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		October 5, 2024 SUPERIOR COURT OF NEW JERSEY
STATE OF NEW JERSEY,	:	APPELLATE DIVISION
	:	Docket No.: A-3092-23T4
Respondent,	:	CRIMINAL ACTION
	:	On Appeal from Appellant's
	:	Judgment of Conviction entered
vs.	:	in the Superior Court of New
	:	Jersey, Law Division, Essex County
	:	
JOVANNY CRESPO,	:	Indictment No.: 19-05-1401-I
	:	
Defendant-Appellant.	:	Sat Below: Hon. Michael L. Ravin, J.S.C.
	:	and a Jury

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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1 Designation for Defendant-Appellant's Appendix is "Da".
Designation for Defendant-Appellant's Confidential Appendix is "CDa".

2 The Indictment is contained within the CDa because it was filed in the Law Division as a "confidential Indictment."

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3 Although the criminal histories were not introduced at the motion hearings, they were referred to by the prosecutor, trial court and defense counsel throughout the hearing and it is clear that all parties had the criminal histories of Griffin and Dixon. CDa 35-55 are included in the Defendant's Confidential Appendix as the documents fall within one or both of the "exceptions to the general prohibition against included trial court briefs and exhibits in the appendix, pursuant to R. 2:6-1(a)(2), because they are referred to in the trial court's decision and are germane as to whether an issue was raised in the trial court. (6T12-19 to 25; 6T13-18 to 25; 6T45-1 to 4; 15T17-13 to 18-5; trial court's Letter of Clarification to the Appellate Division at Da 23-28)

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4 Da 161 is the Prosecutor's Investigator's note and the Newark Police Towed Vehicle Report (Da 164-165), which supported the defense argument that Griffin stole the motor vehicle from Ebony Davis who was the owner of the vehicle driven by Griffin, and are included in the Defendant's Appendix as the documents fall within one or both of the "exceptions to the general prohibition against included trial court briefs and exhibits in the appendix, pursuant to R. 2:6-1(a)(2), because they are referred to in the trial court's decision and are germane as to whether an issues was raised in the trial court. (6T52-10 to 23; Order at Da 13-15; Amended Order at Da 30-33; trial court's Letter of Clarification to the Appellate Division at Da 23-28)

5 The toxicology report for Gregory Griffin and the urine drug screen for Andrew Dixon (Da 163) are included in the Defendant's Confidential Appendix as the documents fall within one or both of the "exceptions to the general prohibition against included trial court briefs and exhibits in the appendix, pursuant to R. 2:6-1(a)(2), because they are referred to in the trial court's decision and are germane as to whether an issues was raised in the trial court. (Da 35-46)

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PRELIMINARY STATEMENT

Mr. Jovanny Crespo, the defendant herein, was a sophomore Newark Police Officer working a dangerous night shift in a high crime area of Newark. On January 28, 2019, Officer Sanchez observed a Chrysler 300 fly by her. Sanchez pursued the vehicle with her emergency lights activated. The vehicle, operated by Gregory Griffin, with Andrew Dixon as his passenger, would not come to a complete stop. Finally, Griffin stopped, but he faked turning off the motor when requested by Sanchez and kept the car in drive. Griffin appeared under the influence of drugs and was non-compliant to Sanchez's orders.

Sanchez saw a handgun sticking out from under Griffin's leg. She immediately drew her service handgun, pointed it at Griffin's head and ordered him to "show me your hands." Sanchez called in a "646" (suspect with a handgun). Detective Moss also ordered Griffin to get out of the vehicle. Moss tried to open the door. This is when Griffin violently sped away.

Mr. Crespo was partnered with Officer Ortiz, who was the driver. They pursued Griffin who was driving at speeds of 75 mph, disregarding traffic signals, driving over sidewalks and even driving the wrong way on the streets. Griffin slowed his vehicle enough where Mr. Crespo exited his patrol vehicle and approached the Griffin vehicle from the passenger side. Mr. Crespo observed Dixon point a handgun at him. In response, Mr. Crespo fired at

Dixon. The vehicle sped away. At the second attempted stop, Mr. Crespo approached on foot on the driver's side. Dixon still had the gun in his hand and now had a mask covering his face. Mr. Crespo fired at him. Again, the vehicle sped away. At the third attempted stop, with Mr. Crespo believing that both the driver and passenger were armed, he approached from the passenger side and believed Dixon was going to shoot him when he was cracking the door open. Mr. Crespo fired twice, killing Griffin and hitting Dixon.

Griffin and Dixon were both under the influence of drugs. The gun they possessed was illegal. Both men had extensive criminal histories. Two days earlier Griffin had beaten up his former girlfriend and stole her vehicle, the same vehicle he was operating. There were illegal drugs recovered from the vehicle. In pretrial rulings, the trial court excluded this evidence. In Points VI and VII, Mr. Crespo challenges these rulings.

In Point I of this brief, Mr. Crespo contends that he was deprived of a fair jury trial because Juror number 4 had a prior opinion of the case from watching a news program about the shooting. The juror did not disclose this to the trial court. During deliberations, the panel of jurors informed the trial court of his bias. A mistrial should have been ordered. In Point II, Mr. Crespo contends the trial court erroneously excluded Dixon's extensive and violent criminal history. In Point III and IV, Mr. Crespo contends that the trial court

erred by not instructing the jury with negligence and the use of force in law enforcement jury instructions. This was not cured when the trial court ordered supplemental summations concerning the use of force in law enforcement charge. In Point V, Mr. Crespo contends the prosecutor committed misconduct throughout his summation. In Point VIII, Mr. Crespo contends that the trial court erroneously allowed prejudicial hearsay into the trial. In Point X, Mr. Crespo contends that his twenty-seven-year sentence was excessive.

STATEMENT OF PROCEDURAL HISTORY

The Essex County Prosecutor's Office presented evidence to an Essex County grand jury concerning a January 28, 2019 shooting by Mr. Crespo, who at that time was an on-duty Newark Police Officer. (1T; 2T; 3T; and 4T) On May 22, 2019, the grand jury returned a true bill of indictment charging Mr. Crespo with first-degree aggravated manslaughter, contrary to N.J.S.A. 2C:11-4(a)(1)(count one); second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1(b)(1)(count two); two counts of second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a)(1)(counts three and four); and two counts of second-degree official misconduct, contrary to N.J.S.A. 2C:30-2(a)(counts five and six). (CDa 1-7) On July 25, 2022, the trial court denied the State's motion for pretrial detention. (Da 8-12)

On August 31, 2021, the Hon. Martin Cronin, J.S.C. granted the State's motion to quash the defense subpoenas seeking information concerning (1) the criminal histories of the alleged victims (6T24-22 to 26-4); (2) the heroin recovered from the vehicle (6T44-4 to 12); and (3) the domestic violence incident, as well as any evidence that the vehicle operated by Griffin was just previously stolen from Griffin's former girlfriend. (6T5-13 to 76-2; 6T52-1 to 53-9; Da 13-15). [6] On October 6, 2021, Judge Cronin granted the State's motion *in limine* excluding any reference by the defense to the charges lodged by the State against Griffin and Dixon. (Da 16-21)

On September 28, 2021, Mr. Crespo filed a motion for leave to appeal the trial court's rulings. (Da 22) On October 5, 2021, Judge Cronin filed a R. 2:5-1(b) clarification letter with the Appellate Division. (Da 23-28) On October 19, 2021, the Appellate Division denied Mr. Crespo's motion for leave to appeal. (Da 29) On June 22, 2022, Judge Cronin amended his September 8, 2021 and October 6, 2021 orders. (Da 30-33)

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[6] The trial court treated the motion as a motion *in limine*. (6T5-13 to 6-9) Because the trial court granted the motion to quash the subpoenas, the proffered evidence was not produced and was not made part of the record. Both Griffin and Dixon had extensive criminal histories (Da 135-155), and Ebony Davis reported to law enforcement authorities, after Griffin's death, that he beat her, stole money from her person and stole her motor vehicle. (Da 161)

On December 6, 2022, the Hon. Michael L. Ravin, J.S.C. granted the State's motion *in limine* to exclude the toxicology report for Griffin, which indicated he was under the influence of drugs, and evidence that Dixon was under the influence of PCR. The trial court prohibited any testimony concerning the victims' drug use. (Order at Da 34; Opinion at Da 35-46)

A jury trial commenced before Judge Ravin on May 2, 2023 and concluded on July 3, 2023. (11T to 32T) On June 13, 2023, the trial court entered an order and opinion concerning what instructions the jury was to receive. (Order at Da 47-48; Opinion at Da 49-60) On June 13, 2023, the trial court entered three orders denying the defense leave to appeal the ruling. (Da 68; Da 69; Da 70-71). On June 13, 2023, Mr. Crespo file an emergent application to the Appellate Division. (Da 61-67) On June 14, 2023, the Hon. Allison E. Accurso, P.J.A.D. denied the request because she was aware the jury had been on the case for quite some time and the "[Appellate Division's] involvement at this stage could easily do as much harm as good, and defendant has appeal rights in the event of a guilty verdict." (Da 72-73)

After summations were completed the trial court reversed its previous ruling that denied the defense request for the Use of Force in Law Enforcement jury instruction. (Da 74-79; 25T3-10 to 5-13) The next day the defense

(25T10-14 to 21-2) and State (25T21-6 to 50-15) were both given 30 minutes to reopen their summations limited to the use of force jury instruction. (Da 79)

On June 28, 2023, the trial court denied a defense motion for a mistrial to substitute the third, and last, alternate juror. (Da 80-84). On July 3, 2023, the trial court denied a defense motion for a mistrial due to the actions of a tainted juror. (31T82-12 to 13; 31T90-16 to 99-1) On July 5, 2023, Mr. Crespo was found guilty on all counts. (32T6-5 to 10-25; Da 85-89) On July 5, 2024, the trial court denied Mr. Crespo's motion for bail pending appeal. (Da 90) On August 10, 2024, the trial court denied Mr. Crespo's motion for reconsideration of his bail motion. (Da 90-100) On February 22, 2024, the trial court denied Mr. Crespo's motion for a new trial and bail pending sentence and appeal. (Da 101-118) On May 22, 2024, Mr. Crespo's motion for bail pending appeal was denied, without prejudice. (Da 119)

On May 31, 2024, Judge Ravin sentenced Mr. Crespo to twenty years of imprisonment, subject to The No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2, for the first-degree aggravated manslaughter conviction; and seven years of imprisonment, consecutive, subject to NERA, for the aggravated assault conviction. The weapons offense convictions in counts three and four were merged into count one. Mr. Crespo was sentenced to concurrent, flat, six-year prison terms for his two official misconduct convictions. The

aggregate sentence imposed was twenty-seven years of imprisonment, subject to NERA. (Da 120-122; Da 131-134; 33T76-9 to 80-13)

On June 8, 2024, Mr. Crespo appealed his conviction and sentence to the Appellate Division. (Da 123-128) On August 20, 2024, the trial court denied Mr. Crespo's motion for bail pending appeal. (Motion at Da 129-130; Certification at CDa 135-155; Order at Da 156). This brief now follows.

STATEMENT OF FACTS

On January 28, 2019, Mr. Crespo was a sophomore Newark Police Officer working out of the 5th Precinct. (19T30-9 to 16) That evening his partner was Hector Ortiz, who graduated the Police Academy with Mr. Crespo. They were working the 7:00 p.m. to 3:00 a.m. shift as Suppression Unit 588 and were patrolling in the high crime area known as the Pennsylvania corridor. (13T17-1 to 20-1; 18T140-12 to 14; 19T30-23 to 31-21) Prior to their shift, the officers were briefed by their Lieutenant to be on the look out for retaliatory shootings between rival gangs. (13T48-9 to 16; 19T31-15 to 32-11)

At approximately 11:30 p.m., Officer Valeria Sanchez, who was assigned as an Alpha Unit (lone officer without a partner) as a Suppression Unit that would thwart crimes before they occurred. She was also patrolling in the Pennsylvania corridor. (18T140-12 to 141-16) While on patrol, Sanchez observed a black Chrysler 300 “fly by" at a high rate of speed.

(18T149-1 to 150-16) Sanchez radioed in what she observed and prepared to conduct a motor vehicle stop. The driver, later identified as Griffin, with a passenger in the front seat, later identified as Dixon, did not immediately pull over. Griffin would pretend to stop, then pull forward, pretend to stop and pull forward, repeatedly. (18T151-21 to 163-5; BWC at Da 157)

Finally, Sanchez exited her motor vehicle and approached the driver side of the Chrysler on foot. Sanchez commanded Griffin to turn off the motor vehicle. Griffin's mood changed. Sanchez's body worn camera ("BWC") depicted Griffin as an agitated, disorientated and angry man, that appeared to be preparing to flee by driving away. In response to Sanchez's orders, Griffin questioned Sanchez, "Why?," repeatedly. Griffin pretended to turn the vehicle off, but he did not. Griffin also did not put the vehicle in park. Griffin then rolled his window up. Sanchez pounded on the window ordering him out of the vehicle. (See BWC at Da 157; 18T148-24 to 163-5)

Griffin looked down. Sanchez then observed a handgun between Griffin's legs and immediately radioed in for backup by calling in a 6-4-6 [suspect with a firearm in the motor vehicle (12T4-12 to 14)]. (18T165-3 to 17) Sanchez drew her service handgun and pointed it directly at Griffin's head, while ordering him to "show me your hands." Sanchez's BWC depicted

Griffin with his hands up, but he was ready to take flight by driving away. (See BWC as Da 157; 18T166-8 to 172-17)

Sanchez's BWC video recorded the following:

> Officer Sanchez: Turn off the vehicle. Turn off the vehicle. Turn it off. Griffin: Huh? Officer Sanchez: Turn off the car. Griffin: Why? Officer Sanchez: Turn off the car. Griffin: Why? Officer Sanchez: Sir turn off the vehicle. Turn off the vehicle sir. Turn it off. Griffin: (indiscernible) Officer Sanchez: Turn off the car and roll down the window. Open the door. Get me another unit. Open the window. Open the door. Griffin: What's up? Officer Sanchez: I got a 6-4-6. Let me see your hands. Let me see your hands. Hands. Hands on the wheel. Let me see your hands. Show me your hands. Griffin: (indiscernible) Officer Sanchez: Hands on the wheel. Unidentified officer: Turn it off. Turn it off. Officer Sanchez: The car's off. Unidentified officer: indiscernible) Officer Sanchez: The vehicle took off. Officer Sanchez: Thomas and Pennsylvania. Fuck. (11T92-4 to 93-7; BWC at Da 157)

Detective Christopher Moss and his partner, Officer Richard Masciero, arrived at the scene in an undercover black Mercedes Benz. Moss approached on the driver side while Sanchez had her handgun pointed at Griffin's head. Moss ordered the driver to step out of the vehicle. Moss attempted to open the door to ultimately apprehend Griffin and place him under arrest. At that moment, Griffin was under arrest, the officers only needed apprehend him. Instead, Griffin fled. (13T86-5 to 90-6; 18T173-4 to 175-25)

Sanchez or Moss could have been dragged down the street or shot. (18T 173-4 to 175-25; BWC at Da 157) Moss and Masciero returned to their

vehicle and engaged in a high-speed pursuit. (13T90-8 to 91-6) Sanchez radioed to police dispatch what happened and began to pursue the motor vehicle. (BWC at Da 157) Soon, scores of Newark Police Officers would be involved in a high-speed pursuit. (See BWC at Da 157; Da 158; and Da 159)

Officers Crespo and Ortiz responded to the call. (13T18-12 to 20-1) Officer Ortiz was the driver and they were pursuing Griffin on Clinton Avenue at a dangerous rate of speed. Officer Crespo was informed that the driver possessed a gun. Ortiz and Crespo followed the vehicle, which would slow down and then take off, over and over. The officers that pursued Griffin reached speeds of 75 miles-per-hour in residential 25 miles-per-hour speed zones. Griffin was driving erratically and recklessly. At one point he was driving on the wrong side of the road. Eventually, Griffin slowed his motor vehicle to a crawl at Madison and Bergen Streets. Ortiz pulled alongside the passenger side of the vehicle. Officer Crespo exited and went around the back of his vehicle to approach the passenger side of the Chrysler. Seated in the front passenger seat is Dixon, who leaned forward up against the driver and lifted up his arm and pointed a handgun directly at Officer Crespo, who believed he was going to be shot. Officer Crespo took three shots at Dixon as the Chrysler sped away. Officer Crespo now believed both the driver and passenger were armed with handguns. (See BWC at Da 158; BWC at Da 159;

Ortiz at 13T20-2 to 26-9; 13T30-9 to 19; Crespo at 19T55-7 to 13; 19T56-16 to 59-8; 59-8; 19T64-9 to 71-13; Gonzalez at 14T8-16 to 14-22; Lopez at 14T106-24 to 107-4)

Officer Crespo returned to his vehicle. Ortiz continued the pursuit. Griffin was driving over sidewalks and through red lights. Eventually, Griffin slowed at a light at Bergen Street and Springfield Avenue. Ortiz pulled near the driver side of the Chrysler 300. Officer Crespo exited his motor vehicle and approached the driver side. The vehicle never stopped. Officer Crespo observed Dixon holding a handgun and believed he was going to shoot at him. Officer Crespo also believed the driver was armed based upon Sanchez's report. Officer Crespo fired at Dixon with Griffin in his line of fire. Officer Crespo repeatedly informed his partner that the passenger pointed a gun at him. Officers Dixon and Crespo continued to pursue the Chrysler 300 on Springfield Avenue. Griffin turned right onto Irvine Turner Boulevard. (Ortiz at 13T36-10 to 39-10; 20-2 to 26-9; Crespo at 19T70-16 to 71-13) Officer Crespo observed Officer Gonzalez exit his motor vehicle and point his handgun at Griffin's vehicle. (19T72-1 to 11)

Officer Gonzalez was walking into the 5th Precinct when he received the 6-4-6 call. (14T8-16 to 14-22) Officers Gonzalez and Lopez engaged in the pursuit and were pursuing the Chrysler 300 on Irvine Turner Boulevard.

(14T23-1 to 26-2) The officers passed the vehicle with their emergency lights activated. (14T28-1 to 30-4) Gonzalez could see into the vehicle and observed Griffin driving as if nothing was wrong. Gonzalez pulled ahead and the stopped his vehicle. Griffin slowed his motor vehicle, but never stopped. At no time during the pursuit did Griffin give any indication that he would surrender to the police. Gonzalez and Lopez were walking towards Griffin's motor vehicle when they heard two shots. Gonzalez went to the driver's side door to remove Griffin. Griffin's foot was on the brake and the vehicle was in drive. Lopez testified that there was no question that she could see through the tinted windows of Griffin's vehicle. (Gonzalez at 14T28-1 to 32-7; 14T70-10 to 24; Lopez at 14T107-4 to 119-7)

Officer Crespo observed the passenger side door opening and closing and believed the pursuit might become a foot pursuit. (19T75-16 to 25) Officer Crespo exited his motor vehicle and approached from the rear passenger side of the Chrysler 300. Officer Crespo observed movement inside of the motor vehicle and the passenger door kept cracking open as if Dixon was going to take a shot at him. (19T78-23 to 79-18) Dixon was wearing a black balaclava mask (Da 166) that covered his entire face that he was not wearing during the Sanchez first attempted apprehension. (19T86-10 to 88-10)

Officer Crespo believed that both men were armed and were about to shoot at him. (19T100-10 to 15) In a split second, Officer Crespo fired two shots at both of them. (19T83-20 to 22) One round struck Dixon in the side of the face and the other struck Griffin in the head. Officer Crespo opened the passenger door and observed a handgun move to the right side of the floorboard as Dixon moved his feet. (19T84-8 to 18)

The State's case consisted of playing the four-hour tape of Officer Crespo's grand jury testimony (12T5-7 to 164-19). Officer Crespo explained the first attempted apprehension of Griffin and Dixon at 11T23-17 to 28-6, wherein Officer Crespo observed Dixon point a handgun at him; the second attempted apprehension at 12T32-15 to 36-11, wherein Officer Crespo again observed Griffin with a handgun about to point it at him; and the third stop at 12T38-13 to 46-14, wherein officer Crespo observed Dixon cracking the door open to take a shot at him. The BWC videos of Officer Sanchez (Da 157; 11T91-11 to 93-13); Officer Ortiz (Da 158; 11T104-12 to 113-10); and Officer Crespo (Da 159; 11T97-1 to 104-10), as well as the dash cam video from Ortiz's patrol vehicle (Da 160; 11T96-13 to 25) were played for the jury.

The State's first witness was Officer Ortiz, who confirmed that he did not terminate the vehicular pursuit because the risk was low, there was a weapon, and a supervisor did not order it. (13T26-12 to 29-22) Ortiz

remembered that Griffin never brought his vehicle to a complete stop. (13T39-6 to 10) Detective Moss was also asked by the prosecutor why he continued the pursuit. Moss responded that there was low risk as there were not a lot of traffic or pedestrians and the suspect had a handgun. Moss also noted that his supervisor did not order it. (13T91-13 to 93-7) When Moss approached the Griffin vehicle at the first attempted apprehension, Moss ordered Griffin to step out of the vehicle. Griffin refused. Moss reached into the vehicle to open the door. Griffin then sped away. (13T86-5 to 90-6) Moss's partner, Officer Macieira, noted that Griffin was driving recklessly over sidewalks and disregarded traffic lights. Macieira observed Griffin engaged in stop and go driving. Meaning, he would slow down as if he were going to stop and then speed up. Maciera noted that at no time did Griffin or Dixon give any indication that they would surrender to the police. (14T86-9 to 90-5)

Detective Giron joined in the pursuit with his partner Eddie Rosario. Giron noted that he could see into the vehicle and observed two individuals. (13T115-1 to 123-15) Giron observed a gun on the floor by Dixon's feet. Giron placed Dixon in handcuffs, with Dixon initially resisting arrest. (13T124-18 to 127-8) Chauncey Riley of the Crime Scene Unit confirmed that he recovered a black and chrome Ruger SR-45 .45 caliber loaded handgun from the passenger side floorboard of the Griffin vehicle. (14T144-0 to 145-

20) The handgun was processed for fingerprints with negative results. (14T178-19 to 181-5) He also recovered a black ski mask with a hole in it where Dixon was shot in the face. (14T188-23 to 25; Da 166)

Sergeant Frank Ricci of the Crime Scene Unit was qualified as an expert in firearms examination. (17T29-12 to 13) Ricci stated that the handgun recovered from the Griffin vehicle had six rounds in the magazine, five hollow point cartridges and one Winchester full metal jacket cartridge. Ricci opined that the handgun was operational. (17T40-14 to 42-1) The State tested for DNA swabs taken from the handgun. (Forensic scientist Andrea McCormack at 16T55-20 to 56-11; 16T65-14 to 23; 16T75-23 to 25). There was not enough of a sample to generate a profile. The results revealed their were multiple contributors to the swabs tested. (Forensic scientist Melissa Lito at (17T7-5 to 18; 17T14-4 to 17-14) Dr. Eddy Lilavois, the medical examiner, opined that the cause of death to Griffin was a gunshot wound to the head and the manner of death was homicide. (16T25-1 to 17) Dr. Davashish Ajaria, treated Dixon's gunshot wound. (18T23-7 to 25-18)

Sergeant Richard Ashkar from the New Jersey State Police Training Bureau in Sea Girt was Officer Crespo's and Ortiz's instructor. (18T82-4 to 6) Ashkar did not review anything from the case. (18T91-6 to 92-4; 18T93-15 to 23) His testimony was limited to what recruits were taught concerning use of

force. Ashkar testified about the Attorney General Use of Force Policy. From section B, subsection 1, Ashkar read:

> A law enforcement officer may use deadly force when the officer reasonably believes such action is immediate and necessary to protect the officer, or another person, from imminent danger or death or serious bodily injury. (18T56-2 to 9)

The defense presented Officer Sanchez, who confirmed that the Pennsylvania corridor is known for violence and shootings. (18T140-12 to 14) Sanchez viewed her BWC video and confirmed the moment when the Chrysler 300 carelessly sped past her. She observed that the driver was engaged in a stop and go behavior by slowing his car down to only drive forward. Sanchez identified in the video where Griffin faked a gesture that he turned the ignition off. (Sanchez's BWC video at Da 157) Sanchez observed a handgun tucked under Griffin's leg and called out a 6-4-6 (suspect with a gun). (18T141-16 to 165-3 to 17; 18T169-20 to 25) Sanchez was going to arrest Griffin, but she needed to apprehend him and place him in handcuffs. (18T170-8 to 20; 18T172-5 to 17) Griffin took off with Sanchez's arm in the vehicle trying to open the door. Sanchez noted that Griffin could have shot her. (18T173-4 to 175-25)

Detective Samouri Clegg arrived at the scene where Griffin and Dixon were shot on Irvine Turner Boulevard. Clegg was on the passenger side of the Chrysler 300 assisting Officer Crespo with getting Dixon out of the vehicle.

Clegg observed a handgun fall from Dixon's lap area to the floor of the motor vehicle. (19T11-4 to 12-25) Clegg may not have seen the gun on Dixon's lap, he heard something hard hit the floor. (19T18-2 to 12; 19T26-2 to 23)

Officer Crespo noted that he was a proud Newark Police Officer on duty on the evening on January 28, 2019. Prior to the commencement of his shift, he was briefed by his Lieutenant to be on the look out for retaliatory shootings. (19T30-9 to 32-11) Crespo and Ortiz received a call that two individuals were being pursued driving a black Chrysler 300. It was reported that the driver had a handgun. Ortiz responded and they were the first police vehicle behind the Chrysler. (19T42-23 to 43-19; 19T45-5 to 8) Officer Crespo noted that the driver was engaged in stop and go driving behavior. The vehicle was travelling at excessive rates of speed, going over sidewalks, disregarding traffic signals and traveling on the wrong side of the road. (19T50-1 to 54-2)

At the first encounter, Ortiz cut in front of the Chrysler, Officer Crespo ran around the back of his vehicle to the passenger side door and observed the passenger point a gun at him. Crespo fired at the passenger three times. (19T56-16 to 59-8) At the second encounter, Officer Crespo exited his vehicle and could see Griffin and Dixon through the front windshield as well as the driver's side window. Dixon was still holding the gun and Officer Crespo

believed Griffin also had a gun. Officer Crespo believed he was going to be shot and fired two rounds at Dixon and Griffin. (19T70-16 to 71-13)

At the third encounter, Griffin was boxed in by other police units on Irvine Turner Boulevard. Officer Crespo was the first to engage the vehicle that was still moving forward. Officer Crespo observed Dixon crack open the door as though Dixon was going to shoot at him through the crack. Officer Crespo observed Dixon grabbing something with his hands. In less that one second, Officer Crespo fired two rounds. After the shooting, Officer Crespo observed a handgun on the left leg of Dixon. Dixon was wearing the balaclava mask covering his face entire face, which he was not wearing during the first Sanchez stop. Officer Crespo stated that he did not want to kill Griffin, but didn't want to get shot. (19T86-10 to 88-10; Da 166)

When asked to recall the event, Officer Crespo noted that Griffin was driving erratically, putting everyone's life at risk. (19T108-18 to 25) Officer Crespo believed there were two guns. The driver having the gun that Sanchez observed and the passenger having the gun that he observed. (19T100-10 to 15) Officer Crespo explained that he shot at the driver because he thought he had a gun. (19T106-22 to 107-2)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY NOT DECLARING A MISTRIAL AFTER IT WAS DISCOVERED THAT A DELIBERATING JUROR HAD A PRIOR OPINION OF THE CASE PRIOR TO THE COMMENCEMENT OF TRIAL BECAUSE HE HAD WATCHED A VIDEO OF THE SHOOTING CONTAINED WITHIN A NEWS PROGRAM AND FAILED TO DISCLOSE THAT INFORMATION TO THE COURT. (Rulings at 31T82-12 to 13; 31T90-16 to 99-1)

"The essence of a fair trial requires the securing and preservation of an impartial jury, neither tainted by prejudice nor exposed to extraneous influences." State v. Hightower, 146 N.J. 239, 263 (1996) (Citing State v. Bey I, 112 N.J. 45, 75 (1988) and State v. Corsaro, 107 N.J. 339, 346-47 (1987). In the instant matter, the trial court was down to its last alternate juror when Juror Number 15 announced she could not continue past June 28th due to a family vacation. The trial court had previously stated that the trial would last until June 21st. [7] The trial court discharged Juror Number 15 and substituted Juror Number 4 over defense counsel's objection. During deliberations, the other eleven jurors found out the Juror Number 4 watched a news program with a video of the shooting, and that he had an opinion of the case prior to the commencement of trial. The jury sent a note to the trial court. (30T4-1 to 17)

[7] The jury heard the last of the evidence on June 6, 2023, and did not return for summations until June 20, 2023. (21T to 22T)

The testimony at the *voir dire* of the jurors, including Juror Number 4, indicated that he had an opinion of the case prior to the commencement of trial and that he wanted to be on the jury because of what he knew about the case and because he could related to Mr. Crespo because they were both Latinos. Most importantly, the juror never informed the trial court that he saw the news program. Juror Number 4 was tainted and could not be replaced with an alternate. The only recourse for the Court was to declare a mistrial.

