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June 16, 2025

REDACTED LETTER-BRIEF ON BEHALF OF
DEFENDANT-APPELLANT

STATE OF NEW JERSEY,	SUPERIOR COURT OF NEW JERSEY
	APPELLATE DIVISION
Plaintiff-Respondent,	DOCKET NO. A-571-24T3
v.	Criminal Action
GIVER VASQUEZ,	ON APPEAL FROM AN ORDER
	DENYING POST-CONVICTION
Defendant-Appellant.	RELIEF OF THE SUPERIOR COURT
	OF NEW JERSEY, LAW DIVISION,
	MIDDLESEX COUNTY
	Ind. No.16-01-00083-I
	Sat Below:
	Hon. Pedro J. Jimenez, Jr., J.S.C.
	DEFENDANT IS CONFINED

Your Honors: This letter-brief is submitted pursuant to R. 2:6-2(b).

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[1] The petition for post-conviction relief is tantamount to a complaint and therefore is required to be included in the appendix pursuant to R. 2:6-1(a)(1).

[2] PCR counsel's brief is included in the appendix because it falls within one of the "exceptions to the general prohibition against including trial court briefs in the appendix." R. 2:6-1(a)(2). Specifically, issues raised in PCR counsel's brief were referred to in oral argument and the PCR court's opinion.

[3] See in Confidential Appendix.

CONFIDENTIAL APPENDIX

PRELIMINARY STATEMENT

Defendant received a life sentence with an 85% parole ineligibility for committing first-degree murder. He questions whether he received effective assistance of counsel when he agreed to waive his right to testify and elect to have a jury instruction given, considering the mental provocations he received at the hands of the victim—a story he feels should have been told to the jury. He also submits that a key State's witness was not properly cross-examined regarding any potential agreement between the State and the witness for leniency because of her apparent admission into PTI for two separate indictments. Finally, an issue which must be addressed at an evidentiary hearing, along with the others, involves whether defendant consented to trial counsel's concession that defendant did in fact mortally shoot the victim. Trial counsel died subsequently to sentencing and prior to the PCR hearing, but defendant is nonetheless entitled to an evidentiary hearing to address the issues raised herein.

PROCEDURAL HISTORY

The Middlesex County grand jury charged defendant, Giver Vasquez, on January 19, 2026, with the following charges in Indictment 16-01-00083-I: first-degree murder, in violation of N.J.S.A. 2C:11-3a(1)(2) (count one); second-degree unlawful possession of a weapon (handgun), in violation of N.J.S.A. 2C:39-5b (count two); second-degree possession of a weapon for an unlawful

purpose, in violation of N.J.S.A. 2C:39-4a(1) (count three); and fourth-degree stalking, in violation of N.J.S.A. 2C:12-10b (count four). (Da1-2)[1]

Defendant, who pled not guilty, was tried before the Honorable Pedro J. Jimenez, Jr., J.S.C. who held a Miranda[2] hearing on September 12, 1997, regarding defendant's statements to the police. The court found the statements were admissible. (3T97-16 to 102-15)

On October 3, 2017, the jury returned verdicts of guilty on all four counts of the indictment. (8T137-9 to 141-13; Da3) The court revoked defendant's bail. (8T144-18 to 19)

The court sentenced defendant on January 18, 2018, on count one charging murder to life imprisonment without parole. (9T25-13 to 17; Da3-5) The court merged counts two, three, and four into count one for sentencing purposes. (9T24-20 to 25-5; Da3)

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[1] "Da" refers to the brief for defendant-appellant.
1T refers to the conference transcript of February 14, 2017.
2T refers to the conference transcript of September 11, 2017.
3T refers to the motion and trial transcript of September 12, 2017.
4T refers to the trial transcript of September 14, 2017.
5T refers to the trial transcript of September 19, 2017.
6T refers to the trial transcript of September 20, 2017.
7T refers to the trial transcript of September 21, 2017.
8T refers to the trial transcript of October 3, 2017.
9T refers to the sentencing transcript of January 18, 2018.
10T refers to the resentencing transcript of March 9, 2018.
11T refers to the PCR hearing transcript of May 30, 2024.

[2] Miranda v. Arizona, 384 U.S. 436 (1966)

The court, upon realizing that it could not impose a sentence of life imprisonment without parole, resentenced defendant on March 9, 2018, for count one, to life imprisonment with an 85% parole ineligibility along with a five-year period of parole supervision. (10T3-19 to 4-4; 10T6-11 to 19; Da6-11) The sentence remained the same for the other counts of the indictment as the court maintained the merger but articulated separate sentences for each count. (10T6-20 to 7-22) The court imposed the requisite fines and penalties. (10T7-23 to 8-3) The court awarded defendant 987 days jail credit. (10T8-8 to 13; Da9)

Defendant appealed his conviction and sentence to the Appellate Division. On August 20, 2021, the court affirmed the conviction and sentence but remanded to correct the judgment of conviction. (Da12-30) The Appellate Division ruled that the weapon counts and the stalking counts did not merge with the murder conviction. (Da30) An amended judgment of conviction was filed on August 31, 2021, which imposed a sentence without a merger of counts two and four. Counts one and three were merged. The court ran counts two and four concurrently with counts one and three. Jail credits of 937 days were awarded. (Da31-34)

A petition for certification to the Supreme Court was filed by defendant. It was denied on April 5, 2022. (Da35)

Defendant filed a timely petition for post-conviction relief on January 15, 2023. (Da36) The petition was denied without an evidentiary hearing on August 13, 2024, by way of a written opinion. (Da90-110)

Defendant filed a Notice of Appeal on October 28, 2024. (Da111-113)

STATEMENT OF FACTS

On the morning of June 24, 2015, defendant followed Alicia Martinez with whom he had a relationship on occasion. According to Ericka Loaiza, Ms. Martinez's best friend, the relationship between defendant and Ms. Martinez had contained too many arguments and was full of drama. (5T123-8 to 14) He followed her to the home of her current boyfriend, Manuel Santiago, in Jamesburg. He then followed her to a Dunkin Donuts in Jamesburg and then to her place of work at Drexel Medical in South Brunswick. (4T104-23 to 113-5; 4T107-4 to 109-20) Ms. Martinez had been dating Mr. Santiago for about three months at that time. (4T105-16 to 22) During this time frame, Ms. Martinez dated other men and had moved in with Mr. Santiago. (5T123-16 to 124-8) Ms. Loaiza characterized defendant as possessive and very jealous of Ms. Martinez's behavior. (5T124-22 to 125-3)

At Drexel Medical, defendant followed Ms. Martinez into the parking lot, got out of his car, walked up to the victim's car, and fired two shots into her head from a .38 caliber revolver, killing her. (4T80-19 to 20)

On the next day, June 25, 2015, Detective Eric Tighelaar, and Detective Dennis Yahasz drove to 27 West Bridge Street in New Hope, Pennsylvania, to look for defendant. (5T176-9 to 177-23) This was the residence of Richard Crosby with whom defendant was familiar, and defendant appeared unannounced. (5T196-5 to 9) Crosby told the police that defendant was in the bedroom where he was taken into custody. (5T186-16 to 187-4; 5T219-1 to 7) The officers located a bag of bullets and a cell phone in one of defendant's boots and a .38 caliber revolver under the mattress. (5T191-11 to 16; 5T220-7 to 223-11) Defendant was transported to the New Hope Police Department station. (5T189-7 to 19)

