SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2895-22

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Monmouth County.
Plaintiff-Respondent,	:	
v.	:	
JAMIL S. HUBBARD,	:	Ind. No. 19-03-322-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. Lourdes Lucas, J.S.C., and a Jury.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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[1] The expert reports from Drs. Vo and Gilman, included as pages Da 81 to 127 of the appendix, have been moved to a confidential appendix.

[2] Appendix pages Da 129 and Da 180 to 184 of the State's PowerPoint presentation have been moved to a confidential appendix.

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[3] The State's Summation PowerPoint is appended as both a PDF document and on a separate CD because it contains images that are viewable in PDF form as well as videos that can only be played when viewed as a PowerPoint file.

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PRELIMINARY STATEMENT

The main question at trial was whether Jamil S. Hubbard understood the nature and quality of his actions when he randomly attacked and ran over a stranger, leading to his death. The evidence that Hubbard did not understand his actions was compelling, including that he suffered from a serious history of mental illness, including bipolar disorder; that he displayed symptoms of this illness before, during, and after the crime; and that psychiatric experts for both the State and the defense agreed that he experienced a manic episode with psychotic features. Ultimately, however, a series of errors prevented the jury from returning a reliable verdict concerning these proofs.

Chief among them were multiple errors that interfered with the jury's ability to fairly assess Hubbard's insanity defense. This included the State telling the jury that it could reject that defense if it found that Hubbard's symptoms were caused or aggravated by his substance use or medical non-compliance, despite clear statutory and jurisprudential law to the contrary. It also included the State presenting unsupported expert opinions to distract from Hubbard's bipolar diagnosis, repeatedly appealing to the jury's emotions, and unfairly attacking the defense expert's credibility with irrelevant hearsay.

On top of that, the State was allowed to undermine Hubbard's insanity defense with two custodial statements that should have been suppressed. And

the court failed to ensure that Hubbard's case was decided by a fair and impartial jury, as it improperly removed one juror without cause and repeatedly declined to ensure that other jurors were not contaminated.

These errors, along with the others discussed below, were individually and cumulatively capable of affecting the verdict, requiring a new trial.

PROCEDURAL HISTORY

On March 11, 2019, a Monmouth County grand jury charged Jamil S. Hubbard, through indictment number 19-03-322-I, with first-degree murder, N.J.S.A. 2C:11-3a(1) and/or N.J.S.A. 2C:11-3a(2) (count one); first-degree felony murder, N.J.S.A. 2C:11-3a(3) (count two); first-degree armed robbery, N.J.S.A. 2C:15-1 (count three); first-degree bias intimidation, N.J.S.A. 2C:16-1a(1) and/or N.J.S.A. 2C:16-1a(2) (count four); second-degree eluding, N.J.S.A. 2C:29-2b (count five); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4d (count six); and third-degree theft of movable property, N.J.S.A. 2C:20-3a (count seven). (Da 1-5)[4]

Trial began before the Honorable Lourdes Lucas, J.S.C., and a jury on September 28, 2022. (10T) On November 18, the jury acquitted on count two but convicted on the remaining charges, including on the lesser-included

[4] Da = Appendix to defendant-appellant's brief
PSR = Presentence report

offense of third-degree theft for count three. (Da 6-11; 31T29-16 to 45-22) Judge Lucas denied Hubbard's motion for a new trial. (32T74-24 to 75-1)

On April 25, 2023, Judge Lucas sentenced Hubbard to life plus thirty-five years, consisting of: a life term subject to the No Early Release Act on count one; a consecutive twenty-five-year term on count four; a consecutive ten-year term on count five; and concurrent five-year terms on counts three and seven. (Da 12-15; 33T133-11 to 135-2) The court merged count six and dismissed all related motor-vehicle tickets. (Da 12-15; 33T134-19 to 21)

Hubbard filed a notice of appeal on May 26, 2023. (Da 16-19)

STATEMENT OF FACTS

This case arose from death of Jerry Wolkowitz. All agreed that Hubbard attacked Wolkowitz, a total stranger, causing his death. There was also no dispute, however, that Hubbard suffered from serious mental illness, including at the time of the offense. The main dispute was therefore not about what occurred, but whether Hubbard knew the nature and wrongness of his actions.

Hubbard's History of Serious Mental Illness

Hubbard was born to teenaged parents Kena Hubbard[5] and Tajji Williams, on August 30, 1992. (19T40-9 to 14; 21T142-5 to 9) There were

[5] Hubbard's mother was also referred to as Mary Hubbard in the trial proceedings. For the sake of clarity, she will be referred to as Kena in this brief.

"major mental health problems" with Kena and her family, including a history of schizophrenia and bipolar disorder. (19T43-1 to 45-8, 90-7 to 92-2; 21T131-25 to 133-17) Records also indicated that Hubbard "had trouble in school[,]" had "a history of childhood sexual abuse," and was exposed to domestic violence. (21T131-19 to 132-4; 23T51-4 to 13, 89-3 to 12)

Hubbard's parents separated in 2010. (19T41-9 to 19, 74-24 to 75-3) Around the same time, when Hubbard was sixteen or seventeen, he began displaying "abnormal" behavior including wearing a winter coat in the summer, not sleeping, becoming "very agitated" and "[i]rate," and having difficulty holding conversations. (19T46-13 to 47-20) This change in behavior presaged a string of hospitalizations and serious mental health diagnoses.

Hubbard was hospitalized over a dozen times in the following years. (19T81-13 to 16, 117-10 to 12; 21T135-5 to 137-13) The hospitalizations were preceded, and often followed, by unusual, aggressive, and/or psychotic behavior, including screaming, yelling, and hallucinations. (19T47-21 to 48-18; 21T141-6 to 146-6, 156-7 to 20, 190-5 to 12, 202-17 to 203-25; 22T22-11 to 23-6; 23T91-17 to 93-19, 101-4 to 102-7, 107-8 to 108-9, 141-9 to 12) Hubbard also experienced suicidal and homicidal ideations, and engaged in self-harm, including three suicide attempts. (19T98-1 to 4, 119-21 to 120-2, 127-15 to 128-13; 21T192-20 to 194-11, 199-17 to 201-12; 22T11-20 to 12-25,

16-7 to 18-8; 23T97-16 to 21, 101-11 to 23, 115-3 to 16, 119-14 to 121-24)

Throughout this time, doctors repeatedly diagnosed Hubbard with, and treated him for, serious mental illnesses. This included diagnoses for severe depression, substance-induced psychosis, and schizophreniform disorder, which is similar to schizophrenia. (21T146-15 to 152-16, 165-7 to 166-6; 22T13-5 to 15-15) Hubbard was also consistently diagnosed with bipolar I disorder, the most serious type of bipolar disorder, often with "psychotic features."[6] (21T188-7 to 9, 194-12 to 24, 201-13 to 202-2; 22T11-24 to 14-14; 23T107-1 to 4, 114-12 to 15; 24T229-8 to 14; 26T150-1 to 24)

Consistent with these diagnoses, Hubbard was prescribed a series of oral and injectable anti-psychotic medications for people dealing with bipolar disorder and/or schizophrenia. (21T161-10 to 163-21, 190-13 to 25, 197-17 to 198-12; 22T19-12 to 20-9) Hubbard's treatment, however, was often hindered by non-compliance, which is common among people with serious mental illnesses (21T163-22 to 164-16; 22T102-3 to 103-9), and other factors. For

[6] Bipolar disorder involves distinct depressive and manic episodes, causing "impairment in functioning in the patient." (21T188-7 to 19) Manic episodes can involve symptoms such "elation, euphoria, expansiveness, [and] pressured speech[,]" and can be accompanied by psychotic features or symptoms. (21T189-4 to 21) "People with bipolar I disorder," as opposed to bipolar II disorder, "present with a severe form of these mood swings" that may require hospitalization and involve symptoms such as aggression, paranoia, agitation, disorganization, and impulsiveness. (21T188-20 to 189-3, 191-20 to 192-14)

example, Hubbard's mother discharged him from a hospital "against medical advice" in 2010 (21T157-12 to 160-3; 26T80-24 to 81-10), and a clinician discharged Hubbard in 2018 despite him having been "deemed to be unsafe" and "in need of involuntary psychiatric hospitalization." (23T139-12 to 141-5)

In the weeks before the attack, Hubbard was discharged from outpatient services for non-compliance (22T100-23 to 102-2; 24T229-8 to 232-2), and lost access to Medicaid (19T57-16 to 60-7, 83-10 to 85-2, 120-16 to 23; 22T17-11 to 14; 24T235-11 to 16), with him receiving his last dose of medication in March 2018. (26T156-1 to 19) Around this time, according to Hubbard's then-girlfriend, Kayla Watts, Hubbard's mind was "all over the place," with him saying unpredictable and unusual things, resulting in Kena unsuccessfully seeking to have him involuntarily committed. (19T145-1 to 148-14, 192-1 to 12, 184-3 to 13, 196-9 to 17, 220-19 to 223-2)

The Twenty-Four Hours Before the Assault

Hubbard continued to engage in strange behavior in the twenty-four hours before the assault. On the morning of April 30, Hubbard called his father multiple times, finally leading to a conversation that quickly devolved into Hubbard "yelling and going into a rant" that Williams could not understand. (19T61-11 to 66-17, 93-6 to 94-25) Hubbard would fail to answer other calls from Williams later that day. (19T60-17 to 23, 66-18 to 69-6, 96-1 to 97-1)

Watts and Hubbard exchanged text messages between 5 and 6 p.m. about a pregnancy scare and about Hubbard going to a bar. (17T33-18 to 37-14; 19T198-6 to 200-15) Around 8 p.m., Hubbard refused to comply with a traffic stop initiated by an East Brunswick police officer. (11T161-8 to 162-21, 166-11 to 170-1, 171-4 to 11) The State's psychiatric expert later testified that Hubbard told him, over two years later, that he did not stop because he had just sold counterfeit drugs to a coworker and believed he had been set up. (25T157-22 to 159-9) In any event, the officer testified that he ultimately terminated the pursuit and responded to Hubbard's apartment complex, where he saw Hubbard's Chevy Malibu parked in an illegal spot, with the lights on, and the keys sitting on the front seat. (11T170-22 to 173-19, 193-6 to 9)

Hubbard drove to Watts's apartment, which she shared with several family members, a few hours later. (11T89-6 to 91-9, 121-13 to 122-20; 19T150-22 to 151-10, 201-1 to 202-16) Watts's aunt's then-husband, Anthony Mayfield, testified that Hubbard knocked loudly on their door and appeared "upset," "angry," and "agitated" in a way that was "very" different than he had seen before. (11T99-1 to 18, 123-13 to 20, 133-8 to 12) According to Mayfield, Hubbard refused to leave, was playing loud music, "pacing" quickly back and forth, and "pleading" about needing to stay "in a loud and aggressive way." (11T99-18 to 100-21, 107-8 to 11, 112-1 to 18, 130-3 to 132-5) Watts,

in contrast, and contrary to her statement to police, denied that Hubbard was angry or aggressive but agreed that "something was off" and that he was "all over the place" and "not making sense," leading her to go back inside. (19T169-12 to 170-2, 171-6 to 172-24, 186-4 to 23, 210-13 to 214-24)

Williams texted Hubbard at 11:04 p.m. asking whether he was "okay." (18T23-25 to 24-11; 19T69-7 to 24) At 12:59 a.m., Hubbard answered a call from Williams, leading to a nearly nine-minute-long conversation. (18T23-1 to 11; 19T69-25 to 70-18) Williams testified that this call made him believe that he needed to get Hubbard "to a hospital" but that he felt powerless to help because Hubbard refused to disclose his location. (19T71-10 to 72-8)

Phone records suggest that Hubbard returned to the area near Watts's apartment in Freehold after 6:30 a.m., at which point he called Watts three times. (16T121-9 to 126-24; 17T43-21 to 44-20) At 6:50, Watts texted Hubbard that she was "trying to sleep" and that he could not "come over[.]" (17T44-17 to 45-1) Hubbard and Watts then exchanged several benign messages before Hubbard sent texts saying "M-M-M-M M-M-M-M" and asking for his key. (17T45-2 to 22) When Watts declined, telling Hubbard that he could not "pop up like this" and that she had "tried" to give him his key the night before, Hubbard responded by saying "Kayla" and twice more asking for his key. (17T45-23 to 47-4) Hubbard also began backing his car into Watts's

car. (11T76-11 to 77-18, 78-25 to 79-23; 16T171-22 to 176-20, 188-12 to 189-1; 17T47-22 to 48-5) The assault began only minutes later.

The Assault

The assault was witnessed by two neighbors, Nomir Alkhier and Ana Minier. According to their testimony, Hubbard was screaming and "beating" Wolkowitz in the back of their apartment complex, while his car sat running with its doors open, playing "really loud" music nearby. (11T10-22 to 15-3, 34-16 to 21, 36-22 to 37-15, 42-9 to 12, 44-10 to 46-5, 47-8 to 15, 50-23 to 52-12, 53-22 to 24, 69-23 to 71-5) Hubbard then dragged Wolkowitz into the middle of the parking lot, got into his car, and ran him over. (11T15-7 to 17-7, 47-22 to 48-14, 53-6 to 21, 54-15 to 56-16, 65-8 to 10, 69-4 to 15) Although the timeline is unclear, both neighbors testified that Hubbard at some point approached a dumpster and engaged in strange behavior, with Minier testifying that he appeared to be putting is phone in front of his face (11T66-18 to 68-5, 71-21 to 72-12), and Alkhier reporting that he "burn[t] some paper" while "smiling" and "kind of dancing." (11T15-7 to 22, 17-8 to 18-3, 38-9 to 17) Hubbard then left in Wolkowitz's car, a Kia (13T105-3 to 14; 15T127-8 to 19), leaving his own car behind, running and blasting loud music. (14T140-6 to 9)

As extensively detailed at trial, the assault caused many serious injuries, leading to Wolkowitz's death on October 18, 2018. (10T92-25 to 113-18, 145-

18 to 146-15, 176-19 to 177-14)

The Pursuit

Hubbard was quickly identified as a suspect. The Malibu Hubbard left running at the scene was registered to his mother, leading police to their home at the Winding Woods Apartment Complex in Sayreville. (13T149-2 to 8, 217-15 to 217-11; 14T192-5 to 194-13) A search of the Malibu also turned up Hubbard's license, a binder from the trucking school he attended, and two of his credit cards, as well as biological material from Wolkowitz on the bottom of the car. (15T76-5 to 81-3, 119-4 to 10, 120-9 to 122-17, 124-12 to 126-5)

Hubbard was also immediately pursued while leaving the scene in Wolkowitz's Kia. (11T196-22 to 200-16, 203-4 to 6, 226-22 to 227-3; 12T13-20 to 17-21) The pursuit extended over several highways and towns before being terminated for safety reasons. (11T203-7 to 206-17; 12T108-23 to 109-13) Hubbard properly signaled some lane changes and turns during the pursuit and was seen driving erratically even when there was no ongoing pursuit. (11T204-5 to 13, 219-1 to 13; 12T86-24 to 87-7, 104-9 to 111-7) Police later found the Kia "abandoned in the roadway[,]" "running[,]" and "blasting" "extremely loud" music, near Hubbard's apartment. (12T126-21 to 129-4, 132-25 to 134-17; 13T100-15 to 24, 104-15 to 105-14) Police also found a "continual path" of Hubbard's clothing leading from the Kia to his apartment

complex, including a shirt bearing the name of Hubbard's trucking school. (13T48-6 to 52-15, 73-7 to 10, 84-20 to 98-15, 133-16 to 24)

The Arrest and Initial Transports and Detention

Officer Glenn Wagner of the Sayreville Police Department responded to Hubbard's apartment about a half hour after the assault. (13T145-15 to 147-7) After entering the complex, Wagner was flagged down by Kena, who was "jumping up and down" and "frantically yelling" that Hubbard "ran into [her apartment] with no shirt on, profusely sweating, and" screamed at her to "[g]et off the fucking phone[.]"(13T147-14 to 148-21) Kena also said that Hubbard "tends to get violent, and suffers from bipolar" disorder. (13T148-21 to 23)

Wagner and four other officers knocked on the apartment door and met Hubbard, who answered and identified himself. (13T150-12 to 151-22) Hubbard, who did not smell of alcohol or marijuana, was not wearing a shirt or shoes, and was "excited," "profusely sweating," and "out of breath." (13T46-6 to 23, 152-13 to 18, 226-3 to 20) The officers had Hubbard come outside and sit down, and then asked him a series of questions, including whether he was "involved in a motor vehicle accident" and "what kind of car he had[.]" (13T152-24 to 153-16) Hubbard reportedly responded that he "didn't know" if he was in an accident and that he drove "a pickup truck[.]" (13T153-17 to 21) Wagner then handcuffed Hubbard, placed him in a patrol car, and asked him

additional questions, including about "what happened." (13T154-4 to 156-4) In response, Hubbard indicated that he "didn't know" what happened and did not want to talk, but that he might later "[i]n Crisis," meaning the psychiatric emergency room. (13T168-2 to 170-10, 227-1 to 231-3)

Hubbard was transported to the Freehold police station, and then to the Monmouth County Prosecutor's office. (12T28-8 to 20; 13T161-10 to 15) Hubbard was initially calm during both transports before engaging in erratic behavior, including yelling, kicking, spitting, and making unprompted comments, including asking the police about the Sabbath and if they were devils; claiming to be God; talking about prison and gangs; and referencing Italians, Muslims, and "rednecks." (Da 202-03; 12T32-9 to 22, 38-6 to 15, 45-25 to 51-14, 77-12 to 78-5, 84-6 to 19; 13T161-16 to 162-16, 194-1 to 198-23, 239-2 to 21) Hubbard became less "agitated" after arriving at the prosecutor's office, falling asleep in a holding cell before allegedly asking to "speak with someone." (12T30-20 to 31-13; 14T34-18 to 38-12; 17T197-1 to 198-17)

Hubbard's Statement

Hubbard was interrogated by Detectives Wayne Raynor of the Monmouth County Prosecutor's Office and James Burdge of the Freehold Township Police Department. (17T63-15 to 19) The recorded interrogation began around noon and lasted about an hour. (Da 204; 16T9-10 to 13) Hubbard

waived his rights and then discussed the previous day. (17T66-1 to 69-25)

Some of this information was of questionable accuracy. For example, Hubbard said that he "slept in his car" in Freehold for about four hours the night before (17T79-3 to 80-2, 130-10 to 131-6), even though his phone records did not appear to place him near Freehold until shortly before the assault. (16T121-9 to 126-24) Hubbard also said that he slept in his car because he locked himself out of his home, stating at times both that this was "on purpose" and that it was unintentional. (17T80-3 to 82-15, 88-13 to 14)

Hubbard said that he had been "pissed" but that he did not know why, and that he could not "explain" his state of mind. (17T88-19 to 89-17) Hubbard went on to say that he had never felt that anger before and that you need to be "different" "to do" what he did. (17T89-6 to 91-16) Raynor then asked whether Hubbard had ever "talked to anybody," gotten "help," or taken "medicine," leading Hubbard to indicate that he had sought mental-health treatment in the past, but that it did "nothing" and that he was unmedicated, stating he "ain't no guinea pig" and "don't take that shit." (17T91-17 to 92-13)

Without further inquiry into his mental state, the detectives then questioned Hubbard about the assault. Hubbard initially responded by talking about religion, stating that "God is real. There's only one"; that "the devil is a god also"; and that the Sabbath is not "a godly day" but rather for "witches and

people who worship the devil." (17T94-6 to 25) Hubbard then stated that he did not "know" what he did. (17T95-20 to 21) When asked if he would seek forgiveness from God, however, Hubbard responded that his actions would be on his conscience "for the rest of [his] life." (17T95-22 to 97-19)

Hubbard then detailed the assault, albeit with a fair amount of ambiguity and often in response to leading questions. Hubbard confirmed that he first punched Wolkowitz, stating that Wolkowitz "was shot" and "lost consciousness before [he] even touched him." (17T107-2 to 108-15) He agreed that he moved Wolkowitz into the parking lot but was uncertain about how he did it and whether he was unconscious at the time. (17T109-21 to 111-7) Hubbard admitted that he drove over Wolkowitz but was unsure about which car he was in. (17T117-16 to 23) Hubbard also said that he had an "easy" drive home but that that he screamed at his mother when he got there because she said his name while on the phone, making him feel like he was "caught" even though she "didn't even know" what happened. (17T121-12 to 124-18)

Hubbard provided several reasons for randomly attacking Wolkowitz. (17T97-20 to 21) When first asked what had set him off, Hubbard said: "He was white. Old white man. Nothing." (17T97-22 to 25) At other times, Hubbard said it was "[s]trictly for" Watts, even though he could not say why she had upset him and at other points indicated that he was not upset with her.

(17T82-20 to 83-1, 84-25 to 85-15, 120-5 to 121-11) He confirmed that he burned cash that he took from Wolkowitz, explaining that it was to show that the crime was not about money. (17T99-15 to 101-4, 118-25 to 119-15) And he repeatedly stated that he acted based on an angry, "fucked up," "savage" state of mind, which he did not understand or want to understand. (17T101-7 to 10, 120-14 to 121-6); see also (17T99-10 to 11) ("I just felt like a savage. That's all. Fuck it."); (17T104-3 to 24) (stating Wolkowitz's car had "the smell of the savage," like "[f]lesh and blood" and "dead raccoons").

Hubbard provided similarly mixed answers about whether he understood the nature of his actions. Early on, Hubbard stated that he "tried to kill" Wolkowitz (17T102-5 to 10), and indicated that he would "turn to God in jail." (17T95-1 to 7, 102-5 to 10) At other points, however, Hubbard suggested that he was "not going to jail" (17T95-8 to 14), discussed plans for his return home (17T115-9 to 18), and stated that he "didn't do it on purpose" (17T113-23 to 114-2), that he "cared about" Wolkowitz (17T101-11 to 24), and that he "didn't mean to kill him[.]" (17T142-15 to 16) Hubbard also stated near the end of the interrogation that he would only consent to a search of his phone if he was charged with murder because of his "conscience" and to make it "look like I did it on purpose, because I'm black. I'm ignorant. I'm stupid." (17T136-8 to 142-24) Hubbard also continued to express confusion about the

crime, stating he "ain't never been pressed to hurt" anyone before; that it was "the most ignorant shit" to be violent; and that he did not understand his actions. (17T142-24 to 143-8); see also (17T143-17 to 22) ("I don't know. I don't know. Fuck it. I could do it again and I could kill everybody. The fuck?"); (17T144-17 to 22) ("Why? Why? I don't fucking know.").

The Post-Statement Detention

Hubbard was later transported to the Freehold police department and then to county jail. (14T173-20 to 175-9; 17T49-8 to 18) Hubbard was placed on constant watch, meaning full-time observation, and was reported to be "agitating, threatening, psychotic[,]" possibly delusional, and "unable to sleep." (22T92-3 to 93-10) Within two days, he was diagnosed with bipolar I disorder and treated with anti-psychotic medication. (22T33-19 to 25, 93-10 to 15; 24T234-9 to 15) Hubbard was released from constant watch and deemed competent to stand trial on May 7, although his medication was later increased. (22T92-23 to 94-17) Hubbard "maintained psychiatric stability" and was "asymptomatic" from that point on. (22T34-4 to 25, 96-9 to 97-19)

The Competing Expert Testimony

The jury heard from two experts concerning Hubbard's mental illness and whether it prevented him from understanding the nature or wrongfulness of his actions. The defense called Dr. Fabian Saleh, a psychiatrist specializing

in forensic, child, adolescent, and adult psychiatry. (21T22-6 to 14) Among other credentials, Dr. Saleh maintained a private practice, was affiliated with two hospitals, was on the faculty of Harvard Medical School, had written and edited several articles and books, and previously served as the president of the American Society of Adolescent Psychiatry. (21T22-14 to 16, 32-18 to 43-17, 52-18 to 53-21) Dr. Saleh was accepted as an expert in psychiatry and the subspecialties of adult, child, and forensic psychiatry.[7] (21T91-22 to 92-14)

The State called Dr. Howard Gilman in rebuttal. Dr. Gilman maintained a private practice, previously did clinical work at hospitals and a psychiatric center, and was an assistant professor at Rutgers University Hospital. (25T60-2 to 64-5) Dr. Gilman began focusing on forensic psychiatry, part-time, two years before trial. (25T61-1 to 11, 68-9 to 21) Dr. Gilman was accepted as an expert in general forensic psychiatry. (25T75-22 to 25)

The doctors agreed that Hubbard had a documented history of serious mental illness and diagnosed him with bipolar I disorder. (22T103-14 to 104-13; 26T160-2 to 161-18) They both also diagnosed cannabis use disorder (22T110-24 to 111-22; 25T163-19), with Dr. Gilman rendering additional, "speculative" diagnoses of substance-induced psychosis and antisocial

[7] Clinical psychiatry is focused on treating a patient, while forensic psychiatry is concerned with whether a person satisfies legal tests or standards, such as competency or insanity, based on their mental illness. (21T51-5 to 52-1)

personality disorder, and alcohol use disorder. (25T163-19 to 21, 170-13 to 175-2; 26T174-19 to 180-15) Both experts also agreed that Hubbard "was suffering from a serious mental illness" and experiencing a manic episode with psychotic features at the time of the crime. (22T104-7 to 13; 25T163-2 to 19, 166-24 to 167-16, 180-10 to 14) They disagreed, however, on whether this serious mental illness prevented Hubbard from understanding his actions.

