STATE OF NEW JERSEY Plaintiff-Respondent, v. WILLIE TANNER, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3885-22T1 <u>Criminal Action</u> Appeal from order filed July 7, 2023, denying defendant's motions for post-conviction relief and for a new trial entered by the Law Division, Criminal Part, Middlesex County, at Ind. Nos. 04-01-00089 & 04-01-00106 Sat Below: Honorable Benjamin Bucca, Jr, J.S.C.

DEFENDANT'S BRIEF

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PRESENTLY CONFINED

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INTRODUCTION

This brief is respectfully submitted by Defendant-Appellant Willie Tanner in support of his appeal from the order denying his Petition for Post-Conviction Relief (PCR) and Motions for a New Trial.[1]

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[1] References to transcripts of the proceedings are cited as follows:

1T January 19, 2006 (trial).
2T January 24, 2006 (trial).
3T January 25, 2006 (trial).
4T January 26, 2006 (trial).
5T January 31, 2006 (trial).
6T February 1, 2006 (trial).
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12T February 16, 2006 (trial).
13T February 22, 2006 (trial).
14T February 23, 2006 (trial).
15T February 24, 2006 (trial).
16T February 28, 2006 (trial).
17T December 6, 2006 (sentencing).
18T September 7, 2012 (new trial motion).
19T July 25, 2013 (oral argument).
20T January 29, 2018 (AP McKinney testimony).
21T January 30, 2018 (AP McKinney testimony).
22T February 16, 2018 (Wilona & William Johnson testimony).
23T March 5, 2018 (Dr. Weiss testimony).
24T May 14, 2018 (Robert White testimony).
25T December 18, 2019 (William Johnson testimony).
26T February 25, 2020 (Karleen Duca testimony).
27T February 27, 2020 (AP McKinney testimony).
28T March 3, 2020 (AP McKinney testimony).

STANDARD OF REVIEW

As to legal issues, the standard of review on appeal is *de novo*. *State v. Shaw*, 213 N.J. 398, 411 (2012). *Manalapan Realty, LP v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995). As to materiality of withheld evidence under *Brady v. Maryland*, in particular, this is an issue of law for which the appellate court has *de novo* review. *Wilson v. Beard*, 589 F.3d 651, n.1 (3d Cir. 2009); *State v. Landano*, 271 N.J. Super. 1, n.13 (App. Div. 1994), quoting *Carter v. Rafferty,* 826 F.2d 1299, 1306 (3d Cir. 1987); *United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007)("[A]ssessment of the materiality of [] evidence under Brady is a question of law"); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995)(same).

29T March 4, 2020 (Ap McKinney and Darryl Saunders's testimony).
30T January 22, 2021 (Pete Hamerslag testimony).
31T May 9, 2023 (hearing record).
32T June 7, 2023 (hearing record).
33T February 17, 2005 (suppression hearing).
34T August 30, 2004 (status conference).
35T October 4, 2004 (co-defendant Johnson status conference).
36T January 26, 2007 (co-defendant Johnson plea/sentencing).
37T July 23, 2007 (co-defendant Johnson reconsideration).

Under the unique circumstances of this case, it is respectfully submitted that any fact and credibility findings should be reviewed *de novo.* This is because PCR Judge Bucca was not assigned to the case until *after* Judge Rivas recused himself. Judge Bucca could consider the testimony that came before his assignment, including Volumes 20T, 21T, 22T, 23T, and 24T only from transcripts, including all of the expert testimony, as well as other witnesses. As such, Judge Bucca could not make traditional credibility findings by the "opportunity to hear and see the witnesses and to have the 'feel' of the case, to which the appellate court ordinarily defers." *State v. Johnson*, 42 N.J. 146, 161 (1964), cited in *State v. Elders*, 192 N.J. 224, 244 (2007). This Court is in the same position to read the transcripts as the PCR court, so review should be *de novo*. *Little v. KIA Motors America, Inc.*, 425 N.J. Super. 82, 93 (App. Div. 2012), *quoting Jastram v. Kruse*, 197 N.J. 216 (2008)(as second judge did not hear and see witnesses, "we are not required to 'afford due deference [] to the assessment of intangibles, such as witness credibility.'").

It should be noted that the PCR judge erred as a matter of law when he applied the "manifest denial of justice" test (Da423) instead of the "interest of justice" test to review Mr. Tanner's motion for a new trial. The "manifest denial of justice" standard applies only when a defendant is seeking a new trial based on the verdict being against the "weight of the evidence" under R. 3:20-1. It was error to

apply the manifest denial of justice standard to a post-conviction motion for a new trial asserting that had the jury been aware of the newly discovered evidence of Johnson's psychosis and his failure to identify the North Face mask, and other matters discovered *after* the verdict, there is a reasonable probability that the verdict would have been different. In such case, the proper standard is that presented in State v. Carter, 85 N.J. 300, 314 (1981), in which a new trial shall be granted where the newly discovered evidence is:

> "(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. Carter, 85 N.J. at 314. As such, the PCR judge erred as a matter of law in denying relief under the "manifest denial of justice" standard.

As to *Brady* matters, the standard of analysis arises under federal case law, *see e.g. Brady v. Maryland*, 373 U.S. 83 (1963), and related decisions, not the "manifest denial of justice" test in *R.* 3:20-1.

BRIEF PROCEDURAL HISTORY

In February 2006, defendant Willie Tanner was convicted by a jury of charges in connection with four armed robberies and a shooting at one incident that resulted in a conviction for attempted murder. (Da38-42).

Mr. Tanner received a sentence of forty-five (45) years that included 37¼ years of parole ineligibility (32¼ years under NERA). (Da38-45).

Before trial he had been offered a plea deal with a proposed sentence of fifteen (15) years. [33T8]. Mr. Tanner has already served *more than twenty years*, five years longer than the plea offer and still has 25 years remaining on his sentence.

Following direct appeals, on May 6, 2010, Mr. Tanner filed a *pro se* petition for post-conviction relief. (Da71-74).

The Office of Public Defender was originally assigned as counsel and subsequently, Bruce I. Afran ("PCR counsel"), substituted his appearance (Da75) and expanded the PCR application. PCR counsel also filed a motion for new trial based on newly-discovered evidence revealed for the first time during the PCR process. (Da136-137).

On August 23, 2013, without an evidentiary hearing, the Hon. Bradley J. Ferencz denied all relief. (Da147-186).

On July 26, 2016, this Court reversed and remanded for an evidentiary hearing as to two issues: (1) the effect of an undisclosed promise of early release by the prosecutor to the State's "only eyewitness," William Johnson, Jr. ("Johnson"); and (2) the effect of an unknown diagnosis of psychosis on Johnson's mental state and capacity to testify at trial. (Da205-206).

Following the remand order, evidentiary hearings were held on January 29, 2018; January 30, 2018; February 16, 2018; March 5, 2018; May 14, 2018; December 18, 2019; February 25, 2020; February 27, 2020; March 3, 2020; March 4, 2020; and January 22, 2021. *See* 20T, 21T, 22T, 23T, 24T, 25T, 26T, 27T, 28T, 29T, and 30T.

Hearings were delayed for almost two years, from May 14, 2018 to December 18, 2019, after Judge Rivas (and two other judges) were recused. After assignment to the Hon. Benjamin Bucca, J.S.C., an additional delay of nearly one year ensued due to COVID.

During the evidentiary proceedings, new disclosures by the prosecution resulted in the filing of an additional motion for new trial on *Brady* and other issues separate from those addressed in the 2016 remand order (Da249-250); these additional issues are addressed at **Points II, IV, V** and **VI**, *infra.*

On July 7, 2023, Judge Bucca denied PCR relief and the motion for a new trial and issued a written opinion. (Da399-446).

This appeal followed.

BRIEF STATEMENT OF FACTS[2]

Twenty years ago, on October 2, 2003, Willie Tanner was arrested in East Brunswick and was charged, along with his "step" cousin, Willian Johnson, Jr., (Johnson) with committing five armed robberies at gas stations or convenience stores in South Brunswick, Edison and North Brunswick and attempted murder in connection with a shooting at one incident, at a Krauszer's market. (Da1-13).[3] Neither Tanner nor Johnson were at a crime scene when arrested nor had they been previously considered as suspects in the robberies.

No witness identified the perpetrator who, at all times, wore a "North Face" ski mask that covered his entire face, as seen on crime scene videos.

Three years later, on February 28, 2006, Mr. Tanner was found guilty by a jury of charges in connection with four robberies, including the charge of attempted murder. (Da38-45).

Johnson was the State's only eyewitness and testified that he and Mr. Tanner had agreed to commit the robberies and that he drove Tanner to the

[2] The factual background of the issues addressed at the evidentiary hearing is extensive and for purposes of economy are only briefly summarized here. These matters are addressed in full in the relevant Point Headings below, to which the Court is respectfully referred.

[3] Wilona Johnson, William Johnson's sister, testified that Willie Tanner was unrelated to the Johnson family by blood, but that they called Willie a "cousin" because Mr. Tanner's half-sisters were Wilona's cousins. 22T33-5 to 20.

alleged crime scenes. 10T6-15 to 19; 10T6-20 to 24; 10T8-25 to 9-10; 10T21-23 to 22-6.

Johnson's "confession" in itself was irregular and had been obtained via an all-night interrogation by shifting teams of police from multiple departments from midnight to 6 AM on the night of October 3, 2003. In addition, officers destroyed their notes of Johnson's initial statements and interviews, meaning that there is no record of the *original* questions first put to Johnson and his answers before the officers went on tape. No satisfactory explanation for destroying these notes has ever been provided. Officer Shannon admitted that he interviewed Johnson **for an hour** *before* going on tape, but then destroyed the interview notes. 6T:82-6 to 24; 6T:90-5 to 91-25; 6T:92-5 to 17; 6T94-21 to 96-10. Officer Conlon admitted he destroyed his notes of Johnson's **2:35 AM** interrogation. 4T108-22 to 25; 4T110-18 to 111-3.

Not only was the interrogation irregular but numerous *Brady* violations have been identified during PCR. In fact, the PCR record disclosed during the hearing on remand that prosecutors were in possession *more than a year before trial* of a report from Dr. Peter Krakoff, a New Brunswick psychologist who examined Johnson and reported he had such significant psychological and cognitive deficits that he could not knowingly waive his *Miranda* rights and would have been "overborne" to police pressure to confess. 30T10-4 to 18;

30T12-17 to 13-2; 30T16-12 to 16 (Da234-236). This report was disclosed only during PCR, ***more than a decade after the 2006 trial***. Thus, it was unknown to the defense that this witness, interrogated as described above, was incapable of resisting police suggestion and manipulation, facts as to which the jury was wholly unaware and ignorant.

Non-disclosure of Dr. Krakoff's report was almost certainly intentional. Assistant Prosecutor Pete Hamerslag admitted at PCR that he was in possession of Dr. Krakoff's oral report but did not believe he was required to disclose it to Tanner's defense counsel, a clear constitutional violation. 30T25-6 to 18. Ultimately, the information in the Krakoff report was never disclosed to Tanner's counsel or the jury until years after the trial and its non-disclosure is a *Brady* violation. *See* **Point II**, *infra*.

As this Court noted in the 2016 remand order, Johnson was the State's "critical" witness. Da202, 205-206. Aside from Johnson's testimony that he had agreed to commit the robberies with Tanner and drove Tanner to the robbery scenes, 10T6-15-19; 10T6-20-24; 10T8-25 to 9-10; 10T21-23 to 22-6, the remainder of the evidence was circumstantial or equivocal in nature. Even Judge Ferencz, the original PCR judge who denied PCR relief without an evidentiary hearing (later reversed by this Court in its 2016 judgment), said, "**I wouldn't call it the most overwhelming case that I've ever seen**" (19T37-10 to 11).

At PCR, the prosecution conceded Johnson's paramount role in its prosecution of Tanner. Assistant Prosecutor Martha McKinney, who tried the case for the State in 2006, admitted that Johnson was "the ***only*** eyewitness the State had who could say ***they saw and knew that Willie Tanner had committed these robberies*** and conspired to commit them…" 20T147-8 to 148-7. AP McKinney's predecessor, AP Hamerslag, even told police investigators in a pre-trial memorandum that convicting Mr. Tanner **depended on Johnson**: "**[T]he success of prosecuting Tanner depends in very large part on the willingness and ability of Johnson to cooperate and testify**." (Da233).

In its 2016 decision, this Court ordered an evidentiary hearing, in part, due to the November 2012 disclosure by Johnson, six years ***after*** the trial, that he had been promised early release by McKinney, an offer of leniency never disclosed to Tanner's defense counsel or to the jury. In his November 2012 certification, Johnson stated that *before* he testified against Tanner at the trial in February 2006 McKinney promised him early release after serving six months of his three-year state prison sentence. (Da134-135).

At the PCR hearing, it was undisputed that a "secret" "pre-planned" leniency was offered to Johnson. In fact, such information came from Johnson's former attorney, Darryl Saunders, Esq., who testified on PCR that Johnson was offered "**in advance**," "***prior* to the time Mr. Johnson testified**" a special

leniency that consisted of an offer of "credit" for what was called *in-patient drug treatment* against Johnson's three-year term. 29T178-8 to 22; 29T191-18 to 24; 29T198-2 to 7. This was never disclosed to Tanner's defense counsel or the jury. Saunders even confirmed his earlier text message to PCR counsel that this was a "secret deal" and "WAS preplanned." 29T157-16 to 24 (upper case in Saunders's original; Da389).

True to this promise, Johnson *was* re-sentenced and released on probation in July 2007, almost six months to the day after his original sentencing. 20T39-4 to 40-5.

During the first phase of the PCR proceeding in the Law Division, and on the initial appeal to this Court, prosecutor McKinney **refused** to deny or dispute Johnson's assertion that she promised him early release, a point noted by this Court in its 2016 remand decision when it ordered the evidentiary hearing to determine if the promised leniency had influenced or affected Johnson's testimony, *i.e.*, to determine if Johnson admitted he "***lied*** about the critical testimony regarding [Tanner's] participation in the crimes, ***or that he was unsure of his recollection.***" (Da205-206)(emphasis added).

Following completion of the remand proceeding, that evidence has **now** been produced. At the evidentiary hearing, Johnson admitted that his testimony at Tanner's trial was false. 22T56-23 to 57-8. Johnson also denied knowledge of

any robberies, saying "**I didn't know what was going on**." 25T108-22 to 109-12 and "**I'm not sure. I don't know**…,"when PCR counsel asked, "**so you don't actually know that Willie was committing robberies, do you**? 25T109-15 to 17.

Thus, the record now shows that Johnson admits he either "***lied***…or is ***unsure of his recollection***" as to whether any robberies took place, the evidence this Court held would be necessary to vacate Mr. Tanner's conviction due to the undisclosed offer of leniency to Johnson. These issues are discussed at **Point III**, *infra.*

The second ground of inquiry ordered by this Court in 2016 concerned Johnson's diagnosis of "psychosis" at county jail on November 12, 2003 (Ca2), and later at University Behavioral Healthcare (UBHC), Ca100, Ca219 and Ca282, just a few weeks after his October 3, 2003 arrest and "confession." Johnson was supposed to remain in treatment until at least March 9, 2004, but he discontinued his treatment on December 10, 2003, against the wishes of his doctors. (Ca289-294). In its 2016 decision, this Court ordered the evidentiary hearing to evaluate the effect of Johnson's psychosis on his testimony and how that diagnosis could have impacted the jury's view of his credibility and reliability. (Da205-206).

At the evidentiary hearing, Kenneth Weiss, M.D., a well-known forensic psychiatrist at the University of Pennsylvania, testified in extensive detail as to his review of Johnson's UBHC records, Johnson's diagnosis at the psychiatric institution, his treatment and how psychosis would impair and affect Johnson's capacity to perceive reality and to testify freely and truthfully. *See generally* Volume 23T; *see also* 23T25-12 to 23T132-6.

Dr. Weiss's detailed report and testimony are discussed at **Point I**, *infra*. The State called no expert and Dr. Weiss's opinion is unrefuted.

A. ADDITIONAL *BRADY* VIOLATIONS DISCLOSED DURING THE PCR HEARINGS:

Multiple *Brady* violations going to the fundamental fairness of the Tanner trial were revealed for the first time during the evidentiary hearings, as follows:

1. Suppression of Dr. Krakoff's pre-trial report as to Johnson's psychiatric deficits (**Point II**);

2. Suppression of Johnson's February 7, 2006 pre-trial interview statement that Tanner did not wear or possess the "North Face" ski mask that was worn by the perpetrator, as seen in the crime scene videos (**Point IV**);

3. Suppression of Johnson's February 7, 2006 admission that he could not remember his own prior police statements and that the prosecutor had to reconstruct his memory ***two days before trial***, information not disclosed to

Tanner's counsel or to the jury (*see* **Point V**);

4. Prosecutor McKinney's admission and disclosure during her PCR testimony that she secretly provided a scripted set of prepared questions and answers to **all** prosecution witnesses to study before they testified and the discovery that the scripts provided materially misleading answers for at least two important witnesses: Johnson and Kaihala Staten (**Point VI**).

For economy of space, the facts as to such matters are addressed in this brief at the relevant point headings.

B. CERTAIN ERRORS BY THE PCR JUDGE

The PCR judge, the Hon. Benjamin S. Bucca, Jr., made several factual errors in deciding that there was *independent* evidence sufficient to convict Mr. Tanner, irrespective of the *Brad*y violations and newly-discovered evidence. (Da407).

These errors are briefly summarized below and will be discussed in detail in defendant's Reply Brief if the State persists in relying upon these in its merits brief:

1. **"Ski mask found *on the Defendant* that matched the style of the ski mask worn in the robberies."** (Da407) (Emphasis added). This is an error by the PCR judge. The ski mask was not "found *on* the Defendant." Although Officer Csizmar and Officer Rios claimed at trial they saw Tanner wearing the

North Face ski mask when they first went to arrest him, Csizmar's initial report filed the night of the arrest said nothing about seeing a North Face ski mask on Mr. Tanner. (Da393). The officers claim they "found" it, later, when they say they returned to the location where Defendant was arrested and searched the parking lot (3T217-14 to 218-1; 4T10-15 to 18; 4T60-25 to 61-14).

2. **"Recovery from the Defendant of a silver-plated revolver, which matched the revolver seen in the videos."** (Da407). This is also an error by the PCR judge. As indicated by the Appellate Division on direct appeal, the gun that police claim Defendant allegedly discarded shortly before he was arrested was a .25 caliber semi-automatic. (Da52). It was not a revolver, and it was ruled out by forensic experts as the weapon used in the Krauszer's robbery. *Id.* *See also* 3T212-1 to 6; 4T44-1 to 2; 4T144-2 to 4; 9T56-8 to 15.

3. "**Photos showed the Defendant having a scar in his mustache, which the Defendant had.**" (Da407). Although Mr. Tanner's arrest photograph showed that he has a scar in his mustache, there were no crime scene photos that showed the perpetrator with such a scar. Nor was there any such testimony at trial. It was prosecutor McKinney who falsely told the jury during her closing argument that a gas station attendant, Abdul Imran, saw a scar in the mustache of the perpetrator at one of the robberies. 11T132-13 to 17 and 11T142-9 to 12.

No witness ever testified that the perpetrator had a mustache scar nor did Mr. Imran. *See* 6T98 to 6T113 (Testimony of Abdul Imran). This assertion was made by the prosecutor in an effort to falsely implicate Mr. Tanner in the robbery. It is not clear why the PCR judge repeated this error but the attempt to link Mr. Tanner to the offenses via the "mustache scar" is false.

4. **"A shell casing found in the revolver seized from the Defendant matched the projectile that was found at the robbery which occurred at the Krauszers."** (Da407). As indicated above, the .25 caliber automatic recovered from the area where Defendant was arrested on October 2, 2003 was ruled out as the weapon used in the Krauser's robbery (Da52). This is an error by the PCR judge.

5. **"He admitted to his girlfriend of doing a really bad thing."** (Da407). This is a factual error by the PCR judge and omits the actual statement that Kaihala Staten made to the police. The "really bad thing" that Tanner called Kaihala about was **not** the shooting at Krauser's or any robbery. Kaihala told the police, as shown in her police interview transcript, that Mr. Tanner called her about a fight at a bus stop where Defendant said someone was stabbed. (Da245-248). Kaihala even told the police in the interview that she knew nothing about anyone getting "shot" or a robbery at a "Krauszer's." (Da246).

In an attempt to link this phone call to the Krauszer's shooting, prosecutor McKinney omitted the information that Tanner had called about a fight at a bus stop when she examined Staten in front of the jury at the 2006 trial. 28T21-18 to 22-11; 28T32-7 to 22; 28T34-5 to 8; 28T57-25 to 58-7; 28T59-24 to 60-1. These misleading answers were also included by prosecutor McKinney in the "script" McKinney prepared for Kaihala Staten *before* she testified in Mr. Tanner's trial. (Da241). *infra*. Although this false testimony came out in the original trial, it is neither true nor accurate and cannot be considered as "independent" evidence of guilt. The matter is addressed at Point VI, *infra*.

Defendant will address the above matters in his Reply Brief if the State continues to rely on these misstatements of fact in support of a claim that there is "independent" evidence of guilt.

ARGUMENT

POINT I

A REASONABLE PROBABILITY EXISTS THAT THE VERDICT WOULD HAVE BEEN DIFFERENT HAD THE JURY BEEN AWARE OF JOHNSON'S PSYCHOSIS AND THE IMPLICATIONS THIS DISEASE HAS FOR THE JURY'S ABILITY TO ASSESS THE RELIABILITY OF HIS TESTIMONY [Raised below at Da425-430]

In its 2016 remand order, this Court directed an evidentiary hearing to evaluate the mental state of Johnson and its likely effect on his reliability and credibility before the jury. (Da205-206). Johnson was undeniably the singular witness whose testimony "may well be determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972). At the 2006 trial, Johnson gave the critical testimony that he and Tanner agreed to commit armed robberies and that he drove Mr. Tanner to the alleged crime scenes to commit the robberies. 10T6-15 to 19; 10T6-20 to 24; 10T8-25 to 9-10; 10T21-23 to 22-6. Prosecutor McKinney acknowledged Johnson's central role in the case, telling the PCR court that Johnson was the "*only* eyewitness" who could testify that Tanner committed these offenses or could place him at the alleged crime scenes. 20T147-8 to 148-7. Similarly, Assistant Prosecutor Hamerslag told investigators, in a pre-trial memo, that convicting Tanner **depended on Johnson's testimony**: "[T]he success of prosecuting Tanner depends in very large part on the willingness and ability of

Johnson to cooperate and testify." (Da233).

Yet, unknown to Tanner, his defense counsel or the jury, only a few weeks after Johnson's "confession" on the night of October 3, 2003, this critical witness was diagnosed at UBHC, the Rutgers psychiatric institution in New Brunswick, with a severe and debilitating mental illness: "[p]sychosis meaning a severe disruption in a person's ability to understand and perceive reality." 23T25-12 to 13. Johnson was prescribed strong anti-psychotic medication and subjected to months of outpatient treatment following his inpatient commitment (Ca2, Ca131, Ca167, Ca199, Ca243 and Ca273).

It was to test the likely effect of such disease on Johnson's mental status that this Court in 2016 ordered the evidentiary hearing, acknowledging the "critical nature" of Johnson's testimony. (Da205-206).

At the evidentiary hearing, Dr. Weiss testified to a reasonable degree of medical certainty, "that at that time [of trial] in 2006 it is likely that [Johnson] would still have the condition diagnosed." 23T62-17 to 63-1, referring to Johnson's diagnosis of psychosis. Notably, the State called no expert to dispute Weiss testimony and his expert opinion went un-refuted.

Dr. Weiss pointed to important indicators in the clinical record which established that, despite treatment, Johnson's prognosis was poor and that the "trajectory of the psychotic illness is going toward getting worse." 23T49-3 to 17.

As a psychotic, Johnson's perception of reality would be impaired by his psychotic state: "[T]hose perceptions he formed let's say in his interactions with police and with medical professionals during the course of where his illness worsened would be imprinted on his memory and would have come out [in his testimony] as his own narrative." 23T79-25 to 80-8. In other words, the only expert who testified made it clear that Johnson did not have control over his own perceptions of reality and would repeat to the jury a narrative of events imparted by the police.

Dr. Weiss's testimony was not only undisputed, it is supported by the UBHC clinicians who noted in the clinical record, disclosed during PCR (but not known during the trial), that Johnson failed to achieve significant outcome from outpatient treatment, 23T113-20 to 114-4, and that Johnson's "reliability" was "poor" because his "reliability [was limited] by psychosis." (Ca67; Ca93; Ca162; Ca200; Ca211, Ca274; Ca294; 23T57-5 to 18; 23T58-22 to 59-3. In this vein, Weiss testified that Johnson's "discontinuation of the medication would be a reason that the condition continued into 2006," 23T64-3 to 5, and that Johnson's psychotic condition would have continued even if Johnson had intermittently took his medication because the "condition has to be treated consistently; otherwise, it doesn't have an affect" (23T64-14 to 15).

Weiss testified that all of his opinions in the case were expressed to a reasonable degree of medical certainty (23T79-22 to 24), that Johnson was diagnosed with a "severe disturbance," that his hospitalization indicated "a severe illness," that "it is *highly likely* that would have persisted" (23T82-17 to 23), and that it was "within reasonable medical certainty very unlikely" that Johnson's psychosis had resolved itself (23T85-9 to 15).

While Dr. Weiss did not interview or examine Johnson during PCR (that took place at least 12 years *after* the trial), he testified that his professional experience and knowledge allowed him to provide an expert analysis of the long-term effect of Johnson's diagnosis based on the clinical records and the nature of Johnson's illness. 23T127-25 to 128-25. Dr. Weiss made it clear that it was not necessary for him to interview Johnson many years after the fact to evaluate the likely state of this disease at the time of the trial. **No one refuted this opinion and no expert was called by the State to contradict Dr. Weiss's methodology**. Whatever disagreement the PCR judge may have with this viewpoint, it was not the place of the PCR court to substitute its own view of the proper methodological approach in place of the only expert who testified in the case. The State could certainly have called its own expert if there was a professional basis to dispute Weiss's methodology but it failed to do so.

Dr. Weiss gave comprehensive and uncontested testimony explaining the operation and effect of psychosis and how it would impact and impair the reliability of Johnson's testimony at trial. Weiss testified that a psychotic such as Johnson would be susceptible to suggestion and manipulation by police interrogators; that a psychotic will retain the police narrative as a false memory and consistently reiterate that narrative as his own; that such narrative would be imparted to Johnson through "leading questions" by police interrogators that would "cue" the psychotic's answers; that a psychotic cannot think abstractly or objectively on their own; that Johnson's disease was long-term and most likely did not resolve prior to the trial; and **to a reasonable degree of medical certainty** that the disease existed *before, during* and *after* his arrest. 23T27-18 to 24; 23T28-5 to 11; 23T28-17 to 23; 23T38-12 to 25; 23T39-11 to 21; 23T41-6 to 42-10; 23T49-18 to 52-1; 23T52-2 to 19; 23T53-18 to 23; 23T55-19 to 56-3; 23T58-22 to 59-3; 23T62-17 to 63-1; 23T75-1 to 13; 23T82-16 to 23; 23T85-9 to 15; 23T99-8 to 17; 23T102-1 to 105-23; 23T113-20 to 114-16.

The influence of psychosis on Johnson's ability to testify is manifest. Weiss testified that psychotics cannot "**access[] reality correctly**" and are highly **susceptible to suggestion and manipulation by police and prosecutors**; they **are likely to confess *against* their own judgment**; the psychotic will repeat **a version of events given to them by police in which the psychotic has no actual**

or objective belief:

> Suggestibility or susceptibility to manipulation by others would be increased in someone with psychosis because they're not thinking clearly and they cannot make their own decisions or interpret perceptions correctly. Therefore, such a person would take what is given to them without critical thinking capacity, and therefore they're more likely to be manipulated. 23T27-18 to 24.
>
> In the context of say a custodial interrogation an individual might accept facts without being able to appraise for themselves whether it's true or not and take it as factual when indeed they have no basis for it in reality, because they're not assessing reality correctly. 23T28-6 to 11; 23T28-17 to 23.

A psychotic such as Johnson will display an "acquiescence response" in which they yield to authority figures, display a lack of "critical thinking" and adopt "demand characteristics of the situation," meaning they internalize what they are told by authority figures, such as police interrogators:

> Someone with psychosis may not be able to think clearly, so they would have a tendency to latch on to what's perceived as the demand characteristics of the situation.
>
> Namely, if they perceive, for example, that a detective wants them to agree to something or to give a -- an affirmative response. That is -- that is to say yes to questions. Were you here at this time? Yes. Did you do this, did you do that? Yes, yes, I did. And they do it repeatedly in a pattern that doesn't involve critical thinking.
>
> The person with psychosis is lacking to a degree the capacity to think critically. By saying yes, yes, yes over and over again in a rote, mechanical way, which some individuals do in these situations, particularly those with mental illness, ***we have an acquiescence response, which overall diminishes the reliability of what they have to say.*** 23T33-8 to 25.

"Fear," Dr. Weiss said, enhances the degree to which a psychotic will be susceptible to suggestion by police interrogators. 23T35-6 to 15. Weiss testified that for a psychotic sleep deprivation while under interrogation by shifting teams of police on the night of October 2-3, 2003 (as Johnson experienced on the night of his "confession") would enhance the "acquiescence response" or "internalization" effect in the psychotic. 23T30-2 to 13; 23T43-17 to 44-17; 23T38-12 to 25.

For a psychotic faced with such conditions, "[l]eading questions would cue the individual as to what they're expected to say." 23T45-6 to 7. Weiss confirmed that leading questions "would create a reality that may be different from the reality truly known [to the psychotic]" and the psychotic's lack of capacity for "critical analysis" would cause leading questions to "be accepted as true and then recited back ***as if it were the person's own narrative,***" 23T45-18 to 25, what Weiss called the "internationalization" of a police narrative. 23T52-2 to 19; 23T38-12 to 25; 23T61-5 to 11. A psychotic will have "***locked into*** his memory" the facts imparted to him by interrogators. 23T52-2 to 19.

