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STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Respondent,	:	DOCKET NO. A-1314-23T2
	:	
v.	:	<u>CRIMINAL ACTION</u>
	:	
LASHAWN JONES,	:	ON APPEAL FROM A FINAL ORDER
	:	DENYING POST-CONVICTION
Defendant-Appellant.	:	RELIEF, SUPERIOR COURT OF
-----	:	NEW JERSEY, LAW DIVISION,
	:	MIDDLESEX COUNTY

Indictment No. 16-05-00864-I

Sat Below:  
Hon. Thomas J. Buck, J.S.C.

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**BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT**

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Defendant is Confined

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## PROCEDURAL HISTORY

Defendant, Lashawn Jones, was indicted on May 12, 2016, by the Middlesex County grand jury, in Indictment 16-05-00864-I, with: first-degree murder, in violation of N.J.S.A. 2C:11-3a(3) (count one); first-degree robbery, in violation of N.J.S.A. 2C:15-1 (count two); first-degree aggravated manslaughter, in violation of N.J.S.A. 2C:11-4a (count three); and third-degree endangering an injured victim, in violation of N.J.S.A. 2C:12-1.2 (count four) (Da1-2)

On May 11, 2011, defendant pled guilty to first-degree aggravated manslaughter. (1T9-14 to 11-1; Da9)<sup>1</sup> Defendant was sentenced on September 14, 2018, to 15 years imprisonment with an 85% parole ineligibility. (2T23-6-30-11; Da9)

Defendant appealed his sentence at the May 7, 2019 SOA calendar. (3T) The Appellate Division affirmed defendant's sentence. (Da12) On October 21, 2019, the Supreme Court of New Jersey filed an Order denying defendant's petition for certification. State v. Jones, 240 N.J. 17 (2019).

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<sup>1</sup> "Da" refers to the appendix of brief for defendant.

1T refers to the plea transcript of May 11, 2018.

2T refers to the sentence transcript of September 14, 2018.

3T refers to the SOA transcript of May 7, 2019.

4T refers to the PCR transcript of August 3, 2023.

Defendant filed a timely pro se petition for post-conviction relief on or about June 13, 2019. (4T; Da14-21) On September 16, 2019, the Honorable Diane Pincus, J.S.C. filed an Order dismissing defendant's petition for post-conviction relief without prejudice. (Da22) However, on September 8, 2020, Judge Pincus vacated her prior Order dismissing defendant's petition without prejudice. (Da23)

On May 25, 2023, defendant signed an Amended Petition for Post-Conviction Relief and a Certification in support of his petition. (Da24-29) A PCR hearing was held on August 23, 2023, before the Honorable Thomas J. Buck, J.S.C. Judge Buck denied defendant's petition for post-conviction relief by way of an Order and a written opinion on August 31, 2023. (Da73-84)

Defendant filed a Motion to File a Notice of Appeal as Within Time. (Da85) The motion was granted, and defendant filed a Notice of Appeal on January 3, 2024. (Da86-88)

#### STATEMENT OF FACTS

On September 18, 2015, at about 4:37 a.m., defendant was in Perth Amboy when he came across a man walking down the street. Defendant punched the man with a closed fist on the man's head. The punch was a hard blow which caused the man to fall to the ground. (1T9-14 to 10-11) Defendant then left the scene without calling anybody for help. Defendant, when he pled guilty, stated



that he understood that by punching the man and leaving the area without calling for help, there was a probability that the man would die. In fact, the man did die. (1T10-12 to 23)

At sentencing, defense counsel asserted that there were no mitigating factors present in the case. (2T8-11 to 13) He agreed with the State's position that the law did not permit defendant from receiving jail credits from September 23, 2015 to March 8, 2018, because defendant was being held on a parole violation. (2T9-16 to 10-17). However, the parole violation was never adjudicated. (2T9-25 to 10-1; Da40) Defense counsel asked the court to impose a lesser sentence of 12 years in order to take "[i]nto account approximately the amount of time he spent in State Prison. . . with a non-adjudicated parole violation. (2T11-12 to 15)

The issue of jail credits was mentioned at the SOA appeal, but not asserted by the defense. No additional jail credits were awarded. (3T2-8 to 16; Da12)

## LEGAL ARGUMENT

### POINT I

#### DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL (Da78-80)

The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 18, 541 (2013), citing Strickland v. Washington, 466 U.S. 668 (1984). Strickland, which was adopted in New Jersey

in State v. Fritz, 105 N.J. 42 (1987), set forth a two-prong test to determine whether a defendant has been deprived of effective assistance of counsel. Under the first prong of the test, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and that "counsel made errors so serious that 'counsel' was not functioning as the counsel guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687-688. A defendant must show that counsel's actions were beyond the "wide range of professionally competent assistance." Id. at 690. The "quality of counsel's effectiveness" is based on the "totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Marshall, 123 N.J. 1, 165 (1991). The standard for establishing that a defendant was denied the effective assistance of counsel is the same under both the federal and state constitutions. State v. O'Neil, 219 N.J. 598, 610 (2000).

In order to show prejudice under the second prong, defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A court focuses on the "fundamental fairness of the proceeding whose result is being challenged." Id. at 696. "If counsel's performance has been so deficient as to create reasonable probability that these deficiencies materially

contributed to defendant's conviction, the constitutional right would have been violated." Fritz, 105 N.J. at 58.

Furthermore, to show prejudice in connection with a guilty plea, "a defendant must prove that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial." State v. Castagna, 187 N.J. 293, 351 (2006); State v. Antuna, 446 N.J. Super. 595, 600 (App. Div. 2016). See Hill v. Lockhart, 474 U.S. 52, 59 (1985) (In a challenge to a conviction resulting from a guilty plea, a defendant may satisfy the prejudice prong of Strickland by showing a "reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.")

In determining whether a defendant has stated a prima facie claim for relief in a PCR hearing, the court must view the facts in the light most favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-463 (1992); State v. Pratt, 316 N.J. Super. 46, 50-51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999). Defendant submits that upon reviewing the facts in the light most favorable to him, the court will conclude that an evidentiary hearing is necessary to determine the effectiveness of trial counsel's representation.

A. Defendant was deprived of the effective assistance of counsel of trial and appellate counsel when they failed to argue that defendant should receive jail credit on this matter for the time served for an unadjudicated violation of parole. (Da81-82)

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.” In Morrissey v. Brewer, 408 U.S. 471 (1972), a unanimous Court held that parole revocations must comply with due process hearing and notice requirements. The Court specified the requirements of due process, including:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.

