FILED, Clerk of the Appellate Division, May 30, 2025, **A-000351-24**

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000351-24T3
May 28, 2025

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Denial of a Petition for Post-Conviction
v.	:	Relief in the Superior Court of New Jersey, Law
HASAN BRUCE,	:	Division, Atlantic County.
Defendant-Appellant.	:	Ind. No. 13-04-1116-I
	:	Sat Below:
	:	Hon. Donna M. Taylor, J.S.C.

DEFENDANT IS CONFINED

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED

INDEX TO APPENDIX

VOLUME I

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[1] The PCR petition is tantamount to a complaint and thus is required to be included in the appendix pursuant to Rules 2:6-1a(1)(a),(b).

2 These pages were the only three (3) pages submitted in the Petitioner's Appendix and are the only pages in the record below.

[3] PCR counsel's brief is part of the record below, thus permitting inclusion pursuant to Rule 2:6-1a(2). See also (Da 24-27) (Defendant's Pro Se Brief); (Da 80-84) (Defendant's Pro Se Supplemental Brief)

TABLE OF AUTHORITIES

CASES

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PROCEDURAL HISTORY

The Atlantic County Grand Jury returned Indictment 13-04-1116 charging petitioner-defendant Hasan Bruce (hereafter, "defendant") and codefendant Jamal Bruce with: knowing or purposeful murder, contrary to N.J.S.A 2C: 11-3 (a) (1) and (2) (Count One); first degree conspiracy to murder, contrary to N.J.S.A 2C: 5-2 (Count Two); second-degree possession of a weapon for unlawful purpose, contrary to N.J.S.A 2C: 39-4a (Count Three); and second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C: 39-5b (Count Four) (Exhibit Da1-6)[1]

Defendant was represented privately by Robert Gamburg, Esq. After defendant and the co-defendant waived a jury trial, they were tried in May 2015 before the Hon. Albert J. Garofolo, J.S.C., and the co-defendant was acquitted of all counts via a motion for a judgment of acquittal (3T 88:1-2), while defendant

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1 The exhibits referenced in this brief are contained in the Table of Exhibits and Appendix filed along with this brief.

(1T) – transcript of motion dated February 12, 2014

(2T) – transcript of trial dated May 18, 2015 (Vol. 1. 1-200 and Vol 2. 201-233)

(3T) – transcript of trial dated May 19, 2015

(4T) - transcript of trial dated May 20, 2015

(5T) - transcript of trial dated May 21, 2015

(6T) - transcript of plea and sentence dated May 29, 2015

(7T) – transcript of PCR hearing non-evidentiary hearing dated August 27, 2024

was acquitted of Counts One, Two, and Three, and convicted of aggravated manslaughter, as a lesser-included offense of Count One, and of Count Four (4T 31:6-37:10)

On May 29, 2015, Judge Garofolo sentenced defendant to the following consecutive prison terms: for aggravated manslaughter, 18 years, 85% without parole, and, for Count Four, six years, three without parole. (Da 7-9).

Defendant appealed the convictions. Defendant was represented by Assistant Deputy Public Defender Stephen W. Kirsch on the appeal. Appellate counsel raised the following issues:

Point I

THE TRIAL JUDGE'S STATED REASONS FOR REJECTING THE CLAIM OF SELF-DEFENSE AT THIS BENCH TRIAL INDICATE A FUNDAMENTAL MISUNDERSTANDING OF THE LAW OF SELF-DEFENSE, AND THUS, THE VERDICT FOR AGGRAVATED MANSLAUGHTER MUST BE REVERSED AND THE MATTER REMANDED FOR TRIAL

Point II

THE MATTER SHOULD BE REMANDED FOR RESENTENCING TO CONCURRENT TERMS

(Da 11-12)

The Appellate Division affirmed the convictions and sentence (Da 10-16)

Defendant petitioned for certification to the New Jersey Supreme Court. On June 19, 2018, the New Jersey Supreme Court denied certification (Da 17)

On April 28, 2022, Petitioner filed a pro se motion to correct an illegal sentence. Judge Donna Taylor, J.S.C, denied that motion by Order dated July 6, 2022. (Da 18).

On May 5, 2023, Defendant filed a pro se petition for post-conviction relief on the court. (Da 19-23)

On August 27, 2024, the Honorable Donna M. Taylor, J.S.C, held a PCR non-evidentiary hearing (6T). PCR counsel argued several points, including that the waiver of the jury trial represented ineffective assistance of counsel. (6T 4:24-7:25. PCR counsel also addressed a series of trial counsel errors that cumulatively prejudiced Mr. Bruce, denying him his Sixth Amendment right to counsel. (6T 8:11:11). Finally, PCR counsel addressed the alleged time-bar as the PCR petition was filed more than five (5) years since conviction. PCR counsel cited evidence and case law, including State v. Hannah, 248 N.J. 148, 155 (2021) and State v. Molina, 187 N.J. 531, 536 (2006) which supported substantive review of the Petition. (6T 11:20 – 13:25). After hearing from the State, the PCR Court reserved its decision (6T 20:2-11).

On September 24, 2024, Judge Taylor denied relief by written Order and opinion. (DA 86-106).

On October 4, 2024, Mr. Bruce filed a notice of appeal from the denial of

his petition. (Da107-109).

STATEMENT OF FACTS

Zachary "Zooty" Taylor was shot and killed on Michigan Avenue in Atlantic City shortly after 9:00 p.m. on June 18, 2012. He was struck by two bullets, both of which were recovered at the autopsy. (3T 58:22-25). According to the medical examiner, one of the shots was to the left side of Taylor's neck from a range of one to two feet, and the other was from a greater, unspecified distance and hit Taylor in the lower left back. (3T 56:4-22, 3T 58:4-21) The medical examiner noted that Taylor had a tattoo of a handgun on his right arm, and that his body showed no evidence of a struggle. (3T 63:15-17) The autopsy did not allow for a determination of whether Taylor held anything in his hand when he was shot. (3T 63:21-24). There was no dispute at trial that Taylor's death was caused by a gun fired by the defendant.

Detective Neil Kane, who responded to the scene, testified that Taylor's body was found at the corner of Michigan and McKinley avenues where he had collapsed, after leaving a trail of blood on Michigan Avenue. (2T 33:6-9) A loaded handgun, eventually traced to Taylor was found "in the middle" of Michigan Avenue, according to Kane. (2T 33:25 -34:1) The hammer on the gun was "locked back," as if ready to fire and there appeared to be blood on the gun,

Kane testified. (2T 39:19 – 40:1) Kane further testified that the positioning of the hammer rendered the gun unsafe enough to handle – i.e., ready to fire—he "wouldn't be comfortable with somebody just walking up and picking it up." (2T 72:18:25) Kane agreed that the only things of evidential value at the scene were "a gun and a blood trail" (2T 72:5-6) Kane also noted that when police went to a home on Indiana Avenue where defendant and codefendant Jamal Bruce lived with their mother, their mother consented to a search which located a pair of white sneakers, a green shirt, and a bulletproof vest along with a cell phone that appeared to a broadcasting police dispatches. (2T 41:13-23) However, Kane admitted that there is no proof that the bulletproof vest was worn by anyone the night of the shooting. (2T 72:11- 17).

Jasper Walker, a friend of Zachary Taylor, testified that he was with Taylor and others "all day" on the date of the incident. (2T 72:11- 17). They were at the Michigan Avenue house of a friend named Tony, and they were smoking, "just chillin'" and listening to music, according to Walker. (3T 15:17- 23). Walker claimed that during the day, Taylor noted that a car kept passing by the house, and it "looked suspicious." (3T 7:6 – 9:20) But Walker also recounted that at one point during the day, Jamal Bruce, the codefendant, approached the home and asked to speak with Taylor, and so Taylor went outside and had a conversation

with both defendant and the co-defendant on a nearby corner. (3T 10:22 – 14:13) Walker did not hear the whole conversation, but what he heard appeared to be about a woman, and the men did not seem to be arguing. (3T 14:2-16) In fact, he agreed that they were "talking normal." (3T 14:17-19) Taylor eventually walked back to the house and his only comment was that "it"- presumably the subject of the conversation- "was dead," a phrase that Walker interpreted to mean "[t]hat it wasn't no problem" and that "everything was fine between" Taylor and the Bruces. (3T 15:1-10) Taylor and friends then returned to their "smoking"/ "chillin'" regimen at the house, according to Walker. (3T 15:14-23)

Walker testified that "at some point" that evening, Taylor received a phone call in which he was arguing with the person on the other end, and, then, when Taylor hung up the phone, he "tied his hair with his shirt," "grabbed his gun from under the couch," and said he "was about to fight." (3T 15:23 – 17:18) Walker assumed this "fight" would be a "fistfight" with defendant, but Walker did not testify why he believed defendant was involved. (3T 17:15-19) Walker testified at trial that Taylor "tucked" the gun into his pants, but he had told police in a September 2012 statement that Taylor's gun was "out" and he admitted at trial that his memory of the matter was better in 2012 than at trial. (3T 18:1; 3T, 31:17-25) But then, he admitted, he did not remember whether Taylor really put the gun

away before going outside. (3T 40:1- 4) Moreover, he testified again that he told detectives in 2012 that he never saw Taylor put the gun away. (3T 44:1-3) At the time, Walker agreed, Taylor was "acting all hype[d] and getting all nutty," and the distance from the couch, where Taylor retrieved the gun, to the door was "less than two steps." (3T 37:15 – 39:16) Walker also admitted that he was carrying a gun himself at the time, but stated that he did not have it out. (3T 44:4-6)

