ROCCO MALDONADO
734674/2-Middle-43-B
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RAHWAY, NEW JERSEY 07065

REVISED LETTER-BRIEF AND APPENDIX DA 1-36 OF DEFENDANT-APPELLANT

STATE OF NEW JERSEY Plaintiff, vs. ROCCO MALDONADO Defendant,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001991-23 **Criminal Action** On Appeal from an Order of the Superior Court of New Jersey, Law Division, Ocean County Denying Motion to Reduce Sentence Pursuant to Rule 3:21-10(b)(7) Sat Below: Kimarie Rahill, J.S.C. Indictment No. 10-07-1246 **DEFENDANT IS CONFINED**

Your Honors:

This letter-brief is submitted in lieu of form brief pursuant to Rule 2:6-2(b).

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS

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

PROCEDURAL HISTORY[1]

On July 8, 2010 an Ocean County grand jury returned Indictment Number 10-07-1246 charging defendant with two counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts one and two); second-degree burglary, N.J.S.A. 2C: 18-2 (count three); fourth-degree possession of a prohibited device, a stun gun, N.J.S.A. 2C: 39-3(h) (count four); fourth-degree possession of a weapon, imitation firearm, for an unlawful purpose, N.J.S.A. 2C:39-4(e) (count five); and fourth-degree possession of a weapon by a convicted person, N.J.S.A. 2C: 39-7 (count six) (Da 1-4).

On November 5, 2010, the judge heard and denied defendant's motion to dismiss the robbery counts (counts one and two) and the possession of prohibited device count (count four). After reviewing the grand jury transcript, the trial court found that, in addition to assaultive conduct, defendant "acted in such a way that a reasonable person would believe that his purpose was to steal something." In particular, the trial court also found that there was sufficient circumstantial evidence that defendant possessed the stun gun as it was recovered outside of the

[1] "Da" refers to the appendix attached hereto;
"2T" refers to November 5, 2010 transcript;
"7T" refers to October 5, 2011 transcript;
"8T" refers to the October 6, 2011 transcript;
"9T" refers to the October 11, 2011 transcript;
"10T" refers to the October 12, 2011 transcript;
"11T" refers to the October 13, 2011 transcript,
"12T" refers to the October 14; 2011 transcript,
"13T" refers to the February 10, 2012,

victim's window, a place where defendant may have entered the victims' home and denied, the motion. (2T-14-13 to 25-5).

On October 5, 2011, the trial court heard and denied defendant's motion to suppress oral statements defendant allegedly made to police.

After the State presented its case, defense counsel moved to dismiss the robbery charges, arguing "the state had not made out a prima facie case with respect to those charges." The trial court concluded that a reasonable juror could find defendant guilty of the elements of robbery.

After the state rested, Defendant opted not to testify, or present any witnesses. After closing arguments, the trial court gave his instructions to the jury. Notably, the trial court did not charge aggravated assault and simple assault as a lessor included offenses of the robbery. In addition, the trial court did not define "attempted theft" when instructing the jury on the robbery charge but did define it with regard to the burglary charge.

On October 14, 2011, the jury found Defendant guilty beyond a reasonable doubt on counts one through five of the indictment, (12T8-14 to 9-15). Thereafter, Defendant pled guilty to count six of the indictment which charged possession of a weapon by a convicted person, (12T14-4 to 16-25).

On February 10, 2012, the judge sentenced defendant on count one to an extended term of forty years in custody with a mandatory eighty-five percent

period of parole ineligibility pursuant to NERA. N.J.S.A. 2C:43-7.2. On count two, he was sentenced to eighteen years in custody with a mandatory eighty-five percent period of parole ineligibility.

On count three, he was sentenced to nine years in custody with a mandatory eighty-five percent period of parole ineligibility. On counts five and six, he was sentenced to eighteen months in custody on each count, and count four was merged with count six. All sentences were ordered to run concurrently. (Da 5-7; indicating verdict sheet; Da 8-11; indicating judgment of conviction; 13T-32-6 to 33-15)

Defendant appealed his conviction and sentence. The Appellate Division affirmed on January 15, 2015;See State v. Maldonado, 2015 N.J. Super. Unpub. LEXIS 100, 2014 WL 7534015, at *15. On July 10, 2015, the New Jersey Supreme Court summarily denied certification. See State v. Maldonado, 222 N.J. 18, 116 A.3d 1073 (N.J. 2015) (unpublished table decision).

On November 23, 2015, defendant filed a petition for post-conviction relief The PCR trial court denied the petition on December 2, 2016.

On March 22, 2018, the Appellate Division affirmed See, State v. Maldonado, No. A-2368-16T3, 2018 N.J. Super. Unpub. LEXIS 645, 2018 WL 1415602, at *2 (N.J. Super. Ct. App. Div. Mar. 22, 2018), the New Jersey Supreme Court summarily denied certification on December 17, 2018, See State v. Maldonado, 236 N.J. 230, 199 A.3d 278 (N.J. 2018) (unpublished table decision).

