

APPELLATE DIVISION  
DOCKET NO. A- 3497-22  
INDICTMENT NO. 18-12-03010-I

STATE OF NEW JERSEY, : CRIMINAL ACTION  
  
Plaintiff-Respondent, : On Appeal from a Judgment of  
v. : Conviction of the Superior Court  
TIMOTHY D. SIMON, : of New Jersey, Law Division, Camden  
 : County.  
Defendant-Appellant. : Sat Below:  
 : Hon. Sherri L. Schweitzer, J.S.C.,  
 : Hon. Thomas T. Booth, Jr., J.S.C., and  
 : a Jury

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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT**

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**TABLE OF ABBREVIATIONS**

Da: Defendant-appellant's appendix

Psr: Pre-sentence report

1T: 9/8/17 hearing

2T: 10/6/17 hearing

3T: 10/12/17 hearing

4T: 12/5/17 hearing

5T: 12/15/17 hearing

6T: 2/6/18 hearing

7T: 2/27/18 hearing vol. 1

8T: 2/27/18 hearing vol. 2

9T: 3/8/18 hearing

10T: 4/16/18 hearing

11T: 4/17/18 hearing

12T: 8/13/18 hearing

13T: 9/21/21 hearing

14T: 9/14/22 hearing

15T: 1/4/23 trial

16T: 1/5/23 trial

17T: 1/10/23 trial vol. 1

18T: 1/10/23 trial vol. 2

19T: 1/11/23 trial vol. 1

20T: 1/11/23 trial vol. 2

21T: 1/12/23 trial vol. 1

22T: 1/12/23 trial vol. 2

23T: 1/18/23 trial vol. 1

24T: 1/18/23 trial vol. 2

25T: 1/24/23 trial

26T: 1/25/23 trial vol. 1

27T: 1/25/23 trial vol. 2

28T: 1/26/23 trial

29T: 1/31/23 trial

30T: 2/1/23 trial

31T: 2/2/23 trial

32T: 2/7/23 trial

33T: 2/8/23 trial

34T: 2/9/23 trial

35T: 2/14/23 trial

**TABLE OF ABBREVIATIONS (CONT'D)**

36T: 2/15/23 trial

33T: 5/19/23 sentencing

**PRELIMINARY STATEMENT**

The State charged Timothy D. Simon with the murder of his girlfriend Lawanda Strickland nearly five years after he called 911 to report that he had found her body in her apartment. From the outset of the investigation, Simon cooperated with police, detailing his relationship with Strickland and his whereabouts over the prior days, which were later verified by his cell phone records. Police had reason to suspect individuals other than Simon were involved in Strickland's death because three men admitted to entering Strickland's apartment before Simon that morning and seeing Strickland's body slumped unresponsive on the couch, yet left without contacting police.

Five years after her death, samples taken from Strickland's fingernails and vagina were tested against buccal swabs provided by Simon and the three men who were in Strickland's apartment before Simon that morning. Unsurprisingly, Simon could not be excluded as a contributor to the samples: by his own account to police the morning he found her body, the two had sex the night before Simon found her body. Although no other evidence had emerged in the intervening years, the State indicted Simon for Strickland's murder based primarily on the DNA evidence and the suspicions of Strickland's friends and family that Simon was involved in her death.

Pervasive errors violated Simon's right to a fair trial, requiring the reversal of his conviction for murder. The court violated Simon's constitutional right to confrontation by erroneously allowing the State to use a prior testimonial statement by Strickland under a theory of forfeiture by wrongdoing, even though the State failed to show Simon had killed Strickland for the purpose of preventing her from testifying against him. The court also violated Simon's right to confrontation by permitting the State to call an expert witness to testify to forensic analysis performed by a non-testifying expert who handled critical DNA evidence taken from Strickland's person.

In addition to these errors, the court allowed the State to strengthen its threadbare case by parading Strickland's family and friends before the jury to testify to Simon's bad behavior during his relationship with Strickland. Yet the court blocked Simon from presenting evidence rebutting the State's claim he acted aggressively during one of these incidents and showing Strickland had a motive to fabricate allegations against him. The pervasive testimony about Simon's prior bad acts transformed the trial into a referendum on Simon's bad character rather than an adjudication of whether the State could prove his guilt for Strickland's murder.

Given the weaknesses of the State's circumstantial case and the serious errors, Simon was deprived of a fair trial and his conviction must be reversed.

## PROCEDURAL HISTORY

On December 20, 2018, a grand jury returned Camden County Ind. No. 18-12-03010-I, charging defendant-appellant Timothy D. Simon with murder, N.J.S.A. 2C:11-3a(1)/(2), in connection with the death of Lawanda Strickland on July 10, 2010. (Da 1-2)<sup>1</sup>

Prior to trial, the State moved to admit N.J.R.E. 404(b) evidence about numerous prior incidents from Simon's relationship with Strickland that it contended showed Simon's "motive" to kill Strickland. On May 3, 2018, the Honorable Sherri L. Schweitzer, J.S.C., granted the State's motion to introduce most of the evidence, including a prior testimonial statement made by Strickland to Investigator Gregory Berry, which the court found to be admissible under the hearsay exception of forfeiture by wrongdoing, N.J.R.E. 804(b)(9). (Da 3-6) The court ruled, however, that Simon could not "elicit testimony" that Strickland was criminally charged for one of the incidents about which the State sought to present testimony. (Da 6)

The Honorable Thomas T. Booth, Jr., J.S.C., presided over a jury trial beginning on January 5, 2023. On February 15, the jury convicted Simon of murder. (Da 7)

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<sup>1</sup> This indictment superseded Ind. No. 16-06-1666, returned in June 2016.

On May 19, 2023, Judge Booth sentenced Simon to sixty years of imprisonment with an 85 percent period of parole ineligibility pursuant to the No Early Release Act. (37T; Da 11-17) This appeal followed. (Da 18-20)

### **STATEMENT OF FACTS**

On July 10, 2010, Simon called 911 to report that he had discovered the body of his girlfriend Lawanda Strickland in her apartment at 928 Jackson Street in the Sheridan Apartment Complex in Camden. (25T:69-19 to 70-8) EMS responders arrived around 8:55 am and determined Strickland was “cold and in rigor mortis” without a detectable pulse. (17T:176-16 to 178-5)

Simon spoke to police who arrived at the apartment, telling them that Strickland did not have any known medical issues and that the apartment showed no signs of forced entry when he arrived. (25T:70-1 to 8) Simon told Lieutenant Paul Audino that he had been with Strickland in the apartment the night before and that the two had sex before getting into an argument. (25T:75-1 to 9) Following the argument, Simon left the apartment to go to a friend’s place in Paulsboro. (25T:75-1 to 9) Simon showed Audino his phone, which showed that he had placed calls to Strickland during the night after leaving. (25T:75-10 to 15) Simon agreed to go to the Prosecutor’s Office to make a recorded statement. (25T:75-16 to 24)

Other officers at the scene learned that three men had been in Strickland's apartment before Simon returned that morning in connection with a carpet cleaning, but had not called police to report seeing Strickland's body on the couch. (19T:26-11 to 27-21) Raymond Brown, a maintenance man for the Sheridan Apartments, had unlocked the back door of Strickland's apartment and walked through to let the carpet cleaners, Tyrone Joiner and his son Tyrone Goldsboro, in through the front door around 8:20 am. (19T:82-17 to 84-10; 29T:11-20 to 14-25) Brown claimed that he saw "a quilt . . . on the couch," but did not recognize that a person was underneath. (29T:14-15 to 15-4) After he finished cleaning, Joiner called Brown and told him that somebody was on the couch and was "not responding," even though Joiner and Goldsboro were making "an awful lot of noise" and had "called out to" the person. (19T:17-6 to 18) Notwithstanding this report, Brown did not check on the person or call the police when he locked up Strickland's apartment. (19T:43-16 to 44-2)

Police directed Barbara Griffin, a neighbor and friend of Strickland's who had arranged the cleaning, to call Joiner and Goldsboro to return to the building and speak with police. (19T:27-15 to 28-4; 82-11 to 25) Joiner and Goldsboro acknowledged that they had seen "a young lady laying on the couch with a blanket over her with a little bottle in her hand," but said they did not

approach or speak to her while cleaning the carpets in the room because they believed she was asleep. (19T:85-20 to 87-4)

At the police station, Audino had Simon sign a Miranda waiver form, although Audino testified that Simon was not a suspect at the time. (25T:81-7 to 82-13) Retracing his previous day at the request of police, Simon said that, on morning of July 9, he woke up on the couch in Strickland's apartment because Strickland was sleeping with her two daughters in her bedroom. (25T:111-17 to 113-6) Simon reported to his union hall to see if work was available, before leaving around 8:30 am to return to Strickland's apartment. (25T:114-11 to 116-22) Strickland returned from work around 4:30 pm before bringing her daughters to stay overnight with Shontay Parker, who had other children with the father of Strickland's daughters. (25T:119-8 to 120-21)

Simon said that he and Strickland had recently been arguing about his drinking and that she had thrown him out of the apartment for a few days sometime around Father's Day. (25T:117-12 to 119-2) Since then, Simon had been trying to avoid drinking, but, on July 9, became upset that Strickland was drinking beer in his presence and "snuck out" to buy himself gin at Liquor Bank. (25T:117-12 to 21; 125-10 to 129-1) Later that night, after they argued about drinking, Simon and Strickland began to have sex in Strickland's bedroom before moving downstairs. (25T:128-23 to 130-15) Afterwards,

Simon and Strickland again began to argue about Strickland's sister Lakia Murphy, who Simon had allowed to stay in his apartment for a period of time before kicking her out due to Murphy leaving the apartment in poor condition. (25T:132-12 to 133-25)

Because of the argument, Simon left for Paulsboro, where he parked in the driveway of a friend and rested in his car. (25T:136-5 to 138-5) Simon explained he drove there because he felt more comfortable sleeping in his car there than in Camden, but he did not go into the friend's house because it was so late at night. (25T:137-6 to 138-3) After resting for a period of time, Simon called Strickland around 3:54 am, but she did not answer. (25T:138-4 to 20) Simon concluded Strickland had passed out from drinking and drove back to Camden, stopping at a different friend's house. (25T:139-14 to 140-21)

Around 7 am, Simon went to the Off Broadway Lounge in Camden for breakfast. (25T:139-20 to 141-29) Simon called Strickland to see if she wanted breakfast, but she did not answer. (25T:141-16 to 25) Simon ordered food and had "four or five beers" before driving back to Strickland's apartment, where he found her body and called police. (25T:142-2 to 12) Simon denied ever being physically violent toward Strickland during their relationship. (25T:144-6 to 146-9)

Historical cell site analysis of Simon's phone corroborated Simon's account that he was present in the vicinity of Strickland's home on the evening of July 9, 2010 until after midnight. His cell phone was then used in the area of Paulsboro around 3:47 am and near the Off Broadway Lounge in Camden around 7:43 am on July 10. (26T:182-12 to 186-8)

Dr. Edward Chmara performed an autopsy of Strickland at Underwood Hospital in Woodbury because Dr. Gerald Feigin, the Camden County medical examiner at the time, was on vacation. (21T:16-15 to 17-8) Feigin reviewed Chmara's report and, on August 13, 2018 and July 2, 2019, wrote brief letters adopting its findings. (31T:16-19 to 17-20; 88-8 to 21) After reviewing autopsy photographs, Feigin noted abrasions on both of Strickland's cheeks, hemorrhages in the lining of the eyes, and some bruising on her upper extremities. (31T:27-8 to 28-1) After reviewing Chmara's report and autopsy photographs, Feigin ruled Strickland's death was a homicide caused by "blunt neck trauma." (31T:85-8 to 86-9)

Annette Estilow of the New Jersey State Police Office of Forensic Scientists wrote a laboratory report in connection with her review of samples taken from Strickland's person. (23T:60-14 to 24; 73-8 to 11) Estilow, who retired prior to trial, did not testify; instead, the State called Laura Tramontin to testify to the conclusions contained in Estilow's report. (23T:73-3 to 7)

Tramontin did an “administrative review” of Estilow’s report to “make sure . . . the names were right,” “item numbers match[ed] the evidence receipt” and a “technical review” where she “learned the type of analysis that was done on each item.” (23T:77-20 to 78-7) Although Tramontin initialed the report, the date of her review was not recorded. (23T:76-4 to 17) Tramontin testified that she did not do any of the analysis herself but was “relying on what [Estilow] did.” (23T:43-5 to 16)

According to Estilow’s report, the lab received a number of items of evidence taken from Strickland. (23T:62-1 to 64-9) A stain in Strickland’s underwear tested presumptively positive for seminal material. (23T:66-9 to 18) Estilow removed the stain and “that sample was submitted to DNA for further testing.” (23T:66-13 to 18) Estilow performed a test of Strickland’s fingernail clippings for blood, which was presumptively positive. (23T:66-19 to 67-9) Estilow tested swabs from Strickland’s vagina, which were presumptively positive for spermatozoa. (23T:67-19 to 68-13)

Estilow submitted all the samples for analysis by the DNA laboratory, where forensic scientist Christopher Szymkowiak analyzed the items to develop DNA profiles. (23T:68-9 to 13; 129-4 to 130-11) Strickland was identified as the source of the major DNA profile in the sperm cell fraction of the vaginal swab, with a second profile detected. (23T:129-22 to 130-15) Male

DNA was also identified in Strickland's fingernail clippings. (23T:129-22 to 131-3)

No charges were filed for five years. In 2015, Detective Peter Longo, who worked on the "cold case squad" at the Camden County Prosecutor's Office, revisited Strickland's case following a period of high turnover in the police force due to the disbanding of the Camden City Police Department. (28T:69-17 to 76-8) Longo learned that Simon had moved to Houston, Texas, and called Sergeant Reginald Olive of the Houston Police Department to request that he locate Simon and take a buccal swab. (25T:14-13 to 15-17; 28T:76-1 to 19) On August 12, 2015, after being arrested for a traffic violation, Simon agreed to provide Olive with a buccal swab. (25T:16-7 to 18-17)

On October 16, 2015, Szymkowiak generated a report using the reference DNA sample taken from Simon, concluding Simon's Y-STR DNA profile "matche[d]" the Y-STR DNA profile from Strickland's fingernail clippings and the sperm cell fraction of the vaginal swab. (23T:150-3 to 152-23) Because Y-STR DNA is paternally inherited, Szymkowiak could not exclude all of Simon's paternal relatives. (23T:154-13 to 23) More information was available from the sample on Strickland's right fingernail than the left: while the profile from the left could "occur no more frequently than 1 in 7 of the African-American population," the sample from the right fingernail is

“expected to occur no more frequently than 1 in 2.01 thousand of the African-American population.” (23T:155-2 to 8; 156-13 to 19) Szymkowiak did a “statistical analysis of the autosomal and the Y-STR and then [] combined those frequencies together,” concluding “[t]he combined statistical probability of occurrence from the DNA profile from sperm cell fraction in unrelated individuals is approximately . . . 1 in 94.7 million of the African-American population.” (23T:137-16 to 158-3)

Szymkowiak also obtained DNA samples from Joiner, Goldsboro, and Brown. Analysis excluded Goldsboro, Joiner, and Brown as possible contributors to the Y-STR DNA profiles in Strickland’s left fingernail and vagina, but could not exclude them as contributors to the sample taken from Strickland’s right fingernail. (23T:171-25 to 179-6)

The State’s case included extensive testimony from Strickland’s relatives and friends about specific previous arguments throughout Simon and Strickland’s relationship. Simon moved in next door to Strickland around 2008 and the two became involved in a romantic relationship. (16T:133-4 to 10)

Strickland’s sister Pamela testified regarding an incident in early 2010 at the Off Broadway Lounge where Tim struck a man who had bought Strickland a drink. (16T:65-4 to 66-9; 71-11 to 17) In response, the man “beat[ Simon] down.” (16T:66-20 to 67-2) Pamela drove Strickland and Simon home after the

fight and Simon, who sat behind Strickland, was “flipping out” and “hitting the seat,” but “not hitting [Strickland].” (16T:67-1 to 6) Pamela pulled over and told Simon to walk home, but Strickland asked her to drive them both home. (16T:67-7 to 16) When Pamela dropped them off, Simon became upset again, but Strickland told Pamela, “I got this,” so Pamela left her. (16T:69-3 to 9)

Shamia Martin, a neighbor and friend of Strickland’s, testified that she once saw a physical altercation between Strickland and Simon. (16T:152-11 to 153-18; 160-14 to 21) Martin and Strickland were listening to music in Strickland’s living room when Simon knocked on the door, asking who was in the house with Strickland. (16T:161-15 to 162-7) According to Martin, Simon was upset to learn Martin was in the house and reached for a knife in the kitchen sink. Simon and Martin began “tussling over” the knife and both got cut before Strickland “got control of the knife” and pushed Simon out. (16T:162-14 to 22)

Although Martin appeared to place the incident in the summer of 2010 (16T:165-14 to 25), Detective John Waida of the Camden County Police Department testified about a report from the incident on August 28, 2009. (32T:50-22 to 58-15) Strickland told Waida that she let Simon into her apartment, at which point she and Simon “exchanged words and she grabbed a kitchen knife and Timothy [Simon] grabbed a knife and they tussled over it

and her left thumb got cut.” (32T:58-7 to 15) Martin testified that, sometime after the incident, Simon confronted her on the street, telling her that Strickland “don’t need no friends” other than Simon and “you’ll learn,” which Martin took as a threat. (16T:163-11 to 164-10) Martin also recalled that she had called Strickland’s house and received a returning call from Simon who told her to stop calling Strickland. (16T:165-5 to 25)

Officer Tracy Hall testified she went to 928 Jackson Street at around 4:40 am on March 27, 2010 in response to a call from Strickland. (17T:27-7 to 25) Strickland’s voice was “kind of hoarse” and “[s]he had marks around her neck.” (17T:28-1 to 4) Strickland told Hall her boyfriend who lived next door had come to her apartment wanting money and had choked her before taking her pocketbook. (17T:28-5 to 9; 38-25 to 39-7)

On March 31, 2010, Investigator Gregory Berry of the Camden County Prosecutor’s Office testified that he brought Strickland in for a taped statement relating to the incident. (17T:45-1 to 11) The statement was played for the jury, including this exchange:

MS. STRICKLAND: Earlier that day on Friday morning of the incident we had an argument -- time. And I guess like Timothy was holding it in the whole day. So I got home from work. Timothy went out. I left work early Friday and Timothy went out like 2 o’clock to Off-Broadway drinking. Timothy comes to my house 1 o’clock in the morning falls asleep, wakes up. It was around, you know, 3 in the morning and started arguing,

you're messing with the maintenance men down here. And I'm like telling him go home, go sleep it off. But he just kept coming at me. I tried to get up to the steps, he wouldn't let me up the steps. So -- to call the cops. So he kept telling me -- that's why everybody's speaking to you out here because you're messing with everybody out here. And -- push him out of my way. He took he grabbed me around my neck. And I fell down to --

DET. BERRY: You fell on the steps?

MS. STRICKLAND: I fell to the -- I fell -- I was on the steps, when I was coming -- I was at the -- towards -- up the steps. So when he went to go put his hands around my throat I had fell down to the floor. I managed to make it upstairs. I called the cops, you know, told them what was going on.

DET. BERRY: Did he leave any markings --

MS. STRICKLAND: I had two. I had a scratch back here and a scratch up here.

(17T:52-1 to 53-3)

Strickland called Berry later that day to ask him to explain what would happen next in the process. (17T:55-20 to 56-4) Strickland told Berry that Simon had called her to ask what was happening with the case. (17T:58-16 to 19) On May 12, 2010, the day of the scheduled pre-indictment conference, Strickland called Berry repeatedly and hung up. (17T:59-25 to 60-12) Strickland called again and told Berry that the prior calls had been from Simon, who was sitting next to her, but that she was okay. (17T:61-11 to 24)

Strickland later called back again and told Berry that Simon was sitting in the room and would not leave, but insisted she was not in danger and did not need Berry to contact the police. (17T:63-22 to 64-13) Strickland explained Simon was “tripping because he thought the case would get dismissed.” (17T:64-8 to 11)

Tamala Kearney, who worked with Strickland at South Jersey Rehab Center, testified that Strickland was scheduled to work on July 10, 2010. (30T:139-9 to 142-16) Kearney became worried when Strickland, who was typically on time, was a half hour late to work that morning. (30T:141-10 to 143-15) Kearney asked another nurse to call Strickland, but the call went to voicemail. (30T:143-12 to 22) Sometime after that call, a man called and asked if Strickland was there. (30T:143-23 to 144-2) Kearney recognized the man’s voice from prior calls during Strickland’s shifts when he would call and ask Kearney to put Strickland on the phone in a manner that was “a little rude.” (30T:144-5 to 145-4) Kearney recalled the man sounded “different” this time than on prior calls and asked if Strickland was at work rather than requesting to speak to her as he usually did. (30T:145-5 to 19)

In the summer of 2010, Strickland asked Greta Culbreath, the property manager of the Sheridan Apartments, to change her locks because Simon had been coming into her apartment. (16T:117-9 to 17; 133-23 to 137-23)

Culbreath never saw Simon enter Strickland's apartment after the locks were changed. (16T:138-17 to 20) Keys to all the apartments were kept in a key box in the office, but there was no universal key for all apartments. (16T: 139-10 to 22)

Brown, who worked the Sheridan Apartments and let Goldsboro and Joiner into Strickland's apartment the morning her body was found, testified that Simon had "questioned" his relationship with Strickland, but Brown assured Simon they were only friends. (29T:31-12 to 32-5) Although she acknowledged she did not remember many details due to the passage of time, Strickland's neighbor Carol Cotton testified that she remembered that Simon had once told her "to watch my back and th[at] [Strickland]'s not the person that I think she is." (29T:146-16 to 149-12)

Alexis Williams, Strickland's niece, testified that she babysat for Strickland in the summer of 2010. (16T:179-15 to 180-15) Williams testified that her late mother, Lokia Murphy, "did not want me to babysit if certain people were around," and had her call Strickland's house on July 4, 2010, to "see if [Simon] was there." (16T:179-17 to 21; 181-13 to 25) When Simon answered the phone, identified himself, and asked who was calling, Williams responded, "That's all I need to know," and hung up. (16T:182-1 to 10)

Williams received several calls afterward and voicemails where she heard a person breathing. (16T:182-11 to 24; to 187-3 to 18)

Strickland's sister Melanie Gray testified that she received a call from Simon on Strickland's phone in May 2010. (20T:205-8 to 208-15) Simon said he regretted not meeting Gray when she had visited New Jersey over Mother's Day because he had gotten "into something" with Strickland at the time. (20T:208-17 to 23) Simon explained that he had really wanted to meet Gray because Strickland spoke highly of her. (20T:208-17 to 23)

Pamela Strickland provided the prosecutor's office with Strickland's cell phone. (16T:88-1 to 11) Christopher Robinson of the High Tech Crimes Unit extracted text messages from Simon's phone. On July 1, Simon wrote to Strickland, "I have to sleep in my car until I get another place, but it's okay I'll be back to work soon. Wish I never met your ass. Ask the MF that you fucking for the money." (30T:109-2 to 110-24) Strickland replied asking Simon to sit and talk, to which he replied, "I need that. What do you want me to do?" (30T:110-22 to 112-7) On July 9, 2010, Strickland texted Simon, "Outside." (30T:112-14 to 113-2) No texts messages indicated that Simon was threatening Strickland with violence or pressuring her not to testify against him in connection with her March 2010 report to police.

**LEGAL ARGUMENT**

**POINT I**

**THE COURT VIOLATED SIMON’S RIGHT TO CONFRONTATION BY ALLOWING THE STATE TO ADMIT STRICKLAND’S PRIOR TESTIMONIAL STATEMENT TO POLICE WHERE THE STATE DID NOT ESTABLISH AND THE TRIAL COURT DID NOT FIND THAT SIMON ACTED WITH THE PURPOSE OF PREVENTING STRICKLAND FROM TESTIFYING AGAINST HIM. (11T:8-7 to 13-16; Da 6)**

The trial court violated Simon’s constitutional right to confrontation by allowing the State to present a testimonial out-of-court statement by Strickland in which she told police that Simon had grabbed her around her neck during an argument in March 2010. (17T:52-1 to 53-3) The court found the statement was admissible under N.J.R.E. 804(b)(9)’s forfeiture by wrongdoing exception because Simon “caused the unavailability of the victim” by committing the murder for which he was on trial. (11T:12-3 to 18) Critically, the State did not establish, and the trial court did not find, that Simon acted with the specific purpose of making Strickland unavailable to testify against him. Without this required finding, the admission of her unconfrosted statement – which was central to the State’s circumstantial case – was not constitutionally

permissible. Giles v. California, 554 U.S. 353, 367 (2008).<sup>2</sup> The violation of Simon’s right to confrontation compels the reversal of his conviction. U.S. Const., amends. VI and XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” Maryland v. Craig, 497 U.S. 836, 845 (1990). The Confrontation Clause bars the admission of “[t]estimonial statements of witnesses absent from trial” except “where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” State v. Dehart, 430 N.J. Super. 108, 114 (App. Div. 2013) (citing Crawford v. Washington, 541 U.S. 36, 59 (2004)). “The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge.” Id. at 596.

There is no question that Strickland’s March 2010 statement was testimonial hearsay. Investigator Gregory Berry of the Camden County

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<sup>2</sup> As will be discussed, infra Point III, the introduction of extensive prejudicial evidence about this incident and others also violated N.J.R.E. 404(b) and deprived Simon of his right to a fair trial.

Prosecutor's Office testified that he brought Strickland in to give the statement in connection with a criminal investigation. (17T:45-1 to 11) "A statement about a relevant past event made to a police officer conducting a criminal investigation" constitutes a testimonial statement for the purposes of the Confrontation Clause. State v. Basil, 202 N.J. 570, 592 (2010).

Even where evidentiary rules permit the introduction of hearsay, that evidence cannot be admitted at trial if it violates a defendant's constitutional right to confrontation. N.J.R.E. 804(b)(9) permits the introduction of hearsay where the declarant is "unavailable" and the statement is "offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." New Jersey codified the forfeiture by wrongdoing exception in 2011, in response to our Supreme Court's decision in State v. Byrd, 198 N.J. 319 (2009). But the Court in Byrd acknowledged that the Confrontation Clause of the Federal Constitution only allows the introduction of a witness's unfronted prior testimonial statement under this exception where the defendant "ha[d] as his intent 'the particular purpose of making the witness unavailable' to testify at trial." Id. at 340 (quoting Giles, 554 U.S. at 367).

In Giles, the United States Supreme Court held that California's forfeiture by wrongdoing exception failed to comply with the right to

confrontation under the Sixth Amendment because it did not require a finding that defendant acted with the specific intent to prevent a witness's testimony. Under California's then-existing exception, "a defendant forfeit[ed] his Sixth Amendment right to confront a witness against him when a judge determine[d] that a wrongful act by the defendant made the witness unavailable to testify at trial," regardless of his intent. Id. at 357. The Court explained that the forfeiture by wrongdoing exception did not permit the introduction of a decedent's prior testimonial statements in any "typical murder case involving accusatorial statements by the victim." Id. at 361. Instead, the rule applied more narrowly to cases where "the defendant engaged in conduct *designed* to prevent the witness from testifying." Id. at 359 (emphasis in original). Surveying how the rule was applied in common law at the time of the founding, the Court concluded that historical practice "makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." Id. at 361 (emphasis in original).

Giles involved facts that closely resemble this case. The defendant was tried for the murder of his ex-girlfriend. Id. at 356. The State introduced statements the ex-girlfriend "had made to a police officer responding to a domestic-violence report" about a month before the murder. Ibid. The Supreme

Court held that the trial court erred in admitting the ex-girlfriend's prior testimonial statement without finding that defendant had killed her for the specific purpose of preventing her from testifying against him. Id. at 377. The Court acknowledged the seriousness of domestic violence, but held this outcome was mandated by the Constitution and refused to craft "a special, improvised, Confrontation Clause for those crimes that are frequently directed against women." Id. at 376. The Court explained that the domestic violence context may be relevant to a trial court's finding of intent because "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." Id. at 377. The Court explained "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." Id. at 377. Nonetheless, the Court refused to infer such an intent on appeal where it had not been found by the trial court below. Ibid.

Likewise here, the trial court did not find Simon acted with the specific purpose of preventing Strickland from testifying against him, resting its conclusion entirely on its finding that Simon had caused Strickland's

unavailability without reaching any conclusion about his purpose in doing so. (11T:8-7 to 13-16) The trial court had no evidentiary basis to conclude Simon acted with the intent of preventing Strickland's testimony. Evidence presented by the State at the 104 hearing on the admission of the statement pointed to other potential motives. Several witnesses testified that Simon would often become violent with Strickland out of jealousy or a desire to control her actions. Strickland's sister Melanie Gray testified she noticed Simon was "jealous of anyone who came around her" and, for this reason, had warned Strickland "that mother fucker's going to kill you." (9T:15-17 to 24) Likewise, Strickland's sister Pamela Strickland testified that Simon had once become angry and started a fight with a man that bought Strickland a drink. (8T:208-6 to 209-13) Strickland's friend Samia Martin testified that Strickland had reported to her that Simon would grab her by the neck "[w]henever he thought somebody was – whenever somebody called her, she wanted to go somewhere, or if anybody waved at her or anything." (7T:143-2 to 145-17)

The State's witnesses also testified that, in the months before her death, Simon's drinking had put a strain on the relationship, causing Strickland to throw Simon out of the apartment, further angering him. Strickland's sister Lakeya Murphy testified to an April 2010 argument between Strickland and Simon over Simon "wanting money" for drinking that led to Strickland kicking

Simon out. (7T:98-18 to 99-18) Gray testified that Simon was upset Strickland had put him out of her apartment and had told Strickland, “I’m going to get you.” (9T:16-20 to 17-2) Pamela Strickland testified she had told Strickland that she feared Simon was “really going to hurt you” because she had “kicked him out.” (8T:219-7 to 220-18)

Although the State introduced evidence that Simon faced pending charges in connection with Strickland’s March 2010 statement, no witness testified that, at the time of her death, Strickland intended to testify against Simon at a future proceeding related to these charges or that Simon had threatened Strickland with violence to prevent her from doing so. See People v. Quintanilla, 45 Cal. App. 5th 1039, 1055 (2020) (holding trial court erred in admitting decedent’s statement against abusive partner where “there was no evidence that [defendant] ever made any prior threats that he would kill [decedent] if she went to the authorities or became a witness against him”). Strickland called police in May 2010 to inquire about the status of the case while Simon was present, but denied being afraid or threatened by him. (7T:56-23 to 57-22; 67-1 to 3) Instead, Strickland straightforwardly told police that she had broken up with Simon until he “gets his shit together, stop

drinking, and go to some type of – get some type of help.” (7T:56-23 to 57-22)<sup>3</sup>

Strickland’s prior statement was only admissible if the court found that Simon “ha[d] in mind the particular purpose of making [Strickland] unavailable” to testify when he killed her. Giles, 554 U.S. at 367 (citing to various authorities). The statement was not admissible if Simon acted out of jealousy, drunken rage, or anger at being thrown out of Strickland’s apartment, as the evidence presented by the State at the pre-trial hearing indicated. Because the court failed to make the necessary finding regarding Simon’s purpose and no evidence introduced at the pre-trial hearing could have supported a claim that Simon killed Strickland with the motive of preventing her testimony, the admission of the statement violated Simon’s right to confrontation. Ibid.

The erroneous admission of Strickland’s statement compels reversal because Strickland’s statement to police was critical to the State’s case, which was entirely circumstantial. The evidence showed that three men other than Simon were in Strickland’s apartment before Simon on the morning of her

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<sup>3</sup> The trial evidence also failed to establish that Simon threatened Strickland to prevent her from testifying against him. The State introduced the text message history between Strickland and Simon from the weeks prior to her death, none of which indicated Simon was pressuring Strickland to not testify against him.

death, yet did not call police despite seeing her body slumped unresponsive on the couch. Simon called 911 to report the discovery of Strickland's body and voluntarily spoke with police in detail about his actions over the two prior days. Simon readily admitted that he was present in Strickland's apartment the night before, had sex with her, and then left after the two got into an argument about his drinking. Simon's phone history corroborated his account of his whereabouts during the relevant period. Notably, although police knew that Strickland had reported being abused by Simon months before, they did not charge Simon for her murder until over five years after her death. Simon's DNA was found on Strickland's fingernails and in her vagina, however, the presence of his DNA was fully consistent with his own account that the two had been intimate the night before her death.

Strickland's prior statement therefore played a crucial role in the State's circumstantial case, as demonstrated by the State's decision to replay the statement for the jury at the very beginning of its closing argument. (34T:105-2 to 109-17) Yet Strickland's testimonial accusations against Simon were not subject to confrontation, depriving Simon of the ability to question Strickland and depriving the jury of the benefit of observing Strickland's demeanor in person and under oath. See State v. Castagna, 187 N.J. 293, 309 (2006) (explaining the "four key elements of a defendant's right of confrontation:

physical presence; the oath; cross examination; and observation of demeanor by the trier of fact”). “[A] defendant must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses.” State v. Sugar, 100 N.J. 214, 230 (1985). Because Simon was unable to confront Strickland about her March 2010 statement to police, the defense was unable to explore her potential motive to lie, including the fact that Strickland herself had been arrested in connection with a prior dispute with Simon. See infra Point IV. (7T:94-2 to 15)

The trial court admitted Strickland’s prior testimonial statement because it concluded Simon had killed Strickland, making her unavailable. (11T:12-3 to 18) But more was required for the court to dispense with Simon’s constitutional right to confront the witnesses against him. The State failed to establish that Simon acted with the purpose of preventing Strickland’s testimony. Simon’s conviction must be reversed, and this case must be remanded for a new trial. U.S. Const., amends. VI and XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10.

**POINT II**

**THE COURT VIOLATED SIMON’S RIGHT TO CONFRONTATION BY ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY THAT SUMMARIZED THE FINDINGS OF A NON-TESTIFYING ANALYST. (23T:45-2 to 48-9)**

The State presented forensic evidence at trial indicating that semen was found in Strickland’s vagina and on her underwear, and that blood was found in clippings from her fingernails. Five years later, the samples were compared to a buccal swab taken from Simon. This evidence was relied on extensively by the State to implicate Simon at trial. But the State did not call the forensic analyst who analyzed this critical evidence, instead calling only her supervisor, who was not present for the analysis, yet testified that testing was performed properly in this case. (23T:21-73 to 22-3; 58-14 to 59-21) The United States Supreme Court has made clear that such a procedure violates a defendant’s constitutional right to confront the witnesses against him. Smith v. Arizona, 602 U.S. 779, 798 (2024). Simon’s counsel promptly objected, arguing that the supervisor could not testify to the findings made by a non-testifying analyst under the Confrontation Clause, but was overruled. (23T:45-2 to 48-18) Because Simon was unable to confront the forensic analyst who handled and analyzed DNA evidence central to the State’s prosecution, Simon’s conviction

must be reversed. U.S. Const., amends. VI and XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10.