Walker testified that when Taylor left the house with a gun in his possession, Taylor went to a nearby corner and was "arguing with" defendant. (3T 19:14-24) The two men were "in each other's faces arguing." (3T 19:20) Walker was "[l]ike 20 feet" behind Taylor at the time. (3T 19:15-18) Walker believed defendant and Taylor were going to fight with their hands. (3T 20:16-24) Walker saw Taylor "raise his hands like what's up" and shortly thereafter he heard a gunshot and he ran. (3T 21:1-21) Walker did not see who shot Taylor, he testified at trial, and he did not see if defendant had a gun. (3T 22:22 – 23:3)

The State noted at trial that Walker had given a statement to police in July 2013 in which he said that the defendant had a gun in his hand and "already had it out." (3T 24:7 – 25:16) The same statement also said that the co-defendant was "reaching for his hip" but that defendant was the one that shot Taylor, and did so "close up." (3T 25:20 – 27:4) When asked at trial, Walker said that he was

"telling the truth" in that 2013 statement, but he also admitted that he picked up pending second-degree robbery charges between the 2012 and 2013 statements and that his favorable plea deal was contingent on his testimony in his case. (3T 27:11 – 29:16)

Laquay Elliott testified that he was also hanging and listening to music with Zachary Taylor at the house of a friend named Tony on the date of the shooting and in the evening. (3T 7:1-21) According to Elliott, Taylor got a call from someone that Elliott believed to be a woman, and Taylor's reaction was to get "a little" upset, grab a gun and go outside, despite Elliot's urgings for him not to do so. (4T 8:23 – 10:25) Elliott followed Taylor outside and off the porch, and Taylor remarked to Elliott that someone was "peeking" at him from around the corner; Elliott again assumed this remark was a reference to a woman. (4T 13:15 – 14:10) Not long later- "[p]robably like a minute or two"- Elliott heard gunshots. (4T 14:19 – 17:1) He then saw Taylor running toward him, and then Taylor collapsed on the corner. (4T 17:2-13) Elliot did not mention defendant or the co-defendant in his testimony. He also stated – at direct odds with Jasper Walker's own admission – that Walker did not have a gun that Elliott "knows of." (4T 19:1-7)

Michael Bolden testified that he was also hanging out with Zachary Taylor

that evening. (3T 87:14 – 88:4) Bolden described the phone call that Taylor received as one that resulted in the caller and Taylor arguing back and forth until Taylor hung up the phone. (3T 88:17-22) Bolden did not know the gender of the caller. (3T 88:18- 19) Bolden's description of Taylor immediately post-call was: "Just in a state of rage, what's going on, where's my gun and duh, duh, duh, just tripping." (3T 89:11- 12) Taylor then ran out of the house and "was tearing stuff up trying to find the gun," which he eventually located. (3T 89:14-15) Bolden did not see the gun out in the open, he claimed, so he assumed it was on Taylor's hip as Taylor left the house. (3T 90:1-6)

Bolden stayed inside, but saw Taylor walk to the right as he left the house. (3T 90:21-24) Within a minute, Bolden estimated, he heard gunshots and, when Bolden went outside, he saw Taylor come around the corner and collapse. (3T 91:9 -92:19) Bolden told police that he saw Taylor with the gun and knew "something was about to happen." (3T 100:17 – 101:2) He also told police that Jasper Walker likely had a gun, but at trial, he claimed not to have seen such a weapon in Walker's possession. (3T 99:2-3) Finally, Bolden told police about Taylor and friends: "This is how we're doing. You live by the gun. You die by the gun." (3T 102:13-22)

Lieutenant Justin Furman testified that a video[2] from a local business depicted defendant running down the street just after the time of the shooting. (2T 104:12 – 106:15) Defendant appeared to be wearing the sneakers that were later seized in the search of the house, Furman claimed. (2T 100:6-19) A photo from earlier that same day also showed defendant wearing those sneakers, Furman testified. (2T 101:22 – 102:10)

Detective James Armstrong testified that, on the night of the shooting, defendant was taken into custody for questioning after police set up a "loose perimeter" around defendant's mother's house and defendant ran out of the house and tried to jump a fence into the next yard. (2T 228:2 – 229:13) When being walked to a police car, Armstrong claimed, defendant said, "I didn't shoot anybody," even though no one had mentioned a shooting to him. (2T 230:15-22) However, Armstrong admitted, defendant was "cooperative" when taken into custody. (2T 232:11-14) Sergeant Harry Brubaker testified that defendant asked the police that night why they kept "saying his name on the police radio." (3T 77:8-11) Brubaker also testified that Taylor was wearing a dark hooded sweatshirt the night he was killed, even though it was June. (3T 80:4-7)

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2 A copy of the video referenced at trial was not submitted to the PCR Court for review or consideration. The video referenced at trial is not relevant to the issues presented in this appeal.

Lieutenant Furman testified further that, after both defendant and co-defendant were questioned by police that night, they were released, and the investigation continued, including monitoring their social media, text messages, and phone calls. (2T 109:20-110:12) Furman testified that before the incident, defendant had posted on Twitter, in April 2012, with a photo of him at a gun range, "Ain't no running when I start shooting shit." (2T 111:8-10) Another from later that month read, "I always put myself in fucked up predicaments." (2T 112:23) Finally, a tweet from defendant's account in either late August or sometime in September 2012 read: "If I get caught I'm going to do my time. I don't point fingers." (2T 114:7-8)

Furman also testified that police recovered the following text messages from the defendant's phone, from two days after the shooting: "Be careful, Brah, please. And detectives took Nanya to the station. Word and I heard. I hope her nut ass don't say noting. I talked to her about that before that. She good. Oh all right. I love you too. I'm not outside nowhere." (2T 119:25 – 120:5) Furman admitted that the reference in the text message to not being outside could have referred to a retaliatory shooting of defendant and the co-defendant that the police learned had been planned for June 19, 2012. (2T 128:4-17) Furman claimed that phone records showed a 33-second call from defendant to Zachary Taylor at 9:11

p.m., just prior to the shooting, and slightly less than three minutes later, still before the shooting, a call from Taylor to the defendant that lasted 16 seconds. (2T 122:7-13) Furman agreed that at no point, other than a "short period" when defendant went to Pennsylvania and then came back, did defendant try to avoid police during the post-shooting investigation. (2T 137:20 – 138:3) Furman also testified that neither defendant nor Taylor had a gun permit, but he admitted that gun owners often go to gun rangers to maintain proficiency with a weapon. (2T 159:9-16) Defendant and the co-defendant were arrested on September 27, 2012 pursuant to warrants issued that day. (2T 123:19 – 124:7)

Detective Caroline MacDonald testified that no shell casings were found at the scene and no fingerprints found on the gun that was discovered in the street. (2T 167:5-17) Macdonald testified that the gun "was not seated properly," which could have caused it to jam. (2T 205:8-15) That gun was bloodstained and DNA from one stain from the gun matched only Taylor, while another stain showed Taylor's DNA to be the principal contributor, along with someone else's. (4T 23:9-14) The blood trail from the scene also matched Taylor's DNA. (4T 32:1-4)

Ballistics tests revealed that Taylor's gun- an uncommon, Chinese-made 7.62-mm. semiautomatic pistol, according to the State's expert, Trooper Gwen

Tietjen – was operable if used correctly, but it had a small fragment of metal lodged in it, as if the owner tried to fire a too-large, but more common, 9-mm. bullet and small piece of metal had been in advertently shaved off the bullet inside the gun. (3T 112:4 – 114:12) Nothing from the outward appearance of the weapon would lead one to believe that it was jammed by such a small obstruction, but it was, according to Tietjan. (3T 119:3- 6) Moreover, the fact that the hammer was cocked back rendered the weapon ready to fire according to Tietjen. (3T 124:13-15) He also testified about the two bullets recovered from Taylor's body. Those were .38 caliber and could not have been fired from Taylor's gun; however, they were both fired from the same weapon, an unknown .38 caliber class firearm. (3T 114:17 – 118:20) That unknown gun could have been a revolver or a semi-automatic according to Tietjen. (3T 131:24 – 132:1)

Finally, the State presented Sergeant Greg Navas, from the Atlantic County Jail, who testified that when defendant was interviewed at the jail regarding an order that he kept separate from Laquay Elliott, who was also at the jail, defendant said that he had "killed [Elliot's] friend." (3T 61:19 – 66:7)

Defendant testified that on June 18, 2012, he had sex with a woman and then, after she fell asleep, her phone vibrated with a message that indicated that Zachary Taylor was threatening defendant's life: "Wait until I catch your

boyfriend. I'll be downing." (4T 88:22 – 90:13) Defendant explained that "downing" meant to bury him in the dirt. (4T 90:12 – 91:10) Defendant also recalled tweets from Taylor at that time were directed at defendant and he told defendant that he would be "fill[ed] with holes" if he "came out of the crib." (4T 91:5-19) Defendant then drove toward this mother's house, so he could speak to his brother Jamal, but, when he parked he heard, "Yo, what's up?" and saw Taylor with "his hand all that [sic]." (4T 92:24 – 93:1) Defendant testified that he "didn't go over there with no problem" but, when he saw Jasper Walker nearby and saw that Taylor was wearing a hoody in June, he "knew exactly what [Taylor] want[ed]." (4T 92:24 – 93:4)

Because of his awareness of what was about to happen, defendant testified, he "put [his] hand on" his gun. (4T 93:4) He testified further: "I started reaching, he started reaching, and I asked him why he had his hand in his hoody, and he started going on to say something else, but I wasn't listening to him because I'm trying to watch both of them." (4T 93:5-9) Defendant testified that as Taylor and defendant walked toward each other, Taylor "had his hand on his gun"- and then Taylor simultaneously pushed defendant and tried to reach for a gun, but defendant testified that he already had his hand on his gun. (4T 93:9-12) Defendant had been shot before and did not want to be shot again. (4T 93:9-

12). Defendant said it was "shoot or be killed." (4T 97:1-10)

Defendant also testified that he had previously been to a gun range in Philadelphia and, thus, has some familiarity with guns. (4T 97:16-19) He explained his posts on Twitter as attempts to deter Taylor's "people" from coming after him. (4T 98:21-25)

