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May 3, 2024
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3998-22T1

STATE OF NEW JERSEY,

CRIMINAL ACTION

Plaintiff-Respondent,

: On Appeal From a Denial of a
Petition for Post-Conviction
: Relief in the Superior Court
of New Jersey, Law
: Division, Camden County.

KEITH CUFF,

: Ind. No. 13-05-01446-I

Defendant-Appellant.

:
Sat Below:
: Hon. Edward J. McBride, Jr., P. J.Cr.

DEFENDANT IS CONFINED

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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¹ The judgement of conviction was amended in accordance the Appellate Division decision reversing convictions on counts 15 and 46 (Da 190), and with the New Jersey Supreme Court opinion, which directed the trial court to re-sentence with a proper analysis under State v. Yarbough, 100 N.J. 627 (1985) with respect to offenses committed within a single criminal episode. State v. Cuff, 239 N.J. 321, 349 (2019).

²The PCR petition is tantamount to a complaint and thus is required to be included in the appendix pursuant to R. 2:6-1a(1)(a),(b).

³This document is included in the appendix as it falls within one or both of the "exception to the general prohibition against including trial briefs in the appendix" R. 2:6-1(a)(2), because it was referred to in the trial court's decision and is part of the PCR record, and germane as to whether an issue was raised in the trial court.

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⁴ These two sentencing memoranda are included in the appendix as they fall within the “exception to the general prohibition against including trial briefs in the appendix” R. 2:6-1(a)(2), because they are part of the PCR record and are germane to the ineffective assistance of original counsel at sentencing claim as set forth in Point II.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

A. Trial facts

Camden County Indictment Number 13-05-1446 charged the petitioner, Keith Cuff, and three co-defendants, with 56 counts arising from five residential robberies involving kidnapping due to restraint of occupants, and an additional incident arising from a traffic stop. State v. Cuff, 239 N.J. 321, 328 (2019).

Petitioner was represented by private counsel during pretrial, trial and sentencing as evidenced by the Post-Conviction Application filed and hereby incorporated into the Statement of the Facts. (Da 216)

A jury trial began on November 17, 2015 before the Honorable Kathleen M. Delaney, J.S.C. Petitioner was acquitted of 30 charges and four were dismissed on the State's own motion at the end of its case. He was convicted of 19 charges, one of which was reversed on appeal. Id. at 336-37. The remaining 18 charges stem from three separate incidents that took place in the course of a month: the Gola home invasion, the Patel robbery, and a car stop.

¹ The Procedural History and Statement of Facts are combined in a single statement for clarity, as they are intertwined in the circumstances of this appeal.

1. Gola Home Invasion (Counts 41 to 54)

On February 28, 2011, two armed men entered a residence in Cherry Hill when four children were in the home. Id. at 330. The two sleeping children were left undisturbed, but the men committed kidnapping when they tied the hands of a 14 year old and a 13 year old behind their backs, and when the children's parents came home about an hour later, the men demanded money at gunpoint. Id. Both parents' hands were tied behind their backs. Id. at 331.

As soon as the men left, Mr. Gola was able to slip out of his restraints and release his wife's and daughters' hands. Ibid. Mr. Gola testified that his children were "fright[ened]," but otherwise unharmed. (11T at 31-20) The perpetrators had been "chit-chatting" with them. (11T at 31-21) Assault charges related to Mr. Gola's children were dismissed by the State after the close of the State's case. (12T 27-11 to 28-1, 62-1 to 22)

2. Patel Robbery (Counts 1 to 6)

Three days later, on March 3, 2011, Umesh Patel, a business owner, returned home and was confronted by two men, one of whom pointed a gun at him. Id. at 331. The men took \$2,200 of cash from him and left in his truck, which was retrieved shortly thereafter. Ibid.

3. Car Stop (Counts 7 and 8)

On March 29, 2011, Jerome Thomas was driving a car, which was pulled over for matching the description of a car that had been reported to be involved in an unrelated incident. Cuff, 239 N.J. at 331. A Black male ran out of the car; at trial Mr. Thomas identified that man as petitioner. (4T 60-5, 6T 90-20 to 22, 9T 133-1 to 8) Officers looked in the direction in which the passenger ran and found two guns. (4T 60-20 to 61-23) The car's owner testified that it had been taken without permission. In relation to this incident, petitioner was convicted of unlawful possession of a weapon and the lesser-included offense of taking a motor vehicle without consent.

4. The Plea Deals Of The Cooperating Witnesses

The State's case rested on the testimony of two cooperating co-defendants: Mr. Thomas and Mr. Abdul Mansaray. Mr. Mansaray was named in 19 of the counts contained in the indictment, including all of the counts from the Gola incident. Mr. Thomas was an unindicted co-defendant, who claimed to be involved in each of these incidents.

As a result of his involvement in the robberies, Mr. Mansaray was facing 185 years in prison, with a significant period of parole ineligibility. (8T 66-9 to 74-

5) Instead of pleading guilty to any of the charges in the indictment, he pleaded guilty to conspiracy to commit theft, a third-degree offense. (8T 25-15 to 24) The plea bargain called for Mr. Mansaray's testimony at trial in exchange for a five-year flat sentence. (8T 26-3 to 12) This sentence was to run concurrently to an unrelated three-year sentence Mr. Mansaray received for conspiracy to distribute cocaine. (8T 23-8 to 21, 73-25 to 74-5)

At the time Mr. Thomas testified, he was serving a 15-year federal sentence for conspiracy to distribute drugs and possession of a weapon. (8T 88-11 to 20) Because of his lengthy record and his status as a "career criminal," he faced a life sentence on each of the five robberies contained in the indictment. (9T 183-1 to 184-15) As a result of his cooperation, Mr. Thomas was not prosecuted in relation to any of the incidents charged in the indictment. (8T 91-8 to 16) By testifying against petitioner, Mr. Thomas was hoping to get a further reduction on the federal sentence he was serving at the time of trial. (8T 91-17 to 20) While he did not know what sentence reduction he would receive, he was "hoping" for "[e]verything." (8T 91-21 to 25).

B. The First Sentencing

The State submitted a memorandum in advance of the sentencing date in

which it argued that there were no mitigating factors, sought multiple consecutive terms, and requested an aggregate sentence of 110 years with 98 years parole ineligibility under the No Early Release Act. (Da 260 to 266) Trial counsel was copied, and did not file any response.

Petitioner was sentenced for the first time on January 26, 2016. He was 29 years old. He was 24 years old at the time of the offenses. The aggregate sentence imposed was 98 years with 66.4 years of parole ineligibility. (19T 51-7 to 11) That aggregate sentence included a consecutive, eight-year sentence for a separate offense unrelated to these three incidents.

In regard to the Patel robbery, petitioner was convicted of first-degree robbery, fourth-degree aggravated assault, unlawful possession of a weapon, possession of a weapon with an unlawful purpose, taking a motor vehicle without consent, and conspiracy to commit robbery. Petitioner received an 18-year sentence with an 85% parole disqualifier for the robbery. (19T 4-8) The trial court merged the assault, possession with an unlawful purpose, and conspiracy into the robbery, but imposed a consecutive eight-year sentence with a four-year period of parole ineligibility for the possession of a weapon and a consecutive one-year sentence for taking the car. (19T 40-4 to 40-10)

In imposing a consecutive sentence for the possession of a weapon, the trial court merely stated that "[t]he elements of this [of]fense are separate and distinct from the charge of armed robbery, and there can be no free crimes." (19T 39-13 to 15) The trial court also sentenced petitioner to a consecutive sentence for taking a motor vehicle without consent because, according to the trial court, it was a "separate and distinct crime." (19T 40-12 to 14).

In regard to the Gola robbery, petitioner was convicted of burglary, possession of a weapon with an unlawful purpose, conspiracy to commit robbery and/or burglary, and three kidnapping charges, one each for Mr. Gola and two of his children. The trial court merged the burglary, weapon possession and conspiracy charges into the kidnaping and robbery charges. (19T 46-8 to 47-10) The trial court sentenced petitioner to two terms of 23 years with an 85% parole disqualifier for the kidnapping of M.G. and Mr. Gola, to run consecutively to charges stemming from the other incidents and to each other. (19T 42-32 to 44-6) The trial court ran the kidnapping of A.G. concurrent to those charges. (19T 45-15 to 19) It also sentenced petitioner to a consecutive eight-year sentence with a four-year period of parole disqualification for unlawful possession of a weapon. In

explaining the reason for running the kidnapping of M.G. consecutively, the trial court asserted that "[t]his crime is separate and distinct from the other crimes committed on this date, including the kidnapping of Mr. Gola." (19T 43-2 to 5) The court said the same thing to justify the consecutive sentence for kidnapping Mr. Gola. (19T 48-16 to 18) In support of this assertion, the trial court pointed only to the hour between when the home was initially entered and when Mr. Gola arrived. (19T 43-20 to 22, 49-22 to 50-11) In sentencing petitioner consecutively for unlawful possession of a weapon, it again stated that "[t]he elements of this offense are separate and distinct from the charges of kidnapping. The defendant possessed the weapon and did not have a permit for it, and there can be no free crimes." (19T 46-21 to 25)

The trial court also imposed consecutive sentences for the two incidents stemming from the car stop: an eight-year sentence with a four-year parole disqualifier for unlawful possession of a weapon and a one-year sentence for taking a motor vehicle without consent. In explaining why these incidents should run consecutively to each other, the court merely stated that "[t]his crime is separate and distinct from the crime of unlawful possession of a weapon." (19T 421 to 3)

C. Prior Appellate Proceedings

Petitioner appealed his convictions and sentence. This Court largely affirmed defendant's convictions in an unpublished opinion. (Da 165) However, the court vacated the convictions on counts 15 and 46, "conspiracy to commit robbery 'and/or' kidnapping," due to the erroneous use of "and/or" in that charge. The aggregate sentence after the decision was 90 years in prison with a 66.4-year parole disqualifier. (Da 190)

Petitioner filed a petition for certification with the New Jersey Supreme Court, which was granted on August 1, 2018, and limited to two issues: (1) the verdict sheet's omission of the charge of second-degree kidnapping; and (2) the trial court's imposition of consecutive sentences. (Da 191) In an opinion decided August 6, 2019, the Court affirmed the Appellate Division's decision with respect to the convictions. State v. Cuff, 239 N.J. 321 (2019). However, the Court remanded the matter to the Law Division for re-sentencing, holding, “[i]n sentencing defendant to consecutive terms for offenses committed within a single Criminal episode...the trial court set forth findings that do not satisfy State v. Yarbough, 100 N.J. 627 (1985) warranting a remand for resentencing with respect to those offenses.” Ibid. The Court retained jurisdiction and specifically cautioned

that in addition to reconsidering these consecutive sentences, the trial court's "focus should be on the fairness of the overall sentence." Id., at 352. (quoting State v. Miller, 108 N.J. 112, 121 (1987)). Thus, the Supreme Court ordered that "[i]n re-sentencing defendant on remand, the trial court should consider the fairness of the aggregate sentence imposed for the eighteen offenses as to which defendant's convictions have been affirmed." Ibid. The Court noted further that it did "not foreclose the parties from making any argument on remand regarding the court's imposition of consecutive or concurrent sentences" on any of the charges. Id. at 352 n.9.

D. Re-sentencing

The re-sentencing was held on January 25, 2020. At that point, petitioner had been in custody for seven-and-a-half years. Petitioner was represented by a different attorney, who submitted a detailed memorandum, along with exhibits presented in mitigation, prior to sentencing. (Da 267 to 345) Counsel requested a 20-year sentence, subject to NERA. (Da 284) In support of this request, counsel pointed to petitioner's limited criminal history. As a teenager, petitioner had been convicted of four offenses, for which he had never been incarcerated: conspiracy to possess a controlled dangerous substance, robbery, a violation of probation, and

verbal harassment. (PSR 7-8) As an adult, he had two municipal convictions for public drunkenness and concealing merchandise and two indictable convictions stemming from the same incident for third-degree burglary and third-degree fraudulent use of a credit card. (PSR 8-10) He had never been sentenced to a day in state prison.

Counsel also presented substantial evidence of rehabilitative efforts petitioner had undertaken over the previous seven years. During that time, petitioner had not had a single infraction in prison. (Da 328) Since 2016, petitioner had been working as a "runner" in prison, which is a position that requires the trust of the staff because a runner is "allowed outside of his prison cell and allowed to run errands around the entire facility with limited supervision." (Da 275, Da 330).

Petitioner has also deepened his religious convictions while in prison. Mr. Cuff submitted a letter from the pastor of his home church, who wrote that the money that petitioner earns working in the prison-which is \$1.50 an hour-is sent back to the church. (Da 335).

Counsel also presented evidence of petitioner's troubled childhood and close relationship with his children. Petitioner's grandmother submitted a letter which described his childhood: his grandmother took custody of him when he was two

years old because his drug-addicted mother would leave him home alone and his father was too unstable to take care of him. Petitioner has physical and intellectual limitations due to his mother's drug use. His grandfather was his father figure, but he died in the time petitioner has been incarcerated. (Da 337) Petitioner has three children, and since he has been incarcerated, he "tries to continue to parent over the phone." The mother of petitioner's children wrote a letter explaining that his incarceration has had a negative effect on his children and asking for a sentence that would allow petitioner to see his children again. (Da 343) One of petitioner's children wrote a letter in which he said that his "dad is a good dad to my little brother and I even though he is in jail now." Since petitioner has been incarcerated, "[N]o one is here to protect us or fix stuff when it gets broken. I don't have anyone to talk to about man things . . . I want him to come home. Me and my little brother need him home." (Da 345)

Counsel also noted the disparity in sentencing between petitioner and two of his co-defendants. Mr. Mansaray and Donte Goree, who had been charged in counts petitioner was acquitted of, both received 5- year sentences. Mr. Goree's sentence was subject to NERA and Mr. Mansaray's was not. The Judgment of Conviction for Mr. Goree shows that he has a very similar criminal record to Mr.

