

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1176-22

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Passaic
	:	County.
FERREIE JOHNSON,	:	
Defendant-Appellant.	:	Indictment No. 18-06-0592-I
	:	Sat Below:
	:	Hon. Marybel Mercado-Ramirez, J.S.C.
	:	and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
(973)877-1200

KEVIN S. FINCKENAUER
Assistant Deputy
Public Defender
Attorney ID: 301802020

June 25, 2024

Of Counsel and
On the Brief
Kevin.Finckenauer@opd.nj.gov

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY.....	1
STATEMENT OF FACTS.....	2
LEGAL ARGUMENT	5

POINT I

THE CUSTODIAL INTERROGATION OF MR. JOHNSON SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE LIED ABOUT THE PURPOSE OF HIS DETENTION AND MINIMIZED THE INTERROGATION, THEREBY PRECLUDING A VALID <u>MIRANDA</u> WAIVER. (7T3-24 TO 27-4; 16T40-8 TO 41-9).....	5
A. The <u>Miranda</u> Hearing and Decision.....	6
B. A Voluntary Waiver of <u>Miranda</u> Rights Must Be Established Beyond a Reasonable Doubt, and Any Such Waiver May Not Be Obtained Through Deception, Minimization, or Manipulation of the Proceedings.	11
C. Law Enforcement Minimized and Misrepresented the True Nature of the Interrogation to Overcome Mr. Johnson's Equivocal Statements about Possibly Invoking His Rights and Induce Him to Waive.....	14
D. The Improper Admission of the Statement Was Reversible Error.....	23

TABLE OF CONTENTS (Cont'd.)

PAGE NOS.

POINT II

SERGEANT MARTINEZ IMPROPERLY NARRATED EVENTS CONTAINED IN THE SURVEILLANCE VIDEO OF WHICH HE HAD NO FIRSTHAND KNOWLEDGE AND THAT THE JURY WAS ABLE TO EVALUATE FOR ITSELF, INCLUDING REPEATEDLY TESTIFYING THAT THE FOOTAGE SHOWED MR. JOHNSON SHOOTING A GUN. (PARTIALLY RAISED BELOW; 4T5-13 TO 6-8; 9T44-22 TO 45-24, 62-22 TO 64-3, 79-19 TO 80-1, 109-9 TO 12; 16T35-8 TO 40-7) 25

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE JURORS TO TAKE A LAPTOP INTO THE JURY ROOM FOR USE DURING THEIR DELIBERATIONS. (NOT RAISED BELOW) 41

A. Allowing the Jurors Unfettered Access to the Surveillance Video Footage in the Jury Room Was Reversible Error..... 42

B. It Was Otherwise Reversible Error to Provide the Jurors a Laptop For Use In Their Deliberations. 48

POINT IV

THE TRIAL COURT ERRED IN ESTABLISHING THE APPLICABLE SENTENCING RANGE FOR A PERSISTENT-OFFENDER EXTENDED TERM AND ERRED IN ASSESSING THE AGGRAVATED AND MITIGATING FACTORS, RESULTING IN AN EXCESSIVE, MAXIMUM EXTENDED TERM SENTENCE. (17T73-2 TO 105-20) 51

CONCLUSION 60

INDEX TO APPENDIX

PAGE NOS.

Municipal Complaint	Da 1-7
Passaic County Indictment No. 18-06-0592-I	Da 8-11
Pretrial Omnibus Order.....	Da 12-13
Miranda Order	Da 14
Verdict Sheet	Da 15-17
New Trial Order	Da 18
Judgment of Conviction	Da 19-21
Notice of Appeal.....	Da 22-26
Interrogation Transcript	Da 27-43
<u>Cole v. State</u> opinion.....	Da 44-57

JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

<u>Miranda</u> Order	Da 14
<u>Miranda</u> Decision	7T
New Trial Order	Da 14
New Trial Decision.....	16T
Sentencing.....	17T73-2 to 105-20
Judgment of Conviction	Da 19-21

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE NOS.</u>
<u>Brown v. Kennedy Mem’l Hosp.</u> , 312 N.J. Super. 579 (App. Div. 1998)	48
<u>Brown v. Mississippi</u> , 297 U.S. 278 (1936)	11
<u>Cole v. State</u> , No. 2768, Sept. Term, 2014 WL 5450752 at *5-7 (Md. Ct. Spec. App. Nov. 14, 2017).....	50
<u>Fiorino v. Sears Roebuck & Co.</u> , 309 N.J. Super. 556 (App. Div. 1998)	42, 47
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	Passim
<u>State v. A.G.D.</u> , 178 N.J. 56 (2003).....	13, 20
<u>State v. Burr</u> , 195 N.J. 119 (2008)	42, 44, 47
<u>State v. Carrion</u> , 249 N.J. 253 (2021)	24
<u>State v. Chen</u> , 208 N.J. 307 (2011).....	40
<u>State v. Dalziel</u> , 182 N.J. 494 (2005).....	52
<u>State v. Diaz</u> , 470 N.J. Super. 495 (App. Div. 2022), <u>leave to appeal denied</u> , 251 N.J. 8 (2022)	13, 21, 22
<u>State v. Dunbar</u> , 108 N.J. 80 (1987)	54
<u>State v. Frisby</u> , 174 N.J. 583 (2002)	27
<u>State v. Hartley</u> , 103 N.J. 252, 260 (1986).....	11
<u>State v. Higgs</u> , 253 N.J. 333 (2023).....	27
<u>State v. Knight</u> , 477 N.J. Super. 400 (App. Div. 2023).....	43, 46, 51
<u>State v. McCloskey</u> , 90 N.J. 18 (1982)	25

TABLE OF AUTHORITIES (Con'd.)**PAGE NOS.****CASES (Cont'd.)**

<u>State v. McLean</u> , 205 N.J. 438 (2011)	27
<u>State v. Melvin</u> , 248 N.J. 321 (2021).....	55, 58
<u>State v. Michaels</u> , 264 N.J. Super. 579 (App. Div. 1993) <u>aff'd</u> , 136 N.J. 299 (1994).....	43, 47
<u>State v. Miller</u> , 108 N.J. 112 (1987)	54
<u>State v. Miller</u> , 205 N.J. 109 (2011)	43, 44, 47
<u>State v. Moore</u> , 181 N.J. 40 (2004).....	16
<u>State v. Nyhammer</u> , 197 N.J. 383 (2009).....	12
<u>State v. O'Neill</u> , 193 N.J. 148 (2007)	11, 12
<u>State v. Pierce</u> , 188 N.J. 155 (2006)	53, 54
<u>State v. Presha</u> , 163 N.J. 304 (2000).....	11, 12
<u>State v. Randolph</u> , 210 N.J. 330 (2012).....	52
<u>State v. Reed</u> , 133 N.J. 237 (1993).....	12
<u>State v. Sanchez</u> , 129 N.J. 261 (1992).....	13
<u>State v. Shaw</u> , 237 N.J. 588 (2019).....	16
<u>State v. Sims</u> , 250 N.J. 189 (2022)	Passim
<u>State v. Sims</u> , 466 N.J. Super. 346 (App. Div. 2021), <u>rev'd</u> , 250 N.J. 189 (2022)	19-21
<u>State v. Singh</u> , 245 N.J. 1 (2021).....	39

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

CASES (Cont'd.)

<u>State v. Tillery</u> , 238 N.J. 293 (2019).....	53
<u>State v. Vasquez</u> , 374 N.J. Super. 252 (App. Div. 2005)	54
<u>State v. Vincenty</u> , 237 N.J. 122 (2019)	18
<u>State v. Watson</u> , 254 N.J. 558 (2023)	Passim
<u>States v. Salerno</u> , 108 F.3d 730 (7th Cir. 1997).....	47

STATUTES

N.J.S.A. 2C:11-3(a)(1).....	1
N.J.S.A. 2C:11-3(a)(2).....	1
N.J.S.A. 2C:39-4(a)	1
N.J.S.A. 2C:39-5(b).....	1
N.J.S.A. 2C:39-7(b).....	1
N.J.S.A. 2C:43-7(a)	53
N.J.S.A. 2C:44-1	52
N.J.S.A. 2C:44-1(a)	52
N.J.S.A. 2C:44-1(b).....	52
N.J.S.A. 2C:44-1(b)(3)	59
N.J.S.A. 2C:44-1(b)(4)	59
N.J.S.A. 2C:44-3(a)	2, 52

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

RULES

<u>R. 1:8-8</u>	48
<u>R. 1:36-3</u>	50
<u>R. 2:10-2</u>	40, 46

RULES OF EVIDENCE

N.J.R.E. 701	27, 29, 37
--------------------	------------

CONSTITUTIONAL PROVISIONS

<u>N.J. Const. art. I, ¶ 1</u>	6, 11, 26, 42, 52
<u>N.J. Const. art. I, ¶ 9</u>	6, 11, 26, 42, 52
<u>N.J. Const. art. I, ¶ 10</u>	6, 11, 26, 42, 52
<u>N.J. Const. art. I, ¶ 11</u>	52
<u>U.S. Const. amend. V</u>	6, 11, 26, 42, 52
<u>U.S. Const. amend. VI</u>	26, 42, 52
<u>U.S. Const. amend. XIV</u>	6, 11, 26, 42, 52

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

OTHER AUTHORITIES

America Bar Association Judicial Division National Conference of State Trial Judges, <u>A Fair Trial: Jurors Use of Electronic Devices & the Internet</u> 12-13 (2010)	49
Anita Ramasastry, <u>Why Courts Need to Ban Jurors' Electronic Communications Devices</u> , <u>FindLaw</u> (Aug. 11, 2009)	49
Pressler & Verniero, <u>Current N.J. Court Rules</u> , cmt. 1.1 on <u>R. 1:8-8</u> (2023)	48
Sweeney, 1 <u>Reynolds Courts & Media L.J.</u> at 141 (advocating for ban on “computers, cell phones, or other electronic communications devices” while jury is deliberating); <u>N.D. Cal. Gen. Order No. 58</u> , “Regulating Possession and Use of Electronic Devices in the Courthouse” (amend. Sept. 15, 2015)	50
Worlds Collide: The Digital Native Enters the Jury Box, 1 <u>Reynolds Courts & Media L.J.</u> 121 (Spring 2011)	49

CITATION INDEX

Da = defendant-appellant's appendix

1T = sentencing transcript, dated March 17, 2017

2T = plea hearing transcript, dated March 9, 2018

3T = pretrial conference transcript, dated November 12, 2019

4T = motion hearing transcript, dated July 13, 2021

5T = hearing transcript, dated September 22, 2022

6T = Miranda hearing transcript, dated September 28, 2022

7T = Miranda decision transcript, dated September 29, 2022

8T = trial transcript, dated October 4, 2022

9T = trial transcript, dated October 5, 2022

10T = trial transcript, dated October 6, 2022

11T = trial transcript, dated October 7, 2022

12T = trial transcript, dated October 11, 2022

13T = trial transcript, dated October 12, 2022

14T = trial transcript, dated October 13, 2022

15T = motion for new trial transcript, dated November 3, 2022

16T = motion decision transcript, dated December 6, 2022

17T = sentencing transcript, dated December 8, 2022

PROCEDURAL HISTORY

On June 27, 2018, Passaic County Indictment No. 18-06-592 was filed, charging defendant-appellant Ferreie Johnson with: first-degree murder, N.J.S.A. 2C:11-3(a)(1) and/or (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Two); second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b) (Count Three); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (Count Four). (Da8-11).

On September 28, 2022, the Honorable Marybel Mercado-Ramirez, J.S.C., heard the State's motion to admit Mr. Johnson's recorded custodial interrogation. (6T). On September 29, the trial court partially granted the State's motion, finding admissible the portion of the interrogation preceding Mr. Johnson's invocation of his right to an attorney. (7T; Da14).

A trial was held before Judge Mercado-Ramirez and a jury over several dates in October 2022. (8T; 9T; 10T; 11T; 12T; 13T; 14T). On October 13, 2022, the jury acquitted Mr. Johnson of murder but found him guilty of the lesser-included offense of second-degree reckless manslaughter. (14T26-10 to 27-5). The jury also found him guilty of the two weapon-possession offenses. (14T27-7 to 22). Mr. Johnson pleaded guilty to the certain persons offense, which had been severed, at the conclusion of the trial. (14T38-5 to 59-12).

On November 3, 2022, Judge Mercado-Ramirez heard Mr. Johnson's motion for a new trial. (15T). The motion was denied on December 6, 2022. (16T; Da18).

On December 8, 2022, Judge Mercado-Ramirez granted the State's application to sentence Mr. Johnson to a discretionary persistent offender extended term, N.J.S.A. 2C:44-3(a), and imposed the maximum extended term of twenty years in prison for reckless manslaughter. After merger, the court imposed two concurrent ten-year terms, subject to five-year parole disqualifiers, for the unlawful possession of a handgun and certain persons convictions. In aggregate, Mr. Johnson received a twenty-year prison term of which he will have to serve at least 85%. (Da19-21).

A corrected notice of appeal was filed on March 8, 2023. (Da22-26).

STATEMENT OF FACTS

In the early morning hours of March 31, 2018, Mr. Johnson went to a club in Paterson called D'Classico. (9T7-9 to 8-18, 47-6 to 24). While there, Mr. Johnson's friend group, associated with 12th Avenue in Paterson, encountered a rival group, associated with 5th Avenue in Paterson. (9T47-6 to 24; 10T28-18 to 29-5, 45-4 to 9). The encounter devolved into a physical brawl, causing crowds of people to rush out of the club. (9T47-6 to 24, 121-13 to 22). Shortly thereafter, several guns were fired in the parking lot outside of D'Classico, and Parker

Sams, a clubgoer and bystander who was not involved in either side of the fight, was struck and killed. (9T130-17 to 136-21; 10T141-11 to 16, 149-11 to 23, 158-7 to 159-23).

Surveillance footage captured much of what happened outside of D’Classico that night. (9T18-24 to 19-14). Cameras captured several individuals from the 5th Avenue group going to a BMW in the parking lot, getting guns, and shooting into the crowd. (9T126-22 to 18, 130-17 to 131-17). The car was situated in the top corner of the parking lot near Tony Lalama Boulevard. (9T131-1 to 13, 134-1 to 12). Law enforcement later effectuated a car stop of that BMW, found two guns matching those used in the surveillance footage, and arrested three men in connection with the shooting: Christopher Blanco, Troy Staton, and Jahsett Carr. (9T209-2 to 23). Ballistics experts concluded that the bullet that killed Mr. Sams matched the kind of gun that was found in the BMW,¹ although it could not be determined if the bullet came from that specific gun. (11T8-10 to 15-16, 37-3 to 9).

Surveillance footage also captured two individuals—a man and a woman—go to a Ford Focus near a parking attendant booth in the lot around the time of the shooting. (8T134-22 to 136-21). In the footage, the man takes an

¹ The bullet that killed Mr. Sams and one of the guns recovered from the car were both .38 caliber.

object out of the car while the woman tries to restrain him, points it in the direction of the Tony Lalama Boulevard shooters while running towards the middle of the parking lot, then returns to the car. (8T134-22 to 136-21). The pair then get into the car and speed out of the lot. (8T137-13 to 142-23). ShotSpotter, a software designed to pick up sounds that may be gunshots, had several alerts near where the BMW shooters were active; there were no such alarms near the Ford Focus's section of the lot. (9T146-12 to 147-3, 196-9 to 197-16).

Following conversations with eyewitnesses, receipt of information about the owner of the Ford Focus,² and the review of the surveillance footage, law enforcement identified Mr. Johnson as possibly being the man depicted in the footage captured near the Ford Focus. (9T149-9 to 151-12, 185-5 to 186-7). On April 3, 2018, police arrested Mr. Johnson and brought him to the police station for questioning. (9T151-10 to 15). Mr. Johnson gave a statement acknowledging he went to the club that night in a Ford Focus and that he was involved in a fight there, but he denied shooting a gun. (9T161-20 to 177-17). Despite his denials, he was detained and charged with murder and other offenses. (9T179-5 to 16).

Police ultimately obtained Mr. Johnson's cell phone and found various text messages with friends about his needing to "lay low" after the fight and in which he asked if the police were looking into him. (10T23-23 to 41-18). He

² The owner was the woman in the video and a romantic partner of Mr. Johnson.

also texted one of his friends that he was “dropping off [his] strap” after the incident. (10T46-5 to 22). Mr. Johnson never said anything in his texts indicating he was involved in the shooting and denied being involved. (10T42-14 to 18).

Police never produced a gun they alleged to be owned by Mr. Johnson, and no witness testified that they saw Mr. Johnson with a gun or at the club that night. Mr. Johnson’s primary defense was that the lethal bullet must have come from the .38 Colt revolver recovered from the BMW. (13T3-25 to 4-5).

LEGAL ARGUMENT

POINT I

THE CUSTODIAL INTERROGATION OF MR. JOHNSON SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE LIED ABOUT THE PURPOSE OF HIS DETENTION AND MINIMIZED THE INTERROGATION, THEREBY PRECLUDING A VALID MIRANDA WAIVER. (7T3-24 to 27-4; 16T40-8 to 41-9)

By April 3, 2018, police had substantial video footage of the shooting and statements from several witnesses identifying Mr. Johnson from that footage; they personally recognized Mr. Johnson from the footage; and they knew he was connected to the Ford Focus pictured in the footage. With this evidence, police located Mr. Johnson, towed the Ford, took him to the police station in handcuffs, and locked him in the interrogation room with the intention of charging him with murder. When Mr. Johnson repeatedly tried to clarify if he was under arrest,

however, he was told “no” and that the officers only wanted to talk with him “real quick.” Mr. Johnson said if he wasn’t under arrest he did not need a lawyer, waived his rights, and spoke with police.

At the time of his statement, Mr. Johnson was under arrest and police and had both probable cause and a clear intention to charge him with all the offenses with which he was eventually charged. Official charging was delayed, however, to avoid telling Mr. Johnson what he was about to be charged with. Additionally, the officers’ assurances that Mr. Johnson was not under arrest and that they only wanted to talk with him quickly were minimizing half-truths at best, and outright falsities at worst, that induced him to waive his rights despite his equivocations indicating he might not want to talk. Our courts have repeatedly denounced using such deceptive tactics to induce a Miranda waiver. Because Mr. Johnson’s statement was obtained in violation of Miranda and its progeny, it must have been suppressed. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The Miranda Hearing and Decision.

At the Miranda hearing, the State produced only one witness, Sergeant Richard Martinez, and played video footage of the interrogation. Sergeant Martinez testified that through his investigation he had identified Mr. Johnson as a “suspect” in the homicide, located Mr. Johnson, “arrested” him, and brought

him back to the police station in handcuffs where he, along with another officer, interviewed Mr. Johnson. (6T8-10 to 23, 42-24 to 44-2).

At the outset of the interview, officers asked Mr. Johnson if he wanted water. He replied, “No, I’m good . . . I just want to get this over with.” (Da27).³ Mr. Johnson then asked, “First of all, am I under arrest?” The officers replied, “No . . . no we got to talk to you real quick.” (Da27). Mr. Johnson said, “Alright”; the officers responded, “[We] give you your rights, and then we talk to you, and then we go from there, alright?”; and Mr. Johnson agreed to continue. (Da27). After quickly going through his rights and having Mr. Johnson sign the standard Miranda waiver form, the officers asked, “you want to talk to us?” and Mr. Johnson equivocally replied, “If I’m not under arrest.” (Da28). The officers assured him he was not and that he had “no charges on him . . .[,]” to which Mr. Johnson replied, “I don’t need a lawyer then” (Da28).

The officers then questioned Mr. Johnson at length about what happened in the early morning hours of March 31, 2018, at D’Classico. He acknowledged having gone to the club with friends and getting into a fight with a rival group. (Da28-29). Eventually, shots were fired, one of his friends was shot and wounded, and someone else was killed. (Da28-29). Mr. Johnson said that there

³ Because the interview was not entirely captured on the hearing transcript, quotations are from the (imperfect) interview transcript provided by the State. (Da 27-43). The interview transcript does not distinguish between the detectives.

was existing animosity between the two groups because there was an altercation several months before. (Da29). Mr. Johnson further acknowledged that he drove to the club in a Ford Focus with a girl he was seeing romantically. (Da30, 34).

After a while, one of the officers said, “So Ferreie, now I’m going to be honest with you.” (Da38). The officers then disclosed they had what they believed was video footage of him committing the shooting. (Da38). Mr. Johnson twice asked, “I’m under arrest?” The officers replied, “you’re not charged yet,” and described the footage in detail. (Da38). Mr. Johnson thereafter said, “I’d rather bring in a lawyer for this” (Da39). The officers continued to question Mr. Johnson, and he continued to deny any involvement in the shooting. (Da39-43). Eventually, the officers terminated the interview, asking Mr. Johnson if he wanted a cigarette because “he might be there a while.” (Da43). The officers then immediately contacted the prosecutor’s office and had Mr. Johnson formally charged with murder and other offenses. (Da1-7).

On cross-examination, defense counsel questioned Sergeant Martinez about Mr. Johnson’s status at the police station. When counsel asked if Mr. Johnson was free to leave the station that night, Sergeant Martinez initially said yes. When pressed, however, Martinez repeatedly admitted that if Mr. Johnson had tried to leave, they would have reached out to the prosecutor’s office to bring formal charges against him. (6T44-3 to 45-5, 48-14 to 19). Sergeant

Martinez also stated that he knew they had probable cause at the start of the interview to at least charge Mr. Johnson with gun possession and could have charged him with that without prosecutorial approval. (6T48-17 to 19).

During oral argument, the State argued that, because the officers had no duty to advise Mr. Johnson they were intending to charge him with murder or gun possession, and Mr. Johnson knew he was being questioned about the shooting, his Miranda waiver was knowingly and voluntarily obtained. (6T54-18 62-7). The trial court appeared skeptical, questioning the State about whether there was an intentional decision to delay charging Mr. Johnson so that he would be more likely to waive his rights. (6T62-14 to 22, 64-1 to 17). The trial court also noted that if Mr. Johnson had been told he was under arrest for a particular charge, he likely would have changed his mind about speaking with police because he repeatedly asked, “Am I under arrest?” (6T63-18 to 23).

In response, the State claimed that because the decision to charge an individual with a homicide offense had to be made by the prosecutor’s office, the point at which police eventually charged Mr. Johnson was irrelevant to whether his waiver and statement was voluntary. (6T65-8 to 67-21). The State essentially conceded, however, that the interview should have terminated once Mr. Johnson said he should have a lawyer. (6T67-22 to 68-6).

Defense counsel argued that the officers intentionally waited to charge Mr. Johnson until after they interrogated him. He noted that the interrogation did not move the needle with respect to probable cause for the homicide offense because Mr. Johnson flatly denied being involved in the shooting. (6T69-20 to 70-3). Counsel also argued that the officer's response to Mr. Johnson's asking if he was under arrest ("No we got to talk to you real quick") minimized the purpose of the interrogation in violation of Miranda, particularly given Mr. Johnson's statements that he would only speak without a lawyer if he was not under arrest. (6T70-20 to 75-24).

In its final decision, the trial court found Sergeant Martinez's testimony credible. (7T11-8 to 24). As to Mr. Johnson's Miranda waiver, the trial court said that he competently understood his rights and that there was no coercion or overbearing of his will by the officers. (7T14-11 to 16-22).

The trial court also found that Sergeant Martinez's testimony was consistent with the recording of the interrogation. Notably, the court stated the parties had agreed that Mr. Johnson was not under arrest during the interview, and that his handcuffing was merely for the officers' safety. (7T17-20 to 18-2). The trial court further found that the officers did not misrepresent anything to Mr. Johnson or minimize the nature of the interrogation or waiver, and that there was nothing to indicate they acted in bad faith by delaying charges, "[e]ven

though the police did charge Mr. Johnson after his interview” (7T19-15 to 25-7). Accordingly, the court held there was no basis to suppress the majority of Mr. Johnson’s interrogation; the court suppressed the remainder of the statement after Mr. Johnson said he would “rather bring in a lawyer for this[.]” (7T25-8 to 26-14).

B. A Voluntary Waiver of Miranda Rights Must Be Established Beyond a Reasonable Doubt, and Any Such Waiver May Not Be Obtained Through Deception, Minimization, or Manipulation of the Proceedings.

The use of an involuntary custodial statement against a defendant in a criminal trial violates due process and the federal constitutional and state common-law privileges against self-incrimination. U.S. Const. amends. V, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; Brown v. Mississippi, 297 U.S. 278, 286 (1936); State v. Hartley, 103 N.J. 252, 260, 285-86 (1986). New Jersey’s privilege against self-incrimination has broader application than the federal privilege. State v. O’Neill, 193 N.J. 148, 176-77 (2007). Under New Jersey’s privilege against self-incrimination, before a custodial statement can be admitted into evidence, the State must prove beyond a reasonable doubt that it was knowingly, intelligently, and voluntarily made. Id. at 180. The right against self-incrimination is “an integral thread in the fabric of [the] common law,” Hartley, 103 N.J. at 286 (citation omitted), and “one of the most important protections of the criminal law,” State v. Presha, 163 N.J. 304, 312 (2000). Accordingly, New

Jersey courts maintain “an unyielding commitment to ensure the proper admissibility of confessions.” State v. Reed, 133 N.J. 237, 252 (1993) (citations and internal quotations omitted).

“Foremost” among mechanisms developed to safeguard the privilege against self-incrimination, and the “adjunct” right to counsel, are “Miranda warnings,” i.e., warnings that a defendant has the right to remain silent, that any statements will be used against her in court and that she has the right to an attorney during interrogation. Id. at 251; Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). A suspect may decide to waive her Miranda rights, but a waiver of these rights is invalid if not knowingly, intelligently, and voluntarily made. Id. at 475; O’Neill, 193 N.J. at 168. Under our state law, “the prosecution at a Miranda hearing must prove beyond a reasonable doubt that a defendant's waiver of the privilege was knowing, intelligent and voluntary” O’Neill, 193 N.J. at 168 n.12 (citing Presha, 163 N.J. at 313).

When evaluating the voluntariness of a Miranda waiver, there is no brightline rule that police must inform an interviewee that he is a suspect in an investigation before the interrogation, State v. Nyhammer, 197 N.J. 383, 401-08 (2009), or of the potential charges forming the basis of his arrest, State v. Sims, 250 N.J. 189, 211-17 (2022). Once formal charges are filed, however, a brightline rule applies, and the interviewee must be told of the charges before

any interrogation. State v. A.G.D., 178 N.J. 56, 68 (2003). Likewise, after indictment, police may not initiate any potentially incriminating conversations with a defendant without the consent of defense counsel. State v. Sanchez, 129 N.J. 261, 277 (1992). Thus, although police are not permitted to affirmatively deceive a person or manipulate the proceedings to obtain a Miranda waiver, see Nyhammer, 197 N.J. at 407 (suspect cannot be “tricked” or “cajoled” into waiver), there is substantial incentive not to initiate formal criminal proceedings against a person before attempting to elicit an incriminating statement from them.

