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SUPREME COURT OF NEW JERSEY
Docket No. 090853
App. Div. Dkt. No.: A-1045-22
Ind. No.: 98-08-01208

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

v. :

YUSEF B. ALLEN, :

Defendant-Appellant. :

Criminal Action

On Certification Granted from a
Final Judgement of the Superior
Court of New Jersey, Appellate
Division.

Sat Below:

Hon. Ronald Susswein, J.A.D.

Hon. Lisa Perez Friscia, J.A.D.

Hon. Stanley L. Bergman, Jr., J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DATED: February 18, 2026

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COUNTER-STATEMENT OF PROCEDURAL HISTORY¹

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

¹ Da refers to defendant's appendix on appeal.

Db refers to defendant's brief on appeal.

Dsa refers to defendant's supplemental appendix.

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). On June 12, 2025, in a published opinion, the Appellate Division affirmed the motion court's denial of defendant's Motion for a New Trial, but remanded to the motion court for additional fact finding regarding the defendant's claim that the motion court failed to enforce a subpoena to Crime Stoppers and the Union County Prosecutor's Office. State v. Allen, 482 N.J. Super. 142, 168-169 (App. Div. 2025).

On June 25, 2025, defendant filed a Petition for Certification with this Court. On September 16, 2025, the Court granted certification, "limited to the proper measure of "materiality for a claim that the State failed to turn over evidence under Brady, including whether the materiality standard articulated in

Carter applies, and whether the record in this case meets that standard[.]”

(Dsa1). The State’s response 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 APPELLATE DIVISION INCORRECTLY EQUATED THE MATERIALITY TESTS SET FORTH IN BRADY V. MARYLAND, 373 U.S. 83 (1963), AND STATE V. CARTER, 91 N.J. 86 (1982).

Though the difference in the materiality standards set forth in Brady v. Maryland, 373 U.S. 83, 87 (1963), and State v. Carter, 91 N.J. 86, 112-113 (1982) are slight, the Appellate Division erred in stating that there is no “practical difference” between the two. State v. Allen, 482 N.J. Super. 142, 164 (App. Div. 2025). Because our case law ascribes different weight to each materiality standard, the Appellate Division improperly equated the two standards. Accordingly, the conclusion of the court equating the two materiality standards should be clarified and reversed on appeal.

The three elements that must be considered when addressing a Brady violation has occurred is: 1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; 2) the State must have suppressed the evidence, either purposely or inadvertently; and 3) the evidence must be material to the defendant’s case. State v. Brown, 236 N.J. 497, 518 (2019); citing State v. Nelson, 155 N.J. 487, 497 (1998).

The Brady rule is invoked where information is discovered after trial “which

had been known to the prosecution but unknown to the defense. United States v. Agurs, 427 U.S. 97, 103 (1976). The Agurs Court observed that a prosecutor is charged with knowing the content of evidence in his file, even if that evidence has been overlooked. Id. at 110. Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence. Giglio v. United States, 405 U.S. 150 (1972). The State's obligation to disclose is not "limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of a State's witness." State v. Carter, 69 N.J. 420, 433 (1976). Nonetheless, a failure to disclose evidence favorable to the accused violates a constitutional right to due process only "where the evidence is material to guilt or punishment." Brady, 373 U.S. at 87.

Establishing the materiality element of Brady requires that the suppressed evidence be material to defendant's guilt. In United States v. Bagley, 473 U.S. 667, 682 (1985), the Supreme Court found that the materiality test set forth in Strickland v. Washington, 466 U.S. 668 (1984) sufficient to apply to cases involving prosecutorial failure to disclose evidence favorable to the accused. Notably, in Strickland v. Washington, the Court held

that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id., at 694. The Strickland Court defined a “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” Ibid.

Accordingly, the Bagley Court found that evidence is material only if there is a “reasonable probability” that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. 682; See also State v. Nelson, 155 N.J. at 500; Kyles v. Whitley, 514 U.S. 419, 506 (1995). In State v. Marshall, 148 N.J. 89, 155-56 (1997), our Supreme Court adopted the Bagley standard of materiality. See State v. Landano, 271 N.J.Super. 1, 32-36 (App. Div.), certif. denied, 137 N.J. 164 (1994).