Defendant was interviewed at about 9 p.m. that night. (7T7-17 to 8-25) Defendant confessed to the crime and explained his relationship with Ms. Martinez which drove him to commit the instant offenses. He claimed that she was cheating on him and took advantage of him financially. He said he could not take it anymore. (7T23-19 to 67-1)

The detectives conducted a second interview which concluded at 2:10 a.m. on June 26. (7T69-8 to 75-2) Defendant never denied responsibility for his offenses. (7T90-4 to 6) The State was also able to extract from defendant's cell phone a video in which defendant gave his family the reasons why he did what he did. (6T47-19 to 50-25; 7T82-16 to 83-25)

Defendant called no witnesses at trial. (8T3-1 to 4-1) The court explained defendant's options regarding his right to testify or remain silent, and whether defendant desired the court to provide a jury instruction should he elect not to testify. The court questioned defendant about his right to testify or remain silent, and whether he wished a jury instruction should he decide not to testify. (6T187-13 to 189-10; 7T105-21 to 111-9; 8T4-2 to 5) Defendant elected to remain silent and have the court provide a jury instruction that his silence could not be used against him. (8T4-6 to 25)

LEGAL ARGUMENT

POINT I

TRIAL COUNSEL WAS INEFFECTIVE BY NOT ADEQUATELY EXPLAINING TO DEFENDANT THAT FAILING TO TESTIFY WOULD RESULT IN THE COURT DENYING HIS REQUEST FOR A COMPLETE JURY CHARGE ON PASSION/PROVOCATION MANSLAUGHTER AND BY FAILING TO ADEQUATELY CROSS-EXAMINE ERIKA LOAIZA REGARDING HER PRIOR CRIMNAL RECORD (Da102-107)

The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013), citing Strickland v. Washington, 466 U.S. 668 (1984). Strickland, which was adopted in New Jersey in State v. Fritz, 105 N.J. 42 (1987), set forth a two-prong test to determine whether a defendant has been deprived of effective assistance of counsel. Under the first prong of the test, a defendant must show that counsel's performance

was deficient in that it "fell below an objective standard of reasonableness" and that "counsel made errors so serious that 'counsel' was not functioning as the counsel guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687-688. A defendant must show that counsel's actions were beyond the "wide range of professionally competent assistance." Id. at 694. The "quality of counsel's effectiveness" is based on the "totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Marshall, 123 N.J. 1, 165 (1991). The standard for establishing that a defendant was denied the effective assistance of counsel is the same under both the federal and state constitutions. State v. O'Neal, 219 N.J. 598 (2000).

In order to show prejudice under the second prong, defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A court focuses on the "fundamental fairness of the proceeding whose result is being challenged." Id. at 696. "If counsel's performance has been so deficient as to create reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right would have been violated." Fritz, 105 N.J. at 58.

In determining whether a defendant has stated a prima facie claim for relief in a PCR hearing, the court must view the facts in the light most favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-463 (1992). In addition, "a defendant must establish a prima facie case for relief, material issues of disputed fact, and show what an evidentiary hearing is necessary to resolve the claims. R. 3:22-10(b)." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014). Defendant contends that upon reviewing the facts in the light most favorable to him, the court will conclude that an evidentiary hearing is necessary to determine the effectiveness of trial counsel's representation. No evidentiary hearing was conducted in the instant matter.

This court exercises de novo review over the court's factual findings and legal conclusions because the PCR court conducted no evidentiary hearing, and thus made no credibility findings. State v. Harris, 181 N.J. 391, 420-421 (2004), cert. denied, 545 U.S. 1145 (2005) (internal citations omitted). "A trial court's interpretations of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id, at 419 (citations omitted). Therefore, "resolution of the claim is based on objective evidence in the record, and not on any credibility determinations made by the PCR court." See also State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (Appellate courts

"review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing.").

A. Trial counsel was ineffective by not adequately explaining to defendant that failing to testify would result in the court denying his request for a complete jury charge on passion/provocation manslaughter. (Da102-105)

According to the Supreme Court, an attorney's failure to properly advise a defendant about his right to testify can give rise to a claim of ineffectiveness of counsel. See State v. Savage, 120 N.J. 594, 631 (1990). "It is the responsibility of a defendant's counsel not the trial court, to advise defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so or of not doing so." State v. Bogus, 223 N.J. Super. 409, 423 (App. Div.), certif. denied, 111 N.J. 567 (1988). "Counsel's responsibility includes advising a defendant of the benefits inherent in exercising that right and the consequences inherent in waiving it." Savage, 120 N.J. at 631.

At trial, during a side-bar conference, the court referred to the standard instruction for passion/provocation which described a threat of physical abuse over a period of time, which also included a few incidents of actual injury. (8T27-7 to 9) However, by not testifying, defendant's account of his extended mental abuse at the hands of Ms. Martinez was not brought to the attention of the jury, and he did not receive the benefit of a jury instruction. The State's theory of the case went before the jury unopposed. Although a jury is required

to follow the instructions provided by the trial court, it is free to accept or reject evidence as it sees fit. "A jury is free in most cases to return verdicts that are inherently inconsistent or to reject evidence that has not been challenged." State v. Ragland, 105 N.J. 189, 195 (1986). Surely, if a jury can reject unchallenged evidence, it is more likely to reject the State's evidence if the defense can provide satisfying evidence to the jury such as a defendant's account of the severe emotional stress which led up to the offenses in issue.

According to defendant's supplemental certification (Da40-43), trial counsel failed to prepare him to testify. The State's case painted defendant as being obsessed with Ms. Martinez and that he was jealous when she dated other men. However, as evidenced by defendant's statement, Ms. Martinez would manipulate defendant and used him in an emotionally abusive manner. At various times during their relationship, she would contact defendant to come over to her home or to take her out. He would as a result get into trouble with the police or spend time in jail. (7T24-14 to 26-14; 7T31-9 to 32-8) Ms. Martinez would request merchandise from defendant and tell him she would get it from another man if he would not give it to her. (7T27-1 to 20) Defendant would pay her rent, for her beauty salon appointments, and for other things she wanted. (7T35-23 to 25) According to defendant, Ms. Martinez threw his laptop, scratching his face, and injuring his finger. (7T35-9 to 17) Defendant

allowed her to drive his Cadillac Escalade when she was drunk, and she crashed the vehicle. (7T36-1 to 16) Defendant took the blame for the crash so that Ms. Martinez would not get into trouble. He had to sell the Escalade in order to obtain bail money so he could be released from jail. (7T36-11 to 18; 7T38-10 to 12; 7T39-19 to 40-7)

Ms. Martinez shrewdly knew how to play upon defendant's emotions, and she manipulated him constantly. (7T52-21 to 54-24) At one point, she informed defendant that she was pregnant when she was not. (7T43-10 to 22) Her conduct was severely hurtful—as hurtful and painful as if she had engaged in physical violence, as much as if she had slapped him. Defendant's emotional trauma is evidenced by the fact that the night before the shooting, he did not sleep and had been drinking with his friend, Renne Gonzalez, with whom he stayed and whose car he had taken. (5T167-8 to 12; 5T170-22 to 24)

"A charge is a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations, . . .the court must explain the controlling legal principles and the questions the jury is to decide. State v. Martin, 119 N.J. 2, 15 (1990)." State v. Viera, 346 N.J. Super. 198, 210 (App. Div. 2001), certif. denied, 174 N.J. 38 (2002). Due to the absence of the testimony of defendant, a complete definition of passion/provocation manslaughter was not presented to the jury. Trial counsel's failure to properly

explain the consequences of testifying prevented defendant from making an informed decision and resulted in a jury charge which did not contain a proper passion/provocation instruction.