While the obligation of officers to supply an interviewee with information about his situation before the filing of formal charges is minimal, evidence that officers intentionally delayed bringing charges to induce a suspect into waiving his Miranda rights weighs against the finding of a voluntary waiver under the totality of the circumstances analysis. Sims, 250 N.J. at 216. Likewise, although there is no brightline rule for police to make certain disclosures, “[i]t is another thing entirely for them to provide an explanation that creates or reinforces a false impression as to the seriousness” of the interrogation. State v. Diaz, 470 N.J. Super. 495, 519 (App. Div. 2022), leave to appeal denied, 251 N.J. 8 (2022). There is a distinction, then, between trickery used to get a defendant to confess after he provides a valid waiver and trickery used at the outset of an interrogation

to induce a defendant to waive his constitutional rights. Id. at 524-25. While the former can be appropriate interrogation tactics, the latter is constitutionally prohibited. Ibid.

C. Law Enforcement Minimized and Misrepresented the True Nature of the Interrogation to Overcome Mr. Johnson's Equivocal Statements about Possibly Invoking His Rights and Induce Him to Waive.

When viewed in totality, it is apparent the officers intentionally misled Mr. Johnson at the outset about the nature of the interrogation and delayed bringing charges against him to induce him to waive his Miranda rights. Such a deceptive stratagem must render Mr. Johnson's subsequent waiver, made in reliance on the minimizations and misrepresentations, involuntary.

When Mr. Johnson was arrested, police already had substantial evidence from numerous witnesses, surveillance videos, and DMV records that provided them with probable cause to arrest him and charge him with murder. Indeed, at the time of arrest, the police had every intention of charging Mr. Johnson with murder and every intention of that detention being one from which he could never again leave. The moment Mr. Johnson's interrogation ended, although he denied involvement in the shooting and did not tell the officers anything they did not already know, he was immediately charged with murder and several related offenses and jailed.

While the officers may not have been under a per se legal obligation to tell Mr. Johnson every piece of the story or every step of their plan, Mr. Johnson's initial questions and statements to police made clear that any decision to speak with them was conditional: if he was not under arrest and not being questioned as a suspect in the shooting, only then would he speak to police. In response, despite having brought Mr. Johnson to the police station in handcuffs and having every intention of charging him with murder, the police told Mr. Johnson he was not under arrest and that they only wanted to speak with him "real quick" before quickly mumbling through the rights listed in the Miranda form. Whether considered half-truths or outright lies, those remarks were undoubtedly misleading statements that misrepresented the nature of the interrogation to induce Mr. Johnson to waive his rights after he expressed reservations about speaking to police without an attorney. Those misrepresentations require suppression of Mr. Johnson's interrogation.

First, substantial evidence in the record establishes that the officers' statements to Mr. Johnson minimizing the interrogation (i.e., that he was not under arrest and officers only wanted to talk with him quickly) were factually not true. Officers handcuffed Mr. Johnson, transported him to the police station in a patrol car, and isolated him in an interrogation room to question him about offenses for which they had probable cause to charge him, with no intention of

letting him leave. That, by any understanding, is an arrest. It does not matter that he was not formally charged, as police do not need formal charges to make an arrest; they need only probable cause, which they had. State v. Moore, 181 N.J. 40, 45 (2004). Indeed, our Supreme Court has emphasized that handcuffing, transportation in a police car, and isolation all convert an investigative detention into an arrest. State v. Shaw, 237 N.J. 588, 612-13 (2019). That Sergeant Martinez stated in a hearing Mr. Johnson was not under arrest does not mean the detention was not an arrest under the law.

In other words, neither the lack of formal charges nor the officer's personal opinion about Mr. Johnson's detention negated Mr. Johnson being under arrest at the time of the interrogation. The officer's assertions that he was not were misleading statements designed to induce him to waive his rights, and the trial court's finding that Mr. Johnson was not under arrest was not supported by the record.⁴

⁴ It is important to note that the trial court's finding that defense counsel had conceded Mr. Johnson was not under arrest during the interrogation was inaccurate. Defense counsel argued at the suppression hearing that the officer's statements to Mr. Johnson that he was not under arrest were a "minimization" designed to induce him to waive his rights, and during that argument he expressly said that Mr. Johnson was under arrest:

He was in handcuffs. I mean, the State did admit that he was in custody, which obviously he was in custody. So the situation here where they know that they're going to charge him. And, Judge, they knew they were gonna charge him with the guns. . . . when he says,

Likewise, the officers’ assertion that “we got to talk to you real quick” was similarly a misrepresentation designed to induce Mr. Johnson to waive his rights. The implication of the remarks is clear: We are only asking you questions as a witness to the shooting and then you will be free to go. This, of course, was not the case. Although initially wavering on whether Mr. Johnson was free to leave, Sergeant Martinez subsequently admitted that if Mr. Johnson had tried to leave, he would have reached out to the prosecutor’s office to have him immediately formally charged, just as the officers did as soon as they finished the interrogation. (6T44-3 to 45-5, 48-14 to 19). Again, law enforcement’s plan from the inception was that Mr. Johnson would never leave police custody, and the statements the officers made at the outset of the interrogation were intended to obscure this fact to minimize the situation to induce a waiver.

The trial court found the “real quick” comment was not misleading because the officers did not interrogate Mr. Johnson for an especially long time. (7T20-14 to 22). However, the issue is not the actual length of the interrogation, it is the officers’ suggestion that after the interrogation Mr. Johnson will be free

am I under arrest? He wasn’t walking out of there. . . . [H]e was under arrest.

[(6T68-18 to 69-3) (emphasis added).]

to go, rather than spending the rest of his foreseeable future in custody on this case.

Furthermore, the officers' statements once they revealed the true nature of the interrogation cement that their initial statements to Mr. Johnson were not forthcoming. Once officers made the decision to reveal the true nature of their interrogation, they said to Mr. Johnson, "So Ferreie, now I'm gonna be honest with you." (Da38) (emphasis added). The implication of this, obviously, is that in their previous discussion the officers were not being honest with Mr. Johnson. In response, when Mr. Johnson again asked if he was under arrest, the officers modified their answers and said, "you're not charged yet" (Da38) (emphasis added). Then, they informed Mr. Johnson that they had video footage of the parking lot that seemed to show him shooting a gun and were going to refer the matter to the prosecutor's office for charges in connection with the shooting.

Critically, once the officers made these disclosures, Mr. Johnson made a more explicit invocation of his right to counsel. Cf. State v. Vincenty, 237 N.J. 122, 134 (2019) (considering change in willingness to speak and invocation once officers were honest about nature of interrogation in finding Miranda waiver not voluntary). Thus, the ending of the interrogation affirmed what appeared clear from the beginning: Mr. Johnson's decision to speak with police was conditioned on his not being under arrest in connection with the shooting; the officers made

misleading statements to obscure his true status and the nature of the interrogation; and those misleading statements were made to induce him to waive his rights and did in fact induce him to so waive. Our caselaw unequivocally supports the conclusion that such circumstances fail to produce a voluntary waiver beyond a reasonable doubt.

In its decision, the trial court largely relied on Sims to conclude that the circumstances did not demonstrate an involuntary waiver. In that case, police arrested Sims in connection with a shooting and drove him to a police station for an interrogation prior to the issuance of any formal charges. Sims, 250 N.J. at 293. The officers advised Sims he was under arrest but would not elaborate any further. Ibid. During the interrogation, when Sims asked if he was under arrest, the officers told him “no specific charges” had been filed “at this point in time” but confirmed he was in fact under arrest. State v. Sims, 466 N.J. Super. 346, 357 (App. Div. 2021), rev’d, 250 N.J. 189 (2022). Sims waived his rights, and the officers conducted a videotaped interrogation. Sims, 250 N.J. at 293. Law enforcement conducted additional investigation after the interview, and Sims was eventually charged. Sims, 466 N.J. Super. at 358-59.

On appeal, Sims argued that his Miranda waiver was invalid because the officers did not tell him why he was arrested. Sims, 250 N.J. at 204. The Supreme Court ultimately rejected his arguments, finding that law enforcement

has no obligation to tell an interviewee about potential charges before formal charges have been filed. Id. at 217. However, the Court went on to note that evidence of law-enforcement manipulation of the process to avoid rules set out in cases like A.G.D. would be something to consider in the totality-of-the-circumstances analysis. Id. at 216.

There are several critical factors that distinguish Mr. Johnson's case from Sims. Most critical is that, when Sims asked the officers if he was under arrest at the outset of the interview, they told him he was in fact under arrest and did not minimize his detention by saying he was not. Sims, 466 N.J. Super. at 357-58. Likewise, although police did not tell Sims why he was arrested, they told him "no specific charges" had been filed "at this point in time." Id. at 357. Such language was an accurate representation of the situation Sims was in and implied a possibility of charges in the future. Here, by contrast, police told Mr. Johnson he had "no charges on" him and they just had to talk with him "real quick." Only when the officers revealed the true nature of the interrogation did they say that he was not charged "yet" and that what charges would be lodged against him was up to the prosecutor's office. In short, although the police in Sims did not tell the defendant why he was arrested, they did not make any misrepresentations, and they did not attempt to minimize the nature of the interrogation to get him to waive his Miranda rights. Here, by contrast, the

officers did exactly that: they minimized and misrepresented the facts to induce a Miranda waiver from Mr. Johnson.

Additionally, with respect to evidence of bad-faith delay of charges, law enforcement in Sims did not immediately charge the defendant after the interrogation, but instead conducted additional investigation before bringing formal charges, suggesting the charges were not delayed simply to induce a waiver. Sims, 466 N.J. Super. at 359. In Mr. Johnson's case, the police already had every intention of charging him with murder and related offenses and did so immediately after the interrogation concluded. Critically, Mr. Johnson did not say anything during the interrogation that solidified the case against him; in the complaint-warrant, reference to the interview was a tiny fraction of the stated basis for probable cause. (Da1-7). Thus, the record sufficiently supports that officers arrested Mr. Johnson with the intent to charge him with murder and delayed doing so to minimize the nature of his interrogation and induce a waiver.

The facts of Mr. Johnson's case more closely mirror those of State v. Diaz. In Diaz, police detained the defendant and sought to interrogate him in relation to a potential drug-induced-death charge. 470 N.J. Super. at 504-06. When Diaz asked why he was being questioned, the police told him that the questioning was in relation to a narcotics investigation but did not mention the overdose death. Id. at 506. Diaz was transported to a police station, waived his rights, and

questioned at length. Id. at 507. During the interrogation, the officers eventually revealed that a person Diaz had sold heroin to had died of an overdose and that Diaz might be facing a homicide charge. Id. at 508. Diaz was later charged with several offenses, including drug-induced death. Id. at 508-09.

This Court held Diaz’s waiver was not knowingly and voluntarily made because the officers “provid[ed] a deliberately vague and incomplete answer to his question as to the reason why he was taken into custody” to induce a Miranda waiver. Id. at 518-19. Even if the officers had not affirmatively lied, it was enough that they did not tell the “whole truth” to trick Diaz into waiving. Id. at 519-20. “Any such deception or trickery as to the true reason a defendant is taken into custody . . . is an important circumstance to be considered” in determining whether a defendant validly waived his rights. Id. at 519.

Here, like in Diaz, officers gave misleading, incomplete, and incorrect information to induce Mr. Johnson to waive his rights. In fact, the officers’ actions here were more egregious than those in Diaz. The record strongly suggests that Mr. Johnson would not have waived but for the officers’ misleading statements; his remarks at the beginning of the interrogation demonstrated an inclination to invoke his rights if the officers intended to question him as a suspect in the shooting; and he invoked once the officers were “honest” about the true nature of interrogation. Likewise, there is no evidence in Diaz that law

enforcement intentionally delayed bringing charges as part of a broader stratagem to get the defendant to waive; in that case, like in Sims, formal charges were not brought until sometime after the interrogation. Here, by contrast, police delayed charging Mr. Johnson to interrogate him first without having to inform him of any pending charges and charged him immediately after the interrogation despite learning nothing new during the questioning.

In summary, law enforcement manipulated the process and minimized the nature of the interrogation to induce a waiver of rights from Mr. Johnson. The record supports that Mr. Johnson did in fact rely on the police's misrepresentations in waiving his rights and likely would not have waived but for those misrepresentations and manipulations. Under such facts, the State failed to establish a knowing and voluntary waiver beyond a reasonable doubt. The trial court's decision to the contrary is legally erroneous at critical points, and at others, not sufficiently grounded in competent, credible evidence in the record such that it amounted to an abuse of discretion. Accordingly, the trial court's order admitting Mr. Johnson's statement to police must be reversed.

D. The Improper Admission of the Statement Was Reversible Error.

Lastly, the recorded interrogation was substantially prejudicial such that its improper admission warrants a reversal of Mr. Johnson's convictions. As an initial matter, the argument that the interrogation did not move the needle with

respect to probable cause to arrest Mr. Johnson should not be conflated with a concession that the interrogation's admission at trial was harmless. Almost all the witness statements and identifications the police obtained before interrogating Mr. Johnson were not admitted at trial, with the State instead relying largely on Mr. Johnson's statement to establish his presence at the club and details about the fight. At trial, no witness placed Mr. Johnson at the scene, no witness stated they saw Mr. Johnson near a Ford Focus, and no witness said they saw him in a fight. Instead, the State relied almost exclusively on Mr. Johnson's interrogation to establish much of its theory of the case.

Even beyond the substance of Mr. Johnson's statement, there were additional aspects of the interrogation that had the potential to be very prejudicial. Jurors may have been put off by Mr. Johnson's cocky demeanor in the video or disliked the swearing or misogynistic language he used; they simply might not have liked that he was smoking cigarettes throughout. These factors similarly had the capacity to unduly prejudice Mr. Johnson in the eyes of the jury.

Finally, our courts have repeatedly acknowledged that incriminating statements by a defendant are among the most prejudicial evidence to the jury, and the erroneous admission of such statements will very rarely be harmless. State v. Carrion, 249 N.J. 253, 284 (2021) (“[I]t is rare that an unconstitutionally

secured confession is deemed harmless beyond a reasonable doubt, for we have recognized ‘that inculpatory remarks by a defendant have a tendency to resolve jurors’ doubts about a defendant's guilt to his detriment.’”); State v. McCloskey, 90 N.J. 18, 31 (1982) (holding “harmless error doctrine sparingly” applies where “the State has violated the defendant's privilege against self-incrimination”).

In short, Mr. Johnson’s statement was a focal point of the State’s case and its sole source for much of the facts constituting the its theory. The significance of the statement at the trial render its improper admission harmful error requiring the reversal of his convictions and a remand for a new trial.

POINT II

SERGEANT MARTINEZ IMPROPERLY NARRATED EVENTS CONTAINED IN THE SURVEILLANCE VIDEO OF WHICH HE HAD NO FIRSTHAND KNOWLEDGE AND THAT THE JURY WAS ABLE TO EVALUATE FOR ITSELF, INCLUDING REPEATEDLY TESTIFYING THAT THE FOOTAGE SHOWED MR. JOHNSON SHOOTING A GUN. (Partially Raised Below; 4T5-13 to 6-8; 9T44-22 to 45-24, 62-22 to 64-3, 79-19 to 80-1, 109-9 to 12; 16T35-8 to 40-7)

Undoubtedly, the most significant evidence at the trial was the surveillance footage obtained from D’Classico, the Parking Authority, and various businesses that captured much of the events leading up to and including the shooting. According to the State, the footage showed Mr. Johnson arriving

at the club, a fight between his group and a rival group, several rival members firing guns in the parking lot, and—most critically—Mr. Johnson going to a Ford Focus to get a gun and firing back. However, none of the eyewitnesses who testified at the trial knew Mr. Johnson and could not place him at the club that night. Nor did police ever recover a gun connected to Mr. Johnson or obtain any forensic evidence suggesting he was the shooter. In his interrogation and in private text messages, Mr. Johnson repeatedly denied firing a gun that night.

Much of the State’s case, in other words, came down to the events captured in the surveillance footage. One of the most critical tasks for the jury was to evaluate that important footage and determine whether it showed Mr. Johnson in the parking lot; if so, whether he had a gun; and, if so, whether he fired it. The jury’s unbiased evaluation of those questions was clouded, however, by the testimony of the State’s main law enforcement witness, Sergeant Martinez, who repeatedly testified about what he believed the footage showed, including his belief that it captured a “suspect [] firing a gun into a crowd.” This impermissible narration and opinion testimony undermined the jury’s ability to independently evaluate the crucial surveillance footage, denying Mr. Johnson of his rights to due process and a fair trial and further requiring reversal of his convictions. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Pursuant to N.J.R.E. 701, a lay witness may offer testimony in the form of an opinion or an inference if it “(a) is rationally based on the witness’ perception” and “(b) will assist in understanding the witness’ testimony or determining a fact in issue.” However, a lay opinion that is “not within [the witness’s] direct ken . . . and as to which the jury is as competent as he to form a conclusion” is inadmissible because such testimony does not “assist” the jury. State v. McLean, 205 N.J. 438, 459 (2011) (internal citation omitted). In other words, lay opinion testimony cannot be “a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself” Ibid.

The testimony of a witness must be limited, then, to what “he or she perceived through one or more of the senses.” Id. at 460. Police officers testifying as lay witnesses are not permitted to testify about what they “believed,” “thought,” or “suspected,” but instead must provide “an ordinary fact-based recitation . . . with first-hand knowledge.” Ibid. Our courts have not hesitated to reverse a defendant’s convictions where an officer improperly testified as to ultimate issues before the jury, even where no objection was made below. See, e.g., State v. Frisby, 174 N.J. 583, 595-96 (2002).

Several recent cases by our Supreme Court have applied these principles to limit how an officer may testify about video footage presented to a jury. In State v. Higgs, 253 N.J. 333 (2023), the defendant was charged in relation to a

shooting death that occurred on his porch. Id. at 340-41. An officer testified that he approached the porch and saw the defendant arguing with the decedent, the defendant then shot his romantic partner, and the officer returned fire and shot the defendant several times. Id. at 340. According to Higgs's version of events, however, it was the decedent who was armed with the gun, he had wrested it away from her during the dispute, and the gun discharged involuntarily after he was shot by the officer. Id. at 341. At trial, dashcam footage from the officer's car was played for the jury and a different officer who was not present that night testified that the footage showed Higgs with a gun in his waistband, a point disputed by the defense. Ibid.

The Supreme Court held that the officer's narration testimony about what he believed he saw in the video was reversible error. Id. at 363-67. Specifically, it held that the officer's testimony did not help narrate particularly complex footage, was not based on his firsthand perceptions, and was damaging testimony about an important factual dispute that was not clear from the video. Id. at 366-67. Accordingly, the Supreme Court reversed Higgs's convictions and remanded for a new trial. Id. at 371.

More recently, in State v. Watson, 254 N.J. 558 (2023), the Supreme Court addressed in greater detail the limits of what a testifying officer can say about surveillance footage capturing events of which he or she has no personal

knowledge. Drawing on N.J.R.E. 701 principles, the Court held that video narration testimony from a lay witness must satisfy two fundamental requirements: (1) it must be based upon the witness's "firsthand knowledge" and (2) it must be "helpful to the jury." Watson, 254 N.J. at 601. Particularly important to the Court was how these requirements related to the testimony of an investigator who was familiar with surveillance footage from her investigation but was not a firsthand witness to the events depicted. According to the Court, investigators can satisfy the "firsthand knowledge" requirement so long as they watch the video "a sufficient number of times prior to trial." Ibid. However, because the jury is just as capable as investigators of viewing the video, investigators will only satisfy the "helpful[ness]" requirement in a limited set of circumstances. Id. at 601-02.

The Watson Court established four "limiting principles" that serve to exclude narration that would be unhelpful to the jury. Id. at 603-04. All narration testimony from investigators "must accord with [these] specific limits" to be admissible. Id. at 602. First, investigators cannot provide "continuous" or "running commentary" while the video is played, and counsel eliciting the testimony must ask "focused questions designed to elicit specific, helpful responses." Id. at 603. Second, "investigators can describe what appears on a recording but may not offer opinions about the content." Id. at 603. That is,

investigators can offer “objective, factual comments” such as, “the individual opened the door with his elbow,” but cannot offer “subjective interpretations” of those objective facts, such as, “he [opened the door with his elbow] to avoid leaving fingerprints.” Ibid. Third, “investigators may not offer their views on factual issues that are reasonably disputed.” Ibid. Thus, a “witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it does not.” Ibid. Fourth, “investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence.” Id. at 604.

Although not addressing the harm because it reversed on other grounds, the Court noted that the narration testimony in that case failed to comport with its new guidelines because: the prosecutor posed open-ended questions that called for the officer to describe the events in the video rather than asking narrow and pointed questions designed to elicit undisputed facts; the officer opined on what the video might show (e.g., “it appears the suspect removes the glove”) rather than what it undisputedly did show; and the officer subjectively opined on why people in the video were doing what they were doing. Id. at 607-08.

At Mr. Johnson’s trial, Sergeant Martinez’s testimony throughout the playing of the surveillance footage grossly exceeded what he was permitted to say in accordance with these guidelines and severely undermined the jury’s

capacity to fairly and independently evaluate the evidence, despite attempts by Mr. Johnson's trial counsel to limit the scope of that testimony.

On July 13, 2021, well before trial, defense counsel made a motion to limit what Sergeant Martinez would be able to testify to at trial with respect to the video footage. Defense counsel acknowledged that the State agreed not to have the officers identify Mr. Johnson on the footage but asked for clarification on the State's claim that "detectives will be asked to relate permissible information about their observations in the videos, which may have guided and or directed their investigation." (4T5-13 to 6-8). The trial court said it was "not sure" the State was obligated to answer that question (4T8-2 to 4), refused to make the State respond, and instead suggested that the parties speak off-the-record to discuss what testimony the State intended to elicit. (7T8-20 to 9-2).

As initial defense counsel portended, Sergeant Martinez's narration testimony about the footage at the trial was prolific. Even before the video was played, the prosecutor had Sergeant Martinez frame (multiple times) what the jury was about to see:

Q: And what was the purpose of obtaining this video surveillance?

A: It shows you what happens, what led to the incident the patrol responded to the scene on a fight at the club with shots fired -- shots being fired. That was the result of the shooting was a spillover fight from the club itself.

. . .

Q: Now, at -- after reviewing these surveillance videos what if anything did you gain from your observations of these videos?

A: There was a fight inside the night club, spilled over onto the streets. Two of the patrons ran to a vehicle and retrieved what appeared to be handguns, shots were fired. People are running to the parking lot. Another patron is seen running to the -- to another vehicle and retrieving what appeared to be a handgun. Shots are fired in the area approximate [sic] where the victim was located and everybody just fleeing out the parking lot.

[(9T23-22 to 25-3) (emphasis added).]

At the beginning of the video, the narration was limited to relatively innocuous statements describing the victim's appearance and pointing out who the officer believed was the victim. However, Sergeant Martinez's testimony soon veered into more violative commentary. When showing footage of the BMW used by rival members who fired into the crowd, Sergeant Martinez testified that the car "was being operated by one of the males that Mr. Johnson was -- had an argument with inside the club." (9T44-12 to 18). The trial court held a sidebar, cautioning the prosecutor that there was no basis for that testimony in the evidence yet, and defense counsel noted he would object to the officer saying Mr. Johnson was fighting inside the club. (9T44-22 to 45-24).

The prosecutor returned to his examination and again began asking Sergeant Martinez to describe generally what he viewed on the footage as whole, causing him to respond, "It was observed on the video that these three males that enter the night club are involved in a fight with Mr. Johnson and his friends."

(9T46-21 to 25). Defense counsel objected, and rather than strike the comment, the trial court questioned Sergeant Martinez and elicited that he knew there was a fight because Mr. Johnson admitted he was involved in one in a statement that would be played later at trial. (9T47-2 to 48-2).

As direct examination continued, Sergeant Martinez went back to giving play-by-play commentary for the footage leading up to the fight, including repeatedly identifying key rival members in the footage. (9T49-20 to 62-11). Defense counsel again objected to the sergeant's heavy-handed narration, and the trial court, while expressing concern, noted nothing the sergeant had said had been particularly prejudicial to the defense. (9T62-22 to 64-3).

The trial court then dismissed the jury to have an impromptu hearing about limiting what the court felt was an excessive amount of footage being shown. During that hearing, defense counsel, relying on Watson,⁵ expressed concern over potential "unhelpful narration" by Sergeant Martinez that would overly emphasize the fight soon to be shown to the jury. (9T79-19 to 80-1). The trial court again claimed such narration was not damaging to the defense because the fact that a fight occurred had not been contested. (9T80-2 to 83-15). The court then referenced the pre-trial hearing where the narration issue was first discussed, and emphasized that, so long as the State's witnesses did not

⁵ This Court's decision, as the Supreme Court's opinion had not yet been issued.

specifically identify Mr. Johnson on the video, there would be no issue with the narration. (9T84-5 to 88-21).

Eventually, the State played the parking lot footage of the Ford Focus alleged to have been used by Mr. Johnson that night. The State again posed an open-ended question to Sergeant Martinez about what the footage was about to show, and the trial court called the prosecutor to sidebar to admonish him, saying, “(Inaudible) narrate or are we just playing the video? What are you trying to elicit from him now? . . . why don’t you just play the video?” (9T104-3 to 15). The State played the footage, and Sergeant Martinez identified the Ford Focus as a vehicle of interest. (9T106-21 to 107-9). The State then showed footage of a large group of people (alleged to be Mr. Johnson and his friends) entering the club, and Segreant Martinez opined that “those individuals ultimately associated with the individual who [he] believe[d] might be a suspect in this incident[.]” (9T108-20 to 23). When Sergeant Martinez identified the group a second time, defense counsel objected to the narration, saying, “[L]et the video speak for itself.” (9T109-9 to 12). The trial court denied the objection. (9T110-10 to 111-11).

When the person the State alleged was Mr. Johnson was shown in the video, Sergeant Martinez identified him as “a suspect in the investigation at a later time.” (9T113-5 to 11). Sergeant Martinez continued to narrate the actions

of the “suspect,” incurring one sustained objection to a State’s question that characterized his actions as “just waiting.” (9T115-1 to 116-7). Eventually, Mr. Johnson’s romantic partner was shown on the video; Sergeant Martinez identified her as the owner of the Ford Focus and testified he had learned that fact “through investigation.” (9T120-10 to 121-3). The State then showed the video of the fight and its immediate aftermath, eliciting testimony from Sergeant Martinez that “people [are] rushing out. There’s some type of fight or commotion going up over here in the corner of the establishment, but as he plays the video I see people rushing out. Trying to get away from the commotion.” (9T121-13 to 22). Sergeant Martinez continued to similarly narrate the fight and the exodus of club goers immediately after, including noting the “[s]uspect and the registered owner of the vehicle which became part of the investigation” were leaving the bar. (9T128-19 to 130-3). When the State played video of the rival members going to their car and shooting into the crowd, it elicited play-by-play testimony by Sergeant Martinez narrating every action.

Then, the State played footage alleged to have captured Mr. Johnson going to his car and grabbing a gun, and the prosecutor continued to elicit heavy narration from Sergeant Martinez. After testifying that the person he identified as a “suspect” arrived at the Ford Focus with his female companion, Sergeant Martinez testified that the suspect “removes what appears to be a handgun from

the vehicle and shoots into the crowd.” (9T136-20 to 21). He went on to say that, as the Ford Focus was leaving, the car “stops, seems like they’re looking at the victim, deceased victim.” (9T139-1 to 3). Defense counsel objected. The trial court did not explicitly sustain the objection but said, “Yeah, can you just play the footage and let the jurors see for themselves?” (9T139-4 to 9).

