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September 19, 2024
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1595-23T4

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From a Denial of a Petition for Post-Conviction
	:	Relief in the Superior Court of New Jersey, Law
	:	Division, Hudson County.
ANDREW HOWARD-FRENCH,		
	:	Ind. No. 18-10-00872-I
Defendant-Appellant.		
	:	
		Sat Below:
	:	Hon. Mitchell L. Pascual, J.S.C.

DEFENDANT IS CONFINED

BRIEF AND APPENDIX (VOL. I) ON BEHALF OF DEFENDANT-APPELLANT

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Volume I

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

[2]This document is included in the appendix as it falls within one or both of the "exception to the general prohibition against including trial briefs in the appendix" R. 2:6-1(a)(2), because it was referred to in the trial court's decision and is part of the PCR record, and germane as to whether an issue was raised in the trial court. See also Da88, Da110, Da119.

Volume II

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Cases

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Court Rules

Procedural History

A Hudson County Grand Jury returned Indictment Number 18-10-004365-00872-I, charging Petitioner, Andrew Howard-French, with first-degree murder, contrary to N.J.S.A. 2C:11-3(a)(1) and (2), (Count One), second-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(a)(2), (Count Two) and third-degree endangering an injured victim, contrary to N.J.S.A. 2C:12-1.2(a) (Count Three). (Da1 to 2)[3]

Petitioner was tried before the Honorable Paul J. Arre, J.S.C., and a jury from October 7, 2019 to October 17, 2019. The jury returned a verdict of guilty on all three counts of the Indictment. (Da3 to 5; Da6; 14T3-13 to 4-7)[4]

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[3] "Da" refers to the appendix to petitioner's brief.

[4] 1T refers to the motion transcript of January 10, 2019
2T refers to the motion transcript of April 1, 2019
3T refers to the motion transcript of April 11, 2019
4T refers to the motion decision transcript of April 29, 2019
5T refers to the scheduling conference of September 5, 2019
6T refers to the status conference of September 17, 2019
7T refers to the motion *in limine* of October 1, 2019
8T refers to the trial transcript of October 7, 2019
9T refers to the trial transcript of October 8, 2019
10T refers to the trial transcript of October 9, 2019
11T refers to the trial transcript of October 10, 2019
12T refers to the trial transcript of October 15, 2019
13T refers to the trial transcript of October 16, 2019
14T refers to the trial transcript of October 17, 2019
15T refers to the sentencing transcript of January 31, 2020
16T refers to the PCR hearing transcript of November 2, 2023

Petitioner appeared for sentencing on January 31, 2020. The court imposed a sentence of life imprisonment on Count One, ten-years imprisonment on Count Two, to run concurrent to the term on Count One, and five-years imprisonment on Count Three, to run consecutively to the terms imposed on Counts One and Two. All terms were subject to an 85% period of parole ineligibility pursuant to NERA. (Da6, 15T29-4 to 16)

The Petitioner appealed his conviction and sentence. On August 5, 2021, this Court affirmed the conviction and the sentence. (Da9) On November 3, 2021, the New Jersey Supreme Court denied the petitioner's petition for certification. (Da37)

Petitioner thereafter filed a pro-se Petition for Post-Conviction Relief on April 11, 2023. Counsel submitted a brief (Da42) and supplemental brief (Da88) on petitioner's behalf.

The Honorable Mitchell L. Pascual, J.S.C., heard argument on November 2, 2023 and reserved decision. (16T14-11 to 18). By order and decision dated December 6, 2023, the court denied the petition for post-conviction relief without holding an evidentiary hearing. (Da89 to 105).

Petitioner filed a Notice of Appeal to this Court on January 30, 2024, (Da 106) as within time. (Da109).

Statement of Facts

Monique Sparrow, the mother of Bryce Sparrow (8T197-2), worked for the Transportation Security Administration [TSA] and in July of 2018, her shift was 2:00 p.m. to 10:30 p.m. (8T198-6 to 8) She had two children: Bryce and her daughter Brooke. While she was at work, the children were cared for by Jeannine, her brother, Monique Dugan and petitioner. (8T199-11 to 16) Bryce was 23 months old. (8T201-4 to 15) He was able to walk and talk. (8T215-10)

Petitioner was caring for Bryce on July 11, 2018 when Bryce fell down the stairs of Dugan's apartment building. (8T226-13 to 227-16) Bryce had been seated in his stroller after Sparrow had dropped him off - after Sparrow was out the door Bryce left the stroller and tried to chase after her. Petitioner tried to grab Bryce to stop him, but he fell down the stairs. (8T221-19 to 22; 8T222-12 to 15). Sparrow was not in a position to see if petitioner walked up the stairs with Bryce. (8T52-2 to 13) Petitioner later sent Sparrow a text message apologizing, stating "I know you're mad but it wasn't my intention, it just happened too fast. Sparrow replied, "I know you wouldn't do anything intentional to hurt him." (8T18-8 to 19-5)

The State attempted to refute petitioner's claim that Bryce fell down the stairs on July 11 by showing a surveillance video[5] from the apartment building's

[5]The video was admitted into evidence by the motion judge, who did not preside at trial, in response to the State's pretrial N.J.R.E. 404(b) motion. (4T11-1 to 5) The

lobby depicting petitioner and Bryce walking into the building, followed by petitioner taking Bryce out of the stroller and carrying him up the stairs without Bryce falling at any point[6]. (8T217-22 to 24; 9T15-21 to 25) Petitioner was not charged for any offense in connection with July 11.

After July 11, Sparrow continued to place Bryce in petitioner's and Monique Dugan's care on July 12, 16 and 17, 2018. (8T54-10 to 14)

On July 16, Monique Sparrow picked Bryce up between 11:40 p.m. and 11:50 p.m. that night. (9T8-4 to 5) When she got home, she noticed a bruised lip on the child. It was swollen and it was white as if someone hit him in the mouth and there was bruising on the back of his left ear and on his head. As a result, Monique Sparrow took him to the emergency room at the Jersey City Medical Center. (9T8-20 to 9-6) Monique Sparrow took photos at that time. A photograph showed the swelling and discoloration of Bryce's lip and redness on his head and ear.(9T12-12 to 13-22)

The doctor at the hospital, Noushin Sultana, said the bruising on his ear was because "kids are clumsy" and "probably he bumped into something." Bryce was a

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trial court did not give any limiting instruction regarding the video.

[6] Though videos were introduced into evidence at trial, they were not part of the record before the PCR court and are not germane to the ineffective assistance of counsel issues raised in this appeal of the denial of post-conviction relief. Therefore, copies of the videos are not being submitted. See also petitioner's brief at p. 7, 9, 12, 24, and 25.

little clumsy. (9T61-1 to 20) He had just started riding the scooter. (9T62-12 to 15) He had never previously ridden a two-wheel scooter. (9T65-2 to 5) The doctor did not tell her that there was any evidence of child abuse.(9T68-16 to 18) Dr. Sultana testified consistent with Sparrow's recounting of the hospital visit on July 17(9T105-22 to 120-14) He made no report of child abuse. (9T118-1 to 12) Dr. Sultana speculated that if he had seen the injuries depicted in photos, he would have reported it as child abuse - "those injuries in that picture are severe injuries from either some sort of blunt trauma or something that's much more significant than scratches." He would have had to report them.(9T121- 122)

Because of what she learned at the hospital, Sparrow assumed that what she had been told was true, that Bryce bit his lip while eating. (9T59-6 to 20) After going to the hospital on July 17, Sparrow felt confident that she could bring the child back to petitioner. (9T60-3 to 5)

On July 17, Monique Sparrow exchanged text messages with Monique Dugan, during which Ms. Sparrow said: "I mean his face is red. I'm going to put some make-up on it because I don't want anyone thinking she had done something to her son."(8T43-7 to 18) Monique Sparrow was afraid someone might call the Division of Child Protection & Permanency [DCP&P, formerly "DYFS"] about herself.(9T48-4 to 8)

On July 17, 2018, Monique Sparrow dropped Bryce off with petitioner at around 1:15 p.m. (8T203-21 to 23) She subsequently got a message from petitioner: "We in the park". Petitioner had told Ms. Sparrow when she dropped him off that he was taking Bryce to the park. (9T22-12 to 19) Bryce was fine when she dropped him off. Bryce laid his head on Defendant's shoulder.(9T24-16 to 25) A video showed Monique Sparrow handing Bryce to Defendant with the baby bag.(9T24-25 to 26-2) Bryce was wearing a tee shirt, shorts and Vans shoes, all of which were admitted into evidence.(9T30-5 to 20);(9T35-6) Monique Sparrow generally communicated with petitioner by Instagram. He sent the following messages that day: “Leave the park"; she said "Okay". The next message: "Do you know how to ride a little bike or scooter?" "I'm going." (8T213-9 to 16) Petitioner was at the park with Bryce. He was playing on the slide and then fell off the slide, but he never hit his head or anything. (8T189-18 to 21) Petitioner and Bryce were initially playing and riding the scooter. Then kids, maybe nine and a half, tried to show Bryce how to go down the slide. Bryce got scared, he stopped, he didn't go all the way down and then he rolled and tried to jump off. Bryce then landed on his feet. (2T98-3 to 20) Bryce then laid himself down. Petitioner said he did not know if Bryce "laid down hard." and then observed: “...but to me it looked like he just wanted attention.”