When asked about a clinical entry that Johnson's "reliability" was "poor" (Ca289), Weiss said this reflected the diagnosis at UBHC that his ability to speak coherently and to perceive reality, what he called the psychotic's "conceptual disorganization," was impaired:

> I don't have to speculate. It says in the next line "client reliability limited by," and it says "psychosis." So, that's what it means to me, it means that the psychosis -- the conceptual disorganization limits the client, namely Mr. Johnson's, ability to present his own narrative. That is to be an informant and to speak about his problems in living or his symptoms in a coherent and reliable manner. 23T57-11 to 18.

In view of this testimony, it is puzzling that the PCR court concluded that "Weiss never specifically identified any part of Johnson's trial testimony to demonstrate an example of how his testimony was impacted by a psychotic disorder" (Da427). To the contrary, Weiss pointed directly to the impact of Johnson's diagnosis on his trial testimony.

> "To the best of my recollection, Mr. Johnson was responsive to questions that in -- in my opinion were leading questions. In other words, there was information given to him to which he responded usually in one word, if I recall correctly, or often. So, I don't exactly call that a narrative." 23T98-9 to 14.

Weiss went on to explain that those leading questions and the resulting responses were an important indicator of the impact at trial of Johnson's diagnosis because, as Weiss pointed out, a witness with psychosis would be unlikely to "*initiate* their ***own*** narrative."

> "As I mentioned earlier, they would have a difficult time expressing their own views when faced with interrogation and the demand characteristics of say detectives and would be limited to making responses to questions ***rather than to initiate their own narrative.***" 23T61-5 to 11.[4]

[4] As noted by the PCR court, Tanner's trial attorney, Robert White, like Dr.

Without support from any witness, the PCR court rejected Dr. Weiss's opinion on the purported ground that Johnson could **not** be psychotic because he testified at trial "to a *consistent* narrative" and that if Johnson were truly psychotic "meaningful ***in***consistencies in his testimony would have emerged…," (Da427-Da428) (emphasis added). As discussed below, this conclusion by the PCR judge is wholly unsupported by any expert testimony and is directly contrary to what Dr. Weiss actually told the court.

First, no testimony appeared in the record that "inconsistencies" in a witness's testimony must emerge to demonstrate psychosis, as the trial judge suggested. Dr. Weiss never said a psychotic would demonstrate "meaningful inconsistencies" in his testimony nor did any other witness (since no other expert even testified). Second, Dr. Weiss clearly and specifically testified **to the opposite**: the psychotic *will* consistently repeat the narrative given to them by police that they will "internalize" and have "locked in" to their memory. 23T52-2 to 19; 23T61-5 to 11. The PCR judge is simply wrong in concluding that a

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Weiss, "also described Johnson's testimony as lacking detail and only responding to leading questions from AP McKinney" (Da413). As described in Point V, *infra*, the State's own investigator. Det. Duca, told the PCR court that Johnson could not remember his own police statements and had to be "re-directed" to those statements in order to testify, further demonstrating Weiss's point, 23T61-5 to 11, that a psychotic cannot "initiate their own narrative." *Id.* Duca testified on PCR that Johnson "didn't provide a narrative" during the meeting on February 7, 2006 (26T26-17 to 19). *See* Point V, *infra*.

psychotic person would be inherently inconsistent in their testimony, a claim not supported by Dr. Weiss or any other expert witness and that appears to be the PCR court's own, non-scientific opinion.

What Dr. Weiss said is that the psychotic witness cannot ***"initiate their own narrative.***" 23T61-5 to 11, or give their "***own*** **views** when faced with interrogation…" 23T61-5 to 11. Dr. Weiss clearly testified the psychotic witness **will** consistently repeat the narrative given by police that is "locked in" to their memory and "carried forward into his [trial] testimony," as if it were his own. 23T52-2 to 19; 23T61-5 to 11. No testimony supports the PCR judge's erroneous and contrary notion that psychosis naturally means "inconsistencies" and Dr. Weiss clearly said the opposite: the psychotic will repeat the narrative given by police and authority figures. By ruling as he did, Judge Bucca improperly substituted his own uninformed opinion about psychosis and how it operates for that of the only expert in the case. *Cf. State v. Rodia*, 132 N.J..L. 199, 203-204 (E & A 1941) (a judge may not assert his own "common knowledge against the testimony of the psychological and psychiatric experts.")

By holding in this manner, Judge Bucca also exceeded the task of the PCR judge. In its 2016 remand, this Court ordered the PCR court to determine if Johnson's psychosis "*could* have affected the outcome of the trial," (Da205), or, put another way, if it would have the "*probable* effect" of raising reasonable doubt.

State v. Ways, 180 N.J. 171, 189 (2004). Dr. Weiss's testimony meets this standard. While the PCR judge may personally disagree and take the view that Johnson was not psychotic, once the medical *bona fides* of the effect of psychosis on a witness have been shown via expert testimony, especially where it is un-refuted by any other expert, it is up to the jury on a re-trial to accept or reject the expert testimony, **not** the PCR judge.

Nor did Dr. Weiss conclude there was only a "possibility" that the perceptions Johnson formed during his interactions with police would be imprinted on his memory and adopted as his own narrative, as the PCR court mistakenly held (Da428). To the contrary, Dr. Weiss's conclusions were not a mere "possibility" but were expressed to "a reasonable degree of medical certainty," 23T79-7 to 80-8, in accord with *State v. Freeman*, 223 N.J. Super 92, 116 (App. Div. 1988). As Volume 23T shows, Dr. Weiss supported his opinion with extensive and comprehensive testimony.

Dr. Weiss testified from Johnson's own medical record that his psychosis would cause Johnson to suffer from "impaired" "abstract thinking," explaining a clinical note in the UBHC record as to Johnson's inability to "understand concepts," that he cannot practice "concrete" thinking, that his "insight" was "poor." That "he would know he was talking to somebody – let's say he knew he was talking to a detective, but he wouldn't understand that the detective was trying

say to get Mr. Tanner in trouble, is an example of that." 23T120-9 to 121-11.

Dr. Weiss added that a psychotic "would just understand at his level that he was doing what people in power wanted him to do," in other words not thinking for himself and not thinking independently. 23T121-23 to 122-8. In other words, Johnson as a psychotic would be unable to think beyond the present, would not understand the police were his adversary and were seeking to gain a confession against his own (and Tanner's) interests. As Dr. Krakoff concluded independently, but also unknown to Tanner's defense, *see* **Point II**, *infra*, such a witness could not knowingly "confess" or waive his *Miranda* rights.

Dr. Weiss testified Johnson had an "established" or *continuing* psychotic condition (not one that was "situational" or short-term as might arise from temporary incarceration in the county jail):

> "[T]he observations made by professionals [in December 2003] tells us that Mr. Johnson had an established psychotic illness, not one that was simply situational by virtue of being stressed at the jail. That would have gone away probably within days. But it shows that he had an established psychotic condition" 23T53-18 to 23.

Dr. Weiss explained that Johnson was psychotic when he confessed in October 2003 but that his condition only became visible while he was in the county jail in October and November 2003 as he lost access to the marijuana he was taking to mask the overt visible symptoms:

> Johnson, who is most likely, in my opinion, psychotic in early October [2003] as well, became much more symptomatic in the middle of November [referring to November, 2003 when Johnson was sent from the county jail to UBHC]." 23T51-19 to 23.
>
> [T]he emergence of psychotic symptoms usually indicates that those symptoms or the illness underlying it was present beforehand." 23T49-18 to 52-1.

As Dr. Weiss said in his report, "by removal of the drug," Mr. Johnson's underlying mental illness came to the forefront" (Ca301). In other words, Johnson was "psychotic in early October [2003]" when he made his "confession" but the symptoms only became noticeable to an outside observer as Johnson lost access to the marijuana that was masking the visible signs of the disease. 23T50-25 to 51-11.

From his review of the clinical record, Dr. Weiss concluded that Johnson had a continuing condition that would *not* resolve, as shown by Johnson's lack of insight, *i.e.*, his failure to adhere to treatment — Johnson missed all but two of his 12 scheduled intensive outpatient sessions. Against the advice of his doctors, Johnson completely discontinued treatment after December 10, 2003. 23T55-19 to 56-3; 23T75-1 to 13; 23T102-1 to 105-23.

> It's part of what was referred to as poor prognosis, that the combination of factors - namely, the partial response to medication, the patient's lack of motivation, and the patient's lack of insight confer a poor prognosis on the outcome of psychotherapy. 23T113-20 to 114-4.

Johnson's resumption of daily marijuana use, shown in the UBHC records, also reflected poorly on his prognosis, Dr. Weiss said, because he was "already not

compliant" with his treatment regimen; continued use of marijuana would *enhance* the psychotic's suggestibility and inability to perceive reality. 23T118-11 to 119-2; 23T31-4 to 8.

Dr. Weiss said the UBHC record shows, as of the last evaluation on 12/10/03, that Johnson had *not* emerged from his disease and wants to "break treatment for [] ***reasons other than medical ones***":

> It [the medical record] does not indicate that anyone believes he has emerged from the disease. They -- they place the emphasis on Mr. Johnson's wanting to break treatment ***for other reasons other than medical ones***. And the implications here in this document are that ***he has the underlying condition that he came in with and that he remains at risk for it becoming worse***. 23T58-22 to 59-3.

Dr. Weiss testified that Johnson's behavioral and personality traits, as recorded in the UBHC clinical record, are typical of individuals with ***long***-term "schizophrenia and related disorders such as psychosis." Johnson's speech was slow and underproductive; he was "guarded" and "evasive," he had a "blunted affect," he was "vague" and "overly abstract," and he had impaired concentration and attention. 23T106-7 to 110-17.

Weiss concluded that Johnson did **not** have a temporary condition but during and after treatment was "*still* psychotic…" *Id*. "[It] means that he's either going to stay sick or become sick again…[,]" an outcome "likely in terms of the natural history of this illness." 23T113-20 to 114-16.

Other important evidence of Johnson's long-term condition is that prior to breaking treatment Johnson was *still* being prescribed at UBHC a dosage of 5 mgs. of Abilify, as Dr. Weiss told the PCR court. 23T132-1 to 6. Abilify is an anti-psychotic used to treat the *continuing* symptoms of active schizophrenia or psychosis. 23T70-22 to 25. "[T]he point of prescribing Abilify…would be to reduce psychotic symptoms," 23T89-17 to 20, and it "***clearly…hadn't done so.***" 23T125-9 to 15. Johnson's condition was so serious that even when he "denied" symptoms, "three days later…the doctor ***increased the medication***,…" 23T90-1 to 91-12.

All of this contributed to Dr. Weiss's conclusion that Johnson had a poor prognosis for recovery and that his psychosis would likely have persisted when he testified at Tanner's trial, based on the "natural history of psychotic disorders" in which "**two-thirds of patients" "continue with the disease or it worsens**," as shown by Johnson's symptoms. 23T39-11 to 16; 23T41-6 to 42-10; 23T62-17 to 63-1. Dr. Weiss testified that Johnson was hospitalized with a "severe disturbance" and "it is highly likely that would have persisted." 23T82-17 to 23. Weiss testified that it was "within reasonable medical certainty very **un**likely to happen [that Johnson's psychosis had resolved itself]." 23T85-9 to 15.

No witness disputed these findings. No expert was called by the State.

Dr. Weiss rejected the State's suggestion on cross-examination that Johnson was healthy based on references in the UBHC medical notes that, at times, he was "fully oriented," "demure," could "smile and laugh," could "refocus" and communicate on a "social" basis. 23T86-23 to 87-16; 23T89-4 to 25. As Weiss put it, the psychotic patient may retain "*some* social skills" but is otherwise still psychotic: "not all functions of the human mind are affected in a psychotic state. One could still be as intelligent as they were before, one can still have some social skills. Some aspects of the mind are not affected very much." 23T89-21 to 25.

Dr. Weiss concluded to a reasonable degree of medical certainty that "Johnson had an established psychotic condition before, during, and after November of 2003," 23T99-8 to 17, that would adversely impact his ability to testify truthfully, of his own free will or to perceive reality and to resist police pressure to confess, evidence a jury would need to hear in evaluating the reliability and credibility of this "critical" witness.

This Court should read Dr. Weiss's testimony for itself and not defer to the PCR judge who did not hear or observe this expert testify and could only read the transcript of Dr. Weiss's testimony. The Court is respectfully referred to the entirety of Volume 23T for Dr. Weiss's complete opinion.

Tanner's defense counsel from the 2006 trial, Robert White, III, Esq., testified at PCR that he knew nothing of Johnson's mental illness or

hospitalization but that such information would have been important to his defense of Mr. Tanner. White said that information as to Johnson's psychotic state would have affected the ability of the jury to evaluate the reliability of Johnson's testimony: "whether or not he knew what he was doing, or even what he was saying possibly when he was giving information, or making admissions to the police or the Prosecutor" or "[whether] what he was saying could be given any weight due to his mental state." 24T9-23 to 10-14; 24T11-7 to 16; 24T11-21 to 25, 24T12-15 to 23.

White gave a sophisticated description of the use to which he would have put such expert testimony. 24T14-13 to 15-10. White said it would have been important for the jury to know that someone with psychosis would be susceptible to adopting views offered by police, instead of giving their *own* version of events:

> That … may be the most important thing, especially because if he was giving information, and being shown things, and simply acknowledging yes or no as the police presenting their case to him, and just asking him to confirm whether or not things they were saying they thought to be true were true. 24T15-17 to 16-5.

Even if Johnson had been taking medication when he testified at trial, White said that would **not** change his prior answers: it would be important for a jury to know that Johnson could *only* testify "on medication."

> If I had known that he was on medication, I would have pointed out, and folks, he's on drugs to be able to even get through this. Imagine what it must have been like when he was giving all this information to the police without the benefit of the narcotics.

24T38-4 to 16.

Now that he knew of Johnson's condition, White disagreed when asked whether the jury had everything they needed to decide if Johnson was a credible witness: "No. I – I wouldn't say they had – *they had everything I could give them* ... ***At that time*** ..." 24T47-11 to 23.

As did Dr. Weiss, White made the point that the State's examination of Johnson through "leading questions" would loom far more significantly with jurors once they learned that a psychotic such as Johnson was subject to suggestibility by authority figures and could not initiate his own narrative of events. 24T55-4 to 11.

In view of what he called the "circumstantial" nature of "all other evidence," White said the ability to use Johnson's mental illness to attack his credibility would have been fundamental to Tanner's defense:

> All other evidence including DNA, or masks, or what have you, are circumstantial evidence. A direct witness, if - especially - even a co-defendant, and a relative testifying directly as to personal knowledge as to participation in crimes, that's - that's going to usually be the anchor. 24T57-10 to 15.

As would any trial attorney, White made it clear in his PCR testimony that the entirety of the trial would be seen differently by the jury once it became aware of Johnson's psychiatric condition.

In its 2016 remand, this Court, relying on *State v. Henries,* held that a new trial should be granted where "evidence of the witness's 'mental disorders, the

substantial medication he was subjected to, and the probable effects of such disorders upon his cognitive abilities' *could* have affected the outcome of the trial." (Da205) (emphasis added). It was to determine if such standard could be met that the Court ordered the evidentiary hearing in 2016 as to Johnson's psychosis.

Now that the medical evidence has been heard (and it is undisputed since the State called no witness to refute Dr. Weiss), Johnson's psychiatric condition "would have the probable effect of raising a reasonable doubt as to the defendant's guilt …" *State v. Ways*, 180 N.J. 171, 189 (2004); *State v. Carter*, 85 N.J. 300, 314 (1981) (same). Obviously, the effects of psychosis on a "critical" witness "have *some* bearing on the claims being advanced,…" to meet the standard for a new trial. *Ways, supra* at 188 (2004) (emphasis added). Johnson, the "only eyewitness," was clearly the "linchpin upon which the verdict rested." *Henries* at 524; 530; 535-536. It is because the similarities are so compelling that this Court relied on *Henries* in its 2016 decision ordering the evidentiary hearing.

Judge Bucca erred as a matter of law in holding that Dr. Weiss failed to "demonstrate ***with specificity*** that Johnson's 2003 diagnosis did in fact have an impact on his ability to testify truthfully." (Da427)(emphasis added). The appropriate legal standard is not "specificity" but whether the new evidence "*could* have affected the outcome of the trial," as this Court held in 2016, *State v.*

Tanner, A-929-13T3 at 19 (Da205), or would have the "*probable* effect" of raising reasonable doubt. *State v. Ways*, *supra,* 180 N.J. at 189 (emphasis added). In any event, Dr. Weiss demonstrated "with specificity" that the condition Johnson suffered — psychosis — was directly relevant to the reliability and credibility of his testimony and he gave numerous examples of this effect, in extensive detail, so that if "specificity" was the standard, it would be satisfied.

Similarly, defendant was not required by the remand order to show that Johnson was "symptomatic" at the time of trial as the PCR court concluded. (Da427). Rather defendant was to demonstrate how "the probable effects of such disorders upon [Johnson's] cognitive abilities' could have affected the outcome of the trial." (Da205, citing *Henries* at 535). Dr. Weiss has done just that and explained in exquisite detail, summarized in this Point I and in his testimony at Volume 23T, how a psychotic is burdened and limited by their disease, how this affects their ability to perceive reality, how it makes them susceptible to coercion and manipulation and impairs their ability to testify truthfully, information any jury would want to know if the "only eyewitness" in the case was burdened by such a severe psychiatric disorder. For a jury to convict without knowing that the critical and singular "eyewitness" is burdened by such a disease, is a denial of due process and requires a new trial.

No reasonable dispute exists as to the admissibility of Johnson's psychosis and the resulting need for a new trial. As recognized in *Henries*, the witness's "mental history and psychiatric disorders relate…*directly to the focal issue of the trial*. . . ," *Henries*, at 531 (emphasis added), *i.e.*, whether Johnson could testify reliably and credibly that he and Tanner committed the robberies. "Evidence of mental illness or a disability which impairs a witness's ability to perceive, remember and narrate perceptions accurately *is invariably admissible to impeach credibility*. . ." *Wilson v. Beard*, 589 F.3d 651, 666 (3d Cir. 2009)(emphasis added). As *Henries* has said, "there could be no question but that [Tanner] would have had an absolute right to present such evidence and that a refusal to so permit would have required a reversal." *Henries* at 531.

Even if the newly discovered psychiatric evidence is limited to impeachment, this would *not* diminish its evidentiary value, as *Henries* held: "There is no reason to consider such evidence as any less relevant and material in the context of a newly discovered evidence motion simply because it may be cast in terms of impeachment evidence." *Henries* at 531. Indeed, the primary value of Johnson's psychosis *is* impeachment: to demonstrate his fundamental inability to testify reliably and truthfully.

Johnson's psychosis would also impair and weaken the jury's faith in police testimony as to statements supposedly made by Johnson (while in custody),

including the following: Tanner would tell him where to park and wait and that they got "money;" Tanner said he had "heat;" Tanner said, "let's get out of here, take me home," supposedly after returning from Krauszer's. 5T34-2 to 35-7; 6T69-1 to 3; 6T72-12 to 74-8; 6T69-23; 4T102-23 to 103-1; 8T36-1 to 7; 5T39-14 to 23. A jury would give such police testimony far greater scrutiny once it learns the statements came from a person — Johnson — whose psychotic disease impaired his ability to perceive reality and that he would acquiesce to police pressure to confess.

No merit lies in the claim raised by the State below that Johnson's psychosis is "merely cumulative." *Cf*., *State v. Carter, supra*, at 188-89. This argument was based on the State's belief that all parties agreed at trial that Johnson was "slow" but a vast gulf exists between lay descriptions of a witness who may be "slow" and a diagnosis of psychosis with all of the expert knowledge that such a diagnosis suggests and requires. Second, the jury in Tanner's trial was never told of Johnson's psychosis and both prosecutor *and* defense counsel said they were unaware of his condition. 21T:60-4 to 10; 24T9-23 to 10-14. Johnson's psychosis cannot be "cumulative" if *both* prosecutor and defense counsel were unaware of it and no psychiatric evidence came before the jury. Put another way, "no comparable evidence was offered at trial." *State v. Behn*, 375 N.J. Super. 409, 431 (App. Div. 2005). As such, the evidence of Johnson's impairment due to psychosis is *not* cumulative.

The PCR court also erred in holding that Tanner failed to diligently seek out information about Johnson's psychiatric condition prior to trial. (Da430). This was based on a statement by Johnson's sister, Wilona, who said in her PCR testimony that she thought the "family" knew Johnson had been hospitalized for a "breakdown." 22T43-12 to 16. In reaching this conclusion, the PCR court ignored Wilona's qualifying testimony that she was not in contact with Tanner at that time and had **no** knowledge as to whether anyone in the "family" actually spoke to Tanner about Johnson's "breakdown" or hospitalization." 22T44-15 to 48-19. There was simply no factual basis in Wilona's testimony (or from any other witness) to draw the conclusion that Tanner was personally made aware of Johnson's diagnosis of psychosis or his hospitalization prior to trial.[5]

In a puzzling reference, the PCR court somehow believed that Johnson's parents' involvement in his illness meant that Mr. Tanner must have been aware of the hospitalization. (Da429). No evidence exists to support this speculative conclusion — even if Johnson's parents were involved in his treatment, this does not mean that they, or anyone else, informed or involved Mr. Tanner. In fact, the clinical records at UBHC state that Johnson's parents had "little insight into his condition," 23T115-17 to 116-1, giving little reason to believe that Johnson's

[5] In fact, no evidence was presented below that Tanner knew about Johnson's hospitalization prior to March 2010, four years after the trial, as Tanner certified in his Petition filed the *next* month, hardly a lack of diligence. (Da74; Da139).

parents were communicating information to anyone, let alone Tanner who was sitting in prison awaiting trial.

Even if Tanner, a layperson sitting in the county jail, had heard of Johnson's "breakdown," this would hardly equate with knowledge of the impact on a witness of a deep-rooted psychiatric disturbance such as psychosis, as Dr. Weiss with his decades of medical experience testified. *Cf., State v. Solari*, 2021 N.J. Super. Unpub. LEXIS 756, *10 (App. Div., April 30, 2021) (where defendant police officer was expert in the "computer-assisted radio transmission equipment utilized at the time of trial," he had sufficient knowledge to request missing transmission records if he had acted with diligence).

This record simply does not support a finding of a lack of diligence that typically arises in cases where records and documentary evidence are equally available to both sides, not where the relevant issue depends upon expert knowledge and understanding. *See e.g. Matynska v. Fried*, 175 N.J. 51, 52 (2002) (medical records); *Johnston v. Muhlenberg Regional Medical Center*, 326 N.J. Super. 203, 206-07 (App. Div. 1999) (same); *Cardona v. Data Sys. Computer Ctr.*, 261 N.J. Super. 232, 235 (App. Div. 1992) (police report); *Younger v. Kracke*, 236 N.J. Super. 595, 601 (Law Div. 1989) (same).

Finally, the State itself has unclean hands on the issue, having *twice* failed to disclose Johnson's psychiatric condition to Tanner's counsel, as the PCR record

now demonstrates. *First*, the PCR hearings disclosed that more than a year before trial the State concealed psychologist Peter Krakoff's report that Johnson's cognitive deficits were so severe he "**probably didn't understand *Miranda,* police, *et cetera"*** and "**will overborne**." 30T10-4 to 18. The suppression of this evidence and its significance is discussed in detail at **Point II**, *infra.*

Second, Wilona Johnson testified that she told prosecutor McKinney *before* the trial that Johnson "had a nervous breakdown" and was taken "from the jail when we picked him up…to UMDNJ, where he spent - [] a few weeks there." 22T19-18 to 20-1; 22T34-9 to 22. Wilona was in "no doubt at all" this conversation with McKinney took place "before" the Tanner trial. 22T19-15 to 20-19. McKinney was later recalled to the stand by the State on three dates but was not asked about the conversation with Wilona nor did she deny it took place.

Having *twice* failed to disclose Johnson's condition, the State cannot now seek to bar Dr. Weiss's evidence due to a claimed "lack of diligence" by Mr. Tanner. *State v. Taliaferro*, 2014 N.J. Super. Unpub. LEXIS 2818, *7-9 (App. Div., Dec. 5, 2014)("The defendant need not demonstrate that he acted with diligence to discover what the prosecutor should have disclosed…").

Based on the foregoing, the PCR judge erred as a matter of law in rejecting undisputed psychiatric evidence and a reasonable probability exists that the verdict would have been different had the jury been aware of Johnson's condition and a

new trial should be ordered.

POINT II

THE PROSECUTION FAILED TO DISCLOSE *BRADY* MATERIAL CONSISTING OF A PSYCHOLOGIST'S REPORT THAT JOHNSON HAD SUCH COGNITIVE DEFICITS THAT HE WOULD NOT UNDERSTAND HIS *MIRANDA* RIGHTS AND "WILL OVERBORNE" TO POLICE PRESSURE TO CONFESS [Raised below at Da436-438]

Unknown to Mr. Tanner and his defense counsel, more than a year *before trial,* Dr. Peter Krakoff, a New Brunswick psychologist, examined Johnson in September 2004 and reported to Johnson's counsel (who informed the court and the prosecutor) that Johnson had such severe cognitive deficits and was "**so slow**" he "**probably didn't understand Miranda, police, et cetera…**" "**and will overborne,**" meaning Johnson could not resist police pressure to confess. A note of Dr. Krakoff's oral report was placed into the prosecution file by Assistant Prosecutor Hamerslag (Da236) but was not disclosed to Tanner's defense counsel until ***twelve years after the trial*** when it was ordered turned over to the defense by then-PCR Judge Rivas (Da230-231).

Vacating the conviction is now mandatory under *Brady*. The record **now** contains the evidence this Court found to be missing in its 2016 decision as to whether prosecutors had knowledge of Johnson's mental deficits and failed to disclose it to Tanner's defense counsel. (Da204-206). Alternately, the Krakoff

report is newly-discovered evidence and the conviction must be vacated for reasons similar to those as to Johnson's psychosis, discussed at **Point I**, *supra*.

The issue of the Krakoff report originated more than a year before trial at a status conference on August 30, 2004 where Johnson's then-attorney, Darryl Saunders, Esq., told the court he wanted to have Johnson "examined" to determine if Johnson was "suggestible" or "able to be manipulated." 30T7-23 to 9-20. Mr. Tanner's lawyer, Robert White, was present at that first conference but there was no diagnosis at that time since Johnson had not yet been examined.

Five weeks later, at a second conference on October 4, 2004 (where Tanner and his lawyer were **not** present), Mr. Saunders placed Dr. Krakoff's oral report of his examination of Johnson on the record. 30T10-4 to 18; 30T12-11 to 13-2; 30T16-12 to 16. AP Hamerslag recorded the report in his Administrative Note (Da236) and read out the note during his PCR testimony:

> "Darryl," meaning Darryl Saunders, "says he has had the defendant examined by Dr. Krakoff, **who says the defendant is so slow, he probably didn't understand" -- parentheses -- "Miranda, police, et cetera" -- question mark, closed parentheses -- "and will overborne." That means his will was overborne.** "Report to follow." 30T10-4 to 18; 30T16-12 to 16

Concealment of this report was a *Brady* violation and goes directly to a core issue in the case — the credibility of the state's primary witness, Johnson, and whether he was even capable of making a voluntary confession. Dr. Krakoff's conclusion that Johnson had such cognitive deficits that he could not waive his

Miranda rights and that his will would be "overborne" would be essential to any jury evaluating the credibility of Johnson's testimony and his "voluntary" confession. It should have been reported under *Brady* but was suppressed.

AP Hamerslag's concealment of the Krakoff report was almost certainly intentional. Hamerslag testified at PCR that "regarding the psychiatric issue…it was **not** my responsibility as the prosecutor" to notify defense counsel:

> Q. If you had had a conversation with Mr. Tanner's attorney about Saunders seeking the psych exam or about the results of any exam, would you noted that in your notes?
>
> A. A conversation with Mr. Tanner's attorney, you said?
>
> Q. Yes, that's my question.
>
> A. I'm not -- I can't be sure. **My feeling though, regarding the psychiatric issue, was it was not my responsibility as the prosecutor to keep the co-defendant updated on everything.** That would be a matter -- if a report was received, then that attorney or the judge would make the call on who else gets it. 30T25-6 to 18.

Not only is this constitutionally incorrect under *Brady* but New Jersey law imposes on a prosecutor an even broader "duty… to produce or offer to the defendant *whatever it has that could help him*." S*tate v. Tate*, 47 N.J. 352, 356 (1966) (emphasis added). AP Hamerslag admitted at PCR that he knew a psychologist had examined Johnson and concluded that he was so cognitively deprived that he could not resist pressure to confess, yet Hamerslag kept this information from Tanner's attorney. AP McKinney, who took over the case from

AP Hamerslag, admitted that the duty to disclose under *Brady* was not limited to formal reports and *would* cover Dr. Krakoff's oral diagnosis. 20T149-19 to 22.

While Tanner's defense lawyer, Robert White, was certainly ineffective in his own right for failing to ask Saunders (after the *first* conference in August) about the results of his search for an expert, **it is the prosecutor** who has the "duty…to produce or offer to the defendant ***whatever it has that could help him***," *State v. Tate*, *supra,* 47 N.J. at 356 (emphasis added). Regardless of White's ineffectiveness, the prosecutor (along with the court) is the gatekeeper of the defendant's due process rights and has the primary duty of disclosure. Yet, neither AP Hamerslag, nor Judge Mulvihill who was presiding over the conference and heard the Krakoff diagnosis (and was later Tanner's trial judge), troubled themselves to inform Tanner's counsel.

McKinney acknowledged her own negligence in failing to read Hamerslag's Administrative Note once she took over the case, saying "**I just didn't read this. I know that's big, but I just – didn't read it**." 20T142-8-9. McKinney attempted to justify her neglect by claiming that AP Hamerslag's notes from the Johnson file were not in the two boxes she was given to prepare for Tanner's trial:

> "I had two boxes that I had to go through and I had a relatively short period of time to do it." 20T50-13 to 14. *See also* 20T50-6 to 11; 20T53-19 to 21; 20T55-21 to 23; 27T71-15 to 18; 27T72-18 to 20; 27T73-10 to 17; 27T77-1 to 6; 21T90-11 to 12; 21T94-22 to 95-6.

