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July 28, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2638-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	ON APPEAL FROM FINAL ORDER DENYING
	:	PETITION FOR POST-CONVICTION RELIEF,
v.	:	SUPERIOR COURT OF NEW JERSEY, LAW
	:	DIVISION, MIDDLESEX COUNTY
DANA KEARNEY,	:	
	:	INDICTMENT NO. 16-10-01645
Defendant-Appellant.	:	
	:	SAT BELOW:
	:	THE HONORABLE COLLEEN M. FLYNN,
	:	P.J.Cr.
	:	

BRIEF FOR DEFENDANT-APPELLANT CONFINED

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TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

INDEX TO APPENDIX

[1] The petition for post-conviction relief is tantamount to a complaint and thus is included in the appendix pursuant to Rule 2:6-1(a)(1).

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CASES CITED

[2] This brief, being germane to an issue on appeal, is included in the appendix pursuant to Rule 2:6-1(a)(2).

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UNITED STATES CONSTITUTION CITED

RULE CITED

PROCEDURAL HISTORY

On October 21, 2016, Middlesex Superseding Indictment No. 16-10-01645 was filed, charging defendant with second-degree conspiracy to commit aggravated assault, contrary to N.J.S.A. 2C:5-2a and 2C:12-1b(1) (count one); first-degree purposeful or knowing murder, contrary to N.J.S.A. 2C:2-6a and 2C:11-3a (count two); third-degree endangering an injured victim, contrary to N.J.S.A. 2C:12-1.2a (count three); second-degree hindering his own apprehension, contrary to N.J.S.A. 2C:29-3b(3) (count five); and third-degree witness tampering, contrary to N.J.S.A. 2C:28-5a (count six). Shane Timmons was charged in counts one through four of the indictment, and Joseph Kearney was charged in counts one and two of the indictment. (Da 1 to 3).[3]

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3 "Da" denotes defendant's appendix.
"1T" denotes motion transcript dated May 3, 2017.
"2T" denotes hearing transcript dated May 16, 2017.
"3T" denotes motion to be relieved transcript dated May 22, 2017.
"4T" denotes motion transcript dated May 22, 2017.
"5T" denotes hearing transcript dated May 23, 2017.
"6T" denotes hearing transcript dated June 19, 2017.
"7T" denotes hearing transcript dated July 5, 2017.
"8T" denotes hearing transcript dated July 6, 2017.
"9T" denotes hearing transcript dated July 18, 2017.
"10T" denotes trial transcript dated July 19, 2017.
"11T" denotes trial transcript dated July 20, 2017.
"12T" denotes trial transcript dated July 24, 2017.

(Continued)

The defendant was tried before the Honorable Joseph Paone, J.S.C., and a jury, from July 19 to September 5, 2017. (10T to 29T). He was convicted of all the charges. (Da 4 to 7).

On December 22, 2017, Judge Paone imposed an aggregate 50-year sentence with 40 years subject to the No Early Release Act (NERA), broken down as follows: 40 years of imprisonment for the murder; five years for endangering an injured victim; ten years for hindering; and five years for witness tampering. The court ordered that the hindering count run concurrently to the

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"13T" denotes trial transcript dated July 25, 2017.
"14T" denotes trial transcript dated July 26, 2017.
"15T" denotes trial transcript dated August 2, 2017.
"16T" denotes trial transcript dated August 3, 2017.
"17T" denotes trial transcript dated August 14, 2017.
"18T" denotes trial transcript dated August 15, 2017.
"19T" denotes trial transcript dated August 16, 2017.
"20T" denotes trial transcript dated August 17, 2017.
"21T" denotes trial transcript dated August 18, 2017.
"22T" denotes trial transcript dated August 21, 2017.
"23T" denotes trial transcript dated August 22, 2017.
"24T" denotes trial transcript dated August 23, 2017.
"25T" denotes trial transcript dated August 24, 2017.
"26T" denotes trial transcript dated August 29, 2017.
"27T" denotes trial transcript dated August 30, 2017.
"28T" denotes trial transcript dated August 31, 2017.
"29T" denotes trial transcript dated September 5, 2017.
"30T" denotes sentencing transcript dated December 22, 2017.
"31T" denotes post-conviction relief hearing transcript dated January 19, 2023.

murder count; that the witness tampering count run consecutively to the endangering count and the murder count; and the conspiracy count merge with the murder count. The court also imposed the mandatory fees and fines and restitution of $2500. (30T 82-25 to 83-10; Da 8 to 11).