On February 26, 2019, defendant sought 2254 relief in the District of New Jersey, denied on March 4, 2022. The third Circuit Court of Appeals denied defendant's application for a Certificate of Appealability.

On October 27, 2023, Defendant obtained an expungement order from the Law division concerning a prior marijuana conviction utilized by the state to seek and obtain an extended term, (Da 23-25; indicating extended state's term motion which the trial court granted; Da 19 to22; indicating expungement order).

On November 20, 2023, Defendant filed the instant motion to reduce his sentence upon the ground that a prior marijuana), conviction utilized by the state to seek and obtain his current extended term was expunged, (Da 12-16; 17-25). On January 22, 2024, the trial court denied the instant motion to reduce defendant's sentence, (Da 26-28). Defendant filed a timely notice of appeal, (Da 29-31). This letter-brief follows.

STATEMENT OF FACTS

The record shows that, in the early morning hours of December 24, 2008, defendant broke into the residence of R.D. (Raymond) and his fiancée, D.S. (Denise), in Bayville. At the time of the break-in, Raymond was asleep in the master bedroom and Denise was asleep on the couch. Denise testified she awoke from "a dead sleep" to find defendant leaning over her, wearing a mask and a knitted cap over his head. Defendant fastened zip ties to her right hand and put

duct tape on her left hand. As defendant grabbed Denise's left hand, she heard him say, "Just cooperate, it's a raid." Observing something in defendant's hand that looked like a gun, Denise yelled, "[Raymond], get up. There's this big fat guy in the living room. I think he has a gun." (10T-9-18 to 9-25; 10T-84-9 to 84-19; 10T-84-20 to 85-16)

Hearing Denise's cries, Raymond testified that he got up and went down the hall, where he saw "someone standing in the center of the living room pointing a gun at me with a ski mask[, who] said, 'Just do what I say and you won't get hurt.'" 10T-11-13 to 11-15). Defendant then ordered Raymond to step behind the couch, where he pointed the gun at the back of Raymond's head, leaned him over the couch, and told him to put his hands behind his back so he could put flex cuffs on him. (10T-12-6 to 12-17).

Believing the gun was real, Raymond explained that he allowed defendant to handcuff him "[b]because I thought he was going to shoot me in the head." Defendant then walked Raymond back around the couch and sat him near Denise. When defendant attempted to apply the zip ties to Denise's other wrist, she refused to cooperate. According to Raymond, at that point defendant "took that gun and he just whaled her right in the head with it. When Denise continued to struggle, Raymond said defendant "picked up [a] pillow, put it up to her head, put the gun to the pillow and fired." When nothing happened to Denise, she and Raymond

realized the gun was not real and started to fight back (10T-13-6 to 13-8; 10T-88-11 to 88-18).

Raymond managed to free himself from the flex cuffs and started wrestling with defendant. During the struggle, defendant's mask came off. Also during the struggle, defendant reached behind Raymond, put the gun to the back of his head and fired it twice. Raymond recalled feeling "burning on the back of [his] head" at the spot where the weapon went off (10T-13-10 to 14-5; 10T-88-19 to 89-25).

Defendant eventually fled and ran out the front door. Raymond pursued defendant on foot, remaining fifty feet behind him to see where he was going, but not trying to overtake him. According to Raymond, he never lost sight of defendant and saw him run to a house on Mill Creek Road, and then duck down behind a truck in the driveway (10T-19-3 to 19-23; 10T-22-7 to 22-19).

At 4:38 a.m., Dawn Sommeling, of the Ocean County Sheriff's, received a 9-1-1, call from Denise Schoenberg and Officer Warren Black of the Berkley Township Police Department was dispatched at 4:40 a.m. Raymond knew Denise was on the phone with the police as he left the house and also knew the police would have to travel down Mill Creek Road to get to his house, so he waited in the middle of the street, where he flagged down Officer Black.

As soon as the officer got out of the car, Raymond pointed at the driveway where defendant was hiding. (7T169-20 to 170-3; 7T192-14 to 192-23; 7T193-4 to 194-18; 7T194-19 to 194-22; 10T23-11 to 23-25).

Officer Black testified that he pulled out his weapon and ordered defendant out from behind the vehicle. Defendant came out with his hands up and was arrested. Officer Black asked defendant to put his hands on the hood of the police car and searched him.

After Officer Black read defendant his Miranda warnings from a card, he asked defendant what he was doing at the house. According to Officer Black, defendant responded by saying, "I'm sorry, I'm sorry, I broke in, I'm sorry" (7T-197-5 to 197-22).

