SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. **A-1687-17T2**

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Morris County.
VIRGINIA A. VERTETIS,	:	Indictment No. 14-08-0797-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Stephen J. Taylor,
	:	J.S.C., And A Jury

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

JAMES K. SMITH, JR.
Assistant Deputy
Public Defender
Attorney ID: 281571972
James.Smith@opd.nj.gov

Of Counsel and
On the Brief

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS CONT'D

PAGE NOS.

INDEX TO APPENDIX

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TABLE OF AUTHORITIES

PAGE NOS.

Cases

TABLE OF AUTHORITIES CONT'D

PAGE NOS.

Cases Cont'd

Statutes

Rules

Other Authorities

PROCEDURAL HISTORY

In Morris County Indictment No. 14-08-0797, filed on September 9, 2014, the defendant Virginia A. Vertetis, was charged in two counts as follows:

> Count One: Purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) & (2);
>
> Count Two: Possession of a handgun with intent to use it unlawfully against the person of another, contrary to N.J.S.A. 2C:39-4a. (Da 1 to 2))

The defendant entered a plea of not guilty to those charges on October 14, 2014.[1]

---

[1] The following code has been used to refer to the transcripts:
"1T" - December 7, 2015 – Motion
"2T" - June 6, 2016 – Motion
"3T" - July 25, 2016 – Motion
"4T" - September 12, 2016 – Motion
"5T" - October 25, 2016 – Motion
"6T" - November 29, 2016 – Motion
"7T" - December 13, 2016 – Motion
"8T" - January 19, 2017 – Pretrial conference
"9T" - February 21, 2017 – Excerpt of pretrial conference
"10T" - March 2, 2017 – Conference
"11T" - March 6, 2017 – Trial
"12T" - March 7, 2017 – Trial
"13T" - March 8, 2017 – Trial
"14T" - March 9, 2017 – Trial
"15T" - March 13, 2017 – Trial
"16T" - March 15, 2017 – Trial
"17T" - March 16, 2017 – Trial
"18T" - March 20, 2017 - Trial
"19T" - March 21, 2017 – Trial
"20T" - March 22, 2017 – Trial
"21T" - March 23, 2017 – Trial
"22T" - March 27, 2017 – Trial
"23T" - March 28, 2017 – Trial
"24T" - March 29, 2017 – Trial
"25T" - March 30, 2017 – Trial
"26T" - March 31, 2017 – Trial

In a lengthy written decision filed on January 11, 2017, the Hon. Stephen J. Taylor, J.S.C., ruled upon a number of pretrial motions filed by the parties. (Da 15 to 85) A written order was filed on January 24, 2017. (Da 86 to 88)

A jury trial was held before Judge Taylor, from March 6, 2017, until April 3, 2017. Defendant was found guilty on both counts. (Da 3 to 4)

A motion for a new trial was heard and denied by Judge Taylor on May 23, 2017. That same day, the judge sentenced defendant to 30 years in prison with a 30-year parole disqualifier, plus a five-year term of parole supervision on the murder charge. Count Two was merged. (Da 5 to 7) Defendant was awarded 1,176 days of jail credit. (Da 7)

A Notice of Appeal was filed with this Court on December 8, 2017. (Da 8 to 10) On December 28, 2017, this Court granted defendant's motion to appeal as within time. (Da 11) Then, on May 7, 2018, an Amended Notice of Appeal was filed reflecting the correct spelling of defendant's surname. (Da 12 to 14)

Ms. Vertetis is currently incarcerated at the Edna Mahan Correctional Facility.

"27T" - April 3, 2017 – Trial
"28T" - May 23, 2017 – Sentencing

STATEMENT OF FACTS

Virginia Vertetis was a 51-year-old elementary school teacher who was convicted of the shooting death of Patrick Gilhuley, her sometimes boyfriend. The shooting occurred at Virginia's house in Mount Olive on March 3, 2014. At the time, Patrick was very drunk, with a blood alcohol content of .28. The defense argued that Virginia shot Patrick in self-defense after he physically assaulted and threated to kill her.

A. The Prior Relationship

Virginia met Patrick in March, 2008. (20T 201-2 t0 204-25) Patrick, a retired police officer who worked security at construction sites in New York City, was a large man, about 6'2" tall and 250 lbs. (15T 91-25) He "drank way too much" and when he drank, his personality would change. (13T 43-22; 20T 207-3 to 208-25) If he drank a lot, and something made him angry, he would get very angry. (20T 223-11) On a number of occasions, he physically assaulted Virginia. (21T 17-3 to 43-18) At one point in 2010, Virginia sent Patrick a message that she loved him and wanted them to be happy together, but "living on egg shells for your next psycho moment is exhausting and breaking down my hopes for having a normal relationship with you." (23T 25-10 to 26-20)

Patrick also dated "numerous women," which caused Virginia to be jealous. (18T 40-11 to 24; 17T 266-3 to 8; 18T 29-22 to 30-23)

Once, in January, 2013, she saw a message on Patrick's phone to a woman named Susan Jermyn. Patrick said that Jermyn was just a "psycho" ex-girlfriend, who wouldn't leave him alone. (20T 244-18 to 245-12) Virginia then sent Jermyn a message, "This is Patrick's girlfriend. Leave him alone or I will hunt you down." ((20T 236-19 to 237-5; 20T 244-18 to 246-5) Patrick, who was lying next to Virginia when she sent the message, "just laughed" about it. (20T 245-19 to 246-13)

On at least four or five occasions, Virginia and Patrick would break up, but then get back together. (17T 223-14 to 21; 18T 46-9 to 23; 21T 138-9) Their off-and-on relationship continued for five or six years, right up until this incident. (13T 33-16 to 34-3; 17T 220-12 to 16; 18T 39-7) Indeed, Patrick lived with Virginia at her house for over a year, from 2010 until 2012. (13T 37-1to 8; 20T 214-20; 20T 225-11 to 15)

During the period from late 2013 through early 2014, Virginia was admittedly depressed because of other issues in her life. (18T 143-14; 20T 195-4 to 14) Because of medical problems, she had to take a leave of absence from her teaching job, and on February 28, 2014, she learned that she would not be allowed to return to teaching on a part-time basis, as she had requested. (18T 125-21 to 126-17; 20T 199-16 to 200-8; 21T 54-12 to 56-5) That same day, she learned that she would have to pay increased child support for her son, who had left her house and moved in with his father. (18T

146-17 to 147-2; 18T 166-16 to 167-21; 20T 130-24 to 131-4; 20T 188-15 to 189-8)

At some point about 2012, Virginia learned that Patrick had failed to pay taxes on a business that he owned. (21T 46-15 to 48-4) He was concerned that the IRS might find out about this, and that he would be subject to financial penalties or even jail time. (21T 48-3; 18T 102-1 to 108-8) Virginia considered reporting him to the IRS, and even downloaded an IRS form used to report delinquent taxpayers. (21T 48-12 to 49-22; 21T 157-4 to 17) On that form, she answered "Yes" to the question of, "Do you consider the taxpayer dangerous?" (21T 50-12 to 23) That form, S-369, indicated that Patrick owed $800,00 in back taxes. (23T 19-17 to 20-22; 25T 49-22 to 50-17) She had filled out the form, but had not decided whether to send it to the IRS. (21T 51-1; 21T 160-24; 23T 20-6 to 10) That form was lying on the desk in her office next to the kitchen on the night of the incident. (21T 50-24; 22T 144-1)

In early January, 2014, Virginia and Patrick went to Las Vegas together. (20T 259-11 to 260-14) But after their return, Virginia learned that Patrick had been dating a woman named Colleen Roper. (20T 260-20 to 262-20) Using a different voice, Virginia left a message on Roper's phone, "Patrick has a girlfriend and he took her to Vegas." (19T 7-2 to 21; 19T 24-22 to 25-19) But still, Virginia stayed at Patrick's house on Super Bowl weekend, February

1-2, 2014, and did not leave until the morning of February 4, 2014. (20T 38-7 to 11; 20T 264-10 to 25)

That day, February 4th, Virginia sent Roper a "friend request" on Facebook, which triggered a series of text messages between the two women. (19T 8-11 to 10-21) Roper said, "Please stop leaving messages on my phone," and "The only thing we have in common, unfortunately, is Patrick." (19T 11-11 to 12-11) Virginia replied, "You don't think sleeping with my boyfriend of six years is not doing anything to me," to which Roper responded, "No not if it is over." (19T 10-15 to 12-18) As the exchange continued, Virginia stated, "We just slept together this morning." (19T 12-19)

Roper was angry that she had been contacted by another woman, and she had "numerous conversations" with Patrick about him not being honest with her. (19T 36-17 to 37-6) When Patrick learned that Virginia had contacted Roper, he was "livid and angry, to say the least." (20T 274-6) That same day, February 4th, he sent Virginia a series of messages stating that their relationship was over. (20T 59-19 to 67-3)

In February, 2014, Patrick told his daughter Jennifer that his relationship with Virginia was "not good." (13T 15-15 to 22) He said that he and Virginia were breaking up, but she was not handling it well. (13T 16-19 to 17-19) She was calling him and texting him a lot, and asking to see him more often. (13T 17-20 to 23) In conversations with Jennifer and others, Patrick also

expressed concern that Virginia was threatening to report him to the IRS about his tax delinquency. (13T 18-22 to 19-9; 13T 38-10 to 39-14; 18T 102-16; 19T 89-2 to 90-2)

Nevertheless, the relationship continued to go back and forth. On January 23, 2014, Virginia sent Patrick a letter in which she referred to "the worse times and crap" because of "the drinking and the emotional and physical abuse." (23T 21-16 to 23-13) But then, on February 10, 2014, there was a whole series of text messages between the two, including one from Virginia that was sexually explicit. (20T 79-6 to 81-8) Virginia did not have any contact with Collen Roper after February 4th, but on February 11th, Roper sent Patrick a text message telling him to have his ex stop contacting her, or she would have Virginia "beaten up in front of her school class." (19T 34-21 to 35-24) Patrick then left Virginia a drunken voicemail in which he was screaming, calling her a "psycho, psycho woman," and stating that he had called her mother "12 times today." (20T 84-23 to 85-6; 21T 7-18 to 8-2)

On February 19, 2014, Virginia went to Patrick's apartment in Staten Island to retrieve a pair of glasses which she had left there. (19T 192-9 to 24; 20T 42-24 to 44-20; 21T 13-2 to 14-15; 22T 121-8 to 122-5) Patrick was at work, and she did not have a key to his apartment, so he left her glasses between the door and the screen door. (21T 13-7 to 20; 21T 187-21 to 188-22) That night she sent Patrick a sexually explicit message. (20T 105-10 to 22;

21T 183-6 to 19) Two days later, on February 21st, she sent Patrick a naked photo of herself. (20T 108-20 to 111-9) But during that period, Virginia also went on computer dating sites, and even dated two other men. (21T 204-1 to 21)