Dr. Saleh opined that Hubbard's mind was "adversely affected" by his mental illness, such that he did "not have the ability to appreciate and understand the nature and quality of what he" was doing during the assault, but that he lacked sufficient data to render an opinion concerning any other time periods. (21T120-14 to 123-12; 22T99-2 to 13, 128-13 to 129-1) Dr. Gilman, in contrast, opined that Hubbard likely knew what he was doing and that it was wrong. (25T132-20 to 134-10, 180-10 to 14) This difference was largely due to a disagreement as to which data was the most significant.

Dr. Gilman relied in large part on his November 2020 forensic evaluation, conducted over Zoom, during which Hubbard suggested that he knew that he would be going to jail after he hit Wolkowitz and that he ran over him because "the damage was [already] done." (25T95-23 to 96-11, 129-9 to 130-20) According to Dr. Gilman, these statements were an "indication" that Hubbard "knew what he was doing" and that he "most likely knew" that it was

wrong. (25T132-20 to 134-4, 182-3 to 21, 189-13 to 193-24, 195-17 to 196-2) At the same time, Dr. Gilman acknowledged that Hubbard "couldn't put an explanation on what he was doing" and stated at multiple other points that he acted without "thinking about what he was doing." (25T134-16 135-2) Dr. Gilman also recognized that his evaluation was two-and-a-half years after the assault and that Hubbard could have been "fill[ing] in" blanks with information he had received since his arrest, and that he discounted other statements made by Hubbard because of his inherent unreliability as a mentally ill person. (25T199-21 to 203-10; 26T90-12 to 91-6, 101-10 to 102-3)

Dr. Gilman also relied on Hubbard's post-arrest statement, at least to the extent he made comments about going to prison and indicated that he was angry during the assault. (25T142-7 to 23, 182-22 to 183-7) As with the 2020 evaluation, Dr. Gilman conceded that he gave these statements weight even though Hubbard also made "various ambiguous" and "incoherent" comments and may have been experiencing psychosis or a thought disorder at the time. (26T116-16 to 119-23, 125-1 to 126-1, 127-5 to 15) Dr. Gilman also opined that Hubbard's history of mental illness was not relevant even though there was evidence that he was decompensating and experiencing "increasing symptoms" leading up to the assault. (25T95-9 to 22; 26T140-18 to 141-4)

Dr. Saleh, in contrast, discounted the statements Hubbard made during

his forensic evaluations because they occurred years after the assault,[8] when Hubbard had been medicated, had received information about his case, and was "trying to make sense of what he did"; because Hubbard also made multiple comments indicating that he did not understand what he was doing, including that he was "on autopilot" and "not thinking"; and because of the unreliable nature of self-reporting, and the other data available. (22T119-13 to 16; 24T75-10 to 83-13, 96-4 to 97-8, 212-12 to 214-23, 222-20 to 223-7)

Specifically, Dr. Saleh opined that it was more important that Hubbard had a documented history of serious mental illness and that he displayed symptoms of that illness before, during, and after the assault. (22T35-1 to 36-21, 117-23 to 118-23) This included signs of Hubbard "cycling into a manic episode" while at Watts's home (22T32-5 to 14), as well as the random, strange, and aggressive nature of the crime, in which Hubbard quickly and brutally attacked a stranger in public, leaving his car behind. (22T87-18 to 88-1, 118-14 to 23, 119-16 to 120-10; 24T196-25 to 199-18, 219-21 to 220-19, 236-8 to 17) Dr. Saleh also pointed to Hubbard's conduct after his arrest, which included agitation, aggression, and possible hallucinations during the transports (22T36-22 to 41-2), and his continued treatment for serious mental

[8] Dr. Saleh was retained after the initial defense expert passed away, resulting in him not interviewing Hubbard until June 2022. (21T117-5 to 119-9)

illness while in jail. (22T33-15 to 34-4) Further, Dr. Saleh opined that the post-arrest interview supported his conclusion, noting that Hubbard was at times incoherent, illogical, or unresponsive (22T25-8 to 28-9, 41-16 to 42-10, 83-6 to 15); that he was internally contradictory, including as to whether he intended to kill Wolkowitz (22T83-16 to 85-15, 118-25 to 119-12); and that his requests to be charged with murder demonstrated "some break with reality" consistent with psychosis. (22T89-7 to 91-15)

LEGAL ARGUMENT

POINT I

THE STATE INTERFERED WITH THE JURORS' DELIBERATIONS BY TELLING THEM THAT DEFENDANT COULD NOT BE FOUND INSANE IF HE TRIGGERED HIS SYMPTOMS (Not Raised Below); ELICITING UNSUPPORTED EXPERT TESTIMONY ABOUT ALTERNATIVE DIAGNOSES (28T39-8 TO 43-16; 32T66-22 TO 71-22); APPEALING TO THE JURY'S EMOTIONS (Partially Raised at 9T9-13 to 34-22, 36-14 to 40-6, 76-13 to 78-8; 10T60-3 to 61-4, 148-3 to 150-8, 171-6 to 172-4; 11T249-21 265-4; 28T113-19 to 115-1, 124-17 to 25; 29T10-10 to 12-25); AND IMPROPERLY ATTACKING THE DEFENSE EXPERT. (Partially Raised at 21T118-9 to 119-1; 27T51-1 to 52-14)

The sole issue at trial was whether Hubbard was legally insane. To that end, the jury was presented with substantial, uncontradicted evidence that Hubbard had a long history of serious mental illness and that he experienced a manic episode with psychotic features at the time of the crime. The jury also

heard competing expert testimony as to whether those conditions rendered Hubbard incapable of understanding what he was doing. This case, in other words, required the jury to carefully assess sensitive evidence that clearly could have supported a verdict of not guilty by reason of insanity.

The State, however, was allowed to interfere with the jury's consideration of the insanity defense in multiple ways. This included improperly arguing that Hubbard could not be found insane due to his use of drugs and lack of medical compliance; presenting unsupported expert testimony about other diagnoses; distracting the jury with irrelevant, cumulative, and highly prejudicial information; and wrongly attacking the defense's key expert witness with irrelevant hearsay. These errors were individually and cumulatively capable of affecting the jury's deliberations, denying Hubbard his rights to due process and a fair trial, and requiring a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; R. 2:10-2.

A. The State Improperly Told the Jury that It Could Not Find Defendant Legally Insane Based on His Alleged Substance Use and Lack of Medical Compliance.

A major part of the State's case was its argument that Hubbard could not be acquitted by reason of insanity because he was responsible for "triggering" his mental illness. The State did this in multiple ways, including by eliciting extensive testimony about Hubbard's use of marijuana and alcohol, and his

failure to comply with medical treatment; questioning the psychiatric experts about how this conduct could have triggered or exacerbated Hubbard's symptoms; and telling the jury that it could not find Hubbard insane if he was so affected. This strategy was improper, as the law makes clear that a person can be found insane regardless of what caused their mental illness. The State's evidence and arguments were therefore inaccurate and, given their significance, clearly capable of misleading the jury, requiring a new trial.

That a jury should not consider the cause of a defendant's mental illness is apparent from the plain text of the insanity statute. N.J.S.A. 2C:4-1 provides that a person is not criminally responsible if at the time of the offense "he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing" or "did not know what he was doing was wrong." The statute does not limit the defense based on how the person's "disease of the mind" came to be. The plain text of the statute therefore allows a person to be found insane even if their mental illness was aggravated or triggered by their own conduct.

Indeed, the Supreme Court confirmed as much over fifty years ago in State v. Maik, 60 N.J. 203 (1972). There was no dispute that Maik killed the victim and that he suffered from serious mental illness. Id. at 207, 209-11. Proof was adduced, however, that Maik's mental illness, or the psychotic

episode at issue, may have been "triggered" by him using LSD and hashish. Id. at 210-12. As a result, the court charged the jury that it could not find Maik insane "if [his] psychosis was triggered by" his drug use. Id. at 212. The jury thereafter convicted Maik and rejected his insanity defense. Id. at 206.

The Supreme Court reversed after finding that the jury should have considered the insanity defense "without inquiry into [Maik's mental illness's] etiology" or "triggering" event. Id. at 216. As the Court explained, focusing on how a person became ill, rather than the illness itself, is inconsistent with the insanity defense's purpose of "distinguish[ing] between the sick and the bad" and determining whether public safety is best ensured through incarceration or hospitalization. Id. at 212-13. Moreover, it would invite arbitrariness, as determining what caused a person to become mentally ill would likely rely on "speculation[.]"[9] Id. at 216. Accordingly, the Court held that the jury should not have considered Maik's substance use in determining whether the insanity defense applied and remanded the matter for a new trial focused solely on the issue of insanity. Id. at 221. The same remedy is needed here.

The State improperly told the jury that it could reject Hubbard's insanity defense based on his substance use and non-compliance repeatedly, and in

[9] Moreover, many possible "triggering" events, including substance abuse and non-compliance, are often themselves symptoms of mental illness. (22T102-3 to 103-9; 24T222-20 to 225-9, 242-6 to 21, 251-6 to 13; 25T175-3 to 14)

multiple ways. The State's questioning of the psychiatric experts was riddled with references to Hubbard's non-compliance and use of marijuana and alcohol. (23T16-5 to 12, 31-15 to 17, 95-23 to 97-15, 100-24 to 101-4, 106-11 to 25, 109-3 to 6, 117-1 to 4, 122-14 to 17, 141-13 to 17, 145-13 to 15, 149-17 to 150-8, 152-3 to 7, 155-9 to 12, 156-22 to 157-3, 170-2 to 20; 24T88-18 to 90-8, 91-23 to 92-7, 244-13 to 22; 25T92-18 to 93-23, 107-17 to 25, 125-24 to 126-5, 127-6 to 9, 128-3 to 10, 157-22 to 158-4, 171-14 to 24; 26T193-10 to 195-19) It elicited testimony about how that conduct could cause or worsen Hubbard's mental illness, and how it had done so in the past. (23T12-18 to 13-9, 32-17 to 34-2, 93-10 to 94-23, 100-4 to 15, 110-23 to 111-15, 114-2 to 11) And it had Dr. Gilman opine that Hubbard's use of alcohol and marijuana was "a precipitant or exacerbator" of his symptoms, resulting in a substance-induced psychosis. (25T170-13 to 171-13, 187-23 to 189-12; 28T6-15 to 7-9)

The State also extensively pressed Dr. Saleh, often over objection, on why he did not find that Hubbard's symptoms were "caused or exacerbated by drugs and/or alcohol." (23T31-2 to 34-9) It asked whether Hubbard smoking "a whole lot of weed" could have had "an effect on" his "mental illness" (24T248-10 to 250-9), whether he had a "responsibility" "to make sure that he stayed on his medication and did not smoke weed" (24T202-11 to 15, 251-14 to 252-20), and whether Wolkowitz's death "was preventable" because

Hubbard "knew" that he would "worsen his symptoms" by "failing to comply with his treatment programs" or by "smoking weed and drinking alcohol[.]" (24T200-3 to 201-6) The State, again over objection, also questioned Dr. Saleh about a Massachusetts case in which he had opined that the defendant was not legally insane because his symptoms were triggered by marijuana, thereby suggesting the same conclusion was warranted here.[10] (23T171-13 to 180-22)

The State also drove its point home in summation. It urged the jury to punish Hubbard for "never compl[ying]" with his treatment, noting that "there is medication and treatment available that he turned away from time and time and time again," and that Wolkowitz was "the victim" of, and "paid the price" for, his inaction. (28T158-17 to 160-16) And it emphasized Hubbard's substance use both orally and in its PowerPoint (Da 158; 28T115-19 to 23, 167-22 to 23), including by stating that Hubbard "kn[ew] that he cannot be smoking marijuana, much less a lot of it, and drinking alcohol" (28T117-3 to 8), and by explicitly telling the jury that it had to reject the insanity defense if it found that Hubbard was "affected" by drugs or alcohol:

> He smoked marijuana and drank liquor. Now, keep in mind, we don't have to prove a DUI. There's nothing in the insanity statute that says he has to be .08

[10] The Supreme Judicial Court of Massachusetts later found that this testimony was improper, and reversed the defendant's convictions, because the "origins" of his mental illness were "irrelevant" for purposes of the insanity defense. Commonwealth v. Dunphe, 153 N.E.3d 1254, 1264-70 (Mass. 2020).

> or higher. But we have to show that smoking marijuana and drinking alcohol affected him. It affected him, and I think all of you can see that.
>
> [(28T167-16 to 21)]

Thus, the State repeatedly told the jury that it could not find Hubbard insane if his symptoms were triggered by his non-compliance or substance use. This claim, made through testimony and commentary, violated binding precedent; the rules of evidence, given the testimony's irrelevance, N.J.R.E. 401, and capacity to mislead, N.J.R.E. 403; and the prosecutor's obligation to "not make inaccurate legal . . . assertions[.]" State v. Frost, 158 N.J. 76, 85 (1999). It was also, moreover, clearly capable of affecting the jury's verdict on the key issue of insanity. Indeed, the State's argument provided an off-ramp by which the jury could have wrongly rejected the insanity defense even if it found that Hubbard did not understand his actions or without ever reaching that question. That the jury might have been so influenced, moreover, was especially likely given the closeness of the case, the prevalence of the State's claims, and the court's failure to take any curative action. See State v. Rodriguez, 365 N.J. Super. 38, 51-52 (App. Div. 2003) (reversing where prosecutor misstated law by calling insanity defense an "excuse" even though curative instruction was issued). A new trial is required.

B. The State Was Allowed to Undermine the Insanity Defense with Net Opinions About Alternative Diagnoses.

The insanity defense in this case was premised on Hubbard's bipolar disorder and its ability to prevent him from understanding his actions. (29T122-6 to 17) To undermine this defense, the State elicited testimony from Dr. Gilman that Hubbard had two other diagnoses -- substance-induced psychosis and antisocial personality disorder -- that could explain his behavior without allowing him to be found insane.[11] Dr. Gilman, however, failed to show that these diagnoses were supported by reliable facts and methodologies. Thus, they should have been excluded as net opinions, as argued below (28T33-14 to 35-21), with the court's failure to do so requiring a new trial.

The net opinion rule bars expert opinions "that are not supported by factual evidence or other data." State v. Burney, 255 N.J. 1, 23 (2023) (quoting Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)). "The rule requires that an expert 'give the why and wherefore that supports the opinion, rather than a mere conclusion.'" Townsend, 221 N.J. at 54-55 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). The expert must "identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable."

[11] As discussed in Point I.A., the State was wrong in arguing that Hubbard could not be found insane if his psychosis was substance induced.

Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)).

An expert's opinion is a net opinion and must be "excluded if it is based merely on unfounded speculation and unquantified possibilities[,]" ibid. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)), or if the expert offers a "bald conclusion, without specifying the factual bases or the logical or scientific rationale that must undergird that opinion." Polzo v. Cnty. of Essex, 196 N.J. 569, 583-84 (2008). An expert will also offer a net opinion if he grounds his "testimony in personal views, rather than objective facts," Burney, 255 N.J. at 23 (citation omitted), such as by relying on a "personal" test or standard. Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372-73 (2011). As argued below, Dr. Gilman violated these principles because his diagnostic opinions were based on his own standards and speculation rather than reliable facts and validated scientific methodologies.

This is first demonstrated by the fact that Dr. Gilman did not follow the Diagnostic and Statistics Manual (DSM), the "authoritative" text for defining mental disorders. State v. J.L.G., 234 N.J. 265, 272 (2018). The DSM outlines a series of factors or symptoms that must be present for a specific diagnosis to be rendered. (Da 55-57; 21T112-4 to 116-7; 25T161-1 to 162-8; 26T164-11 to 17) These criteria are developed by "the leading authorities on mental disorders[,]" with the most recent version, found in the DSM-5, having been

the result of a twelve-year effort in which "hundreds" of experts and organizations reviewed scientific studies, published research reports, and subjected the criteria to testing and peer review. (Da 32, 36-43) In other words, as Dr. Gilman acknowledged, the DSM's diagnostic criteria are rooted in scientific research, ensure "reliability" and "consistency" in the diagnostic process, and, as a result, have been "universally recognized among psychologists and psychiatrists" as the best tool for rendering psychiatric diagnoses. (Da 30; 25T161-1 to 162-8; 26T25-2 to 26-1)

Nonetheless, Dr. Gilman conceded that he did not adhere to the DSM when he diagnosed Hubbard with substance-induced psychosis and antisocial personality disorder because he did so without data to satisfy the diagnostic criteria. Specifically, Dr. Gilman testified that he diagnosed antisocial personality disorder even though he had "no data" that Hubbard engaged in antisocial behavior before he turned fifteen. (Da 75; 26T174-19 to 176-23) And he testified that he diagnosed substance-induced psychosis even though Hubbard did not have "delusions or hallucinations"; there was no evidence that his symptoms "developed during or soon after" consuming a substance capable of causing hallucinations or delusions; and Hubbard's symptoms could be "better explained" by his bipolar disorder. (Da 68; 26T177-13 to 178-14)

This departure from the DSM, the authoritative text meant to ensure the

reliability of mental-health diagnoses, on its own, raises serious questions about whether Dr. Gilman employed a reliable methodology. Even more troubling, however, is that Dr. Gilman did not identify an objective and reliable basis for his departures. Dr. Gilman did not, for example, point to any part of the DSM that allowed him to make his diagnoses without satisfying the specific diagnostic criteria at issue. And he did not cite any other studies, guidelines, or objective standards to show that he could reliably diagnose Hubbard with those conditions, independent of the DSM.

Rather, Dr. Gilman left his conclusions unexplained or supported only by his own experience or guesswork. For example, Dr. Gilman testified that he relied on "speculation" and vague statements about Hubbard's childhood to compensate for the lack of data showing that he engaged in antisocial behavior before the age of fifteen, without pointing to a scientific basis for doing so. (26T175-22 to 176-4, 186-15 to 188-6; 28T7-10 to 8-14) Likewise, Dr. Gilman testified that he relied on "speculative" conclusions to make up for the lack of evidence concerning Hubbard's substance use (25T170-13 to 171-13; 26T178-15 to 179-13), and did not offer any explanation for diagnosing substance-induced psychosis without satisfying the other relevant factors, instead relying on his belief that "there was a possibility of the substances playing a role in some of [his] symptoms." (25T188-12 to 15; 28T6-19 to 7-9)

This testimony could not establish the reliability of Dr. Gilman's diagnoses. An expert cannot rely on speculation. Townsend, 221 N.J. at 55 (citation omitted). And contrary to the trial court's focus on Dr. Gilman's "experience and specialized skill" (28T39-8 to 43-16; 32T66-22 to 71-22), an expert's opinion cannot be grounded in their untested clinical experience, J.L.G., 234 N.J. at 291, or "personal" standards or views. Pomerantz, 207 N.J. at 373. Dr. Gilman's departure from the DSM, and his failure to ground his diagnoses in some other "generally accepted" and reliable scientific standard thus rendered them improper net opinions, Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017) (citation omitted), the admission of which was not only an abuse of discretion, but prejudicial.

As discussed in Point I.A., the State centered much of its case on the false claim that Hubbard could not be found insane due to his use of marijuana and alcohol. Dr. Gilman's diagnosis of substance-induced psychosis was an essential component of that argument, providing an expert opinion upon which the jury could find that Hubbard was so affected, while also reinforcing the State's misstatement of the law. (25T170-13 to 171-13, 187-23 to 189-12) Similarly, the State used Dr. Gilman's antisocial personality disorder diagnosis to argue that Hubbard knowingly committed his crimes out of "anger and rage," rather than due to his bipolar disorder. This included in opening (10T35-

9 to 25); when it questioned Dr. Gilman about that diagnosis (25T163-21, 171-25 to 178-3; 26T186-10 to 191-12; 28T7-10 to 8-7); when it pressed Dr. Saleh on why he did not render the same diagnosis (23T34-10 to 54-7, 118-2 to 12); and in summation, when it defended Dr. Gilman's failure to follow the DSM (28T166-4 to 15), and repeatedly argued that Hubbard's conduct was consistent with "the antisocial personality disorder" that "define[d]" his life, and not his bipolar disorder. (28T173-6 to 14, 176-15 to 17, 178-10 to 12)

Dr. Gilman's unsupported diagnoses were therefore clearly capable of affecting the jury's verdict because they served as a cornerstone of the State's argument against finding Hubbard insane. The jury, moreover, was likely to credit Dr. Gilman's opinions, despite their unreliability, simply because they were "labeled 'scientific' and 'expert'" by the court. State v. Cavallo, 88 N.J. 508, 518 (1982). The admission of the testimony was therefore clearly capable of affecting the jury's deliberations such that reversal is required.

C. The State Was Allowed to Distract and Inflame the Jury with Irrelevant, Cumulative, and Highly Prejudicial Evidence and Comments about the Crime and Injuries.

There was no dispute that Hubbard caused Wolkowitz's death. (8T14-25 to 15-4) As a result, the defense sought to limit the jury's exposure to inflammatory information about Wolkowitz's injuries and medical treatment. The court, however, allowed the State to present extensive information about

Wolkowitz's suffering, including testimony from five medical professionals and multiple graphic photos and videos. (9T9-13 to 34-22, 36-14 to 50-6, 76-13 to 78-8; 10T60-3 to 61-4, 148-3 to 150-8, 171-6 to 172-4; 28T113-19 to 115-1, 124-17 to 25; 29T10-10 to 12-25) These rulings were erroneous and prejudicial, particularly given the multiple other ways in which the State appealed to the jury's emotions. A new trial is required.

At the outset, most if not all the testimony about Wolkowitz's injuries and medical treatment should have been excluded because it was irrelevant. Evidence is only relevant if it has a "a tendency in reason to prove or disprove any fact of consequence to the determination of the action[,]" N.J.R.E. 401, meaning that it relates to a fact that is both significant and "in issue[.]" State v. Hutchins, 241 N.J. Super. 353, 358-59 (App. Div. 1990); see also State v. Johnson, 120 N.J. 263, 299 (1990) (stating evidence is not admissible simply to show the jury "the entire picture of the crime"). Because Hubbard was "not challenging" his culpability, as the State acknowledged (10T183-18 to 22), the cause of Wolkowitz's injuries and death was not "in issue," rendering most testimony on that subject irrelevant and inadmissible. N.J.R.E. 402.

Moreover, even if relevant, the testimony and evidence should have been greatly limited because its minimal probative value was "substantially outweighed by the risk of" undue prejudice, confusion, and misleading the

jury. N.J.R.E. 403. Simply put, even if there was a need for the State to present some evidence about how the attack led to Wolkowitz's death, there was no reason for it to present that information from multiple witnesses, over a full day of testimony, in graphic detail. Rather, such an extensive presentation only served to wrongly sway the jury's careful deliberations based on anger and sympathy, making its admission not only improper but harmful. R. 2:10-2.

As noted, the State was allowed to devote the first full day of trial to Wolkowitz's medical condition and treatment, eliciting extensive testimony from two paramedics and three doctors. (10T) From the paramedics, the jury heard graphic details about Wolkowitz's condition when they first arrived, including that he had "tire tracks across his abdomen" and "burn charring" and, over objection, that he "was pleading, please help me, please don't let me die[.]" (10T60-3 to 61-8, 72-3 to 8, 77-16 to 78-2) They also told the jury that Wolkowitz started to "decompensate" and experienced "cardiac arrest" and "clinical death" requiring CPR, and detailed their unsuccessful attempt to intubate him with a breathing tube. (10T64-12 to 66-10, 73-16 to 79-11)

The jury then heard more details from Dr. Abimbola Pratt, including that Wolkowitz was "without signs of life" when he arrived at the hospital and that he went into cardiac arrest four times. (10T92-25 to 93-15, 95-19 to 96-13, 98-7 to 104-1, 111-11 to 113-18) Dr. Pratt also described Wolkowitz's course of

treatment, including that doctors had to "make an incision on the neck" to "put a tube directly into the airway"; install "chest tubes" to "re-expand the lungs"; give "blood transfusions" through a "large IV" "in the groin"; and put a "catheter in the brain"; and that Wolkowitz was left in a "vegetative state." (10T94-8 to 98-6, 101-9 to 102-17, 107-15 to 23, 113-19 to 119-4) Dr. Pratt also identified multiple photos of Wolkowitz, including of the injuries to his face and body, tubes going into "his windpipe," mouth, chest, and nose, and the "catheter in his brain[.]" (Da 180-84; 10T105-6 to 111-10)

The jury also heard from Dr. Smitha Narasimhaswamy, who provided gratuitous details about Wolkowitz's treatment between September 10, 2018, and his death about a month later. (10T145-18 to 146-15) This included that Wolkowitz had "multiple infections," that he was "fighting the ventilator" that he needed to breathe, that he was medicated for "pain and anxiety," that his kidneys stopped working, and that he eventually could not "tolerate" feedings because food was "backing up into his stomach[.]" (10T146-12 to 152-22)

Finally, the jury heard from Dr. Melissa Guzzetta, who conducted the autopsy. Like the other witnesses, Dr. Guzzetta provided unnecessary details about Wolkowitz's injuries, including that had "a shunt in his head," a "Foley catheter," "[s]cars from other procedures," multiple fractures, "bruising of the lung," and "a lot of disease process" from "being hospitalized for so long."