Defendant disagrees with the PCR court's analysis that there was sufficient discussion between trial counsel and defendant regarding whether he should testify on his own behalf. (Da102-105) It is apparent from the confession provided by defendant that although he could speak English, he could only do so only haltingly. The record is devoid of any information whether trial counsel could understand defendant without the aid of an interpreter, whether an interpreter was in fact used, or when they discussed his right to testify or not. There is no specific information whether defendant, despite English not being his first language, nonetheless could understand his right to testify. These concerns should have been addressed but were not.

Reversal of the denial of post-conviction relief is warranted.

B. Trial counsel was ineffective in his cross-examination of State's witness Erika Loaiza regarding whether she had been given any consideration by the State in exchange for her testimony. (Da105-107)

Cross-examination is "the greatest legal engine ever invented for the discovery of truth." State v. Silva, 131 N.J. 438 (1993), citing California v. Green, 399 U.S. 149, 158 (1970). While courts have broad discretion in determining the scope of cross-examination, the law recognizes five acceptable

modes of attack upon the credibility of a witness: (1) prior inconsistent statements; (2) partiality; (3) defect of character; (4) defect of capacity of the witness to observe, remember, or recount matters; and (5) proof by others that material facts are otherwise than as testified to by the witness under attack. See State v. Siegler, 12 N.J. 520, 526-527 (1953).

The State relied significantly upon the testimony of Loaiza who was a close friend of Ms. Martinez. She testified about the relationship between Ms. Martinez and defendant. Loaiza testified that she was the victim's best friend and that the Ms. Martinez and defendant had dated off and on since the end of 2012 to 2015. (5T107-7 to 12; 5T122-21 to 123-7) She stated that the relationship was quarrelsome. (5T123-8 to 14) During this time, Ms. Martinez would date other men, including her boss at work, Santiago, with whom she began to live with. (5T123-16 to 124-18) Defendant was possessive and very jealous of her. She would ask him for money on occasion which he would give to her. Sometime he provided her with money when she did not ask for it. (5T124-22 to 126-11)

When trial counsel cross-examined Loaiza, he did not inquire whether she had any criminal charges and whether she had been given any consideration by the State regarding a disposition of those charges in exchange for her testimony.

----------Thus, trial counsel should have cross-examined Loaiza as whether the State allowed her into PTI twice in return for her testimony. "Our system permit exploration, through cross-examination, of a witness's motivation in testifying." State v. Jackson, 243 N.J. 52, 65 (2020), citing Delaware v. Van Ardall, 475 U.S. 673, 678-679 (1986). "If a witness faces a pending investigation or unresolved charges when he or she gives a statement to law enforcement, cooperates with the prosecution in preparation for trial, or testifies on the State's behalf, that investigation or charge is an appropriate subject for cross-examination." Jackson, 243 N.J. at 66, citing State v. Bass, 224 N.J. 285, 305 (2016). Certainly, allowing a State's witness into PTI twice suggests that she was being provided a type of sentence at a minimum, or an elimination of criminal charges, in exchange for her testimony. Note that the Court in Jackson determined that its reasoning in Bass was four-square with the United States Supreme Court's

reasoning in Van Arsdall that the trial court had erred when it precluded cross-examination into a cooperating witness's sentencing deduction and its holding in Davis v. Alaska, 415 U.S. 308, 315-320 (1974) that a defendant's confrontation right was violated when the trial court prevented the cross-examination of a witness who was on probation for an offense unrelated to the defendant's alleged offenses. Jackson, 243 N.J. at 67.

In rejecting defendant's claim, the PCR court concluded that trial counsel would not have been able to attack Ms. Loaiza's credibility by asking her about the charges against her because they were offenses she did not admit committing. It rejected the assertions of defendant regarding the fact that the State offered her PTI twice. The court held that PTI is left to the discretion of the State, and thus of no consequence to the defense position. (Da105-107) However, the court's logic erroneously fails to address whether the State provided Ms. Loaiza PTI as part of an agreement for her testimony. This issue should have been examined by the court in an evidentiary hearing.

POINT II

STRUCTURAL ERROR OCCURRED WHEN TRIAL COUNSEL CONCEDED DEFENDANT'S GUILT DURING SUMMATION (Da107-108)

In McCoy v. Louisiana, 584 U.S. 414 (2018), the United States Supreme Court explained the difference between tactical and fundamental decisions. The

Fourth Circuit, in United States v. Hashimi, 110 F.4th 621, 628-629 (4th Cir. 2024), explained succinctly what must be done in a situation as in the instant matter where a defense counsel concedes guilt.

> Like McCoy, Nixon involved a capital defendant facing overwhelming evidence of guilt. See Nixon, 543 U.S. at 180-82. And as in McCoy, defense counsel determined that "the most promising means to avert a sentence of death" was to concede guilt at the guilty phase of trial and then hope for mercy at the sentencing phase. Id. at 178, 190-91. But unlike the defendant in McCoy, who vocally opposed his counsel's "assertion of his guilt at every opportunity," 584 U.S. at 424, the defendant in Nixon took no position on his counsel's planned concession of guilt, refusing to engage at all in his defense: Counsel "attempted to explain this [concession] strategy to Nixon at least three times," and each time, Nixon "was generally unresponsive" and "never verbally approved or protested" the concession. Nixon, 543 U.S. at 181; McCoy, 584 U.S. at 424. In those circumstances, the Court held, the client's effective abdication of his right to choose allowed counsel to make the decision instead. Nixon, 543 U.S. at 192. But essential to the Nixon court's holding were the lawyer's efforts to leave the decision with the client: "When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." Id.; see McCoy, 584 U.S. at 424 (discussing Nixon).
>
> In short, McCoy, and Nixon leave us with a reasonably straightforward rule. If defense counsel assesses conceding guilt to a jury as the wisest path, he has two obligations: He must consult with his client, and, if the client engages, he may not "steer the ship the other way." McCoy, 584 U.S. at 424. If the lawyer violates these rules and thus "usurp[s] control of an issue within [the defendant's] sole prerogative," the remedy is a new trial, regardless of whether prejudice can be demonstrated. Id. at 426-27.

In the instant matter, an evidentiary hearing is necessary where defendant can testify whether he participated in the decision to concede guilt for the shooting in the hope of receiving a favorable jury instruction. The fact that trial counsel has passed away should not be permitted to prevent a hearing in which the truth must be determined.[3] If counsel acted without defendant's consent, then a new trial must be ordered.

