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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1647-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BASIM HENRY, a/k/a
BASIN HENRY,
BASIM A. HENRY,
SALAAL PACKER,
EASIM PARKER, BOZ,
BASIM AMIN HENRY,
and BASIR WKITE,

Defendant-Appellant.

Submitted March 1, 2023 – Decided March 21, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 14-09-2285.

Terrell A. Ratliff, attorney for appellant.

Theodore N. Stephens II, Acting Essex County
Prosecutor, attorney for respondent (Frank J. Ducoat,

Special Deputy Attorney General/Acting Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Basim Henry appeals from a Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

The facts underlying defendant's convictions and sentence are set forth in our opinion rejecting his direct appeal, State v. Henry, No. A-4619-16 (App. Div. Apr. 21, 2020), and need not be repeated here in their entirety. Briefly:

In the late afternoon of December 15, 2013, [Jamie] and Dustin Friedland drove their 2012 silver Range Rover to the The Mall at Short Hills (the mall) in Millburn and parked on the third-floor parking deck. Several hours later, defendant drove [Hanif] Thompson, [Kevin] Roberts and [Karif] Ford in a 1996 green and beige two-tone GMC Suburban to the same parking deck.

Shortly after 9:00 p.m., surveillance footage from the mall captured the couple returning to their Range Rover. Dustin opened the car door for Jamie and then walked around to the back of the car. At this point, Thompson and Roberts approached Dustin; following a struggle, Thompson shot Dustin in the head, inflicting a fatal wound. After pointing a gun at [Jamie]'s head and ordering her to get out of the car, Thompson and Roberts fled in the Range Rover, following defendant and Ford in the Suburban. Thompson, Roberts, Ford, and defendant then returned to Newark.

[Id. (slip op. at 2).]

An Essex County grand jury charged Ford, Roberts, Thompson, and defendant with first-degree carjacking, N.J.S.A. 2C:15-2(a)(2); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree murder, N.J.S.A. 2C:11-3(a)(1); second-degree conspiracy to commit carjacking, N.J.S.A. 2C:5-2, 2C:15-2(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a). On the same day, the grand jury also charged defendant with one count of second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b).

A jury convicted defendant on all counts. After merger, defendant received a life sentence for first-degree murder, lesser concurrent sentences for first-degree carjacking and second-degree unlawful possession of a weapon, and a consecutive ten-year sentence on the certain persons conviction. As noted, we affirmed defendant's convictions and sentence, Henry, No. A-4619-16 (slip op. at 1), and the Supreme Court denied defendant's petition for certification, State v. Henry, 244 N.J. 181 (2020).

Defendant filed a timely PCR petition asserting his trial counsel was constitutionally ineffective under the two-part test established in Strickland v.

Washington, 466 U.S. 668, 687 (1984),¹ by failing to: raise meritorious objections and defenses; request an adjournment; seek a change in venue; adequately prepare for trial; and competently consult with him. The PCR court rejected defendant's claims in a written opinion, finding the alleged errors did not, independently or cumulatively, render his trial counsel ineffective and did not prejudice his defense in any event.

As to the first Strickland prong, the PCR court found no error in either the State's summation or the court's jury instructions, and therefore concluded counsel was not ineffective for failing to object. Similarly, the court found no support in the record for any of defendant's asserted affirmative defenses and thus his trial counsel committed no error in failing to raise them.

The court also rejected defendant's contention his counsel's failure to seek an adjournment until after his co-defendants' trials caused the jury to convict him based on "speculation and assumption," as the court instructed the jury "it could only find [defendant] guilty of the substantive crimes if it found, beyond

¹ To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by demonstrating that: 1) counsel's performance was deficient, and 2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. See State v. Fritz, 105 N.J. 42, 58 (1987).

a reasonable doubt, that his co[-]defendants committed the acts of which they were accused." Similarly, the court concluded "trial counsel was not ineffective for failing to seek a change of venue or the empaneling of a foreign jury, as it is most likely that [such] request would have been denied." According to the PCR court, the record also lacked support for defendant's claims his counsel failed to adequately prepare for trial or consult with him. Finally, the court rejected defendant's cumulative error argument.