[Morrissey, 408 U.S. at 489]

In the instant matter, the Perth Amboy Police, suspecting that defendant had attacked the victim in this matter, arrested him on September 18, 2015 on a parole violation warrant. (Da32-33) He was held in state prison on the parole violation from September 23, 2015 to March 8, 2018, a total of 897 days. (Da56) Defendant’s letter from his assigned counsel, Brandon L. Goodman, Esq., on the parole revocation proceeding, specifically stated: “The Parole Board recognizes

that you [defendant] were returned to custody based on allegations of a parole violation, but that no decision was rendered.” (Da40) [emphasis in original]<sup>2</sup> Defendant’s letter from counsel is clear that trial defense counsel was contacted by Mr. Goodman regarding the jail credits issue and that Mr. Goodman provided a copy of the letter to trial defense counsel. (Da40-41) The letter makes clear that although defendant initially requested that his parole revocation proceedings be deferred, it was ultimately the Parole Board’s decision to not go forward with the parole violation charges.

Trial defense counsel was aware that the parole violation was not adjudicated because he said so at sentencing:

There’s really no much I can say, Judge. I’m asking Your Honor to consider the fact that when he was arrested—the State’s going to argue that he’s not entitled to any jail credit. And at this point, my understanding of the law is that they are correct. I am asking the Court to consider giving Mr. Jones the jail credit that he served at the State Prison. And I make that request, Judge because, yes, there was a parole warrant out for him. I get that. And that parole warrant was based on parole violations other than this case; however, that parole warrant—or that parole violation was never adjudicated.

[2T9-15 to 10-1 (emphasis added)]

Instead, trial defense counsel requested in lieu of credits that the court impose a twelve-year sentence to remedy the fact that he had sat in state prison for a non-

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<sup>2</sup>The entire letter is included in the appendix of the brief for defendant. (Da40-41)

adjudicated parole violation. (2T11-10 to 15) (See also Da18 where defendant in his pro se petition for post-conviction relief has inserted a copy of trial defense counsel's letter where he states that the case law does not favor defendant's position regarding jail time credits.)

Trial defense counsel did not adequately protect his client's interests because he agreed with the State that defendant was not entitled to jail credits for the non-adjudicated parole violation. Defendant submits he was grossly mistaken. In the unpublished opinion of State v. Summers, A-2072-19 (App. Div. May 11, 2022) (Da89-95), the record established that defendant was held in jail before his sentence from May 14, 2019 to December 5, 2019, and he was not awarded jail credits for that time frame. Defendant had been released from pretrial detention, resulting from various charges against him, on April 2, 2019, on the condition that he remain in his home. He was to turn himself in the court two weeks later, on April 16, 2019. Defendant failed to report on April 16, and a juvenile bench warrant was issued for his arrest on the same day.

Summers was arrested on May 14, 2019 on the outstanding warrant and for a new, fourth robbery charge. Defendant was held in jail until he was sentenced on December 6, 2019. The trial court awarded defendant 406 days of jail credit for the time frame between February 21, 2018 and April 2, 2019, for his earlier crimes.

The Appellate Division remanded the matter because neither the State nor the defense could provide any evidence of a juvenile parole violation. The court ruled:

If the State cannot present evidence that defendant was being held on a juvenile parole violation, as well as evidence of when that parole violation was adjudicated and whether it would have resulted in his incarceration, defendant is entitled to an award of 206 additional days of jail credit from the time of his arrest on May 14, 2019, to the day before he was sentenced in this matter on December 6, 2019.

[(Da95) (emphasis added)]

Thus, trial defense counsel could have argued for jail credits in light of the lack of adjudication of the parole violation. By not doing so, he was ineffective because defendant was prejudiced by the imposition of a sentence which is keeping him in prison far longer than what is legally required. Similarly, appellate defense counsel was ineffective for failing to raise the issue on appeal. See O’Neil, 219 N.J. at 617 (“[b]ut for appellate counsel’s errors, there is a ‘reasonable probability’ that ‘the result of the proceeding would have been different.’”) (citations omitted).

Furthermore, trial defense counsel failed to argue that the 897 days of jail credit should have been awarded to defendant as a matter of fundamental fairness because the failure to adjudicate the parole violation was a violation of defendant’s due process rights under the federal and state constitutions. New

Jersey's fundamental fairness doctrine "protect[s] citizen generally against unjust and arbitrary governmental action." Doe v. Poritz, 142 N.J. 1, 108 (1995). The doctrine "has supported procedures to protect the rights of defendants at various stages of the criminal justice process, even when such protections are not constitutionally required." State v. P.Z., 152 N.J. 86, 118 (1997). A defendant is entitled to "fairness and protection of basic rights" whenever government action subjects a person to a grievous loss." Morrissey, 408 U.S. at 484. The Supreme Court has described the fundamental fairness doctrine as "an integral part of due process" that "is often extrapolated from or implied in other constitutional guarantees." State v. Miller, 216 N.J. 40, 71 (2013); accord State v. Saavendra, 222 N.J. 39, 67 (2015).

Similarly, appellate defense counsel failed to raise the argument that defendant was denied due process and that fundamental fairness required that he receive the 897 days of jail credit. (3T2-0 to 3-4) Simply, defendant was prejudiced by the failure of appellate defense counsel to raise this issue because defendant's sentence is unjustly longer by 897 days. See O'Neil, 219 N.J. at 617.

The PCR court reasoned that because defendant had asked to defer the parole revocation proceedings, he cannot be awarded with jail credits. (Da81-82). Defendant disagrees. The fact remains that the parole violation was never



adjudicated. The parole authorities were not obligated to defer any request by defendant and did not do so. The record does not show that the violation was deferred. Rather, the parole authorities chose not to proceed and terminated the proceedings “due to short mandatory supervision expiration date” (Da40) and left defendant incarcerated without any adjudication.

Accordingly, defendant seeks that this court grant the 897 days in issue or in the alternative, remand the matter back to the Law Division to allow that court to impose the 897 days and to amend the judgment of conviction to include the 897 days.