Berkeley Township Police Officers Patrick Stesner and Clark Baranyay also responded to the 9-1-1 call. At the victims' house, they found Denise still visibly upset. The zip ties remained on her one wrist and duct tape on the other. She showed the officers the cut on the back of her head she received when defendant hit her with the gun. They also observed that Raymond still had the zip ties on his wrist, scratches on his body, and a burn mark on the back of his head.

Officer Baranyay testified that it was obvious there had been a struggle because the house was in disarray. In addition, the officers found a black ski mask on the floor, a long sleeved, XXL size jacket on the back of the couch, a “gray-

colored jacket, in which there were a pair of tan gloves, and a black knit hat. The officers also saw a pillow with soot on it and red staining on one of the couch cushions. Under the Christmas tree, the officers found more zip-ties fastened together to make flex cuffs (8T-42-16 to 43-4; 51-4 to 51-25).

Officer Baranyay testified that he and the other officers who arrived at the scene conducted a "brief walk around the outside perimeter of the house," and noticed on the "front right bottom windows, there was a window pane broken out and it looked like somebody dug at the window sill from the outside." The size of the lower-portion of that window was approximately three feet long and two feet high. They also noticed one pane of a basement window was broken and had been duct taped back together. This basement window was open and unlocked upon Officer Baranyay's inspection. Raymond testified that the basement window was locked and did not have duct tape around any portion of the window on December 23 when he went to sleep (8T52-15 to 53-1; 71-11 to 171-14; 9T-4-10 to 4-24; 9T-53-17 to 53-23; 8T-80-17 to 80-20; 8T-175-21 to 176-2; 8T-177-22 to 178-14; and 10T-27-10 to 27-17).

On the ground outside the basement window, the police found a metal pry bar and a duffel bag that contained a small flashlight and additional flex cuffs, a glass cutter, and a stun gun. Raymond testified that the metal pry bar did not belong to him. The police also discovered various other items outside the window,

including candles, baby wipes, and a little black case. Raymond testified that these items had been inside the house on a table.

On the morning of December 24, Berkeley Township Police Officer Jerry Bacon responded to a phone call from a man who resided near the victim's residence, who found a black bag in his yard earlier that day. Officer Bacon retrieved the bag which contained zip ties, a deluxe voice disguiser with headphones, a crow bar, a black mask, flashlight, a flat head screwdriver, black wire cutters, a black and yellow utility knife, duct tape, and a pair of black and yellow gloves (10T-26-12 to 27-3; 10T-27-18 to 28-22)

At headquarters, a search of Defendant showed he was wearing several layers of clothing, where inside the clothing; Defendant possessed a small pocket knife and a small flashlight, (8T8618 to 86-19). Defendant complained of pain in his shoulder area, rib cage, because he fell down some stairs, (7T206-16 to 207-1). Officer Black called for first aid, and Defendant was transported to Community Medical Center, where he was diagnosed and treated for a dislocated shoulder, (7T207-7 to 207-16; 10T7-3 to 7-17).

Officer Jerry Bacon responded to a call from a nearby residence and retrieved a black bag from the homeowner, March Barcello, (8T132-1 to 132-24).

Melissa Johns, an expert in DNA analysis, testified she was able to match a buccal swab obtained from defendant to the DNA profile she obtained from two different portions of the black face-mask that was found at the victims' residence.

Additionally, the DNA from the gloves found on December 24, in the black bag at the nearby residence, matched defendant's DNA. Johns also concluded that Denise was the source of the DNA profile obtained from the red staining on the couch (11T-46-15 to 47-12).

This appeal follows:

POINT I

LEGAL ARGUMENT

THE PCR JUDGE ERRED IN SUMMARILY DENYING DEFENDANT'S MOTION TO REDUCE SENTENCE UNDER RULE 3:21-10(b)(7) AFTER DEFENDANT'S MARIJUANA CNVICTION THAT WAS THE BASIS FOR THE TRIAL COURT GRANTING THE STATE'S MOTION FOR AN EXTENDED TERM WAS EXPUNGED (Da 17-22; Da 23-25; Da 26-28)

Pursuant to Rule 3:21-10 which states among other things in relevant part: (b) A motion may be filed and an order may be entered at any time (7) changing or reducing a sentence when a prior conviction has been reversed on appeal or

vacated by collateral attack. In this case, prior to sentencing, the State moved for an extended term and cited Marijuana convictions of January 1, 1999, violation of N.J.S.A. 2C:35-5a, and June 8, 1998, violation of N.J.S.A. 2C::35-5a(1) as the basis for their motion, (See Da 25-25). Ultimately, the trial court granted the state's motion and imposed the extended term and defendant's sentence taken together was 40-years 85% subject to N.E.R.A.