> The Sixth Amendment "contemplate[es] a norm in which the accused, and not a lawyer, is master of his own defense." Gannett Co. v. DePasquale, 443 U.S. 368, 382 n.10, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). To that end, the Supreme Court has reserved for a criminal defendant the right to make "certain fundamental decisions" about his defense no matter how strongly his lawyer may disagree. United States v. Roof, 10 F.4th 314, 351 (4th Cir. 2021).
>
> [Id. at 627]

McCoy also held that some decisions are so fundamental that they are "reserved for the client," including "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." McCoy, 584 U.S. at 422. "McCoy added to that 'latter category' the decision whether to maintain innocence or concede guilt at trial. Id." Hashimi, 110 F.4th at 627. Note also the following verbiage of Nashimi: "Instead, and as the government concedes, McCoy puts the obligation on the lawyer, requiring that before counsel may

[3] In State v. Ball, 381 N.J. Super. 545 (App. Div. 2005), a PCR hearing was held notwithstanding the death of the trial counsel between defendant's sentencing and the PCR petition.

make a concession of guilt to the jury, he must disclose his plan with the defendant. McCoy, 584 U.S. at 424." Hashimi, 110 F.4th at 630 (emphasis added).

It is crucial to note that this matter was appealed to the Appellate Division and the New Jersey Supreme Court, and direct review only concluded in 2022 when the Supreme Court of New Jersey denied defendant's petition for certification. (Da35) Thus, the PCR court was wrong in applying the test of Edwards v. Vannov, 593 U.S. 255 (2021) by analogizing the instant matter to that of a federal collateral review and holding that procedural rules do not apply here. (Da108) Edwards held that procedural rules do not apply retroactively on federal collateral review.[4] However, as this matter was on direct review when McCoy announced its new rule, the PCR court should not have cited Edwards as justifying its conclusion. "When a decision of the Supreme Court 'results in a "new rule," that rule applies to all criminal cases still pending on direct review.'" Schriro v. Summerlin, 542 U.S. 348, 351 (2004) The same should be true also here. Thus, contrary to the decision of the PCR court regarding retroactivity, the issue of the concession had to be considered as this matter was

[4] Defendant disputes the characterization of the rule of law enunciated in McCoy as procedural. He asserts that the rule is substantive in light of the fact that when error occurs under the McCoy rule, it is structural, and prejudice need not be shown.

on direct review at the time McCoy was decided in 2018—not collateral review as believed by the PCR court. Furthermore, defendant asserts that the New Jersey Constitution would likewise justify the reversal of the denial of the PCR petition and the granting of an evidentiary hearing for the reasons expressed in McCoy.

CONCLUSION

For the foregoing reasons, defendant is entitled to a remand and an evidentiary hearing to assert that he was deprived of effective assistance of trial counsel and that he is entitled to a new trial based on McCoy.

Respectfully submitted,

JENNIFER N. SELLITTI
PUBLIC DEFENDER
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By: *s/Steven E. Braun*
Steven E. Braun
Designated Counsel

Dated: June 16, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000571-24T3

STATE OF NEW JERSEY, Plaintiff-Respondent, v. GIVER VASQUEZ, Defendant-Appellant.	Criminal Action On Appeal from a Final Judgement of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County, Denying Post-Conviction-Relief. Sat Below: Hon. Pedro J. Jimenez, Jr., J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On January 19, 2016, a Middlesex County Grand Jury returned Indictment No. 16-01-83-I, charging defendant, Giver Vasquez, with the following crimes: first-degree murder, contrary to N.J.S.A. 2C:11-3(a)(1)(2) (Count One); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b) (Count Two); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a)(1) (Count Three); and fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b) (Count Four). (Da1-2).[1]

On September 12, 2017, through September October 3, 2017, defendant was tried before the Honorable Pedro J. Jimenez Jr., J.S.C. and a jury. (3T to 8T). On September 12, 2017, Judge Jimenez denied defendant's motion to

[1] References to the record are denoted as follows:
Db = Defendant's brief.
Da = Defendant's appendix.
Sa = State's appendix.
1T = Transcript of pretrial hearing, dated February 14, 2017.
2T = Transcript of pretrial hearing, dated September 11, 2017.
3T = Transcript of trial, dated September 12, 2017.
4T = Transcript of trial, dated September 14, 2017.
5T = Transcript of trial, dated September 19, 2017.
6T = Transcript of trial, dated September 20, 2017.
7T = Transcript of trial, dated September 21, 2017.
8T = Transcript of trial, dated October 3, 2017.
9T = Transcript of sentencing, dated January 18, 2018.
10T = Transcript of resentencing, dated March 9, 2018.
11T = Transcript of PCR hearing, dated May 30, 2024.

suppress a confession he gave to police. (3T99-2 to 102-15). Defendant twice moved to dismiss Count Four, but Judge Jimenez denied both applications. (7T98-6 to 105-16; 8T23-18 to 25-5). When discussing the jury charge of passion/provocation manslaughter, defendant asked Judge Jimenez to provide an instruction that "a continuing course of ill treatment by the decedent against the defendant, or a third person, with whom the defendant stands in close relationship, can constitute adequate provocation." (8T15-14 to 16-11). Judge Jimenez declined defendant's request. (8T26-10 to 31-14).

On October 3, 2017, the jury found defendant guilty of all counts of Indictment No. 16-01-83-I. (8T137-9 to 141-14; Da116-19). On January 18, 2018, defendant appeared before Judge Jimenez for sentencing. (9T). Judge Jimenez found aggravating factor one, N.J.S.A. 2C:44-1(a)(1) (nature and circumstances of offense), N.J.S.A. 2C:44-1(a)(3) (risk of another offense), and aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others). (9T19-11 to 22-8; Da5). Judge Jimenez found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7) (no history of prior delinquency or criminal activity). (9T19-3 to 6; Da5). On balance, Judge Jimenez found that the aggravating factors substantially outweighed the mitigating factors. (9T23-19 to 22; Da5). Accordingly, Judge Jimenez sentenced defendant to a term of life

without parole on Count One. (9T25-13 to 17; Da3). Judge Jimenez also merged Counts Two, Three, and Four with Count One. (9T25-1 to 5; Da3).

On March 9, 2018, defendant appeared before Judge Jimenez for resentencing. (10T). Defendant was resentenced because the court had previously sentenced him to a term of life without parole on Count One, however the maximum to which defendant could be sentenced on Count One was a term of life with an eighty-five percent parole disqualifier. (10T3-19 to 4-4). At resentencing, Judge Jimenez found the same aggravating factors and also that the aggravating factors substantially outweighed the mitigating factors. (10T5-20 to 24; Da11). As before, Judge Jimenez merged Counts Two, Three, and Four with Count One. (10T7-18 to 19; Da9). However, Judge Jimenez resentenced defendant to a life sentence with an eighty-five percent parole disqualifier on Count One. (10T6-11 to 16; Da9). A second amended JOC was filed on March 29, 2018 to "edit the amount of jail and prior service credit time awarded." (Da6).