Telephone records indicated that from February 21st to March 2nd, there were numerous communications back and forth. (20T 111-7 to 134-2) During that time, Patrick called Virginia 22 times (22T 141-9 to 142-25), and some of those calls were quite lengthy. On February 23rd, he called, and they spoke for 11 minutes and 14 seconds. (20T 119-5) Then, on February 25th, he called again and they spoke for 30 minutes, eight seconds. (20T 124-7) Patrick was supposed to come to Virginia's house on the weekend of March 1-2, 2014, to get things that he had left there, but on each day, he cancelled. (18T 174-3 to 175-7; 21T 59-12 to 25) When Virginia spoke to him on Sunday, March 2nd, he said that there was a "small chance" that he would come to her house the next day, "but he didn't think he would probably be able to." (21T 92-17 to 25)

B. The Events Of March 3-4, 2014

At the trial, the prosecution presented testimony from John Luongo that at lunchtime on the day of the incident, March 3, 2014, Patrick was sitting with several of his co-workers, while text messages from Virginia were coming into his phone. (17T 212-18 to 213-22; 17T 236-6 to 237-16) Luongo agreed that, at the time,

"[e]verybody was joking, laughing [and] kidding around …." (17T 236-16) At some point, Patrick shook his head, laughed, and said, "you know, she is going to kill me some day." (17T 212-23; 17T 214-3 to 7) Although Luongo did not see the texts, he thought that Patrick was referring to Virginia, and responded, "End it. Don't see this girl anymore." (17T 214-1; 17T 237-7 to 15) However, that testimony could not have been correct because the prosecutor stipulated that Patrick's phone records indicated that he had not received any communications from Virginia until about six o'clock that evening. (17T 239-5 to 241-6) Instead, Colleen Roper testified that she had been sending Patrick sexually explicit messages at lunchtime that day. (19T 39-5 to 16) Nevertheless, on cross-examination, Luongo said that over the course of the relationship, "[i]f [Patrick] told me once, he told me a hundred times that she is going to kill me someday," but that he would laugh about it. (17T 233-14 to 235-7)

At work on March 3rd, Patrick told another co-worker, John Denora, that he was going to go to Virginia's house and end the relationship because things were "getting crazy." (18T 31-11 to 32-21) Then, at 5:22 p.m., Patrick called a friend, Ray Stein, and said that he was driving to Virginia's house to break up with her. (17T 259-21 to 261-19) According to Stein, Patrick said that he wanted to move on from the relationship because "[t]here was something about her that was not right." (17T 261-20) In a phone

call to his brother Paul, Patrick said that he had told Colleen Roper that he was going to Virginia's house to retrieve his gun, but that was only an excuse for going there. (18T 96-24 to 97-8)

The first communication between Virginia and Patrick on March 3, 2014, came at 5:56 p.m. when she sent him a text stating, "Patrick. Guessing you are too tired to head out tonight since it is almost six and I haven't heard from you." (14T 36-7 to 37-14; 20T 134-2 to 7) Patrick responded, "Call me." (14T 37-15; 14T 44-11) At 6:01, Virginia replied, "N shower, call in ten." (14T 37-19; 14T 44-14) According to telephone records, Patrick's cell phone arrived in the Flanders – Mount Olive area at 6:19 p.m. (19T 189-2)

During the next few hours, both Patrick and Virginia made a number of phone calls to other people. (22T 24-14 to 25-1) Colleen Roper received a voicemail from Patrick at 6:27 p.m. in which he "sounded tired and a little woozy." (19T 40-16 to 20) He said that if he did not answer his phone it was because he had gone to bed; Colleen assumed that he was at his home in Staten Island. (19T 40-18 to 41-5) At 8:08 p.m., Patrick had a five-minute phone call with Colleen Roper. (19T 20-13 to 23) He sounded exhausted, so she assumed that he was at home. (19T 22-1 to 7) Meanwhile, at 7:38 p.m., Virginia sent her mother a text message stating that she was too upset to talk to her. (22T 23-14 to 24-2) Beginning at 7:56 p.m., there was a series of short telephone calls back and

forth between Patrick and Virginia. (20T 135-14 to 24) The last call in that series, from Patrick, lasted one minute and 42 seconds. (20T 135-22)

At 9:28 p.m., Patrick called Virginia's mother, Cranie Koellhoffer, who lived in Florida, and said, "You need to talk to your daughter. Uhmm, I need to go home." (18T 131-14 to 132-7) Patrick sounded "gruff" and seemed to be intoxicated. (18T 132-17 to 23) He did not explain how Virginia could possibly prevent a 6'2", 250 lb. man from leaving her house. During the call, Ms. Koellhoffer could hear her daughter crying in the background. (18T 132-8) She asked Patrick to give Virginia the phone, but instead, he hung up. (18T 133-4 to 11) Virginia testified that she was not even aware that Patrick had called her mother. (21T 256-3 to 9)

At 9:38 p.m. that evening, Patrick sent separate voicemails to John Luongo and John Denora, but neither man picked up his phone and the voicemails were too garbled to be understood. (17T 214-17 to 216-14; 18T 33-8 to 37-5; 18T 57-22 to 58-21) Also at 9:38 p.m., Jennifer Gilhuley received a 22-second phone call from her father, who was screaming, "She is hitting me. She is hitting me. Stop. Stop." (13T 19-10 to 22-11; 13T 23-9 to 16; 13T 42-23 to 43-21) At 9:40, she received a 44-second call in which she heard yelling, including a woman's voice, but could not hear words. (13T 22-12; 13T 24-17 to 25-16; 13T 54-13 to 55-18) At 9:42 p.m., she received a third call from her father, who seemed to be out of

breath. (13T 25-17 to 26-2) He said that he was in New Jersey, but when Jennifer asked what he was doing there, she heard three loud shots. (13T 26-5 to 9) He said, "Holy shit. She is shooting," and then the phone cut off. (13T 86-10) She tried to call her father back, but could not get through. (13T 29-7 to 12) Because Jennifer did not know where Virginia lived in New Jersey, she had to call her uncle to get the address. (13T 27-6 to 28-2) She then called 9-1-1 in New York, which transferred the information to New Jersey. (13T 28-3 to 20)

Based on the 9-1-1 call, several Mount Olive police officers were dispatched to Virginia's house at 9:59 p.m.. (11T 85-23 to 87-1; 12T 69-19 to 70-5) Det. Eric Krouse testified that as he approached the house, he could see movement in an upstairs window, but could not tell if it was a man or a woman. (12T 10-9 to 17) Seconds later, a woman was seen walking past the dining room window with a cell phone in her hand. (11T 95-14; 12T 75-9 to 76-6) As the officers entered the house through the front door, they had to push aside Patrick's body, which was lying in the front foyer, just inside the door. (11T 96-12 to 97-16; 12T 17-2 to 28-1)

Det. Krouse proceeded down a hallway until he saw Virginia kneeling in the kitchen, "almost like a fetal position," clad only in her pajamas. (11T 100-23 to 101-6; 12T 18-6 to 19-7; 11T 104-8 to 12) At the time, she was holding a phone and speaking with 9-1-1. (12T 19-13; 21T 106-18 to 25) The officers yelled out, "show

up your hands," but she was crying and "unresponsive." (11T 100-17 to 102-4; 12T 35-20 to 36-9) The officers then grabbed her, took her to ground, and put her in handcuffs. (11T 102-4 to 103-23; 12T 19-11 to 21-11)

In her 9-1-1 call, Virginia said, "Somebody was breaking into my (inaudible) * * * I didn't know he was coming into my house. I was in bed. You can (inaudible)." (12T 23-6 to 25-12) Then, as she was being handcuffed, she asked one of the officers, "Why are you doing this to me? I live here alone. I was upstairs in bed." (11T 105-5) As she later admitted, those statements were untrue. (21T 107-2)

After a period of time, Virginia was taken to a police car for transport to the police station. (12T 169-20 to 170-10) When asked if she had "anything on her," she responded, "these are the pajamas I was sleeping in." (12T 188-14 to 189-21) As the officer "escorted" her to the car and drove her to the station, she said, "Patrick, … I love you so much. * * * Please let him live," and "I can't help but knowing for sure if he is okay." (12T 170-6 to 10; 12T 174-7 to 178-17)

As noted, Patrick Gilhuley's body was found lying in the foyer of the house at the bottom of the staircase leading to the second floor. (14T 8-24) A baseball cap with blood spatter was found in the foyer near the body. (14T 27-4) A suitcase was against the wall near the body. (14T 9-3; 13T 168-23) Next to the suitcase

was a set of keys and the casing for a broken key fob for a car. (14T 9-10) Another part of the key fob was found between the foyer and the living room. (14T 9-20; 12T 153-4) There was a lot of broken glass in the foyer right inside the front door. (12T 151-18 to 152-8; 14T 59-14 to 19; 15T 35-5)

When the police first arrived, they noticed that the washing machine in the laundry room near the kitchen was running. (12T 26-19; 12T 87-2) A pair of pink pajama pants were later found inside. (14T 8-5; 14T 22-7) Upstairs in the master bedroom, the police found what appeared to be sex toys on the nightstand. (14T 10-14) On the floor of the bedroom, there was a small circuit board, which may have been part of the broken key fob. (14T 10-19; 14T 135-3 to 8) The shower attached to the master bedroom appeared to be wet. (14T 10-25)

The gun used in the shooting was found on the third step of the stairs going to the second floor. (14T 9-14) It was a Smith & Wesson .38 caliber six-shot revolver with a wooden handle. (11T 99-2; 15T 236-22 to 237-6) There were six empty shell casings in the gun, suggesting that it had been fired six times. (14T 122-11 to 123-7; 15T 251-3 to 15)

Outside the front door, the police recovered a black briefcase belonging to Patrick which contained two loaded semi-automatic handguns. (14T 28-17 to 29-18; 14T 166-6 to 171-22; 15T 231-15 to 235-23) No other guns, ammunition, or gun boxes were found in the

house at that time.[2] (14T 40-7 to 12) The briefcase also contained "a sheet of Viagra" and personal hygiene items such as a toothbrush, suggesting that Patrick may have planned to stay over that night. (14T 97-1 to 7; 14T 191-2 to 13) About a month after the shooting, Patrick's family went to Virginia's house in Mount Olive and recovered ten or 15 boxes of his possessions. (19T 53-10 to 54-18)

The crime scene investigators found three spent bullets inside the house. (15T 13-12 to 22) One spent projectile was found on the living room floor next to a love seat. (15T 11-18 to 12-11; 15T 13-23) A second projectile was found in the wall of the foyer on the left side as one faced the front door from the stairwell. (15T 14-4; 4T 128-4 to 14) A third projectile was recovered upstairs at the entrance to the master bathroom. (14T 11-4; 14T 129-15 to 130-14; 14T 67-10 to 68-14) A fourth bullet was found in the body bag used to take Patrick to the autopsy. (15T 138-14 to 139-5) And two bullet fragments were removed from Patrick's right arm during the autopsy. (15T 104-24 to 105-15; 15T 138-5 to 15) There was also a bullet hole from possibly a sixth bullet which went through the front door and to the outside. (15T 26-9 to 18; 17T 124-5 to 24) That bullet was never recovered. (17T 122-20 to 123-7)