Significantly, as the Kyles Court noted, that in applying the “reasonable probability” standard, the adjective “reasonable” is important. Kyles, 514 U.S. at 434. The Court elaborated on the meaning of this qualifying term, stating:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a

fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence” in the outcome of the trial.”

[Ibid., quoting Bagley, 474 U.S. at 678.]

For an appellant, the materiality standard is not difficult to achieve. “[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.” Kyles v. Whitley, 514 U.S. at 434.

This proposition was further addressed in State v. Nelson, where this Court noted:

“[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.”

[Nelson 155 N.J. at 500; (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." State v. Parsons, 341 N.J. Super. 448, 455 (App. Div. 2001).

Clear from these analyses of the Brady materiality standard, is the recognition that a "reasonable probability," is not a preponderance of the evidence standard. That is to say, a "reasonable probability" is not to be viewed as more likely than not that the withheld evidence would have resulted in an acquittal. Rather, it is a slightly lower standard requiring consideration of whether the defendant received a trial resulting in a verdict worthy of confidence.

To meet the standard for a new trial based on newly discovered evidence under State v. Carter, 85 N.J. 300, 314 (1981), a 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." The Court in Carter held that all three prongs of that test must be satisfied before a defendant will gain the relief of a new trial. Ibid.; State v. Artis, 36 N.J. 538, 541 (1962).

In State v. Ways, 180 N.J. 171, 187-93 (2004), this Court restated the newly discovered evidence standard as set forth in State v. Carter. The Ways

Court stated that under prong one of the Carter test, “[m]aterial evidence is any evidence that would have some bearing on the claims being advanced,” and includes evidence that supports a general denial of guilt. Id. at 188 (internal quotation marks and citation omitted). “Determining whether evidence is ‘merely cumulative, or impeaching, or contradictory,’ necessarily implicates prong three,” whether the evidence is ‘of the sort that would probably change the jury’s verdict if a new trial were granted.’” Id. at 188-89 (quoting Carter 85 N.J. at 314).

Determining whether evidence is “merely cumulative, or impeaching, or contradictory,” and, therefore, insufficient to justify the grant of a new trial requires an evaluation of the probable impact such evidence would have on a jury verdict. Id. at 188-189 (quoting Carter, 85 N.J. at 314). As a result, this Court in Ways observed that the focus properly turns to prong three of the Carter test, whether the evidence is “of the sort that would probably change the jury’s verdict if a new trial were granted.” Id. at 189 (emphasis added), citing Carter, 85 N.J. at 314; see also State v. Henries, 306 N.J. Super. 512, 535 (App. Div. 1997). The characterization of evidence as “merely cumulative, or impeaching, or contradictory” is a judgment that such evidence is not of great significance and would probably not alter the outcome of a verdict. Ibid. However, evidence that would have the probable effect of raising a reasonable

doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory. See Henries, 306 N.J. Super. at 535.

In other words, the new evidence must “have the probable effect of raising a reasonable doubt as to the defendant's guilt” to “not be considered merely cumulative, impeaching, or contradictory.” State v. Nash, 212 N.J. 518, 545 (2013) (quoting Ways, 180 N.J. at 189). “The power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence.” Ways, 180 N.J. at 191-92 (citation omitted). In this sense, the first and third prongs are “inextricably intertwined.” Ibid. (alteration in original) (quoting Ways, 180 N.J. at 189).

Whether the newly discovered evidence has the potential to alter a verdict is a contextual determination, as “[t]he evidence [proffered] must be ‘evaluated in light of the . . . corroborative proofs in the record.’” State v. Fortin, 464 N.J. Super. 193, 221 (App. Div. 2020) (omission in original) (quoting State v. Herrera, 211 N.J. 308, 343 (2012)).