B. Defendant was deprived of the effective assistance of counsel when trial defense counsel failed to file a pre-sentencing motion to vacate defendant’s guilty plea. (Da81-82)

Defendant provided a certification in support of his amended petition. It states:

When I pled guilty my attorney told me that I would receive credit for the time I served in state prison on an unadjudicated parole violation. At some point between my guilty plea and my sentencing, I received a letter from my attorney stating that I would not receive the credits. I then prepared a motion to vacate my guilty plea and sent it to the court. My motion was not filed—instead it was sent to my attorney. A few days later, Mr. Mazrani came to see me at the Middlesex County Jail and asked why I sent the motion to the court—he said that I was ‘ruining everything.’ He said: ‘I told you the judge is going to give it to you, it just can’t be in writing.’ He claimed that he had spoken to the judge in chambers. He persuaded me not to vacate my guilty plea by promising that the judge would give me the credit at sentencing. He said: ‘Trust me on this.’

[Da28]

The issue of whether defendant would receive jail credits for the 897 days he served on an unadjudicated parole violation was a major issue for the defense. As trial defense counsel acknowledged at sentencing: “[W]e were always struggling with the issue of jail credits.” (2T11-4 to 5) According to defendant, he only pled guilty based on trial counsel’s representation that he would receive the credits. (Da28) When informed by trial defense counsel that he would not receive the credits, defendant attempted to file a motion to vacate the guilty plea. (Da28) When the motion was sent to trial defense counsel by the court, he saw defendant at the jail and persuaded him to abide by the plea agreement, assuring him that the judge would give him the jail credits. (Da28)

Trial defense counsel’s statement at sentencing makes it clear that he was aware of the importance of jail credits to defendant and the dramatic effect the awarding of jail credits would be for defendant’s sentencing. It was incumbent upon trial counsel to file a motion to vacate defendant’s guilty plea. The failure to do so denied defendant the effective assistance of counsel.

Before sentencing, courts are to exercise their discretion liberally to allow plea withdrawals. In a close case, the “scales could usually tip in favor of defendant.”

[State v. Slater, 198 N.J. 145, 156 (2009)]

Defendant contends that ample evidence existed in support of his pre-sentence motion to withdraw his plea pursuant to Slater. Ample evidence existed that rejecting the plea bargain would have been rational under the circumstances. See State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020).

In Slater, the Supreme Court held that trial judges are to consider and balance four factors in evaluating motions to withdraw a guilty plea: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused. Id. at 157-158. None of the four factors are mandatory; if one is missing, that does not automatically disqualify or dictate relief. Id. at 162. The most compelling factor for withdrawal of the guilty plea is the second Slater factor, the nature and strength of the defendant's reasons for withdrawal. Defendant was misinformed as to the jail credits he would receive and thereby the length of time he would be incarcerated. Wrong information about such an important aspect of the plea bargain presents a compelling reason for the court to grant a pre-sentence motion for withdrawal of the guilty plea. Counsel must not "provide misleading, material information that results in an uninformed plea." State v. Nunez-Valez, 200 N.J. 129, 139-140 (2009).

Although it is anticipated that the State would argue that defendant cannot provide a substantial claim of innocence, such is not required for a plea withdrawal to be granted. Slater, 198 N.J. at 162. It is for good reason that substantial evidence of innocence is not essential, as plea withdrawals are viewed in light of protecting a defendant's right to trial and the principle that the State bears the ultimate burden of proving offenses against a defendant. In evaluating the first prong, the Slater court warned against conducting "mini-trials" that force a defendant to rebut all the State's evidence against him. Id. at 159. Plea withdrawal motions should be reviewed in light of a defendant's right to trial and the State's burden to prove its case. See, e.g., State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003) ("It is, of course, a basic tenet of our criminal jurisprudence that a defendant has no obligation to establish his innocence.").

Regarding prejudice to the State, it does not appear that there would be any specific or unfair prejudice to prosecute this matter. The prong regarding the fact that the plea was negotiated, as Slater acknowledges, is universally applicable against a defendant and should not be entitled to much weight. Slater, 198 N.J. at 161.

The PCR court concluded that defendant merely had hopes that his sentence would be reduced, despite defendant's attempt to file a motion to

vacate his plea. (Da82) The assertion by defendant that trial defense counsel had tried to persuade him not to take back his plea and the fact that defendant certified that his trial defense counsel had said he told the judge to give him a lesser sentence but that it could not be in writing, proves that an evidentiary hearing is required. It must be determined what truly occurred and whether trial defense counsel unfairly made a promise which he could not be keep, thereby improperly influencing defendant to plead guilty when that plea was not knowing, voluntary, or intelligent.

Defendant asks this court to find that defendant was denied the effective assistance of counsel when trial defense counsel failed to file a motion to vacate the guilty plea. In the alternative, an evidentiary hearing is required to further develop the facts underlying trial defense counsel's efforts, or lack thereof, on behalf of his client.

C. Defendant was deprived of the effective assistance of counsel when trial defense counsel failed to file a motion to suppress defendant's statement to the police. (Da83)

Defendant was arrested on a parole violation warrant on September 18, 2015, at approximately 6:54 p.m. (Da33) About 16 minutes later, Detective Wayne Canastra of the Middlesex County Prosecutor's Office and Detective Pias of the Perth Amboy Police Department questioned defendant at the Perth Amboy

Police headquarters. (Da33) The videotaped statement began at 19:10:04.<sup>3</sup> At 19:11:23, defendant is read his Miranda<sup>4</sup> rights. Defendant acknowledged his rights both orally and in writing at 19:12:14. Questioning proceeded until, at 19:18:52, defendant said: “I don’t want to talk no more.” Defendant repeated the same sentence a second time two seconds later at 19:18:54. The detective questioning defendant said: “Give me a second” and left the room. Before the door closed behind that detective, another police officer entered the room and asked: “Can I ask you a couple of questions?” (19:19:11) Questioning continued for approximately another 22 minutes. During that questioning, defendant inculpated himself in many ways including by disclosing an alibi which was later disproven by the police. (4T7-23 to 8-25: Da64)

The right against self-incrimination is protected by the Fifth and Fourteenth Amendments as well as state common and statutory law. See State v. Muhammad, 182 N.J. 551, 567 (2005). Furthermore, “[o]ur state-law privilege against self-incrimination offers broader protection than its federal counterpart under the Fifth Amendment.” Id. at 568. The privilege includes “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of

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<sup>3</sup> According to PCR defense counsel, the discovery provided does not include a transcribed copy of defendant’s statement. (Da64) A DVD disc (Da97) is included.