On cross-examination, defendant admitted that he had telephoned Taylor that night and asked him to come out to the corner, but he did so because Taylor had been threatening him. (4T 100:23 – 101:2) He admitted giving police a bogus account of the incident in his first statement to them because he "was just saying things to get out of the prosecutor's office" that night. (4T 104:5-8) Defendant admitted that he did not actually see a gun but stated that this is because Taylor had the gun inside his hoody and "tried to pull it out" right before defendant shot first. (4T 105:11 – 106:4) Defendant denied that he went to the scene to kill Taylor. (4T 107:17-18)

Defendant testified that he brought his gun, a .38 special to the scene because he knew Taylor "played with his guns." (4T 111:2-10) Defendant emphasized that he told police that he could not "just sit around and let him do something to me" after the threats on social media and via text message. (4T 111:15 – 112:8) Defendant testified that "words," as used the way Taylor

employed them, "have a whole lot of meaning." (4T 112:12- 15) Defendant also noted that because of his familiarity with guns he "would have chased" Taylor to finish him off if his intent was to kill Taylor; instead, defendant "ran the opposite way from him" after two shots. (4T 112:20-24) He explained the location of the wounds to Taylor: "When the first shot went off, I turned also. You see the one bullet hole is in his neck and the other one in his lower back, my hand was coming down. I was shooting coming down going around." (4T 113:3- 6)

Defendant re-emphasized on cross-examination that his Twitter boasts were "just to keep people off me. I never shot at nobody, never shot nobody before this." (4T 114:12-14) Even his tweet months before the shooting was merely "a defense mechanism." "It's tougher in my area around my neighborhood." (4T 115:16-14) Finally, he explained the texts after the incident as simply evincing his wish to not go to jail. (4T 117:17 – 118:2).

In his petition for post-conviction relief, PCR counsel raised claims that trial counsel rendered ineffective assistance of counsel, first, by waiving the fundamental right to a jury trial and, second, by highlighting a series of basic errors at trial that cumulatively demonstrated that trial counsel was not acting as competent, Constitutionally-mandated counsel (Da 37-77).

After hearing oral argument, (7T), the PCR court denied relief. (Da85)

First, as to timeliness, the PCR court initially found that Mr. Bruce's PCR Petition was time-barred. (Da100). However, the PCR Court combed the record and could not find any evidence that Mr. Bruce was advised of the time limitation. It also relied upon Mr. Bruce's Certification that he was unaware of any such time limitation. (Da100). As such, the PCR Court relaxed the time bar and addressed the merits of the Petition. (Da101).

Second, the PCR court found that the claims were barred because they could have been previously adjudicated on direct appeal. (Da102). Further, the court found as to the arguments that Mr. Bruce failed to demonstrate the errors were the result of trial counsel falling below a reasonable level of competence. (Da102-103).

Third, as to prejudice, the PCR court found that Mr. Bruce did not showcase how the trial outcome would have changed. As such, it found no prejudice had been demonstrated. (Da103-104)

Fourth, the PCR court addressed pro se arguments pursuant to State v. Webster, 187 N.J. 254 (2006). This related to Mr. Bruce's argument that a suppression motion should have been filed. (Da105). The PCR court found this argument held "no weight" since Mr. Bruce testified that he shot the victim. In other words, the PCR court found the failure to file a suppression motion was

"moot" and would not have changed the outcome of the proceedings.

Finally, the PCR court denied an evidentiary hearing as it found no ineffective assistance of counsel had been demonstrated.

Mr. Bruce timely filed a notice of appeal with this Court. (Da107-109).

LEGAL ARGUMENT

POINT ONE
MR. BRUCE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY WAIVING A JURY TRIAL. (Da103)

Mr. Bruce presented *prima facie* evidence of ineffective assistance of counsel by counsel's decision to waive a jury trial. Further, his overall claims are dependent on evidence outside of the record. As a result, the PCR court should have held an evidentiary hearing on these ineffectiveness claims. Because the PCR court failed to do so, this case must be remanded.

This Court reviews legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. If no evidentiary hearing was conducted below, this Court has authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. "[W]here . . . no evidentiary hearing was conducted," this Court "may review the factual inferences the [trial] court has drawn from the documentary record de novo."

State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing Harris, 181 N.J. at 420-21). The determination of whether to proceed without an evidentiary hearing is reviewed under the abuse of discretion standard. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013).

A criminal defendant is guaranteed effective representation of trial counsel. Evitts v. Lucey, 469 U.S. 387 (1985); State v. Mitchell, 126 N.J. 565 (1992). Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee this right. Kimmelman v. Morrison, 477 U.S. 365 (1986); State v. Davis, 116 N.J. 341, 351 (1989).

To satisfy the Sixth Amendment requirement, "counsel must function as an advocate for the defendant." Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting). This constitutional guarantee is measured by "the fairness of the proceeding—the measure of the adversarial balance." State v. Davis, 116 N.J. at 353. Absent "adequate legal assistance" as defined by the above, a defendant is denied his right to a fair trial as guaranteed by the Due Process Claims of the Fourteenth Amendment. Strickland v. Washington, 466 U.S. 668, 684-85 (1984),

In Strickland, the United States Supreme Court established a two-part standard to determine a claim that a defendant is entitled to PCR because the

defendant had been deprived of the effective assistance of counsel. 466 U.S. at 686. Under Strickland's first prong, a petitioner must show counsel's performance was deficient by demonstrating counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." Id. at 687-88

Under the second prong, a defendant "must show that the deficient performance prejudiced the defense[.]" State v. O'Neil, 219 N.J. 598, 611 (2014) (quoting Strickland, 466 U.S. at 687). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Gideon, 244 N.J. 538, 550 (2021). New Jersey adopted the Strickland test in State v. Fritz, 105 N.J. 42, 58 (1987).

In New Jersey, the right to post-conviction relief must be established by a preponderance of the credible evidence. State v. Preciose, 129 N.J. 451, 459 (1992). Post-conviction relief is the appropriate forum for raising claims of ineffective assistance of counsel. Id., at 462.

Ineffective assistance of counsel claims are "particularly suited for post-

conviction review." Preciose, 129 N.J. at 460-62. And, because these claims often require evidence outside the trial record, such claims usually require an evidentiary proceeding. Ibid.; State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991) ("generally, a claim of ineffective assistance of counsel cannot be raised on direct appeal [because] defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction").

An evidentiary hearing is only required when (1) a defendant establishes "a prima facie case in support of [PCR]," (2) the court determines that there are "material issues of disputed fact that cannot be resolved by reference to the existing record," and (3) the court determines that "an evidentiary hearing is necessary to resolve the claims" asserted. State v. Porter, 216 N.J. 343, 354 (2013) (alteration in original) (quoting R. 3:22-10(b)); see R. 3:22-10(e)(2) (providing "[a] court shall not grant an evidentiary hearing . . . if the defendant's allegations are too vague, conclusory or speculative"). "To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." R. 3:22-10(b).

Mr. Bruce made a *prima facie* claim that counsel was ineffective for waiving a jury trial in this case. On May 18, 2015, Mr. Bruce executed a waiver

of a jury in this criminal trial pursuant to R. 1:8-1(a). (Da32, 1T 6:18-7:20). Trial counsel placed the purported reason for this waiver on the record. Counsel stated that this case "should be free from emotion. We believe that based on the State's proofs that it makes out a viable affirmative defense." (2T 8:6-7).

However, in the same breath, trial counsel argued that no credibility determination would have to be made. (2T 8:8-9, 8:14-15). Respectfully, trial counsel failed to appreciate how the facts of this case lent themselves entirely to emotion. Worse, trial counsel's explanation that "emotion" should be divorced from the affirmative defense he just spoke of is legally *incorrect*.

As in all criminal cases, a jury trial is an incredible advantage. It requires twelve (12) strangers to reach a unanimous verdict. One juror short circuits the proceedings. As such, where "credibility determinations" are in play, the resolution of a criminal trial with *any* verdict is daunting.

Here, twelve people would hear the tragic events of the night, but be forced to untangle them in a coherent and unanimous manner. The jury would hear a litany of facts that methodical deliberation not only as to what Mr. Bruce did, but what Taylor did as well. The jury would hear that Taylor was in a rage after the telephone call, 3T 15:23 – 17:18, and that Taylor frantically searched for a gun and that gun, indeed, jammed (indicating an attempt to kill Mr. Bruce).

This jury, which would consist of members of various communities in Atlantic County, would also use their lived experience and hear that Taylor "played with guns." (4T 107:17-18; 111:2-10). Understanding that in some communities gun violence can be quite prevalent, it would make sense for a jury to assess claims of self-defense since a jury of Mr. Bruce's peers would likely more appreciate the risk of gun violence and the need for protection.

Moreover, in this particular case emotion was the key. Any claim that the trial should be emotion-free misunderstands both the facts and law, each of which is animated by competing emotional considerations. For the reasons just stated, understanding gun violence and the need to protect one's self are personal considerations. But most importantly, self-defense has an embedded finding of emotion.

N.J.S.A. 2C:3-4 provides that the use of force against another 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." Juries are generally charged that deadly force is appropriate "to defend himself/herself against death or serious bodily harm." Criminal Model Jury Charges, Justification – Self Defense, Revised 11/13/2023. The jury charges continue that deadly force has limitations. However, juries

consider "the total circumstances" in assessing whether one could retreat safely, for example. Id.

In sum, this trial came down to *emotions*. Did Mr. Bruce reasonably fear immediate force against him? Could Mr. Bruce have retreated to "complete safety" when a gun was found in Taylor's hand? These questions are part and parcel of the affirmative defense that led to the waiver. Yet, these questions implicate, as a matter of law, the emotional state of Mr. Bruce. This means that while the supposed "strategy" was to take emotions out of a case, the case itself would be determined by emotions themselves.

