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| STATE OF NEW JERSEY,<br><br>Respondent,<br><br>v.<br><br>THERESA WILLIAMS,<br>a/k/a "BIBI KHAN"<br><br>Defendant-Petitioner/Appellant. | **SUPERIOR COURT OF NEW JERSEY**<br>**APPELLATE DIVISION**<br><br>App. Div. No.: A-002945-23<br><br>Criminal Action<br><br>On Appeal From:<br>Superior Court of New Jersey, Law Division, Bergen County<br><br>Direct Appeal From A Final Order Denying Post Conviction Relief<br><br>Sat Below:<br>Hon. Gary N. Wilcox, J.S.C.<br><br>Docket No.: BER-10-003631<br>Ind. No.: 11-02-00231 |

# BRIEF ON BEHALF OF DEFENDANT-PETITIONER/APPELLANT, THERESA WILLIAMS

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases:

Statutes:



Court Rules:



Constitutional Provisions:



Other Authorities:

## TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED



## TABLE OF TRANSCRIPTS

1T: PCR Hearing [4/10/23]

2T: PCR Hearing [10/6/23]

3T: PCR Hearing [1/18/24]

4T: GJ testimony excerpt [2/1/11]

5T: Transcript of arraignment on indictment [3/28/11]

6T: Transcript of guilty plea [4/4/11]

7T: Transcript of sentencing [6/3/11]

8T: Excerpt of transcript of Respondent's statement on record to lower court after remand [8/1/13]

## PRELIMINARY STATEMENT

The Defendant-Appellant, Theresa Williams, whose real name is Bibi Khan (hereinafter, "Appellant" or "Ms. Khan"), was taken from her home country of Guyana as a minor to work as a "labor and sex slave." (Da160-167). She was trafficked into the United States and soon began working for an elderly couple in Bergen County, New Jersey, whereupon she described being enslaved as a house servant for the alleged victim in our case in a manner that was consistent with being in bondage Id. Beginning when Ms. Khan was only thirteen years old, "the husband began to engage in sexual relations with her, which she did not feel empowered to refuse or report." State v. Williams, A-1438-15T2 (App. Div. July 12, 2018) (Da232; 1T-27:11-14). This ongoing sexual abuse continued for over ten years until "one last sexual encounter with the husband in 2007." (Da232-233).

The husband died in 2010 and two years later the husband's widow contacted the police to report an attempted extortion involving Ms. Khan, who had apparently supplied graphic videos of her and the husband having sex when she was a minor to another man, who then called the widow and demanded money not to release the videos publicly. (Da68-75).

Two men were later arrested in a vehicle they used while attempting to meet the widow and collect extortion money. Ms. Khan had been in the car with them on

the way to meet the widow, but she escaped the vehicle on her own accord and walked to a nearby bus stop, renouncing any purpose to commit the crime, and also frustrating the attempted extortion. (Da59-60, Da92, Da253-270, Da276-277; 1T-50:6-57:8, 92:15-97:11).

Ms. Khan hired a private attorney to represent her but the lawyer failed to ever tell her about the affirmative defense of "renunciation of criminal purpose," see N.J.S.A. 2C:5-1(d), which was a viable defense given that police surveilling the vehicle on the day of the alleged extortion attempt witnessed Appellant leave the scene on her own accord. (1T-56:12-57:22, 86:10-15; 2T-35:12-16).

The lower court's finding that Ms. Khan did not testify truthfully regarding her lack of intent to commit extortion has no logical bearing on whether or not the defense of renunciation applies. (Da30-31). Under New Jersey law, entitlement to a renunciation defense is not defeated by reason of a defendant's denial of involvement in the crime. See State v. Alston, 311 N.J. Super. 113, 120-23 (App. Div. 1998). Moreover, as Alston found, inconsistent defenses are not only permitted, but when, as here, seemingly inconsistent defenses are reasonably suggested by the facts, a criminal defense attorney should at least be willing to explore such a highly-viable defense with their client.

Furthermore, Ms. Khan's attorney also failed to look into her background as a victim of human trafficking. He never investigated her mental health to

determine whether a diminished capacity defense existed. Ms. Khan testified that when she told her attorney about everything that happened, including the being a trafficked victim, he told her he did not believe her. (1T-66:6-12, 148:24-149:1). She did not receive a copy of the Indictment or any discovery and she only briefly met with her attorney, but all he did was push a guilty plea on her rather than discuss any possible defenses. (1T-60:24-68:9).

Ms. Khan now appeals from the final order of the Superior Court of New Jersey, Law Division, denying her Petition for Post-Conviction relief ("PCR"), in which she alleged ineffective assistance of counsel because her attorney failed to inform her about or otherwise explore the likely possibility of a renunciation defense. At the very least, her attorney should have explored the renunciation issue and discussed this viable defense with his client. Ms. Khan's credibility as to whether or not she intended to commit the crime in the first place has no logical bearing on whether or not she later renounced that purpose, as is indicated by the objective facts. We must demand that our defense attorneys provide minimal information and protection to arrestees, particularly concerning a victim of human trafficking and child sexual abuse, where an extremely viable renunciation defense exists, which is on its face much more powerful than the renunciation defense that caused the reversal in Alston.

## STATEMENT OF FACTS

This matter arises out of a criminal investigation conducted between December 10, 2010, and December 20, 2010, by the Bergen County Prosecutor's Office ("BCPO") and the Englewood Cliffs Police Department ("ECPD"). (Da58-88). The BPCO and the ECPD set up a method to intercept phone calls between an elderly Englewood Cliffs woman who was the victim of an attempted extortion. (Da61-62). The intercepted calls identified a male caller demanding $500,000.00 in exchange for video discs described as images showing the victim's deceased husband having sex with a minor, namely, Ms. Khan. (Da68-75).

The victim had been telephoned by Appellant's codefendant [Persaud] wherein he alone, and not Ms. Khan, offered damning video evidence as identified above in exchange for large sums of money. Appellant has never been identified as being on the taped recordings. (Da58-88).

At an evidentiary PCR hearing held on April 10, 2023, Ms. Khan testified consistently with her previous affidavit that she was born in Guyana and her father physically abused her. (Da160-167). At the age of twelve, Ms. Khan, who had only a third-grade education, left Guyana under the impression she would fly to the United States to attend school. Id. She ended up in smuggled onto a boat with a shipping container bound for Florida, where a handler took her on a flight to JFK

airport in New York and then to stay with family friends in New Jersey. (1T-14:1-19:24).

Ms. Khan eventually wound up living with a Bergen County couple, the Binders. Ms. Khan testified that the name "Theresa Williams" came about because her real name, Bibi Khan, sounded "too Muslim" for the Binders. (1T-21:3-24:7). In addition to performing domestic work, such as cleaning and laundry, Ms. Khan was sexually abused by Mr. Binder, who began having oral and vaginal sex with her when she was only thirteen years old and this continued until she was approximately twenty-five years old. D160-167). Ms. Khan testified that Mrs. Binder once told her it was "her job" to perform sex acts for Mr. Binder, who would record the sex acts. Id. In 2010, after Mr. Binder was diagnosed with cancer he is alleged by Ms. Khan to have asked to see her where he appeared remorseful at the end of his life and decided to give her the video discs documenting the years of sexual abuse and he suggested that she could use the videos to obtain money from Ms. Binder. (1T-103:1-105:11).

After Mr. Binder's death, Ms. Khan gave the sexual abuse videos to one of her codefendants, Rayan Persaud after her other friend a New York police officer had put preconditions on him taking custody of the videos to which she refused to agree. (1T-34:25-39:19, 110:10-112:23). Ms. Khan testified that she later got in a car with Persaud and another man she did not know and drove toward the Binder's

home. (1T-41:24-44:8). In her testimony, Ms. Khan as a sex trafficking victim struggled with her emotions in describing how she felt about the two codefendants' plan to extort the Binders except for her clear intent to renounce their plan. (Da178-207, Da275-277; 1T-46:19-50:13). The lower court did not find Ms. Khan's testimony to be credible and concluded that she was involved in an attempted extortion of the Binders. Da30-31.

Unbeknownst to the Defendants, the entire area surrounding Mrs. Binder's residence was under police surveillance at the time of the alleged attempted extortion. (Da58-88). Persaud's vehicle passed by the home and then parked on a side street. Id. At this point, Ms. Khan made a complete renunciation by escaping from the vehicle and walking to a bus stop over 2000 feet from the Binder's home. (1T-50:6-57:8; Da175-177, Da253-270, Da276-277). Appellant also took various pieces of physical evidence with her such as the video evidence and GPS equipment and this frustrated the codefendants from completing their attempt to extort the victim. Id.

At a PCR evidentiary hearing held on October 6, 2023, Ms. Khan's former attorney Alien Leibowitz testified that there was no investigation of her mental health history, as was reported in the lower court opinion. (Da31-32). Mr. Leibowitz knew some of the documents form the jail indicating that [Appellant] may have mental health issues; however, it only came to his attention after the

guilty plea was entered and as such, there was no inquiry into [her] mental health or mental capacity by way of an evaluation by a mental health professional." (Da14). Any investigation would have uncovered sex trafficking evidence, severe mental trauma and viable defenses to advise the client of before any plea could be taken so as to ensure the appellant if she did plead guilty she did so knowingly, intelligently, and voluntarily. (Da121-138, Da160-174, Da178-207, Da3271-275).

Ms. Khan testified that when she told her attorney about everything that happened he did not believe anything she said. (Da10-11). Appellant also testified that she did not receive a copy of the Indictment and she was unable to speak with her attorney about her defenses as he refused to listen to her side of the story. (1T-59:1-66:12) "[T]he only thing she saw was plea forms that [her attorney] wanted her to sign." (Da11). He also advised her to "write an apology letter to the Binder family..." Id; (2T-47:19-24). The attorney admitted writing out the appellant's guilty plea facts letter for the judge in his own hand. (2T-57:16-58:2, 59:4-16; Da112).

Ms. Khan's attorney had little if no criminal training and new nothing of sex

trafficking, did no mental health investigation whatsoever, and never took any actions to reveal he even thought of a renunciation defense. (2T-12:3-8, 15:24-16:13). He admitted to never informing the appellant of any possible defenses including renunciation; mainly because he never grasped the defense or understood

the significance of appellant's escape to the bus stop thwarting the attempt. (2T-21:21-22:3, 28:1-29:24, 29:25-30:8, 30:17-31:1, 31:24-32:24, 63:21-25, 113:13-23, 35:12-16, 42:6-44:4). Most significantly, the attorney admitted to never delving into the facts surrounding Ms. Khan's escape from the vehicle or its obvious significance to being a viable strong renunciation complete defense to an attempt crime. (2T-63:21-25). According to the lower court decision, "Mr. Leibowitz testified that he did not ask [Ms. Khan] why she went to the bus stop, nor did he investigate as to what was seized from [her] person at the time of the arrest." (Da16).

Ms. Khan's attorney provided no evidence he ever gave the appellant the discovery and he had no evidence to indicate he did any research whatsoever into renunciation defenses or any other aspect of the case, other than looking for evidence of her guilt to assist in ending the case via a plea agreement. (2T-20:9-19,22:4-22:13, 27:13-16, 30:17-32:4). Ms. Khan's attorney admitted he had no time to really review discovery given there was only seven days between the arraignment and the guilty plea. (2T-19:17-20; See 5T; and See 6T). The attorney admitted that the case was not simple and was not uncomplicated. (2T-45:6-10). The attorney admitted the discovery was still missing at arraignment and was voluminous. (2T-47:11-18, 76:4-12, 59:4-16). The attorney was on record in 2011

stating he was missing discovery at the arraignment seven days before Ms. Khan pled guilty. (See 5T-5:1-25). In fact, his testimony at the PCR Hearing was an admission in its totality to the defense attorney not conducting any investigation whatsoever and issuing no subpoenas. (2T-14:6-19, 15:3-8, 39:1-7). This was further evidenced by post conviction post initial remand statements made by the respondent that are exculpatory when applied to the PCR herein concerning the renunciation defense. (8T-32:15-24).

The attorney had no special training or identifiable recalled specific experience handling extortion cases or dealing with clients who were victims of human slavery and sex trafficking. (2T-15:24-16:13). He "does not recall speaking with [Ms. Khan] regarding her immigration status or how she got into the country." Da15. "

Notably, on February 6, 2018, a U.S. Citizenship and Immigration Court determined that Appellant qualifies as a child labor and sex slave because she was held in the USA in a manner that indicated she was in bondage under the control of the alleged victim(s) in this case, the Binders. Da5. Ms. Khan sought and obtained a trafficking visa ("T visa") and her T non-immigrant status entitles her to the protections of the Victims of Trafficking and Violence Protection Act of 2000.[1]

[1] Human trafficking, also known as trafficking in persons, is a form of modern-day slavery in which traffickers use force, fraud, or coercion to compel individuals to

See 22 U.S.C. § 7101. Accordingly, Appellant is not presently subject to deportation, at least at this time. (Da275). However, due to concerns over immigration after the 2024 presidential election this is subject to change and Ms. Khan can possibly deported back to the land that saw her sold into slavery by her own father. (Da160-174). Today she lives in Florida and is married to a police officer. (1T-91:2-9).

## PROCEDURAL HISTORY

On December 20, 2010, the BCPO and the ECPD arrested and charged Ms. Khan and her two codefendants, Rayan Persaud and Saleem Ghany, with various offenses, including conspiring and attempting to commit extortion. (Da3, Da58-88).