"The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution guarantees criminal defendants the right to trial by an impartial jury." State v. R.D., 169 N.J. 551, 557 (2001); State v. Williams, 93 N.J. 39, 60 (1963); State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997). "That constitutional privilege includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters." R.D., 169 N.J. at 557.

Thus, "a defendant is entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." Williams, 93 N.J. at 60. As a result, the trial judge must take action to assure that the jurors have not become prejudiced as a result of facts which "could have a tendency to

influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Scherzer, 301 N.J. Super. at 486 (quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)). "The test is 'not whether the irregular matter actually influenced the result but whether it had the capacity of doing so.'" Scherzer, 301 N.J. Super. at 486 (quoting Panko, 7 N.J. at 61). It is imperative for courts to intervene when alleged juror bias has a racial or ethnic basis. State v. Loftin, 191 N.J. 172, 207 (2007) ("The failure of the court to ensure that the jury's impartiality had not been compromised requires that we reverse.")

"Any juror misconduct that could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge is a ground for a mistrial." Hightower, 146 N.J. at 266-67. Trial court's thus "must make a probing inquiry into the possible prejudice caused by any jury irregularity, relying on his or her own objective evaluation of the potential for prejudice rather than on the jurors' subjective evaluation of their own impartiality." Scherzer, 301 N.J. Super. at 487-88. "It is a vicious thing to convict a man out of bigotry." State v. Athorn, 46 N.J. 247, 252 (1966). In Loftin, the Court voided a verdict because a racist joke by a non-deliberating juror: "even allowing a non-deliberating juror suspected of racial

bias to sit on a panel will lead to a presumption that other members of the panel may have been tainted." 191 N.J. at 191.

A review of the jury selection and the jury deliberations revealed how the trial court abused its discretion in not declaring a mistrial. On May 2, 2023, the trial court commenced with jury selection by ordering two panels of jurors. The first panel met on May 2, 2023 (7T) and the second panel on May 3, 2023 (8T), both virtually. The trial court explained that the jury selection process would be in two stages, first virtually, and then in person. Each prospective juror was provided a questionnaire with thirty-eight questions.

The trial court stated to the jurors the nature of the case as follows:

> To briefly explain the nature of this case, the State alleges that at around 12:00 a.m. on January 29th, 2019, Defendant Newark Police Officer Jovanny Crespo, pursued a vehicle because the driver of the vehicle, Gregory Griffin, eluded the police following a motor vehicle stop. During the motor vehicle stop, a police officer observed Mr. Griffin with a gun. During the pursuit, Officer Crespo fired his gun at Mr. Griffin and the passenger, Andrew Dixon, on multiple occasions shooting both men in the head, seriously injuring Mr. Dixon, and killing Mr. Griffin. The State asserts that Officer Crespo's use of force was not justified. The Defense on the other hand asserts that Officer Crespo was justified in using deadly force to protect himself and other individuals because Mr. Griffin had been seen with a gun in the vehicle during the initial motor vehicle stop and because Officer Crespo saw Mr. Dixon point the gun at him. (7T14-16 to 15-4)

The trial court then stated and explained the questionnaire. (7T20-4 to 35-22) At the conclusion of the hearing, the trial court asked any prospective juror whether they answered "yes" to one or more of the first fifteen questions

and to raise their hands. The trial court instructed, "If you are unsure as to whether your answer to a particular question is yes, that is you don't know, I'd like you to consider it a yes answer." (7T19 to 20-3). The jurors that raised their hands were excused. (7T35-24 to 36-19)

The sixteenth question was:

> Question 16. I've already briefly described the case by telling you the charges in the indictment. Do you know anything about this case from any source other than what I've told you? (7T24-20 to 23)

The same procedure was employed by the court with the second virtual prospective panel on May 3, 2023. (8T) Juror Number 4 was present.

On May 4, 2023, the prospective jurors assembled before Judge Ravin. The first course of business was to deal with question number sixteen. The trial court read the question and instructed the prospective jurors if your answer to the question is yes, to raise your hand. The juror would then be asked whether they could still be fair and impartial even though they had some prior knowledge of the case. If the juror answered "no" the juror would be excused. If they answered "yes," that they could be fair and impartial, then they would be *voir dired* as side bar. (9T12-4 to 14; 9T14-5 to 15-21)

Eleven prospective jurors from the panel raised their hand. (9T15-21 to 18-5). Only two were not excused by the trial court. Juror C. stated he read an article on NJ.com about the time when the incident occurred. C.

stated he could be fair and impartial, and he did not form any impressions about the case or Mr. Crespo's guilt or innocence from what he read. The trial court did not dismiss him. (9T18-12 to 22-21) Prospective juror K. read an article in the Star Ledger about the incident when it happened. It did not have an impact upon him. K. stated he could be a fair and impartial juror. (9T37-24 to 40-20) K. was a deliberating juror and the foreman, C. was excused later in the jury selection process.

Prospective jurors D.; D.C.; F. (9T23-4 to 26-5); J. (9T30-13 to 24); M.; R. (9T41-7 42-7); and Y.; (9T44-7 to 20) stated that what they learned about the case from outside the courtroom would compromise their ability to be fair and impartial jurors. They were excused. Prospective juror V. was excused because he was a law enforcement officer. (9T42-9 to 43-25) Prospective juror H. stated that he could be a fair and impartial juror. During *voir dire* it was learned that H. saw the video of the shooting, which he described as "disturbing" and "bad." The trial court excused the prospective juror. (9T31-2 to 37-4) All of the prospective jurors observed the questioning, yet Juror Number 4 remained mute as to his prior knowledge and prior opinions of the case.

On May 9, 2023, Juror Number 4, who already answered "no" to whether he learned anything about the case from somewhere other than the court room,

stated, "I guess I was surprised I got selected to hear such a case." (10T144-9 to 11) Juror Number 4 was an empanelled juror. (10T112-4 to 117-17) Juror Number 4 stated he recalled watching the news program with the videos of the shootings and having opinions of the case when the videos were first played, which was the first day of trial. (31T22-16 to 18; 31T22-21) Juror Number 4 was obligated to inform Judge Ravin at that moment. He would have been excused for cause. If Judge Ravin knew he only had two alternates, instead of three, he would not have later discharged jurors 14, 6 and 15, all of which could have remained deliberating jurors.

At the conclusion of the evidentiary portion of the trial, of the fifteen jurors that remained the trial court selected three alternates, Juror Numbers 12, 10 and 4. (26T19-14 to 21) The jury began their deliberations at 10:16 a.m. (26T3 to 5) and concluded at 5:11 p.m. (26T47-21 to 23) Juror Number 14 was informed by the trial court that the trial would end about June 19, 2023, which would not interfere with her vacation plans. Juror Number 14 was excused, without objection from the State or defense. The first alternate juror (Juror Number 12) would replace Juror Number 14. (26T47-21 to 54-25)

On June 26, 2023, the jurors reconvened. The jury was instructed to begin jury deliberations anew with the new juror. (27T4-8 to 6-16) The jury requested to see the BWC videos from Sanchez, Ortiz and Crespo, as well as

the Ortiz dash cam video. (2712-18 to 13-16) The videos were played for the jury. (27T13-24 to 49-3) At 2:16 p.m., Juror Number 6 sent a note to the trial court requesting to speak to the trial court about a health issue. Juror Number 6 informed the trial court that he "cracked my molar completely in half" and that he is pain and getting headaches. The trial court excused Juror Number 6 without objection from the State or the defense. (27T51-10 to 56-10) The trial court informed the jury that Juror Number 6 was excused and would be replaced with Juror Number 10. (27T57-17 to 59-12) The jury deliberated until 5:16 p.m. (27T62-15 to 63-2)

On June 27, 2023, the trial court received a phone call from Juror Number 8 who stated that she was sick with the flu and was getting tested for Covid. (28T3-2 to 4-5) The trial court discharged the jury for the day. (28T6-19 to 7-25) At the request of the State, and over the objection of the defense, the trial court discharged the jury for June 28, 2024 and were ordered to return on June 29, 2023. Juror Number 15 stated she could not serve on the jury past June 28, 2023 for personal reasons. (29T3-11 to 4-25) The trial court called Juror Number 8, who told the court that she could continue on June 29, 2024. The trial court, over defense counsel's objection, discharged Juror Number 15. The trial court denied the defense motion for a mistrial. (29T3-9 to 8-9; Da

36-40) The trial court substituted Juror Number 4 for Juror Number 15 and was discharged. (29T8-10 to 15; 29T9-17 to 19; 29T17-16 to 24)

The jury continued deliberations on June 29, 2023. At 3:50 p.m., the trial court received a note from the jury (C-20) that stated:

> Dear Judge Ravin,
>
> During deliberations it has come to our attention that a seated juror had "prior knowledge and opinion of this case." We need your guidance.
>
> Thank you. The Jury. (30T4-1 to 17)

The defense immediately moved for a mistrial. (30T5-2 to 6-20) The trial court discharged the jury for the weekend. (30T12-10 to 13-12) On July 3, 2023, the trial court *voir dired* the jury concerning the C-20 note. Juror Number 1, the foreman, advised that it was the third alternate juror, Juror Number 4, who was the subject matter of the note. Juror Number 1 disclosed that Juror Number 4 said, "when the prosecution's case began a video was played showing the -- I believe the TV interview and he said that (indiscernible) seen that video and he can remember that he had a prior knowledge of the case." (31T7-5 to 9) Juror Number 1 continued, "Juror Number 4 said he had an opinion on the case." (31T8-24 to 25) "[T]he way it came out, it sounded like he had an opinion from the beginning, and he was going to share it with us." (31T9-10 to 11; 31T9-22 to 25)

Juror Number 2 confirmed that Number 4 "expressed a bias" and wanted to be on the jury to make sure [Mr. Crespo] received a fair trial. (31T16-3 to 4; 31T14-16 to 20; 31T15-24 to 16-2) Juror Number 3 stated that he remembered that Juror Number 4 stated he was "at his house drinking some red wine and watching the news and that he felt that he needed to be here and give this poor kid a fair trial. He was also emotional" and he had a personal opinion about the case before the trial started. (31T18-25 to 19-21)

According to Juror Number 5, Number 4 stated during deliberations that he saw the incident on the news and became very emotional about the shooting. Number 4 was "more emotionally attached to the case than he should be." (31T40-2 to 20) Juror Number 7 recalled that Juror Number 4 expressed the importance in serving on the jury to advance his political agenda. Number 7 stated Number 4 stated that he watched the news of the case when it happened and thought the State would make an example of Mr. Crespo because New Jersey is a "Blue" state. Number 4 resonated with Mr. Crespo because they came from the same background. Number 4, stated "he needed to be a juror on this case" and compared the "case to George Floyd." (31T42-24 to 43-10) Juror Number 12 recalled that there was a racial and ethnic motive compelling Juror Number 4's jury service. Number 4 stated he was Latino like Mr. Crespo and if Number 4 wasn't on the case Mr. Crespo

would not receive a fair trial because Mr. Crespo was Latino. (31T59-12 to 60-5)

When questioned by the trial court, Juror Number 4 claimed that "[a]fter the evidence had started to be presented," he saw "a video of the night of the shooting (31T22-16 to 18)" which "triggered a memory that [he] had of having seen the video (31T22-21)." "[W]hen [Juror Number 4] had the recollection, [he] was having a glass of wine in [his] room and [he] said, oh, like, that guy is fucked and that was it." (31T37-21 to 22) Juror Number 4 took it upon himself to decide whether he should report his 'triggered memory' to the judge.

> [A]s to why I didn't mention this recollection to you . . . [,] I remember at some point you had said if you really think that it's something extremely important -- after I remembered, I thought about it, it's like, this doesn't really influence me either way. (31T24-5 to 10)

So, Juror Number 4 kept his information to himself, only to unleash it during deliberations. Juror Number 4 recalled:

> So the temperature of the room was pretty much everyone, like, getting whatever they had off their chest. And I guess when it was my turn, I said that comment and it was interpreted as me trying to influence in some way the juror … .
>
> After, like, ten minutes after I had spoken, she pretty much started screaming bloody murder saying that I would try to get myself on the -- on the case … . (31T23-18 to 24-3)

Juror Number 13 recalled Juror Number 4 stated:

He felt like he was the most connected to the Defendant by the mere fact that of being a Hispanic man as well.

> . . .
> He said that he remembered when the video started being played -- he remembered -- at that point he remembered the case and remembered thinking back then that he was going to get a fair trial. And when he came and went through the process, feeling like he needed be put on this trial to ensure that he got a fair trial. (2T62-15 to 63-6)

If Juror Number 4 did not recall the video until it was published to the jury, then why would Juror Number 13 say he needed to be on his jury?

The trial court denied the defense motion for a mistrial. However, the trial court 's reasoning is flawed. (31T82-12 to 13) The trial court concluded that the jury was not exposed to any extraneous information about the case not presented in evidence. (31T93-13 to 18; 31T90-16 to 99-1) The trial court failed to consider that Juror Number 4 watched a news program with the video of the shooting. Was the program one with a political agenda that was anti-police, that presented information and ideas that were not presented at trial? The trial court failed to ask in detail exactly what Juror Number 4 watched. The trial court reasoned that Juror Number 4 was credible when he testified that he didn't realize he saw the video until after the trial had begun. (31T94-7 to 14; 31T95-24 to 96-8) However, the other jurors stated that Juror Number 4 said he wanted to be on this jury. Clearly, he recalled the case and the program he watched when Judge Ravin gave a summary of the case (7T14-16 to 15-4) and that is why he wanted to be on the jury.

The trial court compared Juror Number 1 to Juror Number 4 because Juror Number 1 raised his hand to disclose his prior knowledge of the case. Juror Number 1 was prospective juror K., who read an article in the Star Ledger about the case when it happened and that it did not have an impact upon him. K. stated he could be a fair and impartial juror. (9T37-24 to 40-20) Juror Number 4 was prospective juror R.L.A., who watched a news article with the video or videos of the shooting. The jury panel said it did have an impact upon him as they noted he was overly emotional. The jury panel also said he did have an opinion of the case before the trial started and he wanted to be on the jury. Most importantly, R.L.A. failed to disclose the information because he wanted to be on the jury, while K. raised his hand and was *voir dired*. Had R.L.A. been *voir dired*, there is little doubt he would have been excused for cause. If not, the defense would have excused him.

While Juror Number 4 knew of his obligation to inform the trial court if he was aware of any out-of-court information concerning the case, he kept quiet because -- as several jurors noted -- he was emotionally invested in a George Floyd-type case and wanted to be on the jury. According to Juror Number 12, Juror Number 4 expressly identified with Mr. Crespo because he (Juror Number 4) is Latino and he assumed Mr. Crespo was as well. It is apparent that Mr. Crespo never had twelve impartial jurors: at best, he had

eleven jurors and an individual judging him based on his actual or perceived 'Hispanic-ness.' Even if Juror Number 4's deceit regarding prior news exposure had never come to light, his presence on the jury was inconsistent with color-blind justice.

Whether Juror Number 4 may have been biased in favor of Mr. Crespo is irrelevant. Indeed, when Juror Number 4 noted that a juror "pretty much started screaming bloody murder [at him] saying that [he] would try to get myself on the -- on the case … " (31T23-18 to 24-3), Juror Number 4 had a motive to convict, simply to convince his colleagues that he is not a racist. The point is that Mr. Crespo's race should never have been an issue. Juror Number 12 said that Juror Number 4 was making race an issue, and nothing was done to remove the cancer of prejudice.

Likewise immaterial is Juror Number 4's assurance that he could ignore outside influences. First, Juror Number 4 proved that his ability to follow court instructions depended on whether he felt they were worthy of obeying. He knew of his obligation to tell the judge about his having watched the news broadcast, but (per several jurors) he disregarded his duty because being on the 'New Jersey George Floyd' jury was more important to him. Second, racial prejudice requires reversal even when its effect on the jury is unproven. Loftin. In State v. Perez, 356 N.J. Super. 527 (App. Div. 2003), a Law

Division de novo conviction following a Municipal Court bench trial was voided because the municipal court judge made a racially insensitive comment: "A trial de novo on the record, based on acceptance of the credibility determinations of a judge who ought to have recused himself, is inconsistent with due process." Id. at 533.

In deciding Officer Crespo's motion for a mistrial, the trial court erroneously found, "[T]his Court is not confronted with the issue of a deliberating juror's intentional non-disclosure." (31T85-11 to 95-17) It was certainly "intentionally non-disclosure." Juror Number 4 said so. (31T24-5 to 10) Juror Number 4 then stated, "[W]as it wrong for me to mention it in there? It probably was." (31T34-23 to 24) The trial court then based its decision to deny the mistrial motion because the trial court found Juror Number 4 credible, and ruled as followed:

> Here, the Court finds credible Juror Number 4's statements that he did not realize he had seen them when -- until the videos were played. Thus, Juror Number 4 did not intentionally withhold his prior familiarity with the case from this Court, which is of significant import when determining whether Juror Number 4 would have been excused prior to the jury being sworn." (2T95-24 to 96-12)

The trial court disregarded the testimony of the foreman, Juror Number 1, as well as who clearly testified the Juror Number 4 had a prior opinion of the case before the trial began. (2T8-7 to 10-14; 31T9-7 to 10-12; 31T9-21 to 25) Jurors Number 2 and 3 also specifically testified Juror Number 4 had an

prior opinion of the case and wanted to be on this particular jury. (Juror Number 2 at 31T14-16 to 20; 3115-24 to 16-2; Juror Number 3 at 2T18-25 to 19-6) Jurors Number 7 and 10 stated Number 4 said he wanted to be on the case because this was the New Jersey "George Floyd" case. (Juror Number 7 at 31T43-4 to 43-10; Juror Number 10 at 31T53-16 to 20) Juror Number 13 reported that race was a motivating factor for Number 4. (31T62-15 to 63-6)

Juror Number 4 also confessed he wanted to be on the case due to his prior opinion because when the panel found out the jurors started "screaming bloody murder" at Number 4 stating the Number 4 purposefully tried to get on the case. (31T23-25 to 24-4) Juror Number 4 admitted that after he saw the video he said, "[T]his kid is fucked." (31T33-18 to 34-22)

The testimony from the trial court's *voir dire* of the panel revealed that Juror Number 4 saw a video of the shooting on a news program and concluded, "This kid is fucked." Juror Number 4 wanted to be on the jury to ensure a fair trial, therefore he did not disclose this information to the trial court during jury selection or trial. During an emotional part of the jury deliberations, Juror Number 4 disclosed the information to the panel, and that he knew he needed to be on this jury because he saw the video/news program.

The decision to grant a mistrial "to prevent an obvious failure of justice" always remains with the sound discretion of the trial court. State v. Smith, 224

N.J. 36, 47 (2016). However, the trial court must exercise its discretion to declare a mistrial by considering the unique circumstances of the case. State v. Allah, 170 N.J. 269, 280 (2002). If there is "an appropriate alternative course of action," a mistrial is not a proper exercise of discretion. Id. at 281. In the instant matter there was no alternative course of action as there were no remaining alternates. Mr. Crespo was deprived of his right to a fair trial before an impartial jury.

POINT II

THE TRIAL COURT ERRED BY EXCLUDING THE CRIMINAL CONVICTIONS OF ANDREW DIXON BY APPLYING THE INCORRECT STANDARD OF REVIEW. (6T24-22 to 26-4; Order at Da 13-15; Trial Court's Clarification Letter at Da 23-28; Amended Order at Da 30-33)

Mr. Crespo was charged with recklessly causing Gregory Griffin's death and injuring Andrew Dixon under circumstances manifesting an extreme indifference to human life. The State successfully moved to quash Mr. Crespo's subpoenas for the criminal histories of both Griffin and Dixon, which the trial court treated as a motion *in limine* to exclude evidence of Dixon's and Griffin's criminal histories. The trial court noted that the Mr. Crespo pled self-defense and use of force in law enforcement (N.J.S.A. 2C:3-4, -5) and held that the shooting victims' background was irrelevant to the reasonableness of Crespo's perception of a threat since he did not know their criminal histories.

(6T24-22 to 26-11; Da 13-15) The Court later clarified its ruling to the Appellate Division in a motion for leave to appeal. The legal basis for the trial court's ruling was relevance. (Da 23-28)

This was an improper standard of review. State v. Aguiar, 322 N.J. Super. 175 (App. Div. 1999), involved a charge of manslaughter. The Appellate Division held that the victim's conviction for a violent crime was admissible on the issue of self-defense.

> N.J.R.E. 405 provides that "[w]hen evidence of character or a trait of character is admissible, it may be proved by evidence of reputation, evidence in the form of opinion, or evidence of conviction of a crime which tends to prove the trait."
>
> We thus conclude that a victim's conviction of a violent crime may be admitted to establish that he was the aggressor. The relevance of victim character evidence in assaultive crime cases stems from its making it more likely that the victim was in fact using unlawful force—a proposition that, if true, would give rise to the defendant's justified use of self-protective force—rather than its bearing on the defendant's state of mind. Personal knowledge of the victim's propensity for violence is not a prerequisite for admission of victim character evidence under N.J.R.E. 404(a)(2).
>
> Id. at 183-84.

Likewise, "N.J.R.E. 404(a)(2) imposes no prerequisite of knowledge upon a defendant who seeks to offer evidence of a victim's character trait of violence to show that the victim acted in conformity with that trait at the time of the crime." State v. Carter, 278 N.J. Super. 629, 634 (Law Div. 1994). The trial court alternately reasoned that the evidence was outweighed by prejudice

under N.J.R.E. 403. "A trial court's evidentiary rulings . . . are reviewed for abuse of discretion." State v. Martinez-Mejia, 477 N.J. Super. 325, 334 (App. Div. 2023), certif. denied, 256 N.J. 338 (2024).

But "discretion means legal discretion, in the exercise of which the judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly. If the trial judge misconceives the applicable law or misapplies it to the factual complex, . . . the exercise of legal discretion lacks a foundation and becomes an arbitrary act" warranting *de novo* review. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966). The trial court applied the incorrect standard of review because N.J.R.E. 403 does not control. Rather, "a victim's conviction may be excluded if, because of its remoteness, its probative value is substantially outweighed by its prejudicial effect." Aguiar, 322 N.J. Super. at 184.

A review of Dixon's criminal history (Da 151-155) reveals the following:

> 1. June 13, 2003 conviction for second degree aggravated assault. Sentenced to five years of prison, subject to NERA.
> 2. June 13, 2003 conviction for third-degree distribution of CDS on school property. Sentenced for four years of prison.
> 3. At page 3 of Dixon's criminal history, he was charged with throwing bodily fluid at a law enforcement officer on December 6, 2007. The disposition is unavailable.
> 4. October 27, 2008 conviction for second-degree eluding; third-degree unlawful possession of a handgun; third-degree receiving stolen

property; and third-degree criminal mischief. Sentenced to five years of imprisonment.
5. September 29, 2014, convicted for third-degree possession of CDS. Sentenced to three years of probation.
6. May 30, 2017, convicted for disorderly persons wandering to possess CDS. Sentenced to probation. (Da 151-155)

The shooting occurred on January 28, 2019. Mr. Crespo asserted self defense, alleging that Dixon pointed a handgun at him.

In State v. Harris, 209 N.J. 431 (2012), the defendant was charged in August 2006 with burglary. The defendant had prior CDS convictions in 1994. Defendant was tried for the instant offense thirteen years after he was sentenced on the CDS charges. The defendant had accumulated a significant number of disorderly persons offenses in the intervening years. The trial court ruled that the intervening convictions bridged the gap of remoteness and ruled the prior convictions would be admissible.

The Supreme Court noted that N.J.R.E. 609 places limitations on the use of such convictions "if more than 10 years have passed since the witness's conviction or release from confinement for it, which ever is later." The Court held that "the trial court in this matter did not abuse its discretion when it viewed defendant's intervening convictions for disorderly persons offenses as removing the bar to admission of defendant's prior convictions as too remote." Id. at 444-45.

In the instant matter, Dixon was convicted for aggravated assault in June 2003 and released from prison in 2008. He was then convicted in 2008 for eluding, unlawful possession of a handgun, receiving stolen property and criminal mischief and, again, sentenced to five years of prison. In September 2014, he was convicted of possession of CDS and, in 2017, he was convicted of a disorderly persons offense. Dixon died in 2019 in circumstances unrelated to this matter. The intervening convictions bridge the gap to the 2003 aggravated assault conviction. As such, the trail court erred by excluding Dixon's criminal history. The question for the jury was whether Dixon pointed a handgun at Mr. Crespo. The fact that he had multiple convictions, with a conviction of violence, would have been highly relevant for the jury's consideration. [8]

POINT III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON NEGLIGENCE.

(Order at Da 47-48; Opinion at Da 49-60)

Clear and correct jury charges are essential to a fair trial and failure to provide them constitutes plain error. State v. Robinson, 165 N.J. 32, 40 (2000); State v. Green, 86 N.J. 281, 291 (1981). The instructions to the jury

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[8] During the trial, the trial court allowed Dixon's hearsay statement, "Why the fuck did you shoot me" in evidence. This opened the door to the admissibility of all of Dixon's convictions. See Point VIII of this brief.

are a road map to guide the jury as to the law of the case. A court must explain all of the controlling legal principles and each of the questions the jury is to decide. State v. Rhett, 127 N.J. 3, 7-8 (1982). Correct instructions are crucial to a jury's deliberations concerning the issue whether the defendant is guilty or not guilty. Incorrect instructions are poor candidates for rehabilitation under the harmless error analysis. State v. Martin, 119 N.J. 2, 15 (1980); State v. Simon, 79 N.J. 191, 206 (1979). Therefore, erroneous or inadequate instructions are presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422-423 (1997); State v. Afanador, 151 N.J. 41, 54 (1997).

An instruction distinguishing negligence from a charge of recklessness is appropriate when there is reason to believe the jury could confuse the latter mental state with the former. State v. Conception, 111 N.J. 373, 383 (1988); State v. Atwater, 400 N.J. Super. 319, 332 (App. Div. 2008). In Atwater, the Appellate Division reversed a conviction for death by auto where the judge refused to explain the distinction between recklessness and negligence even though the issue as to whether the defendant consciously disregarded a risk was central to the case. Id. at 330-331. In the instant matter, Mr. Crespo was charged with reckless manslaughter and assault, and his attorney contended that the evidence could support a finding that his mental state could more accurately be described as "negligent" as is set forth in N.J.S.A. 2C:2-2(b)(4):

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Mr. Crespo is entitled to argue his defense within "[t]he 'four corners" of the evidence, including "all reasonable inferences drawn therefrom." State v. Loftin, 146 N.J. 295, 347 (1996). Taking a myopic view of the four corners, the trial court held that Mr. Crespo had argued the defense of justification and that this foreclosed a finding of negligence. The fact is that Mr. Crespo's true position has always been that he was consciously aware of the risks from his shooting. Not once has he ever stated that he was unaware and that he should have been aware. He has always maintained the same thing: that the risks he took were justified. (Da 58; June 13, 2023 opinion at 10)

Even if the trial court's assessments were accurate, the four corners of the 'Mr. Crespo's position' is not the same as the four corners of the evidence. For example, the prosecution produced the testimony of Sergeant Ashkar, the State Police instructor who trained Mr. Crespo. At considerable length (18T27-12 to 132-1), Ashkar set forth what a properly trained officer (the 'reasonable person in the actor's situation' to paraphrase N.J.S.A. 2C:2-2(b)(4)) would do as it relates to the use of force under the State Attorney

General's guidelines and the Newark Police Department General Orders on use of force. (18T56-5 to 9) If there was any doubt the negligence should be charged to the jury, certainly the State opened the door to the instruction. The State's case against Mr. Crespo was that Mr. Crespo had a "duty" to follow the use of force guidelines testified to by Ashkar; Mr. Crespo breached that duty by continuing to pursue Griffin and Dixon and shooting at them in order to effectuate their arrest; and Mr. Crespo's actions caused the death of Griffin and the injury to Dixon. These are the elements of negligence.

Had the court read N.J.S.A. 2C:2-2(b)(4) to the jury and/or allowed defense counsel to make appropriate argument during summation, it is reasonable to conclude that the jurors could have found a use-of-force deviation from accepted police standards amounting to negligence under N.J.S.A. 2C:2-2(b)(3), but not rising to the level of recklessness. When viewing the four corners of the evidence from that perspective, it was improper to deny a defense because the label justification/no-justification was used instead of negligence/recklessness.

Moreover, it should be recalled that the prosecutor did not refer to a single shooting incident but asked the jurors to consider three distinct shootings. In the first shooting, Mr. Crespo testified that Dixon pointed a handgun directly at him. In the second shooting Dixon was holding the gun.

However, it is the third shooting that resulted in decades of incarceration. Mr. Crespo shot into the car as the passenger door cracked open because he believed Dixon was going to shoot at him. If the third shooting cannot be justified according to the Guidelines and General Orders, the question becomes whether there was sufficient evidence that Crespo shot negligently as opposed to recklessly. The failure to instruct the jury and permit defense counsel to argue in this regard during summation was erroneous and requires reversal.