An examination of the Carter standard shows it to be, overall, more stringent. Specifically, the Carter structure applies only if a defendant meets all three prongs, including establishing that the evidence was not discoverable by reasonable diligence prior to trial, as well as the materiality of the proffered newly discovered evidence. As set forth in Ways, evidence is material for

Carter purposes whether the evidence is “of the sort that would probably change the jury’s verdict if a new trial were granted.” Ways 180 N.J. at 188-89 (emphasis added). This is a question of “probability and not mere possibility.” State v. Haines, 20 N.J. 438, 445 (1956) citing State v. Bunk, 4 N.J. 482, 486-87 (1950).

Importantly, our Rules of Evidence refer to three standards of proof that govern judicial proceedings: a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. See N.J.R.E. 101(b)(1). The term “probably,” in the context of weighing evidence appears in the “preponderance of the evidence” standard of proof, which states the standard is satisfied by “that amount of evidence that causes [the factfinder] to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince [the factfinder] that the allegation is more likely true than not true.” N.J. Div. of Child Prot. & Permanency v. J.R.-R., 248 N.J. 353, n11 (2021) (emphasis added), quoting Model Jury Charges (Civil), 1.12H, “Preponderance of the Evidence (short version)” (approved Nov. 1998). Thus, where our courts have indicated that, for the purpose of a Carter materiality analysis, the newly discovered evidence would probably change the jury’s verdict if a new trial were granted, it is reasonable to consider the weight of the evidence under the preponderance of

the evidence rubric. That is to say that if a new trial was granted, the evidence “more likely than not,” would have resulted in a different outcome.

Based upon the case law and accepted definitions set forth above, it follows that the materiality standard set forth in Brady, requires a slightly less stringent standard, one of “reasonable probability” that a different result would have been obtained had the evidence been disclosed and which undermines confidence in the outcome of the trial. Indeed, the Court in Kyles, found that establishing materiality “does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.” Kyles, 514 U.S. at 434. The Carter standard requires a slightly more rigorous showing that newly discovered evidence probably or more likely than not would have resulted in a different outcome. That being said, it is the State’s position that despite the difference between the ‘reasonable probability’ and ‘more likely than not’ standards, “that difference is slight and matters only in the ‘rarest case.’” Harrington v. Richter, 562 U.S. 86, 112 (2011), quoting Strickland, 466 U.S. at 697.

As a result, the State submits that the finding of the Appellate Division that there is no “practical difference” in the materiality elements of the Brady and Carter formulations was not correct. Accordingly, this Court should affirm the materiality standard set forth in Brady and its progeny, that requires a

defendant to show that there is a reasonable probability that the undisclosed evidence would have resulted in a different outcome, and undermines confidence in the verdict.

POINT II

THE APPELLATE DIVISION CORRECTLY FOUND THAT THERE WAS NOT A REASONABLE PROBABILITY THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD WALLER'S 1991 PLEA AGREEMENT BEEN DISCLOSED PRIOR TO TRIAL.

In this case, the Appellate Division analyzed the undisclosed evidence of Ruby Waller's 1991 plea agreement under the Brady materiality standard though the trial court applied a Carter analysis. In applying that standard, the Appellate Division correctly concluded that there was not a reasonable probability that had the agreement been disclosed to the defense, the trial result would have been different. State v. Allen, 482 N.J. Super. 142 (2025). Accordingly, the finding of the Appellate Division should be affirmed.

As an initial matter, while the State agrees with the Appellate Division's conclusion that Waller's 1991 plea agreement was not material impeachment evidence because there was not a reasonable probability that had the evidence been disclosed the jury would have reached a different verdict, the State does not agree that defendant has met the other two prongs of the Brady standard. See State v. Nelson, 155 N.J. at 497. Specifically, the evidence does not support the conclusion that evidence of the 1991 plea agreement was favorable to defendant as it was not relevant to any motivation or bias she may have had

eight years later when testifying in defendant's trial. Specifically, there is no evidence that Waller received any promise or favorable treatment in exchange for her testimony at defendant's trial. Moreover, Waller's plea agreement related to a criminal charge that occurred eight years prior to defendant's trial and for which she completed her sentence. Further, there is no evidence that Waller had any interaction, i.e. as an informant or cooperating witness, with the State from the time of her conviction in 1991 until her testimony at defendant's trial that would suggest she expected favorable treatment for any future offenses. Thus, the existence of a plea agreement in 1991 was not evidence favorable to defendant and presented no illumination as to Waller's motivation for testifying as a State witness eight years later.

