

Supreme Court of New Jersey
DOCKET NO.

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
	:	On Motion for Leave to Appeal from an
Plaintiff-Appellant,	:	Interlocutory Order of the Superior
	:	Court of New Jersey, Appellate
v.	:	Division.
NIRAV PATEL,	:	Sat Below:
	:	Hon. Jessica R. Mayer, P.J.A.D.
Defendant-Respondent.	:	Lisa A. Puglisi, J.A.D.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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March 10, 2025

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PRELIMINARY STATEMENT

Because they strike at the finality of jury verdicts, the standards governing motions for new trials based on new evidence are of considerable importance to the courts and the public alike. Such new-trial motions turn on at least two key issues: whether a reasonably diligent defendant should have found the evidence before his conviction, and whether that alleged new evidence is likely to change the conviction. Both questions urgently call for greater guidance by this Court—especially here, where the Appellate Division adopted an approach that conflicts sharply with other decisions and awards an egregious bid for a new trial.

Defendant stole \$750,000 from investors who believed they were buying a 30% ownership in a franchise—when defendant in fact only owned 5% of that franchise. He then used the investors’ money to pay off personal debts. Barely a week after a jury convicted him of theft by deception, defendant filed a motion for a new trial—alleging that in the week between his conviction and the motion, he discovered new evidence that would have justified a different outcome in his trial. That new evidence chiefly consisted of franchise agreements, signed by defendant, purportedly showing that he actually had a claim to the 30% interest that he had exchanged for the \$750,000 that he pocketed. Defendant claimed he did not find these agreements in the four years between his indictment and trial, even though he testified that he found them a week after conviction in his own

email archive after about an hour of searching. And defendant demanded a new trial even as the alleged counterparties did not recall signing these agreements, did not believe they signed them, and noted that their signatures were suspicious. Yet the courts below granted a new trial, finding the evidence qualified as new, and that its credibility would simply have to go the jury in a new trial.

This Court should review that decision for two reasons. First, the decision below involves an important question this Court should squarely address: if and when a defendant can show that evidence was “newly discovered” when it was in his possession all along. This Court has made clear that a defendant must act with “reasonable diligence” in looking for evidence before trial that would aid his cause. And a wealth of both federal and state courts have sensibly explained that a defendant cannot meet that standard if the evidence was in his possession, absent extraordinary extenuating circumstances. But the courts below deviated sharply from that consensus view. Indeed, that erroneous and outlier approach produced an untenable result: a finding that a defendant could not have located evidence in the four years between his indictment and his trial even though that defendant had signed the documents, the documents were in his email archive, and he located them in “about an hour” barely a week after a jury convicted him. This Court should grant leave to appeal and reverse, joining the consensus view that new evidence cannot be new evidence defendant already had.

Compounding that error, the lower courts decided that the authenticity and truthfulness of the documents should be determined by a jury at a new trial. That disregarded this Court’s admonition that newly discovered evidence should be viewed with suspicion—especially if it comes from someone close to defendant, let alone the defendant himself—and a plethora of evidence that the franchise agreements were fraudulent. That judicial gatekeeping function is essential: if credibility of post-conviction evidence was a jury question, then even incredible evidence would demand a new trial—contrary to this Court’s instructions. Not only that, but these documents would not have changed the outcome of the trial, because they did not show that defendant had or believed he had the right to sell these shares to the investors. This Court should grant leave to address these key questions, reverse the errors below, and protect the finality of jury verdicts.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

A. The Underlying Conviction.

In 2012, defendant Nirav Patel, Will Mingo, and Jerrod Douglas entered into an area development agreement (ADA) with World of Beer Franchising, Inc. (WOB), giving them exclusive rights to open twelve WOB franchises—retail alcohol establishments focusing on beer—in New Jersey and Pennsylvania

¹ The counterstatements of procedural history and facts are closely related and are presented together for the Court’s convenience.

over a five-year period. (Sa37-69). The partnership operated under the name “Tapmasters, LLC.,” and later as “Tapmasters II, LLC.” (1T88-25 to 89-1). The partners were initially to share in the profits equally, but over time, they agreed to different ownership structures for different franchise locations. (1T89-11 to 90-6). Each location was subject to its own franchise agreement, which gave the partnership the right to open a WOB at that location, as well as a separate operating agreement. (1T91-21 to 92-6). The operating agreements set forth the terms of ownership, including the percentage of ownership for each partner. Ibid. Tapmasters was also required to provide a principal owner’s guaranty to WOB contemporaneously with the signing of each franchise agreement, which also set forth the ownership percentages. (Sa47 at ¶ 6.3).