In a consistent line of cases, the United States Supreme Court has held that defendants have a right under the Confrontation Clause to confront and cross-examine forensic scientists whose lab testing the State seeks to rely on at trial. First, in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009), the Court held that “affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine” were testimonial, triggering a defendant’s right to confrontation under the Sixth Amendment to the Federal Constitution. Two years later, in Bullcoming v. New Mexico, 564 U.S. 647, 651-52 (2011), the Court held that the Confrontation Clause was not satisfied by testimony from “another analyst who was familiar with the laboratory’s testing procedures, but had neither participated in nor observed the test on [defendant’s] blood sample.”

Last year, in Smith v. Arizona, 602 U.S. 779, 798 (2024), the Court again confronted the issue, holding that a defendant’s right to confrontation also could not be satisfied in a case where “an expert witness restates an absent lab analyst’s factual assertions to support his own opinion testimony.” In the wake of Bullcoming, some state courts throughout the country, including our own Supreme Court, see State v. Michaels, 219 N.J. 1 (2014), had permitted this

kind of workaround. Our Supreme Court reasoned that “a defendant’s confrontation rights are not violated” where a forensic report is admitted at trial and the analyst who prepared the report does not testify, but their supervisor testifies and “is knowledgeable about the testing process, reviews scientific testing data produced,” draws expert conclusions from the data, and “prepares, certifies, and signs a report setting forth the results of the testing.” Id. at 6-7. Our Court therefore concluded that a supervisor could testify about “tests performed on defendant’s blood sample” by a non-testifying forensic scientist and “to opine on the drugs found in defendant’s blood and their likely impact on her at the time the blood was drawn.” Id. at 49.

In Smith, the Supreme Court expressly held such a procedure was insufficient to satisfy a defendant’s right to confrontation. The Court explained that “when an expert conveys an absent analyst’s statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth.” 602 U.S. at 783. The Court rejected the premise that the supervisor’s conclusions could be “independent” of the analysis performed by the forensic analyst because “[a]ll those opinions were predicated on the truth of [the non-testifying analyst’s] factual statements.” Id. at 798. The supervisor “could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the

truth of what” the non-testifying analyst “had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results.” Ibid. The Court observed that, had the analyst who performed the tests “lied about all those matters,” the resulting “expert opinion would have counted for nothing.” Ibid. In a concurrence, Justices Alito and Roberts disagreed that the supervisor was prohibited from testifying to an own expert opinion based on another analyst’s testing, but still agreed that the supervisor in the instant case had “stepped over the line and at times testified to the truth of the matter asserted” by claiming the analyst who had performed the tests had complied with the “policies and practices” of the lab during the testing process where she was not present. Id. at 807-20 (Alito, J., concurring in the judgment).

The Court in Smith declined to reach the question of whether the report in that case was testimonial because that issue was not presented in defendant’s petition for certiorari or ruled on by the lower courts. 602 U.S. at 801. The Court noted that, to determine whether the statement was testimonial, the court would need to consider on remand the statement’s “primary purpose” and “how it relates to a future criminal proceeding.” Id. at 800-01. If the report was prepared to be used later in court, it would be testimonial, whereas if it were made “to comply with laboratory accreditation requirements or to facilitate

internal review and quality control” or “simply as [a] reminder[.]” to the analyst, then it would not. Id. at 802.

There can be no dispute that Estilow’s report in this case was testimonial. Estilow did not prepare the report for quality control purposes or as a reminder to herself; she prepared it for the New Jersey State Police as part of an ongoing criminal investigation whose goal was to identify a suspect in Strickland’s murder. (23T:42-12 to 43-16) Therefore, her statements in the report were testimonial, triggering Simon’s right to confront her at trial as the maker of the statements at issue. Smith, 602 U.S. at 802.

In response to defense counsel’s objection that Tramontin could not testify about the report prepared by Estilow, the State cited New Jersey Supreme Court decisions in Michaels, 219 N.J. 1, and State v. Roach, 219 N.J. 58 (2014), to support the claim a forensic supervisor can testify about conclusions reached by a different analyst. (23T:45-21 to 48-18) But the reasoning of these cases has since been rejected by the United States Supreme Court as inconsistent with a defendant’s confrontation rights under the Federal Constitution. Smith, 602 U.S. at 783. This case is indistinguishable from Smith because Tramontin, the supervisor, conducted a review of a report written by Estilow, a different forensic analyst who did not testify before the jury. Tramontin did not independently test the evidence, she merely did an

“administrative review” of Estilow’s report to “make sure . . . the names were right,” “item numbers match[ed] the evidence receipt” and a “technical review” where she “learned the type of analysis that was done on each item.” (23T:43-5 to 16; 77-20 to 78-7)

Smith rejected this kind of “end run” around all the Court “ha[s] held the Confrontation Clause to require.” 602 U.S. at 799. Simon was unable to cross-examine Estilow, the analyst who reached the conclusions that semen and blood were present in the swabs and fingernail samples taken from Strickland. The jury was therefore unable to assess her credibility or demeanor during trial. See State v. Clark, 909 S.E.2d 566, 567–68 (N.C. Ct. App. 2024) (applying Smith to reverse convictions where testimony by forensic analyst “violated Defendant's rights under the Confrontation Clause of the Sixth Amendment essentially because the basis of [his] opinion was statements made by another analyst, whom Defendant had no opportunity to confront”).

Beyond her conclusions about the presence of semen and blood, Estilow was also a critical link in the chain of custody of the samples at the heart of the State’s case. Estilow handled all the swabs before the DNA laboratory analyzed them to develop DNA profiles. (23T:68-9 to 13; 129-4 to 130-11) Estilow herself created evidence by removing a stain in Strickland’s underwear that she concluded tested positive for semen. (23T:66-13 to 18) Tramontin

claimed Estilow followed lab procedures “correctly and accurately” and, once finished with her analysis, returned the DNA packet that was later tested against buccal swabs taken from Simon, Joiner, Goldsboro, and Brown. (23T:71-4 to 72-13) But Tramontin was not present for this and so had no basis to conclude that Estilow had complied with the “policies and practices” of the lab during the testing. 602 U.S. at 807-20 (Alito, J., concurring in the judgment); accord People v. Vigil, 557 P.3d 805, 812 (Co. Ct. App. 2024) (concluding analyst cannot rely on statement by non-testifying witness to establish chain of custody); State v. Mangos, 957 A.2d. 89, 93 (Me. 2008) (confrontation rights violated where defendant had no chance to cross-examine analyst who took DNA samples).

Tramontin should not have been permitted to testify to Estilow’s analysis and handling of the DNA evidence. Aside from the DNA evidence, the State’s case against Simon was entirely circumstantial, depending on his prior bad acts during his relationship with Strickland. Although Simon’s history was known to police at the time of Strickland’s death, Simon was not charged with the murder until five years later, when police took a buccal swab from Simon and determined that he could not be excluded as a contributor to the samples that Estilow analyzed in 2010. But if Estilow performed the tests incorrectly or mishandled the samples, the State would not have been able to make the

critical claim that the buccal swab taken from Simon implicated him, whereas swabs taken from Joiner, Goldsboro, and Brown did not implicate them.

(34T:152-20 to 155-6 (arguing in summation that samples handled by Estilow implicated Simon and excluded Joiner, Goldsboro, and Brown)).

The importance of the DNA evidence to the State's case cannot be overstated. The State's use of Tramontin to convey the substance of testimonial statements by Estilow, who Simon was unable to confront, violated Simon's right to confrontation. U.S. Const., amends. VI and XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10. His conviction must be reversed.

### **POINT III**

**THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION OF EXTENSIVE PREJUDICIAL TESTIMONY ABOUT SIMON'S PRIOR BAD ACTS THAT SERVED ONLY TO SUGGEST THAT SIMON ACTED IN CONFORMITY WITH A PROPENSITY FOR VIOLENCE. (10T:48-20 to 54-22; 11T:3-1 to 13-16; Da 3-6)**

Because the State lacked direct evidence that Simon killed Strickland, it sought to fill out its case with extensive bad character evidence detailing previous arguments between Simon and Strickland. The State presented evidence from Strickland's friends and family that, in addition to a pattern of threatening statements, Simon: 1) got into an argument with Strickland in her apartment in August 2009 where both he and Strickland reached for a knife; 2)

punched a man who bought Strickland a drink in early 2010; and 3) grabbed Strickland around the neck during a dispute in March 2010. (Da 3-7 (granting State’s pre-trial motion to admit these prior bad acts)) This evidence was all inadmissible because its only purpose was to suggest to the jury that Simon had a propensity for violence and anger and that he acted in conformity with that propensity by killing Strickland in July 2010. Even if the evidence carried some limited relevance, its admission was still improper, as the prejudicial nature of the prior incidents far outweighed any probative value. The erroneous admission of unlawful propensity evidence deprived Simon of due process and a fair trial. His conviction must be reversed. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

Although “[t]he admission or exclusion of evidence at trial rests in the sound discretion of the trial court,” “[t]hat discretion is not unbounded.” State v. J.M., Jr., 225 N.J. 146, 157 (2016). “Rather, it is guided by legal principles governing the admissibility of evidence which have been crafted to assure that jurors receive relevant and reliable evidence to permit them to perform their fact-finding function and that all parties receive a fair trial.” Ibid. (quoting State v. Willis, 225 N.J. 85, 96 (2016)).

N.J.R.E. 404(b) sharply limits the admission of evidence of other crimes or wrongs. This is because such prior-conduct evidence “has the effect of

suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial.” State v. Willis, 225 N.J. 85, 97 (2016) (internal quotation marks and citation omitted); see also State v. Blakney, 189 N.J. 88, 93 (2006) (recognizing “the danger that other-crimes evidence may indelibly brand the defendant as a bad person and blind the jury from a careful consideration of the elements of the charged offense”). To make certain that such evidence will be used only for appropriate, limited purposes and not to demonstrate the defendant’s propensity to commit crime, our Supreme Court set out a four-pronged test for the admissibility of evidence under N.J.R.E. 404(b):

- (1) The evidence of the other crime must be admissible as relevant to a material issue;
- (2) It must be similar in kind and reasonably close in time to the offense charged;
- (3) The evidence of the other crime must be clear and convincing; and,
- (4) The probative value of the evidence must not be outweighed by its apparent prejudice.

State v. Cofield, 127 N.J. 328, 338 (1992). As the Cofield Court emphasized, admitting evidence of other bad acts is the exception, not the rule. Id. at 337. As such, N.J.R.E. 404(b) is a rule of exclusion, not a rule of inclusion. Willis, 225 N.J. at 100.

The first prong requires that “the evidence of the prior bad act, crime, or wrong . . . be relevant to a material issue that is genuinely disputed.” State v. Covell, 157 N.J. 554, 564-65 (1999). Under N.J.R.E. 401, evidence is relevant if it “[has] a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” In Covell, the Court noted that the primary focus in determining the relevance of evidence is whether there is a “logical connection between the proffered evidence and a fact in issue.” 157 N.J. at 565 (internal quotation marks and citation omitted).

The fourth Cofield prong requires that the “probative value of the evidence must not be outweighed by its apparent prejudice.” Cofield, 127 N.J. at 338. The fourth prong recognizes that the “inflammatory characteristic of other-crime evidence . . . mandates a careful and pragmatic evaluation by trial courts, based on the specific context in which the evidence is offered, to determine whether the probative worth of the evidence outweighs its potential for undue prejudice.” State v. Stevens, 115 N.J. 289, 303 (1989). When analyzing prejudice under N.J.R.E. 404(b), courts should also consider the factors presented in N.J.R.E. 403, which states that “relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.” Willis,

225 N.J. at 99 (quoting N.J.R.E. 403) (emphasis in Willis). However, because “[o]ther-crimes evidence . . . necessitates a more searching inquiry than that required by N.J.R.E. 403,” “the potential for undue prejudice need only outweigh probative value to warrant exclusion” of other-crime evidence. State v. Reddish, 181 N.J. 553, 608 (2004).

Beginning with the first prong of Cofield, the trial court in this case erroneously found that the prior incidents were relevant to Simon’s motive for Strickland’s death. The trial court stated broadly that “[e]vidence of arguments or violence between a defendant and homicide victim has long been admitted.” (11T:7-3 to 4) The court reasoned that Simon “is alleged in the past to have harassed, threatened and assaulted the victim,” surmising “clearly it is relevant and material to the motive in this case and to the relevant issues in this case.” (11T:7-13 to 13-13)

The trial court’s conclusion that prior episodes of domestic violence are always admissible to show a defendant’s motive to harm the victim is inaccurate. In State v. Vallejo, 198 N.J. 122, 132 (2009), our Supreme Court reversed defendant’s convictions due to the admission of evidence that “serially described prior incidents of domestic violence” against his girlfriend in instances “different from the incident on which the present trial was based.” The Court concluded defendant’s trial “was poisoned by the recurring

admission of evidence of other crimes and wrongdoings by defendant, and by reference to the domestic violence restraining order against him.” Id. at 124. The Court explained that “witnesses against defendant made him out to be a repetitive perpetrator of domestic violence” against the victim, and their “statements reinforced each other and the poisonous notion that defendant was predisposed to the acts with which he was charged.” Id. at 136-37.

Likewise here, testimony from many of Strickland’s friends and relatives that Simon was a jealous boyfriend who had acted violently in the past impermissibly suggested Simon “was predisposed to the acts with which he was charged.” Ibid. The State claimed the prior incidents in this case were admissible to show Simon’s motive to harm Strickland. But the State cannot introduce 404(b) evidence under a motive theory “when the ‘motive’ is so common that the reasoning that establishes relevance verges on ordinary propensity reasoning or when ‘motive’ is . . . just another word for propensity.” State v. J.M., Jr., 438 N.J. Super. 215, 222–23 (App. Div. 2014), aff’d as modified, 225 N.J. 146 (quoting 1 McCormick on Evidence § 190 (Broun ed., 7th ed., 2013)). This was the case here. Rather than showing that, on July 10, 2010, Simon had a similar motive to act violently toward Strickland that he possessed on these other occasions, the challenged evidence instead merely

claimed that Simon acted violently toward Strickland on this date because he had acted violently toward her previously.

Published cases approving the admission of prior violent actions toward the victim as motive evidence in domestic violence cases typically involve a dispute about a defendant's mental state where the prosecution seeks to prove the defendant acted intentionally by showing that, at the time of the charged offense, he was reacting to the same kind of stimulus that had previously caused him to behave violently. For instance, in State v. Angoy, 329 N.J. Super. 79 (App. Div. 2000), the evidence showed that defendant beat his girlfriend Patty to death immediately after she told him she "got [him] back" by giving him gonorrhea by sleeping with another man. Id. at 82. Defendant raised a claim of passion/provocation, but admitted to hitting Patty, tying her up, and putting her in a tub of scalding hot water. Id. at 82-83. The State in that case introduced evidence that, a month beforehand, the defendant had beat Patty after learning she went on a date with another man. Id. at 87. Therefore, in Angoy, evidence showed that defendant had learned Patty was cheating on him moments before her death, giving him the same motive to harm her that he had when he beat her a month beforehand.

Likewise, in State v. Nance, 148 N.J. 376, 380-82 (1997), evidence showed defendant killed the victim Michael Snow after seeing Snow leave his

former girlfriend's apartment. Defendant did not deny shooting the victim, but claimed the victim had assaulted him first and that the shooting was accidental rather than intentional. Id. at 381-82. Our Supreme Court held that prior episodes where defendant lashed out angrily at his former girlfriend due to jealousy of her contact with other men were properly admitted to establish defendant's motive and intent to kill Snow after seeing him leave defendant's former girlfriend's apartment. Id. at 387-90.

In contrast, the evidence here was not being offered to illuminate Simon's mental state at the time of Strickland's murder, but simply to argue that Simon had probably acted in conformity with his prior conduct by once again being violent toward Strickland. Unlike the defendants in Angoy and Nance, Simon's defense did not turn on his mental state, but rather the claim that he had not committed the acts that caused Strickland's death. The dispute throughout trial over whether Simon had done so posed an intolerable risk that the prior bad acts evidence would be used for the wrong purpose: to prove Simon had acted in conformity with a bad character.

The evidence also did not serve the "motive" purpose claimed by the State because there was no evidence that, at the time Strickland died, Simon was motivated by the same prompt that had previously spurred him to become upset or violent with her. Two of the prior incidents involved Simon becoming

jealous after seeing Strickland socializing with someone else. The third incident allegedly involved Simon seeking money from Strickland. There was no evidence that, on July 10, Simon saw Strickland socializing with someone else or sought money from her. Indeed, the State maintained Simon was the only person in Strickland's apartment that night and nothing of value was taken. The prior bad acts therefore did not illuminate Simon's mental state by showing that Simon had a similar motive to harm Strickland on July 10 as he had at the time of the prior incidents. Instead, the inference the State was asking the jury to draw boiled down to the impermissible propensity inference: that because Simon had acted violently in the past during incidents for which he was not on trial, he likely did so again in this case. See Vallejo, 198 N.J. at 136-37.

Even if the prior disputes were somewhat relevant to Simon's motive to hurt Strickland on July 10, they were inadmissible under the fourth prong of Cofield because their probative value was not outweighed by their apparent prejudice. "Evidence of past crimes does not automatically become admissible just because it is relevant to the issue of motive or intent. In each case the trial court must weigh the probative value of the evidence against its prejudicial effect." State v. Ramseur, 106 N.J. 123, 265 (1987). The prejudicial nature of the evidence was overwhelming: from the very first witness, the trial was

pervaded with evidence from Strickland's friends and relatives that Simon was a jealous and angry boyfriend who responded with violence during incidents separate from the crime for which he was charged. This evidence plainly portrayed Simon as a person of bad character, overwhelming the jury's ability to determine objectively whether he had committed the distinct crime for which he was on trial.

The court's admission of the 404(b) evidence was particularly likely to prejudice Simon because the State lacked direct evidence of Simon's guilt and leaned heavily on the impermissible propensity inference that Simon acted consistently with his prior bad behavior by killing Strickland. "[T]he inherently prejudicial nature of [other-crimes] evidence casts doubt on a jury's ability to follow even the most precise limiting instruction." Stevens, 115 N.J. at 309. There was a serious risk here that, even with the court's limiting instruction, the improper other-crimes evidence would "indelibly brand the defendant as a bad person and blind the jury from a careful consideration of the elements of the charged offense." Blakney, 189 N.J. at 93. This risk was heightened by the prosecutor's extensive use of the prior bad acts evidence in summation. The prosecutor claimed Simon's conduct bore "the hallmarks of domestic violence" and urged the jury to convict Simon because "when someone shows you who . . . they are, believe them." (34T:120-10 to 18; 156-

11 to 16); see State v. Mazowski, 337 N.J. Super. 275, 291 (App. Div. 2001) (reversing convictions where prosecutor used prior bad acts evidence to make propensity argument in summation).

The extensive amount of prior bad acts evidence introduced by the State effectively transformed Simon's trial from a proceeding to determine whether the State could prove his guilt for Strickland's murder into a referendum on his bad character generally. "[T]ogether the challenged [evidence] reinforced each other and the poisonous notion that defendant was predisposed to the acts with which he was charged." Vallejo, 198 N.J. at 136. The amount of 404(b) testimony, when considered in connection with the weakness of the State's case, created an intolerable serious risk that the jury convicted Simon based on the improperly admitted evidence, and accordingly, his conviction must be reversed.

**POINT IV**

**THE TRIAL COURT DEPRIVED SIMON OF THE RIGHT TO PRESENT A COMPLETE DEFENSE BY REFUSING TO ALLOW HIM TO PRESENT RELEVANT EVIDENCE THAT STRICKLAND WAS CRIMINALLY CHARGED FOR AN ALTERCATION WITH SIMON THAT THE STATE ELICITED TESTIMONY ABOUT DURING TRIAL. (10T:57-17 TO 60-10; 11T:4-2 TO 12; Da 3-6)**

The trial court permitted the State to present testimony from Shamia Martin, Strickland's friend, about an altercation in Strickland's apartment where she claimed both Strickland and Simon reached for a knife. (11T:4-2 to 5) The court concluded that this evidence was admissible to "show the jealousy and/or in the violent nature when the defendant would get to be jealous." (10T:52-16 to 53-13) In response, the defense sought to introduce evidence that, in fact, Strickland was charged with assaulting Simon in connection with this incident. (10T:58-2 to 59-16) This evidence would have undercut the inference the State was asking the jury to draw that Simon often incited violence against Strickland. Furthermore, this evidence would have suggested Strickland had a motive to fabricate subsequent allegations against Simon in retaliation or as leverage to get the charge against her dropped. The trial court refused to allow Simon to present any evidence that Strickland was charged, concluding the evidence was both irrelevant and inadmissible hearsay. (11T:4-

2 to 12) The court’s erroneous exclusion of this evidence deprived Simon of his constitutional right to present a complete defense and respond to damaging evidence presented against him at trial, requiring the reversal of his conviction. U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 10.

Constraints placed by a trial court on a defendant’s ability to present evidence implicate the right “to be confronted with the witnesses against him,” as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution. State v. Bass, 224 N.J. 285, 301 (2016) (citing U.S. Const. amend. VI; N.J. Const. art. 1, ¶ 10).

Limitations on the presentation of evidence that preclude defense counsel from making “effective” inquiry into “facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness” constitute “constitutional error of the first magnitude.” Davis v. Alaska, 415 U.S. 308, 318 (1974); see also Olden v. Kentucky, 488 U.S. 227, 230 (1988).

The trial court should not have barred the defense from eliciting evidence that Strickland was charged in connection with an incident where Strickland and Simon struggled over a knife because that evidence was relevant and, therefore, admissible pursuant to Simon’s right to a complete defense. “‘Relevant evidence’ means 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. Even though the evidence Simon sought to introduce related to a prior charge against Strickland, it was not subject to a higher standard of admissibility because Strickland was not the defendant at trial. “When a person charged with a criminal offense seeks to use other-crimes evidence defensively, the Cofield standard does not govern because ‘an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.’” State v. Weaver, 219 N.J. 131, 150 (2014) (quoting State v. Garfole, 76 N.J. 445, 453 (1978)). Instead, “[t]o determine whether a defendant may use other-crime evidence, courts must apply the ‘simple’ relevance standard of Rule 401,” which is more permissive than Cofield. State v. Williams, 240 N.J. 225, 235 (2019).

The evidence was relevant for two purposes. First, Simon sought to counter the State’s claim that Simon often instigated violence against Strickland when he was jealous, as claimed by Martin’s account of the knife incident. The State used Martin’s account of the knife incident to press its claim that Simon was motivated by jealousy to kill Strickland. The fact Strickland, not Simon, was charged for the incident would have allowed Simon to negate his guilt for Strickland’s murder by undermining the State’s claim that Simon regularly instigated violence against Strickland when jealous. The

evidence therefore “rationally tend[ed] to refute his guilt,” so it should have been admitted. Weaver, 219 N.J. at 150.

Second, evidence that Strickland was charged in connection with the incident suggested that Strickland’s subsequent allegations against Simon could have been motivated by an intent to retaliate against him or to undermine the charges against her. Our Supreme Court has held that evidence that a State’s witness “face[d] a pending investigation or unresolved charges when he or she gives a statement to law enforcement, cooperates with the prosecution in preparation for trial, or testifies on the State’s behalf” are relevant and “directly pertinent to the question of a witness’s bias.” State v. Bass, 224 N.J. 285, 305-11 (2016) (reversing convictions where defendant was prohibited “from exploring the terms of the plea bargain that led to the dismissal of” prosecution witness’s unrelated charges and may have established witness had motive to fabricate allegations against defendant); accord State v. Jackson, 243 N.J. 52, 58 (2020) (holding defendant was deprived of right to confrontation by ruling limiting cross-examination about cooperating witness’s sentencing exposure). If anything, the charge against Strickland was even more relevant than the dismissed charges in Bass and Jackson, because here Simon was the alleged victim of the charged offense, which would have allowed the jury to conclude Strickland had two motives to

fabricate an allegation: to get leverage to try to dispose of the charge against her and to retaliate against Simon.

The trial court further erred in concluding any evidence that Strickland was arrested or charged would be hearsay because that determination depends on the manner in which the evidence is ultimately elicited. If the court had not prohibited the defense from exploring Strickland's arrest in advance of trial, the defense could have subpoenaed the arresting officer to testify firsthand to his actions in arresting Strickland and the basis for his decision to do so. That testimony would not have been hearsay. See N.J.R.E. 801 (explaining statements made by a declarant at trial are not hearsay). Even if that officer did not testify, the fact of Strickland's arrest could have been introduced through a police report. "Generally, a police report is admissible as a record of a regularly conducted activity, commonly known as a business record, N.J.R.E. 803(c)(6), and as a public record, N.J.R.E. 803(c)(8)." Manata v. Pereira, 436 N.J. Super. 330, 345 (App. Div. 2014). The trial court erred in concluding in advance that any efforts to elicit testimony that Strickland was charged were impermissible.

The State's case depended on convincing the jury that Strickland's prior complaints to police were evidence of Simon's jealousy and violence that established his guilt for her murder. If the jury knew Strickland was herself

facing a charge prior to making these claims, it could have chosen not to credit her allegations, which were otherwise shielded from cross-examination by her absence at trial. Such weakening of the State’s circumstantial case could have “altered the outcome of defendant’s trial.” Bass, 224 N.J. at 311. The erroneous exclusion of directly relevant evidence that supported Simon’s defense and responded to crucial prosecution evidence deprived Simon of a fair trial and compels reversal of his conviction.

**POINT V**

**THE FAILURE TO CHARGE THE JURY ON  
THIRD-PARTY GUILT DENIED SIMON DUE  
PROCESS AND A FAIR TRIAL. (not raised below)**

Simon’s entire defense was premised on a theory of third-party guilt: that after Simon left Strickland’s apartment early in the morning on July 10, 2010, someone else killed her before he returned and reported discovering her body. The jury heard extensive testimony that Goldsboro, Joiner, and Brown all used a key to enter Strickland’s apartment on the morning of July 10 in connection with a carpet cleaning, but left without notifying police that Strickland was lifeless on the couch. The trial court never instructed the jury regarding the critical principles for assessing the defense’s claim of third-party guilt, specifically that a defendant “does not have to produce evidence that proves the guilt of another” and that the jury need not conclude that “the other

person or persons may have committed the crime” for the third-party guilt defense to create reasonable doubt of defendant’s guilt. See Model Jury Charges (Criminal), “Third Party Guilt Jury Charge” (approved Mar. 9, 2015) (“Model Charge – Third Party Guilt”). The trial court’s failure to instruct the jury on principles relating to a claim of third-party guilt violated Simon’s rights to due process and a fair trial, mandating reversal. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

It is well-established that jury instructions are an essential road map for the jury. State v. Martin, 119 N.J. 2, 15 (1990). Therefore, the trial court has an independent responsibility to provide complete instructions, even absent a defense request. State v. Grunow, 102 N.J. 133, 148-49 (1986). Indeed, the defense may “justifiably assume that fundamental matters will be covered in the charge.” State v. Green, 86 N.J. 281, 288 (1981). An inaccurate or incomplete jury instruction on a material point is presumed to be reversible error. Grunow, 102 N.J. at 148 (1986).

When the defense of third-party guilt is raised, there is a danger that the jury will improperly focus on whether the third party has been proven guilty. Yet a defense of third-party guilt “does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt.” State v. Cotto, 182 N.J. 316,

333 (2005). Thus, the critical role of a third-party guilt instruction is to ensure that jurors understand that the defendant has no burden to prove another party committed the offense.

It is critical that the jury be properly instructed specifically on third-party guilt, to protect against improper burden-shifting. The third-party guilt instruction formally presents the defendant's theory of the case to the jury while making clear defendant bears no burden of proving third-party guilt. The charge focuses the jury on the defense position that "there is evidence before you indicating that someone other than he or she may have committed the crime or crimes, and that evidence raises a reasonable doubt with respect to the defendant's guilt." Model Charge – Third Party Guilt. The charge further clarifies that reasonable doubt may arise even if the defendant has not "produce[d] evidence that proves the guilt of another," or that "even rais[es] a strong probability that someone other than the defendant committed the crime." Ibid. Including this charge in the final jury instructions makes clear that third-party guilt is a valid and recognized defense, clarifies how this defense relates to the State's burden of proof, and emphasizes that the defendant may prevail on a third-party guilt defense by relying entirely on the State's evidence admitted at trial. No other charge provided in this case accomplished these specific purposes.

At trial here, the jury was presented two competing theories. The State argued that Simon killed Strickland; the defense claimed it was someone else. Faced with these divergent accounts, the court was required to charge the jury how to evaluate them in assessing whether the State had proven Simon's guilt. The failure to charge the jury on third-party guilt charge was clearly capable of producing an unjust result. Simon's conviction must be reversed, and the matter remanded for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10; R. 2:10-2.

#### **POINT VI**

#### **SIMON WAS DEPRIVED OF A FAIR TRIAL BY THE STATE'S PERVASIVE MISCONDUCT DURING SUMMATION. (Not raised below)**

“Prosecutors are required to turn square corners because their overriding duty is to do justice.” State v. Garcia, 245 N.J. 412, 418 (2021). The prosecutor's summation in this case, which was pervaded by comments that exceeded well-established limits on fair comment on the evidence, failed to live up to this standard. Seeking to undercut Simon's third-party guilt defense, the prosecutor made claims that lacked evidentiary support and were the equivalent of testifying in summation. Additionally, the prosecutor urged the jury to draw an impermissible propensity inference throughout summation by telling them Simon's behavior fit “the hallmarks of domestic violence” and

urging them to follow wisdom attributed to Maya Angelou that “when someone shows you [] who they are, believe them.” (34T:120-10 to 18; 156-11 to 16) Given the overall weakness of the State’s case, the cumulative effect of this pervasive misconduct deprived Simon of due process and a fair trial, requiring reversal of his conviction. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

Although they are afforded considerable leeway in their closing arguments, prosecutors are still “obligated to use legitimate means to bring about a just conviction.” State v. Smith, 167 N.J. 158, 177 (2001). “[T]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.” State v. Frost, 158 N.J. 76, 83 (1999). To that end, prosecutors must “confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.” Smith, 167 N.J. at 178. Prosecutors’ comments “carry the full authority of the state” and courts should not “condone prosecutorial excesses” that exploit jurors’ confidence in that authority. Id. at 177 (citing Frost, 158 N.J. at 87).

“[P]rosecutors must refrain from opining ‘in such manner that the jury may understand the opinion or belief to be based upon something which [the prosecutor] knows outside the evidence.’” State v. Williams, 471 N.J. Super. 34, 44 (App. Div. 2022) (quoting State v. Thornton, 38 N.J. 380, 398 (1962)).

“[W]hen summing up the State’s basis for asking a jury to convict a defendant, a prosecutor is obliged to confine summation remarks to the evidence in the case and only those reasonable inferences that may be drawn from that evidence.” State v. McNeil-Thomas, 238 N.J. 256, 283 (2019). Prosecutors should not ask jurors to draw conclusions that do not have any support in the record. See State v. Atwater, 400 N.J. Super. 319, 336-337 (App. Div. 2008) (finding reversible error in repeated references to defendant as “drunk” and “blotto”; in question “[w]hat does cold do to smell”; and in inference that defendant acted intentionally because none were supported by evidence in record). A prosecutor commits misconduct if she “implies to the jury that [s]he possesses knowledge beyond that contained in the evidence presented, or if [s]he reveals that knowledge to the jury.” State v. Feaster, 156 N.J. 1, 59 (1997); See also State v. Farrell, 61 N.J. 99, 103 (1972) (finding error where prosecutor’s comments led jury to understand prosecutor’s opinion of guilt is “based upon something which the prosecutor knows outside the evidence”).

For the first time in summation, the prosecutor claimed that Strickland could not have been killed during the course of a burglary because her flat screen television was not stolen and her nails were intact. The prosecutor supplied her own support for their claim about the cost of flatscreen televisions at the time of Strickland’s murder, explaining: “If someone came in to rob her,

they didn't do a very good job. There's a flat screen TV still in her house. And this is 2010. Those -- those -- they were not a couple hundred dollars at that point. They were a couple thousand still." (34T:148-6 to 19) No evidence at trial supported the prosecutor's claim about the value of flatscreen televisions at the time of Strickland's death.

To further buttress the claim Strickland knew her attacker and the case could not have been a burglary, the prosecutor urged the jury to "look at those fingernails," claiming they showed "Strickland never had the chance to so much as swat her attacker." (34T:150-5 to 8) The prosecutor went on:

If you've ever had acrylic nails or you know someone that has, the condition of that -- those nails should be very familiar. When you peel off acrylic nails your natural nails are so fragile. If you grab something wrong, your nail rips or breaks. You -- we can see all the lines where she had refills before. And the end of her natural nails intact. She was attacked from behind and she never saw it coming. This was a planned, calculated, purposeful murder.

[(34T:150-8 to 16)]

Again, no evidence at trial established how susceptible to damage acrylic nails were or whether examination of Strickland's fingernails suggested a struggle. The prosecutor's claim was implicitly based on her own experience as someone "very familiar" with the fragility of acrylic nails. This claim went directly to the heart of the case, which depended on the State showing that Strickland was killed by her boyfriend Simon and not a stranger. The defense

was unable to cross-examine any witness or otherwise challenge the prosecutor's claim that the state of Strickland's nails proved she knew and did not struggle with her attacker because it was brought up for the first time in summation. Cf. Mc-Neil-Thomas, at 277 (noting defense counsel was able to "vigorously challenge[] the neighbor's recollection" during cross-examination).

Additionally, the prosecutor improperly claimed that Simon's behavior fit the "hallmarks of domestic violence" that proved he had a motive to commit the murder:

[C]ontrol, isolation from family, isolation from friends, monitoring her activities, jealousy, -- victim blaming, baseless accusations of infidelity. These hallmarks of domestic violence show you what his intention was when he went to Lawanda's home on the night of July 9th going into July 10th, 2010.

[(34T:120:10 to 18)]

No witness testified about the "hallmarks of domestic violence" at trial, much less what conclusions about a person's future intentions the jury could draw from such past behaviors. This claim by the prosecutor was again the equivalent of testifying because it made claims that were unsupported by the trial evidence. This claim was especially damaging because it impugned Simon's character and encouraged the jury to draw the impermissible propensity inference that Simon's past actions rendered him obviously guilty of

the offense for which he presently stood trial. This inference was emphasized by the prosecutor's reference to Maya Angelou at the close of summation, where the prosecutor told the jury "when someone shows you who . . . they are, believe them." (34T:156-11 to 12) See Mazowski, 337 N.J. Super. at 291 (reversing convictions where prosecutor improperly used evidence of defendant's drug addiction to argue in summation that he had propensity to commit crime).