This "strategy" thus was not only inappropriate, but also legally erroneous. There is no justifiable reason to claim emotions must be removed from consideration when the affirmative defense presented required a determination of Mr. Bruce's emotional state.

A jury of Mr. Bruce's peers would have been more receptive to this claim than a single superior Court judge. The fact that the supposed reason for the waiver is contradicted by the consequence of the waiver demonstrates that counsel's performance was below a reasonable level of competence.

To be clear, Mr. Bruce does not argue that the mere fact of waiving a jury trial under these facts is ineffective assistance of counsel *per se*. Rather, Mr.

Bruce argues that counsel's failure to competently advise Mr. Bruce of the intricacies of this waiver *vis a vis* his trial strategy resulted in representation failing below the bar constitutionally set as counsel.

With this argument properly framed, it is clear that Mr. Bruce breaks no new ground in this claim. In other areas, our courts have held that failure to advise of consequences can be constitutionally suspect. The paradigmatic example is Padilla v. Kentucky, 559 U.S. 356 (2010) and State v. Nunez-Valdez, 200 N.J. 129 (2009), line of case law.

In Nunez-Valdez, our Supreme Court found that ineffective assistance of counsel results if trial counsel provided false or misleading information regarding the risk of deportation resulting from a guilty plea. 200 N.J. at 140-42. In Padilla, the United State Supreme Court found that attorneys must advise their consequences regarding potential immigration consequences of pleading guilty or risk providing constitutionally deficient assistance of counsel. 559 U.S. at 370. The animating theory behind both cases is that, regardless of paperwork, counsel can be ineffective if they fail to thoroughly advise that actions have consequences.

Here, trial counsel was ineffective in its decision because the "material" consequence of the supposed trial strategy (i.e., removing emotion from

consideration) is diametrically opposed to the trial strategy itself (i.e., self-defense). Trial counsel was ineffective when it advised Mr. Bruce to waive a jury trial to remove emotion while simultaneously advising Mr. Bruce to pursue self-defense which requires consideration of emotion. Viewed this way, at best, counsel provided *misleading* material advice, and, at worse, provided *incorrect* legal advice to Mr. Bruce.

Accordingly, the first prong of the Strickland/ Fritz test is met. In turn, since Mr. Bruce was convicted it clear that the second prong of the test is met as well. The Court should thus reverse the decision below and grant post-conviction relief to Mr. Bruce.

Alternatively, an evidentiary hearing on this claim is required. While Mr. Bruce executed a waiver, it is an unresolved fact whether Mr. Bruce was ever advised of the contradictions in this waiver. Did trial counsel explain the theory of self-defense to Mr. Bruce from a legal perspective? Did trial counsel explain that self-defense *requires* an assessment of Mr. Bruce's *emotional* state including being in fear for his life. Did trial counsel explain it was *his* burden of proof as an affirmative defense? Or, did trial counsel simply say that emotions *could* run high without explaining to Mr. Bruce: (1) the elements of self-defense; (2) the shifting burdens of proof; (3) the trade-off of one Judge or twelve jurors? An

intelligent waiver could only have been executed only if trial counsel answered all these questions.

Finally, Mr. Bruce highlights that this issue is not barred as it could *not* have been previously raised on direct appeal. For the reasons just stated, this claim of ineffective counsel requires testimony *outside* the record. The questions just presented that would have (or should have) occurred between trial counsel and Mr. Bruce negate the belief that this issue should have (or could have) been raised earlier. Those questions need answers and those answers can only come from an evidentiary hearing. As such, this argument is not barred as relies upon facts outside the record. PCR is the appropriate vehicle to address this violation.

POINT TWO:

MR. BRUCE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL MADE ERRORS THAT CUMULATIVELY PREJUDICED THE DEFENDANT. (Da103)

During trial, counsel made several critical errors that, when taken as a whole, prejudiced Mr. Bruce's case. Trial counsel's performance fell below the reasonable competent standard required to meet the first prong of Strickland/Fritz for five (5) individual or cumulatively-viewed reasons.

First, trial counsel failed to give proper notice of self-defense. Pursuant to R. 3:12-1, this was required to be filed no later than seven (7) before the Initial

Case Disposition Conference. However, the lack of proper protocol was not raised until *the State* addressed it immediately before trial. (2T 20:12 to 21:5). This shows a lack of sophistication to the intricacies of a *first-degree murder case*. Indeed, if trial counsel could not understand the proper way invoke a basic procedural mechanism then the substantive decision of waiving a jury is surely suspect.

True, the State attempted to cure this obvious error by not arguing against a bench trial. However, this speaks to the necessary finding of ineffectiveness. Even if the State believed that trial counsel committed such an error as to require intervention then this Court should find ineffective representation.

Admittedly, this error alone would not be prejudicial. However, it surely colors review of trial counsel's performance. It shows a complete lack of diligence by trial counsel. Critically, however, it bolsters the claim that an evidentiary hearing is required to determine how trial counsel explained the jury trial waiver to Mr. Bruce.

This error goes hand-in-hand. If trial counsel could not complete simple notice then it implausible to believe trial counsel methodically detailed how this notice and its accompanying waiver substantively effected Mr. Bruce's trial, trial strategy and constitutional rights.

Accordingly, at the very least, the Court should remand and Order an evidentiary hearing.

Second, trial counsel failed to file a suppression motion. In his pro-se application, Mr. Bruce raised that trial counsel failed to make any effort at suppressing his statement. (Da24). Petitioner provided the portion of his statement that was made in violation of his rights under Miranda v. Arizona, 384 U.S. 486 (1966), and its Federal and State progeny. Despite requesting the statement be suppressed, trial counsel did nothing. (Da24).

At the beginning of the trial, the State acknowledged that no hearing was requested. The State continued that it had no intent to introduce any statement in its case in chief. (2T 12:1-4). After all, Mr. Bruce had invoked his right to counsel during that interrogation.

Regardless, trial counsel affirmatively discounted *ever* challenging the statement (2T 13:11-5). At this juncture, the trial court hypothesized that even if suppressed a prior statement *could* be used for impeachment purposes. (2T 13:17-22).

Because of trial counsel's failure, on cross-examination, Mr. Bruce was confronted with this statement. (4T 102:3:4, 102:21-104:13; 104:14-105:10). This confrontation and the damage to Mr. Bruce's credibility was the direct result

of trial counsel's inability to honor a landmark Supreme Court precedent and request a simple hearing. Once again, trial counsel failed to work as an advocate, prejudicing his client.

Credibility was key to this trial strategy. Yet, trial counsel did not put any opposition to the use of Mr. Bruce's statement to impugn his credibility.

Moreover, while the trial court acknowledged that a Miranda violation *could* result in the use of the statements for impeachment purposes, it is equally true that the trial court could have suppressed the statement substantively upon a finding that it was involuntary and untrustworthy. See, Mincey v. Arizona, 437 U.S. 385 (1978) (stating impeachment exception requires statement to be "trustworthy and reliable in that it was given freely and voluntarily without compelling influences."). Thus, by forsaking a Miranda motion, trial counsel provided the State ammunition to attack his client.

At the most generous reading of these facts, trial counsel was ineffective and, based upon the trial court's adverse credibility findings of Mr. Bruce, this error was prejudicial. Alternatively, ineffectiveness is clear and remand is necessary to resolve the factual dispute as to prejudice.

Third, trial counsel failed to object to critical hearsay. When Detective James Armstrong was testifying, trial counsel's failure to object permitted

prejudicial hearsay to be elicited. During this exchange, the State backdoored testimony allegedly identifying Mr. Bruce as the suspect in question. (2T 225:20 to 227:1) This is ineffective and prejudicial. This failure, again, shows a lack of diligence on the part of trial counsel.

Moreover, the fact that the out-of-court declarant (Detective Steve Palmyra) was retired, 2T 41:1-3, is evidence of prejudice that, at a minimum, would require an evidentiary hearing to resolve. Whether this core identification evidence would have been entered into the record is suspect because of Detective Palmyra's retirement. Would he have been available to testify? Was he even in the Atlantic County area? Would the State have simply forgone this evidence had Palmyra been unavailable? These questions need answers. As such, whether this *identification* evidence would have been admitted is suspect.

While one may argue that identification of the shooter was not a major part of the case (since Mr. Bruce admitted same), this failure demonstrates that trial counsel was asleep at the wheel.

Fourth, trial counsel failed to make a motion for acquittal. At the end of the State's case, co-defendant Jamal Bruce made an extensive argument for a judgment of acquittal. (4T 71:22 to 81:13). Jamal Bruce's motion was successful and the court granted the application, dismissal all charges against him. (4T 87:20

to 88:1).

However, when the trial court looked to Mr. Bruce's counsel, trial counsel declined the invitation. (4T 81:13-15) (Court inquiring if Hasan Bruce's has anything to address and counsel declining); (4T 83:18-20) (Court asking if Hasan Bruce's counsel had "anything" and counsel declining).

Under State v. Reyes, 50 N.J. 454 (1967), at the conclusion of the State's evidence, trial counsel reserves the right to make a motion for a judgment of acquittal. In the approximately seventy (60) years since this case was decided, a "Reyes Motion" has become standard practice.

Trial counsel can use a Reyes motion to highlight deficiencies in the State's case and usher forth its theory of the evidence (and a defense) up to that point. It allows trial counsel, also, to hear back from the judge (the decider of a Reyes motion) as to *why* it is denying the application.

In jury trials, a Reyes motion preserves the issues for appeal. In a bench trial, it can serve an even greater function. If the trial judge denies the Reyes motion, it explains *why* it is so ruling. The trial court would tip its hand as to what evidence was strong, for example, or, where the defendant's argument falls short. Here, however, trial counsel missed this critical opportunity.