---

[2] A shotgun belonging to Patrick was later found in defendant's attic. (19T 61-1; 21T 261-14 to 262-8)

At the police station, Virginia was initially placed in the processing area, but at 12:48 a.m., she was moved into an interrogation room. (13T 97-12) She remained locked in that room for the next 13 hours. (13T 98-11) The room has a surveillance video with audio which allowed all the officers in the police station to watch her on their computers. (12T 94-3 to 18; 13T 99-11 to 23) During that 13-hour period, Virginia repeatedly said that she was cold, so eventually a space heater was brought into the room. (13T 102-5; 12T 106-21 to 107-2; 12T 141-10 to 14) She also complained of back pain, and was seen stretching her back. (13T 161-4; 23T 29-15 to 24; 12T 150-1 to 10) Despite her requests, she was never given her medications. (12T 141-15 to 24; 13T 120-11 to 22; 13T 137-24 to 138-3)

At the trial, the prosecutor played eleven video clips of Virginia while she sat alone in the interview room. (13T 105-17 to 119-8) In those clips, she made a number of brief statements, none of which were inculpatory. Among them were the following: "Please don't let him be dead." (13T 106-19) "Can't someone tell me if Patrick is okay?" (13T 112-18) "I just want to die. That gun was meant for me." (13T 118-12) Later, during the defense case, another statement was played: "You wouldn't had to beat me like that. Why did you – why did you have to so beat me like that?" (23T 38-2)

While in the interview room, Virginia asked that photographs be taken of her arms. (12T 105-24 to 106-8; 13T 113-16) At about 4:30 a.m., she was taken from the interview room to a small room in the processing area where two female officers collected her clothing and jewelry. (13T 185-2 to 186-8) After her clothes had been removed, those officers took photographs of her body. (13T 186-12 to 18; 13T 191-23 to 194-17) One photograph depicted a "long scratch" on Virginia's left cheek. (13T 197-18; 13T 215-24) Other photos showed small scratches on her left hand, her right hand, her right arm, and her back, just below the left shoulder blade. (13T 198-10 to 199-21; 13T 201-17 to 202-9) There was also a bruise on the back of her left lower leg (13T 203-21 to 204-2; 13T 215-7), and a "slight discoloration" under her chin. (13T 216-1 to 8)

A few days after her arrest, Virginia was visited at the jail by Dolores Mann, an attorney, who observed injuries on her body. (23T 97-5 to 15) Ms. Mann then contacted an investigator, and asked him to go to the jail and take photographs of Virginia's injuries. (23T 97-15 to 21) However, because the jail had restrictions on allowing cameras inside, Ms. Mann and the investigator were not able to get inside and photograph Virginia's injuries until March 11, 2014, a full week after her arrest. (23T 97-22 to 98-13) By then, some of the injuries had faded and were not as pronounced as when Mann first saw them. (23T 98-14 to 19)

Nevertheless, the photographs were admitted into evidence at the trial. (23T 102-4 to 103-3)

C. The Defendant's Testimony

As the only witness to the shooting, Virginia Vertetis testified on her own behalf. In her testimony, Virginia documented eleven separate incidents in which Patrick physically assaulted her, often after he had had been drinking. A few of those incidents are as follows. In the summer of 2009, while they were in Las Vegas, Patrick saw Virginia speaking to two men by the swimming pool. Once back in their room, Patrick said that the men only "wanted to fuck" her, pushed her down on the bed, and "shredded" her bathing suit cover with his bare hands. (21T 17-13 to 20-14) On another occasion after learning that a carpenter had done work at Virginia's house, Patrick, who was "moderately drunk," shoved her against a wall, causing her to fall down the stairs. (21T 21-6 to 22-21) In still another incident, after Patrick saw another man showing Virginia his new car, he broke through her locked bedroom door, yelled obscenities at her, and threw her to the floor. (21T 27-1 to 29-11) Once, after Virginia had kissed a male friend on the cheek, Patrick threw a phone at her, hitting her on the face, then picked up the phone and threw it her again. (21T 29-25 to 32-22) After an argument in the spring of 2012, Patrick

pushed her against a wall and then down to the floor, took a pillow and was suffocating her. (21T 38-11 to 40-1)

Virginia testified that she never reported any of these incidents to the police because Patrick, a former police officer, said that the police would never believe her. (21T 22-24 to 23-5; 21T 29-12 to 21; 21T 32-23 to 33-3) He also said that in the past, he hit wife and got trouble with the police, but they helped cover for him and he got just "a slap on the wrist" for his actions. (21T 44-21 to 33-3)

As noted, Patrick arrived at Virginia's house after 6:00 p.m. on March 3, 2014. By the time that Virginia got out of the shower, dried her hair, and went downstairs, Patrick was already there. (21T 65-16 to 66-18) He had let himself in with his own key, and was on the phone, pacing back and forth between the kitchen and the computer room, and talking about a problem at his construction site. (21T 67-5 to 15; 21T 215-23 to 216-23) He had made himself a drink with vodka, Diet Pepsi, and lime in a 16-ounce glass. (21T 67-16 to 68-2) After giving him a kiss, Virginia grabbed a beer and went back upstairs to finish drying her hair. (21T 66-14 to 67-4) When she came back downstairs, she took a shot of vodka over ice, then joined Patrick, who was watching television in the living room. (21T 68-8 to 69-6) She unzipped his pants, opened his belt, and gave him oral sex, but he could not obtain an erection, which caused him to be frustrated. (21T 69-11 to 70-8)

DNA testing later corroborated that both Virginia and Patrick's DNA was on his penis. (16T 128-23 to 129-8)

Patrick complained that it was cold in the house, and kept his coat on. (21T 70-9 to 19; 21T 217-14 to 19) Although in her pajamas, Virginia put on a coat, grabbed her pocketbook, went to her car, and drove to the local 7-11 to get some firewood for her fireplace. (21T 70-20 to 71-7; 21T 219-20 to 222-3) When she left, Patrick was lying on the living room floor. (21T 70-22) When she returned home with two packages of firewood, Virginia saw that Patrick's car was gone, and that he had left her a number of phone messages. (21T 71-25 to 73-21) She started to write a text message telling Patrick to return, but he called her before she could send the text.[3] (21T 72-10 to 17; 232-15) In that call, Patrick was angry that she didn't tell him that she was going out, but she said that she had told him, he just didn't hear. (21T 230-21 to 231-22) Patrick then returned, but remained outside in his car for about ten minutes. (21T 74-1 to 16) When Patrick came back inside, he was still angry and slammed the storm door so hard that the glass broke and landed on the floor of the foyer. (21T 74-17 to 75-6; 21T 240-14 to 242-13)

[3] That partial text, which was admitted at the trial, reads, "Get back here right now. I just went to get FI …" (14T 37-22; 21T 72-12 to 17)

For a while, Virginia and Patrick sat by the fire in the living room. (21T 75-11 to 76-2) The only lights that were on in the house were the kitchen light and a 7-watt bulb in the master bedroom. (21T 86-14; 21T 258-11 to 259-2) There were no lights on in the foyer or the stairwell.[4] (21T 86-21 to 25; 21T 258-11)

Virginia was crying and talking about her problems. (21T 75-24 to 77-15) Patrick was kissing her on the neck, and didn't seem interested. (21T 77-6 to 13; 21T 244-12 to 24) He became frustrated that she was crying "all of the time," and commented that his daughter Jennifer thought that she was a "psycho." (21T 77-16 to 78-5) Virginia got aggravated, said, "How compassionate," and began to walk away. (21T 78-6 to 79-9; 21T 246-23 to 247-11) She also said, "You can't even pay your taxes." (21T 79-14)

Patrick, who was "pretty drunk" and "really pissed off," reacted by grabbing her arms, slamming her against the door, and choking her "pretty hard" to the point that she had trouble breathing. (21T 78-24 to 90-3; 21T 247-12 to 249-23) He yelled, "I'm going to fucking kill you, you fucking cunt." 21T 80-25 to 15) She dropped down to get his hand off her throat, but he picked her up by the forearms, and threw her towards the dining room, yelling, "I know you turned me in." (21T 81-22 to 82-6; 21T 250-1

[4] One of the first police officers to arrive at the house testified that the kitchen light was on, but there were no lights on in either the living room or the dining room. (11T 178-1 to 179-8)

to 16) He then picked up Virginia a second time, and threw her on the tile floor. (21T 82-7 to 14) She landed on her spine and felt a shooting pain down her legs. (21T 82-13) Patrick then picked her up once again, and threw her on the stairs. (21T 82-15 to 19; 21T 251-11)

Virginia testified that Patrick's "eyes looked maliciously vicious and pure evil. ... I never saw his eyes like that before." (21T 82-20 to 24) She was "scared to death" and believed that Patrick was going to kill her. (21T 82-25 to 83-5) She flipped herself over and tried to get away, but Patrick grabbed her foot. (21T 83-6 to 17) She was able to kick him away, then ran up the stairs and into the master bedroom. (21T 83-21 to 84-8; 21T 257-10 to 17)

After a few seconds, Virginia heard Patrick coming up the stairs. (21T 84-11; 21T 257-18 to 258-2; 21T 279-13) She did not attempt to "barricade" herself in the bedroom because the door lock was broken. (21T 269-19 to 270-7; 22T 35-10) Thinking that Patrick was coming to kill her, she reached under her mattress and grabbed Patrick's gun. (21T 84-15) He had left the gun at her house years earlier when he moved out, stating that she might need it for protection. (21T 84-19 to 85-1; 21T 260-20 to 24; 21T 267-5 to 21)

Although Virginia had never fired a gun before, she took the gun, went out into the hallway, reached around the corner by the

railing, and started shooting blindly down the stairwell. (21T 264-25; 21T 85-2 to 7; 21T 273-6 to 24; 21T 175-20; 22T 33-5 to 11) She believed that she had "pretty much" fired all her shots from around the corner. (21T 276-9 to 22; 21T 277-8 to 12; 22T 30-17 to 31-1) Patrick was on the stairs, but because the stairwell was dark, she could only see his silhouette. (21T 85-8 to 13; 21T 276-24; 21T 278-4) She estimated that he had reached the seventh step, or about half way up the staircase. (21T 278-7 to 281-10) As she was shooting, she could not tell if he was coming up the stairs or going down. (21T 279-1 to 9) After she had shot all six bullets in the gun, she dropped the gun down the stairs and sat down at the top of the staircase for four or five minutes, crying hysterically. (21T 85-14 to 86-5; 22T 38-24 to 39-6) When she went down the stairs and turned on the hall light, she saw Patrick lying on his side in the foyer. (21T 87-1 to 7)

Virginia testified that she did not see Patrick holding a cell phone, nor did she hear him speaking to anyone at the time of the shooting. (21T 255-20 to 256-9) As noted, Patrick's cell phone was later found in his right pocket. (14T 78-5 to 11; 15T 170-22 to 171-6)

After seeing Patrick lying there, Virginia tried to get a pulse, shook his body, and rolled him over on his back. (21T 87-4 to 25) She then went through her house looking for her cell phone so that she could call 9-1-1. (21T 88-1 to 16) Unable to find

that phone, she went to the master bedroom and picked up her land line phone. (21T 88-17 to 22) As confirmed by her telephone records, she tried three times to call her cell phone from the land line, but could not connect because the cell phone's battery was dead. (21T 89-12 to 17; 22T 51-8; 22T 57-1 to 24) She went to the kitchen and dialed 9-1-1 on her land line, but got a recording. (21T 89-18 to 90-5; 22T 54-6) Finally, she was able to make the connection with 9-1-1. (21T 90-9; 22T 54-8) She was in the kitchen on the phone with 9-1-1 when the police arrived. (21T 90-9; 12T 19-3)

D. The Forensic Evidence

The forensic evidence in this case generally supported Virginia's testimony. However, the experts differed in one crucial area - a defense expert testified that the first shots were fired as Patrick was coming up the stairs, while a prosecution expert testified that he was going down.