<sup>4</sup> Miranda v. Arizona, 384 U.S. 436 (1966)

his own free will, and to suffer no penalty. . . for [] silence.” State v. Camacho, 218 N.J. 533, 543 (2014) (internal quotation marks omitted)

It is clear that “once a defendant clearly and unambiguously invokes his right to remain silent, interrogation must cease.” State v. Maltese, 222 N.J. 525, 545 (2015). “Although not all constitutional errors call for reversal, ‘some may go so plainly to the integrity of the proceeding that a new trial is mandated.’” State v. Wade, 252 N.J. 209, 210 (2022), citing State v. Macron, 57 N.J. 325, 338 (1971). In other words, once an unambiguous invocation is made, “officers are required to stop the interrogation completely.” Maltese, 222 N.J. at 545 (internal quotation marks omitted). Where a defendant invokes his right to remain silent, it must be “scrupulously honored.” The police may not continue with the questioning. Michigan v. Mosley, 423 U.S. 96, 103-104 (1975); State v. Hartley, 103 N.J. 252, 262-267 (1986).

In the instant matter, defendant unambiguously invoked his right to remain silent when he said: “I don’t want to talk no more” at 19:18:52 and then repeated the same sentence two seconds later. The questioning detectives in no manner honored defendant’s invocation. Rather another officer came in to continue the questioning. The police officers violated defendant’s constitutional rights by ignoring the invocations of defendant of his right to remain silent and by continuing to interrogate him.

Although the State stated at the PCR hearing that it was not going to use the statement in any event (4T12-2 to 5), defendant could not have known that prior to his providing a guilty plea. Had a motion to suppress had been successfully raised, it might have convinced the State to offer defendant a better plea bargain. Thus, defendant was prejudiced by trial defense counsel's failure to file a motion which could have led to a better plea bargain.

D. Defendant was deprived of the effective assistance of counsel when his trial defense counsel advised him to plead guilty rather than pursue a motion to suppress the victim's cell phone. (Da83)

Trial counsel, realizing that the police accessed the decedent's cell phone without a warrant, filed a motion to suppress the cell phone and any information obtained from the cell phone. According to the police report, while searching defendant prior to placing him in a cell, the police felt what turned out to be a cell phone in his waistband. (Da34) The police accessed the cell phone without first obtaining a warrant. (Da36)

A warrantless search and seizure of a cell phone during an arrest is unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution. Assessing the cell phone found on defendant required a warrant. See Riley v. California, 573 U.S. 373 (2014); State v. Johnson, 476 N.J. Super. 1, 34 fn. 9 (App. Div. 2023). The State failed to obtain a warrant before assessing the information on the cell phone, rendering the search illegal.



The police report seemed to suggest that the police felt that there were exigent circumstances justifying a warrantless search, namely needing to identify the victim who had been hospitalized. That argument fails for several reasons: (1) the police did not know the cell phone belonged to the victim; although the surveillance video may show defendant allegedly going through the decedent's pockets, the video nonetheless does not show whether anything was taken (upon searching the decedent, a "roll of cash" was found on him); and (2) the cell phone was found when, at the conclusion of defendant's statement, he was searched prior to being placed into a cell. Defendant was removed from the interrogation room at 20:21:18.<sup>5</sup> The cell phone data was accessed at about 10:35 p.m. (Da36) Thus, more than two hours passed between the discovery of the cell phone and the search of the cell phone. Clearly, a search warrant could have been obtained during that period.

The PCR court reasoned that defendant did "not have any reasonable expectation of privacy over property he has stolen." (Da83) However, the videos which were observed did not show that anything was taken, so no proof exists that the cell phone was stolen. Thus, the court's finding is unreasonable and should not be considered by this court.

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<sup>5</sup> A DVD disc (Da96) of the alleged assault upon the victim is included.

Under these circumstances, it was likely that the cell phone would have been suppressed as evidence. Trial defense counsel did not act in a reasonably professional manner in counseling defendant to abandon his filed suppression motion and enter a guilty plea.

E. Defendant was deprived of the effective assistance of counsel when trial defense counsel failed to consult a forensic pathologist to examine the facts of this case. (Da84)

Defendant, in his amended petition (Da25-26), asserted that trial defense counsel was ineffective by failing to consult a forensic psychologist to review the record and determine whether the victim's death was impacted by the repeated doses of Narcan which were administered and by the fact that the victim was initially treated for acute intoxication rather than a head injury.

The Public Defender's Office approved the hiring of a forensic pathologist. On May 3, 2023, PCR counsel learned that the expert had died without rendering an opinion in this matter. On May 17, 2023, PCR counsel obtained Public Defender approval for a replacement expert and mailed the case materials to him on that same day. (Da68-69) The record is devoid of any findings by the expert. A remand is in order so that an evidentiary hearing can be held to ascertain what conclusions were determined by the forensic pathologist.

In denying defendant relief, the PCR court ruled that defendant's claim was speculative because the State's medical examiner rendered an opinion which

was provided in discovery. (Da 84) However, just because a State's expert provides an opinion, that does not ensure its accuracy. Trials frequently have experts who render conflicting opinions, and defendant was entitled to counter the State's expert if such were possible. The fact that defendant pled guilty to circumstances reflecting the State expert's opinion is irrelevant. Had his own expert's opinion differed from the State's expert, he would conceivably have had a plausible defense for a trial. Defendant should be granted an evidentiary hearing so that whatever conclusions were made by the Public Defender's expert can be examined for a plausible defense.

## POINT II

DEFENDANT'S GUILTY PLEA SHOULD BE VACATED BECAUSE IT WAS NOT ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY, AND THUS DEFENDANT WAS DENIED THE DUE PROCESS OF LAW PURSUANT TO FEDERAL AND STATE CONSTITUTIONAL LAW (Da81-82)

The Due Process Clause of the Fourteenth Amendment requires that a defendant's guilty plea must be knowing and voluntary. McCarthy v. United States, 394 U.S. 459, 466 (1969); State v. Barboza, 115 N.J. 415 (1989). “[A] guilty plea is the final relinquishment of the most cherished right—to be presumed innocent of a crime until a jury of one's peers has determined guilt beyond a reasonable doubt.” Slater, 198 N.J. at 154 (quoting State v. Smullen, 118 N.J. 408, 414 (1990)).

