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November 12, 2024

LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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STATE OF NEW JERSEY,	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
Plaintiff-Respondent,	: DOCKET NO. A-2910-23T2
	:
v.	: <u>Criminal Action</u>
	:
JOHN L. HARRIS,	: ON APPEAL FROM AN ORDER
	: DENYING POST-CONVICTION
Defendant-Appellant.	: RELIEF OF THE SUPERIOR COURT
-----	: OF NEW JERSEY, LAW DIVISION,
	: BURLINGTON COUNTY

Ind. No. 18-07-0925-I

Sat Below:  
Hon. Richard J. Nocella, J.S.C.

DEFENDANT IS NOT CONFINED

Your Honors: This letter brief is submitted pursuant to R. 2:6-2(b).

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<sup>1</sup> The petition for post-conviction relief is tantamount to a complaint and therefore is required to be included in the appendix pursuant to R. 2:6-1(a)(1).

<sup>2</sup> PCR counsel's brief is included in the appendix because it falls within one of the "exceptions to the general prohibition against including trial court briefs in the appendix." R.2:6-1(a)(2). Specifically, issues raised in PCR counsel's brief were referred to in oral argument and the PCR court's opinion.

### PROCEDURAL HISTORY

On July 31, 2018, the Burlington County grand jury indicted defendant, John L. Harris, in Indictment 18-07-0925-I with: fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count one); third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count two); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count three); third-degree burglary, in violation of N.J.S.A. 2C: 18-2a(1) (count four); third-degree theft by taking, in violation of N.J.S.A. 2C:20-3a (count five); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count six); third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count seven); third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a (count eight); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count nine); third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count ten); third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a (count eleven); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count twelve); third-degree attempted burglary, in violation of N.J.S.A. 2C:5-1a(1) and N.J.S.A. 2C:18-2a(1) (count thirteen); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count fourteen); third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count fifteen); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count sixteen); third-

degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count seventeen); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count eighteen); fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count nineteen); third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count twenty); third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a (count twenty-one); and third-degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a (count twenty-two). (Da1-22)<sup>1</sup>

Defendant moved on May 16, 2019, before the Honorable Charles A. Delehey, J.S.C., to suppress a search of defendant's person. On May 22, 2019, the court denied the motion. (2T3-9 to 13; Da37)

On June 4, 2019, defendant pled guilty to count fifteen, alleging third-degree burglary. The State agreed to dismiss all other counts of the indictment. (3T8-20 to 9-20; Da25)

On August 15, 2019, the Honorable Philip E. Haines, J.S.C. sentenced defendant to an eight-year term of imprisonment with a four-year parole ineligibility, concurrent to a Camden County indictment. The remaining counts

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<sup>1</sup> "Da" refers to the appendix of the brief for defendant-appellant.

"PSR" refers to the presentence report.

1T refers to the motion transcript of March 13, 2019.

2T refers to the motion transcript of May 16, 2019.

3T refers to the plea retraction transcript of June 4, 2019.

4T refers to the sentencing transcript of August 15, 2019.

5T refers to the PCR hearing transcript of September 25, 2023.

of the indictment were in fact dismissed, and a violation of monitoring was withdrawn by the State. The court awarded defendant 61 days of jail credit and 35 days of gap time credit. The appropriate fines and penalties were imposed. The judgment of conviction was later amended to remove the appellate waiver. (4T3-12 to 4-2; 4T9-10 to 11-9 to 12; Da28-31)

Defendant appealed his conviction. On March 17, 2022, by way of an unpublished opinion, the Appellate Division affirmed his conviction. (Da36-61)

The Supreme Court of New Jersey denied defendant's petition for certification on September 20, 2022. (Da62)

Defendant filed a timely pro se petition for post-conviction relief. Defendant, through counsel, filed an amended petition for post-conviction relief and brief. (Da63-103) On February 14, 2024, by way of an order and a written opinion, the Hon Richard J. Nocella, J.S.C. denied the petition. (Da104-116)

Defendant filed a Notice of Appeal on May 23, 2024. (Da117-119)

### STATEMENT OF FACTS

On February 9, 2018, at about 12:07 a.m., Lieutenant James Harper of the Mount Holly Township Police Department responded to a security alarm alert at the Robin's Nest restaurant. (2T4-11 to 22). Lieutenant Harper and Patrolman

Tim Podeszwa viewed black and white video surveillance footage which showed a man entering the restaurant.<sup>2</sup> (2T5-12 to 7-19)

At about 12:39 a.m., Patrolman Declan Deveney stopped defendant, an African-American man, two blocks from the restaurant at the intersection of Washington and King Streets. (2T8-8 to 9-13) However, Patrolman Deveney's report had the suspect being a white male wearing a hoodie with a black beanie and a black jacket. (2T56-3 to 19)

At about 12:46 a.m., Lieutenant Harper and Patrolman Matthew Kline arrived at the location where Patrolman Deveney had detained defendant. Defendant was sitting on the curb. Lieutenant Harper saw defendant with a backpack and asked him what was in his closed backpack without first advising him of his Miranda<sup>3</sup> rights. (2T63-21 to 22; 2T66-13 to 67-16) Lieutenant Harper observed that the backpack was similar to the one he had viewed in a security video he had watched at the Robin's Nest restaurant. Defendant responded that he had beer in his backpack. (2T20-21 to 25; 2T63-21 to 22) At the hearing for the motion to suppress evidence, Lieutenant Harper testified that he wanted "to see if there is any evidence from the burglary inside the bag." (2T11-8 to 15)

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<sup>2</sup> The defense will supply to the court the videos which are in the defense's possession.

<sup>3</sup> Miranda v. Arizona, 384 U.S. 436 (1966)



Lieutenant Harper then asked defendant to open his backpack, and Lieutenant Harper then rummaged through the inside of the bag, finding trash bags, an open bottle of Fireball whiskey, and a laptop computer. (2T12-4 to 1) Laptops had been taken in other burglaries, and Lieutenant Harper believed defendant to be the likely suspect. He thus felt that the finding of the laptop in defendant's backpack was significant. (2T9-19 to 10-16; 2T12-4 to 16)

After searching defendant, the officers ran a warrant check on him. He provided the officers with his name, social security number, and date of birth. (2T47-5 to 48-8) The warrant check yielded no active warrants. (2T49-3 to 4; 2T68-24 to 69-2) Lieutenant Harper commented to another police officer that he does not have enough to prove he (defendant) did his burglary<sup>4</sup>, testifying that “[w]e need to get this guy on something.” (2T50-2 to 3; 2T68-5 to 9) When one of the officers realized that defendant was on probation, Lieutenant Harper stated: “We have him stopped and if we can find anyone that can pin him on anything, we have him.” (2T50-4 to 11)

At the suppression hearing dealing with the backpack, Lieutenant Harper testified that he thought defendant had a similar build to the person in the surveillance footage, and he was carrying a backpack similar to the one in the footage, as well as wearing similar clothing. (2T10-17 to 11-1; 2T13-8 to 19)

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<sup>4</sup> Lieutenant Harper referred to the burglary as a “B&E”—breaking and entering.