With respect to Strickland's prejudice prong, the PCR court concluded "there was such overwhelming evidence against [defendant]," as noted in our disposition of defendant's direct appeal, "that even if trial counsel had made [the asserted] errors, the result of the proceeding would not have been different." Additionally, the court noted defendant "was not prejudiced by his co[-]defendants' cases being unresolved prior to his trial," and defendant failed to establish what trial counsel's additional preparation or consultation would have revealed. Accordingly, the PCR court held defendant "fail[ed] to demonstrate a reasonable likelihood that his claim [would] ultimately succeed on the merits," and it therefore need not hold an evidentiary hearing.

This appeal followed in which defendant raises the following issues:

POINT I

[DEFENDANT]'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT HAVE BEEN DISMISSED WITHOUT AN EVIDENTIARY HEARING.

POINT II

COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE MERITORIOUS OBJECTIONS.

A. Trial Counsel Failed to Object During the State's Summation.

B. Trial Counsel Failed to Object to the Court's Jury Instructions.

POINT III

COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE MERITORIOUS DEFENSES.

POINT IV

COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN ADJOURNMENT UNTIL AFTER HIS CODEFENDANTS CASES WERE RESOLVED.

POINT V

COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK A CHANGE IN VENUE.

POINT VI

COUNSEL WAS INEFFECTIVE BY NOT BEING PREPARED FOR TRIAL.

POINT VII

COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND FAILING TO ADEQUATELY CONSULT WITH [DEFENDANT].

POINT VIII

THE CUMULATIVE ERRORS OF TRIAL COUNSEL DEPRIVED THE [DEFENDANT] OF [A] FAIR TRIAL.

We find no merit in these arguments and affirm substantially for the reasons stated in the PCR judge's written opinion. We add the following comments.

II.

The first Strickland prong requires a showing that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. A defendant, however, must overcome a strong presumption that counsel rendered reasonable professional assistance. Id. at 689. "The test is not whether defense counsel could have done better, but whether he met the constitutional threshold for effectiveness." State v. Nash, 212 N.J. 518, 543 (2013). Further, the failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel. State v. Worlock, 117 N.J. 596, 625 (1990) (citing Strickland, 466 U.S. at 688).

Under the second prong, a defendant must demonstrate his counsel's errors prejudiced the defense such that the defendant was deprived of a fair and reliable outcome. Strickland, 466 U.S. at 687. To prove this element, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

"[B]ald assertions" are insufficient to sustain a defendant's burden of establishing a prima facie ineffective assistance of counsel claim under the Strickland standard. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). PCR petitions must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity," State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance." Cummings, 321 N.J. Super. at 170.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The de novo standard also applies when reviewing mixed questions of fact and law. Ibid. Where an evidentiary hearing has not been held, as here, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421 (emphasis omitted).

We apply the aforementioned standard to defendant's ineffective assistance of counsel claims and address each alleged error separately.

A. Failure to Raise Objections

In Point II, defendant maintains his trial counsel was ineffective because he failed to raise meritorious objections to the prosecutor's summation and the court's jury instructions with respect to conspiracy, accomplice liability, and felony murder, which he asserts were overly broad and not "tailored to [his] defense." We find no support in the record for defendant's contentions.

First, defendant claims trial counsel should have objected to the following statement made by the prosecutor during summation regarding accomplice liability, which he contends "misstated the accomplice liability provisions and shifted the burden to defendant":

This provision of law means that not only is the person who actually commits the criminal act responsible for it, but one who is legally accountable as an accomplice is also responsible as if he committed it — committed the crimes himself. The law is clear. As the Judge will give you — and he has always said: If you're in for a penny, you're in for a pound.

It is not apparent, and defendant does not explain, how this statement shifted the burden to defendant or misstated the law. See N.J.S.A. 2C:2-6(a) (stating an accomplice "is guilty of an offense if it is committed by . . . another

person for which he is legally accountable"). The court expressly instructed the jury defendant was "presumed to be innocent" and "[t]he burden of proving each element of a charge beyond a reasonable doubt rest[ed] upon the State and that burden never shifts to . . . defendant." We presume the jury followed these clear instructions. See State v. Loftin, 146 N.J. 295, 390 (1996).

Second, defendant asserts his counsel failed to object to the court's erroneous instruction it could find him guilty of carjacking if the State proved beyond a reasonable doubt that "persons whose conduct defendant was legally accountable for" committed every element of that offense. The court's instruction provided no basis to object as it was consistent with the law, see N.J.S.A. 2C:2-6(a), and in accordance with Model Jury Charges (Criminal), "Liability for Another's Conduct (N.J.S.A. 2C:2-6)" (rev. June 11, 2018).