Clearly, Virginia was accurate in describing Patrick as "pretty drunk" because the toxicology report indicated that his blood alcohol level was .28 (15T 132-15), or over three times the legal limit for driving. He also had Viagra and caffeine in his system. (15T 132-8 to 133-17) As noted, there was a substantial amount of glass on the rug inside the front door, which supported Virginia's testimony that when he came back in the house, Patrick

slammed the storm door so hard that it broke the glass. DNA analysis of material found underneath Virginia's fingernails concluded that she was the major contributor, but that Patrick could not be excluded as the minor contributor (16T 137-17 to 138-10; 16T 157-11 to 158-20) Also, the absence of any gunshot residue on Patrick's jacket, or soot or stippling on his body, indicated that he was not in "close proximity" to the muzzle of the gun when it was fired. (15T 88-21 to 90-13; 15T 111-11 to 15; 15T 122-13; 16T 58-22 to 64-25; 17T 77-8 to 80-17) That supported Virginia's testimony that she had not been close to Patrick when the shots were fired.

At the trial, the prosecution presented Howard Ryan, a retired State Police investigator, as an expert in "crime scene and shooting reconstruction." (17T 15-19) He testified that what appeared to be gunshot residue was found on the corner of the upstairs hallway, some 43½ inches up from the floor. (17T 27-14 to 28-22 17T 33-1 to 35-16; 17T 43-16 to 44-4) There was gunshot residue on both sides of the corner. (15T 54-11 to 55-18; 17T 137-3 to 10) Subsequent testing indicated that the substance contained lead, which is commonly found in gunshot residue. (17T 29-23 to 30-10) Ryan testified that the pattern of the gun residue indicated that, when fired, "that weapon was very close to that wall or actually up against the wall." (17T 34-10 to 35-4) The presence of gunshot residue at that location confirmed Virginia's

testimony that she was at the corner by the iron railing, at least when the first shots were fired. The fact that the residue was on both sides of the corner suggests that defendant was hiding behind the corner, or at least not moving towards Patrick when she began firing.

Dr. Cyril Wecht, a pathologist, testified for the defense. He concluded that the first of the six shots fired did not hit Patrick and simply went into the ceiling above the staircase. (22T 213-13 to 19) DNA testing indicated that of the five bullets that were recovered, four contained Patrick's DNA. (16T 159-7 to 161-8) The only bullet that did not have Patrick's DNA on it was the one found in the master bedroom. (17T 115-22 to 116-14) Howard Ryan testified that that bullet, which went through the sloped ceiling above the stairs, went through a layer of drywall on the other side, went through the bathroom vanity, then came out in the master bathroom. (17T 36-10 to 39-6) Using flight path rods, he was able to say that the bullet travelled downward at a 22° angle. (17T 39-7 to 42-7) On a vertical plane, it went from the side of the hallway "almost right in front of" the residue mark towards the other side of the staircase at an 80° angle. (17T 42-8 to 43-15) All of that was consistent with defendant's testimony that she had fired the gun from the area of the handrail down the stairs.

Dr. Wecht testified that the second bullet fired was a graze wound in which the bullet had come from the front of the webbing of Patrick's right hand and traveled back past his thumb. (22T 185-1 to 187-24; 22T 213-20 to 25) He opined that at the time, Patrick had been reaching up towards Virginia with his right hand. (22T 213-5 to 14; 22T 217-6) He did not believe that Patrick had his cell phone in his hand when it was grazed by the bullet, but he conceded that was a possibility. (22T 218-7 to 14; 22T 275-12 to 276-11)

Dr. Ronald Suarez, the Medical Examiner testifying for the prosecution, had initially said that that the wound to Patrick's right hand was "an abrasion." (15T 114-20 to 115-6; 15T 126-25 to 127-5) However, after reading Dr. Wecht's report, he agreed that it "could be consistent with a graze wound" caused by a gunshot (15T 115-7 to 116-2; 15T 128-11; 15T 134-10 to 14) He further agreed that if it was a graze wound, it would be from the front of the hand to the back. (15T 153-1 to 11)

Dr. Suarez did not render an opinion on the sequence of shots (15T 99-22 to 100-2), but he basically agreed about the location and direction of the remaining wounds. Dr. Wecht opined that the third shot had gone through Patrick's coat collar and grazed his neck as he was turning away.[5] (22T 217-9; 22T 260-7 to 261-2) Dr.

[5] Dr. Wecht became somewhat confused about the sequence of wounds, apparently because the number of gun shots differed from the number

Suarez agreed that it was a graze wound to the back of the neck which did not penetrate the body; it went left to right and back to front directionally. (15T 113-1 to 114-6)

Both doctors agreed that what Dr. Wecht characterized as the fourth shot entered the back of Patrick's right arm, shattered his elbow, and exited through the front of the bicep. (22T 190-1 to 5; 15T 100-21 to 103-18) The bullet fragments were found at that wound. (15T 104-21 to 105-15) Dr. Suarez testified, and Dr. Wecht agreed, that that injury would have disabled Patrick's arm and prevented him from putting his cell phone in his pocket. (15T 103-19 to 104-20; 15T 174-11 to 175-5; 22T 257-6 to 14)

The doctors also agreed that what Dr. Wecht felt was the fifth shot went into the right side of Patrick's back, about five and a half inches below the shoulder, on a "somewhat downward" axis. (15T 108-15 to 109-12: 22T 185-5 to 15) That bullet went through his lung and some major blood vessels, and would have quickly led to death. (15T 109-19 to 111-10; 22T 215-8 to 216-23) The doctors further agreed that the remaining shot entered the right side of Patrick's back below the shoulder, but went through soft tissue by the scapula and armpit, and then exited the body without causing any significant damage. (15T 105-16 to 107-18; 22T 216-8 to 20)

---

of wounds. The transcript citations above reflect his corrected testimony. (22T 254-113 to 25)

Based upon his findings, Dr. Wecht testified that Patrick was reaching up towards Virginia when the first two shots were fired. (22T 213-3 to 25) After being hit by the graze wound, Patrick turned his body and was grazed by the bullet that went through his collar and across the back of his neck. (22T 217-1 to 17) Then as he retreated back down the stairs, he was hit in the shoulder, and twice in the back. (22T 217-18 to 218-5; 22T 215-11 to 216-25; 22T 280-24 to 281-3) Dr. Suarez testified that because people were moving, "it is impossible to tell what position the decedent was in at the time of the shooting." (15T 158-18 to 159-1; 15T 101-13 to 20)

Howard Ryan agreed that Patrick was "at least partially up the stairs" in the stairwell "for at least part or all of the shooting" when it began. (17T 131-2 to 132-8) However, he saw no evidence that Patrick was ascending the stairs. (17T 103-18 to 105-24) He further concluded that all of the shots must have been fired from "[n]ear the top" of the stairwell or "at the top." (17T 134-23 to 135-2) Thus, there was no testimony that Virginia was moving down the stairs towards Patrick as she was firing the gun.

Dr. Wecht also testified about Virginia's injuries, based upon photographs taken on both the night of the crime and seven days thereafter. (22T 192-23 to 193-13) All together, he testified that the photographs depicted 68 separate injuries on Virginia's body. (22T 229-19 to 230-6) Among them was a contusion or "dull

reddish purplish discoloration" under Virginia's left eye. (22T 193-14 to 194-20) There were contusion on both sides of her neck which were consistent with a hand to the neck. (22T 195-11 to 198-6) She also had reddish purple contusions on her left arm, and superficial contusions on her right arm, which were consistent with someone grabbing or holding her. (22T 200-5 to 201-22) In addition, there were "punctate abrasions" on her right arm and right foot, which were consistent with contact with shards of glass. (22T 203-12 to 205-2; 22T 210-23 to 211-10) Photos taken a week after the shooting also depicted areas of contusion on both legs. (22T 208-19 to 210-11) Dr. Wecht testified that those injuries were consistent with a "significant struggle" or "significant altercation" in which Virginia's neck was grabbed, and she was thrown to the floor in an area where there were particles of glass on the floor. (22T 218-15 to 219-2)

The prosecution did not present any expert testimony to contest Dr. Wecht's conclusions that defendant had numerous injuries on her body. In his summation, the prosecutor did not attempt to argue that the physical evidence at the stairway was inconsistent with defendant's version of the events. Rather, the prosecutor argued only that because Patrick was retreating down the stairs when hit by some of the shots, it was a "murder."

LEGAL ARGUMENT

POINT I

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE ERRONEOUS INSTRUCTION ON SELF-DEFENSE WHICH STATED THAT SHE HAD "AN OBLIGATION TO RETREAT" EVEN WHEN BEING ASSAULTED IN HER OWN HOME, AND THAT IF SHE DID NOT RETREAT, THE DEFENSE WAS "NOT AVAILABLE TO HER." (Not Raised Below)

From the very beginning of the pretrial proceedings, it was clear that the defense would be relying on a defense of self-defense. (1T 15-2 to 13) When the judge raised the issue of self-defense during the charge conference, the prosecutor said that he wanted the charge on deadly force, and the judge agreed it would be given. (24T 139-15 to 140-2) The judge then noted that there was a separate section, "justification use of force against an intruder," but the judge, the prosecutor, and defense counsel all agreed that that section was not relevant. (24T 140-3 to 8; 24T 214-4) The conference then moved on to other matters.

The instruction that the judge did give to the jurors on self-defense was taken from the Model Charge, "Justification - Self-Defense In Self Protection," (Revised June 13, 2011). The judge began with the introductory section explaining that "self defense is the right of a person to defend against any unlawful force," and moved on to the definition of deadly force. (26T 56-8 to 59-19) As the judge continued, he reached the portion of the charge which sets forth limitations on the use of deadly force:

Even if you find that the use of deadly force was reasonable, there are limitations on the use of deadly force.

If you find that the defendant, with the purpose of causing death or serious bodily harm to another person, provoked or incited the use of force against her in the same encounter, then the defense is not available to her. **If you find the defendant knew that she could avoid the necessity of using deadly force by retreating, provided that the defendant knew that she could do so with complete safety, then the defense is not available to her.**

In your inquiry as to whether a defendant who resorted to deadly force knew that **an opportunity to retreat with complete safety was available,** the total circumstances, including the attended [sic] excitement accompanying the situation, must be considered.