Lieutenant Harper testified that he knew defendant was a suspect in several other burglaries, but he did not ask defendant about any of them. (2T10-4 to 9)

After the warrant check came back negative, numerous officers continued to detain defendant on the curb while Lieutenant Harper returned to the Robin's Nest restaurant to review additional security footage. (2T12-19 to 13-7) The additional footage showed the suspect's face which was not visible in the footage which Lieutenant Harper had reviewed prior to questioning and searching defendant. (2T69-21 to 70-1)

Defendant was not handcuffed at first because Lieutenant Harper felt there were sufficient officers on the scene, and thus it was safe. (2T12-17 to 21; 2T63-11 to 14) However, defendant was not free to leave as he was in custody. (2T25-7 to 13; 2T32-17 to 33-7; 2T63-15 to 18)

Despite not being Mirandized (2T63-21 to 22; 2T67-2 13 to 16), the police interviewed defendant. Defendant stated that he was wearing gloves because it was cold. He admitted to having beer in his backpack, trash bags, chicken, and nothing else. He said he had just left Ott's when he was stopped and just walked past all the police officers. (2T16-5 to 19-1; 2T24-14 to 25-1) Defendant denied going to the Robin's Nest; he said only that he had been to the Quick Mart and Ott's. (2T30-17 to 22; 2T46-20 to 47-4) Certain that the additional footage showed defendant, Lieutenant Harper returned to where defendant was located,

handcuffed him at about 1:15 a.m., and brought him to the police station. (2T32-17 to 23; 2T69-12 to 70-10; 2T69-23 to 70-6)

## LEGAL ARGUMENT

### POINT I

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHO FAILED TO RAISE A MOTION TO SUPPRESS DEFENDANT'S ORAL REMARKS TO THE POLICE (Da110-112)

Defendant submits that when trial counsel failed to move to suppress defendant's oral remarks pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), he was ineffective. Specifically, defendant made incriminating remarks while in custody which went unchallenged, and these incriminating remarks were obtained by the police as a result of the failure of the police to provide the necessary prophylactic warnings.

The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 18, 541 (2013), citing Strickland v. Washington, 466 U.S. 668 (1984). Strickland, which was adopted in New Jersey in State v. Fritz, 105 N.J. 42 (1987), set forth a two-prong test to determine whether a defendant has been deprived of effective assistance of counsel. Under the first prong of the test, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and

that “counsel made errors so serious that ‘counsel’ was not functioning as the counsel guaranteed by the Sixth Amendment.” Strickland, 466 U.S. at 687-688. A defendant must show that counsel’s actions were beyond the “wide range of professionally competent assistance.” Id. at 690. The “quality of counsel’s effectiveness” is based on the “totality of counsel’s performance in the context of the State’s evidence of defendant’s guilt.” State v. Marshall, 123 N.J. 1, 165 (1991). The standard for establishing that a defendant was denied the effective assistance of counsel is the same under both the federal and state constitutions. State v. O’Neal, 219 N.J. 598 (2000).

In order to show prejudice under the second prong, defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There must be a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A court focuses on the “fundamental fairness of the proceeding whose result is being challenged.” Id. at 696. “If counsel’s performance has been so deficient as to create reasonable probability that these deficiencies materially contributed to defendant’s conviction, the constitutional right would have been violated.” Fritz, 105 N.J. at 58.

Furthermore, to show prejudice in connection with a guilty plea, “a defendant must prove that there is a reasonable probability that, but for counsel’s

errors, he or she would not have pled guilty and would have insisted on going to trial.” State v. Castagna, 187 N.J. 293, 351 (2006); State v. Antuna, 446 N.J. Super. 595, 600 (App. Div. 2016). See Hill v. Lockhart, 474 U.S. 52, 59 (1985) (In a challenge to a conviction resulting from a guilty plea, a defendant may satisfy the prejudice prong of Strickland by showing “a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.”)

In determining whether a defendant has stated a prima facie claim for relief in a PCR hearing, the court must view the facts in the light most favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-463 (1992); State v. Pratt, 316 N.J. Super. 50-51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999). Defendant submits that upon reviewing the facts in the light most favorable to him, the court will conclude that an evidentiary hearing is necessary to determine the effectiveness of trial counsel’s representation. No evidentiary hearing was conducted in this matter.

This court exercises de novo review over the court’s factual findings and legal conclusions because the PCR court conducted no evidentiary hearing, and thus made no credibility findings. State v. Harris, 181 N.J. 391, 420-421 (2004), cert. denied, 545 U.S. 1145 (2005) (internal citations omitted). “A trial court’s interpretations of the law and the legal consequences that flow from established

facts are not entitled to any special deference.” Id. at 419 (citation omitted). Therefore, “resolution of the claim is based on objective evidence in the record, and not on any credibility determinations made by the PCR court.” Id., See also State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (Appellate courts “review under the abuse of discretion standard the PCR court’s determination to proceed without an evidentiary hearing.”)

“Custody may occur in a suspect’s home or a public place.” State v. Coburn, 221 N.J. Super. 586, 595 (App. Div. 1987), certif. denied, 110 N.J. 300 (1988). Custody arises only after the police conduct constitutes the functional equivalent of a formal arrest based on an objective evaluation of the totality of the circumstances. See Berkemer v. McCarty, 468 U.S. 420 (1984). New Jersey courts have adopted the “objective reasonable man test” in assessing whether a suspect is in custody at the time of questioning. See State v. Hubbard, 222 N.J. 249, 266-267 (2015).

Miranda warnings are required after the suspect is “taken into ‘custody’ or his freedom has otherwise been significantly restrained.” Oregon v. Elstad, 470 U.S. 298, 309 (1985). The failure to administer Miranda warnings before a custodial interrogation creates a presumption of compulsion. Hubbard, 222 N.J. at 265. Absent Miranda warnings, the State must prove that a defendant was somehow aware of the existence of his right to counsel. See State v. Clausell,

121 N.J. 298, 353 (1990). Any statements made by a suspect while in custody without the benefit of receiving his Miranda rights, whether exculpatory or inculpatory, may not be used in the State's case-in chief. See State v. Hartley, 103 N.J. 252, 262 (1986).