On September 23, 2020, defendant filed a direct appeal. (Da12). On appeal, defendant raised the following arguments:

> POINT I: THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S REQUEST FOR SPECIFIC LANGUAGE CONCERNING THE CONTINUING COURSE OF ILL TREATMENT AS PART OF THE CHARGE ON PASSION PROVOCATION MANSLAUGHTER. THE FAILURE TO INCLUDE

> THIS EXPANDED DEFINITION DEPRIVED THE DEFENDANT OF AN APPROPRIATE CHARGE ON THIS ISSUE AND THEREFORE DEPRIVED THE DEFENDANT OF A FAIR TRIAL.
>
> POINT II: THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE ADMISSION OF HIS STATEMENT CONFESSING TO THE CRIME. DETECTIVE MARCHAK DID NOT OBTAIN A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER BEFORE PROCEEDING TO TAKE THE DEFENDANT'S STATEMENTS.
>
> POINT III: THE FAILURE TO CHARGE A LIMITING INSTRUCTION ON THE PROPER USE OF THE TEXT MESSAGES AND THE COMMENTS BY THE VICTIM TO MS. LOAIZA DEPRIVED THE DEFENDANT OF A FAIR TRIAL (NOT RAISED BELOW.)
>
> POINT IV: THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTIONS TO DISMISS THE STALKING CHARGE.
>
> POINT V: THE COURT DID NOT TAKE INTO CONSIDERATION ALL APPROPRIATE CODE SENTENCING PROVISIONS. THE COURT HAS IMPOSED A SENTENCE THAT SHOCKS THE JUDICIAL [CONSCIENCE].
>
> [Da25-26.]

On August 20, 2021, the Appellate Division affirmed defendant's conviction and sentence, except for a limited remand to amend defendant's judgment of conviction to reflect separate sentences on Counts Two and Four. (Da30). On April 8, 2022, the New Jersey Supreme Court denied defendant's

petition for certification. (Da35). On August 31, 2021, an amended judgment of conviction was filed which imposed a life sentence with an eighty-five percent parole disqualifier on Count One; a term of seven years imprisonment on Count Two; and an eighteen-month term of imprisonment on Count Four. (Da31-34). Count One was merged with Count Three and Counts Two and Four were ordered to run concurrent to each other and Counts One and Three. Ibid.

On December 17, 2022, defendant filed a petition for post-conviction relief ("PCR"). (Da36-39). Thereafter, defendant filed a "supplemental certification" and brief. (Da40-89). Oral argument on defendant's PCR petition was held before Judge Jimenez on May 30, 2024. (11T). Then, on or about August 13, 2024, Judge Jimenez issued a written opinion denying defendant's PCR petition. (Da90-110).

Defendant filed a notice of appeal from the denial of his PCR petition on October 28, 2024. (Da111-13).

COUNTERSTATEMENT OF FACTS

Defendant and the victim, Alicia Martinez, had been dating on-and-off since the end of 2012 into 2015. (5T122-21 to 123-7). The victim's best friend, Ericka Loaiza, reported that the relationship involved frequent drama

and arguing (5T123-8 to 15) and that defendant was possessive and prone to extreme jealousy. (5T124-22 to 125-3). Loiza also indicated that the victim sent her screenshots of text messages from defendant with the instructions that they be shown to the police if "anything happened to her." (5T112-2 to 13). In those text messages, the victim asked defendant if he was going to kill her, defendant stated that nothing in life is guaranteed, and the victim asked defendant to leave her alone. (5T115-1 to 116-24). Defendant also sent texts to the victim calling her a "fake ass bitch," threatening to kill her, and saying that he would find her even if she went underneath the ground. (5T119-8 to 120-10). At another point, defendant sent the victim a screenshot of the location of her boyfriend's house, where she would often stay. (5T117-22 to 118-10). Defendant later confessed that he knew the victim's location because he placed a GPS tracker on her car. (7T32-11 to 18).

Defendant told police that the victim declining to go to the fair with him days before the murder was the "last straw." (7T55-24 to 59-2). On June 23, 2015, the night before the victim was murdered, defendant acquired a revolver and bullets. (5T142-14 to 145-15). He was drinking that night (5T171-6 to 7), stole a car from a friend (5T147-2 to 148-6; 5T151-14 to 154-10), and did not sleep. (7T59-24 to 60-12).

On the morning of June 24, 2015, defendant followed the victim as she drove from her boyfriend's home to her job. (4T84-25 to 86-6; 4T130-19 to 131-12; 7T28-15 to 30-14; 7T32-19 to 25). Defendant texted the victim that "she was going to die today," described what clothes she was wearing, and the victim realized she was being followed and indicated to her boyfriend that she was very scared. (4T108-11 to 21). Once the victim arrived at work, defendant parked nearby, walked up to her car, and shot her in her head. (4T78-20 to 80-7; 4T110-16 to 112-7; 8T53-24 to 54-14). Defendant then drove away (4T86-2 to 5; 4T91-17 to 22; 4T112-17 to 21) and the victim died within minutes of being shot. (4T99-17 to 19; 5T17-19 to 25).

Two bullets were retrieved from the victim's body: one from victim's brain; and one from near her jaw. (4T62-10 to 63-11). An expert concluded that the projectiles retrieved from the victim's jaw and brain were fired from defendant's gun (6T122-9 to 127-20) and that projectiles found in the victim's car were also fired from defendant's gun. (6T129-12 to 130-12; 6T136-1 to 139-18).

The police searched the house where defendant went after the murder and found a thirty-eight-caliber handgun with six cartridges inside it, a bag containing about thirty-two cartridges, boots, and a cell phone. (5T71-19 to 22; 5T75-2 to 12; 5T201-11 to 21; 5T223-4 to 10). The police also found a

thirty-eight-caliber cartridge in the car defendant drove when he killed the victim. (5T85-7 to 87-13; 5T130-1 to 7; 7T6-11 to 13). When defendant was arrested, a bullet was found in his pocket. (5T186-24 to 189-24).

On June 25, 2015, defendant was interviewed by law enforcement (7T7-1 to 4; 7T7-17 to 8-25) and confessed to murdering the victim. (7T61-23 to 63-7). Once the interview ended, the defendant was charged. (7T67-8 to 19). Defendant was also interviewed by law enforcement on June 26, 2015. (7T74-25 to 75-1). In that second interview, defendant confirmed he was wearing the same clothes he was wearing when he murdered the victim. (7T71-7 to 23).

At trial, the jury was shown a video extracted from defendant's phone that was recorded on the morning of June 24, 2015, shortly before he murdered the victim. (7T78-22 to 83-25; 7T93-23 to 25). The video consists of defendant explaining to his family that: (1) he cannot forgive betrayal; (2) he was going to do something to someone who betrayed him; and (3) he did not care about the consequences. (Sa1-4).[2]

Defendant did not testify at trial. (8T5-21 to 25). Further, defendant's trial counsel acknowledged that defendant killed the victim in both his opening and closing statements. (4T32-13 to 17; 8T34-15 to 20) and principally argued

[2] The appended transcript of defendant's phone recording is erroneously marked August 5, 2019, at 4:29 a.m.

that defendant's killing of victim was provoked and thus aggravated manslaughter, not murder. (8T47-6 to 49-11).

