SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3822-22T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal From an Order Denying a Petition for Post-Conviction Relief
v.	:	of the Superior Court of New Jersey, Law Division, Atlantic County.
KESHAUN EARLEY,	:	
		Ind. No. 13-3-858-I
Defendant-Petitioner.	:	
		Sat Below:
	:	Hon. Mark Sandson, J.S.C. (Trial) Hon. Rodney Cunningham, J.S.C. (PCR) Hon. W. Todd Miller, J.S.C. (PCR)
	:	Hon. Pamela D'Arcy, J.S.C. (PCR)

BRIEF ON BEHALF OF DEFENDANT-PETITIONER

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Dated: May 13, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Keshaun Earley has been incarcerated for nearly 12 years for a murder he didn't commit. This injustice is a direct result of trial counsel's critical mistakes, prosecutorial misconduct and the PCR judge's procedural and substantive errors.

The conviction rested on the testimony of three eyewitnesses, who had at most a two-second glance at the fast-moving shooter's face. Two said the shooter had a tattooed face, and one said he was 5'8. Earley is 6'1 with no facial tattoos. Yet each witness claimed to know Earley and identified him when shown a single mugshot. The State's case hinged on a common misconception that non-stranger identifications could not be wrong. Despite the availability of experts to explain that these identifications are just as susceptible to factors known to contribute to misidentification, counsel failed to consult or retain one.

Earley had an alibi: he was at Oakcrest Estates 30 minutes away in Mays Landing. Atlantic County Prosecutor's Office (ACPO) obtained 216 hours of video from all over the complex. It saved two short clips then "wiped" the hard drive, depriving the defense the chance to review the footage. Counsel moved for sanctions. The court repeatedly asked for ACPO's policies, which counsel failed to obtain. The court refused to dismiss the indictment on the grounds that, without a policy violation, the defense had not established bad faith. On the eve of trial, an ACPO exam indicated the clips, which should not have survived

"wiping," remained. Counsel never demanded a forensic exam by an expert.

The preserved Oakcrest clips showed Earley at 12:25 and 12:42pm, and cell-cite data put his phone in Mays Landing. The State argued, however, that he left his phone, shot the victim in Atlantic City at 12:11pm, then sped back to Mays Landing. Since he had only incoming calls, the State argued the phone records supported its theory. Yet, Earley was actively sending messages, posting and liking content on Facebook during the critical time. Counsel had screenshots of Facebook activity but failed to plan for their admission, so jurors never knew Earley's phone was generating Facebook content, contrary to the State's theory.

Also, the shooter shot with his right hand, while Earley is left-handed, yet counsel failed to present evidence of this or object when the prosecutor testified in summation about ambidexterity. He further blundered by promising to prove Earley's innocence, inviting damaging (and otherwise reversible) prosecutorial argument. These are only some of the significant errors of Earley's trial counsel.

The jury could not reach consensus after three days of deliberating. After being charged to continue, on the fourth day they returned a guilty verdict.

It later came to light that: another person confessed to the crime; counsel had previously represented both the murder victim and his brother; and ACPO policies, finally revealed, had been violated.

The PCR court ordered ACPO to provide the hard drive. ACPO delayed,

obfuscated, then admitted it was gone. Interrogatories were ordered. Meanwhile PCR counsel fell ill. The case was reassigned to new counsel and to a new judge, who had been an ACPO supervisor during its prosecution of Earley. ACPO continued to stonewall, asserting it need not comply with the court's order.

At a hearing on Earley's motion to compel, the new PCR judge sua sponte reversed the long-standing discovery orders and moved to the merits of the PCR petition. When substituted PCR counsel protested that she still had open investigations and had not completed her submissions, the judge insisted she complete everything within a week, when the petition would be argued. On that date, counsel continued to object that she had not completed her case, but the judge told her to either argue the merits of the petition or rest. The judge refused to recuse herself, and denied the PCR without an evidentiary hearing.

Our criminal legal system is not infallible. A PCR petition represents a defendant's last chance to right an unjust conviction. A PCR proceeding must be a meaningful opportunity to root out mistakes. Yet, the judge elevated perceived expediency over justice, preventing PCR counsel from meeting her obligations under Rue and Webster, and depriving Earley due process and effective assistance of PCR counsel. This cannot stand. The Court should reverse and remand for an evidentiary hearing and further proceedings so counsel can complete her submissions, rest, and argue the matter.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS

I. INDICTMENT AND PRETRIAL MOTIONS

On August 26, 2012, James Jordan was fatally shot in Atlantic City; Keshaun Earley maintained he was in Oakcrest Estates in Mays Landing at the time. On March 20, 2013, Atl. Ind. 13-3-858 charged him with murder and firearms offenses. N.J.S.A. 2C:11-3(a)(1),(2); 2C:39-4(a); 2C:58-4 (Da1-5)

At a July 3, 2013 status conference, trial counsel said he still needed video from ACPO and had called Det. Lynne Dougherty to obtain it. (3T6-10 to 18; 5T137-15 to 138-23) On August 8 and 15, 2013, Hon. Mark Sandson, J.S.C., granted motions to preserve evidence and compel all information. (Da6-11)

Earley filed motions to suppress eyewitness identifications and to dismiss the indictment due to the State's destruction of exculpatory evidence, or in the alternative, an adverse inference. (Da12-13) Each is explained below.

A. Destruction of Hundreds of Hours of Potentially Exculpatory Video.

ACPO destroyed all but two short clips of Oakcrest Estates surveillance video. Earley moved to dismiss the indictment, and Judge Sandson held a hearing on February 24, 2014. (5T35-1 to 204-9)

When Doughtery interrogated Earley 12 hours post-shooting, he asserted an alibi: he had been at Oakcrest Estates. (5T130-11 to 14, 146-7 to 147-1) Det.-Sgt. Richard Johannessen retrieved surveillance video and met with property

manager Carol Johnson, who said there were a "couple of portions" police would be interested in: 4:40pm, and earlier when she believed Earley was in the complex. Johannessen extracted footage from all 18 cameras of the surveillance system (including covering its two entrances) from between noon and midnight, downloaded the 216 hours of video onto a 300-gigabyte hard-drive, and gave it to Dougherty. Dougherty watched it intermittently over weeks, sometimes simultaneously watching footage from multiple cameras, without documenting anything. (5T42-16 to 23, 43-16 to 44-5, 46-24 to 48-5, 53-1 to 15, 113-21 to 114-12, 118-9 to 119-25, 120-13 to 121-22, 126-16 to 19, 165-6 to 25, 200-25)

Dougherty testified about the first clip, which she saved since she thought it could be Earley: shortly after the shooting, a man walks down the street onto Cardigan Court, and later, a Jaguar pulls in. Doughtery claimed she reviewed other cameras but did not see where he had walked from. She had already started reviewing footage before her October 2012 interview with Tobias in which Tobias confirmed Earley's statement that he had had been at Oakcrest all day until she picked him up in her Jaguar. Even then, Doughtery never tried to determine whether the Jaguar drove by any other cameras. (5T125-7 to 10, 126-4 to 7, 127-4 to 21, 128-2 to 10, 129-20 to 130-6, 131-20 to 23, 160-3 to 5)

The other clip showed the Jaguar at the playground later on and Earley playing with a child there, consistent with Tobias's and Earley's statements.

Dougherty did not know from which street or even direction it had driven to enter that parking lot. She did not believe it important to determine when the Jaguar arrived at Oakcrest Estates and was not aware that the car would have passed by all 18 cameras to get to the playground. (5T167-13 to 170-8)

In addition to not determining where the Jaguar was during key time frames, Dougherty could not remember which vehicles had entered or exited Oakcrest Estates on the footage. She said she "didn't pay attention to" things she did not think were "relevant." (5T124-25 to 125-2, 141-17 to 20)

Doughtery knew defense counsel had not received the video. She was told to send him the "evidentiary" portion. Dougherty did not know which portions he wished to view, nor offer to have him come in and review it. She had Lt. Paley extract only the two clips and told him she no longer needed the rest, aware ACPO would reformat the drive, deleting its contents. Paley extracted the clips[1] and gave the drive to Johannessen, who testified he conducted a "forensic wipe," ostensibly overwriting all information and reformatting the drive so any data was erased and could no longer be retrieved. (5T52-1 to 13, 55-19 to 58-23, 63-12 to 64-17, 73-2 to 25, 138-2 to 139-13, 145-3 to 146-6, 152-11 to 17)

Dougherty testified she alone decided only those clips should be kept and disclosed. Someone said they needed to free up space; she chose them since she

[1] Camera C-6 (12:20-12:40pm); C-21 (4:40-4:50pm) (5T64-3 to 17, 68-18 to 24)

thought would fit on a single disk. Dougherty did not believe there was a written policy about who can decide to keep or destroy evidence retained by ACPO, though she admitted that even if a soda can turned out to not be of evidentiary value, it would still be kept in evidence. (5T139-17 to 24, 148-2 to 151-22)[2]

Capt. Brian Barnett testified that ACPO was required to have a written SOP on destruction of evidence in active investigations, though could not state what it said. He said there was no policy directing or sanctioning destroying property held in pretrial homicide case, and knew of no policy that later deemed non-evidentiary. He testified that the Prosecutor approves and releases ACPO polices, which are available to all staff. (5T83-18 to 96-17, 105-3 to 107-3)

Judge Sandson was "unable to determine whether there's any policy" on what is evidentiary, retained or destroyed. He repeatedly asked to see the book of policies. The prosecutor explained there were "thousands and thousands" kept in a database. None were ever produced, despite the judge stating their existence was "an overriding question." (E.g., 5T107-19-3 to 109-1, 110-27 to 2, 171-21 to 25) The next day, he ruled that while the defense had established the evidence destroyed was material and Earley was prejudiced, it had not clearly established "bad faith or connivance on the part of the State" because "nobody was able to

[2] Per Paley, other drives were probably available, and the computer crimes unit never told Dougherty they needed to free up space. (5T74-1 to 8, 80-13 to 16)

produce a policy" or "criteria" ACPO had violated. The court found ACPO violated its discovery obligation, but despite the "strong case" for dismissal, since bad faith was not established, he would only charge the jury it may draw an adverse inference if it found ACPO destroyed and failed to preserve evidence. (6T8-13 to 14, 14-17 to 17-17, 20-8 to 21-20, 23-3 to 24-2)

B. Eyewitness Identification. Dougherty conducted out-of-court identifications with Ny-Taijah Ceasar, Nicole Jones, and Kevin Brown, showing them only Earley's photo. At the February 25, 2014 Wade hearing, she testified Ceasar identified the shooter as "Buddah and Keshaun," and had yelled his name in earshot of others. Dougherty thought Caesar seemed confident, since she and Earley "used to talk," meaning dated. Dougherty thought Jones, who "had known Earley for about eight years, she knew personal information about him, where his mother's daughter was, and where she lived," also seemed confident. Brown told police he had known Earley for 10 years. Though all the witnesses revealed they had spoken to others about whether Earley was the shooter (with Ceasar and Jones calling around since they did not even know his real name), Dougherty did not ask follow-up questions. (6T49-15 to 51-17, 54-7 to 55-23, 60-6 to 61-5, 62-13 to 23, 82-18 to 83-10, 85-21 to 89-2, 90-23 to 91-2)

Dougherty admitted not following the Attorney General guidelines, failing to use a photo array, instructions, or blind administrator. The State

justified this based on witnesses' prior familiarity with Earley. Judge Sandson denied the motion to suppress the identifications. (6T79-6 to 81-2, 122-2 to 17)

II. TRIAL (February 27 - March 14, 2014)

All 13 seconds of the shooting was captured by a security camera in the Carver Hall area of Atlantic City. Though grainy and soundless, footage showed the shooter wore a white t-shirt, light shorts, and dark shoes, covered his face with a white shirt or towel, and held the gun with his right hand. (Da14 12:16:24-12:16:37; 10T142-21 to 143-2)[3] At 12:10pm he came around the corner of a building where Jordan and Brown stood. Brown turned and began to run away. (Da14 12:16:24-12:16:32) The shooter let go of his gun, and while bending to get it, dropped the shirt from his face for about two seconds while pursuing Jordan. (Da14 12:16:31-12:16:33) Jordan ran around the corner, opposite from Brown's flight from the scene. The shooter followed Jordan, who later collapsed and died. (Da14 12:16:34-12:16:37; see 10T186-11 to 18) A 911 caller said the shooter, who wore a white t-shirt. gray shorts, and a white towel on his head, ran across the street towards the Brigantine homes. (Da15; 12T74-21)

The State presented the testimony of Jones, Ceasar, Britney Ferguson, and Brown, whose accounts varied from each other and the surveillance video. Jones, the victim's aunt, testified she, Ceasar, Ferguson, and Tony Mason were

[3] The timestamp is six minutes ahead of the real time. (11T187-6 to 188-5)

sitting at the dining table in the living room of her second-floor apartment when they heard a gunshot; they ran to the windows to look. Ceasar yelled, "[T]hat's Budd[ah], that's Budd[ah]." Jones did not see the shooter fire the gun because she only looked out the window after hearing the shot. The shooter's face was covered and she did not recognize him, but when the shirt and gun fell, she saw his face for "[a] hot second." After the shot, Jones saw the shooter run toward a field next to the High Gate apartments, crossing 10 lanes of traffic and meeting up with another person there. (10T111-17 to 25, 112-7 to 8, 114-1 to 10, 115-4 to 9, 117-8 to 13, 118-19 to 22, 120-23 to 1, 121-6 to 9, 121-16 to 22, 127-19 to 128-24, 131-17 to 132-14, 142-6 to 11, 145-6 to 9, 148-18 to 149-23, 154-1 to 14) Jones thought the shooter was Buddah. She had only "seen him around a few times" and did not really know him; she tried to learn Buddah's real name prior to speaking to police. She said the shooter wore blue jeans and "definitely" had a tattoo under his eye, and did not remember any tattoos or distinctive markings on his hands. (10T118-3 to 5, 126-13 to 17, 136-1 to 10, 136-24 to 137-3)

Ceasar first said she was looking out the living room window prior to the shooting. She saw a man she knew as Buddah walk across the highway; heard the shot; saw the shooter drop the shirt covering his face and the gun, and run "[s]traight across the highway," where no one else was. Jones was in the kitchen, Ferguson by the TV, and Mason was not there. (10T26-8 to 27-24, 33-12 to 16,

40-5 to 15, 41-11 to 19, 48-16 to 20) However, in Ceasar's statement the day of the shooting, she said was in the kitchen and did not look out the kitchen window until hearing the shot. She never mentioned seeing the suspect walk across the highway before the shooting. Caesar also told police that the others in the apartment were ducking while she looked out of the window. After being confronted by her statement, Ceasar admitted she did not remember which room she had been in and did not see the shooter until **after** the gunshot. (10T57-3 to 22, 58-20 to 23, 63-1 to 8, 63-22 to 63-8, 77-9 to 78-10, 82-19 to 24, 89-4 to 12)

Ceasar could not tell who the shooter was until the towel fell. She only knew defendant as "Buddah." They never dated or were good friends, but rather they would talk "when he would come around." She described the shooter wearing army fatigue shorts, a white shirt, and lime green sneakers with orange and black. Like Jones, she told police he had a tattoo on his face, and she did not recall distinguishing markings on his hands. (10T27-25 to 28-16, 29-5 to 7, 33-5 to 7, 38-18 to 39-15, 40-11 to 17, 43-21 to 45-2, 75-19 to 25, 83-11 to 22)

Ferguson testified she was watching TV when she heard gunshots; she grabbed her son and left the apartment. From the hall window she saw a person with a white t-shirt and a towel on his head run across the field toward High Gate. She could not see his face and did not see anyone waiting for him. (12T11-15 to 25, 12-13 to 13-3, 15-1 to 3, 16-1 to 3, 18-7 to 18-22, 19-5 to 24)

Brown, meanwhile, testified as soon as he saw the shooter come around the corner with a shirt tied around his face while he and Jordan were talking, his adrenaline started flowing. He tapped Jordan and asked who that was. Jordan blew him off, so Brown asked again and started backing away; he thought he was being set up. Brown said Jordan reached for him, so he pushed Jordan who in turn pushed the shooter, causing the gun to fall; when he reached for the gun, the shirt fell for a "fast moment." After being shown video of the shooting, Brown admitted it was "a lot different from" his testimony, including a lack of pushing. Despite the video showing him turning and running almost immediately, Brown testified he saw the shooter's face as he backed away, and only ran after the shot. Brown admitted he told Jones that he thought Jordan had "set him up" and the shooter was Buddah. (13T136-7 to 138-19, 142-20 to 24, 146-20 to 22, 148-15 to 22, 153-1 to 10, 160-7 to 13, 164-6 to 17, 167-12 to 20)

He knew Buddah because "[w]e was incarcerated a couple of times, seen him in the streets a couple of times," but Buddah did not normally hang out in Carver Hall. (13T139-10 to 15) In his description to the police, Brown said that the shooter wore a "wife beater" tank top and black sneakers, but at trial he only recalled "like fatigue shorts, like cutoff shorts." (13T145-15 to 18, 165-6 to 24)

Hours after the shooting, Ceasar and Jones made out-of-court identifications of Earley when shown a single photo of him, and Brown did the

following day. Dougherty testified about her failure to follow the Attorney General Guidelines for conducting the identifications, and that Ceasar and Jones "both told me they were certain" of their identifications. (12T179-17 to 180-2, 180-14 to 16, 185-20 to 195-16) When the prosecutor asked Brown at trial how certain he had been, Brown reported he was "positive." (13T144-1 to 6)

Earley was charged with murder the night of the shooting. (12T195-25 to 196-25) Police found him in the Oakcrest Estates home of Khadidrah Hill, a woman seeing, and took him into custody. Earley complied. (11T108-20 to 22, 214-14 to 16, 215-6 to 17, 223-1 to 244-9) He gave a statement shortly after midnight, repeatedly maintaining his innocence. In the interrogation video, played at trial, Earley signed and initialed the Miranda card with his left hand. (14T7-16; Da16 1:52-2:21) At first, Earley said he was at Hill's or his cousin's home in Oakcrest Estates for most of the day and had taken his daughter to the playground around 3pm with Tobias. (Da19-23, 29, 38) Though he first said he had not been in Atlantic City, he eventually acknowledged he woke up around 10am and walked to his cousin's home and to the store to get cigarettes around noon, all in Oakcrest Estates. (Da78) Tobias picked him up, and they went to get his daughter in Atlantic City around 2pm. (Da62-64) They drove to Tobias' house in Pleasantville and stayed for about two hours before driving back to Mays Landing. (Da79) They went to the playground with his daughter, then

Tobias took her back to Atlantic City while he stayed in Mays Landing. (Da79).

Police told Earley several times that they had video proving he committed the crime, and he responded it was impossible, asking to see footage. (Da23, 26, 30, 56, 64) Earley repeatedly said they had the wrong person. (Da75, 80, 81, 84, 40, 42, 44, 46, 47, 55, 56, 61, 62, 65, 75) He gave police his phone and Facebook passwords and signed a consent to search form (with his left hand) so they could corroborate his alibi. (Da67-68, 80, 82-88; Da16, 2:42:49-2:43:2)

Several of the State's witnesses corroborated Earley's alibi. Hill testified that Earley had spent the night before the shooting with her at her home, and when she left for work that morning, she saw he was wearing gray, red, black, and white sneakers. (11T107-10 to 11, 110-13 to 111-4, 111-7 to 21)

Tobias, Earley's on-and-off-again girlfriend, testified she called him several times, but he did not answer until about noon and again at 12:13pm. She drove herself and her child, in her Jaguar, from her Pleasantville home to Oakcrest Estates. She picked him up in front of Octavian Cross's house on Cardigan Court, and they drove to the Back Maryland area of Atlantic City to pick up Earley's daughter from her mother, Unique Jones. Tobias, Earley, and the children had lunch at Tobias' house and drove back to Oakcrest Estates mid-afternoon. They picked up Cross and went to a playground after 4pm, where Earley played with his daughter. Tobias drove her back to Atlantic City, while

Earley and Cross stayed at Oakcrest Estates. (11T10-16 to 22, 12-11 to 24, 13-1 to 15-2, 28-20 to 22, 30-11 to 20, 32-6 to 13, 42-12 to 15, 43-5 to 25, 44-9 to 46-5, 51-15 to 52-12, 59-20 to 24, 60-8 to 13, 61-2 to 6, 64-12 to 66-3, 80-9 to 13, 81-2 to 19, 83-1 to 21, 84-20 to 85-1; 12T78-17 to 79-1)

Earley's cell phone records also corroborated his alibi and testimony of Hill, Tobias, and Unique Jones. For example, Tobias called Earley at noon and 12:13pm and they had brief conversations. For those and other calls made to Earley midday, historic cell-site analysis placed Earley's phone in Mays Landing. For Earley's text messages and 12:53 and 12:58 calls to Unique, his phone connected to a cell tower between Mays Landing and Atlantic City. It connected to a tower in Atlantic City at 1:18pm, then Pleasantville tower between 1:45 and 2:34 p.m. (Da92-93, 98; 12T100-17 to 106-11, 108-6 to 9, 13T109-3 to 116-13, 117-20 to 119-10, 156-14 to 21; 15T7-16 to 22)[4]

Between 2 and 3pm, Earley exchanged texts with Cross about the shooting, revealing Earley was initially mistaken about who had been shot, just as he later told police. At 4:29pm, Earley made a call that connected a tower in Egg Harbor Township, and from 4:44pm on he made and received calls connected to the Mays Landing tower. (13T119-11 to 120-10; Da94-95, 99-101)

After Earley was arrested, Hill came home and found his phone. Though

[4] Times are EST (four hours behind GMT, which is used in the text records).

it was locked, she could answer the incoming calls. (11T113-11 to 114-11)

Johannessen and Dougherty testified similarly to their pretrial testimony, with Dougherty adding for the first six weeks of the investigation, she thought that the homicide happened a little after 12:30pm, 20 minutes later than it actually occurred. She explained that due to Carver Hall video's poor quality, it's "difficult to identify somebody specifically as being a certain person," and color is distorted in freeze frame and stills. Dougherty also testified the shooter's face was visible in only five frames. (12T198-2 to 200-12; 13T12-1 to 2, 19-6 to 22, 24-14 to 16, 28-2 to 21, 45-2 to 4, 123-12 to 125-24, 127-13)