In determining whether a defendant was aware of his right to counsel despite the lack of Miranda warnings, a court looks to whether the suspect was questioned in a "police-dominated atmosphere," which could impose "inherently compelling pressures" on a suspect. Miranda, 384 U.S. at 444-445. Factors which should be considered include the time and place of the interrogation, the interrogator's status, the suspect's status, length of the questioning, whether the police are asking the questions to secure safety on the scene, whether the suspect volunteered information, and whether the suspect has been deprived of his freedom in any way. See State v. P.Z., 152 N.J. 86, 103 (1997). The ultimate consideration is whether a reasonable person would believe he could not leave freely. Id. at 102.

In the instant matter, trial counsel was ineffective by not challenging defendant's remarks to the police—remarks which could have been used in the State's case in chief against defendant had he chosen to go to trial. It is beyond cavil that defendant was in custody when he was questioned by the police. He was surrounded by numerous police officers. Lieutenant Harper specifically

testified that defendant was not free to leave and that he was in custody. (2T25-7 to 13; 2T32-17 to 33-7; 2T63-15 to 18) Specifically, defendant made an oral statement to the police that he had been to Ott's and the Quick Mart, but he denied being at the Robin's Nest restaurant—despite the videos made by the Robin's Nest security cameras. A jury would have seen, and most likely would have been made aware by the prosecutor in summation, that an inconsistency existed between defendant's denial of entry into the Robin's Nest and the videos showing that he had in fact entered the Robin's Nest. In addition, defendant said that he had beer, trash bags, and chicken in his backpack. He never mentioned that he had a laptop there. It can only be construed by a reasonable jury that defendant did not mention the laptop because he was hoping that the police would not find it—a scenario which could only provide a jury with inferences that defendant was guilty as charged.

In State v. O'Neal, 190 N.J. 601, 615-616 (2007), the Supreme Court cited Stansbury v. California, 511 U.S. 318, 323 (1994) when it stated that “custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” The “unarticulated plan [of a police officer] has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable [person] in the suspect's position would



have understood his situation.” O’Neal, 190 N.J. at 616, citing Berkemer, 468 U.S. at 442.

In O’Neal, the Supreme Court held that based on the nature of the police encounter, which in that case occurred after two plain-clothed police officers stopped O’Neal and confronted him after observing an alleged drug transaction, a reasonable person in O’Neal’s position would not have believed he was free to leave. Defendant also would not have believed he was free to leave. Although defendant was not initially placed under formal arrest, he was surrounded by numerous police officers. Lieutenant Harper’s subjective belief that Miranda rights were not needed in this situation was wrong. Lieutenant Harper clearly testified that defendant was not free to leave and that he was in custody. The Court in O’Neal felt that because O’Neal was in custody and not Mirandized, his remark, upon the officer’s question of what he had in his sock, that he had cocaine in his sock, should have been suppressed. Similarly, all of defendant’s answers were made in response to police questioning without the benefit of Miranda warnings when he was not free to leave, and defense counsel should have moved to suppress those remarks. Had trial counsel moved to suppress and had cited O’Neal, there is a reasonable probability that he could have convinced the trial court to suppress all of defendant’s answers to the police questioning.

Since no motion to suppress was raised, defendant was subjected to ineffective assistance of counsel.

By not moving to suppress defendant's statements, trial counsel fell below the standard for competent attorneys articulated in Strickland and in Fritz. Had trial counsel raised a motion to suppress, there is a reasonable probability that the outcome would have been different because much of the State's case in chief would have been suppressed. Instead of accepting the plea offer of the State for an extended term of imprisonment, defendant could have chosen to go to trial based upon the weakness of the State's proofs against him, or tried to negotiate a more favorable plea bargain where an extended term could have been taken off the table. See Castagna, 187 N.J. at 351; Antuna, 446 N.J. Super. at 600; Hill v. Lockhart, 474 U.S. at 59.

Defendant further submits that the PCR court's analysis is flawed and that a remand for an evidentiary hearing is required. In denying defendant's petition for post-conviction relief, the court cited Miranda for the proposition that "[g]eneral on the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" does not require Miranda warnings. (Da111) However, defendant was not just a citizen who may have witnessed a criminal event; he was the sole suspect. Miranda warnings were required before the questioning of defendant and before the police

examined his backpack. A citizen-witness does not get questioned and his property examined by the police for evidence of a crime; a suspect does.

Defendant disagrees with the conclusion of the PCR court that defendant was not in custody when Patrolman Deveney stopped him. (Da112) Defendant was stopped and sitting on the curb in cold weather in the dead of winter. He was not free to leave. However, there was no police questioning until Lieutenant Harper arrived at the scene. It is beyond cavil that defendant was in custody at the time Lieutenant Harper arrived as he admitted that defendant was not free to leave and that there were sufficient officers present so that defendant did not have to be handcuffed at first. The PCR court recognized that at least when Lieutenant Harper arrived, defendant was in custody. (Da112)

More importantly, the PCR court's opinion, rejecting the issue regarding the suppression of defendant's oral remarks, speaks of defendant having been subjected to a lawful arrest based upon the lieutenant's familiarity with defendant as a suspect in nearby robberies. (Da112) Firstly, defendant was not a robbery suspect; he was a burglary suspect. No issue of a potential for violence exists here. Secondly, the PCR court ignored the issue at hand and spoke of the legality of the arrest which is not in issue. (Da112) Rather, the issue is whether Miranda rights should have been afforded prior to questioning defendant. Assuming the arrest was valid, that does not obviate the need to provide Miranda

warnings prior to questioning a suspect who is in custody. This was not done in this matter, and the State was able to obtain oral remarks from defendant which it should not have been able to obtain without first administering Miranda rights. Trial counsel accordingly was ineffective by failing to file a motion to suppress defendant's statements, and a remand is warranted for an evidentiary hearing.

## POINT II

### TRIAL DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO MAKE ANY ARGUMENTS REGARDING MITIGATING FACTORS AT SENTENCING (Da114-115)

Trial counsel failed to make any arguments at sentencing regarding the existence of mitigating factors. At a criminal sentencing, "there should be presented 'the fullest information possible concerning the defendant's life and characteristics.'" State v. Fuentes, 217 N.J. 57, 71-72 (2014), quoting State v. Marzolf, 79 N.J. 167, 176 (1979). The court may evaluate "a range of information unconstrained by evidential considerations." State v. Randolph, 210 N.J. 330, 348 (2012). Accordingly, trial counsel was ineffective, and this matter should be remanded for resentencing, should the arguments in Point I are rejected and no remand occurs for an evidentiary hearing.

