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April 11, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0206-23T4

| | | |
|-----------------------|---|--------------------------------|
| STATE OF NEW JERSEY | : | <u>CRIMINAL ACTION</u> |
| Plaintiff-Respondent, | : | On Appeal from a Final Order |
| v. | : | Denying Post-Conviction Relief |
| MARKEICH JOHNSON, | : | of the Superior Court of New |
| Defendant-Appellant. | : | Jersey, Law Division, Hudson |
| | : | County. Ind. Nos. 96-07-01222; |
| | : | 96-01-00032; 02-07-01546 |
| | : | Sat Below: |
| | : | Hon. NESLE A. RODRIGUEZ, |
| | : | J.S.C. |

BRIEF AND APPENDIX (Da 1-54) ON BEHALF OF DEFENDANT-
APPELLANT

DEFENDANT IS CONFINED

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² Da 23-29 are included in the appendix as these documents are tantamount to a complaint and thus are required to be included in the appendix pursuant to R. 2:6-1(a)(1).

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PRELIMINARY STATEMENT

On March 26, 1996, as per a plea agreement defendant pleaded guilty to a single charge contained in Ind. #1. On April 26, 1996, while released on bail pending sentencing, defendant was arrested and charged with the offenses contained in Ind. #2. On October 15, 1996, defendant was sentenced on Ind. #1 to a flat term of 5 years. On May 22, 1997, as per a plea agreement defendant pleaded guilty to a single charge contained in Ind. #2. On June 30, 1997, defendant was sentenced on Ind. #2 to a term of 7 years with a 3-year parole bar. This sentence was ordered to be served concurrently with the sentence imposed on the conviction stemming from Ind. #1. Absent specific findings by the court, the sentence on Ind. #2 was statutorily required to be served consecutive to Ind. #1. Thus, the sentence imposed on Ind. #2 constituted an illegal sentence. On March 29, 2002, following his release defendant was arrested. This arrest led to the return of Ind. #3. On September 30, 2003, a jury found defendant guilty as charged. On February 10, 2004, the State's motion to sentence defendant on Ind. #3 as a persistent offender was granted and defendant was sentenced to an aggregate extended term of 50 years with an 85% parole bar. Because defendant's sentence on Ind. #2 was illegal, defendant's sentence on Ind. #3 is illegal as well. For the reasons that follow, defendant's conviction and sentence on Ind. #2 must be vacated and charges reinstated. Likewise concerning Ind. #3.

PROCEDURAL HISTORY

On January 6, 1996, the Hudson County Grand Jury returned Indictment Number 96-01-00032 (Ind. #1), charging defendant, Markeich Johnson with: third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count One); third-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Two); and fourth-degree resisting arrest, contrary to N.J.S.A. 2C:29-2a (Count Three). (Da 1-2)⁴ Defendant was arrested on these charges on October 27, 1995, and he was released on December 7, 1995. (Da 3-4) On March 26, 1996, defendant pleaded guilty to third-degree unlawful possession of a weapon. (Da 3-4) On October 15, 1996, defendant was sentenced on Ind.#1 to a flat term of 5 years. (Da 3-4)

On April 26, 1996, while released on bail pending sentencing on Ind. #1, defendant was again arrested. (PSR 1) Following this arrest, Hudson County Indictment No. 96-07-1222 was returned on July 3, 1996 (Ind. #2). (Da 5-6) Therein defendant was charged with: first-degree attempted murder, contrary to N.J.S.A. 2C:5-1(a) and 2C:11-3 (Count One); two counts of second-degree

⁴ “Da” refers to defendant’s appendix attached hereto.

“1T” refers to the transcript of the hearing held on February 6, 2004.

“2T” refers to the transcript dated February 10, 2004.

“3T” refers to the transcript dated July 31, 2023.

“PSR” refers to the Pre-Sentence Report prepared for sentencing under Ind. #1 (most legible available).

aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Counts Two and Three); third-degree aggravated assault, contrary to N.J.S.A. 2C:12b(2) (Count Four); fourth-degree aggravated assault, contrary to N.J.S.A. 2C:12-b(3) (Count Five); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Six); and third-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b⁵ (Count Seven) (Da 5-6)

On May 22, 1997, defendant entered a plea agreement. (Da 7-9) On the same day, defendant pleaded guilty to Count Six of Ind. #2, second-degree possession of a weapon for an unlawful purpose, pursuant to a plea agreement. (Da 10-11) On June 30, 1997, defendant was sentenced on Ind. #2 to a term of 7 years with a 3-year parole bar concurrent to the sentence imposed on Ind. #1. (Da 10-11) On March 29, 2002, defendant was again arrested. (Da 12-13) This arrest led to the return of Hudson County Indictment No. 02-07-1546 (Ind. #3) charging defendant with: first-degree armed robbery, contrary to N.J.S.A. 2C:15-1 (Count One); second-degree kidnapping, contrary to N.J.S.A. 2C:13-1b (Count Two); fourth-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5db (Count Three); third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4d (Count Four)⁶; and fourth-

⁵ Count Seven predates the Legislature's amendment which made this offense a second-degree crime. See L. 2007, c. 284, sec. 1)

⁶ Count Four was amended to a crime of the fourth degree. (Da 3-4)

degree resisting arrest, contrary to N.J.S.A. 2C:29-2a (Count Five) (Count Seven) (Da 12-13)

On this indictment, defendant elected to be tried to a jury. (Da 12-13) On September 30, 2003, defendant was found guilty as charged. (Da 12-13) On or about October 3, 2003, the State filed a motion to sentence defendant as a persistent offender pursuant to R. 3:21-4e, N.J.S.A. 2C:43-7 and 2C:44-3(a). (1T 4-7 to 9, 5-17 to 24) On February 6, 2004, the State's motion to sentence defendant as a persistent offender was granted (1T 10-17 to 11-22, 41-24 to 42-13) and defendant was sentenced to an extended term of 50 years with an 85% parole bar on Count One (armed robbery). (2T 5-9 to 17; Da 12-13) On Count Two (kidnapping) defendant was sentenced to a term of 30 years with an 85% parole bar. (2T 4-23 to 5-6; Da 12-13) Counts Three and Four (unlawful possession of a weapon and possession of a weapon for unlawful purpose) were merged with Count One (armed robbery). (2T 4-21 to 22; Da 12-13) On Count Five (resisting arrest) defendant was sentenced to a flat term of 18 months. (2T 5-18 to 19; Da 12-13) All sentences were ordered to be served concurrently. (2T 5-19 to 21; Da 12-13)

It is unclear whether defendant appealed his convictions and/or sentence under Indictment Numbers 96-01-00032 and 96-07-01222.⁷ Defendant appealed

⁷ Document and transcript requests made by Deputy Public Defender Kathryn Sylvester of the Conviction Integrity Unit were unable to be obtained. (Da 14-16)

under Indictment Number 02-07-1546, and this Court affirmed his convictions and sentence. (Da 17-18) The New Jersey Supreme Court granted defendant Certification and summarily remanded to the trial court for resentencing pursuant to State v. Pierce, 188 N.J. 155 (2006) and State v. Johnson, 188 N.J. 262 (2006). (Da 18) On remand the trial court imposed the same sentence. (Da 18) Thereafter, defendant timely sought Post-Conviction Relief (PCR) raising ineffective assistance of trial counsel. (Da 18) Following a remand by this Court to allow defendant to supplement the record (Da 18-19), the PCR court denied the petition in a written decision entered on September 15, 2010. (Da 19) This Court affirmed the denial of PCR on July 19, 2011. (Da 17-22)

On August 15, 2022, defendant filed a pro se first Petition for Post-Conviction Relief, including his certification in support thereof, on his convictions and sentence under Indictment Numbers 96-07-01222 and 96-01-00032. (Da 23-29) On June 1, 2023, assigned PCR counsel filed a brief in support of defendant's PCR application. (Da 30-33) Defendant's pro se supplemental brief dated April 1, 2023, was made a part of the appendix to counsel's brief. (Da 34-37) On July 31, 2023, a PCR hearing was held before the Honorable Nesle A. Rodriguez, J.S.C. (3T 3-1 to 11) At the conclusion of the hearing Judge Rodriguez did not issue a decision stating, "I will be posting a decision." (3T 7-1)

On August 1, 2023, Judge Rodriguez issued an order (Da 38), and written

decision denying defendant's application for post-conviction relief including his request for an evidentiary hearing. (Da 39-45) On September 21, 2023, defendant filed a Notice of Appeal. (Da 46-49) On February 29, 2024, defendant filed an amended Notice of Appeal. (Da 50-54)

STATEMENT OF FACTS

Defendant's pro se petition was filed under R. 3:22-2 on August 15, 2022. Therein defendant argued that plea counsel provided ineffective assistance of counsel on the grounds that: 1) counsel misled defendant to understand that although he was pleading guilty to two separate charges, under the agreement "both Indictments would count as one single conviction" (Da 27); and 2) counsel was ineffective by allowing defendant to plead guilty to an offense "I did not commit" and that defendant's "plea allocution" did not support "the elements...for the offense...." (Da 25, 27)

PCR counsel's brief filed on June 2, 2023, abandoned defendant's initial pro se issues and instead argued that defendant's sentence under the second indictment (Ind. No. 96-07-1222) was illegal because N.J.S.A. 2C:44-5(h) required that the sentence be imposed consecutive to the sentence imposed under the first indictment (Ind. No. 96-01-00032). (Da 30-33) Counsel's brief further argued that at this time, due to the illegality of the sentence-imposed, defendant's conviction under the second indictment must be vacated. (Da 30-33) Defendant's pro se brief (attached as appendix to counsel's brief) joined in that argument. (Da 34-37) Both briefs argued that as a direct consequence the extended term sentence imposed under the third indictment (Ind. No. 02-07-01546) pursuant to the persistent offender statute (N.J.S.A. 2C:44-3a) was itself an illegal sentence as defendant at the time of sentencing had only a single prior

conviction. (Da 30-37)

At the PCR hearing defense counsel clarified the position of the defense stating:

[T]he issue as we see it pertains to not so much a PCR issue but an illegal sentence issue. And as Mr. Johnson [defendant] has indicated in this supplemental brief, and then also in my follow-up brief, the argument is that pursuant to N.J.S.A. 2C:44-3(a)⁸, the judge was not supposed to sentence my client to concurrent sentences under those circumstances that are enunciated in the statute. And if there was an exception, there was supposed to be a statement of reasons as to why this was done.