(10T166-19 to 172-4) Dr. Guzzetta also testified that Wolkowitz had "raging pneumonia" from his injuries and intubation, noting he had "a foreign object in [his] trachea for a long time"; that the pneumonia started "necrotizing" or "eating" his lungs; and that the injuries and hospitalization caused his "whole body" to swell with fluid and his brain to "liquefy." (10T172-19 to 175-22)

In sum, the jury was exposed to an entire day of testimony during which five medical professionals repeatedly told them irrelevant, cumulative, and highly inflammatory information about Wolkowitz's serious injuries and medical treatment. This information, including the photos of Wolkowitz's body, were on their own clearly capable of wrongly affecting the verdict by focusing "the jury's attention on the gruesome details of" the crime, rather than on the issue of insanity. Johnson, 120 N.J. at 289-90 (reversing murder conviction where State presented day of minimally relevant but highly inflammatory testimony about blood-spatter analysis, which included multiple photos of "victims' bodies"); see also State v. Walker, 33 N.J. 580, 596 (1960) (finding court erred in allowing State to display three pictures of victim's brain where the cause of death was "uncontested"). The State, however, also took other actions that also increased this risk of prejudice.

For example, over objection (9T36-14 to 40-6; 11T249-21 265-4), the State played video showing Wolkowitz injured on the ground immediately

after the attack, during which he could be heard moaning and trying to speak, and an officer could be heard discussing his injuries and "horrible burn marks." (Da 201; 14T152-16 to 161-1)[12] The State was also allowed to show the jury, again at least partially over objection (9T74-1 to 78-8), photos of "blood staining" and "skin," including on the bottom of Hubbard's car (Da 171-79; 15T77-13 to 78-13, 120-9 to 123-15), and to play a 911 call in which a mother could be heard trying to protect her two children, who were crying in the backseat of her car, during the assault. (Da 200; 11T58-1 to 64-18) This evidence and testimony, like that from the medical experts, did not relate to a material issue and only made it more likely that the jury would be improperly swayed by its sympathies and emotions. See State v. Taylor, 350 N.J. Super. 20, 36-38 (App. Div. 2002) (reversing murder conviction where jury was shown largely irrelevant but inflammatory video of victim after a knife attack).

This risk was also further increased by the State's numerous instances of prosecutorial misconduct, including multiple "improper appeal[s] to the jury's emotions," State v. Darrian, 255 N.J. Super. 435, 454 (App. Div. 1992) (citation omitted), meant to "generat[e] sympathy" for Wolkowitz and those around him, "and anger and hatred for" Hubbard. State v. W.L., 292 N.J. Super. 100, 108 (App. Div. 1996). For example, the State extolled Wolkowitz

[12] The video was played from about 7:20:50 to 7:24:40 and 7:27:00 to 7:34:18.

as a "truly innocent victim" in its opening and summation (10T35-12 to 14, 43-11 to 15; 28T177-4 to 9), thereby improperly highlighting his "virtues in order to inflame the jury." State v. Williams, 113 N.J. 393, 451-52 (1988).

The State also repeatedly detailed Wolkowitz's injuries, stating in opening that he was left "lying on the ground in agony" after the "horror" of "being crushed," with "[h]is face bloody and bruised, bones broken throughout his body. His eyes swollen shut. A mark across his stomach . . . . His ribs crushed, broken. Both of his lungs collapsed, gasping for air. Starting what would become traumatic brain injury" and "cardiac arrest." (10T38-8 to 39-23) Similarly, in closing, the State displayed graphic images of Wolkowitz (Da 129, 137; 29T10-20 to 12-25), and described the attack as a "horror" in which he was "crush[ed]," "burn[ed]," and "dragged" with "violent force," leaving a "grizzly scene" "of death and destruction" and "[t]he smell of flesh and blood . . . permeating the area." (28T123-6 to 24, 126-2 to 5, 131-1 to 7, 132-4 to 12)

The State told the jury that the attack was "only the beginning" of "the brutality" suffered by Wolkowitz because "[f]or nearly six months, a half a year, [he] struggled to breathe every minute of every day. Suffering from the inside out, every organ in his body failing[,]" causing a "slow and agonizing death." (28T124-13 to 20, 145-1 to 6) And, over objection, the State emphasized that Wolkowitz's family members, at least one of whom was seen

crying during parts of the testimony (14T236-6 to 11), also suffered from the crime, stating that they were left "wondering every day for six months, a half a year whether he would live to suffer another day or whether that would be the day that they lost their loved one." (28T124-20 to 125-5)

The State also focused on the fear felt by the neighbors who witnessed the crime, emphasizing in opening and summation that it occurred in front of "a shocked father hiding in his home calling for help" "terrified . . . that this defendant was going to look his way[,]" and a "horrified mother" "trapped in her minivan, cowering in fear with her two young boys, pushing them down onto the ground as she called 9-1-1, terrified that if god forbid he just looked over her way her and her two young sons would be his next target." (10T37-22 to 38-13; 28T121-6 to 17) The State also replayed part of the mother's 911 call, in which she expressed fear for her kids. (Da 200; 28T121-18 to 123-15)

On top of all this, the State at multiple points explicitly invited the jurors to reject Hubbard's insanity defense based on their emotions and the nature of the crime. In opening, the State told the jury that "[t]he purpose of this trial isn't to determine if the defendant has a mental illness" but to "determine if he should be held accountable and responsible" for killing a "truly innocent victim[.]" (10T43-11 to 19) In summation, it emphasized that "mental illness does not give a person a right to take another human beings [sic] life and to not

be held accountable and responsible for it[,]" that Hubbard's mental illness did "not give him the right to impose his tragedy on others[,]" and that Wolkowitz "did not deserve to die[.]" (28T173-15 to 21, 178-10 to 12) And it ended its closing by telling the jury that Hubbard was "looking to be excused from criminal responsibility for the murder of another human being" but that it was their "job" to "hold him criminally responsible[.]" (28T179-3 to 8)

These final comments not only reinforced the idea that the jury should be guided by their emotions but constituted other misconduct. As this Court has explained, characterizing the insanity defense as an "excuse" misstates the law, tends to "denigrate the defense," and improperly suggests "that society should not condone" a finding of insanity when a "heinous crime" has been committed. State v. Rodriguez, 365 N.J. Super. 38, 50-51 (App. Div. 2003). And telling the jury that it was their "job" to reject the insanity defense improperly encouraged them to convict "on the basis of a societal duty" or obligation, State v. Josephs, 174 N.J. 44, 125 (2002) (citation omitted), which is "among the most egregious forms of prosecutorial misconduct." State v. Acker, 265 N.J. Super. 351, 356-57 (App. Div. 1993) (citation omitted).

In sum, the State was allowed to repeatedly focus the jury on irrelevant and prejudicial information about the nature of the crime and harm suffered, about which there was no dispute. This improper evidence and commentary,

presented from start to finish, had "a strong potential to cause a miscarriage of justice[,]" W.L., 292 N.J. Super. at 111, as it was clearly capable of not only "unduly prejudicing the jury against [Hubbard] but also [of] confusing it over whether its deliberations should be influenced" by the nature of the crime, the harm inflicted, its societal obligations, or other irrelevant factors, Williams, 113 N.J. at 452, particularly given the "close and sensitive" nature of the case, W.L., 292 N.J. Super. at 111, and the court's failure to take any curative action. See State v. Frost, 158 N.J. 76, 83 (1999) (citation omitted) (stating harm is more likely if objections were made but the court did not take curative action). Reversal of Hubbard's convictions is therefore required.

D. The State Was Allowed to Improperly Attack the Defense Expert with Irrelevant and Misleading Information About His Compensation in Unrelated Matters.

The jury's consideration of the insanity defense rested in large part on whether it credited the testimony of the defense expert, Dr. Saleh, or the State's expert, Dr. Gilman. The jury's ability to make that determination, however, was improperly hindered when the trial court allowed the State to question Dr. Saleh about his compensation in unrelated matters. That inquiry was irrelevant and prejudicial, particularly as the court also allowed the State to read from a newspaper about how Dr. Saleh had earned $452,455 in 2013 from a defense-oriented organization in Massachusetts; prevented the defense

from eliciting information about his actual compensation; and instructed the jury that it could use the 2013 compensation to discount Dr. Saleh's testimony. These improper rulings undermined the defense's key witness, were clearly capable of affecting the jury's verdict, and require a new trial.

At the outset, the court erred in allowing the State to question Dr. Saleh about his 2013 out-of-state compensation because it was irrelevant. The testimony had no relation to Dr. Saleh's compensation or testimony in the current matter. And, despite the court's suggestions (27T51-15 to 52-1), it did not tend to rebut Dr. Saleh's testimony that he was retained about evenly by prosecutors and defense attorneys, particularly as the information concerned compensation for a single year, nine years prior. (21T55-3 to 22) Dr. Saleh's salary from 2013 thus did not tend to prove or disprove a fact in issue, and questioning on that topic should not have been allowed. N.J.R.E. 401.

Moreover, all information about Dr. Saleh's compensation other than the dollar amount also should have been excluded, even if relevant, because it constituted impermissible hearsay from a 2016 Boston Globe article. (21T76-21 to 23) While the State may have sought to use the article to refresh Dr. Saleh's recollection, the requirements to do so were not satisfied. N.J.R.E. 612. Specifically, the court did not "preliminarily . . . decide whether" the article refreshed Dr. Saleh's memory without "undue suggestion," State v.

Carter, 91 N.J. 86, 123 (1982), and the record shows that it was not. Rather, Dr. Saleh could only recall his total compensation and at most confirmed that the prosecutor "read [the article] correctly" for all other details, without confirming their accuracy. (21T77-5 to 78-2) As a result, the hearsay rules were violated because the jury was told about Dr. Saleh's compensation via the article and the prosecutor's questions, rather than through Dr. Saleh's "independent recollection and knowledge[,]" further requiring its exclusion. Carter, 91 N.J. at 123 (citation omitted); see also State v. Caraballo, 330 N.J. Super. 545, 557-58 (App. Div. 2000) ("[A] prosecutor may not merely parrot a statement ostensibly used to refresh recollection.").

The elicitation of this information was also improper and requires reversal because its nonexistent probative value was substantially outweighed by its risk of prejudice and confusion, N.J.R.E. 403, and because that harm was amplified by other errors. Most basically, the testimony was highly prejudicial because it tended to suggest that Dr. Saleh was unreasonably compensated and may have "fabricated [his] testimony," despite a lack of evidence to that effect. State v. Smith, 167 N.J. 158, 182-83 (2001). This was especially true given that the jury was told that his compensation was the subject of a Boston Globe article, and that he was "[a]mong the highest-paid" experts, implying some type of impropriety. (21T76-21 to 77-14)

This impression, and its resulting risk of prejudice, was also increased by two other errors. First, the court barred the defense from eliciting Dr. Saleh's compensation in this case. (21T118-9 to 119-1; 27T48-2 to 52-5) That ruling was plainly improper and prejudicial, as Dr. Saleh's compensation was clearly relevant and the exclusion of that testimony prevented the defense from rebutting the idea, planted by the State, that he was "paid an exorbitant amount" and may have skewed his testimony accordingly. (27T50-1 to 25)

Finally, the court added fuel to the fire by instructing the jury, over objection, that it could consider Dr. Saleh's 2013 compensation when assessing his testimony (29T38-8 to 39-9, 48-16 to 52-14), allowing them to determine whether it was "reasonable" and, if not, that it "affect[ed] [his] credibility, interest, or bias[.]" (29T48-19 to 49-11) In doing so, the court improperly reinforced the idea that Dr. Saleh's 2013 compensation was relevant and provided the jury with a roadmap to use it against him, and him alone, as the jury did not learn about any other experts' compensation.

In short, the trial court: allowed the State to improperly attack Dr. Saleh's credibility with irrelevant and prejudicial hearsay about his prior compensation; barred the defense from eliciting relevant information about Dr. Saleh's actual compensation; and then instructed the jury that it could use the State's incomplete and improperly admitted information to discount Dr.

Saleh's testimony. These errors were individually and cumulatively capable or leading the jury astray when considering Dr. Saleh's testimony and the key issue of whether Hubbard was legally insane, requiring a new trial.

POINT II

THE COURT REVERSIBLY ERRED IN FAILING TO SUPPRESS DEFENDANT'S CUSTODIAL STATEMENTS. (Da 20; 4T18-17 to 26-16)

Hubbard moved to suppress two statements before trial. The first was an unrecorded statement to the arresting officers, in which he allegedly claimed to drive a truck, rather than the Malibu involved in the crime. The second was his recorded statement to the lead detectives. Hubbard sought to exclude the first statement because he was questioned without being advised of his rights and the second statement because the State failed to prove that he validly waived his rights beyond a reasonable doubt despite his mental illness. The trial court rejected those arguments, allowing the State to use both statements to establish Hubbard's culpability and to attack his insanity defense. These rulings were improper, deprived Hubbard of his constitutional rights, and require reversal. U.S. Const. amends. V, XIV; N.J.S.A. 2A:84A-19; N.J.R.E. 503.

Appellate review of police-obtained statements must be "'searching and critical' to ensure protection" of the defendant's rights. State v. Burney, 471 N.J. Super. 297, 314 (App. Div. 2022) (quoting State v. Patton, 362 N.J. Super.

16, 43 (App. Div. 2003)), rev'd on other grounds, 255 N.J. 1 (2023). The trial court's factual findings will be upheld if they "are supported by sufficient credible evidence in the record." State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). The court's legal findings about "the consequences that flow" from those facts, however, are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015) (citation omitted).

The right against self-incrimination is "guaranteed by the Fifth Amendment to the United States Constitution and this state's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. A.M., 237 N.J. 384, 396 (2019) (quoting S.S., 229 N.J. at 381-82). New Jersey offers "broader protection" against self-incrimination, State v. O'Neill, 193 N.J. 148, 176-77 (2007), seeking "to maximize" the right as an "integral and essential safeguard in the administration of criminal justice." State v. Reed, 133 N.J. 237, 250, 253 (1993) (citation omitted).

Pursuant to that right, a suspect's statement is inadmissible if he was "subjected to police interrogation while in custody . . . or otherwise deprived of his freedom of action in any significant way" without being "adequately and effectively apprised" of his rights against self-incrimination, to remain silent, and to counsel. Miranda v. Arizona, 384 U.S. 436, 467-71, 477 (1966). Suppression is also needed if the State does not prove that the suspect

knowingly and voluntarily waived those rights. Id. at 444. These principles required suppression in this case, and the court erred in finding otherwise.

The court first erred in failing to suppress Hubbard's un-Mirandized statements to the arresting officers on the basis that Hubbard was "not in custody" or interrogated when questioned outside his apartment. (4T35-24 to 36-20) Whether a suspect is in custody "turns on 'whether there has been a significant deprivation of [his] freedom of action based on the objective circumstances[.]'" State v. Bullock, 253 N.J. 512, 533 (2023) (quoting State v. P.Z., 152 N.J. 86, 103 (1997)). Custody "does not necessitate a formal arrest," "physical restraint in a police station," nor "the application of handcuffs[.]" Hubbard, 222 N.J. at 266 (quoting P.Z., 152 N.J. at 103). Rather, a suspect can be in custody in his own home, a public place, or any other location, ibid. (citation omitted), as long "a reasonable person in [his] position" would not have "felt free to leave[.]" Bullock, 253 N.J. at 538.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). This test is focused largely "upon the perceptions of the suspect" and what the officers objectively "should have known" rather than their subjective intent or

knowledge. Id. at 301-02. Application of these standards show that Hubbard's statements to the arresting officers should have been suppressed.

The questioning occurred after five officers knocked on Hubbard's door, knowing he was a suspect in the assault. (2T12-24 to 15-3, 31-11 to 14; 4T10-16 to 11-9) After Hubbard answered, the officers had him identify himself, come outside, and sit on a step. (2T31-15 to 33-5; 4T11-9 to 11) The officers then questioned Hubbard, who was not wearing a shirt or shoes, about "what happened[,]" whether he "was involved in a motor vehicle accident[,]" and what kind of car he drove, resulting in Hubbard stating that he drove a pickup truck. (2T33-6 to 34-19, 36-24 to 37-3; 4T11-11 to 19)

The court erred when it found, without explanation, that Hubbard was "not in custody" for this questioning. (4T36-17 to 20) Simply put, "a reasonable person" in Hubbard's position would not have felt "free to leave," Bullock, 253 N.J. at 538, after five officers knocked on his door, had him come outside, told him to sit on the ground without wearing shoes or a shirt, and then questioned him about the assault. Indeed, the Supreme Court recently held in Bullock that a defendant was in custody after an officer escorted him outside and questioned him with two other officers present. Ibid. This case, if anything, presents an even clearer case of custody, as Hubbard was not only identified as a suspect and taken outside, but confronted by even more officers

and questioned while only partially dressed, making it even "hard[er] to imagine that a reasonable person" would have felt free to go on his way. Ibid.

The court was also wrong in finding that Hubbard was not interrogated because the questions "were investigatory in nature[.]" (4T36-13 to 17) To the contrary, the questioning was not "simply part of an investigation," without targeting Hubbard as "a suspect[.]" State v. Timmendequas, 161 N.J. 515, 614-15 (1999) (citation omitted). Rather, the police knew Hubbard was a suspect in an auto assault and posed questions that were "reasonably likely to elicit an incriminating response[,]" Innis, 446 U.S. at 302, including about whether he was in a car accident and about the type of car he drove. Accordingly, Hubbard was subjected to custodial interrogation, such that his unrecorded and un-warned statements to the arresting officers should have been suppressed.

The same is also true for Hubbard's later recorded statement because the State failed to prove beyond a reasonable doubt that Hubbard knowingly, intelligently, and voluntarily waived his rights. "Because courts assume that defendants seek the advantage of" the right against self-incrimination, they "'indulge every reasonable presumption against waiver'" of that "'fundamental constitutional right[.]'" State v. McCloskey, 90 N.J. 18, 25 (1982) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The State must therefore prove the validity of the waiver beyond a reasonable doubt, based on the totality of

the circumstances. State v. Chew, 150 N.J. 30, 65 (1997) (citations omitted).

Among those circumstances are the suspect's physical and mental well-being. A.M., 237 N.J. at 398 (citations omitted). Indeed, a suspect's "medical condition at the time of the interrogation" is among the most "important circumstance[s] that must be carefully considered[.]" Burney, 471 N.J. Super. at 305. In this case, Hubbard's mental illness posed a significant barrier to the State's ability to prove that his waiver was valid beyond a reasonable doubt.

The court heard about Hubbard's strange behavior (2T24-15 to 20, 46-6 to 49-3), that his mother warned the police about his bipolar disorder (2T15-4 to 16-23), and that he told the detectives that he had been treated for mental illness but was unmedicated. (1T82-2 to 83-8, 239-13 to 241-11) The court also reviewed competing expert reports (4T4-20 to 5-10), that detailed Hubbard's serious mental health history, diagnosed him with bipolar disorder, and agreed that he was exhibiting "psychotic symptoms" during the relevant time, with the defense expert further opining that those symptoms prevented him from understanding his actions.[13] (Da 97-103, 106, 113, 120-27)

In the face of such evidence, the State was required to explain the significance of Hubbard's mental illness and prove beyond a reasonable doubt

[13] The defense expert who prepared the report reviewed for this hearing, Dr. Elanor Vo, passed away before trial. (8T86-10 to 24)

that it did not invalidate his waiver. Logically, and based on prior case law, this should have involved the presentation of expert testimony. See State v. Smith, 307 N.J. Super. 1, 5-6, 10-11 (App. Div. 1997) (finding State met burden where psychiatrists testified that defendant's "mental state was clear" and that he "had no mental disorder that would interfere with his decision-making ability"); see also State v. Glover, 230 N.J. Super. 333, 338, 342 (App. Div. 1988) (finding State met burden where defense expert's testimony did not support finding of insanity and there was "no evidence" that defendant "was unable to exercise his free will in waiving his rights"). Indeed, this Court recently held that "the proof-beyond-a-reasonable-doubt standard . . . cannot be met" when a defendant suffered from a medical condition that could have affected his waiver unless the State presents sufficient "expert medical testimony concerning" that condition and its effects. Burney, 471 N.J. Super. at 305, 316-18 (remanding where defendant was being treated for overdue dialysis and the record did not explain the significance of his symptoms).

The State, however, did not present such testimony in this case, instead relying on the lay observations of the police and court. (3T43-10 to 55-2) This was insufficient. The "lay opinion of the interrogating detectives" was "not an adequate substitute for expert testimony[,]" Burney, 471 N.J. Super. at 317, particularly given their failure to appreciate or explore Hubbard's mental-

health issues. (1T82-12 to 83-10; 2T16-7 to 23) Likewise, the court could not rely on its own opinion because, as it acknowledged, it too was "not an expert in mental illness[.]" (4T20-10 to 22-9) Moreover, the court did not account for parts of the interrogation that cast doubt on Hubbard's mental state, including when he said he locked himself out of his home on purpose and repeatedly expressed confusion about his actions, further undermining its findings. (1T71-18 to 72-13, 86-15 to 16, 108-7 to 18, 111-10 to 112-2, 133-14 to 135-17)

Accordingly, the State failed to meet its burden beyond a reasonable doubt because it inexcusably failed to present competent, reliable evidence proving that Hubbard validly waived his rights. Such evidence was needed based on the serious and undisputed nature of Hubbard's mental illness, as well as its central role in the suppression motion, and it could not be made up for with lay speculation and guesswork. Suppression is thus required.

The improper admission of Hubbard's statements, moreover, was not harmless beyond a reasonable doubt because they played central roles in the State's case. State v. Maltese, 222 N.J. 525, 543-44 (2015) (citation omitted). For example, the State used Hubbard's unrecorded statement about driving a pickup truck, rather than the Malibu involved in the crime, to undermine his insanity defense by arguing that it displayed consciousness of guilt and a lack of credibility. Specifically, the State questioned Dr. Saleh about whether

Hubbard "lied" to the police and whether he "might have done the same thing" during his forensic evaluation. (24T37-6 to 38-21) And it argued in summation that Hubbard "lied" because he "knew what" happened and was "trying to distance himself" from the crime, demonstrating that he "[a]ppreciate[d] the [w]rongfulness" of his actions. (Da 164; 28T129-13 to 130-7, 175-4 to 5) In other words, the State used the unrecorded statement to undermine the insanity defense, rendering its admission prejudicial and necessitating a new trial.

The admission of Hubbard's recorded statement was similarly harmful. Dr. Gilman extensively discussed the statement when opining that Hubbard understood his actions. (25T137-5 to 143-5, 198-14 to 199-1) The State used the statement to question Dr. Saleh's conclusion to the contrary, including by replaying parts of it. (24T100-21 to 133-2, 147-7 to 187-5) And it heavily emphasized the statement during opening and summation, including by replaying excerpts and suggesting that the jury watch the statement again. (Da 143-156, 167-68, 205; 10T34-10 to 16, 40-11 to 41-1; 28T120-12 to 16, 128-22 to 129-6, 135-9 to 140-10, 142-10 to 147-3, 148-5 to 149-21, 152-4 to 155-2, 158-17 to 160-12, 172-1 to 173-1, 175-23 to 178-6) And, indeed, the jury replayed the statement in full, and in part, during deliberations (30T8-2 to 93-6; 31T9-17 to 17-15), without the court warning that it "should not place any extra emphasis on" the played back video, either then or concerning the State's

summation, as required, further increasing the risk of harm. State v. Muhammad, 359 N.J. Super. 361, 382 (App. Div. 2003); Model Jury Charges (Criminal), "Playback of Testimony" (Apr. 16, 2012). Accordingly, the recorded statement, like the unrecorded statement, was an important part of the State's case, the improper admission of which requires reversal.

The recorded statement, however, also carried additional import because it provided the only direct evidence that Hubbard was motivated by race, which was not only part of the State's argument against the insanity defense, but essential to the charge of bias intimidation, N.J.S.A. 2C:16-1. Thus, while the improper admission of that statement requires reversal on all counts, it requires dismissal of the bias charge because "a reasonable jury could [not] find guilt of the charge beyond a reasonable doubt" without it. State v. Reyes, 50 N.J. 454, 458-59 (1967) (citation omitted); (20T18-9 to 22-18)

POINT III

THE TRIAL COURT ERRED WHEN IT REMOVED A JUROR WITHOUT GOOD CAUSE AND WHEN IT FAILED TO ENSURE THAT THE JURY WAS NOT CONTAMINATED. (23T196-21 to 205-20; 30T162-7 TO 175-15; 32T47-6 to 57-21)

A trial court faced with possible juror contamination must conduct a careful inquiry to determine whether the juror can remain fair and impartial and, if not, whether other jurors have been contaminated. The processes and

standards for each step of this inquiry are well established. The trial court in this case, however, repeatedly failed to follow those requirements, both removing a juror without cause to do so, and failing to ensure that the jury remained untainted by extraneous information. These errors deprived Hubbard of his rights to due process and a fair trial and require the reversal of his convictions. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

A. The Trial Court Improperly Removed Juror 14 Without Good Cause or, in the Alternative, Failed to Voir Dire the Remaining Jurors to Guard Against Contamination.