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provide labor or services, including commercial sex. Traffickers often take advantage of vulnerable individuals, including those lacking lawful immigration status. T visas offer protection to victims and strengthen the ability of law enforcement agencies to investigate and prosecute human trafficking . Under federal law, a "severe form of trafficking" is: A. Sex trafficking: When someone recruits, harbors, transports, provides, solicits, patronizes, or obtains a person for the purpose of a commercial sex act, where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age; or B. Labor trafficking: When someone recruits, harbors, transports, provides, or obtains a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.

Ms. Khan remained in custody after her arrest and was not able to make bail, but her boyfriend hired a private lawyer, Alan M. Leibowitz, Esq., to defend her. (Da10).

Appellant was indicted on February 8, 2011, and charged with one count of second-degree conspiracy to commit extortion, contrary to N.J.S.A. 2C:20-5(c) and 2C:5-2, and one count of second-degree attempt to commit extortion, in violation of N.J.S.A. 2C:5-1/2C:20-5. Da3, Da58, Da119-120).

Appellant was arraigned on the Indictment on March 28, 2011, before the Honorable Patrick J. Roma, J.S.C. (Ret.). (See 5T).

On April 4, 2011, Appellant pled guilty before Judge Roma to the second count of the indictment, charging attempted extortion in the second degree. The other charges were dismissed. Appellant was sentenced to three years in New Jersey State Prison on June 3, 2011. (See 6T).

On July 15, 2011, Appellant hired new counsel, Moses Rambarran, Esq., and appealed her conviction and sentence. (Da138).

On June 20, 2013, this Court in an unreported decision remanded the matter back to the lower court to determine if the sentence was illegal and to have the lower court delineate the mitigating and aggravating factors in the case. Da3-4.

On August 1, 2013, Judge Roma received a motion from Appellant's counsel seeking to withdrawal her guilty plea. On this same date, Judge Roma refused to hear the motion to withdraw the guilty plea. (Da4).

On August 1, 2013, Judge Roma resentenced Appellant to the same three-year prison term. By that time, Appellant had served her sentence but was enmeshed in ongoing deportation proceedings in New York. Da4.

On October 16, 2013, Appellant's successor attorney filed a notice of appeal seeking to have the motion to withdraw her guilty plea considered on the merits. Id.

On December 5, 2014, this Court remanded the matter back to the lower court once again and directed the lower court to engage in a determination as to whether the guilty plea should be withdrawn. (Da147-159).

On October 22, 2015, the Hon. Margaret M. Foti, J.S.C., denied Appellant's motion to withdraw her plea. (Da208-226).

On or about December 3, 2015, a new Notice of Appeal was filed on Appellant's behalf. Present counsel replaced Appellant's second counsel after briefing was concluded on the criminal appeal. (Da4-5).

Appellant's direct appeal was denied in an unreported decision issued on July 12, 2018. See State v. Williams, A-1438-15T2 (App. Div. July 12, 2018), appended hereto at (Da227-252).

Thereafter, the undersigned filed with the Supreme Court of New Jersey a Notice of Petition on July 31, 2018. After a motion to extend time was filed, the Petition for Certification and all attached appendices required were filed with the Supreme Court of New Jersey on August 30, 2018. (Da5).

A motion was filed to stay any proceedings in connection the lower court PCR while the New Jersey Supreme Court considered the petition for Certiorari, and on October 12, 2018, the lower court granted the motion to stay the PCR proceedings. Id.

On March 7, 2019, the New Jersey Supreme Court denied the Petition for Certiorari. (Da5).

On April 12, 2019, the undersigned filed Appellant's PCR Petition and exhibits under R. 3:22-8. (Da5).

On August 11, 2019, the PCR Petition and the exhibits were refiled on eCourts as a Motion in order to conform to the eCourts protocol. Id.

The pre-hearing exhibits of the Petition and the prehearing PCR brief were finalized before the Court on October 30, 2019. Id.

On September 22, 2020, the lower court ordered a limited evidentiary hearing to explore the claim that Appellant’s guilty plea should be vacated due to factual innocence and ineffective assistance of counsel. (Da35-57).

On April 10, 2023 and October 6, 2023 respectively, Ms. Khan testified at the evidentiary hearing, as did Mr. Liebowitz, who had previously represented her at the guilty plea stage. Da6, Da13).

After the hearing, oral argument occurred on January 18, 2024. (See 3T).

On April 24, 2024, the lower court denied Appellant's PCR. (Da1-34).

On May 24, 2024, Appellant filed a timely Notice of Appeal and Case Information Sheet with this Court.

On January 6, 2025, an Amended Notice of Appeal was filed. (Da278-279).

On January 19, 2025, an Amended Case Information Sheet was filed. (Da280-285).

## LEGAL ARGUMENT

### Point I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM THE DEFENDANT ABOUT A VIABLE DEFENSE TO THE CHARGE OF ATTEMPTED EXTORTION ARISING FROM HER RENUNCIATION OF PURPOSE TO COMMIT THE CRIME.

(Raised below at Da1-33; 3T at 4:22-64:21)

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the effective assistance of legal counsel. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984). A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and that

the deficient performance prejudiced the defense. Id. at 669, 687; see also State v. Fritz, 105 N.J. 43 (1987) (adopting the two-prong Strickland test in New Jersey). Collateral attacks upon judgments of conviction are warranted by the broad concept of fairness, or when relief is mandated in the interests of justice. See State v. Blanchard, 98 N.J. Super. 22, 30 (Law Div. 1967).

In this case Ms. Khan received ineffective assistance of counsel and the lower court erred and abused its discretion in refusing to vacate her guilty plea due to the undisputed fact that her attorney failed to inform her that renunciation was a viable defense that could potentially exculpate her if the case went to trial. Ms. Khan had a powerful, complete defense to the charge of attempted extortion due to her renunciation of purpose, but no attorney ever advised her of this key information until after she entered a guilty plea and was sentenced to years in prison.

Under New Jersey law, the renunciation defense is to be charged along with criminal attempt when the evidence suggests that the defendant abandoned her efforts to commit the crime. See N.J.S.A. 2C:5-1d; State v. Alston, 311 N.J. Super. 113, 121 (App. Div. 1998). The defense requires that the situation manifest "a complete and voluntary renunciation of [the defendant's] criminal purpose." N.J.S.A. 2C:5-1(d); Alston, 311 N.J. Super. at 121. "To be complete the abandonment [of the criminal conduct] must be permanent, not temporary or

contingent." Alston, 311 N.J. Super. at 121-22. In addition, to satisfy the element of voluntariness, the abandonment "must reflect a change in the defendant's purpose or a change of mind that is not influenced by outside circumstances." Id. at 121.

Renunciation is an affirmative defense in the New Jersey's Criminal Justice Code in that it requires notice to the prosecution because it negates purpose rendering the defendant not guilty even of an attempt to commit an offense.

Thus, in the context of criminal attempts, N.J.S.A. 2C:5-1(d) provides in pertinent part:

> When the actor's conduct would otherwise constitute an attempt under subsection a. (2) or (3) of this section, it is an affirmative defense which he must prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose...

N.J.S.A. 2C:5-1(d).

A similar defense is permitted in the context of accomplice liability. See N.J.S.A. 2C:2-6(e)(3). "[R]enunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. And, because of the importance of encouraging

desistance in the final stages of the attempt, the defense is allowed even where the last proximate act has occurred but the criminal result can be avoided — e.g., where the fuse has been lit but can still be stamped out." Cannel, New Jersey Criminal Code Annotated, comment 8 on N.J.S.A. 2C:5-1 (1998) (internal citations and quotations omitted).

In Alston, supra, this Court observed that the Model Code, and statutes derived from it, including New Jersey's Criminal Justice Code, "differ from the traditional common-law view that, in the context of attempt crimes, it was logically impossible to renounce a crime which is already completed. 311 N.J. Super. at 123. Rather, [t]he Model Code approach is that — ***so long as the criminal design is completely and voluntarily abandoned before it is carried out — it is not illogical to permit the defense even though the events have progressed to the point where a criminal attempt has been committed*** ... excusing the defendant from attempt liability in return for the crime's prevention is seen as a net benefit to the community ... [and] encouraging actors to desist is said to diminish the risk that the crime will take place...." Id. (citing People v. Taylor, 586 N.Y.S.2d 545, 551 (1992) (internal citations omitted) (emphasis added).

Here, Ms. Khan's former defense counsel testified at the PCR evidentiary hearing "that he is aware that there are affirmative defenses in the 2C code and

understood that attempted extortion was one of the charges." Da15. Nevertheless, the defense attorney never even raised the issue.

And yet, crucially, Mr. Khan was actually successful in her act of renunciation. The police conducting surveillance had a front row seat to all of the events and witnessed Ms. Khan's actions. (Da58-88). After she left the car, her codefendants abandoned their attempt and drove away, out of the residential area and well past the bus stop where Ms. Khan was standing. The police arrested Ms. Khan at the bus stop and the codefendants were arrested in their vehicle not far from the bus stop on the way to the George Washington Bridge on their way back to New York without Ms. Khan. Since the acts of Ms. Khan and her codefendants were witnessed in real time by police surveillance the above facts regarding the movement of the defendants are undisputed.

However, the lower court did not even address Ms. Khan's complete and unadulterated renunciation of any criminal purpose. Notwithstanding her testimony at the PCR hearing regarding her original purpose in getting into the vehicle, police surveillance renders her credibility largely irrelevant as to the key issue of renunciation. The evidence entirely apart from her testimony shows that she thwarted any intent to extort the victim by taking the crucial step of escaping from the vehicle and escaping by walking to a bus stop, which was nowhere near the home of the victim or the codefendants' car.

The lower court seemingly believed that Ms. Khan's refusal to admit the full extent her involvement in the extortion scheme somehow precluded a renunciation defense. See State v. Hughes, 215 N.J. Super. 295 (App. Div. 1986). But after the decision in Hughes, this Court recognized in Alston, supra, that a "defendant's entitlement to the renunciation charge is not defeated by reason of his denial of involvement in the crime." 311 N.J. Super. at 122 (quoting Taylor, supra, at 551). In fact, innocence and lack of intent would render there to be no renunciation defense. Thus, the lower court invoked clearly erroneous interpretations of the most important legal concept of this PCR.

Indeed, the defendant in Alston pointed to similar, although less convincing evidence to suggest that a renunciation defense should have been charged to the jury, arguing that he was involved in an attempted carjacking when he entered the cab of a truck with a weapon and showed it to the driver, but that by telling the driver to get out of the truck and to call the police and then by later throwing his gun away, he renounced his involvement in the crime." Alston, 215 N.J. Super. at 118. If anything, in Alston there was a comparatively flawed and weak renunciation defense as opposed to in our case, which presents a classic renunciation and frustration of purpose defense that actually thwarted the commission of the crime.

Ruling in the defendant's favor in Alston, this Court held that a jury "could have rationally concluded, that once the defendant left his codefendant's and once he got into the cab, that he 'had a change of heart' and not only let [the victim] go, but told him to call the police thereby to thwart [the codefendant's] plans." Id. at 122. Similarly, a jury could have concluded that Ms. Khan left the codefendant's vehicle and walked to the bus stop, this constituted a complete and voluntary renunciation of the defendant's criminal purpose, whereupon her codefendant's abandoned the crime and drove back towards the Bronx, and that Ms. Khan did this not because of some external circumstances, but because she had a change of mind and intended to completely abandon the extortion attempt. And, of course, the extortion was indeed prevented. At a minimum, the defense should have at least been explored during a consultation between Ms. Khan and her attorney. Ms. Khan absenting herself from the car and scene deprived the codefendants of their most valuable leverage items-Ms. Khan herself.

The relevant portions of New Jersey's Model Criminal Jury Charge should also have led Appellant's attorney to inform her that the case was defendable using the statutory affirmative defense of renunciation, and the attorney would have advised Appellant that her conduct on the day in question may not constitute substantial towards committing or attempting to commit a crime. Sitting in a car far away from the crime scene is not a substantial step towards commission of a

crime. The pertinent portions of the Model Criminal Jury Charge as to attempt are as follows:

> [T]he step taken [toward commission of the crime] must strongly show the defendant's criminal purpose. That is, the step taken must be substantial and not just a very remote preparatory act, and must show that the accused has a firmness of criminal purpose.

Model Criminal Jury Charge 2C:5-1.

Also, consider the pertinent portions of the Model Criminal Jury Charge for Renunciation of Criminal Purpose (to be used when the defendant's conduct would otherwise constitute an attempt):

> As part of the defendant's denial of guilt, the defendant raised the defense of renunciation of criminal purpose.
> The accused must prove, by a preponderance of the evidence, that he/she abandoned his/her effort to commit the crime or otherwise prevented its commission under circumstances that show a complete and voluntary decision to renounce his/her criminal purpose. The abandonment of the criminal effort must begin with the defendant and not be forced upon him/her by some outside event, such as police intervention. Renunciation of criminal purpose is not voluntary if the reason for it is that it seems more likely that defendant will be detected or caught, or the objective seems more difficult than it did at the beginning of the course of conduct. Renunciation is not complete if the defendant only decides to postpone the criminal conduct to a better time or to focus on another but similar objective or victim. If mere abandonment of the criminal effort is not enough to prevent the offense, then the defendant must have taken further and affirmative steps that actually prevented the commission of the offense.

