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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No. A-1045-22T4

STATE OF NEW JERSEY, :  
 :  
 Plaintiff-Respondent, : Criminal Action  
 :  
 v. : On Appeal from a Final Order of  
 : the Superior Court of New Jersey  
 YUSEF ALLEN, : Law Division, Union County,  
 : Denying Defendant's Motion  
 Defendant-Appellant : for a New Trial.  
 :  
 : Sat Below:  
 : Hon. Pedro J. Jimenez, Jr., J.S.C.

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BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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DATED: June 6, 2024

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## COUNTER-STATEMENT OF PROCEDURAL HISTORY<sup>1</sup>

In August of 1998, a Union County Grand Jury returned Indictment No. 98-08-01208, charging defendant-appellant Yusef Allen with first-degree murder, in violation of N.J.S.A. 2C:11-3(a)(1) and (2) (count one); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(a) (count two); and third-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b) (count three). (Da1 to 2).

Trial was conducted before the Honorable John S. Triarsi, P.J.Cr., and a jury, on several dates in January 1999. (1T to 8T). On January 22, 1999, the

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<sup>1</sup> Da refers to defendant's appendix on appeal.

Db refers to defendant's brief on appeal.

1T refers to trial transcript, dated January 11, 1999.

2T refers to trial transcript, dated January 12, 1999.

3T refers to trial transcript, dated January 13, 1999.

4T refers to trial transcript, dated January 15, 1999.

5T refers to trial transcript, dated January 19, 1999.

6T refers to trial transcript, dated January 20, 1999.

7T refers to trial transcript, dated January 21, 1999.

8T refers to trial transcript, dated January 22, 1999.

9T refers to sentencing transcript, dated May 28, 1999.

10T refers to transcript of PCR Motion, dated September 20, 2005.

11T refers to transcript of motion, dated July 14, 2008.

12T refers to transcript of PCR hearing, dated August 4, 2008.

13T refers to transcript of PCR hearing, dated August 5, 2008.

14T refers to transcript of PCR hearing, dated August 6, 2008.

15T refers to transcript of hearing, dated September 3, 2006.

16T refers to transcript of PCR hearing, July 12, 2011.

17T refers to transcript of motion, August 4, 2022.

jury found defendant guilty as charged on all counts. (Da3 to 4; 8T9-16 to 11-5). At the sentencing on May 28, 1999, Judge Triarsi merged count two into count one and sentenced defendant to life in prison, with eighty-five percent of seventy-five years to be served without parole eligibility, pursuant to the No Early Release Act (NERA). (Da3 to 4; 9T23-1 to 9). Defendant was also sentenced to a concurrent five-year term of imprisonment on count three. (Da3; 9T23-10 to 11).

Defendant appealed, and on February 14, 2001, the Appellate Division affirmed defendant's conviction but reversed and remanded the case for resentencing to vacate the NERA term and impose a sentence of life imprisonment with a thirty-year period of parole ineligibility. (Da5 to 21); State v. Allen, 337 N.J. Super. 259, 275 (App. Div. 2001). On July 3, 2001, Judge Triarsi resentedenced defendant in accordance with the Appellate Division's opinion. (Da22 to 23). Thereafter, the Supreme Court denied defendant's Petition for Certification on January 24, 2002. State v. Allen, 171 N.J. 43 (2002).

Thereafter, defendant filed a Petition for Post-Conviction Relief, which was denied on September 20, 2005. (10T38-8 to 9); State v. Allen, 398 N.J. Super. 247, 249 (App. Div. 2008). Defendant appealed, and on March 4, 2008, the Appellate Division remanded for an evidentiary hearing on two issues. Id.

at 253. On August 4, 5, and 6, 2008, Judge Triarsi heard witness testimony on defendant's motion. (12T to 14T). After hearing counsels' arguments on September 3, 2008, the judge denied defendant's post-conviction petition on the record. (15T61-19 to 90-4).