“Defendants who plead guilty also waive other guaranteed guarantees like the right against self-incrimination and the right to confront one’s accusers.” Slater, 198 N.J. at 154. In light of the constitutional protections implicated when a defendant waives his right to trial, a court may not accept a guilty plea unless it is “convinced that (1) the defendant has provided an adequate factual basis for the plea; (2) the plea is made voluntarily; and (3) the plea is made knowingly.” State v. Lipa, 219 N.J. 323, 331 (2014); State v. Crawley, 149 N.J. 310, 318 (1997).

It is clear from defendant’s certification (Da27-29) that his guilty plea was not entered knowingly, voluntarily, and intelligently. Defendant respectfully requests that this matter be remanded for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, defendant requests that this matter be remanded to the Law Division for an evidentiary hearing, assuming this court does not grant relief.

Respectfully submitted,

JENNIFER N. SELLITTI  
PUBLIC DEFENDER  
ATTORNEY FOR DEFENDANT-APPELLANT

By: s/Steven E. Braun  
Steven E. Braun  
Designated Counsel  
Dated: July 24, 2024



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November 1, 2024

### LETTER BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

The Honorable Judges of the Superior Court of New Jersey  
Appellate Division  
Richard J. Hughes Justice Complex  
25 Market Street  
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent)  
v. Lashawn Jones (Defendant-Appellant)  
Docket No. A-1314-23T2

Criminal Action: On Appeal from a Judgment  
Denying Post-Conviction Relief of the Superior Court  
Of New Jersey, Law Division, Middlesex  
County.

Sat Below: The Honorable Thomas J. Buck, J.S.C.

Honorable Judges: In accordance with R. 2:6-2(b), this letter in lieu of a more formal brief is submitted on behalf of the State in response to the issues raised in the brief filed by defendant.

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<sup>1</sup> The State’s brief is attached to show what was raised below. R. 2:6-1(a)(2).

<sup>2</sup> This document, as well as documents Sa11-28, are filed in the trial court and are thus part of the appellate record. R. 2:5-4(a).

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On May 12, 2016, the grand jurors for Middlesex County returned Indictment Number 16-05-864 charging defendant Lashawn Jones with the first degree, felony murder of Pascual Luna-Grande during commission of a robbery, contrary to N.J.S.A. 2C:11-3a(3) (count one), first degree robbery, contrary to N.J.S.A. 2C:15-1 (count two), first degree aggravated manslaughter, contrary to N.J.S.A. 2C:11-4a (count three), and third degree endangering an injured victim, contrary to N.J.S.A. 2C:12-1.2 (count four). (Da1-2).<sup>1</sup>

On May 11, 2018, defendant entered into a plea agreement with the State whereby defendant agreed to plead guilty to count three of the indictment and the State agreed to dismiss all the other counts in the indictment and to recommend a sentence of 15 years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. (Da3-8). On that same day, defendant

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<sup>1</sup> Citations to the record are as follows:

- “Da” defendant’s appendix;
- “Db” defendant’s brief;
- “Sa” State’s appendix;
- “1T” Transcript dated May 11, 2018;
- “2T” Transcript dated September 14, 2018;
- “3T” Transcript dated May 7, 2019
- “4T” Transcript dated August 3, 2023.



appeared before the Honorable Diane Pincus, J.S.C., and pleaded guilty to count three. (1T9-14 to 1T10-21).

On September 14, 2018, Judge Pincus sentenced defendant to 15 years in prison, subject to NERA. (Da9; 2T45-17 to 18). Defendant appealed, and his appeal was heard on the Excessive Sentence Oral argument calendar on May 7, 2019. (3T). The Appellate Division upheld defendant's sentence. (Da12). The New Jersey Supreme Court denied certification on October 21, 2019. State v. Jones, 240 N.J. 17 (2019).

On June 13, 2019, defendant filed a pro se application for post-conviction relief (PCR). (Da13-22). On September 16, 2019, while defendant's Petition for Certification was still pending, Judge Pincus entered an Order dismissing the PCR application without prejudice. (Da23). The PCR application was reinstated when Judge Pincus entered an Order on September 8, 2020, to this effect, and in March 2021, counsel was appointed to represent defendant. (Da23; Da74). An amended PCR application was filed on May 25, 2023. (Da24-46). PCR counsel also filed a brief. (Da47-72). The State filed its opposing brief on July 19, 2023. (Sa1-9).

The Honorable Thomas J. Buck, J.S.C., presided over the PCR proceeding on August 3, 2023. (4T). On August 31, 2023, Judge Buck issued an Order and written opinion denying the PCR application. (Da73-84).

Defendant thereafter filed a Notice of Appeal with this court. (Da85-88).

### COUNTER-STATEMENT OF FACTS

At about 4:30 a.m. on Friday, September 18, 2015, the Perth Amboy Police Department responded to the area of Madison Avenue and Market Street upon a report of an unresponsive man lying on the ground. (Da31; Da75). The police saw vomit on the man's clothing and smelled the odor of alcohol, so they administered Narcan to him, thinking he had overdosed. (Da43; Da75). It had no effect on the man, who had no identification on him. (Da43; Da75). Police transported the man to Raritan Bay Medical Center and later to Robert Wood Johnson Hospital for treatment. (Da75). Testing showed that the unconscious man had a fractured skull and related brain hemorrhaging. (Da75).

At 9:00 a.m. on September 18, Middlesex County Prosecutor Investigator Scott Crocco went to Robert Wood Johnson Hospital and learned that doctors still did not know the identity of the man, who was brain dead. (Da31). Earlier that same morning, Perth Amboy officers had obtained from a law office located in the area where the man had been found a surveillance video, which captured the relevant event on camera: it showed that at about 2:25 a.m., the victim was struck by a man who Perth Amboy police recognized

to be defendant. (Da32; Da37). The video showed that after the victim was struck and lying “out cold, spread eagle,” on the ground, defendant bent over the victim and searched his pockets. (Da75; 2T27-25; 2T28-19 to 20). The police knew defendant’s street name to be “YoYo” and that he was a documented member of the Bloods street gang. (Da32). Police learned that there was a warrant for defendant’s arrest on a parole violation (VOP). (Da32). Police began to look for defendant. (Da32). At about 6:54 p.m. on September 18, Perth Amboy police spotted defendant and arrested him on the outstanding VOP warrant. (Da33).