The State has a burden to prove to you beyond a reasonable doubt that the defense of self-defense is untrue. This defense only applies if all of the conditions or elements previously described exist. The defense must be rejected if the State disproves any of the conditions beyond a reasonable doubt.

The same theory applies to the issue of retreat. **Remember that the obligation of the defendant to retreat only arises if you find that the defendant resorts to the use of deadly force.** If the defendant does not resort to the use of deadly force, one who is unlawfully attacked may hold her position and not retreat whether the attack upon her is by deadly force or some lesser force.

The burden of proof is upon the State to prove beyond a reasonable doubt that the defendant knew she could have retreated with

> **complete safety.** If the State carries its burden, then you must disallow the defense. If the State does not satisfy this burden and you do have a reasonable doubt, then it must be resolved in favor of the defendant and you must allow the claim of self-defense and acquit the defendant.
>
> A valid claim of self-defense entitles defendant to exoneration on criminal liability on all charges related to her alleged aggressor including aggravated or [sic] manslaughter since a person who kills in the honest and reasonable belief that the protection of her own life requires the use of deadly force does not kill recklessly. (26T 59-19 to 61-15)[emphasis added]

In giving that instruction, the judge completely ignored footnote 4 of the Model Charge, which states that "[a]n exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, unless he or she was the initial aggressor." Although there was no objection to this clearly erroneous charge on self-defense, defendant submits that the error was "clearly capable of causing an unjust result," R. 2:10-2, and requires that her conviction be reversed.

Certainly, the possibility of retreat was an issue in the case. Virginia testified that when she heard Patrick coming up the stairs, she ran into her bedroom, but then came back out with the gun. On cross-examination, the prosecutor got her to agree that at "[n]o point did [she] try to barricade [herself] into [her] bedroom." (22T 35-10) At another point in her cross-examination,

the prosecutor asked Virginia if she had closed the door when she went into her bedroom to get the gun; she replied that she could not because the door was broken. (21T 269-11 to 270-2) She also said that there would be no point in closing the door, considering that Patrick had broken though it once before. (21T 270-3 to 7) There had been testimony that on a prior occasion, defendant had locked herself in the bedroom to get away from Patrick, but he hit the door so hard that he broke the lock, knocking off the strike plate and the screws. (21T 28-16 to 29-11; 21T 131-2 to 132-11) The door was never fixed. (21T 131-21 to 132-3)

In his cross-examination, the prosecutor showed Virginia three photographs, S-620 to S-622, which had been taken on April 17, 2015, about eleven months after the shooting. (21T 132-4 to 137-23 24T 29-18 to 36-24; 24T 89-4 to 91-2) One of those photos, S-622, was later placed in evidence. (21T 167-12 to 23) The prosecutor was apparently trying to show that the door could have been closed and locked. However, Virginia testified that she had put the screws back in place so that she could close the bedroom door when her children were at home. (21T 132-15 to 21; 24T 30-16 to 31-3; 24T 35-5 to 37-2)

The issue of retreat also came up at the conclusion of Howard Ryan's direct testimony when the prosecutor initiated the following exchange:

> **Q. "[B]ased on the evidence that you saw on scene and what you have reviewed afterwards, do you see any evidence that would suggest that the defendant was on the defensive when initiating and engaging in gunfire?**
>
> **A. I saw no evidence of that at all.** (17T 108-16 to 21)[emphasis added]

In his summation, defense counsel argued that Virginia ran into her bedroom, but "that is not a safe haven" because "you can't lock the door" since the strike plate was out. (25T 74-17 to 22) He displayed one of the photos which showed "sheetrock screws holding the strike plate." (25T 74-23 to 6) He then argued that the photo showed "why [Virginia] didn't feel safe in the room." He concluded that "even if she had a dead bolt on that door, [Patrick] is coming through after ... what had happened and what he knew." (25T 75-9 to 12) The prosecutor in summation referred to a photos of the door taken on March 3, 2014 and April, 2015, suggesting that defendant was lying when she said the door was broken on the night of the shooting. (25T 127-9 to 128-10)

The right of self-defense is set forth in N.J.S.A. 2C:3-4a, which provides that:

> Subject to the provisions of this section and of section 2C:3-9, the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

However, "[t]he use of deadly force is not justifiable ... unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm." N.J.S.A. 2C:3-4b(2). Nor may deadly force be used where "[t]he actor knows that he can avoid the necessity of using such force with complete safety by retreat ...." N.J.S.A. 2C:3-4b(2)(b). But still, there is an exception to the duty to retreat: "**The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor.**" N.J.S.A. 2C:3—4b(2)(b)(i). [emphasis added] It is that exception which should have been charged to the jury in this case.

In State v. Montalvo, 229 N.J. 300, 319 (2017), our Supreme Court stated that, "[t]he home is accorded special treatment within the justification of self-defense." "[A]lthough '[t]raditionally self-defense claims require that a person who can safely retreat from the confrontation avail themselves of that means of escape,' that requirement is suspended under the 'castle doctrine ... if the confrontation takes place in one's home or castle.'" Id. at 320, quoting State v. Gartland, 149 N.J. 456, 466 (1997). See State v. Lamb, 71 N.J. 545, 549-50 (1976)(defendant in her apartment had no duty to retreat from ex-husband who no longer lived with her); State v. Bonano, 59 N.J. 515, 521 (1971)(where defendant killed an assailant at his front door, and prosecutor argued in summation that defendant "possibly" could have "[g]one in the house and shut

the door," the judge erred in not giving a supplementary instruction on the subject of retreat).

In State v. Gartland, a wife was charged with the shotgun murder of her husband, who had repeatedly beaten her in the past. Although the husband and wife lived together, they had separate bedrooms. One night, after an argument, the wife went into her own bedroom. When the husband followed her into her room, the wife took a shotgun from the closet and told him to stop. When he threatened to kill her and lunged at her with closed fists, she fired the shotgun, killing him. 149 N.J. at 460-61.

On appeal, the issue was whether the wife had an obligation to retreat before using deadly force. Id. at 460. Under the version of N.J.S.A. 2C:3-4b(2)(b)(i) then in effect, a resident of a house still had an obligation to retreat when attacked in his or her own home by a cohabitant. Id. at 467. Although noting its "grave concerns" that the law failed to protect battered spouses, our Supreme Court held that the law still required the wife to retreat from her husband. Id. at 466-72.

Shortly thereafter, the Legislature responded by passing L. 1999, c. 73, § 1 (eff. April 30, 1999), which eliminated language in the statute mandating a duty to retreat even when attacked by a cohabitant. The law is now clear that Virginia, as the sole resident of the house, had no duty to retreat from Patrick unless

the State could prove beyond a reasonable doubt that she was the initial aggressor.

The issue, then, becomes whether the erroneous jury charge was "clearly capable of causing an unjust result." R. 2:10-2. In this case, the jury charge was not merely incomplete or confusing, it was diametrically wrong. Virginia Vertetis had no duty to retreat in her own home, and she did not have to be "on the defensive" when the first shots were fired; she had every right to stand her ground and protect herself.

Generally, "[e]rroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error in criminal prosecutions." State v. Jordan, 147 N.J. 409, 422 (1997). And demonstrably incorrect instructions on self-defense have been held to be plain error. See State v. Montalvo, supra, 229 N.J. at 321-24 (erroneous instruction that self-defense does not justify possession of a machete in one's own home unless the actor armed himself spontaneously to repel an immediate threat); State v. Gartland, 149 N.J. at 475-76 ("abstract charge" on the duty to retreat was plain error); State v. Gentry, 439 N.J. Super. 57, 67 (App. Div. 2015)("failure to instruct the jury that self-defense is a complete justification for manslaughter offenses as well as for murder constitutes plain error"); State v. Blanks, 313 N.J. Super. 55, 70 (App. Div. 1998)(where defendant in his own residence shot another man, "the

imposition of the duty to retreat was plain error in that it may have 'led the jury to a result it otherwise might not have reached'"); State v. Felton, 180 N.J. Super. 361, 363-65 (App. Div. 1981)(instruction that defendant, in her own apartment, had a duty to retreat from assailant, an invited guest, was plain error); cf. State v. O'Neill, 219 N.J. 598, 615-17 (2014) (defense counsel's acquiescence to erroneous jury instruction that self-defense did not apply to aggravated manslaughter was deficient performance which prejudiced the defendant).

In State v. Gartland, 149 N.J. at 468, our Supreme Court quoted with approval a law review article stating that "imposition of the duty to retreat on a battered wom[a]n who finds herself the target of a unilateral unprovoked attack in her own home is inherently unfair."[6] In this case, where the prosecutor suggested that defendant could have locked herself in her bedroom, and where a crime scene expert testified that there was no evidence that she was "on the defensive" when she fired the shots, there can be no question but that the erroneous instruction on self-defense denied her a fair trial, and requires that her conviction be reversed.

[6] Maryanne E. Kampmann, "The Legal Victimization Of Battered Women," 15 Women's Rights L. Rep. 101, 112-13 (1993).

POINT II

THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S FACTUALLY UNBALANCED JURY INSTRUCTION WHICH FAILED TO TIE THE FACTS OF THE CASE TO THE CHARGE ON SELF-DEFENSE, WHILE EXPOUNDING IN DETAIL THE STATE'S CONTENTIONS. (25T 172-13 to 17; 26T 75-22 to 76-24; 28T 21-21 to 30-5; 28T 32-6 to 38-9)

It is proper, and sometimes necessary, for trial judges in their jury charges to cite relevant facts in the case in order to adequately explain the law. State v. Olivo, 123 N.J. 550, 567 (1991). But as will be seen, in this case, the judge only cited those facts which supported the State's contentions, while failing to even mention the facts which supported the defense of self-defense. That, it is submitted, denied defendant a fair trial.

