJECT TO NUMEROUS HEARSAY STATEMENTS, AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.
>
> B. DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE COMPETENCY OF THE STATE'S PRINCIPAL WITNESS, M.C.S., AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.
>
> C. DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A RULE 104 HEARING ON THE ISSUE OF WHETHER THE PROSECUTOR'S OFFICE UNDULY INFLUENCED WITNESSES TO

DECLINE TO SPEAK WITH DEFENSE INVESTIGATORS, AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.

D. DEFENDANT'S COUNSEL WAS INEFFECTIVE, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL, FOR FAILING TO CONDUCT AN ADEQUATE INVESTIGATION PRIOR TO TRIAL, AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.

E. DEFENDANT'S COUNSEL'S FAILURE TO OBJECT TO NUMEROUS IMPROPER COMMENTS MADE BY THE ASSISTANT PROSECUTOR DURING SUMMATION VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL, AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.

F. DEFENDANT'S COUNSEL'S FAILURE TO ADEQUATELY ADVISE HIM OF HIS RIGHT TO TESTIFY VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL, AND THE PCR COURT ABUSED ITS DISCRETION IN HOLDING OTHERWISE.

After reviewing these arguments in light of the record, including our decision in the direct appeal, and applicable legal principles, we conclude that none have any merit.

In defendant's direct appeal, we addressed arguments that were either the same or overlapped with arguments raised now. By way of example, Subpoint B faults trial counsel for failing to challenge the competency of the principal victim-witness. Point VIII of defendant's direct appeal alleged error in the

denial of defense counsel's motion to permit a psychiatric examination of the victim by the defense expert. In rejecting this argument, we noted defendant was provided with discovery regarding the victim's mental condition, and, further, that his expert was permitted to review the discovery, observe the victim in court, prepare a report and testify. The victim was vigorously cross-examined and the State's expert conceded she was subject to delusions. The defense expert was permitted to testify that victim was capable of misinterpreting the events that occurred involving defendant. We concluded, "[t]he legitimate interests of defendant in pursuing discovery regarding the victims' mental condition, cross-examining the State's expert and presenting his own expert testimony were, therefore, all met and the court did not err in denying the motion."

Similarly, the argument made now regarding alleged prosecution interference with witnesses (Subpoint C) was the subject of Point VII in his direct appeal. We discussed this issue at length. Prior to jury selection, the prosecutor and defense counsel presented conflicting facts to the trial judge. The prosecutor stated that, after the defense investigator contacted a victim, M.C.S., she contacted her counselor and said she did not want to speak to him. The prosecutor asked the

court to instruct the defense to refrain from contacting her further. Defense counsel stated the witnesses told her investigator that the prosecutor had issued a blanket order that they not speak to the defense investigator, a charge adamantly denied by the prosecutor. On the following day, defense counsel brought the investigator to court to report what the witnesses had said. The trial judge declined to hold a hearing at that time and, instead, directed the prosecutor to contact the witnesses and advise them that they were allowed to speak to the investigators. Defense counsel reluctantly agreed to follow this procedure before holding a hearing. However, witnesses continued to decline to speak to the investigators. The trial judge issued repeated directives to the prosecutor to follow up with appropriate instructions to the witnesses. One of the witnesses clarified that it was the clinical director of Friendship House, not the prosecutor, who told him not to speak to a defense representative. The trial court concluded the prosecutor had complied with its directives. Although we stated that a brief hearing would have been preferable to the procedure followed, we concluded the record did not support a conclusion that the State influenced witnesses to refrain from speaking to the defense.

We also addressed and rejected arguments made on direct appeal regarding hearsay evidence and the prosecutor's comments during summation. Therefore, each of the arguments raised in Subpoints A, B, C and E are procedurally barred pursuant to Rules 3:22-4(a) and -5.

We review the remaining arguments to determine whether defendant has presented a prima facie case of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); State v. Fritz, 105 N.J. 42, 52 (1987). Defendant has failed to meet this test.

In Subpoint D, defendant argues his counsel was ineffective for failing to conduct an adequate investigation and take an interest in the case. Defendant concedes that counsel "properly

presented a consent defense, arguing that the sexual relations [he] had with M.C.S. [were] consensual." Nonetheless, he contends that counsel was ineffective for failing to consult with him and investigate witnesses to present a "meaningful" defense. The support for this contention essentially lies in the dissatisfaction of defendant's mother with counsel's efforts. This is insufficient to make a prima facie showing that counsel's performance was constitutionally deficient to meet the first prong of the Strickland/Fritz test.

In Subpoint F, defendant argues his counsel was ineffective because she advised him "at the very last minute" against testifying at trial, stating, "no one would ever believe [him]," and that he would only incriminate himself. This characterization is belied by the record. After the State rested, the trial judge addressed defendant and advised him of his options regarding whether he should testify, including the option of surrendering his right to remain silent and testify, thereby subjecting himself to cross-examination by the prosecutor. The judge advised defendant he could consider the matter overnight. When the judge subsequently raised the issue, counsel stated that they "had a chance to confer . . . on an issue that we've been discussing since the case began and although he first chose to testify, [defendant] has now elected

to not take the stand in this case." The judge than addressed defendant directly and asked whether everything counsel said was correct. Defendant answered, "yes."

We note further the decision as to whether a defendant should testify is fundamentally strategic, bringing to bear the attorney's professional judgment and evaluation of the benefits and disadvantages of the defendant's testimony within the context of the trial. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. However, even if counsel's advice was mistaken, "[a]s a general rule, strategic miscalculations . . . are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" State v. Castagna, 187 N.J. 293, 314-315 (2006) (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). We find no reason to second-guess counsel's advice to defendant here.

Affirmed.

EXHIBIT K

224 N.J. 247
130 A.3d 1248 (Table)

State
v.
Barry Lorenzo Carey (a/k/a Lorenzo Carey, Malik Carey)

NOS. C-609
076698

Supreme Court of New Jersey

February 17, 2016

Opinion

Disposition: Denied.