At police headquarters, Investigator Crocco and a Perth Amboy detective interviewed defendant. (Da33). The interview began at about 7:10 p.m. (Da33). Defendant said he was at his father’s home in Perth Amboy from 11:30 p.m. until 4:00 a.m. (Da33). When the officers confronted defendant with the surveillance video, defendant insisted on viewing it. (Da33). The officers did not oblige defendant’s request. (Da33). The officers saw that defendant was wearing the same attire they saw him wearing in the surveillance video. (Da76).

Defendant kept asking to use the bathroom, so the officers escorted him to the bathroom. (Da33). One officer watched defendant as he sat on the toilet seat, and observed that when finished, the toilet bowl had nothing in it,

meaning defendant had not gone to the bathroom. (Da33-34). Once back in the interview room, defendant asked to look at the surveillance video. (Da34). Defendant was shown three still photographs taken from the surveillance video and defendant maintained the man depicted in them was not him. (Da34; Da76). The officers then arrested defendant and took his clothing for evidence. (Da34). Before defendant was placed in a holding cell, he was searched. (Da34). Inside the waistband of defendant's underwear, the police uncovered and seized a cell phone. (Da34).

At 10:35 p.m. on September 18, police accessed the cell phone found inside defendant's underwear, because they had grounds to believe it belonged to the victim, who was still unidentified. (Da36). The video showed defendant going through the victim's pockets and his request to use the bathroom when he did not have to go showed that he wanted to dispose of the cell phone hidden in his underwear. (Da36). The cell phone disclosed a contact person named "Ashley" and when police called her, they learned that the cell phone belonged to her father, Pascual Luna-Grande, and that he lived at 210 Madison Avenue in Perth Amboy. (Da36; Da76). Family members were thereafter transported to Robert Wood Johnson Hospital where they confirmed Pascual's identity. (Da36; Da76). On September 23, 2015, Pascual was taken off life support and died. (Da36; Da76).

In giving a factual basis to his guilty plea, defendant admitted that he was out late in Perth Amboy on September 18, 2015, when he saw the victim walking and he punched him in the head. (1T9-14 to 24). Defendant admitted he punched the victim hard with a closed fist, causing the victim to fall to the ground. (1T9-25 to 1T10-11). Defendant could not deny he used a closed fist, because it was captured on the video. (2T40-17 to 21). Defendant admitted that he knew there was a probability of death, and that he left the scene without calling for help. (1T10-12 to 21).

## LEGAL ARGUMENT

### POINT I

#### DEFENDANT'S PCR APPLICATION WAS PROPERLY DENIED. (Da73-84).<sup>2</sup>

Defendant contends that Judge Buck erred in denying his PCR application without conducting an evidentiary hearing. Where, as here, the trial court did not conduct an evidentiary hearing, this court reviews de novo the denial of post-conviction relief. State v. Jackson, 454 N.J. Super. 284, 291 (App. Div. 2018). Defendant did not sustain his burden of establishing a prima facie case on his claims of trial counsel's ineffectiveness, and he thus was not entitled to

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<sup>2</sup> This Point responds to Points I and II in defendant's brief.

an evidentiary hearing. The denial of post-conviction relief should be upheld by this court.

A PCR court should grant an evidentiary hearing if the defendant has put forth a prima facie case of counsel's ineffectiveness. State v. Preciose, 129 N.J. 451, 462 (1992); R. 3:22-10(b). To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his claim will succeed on the merits. State v. Marshall, 148 N.J. 89, 158 (1997); R. 3:22-10(b).

The test for ineffective assistance of counsel is well-established. Defendant must overcome the strong presumption that counsel's performance was competent. State v. Norman, 151 N.J. 5, 38 (1997). Defendant must identify errors that show counsel was not acting as an advocate and that the errors prejudiced him. Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). Prejudice in the context of a guilty plea requires defendant to show that he would not have pleaded guilty and would have insisted on trial. State v. Gaitan, 209 N.J. 339, 351 (2012); State v. Brewster, 429 N.J. Super. 387, 392 (App. Div. 2013) (cases cited therein). Defendant must satisfy both prongs of the Strickland test; therefore, if he fails to prove prejudice, his claim fails. Id. at 350; State v. Pennington, 119 N.J. 547, 591 (1990). In reviewing counsel's performance, counsel's performance is evaluated for "reasonableness under prevailing professional norms."

Strickland, 466 U.S. at 688. And counsel's conduct must be evaluated from counsel's perspective at the time he acted; the distorting effects of hindsight are not to be part of the analysis. Ibid.

In his pro se PCR application, defendant argued that trial counsel was ineffective because counsel "lied to [him] and talked [him] into taking the 15 years in hopes Judge Pincus [would] take off 3 years and sentence me to 12 years or give me the 3 years." (Da16). Defendant's claim was related to 897 days, or two years, five months and 13 days, that he spent in state prison on his VOP before being transferred to the county jail on the charges in this case. The PCR application was not the first time this issue had been raised by the defense.

It was raised by trial counsel at defendant's sentencing hearing in September 2018. (2T). Trial counsel acknowledged defendant's VOP had nothing to do with the charges in this case and that under legal precedent, the State was correct that time spent in prison on a VOP was not jail credit to be awarded against the sentence for aggravated manslaughter. (2T9-15 to 25). Defense counsel also acknowledged that it was defendant who asked that the VOP be deferred while this case was pending, and so he remained in state prison. (2T10-3 to 9; 2T10-16 to 17). Nonetheless, trial counsel argued that because parole never adjudicated the parole violation, the trial court should

impose a 12-year base term. (2T10-17 to 21). In so arguing, trial counsel stated that defendant had agreed to the recommended sentence under the plea agreement with the understanding that counsel would be able to argue how much time defendant had spent in state prison on the VOP. (2T11-5 to 12).

Judge Pincus ruled that the time defendant spent in state prison on the VOP could not be awarded as jail credit. (2T37-2 to 6). Defendant was only entitled to 124 days of credit following his transfer to the county jail from state prison. (2T37-6 to 8; 2T37-20 to 22). The judge noted that the VOP warrant related to a robbery conviction, and it was defendant who asked for a deferment on the VOP. (2T37-18 to 20). Judge Pincus held that the fundamental fairness argument raised by trial counsel had no legal merit. (2T37-23 to 24).

During oral argument before the Appellate Division on the excessiveness of defendant's sentence, defendant's appellate counsel conceded time defendant spent in prison on the VOP violation was not jail credit, but argued defendant was entitled to a remand so the trial court could reconsider not reducing the base term of sentence. (3T2-8 to 16). The Appellate Division affirmed the sentence.