Dougherty said though Earley told her he went to a store before Tobias came, she never investigated if one existed in Oakcrest Estates. In fact, one of the houses on Angelsey Court operated as an unofficial store selling things like soda, chips, and ice cream. Dougherty admitted one of the cameras covered Angelsey Court. She also admitted Earley had been adamant it was not him, told her he had posted on Facebook right before leaving with Tobias, and gave police his password. (11T123-10 to 124-5; 13T88-1 to 90-8, 100-5 to 101-5)

The preserved clips were played. (Da90) At 12:25pm,[5] a man is seen from behind walking into Cardigan Court, drinking something in his left hand, and

[5] The Oakcrest Estates footage is five minutes slow, so five minutes must be added to the timestamp to get the real time. (11T185-6 to 13, 206-19 to 207-3)

pulling up his pants. Tobias and Hill identified Earley due to his gait and always needing to pull up his pants, which constantly fell down. Hill also noted the same sneakers she saw him wear that morning. (11T69-3 to 70-23, 97-17 to 25, 140-17 to 141-18, 142-16 to 144-19; Da90 12:20:42-12:21:01.) At 12:42pm, Tobias' Jaguar drives in and pulls out two minutes later with Earley in the passenger seat.[6] (11T63-3 to 64-7, 65-25 to 66-23; Da90 12:37:54-12:39:11)

At 4:42pm, Tobias's Jaguar arrives at the Oakcrest Estates playground, and Earley, Cross, and Earley's daughter get out. (11T56-13 to 57-16; Da90 4:47:30-4:48:37) Earley is again seen pulling up his pants a few times. (11T70-22 to 71-8; Da90 4:49:30-4:51:23) Earley and his daughter play and eventually walk back to the Jaguar and his daughter gets in. (11T58-4 to 6, 59-4 to 6; Da90 4:52:00-4:54:37) Earley begins to walk away with Cross, but runs back to kiss Tobias. (11T60-11 to 18; Da90 4:54:37-4:55:58) Tobias drives away while Earley remains and walks off screen. (11T60-24 to 61-7; Da90 4:55:58-4:56:22)

The defense showed it was nearly impossible to shoot Jordan at 12:11pm in Atlantic City and get back to Oakcrest Estates by 12:25pm One route is 16.2 miles (Brigantine tunnel to Atlantic City Expressway, through two toll plazas, then several local roads before reaching Cardigan Court. It includes seven traffic

[6] The State admitted that this video depicted Earley sitting in Tobias' car and did not contest Earley's timeline from 1pm on. (15T81-14 to 82-8)

lights. The other is 15 miles on local roads, including 24 lights. (14T28-20 to 25, 29-20 to 23, 30-11 to 14, 32-15 to 17, 33-1, 33-18 to 20, 34-16 to 35-22)

The defense presented evidence shooter was much shorter than Earley and had different tattoos. Nicole Jones testified the shooter was 5'8; Earley is 6'1. Jones and Cesar saw the shooter's facial tattoo; Earley has none. Earley has hand tattoos, and witnesses saw no markings on the shooter's hands. (10T43-21 to 44-12, 75-19 to 25, 135-23 to 136-14, 140-21 to 25; Da102)

The police did not search for or collect gunshot residue, and no ballistics evidence or gun was found. (10T199-7 to 12; 13T174-20 to 23) Dougherty never looked up the location of cell towers in the call records, and never spoke to Mason. (13T106-15 to 20, 120-11 to 23) Though the shooter is right-handed, Earley signed forms and was seen drinking a beverage with his left hand.

Defense counsel promised in opening to prove Earley innocent, leading the prosecutor in summation to repeatedly comment on Earley's "failure" to present evidence proving his innocence. (9T42-3 to 11; 15T83-1 to 14; see also 15T93-14 to 16, 95-4 to 10, 105-8 to 9, 111-17 to 18) The jury deliberated for three days, then advised it had had taken several votes but was unable to reach a consensus. Charged to continue deliberating, they ultimately returned a guilty verdict on March 14, 2024. (17T3-10 to 14, 6-6 to 20; 18T9-17 to 11-21)

III. POST-TRIAL MOTION PRACTICE, APPEAL, & RESENTENCING

Earley filed motions to dismiss and for a new trial. (Da103-04) Counsel noted the State gave him a report on the eve of trial indicating the hard drive was found to still have footage, but he did not request anything further. (19T4-22 to 5-15; Da105) The court denied the motions and imposed a 40-year NERA sentence. (19T34-3 to 5, 48-12 to 13, 56-4 to 57-5; Da106-116) On March 17, 2017, the Appellate Division affirmed Earley's convictions, but remanded for resentencing. (Da128-65) His petitions for certification and certiorari were denied. (Da127; Earley v. New Jersey, 583 U.S. 1102 (2018)). On July 25, 2017, he was resentenced to 30 years with a 30-year parole bar. (Da117-20)

IV. POST-CONVICTION PROCEDINGS

On June 26, 2018, Earley filed a pro se PCR petition. (Da121-93) On September 27, 2018, PCR counsel sent a letter to ACPO regarding preservation of the hard drive, and on April 24, 2019, he filed a Motion To Compel Discovery (the hard drive). (Da194-96) Earley filed a counseled PCR brief and appendix, and on May 18, 2020, an amended verified petition based on ineffective assistance of counsel and newly discovered evidence. (Da197-224)

On October 5, 2020, Earley filed an expert report on misidentification by Dr. Steven Penrod and on November 6, a Second Motion to Compel Discovery (for discovery from Sedrick Lindo's murder and Quaran Brown's indicted

cases). (Da225-94, 295-96) On March 11, 2021, Hon. Rodney Cunningham, J.S.C., heard argument but did not enter a decision. (20T)

On December 21, 2021, Hon. Todd Miller, J.S.C., presided over a hearing on the discovery motions. In oral ruling and written order, the court granted the first in part, denied the second, and directed the prosecutor to determine the hard drive's whereabouts and prior and past uses. On January 4, 2022, the prosecutor sent an email that ACPO no longer had the drive. (21T82-10 to 21; Da297-99)

On April 7, 2022, Earley filed a motion for an order granting PCR due to spoilation and violation of the 2013 preservation order, or alternatively, deeming he did not arrive at Oakcrest between 12:10 and 12:45pm the day of the shooting. (Da302-03) On April 12, 2022, Judge Miller granted Earley's motion to compel discovery for responses to interrogatories regarding the lost hard drive. (Da304)

On November 2, 2022, new PCR counsel was substituted. On December 22, she emailed the prosecutor regarding interrogatories. In response to his January 7, 2023 reply that they had not been propounded, she propounded them on March 15. (Da305-18; 23T4-4 to 9) In a May 12 letter, the prosecutor asserted they sought irrelevant information. (Da319) On June 19, Earley moved to compel compliance with the prior discovery order. (Da320-21) On June 21, Hon. Pamela D'Arcy denied the motion and sua sponte decided the prior discovery orders were improvidently granted, vacating them. (24T24-4 to 9; Da322-26)

On June 27, 2023, Earley filed a motion to reconsider and a letter requesting an adjournment. (Da327-30) PCR counsel explained that she still had open investigations and had not completed her submissions. (Da329)

On June 28, 2023, Earley filed motions to recuse and for dismissal or rehearing based on newly discovered evidence and prosecutorial misconduct. (Da331-34) That day, Judge D'Arcy denied pending motions and heard argument on the PCR petition. (25T32-19 to 41-3) On June 29, she issued written opinions denying recusal and the PCR petition without an evidentiary hearing. (Da335-79) On July 14, Judge D'Arcy issued written decisions denying the motions for recusal, dismissal/rehearing and for reconsideration. (Da380-90) Earley filed an amended notice of appeal on October 25, 2023. (Da391-95)

LEGAL ARGUMENT

POINT I: AS EARLEY ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS, THE COURT ERRED WHEN IT DENIED HIS PETITION FOR POST-CONVICTION RELIEF WITHOUT CONDUCTING AN EVIDENTIARY HEARING. (Da335-77)

ACPO destroyed hundreds of hours of potentially exculpatory video footage, but trial counsel never demanded his own examination of the hard drive, even once he learned it had not been totally overwritten as previously claimed. That drive is now lost. Counsel did not obtain ACPO's relevant policies, causing his motion to dismiss to be denied. Among counsel's other devastating errors were: his failure to retain an expert to testify about how familiar identifications

are as susceptible to misidentification as stranger ones; his reckless vow to prove Earley's innocence, opening the door to prosecutorial comment on his unkept promise; and his failure to marshal compelling evidence that right before and after the shooting in Atlantic City, Earley was actively posting on Facebook from his phone in Mays Landing. It has also come to light that he represented the victim of this crime and his brother in numerous prior criminal matters.

Earley demonstrated a reasonable likelihood of success on the merits of his PCR. However, the PCR court disposed out of hand his many cognizable claims of ineffective of assistance of counsel, denying them without an evidentiary hearing. As discussed below, the court repeatedly applied an incorrectly onerous legal standard, ignored its obligation to view facts in the light most favorable to Earley, and speculated that counsel acted strategically. The Court must reverse and remand for an evidentiary hearing on Earley's PCR petition. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. General Principles Governing Appellate Review Of PCR Petition.

An accused is guaranteed effective assistance of counsel. U.S. Const. amend. VI, XIV; N.J. Const. art I, ¶ 10; Strickland v. Washington, 466 U.S. 668, 685-86 (1984). This entails "certain basic duties" like loyalty (avoiding conflicts of interest); making reasonable strategic decisions and informed legal choices after thorough investigation and research; preparing for trial; and "bring[ing] to

bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. 687-91; State v. Porter, 216 N.J. 343, 352-53 (2011). To succeed on an ineffective-assistance claim, a defendant must establish by a preponderance of evidence that counsel's performance, in either his actions or omissions, was deficient; and the deficiencies materially contributed to defendant's conviction. Strickland, 466 U.S. at 686-88, 694 (defining "reasonable probability" of different result as one "sufficient to undermine confidence in the outcome"); State v. Fritz, 105 N.J. 42, 58 (l987).

While informed, thoughtful strategic choices are given very high deference, when counsel has not completely investigated relevant law and facts and considered all possible options, courts do not presume competence. E.g., Wiggins v. Smith, 539 U.S. 510, 525-27, 533-34 (2003) (not strategic if failure to investigate precluded informed decision); State v. Savage, 120 N.J. 594, 617-18, 620-22 (1990) (counsel deficient when he "deprived himself of a reasonable basis on which to later make informed tactical defense decisions"); see also Shumway v. State, 293 P.3d 722, 783 (Kan. App. 2013) ("any argument of 'trial strategy' is inappropriate" when lacking information to make informed decision); Gaines v. Comm'r of Corr., 51 A.3d 948, 962 (Conn. 2012) (same).

The inquiry into counsel's performance is highly fact sensitive. An evidentiary hearing should ordinarily be granted so long as a defendant presents

a prima facie case — that is, shows a "reasonable likelihood" of ultimate success on the merits, viewing facts in the light most favorable to him. Porter, 216 N.J. at 354; State v. Preciose, 129 N.J. 451, 462-63 (1992); R. 3:22-10(b). This standard is apt. As facts are outside the trial record and counsel's testimony is needed, defendants usually need hearings to establish the record supporting their claims. See, e.g., Porter, 216 N.J. at 354; State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998); LaFave., 3 Crim. Proc. § 11.10(c)(c) (4th ed. 2023) ("Whether … action or inaction was based on a strategic choice is a factual question.").

When a PCR judge has not held an evidentiary hearing, an appellate court reviews de novo the factual inferences drawn by the PCR court from the record and the court's legal conclusions. State v. Harris, 181 N.J. 391, 420-21 (2004); State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010).

B. Earley Established A Prima Facie Case, Requiring The Court Conduct An Evidentiary Hearing And Vacate His Convictions.

1. Trial counsel's failure to retain and use an expert on familiarity at both the Wade hearing and trial hamstrung Earley's misidentification defense.

Earley's defense was he was not in Atlantic City during the shooting, and was misidentified by people with only passing experience with him, saw the shooter's face for two seconds, and whose descriptions did not match him. The State relied heavily on the identifications, making the central question whether eyewitnesses who claimed to know Earley could be wrong. Trial counsel argued

they were mistaken yet failed to investigate or present expert testimony on familiarity. This left the jury to decide Earley's fate based on misconception and argument about reliability of the identifications, rather than scientific evidence.

Earley showed that (1) research from well before trial demonstrated "familiar" identifications can be mistaken and are susceptible the same factors as stranger identification; (2) OPD attorneys obtained eyewitness expert testimony during this time, including a murder case litigated at the same time as Earley's in which expert testimony on familiarity contributed to an acquittal; and (3) OPD and other organizations trained on eyewitness identification and using such experts years before Earley's case. Despite this prima facie case, the PCR court denied relief without an evidentiary hearing, requiring reversal.

a. The reliability of eyewitness identifications, especially the role of familiarity, was the critical jury question, but jurors heard no evidence that would assist them in evaluating it.

Dougherty justified the single-photo, non-blind procedure by pointing to the eyewitnesses' claims to have known Earley prior to the crime. While trial counsel argued at the Wade hearing that this claimed "familiarity" should make no difference to the procedure followed and the analysis applied, and that the degree of familiarity and estimator variables had not been established (6T104-5 to 109-6), he called no witnesses to support the proposition that purported familiarity with the suspect did not mitigate the risks of misidentification. There

is no indication in the record that counsel ever consulted an identification expert, or even considered doing so. Based on the testimony of only Dougherty, the court found no suggestiveness and no risk of unreliability in the identification, citing the eyewitnesses' asserted confidence in their identifications and their claimed prior familiarity with the suspect. (6T116-25 to 117-12, 119-2 to 4)

Not only did the court never hear about the deficiencies of "familiar" identifications based on brief observation of a perpetrator under stressful conditions, it also did not hear from eyewitnesses themselves. The court was thus not informed: their prior contacts with Earley were minimal at best;[7] their description of height and tattoos were at odds with Earley; the shooter's face was only visible for two seconds; Ceasar and Jones viewed the incident from the second floor and did not look until after the gunshot; and Brown had already begun running away **before** the shirt fell from the shooter's face. Also, the photo used in the identification procedure was a mugshot of Earley in an orange jumpsuit. (10T6-19 to 8-1) The premature termination of the hearing precluded this testimony from being developed and left the court without essential

[7] At trial, Jones testified she had only seen him around a few times, and Caesar testified they never dated and she did not know him well. (10T38-18 to 39-15, 116-14 to 20; Cf. State v. Watson, 224 N.J. 558, 587 (2023) (domestic partner or friend who knew defendant for some time might be sufficiently familiar); State v. Sanchez, 247 N.J. 450, 474 (2021) (sufficient familiarity when parole officer met with defendant at least twice monthly for preceding 15 months).

information further demonstrating the identifications' lack of reliability.

At trial, counsel argued in opening and summation that the eyewitnesses only saw the shooter for a few seconds, and that their testimony needed to be carefully scrutinized despite their claims to have known Earley before the crime. (9T43-4 to 6, 63-2 to 68-5; 15T:35-25 to 40-12) However, he provided no expert testimony or evidential support of that argument, instead sharing his own experience mistaking someone in the grocery store for someone he knew, and then realizing it was not that person. (9T65-14 to 21) For his part, the prosecutor emphasized that despite inconsistences in their testimony and the split second to view the shooter's face, the eyewitnesses could not be mistaken because they all knew Earley (15106-2 to 114-4), and it was like jurors' own common experience of being in a supermarket and recognizing an acquaintance. (15T108-11 to 25)

Thus, jurors heard from both attorneys that common experience was their guide to assessing the role that already knowing someone could have in the possibility of misidentifying them. They were then given instructions that omitted many of the system variables that were highly relevant to the jury's assessment of the reliability of the identification, such as the fact that a biased procedure can inflate a witness's confidence. (15T128-14 to 138-21) With no other guidance on how to evaluate the identification evidence, they convicted.

b. Earley established a prima facie case that the failure to consult, obtain, and use an expert witness fell below the level of reasonable behavior expected of

competent counsel, and this deficient performance prejudiced his defense.

Expert testimony can be essential in combatting jurors' misconceptions, informing them that commonly accepted notions are actually unfounded. See, e.g., State v. J.L.G., 234 N.J. 265, 304 (2018); State v. B.H., 183 N.J. 171, 1825 (2005). Failing to enlist an expert can constitute ineffective assistance. See, e.g., Hinton v. Alabama, 571 U.S. 263, 273-74 (2014); State v. Chew, 179 N.J. 186, 217-18 (2004). Yet, the PCR court denied an evidentiary hearing by (1) wrongly concluding an expert would not have been permitted in the 2014 trial despite substantial, credible evidence to the contrary, owing to a fundamental misunderstanding of Henderson; (2) improperly presuming counsel made a strategic decision; (3) misapprehending the standard for a prima facie case; and (4) utterly dismissing the significance of the jury's evaluation of the identification evidence. (Da362-64) Each is explained in more detail below.

In Henderson, our Supreme Court adopted a new paradigm for contesting, evaluating, and explaining to jurors variables that affect and diminish reliability of eyewitness identification. 208 N.J. 208 (2011). This included ordering the development of enhanced jury charges. Id. at 219, 298-99. While noting certain advantages of charges and anticipating less need for experts, the Court made clear that expert testimony on eyewitness identification testimony was still permitted. Id. at 298-99. Undergirding Henderson is the premise that common

sense is generally wrong when it comes to identification, and without detailed and specific guidance, jurors cannot properly "evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." Id. at 218, 274. Henderson is not explicitly limited to stranger identifications, but many tend to regard it as irrelevant when the eyewitness claims familiarity with the suspect.

Furthermore, Earley established there were qualified experts available at the time of his hearing and trial to testify about the risks of misidentification by eyewitnesses who claim they knew the perpetrator prior to the crime. Earley provided the PCR court with a report by Steven Penrod, PhD, renowned psychologist who has studied and published extensively on eyewitness identification and has testified as an expert in more than 150 cases, including Henderson. (Da226-27) Dr. Penrod's report establishes that well before 2014, psychologists had found that claimed familiarity does not eliminate the importance of estimator and systems variables in assessing the reliability of an identification. He explained research dating back decades that shows that people regularly mistake an unfamiliar person for someone they know, and the factors known to affect stranger identifications can similarly influence non-stranger ones. (Da229-43) Expecting to see a particular familiar person can further undercut the reliability of an identification. (Da236, 242, 253-54, 266-67) Dr. Penrod also explained that factors that lead to less reliable identifications, such

as disguise, short duration, biased instructions, weapon visibility, less attention and opportunity to view, and lineup size (all present here) "can and do have a cumulative effect." (Da284) Dr. Penrod also discussed research showing that jurors "are strongly influenced by witness assertions of familiarity;" higher levels of perceived familiarity are "associated with more guilty verdicts, higher positive perceptions of the eyewitness, and more negative perceptions of the defendant"; and jurors overvalue witness's statements of confidence. (Da243)

Earley also established that Dr. Penrod was permitted to testify to the same issues in another murder case tried in 2014. In State v. Gonzalez, a different OPD attorney consulted and retained Dr. Penrod as an expert in eyewitness identification, and familiarity was one of the issues he covered in his report and testimony. (Da396-98) The jury acquitted Mr. Gonzalez. (Da397).

Earley also showed attorneys used expert testimony on misidentification well before his trial, submitting certifications from OPD attorneys on how instrumental expert testimony was in securing favorable outcomes, plus supporting court records. (Da396- 450) He also provided evidence that OPD and others were training on litigating eyewitness identification issues, including the use of experts, in the decade leading up to his trial. (Da451-63) [8]

[8] A 2012 National Association of Criminal Defense Lawyers publication explained that research "ha[s] consistently shown that prior familiarity can

Earley established that when defending a murder case with eyewitness testimony as the only direct evidence of guilt, a reasonably competent criminal defense attorney in 2013 and 2014 would have consulted with and presented an expert on eyewitness identification. The evidence submitted, especially Dr. Penrod's report and the Gonzalez records, demonstrate professional expertise on familiar eyewitness identification was available before and during 2014. Thus, the PCR court's unsupported declaration that Dr. Penrod's or another expert's testimony would not have likely been admitted was unfounded. Especially as PCR courts should view the facts in the light most favorable to a defendant, Earley easily established a prima facie case that the failure to consult with and retain an expert fell below an objective standard of reasonableness.

It was also improper to find counsel's failure to consult or use an expert was a "merely a strategic decision" so "no need to scrutinize [his] performance." (Da363-64) To determine if a decision was strategic, let alone reasonable, a judge must hear counsel's testimony (and other evidence) to evaluate his conduct. Counsel attempted to exclude the identifications and argued they for

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adversely affect the reliability of an eyewitness identification in nuanced, complex, and often counterintuitive ways," thus, "familiarity does not guarantee reliability." James E. Coleman, Jr., et al., Don't I Know You? The Effect of Poor Acquaintance/Familiarity On Witness Identification, The Champion 53 (April 2012) (calling belief that familiarity alleviates reliability concerns is "a stunning example of a commonly held but incorrect assumption.").

their careful scrutiny. There could be no strategic reason or tactical advantage in failing to obtain evidence, in the form of expert testimony and scientific evidence, to support this argument that was the backbone of his defense.

The PCR judge also erred on the second Strickland-Fritz prong. She reduced Earley's robust, well-supported argument to "merely opin[ing]" that consulting with and presenting the testimony of an expert "would have promoted greater juror understanding," which did not "prov[e] to the Court that the proceedings would have a different outcome." (Da364) First, this was the wrong standard, since a PCR petition is granted when the petitioner has shown "a reasonable probability" that counsel's deficiencies "materially contributed to defendant's conviction." Fritz, 105 N.J. at 58. For an evidentiary hearing, the standard is even lower. In addition, the judge ignored all the evidence submitted to her. And finally, she completely discounted that, especially with so many reliability issues (show up, duration, opportunity to view, weapons focus, stress, virtually all systems variables, etc.), the jury's understanding of how to evaluate the reliability of a "familiar" eyewitness identification was central to the case.

