	: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	: Docket No. A-002015-23
STATE OF NEW JERSEY,	
	: On Appeal from: SUPERIOR COURT OF NEW
Plaintiff,	: JERSEY
	LAW DIVISION, MIDDLESEX
v.	: COUNTY
JAMES S. GOYDOS,	
	: INDICTMENT NO. 18-12-01698-I
Defendant.	
	: Sat Below: Michael A. Toto, A.J.S.C.
	: **CRIMINAL ACTION**

REPLY BRIEF OF DEFENDANT-APPELLANT JAMES S. GOYDOS

KLINGEMAN CERIMELE, ATTORNEYS
100 Southgate Parkway, Suite 150
Morristown, NJ 07960

Attorneys for Defendant-Appellant James S. Goydos

On the Brief

ERNESTO CERIMELE, ESQ. (Attorney ID No. 034962010)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Preliminary Statement

There existed two questions for the PCR Court's consideration that warranted an evidentiary hearing: First, was a set of files secretly placed on Appellant Dr. James Goydos' computer in the early morning hours of October 3, 2017? Second, did the State rely on those files in an affidavit in support of a search warrant for Appellant's home in 2018?

If the answer to those questions was "yes", Appellant should have been afforded Post-Conviction Relief.

To find the answers to the above questions, the PCR Court correctly ordered an evidentiary hearing. The evidentiary hearing was appropriately "limited" to the concept of "forensics." That is, the Court sought to determine whether a set of files was secretly placed on Appellant's computer in the early morning hours of October 3, 2017.

Appellant presented an expert – John Lucich – who had previously conducted a forensic analysis of Appellant's device in connection with a civil proceeding and who discovered the existence of the collection of files that were planted on Appellant's computer. Mr. Lucich was admitted as an expert—without objection—and offered uncontroverted testimony confirming that the files were, in fact, placed on Appellant's device without his knowledge or consent.

The State was afforded thirteen months between the time the PCR petition was filed and the time the evidentiary hearing was conducted to consult with its own experts and rebut the conclusions of Mr. Lucich.

At the evidentiary hearing, the State offered no rebuttal. Rather, the State offered two *fact* witnesses who denied that they were the individuals responsible for secretly placing the files on Appellant's computer.

The Court denied the PCR, in large part, because Appellant was unable to identify *who* placed the set of files on his device (7 years after the conduct occurred). In other words, the PCR Court became less concerned with the seminal issue – "*Did* misconduct occur?" and more concerned with "*Who* committed the misconduct?"

Although the Court is generally afforded deference with respect to factual findings, this case presents the rare circumstance where deference should not be afforded because the Court's conclusions were not based on the evidentiary record. More specifically, neither the Court, in its written opinion, nor the State, in Respondent's brief, can offer any explanation why the unrebutted and well-supported forensic conclusions of Mr. Lucich should have been disregarded.

Argument

I. TO THE EXTENT THAT THE PCR COURT RELIED ON EVIDENCE OUTSIDE THE TESTIMONIAL RECORD, THE PCR COURT ERRED BY GRANTING ONLY A "LIMITED" EVIDENTIARY HEARING

a. Appellant Requested—and Was Entitled to—a Full Evidentiary Hearing

When the Court granted a "limited" evidentiary hearing related specifically to the issue of "computer forensics," Appellant had no objection to that Order. (Da001). As set forth above, the "limited" evidentiary hearing was designed purely to determine whether a collection of files was placed on Appellant's device in the early morning hours of October 3, 2017 without his knowledge.

When the Court rendered its decision, however, the Opinion was far outside the scope of "forensics." Rather, the Court made factual findings unrelated to "forensics" and credibility determinations for witnesses who were not even present at the evidentiary hearing. (See e.g., Da251-52 (finding that "Detective Kelly did not make statements knowingly and intentionally, or with reckless disregard of the truth in his affidavit"); Da252-53 (finding that "it is not shown that [the other alleged misstatements of fact in Detective Kelly's affidavit] were made with the deliberate or reckless intention to mislead"); Da252 (concluding that "the forensic image obtained of the already tainted computer . . . was never relied on in obtaining the warrant")).

It is well-established that "Post-conviction relief 'courts ordinarily should grant evidentiary hearings … if a defendant has presented a *prima facie* [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (1997) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)) (alteration in original). Indeed, this Court has explained that, where "there are disputed issues as to material facts regarding entitlement to post-conviction[] relief, a hearing *should* be conducted." State v. Russo, 333 N.J. Super. 119, 138 (App. Div. 2000) (emphasis added).

To be clear, Appellant did not request a "limited" evidentiary hearing. He requested a full evidentiary hearing to address all issues raised in his Petition for Post-Conviction Relief and expert report, including the merits of Detective Kelly's search warrant affidavit. (Da275-77 (discussing the merits of the search warrant affidavit)); (Da285 ("Defendant respectfully requests oral argument *and an evidentiary hearing*") (emphasis added)).

