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STATE OF NEW JERSEY *Respondent/Appellee*, v. RONALD IGLESIAS, *Petitioner/Appellant*.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000439-23T2 BRIEF AND APPENDIX IN SUPPORT OF APPELLANT'S NOTICE OF APPEAL

PLENARY BRIEF ON BEHALF OF APPELLANT

On Appeal from:
New Jersey Superior Court
Morris County – Law Division
Criminal Part

Sat Below:
Honorable Stephen J. Taylor, P.J.Cr.
Decided: November 13, 2019

James H. Maynard, Esq.
Designated Trial Counsel
On the Brief

PETITIONER IS NOT CONFINED

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF JUDGMENTS, ORDERS AND/OR RULINGS iii

TABLE OF APPENDIX iii

Volume 1 – Non-Confidential Appendix iii

Volume 2 – Confidential Appendix iv

Filed as Confidential Exhibit iv

TABLE OF AUTHORITIES v

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 2

A. Petitioner's Initial PCR Petition Alleged that His Trial Attorney Misadvised Him About His Eligibility to Apply to Pre-Trial Intervention. 3

B. The Testimony Presented at the Evidentiary Hearing Clearly Established that Trial Counsel Affirmatively Misadvised the Defendant that He Could Not Apply to PTI 6

C. The Trial Court Incorrectly Determined that Defense Counsel's Decision to Not Apply for PTI, or Appeal a Denial of Consent by the Prosecutor, Was "Trial Strategy." 8

STANDARD OF REVIEW 10

A. The New Jersey State Constitution and United States Constitution Guarantee the Right to Effective Assistance of Counsel 10

B. Standard of Review on Appeal 13

LEGAL ARGUMENT 14

I. THE PCR COURT ABUSED ITS DISCRETION IN FINDING THAT TRIAL COUNSEL'S ERRONEOUS LEGAL ADVICE REGARDING PTI DID NOT CONSTITUTE MISTAKEN LEGAL ADVICE [2T6:10 to 2T8:6] 14

II. THE PCR COURT DISREGARDED THE INSTRUCTIONS OF THE APPELLATE COURT BY SPECULATING ABOUT WHAT THE PROSECUTOR WOULD HAVE DONE IF THE DEFENDANT HAD APPLIED TO PTI AND APPEALED ANY PTI DENIAL [2T12:24 to 2T13:12] 19

A. The PCR court's Decision Was Based on Speculation About What an Assistant Prosecutor Might Have Done a Decade Ago If the Defendant Had Applied to PTI 20

B. The PCR Court Abused Its Discretion by Relying on the State's False Timeline Regarding PTI and the State's Plea Offer 21

C. The PCR court's Decision Rested on Speculation About the PTI Application Mr. Dunn Could Have Presented If He Hadn't Mistakenly Believed No Application Was Possible 23

III. THE PCR COURT ABUSED ITS DISCRETION IN HOLDING THAT PRIOR DEFENSE COUNSEL MADE A STRATEGIC DECISION TO PURSUE PLEA NEGOTIATIONS RATHER THAN PURSUE PTI [2T11:1 to 2T12:16] 25

A. Decisions Grounded in Misunderstanding of the Law Can Never Be Strategic Choices 25

B. The Decision Whether to Pursue a PTI Application or an Appeal of a PTI Denial, Belongs to the Defendant, Not Defense Counsel. 27

IV. THE PCR COURT'S REMAINING BASES FOR DENYING DEFENDANT'S PCR PETITION WERE UNSUPPORTED IN THE RECORD, RENDERING THE DENIAL AN ABUSE OF DISCRETION [Not Raised Below] 27

CONCLUSION 32

TABLE OF JUDGMENTS, ORDERS AND/OR RULINGS

Order Denying Defendant's Petition for Post-Conviction Relief
Dated: August 28, 2023 ....Pa006

TABLE OF APPENDIX

VOLUME 1 – NON-CONFIDENTIAL APPENDIX

Notice of Appeal
Dated: October 16, 2023 ....Pa001

Court Transcript Request
Dated: October 16, 2023 ....Pa005

Order and Decision Denying Defendant's Petition for
Post-Conviction Relief
Dated: August 28, 2023...Pa006