In February 2014, Tapmasters decided to open a franchise in Hoboken in a location where defendant had operated a Melting Pot restaurant that had failed, resulting in the loss of his lease. (1T93-15 to 94-23). The operating agreement for that location, establishing Tapmasters Hoboken, LLC, was signed on May 2, 2014, gave Mingo 95% ownership and defendant 5%. (1T109-10; Sa70-119, 1T94-7 to 15; 1T97-10 to 20; 1T105-13 to 107-8; Sa107). As the principals of Tapmasters Hoboken, defendant and Mingo signed a guaranty on March 25, 2015, and an addendum to the WOB Hoboken agreement, indicating that Mingo owned 95% of Tapmasters Hoboken and defendant owned 5%. (Sa120-22).

Like all WOB operating agreements, the Hoboken agreement provided that any potential investors had to complete a subscription agreement, which had to be vetted by the voting members; potential investors could then be admitted to the company, but only with the written approval of the managing partner and 51% of the voting interest. (1T111-19 to 120-19; Sa88). Mingo was the managing partner and held 95% of the voting interest. (1T113-2 to 22). Any contributions would then be used for the benefit of the company, Tapmasters Hoboken, LLC. (1T116-14 to 117-8; Sa79 at ¶ 3.06).

Between March and May 2014, around the time that defendant and Mingo signed the original Tapmasters Hoboken operating agreement, defendant sought additional investors for the project. (1T5-8 to 14; 4T205-10 to 23). Mingo knew defendant was engaged in this recruitment, but had not specifically approved the terms defendant was offering those potential investors. . (1T128-20 to 130-12). Steve Antaro, with whom defendant had another business, assembled six investors under the name “HOBWOB” to invest \$750,000 in exchange for what defendant represented would be a 30% stake in the WOB Hoboken franchise. (3T37-1 to 38-18). Between March 18 and May 16, 2014, these six investors provided the funds to defendant either by wire transfers to an account held by Bhagu, Inc. (“Bhagu”), or checks made payable to Bhagu. (4T206-12 to 208-10; 4T220-17 to 23; 4T227-16 to 19; 4T231-19 to 232-3; 4T244-11 to 18;

4T249-9 to 250-6; 4T252-1 to 253-4; 4T254-19 to 255-8). Bhagu is owned by one of defendant's sisters, but defendant operated it and had signing rights for it. (6T8-14 to 11-16). These deposits and payments, ultimately totaling \$750,000, occurred both before and after the execution of the Tapmasters Hoboken operating agreement on May 2, 2014, which showed defendant only owned 5% of the franchise. None of the investors made payments to any Tapmasters or WOB entity.

Almost immediately after each deposit of funds from the HOBWOB investors into Bhagu's account, defendant used these funds to pay for personal expenses, including the mortgage on an apartment, car payments, checks written to himself, and outstanding debts for the failed Melting Pot. (4T220-8 to 229-25; 4T236-15 to 248-25; 4T238-1 to 8; 4T242-24 to 243-2; 4T250-16 to 251-25; 4T253-9 to 254-21; 4T258-6 to 16).

On June 27, 2014, after defendant spent the investors' money, he sent a proposed operating agreement for HOBWOB to Mingo and their attorney stating that they should add the investors and "not delay the funding." (Sa125). Mingo responded that they needed to identify their respective shares and contributions, and defendant agreed. (Sa123). Defendant did not mention that he had already received money from investors and promised them 30%. (Sa123).