> As I stated, the defendant must prove renunciation by a preponderance of the evidence. I previously explained that the State has the burden of proving every element of the crime(s) charged beyond a reasonable doubt. The burden of proving renunciation by a preponderance of the evidence is a lesser burden. It simply means that the defendant has the burden of establishing that the evidence supporting renunciation is more likely true than not. Another way to describe it is the greater weight of the believable evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses, but rather, the evidence that carries the greater convincing power in your minds. I remind you, however, that the burden of proving every element of the attempt to commit as I have previously defined it is always on the State and never on the defendant.
>
> If you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must find the defendant not guilty of an attempt to commit [the charged offense]. Also, if you find the State has proven each of these elements beyond a reasonable doubt, but that the defendant has established by a preponderance of the evidence that he/she renounced his/her criminal purpose, then you must find the defendant not guilty.

Model Criminal Jury Charge 2C:5-2e.

Moreover, the renunciation defense only requires the defendant to establish by a preponderance of evidence that she renounced her criminal purpose. See N.J.S.A. 2C:5-1(d); see also N.J.S.A. 2C:2-6(e)(3); N.J.S.A. 2C:5-2(e). This is not an onerous standard. Moreover, the State has the burden of disproving the defense beyond a reasonable doubt, which is a higher bar to vault. If only Ms. Khan was

told of this model jury charge before her guilty plea, it is quite likely that the results would have been different.

Ms. Khan not only renounced her own criminal purpose, but she also frustrated the crime completely, causing her codefendants to leave the area before completing the plot. Ms. Khan herself constituted the key piece of physical evidence that the conspirators needed to perpetrate the extortion scheme since she was the witness to the salacious videos. The movement of Appellant to the bus stop was thousands of feet from the Binders' home and this signified a complete escape from the scene by removing herself from the scene and also taking certain physical evidence from the vehicle, including a GPS locator, a camera, and what she thought were the damning sex tapes, although the police later found one disc in the car containing a video of Mr. Binder engaging in sex acts with Ms. Khan while she still a minor. (Da175-177, Da253-270, Da276-277). Nevertheless, Ms. Khan's clear-cut actions strongly indicate the existence of a powerful renunciation defense.

## Point II. TRIAL COUNSEL'S INADEQUATE INVESTIGATION, PREPARATION, AND PERFORMANCE AT THE TIME OF THE GUILTY PLEA VIOLATED THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

(Raised below at Da1-33; 3T at 11:4-22)

The defense attorney at Ms. Khan's plea hearing had virtually no time to conduct an adequate investigation into her background, the facts the case, or the

applicable law. Having just seven days from the arraignment date to the guilty plea date left the defense counsel with insufficient time to investigate, conduct legal research, hear the appellant out as what happened when she escaped the vehicle, or to consider important issues of intent. The defense attorney merely presumed Ms. Khan's guilt and then foisted the first plea offer he received upon her. As set forth at length in Point I above, the attorney told Ms. Khan nothing about the viable defense of renunciation. The fact that the attorney claimed he was aware of this defense is of no moment, as the fundamental flaw in the lower court's opinion is that the attorney never even explored this key issue with Ms. Khan. Attorneys should not be so quick to grab a plea of guilty rather than do the necessary work to investigate the facts of the case and research the applicable statutes and case law to determine what viable defenses may exist before a criminal defendant enters a guilty plea resulting in imprisonment.

Before a court may accept a defendant's guilty plea, it first must be convinced that (1) the defendant has provided an adequate factual basis for the plea; (2) the plea is made voluntarily; and (3) the plea is made knowingly. See R. 3:9-2; see also State v. Slater, 198 N.J. 145 (2009). Here, Ms. Khan had an obvious line-of-defense in this case, and yet her attorney rushed a plea through seven days after the arraignment and never advised her about renunciation. For this reason, Ms. Khan's guilty pleas was not knowingly or intelligently made.

Under the standards enunciated by the United States Supreme Court and the Supreme Court of New Jersey, this deprived Appellant of her right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution of 1947.

"An accused's right to be represented by counsel is a fundamental component of our criminal justice system." United States v. Chronic, 466 U.S. 648, 653 (1984). The United States Supreme Court has repeatedly recognized that, without counsel, "the right to a trial itself would be of little avail." Id. (quoting Powell v. Alabama, 287 U.S. 45, 69 (1984)). Moreover, both the United States and New Jersey Constitution's guarantee not only a right to counsel, but a right "to effective assistance of counsel." Chronic, 466 U.S. at 654 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)); see also State v. Sugar, 84 N.J. 1, 17 (1980) ("Because the Constitution requires the assistance of counsel and not merely his physical presence, counsel must be effective as well as available."). Both constitutional guarantees recognize that "the average defendant does not have the professional legal skill to protect himself when brought when brought before a tribunal with power to take his life or liberty." Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938); Argensinger v. Hamlin, 407 U.S. 25, 31 (1972); Powell, supra, 287 U.S. at 69; Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971). Consequently,

the assistance of counsel "is essential to insuring fairness and due process in criminal proceedings." Sugar, supra, 84 N.J. at 16.

The United States Supreme Court has set forth the criteria to be utilized in determining when a defendant's conviction must be reversed because he did not receive the effective assistance of counsel. See Strickland, supra, 466 U.S. at 690. Here, both prongs of Strickland are met. In light of all the circumstances of this particular case, Ms. Khan's counsel's "acts or omissions were outside the range of professionally competent assistance." Id. The second prong of Strickland is also satisfied because, but for counsel's unprofessional performance, there is a reasonable probability that the result of the proceeding would have been different in that Ms. Khan would not have pleaded guilty had she understood the legal defense(s) that should have been explained to her under the circumstances. Id.

Counsel has been deemed to be ineffective under circumstances where "counsel failed to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." State v. Savage, 120 N.J. 594, 618 (1990). Counsel have also been found to be deficient where they have failed to hire and call appropriate experts or failed to provide an expert with information that was critical to the expert's analysis. Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999), cert. denied 531 U.S. 952 (2000); Caro v. Calderone, 165 F.3d 1223, 1227 (9th Cir. 1999). "An inadequate investigation of the law or fact dispels the

presumption of competence that might otherwise arise from a strategic choice." State v. Bey, 161 N.J. 233, 252 (1999).

As noted in Strickland, supra, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes those particular investigations unnecessary. But strategic decisions made without an adequate investigation into the facts and the law controlling defense theories are reasonable only to the extent that reasonable professional judgment supports counsel's limitations on the investigation. Id.

In Rompilla v. Beard, 545 U.S. 374 (2005), the U.S. Supreme Court reversed the defendant's capital sentence because of his trial counsel's failure to review his prior court file despite knowing that the prosecutor intended to use certain evidence related to the file. The failure of counsel to render effective assistance of counsel has also been considered in the context of determining if the defendant's Sixth Amendment right to confront his accuser has been violated due to defense counsel's failure to pursue impeachment evidence bearing on the credibility of a witness or because the evidence was unavailable. See Fritz, supra, 105 N.J. at 63-65.

The right to the effective assistance of counsel is ordinarily "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Chronic, supra, 466 U.S. at 658. However, there are

circumstances that are so likely to prejudice that accused that no specific showing of prejudice is required. Id. at 659. Chronic strands for the proposition that an attorney's performance may be so deficient that it creates a presumption of ineffectiveness on the part of counsel. Id. "[I]f trial counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. Id. at 668. The adversarial process and "partisan advocacy" are key instruments to be employed towards the ultimate objective that the guilty be convicted and the innocent go free, and to promote truth, justice, and "fairness in the adversary criminal process." Id. at 655-656.

In our case, the presumption of ineffectiveness applies. No specific showing of prejudice is required because the constitutional error was "of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. 308, 318 (1974); see also State v. Pillar, 359 N.J. Super. 249, 275 (App. Div. 2003) (inviting the Supreme Court of New Jersey to readdress whether there should be a harmless error analysis for certain constitutional errors because such analysis deprives individuals of constitutional rights).The defense attorney had only a few days to read discovery in a complex case, and this discovery was incomplete at the time Ms. Khan pleaded guilty. The extreme shortness in time between arraignment and the guilty plea strongly suggests that no meaningful

review of discovery occurred prior to the guilty plea colloquy. If the attorney had taken time to delay the proceedings and conduct proper factual and legal investigations, the outcome would have probably been different. Namely, Ms. Khan most likely would not have pleaded guilty and probably would have received a better, negotiated plea deal, or else a positive verdict at trial. At a minimum, the appellant needed to be advised of the renunciation defense and the attorney should have looked into and investigated potential mental health defenses being that she was a trafficked sex victim at the hands of the victims in this case.

Furthermore, trial counsel's failure to conduct an adequate investigation into either the facts or the law cannot be attributed to a defense strategy. The defendant's right to a "vigorous defense" means defense counsel must "investigate all substantial defenses available." State v. Russo, 333 N.J. Super. 119, 140-41 (App. Div. 2000). Although no absolute duty exists to investigate particular facts or line of defense, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. See State v. Chew, 179 N.J. 186, 510 (2004). The failure to conduct pre-trial investigation may give rise to a claim of ineffective assistance of counsel. State v. Preciose, 129 N.J. 451, 463 (1992) (stating that our PCR system review affords

criminal defendants a broader opportunity to raise constitutional claims than federal habeas review[2]).

In Chew, supra, which dealt a defense attorney's decision not to call an expert made without investigating all the circumstances, the Court stated that strategy decisions made after less than a complete investigation are subject to closer scrutiny. Id. at 205. The court added that the "failure of counsel to make a thorough investigation of these matters before deciding to limit the case in mitigation robbed this strategic choice of any presumption of competence." Id.

In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court found that counsel failed to conduct a reasonable investigation into defendant's background and made unreasonable decisions based on the paucity of their investigations. Citing the ABA Guidelines, the Court stated that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. See ABA Guideline 11.4.1 (1989). The Wiggins Court criticized counsel for abandoning their investigation of appellant's background after having acquired only rudimentary knowledge of his history from

[2] PCR is New Jersey's analog to the federal writ of habeas corpus. See State v. Afanador, 151 N.J. 41 (1997). However, our PCR system review affords criminal defendants a broader opportunity to raise constitutional claims than federal habeas review. Preciose, supra, 129 N.J. at 477.

a narrow set of sources. The reviewing court must consider not only the quantum of evidence already known to counsel but also whether the known evidence should lead a reasonable attorney to investigate further. Id. Not knowing what an investigation will reveal is no reason not to conduct an investigation. Counsel was obligated to find out facts, not to guess, assume or suppose some facts may be adverse. Only after a full investigation of all circumstances can counsel make an informed, tactical decision about which information would be most helpful to the client's case. Since Wiggins, the decision to forego researching into mitigating evidence cannot be credited as calculated tactics or strategy, unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.

In the within matter, it is clear that defense counsel's failure to investigate, review and receive the whole discovery file and consult with any experts was tantamount to ineffective assistance of counsel and was grossly inadequate. Moreover, the defense counsel did not go to the crime scene to assess Appellant’s claim that she was not attempting to commit a crime, and if there was an attempt, she renounced and foiled the codefendants’ intent to commit a crime, and was at a location far removed from the location of the victim’s home. She could not have been acting as a lookout for her alleged coconspirators because the bus stop was

far from the scene of the alleged extortion attempt. Indeed, Ms. Khan's codefendants left her in New Jersey and started driving back home to New York.

It is undisputed that Appellant exited the car and went to the bus stop over 2000 feet away from the Binder residence. She also took video evidence and other devices when she left the car to further thwart commission of the crime. The State has never produced sufficient evidence to refute this point of contention. In fact, the physical chain of custody supports the view that the police did not differentiate where certain physical evidence items were located which buttresses Appellant's testimony in this regard. Moreover, her defense attorney's failure to engage in the investigation into the mental health defense also violated the legal standards elucidated above. This Court does not owe the lower court any deference as to its interpretation on the law applicable to this appeal. See In re Taylor, 158 N.J. 644, 656-57 (1999).

In addition, trial counsel failed to adequately consult with Ms. Khan prior to her guilty plea. The pertinent ABA Guidelines provide that defense counsel ***"at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case***," including:

> 1. The progress of and prospects for the factual investigation and what assistance the client might provide to it;

2. Current or potential legal issues;
3. Development of a defense theory;
4. Presentation of a defense case;
5. ***Potential agreed upon dispositions of the case.***

Guideline 10.5 (c) (emphasis added).

One federal court of appeals has aptly remarked that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005). In Canaan, where counsel did not discuss with defendant the penalty phase and whether he wanted to testify, the court found counsel had defaulted on their duties to consult with the defendant on important decisions and to keep defendant informed of important developments in the course of the prosecution. Id.

In United States ex rel Hill v. Ternullo, 510 F. 2d 844 (2d Cir.1975), a habeas corpus hearing was granted on the issue of whether defendant had been misinformed by his attorney concerning a possible maximum sentence. The Strickland standard of whether "there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty, but would have insisted on going to trial applied. Id., see also Hill v. Lockhart, 474 U.S. 52, 56 (1985).

New Jersey courts have also found that defense attorney during a plea process can provide inadequate assistance of counsel by misinforming his or her client. See, generally, State v. Garcia, 320 N.J. Super 332, 339 (App. Div. 1999); State v. Taccetta, 351 N.J. Super. 196, 200 (App. Div. 2002), (holding that "an

attorney's gross misadvise of sentencing exposure that prevents defendant from making a fair evaluation of a plea offer and induces him to reject a plea agreement he otherwise would have accepted, constitutes remediable ineffective assistance of counsel.").