Verified Petition for Post-Conviction Relief Pursuant
Pursuant to R. 3:22-1..Pa024

Exhibit A – Plea Form – Accusation 14-04-315-A
Dated: April 7, 2014...Pa040

Exhibit B - Judgment of Conviction
Dated: May 23, 2014...Pa050

Exhibit C - Certification of Ronald Iglesias
Dated: May 20, 2019...Pa054

Exhibit E – N.J.S.A. 2C:43-12..Pa069

Exhibit F - Plea Transcript
Dated: April 7, 2014...Pa073

Exhibit G - Sentencing Transcript
Dated: May 23, 2014...Pa086

Exhibit I – State v. F.G., 2015 N.J. Super. Unpub. LEXIS 445
(App. Div. 2015)
Dated: March 6, 2015 .... Pa101

State v. Ronald M. Iglesias, A-1727-19 (App. Div. June 28, 2021)
Dated: June 28, 2021 .... Pa107

State v. Ronald M. Iglesias, 086088 (N.J. Sup. Ct. Dec. 7, 2021)
Dated: December 7, 2021 .... Pa121

VOLUME 2 – CONFIDENTIAL APPENDIX

Verified Petition for Post-Conviction Relief Pursuant
Pursuant to R. 3:22-1

Exhibit H – Treatment Reports of Dr. DiNigris Pa098

FILED AS CONFIDENTIAL EXHIBIT

Verified Petition for Post-Conviction Relief Pursuant
Pursuant to R. 3:22-1

Exhibit D – Presentence Investigation Report –
Dated: April 28, 2014 .... Pa057

TABLE OF AUTHORITIES

CASES

Flagg v. Essex Cnty. Prosecutor,
171 N.J. 561 (2002) 13

Matter of Fernandez,
468 N.J. Super. 377 (App. Div. 2021) 13, 16

State v. Baynes,
148 N.J. 434 (1997) 13

State v. Davis,
116 N.J. 341 (1989) 25, 26

State v. Elders,
192 N.J. 224 (2007) 14

State v. Fritz,
105 N.J. 42 (1987) 12

State v. Goodwin,
173 N.J. 583 (2002) 12

State v. Green,
407 N.J. Super. 95 (App. Div. 2009) 6

State v. Johnson,
42 N.J. 146 (1964) 14

State v. Madan,
366 N.J. Super. 98 (App. Div. 2004) 13

State v. Marshall,
148 N.J. 89 (1997) 25

State v. McDonald,
211 N.J. 4 (2012) 12

State v. Nash,
212 N.J. 518 (2013) 13

State v. Ronald M. Iglesias,
A-1727-19 (App. Div. June 28, 2021)....................4

State v. Savage,
120 N.J. 594 (1990)....................27

Strickland v. Washington,
466 U.S. 668 (1994)....................5, 10, 11

STATUTES

N.J.S.A. 2C:14-2....................1, 3

N.J.S.A. 2C:14-2(c)(4)....................1, 3

N.J.S.A. 2C:14-3(b)....................1

N.J.S.A. 2C:24-4a....................1, 3

N.J.S.A. 2C:43-12....................5, 19, 23, 24

OTHER AUTHORITIES

Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, cmt. on Guideline 3(i), following R. 3:28 at 1128-29 (2013)....................16

CONSTITUTIONAL PROVISIONS

N.J. Const. art. I, ¶ 10....................11

PROCEDURAL HISTORY

On May 13, 2013, Mr. Iglesias was charged with two counts of sexual assault, second degree, in violation of N.J.S.A. 2C:14-2(c)(4) and one count of endangering the welfare of a child in violation of N.J.S.A. 2C:24-4a in Complaint W-2013-000145-1417 (Madison Municipal Court), for conduct alleged to have occurred on May 12, 2013. Pa51. On May 21, 2013, Mr. Iglesias was additionally charged with one count of sexual assault in violation of N.J.S.A. 2C:14-2(c)(4) and one count of endangering the welfare of a child in violation of N.J.S.A. 2C:24-4a in Complaint W-2013-00002-1404 (Chatham Borough Municipal Court), also for conduct alleged to have occurred on May 12, 2013. Pa25, ¶ 2.