Defendant appealed, and on February 28, 2011, the Appellate Division affirmed in part, but remanded for further proceedings on defendant's pro se claim concerning testimony from Ruby Waller in defendant's trial that was inconsistent with testimony she gave in a federal case. (16T4-3 to 5-1). After considering counsels' arguments, the judge denied defendant's petition. (16T30-2 to 39-11). The Law Division's Order was affirmed, and the Supreme Court ultimately denied defendant's Petition for Certification on January 16, 2013. State v. Allen, 213 N.J. 567 (2013).

Thereafter, defendant filed a Motion for New Trial based on newly discovered evidence. (Da25). The motion judge denied defendant's motion in a one-page order, stating the court was satisfied defense counsel conducted a thorough investigation and that there was insufficient reliable information to validate a credible motion. (Da25 to 26). Defendant appealed, and on April 14, 2020, the Appellate Division reversed the motion court's decision and remanded for further review by the motion court. (Da28).

On February 1, 2022, new defense counsel was assigned, and counsel filed a Motion for New Trial based on newly discovered evidence. (Da29). A brief in support of the motion was filed on March 3, 2022. (Da39 to 42). Oral argument on defendant's motion was heard on August 4, 2022, before the Honorable Pedro J. Jimenez, Jr., J.S.C. Judge Jimenez denied the motion on the record that same day and issued a written order and opinion on August 23, 2022. (Da43 to 53; 17T12-14 to 14-17).

Defendant then filed a Notice of Appeal with a Motion to File as Within Time, which was granted by the Appellate Division on February 7, 2023. (Da58). An amended Notice of Appeal was filed on March 28, 2023. (Da54 to 57). This appeal follows.

## COUNTER-STATEMENT OF FACTS

On October 15, 1997, around 6:00 a.m., Ruby Waller was approached by Lannie Silver near West Third Street and Lee Place in Plainfield. Silver asked Waller where he could go to buy some crack. Because Waller was on her way to buy herself some drugs, she offered to take him to the Mack House a couple blocks away on Prescott Place so they could both make purchases. (3T34-17 to 39-6). Waller testified that Silver appeared like he had been drinking because he slurred his speech. (3T45-6 to 8).

Silver drove Waller from Lee Place to Prescott and Third. (3T135-3 to 13). When they arrived at the Mack House, Waller went to a window on the porch and sat at a bench outside the window. She proceeded to speak to the individual that was on the other side of the window inside the house.

Although the window shade was drawn closed, Waller recognized the voice as that of Ben McNeil. Waller proceeded to purchase four nickel vials of crack. (3T40-21 to 44-16).

After Waller made her purchases, she got up off the bench, left the porch area, and let Silver sit down. (3T44-23 to 24; 3T45-15 to 18). Silver approached the window and asked the person on the other side “What you got?” McNeil lifted up the shade and looked at Silver. After looking at Silver, McNeil and defendant came out to the porch. McNeil, in an angered tone,

proceeded to tell Silver “to get the fuck out of here, [we] don’t sell drugs [here], white mother-... .” Silver responded that all he wanted to do was “buy some base.” While Silver walked away at a fast pace with his hands in the air, repeating that he just wanted to buy some drugs, defendant and McNeil continued to walk behind him yelling to “get the f... out of here.” (3T48-2 to 51-4).

At some point while they were following Silver, defendant stated, “Hold up, I got something for this mother-... .” Defendant walked back to the Mack House and came out with a gun in his right hand, holding it on the side of his leg. (3T51-6 to 52-19). When Waller saw defendant come out of the house with a gun, she ran to her house at 307 Prescott Place. (3T53-3 to 4). As she ran home, Waller continued to hear defendant and McNeil yell at Silver. When she approached the stairs of her house, Waller heard three to four gunshots and Silver screaming. The gunshots came within seconds of one another. (3T54-12 to 25). By the time she heard the last gunshot, Waller was looking outside a window from her house and saw Silver reacting to being hit. Waller observed that before getting hit by the last shot, Silver had trouble running. When the last shot hit him, Silver fell to the ground. Silver tried to get up but fell back down and began to crawl in the middle of Prescott Place. (3T55-17 to 57-7; 3T169-23 to 24). Waller further observed defendant and

McNeil, a couple seconds later, run into the Mack office located right next to the house where she had purchased drugs. She never saw them leave the building. (3T61-5 to 62-22).