A PCR petition "is not a pro forma exercise, but a meaningful procedure to" root out mistakes that cause an unjust result either in a verdict or sentence. See State v. Hess, 207 N.J. 123, 144-145 (2011), citing State v. Feaster, 184 N.J.

235, 249 (2005). The Supreme Court has held that “where mitigating factors are amply based in the record before the sentencing judge, they must be found.” State v. Dalziel, 182 N.J. 494, 504-505 (2005). “In our view, the ability of counsel to provide a meaningful argument at sentencing, even in a case that appears ‘open and shut,’ is no less important than the opportunity to give a summation in a nonjury case.” State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002)

[T]he failure to present and argue the mitigating evidence can only be explained as attorney dereliction. In the end, the restrictive plea agreement helped to fuel the breakdown of the adversarial process in this case. The net effect of counsel’s abdication of his role as an advocate was that the sentencing court was deprived of information and arguments that well have led it to impose a lesser term. The sentencing court heard the prosecution’s impassioned account, and from the defense a deafening silence.

We find that the failure to present mitigating evidence or argue for mitigating factors was ineffective assistance of counsel—even within the confines of the plea agreement. Defendant’s attorney was not functioning as the ‘counsel’ guaranteed by our Federal or State Constitution.

[Hess, 207 N.J. at 154 (footnote deleted) (citations deleted)]

One cannot expect a sentencing court to search for mitigating factors on its own if counsel fails to bring them to the attention of the court. It is the duty of defense counsel to bring them to the attention of the trial court. See State v. Blackmon, 202 N.J. 283, 297 (2010) (“mitigating factors that are suggested in

the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record.")

Trial counsel should have argued that defendant's conduct did not cause serious harm. N.J.S.A. 2C:44-1b(1). According to the presentence report, the victim was sent a victim letter, but no response was received. The probation officer then telephoned her, and she said that she was not requesting restitution at this time. (PSR19) One would think that if defendant had caused serious harm, the victim would have responded on her own and also requested restitution.

Trial counsel also should have argued that defendant did not contemplate serious harm. N.J.S.A. 2C:44-1b(2). Although material/financial gain was listed in the assessment of factors contributing to the present offense (PSR18), poor judgment and a disregard for the consequences of illegal activity were seen as the motivating factors which contributed to defendant's commission of the instant offense.

Defendant submits the PCR court failed to properly analyze the argument of PCR counsel regarding mitigating factors. Defendant was not challenging the weighing of aggravating and mitigating factors, the imposition of an extended term, or the legality of the sentence at this point. Rather, he argued that trial counsel should have raised certain mitigating factors as he was obligated to do

and made a proper sentencing argument, but he failed to do so. Had trial counsel done so, there is a reasonable probability that defendant would have been given a lesser sentence within the parameters of the plea bargain. The PCR court found that defendant was not prejudiced by counsel's failure to argue mitigating factors. (Da115-116) However, defendant contends that it is impossible to determine whether he was prejudiced when the mitigating factors were never argued. However, the court can judge by looking to objective evidence in the record. The Appellate Division is not a fact-finding body, so it could not be expected to consider that which was not raised below and which was not placed on the record. The PCR court in effect made its decision in a vacuum because it could not judge what might have made the sentencing judge impose a lesser sentence had mitigating factors been argued, but it can judge by looking to objective evidence in the record. The objective evidence in the record supported mitigating factors one and two, and thus a remand for sentencing is required based on ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, defendant contends that he is entitled to a remand for an evidentiary hearing and a sentencing hearing.

Respectfully submitted,

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PUBLIC DEFENDER  
Attorney for Defendant-Appellant

By: s/Steven E. Braun  
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Designated Counsel

Dated: November 12, 2024



SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-2910-23

STATE OF NEW JERSEY,

PLAINTIFF-RESPONDENT,

V.

JOHN L. HARRIS,

DEFENDANT-APPELLANT.

CRIMINAL ACTION

On Appeal from an Order Denying  
Petition for Post-Conviction Relief in  
the Superior Court of New Jersey, Law  
Division, Burlington County.

Sat Below:  
Hon. Richard J. Nocella, J.S.C.

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AMENDED BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS NOT CONFINED

## **PROCEDURAL HISTORY**

On July 31, 2018, the Burlington County Grand Jury returned Indictment 2018-07-09250-I, charging defendant, John L. Harris, with the following: fourth-degree Criminal Mischief, in violation of N.J.S.A. 2C:17-3a(1) (Counts One, Three, Six, Nine, Twelve, Fourteen, Sixteen, Eighteen and Nineteen); third-degree Burglary, in violation of N.J.S.A. 2C:18-2a(1) (Counts Two, Four, Seven, Ten, Fifteen, Seventeen and Twenty); third-degree Theft By Unlawful Taking, in violation of N.J.S.A. 2C:20-3a (Counts Five, Eight, Eleven, Twenty-One and Twenty-Two); and third-degree Criminal Attempt – Burglary, in violation of N.J.S.A. 2C:5-1a(1) and N.J.S.A. 2C:18-2a(1) (Count Thirteen). [Da1-22].<sup>1</sup>

On February 27, 2019, the State filed a Notice of Motion for Joinder of Offenses of Indictment 18-05-0663 and Indictment 18-07-0925. [Pa1].

On March 13, 2019, the parties appeared before the Honorable Charles A. Delehey, J.S.C., Ret. Recall, on the State’s motion to join the matters of Indictment 18-05-0663 and Indictment 18-07-0925. [T]. Defendant was represented by Assistant Deputy Public Defender Karen Thek on Indictment 18-05-0663 and

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<sup>1</sup> “T” refers to the hearing transcript dated March 13, 2019.

“2T” refers to the motion to suppress transcript dated May 16, 2019.

“3T” refers to the plea transcript dated June 4, 2019.

“4T” refers to the sentencing transcript dated August 15, 2019.

“5T” refers to the post-conviction relief hearing dated September 25, 2023.

“Pa” refers to the State’s Appendix.

“Da” refers to Defendant’s Appendix.

Timothy S. Farrow, Esq. on Indictment 18-07-0925. [T3-1 to -6]. Judge Delehey granted the State's motion and issued an order detailing the same. [T8-9 to -19; Pa2]. At that time, the State's global plea offer was 10 years in New Jersey State Prison, with five years without parole. [T10-9 to -11].