We, unfortunately, aren't able to retrieve the sentencing transcript, but I understand from transcription [services] that they have been destroyed and no longer exist. However, the (indiscernible) of the conviction does not indicate that there was a statement of reasons indicated why the judge would have sentenced my client concurrently since he had committed one of the ... offenses while he was out on bail on the other.

So the crux of the argument, Judge, is that because of that error, that illegal sentence, the State, they want to sentence my client on a subsequent offense, did not have requisite two convictions to give him an enhanced penalty under that subsequent arrest.

And essentially, that is our argument.... (1T 3-21 to 4-20)

At the PCR hearing, the State, for its part, did not address the defense's argument. The State merely argued that: a) the PCR was "20 years" late with

⁸ Counsel later corrected the statute citation to N.J.S.A. 2C:44-5(h). (1T 4-25 to 5-2)

“nothing to show either excusable neglect or a fundamental injustice” (1T 5-12, 5-14 to 16); and b) “there’s been no showing of meeting the Strickland standard” because “[h]is counsel actually seems to have done above and beyond to get him a sentence that was better than he should have been able to get.” (1T 5-25 to 6-1, 6-7 to 10) Defense counsel rebutted stating: “Judge, I would just indicate that this is not technically a PPR [sic] application, and it’s my understanding that with respect to legal sentences, there is some time bar.” (6T 18 to 21)⁹

At the outset of the PCR court’s written decision, it correctly enunciates the issue raised by defendant stating:

The Defendant now claims in his *pro se* brief and defense counsel’s supplemental brief, that since the sentence under Indictment No. 1222-7-96 was illegal, he should be precluded from being treated as a repeat[] offender, which in turn, would vacate the sentence under Indictment 1546-07-2002. (Da 39)

However, going forward the PCR court continues to treat the matter as a claim of ineffective assistance of counsel filed under R. 3:22-2(a). Accordingly, the court concludes that the petition was time-barred because:

[T]here was no explanation provided for this twenty-year delay in either Petitioner’s initial August 8, 2022, petition, Petitioner’s April 1, 2023, supplemental

⁹ This is a direct quote from the transcript. However, it appears to have been wrongly transcribed or at least misheard by the transcriber. Clearly, counsel said or intended to say “PCR” and not “PPR” and rather than “with respect to legal sentences, there is some time bar,” counsel in all likelihood stated, “with respect to [il]legal sentences there is [not] some time bar.” (1T 6-18 to 21)

argument, or Petitioner's counsel's June 1, 2023, supplemental letter brief. Therefore, Petitioner has failed to demonstrate any excusable purpose for the delay which exceeds the five-year statutory limitation for filing a PCR petition[], as required to circumvent the Rule 3:22-12(a)(1) time bar. (Da 43)

Along the same vein, the PCR court concluded that petitioner failed to show that plea counsel did not function as the counsel guaranteed by the Sixth Amendment or that he was prejudiced by counsel's performance. (Da 38) Thus, the court concluded that: "Petitioner failed to make a prima facie showing that he received ineffective assistance of counsel because his arguments do not satisfy the two-pronged Strickland standard." (Da 44)

Ultimately, in the final paragraphs of its decision the PCR court did reach the issue of an illegal sentence. The court acknowledges that, unless the sentencing court "provide[d] reasons" for imposing a concurrent sentence, defendant should have received a consecutive sentence pursuant to "N.J.S.A. 2C:44-5(h)." (Da 45) However, the court again denies relief stating:

There is no transcript available of the 1997 sentencing hearing to corroborate the Defendant's assertion as it was destroyed due to retention policy. The Judgement of Conviction confirms the concurrent sentence and "incorporates all other reasons stated on the record at the time of sentence." Therefore, the Court may have stated reasons to justify the concurrent sentence which at that time benefitted the Defendant. The Defendant received the benefit of a concurrent sentence on matters to which he plead guilty. Accordingly, prong one of the two-prong standard has not been met, Petitioner is

unable to establish that the performance prejudiced the defense. Because petitioner has neither made prima facie showing that his counsel was ineffective, nor shown that facts material to this claim lie outside the record, he is not entitled to an evidentiary hearing. (Da 45)

LEGAL ARGUMENT

POINT I

THE PCR COURT ERRED IN ITS VIEW OF DEFENDANT'S APPLICATION. ALTHOUGH DEFENDANT'S INITIAL PRO SE APPLICATION WAS COUCHED IN TERMS OF INEFFECTIVE ASSISTANCE OF PLEA COUNSEL, ASSIGNED PCR COUNSEL ABANDONED THAT APPROACH AND INSTEAD ARGUED THAT DEFENDANT WAS INITIALLY THE RECIPIENT OF WHAT AMOUNTED TO AN ILLEGAL SENTENCE UNDER N.J.S.A. 2C:44-5(h), WHICH IN TURN RESULTED IN DEFENDANT BEING SUBJECTED TO AN ILLEGAL EXTENDED TERM SENTENCE UNDER N.J.S.A. 2C:44-3(a). AT THIS TIME THE ILLEGAL SENTENCES IMPOSED ON BOTH INDICTMENTS MUST BE VACATED AND THE MATTER REMANDED FOR RESENTENCING. AT RESENTENCING THE COURT MUST BE GUIDED BY THE DICTATES OF THE DOUBLE JEOPARDY CLAUSE CONTAINED IN BOTH THE 5TH AMENDMENT TO THE U.S. CONST. AND ART. I, PAR. 5 OF THE N.J. CONST. (3T 3-17 to 5-3; DA 30-37)

Notwithstanding the issues raised in defendant's pro se application for PCR, once trained counsel was assigned and provided the opportunity to review the record, the application was fundamentally altered. The application was no longer presented pursuant to R. 3:22-2, rather the application was squarely raised pursuant to R. 3-21-10(b)(5). The latter implicates a different set of rules and is governed by substantially different case-law, which the lower court failed to apply.

A. Once Counsel Was Assigned to Defendant’s PCR, Counsel Had the Duty to Review the Entire Record and the Concomitant Obligation to Elucidate the Issues Raised; Add New Issues; and / or Alter the Application in Accordance with the Relevant Law.

Rule 3:22-6(d) provides in pertinent part:

...Counsel should advance all of the legitimate arguments requested by the defendant that the record will support.

Rule 3:22-6(d) has been construed and applied to impose an independent standard of professional conduct upon counsel representing a defendant in a PCR proceeding. (Emphasis added) See State v. Webster, 187 N.J. 254, 257 (2006) (Emphasis Added) (“PCR counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments that the record will support”). See also State v. Hicks, 411 N.J. Super. 370, 377 (App. Div. 2010) (Emphasis Added) (“defendant's PCR trial counsel's performance failed to meet the standards imposed by Rule 3:22-6(d) because there is no evidence that defendant received the presumed benefits of having his case independently reviewed by a trained legal professional.”)

Here, defendant’s first and only PCR application was grossly out-of-time. Defendant provided no reasons that would amount to excusable neglect for its

tardy submission. Nevertheless, as the rules require, counsel was assigned to represent defendant. Once assigned, counsel clearly scoured the record for any “additional claims that should be brought forward.” Webster, 187 N.J. at 257. Having discovered that in 1997 defendant was the recipient of a sentence “not in accordance with the sentence authorized by law” counsel raised the issue of an illegal sentence and by virtue of doing so changed the nature of defendant’s application, at least by de facto, into one filed pursuant to R. 3:21-10(b)(5).

B. R. 3:21-10b(5) Requires No Showing of Ineffective Assistance of Counsel, Nor Is It Subject to Any Time Constraints.

Under Rule 3:21-10(b)(5), "an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice." See State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) ("[A] truly 'illegal' sentence can be corrected 'at any time'" (quoting R. 3:21-10(b)(5); R. 3:22-12). "[A]n illegal sentence is one that 'exceeds the maximum penalty . . . for a particular offense' or a sentence 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000))(Emphasis added). Thus, the legality of a sentence is not only determined by its length, but it may also be illegal in its application as well.

Accordingly, while ineffective assistance of counsel can certainly result in the imposition of an illegal sentence upon a defendant, a showing of

ineffective assistance is not required to correct an illegal sentence which, if not corrected, is always subject to correction provided the sentence has not already been completed. See subsection D infra.

C. Defendant's Sentence Under the Second Indictment Was Illegal, Making Defendant's Sentence Under the Third Indictment Illegal as Well.