It was not until August 2014, when Mingo ran into Antaro at a restaurant

and Antaro asked about the status of documentation memorializing the group's investment, that Mingo learned the group had come to an investment agreement with defendant and provided defendant with funds. (1T144-8 to 145-8). Mingo explained that he was stunned because defendant had never told him about that agreement or the transfer of funds. (1T145-21 to 147-17). On August 11, 2014, Mingo notified defendant that, in light of the misappropriation of \$750,000 that properly belonged to the company, he was removing defendant from Tapmasters Hoboken, LLC, for cause. (1T152-2 to 16).

On May 8, 2019, a State Grand Jury returned Indictment No. 19-05-00046-S, charging defendant with one count of second-degree theft by deception, in violation of N.J.S.A. 2C:20-4. (Sa1-3).

In April 2023, a seven-day jury trial was held before the Honorable Mitzy R. Galis-Menendez, J.S.C. (7T110-14 to 19; Sa4). At trial, defendant testified in his own defense. Like Mingo, he testified that the ownership structure under the ADA was originally a 40/30/30 split between Mingo, himself, and Douglas, with Mingo having the largest share and serving as managing partner. (6T88-16 to 90-25). But defendant also testified, without relying on any documents, that he and Mingo were 50/50 partners in the WOB Hoboken franchise because Douglas had gradually withdrawn. (6T116-2 to 119-9). Defendant testified that he did not recall signing the Hoboken operating agreement showing that he only

had a 5% interest in WOB Hoboken and the only reason he may have done so was to secure a small business loan. (6T10-2 to 8; 6T173-13 to 18).

Based on evidence that defendant had taken \$750,000 from investors in exchange for 30% of a business that he did not own, and that he spent the money on unrelated personal expenses, on April 20, 2023, the jury convicted defendant of theft by deception of property valued in excess of \$75,000. (6T110-9 to 24).

B. Defendant's Motion For A New Trial.

Eight days after his conviction, defendant filed a motion for a new trial and judgment of acquittal. (Sa5-12). That motion alleged, in relevant part, that defendant was in possession of newly discovered evidence. (Sa11). Over two months later, defendant submitted a brief in support of that motion, to which he appended that alleged evidence: (1) two WOB franchise agreements between WOB and Bhagu for the Hoboken location, one signed January 22, 2014, and the other signed May 7, 2015 (the Bhagu franchise agreements); (2) a principal owner's guaranty for "Tapmasters II" showing that defendant had a 30% interest in that entity; (3) a certification from defendant's sister, Lina Patel,² claiming to have found all these documents after "days" of searching boxes in the family's garage; and (4) bank statements introduced by the State at trial. (Sa126-296).

² To avoid confusion, the State refers to defendant's sisters by their first names. No disrespect is intended.

Defendant contended that this evidence showed that he was the sole franchisee of the Hoboken WOB franchise and therefore had the authority to sell 30% of the franchise shares to the HOBWOB investment group.

At an October 12, 2023 hearing on the new-trial motion, Lina testified—contrary to her certification—that she only found approximately eleven pages that said “Bhagu” and “World of Beer” on them. (8T13-13 to 19; 8T24-23 to 25). Instead, she testified, once she showed those pages to defendant, he then searched his own email archives and found “a whole bunch of emails,” including the Bhagu franchise agreements. (8T13-20 to 8T14-4). Lina testified it took “close to an hour” to locate the documents in defendant’s email. (8T33-2). She did not explain where the guaranty for Tapmasters II was found.

Defendant also testified at the motion hearing that he searched his emails for the documents after his sister found several pages in boxes. (8T40-24 to 41-6). Unlike Lina, however, he testified that the only documents attached to the email—dated May 7, 2015, and sent from his own email account to himself—were the 2014 Bhagu franchise agreement and an addendum, dated January 22, 2014. (8T77-1 to 79-1). Defendant was unable to explain where the 2015 Bhagu franchise agreement was found. (8T78-4 to 80-20). He also struggled or failed entirely to explain how he had located other documents in his new-trial motion. (8T47-21 to 48-15; Sa297-300).