PCR counsel argued in his supporting brief that both trial and appellate counsel had been ineffective because they did not argue that the time defendant



spent in state prison on the VOP violated due process. (Da55-59). Relying on a March 28, 2018, letter written to defendant by the attorney who had represented him on the VOP, PCR counsel argued that parole's failure to make a decision on the violation charge meant defendant's incarceration violated due process. (Da19; Da57). PCR counsel argued that "fundamental fairness" required that defendant receive the jail credit of 897 days. (Da59).

PCR counsel also raised other claims of trial counsel error. Counsel argued that trial counsel was ineffective because he did not file a pre-sentence motion written by defendant to vacate his guilty plea due to the failure to have the 897 days awarded to him as jail credit. (Da59-63). PCR counsel argued that trial counsel was ineffective for not filing a motion to suppress defendant's statement to police because it was taken in violation of his right to remain silent. (Da63-66). PCR counsel claimed that trial counsel was ineffective for not pursuing a motion to suppress evidence, which was the victim's cell phone, which the police searched without a warrant. (Da66-68). Finally, PCR counsel argued that trial counsel was ineffective for not consulting a forensic pathologist to examine whether the administration of Narcon to the victim impacted his death. (Da68-69).

On the issue of not pursuing a motion to challenge the warrantless search of the victim's cell phone, trial counsel a motion to suppress physical evidence

on October 3, 2017. (Sa10). On December 4, 2017, the State filed a brief in response to the motion. (Sa11-23).

The State argued that defendant's arrest on the VOP warrant was based on probable cause and that defendant was properly searched incidental to his arrest and before being placed in the holding cell. (Sa14-16). The State argued that defendant had no expectation of privacy in the victim's cell phone, which defendant stole from him. (Sa16-17). The police had a reasonable belief that the cell phone, found secreted in defendant's underwear, did not belong to him and was the victim's property. (Sa17-19). The State also argued that exigent circumstances supported the search of the cell phone without a warrant because the police wanted to identify the victim, who was in a coma and thus not able to communicate. (Sa19-21).

Finally, the State argued the motion to suppress should be denied under the inevitable discovery doctrine. (Sa21-23). The police obtained a warrant to search the victim's cell phone on March 18, 2016. (Sa14). As such, the police would have inevitably learned that the cell phone belonged to the victim. (Sa22).

Trial counsel filed a responding brief on January 3, 2018. (Sa24-27). Trial counsel disputed that the police had cause to believe the cell phone was stolen and, in any event, disputed that an exigency existed that justified a

search without a warrant. Five months later, on May 11, 2018, defendant withdrew the motion. (Sa28). May 11, 2018, was the day the plea agreement was reached in the case and defendant pleaded guilty before Judge Pincus. (1T).

The State filed a PCR brief in opposition on July 19, 2023. (Sa1-9). The State argued that defendant pleaded guilty to second degree robbery on November 29, 2012, and was paroled on March 5, 2015. (Sa6). A parole warrant was issued for him. (Sa6). The State argued that the jail credit awarded to him at sentencing in this case was correct because he was awarded with time spent in custody on this charge, which was September 18, 2015, to September 22, 2015, and all the time he spent in county jail following his release from state prison on the VOP. (Sa6-7). The trial court had no discretion to convert the time defendant spent in state prison on the VOP as jail credit under Rule 3:28-8. (Sa7).

The State argued that a motion to suppress defendant's statement to police would have been frivolous, because defendant denied complicity in causing the victim's injury and death, even after shown the still photographs for him made from the surveillance video. (Sa7). This evidence was never going to be part of the State's case-in-chief against defendant, so defendant could

never establish that but for counsel's error he would have insisted on going to trial. (Sa7).

The State argued that the motion to suppress physical evidence was not going to result in suppression, because the police acted in conformance with the law and constitutional protocols. (Sa7). And defendant had no expectation of privacy in property that did not belong to him and in fact had been stolen by him. (Sa7).

The State argued that the issue regarding a forensic pathologist was sheer speculation. (Sa8). There was no evidence that the victim died from anything other than the fractured skull and the resulting brain bleeding that led to his death.

At oral argument before Judge Buck, PCR counsel and the State reiterated the arguments raised in their briefs. (4T3-19 to 4T12-12). In denying the PCR application, Judge Buck held that with respect to the jail credit issue, defendant's due process argument was undercut by the fact that it was defendant who asked for deferment on the adjudication of the VOP while the charges in this case were pending. (Da81-82). The judge relied on the March 28, 2018, letter that defendant's VOP attorney wrote to him, attesting to defendant's decision to defer adjudication of the VOP proceedings and that parole terminated the VOP proceedings as "short mandatory supervision

expiration date.” (Da19; Da82). Judge Buck ruled that defendant’s strategic decision in delaying his VOP hearing could not inure to his advantage.

(Da82). In any event, trial counsel argued fundamental fairness at sentencing to convince Judge Pincus to sentence defendant to a base term less than the one contemplated under the plea agreement. (Da82). Judge Buck also held that defendant’s own certification in support of the pro se PCR application showed that he knew the 897 days he spent in state prison on the VOP was not a guarantee at sentencing. (Da16; Da82).

Judge Buck held that defendant’s claim about the failure to file a motion to suppress his statement to police was speculative. (Da83). The judge ruled that defendant had failed to show that but for counsel’s alleged error, he would have insisted on going to trial. (Da83).

Judge Buck held that the motion to suppress physical evidence was not going to result in a favorable result for defendant because he had no expectation of privacy in property he stole from his victim. (Da83). The judge also held that the cell phone had been properly seized incidental to defendant’s arrest. (Da83).

Judge Buck also found the claim about the forensic pathologist to be speculative. (Da84). Defendant admitted at the plea hearing that he caused the victim’s death, so there was no question about causation. (Da84).

On appeal, defendant contends that Judge Buck erred in denying his PCR application on the grounds raised by him and counsel. The State submits that defendant failed to make out a prima facie case of trial counsel's ineffectiveness.