Here, defendant was charged under Ind. #1 (96-01-00032), with criminal offenses arising from an incident occurring on October 27, 1995. Defendant was arrested on the same day and released on bail 41 days later on December 7, 1995. (Da 1-4) On March 26, 1996, defendant pleaded guilty to third-degree unlawful possession of a weapon, presumably pursuant to a plea agreement, as at the time of sentencing the remaining two charges were dismissed apparently without objection.¹⁰ (Da 3-4)

On April 26, 1996, while still on bail pending sentencing on Ind. #1, defendant was again arrested. (Da 9) This arrest led to the return of Ind. #2 (96-07-1222) on July 3, 1996. Therein defendant was charged with an additional seven offenses. (Da 5-6) On October 15, 1996, defendant was sentenced on the first indictment to a flat term of 5 years. (Da 3-4) On May 22, 1997, pursuant to

¹⁰ As previously noted, document and transcript requests made by Deputy Public Defender Kathryn Sylvester of the Conviction Integrity Unit could not be fulfilled. (Da 14-16)

a plea agreement (Da 7-9), defendant pleaded guilty to a single offense under Ind. #2 (96-07-1222) with the remaining charges to be dismissed. (Da 7-11) On June 30, 1997, in accordance with the plea agreement, defendant was sentenced on the Ind. #2 to a term of 7 years with a 3-year parole bar. (Da 10-11) The sentence was ordered to be served concurrently with the sentence imposed on the conviction stemming from the Ind. #1. (Da 10-11)

N.J.S.A. 2C:44-5(h) provides in pertinent part that:

[w]hen a defendant is sentenced to imprisonment for an offense committed while released, with or without bail, pending disposition of a previous offense, the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense, unless the court, in consideration of the character and conditions of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.

Absent a finding of a serious injustice, the sentencing court was required by the Legislature to impose the seven years with a three-year parole bar on Ind. #2 consecutive to the five-year flat term imposed on Ind. #1. Clearly, defendant's sentence on the second indictment was illegally lenient.

In denying defendant relief, the PCR court stated:

The Judgement of Conviction confirms the concurrent sentence and "incorporates all other reasons stated on the record at the time of sentence." Therefore, the Court may have stated reasons to justify the concurrent sentence which at that time benefitted the Defendant.

(Da 45)

Respectfully, the PCR court's rationale is far off the mark. To escape imposing the required consecutive sentence the court was required to find that based on the "character and condition of the defendant" imposing a consecutive sentence would rise to a "serious injustice" overriding the "need to deter such conduct by others." N.J.S.A. 2C:44-5(h).

While it is true that in the statement of reasons the sentencing court cited to and "incorporate[d] all other reasons stated on the record," the sentencing court's aggravating and mitigating findings as recorded on the judgment of conviction belie any possibility that "the Court may have stated reasons to justify the concurrent sentence." (Da 10-11, 45) The sentencing court found aggravating factors 3 (risk of reoffending), 6 (prior record and seriousness of which) and 9 (need to deter defendant and others). N.J.S.A. 2C:44-1a (3), (6) and (9). (Da 11) The first two preclude any possibility that the court may have found that based on defendant's "character and condition" a consecutive sentence would result in a "serious injustice." Furthermore, the third aggravating factor found by the court completely negates any possibility that it would also have simultaneously concluded that the "need to deter ... others" was overridden. The sentencing court did find mitigating factor 11 (imprisonment would entail excessive hardship to defendant or his dependents), but a "hardship" is not an "injustice," as required by the statute. Finally, the

sentencing court found that the “Aggravating Factors substantially outweigh[ed] the Mitigating Factors.” (Da 11) Clearly, contrary to the finding of the PCR court, the recorded judgment in question in no way indicates that the sentencing court “may have stated reasons on [the unavailable] record to justify the concurrent sentence.” (Da 45)

Given the facts as best as can be gleaned from the existing record, the PCR court should have vacated the illegal concurrent sentence imposed on Ind. #2 and vacated the extended term imposed on Ind. #3, as the latter would be rendered illegal absent the criminal conviction from Ind. #2. Furthermore, because the conviction under Ind. #2 was the result of a plea agreement, the PCR court should have reinstated all the charges contained in that indictment and placed the parties back into their pre-plea positions. See State v. Njango, 463 N.J. Super. 1, 6 (App. Div. 2020) (“If the court cannot justify a concurrent sentence in compliance with the statute, then the plea, which was based upon concurrent sentences, must be vacated and the charges reinstated.”) However, where, as here, the sentence has already been served in its entirety, any resentencing resulting in a longer sentence is barred by the Double Jeopardy Clause contained in the Fifth Amendment to the U.S. Constitution and art. I, ¶ 11 of the N.J. Constitution. See subsection D infra.

D. Because Defendant Has Completed the Sentence in Question and Because Consecutive Sentencing is Purely Punitive in Nature, Imposition of the Required Legal Sentence in Place of the Illegal Sentence at This Late Date Would Violate the Double Jeopardy Clause Contained in the Fifth Amend. of the United States Const. and Art. I, par. 11 of the New Jersey Const.

Once the parties are restored to their pre-plea positions concerning Ind. #2, plea negotiations in all likelihood would resume. However, the State would be at a distinct disadvantage, not just because of the passage of roughly 27 years since the charged offenses occurred, but because of the New Jersey Supreme Court's interpretation and application of the Double Jeopardy Clause contained in both the federal and state constitutions.

In State v. Schubert, 212 N.J. 295 (2012), Schubert entered a negotiated plea of guilty to the charge of sexual assault in the second-degree. Aside from the dismissal of all remaining charges, the State agreed to recommend that Schubert be sentenced as if he had pleaded to a crime of the third degree and that he receive a noncustodial period of probation. Schubert executed the plea form, including additional forms specific to sexual offenses. He also acknowledged he would be examined at the Adult Diagnostic and Treatment Center and that he understood he would have to register his address every ninety days with law enforcement in the community in which he chose to reside. Regarding the potential consequences of pleading guilty to sexual assault, those

exchanges were the extent of the discussion between defendant and the trial court. Id. at 299.

According to the Avenel Report, Schubert's behavior was found not to be compulsive or repetitive. On June 16, 2000, Schubert appeared for sentencing. The sentencing court found that the mitigating factors clearly outweighed the aggravating factors and that the terms of the plea agreement were appropriate. A period of three years' probation was imposed, along with all appropriate fees, penalties, and restitution. The judgment of conviction was entered on June 23, 2000. Thereafter, Schubert successfully completed his probationary sentence and was discharged from probation in June of 2003. Id. at 300.

On October 3, 2007, roughly seven years after being sentenced and four years after completing his sentence and being discharged, the sentencing court was notified by the New Jersey State Parole Board that Schubert's judgment of conviction did not contain any reference to the mandatory community supervision for life in accordance with the terms of N.J.S.A. 2C:43-6.4. Following notification of the parties, the trial court entered an amended judgment of conviction on April 30, 2008. The sentencing court entered the following comment on the later judgment: "The judgment of conviction is amended to reflect that defendant is sentenced to community supervision for life." Id. at 300-301.

Almost two months later, Schubert was notified by letter from the Parole Board that he had been resentenced because his original sentence was not imposed in accordance with the law governing sexual offenses. His new sentence now included community supervision for life, and he was directed to report on a specified date to the parole office for processing. The letter further informed Schubert that a failure to comply would constitute a fourth-degree crime carrying a potential sentence of up to eighteen months in prison. Id. at 301.

Schubert retained counsel and filed a petition for post-conviction relief in which he requested that the trial court vacate the amended judgment on the grounds that the court lacked jurisdiction to amend a sentence which he [Schubert] had already completed. Schubert further argued that by amending his sentence to include additional punitive terms constituted a violation of the double jeopardy clause, denied him due process of law, and was fundamentally unfair. In opposition, the State contended that the initial sentence was illegal because it failed to include the statutorily mandated provision of community supervision for life and that it was unreasonable for defendant to have an expectation of finality in an illegal sentence. Id. at 302.

Schubert's petition was denied on the grounds that his original sentence was illegal and that because he had answered "Yes" to the question on the plea papers asking whether he understood that a conviction for sexual assault carried

with it as part of the sentence a special sentence of community supervision for life, he was adequately informed of the consequences of community supervision for life. The PCR court determined that Schubert had not been denied due process nor had he been treated in a fundamentally unfair manner. Id. at 302-303. On appeal, this Court reversed the trial court finding that the trial court's action violated defendant's double-jeopardy rights and remanded the matter to the trial court with instructions to enter the original judgment of conviction without any mention to community supervision for life. Thereafter, the New Jersey Supreme Court granted the State's petition for certification. Id. at 303.

The Court first addressed whether a sentence of community supervision for life is punitive or remedial in nature. For reasons irrelevant to the instant matter, the Court held that the special sentence was indeed intended by the Legislature to be punitive. Id. at 304–09. Given this finding, Schubert was permitted to invoke the constitutional protections of the federal and state Double Jeopardy clauses. U.S. Const. amend. V; N.J. Const. art. I, ¶ 11. Ibid. Next, the Court considered the reach of those protections and held that because defendant completed serving his sentence prior to the discovery of the error, he maintained an expectation of finality. Schubert, 212 N.J. 309. See State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996) (“While an ‘illegal’ sentence is ‘correctable at any time,’ the State has an obligation to move quickly when asserting an ‘illegality’ because the defendant has an expectation

of finality of a sentence within the parameters of statutory limits....”)

