

SUPREME COURT OF NEW JERSEY
DOCKET NO. 090381
APP. DIV. DOCKET NOS. A-1374-23,
A-2164-23

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Movant,	:	On Grant of Motion for Leave to
	:	Appeal from a Final Order of the
v.	:	Superior Court of New Jersey,
	:	Appellate Division, Denying the
THOMAS J. DINAPOLI,	:	State's Motion for Reconsideration.
Defendant-Respondent.	:	Sat Below:
	:	Hon. Jack M. Sabatino, J.A.D.
	:	Hon. Katie A. Gummer, J.A.D.

BRIEF ON BEHALF OF AMICUS CURIAE
THE NEW JERSEY OFFICE OF THE PUBLIC DEFENDER

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

RACHEL A. NECKES
Assistant Deputy Public Defender
Attorney ID: 381892021
Rachel.Neckes@opd.nj.gov

Of Counsel and
On the Brief
July 25, 2025

TABLE OF CONTENTS

PAGE NOS.

PRELIMINARY STATEMENT.....1

PROCEDURAL HISTORY AND STATEMENT OF FACTS.....4

LEGAL ARGUMENT13

POINT I

THE DEFENSE EXPERTS’ OPINIONS ARE
RELEVANT TO PRONG ONE OF N.J.S.A. 2C:2-3c
BECAUSE THEY ARE PROBATIVE OF WHETHER
THE MANNER AND CHARACTER OF THE ACTUAL
RESULT (MELE’S DEATH) WAS WITHIN THE RISK
OF WHICH DINAPOLI WAS AWARE WHEN HE
ALLEGEDLY DROVE RECKLESSLY.13

A. The Statute’s Plain Language, Case Law, and
Model Penal Code Demonstrate that Prong One
Requires the Jury to Compare the Risked Result
with the Manner and Character of the Actual
Result.16

B. The State’s Position Must Be Rejected Because It
Will Nullify Prong One and Unjustly Expand
Liability for All Defendants.26

POINT II

THE DEFENSE EXPERTS’ OPINIONS ARE
RELEVANT TO PRONG TWO OF N.J.S.A. 2C:2-3c
BECAUSE THEY RAISE AN ISSUE OF
REMOTENESS.....32

TABLE OF CONTENTS (Cont'd.)

PAGE NOS.

POINT III

IN FUTURE CASES, THERE MUST BE A
MECHANISM FOR FORMAL NOTICE OF THE
STATE’S CAUSATION THEORY PRIOR TO TRIAL.37

POINT IV

INCONSISTENCIES IN THE DEFENSE EXPERTS’
OPINIONS ARE NOT A BAR TO ADMISSIBILITY
AND DO NOT MANDATE A HEARING PURSUANT
TO N.J.R.E. 104.40

CONCLUSION45

TABLE OF AUTHORITIES

	<u>PAGE NOS.</u>
<u>CASES</u>	
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986)	14
<u>State v McGuigan</u> , 478 N.J. Super. 284 (App. Div. 2024)	41
<u>State v. Bryant</u> , 237 N.J. Super. 102 (App. Div. 1988), <u>rev'd on other grounds</u> , 117 N.J. 495 (1989)	42
<u>State v. Buckley</u> , 216 N.J. 249 (2013).....	Passim
<u>State v. Burnett</u> , 198 N.J. Super. 53 (App. Div. 1984).....	38
<u>State v. Carrero</u> , 229 N.J. 118 (2017).....	42
<u>State v. DiFrisco</u> , 174 N.J. 195 (2002).....	38
<u>State v. Eldridge</u> , 388 N.J. Super. 485 (App. Div. 2006)	19
<u>State v. Fortin</u> , 178 N.J. 540 (2004).....	14
<u>State v. Garron</u> , 177 N.J. 147 (2003)	14
<u>State v. Harvey</u> , 151 N.J. 117 (1997)	41
<u>State v. Hofford</u> , 169 N.J. Super. 377 (App. Div. 1979).....	36
<u>State v. Hutchins</u> , 241 N.J. Super 353 (App. Div. 1990)	14
<u>State v. J.R.</u> , 227 N.J. 393 (2017)	41
<u>State v. Loray</u> , 41 N.J. 131 (1963)	36
<u>State v. Martin</u> , 119 N.J. 2 (1990)	Passim
<u>State v. Moore</u> , 158 N.J. 292 (1999)	41
<u>State v. Parkhill</u> , 461 N.J. Super. 494 (App. Div. 2019)	Passim
<u>State v. Pelham</u> , 176 N.J. 448 (2003).....	Passim

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

CASES (Cont'd)

<u>State v. Powell</u> , 84 N.J. 305 (1980).....	42
<u>State v. Scriven</u> , 226 N.J. 20 (2016)	17
<u>State v. Whitlow</u> , 45 N.J. 3 (1965).....	38

STATUTES

N.J.S.A. 2C:2-3	1, 15
N.J.S.A. 2C:2-3a(1).....	15
N.J.S.A. 2C:2-3a(2).....	15
N.J.S.A. 2C:2-3b	18, 19, 24
N.J.S.A. 2C:2-3c	Passim
N.J.S.A. 2C:4-3	39
N.J.S.A. 2C:11-5	5, 15, 28

RULES

<u>R. 3:12</u>	38, 39, 40
----------------------	------------

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

RULES OF EVIDENCE

N.J.R.E. 104	5, 11, 41
N.J.R.E. 401	14
N.J.R.E. 402	14
N.J.R.E. 702	42

PENAL CODES

Model Penal Code § 2.03	23, 24, 29
Model Penal Code § 2.03(2)	23, 24, 25
Model Penal Code § 2.03(3)	23

OTHER AUTHORITIES

2 <u>N.J. Penal Code: Final Report</u> , § 2C:2-3 (Crim. L. Revision Comm’n 1971)	18, 24
Biunno, Weissbard & Zegas, <u>Current N.J. Rules of Evidence</u> , (2020).....	14
<u>Model Jury Charges (Criminal)</u> , “Reckless Vehicular Homicide (Reckless With Driving While Intoxicated or Refusal to Submit to a Breathalyzer Test) (N.J.S.A. 2C:11-5)” (rev. Apr. 20, 2020)	15, 28

PRELIMINARY STATEMENT

The State alleges that Thomas J. DiNapoli drove recklessly and struck an oncoming car carrying Michelina Mele, a passenger with end-stage Alzheimer's disease, cirrhosis, and other illnesses. Mele was brought to the hospital, treated for her injuries, and soon opted for palliative care. She died the next day.

Causation is a crucial safeguard against unjust liability. The causation element asks a jury to consider whether it is fair to hold a defendant responsible for the harm suffered by another. Here, the key dispute is whether the jury can consider how Mele died when assessing causation. The State contends that Mele died because of injuries suffered in the crash. The defense contends that her injuries were not fatal, that her family and doctors elected hospice because of her debilitating, terminal Alzheimer's disease, and that she died in hospice from heavy doses of narcotics. The Office of the Public Defender maintains that New Jersey's causation statute for crimes of recklessness, N.J.S.A. 2C:2-3c, requires the jury to consider both parties' experts' opinions, as both are relevant to whether the manner and character of Mele's death was within the risk of driving recklessly. The State's view of the statute, which excludes the defense experts' opinions as irrelevant, nullifies the statute and vastly expands criminal liability.

The causation statute requires the jury to assess: (1) whether a defendant's conduct is a but-for cause of the result and (2) whether it is just to find the

defendant culpable for the result. The second question, known as the “culpability assessment,” presents two prongs when the State alleges that an actor recklessly caused a particular result: either (1) the actual result must be within the risk of which the actor is aware or, if not, (2) the actual result must involve the same kind of harm as the probable result and must not be too remote, accidental, or dependent on another’s volitional act to have a just bearing on the actor’s liability.