Once the footage was finished, the State asked Sergeant Martinez if he had decided to investigate the Ford Focus and why, to which he responded, “Because you saw the person -- the suspect run to the vehicle, retrieve a handgun, and shoot into a crowd.” (9T149-15 to 21). Sergeant Martinez also testified he was able to locate Mr. Johnson using information he learned about the Ford Focus, saying he “came across Mr. Johnson fitting the description of the male in the video wearing the same exact hooded sweatshirt and we -- and that day we detained him at that point for questioning.” (9T151-4 to 9).

Sergeant Martinez’s testimony about the surveillance footage did exactly what Watson forbids: he identified the person in video as Mr. Johnson and repeatedly stated that the footage showed him grabbing a gun out of the Ford Focus and shooting into the crowd, facts heavily disputed by the defense. Again, before any footage was even shown, Sergeant Martinez told the jury that in the footage a “patron is seen running to the -- to another vehicle and retrieving what appeared to be a handgun. Shots are fired in the area approximate [sic] where

the victim was located[.]” (9T24-17 to 25-3). When the footage was finally shown, he stated that the “suspect” depicted “removes what appears to be a handgun from the vehicle and shoots into the crowd.” (9T136-20 to 21). Finally, when the footage concluded, Sergeant Martinez summarized his opinion that the video showed the “suspect run to the vehicle, retrieve a handgun, and shoot into a crowd.” (9T149-15 to 21).

Making matters worse, Sergeant Martinez went on to opine that Mr. Johnson was the person in the video, and that he could make that determination because the hoodie he was wearing when he was arrested was “same exact” sweatshirt as the one the “suspect” was wearing in the video. (9T151-4 to 9). Notably, all this improper testimony was aggravated by statements Sergeant Martinez made in his video interrogation of Mr. Johnson that was played immediately after the surveillance footage. There, Sergeant Martinez claimed, “I got a video of you shooting Bro. . . . [Y]ou took the gun out of the back side of that Focus. . . [A]s soon as you get out of the car you take it lock it put it in your hand out and start shooting.” (Da38)

All this lay opinion testimony grossly violates N.J.R.E. 701 and the principles outlined in Watson. The core of Watson is that “narration evidence by a witness who did not observe events depicted in a video in real time may not include opinions about a video’s content and may not comment on facts the

parties reasonably dispute.” 254 N.J. at 599. While trial counsel for Mr. Johnson did not put particular emphasis on disputing that Mr. Johnson was in the video or even that he was holding a gun, counsel heavily disputed the assertion that, if Mr. Johnson was holding a gun, it was ever fired. In other words, it was impermissible for Sergeant Martinez to testify that the video showed Mr. Johnson shooting a gun when the officer did not witness that event personally, the defense was disputing that fact, and it was one of the most significant issues for the jury’s consideration.

Crucially, there was significant credible evidence to support the defense’s contention that Mr. Johnson did not fire a gun. There was no muzzle flash in the footage purportedly showing Mr. Johnson as there was with the BMW shooters; ShotSpotter software did not pick up any shots fired in the area where Mr. Johnson was allegedly located; ballistics suggested the fatal bullet could have been fired from a gun recovered from the BMW; and there were no spent projectiles found matching a gun that would be loaded by “racking,” as officers said in the interrogation they saw Mr. Johnson do in the video. Thus, there was substantial reason to believe that, if it was Mr. Johnson with a gun near the Ford Focus, the gun was never fired. Sergeant Martinez’s repeated assertion that the footage showed Mr. Johnson firing a gun significantly undermined the jury’s capacity to fairly and independently evaluate that evidence.

In addition, Sergeant Martinez’s statements that the sweatshirt Mr. Johnson was arrested in was the same one he was wearing in the video likewise violated Watson. Under prong four of Watson, “investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence. That type of comment is appropriate only for closing argument.” 254 N.J. at 604. Yet that is exactly what Sergeant Martinez did. His testimony strayed far beyond what was deemed permissible in State v. Singh, 245 N.J. 1, 19-20 (2021), where the officer merely noted that the sneakers the defendant was wearing when he was arrested resembled those shown in the video footage. Here, Sergeant Martinez testified Mr. Johnson was wearing the “exact same” sweatshirt as the shooter in the video—something he could not possibly know—and that, based on that fact, he knew Mr. Johnson was the suspect depicted in the video footage. (9T151-4 to 9). As with the previously complained of commentary, such remarks were significantly harmful and gutted the ability of the jury to evaluate that evidence on its own.

It is true that, although there were multiple objections to and discussions about the video narration, there were no specific objections to the comments mostly complained of here. However, because the State was repeatedly admonished for having Sergeant Martinez narrate the footage too heavily, and at nearly every instance pushed back against any limitation on the narration

other than specifically identifying Mr. Johnson (which ultimately happened anyway), both the State and the trial court were certainly already alerted to, or at least should have been alerted to, any issues with the narration in this respect as well. Cf. State v. Chen, 208 N.J. 307, 318 (2011) (“Courts have a gatekeeping role to ensure that” improper evidence is not placed before the jury). Nor does it seem anything would have been handled differently if those specific statements were objected to. Thus, the issue should be evaluated for harmless error, rather than the plain-error standard of review.

Regardless, even under the plain-error standard of review, Sergeant Martinez’s improper narration testimony requires reversal as its admission was “clearly capable of producing an unjust result.” R. 2:10-2. The improper narration was not fleeting but was extensive throughout his testimony: Sergeant Martinez stated his belief that the footage depicted Mr. Johnson obtaining and firing a gun before, during, and after the footage. Just like in Higgs, that issue was hotly contested by the defense. This harmful testimony was also emphasized by the State as the definitive interpretation of what were contested facts. In summation, the State pointed to Sergeant Martinez’s improper testimony, saying:

The same hoodie, picked up on the night in the car that he was wearing, the same one he’s wearing that night. Matching the description of the person Detective Martinez, Sergeant Martinez

thought was the shooter. This is how we get to the conclusion that it was the Defendant who fired that shot.

[(13T59-9 to 14).]

Significantly, the footage was also clearly important to the jury because it requested assistance viewing it during deliberations.

In short, Sergeant Martinez repeatedly testified that the video footage showed Mr. Johnson firing a gun. The defense hotly contested that fact, and it was perhaps the most significant factual issue for the jury to decide. In light of significant evidence suggesting Mr. Johnson was not the lethal shooter, as well as the jury's demonstrated interest in the footage, the sergeant's improper remarks had a clear capacity to push the jury to reach a verdict it would not have otherwise. Accordingly, Mr. Johnson's convictions must be reversed, and the matter remanded for a new trial.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE JURORS TO TAKE A LAPTOP INTO THE JURY ROOM FOR USE DURING THEIR DELIBERATIONS. (Not Raised Below)

At the close of trial, the State provided a laptop with a flash drive containing all the evidence for the jury to use in its deliberations. Although the trial court wisely insisted the jury not be given unfettered access to Mr.

Johnson's recorded interrogation, the rest of the evidence, including the surveillance footage, was provided to the jury on the drive. As with the recorded statement, however, the surveillance footage was also required to have been kept out of the jury's hands, as any playback of such footage must be in open court with counsel and in conjunction with a proper limiting instruction. That harmful error was compounded by the trial court's failure to confirm that the laptop did not have internet access and failure to give a limiting instruction informing the jurors not to use the computer to access the internet or alter the evidence. These errors undermined the integrity of the jury's evaluation of the evidence, violated Mr. Johnson's rights to due process and a fair trial, and require the reversal of his convictions. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. Allowing the Jurors Unfettered Access to the Surveillance Video Footage in the Jury Room Was Reversible Error.

Our courts have repeatedly emphasized caution with respect to allowing juries unfettered access to certain evidence in their deliberations. See, e.g., Fiorino v. Sears Roebuck & Co., 309 N.J. Super. 556, 567-69 (App. Div. 1998) (reversible error to allow leaf-shredder screen and screwdriver into jury room without proper instructions). Of particular concern has been permitting juries to watch video footage outside the presence of the parties and the court. In State v. Burr, 195 N.J. 119, 131-32 (2008), a jury was permitted to review videotaped statements of a child-victim during deliberations. Noting concerns about jury

review of videotaped statements, the Supreme Court outlined a procedure for replay of such footage, including the requirement that any replays “must occur in open court” Id. at 135 (emphasis added); see also State v. Michaels, 264 N.J. Super. 579 (App. Div. 1993) (noting “caution against routine replaying” of videotaped statements without adequate safeguards), aff’d, 136 N.J. 299 (1994). The Supreme Court reaffirmed these principles in State v. Miller, 205 N.J. 109, 123 (2011), once again expressing concern over jurors “placing undue emphasis on the particular testimony that is replayed.” The Court reemphasized that video playback must occur in open court and that limiting instructions must be provided to the jury to ensure it considers the playback in the context of all the evidence. Ibid.

While those cases specifically address recorded witness statements, this Court has recently extrapolated their principles to the playback of surveillance footage. In State v. Knight, 477 N.J. Super. 400, 404-05 (App. Div. 2023),⁶ the defendants challenged the manner in which the jury was permitted to playback surveillance videos, including the use of multiple replays and slow-motion. Although this Court found no reversible error, it nonetheless held that any playback of surveillance footage should “occur in open court under the judge's supervision and in the presence of counsel.” Id. at 405. In so holding, this Court

⁶ The New Jersey Supreme Court has granted certification on this case.

observed that “there has been an explosive growth” in the use of surveillance footage at criminal trials. Id. at 416 (internal quotations and citation omitted). It also noted that surveillance footage is often considered particularly definitive evidence of a defendant’s guilt. Id. at 416-17. This Court analogized the concerns over jury playback of such footage to cases like Burr and Miller, recognizing that “there is a potential for undue prejudice that can result from repetitive showings of the videos if they are incriminating. In addition, as defendants argue, the slow motion and other modifications of the speeds at which surveillance videos are replayed might cause undue prejudice, at least in certain contexts.” Id. at 419.

To deal with contemporary emphasis on surveillance footage, this Court established new guidelines in order to ameliorate undue prejudice from multiple playbacks: (1) slow motion and pauses can be permitted only where the trial court “reasonably finds those modes of presentation would assist the jurors’ understanding of the pertinent events and help them resolve disputed factual issues,” (2) playback may occur more than once “provided that the playbacks occur in open court under the judge’s supervision and in the presence of counsel,” and (3) the court should consider several factors to determining whether playback is appropriate, including:

- (a) whether the video has a soundtrack that contains recorded statements of the filmed persons; (b) whether the video is difficult

to discern when played only at normal speed; (c) whether the video can assist in resolving disputed issues of identification; (d) whether the video bears upon disputed issues of intentionality; (e) whether the video contains content that is particularly disturbing or inflammatory to watch repeatedly in slow motion.

[Id. at 425-26 (emphasis added).]

It further noted that a limiting instruction should be provided to “caution jurors to afford such evidence only appropriate and not undue weight in comparison with the other evidence at trial.” Id. at 426.

In Mr. Johnson’s case, the surveillance footage was the most critical piece of the State’s case against him. According to the State, Mr. Johnson can be seen on the video removing a gun from a Ford Focus and firing it. The jury, however, was then improperly allowed unfettered access to the footage in the jury room to view on a laptop as many times as it wanted and in any form.

As noted earlier, the State assembled the evidence on a flash drive which could be viewed by the jury on a laptop. The Court found “the surveillance footage goes into the jury because it’s -- there’s no audio, so there’s no statement,” but noted, “Defendant’s statement does not go to the jury” because, “[i]f’s there’s a recorded statement, it has to be viewed in open court.” (13T206-3 to 7, 208-25 to 209-1). The prosecutor removed the recorded statement from the drive, (13T208-11 to 210-10), and the parties then confirmed that everything else on the flash drive had been admitted into evidence and the laptop was

“clean.” (13T205-5 to 208-7). Defense counsel did not object to the jury being provided a laptop or the surveillance footage in the jury room. The following day, the jury sent a note to the trial judge requesting a larger screen on which to view the video footage, and a TV was provided to the jury for use in the jury room to connect to the laptop. (14T13-13 to 15-4, 16-4 to 17-7). That same day, the jury convicted Mr. Johnson.

As an initial matter, the jury’s unfettered access to the video footage certainly failed to comport with Knight. There is no telling how many times the jurors viewed the footage, how much they made use of pauses or changes in the speed of the playback, whether they zoomed in, or did any other modifications to the footage that were possible with the laptop computer. Nor was the jury provided any cautionary instruction about overemphasizing the footage once it was made clear that it was, in fact, replaying the footage.

It is true that the trial court did not have the benefit of Knight, and the failure to follow those guidelines is not in and of itself reversible. Additionally, defense counsel failed to object to providing the jury the video footage or the laptop in the deliberation room. Nonetheless, the error of allowing the jury unfettered access to the surveillance video in the deliberation room was plain error clearly capable of producing an unjust result. R. 2:10-2. Although Knight outlined how replays of surveillance footage should be handled, the

Michaels/Burr/Miller line of cases long predating Knight should have at least warranted caution with respect to the trial court having providing the jury unfettered video access. See Knight, 477 N.J. Super. at 425 (suggesting that despite lack of guidance trial court may have had duty to provide limiting instruction for multiple playbacks); see also United States v. Salerno, 108 F.3d 730, 745 (7th Cir. 1997) (“[I]n some cases it may be better practice to exclude demonstrative evidence from the jury room in order to reduce the potential for unfair prejudice[.]”).

Most importantly, provision of all the surveillance video, a laptop, and a television in the deliberation room allowed the jury the unfettered ability to replay the video multiple times, to overemphasize parts of the footage, and to alter the playback. Based on its request for a television, it is clear the jury was particularly focused on the surveillance footage and engaged in playbacks of that footage during deliberations. The capacity for the State’s most significant evidence to be viewed on repeat and modified by the jury, without any limiting instruction, certainly provides “reasonable doubt” as to whether the jury reached a result “it otherwise might not have reached.” Id. at 24; cf. Fiorino, 309 N.J. Super. at 567-69 (reversible error to provide jury with equipment-evidence without proper instructions). This harm is only compounded by the improper narration of said footage discussed at length in Point II. Accordingly, providing

the footage on a laptop to the jury in the deliberation room with no limiting instruction sufficiently undermined Mr. Johnson's right to a fair trial such that it amounts to reversible error.

B. It Was Otherwise Reversible Error to Provide the Jurors a Laptop For Use In Their Deliberations.

Additionally, it was further error to provide the jury with a laptop for use during deliberations. Pursuant to Rule 1:8-8, the only items to be provided to the jury during deliberations are the exhibits (minus witness statements and video footage) and the jury instructions. Under this rule, "the jury should obviously have no reference material other than that specifically submitted to it by the court" during trial. Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 1:8-8 (2023); cf. Brown v. Kennedy Mem'l Hosp., 312 N.J. Super. 579, 591 (App. Div. 1998) (affirming grant of motion for new trial where jury had access to charge not provided in the final instructions). In line with this general principle, jurors are forbidden from using or even possessing their cellphones during deliberations to preclude them from improperly using the internet. (13T127-4 to 24).

Here, although it appears the trial court appropriately collected the jurors' cellphones before deliberations, they were nonetheless given a functioning laptop in the jury room. While counsel for both parties asserted that the laptop was "clean" (i.e., that it did not have materials on it unrelated to the trial), they

did not discuss whether the laptop could connect to the internet. The purpose of prohibiting the jurors' access to their personal electronic devices during deliberations is completely undermined if the jurors are simply provided a different electronic device capable of accessing the internet.

New Jersey's practice of prohibiting electronic devices during deliberations is both well founded and widely shared. Despite careful instructions by judges to avoid using the internet for independent research, jurors do not always scrupulously follow those instructions. Hon. Dennis Sweeney, Worlds Collide: The Digital Native Enters the Jury Box, 1 Reynolds Courts & Media L.J. 121, 128-129 (Spring 2011) (discussing instances of "Google mistrials"); Anita Ramasastry, Why Courts Need to Ban Jurors' Electronic Communications Devices, FindLaw (Aug. 11, 2009) (same). For this reason, and because of the lack of oversight over a jury once it enters the jury room, there is widespread support for the rule that all internet-accessible electronic devices should be banned from deliberations. America Bar Association Judicial Division National Conference of State Trial Judges, A Fair Trial: Jurors Use of Electronic Devices & the Internet 12-13 (2010); see also Sweeney, 1 Reynolds Courts & Media L.J. at 141 (advocating for ban on "computers, cell phones, or other electronic communications devices" during deliberations); N.D. Cal. Gen. Order No. 58, "Regulating Possession and Use of

Electronic Devices in the Courthouse” (amend. Sept. 15, 2015) (“Jurors may not use electronic devices in courtrooms during judicial proceedings or in jury rooms during, or in connection with, deliberations.”). In courts where such explicit rules exist, it has been found to be reversible error when those rules are violated. See, e.g., Cole v. State, No. 2768, Sept. Term, 2014, 2017 WL 5450752 at *5-7 (Md. Ct. Spec. App. Nov. 14, 2017)⁷ (reversible error to fail to confiscate cell phones from jury before deliberations).

Here, there were no assurances that the laptop did not connect to the internet and that the jury did not use the device to conduct research or for any other reason. The risk of improper laptop usage was compounded by the fact that the jury was not instructed on how not to use the laptop during their deliberations. While the jury was repeatedly admonished during trial not to use the internet for independent research about the case while at home, there was no similar instruction informing them not to do the same with the laptop while in the jury room.

Beyond the potential for improper internet access, there are other problems associated with giving the jury all the evidence electronically on a laptop for purposes of deliberations. Just as with the video footage, there is a far greater potential for manipulation of the evidence on a laptop than there is with

⁷ Counsel is unaware of any contrary unpublished opinions. R. 1:36-3.

providing the actual “hard copy” evidence. On a laptop, the jury can zoom in on photographs, edit the coloring, crop the images, or engage in virtually any other conceivable edits that Adobe and similar software allow. Such alterations may unduly alter a juror’s perception of the evidence and unfairly prejudice a defendant. See Knight, 477 N.J. Super. at 426.

While it may be convenient to provide a jury with evidence on a laptop, convenience cannot override the potential for prejudice inherent in allowing the jurors to use such technology during deliberations, nor does it override Mr. Johnson’s right to a fair trial and impartial jury. Because providing the jury with the evidence on a laptop without any guidance undermined those rights, Mr. Johnson’s convictions should be reversed and remanded for a new trial.

POINT IV

THE TRIAL COURT ERRED IN ESTABLISHING THE APPLICABLE SENTENCING RANGE FOR A PERSISTENT-OFFENDER EXTENDED TERM AND ERRED IN ASSESSING THE AGGRAVATED AND MITIGATING FACTORS, RESULTING IN AN EXCESSIVE, MAXIMUM EXTENDED TERM SENTENCE. (17T73-2 to 105-20)

Even if Mr. Johnson’s convictions are affirmed, this matter must nonetheless be remanded for resentencing because the trial court misstated the applicable extended-term sentencing range for the reckless manslaughter conviction, double-counted the basis for the extended term in assigning heavy

weight to aggravating factor six, was improperly dismissive of the jury’s verdict, and failed to consider significant mitigating information. U.S. Const. amend. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10, 11.

“[O]nce a judge determines that a term of imprisonment should be imposed, the judge has discretion but must sentence in accordance with the applicable statutes and must determine the length of the term by carefully analyzing and weighing aggravating and mitigating factors.” State v. Randolph, 210 N.J. 330, 348 (2012); see also N.J.S.A. 2C:44-1. When a trial court fails to find a well-supported mitigating factor, a remand is generally required so that it can be appropriately addressed. State v. Dalziel, 182 N.J. 494, 504- 05 (2005).

At sentencing, the court found aggravating factors three (risk of reoffense), six (prior criminal record), and nine (deterrence), which it afforded “great weight,” as well as mitigating factors eleven (undue hardship) and fourteen (under the age of 26 during offense). (17T79-22 to 100-13); see N.J.S.A. 2C:44-1(a), (b). After granting the State’s motion for a discretionary persistent offender extended term, the court sentenced Mr. Johnson to the maximum twenty-year NERA term for reckless manslaughter.

Several errors contributed to this excessive sentence. First, the trial court erred in stating the applicable sentencing range was ten to twenty years on the reckless manslaughter conviction. Under N.J.S.A. 2C:44-3(a), a judge “may”

impose an extended term for a defendant if he has been “previously convicted on at least two separate occasions of two crimes, committed at different times . . .” Once a court grants the State’s motion for the discretionary extended term, “the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range.” State v. Pierce, 188 N.J. 155, 169 (2006); accord State v. Tillery, 238 N.J. 293, 323-24 (2019). In other words, even after a motion for a discretionary extended term has been granted, imposing a sentence in the enhanced range is not “mandatory.” Ibid.; see also N.J.S.A. 2C:43-7(a) (stating that an eligible defendant “may” be sentenced to an extended term). Whether a court chooses to sentence within that range “remains in the sound judgment of the court—subject to reasonableness and the existence of credible evidence in the record to support the court’s [determination] of aggravating and mitigating factors” Ibid.

At sentencing, Mr. Johnson did not dispute that he was statutorily eligible for a persistent offender extended term and the court found that he met the criteria. (17T74-12 to 77-25). However, the court then erroneously stated, “The range bumps his case up to a first degree, so he can be sentenced between 10 to 20 years.” (17T78-3 to 4). Mr. Johnson’s reckless manslaughter conviction was a second-degree offense, meaning the top of the range of the enhanced sentence was twenty years. Tillery, 328 N.J. at 310. However, the bottom of the range

remained the bottom of an ordinary second-degree range: five years, not ten. Pierce, 188 N.J. at 169; Tillery, 238 N.J. at 323-24. Thus, the court erred when it held that the extended term sentencing range began at ten years.

Second, the trial court erroneously relied on the same convictions to find Mr. Johnson eligible for the extended term and to afford the aggravating factors heavy weight. In State v. Vasquez, 374 N.J. Super. 252, 265-68 (App. Div. 2005), this Court addressed the propriety of a maximum extended term imposed for a defendant convicted of multiple drug offenses. The trial court in Vasquez had used the prior conviction mandating an extended term as a basis for affording heavier weight to aggravating factors and imposing a sentence over the midrange point. Id. at 265-67. This Court held that the trial court erred in using “the very conviction which both allowed and required an extended term” as a basis for imposing a sentence above the presumptive term. Id. at 267. That holding was founded in the well-recognized principle that “factors invoked by the Legislature to establish the degree of the crime should not be double counted when calculating the length of the sentence.” Ibid. (quoting State v. Miller, 108 N.J. 112, 122 (1987)); see also State v. Dunbar, 108 N.J. 80, 91 (1987) (stating that, once a decision is made to impose a discretionary extended term, focus should turn away from criminal history and switch “primarily to the offense” for which defendant is being sentenced).

Here, the trial court found Mr. Johnson eligible for a persistent offender extended term based on two prior convictions: a 2015 fourth-degree aggravated assault and a 2016 third-degree aggravated assault. (17T76-11 to 77-3). The court then used those same convictions to afford “great weight” to aggravating factor six. (17T81-12 to 83-23). Notably, those two priors were the only basis given, other than a violation of probation, for finding aggravating factor six. The seriousness of those priors was already contemplated by the Legislature when it permitted a defendant to be sentenced to an extended term based on those convictions; for the sentencing court to use those same convictions again as a basis for imposing a maximum extended term was improper double-counting.

Third, the trial court was improperly dismissive of the jury’s acquittals in imposing a maximum extended term for reckless manslaughter. In State v. Melvin, 248 N.J. 321, 352 (2021), our Supreme Court held that a defendant cannot be sentenced more heavily based on acquitted conduct. “[T]he findings of juries cannot be nullified” by the sentencing court, and though a judge “may well have a different view of the case than the jury[,]” the jury’s verdict is “final and unassailable.” Ibid.

Contrary to the Melvin ruling, at sentencing the prosecutor improperly argued that Mr. Johnson had to be sentenced to a maximum extended term because the jury erred when it acquitted him of murder:

I submit that we can't determine why the jury ultimately came back with Reckless Manslaughter as opposed to the Murder for which he was charged, but what we do know from the trial, from the evidence of this case, is that this wasn't a reckless act

. . . [W]e know for a fact that Mr. Johnson heard the shots, had time to go to his car. Had time to fight off Sade Hill, retrieve a gun and then point a gun into a crowd and start firing.

That is not reckless in the sense of what the statute means. Now, why the jury found recklessness, we don't know. We don't have -- we can't ask those questions and we can't determine what went into their considerations in making that determination, so we are left with the charge as we're left.

It's a Reckless Manslaughter charge, but the facts of this case paint a different picture of what happened that night. They paint a picture of an individual who had every opportunity to walk away.

[(17T51-25 to 52-24).]

Later in his arguments, the prosecutor repeated the same theme:

[Y]ou can say what you want about what the jury ultimately decided, but at that moment that intent was there. You don't pick up a gun, point it at a crowd and start shooting because you are recklessly just firing a gun.

You're shooting with purpose. You're shooting at someone, and that's facts. That was the evidence, and he was shooting.

[(17T55-9 to 55-23).]

The court followed the State's recommendation and sentenced Mr. Johnson to a maximum extended term for reckless manslaughter. In doing so, the court parroted the State's arguments, emphasizing that Mr. Johnson acted intentionally and could have left instead of shooting a gun:

He goes directly to the vehicle, goes to the back seat of the vehicle. Opens the door and pulls out the gun. Ms. Hill kind of, I guess, wraps her arms around him, his body, trying to stop him from doing that, and he shrugs her away. He pushes her away. . . .

He used force, strength to have to, you know, break free from her. Every step that he took towards that car was an opportunity for him to stop and think. . . .

All seconds of opportunities that he could have made a different decision As he's raising his arm up to shoot, he had an opportunity to change his mind.^[8]

[(17T95-24 to 97-5).]

Responding to defense counsel's arguments that sentencing Mr. Johnson to a maximum extended term would be tantamount to rejecting the jury's verdict, the judge also echoed the prosecutor's skepticism of the jury's factfinding:

. . . [R]easonably speaking, I think that a jury could come to that conclusion [that the killing was reckless], the conclusion they came to, for various reasons, including the fact that they spent days looking at Mr. Johnson.

You know, including the fact that he's young; right? They could have had a mercy on him. It could be that they thought, well, we know he didn't intend to shoot Mr. Sams, but he did kill somebody; right?

There are a million reasons why a jury could come to that conclusion. I don't know what it is. . . .

⁸ Notably, the court stated earlier that sentencing Mr. Johnson more heavily because he could have opted not to commit the crime—something that is true of any crime—would have been double-counting. (17T79-4 to 15).

So I don't know that it's fair to make an argument that the jury, you know, made this particular decision and you -- it's unjust to sentence somebody to an extended term.

[(17T97-21 to 98-17).]

Imposing a maximum extended term suggests that this must be the most heinous example of reckless manslaughter. Certainly, this case—a young defendant acting in response to being shot at, not intending anyone be killed, and from which there was only one victim—is not that. Rather, the inference that arises from the maximum extended term imposed is that Mr. Johnson was not being sentenced for second-degree reckless manslaughter, but for the more serious offenses for which he was acquitted: aggravated manslaughter or murder. This conclusion is only strengthened by the trial court explicitly stating, in contradiction of Melvin, that it was not bound by the jury's verdict because it could have reached that result for “various reasons.” Thus, the record supports that the court improperly imposed the maximum extended term because it disagreed with the jury's verdict acquitting Mr. Johnson of murder.