McKinney's claim of *time constraints* does not excuse her failure to disclose such information. McKinney was assigned the Tanner case in August 2005 and it did not go to trial until January 2006, *nearly five months later*, plenty of time to review the complete file. McKinney admitted the Tanner and Johnson files were kept together for purposes of PCR and that she readily found Hamerslag's note on the Friday before her PCR testimony. 20T49-24 to 50-6; 20T140-1 to 4; 21T88-11 to 22. No explanation is offered as to why McKinney so easily found the Hamerslag notes ***14 years after the trial***, but could not do so in the five months ***prior to trial***.

Even if McKinney had not been given the boxes with Hamerslag's notes when she took over the case, this would still not excuse the *Brady* violation. For *Brady* purposes, "[t]he prosecutor is charged with knowledge of evidence in h[er] file." *State v. Brown*, 236 N.J. 497, 520 (2019), *quoting United States v. Agurs*, 427 U.S. 97, 110 (1976). It follows that if McKinney's conduct is negligence rather than intentional non-disclosure, *Brady* and *Tate* were still violated. "[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999).

In its PCR testimony, the State effectively conceded the *Brady* violation. AP McKinney agreed that the Krakoff report was material to Tanner's defense and if

she had known of the report she would have gathered more information about cognitive issues affecting Johnson and turned that over to Tanner's counsel. 27T75-10 to 23; 20T133-8 to 135-10; 27T89-1 to 5. McKinney agreed the State was obligated to turn over information about the mental health of its witness. 20T136-24 to 137-3. McKinney also agreed that Dr. Krakoff's notes were important to Tanner's defense since Johnson was the "***only"*** witness who could provide direct evidence of the State's theory that he and Tanner conspired to commit robberies. 20T147-10 to 22.

No authority holds that Tanner, as a co-defendant, would not have been entitled to pay for Dr. Krakoff's written report and call Dr. Krakoff as a witness to challenge Johnson's credibility. Even without the written report, Tanner's trial counsel could have demanded Dr. Krakoff's examination notes, reviewed them and then called Krakoff as a witness. No privilege would have barred Tanner's use of the Krakoff report (oral or written) since any privilege was waived when Johnson's attorney disclosed Krakoff's findings to the trial court and the prosecutor in the October 4, 2004 conference. *In re Grand Jury Subpoena Issued to Galasso*, 389 N.J. Super. 281 (App. Div. 2006) (privilege waived where counsel intentionally makes disclosure to the State). Tanner could not use this material for the simple reason that the Krakoff report was suppressed by the State.

Dr. Krakoff's findings would have been critical to the jury's evaluation of whether Johnson could testify of his own free will or was "overborne" by police pressure to confess (and incriminate Tanner). Whether a witness's "will [is] overborne" is "the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice…" *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). Dr. Krakoff's testimony would have been material to a jury's consideration as to whether Johnson could make a "free and unconstrained choice [to confess]," *id*., but, instead, it was concealed and never disclosed to Tanner's counsel.

Accordingly, this vital credibility challenge was lost to Mr. Tanner, requiring the conviction be vacated on both *Brady* and newly-discovered evidence grounds.

POINT III

A NEW TRIAL IS REQUIRED BECAUSE JOHNSON ADMITTED DURING THE PCR HEARINGS THAT HIS TRIAL TESTIMONY THAT HE AND TANNER AGREED TO COMMIT ROBBERIES WAS NOT TRUE AND HE DOES NOT KNOW IF ANY ROBBERIES WERE COMMITTED [Raised below at Da430-436]

During his PCR testimony Johnson admitted that his testimony at Tanner's trial that he and Tanner agreed to commit the robberies was false. 22T56-23 to 57-8. Johnson went further and told the PCR Court that he actually had no knowledge that Tanner had committed any robberies. 25T109-15 to 17. These admissions are

directly contrary to Johnson's trial testimony where he confirmed repeatedly before the jury that he and Tanner agreed to and committed the robberies. 10T6-15 to 19; 10T6-20 to 24; 10T8-25 to 9-10; 10T21-23 to 22-6.

In addition, discovery revealed only during PCR shows that Johnson made similar comments when he was sent to the psychiatric hospital in November 2003 where he told his physicians that he did not know *why* he was arrested and that he was unsure if any robberies had been committed. 23T111-6 to 12; 23T123-13 to 124-15. *See also* Ca111-112.

Johnson's testimony and his UBHC records are newly-discovered evidence that directly contradict his trial testimony and require a new trial. *State v. Ways*, 180 N.J. 171, 189 (2004).

Johnson's admission that his original trial testimony was false occurred on February 16, 2018, when Johnson told the PCR Court (after a long set of answers explaining his understanding of the undisclosed pre-trial leniency) that his testimony at the original trial was not true and that he had not agreed with Mr. Tanner to commit robberies:

> Q. **At the trial you testified that you agreed with Willie to commit robberies by dropping Willie at different places to commit robberies. Do you remember that testimony?**
>
> **A. Yes.**
>
> **Q. Was that testimony true?**

A. No.

Q. Was it true that you agreed with Willie to commit these robberies?

A. No.

Q. Was it true that you –

22T56-23 to 57-8 (emphasis added).

At this very moment, Johnson was immediately interrupted and not permitted to continue by Judge Rivas (then sitting as PCR judge before his recusal). Judge Rivas stopped counsel — literally in mid-sentence — from further questioning because, he said, Johnson is "admitting to perjury." Judge Rivas added (again, in front of the witness) that Johnson "should get a lawyer,...because at this point he's admitting to lying. So, He's either lying then or lying now." 22T57-9 to 59-10. Judge Rivas considered Johnson's admission to "lying" to be so important he would not permit the examination to continue unless Johnson retained counsel.

Nearly two years passed before Johnson resumed the PCR stand. *At first*, Johnson appeared to *reverse* his recantation when he answered "yes" to the prosecutor's questions on cross-examination as to whether he had told the truth at the original trial. 25T24-13 to 26-2 and 25T27-21 to 22. However, on re-direct examination by PCR counsel Johnson stated that he did not know — **"I'm not sure. I don't know" —** when asked if Willie Tanner had been committing any robberies. 25T109-15 to 17.

This critical admission occurred when Johnson was asked if he recalled telling the PCR court two years earlier that his testimony at the original trial was false. Johnson responded that he did not "recall" his PCR testimony from two years earlier but added this significant explanation: "Unless I. . .was saying that **I didn't know what was going on**." 25T108-22 to 109-12. When PCR counsel followed up and asked: **"so you don't actually know that Willie was committing robberies, do you?,"** Johnson replied: "**I'm not sure. I don't know…**" 25T109-15 to 17.

The PCR hearings also demonstrated that Johnson made similar statements seventeen (17) years *earlier* in November 2003 to the medical staff at UBHC where he was admitted straight from the county jail due to his psychotic symptoms. The UBHC clinical note dated "11/19/03" states that "in describing charges **he [Johnson] said he's very confused about it all in terms of any robbery**." 23T111-6 to 12. The UBHC record also reports Johnson was "**unable to clearly state what, if anything, he did to warrant arrest and imprisonment**…", 23T123-13 to 124-15, and that Johnson was "**very unclear about it all, says he is confused about it all.**" *See also* Ca111. As a result of the discovery of the UBHC records, it is *now* known that once he is at the hospital ***and outside of police control***, Johnson expresses confusion and doubt as to whether *any* robberies were committed or *why* he was even arrested.

Johnson's admissions at PCR (and in the UBHC clinical records) contradict his testimony at the Tanner trial where he was repeatedly asked to confirm in front of the jury that he and Tanner agreed to and did commit the robberies. 10T6-15 to 19; 10T6-20 to 24; 10T8-25 to 9-10; 10T21-23 to 22-6. Contrary to claims made by the State below, Johnson's trial testimony was not "limited" to saying that he drove Tanner to different locations but, rather, Johnson affirmatively stated to the jury that he and Tanner planned and agreed to the robberies. *Id*.

Johnson's newly-discovered PCR testimony denying knowledge of any robberies, and his nearly identical admissions to the medical staff at UBHC, is a direct contradiction of his trial testimony and is "evidence [that] would shake the very foundation of the State's case and almost certainly alter the earlier jury verdict." *State v. Ways*, 180 N.J. 171, 189 (2004). This is especially so considering the effect of Johnson's psychosis and cognitive deficits that the jury would now hear, as discussed in Points I and II, *supra.*

Standing on their own as newly-discovered evidence, Johnson's recantation and denial of knowledge of any robberies (and his UBHC statements) require vacating the conviction and ordering a new trial. In addition, Johnson has now admitted that he either "***lied*** about the critical testimony regarding defendant's participation in the crimes, ***or that he was unsure of his recollection,***" the very evidence this Court sought in its 2016 remand order to determine whether to vacate

the conviction due to the effect of the prosecution's undisclosed offer of early release. (Da205) (emphasis added)

In the 2016 remand decision, this Court recognized that AP McKinney failed to deny or refute Johnson's claims that she made a promise of early release if he testified against Tanner. (Da205). During the initial PCR proceeding in the Law Division and on the first PCR appeal, AP McKinney and the State never denied or disputed Johnson's filed certification in which he recited AP McKinney's pre-trial promise of early release after six months. Even at oral argument on the first appeal, as this Court noted, when directly asked by the appellate panel the State refused to deny Johnson's allegations. (Da205).

However, this Court declined at that time to vacate outright Tanner's conviction under *Brady* because the record (as of 2016) did not yet show that Johnson admitted he "***lied*** about the critical testimony regarding [Tanner's] participation in the crimes, ***or that he was unsure of his recollection***." (Da205) (emphasis added). It was, in part, to test such issue that this Court ordered the evidentiary hearing. As shown above, that evidence has now been produced and the judgment should be vacated.

No serious doubt should exist based on the PCR record that a promise of early release to Johnson was made by McKinney *before* Johnson's testimony at the Tanner trial. Johnson's own attorney at the time, Darryl Saunders, testified in the

PCR hearings that the leniency was offered "**in advance**," "***prior* to the time Mr. Johnson testified**" and consisted of an offer of "credit" for what was called *in-patient drug treatment* against Johnson's three-year term. 29T178-8 to 22; 29T191-18 to 24; 29T198-2 to 7. Saunders even confirmed his earlier text message to PCR counsel that this was a "secret deal" and "WAS preplanned." 29T157-16 to 24 (upper case in Saunders's original; Da389). Thus, no dispute exists that a pre-trial leniency was offered to Johnson *before* his testimony at the Tanner trial.

Judge Bucca rejected this evidence as a basis for PCR relief, not because he did not accept Saunders's testimony but because he concluded that the difference between serving three years in a state penitentiary and credit off the sentence for time in drug treatment was not "material" under *Brady*. (Da433). This is legal error. Materiality under *Brady* is nothing more than "a *reasonable* probability that had the evidence been disclosed to the defense the result of the proceeding would have been different." *State v. Knight*, 283 N.J. Super. 98, 120 (App. Div. 1995) (emphasis added), *citing* and *quoting United States v. Bagley,* 473 *U.S.* at 682, 105 *S.Ct.* at 3383, 87 *L. Ed.2d* at 494. A "reasonable probability" is simply one that is "sufficient to undermine confidence in the outcome." *Knight, supra, quoting State v. Landano*, 271 N.J. Super. 1, 36 (App. Div. 1994).

McKinney's offer of credit off a three-year state prison sentence in exchange for drug treatment, as Saunders testified, satisfies this standard. "Evidence that

government witnesses have been granted immunity and/or leniency for their cooperation is clearly relevant on the issue of their credibility." *United States v. Higgs*, 713 F.2d 39, 43 (3d Cir. 1983). "[E]vidence of *any* understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility." *Giglio*, 405 U.S. at 155 (emphasis added). Where the leniency is concealed, "[a] new trial is required if 'the false testimony could...*in any reasonable likelihood* have affected the judgment of the jury…'" *Giglio* at 154, quoting *Napue* at 271 (emphasis added).[6]

Any juror would have wanted to know that the State's "only eyewitness" had a hidden incentive to testify in the form of a promised reduction of their state prison sentence for time spent in "drug" treatment. To any reasonable person, it is vastly more favorable to spend one's sentence (or a part thereof) in a drug treatment program than to serve a full state prison sentence with all of the burdens, restrictions, disparagement and dangers of prison life.

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[6] Any promise of leniency must be disclosed to the defense when the "reliability of a given witness may well be determinative of guilt or innocence." *Giglio v. United States*, *supra*, 405 U.S. at 154, *quoting Napue v. Illinois*, 360 U.S. 264, 269 (1959). "[T]he State must disclose any promise of favorable treatment or leniency offered to a witness…" *State v. Hernandez,* 225 N.J. 451, 463 (2016)*, citing State v. Long*, 119 N.J. 439, 489 (1990); *see also State v. Landano*, 271 N.J. Super. 1, 41 (App. Div. 1994) (same). A promise of "credit" against a state prison sentence for "drug treatment" more than satisfies the requirement to disclose "*any* promise of favorable treatment or leniency," *Hernandez, supra*.

Johnson's release after six months time served is more akin to a disorderly persons offense, such as repeat shoplifting (it *is* the penalty for repeat shoplifting), not the conspiracy to commit armed robbery to which Johnson pled. The pledge of *credit* for drug treatment that resulted in this extraordinary leniency is, therefore, an inducement to testify that should have been disclosed under *Brady, Giglio*, *Landano* and *Tate.* As Johnson's attorney told the PCR court, "My client got a great result," 29T167-8 to 10, demonstrating the materiality of the prosecution's promise of leniency.

The PCR court's decision that such promise is not "material" breaches precedent. *Landano* recognizes that **any** undisclosed benefit to the cooperating witness, even a "*possible* interest" that could affect his willingness to lie or mislead will trigger *Brady* obligations. *Landano*, 271 N.J. Super. at 41(emphasis added). For example, in *State v. Knight*, the prosecutor's failure to disclose a mere promise to speak favorably for a cooperating witness was held to violate *Brady* where it resulted in the witness's serving less than her 364-day county sentence, *a far smaller leniency than Johnson's two- and one-half-year reduction. State v. Knight, supra,* 283 N.J. Super. at 120-121.

If the mere promise in *Knight* to speak *favorably* for the witness violated *Brady*, it follows that a pledge by the prosecutor to give "credit" off a state prison term for drug treatment is equally or more constitutionally egregious. *See also*

State v. Spano, 69 N.J. 231, 234-236 (1976) (prosecutor's undisclosed plea negotiations with a cooperating witness gave the witness a motive to mislead to gain the benefit of the plea deal, requiring the conviction be vacated).

As in these cases, Johnson, too, had a hidden motive to mislead. If Johnson did not testify favorably for the State his undisclosed promise of "credit" off his sentence for "drug treatment" may not have materialized, giving Johnson a natural incentive to mislead the jury or falsify his testimony. "The exposure of a witness' motivation to testify is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Where the witness's motivation to testify is concealed, the injury to the defendant's "right to effective cross-examination . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis, supra,* 415 U.S. at 318.[7]

[7] New Jersey cases hold that *any* agreement or understanding in which the State has a "hold" over a witness that might prompt the witness to color his testimony must be disclosed. *State v. Parsons*, 341 N.J. Super. 448, 458-459 (App. Div. 2001); *see also State v. Holmes*, 290 N.J. Super. 302, 312 (App. Div. 1996). Even without an express agreement a witness may have a motive to curry favor with the State and "[t]he defense must have the opportunity to probe the witness's self-interested belief in that respect." *Parsons, supra, citing Holmes* at 313; *State v. Mazur*, 158 N.J. Super. 89, 104-05 (App. Div. 1978); *State v. Sugar*, 100 N.J. 214, 230-31 (1985); *State v. Taylor*, 49 N.J. 440, 447-48 (1967); *State v. Pontery*, 19 N.J. 457, 472 (1955); *State v. Rodriguez*, 262 N.J. Super. 564, 570-71 (App. Div. 1993); *State v. Ortiz*, 202 N.J. Super. 233, 244 (App. Div. 1985); *State v. Blue*, 124 N.J. Super. 276, 282-83 (App.Div.1973); *State v. Zwillman*, 112 N.J. Super.

Even if McKinney did not make the actual offer of a reduction to six months time served until ***after*** Johnson testified, as she claimed at the hearing, 20T30-4 to 33-8; 20T90-3 to 8; 27T103-22 to 104-1, this would not cure the constitutional violation since, as Saunders made clear, the promise of leniency had *already* been made in the form of credit off Johnson' three-year sentence for what was euphemistically call "drug" treatment. As attorney Saunders candidly admitted in his PCR testimony, that pledge was made *before* Johnson's testimony, i.e., "**in advance**," "***prior* to the time Mr. Johnson testified**," 29T178-8 to 22; 29T191-18 to 24; 29T198-2 to 7, and violated Mr. Tanner's due process rights.

Thus, the record on PCR demonstrates that the prosecutor made an undisclosed *pre*-trial offer of leniency to Johnson that violates *Brady*, *Giglio*, *Landano* and *Tate*, depriving Mr. Tanner of due process and a fair trial and requiring that the judgment of conviction be vacated and/or re-trial barred due to prosecutorial misconduct.[8]

6, 18-19 (App. Div. 1970); *State v. Smith*, 101 N.J. Super. 10, 13-14 (App. Div. 1968).

[8] Both Johnson and his sister, Wilona, testified that AP McKinney made the promise of release after six months' time served *before* Johnson testified at the Tanner trial. *See e.g.* 22T55-12 to 56-22 (Johnson's testimony); 22T17-24 to 19-4; 22T28-9 to 20; 22T40-9 to 12 (Wilona's testimony). As noted above, McKinney claimed she made the offer of six months' time served only after the trial, three weeks later at Johnson's sentence. 20T30-4 to 33-8; 20T90-3 to 8; 27T103-22 to 104-1. But this Court need not wrestle with the question of whether

POINT IV

THE STATE VIOLATED *BRADY* BY CONCEALING JOHNSON'S PRE-TRIAL STATEMENT THAT TANNER NEVER HAD THE NORTH FACE SKI MASK THAT WAS SEEN AND WORN IN THE CRIME SCENE VIDEOS [Raised below at Da226; Da228; Da439-440; 21T119-19 to 120-2]

Just two days before Johnson testified against Tanner, the State suppressed Johnson's February 7, 2006 statement to the prosecutor that Tanner never had the North Face ski mask that the prosecution claimed was worn by the perpetrator at the crime scenes and that he had never seen such a hat with Tanner. This was a major exculpatory statement but was suppressed by the prosecutor until it was disclosed during the evidentiary hearings, **more than 12 years after the trial!** Had it been timely disclosed, Johnson's suppressed statement would have been powerful evidence for Tanner's acquittal.

An overriding theme of the prosecution's case at the 2006 trial was its intense effort to link Tanner to a North Face ski mask that matched the mask seen in the crime scene videos. McKinney admitted at PCR that the State's strategy was to "connect[] the mask to Mr. Tanner through DNA evidence" and then show that "a similar mask. . . .was worn by the persons who perpetrated these robberies as

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Johnson and Wilona or McKinney are correct, since it is undisputed as a result of Saunders's testimony that the pledge of credit off Johnson's three-year sentence for drug treatment was made *before* Johnson's testified, a clear and indisputable *Brady* violation.

shown on the video." 29T50-3 to 17.[9]

To this end, eight witnesses were called by the state — six officers and two forensics experts.[10] AP McKinney addressed the North Face ski mask in her opening statement, 3T162-13 to 14; 3T171-9 to 12, and in her closing, even telling jurors the North Face ski mask was among the reasons they should find Tanner guilty. 11T133-7 to 11; 11T139-23 to 140-1; 11T168-10 to 14. Attempting to prove Mr. Tanner owned or possessed a North Face ski mask was fundamental to the State's attempt to link Tanner to the North Face robberies.

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[9] It should be noted that no DNA was ever found at the crime scenes to link Mr. Tanner to the offenses. The "DNA" was only offered by the State to support its claim that Mr. Tanner possessed a North Face ski mask similar to that worn by the perpetrator. McKinney herself confirmed to the PCR court that there was no "DNA evidence [] to connect the mask to the robbers themselves." 29T48-1 to 7. Johnson's suppressed statement denying that Tanner had such a hat, as described in this Point IV, would now raise reasonable doubt over the State's claim that Tanner owned or possessed a North Face mask.

[10] Four officers testified that crime scene videos showed the perpetrator(s) of the robberies wore a North Face mask (6T74-16 to 19) (Detective Shannon); (8T8-9 to 11) (Detective Braun); (9T118-19 to 20) (Det. Duffy); (9T113-6 to 10) and (9T118-19 to 20) (Officer Mintchwarner); (8T15-22 to 23) and (8T19-5 to 15) (Det. Braun); two officers testified that a North Face mask was recovered hours later at the spot where Tanner had been arrested (3T217-14 to 218-1; 4T10-15 to 18; 4T60-25 to 61-14) (Officers Csizmar and Rios); Csizmar testified that he could see Mr. Tanner wearing a "North Face" knit cap when he was arrested; Csizmar was asked in front of jurors to identify the North Face mask he supposedly recovered sometime *after* he returned to the scene where Tanner had been arrested earlier (3T200-1 to 5; 3T217-14 to 218-1). Tanner always denied having a North Face ski mask and testified he was wearing "a black jacket, a blue hat, a white t-shirt, and blue jeans, and boots." 11T19-18 to 20.

However, McKinney suppressed Johnson's February 7, 2006 pre-trial interview, *just two days before Johnson testified*, in which Johnson said he **never** saw Tanner with a North Face ski mask and that Tanner had an entirely ***different hat***, made of ***different material*** and that he saw **no logo or emblem** on Tanner's headgear. Johnson's statement was preserved in the State's notes of the February 7, 2006 meeting (Da226, Da228) that were read into the record at the PCR hearing. 26T25-9 to 26-24; 26T27-5 to 23.

The notes, taken by the prosecution's investigator, Detective Karleen Duca, are clear, specific and unambiguous. Det. Duca wrote that when presented with a photograph of the North Face ski mask (allegedly found by police at the place where Tanner was arrested), Johnson denied outright ever seeing it. Duca wrote that Johnson said: **"did not think that it [the hat] was that material,"** that Tanner's hat was a **"stocking cap thing, black on head. Never noticed an emblem or anything"** (Da226); "**as far as the hat, he didn't see North Face,**" "**doesn't think that material - didn't see North Face;**" **"he did not see a North Face emblem,"** "(Da228) (emphasis added); 26T25-9 to 26-24; 26T27-5 to 23. This was never disclosed to Tanner's defense counsel even though it directly refuted a central component of the State's case, *i.e.*, that Tanner had the North Face ski mask seen in the crime scene videos.

Det. Duca candidly told the PCR court that AP McKinney suppressed this statement and that it was McKinney's decision to make no report of Johnson's interview to the defense. 26T49-18 to 21. Duca's notes of the interview were not produced until 2019, **twelve years** ***after*** **the 2006 trial**, by which time Mr. Tanner had already served 16 years in prison (and remains incarcerated).

Johnson's suppressed statement directly contradicts the State's claims that Johnson drove Tanner to the robbery scenes ***where the North Face ski mask was worn by the perpetrator***. Simply put: if the jury had heard Johnson's statement that he never saw such a mask with Tanner and that Tanner had an entirely different hat made of different material with no emblem or logo, then reasonable doubt would exist as to State's theory that Tanner was the North Face bandit who committed the robberies where the North Face mask was seen and worn.

Johnson's suppressed statement would have been powerful argument for Tanner's acquittal.

No doubt exists that Duca's notes accurately reflect Johnson's February 7, 2006 interview. Duca testified it is her practice to keep accurate notes, that it is part of her Academy training and if her notes were in error she would correct them. 26T93-12 to 94-3. "My notes are not always verbatim but they're as close — as close as can be." 26T122-7 to 8 and 15 to 16. The State never challenged the accuracy of Duca's notes.

Prosecutor McKinney, upon questioning by the PCR Court, agreed that the notes of Johnson's February 7, 2006 interview were *Brady* material:

> BY THE COURT: If Johnson, in the interview, the pretrial interview, said the hat that he saw Mr. Tanner wear when he would drive him was of a different material than the hat shown to him in a picture, wouldn't that suggest then that it was – he was seeing a different hat:
>
> MS. McKINNEY: Yes.
>
> **THE COURT: And would that have been <u>Bradv</u> material?**
>
> **MS. MCKINNEY: Yes.** 29T92-13 to 22 (bold added).

At multiple points, AP McKinney agreed that Johnson's February 7, 2006 statement should have been disclosed to the defense. 29T79-6 to 9; 29T80-2 to 7; 29T85-5 to 8. McKinney acknowledged it would have been relevant to Tanner's defense that Johnson said he never saw the North Face ski mask and she agreed that Johnson's description of Tanner's hat as a "stocking cap" made of *different* material would indicate that Johnson was describing a *different* hat than the one seen in the crime scene videos. 29T45-18 to 22; 29T62-23 to 63-24; 29T93-22 to 94-22.[11]

[11] Det. Duca also acknowledged that Johnson's suppressed February 7, 2006 interview was "*new* information" that "differed" from Officers Csizmar and Rios who claimed they saw Tanner wearing the North Face mask at the time of his arrest. 26T65-24 to 67-15; 26T106-25 to 108-8.

Plainly, a *Brady* violation took place. *See e.g. Brady v. Maryland*, supra, 373 U.S. at 87 ("suppression [] of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Kyles v. Whitley*, 514 U.S. 419, 432-33, 441 (1995) (finding a reasonable probability of a different result arising from prosecution's failure to disclose witness statements that were favorable to the defense); *State v. Carter*, 91 N.J. 86, 111 (1982)("evidence impeaching testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence").

Where the prosecution conceals an exculpatory statement, a *Brady* violation arises and the conviction **must** be set aside. *State v. Cahill*, 125 N.J. Super. 492 (1973) ("It is uncontrovertibly the law . . . that the suppression of exculpatory evidence. . . , whether willful or merely negligent, deprives the defendant of a fair trial."). Evidence is exculpatory when there is a "reasonable probability" that if it had been disclosed the result of the proceeding would have been different. *Kyles*, 514 U.S. at 433-34; *United States v. Bagley*, 473 U.S. 667 (1985); *Government of Virgin Islands v. Martinez*, 780 F. 2d 302, 306 (3d Cir. 1985).[12]

[12] Regardless of *Brady*, under New Jersey court rules the State should have disclosed Johnson's statement under its continuing duty to make pre-trial disclosures. R. 3:13-3(b)-(c) (prosecutor's continuing duty to disclose via post-indictment discovery).

Johnson's February 7, 2006, statement was undeniably exculpatory. It challenged a major component of the state's case — its effort to link Tanner to the "North Face" robberies via the North Face ski mask. Johnson's suppressed statement would have given the jury reason to doubt Johnson was driving Tanner to crime scenes where the North Face ski mask was worn by the perpetrator. After all, if Tanner did not have the North Face ski mask worn by the perpetrator, then reasonable doubt would exist as to whether he was the North Face bandit, making a strong case for Tanner's innocence. But Johnson's statement was suppressed and Tanner was deprived of this powerful evidence for acquittal.

Now that Johnson's statement is known, reasonable doubt also exists as to Officers Csizmar and Rios's claims that they saw Tanner with a North Face ski mask. In fact, Csizmar's *original* report (Da393), written the very night of Tanner's arrest, said only that Csizmar located a "black hat," saying nothing <u>at all</u> about seeing a hat with a "North Face" emblem, as Csizmar *later* claimed at trial. 3T200-1 to 5; 3T217-14 to 218-1; 4T10-15 to 18; 4T60-25 to 61-14. Viewed in light of Johnson's suppressed denial of ever seeing the North Face ski mask with Tanner, a reasonable jury would now have reason to reject the officers' claims. Johnson's suppressed statement also explains why state police analyst Lezniack "found" showed no hair or genetic material belonging to Tanner on the mask the officers claimed to have found, 5T81-25 to 83-12, since, according to Johnson,

Tanner never had the North Face mask in the first place![13]

Concealment of Johnson's statement also hamstrung defense counsel who, because he was ignorant of Johnson's denial of ever seeing the hat with Tanner, felt compelled to concede in his closing argument that the North Face ski mask was one of the most important pieces of evidence in the State's case, 11T105-1 to 9, and that the biggest issue for jurors was whether defendant possessed the North Face mask (11T110-15 to 25). Had he known of Johnson's February 7, 2006 statement, defense counsel could have avoided such concession and, instead, demonstrated to jurors that since the alleged accomplice, Johnson, never saw the North Face ski mask with Tanner, there was reasonable doubt as to Tanner's guilt.

For all of these reasons, the suppression of Johnson's statement as to the North Face ski mask violated *Brady* and related cases and requires vacating the conviction and/or barring retrial due to prosecutorial misconduct.

[13] Two years after Lezniack found no hair or genetic material belonging to Tanner, the State tried again, in June 2005, claiming that analyst Chilseyzn examined a swab allegedly taken from the hat and that he now found Tanner's DNA. Chilseyzn's testimony would now have to be weighed anew against the discovery of Johnson's suppressed statement.

POINT V

THE PROSECUTION SUPPRESSED JOHNSON'S STATEMENT THAT HE COULD NOT RECALL HIS POLICE CONFESSION AND HAD TO HAVE HIS MEMORY RE-STRUCTURED *TWO DAYS BEFORE TRIAL*, GIVING RISE TO A *BRADY* VIOLATION AND NEWLY-DISCOVERED EVIDENCE [Raised below at Da440-441]

Another *Brady* violation arose out of the February 7, 2006 meeting, two days before Johnson testified, when Johnson told AP McKinney that he could not recall his own police statements, meaning that Johnson could not remember his "confession" given on the night of October 3, 2003. This was a significant evidentiary development favoring Mr. Tanner's defense since Johnson was the "only eyewitness" and his lack of memory would mean the lack of any direct evidence against Tanner. It was exculpatory and had to be disclosed but, as she did with Johnson's denial of ever seeing the North Face ski mask, AP McKinney never disclosed such statement to Tanner's defense counsel, again violating *Brady* and again depriving Tanner of powerful evidence for acquittal.