The statute’s plain language, the case law, and the corresponding provision of the Model Penal Code all confirm that the jury must consider how the victim actually died in a prong-one analysis—otherwise, the jury cannot evaluate whether the actual result (the death) is sufficiently similar to the expected risks of the defendant’s conduct. Here, just like the State’s expert’s opinion, the defense experts’ opinions are relevant to whether the manner and character of the actual result (Mele’s death in hospice) was within the risked result (a typical traffic fatality) of which DiNapoli was aware. It will be the jury’s task at trial to evaluate and resolve the parties’ dispute on causation.

The State’s argument to the contrary—that the defense experts’ opinions are irrelevant because DiNapoli was aware of the risk of death when he allegedly drove recklessly—would eliminate prong one. If the jury can only consider whether a defendant was aware of the risk of some death and not how that death

occurred, then prong one will collapse into recklessness. And if defendants are culpable every time a jury finds them to be reckless and a but-for cause of death, then they will be convicted even if the death is so removed from the defendant's conduct that no jury would fairly convict him. The State's rule cannot stand because it represents an extraordinary expansion of liability.

Additionally, to the extent that prong two of N.J.S.A. 2C:2-3c is at issue, the defense experts' opinions are also relevant because they raise a remoteness defense. The experts opine that Mele suffered only non-fatal injuries from the crash, elected hospice because of her Alzheimer's disease, and died in hospice from an aggressive course of narcotics. This evidence raises a remoteness defense because a jury could find Mele's death from Alzheimer's was too remote from DiNapoli's allegedly reckless driving. It is therefore relevant to prong two.

Further, in future cases, this Court should require the State to disclose whether it will pursue prong one, two, or both before trial. Formalizing a disclosure process will ensure that defendants have time to investigate their defense and hire experts, and it will protect defendants from wasting resources on irrelevant issues. Finally, contrary to the Appellate Division's opinion, inconsistencies between the defense experts' views are not a bar to admissibility, as defendants are permitted to pursue alternative or inconsistent theories at trial. A remand to resolve any perceived inconsistency is thus improper.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

This case arises from a car crash on June 4, 2019. The State alleges that Thomas J. DiNapoli was driving his car after taking Clonazepam, crossed the double yellow lines while going 40 miles per hour, and struck an oncoming car in which Michelina Mele was a passenger. State v. DiNapoli, A-1374-23, A-2164-23 (App. Div. Jan. 28, 2025) (slip op. at 2-3, 7-8). (Pa 425-26, 430-31)² Mele was in her nineties and suffered from advanced, end-stage Alzheimer's disease among other illnesses. (Pa 426, 428) Mele went to the hospital, where staff treated her rib fractures and other orthopedic injuries. (Pa 426-28) Mele's

¹ The procedural history and statement of facts have been condensed for the sake of brevity. Counsel relies on the facts set forth in the defense briefs.

² Psb: State's Supplemental Brief (June 24, 2025)

Psa: State's Supplemental Brief Appendix (June 24, 2025)

Pmb: State's Brief in Support of its Motion for Leave to Appeal (Feb. 20, 2025)

Pa: State's Motion for Leave to Appeal Appendix (Feb. 20, 2025)

1T: Apr. 24, 2023 (hearing)

2T: Apr. 26, 2023 (104 hearing)

3T: May 1, 2023 (104 hearing)

4T: May 11, 2023 (trial)

5T: May 11, 2023 (trial)

6T: May 16, 2023 (trial)

7T: May 30, 2023 (trial)

8T: June 1, 2023 (trial)

9T: June 5, 2023 (motion hearing)

10T: June 6, 2023 (declaration of mistrial)

11T: Dec. 1, 2023 (motion hearing)

family placed her in hospice care, and she was pronounced dead at 5:45pm on June 5, about 26 hours after the accident. (Pa 426)

A grand jury indicted DiNapoli on January 8, 2020, charging him with second-degree vehicular homicide, contrary to N.J.S.A. 2C:11-5a, among other crimes. (Pa 1-2) Prior to DiNapoli's first trial, the State moved to preclude two defense experts: Dr. Marc Polimeni and Dr. Robert J. Pandina. (Pa 40) The Honorable Candido Rodriguez, Jr., J.S.C., denied the State's motion as to Dr. Pandina and reserved on the motion as to Dr. Polimeni pending an N.J.R.E. 104 hearing. (1T 21-7 to 22-22) Later, the court determined that a 104 hearing was not necessary for Dr. Polimeni either. (2T 103-3 to 23; see 11T 28-2 to 29-3)

During DiNapoli's first trial, the State relied on two witnesses to establish that Mele died from injuries sustained in the crash: Dr. Beverly Leffers, who also testified during a pre-trial 104 hearing, and Dr. Sabeen Khan. (3T; 5T; 6T) Leffers, who conducted the autopsy, concluded that Mele died of "blunt impact injuries" from the accident and their consequences. (3T 29-17 to 30-20) She testified that Mele's injuries were life threatening and, together with her preexisting conditions, led her family to elect end-of-life care. (3T 19-15 to 23, 21-22 to 22-21) Leffers stated that Mele's rib fractures would have made breathing difficult and, over time, she would have struggled to maintain oxygen levels and been more susceptible to death. (3T 22-3 to 21) Khan, the treating

physician, made similar observations, testifying that Mele's rib fractures made it difficult for her to breathe and that the trauma to her lungs caused her death. (5T 22-4 to 15, 41-13 to 18; 6T 125-18 to 126-11)

After the State rested but before the defense called its experts, the trial ended in a mistrial. (10T 5-13 to 19, 6-16 to 20) The case was transferred to the Honorable Thomas K. Isenhour, J.S.C, and a superseding indictment issued on July 26, 2023. (Pa 292) On August 1, 2023, DiNapoli produced three additional reports from experts Dr. Polimeni, Dr. Henry Velez, and Dr. Pandina. (Pa 289-312) Their reports support the contention that Mele's injuries from the crash were non-fatal, that she elected hospice because of her terminal Alzheimer's disease, and that she died from an aggressive course of opioids. (Pa 8-12, 289-312) Each report is summarized below.

Dr. Polimeni, an internist, authored reports on January 5 and July 31, 2023. He stated that Mele's injuries from the crash "were primarily orthopedic" and that none "were life threatening." (Pa 11, 305) He wrote that Mele did not suffer pulmonary contusions in the accident, experienced no blood loss internally or externally from the accident, and that any issues observed on her chest X-rays and scans were "due to her chronic lung disease." (Pa 11, 305)

Polimeni confirmed that Mele suffered from many preexisting medical conditions, including chronic lung disease, Alzheimer's type dementia, coronary

artery and cardiac valve disease, and cirrhosis. (Pa 11, 305) He opined that Mele was placed on elective end-of-life and hospice care, but that “said care was not directly or proximately caused by the subject motor vehicle accident.” (Pa 11, 305) Rather, because Alzheimer’s “is a terminal disease . . . that is progressive and debilitating,” “[i]t is common medical practice to provide palliative care for patients suffering from end stage dementia and Alzheimer’s.” (Pa 11-12, 305-06) Polimeni concluded that Mele’s “Alzheimer’s Disease was the decision for hospice,” and that because of her “dementia,” her “corrective surgery and medical care to her orthopedic injuries were cancelled and hospice comfort measure set into place.” (Pa 12, 306)