POINT IV

THE TRIAL COURT ERRED BY INITIALLY RULING THAT THE USE OF FORCE IN LAW ENFORCEMENT JURY INSTRUCTION WOULD NOT BE CHARGED TO THE JURY, WHICH COULD NOT BE CURED BY ORDERING SUPPLEMENTAL SUMMATIONS BECAUSE MR. CRESPO HAD A RIGHT TO MAKE ALL OF HIS ARGUMENTS IN ONE SUMMATION. (Order at Da 47-48; Opinion at Da 49-60; Order and Opinion at Da 74-79; Rulings at 25T3-20 to 24; 25T7-3 to 17)

Throughout the trial, the testimony was clear that the Newark Police were pursuing Griffin and Dixon to effectuate their arrests. The first responding officer, Officer Sanchez, testified that she observed Griffin with a handgun protruding from under his leg. She ordered him out of the vehicle and intended to arrest him. (18T170-8 to 20; 18T172-5 to 17) The second officer at the scene, Detective Moss, testified that he ordered Griffin out of the vehicle to arrest him. (13T86-5 to 90-6) All of the police engaged in the

pursuit were trying to arrest Griffin and Dixon, including Mr. Crespo, for illegal possession of a firearm and eluding offenses. The trial court erroneously concluded that Mr. Crespo was not trying to arrest Griffin and Dixon and, therefore, denied Mr. Crespo's request to argue his right to use of force as a law enforcement officer under N.J.S.A. 2C:3-7 (Da 52-54). As a result, defense counsel had to avoid any mention of the concept during summation. The trial court disregarded the trial testimony Officers Crespo, Ortiz, Sanchez, Detective Moss as well as the other responding police officers. Defense counsel's objections were vociferous in that defense counsel alleged that use of force in law enforcement was the theme of Mr. Crespo's defense throughout the trial and now he could not even mention the defense during summation. (24T237-21 to 238-19)

> N.J.S.A. 2C:3-7(a) provides in pertinent part:
>
> [. . .] the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor reasonably believes that such force is immediately necessary to effect a lawful arrest.

What purpose did the Newark Police have in pursuing Griffin? It was to arrest him. Something Officer Sanchez and Detective Moss failed to complete due to Griffin's violent eluding by automobile. Mr. Crespo knew all of this information because it was broadcast over his police radio. Thus, Ortiz and

Dixon set out to arrest Griffin and Dixon for weapons offenses and eluding, as did the other Newark Police officers.

"'[A]ppropriate and proper [jury instructions] are essential for a fair trial.'" State v. Cooper, 256 N.J. 593, 608 (2024) (quoting State v. Baum, 224 N.J. 147, 158-59 (2016)). The trial court erred by not charging the use of force in law enforcement instruction, which could not be cured by allowing supplemental summations. The jury heard summations over one and one-half days, during which the defense was prohibited from even mentioning the use of force in law enforcement defense. This deprived Mr. Crespo of a fair trial.

While the defense did not mention the use of force defense in summation, the State used the exclusion of the use of force defense repeatedly, by arguing that Mr. Crespo had enough "information" about Griffin and Dixon that he could have easily arrested them later is a safe manner and in accordance with the Use of Force Policy. (22T115-22 to 116-4; 23T149-4 to 13; 23T152-17 to 153-1) At this point, the trial court was required to order a mistrial due to the prosecutor's improper summation. See Point V to this brief.

When the State concluded their summation, the trial court informed the jury that they would be charged with the law the next morning and deliberations would commence. However, the trial judge changed his mind overnight and now concluded that the State opened the door to the use of force

in law enforcement jury instruction by the aforementioned argument. The trial court also believed that his previous decision was still correct. (Da 52-54) The trial court would now permit thirty-minute supplemental summations and charge the jury accordingly. (Da 44-49; 25T3-20 to 24; 25T7-3 to 17) This could not, and did not, cure the reversible error.

"After the close of the evidence and except as may be otherwise ordered by the court, the parties may make closing statements in the reverse order of opening statements." R. 1:7-1(b). R. 1:8-7(b) contemplates that the issues in a criminal trial will be resolved at the charge conference and, in any event, before closing arguments. Instead, the trial court ordered that the jury would now be instructed with the use of force jury charge and that the parties would be given a thirty-minute supplemental summation to discuss use of force without addressing argument from the first summation. (Da 74-79)

In State v. Rovito, 99 N.J. 581 (1985), the defendant, a police officer drinking beer with his former fraternity brothers, placed his service revolver on the floor and asked if anyone wanted to play Russian Roulette. One of the brothers responded by picking up the gun and pulling the trigger. Defendant was charged with manslaughter and unlawful disposition of a weapon. After closing arguments, the trial judge decided to charge the jury with the causal relationship between conduct and result under N.J.S.A. 2C:2-3. Noting that

"the better practice is for the court to resolve all questions about the proposed charge before summations." Id. at 588. purpose of Rule 1:8–7, which is to permit counsel to conform their summations to the charge. Ibid.

State v. Speth, 324 N.J. Super. 471 (Law Div. 1997), aff'd, 323 N.J. Super. 67 (App. Div. 1999), was a complicated case involving allegations that the defendant-pathologist had tampered with evidence in an investigation. The jurors could not reach a unanimous verdict after deliberating for several days and requesting re-instruction. Assuming its authority to order supplemental argument was "inherent" (id. at 474), Judge Cohen allowed each side an additional twenty minutes.

> [H]aving considered the length of the trial, the complexity of the issues, the length of the deliberations, the breaks in the deliberations, the numerous jury questions, the expressed inability of the jury to agree as to two of the three counts of the indictment, and the fact that both the State and the defense have joined in this request, this court has determined in the interest of justice to permit each counsel to present to the jury a brief supplemental closing statement of no more than 20 minutes in length.
>
> Id. at 475-76.

Speth goes beyond the limited exception recognized in Rovito where the trial judge has added a charge to conform to the evidence. In the present case, by contrast, the trial court outright refused to allow defense counsel to argue use of force, requiring counsel to tailor his summation around N.J.S.A. 2C:3-7. After many hours of prosecutorial argument, the judge advised the jurors that

the arguments were over and that they would receive the charges the next day. (13T16-11 to 21) The trial court ruled that the supplemental thirty-minute summations were limited to "exclusively address in summation the narrow issue whether the State has disproved the affirmative defense of Use of Force in Law Enforcement beyond a reasonable doubt." (Da 79) It constitutes reversible error for the court to change its mind overnight and have the jurors hear a new and different argument without reference to the arguments they had previously heard.

Importantly, "'the invited-error doctrine ... is implicated only when a defendant in some way has led the court into error. Conversely, when there is no evidence that the court in any way relied on a defendant's position, it cannot be said that a defendant has manipulated the system. Some measure of reliance by the court is necessary for the invited-error doctrine to come into play. Corsaro, 107 N.J. at 359. Here there is none. Mr. Crespo wished to address the use of force in law enforcement, along with his other arguments, in one complete summation. His counsel did not urge the two-summation trial ordered by the judge, and thus he cannot be said to have invited the error. The trial court's actions deprived Mr. Crespo of a fair trial.

POINT V

THE QUANTITY AND EGREGIOUSNESS OF THE PROSECUTOR'S IMPROPER REMARKS DURING SUMMATION REQUIRE VACATION OF THE CONVICTION. (Rulings at 22T121-7 to 18; 23T187-8 to 23T187-12; 23T31-14 to 32-24; 23T33-25 to 34-4; 23T47-17 to 20; 23T60-14 to 16; 23T152-10 to 11; 23T15-22 to 25).

The prosecutor's right "to make a vigorous and forceful closing argument to the jury[,]" State v. Harris, 141 N.J. 525, 559 (1995), is not a license to "make inaccurate legal or factual assertions," State v. Reddish, 181 N.J. 553, 641 (2004) (quoting State v. Smith, 167 N.J. 158, 178 (2001)), or to "cast aspersions on defense counsel or the defense[.]" Scherzer, 301 N.J. at 445. The question is whether the remarks have "the capacity to unfairly influence the jury and deprive defendant of a fair trial." Atwater, 400 N.J. at 337.

"The prosecution in its summation may suggest legitimate inferences to be drawn from the record, but it commits misconduct when it goes beyond the facts before the jury." State v. Harris, 156 N.J. 122, 194-195 (1998) and see Smith, 167 N.J. at 178; State v. Jackson, 211 N.J. 394 (2012). In the instant matter, the trial court ruled that the defense was prohibited from presenting any evidence that the vehicle Griffin was operating was stolen. In fact, the defense was barred from even presenting the fact that Griffin did now own the motor vehicle. However, the prosecutor used this to his advantage and argued

that Officer Crespo could have called off the pursuit and arrested Griffin and Dixon at a later date and time because he had their "information." The information being the license plate number. (22T115-22 to 116-4; 23T149-4 to 13; 23T152-17 to 154-12) The only information that the police had to identify Griffin was Sanchez's BWC video - the Newark Police had no other information. Specifically, the prosecutor stated: "In this case, the Defendant had that information. Mr. Griffin and Mr. Dixon were also recorded on body worn camera." (23T152-24 to 153-1) The jury would have opined that the other information was the plate number from the vehicle that was called in by Officer Sanchez and the plate number would have led the police to Griffin's residence.

Defense counsel objected and argued that the motor vehicle was stolen and there was no other "information" presented to the jury. (23T150-5 to 151-3; 23T153-9 to 13). An Essex County Prosecutor's Investigator interviewed Ebony Davis after the January 28, 2019 incident. Davis informed the investigator that Griffin beat her two days prior to January 28th, stole money from her person, and stole her vehicle. (15T17-13 to 18-5; Investigator's note at Da 161) The prosecutor also had the Newark Police Towed Vehicle Report that indicated the vehicle was owned by Ebony Davis, not Griffin. (Da 164-165) The prosecutor argued that the motor vehicle was not stolen. The

prosecutor claimed Griffin purchased it, but it was in Davis's name. (23T151-13 to 21) If the police ran the plate it would go to Davis, not Griffin. The trial court overruled the objection, based upon the representation made by the prosecutor. (23T152-10 to 11; 23T15-22 to 25) However, this alleged "information" that Mr. Crespo allegedly possessed, was not presented at trial and it allowed the jury to speculate that the prosecutor had more information about the case that was not presented during the trial.

The prosecutor may not suggest that a witness was coached, see State v. Negron, 355 N.J. Super. 556, 577-578 (App. Div. 2002), or that testimony was contrived or fabricated with the assistance of defense counsel, see State v. Rose, 112 N.J. 454, 519 (1988), yet Mr. Crespo's counsel was said to have 'prepared' three of the trial witnesses. Over defense counsel's objection, the prosecutor was permitted in state to the jury, "Did it seem to you that Officer Ortiz and Officer Sanchez were prepped to tell the truth? Or were they coached to tell a particular version." (22T119-17 to 123-1)

"'The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.'" State v. Feaster, 156 N.J. 1, 100 (1998) (quoting ABA Standards for Criminal Justice § 3-5.8 (3d ed. 1993)). Several times, the prosecutor described Mr. Crespo as 'hunting down' Dixon and Griffin, (22T188-2; 23T16-7; 23T105-15; 23T124-16; 23T154-11,

23T182-21) implying that the 'hunter' intended to kill the 'hunted'. The prosecutor stated:

> No one else felt the need to hunt down and kill Gregory Griffin and seriously injure, again, Mr. Dixon.
>
> (23T175-5 to 7)

A hunter kills intentionally. Mr. Crespo was accused of recklessly causing Mr. Griffin's death. Defense objected to the misrepresentation only once, expressing concern that the prosecutor was putting him "in the position of aggravating the jury with [his] objections." (23T182-23 to 183-17)

"'The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law'" State v. Marshall, 123 N.J. 1, 236 (1991) (quoting ABA Standards of Criminal Justice § 3–5.8(d) (2d ed. 1980). The dispute was between the State of New Jersey and Jovanny Crespo, and the jurors were under oath to decide whether the State had proven Mr. Crespo's guilt beyond a reasonable doubt. The jurors were not under an "oath . . . to ensure fairness to all parties, including the victims, Mr. Griffin and Mr. Dixon in this case … (23T40-4 to 6)," and it was improper "'to divert the jury from the material facts to the worthiness of

the victim … .'" State v. Clausell, 121 N.J. 298, 341 (1990) (quoting State v. Pennington, 119 N.J. 547, 571 (1990)). [9]

A prosecutor commits reversible error by "'suggesting that police witnesses are believable because of their status as policemen … .'" State v. Frost, 158 N.J. 76, 84 (1999) (quoting State v. Staples, 263 N.J. Super. 602, 606 (App. Div. 1993)). The prosecutor advised that Essex County Prosecutor's Office was involved in this case "to ensure a fair and impartial investigation (23T52-1 to 2)." In other words, the jurors should trust the fair and impartial people who work in Mr. Albu's office over Mr. Crespo's unfair and partial cronies at the Newark Police Department and his defense counsel.

The prosecutor misattributed statements to defense counsel (23T29-31 to 32-24), misrepresented counsel's comment regarding testimony about the location of a gun in the Dixon-Griffin vehicle (23T45-23 to 46-22), and falsely claimed that counsel had accused the Essex County Prosecutor's Office of tampering with evidence (23T52-21 to 55-4). Defense counsel pointed out that in many instances when the prosecutor 'quoted' transcripts the citations were simply wrong. (23T30-12 to 13) In many instances, the objections were 'resolved' with an admonition that that the jurors should rely on their recollections (e.g. at 23T33-25 to 34-4) of an extremely lengthy and delayed

[9] The trial court denied Mr. Crespo's motion for a new trial and discussed this issue at Da 110-111.

trial. It must be noted that the evidential aspect of the case concluded on June 6, 2023, with the summations beginning on June 20, 2023

The prosecutor's closing argument undermined any chance Mr. Crespo had of receiving a fair trial. The matter should be remanded with specific admonitions so that the State does not repeat the errors during the retrial.

POINT VI

THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTION *IN LIMINE* TO EXCLUDE AS EVIDENCE AT TRIAL THE TOXICOLOGY REPORT OF GRIFFIN, WHICH FOUND A PLETHORA OF DRUGS IN HIS BLOOD, AND DIXON'S STATEMENT THAT HE WAS SMOKING PCP PRIOR TO THE INCIDENT AS WELL AS HIS URINE DRUG SCREEN.
(Order at Da 34; Opinion at Da 36-46)

Per Aguiar, evidence suggesting that a victim was the aggressor is admissible even if the defendant lacked "[p]ersonal knowledge of the victim's propensity for violence" (322 N.J. Super. at 184). The reasoning underlying Aguiar logically extends to evidence of a victim's abuse of substances associated with aggressive behavior. In State v. Jenewicz, 193 N.J. 440, 452 (2008) the Court ruled admissible, as part of defendant's claim of self-defense, expert opinion that victim's "severe paranoia, intense anger, explosive rage, and violence were all symptomatic of severe cocaine dependency." The trial court ruling that Griffin and Dixon's drug use was irrelevant because Mr. Crespo had "no knowledge of the victim's drug use at the time of the shooting"

and was an abuse of discretion. (Opinion at page 9 at Da 44) Mr. Crespo, a trained police officer, was in direct contact with both Griffin and Dixon. Mr. Crespo observed Griffin's erratic and aggressive eluding driving behavior, which is depicted on Ortiz's dash cam and Mr. Crespo's BWC (Da 158; Da 160). A reasonable police officer would be led to believe that Griffin was under the influence of drugs and/or alcohol. Same is true for Dixon, Mr. Crespo observed his behavior of pointing a handgun during the first encounter (18T56-16 to 59-8) and then just sitting there with a gun in his hand during the second encounter. (19T70-16 to 71-13)

Griffin's system contained cocaine, marijuana, ketamine and angel dust (Da 35; Da 162), and Andrew Dixon gave a statement that he smoked marijuana laced with PCR and had a urine drug screen at University Hospital that was positive for PCP. (Da 36; Da 163) Cocaine has been shown to cause aggression regardless of any level of provocation. [10] Ketamine "can cause mood changes, ranging from euphoria to suicidality. It affects behavior, ranging from sedation to violence. And it typically reduces cognition." [11] See

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[10] https://www.psychologytoday.com/us/blog/why-bad-looks-good/202107/which-drugs-make-people-aggressive (last reviewed June 30, 2024).

[11] https://publichealth.jhu.edu/2024/what-to-know-about-ketamine (last reviewed June 30, 2024).

Beverly J. Fauman and Michael A. Fauman, Phencyclidine Abuse and Crime: A Psychiatric Perspective, 10 Bull. AAPL. 3 (1982). [12] The Rules of Evidence "'generally promote admissibility of all relevant evidence'" and "'evince a more expansive approach to the admission of evidence.'" State v. Higgs, 253 N.J. 333, 354 (2023). Dixon brandished a gun while Griffin used a multi-ton vehicle to avoid their apprehension. Evidence that both men had taken drugs associated with violent tendencies was probative on the issue of whether they, or the arresting officer, was the true initial aggressor in this encounter, *i.e.* did Dixon point a gun at Mr. Crespo?

Due to the trial court's decision excluding Griffin's toxicology report and Dixon's statement that he used drugs on the evening in question, the defense could not present the testimony of a forensic toxicologist to explain how the drugs found in Griffin's blood and Dixon's urine cause aggression. The BWC video of Officer Sanchez is telling. (Da 157) Clearly, Griffin appeared to be acting aggressive and is nonresponsive. His driving behavior is erratic and aggressive. Dixon is randomly pointing a handgun at Officer Crespo. A reasonable law enforcement officer would have believed that it was

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[12] idnbmnnnibpcajpcglclefindmkaj/https://jaapl.org/content/jaapl/10/3/171full.pdf (last reviewed June 30, 2024).

highly likely that both Griffin and Dixon were under the influence of drugs. The trial court's ruling deprived Mr. Crespo of a fair trial.

POINT VII

THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTION *IN LIMINE* TO EXCLUDE AS EVIDENCE AT TRIAL THAT (A) GRIFFIN WAS OPERATING A STOLEN MOTOR VEHICLE, WHEREIN THE LICENSE PLATES WOULD NOT LEAD THE POLICE TO HIM; (B) GRIFFIN HAD BEAT UP HIS FORMER GIRLFRIEND PRIOR TO THE JANUARY 28, 2019 PURSUIT AND STOLE MONEY FROM HER PERSON AND HER CHRYSLER 300; (C) THE POLICE RECOVERED DRUGS FROM THE VEHICLE; AND (D) THE HANDGUN WAS NOT LAWFULLY POSSESSED BY EITHER GRIFFIN OR DIXON. (10T52-10 to 23; Order at Da 15-18; Amended Order at Da 30-33)

The jury was led to believe that Griffin and Dixon were two guys out for a drive, while possessing a handgun, that could have been lawfully possessed by either Griffin or Dixon. What the jury did not know is that both men were under the influence of drugs; they had illegal drugs in a stolen vehicle; the handgun was not registered to them; and they both had long criminal histories. These facts led them to aggressively elude the police. Most importantly, the jury did not have a motive for why Griffin and Dixon were running from the police. The motive was simple, Griffin likely thought the police were after him for beating his former girlfriend, robbing money from her person and

stealing her car. [13] Coupled with both Griffin and Dixon being convicted felons in possession of a handgun and drugs, if apprehended both were looking at lengthy prison sentences. (Da 135-155) The jury knew none of the above, due to the trial court's erroneous rulings. Mr. Crespo knew that Griffin and Dixon had committed a crime when Officer Sanchez first pulled them over. Sanchez reported Griffin was in possession of a firearm. (BWCs at Da 157)

"Relevant evidence" is defined as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Probative value of evidence is "the tendency of evidence to establish the proposition that it is offered to prove." State v. Burr, 195 N.J. 119, 127 (2008). In determining probative value, the inquiry should focus upon "the logical connection between the proffered evidence and a fact in issue." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004). By contrast, evidence is not relevant in the sense that it lacks probative value when it does not justify any reasonable inference as the fact. State v. Allison, 208 N.J. Super. 9, 17 (App. Div.), certif. denied 102 N.J. 370 (1985).

N.J.R.E. 403 provides that evidence, otherwise admissible, may nevertheless be excluded if the judge, in his discretion, finds that its probative

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[13] Ebony Davis informed an Essex County Prosecutor's Investigator that Griffin beat her up, stole her money and stole her motor vehicle. Davis did not report the crime. (Prosecutor's note at Da 161; 23T150-5 to 151-3) The prosecutor alleged at trial that the vehicle was not stolen. (23T151-13 to 20)

value is substantially outweighed by undue prejudice. State v. Morton, 155 N.J. 383, 453 (1998). Evidence claimed to be unduly prejudicial can only be excluded where its' probative value "is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issues of the case. State v. Thompson, 59 N.J. 396, 421 (1971).

The evidence sought to admitted are other crimes, wrongs or acts. Griffin beat his former girlfriend and stole her car; operated a stolen car; unlawful possessed a handgun; and unlawful possessed drugs. This evidence establishes that Griffin and Dixon had a motive to elude at all costs, even to point a handgun at the police or operate a vehicle so recklessly that the police will abandon the pursuit.

N.J.R.E. 404(b) admits other crime, wrong or act evidence only when it is relevant to some contested issue, such as motive or identity. The Supreme Court has set forth a rule of "general application" in order to prevent the overuse of other crimes evidence. State v. Cofield, 127 N.J. 328, 338 (1992); State v. Marrero, 148 N.J. 469, 483 (1997). The rule sets forth a series of tests that must all be satisfied prior to admission of such evidence. The Cofield/Marrero test has four prongs, which are as follows: (1) it must be relevant to a material issue which is genuinely disputed; (2) the other conduct

must be similar in kind to what which is charged currently and must have occurred reasonably close in time to the events at issue in the criminal trial; (3) evidence of other conduct must be clear and convincing; and (4) its probative value must not be outweighed by prejudice to the defendant. Cofield, at 338; Marrero, at 483.

The trial court erroneously ruled that the evidence did not pass the relevance test in that Officer Crespo did not have the requisite knowledge when he shot Griffin and Dixon. This evidence established the motive why Griffin and Dixon were eluding at all costs, because if apprehended, both would be sentenced to long prison terms. If provided the opportunity, the defense would have been able to prove by clear and convincing evidence that the car was stolen by calling Ebony Davis to a N.J.R.E. 104 hearing and the Newark Police officers that seized the drugs and handgun.

The prosecutor's summation compounded the error because he argued, over defense counsel's objection, that Mr. Crespo had "information" about Griffin and Dixon to arrest them at a later time and should have terminated the pursuit. (23T149-10 to 153-25) This was not true, because the car was stolen and not in Griffin's name.

In a criminal case the use of other crime evidence under N.J.R.E. 404(b) is not limited to the prosecution. It is well established that a defendant may

use other crime evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him. State v. Williams, 240 N.J. 225, 234-238 (2019). This is referred to as "reverse 404(b)" evidence. State v. Weaver, 219 N.J. 131, 150 (2014). It is apparent that the trial court did not consider the evidence as reverse 404(b) evidence.

There is a distinction when 404(b) evidence is offered against a State's witness as compared to a defendant. The lower standard for defensive use of N.J.R.E. 404(b) derives in part from the fact that there is no danger the defendant will be convicted based on propensity evidence. Because prejudice to the defendant is not a factor when such evidence is offered by the defendant, "simple relevance to guilt or innocence should suffice." State v. Dheher, 302 N.J. Super. 408, 457 (App. Div.), certif. denied, 152 N.J. 10 (1997). The Court's rulings deprived Mr. Crespo of a fair trial.

POINT VIII

DIXON'S STATEMENT TO OFFICER ZAMORA WAS INADMISSIBLE HEARSAY AND SHOULD HAVE BEEN EXCLUDED, ESPECIALLY SINCE THE JURORS WERE PROHIBITED FROM CONSIDERING DIXON'S INTOXICATION AND CRIMINAL HISTORY TO IMPEACH HIS ALLEGED STATEMENT.
(Ruling at 13T155-8 to 9)

After Dixon was removed from his vehicle and placed under arrest, EMTs tended to his gunshot would. EMT Josue Zamora assisted Dixon into an

ambulance. (13T146-7 to 16; 13T147-21 to 149-10; 13T151-7 to 152-9) Zamora heard Dixon say, apparently to the unidentified officer in the ambulance, "Why the fuck did you shoot me." This out-of-court declaration was presented to the jury (13T155-19 to 22; 13T158-8 to 20), over objection by defense counsel (13T152-7 to 155-7). Mr. Crespo maintains that this evidentiary ruling was erroneous, which deprived him of a fair trial. The statement, "Why the fuck did you shoot me", implied that Dixon did nothing wrong to deserve to be shot. It is testimony from Dixon that he did not possess a firearm and certainly did not point it at Mr. Crespo to justify Mr. Crespo to shoot at him.

Appellate courts "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). But "[i]t is well settled that discretion means [l]egal discretion, in the exercise of which the judge must take account of the law applicable to the particular circumstances of the case and be governed accordingly." Steele, 92 N.J. at 507. The trial court misapplied a hearsay exception and Mr. Crespo was greatly prejudiced thereby.

"Hearsay" is "a statement that . . . (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." N.J.R.E. 801(c). The

principle of the hearsay rule is that hearsay is deemed "untrustworthy and unreliable" and generally not admissible at trial. State v. White, 158 N.J. 230, 238 (1999) "Hearsay is not admissible except as provided by these rules or by other law." N.J.R.E. 802. It is the proponent's burden to prove that a proffered statement falls within a hearsay exception. State v. Byrd, 198 N.J. 319, 352 (2009).

In the present case, the trial court held that Zamora's testimony about Dixon's declaration qualified as an excited utterance. The trial court simply overruled the objection without making any findings. However, it appears that the trial court agreed with the prosecutor's argument that the statement was an excited utterance over the defense argument that (1) the statement was not provided in discovery and (2) the statement was hearsay. (13T152-7 to 155-17) The prosecutor did not supply the statement in discovery and it would appear that the witness had been prepped to make the statement. The witness stated, prior to being asked what Dixon said, "Am I allowed to say what he said while we were inside the ambulance?" (13T151-7 to 9)

N.J.R.E. 803(c)(2) requires that three conditions concerning the declarant's statement be met before it can be admitted as an excited utterance. It must be (1) related to a startling event, (2) made under stress of excitement caused by the event, and (3) made without opportunity for the declarant to

deliberate or fabricate. State v. Branch, 182 N.J. 338, 366 (2005). Stated another way, the rule permits the admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate." This requires the proponent to establish that the declarant was under the stress of excitement and without an opportunity to deliberate or fabricate. Gonzales v. Hugelmeyer, 441 N.J. Super. 451, 458 (App. Div.), certif. denied, 223 N.J. 356 (2015).

"'[A] court should consider the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance. Although each of these factors is important, the crucial element is the presence of a continuing state of excitement that contraindicates fabrication and provides trustworthiness. Thus, in this fact-sensitive analysis, a court must determine whether the facts and circumstances reasonably warrant the inference that declarant was still under the stress of excitement caused by the event.'" State v. Buda, 195 N.J. 278, 293 (2008) (quoting State v. Cotto, 182 N.J. 316, 328 (2005)). In Cotto, the victims' statements were inadmissible because they had an opportunity to deliberate between the robbery and the arrival of the police.

Dixon's statement was made after a startling event, but a significant amount of time had elapsed from the time of the shooting to the time the statement was made in the ambulance. Had Dixon made the statement when Crespo first opened the door after Dixon was shot, it would have been admissible. But that is not what occurred. Dixon had ample opportunity to deliberate between the shooting and his declaration. Indeed, since Dixon knew he had been apprehended for illegally possessing a firearm by a convicted felon, the statement was likely a lie intended to exculpate him from the crimes he just committed. Certainly, Dixon wanted to deny possessing the handgun and deny that he pointed at Mr. Crespo. The statement "Why did you shoot me" conveyed the message to the jury that Mr. Crespo was not justified in shooting Dixon or Griffin.

Once the statement was admitted, N.J.R.E. 806 permitted the credibility of the declarant to be attacked. The Rule permits impeachment of a declarant's credibility as if the declarant had been a witness. This would permit, for example, a statement introduced under an exception to the hearsay rule to be impeached by evidence that the declarant had been convicted of a crime. State v. Outland, 458 N.J. Super. 357 (App. Div.), certif. denied, 239 N.J. 503 (2019). In Outland, the defendant had been permitted to introduce a 911 call he made to report the alleged robbery as either an excited utterance or a

present sense impression exception to the hearsay rule. The court held that it was not error for the trial court to allow the State to introduce, pursuant to N.J.R.E. 806, four prior convictions for impeachment purposes.

Dixon had numerous felony convictions and was under the influence of PCR when he made the statement. If the jurors were being asked to decide whether the Dixon's so-called excited utterance was trustworthy, it was crucial for them to have the full and fair picture regarding his criminal history and his mental state at the time the statement was made. The trial court's ruling violated Mr. Crespo's right to confront his accuser.