During the fourteenth day of trial, Juror 14 submitted a note asking the court two questions about why "information [was] being withheld":

> 1. Why have you sustained objections regarding the cost of the injectable medications, weeks or months before the incident? Did [Hubbard] have a health care plan? Why would this be withheld?
>
> 2. According to the defense psychiatrist, Mr. Hubbard was provided medication a week after the incident. Since he is in custody this means the state had him evaluated. Seems odd neither the defense nor the state would want the jury to hear about it[.] Why haven't we heard about the state's psychiatrist report?
>
> [(Da 170; 23T203-21 to 204-4; 32T48-4 to 17)]

The court did not address the note until the lunch break, when it held a sidebar with Juror 14. The sidebar, which was partially inaudible, lasted only twenty-five seconds and only focused on whether Juror 14 "discuss[ed] the questions with any of the other jurors[,]" which he denied. (23T126-23 to 127-24) The

court released Juror 14 to lunch afterward. (23T127-24 to 128-12)

The State sought to remove Juror 14 for cause. (23T129-5 to 132-16) The defense opposed the motion, suggesting that the court instead give a curative instruction and/or question the full panel. (23T132-18 to 137-15) The court reserved judgment until after the jury was dismissed for the day, at which point it removed Juror 14. Although the court did not find that Juror 14 was biased or could not keep an open mind, it concluded that removal was needed "out of an abundance of caution" because his questions "seem[ed] to reflect . . . speculation and questioning" of the court's rulings, raised a "concern" that he might have "already formed an opinion to some extent[,]" and suggested "potential" impartiality and that he might be unable to follow instructions. (23T196-5 to 205-20; 32T48-4 to 51-10) In doing so, the court declined the defense's request that it question the remaining jurors, later explaining that there "was no reason" to do so because Juror 14 said that he had not shared his concerns with other jurors. (32T51-11 to 52-18) Both of the court's rulings, removing Juror 14 and declining to question the other jurors, were mistaken.

The court first abused its discretion in removing Juror 14. A court may only remove an impaneled juror if there is "good cause" to do so. R. 1:8-2(d)(1). This is a fact-specific standard that typically requires "questioning by the trial judge" into the possible grounds for exclusion, followed by detailed

findings. State v. Reevey, 159 N.J. Super. 130, 134 (App. Div. 1978); see also State v. Burks, 208 N.J. Super. 595, 611-12 (App. Div. 1986) (stating trial court should have questioned jurors on attentiveness to determine whether good cause existed). That standard was not satisfied here.

At the outset, the court erred, and no deference is owed, because it did not find that good cause existed, and did not even mention that standard, in removing Juror 14. See State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017) ("[W]hen the trial court renders a decision based upon a misconception of the law, that decision is not entitled to any particular deference and consequently will be reviewed de novo."). Beyond that, however, the record also makes clear that there was no good cause, such that Juror 14's removal would have been a "clear error in judgment" and an abuse of discretion even if the proper standard was applied. State v. S.N., 231 N.J. 497, 500 (2018).

While Juror 14's questions may have raised a concern warranting further action, they could not, on their own, establish good cause. Rather, as defense counsel noted (23T136-24 to 137-7), the court should have questioned Juror 14 to determine whether his "ability to render a fair decision had been impaired" before removing him. Reevey, 159 N.J. Super. at 134; see also Nguyen v. Tama, 298 N.J. Super. 41, 50-51 (App. Div. 1997) (finding juror properly removed for cause when she expressed "thoughts" about the case and

questioning revealed "she had formulated an initial opinion and could no longer be impartial"). The court, however, inexplicably denied this request.

As a result, the court never questioned Juror 14 about his ability to remain fair and impartial. It also never provided additional instructions or questioned Juror 14 about his ability to follow them. Instead, the court removed Juror 14 based on its speculation about his questions' "potential" significance. (23T200-13 to 202-5) Such speculation could not substitute for questioning Juror 14 and could not serve as a basis for establishing good cause. Juror 14's removal was therefore improper and requires reversal.

That said, a new trial is also required even if good cause existed because, in that case, the court should have expanded its inquiry to ensure that no other jurors were similarly contaminated. A trial court's responsibility to ensure that "the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters" does not end after removing a tainted juror. State v. R.D., 169 N.J. 551, 557 (2001) (citations omitted). Rather, if the court finds that a juror is no longer "capable of fulfilling their duties in an impartial manner[,]" State v. Bisaccia, 319 N.J. Super. 1, 12-13 (App. Div. 1999) (citation omitted), it must not only remove the juror but determine whether any other jurors could have been "tainted thereby." R.D., 169 N.J. at 558 (citation omitted). The court must "swiftly"

determine whether the juror "may have" exposed other jurors to contaminating information, id. at 557-58 (citation omitted), even if not asked to do so. State v. Wormley, 305 N.J. Super. 57, 69 (App. Div. 1997).

This inquiry is focused on whether the information "had the capacity to influence" other jurors. R.D., 169 N.J. at 559 (emphasis in original). The first question is thus "whether there was at least an opportunity for the extraneous information to reach the remaining jurors[.]" Ibid. If "circumstances made it impossible for th[e] juror to impart impermissible information to the other jurors even unintentionally[,]" no further action is needed. Id. at 561-63 (finding "no opportunity" for contamination when juror realized he knew testifying witness because he quickly told the court, the witness was the last to testify that day, and "[n]o breaks were taken during her testimony").

More is required, however, when further contamination was not "impossible." Id. at 561. In such cases, the court must "presume" further contamination, and conduct additional investigation. State v. Loftin, 191 N.J. 172, 193 (2007). This should include questioning the removed juror about whether he "intentionally or inadvertently" imparted information to other jurors. R.D., 169 N.J. at 560. A court may not, however, "simply accept the juror's word." Id. at 561. Rather, the court must "expand" the inquiry by "voir dir[ing] the remaining jurors" until it is assured that no further contamination

occurred. R.D., 169 N.J. at 560-61; see also Bisaccia, 319 N.J. Super. at 13 (citation omitted) (stating court should question "remaining jurors" when "there is the possibility" of contamination, including from "jury misconduct"). Failure to conduct such an expanded inquiry is reversible error.

This is illustrated by Wormley, 305 N.J. Super. at 68-69, where a juror was removed after revealing that she knew the victim and had information about the case. Although the juror denied sharing her knowledge, and no party requested additional relief, this Court found that it was plain error to not question the remaining jurors. Id. at 69. The Court reached that conclusion because, "[b]efore the juror disclosed her knowledge, the jury selection process, opening arguments, and testimony of a witness had occurred" and "[t]here was at least one break during which the jurors commingled informally." Id. at 70. Accordingly, "[w]ithout the trial judge's inquiry of the remaining jurors," the Court could "not be assured that [the juror] did not convey, either directly or indirectly, her knowledge," such that a new trial was necessary. Ibid. That remedy is also required here.

If Juror 14 was contaminated, as the court found, then it was required to voir dire the other jurors because it was not "impossible" for him to have imparted his concerns "even unintentionally." R.D., 169 N.J. at 561. Indeed, Juror 14 remained impaneled throughout the day, after typing his questions up

that morning (Da 170), including throughout Dr. Saleh's testimony, nineteen sidebar conferences (23T), and multiple "break[s] during which the jurors commingled informally." Wormley, 305 N.J. Super. at 70. This included when the jurors gathered before trial (23T4-19), a forty-nine-minute morning break (23T70-16 to 71-6, 87-21 to 22), a nearly two-hour-long lunch break (23T127-23 to 128-1, 138-14 to 20), a short afternoon break (23T152-24 to 153-5, 154-21), and after being dismissed for the day. (23T194-10 to 195-17)

These opportunities for contamination far exceeded those that led to reversal in Wormley and, contrary to the trial court's reasoning, could not be cured simply because Juror 14 claimed not to have shared his concerns with other jurors. Such assurances, as noted, are never sufficient to dispel the risk of contamination. R.D., 169 N.J. at 560-61. But they were particularly meaningless here, where, after questioning Juror 14, the court allowed him to remain impaneled for the rest of the day, without further inquiry, including for additional unsupervised breaks. (23T126-23 to 127-25) Accordingly, if there was good cause to remove Juror 14, then the trial court was also required to question the remaining jurors to avoid further contamination, and it committed reversible error in failing to do so. Wormley, 305 N.J. Super. at 70.

B. The Trial Court Erred in Declining to Voir Dire the Entire Panel After a Bible Was Left in the Jury Room.

On the second day of deliberations, it was discovered that Juror 7 had brought the court's Bible into the jury room, where it remained, with the jurors, for at least a half hour. (30T122-12 to 123-16; 32T42-8 to 25) The State sought to question, if not excuse, Juror 7 due to the Bible's capacity to influence deliberations and based on Juror 7's purported failure to follow instructions. (30T123-16 to 126-12, 131-11 to 133-5, 155-14 to 21) The defense opposed those requests and argued that any inquiry should focus on the full panel. (30T126-15 to 131-6, 142-2 to 145-24, 159-9 to 161-17)

Ultimately, the court declined to question the entire jury because it did not believe that the Bible was per se contaminating and because there was no indication "that the deliberative process ha[d] been compromised[.]" (30T162-7 to 175-5) Instead, the court only questioned Juror 7, who remained on the panel after stating that he did not use the Bible for deliberations. (30T175-21 to 180-6; 32T7-5 to 17, 14-21 to 15-3) The court's narrow focus on Juror 7, without questioning the other jurors, was error requiring a new trial.

As discussed, trial courts are charged with ensuring that jurors decide a case based solely on the evidence presented, "free from the taint of outside influences and extraneous matters." R.D., 169 N.J. at 557 (citations omitted). When jurors are potentially exposed to such information, the court is "obliged

to interrogate" the jurors, id. at 558, to "determine whether any exposure occurred[,]" "what was learned and whether the jurors remain[] capable of fulfilling their duties in an impartial manner." Bisaccia, 319 N.J. Super. at 12-13 (citation omitted). Such an inquiry was necessary here based on the presence of the Bible during the jury's deliberations.

The Bible is an important text that carries unquestionable weight. Indeed, "[t]he Bible and other religious documents are considered codes of law by many in the contemporary communities from which . . . jurors are drawn." People v. Harlan, 109 P.3d 616, 630 (Colo. 2005). Those laws or teachings, moreover, often concern matters relating to criminal justice, including passages that call for the strict punishment of those who commit murder. See, e.g., Exodus 21:24-25 ("[E]ye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."); Genesis 9:6 ("Whoever sheds the blood of man, by man shall his blood be shed[.]").

The presence of a non-evidential Bible thus posed a clear risk of influencing the jury based on extraneous matters, requiring further inquiry. Indeed, numerous other courts have found as much. See Oliver v. Quarterman, 541 F.3d 329, 339-40 (5th Cir. 2008) (noting "[m]ost circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence," and vacating death sentence based on such exposure);

United States v. Lara-Ramirez, 519 F.3d 76, 85-89 (1st Cir. 2008) (finding "court had a duty to investigate" presence of Bible and reversing convictions where it only questioned court reporter and foreperson); McNair v. Campbell, 416 F.3d 1291, 1307-09 (11th Cir. 2005) (finding Bible extraneous but denying habeas relief based on jury inquiry); Harlan, 109 P.3d at 629-32 (finding Bible "extraneous" and ordering new trial because inquiry showed jurors considered its passages); Ackerman v. State, 737 So.2d 1145, 1148 (Fla. Dist. Ct. App. 1999) (finding presence of Bible improper but harmless based on juror inquiry); State v. Robinson, 363 P.3d 875, 1060-64 (Kan. 2015) (finding no error where court questioned jurors about Bible and found it did not affect deliberations); but see Robinson v. Polk, 438 F.3d 350, 364-65 (4th Cir. 2006) (finding court did not "unreasonably apply" law on habeas review when it allowed juror to consult Bible but noting outcome could "be different on de novo review"). And even the State recognized that the Bible was "not evidence" and had "no place in the jury room" due to its capacity to "influence" deliberations, although it wrongly opposed a full inquiry. (30T124-10 to 125-23) Thus, contrary to the court's reasoning, the Bible presented a clear risk of juror contamination that could only be addressed with further inquiry, the absence of which calls for a new trial.

POINT IV

DEFENDANT'S RIGHTS WERE DENIED DUE TO THE FAILURE TO RECORD HUNDREDS OF SIDEBAR CONFERENCES. (Not Raised Below)

The transcripts in this case are extensive, covering thousands of pages. They are also, however, irreparably incomplete, as the court failed to properly record hundreds of sidebar conferences, rendering them inaudible and incapable of transcription.[14] These omissions make it impossible to fully understand the proceedings below, creating the real possibility that viable issues will not be raised or properly addressed on appeal. Hubbard's rights to due process and direct appeal have thus been denied, requiring a new trial. U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1, art. 5, ¶ 2.

With limited exceptions, "all proceedings in court shall be recorded verbatim[.]" R. 1:2-2. This includes all sidebar conferences that "pertain in any way to the trial or the conduct thereof[.]" State v. Green, 129 N.J. Super. 157, 166 (App. Div. 1974). A "complete transcript" of such conferences is "of crucial importance for a meaningful review of both the appellate court and to new counsel on appeal." Ibid. (citations omitted); see also State v. O'Neil, 219 N.J. 598, 610 (2014) ("The right to effective assistance includes the right to

[14] Undersigned counsel confirmed this inaudibility with the transcription company and the criminal division manager and by reviewing some of the audio.

the effective assistance of appellate counsel on direct appeal."). The failure to record sidebar conferences therefore denies a defendant his rights, and requires a new trial, unless their substance or immateriality can otherwise be discerned.

For example, this Court found that "error was committed" in Green, where the trial court denied the defendant's sequestration motion during an "off the record" sidebar, making it impossible to know whether it had a "sound reason" for doing so. 129 N.J. Super. at 165-66. In contrast, the Supreme Court affirmed in State v. Perry, 124 N.J. 128, 170 (1991), where "context" showed that three "gaps" in the record "involved inconsequential administrative matters[.]" Similarly, this Court affirmed in State v. Paduani, 307 N.J. Super. 134, 143 (App. Div. 1998), where twenty-nine unrecorded sidebars either "pertained to administrative matters[,]" "were specifically explained[,]" or had enough surrounding context such that the Court was "readily able to discern each issue discussed" and the "judicial ruling[.]" The omissions in this case are far too substantial, and lacking in context, to be harmless.

At the outset, there were at least 262 inaudible sidebars -- nearly every sidebar held -- with several more at least partially inaudible. (Da 185-99; 14T235-4 to 235-23; 21T78-12 to 79-24, 87-16 to 88-7, 95-7 to 12, 104-24 to 105-19; 23T127-6 to 24; 26T133-18 to 134-7; 28T109-17 to 111-9) This dwarfs the inaudible sidebars seen in other cases, on its own creating

significant barriers on appeal.

Further complicating things is that many of the conferences concerned legal issues, or may have related to legal issues, often without surrounding context, including: (1) thirty-seven where the court overruled a defense objection; (2) eighteen where the defense objected without a clear ruling; (3) thirty-eight where the court sustained a State objection, and another two where the outcome was unclear; and (4) dozens where there is no indication of what was discussed or resolved, or sometimes of even who initiated the sidebar. (Da 185-99) As a result, the record is often silent as to what issues were raised, how the court ruled, and what proffers were made, including about lines of defense questioning that the court did not permit. See (18T14-10 to 23, 17-1 to 10) (hammer found on bed); (19T56-10 to 17; 26T140-8 to 16, 155-17 to 23) (Hubbard's loss of insurance); (26T169-1 to 10) (Kena's police reports)

The inaudible sidebars also make it impossible to know how multiple juror issues were resolved. While some of these sidebars appear to have been about scheduling, the record makes it unknown what was discussed and whether any objections to retaining the jurors were raised. (8T7-7 to 8-2; 25T203-25 to 204-20; 30T179-6 to 180-15) The record also omits the court's questioning of Juror 7 about the Bible left in the jury room (30T179-1 to 8), making it impossible to determine whether it was excessive or coercive, as the

defense later argued. (32T7-18 to 21) And it omits most of the discussion about whether jurors noticed that one of Wolkowitz's sisters was crying (14T235-10 to 237-23), as well as the court's questioning of twelve of the thirteen jurors after it was reported that an audience member was making them uncomfortable (28T109-2 to 112-11), in both cases denying one the ability to determine whether other curative action should have been taken.

In sum, the court erred in failing to ensure that a full record was created. And this error was not as harmless, as it resulted in hundreds of inaudible sidebars, often without adequate surrounding context to determine what was said or how the court ruled. The record is therefore too deficient for Hubbard to fully pursue his direct appeal, such that a new trial is required.

POINT V

THE ERRORS' CUMULATIVE EFFECT DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (Not Raised Below)

Each error above is of sufficient magnitude to require reversal. However, if the Court disagrees, it must find that the errors' total effect "casts doubt on the propriety" of the verdict, requiring a new trial. State v. Jenewicz, 193 N.J. 440, 474 (2008); U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

POINT VI

RESENTENCING IS REQUIRED BECAUSE THE COURT BASED THE LIFE-PLUS-THIRTY-FIVE-YEAR SENTENCE ON MULTIPLE ERRORS. (Da 12-15; 33T12-11 to 13-19, 91-2 to 135-4)

Hubbard was sentenced to an aggregate life sentence, plus thirty-five years. The sentence consisted of a life term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on count one (murder), and consecutive terms of twenty-five years on count four (bias intimidation) and ten years on count five (eluding). (Da 12-15; 33T133-11 to 135-2) Resentencing is required because the court erred in weighing the sentencing factors, in deciding to impose three consecutive sentences, and in finding Hubbard extended-term eligible.

A. The Court Improperly Found and Weighed Multiple Aggravating and Mitigating Factors.

The Criminal Code prescribes a careful analysis in which courts must identify the relevant aggravating and mitigating factors and "balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). Appellate courts will review sentences to ensure guidelines were followed and factors were appropriately found and weighed. State v. Roth, 95 N.J. 334, 364-65 (1984). Resentencing is required if a court made "a clear error of judgment[,]" State v. Blackmon, 202 N.J. 283, 297 (2010), such as not properly explaining its reasoning or not basing its findings on "competent, credible evidence in the

record." State v. Case, 220 N.J. 49, 64 (2014) (citation omitted).

In this case, the court found aggravating factors one (nature of the offense); two (harm inflicted); three (risk of reoffending); six (prior record); nine (need for deterrence); and thirteen (use of a stolen vehicle), affording all but factor thirteen heavy weight. (Da 14; 33T93-3 to 105-1) In mitigation, the court found factors four (substantial grounds tending to excuse or justify the offense) and fourteen (defendant was younger than twenty-six), but gave them only minimal and moderate weight, respectively. (Da 14; 33T105-3 to 117-12) Resentencing is required based on multiple errors.

First, the court wrongly relied on Hubbard's 2008 juvenile deferred disposition to afford additional weight to aggravating factors, three, six, and nine, and to give less weight to mitigating factor fourteen. (PSR 6; 33T98-8 to 11, 100-16 to 23, 102-17 to 21, 116-20 to 25) This was improper because a deferred disposition results in dismissal of the complaint, N.J.S.A. 2A:4A-43b(1), and because, absent additional proofs, "prior dismissed charges may not be considered for any purpose[,]" State v. K.S., 220 N.J.190, 199 (2015), including at sentencing. State v. Tillery, 238 N.J. 293, 326 (2019). The court's use of the deferred disposition was thus improper and requires a remand.

The court also erred in affording aggravating factor six heavy weight based on "the nature and seriousness" of the present offenses. (33T100-20 to

101-8) This was wrong because factor six only looks at the extent and seriousness of "the defendant's prior criminal record[.]" N.J.S.A. 2C:44-1a(6) (emphasis added). The court thus should not have considered the offenses for which Hubbard was about to be sentenced, especially as their nature had already been accounted for through their gradation, State v. Fuentes, 217 N.J. 57, 74-75 (2014), and the court's finding and weighing of aggravating factors one and two. (33T93-2 to 98-2) This error, moreover, was particularly harmful because Hubbard's prior record was not especially serious, as it consisted of only two third-degree offenses and a fourth-degree offense. (PSR 6-7)

Resentencing is also necessary because the court gave too little weight to mitigating factor four. While the court properly found that there were substantial grounds tending to excuse or justify Hubbard's actions based on his undisputed mental illness, State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998), it erred in affording that factor only "minimal to light weight" in part because Hubbard "stopped taking his medications" and "failed to consistently take actions to alleviate his bipolar condition[.]" (33T105-19 to 108-25) As discussed in Point I.A., a person's culpability does not turn on how he became mentally ill, with evidence concerning how his symptoms were "triggered" being wholly irrelevant. State v. Maik, 60 N.J. 203, 215-16 (1972). Hubbard's alleged "triggering" conduct thus should have played no role at

sentencing, just as it should have played no role at trial, requiring a remand.

The court also wrongly afforded factor fourteen, that Hubbard "was under 26 years of age[,]" N.J.S.A. 2C:44-1b(14), only "moderate" weight in part because of his prior record and because there was "no indication" that the "crimes resulted in any way from any youthful missteps or youthful misjudgments or immaturity[.]" (33T115-12 to 117-9) Factor fourteen is focused on the defendant's age, based on studies showing "that persons under the age of twenty-six may not have reached a full level of mental and emotional maturity -- thus making them more susceptible to act impulsively, rashly, and without consideration of long-term consequences." State v. Lane, 251 N.J. 84, 98 (2022) (Albin, J., concurring in part). It does not call for the court to weigh the defendant's age against his prior history or to make its own assessments about whether the crimes stemmed from "youthful missteps." The court's consideration of those factors was thus improper.

Finally, resentencing is needed as to the eluding charge because the court did not explain why aggravating factors one and two applied to it. Rather, the court found those factors, and afforded them heavy weight, based solely on the assault (33T93-3 to 98-2), without ever explaining how the eluding was "especially heinous, cruel, or depraved[,]" N.J.S.A. 2C:44-1a(1), or caused particularly serious harm, N.J.S.A. 2C:44-1a(2). Resentencing is

thus required for the consecutive ten-year term imposed on that offense.

B. The Court Improperly Imposed Three Consecutive Terms.

The aggregate sentence consisted of consecutive terms of life on count one (murder); twenty-five years on count four (bias intimidation); and ten years on count five (eluding). Resentencing is required because the court did not assess the overall fairness of the consecutive sentences and because it wrongly believed that a consecutive term was required on count four.

Whether to impose consecutive sentences depends on whether the crimes: (1) and their objectives were predominantly independent of each another; (2) involved separate acts or threats of violence; (3) were committed at different times or places; (4) involved multiple victims; and (5) were numerous. State v. Yarbough, 100 N.J. 627, 643-44 (1985). In addition to considering those factors, courts must avoid "double counting" aggravating factors, cannot permit "free crimes," ibid., and must "place on the record its statement of reasons for the decision[,]" including by "explaining the overall fairness" of the sentence imposed. State v. Torres, 246 N.J. 246, 267-68 (2021). The court did not adhere to those requirements in this case.

First, the court did not make a statement concerning "the overall fairness" of the sentence imposed. Ibid. Accordingly, this Court must "reverse [the] sentence and remand for a new resentencing." Id. at 270; State v. Amer,

471 N.J. Super. 331, 359 (App. Div. 2022), aff'd, 254 N.J. 405 (2023).

Additionally, the court did not conduct any analysis when imposing a consecutive term on count four, bias intimidation, because it believed it was statutorily required to do so. (33T124-18 to 128-4) The relevant statute, however, only states that bias intimidation does not merge with the predicate crime (in this case, murder). N.J.S.A. 2C:16-1e. Unlike other statutes, it does not require consecutive terms, meaning the court was required to conduct its own analysis. Cf. N.J.S.A. 2C:39-4.1d (stating possession of firearm during drug offense "shall not merge" with drug offense and that sentence "shall be ordered to be served consecutively"); see State v. Cooper, 256 N.J. 593, 605 (2024) (quoting Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 234 (1998)) ("[W]hen 'the Legislature has carefully employed a term in one place yet excluded it in another, it should not be implied where excluded.'"). Resentencing is therefore needed, particularly given that a proper balancing of the Yarbough factors should have resulted in concurrent terms, as the crimes were not numerous and the murder and intimidation offenses shared the same objective, were not predominantly independent, involved the same acts of violence, occurred at the same time and place, and involved the same victim.

C. The Court Wrongly Found Extended-Term Eligibility.

On the State's motion, the court found that Hubbard was extended-term

eligible concerning count four, first-degree bias intimidation. Specifically, the court found that Hubbard was a persistent offender, pursuant to N.J.S.A. 2C:44-3a, because he had "previously been convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age," with the latest occurring within ten years. (33T12-10 to 13-19) In doing so, the court engaged in improper judicial factfinding that violated Hubbard's constitutional rights, requiring a remand for resentencing. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10.

Generally, "[o]nly a jury may find 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" Erlinger v. United States, 144 S. Ct. 1840, 1851 (2024) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). And while a limited exception exists for the fact of a prior conviction, a judge may only find "'what crime, with what elements, the defendant was convicted of[,]'" with any additional factual findings needing to be made by a jury "unanimously and beyond a reasonable doubt[.]" Id. at 1852-54 (quoting Mathis v. United States, 579 U.S. 500, 511-12 (2016)). Significant to this case, those additional facts that must be found by a jury to impose an extended term of incarceration include whether the defendant's prior offenses occurred on "separate occasions," no matter how "straightforward" that inquiry may seem. Id. at 1852, 1860.