Polimeni continued that, after the hospital transitioned Mele to hospice, staff administered a more “liberal use of narcotics” than they had been or would have otherwise. (Pa 12, 306) Mele’s cirrhosis—which medical staff were apparently unaware of—compounded the impacts of morphine and fentanyl. (Pa 11, 305) Acknowledging that Mele’s son established Do Not Resuscitate/Do Not Intubate (“DNR/DNI”) status prior to the accident, Polimeni opined that the “dose, combination, and frequency of narcotics” used in hospice caused Mele to die. (Pa 12, 306) He concluded that Mele “did not die” from “injuries, blunt trauma force, [or] blood loss from the impact of the motor vehicle,” or any related complications, but from narcotics administered “under the auspices of

palliative hospice care”—a decision “made not due to Ms. Mele’s injuries,” but due to her “dementia and Alzheimer’s disease making her nonfunctioning.” (Pa 11-12, 305-06) Polimeni concluded that Mele died of a terminal disease, which is a natural cause of death. (Pa 12, 306)

In addition to opining on Mele’s cause of death, Polimeni commented on Leffers’ autopsy report. He noted that Leffers “incorrectly attributes the cause of death . . . to ‘blunt impact injuries’ and the manner of death to ‘accident,’” as “the autopsy reveals no injury to any vital organ, nor evidence of blood loss that would lead to the death of Ms. Mele.” (Pa 9, 302) Polimeni concluded that Leffer’s opinion “about the cause and manner of death is incorrect.” (Pa 9, 302)

Dr. Velez is an internist and pulmonologist. In his July 20, 2023, report, he reviewed Mele’s medical records, an Advance Directive from 2007, and another DNR order written in the hospital on June 4 at the request of Mele’s family. (Pa 307, 310) Velez noted that Mele sustained multiple rib fractures to her chest, sternum, and patella in the crash but that, throughout her hospitalization, her “vital signs were maintained” and there were “no episodes of extremis requiring additional life-sustaining care.” (Pa 310) Mele was stable following the crash, and “her only actual problem was pain,” which was appropriately controlled with opioids prior to her move to hospice. (Pa 311)

Further, Velez opined that Khan's characterization of Mele's prognosis as "poor due to multiple rib fractures" was "overstated." (Pa 311) He cited the fact that Mele's vital signs did not change until she was admitted into hospice. (Pa 311) Only after the doctors moved Mele to hospice did they administer an escalating course of morphine, causing Mele to suffer from "progressive respiratory depression and arterial oxygen desaturation leading to hypoxia." (Pa 310-11) Velez concluded that Mele's respiratory depression was a result of the accelerated opioid treatment in hospice and that it did not develop "as a result of her rib fracture." (Pa 311)

Responding to Leffers' opinion that blunt trauma was the proximate cause of death, Velez noted that there was no "pathologic life-threatening documentation of blunt trauma to the lung and/or to the heart" and that anything "seen on the CT scanning of the chest was only a radiologic finding with none of the known life-threatening complications attributed to a lung contusion." (Pa 311) He noted that Mele had some "mild vascular congestion" that "would not be the proximate cause of death," and emphasized that the autopsy report showed "there was no evidence of trauma" to the heart or lungs. (Pa 311)

In summary, Velez reiterated that even though there were some scans suggestive of lung contusion, "the known complications of a lung contusion, which would be a proximate cause of death[,] was not supported by autopsy

findings.” (Pa 311) He opined that Mele was enrolled in hospice care because, “if she were to survive her injuries, she still would not have any quality of life due to her severe Alzheimer’s disease.” (Pa 312) Velez concluded:

[H]er prognosis for survival was presented to the family as being extremely poor, which again in my opinion was overestimated. Once enrolled in hospice, dosage of opioids was accelerated. . . . Prior to her pronouncement, clearly noted was respiratory depression with arterial desaturation. Accordingly . . . it was more probable than not, that if Ms. Mele had not been placed on hospice care, and if she had not suffered respiratory depression and hypoxia due to the use of opioids, that the medical records provided showed that she always remained stable throughout her hospitalization, and most probably would have survived the injuries of her accident. Therefore, it is my professional medical opinion, that her motor vehicle accident was not the proximate cause of her death.

[(Pa 312)]

Dr. Pandina, a psychologist, wrote reports on July 18 and August 1, 2023³ that focus on the impact of medications administered during Mele’s hospitalization. (Pa 289, 295) Pandina noted that he was missing essential records and could not determine “the exact amounts of narcotics” given, but that the records available indicated that hospital staff “administered significant

³ Pandina also authored a January 2023 report, which is not relevant to this appeal. (Pa 21)

quantities of narcotic analgesics” to Mele, resulting in sedation and suppression of her pulmonary, cardiological, and central nervous systems. (Pa 291, 296)

Pandina detailed the effects and risks of the drugs administered, including morphine, hydromorphone, and fentanyl. (Pa 296-97) He noted that these narcotics create “risks to critical life functions” in geriatric patients, and that special care should be taken for those with dementia. (Pa 297-98) Additionally, Pandina reviewed the toxicological testing on Mele’s blood samples and opined that the lab’s process likely led to inaccurate results. (Pa 298-99) He concluded that, based on the available records, Mele’s “physiological processes and functionality . . . were significantly compromised because of the actions of narcotic medications administered to her during her treatment.” (Pa 299) He also observed Mele’s DNR status in the medical records, but “found no actual documentation to that effect” and was “unclear” why medical staff placed Mele on DNR status to begin with. (Pa 290, 299)

On September 29, 2023, the State moved to preclude testimony from these three experts. (Pa 315) On December 1, 2023, the trial court denied the State’s motion, reserving on the issue of expert qualification. (11T 70-24 to 71-13) The court reasoned that causation would be an issue for the jury to decide at trial. (11T 71-21 to 22) The State filed a timely motion for leave to appeal. (Pa 415)

The Appellate Division granted leave to appeal, vacated the trial court's order denying the State's motion, and remanded the matter for a hearing pursuant to N.J.R.E. 104. (Pa 423, 442-43) The court observed that the defense experts' opinions appeared relevant because they "suggest evidence that potentially could support a conclusion [that] an intervening cause—a decision to place Mele on comfort care that was based on erroneous advice about her condition or that was not related to a condition caused by the crash—broke the chain of causation from defendant's actions." (Pa 441) However, because the court found that the defense experts' opinions were "inconsistent and all over the map," it remanded the matter for a hearing to determine "whether their testimony at trial would support the existence of an intervening cause and, hence, would be admissible." (Pa 441-43)

The Appellate Division denied the State's motion for reconsideration. (Pa 448) The State then filed a motion for leave to appeal in this Court. (Psa 2-3) This Court granted the motion on May 8, 2025. (Psa 4)

LEGAL ARGUMENT

POINT I

THE DEFENSE EXPERTS' OPINIONS ARE RELEVANT TO PRONG ONE OF N.J.S.A. 2C:2-3c BECAUSE THEY ARE PROBATIVE OF WHETHER THE MANNER AND CHARACTER OF THE ACTUAL RESULT (MELE'S DEATH) WAS WITHIN THE RISK OF WHICH DINAPOLI WAS AWARE WHEN HE ALLEGEDLY DROVE RECKLESSLY.