POINT IX

THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE. (Da 120-122; 33T77-5 to 80-20)

Convicted on all six counts of the Indictment, Mr. Crespo appeared for sentencing on May 31, 2024. The trial court found aggravating factor three (the risk defendant will commit another offense) (33T62-24 to 64-17); four (the defendant breached the public trust) and gave it "significant" weight (33T64-18 to 67-2); and nine (need to deter) and gave it "enormous weight." (33T67-3 to 70-7) Moving to mitigating factors, the trial court found mitigating factor seven (defendant has no history of criminal activity) and gave it "significant" weight. (33T51-12 to 52-23) The trial court also found mitigating factors five (victims induced the commission of the crime) (33T50-

8 to 51-11); eight (defendant's conduct was the result of circumstances unlikely to recur) (52-24 to 55-16); nine (character of defendant indicates he is unlikely to commit another offense) (55-17 to 57-11); eleven (excessive hardship to defendant's family) (33T57-12 to 58-18); and twelve (willingness of defendant to cooperate with law enforcement) (33T58-13 to 59-15). The trial court only gave "minimal" weight to these mitigating factors. The trial court ruled that the aggravating and mitigation factors are unbalanced, making a custodial term towards the middle range appropriate. (33T70-8 to 13) The trial court sentenced Mr. Crespo to an aggregate sentence of twenty seven years of imprisonment, subject to NERA. (Da 120-122; 33T77-5 to 80-20) The trial court's analysis of the aggravating and mitigating factors was flawed, requiring this Court to remand for resentencing..

Within the sentencing range authorized by the jury's verdict, a judge has broad discretion to impose an appropriate sentence by considering traditional factors related to the offense and offender. See Apprendi v. New Jersey, 530 U.S. 466, 481 (2000). The judge may engage in fact findings, supported by credible evidence, in setting a fair sentence. State v. Natale, 184 N.J. 458, 487 (2005); State v. Kiriakalis, 235 N.J. 420, 432 (2018).

Sentencing is reviewed for abuse of discretion. State v. Johnson, 118 N.J. 10, 15 (1990). The Appellate Division, however, may modify a

defendant's sentence when it is convinced that the sentencing judge was "clearly mistaken." State v. Jabbour, 118 N.J. 1, 6 (1990). The fundamental principle is that the punishment must fit the crime, not the criminal. State v. Baylass, 114 N.J. 169, 172 (1989); State v. Hodge, 95 N.J. 369, 377 (1984). On appeal, the reviewing court must perform the following three functions: (a) review sentences to determine if the legislative policies, here sentencing guidelines were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case make the sentence clearly unreasonable so as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-65 (1984).

Our Supreme Court has stated that it "will always require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence." Id. at 363. This requirement of "competent" evidence would prohibit the finding of an aggravating factor or the reduction in weight of a mitigating factor with evidential support. Ibid. For an aggravating factor to enter in consideration there must be facts tying it to the particular case. See State v. Case, 220 N.J. 49, 66-68 (2014) (court

found an insufficient basis for finding a risk that defendant would commit other crimes or that there was a need to emphasize deterrence). Mr. Crespo had no criminal history, yet the trial court found that Mr. Crespo was likely to commit another offense because he continued to maintain his innocence. The trial court mistakenly gave this factor significant weight. If "risk of another offense" is relied on, the court must find particular facts supporting it. Here, there are no such facts. The court only cited to Mr. Crespo's testimony and statements that he believed he was justified.

In State v. Toro, 229 N.J. Super. 214, 225-228 (App. Div. 1998), certif. denied, 118 N.J. 216 1989), the court held that the likelihood defendant would commit another offense was not a proper aggravating factor where the twenty-year-old defendant had been gainfully employed for four years with no prior records. Here, we have Mr. Crespo who was twenty-six with no prior record and gainfully employed his entire adult life. (See PSR)

The trial court also gave "enormous" weight to the "need to deter" factor because there remained a large portion of the law enforcement community who still believed that Mr. Crespo was justified. The trial court handed down an excessive sentence to send a message to the law enforcement community that "shoot first ask questions later" was a crime for which there will be a lengthy prison sentence imposed. (33T67-3 to 71-25) This was improper.

Moving to the mitigating factors, the trial court presided over a trial and pretrial motions, that revealed Griffin beat up his girlfriend; stole her vehicle; was under the influence drugs; was in possession of a weapon; violently eluded the police; with his passenger who was also under the influence of drugs; brandished an illegal handgun; and with both men having extensive criminal histories. It is illogical that the trial court did not find that Mr. Crespo acted under a strong provocation (33T47-1 to 48-23) or that there were substantial grounds tending to justify Mr. Crespo's conduct (33T48-24 to 50-7). Mitigating factors three and four should have been afforded significant weight. Equally illogical, the trial court only found minimal weight that the victims induced or facilitated the crime. (33T50-8 to 51-11) Although the trial court properly found mitigating factors eight, nine, eleven and fourteen, the trial court only found minimal weight. The trial court erred by not finding "enormous" weight to mitigating factors eight and nine because Mr. Crespo had never been convicted or arrested for a crime, and who did not have any infractions while a law enforcement officer. (See PSR)

The trial court erroneously concluded that there was a significant amount of time between the first, second and third shootings to impose a consecutive sentence for the aggravated assault conviction for shooting Dixon. (33T75-10 to 16) However, the jury likely found that Mr. Crespo was justified in the first

two shootings and his convictions were limited to the third shooting. The third shooting took less the one second. (See Mr. Crespo's BWC at Da 159)

In applying the Yarborough factors concerning the imposition of consecutive sentences, the trial court ignored that the crimes were not predominantly independent of each other; were not separate acts of violence; and were not committed at different times and places. State v. Yarborough, 100 N.J. 627, 630 (1985). As Mr. Crespo's BWC video depicted, the event was one single. These facts warranted a concurrent sentence.

The above arguments support the imposition of a ten-year term of imprisonment with count two running concurrent to count one.

CONCLUSION

Based on the foregoing, Mr. Crespo respectfully requests that his convictions be reversed and a new trial ordered or, in the alternative, that he be resentenced.

Respectfully submitted,
ANTHONY J. POPE, ESQ.
Attorney for Appellant

/s/ Robert Carter Pierce
By: ROBERT CARTER PIERCE

Dated: October 5, 2024

STATE OF NEW JERSEY, Respondent, vs. JOVANNY CRESPO, Defendant, Appellant	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CRIMINAL ACTION DOCKET NO.: -3092-23T4 *CIVIL ACTION*

BRIEF OF AMICS CURIAE THE NATIONAL POLICE DEFENSE FOUNDATION IN SUPPORT OF APPEAL FROM APELLANT'S JUDGMENT OF CONVICTION

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Dated: February 6, 2025

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THE NATIONAL POLICE DEFENSE FOUNDATION REFERS THE COURT TO THE FOLLOWING PLEADINGS FILED ON BEHALF OF THE DEFENDANT/APPELLANT:

STATEMENT OF FACTS

Amicus relies on the Statement of Facts of the Defendant Appellant's Brief.

ARGUMENTS

POINT I
THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON NEGLIGENCE AND INITIALLY RULING THAT THE USE OF FORCE IN LAW ENFORCEMENT JURY INSTRUCTION WOULD NOT BE CHARGED TO THE JURY

As states in Defendant Appellant's Brief, An instruction distinguishing negligence from a charge of recklessness is appropriate when there is reason to believe the jury could confuse the latter mental state with the former. State v. Conception, 111 N.J. 373, 383 (1988); State v. Atwater, 400 N.J. Super. 319, 332 (App. Div. 2008). In Atwater, the Appellate Division reversed a conviction for death by auto where the judge refused to explain the distinction between recklessness and negligence even though the issue as to whether the defendant consciously disregarded a risk was central to the case. Id. at 330-331. In the instant matter, Officer Crespo was charged with reckless manslaughter and assault, and his attorney contended that the evidence could support a finding that his mental state could more accurately be described as "negligent" as is set forth in N.J.S.A. 2C:2-2(b)(4):

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Officer Crespo, and all similarly situated law enforcement professionals, are entitled to argue their defense within "[t]he 'four corners" of the evidence, including "all reasonable inferences drawn therefrom." State v. Loftin, 146 N.J. 295, 347 (1996). The trial court held that

Officer Crespo had argued the defense of justification and that this foreclosed a finding of negligence. However, Officer Crespo's position has always been that he was consciously aware of the risks from his shooting. Not once has he ever stated that he was unaware and that he should have been aware. He has always maintained the same thing: that the risks he took were justified. (Da 58; June 13, 2023 opinion at 10).

Moreover, the prosecution produced the testimony of State Police Instructor, Sergeant Ashkar. Ashkar set forth what a properly trained officer – the 'reasonable person in the actor's situation' – would do as it relates to the use of force under the State Attorney General's Guidelines and the Newark Police Department's General Orders on use of force. (18T27-12 to 132-1) and (18T56-5 to 9). Indeed, the State argued that Officer Crespo had a "duty" to follow the use of force guidelines; Officer Crespo breached that duty; and Officer's Crespo actions caused the death of the pursuit subjects. Thus, the state set out a prima facie allegation of negligence.

If the court had instructed the jury on negligence and/or allowed counsel for Officer Crespo to make appropriate arguments during summation, the jury could very well have found a use-of-force deviation which amounted to negligence rather than recklessness. The risk of jurors improperly confusing negligence for recklessness was too great to not permit such an instruction. In this regard, law enforcement officers in the course of their duty are confronted with life threatening circumstances in which their lives, the lives of colleagues, and the public are at risk. A lay juror with no law enforcement experience must have a clear understanding of the difference between negligence and recklessness in a situation involving alleged improper use of force. Law enforcement officers who find themselves in the unfortunate position of having to use their weapons and are later called to task for it, must be given the full and fair opportunity to have their conduct judged in light of the reasonable person in the same or similar situation. The automatic

preclusion of arguing negligence solely based on a defense based on justification does not serve the interests of justice and ostensibly prejudices the law enforcement community as a whole.

The failure of the trial court to instruct the jury on negligence was compounded by its failure to permit a use-of-force instruction to the jury. As stated in Defendant-Appellant's Brief:

> Throughout the trial, the testimony was clear that the Newark Police were pursuing Griffin and Dixon to effectuate their arrests. The first responding officer, Officer Sanchez, testified that she observed Griffin with a handgun protruding from under his leg. She ordered him out of the vehicle and intended to arrest him. (18T170-8 to 20; 18T172-5 to 17). The trial court erroneously concluded that Mr. Crespo was not trying to arrest Griffin and Dixon and, therefore, denied Mr. Crespo's request to argue his right to use of force as a law enforcement officer under N.J.S.A. 2C:3-7 (Da 52-54). As a result, defense counsel had to avoid any mention of the concept during summation. The trial court disregarded the trial testimony Officers Crespo, Ortiz, Sanchez, Detective Moss as well as the other responding police officers.

Defendant-Appellant's Brief at pp. 43-44.

Again, there appears to be a prejudice against the law enforcement community in the trial court's decision making. While the court did eventually permit defense counsel to provide the use-of-force instruction in a thirty-minute supplemental summation, it could not cure the prejudice against Officer Crespo after one and one-half days of previous summations. This not only deprived Officer Crespo of a fair trial but sends a chilling message to the law enforcement community as a whole. As this Court is aware, N.J.S.A. 2C:3-7(a) – use of force in law enforcement – provides in pertinent part:

> [...] the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor reasonably believes that such force is immediately necessary to effect a lawful arrest.

The ability to argue justified use of force was not only critical to Officer Crespo in light of the theme of Officer Crespo's defense throughout trial, but is, from a much larger perspective,

critical to the peace of mind of officers across New Jersey. Law enforcement professionals, like Officer Crespo, serve a critical role in the preservation of safety and stability in our towns, cities, and neighborhoods. Unfortunately, they are sometimes forced to make split second life or death decision with regard to the implementation of use of force in effectuating arrests. The provisions of N.J.S.A. 2C:3-7(a) properly account for the inherent difficulty of such situations by considering the actor's state of mind based on the surrounding circumstances. Any police officer would fully expect to have the benefit of this defense in the event their conduct is questioned. Officer Crespo was not a gun toting vigilante but a sworn officer of the peace who made a decision to act in a situation most people could hardly imagine.

Officer Crespo should have been permitted to instruct the jury on negligence and the use-of-force in law enforcement in one single summation, consistent with the issues presented at trial. The trial court's conduct in failing to do so has sent an unsettling message to law enforcement that the inherent risks and challenges unique to their profession will not carry any weight in a New Jersey Courthouse.

POINT II
THE SENTENCE IMPOSED WAS MANIFESTLY EXCESSIVE AND EVINCED A PREJUDICE AGAINST LAW ENFORCEMENT

It appears that the trial court was more concerned with making an example out of Officer Crespo than ensuring that a criminal defendant received a fair sentence. A judge has broad discretion to impose an appropriate sentence by considering traditional factors related to the offense and offender. See Apprendi v. New Jersey, 530 U.S. 466, 481 (2000). The judge may engage in fact findings, supported by credible evidence, in setting a fair sentence. State v. Natale, 184 N.J. 458, 487 (2005); State v. Kiriakalis, 235 N.J. 420, 432 (2018). The fundamental principle

is that the punishment must fit the crime, not the criminal. State v. Baylass, 114 N.J. 169, 172 (1989); State v. Hodge, 95 N.J. 369, 377 (1984).

Here, the trial court gave "enormous" weight to the "need to deter" factor because there remained a large portion of the law enforcement community who believed that Officer Crespo was justified. The sentence imposed was to send a message that "shoot first ask questions later" is a crime which will result in harsh sentencing. This was an abuse of discretion and not rooted in any factual or statistical basis other than the judge's personal view of the law enforcement community.

In fact, according to the Federal Bureau of Investigation's National Use-of-Force Data Collection for 2024, thirty-three individuals died due to law enforcement use of force and another fifty-five suffered serious bodily injury. The top five modes of resistance encountered by law enforcement were Failing To Comply To Verbal Commands; Attempt To Escape or Flee from Custody; Using a Firearm Against An Officer Or Another; Displaying A Weapon At An Officer Or Another; and Resisting Being Handcuffed Or Arrested. Approximately 559 out of 618 agencies in New Jersey participated in this study. The officers employed by these agencies represent 70% of sworn law enforcement officers in the state. In the reporting period, only nine New Jersey agencies reported at least one incident.

Clearly, the trial court's assumptions about the law enforcement community's thoughts, sentiments, and conduct are not supported by actual facts or data. It is merely a regurgitation of tired rhetoric which denigrates and demeans law enforcement officers without considering facts, data, and profession related context. Indeed, the tragic cases which involve loss of life are the extreme minority of the public's interaction with law enforcement and are precipitated by some level of encountered resistance and/or officer safety.

In short, the trial court made a blatant attempt to make an example out of Officer Crespo based on, ostensibly, personal bias, misinformation, and ignorance, which amounts to an abuse of discretion. If the trial court's objective was to ensure to further alienate law enforcement and perpetuate a false, disparaging narrative against the community at large, it succeeded.

CONCLUSION

In conclusion, the trial court's failure to permit the jury to be instructed on negligence and the use-of-force in law enforcement in a single summation prejudiced Officer Crespo's defense. Further, the trial court abused its discretion by imposing a sentence that was unsupported by facts or data, specifically with regard to the alleged "need to deter." By rectifying the errors committed by the trial court in this matter, this Court will reestablish the judiciary's trust and credibility with the law enforcement community and permit law enforcement to engage in their profession uninhibited by the fear of prejudicial treatment. This will, ultimately, benefit and promote the safety of the public at large.

Respectfully submitted,

LAW OFFICES OF JOHN T. BAZZURRO, LLC

Dated: 02/18/2025 BY: _____

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Attorneys for Amicus Curiae the National Police Defense Foundation

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3092-23T4

STATE OF NEW JERSEY	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
	:	of New Jersey, Law Division,
v.		Essex County.
	:	
JOVANNY CRESPO,	:	Sat below: Hon. Martin G. Cronin, J.S.C., and
Defendant-Appellant.		Hon. Michael L. Ravin, J.S.C., and a jury

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT STATE OF NEW JERSEY

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Counterstatement of Procedural History

On May 22, 2019, the Essex County Grand Jury returned Indictment No. 2019-5-1401, charging defendant Jovanny Crespo with: first-degree aggravated manslaughter of Gregory Griffin, N.J.S.A. 2C:11-4a(1) (Count 1); second-degree aggravated assault of Andrew Dixon, N.J.S.A. 2C:12-1b(1) (Count 2); second-degree possession of a handgun for unlawful purposes, N.J.S.A. 2C:39-4a (Counts 3-4); and second-degree official misconduct, N.J.S.A. 2C:30-2a (Counts 5-6). (CDa1-7).[1]

Numerous pretrial motions were heard. On August 31, 2021, the Honorable Martin G. Cronin, J.S.C., granted the State's motion to quash nine of defendant's subpoenas (Nos. 1, 3, 4, 5, 6, 7, 8, 9 and 10) for the reasons stated on the record. (6T7-9 to 8-5; 24-22 to 26-11; 36-20 to 37-1; 50-6 to 16). The judge denied the State's motion to quash defense subpoena No. 2 in part and directed it to provide certain ShotSpotter data. (6T26-12 to 27-6; 32-5 to 33-2).

On September 8, 2021, the judge granted the State's motion in limine to preclude references to the pursued vehicle being stolen, and Griffin's alleged

[1] The State adopts defendant's transcript designation code, see (Db xv-xvi), except to note: CDa refers to defendant's confidential appendix; PSR refers to defendant's presentence report; "4T" is May 21, 2019 (mislabeled as May 31, 2019); and 6T is August 31, 2021 (mislabeled as October 31, 2021).

domestic violence incident. (6T51-24 to 53-9; Da13-15). On September 28, 2021, defendant filed a notice of motion for leave to appeal Judge Cronin's September 8, 2021 order. (Da22). On October 5, 2021, Judge Cronin filed an amplification pursuant to Rule 2:5-1(b) (now R. 2:5-1(d)). (Da23-28). On October 19, 2021, this Court denied defendant's motion. (Da29).

On October 6, 2021, for the reasons expressed in his written opinion, Judge Cronin granted the State's motion in limine to preclude any references to: (a) the criminal charges filed against Griffin for eluding; (b) the criminal charges filed against Dixon; (c) the Grand Jury's return of a True Bill charging Dixon with unlawful possession of a weapon; and (d) the circumstances surrounding Dixon's death on January 23, 2021. (Da16-21).

On June 27, 2022, Judge Cronin issued an amended order incorporating by reference his prior rulings, and adding the following additional rulings: (a) the State's motions to preclude any references to the alleged dismissal of Griffin's criminal charges from May 21, 2019, the accidental death of Dixon, Dixon's criminal charges from May 21, 2019, and drugs found in the victims' vehicle were granted; and (b) the State's motions to preclude references to the victims' clothing, including the balaclava, and any firearms or ammunition or other firearms-related material found in the vehicle were denied. (Da30-33).

On December 6, 2022, the Honorable Michael L. Ravin, J.S.C., granted

the State's motion in limine to exclude the toxicology results and drug use of the victims for the reasons detailed in his written opinion. (Da34-46).

Jury selection proceeded on May 2-4 and 9, 2023. (7T-10T). Defendant was tried before Judge Ravin and a jury on various dates from May 16-July 5, 2023. On June 12, 2023, prior to summations, the judge issued original and amended orders denying defendant's request to charge certain justification defenses, precluding defense counsel's reference to them, and stating his intention to issue an order and written opinion further explaining his reasoning. (Da68-69). The judge denied defendant's motion for a stay to seek an emergent appeal. (Ibid.). That same day, defendant filed an application for permission to file an emergent appeal the June 12, 2023 order. (Da61-67).

The next day, June 13, 2023, Judge Ravin issued a written order and opinion memorializing his June 12 rulings. The judge granted defendant's motion to charge the use of force in the protection of others. He denied defendant's request to charge: (a) the use of force in law enforcement; (b) the use of force in self-protection, in protection of others and in law enforcement as a justification for official misconduct; and (c) negligence. (Da47-60). He also precluded defendant from referencing them in summation. (Da48, 58-59). Judge Ravin again denied defendant's motion for a stay pending emergent

appeal. (Da70-71). On June 14, 2023, this Court denied defendant's emergent application. (Da72-73).

Summations proceeded on June 20 and 21, 2023. (22T, 23T). Following summations, Judge Ravin reversed his June 13 order denying defendant's request to charge the use of force in law enforcement under N.J.S.A. 2C:3-7 sua sponte, and reopened summations to allow the parties to address the defense. (25T3-9 to 24; Da74-79). Second closing arguments proceeded on June 22, 2023. (25T).

On July 3, 2023, after an extensive voir dire of all deliberating jurors, Judge Ravin determined that Juror 4 should remain on the jury and denied defendant's motion for a mistrial. (30T4-5 to 5-4; 31T3-12 to 64-10; 67-10 to 11; 90-16 to 99-1).

On July 5, 2023, the jury found defendant guilty on all counts of the indictment. (32T6-19 to 10-25; Da85-89). Immediately following the verdict, Judge Ravin denied defendant's motion for bail pending appeal, (32T17-4 to 17; Da90), and his later motion for reconsideration. (Da91-100). Defendant sought leave to appeal both orders, and on September 25, 2023, this Court denied his motion. (Pa1).

On February 22, 2024, Judge Ravin denied defendant's various motions, including for release pending sentencing and for bail pending appeal. (Da101

-118). On May 22, 2024, defendant's second application for bail pending appeal was dismissed without prejudice. (Da119).

On May 31, 2024, defendant was sentenced as follows: on Count 1, 27 years with an 85% parole disqualifier pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; on Count 2, 7 years subject to NERA, to run consecutively with Count 1; on Count 5, 6 years, to run concurrent with Count 1; and on Count 6, 6 years, to run concurrent with Count 2. Counts 3 and 4 were merged with Counts 1 and 2. (33T77-5 to 79-9; Da120-122). That same day, the JOC was amended to show an aggregate 27-year NERA sentence and an aggregate 8-year mandatory parole supervision term. (Da131-134).

On June 8, 2024, defendant filed a Notice of Appeal. (Da123-28). On August 20, 2024, Judge Ravin denied defendant's third motion for bail pending appeal. (Da156). On October 24, 2024, this Court granted defendant's motion to file an overlength merits brief. (Pa2).

On December 2, 2024, this Court granted the State's motion to seal two jury selection transcripts dated May 4 and 9, 2023, with consent. The State's motion to seal defendant's brief was denied, but defendant was directed to file a revised brief removing the jurors' names and using initials. (Pa3).

On December 5, 2024, this Court denied defendant's motion for bail pending appeal, or in the alternative, to expedite the appeal. (Pa4).

Counterstatement of Facts

A. The State's Case

On the evening of January 28, 2019, Newark Police Officer Valeria Sanchez[2] was assigned to the 5th Precinct Suppression Unit, which covered the south side of Newark. Her duty was to patrol the area and make motor vehicle stops, and to provide a police presence in the area due to recent shootings and the possibility of a retaliatory shooting in the corridor of Pennsylvania Avenue. She was driving as an "alpha unit", meaning she was alone. She wore a body-worn camera (BWC). Her vehicle did not have a dash camera. (18T138-6 to 141-22; 143-14 to 23; 147-16 to 24; 177-7 to 21; 179-3 to 12).

Around 11:30 p.m., Sanchez was patrolling the area of Pennsylvania Avenue and Thomas Street when she observed a speeding black 2017 Chrysler 300. (18T140-15 to 22; 148-13 to 149-8; 150-10 to 16; 176-10 to 12; 179-13 to 22; Da157@ 0:47-1:25). Officer Sanchez activated her lights and siren and followed the car, which eventually pulled over. (18T152-2 to 154-15; Da157@ 0:47-1:25).

Sanchez's BWC shows the Chrysler's windows are darkly tinted[3] and when the windows are up, the driver can only be seen when Sanchez shines her

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[2] Officer Sanchez testified on behalf of defendant.

[3] Defendant testified before the grand jury that the Chrysler's windows had "dark" "heavy tints." (12T130-1 to 10).

flashlight into the car. Both the driver, later identified as Gregory Griffin, and the passenger, later identified as Andrew Dixon, are seen on Sanchez's BWC. Dixon wears a black ski cap on his head and his face is exposed. (Da157@ 1:25-1:41).

On Sanchez's BWC, the driver's side window is rolled down as Sanchez approaches and commands Griffin to turn off the vehicle several times. Griffin asks, "why?" then says "alright", reaches toward the ignition and rolls up the window. (Da157@ 1:25-1:47). Sanchez knocks on the window and orders Griffin to roll down the window, turn off the car and open the door. She requests a backup unit. (Da157@ 1:48-1:58). When Griffin rolls down the window, Sanchez sees the handle of a gun tucked between his legs and radios, "I got a 6-4-6" (meaning a person with a gun). Sanchez points her service weapon at Griffin and shouts, "Let me see your hands" and "Hands on the wheel!" Dixon raises both hands, and Griffin raises his left hand and then his right hand. Sanchez believed Griffin had already turned off the vehicle, but as she reaches into the car to open the door, Griffin drives off. (18T158-11 to 12; 161-8 to 14; Da157@ 1:58-2:26, 11:00-11:07, 11:56-12:00).

Detective Christopher Mos and his partner Officer Richardo Macieira drive up in an unmarked Mercedes Benz to assist Sanchez, but the Chrysler pulls away. They pursue the Chrysler with lights and sirens activated.

(13T85-13 to 89-1; 18T169-16 to 170-5; Da157@ 2:21-2:27). Sanchez returns to her patrol car, and relays that a black 2017 Chrysler 300 with a certain license plate number (which she calls out) just fled the scene. (13T90-5 to 13; 18T176-10 to 13; Da 157@ 2:27-2:55).

Defendant, a Newark police officer, and his partner Officer Hector Ortiz were assigned to the 5th Precinct Suppression Unit. Like Officer Sanchez, they were responsible for patrolling the area and stopping cars for motor vehicle violations. Just after 11:00 p.m., on January 28, 2019, Ortiz was driving a marked Ford Explorer and defendant was in the passenger seat when they hear dispatch announce that Sanchez pulled over a vehicle at Thomas and Pennsylvania. As they head to the area to assist her, Sanchez yells out, "6-4-6." (13T15-15 to 16-15; 18-12 to 19-22; 19-12 to 20-14; Da160@ 0:00-0:39). Dispatch radios, "The driver's got a gun." (Da158@ 1:51-1:54).

As they head in Sanchez's direction, Ortiz slows down at the red light at Bergen Street and defendant shouts, "move, bro!" to Ortiz. (Da158@ 0:47-0:55; Da160@ 0:50-0:52). Defendant asks for a description of the car and Sanchez calls out the Chrysler's description and plate number. (Da158@ 1:04-1:18). Ortiz and defendant drive eastbound on Clinton Avenue, with lights and siren activated, when they see the Chrysler described by Officer Sanchez speeding toward them in the opposite lane of traffic with an unmarked police

vehicle behind it. (13T20-15 to 21-9; Da160@ 1:30-1:34).

Newark Police Department Policy required that a marked patrol vehicle take the lead in a pursuit, so Ortiz makes a U-turn to get behind the Chrysler. (13T21-10 to 25). Before Ortiz executes the turn, with the Chrysler speeding toward them, defendant shouts to Ortiz, "Cut in front, cut in front!" Defendant laughs as Ortiz swerves to make the turn. Ortiz says to defendant, "What are you stupid, bro?" (Da158@ 1:28-1:40; Da160@ 1:33-1:42).

At Clinton and Peshine, Ortiz overtakes the unmarked police vehicle and takes the lead in the chase. (13T23-20 to 24-6; Da160@ 1:57-2:02). The Chrysler turns the corner and slows but does not stop. Defendant says to Ortiz, "Cut in front, cut in front!" As Ortiz rolls to a stop near the rear driver's side of the Chrysler, defendant opens the door and tries to jump out. Ortiz shouts, "Get in, get in, get in, get in!" to defendant as the Chrysler pulls off, going northbound on Peshine. (13T22-6 to 16; 25-2 to 18; Da158@ 1:57-2:09; Da159@ 0:38-0:48; Da160@ 2:00-2:09). Ortiz testified that from his vantage point about 10 to 15 feet behind the Chrysler, he could see what appeared to be either the silhouettes of the two suspects or the vehicle's headrests. (13T24-7 to 25-1). As the pursuit proceeds, defendant urges Ortiz to, "close the air, close the air!" and "Get in front of it!" Defendant radios, "I just pulled in front and drew my weapon on it. We're trying to get in front of it." (Da158@ 2:10-

2:28; Da159@ 0:52-1:11; Da160@ 2:09-2:15).

The Chrysler turns left onto Madison and slows down at the corner of Bergen and Madison but does not come to a complete stop. (13T25-19 to 26-1; 30-8 to 13; Da160@ 2:30-2:41). Ortiz stops behind the driver's side of the Chrysler, about 10 to 15 feet away, and sees either the silhouette of the suspects' heads or the headrests inside the car. (13T31-12 to 32-16; 34-5 to 12). Ortiz yells to defendant, "Get in, get in!" as defendant jumps from the patrol car, runs to the passenger side of the Chrysler with his weapon unholstered and points at the vehicle. As he runs, defendant says, "Motherfucker, get out of the car!" Defendant reaches for the Chrysler's front passenger door with his left hand but does not open it. With his right hand, he immediately fires one shot at the passenger door and two shots at the Chrysler as it drives away. (13T26-1 to 3; 30-13 to 17; 30-21 to 24; 34-13 to 35-3; Da158@ 2:32-2:45; Da159@ 1:09-1:23; Da160@ 2:34-2:41).