As Silver lay in the middle of Prescott Place, Waller saw a blue van coming down the street. The van went around Silver to avoid hitting him. (3T60-10 to 19). After observing Silver get shot, Waller called 911 and told them that somebody had been shot at that location. (3T64-21 to 65-8). Waller continued to look out her window, even after the police and local residents responded to the scene and tended to Silver. (3T63-2 to 6).

Officer Daniel Passarelli and Officer McGrath of the Plainfield Police Department responded to Prescott and West Third. (2T153-11 to 154-15). Officer Passarelli saw Silver lying and bleeding in the middle of Prescott Place. (2T155-5 to 12). Officers John Austin and Mary Chosney, also of the Plainfield Police Department, responded to the call for assistance and arrived while Officers Passarelli and McGrath were working on Silver. (2T187-18 to 188-1; 2T209-22 to 210-18). The officers called for a paramedic unit to come to the scene. While attending to Silver, Officer Passarelli noted that there was a lot of blood, a gunshot wound to his leg, and a chest wound. (2T156-19 to 157-1; 2T158-15 to 23). The officer also recovered two \$1 bills and a key chain with a car remote that he gave to Officer Austin. Officer Austin pressed

the remote and got a response from a car on the street. The car, a green four-door Honda, was parked on Prescott toward Third Street. A license and registration card were found in the glove compartment of the car. (2T188-13 to 190-16).

While still attending to Silver, Officer Passarelli asked him if he knew who shot him. Silver responded “Yeah,” but that was the only response Silver gave before losing consciousness. (2T159-4 to 17). Once the ambulance arrived, the paramedics tended to Silver and took him to Robert Wood Johnson Hospital for further treatment. (2T160-24 to 25). Officer Chosney went with the paramedics and Silver to the hospital. (2T215-2 to 5). While en route to the hospital, Officer Chosney recovered a bullet off the cot between Silver’s legs. (2T216-11 to 19). When she returned to headquarters, Officer Chosney put the bullet in an evidence envelope and gave it to Detective Frank Wilson. (2T219-2 to 3).

Officer Passarelli and the other officers remained at the scene and secured the area for further criminal investigation. (2T159-24 to 160-3). Officer Passarelli testified that while searching the crime scene, no gun shell casings were found. (2T172-11 to 13; 2T185-17 to 19). Officer Austin testified that he had interviewed Cynthia Harrison and Bobby Harris’s father, Samuel Beasley, at the scene. (2T195-8 to 21; 197-9 to 23). Officer Austin

also patrolled the area searching for a white male, five feet ten inches, weighing 180 pounds, wearing dark clothing and named John. Officer Austin never found him. (2T205-18 to 206-9).

Detective Francis Wilson of the Plainfield Police Department was called to the scene by Sergeant Keith Pagach. (5T48-5 to 12). Detective Wilson first went to headquarters to be briefed on the incident before heading to the scene and meeting with Officers Passarelli and Austin. (5T48-13 to 25). When Detective Wilson first approached the scene, he was passed by defendant and McNeil as they walked on Third Street toward Grand Avenue. (5T49-23 to 51-2). At the scene, Detective Wilson observed blood dripping from a telephone pole into a pool of blood where Silver had collapsed on the corner of Third Street and Prescott. (5T51-15 to 24). Detective Wilson went back to headquarters to secure evidence from the scene before returning to the scene to take photographs. (5T52-19 to 53-19). At trial, Detective Wilson testified that no gun shell casings were found at the scene. (5T84-23 to 24).

Later that day, Waller saw McNeil standing at the corner of Prescott and Third, looking around. (3T66-22 to 67-7). On October 16, 1997, Waller placed an anonymous call to the Plainfield Police Department informing them of what she observed the previous day. (3T147-1 to 24). Waller identified defendant and McNeil as the men she saw that night. (3T191-15 to 192-6).

Officer Pagach testified he took the anonymous call and corroborated Waller's testimony. (4T8-25 to 9-8; 4T10-20 to 16-24).