Because of the evolution of society and changes in laws as it relates to the medical use of Marijuana. New Jersey as well as many sister states has allowed certain level of marijuana convictions to be expunged. In many a case, these age old convictions were utilized to impose extended terms on many convicted defendant's. Based upon this new law structure to provide relief to those who may have been affected by these decades' old convictions. On October 27, 2023, defendant filed an application with the Superior Court of New Jersey, Law Division to expunge the enumerated convictions set forth above. (Da 20 to 22).

On October 27, 2023, Hon. Robert J. Jones, J.S.C., granted defendant's application to expunge these marijuana convictions, (See Da 20-22)

Defendant argues that the PCR court erred in denying his application, as the marijuana convictions were the sole basis for the state's application, which the trial

court granted. Based upon the foregoing, this Court should vacate the order of the PCR court and remand to reduce sentence in accordance with the Code of Criminal Justice.

POINT II

A REMAND IS WARRANTED TO DETERMINE WHETHER DEFENDANT IS ENTITLED TO RELIEF UNDER RULE 3:21-10(b)(4) or (5)(Not Raised Below).

In this case, the PCR court only considered Indictment No. 96-08-000954-I when it denied defendant's motion to reduce sentence, when the operation of law set forth below provides for 98-09-01191-A for automatic expungement by operation of 2019 Legislation.

Pursuant to Rule 3:21-10(b)(4) changing a sentence as authorized by the Code of Criminal Justice, or (5) correcting a sentence not authorized by law including the Code of Criminal Justice, this court should remand for resentencing upon the ground that defendant's extended term sentence is illegal based upon the expungement of the marijuana convictions.

In 2021, the Legislature adopted the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), L. 2021, c. 16, a sweeping law that largely decriminalizes the simple possession of cannabis in New Jersey and redresses many lingering adverse consequences of certain previous

marijuana offenses. Among other things, CREAMMA signifies that such prior marijuana offenses must be deemed not to have occurred and directs, by operation of law, their automatic expungement from an offender's criminal record.

In addition, in 2019, the Legislature enacted an expungement reform bill, S. 4154. The reform bill included major revisions to the expungement system, including "clean slate" expungement for those who had not committed an offense in ten years, N.J.S.A. 2C:52-5.3, as well as the sealing of low-level marijuana convictions upon the disposition of a case, id. at -5.2. This 2019 amendment redefined the concept of "expungement" in Chapter 52 to mean "the extraction, sealing, impounding, or isolation of all records on file." Id. at -1.

The 2019 amendment also implemented several automatic expungement mechanisms. Among them was the automatic expungement of records and information relating to an arrest or charge, which shall occur "at the time of dismissal, acquittal, or discharge." Id. at -6(a). No separate action by the defendant is required. Ibid. These automatic provisions were momentous because, up until their passage in 2019, the expungement process generally required that an individual directly file a petition for such relief with the court. See id. at -5.1.

Defendants with qualifying marijuana-related conditional discharges do not need to file any petition or request for expungement; expungement simply happens

by operation of law. There is no discretion for a court to refuse to expunge certain records, no mechanism for the State to object to the expungement of a particular marijuana offense, and no way the specified marijuana convictions or marijuana-related conditional discharges can be reinstated based on later criminal activity.

In this regard, defendant contends that his sentence is illegal because the extended term based upon convictions being expunged and sentences is therefore not authorized by law under N.J.S.A. 2C:44-3(a). For example, in their motion for an extended term, the state cites to marijuana convictions that fall within the expungement statute, as indicated by the attached order of expungement, (Da 21-22; See, 13T5-18 to 6-15;13T32-1 to 33-4)

In this case, the trial court expunged the defendant's marijuana convictions as it relates to Indictment No. 96-08-000954-I (Da 21; indicating expungement order), and (Da 25; indicating state's motion for extended term). Moreover, and of import, by operation of the "automatic expungement" 2019 Legislation which operates by law. It is respectfully requested, this Court apply this to defendant's 1999 conviction of violation of N.J.S.A. 2C:35-5a County Accusation No. 98-09-01191-A; in its determination of defendant's motion to vacate the extended term as now, as an extended term illegal sentence.

Pursuant to the persistent offender statute, N.J.S.A. 2C:44-3, "a court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if the individual is found to be a persistent offender." (Da 27-28; indicating PCR court opinion).

It is respectfully submitted, since the marijuana convictions relied upon by the state in their extended term application were expunged. Notwithstanding, the PCR Court ruling on the matter. Defendant argues that the extended term is no longer valid under the Code of Criminal Justice.

Based upon the foregoing, this Court should vacate defendant's extended term, and remand for resentencing.

CONCLUSION

For the foregoing reasons, defendant respectfully asks this Court to reverse the order of the PCR court, and remand this matter for reduction of sentence and/or to correct an illegal sentence.