The issue was first exposed during PCR when Det. Duca testified that in the February 7, 2006 meeting Johnson could not provide a narrative and said he couldn't "recall" what he had previously told the police. 26T26-17 to 19; 26T73-10 to 24.

Johnson's statement was so significant that it was fresh in Duca's mind when she disclosed it, on her own initiative on PCR, ***16 years later***:

> Q. You made a statement that William Johnson needed some additional preparation. Do you remember saying that?
>
> A. Yes.
>
> Q. Why did Johnson need additional preparation?
>
> A. Johnson wasn't comfortable discussing or having conversations. He needed – he needed more review of what he had previously – the information he had previously provided.
>
> Q. And what was lacking in what he provided that required further review?
>
> A. **When he – when questions were posed, he didn't respond with a thorough answer. There was [a] lot he didn't recall, and he needed to be directed to what he had previously stated to police**.
>
> Q. So, in this meeting **when you interviewed him and he said I don't recall things, you then pointed his attention to what he had said on other occasions?**
>
> A. **He would – he would be directed – yes**.
>
> 26T73-10 to 74-3 (bold added).

In plain English, Johnson told the prosecutor he could not remember his own confession, yet no one told Tanner's defense counsel, an inexplicable constitutional lapse. Duca admitted she had to restructure Johnson's memory, that she "**pointed his attention to what he had said on other occasions;**" "**he would be directed**" and "**needed to be directed to what he had previously stated to police**." 26T:73-

10 to 74-3. In other words, only two days before he testified, the "only eyewitness" in a major criminal trial told the prosecution he could not remember what he had told the police, and had to have his memory rebuilt by the prosecutor ***and no one told the defense!***[14]

The fact that Duca did not memorialize Johnson's statement in writing did not relieve the state of the duty to disclose. "*Brady* and *Giglio* obligations[] exist regardless of whether the exculpatory or impeachment material *is* <u>*oral*</u> *or written*." *United States v. Walsh*, 774 Fed. Appx. 706, 707 (2d Cir. 2019) (emphasis added), *citing United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (*Brady* obligation exists regardless of "whether that information has been recorded in tangible form.").

Any juror would have been highly skeptical of an "eyewitness" who could not remember his own confession and had to have his memory rebuilt by the prosecution two days before he testified. Johnson's suppressed statement is obviously "material" and satisfies the standard under *Brady* for vacating the conviction for non-disclosure of exculpatory information and, separately, under

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[14] In this same light, the prosecution also concealed a second trip with Johnson to the alleged crime scenes, as AP McKinney acknowledged to the PCR Court. 20T10-1-10. This undisclosed second car trip takes on greater force and meaning now that it is known Johnson could not remember his own confession and had to be "directed" to his prior statements.

State v. Ways for newly discovered evidence. *See e.g. Conley v. United States*, 415 F.3d 183, 191 (1st Cir. 1005) ("Government's suppression of the FBI memorandum [as to "lynchpin" witness's memory loss] may have made the difference between a conviction or acquittal"); *Majors v Warden*, 2016 U.S. Dist. LEXIS 70099, *82-83 (E.D. Cal. 2016) (prosecutor "was required to turn over any 'underlying exculpatory facts' such as [witness's] statements that she was unable to recall details…"); *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (prosecution failed to disclose "notes, both dated and undated, that tend to show [witness] had difficulty remembering the details of key events."); *State v. Allen*, 398 N.J. Super. 247, n.5 (App. Div. 2008) (noting trial court finding of *Brady* violation where prosecutor failed to disclose "trauma" the witness said caused her memory lapse.)

Now that Johnson' statement is known, we can no longer be "confident the jury's verdict would have been the same," *Kyles v. Whitely*, 514 U.S. 419, 453 (1995), and the conviction must be vacated as a *Brady* violation or as newly-discovered evidence in its own right.

POINT VI

THE CONVICTION MUST BE VACATED BECAUSE THE PROSECUTOR SCRIPTED THE TESTIMONY FOR EACH AND EVERY STATE'S WITNESS IN THE TANNER TRIAL AND INCLUDED MISLEADING ANSWERS FOR TWO CRITICAL WITNESSES [Raised Below at Da417; 21T119-19 to 120-2]

In an incredible defiance of Mr. Tanner's due process rights, AP McKinney disclosed during PCR that she scripted *each and every State's witness in the Tanner trial*. 20T19-4 to 25; 20T80-4 to 8. This was accomplished by providing each witness with a prepared set of questions and answers (**with the answers pre-printed by the prosecutor in bold**) to take home and study *before* they testified. *Id.* 20T78-14 (AP McKinney: "All my witnesses get questions and answers."); 21T9-2 to 12; 21T11-12 to 30; 27T19-14 to 20; 27T21-25 to 22-2; 27T23-19 to 22; 27T49-10 to 19. *See e.g.*, Da212-225 (Q&A of William Johnson); Da237-242 (Q&A of Kaihala Staton). According to the PCR court, McKinney testified that she "no longer follows this procedure, acknowledging it could present a perception of impermissible coaching." (Da417).

Such a tactic is abhorrent to due process. AP McKinney's scripting fundamentally altered the nature of the trial and deprived Mr. Tanner of a fair trial. By scripting each witness, the prosecutor sought to minimize the risk that witnesses would vary or deviate from their earlier police statements, a direct interference in the normal functioning of a trial where witnesses are tested on the

stand, in substantial part, for their consistency or lack thereof in testimony. *State v. Yough*, 208 N.J. 385, 397 (2011) (quoting *State v. Winter*, 96 N.J. 640, 646 (1984) (noting that the "vagaries of the human condition" are what make trials unpredictable).

As the Supreme Court in *Yough* and *Winter* recognized, "a trial is not a perfectly scripted and choreographed theatrical presentation; rather, it is an extemporaneous production whose course is often unpredictable given the vagaries of the human condition[.]" *Accord State v. Greene*, 242 N.J. 530, 547 (2020) (noting, in another context, that "testimony of witnesses is not always predictable" and that "a trial is not a neatly choreographed or a perfectly scripted proceeding,…"); *State v. Russ*, 2016 N.J. Super. Unpub. LEXIS 1615 (*App. Div. 2016)(same; *quoting Yough* and *Winter*). As the California appeals court observed, "A trial is not a scripted proceeding. . . .witnesses who have been interviewed vacillate or change their statements . . . ." *People v. Hammond*, 22 Cal.App.4th 1611, 1624, 28 Cal. Rptr. 2d 180 (1994).

This natural aspect of witness behavior — that they "vacillate or change their statements" — was sanitized by AP McKinney's presenting every State's witness with a prepared script with prepared answers (**placed in bold type to avoid any ambiguity in the witnesses' minds**). Scripting had the effect (or intent) of minimizing or eliminating the "testimonial inconsistencies" that arise

naturally in a trial, a fundamental element of cross-examination. *State v. Bozeman*, 2011 N.J. Super. Unpub. LEXIS 1646*17 (App. Div. 2011), citing *Davis v. Alaska, supra*, 415 U.S. at 316.

Viewed in this light, the scripting cannot be seen as "harmless error" simply because the prepared answers supposedly followed the witnesses' prior police statements. As noted above, it is, in large part, the purpose of a trial to test if witnesses are consistent with, or deviate from, their prior statements. It is now impossible to determine if the witnesses would have naturally deviated from their prior statements since their trial testimony cannot be separated from the influence of the prepared answers given them by the prosecutor. Sanitizing witnesses by scripting thus deprives the defendant of a critical cross-examination tool and interferes with the basic functioning of a trial.

Any juror would have wanted to know that each and every witness for the State was provided with a prepared set of questions and answers to study before testifying. Had the jury heard that the State's witnesses needed a script, the jury could infer the witnesses were not sure of their evidence or that the evidence was not strong enough to be retained in their memories. This would be a major challenge to the strength of the State's case but this powerful evidentiary and cross-examination tool was taken from Tanner by the State's concealment and suppression of the scripts.

Not knowing of the scripting, Mr. Tanner's defense counsel could not cross-examine as to the influence of such hidden manipulation on the witnesses' testimony, thereby interfering with his right to effective cross-examination. *See e.g. State v. Bozeman*, *supra*, 2011 N.J. Super. Unpub. LEXIS 1646 at *17, citing *Davis v. Alaska, supra*, 415 U.S. at 316.

AP McKinney's scripting undermined the opportunity for "the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990). "A defendant exercises his right of confrontation through cross-examination, described as the "'greatest legal engine ever invented for the discovery of truth.'" *State v. Branch*, 182 N.J. 338, 348 (2005), citing and quoting *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 *Wigmore* § 1367). By interfering with his right of confrontation, the State deprived Mr. Tanner of "an essential attribute of the right to a fair trial." *Branch, supra* citing *State v. Garron*, 177 N.J. 147, 169 (2003) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)).

Such interference is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, *supra*, 415 U.S. at 318. This was not a case of "harmless error" where an occasional act of "coaching" is revealed during the trial and defense counsel has an opportunity to correct the interference by cross-examination. *Cf. United States v. Milles*, 363

F. App'x 506, 509 (9th Cir. 2010) (coaching of *single* witness did not require a new trial where defense counsel was given the opportunity of further cross-examination once it was disclosed). Contrary to *Milles*, Tanner's defense counsel did not know of the scripting and had **no** opportunity to bring it to the jury's attention, and it applied not to a "single" witness but to **all** of the State's witnesses, as McKinney admitted.

Multiple courts have noted that the use of witness scripts in civil litigation is deeply troubling. *See e.g. FTC v. Noland*, 2021 U.S. Dist. LEXIS 163918, n.10, 2021 WL 3857413 (D. Ariz. 2021) (citing cases). If the practice is to be sharply criticized in civil litigation, it is ever the more egregious in *criminal* cases where liberty interests are at stake. Moreover, the extent of the scripting — to each and every prosecution witness in the Tanner trial — is unprecedented and taints the entirety of the trial.

In at least two significant instances — the testimony of William Johnson, Jr. and Kaihala Staten — scripting caused actual prejudice in that the witnesses' misleading trial testimony cannot be separated from the misleading nature of their scripts.

Johnson's script omitted the information he had given the prosecutor in the February 7, 2006 meeting, just two days earlier, of never having seen the North Face ski mask with Mr. Tanner and saying that Tanner had an entirely *different*

hat made of *different* material with no logo or emblem. *See generally* **Point IV**, *supra*. This exculpatory information was omitted from Johnson's script, as shown by the prepared bold answers that McKinney gave to Johnson.

> Johnson Q & A:
>
> Did he [Tanner] wear anything on his head **(yes)**
>
> Describe what he wore on his head **(he wore a little stocking cap)**
>
> How did he wear it **(he wore it up on his head like a little hat)**
>
> *****
>
> Did he have anything on his head **(Yes, he had a hat on)**
>
> What color was the hat **(it was black)**

Da219, Da223 (**Bold** is in prosecutor's original) .

Johnson's trial testimony as to the hat matches closely the scripted answers and is limited to the color of the hat and, like the script, omitted all of the exculpatory information as to Tanner's lack of a North Face ski mask that appeared in Johnson's February 7, 2006 statement. 10T19-9 to 21; 10T45-7 to 9; 10T46-5 to 9. It is impossible to now separate Johnson's limited trial answers from the misleading and truncated nature of the script.

Kaihala Staten's script also omitted material information from her police interviews that favored Mr. Tanner. In her pre-trial interview, Staten told police that in late August or early September she received a call from Mr. Tanner that

referred to a fight at a bus stop: "**it was I thought something about [] a bus station about a bus stop or something that was a bus stop**" and that "**some guys try to fight him on the bus stop and he hurt them or something stab them or something**." (Da246). Kaihala told police in this same interview that she knew nothing about a "**guy getting shot**" or "**anything about a Krauszers…**" *Id.*

However, the script AP McKinney prepared — and it *was* a script — omitted **all** of this information, specifically omitting Staten's statement that Tanner had been referring to "a fight on the bus stop" and that she knew nothing at all about a shooting or any incident at Krauszer's. The relevant part of the script is produced below [**the answers in bold are in AP McKinney's original**].

> Kaihala Staton Q & A:
>
> Did the defendant ever tell you he had done something bad? (**Yes**)
>
> What did he say **(he called me one night and said he did something bad and needed to see me. He said he had hurt someone by accident, but didn't mean to do it. He hurt 2 guys.**)
>
> Do you [know] about when he said this to you **(it was late August or early September**)
>
> Do you recall the approximate time he spoke to you and said that he had hurt someone **(no later than 12:30 am or 1:00 am**)

(Da241) (**Bold** is in prosecutor's original).

Not content with omitting Kaihala's actual statement from the script, AP McKinney also invented a time frame for when Kaihala supposedly received the

call and included it in the script: "**no later than 12:30 am or 1:00 am,**" as the script says. (Da241). However, Kaihala Staten's police interview transcript contains **no** reference to *any* time when she received the call from Mr. Tanner. (Da243-248). AP McKinney appears to have invented the time frame for the Tanner phone call and included it in Staten's script so that the call from Mr. Tanner would seem to have come shortly after the Krauzers shooting at 11:57 p.m., falsely linking Mr. Tanner to this crime.

Kaihala Staten's trial testimony followed closely these scripted (and misleading) answers. Staten testified in front of the jury that Tanner called her "at the end of August…beginning of September" to report that he "hurt two people" and she gave the very same time frame that was included in the script, twelve to one a.m. (9T167-10 to 169-9; 9T173-19 to 174-5). These are exactly the same answers as in the script.

Staten's trial testimony thus follows the misleading version of the phone call that AP McKinney included in the script to falsely implicate Mr. Tanner in the Krauszer's shooting, even to the extent of inventing a time frame for the call to more closely match it to the Krauszer's incident. McKinney's summation includes this scripted and misleading testimony, 11T160-21 to 161-24), that she also anticipated (based on the script) and made a part of the State's opening to the jury.

(3T172-20 to 173-2).[15]

A conviction obtained through false or misleading testimony is repugnant to the Constitution. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). A prosecutor has a duty to avoid misleading the jury and to correct "testimony that is substantially misleading' and where the misleading nature of the testimony is 'obvious.'" *United States v. Reyes-Romero*, 959 F.3d 80, 103 (3d Cir. 2020), *quoting United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974). A conviction should be reversed where the prosecutorial action is "clearly and unmistakably improper" and "so egregious" in the context of the trial as a whole that it deprived the defendant of a fair trial. *State v. McNeil-Thomas*, 238 N.J. 256, 275 (2019); *State v. Pressley*, 232 N.J. 587, 593 (2018); *State v. Jackson*, 211 N.J. 394, 407 (2012).

AP McKinney's scripting of Johnson's and Staten's testimony, which omitted material information, was a gross violation of due process, altering fundamentally the nature of the trial, giving the State a hidden and unfair advantage. Such tactic interfered with Mr. Tanner's right to a fair trial and deprived

[15] As she admitted to the PCR court, AP McKinney intentionally truncated Kaihala Staten's testimony. McKinney did so, she said, because to have allowed Kaihala to testify truthfully that Mr. Tanner was referring to a fight and stabbing at a bus stop would have raised prohibited "other crimes" evidence (under *N.J.R.E.* 404(b)). 29T26-23 to 27-18; 29T28-9 to 29-1. In other words, AP McKinney knew all along that Kaihala Staten was referring to an unrelated incident but intentionally gave Staten a misleading script and structured her testimony to omit the truth in order to falsely link Tanner to the Krauszer's shooting.

him of the right to effective cross-examination.

As to both Johnson and Kaihala Staten, their testimony on critical areas of evidence was consistent with the misleading scripts that omitted exculpatory evidence and invented a time frame for the Tanner phone call. It is now impossible to separate their testimony from the influence of the scripts. *See e.g. Commonwealth v. ~~Choy,~~* 2020 Mass. Super. LEXIS 195 (Plymouth Cty, Superior Ct. 2020) ("In providing a witness with scripted questions and scripted answers, at least one of which was not factually accurate, [the Prosecutor] created a scenario by which the testimony she elicited was the product of her script, not the witness's memory.").

The due process issue that arises from the scripting of the State's witnesses could not have been waived under *R.* 3:22-4(A) as the PCR Court incorrectly concluded. (Da441-442). Defense counsel had no knowledge of the scripting that was, in fact, disclosed by the State only during the actual PCR hearings, ***15 years after the trial***. This issue has been raised in the very proceeding in which it was disclosed by the prosecutor during her testimony before the PCR Court and has not been waived.

Accordingly, the conviction should be vacated and re-trial barred due to prosecutorial misconduct.

POINT VII

PROSECUTORIAL ERRORS, BOTH INTENTIONAL AND NEGLIGENT, CUMULATIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND REQUIRE VACATING THE CONVICTION [Raised Below at Da443-446]

A conviction should be vacated when legal errors cumulatively render a trial constitutionally unfair. *State v. Weaver*, 219 N.J. 131, 155 (2014); *see, e.g., State v. Rivera,* 437 N.J. Super. 434 (App. Div. 2014) (cumulative impact of prosecutor's conduct deprived defendant of a fair trial); *State v. Frost*, 158 N.J. 76, 87 (1999)(same); *State v. Hinds*, 278 N.J. Super. 1, 19 (App. Div. 1994) (same), rev'd on other grounds, 143 N.J. 540 (1996).

There is no dispute that the prosecution committed significant and material *Brady* and due process violations that undermined the fairness of Mr. Tanner's trial, as well as the scripting that permeated the entirety of the trial and deprived counsel of effective cross-examination and prejudiced defendant in at least two known instances.

While the individual prejudice from each of these *Brady* violations is apparent, their "cumulative" impact also requires vacating the conviction. *Kyles v. Whitley,* 514 U.S. 419, 421 (1995) (recognizing that a conviction should be overturned based on the "cumulative effect of [] evidence suppressed by the government; *State v. Weaver*, supra, 219 N.J. at 131 (same); *State v. Rivera, supra*,

437 N.J. Super. 434 (same); *see also Kyles, supra*, citing *Berger v. United States*, 295 U.S. 78, 89 (1935) (new trial required where the prosecutor's misconduct "was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential").

Accordingly, the conviction must be vacated and/or re-trial be barred by prosecutorial misconduct.

CONCLUSION

For the foregoing reasons, this Court should vacate the Judgment of Conviction and dismiss the charges with prejudice due to intentional prosecutorial misconduct or, in the alternative, a new trial should be ordered.

Respectfully submitted,

/s/ Bruce I. Afran
Counsel for Defendant Willie Tanner

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3885-22T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior Court of
v.	:	New Jersey, Middlesex County, Denying
	:	Post-Conviction Relief and Motion for a
	:	New Trial.
WILLIE TANNER,	:	
	:	Sat Below: The Hon. Benjamin S. Bucca,
Defendant-Appellant.	:	Jr., J.S.C.

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OF COUNSEL AND ON THE BRIEF

JANUARY 13, 2025

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TABLE OF STATE'S APPENDIX
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CASES CITED

[1] These photographs in evidence are part of the appellate record. R. 2:5-4(a).

[2] The statement of Kaihala Staten and William Johnson were before the trial court below, so they are part of the appellate record. R. 2:5-4(a).

PAGE

STATUTES CITED

PAGE

RULES CITED

CITATIONS TO THE RECORD

"Da" defendant's appendix;
"Db" defendant's brief;
"Ca" defendant's confidential appendix;
"Sa" State's appendix;
"1T" transcript dated January 19, 2006;
"2T" transcript dated January 24, 2006;
"3T" transcript dated January 25, 2006;
"4T" transcript dated January 26, 2006;

"5T" transcript dated January 31, 2006;
"6T" transcript dated February 1, 2006;
"7T" transcript dated February 2, 2006;
"8T" transcript dated February 7, 2006;
"9T" transcript dated February 8, 2006;
"10T" transcript dated February 9, 2006;
"11T" transcript dated February 15, 2006;
"12T" transcript dated February 16, 2006;
"13T" transcript dated February 22, 2006;
"14T" transcript dated February 23, 2006;
"15T" transcript dated February 24, 2006;
"16T" transcript dated February 28, 2006;
"17T" transcript dated December 6, 2006;
"18T" transcript dated September 7, 2012;
"19T" transcript dated July 25, 2013;
"20T" transcript dated January 29, 2018;
"21T" transcript dated January 30, 2018;
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"23T" transcript dated March 5, 2018;
"24T" transcript dated May 14, 2018;
"25T" transcript dated December 18, 2019;
"26T" transcript dated February 25, 2020;
"27T" transcript dated February 27, 2020;
"28T" transcript dated March 3, 2020;
"29T" transcript dated March 4, 2020;
"30T" transcript dated January 22, 2021;
"31T" transcript dated May 9, 2023;
"32T" transcript dated June 7, 2023;
"33T" transcript dated February 17, 2005;
"34T" transcript dated August 30, 2004;
"35T" transcript dated October 4, 2004;
"36T" transcript dated January 26, 2007;
"37T" transcript dated July 23, 2007.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On January 21, 2004, the grand jurors for Middlesex County returned Indictment Number 04-01-00089, which was a forty-one-count indictment charging defendant Willie L. Tanner and his co-defendant William Johnson, Jr., both jointly and individually, for a series of armed robberies and related charges. (Da1-9).

Both defendants were charged with eleven counts of first degree armed robbery contrary to N.J.S.A. 2C:15-1: an armed robbery on July 25, 2003, in Piscataway where Sucha Singh was threatened with immediate bodily injury with a deadly weapon, a knife (count four); an armed robbery on July 27, 2003, in Edison, where Cihan Polat was threatened with immediate bodily injury with a deadly weapon, a knife (count seven); an armed robbery on August 2, 2003, in Edison, where Ihsan Kanakas was threatened with immediate bodily injury with a deadly weapon, a handgun (count ten); an armed robbery on August 16, 2003, in Edison, where Abdul Imran was threatened with immediate bodily injury with a deadly weapon, a handgun (count fifteen); an armed robbery on August 25, 2003, in Edison, where Shailash Patel and Dashrath Patel were threatened with immediate bodily injury with a deadly weapon, a handgun (counts eighteen and nineteen); an armed robbery on August 28, 2003, in North Brunswick where Sharad Desai

and Narendra Yash were threatened with immediate bodily injury with a deadly weapon, a handgun (counts twenty-six and twenty-seven); an armed robbery on September 10, 2003, in Edison, where Cihan Patel was threatened with immediate bodily injury with a deadly weapon, a handgun (count thirty); an armed robbery on September 18, 2003, in Piscataway, where Asir Siddiqu was threatened with immediate bodily injury with a deadly weapon, a handgun (count thirty-three); and an attempted armed robbery on October 10, 2003, in East Brunswick where defendants had a deadly weapon, a handgun. (count thirty-six). (Da1-8). Both defendants were charged with second degree conspiracy to commit armed robbery, contrary to N.J.S.A. 2C:5-2 and 2C:15-1 (count three). (Da1).

Defendant was charged alone with first degree armed robbery contrary to N.J.S.A. 2C:15-1 where, on June 14, 2003, in Piscataway, he threatened Mohammad Saleem with immediate bodily injury while armed with a deadly weapon, a knife (count one); with first degree armed robbery contrary to N.J.S.A. 2C:15-1 where, on August 5, 2003, in South Brunswick, defendant threatened immediate bodily injury to Chinna Kundruv while armed with a deadly weapon, a handgun (count thirteen); with fourth degree aggravated assault contrary to N.J.S.A. 2C:12-1b(4) where, on August 25, 2003, in Edison, defendant pointed a firearm at Neils Hansen (count twenty); first degree

attempted murder, contrary to N.J.S.A. 2C:5-1 and 2C:11-3 where, on August 28, 2003, in North Brunswick, defendant attempted to kill or cause serious bodily injury resulting in death to Sharad Desai (count twenty-three); two counts of second degree aggravated assault contrary to N.J.S.A. 2C:12-1b(1), where on August 28, 2003, in North Brunswick, defendant attempted to cause or caused serious bodily injury to Sharad Desai and Narendra Yash (counts twenty-four and twenty-five). (Da1-3; Da5-6). Counts thirty-nine, forty and forty-one charged defendant with crimes from October 2, 2003, in East Brunswick: third degree escape, N.J.S.A. 2C:29-5; fourth degree resisting arrest, N.J.S.A. 2C:29-2a(2); and third degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3b(4). (Da9).

Defendant was also charged alone with eleven counts of possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4: in counts two, five and eight, the weapon was a knife, N.J.S.A. 2C:39-4d; in counts eleven, fourteen, sixteen, twenty-one, twenty-eight, thirty-one, thirty-four and thirty-seven, the weapon was a handgun, N.J.S.A. 2C:39-4a. (Da3-8). Count thirty-eight charged defendant with third degree unlawful possession of a handgun, a .25 caliber Taurus handgun, without a permit, on October 2, 2003, in East Brunswick, contrary to N.J.S.A. 2C:58-4 and 2C:29-5b. (Da8).

Codefendant Johnson was indicted alone in counts six, nine, twelve, seventeen, twenty-two, twenty-nine, thirty-two and thirty-five with third degree eluding, contrary to N.J.S.A. 2C:29-3a. (Da2-5; Da7-8).

Also on January 21, 2004, the grand jurors returned Indictment Number 04-01-00106, charging defendant with eleven counts of certain persons not to have a weapon. (Da10-13). Counts one, two and three charged defendant with possessing a knife on June 14, 2003, in Piscataway, on July 25, 2003, in Piscataway, and on July 27, 2003, in Edison. (Da10-11). Counts four through eleven charged defendant with possessing a handgun on August 5, 2003, in South Brunswick, on August 16, 2003, in Edison, on August 25, 2003, in Edison, on August 28, 2003, in North Brunswick, on September 10, 2003, in Edison, on September 18, 2003, in Piscataway, and on October 2, 2003, in East Brunswick. (Da11-13).

The Honorable James F. Mulvihill, J.S.C., presided over the trial proceedings for both defendant and co-defendant Johnson. (1T-17T; 33T-37T). Judge Mulvihill ruled that both defendants would be tried separately because co-defendant Johnson's incriminating statements to police were part of the State's case-in-chief. (See 34T4-1 to 3; 34T4-11 to 13). On February 17, 2005, co-defendant Johnson pleaded guilty to count three of the indictment

pursuant to a plea agreement with the State. (See Da285; 33T4-8 to 10; 36T3-12 to 14).

Judge Mulvihill presided over defendant's jury trial from January 19, 2006, to February 28, 2006. (1T-16T). The trial covered eighteen counts from Indictment 04-01-00089: counts thirteen, fourteen, fifteen, sixteen, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty, thirty-one, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty and forty-one. (Da14-28). Five of those counts were for armed robbery and the corresponding charge of possession of a weapon for an unlawful purpose (counts thirteen, fourteen, fifteen, sixteen, twenty-six, twenty-seven, twenty-eight, thirty, thirty-one and thirty-seven). (Ibid.). It covered the sole count of possession of a handgun without a permit, count thirty-eight. (Ibid.). It covered count twenty-three, attempted murder, the two counts of aggravated assault, counts twenty-four and twenty-five, count thirty-six, attempted armed robbery, count thirty-nine, escape, count forty, resisting arrest, and count forty-one, hindering. (Ibid.). The trial also covered five counts from the certain persons indictment, Indictment 04-01-00106: counts five, six, eight, nine and eleven. (See Da43; 16T41-24 to 16T43-12).

On February 28, 2006, the jury found defendant guilty on all counts in Indictment 04-01-00089, except count forty, which was dismissed by the court.

(Da27; 16T15-17 to 16T22-21). On count twenty-five, aggravated assault, the jury found defendant guilty of the lesser included offense of attempting to cause bodily injury or causing bodily injury with a deadly weapon. (16T17-22 to 16T19-2). After the jury returned its verdict on the armed robberies and related counts, it deliberated on defendant's guilt for the certain person charges under Indictment 04-01-00106, and the jury found defendant guilty on all counts submitted to it. (16T41-24 to 16T43-12).

On November 15, 2006, defendant reached a plea agreement with the State on the remaining counts from both indictments. (Da29-37). Defendant agreed to plead guilty to counts three, seven, eight, ten, eleven, eighteen, nineteen, twenty, twenty-one, thirty-three and thirty-four from Indictment 04-01-00089, and agreed to plead guilty to counts four, seven and ten from Indictment 04-01-00106. (Da29-30). The State agreed to dismiss counts one, two, four and five from Indictment 04-01-00089 and counts one and two from Indictment 04-01-00106. (Da31). In exchange for defendant's guilty plea to these outstanding counts, the State agreed to recommend an aggregate sentence of ten years in prison, subject to the mandatory parole disqualifier under the No Early Release Act (NERA), which was to run concurrently to his sentence for the counts on which the jury had found him guilty. (Da31).

Sentencing took place before Judge Mulvihill on December 6, 2006. (17T; Da38-42). On Indictment 04-01-00089 for the counts adjudicated by the jury, Judge Mulvihill sentenced defendant to twenty years imprisonment, subject to the NERA parole bar, for first-degree attempted murder; a consecutive term of eighteen years with the NERA parole bar first-degree armed robbery (four counts); a concurrent five years with the NERA parole bar, for second-degree attempted robbery; a concurrent seven-year term of imprisonment, subject to the NERA parole bar, for third-degree aggravated assault; a concurrent four-year term of imprisonment for hindering apprehension. (Da38-42). The judge ordered that counts fourteen, sixteen, twenty-four, twenty-eight, thirty-one and thirty-seven, possession of a weapon for an unlawful purpose, be merged. (Da40-41). On Indictment 04-01-00106 for the counts adjudicated by the jury, the judge imposed a consecutive term of seven years with a five-year period of parole ineligibility on count eleven. (Da43-45). On counts five, six, eight and nine, the court imposed concurrent terms of seven years with five-year periods of parole ineligibility. (Da43).