Petitioner told Bryce to get up. He and Bryce then got on the scooter to go home." Petitioner then noticed "how much he's pushing too hard, he's hot, he's hurt bad, he's sweating." Petitioner "started giving him water, he went straight to the bed, laid down and got him a rag, tried to cool him off, that's when he noticed he's breathing, but now he's not." (8T98-23 to 99-19) At this point, petitioner started "calling his girl" (referring to Monique Dugan). All of a sudden, he heard Bryce, he does not know if he was "pushing too much"; he "used to be a lifeguard" so he "gave him the aid, C.P.R. Bryce threw up water." (8T100-13)

Monique Dugan was at petitioner's mother's house when he called and pleaded with her to hurry home. Something was wrong. (10T46-24 to 47-5; 10T47-4 to 14) Bryce was not responding.(10T51-1 to7) Monique Dugan's statement was read to her in which she said that petitioner said, "Bryce fell off his scooter." (10T54-13 to 14) He said Bryce got scared on the slide. (10T54-22)

When Monique Dugan arrived home, Bryce was lying down and hot; he was burning up. Monique Dugan put him in the tub with cool warm water. (10T 57-12 to 21) She got into the tub with him. (10T73-15 to 20) DVR footage was played. The time of the video was 2:47 p.m. on July 17.(10T59-17) It depicted petitioner outside as well as Monique Dugan underneath an umbrella; it was raining. petitioner had been waiting for her.(10T60-2 to 61-2) When petitioner met her, he

was panicking and scared.(10T100-1 to 5) Both petitioner and Monique Dugan went up the stairs into Monique Sparrow's apartment at 115 Wagenen Avenue.(10T65-4) Monique Dugan went into Bryce's room where he was lying on his stomach.(10T66-20) His eyes were closed. When Monique Dugan first got there, she slapped Bryce's back to see if that would cause him to react. (10T100-19 to 20) Monique Dugan did not remember whether Bryce was breathing.(10T72-20 to 23) Bryce had vomited on the floor while in his room. (10T80-22-24)

Monique Dugan held Bryce to her chest with water running on his back. In the shower, Bryce was breathing heavy.(10T99-15 to 16) While in the tub, Bryce flinched and his eyes rolled back. (10T75-21) Monique Dugan did not remember seeing any bruises.(10T77-11 to 21) The 9-1-1 dispatcher told her to perform C.P.R. (10T67-14to 22) Monique Dugan performed C.P.R on Bryce's chest.(10T79-5to 10) She did not recall seeing any of the bruises which were shown on a photograph.(10T79-5 to 80-24)

Petitioner called 9-1-1 at 2:52 p.m. (8T31-7 to 16) during which he reported:

> CALLER: "9-1-1 Emergency, I have a two-year-old -- I have a two-year infant that passed out from the heat. We at 115 Van Wagenen, Apartment 304. We couldn't -- we got him in hot, we got him in cool water, he's not responding.
>
> [8T34-3 to 9]

Allan Pereira, a Jersey City Medical Center Basic Life Support [BLS] certified EMT, responded to the call. Traveling by ambulance, he arrived at 2:59 p.m.(8T64-9 to 12) With him was his partner, Luis Rivera Ordaz, an EMT. Allan Pereira described what was on the video. On his arrival, it showed a person who he believed was the caller meeting them outside. This person told them that there was a child upstairs not responding. (8T67-21 to 23) Mr. Pereira was led to a back room where there was a female performing cardiopulmonary resuscitation [CPR].(8T68-4 to 5) She was applying CPR by doing compressions over the sternum of the child. (8T79-5 to 14) Mr. Pereira had no way of knowing whether the female was performing the CPR correctly. (8T89-21 to 24) The child was wearing a diaper and was on a hardwood floor. The room was very warm. There was no air conditioner or fan. (8T68-15 to 24)

Bryce was non-responsive to any stimuli. The first responders could not get the child to make any motion with even painful stimuli. He was not breathing on his own and he had no pulse. (8T72-2 to 5) Mr. Pereira did not notice any blood in the apartment nor on the walls of the bedroom nor on petitioner. (8T81-25 to 82-15)

The woman giving the CPR said that the child fell from a scooter and struck his head. (8T73-1 to 10) Based on further information that the EMTs received, they

began to believe that a heavier head trauma had possibly occurred. (8T77-13 to 21) A number of people applied compressions to the child.

David Pernell, an Advance Life Support [ALS] certified Paramedic from the Jersey City Medical Center arrived on the scene at 02:54 p.m. (8T95-2) Petitioner met Mr. Pernell and his partner at the door and directed them to the second floor. (8T98-8 to 12) When Mr. Pernell arrived, there were numerous people: firemen, maybe three or four, and there were two of the ambulance personnel along with him, his partner, a student and a young lady and petitioner. CPR was being performed. (8T98-17 to 23);(8T109 1 to 6) Mr. Pernell observed Bryce and noticed there was a lot of bruising on him. His vital signs were a flat line; there was no type of heart activity whatsoever.(8T99-17 to 100-5) He noticed bruising on the abdomen and back. (8T100-19 to 25) A number of people were pressing down on this child while he was laying flat on his back on the hardwood floor. (8T115- 16 to 20) The child could have been moved three or four times by firefighters or by paramedics who were there. A number of people could have handled Bryce before Mr. Pernell arrived. (8T116-13 to 19) Stickers were placed on the child and hooked up to electrodes on a monitor. The electrodes were on the child's chest area, on the stomach and in the leg area. The first responders also placed a tube into his airway. This was done to ventilate Bryce to enable him to breathe. (8T103-23 to104-5)

When Bryce was put in the ambulance, Mr. Pernell noticed that his leg was broken. (8T104-24) The femur bone was snapped in half.(8T106-17 to 18) An intravenous [IV] line was inserted into his leg. (8T113-15) The first responders gave the child normal saline fluid, dextrose and sugar, because his sugar level was 35. It should have been well over 60.(8T114-6 to 13) David Pernell believed that petitioner said that the child was at the park and fell, got sick and vomited and he brought him home. (8T108-7 to 12)

Luis Rivera Ordaz, Mr. Pernell's partner, said when they arrived, the gentleman who was at the door first questioned why they took so long and then he said I called because the child fell at the playground and when we were coming back, he was walking funny. (8T123-14 to 20) When Mr. Ordaz asked the woman performing CPR what happened, she said the child had just been in the bathtub and then just collapsed in the room. (8T128-4 to 7) The first responders proceeded to ventilate Bryce to assist in breathing and administered CPR to get the child's heart beating. They were not successful. The first responders did this for about 30 minutes. (8T128-24 to 129-9) They took out a defibrillator to send out a shock to the child, (8T133-9 to 13) but no shock was sent. (8T136-23) Six people handled the child during the half hour that EMT Luis Rivera Ordaz was there. (8T134-8 to 12)

Because of the bruises, Bryce was taken to the Jersey City Medical Center, the closest trauma center, where he was later pronounced dead. (8T131-306) Miguel Rivera, a Jersey City Juvenile Division Detective, was dispatched to 115 Van Wagenen Avenue and arrived at 4:00 p.m.(8T186-5) He met with petitioner and asked him what happened. (8T186-22 to 25) Petitioner explained that he was at the park with Bryce. Bryce was playing on the slide fell off , but "never hit his head or anything." (8T189-18 to 21) Petitioner called 9-1-1 because he was trying to talk to Bryce and he was unresponsive. (8T190-19 to 21) Detective Rivera turned over the scene to Hudson County Prosecutor Officers, Sergeant Matt Stambuli, Detective Brenton Porter, Detective Stable and Detective Gerson.(8T191-1 to14)

Petitioner agreed to accompany detectives to be interviewed at the Hudson County Prosecutor's Office. (9T84-8 to 9). The statement was video recorded and played for the jury. (9T85-16 to 87-2). Petitioner repeated his account of the events as he previously told Detective Rivera. (9T98-3 to 20; 9T98-23 to 99-19). He told detectives that he did not notice any bruises on Bryce, and never disciplined him. (9T139-21 to 23; 9T146-18 to 20)

During the course of the recording, which was played to the jury, the following statements were made by the detectives:

> DETECTIVE: "Well, what we're saying is like with that amount of bruising, in my opinion, I think it's almost -- you said when you changed his diaper and you said you didn't see any bruising, I don't -- it's almost impossible not to see that amount of bruising." (9T187-18)
>
> DETECTIVE: "So at that point, what we're saying is you didn't notice all this bruising. I mean it's pretty heavy bruising even if you're trying not to be a creep because like, no, I get it, you're not like,"
>
> DETECTIVE: "-- you know, fucking with little kids, I understand that, I'm just saying that, you know, I gotcha. But you're going to notice that, that's what I'm kind of getting at" [9T188-89]
>
> DETECTIVE: "...when I stop and think about it and we step out of the room and we sit there and you kind of think about it for a second and we retell it our bosses or whatever, it doesn't seem to be adding up." [9T 193-11]
>
> DETECTIVE: "-- that's another thing I'm saying like, oh, what -- that's part of what's not adding up, is like how can you change the kid's diaper and didn't see it, like you're -- you change the child's diaper, you're going to see those bruises. That's all. That's all I'm getting at is there's a lot of bruises that are there."[9T198 to 199]

After the statement was completed, a Detective transported petitioner home. (9T209-6 to 7) He was arrested eight days later, on July 25, 2018. (9T22-17 to 19)

Jacqueline Benjamin, a Forensic and Neuropathologist at the Bergen Region

Medical Examiner's Office, testified. (10T125-18 to 21) She qualified as an expert witness in forensic pathology. (10T128-19 to 21) Dr. Benjamin performed the autopsy on Bryce Sparrow on July 18, 2018. (10T139-19 to 21) Her examination chart was moved into evidence.(10T133-23 to 134-14)

Dr. Benjamin found signs of medical intervention on the body. Bryce had bilateral chest tubes in as well as an 8' intraosseous catheter with a chest insert on the sides.(10T137-4 to 8) On the back right side of the neck, there was a healing brown abrasion and also on the right elbow and a hyper-pigmentedmelanin(a spot that's slightly darker than the decedent's skin).It was on the back of the left leg. (10T139-13 to 17)