On April 7, 2014, under Accusation No. 14-04-315-A, Mr. Iglesias pled guilty to one count of criminal sexual contact, fourth degree, in violation of N.J.S.A. 2C:14-3(b). Pa51, Pa82-83. On May 23, 2014, Mr. Iglesias was sentenced by the Honorable Stuart Minkowitz, J.S.C., Morris County Superior Court to two years of probation, including confinement at the Morris County Correctional Facility for a period of 180 days as a condition of probation. Ibid. Additionally, fines of $1,550.00 were imposed and the defendant was ordered to have no victim contact. Ibid. Mr. Iglesias was directed by the court to comply with Megan's Law requirements. Ibid. The court dismissed counts two and three from W-2013-000145-1417 and counts one and two from W-2013-00002-1404. Ibid. The Judgment of Conviction was signed and entered on May 24, 2014. Ibid.

Petitioner did not file a Notice of Appeal. Mr. Iglesias successfully completed probation with no violations or infractions. Pa30, ¶ 29.

On May 22, 2019, Mr. Iglesias filed a Petition for Post-Conviction Relief. Pa24-Pa. Said Petition for Post-Conviction Relief was denied in an Order entered November 13, 2019 by the Hon. Stephen J. Taylor, P.J.Cr. Pa106.

Petitioner appealed to the New Jersey Superior Court, Appellate Division, which court reversed the decision below and remanded for further proceedings before a different judge. Pa107-120. The State appealed and the Supreme Court denied certification, but remanded the matter to the original PCR court. Pa121. An evidentiary hearing was held on August 16, 2022, 1T,[1] with oral arguments held on March 15, 2023. 2T. On August 28, 2023, the PCR court again denied Petitioner's PCR, and provided a written decision in support of that order. Pa6-23.

Petitioner filed a timely notice of appeal on October 16, 2023, and this Plenary Brief is now filed in support of that appeal. Pa1-5.

STATEMENT OF FACTS

On May 12, 2013, a Chatham Township Police Officer observed Mr. Iglesias in a parked car with an underage minor (fourteen years old). Pa60-62. The officer transported Mr. Iglesias and the minor to the local police station where Mr. Iglesias admitted to engaging in sexual conduct with the minor that

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[1] 1T = Transcript of PCR Evidentiary Hearing, August 16, 2022
2T = Transcript of Oral Argument on the PCR Motion, March 15, 2023.

evening. Ibid. Mr. Iglesias was arrested in the early morning hours of May 13, 2013 and charged with sexual assault in violation of N.J.S.A. 2C:14-2(c)(4), 2nd degree, and endangering the welfare of a child in violation of N.J.S.A. 2C:24-4a, 3rd degree. Pa51-53. According to the victim's statement, the sexual contact was consensual. Pa60; Pa92.

A. Petitioner's Initial PCR Petition Alleged that His Trial Attorney Misadvised Him About His Eligibility to Apply to Pre-Trial Intervention.

Mr. Iglesias asserted ineffective assistance of counsel in his 2019 PCR Petition, alleging that his prior attorney, Mr. Robert Dunn, misadvised him that he could not apply to Pre-Trial Intervention Program (PTI). Pa34-35. In support of that claim, Mr. Iglesias submitted the following facts.

After his arrest, Mr. Iglesias was held in detention at the Morris County Correctional Facility, during which time he spoke with another inmate at the facility who told him about the Pre-Trial Intervention (PTI) program. Pa27, ¶ 11. After Mr. Iglesias was released on bail, he met with Mr. Dunn and asked him about applying to PTI. Id. at ¶ 12. At that time, Mr. Dunn told Mr. Iglesias that he (the attorney) had to first get the discovery in the case before he could consider whether PTI was an option. Id. at ¶ 13. Mr. Iglesias heard nothing more about PTI until just prior to his plea hearing, at which time his attorney advised Mr. Iglesias that he was ineligible for PTI due to the nature of the crime. Id. at ¶ 14. Notwithstanding that advice, when Mr. Iglesias later reported to probation after being sentenced, he was told by a staff member at Probation Intake that he

would probably have been eligible for PTI. Id. at ¶ 15; Pa55 at ¶ 6.