Respectfully submitted,
X _____
Rocco Maldonado
Defendant-Appellant

Dated: 7-15-24
Rahway, N.J. 07065

BRADLEY D. BILLHIMER
Ocean County Prosecutor

ANTHONY U. CARRINGTON
Chief of Detectives

MICHAEL T. NOLAN, JR.
First Assistant Prosecutor

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December 11, 2024

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

Re: State of New Jersey (Plaintiff-Respondent) v.
Rocco Maldonado (Defendant-Appellant)
Docket No. A-1991-23T2

Criminal Action:
On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Ocean County

Defendant is confined.

Honorable Judges:

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

Samuel Marzarella
Chief Appellate Attorney
ID# 038761985
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TABLE OF APPENDIX

PROCEDURAL HISTORY[1]

On July 8, 2010 an Ocean County grand jury returned Indictment Number 10-07-1246 charging defendant with two counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts one and two); second-degree burglary, N.J.S.A. 2C:18-2 (count three); fourth-degree possession of a prohibited device, a stun gun, N.J.S.A. 2C:39-3(h) (count four); fourth-degree possession of a weapon, imitation firearm, for an unlawful purpose, N.J.S.A. 2C:39-4(e) (count five); and fourth-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7 (count six).

On October 14, 2011 Defendant was found guilty on counts one through five, and following the verdict, Defendant pled guilty to the certain persons charge in count six.

On February 10, 2012, the judge sentenced defendant on count one to an extended term of forty years in custody with a mandatory eighty-five percent period of parole ineligibility pursuant to NERA. N.J.S.A. 2C:43-7.2. On count two, he was sentenced to eighteen years in custody with a mandatory eighty-five percent period of parole ineligibility. On count three, he was sentenced to nine years in custody with a mandatory eighty-five percent period of parole ineligibility. On counts five and six, he was sentenced to eighteen months in

[1] "A" designates the State's appendix attached hereto.
"DA" designates the Defendant's appendix

custody on each count, and count four was merged with count six. All sentences were ordered to run concurrently.

State v. Maldonado, No. A-4047-11T4, 2014 WL 7534015.

Defendant appealed his conviction and sentence but this Court affirmed on January 15, 2015. See Maldonado, supra.

On July 10, 2015, the New Jersey Supreme Court denied certification. See State v. Maldonado, 116 A.3d 1073 (2015) .

DEFENDANT'S FIRST PCR

On November 23, 2015, Petitioner filed a petition for post-conviction relief alleging, in pertinent part, that the prosecutor violated Defendant's due process rights by withdrawing a plea offer that Defendant contended he had accepted. The PCR court denied the petition on December 2, 2016.

Defendant appealed, arguing, in pertinent part, that the PCR trial court erred in denying the petition without affording him an evidentiary hearing regarding the State's withdrawal of the plea offer.

On March 22, 2018, this Court affirmed, see State v. Maldonado, No. A-2368-16T3, 2018 WL 1415602 (App. Div. Mar. 22, 2018), attached hereto at 30-31). The Supreme Court denied certification on December 17, 2018, see State v. Maldonado, 199 A.3d 278 (2018).

WRIT OF HABEAS CORPUS

On February 26, 2019, Defendant filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In ground five, Defendant argued he was denied his due process rights by the State withdrawing a plea offer of twelve years to robbery which was tendered by the prosecutor and accepted by the Petitioner but then withdrawn due to the State indicating the victims did not approve of the offer.

The District Court denied the petition and refused to issue a certificate of appealability. (See Maldonado v. Attorney General supra A19-29)

DEFENDANT'S SECOND PCR

On April 19, 2021 Defendant filed a second PCR petition, raising claims not asserted in his habeas petition, which this Court denied as untimely. See State v. Maldonado, No. A-2175-19, 2021 WL 1996926 (App. Div. May 19, 2021). (see A 32-34)

On October 8, 2021.The Supreme Court denied certification. See State v. Maldonado, 259 A.3d 1288 (N.J. 2021).

DEFENDANT'S THIRD PCR

On May 4, 2022 Defendant filed his third petition for post-conviction relief – characterizing it - in an attempt to avoid the time bar - as a "motion for

a new trial." (Da 8)

On October 27, 2023, Defendant's conviction for a marijuana offense included in N.J.S.A. 2C:52-5.1 was expunged, (Da20-22), forming the basis for his present arguments regarding sentence reduction.

On December 27, 2023 this Court rejected the relief sought in his May 4, 2022 submission, (see A 35-43), characterizing Defendant's submissions as a motion for a new trial as well as Defendant's third PCR. On the new trial motion this Court rejected Defendant's claim reasoning that a new trial was not justified and that there was sufficient factual support for the trial judge's decision on that issue. (A40) As for the relief on Defendant's third PCR alleging ineffectiveness of counsel, this Court applied the time-bar to the case in rejecting relief. (A40)

On November 20th 2023, following the expungement of his marijuana charge, Defendant filed the present action arguing for a sentence reduction under R. 3:21-10(b). This relief was denied by the Hon. Kimarie Rahill, J.S.C. (Da26-28)

On August 27, 2024 Defendant appealed to this Court.