Judge Mulvihill sentenced defendant on the remaining counts of the two indictments in conformance with the post-trial plea agreement, thus imposing an aggregate sentence of forty-five years in prison along with the applicable fines, penalties and restitution. (Da38-45).

On March 7, 2007, defendant filed a Notice of Appeal. (Da46). On September 8, 2009, the Appellate Division upheld defendant's convictions and aggregate sentence in a per curiam opinion. (Da47-69). The Appellate Division modified defendant's custodial sentence for third-degree aggravated assault with a deadly weapon, count twenty-five, from seven years to three years. (Da66). The New Jersey Supreme Court denied certification on January 14, 2010. (Da70).

On May 6, 2010, defendant filed a petition for post-conviction relief (PCR). (Da71-74). He subsequently filed a motion for a new trial based upon newly discovered evidence. (Da136-140). In May 2012, defendant's PCR counsel obtained from co-defendant Johnson authorization for disclosure of his psychiatric records from the Middlesex County Jail and the University of Medicine and Dentistry of New Jersey (UMDNJ), records which PCR counsel subpoenaed from the county, but was denied due to federal and state confidentiality laws. (See Da255-284). Co-defendant Johnson also provided authorization for the defense to obtain his medical records from St. Peter's Hospital, Acute Psychiatric Services and the Ann Klein Forensic Center. (Da260; Da271; Da273-274; Da279; Da281; Da283).

On August 23, 2013, the Honorable Bradley J. Ferencz, J.S.C., issued a written opinion and Order denying defendant's PCR petition and his motion for a new trial without an evidentiary hearing. (Da147-186).

Defendant appealed and on July 26, 2016, the Appellate Division, in a per curiam opinion, remanded for an evidentiary hearing on two issues raised in defendant's motion for a new trial based upon newly discovered evidence. (Da187-211). In all other respects, the Appellate Division affirmed Judge Ferencz's Order denying post-conviction relief. (Da211).

The Honorable Roberto Rivas, J.S.C., presided over the remand hearings on January 29, 2018, (20T), January 30, 2018, (21T), February 16, 2018, (22T), March 5, 2018, (23T), and May 14, 2018, (24T). Before the testimonial hearings began in 2018, Judge Rivas granted defendant's motion for discovery from the State's file, including notes, in November 2017. (Da229-231).

During the pendency of the remand proceedings, defendant moved for a new trial, seeking to dismiss the indictments with prejudice based upon "intentional prosecutorial misconduct," which was newly discovered evidence of co-defendant Johnson's recantation of this trial testimony from 2006, the State's failure to inform the defense before the trial of co-defendant Johnson's pre-trial admission denying identification of a mask worn by defendant during the robberies, the State's withholding of statements made by witnesses during

the State's "scripting of the trial" and seeking all "scripts" as testified to by Middlesex County Assistant Prosecutor (AP) Martha McKinney on January 29, 2018, and all notes or documentation from Middlesex County Assistant Prosecutor (AP) Keith Warburton's pre-trial trips to the crime scenes with co-defendant Johnson, as testified to by AP McKinney on January 29, 2018. (Da249-252).

During the testimonial hearing on February 16, 2018, co-defendant Johnson recanted his trial testimony from 2006, which prompted Judge Rivas to cease the hearing so Johnson could obtain counsel. (See 22T57-9 to 22T60-1). Three months later, in May 2018, PCR counsel moved to have Judge Rivas recuse himself from the case. (Da253-254; 22T60-2 to 6). On August 30, 2018, Judge Rivas entered an Order recusing himself. (Da350).

The case was thereafter assigned to the Honorable Benjamin S. Bucca, Jr., J.S.C., who presided over the continued testimonial hearings on December 18, 2019, (25T), February 25, 2020, (26T), February 27, 2020, (27T), March 3, 2020, (28T), March 4, 2020, (29T), and January 22, 2021, (30T).

On July 7, 2023, Judge Bucca issued a 46-page opinion and accompanying Order, denying defendant's PCR application and motion for a new trial. (Da399-446).

On September 1, 2023, defendant submitted a Notice of Appeal with this court. (Da394-396).

COUNTER-STATEMENT OF FACTS

In the summer and fall of 2003, defendant committed several armed robberies in different municipalities in Middlesex County. Co-defendant Johnson drove defendant to and from the crime scenes.

The first armed robbery took place on August 5, 2003, at an Exxon gas station on Route 1 in South Brunswick. (Da48). Chinna Kundurv was working at the station when, at about 3:15 a.m., a man entered the store wearing a black mask and a loose-fitting, long white T-shirt. (Da48). The long shirt was down to the man's knees. (5T114-21 to 5T115-3). The man was about five-feet-six inches tall and was "a little fat." (Da48).[1] The man was African American. (5T113-22 to 23; 5T130-1 to 2). The man was holding a white or silver gun, which he pointed at Kundrurv's head. (Da48). The man ordered Kundurv to open the safe, however, Kundurv did not have the key. (Da48). Instead, the man took less than $100 from the cash register and six dollars from Kundurv's wallet before leaving the store. (Da48; 5T117-17 to 21). Kundruv would later tell police that the robber fled the gas station toward

[1] By the time of trial in 2006, defendant had slimmed down. (3T206-4 to 25; 5T12-19 to 25).

Deans Lane, which was a wooded area with residential homes. (5T132-16 to 22).

A subsequent review of the surveillance video tape by police showed that the man who committed the crime was an African American male, of medium-to-stocky build, who held a shiny gun in his left hand. (Da48; 5T133-21 to 5T134-12; 5T134-24 to 5T135-10; 6T31-9 to 18). The police also called a K-9 officer to the gas station at about 4:16 a.m. on August 5, who had his canine partner track a scent from the spot where the suspect was last seen, and the dog tracked the scent to Dean's Lane for about a quarter of a mile after which the dog lost the scent. (5T148-18 to 5T149-13; 5T150-6 to 8; 5T150-23 to 5T151-4). This was consistent with the person being tracked by leaving the area, such as being picked up in a vehicle. (5T151-15 to 19).

The second armed robbery occurred on August 16, 2003, at a Sunoco gas station on Route 1 in Edison. (6T101-10 to 13). Abdul Imran was working the 11:00 p.m. to 10:00 a.m. shift. (6T101-22 to 23). Sometime between midnight and 1:00 a.m., a car stopped at one of the gas pumps. (6T102-4 to 8). Imran described the vehicle gray in color. (6T64-19 to 21). After this vehicle pulled away, Imran saw a man, who entered the cubicle he was sitting in and pointed a silver gun at him, demanding money. (Da48-49; 6T102-9 to 12; 6T54-14 to 21). Imran later described the assailant to police as a black male, between

five-feet-six-inches tall, with a medium build and a mustache. (Da49; 6T109-22 to 25; 6T79-25 to 6T80-3; 6T109-22 to 25). He said the man wore a black, open-faced mask, a baggy white shirt and dark gloves. (Da49; 6T102-12). The man took all the cash in Imran's pocket and in the cash register before fleeing on foot. (Da49; 6T54-23 to 25; 6T155-1 to 5). Surveillance video obtained by police confirmed Imran's version of the robbery. (Da49; 6T62-18 to 25; 6T63-15 to 19).

The third armed robbery took place on August 28, 2003, at the Krauzer's grocery store on Livingston Avenue in North Brunswick. (Da49). Surinder Singh was working at the store along with Sharad Desai and Narendra Yash. (Da49; 6T121-2 to 17). Between midnight and 1:00 a.m., a man wearing a mask and a white T-shirt entered the store carrying a silver gun with a white handle. (Da49; 6T128-15 to 16; 7T50-6 to 8; 7T66-1 to 6; 7T37-6 to 8). The man jumped over the store counter at the front register and ordered Desai and Yash to lie down on the floor. (Da49; 7T51-1 to 11). Singh was at the slicer in the back of the store when the man entered the store, and he did not think the man saw him. (Da49; 6T122-1 to 3). When Yash looked up, the man hit him on the left side of his head with his fist and the gun. (Da49; 7T43-1 to 10; 7T115-12 to 21; 7T116-3 to 4; 7T116-23 to 7T117-4).

The man took cash from Desai's wallet and Yash's pocket and ordered Desai to open the cash register. (Da49). When the man backed up, he tripped over Yash's legs. (Da49; 7T51-1 to 24). The man fired a shot at Yash, which passed Yash's head. (Da49; 7T51-9 to 24). The man fired again and hit Desai in the back as he was lying face down on the floor. (Da49-50; 7T83-19 to 20; 8T8-15 to 18). After Singh heard the shots, he took a 12-pack of soda and threw it at the man. (Da49; 6T122-7 to 9). The man then fled from the store, fleeing south on Livingston Avenue. (6T123-5 to 9).

Desai was taken to the hospital to be treated for his gunshot wound. (7T85-24 to 25). His right lung had diminished capacity and had a distended abdomen, which meant that internal bleeding was a possibility. (7T100-16 to 21; 7T100-22 to 23). At the hospital, doctors found that he had a collapsed lung and blood in his chest, in addition to a fracture of his eighth rib and a bruise on his left lung. (7T29-3 to 8; 9T7-22 to 24; 9T9-4 to 8). The bullet that entered Desai was never removed because doctors determined no surgery was needed, so police never recovered it. (8T18-5 to 10; 9T10-2; 9T11-7 to 9). The bullet lodged in Desai's body was fragmented, so doctors decided to leave it as it was. (9T11-16 to 23).

Investigators found at the store a discharged bullet that was found at the counter lodged inside a sleeve that contained plastic bags. (7T45-15 to 17;

8T10-1 to 3). Testing confirmed that it was a.38 caliber/.357 Magnum caliber projectile. (Da50; 9T41-7 to 10).

Police obtained a surveillance video from the owner of the Krauzers, and it showed a black man of small to medium build, wearing a white T-shirt, a ski mask with a white North Face logo and a watch on his right wrist, enter the store, approach the counter, holding a gun in his left hand. (Da50; 8T11-16 to 19; 8T12-21 to 8T13-1; 8T14-6 to 11; 8T14-24 to 8T16-7). The man pointed the gun in all directions. (Da50; 8T12-21 to 8T13-1). The video showed the victims and showed Singh chasing the assailant out of the store. (Da50; 8T13-4 to 6).

The fourth armed robbery took place on September 10, 2003, at a Shell gas station on Route 1 North in Edison. (Da50; 9T83-23 to 9T84-3; 9T84-15 to 20). At about 9:30 p.m., a man, who Cihan Polat, the attendant on duty, later described to police as being a black man about five-foot-six-inches to five-foot-eight-inches tall who was wearing a baggy white T-shirt, baggy blue jeans and a hood on his head, approached him as he sat inside the attendant's booth and pointed a silver gun at him. (Da50-51; 9T91-6 to 10; 9T95-20 to 25; 9T96-4 to 8; 9T96-9 to 10; 9T96-17 to 20). The man frisked Polat and took $640 from the cash register. (Da51; 9T95-20 to 9T96-3). The man then ran from the gas station to and toward a parking lot where he rounded the

corner of a building after which a vehicle pulled out of the parking lot and then proceeded onto Route 1 South. (Da51; 9T94-6 to 14). The vehicle was gray or silver in color. (9T97-3 to 6). Polat did not see if anyone got into the vehicle. (9T104-2 to 10).

Police obtained surveillance video from the gas station owner, which confirmed Polat's account of the robbery. (Da51; 9T109-5 to 10; 9T109-22 to 25; 9T119-10 to 12; 9T119-16 to 9T120-13).

The fifth robbery, attempted armed robbery, took place on October 2, 2003, in East Brunswick, and it led to both defendants' arrests. (Da51-55). At about 9:05 p.m., East Brunswick Police Officers Mark Csizmar and Jason Rios were in uniform and out on patrol in an unmarked police vehicle when they saw a man walking toward Route 18 on West Amherst Street. (Da51; 3T183-25 to 3T184-9; 3T185-12 to 14; 3T185-17 to 22; 3T186-4 to 8; 3T186-18 to 21; 3T189-14 to 18; 3T191-1 to 6). The man was walking in the middle of the street in the dark in a residential neighborhood with sidewalks. (3T189-18 to 24). He was of a stocky build, about five-foot-seven-inches tall, and was wearing a black knit cap rolled up on the top of his head, a white T-shirt, a black jacket, baggie jeans and untied work boots. (Da51; 3T200-1 to 15; 4T9-20 to 22). The man also was wearing a silver watch on his right wrist. (Da51; 3T216-17 to 21; 3T218-2 to 7; 4T15-19 to 23).

The officers followed the man as he made a turn onto another street and walked toward a strip mall. (Da51; 3T191-7 to 12). Alongside the strip mall was a Mobile gas station. (3T192-9 to 12). There was another gas station nearby, a Pit Stop gas station. (3T192-9 to 14). The officers drove to the parking lot of the strip mall and saw the man walk to the back of the lot where there were some bushes against a fence. (Da51; 3T192-21 to 3T193-5; 3T193-15 to 16). The officers thought the man might urinate against the fence. (Da51; 3T200-22 to 3T201-2). When the man entered the bushes, Officer Csizmar exited his police vehicle and flashed his flashlight. (Da51; 3T201-1 to 6). He saw the man motioning his waistband and pulling an object out, which the man then threw to the ground. (3T201-4 to 9). The object was a silver handgun, a .25 Taurus semiautomatic gun. (Da51-52; 3T201-4 to 9; 3T212-1 to 6). The gun was loaded with one bullet in the chamber and seven in the magazine. (3T211-11 to 16; 4T7-23 to 4T8-1).

Officer Csizmar immediately pulled out his service revolver and ordered the man to lie down on the ground. (Da52; 3T201-16 to 25). Officer Rios handcuffed the man. (Da52; 3T202-23 to 24). The man had no identification on him, and he said his name was Mookie Jackson and he lived in Franklin Township. (Da52; 4T7-14 to 20). When the officers asked the man where he

got the gun, the man said he found it in New Brunswick. (Da52; 3T204-4 to 8).

The officers told the man to sit on the curb after which the man's boots were removed; the man then jumped up and started running through the parking lot in his socks with his hands cuffed behind him toward Route 18. (Da52; 3T207-5 to 21; 3T208-3 to 5; 4T68-24 to 4T69-2; 4T69-13 to 21). The officers gave chase as the man ran onto the highway and into the line of traffic. (Da52; 3T208-3 to 5; 3T208-14 to 16). The scene was chaotic as drivers were forced to apply their brakes suddenly and swerve to avoid hitting the man. (Da52; 3T208-21 to 3T209-1). Police eventually caught the man and placed him in a police vehicle. (Da52; 3T210-5 to 7). Officer Csizmar told the man that he was facing only a gun charge which was not worth killing himself over to which the man replied, "if you knew what I did, you would run too." (Da52; 3T210-17 to 23). The police went back to the fence and found a North Face black hat and retrieved the man's footwear. (Sa1-4; 3T24-15 to 18; 3T215-18 to 23; 3T216-10 to 13; 3T217-9 to 22). The black hat was rolled up and when the police unrolled it, they saw it was a ski mask. (Sa1-4; 4T10-15 to 18).

At about 9:46 p.m. that same night, East Brunswick Police Officer Jeffrey Marino was out on patrol in a marked police vehicle between Route 18

and Old Bridge Turnpike, a residential area that borders commercial stores on Route 18, when he noticed a tan Hyundai moving at a very slow speed. (Da53-54; 4T73-13 to 18; 4T74-23 to 4T74-2; 4T74-6 to 7; 4T74-11 to 4T75-5). It appeared as if the driver was looking for someone. (Da54; 4T76-8 to 13). The officer followed the vehicle as it was driving on Highland Street, down Old Bridge Turnpike, then onto another street that took it back to the same neighborhood where the officer first saw it. (4T76-7 to 4T77-10). The vehicle then proceeded toward Route 18. (4T77-11 to 17). The officer ran a license plate check, and the registration showed an address in Piscataway. (4T77-18 to 24; 4T77-21 to 24).

Officer Marino pulled over the vehicle before it entered Route 18. (4T78-3 to 6). The driver was co-defendant Johnson. (4T78-7 to 10). He told the officer that he was coming from his cousin's house but when the officer asked Johnson where his cousin lived, Johnson changed his story and said he was coming from a store. (4T78-15 to 20). When asked what store, Johnson claimed he could not remember any details. (4T78-23 to 4T79-5). As the officer spoke with Johnson, he detected the smell of burned marijuana from inside the vehicle. (4T79-6 to 9). A search of the vehicle uncovered a blunt in the front seat area and a small bag. (4T79-10 to 24). The officer placed Johnson under arrest and found a zip lock bag of marijuana inside one of his

socks. (4T80-5 to 8). Johnson was taken to East Brunswick police headquarters. (4T80-15 to 18).

The man who told police he was Mookie Jackson was also taken to East Brunswick Police Headquarters where he continued to claim that was his name, however, an automated fingerprint identification system revealed his real name was Willie Tanner, defendant, and that he had two addresses in Franklin at 3 Pershing Avenue and at 8 Irving Avenue. (Da53; 4T65-7 to 12; 4T65-21 to 4T66-6; 4T117-6 to 15; 5T7-15 to 23; 5T10-14 to 18; 5T11-3 to 6; 5T11-9 to 15; 5T12-4 to 11). The two addresses are about a mile apart from one another. (4T127-16 to 21; 5T17-11 to 13). Investigators would learn that "Mookie" was defendant's nickname. (5T25-16 to 22). Defendant had no permit for the gun he had at the time of his arrest. (4T65-1 to 6). His height was five feet nine inches tall, and he weighed 155 pounds; he was 33 years old. (Sa7-10; 4T81-14 to 23; 4T82-5 to 6; 10T66-9 to 18; 10T67-7).

Investigators went to the address on Pershing Avenue around 5:30 a.m. and confirmed that defendant lived there with defendant's mother. (Da53; 5T13-10 to 13; 5T13-20 to 22; 5T14-1 to 22). She gave her consent to have police search the basement where defendant stayed. (Da53; 5T15-4 to 5; 5T15-14 to 16). The search uncovered a shoe box containing money, a white

T-shirt, Timberland shoes and two spent shell casings from a .38 caliber gun. (Da53; 4T121-12 to 17; 4T142-18 to 25).

Investigators then proceeded to the address on Irving Avenue at about 7:30 a.m., which was where defendant's girlfriend lived. (4T127-16 to 21; 4T128-9 to 12; 5T17-14 to 16). Investigators received consent to search the house, and they were given two bags: one bag contained a white T-shirt and a pair of dark blue jeans, which the parties stipulated at trial were the property of defendant; the second bag contained a pair of jeans, some change, a "Stacker" bottle and a pair of white Timberland boots. (Da53; 4T128-9 to 12; 4T128-24 to 25; 4T129-1 to 5; 4T137-10 to 20; 5T18-4 to 12; 5T19-20 to 22; 5T20-2 to 6; 5T20-18 to 20; 5T22-11 to 15; 5T22-20 to 22; 5T23-9 to 111 5T23-24 to 5T24-1).

Co-defendant Johnson was questioned by different investigators from East Brunswick, North Brunswick, Franklin Township and Edison following his arrest, and Johnson admitted that he drove defendant to the robberies and parked his vehicle and waited for defendant to return. (Da54; 5T31-21 to 25; 5T33-22 to 5T34-5; 5T35-3 to 13; 6T68-11 to 6T69-9; 6T69-18 to 24; 6T71-15 to 6T73-15; 8T20-2 to 11; 8T21-4 to 6). Johnson told East Brunswick police that defendant had approached him and asked him to give him a ride to Route 18 in the town to "get some money." (4T102-23 to 4T103-1). Johnson said

that defendant directed him to pull over about a block away from where police arrested him by the fence. (4T103-2 to 6). Johnson told an officer from Franklin Township that defendant told him that he had "heat," which meant he had a gun. (Da54; 5T39-19 to 23).

North Brunswick Police Detective Michael Braun, one of the officers who interviewed Johnson at police headquarters in East Brunswick, had Johnson transported to the North Brunswick police station where he had Johnson placed into an unmarked patrol car after which Johnson directed him along a series of roads that led them to the Krauzer's on Livingston Avenue; Johnson instructed the police to stop their vehicle at a house on a nearby street, Walnut Street, where they could see a furniture store located next to the Krauzer's store. (8T20-2 to 11; 8T21-4 to 6; 8T23-4 to 10; 8T23-14 to 18; 8T24-5 to 8; 8T24-18 to 25; 8T25-5 to 8; 8T28-20 to 8T33-16; 8T36-3 to 8). The officers took the route to the store that Johnson told them to take. (8T26-25 to 8T27-7; 8T30-9 to 13; 8T31-5 to 8; 8T35-20 to 23). Johnson told the officer that when defendant returned to his vehicle, defendant said, "let's go. Let's get out of here. Take me home." (8T37-19 to 21). The interview with Johnson in the police vehicle with North Brunswick police was recorded. (8T24-18 to 25).

Kaihala Staten, who was defendant's girlfriend in 2003, lived at 8 Irving Street, and testified that defendant wore baggy jeans, big T-shirts and wore a watch. (9T148-12 to 14; 9T149-1 to 13; 9T155-2 to 6). He also would wear a black wool cap or hat, which he would wear rolled up on his head. (9T156-1 to 10; 9T156-17 to 9T157-1). She testified that on one occasion, she was with defendant in his basement bedroom when he showed her a silver handgun with a brown handle. (9T160-8 to 16). She also testified she had seen a black gun. (9T161-11 to 15). She also testified that subsequently she heard defendant and his brother talking about a gun and defendant saying he did not want it. (9T164-5 to 24; 9T165-2 to 7; 9T172-21 to 25). The conversation was about the gun defendant had shown her. (9T171-10 to 25).

Kaihala also testified that defendant would talk to her about going out with Johnson to get money. (9T137-23 to 25; 9T166-10 to 16). One night, defendant called her on her cell phone around 12 to 1 a.m. and told her he had "hurt someone" and wanted to talk with her. (9T167-10 to 13; 9T168-19 to 22; 9T168-25 to 9T169-3). She estimated the call came in the middle or the end of September, but she was not positive about the date. (9T167-24 to 6T168-9; 9T169-5 to 9).

Kaihala's sister, Bethany, testified that she knew both defendant and Johnson. (9T125-10 to 18). She recalled that defendant would come to the

house at 8 Irving by himself or sometimes he would come with Johnson. (9T126-23 to 9T127-15). She knew that defendant and Johnson were cousins. (9T128-20 to 22). During the summer of 2003, she recalled defendant wearing jeans, loose-fitting T-shirts and a watch. (9T128-23 to 25; 9T129-4 to 9). Another sister, Crystal, testified that defendant had no car and would get around in Johnson's car. (9T138-21 to 25). Johnson had a four-door gold-colored car, which she identified from a photograph taken by police on the night of Johnson's arrest. (4T82-22 to 4T23-2; 9T139-5 to 10; 9T139-16 to 20; 9T140-1 to 10).

In June 2004, police recovered a .38 caliber Colt revolver from a juvenile, X.B. (4T138-2 to 4T139-6; 4T140-3 to 16). This gun was a silver revolver with a wooden handle. (4T139-221 to 24). In May 2005, this gun was examined by the State's ballistics expert. (9T37-19 to 8T38-3; 9T38-14 to 18). The ballistics expert determined that the projectile recovered at the Krauzer's store, and the two .38 casings recovered from defendant's bedroom, had been fired from this gun. (9T39-5 to 13; 9T40-3 to 24). Before the expert had the Colt revolver to examine, he had compared the spent casings and the

projectile and found them to be compatible with one another because of a copper wash. (9T37-6 to 18; 9T39-14 to 9T40-2).[2]

Co-defendant Johnson testified at trial and admitted to driving defendant to the robberies. (Da54; 10T21-23 to 10T22-1; 10T24-1 to 10T24). He testified that following his arrest on October 2, 2003, he spoke with the police and rode around with them to show them where he had parked. (10T37-15 to 10T38-13). Johnson testified that he had reached a plea agreement with the State where he pleaded guilty to conspiracy and agreed to testify truthfully against defendant in return for a sentence of three years in prison, subject to serving 85% without parole. (10T7-23 to 10T8-5; 10T8-19 to 10T9-1). The State recommended a term of four years in prison with the parole bar; the court had recommended a base term of three years in prison subject to the parole bar. (10T8-2 to 3; 10T8-19 to 21; 10T9-11 to 15).

Defendant testified on his own behalf and denied that he committed the armed robberies at the gas stations and the Krauzer's store. (11T33-25 to 11T34-14). Defendant claimed that on October 2, a friend drove him to East Brunswick to purchase marijuana from Johnson. (Da55; 11T18-13 to 11T19-7). He claimed that he was wearing a black jacket, a blue hat, a white T-shirt,

[2] It was elicited at trial that X.B. stood five foot six inches tall, weighted 143 pounds and had darker, black skin from defendant. (4T142-14 to 17; 4T151-14 to 15; 4T151-21 to 22; 4T152-12 to 15).

blue jeans and boots. (11T19-16 to 20). He denied owning a black knit mask. (11T19-23 to 25). He claimed that his friend parked at a gas station on Route 18 after which he got out and looked for Johnson's car. (11T19-5 to 12). He claimed that two police officers "jumped out" of their car and arrested him. (Da55; 11T19-11 to 15). He testified that Johnson was a person subject to manipulation and when asked by counsel if Johnson was known to be "out to lunch," he answered yes. (11T33-6 to 11).

On cross-examination, defendant denied that he was left-handed and claimed that he was "predominantly right-handed." (11T46-24 to 11T47-4). But he claimed that he could eat with his left hand. (11T47-9). He denied that the North Face ski mask found by police on October 2 belonged to him, even though testing showed that his DNA was the major source of the DNA found on it. (11T54-17 to 11T55-25). He admitted that a scar visible in his mustache at the time of trial was the same scar he had in 2003. (See Sa7; 11T54-9 to 12).

The State called a corrections officer on rebuttal, who testified that he had seen defendant write using his left hand. (11T95-17 to 11T96-1; 11T96-22 to 11T97-1). The officer also saw defendant eating using his left hand, brush his teeth with his left hand and play chess using his left hand to move the chess pieces. (11T97-1 to 4; 11T97-22 to 11T98-1).

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE AND FOR POST-CONVICTION RELIEF. (Da440-446).[3]

Defendant contends that Judge Bucca erred in denying his application for a new trial and his application for post-conviction relief. The State submits that Judge Bucca properly denied defendant's application. Defendant did not sustain his burden of showing his entitlement to collateral relief by a preponderance of the evidence. State v. Preciose, 129 N.J. 451, 459 (1992).

To place the remand proceedings into context, an overview of the first PCR proceeding and appeal needs to be outlined. Defendant raised ineffective assistance of counsel claims and due process claims in his PCR application. (Da156-158). Judge Ferencz denied defendant's claims and ruled he was not entitled to an evidentiary hearing. (Da161-185). With respect to defendant's claim that the State violated his right to due process by failing to disclose that it had reached a secret deal with co-defendant Johnson before the 2006 trial, (Da164), Judge Ferencz held that there was no evidence of a pre-arranged deal at the time of the trial. (Da165-166). With respect to defendant's claim that

[3] This Point responds to Points I to VII in defendant's brief.

the State had violated his due process rights by not disclosing Johnson's psychiatric history, Judge Ferencz held that the evidence was not sufficiently material considering the evidence of defendant's guilt. (Da169-171; Da184-85). In addition, the judge ruled that the medical records were discoverable through reasonable diligence before trial. (Da185).

The Appellate Division affirmed in part, reversed in part and remanded for an evidentiary hearing. (Da189). The Appellate Division placed defendant's claims into three categories: 1) the State's failure to disclose the true nature of Johnson's plea bargain and the failure to disclose Johnson's psychiatric history; 2) the enforcement of subpoenas defendant filed to compel disclosure of documents from different law enforcement agencies; and 3) ineffective assistance of counsel. (Da197). The Appellate Division affirmed Judge Ferencz's rulings with respect to the second and third categories. (Da206-211). It reversed and remanded with respect to the first category. (Da203- 206).

The Appellate Division disagreed with Judge Ferencz's assessment of the potential prejudice against the defendant if in fact the State had agreed to a more favorable plea bargain with Johnson than revealed at defendant's trial. (Da203). The Appellate Division ruled that the evidence did not support defendant's claim that the State violated Brady v. Maryland, 373 U.S. 83

(1963), only that defendant had produced enough evidence to have an evidentiary hearing. (Da197; Da204; Da206). The Appellate Division agreed with Judge Ferencz that there was no evidence that the State was aware of Johnson's psychiatric history, and it rejected defendant's claim under Brady that the State should be charged with constructive knowledge of Johnson's health history. (Da204). However, the panel disagreed with the judge's ruling that the medical records were not material under the test for newly discovered evidence such that no evidentiary hearing was warranted. (Da204; Da205).

The remand hearing took place on different dates between 2018 and 2021. (20T-30T). Defendant called witnesses Johnson's sister, Johnson, himself, a psychiatrist, and his trial attorney. (22T; 23T; 24T; 25T). The State called witnesses AP McKinney, who prosecuted the trial, Middlesex County Investigator Karleen Duca, who worked on the case, Darryl Saunders, Esq., who was Johnson's trial attorney, and former Middlesex County AP Peter S. Hamerslag, who originally handled the cases. (20T; 21T; 26T; 27T; 28T; 29T; 30T).

Judge Rivas presided over the testimony produced on January 29, 2018, (20T), January 30, 2018, (21T), February 16, 2018, (22T), March 5, 2018, (23T), and May 14, 2018. (24T). Following Judge Rivas' recusal, Judge Bucca presided over the testimony produced on December 18, 2019, (25T),

February 25, 2020, (26T), February 27, 2020, (27T), March 3, 2020, (28T), March 4, 2020, (29T), and January 22, 2021. (30T). In denying defendant's application for a new trial and for post-conviction relief, Judge Bucca outlined the testimony produced before the court, including testimony that had been heard by Judge Rivas. (Da410-422).