In his pretrial opinion, the judge allowed into evidence some, but not all, testimony about past instances in which Patrick had physically assaulted Virginia. (Da 42 to 47) In doing so, the judge promised that, "[a]n appropriate limiting instruction will be used to guide the jury's consideration of this evidence and counsel's arguments regarding the evidence." (Da 47) The judge later repeated that his charge would contain "404(b), defense use regarding the allegations of domestic violence." (24T 140-9)

During a charge conference, defense counsel objected to the judge's proposed charge on Rule 404(b) evidence, stating that it was "laying out the State's case." (24T 159-3 to 12) The judge agreed that some work needed to be done on that instruction, and

counsel said that perhaps she could "write something out." (24T 159-3 to 160-1) The next day, defense counsel set forth a "very strong objection" to certain language in the proposed charge, which she characterized as "reversible error." (25T 164-2 to 5) Specifically, counsel objected to language that listed each of the State's factual allegations of defendant's supposed acts after the shooting which the prosecution believed exhibited consciousness of guilt. (25T 164-8 to 165-18) The judge responded that he was required to give the jury "some direction" on "specific types of evidence" under Rule 404(b). (25T 165-19 to 166-11) Counsel further objected to inclusion of a reference to the Susan Jermyn incident in the charge on 404(b) evidence, and noted that prior to trial, the defense had objected to all of the prior bad act testimony. (25T 171-4 to 172-23) However, the judge held that the Roper and Jermyn incidents "ha[d] to be mentioned," so that the jury would not draw a negative inference that defendant is a bad person. (25T 172-13 to 17)

The charge which the judge did give was one-sided in its recitation of the trial facts. In discussing the State's 404(b) evidence, the judge specifically mentioned the phone calls to Colleen Roper; the attempt to communicate with Roper via Facebook; an allegation by Roper that defendant was harassing her; and the text message to Susan Jermyn to "'leave him alone or I will hunt you down.'" (26T 30-21 to 31-17) The judge stated that such

evidence cannot be used "to show that she has a disposition or a tendency to do wrong," but noted it was relevant to a disputed issue in this case, specifically, the state of mind of the defendant. (26T 32-5 to 9) The judge then added that, "**The State argues that this evidence is highly probative of defendant's state of mind and shows that she is a jealous, obsessive woman who lashed out at perceived rivals and killed the victim because he was ending their relationship**."[7] (26T 32-21 to 25)[emphasis added] Having said that, the judge added that, defendant "claims that she sent the message to Jermyn at the direction of the victim[8] and that she tried to friend Roper on Facebook to speak with her about the victim." (26T 33-1 to 4)

The judge then moved on to the State's claim that "certain evidence of post crime conduct" showed consciousness of guilt. (26T 34-6 to 10) Once again, the judge listed the prosecution's factual allegations in support of that argument, including that

---

[7] During his jury charge, the judge repeatedly referred to Patrick as "the victim." However, self-defense is a justification defense, so if Patrick had intended to inflict serious bodily injury upon Virginia, he was not a "victim." The Model Charge on self-defense refers to the "the person" who initiated the attack. In a case where the sole issue for the jury was whether Patrick had assaulted Virginia and put her in fear of her life, the judge pre-judged the issue by designating Patrick as "the victim."

[8] The judge did not mention that defendant subsequently had a 162-minute telephone call with Jermyn, and later exchanged text messages with her. (20T 249-12 to 253-2) Those communications were apparently friendly, but the judge sustained the prosecutor's objections to their content. (20T 252-6 to 24)

defendant "may have showered, washed a pair of pajama bottoms, attempted to clean a blood stain off of her pajamas ... with a paper towel, and may have caused injuries to herself at the police station." (26T 34-10 to 16) The judge did not add that the defense had denied those allegations.

Next, the judge addressed a "second portion" of Rule 404(b) evidence dealing with Patrick's prior bad acts. (26T 35-11) But this time, the judge did not list any of the alleged facts to support Virginia's testimony that Patrick had physically assaulted her in the past. Rather, the judge said only that "[t]he defense has introduced evidence that the victim, Mr. Gilhuley, has committed previous acts of domestic violence against the defendant;" that "the victim drank alcohol excessively;" and that he had "a potential tax issue." (26T 35-14 to 21) The judge added that evidence of "domestic violence and defendant's [sic] drinking was admitted solely on the issue of the reasonableness of defendant's belief that deadly force was immediately necessary to protect herself against death or serious bodily harm." (26T 35-23 to 36-2) The judge added that "the purported acts" could not be used to show that "the victim acted in conformity with" them or that he was "the initial aggressor at the time of the incident." (26T 36-3 to 36-21) But conversely, the judge never instructed the jury that evidence of Virginia's prior bad acts could not be

used as evidence that she was the initial aggressor. (26T 33-7 to 34-5)

Later in his jury charge, when the judge instructed the jurors on self-defense, he did not mention Virginia's testimony about the instances in which Patrick had physically assaulted her in the past, or that, just before the shooting, he beat her, and then threatened to kill her. (26T 56-8 to 61-15) Thus, the only mention of how the jury could consider Patrick's "previous acts of domestic violence against the defendant" came earlier, during the charge on N.J.R.E. 404(b) evidence.

At the conclusion of the jury charge, defense counsel repeated her objection that the Rule 404(b) instruction "unfairly highlights the State's case." (26T 75-13 to 20) The judge agreed that "[w]e discussed that yesterday," and simply ruled that, "Your objections are noted for the record." (26T 75-22 to 76-24)

In the first point of her new trial motion, defendant argued that "THE JURY CHARGES WERE DEFECTIVE AND CAUSED A MANIFEST DENIAL OF JUSTICE ... BECAUSE THEY WERE NOT TAILORED TO THE FACTS OF THE CASE; DID NOT ACOUNT FOR DEFENDANT'S MENTAL STATE AND PERSPECTIVE AS A VICTIM OF ABUSE; AND PRESENTED THE JURY WITH AN UNBALANCED SUMMARY OF THE EVIDENCE." (Da 99 to 103) In that motion, counsel argued that the court never mentioned "the many specific acts of physical and emotional abuse" which "would account for Defendant's perspective as an abused woman." (Da 102; Da 107) Counsel further

asserted that the error was compounded because the judge did not mention the assault prior to the shooting, or Patrick's threat, "I am going to kill you, you f-ing cunt." (Da 102; Da 107)

At the hearing on the new trial motion, defense counsel repeated her complaint that the jury charge "highlighted the State's case," especially the post-shooting conduct. (28T 7-11 to 11-20) Counsel further argued that "[t]he court is required to give an equal review of the facts," but the charge given "was mum" on the facts supporting the defense of self-defense or recklessness. (28T 9-11; 28T 11-4 to 16)

In denying the motion for a new trial on this point, the judge simply held that that he had complied with State v. Gartland, supra, by linking "the history of alleged abuse directly to the reasonableness [of] defendant's belief that deadly force was immediately necessary." (28T 21-21 to 30-5) In responding to the claim that he had "presented an unbalanced summary which focused on the strength and fear [?] of the State's case while ignoring critical defense evidence," the judge held that he was required to give a factually-tailored instruction on Rule 803(c)(3) and Rule 404(b) evidence, but he failed to explain why he had done so only for the State's prior bad act evidence, and not for defendant's. (28T 32-6 to 36-21) The judge added that to refer to evidence in the 404(b) charge that "defendant was allegedly choked by the victim, thrown around the room, and then chased up the stairs"

would "do nothing other than to completely confuse the jury." (28T 37-28 to 38-9)

In fact, State v. Gartland does not support the trial judge in this case. There, the jury instruction, although correct under the law at the time, was still found to constitute plain error because it was "largely devoid of specific circumstances of the case," and could have led to juror confusion. 149 N.J. at 472-77. That was also true in the present case.

In Gartland, 149 N.J. at 472-74, where the court had instructed the jury to consider the evidence of prior abuse in determining the issue of reasonable provocation, but had not included it in the charge on self-defense, the Court found that "[t]aken as a whole, the instruction could not be understood to foreclose the jury's full and appropriate consideration of the prior abuse in assessing the honesty and reasonableness of defendant's belief." Nevertheless, the Court found that the "abstract charge" that was presented "solely in the terms of the language of the statute," was not sufficient because it was "largely devoid of the specific circumstances of the case." Id. at 475. Finding that "[t]he charge on self-defense should also have been tailored to the factors of the case," the Court found that it was clearly capable of causing an unjust result, and that reversal was required. Id. at 476-77. See also State v. Gentry, supra, 439 N.J. at 72 ("it is often important to mold jury instructions so

that the jury clearly understands how the evidence in this particular case relates to the legal concepts addressed in the charge"); State v. Martinez, 229 N.J. Super. 593, 601-04 (App. Div. 1989)(although judge properly charged jury that "a man need not retreat when attacked in his own dwelling house," defendant was denied a fair trial by judge's refusal to clarify that that also encompassed standing at a doorway and preventing an assailant from entering).

At set forth in Point I, a proper discussion of the facts in this case would have begun with a statement that Virginia was not required to retreat into the bedroom, and that she was entitled to stand her ground at the top of the stairs. But even ignoring that very critical error, the instruction given was so one-sided as to deny defendant a fair trial. In his charge, the judge did nothing more than make conclusionary statements that "[t]he evidence of domestic violence can only be used to show the reasonableness of the defendant's belief that deadly force was immediately necessary to protect herself against death or serious bodily injury." (26T 36-18) The judge gave the jurors a detailed summary of the facts supporting the State's 404(b) evidence, but no specifics supporting either the defendant's 404(b) evidence or the jury charge on self-defense. The jury was instructed that the State's theory was that defendant was "a jealous, obsessive woman who ... killed the victim because he was ending their relationship," but

it was never told the defense theory that defendant had shot Patrick to save herself from death or serious bodily injury.

In State v. Reddish, 181 N.J. 558, 612 (2004), a murder case, the defendant argued that a jury instruction on "lack of a body" "presented an unbalanced and misleading summary of the evidence" because "the court summarized only evidence unfavorable to him and ignored evidence in support of his version of events." Id. Although trial counsel had "failed to object to much of the challenged instruction," our Supreme Court held that the trial court's "impermissibly unbalanced commentary on the evidence" denied defendant a fair trial. Id. at 615. It said that "[i]f a court finds it necessary to comment on the strengths of one party's case, it must refer to the opponent's counterarguments." Id. at 613.

In Reddish, the Court held that trial judges have an "independent duty to ensure that jurors receive[] ... when necessary, a balanced assessment of the facts to allow them to apply the law." Id. at 615. Certainly, "a balanced assessment of the facts" is essential to a fair trial. And because defendant did not receive the unbalanced jury charge to which she was entitled, her convictions must be reversed.