On the right side of the forehead, there was a faint red contusion. On the left side of the forehead, there was also a red contusion. On the upper lip, there was confluent red contusion. There were also areas of red contusion on the lower lip on the inside. Next to the right angle of the mouth, the right side, there was a red abrasion and underneath the lower lip, there appeared to be a superficial laceration. On the left side of the chin, there was a red abrasion. (10T141-3 to 17) There were multiple red contusions on the left side of the face, the left ear. (10T145-23 to 146-1) There was a contusion on the top of the right ear, on top of the pinna and above and slightly behind the right ear.(10T146-13 to 16) There was an area of red

discoloration on the back midline and left side that looked also like a red contusion. (10T145-25 to 147-2) A contusion on the upper lip was caused by blunt force injury. (10T150-14 to 19) There was some contusions in the lower lip, the inner part; an abrasion of the chin, a contusion above the left ear.(10T150-25 to 152-3)

There were four right contusions on the lower right side of the chest and close to the costal margin (the costal margin is an area of the rib cage). There was also a partially healed pink abrasion on the left side of the chest and a white abrasion just below the right nipple that was also partially healed above this region there. There was a faint abrasion and red contusion on the left side of the abdomen. On the right side of the abdomen, there were 8-10 red contusions and one green contusion.(10T153-18 to 155-7) There were a number of contusions on the upper back and a small tear in the anus.(10T156-22 to 157-22)

Photos of the injuries were introduced into evidence. Dr. Benjamin reviewed the photographs of the dead body and described the injuries depicted in the photographs. This included a photograph of the lower part of the chest and all of the abdomen. Dr. Benjamin described contusions on the right side of the chest-a discreet red discoloration. These contusions, with a superimposed brown abrasion, embedded in a contusion on the right side, which was continuous with another

contusion. Dr. Benjamin described a right contusion above the belly button, another contusion on the abdomen, a contusion close to the hip and pelvic region, and over on the left side. (10T160-9 to 21)

A photo showed a healing abrasion over the right nipple and the contusions on the right side of the chest around the costal margin, which is raised and the contusions on the right side of the abdomen and pelvic region.(10T162-1 to 6) A photo depicted the bruises on the front left side.(10T163-2 to 5)A photo depicted three red contusions on the right leg and two on the left. (10T163-13 to 14) Other photos depicted some contusions on both sides of the scapula, some faint red discoloration on his buttock and an anus orifice tear. (10T164-3to 165-14)
Dr. Benjamin described a fracture on the right femur, stating it takes a bit more force to fracture the bones in a child. A child, whose femur was fractured, would not typically be able to walk.(10T166-25 to 167-5)

Dr. Benjamin performed a dissection of the abdominal cavity. She found hemorrhage in the right side of the rectus muscle. There was also a lot of hemorrhage, bleeding and blood in the lining of the abdomen, and blood in the abdominal cavity itself.(10T168-3 to 8) There was a laceration in the fatty tissue that is attached to the transverse colon and there were bruises on the upper part of the small bowel.(10T168-23 to 169-4) Typically, the laceration injury is caused by

a force or a blow.(3T170-17 to 23)

There was a hemorrhage behind the anterior part of the abdomen. It separates the anterior part of the abdomen from the back which are where the kidneys and pancreas are located.(10T172-4 to9) There were scalp hemorrhages; some skull fractures and a right parietal epidural hemorrhage. The parietal region is by the crown. There was blunt trauma.(10T173-3 to 15)

The other fracture was at the base of the skull on the right; once Dr. Benjamin took the calvarium off and took the brain out, the fractures on -- at the base on the right could be seen. (10T174-15 to 175-8) There was a hemorrhage in the right occipital and left parietal scalp tissue. (10T176-10 to 11)

Dr. Benjamin gave the opinion that the cause of death was multiple blunt force injuries.(10T176-20) She also gave the opinion that the manner of death was homicide.(10T177-8 to 9) Dr. Benjamin did not give that opinion to a reasonable degree of medical certainty.(10T177-17 to 21) Dr. Benjamin determined that the death was not a suicide; not an accident; not natural; not undetermined.(10T177 to178)

The sections from the right buttock had a number of cells that were staining positive with iron, which sort of indicated that the injury was days old, and the

section from the anus and rectum region was actually, because it had new blood vessels being formed in that region, it was probably five to seven days old. (10T181-17 to 23) Dr. Benjamin did not give an opinion on the cause of these injuries. The toxicology examination was negative.(10T182-7 to 8)

Dr. Benjamin's opinion, with respect to the anal fissure, would be altered as a result of knowing this child was eating solid foods. (10T183-14 to 19) If someone had suffered a subarachnoid cerebral hemorrhage at 12:30 p.m., at 01:15 p.m. he could still possibly be walking and possibly be conscious. (10T184-14 to 20) Some of the injuries, with respect to the mesentery, could have possibly occurred on July 16 rather than July 17.(10T185-19 to 23)

Dr. Benjamin acknowledged that a number of slaps to try to wake the child could possibly cause injuries to the face.(10T186-13 to 15) Dr. Benjamin temporarily formed her opinion after she came to the conclusion that the child did not fall off the slide or a scooter. (10T188-3 to 6) Her report was not completed until November. (10T189-8) Dr. Benjamin did not believe that all of these injuries could be sustained from a simple fall but, “it's best not to jump to conclusions.” (10T190-18 to 20)

According to Dr. Benjamin, it is possible, but not likely, that the injuries that caused the subarachnoid cerebral hemorrhage were incurred an hour and a half

prior to 01:15 p.m. on July 17. (10T193-23 to 194-3) Dr. Benjamin also acknowledged that the injuries to the child's abdomen and his chest could have been caused by an inexperienced person performing C.P.R. (10T194-6 to 17) However, the injuries normally seen when an inexperienced person does the CPR was not observed. (10T200-7 to 21) Dr. Benjamin did not know what blunt force was used. (10T194-24) It was possible that all those bruises were caused by different individuals handling this child.(10T196-12 to 1) A white scar on his right elbow had happened long in the past. The nearly healed abrasions on his calf were older wounds as well. They were not incurred on July 17. (10T192-8 to 21)

The skull fracture and the right femur fracture could have been caused by a fall from a height. (10T197-17 to 22) All of the other injuries that were visible on the child could not be sustained from a single fall. (10T199-15 to 17) If the fractured femur had occurred on July 16, it is not likely that Bryce would have been able to walk. (10T201-21 to 24) A single fall from a slide is not going to cause contusions on-essentially all-surfaces of the body and that one fall is not going to cause a fracture of the femur or a torn mesentery. (10T202-19 to 24) The only instance in which Dr. Benjamin could see that happening is if the child jumped off the bed and struck the femur just right on that chair, or a trunk. (10T203-25 to 204-6) The blood on the left side possibly flowed through from the

injuries caused on the right side. (10T198-3) Bryce was photographed at the hospital. (10T212-7 to 12) Other photos introduced into evidence were of the entire back yard area of 115 Van Wagenen Avenue, as well as of the apartment building, the apartment itself, the stairs leading up to the third floor, and the hallways leading to the apartment. (10T213-1 to 215-18) Photos of the interior of the apartment were also introduced into evidence. (10T215-22 to 217-2) Among the photos were: vomit on a child's pillow (10T219-8), a T-shirt with vomit (10T220-24 to 25), and a box with a scooter in the living room. (10T221-24 to 25)

LEGAL ARGUMENT
INTRODUCTION

STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL AND EVIDENTIARY HEARING

This case is an appeal of the denial of a motion for post-conviction relief, based upon claims of ineffective assistance of counsel at trial. When ineffective assistance of counsel claims are raised, "trial courts ordinarily should grant evidentiary hearings to resolve [such] claims if a defendant has presented a prima-facie claim in support of post-conviction relief." State v. Preciose, 129 N.J. 451, 462 (1992). To establish a prima-facie claim of ineffective assistance of counsel, a defendant must "demonstrate the reasonable likelihood of succeeding" under the test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1986), "and adopted

by the Supreme Court of New Jersey in State v. Fritz, 105 N.J. 42, 58 (1987), Preciose, 129 N.J. at 463.

The two-pronged test of Strickland and Fritz is: (1) whether counsel's performance was deficient, and (2) whether there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In deciding if a defendant has established a prima-facie claim, courts must "view the facts in the light most favorable to a defendant." Preciose, 129 N.J. at 463.

The Preciose Court set forth this surmountable standard because a defendant usually needs a hearing to establish a record to support his claim of ineffective assistance of counsel. The Court reasoned that a hearing is more likely required on ineffectiveness claims "because the facts often lie outside the trial record and because the attorney's testimony may be required." Preciose, 129 N.J 462; see also State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991) ("generally, a claim of ineffective assistance of counsel cannot be raised on direct appeal [because] defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction"). In determining whether to conduct an evidentiary hearing, the PCR court should view the facts in the light most

favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-63 (1992). If the PCR claim with the facts so viewed has a reasonable probability of being meritorious, the court should ordinarily grant an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158(1997). Where, as here, the PCR court denied an evidentiary hearing, appellate review is de novo. State v. Harris, 181 N.J. 391, 420-21(2004), cert. denied, 545 U.S. 1145(2005).

For the reasons in the Points that follow, petitioner was denied the effective assistance of counsel for which there was a reasonable probability that the outcome at trial was affected. Since the petitioner presented prima-facie evidence of these claims below, the PCR court was wrong to deny his petition without granting an evidentiary hearing.

POINT I

COUNSEL'S FAILURE TO PERFORM BASIC EXPECTED FUNCTIONS, SUCH AS FILING BRIEFS IN OPPOSITION TO THE STATE'S 404(B) MOTION, AND APPEARING AT MULTIPLE HEARINGS, WERE EGREGIOUS SHORTCOMINGS THAT DEPRIVED PETITIONER OF HISRIGHTS UNDER THE SIXTH AMENDMENT AND TO A FAIR TRIAL (Da96)

A person on trial for his freedom in our criminal justice system may reasonably expect certain standards of professionalism from his attorney. Among them, showing up on time for hearings, attending all hearings, filing briefs in critical evidentiary motions, and avoiding antagonizing the trial judge to the point

where the judge imposes sanctions for repeated failure to timely appear at hearings. Petitioner's trial attorney committed all of these acts of unprofessional conduct, to the extreme that this attorney failed to act as counsel, thereby depriving petitioner of a fair trial.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant ... [and] advocate the defendant's cause." Strickland, supra, 466 U.S. at 688, State v. Morton, 155 N.J. 383, 476(1998). These duties include client loyalty, adequate consultation, and legal proficiency. Ibid, Fritz, 105 N.J. at 52.