Cuff: two juvenile adjudications, three Municipal Court convictions and one Superior Court conviction. (Da 287 to 289) Mr. Mansaray's similar record was comprised of two juvenile adjudications and three Municipal Court Convictions. (Da 290 to 292)

Counsel also pointed to other defendants who had received significantly lower sentences for more serious robberies in Camden County. Charles Walls and Anthony Ervin committed eight armed robberies. In one, a clerk was shot multiple times, paralyzing him. Mr. Walls pleaded guilty to attempted murder, first-degree robbery, and two counts of criminal restraint and received an aggregate 20-year sentence, subject to NERA. (Da 307 to 309) Mr. Ervin pleaded guilty to first-degree robbery and received 10 years in prison. (Da 310 to 324)

Petitioner spoke at re-sentencing and stated that he was remorseful for his actions and that he “apologize[s]” to all the victims.” (20T33-5 to 11).

The Office of the Public Defender, as amicus, argued that petitioner’s sentence was excessive because it was longer than necessary to achieve the four goals of criminal punishment: incapacitation, deterrence, rehabilitation, and retribution. Amicus urged the court to impose a sentence that gives petitioner a “realistic possibility of re-joining society.” (20T19-6 to 21-17).

The trial court reassessed the aggravating and mitigating factors. N.J.S.A. 2C:44-1. The court found that aggravating factor (1), that the crime was committed in an especially heinous, cruel, or depraved manner did not apply. It found that aggravating factor (2), the gravity and seriousness of the harm inflicted on the victim, did not apply because "no victim was seriously physically harmed in any of these incidents" and the child victims "were not of extreme youth." (20T43-15 to 19). The trial court found the same aggravating factors it did at the original sentencing: (3), the risk that defendant will commit another offense, (6) the extent of defendant's prior criminal record and the seriousness of the offenses of conviction, and (9), the need to deter and found that each of these three factors weighed heavily.

The trial court rejected all mitigating factors. As to mitigating factor (9), that character and attitude of the defendant indicate that he is unlikely to commit another offense, the trial court stated that petitioner's "callous actions reveal" that this mitigating factor does not apply. (20T53-7 to 25) The court stated that it does "not find that these submissions of any change that he's made while incarcerated" overcome what was revealed about petitioner's character "based upon his actions in this case." (20T52-23 to 53-3) The trial court rejected that the impact of

petitioner's incarceration on his children required the finding of mitigating factor (11). (20T53-7 to 22)

The trial court then did another Yarbough analysis. Following the Supreme Court's guidance, the trial court ran the three counts from the Patel robbery concurrent to each other. (20T 56-7 to 68-22) The trial court ran the unlawful possession of a weapon count from the Gola home invasion concurrent to the other counts, but maintained the consecutive nature of the two kidnaping charges. (20T66-18 to 70-22). The trial court reasoned that the "[k]idnaping of Mr. Gola is a separate crime of violence that took place after the defendant had broken into the home, terrorized the children, and waited for Mr. Gola and his wife to come home so that he could effectuate the robbery of Mr. Gola." (20T70-6 to 21)

The court then ran the counts stemming from each incident consecutive to each other. In doing so, it reasoned that "[t]he crimes and their objectives were independent of each other having occurred on three separate dates in three separate municipalities. They are separate and distinct crimes. The crimes involve separate acts of violence or threat of violence and were committed at separate times and places." (20T56-20 to 57-2)

"In focusing on the overall fairness of the sentence," the trial court reduced

the sentence for possession of a weapon stemming from the car stop from eight years with a four-year parole disqualifier to six years with a 42-month parole disqualifier. (20T61-18 to 25) The original sentences otherwise remained: 18 years NERA for the armed robbery of Mr. Patel and two 23 year NERA sentences for the kidnaping of Mr. Gola and one of his daughters.

The court noted that the “defendant is making some progress while he’s in prison,” but did not explain how that progress related to the ultimate sentence imposed: 70 years in prison, 57.9 years to be served before Mr. Cuff is eligible for parole. (20T64-4 to 5, 71-2 to 22; Da192 to 196). As a result of this new sentence, Mr. Cuff will not be released until he is 83 years, 11 months, and 14 days old.

E. Post-Re-sentencing Appellate Proceedings

Petitioner appealed his re-sentence. By *per curiam* decision decided on March 31st 2022, this Court affirmed the re-sentencing, finding that the trial court followed the Supreme Court’s instructions on remand and because the resulting aggregate sentence did not shock the judicial conscience in light of the multiple crimes committed. (Da 198).

Petitioner filed a petition for certification, which the New Jersey Supreme Court denied on October 7th 2022. (Da 213).

Petitioner initially filed a petition for post-conviction relief on January 24th 2021. (Da 214) PCR counsel filed a brief on his behalf (Da 219).

The Honorable Edward J. McBride, J.S.C., heard argument on the petition on July 21st 2023. (21T). The court issued an oral decision and order denying the petition on the same date. (21T6-18 to 20-4; Da 254). The court entered an amended order, which modified the reasoning on the denial of the claim pertaining to counsel's failure to call a specified witness (Da 255), and explanatory letter (Da 256), on August 4th 2023.

Petitioner filed an amended Notice of Appeal to this Court on September 18th 2023 (Da 257).

LEGAL ARGUMENT POINT I

PETITIONER'S EFFECTIVE SENTENCE OF LIFE IMPRISONMENT FOR KIDNAPPING AND RELATED CRIMES WHERE THE VICTIMS WERE PHYSICALLY UNHARMED IS UNFAIRLY DISPARATE TO HIS EQUALLY CULPABLE CO-DEFENDANTS, WHO RECEIVED A MAXIMUM OF FIVE YEARS

A. The PCR Court Wrongly Determined That Petitioner's Claim Of Disparate Sentencing Was Procedurally Barred, Since A Disparate Sentencing Claim Qualifies As A Sentence Not Authorized By Law And Is Thus Cognizable Pursuant To R. 3:22-2c (21T14-1 to 17)

Petitioner argued below that his sentence was unfairly disparate in comparison to his more culpable co-defendants. (Da 231 to 236). The PCR court found that this claim was procedurally barred pursuant to R. 3:22-5 as previously adjudicated in accordance with the Supreme Court remand at the re-sentencing. (21T14-10 to 15) The court also found that petitioner could have made this argument on appeal, and was thus procedurally barred pursuant to R. 3:22-4. Ibid.

The PCR court mistakenly found that the claim of disparate sentencing was previously adjudicated in prior appeals. As set forth in this court's initial direct appeal opinion, petitioner argued that the trial court improperly ran separate charges stemming from the same conduct consecutively, and imposed an excessive sentence. (Da 174). No claim of disparate sentence was raised.

Nor did petitioner raise a disparity claim in his appeal of his re-sentence after remand. Rather, as set forth in this Court's decision, petitioner argued in multiple sub-points that his de facto life sentence of 70 years with 57.9 years was excessive. (Da 205) In particular, petitioner argued:

A. Procedurally, The Trial Court Again Failed to Weigh Sentencing Factors Appropriately.

1. The trial court overweighed defendant's prior record and failed to sufficiently take his rehabilitative efforts into account when assessing

aggravating and mitigating factors.

2. The trial court gave insufficient attention to the fact that these crimes occurred in an aberrant spree in defendant's life.

B. Substantively, The Trial Court's Revised Sentence Remains Manifestly Excessive

1. Courts have a responsibility to ensure that aggregate sentences are not excessive.

2. This sentence is much longer than necessary to incapacitate.

3. This sentence is much longer than necessary to deter.

4. This sentence is much longer than necessary to rehabilitate.

5. This sentence is much longer than necessary to further the goal of retribution.

[Da 205 to 206]

None of these claims raise a legal claim of disparity of petitioner's sentence.

No court below has adjudicated a disparate sentencing claim with respect to petitioner. Prior adjudication of an issue on direct appeal will ordinarily constitute a procedural bar to post-conviction relief. R. 3:22-5; State v. Harris, 181 N.J. 391, 394 (2004). Since no court has adjudicated petitioner's disparate sentencing claim, the PCR court was wrong to rely upon R. 3:22-5 as a procedural bar to this claim.

The PCR court also improperly found that the disparate sentencing claim was procedurally barred as a claim that could have been raised in a prior litigation. R. 3:22-4. This finding fails to recognize the import of R. 3:22-2(c), which provides:

A petition for post-conviction relief is cognizable if based upon any of the following grounds:

(a) Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or law of the State of New Jersey.

* * * * *

(c) Imposition of sentence in excess of **or otherwise not in accordance with the sentence authorized by law** if raised together with other grounds cognizable under paragraph (a), (b) or (d) of this rule. Otherwise, a claim alleging the improper imposition of a sentence in excess of or not in accordance with the sentence authorized by law shall be filed pursuant to R. 3:21-10(b)(5).

[Emphasis added]

A disparate sentence may invalidate an otherwise sound and lawful sentence. State v. Roach, 146 N.J. 208, 232 (1996). Since a disparate sentence is not authorized by law, such a claim is cognizable under R. 3:22-2(c) and does not fall in the category of excessive sentences that are ordinarily remediable only on direct appeal. Pressler and Verniero, 2023 Court Rules, Comment 3, R. 3:22-2 (Gann); State v. Acevedo, 205 N.J. 40, 45, 47 (2011). The PCR judge mistakenly categorized the disparate sentencing claim as an excessive sentencing claim that is usually limited to a direct appeal. Since a disparate sentencing is a cognizable post-conviction relief claim, the PCR court incorrectly determined that this claim is

procedurally barred. Accordingly, this court should order a remand for full consideration of this issue.

B. The 65 Year Disparity Between Petitioner And His Equally Culpable Co-Defendants Warrants A Remand For An Evidentiary Hearing Pursuant To State V. Roach To Determine If The Sentence Is Unfairly Disparate (21T14-17to25)

The PCR court, turning very briefly to the merits, rejected the disparity claim on the basis that co-defendant plead guilty to only a single offense, as opposed to the multiple convictions incurred by the petitioner. (21T14-17to 25). Such minimal analysis is insufficient to determine if petitioner's effective life sentence was unfairly disparate to his equally culpable co-defendants with more extensive criminal histories, one of whom received a five-year sentence subject to NERA, and another who received a five-year flat sentence. The PCR court should have held an evidentiary hearing in order to consider all relevant factors of petitioner and co-defendants in order to make a determination on disparity.

"Ensuring a reasonable degree of uniformity in sentencing is an essential feature of our system of justice." State v. Case, 220 N.J. 49, 63 (2014). Our Supreme Court has "consistently stressed uniformity as one of the major sentencing goals in the administration of criminal justice." State v. Roach, 146 N.J.

208, 231 (1996). Unwarranted (or gross) "[d]isparity [with the sentence of a co-defendant] may invalidate an otherwise sound and lawful sentence." Id. at 232 (citing, e.g., State v. Hubbard, 176 N.J. Super. 174, 175 (Resent. Panel 1980). "[a] sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter." Id. at 232 (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). However, "there is an obvious sense of unfairness in having disparate punishments for equally culpable perpetrators." Ibid. (citations omitted). Where there are disparities in co-defendants' sentences, "[t]he trial court must determine whether: (1) the co-defendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria," and, (2) "then inquire into the basis of the sentences imposed on the other defendant," and (3) considering "the length, terms, and conditions of the sentence imposed on the co-defendant." Id. at 233.

Roach was sentenced to two consecutive life terms with sixty years' parole ineligibility, while his co-defendant was sentenced to two consecutive life terms with thirty years parole ineligibility. Roach, 146 N.J. at 216. The Court found that while there was nothing illegal or "intrinsically wrong" with his sentence, State v. Roach 167 N.J. 565, 567 (2001) (Roach II), there was "no acceptable

justification of [the] defendant's sentence in light of the sentence imposed on his co-defendant." Roach I, 146 N.J. at 233. Concerns about sentencing disparity expand beyond individual co-defendants. In State v. Gerns, 145 N.J. 216, 231-32 (1996), the Supreme Court noted that defendant had presented "impressive" statistical data of disparity of sentencing in drug cases, and suggested that such disparity might offend either the State Constitution or the Code's "overriding commitment to assuring uniformity in criminal sentencing." In State v. Brimage, 153 N.J. 1 (1998), the Court held that county-by-county disparities in plea offers in "school zone" drug cases were unconstitutional and required the Attorney General to draw up new guidelines. These broader concerns in drug cases, as well as disparities between co-defendants, derive from the long-standing principle that "grievous inequities in sentences destroy a prisoner's sense of having been justly dealt with, as well as the public's confidence in the even-handed justice of our system." State v. Hodge, 95 N.J. 369, 391 (1984).