Here, however, the court here found that Hubbard's prior convictions were from two crimes committed at different times, without that fact first being found by a jury. This violated Hubbard's constitutional rights and requires resentencing. Indeed, while the court did not sentence Hubbard outside the fifteen-to-thirty-year range for first-degree bias intimidation, N.J.S.A. 2C:16-1c, its decision to impose a near-maximum twenty-five-year term was based on the application of "[in]correct legal principles[,]" Roth, 95 N.J. at 363, concerning the overall sentencing range, an error that cut to the heart of the court's determination. State v. Pierce, 188 N.J. 155, 169-70 (2006). In other words, this constitutional error prevented the court from accurately assessing Hubbard's overall exposure, leading it to wrongly believe that he could have faced up to a life sentence on the bias crime alone (33T129-2 to 130-5), undermining faith in its sentence and requiring a remand.

CONCLUSION

For the reasons stated in Points I through V, Hubbard's convictions should be reversed, and the matter remanded for a new trial. Alternatively, as explained in Point VI, the matter should be remanded for resentencing.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2895-22T1

INDICTMENT NO. 19-03-0322
CASE NO. 19000475

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM A FINAL
v.	:	JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF
JAMIL S. HUBBARD,	:	NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable Lourdes Lucas, J.S.C., and a Jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT PROCEDURAL HISTORY

Jamil Hubbard was charged by way of Indictment Number 19-03-0322, with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and/or 2C:11-3(a)(2) (Count One); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (Count Two); first-degree armed robbery, N.J.S.A. 2C:15-1 (Count Three); first-degree bias intimidation, N.J.S.A. 2C:16-1(a)(1) and/or 2C:16-1(a)(2) (Count Four); second-degree eluding, N.J.S.A. 2C:29-2(b) (Count Five); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (Count Six); and third-degree theft of movable property, N.J.S.A. 2C:20-3(a). Da1-5.

Prior to trial, the Honorable Lordes Lucas, J.S.C., heard and denied defendant's motion for suppression of statements. See Da20; (1T; 2T; 3T).[1] Defendant was tried before Judge Lucas and a jury between September 28, 2022 and November 18, 2022. See (10T to 31T). On November 18, 2022, the jury returned its verdict, finding defendant guilty on Counts One, Four, Five, Six, and Seven, guilty of a lesser-included offense on Count Three, and not guilty on Count Two. Da6-11; (31T:29-10 to 45-19). In so finding, the jury rejected defendant's proffered insanity defense. Ibid.

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[1] The State's transcript citations conform with the key contained in defendant's brief, see Dbxvi-xvii.

Defendant appeared before Judge Lucas for sentencing on April 25, 2023. (33T). After granting the State's motion for extended term sentencing, N.J.S.A. 2C:44-3(a), (33T:3-16 to 17-14), and following appropriate merger, Judge Lucas sentenced the defendant as follows: Count One – a custodial term of life subject to the No Early Release Act (NERA); Count Three – a five-year custodial term; Count Four – a 25-year extended custodial term; Count Five – a 10-year custodial term; Count Seven – a five-year custodial term. Counts One, Four and Five were ordered to run consecutively. All mandatory fines and penalties were also imposed. (33T:87-17 to 135-5); Da12-15.

Defendant filed a Notice of Appeal with this Court. Da16-19. The State opposes defendant's appeal and submits the following in support thereof.

COUNTERSTATEMENT OF FACTS

The lives of defendant and Jerry Wolkowitz – two strangers – became intertwined forever on May 1, 2018, when defendant chose Jerry to be the target of his anger. What caused these two men to cross paths on May 1st, started the night before, on April 30, 2018. Defendant's girlfriend of three months, Kayla Watts, called and messaged defendant telling him she could be pregnant. Later that evening, defendant appeared at the Harding Road condominium Kayla shared with her aunt and Anthony Mayfield, her aunt's husband. Kayla declined to spend time with defendant that evening.

Anthony was watching the Yankees game when the defendant appeared outside. Antony heard a commotion; Kayla and defendant were fighting. Anthony had "never seen" defendant "angry like this." Anthony ultimately told the defendant to calm down, turn down his car radio, and leave. Defendant left, smoked marijuana, and went to a strip club, where he consumed alcohol. When he realized he did not have the key for his apartment, defendant drove back to the Harding Road condominium complex, parked his Chevy Malibu in the parking lot, and slept for approximately four hours.

Defendant woke up and felt angry, "like a savage." He saw Jerry near Jerry's blue Kia. Jerry appeared to be a resident of the complex. Even though defendant did not know Jerry and even though Jerry had not said anything to defendant, defendant decided to make Jerry the target of his rage because Jerry "was white. Old white man." Defendant did not believe he would have been "triggered" if Jerry had been African American: "I would have let that man walk home." For defendant, "[t]he trigger was that he was a white guy."

Defendant admittedly "attempted to kill" Jerry. He struck Jerry with his fists, first from behind to Jerry's head. Jerry did not try to fight back; defendant believed Jerry lost consciousness. Defendant then decided to "finish" Jerry "off" because he "already knew" he "was going to jail," "so [he] said to [himself], what the fuck, I might as well continue." Defendant dragged

Jerry to the middle of the parking lot and ran him over with his car. Jerry's body was dragged under the vehicle's tires.[2]

Defendant took money and car keys from Jerry's pockets. Defendant burned the money by a nearby dumpster. He used the keys to flee home in Jerry's vehicle. Defendant knew the police were trying to stop him as he drove home, but he did not stop. Defendant ditched Jerry's vehicle by train tracks near his home and then ran five minutes to his apartment. Defendant had not yet finished smoking a Black and Mild when police arrived at his door. (11T:95-1 to 113-8; 17T:30-18 to 48-5; 65-1 to 147-23; 19T:144-8 to 228-13; 25T:110-5 to 110-15; 125-13 to 135-5).

Other Harding Road residents, Jerry's neighbors, witnessed the assault. Nomir Alkhier was awoken at 7:15 a.m. to noises outside his bedroom window, "like punches and kicks." When Nomir opened his blinds, he saw the defendant beating Jerry "so bad." Nomir did not see Jerry defend himself, but he did hear defendant was cursing, saying words "like, mother fucker." The beating was taking place on a grass area between the parking lot and the condominium building. Nomir also noticed a vehicle in the middle of the parking lot; it was running and there was loud music coming from it. Nomir

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[2] The assault was video recorded on neighbor's Nest camera. (16T:171-22 to 186-8; 188-12 to 188-20)

called the police. As he did so, he observed the defendant leave Jerry, return to continue the beating, and then drag Jerry by the shirt between cars towards the parking lot. Nomir later observed the defendant near a dumpster, "burning some paper."(11T:9-18 to 32-15).

Ana Maria Minier was walking her sons to her minivan when she saw the defendant beating Jerry. Ana Maria could see that Jerry was not fighting back. As Ana Maria got her sons into her minivan – she was "nervous" and "just wanted to get in the car and leave" – she saw defendant drag Jerry by the arms into the middle of the parking lot. Jerry's shirt was pulled off as he was dragged. He was "limp" and offering no resistance. Ana Maria then watched as defendant got into his vehicle and "dr[o]ve over" Jerry's "body." After making sure her sons were hiding "on the floor" of the minivan, Ana Maria called 911. She last saw defendant walking toward the dumpsters. (11T:43-11 to 69-15).

Two types of emergency services arrived on Harding Road that morning following these 911 calls. Emergency medical services arrived to treat Jerry, who was still laying in the parking lot, at approximately 7:28 a.m. Jerry was shirtless and had black marks, which appeared to be from tires, on his abdomen. Jerry had "suffered a major traumatic injury;" he had a weak pulse and labored breathing. He was begging the emergency medical personnel not to let him die. EMS and paramedics did what they could to try and stabilize the

unstable, decompensating Jerry and transported him to Jersey Shore University Medical Center (JSUMC). By the time the ambulance arrival at JSUMC, Jerry had gone into cardiac arrest. (10T:57-2 to 67-19; 72-6 to 79-11).

Doctor Abimbola Pratt, a trauma surgeon, treated Jerry from his arrival at JSUMC in May until his discharge on September 10, 2018. When Dr. Pratt first encountered Jerry in the emergency department, he was "in critical condition ... He was without signs of life[.]" From head to foot, the victim presented with the following injuries:

> he had abrasions over ... his head. He had subcutaneous emphysema, which is air underneath the skin, that goes all the way up to his head and neck.
>
> He had an obvious chest wall deformity, which is concerning for blunt traumatic chest injury. Abrasions over his abdomen, his flanks, his both knees. ... [h]is left arm ... had a deformity.

Dr. Pratt eventually was able to stabilize and resuscitate Jerry, through use of an endotracheal tube, ventilator, and medications.

Various scans and tests were performed, which allowed doctors to learn Jerry also had multiple rib fractures, traumatic subarachnoid hemorrhage, hemorrhage shock, collapsed lungs, acute respiratory distress syndrome, a grade one pancreatic injury, bilateral knee instability, and additional humeral, scapular, pelvic, and sacral fractures. Jerry rated the lowest possible score, a three, on the Glasgow Coma Scale, "a classification system of level of

alertness in patients with traumatic brain injury." During his four-month stay in JSUMC, Jerry's Glasgow Coma Scale score never rose higher than four. Jerry remained in a persistent vegetative state. He also developed medical complications related to his injuries, including hydrocephalus and sacral decubitus ulcers. (10T:81-23 to 119-4).

From JSUMC, Jerry was transferred to Specialty Hospital of Central New Jersey in Lakewood on September 10, 2018. Specialty Hospital is a long-term acute care center. At that time, his "prognosis was extremely poor." In addition to his injuries, Jerry had an infection. His breathing was "a hundred percent" done by a ventilator. Specialty Hospital had to give Jerry medications like Morphine to manage his "pain and anxiety." Jerry's condition continued to deteriorate at Specialty Hospital. Jerry died there on October 18, 2018. A later-performed autopsy concluded Jerry's cause of death was "blunt impact injuries of the head, torso, and extremities" and the manner of his death homicide. (10T:141-2 to 154-19; 156-17 to 177-5).

Police also arrived on Harding Road on May 1st. Detective George Bauman was one of the Freehold Township Police Departments' responding officers. Detective Bauman saw Jerry "laying on his back, shirtless, with severe injuries." Jerry was breathing, had a pulse, and could respond to the detective, though his speech was sometimes "gargled."

The detective could also see a stopped vehicle, defendant's Chevy Malibu, "ahead of" the victim and that this vehicle was running. Detective Stephen Vogt of the Monmouth County Prosecutor's Office's Crime Scene Unit later processed the scene and defendant's Malibu. Detective Vogt photographed damage and blood staining to the Malibu's passenger's side, undercarriage and tail pipe, as well as to the roadway. Detective Vogt collected physical pieces of evidence from the vehicle (fibers, the victim's tissue and blood, a binder for Smith & Solomon Commercial Driver Training, defendant's driver's license and credit cards), the scene ("a wallet, a lunch box, hearing aids, an envelope and eyeglasses," clothing, and U.S. currency), and defendant's apartment and apartment complex (two cellular telephones, sneaker stained with the victim's blood). (14T:135-14 to 165-16; 15T:43-20 to 150-5; 16T:188-19 to 189-4).

Freehold Township Police Office Walter Magiera also responded to Harding Road. Officer Magiera observed defendant driving Jerry's blue Kia slowly past, coming from the area in which the assault occurred. Officer Magiera attempted to stop the Kia, "to see if" its driver "was involved." Defendant "pretty much ... took off on us," despite the officer's use of his patrol vehicle's lights and sirens. (12T:12-13 to 28-7).

When Freehold Township Police Officer Charles Lasky arrived on Harding Road, he observed Officer Magiera following a blue Kia that was being driven by the defendant. Officer Lasky and other Freehold Township officers joined the chase of the Kia, activating lights and sirens while doing so. Defendant drove the Kia out of Freehold and onto Route 18 North into Old Bridge. While doing so, defendant was driving recklessly – e.g. he did not stop for red lights, drove on the shoulder when he encountered traffic – and did not stop for the officers' lights and sirens. The officers' pursuit of defendant was "call[ed] off" in Old Bridge as his driving made it "too dangerous" to continue. (11T:194-16 to 220-10; 12T:12-13 to 28-7).

Officer James Angermeier of the East Brunswick Police Department learned that the pursuit of the defendant and Jerry's Kia had terminated in Old Bridge, the town immediately south of East Brunswick, and that the Kia was travelling north on Route 18. At that time, approximately 7:35 a.m., Officer Angermeier was stationed in a bank parking lot on Route 18 North. From his location, he observed the Kia driving north. Officer Angermeier pulled out behind and followed the Kia, but did not activate his patrol vehicle's lights and sirens. When the defendant began evasive driving movements, driving "southbound in the northbound lanes of Route 18," Officer Angermeier activated his lights and sirens. Officer Angermeier's pursuit of defendant also

became dangerous, with defendant driving over 80 miles per hour on a "very highly traveled roadway" in "very heavy" traffic. While Officer Angermeier terminated the pursuit – i.e., he turned off his lights and sirens – for safety reasons, he continued to follow defendant for a bit longer and saw defendant drive the Kia into Sayreville. (12T:99-6 to 118-5).

Officer Joseph Bartlinski of the Sayreville Police Department was the next officer to encounter defendant on May 1st. Officer Bartlinski heard a radio transmission reporting an erratic driver on Bordentown Avenue, near where Officer Angermeier had last seen the Kia. Officer Bartlinski traveled down Bordentown Avenue to the area of the Winding Woods Apartment Complex, where he found the Kia abandoned in the roadway of Bordentown Avenue. It was still running. Officer Bartlinski did not locate anyone in this area, which was less than a quarter mile walking distance from defendant's apartment complex. (12T:126-21 to 133-20).

Several officers with the Sayreville Police Department, including Officer Glenn Wagner and Sergeant Jason Mader, arrived to the Winding Woods Apartments at approximately 7:45 a.m., in response to a dispatch advising that Monmouth County was looking for Jerry's Kia and which provided a possible address for a suspect in the Winding Woods complex. Sergeant Mader found clothing discarded around the Winding Woods complex. Sergeant Mader

recognized one of the shirts – a Smith & Solomon Truck School shirt – as belonging to a school defendant attended. (13T:43-6 to 64-18).

When Officer Wagner arrived at Winding Woods, he did not first encounter the defendant or Jerry's Kia; he encountered the defendant's mother flagging him down. She was "jumping up and down, frantically yelling." Defendant's mother provided Officer Wagner with her apartment address, which matched that identified as connected to Monmouth County's suspect, and advised that her son was at that address and had "ran into the house with no shirt on, profusely sweating" and told her to "[g]et off the fucking phone." Defendant's mother advised that "he tends to get violent, and suffers from bipolar." Defendant's behavior had caused her to flee her residence.

Officer Wagner, along with four other Sayreville officers, went to defendant's apartment. Officer Wagner knocked on the door and defendant answered it. "He was not wearing a shirt. He had no shoes on. He was profusely sweating. But other than that, he was calm and he answered any questions that [Officer Wagner] asked him." Officer Wagner had defendant exit his apartment and sit on the porch, directions with which defendant was able to comply. Officer Wagner asked defendant three questions: "if he ... was involved in a motor vehicle accident, ... what kind of car he had, and ... if he knew where he parked his car." Defendant responded that he drove a unknown

make/model pickup truck that was parked in an unknown location. He stated he did not know if he had been involved in an accident.

Upon later request from Monmouth County, Sayreville Police detained defendant. Officer Wagner handcuffed the defendant and placed him in his patrol vehicle. In the patrol vehicle, defendant provided Officer Wagner with biographical information. During transport to Sayreville Police Department, defendant's cooperative behavior changed: "He was rapping, yelling. He was kicking the partition, spitting on the glass, spitting in [the officer's] direction." Once at Sayreville Police Department, Officer Wagner transferred defendant to a Freehold Township Police Department vehicle driven by Officer Magiera. During the approximately 35-minute drive from Sayreville Police Department to the Monmouth County Prosecutor's Office, defendant was "[v]ery aggressive, very agitated, screaming, yelling" and spitting. (12T:28-11 to 54-12; 13T:43-6 to 64-18; 145-15 to 216-18; 14T:166-1 to 186-21).

Defendant's demeanor changed upon arrival and processing at the Monmouth County Prosecutor's Office. Defendant "was calm and listening to any command used. Quiet." While at the Monmouth County Prosecutor's Office, he provided a confession to the investigating detectives. Defendant was "calm" and "coherent" and understood "what we were talking about." He waived his Miranda rights before speaking to detectives for approximately one

hour. During that one hour, defendant confessed, see supra. (14T:170-13 to 186-21; 16T:193-13 to 213-2; 17T:54-5 to 148-23).

LEGAL ARGUMENT

POINT I: DEFENDANT RECEIVED A FAIR TRIAL

New Jersey law entitles defendant to a "fair trial." State v. Lane, 288 N.J. Super. 1, 12 (App. Div. 1995). Despite defendant's numerous claims to the contrary, he received a fair trial; one that resulted in a verdict that can and should be affirmed by this Court.

A. The State Did Not Make Improper Insanity Arguments: At trial, the State and defendant presented opposing mental health experts. Defendant's expert, Dr. Fabian Saleh, concluded defendant suffered from serious metal illness and opined that defendant met the legal definition of insanity on May 1, 2018: "he lacked the ability to appreciate the wrongfulness of his actions." (22T:120-19 to 121-2). The State's expert, Dr. Howard Gilman, agreed that "[defendant] was suffering from a serious mental illness," but opined that this did not render defendant legally insane: "he understood what he was doing and he understood that what he was doing was wrong and, therefore, did not meet criteria for legal insanity." (25T:180-10 to 183-10).

In many respects, the defendant's and State's case theories mirrored those of their experts in that both agreed as to the series of events the led up to

the assault on Jerry, but differed as to the significance to be placed on these events. Defendant relied on his fight with Kayla as evidence of his mental illness and decompensation. Defendant disclaimed any significance to his other pre-assault activities, e.g., smoking marijuana or drinking alcohol, other than that each led to a lack of sleep, which he claimed further exacerbated his mental illness and psychosis. (28T:53-5 to 83-6).

The State's theory also centered the fight with Kayla as a significant event, not because it evidenced defendant's mental illness, but because it motivated defendant's "violent rage," of which Jerry became the target:

> At the beginning of this case the defense asked you, and they asked you earlier this morning to decide whether Jerry's violent death was the result of wickedness or mental illness, but what if it was rage? Rage that exploded into wicked actions, anger and aggression with no outlet. Kayla would not see him. Anger and aggression with no outlet. Kayla would not take his calls. Anger and aggression with no outlet. Kayla wanted to give him his key back to his apartment. Anger and aggression with no outlet. Kayla was trying to put distance between them. Anger and aggression with no outlet. No outlet that is until Jerry stepped out of his car on that fateful morning, and this defendant had a focus.

(28T:113-22 to 114-24). See also (28T:132-4 to 132-14; 157-4 to 158-22; 160-17 to 161-5; 176-15 to 176-17). Like the defendant, the State also briefly discussed some of the same events from the evening before, acknowledging that defendant had smoked marijuana and drank alcohol "to blow off steam" "in a manner that any 25 year old young man would when they're fighting with

their girlfriend." The State mentioned these activities were ones the defendant "kn[e]w" he should not do. (28T:115-11 to 117-8; 167-16 to 167-23).

Before submission of the case to the jury, the trial court correctly instructed the jury with regard to the insanity defense; defendant raises no challenge to the sufficiency of these instructions. See (29T:51-14 to 54-5; 118-2 to 127-25). The judge also reminded the jury that "[a]rguments, statements, remarks, openings and summations of counsel are not evidence, and must not be treated as evidence." (29T:25-15 to 26-4).

On appeal, defendant takes issue with the jury's application of these instructions to the evidence presented to it simply because the verdict was not the one for which he advocated. According to defendant, "the jury was presented with substantial, uncontradicted evidence that [he] had a long history of serious mental illness and that he experienced a manic episode with psychotic features at the time of the crime," and, therefore, should have found him not guilty by reason of insanity. Db21.

To create an error warranting reversal, defendant attempts to shift blame for his guilty verdict from the volume of evidence establishing his knowledge of the wrongfulness of his assault on Jerry (inclusive of his own confession), onto the State. To do so, defendant mischaracterizes the State's case theory to align it with a half-century old case, State v. Maik, 60 N.J. 203, 216 (1972), in

which the Court – addressing a pre-Code homicide admittedly committed while the defendant was legally insane, but also some time after defendant had taken LSD, and while attempting to distinguish insanity from voluntary intoxication – cautioned against "inquir[y] into the identity of the precipitating event or action" that "triggered" "acute psychosis:" "We think it compatible with the philosophical basis of M'Naghten to accept the fact of a schizophrenic episode without inquiry into its etiology."

This Court should not be persuaded by these mischaracterizations or citation to Maik. As this Court can judge from its own reading of the State's summation, it did not argue that defendant should not be found legally insane "because he was responsible for 'triggering' his mental illness," as defendant now contends. Db22. Defendant uses the word "triggering" in his brief more times than the assistant prosecutor used that word in her entire summation; the word is wholly absent from the State's opening statement. Compare (28T:117-22; 120-15; 154-5) with Db22, 24.

Moreover, when the assistant prosecutor did utter the word "triggering," she never contended that defendant "triggered" his mental illness or even mentioned drug or alcohol use.[3] The State consistently contended that

[3] Dr. Gilman did testify as to the role drug and alcohol use may have played in the defendant's criminal conduct: "it's my opinion that the intoxicants were

defendant's rage and anger were triggered by his fight with Kayla and Jerry's race: "What did Jerry do to become the focus of this defendant's rage? Nothing. Absolutely nothing. He was simply coming home from work and he was white, which was another trigger for this defendant as he, himself, told us." (28T:120-12 to 120-16). As this quote makes clear, it was actually defendant himself that introduced the concept of a "trigger" into the case. As the assistant prosecutor accurately told the jury in summation, in his confession defendant told Detective Raynor that he targeted Jerry because Jerry's race had "triggered" him. The assistant prosecutor reminded the jury of this by playing this portion of the defendant's interrogation during summation, and did not commit reversible error in doing so. (28T:151-24 to 153-19).

The State's case theory appropriately argued that two things could true: that defendant could be mentally ill and that defendant could intentionally act out of rage caused by the circumstances – his fight with Kayla, Jerry's race – and not his mental illness. Speaking to a defendant's motive in a homicide prosecution is not exceptional or inappropriate. While the State has no burden

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a precipitant to or an exacerbator of his symptoms of bipolar disorder. What ... I mean by that is that the ... onset of his acute bipolar symptoms, which occurred really about that day or so, maybe they had started the day before. By using cannabis and by using alcohol may have worsened the symptoms, and which is part of why I diagnosed him with the substance use disorder – substance induced psychotic disorder." (25T:188-24 to 189-12).

to prove motive, our law has for decades recognized the importance and admissibility of motive evidence. See State v. Calleia, 206 N.J. 274, 293 (2011); State v. Castagna, 400 N.J. Super. 164, 175-78 (App. Div. 2008) (preclusion of motive evidence would hinder a prosecution in a manner "equivalent" to a "production of MacBeth without the witches").

Nothing argued by the prosecutor in summation, which fairly responded to the argument proposed by the defendant in his summation, prejudiced defendant's right to a fair trial or distracted the jury from the law on insanity provided to it by the judge. See State v. Frost, 158 N.J. 76, 82-86 (1999); State v. Smith, 167 N.J. 158, 177-78 (2001); State v. Acker, 265 N.J. Super. 351, 356-57 (App. Div.), certif. denied, 134 N.J. 485 (1993); State v. Hawk, 327 N.J. Super. 276, 283 (App. Div. 2000); State v. Harris, 141 N.J. 525, 559 (1999); State v. Echols, 199 N.J. 344, 360-61 (2009); State v. Ramseur, 106 N.J. 307, 322 (1987), cert. denied, 508 U.S. 947 (1993). This Court can and should affirm the jury's verdict and its wholly lawful and fair rejection of the insanity defense.

B. **Net Opinion**: Defendant asks this Court to reverse his conviction due to alleged "net opinion" testimony provided by Dr. Gilman with regard to his diagnosis of defendant with "cannabis use disorder" and "alcohol use disorder." (25T:163-17 to 163-21; 169-2 to 169-4). Creatively, defendant

argues that the admissibility of expert psychiatric testimony should be governed by the Diagnostic and Statistical Manual, Fifth Edition ("DSM"), such that any deviation from this treatise should be deemed an inadmissible net opinion. Neither the DMS itself, nor New Jersey law require such a holding.

The DSM itself – and the understanding of its use by mental health (and not legal) professionals – is directly unsupportive of defendant's claims. The DSM contains a statement regarding its use that reads as follows:

> This does not constitute comprehensive definitions of underlying disorders which encompass cognitive, emotional, behavioral and physiological processes that are far more complex tha[n] can be described in these ... summaries. Hence, it is not sufficient to simply checkoff the symptoms and the diagnostic criteria to make a mental disorder diagnosis. Although a systematic check for the presence of these criteria as they apply to each patient will assure a more reliable ... assessment, the relative severity and balance of the individual's criteria, and their contribution to a diagnosis require clinical judgment.