On January 7, 2020, the Appellate Division affirmed defendant's convictions and sentence. (Da 12 to 112).

On November 2, 2020, the Supreme Court denied defendant's petition for certification. (Da 113).

On April 1, 2021, defendant filed a petition for post-conviction relief (PCR), along with his brief. (Da 114 to 139).

On January 19, 2023, the Honorable Colleen M. Flynn, P.J.Cr., heard argument regarding the petition (31T), and on February 1, 2023, issued an opinion and order denying relief except for vacating the imposed restitution. (Da 140 to 164).

On March 5, 2023, defendant filed a notice of appeal. (Da 165 to 168).

STATEMENT OF FACTS

Defendant Dana S. Kearney was convicted of, inter alia, murder, arising from the fatal stabbing of Christopher Sharp. The stabbing occurred during a party at the home of Alicia Boone, located at 143 William Street in Perth Amboy, which was also the defendant's residence. (20T 117-6 to 13).

Sharp's body was found on the floor of the living room of 143 William Street by Perth Amboy EMT Dennis Patrick, at 2:04 a.m. on August 18, 2013, following a 911 call. Patrick saw stab wounds to Sharp's chest, and that he had no pulse. (13T 112-15 to 115-14).

Dr. Andrew Falzon, who conducted the autopsy, testified that Sharp's death was caused by three stab wounds to the chest, one of which penetrated his heart and left lung. (15T 26-18 to 27-1; 15T 32-1 to 39-22; 15T 50-17 to 51-1). The knife that inflicted the wounds was not found. (15T 204-12 to 23). Falzon found Sharp's blood alcohol level to be 0.211 percent, more than twice the legal limit for intoxication. (15T 49-19 to 25). Falzon testified that Sharp would have died within a minute of the infliction of the fatal wound. (15T 61-13 to 17).

Alicia Boone, Christopher Sharp's cousin, lived at 143 William Street with her children Ayanna, Erizah, and three-month-old Josiah, and Dana Kearney, Josia's father. (20T 113-25 to 114-10; 20T 117-14 to 118-6; 20T 126-

17 to 19; 21T 103-23 to 25; 21T 144-20 to 24; 22T 158-12 to 16). Also, Ms. Boone's goddaughter, Nadia Bell, was spending the night at the home on the night of the killing. (21T 159-17 to 23).

The party held on the night of the killing was for the birthday of co-defendant Shane Timmons. Attending the party, in addition to the people who lived in the house, were Sharp, Timmons (known as "Jamel"), Timmons' cousin Tori Evelyn, and the defendant's cousin, Joseph Kearney[4], known to Evelyn as "Hood." (16T 104-7 to 22; 20T 126-6 to 13). Evelyn knew the defendant as "Moose." (16T 98-20 to 99-7; 16T 105-25 to 106-1). Timmons had arrived at the house with Evelyn, in Evelyn's van. (16T 104-7 to 105-9).

Also present at some point during the night were Boone's sister Bria Williams, Brittany Gibbons, and two other women. (20T 132-3 to 19; 24T 175-22 to 176-9). Evelyn testified that a man with flower tattoos on his arm and "a Spanish guy" also were at the party. (16T 38-12 to 39-6; 16T 50-18 to 20; 19T 140-13 to 141-15).

Evelyn testified that at the party, Timmons, Sharp, Joseph, and Dana were playing cards. (16T 106-18 to 107-2; 16T 114-5 to 12; 20T 133-4 to 12).

[4] For brevity, Joseph Kearney and Dana Kearney will generally be referred to by their first names.

According to Evelyn, the participants were drinking alcohol at least as early as 6:45 p.m. (16T 106-10 to 17; 19T 129-4 to 5). During the evening, Boone's step-father, Barry Gibbons, brought Bria Williams and her friends to the house; at that time, according to Gibbons, both Sharp and Joseph had passed out from alcohol. (22T 37-12 to 39-5; 22T 104-6 to 20).