POINT III

THE JUDGE VIOLATED N.J.R.E. 803(c)(3) AND FAILED TO FOLLOW THE GATEKEEPING ROLE MANDATED BY STATE V. SCHARF, IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT ON THE DAY OF THE SHOOTING, THE DECEDENT HAD SAID, "SHE IS GOING TO KILL ME SOME DAY," BECAUSE THERE WAS NO PROOF THAT HE WAS REFERRING TO DEFENDANT, AND NO REASON TO BELIEVE THAT HE WAS ACTUALLY IN FEAR OF HIS LIFE. (Da 68 to 70; 24T 166-6 to 267-7; 24T 169-2)

At a pretrial hearing on December 13, 2016, John Luongo testified that at lunch in their worksite trailer on the day of the shooting, "the guys" were laughing about text messages that Patrick was receiving. (7T 41-12 to 42-8) Luongo did not see the texts, and did not know what they said, but he testified that Patrick said they were from Virginia. (7T 47-5 to 18; 7T 48-15) Patrick supposedly shook his head, laughed, and said, "she is going to kill me someday, you know." (7T 42-11; 7T 49-6) Although Patrick "laughed at everything," Luongo did not believe it was a joke. (7T 49-11) Nevertheless, he did not tell the authorities about the statement until six or seven months afterwards.[9] (7T 43-13 to 25; 7T 49-8 to 16) The prosecutor later assured the judge that he would never ask Luongo to repeat the statement, "she is going to kill me." (7T 55-9 to 16; 7T 60-18)

[9] In fact, Loungo did not tell the authorities about this statement until March, 2016, a full two years after the shooting. (17T 248-25 to 249-8)

In an August, 2016 motion-brief, defense counsel argued that the "unsupported hearsay statement" by the decedent regarding his fear of the defendant should be excluded because it was irrelevant and because the danger of prejudice "substantially outweighs any probative {it] might have." (Da 92) At a hearing in September, 2016, the judge acknowledged that "general statements about being scared of the defendant doesn't [sic] necessarily come into evidence because it paints such a negative portrait of the defendant, and it is prejudicial." (4T 129-76 to 18)

John Luongo's testimony, quoted above, came at a pretrial hearing in December, 2016. In his January 17, 2017 pretrial opinion, the judge relied on State v. Scharf, 225 N.J. 547 (2016), and noted "the perilous nature of" state-of-mind evidence. (Da 52) Nevertheless, he held that the statement would be admissible as an expression of fear on the part of the deceased. (Da 68 to 69) The judge suggested that the statement was relevant to show that Patrick "did not engage in domestic violence towards the defendant prior to the shooting" and was "not the aggressor at the time of the shooting." (Da 69; Da 53) The judge further found, in conclusory fashion, that "the highly probative nature of the evidence is not substantially outweighed by the risk of undue prejudice." (Da 69) However, the judge promised to give a limiting instruction "to 'guard against the risk that the jury will consider

the victim's statements of fear as evidence of the defendant's intent or actions.'" (Da 69), quoting Scharf, 225 N.J. at 581.

At some point, apparently before the beginning of the trial in March, 2017, phone and text records were revealed establishing that defendant had not sent Patrick any messages at lunch time on March 3, 2014. Indeed, **the prosecutor stipulated that Patrick and Virginia had not exchanged any communications of any sort until about 6:00 p.m. that day.** (17T 238-18 to 241-2; 18T 182-22)[emphasis added] However, there was evidence that during the day on March 3rd, Colleen Roper had sent Patrick sexually-explicit text messages. (18T 182-4 to 183-5; 19T 16-2 to 17-5)

Nevertheless, the prosecutor had John Luongo testify that Patrick's co-workers were joking about the text messages which were supposedly coming into his phone at lunchtime on the day of the shooting. (17T 213-10 to 21) Patrick "kind of shook his head and ... said, 'you know, she is going to kill me someday.'" (17T 213-22) Patrick was laughing when he said that; he always "shrugged everything off" and "[n]othing bothered him." (17T 214-3 to 7) Luongo responded, "Don't see this girl anymore, end it." (213-25 to 214-2)

On cross-examination, Luongo admitted that he did not see the text messages in question, but insisted that Patrick had said they were from Virginia. (17T 237-3 to 24; 17T 238-13) He was surprised to hear that there were no communications between

Virginia and Patrick before six o'clock that evening. (17T 238-5 to 8) Still, Luongo volunteered that, "[i]f he told me once, he told me a hundred times that, 'she is going to kill me someday.'" (17T 233-14) He could not say if Patrick had made those statements "during that year [or] two years before, three years before." (17T 233-16 to 21)

After Luongo's testimony, the judge instructed the jury that "the victim's"[10] statements had been introduced for a limited purpose as state of mind testimony. (17T 251-5 to 253-4) The judge then referenced the "[s]he is going to kill me someday" statement, which, although subject to dispute, "could be considered an expression of fear by the victim …." (17T 253-5 to 17) The judge then went on to say that "expressions of fear expressed by the victim, are generally admissible to establish that the victim was not the aggressor in the incident leading up to his death." (17T 253-18 to 254-4) However, the judge did not tell the jury that such expressions of fear could not be used to as evidence that defendant was the aggressor.

During the charge conferences, defense counsel said that she had "an issue" with the proposed charge dealing with Patrick's "expressions of fear." (24T 162-6 to 11) The judge acknowledged

[10] As noted, in his jury charges, the judge repeatedly referred to Patrick as "the victim," even though that was the sole issue to be decided by the jury.

that there was no testimony that Virginia was sending Patrick messages at the time he made the comment, "she is going to kill me some day." (24T 166-4 to 268-27) The judge also agreed that that statement "could be ... characterized as something said in jest …." (24T 138-20) While the judge stated that Patrick had "some worry in his mind, the degree of which is subject to debate," he said that it was testified to, and should not be excluded from the charge. (24T 165-15 to 24) Although defense counsel asked the judge to add a sentence to the proposed charge indicating that the reference was actually to Colleen Roper, the judge declined to amend the charge, subject to the arguments made in summation. (24T 166-6 to 267-7; 24T 169-2)

The charge which the judge did give on the subject is as follows:

> In cases where self-defense is claimed, expressions of fear expressed by the victim are generally admissible to establish that the victim was not the aggressor in the incident leading up to his death. To counter any argument that the victim was the initial aggressor, the State is permitted to present relevant evidence regarding the victims then-existing state of mind including any expressions of fear. Such state-of-mind testimony may only be used for evaluating the victim's actions or the likelihood of him acting in a certain way.
>
> Recall, ladies and gentlemen, that John Luongo testified that on March 3, 2014, that the victim made a statement to him, quote, "she's going to kill me one day," and further testified that this statement pertained to

> defendant. The defendant claims however that this reference, if made, was not a reference to her but to some other person.
>
> Whether the victim made the statement, quote "she is going to kill me some day," is for you to decide. If you find the statement was made, you have to decide as well whether the statement pertained to the defendant or to another person. If the statement pertained to another person, it has no relevance to this case.
>
> If, however, you find that the statement was made by the victim and that it did pertain to the defendant, you have to determine whether the statement was an actual expression of fear of the defendant or whether it was a statement that was said in [j]est. If you find that the victim did express genuine fear of the defendant to John Luongo, you will have to determine whether the victim, when he went to the defendant's home on March 3, 2014, was in such a state of fear that he would not have engaged in the type of physical assault as claimed by the defendant prior to the shooting.
>
> You may not use this evidence for any other purpose. (26T 40-14 to 42-2)

In a new trial motion, defense counsel argued that the above instruction failed to remind the jury that "Mr. Luongo's testimony had been shown to be a lie by telephone records which conclusively established that defendant had not communicated with Mr. Gilhuley" at that time. (Da 107 to 108) However, the judge said that because the "she is going to kill me someday" remark was in evidence, he had to address it in his jury charge. (28T 36-22 to 37-6) The judge also said that it was up to the jury to determine if Luongo's

recounting of that statement was a lie, and it was "not up to the court to advance a defense theory in its charge to the jury." (28T 37-7 to 17)

In State v. Scharf, 225 N.J. 547 (2014), our Supreme Court held that in a murder case where the defense was accident, statements by the deceased expressing fear of the defendant were admissible under N.J.R.E. 803(c)(3). In that case a husband was convicted of pushing his wife over a cliff; he testified that her fall was an accident. The trial court held, and our Supreme Court agreed, that to rebut the husband's testimony, friends of the wife could testify about statements she made expressing fear of her husband to show that she would not willingly have gone hiking near a cliff with him. Id. at 574.

Rule 803(c)(3) allows into evidence "[a] statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition …." Such evidence is generally admissible where the defense is self-defense. 225 N.J. at 570. It can also be used "'to establish that the decedent was not the aggressor'" id., quoting State v. Machado, 111 N.J. 480, 485 (1988). However, the Court emphasized that care must be exercised in a case such as this:

> When it comes to an expression of fear by the out of court declarant, the state-of-mind exception is analyzed carefully concerning its relation to the issues at trial and whether

> the hearsay should be permitted for a limited use.

Id. at 569.

Although the Court held that the statements expressing fear of the defendant were relevant and admissible, it acknowledged that they "were plainly prejudicial to defendant because they conveyed unfavorable information about defendant, as conveyed by [the deceased]." Id. at 577. It further recognized that evidence that the deceased feared the defendant "is powerful evidence," which "clearly carries prejudicial impact for the defendant…." Id. at 579. Thus, because of its "concern about the proper use of" such evidence, the Court "impose[d] on trial courts as gatekeepers to the admissibility of such evidence, the obligation to perform an express Rule 403 weighing of evidence in addition to an assessment for relevance of the ... state of mind testimony …." Id. at 580.

In addition, the Court in Scharf held that "a proper limiting instruction is necessary." Id. That instruction should include reference to the "prohibited purposes of the evidence," including a warning that it "may not be used as evidence of the defendant's actions or intent." Id. at 581. "[T]he better practice to be followed, whether requested or not, is to tailor the charge on how to use the state-of-mind evidence to the facts and to tell the jury how the evidence may be used and how it may not be used." Id.

In this case, the judge did not follow any of Scharf's commands. First, the judge did not do the required "express" Rule 403 analysis, but simply made conclusory statements that the probative value of this evidence substantially outweighed the danger of prejudice.[11] (Da 69) Certainly, this supposed statement had zero probative value because the prosecutor had conceded that any text messages that Patrick received at lunch time on March 3rd had not come from the defendant.[12] Also, considering that Patrick was laughing when he received the messages, and that there was no evidence that Virginia had ever threated him previously, there was no basis for finding that he was actually in fear of her.

Conversely, there was a grave potential for prejudice. While a decedent's statements expressing fear of a defendant are always prejudicial, this statement came on the very day of the shooting. There was a real danger that the jury would interpret Patrick's supposed fear of Virginia, who the prosecutor described "a woman with clear mental health issues" (25T 138-24), as an evaluation of

---

[11] Normally, a trial court's ruling on the admissibility of evidence is reviewed on appeal for abuse of discretion. State v. Rose, 206 N.J. 141, 157 (2011). But if the trial court does not use the correct legal standard, review is de novo. State v. Reddish, 181 N.J. 553, 609 (2004).

[12] John Luongo's testimony that Patrick had made similar statements in prior years should also have been excluded because Rule 803(c)(3) only allows testimony about a "then existing" state of mind.

her mental state – his belief that she was so unstable that she might do him harm. As such, the jury could have used Patrick's supposed fear of defendant as evidence that she was the initial aggressor.

Second, the mandated limiting instruction was deficient insofar as the judge said that the statement could be used as evidence of Patrick's state of mind, but not "for any other purpose." That failed to detail "the prohibited purposes of the evidence," most importantly that "the evidence may not be used as evidence of the defendant's actions or intent." Id. at 580. In Scharf, the trial court "expressly stated that it would not permit any of the testimony to be used to prove defendant's motivation or conduct," id. at 574, but no such instruction was given in this case. And third, the limiting instruction failed to tie the state of mind evidence to the facts of the case, such as by stating that even if Patrick was afraid of Virginia, that would only be relevant to his reasons for going to her house; the jurors could not assume that it was because he believed her to be mentally unstable and likely to assault him.

In sum, this highly prejudicial evidence should never have been admitted into evidence because (1) it did not meet the requirements of Rule 803(c)(3); it could never pass an "express" Rule 403 analysis; and even when it was admitted, no proper

limiting instruction was given. As such, the defendant's convictions should be reversed.