In State v. Pierre, 223 N.J. 560, 576-77 (2015), the Supreme Court set forth the standard of review in PCR cases where the PCR court held an evidentiary hearing. In reviewing the PCR court's factual findings based upon testimony, the appellate court applies a deferential standard and will uphold the PCR court's findings that are supported by sufficient, credible evidence in the record. Ibid. The appellate court's reading of a "cold record" is not a substitute for the PCR court's assessment of the credibility of the witnesses observed firsthand. Ibid. However, the PCR court's interpretation of the law is afforded no deference and is reviewed de novo. Ibid. For mixed questions of law and fact, the appellate court gives deference to the supported factual findings of the trial court but reviews de novo the lower court's application of any legal rules to such factual findings. Ibid.

Defendant's application below was also presented as a motion for a new trial and Rule 3:20-1 and 3:20-2 provide the mechanism for seeking a new trial. State v. Armour, 446 N.J. Super. 295, 305 (App. Div.), certif. denied, 228

N.J. 239 (2016). Rule 3:20-1 provides that a trial court may grant a new trial if "required in the interest of justice." Similarly, Rule 3:20-1 permits the trial court to set aside the jury's verdict as being against the weight of the evidence if it "clearly and convincingly appears that there was a manifest denial of justice under the law." Rule 3:20-2 permits a defendant to seek a new trial at any time on the ground that there was "newly discovered evidence." The trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." Ibid. The difference between the appellate standard of "miscarriage of justice" and the Rule's standard of "manifest denial of justice under the law" is "semantic." Id. at 306.

Defendant initially argues that the traditional standard for appellate review should be abandoned, and this court should review de novo Judge Bucca's fact and credibility determinations because Judge Bucca did not observe live the testimony heard by Judge Rivas. (Db3). Defendant asserts that this court stands in equity to Judge Bucca to read the transcripts of the testimony heard by Judge Rivas and to make its own credibility and factual determinations. (Db3). Defendant's argument directly conflicts with precedent from the New Jersey Supreme Court.

In State v. S.S., 229 N.J. 360 (2017), the Supreme Court reversed one of its prior opinions and held that the traditional deference afforded to a trial court's fact-finding extends to findings based solely upon the trial court's review of video or documentary evidence because such deference "best" advances the interests of justice in a system that assigns different roles to trial and appellate courts. 229 N.J. at 379, 381. The Supreme Court noted the "ongoing experience and expertise" of trial courts in fulfilling the role of factfinder. Id. at 380. In contrast, the appellate court's role is to review issues of law and the trial court's legal conclusions. Ibid. The Supreme Court held that permitting the appellate court to substitute its factual finding for that of the trial court in the context of video or documentary evidence would undermine the legitimacy of the trial court in the eyes of litigants, would multiply appeals by encouraging appellate retrials of factual issues and needlessly reallocate judicial authority. Id. at 380-81. The Supreme Court reaffirmed its holding in S.S. in State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019).

In rendering his ruling, Judge Bucca familiarized himself with the testimony produced in court before his assignment to the case and whether the judge accomplished this task by listening to the courtsmart recordings or by

reading the transcripts of the testimony, the judge's factual findings and his credibility assessments are entitled to deference in accordance with S.S.

Defendant also argues up front that Judge Bucca made factual errors in summarizing the evidence the State used at trial to support the convictions, but the judge made no serious error that undermines his findings and legal conclusions on the issues raised by defendant at the remand. (Db14-17).

Defendant first claims it was error for the judge to write that the North Face mask seized by East Brunswick police was found on defendant. (Da407). When the officers saw defendant walking in the street, they saw him wearing a black knit cap rolled up on the top of his head. Following the officers' chaotic and dangerous foot pursuit of defendant up Route 18, they seized the mask at the fence where they originally stopped and approached him. It is not factually incorrect to say that the North Face mask was found on defendant because the officers saw him wearing it.

Defendant claims the judge erred by writing that the gun recovered by East Brunswick police on October 3, 2003, matched the gun in the surveillance videos. (Da407). Each of the armed robberies at the gas stations involved the armed assailant holding a silver gun. The gun seized from defendant on October 3 is silver-colored, (Sa1-2), and the surveillance videos from the gas stations confirmed that the armed assailant was holding a silver gun. The gun

seized from defendant on October 3 was not involved in the Krauzer's robbery, however, this error on the judge's part is minor, because the ballistics evidence from defendant's bedroom and the projectile recovered by police at the Krauzer's store were linked to the Colt revolver police obtained from X.B., which was identified as the gun used in the Krauzer's robbery.

Defendant claims that Judge Bucca made a factual mistake by writing that photos showed defendant with a scar in his mustache. (Da407). This is factually accurate. The photograph taken of defendant on October 3 and admitted into evidence showed a scar in his mustache. (Sa7-8). On cross-examination, defendant admitted he had the scar, saying he sustained it in 1998 or 1999. (11T54-7 to 12). AP McKinney later argued during her summation that Abdul Imran told police the armed assailant had a scar in his mustache, (11T132-13 to 17; 11T142-9 to 12), however, Imran testified he only saw a mustache, so if the judge made a mistake, it was to mention the scar. There was no testimony from Imran that he saw a scar, and Edison Police Detective Joseph Shannon testified that to his knowledge, Imran never mentioned a scar. (6T80-11 to 13). But the photograph admitted at trial supports the conviction

because it shows that defendant on the night of his arrest had a mustache, which is consistent with Imran's testimony.[4]

Defendant also challenges as factually incorrect Judge Bucca writing that a shell casing found in the gun seized from defendant was linked to the Krauzer's robbery. (Da407). The shell casings that were linked to the Krauzer's robbery were seized from defendant's bedroom, not the gun in his possession on October 3. The judge's mistake involved where the linked shell casings came from. The ballistics evidence linked defendant to the Krauzer's robbery.

Defendant also claims it was factually incorrect for the judge to write that defendant told his girlfriend he had "done a really bad thing." (Da407). The judge's statement is consistent with the testimony adduced at trial.

In addition to claiming that Judge Bucca made factual errors in outlining some of the evidence from the trial, he claims that Judge Bucca erred as a matter of law by applying the incorrect standard for adjudicating his new trial

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[4] On direct appeal, the Appellate Division rejected defendant's pro se claim that AP McKinney's argument about Imran's identification denied him a fair trial. (Da68-69). On PCR, defendant alleged that trial counsel was ineffective for not objecting to AP McKinney's argument. (Da157). Judge Ferencz ruled the claim was adjudicated on direct appeal and thus was barred under Rule 3:22-5. (Da182). As outlined above, the Appellate Division in the first PCR appeal upheld Judge Ferencz's ruling on the ineffective assistance of counsel claims.

argument by applying a "manifest denial of justice" standard when the court rule states, "interest of justice." (Db3-4). The judge stated the standard quoted in Rule 3:20-1, as well as that for setting aside a jury's verdict as being against the weight of the evidence. The judge's ruling discussed issues of materiality in addressing the multitude of claims being raised by defendant under Brady and the test for newly discovered evidence. There is no basis for arguing the judge's ruling is erroneous.

In any event, as outlined above with the appellate standard of review, the judge's legal conclusions are entitled to de novo review by this court. It is also important to note that appeals are from judgments, not opinions. E.g., Heffner v. Jacobson, 100 N.J. 550, 553 (1985); see R. 2:2-3(a)(2). A trial court's judgment can be upheld by this court if it is sustainable for any reason. Hayes v. Delamotte, 231 N.J. 373, 387 (2018).

Johnson pleaded guilty on February 17, 2005.[5] Johnson was sentenced by Judge Mulvihill on January 26, 2007. (36T). Johnson was represented by his attorney Darryl Saunders, Esq.; AP McKinney represented the State. (36T). After Johnson's family spoke, AP McKinney addressed the court and

[5] The transcript of Johnson's guilty plea from February 17, 2005, was before Judge Bucca. The transcript dated February 17, 2005, that defendant uploaded to e-courts appellate on July 3, 2024, is "vol. 1," which is the transcript of defendant's Miranda motion. (33T).

said that each time she had spoken with Johnson, she was left with the thought that he was very impressionable, and this belief was reaffirmed after speaking with Johnson's parents. (36T10-5 to 9). AP McKinney asked the court to sentence Johnson in accordance with the plea agreement. (36T10-15 to 18). AP McKinney then said that the State would not oppose a motion for reconsideration of sentence in the future to convert the sentence to a drug court sentence pursuant to N.J.S.A. 2C:35-14, on condition that there was an available bed in a drug treatment program. (36T11-2 to 7). In addition, AP McKinney advised the court that she had spoken with Johnson's family and Ed Mann earlier that morning, and Ed Mann had agreed to help; Johnson was going to write Mann in five months to begin the process of getting a bed. (36T11-7 to 11).

Judge Mulvihill went on to state that Johnson was going to return to his courtroom in July 2007. (36T11-22 to 23; 36T12-11 to 12; 36T36-16 to 18). Judge Mulvihill sentenced Johnson in accordance with the plea agreement to three years in prison, subject to NERA. (36T11-25 to 36T12-5; 36T12-6 to 10). Judge Mulvihill instructed Mr. Saunders to ensure there would be availability in one of Mr. Mann's programs so he could resentence Johnson to probation and an inpatient program. (36T12-18 to 2).

On July 23, 2007, Johnson appeared in court for resentencing as previously scheduled. (37T). Mr. Saunders was not present. (37T2-16 to 19). AP McKinney appeared for the State. (37T2-3 to 4). Judge Mulvihill asked Johnson if he had an objection with proceeding without Mr. Saunders; Johnson answered no. (37T3-4 to 5). The judge resentenced Johnson to five years' probation and remanded Johnson to an ASAP pod at the county jail pending a bed at Dudley's House. (37T6-2 to 16).

During the PCR remand proceedings, defendant called Wilona Johnson, Johnson's sister, as a witness. (22T). Ms. Johnson attended defendant's trial in 2006 and before Johnson testified, it was her understanding that his sentence would be six months in jail, a halfway house and a few years of probation. (22T18-11 to 19). She claimed to have learned this information a few months before defendant's trial from AP McKinney and Mr. Saunders. (22T18-20 to 22T19-2). Ms. Johnson also testified that before defendant's trial, she told AP McKinney that Johnson had been beaten by corrections officers, had suffered a nervous breakdown and had been taken to the hospital. (22T19-18 to 22T20-10).

Ms. Johnson admitted that everyone in the Johnson household knew that Johnson had been hospitalized. She said, "Everyone knew. It was a big thing in the family." (22T43-9 to 16). She claimed that she never discussed

Johnson's hospitalization with defendant or his family or his defense attorney. (22T45-2 to 22T46-4). Yet, she admitted that defendant's family probably knew about the hospitalization because they had a "huge" family, and they all knew the same information. (22T46-8 to 22). She also admitted she was present when her mother had phone calls with her mother's brother, which was her uncle and defendant's stepfather, about Johnson's hospitalization. (22T47-10 to 6 to 22T48-1). These phone calls occurred before defendant's trial. (22T48-2 to 4).

Johnson testified for the defense twice. (22T; 25T). During his first appearance, when he was not represented by counsel, Johnson testified that his plea was for a sentence of three years in prison with the 85% parole bar, but he would be resentenced to six months with probation and a drug program. (22T53-11 to 21). He claimed that this information was given to him before defendant's trial, and it was told to him by "Martha." (22T53-22 to 25T54-9; 22T56-20 to 22). He claimed that her promise was prompted by him telling her he wanted to withdraw his guilty plea. (22T55-25 to 22T56-15). He testified that his testimony at defendant's trial was false. (22T57-5 to 7).

When Johnson testified for the second time, an attorney for him was present. (25T3-24 to 25T4-3). The State cross-examined Johnson, who testified that he recalled telling police that he drove defendant to different

locations with defendant getting out of the car and then returning. (25T9-11 to 17; 25T14-4 to 15). He acknowledged that what he told police was the truth. (25T25-24 to 25T26-2). Johnson acknowledged that he had pleaded guilty under oath to agreeing to commit robberies with defendant. (25T11-4 to 12). Johnson acknowledged that he told the truth. (25T11-13 to 14). He acknowledged that he testified truthfully at defendant's trial. (25T27-9 to 22). This included his truthful testimony at defendant's trial that his sentence under the plea deal was three years in prison with an 85% parole bar. (25T32-7 to 13; 25T33-8 to 15).

On re-direct, PCR counsel confronted Johnson with his testimony from his first appearance where he recanted his trial testimony, and Johnson claimed he could not recall it. (25T108-23 to 25T109-7). Johnson added that he might have been saying he did not know what was going on. (25T109-11 to 12). When PCR counsel confronted Johnson by asking if he "actually" knew defendant committed robberies, Johnson answered "I'm not sure. I don't know." (25T109-13 to 17).

The defense produced Dr. Kenneth Weiss as an expert in psychiatry. (23T18-12 to 14; 23T19-17 to 22). Dr. Weiss reviewed Middlesex County jail medical records and Robert Wood Johnson Behavioral Health Care center records where Johnson received psychiatric care following his post-arrest

attempted suicide. (23T21-14 to 22; 23T23-10 to 13; 23T26-13 to 25). The medical records spanned from October 2003 to March 2004. (23T24-6 to 21). Dr. Weiss's report was written on October 22, 2012. (23T22-25 to 23T23-2).

Dr. Weiss testified that the records showed that Johnson was diagnosed with an "unspecified psychosis." (23T25-5 to 13). Dr. Weiss explained that the "unspecified" diagnosis meant it was not known at the time if there was adequate information to make a specific diagnosis, meaning it could be "transitory." (23T25-14 to 22). Psychosis, he explained, is a general departure from reality where the person is not as able as the average person who is healthy to assess what is what and what is not real. (23T26-1 to 5). Johnson was also diagnosed with cannabis abuse. (23T25-8 to 9). A positive urine screen from November 15 for marijuana was an indication of chronic marijuana use. (23T48-7 to 10).

Based upon his review of the medical records, Dr. Weiss opined that Johnson was psychotic at the time of his arrest and his subsequent statements to police. (23T49-18 to 25). He assumed that Johson gave four statements to police on October 3, 2003, and the police reports showed that Johnson gave a statement to detectives in North Brunswick, two statements in Piscataway, and one in Edison. (23T42-11 to 17). He considered that Johnson was a person with psychosis, who was in sleep deprivation and was high on marijuana,

which would have made Johnson tired and unable to resist questioning or to think critically about his situation or "holding one's own in reality." (23T43-17 to 23T44-4). He opined that Johnson was susceptible to leading questions. (23T45-9 to 17).

Dr. Weiss believed that Johnson had an established psychotic illness that was not solely related to jail-induced stress. (23T53-11 to 23T54-2). Even though Johnson's treatment was terminated in December 2003, Dr. Weiss opined that Johnson's illness was likely to continue and it was unlikely that it would remit spontaneously without treatment. (23T62-5 to 13). The doctor believed that Johnson still had a psychotic condition in January 2006. (23T62-14 to 15).

On cross-examination, Dr. Weiss admitted that he was not present at the 2006 trial when Johnson testified, did not speak to anyone who had observed Johson testify at the trial, did not interview or examine Johnson before or after the trial, and did not speak with Johnson's parents, sister or coworkers about Johnson's demeanor and testimony at the trial. (23T67-1 to 14). Thus, Dr. Weiss could not offer an opinion as to Johnson's mental state at the time he testified at defendant's trial because the doctor did not examine him; his opinion was limited to whether Johnson's psychotic condition would have continued after his treatment, which pre-dated the trial by three years. (23T73-

2 to 13; 23T74-12 to 17). Even on this front, the doctor admitted that Johnson's symptoms abated enough so he was able to be transferred to a less restrictive type of care, which was intensive outpatient care on a reduced level of Abilify, an anti-psychotic drug. (23T72-2 to 25).

Dr. Weiss reviewed Johnson's trial testimony from 2006 and did not notice anything unusual about the way he testified. He observed that Johnson was able to answer questions on direct and cross-examination and there was no indication that Johnson "was a psychotic person talking." (23T75-14 to 23; 23T76-14 to 20).

Dr. Weiss also admitted that a psychiatric evaluation was not performed on Johnson until he attempted suicide after he claimed he had been beaten while in jail. (23T68-1 to 5). He also acknowledged that Johnson was not diagnosed with either schizophrenia or bipolar disorder, which are typical psychotic conditions. (23T71-1 to 6). Even though the doctor believed that Johnson had an established psychotic condition before, during and after November 2003, he acknowledged that a person in a psychotic state can testify truthfully. (23T97-1 to 13; 23T99-6 to 12).

Defendant's trial attorney, Robert White, Esq., testified for the defense. (24T). He recalled that Johnson testified at defendant's trial pursuant to a plea agreement where Johnson promised to testify truthfully against defendant in

exchange for a plea of three years subject to NERA. (24T6-20 to 24T7-23). He was asked to speculate about what he would have done if he had known that Johnson had a psychotic episode at the time of the trial, and Mr. White was unsure about what he would have done. (24T13-3 to 24T22-19; 24T40-10 to 22). He at one point noted that he was being asked to go back fifteen years. (24T16-13 to 14). Mr. White's testimony was limited also because he had not reviewed any of the trial transcripts before he came to court. (24T42-23 to 24T44-15). However, he acknowledged that had he known about Johnson's post-arrest breakdown, he may have done some research and may have sought out an expert to see if Johnson's credibility could be attacked. (24T38-17 to 24T40-9).

Mr. White could not recall having a discussion with defendant about Johnson's mental health. (24T28-8 to 11). But he did recall that Johnson was not particularly bright and was known to be "somewhat slow." (24T32-5 to 10). He recalled from the trial that Johnson did not present himself as a "confident, very intelligent sharp individual." (24T33-11 to 15; 24T36-7 to 15). He said he used his cross-examination of Johnson and his summation to make this evident to the jury. (24T33-16 to 24T35-21; 24T36-4 to 6; 24T37-1 to 6; 24T45-2 to 11). Mr. White did not believe Johnson was high on anything when he testified at the trial. (24T36-16 to 23).

The State called AP McKinney as a witness. During her testimony on January 29, 30, 2018, she testified that prior to defendant's trial, she never spoke to Johnson about anything other than his testimony. (20T60-2 to 4). She was not the AP who negotiated the plea agreement with Johnson; it had been negotiated with AP Keith Warburton. (20T8-1 to 20; 20T96-1 to 3). AP McKinney was not present when Johnson pleaded guilty in 2005. (20T22-25 to 20T23-1; 20T56-13 to 16). Before AP Warburton handled the case, it was handled by AP Hamerslag. (20T7 to 11). AP Warburton assumed the case when AP Hamerslag retired. (20T138-22 to 20T139-3). AP McKinney was only assigned to handle defendant's trial. (20T56-17 to 18; 21T42-19 to 25).

AP McKinney was assigned to handle defendant's trial in the summer of 2005 because AP Warburton had another trial to handle. (20T8-3 to 20; 20T9-12 to 20T10-10; 20T120-15 to 19). When AP Warburton assigned defendant's trial to her, he told her that he had met with Johnson and had taken Johnson for a ride like he had ridden with the police departments to the scenes of the robberies. (20T9-16 to 20T10-10; 20T112-13 to 23). AP McKinney did not consider the ride as evidence, just preparation for trial. (20T114-10 to 16). She did not recall a note in the file about the police ride with AP Warburton. (20T115-13 to 15). She said AP Warburton told her the trial was "set to go." (20T9-24 to 25). When she prepared for the trial, she concentrated on the

boxes related to the evidence against defendant; AP Hamerslag's notes on Johnson's case were not in the boxes she used to prepare for trial. (20T131-1 to 10; 20T141-14 to 20T143-11).

She denied making any representation to Johnson about a further reduction in his sentence until she spoke with his parents at Johnson's sentencing hearing on January 26, 2007. (20T60-7 to 13). She stated that Johnsons' resentencing was not in exchange for cooperation as a witness. (20T61-6 to 8). She was not aware of any reports on Johnson's mental state when she appeared for Johnson's sentencing. (20T56-24 to 20T57-1).

AP McKinney explained that on the day of Johnson's sentencing, she spoke with Johnson's parents out in the hallway. She was prepared to ask for the sentence contemplated by the plea agreement. (20T96-3 to 4). When Johnson's family approached her and asked her if she could do something for Johnson, she considered an alternative sentence. (20T30-15 to 23; 20T31-4 to 7; 20T95-21 to 20T97-1). She explained that she was moved by his parents, and Johnson's father reminded her of her own father. (20T31-7 to 15; 20T32-1 to 5). She believed that had it not been for defendant, Johnson would not have gotten into trouble. (20T32-5 to 8; 20T91-9 to 16).

She testified that she told Johnson's parents that she could help get Johnson into a drug program, but he would have to serve time in prison first.

(20T32-8 to 16). She said that this was discussed with Johnson's attorney, Mr. Saunders and Judge Mulvihill. (20T32-17 to 20T33-3). The plan was for Mr. Saunders to file a motion for reconsideration of sentence, which would be the trigger for the case to come back before the judge and if there was a bed for Johnson in a drug program, the State would consent. (20T34-17 to 20T35-6).

When asked why she decided to proceed with Johnson's resentencing in July 2007 without Johnson's attorney being present, she explained that adjourning the hearing would be to Johnson's detriment and was not within the spirit of what had been agreed to in January of that year. (21T75-12 to 22).

AP McKinney also testified in 2018 about how she prepared witnesses for trial. She said that when she handed questions and answers to the witness to review, the witness would not change any of the answers. (20T82-7 to 10; 20T82-8 to 10; 21T12-6 to 25). Any change would be to her questions. (20T82-11 to 17; 20T82-11 to 17). And she made any changes on her copy. (20T83-6 to 13). She described this practice as a means to let the witness know what was going to be asked so as not to surprise the witness and to settle any nervousness the witness may feel. (20T83-13 to 21).

In this case, the questions and answers she typed out for Johnson were based on the police reports and statements. (20T19-1 to 3; 20T83-22 to 20T84-18; 20T78-20 to 20T79-22; 20T81-6 to 18). She instructed Johnson in

conformance with her practice, which was the questions and answers were not a script. (20T19-4 to 8). As she put it, her instruction to the witness was, "I follow you. You don't follow me." (20T19-8 to 9). She testified that she had gone over the questions she wanted to ask Johnson. (20T19-24 to 20T20-1). There was no discussion about Johnson's ultimate sentence during her pretrial meeting with him. (20T28-15 to 21). She could not recall whether Johnson made any changes to the document she had prepared. (20T88-18 to 21). She recalled that when Johnson spoke, he spoke slowly. (20T92-9 to 12). But he appeared to be lucid, appeared to understand the proceedings, and responded appropriately to questions posed to him. (21T59-9 to 21T60-10). It never occurred to her that Johnson could have been manipulated by the police. (20T94-23 to 20T95-1). AP McKinney testified that Johnson's trial testimony was generally consistent with what he had told police in his statement. (21T61-15 to 21T62-15).

AP McKinney appeared again for testimony on February 27, 2020, so that Judge Bucca could question her regarding her testimony before Judge Rivas. (27T). Judge Bucca asked AP McKinney his questions first, (27T3-19 to 27T43-6), after which both counsel conducted direct and cross-examination that continued onto March 3, 2020, and March 4, 2020. (27T47-11 to 27T126-21; 28T; 29T).

AP McKinney, in response to Judge Bucca's questions, reiterated that she inherited defendant's case from AP Keith Warburton, that she was not involved in the plea negotiations with Johnson, that he already had pleaded guilty when she took over defendant's case, that Ed Mann was outside the courtroom on the day of Johnson's sentencing and that when she spoke with Johnson's parents outside the courtroom on the day of Johnson's sentencing, she empathized with them, so she decided that if Johnson spent six months in prison, she would not oppose his attorney filing a reconsideration motion for entry into a drug program. (27T4-10 to 25; 27T6-4 to 8; 27T7-6 to 21; 27T10-10 to 27T11-8; 27T11-11 to 25; 27T14-2 to 20; 27T25-17 to 24). She did not discuss this arrangement in advance with Judge Mulvihill or with any of her supervisors. (27T14-16 to 20).

She also testified that Johnson was not admitted into Drug Court. Rather, he was resentenced pursuant to Rule 3:21-10, which permits a defendant to make an application for resentencing to a drug rehabilitation program with consent of the State. (27T42-8 to 25). She did not notify defendant's attorney about Johnson's resentencing because by the time it happened, defendant had been tried and convicted. It never crossed her mind to notify defendant's counsel because the resentencing arrangement was

formulated after defendant was convicted and sentenced. (27T60-19 to 27T61-5; 27T61-16 to 22).

Judge Bucca questioned AP McKinney regarding her prepared questions and answers for the witnesses. She explained that she prepared questions for each witness because the trial involved numerous witnesses, numerous charges, hundreds of exhibits and she wanted to ensure she covered all the information she needed to cover to prove the State's charges. (27T18-17 to 27T19-13). She did not view this practice as impermissible coaching and she testified while she had not tried a case in "quite some time," she would no longer continue it. (27T22-10 to 19). She said that if a witness said something inconsistent or there was new evidence, Investigator Duca would have recorded it. (27T22-20 to 27T23-11).

AP McKinney later identified during her testimony the questions and answers that she prepared for Johnson's trial prep. (Da212-225; 27T57-6 to 13). She identified on page 8 of the portion of the questioning that pertained to defendant's head covering, (Da219), and did not have an independent recollection of what Johnson said during trial prep, but she wrote "like a scully" on the question-and-answer sheet. (Da219; 27T57-16 to 27T58-25). AP McKinney recalled that Johnson said he did not see a mask on defendant's face because it was rolled up. (27T51-23 to 27T52-5). If the North Face cap

was rolled up, the North Face emblem would not be visible. (27T53-6 to 15). She did not recall whether Johnson mentioned seeing a North Face emblem. (27T54-21 to 23).

Prior to Johnson's prep, AP McKinney did not look in Johnson's file. (27T72-14 to 20). She said that a reference to a "psych report" in Johnson's file would not have been important until there was a report that indicated Johnson had a problem. (27T73-10 to 17). Had there been a report in the file from a psychiatrist, and she saw it, she would have gathered the information to turn over. (27T75-10 to 23). As it was, the trial boxes she received when she was assigned the case only pertained to defendant. (27T76-16 to 23). In short, the two cases were not boxed together. (27T77-20 to 20T78-2). Thus, notes that AP Hamerslag made in October 2004 about a Dr. Krakoff on whether Johnson could waive his Miranda rights were not reviewed by her when preparing for defendant's trial. (Da236; 27T84-11 to 27T85-24).

When Judge Bucca asked AP McKinney if Johnson was a necessary witness for the State, she said that as she sat in court that day and after reviewing all the evidence, her answer was no, because the other evidence against defendant was strong and corroborated Johnson's testimony. (27T27-23 to 27T31-11; 27T32-15 to 27T33-18; 27T39-18 to 27T40-20).

When AP McKinney testified on March 3, 2020, she was further cross-examined, and she reiterated that she told Johnson the questions and answers were not a script because she wanted to make sure Johnson understood it was not a script in the event the idea entered his head. (28T12-6 to 24; 28T13-8 to 13). She was also shown the questions and answers she wrote for Kaihala Staten's trial prep, (Da237-242), and PCR counsel tried to establish that her questions and answers omitted certain facts in Staten's statement to police, notably she claimed defendant told her in his phone call with her that he had hurt someone at a bus stop. (Sa11-36; 28T17-22 to 28T34-14).[6] She acknowledged that her questions and answers did not include a reference to a bus stop. (28T59-24 to 28T60-8). She could not recall where Staten's testimony that defendant may have hurt someone came from. (28T60-9 to 12; 28T62-1 to 18; 28T63-14 to 17).

When AP McKinney's cross-examination continued on March 4, 2020, PCR counsel cross-examined about her notes on Kaihala Staten, and when counsel suggested she should have questioned Staten about the bus stop

[6] Both below in his brief to Judge Bucca and on appeal, defendant provided only five pages from Staten's statement. (Da243-248). The State supplied Judge Bucca with the full statement in its summation brief. (Sa11-36). Staten told police defendant called her and told her something happened at a bus stop in North Brunswick where he got into a fight and said he hurt or stabbed someone. (Sa26). She said defendant told her two men had tried to fight him, and she was not sure if defendant stabbed or shot the man. (Sa28).

stabbing, she said she did not believe defendant told Staten the truth when he told her the alleged incident occurred at a bus stop, and even if there was some stabbing episode at a bus stop, it implicated other crimes evidence. (28T6-7 to 28T30-22). She reiterated that she told all witnesses to tell the truth. (28T30-24 to 25). And she recalled that, as with any witness, Staten had a copy of her statement. (28T25-22 to 28T26-3).

AP McKinney was also cross-examined about Johnson's trial testimony that defendant's hat was black, eliciting that she never showed Johnson at trial the North Face mask to identify. (28T36-25 to 28T45-12). She recalled that she did not show it to Johnson because he was not clear it was a ski mask defendant wore. (28T45-2 to 7). When confronted with Johnson telling Edison police that defendant wore a ski mask and saying during his trial prep that the photograph of the North Face hat was not the same material as the hat worn by defendant, AP McKinney did not believe this was inconsistent because if the hat is rolled up on one's head, it looks like a cap. (28T106-22 to 28T107-7).[7] She testified that any note indicating he said he never saw the

[7] Judge Bucca had the transcript of Johnson's October 3, 2003, statement to Edison police. (Sa37-51). Johnson was asked if defendant had "a black ski mask." (Sa42). Johnson answered, "Yeah, a black hat, yeah. It could have been a mask. It was a mask." (Sa42). He also said he did not see it over defendant's face. (Sa42). He said it was "rolled up on his head" and he "didn't see." (Sa42).

North Face emblem was consistent with what he told police, which was that the hat was rolled up. (29T80-10 to 29T81-2).

Based on a hypothetical posed by the defense that contained facts different from the case, AP McKinney said that if Johnson said that he saw defendant wear a hat that was of a different material when he drove defendant around than was shown in a photo, it would have suggested that defendant was wearing a different hat and the State would have been required to disclose that information. (29T92-13 to 22).