(28T:37-9 to 37-25); see also (25T:161-1 to 163-1) (Dr. Gilman's testimony describing the DSM as a "guide for making diagnoses").

Even more damning of the viability of defendant's attack on Dr. Gilman's testimony is New Jersey law defining inadmissible net opinions. The established policies governing the admission of expert testimony encompass the "net opinion" rule, "a corollary" to the general admissibility requirements for expert testimony codified in N.J.R.E. 703. State v. Burney, 255 N.J. 1, 23

(2023) (quoting Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)). The net opinion rule "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." State v. Townsend, 186 N.J. 473, 494 (2006); Burney, 255 N.J. at 23.

"Simply put, the net opinion rules 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" Ibid. (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)). Compare Burney, 255 N.J. at 23 (noting that our "Court has previously held that when an expert grounds testimony in personal views, rather than objective facts, the net opinion rule requires exclusion of such unsupported views") with Townsend, 186 N.J. at 495 (finding expert's "education, training, and most importantly, her experience, provided a sound foundation for her opinion and that her opinion was not a net opinion"). Nowhere in this precedent is an admissible expert opinion defined by or in relation to any professional guidebooks, manuals or authoritative tomes.

Moreover, a review of the entirety of Dr. Gilman's testimony makes plain that he rendered no inadmissible net opinion. Dr. Gilman's testimony gave the whys and wherefores supporting his now-contested diagnoses:

> I diagnosed Mr. Hubbard with cannabis use disorder and alcohol use disorder primarily based upon the use of those substances and its negative impact on his life. So, one can ... use cannabis or

> alcohol and it doesn't have a negative impact on ... your life, and then it wouldn't be a substance use disorder. But when it begins to affect things like your work, your relations with family, ... your ability to get along in society, then it becomes an illness if you will ... or a use disorder. So, I felt that Mr. Hubbard had those.
>
> ...
>
> I wanted to be careful about that diagnosis with Mr. Hubbard because he had ... no testing done. Many of these substances can be tested for in the blood if they're done relatively soon after the ... substances have been used. Mr. Hubbard did not have any of that testing done. So, this is a little bit of a speculative diagnosis on my part.
>
> But I felt that given the level of his symptoms and given the fact that he had smoked a whole ounce of marijuana literally ... 12 to 16 hours before the crime, that I thought that plus ... the alcohol that he was using. I think it was cognac, I thought those had an impact on his overall mental state, and that's why I included that diagnosis.

(25T:170-2 to 171-13). Even in the absence of toxicological testing, these opinions were supported by defendant's own admissions during his two-hour interview with Dr. Gilman regarding his cannabis and alcohol use and defendant's medical records that contained prior substance use disorder diagnoses.

Moreover, these diagnoses were not inconsistent with uncontested similar findings by made by defense expert Dr. Saleh:

> Dr. Saleh's report on Page 27, he diagnoses ... Mr. Hubbard with cannabis used disorder, which I [Dr. Gilman] did. We're in agreement about that. He says it's in sustained remission in a controlled environment, but I presume that he was referring to August 12th, 2022. I ... was referring to the date of the crime.

...

> So that's ... the reason for the difference or that's what I assume is the reason for the difference. He acknowledges that Mr. Hubbard used alcohol prior to ... the offenses, although he ... said that there's no data available to me to suggest that he was merely intoxicated at the time of the alleged offenses, so that's a difference.

(25T:85-14 to 93-23; 97-17; 107-10 to 108-10; 126-2 to 128-7; 158-1 to 159-9; 169-1 to 171-24; 177-4 to 178-2).

In permitting this testimony to be submitted to the jury – defendant did not object at the time offered, but did later move to strike the testimony – the lower court did not abuse its discretion. See (28T:39-8 to 43-16). This Court can and should affirm this ruling.

C. Evidence Of the Victim's Injuries and Death Was Admissible: Defendant asks this Court to grant him a new trial based upon what he claims to be the State's impermissible insertion of evidence into his murder trial designed not to establish his guilt, but instead to inflame the jury. Defendant identifies as improperly admitted virtually all evidence (and argument related thereto) related to the injuries he caused to the victim that resulted in the victim's death months later. Much of defendant's argument focuses on detailing all of the evidence and arguments he contends were more prejudicial than probative. Db33-42.

However, the linchpin upon which all of these claims of prejudice rest is defendant's contention that New Jersey law gave him the unilateral authority to define the scope of admissible evidence: "Because [defendant] was 'not challenging' his culpability ... the cause of [the victim's] injuries and death was not 'in issue,' rendering most testimony on that subject irrelevant and inadmissible." Db34 (citations omitted). Because this contention is in direct conflict with New Jersey law, it cannot support the prejudicial errors defendant claims warrant reversal of his conviction. This Court can and should affirm.

"In a criminal prosecution, the State bears the burden of proving all elements of the crimes charged beyond a reasonable doubt." State v. Fierro, 438 N.J. Super. 517, 525-26 (App. Div. 2015). "[D]efendant is not obligated to present witnesses or testify to establish a defense." Id. at 526. This is so even where the defendant proffers an insanity defense, under which defendant bears the "burden to prove insanity." State v. Handy, 421 N.J. Super. 559, 590 (App. Div.), aff'd as mod., 215 N.J. 334 (2013); State v. Delibero, 149 N.J. 90, 99-100 (1997); State v. Jimenez, 188 N.J. 390, 406-07 (2006).

"The advancement of a claim of insanity ... does not relieve the State of its burden of proof ... the State remains 'constitutionally responsible to prove every element of the offense beyond a reasonable doubt.'" Handy, 421 N.J. Super. at 590 (quoting Delibero, 149 N.J. at 100). Thus, regardless of

defendant's statement of "not challenging"[4] his guilt, the State remained obligated as a matter of law to prove to the jury – beyond a reasonable doubt – all elements of N.J.S.A. 2C:11-3(a)(1) and/or (2). This specifically included establishing that defendant purposely or knowingly caused his victim serious bodily injury resulting in the victim's death. N.J.S.A. 2C:11-3(a); see also N.J.S.A. 2C:11-1(b) (defining serious bodily injury); State v. Pelham, 176 N.J. 448, 460-61 (2003) (discussing N.J.S.A. 2C:2-3's causation requirement).

All of challenged evidence and argument admitted and advanced by the State, and now complained about by defendant, was fairly admitted as wholly relevant to that which the State was and always remained obligated to prove beyond a reasonable doubt: that defendant caused serious bodily injuries to the victim and that these injuries ultimately caused his death months later. If there was any prejudicial impact caused by the admission of evidence and argument relevant to the victim's injuries and subsequent death that prejudice was simply that which attends all relevant, admissible evidence and argument does: it established defendant's guilt. Cf. State v. Long, 173 N.J. 138, 165 (2002);

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[4] "Not challenging" also falls well short of entering a stipulation as to elements of the crimes with which he was charged, and yet even a stipulation would not have operated to bind the State's presentation of evidence or remove from the State its burden of proof. See State v. Wesner, 372 N.J. Super. 493-94 (App. Div.), certif. denied, 183 N.J. 214 (2005); State v. Laws, 50 N.J. 159, 183-84 (1967).

see also State v. Sanchez, 224 N.J. Super. 231, 249-50 (App. Div.), certif. denied, 111 N.J. 653 (1988); State v. Johnson, 120 N.J. 263, 296-99 (1990); Frost, 158 N.J. at 82-86; Smith, 167 N.J. T 177-78; Acker, 265 N.J. Super. at 356-57; Harris, 141 N.J. at 559; Echols, 199 N.J. at 360-61; Ramseur, 106 N.J. at 322. Because defendant received a fair trial – one that fairly presented the jury with relevant evidence as to all required elements of the crimes with which he was charged – defendant's conviction should be affirmed.

D. The State's Questioning of Dr. Saleh Was Appropriate: During it questioning of Dr. Saleh, the State appropriately asked him regarding his prior work as an expert witness, including how many cases he had worked as an expert on, how many of those were for the prosecution versus the defense, and with regard to his compensation. Dr. Saleh did not "know exactly the number" of cases in which he "testified as an expert;" did not include on his C.V. a list of cases in which he testified as an expert and for which side, though he maintained that "list" on his computer; and believed that he had made "a little bit more" than $452,000 in 2013. When questioned specifically about 2013, Dr. Saleh could not recall what percentage of his $452,000 earnings were from defense, prosecution or private practice.

Dr. Saleh conceded that there "were a number of articles of the course of the years" regarding the payment of experts, but was unfamiliar with a specific

article reporting on his compensation in the Boston Globe. When questioned by the assistant prosecutor, Dr. Saleh acknowledged the article reported that he had been paid $452,445 by the Committee for Public Counsel Services, a "defense related" program in Massachusetts, in 2013, equating to between 1,900 and 3,000 hours of work. Dr. Saleh questioned the possibility of that number of hours being correct, but acknowledged that this salary represented what he thought could be predominantly defense-related work he completed. (21T:73-6 to 78-2).

Contrary to defendant's varied attempts to create error in these five transcript pages of un-objected-to questioning, no error warranting the reversal of his conviction can or should be found. "The bases on which an expert relies when rendering an opinion are a valid subject of cross-examination." State v. Jenewicz, 193 N.J. 440, 466 (2008). Because a jury is permitted to consider "the compensation received by the expert witness(es) as bearing on [his] credibility," there is nothing improper in the State questioning an expert with regard to this topic, as was done here. Model Jury Charge (Criminal), "Optional Charge Concerning Compensation of Experts" (approved 10/1/01); State v. Smith, 167 N.J. 158, 189 (2001); see also (29T:48-19 to 49-15) (provision to this jury of the applicable Model Jury Charge, which informed the jury it was permitted to consider expert compensation, while reminding it

that "there is nothing improper in any expert receiving reasonable compensation for [his] work or for [his] appearing in court").

In the absence of any impropriety or error, defendant's post-conviction request for reversal of his conviction on this basis should be denied.

POINT II: THE MIRANDA MOTION WAS CORRECTLY DENIED

An appellate court reviewing the denial of suppression need not defer to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Township Comm. Of Twp. Of Manalapan, 140 N.J. 366, 378 (1995); State v. Stott, 335 N.J. Super. 611, 620-21 (App. Div. 2000), rev'd o.g., 171 N.J. 343 (2002); State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif. denied, 182 N.J. 148 (2004). "Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." Cleveland, 371 N.J. Super. at 295 (citing State v. Sailor, 355 N.J. Super. 315, 320 (App. Div. 2001)); State v. Gandhi, 201 N.J. 161, 176 (2010).

However, the standard governing review of factual finding requires this Court "uphold the trial court's factual findings ... 'so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hagans, 233 N.J. 30, 37 (2018)(quoting State v. Gamble, 218 N.J. 412, 424 (2014)); State v. S.S., 229 N.J. 360, 374 (2017). This standard accords substantial deference "to

those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007)(quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

"Acknowledging that a trial court's factual findings are entitled deference" admittedly "does not mean that appellate courts must give blind deference to those findings." S.S., 229 N.J. at 381. "Deference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record" or "when factual findings are so clearly mistaken – so wide of the mark – that the interests of justice demand intervention." Ibid.; Elders, 192 N.J. at 245; Hagans, 233 N.J. at 37-38. Deference does not end "merely because '[the appellate court] might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162). "A disagreement with how the motion judge weighed the evidence in a close case is not a sufficient basis for an appellate court to substitute its own factual findings to decide the matter." Id. at 245.

Deference also does not end because a lower court's factual findings are based on video evidence; "[v]ideo-recorded evidence is reviewed under the same standard." Hagans, 233 N.J. at 38; S.S., 229 N.J. at 379-81; State v.

A.M., 237 N.J. 384, 395-96 (2019). "When more than one reasonable inference can be drawn from the review of a video recording ... then the one accepted by a trial court cannot be unreasonable." S.S., 229 N.J. at 380. "In such a scenario, a trial court's factual conclusions reached by drawing permissible inferences cannot be clearly mistaken;" "substitution of an appellate court's judgment for that of the trial court's advances no greater good." Ibid.

Consistent with this deferential standard, the State will rely upon Judge Lucas's factual findings, gleaned from two days of "credible" testimony from Officer Wagner and Detective Raynor and three exhibits, which included defendant's video-recorded statement. See (1T; 2T; 4T:4-18 to 7-13; 13-22 to 16-19). For the convenience of this Court, the State will summarize the lower court's factual findings as to the two claims presented by defendant on appeal: 1. defendant's was allegedly in custody when asked investigatory questions by Officer Wagner, and 2. defendant's bipolar disorder inhibited his ability to knowingly and voluntarily waive Miranda and provide a statement to police:

Following the 7:15 a.m. assault of the victim and subsequent aborted police chase of the Kia, Sayreville Police arrived at defendant's mother's apartment at approximately 8:00 a.m. The Sayreville Police that arrived at the apartment were not the same Freehold officers that has responded to the scene of the assault. Because of this, Officer Wagner "had limited knowledge at the

time he went to defendant's address. He was unsure of the defendant's role in ... the incidents that were reported in Freehold."

Outside defendant's residence, officers "were flagged down by defendant's mother, who was visibl[y] distressed." She advised officers that defendant "had violent tendencies," that had "prompted" her "to flee [the] apartment when encountering him out of fear." "[D]efendant's mother was not yet aware of the event that had occurred in Freehold, and she did not know that the police were in the area specifically searching for her son."

> The officers proceeded to knock on the door of the residence. They were able to make contact with defendant, and asked him to step out and sit on the front step. He was noted to be sweaty with no shirt, and no shoes on. Defendant will not tell the officers what happened when asked. They asked him if he had been in a motor vehicle accident, and he responded to the officers that he did not know. The officers then asked him what kind of vehicle he drove, and he told them a pickup truck, but did not know the make or model, and he did not know where he had parked the truck.

The Court found these limited questions posed "were just initial questions for identification purposes and for background purposes:"

> [T]he Court agrees that the initial questions posed by Officer Wagner were investigatory in nature. It was clear from Officer's Wagner's testimony that at the time that he responded to Sayreville he had very little information regarding what had transpired in Freehold, and it was unclear what, if any, the defendant's role was at that time. There was information being put on the radio that there were two vehicles involved ... Officer Wagner's testimony with regards to his knowledge at the time ... that he initially encountered the defendant, and asked the initial

> question was credible, and the Court agrees with the State that, at that time, those initial questions identifying who the defendant was, asking questions about what vehicle he may have been driving ... were investigatory in nature, and the defendant was not in custody at that time when there was the initial ... knock on the door and initial questions were asked.

Sayreville officers the advised defendant "he was being detained" and transported him to their police station. When put into the police vehicle defendant's demeanor changed from "calm" to "irate." Defendant was in a "state [of] agitation." He spit, kicked, and yelled profanities. It appeared to the officers that "he didn't like that the camera was in the back, although clearly that was a conclusion drawn by the officer at the time, but that was the behavior that was described during transport." See (2T:13-1 to 19-22; 28-10 to 38-3; 4T:7-17 to 13-8; 20-11 to 39-3).

From the Sayreville Police Department, defendant was transported to the Monmouth County Prosecutor's Office, where his interview by detectives, include Detective Raynor, started "[a]t around" 11:00 a.m. and "noon." Thus, the interview started approximately " three to ... four hours" after the assault. The entire interview lasted approximately one hour. Before the interview commenced, defendant "affected both an oral and written waiver of his Miranda rights." "Defendant was able to state when he did not understand his rights, asking Detective Raynor to repeat a portion of the Miranda warning and

then afterwards stated that he understood." The lower court further noted that defendant "ask[ed] for clarification of the Miranda waiver," "demonstrate[ing] his sense of agency and awareness of his rights during the interview."

The lower court found from its review of both the transcript and recording of the statement that the questioning of the defendant "was cordial and mostly conversational." Defendant was offered water, even though the interview was relatively brief – approximately one hour. "Defendant remained calm and composed about the interview" and "did not seem agitated." While "at times, did display a bit of irritability," the lower court found that to be "nothing beyond what would be expected for a person charged with the crimes he was charged with, as well as the state that the defendant, himself, described." The lower court noted that defendant "had prior involvements with the criminal justice system."

Defendant told detectives where he lived, where he slept the night before, and confessed to assaulting "an elderly white male." Defendant told detectives the assault occurred "during a savage mentality" that made him "decide[] to try and kill this unknown make solely because he was white."

The lower court made the following additional "observations of the defendant's demeanor during the interview," which it found telling of defendant's state of mind, as well as the voluntary nature of his waiver, and his

awareness ... of the situation in which he found himself in:"

> The defendant, throughout the interview remained calm. He was not fidgeting. He didn't show any type of nervousness, like legs shaking or fidgeting with his fingers. He ... felt free to ask questions, particularly with the waiver, where he ... did not understand. He also indicated during the beginning portion of the interview when he was asked if they could look at his phone, he indicated that he was not comfortable with you guys looking at the phone.
>
> He was able to state with specificity where he spent the night, and why he spent the night in his car.
>
> His hand gestures during the interview were appropriate to the situation, and to the statements he was making.
>
> He corrected the officers when the officers misstated his girlfriend's name. He also indicated awareness of his own feelings, and his own emotional state at the time. He indicated, today I'm good. Today I'm calm. He also discussed ... in responding to some questions, he references conscience, and he indicated that that would be the key word for today, his conscience.
>
> He also had a clear recollection of the amount of money that he had taken from the victim ... He also specifically indicated during the interview ... complete awareness of his actions. At the time he indicated, I tried to kill him. I intended to kill him, and he indicated that very calmly. Did not appear confused at all.
>
> He also indicated during the interview that prior to the police coming he had a smoke ... and a Black and Mild, because he figured he wouldn't smoke for some time. Again, showing clear awareness of a situation in which he found himself in and why the police were coming to get him.
>
> I will also note that his agitation with his mother resulted from the fact and he indicated this during the interview that ... when he saw

> his mother calling and saying his name he indicated; now they'll know where I am ... clearly indicating that he was aware of why the police w[ere] coming and ... during the interview clearly aware of all the facts and circumstances leading up to the interview and why he found himself there.
>
> ... but also ... subsequent statements during the interview such as where he indicated that he was supposed to be at work right now, but I guess I won't be, all indicating that he was aware of time and place.
>
> He was also keenly aware during the interview it appeared of the questions being asked of him ... I thought you asked me that already.
>
> ...
>
> [T]he defendant indicated, I know ... what the fuck I just did, and then went on ... to say, I tried to kill him. I attempted to kill him.
>
> At another point, again, aware of the questioning that was being placed to him, the defendant said, ... you're asking too many questions.

As it needed to, the lower court acknowledged that "defendant suffers from mental illness." Nonetheless, the lower court found "defendant's waiver is not invalidated by his suffering of mental illness," and not only because of its observations of defendant's behavior during the interview.

> As far as the Court can tell the defendant ... did knowingly and voluntarily provide that statement. Certainly the Court is not an expert in mental illness, and, again, the Court here has no psychiatric opinion ... I will note that the defendant has been found competent to proceed in this matter, was found that he understood and that he is able to assist in his own defense ... that is the state in which the defendant finds himself today.

Ultimately, the lower concluded defendant's "statements were certainly not the result of police coercion." The lower court could "not find that the defendant's will was in anyway overborne and that certainly ... the totality of the circumstances point to the fact that the defendant's waiver was knowing and voluntary." (1T:29-1 to 160-1; 4T:7-17 to 13-8; 20-11 to 39-3).

These factual findings by the lower court are worthy of this Court's affirmance, as they are supported by the credible evidence in the record. Moreover, and contrary to defendant's claims, these facts establish that the lower court's legal conclusions – defendant was not in custody when asked investigatory questions by Officer Wagner and that this bipolar defendant could and did knowingly and voluntarily waive Miranda and provide a statement to police – are also worthy of affirmance by this Court.

"Miranda sets forth a balance between the rights of the government and those accused of criminal activity." State v. M.L., 253 N.J. Super. 13, 20 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992). This balance requires a defendant be advised of the specific rights set forth by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444 (1966), prior to custodial interrogation. See also State v. Nyhammer, 197 N.J. 383, 400-01 (2009); M.L., 253 N.J. Super. at 20.

"'Custody' for the purposes of Miranda requires a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" State v. Erazo, 254 N.J. 277, 298 (2023). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action." State v. P.Z., 152 N.J. 86, 103 (1997). This "fact-sensitive" inquiry "is determined objectively, based on how a reasonable person in the suspect's position would have understood his situation." State v. Hubbard, 222 N.J. 249, 262 (2015); State v. Bullock, 253 N.J. 512, 533 (2023). Relevant factors include "the time and place of the interrogation, the status of the interrogator, [and] the status of the suspect." P.Z., 152 N.J. at 103; Erazo, 254 N.J. at 299. Factors that are not dispositive include "whether police consider someone a 'suspect,' 'person of interest,' or 'witness." Ibid.

Because an investigatory detention is "presumptively temporary and brief," it is generally not considered "custody" for Miranda purposes even though the detainee's "freedom of action" "may be "significantly curtail[ed]" of the detainee. State v. Hickman, 335 N.J. Super. 623, 630 (App. Div. 2000) (quoting Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984)). See, e.g., State V. Toro, 229 N.J. Super. 215, 221 (App. Div.), certif. denied, 118 N.J. 216 (1989) (motorist detained during "brief" roadside "detention" not subjected to custodial interrogation when asked "only a few, noncoercive questions" about

contents of a package suspected of containing drugs after being asked out of vehicle and frisked; "[d]efendant was not told that he was under arrest, he was not handcuffed and he was not subjected to any search beyond" the frisk).

Officer Wagner's interactions with the defendant outside of his apartment were investigatory in nature. While five officers ultimately arrived on scene, it was Officer Wagner that ultimately knocked on defendant's door. With the limited information he possessed – Officer Wagner had no information as to defendant's role in the Freehold investigation and had been told by defendant's mother that defendant had expressed "violent tendencies" that she had fled from – Officer Wagner rightly had defendant exit his apartment and sit on his front steps. Defendant was outside his own residence, after having answered a knock to his door. Defendant was never told he could not return inside if he chose. He was not handcuffed. Officer Wagner's protective request that defendant sit on the step did not convert this investigatory stop into the functional equivalent of an arrest.

The questioned asked by Officer Wagner did not convert this stop into the functional equivalent of arrest either. Just like an officer during a traffic stop or a motor vehicle collision, Officer Wagner asked routine investigative questions that did not presuppose guilt or overbear defendant's will. Officer Wagner inquired as to what had happened generally, asked defendant if he had

been involved in a motor vehicle accident, and asked defendant what vehicle he drove and where it was. Had Officer Wagner asked these same questions during a roadside motor vehicle collision investigation, it would be unquestionable that Miranda would not be required to precede them. That these same questioned were posed on defendant's front steps – defendant having returned home after the collision – does not convert this limited investigative detention into an arrest. It does not convert this interaction into a custodial interrogation such that Miranda was required. Because the lower court did not err in so finding, this Court can and should affirm.

Similarly without merit is defendant's challenge to the knowing and voluntary nature of his Miranda waiver and confession. Both a valid Miranda rights waiver and a knowing, voluntary, admissible confession require a court to "look at the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation." State v. Burris, 145 N.J. 509, 534 (1996); State v. Burno-Taylor, 400 N.J. Super. 581, 588 (App. Div. 2008); State in the Interest of A.S., 203 N.J. 131, 146 (2010); State v. Timmendequas, 161 N.J. 515, 613-14 (1999), cert. denied, 534 U.S. 858 (2001); Nyhammer, 197 N.J. at 402 (citing State v. Dispoto, 189 N.J. 108 (2007); State v. O'Neil, 193 N.J. 148 (2007)); A.S., 203 N.J. at 146. Factors to be considered include "the suspect's intelligence and education, age,

familiarity with the criminal justice system, physical and mental condition, and drug and alcohol problems." State v. Tillery, 238 N.J. 293, 316-17 (2019); A.S., 203 N.J. at 146; Nyhammer, 197 N.J. at 402.

Because our Court has "applied a per se rule to decide whether a defendant knowingly and voluntarily waived Miranda rights" in "[o]nly the most limited circumstances," "[t]he fact that defendant was suffering from a mental illness at the time of the questioning" does "not render his waiver or his statement involuntary." State v. Sims, 250 N.J. 189, 211-212 (2022); see, e.g., State v. Smith, 307 N.J. Super. 1, 10-11 (App. Div.), certif. denied, 153 N.J. 216 (1998); State v. Glover, 230 N.J. Super. 333, 342 (App. Div.), certif. denied, 121 N.J. 621 (1990). This is so because "the 'Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."'" Smith, 307 N.J. Super. at 10 (quoting Colorado v. Connelly, 479 U.S. 157, 167 (1986); Oregon v. Elstad, 470 U.S. 298, 304-05 (1985)). "The voluntariness of a waiver of this privilege [was said to] depend[] on the absence of police overreaching, not on 'free choice' in any broader sense of the word." Ibid.