"When there are 'egregious shortcomings in the professional performance of counsel' a presumption of prejudice arises without inquiry into the actual conduct of the trial." Morton, 155 N.J. 383, 481 (1998) State v. Marshall 148 N.J., 89, 312 (1997)(Handler, J., dissenting) (quoting Fritz, supra, 105 N.J. at 61); accord State v. Jack, 144 N.J. 240, 249 (1996) ("[W]hen the level of counsel's participation makes the idea of a fair trial a nullity, a defendant is not required to show prejudice. That degree of deficient performance is tantamount to a complete denial of counsel." (citation omitted)). That presumption of prejudice is conclusive. Fritz, 105 N.J. at 61.

Counsel failed to file a brief in response to a critical motion. The State filed a pre-trial motion to admit prior bad acts of petitioner pursuant to N.J.S.A. 404(b). In particular, the State moved to introduce statements petitioner made in which he claimed that Bryce fell down the stairs when chasing his mother on July 11, 2018, as well as surveillance video in order to refute this claim. The motion consisted of two full days of testimony. (1T, 2T). The first part of the motion was devoted to the admissibility of petitioner's statements.(1T4-4 to 10) The State filed a brief in support of this motion November 20, 2018. (Da110). The hearing on the statements was held on January 10, 2019. Defense counsel did not file a brief, as the motion judge noted that the court received the State's brief, but "I have not received Mr. Lisa's brief." (1T3-12 to 17) The State's brief contained 9 pages summarizing the facts, and 8 pages of legal analysis and argument to guide the motion court during the hearing. Trial counsel submitted nothing, yet declared "We're ready to go." (1T3-18 to 20)

The State filed a brief on the 404(b) part of the motion on January 17, 2019. (Da119). The hearing was scheduled for April 1, 2019. Once again, trial counsel failed to submit a brief. The motion judge again noted this dereliction just prior to the April 11 argument on the motion:

> The Court: All right. I have the - - Mr. Lisa, you did not provide a brief?

Mr. Lisa: No.

The Court: All right. I hope this is not like your brief that I have not been able to look at that you're going to be arguing.

Mr. Lisa: No, judge, but we are going make our oral argument.

[3T3-2 to 9]

The court granted the State's motion to admit the 404(b) evidence, which was particularly damaging to petitioner in this circumstantial case. The lack of basic advocacy led to this damaging admission of prior bad act evidence of the July 11 video to support the State's contention that petitioner lied about Bryce falling down the stairs. This evidence was admitted without a limiting instruction. (Da83 to 84). In a factually similar case involving the death of a young child, our Supreme Court emphasized the importance of well-crafted limiting instructions when other crimes or prior bad act evidence is admitted in order to overcome the risk that the evidence may "indelibly brand the defendant as a bad person and blind the jury from a careful consideration of the elements of the charge offense." State v. Blakney, 189 N.J. 88, 93 (2006).

Trial counsel also had a pattern of being habitually late for hearings, as well as failing to appear at all. The court scheduled a hearing for an oral decision on the Miranda/404(b) motion for April 29, 2019. (4T) A plea hearing cutoff conference

was also scheduled for that day. The hearing was scheduled for 9:00 a.m., and counsel was still not present when the court called the case at 12:33 p.m:

> The Court: All right, Mr. Lisa, who represents the defendant, is not present in court. It is 12:35. He was supposed to be here at 9:00. This has been ongoing for a little while. Every court date this matter is on we have to hunt down Mr. Lisa. There's been numerous calls from this court and Court Clerk, my clerk has been trying to reach out to Mr. Lisa, and it's been to no avail.
>
> [4T3-8 to 15]

Though petitioner was present, the court declined to bring him into the courtroom because his attorney was not present; instead, the court rendered its decision orally in the prosecutor's presence. (4T3-23 to 11-2)

The court then confirmed that it would reconvene at 2:00 p.m. for the plea cutoff conference, and that it would consider imposing sanctions if counsel did not appear by that time. (4T11-13 to 16)

The court again called the case at 2:49 p.m. and imposed sanctions for his failure to appear:

> The Court: All right. Mr. Lisa is still not here. I did call over to Judge Arre. He came in, I understand, and poke his head in and left and went to Judge Arre, which he did call the hearing and I called over there and he's not over there. I don't know where he is and Judge Arre's court is 50 feet or so, I mean it's not far, it's on the same floor so he doesn't even have to take any stairs.
>
> * * * *

> It's plea cutoff and he's not here, so I'm going to sanction him for not being here. I understand there might have been a personal issue, but that could have – the Court could have been contacted in advance regarding that and I wasn't inclined to sanction him, because I was going to give him until this afternoon, but seeing what he did this afternoon, totally disregard this Court.
>
> So I'm going to sanction him and his client is in custody and this is a speedy trial case. And like I said, it's scheduled for plea cutoff, therefore, this Court is going to sanction him $1,000. Thank you.
>
> [4T12-10 to 13-14]

The court then noted that, due to counsel's failure to appear, it was unable to make progress on the plea cutoff and would have to call the assignment judge to explain the situation. (4T14-21 to 15-2)

Counsel had another unexplained non-appearance during jury deliberations. The jury submitted a note with a question for the court regarding the instruction on the murder charge on October 16, 2019. (13T3-5 to 18) Without explanation, another attorney appeared instead of Mr. Lisa. This attorney never appeared during any of the previous trial days, and was thus a stranger not only to petitioner, but the jury when he appeared. The court heard from both the State and substitute counsel as to how it should respond to the question before re-issuing the murder instruction. (13T3-20 to 11-12)

Counsel's shortcomings in basic expected attorney functions such as filing opposition briefs, failing to appear at hearings, being habitually late, and incurring sanctions by the judge understandably caused petitioner to doubt whether his attorney was performing the basic expected functions of counsel. It is therefore not surprising that petitioner alleged in Ground VI of his petition "attorney performance affected by drug use. Trial counsel failed to appear and exhibited erratic behavior. Took extremely long breaks and returned confused." (Da39) The PCR court incorrectly found that petitioner's contentions were "bald assertions" because they were not supported by affidavits or certifications. (Da96) As detailed above, petitioner provided specific instances to demonstrate counsel's erratic performance. Petitioner submits that these were not minor deficiencies. A client on trial for his freedom has a reasonable right to expect that his attorney will file appropriate opposition to important evidentiary motions, to show up for court hearings, to show up to court hearings on time, and to not engage in repeated misconduct that leads to the imposition of sanctions by the trial judge. A reasonably professional attorney would not engage in this repeated erratic behavior, which demonstrates that counsel was not really present and not functioning as counsel. This degree of deficient performance is tantamount to a complete denial of counsel for which presumption of prejudice is conclusive.

Fritz, 105 N.J. at 61. The PCR court should have recognized that these substantial deficiencies denied petitioner a fair trial, and granted the petition for post-conviction relief.

POINT II

PETITIONER'S TRIAL ATTORNEY ENGAGED IN SIGNIFICANT ERRORS THAT HAD A CAPACITY TO IMPACT THE OUTCOME, AND COLLECTIVELY DENIED HIM A FAIR TRIAL

In addition to trial counsel failing to perform basic functions of showing up to hearings and filing briefs, trial counsel committed numerous substantial trial errors that demonstrated his overall inattentiveness to the proceedings, and, individually or cumulatively, substantially prejudiced petitioner.

A. TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING PETITIONER TO APPEAR FOR TRIAL IN HIS PRISON UNIFORM, THEREBY PREJUDICING HIM WITH THE TAINT OF CRIMINALITY IN THE EYES OF THE JURY AND DENYING HIM A FAIR TRIAL (Da99)

For the first two days the defendant wore his prison pants and prison footwear and counsel did not object. (Da39) The Supreme Court in Estelle v. Williams, 96 S. Ct. 1691, 1693 (1976) noted that the potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.

"There is little doubt . . . that negative inferences can be, and more than likely are, created in the minds of the jurors when the accused is brought into court and tried in prison clothing." Hernandez v. Beto, 443 F.2d 634, 636 (1971).

Our courts recognize that requiring a defendant to appear at trial in distinctive prison garb negatively impacts the presumption of innocence to which every defendant is entitled. State v. Artwell, 177 N.J. 526, 534 (2003). Distinctive clothing is clothing that "allows the jury to visibly identify" the defendant as a prisoner. Artwell, 177 N.J. at 534 n.1. The right to a fair trial is implicated when a defendant's clothing has "markings identifying it as a correctional uniform." A defendant appearing for trial in prison garb "may affect a juror's judgment, furthers no essential state policy and operates usually only against only those who cannot post bail prior to trial." Id, at 535.

The PCR court found that counsel's failure to object to Petitioner's appearance in prison pants and footwear did not prejudice the outcome of the trial. (Da98) The court found that the claim lacked specificity because the only supporting statement was a statement in petitioner's counseled brief that "for the first two days the defendant wore his prison pants and prison footwear, and counsel did not object." (Da99) This finding is incomplete, as petitioner stated in his verified petition that he was "forced to appear to trial in prison garb." (Da39)

The PCR court faulted petitioner for not describing more specifically the distinctive nature of the prison pants and footwear, or for providing details on the type of upper body clothing in which petitioner was attired. (Da99). The court also accepted without any factual underpinning the State's argument that the jury did not see petitioner wearing prison pants or footwear because he was seated during the trial. (Da99 to 100)

The PCR court erred by failing to interpret the facts alleged in a PCR petition in a light most favorable to the petitioner. State v. Cummings, 321 N.J. Super. 154 (App. Div.), certif denied, 162 N.J. 199 (1999); Preciose, 129 N.J. at 462-63. Petitioner alleged in his verified petition that he was forced to wear prison garb. This allegation was further specified by counsel to refer to prison pants and shoes. This information was sufficient to raise an inference that the jury saw petitioner wearing identifiable prison clothing. It is ludicrous to suggest that since litigants are seated during the bulk of trial that the jury would not see petitioner's pants and shoes. The PCR was wrong to rely upon this speculative argument by the State, which was not supported by any affidavit or certification. It also defies common sense, as there are portions of a trial, such as when a judge enters or leaves the courtroom, where all persons rise. And even where litigants are seated, pants and shoes can still be seen.