For one, trial counsel failed to usher forth that Taylor was in a rage,

grabbed a gun, cocked it, and did something to jam that *firing* mechanism. Even in a denial of the motion, the trial court would have telegraphed *why* it was so ruling.

Trial counsel and Mr. Bruce would have heard from the ultimate fact-finder herself which facts were guiding her decision to deny that motion. This, in turn, would have armed trial counsel with an actual strategy as to how to proceed in its case.

Trial counsel could have (and should have) understood that at a bench trial it could tailor its direct examination and case towards addressing any concerns, facts, or legal claims the trial judge made in her Reyes motion decision. By failing to even stand up and defend Mr. Bruce at that critical juncture, trial counsel fell far below the level of reasonable competence required to a constitutionally-sufficient advocate for Mr. Bruce.

Fifth, trial counsel failed to investigate or call Jamirah Simley as a witness. Jamirah Simley was the defendant's girlfriend at the time of the incident. Taylor had also contacted her via social media and made threats to Mr. Bruce's life. (4T 89:2-91:25). This probative evidence was objected to by the State and sustained by the trial court. (4T 91:19-23).

Being able to call a witness is baseline competence. Here, obviously, trial

counsel *correctly* felt that Mr. Bruce's knowledge of threats by Taylor would be relevant to a claim of self-defense. After all, such evidence goes to the *emotional* consideration of Mr. Bruce's claim of self-defense (i.e., whether Taylor would be armed; whether it was reasonable to think he could retreat, etc.). Yet, there was no investigation into this witness prior to trial and trial counsel did not call her as a witness.

In sum, these trial counsel errors struck at the heart of Mr. Bruce's trial: the proper invocation of the actual defense; a core motion that would have simultaneously highlighted errors in the State's case-in-chief while telegraphing a strategy for the defense's upcoming case; substantive protections about confronting witnesses through calling them to the stand; compulsory process to call one's own witnesses; and a landmark Supreme Court case which would have maintained Mr. Bruce's credibility. These errors demonstrate that trial counsel was not acting as a zealous advocate, prejudicing Mr. Bruce.

POINT THREE:
EXCLUSABLE NEGLECT JUSTIFIES RELAXATION OF THE TIME LIMITATION UNDER 3:22-12. (Da100-101)

Mr. Bruce was sentenced on May 29, 2015 (Da7-9). His pro se petition for post-conviction relief was filed on May 5, 2023 (Da19-23). Counting the days, the PCR was filed beyond the five-year time period permitted under Court Rule.

However, Mr. Bruce was never advised of this limitation or his rights to a PCR by the trial court or his trial counsel. Therefore, the time bar should be relaxed.

Pursuant to R. 3:2-12, the five-year limitation may be relaxed based upon a finding of "excusable neglect." This time limitation serves the purpose of ensuring a fair and accurate assessment of the events as well as achieving finality in judgments. State v. Mitchell, 126 N.J. 565, 575 (1992). However, this Rule is "not rigid or monolithic" and "as with all of our Rules, where the interests of justice so require, the Rule will be relaxed. Mitchell, 126 N.J. at 575 (citing R. 1:12).

The Court guided that, in considering the relaxation of this Rule, courts should consider "the extent and cause of the delay, the prejudice to the State, and the importance of petitioner's claim in determining whether there has been an injustice sufficient to relax the time limits." Id.; see also, State v. McQuaid, 147 N.J. 464, 485 (1997) (citing Mitchell, 126 N.J. at 580).

In State v. Molina, our Supreme Court recited that "a form outlining a defendant's appeal rights **must** be given to the defendant, and completed by the defendant and his counsel..." 187 N.J. 531, 536 (2006) (emphasis added). Contra this admonition, the record is void of instruction advising Mr. Bruce of his rights to a PCR. (5T, 32:1-15). Thus, Mr. Bruce cannot be faulted for failing to file

within five (5) years when he was never advised of that time limitation. Holding Mr. Bruce to an unadvised standard is not in the interests of justice.

Indeed, State v. Hannah, 248 N.J. 148, 155 (2021) is instructive. There, the New Jersey Supreme Court considered an ineffective assistance of counsel claim for a claim that had been previously raised and decided years earlier. To the Court, the interests of justice dictated review and, in the end, a reversal of 28-year-old conviction on the grounds of ineffective assistance of counsel. Id. "R.3:22-5's bar to review a prior claim litigated on the merits is not an inflexible command and must yield to a fundamental injustice." Id., at 155.

Here, Mr. Bruce certified that he was never advised of the time bar and there is nothing in the record to contradict this evidence. (Da100). As the PCR court noted the loss of his file is not his fault. (Da101). Accordingly, there is no time-bar and the Rule should be relaxed to address the merits of this action.

POINT FOUR:
PETITIONER'S CLAIMS ARE NOT BARRED (Da103)

The PCR court originally found that the claims were "barred because they should have previously been adjudicated." (Da102). Claiming the errors "were part of the record and known to the Petitioner," the PCR court indicated that Court Rule barred review of the claims. This is incorrect.

Under R. 3:22-4(a), a ground for relief not previously raised is barred

unless a court finds: (1) "that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in a fundamental injustice."

While this matter is reviewed *de novo*, the points raised below and herein could not have raised on appeal and/or failing to review the claims would result in a fundamental injustice.

Initially, it must be stated that the Rule relied upon specifically carves out an exception for claims of ineffective assistance of counsel. That is exactly what was argued below.

Moreover, the claims were not "part of the record" as the substantive error requires review of evidence that could only be adduced at an evidentiary hearing. For example, the questions presented as to the "strategy" to waive a jury trial, decision to waive a jury trial, and whether trial counsel properly advised Mr. Bruce about the waiver of a jury trial, as explained more fully below, is not encapsulated in the record. The mere presentation of a piece of paper regarding waiver, Da32, is not the whole picture.

For one, whether Mr. Bruce was properly advised of the "strategy" behind all decisions (i.e., waiver of jury trial; failure to investigate a witness; failing to

file basic motions) necessarily involves trial counsel testimony explaining the reason behind the decision and/or whether trial counsel thoroughly advised Mr. Bruce of how the "strategy" was to be utilized.

For another, simply casting these errors as "strategic" ignores that the "strategy" must make sense and is in line with Mr. Bruce's choice of defense. As Mr. Bruce's certification makes clear, the "decisions," or more aptly put "failures," of trial counsel were contra Mr. Bruce's stated goals. The failure to have a coherent strategy consonant with the client's own wishes indicates that trial counsel was not operating as an advocate, but rather was dictating by fiat.

Additionally, as further stated below, denying substantive review of the claims would result in a fundamental injustice. Not only do the claims address sound ineffective assistance of counsel and require additional evidence, but they go to whether Mr. Bruce was accorded a fair and proper trial.

The questions go to what would have (or should have) been advised of supposed "strategic" decision and, in turn, whether, as the person actually on trial, blesses those decisions. Those questions need answers. Those answers can only come from an evidentiary hearing. For all these reasons, the claims made by Mr. Bruce are not barred under R. 3:22-4(a). PCR is appropriate vehicle to address this violation.

CONCLUSION

For all of these reasons, defense counsel's errors individually and/or cumulatively deprived Mr. Bruce of his right to the effective assistance of counsel. A reviewing court may reverse a conviction based on cumulative errors. As the New Jersey Supreme Court has stated, where

> the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury.

State v. Orecchio, 16 N.J. 125, 129 (1954). Here, the errors – alone or in their aggregate – rendered Mr. Bruce's trial unfair. As such, the PCR judge erred and that reversal of the conviction is required. Alternatively, an evidentiary hearing should be ordered.

Respectfully submitted,
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LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
HASAN BRUCE (Defendant-Appellant)
DOCKET NO. A--351-24
INDICTMENT NO. 13-04-1116-I

Criminal Action: On Appeal from an order of the Superior Court of New Jersey, Law Division, Atlantic County, denying a petition for post-conviction relief.

Sat Below: Hon. Donna M. Taylor, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-4(a), this letter is submitted in lieu of a formal brief on behalf of the State of New Jersey.

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TABLE OF JUDGEMENTS, ORDERS, AND RULINGS

STATEMENT OF PROCEDURAL HISTORY

On April 17, 2013, an Atlantic County Grand Jury issued a true bill for Indictment No. 13-04-1116, charging Hasan Bruce (hereinafter Defendant) with: Count 1, First-degree murder, contrary to N.J.S.A. 2C:11-3a(1)(2); count 2, first-degree conspiracy to commit murder, contrary to N.J.S.A. 2C:5-2; count 3, second-degree possession of weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a; and count 4, second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b.

The Defendant waived his right to a jury trial. (Da[1] 32). A bench trial was conducted on May 18, 2015. (1T[2]-5T). On May 21, 2015, the Trial Court, sitting as judge of both law and facts, found the Defendant guilty of aggravated manslaughter, and unlawful possession of a weapon, acquitting him of the other offenses. (4T 36:21-25; 37:1-10). On May 29, 2015, the Defendant was sentenced to a term of eighteen years, NJSP, subject to NERA on the amended count 1, and six years subject to the Graves Act on count 4, to be served consecutive to count 1. (Da 007). A direct appeal was filed by the Defendant,

[1] "Da" refers to Defendant's Appendix.
[2] "1T" refers to trial transcript dated May 18, 2015.
"2T" refers to trial transcript dated May 19, 2015
"3T" refers to trial transcript dated May 20, 2015.
"4T" refers to trial transcript dated May 21, 2015.
"5T" refers to sentencing transcript dated May 29, 2015.
"6T" refers to motion transcript dated February 12, 2014
"7T" refers to PCR hearing transcript dated August 27, 2024.

and this Honorable Court affirmed the trial court in a decision issued on January 25, 2018. (Da 010). The Supreme Court denied certification in an order dated June 19, 2018. (Da 017).

