Stephen W. Kirsch, Esq.
3111 Route 38, Suite 11 #302
Mount Laurel, NJ 08054
609-354-8402
SteveKirschLaw@gmail.com

Jennifer Sellitti, Public Defender
Public Defender, Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07102
Attorney for Defendant-Appellant

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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
PO Box 970
Trenton, NJ 08625

Re: State (Plaintiff- Respondent) v.
Yusef B. Allen (Defendant-Petitioner),
Supreme Court Docket No. 090853
App. Div. Docket No. A-1045-22

Your Honors:

Please accept this letter in lieu of a more formal petition for certification on behalf of defendant-petitioner Yusef Allen. Defendant urges that certification be granted for all the reasons set forth in Point I of his Appellate Division brief, which he adopts in full here, plus the additional argument contained herein with respect to that same point.

Point I addresses two important, related issues, certain to arise in many

other cases: first, the proper measure of "materiality" for a claim that the State failed to turn over evidence under Brady v. Maryland, 373 U.S. 83 (1963), regarding the State's primary witness at trial, and, second, whether the record in this case meets that standard. As argued infra in this petition, the published opinion of the Appellate Division, State v. Allen, ___ N.J. Super. ___, 2025 N.J. Super. LEXIS 43 (2025), holds -- contrary to prior decisions of this Court -- that the standard of materiality for a Brady claim is the same as the heightened materiality standard for a newly-discovered-evidence claim under State v. Carter, 86 N.J. 300, 314 (1981). That conflict with prior case law, most notably Carter itself, as well as the important nature of the issues presented -- because of their bearing not merely on this murder case, but on future cases – and the published aspect of the Appellate Division decision, should result in a grant of certification.

This 1999 murder trial, as described in the Statement of Facts in defendant's Appellate Division brief, involved no direct eyewitnesses to the shooting that occurred. In 2014, defendant received, for the first time, information that indicated that Ruby Waller -- the main witness for the State -- had previously received favorable treatment from the State in a 1991 plea deal in exchange for her testimony in the State's portion of that other case. (Da 30 to 31)[1] The State

[1] Da – appendix to defendant's Appellate Division brief
Db – defendant's Appellate Division brief

does not dispute the truth of that information or the fact of its non-disclosure. Thus, defendant filed a motion for a new trial, alleging, inter alia, that the State's failure to turn over information about that prior plea deal was a violation of the State's due-process-based discovery obligations under Brady, 373 U.S. at 87. (Da 38 to 39) Defendant's argument was simple: Waller insisted on the stand that her decision in this case to approach the police with information and then testify against defendant was merely a benevolent act and not done to curry favor with prosecutors for present or future charges, but the 1991 plea deal -- a guilty plea with a testimony requirement in exchange for favorable treatment -- made it clear that she was quite experienced in participating in such deals, thereby making it quite likely that she testified with an eye towards currying favor with the State here.

Despite the fact that defendant, in his pro se filing in the Law Division, clearly made a Brady-based claim with respect to this issue (Da 37 to 38), the lawyer assigned to handle the motion for defendant primarily relied upon the more stringent materiality standard set forth in State v. Carter, 86 N.J. 300, 314 (1981), for handling non-Brady-based assertions that "newly discovered evidence" warrants a new trial. (17T 4-6 to 7; Da 40 to 41) The motion judge did even worse -- failing to address Brady at all, and denying the claim in this point

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Pa – appendix to this petition

based upon the harsher Carter standard. (17T 12-14 to 13-9; Da 50 to 53)

Thus, defendant appealed, making two claims: (1) that the judge applied the wrong legal standard for materiality -- i.e., Carter, not Brady -- and (2) that defendant should have prevailed under either of those standards because the case against defendant was far from airtight and the nondisclosure of Waller's prior plea deal certainly would have affected the verdict, casting great doubt on her veracity, and, thus, the veracity of the State's case.

The resulting Appellate Division decision is confusing, contradictory, and, disconcertingly, published, thereby raising the specter that, unless certification is granted to address that decision, future cases such as this may be negatively affected. As argued herein, the Appellate Division applies the wrong legal standard, in conflict with prior decisions, notably Carter, and reaches the wrong result on the question of materiality.