"[T]o justify reversal, the [prosecutorial] misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" Smith, 167 N.J. at 181 (quoting Frost, 158 N.J. at 83). It was. The State's overall case was weak, as demonstrated by the lengthy delay in charging Simon and the State's reliance on bad character evidence throughout trial. The prosecutor's unsupported claims in summation had the capacity to substantially prejudice Simon's "right to have a jury fairly evaluate the merits of his defense." Smith, 167 N.J. at 181-82. Given the overwhelming nature of the misconduct, the lack of any curative instruction, and the circumstantial nature of the State's case, the misconduct was clearly capable of producing an unjust result and compels reversal. Atwater, 400 N.J. Super. at 337; Rule 2:10-2.

**POINT VII**

**THE CUMULATIVE EFFECT OF THE LEGAL ERRORS DENIED SIMON A FAIR TRIAL.**

Even if this Court does not agree that the errors merit reversal individually, it should reverse Simon’s conviction because their cumulative effect fundamentally obstructed the jury’s ability to assess the evidence at trial. See, e.g., State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (“[E]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial”).

Simon discovered Strickland’s body on the morning of July 10 and immediately called police, yet the State did not charge Simon until five years after her death. Simon cooperated with police who responded to the scene, providing a detailed description of his whereabouts over the previous day that was subsequently corroborated by his cell phone records. The State’s discovery years after the fact that Simon’s DNA matched swabs taken from Strickland’s person was fully consistent with Simon’s account that he had sex with Strickland before leaving her apartment that night. The State’s own evidence established that three men entered Strickland’s apartment after Simon left and before he returned the following morning, claimed to have seen Strickland slumped unresponsive on her couch, yet did not notify police.

In the face of these serious issues with the State's case, the central question for the jury was whether the evidence amounted to proof beyond a reasonable doubt that Simon had killed Strickland. The denial of Simon's right to confront the witnesses against him regarding Strickland's prior testimonial statement against him and critical forensic evidence, combined with the State's excessive reliance on other bad acts testimony, the prosecutor's improper remarks in summation, and the failure to charge the jury regarding Simon's third-party guilt theory deprived Simon of his right to a fair trial.

These errors were thus "clearly capable of producing an unjust result." See R. 2:10-2; State v. Frisby, 174 N.J. 583, 591 (2002). Simon's conviction should be reversed and remanded for a new trial. U.S. Const. amends. VI and XIV; N.J. Const. art. I, ¶¶ 1, 9, and 10.

### **CONCLUSION**

For the reasons set forth, Simon's conviction must be reversed.

Respectfully submitted,

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Public Defender

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Dated: March 5, 2025

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3497-22T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY D. SIMON,

Defendant-Appellant.

: **CRIMINAL ACTION**

:  
: On appeal from a Judgment of  
: Conviction of the Superior  
: Court of New Jersey, Law  
: Division, Camden County

: Sat Below:

: Hon. Sherri L. Schweitzer, J.S.C.  
: Hon. Thomas T. Booth, Jr., J.S.C.,  
: and a Jury

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**PRO-SE SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT**

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Timothy D. Simon  
SBI # 752734B  
New Jersey State Prison  
PO Box 861  
Trenton, New Jersey 08625

**APPELLANT IS CONFINED**

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**TABLE OF ABBREVIATIONS**

Da = Defendant-appellant Appendix  
DaProSe\* = Defendant-appellant Pro Se Appendix  
Psr = Pre-sentence report  
1T = 9/8/17 hearing  
2T = 10/6/17 hearing  
3T = 10/12/17 hearing  
4T = 12/5/17 hearing  
5T = 12/15/17 hearing  
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8T = 2/27/18 hearing vol. 2  
9T = 3/8/19 hearing  
10T = 4/16/18 hearing  
11T = 4/17/18 hearing  
12T = 8/13/18 hearing  
13T = 9/21/21 hearing  
14T = 9/14/22 hearing  
15T = 1/4/23 trial  
16T = 1/5/23 trial  
17T = 1/10/23 trial vol. 1  
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19T = 1/11/23 trial vol. 1  
20T = 1/11/23 trial vol. 2  
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23T = 1/18/23 trial vol. 1  
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25T = 1/24/23 trial  
26T = 1/25/23 trial vol. 1  
27T = 1/25/23 trial vol. 2  
28T = 1/26/23 trial  
29T = 1/31/23 trial  
30T = 2/1/23 trial  
31T = 2/2/23 trial  
32T = 2/7/23 trial  
33T = 2/8/23 trial  
34T = 2/9/23 trial

**TABLE OF ABBREVIATIONS (CONT'D)**

35T = 2/14/23 trial

36T = 2/15/23 trial

37T = 5/19/23 motion/sentencing

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\* "DaProSe" is the citation for Defendant-Appellant's Pro Se Appendix to distinguish his from the citation to counsel's Appendix as "Da".

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

We shall rely upon the Procedural History and Statement of Facts submitted in counsel's brief.

**LEGAL ARGUMENT**

**POINT I**

**MR. TIMOTHY SIMON IS ENTITLED TO A JUDGMENT OF ACQUITTAL AND HIS CONVICTION VACATED AND INDICTMENT DISMISSED WITH PREJUDICE, AS THE JURY VERDICT WAS BEYOND THE WEIGHT OF THE EVIDENCE AND BASED UPON SPECULATION AND CONJECTURE FORBIDDEN BY OUR SUPREME COURT IN STATE V. LODZINSKI, INFRA; U.S. CONST., AMENDS. IV, V, VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10, 12. (Raised below at 12T; 31T 137-11 to 156-21; 37T 3-1 to 63-20)**

The instant case against Mr. Timothy Simon was based entirely upon circumstantial evidence. However, the nature of the circumstantial evidence in this case was not of that in which a reviewing court can sustain a jury's guilty verdict against Mr. Simon. The verdict from below was beyond the weight of the evidence and could have only been returned by the jury engaging in speculation and conjecture forbidden by our Supreme Court in State v. Lodzinski, 249 N.J. 116 (2021). Thus, the trial court erred where it failed to enter a judgment of acquittal and dismiss the indictment due to insufficiency of evidence.

The State knew its case against Mr. Simon was factually infirm, which is why it decided to wage a testimonial campaign against Mr. Simon's character by calling a plethora of irrelevant non-fact witnesses who only offered testimony of bad character/other bad acts against him without providing any facts relevant to the crime charged. (See Counsel's Brief, Point III, at 35-45.) Nonetheless, with or

without the testimony of these irrelevant witnesses, the State could not meet its burden of proof to convict Mr. Simon beyond a reasonable doubt, as the jury verdict is beyond the weight of the evidence and the trial judge erred in failing to enter a judgment of acquittal and vacate his conviction, dismissing his indictment with prejudice.

In Lodzinski the facts are strikingly similar to the instant case. In Lodzinski the defendant's 5-year-old son went missing at a carnival on May 25, 1991. 209 N.J. at 119. The defendant claimed he was abducted. Ibid. "Eleven months later" his "skeletal remains were found in a shallow creek bed." Ibid. "No forensic evidence . . . tied Lodzinski to the child's death." Ibid. Thus, no criminal charges were made against Lodzinski and the case went cold for almost two decades. Id. at 120.

Nineteen years later the case was reopened in 2011. Ibid. The reopened investigation led to Lodzinski's estranged niece identifying the blanket found near her son's remains as a blanket in Lodzinski's apartment when she babysat for her two decades ago. Ibid. This led to Lodzinski being charged with murder. Ibid. Due to pretrial publicity of the case, two additional former babysitters identified the blanket. Ibid. However, numerous other witnesses familiar with Lodzinski's home could not identify the blanket, and it was not in any pictures of Lodzinski's home. Ibid. Further, the medical examiner could not identify a specific cause of death but only that it was a "homicide." Ibid.

The jury found Lodzinski guilty and the trial court denied her motion for a judgment of acquittal and the appellate court affirmed. Id. at 121. She petitioned for certification and our Supreme Court held "that after reviewing the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from that testimony, no reasonable jury could find beyond a reasonable doubt that Lodzinski purposefully or knowingly caused

[her son's] death." Ibid. (citing State v. Williams, 218 N.J. 576, 594 (2014) (which cited State v. Reyes, 50 N.J. 454, 458-59 (1967))).

The Court further observed that "[o]ur criminal justice system . . . recognizes that juries are not infallible," and that "checks and balances built within our system of justice are intended to prevent a miscarriage of justice." Ibid. Further, "our trial and appellate courts are granted a reservoir of power . . . to overturn a conviction that is not rationally based in the evidence." Ibid. Indeed, in deciding a motion for judgment of acquittal, a court "must ensure that a jury verdict meets the evidential standard mandated by our constitutional jurisprudence and court rules." Id. at 121-122. "Bootstrap inferences cannot substitute for the proof necessary to satisfy an element of an offense." Id. at 157 (internal citation omitted).

In Burkes v. U.S., the Supreme Court distinguished between reversal due to trial error and reversal based on acquittal for insufficiency of evidence. 437 U.S. 1 (1975). A reversal for trial error does not mean it failed to prove its case, but is a judgment indicating defendant was convicted through a fundamental "defective" trial process; while when reversing due to insufficient evidence dismissing the indictment with prejudice to prevent a retrial is appropriate. Id. 437 U.S. at 15-16; see also Green v. Massey, 437 U.S. 19, 24 (1978) (retrial barred when conviction reversed due to insufficiency of evidence applies to states because integral part of the 5th Amendment).

"In assessing a motion for judgement of acquittal notwithstanding the verdict pursuant to Rule 3:18-2, a reviewing court must view the entirety of the direct and circumstantial evidence presented by the State and the defendant and give the State the benefit of all the favorable evidence and all the favorable inferences drawn from that evidence, and then determine whether a reasonable jury could find guilt beyond a reasonable doubt." Lodzinski, 249 N.J. at 144 (citing Williams, 218 N.J.

at 594). With that standard of review in mind, we now will evince that Mr. Simon is entitled to a judgment of acquittal notwithstanding the evidence and the verdict.

In the instant case, similar to Lodzinski, "no direct evidence tied [defendant] to the murder" and Mr. Simon "never confessed to committing a crime against" the victim. Id. 249 N.J. at 146. Nonetheless, we acknowledge that "[t]he absence of direct evidence . . . was not fatal to the State's case." Ibid. Indeed, "circumstantial evidence often can be as persuasive and powerful as direct evidence and sufficient to support a conviction." Id. 249 N.J. at 146-47. However, as the Court did in Lodzinski, "We now canvass the record to determine whether the State provided proof to satisfy each element of the crime of murder." Id. 249 N.J. at 147.

On July 10, 2010, the defendant—Mr. Simon—called 9-1-1 to report that he discovered the body of his girlfriend Lawanda Strickland in her apartment he frequented (25T 69-19 to 70-8). EMS arrived around 8:55 a.m. and determined Ms. Strickland was "cold and in rigor mortis" without a detectable pulse (17T 176-16 to 178-5). Mr. Simon spoke to police at the apartment, telling them that Ms. Strickland did not have any known medical issues and that the apartment showed no signs of forced entry upon his arrival (25T 70-1 to 8). Simon told Lieutenant Paul Audino that he had been with Strickland in the apartment the night before and the two had sex before getting into an argument (25T 75-1 to 9). Following the argument, Simon left the apartment to go to a friend's place in Paulsboro (25T 75-1 to 9). Mr. Simon showed Audino his phone during the night after leaving (25T 75-10 to 15). Mr. Simon was cooperative and agreed to go to the Prosecutor's Office to make a recorded statement (25T 75-16 to 24).

Other officers at the scene learned that three men had been in Ms. Strickland's apartment before Simon returned that morning in connection with a carpet cleaning, but had not called police to report seeing Ms. Strickland's body on the couch (19T 26-11 to 27-21). Raymond Brown, a maintenance man for the Sheridan

Apartments, had unlocked the back door of Strickland's apartment and walked through to let the carpet cleaners--Tyrone Joiner and his son Tyrone Goldsboro--in through the front door around 8:20 a.m. (19T 82-17 to 84-10; 29T 11-20 to 14-25). Brown claimed that he saw "a quilt . . . on the couch," but did not recognize that a person was underneath (29T 14-15 to 15-4). After they finished cleaning, Joiner called Brown and told him that somebody was on the couch and was "not responding," even though Joiner and Goldsboro were remaking "any awful lot of noise" and had "called out to" the person (19T 17-6 to 18). Notwithstanding this report, Brown did not check on the person nor did he or the carpet cleaners call the police before or after they left Ms. Strickland's apartment (19T 43-16 to 44-2).

Police had a neighbor of Ms. Strickland, who arranged the cleaning for her, to call Joiner and Goldsboro to return to the building to speak with police (19T 27-15 to 28-4, 82-11 to 25). Joiner and Goldsboro acknowledged that they seen "a young lady on the couch with a blanket over her with a little bottle in her hand," but said they did not approach or speak to her while cleaning the carpets in the room because they believed she was asleep (19T 85-20 to 87-4).

At the police station Lt. Audino had Mr. Simon sign a Miranda<sup>1</sup> waiver form, although Audino testified that Mr. Simon was not a suspect at the time (25T 81-7 to 82-13). Retracing his previous day at the request of police, Mr. Simon stated that on the morning of July 9, 2010, he woke up on the couch in Ms. Strickland's apartment because Ms. Strickland was sleeping with her two daughters in her bedroom (25T 111-17 to 113-6). Mr. Simon reported to his union hall to see if work was available before leaving around 8:30 a.m. to return to Ms. Strickland's apartment (25T 114-11 to 116-22). Ms. Strickland returned from work around 4:30 p.m. before bringing her daughters to stay overnight with Shontay Parker, who had other children with the father of Ms. Strickland's daughters (25T 119-8 to 120-21).

1 Miranda v. Arizona, 384 U.S. 436 (1966).

Simon said that he and Strickland had recently been arguing about his drinking and that she had thrown him out of the apartment for a few days some time around Father's Day (25T 117-12 to 119-2). Since then, Mr. Simon had been trying to avoid drinking, but on July 9th he became upset because Ms. Strickland was drinking beer in his presence so he "snuck out" to buy himself gin at Liquor Bank (25T 117-12 to 21, 125-10 to 129-1). Later that night after they argued about drinking, Simon and Strickland began to have sex in Strickland's bedroom before moving downstairs (25T 128-23 to 130-15). Simon and Strickland again began to argue about Strickland's sister Lakinia Murphy, who Mr. Simon allowed to stay in his apartment for a period of time before kicking her out due to Murphy leaving the apartment in a poor condition (25T 132-12 to 133-25).

Because of the argument, Mr. Simon left and drove to the city Paulsboro, where he parked in the driveway of a friend and rested in his car (25T 136-5 to 138-5). Mr. Simon explained he drove there because he felt more comfortable sleeping in his car there than in Camden, but he did not go into the friend's house because it was so late at night (25T 137-6 to 138-3). After resting for a period of time, Mr. Simon called Ms. Strickland around 3:45 a.m. but she did not answer (25T 138-4 to 20). Simon concluded Ms. Strickland had passed out from drinking and drove back to Camden, stopping at a different friend's house (25T 139-14 to 140-21).

Around 7 a.m. Mr. Simon went to the Off Broadway Lounge for breakfast (25T 139-20 to 141-29). Simon called Ms. Strickland to see if she wanted breakfast, but she did not answer (25T 141-16 to 25). Simon ordered food and had "four or five beers" before driving back to Ms. Strickland's apartment, where he found her body and called police (25T 142-2 to 12). Simon denied ever being physically violent toward Ms. Strickland during their relationship (25T 144-6 to 146-9).

Historical cell site analysis of Simon's phone corroborated his account that he was present in the vicinity of Ms. Strickland's home in Camden on the evening of

July 9, 2010, until after midnight; his cell phone was then used in the area of the city Paulsboro around 3:47 a.m., and near the Off Broadway Lounge in Camden around 7:43 a.m. on July 10, 2010 (26T 182-12 to 186-8).

Dr. Edward Chamra performed an autopsy of Ms. Strickland because the Camden County medical examiner at the time, Dr. Gerald Feigin, was on vacation (21T 16-15 to 17-8). After reviewing Chamra's autopsy report and photographs, Feigin ruled Ms. Strickland's death as a homicide caused by "blunt neck trauma" (31T 85-8 to 86-9).

Samples of possible DNA evidence was taken from Ms. Strickland's person. A stain in Strickland's underwear tested presumptively positive for seminal material (23T 66-9 to 18) and was submitted for further DNA testing (23T 66-13 to 18). Tests of Strickland's fingernail clippings for blood was presumptively positive (23T 66-19 to 67-9). Swabs tested from Ms. Strickland's vagina were presumptively positive for spermatozoa (23T 67-19 to 68-13).

All these sample specimens were forwarded to the DNA laboratory to develop DNA profiles (23T 68-9 to 13, 129-4 to 130-11). Strickland was identified as the source of the major DNA profile in the sperm cell fraction of the vaginal swab, with a second profile detected (23T 129-22 to 130-15). Male DNA was also identified in Ms. Strickland's fingernail clippings (23T 129-22 to 131-3).

No charges were brought for five years and the case went cold. In 2015, Detective Peter Longo, who worked in the "cold case squad" at the Camden County Prosecutor's Office, revisited Ms. Strickland's case (28T 69-17 to 76-8). Det. Longo learned that Mr. Simon had moved to Houston, Texas, and Sergeant Reginald Olive of the Houston Police Department to request that he locate Simon and take a buccal swab (23T 14-13 to 15-17; 28T 76-1 to 19). On August 12, 2015, after being arrested for a minor traffic violation, Mr. Simon agreed to provide Olive with a buccal swab (25T 16-17 to 18-17).

On October 16, 2015, forensic scientist Christopher Szymkowiak concluded in a report that Mr. Simon's Y-STR DNA profile "matche[d]" the Y-STR DNA profile from Ms. Strickland's fingernail clippings and the sperm cell fraction of the vagina swab (23T 150-3 to 152-23). Because Y-STR DNA is paternally inherited, Szymkowiak could not exclude all of Simon's paternal relatives (23T 154-13 to 23). More information was available from the sample on Ms. Strickland's right fingernail than the left: while the profile from the left could "occur no more frequently than 1 in 7 of the African-American population," the sample from the right fingernail is "expected to occur no more frequently than 1 in 20.1 thousand of the African-American population" (23T 155-2 to 8, 156-13 to 19).

Szymkowiak also obtained DNA samples from Joiner, Goldsboro, and Brown. Analysis excluded Goldsboro, Joiner, and Brown as possible contributors to the Y-STR DNA profiles from Ms. Strickland's left fingernail and vagina, but could not exclude them as contributors to the sample taken from Ms. Strickland's right fingernail (23T 171-25 to 179-6) (emphasis).

Notwithstanding this evidence, the State's case heavily relied upon testimony of irrelevant witnesses to the facts, who testified unlawfully to the bad character and prior bad acts of Mr. Simon, most of which was hearsay. (See Counsel's Brief, Point III, at 35-45.)

Notwithstanding the mixture of permissible and contested impermissible evidence used against Mr. Simon at trial, whether combined or separated, still could not establish his guilt beyond a reasonable doubt, even with all favorable inferences therefrom.

Neither the evidence obtained before this case was reopened in 2015, nor the evidence obtained after it was reopened in 2015, or the combination thereof, does not rise to the level whereby a jury could convict Mr. Simon of the murder of Ms.

Strickland beyond a reasonable doubt, nor is the jury verdict sustainable in face of a motion for acquittal.

The State obviously did not believe the evidence it possessed prior to the case being reopened in 2015 was enough to establish probable cause to arrest Mr. Simon, which means it does not rise to the level of proving guilt beyond reasonable doubt.

Moving forward to after the case was reopened in 2015, the only new evidence developed was Mr. Simon's DNA matching DNA found in the victim's vagina and fingernail clippings.

Beginning with his DNA found in the victim's vagina: Mr. Simon already admitted to police the day Ms. Strickland's body was found that they had sex the night before, as they were partners in a romantic relationship. The presence of Mr. Simon's DNA in Ms. Strickland's vagina is in no way indicative of criminal behavior under these circumstances. Giving all favorable inferences to the State, this evidence at most could only establish Mr. Simon as guilty of having sex with a woman he was in a romantic relationship with. If Mr. Simon was a stranger with no relationship to Ms. Strickland, then this evidence may very well be indicative of criminal behavior. However, with Mr. Simon being Ms. Strickland's boyfriend who admitted to having sex with her the night before he found her body, this is in no way indicative of implicating him in her murder. Moreover, there was no allegation that he engaged in any unlawful sex act with Ms. Strickland.

Next, the presence of his DNA found under her fingernail clippings should also not be too surprising. During the course of sexual intimacy it is normal for couples to exchange bodily fluids onto one another's bodies, such as sweat and saliva. Also, it is normal in some sexual relationships for women to scratch men's backs in the midst of sexual intercourse. These are all normal occurrences. Thus, the presence

of Mr. Simon's DNA under Ms. Strickland's fingernail clippings is not indicative of criminal behavior that implicates him in her murder, not under these circumstance.

Finding DNA evidence of a romantic partner who admitted to being sexually intimate with the other the night before finding the victim's body does not implicate him in the crime of murder. Attempting to implicate a romantic partner who admitted to having consensual sexual intercourse with the other the night before her body is found due to the partner's DNA being found on the victim, is like attempting to implicate him in her murder because his fingerprints were found in her apartment where he often frequented and at times resided. It is a nonsensical implication in this type of circumstance.

There is no evidence to contradict Mr. Simon's statement that he left Ms. Strickland's apartment the night before due to an argument and returned the following morning and found her lifeless body. Period.

There is no evidence that Mr. Simon harmed or attempted to harm Ms. Strickland around the time she was killed.

There is no evidence that Mr. Simon was present at Ms. Strickland's residence when she died.

And there is no evidence that Mr. Simon murdered Ms. Strickland.

However, the evidence does corroborate Mr. Simon's version of events: that he was at Ms. Strickland's residence, they had an argument, had sex, then had another argument, and he left and went to Paulsboro and slept in his car in front of a friend's driveway, then returned to Camden in the morning and ordered food at the Off Broadway Lounge, and that he called her while in Paulsboro and called her the next morning to ask her if she wanted breakfast but she did not answer her phone either time (25T 81-7 to 82-13, 117-12 to 119-2, 125-10 to 129-1, 128-23 to 130-15, 132-12 to 133-25, 136-5 to 138-20, 139-14 to 142-12).

The cell site history analysis of Mr. Simon's phone shows he was present in the vicinity of Ms. Strickland's home on July 9, 2010, until after midnight; and that his cell phone was then used in the area of the city Paulsboro around 3:47 a.m., and then used near the Off Broadway Lounge around 7:43 a.m. (26T 182-12 to 186-8).

What is unknown about the instant case is: who else was in Ms. Strickland's apartment in between the time he left the night before and finding her body the next day, besides the three men we already know were there, mentioned ante.

Also unknown is who is the other male contributor to the Y-STR DNA profile taken from Ms. Strickland's right fingernail (23T 171-25 to 179-6). As the forensic scientist was questioned, "So it's two DNA profiles from two different males. Correct?" to which he replied, "Correct. Correct. Yes" (24T 220-12 to 14). Thus, there was other unknown male DNA found on Ms. Strickland's body other than Mr. Simon's; and Raymond Brown, Tyrone Goldsboro and Tyrone Joiner could not be excluded as being the contributor to this other DNA (23T 171-25 to 179-6). Nonetheless, there was other male DNA found other than Mr. Simon's, which could identify the perpetrator of Ms. Strickland's murder.

Because the contributor of this other male DNA profile is unknown does not mean the State is entitled to place the blame of Ms. Strickland's death onto Mr. Simon, whom it is known shared a romantic relationship with Ms. Strickland.

The fact of witnesses being paraded into court as a smear campaign against Mr. Simon's character who testified to him and Ms. Strickland having a toxic relationship is not enough to implicate or infer that he killed her.

The jury verdict of guilt in the instant case is a manifest injustice and could only have been returned against Mr. Simon based upon the jury's hunch, "speculation," "surmise, conjecture" or mere "suspicion"—all forbidden by our Supreme Court in Lodzinski, 249 N.J. at 144-45. However, Mr. Simon was subject to the very miscarriage of justice our criminal justice system was designed to prevent.

For the reasons stated above, we request this Court to enter a judgment reversing the trial court's denial of judgment of acquittal and vacate Mr. Simon's conviction, dismissing the indictment with prejudice.

POINT II

**THE COMPLAINT WARRANT WAS FALSIFIED AND BACKDATED ON A WARRANT FORM THAT WAS REVISED AND CREATED FOR USE ON "1/1/2017," WHILE MR. SIMON WAS ARRESTED ON "1/27/2016," A YEAR BEFORE THIS FORM WAS CREATED, AND IT DOES NOT HAVE THE REQUIRED SIGNATURE OF A JUDICIAL OFFICER, THUS MAKING HIS ARREST AND DETENTION ILLEGAL, IN VIOLATION OF U.S. CONST., AMENDS. IV, V, VI, VIII, AND XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10, 12. (Raised below at 13T; 14T 77-6 to 24; 18T 205-7 to 207-6)**

On pages 1 and 2 of the Complaint Warrant issued against Mr. Simon, we see the creation/revision date in the lower right-hand corner on this form as "8/1/2015" (DaProSe 1 and 2). On pages 3 to 6 of this same Complaint Warrant, we see in the lower right-hand corner the creation/revision date of this form as "1/1/2017" (DaProSe 3 to 6). However, Mr. Simon's arrest date is "1/27/2016" (DaProSe 3 & 4), which means he was arrested an entire year before pages 3 to 6 of the Complaint Warrant were created. Thus, it is uncontestable that pages 3 to 6 of the Complaint Warrant were unlawfully falsified and backdated well after Mr. Simon was already arrested and detained.

To even further show the Complaint Warrant was unlawfully falsified and backdated, at the section of the form that requests for "Signature and Title of Judicial Officer Issuing Warrant," there is no "signature" nor "title of judicial officer issuing warrant" on this line; rather, someone typed here, generically, "JUDICIAL OFFICER" (ibid.), which is not a signature of a named judicial officer, nor is it an actual title of a judicial officer.

If pages 3 to 6 of this Complaint Warrant were created on "1/1/2017," then it is false where it states these pages of the form that they were dated and signed on "12/22/2015" (*ibid.*). With pages 3 to 6 of the Complaint Warrant having been created and backdated a year after Mr. Simon's arrest can only lead us to one logical conclusion we must accept: **there was no complete Complaint Warrant at the time Mr. Simon was arrested. Which makes his arrest and detention illegal.**

The unlawful fabrication and backdating of pages 3 to 6 of the Complaint Warrant issued against Mr. Simon can only be described as intentional deceit, dishonesty, and fraud by the State, which proves there was no complete Complaint Warrant when he was arrested. And this requires this Court to invalidate Mr. Simon's arrest and detention and vacate his convictions while dismissing the indictment against him with prejudice.

The Fourth Amendment to the United States Constitution governs all searches and seizure conducted by government agents. U.S. Const., amend IV. The Amendment contains two separate clauses: (1) a prohibition against unreasonable searches and seizures, and (2) a requirement that probable cause support each warrant issued. *Ibid.* The Fourth Amendment applies only to searches and seizures that are the product of government action. Walker v. U.S., 447 U.S. 649, 656 (1980). It protects against unreasonable government seizures of person and property. The Fourth Amendment only applies to government actions that terminate "freedom of movement through means intentionally applied." Brower v. Cnty. of Inyo, 489 U.S. 593, 597 (1989). Seizure of a person occurs when a reasonable person would not feel "free to leave," "decline the officer's requests," or "otherwise terminate the encounter." Fla. v. Bostick, 501 U.S. 429, 435 (1991). An encounter with an officer does not constitute a seizure unless the officer restrains

the individual's liberty by means of physical force or a show of authority to which the individual submits. Cal. V. Hodari D., 499 U.S. 621, 625-26 (1991).

A search or seizure unsupported by probable cause is generally unlawful. Carroll v. U.S., 267 U.S. 132, 155-56 (1925). In Katz v. U.S., the Supreme Court stated that warrantless searches "are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." 389 U.S. 347, 357 (1967); see also Terry v. Ohio, 392 U.S. 1, 20 (1968) ("[P]olice must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure").

To satisfy the warrant requirement, which applies to searches and arrests, an impartial judicial officer must assess whether the police have probable cause to make an arrest, conduct a search, etc. Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 301-02 (1967). An arrest warrant protects an individual from an unreasonable seizure and may only be issued upon a showing of probable cause to believe a suspect is committing or has committed an offense. Payton v. N.Y., 445 U.S. 573, 602-03 (1980).

"An arrest—the most significant type of seizure by police—requires probable cause and generally is supported by an arrest warrant or by demonstration of grounds that would have justified one." State v. Rosario, 229 N.J. 263, 272 (2017). Like a search warrant, an arrest warrant is presumed valid, and a defendant challenging its validity has the burden to prove there was no probable cause supporting the issuance of the warrant. See State v. Jones, 179 N.J. 377, 388 (2004). Criminal defendants are required, when challenging an indictment, to show that facts in the warrant were "knowingly and intentionally" false or made with "reckless disregard for the truth." Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

In the instant matter, it was evinced above that the Complaint Warrant at pages 3 to 6 were obviously falsified and backdated—and without a required signature and title of a judicial officer, which means no complete Complaint Warrant existed when Mr. Simon was arrested. Thus, his arrest, extradition from Houston, Texas, and detention all were illegally conducted.

We urge this Court to invalidate Mr. Simon's arrest and detention and vacate his convictions and dismiss the indictment with prejudice.

### POINT III

**MR. SIMON'S RIGHTS TO A SPEEDY TRIAL WERE VIOLATED WHERE THE TRIAL COURT DENIED HIS MOTIONS FOR A SPEEDY TRIAL, THUS CAUSING HIM TO AWAIT TRIAL IN THE COUNTY JAIL FOR SEVEN YEARS, VIOLATING U.S. CONST., AMENDS. IV, V, VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10, 12. (Raised below at 11T, 14T)**

The Due Process Clause protects defendants from intentional and prejudicial preaccusation delays. U.S. Const., amend V. The Sixth Amendment's speedy trial guarantee protects defendants from undue preaccusation delay. U.S. Const., amend. VI. The Sixth Amendment right to speedy trial is not implicated before arrest, U.S. v. Marion, 404 U.S. 307, 322 (1971), and even after arrest only applies to charges actually made. U.S. v. Battis, 589 F.3d 673, 678-79 (3d Cir. 2009).

To establish a due process violation based upon preaccusation delay, a defendant must show that the government's delay was an intentional device employed to gain a tactical advantage or to harass the defendant, and that the delay resulted in actual and substantial prejudice. Doggett v. U.S., 505 U.S. 647, 666 (1992); U.S. v. Lovasco, 431 U.S. 783, 789 (1977).

The Sixth Amendment provides a fundamental right to a speedy trial that serves to: 1) "prevent undue and oppressive incarceration prior to trial"; 2) "minimize anxiety and concerns accompanying public accusation"; and 3) "limit the possibility that a long delay will impair the ability of an accused to [present a defense]." U.S. v. Ewell, 383 U.S. 116, 120 (1966); see also Klopfer v. N.C., 386 U.S. 213, 222-24 (1967) (right to speedy trial imposed on states by the Due Process Clause of the 14th Amendment). **The remedy for a violation of this right**

**is to dismiss the indictment and vacate any sentence that has been imposed.** See Strunk v. U.S., 412 U.S. 434, 440 (1973) (vacating sentence and dismissing indictment "only possible remedy" for defendant denied right to speedy trial).

To determine whether a defendant has been deprived of the right to a speedy trial, courts are to consider the conduct of the defendant and the prosecution, focusing on four factors articulated by the Supreme Court in Barker v. Wingo: 1) length of delay; 2) reason for delay; 3) if, when and how the defendant asserted the speedy trial right; and 4) whether the defendant was prejudiced by the delay. 407 U.S.: 514, 534 (1972); see also State v. Cahill, 213 N.J. 253 (2013) (same).

The first Barker factor--the length of delay--is "a triggering mechanism" because "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." Id. 407 U.S. at 530. Courts generally hold that a delay in excess of one year is presumptively prejudicial. Doggett, 505 U.S. at 642.

To determine how the first factor affects the overall speedy trial inquiry, courts consider the particular circumstances of each case because "the delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious complex conspiracy charge." Barker, 407 U.S. at 530-31.

The second Barker factor is the "reason for the delay." Id. at 530. "[D]ifferent weights [are] assigned to different reasons" for the delay. Id. at 531. The reasons for each period of delay are considered in the aggregate, with consideration given to the effect earlier delays had in causing later delays. Vt. v. Brillon, 556 U.S. 81, 92-93 (2009). Deliberate attempts to hamper the defense weigh heavily against the prosecution, Barker, 407 U.S. at 531, and neutral reasons, such as overloaded courts and negligence, weigh less heavily. Doggett, 505 U.S. at 657. Delays resulting from valid reasons such as case complexity, U.S. v. Casas, 425 F.3d 23, 33-34 (1st Cir. 2005), good-faith interlocutory appeals, U.S. v. Loud Hawk, 474

U.S. 302, 316 (1986), or the defendant's actions do not weigh against the government at all. Brillon, 566 U.S. at 92-93.

The third Barker factor focuses on whether and how the defendant asserted his or her right to a speedy trial. Barker, 407 U.S. at 529.

The fourth and final Barker factor is prejudice. Courts assess prejudice "in the light of the interests of defendants which the speedy trial right was designed to protect," including: oppressive pretrial incarceration, anxiety and concern, and impairment of the defense. Id. 407 U.S. at 532. However, prejudice is not a necessary prerequisite "to the finding of a deprivation of the right of a speedy trial," id. at 533; nonetheless, some courts have been reluctant to find a violation of the speedy trial right absent a showing of prejudice, while others have not. See U.S. v. Ingram, 446 F. 3d 1332, 1336 (11th Cir. 2006) (speedy trial violation found when first 3 Barker factors weighed heavily against the prosecution, eliminating the need to show actual prejudice.).

In the instant case, Mr. Simon was arrested and charged with murder on January 27, 2016 (Da11; DaProSe 3). On June 9 he was indicted, then formally arraigned on June 20, 2016 (14T 49-11 to 12). Since arraigned there were numerous delays, some because of the defendant, while the majority of delays were due to the State.

On July 19, 2016, defense counsel indicated that we received discovery and needed time to review it (14T 49-16 to 20).

On September 12, 2016, defense counsel stated we were missing discovery while simultaneously undertaking our own investigation (14T 49-21 to 25).

On September 12, 2016, the defense filed a motion to dismiss the indictment, which was withdrawn on October 20, 2016 (14T 49-21 to 25).

On September 26, 2016, the defense filed a motion to reduce bail, which was denied on October 31, 2016 (14T 50-7 to 9).

On November 29, 2016, a motion to be relieved as counsel was filed by the defense, which was granted on December 18, 2016 (14T 50-16 to 18).