Finally, the trial court erred when it refused to apply mitigating factors that related to the fact that Mr. Johnson's act of shooting was in response to other shooters firing at him. The shot Mr. Johnson purportedly fired was not unprompted: two men who had fought with him and his friends unloaded their guns in his direction. Defense counsel argued this fact should be considered as

a basis for mitigating factor four, (“[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense,” N.J.S.A. 2C:44-1(b)(4)). (17T27-10 to 18). The trial court rejected this factor, finding no self-defense (or other defense) had been established. (17T86-18 to 87-15).

As an initial matter, the court’s rejection of mitigating factor four misinterprets the factor. Factor four specifically encompasses circumstances that fail to establish a defense. If they did establish a defense, there would be no conviction. The court’s rejection of this factor because there was no established defense or justification, then, was legally erroneous. Regardless, even if factor four did not apply, the facts easily warranted application of mitigating factor three (“The defendant acted under a strong provocation,” N.J.S.A. 2C:44-1(b)(3)). The most important mitigating circumstances of his case, then, was completely and improperly left out of the trial court’s sentencing analysis.

In summary, the trial court erred in defining the extended-term sentencing range, double-counted the basis for the extended term by using those same convictions to afford heavy weight to aggravating factor six, improperly disregarded the jury’s acquittals, and failed to consider the most important mitigating circumstances in the record. For these reasons, the sentence must be vacated and remanded for a new sentencing.

CONCLUSION

For the foregoing reasons, Mr. Johnson's convictions must be vacated and the matter remanded for a new trial, or, alternatively, his sentence must be vacated and the matter remanded for the imposition of a reduced sentence.

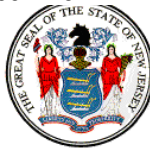
Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: 

KEVIN S. FINCKENAUER
Assistant Deputy Public Defender
ID# 301802020

Dated: June 25, 2024



PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239
kevin.finckenaucr@opd.nj.gov

JENNIFER N. SELLITTI
Public Defender

August 6, 2024
KEVIN S. FINCKENAUER
ID. NO. 301802020
Assistant Deputy
Public Defender
Of Counsel and
On the Letter-Brief

**SUPPLEMENTAL LETTER BRIEF
ON BEHALF OF DEFENDANT-APPELLANT**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1176-22
INDICTMENT NO. 18-06-0592-I

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FERREIE JOHNSON,

Defendant-Appellant.

:

:

:

:

:

:

CRIMINAL ACTION

On Appeal from a Judgment of
Conviction of the Superior Court
of New Jersey, Law Division,
Passaic County.

Sat Below:

Hon. Marybel Mercado-Ramirez, J.S.C.
and a Jury.

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

<u>TABLE OF CONTENTS</u>	<u>PAGE NOS.</u>
LEGAL ARGUMENT	1
<u>SUPPLEMENTAL POINT</u>	
THE UNITED STATES SUPREME COURT IN <u>ERLINGER V. UNITED STATES</u> HELD THAT ANY FACTS ENHANCING A DEFENDANT’S SENTENCE MUST BE PRESENTED TO A GRAND JURY AND FOUND BY A PETIT JURY. BECAUSE THE FACTS UNDERLYING THE PERSISTENT-OFFENDER EXTENDED TERM APPLIED TO MR. JOHNSON WERE NOT INDICTED OR FOUND BY THE TRIAL JURY, HIS EXTENDED-TERM SENTENCE MUST BE VACATED AND A TERM WITHIN THE ORDINARY RANGE IMPOSED. (Not Raised Below)	1
CONCLUSION.....	7

LEGAL ARGUMENT

Defendant-appellant Ferreie Johnson respectfully submits that his motion for leave to file a supplemental brief raising the following additional point should be granted.

SUPPLEMENTAL POINT

THE UNITED STATES SUPREME COURT IN ERLINGER V. UNITED STATES HELD THAT ANY FACTS ENHANCING A DEFENDANT’S SENTENCE MUST BE PRESENTED TO A GRAND JURY AND FOUND BY A PETIT JURY. BECAUSE THE FACTS UNDERLYING THE PERSISTENT-OFFENDER EXTENDED TERM APPLIED TO MR. JOHNSON WERE NOT INDICTED OR FOUND BY THE TRIAL JURY, HIS EXTENDED-TERM SENTENCE MUST BE VACATED AND A TERM WITHIN THE ORDINARY RANGE IMPOSED. (Not Raised Below)

In Appendi v. New Jersey, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. 466, 490 (2000); see also Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and

proven beyond a reasonable doubt.”). On June 21, 2024, in Erlinger v. United States, ___ U.S. ___, 144 S. Ct. 1840 (2024), the Court expanded and explained the scope of this ruling.

Specifically, Erlinger concerned a federal sentencing enhancement, 18 U.S.C. § 924(e)(1), which increases the penalty for a felon-in-possession conviction from a maximum sentence of 10 years to a mandatory minimum sentence of 15 years if the sentencing judge finds that the defendant was previously convicted of three predicate offenses “committed on occasions different from one another.” Id. at 1846. At first blush, it may have seemed like the question of whether a defendant’s predicate offenses were committed on separate occasions fell within the one exception to Apprendi, which allows sentencing enhancements based on a judge’s finding of a prior conviction. But Erlinger reiterated that this exception to Apprendi is a “‘narrow exception’ permitting judges to find only ‘the fact of a prior conviction.’” Id. at 1853-54 (quoting Alleyne v. United States, 570 U.S. 99, 111, n.1 (2013)). “Under that exception, a judge may ‘do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.’” Id. at 1854 (quoting Mathis v. United States, 579 U.S. 500, 511–512 (2016)).

The Court noted that to decide whether Erlinger’s prior convictions satisfied the “different occasions” provision of 18 U.S.C. § 924(e)(1) required

the sentencing court “to do more than identify his previous convictions and the legal elements required to sustain them. It had to find that those offenses occurred on at least three separate occasions.” Ibid. The Court held that the factual finding of whether these offenses occurred on separate occasions exceeded the “prior conviction” exception to Apprendi. Ibid. In a key passage, the Erlinger Court concluded:

Often, a defendant’s past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions. But none of that means a judge rather than a jury should make the call. There is no efficiency exception to the Fifth and Sixth Amendments. In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers “regardless of how overwhelmin[g]” the evidence may seem to a judge.

[Id. at 1856 (quoting Rose v. Clark, 478 U.S. 570, 578 (1986).]

Our Supreme Court anticipated this reasoning in State v. Franklin, 184 N.J. 516, 536 (2005), where the Court “reject[ed] the State’s argument that defendant’s trial admissions and his attorney’s trial concessions were a sufficient basis for the judge to impose an extended Graves Act sentence.” The Court determined that these concessions—unless in the context of a plea—were an insufficient substitute for submission of these questions to a jury. Ibid.

Erlinger applies directly to New Jersey's similar persistent offender statute, which allows the court to sentence a defendant to an extended term if certain criteria are met. N.J.S.A. 2C:44-3(a) permits a court to sentence a defendant to an extended term as a "persistent offender" if the court finds that the defendant has been convicted of an offense in the first, second, or third degree, and

at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

Under Erlinger, a sentencing court may still determine whether the defendant was previously convicted of two crimes but otherwise may "do no more." 144 S. Ct. at 1854 (quoting Mathis, 579 U.S. at 511). Thus, a court may not determine whether a defendant's prior offenses were "committed at different times" or whether "the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentence." N.J.S.A. 2C:44-3(a). Because these questions go beyond determining "what crime, with what

elements, the defendant was convicted of,” they must be submitted to a jury and cannot be decided by a judge.¹ Ibid. (quoting Mathis, 579 U.S. at 511)

Erlinger directly abrogates State v. Pierce, which held that there was “no Sixth Amendment violation in the sentencing court's consideration of objective facts about defendant’s prior convictions, such as the dates of convictions, his age when the offenses were committed, and the elements and degrees of the offenses, in order to determine whether he qualifies as a ‘persistent offender.’” 188 N.J. 155, 163 (2006). Because it directly abrogates Pierce, it is a “new rule.” As with every other new rule announced under the Apprendi framework, Erlinger must be given pipeline retroactivity. See, e.g., State v. Grate, 220 N.J. 317, 335 (2015) (affording pipeline retroactivity to Alleyne); State v. Natale, 184 N.J. 458, 494 (2005) (affording pipeline retroactivity to Blakely claims).

Furthermore, Erlinger requires that the question of whether a defendant’s predicate offenses occurred at “different times” and within the required ten-year period be submitted to the grand jury and included in the indictment. Under the Fifth and Sixth Amendments, “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment,

¹ Erlinger thus answers the question that this Court previously acknowledged was unanswered. State v. Clarity, 461 N.J. Super. 320, 326 (App. Div. 2019) (“Apprendi does not expressly hold that proof of the ‘last release from confinement’ also falls within this narrow exception, nor are we aware of any authorities suggesting it does.”).

submitted to a jury, and proven beyond a reasonable doubt.” Apprendi, 530 U.S. at 476 (quoting Jones v. United States, 526 U.S. 227 (1999)). Pursuant to the grand jury clause of Article I, paragraph 8 of the New Jersey Constitution, our courts have previously held that all questions which must be determined by a petit jury under Apprendi must also be submitted to the grand jury and included in the indictment. Franklin, 184 N.J. at 534 (“That a defendant possessed a gun during the commission of a crime is a fact that must be presented to a grand jury and found by a petit jury beyond a reasonable doubt if the court intends to rely on it to impose a sentence exceeding the statutory maximum.”); State v. Fortin, 178 N.J. 540, 646 (2004) (“We, therefore, hold that our State Constitution requires that aggravating factors be submitted to the grand jury and returned in an indictment.”). Thus, the factual findings which must be determined by a petit jury pursuant to Erlinger—whether a defendant’s predicate convictions were committed at different times and within the requisite ten-year period—must also be submitted to the grand jury and included in the indictment.

In this case, sentencing Mr. Johnson to a persistent-offender extended term violated the Fifth and Sixth Amendments of the United States Constitution as well as Article I, paragraph 8 of the New Jersey Constitution. The question of whether his predicate convictions were committed at different times and within the requisite ten-year period was not indicted by the grand jury nor found

by the petit jury. The “‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict.” Blakely, 542 U.S. at 303 (emphasis in original). The jury found Mr. Johnson guilty of second-degree reckless manslaughter and two other second-degree possession offenses. Thus, the maximum sentence that the court could impose on any of those offenses is ten years. The twenty-year sentence for reckless manslaughter violates Apprendi and Erlinger and must therefore be vacated so that a sentence within the ordinary range can be imposed.

CONCLUSION

For the foregoing reasons, if Mr. Johnson’s convictions are not vacated, his sentence must be vacated and the matter remanded for the imposition of a sentence within the ordinary range.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: _____


KEVIN S. FINCKENAUER
Assistant Deputy Public Defender
ID# 301802020

Dated: August 6, 2024



PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO Box 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-6500

MATTHEW J. PLATKIN
Attorney General

J. STEPHEN FERKETIC
Director

December 3, 2024

Leslie-Ann M. Justus
Attorney No. 000591995
Deputy Attorney General
justusl@njdcj.org
Of Counsel and on the
Letter Brief

SUPPLEMENTAL LETTER-BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

The 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.
FERREIE JOHNSON, (Defendant-Appellant)
Docket No. A-001176-22

Criminal Action: On Appeal from a Judgment of Conviction of
the Superior Court of New Jersey, Law Division, Passaic County.

Sat Below: Hon. Marybel Mercado-Ramirez, J.S.C., and a jury.

Honorable Judges:

This letter brief is submitted in lieu of a formal brief on behalf of the State.

See 2:6-2(b); R. 2:6-4(a).



TABLE OF CONTENTS

	<u>PAGE</u>
<u>COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS</u>	1
<u>LEGAL ARGUMENT</u>	2
<u>POINT I</u>	2
SENTENCING DEFENDANT TO AN EXTENDED TERM OF TWENTY YEARS AS A PERSISTENT OFFENDER WITH A SEVENTEEN-YEAR NERA PAROLE DISQUALIFIER WAS FAIR PUNISHMENT FOR HIS SHOOTING RECKLESSLY INTO A CROWD AND KILLING THE VICTIM.	2
A. <u>Sentencing Defendant as a Persistent Offender Remains Proper after Erlinger</u>	3
B. <u>The Judge Appropriately Sentenced Defendant to Twenty Years Imprisonment as a Persistent Offender with a NERA Parole Disqualifier.</u>	14
<u>CONCLUSION</u>	20

TABLE OF CITATIONS

The following citation form is used:

Da = Defendant's appendix

Db = Defendant's brief.

Dbs = Defendant's supplemental brief

1T = sentencing transcript, dated March 17, 2017

2T = plea hearing transcript, dated March 9, 2018

3T = pretrial conference transcript, dated November 12, 2019

4T = motion hearing transcript, dated July 13, 2021

5T = hearing transcript, dated September 22, 2022

6T = Miranda hearing transcript, dated September 28, 2022

7T = Miranda decision transcript, dated September 29, 2022

8T = trial transcript, dated October 4, 2022

9T = trial transcript, dated October 5, 2022

10T = trial transcript, dated October 6, 2022

11T = trial transcript, dated October 7, 2022

12T = trial transcript, dated October 11, 2022

13T = trial transcript, dated October 12, 2022

14T = trial transcript, dated October 13, 2022

15T = motion for new trial transcript, dated November 3, 2022

Pa = State's Appendix to the State's Initial Response Brief

PSR = Defendant's Adult Pre-Sentence Report

COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies on the Counter-Statement of Procedural History and Counter-Statement of Facts set forth in its initial response brief, and adds the following for purposes of the issue raised in defendant's supplemental brief.

On October 13, 2022, a jury found defendant guilty of reckless manslaughter as a lesser included offense of murder and two firearms offenses. (14T26-10 to 27-22; Da15-17). On October 20, 2022, the prosecutor timely filed his motion to sentence defendant to extended terms as a persistent and Graves Act offender. (Pa121-25); 14T26-10 to 27-22). The State submitted certified copies of the judgments of convictions for the predicate Indictment Nos. 14-04-00293-I; 14-06-00590-I; and 16-05-00478-I to defense counsel and the judge. (17T5-21 to 8-12; Pa111-120). When the judge asked defense counsel, "Any objection?," counsel replied, "No, Judge." (17T8-5 to 7). It should be noted that defendant pleaded guilty to all of the final charges indicated on these judgments of convictions. (Pa111-120).

Defense counsel did not object to the underlying predicate facts making defendant persistent offender eligible. Rather, defendant argued that he should be sentenced to "14-15 years" to a Graves Act mandatory extended term in the first-degree range with a fifty percent instead of a NERA eight-five percent parole disqualifier. (Pa140). The judge found that defendant was subject to

extended terms as a mandatory Graves Act and persistent offender. (17T74-4 to 17). The judge found that the State had satisfied all of the requirements for defendant to be eligible to be sentenced as a persistent offender. (17T74-4 to 78-10; Pa142). After finding aggravating factors 3, 6, and 9 and mitigating factors 11 and 14, the judge sentenced defendant to twenty years imprisonment subject to NERA for reckless manslaughter and to two concurrent ten-year prison terms for his firearms convictions as Graves Act extended terms with five-year parole disqualifiers. (Da19-21; 17T102-2 to 103-5).

Following the United States Supreme Court's decision in Erlinger v. United States, 144 S. Ct. 1840 (2024), defendant filed a supplemental brief with this Court, arguing for the first time that the jury should have determined the predicate facts establishing his persistent offender extended-term eligibility. Defendant claimed that his matter should be remanded for him to be resentenced to a maximum sentence of ten years. (Dbs7).

LEGAL ARGUMENT

POINT I

SENTENCING DEFENDANT TO AN
EXTENDED TERM OF TWENTY YEARS AS
A PERSISTENT OFFENDER WITH A
SEVENTEEN-YEAR NERA PAROLE
DISQUALIFIER WAS FAIR PUNISHMENT
FOR HIS SHOOTING RECKLESSLY INTO A
CROWD AND KILLING THE VICTIM.

Defendant's reliance on Erlinger is entirely misplaced. The judge's determination that defendant, who was then on probation, was eligible for sentencing as a persistent offender was harmless beyond a reasonable doubt, especially where defendant made no objection to his eligibility to be sentenced as such. Moreover, defendant's sentence to twenty years in prison as a persistent offender with a seventeen-year NERA parole disqualifier concurrent to his ten-year mandatory Graves Act extended term sentences with five-year parole disqualifiers was fitting punishment for his having indiscriminately fired into a crowd in a parking lot killing Parker Sams. Defendant's extended term sentence was fair and should be affirmed.

A. Sentencing Defendant as a Persistent Offender Remains Proper after Erlinger

The New Jersey persistent offender statute provides that upon application of the prosecutor, defendants may be sentenced to an extended if they have been "convicted of a crime of the first, second or third degree and is a persistent offender." N.J.S.A. 2C:44-3(a); State v. Carlton, __ N.J. Super. __ (App. Div. November 27, 2024) (slip op. at 14).

In Erlinger, the United States Supreme Court ruled that under the Fifth and Sixth Amendments, a "jury — not a sentencing judge — must decide whether prior convictions used to establish the basis for enhanced sentencing

had been committed on separate occasions.” Carlton, slip op. at 3. The Erlinger Court “explained they were not creating a new rule, but merely applying constitutional principles it had previously announced” in Appendi v. New Jersey, 530 U.S. 466 (2000). Ibid. But, at the time of defendant’s sentencing, State v. Pierce, 188 N.J. 155, 158 (2006), held a “sentencing court does not engage in impermissible fact-finding” when it determines a defendant’s persistent offender eligibility. Id. slip op. at 14. A panel of this Court ruled in Carlton that Erlinger abrogates the precedent established in Pierce, which “necessitates a significant change to New Jersey practices and procedures” for imposing such extended terms. Id. slip op. at 3. The panel remanded the case for the State to convene a new sentencing jury to determine the persistent offender predicate facts.

The State agrees with defendant that Erlinger may apply retroactively to persistent offender cases that are still on direct appeal. Id. slip op. at 16. (Accord Dbs7). But in defendant’s case, the judge’s finding of the persistent offender predicate facts instead of a jury was harmless beyond a reasonable doubt, and no remand is necessary.

At sentencing, defense counsel did not object to the predicate facts making defendant eligible as a persistent offender. He stated the prosecutor “has every right to file the Motion. I understand. Obviously, our argument is

that he's not. The public doesn't need protection." (17T9-14 to 18). In his initial brief defendant stated, "[a]t sentencing, [defendant] did not dispute that he was statutorily eligible for a persistent offender extended term and the court found that he met the criteria." (Db53 (citing to 17T74-12 to 77-25)).

The judge stated that there was no "disagreement here with regard to the defendant's prior record nor any dispute between the State and the defense that the defendant" was to be sentenced both as a Graves Act and persistent offender. (17T74-15 to 23). Defense counsel did not object to the judge's statement. The judge ruled that defendant was subject to both mandatory Graves Act and persistent offender extended terms. (17T74-4 to 17). Since defendant's reckless manslaughter and second-degree unlawful possession of a weapon convictions were to run concurrently to each other, the mandatory bottom of the range for the Graves Act offense was in the first-degree range of ten years, not five years. Thus, the judge did not err, as defendant claims, when she ruled that the "range bumps his case to a first degree, so he can be sentenced between 10 and 20 years." (17T78-3 to 7; contra Db53). Even if the judge did misspeak when she indicated that the bottom of the range was ten years, that error was incapable of producing an unjust result, and it is not a reason to disturb defendant's sentence here. See State v. Macon, 57 N.J. 325, 336 (1971); R. 2:10-2).

Next, the judge found that the State had satisfied all of the requirements for defendant's eligibility to be sentenced as a persistent offender. (17T74-4 to 77-25; Pa142). Again, the defense did not object. Thus, defendant has waived his right to belatedly complain about this alleged error on appeal. See State v. Gibson, 219 N.J. 227, 242 (2014) (stating that "even a fundamental right . . . may be waived and when waived the error may be considered harmless.") (citation omitted).

Moreover, defendant never gave the judge an opportunity to hold a jury trial on this issue. Unlike Erlinger, who disagreed "vigorously" that his string of four burglaries occurring "within a span of days" were predicate offenses, Erlinger, 144 S. Ct. at 1847, 1852, defendant here did not challenge his extended term on Fifth or Sixth Amendment grounds. Instead, he conceded his statutory eligibility. (Db53; 17T9-14 to 18). See Clarity, 461 N.J. Super. 320, 328-29 (2019) (recognizing concession to prior convictions was sufficient to impose extended term as a persistent offender), certif. denied, 241 N.J. 246 (2020). Plain error review should thus apply. But the conclusion is the same under any standard of review. The "overwhelming" and "uncontested" evidence indicates that a rational jury would have reached the same result. United States v. Neder, 527 U.S. 1, 19 (1999). Thus, defendant is barred from raising this issue on appeal. R. 1:7-2; R. 2:10-2; State v. Galicia, 210 N.J. 364,

383 (2012) (“Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below”).

While Erlinger settles whether a trial judge violates the principles of Apprendi and Alleyne v. United States, 570 U.S. 99 (2013), at sentencing by making judicial fact-finding of the persistent offender predicate facts, an issue is raised as to the appropriate remedy for that underlying constitutional error. United States v. Campbell, ___ F.4th ___ (6th Cir. Nov. 22, 2024) (slip op. at 7). In fashioning a remedy, courts do not do so “on a blank slate” because the United States Supreme Court stated in Arizona v. Fulminante, 499 U.S. 279, 306 (1991) “that a constitutional error alone does not entitle a defendant to an automatic reversal.” Id. slip op. at 7-8. “Indeed, most constitutional errors are subject to a harmless error analysis, leaving” a court “to ask whether the government has made it clear ‘beyond a reasonable doubt that the outcome would not have been different’ without the constitutional violation.” Id. slip op. at 8 (internal quotations omitted); accord State v. Camacho, 218 N.J. 533, 547 (2014) (“‘most constitutional errors can be harmless’ and therefore ‘not subject to automatic reversal;’ and “‘while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule’” (quoting Fulminante, 499 U.S. at 306; Rose v. Clark, 478 U.S. 570, 578 (1986))). Then, the issue becomes whether the State has made it clear beyond a

reasonable doubt that the outcome would not have been different without the constitutional violation. Ibid. “Errors arising from violations of Apprendi and Alleyne are not exceptions to this general rule.” Ibid.

In Washington v. Recuenco, the Supreme Court stated, “[w]e have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, ‘most constitutional errors can be harmless.’” 548 U.S. 212, 218 (2006) (quoting Neder, 527 U.S. at 8). In Recuenco, the Supreme Court stated, for example, that the “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error that “requir[es] automatic reversal.”” 548 U.S. at 222. Similarly, in Johnson v. United States, 520 U.S. 461 (1997), and Neder, 527 U.S. at 9, the Court held that the failure to submit an element of the offense to the jury was subject to review for plain or harmless error, respectively, depending on whether the defendant objected. In both cases, the Court found no reversible error because the evidence supporting the omitted element was “overwhelming” and “uncontroverted.” Johnson, 520 U.S. at 470; Neder, 527 U.S. at 9, 16-17; see also United States v. Booker, 543 U.S. 220, 268 (2005) (expecting “reviewing courts to apply ordinary prudential doctrines,” like plain-error and harmless-error review, determining, for example, whether the issue was raised below and whether it

fails the “plain-error” test); United States v. Cotton, 532 U.S. 625 (2002) (applying the plain-error test to Apprendi claim not raised below).

It is well settled that the lack of a jury finding as to an element of an offense is harmless if it is “clear beyond a reasonable doubt that a rational jury” would have found the element anyway. Neder, 527 U.S. at 18. That standard is met when “the omitted element was uncontested and supported by overwhelming evidence.” Id. at 17. It is also met where the record contains no “evidence that could rationally lead to a contrary finding with respect to the omitted element.” Id. at 19.

Indeed, Chief Justice Roberts and Justice Kavanaugh, joined by Justice Alito, followed well-settled precedent in recognizing that the error in Erlinger, like nearly all errors, is subject to harmless-error review. Erlinger, 144 S. Ct. at 1860-61 (Roberts, C.J. concurring) (while a jury should “determine beyond a reasonable doubt whether his predicate offenses were committed on different occasions,” [b]ut as Justice Kavanaugh explains, violations of that right are subject to harmless error review); id. at 1866-67 (Kavanaugh, J., dissenting) (discussing applicability of harmless error review).¹

¹ Indeed, the Erlinger oral argument transcript reveals all parties agreed harmless-error review applied. Tr. of March 27, 2024 Oral Argument at 16-14 to 23; 24-22 to 25-4; 45-1 to 9. See https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-370_5368.pdf

As for the district court’s finding of the predicate offenses for the ACCA enhanced sentence rather than a jury, the Sixth Circuit, most recently in Campbell, stated that the Neder and Recuenco precedents “inform[] [the] analysis” that Erlinger errors are subject to harmless error review. Campbell, slip op. at 8. The Neder Court stated that the harmless-error inquiry requires a determination that is

clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.] To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” We believe that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between “society’s interest in punishing the guilty [and] the method by which decisions of guilt are made.” The harmless-error doctrine, we have said, “recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial.”

. . . .

In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes

of the jury trial guarantee. [Neder, 527 U.S. at 18-19 (internal quotations omitted).]

The Sixth Circuit noted that other circuits have held that the “failure to submit the [ACCA] occasions clause question to the jury is subject to harmless error review.” Campbell, slip op. at 10-11. “This practice has generally persisted, even in Erlinger’s wake.” Id. slip op. at 11 (citing cases from the 1st, 2d, 7th, and 8th Circuits that reviewed Erlinger errors for harmlessness). “Accordingly,” because it was heeding “Erlinger’s statement that it ‘decide[d] no more than’ the underlying Apprendi question,” the Sixth Circuit remained “bound to view Apprendi-Alleyne errors as subject to harmless error analysis.” Id. slip op. at 11-12 (quoting Erlinger, 144 S. Ct. at 1852).

Turning to the question of whether harmlessness applied to Campbell on the issue of the different occasions, the Sixth Circuit stated that it “can ‘confidently say,’ based on the ‘whole record,’ that the government has shown that the constitutional error at issue here was ‘harmless beyond a reasonable doubt.’” Id. slip op. at 12 (internal quotations omitted). “Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a “‘significant distance.’” Wooden v. United States, 595 U.S. 360, 370 (2022). Defendant committed his two prior offenses on different dates: first instance, where he committed two offenses occurring on January 14, and 28, 2014 (for fourth-degree aggravated

assaults with a firearm) but was sentenced on both offenses on June 30, 2015; and a second instance on September 3, 2015 (fourth-degree violation of firearms regulations), or 19 months apart (January 2014 to September 2015). (Pa111-120; PSR at 8-9).

If courts “nearly always treat[] offenses as occurring on separate occasions if a person committed them a day or more apart,” then certainly they should be considered separate offenses when committed 19 months apart as in defendant’s case. See Wooden, 595 U.S. at 370. Defendant’s offenses thus constitute a “straightforward and intuitive” example of crimes committed on different dates. See Wooden, 595 U.S. at 361. The overwhelming evidence thus showed that defendant here committed his predicate offenses “on occasions different from one another.” Accord United States v. Jenkins, 770 F.3d 507, 509 (6th Cir. 2014) (no one “would hesitate to conclude” that felonies committed in different years “occurred on two different occasions”); Erlinger, 144 S. Ct. at 1856 (recognizing that typically, a “defendant’s past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions”). And, defendant cannot point to anything in the record that suggests that the dates of his prior predicate convictions involved intertwined conduct, or were part of a common scheme or plan. Thus, no rational juror could find that his offenses

were committed on the same date. As a result, the record shows beyond a reasonable doubt that a jury's failure to consider the different-dates question had no effect on defendant's sentence and was harmless beyond a reasonable doubt.