Investigator Duca testified for the State about her notes from the trial prep she and AP McKinney had with Johnson on December 22, 2005, and on February 7, 2006. (Da226-228; 26T23-7 to 26T27-23). During his prep, Johnson said defendant wore a baggy white shirt, jeans, boots and some sort of black head covering. (26T13-24 to 26T14-6). Her notes reflected the following description that defendant was wearing a "stocking cap thing, black, on head. Never noticed an emblem or anything." (Da226; 26T25-13 to 15; 26T25-24 to 25; 26T26-14 to 19). Her notes also reflected that Johnson was shown a photograph of a head covering and Johnson said he did not think that was the material of the hat and he did not see North Face. (Da228; Sa1-6; 26T27-11 to 23; 26T28-17 to 23). She did not write an investigative report following Johnson's statement about the hat because his statement was

consistent with his earlier statement to police. (26T27-24 to 26T28-23; 26T30-7 to 13).

When PCR counsel pressed Investigator Duca on whether Johnson said that defendant, according to her notes, did not recognize the North Face hat and defendant wore a different hat altogether, she answered that counsel was asking something different from what she recalled and wrote in her notes. (26T66-15 to 22). She explained that Johnson never said there never was a North Face hat. (26T66-22 to 23). He said he did not believe the material was the same. (26T66-23 to 25). He was not necessarily saying there was a different hat, because he was looking at a photograph and said he did not think it was the same material. (26T104-9 to 16). She was certain that it was a photograph shown to Johnson, not the actual North Face hat. (26T113-24 to 26T114-25). She could not recall if the photograph shown to Johnson was in color or black and white. (26T115-3 to 5).

On cross-examination, when PCR counsel asked her if it was "new" information if Johnson said that he did not think the hat defendant had was of the material of the hat in the photograph, she answered yes, but on redirect clarified that what her notes reflect was Johnson saying he had not seen the North Face emblem, not that it was not there on the hat defendant wore.

(26T108-3 to 8; 26T120-14 to 26T121-5; 26T121-17 to 26T122-2). Johnson was not certain. (26T123-10 to 12).

When the investigator was asked on cross-examination about why Johnson needed a second prep session, she said that Johnson was not comfortable discussing or having conversations and there were "a lot he didn't recall," so he needed to be directed to what he had previously said. (26T73-14 to 24). She said that when Johnson lacked recall, he would be directed to what he had said on other occasions. (26T73-25 to 26T74-3). She was not able to recall what Johnson had been directed to look at. (25T74-22 to 26T75-2).

Johnson's trial attorney, Darryl Saunders, Esq., testified for the State. (29T). Mr. Saunders recalled the plea deal with Johnson calling for prison time. (29T130- 4 to 11). He was not present in court when Johnson testified at defendant's trial, but it was his understanding that Johnson had followed through with the plea agreement to testify truthfully against defendant. (29T130-13 to 16).

He had no knowledge of a secret deal for resentencing. (29T143-8 to 12). He was aware in January 2007 that Johnson would be brought back in six months and would be given a bed in a drug treatment program. (29T146-3 to 29T147-18). He testified that after he was given a copy of Johnson's sentencing transcript by the State, he realized that he had been under a

misimpression when he originally spoke to PCR counsel. (29T141-5 to 15; 29T147-22 to 29T149-17). He was under the initial impression that AP McKinney had engaged in conversations with Johnson to which he was not a party, but he realized he was wrong after he read the 2007 transcript. (29T148-3 to 9; 29T149-15 to 17; 29T164-21 to 29T165-17). There was no "secret deal." (29T159-21 to 29T160-1).

While Mr. Saunders was not present for Johnson's resentencing, he learned about the results from PCR counsel. (29T139-9 to 11). He believed that his client got a "fantastic result." (29T139-15 to 18; 29T167-4 to 11). He believed that what Johnson received was an illegal sentence, but he would never have appealed it because it benefitted his client. (29T139-12 to 20).

He recalled that Johnson was not "the sharpest knife in the box" and it was his opinion that defendant took advantage of him. (29T133-7 to 16). He did not know if Johnson had any psychosis or psychiatric issues, but he recalled Johnson's mother saying her son had "psychological deficits," a fact he never confirmed with any expert. (29T133-20 to 29T134-5; 29T169-17 to 29T170-6). The most he could say was Johnson had a low IQ. (29T134-5 to 7). He said that he did not seek an expert report on Johnson's psychological state because it was not going to say Johnson had psychological or neurological defects. (29T135-7 to 13).

Mr. Saunders recalled that Dr. Krakoff evaluated Johnson, who believed that Johnson had cognitive defects that would impact his ability to understand his Miranda rights. (29T155-1 to 5). Mr. Saunders requested ancillary funding from the Public Defender for a full evaluation, but the request for funds was denied; he did not pursue the matter further. (Da348-349; 29T153-21 to 29T156-19; 29T162-3 to 9). In addition, the matter became moot when Johnson and his mother indicated to him that they were going to take the State's plea offer. (29T162-13 to 15; 29T162-20 to 24; 29T163-11 to 14; 29T164-17 to 20). Mr. Saunders said that Dr. Krakoff did not write a report. (Da348; 29T156-25 to 29T157-8). Dr. Krakoff verbally reported to Mr. Saunders, and he did not tell him that he had conducted a psychological examination of Johnson, only that Johnson was not that smart. (29T184-15 to 29T185-2; 29T188-20 to 29T189-4).

Former AP Hamerslag testified for the State and refreshed his recollection with documents sent to him. (30T5-23 to 30T6-1; 30T6-4 to 10). He retired from the Prosecutor's Office in December 2004. (30T4-22 to 25). He identified notes in Johnson's criminal file which were labelled "administrative" notes. (Da234-236; 30T6-11 to 22). He explained that "administrative" notes related to non-trial matters, such as status conferences. (30T6-23 to 30T7-3). He kept these kinds of notes to keep track of the case, as

well as to note significant statements by the attorneys. (30T7-4 to 12). During his tenure on the case, he never met with Johnson. (30T7-20 to 22).

When shown his administrative notes, Mr. Hamerslag indicated that one page of notes referred to a status conference from August 30, 2004, where Johnson's attorney, Mr. Saunders, told him that he wanted to have Johnson examined and Mr. Hamerslag placed the word "suggestible" in quotes. (Da236; 30T8-16 to 30T9-9). He put the word in quotes probably because that was the word counsel used. (30T9-13 to 18). He interpreted what counsel told him to mean Johnson was subject to manipulation. (30T9-18 to 20).

Mr. Hamerslag's administrative notes indicate that on October 4, 2004, Mr. Saunders told him he had Johnson examined by Dr. Krakoff, who said Johnson was "so slow probably didn't understand (Miranda, police, etc) and will overborne." (Da236; 30T10-4 to 13). His notes then indicate, "report to follow." (Da236; 30T10-14). Mr. Hamerslag then noted he editorialized by writing, "that is crap. When you read the statements, it's clear he is not stupid and he denied involvement in some incidents." (Da236; 30T10-8 to 14). He had read Johnson's statements to police and thought Johnson was smart enough to deny involvement in some of the incidents. (30T11-2 to 8). Mr. Hamerslag was confident in the accuracy of his notes. (30T18-14 to 16). The

notes are consistent with the transcript of October 4, 2004, before Judge Mulvihill. (35T).

Mr. Hamerslag further interpreted his notes, which indicated that the State might need to hire an expert, depending on what Dr. Krakoff's report said. His notes indicated that Mr. Saunders said he was going to petition the Public Defender for ancillary services to pay for Dr. Krakoff to render a report. (Da236; 30T11-9 to 17; 30T12-1 to 7). The notes than continue with his notes from "in court." (Da236; 30T12-11 to 13). So, on the record, Mr. Saunders told the judge that he was going to file for ancillary services because he needed $1500 for the report. (Da236; 30T12-13 to 16).

The court set a scheduling order whereby Mr. Saunders would file for ancillary services and for a Miranda motion by October 8, 2004, and that by November 12, defendant would have to provide a psychiatric or psychological report and get all the psych work done by that date. (Da236; 30T12-17 to 24). On November 29, 2004, the State would have to decide if it wanted to retain its own expert to counter the defense report, if it ever materialized. (Da236; 30T12-25 to 30T13-2). The notes show that the request for ancillary services was denied. (Da236; 30T13-22 to 30T14-8). The State never received a report. (30T14-9 to 12). Had a report been received, Mr. Hamerslag said that his notes would have reflected such a report because it would have been a "key

thing." (30T14-13 to 21). Mr. Hamerslag's notes on defendant's case that referenced a "psych exam" on August 30, 2004, were consistent with those in the Johnson file and both indicated that no expert report was received from the defense. (Da235; 30T15-5 to 25).

Following the completion of testimony, the parties submitted summation briefs to Judge Bucca and there was oral argument. (Da400). Judge Bucca issued his opinion on July 7, 2023, denying relief. (Da399-446). The judge outlined the evidence presented at the 2006 jury trial and the remand hearings. (Da401-423). The judge set forth the standard for granting a new trial under Rule 3:20-1 and that for granting a new trial under Rule 3:20-2 for newly discovered evidence. (Da423-425). The judge found that defendant's claims failed to establish his right to a new trial or to post-conviction relief. In so ruling, Judge Bucca found that AP McKinney was a "very credible witness." (Da434; Da441). He also found Investigator Duca to be a credible witness. (Da439; Da441). Defendant claims that the judge's ruling should be reversed because the State violated its discovery obligations under Brady, committed misconduct and because Johnson's psychiatric records constituted newly discovered evidence, entitling him to a new trial. For the following reasons, Judge Bucca's judgement denying relief should be upheld.

In Brady, the United States Supreme Court held that the State's suppression of evidence favorable to the accused violates due process where the evidence is material to guilt or innocence, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. Evidence impeaching the testimony of a state's witness falls under Brady when the reliability of the witness may be determinative of guilt or innocence. State v. Carter, 91 N.J. 86, 111 (1982).

Three factors must be considered in determining whether a Brady violation occurred: 1) whether the evidence at issue was favorable to the defense, either as exculpatory or impeachment evidence; 2) whether the evidence was suppressed by the State, either purposely or inadvertently; and 3) whether the evidence was material to defendant's case. State v. Brown, 236 N.J. 497, 518 (2019).

With respect to the second factor, the prosecutor is charged with knowledge of evidence in his file. Id. at 520. As to the third factor, materiality, the court evaluates the circumstances under which the nondisclosure arose and the significance of it in the context of the "entire record," which includes the strength of the State's case, the relevance of the suppressed evidence, and the withheld evidence's admissibility. Id. at 518-19. It also includes whether the nondisclosed evidence was impeaching of a

witness whose reliability and credibility was crucial. State v. Henries, 306 N.J. Super. 512, 534-35 (App. Div. 1997). The inquiry is whether the absence of the undisclosed evidence denied defendant a fair trial, meaning a trial resulting in a verdict worthy of confidence. Id. at 520. Evidence is material if there is a "reasonable probability" that timely production of the withheld evidence would have led to a different result at trial. Id. at 520, citing United States v. Bagley, 473 U.S. 667, 682 (1985).

Unlike PCR petitions, which are subject to a statute of limitations and procedural bars, a motion for a new trial based upon newly discovered evidence may be made at any time. R. 3:20-2. Evidence is newly discovered and sufficient to warrant the grant of a new trial when it is material to the issue and is not merely cumulative or impeaching or contradictory; was discovered since the trial and was not discoverable by reasonable diligence beforehand; and is of the sort that would probably change the jury's verdict if a new trial was granted. State v. Nash, 212 N.J. 518, 549 (2013).

Materiality under the newly discovered evidence test includes material that has some bearing on the claims being raised and includes any evidence supporting a general denial of guilt. Ibid. The first and third prongs of the test are intertwined, so evidence that would "shake the very foundation of the State's case" cannot be considered merely impeaching, contradictory or

cumulative. Id. at 549-50. It is the power of the newly discovered evidence to alter the verdict that is key. Id. at 550. The test of materiality under the newly discovered evidence test is more stringent than under Brady. Henries, 306 N.J. Super. at 534.

As in the PCR context, the requirement of reasonable diligence bearing upon whether evidence is newly discovered, is based on the principle that "judgments must be accorded a degree of finality." State v. Szemple, 247 N.J. 82, 99 (2021). The requirement of reasonable diligence encourages defendants and their attorneys to act with "reasonable dispatch" in searching for evidence to be used at trial. Ibid.

In Point I, defendant claims that the medical records related to Johnson's single suicidal episode several weeks following his arrest in October 2003 and while in custody at the county jail entitled him to a new trial under Rule 3:20-1 and Rule 3:20-2. (Db18-42). Judge Bucca ruled that Johnson's suicide attempt was not newly discovered evidence and ruled that it did not meet the materiality requirement for granting a new trial. (Da425-430). The record supports Judge Bucca's ruling.

Defendant's expert, Dr. Weiss, based his opinion solely on his review of three months of medical records following Johnson's post-arrest suicide attempt. There were no medical records from prior to 2003 and no medical

records from 2003 to 2006. It can be inferred that there was no other suicide attempt before or after 2003.

The transcripts are replete with evidence that Johnson's family was always concerned about his welfare and looked out for his interests. If Johnson had experienced another suicide attempt, his family would have known about it. Johnson testified twice during the remand proceedings, and the defense did not pose any questions to him regarding whether he had additional suicidal or psychotic episodes that caused him to be hospitalized or to be on medication. Nor did the defense ask such a question of Johnson's sister, who testified at the remand for defendant. Defendant's trial attorney testified below he had no indication Johnson was psychotic at the time of the trial. Nor did AP McKinney have any such impression. If Judge Bucca had noticed any evidence of it when Johnson testified before him below, the judge would have noted it. In fact, Judge Bucca expressly noted Johnson had not demonstrated to the court that he was unable to "perceive reality" and that he had presented a "coherent narrative" of his role in the robberies, which was to act as defendant's driver. (Da428).

There was no documentary evidence of additional psychotic episodes that would support Dr. Weiss's opinion that Johnson was in a continued psychotic state before and after his November 2003 suicide attempt such that

he had no attachment to reality when he testified at defendant's trial in February 2006. The diagnosis made of Johnson in 2003 following the attempted suicide was of unspecified psychosis. (Ca100). In November 2003 to December 2003, Johnson exhibited psychotic symptoms and was proscribed Abilify. (Ca26, 97, 130, 158, 207). Up until his final discharge in December 2003, he was evaluated and the records indicated Johnson was complying with his medication and did not experience any symptoms of psychosis. (Ca74, 97, 145-46, 152-53, 157-58, 160-61, 202; 207, 222, 253, 289-294). On January 27, 2007, one day after his sentencing, Johnson was evaluated, and the psychiatric progress notes recorded that Johnson said he was not on medication because he "doesn't need it." (Ca48). The report also noted that Johnson had no symptoms of psychosis, was alert and oriented, cooperative and was oriented as to the future. (Ca48).

Against this backdrop, Judge Bucca properly found that Dr. Weiss's opinion had limited weight, noting that the doctor had only reviewed medical documents, had never interviewed Johnson and had never shown with specificity how Johnson's trial testimony was impacted by his alleged psychosis. (Da247). Defendant argues that the judge was in no position to question Dr. Weiss's methodology, (Db21), however, the judge, who was factfinder, had to assess credibility and the weight of the testimony and

documentary evidence before him. The judge performed this function by holding that the evidence did not support what Dr. Weiss was saying. Contrary to defendant's claim, this finding was not dependent on the State calling an expert witness. Defendant had the burden of proof, not the State, and the State contested the opinion of Dr. Weiss through its cross-examination and legal argument.

More importantly, the record, both from the trial and from the remand, support Judge Bucca's holding that the 2003 medical records were not newly discovered evidence. (Da428-29). The testimony at the hearing established that defendant and Johnson were cousins, had associated with each other since childhood, and had a close family. When defendant testified at trial in 2006, he said that Johnson was known to be subject to manipulation and was known to be "out to lunch." As outlined earlier, Johnson's sister testified below that defendant's family probably knew about Johnson's suicide attempt and hospitalization because the family was a large one and they all knew the same information. She said that before defendant's trial, she was present when her and Johnson's mother would have phone calls with her brother, defendant's stepfather, about Johnson's hospitalization. Defendant was required to show that the medical records were not discoverable by reasonable diligence

beforehand, and Judge Bucca found this prerequisite to be lacking considering how the Johnson and Tanner families were "intertwined." (Da429).

In any event, Judge Bucca analyzed the medical records and held that they were not material and thus would probably not change the jury's verdict. (Da427-429). The judge held that the medical records, at best, would only have been impeaching, because they did not bear on the focal issue at trial, or the "heart of the State's case," contrasting this case to Henries, where the credibility of a juvenile eyewitness to a shooting inside the home was determinative to defendant's guilt and where the juvenile's psychiatric disorders were well documented before the crime. (Da425; Da427). Henries, 306 N.J. Super. at 530, 533-534.

Here, Johnson was the driver to and from the robberies, so Johnson was never present when defendant executed the crimes. Johnson was the last witness to testify for the State. (10T). Thus, defendant's identity as the robber had been established long before Johnson testified. (3T-9T). This included testimony from the victims, the police officers, his former girlfriend, her sisters, the ETA personnel and doctors, the DNA expert and the ballistics expert. This also included the surveillance videos from the gas stations and the Krauzer's, which captured defendant on camera wearing the same kind of clothes and hat he was wearing when arrested and holding a gun in his left

hand, when he is left-handed, and wearing a watch on his right wrist. It included viewing the clothing taken from defendant's home, which was like that worn by the assailant in the videos and by defendant when arrested. It included his admission to police on the night of his arrest and his phone call with his girlfriend where he told her he had hurt someone.

This case is distinguishable from Henries, where a juvenile identified defendant as the shooter and whose trial testimony was "replete with inconsistencies" and whose documented psychiatric disorders were "extensive" and bore upon his ability to perceive "the rapidly unfolding events" of the shooting. Henries, 306 N.J. Super. at 530, 535. Johnson's testimony was not replete with inconsistencies. His testimony lacked detail, and he was slow, but his narrative was consistent: he was the driver who took defendant to and from the robberies. With no other evidence that he was psychotic at the time of the crimes, his post-arrest attempted suicide was merely impeaching but would probably not have changed the jury's verdict because it would not have called into question the reliability of what he testified about. Judge Bucca focused on the proper concerns in finding that the medical records were merely impeaching and would probably not have changed the jury's verdict.

The issue of the medical records was argued below under the test for newly discovered evidence, but defendant now argues that the State has

"unclean hands" for not having disclosed Johnson's medical records. (Db41-42). As the State noted at the outset, the Appellate Division rejected defendant's claim under Brady that the State knew about Johnson's psychiatric condition and should be charged with constructive notice of it. The medical records obtained by defendant during the PCR proceedings were not part of the State's file. Defendant only obtained them in 2012 after securing a waiver of confidentiality from Johnson. AP McKinney and former AP Hamerslag said below they did not know about a diagnosis of "unspecified psychosis." Judge Bucca found AP McKinney to be a credible witness, so Johnson's sister's testimony below that she told AP McKinney before defendant's trial that Johnson had suffered a nervous breakdown and had been beaten was not credited by the judge. The medical records did not entitle defendant to a new trial.

In Point II, (Db43-49), defendant claims that Judge Bucca erred by ruling that the non-disclosure to his attorney that Johnson's attorney verbally told AP Hamerslag about a verbal report from Dr. Krakoff that Johnson was subject to manipulation and thus may not have understood his Miranda rights, was neither a Brady violation nor supportive of granting defendant a new trial under Rule 3:20-2. (Da436-439). Judge Bucca's ruling should be upheld, because there was no obligation to report to defendant's attorney what

Johnson's attorney said in open court about a verbal representation that he received from Dr. Krakoff, which was never formalized into a report. (Da437).

As outlined above, AP Hamerslag's "administrative" notes reflected that on October 4, 2004, Mr. Saunders indicated that Dr. Krakoff had told him Johnson was slow and may not have understood his Miranda rights and that a report was to follow. The transcript from October 4, 2004, was consistent with the notes. (35T2-11 to 14; 35T4-14 to 16; 35T5-6 to 9). The Miranda hearing was never heard and a report from Dr. Krakoff was never generated because Mr. Saunders' request for ancillary services from the Public Defender was denied. Four months later, Johnson pleaded guilty.

The verbal representation made by Mr. Saunders in open court in October 2004 and reflected in AP Hamerslag's "administrative" notes was not Brady material. It was a preliminary line of inquiry that Mr. Saunders wanted to make on Johnson's behalf for purposes of a Miranda hearing, but it never materialized into anything concrete. The Public Defender denied the request for ancillary services to pay for an evaluation and the writing of a report. The line of inquiry became moot, as Mr. Saunders explained below, after Johnson decided he wanted to accept the State's plea offer and plead guilty.

Judge Bucca found that the verbal representation, alone, was unreliable and did not obligate the State to provide defendant's attorney with a "hearsay

conclusory statement." (Da438). In short, it was not evidence favorable to defendant, which triggers Brady. The judge also properly found that there had been nothing suppressed by the State, because Mr. Saunders represented what Dr. Krakoff said to him in open court before Judge Mulvihill. (Da437). There was no evidence presented to show that defendant's attorney, Mr. White, could not have learned about Dr. Krakoff and Mr. Saunders' strategy on a Miranda issue through the exercise of reasonable diligence, which defeats defendant's claim the AP's notes were newly discovered evidence.

Judge Bucca noted that if Johnson's attorney had provided the State with a written report from the doctor, then the State would have had an obligation to turn it over to defendant's counsel. (Da438). But the record from the remand shows that there was nothing "material" to report, nothing "new." Defendant's claim to the contrary should be rejected.

In Point III, (Db49-59), defendant claims that Judge Bucca erred by rejecting his claim that there was a secret deal made before his trial between the State and Johnson regarding him receiving a more lenient sentence than what was testified to at trial. Defendant supports this claim by relying on Johnson's first appearance at the remand where he recanted his trial testimony. Judge Bucca's ruling should be affirmed. (Da430-436).

Judge Bucca, who found AP McKinney to be a credible witness, found that she did not negotiate Johnson's plea agreement with the State and the arrangement for Johnson to enter a drug program arose on the day of Johnson's sentencing in 2007 when AP McKinney spoke with Johnson's parents. (Da431-433). The judge found that their conversation was spontaneous and unplanned. (Da434). There was no discussion about a reduction of sentence before Johnson testified in 2006. (Da433). Mr. Saunders' testimony below corroborated AP McKinney about there not being a secret deal in place before defendant's trial. Johnson's plea agreement was accurately presented to the jury at the trial.

Defendant's reliance on Johnson's remand testimony at his first appearance in 2018 is misplaced. As outlined earlier, after Johnson recanted his trial testimony from 2006 before Judge Rivas, the hearing was adjourned so Johnson could obtain counsel. When Johnson appeared to testify the second time in 2019 before Judge Bucca, this time appearing with counsel, he testified on cross-examination that his trial testimony was truthful, that what he had told police was the truth and that his guilty plea was truthful. He recanted his recantation.

When PCR counsel then asked questions on redirect, he confronted Johnson with his recantation testimony before Judge Rivas, and counsel

elicited from Johnson that he was "not sure" if defendant committed the robberies. (25T109-13 to 17). Defendant reads the question and answer out of context. Counsel's questioning was designed to obfuscate because Johnson was the driver to and from the robberies and thus was not with defendant when he robbed the gas stations and the Krauzer's store. PCR counsel's question was strategically worded by asking Johnson, "so you don't actually know that [defendant] was committing robberies, do you?" (25T109-15 to 16) (emphasis added). Johnson, being asked if he "actually" knew, responded honestly by saying, "I'm not sure. I don't know." (25T109-17).[8] Johnson never retracted what he said on cross-examination that day about the veracity of what he told police in 2003, what he said during his guilty plea in 2005 and what he testified to at defendant's trial in 2006. Contrary to defendant's claim, (Db51), Johnson did not reverse himself in 2019 and claim that his trial testimony was false.

In Point IV, (Db60-67), defendant claims that Judge Bucca erred by ruling the State had not violated Brady by not disclosing to the defense Johnson's statement during his prep where he denied seeing a North Face mask and stating defendant had an entirely different type of hat when shown a

[8] When questioned by Edison police in October 2003, Johnson said his only role was to provide transportation for defendant. (Sa47).

photograph. Judge Bucca rejected defendant's claim because Johnson did not say anything inconsistent during his prep with AP McKinney and Investigator Duca, so there was nothing exculpatory to disclose. (Da439-440). The judge also found that the issue was not material, because East Brunswick Police Officer Mark Csizmar identified the North Face mask at trial. (Da439).

Investigator Duca's remand testimony was outlined earlier, and her testimony about her notes during Johnson's prep supports Judge Bucca's ruling. (Db60). As the investigator and AP McKinney testified, if Johnson had made such an inconsistent statement, a new investigative report would have been written. But, as explained by their testimony, Johnson did not have the opportunity to see a North Face emblem because he saw the hat on defendant when it was rolled up on his head. His description of the hat during his prep of a "stocking cap thing, black, on head," (26T25-14 to 25; 26T26-14 to 25), was consistent with the description he gave to police. His statement during the prep that the material looked different was not exculpatory because Johnson had no knowledge of what the hat looked like unraveled.

Photographs of the hat that defendant was wearing at the time of his arrest, which was later tested and found to have defendant's DNA on it, were admitted into evidence at trial and were provided to Judge Bucca. (Sa1-6). Although Investigator Duca could not recall the photo shown to Johnson

during the prep, these photographs show the North Face hat at different distances from the camera. Seeing these photographs of the hat in conjunction with Johnson's trial testimony of a "black hat," (10T19-9 to 18), or his statement to police of a "black mask" rolled up, (Sa42), makes clear his observation during his prep that the material looked different in a photo would have supported his credibility because the material does look different in the photos because of the manner in which the photos were taken. More importantly, what he said during prep was not inconsistent with what he had told police. The record supports Judge Bucca's finding that there was no inconsistency in the notes, so there was no exculpatory evidence the State was required to disclose under Brady. (Da439).

Judge Bucca also properly found no Brady violation because the notes on Johnson's prep regarding the hat were not material to defendant's case. (Da439-440). Officer Csizmar, one of the arresting officers, described the hat he saw on defendant's head as "rolled up almost like a watch cap type of hat up on top of his head, like a winter cap." (3T200-8 to 9). After defendant tried to escape and was caught, the officer returned to the area where defendant had been handcuffed and recovered the hat, which had been on the ground before defendant tried to escape. (3T214-15 to 25; 4T19-6 to 17). The photographs marked as S-96 and S-97, (Sa3-6), were identified by the officer,

and he described S-97 as a "close-up" of the hat with the North Face logo. (3T217-13 to 25). The officer said he could see the North Face emblem when he saw defendant wearing it. (3T217-24 to 3T218-1). The officer was shown the hat recovered from defendant and he identified it as the same hat that defendant was wearing when he first saw him. (3T10-15 to 18). At trial, Johnson was not asked on direct or cross to identify the picture or the hat.

As Judge Bucca held, the jury had the North Face hat in evidence and was able to compare it to the surveillance videos showing defendant with a black hat to determine if it was the same hat. (Da439). Materiality under Brady, as outlined above, considers the context of the entire record. Brown, 236 N.J. at 518-19. Johnson did not see an unfurled hat on defendant. There was no violation of the State's discovery obligations.

In Point V, defendant claims that the State violated Brady by not disclosing Johnson's statement to Investigator Duca during his prep that he could not recall what he said to police. (Da68-71). Judge Bucca held that Johnson did not say he had no memory, but that he could not recall what he had said to police, something the judge found to be "foreseeable," given that Johnson was preparing for trial more than two years after his arrest. (Da441). There was nothing exculpatory or impeaching with what he said during his prep. (Da441). The judge, finding that AP McKinney and Investigator Duca

were credible, also found nothing "wrong or inappropriate" in how the State prepared Johnson for trial, which included a pre-trial ride with AP Warburton to the crime scenes. (Da441; Da443). No discovery violation occurred.

The purpose of trial preparation is to prepare the witness so the witness can testify truthfully. This includes reviewing the witness's prior statements because he might not recall their contents and a ride with an AP to the crime scene. In this case, Johnson had given several statements to police following his arrest in which he discussed his involvement with driving defendant to the robberies. His interactions with police occurred in 2003. Johnson was prepped for trial more than two years later. That he might not have recalled the statements he made to the police or the locations was understandable and predictable, as Judge Bucca found. Apparently, Johnson remembered his statements at the time of his guilty plea in February 2005, because he gave a factual basis for it. And Johnson remembered making his statements because his trial testimony was consistent with what he had said to police. (10T17-12 to 10T37-14). He also recalled at trial that he "rode around" with the police and told them where he had parked. (10T37-15 to 10T38-13).[9]

[9] AP McKinney said during the remand hearing that Johnson had driven with the police from "location to location." (20T14-12 to 18). Edison detectives asked Johnson if taking him to two locations would help refresh his memory. (Sa49-50). The officers made it clear to Johnson that if he did not recall the location, he should say so. (Sa50).

Trial counsel, Mr. White, had every opportunity at trial to cross-examine Johnson about his statements to police and his ride with police to show them where he had parked, and trial counsel did not. (10T49-1 to 10T56-25). Trial counsel chose to attack Johnson's credibility by focusing on the obvious, which was Johnson's incentive to testify against defendant and his general demeanor and ability to recall the events of the crimes. When Mr. White testified for defendant at the remand hearing, he was not asked any question by PCR counsel about his cross-examination of witnesses at the trial, including Johnson and Kaihala Staten. (24T4- 8 to 24T22-19; 24T52-5 to 24T57-18). The State did not violate its discovery obligation under Brady. Defendant's claim to the contrary was without merit, and Judge Bucca properly rejected it.

In Point VI of his brief, (Db72-81), defendant claims that AP McKinney presented false testimony at the 2006 trial when she did not elicit from Kaihala Staten during direct examination that she told police in her statement that defendant told her he had hurt someone at a bus stop. Defendant argues that AP McKinney's written questions and answers that she wrote down for Staten before prep show that her conduct at the trial was intentionally misleading. Judge Bucca ruled that this claim was procedurally barred under Rule 3:22-4, and his ruling should be upheld. (Da441-442).