LEGAL ARGUMENT

POINT I

THE DENIAL OF DEFENDANT'S PCR PETITION SHOULD BE AFFIRMED BECAUSE THE PCR COURT CORRECTLY FOUND THAT DEFENDANT FAILED TO ESTABLISH EITHER: (1) A PRIMA FACIE CASE THAT HIS TRIAL COUNSEL DEPRIVED HIM OF HIS RIGHT TO TESTIFY OR INADEQUATELY CROSS-EXAMINED ERIKA LOAZIA; OR (2) THAT HIS TRIAL COUNSEL COMMITED STRUCTURAL ERROR IN STRATEGICALLY CONCEDING HIS GUILT DURING SUMMATION. (11T; Da90-110).[3]

Defendant contends that his "[t]rial counsel was ineffective by not adequately explaining . . . that failing to testify would result in the court denying his request for a complete jury charge on passion/provocation manslaughter." (Db9). Specifically, he asserts that "[t]here is no specific information whether defendant, despite English not being his first language, . . . could understand his right to testify." (Db12). Defendant further argues that his "[t]rial counsel was ineffective in his cross-examination of [the] State's witness[,] Erika Loaiza[,] regarding whether she had been given any

[3] This point addresses Points One and Two of defendant's brief.

consideration by the State in exchange for her testimony." Ibid. In other words, defendant argues that "[w]hen trial counsel cross-examined Loaiza, he did not inquire whether she had any criminal charges and whether she had been given any consideration by the State regarding a disposition of those charges in exchange for her testimony." (Db13). Lastly, defendant asserts that an evidentiary hearing is necessary because he can provide testimony concerning "whether he participated in the decision to concede guilt for the shooting in the hope of receiving a favorable jury instruction." (Db17). On these bases, defendant asserts that he "is entitled to a remand and an evidentiary hearing . . . ." (Db19).

Nonetheless, defendant's arguments are unavailing, as will be discussed, because the record reflects that he received the effective assistance of his trial counsel. There is an ample evidence to establish that defendant's trial counsel and the court adequately informed him of his right to testify, and a dearth of evidence to the contrary. Likewise, his trial counsel's approach to cross-examination falls within the unassailable realm of trial strategy and, notwithstanding that fact, must fail for two other reasons. First, the topic his counsel purportedly failed to raise was not a proper subject for cross-examination. And, second, such a strategy would have been unsuccessful in light of the cumulative effect of the State's questioning on direct examination.

Lastly, the case law cited by defendant to assert "structural error" is not retroactively applicable to the instant matter and nothing has been submitted to establish that his trial counsel conceded guilt without his tacit approval. Thus, the PCR court correctly denied defendant's PCR petition without an evidentiary hearing.

An evidentiary hearing should only be granted where the PCR court has determined "that there are material issues of disputed fact that cannot be resolved by reference to the existing record" and "that an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b). Additionally, a PCR court should ordinarily grant an evidentiary hearing only if the defendant has presented a prima facie case of ineffective assistance of counsel. State v. Preciose, 129 N.J. 451, 462 (1992); R. 3:22-10(b). "To establish such a prima facie case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." State v. Marshall, 148 N.J. 89, 158 (1997); R. 3:22-10(b).

Ineffective-assistance-of-counsel claims are evaluated under the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987). State v. Castagna, 187 N.J. 293, 313-14 (2006). That test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the

> defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.
>
> [Strickland, 466 U.S. at 687.]

Under this test, defendant must overcome "the strong presumption" that counsel's performance was competent. State v. Norman, 151 N.J. 5, 38 (1997). Moreover, a defendant is entitled to reasonably competent representation, not the best representation available. State v. Arthur, 184 N.J. 307, 332-33 (2005); State v. Nash, 212 N.J. 518, 543 (2013) ("The test is not whether defense counsel could have done better, but whether he met the constitutional threshold for effectiveness.").

The United States Supreme Court noted in Strickland that "[t]here are countless ways to provide effective assistance in any given case." 466 U.S. at 689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Thus, counsel's performance is presumed to be effective, and "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. The Strickland Court admonished against holding counsel to a detailed set of rules, since there is no one

way to represent a defendant. Id. at 689-90; accord State v. Echols, 199 N.J. 344, 358 (2009). The Strickland test is not meant to be so burdensome on defense counsel that "the entire criminal justice system suffers as a result." Strickland, 466 U.S. at 697.

In addition to deficient performance, a defendant must affirmatively prove prejudice—that is, a reasonable probability that, but for counsel's errors, "the results of the proceedings would have been different." Norman, 151 N.J. at 36-37. "Although a demonstration of prejudice constitutes the second part of the Strickland analysis, courts are permitted leeway to choose to examine first whether a defendant has been prejudiced, and if not, to dismiss the claim without determining whether counsel's performance was constitutionally deficient." State v. Gaitan, 209 N.J. 339, 350 (2012) (citations omitted).

Because prejudice is not presumed, Fritz, 105 N.J. at 52, the defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.26 (1984). Furthermore, "[a] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Porter, 216 N.J. 343, 355 (2013) (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999)), and allegations that "are too vague, conclusory, or speculative" will not establish a prima facie case of ineffective-

assistance-of-counsel. Ibid. (quoting Marshall, 148 N.J. at 158). Specifically, "when a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. (quoting Cummings, 321 N.J. Super. at 170); see also R. 1:6-6.

Preliminarily, the State notes that as of the filing of the State's brief, defendant has never provided a valid affidavit or certification in support of his claims for relief. Rule 3:22-10(c) provides that "[a]ny factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing." Here, the only statements provided by defendant fail to include the language required by Rule 1:4-4 and only offers what can be characterized as vague and conclusory allegations of ineffectiveness. (Da36-43).

Because defendant has failed to provide any other evidence in the form of a signed affidavit or certification, there are no facts that can serve as a "predicate for a claim of relief" in this case, and thus defendant is not entitled to an evidentiary hearing. R. 3:22-10(c). Moreover, defendant should not be afforded an evidentiary hearing to supply the contents missing from his PCR

petition. See State v. Bringhurst, 401 N.J. Super. 421, 436-37 (App. Div. 2008) (observing that "the court is not obligated to conduct an evidentiary hearing to allow defendant to establish a prima facie case not contained within the allegations in his PCR petition").

Moving to the substance of his claims, however, defendant asserted before the PCR court that his counsel was ineffective because "his attorney never prepared him to testify, never fully explained to him what would happen if he did testify, and most importantly, never explained to him that the decision to testify or to remain silent would have a decisive impact on the court's decision to instruct the jury regarding the passion/provocation charge." (Da72). Further, that had he testified, the contents of his testimony "would have supported a passion/provocation jury charge that included the continuous course of ill treatment." (Db24). He has again asserted this on appeal, with the addition that "although he could speak English, he could only do so haltingly" and that "[t]here is no specific information whether . . . [he] could understand his right to testify." (Db12).