On December 14, 2023, Benjamin Novello, Chief Development Officer of WOB, testified. Novello, whose signature appears on both of the alleged Bhagu franchise agreements (purportedly signed January 22, 2014 and May 7, 2015), testified that the first time he saw either agreement was in the summer of 2023. (9T13-13 to 14-5; 9T7-5 to 11). Neither Novello nor his colleague recalled any Bhagu franchise agreement, nor were they able to locate one in their electronic or paper records or with their lawyers, even though the company kept copies of every franchise agreement it ever executed. (9T14-6 to 23). Novello not only testified that he could not recall signing these agreements, (9T15-20 to 16-4; 9T18-3 to 14), but stated that his signature looked identical—not just similar—to his signature on an agreement between WOB and Tapmasters for an Albany franchise signed on the same date. (See 9T15-1 to 18-14).

Novello also offered further reasons for skepticism: these agreements overlapped with the franchise agreement for Tapmasters Hoboken, which was signed on May 7, 2015, and was in WOB's files. (9T9-18 to 20; 9T15-4 to 12; 9T20-20 to 22; Sa305-63). Both purported to grant an exclusive 10-year franchise for the same location. (9T9-18 to 13-12; 9T15-11 to 16; 9T17-12 to 18-2). Novello also testified that WOB would not have approved a franchise for anyone other than Tapmasters because of the ADA in effect. (9T22-19 to 21).

As he explained, under the ADA, defendant had 30% of the area

development rights, but each time a new unit was opened, a separate operating agreement had to be executed setting forth the ownership interest for that unit. (9T40-7 to 16; 9T47-10 to 14). He testified that the principal owner's guaranty for Tapmasters II that was submitted along with Lina's certification related only to the ADA concerning the exclusive rights to open franchises throughout New Jersey, New York, and Pennsylvania, and not the Hoboken franchise, which was governed by separate agreements that detailed percentages of ownership in the Hoboken location. (9T42-21 to 45-24). According to other documents submitted by Tapmasters to WOB and signed by both defendant and Mingo, defendant only had a 5% ownership share in WOB Hoboken. (9T41-19 to 42-7).

C. The Decisions Below.

On February 16, 2024, the trial court issued a written opinion granting the new trial. First, the trial court found that the evidence qualified as "new": she held that these documents "were not discoverable by reasonable diligence at the time of trial" because they were "discovered among presumably thousands of documents" and because "[d]efendant searched his email for around an hour before any emails with the documents popped up.'" (Sa24). Second, the court rejected Novello's opinion that the Bhagu franchise agreements were fraudulent because, although WOB could not locate those two agreements in its files, it was

able to locate the Tapmasters II guaranty in its files. (Sa25). Last, the trial court found the documents were material because the Bhagu franchise agreements gave defendant authority to sell shares and “thus [he] could not have deceived investors,” and the Tapmasters II guaranty does not portray defendant as a 5% owner in the franchise. (Sa25-26). The court vacated the jury’s verdict.

The Appellate Division granted the State’s subsequent motion for leave to appeal, (Sa34-37), but ultimately affirmed in an unpublished opinion, (Ma1-18). First, the court found that the trial court did not abuse its discretion in holding that defendant could not have located the documents with reasonable diligence given the “presumably thousands of documents” among which the agreements were discovered. (Ma12). Second, the court found that the new evidence also justified overturning the original jury verdict: despite acknowledging “issues of authenticity” with the franchise agreements, the panel agreed that a jury should determine at the subsequent trial whether the evidence was fabricated. (Ma15-16). The panel also believed this evidence was not cumulative. (Ma17-18).

This motion followed.

QUESTIONS PRESENTED

1. Whether and when evidence that is indisputably in defendant’s possession before conviction can qualify as newly discovered.
2. Whether judges can assess the credibility of newly discovered evidence in considering its impact on the jury’s verdict.