Here, Ms. Khan did not receive competent and accurate advice from her defense attorney in 2011. Appellant was an uneducated immigrant and a total novice to the criminal justice system. She should have been made aware that her actions on the day of her arrest in exiting the vehicle, leaving the area, and taking the video evidence, all provided her with an arsenal of facts to at trial. Make no mistake, this was a highly defendable case. But there was simply not enough time for the defense attorney to have meaningful discussions with Ms. Khan after her arraignment. This lack of time prostrated the process and represents the type of fact pattern that is on all fours with Chronic, supra, meaning that the presumption of ineffectiveness applies and renders the guilty plea wholly unconstitutional.

## Point III. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE A MENTAL HEALTH-RELATED DEFENSE.

(Raised below at Da1-33, 3T 11:11-14)

In this particular case, an effective attorney would have considered the needs of a victim of human trafficking and taken greater care to determine if a mental health defense applied. Ms. Khan alleged she was a child sex and labor slave at the

hands of the Binders. Not only did her attorney fail to investigate this claim adequately, but he also doubled-down on his ineffectiveness by berating Ms. Khan and calling her a liar. When women are victimized as battered spouses or as sex slaves or as human trafficking victims, a defense attorney should take the time to pursue defenses to challenge the *mens rea* element of the crime, and, if possible, lessen the intent of the given defendant. See, generally, State v. Townsend, 186 N.J. 473 (2006); see also State v. Curley, 250 So. 3d 236 (La. 2018).

For example, in Daniels v. Woodford, 428 F. 3d 1181 (9th Cir. 2005), a murder case in which the defendant killed two police officers, trial counsel failed to conduct a thorough investigation into defendant's mental illness. Citing the ABA Standards for Criminal Justice, §4.41(2d Ed 1982), the court held that counsel had an independent duty to investigate and prepare facts of the case and possible mitigating evidence. Id. Defendant was prejudiced because the jury could have heard evidence defendant suffered from mental disorders at the time of the murders. Id., see also Glover v. United States, 531 U.S. 198, 200 (2001).

Here, trial counsel should have partaken in a fact finding mission to determine whether independent evidence supported Appellant’s claim to her attorney that her mental health was damaged due to the alleged victims being the perpetrators of a human trafficking crime against the appellant and against the United States of America. Ultimately, if the case were tried an expert could have

been retained to testify concerning Ms. Khan's lack of criminal intent. Certainly, the jury would have been straddled with a case where the appellant was being prosecuted for a crime wherein the victims were implicated in human trafficking/ child slavery and sexual abuse allegations for which Emanuel Binder was never investigated, much less prosecuted. This very well could have led to a not guilty verdict when considered together with the evidence of Ms. Khan's renunciation at the scene.

Indeed, trial counsel in 2011 had at his disposal publications such as:

> 1. United Nations Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. General Assembly Resolution 55/25/2000.
>
> 2. Zimmerman C. & Borland R. (2009) Caring for Trafficked Persons: Guidance for Health Providers. International Organization for Migration.

Given the foregoing publications existed and were readily available to criminal defense attorneys in 2011, Ms. Khan's counsel should have conducted at least some minimal investigation into her claims. He should have researched the mental health literature relevant to Appellant’s claims about human slavery. With any amount of due diligence, he would have discovered viable and powerful defenses. The attorney’s dismissive posture in the case as to this issue cannot be supported as a strategy decision because there was no investigation done, and if

there was an investigation done in a preliminary fashion, it provided an erroneous finding that revealed additional ineffectiveness of counsel.

Furthermore, this specific component of the ineffective assistance of counsel claim is also raised as newly-discovered evidence given the ongoing advancements in the criminal forensic setting regarding victims with psychological damage resulting from being trafficking. The publications in this field have only intensified since 2013, as illustrated by the list below:

> 1. Abas M., Ostrovschi N. V., Prince M., et al. (2013) Risk factors for mental disorders in women survivors of human trafficking: a historical cohort study. BMC Psychiatry, 13, 1–11.
>
> 2. Domoney J., Howard L. M., Abas M., et al. (2015) Mental health service responses to human trafficking: a qualitative study of professionals' experiences of providing care. BMC Psychiatry, 15, 1.
>
> 3. Hemmings S., Jakobowitz S., Abas M., et al. (2016) Responding to the health needs of survivors of human trafficking: a systematic review. BMC Health Services Research.
>
> 4. International Labour Office (2012) ILO Global Estimate of Forced Labour: Results and Methodology. ILO.
>
> 5. Kiss L., Pocock N., Naisanguansri V., et al. (2015) Health of men, women, and children in post-trafficking services in Cambodia, Thailand, and Vietnam: an observational cross-sectional study. Lancet Global Health.

6. Oram S., Khondoker M., Abas M., et al. (2015) Characteristics of trafficked adults and children with severe mental illness: a historical cohort study. Lancet Psychiatry, 2, 1084–1091.

7. Oram S., Abas M., Bick D., et al. (2016) Human trafficking and health: a cross-sectional survey of male and female survivors in contact with services in England. American Journal of Public Health, 106, 1073–1078.

8. Ottisova L., Hemmings S., Howard L. M., et al. (2016) Prevalence and risk of violence and the mental, physical, and sexual health problems associated with human trafficking: an updated systematic review. Epidemiology and Psychiatric Sciences, 25, 317–341.

9. Ross C., Dimitrova S., Howard L. M., et al. (2015) Human trafficking and health: a cross-sectional survey of NHS professionals' contact with victims of human trafficking. BMJ Open, 5.

10. Silverman B. (2014) Modern Slavery: An Application of Multiple Systems Estimation. Home Office.

Evidence that is newly discovered can lead to a new trial being ordered if such new evidence: (1) is material to the issue and not merely impeaching, contradictory or cumulative; (2) was discovered after the trial and not discoverable by reasonable diligence beforehand; and (3) is of the sort that that would probably change the fact finder's verdict if a new trial were granted. See Russo, supra, 333 N.J. Super. at 136-137; State v. Henries, 306 N.J. Super. 512, 529 (App. Div. 1997); State v. Carter, 85 N.J. 300, 314 (1981) ("Carter III").

In State v. Ways, 180 N.J. 171 (2004), our state Supreme Court reversed the defendant's murder conviction on the basis of third-party guilt evidence that pointed to another man as the possible killer. The Court found for the reversal despite the confession that the defendant admitted he voluntarily gave while in the jail. Much of the new evidence was circumstantial and tended to contradict trial testimony of witnesses who inculpated the defendant. The Court, following the Henries case, found that evidence which would raise a reasonable doubt as to the defendant's guilt could not be described as merely "cumulative", "impeaching" or "contradictory." Id. at 189. Here, the question is whether the newly-discovered scientific evidence could raise a reasonable doubt and alter the verdict. Id. at 431-432; see also Henries, supra, 306 N.J. Super. at 533-535.

Thus, pursuant to R. 3:20-2, Appellant is entitled to have all or some of her PCR claims considered under the newly discovered evidence statute. Claims involving evidence which was not available at the time of the trial can be considered under this statute at any time. See State v. Behn, 375 N.J. Super. 409, 431-432 (App. Div. 2005) (converting a PCR into a newly-discovered evidence claim based upon new scientific evidence which was not available at the time of trial).

The mental health evidence from potential defense expert Dorothy Lassiter should be considered under newly-discovered evidence standard. (Da271-274).

Moreover, the T visa granted by the INS judge due to Ms. Khan being a human trafficking victim is also newly discovered because it occurred on February 6, 2018. (Da275). The evidence developed on PCR should be considered alternatively under the newly discovered evidence standard, should the ineffective assistance of counsel clams fail.

The newly-discovered evidence in this case would probably cause Appellant's PCR claims to be granted because if such evidence was available to her in 2011 she would have not entered a guilty plea, and probably would have gone on to be acquitted in a jury trial, or at least accepted a plea that did not involve imprisonment.

While the failure of the defense attorney to investigate the mental health defense and sex trafficking aspect of the matter clearly constitutes the ineffective assistance of counsel, Respondent has argued without legal support that the renunciation defense and mental health defenses were too tenuous to be considered as matters forming a viable ineffective assistance of counsel claim. See 3T-43:15-19. Thus, the matter should also be reviewed under case law that applies to newly-discovered evidence. As a victim of human trafficking and child sex slavery, Ms. Khan should not be relied upon to sort out facts of her traumatization. Rather, what is at stake in the PCR on appeal is whether Ms. Khan was deprived of effective assistance of counsel at the stage of entering a guilty plea within seven days of her

arraignment on attempted extortion and related charges. Whether deemed ineffective assistance of counsel or newly-discovered evidence, the failure to advise Appellant about these defenses is fatal to the guilty plea and the conviction.

## CONCLUSION

For the foregoing reasons, the Defendant-Appellant, Theresa Williams, whose real name is Bibi Khan, by and through her undersigned appellate counsel, Eric V. Kleiner, Esq., respectfully requests that the trial court's Order denying her Petition for Post-Conviction Review be reversed and that her guilty plea and resulting conviction be vacated.

Respectfully submitted,

By: s/ Eric v. Kleiner
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*Attorney for Defendant-Appellant*
*Theresa Williams a/k/a Bibi Khan*

Dated: January 20, 2025

# Superior Court of New Jersey
# Appellate Division

DOCKET NO. A-002945-23T3

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| STATE OF NEW JERSEY, | : | CRIMINAL ACTION |
| Plaintiff-Respondent, | : | On Appeal from an Order Denying a Petition for Post-Conviction Relief of the Superior Court of New Jersey, Law Division, Bergen County. |
| v. | : | |
| THERESA WILLIAMS AKA BIBI KHAN | : | |
| | : | Sat Below: Hon. Gary N. Wilcox, J.S.C. |
| Defendant-Petitioner. | : | |

## BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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# TABLE OF CONTENTS

## TABLE OF APPENDIX



## TABLE OF AUTHORITIES

## PRELIMINARY STATEMENT

Defendant's appeal raises arguments that this Court has already rejected. In this appeal, defendant challenges the Law Division's denial of her petition for post-conviction relief (PCR). To do so, defendant recycles arguments that supported a prior motion to withdraw her guilty plea. Those arguments were rejected by both the Law Division (who denied defendant's motion to withdraw her guilty plea) and this Court (who affirmed the Law Division's decision). The State submits that defendant's attempt to advance previously-adjudicated arguments should be procedurally barred and, in any event, the arguments remain meritless.

Back in 2011, defendant pled guilty to extorting an elderly widow and was sentenced to three years' imprisonment. In 2015, defendant moved to withdraw her guilty plea on the grounds that (1) she was unaware of the extortion plot or, in the alternative, had renounced it; (2) she only pled guilty due to her emotional damage from her troubled past; and (3) her attorney was ineffective for failing to investigate related defenses and pressuring her to plea.

Those arguments failed before the motion court and fared no better on appeal. As this Court put it, "[t]he facts essential to [defendant's] claim of innocence are neither 'credible' nor 'plausible.'" Undeterred, defendant filed

a PCR petition on now-familiar grounds—(1) she was unaware of the extortion plot or, in the alternative, had renounced it; (2) she only pled to the crime due to her emotional damage from her troubled past; and (3) her attorney was ineffective for failing to investigate related defenses and pressuring her to plea.

Here is where the State dropped the ball. Although defendant's PCR petition plainly sought a second bite at the apple, the State neglected to assert the procedural bar for previously-adjudicated claims. That error led to the PCR court to address the merits of defendant's arguments once more. Nevertheless, the PCR court arrived at the same conclusion as the two courts before it—that defendant's arguments are neither credible nor plausible.

Now, the State seeks the opportunity to rectify its mistake and respectfully requests that this Court apply the procedural bar. Defendant's PCR arguments are, without a doubt, substantially equivalent to previously-rejected arguments. But even if this Court chooses to address the merits of defendant's contentions, the State submits that the PCR court's decision should be affirmed because, as three courts have now found, defendant's arguments lack merit.

## COUNTER-STATEMENT OF PROCEDURAL HISTORY & FACTS[1]

A. The Indictment and Grand Jury Testimony Outlining Defendant's Crime.

On February 8, 2011, a Bergen County grand jury returned indictment S-0231-11 charging defendant Theresa Williams aka Bibi Khan (along with co-defendants Rayan Persaud and S.G.) with two crimes: second-degree conspiracy to commit extortion, N.J.S.A. 2C:5-2 & 2C:20-5(c) (count one) and second-degree attempted extortion, N.J.S.A. 2C:5-1 & 2C:20-5(c) (count two). (Da119). [2]

The grand jury indicted defendant based upon the following facts: on December 6, 2010, Blanche Binder, an elderly widow, reported to the Englewood Cliffs Police Department that she was the victim of an ongoing extortion plot. (4T5-6 to 13; 4T6-6). That day, a man who identified himself

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[1] This brief combines the procedural history and facts because they intertwine.