Defendant relies on State v. Franklin, 184 N.J. 516 (2005), where our Supreme Court disapproved of courts "engag[ing] in an after-the-fact review of the record to determine whether the State's evidence fits an offense with which defendant was never charged." Id. at 536. But Franklin was issued prior to Recuenco, and the Court otherwise did not confront any of the then-existing U.S. Supreme Court precedent establishing that the omission of an element is subject to appellate review for its effect on the outcome. Worse yet, Franklin overlooked existing New Jersey precedent and is inconsistent with subsequent cases approving of the Neder principle. For example, in State v. Johnson, 166 N.J. 523 (2001), the Court held, in the aftermath of Apprendi, that a jury was required to determine the NERA "violent crime" predicate under the pre-2001 version of NERA, but affirmed Johnson's sentence "because the facts adduced at trial establish that the jury made that finding beyond a reasonable doubt." Id. at 546. In State v. Purnell, 161 N.J. 44, 63 (1999), the Court cited Neder favorably in holding that the "procedural defect" of the judge deciding the materiality element of perjury "based on trustworthy

evidence,” was error that “was harmless because materiality was not in dispute and therefore did not contribute to the verdict.” See also Camacho, 218 N.J. at 549-51 (citing Neder and holding that even instructional errors “of constitutional dimension” are subject to harmless-error review).

Even if the Erlinger error were not amenable to harmless-error review, the Carlton panel ruled that there was no need to remand for both a grand jury and petit jury to make the factual determinations that Erlinger requires. Carlton, slip op. at 35. A petit jury, applying a higher standard of proof beyond a reasonable doubt than a grand jury, could make such a determination. Ibid. Second, defendant’s requested remedy — that he be resentenced to ten years imprisonment as the maximum sentence that could be imposed because of the jury’s verdict is wrong and contrary to what he argued below where he acknowledged that he was Graves Act mandatory extended term in the first-degree range. (Compare Dbs7 with Pa140). The appropriate remedy in the alternative for this pipeline case would be a remand to allow the State to pursue a persistent offender extended term with a new sentencing jury.

B. The Judge Appropriately Sentenced Defendant to Twenty Years Imprisonment as a Persistent Offender with a NERA Parole Disqualifier.

The appellate review of a judge’s sentence is limited and “deferential” and ““must not substitute [the appellate court’s] judgment for that of the sentencing court.”” State v. Rivera, 249 N.J. 285, 297 (2021) (internal

quotations omitted). An appellate court is bound to affirm a judge's sentence unless (1) the "sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" Id. at 297-98 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)); State v. Vanderee, 476 N.J. Super. 214, 235 (App. Div.), certif. denied, 255 N.J. 506 (2023). The test "is not whether a reviewing court would have reached a different conclusion" on the appropriate sentence, but rather, whether "on the basis of the evidence, no reasonable sentencing court could have imposed" the sentences defendant received here. State v. Ghertler, 114 N.J. 383, 388 (1989) (citing to Roth, 95 N.J. at 365).

The trial judge found aggravating factors 3, 6, and 9, and mitigating factors 11 and 14. The judge rejected the State's request to find aggravating factor 1 and rejected defendant's requests for any other mitigating factors. Despite finding that defendant had an opportunity to walk away from the fight without resorting to firing a gun, the judge found it would be double counting to consider this factor because the nature and circumstances of the offense were already taken into account in grading the crime. (17T78-14 to 79-21).

In finding aggravating factor 3 that there was a risk defendant would re-

offend, the judge considered defendant's prior juvenile criminal history. (17T79-22 to 81-11). She found that he had a disorderly persons harassment in 2010; two Violations of Probation (VOPs); an aggravated assault; and a robbery adjudication in January 2012 where defendant was sentenced to a juvenile correctional facility. Defendant committed his first adult offense in January 2014 or two years after his juvenile adjudication. (17T80-5 to 81-11).

In reviewing defendant's criminal history regarding aggravating factor 6, the judge found, in addition to the persistent offender predicate convictions, defendant had violated probation for his September 3, 2015 violation of a firearm regulation conviction and had been resentenced to probation on March 9, 2019, or a mere 22 days before he killed the victim here. (17T81-12 to 83-16). While the judge acknowledged that for purposes of the persistent offender eligibility, defendant's first and second convictions as an adult, where he was sentenced on the same date, only counted as one prior conviction, he nonetheless had four prior Superior Court convictions involving a gun. (17T95-14 to 17). In light of defendant's violent history where he employed a firearm, it was not double counting, as he claims to afford great weight to his criminal record that showed his continued aberrant behavior as an adult from January 2014 to March 31, 2018.

Since defendant's conviction history included more than just two

predicate convictions necessary to qualify for persistent offender sentencing, the judge properly considered defendant's two other offenses, which also involved his illegal possession of firearms. Accord State v. McDuffie, 450 N.J. 554, 576-77 (App. Div. 2017) (after finding the requisite number of offenses to qualify for an extended term, judge was not then required to ignore the extent of a defendant's criminal history when considering aggravating factors), certif. denied, 232 N.J. 72 (2018). The judge found that there was a specific need to deter defendant and other young people who "think it's okay for you to have a gun when you feel like it, just because." (17T83-17 to 20).

Regarding mitigating factors, the judge had read all the letters sent to the court on defendant's behalf. (17T95-1 to 5). The judge found mitigating factors 11 – defendant's imprisonment would entail a hardship to his family and 14 – the defendant was under 26 years of age at the time of the offense. (17T92-23 to 94-8). She also found non-statutory mitigating factors that defendant had Attention Deficit Hyperactive Disorder, he saw his mother be a victim of domestic violence, his father was absent, and defendant grew up in a "hard way, in the middle of Paterson." (17T84-5 to 22; 17T92-23 to 95-9).

The judge denied defendant's request to find mitigating factor 4 – there were "substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense" because there was no evidence that the

Tony Lalama shooters were shooting at defendant, and there was “absolutely, positively, not” any basis to excuse defendant’s actions. (17T86-16 to 87-15). Moreover, defendant’s girlfriend, Hill, tried to restrain him two times, and he broke away from her, retrieved his gun, and fired into the crowd. (17T87-7 to 11). The judge found that defendant had “[e]very opportunity to just get in the car and leave but he chose not to, so it’s not okay for him to shoot back. There is no justification for that.” (17T87-8 to 11).

Because defendant had no ability to pay, the judge denied defendant’s request to find mitigating factor 6 for restitution. (17T88-24 to 90-3). The judge denied defendant’s request to find mitigating factor 8 – that these circumstances are unlikely to recur – and 9 – defendant’s character and attitude indicate that he is unlikely to reoffend – because defendant presented a future risk of reoffending given that his time in custody as a juvenile and adult had not deterred him. (17T90-21 to 92-22). Having found that the aggravating factors substantially, if not “extremely,” outweighed the mitigating factors, the judge found that defendant posed a danger and was a “high risk to the public” because he had “[n]o problem with picking up a gun, none.” (17T100-14 to 21). Based on these findings, after merger, the judge sentenced defendant to twenty years as a persistent offender with a NERA parole disqualifier; to two concurrent Graves Act extended terms of ten years for his firearm offenses

with five-year parole disqualifiers; and to ten years flat for his violation of probation conviction regarding Indictment No. 16-05-00478-I, concurrent to the above sentences. (Da19-21; 17T102-5 to 103-5).

The judge's findings of aggravating and mitigating factors were supported by the sufficient credible evidence in the record given the trial testimony, the video evidence S-274 and S-242B; defendant's recorded statement (S-94); text messages; and defendant's PSR at pages 6 to 9. Cohen, 254 N.J. at 318-19; Vanderee, 476 N.J. Super. at 235. Indeed, in S-274, the shooters on Tony Lalama Blvd can be seen shooting at 01:31:08 to 01:31:18. Hill and defendant can be seen running to the Ford Focus about sixty seconds later at 01:32:24. Hill then tried to physically restrain defendant for a second time from retrieving his gun at S-274 at 01:32:38 to 01:32:40. As the judge found, defendant could have simply run to his car and driven away, but he chose not to. (17T87-8 to 11).

In sum, defendant's sentence as a persistent offender to a twenty-year extended term subject to a NERA parole disqualifier for reckless manslaughter by shooting indiscriminately into a crowd after his girlfriend had tried twice to restrain him and this incident being his fourth gun offense, represented the severity of his crimes. See State v. Torres, 246 N.J. 246, 262 (2021) ("the severity of the crime is now the single most important factor in the sentencing

process.”) (internal quotations omitted). The judge applied the sentencing guidelines and properly weighed the aggravating and mitigating factors. The sentence imposed is neither illegal nor in error, let alone, a clear error of judgment that shocks the judicial conscience. See Roth, 95 N.J. at 363-65. Defendant’s actions alone are shocking, and his sentences are a product of his own reckless conduct resulting in the shooting death of the innocent victim; it is not an abuse of the judge’s discretion. Defendants who commit serious crimes should expect to spend time in prison. State v. Jabbour, 118 N.J. 1, 8 (1990). This Court should affirm defendant’s sentence.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant’s sentence.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

By: /s/ Leslie-Ann M. Justus
Leslie-Ann M. Justus
Deputy Attorney General
justusl@njdcj.org

DATED: December 3, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-001176-22

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

v. :

FERREIE JOHNSON, :

Defendant-Appellant. :

CRIMINAL ACTION

On Appeal from a Judgment of
Conviction from the
Superior Court of New Jersey,
Law Division, Passaic County.

Sat Below:
Hon. Marybel Mercado-Ramirez, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
R.J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

LESLIE-ANN M. JUSTUS
DEPUTY ATTORNEY GENERAL
ATTORNEY NO. 000591995
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
justusl@njdcj.org

OF COUNSEL AND ON THE BRIEF

December 3, 2024

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
<u>COUNTERSTATEMENT OF PROCEDURAL HISTORY</u>	1
<u>COUNTERSTATEMENT OF FACTS</u>	2
<u>LEGAL ARGUMENT</u>	
<u>POINT I</u>	9
THE TRIAL JUDGE PROPERLY ADMITTED DEFENDANT’S STATEMENT	9
A. <u>The Judge Properly Found That Defendant Waived His Rights</u>	12
B. <u>The Police Did Not Minimize Miranda.</u>	16
C. <u>The Police Did Not Misrepresent Defendant’s Status When They Said He Was Not Under Arrest and No Charges Had Been Filed.</u>	20
D. <u>The Admission of Defendant's Statement Was Harmless.</u>	21
<u>POINT II</u>	23
THE JUDGE PROPERLY EXERCISED HER DISCRETION UNDER <u>N.J.R.E. 611(a)</u> TO CONTROL THE MANNER IN WHICH THE DETECTIVE TESTIFIED ABOUT THE SURVEILLANCE VIDEOS.	23
A. <u>Video Surveillance Footage</u>	24
1. <u>S-241B (Camera Four); S-241E (Camera Eight); S-241F</u>	25
2. <u>S-240</u>	25

3. <u>S-241A; S-241D; S-241C</u>	26
4. <u>S-242A; S-242B</u>	27
5. <u>S-243A to S-243D</u>	27
6. <u>S-274 (Composite Video)</u>	27
7. <u>S-242B</u>	29
<u>POINT III</u>	45
THE JUDGE PROPERLY ALLOWED THE JURY TO REVIEW THE SURVEILLANCE VIDEO ON A LAPTOP IN THE DELIBERATION ROOM	45
A. <u>Defendant Has Waived His Right To Complain About The Jury Reviewing The Compilation Video In The Jury Deliberation Room</u>	48
B. <u>Defendant Failed To Establish Any Plain Error Regarding The Jury’s Review Of The Compilation Video In The Deliberation Room</u>	49
<u>POINT IV</u>	61
SENTENCING DEFENDANT TO AN EXTENDED TERM OF TWENTY YEARS AS A PERSISTENT OFFENDER WITH A SEVENTEEN-YEAR NERA PAROLE DISQUALIFIER WAS FAIR PUNISHMENT FOR HIS SHOOTING RECKLESSLY INTO A CROWD AND KILLING THE VICTIM.	61
<u>CONCLUSION</u>	61

TABLE TO THE APPENDIX

Paterson Police Department Detectives Supplemental Report.....	Pa001-042
Prosecutor’s Brief in Opposition to Defendant’s Motion to Dismiss the Indictment, dated May 14, 2021	Pa043 - 068
Defendant’s Text Messages S-140 to S-183.....	Pa069 - 095
Defendant’s Text Messages S-140 to S-183	Pa069 - 095
Video S-240	Pa96
Video S-241A.....	Pa97
Video S-241B	Pa98
Video S-241C	Pa99
Video S-241D.....	Pa100
Video S-241E	Pa101
Video S-241F	Pa102
Video S-242A.....	Pa103
Video S-242B	Pa104
Video S-243A.....	Pa105
Video S-243B	Pa106
Video S-243C	Pa107
Video S-243D.....	Pa108
Video S-274	Pa109
Defendant’s April 3, 2018 Recorded Statement videos (S-94).....	Pa110

Judgment of Conviction for Indictment No. 14-06-00590-I dated October 16, 2015	Pa111 - 113
Judgment of Conviction for Indictment No. 14-04-00293-I, dated October 16, 2015	Pa114 – 117
Judgment of Conviction for Indictment No. 16-05-00478-I, dated March 9, 2018	Pa118 - 120
Prosecutor’s Motion for a Persistent Offender Extended Term	Pa121 – 125
Defendant’s Sentencing Memo Dated November 21, 2022	Pa126 - 141
Court Order dated December 8, 2022, Granting Prosecutor’s Motion to Sentence Defendant to a Persistent Offender Extended Term	Pa142
Google Photo of the D'Classico parking lot and crime scene (S-240)	Pa143

JUDGMENTS

Judgment of Conviction for Indictment No. 14-06-00590-I dated October 16, 2015	Pa111 - 113
Judgment of Conviction for Indictment No. 14-04-00293-I, dated October 16, 2015	Pa114 – 117
Judgment of Conviction for Indictment No. 16-05-00478-I, dated March 9, 2018	Pa118 - 120
Court Order dated December 8, 2022, Granting Prosecutor’s Motion to Sentence Defendant to a Persistent Offender Extended Term	Pa142

TABLE OF AUTHORITIES

CASES

<u>Brett v. Great Am. Recreation, Inc.</u> , 144 N.J. 479 (1996)	53
<u>C.R. v. M.T.</u> , 248 N.J. 428 (2021).....	13, 14
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	23
<u>Commonwealth v. Cash</u> , 137 A.3d 1262 (Pa. 2016)	56
<u>Erlinger v. United States</u> , 602 U.S. 821 (2024)	61
<u>Horne v. Edwards</u> , 477 N.J. Super. 302 (App. Div. 2023)	36, 37
<u>Hrymoc v. Ethicon, Inc.</u> , 467 N.J. Super. 42 (App. Div. 2021), <u>judgment affirmed as modified</u> , 254 N.J. 446 (2023).....	60
<u>J.K. v. N.J. State Parole Bd.</u> , 247 N.J. 120 n.6 (2021)	49
<u>Lutwak v. United States</u> , 344 U.S. 604 (1953)	55
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	passim
<u>Nieder v. Royal Indem. Ins. Co.</u> , 62 N.J. 229 (1973).....	49
<u>Shaw v. Bender</u> , 90 N.J.L. 147 (E &A 1917)	48
<u>State v. A.G.D.</u> , 178 N.J. 56 (2003)	19
<u>State v. A.L.A.</u> , 251 N.J. 580 (2022).....	60
<u>State v. A.R.</u> , 213 N.J. 542 (2013)	passim
<u>State v. Alessi</u> , 240 N.J. 501 (2020).....	36
<u>State v. Allen</u> , 254 N.J. 530 (2023)	30, 31

<u>State v. Brewington</u> , 471 S.E.2d 398 (N.C. 1996)	56
<u>State v. Burr</u> , 195 N.J. 119 (2008).....	50, 53
<u>State v. Canfield</u> , 470 N.J. Super. 234 (App. Div. 2022)	35, 36, 55, 59
<u>State v. Cohen</u> , 254 N.J. 308 (2023).....	15, 16, 17
<u>State v. Corby</u> , 28 N.J. 106 (1958).....	43
<u>State v. Derry</u> , 250 N.J. 611 (2022).....	21
<u>State v. Funderburg</u> , 225 N.J. 66 (2016).....	36, 60
<u>State v. Harris</u> , 209 N.J. 431 (2012)	passim
<u>State v. Higgs</u> , 253 N.J. 333 (2023)	56
<u>State v. Jenkins</u> , 112 N.J. 112 (2004)	54
<u>State v. Knight</u> , 477 N.J. Super. 400 (2023), <u>certif. granted</u> , 257 N.J. 244 (2024)	passim
<u>State v. LaFera</u> , 42 N.J. 97 (1964)	54
<u>State v. Lazo</u> , 209 N.J. 9 (2012).....	31
<u>State v. Macon</u> , 57 N.J. 325 (1971).....	35, 36, 49
<u>State v. Maltese</u> , 222 N.J. 525 (2015)	23
<u>State v. Mayberry</u> , 52 N.J. 413 (1968)	43
<u>State v. McGuire</u> , 419 N.J. Super. 88 (App. Div. 2011).....	54
<u>State v. McNeil-Thomas</u> , 238 N.J. 256 (2019)	16
<u>State v. Medina</u> , 242 N.J. 397 (2020)	35

<u>State v. Miller</u> , 205 N.J. 109 (2011)	50
<u>State v. Miranda</u> , 253 N.J. 461 (2023).....	16
<u>State v. Musa</u> , 222 N.J. 554 (2015)	54
<u>State v. Nash</u> , 212 N.J. 518 (2013).....	13
<u>State v. Nelson</u> , 173 N.J. 417 (2002).....	36
<u>State v. O.D.A.-C.</u> , 250 N.J. 408 (2022).....	17, 18
<u>State v. Perez</u> , 334 N.J. Super. 296 (App. Div. 2000), <u>certif. denied</u> , 167 N.J. 629 (2001).....	19
<u>State v. Pressley</u> , 232 N.J. 587 (2018), <u>affirmed as modified</u> , 252 N.J. 497 (2023)	35
<u>State v. R.B.</u> , 183 N.J. 308 (2005)	55
<u>State v. R.K.</u> , 220 N.J. 444 (2015)	34, 35
<u>State v. Robinson</u> , 200 N.J. 1 (2009).....	48, 49
<u>State v. Ross</u> , 229 N.J. 389 (2017)	35, 54
<u>State v. S.N.</u> , 231 N.J. 497 (2018).....	16
<u>State v. S.S.</u> , 229 N.J. 360 (2017)	15
<u>State v. Sanchez</u> , 247 N.J. 450 (2021).....	31, 32
<u>State v. Sanchez-Medina</u> , 231 N.J. 452 (2008).....	35
<u>State v. Santamaria</u> , 236 N.J. 390 (2019)	35, 36, 55
<u>State v. Sims</u> , 250 N.J. 189 (2022)	19
<u>State v. Singh</u> , 245 N.J. 1 (2021)	34, 42, 43

<u>State v. T.E.</u> , 342 N.J. Super. 14 (App. Div. 2001).....	37
<u>State v. Tindell</u> , 417 N.J. Super. 530 (App. Div. 2011)	43
<u>State v. Watson</u> , 472 N.J. Super. 381 (App. Div. 2022), <u>remanded on other grounds</u> 254 N.J. 558 (2023)	passim
<u>State v. Weaver</u> , 219 N.J. 131 (2014).....	55
<u>State v. Weston</u> , 222 N.J. 277 (2015)	passim
<u>United States v. Wade</u> , 388 U.S. 218 (1967)	32

STATUTES

N.J.S.A. 2C:11-3(a)(1).....	1
N.J.S.A. 2C:11-3(a)(2).....	1
N.J.S.A. 2C:39-4(a)	1
N.J.S.A. 2C:39-5(b)	1
N.J.S.A. 2C:39-7(b)	1
N.J.S.A. 2C:44-3(a)	1

OTHER AUTHORITIES

Frank M. Coffin, <u>On Appeal: Courts, Lawyering, and Judging</u> 84-85 (1994)	49
--	----

RULES

<u>N.J.R.E.</u> 404(b).....	39
<u>N.J.R.E.</u> 602	31
<u>N.J.R.E.</u> 611	24, 41

<u>N.J.R.E. 611(a)</u>	24
<u>N.J.R.E. 611(a)(1)</u>	36
<u>N.J.R.E. 611(a)(2)</u>	36, 37
<u>N.J.R.E. 701</u>	24, 30, 31, 42
<u>R. 2:10-2</u>	34, 54
<u>Rule 1:8-8(a)</u>	50

TABLE OF CITATIONS

The following citation form is used:

Da = Defendant’s appendix

Db = Defendant’s brief.

Dbs = Defendant’s supplemental brief

1T = sentencing transcript, dated March 17, 2017

2T = plea hearing transcript, dated March 9, 2018

3T = pretrial conference transcript, dated November 12, 2019

4T = motion hearing transcript, dated July 13, 2021

5T = hearing transcript, dated September 22, 2022

6T = Miranda hearing transcript, dated September 28, 2022

7T = Miranda decision transcript, dated September 29, 2022

8T = trial transcript, dated October 4, 2022

9T = trial transcript, dated October 5, 2022

10T = trial transcript, dated October 6, 2022

11T = trial transcript, dated October 7, 2022

12T = trial transcript, dated October 11, 2022

13T = trial transcript, dated October 12, 2022

14T = trial transcript, dated October 13, 2022

15T = motion for new trial transcript, dated November 3, 2022

16T = motion decision transcript, dated December 6, 2022

17T = sentencing transcript, dated December 8, 2022

Pa = State’s Appendix

PSR = Adult Pre-Sentence Report

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On June 27, 2018, a Passaic County Grand Jury returned Indictment No. 18-06-592-I against defendant Ferreie Johnson, charging him with first-degree murder, in violation of N.J.S.A. 2C:11-3(a)(1) and/or (2) (count one); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (count two); second-degree unlawful possession of a handgun without a permit, in violation of N.J.S.A. 2C:39-5(b) (count three); and second-degree certain persons not to have weapons, in violation of N.J.S.A. 2C:39-7(b) (count four). (Da8-11).

On October 13, 2022, a jury found defendant not guilty of first-degree murder and aggravated manslaughter as a lesser included offenses of murder, but guilty of reckless manslaughter as a lesser included offense and weapons offenses. (14T26-10 to 27-22; Da15-17). At the conclusion of his trial, defendant pleaded guilty to the certain persons not to possess firearms charge. (14T38-5 to 60-11).

On December 8, 2022, the judge granted the State's application to sentence defendant as a persistent offender. (17T76-11 to 78-10; Pa141). The judge sentenced defendant to twenty years subject to NERA for reckless manslaughter and to two concurrent ten-year prison terms for his firearms convictions as Graves Act extended terms with five-year parole disqualifiers.

(Da19-21; 17T102-2 to 103-5).

On March 8, 2023, defendant filed a corrected notice of appeal. (Da22-26).

COUNTERSTATEMENT OF FACTS

On Friday, March 30, 2018, the victim, 22-year-old Parker Sams (“Sams”) and his girlfriend Tamika Johnson¹ (“Tamika”) who was also the mother of his daughter, had plans to attend a birthday party, but when their plans changed, they decided to go to D’Classico Lounge located at 80 Prospect Street at the corner of Prospect Street and Tony Lalama Blvd. in downtown Paterson. (Pa001; 8T76-24 to 77-2; 8T94-4 to 95-7; 10T136-3 to 140-18; see also S-244). Tamika arrived at D’Classico between 9:00 to 10:00 p.m.; Sams and his friend Davonta Stephenson (“Stephenson”) met Tamika there around 10:00 p.m. (8T95-13 to 19; 10T139-23 to 140-10).

Defendant, who was from 12th Avenue in Paterson, drove his sister, and Sade Hill in a “grayish” Ford Focus owned by Hill to D’Classico, arriving after 12:30 a.m. on Saturday, March 31, 2018, and met up with his “12th Avenue ” friends. (Da28-30; 9T163-11 to 173-14). Defendant saw the

¹ Tamika Johnson, who does not appear to be related to defendant, Ferreie Johnson, will be referenced in this brief as “Tamika” to avoid confusion with no disrespect intended.

“boys [he] had trouble with” from 5th Avenue, including an individual named Chris Blanco. (Da28-29; 9T163-1 to 5; 11T15-5).

Defendant walked up to Blanco and said, “yo what’s up?” (Da33). Having been in D’Classico for about five minutes, defendant and Blanco started fighting. (Da31-33; Da36; 9T164-1 to 5; S-274). Several other patrons can be seen fighting and throwing tables onto the DJ stand. (S-274).

Sams, Tamika, and Stephenson had been at D’Classico about one hour when this fight broke out. (8T95-18 to 25). No one in this group was involved in this fight. (8T96-1 to 3; 10T141-5 to 1). They ran out of the club into the Paterson Parking Authority Lot #7 behind D’Classico. (8T100-25 to 102-2). This lot was shown on S-244, a Google map photo admitted into evidence. (9T95-3 to 10; Pa143).

S-274 at 1:28:31 showed people rushing out of the club and one of those individuals, who was shirtless, being punched by a male from behind him. (9T125-12 to 127-2). The victim and his girlfriend can be seen leaving the club at S-274 at 1:25:42. (9T125-12 to 17). S-274 at 1:30:00, defendant was seen leaving the club with Hill. (9T128-19 to 130-15). At S-274 at 1:30:40 to 1:30:44, Hill tried to hold defendant back from running into the parking lot.

S-274 at 1:30:34 showed someone in the rear seat of the BMW get out,

run to Tony Lalama Blvd, meet the shirtless male there, and both of them started shooting into the parking lot. (9T126-22 to 132-14). Starting at S-274 at 1:30:54, several muzzle flashes could be seen on the video. (9T131-21 to 132-7). The shirtless individual, who had been punched, and another individual ran out of the club onto Tony Lalama Blvd. and obtained guns from a vehicle and then fired them into a crowd of people. (9T126-22 to 127-16). Starting at S-274 at 1:30:54, several muzzle flashes could be seen on the video. (9T131-21 to 132-7). S-274 at 1:30:34, someone in the rear seat of the BMW exited the vehicle, ran to the boulevard, met someone there, and then both individuals started shooting into the crowd in the parking lot. (9T130-24 to 132-14).

S-274 at 1:30:39 to 1:30:42, showed Hill, who was dressed in a pink jacket and blue jeans, unsuccessfully tried to restrain defendant outside the club Hill. Upon reaching the Ford Focus, Hill again tried to restrain defendant from retrieving something from the rear of the Focus. (See S-274 at 1:32:35 to 1:32:41). Defendant took this object, which appeared to be a gun, “racked it, put [his] hand down and started shooting.” (Da38; S-274 at 1:32:41 to 1:33:51; 9T177-6 to 12). Defendant and Hill returned to the Focus and attempted to leave the parking lot through the entrance, but were stopped by a police vehicle. (S-274 at 1:35:52 to 1:35:56). Defendant drove

the Focus around again and got in line behind a white car that was leaving through the exit. (S-242B at 00:00:10 to 00:01:17). On S-242B at 00:01:42, defendant can be seen getting into another vehicle. (9T145-5 to 15).