LEGAL ARGUMENT

POINT I

LEAVE IS WARRANTED TO ADDRESS THE TWO QUESTIONS GOVERNING NEW TRIAL MOTIONS.

This Court should grant leave to consider the panel’s decision to affirm a new trial here, and ultimately reverse that decision. New trial motions based on newly discovered evidence are “not favored and should be granted with caution by a trial court.” State v. Conway, 193 N.J. Super. 133, 171 (App. Div. 1984). A defendant must show that such evidence is: “(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury’s verdict if a new trial were granted.” State v. Szemle, 247 N.J. 82, 99 (2021). Said another way, the evidence must actually be new and not discoverable beforehand with reasonable diligence, and it must be of sufficient relevance and sufficient credibility to suggest that the jury would not have convicted the defendant. But the Appellate Division erred in both parts of the analysis—conflicting with persuasive and binding precedent alike. First, the decision below is difficult to reconcile with this Court’s teachings on reasonable diligence, and flatly irreconcilable with other courts’ treatment of evidence that was in the defendant’s possession before the conviction. Second, the courts below violated this Court’s precedents in leaving credibility of this

evidence to a future jury, and in their assessment of the evidence's materiality.

A. This Evidence Was Discoverable By Reasonable Diligence.

The framework the courts below employed when assessing the reasonable-diligence prong conflicts with this Court's precedents and reams of cases from other jurisdictions. This Court has held that just as a "defendant is not entitled to benefit from a strategic decision to withhold evidence," neither should he be able to overturn his conviction by failing or declining "to act with reasonable dispatch in searching for evidence before the start of the trial." State v. Ways, 180 N.J. 192, 171 (2004). In keeping with that principle, this Court has made clear that where no "external obstacle" impedes a defendant's access to evidence before or during trial, defendants usually cannot present such evidence post-conviction as a basis for a new trial. Szemple, 247 N.J. at 100; compare State v. Nash, 212 N.J. 518, 552 (2013) (asking if defense counsel's pre-trial efforts to obtain evidence "were probably thwarted" by a third party).

It follows that evidence would not qualify as "newly discovered" to justify a new trial when it involves, e.g., "testimony of a witness whose 'identity was well known to the defense at trial,'" Szemple, 247 N.J. at 100 (quoting Ways, 180 N.J. at 196)), or "scientific reports" that had "existed at the time of trial," ibid. (quoting State v. Fortin, 464 N.J. Super. 193 (App. Div.), certif. denied, 246 N.J. 50 (2021)). The logical import of this Court's legal standard and the

illustrative examples are clear: the reasonably diligent defendant would be able to identify evidence in his own possession, which is accessible to him before trial and is not likely to be obstructed by an external obstacle or actor.

Many, if not most, of the federal circuits have expressly adopted a similar rule. See, e.g., United States v. Cimer~~a~~, 459 F.3d 452, 460 n.10 (3d Cir. 2006) (acknowledging that “several ... circuits have held that where the defendant had possession of the evidence at the time of trial, his failure to realize its relevance will not render that evidence ‘newly discovered,’ and “agree[ing] that this is the correct rule”); United States v. Jaramillo, 42 F.3d 920, 925 (5th Cir. 1995) (stating the same rule and adding that “[d]ue diligence requires that a defendant exert some effort to discover the evidence” in his possession); Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987); Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987); United States v. Pappas, 602 F.2d 131, 134 (7th Cir. 1979). Multiple cases illustrate how defendant’s failure to expend effort to either discover or assess the relevance of accessible evidence is dispositive. See, e.g., United States v. Garcia-Alvarez, 541 F.3d 8, 18 (1st Cir. 2008) (explaining evidence of defendant’s location at time of crime derived from “complex and time-consuming” analysis of call records conducted after conviction was not newly discovered because defense counsel possessed the records themselves pre-trial); United States v. Castillo, 171 F.3d 1163, 1167 (8th

Cir. 1999) (defendant failed to listen to both sides of audiotape).