Nevertheless, Appellant *welcomed* the limited hearing, knowing that the findings of forensic expert John Lucich would be undisputed and uncontradicted. In other words, the testimony of the forensic expert would have confirmed allegations of misconduct as set forth in the PCR. Contrary to the State's contention that Appellant "waived" certain arguments on appeal, there existed no reason to raise an objection below to an evidentiary hearing "limited to the issue of computer forensics." Rather, the issue only presented itself once the Court entered its February

20, 2024 Order (hereinafter referred to as the "Final Order"), denying the Petition for Post-Conviction Relief. The Final Order, setting forth reasons far outside the scope of the evidentiary hearing, triggered the issue raised on appeal. Prior to that determination, however, Appellant appropriately preserved all arguments for appeal.

b. The State's Reliance on Rule 3:22-4 is Misplaced

The State argues – incorrectly – that Appellant's failure to raise certain challenges on direct appeal constitute a "waiver" pursuant to Rule 3:22-4. The State also argues – incorrectly – that Appellant waived any challenge "when he pled guilty."[1] State Br. at 27. Both arguments fail as a matter of law.

The "newly discovered evidence" at issue was not discovered until August 2022, three years after Dr. Goydos' plea and one year after his direct appeal.

Relief sought "based on the ground of newly-discovered evidence may be made at any time." R. 3:20-2; see also Marshall, 148 N.J. 89. However "difficult the process of review, the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent." Ibid. Indeed, one of the Carter factors requires consideration of whether

[1] Contrary to the State's argument, Appellant did *not* plead guilty to any offense associated with filming women in a restroom. He has always maintained his innocence with respect to these claims and all associated charges have been dismissed.

the newly discovered evidence was "discoverable by reasonable diligence beforehand." State v. Carter, 85 N.J. 300, 314 (1981).

Furthermore, because Appellant was not aware of the newly discovered evidence at the time of his guilty plea, the plea itself does not constitute a waiver. Any contention to the contrary simply misconstrues well-established authority in this state. Rather, where a defendant enters a guilty plea, a judge may still "relieve a party from final judgment for newly discovered evidence" that could not have been discovered earlier and which would likely change the result of the case if a new trial were granted. State v. Adams, No. A-1860-18T4, 2020 WL 7419068, at *7 (N.J. Super. Ct. App. Div. Dec. 18, 2020); see also State v. R.P.B., No. A-0093-18T3, 2019 WL 6816909, at *7 (N.J. Super. Ct. App. Div. Dec. 13, 2019); State v. Farrell, No. A-1842-14T1, 2016 WL 3189644, at *3 (N.J. Super. Ct. App. Div. June 9, 2016) (articulating the same standard of review).[2]

In any event, enforcement of a theoretical procedural bar would result in a fundamental injustice. Although "[g]enerally, an appellate court will not consider issues . . . which were not raised below," State Br. at 26 (quoting State v. Galicia, 210 N.J. 364, 383 (2012), "[a]n issue not raised below may be considered if it meets the plain error standard or is otherwise of special significance to the litigant, to the

[2] These cases are included in Defendant-Appellant's Appendix at Da193 – Da199, Da205 – Da208, and Da214 through Da220.

public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006).

Here, Appellant was not aware of the newly discovered evidence at the time of his plea and first appeal. Consequently, there is no procedural bar or waiver.

c. The State Conflates a "Franks" Hearing with An Evidentiary Hearing Prompted by a Post-Conviction Relief Petition

The State also argues – incorrectly – that Defendant did not request "Franks" hearing and, consequently, "waived any challenge to the warrant-supporting affidavit when he pled guilty." This argument misses the mark and confuses the procedural posture to date.

When Appellant requested an evidentiary hearing in connection with the PCR, he demanded a full hearing, inclusive of "testimony from John Lucich about the nature and extent of Dr. Libutti and Rutgers's attempt to influence the prosecution against Dr. Goydos." (Da279).

In its Final Order, the Court concluded that Appellant not only appropriately requested a hearing, but also specifically found that Appellant made a *prima facie* showing that a hearing was necessary:

> It has already been established that the defendant made a preliminary showing that potentially false information was included in the search warrant application, evidenced by Mr. Lucich's report. Thus, this Court granted an evidentiary hearing to piece together the assertions made

> by Mr. Lucich and the defense. As the Supreme Court stated in Franks v. Delaware: In the event that [a] hearing [of an] allegation of perjury or reckless disregard establishes by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

[Da179 [Franks v. Delaware, 438 U.S. 154, 155 (1978)].