On January 3, 2017, defense counsel Igor Levenberg appeared on the case; then on March 6, 2017, Wayne Powell entered as defense counsel (14T 50-19 to 51-4).

On March 27, 2017, the matter was continued because Mr. Powell did not yet receive all the discovery (14T 51-5 to 8).

On May 10, 2017, the defense filed a motion to suppress that was denied on December 5, 2017 (14T 51-15 to 18, 52-19 to 21).

On June 11, 2018, the defense filed a motion to dismiss the indictment, which was denied on August 14, 2018 (14T 53-12 to 17).

On/around February 20, 2018, the defense filed its first motion for a speedy trial (11T).

An original trial date was set for September 4, 2018 (14T 53-21 to 23). After this trial date was set, the State filed a motion in limine on August 27, 2018--the eve of trial--that was heard on October 23, 2018 (14T 53-18 to 20, 54-10 to 12).

Two years after Mr. Simon was arrested and indicted, the State then decides to have another medical examiner review the findings of the original doctor who performed the actual autopsy and indicated the cause of death was manual strangulation. The new doctor—Dr. Feigin—then opined the cause of death was blunt neck trauma, as opposed to strangulation, which led the State to seek to amend the indictment with defendant's consent. On November 7, 2018, the defense withdrew consent, so the State then filed a motion to amend, which the court denied on December 7, 2018. Thereafter, the State issued a second, superseding indictment on December 20, 2018, and Mr. Simon was arraigned on January 22, 2019 (see 14T 54-13 to 55-17).

On July 25, 2019, defense counsel Powell filed a motion to be relieved from the case, which was granted on September 15, 2019 (14T 56-7 to 11). On October 21,

2019, new counsel, Mary Claire Wolf, was appointed; the following month Wolf stated she needed discovery and on January 21, 2020, she indicated she received discovery from the State and was reviewing it (14T 57-5 to 20). On February 18, 2020, Wolf requested Mr. Simon undergo a competency evaluation. While the result of this evaluation was pending, the Covid-19 pandemic began around February/March 2020.

Court hearings returned in this matter on 12/15/2020, 1/25/2021, 2/17/2021, 3/29/2021, and 4/26/2021, however, they were all continued because Mr. Simon was still pending the competency evaluation. On June 9, 2021, the evaluation took place, however, the report was not complete so the matter was postponed. On August 7, 2021, Mr. Simon was deemed competent to stand trial, and trial was set for January 24, 2022 (see 14T 57-21 to 59-12).

Attorney Kevin Watkins then entered appearance as defense counsel around this time, and on 12/6/2021, 2/28/2022, 3/14/2022 and 3/23/2022 requested adjournments of the matter (14T 59-13 to 17).

On May 9, 2022, defense counsel filed another motion for speedy trial (14T 62-16 to 17). After requests for several postponements, defense counsel's brief was due by August 5, 2022, and the State's reply by 8/31/2022, with the motion being heard and denied on September 14, 2022 (14T 62-17 to 64-11).

Albeit there were delays in the matter due to the defense, many of the delays are attributed to the State.

For at least six months the prosecutor was out on maternity leave and was the only prosecutor on the case (14T 34-7 to 15). Even more troubling, at the eve of trial, two years after Mr. Simon was charged, the State sought a new medical examiner to review the findings of the doctor who actually performed the autopsy, to come up with a new cause of death (14T 54-13 to 55-4). This led to the State seeking to amend the indictment which was denied, but then they issued a

superseding indictment on December 13, 2018, and rearraigned Mr. Simon on January 22, 2019 (14T 55-5 to 17), thus causing the entire matter to be restarted anew from the beginning, as the defense obviously had to readjust trial strategy due to the superseding indictment and new cause of death.

Even further, numerous delays occurred due to the State failing to timely turn over discovery. For instance, on September 19, 2016, defense counsel indicated we were missing discovery from the State (14T 49-21 to 25), thus causing delay. On March 6, 2017, the matter was again postponed due to "incomplete discovery" (14T 50-25 to 51-2). On November 18, 2019, the case was postponed because defense counsel "needed discovery" from the State (14T 57-9 to 11), which the State turned over by January 21, 2020 (14T 57-14 to 16).

Even further, as Mr. Simon himself argued at the speedy-trial hearing, "[O]ver the years nothing was mentioned about the change of the judges. That same thing that goes--that falls into play for--for the attorneys, the attorneys need to get up to speed with the case. I had four different judges, okay" (14T 76-13 to 17)<sup>2</sup>. First he had Judge "Schweitzer" (14T 28-24 to 25), then Judge Shusted (14T 28-25 to 29-2), then Judge Shuck (14T 29-2 to 4), then "Judge Stein" (14T 40-12 to 13), and then "Judge Booth" (14T 1).

2 Albeit on record Mr. Simon mentioned having "four different judges," he actually had five different judges, which included the judge hearing the speedy-trial motion and presiding over his trial.

Next, albeit counsel Wolf was granted an order requiring Mr. Simon to undergo a competency evaluation, Mr. Simon himself stated, "She requested a mental health evaluation without my knowledge, okay. That was done without my knowledge" (14T 75-23 to 25). And he stated, "[M]e and Ms. Wolf conversated

from maybe 5, 10 minutes at most. She had more conversation with the Prosecutor than me" (14T 78-3 to 5). Thus, the delay caused by this evaluation should not be weighed against Mr. Simon, but rather against the court who ordered it without his knowledge or consent.

Even after Mr. Simon filed his speedy-trial motion on "May 9, 2022" (14T 62-16 to 17), trial still did not commence until January 2023.

Overall, Mr. Simon sat in county jail awaiting trial for over seven years. Thus, the first Barker-Cahill factor should be found in his favor.

The second factor being the reason for the delay, the majority of the delays can only be attributed to the State government. Even trial court judges--in this case, five--have a duty to control the trial calendar and set deadlines for all motions to be submitted. Therefore, the court can not place all the blame for delays upon the defendant when he filed motions. Also, numerous motions were filed by the State that also caused delay, including issuing a new indictment right upon the eve of trial. This was done for a tactical advantage to prejudice defendant's defense that was prepared for the original indictment.

Mr. Simon sat in county jail over seven years awaiting trial with serious medical problems such as "hypertension, intestinal problems" and "hemorrhoids," inter alia (14T 9-6 to 13). He pled, "I'm in there dying. And you think this is fair to me" (14T 78-10 to 11). Also he had a child to take care of and an ill "mother who suffers greatly" (14T 9-13 to 14). He even "lost loved ones" while awaiting trial (14T 92-11 to 12), and nothing can compensate for causing him to miss their funerals.

All of the factors of whether Mr. Simon's speedy-trial rights were infringed upon should be weighed in his favor and against the State government. Even if relief is granted, as in Mr. Simon's own words, "I don't get this time back" (14T 92-11). Nonetheless, we can attempt to make it right.

Thus, for the reasons above we ask this Court to vacate Mr. Simon's convictions and dismiss the indictment with prejudice for violating his constitutional speedy-trial rights.

**POINT IV**

**THE TRIAL COURT VIOLATED MR. SIMON'S  
CONSTITUTIONAL RIGHTS TO A PUBLIC  
TRIAL BY BARRING HIS MOTHER FROM THE  
COURTROOM FOR UNJUSTIFIED REASONS, IN  
VIOLATION OF U.S. CONST., AMENDS. I, IV, V,  
VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10 12.  
(Raised below at 21T 6-19 to 20-22)**

The Sixth Amendment of the U.S. Constitution grants all criminal defendants the right to a public trial, U.S. Const., amend. VI, and this right is made applicable to the States via the Fourteenth Amendment. U.S. Const., amend. XIV. Similarly, the New Jersey State Constitution provides the criminally accused with the right to a public trial. N.J. Const., art. I, ¶ 10. Additionally, the First Amendment implicitly provides the press and the general public the right to attend trials. See Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 580 (1980); El Vocero de P.R. v. P.R., 508 U.S. 147, 148-50 (1993); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-03, 610-11 (1982).

The constitutional right to a public trial ensures fairness to the defendant, maintains public confidence in the criminal justice system, provides an outlet for community reaction to crime, provides incentives for judges and prosecutors to fulfill their duties responsibly, encourages witnesses to come forward, and discourages perjury. Waller v. Ga., 467 U.S. 39, 46 (1984). A defendant may waive his or her Sixth Amendment right to a public trial and request a closed proceeding, but does not have a right to a closed proceeding. Singer v. U.S., 380 U.S. 24, 34-35 (1965). However, a request for closed proceedings implicates the

public's First Amendment right of access. See Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1, 7 (1986) ("[R]ight to an open public trial is a shared right of the accused and the public . . .").

The United States Supreme Court held that the First Amendment right of access and the Sixth Amendment right to a public trial require trial proceedings to be open to both the press and public unless the trial court specifically finds on the record that: (1) closure would prevent a substantial probability of prejudice against a compelling interest of the defendant, government or third party; (2) alternatives would not adequately protect the interest(s) in question, while preserving the transparency of the proceedings; (3) the prejudice to the interest in question outweighs the First Amendment right of access; and (4) the closure remedy "is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court (Press-Enterprise v. Superior Court (Press-Enterprise I)), 466 U.S. 501, 510-11; Waller, 467 U.S. at 48-49).

In the instant matter, defendant's mother, Ms. Simon, then an 83-year-old woman, was barred from attending her son's trial for unjustified, unsustainable reasons, due to benign, incidental small talk between her and some jurors. Ms. Simon was not a witness nor party in the case, but was a mere spectator there as Mr. Simon's only noted moral support.

Some of the instances of benign conversation between Ms. Simon and jurors the judge used as justification to bar her from the courtroom--and the entire "fifth floor" of the courthouse (21T 10-12 to 12, 11-24 to 12-1)--consist of "you look nice today" or similar, "I hope you have a good" day (21T 7-4 to 10); "the individual [Ms. Simon] then commented on the fact that she had been chopping onions and needed to wash her hands" (21T 7-11 to 13); placing a handwritten note on a cellphone she thought was left behind that read "please don't touch this cell phone" (21T 7-15 to 8-4, 14-4 to 17); "during lunch two jurors were having a

conversation about the fact that they have family in Virginia and that this individual came up to them and said oh you have family in Virginia, I have family in Virginia to initiate conversation" (21T 8-5 to 10); and she showed some other jurors a picture on her shirt of "her uncle who was a police officer" and said he was "a good man" and that they're "a praying family or we come from a praying family or words to that effect (21T 8-11 to 7, 15-3 to 19).

None of these benign comments justified barring this 83-year-old elderly woman from the courtroom. Giving all due deference to the lower court, nothing this lady said warranted her being kicked out of the courtroom.

Also, there was no indication that Ms. Simon ever introduced herself to jurors as defendant's mother or tried to influence their ultimate judgment in the case.

It should be noted that at least two juror knew nothing of the incidental benign conversations, or rather, benign comments (21T 9-1 to 11). And "all the jurors" indicated nothing that was said or heard from this 83-year-old woman "would affect their ability to continue to serve as jurors in this case" (21T 9-12 to 19).

Even further, there was no objection from the defense or prosecution nor a request for mistrial or "for any other action for the Court to take" from either party (21T 10-6 to 9)

Once the court decided to bar this 83-year-old woman from the court, defense counsel lodged a heartfelt objection pleading to allow defendant's mother to remain in the courtroom and to uphold the constitutional right to a public trial (21T 13-13 to 20-14). However, the court still barred her from the courtroom and the 5th floor of the courthouse.

In barring her from the actual courtroom, the trial judge made available for her to watch the trial on screen in a "tech room" via Zoom (21T 10-12 to 18, 20-18 to 22). While viewing trial via zoom screen, defendant Mr. Simon could not see his mother because the court said "I don't want her face on our screen" (21T 11-10 to

11). Also, it's not clear whether she could see evidence going up nor did the court care if he couldn't, as the trial judge stated, "If it means she can't see the evidence going up so be it" (21T 11-21 to 22).

Defendant not being able to see his mother in court had the capacity to weaken his morale and make him feel abandoned and distant from his mother's moral and emotional support.

From the record we have, Mr. Simon's 83-year-old mother was his only moral support attending his trial. Instead of barring her from her sons' trial, as an alternative the trial judge could have first issued her a warning to not talk to jurors even if with benign harmless small talk. However, the judge decided to castigate her with the most draconian and harsh punishment of barring her from her son's trial.

Also, it should be noted well that the trial court **never** instructed jurors that they cannot talk to people in general; rather, he only instructed them daily to "don't talk about the case" (15T 23-6 to 23; 18T 223-5 to 6; 31T 130-5; 32T 136-5; 33T 182-7 to 8; 34T 157-25 to 158-1) (emphasis added). (And if the court did not want the jurors intermingling with the general public at the courthouse the court could have ordered that they be sequestered away from the public in the courthouse.) If the court only instructed jurors to not talk about "the case," and **never** instructed them to not talk to people in general (which would've been an inappropriate and unrealistic instruction), then what court instruction did Ms. Simon intentionally or knowingly break and violate by engaging in small talk with jurors? What did she do that was so wrong and deserving of being barred from the courtroom when there was no forewarning that her conduct was inappropriate? Where is the justice in barring this elderly woman from the courtroom where her son is being tried for his life?

It should also be noted, Ms. Simon was barred from her son's trial on "January 12, 2023" (21T), while his trial lasted until "February 15, 2023" (36T). Thus, she was barred for a significant portion—OVER A MONTH'S TIME—of her son's trial, in which he could no longer see his mother for emotional and moral support.

Compelling Ms. Simon to monitor her son's trial via Zoom hindered Mr. Simon's ability to see her the remainder of his trial. Thus, it was prejudice to the defendant and infringed upon his right to a public and open trial. From the defendant Mr. Simon's vantage point, his mother was not at the remainder of his trial due to the court barring her from attending and his inability to see her there. Nonetheless, he shared an interest and constitutional right in his mother being physically present in the courtroom with him.

The facts in this instant case are strikingly similar to the facts found in Presley v. Georgia, 558 U.S. 209 (2010). In Presley, defendant's sole relative was asked to leave the courtroom to make room for prospective jurors during voir dire. Ibid. However, the U.S. Supreme Court found that this violated defendant's constitutional right to an open and public trial in vacating his convictions and remanding the matter for a new trial. Ibid.

The reason for barring the defendant's relative from the courtroom in Presley had a much more compelling government interest (i.e., to seat potential jurors) than the benign comments of a loquacious and overly-pleasant 83-year-old elderly woman in the instant case. Nonetheless, the Court did not find that this interest overrode the defendant's constitutional right to an open and public trial in Presley.

Thus, we urge this Court, based upon the facts and law above, to uphold the sacrosanct constitutional right to a public trial and reverse Mr. Simon's conviction and remand the matter for a new trial.

POINT V

**MR. SIMON'S CONVICTION MUST BE VACATED AND INDICTMENT DISMISSED WITH PREJUDICE DUE TO THE PROSECUTOR FAILING TO PRESENT EXCULPATORY INFORMATION TO THE GRAND JURY, IN VIOLATION OF STATE V. HOGAN, 144 N.J. 216 (1996); U.S. CONST., AMENDS. IV, V, VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10, 12. (Raised below at 12T)**

In the case sub judice, the prosecutor withheld from the grand jury the fact that Mr. Simon's cellular phone records corroborated his alibi and whereabouts after he left the victim Ms. Strickland's residence the night before she died up to the point of him discovering her body the next morning and contacting the police. Therefore, this warrants this Court to vacate Mr. Simon's murder conviction and dismiss the indictment against him with prejudice.

In State v. Hogan, 144 N.J. 216, 228-29 (1996), the Court held that an indictment should be dismissed in a case where the indictment is manifestly deficient or palpably defective. Every reasonable inference is given to the State during an indictment proceeding and the quantity and quality of the evidence does not need to be substantial as long as there is some evidence to support each element of a prima facie case to the grand jury the indictment should survive. State v. Schenkolewski, 30 N.J. Super. 315 (1997).

In establishing its prima facie case, the prosecutor "may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a half truth." Hogan, 144 N.J. at 236. Moreover, prosecutors are obligated to inform a grand jury of any evidence that is clearly exculpatory that directly negates the

guilt of the accused. Ibid. This is a requirement, as grand juries are "intended to be more than a rubber stamp for the prosecutor's office." Ibid. If exculpatory evidence "is withheld from the grand jury, the prosecutor, in essence, presents a distorted version of facts . . . and interferes with the grand jury decision-making function." Ib. (internal citation omitted).

On June 2, 2016, Mr. Simon was first indicted for the murder of Ms. Strickland (DaProSe 8 to 18). Thereafter, defendant moved to dismiss the indictment (12T). The reasons he sought dismissal were twofold: (1) based upon insufficiency of evidence to indict; and (2) based upon the State's failure to present to the grand jury Mr. Simon's alibi statement of his whereabouts, and that he left Ms. Strickland's apartment while she was alive and then returned the following morning and discovered her body (12T 3-24 to 8-24).

Next, the State then convened another grand jury and secured a superseding indictment (DaProSe 19 to 30).

At the second grand jury hearing, the State presented Mr. Simon's alibi statement in which he told police that he left Ms. Strickland's residence in Camden the night before, following an argument they had, and that he then drove to Paulsboro, New Jersey, where he slept in his car, then woke up and tried to call her but received no answer, then drove back to Camden and slept again in his car on Lyme Street, and that he woke up again and called Ms. Strickland again to see if she wanted some breakfast but she still did not answer her phone, then he went to a bar and got breakfast and had some drinks before returning to her home and discovering her body. (See DaProSe 24 to 25).

What the State failed to present to the grand jury was evidence that corroborated Mr. Simon's alibi. The prosecutor withheld from the grand jury facts that show Mr. Simon's cell site history analysis of his cellphone showed he was present in the vicinity of Ms. Strickland's home on July 9, 2010, until after

midnight; and that his cellphone was then used in the area of the city of Paulsboro around 3:47 a.m., and used near the Off Broadway Lounge in Camden around 7:43 a.m. (26T 182-12 to 186-8). These are all the locations that Mr. Simon stated he was in his alibi statement to police.

The only corroborating evidence the State presented to the grand jury was the fact that "detectives were able to confirm that he was at the bar" and that people at the bar "recall seeing him" there (DaProSe 25).

Nevertheless, the State failed to present the fact that Mr. Simon's cell site history corroborated him being in an entire different city—Paulsboro—around 3:47 a.m. when he tried to call Ms. Strickland's phone; and that his cell site history shows he was last around the vicinity of Ms. Strickland's residence until right after midnight (26T 182-12 to 186-8).

Had this evidence been presented to the grand jury it would've corroborated his alibi of his whereabouts from the time he left Ms. Strickland's apartment the night before up until the time he discovered her body the next day. And this could have led the grand jury to return a No Bill on the indictment.

The prosecutor presented the grand jury with one side of the coin of Mr. Simon's alibi--his statement of his whereabouts, but withheld the other side of his alibi coin that corroborated his statement--his cellphone's cell site analysis history. This shows that the prosecutor presented the grand jury with a clear "half-truth" concerning this exculpatory evidence that our Supreme Court forbid prosecutors from doing. Hogan, 144 N.J. at 236.

Withholding this corroborating evidence that supported Mr. Simon's alibi is similar to if the State withheld from the grand jury witness statements that corroborated a defendant's alibi. Thus, the State's failure to present this corroborating evidence to the grand jury left the main part of defendant's alibi as

unsupported/uncorroborated. And this evidence withheld was clearly of exculpatory nature.

For these reasons above, we urge this Court to vacate Mr. Simon's conviction and dismiss the indictment against him with prejudice.

POINT VI

**THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN FAILING TO CHARGE THE JURY ON THIRD-PARTY GUILT WHEN EVIDENCE EXISTED OF ANOTHER MALE'S DNA ON THE VICTIM'S BODY, INTER ALIA, WHICH DENIED MR. SIMON HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, VIOLATING U.S. CONST., AMENDS. IV, V, VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 19, 12. (Not raised below)**

This Point supplements the argument under Point V of counsel's merit brief on my behalf, and his argument is incorporated hereto as if fully set forth herein, and vice versa.

In counsel's Brief he argues it was plain error where the trial court failed to charge the jury with a jury instruction on third-party guilt due to evidence in the trial record that three men entered the victim's home the morning her body was discovered but they left without contacting the police to report the body. (See Counsel's Brief, Point V, at 51-54.) However, additionally, counsel was remiss in overlooking to mention in support of this argument the fact that another male's DNA profile was found under the right fingernail of the victim, Ms. Strickland.

In the instant matter, in addition to Mr. Simon's DNA been found under the victim's right fingernail—whom he shared a romantic relationship with, there was also an unknown, unidentified male's DNA found under her right fingernail (23T 171-25 to 179-6). As the forensic scientist stated when questioned: "So it's two DNA profiles from two different males. Correct?" to which he answered, "Correct. Correct. Yes" (24T 220-12 to 14).

Further, the three men who entered the victim's apartment but never reported her body to police—Raymond Brown, Tyrone Goldsboro, and Tyrone Joiner—could not be excluded as being the contributor to this other DNA (23T 171-25 to 179-6) (emphasis). Thus, this evidence of another male's DNA having been found further supports counsel's argument that the trial court committed plain error in failing to instruct the jury with a charge on third-party guilt.

Even further, it is unknown based on the facts of whether any other individual(s) entered the victim's residence in between the time Mr. Simon left her apartment the night before and returning to discover her body the next morning. This further supports our argument that the trial court erred in failing charge the jury with third-party guilt.

These arguments stated above should be considered along with and incorporated into counsel's argument at Point V of his merit brief; and counsel's argument at Point V of his merit brief should be considered along with and incorporated hereto this instant argument. In doing so, we urge this Court to find that the trial court plainly erred in failing to charge the jury with third-party guilt defense and reverse Mr. Simon's conviction and remand the matter for a new trial.

**POINT VII**

**THE CUMULATIVE EFFECT OF TRIAL ERRORS DENIED MR. SIMON DUE PROCESS AND A FAIR TRIAL, VIOLATING U.S. CONST., AMENDS. I, IV, V, VI, VIII, XIV; N.J. CONST., ART. I, ¶¶ 1, 8, 9, 10, 12. (Not raised below)**

The "cumulative effect" of errors can warrant the grant of reversal of one's conviction(s) and sentence. State v. Marshall, 148 N.J. 89 (1997). Our Supreme Court upheld the Appellate Division's reversal of the defendant's convictions in State v. Orecchio, 16 N.J. 125 (1954), and in its opinion it observed:

The sound administration of criminal justice in our democracy requires that both the end and the means be just. The accused, no matter how abhorrent the offense charged, not how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards, which have stood for centuries as bulwarks of liberty in English speaking countries. This, of course, which creep into the trial but not prejudice the rights of the accused or make the proceedings unfair, may be invoked to upset an otherwise valid conviction. . . . Where, however, the legal errors are of such magnitude as to prejudice the defendant's rights, or **in there aggregate** have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury.

[Id. 16 N.J. at 129 (emphasis added).]

More recently, the Appellate Division found that the cumulative effect of errors in the charge to the jury required reversal of defendant's convictions. See State v. Allen, 308 N.J. Super. 421 (App. Div. 1998). The Court noted that albeit simple

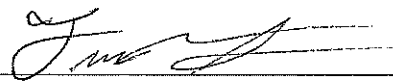
errors may be harmless, the cumulative nature of them may render a result unfair. Id. 308 N.J. Super. at 427.

Turning to the instant case, the collective errors raised in Mr. Simon's counsel's brief and in his pro se brief had the cumulative capacity to deny him his fundamental rights to due process and a fair trial. Therefore, Mr. Simon is entitled to relief.

**CONCLUSION**

We urge this Court to vacate Mr. Simon's convictions and dismiss the indictment against him with prejudice. Alternatively, we ask this Court to reverse Mr. Simon's conviction and remand the matter for a new trial.

Respectfully submitted,



By: Timothy Simon

Date: May 1, 2025

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# Superior Court of New Jersey

## APPELLATE DIVISION DOCKET NO. A-3497-22T5

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CRIMINAL ACTION

STATE OF NEW JERSEY, : On Appeal from a Judgment of  
Plaintiff-Respondent, : Conviction of the Superior Court of  
New Jersey, Law Division,  
Camden County.

v. :  
Sat Below:

TIMOTHY D. SIMON, : Hon. Sherri L. Schweitzer, J.S.C.,  
Defendant-Appellant. : Hon. Donald J. Stein, J.S.C.,  
Hon. Thomas T. Booth, Jr., J.S.C.,  
and a jury

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### BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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July 14, 2025

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Da – Defendant’s counseled appendix  
DbProSe – Defendant’s pro-se brief  
DaProSe – Defendant’s pro-se appendix  
Pa – State’s appendix  
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3T – October 12, 2017 suppression hearing transcript  
4T – December 5, 2017 suppression hearing transcript  
5T – December 15, 2017 suppression hearing transcript  
6T – February 6, 2018 motion to admit evidence hearing transcript  
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39T – December 13, 2018 grand-jury hearing  
PSR – Pre-sentencing report

## PRELIMINARY STATEMENT

Defendant murdered his girlfriend, Lawanda Strickland, in her apartment in Camden. He then staged her body under a blanket on her couch, placing a bottle of alcohol in her arm, to be found by carpet cleaners scheduled to come the following morning. When the cleaners performed their work without disturbing Strickland's body, defendant called the police himself to report her death. He was convicted of first-degree murder and sentenced to sixty years in prison with an eighty-five-percent parole disqualifier. Now, through counsel and a pro-se brief, he claims a variety of errors, all of which are incorrect.

First, testimony regarding defendant's prior jealousy and possessiveness (and attendant violence) toward Strickland—including Strickland's statement to police after a previous domestic-violence incident pending charges at the time of her murder—was admissible under N.J.R.E. 404(b), N.J.R.E. 804(b)(9), and the Confrontation Clause. The fact that Strickland was charged in connection with one incident was correctly deemed irrelevant and ruled inadmissible.

Second, defendant's confrontation rights were also satisfied by testimony from a forensic serologist who supervised the laboratory report of an unavailable analyst. That testimony was not subject to a confrontation analysis because it was not hearsay. Even if it was hearsay, controlling law on the Confrontation Clause permits such testimony because the testifying expert contemporaneously

reviewed and authorized the report. And its admission was harmless because the same evidence would have been admitted through the DNA expert.

Third, the judge's instruction to the jury, which did not include a third-party-guilt charge, was proper. Defendant did not seek such an instruction, and it was nevertheless unwarranted: defendant was the only person who was in Strickland's apartment during the timeframe in which she was killed. Further, the prosecutor properly commented on the evidence in summation. Regardless, any prosecutorial impropriety did not deprive defendant of a fair trial.

In defendant's pro-se brief, he raises several more unavailing issues. First, he was not entitled to a judgment of acquittal because compelling evidence implicated him in Strickland's murder. Further, his arrest warrant was properly issued and any alleged error was cured by both of his indictments. Also, defendant's speedy-trial rights were not violated because virtually all of the post-arrest delays were attributable to him, and he failed to show prejudice to his defense. In addition, the trial judge appropriately barred defendant's mother from the courtroom because she spoke with jurors on several occasions. And the State did not omit exculpatory evidence from its grand-jury presentation because defendant had no alibi, and even if he did, cell-site data contradicted it. Finally, without prejudicial error, there was also no cumulative error.

This Court should therefore affirm defendant's conviction.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On June 2, 2016, a Camden County Grand Jury returned Indictment No. 16-06-1666-I, charging defendant with first-degree murder “by strangling [Strickland]”, N.J.S.A. 2C:11-3(a)(1)/(2). (Pa1-2).

By oral decision on April 16, 2018, and an order dated May 3, 2018, the Honorable Sherri L. Schweitzer, J.S.C., granted in part and denied in part the State’s motion to admit evidence of defendant’s prior acts under N.J.R.E. 404(b) and N.J.R.E. 804(b)(9). (Da3-6).

On December 20, 2018, a Camden County Grand Jury returned Indictment No. 18-12-03010-I, still charging defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1)/(2), but removing the strangulation reference. (Da1-2).

On September 21, 2021, the Honorable Donald J. Stein, J.S.C., denied defendant’s motion to suppress his buccal swab. (13T137-10 to 157-5). And on September 14, 2022, the Honorable Thomas T. Booth, J.S.C., denied defendant’s speedy-trial motion. (14T48-20 to 74-15).

Following a jury trial before Judge Booth, and after a denial of defendant’s acquittal motion, he was found guilty of first-degree murder on February 15, 2023. (36T4-12 to 5-6; Da7-10). On May 19, 2023, he was sentenced to a sixty-year prison term with an eighty-five-percent parole-ineligibility term under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, in addition to all statutory

finer. (37T112-14 to 113-2; Da11-17).

Defendant filed a Notice of Appeal on July 19, 2023. (Da18-20).

### COUNTERSTATEMENT OF FACTS

The following facts were elicited at defendant's trial. (16T-35T).

Shortly before 9:00 a.m. on July 10, 2010, Amy Pacione, an EMT for University Hospital, responded to a call to Strickland's Camden apartment, where she was deceased on her couch. (17T176-12 to 178-7). Pacione assessed that Strickland's body "was cold and in rigor mortis" with no detectable heart rate, blood pressure, or breathing. (17T178-1 to 7; 18T220-10 to 16).

Sergeant John Ellis of the Camden County Prosecutor's Office (CCPO) arrived shortly thereafter. (21T27-15 to 21, 29-1 to 11). Defendant, Strickland's boyfriend and former neighbor, had called to report her death, stating that he found Strickland "lying on her left side facing the back of the couch[,] with a blanket pulled up to her chin[,] holding a [twenty-two-]ounce Colt 45 malt-liquor beer bottle that . . . was [ninety-]percent empty." (21T31-15 to 23). When Ellis arrived, he noted that the "body was cool to the touch in full rigor mortis" and there was "an abrasion on the right side of her face." (21T32-6 to 10).

Sergeant Ellis testified that as the responders moved Strickland's body to bring her to the medical examiner's office for an autopsy, liquid fell from her mouth. (21T51-25 to 22-6). He explained that "purge," a frothy or foamy

substance with “a very sour smell, like bile,” often expels from the body after death. (21T52-5 to 18, 53-4 to 19). But Ellis stated that the “strong liquid” that came out of Strickland’s mouth was “more than just purge,” was “pure alcohol” and “smelled like straight[-]up alcohol.” (21T52-3 to 12).

Investigator Paul Audino of the CCPO Major Crimes Unit also responded. (25T67-7 to 9, 68-7 to 69-20). Entering the apartment, Audino noted that Strickland was “obviously deceased” with a blanket pulled up and “a red mark on her chin.” (25T70-16 to 20). After Strickland’s body was removed for the autopsy, Audino and another officer, Barbara Kane-Ryan of the then-Camden City Police Department (CCPD), briefly spoke with defendant inside the vacant neighboring apartment. (25T71-5, 71-24 to 75-9). After a maintenance man asked them to leave so he could work in the apartment, defendant agreed to give a taped statement at the CCPO. (25T75-16 to 24).

Defendant, after acknowledging his rights (though not “in any trouble”), gave his account, which was played at trial, to Audino and another officer. (25T76-8 to 13). He explained that because of his drinking, Strickland had kicked him out of the house a few days prior. (25T118-14 to 119-2). On July 9, however, after Strickland left for work, defendant spent the day drinking alone in her apartment. (25T117-25 to 118-5).

Defendant told police that when Strickland returned around 4:30 p.m., she

brought her six- and four-year-old daughters from a previous relationship to the house of Shante Parker, a friend, to stay the night. (25T119-8 to 120-12). He said Strickland came home and put “three or four” bottles of Colt 45 malt liquor in the refrigerator for herself and later took two upstairs. (25T123-4 to 124-24). Defendant then “snuck off” to a liquor store to buy gin around 9:00 p.m. and returned. (25T125-10 to 126-9). After finishing that bottle, he put it atop a kitchen cabinet. (25T126-16 to 130-15, 131-3 to 25). Strickland caught him, and they argued before she went back upstairs. (25T127-14 to 128-11).

Eventually, defendant told police, he and Strickland had sex, argued about defendant’s drinking again, and defendant insulted “everybody” in Strickland’s family. (25T129-2 to 131-10). Defendant stated that sex did not “get physical” and he did not know where the red mark on Strickland’s chin came from, suggesting it could have resulted from shaving or waxing her face. (25T134-8 to 136-3). He later stated he never “beat her up or hit her.” (25T144-3 to 12).

Defendant claimed he left the apartment around 2:30 a.m. on July 10 and drove to Paulsboro to sleep in his car in a friend’s driveway. (25T136-5 to 137-1). He said he felt unsafe “laying [his] head back in Camden” and did not contact his friend to sleep inside because it was late at night. (25T137-8 to 138-3). Around 4:00 a.m., defendant left Strickland a voicemail message. (25T138-4 to 23). On his way back to Camden, defendant called Strickland again to no avail,

suggesting to police that Strickland was a heavy sleeper when she drank alcohol. (25T138-25 to 139-12). Back in Camden, defendant drove to the house of Akbar Streater, another friend, which he claimed was “boarded up,” and again slept in his car until daylight without contacting Streater. (25T139-14 to 141-17).

Waking up between 6:30 and 7:00 a.m., defendant drove two blocks away to the Off Broadway Lounge, a bar he often visited. (25T139-20 to 22, 140-17 to 141-20). After calling Strickland purportedly to ask if she wanted breakfast, but again receiving no answer, he drank “four or five beers” while waiting for breakfast and returned to Strickland’s apartment. (25T140-22 to 141-9).

Telling police that he was “having a problem with [his] key,” he entered Strickland’s apartment through the back door. (25T142-13 to 22). He explained that carpet cleaners were scheduled to come, and he noticed that the coffee table had been moved off of the carpet, but no one was there when he arrived. (25T142-21 to 143-23). He noted that the only other person with a key to the apartment was a neighbor who facilitated the carpet cleaning. (25T148-4 to 6).

When defendant saw Strickland on the couch, he started “slapping her” and called 911. (25T181-9 to 18). After doing so, he then called for help to a maintenance worker, Kevin Smith. (25T181-15 to 21). Defendant told police he lifted Strickland’s head to resuscitate her, but Smith told him that Strickland was “cold” and “dead.” (25T182-6 to 183-20). When asked if he knew how

Strickland died, defendant claimed that she could have fallen. (25T191-12 to 14). During the interview, defendant received several phone calls from his mother and a bartender at the Off Broadway Lounge, after which the interview concluded and defendant left. (25T197-8 to 15, 25T199-16 to 26T39-6 to 13).

Witnesses testified regarding the time surrounding Strickland's death. Parker said that on July 9 at about 5:30 p.m., when Strickland dropped her children off for a sleepover for Parker's daughter's birthday, Strickland had no "marks or injuries" on her face. (30T73-17 to 74-11). Carol Cotton, a neighbor, also saw Strickland that evening uninjured. (17T150-19 to 22).

