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| STATE OF NEW JERSEY, : | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION |
| Plaintiff-Respondent, : | DOCKET NO. A-2662-21T4 |
| v. : | |
| JEREMY ARRINGTON, : | CRIMINAL ACTION |
| Defendant-Appellant. : | On Appeal from a Judgment of Conviction, entered in the Superior Court of New Jersey, Law Division, Essex County. |
| | Sat Below:<br>Hon. James W. Donohue, J.S.C.,<br>Hon. Ronald D. Wigler, J.S.C., and a Jury |

# BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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## Preliminary Statement

The affirmative defense of insanity hinges on a "defect of reason" caused by a "disease of the mind." It has long been understood—though never expressly held—that a defendant seeking to advance the insanity defense must meet his burden through expert testimony as to his mental capacity. Only someone qualified to diagnosis a "disease of the mind" can competently explain whether someone is suffering from one, and whether that disease caused such a "defect of reasoning" that the defendant did not know that what he or she was doing was wrong.

Here, defendant Jeremy Arrington killed three people, including two children, and attempted to kill three more. When no doctor could say he was insane, he sought to pursue the defense anyway based on nothing more than his own proposed lay testimony. The trial judge ruled that he could not advance the defense in this way; an expert was required.

The trial judge was correct. While this is an issue of first impression in New Jersey, our courts have long understood that insanity cases require expert testimony as to a defendant's mental state. Expert testimony provides competent, qualified insight into the defendant's mental condition and allows the fact-finder to differentiate between defendants who, because of a "disease of the mind," can choose between right and wrong and those who cannot,

which is the critical question in an insanity case. Our courts have long recognized that some level of mental deficiency will not suffice; only a "defect of reason" caused by a "disease of the mind" will satisfy the statute.

Conversely, to allow a defendant to introduce only lay testimony on such an esoteric medical issue would invite the jury to speculate about mental conditions, how they affect behavior, how they affect an ability to perceive right and wrong, and a whole host of other questions best left for those qualified to answer them. Simply put, if a defendant cannot put forth competent expert testimony as to his own insanity, he may not put that defense before the jury.

Expert testimony as to a defendant's mental capacity is not just helpful to a fact-finder, but necessary to its effective functioning. Mental health, and particularly its effects on behavior, is a highly specialized medical field well beyond the ken of the average person. Only through expert testimony can a defendant show a lack of responsibility due to a "defect of reason" caused by a "disease of the mind." Because this defendant failed to do so, the trial court properly denied his request to advance the insanity defense. This Court should uphold that ruling and affirm defendant's convictions.

## Counterstatement of Procedural History

For purposes of this appeal, the State adopts defendant's Statement of Procedural History, see (Db3-7),[1] with the following exception that will be discussed further in Point I, post: Defendant was never "barred from presenting an insanity defense." (Db6). Defendant was free to advance that defense if he could produce sufficient evidence to support it, but he could not.

## Counterstatement of Facts

When first responders arrived at 137 Hedden Terrace in Newark in the afternoon of Saturday, November 5, 2016, they found "chaos and confusion," young, "very frightened" bloody children screaming, and what they would later describe as "a house of horrors." (11T60-19 to 62-11, 128-23 to 131-24). Those who lived and told the undisputed story of what happened all identified defendant Jeremy Arrington as the person who a jury would later hold responsible for three murders, three attempted murders, and a slew of other offenses.

The Crimes

Vanessa Karam lived at 137 Hedden Terrace on the second floor with her children Bilqis Karam, 22, Asia Whitehurst, 28, and twins Asaad and Asiyah Floyd, 13. Asiyah had special needs. On November 5, at the time of the incident, Vanessa wasn't home, but her four children were, along with Asia's children Ariel,

[1] The State adopts defendant's transcript designation codes. See (Db3-4 n. 1).

7, and Al-Jahon, 11, who also lived there. And there that day visiting were: their cousin Shyleea Ryan, 14, whose mother is Venus Ryan; Bilqis's friend Syasia McBurroughs, 23; and Asiyah's friend Tyquannah McGee, who also had special needs. (12T52-18 to 53-3; 14T40-12 to 48-1, 114-22 to 23, 123-5 to 128-1; 15T18-9 to 26-17; 19T9-3 to 11-11, 100-20 to 101-16).

That morning, Shyleea made breakfast and then played video games with Al-Jahon and Asaad. Some of the others were in the front living room when a family friend, "Little Thomas" Trent, came by to use the bathroom. Asaad let him in downstairs, and after walking through the apartment, Trent exited but said he'd come back. Bilquis was in her mother's bathroom after having just taken a shower. (14T128-2 to 133-3; 15T26-19 to 29-11; 19T11-12 to 14-11).

After Trent left, Ariel went to lock the door when defendant, who most of the occupants of the house knew as "Cookie," burst through the second-floor door, knocking Ariel to the ground. Defendant was wearing a black North Face vest with a hooded sweatshirt underneath it, sweatpants, and black Nike Air Force 1 sneakers. He had on a black ski mask and was holding a black handgun. (15T29-13 to 30-19, 69-22 to 70-20; 19T21-14 to 22-8).

Asia was screaming and ran to the back of the apartment towards the master bedroom, Vanessa's bedroom, with her daughter Ariel. On the way, Asia gathered Asaad, Al-Jahon and Shyleea from Asaad's room and brought them with her to the

master bedroom. Syasia, who was in a towel and just finished showering in another bathroom, followed everyone into Vanessa's bedroom. Defendant, holding the handgun, followed. Everyone was there except Tyquannah. (14T133-4 to 134-16; 19T14-12 to 20-10). Bilqis, in only her underwear, was drying her hair in the master bathroom when she heard Trent come in. (14T48-2 to 50-15). Then Asia knocked on the bathroom door. All of the kids were "huddled up…like something was wrong." (14T50-16 to 51-16).

Then Bilqis saw defendant, wearing a ski mask. Bilqis tried to close the door, but defendant "bumrushed it," knocking her over and causing her to hit her head on the bathtub. Defendant waived the gun at her and told her to get up, which she did. The witnesses did not later recall observing Tyquannah at this point. Defendant then started wiping things off, including doorknobs, that he may have touched. (14T51-16 to 53-17, 92-10 to 22; 15T32-9 to 34-21).

Defendant then directed everyone back to Vanessa's bedroom. Defendant asked Asia where her mother was. She didn't know. He also said to Asia: "You don't like me?" Defendant asked them, "y'all think I'm playing?" and "y'all know who this is?" and pulled his mask down. He showed the children his gun and said, "why isn't nobody, like, you know, crying or anything? Do you think this is like fake bullets in here or it's not real bullets in here? I got a bullet for every one of y'all in here." Defendant said if they made any noise, he would kill them. (14T55-

19 to 57-5, 135-16 to 138-6; 15T34-22 to 37-9; 19T23-1 to 5, 27-2 to 18).

Defendant was also talking about a Facebook post about him and the negative comments people had made on it. Holding the gun, he said that they "don't know what he did," and said, "y'all think I'm a joke." He also asked them, "you don't like me?" and "you didn't think people were going to tell me?" Defendant then took the cell phones of everyone who had one, put them in a pillowcase, and stomped on it. Then, after either defendant or Syasia got what Asaad later described as a big "turkey" knife, defendant cut up the pink bedsheets and tied up everyone except Shyleea with their hands behind their backs. He had first ordered Asiyah to do it, but she did it too slowly. (14T57-6 to 62-7, 138-7 to 142-5; 15T39-1 to 42-1, 70-21 to 71-8; 19T23-14 to 26-14, 27-19 to 28-1).

Defendant next directed everyone to the living room. While in there, someone knocked at the door. Shyleea, at defendant's instruction, told the person that they couldn't come outside. Defendant then asked them if they wanted to play a game. After going to the kitchen where the knives were kept, defendant moved them all to a back bedroom. He then started "taking everybody out one by one" to different rooms. Ariel was crying the whole time, and at one point defendant punched Asiyah in the face. He took Ariel to the hallway bathroom. Shyleea heard him hitting her in there. Defendant then took Asaad to Vanessa's bathroom and beat him. (14T62-15 to 67-1; 19T30-9 to 32-4, 106-3 to 17).

At one point during the incident someone called Asia's phone. Defendant had her answer it and told her if she said anything that "made it seem suspicious" he would kill her "on the spot." After the call he hit her with a closed fist, knocking her to the floor. Defendant laughed. He then brought her to a back room where he stabbed her in the neck and chest. Shyleea could hear a lot of hitting and then "gargling" from that direction. (14T62-8 to 14; 15T37-15 to 38-24, 42-2 to 45-8; 19T28-2 to 30-8). Bilquis recalled that defendant was in there for a while, and she heard Asia screaming and Ariel crying. (14T67-2 to 8).