Officer Gabriel Lopez, who is part of the pursuit, is heard yelling, "shots fired, shots fired" over the radio. Defendant enters the patrol vehicle as the Chrysler accelerates northbound on Bergen Street. Ortiz continues the pursuit, along with other officers. (13T26-10 to 19; 33-7 to 34-1; 14T22-24 to 23-3; Da158@ 2:41-2:46; Da159@ 1:21-1:35; Da160@ 2:40-2:45). Defendant radios, "Shots fired on the vehicle, shots fired." (13T30-25 to 31-7; Da158@

2:50-2:53; Da159@ 1:30-1:36; Da160@ 2:52-2:55).

Detective Mos was about two to four car lengths behind the Chrysler and about to exit his car when he heard gunshots. (13T94-4 to 24). At Bergen and Madison, Officer Edgardo Gonzalez and his partner Officer Lopez pull up on the driver's side of the Chrysler in their unmarked Crown Victoria. Gonzalez hears two gunshots. Lopez hears gunshots and sees defendant in "a cloud of smoke." (14T8-17 to 9-8; 13-12 to 14-22; 110-2 to 21). Gonzalez can see the driver through the Chrysler's windshield, but he is not visible through the driver's side window. (14T20-11 to 22). Lopez cannot see inside the Chrysler due to the window tints. (14T111-2 to 13).

When he returns to the car, defendant says to Ortiz, "I shot at it, bro." (Da158@ 3:04-3:06; Da159@ 1:44-1:47). Ortiz recalled at trial that when defendant returned to the patrol vehicle he said, "the passenger pointed the weapon at me", and then relayed the same information over the radio. (13T26-4 to 9; 35-20 to 36-7). However, defendant is not heard making this statement to Ortiz or radioing this information on dash cam or BWC videos at any time during the pursuit.

Defendant testified before the first grand jury that during the first shooting on Bergen and Madison, as he ran to the Chrysler, he could see movement inside the car through the back seat window. He was about to open

the front passenger door when he saw the passenger turn sideways against the driver and point a gun directly at him. Defendant fired one shot at the closed front passenger door and the remaining shots as the car drove away. The passenger never fired at him. (12T25-16 to 28-6; 36-1 to 3; 41-17 to 42-2). He told the second grand jury that he opened the passenger door and saw the passenger pointing a gun at him. (12T175-17 to 176-14). Defendant stated that even though the car's windows were heavily tinted, he could still see the passenger point a gun at him. (12T130-1 to 25). Defendant surmised that there were two guns in the car, although he never saw the driver with a gun. (12T33-5 to 15).

As the pursuit continues, defendant tells Ortiz twice to "go around" the marked police vehicle in front of them, and Ortiz replies, "relax, relax, bro, relax." They overtake the marked police vehicle. (Da158@ 3:21-3:30; Da159@ 2:00-2:12; Da160@ 02:53-03:27). The Chrysler turns right at the corner of Bergen and Springfield and slows but does not stop. Ortiz pulls up next to the Chrysler's driver's side about 5 to 10 feet away. (13T36-8 to 38-3; Da160@ 3:31-3:37). Ortiz is able to see the same silhouettes of either two heads or two headrests inside the Chrysler. (13T37-14 to 20).

Ortiz shouts, "No, no, no, get in!" and "relax, bro!" as defendant opens the door, exits the patrol vehicle and fires two shots at the Chrysler's driver's

side as it drives away. The Chrysler flees eastbound on Springfield Avenue. Ortiz shouts to defendant, "get in!", and the pursuit continues with the unmarked Crown Victoria in the lead. (13T36-13 to 37-9; 39-11 to 15; Da158@ 3:30-3:49; Da159@ 2:12-2:30; Da160@ 3:30-3:49). Inside the patrol car, defendant states, "I think I shot him", "I seen the gun", "he pointed the gun at me", and "he pointed the gun right at me." Ortiz tells him, "Relax, relax, relax." (Da158@ 3:56-4:03; Da159@ 2:37-2:47).

Detective Mos testified that he was two to four car lengths behind the Chrysler and was about to exit his car, when he saw a uniformed officer fire a few shots at the Chrysler from two feet away. (13T96-2 to 19). Officer Gonzalez testified that his vehicle was about 10 to 15 feet behind the Chrysler as it drove to the intersection of Bergen and Springfield. He could not see inside the vehicle because of the window tints and the darkness. (14T23-6 to 24-8; 25-25 to 26-11). Gonzalez stopped near the Chrysler and as he exited the vehicle, he heard gunshots. (14T24-18 to 25-21). Lopez also heard gunshots. (14T112-8 to 17).

Regarding the second shooting, defendant told the grand jury that he exited the patrol car when Ortiz pulled along the driver's side of the Chrysler because he had "no cover" inside the patrol car if the driver or the passenger shot at him. (12T33-20 to 34-23; 109-9 to 14). Defendant saw the occupants

moving around and the silhouette of a gun through the front windshield and the driver's side window. The passenger looked directly at him with the gun in his hand, but the gun was down by the passenger's thigh, not pointed at him. Defendant fired his weapon because "I didn't give him the chance to point it directly at me and give him the chance to shoot and kill me again." (12T35-3 to 36-6; 89-25 to 90-18; 94-13 to 15; 95-1 to 7). Defendant testified that he still felt he was in enough danger to fire at the car, even though it was speeding away. (12T90-19 to 24). After the second shooting, defendant believed he might have hit one or both of the occupants and that they needed medical attention. (12T38-18 to 22; 112-18 to 113-1).

As the Chrysler slows down on Springfield Avenue, defendant opens the door and attempts to exit the patrol vehicle again, and Ortiz yells to him to, "Get in!" (Da158@ 4:07-4:09; Da159@ 02:47-02:53; Da160@ 3:50-4:10). The Chrysler continues to slow and accelerate. Defendant tells Ortiz to, "cut in front", "He's gonna hop out", "I seen him do it." Ortiz says, "Relax, relax." (13T39-22 to 40-10; Da159@ 02:57-3:15; Da160@ 4:10-4:39).

The Chrysler turns right onto Irvine Turner Boulevard and comes to a complete stop. The unmarked Crown Victoria pulls in front of it and Ortiz pulls directly behind it. (13T40-11 to 16; Da160@ 4:10-4:39). Ortiz can see either the silhouette of two heads or the headrests inside the Chrysler. (13T41-

10 to 14). As the Chrysler pulls slightly forward, defendant exits the patrol car with his weapon drawn, runs to the passenger side of the Chrysler yelling, "stop the car", and fires two shots at the passenger door as it opens a crack. Defendant opens the passenger door and orders the passenger, "get out of the car" and "put the guns down" and attempts to undo his seatbelt. Ortiz runs to the driver's side and tries to open the door. (13T40-16 to 41-17; Da158@ 4:37- 04:58; Da159@ 3:09-3:42; Da160@ 4:39-04:50).

Detective Mos, who was stopped a few car lengths behind the Chrysler, saw a uniformed officer shoot at it. (13T98-20 to 99-22). Officer Edgar Giron testified that the Chrysler's window tints were very dark and prevented him from seeing inside the vehicle, but as he got closer, he could see the two men through the window with the aid of a flashlight. (13T123-25 to 125-2; 130-6 to 15; 132-18 to 133-25). Officer Gonzalez testified that as the Chrysler turned onto Irvine Turner, he could see the silhouette of the driver through the tints because the area was well-lit. (14T26-17 to 22). Gonzalez stopped in front of the Chrysler and as he exited his car and walked toward the vehicle he heard gunshots. (14T27-4 to 15). Officer Lopez testified that when he and Gonzalez were driving side-by-side with the Chrysler, he could see through the tint on the driver's window that the driver was facing forward. He heard

gunshots and ran toward the Chrysler. Lopez recalled the car was not moving when defendant fired two shots at it. (14T113-7 to 114-18; 119-12 to 15).

Other officers appear with guns drawn and assist defendant in pulling Dixon from the car to the ground. (Da159@ 4:00-4:10; Da160@ 4:44-5:23). Defendant states, "I shot him", and "I shot him in the head." (Da159@ 3:54-4:04). Other officers eventually open the driver's side door. (Da160@ 5:23-6:28). Griffin was unconscious and slumped in the driver's seat. His foot was on the brake.[4] (13T31-9 to 32-7; 99-1 to 5; 138-25 to 139-6;). Defendant points to a gun on the passenger side floorboard.[5] (12T45-12 to 46-5; Da159@ 4:30-4:36). Dixon is handcuffed and both victims are taken to the hospital. (13T147-21 to 149-3; 156-17 to 18; Da159@ 4:37-4:50; Da160@ 8:52-11:52). Ortiz and defendant were also taken to the hospital, and their supervisor later confiscated their service weapons. (13T43-10 to 16; Da159@ 5:32-5:41).

Regarding the third shooting, defendant told the grand jury that he believed the driver's erratic driving "was going to take an officer's life, he was going to take anybody's life in the street that day." (12T38-13 to 39-1). As he

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[4] Officer Gonzalez testified that he believed Griffin was giving up the chase at that point because he saw the Chrysler stopping through his rear-view mirror. As he walked toward the stopped car, he heard gunshots. (14T27-4 to 15; 45-6 to 9; 46-11 to 47-7; 65-4 to 23).

[5] Officer Giron, the first officer to assist defendant in removing Dixon from the passenger seat, saw the gun on the passenger floor. (13T125-13 to 126-14).

approached the vehicle, he could see the passenger and the driver moving around inside and could see their silhouettes, but he did not see either occupant point a gun at him. Although he believed he had previously shot at least one of the occupants, defendant nevertheless fired his weapon at the driver and the passenger. (12T39-1 to 25; 43-12 to 16; 112-7 to 113-6; 124-9 to 12). After he fired his weapon, defendant gave a verbal command to "stop moving, stop moving[,]" and said, "I didn't want to give him the opportunity to point the gun at me[.]" (12T44-11 to 25). Significantly, defendant stated that "[t]hey never put their – the windows down at all through this whole pursuit." (12T113-19 to 20). He also admitted he could have used his patrol car's loudspeaker to get the occupants' attention. (12T116-11 to 117-1; 138-5 to 7).

The entire chase proceeded through residential areas. (13T52-9 to 17; 15T65-8 to 14; 20T39-8 to 11; 21T9-16 to 19). Officer Sanchez knocked on doors in the area after the third shooting incident to make sure no one was hurt or had property damage. (18T187-7 to 188-13).

In the aftermath of the shootings, defendant is heard on his BWC stating, "Yo, I shot both of them" (Da159@ 5:01-5:04), "I shot both of them" (Da159@ 5:53-5:58, 8:47-8:50), "He pointed his gun at me" and "I can't believe he pointed the gun at me. Oh wow", (Da159@ 7:41-7:43, 8:31-8:41, 9:31-9:35), "He was trying to get out and he pointed the gun at me[,]"

(Da159@ 9:08-9:15), "I thought he was going to shoot me, bro. He tried to run me over too." (Da159@ 9:35-9:40). Defendant said to Ortiz, "My bad, bro. I seen he was trying to get out." (Da159@ 8:51-9:10). Officer Lopez is heard on defendant's BWC telling him to keep quiet and go to hospital. (Da159@ 10:05-10:26; 14T115-2 to 117-10).

In his continuation report filed on February 21, 2019, two months after the shootings, defendant reported that he was able to see the occupants inside the Chrysler at all four stops because the interior was illuminated by the patrol car's lights and the streetlights. (12T47-19 to 48-7; 50-1 to 13; 51-24 to 52-15 15; 53-3 to 15; Pa5-6). He also reported that the passenger pointed the gun at him only one time during the first shooting at Bergen and Madison. (12T51-6 to 12; 52-1 to 16; 53-3 to 15; 54-19 to 22).

In later news interviews on June 25 and 26, 2019, defendant said, "We didn't receive any training that – that can help me with that incident right there. With split second decisions, you have to go with your gut[.]. . ." (12T191-3 to 192-3). In a press conference on June 2, 2019, defendant said he had no regrets and "would do it again." (12T198-19 to 199-10).

Sergeant Richard Ashkar, an instructor with the New Jersey State Police Academy, trained police recruits on use of force policy. In 2017, he instructed a class of recruits for the Newark Police Department that included defendant.

(18T27-3 to 28-15; 30-18 to 31-6). A large portion of the training involved hands-on, situation-based motor vehicle stops and high risk stops involving dangerous situations. (18T31-7 to 24). Police recruits were instructed on the New Jersey Attorney General (AG)'s and the Newark Police Department (Newark)'s use of force policies through academic and practical training classes. (18T35-5 to 36-2; 43-24 to 45-10; Pa7-12). The course ranged from the use of physical force to the use of deadly force, and how to make "educated use of force decisions, in real time" and to assess imminent danger. (18T45-11 to 46-5; 52-22 to 55-1).

Ashkar explained how he taught the AG's use of force policy, including the definition of "imminent danger", the use of force and deadly force in self-defense and defense of other persons, and how to practically assess those situations. (18T47-19 to 48-11; 49-13 to 19; 52-22 to 55-2; 55-18 to 57-16; 60-2 to 20; 61-13 to 63-9; 65-16 to 70-15; Pa7-9). Because imminent danger may be present one moment and dissipate the next, officers are taught "the dynamics of use of force, and how in any given situation, force levels rise and fall." For example, a recruit is taught to draw his weapon and command an individual approaching with a knife to drop the weapon and put his hands up before resorting to deadly force, and in this manner, an officer is taught to try to lower the level of force. (18T78-4 to 79-5; 112-12 to 113-20).

Ashkar also taught recruits about the AG's restrictions on the use of deadly force. (18T71-2 to 80-6). Under Section C(1) of the AG's policy, "[a] law enforcement officer is under no obligation to retreat or desist when resistance is encountered or threatened. However, [he] shall not resort to the use of deadly force if [he] reasonably believes that an alternative to the use of deadly force will avert or eliminate an imminent danger of death or serious bodily harm, and achieve the law enforcement purpose at no increased risk to the officer or another person." (18T71-9 to 72-2; Pa7) (emphasis added). Ashkar explained that recruits are taught that before they resort to using deadly force, if feasible, they should "tactically reposition in an attempt to deescalate that situation", by finding cover or concealment, using verbal commands, building rapport, slowing down the situation and/or calling for backup. (18T72-3 to 73-15; 79-11 to 80-6). Recruits are taught "what could happen is not what matters." Instead, "[w]hat is actively being done, in the moment that I've – the decision to use force is made, is what is taught, in that moment." (18T106-2 to 20).

Under Section C(6), police officers are taught that "discharging a firearm at or from a moving vehicle entails an even greater risk of death or serious bodily injury to innocent persons[,]" because "[t]he safety of innocent people is jeopardized when a fleeing suspect is disabled and loses control of

his or her vehicle." "There is also a substantial risk of harm to [innocent or less culpable] occupants...." (18T74-1 to 18; Pa8). Under subsection 6, subpart a., officers "shall not fire from a moving vehicle, or at the driver or occupant of a moving vehicle unless the officer reasonably believes: (1) there is an imminent danger of death or serious bodily harm to the officer or another person; and no other means are available at the time to avert or eliminate the danger." Under subpart b., "[a] law enforcement officer shall not fire a weapon solely to disable moving vehicles." (18T75-17 to 76-5; 77-6 to 10; Pa8) (emphasis in original and added).

Recruits are taught that they shall not shoot at a motor vehicle in order to stop it. A typical 9 mm or .45 caliber round from a handgun will not stop a motor vehicle because the direction of the bullet cannot be predicted once it penetrates the vehicle's windshield or door. If the driver is shot and cannot apply the brake, the vehicle's momentum creates a substantial risk to innocent people in the area. (18T74-19 to 75-16; 77-6 to 78-3; 131-2 to 21). Only if there is imminent danger and no other means available to exit the situation or move out of the vehicle's path, such as being cornered in an alleyway with no exit, the officer is justified in shooting at the driver. (18T75-19 to 77-1).

Ashkar testified that police recruits are also taught about the AG's and Newark's Motor Vehicle Pursuit Policy. (18T108-6 to 21; Pa13-19). Under

section C(f) of the AG's policy, "the pursuing officer shall terminate the pursuit . . . [i]f there is a clear and unreasonable danger to the police officer or the public. A clear and unreasonable danger exists when the pursuit requires that the vehicle be driven at excessive speeds or in any other manner which exceeds the performance capabilities of the pursuing vehicles or police officers involved in a pursuit." (18T108-22 to 109-20; Pa13). Recruits are taught termination under these circumstances is not discretionary. (18T109-21 to 110-12).

The crime scene investigation at Irvine Turner Boulevard revealed two spent 9 mm Luger shell casings - one on the sidewalk and one near the curbline in front of a parked black car, and a black wool toboggan hat in a pool of blood outside the door on the Chrysler's passenger side. (14T143-18 to 144-4; 157-24 to 158-20; 171-11 to 174-13). A copper jacketed projectile was stuck in the middle pillar on the driver's side door. Ballistic strikes were seen on the driver's side window, which was shattered. (14T144-3 to 8; 150-6 to 151-4; 153-19 to 154-9; 15T36-19 to 37-19). There were ballistic strikes on the passenger side to the windshield, the rear door, the pillar between the front and rear windows, the front window, and the sideview mirror. A copper projectile fragment was embedded inside the doorframe. (14T151-10 to 23; 155-12 to 156-23; 15T37-16 to 40-14). A black and chrome Ruger SR-45

semi-automatic handgun was found on the front passenger floorboard. (14T144-9 to 14; 177-22 to 12). No fingerprints were found on the handgun. (14T179-21 to 181-7). Swabs taken from the gun's grip, trigger and magazine were not sufficient for DNA comparison. (17T13-5 to 14-18; 20-20 to 25).

At Bergen and Madison, three spent 9 mm Luger shell casings were recovered. Two casings were collected near a telephone pole at the northeast corner. (15T65-19 to 21; 68-1 to 17; 74-9 to 76-13). A third casing was recovered from the painted white stop bar on Madison at the intersection with Bergen. (15T72-24 to 73-6; 77-6 to 17). At Bergen and Springfield, two spent 9 mm Luger shell casings were recovered from the intersection. (15T79-19 to 24; 83-14 to 84-6; 84-25 to 86-1). The seven 9 mm Luger shell casings were fired from defendant's service weapon. (14T186-5 to 22; 17T42-2 to 47-7).

Dixon sustained a gunshot wound to the face that broke his jawbone and required surgery and the removal of five or six teeth. (18T23-6 to 19). Griffin sustained a single gunshot wound to the right side of his head. The main part of the bullet and two bullet fragments were recovered from the brain. (16T23-16 to 25; 21-10 to 24; 26-18 to 27-1). Two bullet fragments were positively matched to defendant's weapon. (14T186-5 to 13; 17T47-11 to 48-11). Griffin's cause of death was a gunshot wound to the head and the manner of death was homicide. (16T25-1 to 7).

B. Defendant's Testimony

Defendant testified that on January 28, 2019, his supervisor had informed him about a rash of shootings and a possible retaliatory shooting in the Pennsylvania and Thomas corridor. He and Ortiz were waiting for a retaliatory shooting and conducting motor vehicle stops that evening. (19T30-23 to 31-21; 36-23 to 37-6). Defendant testified in conjunction with his patrol car's dash cam video (Da160) that when he heard Officer Sanchez radio about the gun in the Chrysler, he told Ortiz to make a U-turn in front of it so they could lead the pursuit. (19T42-7 to 43-19; 45-1 to 46-9; Da160@ 0:33-1:33).

Defendant estimated the Chrysler was driving at 60 to 70 mph, and sometimes 80 mph in a 25-mph zone. (19T50-20 to 25). As he exited his patrol car at the corner of Peshine and Clinton, the Chrysler drove off. Defendant believed the car drove over the sidewalk as it made a right turn, disregarded speed bumps, and drove on the opposite side of the road. (19T52-7 to 53-22; Da160@ 1:58-02:11). However, on cross-examination he admitted he also saw the Chrysler brake at red lights, for a speed bump and for a stop sign and use its turn signal. (20T223-3 to 18; 233-11 to 234-25; 237-1 to 18; 21T31-2 to 20; 32-11 to 20). He also admitted he did not actually see it drive over the sidewalk or see any pedestrians in the area or any oncoming traffic. (20T224-10 to 225-18).

At the corner of Bergen and Madison, defendant testified that as he reached to open the passenger side door, he saw the passenger point a gun at him and he fired his weapon three times. Defendant believed the passenger "was gonna kill me." (19T54-21 to 55-13; 57-13 to 23; 58-23 to 59-1; Da160@ 2:17-2:44). Defendant said the Chrysler had "medium" tinted windows and that he could see inside the car due to the patrol car's lights and the streetlights. (19T57-24 to 58-11). Defendant claimed Ortiz's admonitions to him to "relax" was something he said to "everybody", "it's almost like a nervous tick he has." (19T62-8 to 63-8; Da160@ 3:14-3:26).

Defendant testified that at Bergen and Springfield he exited the car next to the Chrysler's driver's side door and could see both occupants through the front windshield and the driver's side window because the windshield tint was lighter than the sides. He saw the passenger was still holding the gun. (19T68-8 to 18; 70-16 to 71-3; Da160@ 3:36-3:59). Although he told the grand jury he was shooting at both occupants at this stop, he testified at trial that he was only shooting at the passenger. (21T85-3 to 86-10).

On Irvine Turner Boulevard, defendant's patrol car was directly behind the Chrysler when he saw the passenger door open a crack and the dome light turn on. As he approached the car with his gun drawn, he saw the passenger's hands were down, like he was "reaching for something." Defendant then fired

his weapon at the passenger side because "I wasn't gonna give him the chance to point the weapon and shoot me this time." (19T78-18 to 79-16; Da160@ 4:36-4:46). He fired two shots at the passenger side: as he ran up on the car and then directly at the passenger door. (19T83-20 to 22; 21T100-4 to 101-1).

Defendant testified that he shot in the direction of the driver as well because the driver and the passenger were aggressively moving around in the vehicle. (21T147-12 to 148-20). Defendant told the grand jury he shot at both men because he believed both men had guns, "they were working together, the way they were driving, as well as I knew that he pointed the gun at me." (21T101-2 to 12; 148-15 to 25). However, he admitted on cross that he never saw the driver with a gun and never mentioned the men were working together in his continuation report. (21T101-24 to 102-15). Defendant said he saw a gun on Dixon's left leg[6] and a balaclava over his face when he opened the passenger door. (19T83-25 to 84-22; Da160@ 4:46-4:58). Defendant knew he shot both men, and they need emergency medical assistance. (19T91-8 to 20).

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[6] Newark Detective Samouri Clegg was called as a defense witness. He testified on direct that he saw a gun fall from Dixon's lap to the floorboard. (19T12-3 to 18). On cross-examination, he admitted that in his initial statement to law enforcement he said he saw the gun on the floorboard. He didn't see the gun fall and hit the ground but only assumed from a sound he heard that it fell to the ground. After viewing the dash cam video, Clegg agreed he was not one of the three initial officers who opened the passenger door and when he was able to see inside the car, the gun was on the floorboard. (19T13-21 to 14-16; 15-15 to 17-11).

Defendant testified that he was taught at the police academy that he could shoot at a moving vehicle if he was in a stationary car and his life was threatened. (19T106-6 to 10). He shot at the men because he thought they had two guns and that the passenger was reaching for a gun. (19T106-16 to 107-2). Defendant believed the use of force on the driver was necessary to prevent his escape. (19T118-17 to 20).

On cross-examination, defendant acknowledged that his training at the police academy included instruction on the AG's and Newark's use of force and vehicle pursuit policies, and that he was bound to follow these polices. (19T139-7 to 142-18). Defendant signed documents acknowledging that he received training on these policies and copies of the policies. (19T142-19 to 143-12; 21T14-8 to 16-3). During his four months at the academy, defendant also received training on dealing with stress, decision making, and awareness of emotion reactions, with the purpose to make objective, reasonable decisions under stress to protect himself and the public. (19T150-4 to 151-4).

Defendant understood he was bound by the AG's and Newark's use of force and pursuit policies that an officer could only shoot at the driver of a moving vehicle if there was an imminent danger and no other means to avert that danger. (19T174-18 to 175-5; 21T16-24 to 17-11). If a clear and unreasonable danger to the officer or the public existed, the policy required

termination of the pursuit. It did not permit an officer to shoot the driver in the head. (19T178-13 to 179-2).

In his continuation report, he acknowledged that Officer Sanchez relayed the Chrysler's license plate number, and therefore he could have terminated the pursuit if it became dangerous or unsafe, and later find the driver and issue a summons or other appropriate charges. (19T168-13 to 169-12). He understood he could terminate a pursuit without a supervisor's permission. (21T20-5 to 22). Defendant stated in his report that the Chrysler was speeding only. He never mentioned the car was being driven erratically or in a manner that put him or others in imminent danger of being struck, or that it drove over sidewalks. (19T169-13 to 171-11; 174-2 to 17). He claimed the Chrysler's speed and failure to heed a red light posed imminent danger to others because the driver "could've easily hit somebody and killed them", but admitted no pedestrians were "around at that time." (21T19-7 to 24). Defendant believed the Chrysler and its occupants were "the retaliating vehicle, or retaliating suspects" mentioned by his supervisor, but he did not include this detail in his report. He knew a use-of-force report must provide a basis for the officer's objective and reasonable belief in the need to use force. (20T226-2 to 228-22).

Defendant acknowledged that when he said to Ortiz, "I shot at it" at Bergen and Madison, he meant the Chrysler, and this shooting was in breach

of the use of force policy prohibiting shooting at vehicles. He did not tell Ortiz that the passenger pointed a gun at him or radio this information to his fellow officers. (19T183-23 to 185-12; 198-5 to 19; 200-3 to 11). He also sprinted at the car and held his service weapon in one hand, contrary to his police training requiring two hands on a gun and fired shots in a residential area. (20T238-12 to 239-11). He believed the Chrysler remained a threat to him even as it fled away. (21T144-18 to 21).

At Bergen and Springfield, defendant acknowledged that when he exited the patrol car, he effectively abandoned his partner and the concealment or cover provided by his car, contrary to his training, and fired two rounds at the Chrysler's driver's side. The second shot was fired as the car was driving away. (19T185-13 to 186-18; 195-24 to 196-2). Defendant testified that Ortiz "was safe in the car", but that he was not because "[t]here was a threat that I had to go forward." (19T188-1 to 9). Rather than remain in the patrol car and use its loudspeaker, defendant ran straight at the person who had previously pointed a gun at him. (19T188-10 to 189-1). In his report and before the grand jury, defendant stated that at this second stop the passenger had the handgun at his side, not pointing it at him, and the driver was not an imminent danger to anyone. (19T189-2 to 19; 191-16 to 192-20; 193-8 to 23). In fact, defendant admitted he never saw the driver with a gun during the entire

incident. (19T199-21 to 200-2). Defendant understood the use of force policy required that he actually witness imminent danger before using deadly force. (19T193-24 to 194-3). Nevertheless, he fired his weapon because he believed the passenger might lift the gun and aim it at him. (19T189-2 to 19; 195-14 to 20). When defendant returned to the car, he told Oritz, "he pointed a gun at me", but did not say it was the passenger. (19T196-3 to 198-8).

Defendant stated in his report that when the Chrysler stopped on Irvine Turner Boulevard and the passenger opened the door, he believed the passenger was going to fire at him. (20T203-10 to 204-3). In his report, he said the two occupants were moving aggressively inside the car. He did not report aggressive movement between them, as he did to the grand jury, or that the passenger was reaching down and doing something with his hands. (20T205-16 to 206-15; 207-3 to 21). He said in his report that he saw a handgun on the passenger side floor, not on the passenger's lap as he stated on direct examination. (20T210-18 to 211-6).

Legal Argument

Point I

The Trial Court Correctly Determined That Juror 4 Should Remain on the Deliberating Jury.

Jury selection took place over four days. The juror questionnaire was comprised of 38 questions. (7T19-3 to 8). Question 16 asked, "I've already

briefly described the case by telling you the charges in the indictment. Do you know anything about this case from any source other than what I've told you?" (7T24-20 to 23). The parties agreed that any prospective jurors who answered "yes" to this question would not be automatically excused for cause but instead would be questioned about their ability to remain fair and impartial in spite of what they may have learned about the case. (8T4-14 to 7-17; 9T4-25 to 5-19; 5-20 to 6-19; 12-3 to 13-8).[7]

When the jury was reduced to twelve before deliberations, Juror 4 was chosen as the third of three alternate jurors. (26T18-17 to 19-21). Two juror substitutions occurred on the second day of deliberations. (26T48-17 to 49-11; 53-20 to 23; 27T4-13 to 21; 51-11 to 53-7; 54-8 to 55-23; 57-20 to 58-12). No deliberations occurred on June 27 and 28 due to Juror 8's illness. (28T7-1 to 7; 29T3-9 to 4-3). Deliberations continued on June 29, and that day, Juror 4 was substituted for Juror 15, who was unable to serve past June 28 for personal reasons. Deliberations began anew. (29T3-9 to 7-3; 8-10 to 13; 9-17 to 11-3).