STATEMENT OF FACTS

This Court, in its January 15, 2015 decision disposing of Defendant's direct appeal, summarized the relevant facts drawn from evidence presented at

trial as follows:

> In the early morning hours of December 24, 2008, defendant broke into the residence of R.D. (Raymond) and his fiancée, D.S. (Denise),[1] in Bayville. At the time of the break-in, Raymond was asleep in the master bedroom and Denise was asleep on the couch. Denise testified she awoke from "a dead sleep" to find defendant leaning over her, wearing a mask and a knitted cap over his head. Defendant fastened zip ties to her right hand and put duct tape on her left hand. As defendant grabbed Denise's left hand, she heard him say, "Just cooperate, it's a raid." Observing something in defendant's hand that looked like a gun, Denise yelled, "[Raymond], get up. There's this big fat guy in the living room. I think he has a gun."
>
> Hearing Denise's cries, Raymond testified that he got up and went down the hall, where he saw "someone standing in the center of the living room pointing a gun at me with a ski mask[, who] said, 'Just do what I say and you won't get hurt.' " Defendant then ordered Raymond to step behind the couch, where he pointed the gun at the back of Raymond's head, leaned him over the couch, and told him to put his hands behind his back so he could put flex cuffs on him. Believing the gun was real, Raymond explained that he allowed defendant to handcuff him "[b]ecause I thought he was going to shoot me in the head." Defendant then walked Raymond back around the couch and sat him near Denise.
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> When defendant attempted to apply the zip ties to Denise's other wrist, she refused to cooperate. According to Raymond, at that point defendant "took that gun ... and he just whaled her right in the head with it." When Denise continued to struggle, Raymond said defendant "picked up [a] pillow, put it up to her head, put the gun to the pillow and fired." When nothing happened to Denise, she and Raymond realized the gun was not real and started to fight back.
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> Raymond managed to free himself from the flex cuffs and started wrestling with defendant. During the struggle, defendant's mask came off. Also during the struggle, defendant reached behind Raymond, put the gun to the back of his head and fired it twice. Raymond recalled feeling "burning on the back of [his] head" at the spot where the weapon went off.
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> Defendant eventually fled and ran out the front door.

Raymond pursued defendant on foot, remaining fifty feet behind him to see where he was going, but not trying to overtake him. According to Raymond, he never lost sight of defendant and saw him run to a house on Mill Creek Road, and then duck down behind a truck in the driveway.

Meanwhile, Denise called 9-1-1, and Officer Warren Black of the Berkley Township Police Department was dispatched at 4:40 a.m. Raymond knew Denise was on the phone with the police as he left the house and also knew the police would have to travel down Mill Creek Road to get to his house, so he waited in the middle of the street, where he flagged down Officer Black. As soon as the officer got out of the car, Raymond pointed at the driveway where defendant was hiding.

Officer Black testified that he pulled out his weapon and ordered defendant out from behind the vehicle. Defendant came out with his hands up and was arrested. Officer Black asked defendant to put his hands on the hood of the police car and searched him.

After Officer Black read defendant his Miranda warnings from a card, he asked defendant what he was doing at the house. According to Officer Black, defendant responded by saying, "I'm sorry, I'm sorry, I broke in, I'm sorry."

Berkeley Township Police Officers Patrick Stesner and Clark Baranyay also responded to the 9-1-1 call. At the victims' house, they found Denise still visibly upset. The zip ties remained on her one wrist and duct tape on the other. She showed the officers the cut on the back of her head she received when defendant hit her with the gun. They also observed that Raymond still had the zip ties on his wrist, scratches on his body, and a burn mark on the back of his head.

Officer Baranyay testified that it was obvious there had been a struggle because the house was in disarray. In addition, the officers found a black ski mask on the floor, a long sleeved, XXL size jacket on the back of the couch, a "gray-colored jacket", in which there were a pair of tan gloves, and a black knit hat. The officers also saw a pillow with soot on it and red staining on one of the couch cushions. Under the Christmas tree, the officers found more zip-ties fastened together to make flex cuffs.

Officer Baranyay testified that he and the other officers who arrived at the scene conducted a "brief walk around the outside

perimeter of the house," and noticed on the "front right bottom windows, there was a window pane broken out and it looked like somebody dug at the window sill from the outside." The size of the lower-portion of that window was approximately three feet long and two feet high. They also noticed one pane of a basement window was broken and had been duct taped back together. This basement window was open and unlocked upon Officer Baranyay's inspection. Raymond testified that the basement window was locked and did not have duct tape around any portion of the window on December 23 when he went to sleep.