A couple weeks later, Waller learned that Silver had passed away. This knowledge motivated Waller to call the Plainfield Police Department and arrange to give a formal statement. On October 27, 1997, Waller gave a statement to Detective Wilson and positively identified McNeil as the individual that sold her the drugs, and defendant as the other individual she saw on October 15, 1997. (3T118-1 to 123-6; 5T57-24 to 60-15). Waller testified that the reason she finally contacted the police was because she had learned the victim had died. (3T119-21 to 24). Waller candidly admitted that if she had not heard about the victim's death, she would have remained quiet. (3T119-25 to 120-2).

Rhonda Whitfield testified that she was out on the street on the morning of October 15, 1997 to buy drugs at the Mack house. (4T22-9 to 23). When she approached the Mack house, Whitfield observed Silver at the window and the ensuing confrontation between Silver and defendant. (4T23-1 to 25-13; 4T26-24 to 27-10). Whitfield testified that defendant appeared to be holding something on his right leg as he followed Silver away from the Mack house. (4T28-24 to 29-23). Whitfield realized that she would not be able to purchase drugs at the Mack house, so she went around the corner to Pond Place and

bought some from a person on the street. (4T26-10 to 15). As she walked to Pond Place, Whitfield heard what sounded like firecrackers. (4T30-12 to 31-17). On October 24, 1997, Whitfield gave a statement to Detective Wilson and identified defendant as the man that was arguing with Silver. (4T32-2 to 4; 4T39-12 to 23; 4T40-17 to 19; 5T56-2 to 57-16).

Judeah Brown, Alexis Thomas, and Pearline Douglas also testified that they lived near the corner of Third Street and Prescott Place, and on the day in question, they were awakened by the sound of gunshots and observed Silver crawling in the street. (4T124-7 to 19; 4T126-12 to 129-3; 4T137-25 to 138-23; 4T149-5 to 154-15). Brown and Douglas went out to help Silver. (4T131-19 to 132-5). Thomas testified that after she observed Silver laying in the middle of the street, she saw two men walk back into the Mack house. Because she did not have her glasses on, she could not tell if it was defendant and McNeil. Thomas reported the incident to the police and saw them arrive a few minutes later. (4T137-25 to 143-25).

Dr. Graciela Linares, Chief Medical Examiner for Union County, performed the autopsy of Silver on October 17, 1997. (5T13-24 to 25; 5T17-20 to 23). Dr. Linares testified that an external exam found six bullet wounds. (5T18-18 to 19). An internal exam showed that one of the bullets entered Silver's left side, went through his diaphragm, punctured his stomach

and his liver, and exited on the right side. Dr. Linares explained that this was the fatal wound and the cause of Silver's death. A second bullet was determined to be a flesh wound. The third bullet penetrated the femur bone in the thigh and caused it to fracture. This would have prevented Silver from walking. These additional wounds, though not as fatal, caused Silver to bleed to death. (5T20-22 to 22-17; 5T34-7 to 11). Dr. Linares further testified that the significance of there not being any gunpowder residue found on Silver's clothing or skin was evidence that the shooter was at a distance beyond eighteen to twenty inches of Silver when he was shot. (5T31-15 to 23).

Detective Gary Mayer, an employee of the Essex County Sheriff's Office Ballistics Armor Unit, testified as an expert at trial. (6T39-18 to 21; 6T41-4 to 6). Detective Mayer stated that he was assigned to examine the bullet fragments. From his examination of the evidence in this case, Detective Mayer was able to conclude that the two bullets had been fired from a weapon, but he could not be certain that they were fired from the same weapon. (6T51-14 to 23). Detective Mayer also explained the difference between ammunition fired from a revolver and ammunition fired from an automatic weapon. Based on the evidence, Detective Mayer believed that the shell fragments may have come from a revolver that shot nine-millimeter ammunition like an automatic gun. (6T57-8 to 61-6).