The PCR judge improperly relied upon the fact that cooperating co-defendant plead guilty to a single offense as the sole reason for rejecting the disparity claim. (21T14-18 to 25). Cooperation of a co-defendant with law enforcement authorities may provide a valid reason for disparate sentences

between co-defendants. State v. Gonzalez, 223 N.J. Super. 377, 393 (App. Div. 1988). Gonzalez does not stand for the proposition that any disparity, no matter how extreme, is justifiable. Gonzalez was sentenced to fifteen years with a mandatory five year period of parole ineligibility for first degree robbery. Id., at 380. Though the sentence of his co-defendant was not specified, the court noted that he received the presumptive sentence for a first offense and that there was no “grievous inequity” between his sentence and co-defendants, who were eligible to receive mitigation consideration by virtue of their cooperation with law enforcement. Gonzalez, 223 N.J. Super. at p. 393.

In contrast, Roach focused on the unjustified disparity between defendants' minimum sentences and found “the disparity between the sentences is not minimal it is huge: thirty additional years in prison.” 146 N.J. at 216, 233. The disparity between petitioner’s and his co-defendants’ sentences are manifestly more huge. Petitioner received an aggregate sentence of 70 years in prison, 57.9 years to be served before he is eligible parole, making this a *de facto* life sentence. His equally culpable and similarly situated co-defendants received exponentially lesser terms that gave them the opportunity for a meaningful life after serving their terms. Donte Goree received a five-year prison sentence subject to NERA, pursuant to a

negotiated plea. (Da 286) Abdul Mansaray received a five-year flat prison sentence pursuant to a negotiated plea the included testifying against petitioner at trial. (Da 290, 8T 26-3 to 12) Justin Thomas was not even prosecuted. Even considering that co-defendants either plead guilty or cooperated with the State, the 65 year disparity has no justification or explanation.

Also relevant is that two men who were convicted in 2014 of a string of armed robberies stemming multiple counties, including Camden, received significantly lower terms. These crimes were more severe, as a store clerk was shot multiple times and was paralyzed, in contrast to the lack of bodily injury in this case. One defendant, Charles Walls, received a 20 year term with 17 years parole ineligibility. The other, Anthony Ervin, was sentenced to 12 years with just over 10 years parole ineligibility. (Da 305).

This enormous disparity between equally culpable defendants cries out for meaningful judicial review. Despite being sentenced, and re-sentenced upon remand, no court has reviewed whether petitioner's sentence was unfairly disparate. Though petitioner properly raised this cognizable issue in his petition, the PCR judge failed to conduct the required disparity analysis under Roach, namely, if (1) the co-defendant is identical or substantially similar to the defendant

regarding all relevant sentencing criteria," and, (2) "then inquire into the basis of the sentences imposed on the other defendant," and (3) considering "the length, terms, and conditions of the sentence imposed on the co-defendant." Id. at 233.

This Court should remand this matter for a hearing in which petitioner should have the opportunity to present evidence relevant to the disparity and for the court to consider the fairness of the disparate sentence after analyzing these factors.

POINT II
TRIAL COUNSEL FAILED TO ADVOCATE FOR PETITIONER AT SENTENCING BY FAILING TO ARGUE AGAINST THE STATE'S REQUEST FOR AN EFFECTIVE LIFE SENTENCE AND FAILING TO OFFER RELEVANT MITIGATING CIRCUMSTANCES (21T18-11 to 25)

Introduction: Standard For Ineffective Assistance Of Counsel And Evidentiary Hearing

When ineffective assistance of counsel claims are raised, "trial courts ordinarily should grant evidentiary hearings to resolve [such] claims if a defendant has presented a *prima facie* claim in support of post-conviction relief." State v. Preciose, 129 N.J. 451, 462 (1992). To establish a *prima facie* claim of ineffective assistance of counsel, a defendant must "demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1986)," and adopted by the Supreme Court of New Jersey in State v. Fritz, 105

N.J. 42, 58 (1987), Preciose, 129 N.J. at 463.

The two-pronged test of Strickland and Fritz is: (1) whether counsel's performance was deficient, and (2) whether there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In deciding if a defendant has established a *prima facie* claim, courts must "view the facts in the light most favorable to a defendant." Preciose, 129 N.J. at 463.

The Preciose Court set forth this surmountable standard because a defendant usually needs a hearing to establish a record to support his claim of ineffective assistance of counsel. The Court reasoned that a hearing is more likely required on ineffectiveness claims "because the facts often lie outside the trial record and because the attorney's testimony may be required." Preciose, 129 N.J. 462; see also State v. Sparano, 249 N.J. Super. 411, 419 (App. Div. 1991) ("generally, a claim of ineffective assistance of counsel cannot be raised on direct appeal [because] defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction.") Where, as here, the PCR court denied an evidentiary hearing, appellate review is *de novo*. State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145 (2005).

The “failure to present mitigating evidence or argue for mitigating factors” may constitute ineffective assistance of counsel. State v. Hess, 207 N.J. 123, 154 (2011). Defense counsel’s lack of advocacy at sentencing through “failure to bring relevant information in his file to the attention of the [sentencing] court so that the court could independently and identify mitigating factors cannot be ascribed to strategy or reasonable professional judgment.” Id., at 149-50. Put another way, defense counsel owes an independent duty to present “mitigating evidence in support of a lesser sentence,” and a failure to honor that obligation denies a defendant of the “constitutional right to the effective assistance of counsel at sentencing.” Id., at 129. “[T]he failure [of defense counsel] to present and argue the mitigating evidence can only be described as attorney dereliction” and may rise to the level of ineffective assistance of counsel.” Id., at p. 154.

A. Defense Counsel Was Ineffective By Failing To Submit A Memorandum Prior To The Sentencing Hearing In Order To Refute The State’s, Which Presented Strong Victim Impact Evidence And Requested A Life Sentence; Counsel’s Silence Allowed The State To Set The Narrative For The Initial Sentencing As Well As The Re-Sentencing Upon Remand

First impressions matter. Materials sent to a sentencing judge prior to the sentencing hearing matter. Our system of justice does not provide for sentencing

immediately after a guilty verdict or plea. Rather, trial courts schedule a later sentencing date, in order to allow the preparation of a mandatory pre-sentence report, N.J.S.A. 2C:44-6, and the opportunity for parties to advocate for their clients prior to the hearing by submitting memoranda and presenting relevant evidence in order to guide the court in deciding what sentence to impose.

Petitioner submits that such pre-hearing materials have the most impact in allowing the court to conduct a meaningful sentencing hearing, as most sentencing judges, guided by such materials, will have an initial sentence in mind by the start of the sentencing hearing.

The jury returned its verdict on December 17th 2015. (18T). The sentencing hearing occurred on January 29th 2016. (19T). The State submitted a memorandum in advance of the sentencing date in which it argued that there were no mitigating factors, sought multiple consecutive terms, and requested an aggregate sentence of 110 years with 98 years parole ineligibility under the No Early Release Act. (Da 266) . The State emphasized how the Gola children had marks on their hands from being bound with zip ties for almost an hour, and how Mrs. Gola “was prostrated by fear when she realized what was happening.” (Da 261). The State noted that “any time a homeowner finds himself confronted in their home, the place where

they raise their family, the place where they sleep, by masked, armed men, it is obviously a terrifying, life changing experience.” (Da 262). Passionately advocating the State’s position on the severity of the crime, the prosecutor noted: “[w]hen the invaders so far violate the bounds of minimum human decency, as defendant did here, by binding the hands of innocent children and holding them at gunpoint waiting for their father to come home so they could attack and rob him, the violent and already heinous nature of the crime is elevated to an extreme.” (Da 263).

The State argued as aggravating factors the nature and circumstances of the offense, the risk that defendant will commit another offense, the extent of defendant’s prior criminal record, the need to deter, and with respect to Count Seven, flight in the course of committing or attempting to commit a crime, including the immediate flight therefrom. N.J.S.A. 2C:44-1(a) 1, 3, 6, 9 and 13. (Da 262). The State also argued for consecutive sentences both as to crimes committed within the same incident as well as those committed on different dates. The State ended its memorandum with a request for an effective life sentence for any adult human being - 110 years with 98 years subject to the No Early Release Act. (Da 266).

This extreme position cried out for a response. There was none. As a result, the sentencing court did not have the opportunity prior to sentencing to consider an alternative position as to why defendant did not deserve a life sentence, as to a suggested alternative sentence that would adequately reflect the crimes of which petitioner was convicted but gave him some chance at life after prison, and as to an alternative analysis and balance of aggravating and mitigating factors.

The sentencing judge noted this omission at the outset of the sentencing hearing by telling the prosecutor, “I have received your sentencing memorandum, and I have reviewed it.” The judge confirmed with defense counsel, “you did not submit one, correct? No, your honor.” (19T4-17 to 21).

Counsel squandered this opportunity to advocate for petitioner and to persuade the court to impose a lesser sentence at the time it most mattered - before the actual sentencing hearing. Counsel was obligated at this critical stage of sentencing to make “a vigorous argument regarding mitigating and other circumstances, hoping to personalize defendant in order to justify the least severe sentence under the criminal code.” State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002). The “unhindered adversarial process at sentencing allows the court to be fully informed about all of the evidence and factors that will lead to a just

sentence.” Hess, 207 N.J. at 153. Remaining mute under these circumstances, and failing to advocate for his client prior to sentencing, constituted “attorney dereliction” such that counsel was ineffective, as he was not functioning as the ‘counsel guaranteed by either our Federal or State Constitution.” Hess, 207 N.J. at 154, citing Strickland, 466 U.S. at 687-88 and Fritz, 105 N.J. at 58.

B. Defense Counsel Was Ineffective at the Sentencing Hearing by Failing to Present Relevant Mitigating Circumstances as to Petitioner’s Background and by Failing to Argue Against the State’s Request for an Effective Life Sentence

This lack of advocacy to argue for the least severe sentence allowed by the criminal code continued at the sentencing hearing. The State passionately emphasized the crimes impact on the victims by mentioning the trauma of Gola family, who moved back to Israel, "because they felt a country in the Middle East, where there are frequent acts of terrorism, was safer than the home that they had in Cherry Hill." And that as a result, the two victim daughters, had to do mandatory service in the Israeli army, and that "he said that even with that, his family still feels safer there because they don't believe this kind of home invasion would actually occur." (19T5-9 to 24) Trial counsel made no objection to this hearsay victim impact testimony. The State continued to personalize the victim impact on

the Gola family by recounting the fear and feeling of lack of safety and security, the feeling of hyper-vigilance since home invasion, including the children being constantly nervous. (19T6-2 to 20) Trial counsel did not object to this hearsay victim impact statement. Driving this point home, the State argued:

. . . the impact of it is as fresh now as it was then because, again, it is a violation of the place where every citizen of this country feels that they should be the safest.

The place where you sleep and are completely the most defenseless. The place where you feel you can leave your children safely, a teenager, and go out and socialize and go to work.

That has been taken from these families. It can never be brought back to them, and I would ask the court to consider that, along with all of the other information that was in my brief, in rendering your sentence.

[19T7-11 to 20-8]

In the face of this passionate argument, defense counsel offered only a subdued and limited refutation of aggravating factors - in particular, nature and circumstances of the offense - inasmuch binding the victims and leaving them in their homes is an element of the offense. (19T9-14 to 10-5). Counsel also argued that Petitioner's prior record was not extensive enough to count it as an aggravating factor, but instead should count as a mitigating factor. (19T8-13 to 9-15; 19T10-23 to 11-4) Counsel also noted that none of the victims were beaten or

pistol-whipped, and that “as home invasion robberies go, they are not particularly heinous ones,” as they did not include gratuitous acts of violence. (19T10-16 to 22) Counsel concluded his remarks by stating: “And with that, I would offer my client for sentencing.” (19T11-5 to 6)

Counsel did not present any of petitioner’s background or life circumstances that could have explained his conduct. Nor did he make any effort to refute the extreme sentence sought by the State - 110 years with 98 years subject to the No Early Release Act. (Da 266) Petitioner was 29 years old on the date of sentencing. (19T14-20 to 22) Counsel made no effort to argue that Petitioner’s crimes did not rise to the level of condemning him to prison for life. An attorney properly functioning as counsel should have been outraged at such an extreme request and was obligated to present a counter-narrative to show that Petitioner is a human being who did not deserve such a long sentence. An attorney properly acting as counsel would have pointed out that such a long term was not necessary to fit the goals of deterrence and protection of the public, and rehabilitation. Counsel properly fulfilling his role as advocate for his client would have pointed out that a life sentence for multiple home invasions where no one was injured was simply not in line with defendants who receive lesser sentences for murder and aggravated

sexual assault, including sexual crimes against children or for armed robbery with a shooting causing paralysis to the victim. Competent counsel would have sought to offer a different narrative than the extreme one proffered by the State by suggesting a different, lower sentence, that would give him some chance of a life outside prison walls. This lopsided presentation, both before and during the sentencing hearing, did not provide the court with proper advocacy required to impose a just sentence, and constitutes ineffective assistance of counsel. Hess, 207 N.J. at 153. (“A lopsided presentation by the State, and the virtual gagging of defense counsel, does not accomplish [the] goal” of allowing the sentencing court to “be fully informed about all the evidence and factors that will lead to a just sentence.”)