There is more than enough evidence in the record to show that counsel's failure to consult with and obtain an expert like Dr. Penrod contributed materially to Earley's convictions. First, though the trial court found police did not follow any of the proper identification procedures, and that witnesses may

have spoken to each other about the identification prior to speaking to police (6T115-18 to 116-23), it ended the hearing without hearing testimony from anyone other than Dougherty. Had counsel offered Dr. Penrod's or another expert's testimony, he could have mounted a real challenge to the impropriety of the procedures, undermined the detective's testimony about the asserted familiarity of the eyewitnesses with Earley, and properly probed the many system and estimator variables showing the identifications were unreliable.

Even if the identifications would have still been admitted, this case depended almost entirely on the jury's evaluation of the reliability of the identifications of witnesses with claimed familiarity. For jurors to properly assess an identification, they "must be told about relevant factors and their effect on reliability." See Henderson, 208 N.J. at 219. But here, jurors received no guidance on how to evaluate "familiar" identifications, other than the dueling arguments of counsel regarding their own experience

This case begged for the application of science to undermine commonly accepted, but inaccurate, notions of familiarity breeding reliability. An expert like Dr. Penrod would have related estimator variables, such as the two-second observation of the shooter's face and its interaction with studied perils of even non-stranger identifications. He would have disputed the State's central theme that the three eyewitnesses knew Buddah from prior exposure and thus cannot

be mistaken. Dr. Penrod would have explained why, "counterintuitively, prior familiarity can actually reduce the reliability of an eyewitness identification," especially when one is expects to see a certain known person. (Da237-43) Thus, an expert like Dr. Penrod could have provided the tools jurors needed to evaluate the eyewitness identifications, instead of leaving them to overvalue them based on witnesses' assurances they knew and recognized defendant.

This record established the direct connection between experts such as Dr. Penrod and acquittals. Furthermore, the case hinged on eyewitnesses who glimpsed the shooter for at most two seconds under stressful circumstances, whose stories did not line up, and who testified the shooter's height and tattoos were an undisputed mismatch to Earley. There was no physical evidence linking Earley to the crime, no gun recovered, the witnesses offered conflicting accounts, and Earley presented an alibi corroborated by witnesses and cell phone records. The jury also had a difficult time reaching a verdict. The failure to offer evidence that could have "tipped the credibility scale," such as testimony of an expert like Dr. Penrod, prejudiced Earley and deprived him of both the effective assistance of counsel and the fair trial to which he was entitled.

In denying Earley's PCR without an evidentiary hearing, the court ignored the record, misapplied the law, and disposed his claim out of hand. His PCR claim has a meritorious basis for relief; at minimum Earley is entitled to present

evidence not in the record – including the testimony of Dr. Penrod and of his trial counsel – at an evidentiary hearing to support his claim.

2. Trial counsel's failure to investigate and enable presentation of Facebook posts and other evidence left him unable to cement Earley's alibi.

Multiple times between 11:50am and 12:48pm, Earley's cell phone pinged off cell towers near Oakcrest Estates in Mays Landing, conclusively establishing his phone was there — not Atlantic City — during this critical period. (12T106-13 to 114-19; 14T22-8 to 29-23) The prosecutor argued Earley must have left his phone behind when he went to Atlantic City, killed Jordan there at 12:11pm, and then raced back to Mays Landing to be caught on camera at 12:42pm. In opening and summation, the prosecutor argued that there were only incoming communications during this period, and the lack of outgoing communication suggested that Earley was not actually with his phone, because only he (the person with the access code) could have made a phone call or sent a text. (See, e.g., 9T31-20 to 33-1; 15T87-8 to 89-13) Though trial counsel argued against this inference, he failed to marshal available compelling evidence combatted the State's theory: Earley's Facebook timeline showed his phone was sending Facebook messages from 11:50am to 12:30pm, strongly suggesting it was Earley who generated them and that he was miles away when the shooting occurred.

Screenshots of the Facebook timeline from Earley's phone showed from 11:33 to 11:57am he liked a photo and wrote personalized messages to users; he

became friends with users at 12:04pm and 12:07pm; and from 12:26 to 12:38pm, he updated his status, wrote a message, and liked photos. (Da471, 474) Counsel turned over the screenshots in discovery but failed to prepare for their admission. Instead, he attempted to inject the Facebook activity into Dougherty's cross examination. The State objected on hearsay, foundation, and authentication grounds; objections were sustained or counsel implicitly conceded and moved on, never again trying to admit this critical exculpatory evidence. (13T102-1 to 104-16) As a result, the Facebook records were never presented to the jury.

On PCR, Earley provided a report from NuVida Data Forensics, prepared in 2014 at the request of trial counsel. It analyzed data from phone records, cell tower evidence, surveillance, and Earley's Facebook account, and created a timeline. (Da464-87) That report included the Facebook screenshots. (Da467, 470) Earley also verified in his amended PCR petition that he was, in fact, in Mays Landing, sending those Facebook postings with his phone. (Da213)

The PCR judge denied a hearing, finding Facebook activity from 11:57am to 12:28pm did not necessarily require action; it did not show definitively who was using the account; and phone records were more pertinent since a call was answered shortly before the shooting. She concluded Facebook evidence was "merely cumulative" and did not "prove that but for Trial Counsel's failure to admit the Facebook records, the result would have been different." (Da367-69)

First, the judge again applied the wrong standard. She also improperly dismissed the 12:04pm and 12:07pm Facebook friendships. While it is true a person becomes a Facebook "friend" by either accepting a request or when another user accepts theirs, Matter of Robertelli, 248 N.J. 293, 203 (2021), it was not apparent from the screenshot whether Earley accepted others' requests, or whether they accepted his previously-sent requests. It is, however, very likely that full records from Facebook, had counsel obtained them, would have shown this. The PCR judge failed to view the facts in the light most favorable to Earley when she presumed that these were not him accepting requests himself, particularly since Earley has averred that it was him using the phone.

Counsel did not take basic steps to ensure the Facebook records would be admitted at trial. There is no evidence he subpoenaed a representative from Facebook who could lay the foundation for and authenticate records or explain them to the jury. See, e.g., Porter, 216 N.J. at 353; Walker v. State, 723 S.E.2d 610, 615-16 (S.C. Ct. App. 2012) Nor did he seek more complete records from Facebook that could have shown, for example, whether Earley accepted the friend requests at those times. Counsel also failed to determine whether another witness could have verified that Facebook messages had come from Earley, such as Earley himself or a friend or associate. See State v. Hannah, 448 N.J. Super. 78, 88-92 (App. Div. 2016) (nature and content of social media posts can provide

sufficient circumstantial evidence they were created by given individual).

Here, the need for further investigation of the Facebook activity and to present it at trial was obvious. Counsel evidently saw the value of the Facebook activity in providing it to his consultant but failed to investigate it further. Similarly, he recognized that it strengthened the alibi defense and sought to have it admitted but did not take the necessary steps to ensure it would come into evidence. He premised his alibi in large part on phone records and cell-site data but was missing critical Facebook information to completely close the gap.

This deficient performance materially contributed to Earley's conviction. Any evidence Earley was more likely with his phone in Mays Landing lent crucial support to his alibi defense. More importantly, a central premise of the State's argument was that incoming calls could be answered by anyone, since no passcode was necessary to pick up the phone, so phone records were consistent with the phone being left while Earley was in Atlantic City. Thus, even though the incoming calls were slightly closer in time to the shooting, Earley's Facebook activity, which requires access to the phone and account, was much stronger evidence it was Earley using the phone in Mays Landing. If the jury had evidence that Earley was transmitting Facebook postings from his phone in the minutes immediately before the killing and the half an hour afterwards, it this would have substantially weakened (if not totally rebutted)

the State's theory that he was in Atlantic City, separated from his phone, while some unknown co-conspirator was using his phone to impersonate Earley.

However, given the seeming absence of outgoing transmissions from Earley's phone during the critical hour in which the murder took place, the prosecutor's theory evidently took hold jurors' minds. In sum, counsel's bungling of the Facebook evidence deprived Earley of proofs that would have strongly supported his alibi. Had counsel established the foundation and authenticity of the Facebook activity, there is a reasonable probability of a different trial outcome. Earley has made a prima facie claim, and a hearing is required so he can present evidence not in the record – namely, testimony of witnesses who could verify his Facebook activity and of trial counsel.

3. Trial counsel's inexplicable failure to demand production of the hard drive (or take any other action) after learning that ACPO had not, in fact, "wiped" it, deprived Earley of the opportunity to fully present his alibi and meaningfully counter the State's case.

As detailed above, the shooting occurred at 12:11pm in Atlantic City. Earley told police that throughout the morning and into the midafternoon, he was at Oakcrest Estates about a half an hour drive away. The ACPO moved quickly to collect footage from all Oakcrest's 18 surveillance cameras, totaling over 200 hours of footage, and including video showing Oakcrest's entrances and exits, and download it on a portable hard drive. ACPO detective Dougherty unilaterally decided that just two short clips were relevant, and ACPO deleted

the rest of the footage, without ever affording the defense a chance to inspect it.

When counsel discovered almost all the footage was erased, he moved to dismiss the indictment for spoliation; the defense had wanted to determine what cars entered and left the complex at various important times. During the February 24, 2014 hearing, ACPO IT worker Johannsen testified that in July 2013, the footage was deleted and drive wiped clean to make available for other cases. He testified this process would obliterate everything on the drive, unlike a simple deletion that would have left all or part in a recoverable state. Counsel apparently accepted the assertion the footage was gone forever and did not demand production of the drive for analysis. The court refused to dismiss the case but agreed to give a permissive adverse inference charge. (6T23-3 to 24-2)

As trial was beginning, counsel learned of a report from ACPO Sgt. Furman stating on February 24, 2014, he "witnessed" a forensic examination of the drive and found the footage of the preserved clips. (Da105) There was no explanation of how they survived the purported "complete wiping" of the drive in July 2013. The report thus suggested this "wiping" had not occurred at all.

Counsel did nothing with this bombshell disclosure. He did not demand the drive be produced for examination, which might have found more data or put ACPO's handling of the drive in a more critical light, or even seek a continuance. Meanwhile, in summation the prosecutor emphasized defendant's

purported failure to produce evidence supporting his alibi. Only after Earley was convicted did counsel bring the report to the court's attention, but he still never requested the drive be produced for examination. To the contrary, he

> took some comfort at least now they finally had chosen to identify the hard drive, that they have competent people to conduct a forensic examination. Because after all, we're dealing with what the defense considers the most critical evidence in the case.

(19T5-9 to 15) On PCR, the court granted Earley's motion to compel the hard drive. When ACPO claimed it did not have the hard drive, the court granted a motion to compel responses to interrogatories about the hard drive and the February 2014 report. ACPO refused to answer the interrogatories propounded, a refusal that the judge who took over the case and ultimately denied the PCR allowed by sua sponte vacating the earlier orders, as discussed more below.

The PCR judge then denied the claim counsel was ineffective for not demanding the hard drive be produced for forensic examination. She decided: the charge was "an effective sanction against the State" at trial; with no evidence, that counsel made a strategic decision in not demanding the drive; and Earley "could not prove by clear and convincing evidence that the hard drive contains evidence that would change the jury's decision." (Da358-59)

The judge again applied the wrong standard: for an evidentiary hearing, Earley only needed to present a prima facie claim. Preciose, 129 N.J. at 462-63. Also, effective assistance includes the right to have an attorney investigate

available evidence. Counsel's decision not to present evidence cannot be strategic if failing to investigate precluded him from making an informed decision. Reasonably competent counsel must fully investigate a defense he is presenting at trial, which here included having the drive examined in the first instance, rather than relying solely on ACPO's pretrial assertions. And certainly, once ACPO revealed that its prior statements about the wiping the data were incorrect, it was incumbent upon counsel to conduct its own analysis.

The need for investigation of the hard drive would have been obvious to competent counsel. The case came down to whether the jury believed Earley left Oakcrest Estates in time to get to Atlantic City, kill Jordan at 12:11, and speed back in time to appear on the security cameras and fabricate an alibi. The purported "wiping" of the drive deprived the defense the opportunity to review all the footage to discover what would have corroborated Earley's alibi, such as showing that no car came between 12:11 and 12:42pm, or showing Earley around the complex that morning and midday, supporting other aspects of his statement. The defense needed all the downloaded footage, not just the short clips the State preserved, refute the State's theory. Without it, the State was able to argue its timeline, particularly since the 12:25pm video was from the rear without any facial characteristics, not proving conclusively that it was Earley.

Earley has made a prima facie claim. Thus, a hearing is required so he can

present testimony of witnesses who could explain the state of the hard drive in 2013 and 2014 and what a forensic examination could have yielded (particularly since it is undisputed that ACPO did not "wipe" the drive as Johannessen testified had been done), and of trial counsel regarding his failure to act.

4. ACPO's policies regarding preservation, production, and destruction of evidence plainly demonstrate that the ACPO blatantly violated its policies in this case; trial counsel's failure to obtain them deprived the defense of information essential to establishing ACPO's bad faith.

Much of the pretrial spoliation hearing focused on ACPO's retention protocols and procedures. Dougherty did not know of a policy on evidence retention and thought she could destroy the footage she didn't deem "evidentiary," without providing it to the defense. Barnett testified there was a written policy on destruction of evidence, thought an assistant prosecutor would need to review and approve destruction of materials, and ACPO policies were sent and available to every staff member. (5T93-18 to 94-15, 96-21 to 99-9, 105-3 to 107-3, 150-18 to 152-17) The judge repeatedly asked for ACPO's policies on preservation, production, and destruction of evidence. (E.g., 5T105-13 to 106-4, 106-17 to 18, 106-24 to 107-2, 107-16, 108-7 to 13, 11-21 to 25, 150-18 to 24, 151-4 to 6, 151-20 to 22) The prosecutor deferred, saying, "I don't think it's going to come down to somebody authorizing allegations[sic] of evidence or property in the middle of an investigation. I don't think that there is such a procedure." (5T107-20 to 108-2, 109-21 to 110-3) Policies were never provided.

In its final analysis, the court ruled ACPO's conduct inexcusably caused the destruction of a large amount of evidence material to the defense, and this prejudiced Earley. However, the Court ruled it would stop short of making a "bad faith" determination against ACPO – a determination that would likely have resulted in a mandatory adverse inference charge, or full dismissal – because it was not privy to the ACPO's policies. (6T13-21 to 14-6, 15-4 to 24)

Only during PCR proceedings did the defense received ACPO's policies, in response to an OPRA request for its relevant standard operating procedures. (Da488-542) These policies provide specific procedures for evidence collection, preservation, and destruction; call for trainings and audits; and set forth a chain of command. They were circulated widely. And they were violated.

However, the PCR judge rejected the claim that the failure of defense counsel to obtain ACPO's polices was ineffective assistance. The PCR judge recognized that counsel could have requested the policies, which were "known to the Petitioner" based on Barnett's testimony, but declared they would have "adding nothing [to Judge Sandson's] consideration of the motion to dismiss the indictment and would not have had a material difference on the result of the case," since a permissive inference charge was given to the jury. (Da381-84)

This was wrong. In ruling on the motion to dismiss, Judge Sandson found Earley established all the Hollander factors except the first, bad faith, because

he did not show ACPO violated its policies. Yet, the policies at the heart of the court's concern existed at the time and contained specific requirements implicating the exact issues at bar. They were disseminated to the entire ACPO office and available internally, yet not produced. The existence of these policies, the witnesses' lack of awareness of them, and ACPO's failure to comply with them demonstrates egregious carelessness on the part of numerous individuals within ACPO. See State v. Laganella, 144 N.J. Super 268 (App. Div. 1976) (bad faith can be found by willful deprivation of evidence or "egregious carelessness"); State v. Lewis, 137 N.J. Super. 167 (Law Div. 1976) (dismissing counts of indictment where State lost originals of documents); State v. Hunt, 184 N.J. Super. 304, 306-09 (Law. Div. 1981) (dismissing indictment where officer destroyed tape it determined "was of no value," explaining that "it is not the prerogative of the State to determine what is or is not valuable evidence. They may not select exhibits for and on behalf of defendant.") This also constitutes a Brady violation, and further misconduct vis-à-vis the court itself.

Had trial counsel obtained these publicly available policies, they would have impacted the outcome of the evidentiary hearing. His failure to do so deprived the court of the key information it needed to rule in Earley's favor. It also deprived the defense of the essential ingredient to effectively cross-examining ACPO personnel at the hearing, as well at trial had the court not

dismissed the indictment learning that ACPO flagrantly violated its policies.

PCR, or at a minimum an evidentiary hearing, should be granted.

5. Trial counsel's repeated prior representation of the victim and his brother warrants an evidentiary hearing on the conflict of interest.

Counsel must represent a client with "undivided loyalty, unimpaired by conflicting interests." State v. Cottle, 194 N.J. 449, 463, 465-67 (2008); accord State v. Murray, 162 N.J. 240, 249 (2000). Trial counsel, Eric Shenkus, represented James Jordan in 2006 and 2006, and his brother, Anthony A. Jordan, in three cases in 2008 and 2009.[9] This information was withheld from Earley and the court. (Da218) An evidentiary hearing is required to address this conflict of interest, the lack of disclosure, and its impact on Shenkus' representation.

Under the federal constitution, counsel is ineffective if he operated under an "actual conflict of interest" that "adversely affected" his performance, Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), a lower standard than in other ineffective-assistance claims, see United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988). In New Jersey, where there is a per se conflict "prejudice is presumed in the absence of a valid waiver, and the reversal of the conviction is mandated."

[9] Court records and publications establish Shenkus represented the brothers. Dca 1-7, 12, 14, 21, 23, 33-39; James Jordan Obituary, Press of Atlantic City (Sept. 6, 2012), obits.nj.com/us/obituaries/pressofatlanticcity/name/james-jordan-obituary?id=21374506; James Jordan, Gun Violence Memorial, gunmemorial.org/2012/08/26/james-jordan; Anthony A. Jordan, Gun Violence Memorial, gunmemorial.org/2017/05/11/anthony-a-jordan.

Cottle, 194 N.J. at 467. Even without a per se conflict, constitutionally defective representation can be established by showing "a potential conflict of interest and a significant likelihood of prejudice." State v. Norman, 151 N.J. 5, 25 (1997).

A lawyer cannot represent a client if there is a significant risk his representation may be materially limited by responsibilities to a former client, absent waiver, and he cannot use information from a former client or reveal information related to the former representation. RPC 1.6(a), 1.7(a)(2), 1.9(c).

Investigation into the Jordans and witnesses close to them could have provided fertile areas for defense, yet counsel's prior representation discouraged full exploration. See People v. Cleveland, 981 N.E.2d 470 (Ill. App. Ct. 2012). There is no evidence counsel investigated anything regarding the victim or his family, including background or history that might have added to the defense's ability to defend the case. (Da220) Furthermore, close associates and at least one family member of the victim (Nicole Jones, his aunt) testified at trial. (10T114-1 to 10) It is possible that based on prior relationship with the Jordan family, counsel might have been inclined to cross-examine less vigorously, See State v. Loyal, 164 N.J. 418, 440 (2000). Without an evidentiary hearing, it is impossible to know of other areas of impeachment not investigated or explored at trial, or whether counsel had damaging confidential information he learned about the victim or his family that he could not use, owing a duty to them, which

also may have also significantly influenced counsel's approach to investigating and to putting on his defense, requiring a hearing. Ibid.; United States ex rel. Williamson v. LaVallee, 282 F. Supp. 968, 971-72 (E.D.N.Y. 1968).

Moreover, Earley verified that counsel never disclosed his prior representation. This denied the court the chance to explore the circumstances and determine whether he could effectively represent Earley. Most importantly, it denied Earley the opportunity to decide whether to seek different counsel. See Cottle, 194 N.J. at 472 (waiver must knowing, intelligent, and voluntary).

When the PCR judge denied this claim, she stated that there was not support that counsel previously represented Jordan, he "was not materially limited" by any past representation, and "none of the responsibilities of RPC 1.9 are implicated here," particularly since Jordan was deceased. (Da371-72) First, an attorney's duties to a client, including the confidentiality obligation, continue after the termination of representation, including after a client's death. See Michels & Hockenjos, N.J. Attorney Ethics §§ 15:2-2b, -4; State ex rel. S.G., 175 N.J. 132, 141-42 (2003). Second, it is readily apparent that counsel did in fact represent Jordan. (Dca1-7, 12, 14, 21, 23, 33-39;) N.J.R.E. 201, 202(b).

It was improper for the judge to deny the PCR claim without an evidentiary hearing at which counsel would explain when he learned about the conflict and why he failed to reveal it, and provide needed information about his

prior representation of the victim and his brother. Reversal is required.

6. Trial counsel overplayed his hand in opening by promising to prove Earley's innocence, inviting the State's damaging remarks on his failure to provide exonerating evidence.

An accused is protected by the constitutional right to remain silent without penalty and the presumption of innocence. Counsel's choice to abandon these rights during opening and to embrace the responsibility to prove innocence may constitute ineffective assistance of counsel. See, e.g., Ouber v. Guarino, 293 F.3d 19, 27-32 (1st Cir. 2002) (unnecessary embrace of burden of proof was "monumental" error satisfying prejudice prong).[10] When counsel promises proof of innocence, it is both damaging in and of itself and gives the prosecutor the right to make arguments that would ordinarily be prohibited as burden-shifting.

Trial counsel declared in opening that he accepted the burden to prove his client's innocence and vowed to prove it. (9T42-3 to 11)[11] This promise, at the

[10] See also Anderson v. Butler, 858 F.2d 16, 19 (1st Cir. 1988) (failure to introduce exculpatory evidence promised in opening can be prejudicial as matter of law); McAleese v. Mazurkiewicz, 1 F.3d 159, 166 (3d Cir. 1993) (failure to produce promised evidence "a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel."); Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990) (counsel deficient when"jury likely concluded [he] could not live up the claims made in the opening."); State v. Petric, 333 So. 3d 1063, 1083 (Ala. Crim. App. 2020) (unkept promise to present third-party guilt defense); State v. Moorman, 358 S.E.2d 502, 506 (1987) (unkept promise to prove defendant was incapable of committing the offense, "severely undercut the credibility of the actual evidence offered at trial, including defendant's own testimony").