Despite these contentions, the record reflects that the trial court advised defendant of his right to testify in detail (6T187-13 to 189-25; 7T106-6 to 110-1), defendant was provided significant time to consult with his counsel regarding his decision to testify and used that time to consult with his counsel

(6T189-22 to 25; 7T109-22 to 110-1; 8T3-8 to 18; 8T4-12 to 24), and defendant freely and voluntarily waived his right to testify. (8T4-25 to 5-25). Beyond his own, uncertified words, there is no support for defendant's claim that his trial counsel was anything but effective in informing him of his right to testify. Further, as the PCR court put it, "[t]he answers given by the defendant during his vior dire strongly undercut the . . . claim that his trial counsel did not fully explain to the defendant the outcome of what would happen if he testified at trial." (Da105). The State will add that defendant's statements on the record also undercut the suggestion that he could not understand his waiver due to "English not being his first language." (Db12).

To the extent that defendant suggests that his trial counsel should have not just advised him of his right to testify but advised him to do so, it should be noted that a defendant's decision to testify in a criminal case "is an important strategic or tactical decision to be made by a defendant with the advice of counsel." State v. Coon, 314 N.J. Super. 426, 435 (App. Div. 1998). "Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds." State v. Cooper, 410 N.J. Super. 43, 57 (App. Div.), certif. denied, 201 N.J. 155 (2010). "[M]ere improvident strategy, bad tactics or mistake do not amount to ineffective assistance of counsel unless, taken as a whole, the trial was a mockery of justice." State v.

Bonet, 132 N.J. Super. 186, 191 (App. Div. 1975). Defendant ultimately made the decision himself not to testify on the advice of his counsel. (8T4-2 to 5-25). Trial counsel argued for and was properly denied the jury charge that defendant now argues his testimony would have secured. (8T15-14 to 19-8; 8T26-10 to 31-14). Trial counsel's approach to the jury charge and advice regarding whether or not the defendant should testify implicates trial strategy and therefore is unassailable on PCR.

Moreover, "[t]he quality of counsel's performance cannot be fairly assessed by focusing on a handful of issues while ignoring the totality of counsel's performance in the context of the State's evidence of defendant's guilt." Castagna, 187 N.J. at 314 (citing Marshall, 123 N.J. at 165). "As a general rule, strategic miscalculations or trial mistakes are insufficient to warrant reversal 'except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of [a] fair trial.'" Id. at 314-15 (quoting State v. Buonadonna, 122 N.J. 22, 42 (1991)). Considering the context of the State's evidence of defendant's guilt, which will be discussed, it was an objectively reasonable strategy to argue for the jury charge without putting defendant on the stand. Specifically, had defendant testified he would have surely been subject to cross-examination concerning the substantial

evidence of his guilt. Given that defendant cannot establish that his counsel's approach was deficient, the State's analysis of this claim could end here.

Nonetheless, defendant too cannot establish prejudice. The subject of whether defendant would have been entitled to a passion/provocation jury charge that included "a continuing course of ill treatment by the decedent against the defendant, or a third person, with whom the defendant stands in close relationship" was extensively litigated. As already discussed, defendant's trial counsel argued that the language be included in the final jury charge. (8T15-14 to 19-8). In response, the trial judge provided a thorough explanation of his reasons for rejecting the language. (8T26-10 to 31-14). The issue was then raised on appeal. (Da25). There, the Appellate Division held that "[t]he trial judge correctly denied defendant's request to instruct the jury to consider this defense because the record shows defendant decided to kill his former romantic partner the day before he carried out the homicide." (Da27). Furthermore, the Appellate Division found that the facts established that "[d]efendant did not act on an impulse; he methodically stalked his victim as she drove to work." (Da28). Specifically, the Appellate Division noted that "[t]his was a calculated, purposeful, knowing murder" and, therefore, the passion/provocation manslaughter charge was not applicable. Ibid.

Defendant seemingly cites excerpts from the trial record and his own baseless words, as he did below, to assert that he and the victim had a mutually abusive relationship sufficient to constitute the expanded passion/provocation jury charge's "continuing course of ill treatment." (Db10-11; Da72-74). However, in relying largely on the record to make his assertion of prejudice, defendant highlights facts already properly considered by the trial judge in making his decision. Additionally, facts alleged through defendant's retrospective words alone are insufficient to establish that he would have testified as to those same facts on the stand or that such testimony would have been successful in warranting the jury charge. As our Supreme Court has observed, "a trial is not a perfectly scripted . . . presentation; rather, it is an extemporaneous production whose course is often unpredictable, given the vagaries of the human condition." State v. Yough, 208 N.J. 385, 397 (2011). It defeats reason to assert with any degree of certainty that defendant's testimony would have either secured the expanded jury charge or persuaded the jury to find passion-provocation manslaughter. Defendant's testimony would have been weighed against the facts already contained in the record, which the Appellate Division found to reflect "a calculated, purposeful, knowing murder" where the passion-provocation manslaughter charge was inapplicable.

(Da28). Thus, defendant cannot meet either prong of the Strickland-Fritz test on this basis and the PCR court correctly rejected related argument. (Da105)

Next, defendant asserts, again, that "[w]hen trial counsel cross-examined [Erika] Loaiza, he did not inquire whether she had any criminal charges and whether she had been given any consideration by the State regarding a disposition of those charges in exchange for her testimony." (Db13; Da75-77). The PCR court adequately addressed this claim as follows:

> Ms. Loazia was enrolled in PTI for unrelated charges that occurred before the instant murder. Trial counsel would not have been able to attack Ms. Loazia's credibility by asking her about those charges because they were offenses she did not admit to committing. It is of no moment that the State offered Ms. Loazia PTI twice as acceptance into the program is left to the discretion of the State. Because Ms. Loazia did not have a criminal history at the time of trial, trial counsel was not ineffective in failing to ask her about her prior criminal history.
>
> [Da107.]

The State will add, however, that while attorneys must defer to their clients as to the objectives of representation (Model Rules of Prof'l Conduct R. 1.2 (2025)), the broad area of attorney discretion extends to "[w]hich witnesses to cross-examine and the nature of the questions asked . . . ." State v. Hightower, 120 N.J. 378, 432 (1990). Such decisions "are virtually unassailable on ineffective assistance of counsel grounds . . . ." Cooper, 410

N.J. Super. at 57-58. Here, trial counsel's decision to not ask the witness questions relating to the details of her criminal record implicates strategy. And, as alluded to by the PCR court, N.J.R.E. 609 applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for nor charges of crimes are proper subjects of cross-examination. See State v. McBride, 213 N.J. Super. 255, 267 (App. Div. 1986). Therefore, defendant could not establish prong one of the Strickland-Fritz test on this basis.