On March 20, 2019, defendant filed a Notice of Motion to Suppress Evidence Obtained as a Result of a Warrantless Illegal Search and Seizure. [Pa2]. On March 29, 2019, the State filed a brief in opposition to defendant's motion to suppress evidence.

On May 16, 2019, defendant appeared again before Judge Delehey for a hearing on his motion to suppress evidence. [2T]<sup>2</sup>. Mount Holly Police Department Lieutenant James Harper testified on behalf of the State. [3T24 to 4-1]. On May 22, 2019, the court issued a decision denying defendant's motion to suppress evidence. [Pa3-8]. Judge Delehey found that the police had reasonable suspicion to stop defendant based on his possession of a distinctive backpack that matched the one observed in the surveillance footage, the clothing worn by defendant and the time and location where defendant was initially located. [Pa7]. Judge Delehey also held that police appropriately took defendant into custody and performed a legal search of his person incident to arrest. [Pa7].

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<sup>2</sup> Defendant also appeared before the Honorable Terrence R. Cook, P.J.Cr. on the same day for a Pretrial Detention hearing. That hearing is not relevant for purposes of this appeal.

On June 4, 2019, defendant appeared before Judge Delehey to enter a plea of guilty as part of a negotiated resolution of both pending cases. [3T]. In exchange for his plea of guilty to Count Fifteen, third-degree Burglary, the State agreed to dismiss all remaining counts of the indictment as well as Indictment 18-05-0663 in its entirety. [3T2-1 to -18]. Additionally, defendant conceded that he was subject to an extended term sentence and understood that the State would ask that he be sentenced to eight years in New Jersey State Prison for which he must serve four before parole eligibility and that the State would ask that it run concurrent to a pending Camden County matter. [3T2-9 to -22]. Defendant acknowledged that for a third-degree crime he was only exposed to a five year sentence and that he was stipulating that if the matter proceeded to trial, the State would make a motion for an extended-term sentence which the court would likely grant. [3T2-23 to 3-4]. Defendant was aware that as part of the State's offer, in order to enter a guilty plea to only one count of the indictment, he would have to be sentenced to an extended term of incarceration. [3T3-5 to 4-5]. His counsel also explained to defendant why he was eligible to be sentenced to an extended term. [3T3-5 to 4-5].

The court explained to defendant that if he proceeded to trial and was convicted on numerous counts of the indictment, he could be sentenced to a five-year term of imprisonment for each count, to run consecutive to each other. [3T4-12 to -21]. Defendant testified that he understood. [3T4-9 to -22]. Prior to accepting

defendant's plea, the court again spelled out the terms of the agreement, to which defendant testified that he understood. [3T6-5 to 7-2].

Defendant testified that he understood that by entering a plea of guilty, he was foregoing his right to a jury trial where he could have exercised his right to remain silent. [3T7-6 to -15]. Defendant also testified that he was pleased with his attorney's services and advice and was able to understand what was happening. [3T7-20 to 8-4]. Defendant denied being threatened or coerced into entering the plea agreement. [3T8-6 to -9].

Defendant then entered a factual basis for his plea. He testified that on February 9, 2018, he unlawfully entered the Robin's Nest restaurant and took a bottle of alcohol. [3T9-6 to -20]. While inside the restaurant, he also rummaged around the cash register with the intent to take money from the cash drawer if there was any in there. [3T9-11 to -17].

On August 15, 2019, defendant appeared for sentencing before the Honorable Philip E. Haines, J.S.C. [4T]. The State argued for the application of aggravating factors 3, 6 and 9, and asked for the court to impose the negotiated sentence. [4T4-20 to 6-5]. Defendant also asked the court to impose the negotiated sentence and run it concurrent to the sentence he was serving in Camden County. [4T7-5 to -11].

The court applied aggravating factors 3, 6 and 9 and sentenced defendant pursuant to the agreement to 8 years in New Jersey State Prison with 4 years to be

served before parole eligibility. [4T8-7 to 9-13]. Judge Haines ordered that defendant's sentence run concurrent to his Camden County sentence and noted that defendant was entitled to 61 days of jail credit and 35 days of gap credit. [4T9-10 to 10-35]. Defendant was ordered to pay the following fines and penalties: \$75 Safe Neighborhood Fund; \$50 Victims of Crime Penalty and \$30 Law Enforcement Training Fund. [4T10-6 to -15]. All remaining counts of the indictment were dismissed, as well as Indictment 18-05-0663 in its entirety. [4T10-17 to 11-12]. Prior to concluding the hearing, defendant was advised of his right to appeal his conviction and sentence as well as to file a petition for post-conviction relief. [4T11-13 to 12-6].

On September 19, 2019, defendant filed a notice of appeal in the Superior Court of New Jersey, Appellate Division. [Pa9-13]. In his appeal, defendant raised the following arguments:

POINT I

LIEUTENANT HARPER HAD NO BASIS TO SEARCH MR. HARRIS'S PERSON AND BAGS IMMEDIATELY UPON ENCOUNTERING HIM ON THE SIDEWALK, BEFORE DETAINING HIM FOR A HALF HOUR PRIOR TO TAKING HIM INTO CUSTODY.

Subpoint A.

Mr. Harris's Motion to Suppress and the Court's Decision.

Subpoint B.

The Warrantless Search of Mr. Harris's Person and Bag, Conducted by Police 30 Minutes Before His Arrest, Was Not a Search Pursuant to Arrest.

Subpoint C.

The Search Cannot Be Justified As A Protective Frisk For Weapons Because There Was No Indication Mr. Harris Was Armed and Dangerous.

POINT II

THE TRIAL COURT ERRED IN SENTENCING MR. HARRIS TO EIGHT YEARS IMPRISONMENT WITH FOUR YEARS OF PAROLE INELIGIBILITY FOR A THIRD-DEGREE OFFENSE, WHICH IS AN ILLEGAL SENTENCE.

On March 17, 2022, this Honorable Court denied defendant's appeal. [Da36-61].

On November 9, 2022, defendant filed a pro se petition for post-conviction relief. [Da63]. On May 28, 2023, defendant filed a brief in support of his petition for post-conviction relief. [Da73].

On September 25, 2023, defendant appeared before the Honorable Richard J. Nocella, J.S.C., at a hearing to address his petition for post-conviction relief. [5T]. Defendant was represented by Kayla Rowe, Esq. [5T].

On February 14, 2024, the court issued an order and opinion, denying defendant's petition for post-conviction relief without ordering an evidentiary hearing. [Da104-116].