Streater, who had been allowing defendant to stay at his house in Camden, was the first person to see defendant the morning of July 10. (28T142-8 to 143-2). He and defendant were part of a "breakfast club" who frequented the Off Broadway Lounge beginning at 7:00 a.m. to drink alcohol and eat breakfast. (28T139-16 to 140-1). Streater noted that defendant mentioned "[m]ore than once" that he was "[t]aking his girlfriend home some breakfast," which he had never done before. (28T146-20 to 147-4). The State showed photos from the Off Broadway surveillance video that morning showing defendant arriving at 7:03 a.m., having a bag of food placed in front of him on the bar at 7:59 a.m., and leaving at 8:36 a.m. (28T147-12 to 152-2; Pa3-5).

Tamala Kearney, Strickland's work supervisor at a rehabilitation center,

testified that defendant called the unit to ask for Strickland between 8:30 and 8:45 a.m. on July 10. (30T143-23 to 144-2, 147-9 to 18). While Strickland was “normally on time” for her 8:00 a.m. work shift, she did not call to say she would be late, which she “always” did. (30T141-10 to 19, 142-13 to 21). Kearney explained that defendant typically called the unit “nine or ten times during [Strickland’s] work shift” and was normally “a little rude” and “[un]pleasant,” ordering that she “put [Strickland] on the phone.” (30T144-5 to 145-1). That day, though, defendant called and politely “asked if [Strickland] was there,” to which Kearney replied “she’s not here[,] and someone should check on her because she’s normally here or she would have called.” (30T145-5 to 19, 147-2 to 8). In response, defendant hung up. (30T147-7 to 8).

The maintenance men and carpet cleaner also testified. Maintenance worker Raymond Brown said that a neighbor had helped Strickland set up a carpet cleaning, and Strickland gave Brown a key to her apartment to let the cleaners in around 8:00 a.m. on July 10. (29T11-2 to 12-19). When they arrived, Brown used the key to enter through the back door and allowed them in from the front. (29T13-23 to 14-14). Walking through the apartment, Brown saw “a quilt . . . on the couch” but did not notice a person lying there. (29T14-15 to 15-4). He believed Strickland was at work, telling police that she would typically leave at 7:00 a.m. (29T24-6 to 14, 27-10 to 14). After admitting the

carpet cleaners, Brown returned to work on the next-door unit. (29T16-3 to 14).

Tyrone Joyner, the carpet cleaner, testified that he and his teenage son, Tyrone Goldsboro (who assisted him), arrived around 8:25 a.m. to clean Strickland’s carpet. (19T83-8 to 23). Walking into the living room, Joyner—who did not know Strickland—noticed “a young lady laying on the couch with a blanket over her [and] a little bottle in her hand.” (19T85-20 to 24). Joyner, not thinking she was dead, believed that “she partied and came home [and] went to sleep with the bottle in her hand,” which was “not [his] business.” (19T86-1 to 10). Joyner cleaned the carpet in about ten minutes while Goldsboro stood near the front door after moving a coffee table. (19T88-4 to 25; 30T53-17 to 18). At around 8:40 a.m., Joyner collected his equipment and “hollered to the lady [that he] finished.” (19T89-15 to 25). Receiving no answer, Joyner left and asked Brown to lock the door.<sup>1</sup> (19T90-1 to 5; 29T29-1 to 8).

Smith, the other maintenance worker, was scheduled to work with Brown next door to Strickland’s unit; walking toward it, he noticed defendant, “excited and talking on the phone, . . . bolt[ing] back into [Strickland’s] apartment.” (19T116-12 to 21). When defendant exited “yelling and screaming” and calling

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<sup>1</sup> Defendant subpoenaed Joyner to re-testify during his case-in-chief, and Joyner reaffirmed that he did not touch the body and did not think the person on the couch was dead. (30T53-17 to 18, 60-14 to 16). Defendant also subpoenaed Goldsboro, who testified similarly. (30T38-5 to 10, 41-20 to 42-2).

for help, Smith entered Strickland's apartment and saw her lying on the couch with the covers down. (19T118-22 to 119-6). Pulling up the blanket, he noticed that her arm was "rigid and cold" and that she was dead. (19T119-11 to 120-3).

Parker testified that Strickland's sister, Pamela Strickland,<sup>2</sup> came to tell her Strickland had died, and the children's father, John Logan, arrived to pick them up. (30T75-14 to 77-7). Logan, Strickland's ex-partner, testified that he was in Philadelphia that morning with his wife when he heard that "something had happened to" Strickland. (25T58-10 to 20). Logan did not have a key to Strickland's apartment. (25T60-1 to 2).

Dr. Gerald Feigin, the Camden County medical examiner, testified regarding the autopsy.<sup>3</sup> He stated that Strickland's entire body was in rigor mortis, which takes about four to six hours to establish. (31T23-21 to 24-17). He described Strickland's injuries, including (1) bruising and "rug burn" on her cheeks and arms; (2) peeled fingernails consistent with having torn acrylic fingernails; (3) hemorrhaging in her eyes; (4) a cut in the lining of her mouth from a tooth "being pushed against it forcibly"; (5) hemorrhaging in her neck

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<sup>2</sup> Because Pamela and the victim share a last name, the State refers to Pamela by her first name to avoid confusion.

<sup>3</sup> Dr. Feigin was on vacation at the time, so Dr. Edward Chmara performed the autopsy and wrote a report. (31T16-21 to 17-8). Feigin wrote two addenda to the report, dated August 13, 2018, and July 2, 2019. (31T18-7 to 9, 21-2 to 10).

muscles; and (6) swelling in her brain from lack of oxygen. (31T27-8 to 29-2, 33-14 to 34-8, 53-15 to 54-24, 64-10 to 66-23). Based on these injuries, Feigin concluded that Strickland's death was a homicide caused by blunt neck trauma.<sup>4</sup> (31T85-8 to 86-9).

Laura Tramontin, a forensic serologist for the New Jersey State Police (NJSP), testified regarding the laboratory's biological-stain analysis. She described the lab's function as a "screening" to forward evidence containing presumptive biological stains to the DNA laboratory "for further testing" if necessary. (23T56-16 to 24). The serology lab received nine items from the scene: (1) Strickland's underwear; (2) fingernail clippings from her left hand; (3) fingernail clippings from her right hand; (4) a hair sample; (5) her DNA card; (6) vaginal swabs; (7) a buccal swab; (8) anal swabs; and (9) the Colt 45 bottle. (23T62-1 to 7, 63-19 to 64-9).

Tramontin explained that six of the nine items required further testing by the NJSP DNA unit. Strickland's underwear tested presumptively positive for semen and the sample was forwarded. (23T66-9 to 18). Also, Strickland's left

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<sup>4</sup> Chmara's report listed the cause of death as "manual strangulation," while Feigin's addendum used the term "blunt neck trauma." (31T91-2 to 23). Feigin explained on cross-examination that his decades-long practice was to use that broader phrase, but that manual strangulation was also "within reason." (31T85-19 to 86-5, 91-24 to 92-10, 100-11 to 17). Both examiners agreed Strickland died by homicide. (31T86-6 to 9, 91-10 to 15).

fingernail clippings, right fingernail clippings, and vaginal swabs tested presumptively positive for blood; all were submitted as well. (23T66-19 to 67-11, 67-24 to 68-13). The vaginal swabs also tested presumptively positive for semen. (23T67-24 to 68-13). Further, the Colt 45 bottle and Strickland's DNA card were procedurally forwarded without testing. (23T56-25 to 57-18, 67-22 to 23, 68-21 to 24).

On March 2, 2011, Christopher Szymkowiak, an NJSP Forensic Scientist, analyzed the DNA samples submitted by the forensic-serology lab. (23T96-21 to 25, 125-1 to 8). He determined that Strickland was the source of the major DNA profile on the fingernail clippings, Colt 45 bottle, and vaginal swabs. (23T129-15 to 130-5). He also detected male DNA on Strickland's fingernail clippings and sperm-cell vaginal swabs, but without a reference sample, he could not conclude the source of that DNA. (23T130-6 to 131-10).

After Strickland's death was ruled a homicide, the case was transferred to the CCPO Homicide Unit. (26T41-9 to 21, 28T21-5 to 25). After the initial detective left the unit, CCPO Detective Peter Longo took over in March 2011. (28T69-6 to 16). Longo testified that in 2015, he learned that defendant had moved to Houston, Texas.<sup>5</sup> (28T76-9 to 19). He contacted Sergeant Reginald

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<sup>5</sup> Longo explained that while he received Szymkowiak's report in 2011, urgent attention to fresh homicides rendered him unable to immediately investigate.

Olive of the Houston Police Department, who retrieved a buccal swab from defendant in August 2015. (25T15-20 to 18-13, 30-20 to 31-3, 28T76-9 to 19).

Szymkowiak concluded in an October 6, 2015, report that defendant's DNA matched the profile on Strickland's fingernail clippings and sperm-cell fraction of the vaginal swabs. (23T150-6 to 152-7, 154-8 to 20, 155-21 to 156-5, 156-20 to 157-6). He noted that the DNA profile matching defendant's from Strickland's right fingernail "is expected to occur no more frequently than 1 in 2.01 thousand of the African-American population." (23T155-21 to 156-19). And the DNA profile on Strickland's left fingernail clippings was "expected to occur no more frequently than 1 in 7 of the African-American population." (23T154-24 to 155-8). Finally, he explained that the sperm-cell fraction of the vaginal swab contained two profiles: Strickland matched the major profile and defendant matched the minor profile. (23T156-20 to 157-15). The expectation that that minor profile came from multiple individuals was "1 in 94.7 million of the African-American population."<sup>6</sup> (23T157-16 to 158-1).

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(28T70-7 to 19). A plethora of homicides in Camden—over 200 between 2011 and 2014, including a record sixty-eight in 2012 alone—required attention from the seven detectives in the unit. (28T70-21 to 72-17). Longo further noted that during this time, the CCPD reorganized into the Camden County Metro Police Department, so turnover made collaboration difficult. (28T74-23 to 75-6).

<sup>6</sup> Szymkowiak later analyzed DNA samples obtained from Brown, Joyner, and Goldsboro. (23T170-9 to 12). He explained that although each matched a minor

Testimony also revealed defendant’s history of violent jealousy and possessiveness toward Strickland, including three specific incidents in the months before the murder. Shamia Martin, Strickland’s friend, testified about an August 2009 “knife incident.” Martin was sitting in Strickland’s living room when defendant “bang[ed] on the back door.” (16T161-11 to 18). As the knocks “continued and [became] louder,” defendant “barged his way in.” (16T161-19 to 23). Defendant demanded to know who was in the house because he “hear[d] [her] talking to somebody.” (16T161-23 to 24). Seeing Martin, defendant told Strickland he wanted no one in her apartment. (16T161-24 to 162-3). The situation escalated when defendant “reache[d] for the knife that was in the sink,” defendant and Strickland “tussl[ed] over it,” and they both got cut before Strickland “pushe[d] him out.”<sup>7</sup> (16T162-14 to 22).

Martin also discussed two subsequent threats by defendant toward her. In one, as Martin walked down the street, defendant called her name from a car.

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DNA profile obtained from Strickland’s right fingernail clippings, the match was “very weak,” particularly since Joyner and Goldsboro were father and son. (23T171-25 to 173-12, 174-16 to 175-17). All three were excluded from the sperm-cell fraction and left-fingernail clippings; only defendant matched those profiles. (23T175-18 to 176-3, 23T178-12 to 16, 24T274-6 to 19)

<sup>7</sup> Defendant called John Waida of the CCPO Domestic Violence Task Force—the officer who investigated the knife incident—as part of his case-in-chief. (32T52-4 to 16). Waida, who interviewed both Strickland and defendant at the time, testified consistently with Martin’s account. (32T58-4 to 15).

(16T163-11 to 20). Defendant exited the car and walked around it, saying that Strickland “d[id]n’t need [any]] friends” and defendant was “the only friend she need[ed].” (16T163-21 to 25). As defendant approached Martin, she called to a nearby friend, causing defendant to reenter the car, tell Martin, “you’ll learn,” and drive away. (16T163-25 to 164-10). Finally, Martin described a time a week after the knife incident where she called Strickland, and defendant called back to tell Martin to “[s]top calling her.” (16T165-5 to 13).

Strickland’s sister Pamela described a violent “bar incident” involving defendant’s possessiveness in January 2010. (16T65-4 to 10). That night, Pamela and Strickland went to the Off Broadway Lounge and a male acquaintance bought them drinks. (16T65-11 to 20). Defendant—whom Pamela did not know was there—took Strickland outside to talk. (16T65-13 to 15). When the two returned, defendant went to the bathroom; a moment later, he exited and “sucker[-]punched” the man next to Strickland, who turned around and “beat [defendant] down.” (16T65-16 to 20, 66-7 to 23, 73-21 to 74-3).

While leaving the bar, Strickland “begg[ed]” Pamela to drive defendant home. (16T66-25 to 67-6). On the way, in the back seat, defendant was “flipping out” and “punching” Strickland’s seat in front of him. (16T68-3 to 16). Pamela stopped the car for defendant to walk home, but Strickland said, “I got this.” (16T67-10 to 12). When Pamela dropped the two outside Strickland’s

apartment, defendant threatened Pamela and “slam[med] her car door,” so Pamela drove off. (16T67-12 to 15, 69-3 to 9).

CCPO Officer Tracy Hall testified regarding a March 27, 2010, “choking incident.” In the early-morning hours, she responded to a “domestic call” placed by Strickland. (17T27-7 to 25). Strickland sounded “raspy” and “hoarse,” and “[s]he had marks around her neck, indicative [of] being strangled.” (17T28-1 to 4). Strickland told Hall that defendant, who “lived next door,” asked her for money; when she refused, he “choke[d] her violently” and, after she escaped, he said “he was going to bust her in her face and . . . get her.” (17T28-5 to 9, 38-25 to 39-5). He then removed money from her purse and left. (17T39-5 to 9).

Investigator Gregory Berry of the CCPO Domestic Violence Unit became the lead investigator on the “choking incident.” (17T42-16 to 43-5). His March 31, 2010, audio-recorded interview with Strickland was played with redactions at trial. (17T45-1 to 7, 50-3 to 53-21). Strickland told Berry that she had argued with defendant earlier that day, and defendant went to the Off Broadway Lounge to drink around 2:00 p.m., while Strickland was at work. (17T52-1 to 6). Overnight, defendant arrived at Strickland’s apartment, accusing her of having affairs with the complex’s maintenance workers. (17T52-6 to 9). After Strickland asked him to go home and sleep it off, “he just kept coming at” her; as she “tried to get up the steps . . . to call the cops,” he blocked her and then

“grabbed [her] around [her] neck.” (17T52-9 to 17). Strickland “fell down to the floor” and “managed to make it upstairs” to call police. (17T52-20 to 25).

Strickland called Berry back later that day. (17T55-20 to 24). Defendant had called her to find out “what was going on with the case,” and Strickland expressed concern “about the proximity because he lived . . . right next door.” (17T59-10 to 19). For her safety, Berry referred her to the CCPO Victim Witness Unit. (17T59-20 to 24).

On May 12, 2010, after the pre-indictment conference (PIC) on the choking incident, at which defendant’s pending charges were not dismissed, Investigator Berry received “a lot of phone calls and hang[-]ups” in a row. (17T59-25 to 60-12). After a “small break,” Strickland called Berry to tell him defendant had made the previous calls and was “sitting right next to her.” (17T61-2 to 19). When Berry asked if Strickland “was okay,” Strickland “said yes and immediately hung up.” (17T61-20 to 24, 63-16 to 18). Shortly thereafter, she called again, “basically whispering,” because defendant “was in the room and . . . wouldn’t leave.” (17T63-25 to 64-1). When Berry asked Strickland if she wanted to contact police, she declined but said defendant was “tripping because he thought the case would get dismissed” and he “wouldn’t let it go.” (17T64-1 to 18). He testified that before the murder, Strickland had not sought to drop any potential charges against defendant. (17T112-22 to 24).

Other family members and friends described threats linked with defendant's possessiveness of Strickland. Strickland's teenage niece, Alexis Williams, described threatening voicemails from defendant shortly before the murder. (16T181-13 to 15). Williams planned to babysit Strickland's children, but her mother "did not want [Williams] to babysit if [defendant was] around." (16T181-16 to 21). Williams's mother asked her to call Strickland's apartment to "see if [defendant] was there," and when defendant picked up the phone, Williams hung up. (16T182-1 to 10). Shortly thereafter, Williams received several phone calls from defendant, which her mother instructed her not to answer. (16T182-11 to 21). Voicemails left on her phone contained "somebody breathing." (16T187-3 to 18). Eventually, Williams's uncle confronted defendant and he stopped calling. (16T188-21 to 189-13).

Cotton, a neighbor and Strickland's friend, testified to a confrontation with defendant about a week before the murder. (17T17T146-16 to 19). Around this time, Strickland had kicked defendant out of her apartment.<sup>8</sup> (17T170-16 to 18). As Cotton walked through the neighborhood, defendant called to her. (17T148-24 to 149-1, 149-7 to 12). He told Cotton "to watch [her] back," that

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<sup>8</sup> Indeed, then-property manager Greta Culbreath testified that a few weeks before the murder, Strickland requested that Culbreath change her locks because defendant "kept coming . . . in her apartment." (16T137-1 to 4, 137-18 to 138-1). Culbreath granted her request and the locks were changed. (16T138-2 to 4).

Strickland was “not the person” Cotton thought she was, and that Strickland was a “B-I-T-C-H.” (17T146-16 to 24, 148-3 to 6).

Also, Melanie Gray, Strickland’s sister, was in the hospital expecting a call from Strickland. (20T206-25 to 207-15). Answering a call from Strickland’s phone number, Gray answered. (20T207-16 to 208-11). Defendant—whom Gray had never met—began to tell her that “he wasn’t the bad guy that people were making him out to be” and that Strickland “does things to[o].” (20T209-14). After defendant moved on to insulting another sister, Gray hung up on him. (20T211-1 to 14, 213-5 to 10).

Finally, cell-phone data tracked defendant’s location the night of the murder. According to William Shute, an FBI cell-site analyst, defendant’s phone pinged cell towers near Strickland’s apartment from 8:39 p.m. on July 9 until 12:24 a.m. on July 10. (26T182-20 to 183-2). Defendant’s call-log records showed the following calls to Strickland’s phone throughout that period: (1) eight seconds at 8:39 p.m.; (2) one second at 9:45 p.m.; (3) five seconds at 9:45 p.m.; (4) five seconds at 9:46 p.m.; (5) five seconds at 9:54 p.m.; (6) five seconds at 10:34 p.m.; (7) one minute, forty-nine seconds at 11:52 p.m.; (8) one minute, twenty seconds at 11:54 p.m.; (9) one minute, nine seconds at 12:18 a.m.; and (10) twenty-one seconds at 12:23 a.m. (26T133-17 to 135-24; Pa7-8, items 42-46, 49, 52, 54-56).

Shute testified that defendant's phone showed no activity between 12:24 a.m. and 3:47 a.m. on July 10, so he could not "analyze geographically where that phone [wa]s during that time frame." (26T183-23 to 184-12). At 3:47 a.m., defendant's phone pinged near the Greenwich/Gibbstown area and sites moving back toward Camden. (26T184-13 to 185-14). Cell records showed several more calls to Strickland: (1) one-minute, thirty seconds at 3:47 a.m.; (2) an unconnected call at 3:54 a.m.; (3) two seconds at 3:54 a.m.; and (4) one-minute, thirty-one seconds at 3:55 a.m. (26T135-25 to 136-8; Pa8, items 58-61).

Defendant's next cell-phone activity began at 7:43 a.m. near Streater's residence and the Off Broadway Lounge. (26T185-16 to 186-4). He called Strickland's phone twice more: a forty-second call at 7:43 a.m. and a forty-six-second call at 8:16 a.m. (26T136-14 to 18; Pa8, items 62-63). He returned to the area near the apartment around 8:49 a.m., when he called the police. (26T186-5 to 8; Pa8, item 67). Evidence also showed that defendant changed devices on July 11, 2010—the day after Strickland's body was found. (26T137-8 to 138-1).

Based on the foregoing evidence, the jury found defendant guilty of murder as charged. (36T3-20 to 4-20).

This appeal follows.

LEGAL ARGUMENT

POINT I

THE MOTION JUDGE PROPERLY  
ADMITTED EVIDENCE OF  
DEFENDANT’S PRIOR BAD ACTS.

The motion judge fashioned the proper scope of prior-bad-act evidence, including admitting evidence of the knife, bar, and choking incidents. Testimony regarding each incident was properly admitted under N.J.R.E. 404(b). Further, Strickland’s statement to police after the choking incident was properly admitted under N.J.R.E. 404(b) as well as the forfeiture-by-wrongdoing exception to the hearsay rule, N.J.R.E. 804(b)(9), and it did not violate defendant’s confrontation rights because by murdering her, he intended to procure her unavailability to testify against him regarding that incident. Finally, evidence that Strickland was initially charged in connection with the knife incident was properly excluded because it was irrelevant to defendant’s guilt. Judge Schweitzer correctly granted in part the State’s motion to admit evidence of defendant’s prior bad acts, and her decisions should be affirmed.

“Traditional rules of appellate review require substantial deference to a [motion] court’s evidentiary rulings.” State v. Morton, 155 N.J. 383, 453 (1998). The judge’s rulings will be upheld “absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.” State v. Perry, 225

N.J. 222, 233 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). The motion judge’s decision to admit evidence should not be overturned unless its “finding was so wide of the mark that a manifest denial of justice resulted.” State v. Lykes, 192 N.J. 519, 534 (2007).

A. Facts Elicited at the N.J.R.E. 404(b) Hearing

Shamia Martin testified regarding the August 2009 knife incident. She was in Strickland’s living room when defendant began “banging on [Strickland’s] back door” while yelling “[w]ho is at your house? Who’s in here?” (7T146-7 to 14). Martin walked in the kitchen to check on Strickland, who said she was “fine.” (7T146-14 to 17). Defendant then told Strickland “I don’t want no one in this house. I don’t want you to talk to nobody.” (7T146-17 to 19). During the argument, defendant “grab[bed] the knife that . . . was in the sink” and lunged at Strickland, but she “got the knife from him” and “pushed him out” despite that “her arms and her hands were cut up.” (7T146-19 to 22).

CCPO Assistant Prosecutor (AP) Tracy Cogan testified regarding her role in prosecuting that incident. She explained that while Strickland was initially charged in connection with the altercation, Cogan recommended a downgrade following an investigation of “the whole picture” of domestic-violence history. (9T61-9 to 63-14). Indeed, Cogan noted, defendant had “a history of domestic violence, whereas [Strickland] had no history of domestic violence” or

criminality. (9T63-17 to 21). She also found Strickland’s account—that defendant entered her house arguing and “refused to leave,” which led to a struggle over the knife in which Strickland was accidentally cut—“logical,” “seemingly plausible,” and unexaggerated.<sup>9</sup> (9T63-21 to 64-6). Within about one month of the initial charges, the CCPO downgraded them. (9T64-10 to 17).

Strickland’s sister Pamela described the January 2010 bar incident at Off Broadway Lounge. While at the bar, Strickland and Pamela spoke to “a long-time [male] friend” who bought them both drinks. (8T209-3 to 4, 14 to 17). Unknown to Pamela, defendant was also at the bar; he became angry and approached Strickland, asking to speak outside. (8T208-19 to 21, 209-9 to 13). After Strickland rejoined the group, defendant “just started throwing blows at the guy, . . . sucker punch[ing] him”; however, “the guy beat [defendant] down.” (8T209-4 to 210-11).

Strickland then asked Pamela to drive defendant and her home because defendant was too drunk to drive. (8T210-14 to 18). On the ride, defendant, from the back seat, was “hitting” Strickland, who was in the front-passenger seat, “just going at her.” (8T210-18 to 21, 211-7 to 11). Pamela testified that she parked the car to help, but Strickland insisted, “[n]o I got it, I got it.”

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<sup>9</sup> Defendant, according to Cogan, said that Strickland “just invited him into the home and came at him with a knife, and he . . . disarmed her.” (9T15 to 18).

(8T210-21 to 24). When Pamela parked outside Strickland's apartment, defendant "still wanted to fight" Pamela, slammed her car door, and "bust[ed] [her] window out" while "trying to attack" her. (8T210-24 to 211-2). Strickland again told Pamela, "I got it." (8T211-6). As defendant tried to "beat [Pamela] up," he was "flipping out" and "ready to . . . tear [her] car up," but Pamela drove away.<sup>10</sup> (8T230-8 to 13).

A few weeks later, on March 27, 2010, Strickland called to report the choking incident. Cogan testified that officers noticed "ligature marks around [Strickland's] neck" and noted her voice was "hoarse" as she gave her account of the incident. (9T65-22 to 66-4). Defendant was arrested that day. (9T66-5 to 8). Four days later, Strickland gave a taped statement to Investigator Berry, which was played at the hearing. (7T41-19 to 48-12; Pa9-15). Strickland explained that she had argued with defendant that morning. (7T43-19 to 22; Pa10-11). Defendant then went out drinking that afternoon while Strickland worked, and he returned to her apartment around 1:00 a.m. to sleep. (7T43-24 to 44-2; Pa11). Around 3:00 a.m., defendant woke up and accused Strickland

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<sup>10</sup> Pamela admitted on cross-examination that on the day of Strickland's death, she did not tell police that defendant had previously struck Strickland. (8T232-6 to 13). She explained her hesitancy to admit that because he hit Strickland, Pamela exited the car and "pulled [out] a crowbar . . . to knock him upside his head." She thus wanted to avoid legal penalties. (8T232-14 to 233-10).

of having affairs with “the maintenance men.” (7T44-2 to 4; Pa11). Strickland said that when she told defendant to “go home or sleep it off, . . . he just kept coming at” her. (7T44-4 to 6; Pa11).

As Strickland tried to walk upstairs to call the police, defendant blocked the way, saying “everybody” was talking about how Strickland was cheating on him. (7T44-6 to 10; Pa11). When Strickland tried to “push him out of [her] way,” defendant “grabbed [her] around [her] neck” and she “fell down to the floor.” (7T44-10 to 17; Pa11). When Strickland “managed to make it upstairs,” she called the police. (7T44-18 to 20; Pa11). She showed Berry two scratches on her neck as well. (7T44-21 to 45-3; Pa11).

At a May 12, 2010, pre-indictment conference (PIC) on the choking incident, AP Cogan prepared a grand-jury presentment against defendant—scheduled for July 21, 2010, eleven days after Strickland’s body was found—on charges of second-degree aggravated assault, third-degree aggravated assault, and terroristic threats. (9T68-13 to 70-19).

Later that day, Investigator Berry “received a number of phone calls” in a row in which “someone was just calling and hanging up.” (7T54-1 to 17). A few minutes afterward, Strickland called and asked about the results of the PIC. (7T54-20 to 55-9). Berry asked if she made the prior calls; she whispered that defendant had called from her phone and “was sitting right there next to her.”

(7T55-16 to 22). Noticing the whispering, Berry asked if she was “okay”; Strickland replied “yes,” and the call abruptly ended as if someone “snatched the phone and hung it up.” (7T55-23 to 56-17). Shortly after, Strickland called Berry again and declined his offer to call the police, saying that defendant was “tripping because he wants the case to get dismissed.” (7T56-18 to 57-8).

Witnesses also recounted other threatening encounters with defendant displaying his possessiveness of Strickland. Brown, a maintenance worker, stated that while working in defendant’s apartment, defendant accused him of trying to date Strickland. (6T53-9 to 16). Brown clarified to defendant that although he was friendly with tenants, “there [was] nothing going on” between him and Strickland. (6T53-9 to 25). In his statement to police the day after Strickland’s murder, Brown said he “put [defendant] him in his place” by saying he knew Strickland before defendant had moved in, which caused defendant to “back[] off.” (Pa31). He stated that defendant was a “highly jealous dude.” (Ibid.). Brown likewise testified at the hearing that defendant “didn’t want [any]body to come between” him and Strickland. (6T61-22 to 62-9).

Kearney, Strickland’s work supervisor, testified regarding a history of defendant’s phone calls. She explained that he called the unit several times during each of Strickland’s shifts. (7T13-20 to 14-1). On each occasion Kearney answered the phone, defendant was “rude” and “direct.” (7T14-14 to

15-9). The day Strickland's body was found, Kearney noticed that she was late to work because she was "always on time" or would call if she ran late. (7T11-11 to 12-25). Shortly thereafter, defendant called, asking for Strickland. (7T13-14 to 19, 18-9 to 11). Unlike on the other occasions, defendant said "[g]ood morning" and "wasn't rude as he was normally." (7T15-19 to 16-4). When Kearney replied that Strickland was not at the hospital and that someone should check on her, defendant hung up without replying. (7T16-5 to 15).

Aside from the knife incident, Martin testified about encounters with defendant. "[A] few weeks" prior to the murder, defendant threatened her. (7T149-3 to 9). As Martin was near a friend's house, defendant drove up in a car and asked her name. (7T148-6 to 11). When Martin confirmed that Strickland was her friend, defendant got out and told Martin to "[s]top talking to" Strickland, that he was Strickland's only friend, and that Martin would "learn" if she did not "stay away from" Strickland. (7T148-11 to 22). As he walked toward her with "his hands behind his back," Martin's friend walked by, prompting defendant to reenter his car and drive away. (7T148-14 to 19). Martin also detailed two phone incidents: a time when defendant called her from Strickland's phone to tell her not to call Strickland, and another time—a few days before the murder—when defendant confronted Strickland while on the phone with Martin and "the phone just went dead." (7T149-21 to 150-16).

CCPO Detective Antonio Pagan testified regarding a July 14, 2010, interview with Gray, Strickland's older sister.<sup>11</sup> Gray recalled an incident on May 17, 2010, where she was in the hospital and defendant called her from Strickland's phone to tell her, unsolicited, that he was not a "bad guy" and Strickland "d[id] things, too." (9T19-1 to 20-19; Pa38-41). Defendant then ranted about Gray's other sister, claiming she was "married to a crack[-]head" and misspent money that Gray had sent her. (9T20-19 to 21-4; Pa41). When Gray asked him why he called to complain about her sisters, he said he "just wanted [Gray] to know," and Gray "hung up on him." (9T21-4 to 13; Pa41).

Also, Cotton, a neighbor and Strickland's friend, testified that shortly before the murder, while she was walking in the neighborhood, defendant, standing in Strickland's doorway, told Cotton she had "better watch [her] back," and that Strickland was "a bitch." (9T159-5 to 14, 160-11 to 15). Cotton did not engage because defendant and Strickland argued often and she did not want to "get in the middle" of their "business." (9T159-13 to 160-10).

Finally, Culbreath, the former apartment-complex manager, told the CCPO that Strickland asked to have her locks changed "so that [defendant]

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<sup>11</sup> Gray experienced "serious medical issues" preventing her from attending the hearing. (9T9-8 to 11).

couldn't get in[to]" her apartment.<sup>12</sup> (Pa62). About a month before the murder, Culbreath directed a maintenance worker to change the locks. (Pa54).

B. The Motion Judge's Admissibility Rulings

At the close of the hearing, Judge Schweitzer made admissibility rulings and credibility findings. First, finding Martin "credible," "composed," and "articulate," the judge ruled her knife-incident testimony admissible. (10T52-16 to 53-1). Under the N.J.R.E. 404(b) analysis outlined in State v. Cofield, 127 N.J. 328 (1992), the judge concluded the testimony "show[ed] [defendant's] jealousy" and "the violent nature" accompanying it. (10T53-2 to 5). The judge also found the testimony clear and convincing. (10T53-5 to 6). Defendant's threats toward Martin were admitted and not subject to Cofield. (10T53-6 to 9).

Under Cofield, Judge Schweitzer denied defendant's request "to elicit testimony . . . that [Strickland] was charged" in connection with the knife incident because it was irrelevant hearsay with no applicable exception. (11T4-2 to 12). The judge also ruled inadmissible testimony regarding Martin's and Gray's conversations with Strickland in which Strickland said defendant liked to choke her during and outside of sex. (10T50-25 to 51-7; 11T3-14 to 4-1).

The judge also admitted Pamela's testimony concerning the bar incident

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<sup>12</sup> Culbreath testified at the hearing, but only content covered in her statement to police was admitted. (10T36-2 to 8, 35-8 to 20, 36-8 to 10, 52-6 to 9).

under Cofield. (10T49-16 to 14). She first stated that the incident was relevant to “the State’s theory that [defendant] would be physically aggressive” when jealous. (10T49-24 to 50-2). She also found the event to be “reasonably close in time” to the murder—which occurred a few months later—and that the evidence was clear and convincing. (10T50-3 to 6). Finally, she concluded that the testimony would be probative and not unduly prejudicial. (10T50-6 to 12). In finding Pamela credible, clear, convincing, and articulate, the judge specifically credited her admission that she did not tell police she brandished a crowbar and threatened defendant during the incident. (10T49-5 to 21).

The judge admitted Strickland’s recorded statement after the choking incident until “the police w[e]re called,” excluding subsequent statements regarding the knife incident and the relationship in general. (10T53-14 to 19). She concluded that under the N.J.R.E. 804(b)(9) forfeiture-by-wrongdoing test outlined in State v. Byrd, 198 N.J. 319 (2009), Strickland’s statement was “reliable and . . . admissible as substantive evidence.” (11T12-3 to 4). She found the statement reliable because it was given “in a secure environment intended to complete an investigation” by the victim of a crime. (11T10-25 to 11-8). The judge noted that Strickland was coherent and precise without rambling. (11T11-9 to 17). She further found that the statement was consistent with the observations of the responding officer and that the questions were posed

“in a calm manner” and without elevated voices. (1T11-18 to 12-2).

Likewise, Judge Schweitzer found that under Byrd, defendant “caused the unavailability” of Strickland based on Berry’s testimony, including “the numerous phone calls made when the matter wasn’t dismissed at PIC” and that Strickland was whispering when she called shortly thereafter. (11T12-4 to 18). And she found that the statement was relevant to defendant’s motive. (11T12-19 to 23). She also concluded that the incident was “similar in kind” and “recently close in time” to the murder. (11T12-24 to 13-3). The nature of the statement, coupled with a mirroring police report, made the evidence clear and convincing. (11T13-4 to 8). Finally, under State v. Angoy, 329 N.J. Super. 79 (App. Div. 2000), the “prejudice [did] not outweigh the probative value” and the statement was “clearly . . . relevant and material to [defendant’s] motive . . . [and] the relevant issues in this case.” (11T13-8 to 13).

The motion judge also made rulings on certain evidence she determined to be outside the scope of N.J.R.E. 404(b). She found Brown’s testimony regarding defendant’s accusation that he was trying to date Strickland admissible under N.J.R.E. 803. (10T19-17 to 20-5). With regard to Kearney’s testimony on defendant’s calls to the hospital, the judge found that she was “very credible,” articulate, composed, and consistent. (10T30-17 to 8, 34-9 to 11, 10T34-6 to 9). She admitted Kearney’s testimony regarding the characteristics

of defendant's phone calls to the unit, including "the amount of phone calls [a]nd the manner in which those calls were received," as well as "the difference in the [July 10, 2010,] call, if there was one." (10T34-13 to 24, 51-24 to 52-1).