While this court has held that an illegal sentence can be corrected at any time, “even though the imposition of a lawful term involves an increase in a defendant's aggregate sentence,” State v. Baker, 270 N.J. Super. 55, 76 (App. Div.), *aff'd o.b.*, 138 N.J. 89 (1994); accord State v. Chambers, 377 N.J. Super. 365, 369 (App. Div.2005); State v. Johnson, 376 N.J. Super. 163, 170 (App. Div.), *certif. denied*, 183 N.J. 592 (2005), in Schubert, the Court stated: “That principle ... is not unlimited.” Schubert, 212 N.J. at 309. In further explication, the Schubert Court cited to State v. Laird, 25 N.J. 298, 307 (1957), where the Court cautioned that the “at any time” phrase “was not designed to authorize an enlargement of the punishment after the sentence imposed had been satisfied and the defendant discharged.” In State v. Murray, 162 N.J. 240, 247 (2000), the Court repeated that while an illegal sentence “may be corrected at any time,” the correction must be done “before it is completed.” See also State v. Austin, 335 N.J. Super. 486, 494 (App. Div. 2000), *certif. denied*, 168 N.J. 294 (2001). (“An illegal sentence that has not been completely served may be corrected at any time without impinging upon double-jeopardy principles.”); State v. Horton, 331 N.J. Super. 92, 94-102 (App. Div. 2000) (with six months remaining to defendant's probationary sentence, App. Div. affirmed that trial court's action amending the judgment to include community supervision for life did not violate the constitutional prohibition against double jeopardy); accord State v. Cooke,

345 N.J. Super. 480 (App. Div. 2001), certif. denied, 171 N.J. 340 (2002).

Here, like Schubert, by any calculation defendant has completed the sentence in question. He did so roughly 20-years¹¹ before his PCR application to correct an illegal sentence. Thus, he too has an expectation of finality in that sentence.¹² Moreover, to make defendant's sentence legal, would require that he be resentenced on Ind. #2 to a term consecutive to the sentence imposed in 1997 on Ind. #1. In turn, the Department of Corrections (DOC) would be required to recalculate defendant's service of those terms. In that case, simple mathematics would dictate an outcome where defendant would be required to serve a longer sentence than he is presently serving. A result that would violate the Double Jeopardy Clause under any interpretation of that clause. See Schubert, 212 N.J. at 309-13 ("to permit" an increase in sentence after service has been completed "is a violation of a defendant's fundamental rights under the Double Jeopardy Clauses of the United States and New Jersey Constitutions.")

In Schubert, both Courts of review found it helpful to quote from a New

¹¹ Defendant was sentenced on Ind. #2 on June 30, 1997, to a term of 7 years with a 3-year parole bar. (Da 10-11) Excluding jail credits and institutional credits, he would have completed serving that sentence on or about June 30, 2004. Some 20 years ago.

¹² In Schubert, the Court noted that a defendant's expectation of finality would not be legitimate had the illegal sentence been the result of some "devious plot" by defendant and/or his attorney to mislead the sentencing court. Schubert, 212 N.J. 313. Here, there is no evidence in the existing record that the failure to impose a consecutive sentence was the result of anything other than an inadvertent oversight by all concerned.

York case decided by that State’s highest court in People v. Williams, 14 N.Y.3d 198, cert. denied, 131 S.Ct. 125, 178 L.Ed.2d 242 (2010). Schubert, 212 N.J. at 311. In Williams, the court was deciding whether a defendant whose original sentence should have included post-release supervision, but did not, could be corrected after the defendant had completed the sentence originally imposed. The Williams court concluded that the State lacked the ability to do so stating:

[T]here must be a temporal limitation on a court's ability to resentence a defendant since criminal courts do not have perpetual jurisdiction over all persons who were once sentenced for criminal acts. Even where a defendant's sentence is illegal, there is a legitimate expectation of finality once the initial sentence has been served and the direct appeal has been completed (or the time to appeal has expired). In these situations, the sentences are beyond the court's authority....

Williams, N.Y.3d at 217. (citation omitted)¹³

As for whether consecutive sentencing is punitive in nature, the answer is contained within State v. Yarbough, 100 N.J. 627 (1985). There the Court discussed the difference between sentencing based on “rehabilitation” and “retribution.” In that regard the Court stated:

[P]roponents of sentencing based on rehabilitation advocate[] a presumption in favor of concurrent sentencing to facilitate the reform of the defendant. The

¹³ Any doubts as to the New Jersey Supreme Court’s reliance upon Williams in Schubert should be assuaged by the Court’s following statement: “Our own research has not disclosed reported authority that is more persuasive than Williams.” Schubert, 212 N.J. at 312.

Legislature merely set maximum and minimum terms. The court would impose a sentence within the range and the basic decision, as to release of the prisoner, was left to the correctional and parole authorities. Concurrent sentencing increased the flexibility available to prison officials to determine prisoners' release dates based on rehabilitation.

By contrast: A system of just deserts with an objective of allocational fairness must take the opposite approach. On retributive grounds, two offenses deserve a more severe sanction than one offense. The offender who commits two armed robberies should, all other things being equal, serve more time than the offender who commits one robbery. Concurrent sentences frustrate this objective, and consecutive sentences thus should be the rule in a just deserts model.

Yarbough, *supra* at 637-38 quoting from Periman and Stebbins, "Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act," 65 *Va.L.Rev.* 1175, 1220 (1979). See also State v. Torres, 246 N.J. 246, 251 (2021) ("A sentencing court's decision between imposing consecutive or concurrent sentences on a defendant for multiple offenses has the potential to drastically alter aggregate sentence length.")

Thus, in the present matter, because: 1) the purpose of consecutive sentencing is purely punitive; 2) the illegal sentence was not the result of anything devious attributable to defendant or his counsel; 3) defendant has already completed service of his original sentence; and 4) the time for direct

appeal has been exhausted, defendant maintains a legitimate expectation of finality in that sentence. It is now far too late to correct the sentence imposed on Count Six of Ind. #2 (possession of a weapon for an unlawful purpose).

E. Only Count Five of Ind. #2 May Be Reinstated for Re-Prosecution.

As in other similar matters where an illegal sentence has been imposed following a guilty plea, this Court's only recourse is to vacate defendant's conviction and sentence under Ind. #2, reinstate the original charges, and restore the parties to their pre-plea positions. See State v. Njango, 463 N.J. Super. at 6. ("If the court cannot justify a concurrent sentence in compliance with the statute, then the plea, which was based upon concurrent sentences, must be vacated and the charges reinstated.") However, given that the Double Jeopardy Clause contained in the Fifth Amendment to the U.S. Constitution and art. I, ¶ 11 of the N.J. Constitution precludes defendant from being re-sentenced to a greater term than he bargained for and has already served, and given that a guilty plea to any of the crimes charged in Ind. #2, except Count Five (fourth-degree aggravated assault) would necessarily subject defendant to a greater sentence than he has already served, on remand the sole surviving charge contained in Ind. #2 which can be reinstated would be Count Five.

Simple mathematics dictates this result. The illegal sentence defendant has already served on Count Six of Ind. #2 was 7 years with a 3-year parole bar

concurrent to a flat 5 years on Ind. #1. On remand, the only charge defendant could possibly be convicted of which would not result in a greater term than that which defendant has already served would be on Count Five, a fourth-degree offense. The maximum possible sentence on a fourth-degree crime would be an 18-month term with a nine-month parole bar consecutive to the flat five imposed on Ind. #1. In that case, defendant's aggregate sentence on Ind. #1 and #2 would be 6 and ½ years with a nine-month parole bar. Roughly six months less than the outer term defendant has already served.

On the other hand, all other charges contained in Ind. #2 are of the second and third-degree and even the minimum sentence imposed on those charges, consecutive as they must be to the flat 5 years on Ind. #1, would result in a sentence greater than the 7 years with a 3-year parole bar defendant has already served. Thus, by virtue of the Double Jeopardy Clause contained in both the federal and state constitutions, on remand the only charge subject to reinstatement would be limited to Count Five (fourth-degree aggravated assault).

Moreover, since the parties would be back in their pre-plea positions of 27 years-ago, defendant would have the opportunity and leverage to negotiate a more beneficial agreement for himself. One that could not result in the reimposition of an extended term on his armed robbery conviction stemming from Ind. #3. See subsection F infra. For example, in order for defendant to be eligible for an extended term as a persistent offender, N.J.S.A. 2C:44-3a requires

in pertinent part that he must have “been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age...” If defendant were successful in negotiations by getting the State to downgrade the charge contained in Count Five of Ind. #2 from the third-degree crime of “[r]ecklessly causes bodily injury to another with a deadly weapon” N.J.S.A. 2C:12-1b(3), to the disorderly persons offense of “[n]egligently causes bodily injury to another with a deadly weapon” N.J.S.A. 2C:12-1a(2), he would no longer be eligible as a persistent offender as he would no longer have been guilty of committing “two crimes.” See N.J.S.A. 2C:1-4b (“Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State.”) In that case, defendant’s aggregate sentence on Ind. #3 would go from 50 years with an 85% parole bar on the armed robbery conviction to 30 years with an 85% parole bar on the kidnapping conviction.

F. Unless and Until Defendant’s Criminal Conviction Under Ind. #2 (96-07-1222) is Restored, He Fails to Qualify for the Imposition of an Extended Term as a Persistent Offender on Ind. #3. Consequently, Until Ind. #2 is resolved, Defendant’s Extended Term Sentence Imposed on His Armed Robbery Conviction Under Ind. #3 (02-07-1546) is Illegal and Must Be Amended to an Ordinary Term. In That Circumstance, Defendant’s Aggregate Sentence Should Be No Greater Than the Ordinary Term of 30 Years With an 85% Parole Bar Imposed on the

Kidnapping Conviction Under Ind. #3 (02-07-1546).