A number of state courts agree. See, e.g., Gutierrez v. State, 602 S.W.3d 17, 21 (Tex. App. 2020) (“A new trial is never allowed to obtain evidence that was known or accessible to the defendant at the time of trial.”); People v. Wong, 784 N.Y.S.2d 158, 160 (N.Y. App. Div. 2004) (agreeing a report “in defendant’s possession” at time of trial was not newly discovered evidence); State v. Perez, 457 N.W.2d 448, 457 (Neb. 1990) (similar); State v. Daymus, 380 P.2d 996, 997 (Ariz. 1963) (“Information within the personal knowledge of defendant does not become newly discovered evidence by reason of later recollection.”).

Against that backdrop—consisting of both this Court’s precedents and the overwhelming weight of case law from other jurisdictions—the decisions of the trial court and the Appellate Division here are significant outliers. The evidence defendant produced in his new-trial motion, allegedly found just one week after his conviction, were franchise agreements that (by defendant’s own admission) were in his family’s garage and his own email archive. See supra at 9. And as explained above, defendant had four years between indictment and conviction to locate the allegedly inculpatory evidence—which, by his own admission, was recoverable after only about an hour of searching his email archive. See supra at 9. Neither the trial court nor the Appellate Division explained why they were deviating from the broadly-accepted rule that evidence in defendant’s own

possession would not qualify as newly discovered. Nor did these courts explain why defendant could not have “act[ed] with reasonable dispatch in searching” his family’s garage and his own email account for the Bhagu agreements “before the start of the trial,” Ways, 180 N.J. at 192, let alone identify a single “external obstacle” that had impeded his access to them, Szemple, 247 N.J. at 100. This Court’s review is needed to address the Appellate Division’s conflict with this Court’s legal standard and with this array of persuasive precedent.³

This is also a particularly good case to review the question of whether any evidence can be “newly discovered” when it was in the defendant’s possession all along. After all, the question is dispositive: if this Court agrees that evidence

³ Of course, if this Court does agree to grant leave and consider these questions, the State’s view is not that evidence in defendant’s possession can never justify a new trial; instead, it requires extraordinary extenuating circumstances of the sort that qualify as a special “obstacle” to accessing the evidence. For example, in Commonwealth v. Boyle, 625 A.2d 616, 621-22 (Pa. 1993), a defendant who was convicted of willfully failing to file his tax returns argued that he discovered after trial a single-page document indicating he had been granted an extension of time. A tax auditor placed the document in defendant’s files, but never told defendant of that document or of the extension of time after returning the files to defendant. Ibid. The Court agreed that the document was newly discovered because “[r]easonable diligence” does not require a defendant to examine boxes of his own documents on the outside chance that the Commonwealth may have placed or secreted relevant evidence among the documents.” Id. at 622. But nothing of the sort exists here: these franchise agreements were in defendant’s email archive because defendant emailed them to himself. See supra at 9. Far from a case in which something had been placed in a defendant’s possession in secret, in this case defendant alone had awareness of these materials.

generally can be found with reasonable diligence when the defendant possesses it, this new trial order cannot stand. While the courts below emphasized that defendant possessed thousands of pages of hard-copy records, see supra at 11, defendant had four years to conduct the search; it only took about an hour of searching to uncover these Bhagu franchise agreements; defendant identified no “external obstacle” to conducting this search earlier, see supra at 9; and the mere fact that locating evidence may be “complex and time-consuming” is insufficient to justify a new trial, Garcia-Alvarez, 541 F.3d at 18. Tellingly, the only explanation defendant offered for the four-year delay in decided to search his own email archive is that defendant believed he had a strong trial defense. (Db24). But courts do not subvert jury verdicts simply to afford a defendant the “opportunity to rectify a faulty trial strategy.” Garcia-Alvarez, 541 F.3d at 18; see Ways, 180 N.J. at 192. To the contrary, endorsing this rule would encourage gamesmanship—encouraging defendants to test a preferred theory at trial, while holding evidence in reserve to later seek a second bite at the apple. See Ways, 180 N.J. at 192. That is not, and has never been, our law.