Alicia Boone testified that she and the children went upstairs to bed at about the time that Gibbons arrived. (20T 133-1 to 12). At about 12:30 a.m., Boone went downstairs to get water. (20T 133-13 to 136-9). She saw Sharp and Joseph asleep on separate couches in the living room; Joseph had vomited on himself and on the couch. (20T 136-10 to 21). She also saw that the front door to the house was open. (20T 136-22 to 137-10). Dana was not home at the time, and Boone called him to ask why the door was open and the house was in disarray. Dana replied that he would come home. (20T 137-16 to 138-10).

A car containing Dana, Timmons, and Evelyn arrived in the driveway of 143 William Street at 1:13 a.m. (19T 39-1 to 19; 19T 150-13 to 151-12). Boone testified that Dana went upstairs and told her that Sharp had urinated on the floor. (20T 140-6 to 141-6; 22T 39-1 to 5). Boone went downstairs in response; Gibbons was present when she did so. (20T 140-24 to 141-4). According to Boone, Joseph and Timmons were arguing at that time, while Sharp was still

asleep on the couch. (20T 143-19 to 144-9). Dana was cleaning up and yelling at Sharp to get up. (20T 144-10 to 16; 20T 148-7 to 11).

Boone continued that she went back upstairs, but returned to the living room after hearing another commotion. She testified that Dana and Joseph were arguing, while Sharp remained asleep. Boone told the men to leave, but no one obeyed her. (20T 148-14 to 149-11; 20T 150-5 to 151-12).

At that point, Sharp arose and got between Joseph and Dana. Boone grabbed Dana by his shirt, ripping it. (20T 151-13 to 152-17). According to Boone, Timmons then became involved: Timmons was on one of the couches, holding Sharp in a headlock and fending Joseph off with his other hand. Evelyn also testified that Timmons was trying to separate the two. (20T 152-18 to 155-1). At that point, Evelyn testified, Joseph told him to go outside, and he went to the front porch. (19T 55-14 to 57-22).

Evelyn, after being shown a statement he had given to the police, testified that he saw Dana and "the other guy" fighting. (16T 125-14 to 126-13). He later testified that Sharp was fighting with the man with a flower tattoo. (20T 38-11 to 39-6). Dana exhibited to the jury that he has no tattoo. (20T 39-23 to 40-4).

Boone testified that at that point, she asked Sharp to go to her grandmother's house, where Sharp lived, but he refused. (20T 156-13 to 21; 20T 157-5 to 22). Boone decided to get the children and leave the house. She awakened her children and Nadia Bell. (20T 161-16 to 162-12; 21T 109-14 to 18; 21T 147-7 to 15; 21T 161-4 to 11).

While Boone was waking the children, Dana came upstairs. (20T 162-2 to 20). Ayanna testified that she saw Dana go into a nightstand in his bedroom and retrieve an object, but could not recall what it was. However, in her statement to police, she described the object as a "blade," and also as a silver and black switchblade knife. (21T 110-1 to 113-6; 21T 118-2 to 21). Ayanna added that she thought that Dana was getting ready to fight, and that he then went downstairs. (21T 113-7 to 114-15). Nadia Bell also testified that she saw Dana retrieve an object, which she could only describe as "small," from the nightstand. (21T 162-2 to 16).

Boone left the house with the children and took them to her mother's home, a short distance away. She testified that she did so because a fight was apparently about to occur; Sharp was angry and was getting ready to fight someone. (20T 162-2 to 164-6). Tori Evelyn was on the front porch, when

Boone and the children left the house and entered Boone's car. (20T 164-2 to 165-14).

As Boone was about to drive away, Dana exited the house, entered her car, and told her to take him to Plainfield. (20T 166-1 to 19). She instead drove to her mother's house. On the way, she passed her step-father Barry Gibbons, driving toward her house. (20T 167-16 to 168-25). Gibbons testified that he intended to bring Sharp home. (22T 40-8 to 17).

Boone testified that when she arrived at her mother's house, the children went inside, but Dana remained outside and asked her to take him back to 143 Williams Street. (20T 169-1 to 11). When Boone refused, she testified, Dana told her that he had to go back because there was "something wrong with" Sharp, because "he's been poked," or "something to that effect." (20T 169-12 to 170-15).