The judge also allowed Culbreath to testify to Strickland's lock-change request, but testimony on defendant's former girlfriend was inadmissible. (10T35-8 to 20, 36-2 to 10). Further, Cotton's testimony that defendant threatened her to "watch [her] back" was relevant and not subject to N.J.R.E. 404(b). (10T39-1 to 13, 52-10 to 15). Finally, Judge Schweitzer ruled Gray's testimony admissible so long as "she present[ed] herself in some capacity for cross[-]examination" at trial, limited "solely as to the phone call and conversation that she received from" defendant.<sup>13</sup> (10T50-16 to 24).

C. The motion judge properly admitted Strickland's statement on the choking incident under the forfeiture-by-wrongdoing exception to the hearsay rule, and its admission satisfied the Confrontation Clause.<sup>14</sup>

Judge Schweitzer properly exercised her discretion to admit Strickland's statement to police concerning the choking incident. The State proved by a preponderance of the evidence that defendant caused Strickland's unavailability

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<sup>13</sup> Testimony by Strickland's sister, Lokia Murphy, was partially admitted, but she passed away before trial. (10T51-16 to 23; 18T253-7 to 14). Also, no direct ruling was made on AP Cogan's testimony, but she did not testify at trial.

<sup>14</sup> This subpoint responds to defendant's Point I. (Db18-27).

to testify when he murdered her, and his actions when his aggravated-assault case involving her was not dismissed at the PIC show an intent to procure Strickland's inability to testify. This Court should thus affirm the judge's ruling that Strickland's audio-recorded statement to police was admissible.

The Sixth Amendment's Confrontation Clause gives the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; see also N.J. Const. art. I, ¶ 10 (same). The right is "procedural," guaranteeing "an adequate opportunity to cross-examine" the witnesses against a defendant. Crawford v. Washington, 541 U.S. 36, 57, 61 (2004); id. at 53-54 (holding Clause bars out-of-court testimonial statements unless declarant is unavailable to testify and defendant had prior opportunity for cross-examination).

Hearsay, meanwhile, is a statement that "the declarant does not make while testifying at the current trial or hearing" which is offered "to prove the truth of the matter asserted in the statement." N.J.R.E. 801(c). The forfeiture-by-wrongdoing hearsay exception, however, allows for the admission of a statement "offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." N.J.R.E. 804(b)(9).

That exception, which "parallels its federal counterpart, Federal Rule of Evidence 804(b)(6)," State v. Rinker, 446 N.J. Super. 347, 359-60 (App. Div.

2016), requires only that the party “has in mind the particular purpose of making the witness unavailable,” not that it be the sole purpose of the wrongdoing. Giles v. California, 554 U.S. 353, 367 (2008); see also State v. McKelton, 70 N.E.3d 508, 545 (Ohio 2016) (“[I]t is sufficient [under Giles] if one purpose for the defendant’s conduct was to make the victim unavailable.”); State v. Supanchick, 323 P.3d 231, 239 (Or. 2014) (explaining that “[a]cts of domestic violence that culminate in murder can reflect a complex of motives” and “limiting forfeiture-by-wrongdoing to those instances in which the defendant’s primary motive or purpose was to make the declarant unavailable would undercut” Giles).

Indeed, the Giles Court held that prior “abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help” can be “highly relevant” to whether a defendant intended to prevent the victim from participating in legal proceedings. 554 U.S. at 377. To this end, when “an abusive relationship culminates in murder, the evidence may support that the crime expressed the intent to isolate the victim and stop her from reporting the abuse to authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.” Ibid.; see also id. at 380 (Souter, J., concurring in part) (“[I]t would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.”).

In light of Giles, the New Jersey Supreme Court adopted a forfeiture-by-wrongdoing hearsay exception to ensure that “a criminal defendant will not profit from making a witness unavailable to testify.” Byrd, 198 N.J. at 337-38. First, when the State intends to introduce such a statement, “it must make known its intention as soon as reasonably practicable.” Id. at 350. Next, the court must conduct an N.J.R.E. 104(a) hearing “to determine whether the witness’s out-of-court statement should be admitted into evidence because defendant engaged in wrongful conduct, making the witness unavailable.” Ibid. At that hearing, the statement is admissible if, by a preponderance of the evidence, the State shows “that defendant engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the witness’s unavailability.” Id. at 352. Lastly, “the court must determine that the statement bears some indicia of reliability.” Ibid.

That defendant intended to murder Strickland to ensure she could not testify against him in front of the grand jury two weeks later is amply supported by a preponderance of the evidence. Defendant’s history of isolating, threatening, and assaulting Strickland, coupled with his jealous and possessive behavior, was highly probative of his intent to make her unavailable to testify. Several witnesses testified to defendant’s possessiveness of Strickland as well as violence and direct threats toward Strickland and those witnesses. In fact, the knife incident stemmed from defendant’s desire that Strickland only associate

with him, and the bar incident similarly arose because defendant saw a man buy her and Pamela drinks. The choking incident likewise involved false accusations of infidelity. The acts of violence that accompanied defendant's possessiveness support the conclusion that he intended to control Strickland's ability to testify against him on the choking incident by murdering her.

Defendant also showed a proclivity for aberrant behavior directly connected to the pending choking-incident case. Indeed, Investigator Berry testified that in the hours after the PIC at which defendant's potential aggravated-assault and terroristic-threats charges were not dismissed, he received a consecutive series of phone calls in which "someone was just calling and hanging up." Strickland called thereafter, whispering, because defendant wanted to know about the case and was sitting next to her. A moment later, the phone line cut out as if someone "snatched the phone and hung it up." When Strickland called back a short time later, she told Berry that defendant was "tripping because he wants the case to get dismissed," which meant that he was "[u]pset[,] angry, [and] just wouldn't let it go." (17T63-19 to 64-18).

AP Cogan, two weeks after the murder, was set to present two aggravated-assault charges and a terroristic-threats charge against defendant. In light of Strickland's death, she could not move forward, and the case was ultimately administratively dismissed sometime in 2011. (9T70-6 to 71-23). The motion

judge therefore correctly concluded by a preponderance of the evidence that defendant intended to—and did—procure Strickland’s unavailability to testify against him. Belying defendant’s claim, while the judge did not use the word “intent,” she discussed defendant’s phone calls to Berry after the PIC (and the fact that Strickland was whispering) immediately before stating that “defendant caused [Strickland]’s unavailability,” directly linking defendant’s state of mind regarding his potential criminal charges to Strickland’s murder.

Defendant’s mistaken claim that the State’s presentation at the motion hearing suggested other potential motives, such as jealousy and control, misapplies Giles. Indeed, defendant’s history of violent possessiveness dovetailed with his intent to kill Strickland to prevent her testimony in light of the fact that she did not seek to drop the pending charges against him. His jealousy and control were part-and-parcel with his desire for her to do so. As Justice Souter noted in his Giles concurrence, “it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.” 554 U.S. at 380 (Souter, J., concurring in part). Thus, even if defendant acted with some additional motive, a preponderance of the evidence established that he killed Strickland to prevent her from testifying. See id. at 367; McKelton, 70 N.E.3d at 545; Supanchick, 323 P.3d at 239. Strickland’s statement was therefore

properly admitted under the forfeiture-by-wrongdoing exception and its admission did not violate the Confrontation Clause.

D. The motion judge properly admitted testimony regarding each incident between Strickland and defendant under N.J.R.E. 404(b).<sup>15</sup>

The motion judge admitted evidence of defendant’s past acts to the proper extent. She properly applied Cofield in analyzing testimony regarding the August 2009 knife incident, January 2010 bar incident, and March 2010 choking incident, correctly ruling each admissible. Her rulings should be affirmed.<sup>16</sup>

Under N.J.R.E. 404(b), evidence of “other crimes, wrongs, or acts” is admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.” See also State v. Stevens, 115 N.J. 289, 300-01 (1989). As with other evidentiary rulings, “admissibility rulings made pursuant to the weighing process demanded by Rule 404(b)” will not be disturbed absent “a clear error of judgment.” State v. Rose, 206 N.J. 141, 157-58 (2011) (quoting

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<sup>15</sup> This subpoint responds to defendant’s Point III. (Db35-45).

<sup>16</sup> Defendant also refers to a catch-all “pattern of threatening statements” without delineating specific testimony he claims was inadmissible. (Db35). As noted, the motion judge correctly found defendant’s accusation toward Brown and his threats to Martin and Cotton admissible because those statements were not subject to N.J.R.E. 404(b), were plainly relevant to defendant’s jealousy and possessiveness, and did not unduly prejudice him.

State v. Barden, 195 N.J. 375, 391 (2008)). To justify admission, the evidence must (1) be “relevant to a material issue”; (2) “be similar in kind and reasonably close in time to the offense charged”; (3) “be clear and convincing” evidence of the other crime or bad act; and (4) have probative value that is not “outweighed by its apparent prejudice.” Cofield, 127 N.J. at 338 (citation omitted).

To satisfy the first prong of Cofield, the evidence must have “a tendency in reason to prove or disprove any fact in consequence to the determination of the action.” See N.J.R.E. 401 (defining “[r]elevant evidence”). It must also concern a material issue, “such as motive, intent, or an element of the charged offense.” Rose, 206 N.J. at 160 (quoting State v. P.S., 202 N.J. 232, 256 (2010)).

The second Cofield factor, that the acts be “similar in kind and reasonably close in time to the offense charged,” 127 N.J. at 338, is “limited to cases that replicate the circumstances in Cofield” and “need not receive universal application” since it is not “found in the language of [N.J.R.E.] 404(b).” State v. Williams, 190 N.J. 114, 131 (2007); see also Cofield, 127 N.J. at 328 (affirming admission of past conviction of conspiracy to distribute drugs in subsequent case for conspiracy, unlawful possession, and unlawful possession with intent to distribute).

The third prong requires clear-and-convincing proof that the party against whom the evidence is introduced actually committed the other crime or wrong.

State v. Carlucci, 217 N.J. 129, 143 (2014). The clear-and-convincing standard may be satisfied by uncorroborated testimonial evidence. State v. Hernandez, 170 N.J. 106, 127 (2001). The trial court can also consider the surrounding circumstances to find adequate “support that the third prong of Cofield was satisfied.” Rose, 206 N.J. at 163.

For the fourth prong, “[b]ecause of the damaging nature of such evidence, the trial court must engage in a ‘careful and pragmatic evaluation’ of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice.” Ibid. (quoting State v. Stevens, 115 N.J. at 303). The analysis incorporates balancing the prejudice versus probative value required by N.J.R.E. 403, but does not require that the risk of undue prejudice must merely outweigh the probative value. Ibid. Under this prong, “there must be a ‘very strong’ showing of prejudice to exclude evidence of a defendant’s motive.” State v. Castagna, 400 N.J. Super. 164, 180 (2008) (quoting State v. Covell, 157 N.J. 554, 564 (1999)).

Initially, defendant misconstrues the motion judge’s statement that “[e]vidence of arguments or violence between a defendant and homicide victim has long been admitted” under N.J.R.E. 404(b). (11T7-3 to 4). Such an acknowledgement does not assert that “prior episodes of domestic violence are always admissible to show a defendant’s motive to harm the victim,” (Db39); it

was a general statement leading into the judge's admissibility ruling on the specific N.J.R.E. 404(b) evidence in this case.

In any event, State v. Vallejo, 198 N.J. 122 (2009), is distinguishable. There, even the State admitted that the prior-bad-act evidence was not offered for any "limited use . . . such as motive [or] plan" and was "a pure case of inadmissible prejudicial evidence of prior bad acts seeping into a criminal trial." Id. at 133. The Vallejo judge also failed to properly instruct the jury when the statements were made, merely giving a general instruction at the end of the case that in reaching a verdict, the jury "can't use" evidence that was "blurted out" and was "not part of this case," only "that which was dealt with in this courtroom" relating to the current charges. Id. at 136. The Court found that the trial judge's instruction "did not fulfill its purpose" because it lacked specificity and used "language [which] was simply not clear enough or sharp enough to achieve its goal." Id. at 137.

Here, conversely, the judge gave limiting instructions specific to each witness's N.J.R.E. 404(b) testimony, referring directly to each prior bad act, and he instructed the jury on the proper purposes for that evidence. (17T20-15 to 24-25; 127-19 to 130-1). He also issued a more detailed instruction on Strickland's audio-recorded statement after the choking incident and its proper use to show defendant's motive and intent in this case. (17T128-23 to 130-19).

He further clarified that defendant was not to be convicted simply because he had committed prior bad acts. (17T24-22 to 25, 129-23 to 130-1). And at the end of the case, he repeated the entire prior-bad-act instruction. (35T20-24 to 24-21). The judge’s instruction here was far more immediate, expansive, specific, and detailed than in Vallejo, and the purpose for which the jury was to use the N.J.R.E. 404(b) evidence (as well as the improper purposes) was clear.

Likewise, defendant errantly asserts that a jealousy motive is equivalent to propensity evidence. In State v. Nance, our Supreme Court admitted N.J.R.E. 404(b) evidence establishing a Nance’s jealousy as a motive for killing his ex-wife’s male friend. 148 N.J. 376, 387-92 (1997). To this end, the Court concluded that intent “was a relevant issue, and the motive of jealousy was a proper basis upon which the jury could conclude that [Nance] did or did not intend to shoot” the victim. Id. at 388. In other words, evidence of Nance’s jealousy “was probative of intent, motive, and the absence of an accident, all of which are enumerated exceptions to the rule.” Id. at 389.

Indeed, a nearly identical theory of “jealousy and possessiveness” satisfied this Court in Angoy. There, a prior instance of domestic violence was admissible in defendant’s murder trial to show that motive: Angoy first beat and choked the victim because she had been “out with a white man,” and he later killed her (in part by choking her) because she “gave [him] gonorrhoea.” 329

N.J. Super. at 83, 86-88. This Court concluded that such a prior act satisfied Cofield in part because it was relevant to motive. Id. at 87.

Here, like Nance and Angoy, evidence of defendant's jealousy and possessiveness was probative of his motive and intent to kill Strickland. In each prior bad act admitted under N.J.R.E. 404(b)—the knife incident, the bar incident, and the choking incident—defendant showed a jealous and violent possessiveness. First, he banged on Strickland's back door and confronted her about Martin being in her house, leading to Strickland being cut with a knife. Then, when defendant saw Strickland talking to Pamela and their friend at a bar, he sucker-punched the man and acted violently toward Strickland and Pamela on the ride home. Finally, during a dispute, he accused Strickland of having sex with the apartment complex's maintenance workers right before he choked her.

Evidence of each incident aligns with the State's theory—which it argued in both opening and closing—that defendant murdered Strickland after she had broken up with him, kicked him out of her apartment, had her locks changed, and chosen not to drop the choking-incident charges. And the charges against defendant related to the choking incident were to be presented to a grand jury after he killed her. The motion judge thus properly admitted the N.J.R.E. 404(b) evidence to show defendant's motive and intent to kill Strickland. Cf. State v. J.M., Jr., 438 N.J. Super. 215, 222-23 (App. Div. 2014) (finding prior bad act

inadmissible where only act proffered was acquittal for sexual assault six years prior, in another state, against different victim).

1. The Knife Incident

All Cofield factors support admission of Martin’s testimony regarding the August 2009 knife incident. First, as the motion judge found, the incident showed defendant’s jealousy and was probative of his motive and intent to kill Strickland. To this end, as Martin sat in Strickland’s living room, defendant banged on the back door in the kitchen, and when Strickland opened the door, he demanded to know “[w]ho is at your house? Who’s in here?” When Martin entered the kitchen, defendant told Strickland that she could not “talk to [any]body” or have guests in her home, which led directly to the knife struggle resulting in Strickland being cut. Defendant’s jealousy and controlling behavior inciting the knife incident thus satisfied the first Cofield factor.

Next, the second Cofield prong is met because the knife incident occurred as part of an ongoing pattern of jealousy accompanied by domestic disputes and violence in the relationship culminating in Strickland’s murder. In any event, this prong is not required in every case. See Williams, 190 N.J. at 131.

Third, evidence of the knife incident was clear and convincing. Martin’s testimony at the hearing and her statement to the CCPO, in addition to AP Cogan’s testimony regarding her investigation of the incident and in the absence

of any dispute by defendant, showed that the knife incident took place.

Fourth, the substantial probative value of the knife incident outweighed its potential prejudice. Martin provided firsthand knowledge of a physical domestic dispute between defendant and Strickland, and it showed a fuller picture of defendant's jealousy and the aggressiveness that accompanied it. The testimony also shows one of defendant's attempts to control and isolate Strickland, supporting the State's theory that he murdered her to prevent her from testifying against him in connection with the choking incident. Defendant was able to—and did—cross-examine Martin on her observations at the motion hearing, including the fact that the CCPO did not interview her until five years after the murder. (7T154-15 to 197-22).

Finally, the judge instructed the jury to consider Martin's testimony "for the limited purpose of demonstrating the defendant's jealousy regarding . . . Strickland and violence when he would become jealous" and "for the purpose of demonstrating the defendant's intent and motive for [Strickland's] murder." (17T22-17 to 23-10). This limited any prejudice to defendant. Because Martin's knife-incident testimony satisfied Cofield, it was properly admitted.

## 2. The Bar Incident

Pamela's testimony regarding the January 2010 bar incident likewise passes muster under Cofield. First, as the motion judge found, defendant's

“sucker punch” of the man who was talking to Strickland at the bar, and his subsequent outburst in the car toward Strickland and Pamela, were relevant to “the ongoing physical[ity] . . . when the defendant would get jealous.” (10T49-24 to 50-2). When defendant saw a man talking to Strickland and Pamela, he brought Strickland outside to talk. After that conversation, defendant walked back inside and punched the man, starting a fight. Defendant’s anger directly carried over to Pamela’s car on the ride home, where he was “hitting” Strickland and also wanted to fight Pamela. The relevancy prong is therefore established.

Second, the bar incident occurred six months prior to the murder and was part of an ongoing pattern of jealousy, isolation, and domestic violence that resulted in defendant murdering Strickland. In any event, this prong need not be universally applied. See Williams, 190 N.J. at 131.

Further, the judge correctly ruled that evidence of the bar incident was clear and convincing. Indeed, Pamela described the incident to police the day that Strickland was found dead. That statement, combined with her credible, “confiden[t], clear, and articula[te]” testimony at the hearing, satisfied this factor. The judge was further convinced by Pamela’s reasoning as to why she did not tell police (and admitted for the first time on cross-examination at the hearing) that she pulled the car over to threaten defendant with a crowbar: to avoid legal issues. (10T49-1 to 11). The judge therefore properly found that

the bar incident was established by clear-and-convincing evidence.

Lastly, the bar incident's substantial probative value outweighs its prejudice. Pamela personally observed defendant's violent behavior toward Strickland when jealous. That observation added to the picture of domestic violence, including another attempt to violently isolate Strickland. The judge ultimately instructed the jury after Pamela's trial testimony, permitting evidence of the bar incident for "the limited purpose of demonstrating the defendant's jealousy regarding . . . Strickland and physical aggressiveness that accompanies that jealousy," as well as "defendant's intent and motive" for murdering Strickland. (17T22-3 to 9). The bar incident thus satisfied Cofield, and the motion judge properly exercised her discretion.

### 3. The Choking Incident

The motion judge also correctly admitted evidence relating to the March 2010 choking incident. The first prong of Cofield is met because defendant accused Strickland of sleeping with "the maintenance men[]" and "everybody out here," linking his jealousy with violence. As she went to call the police, defendant choked her, beginning the turn of events that led to the murder. Relevance to a material issue was thus established.

As for the second prong, the choking incident was similar in kind and reasonably close to the murder. The autopsy revealed that Strickland died of

blunt neck trauma; that defendant choked her during another dispute just four months prior to the murder certainly carries weight under Cofield.

Third, evidence of the choking incident was clear and convincing. Strickland called police immediately after it occurred and AP Cogan testified regarding her investigation. Strickland's audio-recorded statement, authenticated by Investigator Berry, was also played for the motion judge.

Finally, Strickland's statement was probative in that it showed defendant's motive and intent to murder her. To limit any prejudice against defendant, the trial judge issued an instruction at the close of Berry's testimony that the jury consider the statement for the "limited purpose of demonstrating the defendant's state of mind wanting Ms. Strickland to drop the charges in that case" and "defendant's intent and motive for the murder of . . . Strickland." (17T127-19 to 130-1). To be sure, the judge also issued that instruction at the close of trial. All four Cofield prongs were met by admission of the choking incident, and the motion court correctly admitted that statement.

E. The motion judge appropriately ruled inadmissible the fact that Strickland was charged in connection with the knife incident.<sup>17</sup>

After the N.J.R.E. 404(b) hearing, the judge properly denied defendant's request to introduce evidence that Strickland was criminally charged after the

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<sup>17</sup> This subpoint responds to defendant's Point IV. (Db46-51).

August 2009 knife incident. That evidence was not relevant, particularly since the charges were downgraded after an investigation, and it would have constituted inadmissible hearsay. Thus, this Court should affirm the motion judge's decision to exclude evidence of that charge.

A defendant's use of N.J.R.E. 404(b) evidence must in the first instance be relevant. State v. Weaver, 219 N.J. 131, 150 (2014). A court must also "determine that the probative value of the evidence is not substantially outweighed by any of the [N.J.R.E.] 403 factors" for exclusion. Id. at 151; see also N.J.R.E. 403. Under this standard, "the question . . . is not relevance as such, but the degree of relevance balanced against the counter considerations . . . of undue consumption of time, confusion of the issues[,] and the misleading of the jury." State v. Garfole, 76 N.J. 445, 451 (1978). Such a determination is "highly discretionary." Weaver, 219 N.J. at 151.

That Strickland was charged in relation to the knife incident does not refute defendant's guilt here. In fact, Martin's testimony shows that defendant, not Strickland, was the initial aggressor by banging on the door, confronting Strickland, and reaching for the knife. Further, AP Cogan explained that she downgraded the charges within a month after analyzing the full picture of domestic violence in the relationship. Her review of defendant's history revealed prior domestic violence, while Strickland's did not. Cogan also

credited Strickland's account as "a logical, seemingly plausible explanation as to what occurred," finding that she "did not exaggerate." Thus, the mere fact that Strickland was initially charged is not relevant to whether defendant murdered her months later. See State v. Jenewicz, 193 N.J. 440, 457-58 (2008) (holding testimony that victim kicked Jenewicz down stairs on occasion prior to fatal shooting was not relevant to Jenewicz's self-defense claim). The judge therefore properly ruled evidence of Strickland's initial charge inadmissible.

In sum, the motion judge fashioned the appropriate scope of admissible evidence. First, Strickland's statement regarding the choking incident was properly admitted under the forfeiture-by-wrongdoing exception to the hearsay rule and did not violate the Confrontation Clause. And the N.J.R.E. 404(b) evidence was correctly admitted after analyses under Cofield. Finally, that Strickland was initially charged in relation to the knife incident was properly excluded. The judge's evidentiary rulings should thus be affirmed.

## POINT II

THE TRIAL COURT PROPERLY  
PERMITTED TESTIMONY FROM THE  
STATE'S SEROLOGY EXPERT.<sup>18</sup>

For two reasons, the trial court properly allowed Tramontin to testify

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<sup>18</sup> This point responds to defense counsel's Point II. (Db28-35).

regarding the forensic-serology report authored by her direct supervisee. First, Tramontin did not offer the report's conclusions for the truth of the matter asserted in the report, so defendant's Confrontation Clause rights were not at issue. Second, even if defendant's confrontation rights were at issue, he had the opportunity to effectively cross-examine her on the report's conclusions because Tramontin contemporaneously conducted two independent reviews of the analyst's work and authorized the report's release to the DNA lab. In any event, any error in admitting Tramontin's testimony regarding the report was harmless. Defendant's conviction should thus be upheld on this ground as well.

Tramontin explained at trial that she supervised Annette Estilow, who authored the serology report but was unavailable to testify. (23T42-12 to 43-16). Defendant objected at sidebar that his right to confrontation was violated. (23T45-2 to 4, 47-7 to 13). Tramontin ultimately testified regarding her role in supervising and authorizing the report, including an "administrative review" and a "technical review," ensuring that Estilow "followed all policies and procedures" that Tramontin would have followed if she had done the testing herself. (23T58-24 to 59-3). The report was neither offered into evidence nor admitted at trial. Tramontin's testimony on the report was admissible.

A. Defendant's confrontation rights were not implicated because the serologist's testimony was not hearsay.

Tramontin's testimony does not implicate the Confrontation Clause

because it was not offered to prove the truth of the matter asserted, i.e., that the items recovered at the scene tested positive for certain biological substances. Thus, no Confrontation Clause analysis is warranted.

The United States Supreme Court has held that the Confrontation Clause bars the admission of “[t]estimonial statements of witnesses absent from trial” admitted to prove the truth of the matter asserted, except “where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Crawford, 541 U.S. at 59-60 n.9; see also Smith v. Arizona, 602 U.S. 779, 785 (2024) (“[T]he Clause bars only the introduction of hearsay—meaning, out-of-court statements offered to prove the truth of the matter asserted.”) (citation and quotation marks omitted). Non-hearsay statements are thus not subject to the Clause. State v. Buda, 195 N.J. 278, 301 (2008).

Tramontin’s testimony was not offered to prove the truth of the matter asserted in the report, that the items recovered tested positive for various biological substances. Instead, she established chain of custody of the forensic evidence and showed that, complying with laboratory procedures, six of the nine items retrieved from the scene were forwarded to the DNA lab for further testing. Indeed, Tramontin testified at length regarding the serology lab’s chain-of-custody procedures. (23T53-2 to 55-14). She described the lab’s function as “screening to see if there are biological stains available” on the evidence, and

“forward[ing] [the evidence] on for further testing by our DNA laboratory” if more testing is “deem[ed] necessary.” (23T56-16 to 24). Tramontin described the evidence receipt as well, including all nine items received for analysis.

Tramontin’s testimony regarding the conclusions reached on each item was offered to explain why only six items were forwarded to the DNA unit for further analysis. A sample of Strickland’s hair, oral swabs, anal swabs were collected from the scene but not received by the DNA lab. Tramontin’s description of the testing process to determine preliminary results—which she contemporaneously reviewed twice and approved—showed the jury why only certain items were submitted to the DNA lab. Her testimony was therefore not hearsay and not subject to the Confrontation Clause.

B. If defendant’s confrontation rights were implicated, there was no violation because the testifying expert reviewed and authorized the report.

To the extent admission of Tramontin’s testimony on the serology report implicated the Confrontation Clause, the Clause was satisfied. She supervised Estilow during the drafting of the report, performed two contemporaneous reviews of Estilow’s work, and authorized the report for release. Because Tramontin had sufficient knowledge of the work performed at the time it was performed and was required to sign off on it, she was able to be effectively cross-examined to satisfy the Confrontation Clause.

The United States Supreme Court has addressed the admissibility of

testimony by experts who did not participate in drafting the underlying reports. In Bullcoming v. New Mexico, a driving-while-intoxicated case, the State’s analyst testified regarding a lab report on blood-sample testing in which he neither “participated in nor observed.” 564 U.S. 647, 651 (2011). The majority held that the “surrogate testimony” of a person who did not “sign the certification or perform or observe the test” violated the Confrontation Clause. Id. at 657-58. It described the right of an accused “to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” Id. at 652. But concurring in part, Justice Sotomayor stressed the majority holding’s “limited reach,” distinguishing “a different case” where “a supervisor who observed an analyst conducting a test testified about the results or a report about such results.” Id. at 688, 672-73 (Sotomayor, J., concurring).

Our Supreme Court held that Bullcoming does not require “the primary analyst who performed the test [to] testify when a different, sufficiently knowledgeable expert is called to testify at trial.” State v. Michaels, 219 N.J. 1, 33 (2014); see also State v. Roach, 219 N.J. 58, 77 (2014) (referencing Justice Sotomayor’s Bullcoming concurrence). To this end, testimony referencing another analyst’s report is permissible “so long as the testifying witness is qualified to perform, and did in fact perform, an independent review of testing

data and processes, rather than merely read from or vouch for another analyst’s report or conclusions.” Roach, 219 N.J. at 61. In short, a supervisor may testify to another analyst’s findings without violating the Confrontation Clause where the testifying analyst does not “merely parrot the findings of another.” Id. at 79; see also Michaels, 219 N.J. at 42-43 (affirming admission of expert testimony by qualified supervisor who analyzed underlying data and reported his findings).

Recently, the United States Supreme Court held in Smith that an absent analyst’s statements are inadmissible where the testifying analyst “did not participate in their creation” or “presents the out-of-court statements as the basis for [the testifying analyst’s] expert opinion.” 602 U.S. at 803. There, the testifying analyst’s knowledge “came only from reviewing [the non-testifying analyst]’s records.” Id. at 796. To this end, the Court reasoned that all of the analyst’s “opinions were predicated on the truth of” the non-testifying analyst’s “factual statements” regarding her lab work. Id. at 798. The Court reasoned that a contrary result would admit “every testimonial lab report” through testimony of “any trained surrogate, however remote from the case.” Id. at 799. In sum, the Court stressed Smith’s “right to confront the person who actually did the lab work, not a surrogate merely reading from her records.” Id. at 800.

Here, however, Tramontin was no such surrogate. She reviewed Estilow’s work multiple times and authorized its release to the DNA lab. Indeed, Estilow

reported directly to Tramontin at the serology lab. (23T58-14 to 24). Tramontin confirmed she “review[ed] the report at the time back when the report was issued.” (23T59-4 to 8). To this end, she explained that reports require a “peer technical review and an admin[istrative] review” before receiving supervisor approval “to be released to the submitting agency.” (23T59-16 to 21). Further, on cross-examination, she confirmed that she performed both review types and that she “kn[e]w the type of test that was done for each item” of analyzed evidence. (23T77-2 to 78-7). To this end, Tramontin reviewed the report “for technical correctness”—i.e., that Estilow “followed all the policies and procedures” as if Tramontin conducted the testing herself. (23T58-24 to 59-3). She also initialed the report as part of her authorization. (23T60-10 to 24).

The facts here align with Justice Sotomayor’s Bullcoming concurrence: Tramontin was “a supervisor who observed an analyst conducting a test” and testified “about the results or a report about such results.” See 564 U.S. at 672-73 (Sotomayor, J., concurring). Our Supreme Court has recognized the applicability of that principle in Michaels and Roach. Like the expert in Roach, Tramontin was “qualified to perform, and did in fact perform, an independent review” of the report “rather than merely read from or vouch for [Estilow]’s report or conclusions.” 219 N.J. at 61. And like the Michaels expert, Tramontin “reviewed the procedures followed in the testing,” signed and certified the

report, and her supervisory role required knowledge of laboratory testing procedures, the testing itself, and “to be able to evaluate the results generated.” 219 N.J. at 42-43. The case law thus disposes of defendant’s argument.

Contrary to defendant’s claim, Smith did not disturb Michaels or Roach and is distinguishable. The Smith Court was concerned with the testifying expert’s “remote[ness] from the case” and the attendant danger of “accept[ing] the truth of what [the non-testifying analyst] had reported about her work in the lab.” 602 U.S. at 798, 799. There, the testifying analyst lacked any personal knowledge about the testing; his only knowledge came from merely reviewing the report. Id. at 796, 803. Cases like Michaels and Roach, in which testifying experts are involved in the creation and analysis contained in the relevant report, address the Smith Court’s concern for effective cross-examination. Tellingly, Justice Sotomayor joined the majority rejecting the expert in Smith, indicating it was not the type of case she described in Bullcoming. Thus, Tramontin’s testimony, admissible under Roach and Michaels, stands unaffected by Smith because of her extensive involvement in reviewing and authorizing the serology report. Her testimony satisfied defendant’s right to confrontation.

C. Any error in the admission of the serologist’s testimony was harmless because another expert linked defendant to the DNA found on the victim and chain of custody of the samples was established.

In any event, defendant overstates the significance of Tramontin’s

testimony. Belying his argument that the State “relied on” the serology evidence “extensively” at trial, (Db28), Tramontin described her work as a “screening” before forwarding certain evidence to the DNA lab. (23T56-16 to 24). Indeed, she noted that certain items—including those submitted after the initial serology testing—“go directly to DNA.” (23T72-4 to 13). For example, buccal swabs from defendant, Joyner, Goldsboro, and Brown, which were obtained after the release of the serology report, were forwarded directly to Szymkowiak at the NJSP DNA lab for analysis. (23T72-4 to 13; 28T77-16 to 78-17). Had there been no serological screening and all samples were forwarded directly to the DNA lab, the same evidence would have been admissible. Tramontin’s testimony thus did not significantly lead to defendant’s conviction.

Defendant also relied in part on Tramontin’s testimony to undermine the State’s evidence. He used the existence of a minor DNA profile underneath Strickland’s right fingernails (matching the DNA of Goldsboro, Joyner, and Brown) as a focal point of his defense. Indeed, he used this fact—which the serology report linked from the scene to the DNA lab—to thoroughly cross-examine Szymkowiak, who admitted that he did not know “the relative amounts of DNA from the contributors” without reviewing the data. (23T198-11 to 200-12, 24T207-3 to 213-13). Defendant also cross-examined Brown and Joyner about their interactions with Strickland’s body to urge that someone else could

have killed Strickland. (19T107-4 to 111-13; 29T35-24 to 46-11). A step further, he subpoenaed Joyner and Goldsboro to again ask for details about the carpet cleaning, whether either had touched Strickland's body, and the circumstances of their buccal swabs. (30T28-8 to 45-15, 51-1 to 57-17).

And in summation, defense counsel stressed to the jury that "DNA evidence says other people were" at the scene, describing it as "[a]stounding" that Joyner, Goldsboro, and Brown were "very innocent and very benign" and yet they matched DNA obtained from Strickland's body. (34T85-6 to 23). Further, he discussed at length that Strickland's DNA appeared on the Colt 45 bottle. (34T76-19 to 77-18, 93-9 to 18). Aside from Tramontin's testimony, other testimony verified the DNA results and defendant relied extensively on evidence contained in the serology report in his defense. That his trial strategy was unsuccessful does not render Tramontin's testimony prejudicial error.

### POINT III

#### THE TRIAL COURT APPROPRIATELY INSTRUCTED THE JURY.<sup>19</sup>

A third-party-guilt charge was unwarranted, as defendant acknowledged below by failing to seek such a charge or object to the lack of one. Judge Booth

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<sup>19</sup> This point responds to defense counsel's Point V and defendant's pro-se Point VI. (Db51-54; DbProSe33-34).

properly informed the jury of the applicable law and the jury's role in deciding the case. In any event, lack of such an instruction did not affect the outcome, as the evidence contradicted the theory that someone besides defendant murdered Strickland. Defendant's conviction should thus be affirmed.