[11] "I'll tell you this: The defense will prove that Keshaun Earley is innocent. We

threshold of trial, to prove innocence primed the jury for incontrovertible proof that did not materialize, tainting his credibility and creating an impossibly high burden to prove a negative. By so overplaying his hand on opening, counsel also invited the prosecutor to seize on his failure to produce the incontrovertible proof he suggested he had up his sleeve. Rather than simply contesting the alibi evidence, the prosecution repeatedly underscored that the defense had failed to show where Earley was at the moment of the shooting. This then segued to the prosecution contrasting the absence of evidence in Earley's favor with the three State's eyewitnesses who were clear from the outset, supposedly, that it was Earley they had seen shoot James Jordan. (See 15T83-1 to 14)[12]

Earley protested the prosecution's burden shifting that so damaged his defense on direct appeal, but this Court rejected the argument, finding counsel's ill-advised opening permitted the State a "fair" response. (Da158-60) This

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don't have to, we shouldn't have to, but here we are today and he's on trial for a murder he didn't commit. We don't have to prove it, but we will. And, you know, I don't say that lightly. That's a big promise I'm making to you, and I got to hope I fulfill it for my client's sake…"

[12] "Now, Mr. Shenkus is absolutely right. He does not have to prove a single thing to you, but he said he would. He said in the beginning he was going to prove his client was innocent, his client was not in Atlantic City on that day. So what does he do? Well, he takes out a lot of cell phone records, and Mr. Shenkus is very technologically savvy. He knows all the terms for the cell phone records, he knows all the terms for the text messages, and he says, look, look at these texts, look at these cell phone records, but he doesn't prove a thing. He doesn't have to, but he didn't. Absolutely no evidence was put forward in this case to prove that Keshaun Earley was anywhere but Atlantic City murdering James Jordan."

opening promise thus allowed the prosecution to belittle the defense's inability to prove its alibi, and then erased any prospect of meaningful appellate review of the propriety of the State's summation. The record is silent as to any possible strategic reason for counsel making such a promise. Earley has thus presented a prima facie case of ineffectiveness, and an evidentiary hearing is required.

7. Trial counsel was ineffective for failing to investigate and present testimony of property manager Carol Johnson, an exculpatory witness.

Oakcrest property manager Carol Johnson told police she had seen Earley walking around the complex earlier in the day. (5T44-2 to 5) While Johnson was not precise on the time, there was footage 9 minutes post-shooting witnesses believed was Earley, but defense counsel failed to present Johnson as a witness. The PCR judge denied a hearing, stating that Earley "has not proven by clear and convincing evidence [her] testimony would have altered the outcome at Trial" and "even if [she] did see [Earley] earlier during the day on the day of the murder, that does not equate to a definitive finding that [he] did not commit the murder or was not in Atlantic City at the time of the murder." (Da373) She found "[t]he verdict relied upon the identifications at the scene by eyewitnesses, not the failure of Petitioner to establish an alibi," and concluded, without support, that failing to call Johnson was a strategic decision. (Da373-74)

The PCR judge again applied an improperly onerous standard. Also, the need for further investigation into Johnson's statement, and presenting her

testimony at trial, should have been obvious to competent counsel since it was essential to fortifying the alibi defense. There is enough evidence in the record to show the failure to investigate and call Johnson materially contributed to his conviction. This was a close case where Earley's alibi was that he was at Oakcrest Estates; any additional evidence that helped to convince the jury Earley he was there lent crucial support to his defense. See Wilson v. Cowan, 578 F.2d 166, 167-68 (6th Cir. 1978) (ineffective to not call alibi witness in identification case). Lawrence v. Armontrout, 900 F.2d 127, 129 (8th Cir. 1990) (unreasonable to not interview potential alibi witness); Acola v. Woodford, 334 F.3d 862, 870-71 (9th Cir. 2003) (ineffective not to present particular alibi witness); State v. LA., 433 N.J. Super. 1, 14-16 (App. Div. 2013).

Earley made a prima facie claim. See, e.g., State v. Petrozelli, 351 N.J. Super. 14, 24-25 (App. Div. 2002) (remanding for evidentiary hearing to explore counsel's reasons for not calling exculpatory witness). Despite the judge's speculation it was a strategic decision not to call Johnson, there is no such evidence. The Court should remand for a hearing at which Earley can present evidence not in the record – namely, testimony of Johnson regarding what she saw, and of trial counsel regarding his failure to pursue Johnson's testimony.

8. Trial counsel was ineffective in failing to object to the prosecutor's testimony in summation regarding ambidexterity, and in failing to present evidence of Earley's left-handedness.

Although prosecutors enjoy some latitude in making closing arguments, they must confine their comments to only evidence admitted at trial and reasonable inferences drawn from it. E.g., State v. Bradshaw, 195 N.J. 493, 510 (2008). When a prosecutor argues facts in summation which are not in evidence, his comments are "the equivalent of testimony." State v. Farrell, 61 N.J. 99, 102 (1972); see also United States v. Edwards, 154 F.3d 915, 918-22 (9th Cir. 1998) This violates the right to confrontation because a defendant may not cross-examine him to test the veracity of his assertions. State v. Hipplewith, 33 N.J. 300, 312 (1960). Furthermore, the prosecutor wields great influence and automatically enjoys enhanced credibility with jurors, and thus his comments "are apt to carry much weight against the accused when they should properly carry none." State v. Rose, 112 N.J. 454, 509 (1988) (quotation omitted).

Here, the defense properly argued that evidence showed the shooter fired the gun with his right hand, while Earley is left-handed. (15T76-21 to 77-7) Confronted with this evidence from which a reasonable doubt might arise, the prosecutor injected extra record "evidence" of his friend's son who writes left-handed but plays baseball right-handed. (15T112-2 to 23) Defense counsel made no objection, permitting the prosecutor to essentially testify in a manner that neutralized a compelling defense argument, depriving the court an opportunity to provide a curative instruction, and failing to preserve the issue for appeal.

Furthermore, counsel adduced no evidence as to Earley's left-handedness other than the video of him signing with his left hand. The need to support his argument about Earley's dominant hand should have been obvious to competent counsel. Had any additional evidence of his left-handedness been adduced, the prosecutor's argument would have carried less weight with jurors.

Counsel's deficient performance was manifestly harmful, as whether the right-handed shooter was the left-handed Earley was key. Earley has shown a prima facie case of ineffectiveness. An evidentiary hearing is necessary to determine the reasons for counsel's inactions, and what additional evidence of Earley's left-handedness could have been presented to the jury.

9. Counsel's errors cumulatively denied Earley effective representation.

These errors also collectively denied Earley his right to effective assistance. See, e.g., State v. Sanchez-Medina, 231 N.J. 452, 469 (2018). At the very least, he is entitled to an evidentiary hearing on his PCR petition.

A. Conclusion

"Our system of criminal justice is not infallible," and rules governing PCR are the safeguard to ensure wrongful convictions do not stand. State v. Nash, 212 N.J. 518, 540 (2013). As a PCR petition is the last chance to challenge the fairness and reliability of a conviction, it must be a "meaningful opportunity" to root out mistakes causing unjust conviction. Id. at 526, 540. The denial of the

PCR without an evidentiary hearing denied Earley a meaningful opportunity to demonstrate how counsel's deficient performance prejudiced him. Construing the facts in the light most favorable to Earley, and considering his extensive submissions and trial record that support his claims, Earley has shown counsel's many failures, including his choice to promise in opening to prove innocence, failure to examine the purportedly wiped hard drive and obtain ACPO's polices, failure to present essential witnesses and critical exculpatory evidence, and failure object to devastating prosecutorial remarks demonstrate a reasonable likelihood of ultimate success on the merits. R. 3:22-10(b). Accordingly, the denial of his PCR petition must be reversed. Porter, 216 N.J. at 355.

POINT II: THE MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE SHOULD HAVE BEEN GRANTED. (Da374-77)

A defendant is entitled to a new trial when there is evidence discovered after trial that is material, could not have been discovered before by reasonable diligence, and "'of the sort that would probably change the jury's verdict.'" Nash, 212 N.J. at 549 (quoting State v. Carter, 85 N.J. 300, 314 (1981)). Evidence is not merely cumulative or impeaching, when it "would have the probable effect of raising a reasonable doubt." Id. at 551. Earley filed motions for a new trial based on newly evidence of third-party guilt and ACPO's withholding of its policies critical to the question of whether it acted in bad faith. Both should have been granted. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. Newly Discovered Evidence of Third-Party Guilt

Around November 2016, Earley received two handwritten letters from another inmate, Kevin Taylor. Taylor wrote that a third inmate, known to him by street name, admitted he had shot Jordan. When Taylor learned Earley had been blamed, he wrote offering his help. Taylor agreed to speak to Earley's appellate counsel, and he confirmed the other inmate, named something like "Taquon Brown," confessed to him (Da543-45) Department of Corrections database shows Quaran Brown was incarcerated in the Atlantic County Jail (ACJ) for several months with Taylor. (Da547-48) Taylor verified he was the confessor when he saw a photo of Quaran Brown, and noted Brown was about 5'6. While the PCR petition was pending, an OPD investigator visited Taylor, who confirmed the above and signed an affidavit memorializing it. (Da549-50)

The PCR court was also provided documentary evidence indicating that:

- In August 2012, Quaran Brown was at liberty. (Da547)
- In 2014, he was arrested for multiple shootings in Atlantic City, resulting in three indictments for aggravated assault or attempted murder. His codefendant in one of those indictments was Clevone Lindo. (Da547, 551-57)
- From December 6, 2014 to February 22, 2015, Quaran Brown and Taylor were both inmates in the ACJ, and thus would have had an opportunity to speak and interact. (Da547-48)
- In January 2015, Brown resolved his indictments with a package plea agreement. In imposing the negotiated 10-year NERA sentence, the judge explained that in a "series of violent street crimes," Brown had "callously used a handgun to shoot his victims." 20-year-old Brown had an extensive history, with his "criminality escalating sharply and violently. A commitment to state prison is required to interrupt his dangerous behavior." (Da558, 560)

Also Kevin Brown claimed Earley or his friends had killed his brother, Sedrick Lindo, and Earley wanted to kill him to preempt retaliation (Da570-71), despite the video showing the shooter focused solely on pursuing and shooting Jordan. One of Quaran Brown's codefendants was Sedrick Lindo's brother Clevone Lindo, suggesting he too was allied with the Lindos. (See Da555) Brown was also roughly the same height as the shooter. (See 2T72-21 to 73-5) The evidence is consistent with Quaran Brown, not Earley, being the shooter.

The PCR judge denied the motion without a hearing. She conceded that the evidence "would certainly be material if true," but decided it was "contradictory," "conclusory and speculative" because the certification from Taylor was not detailed enough, Earley had not provided the court with a possible motive for Quaran Brown to target Jordan, and did not identify Quaran Brown as the shooter "with certainty." (Da376-77) The judge also suggested that she did not find Taylor's certification credible. (Da377)

First, it was improper to dismiss the credibility of Taylor's certification and the other supporting evidence provided. See Porter, 216 N.J. at 355 ("Even a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'") (holding court erred in denying motion for new trial without evidentiary hearing where defendant offered affidavit of fellow inmate in support of motion)). As discussed infra

Point III, it was unfair to hold further development of the record against Earley, since the PCR court denied his repeated discovery requests to glean additional information about the Lindos and Quaran Brown. In addition, the record contains no certifications, documents, or any other evidence from the State to counter Earley's very plausible and factually supported claim, which was at least sufficient to warrant an evidentiary hearing on the motion.

It also it is beyond dispute that evidence supporting a third-party guilt defense is material as it "relates directly to the focal issue at trial." State v. Ways, 180 N.J. 171, 188 (2004). The test is not whether at this stage, Earley proved "with certainty" that Quaran Brown killed Jordan (contra Da 377), but rather, whether there is a probability that a jury would return a different verdict in light of the new evidence. See id. at 197-98 (standard is whether "there is a probability – not a certainty" new jury would return different verdict after reviewing all evidence); see also State v. Friedman, 4 N.J. Super. 187 (App. Div. 1949) (confession by son after father convicted sufficient to warrant new trial where jury can judge credibility of confession); State v. Carsetti, 306 A.2d 166, 171 (R.I. 1973) (collecting cases of post-trial confessions considered newly discovered evidence).

This was a prosecution without forensic evidence. It rested entirely on very questionable eyewitness identifications, dependent on a two second glimpse of a face from upper story windows or while running away. The defense

presented strong alibi evidence. The revelation that a man who had already admitted to a spree of Atlantic City shootings around the same time, who apparently had the opportunity to commit the shooting, had confessed shakes the foundation of the State's case. Nash, 212 N.J. at 357.[13] The admission of guilt by another plainly could have made the difference. The denial of this motion must be reversed.

B. Newly Discovered Evidence of ACPO's Bad Faith and Misconduct.

As discussed in Point I.4, ACPO officials and the prosecutor repeatedly denied there were policies and procedures addressing the destruction of the video in this case, and maintained policies were available only in an online database. The court and counsel relied on these representations, and the court declined to find bad faith because it could not determine whether a policy had been violated. The withheld policies were violated by ACPO. Earley relies on his earlier arguments and adds it is unjust to penalize him for his attorney's misguided reliance on the representations of ACPO officials, including the prosecutor in the case. ACPO officials misleading the court and the defense, as appears has occurred, also violated Earley's rights to confrontation, due process, a fair trial, and to present a complete defense, as well as court rules requiring

[13] Cf. State v. Hanna, 248 N.J. 148, 181 (2021) (finding counsel ineffective for failure to marshal available evidence of third-party guilt, emphasizing such evidence is admissible if it has rational tendency to engender reasonable doubt defendant is person who committed offense, and noting statements against penal interest are generally admissible when they draw connection between third party and offense)

the State to provide defendant with exculpatory information and material. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10; Brady v. Maryland, 373 U.S. 83 (1963); Nash, 212 N.J. 518, 550 (reiterating that court "would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less than reasonably diligent attorney") (quoting Ways, 180 N.J. at 188); R. 3:13(b). At the very least, an evidentiary hearing should be granted on fundamental-fairness grounds. Doe v. Poritz, 142 N.J. 1, 108 (1995) (fundamental fairness "serves…as an augmentation of existing constitutional protections or as an independent source of protection against" unjust or arbitrary state action); In re Directive of the N.J. Dep't of Envtl. Prot., 110 N.J. 69, 81 (1988) (fundamental-fairness doctrine has been applied to provide procedural protections beyond due process clause).

POINT III: THE PCR COURT MADE A SERIES OF PROCEDURAL RULINGS THAT INDIVIDUALLY AND COLLECTIVELY DEPRIVED EARLEY OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL, REQUIRING REVERSAL.

A. The PCR Court's Discovery Decisions Must Be Reversed.

ACPO spoliated hundreds of hours of potentially exculpatory evidence. A late revelation showed the hard drive containing this video footage may not, in fact have been "wiped" as previously claimed. There is also every indication that that 6'1" Earley was misidentified as a much shorter man, who was only visible for two seconds under very suboptimal viewing conditions, coupled with

the confession of a much shorter man who was at liberty at the time of the crime and had been in the midst of a rash of similar shootings. Earley sought discovery of: (1) the hard drive that was the only source of the spoliated evidence; and (2) evidence relevant to his viable third-party defense that only came to light post-conviction. PCR Judge Miller granted Earley's discovery request as to the hard drive, but Judge D'Arcy later denied a subsequent motion to enforce the order and sua sponte vacated the prior discovery orders. The PCR court also denied Earley's request for discovery on the confession of another person to this crime. The PCR court's handling of each of these issues requires reversal.

New Jersey's open-file approach to pretrial discovery is designed to ensure "fair and just trials," recognizing the prosecutor's duty to do justice, not secure convictions. See, e.g., State v. Hernandez, 225 N.J. 451, 453. 462 (2016); State in the Interest of A.B., 219 N.J. 542, 556 (2014). Although not an automatic right, courts have the inherent authority to compel PCR discovery when good cause is shown. State v. Szemple, 247 N.J. 82, 97, F (2021).[14] Requests that are simply attempts to "fish" through official files for belated

[14] This is consistent with the Court granting discovery in other contexts based on its inherent authority. Marshall, 148 N.J. at 269 (citing State ex rel. W.C., 85 N.J. 218, 221 (1981) (compelling pretrial lineup); State v. Cook, 43 N.J. 560, 569 (1965) (permitting defendant to view State's psychiatric reports on him); State v. Moffa, 36 N.J. 219, 221-22 (1961) (permitting defendant to inspect witness's grand jury testimony); State v. Butler, 27 N.J. 560, 604-05 (1958) (compelling witness to submit to psychiatric examination by defense expert)).

grounds of attack on the judgment, or to confirm mere speculation or hope a basis for collateral relief may exist" should be denied, but specifically tailored requests, when good cause is shown, should be granted. Id. at 97, 103, 107.

Courts may "reason by analogy" to existing discovery rules in designing an appropriate PCR discovery order. State v. Marshall, 148 N.J. 89, 150 (1997). Marshall cited with approval other jurisdictions permitting post-conviction interrogatories, noting the court's inherent authority includes the power to fashion discovery procedures as necessary. Id. at 91 (citing Harris v. Nelson, 394 U.S. 286 (1969) (interrogatories in habeas corpus proceedings); People ex rel. Daley v. Fitzgerald, 526 N.E.2d 131 (Ill. 1988) (depositions in PCR). A review of unpublished New Jersey cases indicates it is not unheard of to compel interrogatories in PCR discovery. See State v. Russell, A-5319-15T2, 2019 WL 2114762 (App. Div. May 15, 2019) (Da580) (interrogatories to trial judge regarding potential conflict issue).[15] vUltimately, PCR proceedings must provide a meaningful opportunity to root out unfairness and injustice. When there is good cause, discovery is essential to that opportunity. Such was the case here.

1. Discovery Related To The Hard Drive

[15] This case is cited to show that interrogatories have been ordered as PCR discovery. Counsel is unaware of contrary unpublished opinions. R. 1:36-3.

As discussed above, further efforts at the time of trial to investigate ACPO's handling of the hard drive drive may have changed the course of this case. On PCR, the defense wanted an expert to conduct a forensic examination of the drive to determine if any vestige of footage survived. PCR counsel wrote to ACPO in 2018 requesting it "ensure it has preserved and will continues to preserve" the hard drive so it could be made available for "inspection or cloning" on PCR. (Da194-95) However, when PCR counsel requested the drive, ACPO refused to even confirm its continued existence. (See 20T11-8 to 13)

Thus, on April 24, 2019, PCR counsel filed a motion to compel production of the hard drive for examination, and, if it turned out footage was irretrievably lost, to have the opportunity to probe whether any of the processes resulting in the loss came after the August 2013 preservation order. (Da196) On December 21, 2021, Judge Miller, who had previously presided over the PCR proceedings, found "[t]his is an unusual case" and the discovery request was narrow, specific, and limited. (21T46-14 to 25, 47-17 to 48-4, 48-11 to 12) He determined Earley should be permitted to conduct his own forensic examination of the drive for critical evidence pertaining to his alibi, granted the order, and directed the prosecutor to determine whether the drive still existed, and about its use in any subsequent cases. (21T45-16 to 48-22; Da297) The State did not appeal.

In a January 4, 2022 email, the prosecutor said that his "office no longer

possesses the hard drive in question." (Da300) PCR counsel filed a motion for an order granting PCR due to ACPO's violation of the preservation order, or alternatively, deeming it fact that the footage the ACPO destroyed would have supported Earley's alibi by establishing he did not arrive by car at Oakcrest Estates between 12:11 and 12:45pm on the day in question. (Da302-03) Judge Miller presided over a hearing on April 12, 2021. He reiterated if the drive still existed it would need to be turned over, but since he could not compel ACPO to turn over what it no longer had, he issued an order permitting Earley to conduct discovery by way of interrogatories, so he could make a record to rely on in his PCR filings and argument. (22T21-18 to 22-17, 27-20 to 28-6, 33-16 to 34-10, 35-5 to 12, 38-5; Da304) When second PCR counsel was substituted and served interrogatories consistent with Judge Miller's April 21, 2021 order, ACPO refused to answer or provide any details concerning when and how the drive disappeared or who was involved in the decision to dispose of it. (Da306-19)

On June 19, 2023, Earley filed a motion to compel the State to comply with the April 21, 2021 discovery order. (Da320) By this time, a new PCR judge, Judge D'Arcy, was presiding over the case.[16] On June 21, 2023, Judge D'Arcy not only denied the motion, but sua sponte determined that the discovery orders

[16] As discussed infra, she had been an ACPO section chief during the investigation and prosecution of of Earley.

issued by Judge Miller had been improvidently granted. She reasoned that the hard drive had been available at trial and the record contained all the information the defense needed, although the defense had never examined the drive. She believed Earley was just relitigating his pretrial motion to dismiss the indictment and that interrogatories were not permitted in PCR. (Da322-26) In effect, Judge D'Arcy relieved the State from providing any explanation as to the current whereabouts of the drive or what may have still been on it.

On June 27, 2023, Earley filed a reconsideration motion, which the judge denied orally the next day, citing a need for finality, shortly before she denied the PCR petition without a hearing. (Da327-28; 25T35-4 to 41-3) She issued a written decision on July 14, 2023. (Da386-90)

a. Judge D'Arcy's denial of Earley's motion to enforce the earlier discovery order regarding the hard drive, her sua sponte vacation of prior discovery orders, and the denial of reconsideration motion were improper and demand reversal. (25T24-4 to 9, 37-4 to 41-3; Da322-26, 386-90)

Judge Miller determined Earley was entitled to examine the hard drive that had been the only source of the hundreds of hours of spoliated evidence at the center of this case, and that counsel never had examined. This was a narrowly tailored, limited, and focused request for a single identified item that was the subject of a ruling of prosecutorial malfeasance. It was only after the prosecutor said ACPO no longer had it (despite a preservation order and requests to preserve it) that Judge Miller issued his order permitting interrogatories

regarding the hard drive. He appropriately exercised his discretion in granting PCR discovery in this matter. See Szemple, 247 N.J. at 111 (PCR discovery decisions reviewed for abuse of discretion). Judge D'Arcy's reversal of these rulings was both procedurally and substantively wrong.