Left without an alternative request to sentence petitioner to a lesser term, or with reasons to do so, it is no surprise in light of the one-sided advocacy that the court imposed a sentence very much in line with the State’s request - 98 years with 66.4 years of parole ineligibility. (19T 51-7 to 11)

The detailed sentencing memorandum and exhibits submitted by new counsel for petitioner (Da 267) at the re-sentencing illustrates the mitigating circumstances and arguments that should have been made at the initial sentencing

but were not. Although the re-sentencing took place before the same judge who imposed the initial sentence, petitioner urges that the die was cast at this point. The judge had already made a determination that petitioner would not be eligible for parole until he attained an age in excess of 95 years. The remand was for the limited purpose of conducting the required analysis for consecutive sentencing on the crimes occurring within the same incident, and a determination of overall fairness. State v. Cuff, 239 N.J. 321, 352 (2019) Judges are human beings. “No less than jurors, they are subject to the wide range of human emotions” Hess, 207 N.J. at 157, including, petitioner submits, the reluctance to change one’s mind.

The re-sentence reflects this reality - though the court conducted a new Yarbough analysis - the practical impact is virtually the same. The court imposed 70 years in prison, 57.9 years to be served before petitioner is eligible for parole. (20T64-4 to 5, 71-2 to 22; Da192 to 196). As a result of this new sentence, he will not be released until he is 83 years, 11 months, and 14 days old.

Judges are no less susceptible than lay-persons to the adage that first impressions matter. The following information and arguments made by re-sentencing counsel had the capacity to make a real difference had they been presented before the sentencing judge had already decided to impose a virtual life

sentence. Re-sentencing counsel submitted a detailed memorandum in advance of the hearing. (Da267). She noted the relatively minor nature of petitioner's prior adult convictions - related to a single incident for third-degree burglary and third-degree fraudulent use of a credit card. Petitioner had never been sentenced to a single day in State prison. (Da 284). Counsel submitted evidence of Petitioner's troubled childhood. She submitted a letter from his grandmother, which detailed that she took custody of him when he was two years old because his drug-addicted mother would leave him home alone and his father was too unstable to take care of him. Petitioner has physical and intellectual limitations due to his mother's drug use. His grandfather was his father figure, but he died in the time petitioner has been incarcerated. (Da 277, Da 337)

Counsel also submitted letters from the mother of petitioner's children and one of the petitioner's children. The mother requested a sentence that would allow petitioner to see his children again. The child said that he and his little brother want their father to come home. (Da 278, Da 335).

Counsel also argued the difference in sentences between petitioner and two of his equally culpable co-defendants, Abdul Mansaray and Donte Goree, who

each received five-year sentences, one subject to NERA and the other not. (Da 272, 286) Mr. Goree had a similar prior record to petitioner. (Da 290)

Counsel also presented evidence of other defendants who received significantly lower sentences for more serious multiple robberies in Camden County. Charles Walls and Anthony Ervin committed eight armed robberies. In one, a clerk was shot multiple times, paralyzing him. Mr. Walls pleaded guilty to attempted murder, first-degree robbery, and two counts of criminal restraint and received an aggregate 20-year sentence, subject to NERA. (Da 273 to 275).

Based upon these arguments and supporting materials, re-sentencing counsel requested a 20 year sentence, subject to NERA. (Da 284). She continued her vigorous advocacy of Petitioner at the re-sentencing hearing, where she again emphasized the unfair difference between petitioner's sentence and that of his co-defendants. (20T22-4to23-20). She also referenced the Walls/Ervin case where they received a 20 year NERA sentence for multiple robberies with a total of eight victims, where one of them was shot and permanently paralyzed. (20T24-10 to 25-13). Counsel also argued mitigating factor nine - the impact on petitioner's family. (20T29-6 to 7). She urged the court to look "at the entire person." (20T29-10 to 12) She argued that petitioner is not suggesting that he shouldn't pay for his

crimes, but pleaded for the court to consider “the true man he is and can be.” She asked the court to impose a fair and just sentence, and to:

consider the likelihood of him being able to one day get out of prison, come back to his family, help raise his children, and hopefully give something good to society for being given a second chance at another life.

* * *

And the family is just asking for some mercy in the sentence that he may have an opportunity to come out and live a different life and be on the right track and do great things. And just be in a position to try and get back to society, some of the things that he’s taken away. Maybe not directly to these victims, because that may not be available to him. But so someone that’s hurting, to have that chance. And Your Honor, I really - - just knowing this young man’s history and talking with some of his family, I don’t think that a second chance would be wasted on him. I really don’t.

[20T30-6 to 31-2]

This vigorous advocacy, by way of the 18 page sentencing memorandum and counsel’s passionate arguments at the re-sentencing hearing starkly contrast with the lack of advocacy by counsel at the original sentence - where he submitted no memorandum prior to the hearing, and did not argue for an alternative sentence. Rather, he concluded his remarks with: “And with that, I would offer my client for sentencing.” (19T11-5 to 6).

This is not the advocacy the Supreme Court had in mind in Hess. Petitioner was entitled to the level of advocacy at his initial sentencing that new counsel provided at re-sentencing. Such vigorous advocacy at the earliest stages of the sentencing proceedings had a strong capacity influence the result at a time when it most mattered. The PCR court gave little analysis to this claim, finding that the lack of a sentencing brief had no impact, and further, that the arguments pertaining to ineffective assistance of counsel at sentencing were moot because the court considered mitigating factors at the re-sentencing. (21T18-11 to 25). Petitioner urges that he was substantially prejudiced by counsel's lack of advocacy at the original sentencing hearing, before the court made up its mind to impose a virtual life sentence. Because petitioner was prejudiced by counsel's lack of advocacy at sentencing, this matter should be remanded for re-sentencing. Since the sentencing and PCR judges below have already made findings, the matters should be remanded to a different judge. See State v. Jones, 475 N.J. Super. 520, 534 (App. Div. 2023).

POINT III

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CALL AN AVAILABLE WITNESS CRITICAL TO HIS DEFENSE; SINCE THIS WITNESS WOULD CONTRADICT A STATE WITNESS CLAIMING PETITIONER COMMITTED THE CRIMES, THERE WAS NO LEGITIMATE STRATEGIC REASON FOR FAILING TO CALL THIS WITNESS (21T15-3 to 17-28; Da 256)

The State's case rested on the testimony of two cooperating co-defendants:

Mr. Thomas and Mr. Abdul Mansaray. Mr. Mansaray was named in 19 of the counts contained in the indictment, including all of the counts from the Gola incident. Mr. Thomas was an unindicted co-defendant, who claimed to be involved in each of these incidents.

During the pretrial process petitioner hired his lawyer to thoroughly investigate his case and interview witnesses. Petitioner's trial attorney engaged the services of Brian DeCosmo of Bottom Line Investigations to interview Mr. Alhaji Mustapha. Mr. Mustapha was interviewed and provided a statement on October 28, 2015. In his interview statement Mr. Mustapha stated that Musa Mansaray (also known as Abdul Musa-Mansaray) is his cousin. Mr. Mustapha further states that he had a conversation with Mr. Mansaray at his aunt's apartment in Willingboro, New

Jersey (the weekend of October 16th or 17th of 2015, approximately 2pm).

Furthermore, Mr. Mustapha provided the following information in his interview:

(Brian DeCosmo = BD and Alhaji Mustapha = AM)

BD: Ok, so around October 17th ---the 16th of October 2015, you engaged in a con --- around two PM, you engaged in a conversation with your cousin, Musa Mansaray regarding his co-defendant Keith Cuff, Junior. Is that correct?

AM: Yes.

BD: Ok. Can you just tell me a little bit about that conversation?

AM: I basically asked him about what was going on with the case and he let me know that he might have--- he'd probably have to turn himself in like around the end of October and for me to just try to look out for his kids if I could and I got into--- I was asking him like you know what did they ---what about his co-defendant Keith and he basically told me that you know --- I actu---**I said to him' I said, damn, "It's messed up, they trying to make Keith wear all those robberies", and he says, "Yeh, I know, that's fucked up but you know I gotta save my black ass and do what I gotta do."**

BD: But what did he -what do you think he meant when he said I have---that he says yeh I know that when you said to him that it's a shame

AM: When **I said it's a shame they trying to make him wear all those robberies, he said, "Yeh, I- "to me he told me, "Yeh, I know, but I gotta do what I gotta do to save my black ass."**

BD: Did he go on further to say wh--- about what he said he's saving his black ass what did he mean?

AM: He basically said that he's going to go with whatever the detectives wanted him to say, is what he basically said, whatever they wanted him to say or do he was going to do to keep his part, the reason, the whole, you know

BD: So he said to you, did he say whatever he was going to say whatever they wanted him to say regarding Keith's involvement? In the robberies?

AM: Yes. Basically yeh. He was like they want --- they really want him bad and you know **he was going to help him with whatever they needed done. Even though he knows and I know that Keith really didn't have nothing to do with all those robberies.**

BD: Ok, so once again when you said to him it's messed up that Keith, that they wanted Keith for the robberies, to take the hit for the robberies, in the conversation, he said, "Yeh, I know." **He acknowledged that Keith had nothing--- little or nothing to do with the robberies. Is that correct?**

AM: Yes.

[Da 241, emphasis added]

Mr. Mustapha's testimony could have impeached Mr. Mansaray and the exculpatory testimony could have had the probability to persuade the jury not to convict Mr. Cuff. Mr. Mansaray was facing 185 years in prison, with a significant period of parole ineligibility. (8T 669 to 74-5) Instead of pleading guilty to any of the charges in the indictment, he pleaded guilty to conspiracy to commit theft, a third-degree offense. (8T 25-15 to 24) The plea bargain called for Mr. Mansaray's

testimony at trial in exchange for a five-year flat sentence. (8T 26-3 to 12) This sentence was to run concurrently to an unrelated three-year sentence Mr. Mansaray received for conspiracy to distribute cocaine. (8T 23-8 to 21, 73-25 to 74-5)

However, despite petitioner directing his attorney to call Mr. Mustapha to attack the credibility of Mr. Mansaray; petitioner's attorney failed to subpoena and failed to call Mr. Mustapha as a witness. Trial counsel provided a copy of Mr. Mustapha's statement to the State's prosecutor on November 3, 2015. (Da 242) Nonetheless, trial counsel failed to subpoena and failed to call Mr. Mustapha to testify on petitioner's behalf. Trial counsel's error in failure to subpoena and call Mr. Mustapha as a witness on behalf is gross ineffective assistance of counsel.

Petitioner has been prejudiced where there was certainly "a reasonable probability that, but for counsel's unprofessional errors, (failing to subpoena and call Mr. Mustapha to testify on petitioner's behalf) the result of the proceeding would have been different. The jury could have given Mr. Mustapha's testimony great weight given the fact that he was the cousin of Mr. Mansaray. If the jury had heard Mr. Mustapha's testimony they could have found that Mr. Mansaray was lying to get a plea deal and that his testimony cannot be trusted and could have

found petitioner was not guilty on some or all of the remaining 19 counts that he was found guilty of at trial.

Mr. Mustapha's exculpatory testimony could have raised reasonable doubt for the jury concerning Mr. Thomas' testimony as well. Mr. Thomas received the best "plea deal" of all, Mr. Thomas who by his own admission at trial was the mastermind behind all crimes, was not even prosecuted by the State. At the time Mr. Thomas testified, he was serving a 15-year federal sentence for conspiracy to distribute drugs and possession of a weapon. (8T 88-11 to 20) Because of his lengthy record and his status as a "career criminal," he faced a life sentence on each of the five robberies contained in the indictment. (9T 183-1 to 184-15) For Mr. Thomas' cooperation he was not prosecuted in relation to any of the incidents charged in the indictment. (8T 91-8 to 16). By testifying against petitioner, Mr. Thomas was hoping to get a further reduction on the federal sentence he was serving at the time of trial. (8T 91-17 to 20) While he did not know what sentence reduction he would receive, he was "hoping" for "[e]verything." (8T 91-21 to 25). Certainly, if the jury found that Mr. Mansaray was lying (by his own admission to Mr. Mustapha) to get a plea deal when facing 185 years in prison then Mr. Thomas may be lying "hoping" for "[e]verything." (8T 91-21 to 25). Furthermore, Mr.

Mustapha's testimony offers exculpatory evidence which could serve to impeach Mr. Mansaray and Mr. Thomas.

In essence Mr. Mustapha's testimony could have raised enough reasonable doubt for the jury that the DNA evidence in the case would not have been enough to overcome the reasonable doubt created by Mr. Mustapha's testimony. In fact, the DNA evidence was on a mask that was in the car with Mr. Thomas. Petitioner's DNA was not found at any of the crime scenes (other than the car stop). Without Mr. Thomas' testimony (because he would have been impeached had trial counsel called Mr. Mustapha to testify) there is no evidence that the mask found in the car was the same masks that the victims testified the assailants wore during the crimes.

The PCR court denied this claim for two reasons. First, that the interview of Mr. Mustafa provided as an exhibit to the petition failed to comply with R. 3:22-10(c) requiring any factual assertions underlying a claim for relief be made by an affidavit or certification. (21T15-3to 21). The court made this finding despite the fact that the detailed scope of Mr. Mustafa's proposed testimony was set forth in an interview arranged by trial counsel between an investigator and Mr. Mustafa. The full transcript of this interview was attached as an exhibit to the petition, and referenced in PCR counsel's brief. (Da 243). The court also referenced State v.