As outlined above, both trial and appellate counsel argued that defendant's base term sentence should be reduced by the amount of time defendant spent in state prison on the VOP charge. They acknowledged before the trial court and before this court that the time defendant spent in state prison on the VOP could not be considered jail credit under Rule 3:21-8. Trial counsel wrote to defendant on May 29, 2018, and advised him of this fact. (Da18). The precedent is clear that jail credit under the rule only pertains to custody attributable to the offense and sentence at issue. State v. Hernandez, 208 N.J. 24, 36 (2011); State v. Carreker, 172 N.J. 100, 115 (2002); State v. Black, 153 N.J. 438, 455-62 (1998). The trial court has no discretion in either granting or denying jail credits under the rule. Id. at 48. The defendant is either entitled to it or he is not. Ibid; State v. Joe, 228 N.J. 125, 130 (2017). Time spent in prison on a no bail parole warrant is attributable to the original sentence. State v. Harvey, 273 N.J. Super. 572, 574-76 (App. Div. 1994). Counsel in this case advocated a position that they could argue under the law.

That their arguments did not prevail in the trial court on direct appeal does not render their performance unreasonable under Strickland/Fritz.

Defendant's reliance below on Morrissey v. Brewster, 408 U.S. 471 (1972), was misplaced. As Judge Buck held, in Morrissey, the United States Supreme Court ruled that parole revocations must comply with due process, however, in this case it was defendant who requested that his parole revocation hearing be deferred during the pendency of this case. (Da81). As Judge Pincus held at sentencing in 2018, defendant was not entitled to the 897 days as jail credit under Rule 3:21-8.

Defendant's reliance on an unpublished decision from the Appellate Division, (Db8-9; Da89-95), is improper because unpublished opinions are not precedent under Rule 1:36-3. In any event, the opinion does not serve as secondary support because in that case, the record did not support the State's position that the period of pre-sentencing confinement at issue was due to the defendant's juvenile parole being revoked. (Da90). The Appellate Division remanded the case because the record did not establish that defendant was on juvenile parole at the time he committed the new offense and whether his parole had been revoked. (Da95). Here, there was no dispute that when defendant committed his crime in this case, he was on parole for a prior crime, which was second degree robbery, a NERA offense. As has been already

noted, police arrested him on a no bail parole warrant. (Da32). The March 28, 2018, letter from defendant's VOP lawyer shows that defendant chose for strategic reasons to "defer adjudication of the VOP proceedings" while the instant case was "ongoing." (Da19). Eventually, parole terminated the VOP proceedings. (Da19).<sup>3</sup> The period of confinement at issue was not attributable to the aggravated manslaughter charge.

Judge Buck also properly rejected defendant's claim that trial counsel erred in not pursuing a pre-sentence motion to vacate defendant's guilty plea. The motion to vacate the guilty plea that defendant prepared was based on the jail credit issue, and there was no legal support for defendant's claim that he was entitled to the credit as jail credit under Rule 3:21-8. The record did not support a claim that defendant was promised 897 days as jail credit. Trial counsel argued at sentencing that defendant understood that he remained free to bring the amount of time he had spent to the court's attention to argue for a lesser sentence and even defendant in his PCR application said it was "in hopes" of getting a lesser base term sentence. If defendant's motion had been filed, it would have been denied. Defendant addressed Judge Pincus before

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<sup>3</sup> A person serving a NERA period of parole supervision can be returned to custody for a violation of a condition of that parole not only for the balance of the original custodial term, but for the remaining length of the parole supervisory period. State v. Friedman, 209 N.J. 102, 116 (2012).



giving his factual basis, and there was no evidence that defendant was being coerced into pleading guilty. He understood the plea agreement and his penal exposure. His guilty plea was validly accepted by Judge Pincus.

The claim of counsel's alleged error for not filing a motion to suppress defendant's statement to police is a non-issue. First, the Supreme Court has expressly held that the admission of a defendant's statement against him in a criminal trial is not the subject of a "motion to suppress." State v. W.B., 205 N.J. 588, 602 n.3 (2011) (emphasis in original). Rather, the State has "the affirmative duty" under Evidence Rule 104(c) and legal precedent to prove beyond a reasonable doubt that defendant's statement was voluntary and was constitutionally obtained. Ibid. A motion to suppress evidence under Rule 3:5-7 only pertains to motions to suppress physical evidence. Ibid. Defendant did not provide an incriminating statement to police when he spoke with investigators following his arrest. He denied complicity and denied it was him depicted in the still photographs. As the State argued below, it was "never going to use that statement" against defendant. (4T12-2 to 4). Because the statement was not being proffered against defendant, there was no reason for the State to file a motion under Evidence Rule 104(c).

In any event, even if a hearing had been conducted and defendant's statement suppressed, Judge Buck correctly held that there was no evidence

defendant would have insisted on going to trial. The assault was captured on a surveillance video. Police officers recognized defendant when they watched it. Identity was not an issue in this case. The evidence was clear that after being punched by defendant, the victim fell to the ground, hit his head and suffered a skull fracture that led to brain bleeding, a coma and his ultimate death when it was determined he was brain dead.

Defendant's claim that trial counsel was ineffective for not pursuing the motion to suppress the cell phone ignores the fact that the motion filed by trial counsel was withdrawn on the day he garnered for defendant the favorable plea deal. There was no legal basis for suppression of the cell phone, because it had been lawfully seized by police and examined to try and determine the victim's identity. The police had reasonable grounds to believe that the cell phone did not belong to defendant: the surveillance video showed defendant going through the victim's pockets; defendant kept asking the investigators during his statement to use the bathroom and when he was taken to the bathroom, he did not relieve himself; the cell phone was found secreted in his underpants. The cell phone was examined to see if police could identify the man in the hospital who was in a coma and who had on him no identification. In any event, the case law cited by the State in 2017 in its brief supports Judge Buck's ruling that a defendant has no expectation of privacy in property he

knows is stolen. (Sa17-18). This claim against trial counsel was insufficient to warrant post-conviction relief.

Finally, Judge Buck properly rejected defendant's claim that trial counsel should have consulted a forensic pathologist. There is no evidence to support a claim that the victim's death was caused by anything other than blunt force trauma. (Da43). Defendant punched the victim so hard that he fell to the ground and hit his head, which caused the skull fracture. Defendant failed to show that an expert would have been able to draw a credible cause and manner of death. This claim was without merit.

In sum, defendant's application for post-conviction relief was properly denied. This court should uphold the trial court's judgment.

CONCLUSION

For the foregoing reasons, the State urges this court to uphold the denial of post-conviction relief.

Respectfully submitted,

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