In other words, in the Final Order, the Court concluded that a "Franks" hearing was 1) requested and 2) necessary. The issue currently presented on appeal, however, is that the *scope* of the evidentiary hearing was limited and fell far short of that required to render an appropriate decision pursuant to Franks, 438 U.S. at 155. This becomes apparent because the PCR Court ruled:

> Considering the Court's opinion in Franks it's evident that intentional misstatements or omissions in a warrant application, do not authorize the use of the exclusionary rule unless it was those misstatements that created probable cause. That is not the case here . . . Detective Kelly did not make statements knowingly and intentionally, or with reckless disregard of the truth in his affidavit.

[Da251-52].

How could the PCR Court render a factual and credibility determination as required by Franks without affording the Appellant an opportunity to examine the affiant about the veracity of the affirmations made to the Court? It cannot.

II. THE PCR COURT'S FACTUAL FINDINGS ARE NOT ENTITLED TO DEFERENCE BECAUSE THEY ARE NOT BASED ON CREDIBLE EVIDENCE IN THE RECORD

A PCR court's factual findings must be based on "sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013) (citing State v. Harris, 181 N.J. 391, 415 (2004), cert. denied, 545 U.S. 1145 (2005)). If the court does not conduct an evidentiary hearing, the Appellate Division "may review the factual inferences the court has drawn from the documentary record de novo." State v. Blake, 444 N.J. Super. 285 (App. Div. 2016) (citations omitted). In contrast, if the court conducts an evidentiary hearing, its findings are ordinarily entitled to deference. See Harris, 181 N.J. at 415. However, where factual findings "are not supported by substantial credible evidence," they are not entitled to deference and an appellate court may reverse them. State v. Habel, A-3699-20, 2023 WL 4479692 at *3 (citing State v. Pierre, 223 N.J. 560, 576 (2015))[3]. As the New Jersey Supreme Court has explained, "an appellate tribunal may make new factual findings if the findings of the trial court instill a 'feeling of wrongness.'" Harris, 181. N.J. at 417 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). In other words, the Appellate Division need not give deference to a PCR court's factual findings "where the sound administration of justice calls for appellate 'intervention and correction.'" Id. at 418 (quoting Johnson, 42 N.J. at 162). This is particularly true where a PCR court's

[3] Included in Defendant-Appellant's Appendix at Da122.

findings are not based on "matters of credibility, demeanor or personal view of the premises." Ibid. (quoting Patton v. North Jersey Dist. Water Supply Comm'n, 93 N.J. 180, 188 (1983)).

The PCR Court made several factual determinations that should not be afforded deference. There exists one significant and erroneous conclusion that is particularly material: "The forensic image obtained of the already tainted computer of Dr. Goydos' . . . was never relied on in obtaining the warrant." (Da252).

Specifically, the Court concluded – incorrectly – that the collection of files placed on Dr. Goydos' device on October 3, 2017 was *not* used in support of the search warrant of his home. (Da252). That is simply not true and that factual determination should be afforded no deference.

The forensic expert concluded – and testified – that the forensic image (containing the tainted evidence) *was* relied on in obtaining the warrant. Although Detective Kelley represented to the Court in his affidavit in support of the search warrant that he (personally) did not review any evidence obtained from the unlawful seizure of Dr. Goydos' computer, he set forth conclusions drawn by Rutgers, who *had* reviewed the tainted evidence (without disclosing to the court the existence of the conduct perpetuated on October 3, 2017).

Here, the *only* suggestion of unlawful activity referenced in the affidavit was contained on the collection of files placed on Dr. Goydos' device in the early morning hours on October 3, 2017. (Da053 ("The conclusions drawn by the State with respect to the 'MiddlesexTips' evidence are incorrect in material respects. All the MiddlesexTips and CrimeStoppers URLs that relate to the tip site were not found in the search or web histories on Dr. Goydos' computer.")). In other words, the evidence establishing probable cause was only discovered on the *planted* files. This distinction is critical and overlooked by the Court. Although Rutgers performed two forensic images of Dr. Goydos' computer (on Nov. 6, 2017 and March 25, 2018), both of these images show *no* evidence that his computer engaged in unlawful conduct (for example, that he visited MiddlesexTips.com). The only set of files contained in the forensic images that purport to show unlawful conduct were the files that were planted on Dr. Goydos' device on October 3, 2017.

Consequently, this Court need not defer to the erroneous, factual conclusions made by the PCR Court.

A. The Newly Discovered Forensic Evidence was Material, Documented and not "Speculative"

Like the PCR Court, the State errs in arguing that "even accepting as accurate the testimony of defendant's expert, there is simply no evidence to support a conclusion that anyone planted evidence on defendant's computer or otherwise improperly tampered with it." State Br. at 22. Later, the State doubles down, arguing

that the expert forensic findings were "[s]peculati[ve]" "assertions of mysterious hackers" that "do[] not rise to the level of materiality necessary to constitute newly discovered evidence." State Br. at 24 (quoting Da177). These arguments are self-serving, if not incredulous.