Following a jury trial which resulted in defendant's conviction of the charges contained in Ind. #3 (02-07-01546), defendant appeared for sentencing on February 10, 2004. At that time, defendant had already been convicted and sentenced for committing the third- and second-degree offenses charged in Ind. #1 (96-01-00032) and Ind. #2 (96-07-01222) respectively. Under those circumstances, defendant met the prerequisites to be sentenced as a persistent offender pursuant to N.J.S.A. 2C:44-3a. Thus, the sentencing court granted the State's motion to sentence defendant as a persistent offender. (Da 12-13) Following the merger of convictions, the court imposed an extended term of 50 years with an 85% parole bar on defendant's armed robbery conviction and ordered all other sentences to run concurrently with each other and with the extended term. (Da 12-13) Absent the extended term, the greatest of the remaining terms was a sentence of 30 years with an 85% parole bar on defendant's kidnapping conviction. (Da 12-13)

Should this Court agree with defendant's arguments presented in the preceding subsections of this brief, defendant would no longer have the requisite number of separate crimes to qualify for an extended term under the persistent offender statute. By virtue of this fact, defendant's extended term also constitutes an illegal sentence, and it too must be vacated, and the matter

remanded for resentencing under Ind. #3 (02-07-1546). See subsection C, supra. However, if the state intends to move for an extended term, resentencing on Ind. #3 would likely have to wait for the outcome of the charges contained in Ind. #2. Unless and until the charges in Ind. #2 are resolved, resentencing on defendant's jury conviction for armed robbery under Ind. #3 would either be for a regular term or, by necessity, resentencing would have to remain in limbo until Ind. #2 is resolved. Furthermore, if and when defendant is subjected to an extended term as a persistent offender on Ind. #3, the court would be precluded from imposing the extended term on the kidnapping conviction as it previously rejected imposing the extended term on that conviction.¹⁴

To the extent that it may be argued that any reduction in sentence

¹⁴ At the time of sentencing, the State had requested that an extended term of life be imposed on defendant's kidnapping conviction pursuant to N.J.S.A. 2C:43-7a(1) and 2C:44-1. (1T 35-20 to 36-7, 54-18 to 55-17) Although the court initially imposed an extended term sentence of 50 years with an 85% parole bar on the first-degree kidnapping conviction (1T 49-14 to 18), the prosecutor alerted the court that that sentence would be improper as the presumptive extended term for a first-degree kidnapping where the jury found that the victim was harmed and not left in a safe place was life. (1T 4-12 to 16, 54-18 to 55-17) The court, in its discretion, instead made the extended term applicable to defendant's armed robbery conviction stating: "I'm not inclined to give him life in prison on this" (1T 55-18 to 22; 2T 3-9 to 6-13) Thus, on remand the resentencing court is precluded from making the extended term applicable to defendant's first-degree kidnapping conviction. It should be noted that sentencing on Ind. #3 occurred prior to the decision in State v. Thomas, 195 N.J. 431, 436 (2008), where the Court first held that if the court disagrees with the prosecutor as to which offense to apply the extended term, it must state the reason why it chose to impose it on a different count than selected by the prosecutor.

represents an undeserved windfall for the defendant, Schubert cites approvingly to what this Court stated in State v. Eigenmann, 280 N.J. Super. 331, 348 (App. Div. 1995) (quoting United States v. Turner, 518 F.2d 14, 17 (7th Cir.1975)):
“[t]he potential for abuse in broad judicial power to increase sentences outweighs the possibility of giving a few defendants the benefits resulting from a judicial mistake.” Schubert, 212 N.J. at 313.

CONCLUSION

For all of the foregoing reasons, defendant's conviction and sentence on Ind. #2 must be vacated. Because defendant has already completed the original sentence, the Double Jeopardy Clause contained in both the U.S. and N.J. Constitutions precludes the imposition of a greater sentence on Ind. #2. Since any sentence consecutive to Ind. #1, even the minimum sentence, on all counts, except Count Five of Ind. #2, would result in a sentence greater than the sentence defendant has already served, only Count Five (fourth-degree aggravated assault) may be reinstated. As a direct consequence of vacating defendant's conviction under Ind. #2, defendant no longer meets the criteria for an extended term sentence as a persistent offender on Ind. #3 and that sentence must be vacated as well. Although defendant's convictions under Ind. #3 remain, any motion to sentence defendant as a persistent offender under Ind. #3 must await the outcome of the charges contained in Ind. #2 and one can only be imposed on defendant's armed robbery conviction.

Respectfully submitted,

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Public Defender
Attorney for Defendant-Appellant

By: /s/ FRANK J. PUGLIESE
Designated Counsel
Attorney ID#002971989

Dated: April 11, 2024

STATE OF NEW JERSEY

VS.

MARKIECH JOHNSON,
Appellant.

) SUPERIOR COURT OF NEW JERSEY
APPELLANT DIVISION

) DOCKET NO. A-0206-23T4

) Ind. Nos. 96-07-01222; 96-01-00032;
02-07-01546

) On Appeal From Superior Court
Law Division Hudson County

) Sat Below:

Hon. NESLE A. RODRIGUEZ, J.S.C.

PRO SE SUPPLEMENTAL BRIEF AND APPENDIX

Mr. Markiech Johnson
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1100 Woodbridge Road
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TABLE OF JUDGMENTS, ORDERS AND RULINGS

Appellant relies upon the Table of Judgements, Orders and Rulings presented in his defense counsels brief.

INDEX TO APPENDIX

Appellant relies upon the Index to Appendix attached to defense counsels brief with the exception of Aa1-3 attached pursuant to R.1:36-1.

TRANSCRIPT(S) CITED

Appellant relies upon the Transcript(s) Cited in his main defense counsels brief.

PRELIMINARY STATEMENT

Appellant relies upon the Preliminary Statement laid out in his defense counsels brief.

PROCEDURAL HISTORY/STATEMENT OF FACTS

Appellant relies upon the Procedural History/Statement of Facts laid out in his defense counsels brief.

ARGUMENT

POINT I

AN ILLEGALLY LENIENT SENTENCE IS ALSO SUBJECT TO CORRECTION AT ANY TIME BY MOTION OR BY THE COURT ACTING SUA SPONTE.

Appellant Markiech Johnson submits that although the concurrent sentences imposed by the court on Ind. No. 96-01-00032 appeared to be favorable to him at the time, the sentences were nevertheless illegal pursuant to **N.J.S.A.** 2C:44-5(h), which mandates that sentences for crimes committed while on bail *must* be consecutive unless the trial court makes a “serious injustice finding in consideration of the character and condition of the defendant that would override the need to deter.” The court did not make the requisite “serious injustice finding.” See, **State v. Njango**, App. Dkt. No. A-1400-12T1 (Decided April 14, 2015) (Unpub. Opin. Attached Per. **Rule** 1:36-1). (Aa1-3)

A sentence that is illegal because it does not adhere to legislative mandate may be corrected at any time, either on direct review or by application for post-conviction relief.

Although the sentences in these particular cases are completed, however because there is collateral consequences of magnitude Mr. Johnson has suffered harm due to a subsequent criminal matter under Indictment No. 02-07-01546. The latter Indictment is currently reliant upon the instant *illegal* sentence and guilty pleas

which serves as the predicates for the court to impose an extended term sentence which otherwise would not be applicable without the unconstitutional convictions and sentences in the instant case. See, State v. Roper, 362 N.J. Super. 248 (2003), “there is no doubt that defendant is subject to a consequence of magnitude from his conviction....Accordingly, defendant's petition is not moot.”

There is no time limit on the correction of an illegal sentence. An illegal sentence which is cognizant for a post-conviction relief petition pursuant to R. 3:22-4[6] can be raised at any time pursuant to R. 3:22-2[3]. See, State v. Acevedo, 205 N.J. 40 (2011). An illegally lenient sentence is also subject to correction at any time just as any other illegal sentence. See, State v. Haliski, 273 N.J. Super. 157 (App. Div. 1994)(affirming a corrected sentence that imposed an extended second offender Graves Act sentence after the first Graves Act conviction was affirmed on appeal.) In affirming the Appellate Division decision in Haliski, however, the Supreme Court held that if the predicate decision is still pending appeal, a provisional enhanced sentence should be imposed, correctable under Rule 3:22-2[3] or Rule 3:21-10(b)(4) in the event of reversal.


Therefore it is clear in light of the law and the facts¹ that Mr. Johnson is deserving of the correction of the illegal sentence that was imposed upon him.

¹ The lower court took issue with regard to the lack of a sentencing transcript, however the Judgement of Conviction clearly supports the record that no “serious injustice finding” was made by the sentencing court. See, State v. Vasquez, 265 N.J. 528 (1993) (Sentencing procedures rely largely on a “paper record.” See, Sentencing Manual for Judges, p.

Regardless of whether the sentence at the time was lenient, the collateral consequences of facing an extended term pursuant to N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-3(a) remains detrimental and violates the doctrine of fundamental fairness. Appellate should be resentenced.

CONCLUSION

For all of the foregoing reasons this matter should be remanded to the Law Division for resentencing anew.

Respectfully submitted,
x 
Markiech Johnson, pro se

Dated: April 25, 2024

69 (September 1988); also see N.J.S.A. 2C:44-6b). The appellate courts are as equipped to evaluate the case as the sentencing court.



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June 11, 2024

LETTER-BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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

Re: STATE OF NEW JERSEY (Plaintiff-Respondent)
V. MARKEICH JOHNSON (Defendant-Appellant)
Docket No. A-0206-23T4

Criminal Action: On Appeal from a Final Order Denying Post-
Conviction Relief of the Superior Court of New Jersey,
Law Division, Hudson County.

Sat Below: Honorable Nesle A. Rodriguez, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of formal brief is submitted
on behalf of the State.

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STATEMENT OF PROCEDURAL HISTORY

The State adopts the Procedural History as stated in the brief submitted by Markeich Johnson (“defendant”) as if set forth at length herein.

STATEMENT OF FACTS

The State adopts the Statement of Facts as stated in the brief submitted by defendant as if set forth at length herein.