[2] "1T" refers to the April 10, 2023 PCR hearing transcript;
"2T" refers to the October 6, 2023 PCR hearing transcript;
"3T" refers to the January 18, 2024 PCR hearing transcript;
"4T" refers to the February 1, 2011 grand jury proceedings transcript;
"5T" refers to the March 28, 2011 arraignment hearing transcript;
"6T" refers to the April 4, 2011 plea hearing transcript;
"7T" refers to the June 3, 2011 sentencing transcript;
"8T" refers to the August 1, 2013 re-sentencing transcript;
"9T" refers to the September 25, 2015 motion transcript;
"Db" refers to defendant's brief;
"Da" refers to defendant's appendix;
"Pa" refers to the State's appendix.

as "Eric" and a woman had appeared at her residence. They told Mrs. Binder that they had a video recording of Mrs. Binder's deceased husband[3] engaging in sexual relations with a woman that was a friend of his. (4T5-14 to 21). Eric had a video camera with him and, using the camera's screen, played the recording for Mrs. Binder. (4T6-23 to 7-3). After showing her the recording, Eric demanded that she pay $500,000. Otherwise, he would distribute copies of the sex tape to her family members, neighbors, and the community. (4T6-19 to 7-7).

Police verified the extortion plot. They installed a device on Mrs. Binder's phone capable of recording calls. (4T7-16 to 8-13). Over a series of recorded calls, police overheard Eric demand that Mrs. Binder pay $500,000 to prevent the sex tape's release. (4T8-1 to 4).

Police devised a plan to catch the culprits. They instructed Mrs. Binder to tell Eric that she would pay the requested sum and that he should come to her residence to collect. Police planned to arrest those involved in the plot when they arrived. (4T8-14 to 9-9).

In accordance with that plan, on December 20, 2010, Mrs. Binder told Eric that she would pay $75,000 in cash and the remaining $425,000 by check.

[3] The prior summer, Mr. Binder had drowned in the Binders' swimming pool. (4T5-24 to 25).

(4T8-18 to 9-9). Eric told her to write the check out to "Rayan Persaud" and increased his demand to $700,000. (4T9-15 to 9-25). He suggested that the transaction take place at a diner or "some place around the corner from the house" but, after Mrs. Binder declined, he agreed to come to Mrs. Binder's residence. (4T10-2 to 9).

Police stationed themselves inside Mrs. Binder's home and placed surveillance units outside. (4T10-11 to 19). They observed a car occupied by three individuals circle the house and park halfway up the block. (4T10-19 to 21). A woman exited the vehicle and walked east toward a park about a block from the residence. (4T10-22 to 25).

At the time the car was parked, Mrs. Binder received a phone call from Eric. He attempted once more to convince her to meet him at a diner rather than her house, but she refused. (4T11-8 to 25). The car then drove away. (4T12-7 to 9). Police followed the vehicle, stopped it, and arrested the driver, S.G., and the passenger, Persaud. (4T11-8 to 12-15). A few minutes later, police arrested the woman, defendant, at the park. (4T12-14 to 15).

Police searched the car and found two tapes that depicted Mr. Binder and defendant having sex, as well as bag of blank tapes that police surmised was a prop to aid in the extortion plot. (4T11-1 to 4; 4T14-12 to 20).

Persaud and S.G. gave statements to police. In Persaud's statement, he admitted that he was "Eric" and that he had been calling Mrs. Binder to extort her. (4T13-25 to 3). He stated that defendant had asked him to make the calls and to collect the money for her. (4T12-16 to 13-18). Defendant had told Persaud that she was entitled to the money because Mr. Binder had promised it to her before his death. (4T13-7 to 10). In S.G.'s statement, he admitted to police that he was aware of the criminal purpose of their trip to Mrs. Binder's home. (4T13-19 to 24).

B. The Arraignment Hearing Reveals Counsel's Active Review of Discovery.

On March 28, 2011, defendant, represented by Alan Liebowitz, Esq., was arraigned and entered a not guilty plea before the Honorable Patrick Roma, J.S.C. (5T5-1 to 4). At the hearing, Mr. Liebowitz informed the court that he had reviewed the voluminous discovery provided so far, that his review led him to conclude that further discovery needed to be provided, and that he would review that discovery so that he could give defendant well-informed advice regarding the State's plea offer.

> I received a tremendous discovery, however, upon review of it, there appears to be a couple things missing. I mentioned it to the [the prosecutor] previously this morning. . . . [T]here's a tape recorder with recordings on it [in the] possession of . . . the Englewood Cliffs police -- Miss Williams' property. . . . I'd like to at least

> have the opportunity to hear . . . those tapes . . . so that I could properly advise my client about the plea offer.
>
> [(5T5-4 to 13).]

The court scheduled another appearance for April 4, 2011, and set May 9, 2011, for the plea cutoff date. (5T6-14 to 15).

C. Defendant's Guilty Plea and Sentencing.

On April 4, 2011, defendant, represented by Mr. Liebowitz, appeared for a plea hearing before Judge Roma. In exchange for defendant's guilty plea to count two (second-degree attempted extortion), the State agreed to recommend a downgraded sentence of three years imprisonment on count two and the dismissal of count one. (6T4-15 to 5-1).

Prior to the hearing, defendant filled out a plea form, in which she confirmed that she had committed the offense; understood the charges; understood the consequences of pleading guilty; and was not pleading guilty due to any threats or promises beyond those included in the plea agreement. (Da108 to 111; Pa1 to 5). The plea form advised defendant that "there is a substantial likelihood that you will be deported, and your deportation should not be a surprise, but should be anticipated as a result of this guilty plea." State v. Williams (Williams I), No. A-5505-10 (App. Div. June 20, 2013) (slip op. at 3 n.1); (Da141; Pa5).

Prior to taking a factual basis, Judge Roma verbally confirmed with defendant that she understood the charges and wanted to enter a guilty plea; was satisfied with her attorney's performance and had discussed the charges and plea offer with him; had enough time to discuss the case with her attorney and had all her questions answered; and had gone over the plea form with her attorney and answered all questions truthfully. Judge Roma verified that, as a non-citizen, defendant fully understood that she would be subject to deportation as a result of her plea. (6T6-15 to 13-8).

In her factual basis, defendant admitted that (1) she and Persaud had contacted Mrs. Binder personally and by telephone; (2) she had attempted to get money from the Mrs. Binder; and (3) she had threatened to expose an embarrassing secret, specifically a videotape of defendant and Mr. Binder having sexual relations, if the money was not paid. (6T13-14 to 15-5). Defendant signed a written "guilty plea stipulation" that confirmed those facts. (Da112).

At the hearing, Persaud also pled guilty and, in his factual basis, affirmed that defendant had plotted with him to extort Mrs. Binder. (6T15-8 to 21).

On June 3, 2011, defendant appeared for sentencing before Judge Roma. (7T). At the hearing, defendant spoke and apologized for her conduct. (7T7-

25 to 8-1). She also submitted letters, in which she wrote, "I am sorry for being a person who causes grief and pain onto another human being" and "I wish to god that I can go back and make things right but all I can do is apologize to the family . . . with all my heart and soul for putting them through this." (Da116 to 118).

In accordance with the plea agreement, the court imposed a downgraded sentence in the third-degree range of three years imprisonment on count two and dismissed count one.[4] (7T8-15 to 24).

D. Defendant's Direct Appeal (*Williams I*) Raises Ineffective Assistance Claims.

On direct appeal, defendant, represented by new counsel, Moses V. Rambarran, Esq., argued that plea counsel had rendered ineffective assistance of counsel. Williams I, slip op. at 2; (Da140). Specifically, defendant argued that plea counsel failed to pursue a defense that "[defendant] played no willing part in the attempt to obtain money from the widow, and actually attempted to prevent a co-defendant from showing the recordings to the woman." Id. at 3; (Da141). As support for that allegation, defendant included an affidavit in her appendix, which was not part of the trial record. Id. at 2-4.

[4] As for S.G., the State consented to his entry into the pretrial intervention program. (6T5-2 to 6).

This Court held that defendant's ineffective-assistance-of-counsel claim was not cognizable on direct appeal because it relied on documents that were not part of the record below. Id. at 4-5; (Da142 to 143). For reasons not relevant to this appeal, this Court remanded for resentencing. Id. at 6; (Da144).

E. Defendant's Resentencing.

On the afternoon of August 1, 2013, defendant, represented by Mr. Rambarran, appeared for the resentencing hearing. (8T). As part of that proceeding, defendant attempted to file a motion to "vacate" her plea based on claims of ineffective assistance of plea counsel. As Judge Roma put it, "During the lunch hour these papers were dropped off dealing with a motion to vacate the guilty plea." (8T47-23 to 25). The court declined to hear defendant's last-minute motion prior to resentencing. (8T5-20 to 24).

After making necessary findings, the court again imposed a downgraded three-year prison term. (8T55-3 to 10). As part of its decision, the court acknowledged that defendant maintained, as stated in the pre-sentence report, that the victim's late husband had allegedly made a voice recording of himself saying that he wanted defendant to have the money. (8T54-10 to 19). The court stated, "So I don't know if she had some sort of misdirected sense of being owed money or . . . that somehow this is justified – I'm not suggesting

that I condone what she did, but what I am suggesting she may have had some thought in her mind that . . . somehow . . . there was sense of entitlement by her own words." (8T54-13 to 19).

F. Defendant's Second Direct Appeal (*Williams II*).

For defendant's second direct appeal, she was represented by Mr. Rambarran and Eric V. Kleiner, Esq. State v. Williams (Williams II), No. A-0834-13 (App. Div. Dec. 5, 2014) (slip op. at 1); (Da147). On appeal, defendant challenged the sentencing court's refusal to hear her motion to "vacate" her plea. Id. at 9; (Da155).

This Court "discerned no error" in the trial court's decision not to hear defendant's motion prior to the resentencing. Id. at 12 ("The judge correctly determined that the scope of the remand was limited to [sentencing matters.]"); (Da158). However, this Court determined that defendant's motion to "vacate" her plea was, in reality, a motion to withdraw the plea, which can be made at any time. Ibid. This Court remanded the matter for consideration of defendant's motion to withdraw her plea, which would be subject to a manifest injustice standard. Id. at 13; (Da159).

G. Defendant's Motion to Withdraw Her Plea.

On September 25, 2015, defendant, represented by Mr. Rambarran and Mr. Kleiner, appeared for oral argument on the motion to withdraw her plea before the Honorable Margaret M. Foti, J.S.C. (Da213; 9T).

Defendant advanced three arguments. First, she argued that she was unaware of the extortion plot or, in the alternative, had renounced it. (9T6-7 to 25). In support, defendant cited the affidavit she had submitted to this Court in Williams I, in which she denied knowledge or participation in the crime. (9T7-24 to 8-1). Therein, defendant averred that (1) she gave the sex tape to Persaud only for safekeeping and had no involvement with Persaud's plot to extort Mrs. Binder; (2) on the day of her arrest, defendant entered Persaud's car under the false pretense that they were going to scout locations for his new business; and (3) Persaud told her of the extortion plot for the first time when they arrived at the Binders' home, at which point defendant grabbed the recordings and left for a bus stop. (Da166 to 170). At the hearing, defendant also argued that she was arrested too far from the scene to have been acting as a "lookout." (9T10-24 to 11-2; 9T43-15 to 44-25).

Second, she argued that she only pled guilty due to her emotional damage from her troubled past. (9T48-13 to 49-12). As support, defendant cited her affidavit; two reports by Dr. Nguyen from 2012 and 2015; and

records from the Bergen County jail stating that defendant felt depressed. (9T48-13 to 52-23; Da215 to 216). In her affidavit, defendant averred that she had been sexually exploited upon her arrival to the United States from Guyana (by someone other than Mr. Binder) and, once she began to work as a housekeeper for the Binders, by Mr. Binder. (Da162 to 166). In her reports, Dr. Nguyen opined that defendant's troubled past and mental health issues impaired her judgment at the time of her plea. (Da178 to 193).

Third, defendant argued that plea counsel was ineffective for failing to investigate related defenses and pressuring her to plea. (9T47-9 to 48-12; 9T54-1 to 13). As support, she cited to her affidavit, in which she alleged that plea counsel "showed no interest" in "the history of [her] relationship with the Binders" and told her that a guilty plea would "help" her immigration case. (Da171 to 172).

In opposition, the State contended that defendant's allegations were contradicted by the plea record and were motivated by a pending civil suit against Mr. Binder's estate and to avoid deportation. (Da217 to 220).

On October 22, 2015, Judge Foti issued an order and written decision denying defendant's motion to withdraw her guilty plea. (Da208). First, the court disposed of defendant's protestations of innocence:

> Defendant's argument in connection with the so-called "lookout theory" fails. The court places little weight

> on defendant's assertion, when considered against the evidence inculpating defendant. The record is clear: "specific, credible facts" demonstrate defendant's guilt. The record demonstrates that the illicit tape came into Mr. Persaud's hands from the defendant, who admitted making the tape. Moreover, the defendant informed Mr. Persaud of information concerning Mrs. Binder's identity, address, and telephone number. The defendant's claim that she was attempting to make introductions for job opportunities, or scout out store locations, simply does not ring true, especially in light of the extortion attempt and the defendant's view that she was promised and owed money from Mr. Binder. The court also finds incredible [defendant's] assertion that she gave the illicit tape to Mr. Persaud because was a "trusted friend," when those very recordings were used in the extortion attempt. All of these factors weigh against defendant's claim of innocence.
>
> [(Da223).]

Moreover, Judge Foti found that defendant had truthfully acknowledged her guilt in her plea form, the guilty plea stipulation, her factual basis, and her apology letters. (Da223 to 224).

Turning to defendant's mental-health claims, Judge Foti determined that defendant had not presented "strong, compelling reasons to withdraw her guilty plea." As stated by Judge Foti, "The court understands the seriousness and profound impact of sexual abuse, but . . . [o]nly years later, when the defendant faces deportation and seeks a money judgment against the victim in a civil case, does the defendant proffer this detailed explanation." (Da225).