Exemplary of these principles is Glover, 230 N.J. Super. at 337, 342, in which this Court found defendant's diagnosis of paranoid schizophrenia did not preclude a knowing and voluntary Miranda waiver:

> Defendant when apprehended acted and appeared normal. He acknowledged that he understood his rights and was willing to waive them. Although the trial judge indicated that defendant's lack of concern was "not how a rational person would act," there is no evidence that defendant was not rational or acting in an intelligent manner or that he was unable to exercise his free will in waiving his rights and confessing to his crimes ... the record clearly demonstrates that defendant's ability to make free and rational choices when interrogated by the police was not "overborne by defendant's severe mental illness." Defendant was given all of his Miranda rights numerous times in detail and acknowledged each time that he understood those rights. Further, he was able to state in detail what he desired, including his specific requests for certain food and drink.

Similar findings were properly made by the lower court here, warranting a similar conclusion – affirmance of the denial of defendant's suppression motion. As the lower court correctly found, defendant's interrogating officers were cordial and his interview was conversational in tone. During the Miranda waiver and statement, defendant was calm and composed, both in words and actions. When he did not understand his rights, he asked and his confusion was cleared up. Defendant was oriented in time and space and was able to provide a cogent recitation of his actions from the previous day until present. While defendant's conduct seems inexplicable, defendant was able to explain with clarity why he acted as he did. Defendant fully participated in the interview, even recalling when questions were repeated.

Further evidencing defendant's ability to knowingly and voluntarily waive his rights and participate in the interview were two facts correctly deemed significant by the lower court. First, defendant had prior interactions with the criminal justice system; this was not his first time interacting with police. Second, when asked to consent to a search of his phone during the interview, defendant declined to provide consent due to his uncertainty as to the criminal charges he was facing. That defendant could both evaluate the choice presented to him and feel able to decline the request helped prove beyond a reasonable doubt defendant's confession was knowingly and voluntarily made, and not the product of either coercion or mental illness.

Defendant's assignment of error due simply to the lack of any mental health testimony presented by the State asks this Court to do that which our Supreme Court has declined to do except in the most limited of circumstances – apply a per se rule to Miranda. The totality of the circumstances analysis that is required does not require expert testimony, from either defendant or the State. (4T:4-18 to 6-2); Glover, 230 N.J. Super. at 337, 342; Smith, 307 N.J. Super. at 10-11. The evidence presented here – both testimonial and video recorded – allowed the lower court to make the finding that defendant's waiver and interrogation were knowing, voluntary, and not the product of police coercion. This Court can and should affirm.

POINT III: THE COURT PROPERLY ADDRESSED JUROR ISSUES

Two juror-related issues arose during trial, both of which defendant argues the trial court handled inappropriately. The first arose on November 4, 2022 – a day in which defense expert Dr. Saleh's cross-examination by the State continued. Juror 14 (aka "Mr. C") provided the court with a note containing two questions that he had typed out at home before coming to court (because he "didn't want to raise [his] hand and ask"):

> Question number 1, "Why have you sustained objections regarding the cost of injectable medications weeks or months before the incident? Did he have a healthcare plan? Why would this be withheld?"
>
> The second question ... was, "According to the defense psychiatrist Mr. Hubbard was provided medication a week after the incident. Since he is in custody this means the [S]tate had him evaluated. Seems odd neither the defense nor the [S]tate would want the jury to hear about it. Why haven't we heard about the [S]tate's psychiatrist report?"

Juror 14 was questioned by the court at sidebar and was specifically asked, "whether he had shared the contents of his questions or discussed the questions with anyone else to which Mr. C. clearly replied he had not. He indicated that these were just his questions." The court found Juror 14's demeanor to be "frank[]" and because of this "frankness," the court had "no reason ... to believe that Mr. C. was not being truthful when he indicated to the Court that he had not discussed this or made any of the other jurors aware

of his concerns or of his questions or the nature or content of any note or even that he had posed any questions to the court."

The court solicited the opinions of the parties on how to address this juror-related issue. The State sought Juror 14's removal; the defendant sought nothing more than a curative instruction "on what the jury is supposed to think in terms of your objections." The court agreed that Juror 14 needed to be removed from the jury:

> The questions presented to the Court by the excused juror ... reflect a consideration of the evidence and speculation of evidence not presented before the close of both the [S]tate and the defendant's case in chief, as well as consideration of information that was expressly excluded by the Court and which the jurors were instructed to disregard. Of note, the first question ... is reflective of speculation into information that was specifically excluded from trial ... the use of the word "withheld" as well as the question directly to the Court as to why you, meaning the Court, sustained objections to this Court clearly reflects ... a feeling that ... information was intentionally being withheld.
>
> The phrasing of the question also indicated that the juror, himself, admitted curiosity into a subject matter that ... the jury was not permitted to consider as evidence as a result of the sustained objections to the introduction of that information before the jury.
>
> The second question also speculates as to why ... neither the defense nor the [S]tate would want the jury to hear from a [S]tate's psychiatrist. First, it[] assumes that there was, in fact, the [S]tate's psychiatrist and ... impliedly that information was not being presented to the jury and ... being withheld.
>
> This question also infers a degree of speculation into the existence of a [S]tate psychologist and contrary ... to the Court's instruction

> that jurors are to keep an open mind, wait until all the presentation of the evidence, and wait until instructions on the law before reaching conclusions on the case.
>
> In addition to that, clear expressed instructions that they are to decide the case[] and only to consider information that has been presented to them as evidence in the case.
>
> The question to this Court presents a clear conclusion that because the defendant was in custody that juror had already surmised and assumed, despite the fact that the evidence had not been presented that he must have been evaluated, that there must have been a report and that that ... information was being withheld.
>
> Significantly, these questions came after explicit instructions that jurors are not to speculate as to why objections are sustained or overruled, and the jurors are not to consider and evaluate testimony elicited at trial until the case is, in fact, ultimately handed to the jury for deliberations. The questions posed by Mr. C. indicates he was, in fact, considering impermissible information.

Defendant re-raised this issue on motion for new trial, this time arguing error in the court' failure to voir dire the remaining jurors following Juror 14's excusal. The court rejected this argument: "Further voir dire of the entire panel without cause to believe Mr. C. had shared the questions and concerns with the jurors could certainly ... pose a risk of tainting the jury or planting seed in the jurors mind ... inviting impermissible speculation as to Mr. C himself, ... the process, or ... to the deliberative process, and ... [c]ourts are instructed to be sensitive to any interference with the deliberative process." (23T:126-15 to 137-15; 196-5 to 202-5; 32T:48-4 to 52-18).

The second arose on November 17, 2022, during deliberation. Juror 7 was observed taking the courtroom Bible – "that sits on the jury rail" and which "the Court used to swear in the officer earlier today in front of the jury" – into the jury deliberation room. When brought to the court's attention, the judge had the Bible removed. The Bible was in the jury room for between 30 and 45 minutes. When asked how to address this issue, the State sought the juror's exclusion; defense opposed even a voir dire of Juror 7. The court elected to question Juror 7.

During questioning at sidebar, Juror 7, who was a deacon and the only Black male juror, admitting to taking the court's Bible into the jury room. He told the court "he had not thought of the Bible as an extraneous item not to be brought into the jury room" and explained he had done so "for comfort given the weighty decision," as the Bible is "a source of support for him." Juror 7 "denied the use of the Bible in deliberations, denied referencing it or reading from it during the deliberations and maintained that … he only possessed it to give him comfort."

The court was satisfied with Juror 7's explanation: "he was very forthright" and "did not show any signs of being upset about being questioned … or any distress." The court found "no need to voir dire any of the other jurors … with regards to the Bible … and that such would … be inappropriate

as ... it could certainly lead to the Court's interferences with the deliberative process when such was not necessary given the information provided by [J]uror 7. (30T:150-1 to 179-5; 32T:55-14 to 57-21).

Because "a defendant is entitled to a jury that is free of outside influences," one that "will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself," "the trial judge must take action to assure that ... jurors have not become prejudiced as a result of facts which 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" State v. Bisaccia, 319 N.J. Super. 1, 12 (App. Div. 1999) (quoting State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997).

A court "must use appropriate discretion to determine whether the individual juror, or jurors, 'are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.'" State v. R.D., 169 N.J. 551, 558 (2001) (quoting State v. Bey (I), 112 N.J. 45, 87 (1988)). To that end, what a court "is obliged" to do first is "interrogate the juror, in the presence of counsel, to determine if there is a taint." R.D., 169 N.J. at 558-61. Only if taint is found "must" the court's inquiry "expand to determine whether any other jurors have been tainted

thereby." Ibid.

"The test is 'not whether the irregular matter actually influenced the result but whether it had the capacity of doing so.'" Bisaccia, 319 N.J. Super. at 12 (quoting Scherzer, 301 N.J. Super. at 486). In crafting a remedy where taint is found, a court may "excus[e] the tainted juror or jurors" or even grant a mistrial where "necessary." R.D., 169 N.J. at 558. "[A]ll doubts about a juror's integrity or ability to be fair should be resolved in favor of removing the juror from the panel." State v. Loftin, 191 N.J. 172, 187 (2007).

Review of a trial court's handling of juror irregularities seeks only to correct abuses of discretion. R.D., 169 N.J. at 559; see also id. at 561 ("declin[ing] to adopt a per se requirement that ... restricts the trial court's discretion in handling mid-trial juror taint"). "Application of" the abuse of discretion "standard respects the trial court's unique perspective." Id. at 559-60. Even "the decision to voir dire individually the other members of the jury best remains a matter for the sound discretion of the trial court:"

> The court may learn through its questioning of the excused juror that circumstances made it impossible for that juror to impart impermissible information to the other jurors even unintentionally. Although the court should not simply accept the juror's word that no extraneous information was imparted to the others, the court's own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that impermissible tainting of the other jurors did not occur. In some instances, the court may find that it would be more harmful to voir

> dire the remaining jurors because, in asking questions, inappropriate information could be imparted.

Id. at 560-61.

This record presents no abuse of discretion for this Court to correct with regard to the trial court's handling of Juror 14 or Juror 7. Contrary to defendant's claims, the trial court made sufficient findings to support Juror 14's removal. As set forth by the judge both at the time and during the new trial motion, Juror 14's type-written questions evidenced two issues that had the capacity to impact Juror 14's fitness to serve: he was demonstrably not following the judge's instructions and, in doing so, was considering impermissible evidence. In finding this to qualify as sufficient taint to warrant removal, the trial judge did not "not find good cause" as defendant now alleges. Db58. Guided by Loftin, 191 N.J. at 187, the lower court resolved its "doubts about" Juror 14's fitness "in favor of removing" him "from the panel." No abuse of discretion can or should be found in a decision supported, as this one was, by the undisputed facts and precedent from our Court. State v. C.W., 449 N.J. Super. 231, 235, 255-56 (App. Div. 2017) (citations omitted).

Similarly unavailing in establishing an abuse of discretion is defendant claim that Juror 14's removal required the court to voir dire the rest of the jury panel, something he did not claim was necessary until after his conviction. The

lower court correctly determined there was not sufficient evidence that Juror 14's taint could impact the remaining jurors to warrant the risk of imparting inappropriate information via voir dire.

Nothing in the record supported even an inference that Juror 14 had shared his concerns with any other juror. Juror 14 specifically told the court that he choice the method for asking his questions to avoid making his questions widely known; Juror 14 typed his questions at home rather than raise his hand in front the other jurors. That his questions were personal to him, and him alone, was confirmed during his voir dire, in which he made clear that he had not shared or discussed his questions with any other juror. The lower court found Juror 14 to be credible in this respect.

These facts are vastly different than State v. Wormley, 305 N.J. Super. 57 (App. Div.), certif. denied, 154 N.J. 607 (1998), a case the defendant relies on as illustrative of the lower court's error. Db61. In Wormley, 305 N.J. Super. at 68, a juror advised the court during the first day of trial that she knew the State's main witnesses and was familiar with the crime that was the subject of the trial. This Court found "[t]he juror's familiarity" with the witnesses and crime "was not only disqualifying, but potentially impermissibly tainting," such that after her removal all jurors should have been subject to voir dire, even in the face of her juror's disclaimer of having share this information. Id.

at 69. It was not merely that there had been an opportunity for direct or indirect disclosure, but the nature of the information that could have been disclosed – extra-judicial information regarding witnesses and the crime – that mandated this conclusion. The vast difference in the facts before the lower court prevent the lower court's different choice from being an abuse of discretion. Juror 14 had personal questions his specifically elected to raise with the court and court alone; he did not possess external information. Wormley, therefore, does not establish an abuse of discretion in the lower court's decision making; it shows how different facts permit different choices to lawfully be made.

Similarly, New Jersey law does not establish any abuse of discretion in the lower court's decision to limit her Bible-related inquiry to Juror 7 alone. Defendant relies on numerous out-of-state cases he claims demonstrate the necessity of reversal here. However, none of the cases cited to by the defendant mandate either the removal of a juror or voir dire of an entire panel for the mere presence of a Bible in the jury deliberation room, which are the facts presented here. See, e.g., United States v. Lara-Ramirez, 519 F.3d 76 (1st Cir. 2008); Ackerman v. State, 737 So.2d 1145 (Fla. Dist. Ct. App.), rev. denied, 751 So.2d 50 (Fla. 1999); State v. Robinson, 363 P.3d 875 (Kan.), cert. denied, 580 U.S. 876 (2016).

Ignored in defendant's out-of-state citations is a more factually analogous case in which no remedy – polling of all jurors or mistrial – was found to be needed where the jury foreperson disclosed that a Bible brought into jury deliberation room by another juror was not discussed during deliberations. United States v. Rodriguez, 667 F.Supp.2d 218 (D. Mass.); aff'd, 675 F.3d 48 (1st Cir. 2012). Also ignored by the defendant is Scherzer, 301 N.J. Super. at 486-490, in which this Court addressed the related topic of addressing juror prayer and found "nothing so inherently prejudicial about juror prayers, where no outsider enters the jury room to conduct them and the prayer is voluntary and neutral." This Court agreed with the trial court that juror prayer created a "low risk of danger" to impartiality; "[r]ather it reinforces the judge's conviction that the jurors were well intentioned and sincerely desired to act impartially and justly." Id. at 491. Even in his citation to the Bible, defendant ignores all the times that the Bible calls out for forgiveness[5], e.g., Matthew 6:14; Mark 11:25, in an effort to create reversible error. Db64.

Unfortunately for defendant's appeal, the factual record too does not support his demand for reversal. Juror 7's voir dire made clear that while the

[5] Even the Lord's Prayer itself speaks in terms of forgiving those who "trespass against us."

Bible physically entered the jury deliberation room, it did not enter jury deliberations. For under one hour, the courtroom Bible served as nothing more and nothing less than a source of physical comfort for the juror – a religious man. In the absence of any evidence of even a hint of impropriety or influence, and supported by the trial judge's credibility determination, the mere presence of the Bible did not warrant a more-search, jury-wide voir dire and does not warrant reversal of defendant's conviction.

POINT IV: DEFENDANT HAS NOT ESTABLISH ERROR IN THE RECORDING OF SIDEBAR CONFERENCES

Defendant asks this Court to grant him a new trial based on the "hundreds" of "inaudible" sidebar conferences in his trial transcripts. Db66-67. According to defendant the sheer number of inaudibles, which "dwarfs" those in this Court's precedent, renders the transcripts of his trial "too deficient" for him "to fully pursue his direct appeal." Db69. Defendant lays the blame for this harmful error at the feet of the trial court, who defendant claims failed "to ensure that a full record was created." Ibid. Contrary to defendant's claims, this Court's precedent does not lay the blame at the feet of the trial court[6] and

[6]The record here establishes that the inaudibility of the sidebar conferences can be attributable to "white noise interferes." See, e.g., (23T:127-8 to 127-9). This also appears to be the issue in this Court's unpublished, 2025 opinion in State v. J.C.H., where the audibility of sidebar conferences was noted by the trial judge to have been impacted by "background filter noise" used in all

does not create a direct path to reversal of his conviction.

"The absence of a verbatim record merely raises a question of fairness that must be addressed;" "[i]t does not render a trial unfair." State v. Bishop, 350 N.J. Super. 335, 347 (App. Div.), certif. denied, 174 N.J. 192 (2002) (emphasis added); see also State v. Paduani, 307 N.J. Super. 134, 141-43 (App. Div.), certif. denied, 153 N.J. 216 (1998) (noting that State v. Green, 129 N.J. Super. 157 (App. Div. 1974) "did not conclude that every failure to comply with" the recordation requirements of R. 1:2-2 "constitutes a per se basis for reversal").

Defendant "has a duty to attempt to reconstruct the record." Bishop, 350 N.J. Super. at 347 (citing Paduani, 307 N.J. Super. at 142; State v. Bates, 933 P.2d 48, 54 (Haw. 1997)). The failure by defendant to execute this duty by way of a motion to settle the record, see R. 2:5-5(a) "'precludes [defendant] from alleging reversible error." Paduani, 307 N.J. Super. at 142 (citing Bates, 933 P.2d at 54); Bishop, 350 N.J. Super. at 347.

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criminal courtrooms in New Jersey to make sidebar conferences inaudible to the rest of the courtroom, including the jury. See Pa8-9. The State cites to this unpublished opinion not for precedential purposes, but for "evidential" purposes, consistent with R. 1:36-3 and in accordance with State v. Robertson, 438 N.J. Super. 47, 60 n. 8 (App. Div.), rev'd on o.g., 228 N.J. 138 (2017), and in hopes that this recurring issue can be addressed by the Administrative Office of the Courts.

Nothing in this trial record relieves defendant of his obligation to reconstruct the record, with the assistance of the trial court and the State[7]. Bishop, 350 N.J. Super. at 347. Defendant's claimed inability to fully pursue his appeal appears on page 69 of a 78-page appellate brief, in the fourth of six points of error. In defendant's list of inaudible sidebars, he identifies at least 75 in which the ruling – objection sustained or overruled – is admittedly clear from the record. See Db68. Defendant has not factually, nor legally established entitlement to the relief of reversal of his conviction.

POINT V: THERE IS NO CUMULATIVE ERROR IN THIS RECORD

"[I]ncidental legal errors" necessarily "creep into" proceedings. State v. Orecchio, 16 N.J. 125, 129 (1954); see also State v. Marshall, 123 N.J. 1, 169 (1991), cert. denied, 507 U.S. 929 (1993). Where they do so in a manner that does "not prejudice the rights of the accused or make the proceedings unfair," "an otherwise valid conviction" will not be disturbed. Ibid. Only where "the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the [proceedings] unfair," do "fundamental constitutional concepts dictate" the grant of relief. Ibid.

[7] The trial judge is still on the bench in the Monmouth Vicinage; both assistant prosecutors and one of defendant's attorneys are still employed at the Monmouth County Prosecutor's Office and Public Defender's Office.

Despite having failed to establish that any reversible error exists, see POINT I through IV, supra, defendant argues this Court should aggregate these non-reversible errors into a cumulative effect that together render his conviction reversible. There is no basis in law or fact to do as defendant requests. The individual alleged errors complained of by the defendant do not alone rise to the level of reversible error, and for that reason, cannot and should not be aggregated to cumulative error warranting reversal of defendant's conviction.

POINT VI: DEFENDANT'S SENTENCE CAN BE AFFIRMED

Appellate review of sentencing determinations is "deferential," a standard that cautions a reviewing court from "substitut[ing]" its "judgment for that of the sentencing court." State v. Rivera, 249 N.J. 285, 297 (2021) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Case, 220 N.J. 49, 65 (2014). In fact, a sentence "must ... be affirmed unless,"

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'

Rivera, 249 N.J. at 297-98 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Defendant presents to this Court three bases upon which he claims this Court can and should exercise its discretion to reverse his sentence and remand

for resentencing: 1. the lower court's findings of aggravating and mitigating factors; 2. the imposition of consecutive sentences; and 3. the imposition of extended term sentencing post-Erlinger v. United States, 602 U.S. 821 (2024). The State will address these claims in reverse order.

A. Extended-Term Sentencing: Just over one year after imposition of defendant's extended-term sentencing, see N.J.S.A. 2C:44-3(a), the United States Supreme Court "held" in Erlinger, 602 U.S. at 849, "that a jury, not the sentencing judge, must decide the existence of the facts necessary to establish the grounds for a sentence enhancement based on prior convictions for offenses committed on separate occasions." State v. Carlton, __ N.J. Super. __, __ - __ (App. Div. 2024). While the Office of the Attorney General (OAG) has conceded on behalf of the State that the rule of Erlinger "applies retroactively to persistent offender cases, like this one, that are still in the direct appeal 'pipeline,'" it has argued that cases "where a judge made the requisite 'separate occasions' findings are subject to harmless error analysis." Carlton, __ N.J. Super. __, __.

A panel of this Court has rejected the OAG's harmless error position as a general matter: "We do not mean to suggest that the harmless constitutional error doctrine can never apply to an Erlinger violation." Id. at __. Exemplary of circumstance in which this Court believed a harmless error analysis could

take root include: "where a jury was provided with a flawed special verdict form or faulty instructions that were not objected to by the defense" or "where a jury was asked to make findings on some but not all the facts needed to establish the basis for an enhanced sentence." Id. at __.

Because the Carlton Court "determined the constitutional violation ... should not be excused under the harmless constitutional error doctrine," it found it "clear" that the extended-term sentence "must be vacated." Id. at __. Because this Court also determined that affected defendants are "not entitled to escape the consequences of his criminal history," the sentence vacation-remedy was coupled with a remand, at which three resolutions were permitted: 1. "the State may elect to forego pursuing an extended term;" 2. "the parties may enter into a negotiated post-conviction agreement" if defendant "admit[s] to the facts establishing persistent-offender eligibility;" or 3. "the trial judge shall convene a jury for trial limited to the question of whether defendant meets the definition of a persistent offender set forth in N.J.S.A. 2C:44-3(a)." Id. at __.

It is the State's understanding that a petition for certification filed by the OAG in Carlton remains pending before our Supreme Court. To preserve its rights, the State maintains that a harmless error analysis is appropriate. The State submits that that is particularly appropriate here where the defendant conceded his legal eligibility for persistent offender sentencing. See (33T:3-6

to 4-7; 5-7 to 5-15; 6-25 to 7-19; 13-10 to 13-17). The State understands that if this Court does not agree with its harmless error analysis and/or if the Supreme Court does not grant certification in Carlton or agrees with the Carlton Court's harmless error analysis, then a remand would be needed.

B. Consecutive Sentencing: Defendant presents this Court with two reasons to for it to reverse the consecutive sentences imposed by the lower court for Counts One (murder), Four (bias intimidation), and Five (eluding): 1. the lower court erred in interpreting the non-merger provision of the bias intimidation statute, N.J.S.A. 2C:16-1(e) as calling for consecutive sentencing; and, 2. the lower court failed to provide a statement of overall fairness as required by State v. Torres, 246 N.J. 246 (2021). The State submits neither mandates reversal by this Court.

Where consecutive sentences are imposed, a sentencing court must also consider and qualitatively apply the Yarbough factors and provide "[a] statement of reasons" in support thereof. State v. Cuff, 239 N.J. 321, 347-48 (2019) (quoting State v. Miller, 108 N.J. 112, 122 (1987)). The Yarbough factors include general principles, such as "there can be no free crimes," and "no double counting of aggravating factors," and case specific reasons, such as "the crimes involved separate acts of violence," "the crimes were committed at different times or separate places, rather than being committed so closely in

time and place as to indicate a single period of aberrant behavior." Cuff, 239 N.J. at 347-48 (quoting State v. Yarbough, 100 N.J. 627, 643-44 (1985)).

In order to "advance[] critical sentencing policies of the Code, as amplified by Yarbough," where consecutive sentences are imposed the sentencing court should provide "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding." Torres, 246 N.J. at 268. That being said, our Court has also recognized that "sentences can be upheld where the sentencing transcript makes it possible to 'readily deduce' the judge's reasoning." State v. Miller, 205 N.J. 109, 129-30 (2011).

While admittedly, these "cases are the exception, not the rule," the State submits this exception applies here. Ibid. The sentencing judge, who also presided over defendant's trial, was intimately familiar with the totality of the defendant's criminal conduct and the sentencing ranges to which each exposed defendant. (33T:16-20 to 17-14; 91-18 to 92-12). The court was aware of the defendant's age at the time of the crime and sentencing; it applied mitigating factor 14. (33T:115-12 to 117-19). Defendant's sentencing arguments directed the court to consider non-statutory factors in consideration of "the overall sentence," see (33T:117-17 to 177-18), and impose a sentencing "[t]hat would essentially make [defendant] mid-50's by the time he is eligible for parole."

(33T:10-20 to 10-23).

From this, the State submits this Court can readily deduce that the overall fairness of defendant's sentence was front and center in the mind of the lower court when it engaged in a lengthy, detailed analysis of the applicable aggravating and mitigating factors, the relative weight to be applied to each, and its analysis of the Yarbough factors. (33T:122-16 to 129-18; 131-14 to 133-4). Because the defendant's sentence is fair, even with its consecutive features, the State submits this Court can and should affirm.

As to defendant's challenge to the consecutive sentence imposed on Count Three, bias intimidation, the State submits defendant's argument that consecutive sentences are not called for by the statute is misplaced. N.J.S.A. 2C:16-1(e) directs that "a conviction for bias intimidation shall not merge with a conviction of any of the underlying offenses referred to in subsection a. of this section, nor shall any conviction for such underlying offense merge with a conviction for bias intimidation." The next sentence states: "The court shall impose a separate sentence upon a conviction for bias intimidation and a conviction of any underlying offense." N.J.S.A. 2C:16-1(e) (emphasis added).