Holding petitioner to such a high level of specificity is particularly unfair where counsel's failure to object to petitioner's wearing prison clothing inevitably resulted in the inability to rely on trial transcripts as documentation. There is one portion that sheds some light on the issue. At the conclusion of the final pre-trial proceeding, just prior to jury selection, the court asked trial counsel if petitioner received his street clothing. (7T14-16 to 23) Counsel replied that petitioner's mother was arranging to bring clothes and that he has her phone number in order to follow up. (7T14-24 to 15-3) The court, emphasizing the importance of this issue, offered to read the jury the instruction on prison garb to which counsel indicated he would object. (7T15-4 to 14)

The verified petition and arguments presented below raise a *prima facie* claim that counsel failed to follow up with petitioner's mother to provide street clothes, and allowed him to appear in prison clothes without objection for the first two days of trial. This oversight is yet another example of trial counsel's inattentiveness to the basic precepts of advocating for petitioner's interests during the proceedings. Since petitioner came forward with details that he was wearing prison issued shoes and pants, the PCR court was wrong to conclude that the jury was not prejudiced without conducting an evidentiary hearing at which those who attended the trial could provide more specific details as to what petitioner was

wearing, the view from the jury box to the defense counsel table, and trial counsel's explanation of the issue. This court should remand for an evidentiary hearing.

B. COUNSEL WAS INEFFECTIVE FOR FAILING TO REDACT FROM PETITIONER'S RECORDED STATEMENT THE INTERVIEWING DETECTIVE'S COMMENTS THAT HE DID NOT BELIEVE PETITIONER, OR, ALTERNATIVELY, TO REQUEST A LIMITING INSTRUCTION (Da 102)

During the course of petitioner's recorded statement, Detective Porter, on a number of occasions, gave his opinion that he did not believe him. Trial counsel did not move to have these opinions sanitized from the recording nor did he ask for a limiting instruction:

> DETECTIVE: "Well, what we're saying is like with that amount of bruising, in my opinion, I think it's almost -- you said when you changed his diaper and you said you didn't see any bruising, I don't -- it's almost impossible not to see that amount of bruising."(3T187-18)
>
> DETECTIVE: "So at that point, what we're saying is you didn't notice all this bruising. I mean it's pretty heavy bruising even if you're trying not to be a creep because like, no, I get it, you're not like,"
>
> DETECTIVE: "-- you know, fucking with little kids, I understand that, I'm just saying that, you know, I gotcha. But you're going to notice that, that's what I'm kind of getting at" (3T188-89)
>
> DETECTIVE: "--when I stop and think about it and we step out of the room and we sit there and you kind

> of think about it for a second and we retell it our bosses or whatever, it doesn't seem to be adding up" (3T 193-11)
>
> DETECTIVE: "-- that's another thing I'm saying like, oh, what -- that's part of what's not adding up, is like how can you change the kid's diaper and didn't see it, like you're -- you change the child's diaper, you're going to see those bruises. That's all. That's all I'm getting at is there's a lot of bruises that are there." (3T198 to 199)

Defense counsel made no attempt to have the recordings sanitized to remove these improper comments by the officer.

When a police officer testifies as a lay witness, he or she may only provide fact testimony "through with [the] officer is permitted to set forth what he or she perceived through one or more of the senses." State v. McLean, 205 N.J. 438, 460 (2011) " [I]t [is] the jury's province to assess the credibility of all of the evidence." State v. Cole, 229 N.J. 430, 450 (2017). "[C]redibility is an issue which is peculiarly within the jury's ken . . . ." State v. Frisby, 174 N.J. 583, 595 (2002) (quoting State v. J. Q., 252 N.J. Super. 11, 39 (App. Div. 1991). Thus, one witnesses' "assessment of another witness's credibility is prohibited." Ibid. (finding police testimony that one witness was more "credible" than the defendant to be improper); see also, State v. Clausell, 121 N.J. 298 337-38 (1990) (finding police testimony that a witness was a "good witness" "improperly bolstered the credibility

of a key prosecution witnesses").

Moreover, in Frisby, the New Jersey Supreme Court found such testimony to be particularly problematic because "[t]his case was pitched credibility battle between [two individuals] on [a] pivotal claim. Any improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrant[ed] reversal." Frisby, 174 N.J. at 596.

The harm to petitioner is analogous, because there were no eyewitnesses to the underlying events - rather - the State relied upon questionable 404(b) evidence, and there was a lack of compelling expert or physical evidence tying the victim's injuries to petitioner. Detective Porter's repeated comments during his interview that he did not believe petitioner had a great capacity to tip the scales against petitioner.

The PCR court found that petitioner had raised this claim on direct appeal, and relied upon the prohibition of R. 3:22-5(a) barring a claim on PCR that was previously litigated on direct appeal. (Da102 to 103) The claim on direct appeal and the issue on PCR are materially different. Petitioner argued on direct appeal that the trial judge committed plain error by failing to sanitize the portions of Detective Porter's statement in which he commented on petitioner's credibility. (Da27) The instant claim involves ineffectiveness of counsel due to his failure to

request sanitization of the offending portions, or a limiting instruction. Counsel's failure to properly advocate for petitioner not only led to the unchallenged admission into evidence where a police officer opined negatively on petitioner's credibility - it also placed petitioner in a worse position to raise this claim on direct appeal. Since counsel did not object below, the claim was subject to the more stringent standard of appellate review set forth in the plain error rule of R. 2:10-2, which provides that where an error is not raised below, the "mere possibility of an unjust result is not sufficient for reversal." State v. Singh, 245 N.J. 1, 13 (2021); State v. Funderburg, 225 N.J. 66, 79 (2016). Instead, reversal is required only 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 not otherwise have reached." State v. Alessi, 240 N.J. 501, 527 (2020).

This oversight is another example of counsel's inattention to advocating for petitioner's interest. The trial court may very well have granted a timely request from counsel to redact portions of Detective Porter's statement commenting on petitioner's credibility. In a case such as this one, relying exclusively on circumstantial evidence, repeated statements by a police officer had the capacity to turn the jury against petitioner, thereby satisfying the prejudice requirement of Strickland. Since the PCR court did not evaluate this claim in the context of

ineffectiveness of counsel, this matter should be remanded for an evidentiary hearing, or, alternatively, a new trial.

C. TRIAL COUNSEL INEFFECTIVELY FAILED TO PRESENT A DEFENSE BY NEGLECTING TO INVESTIGATE AND CALL POTENTIALLY HELPFUL FACT, EXPERT and CHARACTER WITNESSES(Da97)

1. Counsel Was Ineffective for Failure to Present Fact Witnesses Who Were Present During the Relevant Time Period(Da97)

One of the key roles of a criminal defense attorney is to conduct a proper investigation to determine if witnesses, fact or expert, would assist his client's case. Petitioner presented evidence to the PCR court that a witness was present at the apartment just before and during the time period he called 911 to assist Bryce. In particular, a video introduced by the State shows that on July 18 petitioner was walking with Delwood Martin, a twelve-year-old boy he and Monique also watched. Petitioner then carried him up the stairs. (10T35-2 to 39-5) Delwood was in the apartment when paramedics arrived after petitioner called 911. (8T172-5 to 6). Detective Jones later interviewed a shy Delwood. (11T150-2 to 5). This witness could have supported the proposition that petitioner properly cared for Bryce and did not cause his death. Delwood Martin was present at the apartment and Delwood's aunt, who cared for him, had relevant information. See State v. L.A. 433 N.J. Super.1, 19 (App. Div. 2013). (issue on ineffectiveness claim based

upon failure to call witness is whether there was a reasonable probability - that is, a probability sufficient to undermine confidence in the outcome - that the jury would have found reasonable doubt about defendant's guilt had it heard from the absent witness.") Inasmuch as Delwood was present, and his aunt could have provided information that Delwood was unharmed in petitioner's care, these witnesses could have provided evidence raising a reasonable doubt that petitioner harmed Bryce. Since petitioner detailed specific instances in the record where refuted testimony had the capacity to raise a reasonable doubt, the PCR court was wrong to conclude that petitioner failed to provide sufficient information to warrant an evidentiary hearing. (Da 97)

2. Counsel Was Ineffective for Failing to Consult With and Present an Expert Witness to Refute the State's Expert's Conclusion that Bryce's Death Was Not Natural or Accidental (Da97)

Trial counsel also failed to pursue calling an expert witness on petitioner's behalf. Inasmuch there were no eyewitnesses, the State relied heavily upon expert testimony in an attempt to prove that petitioner caused the injuries that resulted in Bryce's death. In particular, medical examiner Jacqueline Benjamin, who performed the autopsy on Bryce, testified as an expert witness in forensic pathology. (10T125-18 to 21; 10T128-19 to 21; 10T139-19 to 21) After testifying in detail as to injuries, Dr. Benjamin gave the opinion that the cause of death was

multiple blunt force injuries.(10T176-20) She also gave the opinion that the manner of death was homicide.(10T177-8 to 9) Dr. Benjamin did not give that opinion to a reasonable degree of medical certainty.(10T177-17 to 21) Dr. Benjamin determined that the death was not a suicide; not an accident; not natural; not undetermined.(10T177 to178)

Petitioner verified that trial counsel failed to adequately investigate and present evidence in support of his innocence. (Da40) He argued through PCR counsel below that defense counsel failed to consult with experts in order to rebut the State's expert - a claim that was not refuted by the State (Da79;16T5-14 to 17) Dr. Benjamin's expert testimony that Bryce's death was not natural or accidental was damaging to petitioner. An expert could have cast doubt on these findings by highlighting questionable portions of Dr. Benjamin's testimony, such as that some injuries to Bryce's abdomen and chest could have been caused by an inexperienced person performing C.P.R. (10T94-6 to 17). Further, she acknowledged that the skull and femur fracture could have been caused by a fall from a height (10T197-17 to 22), which was consistent with petitioner's statement that Bryce fell. Nor could Dr. Benjamin specify that type of blunt force trauma that was used. (10T194-22 to 24)

An expert could have analyzed this and other aspects of Dr. Benjamin's testimony and autopsy report and could have presented opposing conclusions consistent to support the alternative theory that Bryce's death was accidental, or not caused by petitioner. Given the importance of Dr. Benjamin's conclusions, there was no legitimate professional reason for trial counsel to at least consult with an expert.