On the ground outside the basement window, the police found a metal pry bar and a duffel bag that contained a small flashlight and additional flex cuffs, a glass cutter, and a stun gun. Raymond testified that the metal pry bar did not belong to him. The police also discovered various other items outside the window, including candles, baby wipes, and a little black case. Raymond testified that these items had been inside the house on a table.

On the morning of December 24, Berkeley Township Police Officer Jerry Bacon responded to a phone call from a man who resided near the victim's residence, who found a black bag in his yard earlier that day. Officer Bacon retrieved the bag which contained zip ties, a deluxe voice disguiser with headphones, a crow bar, a black mag flashlight, a flat head screwdriver, black wire cutters, a black and yellow utility knife, duct tape, and a pair of black and yellow gloves.

Melissa Johns, an expert in DNA analysis, testified she was able to match a buccal swab obtained from defendant to the DNA profile she obtained from two different portions of the black face mask that was found at the victims' residence. Additionally, the DNA from the gloves found on December 24, in the black bag at the nearby residence, matched defendant's DNA. Johns also concluded that Denise was the source of the DNA profile obtained from the red staining on the couch.

[See, State v. Maldonado, (2014 WL 7534015) (decided January 15, 2015)

(A1-18) See also, Maldonado v. Att'y Gen. of New Jersey, No. CV 19-7051

(ZNQ), 2022 WL 671473, at 1–3 (D.N.J. Mar. 4, 2022) (A19-29)]

LEGAL ANALYSIS

POINT I
DEFENDANT IS NOT ENTITLED TO A REDUCTION OF SENTENCE AS A RESULT OF A MARIJUANA CONVICTION HAVING BEEN EXPUNGED (responsive to Points I and II)

Defendant argues that he is entitled to a sentence reduction under Rule 3:21-10(b) as a result of his October 27, 2023 expungement of a marijuana charge. Defendant's arguments are without merit.

The State's motion for an extended term was filed on October 18th 2011 based on Defendant's 4 prior convictions contained Accusation number 98-09-01191A, Indictment number 96-08-000954-I, Indictment number 94-11-01019-I, and Indictment number 95-02-00124-I. On October 27, 2023, Defendant received an expungement of 3 counts of Indictment number 96-08-000954-I pursuant to N.J.S.A. 2C:52-5.1.

As Judge Rahill noted, at the time of his sentence Defendant had 4 prior convictions on 3 separate occasions and was otherwise qualified for an extended term. As the Judge concluded, "[s]ince the date of sentencing one of these convictions, Indictment 96-08-000954-I, has been expunged. However, that is only one of the four prior convictions. Thus, the statutory requirements for an extended term are still met, even with the expungement." (Da 28) The

Judge's reasoning is correct.

Additionally, N.J.S.A. 2C:52-21 allows the use of expunged records for sentencing purposes. That statute reflects the following,

> ***Use of expunged records*** in conjunction with setting bail or authorizing pretrial release, presentence report, or ***sentencing.***
>
> Expunged records, or sealed records under prior law, of prior arrests or convictions ***shall be provided to any court, county prosecutor,*** the Probation Division of the Superior Court, the pretrial services agency, or the Attorney General when same are requested for use in conjunction with a bail hearing, pretrial release determination pursuant to sections 1 through 11 of P.L. 2014c. 31 (c. 2A:162-15 et. Seq.) for the preparation of a presentence report, or ***for purposes of sentencing.*** (emphasis supplied)

As our Supreme Court recently observed when reviewing the effect expungement had upon a different statute, "[t]he relief afforded 'by ... expungement ... does not include the wholesale rewriting of history.' " N.J. Div. of Child Prot. & Permanency v. A.P., 258 N.J. 266, 278 (2024) (quoting G.D. v. Kenny, 205 N.J. 275, 294-95 (2011)). The Supreme Court found:

> In addition to N.J.S.A. 2C:52-19, ***the Legislature prescribed other exceptions to the expungement statute's restrictions on the use and disclosure of expunged records and information.*** See, e.g., N.J.S.A. 2C:52-18 (exception for certain uses of expunged records by the Violent Crimes Compensation Office); id. at -20 (exception for certain uses of expunged records in conjunction with supervisory treatment or diversion programs); id. at ***-21 (exception for certain uses of expunged records in conjunction with setting bail, authorizing pretrial release, preparing a presentence report, or sentencing)***; id.

