SUPERIOR COURT NEW JERSEY
APPELLATE DIVISION DOCKET
NO. A-001071-25

STATE OF NEW JERSEY, vs. MUTAH BROWN, Defendant(s).	Criminal Action On appeal from the October 7, 2025 ORDER of the Law Division, Criminal Part, Essex County Sat Below: Hon. Marysol Rosero, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PROCEDURAL HISTORY

Defendant was convicted after trial of second-degree reckless manslaughter and related charges (Da1-Da3) in connection with a fatal crash. After his conviction was affirmed on direct appeal, defendant filed a timely Petition for Post-Conviction Relief (PCR). Defendant was granted a PCR evidentiary hearing held on May 1, 2025.[1] Upon submission of written summations, a hearing for the Court's decision was held on October 6, 2025. At the October 6th hearing, the Court ordered defendant to subpoena trial and appellate counsel to testify in his direct case after he already had rested at the May 1st hearing. The Court's Order was filed on October 7, 2025. (Da4). Defendant now files the instant interlocutory appeal. (Da5). Defendant's motion for a stay before the trial court is pending still and the hearing continuation is presently scheduled for December 18, 2025.

STATEMENT OF FACTS

At the May 1st evidentiary hearing, defendant testified that on the day of the incident, he flagged down his friend, the victim and driver of the subject vehicle because he needed a ride to the hospital to treat a gunshot wound to his left arm. (T76-2 to T79-23, T80-24 to T81-13).[2] A related Incident Report confirmed that

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[1] "T"=Hearing Transcript dated May 1, 2025
"2T"=Decision Transcript dated October 6, 2025

[2] Evidence was adduced at trial during the State's Case in Chief, that the victim alone had carjacked the same vehicle prior to the instant eluding and crash out. Defendant was not alleged to have been involved with the earlier carjacking.

after his arrest, defendant was taken to the hospital where it was discovered he indeed had a gunshot wound. (Da6). Defendant testified that during the police pursuit and resulting car crash, he was seated in the back seat behind the victim, who at all times was the driver. (T79-22 to T80-18).

Defendant testified that he asked his trial counsel to retain an accident reconstructionist; and trial counsel told him she would get back to him about retaining such an expert but never did. (T81-14 to T82-8). The collision reconstructionist retained on PCR and duly qualified as an expert at the PCR hearing, testified that based on a reasonable degree of scientific certainty there was no physical evidence placing defendant in the driver's seat at the time of collision; the evidence was consistent with the victim being in the driver's seat when the car crashed, and the driver's identity could not be determined from the images depicted on the video footage due to the frame type. (T4-24 to T16-11).

Defendant testified that although he wanted to testify he was not the driver of the crashing vehicle at trial (T84-23 to T85-1), defense counsel advised him that if he took the stand, his juvenile record could be used to impeach his credibility and advised him against testifying. (T74-1 to T75-4). Trusting his lawyer's advice, defendant did not testify. (T74-1 to T75-4). Trial counsel's advice regarding the admissibility of his juvenile record was erroneous. See N.J.R.E. 609(d).

Regarding the remaining PCR issues raised by defendant that 1) trial counsel was ineffective for failing to authenticate the 911 dispatch tape and then trying to back door that evidence in on summation; 2) failing to object when the prosecutor provided accident reconstruction commentary on summation without first being qualified as such an expert in the field; and 3) the failure of appellate counsel to raise these issues on appeal, defendant contended those failures by counsel were apparent on the face of the trial/appellate record and did not require further proofs from the defense. To the extent expert Schorr testified that the driver's identity could not be determined by video footage due to unreliable color images (T18-6 to T20-1, T30-10 to T34-19), trial counsel was further ineffective for not objecting to the prosecutor's remarks on summation identifying defendant as the driver based on his lay opinion that the driver's clothes matched defendant's by color.

In this case, consisting mainly of conflicting police officers' observations (T44-3 to T48-22) with no physical evidence establishing defendant as the driver, an expert in collision reconstruction should have been retained by the defense. Defendant argued counsel's failure to do so was ineffective and her further failure to object to the prosecutor's associated remarks that exceeded his qualifications as an advocate for the State was likewise ineffective.

In response to the Court's on the record inquiry (T98-14 to T100-22), defendant did not withdraw any of his PCR issues based on his election not to call

trial or appellate counsel as defense witnesses at the evidentiary hearing. In its October 6th decision, the Court determined it was defendant's obligation to call trial and appellate counsel as witnesses in its direct case and ordered him to do so at a continuation of the evidentiary hearing. (2T3-9 to 2T10-12).

LEGAL ARGUMENT

THE COURT ABUSED ITS AUTHORITY BY ORDERING DEFENDANT TO SUBPOENA WITNESS IN HIS DIRECT CASE (2T3-9 to 2T10-12)

Defendant found no case law standing for the proposition that he was required to present evidence tending to both prove and disprove his case. Just as the State in a criminal case is not required to present witnesses who may contradict the testimony of the witnesses called as part of its case.