Allen Mularez, a private investigator hired by the defense, testified that he and his partner, June Davidson, conducted an interview with Waller on December 14, 1998. (5T123-8 to 9; 5T124-16 to 20; 5T125-7 to 12). Mularez testified that Waller cooperated in speaking with the investigators. (5T133-2 to 8). He also stated that Waller told him she never saw anybody with a gun during the incident in question. (5T134-23 to 25; 6T6-9 to 17). Mularez did not take a sworn statement from Waller. (5T140-23 to 25).

Bobby Harris, also testified for defendant and stated that on the day in question, he was walking his dog toward Prescott before he went to school. (6T15-18 to 17-6). Although he had a Walkman on, he took it off as he heard a gunshot. Harris stated he next saw Silver fall in the street and a white car go driving by him. Harris further testified that there was nobody else out on the street at this time. (6T18-25 to 20-21; 6T21-12 to 17). Harris gave a statement to the police on October 20, 1997. (6T28-3 to 12).

The final defense witness, Cynthia Harrison, testified that on the day in question she was out on Second Street trying to pick up males. While she was waiting, Harrison stated she heard gun shots and ran up Pond Place to Third Street. When she got to Third Street, Harrison testified that she saw Silver laying on the corner and being tended to by police officers. She recognized Silver as a man she had seen roughly twenty minutes earlier on Second Street

and Prescott. Silver had been trying to find cocaine. (6T65-13 to 68-5). On October 16, 1997, Harrison gave a sworn statement to Detective Wilson. (6T88-19 to 89-3). Harrison testified that because she was nervous when she gave her statement to the police, she said she knew defendant and McNeil, even though she really did not know them. (6T95-15 to 22).

## LEGAL ARGUMENT

### POINT I

THE COURT PROPERLY DENIED DEFENDANT’S MOTION FOR NEW TRIAL. (Da50 to 53; 17T12-14 to 13-9).

Defendant argues that the court erred in denying his Motion for New Trial, contending that the State failed to disclose that a witness agreed to provide truthful testimony against a former codefendant as part of a plea agreement entered nine years before defendant’s trial. Defendant further argues that the motion court used the wrong legal standard when it considered his claim. Specifically, the motion court considered defendant’s claim under the three-prong test in State v. Carter, 85 N.J. 300, 314 (1981). Defendant argues, though, that the motion court should have evaluated his claim under the three-prong test in Brady v. Maryland, 373 U.S. 83, 87 (1963). Regardless of whether his claim should have been analyzed under Brady or Carter, the court properly denied defendant’s Motion for a New Trial.

“It is a longstanding principle underlying appellate review that ‘appeals are taken from orders and judgments and not from opinions ... or reasons given for the ultimate conclusion.’” State v. Washington, 453 N.J. Super. 164, 203-04 (App. Div. 2018) (omission in original) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). “[B]ecause an appeal is taken from a trial court’s ruling

rather than reasons for the ruling, we may rely on grounds other than those upon which the trial court relied.” Id. at 204 (alteration in original) (quoting State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011)); see also, e.g., Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (“A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.”).

A trial judge may grant a motion for a new trial “if required in the interest of justice.” R. 3:20-1. “[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown.” State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000) (citations omitted).

“Appellate review is limited to a determination of whether the trial court could reasonably have reached the findings it made based on ‘sufficient credible evidence ... in the record.’” State v. Van Ness, 450 N.J. Super. 470, 496 (App. Div. 2017) (alteration in original) (quoting State v. Brooks, 366 N.J. Super. 447, 454 (App. Div. 2004)).

“In every criminal case the prosecution must disclose to the defendant all evidence that is material either to guilt or to punishment.” State v. Nelson, 155 N.J. 487, 497 (1998), cert. denied, 525 U.S. 1114 (1999). The rule established in Brady applies regardless of the prosecution’s good faith or bad

faith or whether the defendant specifically requested the exculpatory evidence. State v. Parsons, 341 N.J. Super. 448, 454 (App. Div. 2001). “In order to establish a Brady violation, defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material.” Nelson, 330 N.J. Super. at 212.