The State contends that the defense experts' opinions that Mele died of Alzheimer's disease are irrelevant because they do not reveal whether DiNapoli was aware of the risk of death. The State is incorrect. Under the statute's plain language, the supporting case law, and the Model Penal Code, a defendant is not liable if the actual result of his conduct is not within the risk of death of which he was aware when he acted recklessly. To make this determination, the jury must compare the manner and character of the actual result with the risk of death. Here, the defense experts' opinions are directly relevant because they show that the actual result—Mele's death from complications of Alzheimer's disease—was entirely different in character and manner than the risk of death of a typical traffic fatality. Further, the State's view of the statute would eliminate prong one by collapsing it into recklessness. If a jury can only consider a defendant's awareness of risk—which is identical to the recklessness inquiry—and not how the victim died, then it will be forced to convict every time a defendant is

reckless and a but-for cause of death, no matter how removed the death is from his conduct. Because such an expansion of liability defies the statute and our fundamental sense of fairness, it must be rejected.

This case presents a question of relevancy. Evidence is relevant if it has “a tendency in reason to prove or disprove any fact of consequence to determination of the action.” N.J.R.E. 401; N.J.R.E. 402; see State v. Hutchins, 241 N.J. Super 353, 358-59 (App. Div. 1990) (stating that relevant evidence is both probative and material). “Evidence need not be dispositive or even strongly probative in order to clear the relevancy bar.” State v. Buckley, 216 N.J. 249, 261 (2013). Further, in the case of criminal defendants, who have a constitutional right to “a meaningful opportunity to present a complete defense[,]” State v. Garron, 177 N.J. 147, 168 (2003) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)), the relevance threshold will be met if the evidence “has a rational tendency to engender a reasonable doubt” about the State’s case. Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 4 on N.J.R.E. 401 (2020) (citing State v. Fortin, 178 N.J. 540, 591 (2004)).

To prove vehicular homicide, the charge at issue, the State must establish three elements: (1) that defendant was driving a vehicle, (2) that he caused the death, and (3) that the death was caused by driving the vehicle recklessly. Model Jury Charges (Criminal), “Reckless Vehicular Homicide (Reckless With Driving

While Intoxicated or Refusal to Submit to a Breathalyzer Test) (N.J.S.A. 2C:11-5)” (rev. Apr. 20, 2020). To establish the causation element, the State must meet the requirements of N.J.S.A. 2C:2-3. Id. at 1 n.2.

To demonstrate causation, the State must first prove that defendant’s conduct was an “antecedent but for which the result in question would not have occurred.” N.J.S.A. 2C:2-3a(1). Next, the statute requires that the State meet any other applicable “causal requirements.” N.J.S.A. 2C:2-3a(2). In cases alleging reckless conduct, N.J.S.A. 2C:2-3c applies.

N.J.S.A. 2C:2-3c provides two approaches to establish this element when the State alleges that the defendant recklessly caused a particular result. First, the State can prove under the statute’s first prong that the actual result was within the risk of which the actor is aware. Ibid. Alternatively, the State can prove under the second prong that the actual result involves the same kind of injury or harm as the probable result and is not too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense. Ibid. The statute does not set out a traditional concept of proximate cause, but imposes a “culpability assessment” tied to an actor’s mental state. State v. Martin, 119 N.J. 2, 10-14 (1990); State v. Pelham, 176 N.J. 448, 460 (2003).

In this case, the central dispute revolves around the interpretation and application of prong one of N.J.S.A. 2C:2-3c. Contrary to the State's view, the plain language of the statute, case law, and Model Penal Code demonstrate that this prong requires the jury to review evidence relevant to the manner and character of the actual result so that it may compare the actual result with the risk result of the defendant's conduct. Further, because the State's interpretation of the statute, which would exclude the defense experts' opinions, eliminates the prong-one inquiry, leads to absurd results, and creates an untenable expansion of liability, it must be rejected.

A. The Statute's Plain Language, Case Law, and Model Penal Code Demonstrate that Prong One Requires the Jury to Compare the Risked Result with the Manner and Character of the Actual Result.

The State asserts that evidence is only relevant to prong one of N.J.S.A. 2C:2-3c if it tends to prove that a fatal accident or death was within the risk of which the actor was aware. (Psb 24-25) Under that theory, the circumstances of the actual accident or of the death itself are irrelevant to the inquiry, which only requires evidence that a defendant was driving recklessly and thus aware of the risk of death. Applying that test, the State submits that the defense experts' opinions that Mele did not die of accident-related injuries are irrelevant because they are not probative of DiNapoli's awareness of the risk of a fatality. (Psb 25)

The State's interpretation of the statute is mistaken. Rather, to properly evaluate prong one, the jury must consider how the victim actually died.

First, the plain language of prong one states that, when a defendant recklessly causes a particular result, “the actual result must be within the risk of which the actor is aware.” N.J.S.A. 2C:2-3c; see State v. Scriven, 226 N.J. 20, 34 (2016) (“The plain language of a statute is the best indicator of the statute’s meaning.”). The statute thus demands the jury compare the “actual result” of an actor’s reckless conduct and the “risk of which the actor [was] aware” when he committed the reckless act to determine if they are sufficiently similar. N.J.S.A. 2C:2-3c. To make that comparison, the jury must conduct a fact-specific inquiry, assessing whether “the actual result” is like the expected result or if it varied so significantly that the defendant cannot fairly be culpable. See 2 N.J. Penal Code: Final Report, § 2C:2-3 at 49-50 (Crim. L. Revision Comm’n 1971) (noting that the statute addresses “inevitable problems incident to variations between the result of the conduct and the result . . . probable under the circumstances,” including where the actor’s conduct is “dissociate[d] . . . from a result of which it was a but-for cause”) (emphasis added). The jury cannot conduct the comparison that the statute requires without consideration of key circumstances surrounding the actual result.

Buttressing the statute’s plain language, case law confirms that prong one requires comparison of the circumstances of the actual result with the riskd result to determine culpability. In State v. Martin, this Court explained that, to evaluate causation under N.J.S.A. 2C:2-3b and c, the “actual result is to be contrasted with the designed or contemplated (or . . . probable) result in terms of its specific character and manner of occurrence.” 119 N.J. at 12 (citations omitted and emphasis added). If this analysis shows that the “events transpired as the actor designed or knew that they would transpire . . . it is just to hold him or her culpable for the actual result.” Ibid.; see also Pelham, 176 N.J. at 461-62 (“Generally, to avoid breaking the chain of causation . . . a variation between the result intended or riskd and the actual result of defendant’s conduct must not be so out of the ordinary that it is unfair to hold defendant responsible.”). In other words, as the State acknowledges (Psb 22), prong one is only satisfied “when the actual result occurs in the same manner and is of the same character as the designed or contemplated [or riskd] result.” Martin, 119 N.J. at 12.

Martin illustrates how this language applies to a case. In Martin, the State alleged that defendant spread kerosene before starting a house fire that killed the victim. Id. at 6-7. The defendant asserted that he lit a bag of trash on fire, did not intend for it to spread, and that the fire only spread because of several unknown conditions like AstroTurf carpeting, hidden kerosene, and inoperable

fire detectors. Id. at 6, 9-10. The Court reversed the defendant's convictions and explained that, because the defense was "predicated on a divergence between the actual and designed or contemplated results," the trial court should have given a causation charge consistent with the defendant's version of events, including the language of the culpability assessment in N.J.S.A. 2C:2-3b. Id. at 16-17. With this instruction, the jury could have found that the victim's "death occurred in a different manner" than what was contemplated. Id. at 17. Even if the defense theory was not "compelled by the evidence . . . the jury should have had the opportunity to consider [it] under proper instructions." Ibid. Martin thus illustrates how, when properly instructed, a jury should compare the manner of death (the "actual result") with the contemplated or risked result of the defendant's conduct.⁴