The errors in the case began at the motion level in the Law Division at the motion for a new trial. Where the motion court went astray lies in the fact that there are two kinds of motions for a new trial based upon "newly discovered evidence": (1) a Brady-based claim that such evidence was in the possession of the State, was "favorable to the accused," and should have been disclosed to the defendant pre-trial by the State because it was "material," State v. Nelson, 155 N.J. 487, 497 (1998); and (2) every other kind of "newly discovered evidence"

claim -- i.e., claims not alleging withheld evidence, but rather merely the discovery by the defense of new exculpatory evidence that is "material." See Carter, 85 N.J. at 314.

Obviously, this was the former -- a Brady claim -- and, to its credit, the Appellate Division decision acknowledged that the motion judge was wrong to analyze the claim under Carter rather than Brady. (Pa 22 to 23) Where the Appellate Division nevertheless went wrong was in two respects: (1) deciding that, on the question of materiality, that misapplication was of no moment because the materiality standards under Carter and Brady are the same (Pa 21 to 22); they are not; and (2) holding that the nondisclosure was not "material" when it plainly was.

The first of those errors forces this Court into a bit of a minefield of competing language and puzzling conclusions in the Appellate Division decision. The Appellate Division opinion specifically quoted Carter, 85 N.J. at 314, where this Court held: "Whereas the test of materiality for the granting of a new trial under a Brady analysis is simply whether the suppressed evidence might have affected the outcome of the trial, the test to be satisfied under a newly discovered evidence approach is more stringent." (Pa 21) (emphasis added). But then that court tried to explain why what appears to be a very plain statement in Carter -- that the materiality standard for non-Brady newly discovered evidence is greater

than for a Brady analysis -- does not mean that at all; rather, the Appellate Division opinion claimed that what Carter intended was to say merely that the overall test in Carter is more stringent than Brady, but not the materiality part of it! (Pa 21 to 22)

Not only are the mental gymnastics to reach such a conclusion rather overwhelmingly difficult when one reads the plain language of that particular sentence in Carter -- where this Court appears quite clearly to be talking about "the materiality test" of Brady versus non-Brady claims, 85 N.J. at 314 -- but that conclusion by the Appellate Division also flies in the face of other places in the case law where the two materiality standards are plainly stated by this Court to be different from one another.

For instance, the later decision in State v. Carter, 91 N.J. 86, 113 (1982), clarifies that while the "might have affected the outcome" test for Brady materiality does not mean a "mere possibility" that the undisclosed information might have affected the trial -- because such a standard would require near-automatic reversal -- what it requires is only a little more: a "real possibility" that the information would have mattered to the verdict. (Emphasis added). This Court then says that "real possibility" standard equates well to one we are all familiar with for measuring harmless error on appeal: whether there is a "reasonable possibility" that the error could have affected the result. Id. In comparison, the

standard for materiality of a non-Brady claim of newly discovered evidence is, according to Carter, 85 N.J. at 314: whether the evidence is "of the sort that would probably change the jury's verdict if a new trial were granted." (Emphasis added). To recap, there are two different standards, contrary to the conclusion of the Appellate Division: a "real possibility" the verdict might have been different (Brady) versus a probability (non-Brady) of a different result.

In addition, logic would also lead to the conclusion that the two standards are different. While the Appellate Division is correct that Brady claims are not about "blaming" or "punishing" the State for non-disclosure (Pa 19 to 20), it is indisputable that such claims do address a pretrial error by the State that is claimed to have affected the trial. A Brady claim is like any other claim of trial or pretrial error: that something went wrong back then that tainted the verdict. In comparison, a non-Brady claim of newly discovered evidence does not address an error of the trial or pretrial variety; rather the claim in such a situation is that new evidence has been discovered which, if the trial were held now, would change the otherwise unimpeachable verdict. It makes logical sense that a Brady claim of trial or pretrial error would be measured via the same harmless-error standard as any other trial error: whether there is at least a reasonable doubt -- a "real

possibility" in Carter terms, 91 N.J. at 113[2] -- that the verdict could have been affected by the error. Conversely, an attempt to undo an otherwise final verdict with evidence not of a trial error that taints the verdict, but rather of something new that is so important that it requires redoing a trial that had no reversible error, necessarily raises greater concerns about the finality of verdicts, and, thus, sensibly should require a bit more in terms of a showing of materiality. The Appellate Division's erroneous conclusion in a published opinion that the materiality standards for Brady claims and non-Brady newly-discovered evidence claims are the same conflicts with Carter and with logic, and that conflict should lead to a grant of certification.