LEGAL ARGUMENT

POINT I

THE PCR COURT CORRECTLY FOUND THAT
DEFENDANT’S SENTENCE WAS NOT ILLEGAL

While he was out on bail for charges related to Indictment No. 96-01-00032, defendant was arrested in relation to separate offences later charged under Indictment No. 96-07-01222. After he pleaded guilty to Count 2 of Indictment No. 96-01-00032, third-degree unlawful possession of weapon contrary to N.J.S.A. 2C:39-5b, he was sentenced to serve a flat five years in New Jersey State Prison; and, he was sentenced to a concurrent seven-year term for his guilty plea to Count 6 of Indictment No. 96-07-01222, second-degree possession of a weapon for an unlawful purpose contrary to N.J.S.A. 2C:39-4a. (Da1-11). He has served this sentence. Subsequently, defendant was convicted following a jury trial on all five Counts of Indictment No. 02-07-01546. (Da12-13). At sentencing – after merging Counts 3 and 4 into Count 1 – the trial court

sentenced him to an extended term of fifty years of imprisonment subject to NERA on Count 1, first-degree armed robbery contrary to N.J.S.A. 2C:15-1; thirty years of imprisonment subject to NERA on Count 2, first-degree kidnapping contrary to N.J.S.A. 2C:13-1b; and, eighteen months of imprisonment on Count 5, fourth-degree resisting arrest contrary to N.J.S.A. 2C:29-2a. Ibid.; (2T4-22 to 5-21). His previous convictions were used as predicate offenses for the imposition of his extended term sentence after the court granted the state's motion to sentence defendant as a persistent offender pursuant to Rule 3:21-4e, N.J.S.A. 2C:43-7, and N.J.S.A. 2C:44-3(a). (1T10-17 to 11-22; 41-24 to 42-13).

In his PCR petition, defendant challenged the legality of his previous convictions and sentence under Indictment No. 96-07-01222. The PCR court properly denied his petition finding that it was time-barred; that it did not establish a prima facie case of ineffective assistance of counsel; and, that there was no support in the record for his contention that the sentencing judge failed to state reasons for not imposing a presumptive consecutive sentence pursuant to N.J.S.A. 2C:44-5(h). (Da38-45). On appeal, defendant maintains that the PCR court erred by not vacating his previous convictions and "illegally lenient" sentence.

His contention stems from a misinterpretation of the available record. The sentencing transcript is unavailable. (Da14-16). However, the JOC memorializes the imposition of his concurrent sentence and “incorporates all other reasons stated on the record at the time of sentence.” (Da4). Defendant argues that the PCR court erred by not vacating his convictions and “illegally lenient” sentence under Indictment No. 96-07-01222 because the sentencing court could not have found any reasons to overcome the presumption of imposing a consecutive sentence pursuant to N.J.S.A. 2C:44-5(h). He argues that because the sentencing court found aggravating factors (3), (6), and (9) pursuant to N.J.S.A. 2C:44-1(a) to apply to his sentence, it “preclude[s] any possibility that the court may have found that based on defendant’s ‘character and condition’ a consecutive sentence would result in a ‘serious injustice.’” (Db17).

On appeal, he advances five interconnected claims. All of them are without merit. First, he claims that the PCR court erred when it considered his petition under Rule 3:22-2 as opposed to Rule 3:21-10(b)(5) because PCR counsel “fundamentally altered” his petition by raising the issue that his sentence was not in accordance with law. (Db12-14). Second – while conceding that a PCR petition alleging ineffective assistance of counsel would be “grossly out-of-time” – he claims that because his petition was “fundamentally altered”

by challenging the legality of his sentence, it was not subject to the time-bar pursuant to Rule 3:22-12. (Db14-13). Third, he claims that his “sentence on the [S]econd [I]ndictment was illegally lenient” because he should have received consecutive sentences pursuant to N.J.S.A. 2C:44-5(h) and, the PCR court erred by not vacating it. (Db16). As a consequence, he contends that since his “sentence under the Second Indictment was illegal . . . [his extended term] sentence under the Third Indictment [was] illegal as well” because the previous convictions were used as predicate offenses for the imposition of the extended term sentence. (Db15). Forth, defendant claims once the illegally lenient sentence is vacated, he cannot be resentenced as it would violate the double jeopardy clause under the Fifth Amendment of the United States Constitution and Art. I, par. 11 of the New Jersey Constitution because he has already completed his illegally lenient sentence. (Db19-29)¹. Finally, he claims that “[u]nless and until defendant’s criminal conviction under [the Second Indictment] is restored, he fails to qualify for the imposition of an extended term as a persistent offender on [the Third Indictment]” and therefore his current sentence must be amended to an ordinary term. (Db29).

¹ However, defendant concedes in the course of his arguments that only Count Five of the Second Indictment may be reinstated for prosecution. (Db27-29).

Ultimately, his interconnected claims must fail for two reasons. First, the PCR court properly found no support for defendant’s claim that the sentencing court failed to state reasons for the imposition of a concurrent sentence because, based on the documentary record, it correctly ruled that the sentencing court “may have stated reasons to justify the concurrent sentence which at the time benefitted [defendant]” since the JOC “confirms the concurrent sentence and ‘incorporates all other reasons stated on the record at the time of sentence.’” (Da45; Da4). Second, even if this Court disagrees with the findings of the PCR court, his claim must fail because his “illegal leniency” argument pertains to the total length of his sentence – it does not pertain to the “legality” of his sentence. Therefore, because his claim does not pertain to his sentence’s legality, his claim is not cognizable on PCR or under Rule 3:21-10(b)(5). For the reasons that follow, this Court should reject his arguments.

In the absence of an evidentiary hearing, the factual inferences drawn from the documentary record by the PCR judge as well as the judge's legal conclusions are reviewed de novo. State v. Aburoumi, 464 N.J. Super. 326, 338-39 (App. Div. 2020); see State v. Harris, 181 N.J. 391, 421 (2004) (holding that an appellate court's has the authority “to conduct a de novo review of both the factual findings and legal conclusions of the PCR court.”)

In its pertinent part, N.J.S.A. 2C:44-5(h) states “[w]hen a defendant is sentenced to imprisonment for an offense committed while released . . . pending disposition of a previous offense, the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense”; however, the sentencing court may impose a non-consecutive sentence if, after considering “the character and conditions of the defendant,” the court finds the “imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.” N.J.S.A. 2C:44-5(h).

Our Supreme Court has held that although there is “a presumption of consecutive terms for those who commit crimes while released on parole or bail, the court retain[s] the discretion to impose concurrent sentences.” State v. Sutton, 132 N.J. 471, 482 (1993) (holding that the sentencing court committed error because it automatically imposed consecutive sentences on the defendant for offenses he committed while he was on probation). “[I]n determining whether the terms should be concurrent or consecutive, the focus of the court should be on the fairness of the overall sentence.” Id. at 487 (citing State v. Miller, 108 N.J. 112, 121 (1987)). Thus, under New Jersey law, a sentencing court must state its reasons for imposing consecutive sentences, Miller, 108 N.J. at 122, and, additionally “address the condition under which concurrent

sentences may be given for crimes committed on [pretrial release]”, State v. Njango, 463 N.J. Super. 1, 6 (2020) (citations omitted).

“[A]n illegal sentence is one that ‘exceeds the maximum penalty provided in the Code for a particular offense’ or a sentence ‘not imposed in accordance with law.’” State v. Acevedo, 205 N.J. 40, 45 (2011) (quoting State v. Murray, 162 N.J. 240, 247 (2000). “A defendant may challenge an illegal sentence at any time.” State v. Zuber, 227 N.J. 422, 437 (2017) (citing R. 3:21-10(b)(5) and Acevedo, 205 N.J. at 47 n.4). “Under our case law, the ‘illegal sentence’ standard has been applied to only two types of sentences – sentences that exceed the penalty authorized by statute for the specific offense and sentences not imposed in accordance with the law.” State v. Marshall, 173 N.J. 343, 354–55, n.2 (2002) (citing Murray, 162 N.J. at 246-47). However, the “mere excessiveness of sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate ground of post-conviction relief and can only be raised on direct appeal from the conviction.” State v. Clark, 65 N.J. 426, 437 (1974) (citing State v. Pierce, 115 N.J. Super. 346 (App. Div. 1971), certif. den. 59 N.J. 362 (1971) and R. 3:22-2(c)).

Although a sentencing court must explain the reasons for imposing a concurrent sentence in light of N.J.S.A. 2C:44-5(h), the commission of such an

error is not a cognizable ground for a PCR petition or for the modification of a sentence pursuant to Rule 3:21-10(b)(5). See Acevedo, 205 N.J. at 45 (holding that even though “a trial judge in sentencing a defendant must state his or her reasons for imposing consecutive sentences”, a failure to do so “do[es] not bestow upon a reviewing court the right to either amend or modify a consecutive sentence on PCR because the reasons for imposition of consecutive sentences were not stated.”) Therefore, it follows that claims challenging the total length of a sentence imposed – otherwise within authorized limits – can only be raised on direct appeal and are not cognizable on PCR or under Rule 3:21-10(b)(5). See Id. at 45-46; see also Clark, 65 N.J. at 436.

Here, the PCR court did address defendant’s argument that his sentence was “illegally lenient” because the sentencing court did not provide reasons to overcome the presumption of consecutive sentences under N.J.S.A. 2C:44-5(h). The PCR court stated:

[Defendant] rests his argument on the idea that his original plea was unjust because his sentences were illegal as they ran concurrently as opposed to consecutively as required by N.J.S.A. 2C:44-5(h). He submits the [sentencing court] did not provide reasons as required by N.J.S.A. 2C:44-5(h) for a concurrent sentence as opposed to a consecutive one. There is no transcript available of the 1997 sentencing hearing to corroborate the [d]efendant’s assertion as it was destroyed due to retention policy. The Judgment of Conviction confirms the concurrent sentence and “incorporates all other reasons stated on the record at

the time of sentence.” Therefore, the [sentencing court] may have stated reasons to justify the concurrent sentence which at the time benefitted the [d]efendant. The [d]efendant received the benefit of a concurrent sentence on matters to which he plead guilty.

[(Da44-45).]

The PCR court correctly found that there was no support for defendant’s claim that the sentencing court did not state its reasons for imposing a concurrent sentence. Indeed, the PCR court’s findings are consistent with the documentary record. Notwithstanding the unavailability of the sentencing transcript, the PCR court properly found that the JOC memorializes his concurrent sentence, and incorporates within it “reasons stated on the record.” Therefore, the PCR court correctly found that there was no support for his claim.