But evidence will not be admissible in relation to this analysis if it does not tend to show that that actual result was different than the risked result. In State v. Buckley, for example, the State alleged that defendant was speeding and drove off the road into a utility pole. 216 N.J. at 256-57, 257 n.2. The victim

⁴ Although Martin analyzed causation in the context of a purposeful crime, the principles apply equally when analyzing causation in the context of a reckless crime. See State v. Eldridge, 388 N.J. Super. 485, 498 (App. Div. 2006) (applying the language in Martin to a reckless vehicular homicide and noting that "[n]othing in the Court's opinion in Martin suggests that its holding would not apply equally to a prosecution with a reckless culpability requirement.").

was unresponsive at the scene and pronounced dead 38 minutes later. Id. at 257. Before trial, the defense sought to introduce evidence that the victim would have survived if he had been wearing a seatbelt and that the utility pole he collided with was not installed according to the New Jersey Department of Transportation Roadway Design Manual. Id. at 258. Analyzing the relevance of that evidence to prong one, this Court explained that the “‘actual result’ . . . denotes the harm inflicted on the victim.” Id. at 264. Further, when “the State alleges that the defendant’s reckless conduct caused a fatality, the ‘actual result’ is the victim’s death in the accident.” Ibid. Consequently, “in this vehicular homicide case, the first prong . . . requires the jury to assess whether the defendant was aware that his allegedly reckless driving gave rise to a risk of a fatal motor vehicle accident.” Ibid. The Court affirmed that, if the defendant in Buckley understood that his driving created a risk of a traffic fatality, “the element of causation is established under the first prong.” Ibid. (citing Martin, 119 N.J. at 12).

Applying that test, the Court held that the defense evidence was not relevant to prong one because it did not inform whether the actual result in the case—a typical traffic fatality—was within the risk of which the actor was aware. Id. at 267-68. The Court elaborated that, once the jury determines that the defendant was aware that his conduct gave rise to that risk, it “need not assess the exact degree of that risk, or the variable that could affect its

magnitude.” Id. at 268. Any evidence that the failure to wear a seatbelt “exacerbated [the victim’s] chance of dying in the collision” had no bearing on whether the accident that occurred (the “actual result”) was within the risk result. Ibid. Similarly, evidence regarding the placement of a single utility pole did not shed light on whether this fatal accident was within the risk of the defendant’s reckless driving. Id. at 270.

In Buckley, the comparison the statute required was simple because there was no variation between the risk and actual results: the risk result of defendant’s alleged recklessness was that he would lose control of his car and cause a fatal accident, and the actual result of defendant’s alleged recklessness was that he lost control of his car and caused a fatal accident. Because the victim was unresponsive and died 38 minutes later, there was no dispute about how he died. Moreover, the seatbelt evidence was not relevant to the question of causation because it did not address this lack of variation—it only impacted the “degree” of likelihood that the risk would become the result. Id. at 268. Likewise, a “particular utility pole’s compliance with DOT recommendations” had no implications for the jury’s task of comparing the actual and risk results. Id. at 269-70. Because neither the seatbelt nor the utility pole evidence informed the comparison between the risk—a typical traffic accident—and the result—a typical traffic accident—both were irrelevant to prong one.

The analysis looks different, however, where there is greater variation between the actual and risked results. In State v. Parkhill, for example, a defendant sped through an intersection during a green light and hit a pedestrian illegally crossing the road. 461 N.J. Super. 494, 498 (App. Div. 2019). The Appellate Division held that the case warranted a jury instruction on prong one because “[w]hether the victim acted unlawfully relates to whether a defendant may have contemplated the victim’s actions. In other words, the unlawful nature of the victim’s crossing should have been a factor for the jury in determining whether his fatality was ‘within the risk of which the actor was aware.’” Id. at 505 (quoting N.J.S.A. 2C:2-3c). Because a jury could find that the pedestrian’s illegal conduct meant that the “actual result” was not “within the risk” of which the defendant was aware from his reckless driving, the evidence had to be submitted to the jury. Thus, unlike Buckley, this evidence was relevant to whether the actual result was of the same manner and character as the risked result, making it the jury’s task to compare the risked and actual results and resolve whether the actual result was within the expected risk of the defendant’s reckless driving.

Finally, like the statute’s plain language and the case law, the Model Penal Code confirms that the circumstances of the result must be evaluated under prong one. N.J.S.A. 2C:2-3 is based on Model Penal Code § 2.03. Martin, 119

N.J. at 11. Like our code, § 2.03(1) “poses an initial factual inquiry” requiring but-for causation. Model Penal Code § 2.03 cmt. at 258 (1985). Then, §§ 2.03(2) and (3) impose some “limitation on this broad principle.” See id. at 254, 258. Like N.J.S.A. 2C:2-3c, Model Penal Code § 2.03(3) requires that, if recklessly causing a particular result is an element of an offense, “the actual result” must be “within the risk of which the actor is aware.”⁵ Like our statute, this subsection addresses “the propriety of allowing the result” of a defendant’s conduct “to influence . . . the gravity of his crime,” especially where some variation exists between the defendant’s conduct and the actual result. Model Penal Code § 2.03 cmt. at 258, 260; see 2 N.J. Penal Code: The Final Report, § 2C:2-3 at 50.

Further, the Model Penal Code commentary warns that juries must be able to consider whether the caused result was within the risk result to ensure that individuals are not held culpable in absurd situations. The commentary imagines a “defendant attempted to shoot his wife, with the result that she retired to her parents’ country home and died there from falling off a horse.” Model Penal Code § 2.03 cmt. at 258. Under those circumstances, “no one would think that [the defendant] should be held guilty of murder, though he did intend [his wife’s] death and his attempt to kill her was a but-for cause of her encounter with the

⁵ Model Penal Code § 2.03(2) sets identical limits in cases involving purpose or knowledge, like N.J.S.A. 2C:2-3b.

horse.” Ibid. Thus, even if a defendant has the requisite mental state and his conduct was a but-for cause of death, consideration of the circumstances surrounding the actual result ensures that he will not be culpable when the actual result (death by horse) varies significantly from the contemplated result (death by shooting).⁶

Similarly, the Model Penal Code commentary considers if “the actor had actually shot his wife, and while hospitalized she had contracted a disease (that was medically unrelated to the wound but related to her presence in the hospital), with death resulting.” Id. at 261-62. Once again, §§ 2.03(2) and (3) require the jury to question whether her death was “too unusual” or too different than the death that was intended “to justify a murder conviction.” Ibid. The commentary affirms that these subsections work to “exclude situations” where “the manner in which the actual result occurs, or the nature of the actual result, is so remote from the actor’s purpose or contemplation [or reckless disregard of a risk] that it should have no bearing” on the crime for which he is convicted. Ibid. Key to curbing boundless culpability, these subsections require consideration of how the victim died. And because N.J.S.A. 2C:2-3c was based on this section of the Model Penal Code, this commentary also provides substantial evidence that our

⁶ Troublingly, under the State’s interpretation of prong one, this defendant would be culpable because his wife’s death was within his contemplation when he attempted to shoot her.

statute likewise requires a jury to consider how the victim died to determine if the manner and character of the actual result is within the risk of which the defendant was aware, such that it is fair and just to find him culpable.