The Defendant filed a motion to correct an illegal sentence on April 28, 2022, which was denied by the Hon. Donna M. Taylor, J.S.C. on July 6, 2022. (Da 018). The Defendant then filed a petition for post-conviction relief on May 15, 2023. (Da[3] 024). A hearing was held on August 27, 2024. (7T). The PCR court denied the application in a letter decision dated September 24, 2024.(Da 085). The instant appeal follows.

COUNTERSTATEMENT OF FACTS

The State will rely upon the Appellant's statement of facts pursuant to R. 2:6-4(a).

LEGAL ARGUMENT

POINT 1

THE DEFENDANT'S CLAIM IS BARRED UNDER RULE 3:22-4

I. THE DEFENDANT'S PETITION IS TIME BARRED

"Rule 3:22-2 provides four grounds for post-conviction relief: (a) 'substantial denial in the conviction proceedings' of a defendant's state or

[3] The handwritten addendum to the verified petition has a filed date stamp of May 15, 2023. The certification date is November 15, 2022, and the petition filed date is June 24, 2024. The State has cited the earliest filing date, as the Court Rules rely on the filing date rather than a handwritten date on a document.

federal constitutional rights; (b) a sentencing court's lack of jurisdiction; (c) an unlawful sentence; and (d) any habeas corpus, common-law, or statutory grounds for a collateral attack. A Defendant must establish the right to such relief by a preponderance of the credible evidence. State v. Preciose, 129 N.J. 451, 459 (1992). Citing State v. Mitchell, 126 N.J. 565, 579 (1992).

A petition for post-conviction relief must be filed within five years of the date of the judgment of conviction, unless the defendant establishes "excusable neglect and that there is a reasonable probability that if defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice[.]" R. 3:22-12(a)(1)(A). To meet this standard, a defendant must demonstrate "exceptional circumstances." State v. Jackson, 454 N.J. Super. 284, 295 (App. Div.) certif .denied, 236 N.J. 35 (2018). A fundamental injustice is one in which the error "played a role in the determination of guilt." State v. Nash, 212 N.J. 518,547 (2013) (quoting Mitchell, 126 N.J. at 587).

No mere discretionary guideline, the time bar is to be strictly enforced by the court, which has "an independent, non-delegable duty to question the timeliness of the petition[.]" State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018), certif. denied, 236 N.J. 374 (2019). Indeed, a defendant's failure to establish excusable neglect deprives the court of jurisdiction to consider the

petition. "Absent sufficient competent evidence to satisfy this standard, the court does not have authority to review the merits of the claim." Id.

The rule therefore serves to respect the need for achieving finality of judgments and to allay the uncertainty associated with unlimited possibilities of relitigation. State v. Cummings, 321 N.J. Super. 154, 165 (App. Div. 1999) (quoting Mitchell, 126 N.J. at 576). "In determining whether a defendant has asserted grounds sufficient for relaxation of the Rule, a court 'should consider the extent and cause of the delay, the prejudice to the State, and the importance of the Defendant's claim in determining whether there has been an 'injustice' sufficient to relax the time limits.'" State v. Goodwin, 173 N.J. 583, 594, (2002) (quoting State v. Afanador, 151 N.J. 41, 52 (1997). "Absent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay." Afanador, 151 N.J. at 52. The Defendant must articulate facts, beyond bare allegations, that demonstrate significant issues regarding his guilt or sentence in order to relax the rule. Mitchell, 126 N.J. at 580.

In State v. Brewster, a Defendant was sentenced in 1998. He then filed a PCR in 2010 (nearly twelve years later), claiming incorrect or incomplete advice regarding immigration consequences. The Brewster Court found that "If excusable neglect for late filing of a petition is equated with incorrect or

incomplete advice, long-convicted defendants might routinely claim they did not learn about the deficiencies in counsel's advice on a variety of topics until after the five-year limitation period had run." State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013).

Here, the Defendant does not certify to any facts lending themselves to a conclusion that he did not "sleep on his rights." State v. Chau, 473 N.J. Super. 430, 441 (App. Div. 2022). Conveniently, the Defendant did not certify to any reason at all for the delay (something required upon filing) until after the State filed a brief arguing that it should be dismissed due to the lack of certification. At the very least, the timing suggests the certification was rather self-serving.

Even if it were to be taken at face value, the Defendant merely certifies that he "learned about post-conviction relief while incarcerated" but that he "improperly assumed that the five-year time bar begins running when the all the appellate proceedings have concluded." (Da 078). The trouble with that argument is two-fold. First, as cited above, Brewster held that incomplete or incorrect advice did not constitute excusable neglect. A defendant's "assertion that he lacks sophistication in the law does not satisfy the exceptional circumstances requirement." State v. Murray, 162 N.J. 240, 246 (2000). In State v. Dugan, a defendant's misunderstanding of R. 3:22-12 was found to not constitute excusable neglect. 289 N.J. Super. 15, 22, (App. Div. 1996);

"Ignorance of the law and rules of court does not qualify as excusable neglect. State v. Merola, 365 N.J. Super. 203, 218 (Law. Div. 2002), aff'd, 365 N.J. Super. 82 (App. Div. 2003). Further, the reason certified to is not one that would have been addressed by any form or colloquy.

Still, the Defendant did manage to file a timely direct appeal, as well as a motion to correct an illegal sentence, which lends credence to the notion that he was well aware of post-conviction relief. Nevertheless, the Defendant has failed to provide "sufficient, competent evidence" demonstrating his claim of excusable neglect. State v. Brown, 455 N.J. Super. 460, 470 (App. Div. 2018), certif. denied, 236 N.J. 374 (2019). "The concept of excusable neglect encompasses more than simply providing a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). The Defendant must make a demonstration by a preponderance of the credible evidence while articulating specific facts. State v. Mitchell, 126 N.J. 565, 579 (1992).

Again, the Defendant has the burden to establish excusable neglect. He cannot do so upon the basis of his ineffective assistance of counsel claim. It is the State's position that the Defendant's petition, eight years later, severely prejudices the State, that the cause of the delay has not been certified to, and that the Defendant's claims do not rise to the level of a fundamental injustice

sufficient to relax the time bar. In fact, a majority of the claims should have been raised on appeal, or amount to bald assertions. The Defendant does not evaluate or argue the above-listed factors which establish excusable neglect.

II. The Appellate Rights Form

Appellate counsel argues that "Mr. Bruce certified that he was never advised of the time bar and there is nothing in the record to contradict this evidence." (Def. Brief, 36). For one, it should be noted that there's not much evidence at all because in the intervening years, the file was lost. For another, counsel—when stating "the record is void of instruction advising Mr. Bruce of his rights to a PCR"—cites to the trial transcript and the finding of guilt, namely 5T[4] 32-15, which appears to be the trial court discussing self-defense. (Def. Brief, 35). The trouble with that claim is that the rights colloquy is done at sentencing, and that transcript indicates that he was informed and that he signed an appeals rights form. (5T 31:11-23).

Further, the Defendant's reliance on State v. Hannah, 248 N.J. 148, 155 (2021) is misplaced. Hannah, as the Defendant properly quotes, dealt with the bar on previously adjudicated claims. The issue here is the time bar, not R. 3:22-5's bar on previously adjudicated claims and so Hannah is inapplicable.

[4] This citation refers to the transcript designation by the Defendant, which is the trial transcript.

III. THE DEFENDANT'S CLAIM IS BARRED BY RULE 3:22 AS IT COULD HAVE BEEN REASONABLY RAISED AT A PRIOR PROCEEDING.

As previously stated, Rule 3:22-4 bars claims not raised in prior proceedings, including direct appeal, unless the court finds "(1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey." Further, in order to overcome that bar, a Defendant must demonstrate that the facts supporting the claim could not have been discovered sooner by reasonable diligence. Id.

It is difficult to see how any of the alleged errors contained within the petition could not have been raised on direct appeal. The errors are contained within the record, and were known to the Defendant at the moment they occurred, and known to counsel upon reviewing the transcript. The decision not to make a motion, the missed objection, the waiver of a jury, no notice of a defense claim; all of these claims could have been raised previously, and certainly much sooner than eight years after the fact. For that reason, those claims should be barred.

POINT 2:

THE DEFENDANT'S CLAIM FAILS UNDER THE STRICKLAND/CHRONIC STANDARD

The Defendant claims he was aggrieved by ineffective assistance of counsel on a variety of issues. For the following reasons, the State submits that the Defendant has failed to meet his burden. The Sixth Amendment right to counsel includes the right to effective assistance of counsel. U.S. CONST. Amend. VI; State v. Norman, 151 N.J. 5, 23 (1997). The "benchmark" for analysis of an ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

Ineffective assistance of counsel cases are guided by Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984). The Strickland-Cronic line of cases were adopted by New Jersey in State v. Fritz, 105 N.J. 42, 52 (1987), which held that, to establish a *prima facie* claim of ineffective assistance of counsel, the petitioner must meet Strickland's two-prong test by showing (1) counsel's performance was deficient and (2) actual prejudice by counsel's alleged deficient performance. "… [A] defendant whose counsel performed below a level of reasonable

competence must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 60-61 (quoting Strickland 466 U.S. at 694). The Court in Strickland cautioned that "scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

The Defendant argued that there was "no reasonable justifiable trial strategy that would involve waiving his right to a jury trial." The State would submit that it certainly was justifiable, and the attorney placed his reasons for doing so on the record. Further, it is difficult to see how the Defendant was prejudiced as a result, considering that he was facing a charge of murder, along with three other counts, and ended up with only two convictions, one of which being aggravated manslaughter, being acquitted on the others. The Defendant may well have been convicted of murder when dealing with a jury, as many are, and he would then be claiming the opposite. This claim is precisely the sort of hindsight that the Strickland Court cautioned against—the Defendant clearly received a benefit from counsel's sound strategy. The mere fact that (as

the Defendant argues), the Judge was "not persuaded by the defense" does not render the Defendant prejudiced. If that were the standard, any person convicted would fit the bill. If there had been a jury which had not been persuaded, would the Defendant then argue for a bench trial?