When counsel does not object, this Court reviews for plain error. See State v. Funderburg, 225 N.J. 66, 79 (2016); R. 2:10-2. Plain error in a jury charge is “[l]egal impropriety” that “possesse[s] a clear capacity to bring about an unjust result.” State v. Camacho, 218 N.J. 533, 554 (2014). Without an objection, “there is a presumption that the charge was not error and was unlikely to prejudice the defendant’s case.” State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting Singleton, 211 N.J. at 182). On review, “[t]he charge must be read as a whole in determining whether there was any error.” State v. Torres, 183 N.J. 554, 564 (2005). And the error “must be evaluated in light ‘of the overall strength of the State’s case.’” State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)).

Here, the charge was proper. Judge Booth repeatedly informed the jury that the State had to prove defendant was guilty beyond a reasonable doubt. (E.g., 35T7-8 to 8-20, 10-25 to 2, 13-18 to 14-3, 17-12 to 15, 25-2 to 5). He specifically explained that defendant had “no obligation or duty to prove his innocence or offer any proof relating to his innocence.” (35T7-15 to 18). And

he told the jury that it must be “firmly convinced that the [d]efendant is guilty of the crime charged” and without that belief, the jury “must give [d]efendant the benefit of the doubt and find him not guilty.” (35T8-15 to 20). The judge also made clear that the jurors were “the sole and exclusive judges of the evidence[,] of the credibility of the witnesses[,] and [of] the weight to be attached to the testimony of each witness.” (25T10-7 to 15). Any defense theory regarding the possibility that another person killed Strickland was thus covered by the jury charge. The jury was fully aware that if it believed someone else murdered Strickland, it was obligated to acquit defendant. That the jurors evidently did not believe defendant’s theory did not create an error in the charge.

Nevertheless, there was no plain error because of the wealth of evidence excluding any other killer. Significantly, all four witnesses who touched Strickland’s body stated that she was stiff and, to the extent they were qualified to conclude, that she was in full rigor mortis. (See 17T178-1 to 5 (Pacione); 19T119-13 to 120-3 (Smith); 21T32-6 to 10 (Ellis); 31T24-12 to 17 (Feigin)). Dr. Feigin testified that that full rigor mortis takes four to six hours to set in. (31T23-21 to 24-11). Thus, if Strickland’s body was in full rigor mortis around 9:00 a.m. when Pacione, the EMT, examined her, she died—at the latest—at 5:00 a.m. (17T176-12 to 23). Defendant neither showed nor alleged that Brown, Joyner, or Goldsboro entered Strickland’s apartment four to six hours before her

body was found; all three arrived between 8:00 and 8:30 a.m. (19T83-8 to 23; 29T11-2 to 12-19). The evidence did show defendant was the only person who contacted Strickland and was near her apartment from the evening of July 9 (when she was last seen alive) through 5:00 a.m. on July 10. Thus, an unrequested third-party-guilt instruction would have been against the evidence and the lack of such an instruction could not have caused an unjust result.

Likewise, defendant's pro-se contention that "another male's DNA profile was found" under Strickland's right fingernail mischaracterizes the significance and weight of that evidence. Szymkowiak explained that he found two profiles in those nail clippings: a major and minor type. (23T166-19 to 167-8). He noted that the major type is "the person with more DNA," and the minor type is "the person with less DNA." (23T146-1 to 3). The minor profile matched the DNA profiles obtained from Joyner, Goldsboro, and Brown. (23T170-20 to 172-22, 177-5 to 178-19). Szymkowiak's analysis, though, showed that those matches were "very weak statistic[s]" and "not very informative" because "many people" matched that profile. (23T172-25 to 173-22, 174-14 to 175-17).

On the other hand, defendant was a much stronger match to the major profile obtained from Strickland's right fingernail clippings. (23T155-21 to 156-19). And Brown, Goldsboro, and Joyner were excluded from the samples obtained from Strickland's vagina and left fingernail clippings. (23T175-18 to

176-3; 178-12 to 16). Defendant was the only contributor to those samples. (23T274-14 to 274-19). The DNA evidence strongly supported the conclusion that defendant murdered Strickland. Defendant was thus not prejudiced by lack of a third-party-guilt instruction, as counsel recognized when not requesting one.

#### POINT IV

#### THE STATE’S SUMMATION WAS PROPER.<sup>20</sup>

The prosecutor delivered a proper summation at the end of the case. Despite defendant’s claim otherwise, the prosecutor did no more than summarize trial evidence and draw reasonable inferences therefrom. In any event, no plain error could have resulted because of the overwhelming evidence against defendant. His conviction should thus be affirmed on this basis as well.

Prosecutors are “afforded considerable leeway” during summation, so long as they “refrain from improper methods that result in a wrongful conviction.” State v. Smith, 167 N.J. 158, 177 (2001). Specifically, summation consists of “evidence revealed during the trial and reasonable inferences to be drawn from that evidence.” Id. at 178. But ““not every deviation from the legal prescriptions governing prosecutorial conduct’ requires reversal.” State v. Jackson, 211 N.J. 394, 408-09 (2012) (quoting State v. Williams, 113 N.J. 393,

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<sup>20</sup> This subpoint responds to defense counsel’s Point VI. (Db54-59).

452 (1988)). Reversal is required only if the remarks were “clearly and unmistakably improper” and “substantially prejudiced the defendant’s fundamental right to have a jury fairly evaluate the merits of his or her defense.” State v. Ingram, 196 N.J. 23, 43 (2008) (quoting State v. Harris, 181 N.J. 391, 495 (2004)). A reviewing court must evaluate a prosecutor’s challenged remarks in the context of the entire summation. State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008) (citing State v. Carter, 91 N.J. 86, 105 (1982)).

Courts consider “(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.” Smith, 167 N.J. at 182. Generally, with no objection, “the remarks will not be deemed prejudicial.” State v. Echols, 199 N.J. 344, 360 (2009) (quoting State v. Timmendequas, 161 N.J. 515, 576 (1999)). Because defendant did not object to the remarks below, he “must demonstrate plain error to prevail.” Timmendequas, 161 N.J. at 576.

Here, defendant incorrectly challenges four aspects of the prosecutor’s summation. First, in support of the State’s theory of defendant’s intent to kill Strickland, the prosecutor referenced “hallmarks of domestic violence”—“control, isolation from family, isolation from friends, monitoring [Strickland’s] activities, jealousy, victim[-]blaming, [and] baseless accusations of infidelity.”

(34T10-18). This reference was proper given that at the time defendant murdered Strickland, he was two weeks away from a grand-jury hearing on the choking incident which involved each of these characteristics. The pendency of that case, coupled with the fact that Strickland had not dropped the charges, significantly underscored the State's theory of defendant's motive and intent to kill Strickland. The prosecutor's comment properly arose from the evidence.

Second, defendant mischaracterizes the prosecutor's use of a Maya Angelou quote. Read in its proper context, the prosecutor stated,

Maya Angelo[u] once said[, “[w]hen someone shows you . . . who they are, believe them.[”] The evidence in this case has shown you the defendant's motive, his intent[, and his conduct. And I urge you to believe it and return the only just verdict in this case, [a] verdict of guilty for murder.

[(34T156-11 to 16).]

The prosecutor made clear that the quote referred to defendant's “motive, his intent, and his conduct” with respect to Strickland's murder. It did not, as defendant argues, encourage a scattershot propensity inference. Instead, it summarized the State's theme that defendant was the only person with the motive, opportunity, and intent to kill Strickland. (See 34T104-18 to 105-1). Such a conclusion flowed directly from the evidence presented at trial.

Third, that the prosecutor referenced the general price of a flat-screen television in 2010 properly supported the State's theory that only defendant had

the opportunity to kill Strickland. Indeed, rebutting defendant's contrary theory, the prosecutor argued that "[i]f someone came in to rob [Strickland], they didn't do a very good job" because nothing was stolen and the doors remained locked. (34T148-6 to 17). She referred to the fact that flat-screen televisions "were not a couple hundred dollars at that point, [but] were a couple thousand still" as part of an overarching point that no burglary took place. (34T148-8 to 11). Such a comment was not improper. Regardless, any impropriety could not have prejudiced defendant because of the wealth of evidence showing that defendant was the only person who could have killed Strickland.

Finally, the prosecutor's comment regarding the fragility of natural nails beneath acrylic nails is a reasonable inference from Dr. Feigin's testimony that Strickland's hands were consistent with previously attached acrylic fingernails. (31T61-22 to 62-20). The prosecutor stated that since natural nails are fragile underneath acrylic nails, and Strickland's natural nails were intact, she "never had the chance to so much as touch her attacker." (34T150-5 to 16). This showed that Strickland was killed from behind, not, as defendant suggests, the identity of the killer. Nevertheless, an abundance of evidence—including "abrasions on the chin and jaw" like rug burn, "hemorrhaging from hyperextension and crushing down," "a lack of fingernail marks or marks on the front of the neck," "crushing injuries to the [neck] muscles," and "squeezing of the skin," (31T78-

21 to 19-14, 121-25 to 122-17)—supported the theory that Strickland was killed from behind in “a planned, calculated, purposeful murder,” (34T150-14 to 16).

In any event, the judge’s instructions cured any summation impropriety. He stressed that the jurors were “the sole and exclusive judges of the evidence of the credibility of the witnesses and the weight to be attached to the testimony of each witness.” (35T10-7 to 15). Likewise, he explained that “[r]egardless of what counsel said or I may have said recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts” and that “[a]rguments, statements, remarks, openings, and summations of counsel are not evidence and must not be treated as evidence.” (35T10-16 to 20). In sum, he confirmed that the jury determines the verdict based on the evidence and “[a]ny comments by counsel are not controlling.” (35T10-25 to 11-5). This instruction cured any alleged minor imperfections in the summation. Defendant was not deprived of a fair trial and his conviction should be affirmed.

#### POINT V

#### THE TRIAL JUDGE CORRECTLY DENIED DEFENDANT’S MOTION FOR A JUDGMENT OF ACQUITTAL.<sup>21</sup>

Defendant’s motion for a judgment of acquittal was properly denied. Viewed in the light most favorable to the State, extensive evidence implicated

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<sup>21</sup> This subpoint responds to defendant’s pro-se Point I. (DbProSe1-12).

defendant in Strickland's murder. His conviction should therefore be affirmed.

At the close of the State's case, defendant moved for a judgment of acquittal, claiming evidentiary shortcomings and resulting prejudice. (31T137-11 to 12). But giving the State all favorable inferences, the judge denied defendant's motion based on all of the witness testimony and evidence. (31T155-3 to 156-21).

A motion for a judgment of acquittal will be denied "if 'viewing [only] the State's evidence in its entirety, be that evidence direct or circumstantial,' and giving the State the benefit of all reasonable inferences, 'a reasonable jury could find guilt . . . beyond a reasonable doubt.'" State v. Sugar, 240 N.J. Super. 148, 152 (App. Div. 1990) (quoting State v. Reyes, 50 N.J. 454, 458-59 (1967)). The beyond-a-reasonable-doubt standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Under Rule 3:18-1, when deciding a motion for a judgment of acquittal, the court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. Muniz, 150 N.J. Super. 436, 440 (App. Div. 1977). "If the evidence satisfies that standard, the motion must be denied." State v. Spivey, 179 N.J.

229, 236 (2004).

To prove murder, the State was required to present evidence that: (1) defendant caused Strickland's death or serious bodily injury resulting in death; and (2) did so purposely or knowingly. N.J.S.A. 2C:11-3(a)(1) and (2). The State may rely entirely on circumstantial evidence of defendant's guilt and was not required to offer direct evidence, as long as it proved the elements of the offense beyond a reasonable doubt. State v. Lodzinski, 249 N.J. 116, 146 (2021). Indeed, "in many situations circumstantial evidence may be 'more forceful and more persuasive than direct evidence.'" State v. Mayberry, 52 N.J. 413, 437 (1968) (quoting State v. Corby, 28 N.J. 106, 119 (1958)). "So long as the evidence is of sufficient quality to generate in the minds of the jurors a belief and conviction of guilt beyond a reasonable doubt, it matters not whether direct evidence of guilt is present." State v. Rogers, 19 N.J. 218, 234 (1955).

Despite defendant's reliance on Lodzinski, that Court reaffirmed that circumstantial evidence alone could be sufficient to support a murder conviction. 249 N.J. at 146. That case is also factually distinguishable. There, the Court reversed Lodzinski's conviction of murdering her five-year-old son nearly two decades after the child's death. Id. at 119-22. The Court held that even if the evidence arguably supported that Lodzinski was involved in her son's death, it was insufficient to prove her intent. Id. at 121, 147-56. To that end,

the Court stressed that (1) the State's key physical evidence, a blanket found near the child's body, could not be traced to Lodzinski; and (2) the motive evidence was "based on questionable tropes and stereotypes about single working mothers." Id. at 147-55.

By contrast here, the evidence was myriad: (1) defendant had a history of jealousy and possessiveness (and accompanying violence) as to Strickland; (2) defendant had a then-pending domestic-violence charge that Strickland would not drop; (3) defendant admitted that he was at Strickland's apartment the night of the murder; (4) defendant was the only person who knew Strickland's children were at Parker's that night, that Strickland was supposed to work the following morning, and that the carpet cleaners were scheduled to come; (5) Cotton and Parker testified that Strickland had no injuries when they saw her before she was murdered; (6) call logs indicated that defendant called Strickland many times that night during the time he claimed to be with her; (7) Dr. Feigin testified that rigor mortis sets in four-to-six hours after death, placing Strickland's death sometime before 5:00 a.m.; (8) Brown, Goldsboro, and Joyner entered the apartment around 8:00 a.m.; (9) there was a lack of forced entry; and (10) DNA showed defendant as the sole source of the DNA found in Strickland's vagina and left fingernail clippings, as well as strongly matching the major profile found on Strickland's right fingernail clippings.

Finally, defendant committed post-murder acts and made post-murder statements displaying a consciousness of guilt. He staged Strickland's body on the couch for the carpet cleaners to encounter, pouring alcohol into her mouth (which Sergeant Ellis noticed was not purge) and placing a Colt 45 bottle in her arms. He also tried to create an alibi by pinging cell-phone towers away from Strickland's apartment overnight, claiming to sleep in two friends' driveways despite having a key to Streater's home to sleep there. He also made a point of stating he was ordering breakfast for Strickland for the first time ever, and he called Kearney to ask for Strickland at work. And he changed cell-phone devices within a day of the murder. Compelling evidence, viewed in the light most favorable to the State, justified denying defendant's acquittal motion.

#### POINT VI

#### DEFENDANT'S ARREST WARRANT WAS VALID.<sup>22</sup>

Defendant's arrest warrant was properly issued. Even if a technical defect existed, any defect was cured by the fact that two separate grand juries indicted him for murder. His conviction should therefore be upheld.

At the hearing on defendant's motion to compel discovery and suppress defendant's buccal swab, defendant's third attorney challenged his arrest

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<sup>22</sup> This subpoint responds to defendant's pro-se Point II. (DbProSe13-16).

warrant because neither she nor defendant had ever seen the original warrant. The copy of the warrant was dated January 1, 2017 (later than defendant's arrest), and the probable-cause statement and judicial-officer signature were missing. (13T9-21 to 25). The prosecutor noted the document is computer-generated, so she turned over "everything that [she] could find." (13T10-23 to 11-1). She explained the missing physical pages were given to defendant's original attorney and "the now[-]defunct[]" CCPD. (13T10-4 to 14). The judge found that "everything ha[d] been received that exists." (13T11-2 to 17).

Detective Longo testified at the hearing. He met with the Camden County court administrator, who found probable cause and signed and issued the warrant. (13T66-11 to 69-17). Longo also explained that CCPO would serve physical papers on arrested suspects. (13T69-18 to 25). CCPO Assistant Prosecutor Christine Shah explained that before New Jersey's Criminal Justice Reform, effective January 1, 2017, copies of the warrant and probable-cause statement would be given to defense counsel at a defendant's first court appearance. (13T103-24 to 104-10). Since that date, separate probable-cause statements are uploaded into eCourts. (13T104-15 to 21). Shah explained that an automatically generated copy of the original complaint "should have been" given to defendant's original counsel. (13T109-25 to 110-16). The judge found that the arrest warrant was properly issued. (13T154-10 to 156-17).

As explained at the hearing, the missing pages of defendant's arrest warrant, including the separate probable-cause statement—completed before electronic uploading—were given to defense counsel at defendant's 2016 arraignment. (13T108-12 to 19, 109-25 to 110-16). Having been turned over to defendant, the pages were thus not available to be uploaded into the system, which automatically generated new forms dated January 1, 2017, the date that New Jersey's Criminal Justice Reform became active. (13T10-14 to 11-1).

In any event, any defect in the complaint-warrant was cured by either of defendant's two separate indictments. See R. 3:3-4. In addition, the remedy defendant now seeks has no nexus to the alleged error. There was probable cause to arrest defendant for Strickland's murder, as confirmed by his indictments on June 2, 2016, and December 20, 2018, and his conviction should not be vacated based on a procedural defect in the complaint warrant filed after his arrest. See State v. Brown, 205 N.J. 133, 147-48 (2011).

#### POINT VII

THE MOTION JUDGE PROPERLY  
DENIED DEFENDANT'S SPEEDY-  
TRIAL MOTION.<sup>23</sup>

Defendant's speedy-trial motion was properly denied. The vast majority of post-indictment delays in this case are attributable to defendant. He cannot

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<sup>23</sup> This subpoint responds to defendant's pro-se Point III. (DbProSe17-24).

delay trial by repeatedly changing attorneys and seeking postponements while using those delays as grounds for dismissal. Also, those delays did not prejudice defendant because State witnesses and forensic evidence continued to age throughout the pendency of trial. His murder conviction should therefore stand.

On September 14, 2022, at oral argument, defendant claimed that his then-six-year pretrial jail stint violated his speedy-trial rights. (14T5-14 to 7-3). He alleged “continuous, very substantial medical issues,” including “hypertension, intestinal problems, . . . [and] hemorrhoids” required “the care of outside general practitioners and outside specialists.” (14T9-6 to 13). He also said that his child and mother “suffer[ed] greatly” while he awaited trial. (14T9-13 to 17).

The judge denied defendant’s motion after recounting “the Court event history as set forth in [PROMIS/Gavel], eCourts[,] and CourtSmart.” (14T48-19 to 64-14). Analyzing the factors outlined in Barker v. Wingo, 407 U.S. 514 (1972), the judge agreed with both parties that a six-year wait for trial was “a long delay.” (14T64-25 to 66-7). The judge nevertheless concluded that “[t]he overwhelming majority of the delay in this case is ascribed to activities or actions by the defendant himself,” including repeated replacement of his attorneys. (14T74-6 to 8). Noting defendant’s right “to have the attorney of his choice,” and not “seek[ing] to deprive him of that” choice, the judge held that the indictment could not be dismissed on speedy-trial grounds. (14T74-8 to 12).

A defendant's speedy-trial right, which attaches at the time of arrest, is guaranteed by the Sixth Amendment and Article I of the New Jersey Constitution. U.S. Const. amend. VI; N.J. Const. art. I, ¶¶ 1,10; State v. Tsetsekas, 411 N.J. Super 1, 8 (App. Div. 2009). Denial of a speedy-trial motion must be upheld unless clearly erroneous. Tsetsekas, 411 N.J. Super. at 10. This Court defers to a judge's factual findings as to the assessment and balancing of the Barker factors. State v. Fulford, 349 N.J. Super. 183, 195 (App. Div. 2002).

To determine whether a defendant's speedy-trial right has been violated, courts use the Barker four-factor balancing test: (1) the length of the pre-trial delay; (2) the reason for the delay; specifically, whether the government or the defendant is more to blame; (3) the extent to which the defendant asserted his speedy-trial right; and (4) the prejudice to the defendant. 407 U.S. at 530-32; State v. Cahill, 213 N.J. 253, 258 (2013). "None of the Barker factors [are] determinative, and the absence of one or some of the factors is not conclusive of the ultimate determination of whether the right has been violated." Cahill, 213 N.J. at 267 (citing Barker, 407 U.S. at 533). "[T]he factors are interrelated, and each must be considered in light of the relevant circumstances of each particular case." Tsetsekas, 411 N.J. Super. at 10 (citing Barker, 407 U.S. at 533). It is defendant's burden to show the Barker factors weigh in favor of dismissal. See State v. Berezansky, 386 N.J. Super. 84, 99 (App. Div. 2006).

Even where the first factor, the length of delay, is satisfied, this Court has cautioned against deciding “how long is too long . . . ‘by sole reference to the lapse of a specified amount of time.’” State v. Detrick, 192 N.J. Super. 424, 426 (App. Div. 1983) (quoting State v. Smith, 131 N.J. Super. 354, 360 (App. Div. 1974)). Indeed, “any delay that defendant caused or requested” weighs against a speedy-trial violation. State v. Long, 119 N.J. 439, 470 (1990) (quoting State v. Gallegan, 117 N.J. 345, 355 (1989)). And legitimate delays, “however great,” do not violate a defendant’s speedy-trial right if they do not specifically prejudice the defense. Doggett v. United States, 505 U.S. 647, 656 (1992). Further, it is well established that longer delays may “be tolerated for serious offenses or complex prosecutions.” Cahill, 213 N.J. at 266.

To analyze the reasons for delay and the responsible party, courts should “divid[e] the time into discrete periods of delay” and determine whether each delay was attributable to “the State, defendant, or the court system.” State v. May, 362 N.J. Super. 572, 596 (App. Div. 2003). Even where the State or court system is at fault, different levels of culpability should weigh differently in the balance. See Barker, 407 U.S. at 531. And when evaluating prejudice, the fourth factor, courts should consider three main interests: preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. Id. at 532. Witnesses’

loss of memory or unavailability are the most serious prejudicial factors. Ibid.

Under the circumstances, the second and fourth factors weigh strongly in the State's favor to defeat defendant's motion. On the second factor, the reasons for the delay, as Judge Stein found, defendant was responsible for "[t]he overwhelming majority of the delay." (14T74-6 to 14). Indeed, the judge comprehensively outlined the procedural history of the case and showed the lengths to which defendant delayed his trial by repeatedly changing attorneys, addressing moot issues, and seeking continuances. (14T48-20 to 64-14).

Beginning with his first indictment on July 9, 2016, defendant filed over ten motions (ultimately withdrawing three), asked for dozens of continuances, and had six attorneys. (14T49-11 to 64-14). Each time a new attorney entered the case, that attorney required time to review the file, file motions, and conduct investigations. (14T50-19 to 51-8, 57-5 to 20, 60-13 to 61-3). Also, as defendant admits, one of his attorneys requested a competency evaluation that, coupled with COVID-19 delays, took eighteen months to complete. (14T57-14 to 59-9). As the judge recounted, every instance of delay after December 20, 2018, when defendant was re-indicted, and September 14, 2022, the date of the speedy-trial hearing, was attributable to him or to the COVID-19 pandemic. (See 14T55-5 to 64-14).

Conversely, the State filed only three motions: (1) a motion to admit

evidence, filed May 11, 2017, and decided April 16, 2018, with a defense motion to suppress heard and decided in the interim, (14T51-18 to 53-4); (2) a motion in limine, filed August 27, 2018, and granted October 23, 2018, (14T53-18 to 20); and (3) a motion to amend the indictment, filed sometime after November 7, 2018 (when defendant withdrew his consent to amend), and denied December 7, 2018. (14T55-5 to 17). The prosecutor also explained that she was on maternity leave “for about six months,” but it is unclear from the record when this occurred or whether any delay resulted. (14T34-7 to 15). On the other hand, the prosecutor stated that to facilitate proceedings each time defendant changed attorneys, she “forwarded everything that [she had] sent to prior attorneys because . . . sometimes the file doesn’t always transfer from attorney to attorney.” (14T35-21 to 36-5). The court was responsible for two additional delays: four days for the 2017 motion to suppress and forty-eight days for postponing the September 4, 2018, trial date. (14T52-12 to 14, 53-21 to 54-3).

Neither the State nor the court was responsible for pandemic delays; no hearings were held because of the pendency of the competency evaluation requested by defendant. See United States v. Allen, 86 F.4th 295, 305 (6th Cir. 2023) (collecting cases holding COVID-19 delay “as a valid reason that also weighs against the defendants (or at least as a neutral reason that favors neither party)”). All other delays were unattributed to any party or it was unclear who

requested the continuances. Given that defendant caused the vast majority of delays in the case, the second Barker factor strongly weighs in the State's favor.

As to the fourth factor, defendant identified no prejudice. His reference to "very substantial medical issues," i.e., "hypertension, intestinal problems," and "hemorrhoids," (14T8-23 to 9-17), do not rise to the level of Barker prejudice. Nor does reference to his child and mother, particularly without evidence that defendant supported them in any way. Indeed, a hardship claim solely based on disposition of defendant's case "is insufficient to constitute meaningful prejudice." State v. Misurella, 421 N.J. Super. 538, 546 (App. Div. 2011) (quoting State v. Le Furge, 222 N.J. Super. 92, 99-100 (App. Div. 1988)).

Further, aspects of the delay avored defendant because State witnesses died or their memories faded. See Barker, 407 U.S. at 520 ("As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories fade."); United States v. Loud Hawk, 474 U.S. 302, 315 (1986) ("[D]elay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden.").

Indeed, several potential State witnesses, including one of Strickland's sisters, a neighbor who facilitated the carpet cleaning, a CCPD detective who interviewed defendant, and Pacione's EMT partner passed away during the

pendency of trial. (See 16T126-20 to 127-1, 179-20 to 180-2; 17T176-5 to 11; 26T45-6 to 8). And witnesses either forgot certain details or required their recollections refreshed by prior statements due to the passage of time, on which defense counsel vigorously cross-examined. (See, e.g., 17T121-23 to 122-14; 18T214-8 to 216-20; 19T58-13 to 59-8). That defendant was ultimately convicted does not change those risks. The fourth Barker factor thus weighs strongly in the State’s favor, and the speedy-trial motion was properly denied.

#### POINT VIII

#### THE TRIAL JUDGE APPROPRIATELY BARRED DEFENDANT’S MOTHER FROM THE COURTROOM.<sup>24</sup>

On multiple occasions, defendant’s mother spoke to jurors outside of the courtroom. After the judge asked each individual juror the extent of her communications, and each reaffirmed that he or she could try the case fairly and impartially, he removed defendant’s mother from the courtroom but permitted her to view the trial remotely from a different area of the courthouse. The judge properly protected the trial and defendant’s conviction should be affirmed.

Four days into trial, multiple jurors reported that a woman, later identified as defendant’s mother, approached and interacted with them “multiple times.”

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<sup>24</sup> This subpoint responds to defendant’s pro-se Point IV. (DbProSe24-28).

(19T159-7 to 160-14). The prosecutor requested “that she be excluded from the courtroom and the courthouse completely.” (19T164-5 to 21). While the contact was investigated, the trial judge agreed with defense counsel’s suggestion that defendant’s mother leave for the day. (19T169-24 to 171-4).

Six jurors disclosed to the judge that defendant’s mother directly approached them, while three others either witnessed or overheard that she did. (19T175-5 to 195-4). During a lunch break, defendant’s mother approached multiple jurors and “show[ed] [them] pictures” of a family member who was “a police officer in Texas,” telling the jurors “[h]e’s a good man[,] [w]e’re a good family, we’re a praying family,” to which no one responded. (19T175-5 to 179-22). Another juror left her phone in the hallway, and defendant’s mother left a signed note on top for no one to touch it. (19T180-8 to 181-6). That same juror noted that in the restroom, defendant’s mother commented on washing her hands; the juror refused to “engage in any conversation.” (19T181-7 to 16). Defendant’s mother also twice told another juror that the juror “looked like somebody she knew.” (19T183-24 to 185-13). All jurors reaffirmed they could continue to try the case fairly and impartially. (21T9-12 to 10-1).

That afternoon, outside the jury’s presence, the judge explained to the parties that defendant’s mother had called chambers and “allege[d] she did not know she was talking to jurors.” (20T227-3 to 11). While he was “torn” about

removing her from the courtroom, he worried that jury-related issues often begin with “a seemingly innocent communication.” (20T228-9 to 24). Defense counsel even admitted that such a communication could be “fertile for impropriety or appearance of impropriety.” (20T232-2 to 21).

The following morning, the judge excluded defendant’s mother from the courtroom but permitted her to view the trial remotely from a different floor. (21T10-10 to 23). He reasoned that his solution “protect[ed] everybody while still insuring” her ability to observe defendant’s trial. (21T10-24 to 11-5). He stated that it was “a stretch for [him] to believe” that she did not know she was talking to jurors because they wore “giant juror sticker[s] identifying themselves.” (21T11-24 to 12-18). He also noted that the CCPO may conduct a jury-tampering investigation after defendant’s trial. (21T12-19 to 13-5).

The federal and state constitutions guarantee a criminal defendant the right to a public trial. U.S. Const. amend. I and VI; N.J. Const. art. I, ¶ 6; State v. Venable, 411 N.J. Super. 458, 462-63 (App. Div. 2010). But this right is not absolute. State v. Cuccio, 350 N.J. Super. 248, 265 (App. Div. 2002). The mere existence of the right “does not mean that any exclusion” of spectators during trial, “no matter how brief or insignificant, automatically constitutes a denial of the right to a public trial that necessitates a new trial.” Venable, 411 N.J. Super. at 463.

Where removal of a spectator is “trivial,” the right has not been violated. Id. at 466. The triviality standard looks “to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.” Id. at 464; compare, e.g., id. at 467 (finding removal of Venable’s family and victim’s family during jury selection due to overcrowding trivial) with Cuccio, 350 N.J. Super. at 265 (finding error where court was completely closed during jury selection, including removal of Cuccio’s family where one family member “was qualified and prepared to assist in his defense”).

Certainly, Judge Booth responsibly excluded defendant’s mother after multiple juror interactions. Even more accommodating than Venable, he allowed her to view the trial using the courthouse’s remote capabilities. Judge Booth fulfilled his duty to maintain order in the courtroom and protect the jurors from potential influence. The judge properly noted—and defense counsel agreed—that even “a seemingly innocent communication” is often a precursor to improper jury influence. The judge’s decision is particularly warranted given that the CCPO mulled investigating defendant’s mother for possible criminal charges. Defendant has shown no Sixth Amendment violation. The removal of defendant’s mother from the courtroom was therefore proper.

POINT IX

THE STATE PRESENTED THE  
APPROPRIATE EVIDENCE TO THE  
GRAND JURY.<sup>25</sup>

The State was not required to present the cell-site history to support defendant’s alibi to the grand jury because that evidence neither negated his guilt nor was clearly exculpatory. His conviction should thus be affirmed.

At oral argument on defendant’s motion to dismiss the indictment based on insufficient evidence presented to the grand jury, defense counsel contended that the State failed “to put before the jury the nature and extent of the defendant’s alibi in this case.” (12T6-18 to 7-2). Judge Schweitzer denied defendant’s motion. She first determined that the prosecutor had no obligation to present evidence “to the grand jury that contradicted defendant’s whereabouts.” (12T14-22 to 15-3). She also found that the State met its burden to establish a prima-facie case based on the direct and circumstantial evidence linking defendant to the murder. (12T17-20 to 18-24). Finally, the judge noted that she had “not seen any exculpatory evidence that was not presented.”

“Once the grand jury has acted, an indictment should be disturbed only on the clearest and plainest ground, and only when the indictment is manifestly deficient or palpably defective.” State v. Hogan, 144 N.J. 216, 228-29 (1996)

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<sup>25</sup> This subpoint responds to defendant’s pro-se Point V. (DbProSe29-32).

(citations and internal quotation marks omitted). A trial court has discretion on whether to dismiss an indictment which “ordinarily will not be disturbed on appeal unless it has been clearly abused.” Id. at 229 (citation omitted). A clear abuse is one that was “made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.” State v. Triestman, 416 N.J. Super. 195, 202 (App. Div. 2010) (alteration in original) (quoting United States v. Scurry, 193 N.J. 492, 504 (2008)).

“In seeking an indictment, the prosecutor’s sole evidential obligation is to present a prima facie case that the accused has committed a crime.” Hogan, 144 N.J. at 236. “A trial court . . . should not disturb an indictment if there is some evidence establishing each element of the crime to make out a prima facie case.” State v. Morrison, 188 N.J. 2, 12 (2006). “[A]n indictment will not be dismissed merely because hearsay or highly prejudicial evidence was heard by the grand jury.” State v. Scherzer, 301 N.J. Super. 363, 428 (App. Div. 1997).

Prosecutors have a duty to inform the grand jury of certain evidence “only if the evidence satisfies two requirements: it must directly negate guilt and must also be clearly exculpatory.” Hogan, 144 N.J. at 237. Evidence directly negates guilt if it “squarely refutes an element of the crime in question.” Ibid. Whether the evidence is “‘clearly exculpatory’ requires an evaluation of the quality and reliability of the evidence,” including the “nature and source” of the evidence

and “the strength of the State’s case.” Ibid. To this end, “an accused’s self-serving statement denying involvement in a crime, although such a statement directly negates guilt, ordinarily would not be sufficiently credible to be ‘clearly exculpatory,’ and need not be revealed to the grand jury.” Id. at 237-38.

Contrary to defendant’s argument, he did not present a viable alibi. Indeed, the grand jury heard that defendant admitted that he was the last person in Strickland’s apartment that night; spent the night with her; argued with her, including about his alcohol use; drank an entire bottle of gin; and fought with her again before he left. (39T7-3 to 11-12). He was next seen around 7:30 a.m. on July 10—hours after Strickland was murdered—claiming to have had five beers and wanting to buy Strickland breakfast. (39T12-15 to 13-9). Defendant’s self-serving statement, which was presented to the grand jury, neither negated his guilt nor was “clearly exculpatory.” See Hogan, 144 N.J. at 237.

Importantly, even if his statement to police established an alibi, the cell-site history does not corroborate his story. He claimed that he was at Strickland’s apartment all day until she came home, briefly left to sneak off to the liquor store at around 9:00 p.m., returned, and drove to Paulsboro at about 2:30 a.m. (39T7-3 to 18, 8-13 to 23, 10-25 to 11-16). But the cell-site history showed that defendant called Strickland’s house phone ten separate times between 8:39 p.m. and 12:23 a.m., with connection times ranging from five

seconds to one minute, forty-nine seconds. (26T133-17 to 135-24; Pa6-7). The mere fact that he called her phone multiple times overnight and in the morning does not clearly exculpate him; indeed, with all inferences in favor of the State at the grand-jury hearing, that evidence shows post-murder consciousness of guilt and alibi creation. Therefore, not only do those calls not corroborate his supposed alibi, they contradict it and further implicate him in the murder. His motion to dismiss the indictment was properly denied.