Defendant had moved Syasia, Bilqis, and Shyleea to Asaad's room and Asiyah to another. He asked Syasia if she was going to "snitch" on him. Still holding the gun, he made her go onto the bed. Defendant had Shyleea turn up the volume on multiple TVs. A song came on that defendant said was his favorite and laughed. Then he put a pillow over Syasia's head and again asked if she would snitch on him. She said no. He asked again, and then shot her in the head through the pillow. (14T67-19 to 71-5, 73-8 to 74-6; 19T33-7 to 39-3, 19-7 to 9).

"See? Now you see I'm not playing," defendant said to them. (19T39-4 to 6). He ordered Shyleea at gunpoint to grab several knives from the kitchen. He made her touch all of them and the doorknobs in the apartment. (19T39-10 to 40-9). When they came back in, he put the knife in her hand and told Shyleea to stab Syasia in the heart and neck. With a gun pointed at her, she did so. Bilqis was in

the room but turned her head. (14T74-7 to 76-5, 102-10 to 22, 104-16).

Defendant then told Shyleea to stab Ariel, whose arms were tied behind her back. She told him she couldn't, and he threatened her with the gun. Then he stabbed Ariel multiple times. Shyleea told Ariel that she loved her and to keep breathing. (19T40-10 to 42-11).

Next, defendant brought Shyleea to the room where Asia was. He asked Shyleea if she was going to snitch on him also, and she said no. Then he showed her Asia. She had been stabbed repeatedly and "blood was everywhere." Shyleea couldn't even recognize her. Defendant then stabbed Asia several more times and ordered Shyleea to do the same. This time Shyleea did because she was afraid defendant would shoot her. Defendant would come in and out of the room several times that afternoon to stab Asia. (15T45-11 to 50-13; 19T42-12 to 43-24). Asia could hear her daughter screaming over the blasting music. (15T50-14 to 52-22).

Then defendant brought Shyleea to Asaad. He was on the floor of his mother's bedroom, bloody. He could see Al-Jahon from there and he heard Ariel screaming. Defendant then stabbed Asaad multiple times in the neck. He also made Shyleea stab him as well, and told her if she didn't, he would kill her. She resisted but then relented, crying and trying to stab him only in places that would not kill him. Defendant left her in there with Asaad, whom Shyleea tried to comfort by telling him that she loved him and to keep breathing. (14T142-15 to

147-25, 155-21 to 156-4, 164-18 to 21; 19T44-16 to 46-4).

Asaad recalled hearing a gunshot even though the TVs were very loud. He then watched defendant stab Al-Jahon, whose arms were tied behind his back, to death. (14T148-1 to 149-21). The defendant and Shyleea then went back to Ariel, and defendant stabbed her in the head. "At that point," Shyleea later recalled, "I knew I couldn't save her." (19T48-4 to 10).

Defendant also put Asiyah in the hallway closet with Shyleea. He then stabbed Asiyah. He also made Shyleea stab Asiyah, which she did, but only in the shoulders. Defendant still had the gun. She also knew that defendant had stabbed Al-Jahon. (14T153-25 to 154-16; 19T46-5 to 48-3).

Defendant and Shyleea then went back to Asaad's room, where Syasia laid dead on the bed. With his gun pointed at Shyleea, defendant ordered her to get a broomstick so he could "stick it up" Bilqis. He then stabbed Syasia and made Shyleea and Bilqis do the same. Shyleea got the broomstick, but she didn't know what defendant did with it. He put her in the closet, where she saw Tyquannah hiding under some clothes. (19T48-11 to 52-14).

Shyleea, 14, didn't run because she was afraid defendant would kill her. She later explained that she never wanted to stab anyone but only did so because defendant threatened her at gunpoint. (19T52-18 to 23). Once during the incident he put the gun to her head and pulled the trigger, but it jammed. (19T53-4 to 21).

Shyleea also explained that defendant used multiple knives that day, and one even broke at one point during the stabbing. (19T60-18 to 61-5).

What defendant didn't realize was that when Tyquannah was hiding in the closet, she had a phone and called her sister Zanerah. Tyquannah, who was autistic and frightened, whispered that she was at a friend's house on Hedden Terrace and that a man was there stabbing people and had a gun. (13T14-22 to 17-23; 19T101-3 to 16).

Bilqis testified at trial that after defendant had shot Syasia, he had Bilqis get up. He put the gun in her mouth and asked her if she was ready to die. She said no, and he asked again. This time she said yes, and he responded that he was going to torture her first and that he wanted to find a broomstick. At that point the doorbell rang, and they left the room. (14T76-8 to 77-4). Still alive, Asia also heard the doorbell. (15T53-1 to 54-13).

Zanerah had taken a cab there and went to the door and asked through the intercom if Tyquannah was there. Bilqis said no. However, Zanerah rang the intercom again. This time defendant had Bilqis speak to Zanerah by talking to her through the window. While speaking to Zanerah through an open window, defendant pressed a gun into Bilqis's side. Again, she denied that Tyquannah was there. However, Bilqis tried to give Zanerah a clue using her face and mouthed the words "help me." (13T18-1 to 19-11, 23-6 to 24-7; 14T77-5 to 80-23). Defendant

then put Bilqis in the closet with Asiyah. He then put Shyleea in the master closet, where she saw Tyquannah hiding under some clothes. (19T48-11 to 52-14). Defendant then gave both Shyleea and Bilqis knives and told them to stab Asiyah. Bilqis also saw Tyquannah hiding. Shyleea complied and stabbed Asiyah, and then so did defendant. (14T80-24 to 82-17).

Zanerah had been on the phone with her sister the entire time, for almost an hour. (13T31-7 to 21). But, at some point, Zanerah hung up and called 9-1-1. Police arrived, spoke to her outside, and then made their way inside to the apartment. (13T24-8 to 25-16; 20T138-23 to 141-3).

First Responders Arrive; Defendant Flees

Defendant had Bilqis and Shyleea go to the living room. With police banging on the door, defendant first had the girls answer that they couldn't open it. He said he'd let them live, and then went to Vanessa's bedroom and jumped out the window with the gun. The girls opened the door, ran out, and went downstairs. (11T56-18 to 60-18; 14T82-18 to 85-17; 19T52-24 to 53-3, 54-22 to 57-18).

Officer Mohammed Said was first inside the apartment. He saw a silhouette under a closed bedroom door, later revealed to be Vanessa's bedroom door, and yelled, "Newark Police! Hands up!" A young, bloodied, screaming female said the man who did this jumped out a window. Officer Said saw the open window. (11T62-12 to 63-1). He went outside and tried to locate defendant, but no one was

in the yard. Inside he and other officers saw multiple victims, some alive and others dead. Officer Said recalled that each room of the apartment "had a crime scene in it." (11T64-20 to 66-20, 71-16 to 80-13, 86-2 to 95-25, 97-4 to 6). He called for multiple ambulances. (11T69-12 to 22).

Homicide and crime scene detectives similarly observed the dead and wounded and blood everywhere. (12T88-7 to 92-4; 19T95-13 to 97-17, 101-17 to 103-22). In some spots blood was still dripping from a wall and a door. (12T127-10 to 11). They saw Syasia shot to death on a bed, still in a towel, with her hands tied behind her back and "circular defects" in a pillow and her head. Blood seeped from the bed to the floor, where a .9mm bullet was under the mattress. Most of the victims had their hands tied similarly with the same material, which had to be cut to treat them. (12T142-20 to 23; 13T98-11 to 12, 102-9 to 104-8, 106-10 to 109-7; 19T103-24 to 105-11). Detectives also found several cell phones in a pillowcase, as well as multiple bloody knives, some of which were broken, in the kitchen sink, on the bathroom counter, on the bed, or in the pillowcase. (12T123-20 to 124-5, 142-2 to 15; 13T37-14 to 20, 60-6 to 62-12; 14T17-9; 19T105-12 to 106-1).[2]

Multiple paramedic units arrived to find "chaos and confusion," young, "very frightened" bloody children screaming and injured with stab wounds, and what they would later describe as "a house of horrors." (11T111-8 to 113-1, 115-

[2] Another broken knife was found months later in an untouched microwave when Vanessa was moving out. (20T171-12 to 175-21, 207-5 to 21).

18 to 116-25, 120-1 to 124-2, 60-19 to 62-11, 128-23 to 131-24). Every room had blood in it, and each person there had suffered some degree of trauma. (11T132-9 to 137-11).

Injuries and Autopsies

Asaad was nodding off from massive blood loss when he heard police come in. Shyleea came back in, got him up, and brought him to the dining room where he passed out. (14T149-22 to 150-19; 19T55-23 to 57-18, 113-1 to 25). Asaad awoke in an ambulance. He would need a trach and almost lost his left arm due to his injuries. (14T150-20 to 151-9). Doctors would conclude that multiple stab wounds had caused Asaad significant blood loss requiring an induced coma and a month of hospitalization. (12T31-10 to 47-25).

Asiyah also survived. She suffered about 40 stab wounds to the front and back of her chest, neck, and head. Surgery was required to close all her wounds. She spent 10 days in the hospital. (12T48-1 to 52-17).