Boone testified that she then spoke with her mother, who tried to call Gibbons to ask him to find out what was going on at the house. Boone's mother could not reach Gibbons, but spoke to Dana, who told her that Chris had "gotten cut." (22T 159-24 to 160-19).

Evelyn testified that at about 1:45 a.m. (after Sharp had arisen), he (Evelyn) went out to his van. (19T 171-3 to 24). Timmons came out as well

and told Evelyn that he thought Sharp was "knocked out." (19T 182-12 to 18). Evelyn's statement related that Timmons went back into the house and emerged at 1:50 a.m. with something in his hand, which could have been a shirt. (18T 73-1 to 76-1; 19T 187-10 to 188-21). Timmons told Evelyn to wait for Joseph. (18T 81-1 to 9; 19T 191-6 to 24; 19T 194-3 to 195-18).

According to Evelyn's statement, at 1:58 a.m., Dana came out of the house. (19T 199-8 to 24). At 2:02 a.m., Timmons, Dana, and Joseph entered Evelyn's van. (18T 90-8 to 91-10; 19T 208-17 to 209-25). Evelyn dropped off Dana and Joseph, and then took Timmons home. (19T 98-3 to 17; 19T 210-25 to 212-11).

Gibbons testified that when he arrived at the house at about 1:58 a.m., Dana was exiting the front door. (22T 43-3 to 22). Gibbons went inside and saw Sharp lying on the floor, and called 911. (22T 44-2 to 17). When Gibbons later spoke with Boone's mother, he said, concerning Sharp, "It doesn't look good." (22T 163-2 to 6). In Evelyn's statement to police, he said that Joseph and Timmons appeared to be in shock, thinking that they have "knocked [Sharp] out." (19T 61-3 to 62-19).

Defendants Dana Kearney, Joseph Kearney, and Shane Timmons gave lengthy statements to the police. Dana denied being present when Sharp was

stabbed. (24T 153-8 to 12). Joseph maintained that he had fallen asleep as the result of excessive drinking and was not involved in an altercation with Sharp. (24T 37-14 to 39-13; 24T 57-21 to 25; 24T 97-3 to 10). Timmons stated that he had not witnessed an argument at the house. (23T 246-10 to 13).

All three defendants told the police that they left 143 William Street no later than midnight, and went to a club in Plainfield. (23T 215-16 to 216-20; 23T 41-8 to 9; 24T 57-21 to 25; 24T 156-11 to 20). Tori Evelyn initially stated that he also had left the scene to go to a club in Plainfield. (16T 196-1 to 15).

As noted, Evelyn maintained that he was not involved in the stabbing and had not witnessed it. He testified that after other men arrived at the house, a fight between Dana and Joseph had broken out; after being confronted with his statement, he said that the fight had "calmed down." (16T 107-8 to 114-22; 16T 117-19 to 18-12). He also testified that after he went onto the porch, another fight did not ensue after he had re-entered. (16T 118-3 to 121-20).

At trial, Evelyn repeatedly maintained that he did not remember portions of his statement, and that reviewing a transcript of the statement did not refresh his recollection. (16T 136-10 to 137-23; 16T 146-5 to 147-5). Evelyn also acknowledged having told various lies to the questioners. (19T 219-8 to 13; 19T 231-2 to 10; 20T 37-1 to 4). On cross-examination, Evelyn testified that much

of his statement and testimony was false, including the time that he had arrived at the house; when people left; where they went when they left; and the number of people at the party. (19T 229-1 to 231-10; 19T 232-17 to 24; 20T 61-4 to 62-11). He acknowledged that he was concerned for himself in giving the statement, and that he did not believe the questioning officers' assurances that he would not go to jail. (20T 13-6 to 20). Additionally, Evelyn made numerous references in his statements to the danger that he would be in because of giving a statement. (18T 282-20 to 283-23).