The court emphasized that "defendant informed the [plea] court on multiple occasions that nothing impaired her ability to enter her guilty plea." (Da224).

With respect to defendant's argument based on allegedly incorrect advice on deportation, Judge Foti noted that "the trial judge asked on five occasions whether the defendant was satisfied with her attorney" and received affirmative responses. (Da226).

H. The Appellate Division Affirms the Denial of Defendant's Motion to Withdraw Her Guilty Plea (*Williams III*).

On appeal, defendant was represented by Mr. Kleiner. State v. Williams (Williams III), No. A-1438-15 (App. Div. July 12, 2018) (slip op. at 1); (Da227). Defendant advanced three arguments for why the motion court erred in denying her motion to withdraw her plea. First, she argued that she was unaware of the extortion plot or, in the alternative, had renounced it. Id. at 18; (Da244). Second, she argued that she only pled guilty due to emotional damage from her troubled past. Id. at 10-11, 23-24 ; (Da236 to 237; Da249 to 250). Third, she argued that her attorney was ineffective for failing to investigate related defenses and pressuring her to plea. Id. at 8, 22-23; (Da234; Da248 to 249).

With respect to defendant's claims of innocence, this Court determined that defendant's claims that she was unaware of the extortion plot or had

attempted to foil it were "neither credible nor plausible." Id. at 21; (Da247). This Court's extensive analysis reads:

> Even if we presume defendant only meant to argue that her actions foiled Persaud's plan of which she was previously unaware, she failed to establish a colorable claim of innocence. The facts essential to her claim of innocence are neither "credible" nor "plausible." The trial court fairly concluded that defendant's version of events simply did not ring true. Notably, defendant did not present the trial court with any competent evidence of the recordings' contents to verify her allegations. In any event, evidence that she was victim of the husband's assaults—as reprehensible as that would be—does not prove her ignorance of Persaud's scheme. Moreover, there is no evidence—except for her own say-so—that she took the embarrassing materials when she left the car, in order to foil Persaud's plan. . . . [Defendant's] admission of guilt is supported by the undisputed facts that she provided the tapes to Persaud and accompanied him on two trips to the victim's town. . . . In sum, we agree with the trial court that defendant failed to present a colorable claim of innocence.
>
> [Id. at 21 to 22; (Da247 to 248).]

In addition, defendant's argument that she had a colorable defense based on her renouncement of the extortion plot lacked support because "[d]efendant contends in her affidavit that she never intended to commit extortion." Id. at 20; (Da246).

As for defendant's claims based on her troubled past, this Court determined that "defendant has presented no compelling evidence that any emotional or psychological condition led her to plead guilty, as opposed to

maintain her innocence of the charges against her." Id. at 23-24; (Da249 to 250).

Lastly, this Court reviewed defendant's ineffective-assistance-of-counsel claims and determined that, even accepting defendant's allegations, defendant could not establish prejudice. Id. at 23; (Da249).

> Defendant contends her attorney was ineffective by failing to review discovery materials and misinforming her about the immigration consequences of her plea. However, the discovery materials, even if they contained all that defendant alleges, would, at most, have established that she was a victim of the husband's exploitation. It would not have established her claim that she was ignorant of Persaud's scheme, and did not participate in it. Indeed, her claim that the husband actually advised her to disseminate the tapes to neighbors if his wife did not pay her, would seem to support the State's case that she actually attempted to follow his directions.
>
> [Id. at 23; (Da249).]

Defendant petitioned for certification. On March 5, 2019, the New Jersey Supreme Court denied certification. State v. Williams (Williams III), 236 N.J. 623 (2018).

I. Defendant Repackages Her Denied Motion as a PCR Petition.

Prior to this Court's decision in Williams III, on June 2, 2016, defendant, represented by Mr. Kleiner, filed a petition for post-conviction relief. (Pa6 to 12). On August 31, 2016, and October 12, 2018, Judge Foti

issued orders dismissing the petition without prejudice and permitting it to be "re-filed within 90 days of the outcome" of defendant's appeal in Williams III and the ensuing petition for certification. (Pa13 to 16).

On April 12, 2019, defendant re-filed her PCR petition. Defendant argued in her petition that (1) she was unaware of the extortion plot or, in the alternative, had renounced it; (2) she only pled guilty due to her emotional damage from her troubled past; and (3) her attorney was ineffective for failing to investigate related defenses and pressuring her to plea. (Da41 to 43).

On September 9, 2020, the Honorable Gary N. Wilcox, J.S.C., ordered an evidentiary hearing. Based on defendant's contention that she was innocent, Judge Wilcox determined, "Only after conducting an evidentiary hearing will this court be in a position to evaluate whether further investigation and review of the case would have rendered [a renunciation] defense viable at trial had defendant-petitioner elected not to plead guilty and proceed to trial." (Da53). Additionally, based on plea counsel's comment at the March 28, 2011 arraignment hearing that he still needed to review additional discovery, Judge Wilcox determined, "This court finds an evidentiary hearing is warranted to determine whether trial counsel's having an incomplete discovery file led to per se ineffective assistance of counsel." (Da53).

With respect to defendant's contentions based on her mental health, Judge Wilcox determined, "The court believes an evidentiary hearing is warranted to determine whether trial counsel adequately investigated and/or considered raising defenses related to defendant-petitioner's mental health issues and, if he failed to do so, whether this failure to do so constituted ineffective assistance of counsel." (Da54).

J. The PCR Hearing Testimony by Defendant and Plea Counsel.

At the evidentiary hearing, defendant gave the following testimony. She was born in Guyana. (1T6-12 to 13). Her father, who physically abused her, sent her to live with a married couple in New Jersey when she was twelve. (1T10-4 to 6; 1T19-14). Soon thereafter, the husband began sexually abusing her. (1T20-7 to 18). Defendant helped the wife with her job cleaning houses and met the Binders when she cleaned their home. (1T20-20 to 21-7).

Defendant told Mrs. Binder that she was being sexually abused and Mrs. Binder offered that defendant should live with the Binders from then on. (1T22-5 to 8). Defendant moved into the Binders' home. (1T23-14 to 20). Mrs. Binder told defendant, who went by the name Bibi Khan, that she would now be referred to as Theresa Williams. (1T23-4 to 9). Eventually, defendant moved in with her sister in New York City and, about four days a week, returned to the Binders' home for housekeeping work. (1T24-12 to 26-5).

Defendant testified that Mr. Binder sexually abused her, starting when she was thirteen years old. (1T27-1 to 18). Defendant testified that she stopped having sex with Mr. Binder when she was in her mid-twenties in 2004. (1T28-11 to 15). At some point thereafter, Mr. Binder contacted defendant and told her that he had cancer. (1T31-13 to 22). Defendant testified that she met with him and that he gave her various recordings. (1T32-1 to 11). Defendant testified:

> He called me over and said he has to talk to me, it's important. So I went there and he handed me two C.D.'s, two audio, one camcorder. And he said, I should keep this. That this proves that I was with them since I got to the country and he said, there's a lot of things that was recorded on it.
>
> I should look at it at some point and then he said, he left—he said in there, once he passed away, what I—there's money on it, on the recorder, and the camcorder, that he mentioned on it but I shouldn't get rid of it because it just proves that I was with them from age 13.
>
> [(1T31-25 to 32-11).]

Defendant testified that the recordings included sex tapes of her and Mr. Binder, as well as an audio recording in which Mr. Binder apologized to her for what he had done and added, "[W]hen I pass away, just bring this and give it to her, just take it to her and she'll give you money." (Da167; 1T33-10 to 35-6). Mr. Binder died about approximately three months later. (1T36-11 to 15).

Defendant testified that she kept the tapes because they proved how long she had been in the United States, not to extort Mrs. Binder. (1T39-1 to 8; 1T40-2 to 4; 1T40-22 to 23). She gave the recordings to her friend Persaud for safekeeping and made him promise not to view them. (1T38-15 to 18). Defendant also gave Persaud Mrs. Binder's contact information, not so he could extort her but rather so he could contact her about renting commercial space. (1T118-3 to 5).

Persaud broke his promise not to view the tapes within days and called defendant to tell her that she should extort Mrs. Binder. (1T40-13 to 23). Defendant said she was not willing to do so. (1T40-21).

Thereafter, defendant accompanied Persaud to scout locations for his new business in Englewood Cliffs. (1T42-3 to 22). On a separate occasion, defendant drove Persaud to the Binders residence and dropped him off at the home. (1T127-4 to 10). Persaud told her that his meeting with Mrs. Binder was about renting commercial space. During the meeting, defendant stayed in the car. (1T119-5 to 13; 1T127-4 to 17).

Defendant testified that, on the day of her arrest, she accompanied Persaud again to Englewood Cliffs under the pretense that they would be scouting possible business location once more. (1T43-1 to 24). Instead, Persaud drove her to the Binders' home and, as they got close, Persaud

revealed, "I've been talking to Ms. Binder and she said to bring you here to collect money." (1T46-19 to 47-2).

Defendant responded, "[W]hy, I told you not to do anything, you said you wouldn't." (1T47-3 to 4). Persaud said, "[N]o, she said to bring you here, I have to bring you here. . . ." (1T47-6 to 7). Defendant felt Mrs. Binder was "setting her up" and, when they were a couple houses down the street from the home, told Persaud to stop the car and that she wanted to take the bus home. (1T48-4 to 19).

Before defendant got out of the car, Persaud told defendant that Mrs. Binder was on the phone and that she said that they should come in and get the money. (1T50-15 to 18). Defendant said, "[N]o, I don't want to do that." (1T50-17 to 18). Persaud said, "[L]ook, the tapes are right there," at which point defendant noticed a brown paper bag next to her. (1T50-23 to 51-5). Persaud said, "I'm going to take it to her," but defendant foiled his plan by taking the bag. (1T51-6 to 8). Defendant said, "I'm leaving. You shouldn't do this, I'm not doing this, I want nothing to do with it." (1T51-9 to 11). Despite Persaud's protestations, defendant left on foot for a nearby bus stop. (1T52-4 to 5).

Defendant testified that, about 15 minutes later, she was arrested at the bus stop and police took custody of the brown bag. (1T54-9 to 15). In an

unrecorded conversation, police told her that Mrs. Binder had said she did not know defendant. (1T55-18). In a recorded conversation, defendant told police to show Mrs. Binder the tapes. (1T56-1 to 11).

Following her arrest, defendant hired Mr. Liebowitz as her attorney. (1T57-9 to 11). In their first meeting, defendant told him that she worked for the Binders and had sexual relations with Mr. Binder. (1T58-12 to 16). In the second meeting, defendant told Mr. Liebowitz about what had occurred on the day of her arrest. (1T59-12 to 20). PCR counsel elicited the following testimony from defendant regarding that conversation with plea counsel:

Q Were you able to tell him about the things you told us about, like, getting out of the car and going to the bus stop and?

A Yeah.

Q Did you tell him that?

A Yeah.

(1T59-12 to 20). Defendant testified that Mr. Liebowitz said that he did not believe that defendant had worked for the Binders. (1T59-24 to 60-6). He also did not discuss possible defenses or go over the discovery with her. (1T63-3 to 6; 1T67-3 to 7). Defendant never informed Mr. Liebowitz that she was in poor mental health. (1T173-9 to 174-1).

Following arraignment, in their third meeting, Mr. Liebowitz stated (1) that defendant should accept the State's plea offer of a flat three years prison

sentence; (2) that she would only actually serve one year in prison; (3) that her guilty plea "will not affect your immigration status . . . because it's one year and not three years"; and (4) that, if defendant went to trial, "the Judge would give [her] ten years and then six years in [a] Texas immigration facility for being illegal." (1T65-3 to 10; 1T71-4 to 6). Defendant told Mr. Liebowitz that she was innocent and to "find the tapes and [her] phone," which would show that she did know the Binders. (1T66-9 to 10). Mr. Liebowitz grew angry and said, "I don't believe you, no." (1T66-12).

With respect to the plea form, defendant testified that Mr. Liebowitz filled out the plea form himself and did not review it with her. (1T70-1 to 4). With respect to the written guilty plea stipulation, defendant testified that "maybe" she signed it. (1T72-3 to 13). Before Judge Roma, defendant repeated the answers on the plea form at the instruction of Mr. Liebowitz, even though the answers were not true. (1T73-3 to 74-7).

Approximately a week and a half later, at defendant's request, Mr. Liebowitz visited her at the jail. (1T76-10 to 17). Defendant asked Mr. Liebowitz why the judge had told her that she would be deported despite Mr. Liebowitz's assurances otherwise. (1T76-20 to 77-3). He told her that she had entered her plea already and "[e]verything is done." (1T77-4 to 5).

Defendant testified that, prior to sentencing, she only wrote apology letters to the victim and the court because Mr. Liebowitz instructed her to do so. (1T81-11 to 14). Defendant testified that, if Mr. Liebowitz had told her that she was likely to be deported as a result of her plea, she "do[es]n't think" she would have pled guilty.[5] (1T97-16 to 24). Similarly, if he had told her about the defense of renunciation, she would not have pled guilty. (1T98-1 to 6).