The PCR court rejected this claim as a bald-faced assertion. (Da97) Petitioner pointed to Dr. Benjamin's testimony, and his claim that counsel did not even consult with an expert was not contested. In light of the State's proofs, petitioner established a *prima facie* case that counsel was ineffective for not consulting with and presenting an opposing expert, which prejudiced petitioner, as an alternative theory presented by a defense expert could have raised a reasonable doubt.

3. Counsel Was Ineffective for Failing to Present Character Witnesses in Light of Petitioner's Lack of Prior Criminal History(Da97)

Defense counsel failed to call witnesses to testify as to petitioner's good character. He had never been convicted of any prior offenses. (15T4-13 to 14;15T25-18 to 22) Defendants may, without offering themselves as witnesses, call witnesses to show that their character was such as to make it unlikely that they would be guilty of the crimes charged, and that such evidence is proper for the

consideration of the jury in determining whether there is a reasonable doubt of their guilt. State v. Costa, 139 N.J. Super. 588, 592(Law Div. 1976) see State v. Sinnott, 24 N.J. 408, 412 (1957). The PCR court was wrong to reject this claim as a bald-faced assertion. (Da 97) It is uncontested that trial counsel failed to investigate or present character witnesses. In light of petitioner's lack of criminal history and the highly circumstantial nature of the State's case, strong character witnesses had the capacity to raise reasonable doubt, and thus impact the result on petitioner.

D. Trial Counsel Had No Valid Strategic Reason For Advising Petitioner Not To Testify; In Light Of Petitioner's Lack Of Prior Criminal History, The State's Presentation Of His Statement As Evidence, And Petitioner's Ability To Provide Information Helpful To His Defense, Counsel's Decision Denied Petitioner His Right To Testify (Da98)

Trial counsel advised petitioner that he should not testify. Petitioner could have testified as to his proper care of Bryce and not causing him harm, and he would have been able to rebut the State's testimony. Petitioner would have not run the risk of being impeached by prior convictions. In addition, since his statement to law enforcement had already been introduced into evidence, (9T98-3 to 20; 9T98-23 to 99-19), avoidance of what had been said to the police was not a reason not to testify in this case.

Counsel's advice interfered with Petitioner's constitutional right to testify. See United States v. Mullins, 315 F.3rd 339(5th Cir. 2002);United States v. Curtis,742 F.2d 1070, 1076(7th Cir 1984). Defendant's constitutional right to testify may not be waived by counsel as a matter of trial strategy. United States v. Teague, 953 F.2d 1525, 1534 (llth Cir. 1992) Counsel's obligations include advising a client of "the benefits inherent in exercising the right to testify and the consequences inherent in waiving it." State v. Harris, 181 N.J. 391, 482(2004).

Petitioner would have testified that there was old bruising on the child not caused by him and he did not cause any bruising to the child. Petitioner would have testified as to what he observed that might have caused the bruising by the CPR in the bathroom and on the hardwood floor. Petitioner could have also filled in other blank areas.

The PCR court denied this claim, finding that the record demonstrated that petitioner knowingly waived his right to testify. (Da98) The focus on the waiver colloquy misses the point. Petitioner's answers were guided by the improper and ineffective advice from trial counsel. There was no legitimate strategic reason for petitioner not to testify, as he could not be impeached by prior convictions, and had already given a statement to police that was introduced into evidence. Counsel

denied petitioner the opportunity to tell his story to the jury, which had the capacity to raise reasonable doubt and thus change the result.

E. COMBINED ERRORS OF FAILING TO OBJECT TO IMPROPER EXPERT AND LAY TESTIMONY AND TO REQUEST APPLICABLE INSTRUCTIONS DENIED PETITIONER A FAIR TRIAL; THE PRESENTATION OF THESE ISSUES ON DIRECT APPEAL WAS NOT A BAR TO A PCR REMEDY, WHERE THE FOCUS IS ON COUNSEL'S INEFFECTIVENESS, WHICH ALSO PREJUDICED PETITIONER'S CLAIMS ON DIRECT APPEAL BY SUBJECTING THEM TO A HIGHER STANDARD OF REVIEW (Da100 to 103)

Petitioner argued below that counsel was ineffective for (1) failing to object to Dr. Benjamin's expert conclusions on the cause of death, which were not based upon a reasonable medical certainty(2) failing to move to strike or seek a limiting instruction of Dr. Sultana's testimony on Bryce's injuries two days before his death;; and (3) failing to request an instruction on the affirmative defense of summoning medical treatment. (Da81 to 88) The PCR court found that these issues were procedurally barred because they were raised before and decided by this Court on direct appeal. R. 3:22-5. The claim on direct appeal and the issue on PCR are materially different, as the claims on direct appeal were couched in terms of trial and judicial error, whereas the claim on PCR involves ineffectiveness of counsel. Counsel's failure to properly advocate for petitioner not only led to the unchallenged admission into evidence or proper guidance to the jury in the form of

a limiting instruction- it also placed petitioner in a worse position to raise these claim on direct appeal. Since counsel did not object below, the claims were subject to the more stringent standard of appellate review set forth in the plain error rule of R. 2:10-2, which provides that where an error is not raised below, the "mere possibility of an unjust result is not sufficient for reversal." State v. Singh, 245 N.J. 1, 13 (2021); State v. Funderburg, 225 N.J. 66, 79 (2016). Instead, reversal is required only 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 not otherwise have reached." State v. Alessi, 240 N.J. 501, 527 (2020).

This Court applied the plain error standard in denying these claims on direct appeal. (Da21 to 26; Da29 to 30; Da32 to 33) None of these issues were analyzed in the context of ineffective assistance of counsel. Petitioner asserts that these claims, individually or combined, could have made a difference in the outcome of his trial. Trial counsel failed to object to object to Dr. Benjamin's conclusion that Bryce's manner of death was homicide, and not accidental. (10T177-8 to 9) She did not give this opinion to a reasonable degree of medical certainty. A medical expert is permitted to opine that a death was "homicide" in order to rule out the possibility that a victim's injuries were accidental. State v. Baluch, 341 N.J. Super. 141, 185 (App. Div. 2001). Such medical opinion testimony must be couched in

terms of a reasonable medical certainty or probability. State v. Harvey, 121 N.J. 407, 431 (1990), Johnsee v. Stop & Shop Cos., 174 N.J. Super. 426, 431 (App. Div. 1980). Dr. Benjamin's testimony was critical evidence against petitioner, as it provided the jury the basis for finding that Bryce's multiple injuries were not self-inflicted or the result of an accident. Counsel's failure to move to strike this testimony lacking the applicable legal standard for reaching a scientific conclusion is typical of the lack of attentiveness he demonstrated throughout the trial. Had counsel properly advocated for petitioner, this critical testimony could have been stricken, or the jury would have at least been reminded of the correct legal standard to apply.

Counsel also failed to object to improper testimony Dr. Sultana, who testified regarding injuries to Bryce on July 16th, two days before his death. Dr. Sultana speculated that, if he had seen the injuries depicted in the photos, he would have reported it as child abuse; those injuries in that picture are severe injuries from either some sort of blunt trauma or something that's much more significant than scratches; he would have had to report them.(10T121- 122) There was no clear and convincing evidence that petitioner had caused the injuries of July 16, 2018. Dr. Sultana's speculative testimony about the child abuse should have been stricken because it was mere speculation on the part of the doctor and was not an

opinion based on reasonable medical certainty. See State v. Harvey, 121 N.J. 407, 431(1990); State v. Freeman, 223 N.J. Super. 92, 116(App. Div. 1988) Counsel also failed to request limiting instructions in the jury charge for Dr. Sultana's testimony with reference to injuries on July 16, 2018. A limiting instruction should be given when the evidence is presented and in the final charge to the jury. State v. Barden, 195 N.J. 375, 390 (2008); State v. Fortin, 162 N.J. 517, 534 (2000). No such instruction was given when the evidence was presented.

Counsel's inattentiveness continued during the instruction phase of the trial, when he failed to seek an instruction on an applicable affirmative defense. In particular, counsel did not request the Court to charge that it was an affirmative defense to the crime of endangering an injured person and that the defendant summoned medical treatment for the victim. N.J.S.A.2C:12-l.2(c). Defense counsel did not object when the Court failed to give this charge. It was an affirmative defense that petitioner summoned medical treatment for the victim. N.J.S.A. 2C:12-l.2(c). The Defendant has the burden of proving this defense by a preponderance of the evidence. N.J.S.A. 2C:12-1.2(c)

There was ample evidence that a jury could find that petitioner summoned medical treatment. He called 9-1-1 at 02:52 p.m.(8T30-13):

> CALLER: "9-1-1 Emergency, I have a two year old -- I have a two year infant that passed out from the heat.