The court allowed Evelyn's statement to the police as a prior inconsistent statement. (18T 169-11 to 181-4). He maintained in his statement that he was not involved in the killing, and did not witness it because he had been told to go outside by Joseph. (19T 57-12 to 58-10). He also stated that he had left the house with Timmons and Joseph, dropped Joseph off in Plainfield or Westfield, and returned home with Timmons. (19T 63-1 to 17; 19T 67-1 to 68-5). Evelyn also stated to police that when he went back into the house, he saw the victim on the floor, and agreed with a questioner's characterization that "everybody appears to be in like a shock [,] kind of like holy shit, we knocked ... this guy out or whatever...." (19T 66-1 to 10). Evelyn stated that no one helped the

victim, and that he decided to leave and was accompanied by Timmons and Joseph when he did so. (19T 67-1 to 22).

Evelyn also stated that his initial account of leaving the party at 11:30 or 12:00 to go to a club in Plainfield was a "story" devised outside of the house by "the dude in the tank [top]." (19T 69-13 to 73-15; 19T 170-10 to 15). He maintained in his statement that he had taken Dana and Joseph to Plainfield, drove them around "trying to find somewhere to go," and then dropped them off at home. (19T 209-15 to 212-4). Evelyn maintained that he did not do "anything" to the victim. (19T 216-13 to 17).

Alicia Boone also gave statements to the police. As noted previously, she testified that Dana had told her that Sharp had been "poked." She testified that the transcript of her first statement reflects that she told the police that Dana had said that he thought the victim had "got cut," but acknowledged that she did not recall whether he had said "got cut ... or he got poked ...," and had told the police that she did not recall. (20T 171-18 to 172-22).

Boone acknowledged that in a second statement, given later on the same day, she asserted that Dana had said, "'I poked him.'" (20T 174-5 to 13). However, she testified that she did not recall Dana saying that. (20T 176-11 to

19). Boone also stated, concerning Dana, "He's so mean. And he has people," and "I can't have anything happen to me or my family...." (21T 64-19 to 65-1).

Boone testified that she had said that Dana related he had "poked" the victim only after speaking with Carlos Rodriguez of the Perth Amboy Police Department. She testified that Rodriguez had "scared" her by "insinuat[ing]" that she "was not going home." (20T 228-15 to 14). She also testified that seven hours passed between her two statements and that she did not eat during that time, although she was offered a croissant. (20T 225-3 to 14). She also testified that she was in the police station for 16 hours and was not permitted to go to the bathroom and had urinated on herself twice during that time, adding, "So when I went in to speak with [Rodriguez] ... it was just whatever they want." (20T 230-10 to 21).

Crime Scene Investigator Bree Curran found a bloody palm print on the banister of the outside staircase to 143 William Street and a bloody fingerprint on the storm door. (14T 14-21 to 16-3; 14T 98-2 to 99-11). Curran identified both prints as belonging to Joseph. (14T 105-9 to 107-13; 14T 142-16 to 143-16; 14T 146-7 to 12). Curran testified that fingerprints belonging to Dana were found on a mirror and various bottles located in the house, including a beer bottle in the living room; Curran acknowledged that none of Dana's prints were

bloody, and that he lived in the house. (14T 90-3 to 92-12; 14T 158-12 to 159-12). James Napp, of the Union County Prosecutor's Office, who was qualified as an expert in fingerprint analysis, verified Curran's conclusions. (15T 134-4 to 136-15).

Specimens from clothing found at the scene and clippings from Sharp's fingernails were submitted for DNA analysis. One of the clippings from Sharp's right hand contained DNA from someone other than Sharp, from which Dana and Joseph could not be excluded as the contributors. (23T 108-2 to 109-15). Joseph's DNA also was detected on the banister. (23T 138-15 to 25).

Dana declined to testify. (26T 139-4 to 7).

LEGAL ARGUMENT

POINT I - TRIAL COUNSEL'S INHERENT CONFLICT OF INTEREST, THAT THE STATE'S MAIN WITNESS HIRED AND PAID FOR DEFENDANT'S TRIAL COUNSEL, CONSTITUTES PER SE INEFFECTIVENESS AND MANDATES THAT DEFENDANT'S CONVICTIONS BE REVERSED; IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS. (Da 148 to 150; Da 161 to 162)

Alicia Boone, Christopher Sharp's cousin (20T 126-17 to 19) and defendant's girlfriend and the mother of his son (20T 113-25 to 114-2), testified that she had three meetings with defendant's trial counsel to discuss payment to represent defendant. (21T 4-25 to 5-10). She eventually hired and paid counsel to represent defendant. (21T 82-26 to 83-4).