Asia too survived. She told police "Cookie" did this to her. Doctors found 11 stab wounds—5 to the neck, 6 to the chest—and she stayed in the hospital until mid-December, where she too had a trach put in her neck. (12T21-3 to 22-16, 24-16 to 19, 27-12 to 31-9; 15T54-14 to 57-23, 61-22 to 63-2; 20T135-12 to 24).

Both of Asia's children did not survive. The last time she saw Ariel alive the child was tied up and screaming. (15T71-9 to 72-22). Doctors tried to save

Ariel but were unsuccessful; the 16 stab wounds to her neck and chest—some inflicted in "rapid succession" according to her autopsy—caused her death, which was later ruled a homicide. (12T19-13 to 20-22; 17T64-13 to 19, 69-1 to 86-2, 87-14 to 23, 92-7 to 13). She had no defensive wounds. (17T88-15). The tip of a knife had to be removed from Ariel's skull. (16T96-2 to 7).

Al-Jahon was pronounced dead-on-arrival at University Hospital. (12T19-1 to 12). His autopsy revealed that he had 14 stab wounds to the neck and chest, as well as other injuries and bruises. (17T13-19 to 25, 14-21 to 17-14, 19-5 to 17, 20-21 to 46-14). His cause of death was multiple stab wounds, and the manner of death was homicide. (17T49-25 to 50-8). The doctor noted that Al-Jahon's death wasn't instant, it took some time; any medical intervention would not have been enough to save his life. (17T52-7 to 9, 55-17 to 21).

Defendant had killed Syasia as well. Police found her with her hands tied behind her back. The gunshot wound was fatal and shattered both sides of her skull. There was no stippling due to the pillow being between her head and the gun barrel. Syasia also had 7 stab wounds—4 to the neck, 3 to the chest. Her cause of death was both the gunshot and the sharp-force wounds. (13T164-15 to 199-6; 18T9-15 to 10-23, 13-19 to 15-3, 16-4 to 30-23, 31-16 to 23).

All Identifications Point to Defendant, Leading to His Arrest

Shyleea, Bilqis, Asaad, and Asia all identified defendant—both shortly after the incident and in court—as the person who shot and killed Syasia, fatally stabbed Ariel and Al-Jahon, attempted to kill Asia, Asiyah, and Asaad, and terrorized Shyleea, Bilqis, and Tyquannah.[3] Bilqis and Shyleea told investigators that they both "knew [defendant] their whole" lives. (19T72-2 to 74-4, 112-14 to 126-14). Police then obtained an arrest warrant for defendant. (19T127-25 to 129-15).

Officers had tried to locate defendant shortly after their arrival using a K-9 but were unsuccessful. (11T58-13 to 64-4, 68-24 to 70-13; 19T111-9 to 112-4). They learned that one of defendant's known addresses was 269 Pomona Avenue, Newark. (19T106-2 to 108-15). The following day, November 6, with the assistance of U.S. Marshals, police pinged defendant's phone to that address and there spoke to Josephine Horton, who told police defendant did not live there and that she did not know him. But that night, police learned that defendant was upstairs and barricaded himself inside the second-floor apartment normally occupied by Horton's granddaughter. He told police he had a hostage. Eventually

[3] See (19T59-1 to 60-15) (Shyleea that night); (19T20-11 to 21-5) (Shyleea in court); (14T85-18 to 88-22; 15T107-18 to 119-24, 122-2 to 132-14) (Bilqis at ECPO); (14T54-7 to 55-7) (Bilqis in court); (14T151-20 to 153-6; 20T159-9 to 170-3) (Asaad at ECPO); (14T135-1 to 13) (Asaad in court); (15T63-3 to 66-11; 20T144-25 to 154-1, 155-16 to 159-2) (Asia at ECPO); (15T30-20 to 32-7) (Asia in court). Because Asiyah, 13, had special needs, detectives decided not to take a statement or seek an identification from her. (20T160-8 to 16).

police realized there was no hostage, and defendant surrendered and was taken to the Essex County Prosecutor's Office ("ECPO"). (15T94-13 to 96-12, 100-2 to 104-25; 19T129-23 to 138-25; 20T5-14 to 6-15).

Other Evidence, Including DNA, Establishes Defendant's Guilt

In the apartment where defendant was arrested, police executed a search warrant. They found, among other things, defendant's vest and gloves he had on the day of the killings, which had blood on them, and several live rounds of ammunition. His sweatpants and sneakers he had on when he was arrested also had blood on them. (16T10-15 to 52-13; 19T139-1 to 141-15, 154-8 to 165-19; 18T55-22 to 60-13, 66-12 to 67-2, 69-2 to 73-19, 88-16 to 23, 119-14 to 120-9).

After obtaining DNA profiles from the victims and items of evidence, analysts determined that defendant's sweatpants contained Al-Jahon's and Ariel's DNA. (16T65-1 to 73-2; 17T47-11 to 48-4, 89-4 to 90-2; 18T30-24 to 31-3, 112-12 to 113-10, 119-5 to 8, 127-22 to 136-19, 161-11 to 162-19; 20T189-16 to 25). They also found Asaad and Asia's DNA on knives in the apartment, and Asiyah's and Asia's DNA on defendant's gloves. (18T78-11 to 87-24, 137-4 to 161-10).

Police also executed a search warrant on defendant's phone. Within two hours of fleeing the crime scene, he viewed several news articles online about the incident. (19T139-1 to 144-16).

Defendant Confesses

At the ECPO, after being advised of his Miranda rights, defendant was photographed and gave a videotaped statement.[4] (19T145-7 to 13, 150-7 to 154-7; 20T7-1 to 21, 18-10 to 132-10). In it, he first admitted he was at the scene but said he hadn't done anything. (20T41-24 to 42-2, 93-7 to 9). He explained that Asia, Bilqis, and Venus had been "talking shit" about him on Facebook. Venus—Shyleea's mother and defendant's former paramour—had posted an article on her page about defendant along with his picture, and there were 15 or 16 negative comments on the post. Defendant was not Venus's "friend" on Facebook, but he could see the comments; one was Asia's, which said: "I knew I didn't like his dumb ass." So that day he went there to confront Asia about it, and Shyleea opened the door. He then confronted Bilqis about the post. He claimed that the children there, "all of them," were playing with knives. While he talked to Asia about the post, he saw blood on Bilqis's hands. They started fighting with the knives, and defendant got "a little scrape." He claimed that Bilqis had the gun, but he "snatched" it from her, threw it, and then it went off and a bullet hit someone. Then when police came, he told her not to open the door and then jumped out the window. (19T165-23 to 172-12, 173-11 to 24; 20T42-3 to 58-24, 67-18 to 73-21).

Defendant said they were all "fucked up" when he left the apartment. Some

[4] After a pretrial hearing, the court ruled this statement admissible, see (6T; 7T4-14 to 13-13; Da48), a ruling defendant does not challenge on appeal.

were unconscious. (20T73-22 to 75-7). He then went and hid out at the apartment at 269 Pomona, where he had been staying for a few days with the consent of the owner, "Millie." (20T59-3 to 67-17, 88-10 to 92-20). To negate the idea that he brought a gun to Hedden Terrace, defendant said he wouldn't "got time to be stabbing nobody. If I came there with a gun, I'm going to shoot everybody in that house." (20T84-13 to 87-23).

As the statement continued, defendant eventually admitted that he felt bad, could've prevented what happened, and that he "egged the shit on." He said he was remorseful and apologized. He admitted to bringing the gun to 137 Hedden Terrace and went there to confront Asia about the Facebook post. He admitted that he stabbed Asia but claimed Shyleea did too. He said he didn't shoot anyone, but Bilqis did, "even though the rule is I don't need no witnesses alive…." Defendant then said that he made Shyleea shoot Syasia: "I told Bilqis to put the pillow right there and shoot her." He acknowledged he was "fucked because of this predicament I'm in right now, you see what I'm saying? But like I said, the kids didn't deserve that shit." He also admitted to having Shyleea clean some of the knives. He ditched the gun[5] after he left. (20T119-21 to 124-13, 125-3 to 129-1, 133-17 to 134-18, 135-4 to 7).

[5] Police never recovered the handgun. (20T190-4 to 20). Defendant did not have a carry permit. (20T217-1 to 22).

## Legal Argument

### Point I

**Defendant put forth no competent evidence that he was "insane" as that term is defined by N.J.S.A. 2C:4-1, so the trial court properly refused to permit him to advance that affirmative defense.**

The trial court did not allow defendant to assert the affirmative defense of insanity because he failed to put forth any competent proof that he was insane as that term is defined in N.J.S.A. 2C:4-1. Because the statute requires proof that the defendant "was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong[,]" competent evidence in the form of expert testimony was required to get that defense to the jury. Defendant's failure to set forth sufficient proof on that question properly led the trial judge to deny him use of that defense.

At sentencing,[6] the judge summed up the issue well:

> You[(referring to defense counsel)] spent your presentation primarily I guess criticizing the Court for not permitting you to use the affirmative defense of insanity. And you know all too well -- well, first of all, I am loathe to prevent any defendant from fully pursuing any viable defense that would be available to any defendant. That would be the last thing I would want to do is to prevent any defendant from pursuing a defense.