First, Judge D'Arcy violated the law of the case doctrine, which provides a decision should be respected by all lower or equal courts during the pendency of a matter. Lombardi v. Masso, 207 N.J. 517, 539 (2011) (distinguishing reconsideration by same judge); see Akhtar v. JDN Properties at Florham Park, LLC, 439 N.J. Super. 391 (App. Div. 2015) (doctrine intended to prevent relitigation of resolved issues). Even if a judge is inclined to revisit **her own** prior interlocutory order, she must give notice and fair opportunity to be heard, apply the correct standard, and explain her reasons. Lombardi, 207 N.J. at 537.

Judge D'Arcy reversed Judge Miller's order during argument on Earley's motion to compel its enforcement, without notice or even explaining what exactly in the existing record was purportedly sufficient. While under certain "extraordinary circumstances," a Court may use its discretion to reverse prior rulings in a matter, Clarkson v. Kelly, 49 N.J. Super. 10, 18 (App. Div. 1958), the criteria for doing so were certainly not met here.

Judge D'Arcy's decision was also substantively wrong. Earley showed good cause for his discovery request. The State destroyed or lost crucial alibi

evidence by intentionally deleting footage from the hard drive; ACPO mishandled the drive, at minimum acting without written protocol; and there is substantial imprecision in the record concerning what was deleted, or how the drive was handled after the deletions. ACPO claims that it did a complete wipe in July 2013, yet in an examination by the very same ACPO employee found footage on that drive seven months later — seemingly contradicting the earlier report of a complete "wipe" of the drive. Trial counsel never requested the hard drive for examination, and one claim on PCR was that he should and could have demanded production of the drive, especially once he was informed that there indeed were excerpts of video on the drive that was supposedly wiped clean.

Judge D'Arcy apparently misconstrued the significance of the 2014 report, which answers none of the questions raised in connection with Earley's request. She also wrongly believed that interrogatories are forbidden in PCR discovery, based on dicta from a 1989 Law Division DWI interlocutory appeal, which later cases have not followed. See State v. Ford, 240 N.J. Super. 44, 51 (App. Div. 1990) (noting that interrogatory forms of discovery, though not expressly permitted by court rule, can be demanded with leave of court).

Judge D'Arcy's abrupt decision is even more troubling in light of her summary denial of Earley's PCR claim regarding trial counsel's inexplicable failure to have the hard drive examined, as discussed in Point I.B.4, in which

she faulted Earley for not having information about the hard drive's contents. (See Da355-56) Her discovery decision deprived him of the ability to further develop the record to make his prima facie case regarding this essential evidence and central claim of his PCR petition. At an absolute minimum, her discovery orders and denial of Earley's PCR petition must be reversed, and Earley permitted the tailored discovery needed (and granted by Judge Miller).

b. Alternatively, the court should have granted PCR or the alternative relief requested in the April 7, 2022 motion: deeming it a fact that the destroyed footage would have established Earley did not arrive by car at Oakcrest Estates between 12:11 and 12:45pm. (Da302-03)

The most drastic sanctions for loss or spoliation of evidence depend upon a finding of "intention inconsistent with fair play and therefore inconsistent with due process, or an egregious carelessness or prosecutorial excess tantamount to suppression." Laganella, 144 N.J. Super. at 282-83. The trial judge found ACPO carelessly or negligently disposed of hundreds of hours of potentially exculpatory video that the defense had sought. ACPO once again breached its duty in this important case by failing to preserve and maintain the hard drive for future defense inspection, compounding the manifest prejudice to Earley. This represented a far more egregious lack of care than the July 2013 "wiping." Now, it cannot be known whether there was any further footage to be discovered by forensic examination. ACPO then stonewalled on PCR, refusing to provide any information about the hard drive other than that it no longer had it, even in the face of court orders.

The destruction of discoverable material severely prejudiced the defense in its preparation of the case. ACPO's subsequent loss or destruction of the hard drive violated the August 7, 2013 preservation order, and its stonewalling hamstrung Earley in litigating his PCR petition. Justice and fairness require severe sanction. Dismissal or deeming as fact that the footage would have been exculpatory is warranted. While Judge Miller did not rule on this relief requested in the April 4, 2022 discovery motion, it should be considered by this Court.

Earley has been incarcerated for well over a decade, and has been repeatedly deprived of the means to mount a complete defense. At a minimum, the court on remand should consider, after proper discovery is permitted and an evidentiary hearing held, whether either of these alternative remedies is warranted.

2. The Court Should Have Permitted Discovery Related To The Viable Third-Party Defense. (Da297; 21T81-22 To 82-1, 82-10 To 14)

Earley incorporates his discussion of appellate and PCR counsel's substantial investigation regarding Quaran Brown and Sedrick Lindo in Point II.A. On November 20, 2020, Earley moved to compel discovery concerning: (1) Quaran Brown's admitted crimes, including where they occurred; and (2) Sedrick Lindo's murder, to determine whether others were named in the killing, and to determine his and Clevone Lindo's relationship. (Da295-96; 20T18-23 to 19-11, 21T72-1 to 10) He sought this discovery to: challenge, among other things, trial counsel's failure to adequately investigate; and to learn to what

extent a lack of support for Kevin Brown's theory could have severely undercut his credibility as an eyewitness. However, the court denied both requests. (21T81-22 to 82-1, 82-10 to 14; Da297) This decision should be reversed.

ACPO's case depended on the supposed strength of eyewitness testimony, especially that of Kevin Brown who was closest to the gunman, claimed to know Earley well, and testified as to the certainty of his identification. Brown all but admitted that he expected the shooter to be Earley, whom he believed wanted to kill him to prevent him from retaliating for the murder of Sedrick Lindo. As Dr. Penrod explained, this sort of expectation is a recipe for unconscious transference, especially when coupled with at best a fleeting glance. But contrary to Brown's belief, the trial prosecutor acknowledged that Earley had nothing to do with the Lindo killing. (6T36-18 to 20) Earley was entitled to see the information related to the Lindo murder that was essential to further developing his argument on counsel's failure to call an identification expert, and could have enabled an additional claim regarding counsel's failure to adequately investigate Kevin Brown's claims. Under these circumstances, good cause was established. When Judge D'Arcy later faulted the defense for not having further developed the record on the third-party guilt defense, this only underscored that the discovery was warranted, and Earley's motion should have been granted.

B. <u>It Was Wholly Improper To Require Substituted Counsel To Proceed On The Merits After She Repeatedly Protested That She Had Not Completed</u>

Investigating And Preparing The Case. (25T48-14 To 49-9)

On June 21, 2023, after denying Earley's motion to compel and sua sponte vacating existing discovery orders, the judge declared they would proceed to the PCR petition merits. New PCR counsel, who had taken over when the original PCR attorney became ill, was surprised by this announcement and requested an adjournment. She told Judge D'Arcy she still had investigations ongoing and was not prepared to argue the merits of the PCR petition, as her understanding was the hearing that day was to address open PCR discovery issues. Clearly frustrated, the judge said she would give her only a week. (24T:24-10 to 27-20) Counsel explained she was "in the middle of pursuing an investigation," and would not be able to provide a complete submission of all the issues and support she planned to present within a week's time. (24T:27-12 to 28-14) The judge refused to budge, telling her it would need to be done in time. (24T28-15 to 18)

As she had advised the court, counsel was not able to complete her submissions. She filed an adjournment request on June 27, 2023, explaining: she was in midst of investigating the case, inherited from prior counsel; the records were voluminous, including electronic materials requiring outside technical assistance and programs to operate; and she had been diligently preparing several motions on "threshold issues that should be determined prior to the argument on the PCR, which is still subject to investigation, and which must be

raised as part of my ethical obligations to my client." (Da329-30) Counsel indeed filed those motions the next day. (Da331-34)

On June 28, 2023, PCR counsel explained, again, that prior counsel had to withdraw from the case suddenly due to health issues, it took time even get the file, and she had been diligently pursuing the live issue of the PCR discovery (which the court then reversed), while she "tried to get my arms around this very large file." She substituted right before she began a month-long federal trial and had not been able to meet with Earley until the end of December, let alone go through the 13 boxes of records or various videos, which had technical issues. (25T42-15 to 43-16) She told the court that she was "midstream" and "what hasn't been [considered yet] is a lot." (25T43-14 to 16) There were still investigations to be completed. When asked what investigations she had open, PCR counsel did not want to provide specifics due to attorney-client privilege, but explained generally there were several outstanding issues, including regarding video and whether it could be enhanced, and questions about which witnesses had been and should be interviewed. (25T44-10 to 45-11) She repeatedly told the court she had not completed her investigation, and the court's reversal of the prior discovery order meant that "[t]he entire pace and the issues before the Court have changed." (25T44-10 to 12, 45-10-11, 48-7 to 13) Unmoved, the judge cited the age of the case and the need for finality and told

PCR counsel she could either rest on the prior record, or argue the merits of the PCR, denying the adjournment request. (25T48-14 to 49-9) This deprived Earley of due process and effective assistance of counsel, and reversal is required.

The right to effective assistance of counsel extends to PCR counsel. Under State v. Rue, 175 N.J. 1, 17-19 (2002) and State v. Webster, 187 N.J. 254, 257-58 (2006), PCR counsel must advance all arguments that can be made in support of the petition, including investigating all claims raised by defendant, and arguing all with any merit. See also R. 3:22-6(d); State v. Velez, 329 N. J. Super. 128, 134 (App. Div. 2000) (PCR counsel obligated to conduct "exhaustive examination of the entire trial record" to "determine[ ] whether a viable attack might have been made on the underlying conviction"). Furthermore, if the court fails to consider any PCR claims or denies oral argument on a claim without a statement of reasons, defendant is entitled to a remand so they can be considered. State v. Parker, 212 N.J. 269, 275-75 (2012); Webster, 187 N.J. at 257-58.

Judge D'Arcy sua sponte vacated longstanding discovery orders and demanded new PCR counsel immediately proceed to arguing the merits of the PCR. Counsel protested she had not completed investigation of all potential claims, threshold issues remained, and her ethical obligation to her client was being jeopardized. The insistence she nonetheless argue an incomplete petition is the epitome of an unreasonable abuse of discretion, which denied Earley his

constitutional rights to effective assistance of counsel on PCR and due process of law. State v. Hayes, 205 N.J. 522, 540 (2011) (denial of adjournment is abuse of discretion where it is "unreasonable and prejudicial to defendant's rights").

As argued in Points I and II, Earley's motions and PCR petition should have been granted (or at the very least he established a prima facie case). To the extent the Court disagrees on the current incomplete record, the entire matter must be remanded so PCR counsel can complete investigations and submissions, supplement the existing record, complete motion practice, and present argument, thus protecting Earley's constitutionally-guaranteed meaningful opportunity to present his case and effective assistance of PCR counsel.

C. As An ACPO Supervisor During The Entirety Of The Investigation And Prosecution Of Earley, Judge D'Arcy Abused Her Discretion In Refusing To Recuse Herself From Passing Judgment On ACPO's Misconduct In Destroying Hundreds Of Hours Of Potentially Exculpatory Information, Failing To Retain The Hard Drive At The Center Of Substantial Pretrial Litigation On Spoliation, And Withholding ACPO's Policies From The Court And The Defense. (25T32-19 To 35-3; Da378-79)

Several issues presented in this PCR petition and new-trial motion related directly to ACPO policies and processes, and prosecutorial misconduct on an individual and institutional level. Judge D'Arcy was an ACPO supervisor for 20 years, including during ACPO's investigation and prosecution of Earley. Earley moved for recusal given these unique circumstances, but the judge refused because she had not been personally involved with Earley's case and had left

the ACPO in 2017. (25T33-14 to 35-3; Da378-79) Her denial was an abuse of discretion, and the matter should be remanded and assigned to a new judge.

Judges must above both actual conflicts and the appearance of impropriety, which is essential to promoting the public's trust. State v. McCabe, 201 N.J. 34, 27 (2010). Code of Judicial Conduct, Canon 3.17(B) mandates judges disqualify themselves from matters "in which their impartiality or the appearance of the of their impartiality might reasonably be questioned." The canon lists some circumstances, such as where the judge has "personal knowledge of disputed evidentiary facts involved in the proceeding," but it is not exclusive. Ibid.; see also R. 1:12-1(g) (mandating disqualification "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."); In Re Advisory Letter No. 7-11, 213 N.J. 63, 73-74 (2013) ("Rule 1:12–1(g)—like Canon 3(C)(1) … is intended to apply to scenarios that cannot be neatly catalogued").

The purpose is to "maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impersonality of judicial decision making." Id. at 74-75. A judge's impartiality and fairness must be "above suspicion," thus the "integrity of the judicial process will be cast in doubt" where a judge acts in a "a manner that may be perceived as partial," even if she honestly believes she can be impartial. Id. at 70-71. Judges must also avoid

"any appearance of having a special relationship or an entangling alliance with law enforcement." Id. at 74. Judges formerly employed by government agency "should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of the association." Code of Judicial Conduct, cmt.7 on Canon 3.17. In determining whether recusal is appropriate, the issue may be distilled down to a simple question: "Would a reasonable, fully informed person have doubts about the judge's impartiality?" McCabe, 201 N.J. at 44 (quoting DeNike, 196 N.J. at 517). The answer here is resoundingly, yes.

ACPO's varied misconduct occurred when Judge D'Arcy was an ACPO supervisor. ACPO's policies, procedures, trainings, audits, and compliance issues by staff during her employment as section chief were necessarily front and center, especially once Earley finally received ACPO's polices in response to an OPRA request. It was evident they were not followed when critical evidence pertaining to Earley's alibi was destroyed, calling into question the actions of the individuals who handled Earley's evidence, as well as their training and supervision, or lack thereof. It also implicated the candor of the ACPO detective-witnesses and the prosecutors handling the matter, as ACPO's evidence retention and destruction policies are fundamental to the very function of the office, should have been easily produced, but were withheld on the purported basis they would be too onerous to locate. As detailed above, the PCR

court had the power to determine whether to allow Earley to seek evidence or rehearing regarding various issues raised in the PCR petition and new-trial motions, as well as making the ultimate decision on granting or denying relief.

In refusing to recuse herself, Judge D'Arcy's crabbed analysis ignored the proper standard and her first-hand, contemporaneous, supervisory-level knowledge of ACPO's policies, procedures, and practices. This knowledge, coupled with ACPO's conflicting representations with respect to those policies, demanded Judge D'Arcy's recusal. Even if Judge D'Arcy believed she could maintain impartiality, the appearance of impropriety demanded recusal. The matter must be remanded for new PCR proceedings before a new judge.

D. The Denial Of Earley's Motion For Dismissal Or Rehearing Based On Newly Discovered Evidence Of Bad Faith Must Be Reversed. (Da380-85; 25T35-4 To 41-3)

ACPO's deeply disturbing misconduct, compounded by Earley's trial attorney's ineffectiveness, enabled the case to survive the pretrial motion for dismissal, as well as direct appeal. More than a decade later, we know that — contrary to what ACPO employees, including the prosecutor, disclosed to the trial court — policies on retention and destruction of evidence such as the video ACPO destroyed not only existed, but they: implicated the exact issues before the trial court and were at the heart of its analysis; were disseminated via email to the entire ACPO office; and were internally available within the ACPO, but

not produced during or subsequent to the pretrial proceeding. The existence of these policies, the witnesses' claimed lack of awareness of these policies, and ACPO's failure to comply with them demonstrates egregious carelessness on the part of numerous individuals within ACPO, if not intentional misconduct. We also now know that on the very same day that ACPO technical staff testified that the hard drive was completely overwritten, they conducted an examination that made clear this was untrue. And finally, ACPO refused to retain this hard drive, despite perseveration orders, defense request, and the extensive pretrial litigation, and then stonewalled longstanding PCR discovery orders.

Earley filed a motion for dismissal or rehearing on whether the matter should be dismissed due to bad faith, but Judge D'Arcy denied it essentially because the trial judge (who did not have access to this information essential to his determination) had held a hearing and did not find bad faith. (Da380-85) This decision was wrong; the motion should have been granted.

The information that has now come to light directly calls into question the actions of the individuals who handled the evidence in this matter, as well as their training and supervision, or lack thereof, in ACPO as a whole. It also implicates the candor of the prosecutor handling the matter and ACPO detective-witnesses and constitutes an additional basis for sanctions. ACPO's evidence retention and destruction policies are fundamental to the very function of the

office. These materials should have been easily produced, but were withheld on the basis that they would be too onerous to locate. In addition to being relevant in connection with a bad-faith determination, ACPO's failure to produce the hard drive and its policies to the defense constitutes a Brady violation, and its failure to produce the policies to the court constitutes further misconduct. The manifest harm of the destruction of the evidence is clear. See State v. M.B., 471 N.J. Super. 376, 384-85 (App. Div. 2022) (vacating conviction). Reversal is required. U.S. Const. amends. V, VI, XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

CONCLUSION

The Court should reverse the orders that (1) denied Earley's requests for discovery and sua sponte vacated pre-existing orders; (2) denied adjournment to complete investigation and preparation of his PCR petition; (3) denied dismissal or rehearing based on newly discovered evidence of bad faith; (4) denied reconsideration; (5) denied recusal; (6) denied his PCR petition; and (7) denied his motion for a new trial based on newly discovered evidence. To the extent the Court believes the current record does not yet establish that PCR and a new trial should be granted, the case must be remanded for an evidentiary hearing before a new judge on all issues raised below, and to provide Earley the opportunity to add any additional claims once counsel is permitted to complete investigation and submissions. See State v. Pierre-Louis, 216 N.J. 577, 579-80 (2014).

Respectfully submitted,

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DATED: May 13, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3822-22T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order Denying a Petition for Post-Conviction Relief, Superior Court of New Jersey, Law Division Atlantic County
v.	:	
	:	Indictment No. 13-03-00858-I
KESHAUN EARLEY,	:	Sat Below:
Defendant-Appellant.		Hon. Mark Sandson, J.S.C. Hon. Rodney Cunningham, J.S.C. Hon. W. Todd Miller, J.S.C. Hon. Pamela D'Arcy, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

WILLIAM E. REYNOLDS
ATLANTIC COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY

DEFENDANT IS CONFINED

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OF COUNSEL AND ON THE BRIEF

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PROCEDURAL HISTORY

Atlantic County Indictment 13-03-0858-I charged Defendant with murder, N.J.S.A. 2C:11-3a(1) and N.J.S.A. 2C:11-3a(2) (Count 1); possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a (Count 2); and unlawful possession of a handgun, N.J.S.A. 2C:39-5b (Count 3). Da1-5. Defendant was tried by a jury, which found him guilty on all counts. 18T 9:17-11:21. The Honorable Mark Sandson, J.S.C., sentenced Defendant to 40 years in prison subject to the No Early Release Act, N.J.S.A. 2C:43-7.2 on Count 1, merged Count 2 with Count 1, and imposed a 7-year term of imprisonment on Count 3 to be served concurrently.

Defendant appealed and the Appellate Division affirmed the convictions but remanded the case for resentencing without consideration of two aggravating factors. Da128-65. The New Jersey Supreme Court denied Defendant's petition for certification and his motion for reconsideration of that denial, and the United States Supreme Court denied Defendant's petition for a writ of certiorari. Db18-19; Da127; Earley v. New Jersey, 583 U.S. 1102 (2018). On remand, Judge Michael Blee resentenced Defendant to 30 years in prison with 30 years of parole ineligibility on Count 1 and a concurrent 5-year term of imprisonment on Count 3. Da117-20.

Defendant made application for Post-Conviction Relief (PCR). Db19. The application was made before the Honorable Rodney Cunningham, J.S.C., who accepted the briefs and heard argument but did not issue an opinion before being reassigned. Db19-20. The PCR was transferred to the Honorable W. Todd Miller, J.S.C., who heard motions on orders to compel discovery filed by Defendant. Db20. In an oral ruling and written order, Judge Miller ordered the prosecutor to determine the status of what Defendant claimed was evidence, a hard drive that had previously stored surveillance video of a location where Defendant was eventually apprehended. Db20. At a later hearing, Judge Miller ordered the State to accept and respond to interrogatories promulgated by Defendant regarding the hard drive. Db20; Da304.

The order regarding interrogatories was reversed as improvidently granted after new PCR counsel was substituted and another judge, the Honorable Pamela D'Arcy, J.S.C., took over the PCR, as interrogatories are not used in criminal cases nor is PCR discovery typically permitted. 24T 24:4-9; Da322-26; Db20. Defendant filed a motion for reconsideration as well as a letter requesting an adjournment. Da327-30; Db21. The adjournment was not granted and the following day, Defendant filed motions to recuse and for dismissal or rehearing based on newly discovered evidence and prosecutorial misconduct. Db21. Judge D'Arcy denied the motions and heard argument on

the PCR petition. 25T. She issued written opinions denying recusal and the PCR application for an evidentiary hearing, and later written opinions denying the motions for recusal, dismissal/rehearing, and for reconsideration. Da335-90. Defendant filed an amended notice of appeal on October 25, 2023. Da391-95; Db21.

STATEMENT OF FACTS

At around noon on August 26, 2012, Nicole Jones and several of her friends and relatives were gathered to have breakfast at Jones's apartment on Absecon Boulevard, which is located within Carver Hall Apartments in Atlantic City. Jones planned to do the cooking and sent Kevin Brown and an individual called Meat to buy food at the High Gate apartment complex nearby. 10T 111:17-113:18.

As Brown and Meat were walking back to Jones's apartment, Brown was approached by Jones's nephew James Jordan, called Tiny, outside Carver Hall. 10T 113:6-8; 10T 114:1-10; 13T 136:4-22. While Brown and Jordan were speaking, Defendant emerged from behind a bush and began to approach, his face covered by a shirt. Brown asked Jordan who it was, but received no answer. As Brown began to backpedal, Jordan reached for Brown, but Brown pushed him away. Defendant then fired a gun. The weapon, a revolver, fell to the ground and Defendant reached down to pick it up. In doing so, the shirt

fell from his face. Brown and Jordan ran in separate directions. 13T 137:4-138:19; 13T 145:19-20.