Third, defendant contends his trial counsel erred when he failed to object to the court's conspiracy instruction. Specifically, he argues the court erroneously instructed the jury it must decide "whether the defendant's purpose was that he or a person with whom he was conspiring would commit the crime of carjacking." The court also explained, however, that for defendant "to be found guilty of conspiracy, the State ha[d] to prove beyond a reasonable doubt that when he agreed it was his conscious object or purpose to promote or make

it easier to commit the crime of carjacking." Again, the court's instruction accurately stated the law, see N.J.S.A. 2C:5-2(a), and tracked Model Jury Charges (Criminal), "Conspiracy" (rev. Apr. 12, 2010), and therefore provided no basis for defendant's counsel to object.

Finally, defendant maintains his counsel was ineffective for failing to object to the court's purported erroneous instruction with regard to felony murder, claiming the court "should have instructed the jury that it could find defendant not guilty of the substantive crimes then-pending against the co-defendants, whose status the jury was told to not consider." Defendant's argument is without merit as the court clearly and correctly instructed the jury, "the State [must] prove beyond a reasonable doubt that the defendant, or persons whose conduct defendant was legally accountable for, were engaged in the commission of the crime of carjacking," in order to convict defendant of felony murder.

In sum, defendant failed to establish his trial counsel's failure to object to the prosecutor's summation or the court's accurate jury instructions rendered his representation "below an objective standard of reasonableness," Strickland, 466 U.S. at 688, or led the jury to a result it otherwise would not have reached, id. at 694.

B. Failure to Raise Defenses

In Point III, defendant claims his trial counsel was ineffective because he failed to prepare properly his defense, and instead urged him to plead guilty. Specifically, defendant claims trial counsel should have asserted the defenses of renunciation, duress, or "no crime." He contends a duress defense applied because "accomplice liability can only be imposed if the person participated in the crime through his own free will[,] and "[d]efendant's free will was limited solely in the car theft, not in a murder."

Defendant also claims his trial counsel was ineffective because he failed to argue "accomplice liability could not be imposed if the actual perpetrators have not committed a crime." According to defendant, his "co-defendants were still 'innocent until proven guilty[,]'" and thus, "[b]y being convicted after defendant's trial, the jury could never appreciate wh[ich] actions of the co-defendants . . . defendant was legally accountable [for]." We reject all of these arguments.

A renunciation defense requires a defendant to "prove by a preponderance of the evidence that he abandoned his efforts to commit the crime, or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." N.J.S.A. 2C:5-1(d). Here, in

his post-arrest statement to police, defendant admitted he picked up his co-defendants on the night of the murder with the intention to steal a vehicle, was aware Thompson possessed a gun before the men went to the mall, witnessed his co-defendants approach the vehicle and wrestle with the victim, and picked up his co-defendants in Newark after they discarded the stolen Range Rover. Under these facts, a renunciation defense simply was not available at trial and defendant's counsel was not ineffective for failing to assert a meritless defense. See Worlock, 117 N.J. at 625.

For similar reasons, defendant's claim his trial counsel improperly failed to assert a duress defense is also unavailing. To establish the affirmative defense of duress under N.J.S.A. 2C:2-9(a), a defendant must prove he was coerced to engage in the criminal conduct "by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist." Again, defendant's admission he voluntarily picked up his co-defendants with the purpose of stealing a vehicle vitiates any potential duress defense, and nothing in the trial or PCR record established he was coerced to participate in the carjacking.

As noted, defendant also asserts his co-defendants were "legally innocent" at the time of his trial, and his counsel was therefore ineffective for failing to

argue there was "no crime" sufficient to support accomplice liability. Although his co-defendants had not yet been convicted at the time of defendant's trial, the court repeatedly instructed the jury it could not convict defendant as an accomplice unless it found "the State ha[d] proven beyond a reasonable doubt" that the underlying crimes occurred. Defendant does not contend the jury misunderstood or failed to comply with this instruction, nor that the jury's conclusion the underlying crimes occurred was unsupported by the record. In sum, as none of the asserted defenses were available to defendant at trial, his counsel was not constitutionally ineffective for failing to raise them. See Worlock, 117 N.J. at 625.