[6] This issue was also discussed at various times pretrial. See generally (2T3-15 to 4-21; 5T32-2 to 52-10; 7T22-16 to 23-13; 8T4-5 to 76-13; 9T72-12 to 104-24; 10T4-1 to 13-17).

> And you may recall that I implored you to seek another doctor, I know there were two doctors, and I implored you to seek another doctor. I even, I think I ordered you to consult with members of the Public Defender's Office…and try to get yet another doctor to evaluate your client, which ultimately you did not -- you were not successful in trying to do that.
>
> And as I've mentioned, the reason why is because insanity is an affirmative defense that a defendant must prove by a preponderance of the evidence [the requirements of the statute].
>
> And the only way this Court ultimately determined that one can pursue an insanity defense is to put on some sort of expert, medical doctor, to be able to opine about your client's mental state. By someone else just getting on the stand and reciting how horrific the facts are here, they are horrific, but nobody would have been qualified to testify about a defect of your client's mind.
>
> And in fact, as the prosecutor just indicated, perhaps one of the reasons why a doctor wasn't able to be secured was because your client was all too familiar with the criminal justice system, and he even acknowledged that he was gonna fake mental illness so as to get over on all of us, to get over on the criminal justice system[, see (5T32-2 to 12)]. But I have no doubt that will be for another day for a higher court to determine, whether or not I was right or not in not allowing you to pursue an insanity defense. [(24T73-21 to 75-13).]

That day is today.

The Insanity Defense in New Jersey

Criminal defendants of course have a constitutional right "to 'a meaningful opportunity to present a complete defense.'" State v. Chambers, 252 N.J. 561, 582 (2023) (citations omitted). While that right is "fundamental, a defendant's right to present a defense is not absolute." State v. Jenewicz, 193 N.J. 440, 451 (2008). "'The accused does not have an unfettered right to

offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" Ibid. (citation omitted).

The law—both before and after the adoption of the Criminal Code—presumes that all persons are sane. State v. Worlock, 117 N.J. 596, 601 (1990); State v. Cordasco, 2 N.J. 189, 196 (1949); State v. Molnar, 133 N.J.L. 327, 331 (E. & A. 1945). That presumption "persists until overcome." State v. Fine, 110 N.J.L. 67, 72 (E. & A. 1933). "Underlying that presumption is the belief that people are capable of choosing between right and wrong." Worlock, 117 N.J. at 601 (citing State v. Sikora, 44 N.J. 453, 470 (1965)). Those who are so capable are worthy of punishment, both as a means of deterrence and protecting public safety. Id. at 601-02.

For those who lack that capacity, the law provides the defense of insanity. Known at common law as the "M'Naghten rule,"[7] the insanity defense is codified at N.J.S.A. 2C:4-1. It provides:

> A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.[8]

A "disease" is "a condition of the…body or of one of its parts that

[7] From M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). New Jersey adopted this test almost immediately. See Mackin v. State, 59 N.J.L. 495, 496-97 (E. & A. 1896) (citing State v. Spencer, 21 N.J.L. 96 (E. & A. 1846)).
[8] All emphases herein are added unless otherwise noted.

impairs normal functioning and is typically manifested by distinguishing signs and symptoms." And a "mental disease" is "any of a broad range of medical conditions (such as major depression, schizophrenia, obsessive compulsive disorder, or panic disorder) that are marked primarily by sufficient disorganization of personality, mind, or emotions to impair normal psychological functioning and cause marked distress or disability and that are typically associated with a disruption in normal thinking, feeling, mood, behavior, interpersonal interactions, or daily functioning…."[9]

"Insanity is an affirmative defense which must be proved by a preponderance of the evidence." N.J.S.A. 2C:4-1. That burden is on the defendant. Molnar, 133 N.J.L. at 331; State v. J.T., 455 N.J. Super. 176, 213-214 (App. Div.), certif. denied, 235 N.J. 466 (2018). Setting forth proof of the accused's "mental condition" is critical to advancing the defense. See State v. Maioni, 78 N.J.L. 339, 342 (E. & A. 1909) ("[T]he failure by the defendant to prove the existence of such a mental condition at the time of committing the act charged against him, leaves the case before the jury in the same situation as if the defence had not been set up at all….").

"The insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning." Cannel, N.J. Criminal

[9] Both definitions from Merriam-Webster Online Dictionary (2023) available at: https://www.merriam-webster.com/dictionary (last accessed Nov. 3, 2023).

Code Annotated, comment 2 on N.J.S.A. 2C:4-1 (2023); see also State v. Singleton, 211 N.J. 157, 160 (2012) ("Mental illness does not in and of itself eliminate moral blameworthiness under the test for criminal insanity enshrined in the Code…."); Cordasco, 2 N.J. at 196 ("Insanity varying from this legal concept will not suffice as a defense…."). For example, defendants who kill because of an "irresistible impulse" or "emotional insanity" due to "some defective or perverted moral sense" are not entitled to the defense. Cordasco, 2 N.J. at 196-97 (and cases cited therein).

Instead, the statute specifically requires that the defendant's inability to distinguish between right and wrong at the time of the offense be due to a "defect of reason" caused by a "disease of the mind…." That phrase is as old as M'Naghten itself. See Worlock, 117 N.J. at 603 (quoting M'Naghten, 8 Eng. Rep. at 722). As the Supreme Court has recognized, the defense "is essentially one of cognitive impairment." Id. at 603. It is designed to "determine whether the defendant had sufficient mental capacity to understand what he was doing when he committed the crime." Ibid.; see also J.T., 455 N.J. Super. at 216 ("Defendant's burden of proof under the insanity defense required her to convince the jury that the greater weight of credible evidence showed that she was not mentally capable of distinguishing right from wrong when she committed these horrific crimes.").

Expert testimony is required to establish a "defect of reason" caused by a "disease of the mind."

Given that the insanity defense hinges on a defendant's suffering from a "disease of the mind" that affects "cognitive impairment" and "mental capacity," it logically follows that expert testimony is required. Under N.J.R.E. 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." See State v. Kelly, 97 N.J. 178, 208 (1984) (summarizing the three basic requirements for the admission of expert testimony, including that "the intended testimony must concern a subject matter that is beyond the ken of the average juror….").

While N.J.R.E. 702 is "primarily permissive," certain situations exist "in which expert testimony must be adduced in support of a proposition and absent such testimony the proposition will be rejected as a matter of law." Biunno, Weissbard & Zegas, N.J. Rules of Evidence, comment 1 on N.J.R.E. 702 (2020-21). "In general, expert testimony is required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450, 591 (1993) (quoting Wyatt v. Wyatt, 217 N.J. Super 580 (App. Div. 1987)). Or, more

simply, "[e]xpert testimony is required when the issue is beyond the 'common knowledge of lay persons.'" Froom v. Perel, 377 N.J. Super. 298, 318 (App. Div.) (quoting Kelly v. Berlin, 300 N.J. Super. 256, 265-66 (App. Div. 1997)), certif. denied, 185 N.J. 267 (2005).

The leading evidence treatise in New Jersey explains:

> While the thrust of this Rule is permissive, the identical policy embodied here—concern that a lay jury will need assistance in making determinations in areas of specialized knowledge—also informs certain statutory and common law requirements that expert testimony must be presented in specific kinds of cases to prove technical matters outside the scope of the average juror's knowledge and experience. In a sense, the exert testimony in such cases is deemed so critical that it goes beyond what is deemed merely "helpful" to the jury and becomes "necessary" to the trier of fact's proper functioning. In these areas of substantive law, the party with the burden of establishing a proposition must proffer competent expert testimony or suffer the loss of its cause. [Biunno, Weissbard & Zegas, ante (last emphasis added).]

Scientific or medical requirements, including "any claim of mental illness affecting behavior[,]" ibid., fall into this category.

For example, when the defendant in State v. Hines wanted to rely on Post-Traumatic Stress Disorder in support of her claim of self-defense, this Court found that such psychiatric evidence concerned a subject matter beyond the ken of the average juror and required expert testimony "to explain the nature of the disorder and its consequences." 303 N.J. Super. 311, 318-22 (App. Div. 1997); see also Kelly, 97 N.J. at 187 (reaching a similar conclusion

regarding "battered woman's syndrome").

Similarly, in Mullarney v. Bd. of Review, an unemployment compensation claimant, fired for using a pilfered narcotics patch to attempt to commit suicide, wanted to prove he left his job because "his mental illness so affected his judgment that he was incapable of realizing that the unauthorized taking of the narcotic patch was illegal, could jeopardize his license, and, consequently, his employment." 343 N.J. Super. 401, 408 (App. Div. 2001). "That contention is so esoteric[,]" the Court found, "that a fact-finder of common judgment and experience cannot form a valid judgment on the contention without the assistance of expert testimony." Ibid.