On May 23, 2024, defendant filed a Notice of Motion as to File his Appeal Within Time. [Da117]. On June 13, 2024, this court granted his motion. [Pa14].

## **STATEMENT OF FACTS**

On February 9, 2018, at approximately 12:07 a.m., Mount Holly Police Department Lieutenant James Harper was dispatched to a reported burglary alarm at the Robin's Nest restaurant. [4T4-11 to -22]. When he arrived at approximately 12:22 a.m., three other officers were already at the scene. [4T4-23 to 5-3; 4T9-16 to -18]. The restaurant owner also responded to the scene and provided police with access to the multi-camera and multi-angle system. [4T5-12 to 6-6].

Lt. Harper reviewed the footage and observed that the suspect appeared to be of medium height and build with a hooded jacket and heavier jacket on top with jeans. [4T6-10 to -24]. The suspect was also wearing a wool cap and pants that were a lighter color than his jacket. [4T6-19 to -24]. He wore boots and gloves and carried a drawstring backpack with fluorescent stripes going down the side. [4T6-19 to -24]. A police dispatch was released identifying the suspect as a white male wearing a hoodie with a black jacket over top with a beanie. [4T56-3 to -7]. Lt. Harper explained that the color on the security video did not appear accurate because it was a night vision video. [4T71-2 to -7].

Mount Holly Police Patrolman Declan Deveney was on patrol on Washington and Madison streets in Mount Holly and stopped a subject, later identified as defendant, that fit the description provided by Lt. Harper. [4T7-3 to -15]. Patrolman Deveney stopped the subject at approximately 12:39 a.m. at the intersection of



Madison and King streets, which is approximately two blocks from the Robin's Nest restaurant. [4T8-4 to -18; 4T9-9 to -19]. The subject was observed walking in the direction away from the Robin's Nest restaurant. [4T11-4 to -7].

Defendant was seated on a curb at the time that Lt. Harper arrived at the scene. Upon arriving at where the suspect was being held, Lt. Harper observed the same backpack that he saw in the security footage. [4T9-21 to 10-3]. He also noted that the suspect's build and height were similar to the person in the video and that his clothing matched. [4T9-21 to 10-3]. Lt. Harper identified the subject as John Harris, who was a person known to him due to his prior convictions for various past burglaries. [4T10-4 to -9]. Defendant also possessed a laptop bag that was placed over his shoulder. [4T21-11 to -14].

Having identified defendant as a suspect in the burglary, and with defendant not free to leave, Lt. Harper searched defendant's person to make sure he did not have any weapons on him and searched defendant's laptop bag and backpack for evidence from the burglary. [4T11-8 to -15]. Lt. Harper explained that he did not place defendant in handcuffs at that point because there were sufficient officers on the scene that he believed it was safe. [4T12-17 to -21]. He first asked defendant what was in the bag on his back. [Da120]. Defendant responded that there were beers in there and opened the bag and showed them to Lt. Harper. [Da120]. Next, Lt. Harper asked what was in the laptop bag. [Da120]. Defendant opened the bag which

revealed a bottle of Fireball Whiskey, a laptop and some trash bags, and then closed the bag. [Da120; 4T12-4 to -16]. Lt. Harper did not seize anything from the bag at the time of the search. [4T71-16 to -20].

Lt. Harper next asked defendant if he had any money in his possession. [Da120]. Defendant began searching through his pockets and pulled out some change. [Da120]. Immediately, after, Lt. Harper asked defendant if he could stand up to be quickly patted down. [Da120]. He asked defendant if he had any weapons on him, like a crowbar. [Da120]. Lt. Harper swiftly patted defendant down and then let him return to his seated position on the curb. [Da120]. Lt. Harper then opened the top of the laptop bag and observed the whiskey, trash bags and laptop. [Da120].

When questioned by police, defendant stated that he “just came out of Ott’s” after getting done work between 7:30 p.m. and 8:00 p.m. [4T16-7 to -14]. He also told police that he had beer in his backpack. [4T20-21 to -23].

Shortly after, Mount Holly Patrolman Tim Podeszwa advised that there was additional security footage from Robin’s Nest that was relevant to the case. [4T12-22 to 13-3]. While reviewing the footage, Lt. Harper could see the suspect enter through the window of the business and observed a direct view of the suspect’s face. [4T13-13 to -19]. Additional footage angles also revealed the suspect’s face, which Lt. Harper positively identified as defendant. [4T13-13 to -19]. Lt. Harper returned

to where defendant was being detained and informed him that he was under arrest. [4T25-20 to -25].

Once defendant was brought back to the station and processed, Lt. Harper conducted a full search of the bag and opened the laptop where he found business cards for a nearby surgical center that had also been burglarized. [4T71-24 to 72-4]. A hat matching the one that was depicted in the surveillance footage was found in defendant's coat pocket. [4T40-2 to -14].

## **LEGAL ARGUMENT**

### **POINT I**

#### **JUDGE NOCELLA PROPERLY CONCLUDED WITHOUT GRANTING AN EVIDENTIARY HEARING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS THE STATEMENTS DEFENDANT MADE TO POLICE DURING THE INITIAL INVESTIGATION.**

Judge Nocella properly denied defendant's argument that trial counsel was ineffective for failing to file a motion to suppress his statements to police pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). At the time defendant made the statements in question, he was part of an investigatory stop and was not subject to a custodial interrogation. Further, it strategically did not make sense for defendant to file a motion to suppress his statements as it would have directly contradicted the motion he filed to suppress the items located in his bag. Finally, defendant's argument fails because the statements would have little to no impact on the

overwhelming evidence the State possessed of defendant's guilt, and would not have impacted trial or the State's position during plea negotiations.

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. U.S. CONST. amend. VI; State v. Norman, 151 N.J. 5, 23 (1997). The "benchmark" for analysis of a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

To demonstrate ineffective assistance of counsel, a defendant must satisfy a two-prong test enunciated by the United States Supreme Court in Strickland. Id. at 687; State v. Fritz, 105 N.J. 42, 52 (1987). This test requires defendant to show 1) "that counsel's performance was deficient," and 2) "that the deficient performance prejudiced the defense." Id. The defendant is required to make both showings to demonstrate that a failing of the adversary process rendered the conviction unreliable. Id.

The defendant must first establish that counsel performed deficiently, to the extent "that counsel made errors so egregious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To satisfy this element, the defendant must demonstrate that counsel's representation fell below an

objective standard of reasonableness as determined by prevailing professional norms and the circumstances of the individual case. Id. at 687-88, 690.