> at -22 (exception for certain uses of expunged records by the Parole Board); id. at -23 (exception for certain uses of expunged records by the Department of Corrections); id. at -23.1 (exception for certain uses of expunged or sealed records" to facilitate the State Treasurer's collection of any court-ordered financial assessments that remain due at the time of an expungement or sealing of records granted by a court"); id. at -27(a) (exception for disclosure of the "fact of an expungement, sealing, or similar relief" under N.J.S.A. 2C:52-8(b)); id. at -27(b) (exception for disclosure of the "fact of an expungement of prior charges" dismissed in certain settings involving supervisory treatment or other diversion programs); id. at -27(c) (exception for "information divulged on expunged records," which "shall be revealed by a petitioner seeking employment within the judicial branch or with a law enforcement or corrections agency," and which "shall continue to provide a disability as otherwise provided by law").
>
> [A.P., 258 N.J. at 27 n.4.] (emphasis supplied)

Defendant's motion for a change of sentence was made under Rule 3:21-10. That rule provides that such a motion "shall be filed not later than 60 days after the date of the judgment of conviction." A court may reduce or change a sentence under the appropriate circumstances "by order entered within 75 days from the date of the judgment of conviction and not thereafter." These time constraints are non-relaxable. Rule 1:3-4 (c); State v. Tully, 148 N.J. Super 558 (App. Div. 1977), certif. den. 75 N.J. 9.

None of the exceptions to the time constraints contained in the statute under part "(b)" apply to this case, although Defendant argues that (b) (7) applies which allows sentence reduction or modification at any time, "when a prior conviction has been reversed on appeal or vacated by collateral attack." Defendant's expunged

conviction had not been reversed on appeal, nor had it been attacked collaterally and vacated. None of the part (b) exceptions in the statute apply.

In Point II of his brief Defendant raises an argument which he had not raised below and which he is prohibited from raising now. As stated in State v. Witt, 223 N.J. 409, 419, 126 A.3d 850, 855 (2015), "For sound jurisprudential reasons, with few exceptions, 'our 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.' " (quoting *Nieder v. Royal Indem. Ins. Co.,* 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973)). Hence, the entirety of Defendant's argument contained in Point II of his brief should not be considered by this Court.

In any case, Defendant requests that this Court remand this matter to determine whether his extended term sentence is "illegal" because he claims an additional conviction under Accusation Number 98-09-01191-A, should have been expunged automatically. Defendant relies on N.J.S.A. 2C:52-1 et.seq. in support of his non-specific argument. He has also neglected to provide record support for it. In any case, the argument is meritless as no provisions of the statute cited support it. Defendant's argument is additionally procedurally infirm and must be rejected by this Court.

CONCLUSION

For these reasons, Defendant's motion for a change or reduction of sentence should be dismissed.

Respectfully submitted,

/s/ Samuel Marzarella
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Chief Appellate Attorney
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Date submitted: December 11, 2024

T2 ED

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Dated: December 23, 2024

Re: State of New Jersey v. Rocco Maldonado

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
Docket No. A-1991-23T2; On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Ocean County (Indictment No. 10-07-1246); Criminal Action Denying Motion for Relief Pursuant to Rule 3:21-10(b)(7)
Sat Below: Hon. Kimarie Rahill, J.S.C.
REPLY BRIEF OF DEFENDANT-APPELLANT

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
25 W. Market Street, P.O. Box 006
Trenton, N.J. 08625-0006

Dear Honorable Judges of the Superior Court, Appellate Division:

Please accept this reply letter in lieu of form brief of Defendant-Appellant

Rocco Maldonado.

TABLE OF CONTENTS

REPLY PROCEDURAL HISTORY

Defendant does not disagree with the State's representations statement of procedural history.

REPLY TO STATEMENT OF FACTS

At Pb 4- to Pb 8, [1] Defendant does not disagree with the State's representations statement of facts.

REPLY TO THE STATE'S LEGAL ARGUMENT

POINT I: REPLY TO POINT I

The State (at Pb 10) although they admit the defendant's claim is submitted pursuant to Rule 3:21-10(b)(7), they argue that, because the expunged convictions "had not been reversed on appeal, nor had it been attacked collaterally and vacated" none of the exceptions in the statute apply. The State omits the fact, the trial sentencing court granted its motion for an extended term based upon the marijuana convictions, (See, Da 24 to 25; Db 11 to 12).

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[1] "Pb" refers to the State's brief;
"Db" refers to the Defendant-Appellant's Merits Brief;
"Da" refers to the Defendant-Appellant's Appendix to his Merits Brief;

As such, defendant maintains that his sentence is now, illegal based upon the expunged marijuana convictions, (Db 12 to 15).

CONCLUSION

Based upon the foregoing, and the reasons set forth in defendant's merits brief and appendix, the order denying defendant's motion(s) for a new trial and fourth PCR petition should be reversed.

Respectfully submitted,
x _____
Rocco Maldonado
Defendant/Appellant

Dated: December 23, 2024
Rahway, N.J. 07065