In an about face of the argument defendant submitted below, he now

contends the statute's final sentence addresses merger only.[8] Db75; (33T:124-18 to 128-4). In support of this, defendant cites to N.J.S.A. 2C:39-4.1(d), in which the Legislature specifically addressed both merger and consecutive sentences explicitly, thus implicating the cannon of statutory construction that "a term" "employed" in "one place" "should not be implied where excluded." Db75 (citing State v. Cooper, 256 N.J. 593, 605 (2024)(citations omitted).

The State submits that this is not the operative cannon of statutory construction applicable here. Suggesting that the final line of subsection e. can only refer to merger renders it superfluous and redundant. "We must also 'strive[] for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant." State v. Gargano, 476 N.J. Super. 511, 523-24 (App. Div. 2023) (quoting In re DiGuglielmo, 252 N.J. 350, 360 (2022); Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261 (2020)). A court "must 'seek an interpretation that will make the most consistent whole of the statute.'" State v. Anthony, 443 N.J. Super. 553, 567 (App. Div.), certif. denied, 224 N.J. 529 (2016).

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[8] Defendant also contends that the judge did not address the Yarbough factors with regard to bias intimidation. This is not accurate, see (33T:127-19 to 128-4) ("... and also guided by the factors in Yarbough that provided that there can be no free crimes").

The opening sentence of subsection e. specifically addresses merger and does so by using the word "merger." The second sentence, which defendant claims also refers only to merger, does not use the word merger and does not add anything to the explicit anti-merger provision of the first sentence. The first sentence presents no ambiguity as to merger that the second sentence could be intended to clarify – and somehow clarify by substituting the word merger for "sentence," i.e., "impose separate sentences." The State submits that an interpretation of the second sentence of subsection e. that does not render it superfluous and insignificant, and gives effect to the words used (separate sentence) and omitted (merger), is one that sees it as the lower court did – suggesting that bias intimidation have a "separate sentence[]" imposed, i.e., one that is consecutive.

C. **Aggravating and Mitigating Factors:** Determination of an appropriate sentence requires a sentencing court to "identify any relevant aggravating and mitigating factors," N.J.S.A. 2C:44-1, and then "balance those relevant" factors "by qualitatively assessing each factor and assigning it appropriate weight given the facts of the case at hand." Rivera, 249 N.J. at 298 (quoting Fuentes, 217 N.J. at 72-73); Case, 220 N.J. at 64-65. "The finding of any factor must be supported by competent, credible evidence in the record;" "[s]peculation and suspicion must not infect the sentencing process." Case,

220 N.J. at 64-65.

The sentencing court's analysis of the aggravating and mitigating factors proffered by the State and defendant, statutory and otherwise, covers 29 pages of the sentencing transcript. In support of its finding, or not finding, of each factor the sentencing court provided a detailed analysis of the facts supporting its decision. At the conclusion of its discussion on the each of factors it did find, the sentencing court explained the relative weight it intended to afford each factor. The lower court's analysis represents exactly what this Court and our Supreme Court expect from sentencing courts. (33T:93-3 to 121-8).

Nonetheless, defendant asks this Court to find error warranting the reversal of his sentence. The State submits this Court should not accede to defendant's request as his claims of error simply find no support in this detailed sentencing record.

For example, defendant faults the sentencing court's analysis of aggravating factors three, six, and nine, alleging that too much weight was placed on his prior convictions since there were only three and faulting the court for considering as a conviction defendant's juvenile deferred disposition. The sentencing transcript belies defendant's claims of error. The sentencing court did not rely on the juvenile matter as a prior conviction per se, but in its analysis of what factor three calls for – defendant's risk of re-offense. To

counter defendant's claim of minimal risk due to his then-current compliance with medication, the lower court noted all of the times that defendant was afforded the opportunity to rehabilitate and failed, inclusive of his deferred disposition and parole violations. (33T:98-3 to 100-10). Use of the deferred disposition in this manner was not error and does not warrant reversal.

The sentencing court's consideration of aggravating factor six likewise survives defendant's attempts at establishing reversible error. While defendant minimizes his prior criminal record, the lower court did not err in failing to do so. In its evaluation of defendant's prior record, which incorporated the findings on factor three, the sentencing court looked beyond just the degree of the crime:

> In January of 2014, the defendant was convicted of endangering the welfare of a child and was sentenced ... to time [served], Megan's Law and parole supervision for life. Less than a year later he violated his parole by committing a new offense and ultimately he ... was re-paroled, violating again, and ultimately maxed out on September 7th of 2016.
>
> In November of 2015 he was convicted of third degree possession with intent to distribute ... and fourth degree resisting arrest.
>
> ...
>
> the record does have evidence of volatile tendencies ... involving his family as a result of prior report. The defendant also has a ... final restraining order for assault. Certainly, indicative to this Court, again of a propensity for ... potentially violent conduct and ... ultimately resulting violent conduct.

(33T:98-12 to 99-9; 100-11 to 101-8). No error can be found in these holistic

evaluations. See State v. Fuentes, 217 N.J. 57, 70-74 (2014).

Defendant's attacks on the sentencing court's evaluation of the mitigating factors likewise fails. That the lower court's evaluation does not dovetail with the defendant's does not equate to the abuse of discretion required for a reversal and remand.

With regard to mitigating factor four, the lower court was aware that it could legally find this factor despite the jury's verdict. (33T:105-19 to 106-10) (citing State v. Nataluck, 316 N.J. Super. 336 (App. Div. 1998)). And the lower court did find this factor applicable as "an acknowledgement ... that mental health issues may have to some extent affected the defendant." The court felt it could not give this factor more than "minimal to light weight" because it was not "persuaded that it rose to the level to actually excuse or justify defendant's conduct." Supporting this finding was defendant's history of non-compliance with mental health treatment. Defendant was consistently afforded treatment and consistently was non-compliant. Moreover, after presiding over the trial, the court was persuaded that defendant's criminal conduct was maybe "exacerbated," but not caused by defendant's mental illness: "all [the] facts ... are indicative not of someone who was not aware of what was happening, but rather someone who formulated a clear plan to execute and vent the rage he was feeling at that time, and he targeted the

victim in this case ... by his own admission, because he was a white guy and he was an old guy." (33T:106-10 to 108-25). These factually supported findings can and should be affirmed.

Similarly demonstrating defendant's disagreement and not an abuse of the sentencing court's discretion are the court's findings as to mitigating factor 14, which the court gave "moderate weight." That defendant was under the age of 26 at the time of the crime was undisputable. That this fact could not overcome all other factors was factually supported by the sentencing court's findings:

> Given the defendant's history that the Court already outlined here, including his prior encounters with the criminal justice system, given that he ... was just a few months shy of age 26 ...
>
> The Court also does not give[] that factor heavy weight because ... there is no indication here given the facts of this case that the crimes resulted in any way from any youthful missteps or youthful misjudgment or immaturity but rather, again, resulting from brutal rage, and actions that were happening, even if they were happening within a short period of time[.]

(33T:115-12 to 117-12). These findings, as with all of the sentencing court's aggravating and mitigating factors findings, can and should be affirmed.

CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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REPLY LETTER BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEYAPPELLATE DIVISION
DOCKET NO. A-2895-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
		On Appeal from a Judgment
Plaintiff-Respondent,	:	of Conviction of the Superior
		Court of New Jersey, Law Division,
v.	:	Monmouth County.
JAMIL S. HUBBARD,	:	Ind. No. 19-03-322-I
Defendant-Appellant.	:	Sat Below: Hon. Lourdes Lucas, J.S.C., and a Jury.
		DEFENDANT IS CONFINED

Your Honors:

Please accept this letter brief filed in lieu of a formal reply brief pursuant to Rules 2:6-5 and 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Jamil S. Hubbard relies on the procedural history and statement of facts from his opening brief.

LEGAL ARGUMENT

Hubbard relies on the legal arguments included in his previously filed brief and adds the following:

POINT I

REVERSAL IS REQUIRED BECAUSE THE STATE PRESENTED IMPROPER EVIDENCE AND ARGUMENTS THAT WERE CLEARLY CAPABLE OF AFFECTING THE VERDICT.

The State was allowed to expose the jury to evidence, testimony, and comments that were clearly capable of improperly interfering with its consideration of Hubbard's insanity defense. The State's arguments in response are not only unpersuasive, but often misconstrue the relevant arguments, fail to address key cases, and misstate the record.

A. The State Does Not Dispute that the Cause of Defendant's Mental Illness Was Irrelevant to His Insanity Defense and Is Mistaken in Claiming that the Jury Was Not Told Otherwise.

The State does not dispute that the cause of a person's mental illness is irrelevant to the insanity defense and that it is reversible error for a jury to be told otherwise. Instead, the State makes a purely factual argument, contending that "it did not argue" or present evidence suggesting that Hubbard "should not

be found legally insane 'because he was responsible for triggering his mental illness[.]'" (Pb 15-16)[1] This is inaccurate.

As discussed in Hubbard's opening brief, the State's case was riddled with testimony and evidence about Hubbard's substance abuse and medical non-compliance, and about how those actions could have aggravated his symptoms. (Db 24-27) The State does not really argue otherwise. And it provides no justification for this information being placed before the jury or for the prosecutor emphasizing this evidence in summation, including to claim that the jury could reject Hubbard's insanity defense if it found "that smoking marijuana and drinking alcohol affected him." (Db 26-27; 28T167-16 to 21)

The State cannot justify this evidence and commentary because it served no legitimate purpose and was clearly presented to rebut Hubbard's insanity defense on an improper basis. Reversal is therefore required.

B. The State Presented Improper Expert Net Opinion Testimony and Offers No Actual Argument to the Contrary on Appeal.

Reversal is required because the State's expert witness, Dr. Gilman, was allowed to offer net opinions concerning two diagnoses, anti-social personality disorder and drug-induced psychosis, that the State argued could explain Hubbard's actions without allowing him to be found not guilty by reason of

[1] Db = Defendant's opening brief
Pb = State's response brief

insanity. (Db 28-33) The State's response misunderstands the basis for this argument and fails to justify the diagnoses at issue.

At the outset, Hubbard's position is not that "the admissibility of expert psychiatric testimony should be governed by the Diagnostic and Statistical Manual, Fifth Edition ('DSM'), such that any deviation from this treatise should be deemed an inadmissible net opinion." (Pb 18-19) Rather, his position is that Dr. Gilman's testimony was improper because he departed from the DSM without identifying any other "objective and reliable basis" for his opinions. (Db 30-31) As Dr. Gilman recognized, a reliable psychological diagnosis normally involves following the DSM. (Db 29-30) For Dr. Gilman to render a diagnosis that conflicted with the DSM, as he conceded his diagnoses did, he therefore needed to rely on some other "generally accepted" and reliable scientific standard. Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017) (citation omitted).

Dr. Gilman did not, however, identify such a standard, instead citing his own "personal" standards, Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 373 (2011), and self-described "speculation." The State, moreover, does not identify a reliable, objective standard undergirding Dr. Gilman's opinions on appeal, or even address the relevant diagnoses. See (Pb 20-22) (only addressing cannabis use disorder and alcohol use disorder, which

are not at issue) The State's failure to defend these diagnoses on appeal only further highlights their lack of objective support and the need for a new trial.

C. Reversal is Required Because the State Was Allowed to Present Unnecessary and Highly Inflammatory Evidence and Comments.

A new trial is required because the State presented extensive and unnecessary testimony and evidence about topics including Wolkowitz's injuries, his medical treatment, and the harm suffered by others. (Db 33-42) Importantly, this argument does not rely on the idea that the State was barred from presenting all testimony about causation or that the defense had "unilateral authority to define the scope of admissible evidence[.]" (Pb 23) Rather, this argument relies on the fundamental principle that just because some evidence about Wolkowitz's injuries and medical treatment was admissible does not mean that all such evidence should have been put before the jury, no matter how "cumulative" or prejudicial. N.J.R.E. 403.

The State does not recognize this principle and instead asserts that "[a]ll of challenged [sic] evidence and argument . . . was fairly admitted as wholly relevant" to causation, without specification or qualification. (Pb 24) In doing so, the State does not explain why it was necessary, for example, to elicit detailed testimony from five different medical professionals about the injuries and medical treatment; present graphic photos and videos of Wolkowitz; or make repeated comments about the injuries and treatment in summation. (Db

35-39) The State also does not acknowledge or defend its presentation of inflammatory information that was not even arguably related to the issue of causation, such as about the pain and fear suffered by Wolkowitz's family and unrelated bystanders, and the State's improper characterizations of the insanity defense as an "excuse." (Db 39-41) The State's silence as to the specific evidence and comments further demonstrates their impropriety and harm.

D. Reversal is Required Because the State Was Allowed to Improperly Impeach the Defense's Key Expert Witness.

Reversal is required because the court committed multiple errors in allowing the State to attack Hubbard's expert witness, Dr. Saleh, with information about his compensation in unrelated matters. (Db 42-46) The State addresses almost none of the issues raised while seeming to suggest that a jury is always "permitted to consider 'the compensation received by [an] expert witness'" even if it is not related to the current matter. (Pb 25-27)

The State does not cite any legal support for this proposition, let alone explain how information about out-of-state compensation from nine years earlier could have been relevant to Dr. Saleh's opinion. It does not explain why the State could present hearsay information about that compensation via a newspaper article with which Dr. Saleh was "unfamiliar." (Pb 25-26) It does not explain why the defense should have been barred from eliciting Dr. Saleh's actual compensation. And it does not explain why the jury was told that Dr.

Saleh's unrelated compensation could be relevant to his credibility or bias. The State's silence on these issues further shows that reversible error occurred.

POINT II

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED, AND THE STATE'S ARGUMENTS TO THE CONTRARY FAIL TO CITE AND ADDRESS RELEVANT CASE LAW.

The trial court erred in failing to suppress Hubbard's statements made to the police after being removed from his home and during his post-arrest formal interrogation. (Db 46-55) The State's response misunderstands the defense arguments, ignores recent relevant case law, and is overall unpersuasive.

The State argues that suppression of the first statement was not required because Hubbard was not in custody when five officers removed him from his home, had him sit outside without a shirt or shoes on, and then questioned him about the crime because the officers' actions were "investigatory in nature." (Pb 36-37) The State does not cite any analogous cases to support this argument, instead relying on a distinct line of case law concerning car stops. See State v. Hickman, 335 N.J. Super. 623, 630 (App. Div. 2000) (identifying factors specific to car stops, including their presumptively brief nature, that typically render them non-custodial). And it inexplicably fails to mention State v. Bullock, 253 N.J. 512 (2023), a far more analogous case that helps demonstrate that Hubbard was subject to custodial interrogation. (Db 48-50)

The State's arguments concerning the second, formal interrogation are similarly flawed. Hubbard is not arguing that his statement must be suppressed simply because he suffers from mental illness, as the State suggests. (Pb 41) Rather, Hubbard's argument is that suppression is required because the State could not prove beyond a reasonable doubt that his statement was knowingly and voluntarily made despite his serious mental illness and ongoing psychosis without the assistance of expert testimony. This argument is based on established case law, including the two cases cited by the State (Pb 39-40), and State v. Burney, 471 N.J. Super. 297 (App. Div. 2022), rev'd on other grounds, 255 N.J. 1 (2023), which the State does not address. (Db 51-53)

For the reasons in Hubbard's opening brief and given the lack of persuasive arguments and authority included in the State's response, the statements should be suppressed and Hubbard's convictions reversed.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REMOVED A JUROR WITHOUT CAUSE AND FAILED TO ENSURE THAT OTHER JURORS WERE NOT TAINTED.

The court failed to ensure a fair trial when it removed Juror 14 without cause and when it declined to voir dire the entire jury both after removing Juror 14 and after a Bible was discovered in the deliberation room. (Db 55-65) This Court should reject the State's arguments to the contrary and reverse.

The State does not dispute that the court did not make a finding of "good cause" to remove Juror 14 and does not even argue that this standard was met. Instead, the State seems to suggest that removal was appropriate because the court had "'doubts about' Juror 14's fitness" to serve. (Pb 48-49) (quoting State v. Loftin, 191 N.J. 172, 187 (2007)). Doubt, however, is not enough to remove a juror absent inquiry into their ability to serve and the establishment of good cause, as the cases cited in Loftin, 191 N.J. at 187, the only case relied upon by State, demonstrate. See State v. Singletary, 80 N.J. 55, 63-64 (1979) (affirming decision not to remove "for cause" where "extensive[]" questioning showed juror could be impartial); State v. Van Duyne, 43 N.J. 369, 385-86 (1964) (explaining courts should remove for cause only after questioning juror about ability to remain impartial). Accordingly, it was error to remove Juror 14 without finding good cause or even questioning him about his ability to serve.

The Court also erred in not questioning the other jurors after removing Juror 14. The State does not appear to dispute that Juror 14's concerns, if warranting his removal, had the capacity to taint the other jurors. Instead, the State argues that voir dire was not required because "[n]othing in the record supported even an inference that Juror 14 had shared his concerns with any other juror." (Pb 48-49) This, however, is not the relevant standard. There need not be an "inference" of contamination to warrant a full voir dire. Rather, a

court must question the full jury whenever an affected juror could have possibly shared information with other jurors. State v. R.D., 169 N.J. 551, 560-61 (2001). As discussed in Hubbard's brief, and as the State does not dispute, such a possibility was clearly present here given the multiple, unsupervised opportunities for the jurors to comingle, including after Juror 14 was questioned by the court. (Db 60-62) Reversal is therefore required.

Lastly, the court erred when it declined to question the full jury after a Bible was brought into deliberations. (Db 63-65) The State does not appear dispute that the Bible was capable of influencing deliberations such that some type of inquiry was needed. (Pb 51-52) Indeed, the one additional Bible-related case cited by the State further demonstrates this principle, contrary to the State's suggestions. See United States v. Rodriguez, 675 F.3d 48, 61 (1st Cir. 2012) (stating court had to conduct "an investigation to eliminate any lingering uncertainty as to whether" Bible improperly influenced the jury).

With the potentially contaminating nature of the Bible established, if not undisputed, the question becomes what steps the court had to take to ensure that the Bible did not improperly influence the jurors. On this point, the law in New Jesey, as discussed, is clear: when there is a possibility of improper jury influence, the court must question every juror. R.D., 169 N.J. at 560-61.

This is further demonstrated by State v. Scherzer, 301 N.J. Super. 363

(App. Div. 1997), which involved the issue of juror prayer, and which is cited by the State. (Pb 51) Although the Scherzer Court did not find the juror prayer sessions so "inherently prejudicial" as to automatically require a new trial, it was explicit that they were potentially contaminating and required a new trial absent "a probing inquiry into the possible prejudice caused[.]" Id. at 486-87, 490. Specifically, and as with any other potential juror contamination, the court needed to "question[] each juror individually" to determine whether they "were exposed to" the prayers, and if so, "to determine what information was learned and whether the juror [was] capable of deciding the case impartially, based solely on the evidence presented at trial." Id. at 487 (citations omitted). The Court thus only affirmed because the trial court "scrupulously investigated the situation" in line with these requirements. Id. at 490

The same procedure should have been followed here. Because the Bible could have influenced the jurors, the court was required to "voir dire[] each juror individually" to determine whether they had been exposed to the Bible and whether it "had affected their ability to decide the case fairly and impartially based on the evidence." Id. at 487-89. Because the court did not engage in such an inquiry, the "presumption of prejudice" could not be rebutted, and reversal is required. Id. at 486-87 (citation omitted)

POINT IV

THE FAILURE TO PROPERLY RECORD SIDEBAR CONFERENCES REQUIRES REVERSAL OR, AT MINIMUM, A REMAND.

A new trial is required because nearly every sidebar conference is inaudible. (Db 66-69) The State does not dispute this inaudibility, that the conferences appeared to cover the resolution of multiple legal issues, or that their content frequently cannot be discerned via surrounding context. Instead, the State argues that reversal is not required simply because Hubbard has not sought to reconstruct the record. (Pb 52-54) The State is mistaken.

Despite the State's suggestions, our courts have never held that relief is unavailable for a court's failure to record sidebar conferences if a defendant does not first attempt to reconstruct the record. Rather, this Court has only observed that such a rule is applied in another jurisdiction, Hawaii, without adopting or applying a similar rule. See State v. Paduani, 307 N.J. Super. 134, 142 (App. Div. 1998) (discussing but not applying State v. Bates, 933 P.2d 48 (Haw. 1997)); see also State v. Bishop, 350 N.J. Super. 335, 348 (App. Div. 2002) (same).[2] Rather, our courts have consistently applied a fact-sensitive

[2] Bishop, 350 N.J. at 350, also did not involve inaudible sidebars, let alone the denial of relief due to a lack of reconstruction of such sidebars, but rather whether the defendant was entitled to a new trial when his trial transcripts were unavailable and could not be reconstructed due to his lengthy flight from justice.

inquiry, where relief is only denied when the content or inconsequence of the discussions can be readily discerned, State v. Perry, 124 N.J. 128, 170 (1991); Paduani, 307 N.J. Super. at 143, and where reversal is required when, as here, the discussions appear significant, and their contents are not otherwise revealed. State v. Green, 129 N.J. Super. 157, 165-66 (App. Div. 1974).

Accordingly, this Court should reject the State's arguments and find that reversal is required, particularly given the sheer number of sidebar conferences in this case. If this Court disagrees, however, and does not otherwise reverse Hubbard's convictions, then this Court should remand the matter for an attempted reconstruction of the inaudible sidebars pursuant to Rule 2:5-3(f).

POINT V

RESENTENCING IS REQUIRED BASED ON MULTIPLE ERRORS, SEVERAL OF WHICH HAVE BEEN CONCEDED BY THE STATE.

If his convictions are not reversed, Hubbard must be resentenced for multiple reasons. (Db 70-77) The State's arguments in response require little comment other than noting several concessions, omissions, and misstatements.

As to the sentencing factors, the State acknowledges that the court relied on a dismissed juvenile charge (Pb 63-64), despite clear case law barring the use of dismissed charges for any purpose. (Db 71) It does not mention, let alone defend, the court's decision to afford additional weight to aggravating

factor six based on the nature of the current offenses. (Db 71-72) And it does not dispute that the court did not make any specific findings to support the maximum ten-year term imposed for the eluding charge. (Db 73-74)

The State concedes that that the trial court did not provide "[a]n explicit statement[] explaining the overall fairness" of the consecutive sentences, State v. Torres, 246 N.J. 246, 268 (2021), and does not dispute the cited case law showing that such an error requires resentencing. (Pb 59-60; Db 74-75)

Lastly, the State concedes that the court wrongly found Hubbard extended-term eligible under Erlinger v. United States, 602 U.S. 821 (2024), and State v. Carlton, 480 N.J. Super. 311 (App. Div. 2024). (Pb 56; Db 75-77) The State also acknowledges, under Carlton, that such errors cannot be harmless when, like here, a jury did not find the necessary facts to establish extended-term eligibility. (Pb 56-57) Nonetheless, "the State maintains that a harmless error analysis is appropriate" and should be applied. (Pb 57-58) This argument is not only inconsistent with Carlton, but also the plain language of Erlinger, which makes clear that a "defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury" regardless of how "straightforward" the defendant's eligibility may appear. 602 U.S. at 842 (citation omitted). This Court should therefore reject the State's position and remand for resentencing.

In doing so, however, this Court should also hold that the State may not seek to re-impose an extended-term sentence. Although the Carlton panel held that a court on remand may "convene a jury for trial limited to the question of whether defendant meets the definition of a persistent offender[,]" Carlton, 480 N.J. Super. at 356, that holding is contrary to binding case law for several reasons and should not be followed. See Brundage v. Estate of Carambio, 195 N.J. 575, 593–94 (2008) (recognizing that "the decision of one appellate panel" is not "binding upon another panel of the Appellate Division").

First, the Carlton panel only found that N.J.S.A. 2C:44-3(a) could be saved by engaging in the type of "judicial surgery" that the Supreme Court rejected when construing a similarly invalid sentencing scheme in State v. Grate, 220 N.J. 317, 335-36 (2015). As that Court explained, applying judicial surgery to "[r]equir[e] a jury rather than a judge to make" the necessary eligibility finding, contrary to the plain language employed by the Legislature, "would not merely be severing a constitutionally infirm portion of the sentencing statute, it would be rewriting its essential requirements" in a way that the Legislature may not have intended. Ibid. Thus, it should be avoided.

Second, the panel's holding is inconsistent with the Double Jeopardy Clause's prohibition against "prosecution of a defendant for a greater offense when he has already been . . . convicted on [a] lesser included offense." Ohio

v. Johnson, 467 U.S. 493, 501 (1984). Because Hubbard has already been indicted and convicted for the non-persistent-offender version of bias intimidation, he cannot be newly indicted and convicted for the persistent-offender version of that offense. Additionally, a second bifurcated trial would run headlong into the constitutional safeguard that a single jury -- not multiple juries -- must consider the elements of the entire criminal case. United States v. Alvarez, 519 F.2d 1036, 1051 (3d Cir. 1975). Thus, this Court should remand for resentencing while barring re-imposition of an extended term.

CONCLUSION

For the foregoing reasons, and the reasons stated in his opening brief, Hubbard requests that this Court reverse his convictions. Alternatively, he asks that the matter be remanded for reconstruction of the record and resentencing.

Respectfully submitted,

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