In his PCR brief, defendant claimed that his trial counsel's having "accepted payments from the State's main witness [Alicia Boone], which was the victim's cousin and girlfriend to the defendant," constituted a conflict of interest, thereby depriving him of effective assistance of counsel. (Da 117).

PCR counsel reiterated this claim at the hearing, emphasizing that this conflict constituted "per se ineffectiveness." (31T 10-14 to 11-21).

The PCR court, in rejecting this claim, reasoned, in pertinent part:

> The State acknowledges that Boone was the State's main witness, but it contends that she did "nothing more than hire an attorney for her boyfriend."
>
> While it may be atypical for a victim's cousin and the State's main witness to pay for the petitioner's legal fees these facts alone do not create an actual conflict of interest. The interactions between trial counsel and Boone were limited in nature, arising early in the litigation when Boone made payments to trial counsel for his services. Boone is not alleged to have discussed the substance or case strategies with trial counsel. Nor did her communications with trial counsel extend beyond discussing payment. This case went on for several years, without any indication of further communication between Boone and trial counsel. Additionally, trial counsel's decision to refer Boone to another attorney, showcases his attempts to prevent any appearance of impropriety, and to a greater extent, any actual conflict of interest and protect the petitioner.
>
> Trial counsel should only be disqualified when there is a "high risk of impropriety," which the court does not find occurred here. As the petitioner highlights, the New Jersey Rules of Professional Conduct make clear that "counsel's judgment [must not be ...] impaired by divided loyalties or other entangling interests." In 2006, the "appearance of impropriety" test was replaced and instead disqualification of counsel is warranted when there is a finding of "actual conflict." Based on Boone's trial testimony, she indicated that her communications with trial counsel were limited to "three" occasions in which she and trial counsel discussed "payment." Moreover, she confirmed that "she hired her own lawyer" in preparation for trial. Again, based on the limited interaction between Boone and trial counsel, it cannot be said there was an actual conflict of interest. The record reflects that as the petitioner's girlfriend, Boone interacted with trial counsel solely for the purpose of paying the legal fees. Without more, these limited interactions did not create an actual conflict. Based on the totality of the circumstances, there was no per se conflict or improprieties as to trial counsel's responsibilities towards the petitioner.
> [Da 148 to 150 (footnote citations omitted).]

The PCR court erred in denying relief.

The Sixth Amendment right to effective assistance of counsel was defined by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). There, the Court established its familiar two-pronged test. Id. at 683-87. The first prong requires a showing of deficient performance by counsel. Id. at 687. The second, or "prejudice" prong of the Strickland test, compels showing that "the deficient performance prejudiced the defense." Accordingly, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid.

In United States v. Cronic, 466 U.S. 648, 659-62 (1984), the United States Supreme Court identified three rare instances in which counsel's performance is so deficient that prejudice is presumed. The first and "[m]ost obvious ... is the complete denial of counsel" during "a critical stage of ... trial." Id. at 659. The second occurs when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Ibid. The third occurs "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not," such as a conflict-of-interest situation. Bell v. Cone, 535 U.S. 685, 696 (2002) (citing Cronic, 466 U.S. at 659-62).

Our Supreme Court has adopted the standard of Strickland and Cronic as the benchmark for which a violation of a right to counsel is measured by the New Jersey Constitution. State v. Fritz, 105 N.J. 42, 58 (1987). See also State v. Davis, 116 N.J. 341, 352-53 (1989):

> This [Cronic] test recognizes that when the level of counsel's participation makes the idea of a fair trial a nullity, no prejudice need be shown. It is presumed.... To establish this category of ineffective assistance, defendant is not required to show prejudice. That degree of deficient performance is tantamount to a "complete denial of counsel."
> [quoting Cronic, 466 U.S. at 659.]

Specifically, under both the State and Federal Constitutions, a conflict of interest may render an attorney's performance presumptively ineffective. Cronic, 466 U.S. at 662 n.31 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)); State v. Bellucci, 81 N.J. 531, 543-46 (1986). Our courts have repeatedly invoked "the accepted principle that a criminal defendant has the right to counsel 'whose representation is unimpaired and whose loyalty is undivided.'" State v. Alexander, 403 N.J. Super. 250, 255 (App. Div. 2008) (quoting State v. Murray, 162 N.J. 240, 249 (2000)). "That being the case, it becomes clear that an attorney hobbled by conflicting interests that so thoroughly impede his ability to exercise single-minded loyalty on behalf of the client cannot render the

effective assistance guaranteed by our constitution." State v. Cottle, 194 N.J. 449, 467 (2008).