Hearing the gunshot, Jones, who was in her living room, looked out the window and saw the defendant drop the gun. Observing the shirt fall from Defendant's face as he bent down, she recognized him. 10T 114:17-118:13; 10T 119:12-24. Jones's friend Ny-Taijah Cesar who was also in the living room and had been looking out the window as Defendant approached Brown, saw the defendant shoot the victim and yelled defendant's nickname, Buddha, upon seeing the shirt drop from his face. 10T 26:8-17; 10T 27:18-24; 10T 29:4-8; 10T 118:12-24; 12T 21:6-11. Jones and Ceasar observed Defendant pick up the gun and shirt and then flee across the highway. 10T 31:14-32:19; 10T 119:3-120:23. Another woman, Nina Brooks, called 911 to report the shooting. She reported that a female resident yelled, "it's Buddha." Da15, 0.56-1:19. Police responded to the scene and found the victim on the ground of the Carver Hall courtyard, moaning and writhing in pain. 11T 156:20-157:21. An autopsy later revealed that Jordan died from a single gunshot wound to his chest. 11T 150:15-20. No gun or ballistics evidence was recovered. 10T 199:11-12.

Jones, Ceasar, and Brown each gave a statement to police that day identifying the defendant as the shooter. The witnesses varied in their level of

familiarity with Defendant. Jones testified that she was not acquainted with Defendant but had seen him about three times at the Carver Hall apartments in the two to three months prior to the shooting. 10T 125:6-18. In the aftermath of the shooting, Brown told her that "Buddha" was the shooter. 13T 142:18-24; 13T 166:19-21; 13T 169:1-19. Ceasar testified that she was friends with the defendant and had known him for several years. 10T 27:25-28:16. Brown testified that he knew Defendant from having been incarcerated with him on more than one prior occasion and from seeing him on the streets. 13T 139:8-17.

During her statement to police, Jones was asked if she recognized the shooter, and she responded that it was Buddha. Asked if she could identify a picture of him, she indicated that she could. She then was shown a photograph of Defendant and identified it as such. 10T 122:4-123:16; 12T 160:1-11. Ceasar told police that Buddha was the shooter and indicated that she could identify a picture of him. She too then positively identified a photo of the defendant. 10T 33:17-34:25; 11T 104:16-105:6; 12T 160:1-11. Brown advised police that Defendant was the shooter. He too was shown a photo of Defendant, whom he correctly identified. 13T 143:1-21.

Learning that Defendant had been seen later that day leaving a residence at the Oakcrest Estates apartments in Mays Landing, New Jersey, police

traveled there and were directed to an apartment on Angelsey Court. After speaking with the residence, police searched the apartment and located Defendant in a bedroom, where they placed him under arrest. 11T 213:6-218:1. Defendant agreed to speak with police and maintained that he was at Oakcrest Estates at the time of the murder. 12T 165:15-166:5. After initially denying that he ever left Mays Landing that day, Defendant later admitted that he went to Pleasantville before ultimately admitting that he went to Atlantic City on the day in question.

Defendant did not testify at trial, though his statement was played for the jury. 14T 5:10-8:5. Using cell phone records, Defendant sought to establish that Defendant's cell phone was in Mays Landing at the time of the murder. 14T 20:10-28:12. The State presented evidence from surveillance video obtained from Carver Hall and Oakcrest Estates establishing that the murder occurred at 12:10pm and that Defendant returned to Oakcrest Estates at 12:43pm. 11T 170:8-21; 12T 164:17-165:21; 13T 127:12-13.

LEGAL ANALYSIS

I. MANY OF DEFENDANT'S CLAIMS ARE PROCEDURALLY BARRED AND SHOULD NOT BE CONSIDERED

R. 3:22-4 instructs as to what claims may be brought in a petition for post-conviction relief. The Rule provides, "[a]ny ground for relief not raised

in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, **or in any appeal taken in any such proceedings** is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds: (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey." R. 3:22-4 (emphasis added).

Defendant's claims pertaining to the adjudication of the discovery issue involving the deleted surveillance video, bad faith, and the suggestiveness of the identification were all adjudicated first in the first instance, then on appeal in this Court, and then reviewed further by our Supreme Court in its denial of Defendant's petition for certification and his motion for reconsideration of that denial, and then even further in the United States Supreme Court's denial of Defendant's petition for a writ of certiorari. Db18-19; Da127; Earley v. New Jersey, 583 U.S. 1102 (2018). Defendant's points I.B.1, I.B.4, II.B., and III.D. are all simply repackaged and rebranded phrasings of Defendant's previously adjudicated claims of error on appeal.

Defendant couches this present appeal and each of his claims in the context of ineffective assistance of counsel, implicitly attempting to evade R. 3:22-4's dictates with a contention that these claims are in some manner substantively different from those brought during the appeals process. But claims adjudicated on appeal do not become viable claims a second time through the "constitutional attiring of the petition in ineffective assistance of counsel clothing." State v. Moore, 273 N.J. Super. 118, 125 (App. Div. 1994).

The reasoning behind such claim preclusion is discussed in State v. Mitchell, 126 N.J. 565, 584 (1992):

> "The State has a strong interest in achieving finality. Without procedural rules requiring the consolidation of issues, litigation would continue indefinitely in a disconnected and piecemeal fashion. Each time a petitioner brought forward a new issue, attorneys and courts would waste their limited resources acquainting themselves with all of the complex details necessary to adjudicate it. When the grounds for challenging a conviction are consolidated, that investment need occur only once, and judicial resources can be more efficiently used to decide cases in a timely fashion. Moreover, relevant issues in a case are often interrelated. Adjudicating them separately would impair a court's ability to reach a result that fairly synthesizes all of the relevant factors into a just and reasoned outcome."
>
> Mitchell, at 584.

This rule renders a significant quantity of Defendant's application moot. Defendant has neither made nor attempted a showing of the sort of

fundamental injustice required under R. 3:22-4 and does not assert so in his brief. In any case, "courts will find fundamental injustice when the judicial system has denied a 'defendant with fair proceedings leading to a just outcome' or when 'inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" State v. Nash, 212 N.J. 518, 546-47 (2013) (quoting State v. Mitchell, 126 N.J. 565, 587 (1992) (internal quotations omitted)). Defendant has received fair proceedings; in fact, the merits of his claims of appeal were adjudicated by this Court. There have been no "inadvertent errors," only adjudication of the claims contrary to Defendant's preferences.

Prior examples of the fundamental injustice rule shed light on cases where its application is appropriate. State v. Mitchell discusses with approval prior applications of the fundamental injustice exception, among others, State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (conviction of defendant for disorderly conduct while an involuntarily-committed patient in a psychiatric hospital is fundamentally unjust because it imposes punishment on someone for "displaying the symptoms of his illness while in a place designed to treat that illness") and State v. Allen, 99 N.J. Super. 314, 316 (Law Div. 1968) (because defendant had not been informed of his right to direct appeal, barring petition for post-conviction relief would be "contrary to fundamental

justice"). State v. Mitchell, 126 N.J. 565, 588 (1992). Fundamental injustice is rarely found and is not typically invoked simply because the defendant disagrees with the decisions of prior courts on their merits. Defendant's previous claims, simply bearing a new label, need not be heard yet again after adjudication or review by four courts.

II. THE PCR COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANT DID NOT DEMONSTRATE A PRIMA FACIE CASE AND DEFENDANT INDEED DID NOT DEMONSTRATE A PRIMA FACIE CASE

A. THE PCR COURT DID NOT ABUSE ITS DISCRETION IN NOT ORDERING AN EVIDENTIARY HEARING

Denials of motions for PCR evidentiary hearings are reviewed for abuse of discretion. State v. Preciose, 129 N.J. 451, 462 (1992). Abuse of discretion defies simple definition; "[w]hile the concept is difficult to define with precision, an appellate court 'may find an abuse of discretion when a decision 'rest[s] on an impermissible basis' or was 'based upon a consideration of irrelevant or inappropriate factors'… An appellate court can also discern an abuse of discretion when the trial court fails to take into consideration all relevant factors and when its decision reflects a clear error in judgment." State v. S.N., 231 N.J. 497, 515 (2018) (quoting State v. Baynes, 148 N.J. 434, 444 (1997) (internal citations omitted)).

Petitions for post-conviction relief are the New Jersey equivalent to the federal writ of habeas corpus, so as in federal court, a defendant seeking such relief must establish his or her entitlement to relief by a preponderance of the credible evidence. State v. Preciose, 129 N.J. 451, 459 (1992). A defendant is entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. R. 3:22-10(b). Importantly, the disputed fact(s) must be substantiated, and not simply a "bald assertion." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

In this case, the PCR judge reviewed twenty-two (22) exhibits, the earlier appellate submissions, and briefing and argument by the parties. Da102-03. The law cited in Judge D'Arcy's opinion was accurate and supported her conclusions. The decision does not incorporate irrelevant or inappropriate factors, analyzes each of the parties' arguments, properly discusses the issues, and eventually concludes that a prima facie case was not made. Disagreement on the merits is not a demonstration of an abuse of discretion. Judge D'Arcy did not abuse her discretion, and merely came to a conclusion to which the defendant objects. This brief addresses both the

factual and legal conclusions of the PCR Court as the appellate court "review[s] the trial court's denial of PCR de novo." State v. Belton, 452 N.J. Super. 528, 536 (App. Div. 2017) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

B. DEFENDANT DID NOT PUT FORTH A PRIMA FACIE CASE FOR INEFFECTIVE ASSISTANCE OF COUNSEL

To establish a showing of ineffective assistance of counsel, the defendant must overcome a two-prong test developed in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42 (1987). The Strickland Court created a two-prong test wherein a reviewing court must determine whether (1) counsel's performance fell below an objective standard of reasonableness, and if so (2) whether there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

The first prong of the Strickland/Fritz test is satisfied by showing that counsel's acts or omissions fell "outside the wide range of professionally competent assistance" considered in light of all the circumstances of the case. Id. at 690. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistances. Id. at 689. The Fritz court characterized the deference given to counsel under the first prong of

Strickland/Fritz as "extreme." Id. To rebut this presumption, the defendant must overcome that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). The court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

The second prong of Strickland/Fritz is satisfied when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The error must be so serious as to undermine the court's confidence in the jury's verdict or the result reached.

Thus, "th[e] test requires [a] defendant to identify specific acts or omissions that are outside the wide range of reasonable professional assistance…" State v. Jack, 144 N.J. 240, 249 (1996). "Reasonable competence does not require the best of attorneys, but certainly not one so ineffective as to make the idea of a fair trial meaningless." State v. Davis, 116 N.J. 341, 351 (1989).

"[I]f [a] defendant establishes one prong of the Strickland-Fritz standard, but not the other, his claim will be unsuccessful." State v. Parker, 212 N.J. 269, 280 (2012). As discussed *supra*, post-conviction appeals are reviewed de

novo when the post-conviction relief court does not hold an evidentiary hearing on the claims raised by defendant. State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018).

A defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). A petition that "reveals only conclusory allegations that his counsel was deficient [or] that his counsel did not thoroughly explore his defenses" does not meet the threshold of prima facie ineffectiveness. State v. McDonald, 211 N.J. 4, 30 (2012). A petitioner is required to develop an adequate record demonstrating "facts that would have been revealed" before an evidentiary hearing is required. State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) (citing State v. Preciose, 129 N.J. 451, 459 (1992) (internal quotations omitted)). Any "facts" presented by a petitioner must be in proper form- by "affidavit or certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170. In the absence of the same, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689.

1. Trial Counsel's Decision Not to Retain an Expert on Familiarity Was Not Ineffective

The identifications made by the eyewitnesses in this case have previously been challenged for their admissibility and both the trial court and Appellate Division found the identifications admissible. Da363. It is true that trial practitioners occasionally produce experts in identification as part of their cases in chief. Yet in New Jersey, seminal case State v. Henderson ordered that the court system should develop amended jury charges regarding eyewitness identification for trial judges to present to juries in order for them to better understand the science of identifications. As the Henderson Court opined, "with enhanced jury instructions, there will be less need for expert testimony." The Court found such as "[j]ury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness's credibility." Henderson, 208 N.J. 280, 298 (2011). Just two years after the jury instructions ordered in Henderson were promulgated in 2012 (which were discussed at length during the Wade hearing), it is unlikely that Defendant would have been permitted to present such an expert at either the Wade hearing or at trial, that one would have been needed, and that the

testimony of such an expert would have changed the jury's verdict. As the transcript of Defendant's Wade hearing indicates, the state of the law was in flux and confusion arose as to which procedures were applicable. 4T. Although not foreclosing the possibility of expert testimony, the Henderson Court deferred the question for case-by-case determination at trial. Henderson, at 298 ("We leave to the trial court the decision whether to allow expert testimony in an individual case."). Defense counsel's decision not to call an expert appropriately reflected the state of the law at the time of the case and was a logical course of action given the way such issues at that time were adjudicated.

Defendant merely claims that an identification expert would have strengthened the jury's understanding of the type of evidence offered. Such a claim falls short of the requirement for a prima facie case of ineffectiveness, particularly given the declination to call an identification expert constitutes a strategic decision by trial counsel. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, at 690. Courts may not "second-guess counsel's reasonable adoption of one of the countless ways to provide effective assistance in any given case." State v. Perry, 124 N.J. 128, 153 (1991). Adequate assistance of an attorney is measured according to a standard of

reasonable competence. State v. Fritz, 105 N.J. 42, 53 (1987). Trial counsel was reasonably competent and the lack of an identification expert is not inherently ineffective. Counsel instead attacked the identifications of the defendant by attacking the credibility of the eyewitnesses' recollections (e.g., 13T 146:14-150:21; 10T 41:23-45:15; 10T 56:2-67:17), by explaining while opening how it is easy to mistake strangers for someone you know (9T 65:12-68:5) and by attempting to prove that the defendant's whereabouts were elsewhere at the time of the shooting, and cannot be faulted for this reasonable strategic choice.

Pursuant to Henderson, the court "can end the hearing at any time… if it finds from the testimony that the defendant's threshold allegation of suggestiveness is groundless." Henderson, at 289. This is precisely what the trial court did, pointedly noting the groundlessness of Defendant's claims, which was echoed in this Court's decision on appeal finding that "contrary to defendant's argument… the trial court reasonably exercised its discretion to terminate the hearing after it heard [the identification-administering detective's] testimony and viewed the recorded identifications," finding no substantial likelihood of irreparable misidentification. 6T 122:2-4; Da155. Noted with approval in this Court's appellate decision, the trial court judge

found that "defendant's allegation of improper suggestiveness is in fact groundless." Id.

2. Trial Counsel's Use of Facebook Posts Was Not Ineffective

Defendant argues that his trial counsel was ineffective in not presenting evidence that Defendant's Facebook account was in use at the time of the murder. This argument is meritless for the same reason that the cell phone records were not persuasive to the jury: use of Defendant's Facebook account does not establish Defendant's location. The screenshots of Defendant's Facebook timeline are from a historical data compilation from Defendant's phone, with inbound calls and inbound emails interspersed with the Facebook timeline. Db36; Da467-70. The Facebook posts establish only that the defendant's Facebook account was active, not that Defendant was using it. Another person could have been using Defendant's Facebook account on Defendant's phone if that person had access to Defendant's phone and his Facebook account, especially if Defendant were permanently logged into his Facebook account, which could then be accessed through the Facebook application on the phone without entering Defendant's login credentials.

Further, none of the activity on the Facebook account immediately before nor after the shooting was necessarily initiated by a user of Defendant's

account, whether that user was Defendant or someone else. For instance, even a cursory Facebook user knows that "becoming friends" with another user and receiving a notification of such, as is alleged to have occurred at 12:04pm based on the records, occurs either when the user accepts an existing friend request **or** when another user accepts the first user's friend request, which may have been sent any amount of time, even months or years, prior to the acceptance of the friend request and Defendant's account receiving notification of the established "friendship." Db37; Da471. The shooting took place at 12:10pm, but Defendant's Facebook activity does not show Defendant's account engaging in activity that required any active user of the account at all until 12:26pm, at which point Defendant's account "liked" a photo. This took place more than fifteen (15) minutes after the shooting and even so, the user of the account at that time may not have been Defendant. Defendant's cited case, State v. Hannah, 448 N.J. Super 78 (App. Div. 2016), merely holds that social media evidence must be authenticated under N.J.R.E. 901 like any other evidence, a sensible ruling that does not advance Defendant's claim.

Just as the similar cell phone records were not convincing to the jury on the issue of Defendant's alibi, the Facebook records likewise would have been unconvincing for the same reason; neither establish that Defendant was elsewhere at the time of the shooting. Relevant too was the attempt by trial

counsel to enter the Facebook records during the cross-examination of a State witness; counsel did not conduct a flawed investigation or fail to marshal the evidence. He was aware of the Facebook evidence throughout. His strategy simply did not play out as he intended due to the court's evidentiary rulings. Decisions as to trial strategy or tactics are virtually unassailable on ineffective assistance of counsel grounds. State v. Cooper, 410 N.J. Super. 43, 57 (App. Div. 2009). Thus, trial counsel was not ineffective in his attempted presentation of the records, nor was he ineffective in his investigation. Even if this Court were to find that he was, no prejudice has been demonstrated as, like the cell phone records establishing the same thing, the jury would not have found that they exonerated Defendant. In effect, the Facebook records were cumulative, demonstrating the same evidence as the cell phone evidence with the same flaws. The jury did not find the cell evidence compelling and Defendant's counsel was right not to make a losing argument twice.

3. Trial Counsel's Decision Not to Demand Further Discovery Was Not Ineffective

Trial counsel wisely did not attempt to acquire the hard drive in question after the portions of video already discovered were found upon it, as, firstly, the hard drive was not evidence and secondly, any evidence arguably kept upon the hard drive was not material at that point in the case. Importantly, the

video alleged to have been still available on the hard drive was not video that had been purportedly deleted by the prosecutors office prior to trial but instead merely the two segments that were previously saved. There was never any other video located on the hard drive after its initial wiping for repurposing. Da211.

Rule 3:13-3 does not require the keeping or discovering of data drives, on their own, for the defense. There is good reason behind this; Defendant alleges that the hard drive constitutes evidence but in fact it is simply a vehicle for the storage of evidence. The implication of Defendant's argument is that the State must indefinitely store, preserve, and turn over for inspection any data device that at one time or another stored evidentiary material. This would include computers, electronic devices, flash and external drives, and perhaps even physical objects previously used to store evidence.

Further, Defendant's counsel was aware of the material found on the hard drive after post-wiping inspection. The material was precisely the same video that had been discovered to Defendant in the ordinary course. No other material was located on the drive. Defense counsel wisely did not demand production of what was not evidence in order to locate that which had already been located and utilized. Aside from not being entitled to such discovery, Defendant would not have in any way benefited from review of the same video

he had possessed since the inception of the case. Thus, counsel was not ineffective, and Defendant certainly wasn't prejudiced by a lack of repeated inquiry into the hard drive. Defendant is not and was not able to credibly contend that the drive contained any further footage, as no information or evidence corroborates such an assertion.

4. Trial Counsel's Declination to Pursue a Bad Faith Argument Was Not Ineffective

As the PCR Court Judge appropriately recognized, "Trial Counsel sought dismissal of the case for the State's failure to preserve the videos. Trial Counsel merely did not make the argument Petitioner believes should have been made…" Da325. As discussed *supra*, counsel's strategic decisions are not to be questioned where they are within the purview of his or her determinations and they are made with full knowledge and investigation of the underlying facts. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, at 690. Courts may not "second-guess counsel's reasonable adoption of one of the countless ways to provide effective assistance in any given case." State v. Perry, 124 N.J. 128, 153 (1991). The strategic decision on the part of defense counsel as to one of the countless ways to provide

effective assistance in navigating this issue does not become error or ineffectiveness simply because it did not produce the required result.

5. Trial Counsel Did Not Have a Conflict of Interest

Contrary to Defendant's implied assertion, there is no categorical proscription on representing a client who is accused of committing crimes against a former client. The New Jersey Rules of Professional Conduct prohibit an attorney from representing a client if the attorney has a "concurrent conflict of interest," which exists if "1) the representation of one client will be directly adverse to another client, or 2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." RPC 1.7(a)(1) and (2).

Assuming *arguendo* Defendant's contention that counsel adversely affected by an actual conflict of interest is a lower standard than in other ineffective assistance claims and is the relevant standard here, Defendant still needs to establish that there was an actual conflict and at the very least, that there was a significant likelihood of prejudice. Defendant has accomplished neither. James Jordan was deceased at the time of trial counsel's representation of Defendant. Though the confidentiality obligation continues after a client's death, certainly the representation of Defendant was not directly

adverse to Jordan's interests as a deceased individual. There is no evidence that trial counsel's representation of the defendant was materially limited by trial counsel's representation of Jordan. Defendant's bald assertion to the contrary is insufficient to warrant an evidentiary hearing, which would thus be a fishing expedition attempting to locate some reason why the representation constituted a prohibited conflict of interest and why the representation prejudiced Defendant, as none presently exist nor are asserted beyond bare speculation.

Accepting Defendant's proposed rule that he insists results in the disqualification of trial counsel, trial counsel Eric Shenkus, Esq., a busy public defender, would be prohibited from representing any defendants who victimized someone Shenkus had previously represented in any other context or someone related to that person, no matter how disparate the interests or cases. This would be an impossibility rendering assigning public defense counsel incredibly onerous; as many criminal practitioners know, multiple cases often involve similar groups of people or the same individuals. This is likely why Defendant's categorical prohibition is fictitious.

The case on which Defendant relies, State ex rel. S.G., 175 N.J. 132 (2003), involved a law firm's simultaneous representation of the defendant and his victim, who later died. The case is not applicable here, where this

defendant makes no claim of simultaneous representation. Even so, the S.G. Court noted, "[a]n attorney's responsibility, as attorney of record in a criminal proceeding, terminates upon expiration of the time in which to appeal from the final judgment or order." Thus even if Jordan had survived *and* defense counsel previously represented him and/or his relative, there is no reason to believe that defense counsel bore any obligation to Jordan at the time defense counsel represented Defendant four (4) years later.

6. Trial Counsel Was Not Ineffective in Opening

Defendant alleges that his trial counsel was ineffective for promising to prove Defendant's innocence, which allowed the prosecutor to rebut the assertion in closing. Defendant fails to appreciate that his attorney's promise was a strategic choice that was clearly motivated by the strength of the evidence that doomed the effort.