Mr. Iglesias asserted unequivocally that he would have applied to the PTI program had he been advised that he was eligible to do so. Pa56, ¶15. Moreover, he asserted that had his PTI application been denied, he would have asked Defense Counsel to appeal that denial to the trial judge. Ibid.

Based on that record, on November 13, 2019, the PCR court denied Mr. Iglesias an evidentiary hearing on his PCR Petition, and also denied his PCR Petition. Pa108.

As determined by the Appellate Division, the PCR court's decision to deny Mr. Iglesias an evidentiary hearing rested on improper grounds. As summarized by the Appellate Division in its June 28, 2021 decision:

> The PCR judge assumed for the sake of argument that defendant's trial counsel was deficient in misadvising him about his eligibility for PTI admission. Nonetheless, the judge denied defendant's petition on the basis that "the nature of the original charges" and the "compelling need to prosecute offenders who target children" would have precluded him from admission to PTI.3
>
> > [3]For similar reasons, the PCR judge determined that, if defendant's application to PTI was denied, his appeal would have ultimately been unsuccessful. (1T81:11-20).
>
> [State v. Ronald M. Iglesias, A-1727-19 (App. Div. June 28, 2021) , reproduced at Pa113.]

In reversing the PCR court, the Appellate Division held as follows:

> Here, defendant's argument is that he was affirmatively, and incorrectly, advised that he was not eligible for admission to PTI. We are satisfied that, viewing the facts in the light most favorable to defendant, Preciose, 129 N.J. at 462-63, if this assertion is proven by a preponderance of the evidence, it constitutes mistaken legal

> advice requiring a remedy. . . . We are satisfied that the nature of this mistaken legal advice, if substantiated, would constitute deficient performance.
>
> [Pa118.]

The Appellate Division noted that the PCR court assumed (for purposes of analyzing Mr. Iglesias' PCR claim) that Mr. Dunn's performance in this regard was deficient. However, the Appellate Court concluded that the PCR court erred by placing itself "into the shoes of the prosecutor and analyz[ing] the likelihood of defendant's admission into the PTI program pursuant to the factors enumerated under N.J.S.A. 2C:43-12(e) ." Pa119. The Appellate Division held that the PCR court's speculation and assumptions regarding the prejudice prong of Strickland v. Washington, 466 U.S. 668, 687 (1994) was an abuse of the PCR court's discretion.

The Appellate Division concluded that "the central issue in his ineffective assistance of counsel challenge" was Mr. Iglesias' assertion, that "[he] was told [by his attorney] that he could not apply to PTI." The Appellate Division vacated the order denying Mr. Iglesias' motion for an evidentiary hearing, and his PCR. The Appellate Court ordered the matter be remanded for an evidentiary hearing before a new judge. Specifically, on remand, the Appellate Division instructed the court to conduct an evidentiary hearing to allow "the parties to present evidence as to whether trial counsel affirmatively misadvised defendant he was ineligible for the PTI program." Pa120.

The Appellate Court further held that if the defendant proved he was misadvised by counsel about his ability to apply to PTI, the defendant should then be "given a reasonable opportunity to withdraw his guilty plea to 'permit [him] to submit his PTI

application.'" Pa120, citing State v. Green, 407 N.J. Super. 95, 99 (App. Div. 2009). The State appealed to the New Jersey Supreme Court, which denied the State's Petition for Certification, but modified the remand order to return the matter to the original PCR court for an evidentiary hearing. Pa121.

B. The Testimony Presented at the Evidentiary Hearing Clearly Established that Trial Counsel Affirmatively Misadvised the Defendant that He Could Not Apply to PTI.

An evidentiary hearing was conducted on August 16, 2022, at which Mr. Iglesias' original defense attorney, Robert Dunn, Esq., testified. 1T5 to 1T15.

Mr. Dunn testified that he represented Mr. Iglesias in 2013 and 2014 regarding his criminal matter under Accusation 14-04-315-A, which matter is the subject of this PCR petition. 1T5:19-23.