Our courts apply "a two-tiered approach in analyzing whether a conflict of interest has deprived a defendant of his state constitutional right to the effective assistance of counsel." Ibid. (citing State v. Norman, 151 N.J. 5, 24-25 (1997)). First, the court must determine whether the conflict is a "per se conflict" - one of the certain attorney conflicts [that] render the representation per se ineffective." Cottle, 194 N.J. at 467, 470. If so, then "prejudice is presumed in the absence of a valid waiver, and the reversal of a conviction is mandated." Id. at 467.

Otherwise, absent a per se conflict, "the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in the particular case to establish constitutionally defective representation of counsel." Id. at 467-68 (quoting Norman, 151 N.J. at 25). This approach "provide[s] for broader protection against conflicts under the State Constitution than are provided by the Federal Constitution." Norman, 181 N.J. at 25.

Applying these principles, particularly regarding a per se analyses conflict, defendant's claim in the instant matter must prevail: trial counsel was

inescapably beholden to Alicia Boone, the State's acknowledged main witness, which might well have inhibited his cross-examination and summation regarding her, in gratitude for her past payments and/or so as to secure any balance of payments. Therefore, defendant's convictions must be reversed.

In the alternative, while evidentiary hearings are not required if a defendant has presented a prima facie case in support of PCR, an evidentiary hearing generally should be conducted. State v. Marshall, 148 N.J. 89, cert. denied, 522 U.S. 850 (1997). When determining the propriety of conducting an evidentiary hearing, the PCR court should view the facts in the light most favorable to the defendant. Ibid. (citing State v. Preciose, 129 N.J. 451, 462-63 (1992)). Accord State v. Porter, 216 N.J. 343, 354 (2013). If with the facts so viewed the PCR claim has a reasonable probability of being meritorious, then the defendant should receive an evidentiary hearing to prove his entitlement to relief. Ibid.

Consequently, at the very least, this matter must be remanded for an evidentiary hearing so as to resolve defendant's claim. Preciose, 129 N.J. at 464.

POINT II - TRIAL COUNSEL'S ABRIDGING DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY CONSTITUTES INEFFECTIVENESS OF COUNSEL AND MANDATES THAT DEFENDANT'S CONVICTIONS BE REVERSED; IN THE ALTERNATIVE, THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS. (Da 154 to 156; Da 161 to 162)

In his PCR brief, defendant claimed that his trial counsel deprived him of his constitutional right to testify. (Da 128 to 130).

PCR counsel elucidated this claim at the hearing:

> First, the defendant maintains that, despite his deep desire to testify at trial, his attorney told him not to. Nonetheless, he wanted to explain to the jury that he didn't stab anybody. You know, it's so fundamental for our system, our jurisprudence, is the right to testify on one's own behalf.
>
> Unfortunately, notwithstanding the defendant's intention and desire to profess his innocence at trial, according to Mr. Kearney, his attorney did not prepare him whatsoever for giving such testimony. Apparently, that was because counsel had no intention of -- of calling him as a witness.
>
> But, according to Mr. Kearney, they didn't discuss the -- the testimony that might have been elicited. They didn't talk about the type of questions that -- or even topics that might have been coerced. Didn't explain the difference between cross and -- and direct. And -- and Judge, it's so important because, you know, if you do get on the witness stand that as - as - as a direct witness, your attorney can't ask you leading questions.
>
> You know, how often do we see a defendant say, well, my lawyer never asked me that, or I -- you know, there -- there's a fundamental difference between direct and cross, and you -- you need to go over

> these types of generalities, explain the difference between, you know, cross and direct and preparing an individual for -- for direct testimony and then of cross.
>
> In this case, according to Mr. Kearney, his attorney told him that the State had the burden and so he shouldn't take the witness stand. And because of that, or the lack of preparation, Mr. Kearney now realizes that he wasn't, you know, in a position to make an informed and intelligent decision regarding whether or not he should take the witness stand on his own behalf.
>
> Again, he maintains his innocence, and he didn't testify by virtue of trial counsel's ineffective representation. And in particular, counsel's failure to properly prepare him for giving such -- such testimony. There -- therefore, Mr. Kearney maintains that not only he was denied the effective assistance of trial counsel, but by virtue of that ineffective representation, he was denied the right to testify on his own behalf. Again, a right that is just so fundamental to our system of prejudice.
> [31T 7-15 to 9-13.]