Sams, Tamika, and Stephenson were standing by Stephenson's BMW when they heard the first set of gunshots. (8T102-21 to 104-13; 10T143-1 to 144-8). They at first ducked down but then began to run out of the parking lot. (8T103-17 to 24; 10T144-24 to 145-2). Tamika ran to the middle of the parking lot with Parker behind her. (8T103-25 to 104-6; 10T148-8 to 149-19). Stephenson ran out of the parking lot by the attendant booth toward Main Street when he heard a second set of multiple gunshots. (8T103-11-7 to 11; 8T109-6 to 9; 8T114-10 to 11). Out of the corner of Tamika's eye, she could see that Parker had fallen to the ground. (10T149-18 to 23). She tried to pull him up, but she then saw blood. (10T149-21 to 23). Tamika called 911. (10T149-25).

The victim had been struck by gunfire and was lying on the ground. (8T48-25 to 49-8). Sams was pronounced dead at the hospital at 2:15 a.m. (10T11-6 to 8). He died of a gunshot wound to the "right side of [the] back of the head" with the direction of the wound being from back to front." (10T158-13 to 159-11; S-186). Several bullet fragments (S-252 to S-255) from the victim's skull were submitted to law enforcement for examination.

(10T50-18 to 54-25). Bullet fragment three (S-252) was a .38 caliber class discharged lead bullet with six lands and six grooves in a left-hand twist.

(10T107-7 to 110-2). Bullet number four was a discharged lead bullet of an unknown number of lands and grooves. (10T107-16 to 19)

Paterson Police responded to the scene on a report of shots fired at 1:49 a.m. on March 31, 2018. (8T39-3 to 43-19; 8T49-21 to 24; 9T8-3 to 8).

Detective Sergeant Richard Martinez, as the lead detective for this homicide investigation, looked for ballistics evidence and canvassed the area for surveillance videos and witnesses. (9T5-5 to 19; 9T11-7 to 11; 9T13-12 to 15). The detective recovered surveillance footage from D'Classico and Mancora Lounges, and the parking lot attendant's booth. (9T19-2 to 22).

Hill's Ford Focus became a vehicle of interest in the investigation. (9T106-1 to 3; 9T149-9 to 14). The police were able to read the license plate for this vehicle from the license plate reader at the parking lot attendant's booth and determine that the vehicle's owner was Hill. (9T150-2 to 7; 9T150-8 to 10). Defendant also showed up as an operator of this vehicle. (9T150-15 to 19). This vehicle was found on April 3, 2018. (9T150-24 to 151-6).

Also, on April 3, 2018, the police conducted a video-recorded interview of defendant after he was given and waived his Miranda rights. (9T161-20 to 177-17; S-95). Defendant, who was from 12th Avenue, admitted that he drove

his sister and Hill in her Ford Focus to D'Classico and met up with other friends from 12th Avenue. (Da28; 9T163-21 to 165-5; 9T171-2 to 23; 9T173-8 to 14). Defendant admitted to fighting with Blanco. (Da36-37; 9T173-23 to 174-7). When he, his sister, and Hill ran out of the club, two people started shooting. (Da30; 9T165-12 to 17; 9T170-20 to 24). Defendant heard seven to eight shots, but he did not see Blanco shooting. (Da33; 9T169-10 to 12). Defendant denied shooting anyone, even though he stated in his statement that “everybody says they said it’s me.” (Da30; Da33).

The police recovered several text messages from defendant's phone, which were admitted into evidence as S-140 to S-183. (10T18-21 to 25; S-140 to S-183; Pa69-95). In S-146, defendant asked whether his name came up in conversations with the police. (10T30-21 to 25); in S-150, when asked whether he had something to do with the shooting, defendant responded “IDK,” or “I don’t know.” (10T35-9 to 12); in S-154, defendant stated, “I’m getting low for a couple of days” (10T36-9 to 10); in S-155, defendant wrote, “I’m chilling. I’m going to distance myself a little. It’s a lot going on and you don’t need to be around me for ya’ll safety.” (10T36-17 to 19); in S-156, defendant wrote, “I might go to PA today by Cat for a week. She’s seeing now if it’s real.” (10T36-20 to 37-3); in S-164, defendant asked a friend to find out whether he had any warrants. (10T37-13 to 39-13); in S-169, defendant wrote,

“You right. My name came up and honestly, I didn’t do it.” (10T41-23 to 42-18); in S-174, defendant wrote, “That’s who,” meaning people from 5th Avenue “did it.” (10T45-7 to 13); in S-179, and defendant stated, “I’m dropping off my strap [firearm] on 28th.” (10T47-5 to 22).

The parties stipulated that if Detective Sergeant James Hearn, custodian of records in the Firearms Investigation Unit, were to testify, he would testify that his Unit’s records were thoroughly searched with regard to defendant’s birth date. (10T156-13 to 157-14). This search failed to reveal defendant making application for or being issued a permit to carry a handgun, permits to purchase handguns or firearms purchaser identification card or permit for an assault weapon. (S-96; 10T157-15 to 19).

The defense called Paterson Police Department Detective William Harrmann and former New Jersey State Police Major Carl Leisinger, the sole proprietor of Cal III Enterprises, LLC, which examines ballistics evidence. (11T22-17 to 23-2; 11T38-6 to 10).

Detective Harrmann testified that he was a part of the Street Crimes Unit when he received a radio call on March 31, 2018, at 9:19 p.m. (eight hours after the shooting of Sams) from the Intel Division that there were individuals loitering with armed weapons in the 5th Avenue Grimes Place area. (11T8-2 to 6; 11T17-6 to 19-16). The police noticed a black BMW parked in a fire

lane. (11T8-17 to 19). Three individuals – Christopher Blanco, Troy Staton, and Jahsett Carr – were arrested. (11T15-5 to 7). The police recovered two firearms – a .38 Special (a Colt officer’s model .39 caliber weapon) and a .22 caliber Heritage Arms Rough Rider from the BMW. (11T15-12 to 16).

Leisinger was qualified as an expert in firearms and ballistics, and testified that bullet fragment number three recovered from the victim had six lands and grooves with a left-hand twist that matched the lands and grooves of the interior of the .38 Colt Officer’s Model. (11T36-23 to 37-9). On cross-examination, Leisinger admitted that the recovered bullet fragment was within the .38 “class” of bullets, which could fall within “any number of 1,000 guns,” and he did not test the actual recovered Colt gun with the bullet fragment number three. (11T41-1 to 43-24; 11T46-14 to 16).

The defendant did not testify. (10T171-14 to 176-6).

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE PROPERLY ADMITTED DEFENDANT’S STATEMENT

The judge’s decision that defendant’s will was not overborne and that he freely, knowingly, and intelligently waived his Miranda rights and voluntarily made statements was amply supported by the sufficient credible evidence in

the record. This Court should affirm that ruling.

At the hearing, Detective Martinez testified on behalf of the State. (6T4-17 to 17-9; 6T41-12 to 53-20). The State also adduced and admitted into evidence a videotape (S-94) of defendant's interview and defendant's signed Miranda rights form (S-93). (6T14-24 to 15-1; accord 7T7-17 to 19). The videotape was played in its entirety. (6T17-11 to 41-10; 7T7-18 to 19; S-94). The State also provided the judge with a transcript of this statement. (Da27-43; S-95; 6T16-23 to 17-6).

The detective testified that on April 3, 2018, the police detained defendant, placed him in an interview room, and un-handcuffed him. (6T42-24 to 43-9; S-94). The police conducted about a 19-minute videotaped interview. (Ibid.; 6T16-5 to 6; 6T41-9 to 10).

Defendant stated that he drove Sade Hill, his sister, and another female in Hill's Ford Focus to D'Classico Lounge arriving after 12:30 a.m. on March 31, 2018. (Da28-30; S-94; 6T22-163-11 to 173-14). Defendant and his friends from 12th Avenue saw the "boys [he] had trouble with" from 5th Avenue. Having been in D'Classico for about five minutes, defendant, and Blanco started fighting. (Da31-33; Da36; S-94; 6T31-2 to 9).

When defendant, his sister, and Hill ran out of the club, two shooters, one from the parking lot, and another from the street, were shooting at them.

(Da30; Da32-33; 6T21-14 to 20; 6T25-8 to 14). Upon hearing seven to eight shots, defendant, his sister, and Hill ran to the Ford Focus and left the parking lot. (Da33-35). Defendant denied shooting anything, even though he told the police, “the name everybody says they said it’s me.” (Da33). When the detectives told defendant that the surveillance videos showed him shooting a gun, he denied that he either possessed or shot a gun. (Da30).

Detective Martinez testified that when defendant was detained and questioned, he was a “person of interest” who had not yet been arrested. (6T42-5 to 18). When defendant twice asked Martinez whether he was “under arrest,” the detective told defendant “no,” because he had not been “charged,” and the police had not received approval from the Passaic County Prosecutor’s Office to charge defendant with homicide. (Da27-28; Da38-39; S-94; 6T17-23 to 19-9; 6T33-20 to 23; 6T41-12 to 23). When defendant asked at the end of the interview what the charges would be, the officer told him, “I don’t know.” (Da43).

The policy regarding charging first-degree crimes or homicides was for the police to obtain the Passaic County Prosecutor’s Office’s prior approval. (6T41-12 to 19). As a matter of policy, the police were not permitted to charge anyone with a homicide without prosecutorial approval, even if the police had probable cause to arrest them for homicide. (6T41-20 to 42-4).

Detective Martinez testified that by the time the police had interviewed defendant, they had already interviewed other witnesses and reviewed surveillance videos and had seen him “rack” a gun. (6T45-6 to 46-1). The police also knew they had enough evidence to charge him with gun possession, which did not require prosecutorial approval. (6T46-2 to 8; 6T48-8 to 19).

When the police advised defendant they had a video of him shooting a gun, he replied, “I believe you I mean if I . . . I ain’t . . . ya already got that and then like cause I’m saying if I’m not under arrest I rather bring in a lawyer for this like.” (Da39). Martinez did not review defendant’s Miranda rights after he mentioned the word “lawyer.” (6T50-15 to 51-4). The detective did not recall whether defendant had smelled of alcohol and defendant did not indicate that he had taken ecstasy the night of the shooting. (6T43-13 to 21).

The State conceded that defendant was in custody and interrogated, but there was no obligation to inform him of any charges because none had been filed. (7T8-4 to 6). The State also argued that defendant had a clear understanding of why the police were asking him questions because they told him at the outset that their questions related to the D'Classico shooting. (7T8-4 to 9).

A. The Judge Properly Found That Defendant Waived His Rights

After considering the videotaped interview, Detective Martinez’s

testimony, defendant's signed Miranda form, and counsel's arguments, the judge admitted defendant's statement to police, finding, under the totality of circumstances, that defendant "freely, knowingly, and intelligently waived his Miranda rights and voluntarily made statements." (7T11-8 to 21-13; Da14).

In admitting defendant's statement, the judge first found that Detective Martinez, who testified in a calm and non-confrontational manner on direct and cross-examination, was a credible witness. (7T11-8 to 10; accord 6T4-17 to 17-9; 6T41-12 to 53-20). Appellate courts defer to judges' credibility determinations because they have "a better perspective than a reviewing court in evaluating the veracity of a witness." C.R. v. M.T., 248 N.J. 428, 440 (2021) (internal quotations omitted); State v. Nash, 212 N.J. 518, 542 (2013) (recognizing "appellate court's reading of a cold record is a pale substitute for a trial judge's assessment of the credibility of a witness he has observed firsthand.").

The judge found that "[n]othing in the record demonstrates that Defendant was confused about any of these rights, nothing before the Court even slightly indicates that Defendant was under the influence of alcohol, ecstasy, or any other illegal or legal drug." (6T17-14 to 40-16; 7T15-6 to 10; accord S-93; S-94; S-95). She found that defendant was laughing, joking, and comfortable with the police, "animated, coherent, responded cogently to

questions, and was relaxed and friendly throughout the entirety of a very short interview. It's clear he was completely aware and coherent." (7T14-16 to 16-13; accord S-94; S-95). These credibility determinations are also entitled to deference on appeal because they were supported by sufficient credible evidence in the record. (S-93; S-94). Accord C.R., 248 N.J. at 440.

The judge also found that defendant was neither coerced, abused, nor exhausted by law enforcement or had his will overborne, given that he was uncuffed when brought into the interview room, was offered water, which he declined, was given two cigarettes that he smoked, and told he would be allowed to make a phone call. (Da27; Da43; S-94; 7T15-23 to 16-6). The judge also found defendant to be "very intelligent since the first question to police was whether he -- or not he was under arrest." (7T14-16 to 19). The judge found that defendant's question showed his "understanding of his rights even before he was advised of them by detectives." (7T14-20 to 22). Also, defendant's asking whether he was under arrest proved that during the questioning, he was unafraid to seek clarification if he were confused. (7T15-19 to 22).

The judge also noted that defendant was "fully advised" of his rights prior to the interrogation as shown by defendant's videotaped interview, Martinez's testimony, and the Miranda rights form itself. (7T14-22 to 15-2;

accord Da27). Defendant affirmed both verbally and in writing and by his conduct that he understood each Miranda right. (7T15-3 to 6; accord S-93; S-94). (7T16-23 to 17-11). Therefore, under the totality of circumstances, the judge found defendant had “acknowledged his understanding of each one of his Miranda rights, waived those rights in a knowing, intelligent, and voluntary manner, and proceeded with the interrogation. And later, in the interrogation invoked one of those rights.” (7T17-13 to 19). As for defendant being brought to the police station in handcuffs, the judge found that his handcuffing was “reasonable for the security and safety of law enforcement with a person suspected of shooting and killing another human being.” (7T17-23 to 18-2).

Appellate review of a judge’s factual findings is also limited and “deferential.” State v. Cohen, 254 N.J. 308, 318-19 (2023). Appellate courts must uphold a judge’s factual findings so long as those findings are supported by sufficient credible evidence in the record. In the “typical scenario of a hearing with live testimony, appellate courts defer to the trial court's factual findings because the trial court has the ‘opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.’” State v. S.S., 229 N.J. 360, 374 (2017) (internal quotations omitted). “Further, that deferential standard of review applies ‘regardless of whether the evidence is live testimony, a videotaped statement, or documentary evidence.’”

State v. McNeil-Thomas, 238 N.J. 256, 271 (2019) (quoting State v. S.N., 231 N.J. 497, 514 (2018)); see also State v. Miranda, 253 N.J. 461, 474-75 (2023) (applying the deferential appellate standard of review “even when the trial court's findings are premised on a review of a video or documentary evidence that is part of the appeal record”).

The judge’s comprehensive factual findings that defendant’s will was not overborne and that he knowingly and voluntarily waived his rights and that Martinez was a credible witness were amply supported by the credible evidence in the record, given Martinez’s testimony (6T4-17 to 17-9; 6T41-12 to 53-20), defendant's Miranda rights waiver form (S-93), her review of defendant's videotaped interview (S-94), and a transcript (S-95). (See also Da27-42; 6T14-24 to 15-1; 6T17-11 to 41-10). Accord Cohen, 254 N.J. at 318-19. Given her record-supported credibility and factual findings, the judge properly deemed defendant's statements he made prior to his ambiguous remark about an attorney admissible. (Da14; 7T26-12 to 14).

B. The Police Did Not Minimize Miranda.

Contrary to defendant's claims, the police did not minimize the importance of Miranda by telling him at the outset of his interview that they wanted to “talk to him real quick,” which statement was immediately followed by the police saying, “I’m gonna give you your rights and (inaudible) all

right?,” which the judge found defendant understood prior to the police giving him his Miranda rights. (Da27; 6T17-25 to 18-2; 7T14-20 to 15-22).

Defendant's claims that the “real quick” comment in conjunction with telling him that he was not under arrest amounted to the same minimization of Miranda at issue under State v. O.D.A.-C., 250 N.J. 408, 421-23 (2022), should also be rejected.

After finding Detective Martinez to be a credible witness, the judge also found as fact that the police had not minimized or misrepresented Miranda to defendant by stating they wanted to talk to him “real quick.” (7T20-14 to 22). She found that there was “[n]othing before” her that indicated that Martinez “was in any way deceitful or untruthful in his testimony, nor is there anything before the Court indicating that he had any interest in the outcome of the case or any bias towards” defendant. (7T11-20 to 24). The judge further found that Martinez’s testimony was “fully consistent with the video recording of the interrogation.” (7T17-20 to 22). The trial judge’s factual finding that Detective Martinez did not deceive defendant and that defendant voluntarily waived his rights is entitled to deference on appeal as these findings were supported by the record in the form of Martinez’s testimony, defendant's Miranda rights waiver form (S-93), and his videotaped interview (S-94). Cohen, 254 N.J. at 318.

Secondly, the judge found as fact that the police did interview defendant “quickly,” after informing him of his rights “completely and thoroughly,” since defendant’s interview was about 20 minutes, which the court ruled was “very quick” for a homicide investigation. (7T20-14 to 21-12).

The judge found defendant's reliance on O.D.A.-C. unavailing. (7T19-15 to 25-9). In O.D.A.-C., the police, in direct contravention of Miranda, told the suspect that the warnings were a mere “formality” twice; that his statements would be kept “confidential” and “will not work against” or “will not be used against” him, and confessing “could not hurt” and “could only help.” 250 N.J. at 422-23. While such comments “contradict and hollow out Miranda warnings [which] can negate their effectiveness and cast doubt on whether a defendant fully understood and knowingly waived his rights,” the Supreme Court still assessed the voluntariness of O.D.A.-C.’s waiver under the totality of circumstances. Id. at 423. The Court thus declined to establish a “bright-line rule that would require suppression any time an officer makes an improper comment during an interrogation.” Ibid. (emphasis added).

At best, defendant can only point to one solitary comment by the police telling him that they wanted to talk to him “real quick,” which was accurate given that the judge found that police did talk to him quickly for a homicide investigation. (7T20-14 to 21-12). The police statement to defendant that he

was not under arrest was accurate since, as the judge found he was not under arrest since no arrest warrant or complaint had been issued for him. State v. Sims, 250 N.J. 189, 213 (2022); State v. A.G.D., 178 N.J. 56 (2003). Police are not required to “speculate” about any charges that may later be brought. Sims, 250 N.J. at 213.

The judge found as fact that defendant was not misled by the “real quick” and “not under arrest” comments since the police told him at the outset that “[w]e see you on the video.” (Da28). Defendant, who was no stranger to the criminal justice system, knew how to invoke his Miranda rights if need be. (Da38-43). Accord State v. Perez, 334 N.J. Super. 296, 302 (App. Div. 2000) (finding that since defendant “was no stranger to the criminal justice system,” that he was aware of his “constitutional rights and knowingly waived them”), certif. denied, 167 N.J. 629 (2001). The judge emphasized that defendant “denied he had a gun, denied he was a shooter, denied he had anything to do with the death of Parker Sams” and “there were others that were shooting and he indicated as such others were shooting, not him and that if he – they had him on video he would need a lawyer.” (7T21-1 to 6). Under the totality of circumstances, therefore, the judge found defendant clearly “acknowledged his understanding of each one of his Miranda rights, waived those rights in a knowing, intelligent, and voluntary manner, and proceeded with the

interrogation. And later, in the interrogation invoked one of those rights” when the police told him that they had a video of him racking and firing a gun. (Da38; 7T17-13 to 19).

C. The Police Did Not Misrepresent Defendant’s Status When They Said He Was Not Under Arrest and No Charges Had Been Filed.

The judge’s factual findings that the police neither lied nor misrepresented his status nor acted in bad faith by telling defendant he was not under arrest and that no charges had been filed against him even though they had probable cause to arrest him for gun offenses. (7T23-22 to 24-3). She found that defendant voluntarily waived his Miranda rights and spoke with the police. Because these findings were supported by the record, namely Detective Martinez’s live testimony, defendant’s videotaped interview, and his signed Miranda rights waiver form, they are also entitled to deference on appeal. (Da28-43; S-93; S-94; S-95; 6T4-17 to 17-9; 6T41-12 to 53-20).

“Even though the police did charge [defendant] after his interview,” the judge noted that the police “were still investigating this matter,” given that there were multiple shooters the night Sams was shot, no ballistics information had been obtained nor any autopsy conducted at the time of defendant's April 3, 2018 interview. (7T24-3 to 8; accord 6T56-21 to 23) (police obtained a communications data warrant on April 6, 2018); 6T80-4 to 16 (police interviewed Xavier Harris on April 15, 2018 and Deaven Harris on April 17,

2018); and (9T194-1 to 12) (ShotSpotter official report of shots fired in the Paterson area dated three years after the shooting in April 2021). Due to her comprehensive credibility and factual findings, the judge properly admitted defendant's statement he made prior to asking for a lawyer.

D. The Admission of Defendant's Statement Was Harmless.

Given the overwhelming evidence of defendant's guilt, any alleged error in admitting his statement did not impact the verdict and was harmless beyond a reasonable doubt. State v. Derry, 250 N.J. 611, 634 (2022) (relying on “overwhelming evidence against defendants,” error in admitting testimony found harmless). Admission of defendant's redacted statement did not cause the jury to reach a result it would not have otherwise reached. (7T29-23 to 30-9).

First, while defendant admitted in his statement that he was present at D'Classico and was fighting, several people were also seen fighting. (6T24-10 to 13; 6T31-2 to 9; see also S-274). Nor did defendant ever admit to having a gun or shooting anyone in his exculpatory statement. (Da36; S-94; S-95A). Second, the video surveillance footage in S-274 and S-242B and defendant's text messages that he was disposing of his gun were overwhelming evidence of defendant's guilt. (10T47-5 to 22; S-179 (defendant stated, “I'm dropping off my strap [firearm] on 28th”)).

Lastly, there was no rush to judgment to convict defendant. Rather, the jury thoroughly scrutinized the evidence to satisfy its charge of determining whether defendant was guilty beyond a reasonable doubt. On the first day of deliberations, the jury deliberated from 2:26:10 p.m. to 4:04:04 p.m., or for 98 minutes. (13T212-25 to 213-2). On the second day, the jury deliberated from 9:38:34 a.m. to 10:48:48 a.m., or for 60 minutes; from 10:52:29 a.m. to 11:07:26 a.m., or for 15 minutes; and from 11:49 a.m. to 12:30 p.m., or 41 minutes. (14T13-2 to 5; 14T15-25 to 16-3; 14T22-13 to 23-10). The jury's total deliberation time was 3 hours and 34 minutes. The jury requested a large monitor on which "to see video footage easier." (14T13-15 to 16). In addition, the jury asked the judge, "Are we allowed to ask how tall the Defendant is?" (14T17-12 to 13). The judge told the jurors they had to make a determination based on what had been provided to them in evidence. (14T17-17 to 18-2). The judge also instructed the jury six times in her initial and final charge to consider all of the evidence to determine whether the State had proved defendant guilty beyond a reasonable doubt. (8T8-8 to 9; 13T86-3 to 6; 13T102-25 to 103-1; 13T110-10 to 14; 13T113-15 to 22; 13T114-20 to 25).

In its careful and conscientious review of all of the evidence, including the surveillance footage and defendant's text messages, the jury acquitted

defendant of first-degree murder and aggravated manslaughter as lesser included offenses of murder, but guilty of reckless manslaughter as a lesser included offense for having indiscriminately shot a gun into a crowd of people killing the victim. (14T26-10 to 27-22; Da15-17).

Thus, any alleged error in admitting defendant's statement was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967) (expounding the "harmless beyond a reasonable doubt" standard for cases implicating constitutional error); State v. Maltese, 222 N.J. 525, 550 (2015) (applying the "harmless beyond a reasonable doubt" standard to the defendant's assertion that police violated his Miranda rights in his interrogation). The circumstantial evidence against defendant in the form of the videos S-274 and S-242B, and his text messages, made the admission of defendant's statement was harmless beyond a reasonable doubt. The jury reached a fair result by finding defendant guilty of reckless manslaughter.

For the foregoing reasons, the trial judge properly admitted defendant's statement. This Court should affirm.

POINT II

THE JUDGE PROPERLY EXERCISED
HER DISCRETION UNDER N.J.R.E.
611(a) TO CONTROL THE MANNER IN
WHICH THE DETECTIVE TESTIFIED
ABOUT THE SURVEILLANCE
VIDEOS.

In accordance with N.J.R.E. 611(a), the judge properly exercised her discretion to control the manner in which Detective Martinez's testimony was adduced about the fourteen lengthy surveillance videos. The detective's testimony comported with the two-prong lay opinion rule under N.J.R.E. 701. This testimony was based on the case detective's personal review of the video and on his first-hand knowledge of the crime scene investigation. This testimony was helpful to the jury in that it explained the steps taken during the detective's investigation of the shooting scene and oriented the jury to the relevant portions of the numerous videotapes as to how the victim was shot and killed by defendant. The jury carefully reviewed these videos, acquitted defendant of first-degree murder and aggravated manslaughter and convicted him of reckless manslaughter. (Da15). There was no error, let alone plain error in the admission of this testimony. This Court should affirm the judge's decision to admit this testimony into evidence.

A. Video Surveillance Footage

Detective Martinez and his investigation team obtained several surveillance videos from inside and outside D'Classico Lounge, outside the Mancora Bar, and the Paterson Parking Lot Site #7's attendant's booth. (9T19-2 to 23-18). The detective laid a foundation for the thirteen videos and their various subparts admitted into evidence as S-240; S-241 with its six

subparts S-241-A to S-241F; S-242 with two subparts S-242A to S-242B; S-243 with its four subparts S-243A to S-243D, and are attached in the State's appendix as Pa96 to 109. (9T30-7; 9T34-14; 9T37-19; 9T43-11; 9T56-14; 9T59-1; 9T61-8; 9T93-16; 9T95-1; 9T96-11; 9T97-20; 9T98-21; 9T100-5) are discussed below.² The prosecutor prepared a compilation of the above videos to use in his summation, which was admitted into evidence as S-274. (9T102-23).

1. S-241B (Camera Four); S-241E (Camera Eight); S-241F³

S-241B's cameras four and eight depicted D'Classico's interior dance floor. (9T27-21 to 28-24). The victim is wearing a light-colored heart T-shirt and dark-colored pants, standing by a column underneath the "Exit" sign where his girlfriend, wearing a light-colored dress and slippers, was sitting down with her legs crossed talking to a friend. (9T30-24 to 32-4). Camera 16 of S-241F also showed D'Classico's interior. (9T36-12 to 38-3).

2. S-240

² Some of the videos have their own timestamps embedded within them. This brief will try to cite to those timestamps if they reflect the true time. Some timestamps, however, are incorrect by hours. Lastly, this brief cites to S-274's running time counter as opposed to the timestamps that appear in the individual clips pieced together in this compilation video. (9T214-7 to 14).

³ The prosecutor did not play the videos in numerical order.