C. Failure to Request Adjournment

In Point IV, defendant argues "his counsel was ineffective by failing to request an adjournment until his co[-]defendants' cases were resolved." According to defendant, if trial counsel had moved for an adjournment the motion would have been granted upon the court's consideration of the factors set forth in State v. Furguson, 198 N.J. Super. 395, 402 (App. Div. 1985). He further contends the State's proofs were "based on speculation and assumption" and, had trial counsel sought an adjournment, "he would have received a fair trial, with a favorable outcome." He also asserts "if all the relevant facts were

determined prior to [defendant]'s trial, he may have even taken a plea." We again find no merit to defendant's contentions.

Defendant's "bald assertions" are insufficient to raise a prima facie ineffective assistance of counsel claim under Strickland. Cummings, 321 N.J. Super. at 170. Defendant relies on the nine-factor balancing test set forth in Furguson,² but fails to explain how any one factor militated in favor of an adjournment. Defendant also fails to provide any basis to support his assertion that an adjournment would have led to a "favorable outcome," nor does he address how an adjournment would have led the jury to a different result in light of the court's instruction with respect to accomplice liability.

We also reject defendant's assertion he suffered prejudice by his counsel's failure to seek an adjournment because he may have accepted a plea had his trial been adjourned. By his own admission, defendant's trial counsel urged him to plead guilty prior to trial due to the overwhelming evidence against him. In sum, as defendant failed to establish he was entitled to an adjournment, or that

² We note Furguson's balancing analysis applies when a defendant seeks "an adjournment to enable him to substitute counsel," 198 N.J. Super. at 402, and defendant does not allege his counsel was ineffective for failing to seek an adjournment on those grounds. We need not decide, however, whether Furguson's balancing test is applicable to adjournment applications more broadly, as defendant failed to satisfy that standard in any event.

his trial counsel's failure to seek an adjournment deprived him of a fair and reliable outcome, his arguments fail under both Strickland prongs. See 466 U.S. at 687.

D. Failure to Seek a Change in Venue

In Point V, defendant contends his trial counsel was constitutionally ineffective in failing to seek a "change in venue, or the empaneling of a foreign jury," as "this case presented one of the rare situations where prejudice may be presumed due to the inflammatory atmosphere." Relying on the factors set forth in State v. Nelson, 173 N.J. 417, 476 (2002), defendant asserts prejudice may be presumed due to "the nature and extent of the news coverage," and the victim's status as a "prominent member of the community."

Rule 3:14-2 requires a trial court to grant a motion for a change of venue or foreign jury if it "finds that a fair and impartial trial cannot otherwise be had." The court "must consider whether the change . . . is 'necessary to overcome the realistic likelihood of prejudice from pretrial publicity.'" Nelson, 173 N.J. at 475 (quoting State v. Williams, 93 N.J. 39, 67 n.13 (1983)). It must also recognize the distinction "between cases in which the trial atmosphere is so corrupted by publicity that prejudice may be presumed, and cases in which pretrial publicity, while extensive, is less intrusive, making the determinative

issue the actual effect of the publicity on the impartiality of the jury panel." Ibid. (quoting State v. Biegenwald, 106 N.J. 13, 33 (1987)).

"Cases in which prejudice due to pretrial publicity may be presumed are relatively rare and arise out of the most extreme circumstances." State v. Koedatich, 112 N.J. 225, 269 (1988). Our Supreme Court has established a non-exhaustive list of factors for use in determining the existence of presumed prejudice:

- (1) evidence of extreme community hostility against defendant;
- (2) prominence of either the victim or defendant within the community;
- (3) the nature and extent of news coverage;
- (4) the size of the community;
- (5) the nature and gravity of the offense; and
- (6) the temporal proximity of the news coverage to the trial.

[Nelson, 173 N.J. at 476.]

Defendant offers no evidence to support his assertion the victim was a prominent community member or, even assuming he was so renowned, how the nature and extent of the news coverage supported a change in venue under Nelson. Although it appears media were present in the courtroom, nothing in

the record supports a finding that any pretrial publicity created an "atmosphere . . . so corrupted by publicity that prejudice may be presumed." Id. at 475. Further, defendant fails to provide legal or factual support a change in venue or empaneling of a foreign jury would have changed the result here in light of the overwhelming evidence of his guilt.

E. Failure to Prepare for Trial or Consult with Defendant

In Point VI, defendant contends "his counsel was not prepared for trial." Defendant also claims he "requested . . . his trial counsel file an interlocutory appeal (off the record) at the February 28, 2017 status conference," and was unaware jury selection began the following day. In his certification accompanying his petition, defendant also claimed his counsel "persisted on pressuring [him] to take a plea without any trial notice or trial preparation[.]" He also reprises his earlier arguments that his trial counsel's failure to raise meritorious objections and defenses demonstrated his lack of preparation.