Mr. Leibowitz testified as follows. After defendant retained him, he met with her several times. (2T36-16 to 23). In his conversations with defendant, she initially told him that "she didn't do it" and that she left the vehicle to walk to a bus stop. (2T22-3; 2T25-22 to 25; 2T28-7 to 8; 2T30-1 to 3). He had no recollection of defendant stating that she took the tapes from the car in an attempt to thwart the extortion plot. (2T117-5 to 10). Instead, he recalled that the police reports established that the sex tapes in the backpack were found with Persaud. (2T117-9 to 10). Defendant never told Mr. Liebowitz

[5] Defendant testified that, following her conviction, her new counsel secured a "T Visa," which allows for nonimmigrant status for victims of human trafficking. (1T85-3 to 8). In this appeal, defendant now claims that the immigration court determined that "she was in bondage under the . . . the Binders." (Db5). Defendant has not provided proof of the determinations of any immigration court (defendant's appendix includes a notice without any details) or explained how any such determinations would be binding in this case, see Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006) (listing the required showings for collateral estoppel to apply); (Da275).

that Mr. Binder had sexual relations with her when she was underage or that she was a victim of sex trafficking. (2T52-4 to 14; 2T111-3 to 5).

With respect to discovery, after arraignment, Mr. Liebowitz went to the BCPO and Englewood Police Department and reviewed certain discovery, including watching videos and listening to recordings. (2T17-5 to 18-18; 2T38-12 to 42-13). He recalled reviewing the co-defendants' statements, which confirmed defendant's involvement in the extortion plot. (2T31-6 to 8; 2T98-7 to 102-15). He also received paper discovery, which he reviewed. (2T19-2 to 20-11). Prior to defendant's plea hearing, Mr. Liebowitz reviewed the discovery with defendant. (2T88-14 to 17). Mr. Liebowitz discussed the benefits and disadvantages of proceeding to trial and her potential sentencing exposure. (2T63-15 to 20). From his vantage point, Mr. Liebowitz believed that the proofs against defendant were "ample" and any possible defenses, such as renunciation, were "not strong." (2T49-6; 2T96-20 to 21).

Mr. Liebowitz denied telling defendant that, if she did not plead guilty, she would serve additional time in Texas pending deportation. (2T50-10 to 19). Mr. Liebowitz denied telling defendant that her guilty plea would not result in deportation. (2T50-20 to 24). Mr. Liebowitz denied giving defendant a blank guilty plea stipulation form and telling her to sign it. (2T58-23 to 24). Instead, Mr. Liebowitz went over each answer on the plea form with her.

(2T86-16 to 21). Before the plea hearing, Mr. Liebowitz advised defendant to tell the truth and, by that time, defendant had stopped claiming innocence. (2T62-3; 2T94-4 to 7).

Defendant never expressed to Mr. Liebowitz that she was having mental health trouble and Mr. Liebowitz had no concerns regarding defendant's competency to plea. (2T15-9 to 17; 2T107-12 to 18).

At the PCR hearing, defendant moved a police report into evidence, which summarized Persaud's statement to police. (Da66). In his statement, he discussed the first time he visited Mrs. Binder. (Da66). He stated that defendant drove him to the area of Mrs. Binder's home, but that she did not want to be close to the home while Persaud threatened Mrs. Binder. (Da66). Instead, she parked the car near a park, instructed Persaud on what to do, and remained there while Persaud visited Mrs. Binder to extort her. (Da66).

K. The PCR Court Finds that Defendant Is Not Credible and Denies Relief.

On April 12, 2024, Judge Wilcox issued an order and written opinion denying defendant's PCR petition. First, the court found that defendant's testimony was untruthful. (Da30).

> [T]he court did not find defendant-petitioner's testimony to be credible regarding a number of issues. For example, the court did not believe [defendant's] testimony regarding why she and Persuad were at Mrs. Binder's home a few days before the arrest. Her testimony was that they wanted to see storefronts for a

> consignment shop that Persaud was contemplating opening. The court also did not find credible her testimony regarding how she obtained the videos of her having sex with Mr. Binder; that is, that Mr. Binder gave her the videos and instructed her to ask Mrs. Binder for money. The court believes the State's theory of the case, which [defendant] pled guilty to before the trial court, that she made the videos with the intent to extort money from the Binders. Further, the court did not find [defendant's] testimony to be credible . . . that it never was her intention to extort money from [Mrs. Binder].
>
> [(Da30 to 31).]

Given that defendant's claims of complete innocence were not plausible, the court determined that Mr. Liebowitz did not render ineffective assistance by not informing defendant about the affirmative defense of renunciation. (Da30). The court credited Mr. Leibowitz's testimony that he considered the defense of renunciation but given the evidence determined that there was little chance of success. (Da30).

With respect to defendant's mental health claims, the court found that "both Mr. Liebowitz and [defendant] testified that [defendant] never expressed or indicated that [defendant] was suffering from any mental illness or had a 'diminished capacity'" prior to the plea. (Da31). Accordingly, Mr. Liebowitz had no reason to investigate defendant's mental health and his performance was not deficient. (Da31).

With respect to defendant's argument based on allegedly incorrect advice on deportation, Judge Wilcox found credible Mr. Liebowitz's testimony that he had gone over the plea form with defendant, which informed her that she would be deported. (Da32). Furthermore, Judge Roma also informed defendant that she would be deported and she "indicated that she understood the consequences." (Da32).

On May 24, 2024, defendant filed a notice of appeal.

## LEGAL ARGUMENT

### POINT I

### DEFENDANT'S RENUNCIATION ARGUMENTS ARE PROCEDURALLY BARRED AND LACK MERIT.

Defendant argues that plea counsel was prejudicially ineffective for "failing to inform the defendant about a viable defense to the charge of attempted extortion arising from her renunciation of purpose to commit the crime." (Db19). The State submits that defendant's argument is procedurally barred and lacks merit.

Defendant's PCR argument is all but identical to the argument advanced as part of defendant's motion to withdraw her guilty plea. As noted by this Court in Williams III, defendant argued that she should be allowed to withdraw her plea because of a valid renunciation defense and that her attorney

rendered ineffective assistance for failing to investigate her defense. Williams III, slip op. at 18. This Court rejected that argument for two reasons. First, this Court noted that "there is no evidence—except for her own say-so—that she took the embarrassing materials when she left the car, in order to foil Persaud's plan." Id. at 21. Second, this Court emphasized that defendant's own affidavit contradicted a renunciation defense because "[d]efendant contends in her affidavit that she never intended to commit extortion." Id. at 20. The State submits that, since defendant's PCR argument is nothing more than an attempt to repackage an argument already deemed meritless, it should be barred under Rule 3:22-5.

Rule 3:22-5 provides that "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceedings brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings." (Emphasis added). The rule's purpose is to "promote finality in judicial proceedings," State v. McQuaid, 147 N.J. 464, 483 (1997), since PCR is not "an opportunity to relitigate matters already decided on the merits," State v. Afanador, 151 N.J. 41, 50 (1997).

A "ground for relief" previously raised does not need to be identical to its subsequent counterpart to trigger the bar; rather, the two grounds need only

be "substantially equivalent." Id. at 482 (citing Picard v. Connor, 404 U.S. 270, 276-77 (1971)). In other words, identical grounds may often be proved by different legal arguments or be couched in different language or vary in immaterial respects. Sanders v. United States, 373 U.S. 1, 15 (1963)[6]; see also Brian R. Means, Federal Habeas Manual § 11:23 (2023) ("[A] ground is successive if the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments . . . [or] factual allegations."). As an example, if a defendant argues that his statement should be suppressed due to physical coercion, that defendant is barred from subsequently arguing that his statement should be suppressed due to psychological coercion. Sanders, 373 U.S. at 15.

In terms of what constitutes an "adjudication" under the rule, a ground is considered adjudicated once the court issues "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." Rompilla v. Horn, 355 F.3d 233, 247 (3d Cir. 2004), rev'd on other grounds sub nom. Rompilla v. Beard, 545 U.S. 374 (2005).

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[6] As shown by the McQuaid Court's citation to Picard, federal habeas decisions inform our State's post-conviction-relief jurisprudence. See State v. Lark, 117 N.J. 331, 343 (1989) (noting that there is "sufficient similarity" between the two schemes to allow for comparison).

Rule 3:22-5's bar of previously-adjudicated grounds is generally strict, there is no exception for constitutional claims. See State v. White, 260 N.J. Super. 531, 538 (App. Div. 1992) ("An issue once decided, even of constitutional dimensions, may not be relitigated."). Courts lift the bar only in narrow circumstances; namely, when a "fundamental injustice" would result. See State v. Hannah, 248 N.J. 148, 178 (2021) ("Rule 3:22-5's bar to review of a prior claim litigated on the merits is not an inflexible command and must yield to a fundamental injustice." (Internal quotation marks and citation omitted)). A fundamental injustice exists "when the judicial system has denied a 'defendant with fair proceedings leading to a just outcome' or when 'inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" State v. Nash, 212 N.J. 518, 546 (2013) (quoting State v. Mitchell, 126 N.J. 565, 587 (1992)). In other words, courts lift Rule 3:22-5's procedural bar only when, due to a system failure, an innocent defendant may have been convicted or a guilty defendant received an incorrect punishment. See Hannah, 248 N.J. at 155 (lifting bar "because critical evidence was withheld from the jury that supported [defendant's] third-party-guilt defense"); State v. Berisha, 458 N.J. Super. 105, 116 (App. Div. 2019) (lifting bar where jury "could very well have concluded" that defendant had acted in self-defense, but no such instruction was given).

Here, the substance of defendant's PCR argument—that a colorable renunciation defense existed—has already been rejected by the prior motion court and appellate panel. As a result, the State submits that the procedural bar should apply. But even if this Court chooses to review the merits of defendant's argument once more, the State submits that Judge Wilcox's ruling was correct.

To demonstrate ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, in that counsel made errors so serious that counsel did not function as the counsel guaranteed defendant by the Sixth Amendment, Strickland v. Washington, 466 U.S. 667 (1984); State v. Fritz, 105 N.J. 42, 58 (1987), and second that counsel's performance prejudiced the defense to the extent that defendant was deprived of a reliable result. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 55. Generally, counsel is not ineffective for failing to raise meritless legal arguments or defenses. State v. Worlock, 117 N.J. 596, 625 (1990).

When a defendant pleaded guilty, he or she must also "convince the court that a decision to reject the plea bargain" and proceed to trial "would have been rational under the circumstances." State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011). That determination must be "based on evidence,

not speculation," ibid., and established by a preponderance of the evidence. State v. Gaitan, 209 N.J. 339, 350 (2012).

Appellate review of a PCR court's decision after an evidentiary hearing "is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony." Nash, 212 N.J. at 540.

In this case, plea counsel reasonably determined that a renunciation defense based on defendant's leaving the car had no merit and did not discuss it with defendant. In doing so, plea counsel is joined by Judge Foti, this Court in Williams III, and Judge Wilcox, all of whom determined that defendant set the extortion plot in motion and that defendant's desire to be at another location when Persaud collected payment was of no moment. Given that defendant's PCR testimony fails to establish that she had ever had a criminal plot to renounce, plea counsel's decision not to pursue such a defense was eminently reasonable. See State v. Hughes, 215 N.J. Super. 295, 300 (App. Div. 1986) ("Renunciation, after all, posits prior participation, and defendant could not renounce a conspiracy that he had not joined."). Lastly, as found by Judge Wilcox, defendant never informed plea counsel regarding her allegation that she took the tapes to foil Persaud's plot and, even if she had, that allegation was not credible.

## POINT II[7]

## DEFENDANT'S ARGUMENTS BASED ON INADEQUATE INVESTIGATION ARE PROCEDURALLY BARRED AND LACK MERIT.

Defendant argues that "[plea] counsel's failure to investigate, review and receive the whole discovery file and consult with any experts was tantamount to ineffective assistance of counsel." (Db36). Defendant also argues that "[plea] counsel should have partaken in a fact finding mission to determine whether independent evidence supported [defendant's] claim to her attorney that her mental health was damaged due to the alleged victims being the perpetrators of a human trafficking crime against the [defendant] and against the United States of America." (Db40). As a result, defendant contends that she was deprived of "a better, negotiated plea deal, or else a positive verdict at trial." (Db24). The State submits that appellant's arguments are procedurally barred and lack merit.

Defendant's discovery arguments were resolved in Williams III. There, defendant argued that plea counsel was ineffective for failing to review the discovery and this Court determined that, even accepting defendant's

[7] This Point responds to Points II and III of defendant's brief.

allegations, defendant could not establish prejudice. Williams III, slip op. at 22-23.

> Defendant contends her attorney was ineffective by failing to review discovery materials and misinforming her about the immigration consequences of her plea. However, the discovery materials, even if they contained all that defendant alleges, would, at most, have established that she was a victim of the husband's exploitation. It would not have established her claim that she was ignorant of Persaud's scheme, and did not participate in it. Indeed, her claim that the husband actually advised her to disseminate the tapes to neighbors if his wife did not pay her, would seem to support the State's case that she actually attempted to follow his directions.
>
> [Id. at 22-23.]

Additionally, this Court determined that "defendant has presented no compelling evidence that any emotional or psychological condition led her to plead guilty, as opposed to maintain her innocence of the charges against her." Id. at 23-24.

Defendant's current arguments are substantially equivalent to those previously-adjudicated arguments. That is, defendant now asserts that plea counsel should have reviewed discovery (which particular items is unclear) in order to further investigate defendant's claims of innocence and mental health troubles. Defendant fails to establish what this Court got wrong on the first

go-around and, as a result, the procedural bar should apply. In any event, defendant's arguments are meritless.