Mr. Dunn then testified to the facts of a conversation he had with Mr. Brent Rafuse, the assistant prosecutor on Mr. Iglesias' case.

> The prosecutor on that case was Brett [sic] Rafuse. I contacted him and asked him whether or not he would consent to the application, and he advised me that he would not consent, that PTI was not going to be something that they would consider, and **that the family was not on board with PTI.**[2]

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[2] This testimony from Mr. Dunn about what the family told Mr. Rafuse was directly contradicted by the statements that both the victim and his mother submitted to the sentencing court. As noted by the Appellate Division in its 2021 decision, the victim wrote in his statement that the "most preferred option" was for the defendant to "walk[] out of this whole situation without having served any jail time or prison time." and if "there was a way for [the defendant to not have a felony record]." Pa92. He also expressed that he wished "there was a way for [the defendant to not have a felony record.]" Ibid. The victim's mother also stated that, from her perspective: "I would not have pressed charges," and that she did "not

[1T7:4-10.]

Mr. Dunn then testified regarding what he told Mr. Iglesias about PTI: "So, I reported back to my client that the prosecutor was not going to agree to PTI for him in the case and at that point we did other things." 1T7:11-13.

Current counsel for Mr. Iglesias sought further clarification of what Mr. Dunn had told his client.

> Q. Thank you. So, you told Mr. Iglesias that he could not apply to PTI because the prosecutor would not give a letter of consent; is that correct?
>
> A. In essence, that's correct.
>
> [1T7:19-22.]

In response to questioning by the Court, Mr. Dunn testified:

> MR. DUNN: I do think that what I said to him was without the prosecutor's consent to your application, **Criminal Assignment is not going to take the application** and without the prosecutor's consent, as a practical matter, you are not getting PTI on a second-degree crime.
>
> [1T12:2-6, (emphasis added).]

Mr. Dunn reiterated that point again in his testimony, testifying that: "in essence . . . without the prosecutor's consent it was not happening." 1T8:9-10.

Mr. Dunn further testified as to what he told Mr. Iglesias:

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believe justice would be served for [the defendant] . . . to have a felony charge on his record." Pa92-93. The only way the wishes of both the victim and his mother could have been granted was through admission to PTI. However, the PCR court ignored this glaring discrepancy in the record before it. Pa21.

THE COURT: All right, and did you relate to the defendant, Mr. Iglesias, the sum and substance of your conversation with the prosecutor?

MR. DUNN: I am sure I did, but it was not much of a conversation, because I would have said . . . I spoke to the prosecutor and he is not going to agree to your application, and he's not going . . . **to consent to your application**, and he's not going to agree to PTI, so we have to take a different approach to the case.

[1T13:14-23, (emphasis added).]

C. The Trial Court Incorrectly Determined that Defense Counsel's Decision to Not Apply for PTI, or Appeal a Denial of Consent by the Prosecutor, Was "Trial Strategy."

The evidentiary hearing that was ordered by the Appellate Division produced a clear body of evidence based on the testimony by Mr. Dunn, describing how and why he misadvised Mr. Iglesias regarding his right to apply for PTI, and his right to appeal a denial of PTI. Nevertheless, in complete denial of the unequivocal testimony by Mr. Dunn, the PCR court (for a second time) denied Mr. Iglesias' PCR petition.

First, the PCR court conceded that the prosecutor's consent was not necessary for Mr. Iglesias to apply for PTI.[3]

Indeed, the PCR court stated:

[3] The PCR court also acknowledged that under the version of the Court Rules governing PTI at the time, there was no bar to applying for PTI for a defendant charged with a second-degree offense. Pa16. The PCR court also recognized that at the time of his prosecution in 2013 and 2014, the consent of the prosecutor was not required in order for a defendant to apply for PTI. Ibid.

> Defendant had the right to apply to PTI notwithstanding the prosecutor's denial of consent, and to appeal to the court when an application is "rejected because the prosecutor refuses to consent to the filing of the application…"
>
> [Pa17.]