Similarly, under Point VII, defendant argues "counsel neglected to adequately consult with him prior to and during trial, and thus was ineffective." On this point, defendant relies on the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, § 11.4.1, Investigation (Feb. 1989), and claims a "basic defense function [requires] pre-trial consultation."

He also maintains the aforementioned guidelines "state that the initial step of any investigation is a personal consultation with defendant."

It is well-settled that a defendant's counsel's performance may be deemed deficient under Strickland for "fail[ure] to conduct an adequate pre-trial investigation." State v. Porter, 216 N.J. 343, 352-53 (2013). "[I]t is not the frequency of consultation that reveals whether a defendant has been effectively denied effective legal assistance. Rather, the proper inquiry is whether as a result of that consultation, counsel was able properly to investigate the case and develop a reasonable defense." State v. Savage, 120 N.J. 594, 617 (1990). Where a defendant alleges counsel rendered ineffective assistance by "inadequately investigat[ing] his case," the defendant "must assert the facts that an investigation would have revealed, supported by affidavits or certifications upon the personal knowledge of the affiant or the person making the certification." Porter, 216 N.J. at 353 (quoting Cummings, 321 N.J. Super. at 170).

"If counsel thoroughly investigate[d] law and facts, considering all possible options, his or her trial strategy is 'virtually unchallengeable.'" Savage, 120 N.J. at 617 (quoting Strickland, 466 U.S. at 690-91). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety

of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89. "In evaluating a defendant's claim, the court 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 690).

Defendant has not satisfied his burden under Strickland, as his claims are untethered to any competent evidence in the record. See Cummings, 321 N.J. Super. at 170-71. Indeed, he fails to "specifically outline what was deficient with respect to [any] argument . . . counsel made on his behalf" State v. Gaither, 396 N.J. Super. 508, 514 (App. Div. 2007). He also does not detail what would have been discovered had counsel conducted a more complete investigation or consulted with him further. He identifies no witnesses, documents, or exculpatory evidence his counsel would have uncovered upon further inquiry with him or as a result of any additional investigation. Further defendant's PCR petition is devoid of any evidence establishing he suffered prejudice from counsel's purported errors. See State v. Gideon, 244 N.J. 538, 551 (2021).

We also note defendant's contention his trial counsel inadequately prepared for trial is belied by the record, which reveals counsel's clear strategy to convince the jury defendant should not be held liable for his co-defendant's actions. During his opening statement, counsel informed the jury he specifically sought a verdict of not guilty for murder and the certain persons offense, as defendant never possessed a weapon or the intent to murder the victim. In summation, his counsel similarly relied on the undisputed facts defendant neither took part in the murder of the victim, nor expected his co-defendants to do so. In light of the overwhelming evidence inculcating defendant, it was a reasonable exercise of trial counsel's discretion to concede the events underlying defendant's conviction took place but contend the State did not prove he harbored the requisite mental state to convict him of the most serious offenses.

Additionally, as previously discussed, we reject defendant's contention competent trial counsel would have raised the objections and defenses to which defendant now complains. We also observe defendant's certification undermines his contention his counsel failed to consult with him before trial, as he claimed counsel "persisted on pressuring [him] to take a plea[,]" which suggests, at the very least, counsel informed defendant of the evidence against him and the unlikelihood he would succeed at trial. Finally, defendant does not

explain the basis for which he urged trial counsel to file an interlocutory appeal, or how counsel's decision not to do so prejudiced his defense.

F. Cumulative Error

In Point VIII, defendant argues his counsel "failed to undertake steps that any reasonable and effective counsel should have taken," and "because of the cumulative effect of all the above arguments, his trial counsel was ineffective." Having found no support for defendant's claim his counsel was ineffective, we consequentially find no cumulative error.

III.

As defendant failed to establish a prima facie ineffective assistance of counsel claim under Strickland, there was no need for an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992) ("[T]rial courts ordinarily should grant evidentiary hearings to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of [PCR]."). The mere assertion of a PCR claim does not entitle a defendant to an evidentiary hearing. Cummings, 321 N.J. Super. at 170. The PCR judge was therefore within his discretion in denying a hearing. See State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) ("[W]e review under the abuse of discretion standard the PCR court's determination to proceed without an evidentiary hearing.").

To the extent we have not expressly addressed any arguments made in support of defendant's appeal, we have determined they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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