When challenging counsel's performance, the defendant must specifically allege acts or omissions that constitute ineffective assistance. Id. at 690. Additionally, the defendant must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." Id. at 689. Therefore, the defendant must rebut the presumption that the challenged action, under the circumstances of the trial, would be "considered sound trial strategy." Id. (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690. Defendants must do more than make "bald assertions" of ineffective assistance. State v. Cummings, 321 N.J. Super., 154, 170 (1999).

To satisfy the second prong of the Strickland test, defendant must demonstrate that counsel erred so seriously that defendant was deprived of a fair trial with reliable results. Strickland, 466 U.S. 687; Williams v. Taylor, 529 U.S. 362 (2000); State v. Russo, 333 N.J. Super. 119 (App. Div. 2000). In attempting to meet the requirements of the second prong, it is not sufficient to show that the alleged errors had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. Defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the case would have been different. Id. at 694; Williams v.

Taylor, *supra*, 529 U.S. 362 (2000); State v. Russo, *supra*, 333 N.J. Super. at 139. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 693.

Here, defendant argues there were two specific statements defendant made that should have been suppressed pursuant to Miranda. First, when asked by police where he had been that night, defendant responded that he recently left Ott's and the Quick Mart and did not state that he was at the Robin's Nest restaurant. [Db12]. Second, defendant argues that his statement that his laptop bag contained beer, chicken and trash bags, and not the laptop that was ultimately located in it, should have been suppressed. [Db12]. Not only did defendant elicit these responses during an investigatory detention and thus his Fifth Amendment rights did not apply, they also were of no moment and would have little to no impact at trial or in plea negotiations.

When a defendant's ineffective assistance of counsel claim is based on a failure to file a suppression motion, defendant must establish that the suppression motion has merit. State v. O'Neal, 190 N.J. 601, 618–19 (2007); State v. Fisher, 156 N.J. 494, 501 (1998). Defendant failed to carry his burden in his petition and thus its denial must be affirmed by this Honorable Court.

In State v. O'Neal, 190 N.J. 601 (2007), the Supreme Court of New Jersey provided the following description of the circumstances under which Miranda warnings are required:

In general, Miranda warnings must be given before a suspect's statement made during custodial interrogation [may] be admitted in evidence. In Miranda, the Court defined "custodial interrogation" as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The determination whether a suspect is in custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned . . . . [T]he only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation.

[Id. at 615-16 (first and third alterations in original) (internal citations and quotation marks omitted).]

"The rights set forth in Miranda are not implicated when the detention and questioning is part of an investigatory procedure rather than a custodial interrogation, or where the restriction on a defendant's freedom is not of such significance as to compel the conclusion that his liberty is restrained." State v. Smith, 307 N.J. Super. 1, 9 (App. Div. 1997) (citations and internal quotation marks omitted), certif. denied, 153 N.J. 216 (1998). "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" does not require Miranda warnings. Miranda, supra, 384 U.S. at 477. The United States Supreme Court, as well as New Jersey Courts, have distinguished between detaining a citizen in the course of an investigatory stop,

pursuant to Terry v. Ohio, 392 U.S. 1, 21-22, (1968), and placing a citizen in custody so as to trigger Miranda requirements. See Berkemer v. McCarty, 468 U.S. 420, 435-42 (1984); see also State v. Smith, 374 N.J. Super. 425 (App. Div. 2005). The characterization of police investigative detentions as non-custodial is not limited to motor vehicle stops. "[P]olice may conduct general on-the-scene questioning of a suspect, as authorized by Terry v. Ohio, without giving Miranda warnings." State v. Toro, 229 N.J. Super. 215, 220 (App. Div. 1998), certif. denied, 118 N.J. 216 (1998).

In State v. Pierson, 223 N.J. Super. 62, 67-68 (App. Div. 1988), the defendant was detained for 30 minutes at the scene of a fire investigation while police asked why he was there and then investigated his story. The Superior Court of New Jersey, Appellate Division, concluded that "[a]s [the] defendant's restraint constituted a permissible investigatory detention rather than rendering him in custody, the absence of Miranda warnings did not preclude the evidentiary use of [the] defendant's responses to the officer's questions." Ibid.; see also State v. Smith, supra, 374 N.J. Super. 425, 431-36 (2005) (analogizing the restraint inherent in a domestic violence dispute to that involving a traffic stop).

Here, defendant was initially questioned as part of an investigatory stop and therefore police were not required to administer Miranda warnings before speaking with him. Defendant was first stopped by Mount Holly Patrol Officer Deveney at approximately 12:39 a.m. in response to a description he heard of the suspect for a



very recent burglary that occurred at the Robin's Nest restaurant. Defendant matched the clothing and backpack description and was walking in the direction away from the restaurant. When Sergeant James Harper arrived, he immediately matched defendant's clothing and backpack to that of a suspect he had observed minutes before on the Robin's Nest security footage. [T9-19 to 10-13]. At this point that Sergeant Harper arrived and observed defendant, the police had probable cause that defendant was the person who burglarized the Robin's Nest.

Further, at the point he was not free to leave, defendant did not make any incriminating statements to police and they did not use any of the answers he provided to establish probable cause that he had committed the burglary. Defendant was asked questions typical of an investigative stop, including, what items were in his backpack, where he was coming from, if he had any weapons on his person or warrants for his arrest and why he was out so late.

The answers he gave were not incriminating. First, defendant argues that his response to where he had been that night was incriminating because he did not include that he had been to Robin's Nest restaurant. However, this argument ignores that, as is clear in the restaurant surveillance video and the time of night, Robin's Nest was closed and not open for business, therefore there was no reason for him to have permissibly been there and it would not have made sense for him to give that answer to police.

Second, defendant's argument that he was prejudiced by the jury potentially hearing him neglect fail to admit to police that there was a laptop in his bag is meritless. Defendant's assertion that the jury would assume he purposely did not mention the laptop that was located in his bag is reaching. It is clear in the video and the police reports that defendant did not provide a complete inventory of every item it contained. For example, he did not inform them that there was an open container of alcohol in his bag. Defendant's assertion that his failure to list the laptop would provide a jury with the inference that he was guilty ignored that the State would introduce the bag and its contents at trial.

Most importantly, defendant's argument here ignores that, if counsel filed a motion to suppress his statements made to police during their investigation, he would then be unable to logically argue for the suppression of the items located in his backpack, as he did below. To successfully suppress any statements defendant made during his investigatory stop, defendant must establish that he was under de facto arrest and was not free to go. However, to successfully suppress any items located in his backpack, defendant needed to establish that the officers did not have probable cause or the intention to arrest him at the time they searched it. Defendant could not have simultaneously been under de facto arrest and also not yet a suspect for the crime.