> We at 115 Van Wagenen, Apartment 304. We couldn't -- we got him in hot, we got him in cool water, he's not responding. He's breathing but he don't want to wake up."
>
> [8T32-10 to 15]

The caller gave his name as Andrew. (8T34-3 to 9) As a result of the call, first responders were sent.(8T35-23 to 25) The petitioner met the first responders as they arrived and told them there was a child upstairs not responding.(8T67-21 to 23) This affirmative defense should have been charged. Without these instructions, the jury would have no reason to know of the statutory defense. Knowledge of this defense could have caused a not guilty verdict on this charge. See State v. Blanks, 313 N.J. Super. 55, 63-64 (App. Div. 1998). Counsel's inattentiveness prevented the jury from considering this affirmative defense, which could have resulted in an acquittal.

Based upon the foregoing, the PCR court should not have found that these issues were procedurally barred by R. 3:22-5, and instead should have held an evidentiary hearing.

Conclusion

Based upon the foregoing, Petitioner respectfully urges this Court to reverse the denial of his application for post-conviction relief, and remand for an evidentiary hearing, or a new trial.

Respectfully submitted,

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By: /s/ *Jeffrey L. Weinstein*
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Dated: September 19, 2024

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LETTER BRIEF AND APPENDIX
ON BEHALF OF THE STATE OF NEW JERSEY

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

Re: STATE OF NEW JERSEY (Plaintiff-Respondent)
v. ANDREW HOWARD-FRENCH (Defendant-Appellant)
Docket No. A-001595-23T4

Criminal Action: On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Hudson County, Denying Post-Conviction Relief.

Sat Below: Honorable Mitchell J. Pascual, J.S.C.

Honorable Judges:

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

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

In October 2018, defendant Andrew Howard French (hereinafter "defendant") was charged in Hudson County Indictment No. 18-10-0872-I with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (count one); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2) (count two); and third-degree endangering an injured victim, N.J.S.A. 2C:12-1.2(a) (count three). (Da1-2).[1] The jury found defendant guilty of all charges in the indictment. (Da3-5).

In August 2021 this Court, having heard defendant's direct appeal, affirmed his conviction and sentence. (Da9-36). In November 2021, defendant appealed to the Supreme Court of New Jersey, which denied certification. (Da37).

Defendant then filed for post-conviction relief (PCR) in April 2023. (Da38-41). Defendant set forth thirteen grounds in support of his PCR petition. (Da39-40). Most of the grounds set forth in the PCR petition resurface in this appeal. (Dbi-ii). In June 2023 the Honorable Judge Mitchell L. Pascual, J.S.C.,

[1] The State adopts defendant's appendix and the abbreviations used in defendant's brief and additionally designates "Db" to refer to defendant's brief; "Pa" to refer the State's appendix; 1T to refer to the Motion Hearing Transcript dated April 11, 2019; 2T for the Jury Trial Transcript dated October 1, 2019; 3T for the Jury Trial Transcript dated October 7, 2019; 4T for the Jury Trial Transcript dated October 8, 2019; 5T for the Jury Trial Transcript dated October 9, 2019; 6T for the Jury Trial Transcript dated October 10, 2019; 7T for the Jury Trial Transcript dated October 15, 2019; 8T for the Jury Trial Transcript dated October 16, 2019.

held argument without an evidentiary hearing on defendant's petition for PCR. (Da91-105). In December 2023, Judge Pascual denied defendant's petition. Judge Pascual found that the trial judge sanctioned defendant's counsel for failing to appear at a plea cutoff hearing but that defendant's counsel appeared at every other hearing by himself or through Stephen J. Natoli, Esq., thereafter. (Da96; 8T: 3-8 to 3-10). Judge Pascual further noted that trial counsel argued the prosecution's motion to introduce evidence of defendant's prior bad acts. (Da96; 1T: 3-8 to 3-9). Applying Strickland v. Washington, 466 U.S. 668 (1984), Judge Pascual held that no omissions prejudiced the defendant. (Da94). Moreover, Judge Pascual held that defendant's claims asserting trial counsel's failure to object to certain testimony, request limiting instructions on testimony and affirmative defenses, plus redaction of a recorded interview, were barred under Rule 3:22-5 because they had been raised and decided by this Court on direct appeal. (Da100-101).

In August 2024, defendant moved for remand to supplement the record, arguing that sanctions against his private trial counsel before defendant retained him and trial counsel's federal conviction in May 2024 raised issues of ineffective assistance. (Pa1-9). This Court denied that motion. (Pa10).

This appeal follows.

COUNTERSTATEMENT OF FACTS

The following facts were admitted to the jury at defendant's trial in October 2019 and noted by this Court in August 2021. On July 17, 2018, defendant, caretaker of Bryce Sparrow, the two-year-old son of a friend, Monique Sparrow, called 9-1-1 to report "a two year infant who passed out from the heat." (3T: 33-6 to 33-7). Defendant told detectives that he had taken Bryce to a local playground while his mother was at work and, on the way back home, noticed Bryce hurt his leg and had difficulty walking. (4T: 98-23 to 99-2). A day before, Bryce's mother noticed her son had a swollen and bruised white lip, so she took Bryce to the emergency room. (4T: 8-20).

Nearly two hours passed between the time defendant said he saw Bryce's leg injury and the time defendant placed the 9-1-1 call. (5T: 30-15 to 39-24). Emergency medical technicians arrived at the scene and saw Bryce was unresponsive, was not breathing, and had no pulse. (3T: 72-4 to 72-5). An advanced cardiac life support paramedic at the scene saw multiple bruises on Bryce and a femur snapped in half. (3T: 104-17 to 104-18, 104-25). These paramedics took Bryce to the Jersey City Medical Center, where he was pronounced dead.

Investigation into what transpired on the day of Bryce's death and defendant's caretaking history with the child was turned over to the Hudson

County Prosecutor's Office. Detective Freddie Jones interviewed Delwood Martin, a twelve-year-old child in defendant's care, and noted that Delwood was "very shy" when giving his interview. (6T: 149-24 to 150-5).

Defendant agreed to a recorded interview with Detective Brenton Porter, maintaining what he had told law enforcement at the scene: Bryce fell off the playground slide while defendant babysat him, Bryce did not hit his head, and defendant never noticed any bruises on the child. (4T: 189-12 to 189-13). Multiple times during the recorded interview, Detective Porter implied he was not taking defendant's word for it:

> DETECTIVE: Well, what we're saying is like with that amount of bruising, in my opinion, I think it's almost -- you said when you changed his diaper and you said you didn't see any bruising, I don't -- it's almost impossible not to see that amount of bruising.
> (4T: 187-18 to 187-22).

At one point in the recorded interview submitted to the jury, when detectives were absent from the room, defendant could be heard seeming nervous and remorseful: "[M]y stomach is killing me. I shouldn't have stayed yesterday . . . I should never have took him. I want -- it's cold, geez. . . . I can't keep repeating this like . . . images and everything." (4T: 203-24 to 204-5). Defendant was later arrested and charged with Bryce's death. At trial, the State presented expert testimony by Dr. Jacqueline Benjamin, the forensic pathologist who performed Bryce's autopsy. Dr. Benjamin attested to finding multiple

contusions and abrasions on Bryce's body; a fracture on Bryce's right femur; bleeding in the rectus muscle, the lining of the abdomen, and the abdominal cavity itself; as well as cerebral hemorrhaging. (5T: 139-13 to 139-17, 145-23 to 146-1). Dr. Noushin Sultana, who treated Bryce when his mother brought him to the emergency room before his death, testified she would have reported the extensive injuries on Bryce's cadaver as child abuse had she noticed the injuries. (5T: 122-6 to 122-9).

On October 1, 2019, during a motion in limine hearing outside the jury's presence, defendant's counsel updated the court on defendant's mother's delivery of his street clothes: "Judge, the mother was . . . bringing him clothes, so I want to make sure she's here." (2T: 14-24 to 15-1). The trial judge asked defense counsel whether he had defendant's mother's phone number, to which trial counsel replied he did. (2T: 15-2) The trial judge indicated that if defense counsel did not get in contact with defendant's mother, he would instruct the jury on prison garb. See Model Jury Charges (Criminal), "Defendant - Testifying in Jail Garb or Prison Garb" (approved May 12, 2014). When trial counsel replied that he would object to that instruction, the trial judge said he would "have to really deny" the objection. (2T: 15-11 to 15-12). The October 1 transcript indicates jury selection proceeded throughout that day, and at no other point in the trial did the issue of prison garb arise. (2T: 15-18).

Defendant did not testify at trial. On October 15, 2019, the trial judge questioned defendant to ensure he knew of his right to remain silent:

> THE COURT: Mr. French, you understand that you have the absolute right to testify in your own defense in this case, if . . . you choose to do so. Correct?
>
> MR. HOWARD-FRENCH: Correct.
>
> THE COURT: You also know you have the absolute right to remain silent. Correct?
>
> MR. HOWARD-FRENCH: Yes.
>
> THE COURT: You understand that if you choose to exercise the right to remain silent and do not testify, I will instruct the jury they cannot hold your silence against you and, in fact, I will read to them verbatim the approved model charge that says: As you know, defendant elected not to testify at trial. It is his Constitutional right to remain silent.
> You must not consider for any purpose or in any manner in arriving at your verdict the fact that defendant did not testify. That fact should not enter into your deliberations or discussions in any manner, at any time. . . .
> Now, you understand that you can give up the right to remain silent and testify if you wish. Correct?
>
> MR. HOWARD-FRENCH: Yes. . . .
>
> THE COURT: Okay. Now, have you . . . had enough time to discuss with your attorney whether or not you'll testify in this case?
>
> MR. HOWARD-FRENCH: Yes.
>
> THE COURT: And have you made a decision about whether or not you'll testify?
>
> MR. HOWARD-FRENCH: Yes.

> THE COURT: What is your decision?
>
> MR. HOWARD-FRENCH: Not to testify.
>
> THE COURT: Now, has anyone put you under any pressure, or made any promises, or threatened you in regard to this decision?
>
> MR. HOWARD-FRENCH: No.
>
> THE COURT: Okay. Very good. Thank you, counsel.
> (7T: 55-18 to 57-25).