Mr. Lucich pointed to specific evidence establishing that Dr. Goydos' computer was tampered with before, during, and after the purported imaging of his computer. Mr. Lucich's testimony was supported by system reports he generated during the forensic review. (See Da126 – Da156). The reports were not speculative – they demonstrated precisely what occurred on October 2, 2017 and October 3, 2017: an individual logged in remotely no less than five times on October 2, 2017 (3T at 139:10-20); an individual plugged in a USB on three occasions (id. at 140:18-22); an individual accessed several websites, including Genhealth.com, Citrix.com, Rutgers.edu, Rutgers.edu/citrix, Microsoft.com and Google.com (id. at 145); an individual accessed a shared drive located at \\nbcinj\encvol (id. at 146:7-10); an individual accessed at least seven folders (id. at 147:20-12); an individual accessed a user directory; sources folder (multiple times); control panel; and a profile folder (where all of Dr. Goydos' "data" is stored) (id. at 147:23 – 148:15); and an individual again accessed Dr. Goydos' device on October 4, 2017 (i.e., one day after Dr. Goydos' device was purportedly imaged) (id. at 151:3-6). Of course, Mr. Lucich also generated a file systems report that demonstrated that a collection of files (a

"WIM" file) *was placed on Dr. Goydos' computer in the early morning hours on October 3, 2017 at 12:45 a.m. and later modified at 3:29 a.m*. (id. at 150:4-150:16).

Mr. Lucich testified that this activity suggested that the individual accessing Dr. Goydos' computer was involved in activities "other than imaging a computer." (Id. at 140:18-22). Perhaps most importantly, the two State fact witnesses testified that they were not responsible for the activity discovered by Mr. Lucich and that an individual conducting an image would *not* have engaged in this activity as it would certainly taint the imaging process. (Id. at 70:8-10).

While neither Mr. Lucich nor the State's fact witnesses could identify who was responsible for placing the .WIM file on Dr. Goydos' computer, Dr. Lucich noted that the most plausible explanation would be someone with administrator rights planting the file remotely. (See Da130 at ¶ 17).

The forensic expert's (unrebutted) conclusions and (unrebutted) sworn testimony are wholly supported by reports he generated from conducting his forensic evaluation. (Da198-Da228). The conclusions are not speculative nor immaterial and the reports neatly identify the unlawful conduct, with evidentiary support.

III. THE FINDINGS OF DEFENDANT-APPELLANT'S EXPERT CONSTITUTE NEWLY DISCOVERED EVIDENCE

Lastly, the State argues that Mr. Lucich's findings cannot constitute newly discovered evidence because "all of the information on which Lucich relied for his

report "was already contained in the various hard drives and other electronic storage devices Mr. Lucich examined. Given that this information was there, waiting to be discovered, it follows that the information contained on these devices could have been discovered prior to Dr. Goydos's guilty plea." State Br. at 25 (quoting Da177).

This argument, however, ignores the fact that the evidence was only uncovered because of Mr. Lucich's specialized training and experience as an expert. Even a highly educated layperson, such as Dr. Goydos, would not have the expertise to review the electronic discovery with the level of scrutiny and equipment required by a forensic expert, like Mr. Lucich.

To that end, the State can't have it both ways –either the newly discovered evidence was not easily discoverable prior to Dr. Goydos' plea, or it was easily discoverable and the State failed to identify it, produce it, or disclose it to the Court. Indeed, not even the State, the State's analysts, Dr. Goydos' counsel, or other consultants were able to identify the same evidence. See United States v. Hsia, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998) (explaining that the defense cannot be expected to find exculpatory information within a voluminous discovery production for purposes of the prosecution's obligations under Brady). It was not until a subsequent civil litigation that the evidence was discovered.

Nevertheless, even if Dr. Goydos' counsel or consultants could have earlier discovered the contents of the "WIM" file, this would point to ineffective assistance. As this Court has regularly held, even if the fact that the imaging was tainted could have been discovered by reasonable diligence prior to Dr. Goydos' guilty plea, trial counsel's failure to discover it "would almost certainly point to ineffective assistance of counsel." Nash, 212 N.J. at 549-50.

The Court can and should find that the forensic expert's findings constitute newly discovered evidence, warranting the relief sought herein.

CONCLUSION

For the foregoing reasons, Defendant-Appellant's Appeal and Petition for Post-Conviction Relief based on newly discovered evidence should be granted. Alternatively, this Court should remand the matter for a continued evidentiary hearing.

Klingeman Cerimele, Attorneys
100 Southgate Parkway, Suite 150
Morristown, New Jersey 07960
(973) 792-8822
Attorneys for Defendant-Appellant James Goydos
By /s/ Ernesto Cerimele
Ernesto Cerimele, Esq.