The recorded statement that Kaihala Staten gave to police on May 9, 2005, was recorded. (Sa11-36). The statement was provided in discovery to the defense, and it could have been used at trial to cross-examine her. Her trial testimony, in pertinent part, was that sometime in the middle or end of September, defendant called her and said he had hurt someone. (9T167-7 to 9T169-4). She did not recall the exact date but recalled the call came in at 12:00 a.m. or 1:00 a.m. (9T24-1 to 5). Mr. White cross-examined Kaihala Staten briefly on her call with defendant, establishing that "the extent" of it was just that he had hurt someone, wanted to see her, a request she told him she could not do for him, and that she could only say the call came approximately in September. (9T173-19 to 9T174-5).

Because the trial record contained what had been elicited and because the defense had Kaihala Staten's statement to police in discovery, Judge Bucca ruled that defendant's claim of false testimony was procedurally barred under Rule 3:22-4(a) and that none of the exceptions to the procedural bar existed. R. 3:22-4(a)(1)-(3). (Da441-442). The judge's ruling should be affirmed.

Certainly, defendant could have reasonably raised this claim on appeal because he had the transcripts. R. 3:22-4(a)(1). Judge Bucca ruled that enforcement of the procedural bar would not result in a fundamental injustice under Rule 3:22-4(a)(2), because defendant's claim was ancillary to the issue

of his guilt. (Da442). "Fundamental injustice" under the rule refers to when the judicial system denied defendant a fair proceeding. Nash, 212 N.J. at 546. Defendant must show that the error or violation played a role in the determination of guilt. Id. at 547. This exception to the procedural bar is applied only in "exceptional circumstances." State v. Mitchell, 126 N.J. 565, 586-87 (1992). Defendant's guilt was supported by a plethora of evidence, of which Kaihala Staten's testimony was a part. As noted above, trial counsel could have cross-examined on this issue but chose not to. When trial counsel testified below, the defense asked no question regarding his cross-examination of Kaihala Staten on this issue. Because there was no violation of the state or federal constitution, the exception to the bar under Rule 3:22-4(a)(3) did not apply.

The questions and answers that AP McKinney prepared before her prep with Kaihala Staten do not support defendant's claim of false testimony. He argues that her questions and answers did not mention the bus stop and that her "script" led to false testimony at trial. Defendant's argument begs the question of how the State concealed that which was revealed in discovery prior to trial. Defendant claims that AP McKinney withheld and allegedly scripted information from the jury even though the information defendant wanted elicited was contained in the discovery, could have been questioned about on

cross-examination of Kaihala Staten, and, had the State asked about it, could have elicited from the witness her reference to not only the bus stop, but to a stabbing, which would have most likely raised an objection from Mr. White on grounds it was implicating defendant in another crime in violation of Evidence Rule 404(b). In addition, defendant testified on his own behalf and could have testified to his own statements to Staten that he stabbed someone at a bus stop.

AP McKinney's notes did not support defendant's claim because she did not "script" Kaihala Staten, or Johnson, to present false testimony. As outlined earlier, she testified that she told witnesses that her questions and answers were not scripts and that they should tell the truth. She based her questions and answers on what she saw in statements. (28T14-24 to 28T15-22). She said that if a witness said something during prep that was inconsistent with what she had written down as the anticipated answer, she said Investigator Duca, who was present during the prep in this case, would have written a report. (27T22-20 to 27T23-11; 27T24-4 to 6). She also said that she told the witness being prepped that if an anticipated answer was incorrect, the witness should let her know and she would change it on the sheet. (29T26-15 to 22). She said that her question-and-answer notes for Johnson did not correspond to what came out at trial in terms of phrasing, how questions were asked and the order. (27T50-13 to 27T51-4). Judge Bucca found AP McKinney and

Investigator Duca to be credible witnesses and found that they had not done anything wrong or inappropriate in how they prepared Johnson for trial. (Da441). There was no "scripting" of the witnesses that denied defendant a fair trial.

Finally, in Point VII, (Db82-83), defendant claims that the cumulative effect of trial errors deprived him of a fair trial. Judge Bucca, after reviewing the record, ruled that Johnson's testimony was not the core evidence that proved defendant guilty as the armed robber, holding that significant circumstantial evidence proved that defendant was the armed assailant captured on the surveillance videos of the armed robberies. (Da443-446). Defendant failed to show that the State violated its discovery obligations and that newly discovered evidence entitled him to a new trial. There was no cumulative error.

CONCLUSION

For the foregoing reasons, the State urges this court to uphold the denial of post-conviction relief and the denial of defendant's motion for a new trial.

Assistant Prosecutor Nancy A. Hulett
Attorney ID # 015511985

STATE OF NEW JERSEY JERSEY, Plaintiff-Respondent, v. WILLIE TANNER, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3885-22T1 <u>Criminal Action</u> Appeal from order filed July 7, 2023, denying defendant's motions for post-conviction relief and for a new trial entered by the Law Division, Criminal Part, Middlesex County, at Ind. Nos. 04-01-00089 & 04-01-00106 Sat Below: Honorable Benjamin Bucca, Jr., J.S.C.

DEFENDANT'S REPLY BRIEF

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Faced with due process violations as to its "only eyewitness", William Johnson, Jr., and other significant issues, the State should be joining defendant in seeking a new trial to avoid a fundamental injustice. Instead, it fights to preserve an unsound conviction by trying to minimize Johnson's trial role, claiming that "defendant's identity as the robber had been established long before Johnson testified". State's Merits Brief at Sb68. This is untrue. None of the evidence recited by the State, Sb11-26, identifies Willie Tanner as the perpetrator of these crimes, *except* for Johnson's testimony, but Johnson has now *twice* recanted, admitting he lied at trial and that he had no knowledge of any robberies.

Johnson was central to the prosecution of Mr. Tanner, as this Court recognized when it described "the *critical nature* of Johnson's testimony." (Da206) [emphasis added]. Both prosecutors have acknowledged that the State's case turned on Johnson's testimony. Hamerslag told investigators that "the success of prosecuting Tanner depends in very large part on the willingness and ability of Johnson to cooperate and testify". Da233. McKinney said Johnson was "the *only eyewitness* the State had who could say *they saw and knew* that Willie Tanner had committed these robberies and conspired to commit them…" 20T147-8 to 148-7.

Other indicia of Johnson's importance lie in the attention the prosecution gave to his testimony including two preparation meetings with Det. Duca and McKinney who acknowledged they had to specially "redirect" him to his prior

statements, 26T73-10 to 24, and Warburton's second trip with Johnson to review crime locations. 20T10-1 to 10. McKinney referred to Johnson literally dozens of times in her summation, 11T137,156,158,159,161,162,163,164,165,166, and urged the jury in opening and closing to find Johnson a credible witness. 4T171-15 to 19, 11T165-5 to 24. The State called multiple officers to testify that Johnson provided information to tie Mr. Tanner to the alleged crimes.

Johnson was the only witness who could tie Tanner directly to these offenses. The remaining evidence cannot be said to result with any degree of certainty in a conviction of Willie Tanner. It is undoubtedly for this reason that Judge Ferencz, the first PCR judge, said, "I wouldn't call it the most overwhelming case that I've ever seen". 19T37-10 to 11. Once Johnson's testimony is discounted (or eliminated) due to his recantation and/or his psychosis, all other evidence is indirect, capable of multiple interpretations or is non-dispositive.

For example, the "casings" found in the Darby residence do not connect Tanner to the crimes, *except* via Johnson's testimony. No witness linked the basement (and, hence, the casings) *exclusively* to Tanner. Kaihala Staten said it was "a common area for everybody in the house", 9T170-15 to 17, and Johnson testified, "I guess everyone did" when asked if only Tanner used the basement. 10T50-19 to 22. Thus, the basement was used by many people, including Tanner's brother, Lawrence Darby, Jr., who lived in the house and was identified by McKinney as the person who gave the gun (that matched the casings) to Xavier

Bailey, **who was found with it in a park by police**. 11T128-11 to 15; 11T130-3 to 14. Now that Johnson has recanted, the casings in the Darby house are far more closely linked to Darby and Bailey, than Tanner (as to whom there is **no** direct connection).

Faced with Johnson's recantation, a jury would now have to consider that Bailey, **who was actually found with the crime gun**, matched the perpetrator's description. Bailey was 5' 6" and weighed, at the time of the robberies, 185 pounds, as McKinney told the jury. 11T128-11-15. In other words, Bailey was of *moderate* height and "stocky", as was the perpetrator. McKinney told the PCR court that Bailey was "left handed", as the perpetrator was also described. 28T80-18 to 20. With Johnson's recantation, the casings and gun are now equally linked to Darby and Bailey, and are not evidence on which it can be assumed a jury would independently convict Mr. Tanner.[1]

Nor does the remaining evidence link Willie Tanner in any conclusive way to these crimes. That Mr. Tanner may have worn a bulky metal watch, or a white

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[1] Judge Bucca erred in saying the casings were found among Tanner's "personal belongings". Da445. Police found the casings in the basement but no witness said it was found among Tanner's "belongings". This was an error by the PCR judge.

Judge Bucca also erred in saying Bailey was Tanner's "friend." *Id*. McKinney told the PCR court that Bailey was a "friend or school chum" of Lawrence Darby, Jr. 27T29-25 to 30-1.

T-shirt and jeans, could apply to thousands of young men.[2] That he ran after he was arrested and allegedly said, "if you knew what I did, you would run too", is not evidence of guilt as to the robberies — Mr. Tanner was not arrested at the time of any charged offense and his comment (and running) do **not** link him to these crimes; he also gave an alternate version of what was said and why he ran (namely that the officers drew their weapons). 11T21-10 to 23-2. Although Kaihala Staten said Tanner once showed her a gun, this was also not linked to any crime — no one denies Mr. Tanner possessed a gun (many people do) but there is no evidence the gun Staten saw was used in the charged offenses.

Without Johnson's (now recanted) testimony none of this evidence could independently result in a conviction of Mr. Tanner.

Other "evidence" is irrelevant or outright wrong. Judge Bucca concluded, in error, that Mr. Tanner was arrested with the "silver" gun that "matched the revolver that was seen in the videos." Da407. This is not true. The State concedes Judge Bucca's error and agrees the gun "was **not** involved in the Krauzer's robbery", Sb34 [emphasis added], as this Court also noted in its 2016 decision. Da52. In addition, the gun found with Mr. Tanner was a semi-automatic, as described in the police reports, Da52, but the gun used at the crime scenes was a "revolver", as

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[2] Judge Bucca again erred when he said that the "6XL" (extra large) white "Galaxy" t-shirts found in the Darby house "matched" the clothing worn by the perpetrator. Da445. No witness identified the perpetrator's clothing as "6XL" or as a "Galaxy" T-shirt. This evidence shows only that Mr. Tanner sometimes wore large white T-shirts, as is the common style of many young men.

McKinney told the jury. 11T132-4 to 133-12. Thus, the "silver" gun is **not** related to the robberies and is not a basis on which a jury would convict Mr. Tanner.

The State continues to speak about Mr. Tanner's "mustache *scar*", Sb26, but this is not evidence — no witness said the perpetrator had a "scar" in his mustache. This was an invention by McKinney who, *twice*, told the jury, that Abdul Imran said the robber had "a mustache with a visible scar in it". 11T132-13 to 17; 11T142-9 to 19. Mr. Imran said only that the perpetrator had a "mustache", saying nothing about a "scar", 6T98 to 6T113, and Officer Shannon, when asked if Imran said the robber had a "scar" in his mustache, said, "Not that I am aware of, no." 6T80-11-13. McKinney told the jury the perpetrator had a "mustache scar" so as to tie Mr. Tanner, falsely, to the crimes (since Tanner does have a visible scar in his mustache). The issue is not raised on this appeal to show "ineffectiveness" of trial counsel, as the State says, Sb35,n.4, but to demonstrate that the mustache "scar" is **not** evidence *at all*, let alone on which a jury could convict Mr. Tanner.[3]

Nor can the testimony of Kaihala Staten that Mr. Tanner called and said he "hurt" two people be considered evidence since it is now clear that Staten told police the call related to "a fight" at a "bus stop", **not** the Krauzer's market, as Staten's interview shows. Da245-248; *see discussion,* Defendant's Merits Brief at

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[3] The State concedes McKinney's error in saying that the perpetrator and Tanner *both* had a "mustache scar". Sb34. Yet, the State says the conviction should *still* be upheld because Mr. Tanner did have *a mustache*, as did the perpetrator. Sb34-35. Huge numbers of men have a mustache — this is not evidence of a crime.

Db77-80. Having nothing to do with a robbery, Ms. Staten's statement cannot be considered evidence on which a jury could independently convict Mr. Tanner.

The remaining evidence cited by the State, Sb11-29, is equally inconclusive but for purposes of economy is not addressed in this brief.

Other than Johnson's testimony, none of the evidence relied on by the State can fairly be said to lead to a conviction of Willie Tanner. But Johnson now says he does **not** have knowledge of any robberies and that he lied at the Tanner trial. Johnson's recantations are discussed in detail at Defendant's Merits Brief at Db49-59. Johnson's UBHC medical records, also obtained during PCR, contain his statements to his doctors, made just weeks after his arrest and confession, that he does not know why he was arrested, does not know of any robberies or is confused about whether any robberies took place. Db50-52. None of this was known at the time of trial or heard by the jury. As the State concedes, "it is the power of the newly discovered evidence to alter the verdict that is key." Sb64.

To evade the force of this evidence, the State argues that at the time of Johnson's first recantation — when he said he lied at the Tanner trial — Johnson was not represented by counsel. Sb73. This is a mere red herring. No authority holds that a witness is more reliable if he has counsel present. Moreover, *after* he obtained counsel Johnson recanted a *second* time, this time **denying knowledge of any robberies**. *See discussion*, Defendant's Merits Brief, Db51-52. Johnson thus recanted ***twice*** — once with*out* counsel, the second time *with* counsel.

Faced with this dilemma, the State argues that PCR counsel somehow "obfuscated" Johnson by asking if he "*actually*" knew of any robberies. Sb74. This does not follow. Determining if a witness *actually* knows a fact is precisely what is supposed to come about through direct or cross examination. In any event, the State's claim is incorrect. Johnson made the first statement, "unless I was saying that I didn't know what was going on", when PCR counsel asked if he remembered his testimony from two years earlier when he said he lied at Mr. Tanner's trial. 25T108-22 to 109-17. It was only *after* Johnson made this statement that counsel followed up and asked, "So you don't *actually* know that Willie was committing robberies, do you?", to which Johnson admitted, "I'm not sure. I don't know." 25T109-13 to 17. No "obfuscation" took place — the State simply won't accept that its "only eyewitness" now says he didn't know of any robberies and lied at the Tanner trial.

The State does not deny concealment of Johnson's statement as to the Northface ski mask. Rather, the State defends this constitutional breach by arguing that because Johnson's *original* interview described only a "black" hat, Johnson's *later* interview did not present "new" information to be disclosed under *Brady*. Sb74-76. This is manifestly false. Johnson's second interview went far beyond the mere color of Tanner's hat. Johnson told the prosecutor that he never saw a Northface logo on Tanner's hat, that Tanner had a *different* hat, a "stocking cap" , "doesn't think that material", as Duca wrote in her notes. Da226,228. Had it been

known, the concealed statement would have directly challenged the prosecution's claims that Tanner wore the Northface ski mask seen at the robberies and would also have challenged Officer Csizmar's claim that he saw Mr. Tanner wearing the Northface ski mask. Duca and McKinney both conceded at PCR that Johnson's statement had to be disclosed under *Brady*. 26T108-3 to 8; 29T92-13 to 22. The State's convoluted justification, Sb75-76, cannot excuse the *Brady* violation.[4]

The State also argues that no *Brady* disclosure was necessary because, it claims, Johnson could not clearly observe the image of the Northface ski mask due to the quality of the photograph. Sb76. But the photograph has never been produced and the indistinct copies offered by the State, Sa1-6, cannot substitute for the **actual** photograph that Johnson was shown during his second interview. Det. Duca said the photograph was in the "evidence" file, 26T69-18 to 70-7, but the State has not produced it and now offers only blurred photocopies. Sa1-6. Duca's notes are silent on any difficulty of Johnson in viewing the photograph, including the "manner in which the photos were taken", as the State now claims. Sb76. Duca said her notes are not always "verbatim *but they're as close — as close as can be*." 26T122-7 to 8; 15-16. It follows that if Johnson had difficulty in viewing the photograph, Duca would have said so in her otherwise detailed notes. In short, no

[4] Although the State does not mention it in its brief, Judge Bucca seemed to excuse the concealment of Johnson's statement as harmless because the jury saw "videos showing Tanner with the black hat". Da439. This was yet another error by the PCR judge. No witness identified Mr. Tanner as the person in the videos. In fact, it is undisputed that nowhere do the videos show the perpetrator's face.

defense is offered to support non-disclosure of Johnson's statement as to the Northface mask.[5]

In its opposition brief, the State says that the second meeting with Johnson was normal for witness preparation, Sb78, but it ignores entirely the *Brady* question, namely that when a witness tells the prosecution he could not "recall" or remember what he told the police, that new admission by the witness **must** be disclosed. The defense is entitled to know that the State's only eyewitness said he could no longer remember the facts of his own confession and needed to be "redirected" by the prosecutor — such information is vital to a jury in evaluating the witness's credibility. No authority is cited by the State to excuse such non-disclosure.

Notably, the State does not challenge Saunders's testimony that McKinney made a pre-trial offer to Johnson of credit off his three-year sentence for "inpatient drug treatment" and that such offer was "**secret**" and made "**in advance**" and "***prior* to the time Mr. Johnson testified**". 29T178-8 to 22; 29T191-18 to 24; 29T198-2 to 7. Johnson served only six months and was released from the rest of his three-year sentence, in apparent fulfillment of this promise. The State also

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[5] In yet another unsupported statement, the State claims Johnson would not have seen the Northface logo because Tanner's hat must have been "rolled up". Sb50,53,75. But Johnson never said he could not see Mr. Tanner's hat because it was "rolled up" ***and Duca never recorded such comment in her notes***. Da226,228. This is nothing more than speculation by the State to justify its failure to meet *Brady* duties.

offers no authority to support Judge Bucca's conclusion that the difference between three years in state prison and time off for "drug treatment" was not "material" under *Brady*. Da433. To the contrary, *Brady* materiality is *any* evidence that has "*some* bearing" on the case. *State v. Nash*, 212 N.J. 518, 549 (2013)[emphasis added]. Any reasonable jury would want to know that the State's "only eyewitness" was given a promise that his sentence would be reduced for "drug treatment" after he testified, a hidden inducement favoring the prosecution. *See discussion,* Db55-58 (citing cases).

As for the scripting of **all** prosecution witnesses, the State says this did not violate due process because McKinney "told witnesses that her questions and answers were not scripts and that they should tell the truth." Sb81-83. In other words, no constitutional violation occurred because witnesses were told the "script" was "*not* a script", a beautifully circular argument. McKinney's claim that she "wanted to make sure Johnson understood it was not a script in the event the idea entered his head," Sb52, merely compounds the violation. Johnson was "very impressionable", the State concedes, Sb36-37, yet McKinney gave this "impressionable" witness a script, *then called his attention to it*, without telling defense counsel the script even existed.

As to Staten, the State justifies truncating her script (and her testimony) on the ground that McKinney claims she did not believe Tanner when he told Staten he "hurt" two people at "*a bus stop*". Sb53. McKinney claims Tanner must have

been referring to the shooting at the Krauzer's market. This is not proper argument. As prosecutor, McKinney was obligated to provide the witness's actual evidence to the jury, not skew the evidence in favor of the State on the ground that she did not believe Tanner. It is for the jury to make that judgment, not the prosecutor.

In an even stranger interpretation of the law, the State claims McKinney *had* to use a misleading version of Staten's statement because to give Staten's complete and full statement would comprise prohibited "other crimes" evidence, namely that Tanner "hurt" someone in "a fight" at "a bus stop", an incident unrelated to the robberies. Sb53. This does not avail. If the incident was unrelated, then Staten's statement should not have been used *at all*, let alone skewed to evade the ban on "other crimes" evidence. The prosecution thus admits to manipulating and truncating Staten's script, using prohibited evidence, and did so to create a false impression that Tanner admitted to the Krauzer's robbery, when the prosecutor knew all along Staten said Tanner was referring to *a fight at a bus stop*. It is hard to imagine anything more prejudicial to a defendant. The constitutional magnitude of this stratagem gives rise to a "fundamental injustice" that overcomes any procedural bar. *State v. Martini*, 187 N.J. 469, 481-82 (2006); *State v. Szemple*, 247 N.J. 82, 99 (2021)(same); *State v. Laurick*, 120 N.J. 1, 10 (1990).

In yet another inexplicable act, the State does not deny McKinney inserted into Staten's script an invented time frame for Tanner's call, i.e., "no later than

12:30 am or 1:00 am", Da241, to make it appear Tanner called Staten shortly after the Krauzer's robbery (that took place at 11:57 PM). But Kaihala Staten *never* gave a time frame (or or a date) for Tanner's call and said Tanner's call had to do with a "fight" at "a bus stop" and that she knew nothing about a Krauzer's robbery, as Staten's interview transcript shows. Da243-248. McKinney thus invented a time frame for Tanner's call, inserted it into Staten's script, all unknown to defense counsel, and used it to implicate Tanner, falsely, in the Krauzer's robbery. *See discussion*, Defendant's Brief, Db78-80. Plainly, a fundamental injustice arose from the prosecutor's actions that requires reversal. *See e.g. State v. Martini, supra,* 187 N.J. at 481-82.

Dr. Krakoff's report was not "a *preliminary* line of inquiry", as the State claims. Sb71-72. Dr. Krakoff conducted a medical examination of Johnson at attorney Saunders's request and gave a report significant enough that Mr. Saunders asked for time from the trial court to obtain funds for the written version. The State concedes that Saunders dropped the demand for the report because Johnson accepted a plea, Sb71, not because the Krakoff material was not significant. Hamerslag's administrative note on the Krakoff material says "Report to follow", indicating that the examination was complete, not "preliminary". Da236. Hamerslag also said he used the administrative notes to record "significant" statements by attorneys. 30T7-4-12. Plainly the Krakoff report was material and

had to be disclosed, going as it did to the primary eyewitness's mental and psychiatric deficits.

Brady and *Tate* do not distinguish between a written report and a verbal report "which was never formalized…", as the State argues. Sb71-72. McKinney agreed at PCR that *Brady* required disclosure of Dr. Krakoff's verbal report, 20T149-19 to 22, and that she would have done so had she known about the Krakoff material. 20T133-8 to 135-10; 20T136-24 to 137-3; 20T147-10 to 22; 27T75-10 to 23; 27T89-1 to 5. Nor does the fact that the Krakoff material was recited in "open court" free the State of the obligation of disclosure. Mr. Tanner's lawyer, Robert White, was not present at Johnson's conference (the two cases were segregated for conference purposes) and he was not required to guess or intuit that Johnson's mental state was being presented to the trial court. That is the whole point of *Brady* and *Tate* — the defense **must** receive disclosure of exculpatory information.

Having concealed Dr. Krakoff's report, it is unjust for the State to now argue that Tanner, a layperson sitting in jail after his arrest, should have known that Johnson had been hospitalized *and* understood the implications for Johnson's future testimony. This argument is based on Wilona Johnson's statement that the "family" knew about Johnson's hospitalization, 22T43-12 to 16, but Wilona admits she did not speak with Tanner about Johnson's "breakdown" and did not know if

other "family" members spoke with him. 22T44-15 to 48-19. That Johnson's parents were concerned for Johnson, as the State argues, Sb65-77, does not mean anyone told Tanner about Johnson's condition; in fact, the UBHC records show Johnson's parents had "little insight" into their son's disease. 23T115-17 to 116-1.

It should be remembered that at the time of Johnson's "breakdown" in November 2003, Mr. Tanner had no reason to know that — ***two years later*** — Johnson would be a witness *against* him. By early 2006, when Johnson became a witness for the State, no one may have even remembered his hospitalization, let alone recognize its importance. In such circumstances, to hold Tanner to a lack of diligence is unjust, especially where the State itself concealed Dr. Krakoff's report as to Johnson's mental health deficits. Moreover, the State apparently knew about Johnson's "breakdown" from Wilona who told McKinney before trial about his hospitalization, 22T19-15 to 20-19, a fact McKinney never denied or refuted when she returned to the PCR stand after Wilona testified. *See discussion*, Defendant's Merits Brief, Db42.

Dr. Weiss, the sole expert to testify at PCR, did not limit his analysis to three months of records, as the State argues, Sb64-65, but based his opinion on medical knowledge acquired over many decades as to the "natural history" of psychosis. 23T39-11 to 16; 23T41-6 to 42-10; 23T62-17 to 63-1; 23T73-22 to 74-8; 23T113-20 to 114-16. Moreover, no expert testified for the State, let alone to say Dr. Weiss's review was not sufficient. Nor did any expert testify that Dr. Weiss

needed to currently "interview" Johnson to understand his psychotic state *15 years earlier,* as the State argues. Sb66.

Judge Bucca's disregard of Dr. Weiss's testimony on the ground that it would be "merely impeaching", also argued by the State, Sb68-69, has been rejected decisively by case law. *See e.g. State v. Carter*, 91 N.J. 86, 111 (1982) ("evidence impeaching testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of [] guilt or innocence"); *see also State v. Henries*, 306 N.J. Super. 512, 531 (App.Div.. 1997) (holding that psychiatric evidence is *Brady* material even if its use is limited to impeachment). Thus, the State and the PCR judge rely on a discarded doctrine that was rejected decades ago.

Although Dr. Weiss said he could not tell from reading the trial transcript if Johnson was suffering psychotic symptoms on the day he testified at the Tanner trial, this is not grounds for denial of a new trial, as the State claims. Sb65. In *Henries*, a similar situation occurred: the doctors could not state whether an individual would be affected by the disease on a given day, 306 N.J. Super. at 526, but this Court still ordered a new trial once the fact of the witness's *earlier* illness and its importance to his credibility became known. *Henries* at 526-528.

Nor does *Henries* condition a new trial on "meaningful inconsistencies" in the witness's testimony, as Judge Bucca (Da426-428) and the State (Sb69)

mistakenly conclude. *Henries* is focused on the impact mental illness would have had on the jury's view of the primary eyewitness's credibility, concerns that apply equally to Johnson as they did in *Henries*. As Dr. Weiss explained, and did so *with specificity*, psychosis causes a witness to imprint a confession, be unable to "initiate" their own narrative and *consistently* repeat the police narrative. Db26-28. Dr. Weiss gave a learned and specified discussion of the impact of psychosis on a person's capacity to testify freely and to perceive reality, Db19-30, critical for any witness's credibility. Under *Henries*, a jury is entitled to hear and evaluate this information.

In any event, Johnson has shown multiple "inconsistencies" in his recollection, recanting *twice* during PCR (he even *un*-recanted once in-between his two recantations), admitting he lied at the trial and denying knowledge of any robberies. Equally to the point, Johnson's UBHC records demonstrate his confusion, just weeks after his arrest and confession, when he told physicians he does not know of any robbery, does not know why he was arrested or is confused about whether any robbery took place. 23T111-6 to 12; 23T123-13 to 124-15; Ca111; *see* Defendant's Merits Brief, Db52. Assuming, *arguendo*, that "meaningful inconsistencies" are a predicate to psychosis, as Judge Bucca mistakenly assumed, they abound on this record.

The State also suggests that no basis exists for Dr. Weiss's view that Johnson had a *continuing* psychosis. Sb41. A brief summary of the medical record

demonstrates the error in this argument. UBHC's own treatment plan for Johnson describes his "chronic" condition. Ca283. Dr. Weiss said that when Johnson left treatment, he was *still* on the anti-psychotic Abilify, demonstrating a "continuing" condition. Db29-33. No one terminated Johnson's medication, as the State claims. Sb66. It was *Johnson* who said "*I don't need it*", meaning his anti-psychotic medicine. Ca48. UBHC *always* continued his medication. Ca153,155,159 ("one month [] Abilify on 11/19/03"); Ca207 (another month, 12/3/03). Dr. Weiss said that if his condition was merely "transitory", Johnson would not have required hospitalization. 23T99-6-23. Even when discharged, Johnson was placed in "*intensive* outpatient" status, 23T72-5-8, hardly a sign his condition had "abated", as the State tries to claim. Sb43. Dr. Weiss testified that UBHC's diagnosis of "paranoia" and "guarded" behaviors is typical of a psychotic who "won't own up" to their symptoms. 23T125-8 to 126-12. UBHC repeatedly recommended psychotherapy, Ca146-147;229-230;235, *but Johnson refused*. Ca293;294. Johnson's discharge instructions say he ***must*** keep using Abilify. Ca247,249;274. When "discharged", the record says his reliability was "poor", limited by psychosis and prognosis poor "without further treatment." Ca289-294. Moreover, Dr. Weiss never said, as the State now claims, Sb41, that there was not "adequate information" to make a diagnosis but, rather, he made it clear that Johnson had a continuing, established and troubling psychotic condition.

This record, discussed at length at Defendant's Merits Brief, Db19-24, fully supports Dr. Weiss's view of a "continuing" psychotic condition.

Finally, no support is offered for Judge Bucca's error that Dr. Weiss did not testify "*with specificity*" as to the impact of psychosis on Johnson's ability to testify. Da427. First, no standard of "specificity" appears in case law and none is cited by the State. The law requires not *specificity* but only that "the *probable* effects of such disorders upon [Johnson's] cognitive abilities *could* have affected the outcome of the trial", as this Court held in 2016. Da205 [emphasis added]; *State w. Ways,* 180 N.J. 171, 189 (2004)(same). Second, Dr. Weiss *did* testify "with specificity", *see discussion*, Defendant's Merits Brief at Db19-24, and spoke at length about the impact of Johnson's disease on his capacity to perceive reality and testify freely *and* that he was psychotic when arrested, was susceptible to pressure to confess and that his confession would imprint when he testified. Db19-27.

Any reasonable jury would have wanted to hear evidence of this nature in a case centered around a single (and singular) eyewitness.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the denial of post-conviction relief be reversed and that the judgment of conviction be vacated.

Respectfully submitted,
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