Mullarney cited State v. Jones, where the defense in a strangulation case wanted to argue that because the victim's hyoid bone and larynx were still intact, the jurors could infer that the force necessary to break it was not present and thus acquit him. 308 N.J. Super. 174, 187 (App. Div. 1998). This Court found that such an argument required expert testimony:

> The importance or non-importance of an intact hyoid bone, and how that reflects upon the pressure used to strangle someone and correspondingly upon the aggressor's state of mind, is a matter that is "esoteric" and is an issue upon which jurors of common judgment and experience could not form a valid judgment without expert testimony. [Ibid.]

See also State v. Doruguzzi, 334 N.J. Super. 530, 533, 538-39, 546 (App. Div. 2000) (holding expert testimony is required for the State to rely on the

horizonal gaze nystagmus test; "[N]ystagmus is a scientific term probably not familiar to most persons. The relationship of nystagmus to the consumption of alcohol or drugs is a scientific principle. The manifestation under different circumstances is also a scientific theory that would not be known by the average person.").

In competency proceedings, expert evidence is required to establish a defendant is not mentally fit to proceed. See State v. Martini, 144 N.J. 603, 617 (1996); State v. M.J.K., 369 N.J. Super. 532, 549 (App. Div. 2001), certif. granted, 181 N.J. 549 (2004), app. dismissed, 187 N.J. 74 (2005). That evidence must include, among other things, "a diagnosis of the mental condition of the defendant" and "an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense." N.J.S.A. 2C:4-5b(2) and (3). "[A] determination of competency cannot be sustained in the absence of sufficient supporting evidence." State v. Purnell, 394 N.J. Super. 28, 50 (App. Div. 2007).

New Jersey courts have long understood that expert testimony is necessary to advance the insanity defense.

No New Jersey case has expressly decided the issue presented in this appeal. But our courts have long handled insanity cases with the understanding that expert medical testimony as to defendant's mental state is a prerequisite to advancing the defense.

For example, in State v. Whitlow, the Supreme Court recognized that "[w]hen a defendant charged with crime pleads mental incapacity to stand trial or innocence by reason of insanity, obviously expert medical opinion is necessary both for the defendant and for the State." 45 N.J. 3, 10 (1965). While the Court remarked that lay testimony on the subject "might be admissible," it rightly recognized that "it is unlikely in the extreme that exclusive reliance would ever be placed on it." Ibid. Read together, while there may be a case where lay testimony on the issue "might be admissible," expert testimony would still be "necessary" to advance the defense.

Instead, "[i]n the usual situation when counsel advises the State or the court of his client's mental incapacity for trial or for criminal responsibility, it may be assumed that defense psychiatrists have already examined defendant and furnished an expert opinion supporting the statement." Ibid.; see also id. at 18 (noting "that under our present practice a defendant who interposes the defense of insanity has a private examination and interview with his chosen psychiatrist."); State v. Obstein, 52 N.J. 516, 527 n. 1 (1968) (noting that after the State presents its case, "[t]hen defendant goes forward with his proof of insanity, which ordinarily exposes his discussion with his own psychiatrists…."), over'd o.g., State v. Engle, 99 N.J. 453, 473 (1985). The Whitlow Court went on to observe: "It is obvious, even to the layman, that in

all probability a psychiatrist would require [both a] physical examination of a defendant in order to reach a conclusion of his sanity or insanity [and a] psychiatric interview[,]" the latter being "the basic diagnostic tool" in insanity cases. 45 N.J. at 15.

Similarly, in Worlock, the Supreme Court said that the insanity defense "is a legal standard incorporating moral considerations often established by medical testimony…. Generally, the determination of a defendant's ability to distinguish between right and wrong depends on psychiatric testimony." 117 N.J. at 606. The testimony is vital, the Court explained, because it "provides insight into a defendant's mental condition and enables the fact-finder to differentiate defendants who can choose between right and wrong from those who cannot." Ibid. And our "courts have generally admitted any credible medical testimony on the insanity defense[,]" so long as the witness is qualified. Ibid.; see State v. Zola, 112 N.J. 384, 422 (1988) (finding psychiatric social workers unqualified to testify as to psychiatric diagnoses).

Most other jurisdictions agree: Insanity requires a showing of mental illness, which can only be established through expert testimony.

The United States Supreme Court also believes that expert testimony is critical to advance the insanity defense. In Ake v. Oklahoma, the Supreme Court, almost 40 years ago, remarked that it would "surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today." 470

U.S. 68, 85 (1985). There the Court held that expert testimony is so important to a meaningful use of an insanity defense that the government must provide indigents access to such an expert when the defendant's sanity at the time of the offense is likely to be a significant issue at trial. Id. at 74, 83.

In reaching that conclusion, the Court noted that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." Id. at 80. The reasons are obvious, but worth detailing here:

> In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. [Ibid.]

Lay witnesses, on the other hand, "can merely describe the symptoms they believe might be relevant to the defendant's mental state…." Ibid. But only an expert psychiatrist

> can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. [Id. at 80-81 (citation omitted).]

And while juries remain the "ultimate factfinders" on the issue of legal insanity in a given case, to answer this question "they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Id. at 81. These concepts "inevitably are complex and foreign," and expert testimony is "crucial and a virtual necessity if an insanity plea is to have any chance of success." Ibid. (citation and internal marks omitted). Again, the reason is obvious:

> [O]rganizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. [Ibid.]

More recently, in Kahler v. Kansas, the Court, considering whether the Constitution requires a single insanity test (it held it doesn't), observed:

> Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. [140 S. Ct. 1021, 1037 (2020).]

See also id. at 1038 (Breyer, J., dissenting) (summarizing insanity as when "the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy.") (original emphasis).

Most state courts agree expert testimony is required. Just this year, in Commonwealth v. Fortune, the defendant sought to assert the insanity defense through his own testimony, lay witness testimony, and the expert opinion of Dr. Morrow, who concluded defendant suffered from a mental disease (paranoid schizophrenia) but not that he was "insane" as that term is defined by Pennsylvania law.[10] ___ A.3d ___, 2023 Pa. Super. 158 (2023). The trial court denied the request, concluding that, "as a matter of law," defendant could not establish the defense "without presenting expert testimony concluding that [he] was legally insane." Id. at ___ (slip op. at 4).

The appellate court agreed. It found that "[l]ay witnesses may not offer an opinion about an accused's 'mental capacity in relation to the ultimate determination to be made by the jury'…" Id. at ___ (slip op. at 12) (quoting Commonwealth v. Knight, 364 A.2d 902, 909-10 (Pa. 1976)). To allow such testimony would tempt the jury "to conflate mental illness with legal insanity when confronted with a parade of non-expert lay witness testimony regarding [defendant]'s mental state." Ibid. As such, the court held that "a defendant must present expert testimony finding him M'Naghten insane before he can introduce lay testimony in support of his insanity defense." Id. at ___ (slip op. at 13). Because defendant "failed to provide a qualified witness to provide a

[10] Pennsylvania also follows the M'Naghten test. See 18 Pa.S.C.A. § 315(b).

factual basis to allow the jury to find [defendant] was legally insane, the trial court did not err in precluding [him] from raising" insanity. Ibid.

Fortune cited White v. Commonwealth, where the defendant's proposed expert, Dr. Skinner, could not opine that defendant met the definition of legal insanity, but defendant nevertheless wanted him to testify to provide "an opinion as to the rationale behind the defendant's action." 616 S.E.2d 49, 53 (Va. Ct. App. 2005), aff'd, 636 S.E.2d 353 (Va. 2006). The court held that the trial judge properly prohibited such testimony because such lay "evidence did not establish a prima facie showing that [the defendant] met the M'Naghten test." Ibid. It went on to explain:

> [W]hen applied to an affirmative issue such as the defense of insanity[, a] prima facie case exists when the evidence constitutes the threshold quantum that permits a jury to find the affirmative defense existed in fact. It is that essential quantity of evidence necessary to raise the defense and allow the jury to consider the issue.
>
> The evidence in this case failed to raise an issue of insanity. Unless Skinner's testimony is treated as a qualified opinion, the defendant has no evidence that he suffered from a mental disease and did not know right from wrong. No qualified witness testified that the defendant labored under a defect of reason from a disease of the mind so that he did not know the nature and consequences of his act, or if he did know, that his act was wrong.
>
> While lay witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.
>
> In Mullis [v. Commonwealth], 351 S.E.2d [919,] 925 [(Va. Ct. App. 1987)], a lay witness was not permitted to explain the

> defendant's actions by testifying that he was "paranoid" because this might suggest to the jury that the defendant had been diagnosed "paranoid." In this case, no expert evidence supported the insanity defense, and the only qualified testimony stated the opposite. The other witnesses could only recite observed behavior. The recital of the defendant's behavior did not provide any factual bas[is] from which a jury could find the defendant was suffering from a mental disorder or disease that prevented him from distinguishing right from wrong. [Id. at 53-54 (citations and marks omitted).]

Ellis v. State also held that only a qualified expert could testify that defendant suffered from "paranoia." 309 S.E.2d 924, 926 (Ga. Ct. App. 1983). "Since paranoia is a medical term relating to a mental disorder, only a qualified expert such as a psychiatrist, psychologist or medical doctor would be competent to diagnose and define such a mental disorder." Ibid.