Cummings, 321 N.J. Super. 154 (App. Div.), certif denied, 162 N.J. 199 (1999), for the proposition that petition's for post-conviction relief must set forth the facts that an investigation will reveal and be supported by certification or affidavit. (21T15-15-3 to 16-3) The court also distinguished State v. Jones, 219 N.J. 298 (2014), in which the Court ruled that a PCR petition should have been considered on the merits even though the details of the purported alibi witness testimony was not supported by a certification or affidavit. The PCR court distinguished Jones on that basis that the witness in that case was interviewed by prosecutors, thus, that witness was subject to penalties for false statements to law enforcement, whereas Mr. Mustafa's statements to defense counsel's investigator were not. (21T16-4 to 25).

The court also provided as additional grounds for denial that trial counsel's decision not to call Mr. Mustafa was a strategic decision. (21T17-3 to 20). The PCR court later withdrew this ground as a reason for denial of relief, both by amended order (Da 255), and explanatory letter. (Da 256). The PCR court explained in this letter that this ground for denial "is not viable since there is no evidence in the record as to why trial counsel chose not to call the witness at trial." (Da 256). The court therefore limited the denial of the claim for relief for failure to

call Mr. Mustafa “solely on the ground of non-compliance with the affidavit/certification requirement.” Ibid.

The PCR court’s reliance on Jones as a basis of denial for relief was misplaced. Jones did not base its decision on the fact that the witness was interviewed by law enforcement. Rather, the Court acknowledged that PCR counsel’s practice of having his client sign a verification to the Statement of Facts in the brief did not comply with R. 3:22-10(c). The Court chose “not to visit on defendant the failings of counsel” because the substance of the witness’ testimony was known, had been provided to the Prosecutor’s office, and the defense had filed a notice of alibi, thus alerting the State about the substance of the witness’ testimony. Jones, 219 N.J. at p. 312. In finding that the PCR court should have granted an evidentiary hearing, the Court referenced Cummings admonition that “bald assertions” are not sufficient - “rather, the defendant must allege facts sufficient to demonstrate counsel’s alleged substandard performance.” Ibid. The Jones Court also recounted the well worn principles governing evidentiary hearings in post-conviction relief proceedings. Namely, in determining whether to conduct an evidentiary hearing, the PCR court should view the facts in the light most favorable to the defendant. Ibid., State v. Preciose, 129 N.J. 451, 462-63

(1992). If the PCR claim with the facts so viewed has a reasonable probability of being meritorious, the court should ordinarily grant an evidentiary hearing. State v. Marshall, 148 N.J. 89, 158(1997).

In deciding that the PCR court should have granted an evidentiary hearing, the Jones court noted that even where an affidavit in support of a PCR petition is suspicious or questionable, “it must be tested for credibility and cannot be summarily rejected.” Jones, 219 N.J. at 315, citing State v. Porter, 216 N.J. 343, 355(2013). The Jones court concluded that “[i]n order to resolve the issue, the PCR court should have heard from the witnesses, including trial counsel, whose reason for not ensuring the testimony of an apparent alibi witness is unexplained on the record as it presently stands.” Jones, 219 N.J. at 314.

For the same reasons as in Jones, the PCR judge should have granted an evidentiary hearing. The factual allegations regarding Mr. Mustapha’s testimony, far from being “bald” assertions, were actually quite hirsute. The full text of Mr. Mustapha’s statement was provided to the PCR court as an exhibit and quoted in PCR counsel’s brief. (Da241 to 242) Trial counsel procured the interview through his retained investigator. (Da241) Trial counsel forwarded the transcript of the interview to the State in order to put them on notice that he would call Mr.

Mustapha as a witness. (Da242). These circumstances have an indicia of reliability, as trial counsel is an Officer of the Court who is under the obligation not to advance knowingly false testimony. RPC 3.3(a)(4), RPC 3.4(b) There was no basis for the PCR court to conclude that R. 3:22-2(c) could be relaxed if the witness provided an interview to the State, but not if provided to a defense attorney.

There can be little question that Mr. Mustapha's testimony would have been helpful. The victims were unable to identify petitioner. Mr. Mansaray was one of two witnesses who testified that petitioner participated in the crimes. Mr. Mustapha said in his interview that he and Mr. Mansaray discussed that it was a shame that "all those robberies" were being pinned upon petitioner but that Mansaray was going to say whatever the detectives wanted him to say in order to "save my black ass." (Da 241). Mustapha's testimony had the capacity to attack the credibility of Mr. Mansaray's testimony. Petitioner requested his attorney to subpoena Mr. Mustapha and call him as a witness. (Da216 to 217) The PCR court acknowledged that the reason for counsel's failure to do so is not apparent from the record. (Da 256) This matter should be remanded for an evidentiary hearing in which the court could assess the credibility of the witness and inquire into the

reasons for counsel's failure to call this witness, who could only have helped petitioner's case.

CONCLUSION

Based upon the foregoing, petitioner respectfully urges this Court to remand for (1) an evidentiary hearing to determine trial counsel's reasons for not calling Mr. Mustapha as a witness and whether this omission constituted ineffective assistance of counsel; and (2) for re-sentencing to a different judge who has not already ruled on the legality and fairness of petitioner's sentence.

Respectfully submitted,

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By: /s/ Jeffrey L. Weinstein
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Designated Counsel

Dated: May 3, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003998-22T1

STATE OF NEW JERSEY, : CRIMINAL ACTION
: On Appeal from a Denial of a
: Petition for Post-Conviction Relief
: in the Superior Court of New Jersey,
: Law Division, Camden County.

v. : Indictment No. 13-05-01446

KEITH CUFF, : Sat Below

Defendant-Appellant. : Hon. Edward J. McBride, Jr., P.J. Cr.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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filed March 5, 2021¹ Pa1-62

¹ The State includes Defendant Keith Cuff’s appellate brief in its appendix because the question of whether an issue was raised in this brief is germane to this appeal. See R. 2:6-1(a)(2). The State has omitted defendant’s appellate appendix.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY¹

In a fifty-seven-count Indictment, Number 1446-05-13, a Camden County Grand Jury charged defendant Keith Cuff and three co-defendants with robbery and related offenses committed in Cherry Hill, Gloucester Township, and Winslow Township. (Da1-58). Defendant and co-defendant Tamir K. Logan were tried together. (See 4T). Co-defendants Abdul Mansaray and Donte Goree pled guilty,

¹ 1T refers to the motion hearing transcript dated January 10, 2014.
2T refers to the motion hearing transcript dated September 15, 2014.
3T refers to the motion hearing transcript dated December 15, 2014.
4T refers to the Trial (Volume I) transcript dated November 17, 2015.
5T refers to the Trial (Volume II) transcript dated November 17, 2015.
6T refers to the Trial transcript dated November 18, 2015.
7T refers to the Trial transcript dated November 19, 2015.
8T refers to the Trial (Volume I) transcript dated December 1, 2015.
9T refers to the Trial (Volume II) transcript dated December 1, 2015.
10T refers to the Trial transcript dated December 2, 2015.
11T refers to the Trial transcript dated December 8, 2015.
12T refers to the Trial (Volume I) transcript dated December 9, 2015.
13T refers to the Trial (Volume II) transcript dated December 9, 2015.
14T refers to the Trial transcript dated December 10, 2015.
15T refers to the Trial transcript dated December 11, 2015.
16T refers to the Trial transcript dated December 15, 2015.
17T refers to the Trial transcript dated December 16, 2015.
18T refers to the Trial transcript dated December 17, 2015.
19T refers to the Sentence transcript dated January 19, 2016.
20T refers to the Resentencing transcript dated January 24, 2020.
21T refers to the post-conviction relief hearing transcript dated July 21, 2023.
“Db” refers to defendant’s brief.
“Da” refers to the appendix to defendant’s brief.
“Pa” refers to the appendix to the State’s brief.
“PSR” refers to defendant’s adult presentence report.

and Mansaray testified on the State's behalf at defendants' trial. (8T20-6 to 26-12; PSR at 3). At the time of defendants' trial, Jerome Thomas, who was not charged under the Indictment, was serving a federal sentence pursuant to a plea agreement where the charges against him for his involvement in the crimes in this case had been dismissed. (8T89-2 to 4, 90-24 to 92-18).

The Honorable Kathleen M. Delaney, J.S.C., presided over defendant's jury trial. (See 4T). Prior to jury deliberations, the State consented to the dismissal of four counts. (12T27-11 to 28-1, 62-5 to 22). Following the trial, the jury found defendant guilty of nineteen offenses. (Da59-164; 18T12-12 to 32-23); State v. Cuff, 239 N.J. 321, 328 (2019). The State did not proceed on the certain persons charge against defendant, which the trial court dismissed. (18T45-7 to 13). On January 29, 2016, Judge Delaney sentenced defendant to an aggregate term of ninety-eight years' imprisonment, with more than sixty-six years' parole ineligibility. (Da166); Cuff, 239 N.J. at 328.

On February 2, 2018, this Court affirmed defendant's convictions and sentences, except the two convictions for conspiracy to commit robbery "and/or" kidnapping, and vacated and remanded those convictions for further proceedings. (Da165-90).

On August 2, 2018, the New Jersey Supreme Court granted certification limited to the issues of the verdict sheet's omission of second-degree kidnapping and

the trial court's imposition of consecutive sentences. (Da191). On August 6, 2019, the Court affirmed in part and reversed in part the Appellate Division's judgment, affirming defendant's conviction but vacating defendant's sentence and retaining jurisdiction to review it following a remand. Cuff, 239 N.J. 321.

On January 24, 2020, following briefing, Judge Delaney resentenced defendant in accordance with the New Jersey Supreme Court's remand. (20T, Da192-96). After running some sentences concurrent, rather than consecutive, and reducing the term of one of the sentences, the trial court resentenced defendant to an aggregate of 70 years with 57.9 years to be served without parole. (20T71-21 to 72-21).

On December 8, 2020, the New Jersey Supreme Court issued an order relinquishing jurisdiction and providing that any challenge to the sentence imposed on remand could be filed with the Appellate Division. (See Da204). On March 31, 2022, this Court affirmed defendant's new sentence. (Da197-212). On October 7, 2022, the New Jersey Supreme Court denied defendant's petition for certification. (Da213).

On January 24, 2021, defendant filed a petition for post-conviction relief ("PCR"). (Da214-18). On July 21, 2023, following a hearing, the Honorable Edward J. McBride, Jr., P.J. Cr., denied the petition. (21T; Da254). On August 4, 2023, Judge McBride issued an amended order, reaffirming the reasons stated on the

record for denying defendant's PCR petition, except those regarding the ineffective assistance of trial counsel claim for not calling a specific witness. (Da255). For the reasons in an accompanying letter-decision, Judge McBride ruled that that claim was denied only on the basis that defendant did not proffer evidence consistent with Rule 3:22-10(c). (Da255-56).

On November 1, 2023, defendant filed an amended notice of appeal with this Court. (Da346-49). This appeal follows.

COUNTERSTATEMENT OF FACTS

A. Facts Established at Trial

The following relevant facts are from the New Jersey Supreme Court's August 6, 2019 opinion, affirming defendant's convictions and vacating and remanding his sentence:

On February 28, 2011, two armed men entered a family's Cherry Hill residence when only the children were at home. Two of the children were asleep, but the men encountered a fourteen-year-old girl and a thirteen-year-old girl. They tied the girls' hands behind their backs, and detained them in an upstairs room. When the parents came home about an hour later, the men accosted the father at gunpoint, took about two thousand dollars in cash from him, and demanded access to his safe. The men tied the mother's hands behind her back, forced the husband to turn the alarm system off, brought him to the basement, and tied his hands behind his back. After the men left, the father was able to unbind his hands. He went upstairs, untied his wife's hands, located his daughters, and freed them.

On March 3, 2011, a resident of Winslow Township arrived at his home and was confronted by two men, one of whom pointed a gun at the back of his neck. The men stole approximately two thousand dollars in cash from the man and took his car, which was recovered later that night.

On March 29, 2011, a Gloucester Township police officer noticed a car matching the description of a vehicle reported to have been involved in an incident unrelated to the crimes involved in this matter. The officer turned his patrol vehicle around to follow the car, which pulled onto the shoulder of the road. The officer saw a man exit the car via the passenger door and run away. The officer approached and questioned the driver, who claimed not to know the name of the person who had fled his car. The officer called for backup, and responding officers were able to apprehend the

fleeing suspect.^[2] As officers tracked the suspect, they found two handguns. They later discovered that the vehicle from which the man had fled had been stolen six months earlier.

Another robbery took place on April 3, 2011 in Gloucester Township. Arriving at his home, a man was confronted by two men wearing masks who demanded he open his safe, from which the men took money. The two men then tied the hands of the man, his fiancée, his daughter, and his son, transported the two adults into the bathroom, and placed them into the bathtub. After warning the victims not to move for five minutes, the two men left the home.

[Cuff, 239 N.J. at 330-31.]

B. Defendant's January 29, 2016 Sentencing

On January 29, 2016, Judge Delaney merged certain counts and sentenced defendant on twelve convictions, many of which were first- and second-degree crimes, to an aggregate sentence of 98 years, 66.4 of which had to be served before being eligible for parole. (19T51-7 to 52-2).