The Defendant next argues that the cumulative effect of errors prejudiced the Defendant. Obviously, as the Defendant himself admits, the failure to give notice of the defense claim did not prejudice him as the State took no issue with it. Next, the Defendant takes issue with the failure to object to a hearsay statement, but again admits that the information was not critical, since the Defendant admitted to shooting the victim. That is true, and it is not demonstrated how the result would have been different, never mind the fact that missing a single hearsay objection does not render an attorney unconstitutionally deficient. Such a rule would demand perfection, and that is plainly the opposite of what the Supreme Court has held.

The Defendant then argues that trial counsel failed to make a motion for an acquittal at the end of the State's case. Such a motion would have been frivolous, and so it is hard to discern how it could be ineffective assistance of counsel. "[T]he question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and

giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458–59 (1967). The Defendant was relying on an affirmative defense, and all evidence, including his own, pointed to him shooting the victim.

Despite the comparison, the evidence against the codefendant, who was being tried solely on an accomplice theory, was much thinner than it was for the Defendant. That is, of course, to be expected when (as the defendant testified) he was the one who shot the victim and did so spur of the moment. One cannot be an accomplice to self-defense.

Therefore, for the Defendant to have succeeded, the trier of fact would have to find for the Defendant's defense claim, which would not be favorable to the State. The required inferences drawn from the State's case would have to be viewed in favor of the Defendant for it to benefit him, as the State had introduced sufficient evidence of the homicide. Further, the Defendant fails to establish a reasonable probability that the result would have been different. In this case, he needs to demonstrate that if counsel had made the motion, he would likely have been acquitted.

That same point goes to the Defendant's claim that counsel's cross examination of Michael Bolden did not go as well as it could have gone. First, there is no indication that the case turned on whether counsel's cross examination "almost led to a recantation" of favorable testimony. Almost, is not the standard, and there is no assertion that the result would have been different. Could it have gone better? Perhaps. But counsel did get the answer he was looking for, and the less than stellar performance of counsel or unpredictable answers of the witness in no way prejudiced the Defendant to the point where it led to an unjust trial.

The Defendant alleges that no investigation was done into Ms. Smiley, that she did not testify, and that her testimony would have supported his defense claim because she would testify to the hatred the victim had for the Defendant. First, the allegation that there was no investigation is not supported by any citation to a record or testimony, and therefore amounts to a bald assertion. Second, no one knows what Ms. Smiley would have testified to. Third, it is difficult to see how Ms. Smiley would testify to demonstrate the state of mind of the deceased victim, without testifying to hearsay, and under what exception that would be permitted. Evidence of the victim's relationship with Ms. Smiley is different than evidence demonstrating the intent of the victim. "To that extent, the evidentiary principle embraces the common notion

that people often do that which they say they intend to do. By its very terms, however, the rule is limited to statements offered to prove the declarant's conduct, not that of another person." State v. Downey, 206 N.J. Super. 382, 391 (App. Div. 1986). Finally, that same evidence might just as easily be motive evidence showing why the Defendant shot and killed the victim. Even if she had testified, and it was clear that the victim hated the defendant, the Defendant fails to show how that would have changed the result of the court's finding regarding self-defense.

POINT 3:

THE DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

The Defendant asserts that he is entitled to an evidentiary hearing because he has established a *prima facie* showing of ineffective assistance of counsel ("IAC"). As demonstrated above, the Defendant fails to meet his burden under the test.

In seeking an evidentiary hearing, the Petitioner must present a *prima facie* claim. In IAC cases, a *prima facie* showing requires the Petitioner to "demonstrate the reasonable likelihood of succeeding under the test" set forth in Strickland and Cronic. State v. Preciose, 129 N.J. 451, 463 (1992). Provided the Petitioner establishes deficient performance, he must then satisfy the "far

more difficult prong of the Strickland-Cronic-Fritz test" which requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 464 (citing Strickland, 466 U.S. at 694). In attempting to meet the requirements of this second element, a showing that the alleged errors "had some conceivable effect on the outcome of the proceeding" is insufficient. State v. Fritz, 105 N.J. 42, 52 (1987).

"The judge deciding a PCR claim should conduct an evidentiary hearing when there are disputed issues of material facts related to the defendant's entitlement to PCR, particularly when the dispute regards events and conversations that occur off the record or outside the presence of the judge." State v. Porter, 216 N.J. 343, 354 (2013). However, a hearing is not warranted if those "allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing" Id. At 355, (quoting State v. Marshall, 148 N.J. 89, 158 (1997)).

The crux of the issue is that the Defendant raises a number of claims here, that are not supported by any certification regarding an off-the-record conversation. For instance, "whether Mr. Bruce was properly advised of the 'strategy' behind all decisions" is raised by appellate counsel, who claims that

"those questions need answers." (Def. Brief, 38). Presumably, a *prima facie* claim would purport to have answers. Ideally, in a PCR, the *Defendant* would present the answers in a certification, which could then be disputed by the State or some other source. An evidentiary hearing requires a disputed issue of material facts, and it is rather difficult to dispute material facts when they are not before the court. Counsel asking questions in a brief does not satisfy the standard.

As stated above, the Defendant cannot establish that the results would have been different. An evidentiary hearing would not provide any useful information that is not already known and even if it did, it would not change the fact that the alleged errors have not been shown to have produced an unjust result at trial. An important fact that must be addressed was the court's findings regarding self-defense. First, the court found that the threat perceived by the defendant was caused by his own conduct. (4T 31:14-17). Second, the court found that because he testified that he suspected the victim would be armed, he had an obligation to avoid the confrontation altogether, rather than proceeding to meet him while armed himself. The court found this tantamount to ignoring a duty to flee. (4T 31:23-25; 32:1-10). Because of that expectation, and his testimony regarding the culture of the neighborhood, he could not claim surprise by the victim's conduct, nor could he claim it impassioned him.

(4T 32:17-21). Finally, the court found he did not have an objectively reasonable basis because he testified that he did not see a gun, and because his own gesture of holding a firearm would have equally appeared the same way to the victim. (32:24-25; 33:1-7).

The Defendant's case rested on the self-defense claim. He fails to establish how any of the alleged errors would have impacted the court's findings related to perfect self-defense. To the extent that he wishes he had remained silent on a charge of murder, or whether he should have introduced evidence that could potentially support a conviction for murder, the State would submit that it very well might have resulted in a worse outcome for the Defendant. His own testimony resulted in that outcome, but to not have testified at all would have cost him the benefit of the imperfect self-defense which saved him from a murder conviction.

CONCLUSION

For the reasons expressed, the State respectfully requests that the Appellate Division affirm the Law Division's order denying the Defendant's petition.

Respectfully submitted,

/s/ Matthew T. Mills
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000351-24 T3
June 16, 2025

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Denial of a Petition for Post-Conviction
v.	:	Relief in the Superior Court of New Jersey, Law
HASAN BRUCE,	:	Division, Atlantic County.
Defendant-Appellant.	:	Ind. No. 13-04-1116-I
	:	Sat Below:
	:	Hon. Donna M. Taylor, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Honorable Judges,

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter-brief in lieu of a formal brief is submitted on behalf of Defendant-Appellant.

DEFENDANT IS CONFINED

TABLE OF CONTENTS

STATEMENT OF PROCEDURAL HISTORY

Defendant adopts and incorporates the procedural history recited in his merits brief.[1]

STATEMENT OF FACTUAL HISTORY

Defendant adopts and incorporates the factual l history recited in his merits brief.

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[1] Da-Defendant's Appendix. Pb-State's brief. Db-Defendant's initial brief.
Transcripts:
(1T) – transcript of motion dated February 12, 2014
(2T) – transcript of trial dated May 18, 2015 (Vol. 1. 1-200 and Vol 2. 201-233)
(3T) – transcript of trial dated May 19, 2015
(4T) - transcript of trial dated May 20, 2015
(5T) - transcript of trial dated May 21, 2015
(6T) - transcript of plea and sentence dated May 29, 2015
(7T) – transcript of PCR hearing non-evidentiary hearing dated August 27, 2024

LEGAL ARGUMENT

POINT I

THE CLAIMS ARE NOT BARRED BY COURT RULE

Under State's Point I, the State argues that the claim is barred under Rule 3:22-4. (Pb2). The State then posits: (1) that Mr. Bruce did not certify to facts that support that he did not sleep on his rights; (2) that State v. Brewster, 429 N.J. Super. 37 (App. Div. 2013), precludes review; and (3) that other motions indicate that Mr. Bruce was aware of his rights to file a petition. (Pb5-8). None of these arguments have merit.

First, Mr. Bruce did certify to facts that he did not sleep on his rights. In fact, the State acknowledges the Certification included in the Appendix that support this claim. (Pb5). Mr. Bruce presented that he was not advised of the appropriate time to file. Also, to note, this PCR Petition was filed on November 15, 2022, within five years from when his petition for certification was denied on June 19, 2018. (Da78).

Second, the State conflates State v. Brewster's discussion of ignorance of *substance* of arguments with ignorance of the procedural timeframe. 429 N.J. super. 387 (App. Div. 2013). (Pb5) Brewster related to supposed ignorance of collateral immigration consequences. Id. at 400. That specific issue is unrelated to whether a defendant was advised of the procedural limitations implicated at issue in this case. Here, the PCR Court found nothing in the record to find appropriate notice and make

a specific finding (which the State never appealed) to waive any time bar claim. (Da100) (stating "the Court cannot find any evidence that the Petitioner was advised of the time limitations by the Court on the record or by counsel.").