On the contrary, the case law seems to suggest that the State is expected to call trial counsel as a witness to refute a defendant's claims of ineffectiveness. See State v. Porter, 216 N.J. 343, 356 (2011)(in case remanded for evidentiary hearing the Court noted "that the State chose not to present trial counsel as a witness or even submit counsel's affidavit stating the reasons for not calling Adams or presenting an alibi defense."). Moreover, pursuant to Rule 614:

> (a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
> (b) Examining. The court may examine a witness regardless of who calls the witness.

> (c) Objections. A party may object to the court's calling or examining a witness.

New Jersey Rules of Evidence 614. Rule 614 authorizes the Court to call witnesses on its own, but nowhere does the rule provide that the Court can insert itself into defense strategy by demanding defendant present testimony of witnesses he would not have otherwise called and very well may be adversarial to his case. In doing so here, the Court overstepped its boundaries.

> Claims of judicial misconduct pose a severe problem to our appellate tribunals for 'it is difficult to review a charge of unfairness upon a dry record.' . . . Clearly, such grievances must be weighed against the important interest of preserving order in the courtroom. The intervention of a trial judge is a 'desirable procedure,' but it must be exercised with restraint. . . . 'There is a point at which the judge may cross that fine line that separates advocacy from impartiality.' . . . A trial judge 'may so take over the entire proceedings as to create prejudicial error . . . .'

State v. Medina, 349 N.J. Super. 108, 131-132 (App. Div. 2002), quoting State v. Guido, 40 N.J. 191, 208 (1963), Village of Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958), and Davanne Realty Co. v. Brune, 67 N.J. Super. 500, 511 (App.Div.1961); also citing State v. Ross, 80 N.J. 239, 249-50 (1979), State v. Ray, 43 N.J. 19, 25 (1964), State v. Swint, 328 N.J. Super. 236, 260 (App. Div.), cert. denied, 165 N.J. 492, (2000).

If the trial court would have ordered trial and appellate counsel to testify, both the defense and the State would have been afforded the opportunity for cross-examination. If the Court had ordered the State to produce the desired witnesses,

defendant could have exercised his right to cross-examination. On direct, however, defendant is precluded from asking leading questions ordinarily allowed on cross. Rule 611(c) provides that:

> [l]eading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

New Jersey Rules of Evidence 611(c).

Here, defendant claims counsel rendered services that were not effective and as a result he suffered prejudice. The very nature of as post-conviction relief claim is adversarial to the representation provided by counsel at the trial and direct appeal level. Within this completely adversarial PCR framework, it is illogical for defendant to be tasked with the entire responsibility of presenting both sides of his case while the State sits idly by. Moreover, defendant should not be forced to call potentially adverse witnesses as part of his direct case and then have to rely on the Court's discretion in designating those witnesses as "hostile" for the purpose of cross-examination. On the contrary, defendant properly presented evidence-through his own and expert testimony-in support of his PCR petition, and the case should be decided on the merits of that evidence presented.

Here, the trial court attempts to direct (by ordering him to subpoena potentially adverse witnesses) and at the same time limit (by denying him cross-

examination of those subpoenaed witnesses) defendant's presentation of his case in favor of the State (who would be allowed to cross-examine those subpoenaed witnesses), and that is both unfair and prejudicial. If present PCR counsel was ineffective for not calling trial and appellate counsel at defendant's evidentiary hearing, that is an issue to be fairly raised on second PCR.

CONCLUSION

Based on the foregoing, the Court's decision directing defendant to subpoena witnesses should be reversed.

Respectfully submitted,

/s/Cynthia H. Hardaway
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Dated: December 6, 2025

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December 3, 2025

Honorable Judges
Superior Court of New Jersey – Appellate Division
Hughes Justice Complex - P.O. Box 006
Trenton, New Jersey 08625

Re: State v. Mutah Brown
No. A-1071-25 (AM-0140-25T1)

Your Honors:

Please accept this letter in lieu of a more formal brief in opposition to defendant Mutah Brown's motion for leave to appeal. Defendant fails to meet the standard governing leave to appeal, and his claims lack sufficient merit to justify that relief.

The standard governing motions for leave to appeal is clear: This Court may grant leave to appeal only if "the interests of justice" require. R. 2:2-4. This "stringent" standard should be exercised "sparingly." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008); State v. Reldan, 100 N.J. 187, 205 (1985). The movant must "establish, at a minimum, that the desired appeal has merit and that 'justice calls for [an appellate court's] interference in the cause"

now. Brundage, 195 N.J. at 599 (citation omitted). Defendant does not meet that stringent standard.