S-240 was a multi-camera angle surveillance video that showed D'Classico's exterior including the parking lot and Tony Lalama Blvd. (9T38-8 to 40-23; 9T43-11 to 44-2). Detective Martinez testified that camera five showed a late model BMW operated by Blanco arriving at the club. (9T44-16 to 48-21). When defense counsel objected to any questioning about defendant fighting with Blanco, the judge elicited testimony from the detective that defendant admitted to being in a fight in his statement, but at the time the detective reviewed the S-240 footage, he did not then know defendant had been in a fight. (9T46-2 to 49-5). When asked if her line of questioning clarified the detective's testimony, defense counsel stated, "Yes, Judge." (9T49-7 to 9). Detective Martinez testified that these people, later identified as Blanco, Harris, and "Jah" exited this BMW and walked into D'Classico. (9T49-20 to 51-14).

3. S-241A; S-241D; S-241C

Detective Martinez testified that S-241A, S-241D, and S-241C depicted Blanco, Harris, and Jah arriving and entering the club. (9T54-10 to 60-9). When the prosecutor tried to continue to have the detective review and authenticate the remaining videos, defense counsel objected because the prosecutor kept saying, "there they are" referencing these three males. (9T62-22 to 63-10). It was at this point that the judge ruled this testimony was not

harmful to defendant's case, as discussed more fully below.

4. S-242A; S-242B

S-242A, Mancora Bar's external camera, showed the parking lot behind D'Classico. (9T90-21 to 23). S-242B will be discussed below in Subpoint 7.

5. S-243A to S-243D

S-243A to S-243-D showed surveillance footage from the cameras attached to the parking lot's attendant's booth. (9T95-3 to 99-6).

6. S-274 (Composite Video)

S-274 was a 95 minute, 56 second compilation of all the relevant clips of surveillance footage already admitted into evidence in a sequential order of the events that unfolded in the victim's shooting death from D'Classico's interior and exterior cameras, the Mancora Bar's and the attendant booth's cameras. S-274 was admitted into evidence "without objection." (9T102-1 to 102-23).

The prosecutor fast forwarded S-274 to where Detective Martinez testified that the video showed a grayish-colored Ford Focus backing into a designated handicapped parking space to the left of the attendant's booth. (9T106-21 to 108-2). Based on the detective's investigation, the Focus was "involved in this incident." (9T107-25 to 108-2).

In response to the prosecutor's question, Detective Martinez identified the individual in the middle of the frame standing next to a person with the

number “24 on his jacket” either as the “individual” or the “suspect.” (9T113-10 to 25). The detective testified that this individual was wearing a “[d]ark colored hooded sweatshirt with a silver zipper in the middle” and “work boots and sweatpants or jeans.” (S-274 at 1:18:05 to 1:18:09; 9T115-14 to 17).

S-274 at 1:20:00, Hill, who the detective had learned through his investigation was the Ford Focus’s registered owner, could be seen at the bar in a “pinkish, orang-ish” jacket. (9T120-10 to 121-3). The detective testified that this camera “sometimes” changed the “hues o[r] the colors” of clothing. (9T120-21 to 25).

S-274 at 1:22:26 to 1:31:11 showed patrons rushing out of the club to get away from a commotion or a fight near the DJ stand. (9T121-4 to 122-5). S-274 at 12:38:05 a.m. on March 31, 2018, showed the victim escorting Tamika out of the club. (9T122-19 to 125-17). The detective testified that one of these people, who was shirtless, was punched by a male from behind him. (9T125-12 to 127-2).

S-274 at 1:30:00, defendant, referenced as the “suspect later in the investigation” was seen leaving the club with Hill. (9T128-19 to 130-15).

Detective Martinez testified that S-274 at 1:30:34 showed someone in the rear seat of the BMW got out, ran to Lalama Blvd, met the shirtless male there, and both of them started shooting into the crowd in the parking lot.

(9T126-22 to 132-14). Starting at S-274 at 1:30:54, several muzzle flashes could be seen on the video. (9T131-21 to 132-7).

Thereafter, defendant and Hill returned to the Ford Focus. (9T134-22 to 136-13). At S-274 at 1:32:30, defendant, identified as the “suspect,” rummaged around the back seat of the Focus, removed what appeared to be a gun and shot it into the crowd. (9T136-14 to 21).

At S-274 at 1:33:01, defendant and Hill again returned to the Focus, drove around and then tried to leave the lot through the entrance, but his passage was blocked by a responding police car. (9T137-2 to 138-25).

7. S-242B⁴

After finishing with S-274, the prosecutor showed the jury S-242B at 0:00:27 to 0:00:47, which also showed the Focus being blocked by police. (9T142-1 to 144-1). The Focus reversed and drove around again, but this time getting behind cars properly exiting the lot. (9T139-12 to 142-21). Detective Martinez testified that S-242B at 0:00:45 to 0:00:50 showed the male suspect exit the Focus, walk to the right, and board another vehicle. (9T144-14 to 25). The detective noted that the victim’s body was located to the right of where the cars were leaving the lot. (9T145-5 to 15).

⁴ This video does not contain the actual time. (9T143-19 to 22).

On cross-examination, defense counsel elicited Detective Martinez's testimony that the BMW depicted in S-240 was the same BMW that was pulled over later that night in which a .38 special was recovered. (9T216-4 to 11). Defense counsel also elicited testimony from the detective that the two shooters on Tony Lalama Blvd. could be seen on S-240, and that one of those shooters was Jah. (9T207-10 to 13; 9T213-3 to 7). The detective also testified that people could be seen leaving this BMW, running to the boulevard, and shooting guns from which muzzle flashes could be seen in the middle of the frame at S-240 at 2:57:38. (9T215-10 to 216-20).

The admissibility of Detective Martinez's testimony about these fourteen surveillance videos was entrusted to the sound discretion of the trial court. Appellate courts review trial court's evidentiary rulings for abuse of discretion. State v. Allen, 254 N.J. 530, 543 (2023); State v. Watson, 254 N.J. 588, 602 (2023) ("trial court's evidentiary ruling on the admissibility and scope of narration testimony is subject to review for abuse of discretion"). Appellate courts will not supplant the trial judge's judgment with their own unless the judge's evidentiary ruling is "'so wide of the mark' that it constitutes 'a clear error in judgment.'" Allen, 254 N.J. 543 (internal quotations omitted).

N.J.R.E. 701 permits a lay witness, such as Detective Martinez, to testify in the form of an opinion or inference if the testimony "(a) is rationally based

on the witness's perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue.” Allen, 254 N.J. at 543-44. An “investigator who has carefully reviewed a video a sufficient number of times prior to trial can therefore satisfy the rule’s ‘perception’ and ‘personal knowledge’ requirements as to what the video depicts.” Watson, 254 N.J. at 601. Absent a change in a defendant's appearance by the time the trial starts, “juries,” rather than a police officer, “can decide for themselves – without identification testimony from law enforcement – whether the person in a photograph is the defendant sitting before them.”) (quoting State v. Lazo, 209 N.J. 9, 23 (2012)). State v. Sanchez, 247 N.J. 450, 457 (2021) (“when the witness has had little or no contact with the defendant, it is unlikely that his or her lay [identification] opinion testimony will prove helpful” to the jury).

But in Watson, a case decided after defendant's trial, an investigator who has carefully reviewed a video recording can satisfy the “perception” prongs under N.J.R.E. 701 and 602 and the “helpfulness” prong under N.J.R.E. 701 and offer lay witness testimony, by “drawing attention to key details that a jury might otherwise overlook – as is the case, for example, with a potentially confusing, complex, or unclear recording – such evidence can be particularly helpful.” 254 N.J. at 569.

“Although an investigator's specific comments can assist a jury in

determining facts in issue, the rules of evidence do not allow for continuous, running commentary on video evidence by someone who has merely studied a recording.” Ibid. Thus, investigators should give “focused responses to specific questions; they can provide objective, factual comments but not subjective interpretations; they may not comment on facts that are reasonably in dispute, which should be left for the jury to decide; and they should not offer testimony based on inferences drawn from other evidence.” Ibid.

In response to defendant's motion to dismiss the indictment, the State provided a summary of these thirteen videos to defense counsel and the motion court as required by Watson, 254 N.J. at 569 (a party who “intends to present narration evidence should provide opposing counsel a written summary of the proposed testimony before trial. The parties can then ask the court to address any disputed areas at a Rule 104 hearing.”). (Pa23-26).

At the oral argument for defendant's pre-trial hearing pursuant to United States v. Wade, 388 U.S. 218 (1967) and motion to dismiss the indictment, the State conceded that Sanchez, 247 N.J. at 457, applied and thus no law enforcement officer would take the stand and identify the person in the video as defendant. (Da12; 9T88-17 to 21; see also 4T7-1 to 5). The judge deemed defendant's request for a 104 hearing as moot, given the State’s concession. (Ibid.; 9T86-16 to 87-3). Except for identifying defendant as one of the

persons involved in the fight at D'Classico, which defendant readily admitted to in his recorded statement, Detective Martinez never identified defendant as the one who obtained a firearm from the Focus and shot and killed the victim. (9T136-7 to 21). This person was referenced only as the “suspect.” (9T136-7 to 21).

These thirteen videos and the compilation video S-274 were lengthy and presented a complicated scenario involving three groups of relevant individuals from about 11:00 p.m. on March 30, 2018, to about 12:45 a.m. on March 31, 2018: the first group: the victim, his girlfriend, and their friends arrived at D'Classico between 10:00 p.m. and 11:00 p.m. (10T139-24 to 140-2); the second group: defendant and his friends, who arrived at the club at 12:30 a.m. (9T166-15 to 18); and the third group: later identified as Blanco, Harris, and Jah, who had arrived before defendant and later engaged in a fight with him. (9T164-1 to 5). These three groups along with tens of other patrons arrived at different times to D'Classico. (S-274). The victim, his girlfriend, and Stephenson did not know defendant and were not involved in the fight that defendant incited at about 12:30 a.m. (S-241B; 8T95-13 to 96-3; 9T56-20 to 57-11; 9T44-16 to 48-21; 10T140-3 to 142-55). Thus, the jury would need Sergeant Martinez’s assistance in pointing out these key individuals, the events leading up to the victim being shot and killed in the middle of D'Classico’s

parking lot, and the location of shooters from different locations in the lot.

Contrary to defendant's claim, Sergeant Martinez's testimony, as discussed above, did not constitute prolific narration (Db31), "summarized his opinion" (Db37); or was "harmful and gutted the ability of the jury to evaluate that evidence on its own." (Db39). In fact, defense counsel did not object to the admission of these fourteen videos after Detective Martinez's authentication and brief explanation of what a particular video was depicting in accordance with the court's guidance on the admission of this testimony. (9T29-14 to 30-7 (S-241B); 9T34-6 to 14 (S-241E); 9T37-13 to 19 (S-241F); 9T42-25 to 43-11 (S-240); 9T56-9 to 14 (S-241A); 9T58-19 to 25 (S-241D); 9T61-3 to 8 (S-241C); 9T91-17 to 93-16 (S-242A); 9T94-21 to 25 (S-242B); 9T96-6 to 11 (S-243A); 9T97-15 to 20 (S-243B); 9T98-16 to 21 (S-243C); 9T99-24 to 100-5 (S-243D); 9T102-16 to 23 (S-274)).

When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard. State v. Singh, 245 N.J. 1, 13 (2021) (citing R. 2:10-2). "Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." Ibid. (quoting State v. R.K., 220 N.J. 444, 456 (2015)). Thus, plain error is a "high bar and constitutes 'error not properly preserved for appeal but of a magnitude dictating appellate

consideration.” Ibid. (quoting State v. Santamaria, 236 N.J. 390, 404 (2019)).

“To determine whether an alleged error rises to the level of plain error, it ‘must be evaluated’ ‘in light of the overall strength of the State's case.’” Id. at 13-14 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)). Appellate courts “may reverse on the basis of unchallenged error only if the error was ‘clearly capable of producing an unjust result.’” State v. Ross, 229 N.J. 389, 407 (2017). It is defendant's burden to show that the judge committed plain error. State v. Weston, 222 N.J. 277, 295 (2015). A defendant has this burden because “‘to rerun a trial when the error could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.’” Id. at 294-95 (quoting State v. Macon, 57 N.J. 325, 333 (1971)).

Moreover, this Court has noted that “‘when counsel does not make a timely objection at trial, it is a sign ‘that defense counsel did not believe’ the error prejudiced the defense. State v. Canfield, 470 N.J. Super. 234, 332 (App. Div. 2022) (quoting State v. Pressley, 232 N.J. 587, 594 (2018) (internal citations omitted), affirmed as modified, 252 N.J. 497 (2023)). ‘The absence of objections ‘weighs against [the] defendant's claim that errors were ‘clear’ or ‘obvious.’ Indeed, ‘[i]t [is] fair to infer from the failure to object below that in the context of the trial the error was actually of no moment.’” Id. at 332

(quoting State v. Nelson, 173 N.J. 417, 471 (2002) (alterations in original) (internal citations omitted).

“The mere possibility of an unjust result is not enough.” State v. Funderburg, 225 N.J. 66, 79 (2016). This standard “is a ‘high bar,’ requiring reversal only where the possibility of an injustice is ‘real’ and ‘sufficient to raise a reasonable doubt as to whether the error led the jury to a result it might otherwise not have reached.’” State v. Alessi, 240 N.J. 501, 527 (2020) (quoting Santamaria, 236 N.J. at 404; Macon, 57 N.J. at 336). There was no error, let alone plain error in the admission of this surveillance video testimony.

Given the judge’s authority under N.J.R.E. 611(a)(1) and (a)(2) to exercise reasonable control over the mode of presenting evidence and to prevent the jury from being confused by these numerous videos, the court correctly directed the State to have Sergeant Martinez provide proper and relevant testimony. Horne v. Edwards, 477 N.J. Super. 302, 323-24 (App. Div. 2023). The judge’s guidance regarding the admission of the detective’s testimony about these videos was critical given the judge’s several statements that the jury was “lost” during the presentation of this video evidence. (9T45-17 to 18; 9T63-8 to 72-14; 9T109-16 to 23). “A trial judge is responsible for the control and management of the trial and is vested with wide discretion to

perform this function.’” Horne, 477 N.J. Super. at 324 (quoting State v. T.E., 342 N.J. Super. 14, 29 (App. Div. 2001)).

Because the prosecutor had established several times that Blanco, Harris, and Jah had arrived at D'Classico, the judge ordered him to fast forward to something of evidentiary value. (9T64-17 to 21). The prosecutor then advised the judge that he was reviewing the individual videos in this lengthy manner because defense counsel objected to the prosecutor just showing the jury the composite S-274 video, which was “one flow . . . that streams and it goes through – it’s a little bit lengthy, but it’s a lot shorter than” these other thirteen videos. (9T66-5 to 8). When defense counsel stated that he was going to object, the judge stated, “[y]ou’re gonna box him in on both sides, That’s not fair.” (9T66-9 to 12). Defense counsel objected that the prosecutor should not narrate every single step of the surveillance footage. (9T66-13 to 16). The judge disagreed ruling that “playing footage and not asking a question” was not “connected.” (9T66-23 to 24). Accord Watson, 254 N.J. at 569 (“investigators should give focused responses to specific questions”); N.J.R.E. 611(a)(2) (the court can control the mode of evidence to “avoid wasting time”). The judge had already opined to the prosecutor, “you’re losing the jury” with the repetition of the same evidence about Blanco, Harris, and Jah. (9T64-17 to 65-18). The judge ruled that the prosecutor did not need to show

the video's entire footage, but he could simply have the detective look at the first scene and describe the camera and date and then authenticate the video by stating that he had reviewed it before and to his knowledge the video was complete with no changes. (9T66-17 to 67-12; 9T70-17 to 71-3). When asked whether this approach would be satisfactory, defense counsel responded, "That's fine, Judge." (9T71-3 to 72-15).

The court concluded, "I don't know that there's any requirement that you've put this jury to watch every single second of every camera because what is going to happen is that they're going to get lost in the quagmire; right? Rather than getting to the point." (9T72-7 to 12). The prosecutor agreed, but defense counsel stated that the State's compilation was from the State's perspective and cut off showing the two shooters. (9T72-15 to 19). The prosecutor said that the compilation did include the two Tony Lalama Blvd. shooters and the shooting from the Mancora Bar's surveillance footage. (9T72-20 to 73-1; accord S-274). The court ruled that the State's compilation was not barred and the defense could show whatever footage it wanted to that was not present on the State's DVD. (9T73-7 to 17). In fact, defense counsel cross-examined the detective on the footage from S-242B showing the two shooters on Tony Lalama Blvd. and the BMW from which a shooter obtained a gun. (9T203-12 to 204-21).

While the court agreed with defense counsel that the detective should have referred to defendant and the other three males as “suspects,” the judge found this testimony was harmless. (9T78-5 to 8). When counsel objected to “unnecessary narration,” the judge stated that the fight was “not the point of this case,” and there was no prejudice to defendant since his statement was coming into evidence where he admitted he had been in a fight. (Da27-43; 9T79-19 to 81-17; accord 9T161-20 to 177-17; 12T3-9 to 13 (“I don’t know why he’s [the prosecutor] showing so much footage but it doesn’t necessarily hurt you in any way, shape or form.”)).⁵ The judge had already ruled that defendant’s statement before he asserted his right to counsel was voluntary and admissible. (Da14).

While the court acknowledged that the State could use the fight as a theory for defendant shooting into the crowd, there was no prejudice to defendant. (9T81-12 to 16). Defendant had not been charged with fighting and stated in his statement that he had taken off running and had nothing to do with the shooting. (9T81-19 to 82-3). Moreover, several people were seen fighting including the shirtless shooter in S-274.

⁵ The judge gave the jury a N.J.R.E. 404(b) limiting instruction on the proper use of the fight evidence as a possible motive for defendant’s shooting into the crowd. (14T100-6 to 102-17)

After Detective Martinez had authenticated S-242A, the judge again stated that this footage made “no sense to the jury at all.” (9T91-23 to 92-4).

The judge then instructed the jury as follows:

Everything is being moved into evidence. It is a boring part of the process, but legally it's required that these items be moved into evidence. I just wanted to explain to you that at some point in this process, although it may not be right now, the items are being moved into evidence. Their relevance will become clear to you at some point in the future, all right? So I know you're like what the hell? It's hot. It's 300 degrees and I don't understand what's happening, so I just wanted to give you that instruction.

They -- each of them will explain their respective theories of what's important inside the footage and then it will be played for you. Do you understand?

[9T92-9 to 93-2.]

Neither counsel objected to this instruction. (9T93-4).

Later, when counsel objected to Detective Martinez's testimony about D'Classico's entrance, the judge, at sidebar, again rejected defense counsel's claim that the video should play without any testimony or any explanation. (9T109-11 to 23):

I'm just saying that the video is just playing, they [the jurors] don't know what they're supposed to be looking at. (Inaudible) they're just playing the footage and there's no explanation (inaudible) how the hell are they supposed to know what they're looking for.

. . . .

Because [defense counsel] you have to agree with me (inaudible) and there's video footage playing, nothing being asked or answered so that the jury knows to look here, look there -- tell me (inaudible). There's a lot going on in this video footage (inaudible).

[9T109-18 to 110-16.]

The judge concluded that the jurors needed to know what they were looking at in these videos, “otherwise they’re gonna [be] rewinding the entire thing.” (9T110-21 to 25). The judge thus ruled that the prosecutor is allowed to “say what is this, what is happening here” and he can say “it appears,” “whatever the case is, okay?” (9T111-1 to 4). Despite counsel’s claim that, the detective was providing “inappropriate narration,” the judge ruled that without “any direction this is completely useless to [the jurors]. I’m not trying to help the State. I am trying to get the jury to understand what they’re looking at and that’s what the Court does need to do.” (9T111-4 to 12).

“While reasonable minds may differ on the amount of narration testimony that should have been permitted in this case,” appellate courts “decline to substitute [their] judgment for the trial court's as to whether a police officer’s testimony was helpful to the jury.” State v. Watson, 472 N.J. Super. 381, 470 (App. Div. 2022), remanded on other grounds, 254 N.J. 558 (2023). Appellate courts “interpret N.J.R.E. 611 to afford the trial court broad

discretion to permit video narration testimony and also to impose limitations on such testimony.” Ibid.

Nor did Detective Martinez’s statements about defendant’s sweatshirt violate Watson. First, defendant’s sweatshirt was admitted into evidence without objection. (9T182-24 to 184-23; S-272). Second, defense counsel made no objection to the detective’s testimony that the suspect in S-274 was wearing a “[d]ark colored hooded sweatshirt with a silver zipper in the middle.” (9T115-10 to 18). Third, the detective testified that when the Focus was found on April 3, 2018, the police saw defendant who fit the “description of the male in the video wearing the same exact hooded sweatshirt.” (9T151-6 to 9). There was no objection to this testimony. (9T151-10).

The detective’s testimony about defendant’s sweatshirt comported with Singh, 245 N.J. at 19, where the Supreme Court found that a detective had properly testified that the sneakers depicted in a surveillance video were similar to the ones he saw the defendant wearing at the time of his arrest. Ibid. Because the detective “‘had first-hand knowledge of what the sneakers looked like’ from the arrest,” the Court found the testimony “‘was rationally based on his perception,’” which was ‘helpful to the jury’ even though the jurors ‘may have been able’ to compare the items. Id. at 19-20. The Court “explained that Rule 701 does not require that the lay witness have ‘superior’ ability or ‘offer

something that the jury does not possess.” Id. at 19. Equally here, Detective Martinez’s testimony that the sweatshirt in the video was similar to the one he saw defendant wearing at the time of his arrest was rationally based on his perception from having arrested and interviewed defendant.

Not only did defense counsel not object to this line of questioning about defendant’s sweatshirt, counsel actively elicited testimony that was favorable to defendant in that the detective admitted that he was not 100% sure about whether the sweatshirts were similar and that no gunpowder residue was found on defendant’s sweatshirt or other clothing. (9T217-7 to 18).

Nor was the State required to prove its case based on “forensic evidence” or the recovery of a gun as defendant claims. (Db26). The State can prove its case beyond a reasonable doubt based on either direct or circumstantial evidence. State v. Tindell, 417 N.J. Super. 530, 549 (App. Div. 2011) (“No distinction is made between direct and circumstantial evidence.”); State v. Mayberry, 52 N.J. 413, 437 (1968) (recognizing circumstantial evidence can be ““more forceful and more persuasive than direct evidence.””) (quoting State v. Corby, 28 N.J. 106, 119 (1958)).

As discussed in Point I.-D., there was no rush to judgment here. The jury performed its duty and carefully reviewed these videotapes and other evidence for 3 hours and 34 minutes. (13T212-25 to 213-2; 14T13-2 to 5; 14T15-25 to

16-3; 14T22-13 to 23-10). Because the jurors could not see key details, they requested a larger monitor. (14T13-15 to 17-7). The jurors also requested that the court advise them of how tall defendant was. (14T17-12 to 16). By its question, the jury was trying to determine whether the suspect who went to the Ford Focus and retrieved and shot a gun was indeed defendant.

Having carefully reviewed the videos, the jury acquitted defendant of first-degree murder and aggravated manslaughter as a lesser included offense of murder, but guilty of reckless manslaughter for having indiscriminately shot a gun into a crowd killing the victim. (Da15-17; 14T26-10 to 27-22). The detective's testimony about these videos hardly gutted the jury's ability to evaluate the evidence on its own.

In sum, Detective Martinez's testimony about these fourteen videos comported with the Rules of Evidence. The judge did not commit err, let alone commit plain error, in admitting this testimony about a complicated series of events resulting in defendant's recklessly shooting the victim who was merely standing in a parking lot with his girlfriend and other patrons who were escaping a fight in a club. The jurors carefully evaluated this evidence for themselves, asked questions of the court, and reached a just result. This Court should affirm defendant's convictions.

POINT III

THE JUDGE PROPERLY ALLOWED THE
JURY TO REVIEW THE SURVEILLANCE
VIDEO ON A LAPTOP IN THE
DELIBERATION ROOM

The issue here is whether the judge committed plain error by allowing the jurors to review a compilation of the surveillance footage, which contained no audio or witness statements, inside the jury room on a laptop computer. See State v. Knight, 477 N.J. Super. 400 (2023), certif. granted, 257 N.J. 244, 248 (2024). Defense counsel, however, agreed that the laptop was “clean” for its use by the jurors in the jury deliberation room. He made no objection to this procedure and repeatedly urged the jury in his summation to watch that “video” in support of the defense theory that it neither showed defendant located near the shooters on Tony Lalama Blvd. nor any muzzle flashes at defendant’s location. Moreover, the prosecutor did not show the video in slow motion and defendant does not claim that he did. (Db45-47). The juror’s review of the compilation video in its deliberation room, irrespective of whether they viewed it at either regular or slow-motion speed, did not cause it to reach a result it would not otherwise have. Defendant has waived any right to belatedly object to this procedure on appeal, and the judge did not err by allowing the jury to use the laptop in the deliberation room at defense counsel’s behest. Defendant received a fair trial, and his claims to the contrary should be denied.

As discussed in Point II, Detective Martinez authenticated and briefly described the events depicted on fourteen surveillance videos, which were admitted into evidence. The judge closely controlled the manner in which the detective testified about these videos.

In summation, defense counsel referenced the “video” seven times to support his theory that defendant was located near the parking lot attendant’s booth when the shooters began shooting; that ShotSpotter did not detect shots fired where defendant was standing; and that defendant did not have a gun nor fired any shots. (13T5-9 to 6-1; 13T7-22 to 24; 13T10-22 to 11-2; 13T13-16 to 19; 13T15-1 to 16-18; 13T18-11 to 12). Defense counsel argued that when the jury looked at the evidence, there was “no other conclusion to draw but it was the shooters from Tony Lalama Boulevard that killed Mr. Sams; and defendant “never fired a gun. [Defendant] did not shoot Mr. Sams. He didn’t murder Mr. Sams and it’s for these reasons that I’m asking you that you find [defendant] not guilty of these charges.” (13T21-23 to 23-13).

The prosecutor showed portions of the video four times in normal speed in his summation to establish (1) that the victim was still alive after the first series of shots on Tony Lalama Blvd. (13T40-8 to 42-8); (2) defendant returned to Hill’s Ford Focus, rummaged for a gun in the rear seat, fired it by the side of the parking lot attendant’s booth; (3) Hill, who was the owner of

the Focus, tried to restrain defendant from getting a gun. (13T54-15 to 55-6); (4) after shooting the gun, defendant tried to exit the parking lot in the Focus through the lot's entrance, but his passage was blocked by a police car (13T50-10 to 51-2); (5) he then drove the Focus around the parking lot again and switched cars after Hill, in the pink jacket, left the Focus and ran to where the victim had been shot. (13T49-20 to 53-6); and (6) defendant was wearing the same hoodie as depicted in the video. (13T58-23 to 59-8). The prosecutor rewound the video three times and zoomed in once. (13T50-3; 13T51-6 to 7; 13T52-7 to 10; 13T58-23 to 25).

Except for defendant's video-recorded statement, which was not given to the jury, the judge ruled and defense counsel agreed that the “[s]urveillance footage can go inside” because there was no audio or witness statement thereon. (13T206-4 to 6). Defense counsel confirmed, “what was placed into evidence is all going to the jury.” (13T205-5 to 23). The jury was provided a compilation DVD of the surveillance footage.⁶ (9T100-18 to 101-14; 13T207-21 to 24). The jurors were also given a laptop computer that defense counsel agreed was a “clean laptop,” meaning nothing was on the computer or had folders that were either empty or would not open. (13T205-24 to 208-7).

⁶ Presumably the “compilation” video was S-274.