"[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Additionally, the petitioner must establish a reasonable probability that, with adequate investigation by the attorney, the trial's result would have been different. Strickland, 466 U.S. at 694.

Here, defendant's claims of inadequate investigation by plea counsel are factually mistaken. While plea counsel may not have reviewed all discovery prior to the arraignment, he testified that he finished his review prior to the plea. With respect to defendant's mental health, plea counsel testified that defendant never informed him that either Mr. Binder had sexually abused her while she was underage or that she was having mental health issues. Thus, Mr. Liebowitz had no reason to investigate any mental health defenses.[8] In sum,

[8] Defendant apparently recognizes this point and, now on appeal, argues that the post-conviction medical records and reports should be heard as part of a motion to withdraw her guilty plea based on newly discovered evidence. (Db44). The State notes the obvious—defendant already made a motion to

defendant's vague contentions that further investigation by plea counsel would have led defendant to reject the plea or to an acquittal at trial are unsupported by any credible evidence.

## CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Judge Wilcox's decision to deny defendant's PCR petition.

Respectfully submitted,

MARK MUSELLA
BERGEN COUNTY PROSECUTOR

BY: s/William P. Miller
William P. Miller
Assistant Prosecutor

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withdraw her guilty plea relying on post-conviction medical records and reports and it was rejected in Williams III.

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***New Jersey Bar No. 003951988***

August 22, 2025

***Via eCourts Appellate***
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

**Re: State of New Jersey v. Theresa Williams AKA Bibi Khan**
**App. Div. No. A-002945-23T3**

**Criminal Action**

**On Appeal from an Order Denying Post-Conviction Relief of the Superior Court of New Jersey, Law Division, Bergen County**

**Sat Below: Hon. Gary N. Wilcox, J.S.C.**

**APPELLANT'S LETTER BRIEF IN REPLY**

Honorable Judges of the Appellate Division:

Pursuant to R. 2:6-2(b) and R. 2:6-5, please accept this Letter Brief in Reply on behalf of the Petitioner-Appellant, Theresa Williams, AKA Bibi Khan (hereinafter, "Appellant" or "Ms. Khan"), in lieu of a more formal brief in response to the Respondent's Brief submitted on behalf of the State of New Jersey.

# TABLE OF CONTENTS

## LEGAL ARGUMENT

### Point I. RULE 3:22-5 DOES NOT BAR PCR CLAIMS WHERE THE FACTS WERE NOT PREVIOUSLY DEVELOPED.

Respondent mischaracterizes Ms. Khan's claim as procedurally barred, but Rule 3:22-5 applies only where a prior adjudication fairly resolved the same ground for relief on the merits. That did not occur here. Appellant's motion to withdraw her plea was decided on the papers, without testimony, and before critical facts had been developed through the PCR evidentiary hearing. Her post-conviction claim of ineffective assistance of counsel rests on new evidence, including sworn testimony from both Ms. Khan and plea counsel, and must be assessed accordingly.

Unlike the prior motion to withdraw her plea, this PCR petition followed an evidentiary hearing in which Ms. Khan testified in detail about the abuse and manipulation she suffered as a child and young adult; and Plea counsel admitted he never inquired into her trauma, and had no memory of her describing the sex trafficking or abuse.

The record now contains the following facts that were not before the trial court or the Appellate Division in Williams III, including:

- Plea counsel's admission that he did not recall any disclosure of Ms. Khan's history of sexual abuse or trafficking;
- Plea counsel's failure to investigate or discuss possible defenses arising from that history;

- Plea counsel's lack of awareness or analysis of a viable renunciation defense, even though it was supported by the physical evidence and police reports;

- Ms. Khan's detailed testimony that she actively withdrew from the offense by taking the tapes and walking away;

- Documentary and testimonial evidence corroborating her psychological trauma and its impact on her decision to plead guilty.

These key facts go to the heart of Ms. Khan's claim that she was deprived of effective assistance because her attorney failed to investigate defenses and failed to advise her of the consequences of pleading guilty. That claim was not adjudicated on the merits in the prior motion. Rule 3:22-5 does not bar a PCR court from hearing new evidence that could not have been fairly presented before.

The State's argument to the contrary collapses the distinction between a legal theory previously raised and an undeveloped factual basis only later unearthed through discovery and sworn testimony. It also ignores the purpose of post-conviction relief, which is to correct constitutional errors that could not be addressed through direct appeal. No testimony or expert reports were submitted in the earlier motion to withdraw the plea, and the psychological evaluations and plea counsel's admissions only came to light during PCR. See State v. Preciose, 129 N.J. 451, 462 (1992) (stating that PCR provides "an opportunity to challenge a plea" where "new information has come to light."). Appellant is not relitigating old claims; she is finally litigating a claim that could not have been resolved until now.

## Point II. COUNSEL'S FAILURE TO INVESTIGATE APPELLANT'S PAST AND MENTAL HEALTH WAS CONSTITUTIONALLY DEFICIENT.

Trial counsel never investigated Ms. Khan's personal history. He did not ask about her background, her immigration status, or her relationship with the Binder family. He did not inquire into her mental health or request any psychological evaluation. He testified that he had no knowledge of the repeated sexual abuse she suffered, beginning at the age of only twelve, first by the man who brought her to the United States, and later by Mr. Binder himself. That was not a defense strategy. Under these special circumstances, it was a failure of basic professional responsibility.

Counsel's obligation to investigate relevant defenses, including those related to a client's mental state, is well established. See Strickland v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). That duty is especially critical when the defendant is vulnerable, traumatized, and facing deportation.

Here, Ms. Khan's history directly supported a mental health-based defense and bore on the voluntariness of her plea. By the time of the PCR hearing, the record included two expert reports from Dr. Nguyen diagnosing her with PTSD and depressive symptoms consistent with prolonged trauma and grooming. Dr.

Nguyen found that these conditions impaired her ability to understand the nature of the proceedings and participate meaningfully in her defense. None of that was available at the time of the plea because counsel never investigated it.

The State's brief glosses over these facts and repeatedly characterizes Ms. Khan as merely "troubled" or emotionally vulnerable. That framing ignores the legal significance of her status as a trafficking victim, and the systemic failures that allowed her to be charged, convicted, and nearly deported without any court ever considering her trauma. Dr. Nguyen's findings make clear that Ms. Khan was psychologically incapable of asserting herself under pressure at the time.

At the very least, competent counsel would have recognized red flags and sought an expert opinion. Counsel here did neither. He did not consult any mental health professional, did not request any records, and testified that he had no concerns about Ms. Khan's competency. But she had been raped repeatedly as a child, renamed by her abusers, and instructed to write apology letters to the very people who exploited her. Plea counsel's failure to investigate these circumstances was unreasonable and resulted in a miscarriage of justice. Had counsel conducted even a modest inquiry, he would have discovered mitigating evidence that went to the core of Ms. Khan's decision to plead guilty. He could have challenged the State's theory, supported a claim of diminished capacity, or at the very least advised Ms. Khan of her legal options. Instead, she went to prison and nearly lost

her right to remain in the country without anyone presenting the most basic facts about her life.

## Point III. COUNSEL IGNORED A VIABLE RENUNCIATION DEFENSE.

Ms. Khan had a colorable defense under N.J.S.A. 2C:5-1(d), New Jersey's renunciation statute. Counsel never explained that such a defense existed. He never advised her that renunciation is a complete defense to a charge of attempt or conspiracy where the defendant "abandoned his effort to commit the crime or otherwise prevented its commission" and did so under circumstances manifesting a "complete and voluntary renunciation of his criminal purpose." Id. As a result, Ms. Khan pled guilty without understanding that her actions of removing the tapes from the car and walking away may have constituted a legal defense.

At the PCR hearing, Ms. Khan testified that she told Persaud she wanted nothing to do with his plan, took the materials he intended to use in the extortion, and left the scene. "I told him I didn't want to do this. I walked away with the bag that had the tapes. I left. I didn't want to go through with it." 3T at 36:11–13.[1] Additionally, she later testifies: "I took the bag with the tapes and left. I didn't want him to go through with it. I wanted to stop him." 3T at 40:3–5.

[1] "3T" refers to the January 18, 2023 PCR hearing transcript.

The defense of renunciation was not inconsistent with Ms. Khan's denial of intent to extort if she later distanced herself from the offense and acted to prevent its completion. Yet plea counsel testified that he never discussed the renunciation statute with her and could not recall her giving any version of events that would have triggered that analysis. Ms. Khan, by contrast, testified that she told him she walked away from the scene and tried to stop Persaud. Even if counsel disbelieved her, he had a duty to investigate the facts and advise her accordingly. See State v. Gaitan, 209 N.J. 339, 381 (2012) ("[F]ailure to investigate a potential defense may render the attorney's performance constitutionally deficient.").

Moreover, plea counsel's conclusion that the defense was "not strong" does not satisfy his duty to conduct a reasonable investigation. Strickland, 466 U.S. at 690–91. Had he done so, there was at least a reasonable probability that Ms. Khan would have exercised her right to go to trial rather than plead guilty. See State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (prejudice shown where "a reasonable probability [exists] that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial"). Instead, counsel ignored the issue entirely.

The State repeatedly invokes Slater and the "solemnity" of the plea colloquy, but this ignores Gaitan and Strickland, which hold that a plea is not voluntary if made without knowledge of viable defenses. Mr. Liebowitz admitted

he never discussed renunciation and did not investigate diminished capacity. Even if the colloquy was facially sufficient, Gaitan makes clear that a plea entered in ignorance of fundamental defenses cannot be deemed knowing or voluntary.

If the Court lowers the bar for guilty plea cases to the point that an extremely viable defense of renunciation need not be investigated, explored, and/or openly discussed with a naïve client with no criminal history experience, then the standards by which a guilty plea can be attacked is effectively vitiated and blue penciled out of the rule book. The lower court's fatal error in this analysis or lack thereof in this matter is that it fails to recognize that when it disbelieved that the petitioner was not possessing a guilty mind when she arrived with her codefendants on a parked street a block away from the victims' home, and then abandoned the scene seeking to get out of the area [which is undisputed] this rendered the renunciation defense as completely factually viable as a strong defense. The more the lower court concluded that the petitioner had a guilty intent and then abandoned it, it is indisputable that the major defense was not only viable but had a good chance of leading to a successful out come at trial. It was up to the petitioner to weight hat option not the plea attorney who actually never did a thing to look into this defense. Moreover, it is likely the attorney, given his quick move to a plea just a few days after the arraignment, never even knew that the defense existed in the case or he did not even know that such a defense existed in the law.

## Point IV. THE PCR COURT ERRED IN REJECTING APPELLANT'S TESTIMONY AND IGNORING SUPPORTING EVIDENCE.

The PCR court concluded that Ms. Khan was "not credible," but failed to explain that conclusion or reconcile it with the substantial corroborating evidence presented at the hearing. Its finding rested almost entirely on demeanor, without addressing whether her account was consistent with the police reports, expert evaluations, and other testimony.

First, the court disregarded physical evidence and testimony that lent support to Ms. Khan's account, including her statement that she took the tapes and walked away from the scene to prevent the offense from going forward. Ms. Khan testified that she removed the bag containing the tapes and left because she wanted no part in Persaud's plan. See 3T at 36:11–13; 40:3–5. Defense counsel emphasized at the hearing that the arrest reports and property receipts corroborated this version, showing that Ms. Khan was found in possession of the tapes and other items when arrested. See 3T at 14:15–25. Although Persaud gave a conflicting account, the court made no effort to assess the credibility of the physical evidence or reconcile these competing narratives. Instead, it adopted the State's position wholesale, without explanation. That is not a sufficient basis to reject sworn testimony and documentary support presented at a post-conviction hearing.

Second, the court ignored counsel's own admission that he had no memory of Ms. Khan disclosing her history of sexual abuse or human trafficking and that he never inquired into her background. That failure was not rebutted. Yet the court gave dispositive weight to Mr. Liebowitz's generalized assertions that he advised her competently, without grappling with the fact that he admittedly had no idea she had been a child victim of rape by the man whose family later accused her of extortion. It is difficult to square the court's conclusion with counsel's candid testimony about what he did not know.

Third, the court offered no analysis of the psychological evidence introduced through Dr. Nguyen's expert reports. Those reports diagnosed Ms. Khan with PTSD, chronic trauma, and emotional dissociation, and explained how those conditions affected her capacity to participate meaningfully in her defense. The court made no finding as to Dr. Nguyen's credibility and did not engage with the substance of the reports. Its silence on this point is particularly troubling in a case where plea counsel failed to investigate mental health at all.

Finally, the court dismissed Ms. Khan's account as self-serving, but that is not a valid basis for rejection. Every PCR petitioner is necessarily advocating on their own behalf. What matters is whether their testimony is consistent, corroborated, and plausible in light of the record. Ms. Khan's testimony met that standard. The court's failure to acknowledge corroboration, engage with expert

findings, or apply the correct legal standard for assessing ineffective assistance renders its decision clearly erroneous. That error requires reversal.

## CONCLUSION

For the foregoing reasons, Petitioner-Appellant, by and through her undersigned attorney, Eric V. Kleiner, Esq., respectfully requests entry of an Order reversing the ruling of the Law Division and directing it to vacate Ms. Khan's guilty plea on the basis of ineffective assistance of counsel.

Respectfully submitted,

by: /s Eric V. Kleiner
ERIC V. KLEINER, ESQ.
Attorney for Petitioner-Appellant,

Dated: AUGUST 22, 2025