Third, the State uses filings of a direct appeal and motion to correct an illegal sentence as alleged evidence to support knowledge of a PCR. (Pb6). For one, knowledge of one motion does not necessarily lead to knowledge of all other motions. For another, even knowledge of the mere existence of other motions does not "lend[] credence" to knowledge of *procedural* rules for the entire universe of other motions. (Pb6) Thus, this argument suffers from two layers of flawed logic.

Finally, regardless of the above, the State cites the sentencing transcript to aver that Mr. Bruce signed the appeals rights form. (Pb7) However, the PCR Court ruled on this matter with this record, including that transcript. Based upon this argument, it made specific findings.

Below, the PCR Court found no evidence that Mr. Bruce was properly advised of the time limitations for PCR. (Da100-101). The Court made a specific finding of fact and proceeded to disregard any time based upon the record and arguments. (Da101) ("Therefore, the Court will disregard the time bar and hear the petition on the merits.").

Indeed, even upon the filing of the Notice of Appeal by Mr. Bruce, the State failed to file any Notice of Appeal challenging this holding. The PCR court did not

simply address the merits in the interest of thoroughness, but rather made a legal and factual finding that the State consciously failed to appeal.

Thus, there is no basis to disturb the finding now and any challenge to that finding never properly preserved and appealed by the State. Arguments as to a time bar are not properly before this Court and the finding of the court below should not be disturbed.

Continuing, the State argues that the claims are barred as they should have been previously raised in a prior proceeding. (Pb8) Initially, it is important to emphasize that the State never addresses the most prominent error, i.e., the decision to waive a jury, in this argument. As such, taking this claim at face value, the State does not argue that the jury waiver issue is barred as having to been raised in an earlier proceeding.

As to the errors raised in the State's brief, the State misconstrues the argument to cloud proper analysis. The State simply declares that such arguments "could have been raised previously." (Pb8). However, that is simply incorrect. And, more importantly, the question is whether these *multiple* substantive failures are indicative of the fact that counsel's performance fell below the constitutionally sufficient counsel. In that sense, the error itself is but a subset of the fundamental question. Given that ineffective assessment of counsel claims generally are not cognizable on

direct appeal as they require evidence outside the record, these issues remain properly before the Court in this posture.

Moreover, at least some of these points fall outside the record as well. Direct appeal would not reveal *how* and *why* a motion to suppress Mr. Bruce's statement was not filed. There is clear merit to this motion as within the introductory pages of the statement Mr. Bruce requested counsel *twice*. (Da29-30). Not only were Mr. Bruce's request for counsel not honored then, but his right to effective counsel was not honored at trial when trial counsel disregarded a plainly meritorious motion despite Mr. Bruce's request for same.

Direct appeal would also not reveal the extent of beneficial testimony that Ms. Smiley's testimony would have provided and the supposed reason for failing to simply investigate. Counsel knew that Ms. Smiley's interaction with both Mr. Bruce and the victim played a part in this case. Counsel ensured that she was discussed at trial. (4T 89:2-91:25) Thus, even a cursory review of the arguments reveals that these actions by counsel could *not* have been raised in a prior proceeding due to the nature of the evidence required for assessment.

Both the claims just noted have strong merit with which the State never grapples. The State does not disagree that a motion to suppress could have benefitted Mr. Bruce had the trial court found he could not be impeached with an involuntary statement. The State does not counter that Ms. Smiley's testimony that the victim

threatened Mr. Bruce's life would not have aided a self-defense argument. Instead, the State hides behinds procedural arguments because plainly these meritorious claims require evidence from outside the record.

Alternatively, should this Court find that some of the arguments raised herein could not have been raised previously, this Court could limit a remand to address those specific issues. Discounting all arguments operates as a hatchet when a scalpel may be more appropriate.

POINT II:

A *PRIMA FACIE* SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN MET REQUIRING A REMAND AND EVIDENTIARY HEARING

The State argues that the test under Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984), cannot be satisfied. (Pb9). As to the waiver of a jury trial, the State avers that because the attorney "placed his reasons for doing so on the record," that this resolves the point. (Pb10). It does not.

As previously argued, and as never challenged by the State, the "reasons" placed on the record are irrational. (Db22, 24). To say that a trial should be free from emotion when the defense presented *requires* consideration of emotions is inconsistent with the legal standard for self-defense.

The irreconcilable nature of the waiver with governing legal standard for self-defense calls out for an evidentiary hearing. At such a hearing, trial counsel will be able to testify not only to the extent of the communication with Mr. Bruce but also

can explain how the decision to take emotions out of the case through waiver makes any sense when the defense of the case is an appeal to emotions. Whether this decision is coherent and/or was explained to Mr. Bruce in a proper and non-misleading manner can only be adduced at a hearing.

This is critical given that Mr. Bruce's fear of the victim is inextricably intertwined with this matter. A jury is confronted with emotion rendering this waiver nonsensical. An evidentiary hearing is required.

In support of the reasonably proposition that a declaration on the record does not insulate counsel from PCR review, Mr. Bruce relied on established case law. In State v. Nunez-Valdez, 200 N.J. 129,140-42 (2009), our Supreme Court found that false or misleading information may lead to a finding of ineffective assistance of counsel. So too here, misleading advice such as the potential burdens and benefits of waiving a jury suffer from the same infirmity. This remains the law of the land *regardless* of whether counsel makes a statement on the record.

Mr. Bruce is entitled to an evidentiary hearing in order to flesh out this harm. Again, such a hearing on remand could be tailored to address whether: (1) trial counsel's "strategy" was properly explained to Mr. Bruce such that waiver was knowing, intelligent, and voluntary; (2) whether trial counsel's "strategy" has *any* logical underpinnings given the self-defense theory; and (3) whether trial counsel's

explanation was based upon misleading Mr. Bruce into believing such a waiver was appropriate for this trial given the answers to the previous questions.

Finally, the State argues that the waiver argument fails because Mr. Bruce was not convicted of murder. (Pb10). In other words, the State presents because the results could have been worse then there is no error. This argument deserves short shrift.

On the one hand, this argument presumes that Mr. Bruce would have been convicted of murder had a jury been empaneled. It fails to consider that a murder charge would neither survived scrutiny by a judge or a jury. The State's decision to overcharge could have *always* resulted in a not guilty verdict regardless of who was the finder of fact.

Not only is the supposed lack of prejudice based upon speculation, but it improperly assesses prejudice generally. Prejudice is not simply whether the result could have been worse, but whether but for effective counsel the result would have been *better*. A jury would have heard the totality of the evidence and leaned into the emotions. These emotions would support Mr. Bruce's case as a whole. This could have resulted in less extreme sentences for lesser included crimes such as for second-degree reckless manslaughter or even a complete acquittal for example. Thus, prejudice is demonstrated regardless of being acquitted of the top count.

As to the hypothetical that "[i]f there had been a jury which had not been persuaded, would the Defendant then argue for a bench trial," Mr. Bruce only adds that the obvious answer is no. (Pb11). This type of reverse-engineering does not implicate the same legal questions. It is a hypothetical without basis in fact or law and should be disregarded as hyperbole.

As to the cumulative evidence, Mr. Bruce notes a curious omission in the State's brief. (Pb11-14) On this point, the State again omits the failure to file a motion to suppress. This is the second time in so many pages that the State has failed to address this point head-on.

Mr. Bruce submits that this deliberate failure to address a key point speaks to merits of the issue. The State has no counter that suppression of the statement is linked to impeachment or the quality of the representation. Thus, the State simply ignores the point altogether. This Court should not blind itself to this issue and must find that the failure to make such a motion, and the State's failure to counter on this claim, requires remand.

Still, the State goes through some (but not all) of the cumulative error points. Mr. Bruce will not address each point in turn as the State's brief fails to address the actual argument presented.

For example, Mr. Bruce argued that failure to make a motion for a directed verdict indicates that counsel failed to appreciate that the motion would have tested

the State's theory, pinpointed areas that inured to the State's benefit, and understood the points in need of being addressed when Mr. Bruce took the stand. Instead of tackling this point, the State merely presents that the motion would have been denied. (Pb11-12) But this oversimplification ignores that the failure was just another example of trial counsel sleeping through the case and failing to advocate for Mr. Bruce at all stages.

As to Ms. Smiley's testimony, the State properly notes that "there was no investigation" into her testimony. (Pb13). That is exactly the point: why did counsel fail to investigate this highly relevant witness? An evidentiary hearing is required to probe this point.

Moreover, contra the State's assertion, the trial records include evidence that the victim contacted Ms. Smiley and made threats to Mr. Bruce's life. (4T 89:2-91:25). Thus, it is not a "bald assertion," but rather evidence in black-and-white.

In turn, again, contrary to what the State writes, it is clear to what Mr. Smiley would have testified: that the victim was making threats on Mr. Bruce's life which goes to Mr. Bruce's state of mind. This testimony should have been fleshed out in greater detail at trial as it is the core of a self-defense claim. However, it was not because of trial counsel's ineffective assistance.

In the end, the State concludes that no evidentiary hearing is required. Critically, the State claims that the certification presented fails to present the

disputed question of fact that would necessitate an evidentiary hearing. (Pb15-16). To this, Mr. Bruce will simply direct this Court to the State's brief that disputes the questions presented by Mr. Bruce.

For example, Mr. Bruce argued that the waiver question implicates a host of evidence outside the record and presents lingering disputed questions. The questions weave together both factual and legal concerns, i.e., the inconsistency of the waiver with a self-defense claim and how the waiver was presented to Mr. Bruce. In response, the State attempt to *answer* the question but in a manner to consistent with its position. (Pb10). Thus, the question is clearly disputed. The actual answer is not simply the answer the State briefs. As such, an evidentiary hearing is required.

CONCLUSION

For all the reasons expressed herein and in Mr. Bruce's opening brief, this Court should reverse the decision below and remand to the Law Division to address the merits with an evidentiary hearing.

Respectfully submitted,
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June 16, 2025