The PCR court, in rejecting defendant's claim, reasoned, in pertinent part:

> In the instant case, the trial record amply demonstrates that defendant knew he had the right to testify and voluntarily waived that right. Additionally, the record reflects that the petitioner told the judge that he had adequate time to discuss the potential of testifying with his lawyer. [26T 138-23 to 25.] Following the judge's questioning, the petitioner waived his right to testify. [26T 139-1 to 7.] Notwithstanding any alleged failure by trial counsel to discuss petitioner's right to testify - which is belied by the petitioner's sworn testimony that he <u>did</u> [emphasis as in original] - the trial judge's <u>voir dire</u> was sufficient to notify the defendant of his rights, which he ultimately waived.
>
> The court's colloquy with the petitioner included advising the petitioner that he could be cross-examined about his prior record of convictions. [26T 137-6 to 13.] It would fall within the realm of

> trial strategy decisions to avoid testifying in light of the petitioner's record. The law is well-established that, "in assessing the adequacy of counsel's performance, 'strategic choices made after thorough investigations of law and facts relevant to plausible options are virtually unchallengeable.'" From the premise it follows that, without more, a trial strategy's failure does not render performance deficient.
> [Da 155 to 156 (footnote citations omitted).]

Again, the PCR court erred in denying relief.

Indeed, it is firmly established under both the Federal and State Constitutions that a criminal defendant has the right to testify in his or her own behalf. Rock v. Arkansas, 483 U.S. 44, 53 (1987); State v. Savage, 120 N.J. 594, 627-28 (1990). "Few principles are more fundamental than a criminal defendant's right to testify in his own defense." State v. Lopez, 417 N.J. Super. 34, 39 (App. Div. 2010), certif. denied, 201 N.J. 520 (2011).

As with all constitutional rights essential to due process of law, a defendant's waiver of the right to testify must be knowing and intelligent, and there can be no effective waiver unless there is an "intentional relinquishment or abandonment" of this right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Moreover, because courts assume that defendants seek the advantage of this protection, they "indulge every reasonable presumption against waiver" of this precious constitutional right. Ibid. Accord State v. McCloskey, 90 N.J. 18, 25 (1982).

See also State v. Savage, 120 N.J. 594, 627 (1990), holding that in making this waiver, a defendant is entitled to the effective assistance of counsel:

> [W]e find that "it is the responsibility of a defendant's counsel, not the trial court, to advise defendant on whether to testify and explain the tactical advantages or disadvantages of doing so." Counsel's responsibility includes advising a defendant of the benefits inherent in exercising that right and to do so will give rise to a claim of ineffective assistance of counsel.
> [Citations omitted.]

Furthermore, see United States v. Lore, 26 F. Supp. 729, 734 (D.N.J. 1998), holding that "[i]t was the defendant's right to ultimately decide whether or not to testify," but "[b]y not protecting the right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the Strickland test." (Citation omitted.)

And as the United States Supreme Court has emphasized: "The most important witness for the defense in any criminal case is the defendant himself." Rock, 483 U.S. at 52.

Consequently, as set forth by PCR counsel, trial counsel's dissuading defendant from testifying - underscored by his not preparing defendant - negated any intentional relinquishment or abandonment of this right, thereby constituting ineffectiveness pursuant to the Strickland/Fritz two-pronged test and/or the Cronic/Davis per se analysis.

Therefore, defendant's convictions must be reversed or, in the alternative, this matter must be remanded for an evidentiary hearing to resolve defendant's claim. Preciose, 129 N.J. at 454.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the denial of defendant=s PCR petition and the convictions be reversed; or, in the alternative, this matter be remanded for an evidentiary hearing.

Respectfully submitted,

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