C. The Appellate Division's February 2, 2018 Opinion on Direct Appeal

On February 2, 2018, this Court vacated defendant's convictions for conspiracy to commit "robbery and/or kidnapping", and affirmed the remainder of his convictions and sentence. (Da165-90).

² Contrary to the New Jersey Supreme Court's recitations of the facts, responding officers were not able to apprehend the fleeing suspect. (See 9T139-24 to 142-6).

D. The Supreme Court's August 6, 2019 Opinion on Direct Appeal

On August 2, 2018, the New Jersey Supreme Court granted certification limited to the issues of the verdict sheet's omission of second-degree kidnapping and the trial court's imposition of consecutive sentences. (Da191).

On August 6, 2019, the Supreme Court affirmed defendant's convictions, but remanded for resentencing. Cuff, 239 N.J. 321. In relevant part, as to the trial court's imposition of consecutive sentences, this Court agreed "with the Appellate Division that the terms of incarceration imposed for most of defendant's offenses constituted a proper exercise of the trial court's discretion." Id. at 330. It "conclude[d], however, that the trial court should resentence defendant so that it may consider whether certain offenses committed within the same criminal episode warrant[ed] concurrent rather than consecutive sentences, as well as whether the decision to make the sentences consecutive rather than concurrent made the aggregate sentence imposed on defendant an abuse of discretion." Ibid. The Court retained jurisdiction "to review the sentence imposed on remand." Id. at 330, 353.

E. Defendant's January 24, 2020 Resentencing

On January 24, 2020, Judge Delaney, who presided over defendant's jury trial and imposed the original sentence, presided over defendant's resentencing. (20T). The court analyzed the aggravating factors, finding applicable aggravating factor (3), (6), and (9), and weighed them heavily. (20T44-2 to 48-12); see N.J.S.A. 2C:44-

1a(3), (6), (9). It did not find any applicable mitigating factors. (20T49-4 to 55-4). In weighing the aggravating and mitigating factors on a qualitative and quantitative basis, the trial court found “the aggravating factors clearly and convincingly substantially [sic] outweigh[ed] the lack of mitigating factors.” (20T55-5 to 9).

The trial court reconsidered the sentence and ran some of the sentences concurrent, rather than consecutive, and reduced the sentence on unlawful possession of a weapon (Count Seven) to six years with forty-two months without parole. (20T57-19 to 61-25). In rendering defendant’s sentence, the trial court ruled that contrary to defendant’s contention, the sentence imposed was not a life sentence. (20T62-7 to 21). It also rejected defendant’s arguments regarding proportionality and the co-defendants, explaining that the co-defendants either pleaded guilty or were acquitted and defendant was not in the same position as the co-defendants. (20T62-22 to 63-4). The court further found that defendant’s argument regarding the disparity of the sentence was not addressed by the Supreme Court and that the sole issue on remand was for the court to reconsider the consecutive sentences pursuant to Yarbough. (20T63-5 to 11).

While merging certain counts, the trial court imposed the following sentence:

As to the March 3, 2011 crimes, the court sentenced defendant on: Count One, first-degree armed robbery, to eighteen years subject to the No Early Release Act (hereinafter “NERA”), consecutive to Counts Seven, Forty-One, and Fifty and

concurrent to the remaining counts; Count Three, second-degree unlawful possession of a weapon, to eight years with four years' parole ineligibility, concurrent to the other counts; and Count Five, fourth-degree unlawful taking of a means of conveyance, to one year, concurrent to the other counts. (20T40-1 to 4, 64-24 to 66-1).

As to the March 29, 2011 crimes, the court sentenced defendant on: Count Seven, second-degree unlawful possession of a weapon, to six years with forty-two months parole ineligibility, consecutive to Counts One, Forty-One, and Fifty and concurrent to the other counts; and Count Eight, fourth-degree unlawful taking of a means of conveyance, to one year, concurrent to the other counts. (20T40-13 to 15, 66-2 to 17).

As to the February 28, 2011 crimes, the court sentenced defendant on: Count Forty-One, first-degree kidnapping, to twenty-three years subject to NERA, consecutive to Counts One, Seven, and Fifty and concurrent to the other counts; Count Forty-Two, first-degree kidnapping, to twenty-three years subject to NERA, concurrent to the other counts; Count Forty-Five, second-degree unlawful possession of a weapon, to eight years with four years' parole ineligibility, concurrent to the other counts; Count Forty-Seven, first-degree armed-robbery, to eighteen years subject to NERA, concurrent to the other counts; Count Forty-Nine, disorderly persons false imprisonment, to six months, concurrent to the other

counts³; and Count Fifty, first-degree kidnapping, to twenty-three years subject to NERA, consecutive to Counts One, Seven, and Forty-One and concurrent to the other counts. (20T40-22 to 24, 66-18 to 71-8).

Defendant's new aggregate sentence was 70 years with 57.9 years to be served without parole. (20T71-21 to 72-21).

F. Defendant's Appeals from Resentencing

On December 8, 2020, the New Jersey Supreme Court issued an order relinquishing jurisdiction and providing that any challenge to the sentence imposed on remand could be filed in the Appellate Division. (See Da204).

On March 31, 2022, the Appellate Division affirmed defendant's sentence, finding that the trial court followed the Supreme Court's instructions in resentencing defendant and it could not say the resulting aggregate sentence "shock[ed] [its] judicial conscience given the multiple crimes committed by defendant." (Da197-212).

G. Findings and Rulings of the PCR Court

On January 24, 2021, defendant filed a PCR petition. (Da214-18). On July 21, 2023, Judge McBride held a hearing on the petition. (21T). Prior to the court's ruling, defense counsel, in part, relied on the brief submitted by prior counsel and

³ When imposing the six-month sentence for false imprisonment, the trial court mistakenly referred to Count Forty-Eight instead of Count Forty-Nine, however, the error was corrected in the Judgment of Conviction. (20T69-19 to 23; Da192-96).

stated that she believed “many of those issues which were the sentencing issues have been resolved by the Appellate Court; I agree with the State on that.” (21T5-21 to 24).

The PCR court denied defendant’s PCR petition on procedural and/or substantive grounds. As to the claims that defendant maintains in the instant appeal, first, the PCR court questioned whether defendant’s argument regarding the proportionality of his sentence was even cognizable on a PCR petition. (21T13-24 to 14-2). The court cited Rule 3:22-2(c), authorizing PCR claims for an unlawful sentence either by themselves under certain circumstances or with other claims, and found that the alleged disproportionate sentence did not mean that it was an unlawful sentence. (21T14-2 to 9 (citing State v. Hyland, 238 N.J. 135 (2019))). Even if it was cognizable, the court found it was procedurally barred by Rule 3:22-5, barring grounds expressly adjudicated, and noted that defendant’s resentence was affirmed on appeal. (21T14-10 to 14). The court further found that in the event that the argument was not raised in a prior proceeding, but could have been, the claim also was procedurally barred by Rule 3:22-4. (21T14-14 to 17). Even further, the court denied defendant’s claim as meritless, finding defendant was convicted of multiple first- and second-degree crimes, many with periods of mandatory parole ineligibility, and the co-defendant pled guilty to a single offense. (21T14-18 to 23). Under the

case law, the PCR court ruled “it’s just apples and oranges here, so there’s no basis for relief”. (21T14-23 to 15-2).

Next, the PCR court denied defendant’s claim that counsel was ineffective for failing to call Alhaji Mustapha as a defense witness at trial. (21T15-3 to 17-20). It found that under Rule 3:22-10(c), any factual assertion that provided the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4, and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing. (21T15-3 to 10). It found that the factual assertion was that Mr. Mustapha would testify that Mr. Mansaray told him that Mr. Mansaray was willing to lie at trial and implicate defendant to help Mr. Mansaray’s case. (21T15-10 to 13). It noted there were no affidavit or certification from Mr. Mustafa about what he would testify to if he were called, and only a report of an interview conducted by the defense investigator. (21T15-14 to 19). The court concluded there was no affidavit or certification from Mr. Mustafa and, while he promised to tell the truth, there was no criminal exposure or penalty if Mr. Mustafa was not telling the truth when he gave the statement to the investigator. (21T16-4 to 25). Without factual support or rule compliance, the court ruled that defendant’s claim failed. (21T16-25 to 17-2).

Nevertheless, the PCR court addressed the merits of the claim, finding it was not reasonable to infer that defense counsel’s choice not to call Mr. Mustafa as a

witness was anything other than a strategic decision. (21T17-3 to 10). It ruled that because there was no certification or affidavit and, as the State argued, no reasonable basis to conclude that the choice not to call the witness was anything other than a strategic choice, defendant's claim failed. (21T17-11 to 20).

Finally, as to defendant's claim that counsel failed to submit a written sentencing brief, the PCR court ruled that there was no legal support for the proposition that it was ineffective for counsel to argue strongly in the client's favor in court but not put those arguments in a brief. (21T18-11 to 15). It also found the absence of sentencing brief clearly had no impact given that the sentencing court's initial weighing of the factors was affirmed on direct appeal and the overall resentencing was affirmed after the remand. (21T18-15 to 20).

Additionally, the PCR court ruled that defendant's arguments about mitigating factors that should have been advanced was essentially moot at that point since that mitigating information was presented and considered at the second sentencing, a sentence that was affirmed on appeal. (21T18-21 to 19-2). The court further found State v. Hess, 207 N.J. 123 (2011), cited in defendant's original brief, was distinguishable because there defense counsel agreed as part of a plea agreement not to argue and here, at the first sentencing, defense counsel argued as to at least one mitigating factor and that certain aggravating factors should not apply. (21T19-

2 to 9). The PCR court denied defendant's PCR petition without an evidentiary hearing. (21T20-1 to 4; Da254).

Following the initial order, the PCR court issued an amended order denying defendant's PCR petition. (Da255). It reaffirmed the reasons stated on the record, except those regarding defendant's claim of trial counsel's ineffectiveness for failing to call a specific witness. (Da255). It held that that claim was denied only on the basis that defendant did not proffer evidence in accordance with Rule 3:22-10(c), as detailed in the letter-decision accompanying the order. (Da255-56). In that accompanying decision, the court provided that it reconsidered, on its own motion, a portion of the oral opinion. (Da256). While it originally denied the claim based on failure to comply with Rule 3:22-10(c), reinforced by State v. Cummings, 321 N.J. Super. 154 (App. Div. 1999), and the failure to establish a basis to conclude that trial counsel was ineffective in choosing not to call the witness to testify, upon reconsideration the Court determined that the second basis was not viable since there was no evidence in the record as to why trial counsel chose not to call the witness at trial. (Da256). Thus, the claim was denied solely on grounds of non-compliance with the affidavit/certification requirement. (Da256).

LEGAL ARGUMENT

POINT I: THE PCR COURT PROPERLY DENIED DEFENDANT'S DISPARATE SENTENCE CLAIM.⁴ [(Raised Below.)] [21T; Da254-55).]

Defendant claims the PCR court mistakenly found his argument that his sentence was unfairly disparate in comparison to his more culpable co-defendants was previously adjudicated in prior appeals and capable of being raised in prior litigation. (Db17, 18 (citing R. 3:22-4)). He further contends the PCR court mistakenly categorized the disparate sentencing claim as an excessive sentencing claim that is usually limited to a direct appeal. (Db19-20).

The PCR court properly found that defendant's disparate sentence claim, even if cognizable, would be procedurally barred as having been previously adjudicated and, even if not raised, that it could have been. Despite those procedural bars, the PCR court nevertheless properly denied defendant's claim on its merits because defendant, who was convicted of multiple first- and second-degree offenses with mandatory parole ineligibility periods, was not at all similar to his co-defendants who were either not charged, were acquitted, or pled guilty to a single offense. Accordingly, the State respectfully submits that defendant's arguments must fail and requests that this Court affirm the denial of his PCR claim.

⁴ The State's Point I addresses defendant's Point I and subpoint headings.

Pursuant to Rule 3:22-2(c), a PCR petition is cognizable if based on, in relevant part, the “[i]mposition of [a] sentence in excess of or otherwise not in accordance with the sentence authorized by law if raised together with other grounds cognizable under paragraph (a), (b), or (d) of [the] rule.” “Otherwise a claim alleging the imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law shall be filed pursuant to R. 3:21-10(b)(5).” R. 3:22-2(c).

Rule 3:22-5 also provides: “A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceeding resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.” “Under Rule 3:22-5, prior adjudication of an issue, including a decision on direct appeal, will ordinarily bar a subsequent post-conviction hearing on the same basis.” State v. Afanador, 151 N.J. 41, 51 (1997). “PCR will be precluded ‘only if the issue is identical or substantially equivalent’ to the issue already adjudicated on the merits.” Id. (quoting State v. McQuaid, 147 N.J. 464, 484 (1997)).

As to a claim of disparate sentencing, the New Jersey Supreme Court has “acknowledge[d] that ‘[a] sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant’s sentence is lighter.’” State v. Roach (Roach I), 146 N.J. 208, 232 (1996) (quoting State v. Hicks, 54 N.J. 390, 391

(1969)); see also State v. Roach (Roach II), 167 N.J. 565, 571 (2001). “[A]lthough the sentence imposed on defendant falls within the statutory limits mandated for the offense, ‘there is an obvious sense of unfairness in having disparate punishments for equally culpable perpetrators.’” Roach I, 146 N.J. at 232 (quoting State v. Hubbard, 176 N.J. Super. 174, 175 (App. Div. 1980)). “The question therefore is whether the disparity is justifiable or unjustifiable.” Id. at 233. Where the defendants’ cooperation with the prosecution, roles in the crime, and backgrounds differ widely, so too may their sentences. See State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998).