In challenging the PCR Court’s findings, defendant contends that the JOC demonstrates that the sentencing judge could not have found reasons to overcome the presumption of consecutive sentences. Defendant argues that because the sentencing court found aggravating factors (3), (6), and (9) it precludes the possibility that it could have stated reasons to overcome the presumption of consecutive sentences under N.J.S.A 2C:44-5(h). Defendant’s argument is misplaced primarily because our Supreme Court has held that the assessment of aggravating and mitigating factors should precede the decision of imposing a concurrent or consecutive sentence: “for each crime in a series the

court should impose a sentence, taking into account the appropriate aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1a and -1b, before considering whether the sentences should run consecutively or concurrently.” State v. Rogers, 124 N.J. 113, 119 (1991) (emphasis added). Although it is true that a court’s decision to impose a consecutive sentence is influenced “to a large degree” by an analysis of the aggravating factors, State v. Carey, 168 N.J. 413, 424 (2001), the finding of aggravating factors does not preclude a court from imposing a concurrent sentence after considering the character and condition of the defendant. Sutton, 132 N.J. at 487. Therefore, defendant’s argument that the sentencing court could not have stated on the record reasons to overcome the presumption of consecutive sentences because it found aggravating factors (3), (6), and (9) to apply to his sentence is without merit.

Even if this Court does not accept the PCR court’s findings – that the available record does not support defendant’s assertion that the sentencing court could not have found reasons to overcome the presumption of consecutive sentences – his claim must still fail because the alleged “leniency” of defendant’s sentence does not pertain to the “legality” of his sentence. Therefore, his claim is not cognizable on PCR or under Rule 3:21-10(b)(5).

In Acevedo, the defendant pled guilty to aggravated manslaughter and burglary and received consecutive sentences totaling forty years. 205 N.J. at 42.

There, on PCR, the defendant claimed that because the sentencing court did not explain its reasons for imposing consecutive sentences, the defendant's sentence was illegal. Id. at 44. The Supreme Court, in reinstating the defendant's consecutive sentences, reasoned that while the sentencing court must explain the reasons for imposing consecutive sentences, the commission of such an error is not a cognizable ground for PCR or a modification of a sentence pursuant Rule 3:21-10(b)(5). Id. at 45, 47. The Court concluded that the defendant's claim pertained to the total length of his sentence and not its "legality"; therefore, his claim was "not cognizable on PCR, or under . . . Rule 3:21-10(b)(5)." Id. at 47. Similarly, here, defendant's claim is not cognizable on PCR or under Rule 3:21-10(b)(5) because it pertains to the total length of his sentence and the alleged failure of the sentencing court to explain its reasoning in imposing a concurrent sentence in order to overcome the presumption of N.J.S.A. 2C:44-5(h). Although defendant was charged under Indictment No. 96-07-01222 when he was out on bail, the sentencing court had discretion to impose a concurrent sentence and did not exceed its authority by imposing it. Sutton, 132 N.J. at 482. Even if the sentencing court failed to provide reasons for imposing a concurrent sentence, such an error pertains only to the total length of his sentence, not its legality nor the authority of the sentencing court in imposing his sentence. Indeed, Acevedo forecloses defendant's ability to bring this

argument as a claim on PCR or under Rule 3:21-10(b)(5). Therefore, this Court should reject his arguments because his claim was neither cognizable on PCR, nor under Rule 3:21-10(b)(5).

Resultantly, the interconnected claims he makes must all fail. His first claim that the PCR court erred when it did not consider his petition under Rule 3:21-10(b)(5) is meritless because the record clearly shows that the court did in fact address his illegal sentence argument in its written opinion. (Da45). Second, his claim that the PCR court erred by applying the time bar to his petition is also unconvincing. Because his sentence was not illegal, he was required to file his PCR petition within the five-year deadline mandated by Rule 3:22-12. Alternatively, defendant could have attempted to establish excusable neglect and that a fundamental injustice would result if his petition was not heard on the merits to seek a relaxation of the time-bar. Because he did neither, the PCR court properly found his petition to be time-barred. His third, fourth, and fifth claims regarding the consequences of vacating his illegally lenient sentence are meritless because, as discussed above, his sentence was not illegal.

For the above reasons, the State urges this Court to affirm the PCR court's denial of his petition.

POINT II

THE PCR COURT CORRECTLY FOUND
DEFENDANT’S PETITION AS TIME-BARRED.

As explained in Point I above, defendant’s sentence was not illegal. Because his sentence was not illegal, he was required to file his PCR petition within the five-year deadline mandated by Rule 3:22-12. His JOC was entered on June 30, 1997. (Da11). This means his PCR petition was due on June 30, 2002. Instead, on August 8, 2022, defendant filed his PCR petition twenty years after the PCR deadline had expired. (Da26-29). Because defendant failed to show excusable neglect and that a fundamental injustice would result if his petition was not heard on the merits, the PCR court properly found his petition as time-barred.

Rule 3:22-12(a)(1), provides in pertinent part that a first PCR petition must be filed no more than five years after entry of the challenged JOC unless the petition “alleges facts showing that the delay [. . .] was due to [the] defendant's excusable neglect and that there is a reasonable probability that if [his] factual assertions were found to be true[,] enforcement of the time bar would result in a fundamental injustice.” R. 3:22-12(a)(1)(A). To establish excusable neglect, a defendant must do “more than simply provid[e] a plausible explanation for a failure to file a timely PCR petition.” State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Our courts have made clear that

ignorance of the law, or a misunderstanding of court rules, do not qualify as excusable neglect. State v. Jackson, 454 N.J. Super. 284, 295 n.6 (App. Div. 2018). Furthermore, a “[d]efendant cannot assert excusable neglect simply because he received inaccurate . . . advice from his defense counsel.” State v. Brewster, 429 N.J. Super. 387, 400 (App. Div. 2013) .

In addition to showing excusable neglect, a PCR petition filed after the five-year deadline must also show that a fundamental injustice would occur if the petition is not heard on the merits. Id. at 398. A fundamental injustice occurs “when the judicial system has denied a ‘defendant with fair proceedings leading to a just outcome’ or when ‘inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.’” State v. Nash, 212 N.J. 518, 546 (2013) (quoting State v. Mitchell, 126 N.J. 565, 587 (1992)). The petitioner must be prepared to “establish, by a preponderance of the credible evidence, that he is entitled to the requested relief.” State v. Marshall, 244 N.J. Super. 60, 69 (1990). It follows from these principles that the time-bar “may ‘be relaxed only under truly exceptional circumstances.’” State v. Marolda, 471 N.J. Super. 49, 62 (App. Div. 2022) (quoting State v. Cummings, 321 N.J. Super. 154, 168 (App. Div.), certif. denied, 162 N.J. 199 (1999))

Ruling defendant’s petition as time-barred, the PCR court held:

In the instant matter, [defendant] plead guilty pursuant to the second Indictment on May 22, 1997, and was sentenced on June 30, 1997. His first petition for PCR was filed on August 8, 2022. The State correctly submits that there was no explanation provided for this twenty-year delay in either [Defendant's] initial August 8, 2022, petition, [defendant's] April 1, 2023, supplemental argument, or [defendant's] counsel's June 1, 2023, supplemental brief. Therefore, Petitioner has failed to demonstrate any excusable purpose for the delay which exceeds the five-year statutory limitation . . . as required to circumvent the Rule 3:22-12(a)(1) time bar.

[(Da43).]

Indeed, defendant provided no explanation for the twenty-year delay in filing his petition. Moreover, in his brief submitted by counsel, he concedes that his “first and only PCR application was grossly out-of-time. (Db13). Under these circumstances, because he filed his petition over twenty years after the expiry of the deadline; and, because he did not demonstrate excusable neglect and that not hearing the petition on the merits would result in a fundamental injustice, the PCR court properly denied his petition as time-barred.

For the above reasons, the State urges this Court to affirm the PCR court's ruling finding defendant's PCR petition as time-barred.

POINT III

THE PCR COURT PROPERLY DENIED DEFENDANT'S PETITION BECAUSE HE DID NOT ESTABLISH A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND.

Finally, because defendant's sentence was not illegal as discussed in Point I, to succeed on PCR he was required to show that he received ineffective assistance of counsel. The PCR court properly found that defendant did not make a prima facie showing that he received ineffective assistance of counsel within the meaning of Strickland.

It is the defendant who bears the burden of proving the right to PCR by a preponderance of credible evidence. State v. Preciose, 129 N.J. 451 459 (1992). To meet this standard, "specific facts must be alleged and articulated, which, if believed would provide a court with an adequate basis on which to rest its decision." R. 3:22-8. Our law is well settled that on a PCR petition defendant must support his claims with facts and evidence and, if defendant does not, the PCR petition should rightfully be denied. See State v. Porter, 216 N.J. 343, 355 (2013).

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of the test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668,

687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Under the performance prong, "the defendant must show that counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. This showing requires the defendant to "overcome a 'strong presumption' that counsel exercised 'reasonable professional judgment' and 'sound trial strategy' in fulfilling his responsibilities." State v. Young, 474 N.J. Super. 507, 516 (App. Div.), certif. denied, 254 N.J. 63 (2023); see also State v. Allegro, 193 N.J. 352, 366 (2008) (reiterating that the first prong "is satisfied by a showing that counsel's acts or omissions fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case" (quoting State v. Castagna, 187 N.J. 293, 314 (2006))).

Under the prejudice prong "the defendant must show that the deficient performance prejudiced the defense," that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." Fritz, 105 N.J. at 52. Purely speculative deficiencies in

representation are insufficient to support a claim of ineffective assistance of counsel. Id. at 64.