Additionally, it is questionable as to whether defendant can show that the State purposely or inadvertently suppressed the evidence since the State provided defendant with information as to Waller's 1991 drug convictions and the sentence she received. Indeed, at trial, Waller agreed that on March 30, 1991, she was convicted of two separate drug offenses under two separate indictments, for which she received probation. (3T123-17 to 124-2). As a result, defendant was aware that Waller had these convictions, and in light of the disposition of two indictments on the same date, likely pled guilty pursuant to plea agreements. See United States v. Ramos Cartagena, 9 F.Supp. 2d 88,

90-92 (D.P.R. 1998)(court refused to require government to search state prosecutorial files in previous closed cases for Brady/Giglio information useful to the defense in impeaching the state's witness).

Nonetheless, assuming for the purpose of this argument, as the Appellate Division did, (Allen, 482 N.J. Super. at 165), that the State was required to turn over the 1991 plea agreement, defendant still cannot meet his burden of establishing the materiality prong of Brady. That is to say, defendant cannot show that had the State disclosed this agreement prior to trial, there is a reasonable probability that the outcome would have been different, thus undermining confidence in the verdict. Accordingly, his claim is without merit and should be rejected.

At trial, the main focus concerning Waller's 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. 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 in that trial, would not have undermined the confidence of the jury's verdict, and

defendant's motion was properly denied by the trial court and affirmed by the Appellate Division.

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.” (3T48-2 to 51-4). While the victim retreated, defendant and McNeil continued to follow him, using profane language. Ibid. 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.” (3T51-6 to 52-19). 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. (4T24-23 to 25-13; 4T27-2 to 28-3; 5T56-2 to 57-16). 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. (4T28-24 to 29-23). Whitfield subsequently heard what she thought were “fire-crackers.” (4T30-25 to 31-17).

Other testimony further corroborated Waller’s account of what occurred that morning. Specifically, several witnesses corroborated certain details of Waller’s testimony of what she observed after the victim was shot, namely that residents came out onto the street and attended to the victim by placing a towel under his head. (3T174-20 to 175-19; 4T124-2 to 137-13; 4T149-3 to 155-17).

A detective also corroborated Waller's description of the victim's car and the specific detail that the interior door handle of his car was broken, requiring the victim to open the passenger door from the outside for Waller when they arrived at the area of the Mack house, as well as the fact that the victim had been drinking alcohol at that time. (3T36-24 to 38-22; 3T136-7 to 17; 3T148-3 to 14; 5T68-8 to 17; 5T69-2 to 4; 5T69-8 to 20; 5T91-25 to 92-6).

Further, police record showed that Waller called 911 immediately after the shooting and that she identified defendant and "Ben" as the suspects. (3T143-20 to 146-14; 4T8-17 to 9-8; 4T10-18 to 13-14; 4T13-24 to 14-8; 4T17-6 to 11). The detective also testified that Waller identified defendant from a photo shortly after the murder and corroborated her statement given to police at that time that "Ben" was at the scene of the murder about an hour after it occurred. (3T66-22 to 67-7; 5T49-4 to 50-21; 5T57-24 to 60-15).

Further, the cross-examination of Waller based upon the contents of the 1991 agreement would not have altered the jury's decision. The jury 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). Indeed, at the time of her trial testimony, Waller did not have a lawyer and had not spoken with the municipal court prosecutor. (3T124-7 to 125-2).

The jury was also well aware of Waller's drug problem and heard testimony to that effect. 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.

Moreover, Waller testified 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.

The suggestion that Waller may have 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. Additionally, 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 Appellate Division's finding that defendant failed to

establish the materiality prong of Brady is correct and should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court clarify that the materiality standard set forth in Brady is less stringent than the standard set forth in Carter. Further, this Court should affirm the Appellate Division's denial of a new trial where defendant failed to establish that 1991 plea agreement was material and its non-disclosure undermined the confidence in the jury's verdict.

Respectfully submitted,

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