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[7] For example, Juror 1 answered yes to Question 16 and was questioned at sidebar. He stated that he had followed the case in the Star Ledger but would be able to ignore what he had read and decide the case fairly and impartially based solely on the evidence presented at trial. (9T15-18 to 25; 37-23 to 40-22). Defense counsel did not ask the trial judge to strike Juror 1 for cause or use a peremptory challenge to excuse him. Juror 1 ultimately served as foreperson on the deliberating jury.

The next day, the jury deliberated for the entire day and at 3:50 p.m., sent a note, C-20, to the judge. It read: "During deliberation it has come to our attention that a seated juror had 'prior knowledge' and opinion of this case. We need your guidance." (30T3-1 to 4-17). Defense counsel immediately moved for a mistrial, arguing that he would have used a peremptory challenge to strike Juror 4 based on his prior knowledge and opinion. (30T5-2 to 6-20). The prosecutor opposed the motion, recalling the parties' agreement during jury selection not to automatically disqualify prospective jurors with prior knowledge about the case. He asked that the jurors be reminded to decide the case based on the evidence. (30T6-24 to 10-4).

The next trial day, with the parties' consent, the judge determined he would voir dire each juror at sidebar, asking questions promulgated by both sides, with an opportunity for each side to suggest follow-up questions. (31T3-9 to 5-24). The voir dire began with Juror 1 and proceeded in numerical order. Juror 1 said Juror 4 remembered seeing the TV interview played at the beginning of the State's case and became emotional when relating the event. (31T6-20 to 8-16). Juror 4 did not say he had an opinion before the trial started, and did not share any outside information with other jurors. Juror 1 said nothing Juror 4 said or did would prevent him from fairly and impartially deciding the case based solely on the evidence. (31T8-20 to 11-1 to 15).

Juror 2 recalled Juror 4 said he did not remember this case prior to being selected as a juror, but when the video of the news clip was played at trial, he recalled seeing it on the news. (31T15-14 to 21). Juror 4 stated that he "wanted to make sure that . . . this person was going to get a fair trial." (31T15-22 to 16-2). Juror 4 did not say anything or act in any way to indicate a bias or say he had made up his mind about guilt or innocence before he became a juror in the case or say he could not be fair. Juror 2 said nothing Juror 4 said or did would prevent her from fairly and impartially deciding the case based on the evidence at trial. (31T16-3 to 25; 31T16-19 to 21).

Juror 3 related that Juror 4 said he remembered he was at home drinking some red wine and watching the news, and "he felt that he needed to be here and give this poor kid a fair trial." Juror 4 was crying when he said this. (31T18-21 to 19-6). Juror 3 declared Juror 4 never said he was unable to fairly decide the case, would disregard the evidence or disobey the law. Nothing Juror 4 said would affect Juror 3's ability to fairly and impartially decide the case on the evidence. (31T19-7 to 11; 19-22 to 25; 20-5 to 21-1).

Juror 4 stated that he did not learn any information about the case from outside sources or people involved in the trial prior to becoming a juror. (31T21-14 to 18). He had not reached an opinion as to defendant's guilt or innocence before becoming a juror. (31T22-2 to 6). He explained that when a

video of the night of the shooting was shown at trial, it triggered a memory of having seen the video before trial and having said to himself, "Oh, that kid is fucked." (31T22-7 to 23-9). Juror 4 was having a glass of wine in his room when he saw the video and his comment was "just a reaction to see[ing] that type of video on the news that night", and not an expression of his personal view about defendant's guilt or innocence. (31T37-16 to 38-4).

Juror 4 reported that during deliberations, "the temperature of the room was pretty much everyone, like, getting whatever they had off their chest", jurors were crying, and at that point he made the comment about having seen the video and how he said to himself at the time, "That poor kid is fucked." (31T23-8 to 23; 33-18 to 25). He explained that what he meant by the comment was that "there was a car chase that led to a shooting and the shooting led to the death of a person." (31T34-5 to 19). His recollection of the video "didn't influence me at the time that I remembered it. . . . I just got caught up in the moment after we were done talking about everything and in a human moment, I said my point of view. It's not – for me it's no different than someone saying, oh, that person could have been my son . . . [w]hich were some of the things that were actually said, and they were right before I said what I said[.] . . ." (31T34-19 to 35-15).

Juror 4 said one of the jurors screamed at him and accused him of trying "to get myself on the – on the case, which is not the case." (31T23-20 to 24-4). Juror 4 did not bring his recollection of the video to the judge's attention because "it's like, this doesn't really influence me either way." (31T24-5 to 10). He stated that his viewing of the video and his reaction to it would not interfere with his ability to be a fair and impartial juror and decide the case based on the evidence at trial. (31T24-15 to 25-12; 35-16 to 21).

Juror 5 recalled Juror 4 said that when he saw the video at trial, he remembered seeing the incident on the news four years earlier. Juror 5 said Juror 4 "became very emotional about it" and asked the jurors "if we can have no compassion on it because it's something that this person being put up as a – a scapegoat or something like that." (31T40-1 to 19). Juror 5 believed Juror 4 "was a little bit more emotionally attached to the case than he should be[,]", however Juror 4's words and emotion did not impact Juror 5's ability to be fair and impartial and decide the case on the evidence. (31T40-19 to 41-4).

Juror 7 reported that Juror 4 said he had seen the incident on the news when it happened and believed "Defendant was going to be made an example of because New Jersey is a blue state." (31T42-24 to 43-3). Juror 4 also said he "really resonated with the Defendant because they have the same background[,]" and he "needed to be a juror on this case so that way the

Defendant had a chance." (31T43-4 to 8). Juror 4 "kind of compared this case to Geroge Floyd," but Juror 7 could not recall exactly what was said. (31T43-9 to 13). Juror 7 declared she could disregard what Juror 4 said and decide the case fairly and impartially based on the evidence. (31T43-17 to 24).

Juror 8 stated that Juror 4 recalled hearing about the incident years ago, while watching the news and having a glass of wine. At the time, Juror 4 believed defendant was "going to get effing screwed." Juror 4 became "very emotional" and "was crying", but Juror 8 believed it was due to "the intensity" of deliberations. Juror 4 said "he could relate very much to the Defendant." Juror 8 affirmed that what Juror 4 said or did would not affect his ability to be fair and impartial and decide the case on the evidence. (31T47-4 to 48-17).

Juror 9 related that Juror 4 said when he saw the video at trial, it triggered his memory of having previously seen the video and thinking to himself at the time that he "hoped that there was a fair trial." Juror 4 "started crying" at the time. (31T51-1 to 18). Juror 9 said he could remain fair and impartial and decide the case on the evidence at trial. (31T51-19 to 52-5).

Juror 10 recalled Juror 4 said that when he heard about this case, he mentioned "the Floyd cases" and compared them to this case. (31T53-16 to 20). Juror 10 did not hear Juror 4 say he could not be a fair and impartial

juror. Juror 10 could remain fair and impartial and decide the case on the evidence at trial. (31T53-22 to 54-8).

Juror 11 reported that Juror 4 said he was "surprised" and "impressed" that the other jurors could be fair. (31T56-2 to 17; 57-20 to 58-12). Juror 11 stated that she could remain fair and impartial and decide the case on the evidence produced at trial. (31T56-18 to 22).

Juror 12 related that Juror 4 said he recalled seeing the video previously on the news while drinking some wine. (31T59-4 to 14). Juror 4 said he believed at the time defendant "would not get a fair trial", that he was "screwed", and that "it was related to occupation, race, and age", specifically, that he was a police officer, Latino, and a young man. (31T59-15 to 60-9). Juror 12 was not impacted by Juror 4's words and could remain fair and impartial and decide the case on the evidence at trial. (31T60-10 to 15).

Lastly, Juror 13 recalled that Juror 4 said when the video was played at trial, he remembered the case and recalled back then that he did not think defendant was going to get a fair trial. Juror 4 went through the jury process believing "he needed to be put on this trial to ensure that [defendant] got a fair trial." (31T62-25 to 63-6). Juror 4 said "he felt like he was the most connected to the Defendant by mere fact of being a Hispanic man as well." (31T62-20 to 22). Juror 4 stated to the other jurors that he believed they had

done their "just service" and their "part" by following the law. He wanted to thank the jurors for "our work during deliberations", and was comfortable saying defendant got a fair trial. (31T62-15 to 19; 63-11 to 16).

Following the voir dire, defendant renewed his motion for a mistrial. (31T67-3 to 68-22; 71-2 to 72-7). The prosecutor opposed the motion and asked that deliberations continue. (31T72-9 to 75-23; 77-12 to 78-10). The trial judge denied defendant's application for a mistrial. (31T82-12 to 13; 90-16 to 93-12). First, the jury was not exposed to any extraneous information about the case. The video Juror 4 saw four years earlier was the same video played by the State at trial. (31T93-13 to 95-10).

Second, Juror 4 did not intentionally withhold his prior knowledge about the video during jury selection. (31T95-11 to 96). Third, the parties expressly agreed at the start of jury selection that prospective jurors with prior knowledge about the case would not be automatically excused for cause. Indeed, Juror 1 had prior knowledge about the case through news coverage but was not excused for cause and neither party used a preemptory challenge to excuse him. (31T96-9 to 21). Finally, the deliberating jurors credibly stated that "Juror 4 did not have a prior opinion as to the Defendant's guilt or innocence[,]" and that "Juror 4's testimony is credible." (31T96-22 to 97-4). The judge concluded that he "has not (sic) reason to disbelieve the jurors,

including Juror Number 4's unequivocal statements that they will be able to decide this case fairly and impartially based upon the evidence. The Court does not find that there is a 'strong likelihood' of prejudice." (31T98-8 to 13).

Before deliberations began again, the judge gave a supplemental instruction, agreed to by the parties, that "it is your sworn duty to arrive at just conclusion after considering all of the evidence", "without bias, passion, prejudice or sympathy." (31T82-14 to 87-14). The jury deliberated for the remainder of the day and arrived at a verdict near the end of the following day. (31T107-16 to 108-16; 32T6-3 to 10-25).

There is no doubt that a criminal defendant is "entitled to a jury that is free of outside influences and will decide the case according to the evidence and arguments presented in court in the course of the criminal trial itself." State v. Williams, 93 N.J. 39, 60 (1983). "[I]f during the course of the trial it becomes apparent that a juror may have been exposed to extraneous information, the trial court must act swiftly to overcome any potential bias and to expose factors impinging on the juror's impartiality." State v. R.D., 169 N.J. 551, 557-58 (2001). The question is whether the extraneous information had the capacity to influence the result. Id. at 559.

The trial court must decide whether the extraneous information caused the juror to suffer from an "inability to continue" due to a juror's personal

reasons, not his "interaction with other jurors or with the case itself." State v. Ross, 218 N.J. 130, 147 (2014) (quoting State v. Williams, 171 N.J. 151, 163 (2002)). See R. 1:8-2(d)(1) (providing that a deliberating juror may be discharged "because of illness or other inability to continue"). For example, in R.D., a juror who knew the victim's mother and had formed a personal opinion about the case after overhearing family conversations, was properly excused. 169 N.J. at 555-56.

To affect that end, the trial court should question the individual juror, or jurors to determine if they "'are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court.'" Id. at 558 (quoting State v. Bey I, 112 N.J. 45, 87 (1988)). The court must first interrogate the juror to determine if there is any taint from extraneous information. Ibid. If so, other jurors must be questioned to determine whether any of them have been tainted. Ibid. If the offending juror is excused, the court must decide whether the trial may proceed or whether a mistrial is necessary. Ibid. "[T]he trial court is in the best position to determine whether the jury has been tainted." Id. at 559.

The appellate court must defer to the trial court's jury-related decision unless an abuse of discretion is shown. State v. Musa, 222 N.J. 554, 564-65 (2015); State v. Brown, 442 N.J. Super. 154, 182 (App. Div. 2015). "This

standard respects the trial court's unique perspective and the traditional deference we accord to trial courts in 'exercising control over matters pertaining to the jury.'" Brown, 442 N.J. Super. at 182 (quoting R.D., 169 N.J. at 559-60). The abuse of discretion standard also applies to the trial court's ruling on a mistrial motion. Musa, 222 N.J. at 565.

"The inquiry about whether extraneous information had the capacity to influence the result of the jury requires an examination of whether there was at least an opportunity for the extraneous information to reach the remaining jurors...." R.D., 169 N.J. at 559 (emphasis in original). Here, the trial judge properly determined that Juror 4 and the other deliberating jurors were not exposed to extraneous information, "let alone prejudicial extraneous information", because the video Juror 4 previously saw was the same video played at trial and entered into evidence. (31T94-4 to 6). Juror 4 truthfully acknowledged that he did not learn "any information from any outside sources about this case . . . prior to becoming a juror in this case." (31T21-14 to 18). He also said that nothing he saw in the video before trial "interfered or would interfere with [him] being a fair and impartial juror [and] deciding the case based on the evidence produced at trial" and that he could "fairly and impartially deliberate and reach a verdict based only on the evidence presented in this case." (31T24-15 to 25-12). Juror 4's exposure to information in

evidence had no "tendency to influence the jury in arriving at its verdict in a matter inconsistent with the legal proofs and the court's charge." State v. Negrete, 432 N.J. Super. 23, 34 (App. Div. 2013) (quoting Panko v. Flintkote, 7 N.J. 55, 61 (1951)).

In addition, Juror 4 credibly stated that he did not intentionally withhold that he had previously seen the video during jury selection. (31T95-11 to 96-8). Cf. id. at 29-35 (finding reversible error where the trial court allowed a juror to continue to deliberate after it was revealed that the juror withheld extraneous information about the case during jury selection). Even assuming Juror 4 had recalled seeing the video during the jury selection process, he would have been questioned, like Juror 1, rather than automatically excused.

The trial judge properly found credible, based on his extensive voir dire of all jurors, that Juror 4 had not formed an opinion about defendant's guilt or innocence prior to becoming a juror in the case. (31T22-2 to 6; 96-22 to 97-4). The judge's credibility finding was further supported by his extensive questioning of Juror 4 during jury selection, whose answers to Questions 25, 26, and 29 to 38 on the jury questionnaire revealed he held no bias or prejudice and could be fair and impartial. (10T112-1 to 115-5). For instance, in response to Question 29 regarding "implicit bias" and his ability to decide the case "fairly and impartially", Juror 4 stated "I don't believe I have a bias. I

believe we're all equal." (8T34-7 to 11; 10T114-3 to 5). As to Question 30 regarding "differences or similarities" in "race, ethnicity or religion or background", Juror 4 responded, "I don't believe that the ethnicity or background of the person would effect [sic] my judgment." (8T34-16 to 25; 10T114-6 to 8). He further stated, "I believe the justice system is fair and effective" in response to Question 33, (8T35-22 to 23; 10T114-14 to 16), and "it doesn't affect me that the Defendant is a police officer" in answer to Question 34 (8T35-24 to 36-2; 10T114-17 to 19). Significantly, as to Question 35, "What effect, if any, will news about law enforcement, and/or crime, have on your ability to fairly and impartially decide this case based on the evidence presented?", Juror 4 stated, "I don't think any news would influence me either way." (8T36-3 to 7; 10T114-20 to 21).

Our Supreme Court has held that "a juror who expressly states that [he or] she cannot be impartial or that [he or] she is controlled by an irrepressible bias, and therefore will not be controlled by the law, is unable to continue as a juror for purposes of Rule 1:8-2(d)(1), and must be removed from a jury." State v. Jenkins, 182 N.J. 112, 128 (2004). Indeed, "[a] juror who decides a case based solely on a defendant's race," even if the "defendant stood to benefit," or "on a personal identification or revulsion with a defendant, without regard to the evidence . . . violates [his or] her oath." Id. at 128, 131.

Here, Juror 4 never said to any juror or the judge that defendant's ethnicity, age or employment would affect his ability to be fair and impartial, abide by the law or decide the case based solely on the evidence presented at trial. To the contrary, he affirmed that he could be a fair and impartial juror and deliberate and reach a verdict based solely on the evidence produced at trial. (31T24-15 to 25-12; 35-16 to 21). Juror 4 candidly revealed his knee-jerk reaction when he first saw the video during the heat of deliberations, when jurors were "crying", and everyone was "getting whatever they had off their chest." (31T23-3 to 24-10; 34-5 to 35-1). His recollection of the video didn't influence him, and he was not trying to influence the other jurors or get himself on the case. (31T23-20 to 24-10; 34-20 to 22). Juror 4's emotional statements and interactions with other jurors were part of the deliberative process, not an inability to continue personal to him. See R. 1:8-2(d); State v. Valenzuela, 136 N.J. 458, 468 (1994). Importantly, all jurors confirmed Juror 4 had not formed an opinion about the case prior to trial, did not share any outside information with the jurors, and never said he could not be fair. (31T8-20 to 10-22; 16-3 to 13; 16-19 to 21; 19-7 to 25; 22-2 to 6; 40-19 to 41-4). All said they could remain fair and impartial.

Because a mistrial results in an enormous waste of time, effort and judicial resources, particularly in a long and complex case such as this one, it

should only be applied as a last resort when the substitution of a juror would impair the integrity of the deliberation process. Ross, 218 N.J. at 146-147; Williams, 171 N.J. at 162. The trial court properly considered "the gravity of the extraneous information in relation to the case, the demeanor and credibility of the juror or jurors who were exposed to the extraneous information, and the overall impact of the matter on the fairness of the proceedings." R.D., 169 N.J. at 559. It asked "probing questions to protect the impartiality of the jury." Id. at 563. Its decision to retain Juror 4 and deny defendant's mistrial motion was more than sufficiently supported by the record and was a proper exercise of its discretion. Valenzuela, 136 N.J. at 472-73.

Point II

Dixon's Prior Convictions Were Not Admissible as Character Trait Evidence under N.J.R.E. 404(a)(2) and 405 to Corroborate Defendant's Assertion That Dixon Was the Initial Aggressor. (Raised As Plain Error).

Defendant contends for the first time on appeal that the trial court should have ruled sua sponte that Dixon's prior convictions were admissible as character trait evidence under N.J.R.E. 404(a)(2) and 405 to support his use-of-force claim that Dixon was the initial aggressor when he allegedly pointed a gun at defendant. (Db36-39). He argues the trial court misapplied the applicable law (Db37) but fails to cite to any portion of the record showing this issue was raised below. Defendant "must make known his position to the

end that the trial court may consciously rule upon it." State v. Robinson, 200 N.J. 1, 19 (2009) (citation omitted). "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012).

The trial court has a gatekeeping duty to prohibit the introduction of irrelevant and inflammatory evidence. See State v. Santamaria, 236 N.J. 390, 397 (2019). Its evidentiary rulings are reviewed under the deferential abuse of discretion standard only for a clear error of judgement. State v. Garcia, 245 N.J. 412, 430 (2021). Dixon's prior convictions were not relevant character trait evidence and the trial court's failure to admit them sua sponte had no capacity to produce an unjust result. Id. at 430. R. 2:10-2.

"[A] victim's conviction for a violent crime is admissible to show that he was the aggressor in the context of a claim of self-defense." State v. Aguiar, 322 N.J. Super. 175, 178 (App. Div. 1999). A defendant's personal knowledge about the victim's propensity for violence is not a prerequisite for the admission of victim character evidence under N.J.R.E. 404(a)(2) when the character evidence is offered to corroborate defendant's version of events in which he claims the victim was the aggressor. Id. at 184; State v. Carter, 278 N.J. Super. 629, 634 (Law Div. 1994). "The relevance of victim character evidence in assaultive crime cases stems from its making it more likely that the

victim was in fact using unlawful force—a proposition that, if true, would give rise to the defendant's justified use of self-protective force—rather than its bearing on the defendant's state of mind." Aguiar, 322 N.J. Super. at 184. Accord State v. Jenewicz, 193 N.J. 440, 459 (2008) (when "a defendant accused of murder asserts self-defense, he can adduce evidence of the victim's violent character for the purpose of proving that the victim's character for violence tends to show that the victim was the initial aggressor.").

Even under this relaxed standard, the trial court must still balance the probative value of the evidence against its prejudicial effect under N.J.R.E. 403. "[A] victim's prior conviction may be excluded if, because of its remoteness, its probative value is substantially outweighed by its prejudicial effect." Aguiar, 322 N.J. Super. at 184. The trial court's balancing of the probative and prejudice factors is "highly discretionary." State v. Weaver, 219 N.J. 131, 150 (2014).

Only Dixon's 2003 aggravated assault conviction could be described as a "violent crime" involving "assaultive" behavior. (CDa152). Aguiar, 322 N.J. Super. at 184; Carter, 278 N.J. Super. at 635. His other felony convictions do not involve physical violence against a person and therefore do not

demonstrate a character trait for violence. See (CDa151-155).[8] Also, evidence of Dixon's violent character was arguably only relevant to the one instance, during the first shooting, when defendant claimed Dixon pointed a gun at him and he fired at Dixon, but did not strike or injure him. It was not relevant to the other six times defendant fired his weapon at Dixon and Griffin and their fleeing car, and when he shot Dixon in the face during the second shooting because Dixon was not the aggressor in any of those instances. Jenewicz, 193 N.J. at 459; Aguiar, 322 N.J. Super. at 184; Carter, 278 N.J. Super. at 634.

According to defendant's own testimony before the grand jury and at trial, Dixon only pointed the gun at him one time during the first shooting incident. In response, defendant fired one shot at the passenger side door, where Dixon was seated, and fired two additional shots at the car as it drove away. (12T26-6 to 28-6; 19T57-11 to 23; 179-4 to 25; 20T236-23 to 238-24). While defendant said he saw a gun in Dixon's hand at the second shooting incident, the gun was at Dixon's side, not pointed at defendant. Defendant nevertheless fired his weapon at Dixon and Griffin. (12T35-3 to 36-9;

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[8] Defendant appears to concede that only Dixon's 2003 aggravated assault conviction arguably shows a character trait for violence (Db38-39), but nevertheless asserts throughout Point II, somewhat confusingly and incorrectly, that all of Dixon's prior convictions (including the 2017 disorderly persons conviction) and the unknown disposition for throwing bodily fluids were admissible as character trait evidence for violence to support his use-of-force defenses.

19T189-2 to 190-6; 191-16 to 24). Defendant believed he struck Dixon during the second shooting when no gun was pointed at him. (12T38-13 to 22; 109-18 to 110-3; 112-18 to 113-6). He testified, "I know that someone might have got hit, someone needs medical attention." (12T38-13 to 22). Defendant did not see Dixon point a gun at him before he fired at Dixon and Griffin at the third stop. (12T38-13 to 43-16; 20T203-10 to 18; 205-16 to 207-12).

Dixon's violent character trait was not relevant to corroborate defendant's version that Dixon was the aggressor during the first shooting incident because defendant did not injure Dixon at that time. So, the character evidence would not have been probative of a self-defense claim to exonerate defendant for aggravated assault. And as argued, Dixon was clearly not the aggressor when defendant fired the other six shots and struck Dixon in the face. In short, Dixon's character trait for violence was simply not relevant to defendant's claim that he was justified in using deadly force. N.J.R.E. 401. The evidence has no "tendency to establish the proposition that it is offered to prove." State v. Cole, 229 N.J. 430, 447 (2017) (citations omitted).

For this reason and given the remoteness of Dixon's 2003 conviction, the non-existent probative value of Dixon's conviction to show a character trait for violence was substantially outweighed by its prejudicial effect by confusing the issues and misleading the jury. N.J.R.E. 403. Simply put, the

jury would not have understood how, when or why Dixon's 2003 conviction even applied here.

Defendant argues that the admissibility of Dixon's 2003 assault conviction should be analyzed under N.J.R.E. 609. (Db37-39). However, N.J.R.E. 609 concerns the admissibility of a witness's conviction for a crime "[f]or the purpose of attacking the credibility of any witness[.].. ." (emphasis added). Dixon did not testify at trial, so his credibility was not at issue. Instead, Dixon's 2003 conviction should be evaluated for remoteness under N.J.R.E. 403, as Aguiar suggests. Aguiar, 322 N.J. Super. at 183-84. As argued ante, the conviction's non-existent probative value was substantially outweighed by the risk of confusion of issues and misleading the jury.

Assuming N.J.R.E. 609 applies, as defendant argues, Dixon's 2003 assault conviction is presumptively inadmissible because it is more than ten years old. N.J.R.E. 609(b)(1) "creates a presumption that a conviction more remote than ten years is inadmissible for impeachment purposes, unless the State carries the burden of proving 'that its probative value outweighs its prejudicial effect.'" State v. R.J.M., 453 N.J. Super. 261, 266-67 (App. Div. 2018) (quoting N.J.R.E. 609(b)(1)). N.J.R.E. 609(b)(1) provides:

> If, on the date the trial begins, more than ten years passed since the witness's conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value

> outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof. [emphasis added].

As to the 2003 assault conviction, Dixon was sentenced to five years with a three-year parole disqualifier on June 13, 2003. He had 118 days of jail credit. (CDa152). Assuming he served the entire sentence, he would have been "released from confinement" in or about March 2008, over fifteen years before "the date [defendant's] trial [began]" on May 16, 2023. The probative value of this decades-old conviction to suggest Dixon's violent character is outweighed by its prejudicial effect. N.J.R.E. 609(b)(1).

Dixon's other convictions do not involve violent crimes of an assaultive nature, Aguiar, 322 N.J. Super. at 184; nor do they "bridge the gap" of remoteness between the 2003 assault conviction and defendant's trial by demonstrating a continuing pattern of anti-social behavior, State v. Harris, 209 N.J. 431, 444-45 (2012). Those convictions are:

- A 2003 CDS conviction: Dixon was sentenced to four years with a twelve-month parole disqualifier on June 13, 2003, the same date as the aggravated assault conviction, and served those sentences concurrently. His 186 days of jail credit would bring him to a max date in or about December 2006, over seventeen years before defendant's trial began (CDa152);

- A 2008 conviction for criminal mischief, eluding, receiving stolen property and unlawful possession of a handgun: Dixon was sentenced to five years on October 27, 2008. He received 392 days of jail credit, and maxed out in or about October 2007, over sixteen years before defendant's trial began (CDa153);

- A 2014 CDS conviction: Dixon was sentenced to three years of probation, violated and was given 364 days in the county jail on May 13, 2016. With 68 days of jail credit, he maxed out in or about March 2017 (CDa154); and

- A 2017 municipal conviction for wandering: Dixon received two years of probation on May 30, 2017 (DCa154).

Dixon's 2003 CDS conviction and his 2008 conviction are presumptively inadmissible. N.J.R.E. 609(b)(1). The convictions for the 2003 CDS, 2008 criminal mischief and 2014 CDS convictions are not serious crimes involving dishonesty, lack or veracity or fraud. N.J.R.E. 609(b)(2)(ii) and (iv). The disorderly persons offense is not a crime. N.J.S.A. 2C:1-4b(1). Defendant, as the proponent of the evidence, fails to carry his burden to show the "probative value of Dixon's 2003 assault conviction outweighs its prejudicial effect." N.J.R.E. 609(b)(1).

Finally, any error caused by the trial court's failure to admit Dixon's 2003 assault conviction sua sponte as character evidence under N.J.R.E. 404(a)(2) and 405 had no capacity to unjustly affect the trial outcome given the State's overwhelming evidence disproving defendant's use of force defenses and proving the charged crimes beyond a reasonable doubt. R. 2:10-2. See Counterstatement of Facts, ante. In addition, the trial court charged the jury that in assessing defendant's use of deadly force, it could consider the "evidence . . . presented that Defendant believed Mr. Dixon pointed a firearm

at him on one occasion." (25T113-20 to 115-2). No error, much less plain error, occurred here.

Point III

The Trial Court Properly Determined Not to Charge Negligence in the Final Jury Instruction.

The trial court properly denied defendant's request to charge negligence under N.J.S.A. 2C:2-2b(4) in the final jury instruction because it was not an element of any of the charged offenses or lesser included offenses, and there was no evidence presented at trial that otherwise supported it. (Da47-48, 56-58). Defendant's request to argue negligence in summation was likewise correctly denied for these same reasons. (Da48, 58-59). Further, any error in failing to charge or permit a summation argument was harmless. R. 2:10-2.

It is undisputed that "appropriate and proper charges are essential to a fair trial." State v. Savage, 172 N.J. 374, 387 (2002); State v. Green, 86 N.J. 281, 287 (1981). "Jury charges must provide a 'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Singleton, 211 N.J. 157, 181-82 (2012) (quoting Green, 86 N.J. at 287-88)). However, "a defendant is not 'entitled to have the jury instructed in his own words,' but only 'to an adequate instruction on the law.'" State v. Pigueiras, 344 N.J. Super. 297, 317 (App. Div. 2001) (quoting State v. Pleasant, 313 N.J. Super.

325, 333 (App. Div. 1998), aff'd 158 N.J. 149 (1999)). In addition, the scope of defendant's summation argument must not exceed the "four corners of the evidence", and reasonable inferences from that evidence. State v. Loftin, 146 N.J. 295, 347 (1996) (citation omitted). The trial court's decision is reviewed for an abuse of discretion, with prejudicial error occurring only "when the subject matter is fundamental and essential or is substantially material to the trial." Green, 86 N.J. at 291.