In People v. Moore, the defendant sought a jury charge that would have let the jury excuse his conduct if it found he suffered from a mental disease, defect, or disorder. 117 Cal. Rptr. 2d 715, 721-22 (Ct. App. 2002). Defendant never produced expert testimony on that issue, so the trial court denied his request. Ibid. The appellate court affirmed, explaining that defendant's doctor "did not examine, test, or evaluate defendant, nor did he opine defendant was suffering from a mental disease, mental defect, or mental disorder when defendant stabbed the victim[,]" so the trial court was right to not give the requested instruction. Id. at 723. It continued:

> Mental illness or mental defect is a medical diagnosis. Expert medical testimony is necessary to establish a defendant suffered from

> a mental disease, mental defect, or mental disorder because jurors cannot make such a determination from common experience….
>
> Without expert medical testimony establishing that defendant was suffering from a mental disease, defect, or disorder at the time of the commission of the crime, there was no evidentiary or legal basis for the trial court to [give the instruction]. [Ibid. (citations and marks omitted; original emphasis).]

See also Conservatorship of Torres, 226 Cal. Rptr. 142, 143-44 (Ct. App. 1986) ("Although a juror might know whether a person was able to take care of his basic needs a juror cannot determine from common experience whether that inability results from a mental disorder or from some other reason.").

In Doyle v. State, the defendant wanted his sister, a lay witness, to testify about his psychological problems to support his insanity defense. 785 P.2d 317, 322 (Okla. Crim. App. 1989). The appellate court upheld the trial judge's ruling barring such questioning, noting that while a lay witness could testify as to whether a person's actions seemed rational, "a lay witness is not permitted to give an opinion calling for a medical diagnosis." Ibid. "The question put to the witness called for a medical diagnosis which [defendant's sister] was unable to give." Ibid. Notably, the court found no prejudice given that defendant also called "a licensed drug and alcohol counselor, a [corrections] psychologist…and a psychiatrist, all of whom testified… concerning his mental capacity." Id. at 323.

In State v. Davis, the defendant claimed insanity and wanted Orsban, a

nurse from the jail who observed him there, to testify whether she believed he appeared to be psychotic. 506 S.E.2d 455, 470-71, 477 (N.C. 1998), cert. denied, 526 U.S. 1161 (1999). The court found no error barring the testimony:

> The question posed by defense counsel called for Orsban, a lay witness, to make a psychiatric diagnosis of defendant's mental condition. Orsban was not an expert witness, and no foundation had been laid to show that he had the expertise to make such a psychiatric diagnosis. While it may have been appropriate for Orsban to make a general observation that defendant appeared to be "mentally disturbed" upon admission to jail, it was beyond Orsban's ability as a lay witness to make a specific psychiatric diagnosis of defendant's being "psychotic." [Id. at 471.]

See also State v. Raine, 829 S.W.2d 506, 510-11 (Mo. Ct. App. 1992) (finding lay witnesses testifying about defendant's behavior and that it was not mentally "right" was permissible if relevant, but not whether he "had a mental disease or defect"; "the [lay] witnesses' conclusions that Raine suffered from a mental disease or defect were inadmissible").[11]

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[11] Admittedly, some states have suggested otherwise. Arizona seems to permit lay testimony alone. See State v. Bay, 722 P.2d 280, 284 (Ariz. 1986). But even there, the lay witness must have sufficient knowledge of the defendant's "history," that is "history of mental illness or prior hospitalization for mental illness." Id. at 284, 283. That same court recognizes that this will be the rare case. See State v. McMurtrey, 664 P.2d 637, 644 (Ariz.) ("[I]t is difficult to imagine how a defendant could place his or her sanity in issue…without expert testimony as to the defendant's state of mind at the time of the crime"), cert. denied, 464 U.S. 858 (1983). At least one Ohio decision agrees with Bay, but it too requires any proffered lay testimony be competent on the issue of defendant's "disease or other defect of the mind…." State v. Reynolds, 550 N.E.2d 490, 496 (Ohio Ct. App. 1988) (lay testimony that defendant regularly took two antipsychotic drugs and was off of them at the time of the crimes);

Federal cases are also persuasive. Most recently, in United States v. Turner, the Eleventh Circuit found that although the trial judge should not have allowed the government to call its own expert as to the defendant's sanity, no plain error occurred because the defendant's lay testimony and his own behavior was insufficient to prove insanity. 61 F.4th 866, 889-93 (11th Cir. 2023). The court explained why:

> [T]o establish a legally sufficient insanity defense, Turner had to prove that on November 8, 2018, he had a severe[12] mental disease or defect capable of causing him to possess the firearms even though he knew that he could not do so…. He introduced nothing to prove his defense other than Mary Walker's testimony and his behavior. And Dr. Barnette did not diagnose him with a qualifying "severe mental disease or defect" under [the statute]. To find that he established his defense, the jury would have had to speculate that he had a severe mental disease or defect and that it in fact caused his wrongful conduct. And the law would not allow the jury to do that. [Id. at 893 (citation omitted).]

In United States v. Keen, the Ninth Circuit found that the trial court

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see also State v. House, 2014-OH-138, P9 (Ohio Ct. App. 2014) (distinguishing Reynolds on that basis); State v. McDonald, 571 P.2d 930, 937 (Wash. 1977) (noting one with "a clinical background and close contact over a period of time with the defendant could qualify one to testify regarding the defendant's sanity."), over'd o.g., State v. Sommerville, 760 P.2d 932, 936 (Wash. 1988). These cases are outliers and should not be followed. But, even if applicable, defendant here never proffered any such qualified lay witness; his own testimony that his crimes were atrocious, while true, is not enough. See Ake, 470 U.S. at 90 (Rehnquist, J., dissenting) ("The evidence of the brutal murders perpetrated on the victims…would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder.").

[12] Federal law requires a defendant to show the "mental disease or defect" was "severe." 18 U.S.C.A. §17(a).

properly prohibited the defendant's use of the insanity defense when there was no expert testimony on the issue. 96 F.3d 425, 430-31, amended and reh'g denied, 104 F.3d 1111 (9th Cir. 1996). Keen's proposed evidence was similar to defendant's here:

> We do not have an M.D. or a psychologist to testify as an expert. We do have the defendant's family, who observed him during the relevant time period, and they could testify as to what they personally saw, the behavior that he was engaging in, and the things that he said to them…to show the jury that a person exhibiting this type of symptom, behavior and statements, must have some serious mental disease or defect. [Id. at 431.]

The District Court had denied this request, concluding that

> [lay] testimony can only lead to an impermissible finding, that [the jury] might speculate that [defendant] might be insane. And you can't argue that he is insane from that standpoint of view…. Unless someone summarizes all of this testimony, and can give a medical opinion, or scientific expert can give such a medical opinion, then this testimony can only lead to impermissible inference. [Id. at 430.]

Without "reaching the question of whether lay opinion alone can ever support a finding of insanity," the Court of Appeals affirmed the District Court's decision because the defense's lay proffer failed to establish that any "condition" defendant may have been suffering had an effect on his ability to appreciate the nature of his actions. Id. at 431.

In United States v. Sanchez-Ramirez, the government moved pretrial to bar the defendant from asserting insanity at trial where defendant argued that his testimony alone would be enough allow him to do so. 432 F. Supp. 2d 145,

146 (D. Me. 2006). Defendant said he was "suffering from command auditory hallucinations," which he said resulted in his "inability to appreciate the nature and quality or wrongfulness of" his acts. Ibid. The court recognized that the need for expert testimony is "not merely to prove the existence of a severe mental disease or defect, but also to prove that this condition caused the defendant to be unable to appreciate the nature and quality or wrongfulness of his acts…." Id. at 148. The court therefore found defendant's proffer insufficient. Id. at 148-49. Defendant's testimony alone about his own mental condition, the court found,

> would require a jury to speculate about the cause of these symptoms, whether they represent a physical or mental condition, whether that condition fits the definition of mental disease or defect, if so, whether the disease or defect can be deemed severe, and whether his mental state was caused by the severe mental disease or defect.
>
> In sum, he cannot satisfy his significant burden of proof…simply by telling the jury it is so. Without an expert to testify about what is a mental disease or defect and what is severe, he cannot satisfy this requirement, since such matters are "not within the experience of ordinary jurors. Without expert testimony on causation, he cannot sustain his burden on the second element for the same reason. [Id. at 149 (citations and marks omitted)[13].]

Defendant's failure to produce any competent proof that he was "insane" properly led the trial court to deny him use of that defense.

Defendant put forth no competent proof that he was laboring under a

[13] He later called an expert at his trial. See United States v. Sanchez-Ramirez, 570 F.3d 75, 79 (1st Cir.), cert. denied, 558 U.S. 1005 (2009).