Applying prong one of N.J.S.A. 2C:2-3c to this case, the defense experts' opinions are undeniably relevant. Like in Buckley and Parkhill, the risk result of DiNapoli's allegedly reckless driving was a fatal traffic accident. The State alleges that the actual result is Mele's death from the crash, and it will call witnesses like Dr. Leffers to testify that "blunt impact injuries" caused Mele's death in support of that theory. The defense, however, offers experts to opine that: Mele did not suffer fatal injuries in the accident (Pa 305-06, 310-12); she was placed in hospice because of her advanced Alzheimer's disease (Pa 305-06, 311-12); the accelerated course of opioids administered in hospice caused the respiratory depression that killed her (Pa 299, 305-06, 311-12); and Mele did not die from a crash-related injury. (Pa 302, 305-06) These opinions are directly relevant to the character and manner of Mele's death (the "actual result") and to the jury's determination of whether the manner of her death varied from or was within the probable result of DiNapoli's allegedly reckless driving (the "risk result"). Regardless of the weight or credibility the jury ultimately assigns to these findings, they easily clear the relevancy bar for prong one. See Martin, 119 N.J. at 16-17 (stating that, when "divergent factual versions give rise to different

theories of causation,” the court must charge the jury “consistent with the defendant’s version”).⁷

In sum, the plain language of the statute, the case law, and the Model Penal Code make clear that prong one requires the jury to compare the manner of occurrence and character of the actual result with the risk result. Here, that means that the jury must compare the manner and character of Mele’s death with the type of traffic fatality reasonably expected from reckless driving. Just like the State’s expert’s opinions, the defense experts’ opinions on how Mele died are directly relevant to that inquiry. It will thus be the jury’s task to decide which theory of causation to credit and, ultimately, whether any variation between the actual result and probable result is so significant that it would be unjust to hold DiNapoli culpable. In either case, for the jury to properly conduct this inquiry—and for prong one be effective at all—the jury must consider all evidence of the manner and character of Mele’s death.

B. The State’s Position Must Be Rejected Because It Will Nullify Prong One and Unjustly Expand Liability for All Defendants.

⁷ Notably, if the State’s position is that the defense experts’ opinions on how Mele died are irrelevant, then Leffers’ opinion that Mele died because of “blunt impact injuries” is not relevant either. (See, e.g., 3T 29-17 to 30-20) Either all the expert testimony is relevant or none of it is relevant. There cannot be a fair trial where only the State can present expert testimony on the cause of death. The defense must be allowed to present opposing expert testimony as well.

Additionally, the State’s rule eradicates prong one by collapsing the inquiry into recklessness. Under the State’s rule, juries will be forced to convict defendants as long as they were aware of the risk of death—or, in other words, found to be reckless—and a but-for cause of death, no matter how remote or removed that death is from the defendant’s conduct. Further, the State’s rule would also dilute prong two of N.J.S.A. 2C:2-3c, because it will incentivize the State to pursue prong one even in cases with substantial evidence of remoteness or intervening causes. Because the State’s view of the statute is not only incorrect, but also leads to unfair and unjust results, it must be rejected.

First, the State’s rule—which requires no inquiry into how the victim died even when the manner of death is disputed—collapses prong one into recklessness. To prove recklessness in a vehicular homicide case, the State must show that the defendant “consciously disregard[ed] a substantial and unjustifiable risk that death will result from his/her conduct.” Model Jury Charges (Criminal), “Reckless Vehicular Homicide (Reckless With Driving While Intoxicated or Refusal to Submit to a Breathalyzer Test) (N.J.S.A. 2C:11-5)” at 2. The model jury charge explains that “the State must prove . . . that the defendant was aware he/she was operating a vehicle in such a manner or under such circumstances as to create a substantial and unjustifiable risk of death to another.” Ibid. (emphasis added). The definition of recklessness is thus identical

to the State’s test for prong one—that defendant was aware that his allegedly reckless driving gave rise to a risk of a fatal car accident. If prong one permits no inquiry into how the victim died, as the State submits, then the State will meet prong one every time it demonstrates that an actor drove recklessly. Thus, to secure a conviction, the State will only need to prove recklessness and but-for causation, eliminating any prong-one limitations entirely. Accordingly, the State’s rule nullifies prong one, ensuring that there will be no limits on culpability when a defendant is reckless and a but-for cause of death.

Hypotheticals illuminate how such a rule will lead to convictions in absurd and unjust situations, especially when the victim’s death is remote from the defendant’s conduct. Like the Model Penal Code commentary, imagine a person drove recklessly, hit a car, and caused some nonfatal injuries to the other driver. Then, “while hospitalized, [the other driver] contracted a disease (that was medically unrelated to the [injuries] but related to her presence in the hospital), with death resulting.” Model Penal Code § 2.03, cmt. at 261-62. Or, imagine the person, while hospitalized, tripped and fell down the stairs while taking a walk, hitting their head and dying. Under the State’s rule, evidence of the disease or the fall is irrelevant to prong one because it does not address whether the defendant was aware of the risk of a traffic fatality or death. It would not matter that the disease and the fall inform (1) the character and manner of death (i.e.,

the actual result) and (2) whether that death varies from the type of fatality expected from reckless driving (i.e., the risked result). If the jury found those defendants were reckless, and thus aware of the risk of death, and a but-for cause of death, prong one would do no additional work—it will not matter how remote the victim’s death is from the defendant’s conduct, because the jury will not be able to even consider such remoteness. Instead, the fact that someone died, even in some removed or remote manner, will determine the actor’s culpability. Those results counter the very purpose of the statute, which is to limit culpability and avoid these absurd results. As the hypotheticals show, the statute would be rendered meaningless if the jury were barred from considering the way in which the victim died.

The State’s rule gutting prong one will also lead to absurd results in cases where the victim clearly dies in a traffic accident, but something about the accident is unexpected, like in Parkhill. For example, if the State only needs to prove that the defendant was aware of the risk of a traffic fatality but does not need to compare the manner and character of the actual result with the risked result, then a defendant would be guilty if he was driving 100 miles per hour and struck a person who unexpectedly jumped into the street or even popped out of a manhole, as long as his recklessness was a but-for cause of death. Under the State’s rule, evidence of the victim’s conduct is not relevant to prong one

because it does not tend to prove whether a fatal car accident was within the risk of the defendant's reckless driving. In any similarly unexpected situation, the State's view ensures that there will be no statutory constraint on culpability as long as a defendant drives recklessly and is a but-for cause of death, no matter how that death occurred. The statute, case law, and Model Penal Code did not envision that the culpability assessment would be rendered so toothless in reckless driving cases.

Finally, if this Court adopts the State's position, it will also dilute prong two. Prong two of N.J.S.A. 2C:2-3c permits the State to establish causation when the actual result involves the same kind of injury as the probable result and is not too remote, accidental, or dependent on another's volitional act. Embracing the State's definition of prong one, however, will incentivize the State to shoehorn cases with significant evidence of remoteness or intervening causes into prong one so that it can keep that unfavorable evidence from the jury. See Buckley, 216 N.J. at 255, 266 (permitting the State to choose which prong of N.J.S.A. 2C:2-3c it will proceed on). The State will have every reason to pursue prong one and preclude the jury from considering evidence that might lean toward acquittal—like, from an example above, evidence of a disease contracted in a hospital or some other evidence of an extremely remote death—that is relevant to prong two but irrelevant to the State's understanding of prong one.

Further, because the State's prong-one analysis only presents a question of recklessness, the State will also be disincentivized from proceeding on prong two because doing so will require it to establish an additional element of causation that is absent from prong-one cases. If pursuing prong two means admitting unfavorable evidence that would otherwise be excluded and proving an additional element, prosecutors will be incentivized to pursue prong one in every case. Consequently, the State's enormous expansion of liability under prong one will effectively nullify prong two as well.

Contrary to the State's suggested rule, prong one must allow the jury to contrast the manner and character of the actual and risked results in any given case to determine a defendant's culpability. To do that, the jury must consider how the victim died. Here, the State's attempt to circumvent this analysis flouts the statute, the case law, the corresponding provision in the Model Penal Code, and our general understanding of when it is fair to find someone culpable. Its position must be rejected.