POINT X

BECAUSE THERE WAS NO ERROR,  
THERE IS NO CUMULATIVE ERROR.<sup>26</sup>

“When legal errors cumulatively render a trial unfair, the Constitution requires a new trial.” Weaver, 219 N.J. at 155. “[T]he predicate for relief for cumulative error must be that probable effects of the cumulative error was to render the underlying trial unfair.” State v. Wakefield, 190 N.J. 397, 538 (2007). “If a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair.” State v. T.J.M., 220 N.J. 220, 238 (2015) (quoting Weaver, 219 N.J. at 155). Therefore, without error, “there is nothing sufficient to raise a reasonable doubt as to

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<sup>26</sup> This point responds to defense counsel’s and defendant’s pro-se Point VII. (Db60-61; DbProSe35-36).

whether the error[s] led the jury to a result it otherwise might not have reached.”  
State v. Macon, 57 N.J. 325, 336 (1971). As discussed, defendant has not shown any prejudicial error. Thus, cumulative error does not apply.

CONCLUSION

For these reasons, the State urges this Court to affirm defendant’s judgment of conviction.

Respectfully submitted,

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APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: July 14, 2025



**State of New Jersey**  
**OFFICE OF THE PUBLIC DEFENDER**

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August 12, 2025

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Of Counsel and  
On the Letter-Brief

**REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT**

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3497-22  
INDICTMENT NO. 18-12-03010-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Appeal from a Judgment of
v.	:	Conviction of the Superior Court
TIMOTHY D. SIMON,	:	of New Jersey, Law Division,
Defendant-Appellant.	:	Camden County.
	:	Sat Below:
	:	Hon. Sherri L. Schweitzer, J.S.C.
	:	Hon. Thomas T. Booth, Jr., J.S.C.,
	:	and a Jury

DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b)

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**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

Defendant-appellant Timothy D. Simon respectfully refers the Court to the Procedural History and Statement of Facts set forth in his brief previously submitted in the matter.

**LEGAL ARGUMENT**

Mr. Simon relies on the arguments from his initial brief. Mr. Simon adds the following in response to the State’s arguments regarding Point II of his opening brief.

**POINT I**

**TRAMONTIN’S TESTIMONY ABOUT ACTIONS  
TAKEN BY NON-TESTIFYING LAB ANALYST  
ESTILOW OUTSIDE OF TRAMONTIN’S  
PRESENCE VIOLATED SIMON’S RIGHT TO  
CONFRONTATION.**

As Simon’s opening brief explained, his right to confrontation was violated when State’s witness Laura Tramontin testified about actions taken by lab analyst Annette Estilow, who did not testify at Simon’s trial. Tramontin was not present when Estilow handled and analyzed critical forensic evidence taken from the victim, Lawanda Strickland. Tramontin based her testimony on her review of Estilow’s written report. The United States Supreme Court recently made clear that such testimony fails to comply with a defendant’s rights under the Confrontation Clause. Smith v. Arizona, 602 U.S. 779 (2024).

The State incorrectly claims that Tramontin’s testimony about Estilow’s actions in handling and testing the forensic evidence did not violate the Confrontation Clause because her testimony “was not offered to prove the truth of the matter asserted.” Sb 53<sup>1</sup>. On the contrary, Tramontin made many statements that were plainly offered by the State for their truth.

First, Tramontin testified about specific testing results obtained by Estilow. Tramontin told the jury that Estilow’s analysis revealed Strickland’s underwear, fingernails, and vaginal swabs tested presumptively positive for the presence of blood and semen. (23T:62-1 to 71-3) The truth of these lab results depended on the accuracy of work done by Estilow, who the defense never had the opportunity to confront before the jury. As the Supreme Court explained in Smith, “[i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.” Smith, 602 U.S. at 795.

Tramontin also testified about the procedure that Estilow used to isolate the samples for further DNA analysis. Tramontin told the jury that, based on the results of her testing, Estilow created a “heat-sealed package with an evidence sealing tag . . . to streamline the samples that are going to be now

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<sup>1</sup>Sb: State’s brief.

tested in DNA.” (23T:71-4 to 22) The DNA laboratory relied on Estilow’s isolation of this evidence “to come to the vault and just retrieve that DNA packet instead of all the evidence.” (23T:71-19 to 22) If Estilow ran the tests incorrectly or isolated the wrong samples for the DNA laboratory to retrieve, the State would not have been able to make the critical claim that subsequent DNA testing of the samples implicated Simon in Strickland’s murder by showing that his DNA could not be excluded as a contributor to the samples that Estilow had previously found tested positive for blood and semen.

Finally, Tramontin repeatedly asserted that Estilow properly followed lab “policies and procedures” in handling and testing the evidence. (23T:57-19 to 59-8; 71-23 to 72-3) As Justice Alito explained in his concurrence in Smith, testimony that a non-testifying lab analyst followed a lab’s “typical intake process,” complied with “policies and practices,” and performed certain tests is the equivalent of testifying “to the truth of the matter asserted” and therefore implicates the Confrontation Clause. 602 U.S. at 819-20 (Alito, J., concurring); see also People v. Vigil, 557 P.3d 805, 812-13 (Colo. App. 2024) (concluding use of letter written by non-testifying witness to establish chain of custody of buccal swabs was inadmissible hearsay offered for the truth of the matter asserted). Tramontin claimed Estilow handled, tested, and repackaged critical evidence properly before transmitting it to the DNA laboratory. The

State itself chose to present Tramontin's testimony as a critical part of its circumstantial case; it cannot now disavow its reliance on the truth of the claims made in her testimony to the jury. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009) (explaining that prosecution has discretion in choosing what witnesses to call to establish crucial links in chain of custody, but Confrontation Clause requires "what testimony is introduced must (if the defendant objects) be introduced live").

The State's brief also misleadingly suggests – without ever outright stating – that Tramontin was present when Estilow conducted her testing. The State claims that Smith does not prohibit Tramontin's testimony about Estilow's actions because "Tramontin was 'a supervisor who observed an analyst conducting a test' and testified 'about the results or a report about such results.'" Sb 57 (quoting Bullcoming v. New Mexico, 564 U.S. 647, 672-73 (2011) (Sotomayor, J., concurring)). There is no basis for the State's implication that Tramontin observed Estilow's actions. Tramontin never testified she was physically present to observe Estilow's testing or handling of the forensic evidence. By her own testimony, her knowledge of what Estilow did was based on Estilow's written report. (23T:43-5 to 16) Tramontin admitted she "did not do the analysis" and was "relying on" what Estilow said she did in her "written report." (23T:43-5 to 16) Tramontin merely did an

“administrative review” of Estilow’s report to “make sure . . . the names were right,” “item numbers match[ed] the evidence receipt” and a “technical review” where she “learned the type of analysis that was done on each item.” (23T:43-5 to 16; 77-20 to 78-7)

Therefore, this case is indistinguishable from Smith, where the testifying witness merely performed a review of the non-testifying witness’s written work without testing the evidence herself. As in Smith, Tramontin’s testimony was “predicated on the truth of [the non-testifying analyst’s] factual statements.” 602 U.S. at 798; If Estilow “lied about all those matters” in the written report, Smith, 602 U.S. at 798, then Estilow’s test results and the subsequent DNA testing linking Simon’s DNA profile to the forensic evidence that Estilow had handled would have no value to the prosecution. See also State v. Thomas, 334 A.3d 686, 703 (Me. 2025) (concluding that a testifying chemist’s review of a non-testifying chemist’s work did not satisfy Smith because it “include[d] minimal, if any, independent scrutiny” of non-testifying chemist’s notes and thus impermissibly “relied on the truth of out-of-court statements”).

Given the extremely weak nature of the State’s case against Simon, the trial court’s error in admitting Tramontin’s testimony about Estilow’s actions was not harmless. Other than the DNA evidence, the State’s case consisted

solely of Simon's prior bad acts during the course of his relationship with Strickland. Underscoring the significance of the DNA evidence to the State's case, the State did not charge Simon until nearly five years after Strickland's death, only doing so after testing the evidence handled by Estilow against buccal swabs taken from Simon and three other men who were in Strickland's apartment around the time her body was discovered.

Simon's right to confrontation was violated by Tramontin's testimony about Estilow's actions in handling the critical forensic evidence taken from Strickland. His convictions must be reversed.

### **CONCLUSION**

For the reasons set forth herein and in his opening brief, this Court should reverse Simon's convictions.

Respectfully submitted,

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August 12, 2025



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**SUPPLEMENTAL LETTER-BRIEF ON BEHALF OF**  
**DEFENDANT-APPELLANT**

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3497-22  
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TIMOTHY D. SIMON,	:	of New Jersey, Law Division,
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**POINT I**

**TRAMONTIN’S TESTIMONY CONVEYED CONCLUSIONS THAT NON-TESTIFYING LAB ANALYST ESTILOW MADE ABOUT CRITICAL EVIDENCE OUTSIDE OF TRAMONTIN’S PRESENCE, IN VIOLATION OF SIMON’S RIGHT TO CONFRONTATION.**

This Court’s recent decision in State v. K.W., A-2049-23 (App. Div. 2025), reaffirms that the State’s use of Laura Tramontin’s testimony to convey the laboratory procedures and conclusions of Annette Estilow – a different analyst who did not testify at trial – violated Timothy Simon’s constitutional right to confrontation. The K.W. decision addressed a defendant’s appellate challenge to testimony by the State’s toxicology expert about the results of urine and blood testing that a non-testifying toxicologist performed. K.W., slip op. at 11-12. Although this Court concluded that the expert had testified in violation of the Confrontation Clause by repeating conclusions reached by a non-testifying analyst, it found that the error did not warrant reversal because “defendant chose not to assert his right to confrontation” at trial. Id. at 29. Because Simon did preserve his Confrontation Clause challenge, his conviction must be reversed.

In K.W., defense counsel’s only objection to the expert’s testimony at trial was that the State had not served her resume thirty days in advance. Id. at 35. The defense did not raise a Confrontation Clause challenge to manner in which the expert’s testimony summarized another analyst’s lab work. Ibid. Instead, after a

104 hearing at which the expert previewed her anticipated testimony, defense counsel withdrew any objection to the testimony and “strategically used the underlying test results that were the subject of [the expert’s] testimony in support of his defense.” Id. at 29, 35-37. This Court therefore concluded that the defendant’s “Confrontation Clause challenge is waived on appeal.” Id. at 29 (citing State v. Williams, 219 N.J. 89, 98 (2014)).

Nonetheless, this Court proceeded to opine on the merits of defendant’s waived argument, concluding that the expert’s testimony had in fact “violated defendant’s right to confrontation” when she “included inadmissible testimony regarding” findings that the non-testifying analyst had made “in her absence.” Id. at 35. The Court held that the testimony did not comply with our Supreme Court’s decision in State v. Michaels, 219 N.J. 1 (2014), interpreting United States Supreme Court precedent applying the Confrontation Clause to forensic evidence. In Michaels, the Court allowed testimony by an expert who “analyzed the machine-generated data and produced the certified report” he testified about at trial. 219 N.J. at 42-43 (2014). Michaels held that an expert could testify to “findings and conclusions that he reached based on test processes that he independently reviewed and verified,” but prohibited a witness from testifying in a manner that “parrot[ed] the testimonial hearsay of another analyst.” Id. at 45-46.

Reviewing the testimony in K.W., this Court concluded “[t]here is no

serious dispute” the expert’s “testimony violated the rules set forth in Michaels.” K.W., slip op. at 34. Although the expert “independently reviewed the data” to agree with the “reported conclusions based on the machine-generated data,” the expert “impermissibly testified repeatedly about [the non-testifying analyst’s] conclusions contained in the report.” Ibid. The expert “repeated” the non-testifying lab analyst’s “findings and conclusions and parroted [her] testimonial hearsay,” “violat[ing] defendant’s right to confrontation.” Id. at 35.

Despite concluding that the testimony had violated the Confrontation Clause, but that any such argument was waived on appeal, this Court proceeded to address whether the portion of the New Jersey Supreme Court Michaels decision that permitted an expert to testify about “machine-generated data” prepared by another analyst remained good law after the United States Supreme Court’s decision in Smith v. Arizona, 602 U.S. 779 (2024). Smith held that an expert could not testify as to an opinion that relies on “another analyst’s statements as the basis for his opinion.” Id. at 783. Smith involved an expert who testified based on “notes and a signed report” prepared by a non-testifying analyst that “documented her lab work and results” in testing suspected narcotics. Id. at 790. The report described the items analyzed, the weight of each item, the tests the analyst performed on the items, and a “conclusion” about the item’s identity, followed by “ultimate findings.” Ibid. Smith held that the testifying analyst’s opinion was “predicated on

the truth of” the non-testifying analyst’s “factual statements” in the report, and that, if the non-testifying analyst “had lied about all those matters,” the testifying expert’s opinion “would have counted for nothing.” Id. at 798. The Court explained that allowing an expert to testify based on a report authored by a non-testifying analyst would “allow for easy evasion of the Confrontation Clause,” meaning that “no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted.” Id. at 799. The Court held such a rule did not comply with the Constitution. Ibid.

In K.W., this Court held that Smith did not overrule Michaels because Michaels concerned “machine-generated data identifying and quantifying the drugs found in defendant’s blood sample.” Michaels, 219 N.J. at 36-37. This Court reasoned that a testifying expert could rely on this type of “machine-generated data” obtained by a non-testifying analyst to form their independent opinion because “machine-generated data is not the equivalent of a testimonial statement” about work performed by a lab analyst. K.W., slip op. at 39. Therefore, this Court held that, if the expert had complied with Michaels by not repeating the “findings and conclusions” of the non-testifying analyst, then “there would be no grounds to claim a violation based on Smith” due to the testifying expert’s discussion of his independent conclusions based on “machine-generated data.” Id. at 35-37.

K.W. makes clear that reversal is compelled here. Unlike the defendant in

K.W., defense counsel lodged a Confrontation Clause objection, arguing that Tramontin could not testify to the findings made by a different analyst who was not herself testifying. (23T:45-2 to 48-18) The trial court erroneously overruled the objection. Therefore, Simon’s challenge to Tramontin’s testimony is not waived.

This case involves the exact same kind of testimony that this Court said in K.W. there could be “no serious dispute” violates Michaels and United States Supreme Court precedent. K.W., slip op. at 34. Tramontin “parroted” conclusions reached by Estilow, a non-testifying witness, during Estilow’s analysis of critical evidence “in her absence.” Id. at 35. Tramontin acknowledged that “Estilow authored the report,” not her. (23T:73-8 to 11) Yet Tramontin “refer[red]to [Estilow’s] report for certain conclusions,” which she shared with the jury throughout direct examination. (23T:60-10 to 61-5) Although Tramontin read and reviewed Estilow’s report, Tramontin admitted that she “did not do the analysis” herself and was “relying upon what Ms. Estilow” reported she did when handling and testing the critical vaginal swabs, underwear, and fingernail samples in the lab, before sending them for further DNA testing. (23T:43-5 to 16) Therefore, Tramontin’s testimony “repeated” the non-testifying lab analyst Estilow’s “findings and conclusions and parroted [her] testimonial hearsay,” in violation of Simon’s right to confrontation. K.W., slip op. at 35.

Like the contents of the report that were improperly conveyed to the jury in

Smith, Estilow's report included "detailed notes" that Estilow took while "actually doing the analysis," including her documentation of "lot numbers" and "all of the testing for quality control." (23T:65-9 to 19) Based on reading Estilow's written notes, Tramontin testified that Estilow analyzed a stain in the underwear that "tested positive for the presumptive test for semen" and that Estilow then removed the area of the stain to send it on "for further testing." (23T:64-10 to 22; 83-1 to 7) Tramontin testified that Estilow tested "[t]he victim's vaginal swabs" and found they "they were positive for spermatozoa" by viewing the swabs "under a microscope" and observing a "Christmas tree staining" pattern. (23T:67-19 to 68-8) Tramontin also testified that Estilow tested fingernail clippings for blood by taking "a swab" to "touch the fingernails" and applying a reagent that "turn[ed] a bright pink color in the presence of blood." (23T:66-19 to 67-1) Tramontin also relied on Estilow's notes to testify that Estilow followed "standard operating procedure[s]" from the "forensic serology procedural manual," and that Estilow properly diagrammed her removal of items from evidence for further DNA testing. (23T:83-1 to 84-9) Tramontin told the jury all this even though she did not test or handle any of this critical evidence herself; Estilow did so outside her presence.

Regardless of whether K.W. is correct that Michaels's holding that an expert can testify about conclusions drawn based on "machine-generated data" remains good law after Smith, this case does not involve "machine-generated data."

Tramontin did not just describe the output of a machine-run test, but instead conveyed actions taken and observations made by Estilow while she handled critical evidence. As Smith prohibited, Tramontin conveyed “factual statements” made by Estilow that “would have counted for nothing” if Estilow “had lied about all those matters” in her written report. 602 U.S. at 798. Had Estilow testified, defense counsel would have been able to ask her questions about her handling of the evidence, the chemicals she used to test the evidence, what she saw when she looked at the evidence under a microscope, her compliance with lab standards, and the possibility of cross-contamination with other evidence during the process of testing the evidence and isolating it to be forwarded for further DNA testing, which later purported to match Simon’s DNA to evidence taken from the victim. Because Tramontin did not conduct the testing and instead relied on Estilow’s written report, Estilow was shielded from any cross-examination on these critical issues.

As the Smith Court explained, “when an expert conveys an absent analyst’s statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth.” 602 U.S. at 783.

Allowing such statements to be admitted without testimony from the analyst who did the work would mean that “no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted.” Id. at 799. The Smith Court rejected the premise that the

testifying expert's conclusions could be "independent" of the analysis performed by the non-testifying forensic analyst because "[a]ll those opinions were predicated on the truth of [the non-testifying analyst's] factual statements." Id. at 798. Such approach would be an "end run" around all the United States Supreme Court has "held the Confrontation Clause to require" in case after case. Id. at 799.

Although Mr. Simon's opening brief argued that Smith overruled Michaels, this Court's decision in K.W. held that Michaels remains good law where the testifying expert bases their conclusions only on "machine-generated data." This Court need not reach the issue because K.W.'s endorsement of Michaels cannot be read to authorize what happened here, where the testifying expert did not rely on any machine-generated data, but instead based her testimony on the contents of a report written by a non-testifying human analyst. This situation is indistinguishable from the testimony that the United States Supreme Court found improper in Smith. Indeed, this Court's K.W. decision agreed that this kind of testimony does not comply with the Confrontation Clause under the standard announced in Michaels.

But, if this Court nevertheless chooses to reach the issue of whether Smith overruled Michaels, it need not follow K.W. This Court has repeatedly made clear that it is "not bound by our earlier decisions because we do not sit en banc." State v. Harrell, 475 N.J.Super. 545, 564 (App. Div. 2023), aff'd, 256 N.J. 590 (2024) (quoting Liberty Mut. Ins. v. Rodriguez, 458 N.J. Super. 515, 206 A.3d 426 (App.

Div. 2019) and citing Pressler and Verniero, Current N.J. Court Rules, cmt. 3.3 on R. 1:36-3 (2023) (noting Appellate Division’s “opinions clearly are binding on all [trial] courts” but they do not bind “other panels of the Appellate Division”).

Departure from another panel’s decision is particularly appropriate where, as here, K.W.’s discussion of whether Michaels remains good law after Smith was entirely “dicta” that was not essential to the outcome. See ibid. (refusing to follow language from prior decision that trial court found controlling and noting it was “dicta”).

Jurisdictions throughout the country have concluded that Smith overruled their earlier precedents allowing expert testimony premised on findings made by non-testifying analysts. See, e.g., United States v. Seward, 135 F.4th 161, 169 (4th Cir. 2025) (concluding precedent allowing DNA expert to testify to his own independent conclusions, even though the analyst who did the underlying lab work would not be testifying” was “no longer tenable after Smith”); State v. Hall-Haught, 569 P.3d 315, 323 (Wash. 2025) (holding that “[t]o the extent that” prior state court decision “allowed the supervisor’s expert opinion to rely on the nontestifying forensic analyst’s factual statements as the basis for their opinion, it is unconstitutional under Smith”); State v. Gleason, 339 A.3d 774, 775-76 (Me. 2025) (remanding for a new trial because Smith, “which was issued during the pendency of this appeal, did away with a line of reasoning that the trial court relied upon when it admitted the expert toxicologist’s testimony” without testimony from

“the people who performed” the toxicology tests); Commonwealth v. Gordon, 266 N.E.3d 369, 388 (Mass. 2025) (concluding Smith prohibits “an expert’s opinion based on an absent analyst’s test results that depends also on the truth of the analyst’s testimonial hearsay as to the processes and protocols she said she followed to obtain those results”). Undersigned counsel is not aware of any jurisdiction other than New Jersey that has carved out an exception for “machine-generated data” since Smith. Even in cases of machine-generated data, cross-examination remains a vital tool for the defense to explore the possibility of human error by the analyst operating the machine or, as Smith acknowledged, whether the analyst “lied” about the process used or results obtained. 602 U.S. at 798.

Regardless of whether Michaels and K.W. are consistent with Smith, all three cases make clear Tramontin’s testimony here violated Simon’s right to confrontation. Tramontin testified over defense objection about the actions and conclusions of analyst Estilow, who did not testify at trial. The forensic evidence Tramontin conveyed was critical to the State’s case, which was otherwise entirely circumstantial. Because admission of this evidence violated Simon’s right to confrontation, his conviction must be reversed.

### **CONCLUSION**

For the reasons herein, this Court should reverse Simon’s conviction.

Respectfully submitted,

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Public Defender

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January 14, 2026



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LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

The Honorable Judges of the Superior Court of New Jersey,  
Appellate Division  
Richard J. Hughes Justice Complex  
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Respondent) v.  
TIMOTHY D. SIMON (Defendant-Appellant)  
Docket No. A-3497-22T5

Criminal Action: On Appeal from a Final Judgment of  
Conviction of the Superior Court of New Jersey, Law Division,  
Camden County.

Sat Below: Hon. Sherri L. Schweitzer, J.S.C., Hon. Donald J.  
Stein, J.S.C., Hon. Thomas T. Booth, Jr., J.S.C., and a jury

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Honorable Judges:

This letter brief is submitted in lieu of a formal brief on behalf of the State.

See R. 2:6-2(b); R. 2:6-4(a).



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32T – February 7, 2023 trial transcript  
33T – February 8, 2023 trial transcript

34T – February 9, 2023 trial transcript  
35T – February 14, 2023 trial transcript  
36T – February 15, 2023 trial transcript  
37T – May 19, 2023 sentencing hearing  
38T – June 2, 2016 grand-jury hearing  
39T – December 13, 2018 grand-jury hearing  
PSR – Pre-sentencing report

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>

The State relies on the statement of facts and procedural history set forth in its July 14, 2025, response brief and adds the following. On December 29, 2025, this Court posted an eCourts communication seeking supplemental briefing on State v. K.W., No. A-2049-23 (App. Div. Dec. 17, 2025).

LEGAL ARGUMENT

POINT I

TRAMONTIN'S FORENSIC-SEROLOGY  
TESTIMONY REMAINS ADMISSIBLE.

The decision in K.W. does not affect this case. First, the serology testimony in this case is not hearsay and the underlying notes are nontestimonial, failing to trigger the Confrontation Clause; in any event, the testimony satisfied the Clause, and the K.W. panel misapplied the relevant case law. Regardless, of course, a decision—let alone dicta—from one Appellate Division panel does not bind this Court. In any event, the unchallenged DNA expert testimony (admissible with or without the serology testimony) pointed squarely at defendant's guilt, rendering admission of the serology testimony harmless. This Court should thus affirm defendant's conviction.

In K.W., the defendant's niece asserted that he fed her strong alcohol and

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<sup>1</sup> These related sections are presented together for this Court's convenience.

sexually assaulted her while she was intoxicated and could not consent. K.W., slip op. at 4-8. When the toxicologist who performed the forensic testing was unavailable, the State offered her supervisor's testimony. Id. at 11-12. K.W. objected only to the extent that the State failed to timely serve the supervisor's resume. Id. at 12-13. No Confrontation Clause objection was lodged.

During the ensuing N.J.R.E. 104 hearing, the supervisor explained that she "peer reviewed the toxicology report," meaning that she "review[ed] all of the notes, all of the data associated with the report, and ensure[d] that the supporting documents [were] present, ... appropriate, and ... support[ed] the report." Id. at 13. The supervisor also initialed the report, stated she "agreed" with its conclusions, and "independently 'looked at all of the data and determined that the ... results'" were correct. Ibid. She likewise concluded that the toxicology testing was done correctly. Ibid. The supervisor was permitted to testify, and K.W. did not renew or lodge any further objection. Ibid.

At trial, the supervisor also said that she reviewed the non-testifying analyst's report and notes (which were not offered into evidence). Id. at 14. After describing the tests employed, she agreed with the report's conclusion that the victim's blood-alcohol content was between 0.057 and 0.061, and she "was satisfied 'the results reported' ... were 'accurate.'" Id. at 14-16. The jury convicted K.W. of sexual assault and criminal sexual contact. Id. at 18.

On appeal, the panel concluded that K.W. waived any Confrontation Clause challenge by failing to raise it before the trial court. Id. at 28-29. To this end, it also found that defense counsel “strategically used the underlying test results that were the subject of her testimony in support of his defense.” Id. at 29, 35-37. It then, in dicta, opined that the supervisor’s testimony would have violated the Confrontation Clause. Id. at 34. After examining the relevant New Jersey and United States Supreme Court case law, the panel stated that the supervisor “impermissibly testified repeatedly about [the non-testifying analyst]’s conclusions contained in the report” in violation of State v. Michaels, 219 N.J. 1 (2014). It also posited that if the supervisor’s testimony did not violate Michaels, it would have been permissible under Smith v. Arizona, 602 U.S. 779 (2024), “because machine-generated data is not the equivalent of a testimonial statement” triggering the Confrontation Clause. K.W., slip op. at 37-41. Based on K.W.’s waiver, the panel affirmed his convictions.

A. Tramontin’s testimony did not violate the Confrontation Clause.

For the reasons outlined in the State’s response brief, (Pb51-60), the trial court properly admitted testimony from Laura Tramontin, the serology expert who testified regarding the lab report prepared by her direct supervisee, Annette Estilow. K.W. compels no contrary conclusion. Unlike in K.W., Tramontin’s testimony was not hearsay and so does not implicate the Confrontation Clause. Likewise, the K.W.

panel failed to properly analyze Smith's guidance on when a lab report is testimonial. Further, even if it did implicate the Clause, Tramontin's testimony was properly admitted in spite of K.W. because that case misapplied the law and is factually distinguishable. The State's assertion in its response brief that defendant's conviction should be affirmed on this basis is thus unaffected by K.W.

In any event, unlike the toxicology expert in K.W., Tramontin's serology testimony was properly admitted because her testimony was not hearsay. See (Pb52-54); Smith, 602 U.S. at 793 ("If [the non-testifying analyst]'s statements came in to establish the truth of what she said, then the [Confrontation] Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet."). Certainly, the toxicology testimony in K.W. was offered for the truth of the matter asserted—that the victim was intoxicated when K.W. sexually assaulted her, a fact K.W. disputed. K.W., slip op. at 9-10, 15-17.

Here, though, Tramontin's testimony served to establish chain of custody of the items recovered at the murder scene and to explain why only six of the nine items screened were forwarded to the DNA lab for more detailed analysis. See (Pb53-54). Indeed, Tramontin testified extensively to the lab's chain-of-custody procedures. (23T53-2 to 55-14). Any serology testimony offered to show presumptive positive tests of the evidence would be duplicative since, as discussed further in Point I.B., the expert from the DNA lab offered much more probative and precise conclusions

on the items tested. Thus, since Tramontin’s testimony was not offered to prove the truth of the matter asserted in the report, Smith does not bar that testimony.

Further the K.W. panel also misinterpreted Smith when it categorically opined that experts cannot testify to “conclusions and opinions contained in the notes of a non-testifying analyst,” deeming such notes testimonial. K.W., slip op. at 38-39. Even if the “primary purpose” underlying a non-testifying analyst’s report has “a focus on court,” Smith explains that “some records of lab analysts will not have an evidentiary purpose” and are therefore nontestimonial and do not trigger confrontation rights. 602 U.S. at 802. Indeed, “lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control,” and “some analysts’ notes may be written simply as reminders to self.” Ibid. Those records are nontestimonial. Ibid.

Thus, even if Tramontin’s testimony regarding Estilow’s report should have been precluded, testimony on her notes (and the analyst’s notes in K.W.) was proper. Tramontin testified that Estilow’s bench notes—which were separate from the report, (23T60-10 to 15, 23T69-17 to 19)—were “detailed notes” taken during the analysis in which the analyst “record[ed] [he]r lot numbers [and] ... all of the testing for quality control.” (23T65-12 to 19). She further described the chain-of-custody procedures, including that analysts “indicate in [their] bench notes what items are being sent on to DNA” for internal organization; the DNA packet is placed in a vault

separate from the remaining evidence, helping to “streamline the samples” submitted to the DNA lab. (23T70-24 to 71-18). Thus, Estilow’s bench notes (which included the test performed on each piece of evidence and the conclusions reached) did not have a “focus on court” and are the precise type of records which do not trigger confrontation rights under Smith.

Regardless, Tramontin’s testimony satisfied the Confrontation Clause. See (Pb54-58). In Michaels, our Supreme Court explained that a “truly independent ... supervisor of testing results” may “testify to those results and to his or her conclusions about those results, without violating a defendant’s confrontation rights, if the testifying witness is knowledgeable about the testing process, has independently verified the correctness of the machine-tested processes and results, and has formed an independent conclusion about the results.”<sup>2</sup> 219 N.J. at 45-46; see also Roach, 219 N.J. at 61 (“[A] defendant’s federal and state confrontation rights are satisfied so long as the testifying witness is qualified to perform and did in fact perform an independent review of testing data and processes rather than mainly read from or vouch for another analyst’s report or conclusions.”). The Michaels Court also cautioned: “taking the most rigid approach to confrontation

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<sup>2</sup> That the processes and results in Michaels were machine-tested bears only on whether the report is testimonial. Here, the serology results were not generated by a machine, but our Supreme Court’s logic regarding the independence of the supervisor or reviewer remains sound and applicable.

rights in the context of forensic reports carries practical drawbacks that range from moderate to severe,” providing “no meaningful solution where the analyst or analysts no longer work at the lab, are unavailable, or are deceased. There is a real likelihood that such dilemmas may arise in cold cases.” 219 N.J. at 48. Our Supreme Court thus permits testimony by an analyst—in Michaels, a supervisor, and in Roach, a co-worker—who independently reviewed the work and deemed it correct.

Smith did not upend Michaels or Roach given that unlike those cases, Smith involved testimony from a substitute who had no familiarity with the underlying report. There, the expert witness “did not participate in [the non-testifying analyst’s statements’] creation” and “present[ed] the out-of-court statements as the basis for his expert opinion.” 602 U.S. at 803. As noted in the State’s response brief, (Pb58), Michaels and Roach do not involve such “remote[ness] from the case” by a mere “mouthpiece,” Smith, 602 U.S. at 799, 800; rather, as here, the experts in those cases contemporaneously reviewed and analyzed the non-testifying analyst’s work.

K.W. misapplied this case law. Relying on Michaels, the K.W. panel appears to infuse a requirement for an expert to testify to the contents of his or her own report. K.W., slip op. at 33-34. But so long as a testifying witness is not a “mouthpiece” or a “surrogate merely reading from [the non-testifying analyst’s] records,” Smith, 602 U.S. at 800, there is no Confrontation Clause violation. Like here, this was all that was required. See Roach, 219 N.J. at 61; Michaels, 219 N.J.

at 42-43; Bullcoming, 564 U.S. at 672-73 (Sotomayor, J., concurring) (“It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”); cf. Smith, 602 U.S. at 798-99 (precluding expert testimony where the testifying analyst “had no personal knowledge” about the underlying testing and only gained information “from reviewing [the non-testifying analyst]’s records”). The K.W. panel thus erred by so construing the case law. This panel should properly apply that jurisprudence here by affirming the trial court’s decision to allow Tramontin to testify.

To the extent this Court accepts K.W.’s finding that the expert there “repeated [the non-testifying analyst]’s findings and conclusions and parroted [that analyst]’s testimonial hearsay,” Tramontin here did not do so. The K.W. panel took issue with portions of the toxicology expert’s testimony, including that she “assum[ed] ... which screens were positive” without reviewing the report and used the report to read the tests undertaken and the results reached. K.W., slip op. at 34-35.

But here, Tramontin, testified that she contemporaneously reviewed Estilow’s work “for technical correctness, making sure that [Estilow] followed all the policies and procedures that [Tramontin] would do as if [Tramontin] was doing the testing [her]self,” and she initialed the report to permit its dissemination to the DNA lab, which was a “requirement.” (23T58-21 to 59-21). Tramontin then thoroughly described each test undertaken on each analyzed item. (23T66-13 to 68-24, 70-1 to

23). On cross-examination, defense counsel further probed the testing details; Tramontin explained the standard operating procedures for each test and confirmed that the tests were conducted properly. (23T78-14 to 86-12). Indeed, asked whether she knew Estilow actually performed these tests or if Tramontin was describing the procedures generally, Tramontin replied: “[t]hat’s what was done and what should have been done . . . . It’s one in the same.” (23T83-13 to 18). To disallow testimony by a supervisor so closely familiar with the underlying testing would greatly handicap the State’s ability to prosecute cold cases like defendant’s where the analyst who conducted the test has retired (as here), died, or is otherwise unavailable. To this end, it would effectively close any window for the State to put forth any witness who did not specifically perform the tests outlined in the report, which cannot be an outcome envisioned by the case law.

B. One panel’s dicta should not affect this Court’s confrontation analysis.

In any event, K.W. has no bearing on defendant’s case. Of course, a decision by one Appellate Division panel—let alone dicta from such a decision—is not binding. See, e.g., Liberty Mut. Ins. v. Rodriguez, 458 N.J. Super. 515, 521 (App. Div. 2019) (“[W]e are not bound by our earlier decisions because we do not sit en banc.”); see also Pressler and Verniero, Current N.J. Court Rules, cmt. 3.3 on R. 1:36-3 (2023) (noting this Court’s opinions do not bind other Appellate Division panels). This Court should therefore disregard K.W. to the extent it misapplies the

Confrontation Clause case law, see Point I.A.

C. In any event, unchallenged DNA expert testimony established defendant's guilt, rendering admission of Tramontin's testimony harmless.

As explained in the State's response brief, (Pb58-60), this Court should affirm defendant's conviction regardless of the admissibility of the substance of Tramontin's serology testimony because any alleged error is harmless. With chain of custody established, the unchallenged testimony of Christopher Szymkowiak, the DNA expert, showed through more comprehensive testing that defendant was by far the strongest match to the minor DNA profiles found on the evidentiary items, linking him to the crime. K.W., a case involving a toxicology expert rather than a serologist who conducted a "screening" of certain evidentiary items, (23T56-16 to 24), has no effect on this analysis.

#### CONCLUSION

The State urges this Court to affirm defendant's judgment of conviction.

Respectfully submitted,

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