Defendant was charged with first-degree aggravated manslaughter and second-degree aggravated assault (serious bodily injury), and the lesser-included offenses of reckless manslaughter and second-degree aggravated assault (significant bodily injury). (CDa1-7; 25T83-1 to 89-25). All four offenses require a reckless state of mind as defined at N.J.S.A. 2C:2-2b(3).[9] The difference between recklessness and negligence is the degree of culpability. See State v. Reed, 211 N.J. Super. 177, 181 (App. Div. 1986). Recklessness occurs when the actor "consciously disregards a substantial and unjustifiable risk", N.J.S.A. 2C:2-2b(3), while negligence occurs when he "should be aware of a substantial and unjustifiable risk[, N.J.S.A. 2C:2-

[9] Aggravated manslaughter, N.J.S.A. 2C:11-4a(1), and second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), require the heightened element of recklessness "under circumstances manifesting extreme indifference to human life." Second-degree aggravated assault also includes the elements of "purposely or knowingly" causing serious bodily injury. N.J.S.A. 2C:12-1b(1).

2b(4)]." Ibid. (emphasis added). Both culpability elements are based on a reasonable person standard. See N.J.S.A. 2C:2-2b(3) and (4). There is no crime of negligent homicide in New Jersey. Reed, 211 N.J. Super. at 181. Also, there is no caselaw that requires the trial court to charge negligence or distinguish between reckless and negligent culpability when charging aggravated or reckless manslaughter or aggravated assault in the first instance. See e.g., Reed, 211 N.J. Super. at 181-83; State v. Curtis, 195 N.J. Super. 354, 368-69 (App. Div. 1984). See also State v. Reyes, 50 N.J. 454, 464-65 (1967) ("It is evident to us that the jury could not fail to realize, without any specific instruction on the subject, that if it should believe defendant's tale of an accidental shooting, it was bound to return a not guilty verdict.").

For example, in Pigueiras, this Court determined that the trial judge did not err when he declined defendant's request to charge negligence and carelessness during the final jury instructions because the charges - second-degree aggravated assault and fourth-degree assault by auto – concerned reckless states of mind. The judge reasoned that the jury would simply acquit defendant if it found he did not act recklessly, and a negligence charge would only lead to juror confusion. 344 N.J. Super. at 313. The Court also found no error when the judge again declined defendant's request to charge negligence/carelessness after the jury asked about the heightened element of

"extreme indifference to human life" for aggravated assault because it expressed no confusion about the difference between recklessness, negligence and carelessness. Id. at 314.

Defendant argues that an instruction distinguishing negligence from recklessness "is appropriate when there is reason to believe the jury could confuse the latter mental state with the former." (Db40). However, no New Jersey case requires the trial court to charge negligence where the charged offenses do not involve a negligent mens rea, and the evidence at trial does not "reasonably include[] or speak[] to negligent conduct of [d]efendant", as the trial judge observed. (Da58).

Here, as the judge stated, the evidence adduced at trial "does not reasonably speak to negligence. It reasonably speaks to justification." (Ibid.). Defendant never maintained in his incident report or during his grand jury and trial testimony that he, a trained police officer, was unaware of the risks of firing his service weapon at the victims and their vehicle during the three stops. See N.J.S.A. 2C:2-2b(4); see also N.J.S.A. 2C:2-3c ("the actual result [of criminal negligent conduct] must be within the risk of which the actor . . . should be aware. . . ."); see also State v. Zanger, 370 N.J. Super. 360, 368 (Law Div. 2004) (a defendant who reasonably should have known about the decedent driver's impaired condition is guilty of criminal negligence).

Defendant's assertion was always that he was consciously aware of the risk, but his action in shooting at Griffin, Dixon and their car was not reckless and was justified because Dixon pointed a gun at him at the first stop, Dixon was holding a gun at the second stop, both men were moving around inside the car and had access to two guns, and Griffin was eluding police, driving erratically and exceeding the speed limit. See (12T26-6 to 28-6; 31-15 to 18; 32-19 to 33-22; 35-3 to 25; 38-13 to 40-4; 47-19 to 48-7; 50-24 to 52-21; 53-3 to 21; 19T55-6 to 13; 57-11 to 23; 58-23 to 59-23; 70-16 to 71-13; 72-23 to 25; 75-16 to 25; 77-3 to 9; 78-21 to 79-18; 94-23 to 95-1; 106-16 to 107-2; 118-17 to 20; 185-3 to 12; 186-3 to 6).

The trial judge never said the defense of justification precluded a jury charge and summation argument on negligence, as defendant asserts. (Db41). Rather, the judge accurately observed that "Defendant's true position has always been that he was consciously aware of the risks of shooting", which is required for purposeful, knowing or recklessness conduct. See N.J.S.A. 2C:2-2b(1), (2) (3). (Da58) (emphasis added). "Not once has [defendant] ever stated that he was unaware and that he should have been aware. He has always maintained the same thing: that [the] risks he took were justified." (Da58) (emphasis added). In other words, defendant never asserted that he acted negligently in that "he should [have been] aware of a substantial and

unjustifiable risk" that shooting at the victims or their vehicle would result in death or serious bodily injury. N.J.S.A. 2C:2-2b(4). He claimed he acted in self-defense or defense of others and that these affirmative defenses negated his otherwise unlawful conduct. See State v. Moore, 158 N.J. 292, 301 (1999).

Defendant inaccurately argues that the State introduced evidence of defendant's negligent conduct through the testimony of Sergeant Richard Ashkar. (Db41-42). Sergeant Ashkar was not called as an expert witness for the State. (18T58-21 to 59-2; 85-23 to 25; 94-7 to 11). He was an instructor at the Police Academy, who trained defendant and other recruits on use of force policies. (18T27-3 to 28-6; 30-18 to 31-16). He read the AG's and Newark's policies on use of force and explained how he taught them to recruits. (18T33-22 to 36-24; 43-24 to 50-2; 53-1 to 57-6; 60-2 to 63-9; 65-16 to 80-6). He did not testify about defendant's specific conduct on January 28, 2019, or opine that defendant acted negligently, unreasonably or in contravention of his officer training that night. He did not interview witnesses, review statements, police reports, videos or other discovery in this case, or retrace the route of the pursuit prior to testifying. (18T91-6 to 92-4; 93-15 to 23; 96-4 to 8).

State v. Concepcion, 111 N.J. 373 (1988), and State v. Atwater, 400 N.J. Super. 319 (App. Div. 2008), on which defendant relies (Db40-41), are distinguishable from the present case. Neither case stands for the proposition

that "an instruction distinguishing negligence from a charge of recklessness is appropriate when there is reason to believe the jury could confuse the later mental state with the former." (Db40).

In Concepcion, defendant was charged with reckless manslaughter in the shooting death of the victim following an altercation for a loaded gun left on defendant's apartment bookshelf. Id. at 374-75. The jury asked for clarification on the definition of recklessness and the trial court repeated the statutory definition of manslaughter. Id. at 378-79. Our Supreme Court stated that, in response to the jury's specific question about recklessness, the trial court could have defined other mental states such as negligence to help alleviate the jury's confusion. Id. at 381. It stated: "Rather than repeating the abstract definition that left the jury uncertain in the first place, the trial court might have explained 'recklessly' by comparing it with other mental states, such as . . . negligently." Ibid. (emphasis added). Concepcion did not hold that a negligence charge must be given in the first place, even when the evidence suggests defendant unintentionally discharged the gun. Id. at 380-81.

Atwater, like Concepcion, dealt with the jury's questions indicating confusion as to recklessness. 400 N.J. Super. at 328. In Atwater, defendant was charged with reckless manslaughter in the death of two pedestrians. On appeal, defendant argued that "the trial court's failure to clarify the difference

between negligent and reckless conduct after the jury's questions constitutes reversible error." Id. at 331. While noting the trial court generally need not distinguish between negligence and recklessness when charging reckless manslaughter, this Court agreed with defendant that the jury's confusion required clarification: "Here, however, the trial court should have adopted the Concepcion holding and compared 'reckless' with other mental states, such as negligence, after the jury's repeated questions indicated their confusion on the definition of 'reckless.'" Id. at 332. The jury in Atwater also heard "actual evidence of negligence" because two medical examiners testified that the victims' deaths were accidental. Id. at 332. Here, no such evidence warranted a negligence charge from the outset, and the jury never expressed confusion or requested clarification on recklessness or any aspect of the final charge.

The trial judge also properly denied defendant's request to argue negligence in summation given the complete lack of evidence. In Atwater, this Court found the trial court should have granted defense counsel's request to argue in summation that defendant was "merely negligent" based on the medical examiners' testimony about the victims' accidental deaths. Id. at 334-35. But this error, by itself, did not rise to the level of reversible error, but merely contributed to cumulative error viewed in conjunction with the failure to clarify the mental states. Id. at 335.

Likewise, in Pigueiras, this Court denied defendant's request to charge the jury on negligence, but it permitted defendant to argue mere negligence in summation based on his testimony that the accident resulted from his carelessness in failing to properly negotiate the exit turn due to darkness, an unfamiliar roadway, and speeding. 344 N.J. Super. at 306, 313.

Here, the "four corners" of the evidence did not support a negligence charge, and any reference to it in closing would have merely confused the jury and raised the potential for jury nullification. See State v. Ragland, 105 N.J. 189, 204-05 (1986) ("[T]he power of the jury to acquit despite not only overwhelming proof of guilt but despite the jury's belief, beyond a reasonable doubt, in guilt, is not one of the precious attributes of the right to trial by jury."). Lastly, any error in failing to charge negligence or permit reference to it in summation was harmless given the lack of any evidence of negligent conduct by defendant in the record and the State's overwhelming proofs as to his guilt. Pigueiras, 344 N.J. Super. at 317; R. 2:10-2.

Point IV

The Trial Court Properly Exercised its Discretion to Allow the Parties to Make Supplemental Closing Arguments in Light of Its Decision to Charge Use of Force in Law Enforcement. (Raised as Plain Error).

Defendant argues that the trial court erred "by not charging the use of force in law enforcement instruction," and that "the defense was prohibited

from even mentioning the use of force in law enforcement defense" during summations. (Db45). This is simply untrue. Over the State's objection, the trial court granted defendant's requests to charge this defense under N.J.S.A. 2C:3-7a, and to charge that defendant reasonably believed he needed to use deadly force to arrest Dixon for the crime of attempted murder, N.J.S.A. 2C:3-7b(2)(c). The court then allowed the parties to supplement their closing arguments before the final charge by addressing the issue of whether the State had disproved the defense beyond a reasonable doubt. The court's rulings were a windfall for defendant. Defense counsel posed no objections to these rulings, which clearly had no capacity to produce an unjust result. R. 2:10-2. State v. Macon, 57 N.J. 325, 337-38 (1971).

The trial court initially denied defendant's request to charge the defense of use of force in law enforcement under N.J.S.A. 2C:3-7a as a justification to the charges of aggravated manslaughter, aggravated assault, and possession of a firearm for an unlawful purpose. (Da52-53). The court issued its decision before summations and the final jury charge were given.

After the parties' closing arguments and before the final jury charge, the court reversed its decision, "sua sponte, in the interests of justice" based on the State's summation, and over the State's objection. (Da74-79). Specifically, it found the State had "opened the door to a 2C:3-7 charge" when it argued

"[d]efendant's purpose in firing his gun at or in the direction of Griffin and Dixon . . . was to stop their car, capture and arrest them for offenses Officer Sanchez testified she had observed as well as offenses Defendant testified, he had observed." (Da76).[10] The court granted defendant's requests to charge the 2C:3-7 defense, and that defendant reasonably believed the use of deadly force was necessary to thwart the commission of an attempted murder by Dixon, the element required by N.J.S.A. 2C:3-7b(2)(c). (25T4-1 to 5-3); see (25T120-23 to 123-2). The court reopened summations and allowed the parties thirty minutes to argue "the narrow issue of whether the State has disproved the affirmative defense of Use of Force in Law Enforcement beyond a reasonable doubt." (Da78-79; 25T3-10 to 24; 7-3 to 6).

The court instructed the jury that "both sides will be given a limited and equal time to address you further pursuant to my instructions." (25T10-9 to 12). Defendant did not object to this instruction. (25T8-12 to 22). The parties' supplemental closing arguments proceeded. Defense counsel argued the State failed to disprove the defense of use of force in law enforcement. He

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[10] Defendant wrongly asserts that the prosecutor improperly used the exclusion of the use of force in law enforcement defense to argue that defendant could have abided by New Jersey's use of force policy by ending the pursuit and arresting Griffin and Dixon at a later time because he had the vehicle's "information"; that is, the make, model and plate number as radioed by Officer Sanchez. (Db45). The prosecutor's argument was properly based on the evidence adduced at trial. See Point V, post.

asserted defendant was justified in using deadly force because he was assisting Officers Sanchez and Mos in arresting Griffin and Dixon, and he reasonably believed: his use of deadly force did not create a substantial risk of injury to innocent people; he was arresting Dixon for the crime of attempted homicide, not merely pointing the gun; there was an imminent threat of deadly force to defendant and a third party; the use of deadly force was necessary to thwart the commission of attempted murder; and the use of force was necessary to prevent their escape. (25T10-14 to 21-1). See 2C:3-7a(1)(a) and b(2)(a)-(d).

Following the supplemental summations, the trial court charged all elements of use of force in law enforcement, including limitations on the use of force and deadly force. (25T117-3 to 125-16). Specifically, as to the use of deadly force, the court charged the State must disprove that defendant reasonably believed he was arresting Dixon for attempted murder. (25T121-8 to 123-2). See N.J.S.A. 2C:3-7b(2)(c).

Rule 1:8-7(b) states that "[p]rior to closing arguments, the court shall hold a charge conference on the record in all criminal cases." R. 1:8-7(b). "At the conference, the court shall advise counsel of the offenses, defenses and other legal issues to be charged and shall rule on requests made by counsel." Ibid. "The purpose of the rule is to allow counsel to be heard in avoidance of judicial error." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R.

1:8-7 (2023) (citing e.g., Colucci v. Oppenheim, 326 N.J. Super. 166, 181-82 (App. Div. 1999)). However, "despite the requirement for early submission of requests to charge, if an unanticipated supplemental charge is given, counsel should be afforded an opportunity to make responsive supplemental closing statements." Id., cmt. 2.3 to R. 1:8-7. This reading of Rule 1:8-7 is in keeping with New Jersey's "long-standing tradition of allowing the trial court 'wide discretion' in supervising the conduct of a trial." State v. Tilghman, 385 N.J. Super. 45, 53-54 (App. Div. 2006) (quoting Sullivan v. State, 46 N.J.L. 446, 447 (Sup.Ct.1884), aff'd, 47 N.J.L. 151 (E. & A. 1885)). "Indeed, our rules vest the courts with broad discretion over procedural matters." Id. at 54 (citing R. 1:1-2) ("the rules...shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay"). "The primary responsibility of a trial judge is to ensure a trial in which the issues are fairly decided by an impartial trier of fact based on the evidence and under the law." State v. Speth, 324 N.J. Super. 471, 474 (Law Div. 1997), aff'd, 323 N.J. Super. 67 (App. Div. 1999). This is the reason the court may relax or dispense with a court rule "if adherence to it would result in an injustice." Id. at 475. See R. 1:1-2.

In Speth, after five weeks of trial followed by five days of jury deliberations over an additional two weeks, the trial court granted the joint

request of the prosecutor and defense counsel to give brief supplemental closing statements to the jury "in the interest of justice." Id. 472, 475-76. The court considered numerous factors, including the length of the trial, the complexity of the issues, jury breaks, jury questions, and the parties' joint request. Id. at 475-76.

In State v. Rovito, 99 N.J. 581, 587-88 (1985), a case factually similar to the present case, the trial court decided to charge the jury on causation under N.J.S.A. 2C:2-3 as to the manslaughter charge, after summations were completed. The court then gave each counsel an additional ten minutes to present supplemental summations. Id. at 588. On appeal, defendant argued that the procedure violated Rule 1:8-7, which required a trial court to "rule on the requests prior to closing arguments to the jury." Ibid. The Supreme Court found no error. It held,

> Although the better practice is for the court to resolve all questions about the proposed charge before summations, a trial is not a mere mechanical exercise. The dynamics of trial practice occasionally may require a judge to follow the spirit, if not the letter, of the Rules of Court. Here, the trial court's conduct was consistent with the purpose of Rule 1:8-7, which is to permit counsel to conform their summations to the charge. [Ibid.].

Here, the trial court properly exercised its discretion "in the interest of justice" by granting defendant's request to charge the additional defense and permit supplemental closing statements before the final charge was given.

Defendant posed no objection to the trial court's rulings because they obviously benefited him. Even if the court's favorable rulings for the defense could somehow be characterized as error, they were not plain error.

Point V

The Prosecutor's Remarks During Summation Were Fair Comments on the Evidence. (Partially Raised Below).

When considering claims of prosecutorial misconduct, the reviewing court must first determine whether any misconduct occurred. State v. Frost, 158 N.J. 76, 83 (1999). Where misconduct is identified, it does not constitute grounds for reversal unless it was so egregious that it deprived the defendant of a fair trial. Ibid. To warrant reversal, a prosecutor's misconduct must constitute a clear infraction and "substantially prejudice the defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Roach, 146 N.J. 208, 219 (1996).

As to summation arguments, the prosecutor must confine his comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence. State v. Mahoney, 188 N.J. 359, 376 (2006); State v. R.B., 183 N.J. 308, 330 (2005). Nonetheless, prosecutors, like defense attorneys, are afforded "considerable leeway, within limits, in making" their closing arguments. State v. Chew, 150 N.J. 30, 84 (1997) (citation omitted). A prosecutor is "entitled to sum up the State's case graphically and forcefully."

State v. Feaster, 156 N.J. 1, 58 (1998). If a prosecutor's arguments are confined to the evidence and reasonable inferences therefrom, what is said in discussing the facts, by way of comment, denunciation or appeal will afford no grounds for reversal. Id. at 58-59. Remarks made during closing arguments must be judged in relation to the entire summation and the trial as a whole. State v. Johnson, 31 N.J. 489, 513 (1960). Here, no error was capable of producing an unjust outcome. R. 2:10–2. See R.B., 183 N.J. at 330.

A. Prosecutor's Comment about the Fleeing Vehicle.

The prosecutor properly argued based on the evidence adduced at trial that defendant could have ended the pursuit of the Chrysler and arrested the occupants at a later time because he had the vehicle "information" – its license plate number. (22T115-22 to 116-4; 23T149-10 to 13; 17 to 153-1). See (Db50-51). See Mahoney, 188 N.J. at 376. This information was relayed by Officer Sanchez during the initial stop. (18T176-10 to 13; 180-1 to 8; Da 157@ 2:38-2:52). Her BWC also recorded images of Griffin and Dixon. (Da157@ 1:34-2:28).

Defense counsel claimed that the prosecutor's comment was improper because Griffin had stolen the Chrysler from his live-in girlfriend Ebony Davis. (23T149-16 to 151-3). However, no such evidence was presented at trial because it was precluded by Judge Cronin prior to trial. (6T51-24 to 53-9;

Da15).[11] Judge Ravin properly overruled defense counsel's objection to the prosecutor's summation comment for this reason. (23T152-10 to 11). In addition, the evidence provided during discovery revealed the Chrysler was not stolen. It was purchased by Griffin and registered to Davis. (23T151-13 to 21; Da164-165). After Griffin's death, Davis reported to officers that Griffin took the car keys about three or four days before January 28, 2019, and that she had not seen him since, but she never reported the car as stolen. (Da161).

B. Prosecutor's Comment on Trial Preparation of Defense Witnesses.

Defendant takes the prosecutor's remarks out of context. (Db51). The prosecutor properly argued that Officers Ortiz and Sanchez met with defense counsel prior to trial to prepare for their testimony by watching videos and discussing the incident. (22T119-4 to 20; 120-17 to 22; 121-5 to 6; 121-20 to 123-1). The evidence established that both officers spoke with the prosecutor's office and with defense counsel. Sanchez recalled that she reviewed video footage in preparation for trial. (13T47-7 to 10; 70-7 to 71-15; 72-14 to 21; 18T168-18 to 169-5; 188-14 to 193-23).

Defense counsel objected, claiming the officers never testified they were "prepared" by him. The prosecutor responded that what the witnesses described was in fact trial preparation. (22T120-1 to 121-6). The trial judge

[11] The trial judge's rulings are more fully discussed at Point VI, post.

gave a curative instruction that "[i]t's your recollection of the evidence that was presented that controls", and defense counsel did not object to it. (22T121-7 to 18). The prosecutor continued his summation by acknowledging that it was "normal to meet with witnesses ahead of time in preparation for trial", and the State "did the same thing." (22T121-20 to 122-1). If any error occurred here, it was cured by the trial judge's instruction.

C. Prosecutor's Use of the Word "Hunt." (Raised as Plain Error).

The prosecutor's use of the word "hunt" (Db51-52) was properly based on the evidence and inferences therefrom that, "Defendant was never going to let that car get away[,]" (22T188-1 to 3); Griffin was "afraid to stop and surrender" after being shot at for driving away (23T16-5 to 19); defendant "purposefully ignored the law" (23T105-14 to 15); the mere pointing of a gun at him did not give defendant "a blanket authorization" to shoot or keep shooting (23T124-14 to 17; 182-19 to 22); and defendant was going to continue the pursuit "no matter what the policy prohibited" (23T154-8 to 18).

Defense counsel did not object to the prosecutor's use of the word "hunt." He argued that the prosecutor had misstated the law. The judge instructed the jury that it must accept and apply the law for this case "as I give it to you in this charge", and that any statements by the attorneys that conflicted with the judge's charge "must be disregarded." (23T182-19 to 188-

24; 189-1 to 16). Defense counsel did not object to the instruction, and no plain error occurred. R. 2:10-2.

D. Prosecutor's Comment on the ECPO's Involvement in the Case. (Raised as Plain Error).

The prosecutor accurately commented to the jury that, "you swore an oath to fairly and impartially evaluate the evidence and apply the facts to the law. That oath is to ensure fairness to all parties. ..." (23T40-2 to 8). See (Db52-53). This comment mirrored the trial judge's final instructions. (26T4-21 to 5-10; 6-14 to 7-16). The prosecutor also correctly explained that the ECPO was mandated by the AG's Directive to respond to the scene of all police-involved shootings. (14T125-4 to 127-3). Defendant's assertion that the prosecutor's intention was to bolster the credibility of the State's witnesses is baseless. Defense counsel did not object to the prosecutor's comments at trial and no plain error resulted. R. 2:10-2.

E. Prosecutor's Comments on the Evidence.

Lastly, there is no support in the record for defendant's assertions that the prosecutor misattributed statements to defense counsel. (Db53). During summation, the prosecutor read questions and answers from the transcript of defendant's trial testimony. (23T29-2 to 17; 34-6 to 16). There was an error in the transcript, which was remedied per the parties' agreement with the judge's instruction to the jury that, "it's your recollection that controls."

(23T29-18 to 34-4). Defendant's additional claim about the prosecutor's recollection of the evidence was withdrawn and as a cautionary measure the judge explained to the jury that the transcripts were "not official" and "it's your recollection that controls." (23T45-21 to 51-3). See (Db53-54).

Lastly, the prosecutor's comment that defense counsel had implied ECPO detectives wiped down the gun was based on defense counsel's cross-examination of the DNA expert (17T22-18 to 24; 23T52-22 to 54-3), and in any event, defense counsel withdrew the objection (23T60-9 to 61-16). See (Db53).

Point VI[12]

The Trial Court Correctly Granted the State's Motion in Limine to Preclude Griffin's Toxicology Results and Dixon's Statement About Drug Use. (Partially Raised Below).

The trial court properly granted the State's motion in limine to preclude the admission of Griffin's toxicology results from his autopsy (CDa163) and Dixon's statement to police about his drug use on January 28, 2019. See (3T292-18 to 294-24; 300-6 to 21).[13] (Da34-46).[14] First, the judge found this

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[12] This Point responds to Point VI in the body of defendant's brief. See (Db54-57). This Point is not listed in defendant's table of contents. See (Dbi-iii).

[13] Dixon told police he did not see Griffin smoking marijuana on the night of the shootings. (3T300-6 to 21).

[14] Defendant also argues that the trial court erred in precluding Dixon's urinalysis results from January 29, 2019 (CDa163), but this document is not mentioned anywhere in the trial court's decision. (Da35-36). Because this

evidence inadmissible under N.J.R.E. 401 to determine whether defendant "reasonably believe[d]" he was entitled to use deadly force based on the dangers known to him at the time of the shooting. (Da43). See N.J.S.A. 2C:3-4a, -4b(2); 2C:3-5a; 2C:2C:3-7a, -7b(2). To be logically relevant to defendant's state of mind, the information must have been known by defendant when he fired at the victims. See State v. Bakka, 176 N.J. 533, 545 (2003). "Defendant [had] no knowledge of the victims' drug use at the time of the shooting." (Da43). In fact, defendant told the grand jury he had no information that Griffin and Dixon were on drugs that day. (4T266-9 to 22). Officer Sanchez did not report seeing drugs in the car or that Griffin and Dixon appeared to be under the influence. Defendant's use of deadly force cannot be justified by what he later learned. (Da43). In short, no "logical connection"

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report was not part of the trial record, it should not be considered by this Court. See Galicia, 210 N.J. at 383 (issues must be raised below).

Moreover, defense counsel, acting as his own "expert", improperly "explains" that Griffin's toxicology results and Dixon's urinalysis results show the men were taking "drugs associated with violent tendencies" and caused them to be "aggressive." (Db55-56). This "expert" opinion is wholly incompetent, see N.J.R.E. 702, and does not change the fact that Dixon's drug use was unknown to defendant at the time of the shooting and therefore irrelevant to defendant's reasonable belief in the need to use deadly force, as the trial court concluded. (Da35-46). Also, there is no evidence in this record that defendant sought to call a "forensic toxicologist", or that such motion was denied. (Db56).

existed between the proffered evidence and the issue of defendant's state of mind. Williams, 190 N.J. 114, 123 (2007). N.J.R.E. 401.

The trial court also correctly ruled that the admission of the drug use evidence was barred because any probative value was substantially outweighed by its unduly prejudicial effect. (Da44, citing N.J.R.E. 403). The evidence was "unduly prejudicial" and "highly inflammatory" because it could lead the jury to conclude the victims were "bad guys" based on their drug use. (Da45). It could also "confuse the issue by essentially putting Griffin and Dixon on trial for their drug use." (Ibid.). Finally, it "could lead the jury to improperly excuse defendant's conduct based on the victims' behavior alone, and not fairly evaluate the evidence based on everything known to Defendant at the time of the shooting, [and] whether [he] meets the legal standard for self-defense. ..." (Ibid.). See Ragland, 105 N.J. at 204-05 (observing nullification is "not one of the precious attributes of the right to trial by jury.").

The court also correctly ruled Griffin's and Dixon's alleged intoxication was not relevant to prove they were eluding police "because this conduct is not rationally tied to whether or not they were under the influence." (Da44, citing N.J.R.E. 401). Their actions constituting eluding was visible on dash cam and BWC video irrespective of their drug use or intoxicated states. (Ibid.).

Even though the trial judge ruled the drug use evidence was inadmissible, he allowed that defendant "may testify as to his beliefs, perceptions, or suspicions of the victims' intoxication based on his training as a law enforcement officer and observations on that night, however, whether Griffin and Dixon were in fact intoxicat[ed] is not needed in order for Defendant to do so." (Da43-44). Defendant concedes (Db55) that he did in fact testify at trial, in conjunction with Ortiz's dash cam video, that the fleeing car was driving erratically by speeding, driving on sidewalks and on the wrong side and disregarding speed bumps. See e.g. (19T50-12 to 25; 52-8 to 53-25).

Defendant appears to argue for the first time on appeal that the victims' drug use was admissible under N.J.R.E. 404(a)(2) as evidence of Dixon's violent character to show he was the initial aggressor to corroborate his use of force defenses. (Db54-55, citing Aguiar, 322 N.J. Super. at 184). However, Dixon's use of drugs at some point during January 28, 2019, is not probative of violent behavior, and there is no logical connection between Dixon's drug use and his pointing a gun at defendant on one occasion. N.J.R.E. 401. Moreover, character evidence in the form of a specific instance of conduct, presumably Dixon's drug use on that night, is not an essential element of self-defense and is therefore inadmissible to show Dixon acted in conformity with his alleged violent character, making it more likely that he was the aggressor.

See N.J.R.E. 405(b); Jenewicz, 193 N.J. at 461-62. Any error was harmless. R. 2:10-2.

Point VII[15]

The Trial Court Correctly Precluded as Irrelevant and Unduly Prejudicial Evidence That the Chrysler Was Stolen, Griffin Assaulted His Girlfriend, Drugs Were Recovered from the Chrysler, and the Handgun Found in the Car Was Not Lawfully Possessed by Griffin or Dixon.