POINT II

THE DEFENSE EXPERTS' OPINIONS ARE RELEVANT TO PRONG TWO OF N.J.S.A. 2C:2-3c BECAUSE THEY RAISE AN ISSUE OF REMOTENESS.

Prong two does not appear relevant to the question before this Court because the State is only pursuing a prong one theory. (Psb 23-25) However, to the extent that prong two is at issue, the defense experts' opinions are relevant to prong two because they raise an issue of remoteness. The State relies on Pelham to argue that the defense experts' opinions are irrelevant to prong two because the decision to receive palliative care cannot be an intervening cause. The State's argument is flawed in two ways. First, there are multiple ways to establish prong two—the defense can raise an intervening cause, but it can also raise an issue of pure remoteness. Second, in this case, the defense experts opine that Mele's decision to receive hospice care, where she ultimately died, was not related to her injuries in the crash, such that a jury could find either that her death was too remote from any alleged reckless driving or, as the defense argues, that an intervening cause disconnected her death from DiNapoli's conduct. Because the defense experts' opinions raise issues of remoteness, they are relevant to prong two.

Prong two requires that the actual result “involve the same kind of injury or harm as the probable result” and “not be too remote, accidental in its

occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense.” N.J.S.A. 2C:2-3c; see Martin, 119 N.J. at 13 (explaining that prong two applies when “the actual result is of the same character, but occurred in a different manner from that designed or contemplated [or risked]”). Even where but-for causation is met, the jury may rely on prong two to “nevertheless conclude . . . that the death was too remote” to justify a conviction. Ibid.

Here, the actual result involves “the same kind of injury” as the risked result: Mele’s death. The question under prong two is thus whether Mele’s death was not “too remote, accidental, or . . . dependent on another’s volitional act.” N.J.S.A. 2C:2-3c. Because prong two is disjunctive, the defense need not raise an intervening cause; rather, if the defense raises an issue of remoteness, evidence of that remoteness is relevant. See Martin, 119 N.J. at 16-18. Here, the defense experts’ opinions assert that Mele enrolled in palliative care, where she died from an accelerated course of narcotics, because of her Alzheimer’s disease—a condition completely unrelated to her injuries in the crash. See id. at 17 (noting that evidence of inoperable smoke detectors, hidden kerosene, and the victim’s intoxication raised a remoteness defense such that the jury “might have found that the death . . . was too remotely related” to defendant’s intent).

The experts' opinions that Mele died from an unrelated illness at minimum raise an issue of remoteness that the jury must evaluate.

Failing to address this issue of remoteness, the State relies on Pelham to argue that the defense experts' opinions are irrelevant because electing palliative care cannot be an intervening cause. (Psb 29-31) In Pelham, 176 N.J. at 451-52, the defendant was driving while intoxicated and hit the victim's car. The victim was paralyzed, suffered a significant brain injury, and required a feeding tube, ventilator, and catheter. Id. at 452-54. The victim died soon after deciding to forgo life-sustaining care. Id. at 454. The Court held that the victim's decision was not an intervening cause under prong two. Id. at 467. The Court reasoned,

if defendant's actions set in motion the victim's need for life support, without which death would naturally result, then the causal link is not broken by an unforeseen, extraordinary act when the victim exercises his or her right to be removed from life support and thereupon expires unless there was an intervening volitional act of another, such as gross malpractice.

[Ibid. (emphasis added)]

Nonetheless, the Court observed that the jury could still consider evidence of remoteness, like "the length of time that passed between the date of the accident and the date on which" the victim died, to assess causation. Id. at 468.

Here, the argument under prong two differs significantly from Pelham because the defense experts opine that Mele's decision to elect palliative care

was not a “natural[] result” of DiNapoli’s actions. Id. at 467. Rather, the defense experts opine that: Mele’s injuries from the crash were non-fatal; she went into hospice because of her terminal Alzheimer’s disease; she died in hospice because of the narcotics; and she was otherwise likely to survive her injuries. (Pa 299, 302, 305-06, 311-12) So, while the crash may have been a but-for cause of Mele’s presence in the hospital, it was not why she required or elected palliative care. Certainly, if the defense experts opined that Mele chose hospice because of her injuries in the crash, their opinions may not be relevant. But, unlike Pelham, where the victim succumbed to injuries sustained in the crash once life-support was removed, defense experts here opine that Mele’s family elected hospice, where she died from narcotics, because of unrelated illnesses. A jury considering such evidence could find, at minimum, that Mele’s death was too remote from DiNapoli’s alleged recklessness or even that her death was the result of an intervening volitional act. Because the defense experts’ opinions support a defense of remoteness, they are relevant to prong two.

Moreover, contrary to the State’s assertions, the defense’s position neither depends on an allegation of gross malpractice to establish relevance nor does it characterize Mele as a vulnerable victim. (Psb 31-33) First, even if we assume there was not gross malpractice in this case, showing such malpractice is just one way to establish an intervening cause for prong two, Pelham, 176 N.J. at

467, but it is not the only way to establish evidence relevant to prong two. Second, as discussed, the experts do not opine that Mele succumbed to crash-related injuries because of a particularly vulnerable condition. See ibid. Rather, they opine that Mele’s injuries were non-fatal and did not cause her death, even if they were a but-for cause of her presence in the hospital.⁸ Because the defense experts tend to show that Mele did not die from the accident, but of preexisting terminal illnesses, they are relevant to a remoteness defense under prong two.

⁸ The State’s analogies to such cases are thus inapposite. See State v. Hofford, 169 N.J. Super. 377, 385 (App. Div. 1979) (explaining that liability is not lessened by a condition that “made the victim particularly vulnerable to attack”); State v. Loray, 41 N.J. 131, 140 (1963) (rejecting an argument that the victim would not have died of the inflicted injuries if not for a heart condition). (Psb 33)

POINT III

IN FUTURE CASES, THERE MUST BE A MECHANISM FOR FORMAL NOTICE OF THE STATE’S CAUSATION THEORY PRIOR TO TRIAL.

This Court has previously found that the State is permitted to choose whether it will prove causation at trial through prong one, prong two, or both. Buckley, 216 N.J. at 266. But if the State does not “explicitly limit[] its contentions” to one prong, evidence relevant to both is admissible, and “the jury must be given the option to find causation under either . . . assuming there is evidence raising an issue as to remoteness, fortuity, or another’s volitional act.” Parkhill, 461 N.J. Super. at 504. Here, the State has finally committed to prosecuting DiNapoli under “only a ‘prong one’ theory of causation.”⁹ (Psb 24) Going forward, however, this commitment must be made before trial on the record to ensure that defendants can adequately prepare a defense and do not waste their resources. Accordingly, this Court should formalize a notice process and implement a mechanism requiring the State to disclose its theory of causation prior to trial. As discussed below, that disclosure logically fits with

⁹ Even in prior briefing in this Court, the State’s commitment was unclear. For example, the State previously asserted that “if the State utilizes a prong one theory . . . the second prong is deemed irrelevant.” (Pmb 16-18) (emphasis added)

the disclosures required under Rule 3:12, which must occur at least seven days prior to the initial case disposition conference.