Here, the PCR court properly denied defendant’s disparate sentencing claim. It questioned whether the claim was cognizable on a PCR petition under Rule 3:22-2(c), but, even if it was, ruled that the claim was procedurally barred as being expressly adjudicated and, if it was not previously raised, that it could have been. (21T13-24 to 14-17 (citation omitted)). Even further, despite those procedural bars, the court ruled the claim was meritless, finding defendant was convicted of multiple first- and second-degree crimes, many with periods of mandatory parole ineligibility, while the co-defendant pled guilty to a single offense. (21T14-18 to 23).

The State submits that the PCR court properly denied defendant’s claim and its rulings are fully supported by the record. The PCR court’s initial question of whether the claim was even cognizable was appropriate, given that in a PCR petition,

if raised together with other PCR grounds, a defendant can only claim that a sentence is excessive or not authorized by law. See R. 3:22-2(c); State v. Acevedo, 205 N.J. 40, 45 (2011) (“an illegal sentence is one that ‘exceeds the maximum penalty provided in the Code for a particular offense’ or a sentence ‘not imposed in accordance with law.’” (quoting State v. Murray, 162 N.J. 240, 247 (2000))). Here, defendant did not claim his sentence was excessive or unauthorized; rather, he claimed his sentence was unfairly disparate in comparison to his more culpable co-defendants. (See Db17). Additionally, defendant’s argument that a disparate sentence is not authorized by law and that such a claim is cognizable under Rule 3:22-2(c) erroneously conflates the concepts that a disparate sentence may invalidate a sentence and an unauthorized sentence can be raised in a PCR petition. Further, “[a] sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant’s sentence is lighter.” Roach I, 146 N.J. at 232 (quoting Hicks, 54 N.J. at 391).

The PCR court also properly found defendant’s disparate sentence claim was procedurally barred as being previously adjudicated. Defendant’s disparate sentencing argument raised in his PCR petition is substantially equivalent to the arguments he already raised and were previously adjudicated. Prior to resentencing, defense counsel submitted a brief to the trial court arguing that it would have been “a serious injustice to sentence [defendant] to a significantly longer sentence than

his equally culpable co-defendants” and attached copies of the co-defendant’s judgments of convictions. (Da271; see Da272). At the resentencing hearing, counsel also argued proportionality and the sentences of the co-defendants. (20T22-4 to 24-9).

At sentencing, the trial court noted defendant’s proportionality argument and ruled that it “want[ed] it to be clear that not every defendant was charged in every incident in this indictment.” (20T34-4 to 25). The court found that the co-defendants either pleaded guilty or were acquitted, and defendant was not in the same position. (20T62-25 to 63-4). It noted defense counsel’s brief regarding the disparity of the sentence, responding to that argument by ruling that the issue of disparity of sentence was not addressed by the Supreme Court and the sole issue on remand was for the court to reconsider consecutive sentences pursuant with Yarbough. (20T63-5 to 11).

On appeal from the resentencing, defendant claimed that his punishment was not proportional to the offense and, therefore, did not serve the goal of retribution. (Pa55). He argued there were a few ways that the disparity was made clear, first being that it was substantially longer than the sentences of his three co-defendants. (Pa55). He claimed that the difference between seventy years in prison and five or zero could not legally be justified by the fact that defendant exercised his right to trial and, given that he had a similar record to co-defendants Mansaray and Goree, and a much better record than Thomas, there was no reason to treat him so differently

from the other co-defendants. (Pa55). These arguments were not specifically mentioned by this Court in its opinion, however, this Court affirmed defendant's sentence and the New Jersey Supreme Court denied defendant's petition for certification. (Da197-213).

Based upon the record, defendant's disparity argument in his PCR petition was substantially equivalent to the issue raised at his resentencing and the appeal of his sentence. The trial court specifically rejected this argument, and this Court affirmed his new sentence. Thus, the PCR court properly found the claim was previously adjudicated and the claim was procedurally barred. Further, as the PCR court found, even if the disparity claim was not raised previously, it could have been. Defendant could have raised such a claim at his original sentencing, direct appeal, resentencing hearing, or the appeal of his resentencing. Accordingly, the PCR court properly found the claim procedurally barred.

Nevertheless, the PCR court considered and properly found defendant's disparate sentence claim was meritless. Defendant was not similarly situated to his co-defendants. As that State argued on appeal from his resentencing and below in opposition to his PCR petition, the co-defendants were not facing the same charges as defendant. Contrary to defendant's claim, co-defendant Mansaray was not named in any of the counts from the Gola incident. (Db40, 42-55). Defendant alone was indicted for the crimes related to the Gola home invasion, which accounted for 46

years of his aggregate sentence and 39.1 years of his parole disqualifier. (Da42-55, 192-96). Similarly, defendant alone was indicted for the crimes related to the March 29, 2011 motor-vehicle stop, which accounted for an additional six years of his aggregate sentence and forty-two months of his parole disqualifier. (Da8-9, 192-96).

Further, defendant was not similarly situated to his co-defendants because he was not acquitted of all the charges and did not plead guilty or cooperate. Instead, defendant proceeded to trial where the jury convicted him of, as the PCR court found, multiple first- and second-degree crimes, many with periods of mandatory parole ineligibility. (21T14-18 to 23). Co-defendant Logan, however, was acquitted of all his offenses following the jury trial with defendant. (18T32-25 to 40-10). Co-defendant Goree pled guilty to one count of second-degree conspiracy to commit kidnapping and received a five-year sentence with 85% to be served without parole. (Da286-89). Co-defendant Mansaray pled guilty to one amended count of third-degree conspiracy to commit theft, received a five-year flat prison sentence, agreed to provide a truthful statement at trial, and received the benefit of mitigating factor (12). (Da290-92; see N.J.S.A. 2C:44-1b(12)). At the time of defendants' trial, the charges against Thomas for his involvement in the crimes in this case has been dismissed pursuant to a federal plea agreement and he was not charged under the same State indictment with the defendants. (8T89-2 to 4, 90-24 to 92-18). Accordingly, defendant was not similarly situation to his co-defendants.

Based on the foregoing, the State submits that the PCR court properly denied defendant's disparate sentencing claim. The State respectfully requests that this Court affirm.

POINT II: THE PCR COURT PROPERLY DENIED
DEFENDANT'S INEFFECTIVE ASSISTANCE OF
SENTENCING COUNSEL CLAIM. [(Raised Below).] [(21T;
Da254-55).]⁵

Defendant claims that his counsel at his original January 29, 2016 sentencing hearing was ineffective for failing to advocate in a sentencing memorandum to the trial court. (Db28-31). He also argues that counsel was ineffective for failing to present relevant mitigating circumstances as to defendant's background and argue against the State's request for an "effective life sentence". (Db31-34). Defendant contends that the PCR court gave little analysis to his claim, found that the lack of sentencing brief had no impact, and concluded that the arguments pertaining to ineffective assistance of counsel at sentencing were moot because the court considered mitigating factors at the resentencing. (Db39 (citation omitted)). Additionally, defendant argues that since the sentencing and PCR judges below already made findings, the matters should be remanded to a different judge. (Db39).

The PCR court properly denied defendant's claim, as he failed to demonstrate a prima facie claim of ineffective assistance of trial counsel at his first sentencing hearing. Accordingly, this Court should affirm the denial of his claim.

Rule 3:22-10 recognizes the court's discretion to conduct an evidentiary hearing on a PCR petition. State v. Preciose, 129 N.J. 451, 462 (1992). If a

⁵ The State's Point II addresses defendant's Point II and subpoint headings.

defendant has presented a prima facie claim of ineffective assistance of counsel in support of his PCR application, the trial court will ordinarily grant an evidentiary hearing. Ibid. However, an evidentiary hearing need not be granted “[i]f the court perceives that holding an evidentiary hearing will not aid the court’s analysis of whether the defendant is entitled to post-conviction relief” or “the defendant’s allegations are too vague, conclusory, or speculative”. State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

To establish a prima facie claim of ineffectiveness of counsel to warrant an evidentiary hearing, a defendant “must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronin, 466 U.S. 648 (1984), which was adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42 (1987). Preciose, 129 N.J. at 463. First, defendant must establish his counsel’s performance was deficient, which “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. Second, defendant must demonstrate the deficient performance prejudiced the defense, which requires showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Ibid. “Unless a defendant makes both showings [deficient performance

and resultant prejudice], it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” Ibid.

Our courts also require that “a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel.” State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Defendants must allege facts “sufficient to demonstrate counsel’s alleged substandard performance.” Ibid. Thus, when a petitioner claims his trial counsel inadequately investigated his case, “he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.” Ibid.

Here, as to defendant’s claim that counsel was ineffective for failing to submit a written sentencing brief, the PCR court ruled that there was no legal support for the proposition that it was ineffective for counsel to argue strongly in the client’s favor in court but not put those arguments in a brief. (21T18-11 to 15). It also found the absence of a sentencing brief clearly had no impact given that the sentencing court’s initial weighing of factors was affirmed on direct appeal and the overall resentencing was affirmed after the remand. (21T18-15 to 20).

The PCR court also ruled that defendant’s arguments regarding mitigating factors that should have been advanced was essentially moot since that mitigating information was presented and considered at the second sentencing. (21T18-21 to

19-2). It also noted that the aggregate sentence was ultimately affirmed on appeal. (21T19-1 to 2). Further, the court found Hess, cited in defendant's original brief, distinguishable because there defense counsel agreed as part of a plea agreement to not argue and here, at the first sentencing, defense counsel argued as to at least one mitigating factor and that certain aggravating factors should not apply. (21T19-2 to 9).

The State submits that the PCR court's findings are fully supported by the record. Defendant's claim concerning counsel's performance at the initial sentencing hearing as to mitigating factors should be deemed moot due to the resentencing, during which defendant was represented by new counsel who advanced arguments regarding mitigating factors and his sentence. (Da267-84). On March 31, 2022, this Court affirmed defendant's new sentence. (Da197-212). On October 7, 2022, the New Jersey Supreme Court denied defendant's petition for certification. (Da213).

The PCR court also properly denied defendant's claim pertaining to the lack of a sentencing brief prior to the first sentencing hearing. Defendant failed to demonstrate that counsel was deficient for failing to submit a written brief when he provided reasonable representation at sentencing by arguing against aggravating factors and in favor of a mitigating factor. Defendant also failed to demonstrate any resulting prejudice because his sentence was vacated and on remand his new defense

counsel filed a brief and advanced mitigating factors on defendant's behalf. (Da276-80). The trial court rejected those factors and defendant's sentence was affirmed on appeal. Accordingly, defendant failed to present a prima facie claim of ineffective assistance of counsel. Thus, the PCR court properly denied his claim.

Based on the foregoing, the State respectfully requests that this Court affirm the denial of defendant's PCR claim.

POINT III: THE PCR COURT PROPERLY DENIED DEFENDANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM BASED ON COUNSEL'S DECISION NOT TO CALL A WITNESS TO TESTIFY AT TRIAL. [(Raised Below.)] [(21T; Da254-55).]

Defendant argues trial counsel was ineffective for failing to subpoena and call Alhaji Mustapha as a witness at trial. (Db40-43). The State submits that the PCR court properly denied this claim because defendant failed to provide any affidavit or certification in support of his claim. Accordingly, the State respectfully requests that this Court affirm.

As provided above, under Strickland, defendant must establish his counsel's performance was deficient and the deficient performance prejudiced the defense. 466 U.S. at 687. When a petitioner claims his trial counsel inadequately investigated his case, "he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Cummings, 321 N.J. Super. at 170; see R. 3:22-10(c) ("Any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing.").

Here, on the record at the PCR hearing, the PCR court denied defendant's claim that trial counsel was ineffective for failing to call Alhaji Mustapha as a

defense witness at trial. (21T15-3 to 17-20). It found that under Rule 3:22-10(c), any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4, and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing. (21T15-3 to 10; Da216). It found that the factual assertion was that Mr. Mustapha would testify that Mr. Mansaray told him that Mr. Mansaray was willing to lie at trial and implicate defendant to help Mr. Mansaray's case. (21T15-10 to 13). It noted there were no affidavit or certification from Mr. Mustafa about what he would testify to if he were called, and only a report of an interview conducted by the defense investigator. (21T15-14 to 19). The court found that while he said he was promising to tell the truth, there was no criminal exposure or penalty if Mr. Mustafa was not telling the truth when he gave the statement to the investigator. (21T16-4 to 25). Without factual support or rule compliance, the court ruled that defendant's claim failed. (21T16-25 to 17-2).

Nevertheless, the PCR court addressed the merits of the claim, finding at the PCR hearing that it was not reasonable to infer that defense counsel's choice not to call Mr. Mustafa as a witness was anything other than a strategic decision. (21T17-3 to 10). It ruled that because there was no certification or affidavit and, as the State argued, no reasonable basis to conclude that the choice not to call the witness was anything other than a strategic, defendant's claim failed. (21T17-11 to 20).