The jury found defendant guilty of all charges in the indictment. (Da3-5).

LEGAL ARGUMENT

POINT I

> DEFENDANT'S PCR PETITION WAS CORRECTLY DENIED BECAUSE HE FAILED TO SATISFY HIS BURDEN OF PROVING THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE.[2]

Defendant challenges the denial of his PCR petition by Judge Pascual, arguing first that his private trial counsel -- James R. Lisa -- rendered ineffective assistance by only delivering oral argument on the prosecution's 404(b) motion, missing some hearings, and substituting counsel at other hearings. Second, defendant argues that trial counsel rendered ineffective assistance by allowing defendant to appear at trial wearing prison pants and footwear. Third, defendant argues that trial counsel rendered ineffective assistance by not requesting a

[2] This point responds to all eight points raised by defendant in his appellate brief. (Db22, 29, 33, 37, 38, 40, 41, 43).

redaction of comments made by the detective during a recorded interview. As an alternative to this third argument, defendant submits that trial counsel failed to request limiting instructions on witness testimony or affirmative defenses. Defendant further alleges that trial counsel rendered ineffective assistance by not investigating or calling fact, expert, and character witnesses; and that trial counsel had "no valid strategic reason" for advising defendant not to testify. As defendant has failed to meet his burden to establish ineffective assistance of counsel, this Court should affirm the PCR court's order denying defendant's petition.

In reviewing a PCR court's findings without an evidentiary hearing, an appellate court applies de novo review to facts and legal conclusions of the PCR court. State v. Harris, 181 N.J. 391, 414 (2004). Pursuant to Rule 3:22-5, "prior adjudication on the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding . . . or in any appeal taken from such proceedings." Rule 3:22-5 precludes consideration of an argument presented in a PCR proceeding "if the issue raised is identical or substantially equivalent to that adjudicated previously on direct appeal." State v. Marshall, 173 N.J. 343, 351 (2022) (quoting State v. Marshall, 148 N.J. 89, 150 (1997)); see also State v. McQuaid, 147 N.J. 464, 483 (1997) ("[A] defendant may not use a petition for [PCR] as an opportunity

to relitigate a claim already decided on the merits."). Courts do not countenance circumvention of Rule 3:22-5's procedural bar by "couching essentially the same argument in different constitutional verbiage in order to evade the prohibition against relitigating issues already decided." State v. Cupe, 289 N.J. Super. 1, 8 (App. Div. 1996), certif. denied, 144 N.J. 589 (1996).

A defendant must prove entitlement to an evidentiary hearing by making a prima facie case in support of PCR. R. 3:22-10(b). A defendant establishes a prima facie case by demonstrating a reasonable likelihood that his claim, viewing facts alleged in the light most favorable to him, will ultimately succeed on the merits. R. 3:22-10(b). A court must deny an evidentiary hearing if the hearing will not aid the court's analysis of the defendant's entitlement to PCR or if the defendant's allegations are too vague, conclusory, or speculative. R. 3:22-10(e)(1)-(2). Nor may an evidentiary hearing be used to permit a defendant to investigate whether additional claims for relief exist for which the defendant has failed to demonstrate a reasonable likelihood of success. R. 3:22-10(e)(1)-(3).

To prevail on a prima facie case for PCR based on ineffective assistance of counsel, a defendant must satisfy the two-prong test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong, "the defendant must show that counsel's performance was

deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. This showing requires that defendants overcome a "strong presumption" that counsel exercised "reasonable professional judgment" and "sound trial strategy" in fulfilling his responsibilities. Id. at 689-90; see also State v. Castagna, 187 N.J. 293, 314 (2006) (reiterating that the first prong is met by a showing that counsel's acts or omissions fell "outside the wide range of professionally competent assistance" considered in light of all the circumstances of the case (quoting Strickland, 466 U.S. at 690).

"The decision whether to testify, although ultimately defendant's, is an important strategical choice, made by defendant in consultation with counsel." State v. Savage, 120 N.J. 594, 631 (1990). Courts must avoid second-guessing counsel's tactical decisions and viewing those decisions under the "distorting effects of hindsight." Marshall, 148 N.J. at 157 (quoting Strickland, 466 U.S. at 689).

"[B]ald assertions" of counsel's deficiencies are insufficient. Porter, 216 N.J. at 355 (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)); see also Cummings, 321 N.J. Super. at 171 ("[P]etitioner offers nothing as to what those [absent] witnesses would have said had they been interviewed").

Under Strickland's second prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694. The errors committed must be "so serious as to undermine the court's confidence in . . . the result reached." Castagna, 187 N.J. at 315. The Supreme Court of New Jersey has held that "a conclusive presumption of prejudice is inappropriate except in cases exemplified by egregious shortcomings in the professional performance of counsel." Fritz, 105 N.J. at 61; see also id. at 60 n.3 ("The vast majority of Sixth Amendment claims based upon inadequate preparation continue to be rejected regardless of whether the inadequate preparation is traceable to the haste of the trial court or the incompetence of the trial attorney."); State v. Ball, 381 N.J. Super. 545, 556-57 (App. Div. 2005) ("[R]egardless of whether defendant was advised by counsel, the trial judge fully explained defendant's right to testify, the possible consequences of his choice and the option to have the jury instructed to draw no inference from defendant's choice not to testify.").

A defendant asserting ineffective assistance on PCR shoulders the burden of proving both prongs "by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992). A defendant's failure to carry his burden

under either prong is fatal to his petition. State v. Parker, 212 N.J. 269, 280 (2012).

Here, defendant asserts he is "couch[ing]" the same facts previously raised in the prior appeal in ineffective assistance of counsel terms rather than "terms of trial and judicial error." (Db43). Indeed, this Court previously addressed these same arguments on direct appeal, noting: "[S]ince defendant's ineffective assistance arguments are related to the arguments which we have rejected above, there is no need to examine evidence outside the record for their resolution. . . . [W]e have considered defendant's ineffective assistance claims and find that they lack merit." (Da35. But see Db44 (claiming ineffective assistance claims were not analyzed on direct appeal)). PCR is intended to give defendants the opportunity to raise claims based on facts they could not discover at trial or on direct appeal. Preciose, 129 N.J. at 460. Defendant's claims that counsel failed to object to testimony offered by Drs. Benjamin and Sultana, redact Detective Porter's statements in the recorded interview, or seek a limiting instruction on this testimony or on affirmative defenses, rehash claims already raised on direct appeal and under the same constitutional theory. Under Rule 3:22-5, these issues are therefore barred.

Defendant fails to show that trial counsel's conduct fell outside the wide range of professionally competent assistance considered in light of all the

circumstances of his case. Defendant points to some isolated incidents when his trial counsel was absent, conveniently ignoring trial counsel's attempts to correct course. Trial counsel not only argued the prosecution's 404(b) motion, he had read the prosecution's brief and dissected passages therein. (1T: 19-11 to 19-20). Trial counsel appeared at most hearings by himself or through Stephen J. Natoli, Esq. (Da96; 8T: 3-8 to 3-10). Thus, defendant cannot satisfy the first prong of Strickland.

Defendant's remaining allegations of ineffective assistance -- that trial counsel did not call witnesses and lacked a "valid strategic reason" for advising defendant not to testify -- also fall short of Strickland's first prong. While under oath at his trial on October 15, 2019, defendant told the trial judge that he had discussed testifying with his trial counsel and was declining to testify. (7T: 55-18 to 57-25). The trial judge continued voir dire, asking defendant if anyone had pressured him not to testify or requested that defendant not testify in exchange for a promise. (7T: 57-20 to 57-22). Defendant answered "no." (7T: 56-23). The trial judge asked defendant if the decision not to testify was solely his and whether he understood he could retract his waiver at any point in the trial, to which defendant answered "yes." (7T: 56-16 to 56-19). Defendant's statements on the trial record directly contradict his claims on appeal. Moreover, had defendant chosen to testify he would have been subject to

impeachment based on his pre-arrest interview with Detective Porter by way of vigorous cross-examination by the prosecution. As such, any advice by counsel cautioning him not to testify can hardly be said to have been ineffective assistance.

Like Cummings, in which this Court rejected an ineffective assistance claim because the defendant in that case "offer[ed] nothing as to what those witnesses would have said had they been interviewed," 321 N.J. Super. at 171, here, defendant does not even name expert or character witnesses trial counsel could have called. (Db39). Defendant thus cannot provide certifications of these unnamed witnesses advising what their potential testimony would have been. Even when an absent witness is identified, this Court must determine whether there is a reasonable probability that, but for trial counsel's failure to call the witness, there would have been reasonable doubt about the defendant's guilt. See Cummings, 321 N.J. Super. at 172. As for defendant's claim that Delwood Martin, a twelve-year-old child in defendant's care, would have been an exculpatory fact witness, Detective Jones noted that Delwood was "very shy" during his interview. (6T: 149-24 to 150-5). Defendant does not meet his burden of establishing that this reticent twelve-year-old would have testified favorably or undermine the inculpatory facts developed by the prosecution at trial. Because defendant offers only a blanket assumption that Delwood might have

made the jury doubt his guilt, defendant's claim for a new trial on this issue should be rejected.

Trial counsel's curative steps in this case eliminate any presumption of prejudice. Neither inadequate preparation nor strategic miscalculations are sufficient to warrant reversal of an otherwise valid conviction. E.g., Fritz, 105 N.J. at 60 n.3; Castagna, 187 N.J. at 314-15. Defendant's claims fall far short of demonstrating a reasonable probability that, but for counsel's errors, the result of his trial would have been different. Whether trial counsel allegedly failed to counsel defendant properly on testifying or object to defendant wearing prison garb, the trial judge was at the ready to provide jury instructions shielding defendant from prejudice. See Ball, 381 N.J. Super. at 556-57.

CONCLUSION

For the foregoing reasons, the State submits that the PCR court's denial of defendant's PCR petition should be AFFIRMED.

Respectfully submitted,

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