But the way the Appellate Division analyzed the question of the application of the materiality prong of the Brady analysis in this case should also concern this Court. This evidence of Waller's prior deal with the State was plainly material, and the Appellate Division's analysis should be rejected for a number of reasons. First of all, a simple reading of the record reveals that there was no other witness as important to the State's case as Ruby Waller. The Appellate Division's statement that "another witness, Whitfield, corroborated" Ruby Waller's

[2] Even harder to understand is that the Appellate Division in this case cited the "real possibility" quote from Carter, 91 N.J. at 113, regarding Brady materiality (Pa 19), and then nevertheless applied a "reasonable probability" test instead. (Pa 25) (emphasis added)

testimony (Pa 25) is simply inaccurate. Waller claimed to have interacted with the victim as they both bought drugs from the house where defendant was, to have seen defendant holding a gun and responding angrily to the victim, and to have fled the scene before the shooting, but still looked out a window to see the victim (but not defendant) as the victim was hit by the final shot. (Db 5 to 6; 3T 44-23 to 48-6; 3T 48-11 to 13; 3T 47-15 to 49-3; 3T 49-12 to 13; 3T 49-18 to 50-25; 3T 51-9 to 52-20); 3T 53-3 to 54-8; 3T 159-10 to 18; 3T 54-9 to 21; 3T 55-17 to 24; 3T 60-20 to 61-1). Whitfield, on the other hand, never saw a gun, never saw the shooting, and only saw defendant yelling at someone, possibly the victim, while defendant had "something" in his hand, after which Whitfield and her companion left the scene to buy drugs elsewhere. (Db 9 to 10; 4T 22-9 to 23-22; 4T 25-15 to 20; 4T 55-22 to 24; 4T 25-1 to 28-12; 4T 28-2 to 29-25; 4T 65-6 to 20; 4T 30-1 to 3) Moreover, Whitfield had suffered a head injury in a car accident, with memory problems as a result, and was not only a heroin addict at the time of the shooting who was using eight or nine bags a day, but had just used heroin an hour or two before the incident. (4T 91-20 to 23; 4T 103-3 to 8; 4T 62-6 to 8; 4T 64-1 to 11)

While it is true that Waller's prior record and her pending charges were explored on cross-examination, the Appellate Division decision too easily dismisses what defense counsel could have done with the undisclosed evidence of the 1991 plea deal. Waller claimed not to have any expectation of favorable

treatment regarding her pending charges, but -- because the State withheld evidence of the 1991 plea deal -- the jury and the defense had no idea that she had a history of making favorable deals in exchange for testimony that easily could have influenced her actual expectations, and thus her bias as a witness. In other words, a critical aspect of her credibility of a witness -- whether she was biased in trying to save herself and had experience with doing so in the past via a plea deal -- was left out of the jury's analysis of her credibility because of the State's non-disclosure of the 1991 plea deal.

"The Confrontation Clause protects a defendant's right to cross-examine a witness on the 'possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.'" State v. Higgs, 253 N.J. 333, 361 (2023), quoting Davis v. Alaska, 415 U.S. 308, 316 (1974). "Defendants 'must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses.'" Higgs, 253 N.J. at 361, quoting State v. Sugar, 100 N.J. 214, 230 (1985).

One of the most fertile grounds for cross-examination regarding bias is if a witness has (or even imagines) a figurative Sword of Damocles hanging over them during their testimony because the witness is either facing pending

investigation or charges, or is on probation or parole. State v. Bass, 224 N.J. 285, 303 (2016). The Bass Court noted: "Indeed, '[i]n an unbroken line of decisions, our courts have held that the pendency of charges or an investigation relating to a prosecution witness is an appropriate topic for cross-examination.'" Id., quoting State v. Landano, 271 N.J. Super. 1, 40 (App. Div. 1994); see also State v. Baker, 133 N.J. Super. 394, 396 (App. Div. 1975) (noting that bias can arise from either a witness' expectations of favorable treatment if the witness testifies in a particular manner, or from apprehension of unfavorable treatment if the witness does not so testify).