Typically, issues that require significant trial preparation, investigation, or the retention of experts must be disclosed before trial. Rule 3:12, for example, requires defendants to notify the State seven days before the initial case disposition conference if it intends to rely on defenses like duress, entrapment, self-defense, or insanity. See also N.J.S.A. 2C:4-3 (codifying this rule as it pertains to the defense of insanity). Such defenses must be disclosed because the State requires significant time and resources to meet them. See e.g., State v. Burnett, 198 N.J. Super. 53, 57 (App. Div. 1984) (observing that the rule requiring disclosure of an insanity defense ensures that the State will “not be left helpless to meet the defense” at trial) (citing State v. Whitlow, 45 N.J. 3, 25 (1965)).

The State’s decision to prosecute a defendant under prong one, prong two, or both implicates the same concerns. To build a defense against causation, a defendant will likely need to hire at least one expert witness. See State v. DiFrisko, 174 N.J. 195, 243-44 (2002) (holding that the right to effective assistance of counsel includes the right to effective assistance of experts when appropriate). To effectively utilize that expert, the defendant will need to provide specific information about the case against him—for example, a defendant may

need to provide voluminous medical records or accident reports. If the expert does not know what information to focus on, he or she may waste considerable time, effort, and defense resources responding to or investigating theories well outside of the State's prosecution. Further, if the defense learns at trial for the first time that the State will proceed on prong two, for example, then it will be too late for the defense to conduct additional investigation or to change the investigation plan accordingly. To protect these defense interests in the same way that Rule 3:12 protects the State, a formal notice policy is required. An official mechanism requiring the State to disclose whether it will proceed on prong one, prong two, or both well before trial will protect the defense interests and resources at no cost to the State. Such a formal process must be instituted.

POINT IV

INCONSISTENCIES IN THE DEFENSE EXPERTS' OPINIONS ARE NOT A BAR TO ADMISSIBILITY AND DO NOT MANDATE A HEARING PURSUANT TO N.J.R.E. 104.

In its opinion, the Appellate Division found that the defense experts' opinions may be relevant but remanded the matter for an N.J.R.E. 104 hearing because of inconsistencies among them. (Pa 441-43) The court highlighted that Dr. Pandina "disputes the existence of a DNR order and challenges the decision to abandon life-sustaining efforts," Dr. Polimeni does not "dispute the existence of a DNR order and . . . asserts the need for [end-of-life] care was not caused by the crash," and Dr. Velez "concedes the existence of a DNR order but finds that order was followed based on an 'overstated poor prognosis.'" (Pa 442) Although the only inconsistency in their opinions seems to be the status of the DNR order, which is immaterial, inconsistencies among defense experts' opinions of any kind are not a bar to admissibility. Consequently, a 104 hearing should not be ordered based on such an inconsistency. And, because there is no other dispute necessitating a 104 hearing, no remand is required.

Under N.J.R.E. 104, a court may hold a hearing when there is a "preliminary question" about whether evidence is admissible. The decision to hold such a hearing is a discretionary one, though a request for a hearing should ordinarily be granted when a party challenges the admissibility of expert

testimony. State v. J.R., 227 N.J. 393, 409-410 (2017); State v McGuigan, 478 N.J. Super. 284, 291, 300 (App. Div. 2024). At the 104 hearing, “the proponent of the expert testimony may demonstrate that the expert’s methodology meets the benchmark of N.J.R.E. 702, and the opposing party may challenge the reliability of the expert’s opinion.” J.R., 227 N.J. at 410. Moreover, an N.J.R.E. 104 hearing “is a favored means to create a record for appellate review of a disputed decision.” Ibid. (citation omitted); see also State v. Harvey, 151 N.J. 117, 166-67 (1997) (stating that “the best time to make a record on admission” of “novel scientific evidence” is during a 104 hearing); McGuigan, 478 N.J. Super. at 308 (remanding for a 104 hearing because the expert’s resume, which had only “limited support” for his expertise, still “merited, at a minimum, further exploration” and to “provide[] the parties an opportunity to question [the expert] regarding the bases for his conclusory statement”).

Nothing in the rules of evidence, however, permits the exclusion of relevant experts’ opinions because of inconsistencies among them. Defendants are permitted to pursue inconsistent or alternative theories at trial. For example, in State v. Moore, this Court allowed a defendant to assert both that he committed a shooting accidentally and that he committed the shooting in self-defense. 158 N.J. 292, 301 (1999). Even though an “accidental shooting contemplates the total absence of a purposeful or knowing mental state,” and

“legal self-defense contemplates volitional conduct,” the Court found that the defendant could pursue both alternative defenses because “it is impossible to determine before trial which version of the facts the jury will credit.” Ibid.; see State v. Bryant, 237 N.J. Super. 102, 107 (App. Div. 1988), rev’d on other grounds, 117 N.J. 495 (1989) (explaining that defense counsel’s “notion that he could not present inconsistent defenses . . . was not only wrong but displayed a lack of understanding of the adversarial process” because “[t]he right to assert inconsistent defenses is something that is learned in the first year at law school”); see also State v. Powell, 84 N.J. 305, 317 (1980) (citations omitted) (holding that “where there is evidence which if believed by a jury would reduce a crime to a lesser included offense, an instruction defining that offense should be given” even if it is inconsistent with defendant’s theory, as he “is entitled to have the jury consider any legally recognized defense theory which has some foundation in the evidence”); State v. Carrero, 229 N.J. 118, 128 (2017) (same).

The same principle applies when the defense seeks to present experts with alternative or inconsistent theories. In this case, each of the defense experts’ opinions provide some evidence to combat the State’s theory of causation: Pandina opined that Mele died because of narcotics administered during hospice (Pa 299); Polimeni opined that Mele’s injuries were “primarily orthopedic” and not life threatening, that the need for end-of-life care was “not directly or

proximately caused by the subject motor vehicle accident,” that Mele’s “Alzheimer’s disease was the decision for hospice,” that electing hospice is a “common medical practice . . . for patients suffering from end stage dementia,” and that it was only in hospice that doctors administered “such liberal use of narcotics” (Pa 305-06); and Velez opined that Mele would have survived her injuries if she had not been placed in hospice and that her prognosis was overstated. (Pa 311-12) Although the opinions vary in some respects, each is relevant to causation, and defendants are welcome to pursue different theories in their own defense. Because inconsistency is not a bar to admission, a remand for a 104 hearing on that basis is not required in this case.

And although the significance of the inconsistency has no bearing on admissibility, it is worth noting that, in this case, any inconsistency among the experts is immaterial. As the Appellate Division observed, the defense experts disagree about the status of a DNR order during Mele’s hospitalization. But the DNR is not an intervening cause breaking the chain of causation, and it does not demonstrate that the “actual result” varied from the “riskied result.” See N.J.S.A. 2C:2-3c; Pelham, 176 N.J at 467. Much more importantly, the experts’ opinions are, at minimum, all compatible with the theory that Mele’s orthopedic injuries from the crash were non-fatal, that hospice was elected to treat her end-stage Alzheimer’s disease, and that the narcotics administered in hospice caused the

respiratory depression that killed her. Overall, the experts agree with each other to a much greater degree than any inconsistency among them. Because each expert's opinion is relevant to the causation defense, and because any inconsistency, let alone an immaterial inconsistency, is not a bar to admission, a remand on this basis is impermissible.

CONCLUSION

For the reasons set forth in Points I and II, this Court should find that the defense experts' opinions are relevant to the issue of causation. For the reasons stated in Point III, this Court should impose a disclosure requirement for the State's theory of causation. Finally, for the reasons in Point IV, this Court should clarify that inconsistencies among defense expert opinions is not a bar to admission and that a remand is not needed on that basis.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Amicus Curiae

BY: s/ Rachel A. Neckes
RACHEL A. NECKES
Assistant Deputy Public Defender
Attorney ID: 381892021

Dated: July 25, 2025