Because counsel did not object to this laptop at trial, there was nothing in the record as to whether this laptop was able to connect to the internet.

A. Defendant Has Waived His Right To Complain About the Jury Reviewing the Compilation Video in the Jury Deliberation Room

At no point before, during, or after jury deliberations, where both parties and the court agreed that the jury would have the ability to review the compilation video on the laptop in the deliberation room, did defendant object to the judge's course of action. Because defendant neither objected at trial nor in his motion for a new trial, he has waived this argument on appeal. (16T6-14 to 20; 16T4-3 to 41-35) (defendant's motion for a judgment of acquittal and/or a new trial was denied). Shaw v. Bender, 90 N.J.L. 147, 150 (E & A 1917) ("A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal."); State v. Harris, 209 N.J. 431, 445 (2012) (defendants "may not present entirely new arguments to this Court.").

"It is a well-settled principle" that New Jersey "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); J.K. v. N.J. State

Parole Bd., 247 N.J. 120, 138 n.6 (2021). Thus, “[a]ppellate review is not limitless.” Robinson, 200 N.J. at 19.

The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves. Although New Jersey’s rules do not perpetuate mere ritual, we have insisted that, in opposing the admission of evidence, a litigant must make known his position to the end that the trial court may consciously rule upon it.

[Ibid. (citations and punctuation omitted).]

Indeed, the Supreme Court has recognized that if it allowed “late-blooming issues” to be “raised for the first time on appeal, this would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial level, unveiling them as new weapons on appeal.” J.K., 247 N.J. at 138 n.6 (quoting Frank M. Coffin, On Appeal: Courts, Lawyering, and Judging 84-85 (1994)). Because a timely objection at trial would have given the judge the opportunity to create or enhance the record, and thus dissipate the claimed error, appellate courts “will neither reverse on an assumption that there was error nor remand the matter to explore that possibility.” Macon, 57 N.J. at 333.

B. Defendant Failed to Establish Any Plain Error Regarding the Jury’s

Review of the Compilation Video in the Deliberation Room

The New Jersey Supreme Court has decided several cases establishing when a trial court should “permit a jury to have unrestricted access during deliberations to the videotaped pretrial statements of witnesses. That rule constitutes an exception to Rule 1:8-8(a), which broadly permits a jury to ‘take into the jury room the exhibits received in evidence.’” Weston, 222 N.J. at 289; Knight, 477 N.J. Super. at 417 (“Generally, once an exhibit has been admitted into evidence, the jury may access it during deliberations, subject to the court's instructions on its proper use.”) (quoting State v. Burr, 195 N.J. 119, 133-34 (2008)).

The Supreme Court suggested several precautions for trial courts to use if asked to play trial testimony before a deliberating jury. State v. Miller, 205 N.J. 109, 122-23 (2011). Because a jury's review of a “videotaped witness statement or testimony raises concerns that a particular segment will be overemphasized or viewed out of context,” the Court ruled “that any replay of such a statement or testimony must be conducted in open court, under the careful supervision of the trial judge.” Weston, 222 N.J. at 292-93. As a general rule, when videotaped “pretrial statements or trial testimony are admitted into evidence, deliberating juries should view them only if they request to do so” in open court. Id. at 300.

Prior to Knight, these guidelines heretofore only related to pretrial witness testimony and not to video surveillance footage that did not have any audio or witness statements embedded therein such as the videos in the defendant's case. In Knight, this Court applied the Supreme Court's guidelines for the playback of video-recorded witness statements to non-audio surveillance footage. 477 N.J. Super. at 425. This Court held

[a]s a matter of first impression, we hold that — subject to offsetting concerns of undue prejudice — surveillance video footage may be presented to jurors in slow motion or at other varying speeds, or with intermittent pauses, if the trial court in its discretion reasonably finds those modes of presentation would assist the jurors' understanding of the pertinent events and help them resolve disputed factual issues. We further hold — again subject to offsetting concerns of undue prejudice — that trial courts in their discretion may grant a jury's requests during deliberations to replay the videos in such modes one or more times, provided that the playbacks occur in open court under the judge's supervision and in the presence of counsel.

[Id. at 405.]

Defendant's reliance on Knight is misplaced. This Court ruled that its several principles were to be applied prospectively only and thus not retroactively to a case such as defendant's case, which was tried more than one-year prior. Id. at 425. Defendant admits as much in his brief: "It is true that the trial court did not have the benefit of Knight, and the failure to follow those guidelines" by giving the jury videos to review in the deliberation room,

"is not in and of itself reversible." (Db46).

Even though the Supreme Court found that both trial courts in A.R. and Weston had "procedural lapses," when they "allowed the two juries unsupervised access to the videotaped statements during deliberations," the Court found that the invited-error doctrine applied to both cases because defense counsel had urged the jury to view the videotaped statements during deliberations. Id. at 292.

For instance in A.R., the Court noted that defense counsel had not just "failed to object to the course selected by the trial judge," but counsel "actively encouraged the jury to review the video-recorded statements and urged the trial court to submit the video recordings to the jury. The trial error was plainly invited and does not warrant reversal of defendant's conviction." 213 N.J. 542, 561 (2013)). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." Ibid. Such "[m]istakes at trial are subject to the invited-error doctrine. Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" Ibid. (internal quotations omitted).

The invited-error doctrine "acknowledges the common-sense notion that a 'disappointed litigant' cannot argue on appeal that a prior ruling was

erroneous ‘when that party urged the lower court to adopt the proposition now alleged to be error.’” Ibid. (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996)). The invited-error “principle is grounded in ‘considerations of fairness.’” Ibid. (quoting ibid.). In applying the invited-error doctrine, the Court acknowledged the “strength of the evidence adduced by the State in support of defendant's conviction and the nature of the error.” Id. at 563. The Court found the error was not “structural error” that compromised the “fairness of the trial. Instead, the error related to the procedural protections imposed in Burr and, as such, does not constitute a “fundamental miscarriage of justice.” Ibid.

A.R. stated that while it did not approve of the unfettered access to the video-recorded statement of the victim and defendant in the jury deliberation room, it concluded “the procedure utilized cannot be said to undermine the trial process. The process, although flawed, simply did not implicate either defendant's right to confront evidence or witnesses against him or to assure a fair trial process.” Id. at 558-59. Moreover, defense counsel had urged the jury to review the video during its deliberations. Weston, 222 N.J. at 292. The Court also noted that the jury’s review of the videotape in the jury deliberation room also implicated the “isolation of the jury and the confidentiality of its discussions” which are “hallmarks of the deliberative

process,” and no one “other than the jurors had a right to be present during that stage of the proceedings.” Id. at 559 (citing to State v. LaFera, 42 N.J. 97, 106 (1964)). “[M]aintaining the secrecy of jury deliberations for the purpose of encouraging free and vigorous discourse in the jury room’ is of paramount importance.” State v. Musa, 222 N.J. 554, 568 (2015) (quoting State v. Jenkins, 112 N.J. 112, 134 (2004)). The Supreme Court has “warned that ‘[t]he premature revelation of jurors’ voting inclinations could damage the deliberative process and improperly influence the decisions that must be made by both counsel and the court.’” Ibid. (quoting ibid.).

Any error that may have occurred in defendant's case regarding the submission of the surveillance footage to the jury to review in the deliberation room was procedural and not structural error. A.R., 213 N.J. at 563. Thus, for defendant to prevail on this unobjected-to alleged error, he must meet the burden of establishing plain error in that the error was of such a significant magnitude that it creates a reasonable belief that it led the jury to a result it would not have otherwise reached after consideration of all the evidence. State v. McGuire, 419 N.J. Super. 88, 142–43 (App. Div. 2011); R. 2:10-2.

Appellate courts “may reverse on the basis of unchallenged error only if the error was clearly capable of producing an unjust result.” Ross, 229 N.J. at 407. Without this showing, a defendant is not entitled to any relief. Defendant

cannot meet his heavy burden of establishing plain error, especially where his counsel beseeched the jury to review the surveillance video in the deliberation room where he used the now-challenged procedure as a tactical advantage at trial. The New Jersey Supreme Court has cautioned that ““rerun[ning] a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.”” Id. at 13 (quoting Santamaria, 236 N.J. at 404-05).

Criminal trials, in particular “are not tidy things. The proper and rational standard is not perfection; as devised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness.” State v. R.B., 183 N.J. 308, 333-34 (2005) (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953); see also State v. Weaver, 219 N.J. 131, 155 (2014)). Defendant was ““entitled to a fair trial but not a perfect one.”” R.B., 183 N.J. at 333-34 (quoting Lutwak, 344 U.S. at 619). Defendant received a fair trial here and there was no error plain or otherwise for the jury to review the compilation video multiple times in the jury deliberation room where defense counsel actively encouraged it. It can be inferred from defense counsel’s lack of objection that no prejudice inured to defendant. Canfield, 470 N.J. Super. at 332.

First, it should be noted that the surveillance video at issue here had no

audio soundtrack and contained no witness statements nor had any inflammatory video showing any blood or the victim actually being shot and killed by defendant. (S-274; S-242B). Secondly, defendant's speculation that the jury may have watched the video multiple times or in slow motion in the deliberation room was not improper, especially where defense counsel urged them to carefully review the video. (13T5-9 to 23-13). Juries are entitled to watch videos at regular and slow-motion speed. Accord State v. Higgs, 253 N.J. 333, 341 (2023) (recognizing a jury's ability to replay video footage "slowly" frame by frame during its deliberations).

And, even if it did apply, Knight recognized that the slow motion playing of surveillance footage may be relevant to the "'critical issue' of the 'sequence of events which took place at the time of the shooting.'" 477 N.J. Super. at 420 (quoting State v. Brewington, 471 S.E.2d 398, 403 (N.C. 1996)). A jury's slow motion review of surveillance footage may enhance the jury's ability to view such details as a defendant's face, to determine who a perpetrator or shooter was, which details were not ascertainable when the video was played at normal speed. Ibid. (quoting Commonwealth v. Cash, 137 A.3d 1262, 1277 (Pa. 2016)).

Similarly, here, the jury may have needed to review the video several times even at slow motion speed to determine the sequence of events leading

to the victim's shooting death in D'Classico's parking lot. The jury would have needed to review the following ten segments of the compilation video, which was referenced several times by defense counsel in his closing and shown in the prosecutor's summation: (1) defendant arriving at D'Classico (S-274 beginning at 1:03:35 to 1:07:56); (2) defendant arriving inside the club (S-274 at 1:14:47); (3) defendant and other patrons fighting inside D'Classico (S-274 at 1:29:02 to 1:29:50); (4) Hill and another female walking defendant out of the club (S-274 at 1:29:58 to 1:30:15); (5) Hill unsuccessfully trying to restrain defendant outside the club (S-274 at 1:30:39 to 1:30:42).; (6) a male from the BMW joined the shirtless male, who had been punched from behind in the club, started shooting guns producing muzzle flashes, which could be seen on the video (S-274 at 1:30:32 to 1:31:18); (7) defendant returned to the Ford Focus with Hill who tried to restrain him for a second time (S-274 at 1:32:31 to 1:32:41); (8) defendant takes the gun and moved toward the parking lot attendant's booth and shot his gun (S-274 at 1:32:42 to 1:32:49); (9) defendant tried to leave the parking lot through the entrance when he was blocked by a police car (S-274 at 1:35:53 to 1:35:56); (10) defendant was seen driving the Focus around again before getting into another car where Hill could be seen running to where the victim had been shot. (S-242B; 9T142-2 to 145-15). Given that these events transpired so quickly or were fleeting,

multiple replays could have been needed for the jury to properly evaluate this video evidence. Knight, 477 N.J. Super. at 420 (recognizing slow motion review of surveillance footage is needed when critical issue is sequence of events that took place during shooting).

The jury's review of the compilation video in the deliberation room, which defense counsel consented to and actively encouraged, multiple times in either regular speed or slow motion was incapable of producing an unjust result. As discussed in Point I.-D., above, there was no rush to judgment to convict defendant. Rather, the jury thoroughly scrutinized the evidence to satisfy its serious task of determining whether defendant was guilty beyond a reasonable doubt. The jury deliberated for 3 hours and 34 minutes. (13T212-25 to 213-2; 14T13-2 to 5; 14T15-25 to 16-3; 14T22-13 to 23-10). The jury requested a larger monitor on which "to see video footage easier" and wanted to know how tall defendant was in order to make its determination of whether defendant was guilty. (14T13-15 to 16). After its careful and conscientious review of the evidence, the jury acquitted defendant of two of his most serious charges of murder and aggravated manslaughter, and convicted him of reckless manslaughter. (Da15-17; 14T26-10 to 27-5).

For the first time on appeal, defendant complains about the jury having the use of a laptop that he presupposes, without any support in the record,

could have had internet access and the judge's failure to give a limiting instruction informing the jurors not to use the computer to access the internet or alter the evidence. (Db48-51). Defendant's claim that this laptop may have been capable of connecting to the internet is sheer speculation and is an issue which could have been easily cured on the request of defense counsel at trial, but he made no such objection. Since defense counsel did not object and he agreed that the laptop was a "clean laptop," his acquiescence weighs against defendant's claim that this error was clear and or obvious, but was actually of no moment and no prejudice inured to defendant. Canfield, 470 N.J. Super. at 332.

Second, the judge instructed the jurors twelve times that they were not to conduct any outside research on the "internet" or "on any electronic medium." (8T9-1 to 11-1; 9T124-16 to 17; 9T69-14 to 18; 9T224-15 to 20; 10T123-13 to 19; 10T162-24 to 163-9; 11T47-22 to 48-1; 13T70-2 to 5; 13T214-8 to 215-10; 14T15-15 to 10; 14T19-18 to 21; 14T24-23 to 25-3). One of those admonitions against research was prior to the court setting up a large TV monitor for the jury to use during its continued deliberations. (13T21-14; 14T24-23 to 25-3).

Defendant must establish more than a mere possibility that the jurors who had their cell phones, which are mini handheld computers, confiscated by

the judge, would use a larger computer to conduct prohibited research in the jury room in direct contravention of the judge's instructions. Funderburg, 225 N.J. at 79 ("mere possibility of an unjust result is not enough"). "One of the foundations of our jury system [is] that the jury is presumed to follow the trial court's instructions.'" State v. A.L.A., 251 N.J. 580, 598 (2022) (internal quotation omitted). "Jurors have a sworn obligation and assumed capability to abide by the court's guidance." Hrymoc v. Ethicon, Inc., 467 N.J. Super. 42, 79 (App. Div. 2021), judgment affirmed as modified, 254 N.J. 446 (2023).

In sum, the judge did not commit any error let alone plain error when it allowed the jury to review the surveillance footage on a laptop computer in the jury room to which defense counsel consented and actively urged a careful review on the "clean laptop." In addition to the surveillance footage, there was overwhelming evidence in the form of defendant's text messages, one in which he indicated that he disposed of a gun, and his recorded statement where he admitted to fighting in the club and driving Hill's Focus to and from D'Classico. Defendant's convictions should be affirmed.

POINT IV

SENTENCING DEFENDANT TO AN EXTENDED TERM OF TWENTY YEARS AS A PERSISTENT OFFENDER WITH A SEVENTEEN-YEAR NERA PAROLE DISQUALIFIER WAS FAIR PUNISHMENT FOR HIS SHOOTING RECKLESSLY INTO A CROWD AND KILLING THE VICTIM.

The State will address this Point IV's sentencing issue in Point I of its supplemental brief in response to defendant's supplemental brief on sentencing in light of Erlinger v. United States, 602 U.S. 821 (2024).

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm defendant's convictions below.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

By: /s/ Leslie-Ann M. Justus
Leslie-Ann M. Justus
Deputy Attorney General
justusl@njdcj.org

DATED: December 3, 2024

CERTIFICATION

1. Confidential Information / Confidential Personal Identifiers (must select one). I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

☒ This document or pleading does not contain any confidential information or any confidential personal identifiers, or

☐ This document or pleading previously contained confidential information or confidential personal identifiers, which have been redacted or anonymized, including through the use of fictitious first names or initials. The cover of the redacted version of the document or pleading contains the word "REDACTED." I acknowledge that a non-redacted version must be filed contemporaneously with the redacted version in matters where the confidential information is necessary to the disposition of the matter.

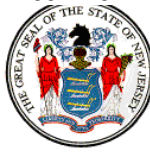
2. Return and Resubmission. I certify that if any confidential information is discovered in this submission and brought to the court's attention, the court will return the document or pleading to me, and I will be responsible to redact or anonymize the confidential information before resubmission. I understand the court may impose sanctions, including suppression of the brief, dismissal in extraordinary cases, and other measures for a failure to accurately make this certification or for the discovery of confidential information in a document that has been filed.

3. Briefs Posted Online. I understand that the presence of confidential information or confidential personal identifiers in a document that has been posted

on the Judiciary's public website will be grounds for the removal of such online posting, pending correction by the filing party, on an expedited timeline. The court in its discretion may postpone further proceedings pending the resubmission of the document.

/s/ *Leslie-Ann M. Justus*
Leslie-Ann M. Justus
Deputy Attorney General

DATED: December 4, 2024



PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section

ALISON PERRONE
Appellate Deputy
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
Tel. 973-877-1200 · Fax 973-877-1239
kevin.finckenaucr@opd.nj.gov

JENNIFER N. SELLITTI
Public Defender

December 8, 2024

KEVIN S. FINCKENAUER
ID. NO. 301802020
Assistant Deputy
Public Defender
Of Counsel and
On the Letter-Brief

REPLY LETTER BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1176-22
INDICTMENT NO. 18-06-0592

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FERREIE JOHNSON,

Defendant-Appellant.

:

:

:

:

:

:

CRIMINAL ACTION

On Appeal from a Judgment of
Conviction of the Superior Court
of New Jersey, Law Division,
Passaic County.

Sat Below:

Hon. Marybel Mercado-Ramirez, J.S.C.,
and a jury

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

PROCEDURAL HISTORY AND STATEMENT OF FACTS 1

LEGAL ARGUMENT 1

POINT I

THE OFFICERS BLATANTLY MINIMIZED THE NATURE OF THE DETENTION TO INDUCE MR. JOHNSON TO WAIVE HIS RIGHTS, AND THE IMPROPER ADMISSION OF HIS STATEMENT AT THE TRIAL WAS SIGNIFICANTLY HARMFUL 1

POINT II

SERGEANT MARTINEZ’S REPEATED COMMENTS THAT THE VIDEO FOOTAGE SHOWS MR. JOHNSON COMMITTING THE SHOOTING WERE UNDENIABLY ERRONEOUS AND HARMFUL, REQUIRING REVERSAL.. 3

POINT III

ALLOWING THE JURY UNFETTERED ACCESS IN THE JURY ROOM TO THE SURVEILLANCE FOOTAGE AND DIGITAL EXHIBITS ON A LAPTOP ALSO REQUIRE REVERSAL. 4

POINT IV

THIS COURT’S RECENT DECISION IN STATE V. CARLTON SOLIDIFIES THAT REVERSAL IS REQUIRED ON MR. JOHNSON’S PERSISTENT OFFENDER SENTENCE. ADDITIONALLY, THE OTHER SENTENCING ERRORS NOT ARGUED AGAINST IN THE STATE’S SUPPLEMENTAL BRIEF MUST ALSO BE ADDRESSED AT ANY RESENTENCING..... 6

CONCLUSION 8

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Ferreie Johnson respectfully refers this Court to the procedural history and statement of facts set forth in his brief previously submitted in this matter.

LEGAL ARGUMENT

In reply to the State's brief, Mr. Johnson relies on the arguments made in his previously filed briefs and adds the following:

POINT I

THE OFFICERS BLATANTLY MINIMIZED THE NATURE OF THE DETENTION TO INDUCE MR. JOHNSON TO WAIVE HIS RIGHTS, AND THE IMPROPER ADMISSION OF HIS STATEMENT AT THE TRIAL WAS SIGNIFICANTLY HARMFUL.

The State's response to Mr. Johnson's Point I mostly regurgitates and relies upon the same faulty reasoning as the trial court's analysis below. As such, there is little to say that was not already addressed in Mr. Johnson's appellant brief. However, it is worth highlighting arguments made in the appellant brief that the State fails to rebut.

The State does nothing to rebut the fact that law enforcement had every intention of charging Mr. Johnson with murder and other offenses in connection with the D'Classico shooting when he was picked up in handcuffs and confined

at the police station. It does nothing to address how the officers in State v. Sims, 250 N.J. 189 (2022)—the case primarily relied upon by the trial court in denying the motion to suppress—did exactly the opposite of what the officers did here: they expressly told the defendant he was under arrest and that no charges were filed “at this point in time.” State v. Sims, 466 N.J. Super. 346, 357 (App. Div. 2021), rev’d, 250 N.J. 189 (2022). The case most directly relied on by Mr. Johnson in his brief, State v. Diaz, 470 N.J. Super. 495, 519 (App. Div. 2022), is not mentioned in the State’s brief at all. Lastly, and perhaps most critically, there is also no discussion in the State’s brief about Mr. Johnson’s references to a lawyer in the beginning and middle of the interrogation, references that show the officer’s minimizations likely did induce Mr. Johnson to improperly waive his rights.

Instead, the State largely hides behind the deference our courts often afford trial court decisions. (Pb13-16). But appellate courts “owe the trial court's evidentiary findings reasoned deference, not blind deference.” State in Interest of A.R., 234 N.J. 82, 106 (2018). Here, it is overwhelmingly apparent that the officers unlawfully minimized the interrogation to (successfully) induce Mr. Johnson to waive his rights and make a statement. The trial court’s findings to the contrary are an abuse of discretion requiring a reversal of the denial of the motion to suppress.

The State goes on to argue that, even if the interrogation should properly have been suppressed, its admission was harmless error. This argument likewise has no merit. It should suffice to say that a statement by Mr. Johnson admitting to being at the club that night, being involved in the fight preceding the shooting, and having a connection to the car in the footage—the only evidence at trial establishing his presence there other than the grainy video—can hardly be said to be harmless beyond a reasonable doubt. See State v. McCloskey, 90 N.J. 18, 31 (1982) (because “the improper use of incriminating statements made by a criminal defendant has great potential for prejudice,” finding improper admission of such statements harmless error is done “sparingly”).

Accordingly, the State having failed to meaningfully rebut Mr. Johnson’s arguments in Point I of his appellant brief, his convictions should be reversed, and the matter should be remanded so that his motion to suppress can be granted.

POINT II

**SERGEANT MARTINEZ’S REPEATED
COMMENTS THAT THE VIDEO FOOTAGE
SHOWS MR. JOHNSON COMMITTING THE
SHOOTING WERE UNDENIABLY ERRONEOUS
AND HARMFUL, REQUIRING REVERSAL.**

As with the State’s Point I, its Point II mostly does not address the elephant in the room. Although it goes through great lengths to discuss the content of the footage and Sergeant Martinez’s narration of the same, there is no

discussion at all about the main focus of this issue: the multiple times Sergeant Martinez says that the video shows Mr. Johnson going to his gar, grabbing a gun, and firing it into the crowd. As discussed in the appellant brief, this is something our caselaw expressly forbids, State v. Watson, 254 N.J. 558, 599, 603 (2023), and it goes to perhaps the single most significant factual dispute at the trial. The substantial harm from these remarks were of course magnified by the comments from the improperly admitted interrogation wherein Sergeant Martinez again expressly states his belief that the video footage shows Mr. Johnson committing the shooting. (Da38).

It cannot be disputed that this commentary was both erroneous and irreparably harmful. Accordingly, for this reason as well, Mr. Johnson's convictions must be reversed.

POINT III

ALLOWING THE JURY UNFETTERED ACCESS IN THE JURY ROOM TO THE SURVEILLANCE FOOTAGE AND DIGITAL EXHIBITS ON A LAPTOP ALSO REQUIRE REVERSAL.

With respect to the State's argument in Point III, it seems to acknowledge that the trial court should not have provided the jury the surveillance footage to be viewed in the jury room, and that any playback should have occurred in open court. (Pb51-54). Instead, the State largely argues that any lapse in judgment was harmless. In so arguing, the State goes into detail about the how the

surveillance footage was the most critical aspect of the case and contained most of the damning evidence, including footage of the shooting itself, saying its critical significance made it important that the jury was able to rewatch it. (Pg57). But the significance of the footage is exactly why it is so imperative that any replay be done in open court. Requiring replay in open court would help ensure that the jury is not overemphasizing particular footage, nor modifying the video, nor using the footage any way that would unduly prejudice Mr. Johnson's rights to a fair trial.

The same is true of the State's response to Mr. Johnson's argument that the laptop should not have been provided to the jury for viewing the evidence. The State seems to argue less that it was a proper thing to do and more that it is not reversible error. (Pb58-60). But as noted in the appellant brief, none of the trial court's instructions against using electronic devices to conduct research were given in connection with using the laptop during active deliberations. Nor does the State make any argument about the many ways in which the jury could improperly manipulate evidence on a computer.

For these reasons too, especially when considered in combination with the other errors in the case, Mr. Johnson's convictions must be reversed

POINT IV

THIS COURT’S RECENT DECISION IN STATE V. CARLTON SOLIDIFIES THAT REVERSAL IS REQUIRED ON MR. JOHNSON’S PERSISTENT OFFENDER SENTENCE. ADDITIONALLY, THE OTHER SENTENCING ERRORS NOT ARGUED AGAINST IN THE STATE’S SUPPLEMENTAL BRIEF MUST ALSO BE ADDRESSED AT ANY RESENTENCING.

The State’s arguments regarding sentencing also require a brief reply.

Almost all of the State’s arguments on the Erlinger¹ point can be disposed of without any comment because this Court just rejected them all in State v. Carlton, ___ N.J. Super. ___ (App. Div. 2024) (slip op.), which the State simply ignores for twelve pages. (Pb2-14). The State writes one paragraph to say that, if this Court reverses Mr. Johnson’s sentence (as it must), the State should be permitted to convene a petit jury on his eligibility as a persistent offender. (Pb14). But our Supreme Court has already rejected this approach as well in State v. Grate, 220 N.J. 317, 336 (2015) (refusing to authorize “the empaneling of a sentencing jury” on remand for similar sentencing error). To the extent that Carlton holds otherwise, the Supreme Court precedent controls. State v. Dabas, 215 N.J. 114, 136-37 (2013). Accordingly, upon vacating Mr. Johnson’s sentence, the State should not be permitted to again seek to sentence him as a

¹ Erlinger v. United States, 602 U.S. 821 (2024).

persistent offender. Because the persistent-offender sentence must be vacated, any other persistent-offender-related arguments Mr. Johnson raised would be moot.

As to the remaining issues, the State makes no direct responses to Mr. Johnson's arguments against the trial court's erroneous rejection of mitigating factor four and/or three in relation to Mr. Johnson having been shot at after a physical fight, nor about the improper disregard of the jury's acquittals in sentencing Mr. Johnson. Accordingly, if Mr. Johnson's convictions are not reversed, at any resentencing, the trial court should apply one or both of those mitigating factors and not sentence Mr. Johnson as if he committed an offense greater than second-degree reckless manslaughter.

CONCLUSION

For the reasons expressed herein, the decision of the trial court denying Mr. Johnson's motion to suppress must be reversed and his convictions vacated or, alternatively, his sentence must be reversed and a reduced sentence imposed.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: 

KEVIN S. FINCKENAUER
Assistant Deputy
Public Defender
ID# 301802020

Dated: December 8, 2024