As to the first factor, the “disclosure rule applies to information of which the prosecution is actually or constructively aware.” Id. at 213. The lack of actual awareness does not relieve the State of its Brady obligations because the prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

The second Brady factor is often presumed and few courts have considered exactly what must be shown in order to establish that withheld evidence is favorable to the defendant. Evidence found to be favorable has generally involved information that impeaches the testimony of a government witness. See State v. Henries, 306 N.J. Super. 512, 533 (App. Div. 1997). Favorability is not limited to impeachment, however, and it has been recognized in cases where evidence simply bolsters a defendant’s claims. See Nelson, 155 N.J. at 497.

The third Brady factor involves the materiality of the evidence that was

withheld. Parsons, 341 N.J. Super. at 454-55. “Evidence is material for Brady purposes ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” State v. Marshall, 148 N.J. 89, 156 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)), cert. denied, 522 U.S. 850 (1997). “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” Nelson, 155 N.J. at 500 (internal quotation omitted). As the Court has stated,

“[a] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” Rather, the question is whether in the absence of the undisclosed evidence the defendant received a fair trial, “understood as a trial resulting in a verdict worthy of confidence.”

[Ibid. (quoting Kyles, 514 U.S. at 434)].

In applying the materiality test “where a conviction has followed a full trial, [a reviewing court] assess[es] the strength of the State’s case, and determines whether introduction of the suppressed evidence would probably have changed the jury’s verdict.” Parsons, 341 N.J. Super. at 455.

The Carter standard, which the motion judge analyzed while considering defendant’s claims, governs claims of newly discovered evidence. Generally,

“[a] motion for a new trial upon the ground of newly discovered evidence is not favored and should be granted with caution by a trial court since it disrupts the judicial process.” State v. Conway, 193 N.J. Super. 133, 171 (App. Div. 1984) (citing State v. Haines, 20 N.J. 438, 443 (1956)). Moreover, newly discovered evidence is reviewed “with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial.” Id. at 187-88.

When reviewing a motion for a new trial based on newly discovered evidence, the court applies a similar three-part test. Specifically, the defendant must show that the evidence is “1) material, and not “merely” cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was “not discoverable by reasonable diligence beforehand”; and 3) that the evidence ‘would probably change the jury’s verdict if a new trial were granted.’” State v. Ways, 180 N.J. 171, 187 (2004) (citation omitted) (quoting Carter, 85 N.J. at 314 (1981)). All three prongs of that test must be satisfied before a defendant will gain the relief of a new trial. Ibid.

Under prong one of the Carter test, a defendant must show the evidence “ha[s] some bearing on the claims being advanced.” Id. at 188 (quoting

Henries, 306 N.J. Super. at 531). This requires the court to engage in “an evaluation of the probable impact such evidence would have on a jury verdict.” Id. at 188-89. Because the issue of materiality inquires whether the evidence would change the jury’s verdict, the court should evaluate the first and third prongs of the test together. Id. at 189.

Under prong two of the Carter test, “the new evidence must have been discovered after completion of trial and must not have been discoverable earlier through the exercise of reasonable diligence.” Id. at 192. A defendant must “act with reasonable dispatch in searching for evidence before the start of the trial.” Ibid.

Prong three of the Carter test requires a defendant to show the evidence “would probably change the jury’s verdict if a new trial were granted.” Id. at 187 (quoting Carter, 85 N.J. at 314). “The power of the newly discovered evidence to alter the verdict is the central issue ...” before the trial judge. Id. at 191. “[T]he test is whether the evidence if introduced is such as ought to have led the jury to a different conclusion — one of probability and not mere possibility[.]” Haines, 20 N.J. at 445.

Here, defendant argues that the State’s failure to turn over the contents of Ruby Waller’s 1991 plea agreement, in which she was to provide truthful testimony against her then-codefendant, resulted in a Brady violation, and, as

such, defendant should receive a new trial. Defendant further argues that the motion court improperly considered his claim under the more stringent test in Carter, rather than under the three-prong test in Brady. Contrary to defendant's argument, the motion court properly denied defendant's motion, and it should not be disturbed on appeal.