Following its initial order denying defendant's PCR petition, the PCR court issued an amended order. (Da255). The court reaffirmed the reasons stated on the record, except those regarding defendant's claim of ineffective assistance of trial counsel for not calling Mr. Mustafa. (Da255). It held that that claim was denied only on the basis that defendant did not proffer evidence in accordance with Rule 3:22-10(c) as detailed in the letter-decision accompanying the order. (Da255-56). In that accompanying decision, the court provided that it reconsidered, on its own motion, a portion of the oral opinion. (Da256). While the court originally denied the claim based on failure to comply with Rule 3:22-10(c), reinforced by Cummings, 321 N.J. Super. 154, and the failure to establish a basis to conclude that trial counsel provided ineffective assistance in choosing not to call the witness to testify, upon reconsideration, the Court determined that the second ground was not viable since there was no evidence in the record as to why trial counsel chose not to call the witness at trial. (Da256). Thus, the claim was denied solely on grounds of non-compliance with the affidavit/certification requirement. (Da256).

The State submits that the PCR court properly denied defendant's ineffective assistance of counsel claim due to defendant's failure to present an affidavit or certification in support. As the PCR court found, there were no affidavits, certifications, or even an acknowledgement that a false statement would subject the witness to criminal punishment. Defendant, thus, only submitted a purported

interview between a defense investigator and Mr. Mustafa about his alleged conversion with co-defendant Mansaray. Such bald assertions cannot support an ineffective assistance of counsel claim. Thus, the PCR court properly denied defendant's claim.

Based on the foregoing, the State respectfully requests that this Court affirm the denial of defendant's PCR claim.

CONCLUSION

For all those reasons set forth herein, the State respectfully urges this Court to affirm the ruling below denying defendant's PCR petition.

Respectfully submitted,

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October 7, 2024
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003998-22T1

STATE OF NEW JERSEY,

CRIMINAL ACTION

Plaintiff-Respondent,

: On Appeal From a Denial of a
: Petition for Post-Conviction
: Relief in the Superior Court
: of New Jersey, Law
: Division, Camden County.

KEITH CUFF,

: Ind. No. 13-05001446-I

Defendant-Appellant.

Sat Below:

Hon. Edward J. McBride, Jr., P.J.Cr.

LETTER REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

Honorable Judges:

Please accept this Letter Reply Brief on behalf of the Appellant Keith Cuff
in lieu of a more formal brief pursuant to Rule 2:6-2(b)

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PRELIMINARY STATEMENT

“The worst moment in someone’s history should not serve as the sole defining moment for their future.” (Office of the New Jersey Governor, Executive Order No. 362, June 19, 2024)

Petitioner was 24 years old when he was sentenced. He had never been sentenced to State prison. He had only one prior conviction for an Indictable crime - a property offense. He had no prior history of violent crimes. Though he stood convicted of serious crimes - among them - four first degree kidnaping charges - the trial judge had a great deal of discretion in the range of sentence to impose.

Defense counsel and the assistant prosecutor had the opportunity to influence this sentencing decision during the period between the verdict and sentence by advocating for their respective clients. The State availed itself of this opportunity by submitting a detailed and passionate sentencing memorandum in which it requested multiple consecutive terms and a total sentence of 110 years - an effective life sentence for any adult human being - for crimes - though serious - did not result in the death or serious bodily injury of any person.

Defendant’s attorney submitted nothing. In the face of the opportunity to argue before the sentencing hearing that these crimes should not be his client’s sole defining moment, he argued nothing. In the face of a chance to argue that his client deserved some meaningful life outside prison walls, defense counsel was silent.

Counsel offered the court no alternative sentence to impose that would adequately reflect the crimes of which defendant was convicted but still give him some chance of life after prison.

Advocacy matters. First impressions matter. The delay between verdict and sentence is there for a reason - to allow a proper pre-sentence investigation in order to inform the court of relevant factors to guide the court in imposing sentence. And to allow counsel for both sides to advocate for their respective positions. This pre-sentence advocacy is especially important when there is a broad range of sentence available for the court to impose. In such a case, a sentencing memorandum with arguments and supporting materials has the potential to carry great weight in guiding the court to imposing a just sentence, considering factors relevant to the State's position and the defendant. In such a case, a criminal defendant's attorney is remiss in his obligation to make a vigorous argument to personalize his client in order to justify the least severe sentence under the criminal code if he fails to avail his client the opportunity afforded by a well-prepared pre-sentence memorandum.

Trial counsel's lack of advocacy continued to starkly contrast with that of the State as the sentencing hearing, where the State presented hearsay victim impact testimony without objection and requested a term of 110 years with 98 years subject to NERA. Defense counsel did not argue for a lower sentence to counter the State's

“lock him up and throw away the key” approach. He offered minimal argument on two mitigating factors, and then concluded his remarks by “offering” his client for sentencing.

This lopsided advocacy resulted in a severe sentence that was grossly disparate to petitioner’s similarly situated co-defendants, one of whom received a term of over half a century less. Petitioner initially received a sentence of 98 years with 66.4 years of parole ineligibility, later reduced after remand to the same sentencing judge to 70 years with 57.9 years parole ineligibility, resulting in a term in which defendant will not be eligible for release until he is almost 84 years old.

Our justice system allows different treatment in sentencing for similarly culpable co-defendants who cooperate by providing truthful testimony, or who enter into negotiated pleas. But our Supreme Court has imposed limitations in order to prevent gross-disparities and to ensure uniformity in sentencing. Here, equally culpable participants in the same acts received a five-year term subject to NERA. There is no valid explanation for this gross disparity - a claim that has never been properly addressed by a court despite a sentencing remand. Petitioner seeks relief from this injustice.

PROCEDURAL HISTORY

Petitioner shall rely upon the Procedural History section in his merits brief dated May 3, 2024 as if fully set forth herein in full.

STATEMENT OF FACTS

Petitioner shall rely upon the Statement of Facts in his merits brief dated May 3, 2024 as if fully set forth herein in full.

POINT I

The Distinctions Between the Co-defendants and Petitioner's Cases Do Not Justify the More than 50 Year Difference in Their Sentences for Like Conduct; This Gross Disparity Has Never Been Considered by a Court That Did Not Already Prejudge Petitioner as Deserving an Effective Life Sentence for Crimes in Which No One Was Killed or Seriously Injured, and PCR Rules Should Not Have Been Interpreted to Deny Petitioner a Remedy

The State relies upon a number of distinctions between petitioner and his co-defendants in an attempt to justify the greater than 50 year difference between petitioner's effective sentence of 57 years and co-defendant Goree's sentence of 5 years subject to NERA. These distinctions include that petitioner was convicted of multiple first and second degree crimes, some with mandatory periods of parole ineligibility. While factually correct, the State fails to take into account the pivotal role the prosecution has in effectuating these differences through its exercise of discretion in the charging and plea-bargaining process. As a result, the State can

choose to grant a defendant immunity in exchange for their truthful testimony, as was done with co-defendant Thomas. (8T91-8 to 16). Or it can dismiss numerous charges, including those with mandatory periods of parole ineligibility, as part of a negotiated plea, as was done with co-defendant Goree. (Da 286-89). In particular, the State, in its discretion, dismissed counts one through 32 and 34 through 57 against co-defendant Goree. Ibid. Pursuant to the plea deal he received from the State, he plead guilty to a single count of third-degree conspiracy to commit theft. (8T25-15 to 24, Da 222) Co-defendant Mansary obtained a significant benefit from testifying. He was initially facing an exposure of life imprisonment - through his negotiation with the State - he avoided multiple first-degree kidnaping convictions and instead plead guilty to a single third-degree charge of conspiracy to commit theft. The State recommended a five-year sentence. (8T25-10 to 26-2; 8T74-3 to 13).

Thus, the State effectuated the distinctions it now relies upon to explain the colossal difference between the sentences. The State is empowered with this discretion in pursuit of laudable and permissible goals to encourage guilty pleas by reducing exposure for those who do; and providing some defendants immunity in order to provide necessary evidence.

It is also a laudable goal in our justice system to have jury trials. It is a constitutional right of all those charged with a crime. Those who exercise that right should not have to pay so dearly for it. This value is well articulated by Executive Order No. 362, which cites to clemency as a way to “temper the impact of a criminal justice system that does not always produce justice.” Among the injustices that could render an applicant eligible for clemency is if the “sentence reflects an excessive trial penalty, based upon a comparison of the sentence and a documented plea offer.” Ibid. Petitioner is not now suggesting he is eligible for clemency, rather, that an excessive trial tax is a recognized injustice. He also recognizes that that there will be some difference in sentences between those who plead guilty, provide truthful testimony and those who are found guilty after trial. It is the extent of this difference that violates State v. Roach, 146 N.J. 208 (1996).

The prosecution controlled factual distinctions on the legal posture between petitioner and his co-defendants do not explain or justify a sentence difference of over one-half a century among persons who participated substantially equally in the crimes charged. Nor is such a disparity consistent with the goal of sentencing uniformity. State . Case, 220 N.J. 49, 63 (2014).

No court in this case has ruled on the issue of this great disparity. The sentencing remand was limited to the issue of consecutive terms. Though new

sentencing counsel argued disparity, the sentencing judge - the same one who initially sentenced petitioner to 98 years with 66.4 years parole ineligibility- did not address the issue - as the re-sentence resulted in a minimal reduction of the parole ineligibility term to 57.9 years, a term still more than 50 years greater than the other participants. (20T64-4 to 5; 71-2 to 22; Da192 to 196).

For the reasons set forth in its merits brief, (Db19 to 25) the PCR court wrongly found that the disparate sentencing claim was procedurally barred, and failed to properly analyze the relevant factors under State v. Roach, 146 N.J. 208, 233 (1996). This Court should remand the matter for a new sentencing hearing on disparity, before a different sentencing judge - one who has not already determined that this worst act in petitioner's history is the sole defining moment for his future.

Point II

Trial Counsel Failed to Advocate for His Client to Obtain a Fair Sentence, as He Made No Argument to Refute the State's Request for More than Ninety Years Parole Ineligibility but Instead "Offered" His Client for Sentencing; Further, This Court Should Find That it is Per-Se Ineffective Assistance for Trial Counsel Not to Submit a Memorandum Prior to Sentencing in a Contested Sentencing Matter Where the State is Seeking a Term on the Extreme End of the Scale and the Court Has Discretion to Impose a Lesser Sentence

The State's contention that trial counsel strongly advocated for his client at the sentencing hearing is not borne out by the record. He made no argument for an

alternative sentence to the State's request for 110 years with 98 years parole ineligibility. (Da260 to 266). He only made a brief argument as to mitigating factors, and then, "offered" his client for sentencing. (19T10-16 to 11-6). Petitioner relies upon his detailed description in his merits brief of the contrast between the State's impassioned advocacy for an extreme sentence and trial counsel's complete lack of advocacy for a lesser sentence. (Db28 to 34). The State presented detailed victim impact submissions in its sentencing memorandum, and reiterated these arguments passionately at the sentencing hearing. (19T5-9 to 7-11).

Trial counsel submitted no memorandum. He did not, as did re-sentencing counsel, point out that petitioner's only prior indictable crime was for a non-violent property crime, and that he had never been sentenced to a single day in State prison. (Da 284). Nor did he submit evidence of petitioner's troubled childhood - namely - that petitioner's grandmother took custody of him when he was two years old because his drug-addicted mother would leave him home alone and his father was too unstable to take care of him. Trial counsel failed to inform the sentencing court that petitioner has physical and intellectual limitations due to his mother's drug use. (Da277, Da377). Trial counsel failed to present evidence that petitioner is the father of two children whose mother depicted petitioner as a good father. (Da278, Da335).

He also failed to point out the very significant disparities in sentencing between the equally culpable co-defendants.

And most importantly, trial counsel failed to present any alternative to the State's extreme request, failed to suggest any sentence that did not entail his client spending his life behind bars. This failure to present mitigating evidence or arguing for a lesser sentence contravened counsel's obligations to advocate for his client at sentencing. State v. Hess, 207 N.J. 123, 154 (2011).

In this regard, the failure to file a pre-sentence memorandum was critical. There are some situations where such a submission would not be impactful, such as when there is a negotiated plea, where a defendant has been convicted of a single offense with a mandatory minimum term and the State is not seeking additional time, or when a defendant is subject to a mandatory extended term and the State is not seeking additional time. In those cases, the sentencing court's hands are tied, and a defense submitted pre-sentence memorandum has no capacity to make a persuasive effect on the sentence imposed.

But a situation like this cried out for pre-sentencing advocacy. The court had a wide range of sentences of which it could have imposed. The sentencing court heard only one voice - the one asking the court to impose the most extreme sentence possible. There was no voice calling for mercy or moderation, that sought to explain

petitioner's individual circumstances, or sought to remind the court that despite the serious nature of the crimes, no one died, no one was seriously injured, and that the jails are filled with murderers who are not serving such extreme terms as sought by the State. Since petitioner was prejudiced by counsel's lack of advocacy at sentencing, this Court should remand for a new sentencing hearing.

CONCLUSION

Based upon the foregoing, and for the reasons set forth in his initial brief, petitioner respectfully urges this Court to remand for (1) an evidentiary hearing to determine trial counsel's reasons for not calling Mr. Mustapha as a witness and whether this omission constituted ineffective assistance of counsel; and (2) for re-sentencing to a different judge who has not already ruled on the legality, disparity and fairness of petitioner's sentence.

Respectfully submitted,
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