While defense counsel succeeded in establishing that Defendant's phone was in Mays Landing at the time of the murder, he could not establish that Defendant was with his phone in Mays Landing. But with the need for an alibi so crucial because of the three eyewitnesses who identified Defendant as the shooter, it was not unreasonable for defense counsel to package the alibi as a pledge to prove Defendant's innocence in order to enhance the impact of an unpromising defense. In the end, defense counsel's clever strategy could not

overcome the State's evidence, which bore out the truth that "[m]erely because a trial strategy fails does not mean that counsel was ineffective." State v. Cooper, 410 N.J. Super. 43, 58 (App. Div. 2009) (quoting State v. Bey, 161 N.J. 233, 251 (1999)).

The case on which Defendant relies, Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002), involved a promise not to present an alibi defense but a promise that the defendant would testify and therefore would exonerate herself. The defense attorney promised four times in his opening statement that the defendant would testify, explaining that the case was a contest between the defendant's credibility and that of the undercover police officer who allegedly purchased cocaine from her. Id. at 23. Defense counsel also presented twenty-four (24) character witnesses to testify about the defendant's reputation for truthfulness. "When she did not testify, this stage-setting quite likely intensified the negative impact on the jury," reasoned the Court, which held that the state courts in Massachusetts had unreasonably applied Strickland.

Where the defense attorney in Guarino reneged on his promise to the jury, and in a way that invalidated the entirety of his defense strategy, defense counsel in this case sought to fulfill his promise and argued to the jury that he had done so by presenting cell phone records and other evidence in an effort to establish Defendant's alibi. The strategy failed not for ineffectiveness but for

lack of supporting evidence. While the PCR Court judge was required to view the facts in the light most favorable to the defendant, such is not the same as accepting as gospel truth the defendant's unsupported, bare allegations without any evidential demonstration, substantiation, or corroboration.

7. Trial Counsel Was Not Ineffective in Not Presenting the Testimony of Carol Johnson

Defendant could not and has not demonstrated a prima facie case for ineffective assistance of counsel in alleging that trial counsel should have called as a witness the property manager of Oakcrest Estates in Mays Landing, who, according to Defendant, told police that she saw Defendant at the apartment complex earlier in the day that the murder occurred. The relevant issue is not whether Defendant ever set foot in Oakcrest Estates that day (Defendant was apprehended there, a fact neither party disputes) but whether he was there at the time of the murder. The putative witness, Carol Johnson, had no evidence to offer pertaining to that point, nor does Defendant claim that she did. Johnson's testimony was far from "fortifying the alibi defense" as Defendant claims. Db52. In fact, it was unrelated to the alibi defense. Defendant's counsel was not ineffective in not calling a witness with no relevant noncumulative testimony to offer and Defendant was not prejudiced by the inadmission of Johnson's observation of Defendant at Oakcrest Estates

at a time other than the time of the murder as such was unrelated to Defendant's presence there during the murder.

8. Trial Counsel Was Not Ineffective in Not Objecting to the Prosecutor's Remarks in Summation

Defendant's counsel was not ineffective in not objecting to the prosecutor's remarks regarding ambidexterity because the remarks were not objectionable and an objection would not have been sustained. Responding to the defendant's argument that Defendant could not have been the shooter because the shooter fired the gun with his right hand whereas Defendant signed the Miranda card at the police station with his left, the prosecutor mentioned in summation that he had a friend whose son writes with his left hand but is a right-handed batter and fielder in baseball. 15T 112:2-15. The trial judge appropriately cautioned the jurors that "[a]rguments, statements, remarks, openings[,] and summations of counsel are not evidence and must not be treated as evidence." 15T 123:16-18. It is well-settled that juries follow instructions. The statements were not evidence and also were not testimonial in nature as Defendant claims. Prosecutors are "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented[,]" which in this case they undoubtedly were and in fact were a direct response to a contrary assertion by defense counsel.

State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)).

9. There Was No Cumulative Error

As there has been no error, there has been no cumulative error. For any contention that may have constituted error, prejudice has not been demonstrated. That is, the defendant has not demonstrated that any such error was so serious as to deprive Defendant of a fair trial, nor that but for the purported errors the result of the proceeding would have been different. The allegation of cumulative error is not appropriate simply wherever multiple claims of error are argued. At times (such as this), "the assertion of a large number of related claims of ineffectiveness of counsel does not necessarily enhance their significance or capacity to affect [relevant deliberations]." State v. Marshall, 148 N.J. 89, 257-58 (1997). The courts have rejected cumulative claims where the court is "unpersuaded that the cumulative force of… claims is measurably greater than that of the individual claims." Id. The Marshall Court's observation is salient here as well.

III. THE COURT DID NOT ERR IN DENYING THE MOTION FOR A NEW TRIAL

"[T]o qualify as newly discovered evidence entitling a party to a new trial, the new evidence must be (1) material to the issue and not merely

cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020) (quoting State v. Carter, 85 N.J. 300, 314 (1981)). "All three [prongs of the] test[ ] must be met before the evidence can be said to justify a new trial." Id. "The defendant has the burden to establish each prong is met." Fortin, at 216 (quoting State v. Smith, 29 N.J. 561, 573 (1959)).

A. ALLEGED EVIDENCE OF THIRD-PARTY GUILT

Defendant claims that following his conviction, a fellow prison inmate, Kevin Taylor, told him that a Quaran Brown confessed to murdering James Jordan. Taylor's allegation suffers from major credibility deficiencies, as he 1) fails to even identify the individual who supposedly confessed to him, initially noting he was "named something like 'Taquon Brown'" before mystically divining Quaran Brown's name for purposes of his eventual certification, and 2) gives an inconsistent account of the shooting in which one person was allegedly the shooter but two individuals were "involved in the shooting," even disregarding the fact that the video surveillance of the murder shows only one attacker. Db56; Da550.

These facts and others informed the PCR judge's assessment of the purported evidence who, far from failing to "test[ ] for credibility" the bare allegation, engaged in a detailed analysis of whether the defendant's allegations were "too vague, conclusory, or speculative to warrant an evidentiary hearing[.]" State v. Marshall, 148 N.J. 89, 158 (1997).

To meet the standard for a new trial based on newly discovered evidence, defendant must show that the evidence is 1) material, and not "merely" cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was "not discoverable by reasonable diligence beforehand"; and 3) that the evidence "would probably change the jury's verdict if a new trial were granted." State v. Carter, 85 N.J. 300, 314 (1981). The certification in this case is, as the PCR Judge found, far too "vague, conclusory, [and] speculative" to merit a new trial. It possesses no marks of reliability such as corroborating statements or circumstances, inmate allegations of this sort are often subject to scrutiny due to their arguable inherent unreliability, and it does not comport with other unquestionable evidence presented during the course of the trial. The evidence, as alluded to in the Carter test, is contradictory, but not in a material sense; it is simply a groundless, bald rebuttal of the charges against Defendant. Although the certification was written post-trial, the information upon which it is based was

discoverable prior to trial. And the unsupported hearsay of a prison inmate with no indicia of reliability is not evidence of the sort that would probably change the jury's verdict if a new trial were granted. Defendant's purported "evidence" of third-party guilt does not meet the Carter test and is obviously suspect and dubious. It is worthy of little consideration and certainly does not merit an entire retrial of the case. The State and victims have an interest in the finality of verdicts, which should not be overturned absent compelling, serious evidence. See State v. Ways, 180 N.J. 171, 187-88 (2004) ("A jury verdict rendered after a fair trial should not be disturbed except for the clearest of reasons. Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial.") (quoting State v. Buonadonna, 122 N.J. 22, 51 (1991) for the proposition that "sketchy" evidence is insufficient to warrant new trial).

B. ALLEGED EVIDENCE OF ACPO'S BAD FAITH

Defendant alleges that various policies, some of which were in place at the Prosecutors Office first in 1998, constitute newly discovered evidence that merits a new trial. These policies are neither newly discovered nor did Defendant's lack of receipt of the policies until 2023 prejudice his case. First,

the policies were not new. Despite Defendant's contention to the contrary, the State did not deny the existence of policies, describing them on several occasions at the hearing. 5T 88:2-93:17 (witness responding at length regarding the requirements of law enforcement and Attorney General rules); 5T 93:18-94:9 (witness agreeing that there are written polices related to retaining and destroying evidence); 5T 96:20-99:9 (witness explaining in detail the provisions of the policies in response to questioning from the judge); 5T 150:16-152:19 (witness explaining her understanding of the applicable policies in response to questioning from the judge). At the hearing, four witnesses were called. The first two witnesses were not questioned about policies. The final two witnesses explained the policies and their respective understandings of the policies upon being asked.

Neither party disputes that the polices have existed for many years and had existed for many years at both the time of the litigation of the original motion to dismiss and at the time of PCR, nor does either party dispute that both parties were aware of the policies' existence harkening all the way back to the adjudication of the motion to dismiss. Defendant seeks to relitigate his motion to dismiss, ignoring also that the policies are not material or relevant "to the issue." The "issue" is the issue of the defendant's guilt. That is, motions for new trials are not granted because the purported new evidence has

some tangential relation to an internal aspect of the case; the purported evidence must be material. Even with regard to the materiality of the polices for the purposes of the motion to dismiss, the policies were not material; the trial court judge found himself abundantly able to decide the issue and had taken testimony regarding the policies and their requirements as known to the actors in the case. The purported "newly discovered evidence" is not "of the sort that would probably change the jury's verdict if a new trial were granted." State v. Fortin, 464 N.J. Super. 193 (App. Div. 2020) (quoting State v. Carter, 85 N.J. 300, 314 (1981)).

The trial court judge gave very pointed instructions to the jury on more than one occasion, instructing that the spoliation issue was sufficient such that the jury could make an unfavorable inference to the State which may in itself constitute reasonable doubt. E.g., 15T 138:22-139:17. Again, it is well-settled that juries follow instructions, and an adverse inference instruction is undoubtedly a strong penalty and remedy. The jury was already prompted that the destruction of the video was a serious matter from which the jury could infer that the defendant was not guilty. The policies do not meet the requirements for newly discovered evidence meriting a new trial.

IV. THE PCR COURT DID NOT ERR IN ITS PROCEDURAL RULINGS AND ANY ERRORS DID NOT MEET THE APPLICABLE LEGAL STANDARDS ENTITLING DEFENDANT TO REVERSAL OF THE RULINGS

A. THE PCR COURT DID NOT ABUSE ITS DISCRETION IN DISCOVERY RULINGS

Discovery rulings are reviewed for an abuse of discretion, and "appellate courts are not to intervene ... absent an abuse of discretion or a judge's misunderstanding or misapplication of the law." Lipsky v. New Jersey Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 463 (App. Div. 2023) (citing Brugaletta v. Garcia, 234 N.J. 225, 240 (2018) and quoting Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). Defendant disagrees with the PCR Court's rulings but does not provide evidence that there has been an abuse of discretion or that Judge D'Arcy's conclusion occurred due to a misunderstanding or misapplication of law.

1. The PCR Court's Rulings Pertaining to the Hard Drive Were Not in Error and Any Error Was Insufficient to Warrant Reversal

Defendant claims that the PCR Court's order vacating discovery orders improvidently granted by another judge was improper. Defendant argues, however, not that the Court abused its discretion but that the adjudication of the merits of the discovery motion reached an incorrect conclusion. Discovery in PCR is atypical and "[o]nly in the unusual case" will such be required.

State v. Herrerra, 211 N.J. 308, 328 (2012) (quoting State v. Marshall, 148 N.J. 89, 91 (1997)).

PCR "is not a device for investigating possible claims, but a means for vindicating actual claims." Marshall, at 270 (quoting People v. Gonzalez, 51 Cal.3d 1179, 275 (1990), *cert. denied*, 502 U.S. 835 (1991)). "The filing of a petition for PCR is not a license to obtain unlimited information from the State, but a means through which a defendant may demonstrate to a reviewing court that he was convicted or sentenced in violation of his rights." Id. As Defendant correctly notes, requests that are simply attempts to "fish" through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope a basis for collateral relief may exist should be denied. Db61 (citing State v. Szemple, 247 N.J. 82, 97 (2021)). This is precisely what Defendant's request for the hard drive was.

The hard drive, after it was initially wiped, never was found to contain any of the footage Defendant wanted, the footage that Detective Dougherty did not save. Even after the wiping, the drive contained only the two excerpts that Defendant already had and were used at the trial. Defendant's hope to peruse the drive was a speculative attempt to fish for information, as the drive contained only the footage that Defendant already possessed, in an effort to

locate some evidence that trial counsel was ineffective in not requesting the drive itself or that his declination to do so somehow prejudiced the defendant.

There is no allegation of anything included on the drive that was not discovered to Defendant. Defendant correspondingly has not produced any argument pertaining to how nonexistent and nonspecified footage on the drive could have affected the outcome of his trial. In any event, the PCR Court judge did not abuse her discretion in vacating the improvidently-granted discovery order. The orders do not reflect a "misunderstanding or misapplication of the law."

As the PCR Court noted, Defendant's claim in this respect is a transparent attempt to relitigate the motion to dismiss made earlier in Defendant's trial proceedings. Da325. With regard to other requests for discovery related to the drive, including the request of interrogatories, the PCR Court appropriately noted, "interrogatories are not used in criminal matters." State v. Tull, 234 N.J. Super. 486, 490 (1989); Da324. Nevertheless, even the case cited by Defendant highlights the rarity with which enlarged discovery requirements should be entertained, with the Court instructing, "More particularized or interrogatory forms of discovery demands seeking to enlarge the language of the rule are not to be permitted without leave of court in extraordinary circumstances" and finding that even the expanded discovery

requested in Tull fell outside what was required by the relevant rules and was too expansive. State v. Ford, 240 N.J. Super. 44, 51 (App. Div. 1990). This is a far cry from Defendant's asserted interpretation of the case, that "interrogatory forms of discovery can be demanded with leave of court." Defendant's request for discovery was not appropriate on PCR.

2. The Court Did Not Err in Denying Defendant's Request for Discovery Pertaining to Defendant's Unviable and Hypothetical Third-Party Defense

Defendant's request for discovery on other cases is patently farcical, was far beyond what the law authorizes or requires, and was simply an attempt at a fishing expedition to search other defendants' cases for some connection to Defendant's. Defendant implicitly recognizes this, pointing out that the discovery on other, unrelated persons' cases investigated by the prosecutors office was not requested with a substantiated assertion in mind but instead to generally address "trial counsel's failure to adequately investigate [ ] and to learn to what extent a lack of support for Kevin Brown's theory could have severely undercut his credibility as an eyewitness." In doing so, Defendant reveals that the request for discovery was improper; discovery, in particular on PCR, is not intended as a means of investigating whether possible claims exist but whether assertions made by Defendant (which cannot be merely "bald

assertions" devoid of any proper demonstration or backing) are supported. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant proposes that the State should discover files of criminal proceedings of individuals unrelated or only peripherally related to Defendant's case, a practical impossibility if employed in PCR cases at large. Defendant does not come asserting any information that such discovery would have uncovered, noting instead that there could have theoretically been found information that "*could have*" undercut a witness's credibility. Notwithstanding Defendant's lack of confidence in his own assertion, Defendant is nevertheless accurate; the discovery request was a means of perusing case files to fish for *possible* claims, not to prove already-made, non-bald assertions meriting the highly unusual remedy of PCR discovery. As discussed *supra*, PCR "is not a device for investigating *possible* claims, but a means for vindicating actual claims." State v. Marshall, 148 N.J. 89, 270 (1997) (quoting People v. Gonzalez*,* 51 Cal.3d 1179, 275 (1990), *cert. denied*, 502 U.S. 835 (1991)) (emphasis added).

B. THE PCR COURT DID NOT ERR IN REQUIRING COUNSEL TO PROCEED

"We review a trial court's denial of a request for an adjournment 'under an abuse of discretion standard.'" Escobar-Barrera v. Kissin, 464 N.J. Super.

224, 233 (App. Div. 2020) (quoting State ex rel. Comm'r of Transp. v. Shalom Money St., LLC, 432 N.J. Super. 1, 7 (App. Div. 2013)). "Whether there was an abuse of discretion depends on the amount of prejudice suffered by the aggrieved party." Id. (citing State v. Smith, 66 N.J. Super. 465, 468 (App. Div. 1961)). "Thus, refusal to grant an adjournment will not lead to reversal "unless an injustice has been done." Id. (citing Nadel v. Bergamo, 160 N.J. Super. 213, 218 (App. Div. 1978)).

To evaluate whether Defendant was prejudiced by the lack of an adjournment, Defendant should make some allegation of prejudice. Defendant has not done so. He instead contends that PCR Counsel "had not completed investigation of all potential claims [and] threshold issues remained," jeopardizing "her ethical obligation to her client." Db71-72. Defendant brings no claims of what additional investigation would have uncovered nor of what threshold issues remained after PCR counsel filed numerous motions on the eve of the PCR proceedings, each of which was decided. Both the record and Defendant's submissions are devoid of any facts that would have been revealed if his PCR counsel had been given an adjournment.

Although PCR counsel in the trial court made a strategic decision to avoid describing at length the issues she was considering in order to, in her estimate, protect the confidentiality of the attorney-client relationship,

Defendant cannot logically claim at both the PCR court and now that he has business to conduct without any indication of what that business is, why it is or was necessary, or what it would have revealed. The PCR court was right to deny the adjournment, particularly given the long procedural history of the case and the desire for a final determination of the issues.

Defendant was obligated to demonstrate prejudice on this point to entitle him to relief on the issue of this adjournment. He has neither done so, nor made an attempt to do so, instead alleging generally that the lack of adjournment was problematic. Such a general and bald assertion lacking the requirements for obtaining relief is insufficient for reversal and is certainly insufficient for demonstrating an abuse of discretion.

C. THE PCR COURT DID NOT ABUSE HER DISCRETION IN NOT RECUSING HERSELF

R. 1:12–2 provides "[a]ny party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." A motion for recusal may be granted for any "reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12–1(g). Recusal motions are "entrusted to the sound discretion of the judge and are subject to review for abuse of discretion." Goldfarb v. Solimine, 460 N.J. Super. 22, 30

(App. Div. 2019) (quoting State v. McCabe, 201 N.J. 34, 45 (2010)). The court reviews de novo whether the judge applied the proper legal standard. Id. Judges must step aside from "proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned." Code of Judicial Conduct Rule 3.17(B). "[A]n appearance of impropriety is created when a reasonable, fully informed person observing the judge's conduct would have doubts about the judge's impartiality." Code of Judicial Conduct, cmt. 3 on Rule 2.1 (2016); DeNike v. Cupo, 196 N.J. 502, 517 (2008).

Judges are notably discouraged for recusing themselves when not strictly necessary. "Judges may not 'err on the side of caution and recuse themselves unless there is a true basis that requires disqualification.'" Goldfarb v. Solimine, 460 N.J. Super. 22, 31-32 (App. Div. 2019) (quoting Johnson v. Johnson, 204 N.J. 529, 551 (2010)). "A judge's duty to sit where appropriate is as strong as the duty to disqualify oneself where sitting is inappropriate." Johnson, at 551; Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 358 (App. Div. 1986) ("It is not only unnecessary for a judge to withdraw from a case upon a mere suggestion that he is disqualified: it is improper for him to do so unless the alleged cause of recusal is known by him to exist or is shown to be true in fact."). "[The New Jersey] Supreme Court has expressed its disapproval of defendants' manipulation of the system to

secure the removal of a judge they dislike." Goldfarb, at 32 (citing, e.g., State v. Dalal, 221 N.J. 601, 607-08 (2015)). "It is just as damaging to the integrity of the judicial process when parties secure, without the opposition's knowledge or consent, the assignment of a judge they prefer. When the judge affirmatively facilitates his or her selection by that one party, public confidence and the appearance of impartiality are further undermined." Id. Appellate courts assume that the trial judge evaluating a motion for recusal will apply his or her "conscious exercise of good will and mature judgment to decide." Magill v. Casel, 238 N.J. Super. 57, 63-64 (App. Div. 1990).

In State v. Harris, 181 N.J. 391 (2004), the Court held that a PCR judge was not required to disqualify himself even though he was the acting county prosecutor at the time an indictment was returned against the defendant, which even bore the judge's (at that time, prosecutor's) signature. The Court found that that "[D]efendant has not established that reason existed that 'might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so,' in violation of Rule 1:12–1." Harris, at 435. "The "evidence" presented in support of [Harris's] motion depicts "at most, mere ministerial involvement by the Acting County Prosecutor. That is not the sort of personal involvement that compels disqualification." Although there was no question that the judge was involved, at least in some respect, in

Harris's case or criminal history, his involvement did not call for recusal. Harris, at 511. Compare State v. Hill, 110 N.J. Super. 370, 374–75 (App. Div. 1970), where the trial judge, who was formerly an assistant prosecutor, was not disqualified from presiding at the criminal trial of a defendant whose file had been pending in the prosecutor's office during the judge's employment, but the judge as an assistant prosecutor had no knowledge of the matter with State v. Tucker, 264 N.J. Super. 549, 555 (App. Div. 1993), which reversed the defendant's conviction because the judge, who previously served as assistant prosecutor and had presented evidence against the defendant to a grand jury, should have recused himself in a subsequent trial against the same defendant.

Here, Judge D'Arcy had served at the prosecutors office for two decades, no doubt handling thousands of cases during her tenure there and being present at the office for the processing of thousands more she never saw. However, Defendant's case was never within her purview as a supervisor of an unrelated unit. At no time was Judge D'Arcy, then Chief Assistant Prosecutor D'Arcy, involved with the investigation, litigation, or post-conviction proceedings of the defendant's case, and even the defendant does not assert that she was.

Even less than the "ministerial" involvement in Harris, Judge D'Arcy did not have any involvement whatsoever in Defendant's case while serving at

the prosecutors office. In accord with Harris, even if she had been involved ministerially with the case's prosecution, she would still need not recuse herself. Clearly, a rule prohibiting Judge D'Arcy from hearing criminal cases arising from the prosecutors office in the same vicinage would render her unable to sit on the criminal bench there, and even a rule prohibiting Judge D'Arcy from hearing any criminal cases arising from that prosecutors office containing accusations of misconduct or bad faith on the part of the State would hamstring the courts, as such accusations or implications can be commonplace. It is not uncommon for individuals holding supervisory positions in prosecutors offices to later become judges, often in the same vicinage. Lawyers representing the government, such as prosecutors, are not automatically associated with other lawyers in that agency. Code of Judicial Conduct Canon 3C(1)(b).