Defense counsel argued pretrial that the criminal histories of Griffin and Dixon, the drugs later discovered in their car, Griffin's girlfriend's information that Griffin assaulted her and took her car keys four days before January 28, 2019, and the charges filed against Griffin and Dixon after January 28, 2019, were relevant to show the victims' mental states; that is, to show they had no intention of stopping the car during the police pursuit because they were career criminals who wanted to avoid arrest. Defendant claimed their states of mind were relevant to his reasonable belief in the need to use deadly force to stop the car by shooting at it. (6T12-3 to 14-13; 16-5 to 17-22; Da13-15, 18-21, 24-27). The trial court correctly precluded the admission of this proffered other-crimes evidence under N.J.R.E. 401, 403 and 404(b). (6T24-22 to 26-11; 44-4 to 12; 51-24 to 53-9; Da13-15, 18-21, 23-27). The trial court's ruling

[15] This Point responds to Point VII in the body of defendant's brief. (Db57-61). It is mistakenly labeled Point VI in his table of contents. See (Dbii).

to preclude this evidence was a proper exercise of its sound discretion, is entitled to deference, and any error in its ruling had no clear capacity to cause an unjust result. Garcia, 245 N.J. at 430.

To be admissible as reverse N.J.R.E. 404(b) evidence, the victims' alleged motive must be "relevant to a material issue in dispute." See Weaver, 219 N.J. at 150 (the simple relevance standard of N.J.R.E. 401 applies to the defensive use of other-crimes evidence). "A defendant is permitted to use other-crime evidence defensively so long as such evidence 'tends, alone or together with other evidence, to negate his guilt' or support his innocence of the charges against him." State v. Williams, 240 N.J. 225, 235 (2019) (quoting State v. Garfole, 76 N.J. 445, 453 (1978)). Even if the evidence is relevant, it may still be excluded as unduly prejudicial under N.J.R.E. 403. Id. at 237-38; Weaver, 219 N.J. at 151. The trial court's balancing of the probative and prejudice factors is "highly discretionary." Weaver, 219 N.J. at 151.

Only defendant's state of mind was relevant to prove the charged offenses and disprove his use of force defenses, not the victim's mental states. Under Count 1, the State had to prove defendant "recklessly cause[d] death under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4a(1). Under Count 2, the State had to prove defendant "cause[d] serious bodily injury purposely or knowingly or under circumstances

manifesting extreme indifference to the value of human life recklessly cause[d] such injury." N.J.S.A. 2C:12-1b(1). As to the use-of-force defenses, the focus was on defendant's "reasonably belie[f]" that the use of force or deadly force against another person was immediately necessary to protect himself, others or effect a lawful arrest. N.J.S.A. 2C:3-4a, -4b(2), 2C:3-5a, 2C:3-7a, -7b.

Here, none of the proffered evidence could have led a jury to conclude defendant acted recklessly by consciously disregarding a substantial and unjustifiable risk of death or serious bodily injury, N.J.S.A. 2C:2-2b(3), or that he reasonably believed in the need to use force or deadly force, N.J.S.A. 2C:3-4, -5 and -7. See Bakka, 176 N.J. at 545. It did not "rationally tend[] to" negate defendant's guilt as to the charged offenses or support his claim of a reasonable belief in the need to use deadly force. Weaver, 219 N.J. at 150 (quoting Garfole, 76 N.J. at 453). When defendant fired at the Chrysler, he did not know who was in it or what it contained other than the gun seen by Officer Sanchez. The proffer information was completely unknown to him, and defense counsel conceded as much. (Da25-26). Thus, the victims' criminal histories, the drugs later found in the car, the allegation that the Chrysler was stolen, and the alleged domestic violence incident were not relevant to defendant's state of mind at the time of the shootings. (6T24-22 to 26-11; 44-4 to 1251-24 to 53-9; Da15, 23-29, 32-33). Also, Griffin's girlfriend Davis

never reported the Chrysler was stolen or filed a domestic violence complaint, so defendant could not have known about these non-existent events when he fired at Griffin and Dixon. (Da26, 161). In short, there was no "logical connection between the proffered evidence and a fact in issue." State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990). N.J.R.E. 401.

The trial court correctly applied N.J.R.E. 403 and concluded the non-existent probative value of the proffered evidence to the issues of defendant's state of mind was substantially outweighed by the risk of undue prejudice, confusion of issues and misleading the jury. (Da24). "Admission of this evidence would also create a substantial danger of jury confusion by injecting a totally impermissible potential basis for jury nullification. That potential basis…is that the victims are 'bad guys' who 'do bad things' and therefore the defendant was justified in perceiving them to be dangerous." (Ibid.).

Griffin was never formally charged with any offenses after January 28, 2019, for his conduct on that date because he died within hours of being shot. (Da19). No charges were filed against Dixon for his conduct on January 28 until after that date, and "evidence of executive branch charging decisions" as to Dixon had "no logical relevance to defendant's state of mind when he shot at the victims." (Da19). It also had no relevance to the circumstances of Dixon's death because he died of causes unrelated to the shooting. (Ibid.).

In addition, any probative value of this evidence was substantially outweighed by its risk of undue prejudice, confusing the issues and misleading the jury. N.J.R.E. 403. (Da19-21). The introduction of the State's charging decisions as to Dixon were "conclusions made by different decision-makers, evaluating different information under a different legal standard as applied to a different person, namely victim Dixon." (Da19). "The introduction of evidence concerning these disparate charging decisions before the petit jury not only poses a substantial danger of confusing or misleading them, it virtually guarantees it." (Da20). See State v. Cain, 224 N.J. 410, 433-36 (2016) (upholding reversal of a conviction based on the prosecutor's repeated reference to a search warrant for defendant's house because it "unfairly implied that the trial judge who issued the warrant credited the same evidence later presented at trial."). See also State v. Alvarez, 318 N.J. Super. 137, 147-48 (App. Div. 1999) (overturning conviction because of the prejudicial impact of the prosecutor's repeated references to judicially authorized warrants); State v. Milton, 255 N.J. Super.514, 519-21 (App. Div. 1992) (reversing conviction due to an improper reference to a search warrant for defendant's person). Lastly, any error in the trial court's rulings had no capacity to bring about an unjust result in light of the State's overwhelming proofs and the total lack of relevance of the proffered evidence. R. 2:10-2.

Point VIII

The Trial Court Properly Ruled Dixon's Statement to a Police Officer Moments After He was Shot in the Face Was Admissible as an Excited Utterance Under N.J.R.E. 803(c)(2). (Partially Raised Below).

EMT Josue Zamora testified that around midnight on January 29, 2019, he and his partner responded to Irvine Turner Boulevard on the report of a gunshot wound victim. Dixon was shot in the upper jaw, and was irritable, angry, loud, and uncooperative as emergency personnel placed him in the ambulance. (13T147-21 to 149-10; 151-13 to 152-9; 155-23 to 156-3).

Defense counsel objected to the prosecutor's next question, "What was he [Dixon] saying?" (13T152-10 to 20). At sidebar, the prosecutor argued that Dixon's exclamation, "Why the fuck did you shoot at me?", was admissible as an excited utterance under N.J.R.E. 803(c)(2), and was inherently reliable because Dixon "was still under the stress of the event of being shot. He did not have an opportunity to fabricate." (13T153-7 to 12; 154-5 to 9; 154-23 to 155-2; 155-19 to 22). Also, Zamora had memorialized Dixon's statement in his report.[16] (13T152-24 to 25; 153-25 to 154-2). The

[16] Defendant misrepresents the trial record with his unfounded assertion that Zamora's statement was not turned over to the defense in discovery. (Db63). The record is clear that defense counsel preemptively objected to the prosecutor's question because he knew what Zamora was going to say. (13T152-10 to 20).

trial judge admitted Dixon's statement as an excited utterance, over defense counsel's objection. Zamora testified based on his report that he heard Dixon repeatedly say, "Why the fuck did you shoot me?" to the police officer in the back of the ambulance. (13T155-8 to 22; 13T156-13 to 18; 13T158-5 to 15).

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate." N.J.R.E. 803(c)(2). "An essential inquiry as to the admissibility of a statement as an excited utterance is whether the declarant had the opportunity to deliberate, reflect or misrepresent before making the statement or whether it was made spontaneously and in a state of excitement so as to negate fabrication." State v. Clark, 347 N.J. Super. 497, 506 (App. Div. 2002). When determining whether the declarant has an opportunity to fabricate or deliberate, the trial court should consider "the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance." State v. Branch, 182 N.J. 338, 366 (2005) (quoting State v. Long, 173 N.J. 138, 159 (2002)).

Here, Dixon made the statement within minutes of the "startling event" of being shot in the face by defendant, who pursued and shot at him and Griffin three times, then pulled him from the car and handcuffed him. Dixon

had no opportunity to fabricate or deliberate under the circumstances. Defendant's assertion that Dixon's statement was a preconceived "lie" intended to "exculpate him from the crimes he just committed" is simply nonsensical. (Db65). Even if error occurred, it was harmless because defendant admitted he shot Dixon and Officer Giron testified, before Zamora and without objection, that Dixon stated, "why did you guys shoot?" as officers were arresting him. (13T113-21 to 114-22; 134-15 to 20). R. 2:10-2.

Relying on N.J.R.E. 806, defendant argues for the first time on appeal that the trial court should have ruled sua sponte that Dixon's "numerous felony convictions and [evidence that he] was under the influence of [PCP]" were admissible to impeach the credibility of his excited utterance. (Db65-66). See Galicia, 210 N.J. at 383 (issues not raised are waived). In any event, this argument is meritless. The evidence was inadmissible because it was not relevant under N.J.R.E. 401 and was highly prejudicial under N.J.R.E. 403, as determined by Judge Cronin. (Da13-33). See Points II, VI and VII, ante. See State v. McLaughlin, 205 N.J. 185, 205-06 (2011) (observing that the first inquiry in determining the admissibility of evidence under N.J.R.E. 806 is whether the evidence is relevant); State v. Outland, 458 N.J. Super. 357 (App. Div. 2019) (the trial judge may still apply N.J.R.E. 403 to exclude the use of a

declarant's prior criminal record to impeach his credibility). No plain error occurred.

Point IX

Defendant's sentence is appropriate and should be affirmed.

The appellate court should not second-guess the trial court's sentencing decision unless it is "clearly mistaken." State v. Jarbath, 114 N.J. 394, 401 (1989). The sentence should be affirmed on appeal if the trial court followed the sentencing guidelines, found aggravating and mitigating factors based on sufficient evidence in the record, and imposed a sentence that is not "so clearly unreasonable as to 'shock the judicial conscience.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 364 (1984)).

The trial court gave "minimal weight" or "nominal weight" to mitigating factors 5, 8, 9, 11 and 12, N.J.S.A. 2C:44-1b(5), (8), (9), (11) and (12). (33T51-3 to 5; 53-19 to 54-1; 57-2 to 4; 58-10 to 12; 59-13 to 15). "Significant weight" was given to factor 7. N.J.S.A. 2C:44-1b(7). (33T52-21 to 23). Aggravating factors 3 and 4 were given "significant weight" and factor 9 was given "enormous weight." N.J.S.A. 2C:44-1a(3), (4) and (9). (33T63-13 to 70-7). Mid-range sentences were proper because these factors were "in balance." (33T70-8 to 13; Da122, 133).

Contrary to defendant's assertion (Db68-69), the trial judge adequately reconciled his findings of aggravating factor 3, risk of re-offense, and mitigating factors 7, no prior record, and factor 8, unlikely to recur, with credible factual support, a detailed explanation of the weight he assigned to each factor, and how those factors balanced as to defendant. See State v. Rivera, 249 N.J. 285, 300-01 (2021); State v. Case, 220 N.J. 49, 67 (2014).

The court ascribed "significant weight" to mitigating factor 7. (33T52-21 to 23). It found to a "limited extent" that "defendant's lack of a criminal history tend[s] to actually mitigate the offenses of which [he] was convicted[,]" and a "review of defendant's whole record and the statements made on his behalf today and the letters" show his criminality on January 28, 2019 "was a glaring aberration from his prior way of life." (33T52-15 to 21). On the other hand, "his clean record enabled him to become a police officer in the first place", but defendant betrayed his duties as an officer "by firing into the fleeing vehicle three times." (33T51-21 to 52-6).

The court correctly gave "nominal weight" to mitigating factor 8, finding it "ostensibly" applied in light of this Court's reasoning in State v. Rice, 425 N.J. Super. 375, 383 (App. Div. 2012), because "[d]efendant will never serve as a police officer again." (33T52-24 to 54-1). However, "an argument for mitigation as an extension of an otherwise bureaucratic and

formalistic process of termination is a weak one." (33T54-1 to 4). The evidence adduced at trial – defendant's chasing the fleeing car, running up to it and firing his weapon multiple times and methodically killing one man at the end of the chase - established "another more malevolent side of defendant . . . [a]nd therefore his conduct might not be entirely attributable to the circumstances he faced." (33T54-4 to 55-16).

The court also applied "significant weight" to aggravating factor 3 because "defendant has stated more than once that he would respond similarly again under the same circumstances[,]" "he views his actions as justified[,]" "he believes that he was acting in defense of himself, even as the vehicle containing his purported assailants was attempting to get away[,]" and he expressed no "remorse." (33T63-13 to 64-12). Nevertheless, the court found its "application of this factor is greatly tempered . . . by the defendant's unblemished criminal record prior to the shootings in this case as the Court described with respect to mitigating factor seven." (33T64-12 to 17).

As to aggravating factor 9, defense counsel conceded, "that's an important aggravating factor and that it actually applies." (33T7-21 to 8-1). The court properly found a need to specifically deter defendant and generally deter others, particularly other law enforcement officers, by "encouraging

faithful adherence not only to the [AG]'s use of force guidelines, but also more fundamental principles of decency and integrity." (33T67-20 to 21).

The trial court also correctly determined that mitigating factors 3, strong provocation, and 4, substantial grounds tending to excuse, did not apply. (33T47-11 to 50-7). See (Db70). As argued at Points II, VI and VII, ante, the court properly ruled irrelevant and inadmissible the victims' criminal histories, drug use, and the allegations about a stolen car and a domestic violence incident.

Finally, the trial court correctly applied the Yarbough[17] factors and explained the fairness of the overall sentence per Torres[18] when imposing consecutive sentences on Counts One and Two. (33T72-1 to 76-15). The multiple victim factor was entitled to great weight and should result in the imposition of consecutive sentences because death and serious bodily injury occurred. (33T74-23 to 75-9, citing State v. Carey, 168 N.J. 413, 429-30 (1999)). Here, "the shootings of the two victims occurred at two separate times with enough time for defendant to change course in between. Had he listened to the pleas of his partner, had he exhibited some modicum of restraint after shooing Andrew Dixon, Gregory Griffin might still breathe today."

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[17] State v. Yarbough, 100 N.J. 627, 643-44 (1985).
[18] State v. Torres, 246 N.J. 246, 267-68 (2021).

(33T75-10 to 16). The trial court's findings were grounded in competent, credible evidence in the record. State v. Megargel, 143 N.J. 484, 493 (1996). Accordingly, defendant's sentence should be affirmed.

Conclusion

Based on the foregoing arguments, the State respectfully asks this Court to affirm the defendant's conviction and sentence.

Respectfully Submitted,

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New Jersey Office

April 14, 2025

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
25 W. Market Street, Box 006
Trenton, NJ 08625-0006

Re: STATE OF NEW JERSEY, Plaintiff-Respondent, V. JOVANNY CRESPO, Defendant-Appellant.
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-003092-23. ON APPEAL FROM JUDGMENT AND ORDERS ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION-CRIMINAL PART, ESSEX COUNTY (19-05-01401-I). CRIMINAL ACTION. SAT BELOW: MICHAEL L. RAVIN, J.S.C. DEFENDANT IS CONFINED. SUBMITTED APRIL 14, 2025

Dear Honorable Judges:

Please accept Jovanny Crespo's reply letter brief [1] .

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[1] On the brief: Anthony Pope (#016201986, apope@apopefirm.com); Robert Carter Pierce (#030401994, robertcpierce@optonline.net).

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REPLY TO COUNTERSTATEMENT OF PROCEDURAL HISTORY

Mr. Crespo does not dispute the history set forth at Pb1-Pb5.

REPLY TO COUNTERSTATEMENT OF FACTS

What Officer Crespo knew at the time of his first encounter with the eluding fugitives was critical and glossed over by the State. Officer Sanchez observed the driver with a handgun under his leg and radioed in, "I got a 6-4-6 (suspect with a firearm in a motor vehicle)." (Db8-Db9) Officer Crespo and his partner heard the dispatch and are now in pursuit of the Chrysler. When Officer Crespo approached the passenger side door of the Chrysler, he observed the passenger pointing a handgun at him. At that moment, Officer Crespo reasonably believes that both the driver, as confirmed by Sanchez's radio transmission, and the passenger are armed with handguns. (Db10)

At Pb 7, the State notes that Griffon and Dixon were compliant to Officer's Sanchez's order to "show me your hands" and simply drove off when Sanchez reached into the vehicle to open the door. The State further notes that "Detective Christopher Moss and his partner Officer Richard Maceira drive up in an unmarked Mercedes Benz to assist Sanchez, but the Chrysler pulls away." The State is suggesting that upon the arrival of Moss and Maceira the Chrysler drove off. Sanchez's BWC reveals otherwise and speaks for itself. Moss exited his motor vehicle and was attempting to open the driver's door, which was

locked, while Sanchez was pointing her handgun at Griffin's head, then the Chrysler violently sped away with Moss's hand on the door. (Db8-Db9)

At Pb12, the State notes that the subject vehicle's windows were tinted, and that Officer Crespo did not see the driver (Gregory Griffin) with a gun. However, Officer Crespo had knowledge the driver had a gun because he had just heard Sanchez's 6-4-6 radio transmission. Then, during his first approach to the Chrysler Officer Crespo saw the passenger (Andrew Dixon) with a gun. (Pb7 as compared to Db9-Db11). The point is that both vehicle occupants were defiantly resisting law enforcement and Officer Crespo had a reasonable belief that both men were armed with a handgun behind the cover of window tinting.

The video-footage review at Pb12-Pb16 is the State's collected, after-the-fact reconstruction of events unfolding before Officer Crespo in a matter of seconds in real time.

The State admits that Mr. Dixon was handcuffed and, in an ambulance, en route to the hospital (see Pb16) before he made the statement about being shot. As Dixon had more than sufficient time to fabricate, his alleged excited utterance should not have been admitted.

The prosecution's recitation of Sgt. Richard Ashkar's use-of-force testimony (Pb18-Pb22) serves only to prove why the jurors should have received some instruction or argument regarding negligence as an alternative to the mens

rea necessary to convict (recklessness). Teaching police recruits that "what could happen is not what matters" (whatever that means) and "[w]hat is actively being done, in the moment that I've -- the decision to use force is made, is what is taught, in that moment," is establishing a standard of care. The jury, having heard the use-of-force protocols, was given a false binary choice: either Crespo followed the policies, or he was acting with the culpable mental state.

At Pb24-Pb27, the State continues to fixate over what Officer Crespo was able to see through the tinted windows. For appellate purposes, the defense can concede that the jury had reason to find that the tinted windows made seeing what is happening inside the vehicle a little harder. However, Officer Crespo knew from Officer Sanchez that the driver was armed and then when he first approached the Chrysler, he knew that the passenger was armed with a handgun because he observed the passenger point a handgun at him. Officer Crespo had good reason to conclude that both men were armed with handguns and defying law enforcement efforts to effect a lawful arrest. There is no question that Crespo had affirmative knowledge that both men were armed with handguns. (Db8-Db11)

The defense will also concede that, as pointed out at Pb27-Pb30, the cross-examination of Mr. Crespo established that his actions on January 28, 2019, were in several respects inconsistent with what he had been trained to do. It was

improper to draw these comparisons unless the trial court was going to allow the defense to point out the difference between negligent deviations from the use-of-force policies and reckless deviations.

REPLY TO LEGAL ARGUMENT

I. REPLYING TO POINT I, JUROR NO. 4 LIED IN ORDER TO GET ON THE JURY AND ADVANCE AN AGENDA ABOUT RACE AND ETHNICITY; THE FAILURE TO REMOVE HIM DENIED MR. CRESPO A FAIR TRIAL.

At Pb30-Pb32, the State correctly notes that a prospective juror's pre-trial receipt of information regarding this case would not per-se bar their service. The defense agreed, based on the assumption that each juror would tell the truth about receiving the information. Juror No. 4 kept information to himself that he watched a program on the shooting and saw the videos, the same videos presented by the State in their case-in-chief. He later told other jurors that he wanted to be selected as a juror because he believed Mr. Crespo is Hispanic.

At Pb37, the prosecution refers to Juror No. 4 as being "connected" to Mr. Crespo. The so-called connection was Juror No. 4's assumptions about Crespo's race. And No. 4 formed that assumption before the trial, then lied about what he knew to get selected as a juror on Mr. Crespo's case.

At Pb38-Pb39, the State points out that the trial court instructed the jurors and that the judge expressed no reason to believe that the jurors would not follow

instructions. It is unreasonable for the judge to make such an assumption about Juror No. 4, who lied to get selected as a juror.

At Pb39-Pb42, the prosecution questions whether the information Juror No. 4 possessed outside of the evidence presented influenced himself or other jurors. There is a presumption that racism had an impact. State v. Loftin, 191 N.J. 172, 192-94 (2007). And, Juror No. 4 having lied to get on the jury and advance an agenda, his after-the-fact promise to be impartial is simply insufficient.

II. REPLY REGARDING DIXON'S CONVICTION.

At Pb47, the State contends that, for purposes of State v. Aguiar, 322 N.J. Super. 175, 178 (App. Div. 1999), Mr. Dixon's 2003 conviction for aggravated assault was too remote to be admissible for self-defense/use-of-force purposes. Mr. Crespo argued that Dixon's more recent convictions 'bridge the remoteness gap,' as occurred in State v. Harris, 209 N.J. 431 (2012), in the context of N.J.R.E. 609 impeachment. See also State v. Higgs, 253 N.J. 333 (2023).

At Pb48 n.8, the State argues that N.J.R.E. 609 case law is inapplicable since Mr. Dixon was not being impeached. This argument is repeated at Pb50. Mr. Crespo was not seeking to impeach Dixon. Mr. Crespo was merely arguing that, just as subsequent convictions can bridge the remoteness gap for purposes

of N.J.R.E. 609 (in Harris and Higgs), subsequent convictions can bridge the remoteness gap for purposes of Aguiar.

At Pb48, the State insists that Mr. Dixon's 2003 aggravated assault conviction would 'only' be relevant to the first encounter when he pointed a gun at Mr. Crespo. The State is contradicting its earlier argument that, after the first encounter, the tinted windows made it impossible to see what Dixon and Mr. Griffin were doing inside the vehicle. If Crespo could not see, then Dixon's aggravated assault conviction was certainly germane in determining the danger posed to Mr. Crespo in each of the encounters.

The State then argues that, because Mr. Dixon did not injure Mr. Crespo during the first encounter, Dixon's character is irrelevant. See Db49. Pointing a handgun at a law enforcement officer is certainly an act of aggression. It is certainly relevant to the issue of whether Dixon pointed a gun at Mr. Crespo or otherwise acted aggressively in the subsequent encounters.

III. REPLY TO THE STATE'S ARGUMENTS REGARDING NEGLIGENCE.

At Pb53 and Pb56, the State questions Mr. Crespo's right to a jury instruction on negligence because the charges did not include that mental state. This was a unique situation where the prosecution was allowed to prove recklessness by contrasting the defendant's conduct with the use-of-force guidelines. The question then became whether it is possible to deviate from a

standard of care negligently – i.e., with something less than a reckless mental state. The trial court erroneously refused to charge negligence or permit the defense to explain the distinction between recklessness and a lesser mens rea.

At Pb57-Pb58, the State asserts that Mr. Crespo was consciously aware of the risks of shooting someone, and that he therefore was guilty of purposeful, knowing or reckless conduct unless his actions were justified. This reasoning is circular. The prosecution sought to prove that Crespo's actions were not justified, by comparing what he did with what the use-of-force guidelines say he should have done. In the final analysis, Crespo was tried and convicted for failing to abide by a standard of care applicable to police officers – and the jurors were never given a chance to consider whether Crespo's failure represented something less than recklessness.

The prosecution insists that Sgt. Ashkar was not called to the witness stand as an expert. See Pb58. Ashkar testified regarding the use-of-force guidelines, and he testified that police officers like Jovanny Crespo were taught those standards in their training. The prosecutor contrasted what Mr. Crespo did with what Ashkar said a police officer is supposed to do. It is irrelevant whether someone referred to Ashkar an expert, the problem remains that his testimony was used to establish a standard which Mr. Crespo did not 'measure up' to. The defense submits that, when the State of New Jersey uses standard use-of-force

guidelines to prosecute a police officer for a crime requiring reckless conduct, the State is inviting a comparison between negligence and recklessness and the officer should be allowed to explore that distinction before the jury.

At Pb60, the State deems State v. Atwater, 400 N.J. Super. 319 (App. Div. 2008), inapplicable. There, the jurors, having heard testimony that the victims' deaths were accidental, expressed confusion over the concept of reckless. Id. at 328-32. In the present case, the prosecution presented evidence that Mr. Crespo's actions were inconsistent with standards of care set forth in Attorney General and Municipal Use of Force Guidelines. If the jury had the opportunity to distinguish reckless inconsistency from some lesser degree of inconsistency, they certainly would have requested and received additional instruction as occurred in Atwater.

The prosecution concludes that any failure to instruct or permit argument on negligence was harmless, because there was no evidence of negligence. See Pb61. If accepted, this reasoning would mean that police officers who violate the use-of-force guidelines are necessarily reckless as there is no such thing as deviating from the standards in a negligent or even grossly negligent manner. This Court should reject the State's rationale and hold that, if the prosecution is permitted to introduce policy guidelines as proof of a police officer's guilt of a crime, the officer must be allowed to point out how his/her

negligent failure to comply with the training standards is different from having the reckless mens rea necessary for a conviction.

IV. REPLY TO STATE'S ARGUMENTS REGARDING THE SECOND CLOSING ARGUMENT.

The defense will not respond at length to what is set forth at Pb61-Pb67, as the State is simply gainsaying what was argued at Db43-Db48. Mr. Crespo would add that use-of-force implicates N.J.S.A. 2C:3-7, which involves the reasonableness of the defendant's belief. In other words, even if negligence was never properly before the jury up to that point, it became an issue when the trial court changed its mind and reopened argument.

V. REPLY REGARDING PROSECUTOR'S ALLUSION TO HUNTING.

Replying to Pb70-Pb71, the defense remains extremely troubled by the repeated summation remarks that Mr. Crespo was 'hunting' Mr. Dixon and Mr. Griffin. There was never an allegation that Crespo planned this tragedy. Indeed, he was convicted because he made split-second decisions – involving an eluding motorist, hiding behind tinted windows, whom Officer Sanchez had just observed carrying a gun – that were at variance with what ought to have been done according to written guidelines. Calling a Newark police officer the 'hunter' of vehicle occupants was pouring gasoline on an already inflamed jury – as the controversy over Juror No. 4 demonstrated.

VI. REPLY REGARDING MR. DIXON'S 'EXCITED' UTTERANCE.

At Pb82, the State points out that Mr. Dixon's utterance ("Why the fuck did you shoot me?") was "within minutes" of the shooting. The amount of time is not the issue. What matters is whether the declarant had time to reflect and fabricate. The State admits that, after the shooting, Dixon was arrested, and handcuffed, and placed in an ambulance. Dixon had plenty of time to realize his legal predicament and take revenge against Mr. Crespo via the statement to the EMT.

As for the State's argument regarding N.J.R.E. 806 (see Pb83), the prosecution opened the door to Dixon's impeachment by introducing his hearsay declaration. It was plain error not to admit Dixon's numerous criminal convictions and/or evidence of his drug use.

VII. REPLY TO THE STATE'S ARGUMENTS REGARDING SENTENCING.

There is no evidence that Mr. Crespo "methodically" (Pb86) killed Mr. Griffin. This is similar to the 'hunter' smear during summations.

At Pb86, the State continues to urge that, because part of Mr. Crespo's defense involved justification, aggravating factor #3 ("The risk that the defendant will commit another offense") applies. That is an example of what this Court referred to as the "trial tax." See State v. Morgan, 393 N.J. Super. 411, 423-24 (App. Div. 2007) ("Penalizing a defendant for asserting his

constitutional right to a trial is clearly inappropriate and we would condemn any court's exercise of discretion in a manner that would achieve such an unjust result."). Mr. Crespo was precluded from arguing negligence. The defense of justification was colorable. If asserting a defense is now an aggravating factor under N.J.S.A. 2C:44-1(a)(3), Mr. Crespo should not be penalized for relying on his trial counsel's expert advice and zealous advocacy.

At Pb87, the prosecution disputes the applicability of mitigating factors 3 ("The defendant acted under a strong provocation") and 4 ("There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"). It is undisputed that Officer Sanchez observed Griffin with a gun between his legs just before he began eluding in an automobile with tinted windows. It is undisputed that Mr. Crespo had this knowledge and observed Dixon with a gun. Denying the existence of extenuating circumstance for purposes of sentencing is untenable.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original merits brief, Jovanny Crespo is entitled to the reversal of his convictions or, alternatively, re-sentencing.

Respectfully Submitted,

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