"defect of reason" caused by a "disease of the mind." To advance the affirmative defense of insanity as defined in N.J.S.A. 2C:4-1, he was required to do so, and to do so through expert testimony. His own lay testimony as to what happened that day, how bad or even irrational it was, and why he acted the way he did, would not have been sufficient to meet the statutory requirements for the defense. To allow a defendant to introduce only lay testimony on such an esoteric medical issue would have only invited the jury to speculate about mental conditions, how they affect behavior, and how they affect an ability to perceive right and wrong, just to name a few issues, best left for those qualified to answer them.

Rather, only a competent, qualified expert, who, after having personally examined defendant's cognitive abilities in light of his or her own expertise, could have explained what a disease of the mind is, how it affected his behavior that day, and what affect it had on his ability to distinguish between right and wrong. Such testimony was "so critical that it goes beyond what is deemed merely 'helpful' to the jury and becomes 'necessary' to the trier of fact's proper functioning." Biunno, Weissbard & Zegas, ante. Expert testimony would have provided competent, qualified insight into the defendant's mental condition and allowed the jury to differentiate between defendants who can choose between right and wrong and those who cannot,

which is the critical question in an insanity case. Our courts have long recognized that some level of mental deficiency will not suffice; only a "defect of reason" caused by a "disease of the mind" will satisfy the statute. And only an expert could provide the proof necessary to show defendant met that standard.

Defendant counters that the statute contains no requirement for medical or expert testimony, (Db18), but such a conclusion was obvious to the Code's drafters when it included the phrases "defect of reason" and "disease of the mind." Surely a lay person could not opine on whether a defendant's ability to reason was defective as a result of a mental disease. If a statute required a party to show that they suffered from a "disease of the heart," it would be quite clear that only the testimony of a qualified cardiologist would do. The same holds true for mental diseases.

The cases defendant relies upon do not compel the result he seeks either. (Db18-20). While it is true in State v. Morehous, decided in 1922, the Court observed that "[l]ay witnesses on insanity may give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness and stated[,]" 97 N.J.L. 285, 294 (E. & A. 1922), that line must be rejected as mere dicta, and in no way controlling on the issue now before this Court. There, a defense witness was asked about his opinion

as to the defendant's "mental condition or his sanity[.]" Ibid. The trial court never should have allowed the question in the first place—an issue not raised on appeal—but, once it did, the reviewing court found the objection was properly overruled because the witness knew no facts upon which to base that opinion. Ibid. Of course, no witness can give any sort of opinion testimony when they have no basis to do so, but the more important point is that Morehous's dicta crumbles under the more persuasive weight of the more recent caselaw discussed above, and even two other cases defendant cites, Risden and Scelfo.

In State v. Risden, the defendant presented expert testimony as to her insanity: "In support of the claim of 'temporary' insanity defendant called a single psychiatrist….he saw her on seven occasions[, and h]is final diagnosis…was depressive reaction, which he characterized as a type of mental disease." 56 N.J. 27, 33-34 (1970), aff'g as mod. 106 N.J. Super. 226 (App. Div. 1969). The Court noted that after a claim of insanity "has been made and supported by testimony," the State may use that expert testimony "on cross-examination of a defendant or of defense psychiatrists with respect to statements made by the defendant to a State's examining psychiatrist on the issue of mental capacity." Id. at 36.

Defendant is correct that the Supreme Court did find that the trial court

should have allowed lay witnesses to testify as to "defendant's physical appearance and her mental and emotional attitude and reactions within minutes before, at the time of, and after the shooting." Id. at 40. Indeed, "[l]ay-witness opinion of the type described requires no expertise." Ibid. But defendant had already set forth expert testimony establishing that she suffered from a "mental disease[,]" and while such lay testimony about what witnesses saw defendant do and what they heard her say was relevant to the defendant's mental or emotional state, ibid., Risden in no way endorses defendant's view that this lay testimony alone would have been sufficient to plead insanity.

Nor does State v. Scelfo, 58 N.J. Super. 472 (App. Div. 1959). There, defendant claimed insanity and offered among other evidence the testimony from a Dr. Collins, "a well-known psychiatrist." Id. at 476. Dr. Collins testified that he had met with defendant on many occasions, and that defendant had been diagnosed with a "mental illness" known as "'schizophrenic reaction, chronic undifferentiated type,' a condition which is also known as *dementia praecox*." Id. at 476-77.[14] Both Dr. Collins and another expert "testified unequivocally that during [the crime] Scelfo was unaware of the nature and quality of his acts and did not understand the difference between right and

[14] The panel initially referred to this testimony as "lay testimony," id. at 476, but later in the opinion correctly notes that this was "medical" and "expert" testimony, id. at 477.

wrong. Thus the opinions were in accord with the M'Naghten rule." Id. at 478. Defendant thus did present expert testimony on the issue of his insanity.

The court went on to observe that when determining mental capacity, "the jury is entitled to consider the conduct of the accused as it appeared to lay observers at the time of the crime." Id. at 477-78. Again, the State does not disagree. Lay testimony is certainly permissible on the question of defendant's actions, statements, and character at the time of the offense, and such testimony could be used by a jury to buttress or discredit the testimony of either side's expert, but Scelfo does not hold or even suggest that lay testimony alone would be sufficient to establish the factual basis necessary to advance the insanity defense.

Finally, Estate of Nicholas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571 (App. Div. 2006), is easily distinguishable. There, this Court addressed N.J.S.A. 2A:14-21, a tolling provision in the Law Against Discrimination applicable if the plaintiff has "a mental disability that prevents the person from understanding his legal rights or commencing a legal action at the time the cause of action or right or title accrues…." In addressing this same civil statute, the Supreme Court noted that "'insanity' has many meanings, for, one may be insane for one purpose and sane for another." Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 113 (1965). That statute does not

require the plaintiff to show a "defect of reason" caused by a "disease of the mind," only "a mental disability." As noted earlier, "[t]he insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning." Cannel, ante. "Mental illness does not in and of itself eliminate moral blameworthiness under the test for criminal insanity enshrined in the Code…." Singleton, 211 N.J. at 160.

Nor does the Model Jury Charge aid defendant's position. (Db20-21). The charge correctly points out that legal insanity is not always in harmony with the views of psychiatrists, and jurors should judge all evidence admitted at the trial that bears upon defendant's mental condition. (Db20) (quoting Model Jury Charges (Criminal), "Insanity" (rev. 10/17/88)). But in fact, the charge presumes jurors will "have heard from witnesses who have testified for the defense and for the State" as to defendant's medical condition. Ibid.

Additionally, while model jury charges may sometimes be persuasive, they "are not binding statements of law." State v. O'Donnell, 255 N.J. 60, 79 (2023). They should not be used "to interpret the meaning of" criminal statutes like N.J.S.A. 2C:4-1. Ibid. Given the plain language of N.J.S.A. 2C:4-1, and the New Jersey and out-of-state caselaw discussed herein, any contrary statement in the model charge should be disregarded.

Finally, contrary to defendant's claim, (Db22-25), the judge's ruling

barring insanity for lack of supporting evidence did not prohibit defendant from testifying, if he so chose. Criminal defendants, like any other witness, can only testify about what they have firsthand knowledge of, or are otherwise qualified to testify about. Here, there was no proffer defendant was qualified to give fact or opinion evidence on whether he was "laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." N.J.S.A. 2C:4-1. He certainly could have testified to his own state of mind at the time of the crimes or provided the jury with his version of what happened that day. He could have sought to walk back his damning confession or try to explain away the victims' DNA on his pants and gloves. But defendant was not a doctor, so he could not have competently testified that he suffered from some "disease of the mind" that could lead the jury to conclude he was not guilty by reason of insanity. See Mullis, 351 S.E.2d at 925 ("[T]he witness was a layman, not a doctor, and could therefore not draw a medical conclusion…. Lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition."). Defendant was free to testify, but his testimony, like that of any other witness, had to be relevant and competent. It would have been neither as to N.J.S.A. 2C:4-1 insanity.

Defendant confuses "insanity" under N.J.S.A. 2C:4-1 with "state of mind." (Db24). Of course, defendant was free to testify as to his state of mind and argue to the jury that he lacked the requisite state of mind to commit the charged offenses. But he was unqualified to testify that such was the result of a "disease of the mind." That failure of proof rendered the insanity defense unavailable to him.

Any error is harmless in this case.

Finally, it is well established that appellate courts should reject as harmless errors that are not clearly capable of producing an unjust result. State v. Macon, 57 N.J. 325, 336, 337-38 (1971); R. 2:10-2. While it may be unusual to argue that the complete denial of a defense could ever be harmless, that is the case here. Any testimony by defendant, a layman, that he was "insane" at the time of the crimes, would have been "dubious" at best. See Ake, 470 U.S. at 90 (Rehnquist, J., dissenting) ("The evidence of the brutal murders perpetrated on the victims, and of the month-long crime spree following the murders, would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder."). And it would have paled in comparison to: his own detailed confession, which "does not suggest insanity;" see ibid.; the deliberate way he carried out the murders; the State's expert opining that defendant was

sane; and that defendant was reading law books while in the jail and even admitted to "a mental health counselor that he was faking…mental illness so it would be in his records when he goes to court." (5T32-2 to 12); accord Ake, 470 U.S. at 90 (Rehnquist, J., dissenting) (noting Ake told a cellmate "he was going to try to 'play crazy.'"). Such evidence would have thoroughly discredited any self-serving lay testimony from defendant assessing his own mental capacity. So, even if the court's ruling barring the insanity defense was error—which again, it was not—that error must be deemed harmless.