Defendant filed a post-conviction relief ("PCR") petition alleging ineffective assistance of trial (four allegations) and appellate counsel (one allegation). (2T5-24 to 6-21).[1] As the Supreme Court has recognized, in PCR proceedings, a "defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction and at which the trial judge can rule upon the claims including the issue of prejudice…." State v. Preciose, 129 N.J. 451, 462 (1992) (emphasis added; citation omitted).

In the proceedings below so far, the PCR judge granted an evidentiary hearing, and the defense called a proposed expert (Dr. Justin Schorr) and the defendant himself. (1T). After their testimonies, the defense rested. (1T98-13). The judge expressed the following concern to defense counsel:

> [Y]ou've made assertions regarding[] trial counsel…. It would be appropriate to have her testify as a part of this. Are you withdrawing those objections?
>
> The Court should consider the testimony of the allegations that have been made go to conversations between the defendant and the counsel. And the Court has the right to hear from the trial counsel in order to make a determination, I have to make determinations of credibility. I have to hear what her testimony is in regards to the allegations that have been made. The Court cannot proceed to make a decision based on limited testimony. So,

[1] The State adopts defendant's transcript designation codes. See (Dmb1 n. 1).

> what [is] your posture? Do you need time to think about how you're going to proceed?
>
> You also made allegations about[] the appellate counsel in the petition. Those can be withdrawn, or, if you -- again, if you need time to consider how you're going to proceed. But, most certainly, the Court cannot make a determination as to any issues involving counsel without affording them, allowing them, and hearing from them as to what their position, what reason, if any, they had for the decisions they made over the course of trial. [(1T98-14 to 99-12).]

The defense took the position that it need not call the attorneys they are alleging were ineffective as witnesses at the evidentiary hearing, and "the Court should still consider the P.C.R. based on what the Defense has presented." (1T99-13 to 23). Counsel asked to brief the issue, which the judge permitted. (1T101-10 to 22).

In an oral decision, the judge determined:

> [H]ere, defendant claims ineffective assistance of counsel that concerns matters that are within the knowledge of counsel, such as trial strategy, advice, communication with the defendant, and decisions made by the defendant as to whether to testify or not, the input of counsel regarding those decisions, and the independence of -- if any -- of the defendant's decisions as it relates to all matters in trial, and especially those that have been raised as a part of this P.C.R.
>
> In order to prevail at a P.C.R., the petitioner bears the burden of proof at a P.C.R. hearing by a preponderance of credible evidence. The failure to present trial and appellate counsel at a P.C.R. hearing may cause the Court to find petitioner's assertions, and I quote, "self-serving, incredible, uncorroborated," as illustrated by the cases….

> A defendant who fails to present trial counsel's testimony at a P.C.R. hearing runs a strong risk that their claim will be found facially incredible. And the petition will be denied because the Court cannot resolve key issues of question about counsel's strategy, advice, or actions using only petitioner's own corroborated [sic] assertions.
>
> This course of action by P.C.R. counsel could -- in [and] of itself -- result in an ineffective assistance of counsel claim against the P.C.R. counsel…. [T]he Court notes that the Defense did not submit any controlling authority to support its position and much less in light of the facts and the claims asserted as a part of this P.C.R. motion.
>
> For these reasons, the Court is ordering P.C.R. counsel to subpoena and produce trial counsel as well as appellate counsel for the subject P.C.R. hearing. [(2T8-20 to 10-10) (citations omitted).]

The PCR court's decision was not an abuse of discretion, and so defendant cannot show his desired appeal has merit.

As part of his PCR, defendant has now testified that trial counsel made certain representations to him, representations defendant now contends were erroneous. (Dmb2) (and citations therein). As to other contentions, defendant alleges that "those failures by [trial and appellate] counsel were apparent on the face of the trial/appellate record and did not require further proofs from the defense." (Dmb3). The PCR court did not abuse its discretion in requiring the defense, who carries both the burden of proof and the burden of production in PCR proceedings, to call the very attorneys whose conduct defendant is now challenging as constitutionally derelict.

As the judge observed, the attorneys who defendant alleges were ineffective are available to testify, (2T7-7 to 11), and their testimony would obviously be helpful to the finder of fact—here, the judge. And presumably the attorneys are on notice of defendant's allegations. See R. 3:22-8(g); R. 3:22-13. Since defendant's allegations directly allege constitutional insufficiency by attorneys who represented defendant in prior proceedings and are now on notice of his claims, the judge did not abuse her discretion in finding their testimonies were necessary for a fair determination of the issues defendant raised in his PCR petition.[2]

Furthermore, in the event the court denies PCR, defendant can always raise this issue on appeal from that denial.

For these reasons, this Court should deny leave to appeal.

Respectfully submitted,

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Of Counsel and on the Letter in Lieu of Brief

[2] Defendant's concerns about being unable to cross-examine these witnesses is overstated and not a basis to grant him relief. In the event either attorney is hostile, the court can permit cross-examination on direct. See N.J.R.E. 611(c).