Here, whether defendant's claim is considered under Brady or Carter, it fails for the same reason – it would not have changed the outcome of the trial. In support of his motion, defendant contends that he received a copy of Waller's 1991 plea form in 2014, which provided that she was required to testify truthfully against her codefendant in that earlier case. Evidence concerning the details of Waller's 1991 plea agreement, simply, was not material to defendant's 1999 trial, and there was no reasonable probability that this information undermined the confidence of the outcome in defendant's trial. Although a requirement in her 1991 plea agreement to testify against her then-codefendant could potentially impact the credibility of Waller in defendant's trial, the main focus concerning her credibility centered around her drug use and her ability to observe and recall the events of October 15, 1997. Indeed, defense counsel vigorously attacked Waller's credibility throughout his questioning of her. Issues concerning Waller's credibility were properly presented to the jury, who then considered it and weighed it accordingly.

Despite her drug use and prior criminal record, the jury found her, and the other State witnesses, to be credible. Thus, any requirement in Waller's 1991 plea to testify against her former codefendant would not have undermined the confidence of the jury's verdict, and defendant's motion was properly denied.

Moreover, nothing in the 1991 plea agreement contemplated that Waller was required to give truthful testimony at defendant's trial nine years later. Rather, when Waller came forward in the instant case, she did so voluntarily, and it was not conditioned upon any plea agreement or with the expectation of the receipt of any benefit. There is no evidence that her testimony was influenced by her desire to receive any sort of reward or receive any sort of credit for any possible future arrests she may experience. Instead, Waller testified that she came forward because someone had been injured and killed.

Specifically, Waller testified that she called 911 after she got back to her apartment to tell them someone had been shot. (3T64-21 to 25). Waller explained that the reason she called the police was because she saw "somebody get hurt." (3T65-1 to 2). She could not recall, though, whether she named defendant as the shooter at that time. (3T65-25 to 66-3). Waller called the police again either the same day of the shooting or the next day. (3T104-23 to 105-4). Once Waller heard that the victim had died, though, she called the Plainfield Police Department to arrange for her to give a statement. (3T118-1

to 119-8). Waller candidly testified that she decided to give a statement because she heard the victim had died, but if the victim had not died, she would have remained quiet. (3T119-6 to 120-2).

The jury also heard testimony that Waller saw defendant and McNeil exit the house and yell at the victim to “get ... out of here.” (Da7); Allen, 337 N.J. Super. at 264. While the victim retreated, defendant and McNeil continued to follow him, using profane language. (Da7 to 8); Id. at 264-65. At one point, defendant said he had something for the victim, then entered the house and returned quickly while holding a gun “in his hand, down on the side.” (Da8); Id. at 265. Waller ran from the area, and she heard shots and the victim screaming shortly thereafter. Ibid.

Waller’s testimony was corroborated by Whitfield, who testified that she also saw defendant come out of the house and yell at the victim. (Da9); Id. at 265-66. As Whitfield started to leave the area, she saw the victim try to walk away, and defendant run up behind him while holding an object on his side. (Da9); Id. at 266. Whitfield subsequently heard what she thought were “fire-crackers.” Ibid.

Defendant contends that the jury may have acquitted him if he had been able to impeach Waller’s credibility based on the contents of the 1991 plea agreement and the recent, unsupported allegation that she received a financial

benefit in exchange for her testimony. The jury, though, heard testimony concerning her prior criminal record. Specifically, the jury heard testimony that Waller had been convicted of two separate possession of cocaine offenses in 1990, in which she was sentenced to concurrent three-year terms of probation, and she was convicted of another possession of cocaine offense in 1991, in which she received a three-year State Prison sentence. (3T123-17 to 124-6). Waller further admitted that she had a 1998 arrest for shoplifting that was pending at the time of the instant trial. Waller testified, though, that she did not request any benefit in the shoplifting case, and she did not have any expectation of receiving any benefit as a result of her testimony in defendant's trial. (3T124-7 to 125-2).