The PCR Court judge relied accurately on applicable law in reaching her decision. She engaged in "conscious exercise of good will and mature judgment to decide," as the courts assume judges do. Magill v. Casel, 238 N.J. Super. 57, 63-64 (App. Div. 1990). The PCR Court judge appropriately noted Canon 3.17(B), which dictates, in relevant part:

> "Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned… [including where] a party is a governmental entity that

> previously employed the judge for a period of two years following judicial appointment if the judge was employed as a state government attorney, county prosecutor, or assistant county prosecutor, provided, however, that prior employment as a state government with broad supervisory authority shall not disqualify judges who had no actual involvement in the matter while in government service…"
>
> Da378-79.

Judge D'Arcy, at the time of hearing the motion, was six years removed from the prosecutors office. Id. Her decision was not an abuse of discretion as it did not "'rest[s] on an impermissible basis' nor was 'based upon a consideration of irrelevant or inappropriate factors.'" State v. S.N., 231 N.J. 497, 515 (2018) (quoting State v. Baynes, 148 N.J. 434, 444 (1997) (internal citations omitted)).

Once more, Defendant complains not that there is an appealable issue entitling him to relief that meets the relevant standard (abuse of discretion) but that he disagrees with the merits of the courts' rulings, simply the fruits of the exercise of that proper discretion. Coupled with Defendant's request to have his trial attorney recused, it is clear that Defendant simply wishes his case had been handled by different counsel or was heard by a different court, whom, as there are many viable ways to try a case, may have theoretically employed some different approach. But Defendant is not entitled to assigned counsel of his choice, nor is he entitled to shop for a court or forum that will entertain his

meritless arguments and rehashed points of appeal repeatedly until he locates one that will.

D. THE PCR COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DISMISSAL OR REHEARING BASED ON ALLEGED NEWLY DISCOVERED EVIDENCE OF BAD FAITH

The Court's ruling denying Defendant's Motion for Dismissal or Rehearing based on "newly discovered evidence" was not in error. In the PCR Court's written opinion, the Court indicated that the application for dismissal or rehearing was inappropriately wedged into a proceeding for PCR, a point Defendant neither mentions nor denies. As the PCR Court judge noted, these claims were resolved by the trial court. Da381-82. Further, the evidence was not "newly discovered" as discussed *supra*, Section III.B, nor was it of the sort that would have changed the verdict.

Incidentally, the trial court judge who heard the original motion to dismiss substantively considered the lack of production of the policy and as a result issued strongly-worded curative instructions. 6T 13:13-17:15; e.g., 15T 138:22-139:17. There were no circumstances, such as procedural error, factual inaccuracy, error in adjudication, etc. present in the original ruling on the motion to dismiss nor in the motion for a new trial presented on the same grounds that would lead to a need for rehearing. Defendant does not contend

that there were. Again, defendant's claim is not one of error, but one of disagreement on the merits.

CONCLUSION

It is the State's position that the defendant's appeal should be denied on these grounds, as this appeal is merely a rehash of Defendant's previously adjudicated arguments, no error occurred, and any error this Court may determine occurred did not meet the relevant standards or cause prejudice. The State respectfully urges the Court to deny Defendant's appeal.

Respectfully Submitted,

/ss/Kristen Pulkstenis

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September 26, 2024

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AMENDED REPLY LETTER-BRIEF
ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3822-22T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order Denying a Petition for Post-Conviction Relief of
v.	:	the Superior Court of New Jersey, Law Division, Atlantic County.
KESHAUN EARLEY	:	
		Indictment No. 13-3-858-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Mark Sandson, J.S.C. (Trial)
	:	Hon. Rodney Cunningham, J.S.C. (PCR)
		Hon. Todd Miller, J.S.C. (PCR)
	:	Hon. Pamela D'Arcy, J.S.C. (PCR)

Your Honors:

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

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Earley relies on the Combined Procedural History and Statement of Facts in his opening brief. (Db 4-21)[1]

LEGAL ARGUMENT

Earley relies on his opening brief, and adds the following:

POINT I: NONE OF EARLEY'S CLAIMS ARE PROCEDURALLY BARRED, BY RULE 3:22-4 OR OTHERWISE.

The State's contention that some of Earley's claims are barred is meritless, and its suggestion they are "repackaged" absurd. Rule 3:22-4 provides:

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

Although only one exception is sufficient, in Earley's case, they **all** apply.

First exception (a) applies because where "details" of the claims raised on PCR "lay outside the trial record," they could not have been presented on direct appeal. State v. Preciose, 129 N.J. 451, 461 (1992). The Court explained:

> [We] have generously interpreted Rule 3:22-4(a) to permit the assertion of claims that could not reasonably have been raised in

[1] Db – defendant's opening brief Sb – State's brief

> earlier proceedings. For example, in State v. Nash, 64 N.J. 464 (1974), counsel had failed to make a claim based on a decision issued before the conclusion of defendant's appeal. There, we noted our "hesita[tion] to make the availability of a retroactive principle in a criminal context turn on whether an attorney has read recent advance sheets." Id. at 475. We concluded that defendant did not have a reasonable opportunity to raise his claim in an earlier proceeding. Thus, Nash suggests that defendants should not pay the exacting price for state procedural forfeitures that result from the ignorance or inadvertence of their counsel — regardless of whether counsel's error violates constitutional standards.
>
> Id. at 467-77 (citations omitted)

The issues raised here have not been addressed on direct appeal; they are based in whole or part on facts outside the trial record. For example, while eyewitness identification was raised on direct appeal, the appellate was whether the judge erred in finding the identifications admissible. In his PCR petition, Earley argues that trial counsel – not the judge – erred in failing to consult with and retain an expert to properly raise eyewitness identification issues pretrial and during trial, thereby ineffectively representing Earley. Earley's PCR arguments are distinct and thus not already adjudicated. See, e.g., Pickard v. Connor, 404 U.S. 270, 276-77 (1971); State v. Bontempo, 170 N.J. Super. 220, 234 (Law Div. 1979) (noting Rule 3:22-5 only bars claims "identical or substantially equivalent to that adjudicated previously on direct appeal)."

Trial counsel's ineffectiveness could not have been addressed in a direct appeal. It is based on a host of information outside of the trial record, such as

what counsel considered; what research was available; what an expert would have offered if consulted and retained; what training and information was available to attorneys regarding familiarity and litigating eyewitness identification issues; and proof that the type of expert testimony at issue was admitted in cases at the time, and resulting in significantly better outcomes.

Taking the State's argument at face value, no ineffective assistance claim could ever be raised on PCR when it was at all related to an appellate issue regarding the propriety of a judge's ruling. This fundamentally misconstrues the relevant standards, particularly because on PCR, the question is often whether had counsel taken a particular action, would it likely have changed the outcome on the substantive ruling. Moreover, one of the most significant aspects of this PCR appeal is that Earley was deprived of the opportunity have a fully litigated PCR – which is the first time that ineffective assistance can be properly raised.

Moving on, exception (c) permits any fundamental constitutional claim to be raised on post-conviction review, such as ineffective assistance of counsel or a due process violation, **even if it could have been raised before.** Preciose, 129 N.J. at 460; State v. Mitchell, 126 N.J. 565, 585-86 (1992). As the Court explained in Preciose, "an 'error that denies fundamental fairness in a constitutional sense and hence denies due process of law' can be asserted in post-conviction proceedings as long as it was not litigated previously.'" Preciose, 129

N.J. at 476 (quotation omitted). While merely "[c]loaking the claim in constitutional language will not guarantee relief," where constitutional rights are truly at stake, "a court may hear [the] claim even though it should have been raised on direct appeal." Mitchell, 126 N.J. at 585. Earley was deprived effective assistance of counsel and of due process, thus, exception (c) is satisfied.

Finally, exception (b) applies here. In defining fundamental injustice, courts look to whether the judicial system has provided the defendant with "fair proceedings leading to a just outcome." Mitchell 126 N.J. at 587. Fundamental injustice is found if the prosecution or judiciary abused the process under which defendant was convicted, or absent intentional abuse, if any "inadvertent errors mistakenly impacted a determination of guilt or otherwise 'wrought a miscarriage of justice for the individual defendant.'" Ibid. (citations omitted). The standard goes beyond constitutional infringements and encompasses any circumstances deemed "unjust." Although a petitioner does not have to prove that an issue cost him the case, "to establish injustice there should at least be some showing that [the alleged violation] played a role in the determination of guilt." Ibid; see, e.g., State v. Coon, 314 N.J. Super. 426 (App. Div. 1998) (PCR claim not related to guilt fell within fundamental injustice exception)

First, there is every indication that Earley is innocent. Maintaining a wrongful conviction, predicated on constitutional violations, is the ultimate

injustice. Earley has not been provided with fair proceedings leading to a just outcome. ACPO destroyed hundreds of hours of likely exculpatory surveillance video; obfuscated regarding its policies and the hard drive in question and failed to preserve it. The PCR judge – herself a veteran ACPO supervisor during the time of its investigation and prosecution of Earley – sua sponte reversed long-standing discovery orders and forced substituted PCR counsel to proceed on the merits despite her protests that she had open investigation and had not completed her preparation of the case or the submissions to the court. Earley has been denied fair proceedings in his cases, resulting in an unjust outcome.

PCR claims should be considered on their merits. All three exceptions apply, though one is enough. Earley's claims are properly before the Court.

POINT II - THE COURT ERRED WHEN IT DENIED EARLEY'S PCR PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

Earley's opening brief laid out how he established a prima facie case that counsel's performance was deficient; and the deficiencies materially contributed to defendant's conviction. See Strickland v. Washington, 466 U.S. 668, 686-88 (1984); State v. Fritz, 105 N.J. 42, 58 (l987). In its response, the State asks the court to presume counsel was "strategic" and "wise," and mischaracterizes Earley's well-supported claims as "bald assertions." Simply put, the State is applying the wrong standard and ignoring the ignoring the facts.

First, it is a foundational principle of PCR that the court may not **presume**

counsel's actions, or inactions, were strategic. See, e.g., State v. Porter, 216 N.J. 343, 354 (2011); Preciose, 129 N.J. at 462-63; R. 3:22-10(b); State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998); LaFave., 3 Crim. Proc. § 11.10(c)(c) (4th ed. 2023).. Although the State repeatedly praises counsel's missteps as "wise" "strategic" choices, (see, e.g., Sb 16, 17, 20, 21, 22, 25, 40) it tellingly cites to cases where the court actually **held** an evidentiary hearing, and based its findings on that hearing, including testimony from counsel. (See Sb 20, citing State v. Cooper, 410 N.J. Super. 43 (App. Div. 2009). As explained in Earley's opening brief, not only may the court not presume counsel was behaving strategically, but there could be no plausible sound strategic or tactical reason for his conduct.

Similarly, the State's baseless refrain that Earley has only provided "bald assertions" (see, e.g., Sb 24, 24, 38, 39, 41) relies on State v. Cummings, 321 N.J. Super. 154 (App. Div. 1991) and State v. McDonald, 211 N.J. 4 (2012), but both actually support Earley's argument. In Cummings, the petitioner's time-barred PCR petition contained only "bald assertions," unsupported by affidavit, certification, or anything else. He also, for the first time 10 years after he was convicted, claimed he would have said he was at another person's house; the Court explained that "this bare assertion of an alibi at this late date, without more," was insufficient. Id. at 170-71. And McDonald was not even a PCR case. Rather, in McDonald, as part of his appeal of the denial on his plea-withdrawal

motion, defendant asserted counsel was ineffective. The only evidence on that record was "only defendant's conclusory allegations," inadequate to evaluate the claim. 211 N.J. at 30. The Court thus declined to consider the issue on direct appeal, instead stating PCR was the appropriate forum. Ibid.

Earley's submission included factual statements by him based on his own personal knowledge, expert reports, and other documents outside of the trial record, and which are competent evidence – a far cry from a mere "bald assertion." Furthermore, PCR counsel was not finished with investigations and submissions forced to proceed prematurely to the merits. Ultimately, there is no basis in fact or law to presume trial counsel exercised sound strategic judgment, and Earley established a prima facie case on each claim.

Because none of the State's arguments regarding Earley's individual claims have any merit, he incorporates by reference his opening brief and adds the following remarks regarding certain of the State's contentions. First, the State's handling of counsel's failure to retain an expert on familiarity is typical of its faulty reasoning. It State conflates the argument raised on direct appeal (that identifications were inadmissible based the trial record) with the argument raised in PCR (that counsel was ineffective for not consulting with and retaining an expert on familiar identifications). The State also flatly ignores the **uncontroverted** evidence provided to the PCR court demonstrating that (1)

research from well before trial demonstrated "familiar" identifications can be mistaken and are susceptible to the same factors as stranger identification; (2) OPD attorneys obtained eyewitness expert testimony during this time, including a murder case in which expert testimony on familiarity contributed to an acquittal; and (3) OPD and other organizations trained on eyewitness identification and using such experts years before Earley's case. There is no reason to think – let alone evidence to support the premise – that counsel's failure to consult and retain an expert was strategic. And even if it was, it would have still been ineffective assistance, as explained in Earley's opening brief.

The State also misses the point on counsel's failure to investigate and enable presentation of the Facebook posts. At this stage, Earley is not required to prove the Facebook posts and evidence would have definitively established his innocence, but rather, that under the circumstances of this case, without counsel's failure to properly investigate and present the Facebook evidence, there is a reasonable probability he could have established the foundation and authenticity of the Facebook activity, leading to a different outcome.

The State ignored applicable facts and law in other points. One example is its defense of counsel's inexplicable failure to demand production of the hard drive (or take any other action), especially after learning ACPO had not wiped it as its witnesses had claimed. In July 2013, ACPO IT worker Johannsen

testified that the drive had been completely wiped, and counsel simply took for granted this was accurate, never demanding production of the drive for analysis. Then as trial was beginning, counsel learned the State had conducted a forensic examination of the drive on February 24, 2014 and found that footage had survived its purported "complete wiping" – strongly suggesting, of course, that it had never been done. Yet, counsel did nothing with this bombshell disclosure that ACPO personnel testified falsely. He still did not demand the drive be produced for examination, before trial or any point thereafter. It cannot seriously be claimed he strategically did so after a "thorough investigation of law and facts." And he did pursue a bad faith argument, just not an effective one.

Another example is the State's myopic focus on categorial bars and James Jordan's interests, rather than on the interests of Earley. The RPCs are clear: a lawyer is prohibited from representing a client when there is a significant risk his representation of **that client** may be materially limited by responsibilities to a former client, absent waiver, and he cannot use information from a former client or reveal information related that representation. RPC 1.6(a), 1.7(a)(2), 1.9(c). It is undisputed that trial counsel represented both Jordan and his brother and that multiple witnesses were Jordans' close associates or relatives. It is also undisputed that counsel never disclosed this conflict to Earley or the court.

Furthermore, there is no evidence counsel investigated anything regarding

the Jordans -- particularly problematic where identity was the central issue and the evidence of it was shaky, and where a motive was never even presented to the jury. Contrary to the State's talismanic repetition of the phrase "bald assertion," Earley has more than provided a prima facie case entitling him to an evidentiary hearing at which counsel would explain when he learned about the conflict and why he failed to reveal it, and provide needed information about his prior representation of the Jordans. A hearing would also reveal other areas of impeachment not investigated or explored at trial, or whether counsel had damaging confidential information he learned that he could not use, owing a duty to them. On this issue, as well as the others, the State has not defeated Earley's prima facie claim, and reversal is required.

POINT III – THE PCR JUDGE'S REFUSAL TO RECUSE HERSELF WAS AN ABUSE OF DISCRETION, REQUIRING REVERSAL.

A judge who makes a decision without rational explanation, departs from established policies, or rests a decision on an impermissible basis abuses her discretion. United States v. Scurry, 193 N.J. 492, 504 (2008); Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002). An abuse of discretion may occur when a decision was not premised upon a consideration of all relevant factors, was based upon a consideration of irrelevant or inappropriate factors, or amounted to a clear error in judgment. Flagg, 171 N.J. at 571.

Such is plainly the case here. First, Judge D'Arcy failed to consider

anything other than her own lack of personal involvement in the case, and that she had left ACPO in 2017. This was despite clear mandates of the Code of Judicial Conduct', Court Rules', and Advisory Letter's requirements that judges consider many other factors, as explained in Earley's opening brief.

Moreover, the State fails to address the fact that as a ACPO supervisor for two decades, including during ACPO's investigation and prosecution of Earley, D'Arcy has personal knowledge of ACPO's policies and practices. Several issues in this matter related **directly** to those policies and processes, and prosecutorial misconduct on an individual and institutional level, though Judge D'Arcy ignored them, and the proper standard. Her refusal to recuse herself was an abuse of discretion, requiring reversal.

Notably, the State relies on State v. Harris, 181 N.J. 391 (2004) and State v. Hill, 110 N.J. Super. 370 (App. Div. 1970), which actually support Earley's position. In Harris, PCR counsel moved to recuse the judge because when Harris had been indicted for an unrelated offense 25 years earlier, the PCR judge had been Acting County Prosecutor. Id. at 510. The PCR judge had no recollection being involved in the indictment, and it appeared that his "signature" on the indictment and dismissal motion, was someone else signing for him. Id. at 510-11. While the Supreme Court upheld the PCR judge's decision not to recuse himself based on the unrelated, 25-year-old indictment in which he had no

personal involvement, it made clear that it was affirming both because of the lack of personal involvement and because nothing about the indictment being signed in his name that provided a "reasonable basis for defendant, counsel, or the public to question the PCR Court's impartiality." Id. at 511.

So too with Hill. There, on direct appeal the defendant argued that the trial judge should have sua sponte disqualified himself merely because he had been assistant prosecutor for four months, more than a year before the trial began, and he had not had any involvement or knowledge of Hill's case during his stint as a prosecutor. 110 N.J. Super.at 374. Unsurprisingly, under those circumstance this Court held that there was no indicate of either personal involvement or the appearance of impropriety. Id. at 375.

The Code of Judicial Conduct and caselaw are clear – judges must avoid both actual conflicts and the appearance of impropriety. ACPO's varied misconduct occurred when Judge D'Arcy was an ACPO supervisor. ACPO's policies, procedures, trainings, audits, and noncompliance by staff during her employment as section chief were necessarily front and center. As detailed in Earley's opening brief, the PCR court had the power to determine whether to allow Earley to seek evidence or rehearing regarding various issues raised in the PCR petition and new-trial motions, as well as making the ultimate decision on granting or denying relief.

Judge D'Arcy utterly abused her discretion in refusing to recuse herself. She should have done so based on her own first-hand, contemporaneous, supervisory-level knowledge of ACPO's policies, procedures, and practices, along with ACPO's conflicting representations with respect to those policies. There was also an obvious appearance of impropriety. Thus, for these reasons and those in the opening brief, a remand is required.

POINT IV- THE STATE IGNORES THE FACTS AND THE RELEVANT CONSTITUTIONAL PROTECTIONS IN DEFENDING JUDGE D'ARCYS INSISTENCE THAT THE PCR PROCEED ON THE MERITS EVEN THOUGH INVESTIGATIONS AND SUBMISSIONS WERE INCOMPLETE.

On PCR – unlike the civil cases upon which the State exclusively relies – a defendant has a constitutional right to effective assistance of counsel. The caselaw (which the State ignores) is clear: counsel **must conduct "an exhaustive examination of the entire trial record," investigate all claims** raised by defendant, and **advance all arguments** that can be made in support of the petition. See, e.g., State v. Webster, 187 N.J. 254, 257-58 (2006); State v. Rue, 175 N.J. 1, 17-19 (2002); State v. Velez, 329 N.J. Super. 128, 134 (App. Div. 2000); R. 3:22-6(d).What the State misses is that **when the judge forced counsel to proceed to the merits when she was still examining the extensive record (including videos with technical issues), pursuing open investigations; determining which claims had merit,** this was an abuse of

discretion. See State v. Hayes, 205 N.J. 522, 540 (2011) (denial of adjournment is abuse of discretion where it is "unreasonable and prejudicial **to defendant's rights."**). By denying the adjournment, Judge D'Arcy deprived Earley of his constitutional rights to effective assistance of PCR counsel and of due process.

The State's claim that counsel made only a "general and bald assertion" is easily disposed of. Counsel explained, in detail, how there were technical issues with the videos, that she was "midstream" in pursuing several outstanding issues including whether the surveillance videos – central to issue of identity – could be enhanced, and determining which witnesses had already been interviewed and should now be interviewed. She pointed out that the case, which was a complex one that she had inherited after original PCR counsel became ill, had both open discovery issues and a history of the State failing to comply with a long-standing discovery order, and she had been diligently pursuing the discovery issues and preparing several threshold motions. The record is clear that the judge upended the long-standing discovery order and forced PCR counsel prematurely to proceed immediately to the PCR merits despite the concrete and specific explanations given by PCR counsel, an officer of the court. The insistence she nonetheless argue an incomplete petition is the epitome of an unreasonable abuse of discretion, which denied Earley his constitutional rights to effective assistance of counsel on PCR and due process of law.

To the extent the Court disagrees on the current incomplete record that PCR should be granted (or at least a prima facie case has been established, the entire matter must be remanded so PCR counsel can complete investigations and submissions, supplement the existing record, complete motion practice, and present argument, thus protecting Earley's constitutionally-guaranteed meaningful opportunity to present his case and effective assistance of PCR counsel.

CONCLUSION

For the reasons stated here and in the opening brief, the Court should reverse the orders that (1) denied Earley's requests for discovery and sua sponte vacated pre-existing orders; (2) denied adjournment to complete investigation and preparation of his PCR petition; (3) denied dismissal or rehearing based on newly discovered evidence of bad faith; (4) denied reconsideration; (5) denied recusal; (6) denied his PCR petition; and (7) denied his motion for a new trial based on newly discovered evidence. To the extent the Court believes the current record does not yet establish that PCR and a new trial should be granted, the case must be remanded for an evidentiary hearing before a new judge on all issues raised below, and to provide Earley the opportunity to add any additional claims once counsel is permitted to complete investigation and submissions. See State v. Pierre-Louis, 216 N.J. 577, 579-80 (2014).

Respectfully submitted,

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