The PCR court properly found that defendant did not establish a prima facie case of ineffective assistance concluding that defendant could not establish that his plea counsel's performance was deficient. The PCR court correctly concluded that defendant "received the benefit of a concurrent sentence [as opposed to a presumed consecutive term] on matters to which he plead guilty" and, therefore he was unable to show how plea counsel's performance was deficient within the meaning of Strickland. (Da45). Indeed, in the circumstances of this case, defendant failed to show how by receiving a lenient sentence "counsel's acts or omissions fell outside the wide range of professionally competent assistance considered in light of all the circumstances of the case." Allegro, 193 N.J. at 366. Therefore, the PCR court properly held that he did not meet the performance prong of the Strickland standard to establish ineffective assistance of counsel.

For the above reasons, the State urges this court to affirm the PCR court's denial of his petition because he failed to establish a prima facie case of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the State urges this Court to AFFIRM the PCR court's decision denying his PCR petition because his sentence was not illegal; his PCR petition is time-barred, and, in any event, his PCR petition is without merit.

Respectfully submitted,

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June 19, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0206-23T4

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|-----------------------|---|--------------------------------------|
| STATE OF NEW JERSEY, | : | <u>CRIMINAL ACTION</u> |
| Plaintiff-Respondent, | : | On Appeal from a Final Order |
| | : | Denying Petition for Post-Conviction |
| v. | : | Relief. |
| MARKEICH JOHNSON | : | Superior Court of New Jersey, |
| | : | Law Division, Hudson County |
| Defendant-Appellant. | : | Indictment Nos. 96-07-00122; |
| | : | 96-01-00032; 02-07-01546 |
| | : | Sat Below: |
| | : | Hon. Nesle A. Rodriguez , J.S.C. |

Letter Reply Brief on Behalf of Defendant-Appellant

This letter is submitted in lieu of a formal reply brief pursuant to R. 2: 6-2 (b).

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

The defendant relies on the procedural history and statement of facts set forth in his appellate merits brief. (Db 4 to 11)¹

POINT I

THE STATE’S ARGUMENT THAT DEFENDANT’S SENTENCE AND CONVICTIONS UNDER HUDSON COUNTY INDICTMENT NOS. 96-07-1222 AND 02-07-01546 MUST BE AFFIRMED WRONGLY IGNORES BOTH THE FACTS AND THE CASE LAW RELEVANT TO THIS CASE. THE MATTER MUST BE REMANDED FOR FURTHER PROCEEDINGS.

The State contends that defendant’s PCR petition was not converted to a motion to correct an illegal sentence under Rule 3:21-10(b)(5). Defendant acknowledges that his initial filing was an out-of-time PCR petition. Yet, once counsel was assigned, counsel, acting in accordance with his obligations to his client, applied his professional training and criminal practice experience and changed defendant’s application to a motion to correct an illegal sentence under the aforementioned court rule. Counsel’s oral argument before the lower court made

¹ "Db" refers to defendant's appellate merits brief on the denial of PCR. "Da" refers to the appendix attached to defendant's appellate merits brief.

that conversion crystal clear. (3T 3-21 to 4-20) Hence, the lower court wrongly continued to view defendant's pleadings as a PCR application and the State continues with this mischaracterization so as to argue that defendant's pleadings are time-barred.

PCR counsel acted precisely as would be expected from diligent counsel. He scoured the record on his client's behalf and brought forward the most cognizable meritorious issue he found in the case. The State wants this Court to ignore counsel's diligence and treat this case as it was initially brought by defendant pro se. In other words, as if defendant did not have the benefit of counsel's expertise. To do so, would violate both the purpose and the spirit of Rule 3:22-6(d), requiring assignment of counsel whenever an application for PCR is filed pro se.

Next, the State asks this Court to ignore the illegality of defendant's sentence and view the issue as a mere excessive sentencing issue. This the Court should not do. Excessive sentencing issues entail whether there was a proper finding and weighing of applicable aggravating and mitigating factors; whether the sentencing court's findings of those factors justified the length of the sentence or its decision to impose multiple sentences concurrent or consecutive with each other.

However, as in the present case, the Legislature in certain instances has removed the sentencing court's discretion. For instance, when sentencing on

certain crimes the court has no discretion concerning mandatory minimums of 85% of the sentence imposed, N.J.S.A. 2C:43-7.2(a) and (d); or the imposition of a non-discretionary extended term, N.J.S.A. 2C:43-7; or post-incarceration periods of parole supervision, N.J.S.A. 2C:43-7.2(c); or parole supervision for life, N.J.S.A. 2C:43-6.4; or as in this case, whether the sentences can be served concurrently or must be served consecutively, N.J.S.A. 2C:44-5(h).

In the case of the latter statute, the Legislature allows the sentencing court some discretion, but the court must make specific findings in order to exercise that discretion. Where the sentencing court fails to make the necessary findings on the record in support of deviating from the statutorily mandated sentence, this Court has deemed the sentence illegal. State v. Njango, 463 N.J. Super. 1 (App. Div. 2020). If the illegal sentence is imposed following a finding of guilt by a jury, the matter has been remanded for resentencing. See State v. Hill-White, 456 N.J. Super. 1 (2018) (appellate court found jury's multiple convictions of the defendant based on a single act unconstitutional, all but one conviction reversed, and matter remanded for resentencing). If the illegal sentence was imposed following a negotiated guilty plea, then the sentence and the plea are vacated, and the matter is remanded with the parties returned to their original pre-plea positions. Njango, supra 463 N.J. Super. at 6 ("If the court cannot justify a concurrent sentence in compliance with the statute, then the plea, which was based upon concurrent

sentences, must be vacated and the charges reinstated.”) Here, the issue is not the aggregate length of defendant’s sentence. The issue concerns whether the sentencing court’s concurrent/consecutive decision was in accordance with the law.

Next the State takes the position that even though there is no documentary evidence to establish that the sentencing court made the findings necessary to escape the statutorily mandated presumptive consecutive sentence, this Court should do as the PCR court did and deduce such evidence from a perfunctory statement that can be found in most every other judgement of conviction. Included in the statement of reasons contained in defendant’s judgement the following statement of the court is recorded: “[the court] incorporates all other reasons stated on the record at the time of sentence.” (Da 45) From these perfunctory words, the PCR court divined the necessary finding that rendered defendant’s sentence legal, and the State now asks this Court to do the same.

To do as the State requests, this Court must not only rely on what is absent from this record, but it must also ignore the incongruity between the sentence imposed and the sentencing court’s aggravating and mitigating findings. Those findings do not support the sentence imposed. N.J.S.A. 2C:44-5(h) provides in pertinent part that:

the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense, unless the court, in consideration of the character and conditions of the defendant, finds that

imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.

Absent a finding based upon defendant's "character and condition" that a consecutive sentence would amount to "a serious injustice," the sentencing court was required by the Legislature to impose the seven years with a three-year parole bar on Ind. #2 consecutive to the five-year flat term imposed on Ind. #1. Yet, the sentencing court's aggravating and mitigating findings as recorded on the judgement of conviction belie any possibility that "the Court may have stated reasons to justify the concurrent sentence." (Da 10-11, 45)

The sentencing court found aggravating factors 3 (risk of reoffending), 6 (prior record and seriousness of which) and 9 (need to deter defendant and others). N.J.S.A. 2C:44-1a (3), (6) and (9). (Da 11) The first two render incongruous a finding that based on defendant's "character and condition" a consecutive sentence would result in a "serious injustice." Furthermore, the court's application of aggravating factor (9), "the need to deter defendant and others," completely negates any possibility that it would also have simultaneously concluded that the "need to deter ... others" was overridden.

The sentencing court did find mitigating factor 11 (imprisonment would entail excessive hardship to defendant or his dependents), but a "hardship" is not an "injustice," as required by the statute. Finally, the sentencing court

found that the “Aggravating Factors substantially outweigh[ed] the Mitigating Factors.” (Da 11) A finding that is yet another incongruity with a sentencing court’s decision to depart from the statutorily presumed consecutive sentence.

Clearly, contrary to the finding of the PCR court, the recorded judgement in question in no way indicates that the sentencing court “may have stated reasons on the record to justify the concurrent sentence.” (Da 45) The State’s characterization of the issue in this case as an excessive sentence issue is flat wrong. The aggregate length of defendant’s sentence is not at issue. The only question before this Court is the legality of the sentence imposed on the second indictment which clearly was not “imposed in accordance with law.” State v. Acevedo, 205 N.J. 40, 45 (2011); State v. Murray, 162 N.J. 240, 247 (2000); State v. Marshall, 173 N.J. 343, 354-355 n. 2 (2002) Based upon the record before this Court, limited as it may be, this Court cannot view the issue here as anything other than a motion to correct an illegal sentence. Nor can this Court find from whole cloth that the sentencing court made the necessary findings to justify the imposition of concurrent sentences. There is absolutely no basis upon which this Court can reach that conclusion. There is no escaping the fact that defendant through assigned counsel converted his pro se petition for PCR into a motion to correct an illegal sentence under R. 3:21-10(b)(5). As such,

temporal limitations have no application to this case. State v. Zuber, 227 N.J. 422, 437 (2017).

Finally, to grant the relief defendant requests in this case is hardly a windfall as defendant would still be required to serve an aggregate 30-year sentence. Nevertheless, the quote from State v. Schubert, bears repeating: “[t]he potential for abuse in broad judicial power to increase sentences outweighs the possibility of giving a few defendants the benefits resulting from a judicial mistake.” State v. Schubert, 212 N.J. 295, 313 (2012), citing State v. Eigenmann, 280 N.J. Super. 331, 348 (App. Div. 1995) (quoting United States v. Turner, 518 F.2d 14, 17 (7th Cir.1975)).

CONCLUSION

Accordingly, defendant’s sentence which he has already served must be vacated along with his convictions under Ind. #2 and the matter remanded for further proceedings.

Respectfully submitted,

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