For all these reasons, this Court should affirm defendant's convictions.

## Point II

**No plain error occurred when defense counsel elicited on cross-examination an answer he now doesn't like. At worst, any error was harmless. (Not raised below).**

Defendant next alleges that an answer to a question asked by his attorney on cross-examination led to the "improper admission of other-crimes evidence without any limiting instruction" and denied him a fair trial. (Db27). Counsel had no objection to the fleeting comment at the time, and no one ever mentioned the witness's answer again. The answer did not cause an unjust result and was harmless error at worst given the overwhelming evidence of defendant's guilt.

As defendant concedes, he did not object to the answer to his counsel's

own question that he now claims deprived him of a fair trial. This Court therefore reviews his contention for plain error. R. 2:10-2; State v. Johnson, 421 N.J. Super. 511, 521 (App. Div. 2011). That means the error must be "sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached[.]" State v. Taffaro, 195 N.J. 442, 454 (2008); see also Macon, 57 N.J. at 336.

Similarly, appellate courts should deem harmless errors that are not clearly capable of producing an unjust result. Id. at 337-38; R. 2:10-2. The "overwhelming evidence" against a defendant is a factor to be considered when determining whether an error is harmless. State v. Derry, 250 N.J. 611, 634 (2022); State v. Trinidad, 241 N.J. 425, 452 (2020). In the end, the issue is "whether in all the circumstances there was a reasonable doubt as to whether the error denied a fair trial and a fair decision on the merits." Macon, 57 N.J. at 337-38. "When, as here, the error is the improper admission of evidence, an error is harmless if the untainted evidence is so overwhelming that in the judgment of the reviewing court conviction was inevitable." State v. Burney, 255 N.J. 1, 33 (2023) (citation and marks omitted).

Such was the case here. Any error was far from "plain," and was at worst harmless given the overwhelming evidence of defendant's guilt. While defendant would have this Court review the allegedly improper answer to his

own counsel's question in isolation, see (Db27), context here is important.

Shyleea had identified defendant both in and out of court as the person who broke in, viciously attacked six people, killing three of them, and had her stab Asaad and Asiyah. See (19T20-11 to 21-5, 59-1 to 60-15). The defense's theory was that Shyleea, although never charged with anything, was more responsible than the State would have the jury believe.[15]

During cross-examination, defense counsel first reminded Shyleea that she had given a videotaped statement to detectives shortly after the incident. (19T69-13 to 70-17). He then brought up Shyleea's mother, Venus Ryan, and asked Shyleea about a dating relationship her mom had with defendant. Shyleea responded: "That's not for me to speak about. I have no idea. I was not with her at the time. I was in DYFS, and I was moving around. I was not with her at the time." Shyleea said she was not living with Venus "at the time she was dating him." Shyleea acknowledged knowing defendant for a long time and that "[h]e was a family friend." (19T70-25 to 71-15).

Counsel then pressed Shyleea on how she knew defendant so well if she wasn't with her mother at that time. Shyleea said he had seen him outside her

[15] See, e.g., (11T41-10 to 14) ("Shyleea [] was complicit in terms of doing the stabbing that caused much of the injury that you're going to hear. And yet for some reason, and I still don't know the answer to it, she was never charged with anything."); (22T29-20 to 22) ("We can't determine whether it was Shyleea [] or whether it was [] Arrington that delivered those death blows.").

school, and a few days before the incident he was talking to other people in front of the house. Counsel then asked Shyleea, "So you never saw him…while…he was with your mother?" Shyleea answered, "One time, one incident, he was at the house. And this is the first day I came to live with her. And they had a incident. She came running in my room with a bloody mouth and told me that he punched her in her face…. Yeah. That's the only incident I remember. And to me, that's not a relationship." (19T71-16 to 72-10).

Counsel did not object to this answer and instead pressed on. He asked Shyleea if the three of them went anywhere together, like school or events at school. She said no. Then counsel asked if defendant ever went to school with her, prompting her to recall that "I remember this one time he tried to walk with me to school. I remember I was scared because I heard that he did things around, and he was on the run. And so, I continued walking with him. I told him I didn't have any phone on me, and I did. And right after that, I let my mom know what happened." (19T72-11 to 22).

Counsel did not object to this answer either. Instead, he kept pushing the issue, attacking Shyleea's credibility as to how well she knew defendant. He then asked her if she recalled "how long before this incident that we're talking about that took place when he walked you to school?" Shyleea replied, "This was a little bit -- I think -- I think this was -- I'm not sure. This was after

an incident about him raping my mother." Counsel yet again did not object, but said, "Right. And how long before the incident we're talking about at the apartment?" Shyleea answered, and counsel eventually moved off this line of questioning and back to her videotaped statement. (19T72-23 to 74-6).

Counsel made the strategic decision to attack Shyleea's credibility by probing into her previous encounters with, and knowledge of, defendant. This obviously included a prior incident where Shyleea believed defendant had raped her mother. Even after Shyleea answered other questions on cross-examination with lengthy answers, counsel continued to press the issue. And it was obviously of no concern to defense counsel, who quickly said "Right" and then kept asking Shyleea about how long she knew defendant.

Defendant fails to show how this answer "was clearly capable of an unjust result," R. 2:10-2, and "led the jury to a result it otherwise might not have reached[,]" Taffaro, 195 N.J. at 454. The evidence against defendant, set forth in the Counterstatement of Facts, post, was overwhelming. The multiple identifications by the eyewitness-victims, his DNA, and his confession all establish, beyond all doubt, that defendant committed these offenses. Shyleea's comment was fleeting, never again repeated, and never mentioned again by anyone. This one line by one witness, elicited by defendant's own counsel and then never mentioned again during the one-month trial, was not

clearly capable of producing an unjust result.

Defendant argues that "[w]hen the State seeks to use [N.J.R.E.] 404(b) other crimes evidence at trial," it must provide notice and then satisfy the Cofield criteria, and then the judge must provide a limiting instruction as to the evidence's proper use. (Db28-29) (referring to State v. Cofield, 127 N.J. 328 (1992)). That's all true. But defendant forgets that the State never sought to admit this evidence, nor did it ever use it in any way; rather, it was elicited by defendant's own attorney. He did not ask the judge to strike the comment or for any instruction. Counsel wisely let it go, and the jury surely did too. This was not a sexual assault case, nor was Shyleea's mother a victim or a witness. The comment was so gratuitous that it could not have had any bearing on the issues the jury was there to decide, rendering its utterance altogether harmless.

At bottom, the jury did not convict defendant based on Shyleea's fleeting answer to his attorney's question, but instead on the overwhelming evidence of his guilt. No basis exists to disturb that conclusion.

## Point III

### The sentences on the three attempted murder counts are illegal.

At sentencing, the judge reasoned that defendant attempted to kill six people—he shot one and stabbed five others, successfully killing three and failing to kill the other three. The judge found that because defendant

"attempted…to murder five or more persons," the extended sentencing range in N.J.S.A. 2C:5-4 applied, and he gave extended terms for each of the three counts (10, 13, and 16) of attempted murder. See (24T92-2 to 25).

On appeal, defendant does not challenge the consecutive nature of any of his sentences, or the judge's findings that the aggravating factors clearly outweigh the mitigating ones. Rather, he claims only that his sentences on the three counts of attempted murder are illegal. (Db31-33).

The State is compelled to agree that the extended-term sentences on counts 10, 13, and 16 are illegal, for the reasons set forth by defendant in his brief. That said, as to remedy, the State would ask that this Court spare the victims of defendant's crimes another sentencing proceeding and merely remand with instructions that the trial court amend the judgment of conviction to impose consecutive 20-year terms subject to the No Early Release Act on those counts. See N.J.S.A. 2C:43-6a(1); N.J.S.A. 2C:43-7.2d(a). This Court has the authority to do so. See R. 2:10-3 ("If a judgment of conviction is reversed for error in or for excessiveness or leniency of the sentence, the appellate court may impose such sentence as should have been imposed…."); R. 2:10-5 (granting this Court the power of original jurisdiction to "complete [the] determination of any matter on review."). Given that defendant does not challenge Judge Wigler's findings as to aggravating and mitigating factors or

that consecutive sentences were appropriate for the attempted-murder counts, there is no doubt the judge would have imposed such a sentence. Doing so here would serve the interests of justice and judicial economy, and, most importantly, save the victims from having to appear and speak at another sentencing proceeding when the practical effect of defendant's sentence will not change. See N.J.S.A. 52:4B-35, -36d.

## Conclusion

Other than the change of sentence explained in Point III, this Court should affirm defendant's judgment of conviction in all respects.

Respectfully submitted,

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