While the judge's ruling on the motion for a new trial, and the Appellate Division decision, correctly noted that the mere fact of the pending charges was known to this jury and explored on cross-examination (Da 52 to 57; Pa 24 to 25), what those rulings incorrectly ignored was that -- because the State withheld evidence of the 1991 plea deal -- the defense at trial was left stuck with Waller's answer that she had no expectation that the State would treat her more favorably regarding her pending charges, or even future charges,[3] if she provided the State

[3] Waller was a drug addict with a criminal history and the potential to pick up new charges at any moment. While Waller had no pending charges when she first gave the police a statement about this case, that does not change the fact that she could easily have been angling to have a "cooperation" feather in her cap for whenever she might need it. As an active crack addict, buying crack daily from street dealers, she was almost certain to pick up future charges and

with testimony that inculpated defendant. When, in fact, Waller had a history of cooperation in exchange for favorable treatment via a plea deal, the defense would have had a fertile ground for cross-examining her real expectations -- had they only been told about the prior deal.

The evidence of the 1991 plea deal and Waller's resulting bias as a witness is plainly "sufficient to undermine confidence in the outcome." Nelson, 155 N.J. at 500.[4] As noted in the Statement of Facts in defendant's Appellate Division brief, Waller's own testimony was contradictory at times, and it conflicted markedly with the testimony of other witnesses, who either never saw defendant at all, or never saw him with a gun, and some of whom saw a vehicle (possibly containing the real shooter) speed off from the scene immediately after the shooting. (Db 4 to 12) Waller's potential for bias was extreme in light of her past plea deal and her resulting experience/knowledge of the extreme benefits that such cooperation can deliver. Because witness bias is always relevant and never collateral, Higgs, 253 N.J. at 361, the defense should have been able to fully

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her cooperation at any time might well help her out in the future. The fact that she had experience with making and benefitting from such deals was critical information for this jury to have.

[4] Indeed, it bears considerable similarity to Nelson, where the State failed to turn over evidence that one of the victim's families was suing the State for inadequately training the police victims in that case, and the death sentence in the case was reversed because that information bore on the jury's assessment of the proofs. 155 N.J. at 497-500.

cross-examine her on that bias, but that opportunity was denied because of the Brady violation: failing to tell the defense about Waller's prior deal.

Additionally, when, as noted, the Brady materiality standard is akin to the ordinary harmless-error standard of "harmless beyond a reasonable doubt," this Court's prior application of that standard is undermined by the published Appellate Division opinion as well. Recent rulings of this Court like State v. Hedgespeth, 249 N.J. 234, 252-253 (2021), and State v. Scott, 229 N.J. 468, 484-485 (2017), make clear that errors which affect the weight the jury gives the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless. It is impossible to reconcile those decisions with the Appellate Division decision that the nondisclosed evidence of the 1991 plea deal was not "material" or was, in harmless-error terms, harmless beyond a reasonable doubt. Is there a "real possibility" that the jury would have assessed Ruby Waller's credibility differently with this information? Of course there is; this evidence significantly challenged her claim that she was not angling for special treatment from the State. This was a case without forensic evidence implicating defendant, with conflicting other evidence, and without anyone identifying defendant as the actual shooter. Waller was the State's principal witness, and the State withheld critical evidence that could have been used to impeach her credibility. Under Hedgespeth and Scott, it is not the role of

an appellate court to make credibility calls when assessing harmless error. Hedgespeth, 249 N.J. at 252-253; Scott, 229 N.J. at 484-485. The clear conflict that the Appellate Division's "materiality" analysis has with those harmless-error decisions should lead to a grant of certification as well.

For all the foregoing reasons, defendant's petition for certification should be granted. Undersigned counsel hereby certifies that this petition presents substantial issues and is not filed for the purpose of delay.

Respectfully submitted,

Jennifer Sellitti
Public Defender
Attorney for Defendant-Appellant

/s/Stephen W. Kirsch
STEPHEN W. KIRSCH
Designated Counsel
Attorney I.D. No. 034601986

Cc: Meredith L. Balo, AP, Union Co.