This case provides this Court with an opportunity to hold that evidence in defendant’s possession is not, absent extraordinary extenuating circumstances, an appropriate basis for a new trial motion based on newly discovered evidence. That is consistent with the principles this Court has laid out. It is consistent with

decisions of other jurisdictions. But it requires reversing the decision below.

B. The New Evidence Would Not Have Changed the Jury's Verdict.

This Court should also grant leave to review these courts' analysis of the first and third prongs of the inquiry, which are "inextricably intertwined." Nash, 212 N.J. at 549. Taken together, these prongs assess whether the new evidence "would 'have some bearing on the claims being advanced.'" Ways, 180 N.J. at 188 (citation omitted). Here, too, the decisions below conflict with decisions of this Court, and open the door to new trials based on fabricated evidence.

Most fundamentally, the Appellate Division's decision directly conflicts with this Court's admonition that courts serve an important gatekeeping function regarding the veracity of post-trial evidence. As this Court has detailed, the trial court is to review the credibility of newly discovered evidence "with a certain degree of circumspection to ensure that it is not the product of fabrication," Ways, 180 N.J. at 187-88, especially if the "sketchy" evidence comes from the defendant or those close to him, State v. Buonadonna, 122 N.J. 22, 50-51 (1991). The "better practice" is for the trial court, as both "gatekeeper" and "factfinder" in this posture, to resolve the documents' admissibility and their truthfulness. Cf. State v. Tormasi, 443 N.J. Super. 146, 157 (App. Div. 2015) (addressing role of PCR court). Otherwise, courts would always grant new trials notwithstanding severe doubts as to the new evidence. See Ways, 180 N.J. at 187-88.

The courts below directly contravened that obligation here. Crucially, the Appellate Division acknowledged that there are “issues of authenticity regarding the newly discovered franchise agreements.” (Ma15). But instead of resolving those issues, the court instead held “‘the jury should be given the opportunity to determine the evidence’ that was presented during the hearing.” (Ma16). The problem, of course, is twofold: this is directly contrary to the case law obligating courts to play a gatekeeper role at this stage, and it rewards defendants by giving them the precise relief they seek—the new trial. After all, a future new jury can only consider the credibility of this evidence if a trial court has vacated the jury verdict, meaning the material—even if not credible—has achieved its goal.

This case is a perfect example: the evidence that defendant fabricated the Bhagu franchise agreements is substantial. When the agreements are compared side-by-side with other agreements in WOB’s records, they are identical to two other agreements—including Novello’s signature—except for defendant’s own signature and the name of the franchisee. (Sa130-189; Sa234-292; Sa305-363; Sa364-243). And Novello testified that WOB would not have entered into a franchise agreement for the Hoboken location except with Tapmasters because it would have violated the ADA and the franchise agreement for that location with Tapmasters. (9T12-17 to 13-12; 9T22-12 to 21). The primary response by the courts below was to note defendant emailed the Bhagu franchise agreements

to himself “four years before the indictment and seven years before the trial”— at a time when, the courts believed, “defendant had little to no reason to fabricate them.” (Ma15). But had the courts performed the factfinder function required by law, they would have quickly discovered this is incorrect: the only email defendant could identify containing the “new” documents was sent to himself in May 2015, after Mingo learned that defendant had pocketed \$750,000 from investors, when defendant had incentive to avoid prosecution, even if he had not yet been charged. (7T44-15 to 46-20.)⁴

Moreover, beyond the courts’ legal errors on credibility, the panel below also erred as to materiality. This Court has made clear that the courts reviewing new trial motions must conduct a “thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury.” Ways, 180 N.J. at 192. The trial court found that the Bhagu franchise agreements gave the defendant the authority to sell a 30% share and “thus [he] could not have deceived investors.” (Sa25); see (Ma17-18). But the franchise agreements themselves do not set forth ownership percentages. Only the operating agreement and personal owner’s guaranty do, and neither was

⁴ Indeed, although the first Bhagu agreement was purportedly dated January 2, 2014, it was attached to an email on May 7, 2015, which was long after Mingo’s discovery. That long delay between the alleged date the agreement was signed and the date defendant emailed it to himself is another reason for skepticism.

included with the Bhagu franchise agreements. (9T42-21 to 45-24). So even if Bhagu was the sole franchisee of Tapmasters Hoboken, that alone would not establish defendant's authority to sell a 30% share, and thus would not "shake the very foundation of the State's case." Ways, 180 N.J. at 189. The Appellate Division failed to grapple with that high bar in finding the documents material.