The jury was also well aware of Waller's drug problem and heard testimony to that effect. (Da7 to 9; Da14). In addition to cross-examining Waller on her observations leading up to the shooting and the subsequent interview with investigators (3T133-24 to 139-19; 3T140-13 to 141-21; 3T143-10 to 173-14; 3T174-11 to 186-19), defense counsel vigorously attacked Waller's credibility based on her drug addiction. (3T129-6 to 133-17; 3T139-20 to 140-12; 3T141-19 to 143-5; 3T173-15 to 174-1; 3T179-12 to 180-13; 3T186-10 to 19). The jury weighed the testimony concerning Waller's drug problem and prior convictions against the remainder of her testimony and

determined the proper amount of weight and credibility her testimony deserved.

Defendant argues, though, that without any evidence about Waller's 1991 plea agreement, the defense was "stuck with" her testimony that she had no expectation of favorable treatment on the shoplifting charge that was pending at the time of defendant's trial. Waller testified, though, that she received no favorable treatment in her shoplifting case in exchange for her testimony at defendant's trial. The jury was able to observe her testimony and weigh her credibility accordingly. Defendant's assertion that Waller sought to testify favorably for the State in an effort to, in essence, bank her cooperation to use as leverage in her own possible future arrests is baseless speculation. Further, there is absolutely nothing in the record to indicate that Waller was on the prosecutor's office payroll to provide favorable testimony in cases as needed. Moreover, Waller had no pending cases to use as leverage in exchange for favorable testimony when she first spoke to the police after the murder. Instead, Waller testified that she was motivated to go to the police because she heard that the victim died. Waller candidly admitted that she would not have come forward had the victim survived. (3T119-6 to 120-2).

In short, defendant received a fair trial. The jury heard testimony concerning Waller's criminal history and her drug addiction. Any requirement

in 1991 for Waller to testify against a former codefendant was not material to defendant's 1999 trial and would not have led to a different outcome had such information been presented to the jury. Any suggestion that Waller testified in defendant's case in order to use it as leverage for any possible future arrests is purely speculative. Thus, even if the details of her 1991 plea agreement had not been turned over to defendant, it would not have changed the jury's verdict, and it would not have undermined the confidence of the outcome of the trial. As such, the Order denying defendant's Motion for a New Trial should be affirmed.

## POINT II

THE JUDGE DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO ENFORCE THE SUBPOENAS.<sup>2</sup> (Not Raised Below).

Defendant argues that the judge erred in failing to enforce defendant's subpoenas to the Union County Crime Stoppers and to the Union County Prosecutor's Office. Defendant's claim that the judge failed to enforce the subpoenas has not been raised below and is not properly before this Court. Regardless, defendant's claim that the subpoenas had not been complied with is baseless, and his appeal should be denied.

Foremost, defendant's argument that the judge failed to enforce his subpoenas was not raised below. "Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). However, "[a]n issue not raised below may be considered by the court if it meets the plain error standard or is otherwise of special significance to the litigant, to the public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication." Ibid.

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<sup>2</sup> Addressing Point II of counsel's brief and Point I of defendant's pro se brief.

During oral argument on defendant's Motion for a New Trial, defense counsel informed the court that she tried to subpoena records from Crime Stoppers and the Union County Prosecutor's Office (UCPO). Defense counsel relayed that UCPO told her that Crime Stoppers would have the relevant information relating to any rewards given, and Crime Stoppers referred her back to UCPO. (17T4-7 to 17). The State responded that UCPO was looking through its files to see if there was any information showing anything relating to Crime Stoppers. (17T7-20 to 8-4). After denying defendant's motion, the judge, though, permitted counsel to file a Motion for Reconsideration should evidence come to light that Waller received some sort of payment. (17T14-18 to 15-3).

On appeal, defendant contends that the judge should have enforced the subpoenas. However, defendant's claim is baseless, and there is nothing in the record to show that the subpoenas had been ignored. Rather, it would appear more likely that neither party found any information concerning any payment made to Waller, which is why defense counsel never filed a Motion for Reconsideration.

Therefore, defendant's argument that the judge erred in failing to enforce the subpoenas is baseless and without merit, and as such, his appeal should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Order denying defendant's Motion for New Trial be affirmed.

Respectfully submitted,

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s/ Meredith L. Baló

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MLB/bd