POINT IV

THE PROSECUTOR'S SUMMATION WAS SO UTTERLY IMPROPER AS TO DENY DEFENDANT A FAIR TRIAL. (Not Raised Below Except For Section C: 25T 170-7 to 171-2)

A. It Was Improper For The Prosecutor To Argue To The Jurors That If He Lied, He Could Lose His Pension.

There was some testimony that the assistant prosecutor who tried the case was at the crime scene on the evening in question. But while defense counsel argued in summation that the investigation could have been more complete, he did not accuse the prosecutor of misconduct. Nevertheless, in his summation, the prosecutor felt that it was necessary to bolster his own credibility:

> I have been involved with this case as long as anybody else. Since day one.
>
> So if anybody is lying to you and if anybody is risking their career or their pension to put forth a lie, then it is me. And you have to believe that after four weeks of me coming in front of you guys that I would lie about this, that is a vital [vile?] accusation and there is no place for it here. (25T 123-14 to 22)

The law is clear that prosecutors may not bolster the credibility of police witnesses by arguing that they could lose their job or their pension if they testified falsely. See State v. Frost, 158 N.J. 76, 85-6 (1999) (prosecutor's argument in summation that the police officers would not lie because of the "magnitude of charges" that could be brought against them was "wholly

inappropriate"); State v. West, 145 N.J. Super. 226, 233-34 (App. Div. 1976), certif. den. 73 N.J. 77 (1977)(police officer's "career would be finished in a minute" if he lied to the jury).

In this case, by making such an argument, the prosecutor sought to make his own credibility an issue for the jury – such that an acquittal would constitute an implied finding that he had not told the truth. Like the cases cited above, such arguments are clearly improper and highly prejudicial.

B. It was Improper For The Prosecutor To Denigrate The Defense Expert By Arguing That Dr. Wecht Was "The Mouthpiece Of" Defense Counsel.

As noted, the prosecution did not present an expert to contest Dr. Wecht's testimony about the injuries on Virginia's body. And Dr. Suarez, the Medical Examiner presented by the prosecution, largely agreed with Dr. Wecht's conclusions about Patrick's bullet wounds. Nevertheless, the prosecutor argued that Dr. Wecht was not credible because he had gotten his information from defense counsel:

> [D]o you find [Dr. Wecht] to be credible? And I submit that the answer should be no. And first and foremost, it should be no because **Dr. Wecht was the mouthpiece of Mr. Bilinkas.** He said so himself. He sat up here ... and time and time and time again what did he say? I got that information from Mr. Bilinkas. I got that information from Mr. Bilinkas.
>
> He wasn't coming to his own conclusions. He was echoing the opening statement of Mr.

> Bilinkas, and there is proof in that because, in the middle of trial, the day after Dr. Suarez testified, do you remember what Dr. Wecht said he did? He spoke to Mr. Bilinkas and he issued a new report. Dr. Wecht wasn't here for that. Dr. Wecht didn't watch Dr. Suarez. He took what Mr. Bilinkas gave him. He came in here with his wonderful resume that dates back to the John F. Kennedy assassination, and **he tried to convince you of something that Mr. Bilinkas wanted him to say**. I would submit that there is a major credibility issue with Dr. Wecht. (25T 108-4 to 25)

Absent evidence to support such a claim, it is improper for a prosecutor to denigrate defense experts by arguing that their opinions were "manufactured" in collusion with defense counsel. State v. Jenewicz, 193 N.J. 440, 471-72 (2008); see id. at 471 (comments that expert "'crossed over the bridge from being an objective psychiatrist to a subjective advocate' ... crossed the line of acceptability"); State v. Nelson, 173 N.J. 417, 462 (2002)("clearly improper" for prosecutor to insinuate that the experts' testimony "was contrived and they had colluded with the defense"); State v. Rose, 112 N.J. 454, 518-19 (1988)("clearly improper" for prosecutor to argue that expert's opinion were "fabricated or contrived with the assistance of defense counsel").

In this case, Dr. Wecht had formed his opinions and submitted a report well before the trial. (22T 223-9) In doing so, he had considered Dr. Suarez's autopsy report. (22T 184-8 to 185-21) It was completely proper for defense counsel to give Dr. Wecht a

summary of Dr. Suarez's trial testimony before Dr. Wecht appeared as a witness. There was no proof whatsoever that Dr. Wecht was the "mouthpiece" of defense counsel, or that he had only related "what [defense counsel] wanted him to say."

C. It Was Improper For The Prosecutor To Mislead The Jury On The Applicable Law By Arguing That If Patrick Was Shot In The Back, "This Is A Murder" And Self Defense Did Not Apply.

The prosecutor argued that if the jury did not accept Dr. Wecht's testimony that Patrick had his hand up when the shooting started, "then **this is a murder without any doubt, because Patrick is going down the steps and you can't shoot anybody when they are going down the steps.**" (25T 108-25 to 109-9) Later, in his summation, the prosecutor argued that even accepting defendant's version of the events, self-defense "does not apply":

> It does not apply because he was moving down those steps away from her when he was shot. She did not need to use self-defense to protect herself. But let's say you do believe what they say, which you shouldn't, but let's say you do. Self-defense still does not apply. Because the shot that killed him was the shot into his back that went across his body. And in what direction was he going when he was shot? Down. * * * You can't shoot somebody that is fleeing away from you.
>
> Remember that, **it is vitally important.** Had she killed him with that first shot under their theory and he was coming up the steps, different argument. But even if you believe what they say, which doesn't make any sense – even if you believe it, you can't shoot somebody that is running away from you. You can't. It has to be the immediate need to use

> deadly force to protect against serious bodily injury or death. **Once he turns around, if you believe their theory, it is over.** (25T 157-9 to 158-5)

With that argument, the prosecutor concluded his summation. (25T 158-6 to 16)[emphasis supplied]

At the conclusion of the prosecutor's summation, defense counsel asked that before reading the charges to the jury, the judge should comment that "this is the law, you have to abide by it." (25T 170-7 to 10) Counsel asserted that the prosecutor had "made mention to various legal principles," and that his "statement about turning and things like that" was not the law. (25T 170-10 to 16) The prosecutor interjected, "[t]hat you can't shoot someone in the back?", indicating his awareness of the issue. (25T 170-17) The judge agreed to address the subject in his charge. (25T 170-22 to 171-2) In that charge, the judge told the jurors that they had to follow the law as it was given to them, and noted that counsel had made references to the law in their summations, which, if different from his instructions, had to be disregarded. (26T 15-1 to 8) However, the judge did not correct the prosecutor's incorrect statement of law, or tell the jury that a shooting in the back does not have to be "a murder." See State v. Whittaker, 200 N.J. 444, 465 (2009)(where the prosecutor erroneously argued in summation that the jury could convict defendant as an accomplice of robbery and felony murder based on his act of discarding the

gun after the crime, the trial court's failure to "dispel the tantalizingly simple but mistaken legal theory" offered by the prosecutor was plain error).

The law is clear that "[p]rosecutors should not make inaccurate legal or factual assertions during a trial. State v. Frost, 158 N.J. 76, 85 (1999). See State v. Rodriguez, 365 N.J. Super. 38, 50-52 (App. Div.), certif. den. 180 N.J. 150 (2003) (prosecutor's repeated reference to insanity defense as an "excuse" had "the capacity to denigrate the defense in the eyes of the jury" and "deprived defendant of a fair trial"); State v. Murray, 151 N.J. Super. 300, 310 (App. Div. 1997)("clearly improper" for prosecutor to argue to jurors that where controlled dangerous substance is found inside a van, all persons in the van are deemed to jointly possess the drug).

Here, the prosecutor clearly and plainly misrepresented the law. First of all, the law does not support the prosecutor's contention that once Patrick turned away from the defendant, and was struck in the back by some of the shots, self-defense no longer applied. The defense of self-defense is available as long as the actor reasonably believes that deadly force is immediately necessary to protect herself against death or serious bodily harm; "it is not imperative that *actual* necessity exist" or that the actor's belief be correct. State v. Kelly, 97 N.J. 178, 198 (1984). Thus, in State v. Burks, 208 N.J. Super. 595, 605 (App. Div. 1986),

this Court held that even if the defendants were wrong in believing that the decedent had fired a gun at them, the jury could have found that they acted in self-defense if they "had an actual, honest and reasonable belief that they had to [return] fire.". The fact that Patrick turned his body and began to move away does not automatically negate defendant's reasonable belief of the need to protect herself from the danger of immediate harm. Just as "[d]etached reflection cannot be demanded in the presence of an uplifted knife," Brown v. United States, 256 U.S. 335, 343 (1921), a 51-year-old-woman is not required to go through a period of analysis when attacked by a 6'2", 250 lb. man who has just threatened to kill her.

Second, even if the defense of self-defense was not available, the fact that some of the bullets struck Patrick in back does not negate the possibility of a reckless state of mind. The State's own evidence supports the fact that some, if not all, of the shots occurred while defendant was shooting blindly around the corner. At the charge conference the prosecutor suggested, and the judge appeared to agree, that defendant's act of shooting blindly around the corner, not knowing if Patrick was coming up or down the stairs, would support a charge for aggravated manslaughter. (24T 197-2 to 17) Thus, even accepting the State's theory of the case, defendant could have been convicted of aggravated or reckless manslaughter.

D. Conclusion

Each of the above comments were "clearly and unmistakably improper, and ... substantially prejudiced defendant's fundamental right to a fair trial." State v. Timmendequas, 161 N.J. 515, 575 (1999). But even where one instance of prosecutorial misconduct is not sufficient to warrant reversal, courts must consider the cumulative effect of multiple instances of misconduct in determining if defendant received a fair trial. State v. Rodriguez, supra, 365 N.J. Super. at 49-52. Here, the prosecutor's improper comments all related directly to the core issue of whether defendant had acted in self-defense, and taken together, they clearly deprived her of a fair trial.

POINT V

THE CUMULATIVE EFFECT OF THESE TRIAL ERRORS REQUIRES THAT DEFENDDANT'S CONVICTIONS BE REVERSED. (28T 43-22 to 44-1)[13]

Each of the points in this brief raises a clear-cut legal error relating to the defense of self-defense issue. And each of those points, standing alone, warrants reversal. But undeniably, "the cumulative impact of the errors casts doubt on the fairness of the defendant's trial and on the propriety of the jury verdict …." State v. Jenewicz, supra, 193 N.J. at 446. As such, defendant's convictions should be reversed and the matter remanded to the Law Division for a retrial.

[13] In her motion for a new trial, defendant made a cumulative error argument. (Da 110) The judge summarily denied relief after addressing all of defendant's claims.

CONCLUSION

For the reasons set forth in this brief, the defendant, Virginia A. Vertetis, respectfully submits that her convictions should be reversed and the matter remanded to the Law Division, Morris County for a new trial.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender

BY: _____
JAMES K. SMITH, JR.
Assistant Deputy
Public Defender
281571972

Dated: May 2, 2019