But, even if the witness' charges were somehow elicited on cross-examination, defendant could not have established prong two of the Strickland-Fritz test as there was not a reasonable probability that questions relating to the witness' criminal history would have ultimately changed the jury's verdict. The cumulative effect of the State's line of questioning, which included emphasizing that defendant was possessive of the victim and prone to extreme jealousy (5T124-22 to 125-3) and that, leading up to the incident, the witness was made aware of extremely threatening text messages sent by defendant to the victim (5T112-2 to 122-8), was sufficient to lead the jury to the same conclusion it would have reached regardless of the witness' criminal background. In other words, had the jury heard the witness had been charged with "fourth-degree possession of marijuana, third-degree possession of

marijuana with the intent to distribute[,] fourth-degree unlawful possession of a weapon[,]" or "tampering" (Db13-14), there would be no doubt that threatening text messages from defendant existed or that the witness was familiar with the victim and defendant's relationship. This is because the text messages were exhibits at trial (5T7-24 to 8-6) and the witness remained very close to the victim, even after they stopped being roommates, and met defendant on multiple occasions. (5T107-7 to 12; 5T107-16 to 25; 5T111-8 to 14). This same reasoning addresses defendant's assertion that his attorney "should have cross-examined Loaiza as to whether the State allowed her into PTI twice in return for her testimony." (Db14). The claim that predicates that assertion is rampant speculation, but – constraining reason – had it somehow been presented to the jury it would have had no impact on deliberations. Thus, defendant is similarly not entitled to PCR on this basis.

Defendant's final argument is that an evidentiary hearing is necessary because he can provide testimony concerning "whether he participated in the decision to concede guilt for the shooting in the hope of receiving a favorable jury instruction." (Db17). As he did below, defendant employs McCoy v. Louisiana, 584 U.S. 414 (2018), to assert structural error as a result of his trial counsel's concession of guilt. (Db15-19; Da78-80).

In McCoy, the Court held that it was a violation of the Sixth Amendment for counsel at the guilt phase of a death penalty trial to, over "the defendant's intransigent and unambiguous objection," 584 U.S. at 420, concede guilt as a strategy to avoid a death sentence in the penalty phase of the trial. However, defendant was found guilty on October 3, 2017. (8T137-9 to 141-14). Defendant was sentenced on January 18, 2018, and re-sentenced on March 9, 2018. (9T; 10T). McCoy was decided May 14, 2018. Thereafter, defendant sought direct review through direct appeal (Da12-30) and a petition for certification (Da35) but did not raise this particular claim.

The holding in McCoy has not been made retroactive to cases on collateral review by either the United States Supreme Court or the Supreme Court of New Jersey, and defendant cannot credibly allege, nor has he alleged, that it has been made retroactive. Additionally, several courts have declined to apply McCoy retroactively to collateral challenges. See Smith v. Stein, 982 F.3d 229 (4th Cir. 2020); Christian v. Thomas, 982 F.3d 1215 (9th Cir. 2020). Those courts reasoned that the Supreme Court has held that new rules of constitutional law, such as the one announced in McCoy, are "generally applicable only to cases that are still on direct review." Smith, 982 F.3d at 233 (quoting Whorton v. Bockting, 549 U.S. 406, 416 (2007)). The only exception for procedural rules such as this one has been if the rule is a "'watershed rul[e]

of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton, 549 U.S. at 416 (alteration in original).

Further, the Supreme Court recently noted that in the decades since it announced the exception for watershed rules of criminal procedure in Teague v. Lane, 489 U.S. 288, 301 (1989), "the Court has never found that any new procedural rule actually satisfie[d] the purported exception." Edwards v. Vannoy, 593 U.S. 255, 264 (2021). The Court found that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." Id. at 272. It accordingly announced "[t]he watershed exception is moribund." Ibid. The law is now that "new procedural rules apply to cases pending in trial court and on direct review . . . [b]ut . . . do not apply retroactively on federal collateral review." Id. at 276.

Given the Court's announcement in Edwards that no new procedural rule will apply retroactively in federal habeas proceedings, the new rule announced in McCoy should not apply here as a matter of federal law. Further, while defendant seeks to apply McCoy's reasoning to the instant matter by asserting that it "was on direct review when McCoy announced its new rule" (Db18), this issue was not raised on direct appeal and only raised on collateral review.

In addition to all this, such a rule would not apply to the instant matter given its dissimilarities to McCoy. In McCoy, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 584 U.S at 417. (emphasis added). As previously discussed, defendant has not provided a valid affidavit or certification in support of his claims for relief. There is nothing else to substantiate the claim that defendant's trial counsel violated his instructions or that prior to filing his application for PCR defendant denied killing the victim. Without more, such a claim is both considerably different than McCoy and constitutes a bare assertion insufficient to support a prima facie case of ineffectiveness.

The State acknowledges that this case might superficially resemble McCoy in that defense counsel acknowledged in both his opening and closing that "there's no question" that defendant killed the victim. (4T32-13 to 17; 4T35-15 to 18; 8T34-15 to 20). Unlike McCoy, however, there is no evidence that defense counsel thought defendant genuinely believed in his own innocence and "simply disbelieved [defendant's] account." 584 U.S at 425. Indeed, there is overwhelming evidence to suggest that defendant killed the victim and that, with his tacit approval, defendant's trial counsel pursued an objectively reasonable approach to his defense. Amongst a litany of other evidence, the jury heard that defendant confessed to killing the victim (7T61-

23 to 63-7), that defendant recorded a video outlining his motivations for the murder (7T78-22 to 83-25; Sa1-4), that defendant was observed and caught on video stalking and then murdering the victim (4T78-21 to 80-7; 4T85-2 to 86-12; 4T99-l to 14; 4T108-15 to 112-7; 4T130-19 to 131-20; 8T53-24 to 54-14), that defendant sent text messages threatening the victim with death (5T112-2 to 120-10), and that the murder weapon and ammunition were recovered from defendant's place of arrest, defendant's vehicle, and defendant's person. (5T75-2 to 12; 5T86-24 to 87-13; 5T189-16 to 19; 5T191-11 to 16; 5T223-4 to 10; 6T124-8 to 125-19). The evidence in this case resembles McCoy in that it is overwhelming. 584 U.S at 425. This evidence exceeds McCoy in that it involves both a confession and a video outlining defendant's motivations. In the face of evidence that would directly contradict any claim of innocence, trial counsel was left with no choice but to argue on defendant's behalf that the killing was provoked and was thus passion/provocation manslaughter, not murder. (8T47-6 to 49-11). Thus, counsel's argument was not a "[v]iolation of a defendant's Sixth Amendment-secured autonomy" like what happened in McCoy, 584 U.S at 427, nor structural error outside the confines of a claim of ineffective assistance of counsel.

The record reflects that defense counsel conceded defendant's involvement in the killing with his apparent approval, effectively attempting to

mitigate the circumstances by offering a logical explanation for defendant's actions. In so doing, his counsel committed to a trial strategy that although unsuccessful, was sound. It had some prospect of success because of the alleged provocation that led to defendant's murder of the victim. The trial strategy left the jury the option of convicting defendant of certain crimes, including lesser included offenses, without convicting him of felony murder. Consequently, this was not deficient performance, but instead well-reasoned trial strategy, and, therefore, defendant cannot meet prong one of the Strickland-Fritz test. Defendant cannot meet prong two of the Strickland-Fritz test for presumably the same reason the decision to acknowledge he killed the victim was made; there is an overwhelming amount of evidence to suggest that defendant murdered the victim. Had defendant testified or his trial counsel argued that defendant did not kill the victim, there is no doubt that the jury would have reached the same verdict. Consequently, defendant is not entitled to PCR on this basis.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the lower court's denial of defendant's petition for post-conviction relief.

Respectfully submitted,

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