Defendant faced a 22 count Indictment that included third-degree Burglary charges for seven businesses and a residence spanning four dates. In addition to the burglary at Robin's Nest, evidence located in the laptop bag strongly indicated his guilt in the burglary of Mt. Holly Surgical Center as well as the attempted burglary of Horse Feather's Florist on the same night. Thus, because the search of the backpack resulted in more inculpatory evidence than any statements he made during the investigation, it was strategically prudent for counsel to pursue a motion to suppress the evidence from the backpack rather than to challenge the admissibility of defendant's limited statements to police.

Judge Nocella correctly found that defendant failed to establish that he was prejudiced by this alleged deficiency. The evidence of defendant's guilt, even without the statements, was overwhelming. There was surveillance footage depicting defendant unlawfully entering the closed restaurant, rummaging through the register for money, taking an open bottle of alcohol and leaving. The footage clearly depicts defendant's face and distinctive backpack that he possessed when stopped shortly after the crime.

Finally, Judge Nocella correctly denied defendant's request for an evidentiary hearing to address defendant's argument. R. 3:22-10 does not require evidentiary hearings to be held on post-conviction relief proceedings, but leaves it within judicial discretion whether to conduct such hearings. State v. Russo, 333 N.J. Super.

119 (App. Div. 2000) (citing State v. Marshall, 148 N.J. 89, 157, cert. denied, 522 U.S. 850 (1997), State v. Preciose, 129 N.J. 451, 462 (1992)). In determining whether an evidentiary hearing is appropriate, the key issue is whether the taking of oral testimony is necessary to resolve issues raised by defendant. Id.

Moreover, a trial court should only grant an evidentiary hearing to resolve an “ineffective assistance of counsel” claim where defendant has presented a prima facie claim in support of post-conviction relief. Preciose, 129 N.J. at 462; State v. Cummings, 321 N.J. Super. 154, 170 (1999). To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate a reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668. If, with the facts so viewed, the PCR claim has a reasonable probability of being meritorious, then the defendant should ordinarily receive an evidentiary hearing in order to prove his entitlement to relief. State v. Marshall, supra, 148 N.J. 89, 158 (1997).

Defendant did not establish a prima facie case for an evidentiary hearing. He failed to present any evidence that his attorney was deficient, and that, assuming *arguendo* counsel was deficient, that defendant was prejudiced by the alleged deficiencies. Because defendant did not establish a prima facie case of ineffective assistance of counsel, his request for an evidentiary hearing and petition for post-conviction relief were appropriately denied.

## **POINT II**

### **JUDGE NOCELLA CORRECTLY FOUND THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE FOR MITIGATING FACTORS 1 AND 2.**

Judge Nocella appropriately held that counsel was not ineffective for failing to argue mitigating factors one and two because: (1) the proposed factors were not supported by the record; (2) the argument should have been raised on direct appeal and (3) because this Honorable Court previously affirmed defendant's sentence. Moreover, even if applied, the proposed mitigating factors would not have resulted in his sentence being lowered.

First, Judge Nocella appropriately found that this argument was procedurally barred because defendant should have raised the argument on direct appeal. R. 3:22-4 prohibits a defendant from raising issues in post-conviction relief proceedings that could have been raised in a prior proceeding. This rule states in relevant part:

Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, . . . or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

R. 3:22-4.

It has long been held that post-conviction proceedings are not a substitute for direct appeal. Rule 3:22-3; See State v. Cerbo, 78 N.J. 595, 605 (1979). Motions for post-conviction relief “cannot be used to circumvent issues that could have, but were not raised on appeal....” State v. Afanador, 151 N.J. 41, 50 (1997). “In the absence of the timely raising of an issue available on direct appeal or a constitutional infringement, relief will be granted in such proceedings only in exceptional circumstances involving a showing of fundamental injustice.” Cerbo, 78 N.J. at 605. Unless a defendant can establish one of the three exceptions articulated in the rule, a claim that might have been recognized on direct appeal can be barred in a post-conviction relief petition. State v. Mitchell, 126 N.J. 565, 584 (1992).

None of the exceptions to this procedural bar are applicable to this case and thus Judge Nocella properly concluded that defendant should have raised the argument on direct appeal. Notably, on direct appeal, defendant challenged the legality of his sentence, but did not specifically argue for the application of mitigating factors 1 and 2. This Honorable Court affirmed defendant’s sentence, and thus his argument here must be denied.

Next, there was insufficient evidence in the record to apply mitigating factor 1, that defendant’s conduct neither caused nor threatened serious harm, and mitigating factor 2, that defendant did not contemplate that the defendant’s conduct would cause or threaten serious harm. N.J.S.A. 2C:44-1(b)(1); N.J.S.A. 2C:44-

1(b)(2). Defendant’s argument inappropriately places the burden on the victim to respond in a victim letter and request restitution in order to establish that a harm occurred that would prohibit the application of mitigating factor 1. Additionally, the surveillance video depicts defendant ransacking the business causing damage to the point of sale system. Defendant unlawfully entered a business after hours, and attempted to take money from the register drawer and took some inventory. Causing harm is inherent in the crime of unlawfully entering and taking something that belongs to another. Thus, these factors do not apply.

Finally, defendant cannot establish that he was prejudiced by this alleged deficiency. The Appellate Division already affirmed defendant’s sentence, finding that Judge Haines did not err when he sentenced defendant to an extended term of imprisonment as a persistent offender. [Da55-61]. The court also stated that was “satisfied that the sentencing court properly weighted the aggravating factors against the non-existent mitigating factors.” [Da59]. The appellate court concluded, “[t]he sentence imposed in this case—which is above the mid-point of the second-degree sentencing range but below the upper limit of that range—comports with the Code of Criminal Justice and does not “shock [our] judicial conscience.” State v. Roth, 95 N.J. 334, 364-65 (1984). Therefore, even if mitigating factors 1 and 2 applied, the sentence was still proper and Judge Nocella correctly found that defendant failed to

establish pursuant to Strickland that his counsel was ineffective and that he was prejudiced by the alleged ineffective assistance.

### **CONCLUSION**

For the foregoing reasons, the State respectfully urges this Honorable Court to deny defendant's appeal and affirm defendant's convictions and sentence.

Respectfully submitted,

LACHIA L. BRADSHAW  
BURLINGTON COUNTY PROSECUTOR

/s/ Nicole Handy

NICOLE HANDY  
Assistant Prosecutor  
Attorney ID 061632013

Date: February 13, 2025