And the panel misunderstood materiality in a second, important respect: regardless of the ownership share defendant believed he had, that still does not refute the independent trial evidence that defendant had intended to deceive the HOBWOB investors and did not intend to give them the promised stake. After all, although defendant told the investors that they were buying shares in WOB Hoboken, he directed them to make payments to Bhagu. As each payment came in, defendant spent the money on purely personal expenses, including payments for his Porsche and his failed restaurant. The deposits to and payments from the Bhagu account occurred both before and after defendant had signed the guaranty indicating that he only owned 5% of Tapmasters Hoboken. And defendant never informed Mingo that he secured investors, much less received Mingo's approval to do so as required by the operating agreement. So even if defendant believed he had a right to sell a 30% share when he began misappropriating the investors' \$750,000, he knew long before he accepted the last payment that he had no such right—and he continued pocketing their money, without telling his partner, and

expending it on personal uses in secret. The new evidence regarding ownership, even beyond its flaws, cannot “strongly advance[] [defendant’s general denial of guilt.” Nash, 212 N.J. at 551. Ordering a new trial was error.

POINT II

THE INTERESTS OF JUSTICE FURTHER SUPPORT GRANTING LEAVE TO APPEAL.

Not only did the decision below commit legal errors on questions of public importance concerning the standard for evaluating new-trial motions predicated on the discovery of new evidence, but the interests of justice further support this Court’s review. See R. 2:2-4. That is so for two reasons: it would otherwise be impossible to review this grant of a new trial, and the decision to vacate a valid verdict works tremendous harms for the State, the public, and the courts.

First, without granting review on this interlocutory posture, this Court will be unable to review this case and the important new-trial questions it presents. After all, if the new-trial order is allowed to stand, and the State again obtains a conviction, there will be little reason to review whether the new trial was proper in the first place—all the downsides of the new trial will have already occurred. By contrast, if the new-trial order is allowed to stand, and defendant ultimately obtains an acquittal from the jury, double jeopardy principles preclude the State from petitioning for review of the original grant of a new trial. See generally State v. Ortiz, 202 N.J. Super. 233, 239-41 (1985). That means defendant’s

motion for a new trial and the fundamental legal questions it presents can be reviewed by this Court only on this interlocutory posture. And because leave to appeal is the only vehicle to ensure this Court can provide our state courts with guidance on whether evidence is “new” notwithstanding it was in defendant’s possession, and whether to review credibility and materiality in the gatekeeper role, that is a particularly compelling basis to grant this motion.

Second, the interest of justice further compel review here because orders granting new trials, including the decisions below, impose significant real-world costs. As this Court has acknowledged, the State has a strong interest in the finality of verdicts. State v. Mitchell, 126 N.J. 565, 584 (1992). Courts and attorneys must expend limited resources litigating new issues post-trial. Ibid. Both the State and the defense face challenges in presenting their cases years after the events giving rise to the charges that can be “substantial, perhaps herculean.” Nash, 212 N.J. at 555. Witnesses may no longer be alive or may be otherwise unavailable, and memories fade. Ibid. And victims should not be put through new trials unnecessarily. Ibid. See also State v. Canfield, 470 N.J. Super. 234, 300 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023) (noting the toll retrying cases has on victims and their interest in the finality of verdicts). Allowing defendants to obtain new trials based on evidence that was in their possession throughout trial, is of extremely questionable validity, and would not

likely have changed the outcome of the trial would undermine the finality of jury verdicts.

CONCLUSION

This Court should grant leave to appeal.

Respectfully submitted,

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