The PCR court concluded that: "[T]he record does not support a finding that Dunn misled defendant regarding his ability to apply to PTI even without consent." Pa18. Ultimately, the PCR court determined that the testimony of Mr. Dunn amounted to a "strategic decision," not a "misunderstanding of the law." Pa18. Thus, in direct contradiction to the testimony of Mr. Dunn, who told his client that because the prosecutor was "not going to agree to PTI, so we have to take a different approach to the case" the PCR court concluded that Mr. Dunn not misadvised Mr. Iglesias. Pa17.

The PCR court's denial of the unmistakable and uncontroverted evidence regarding Mr. Dunn's mis-advice to Mr. Iglesias about PTI, supports the initial decision[4] by the Appellate Division in the prior appeal to remand the matter for an evidentiary hearing before a **different judge**.

> We also conclude that the case should be assigned to a different judge on remand. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005) (requiring assignment of a new judge on remand "to avoid the appearance of bias or prejudice based upon the [original] judge's prior involvement with the matter"); see also Graziano v. Grant, 326 N.J. Super. 328, 349 (App. Div. 1999) (noting an appellate court's authority to direct that a case be assigned to a new judge "may be exercised when there is a concern that the

[4] The New Jersey Supreme Court denied the State's petition for certification but ordered that the matter be remanded to the same judge who heard the original PCR petition. Pa121.

> trial judge has a potential commitment to his or her prior findings." (citing New Jersey Div. of Youth and Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986))).
>
> [Pa120, n.5.]

As cautioned by the prior appellate panel, denial of the evidence—such as demonstrated by the PCR court—creates the appearance (or, sometimes, proves the reality) that a jurist "has a potential commitment to his or her prior findings." Graziano, 326 N.J. Super. at 349. Justice demands that cases be decided entirely on the application of the law to the facts in evidence — therefore, a jurist's denial of facts in the record, especially those facts which appear to be obvious, may be a denial of justice arising from the perspective of the jurist.

Despite being corrected by the Appellate Division in its prior decision for placing the PCR court in the shoes of the prosecutor, Pa119, the PCR court once again based its decision partly on assumptions about what the prosecutor would have done in 2013, noting that had Mr. Dunn pursued "a PTI application and appeal [it] **likely would have resulted** in the State seeking an indictment, which in turn **may have resulted** in an escalated plea offer for defendant." Pa19. [Emphasis added].

Thus, the PCR court denied Mr. Iglesias PCR Petition, from which order, Mr. Iglesias now appeals. Pa6.

STANDARD OF REVIEW

A. The New Jersey State Constitution and United States Constitution Guarantee the Right to Effective Assistance of Counsel

In Strickland, the United States Supreme Court set forth the test for

whether the performance of defense counsel was so deficient as to deny the defendant the effective assistance of counsel guaranteed under the Sixth Amendment to the U.S. Constitution. 466 U.S. at 687.

> [T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown of the adversary process that renders the result unreliable.
>
> [Ibid.]

The United States Supreme Court further held that in applying the Strickland test, courts must be mindful of one overriding consideration: "the essence of effective representation is … 'the **fundamental fairness** of the proceeding whose result is being challenged.'" Strickland, 446 U.S. at 686 [Internal citation omitted; emphasis added].

The New Jersey Supreme Court has adopted the Strickland Test as the standard by which defendants may prove a violation of Article I, Paragraph 10 of the New Jersey State Constitution.[5] .

[5] "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and **to have the assistance of counsel in his defense**." Ibid. [Emphasis added].

> We therefore hold that under Article I, paragraph 10 of the State Constitution a criminal defendant is entitled to the assistance of reasonably competent counsel, and that if counsel's performance has been so deficient as to create a **reasonable probability** that these **deficiencies materially contributed to defendant's conviction**, the **constitutional right will have been violated**.
>
> [State v. Fritz, 105 N.J. 42, 58 (1987) (emphasis added).]

Where a PCR challenge alleges ineffective assistance of counsel in a case involving a plea bargain, the New Jersey Supreme Court has held that "[w]hen a defendant has entered into a plea agreement with the State, a deficiency is prejudicial if there is a reasonable probability that, but for counsel's errors, the defendant would [] have decided to forego the plea agreement and would have gone to trial." State v. McDonald, 211 N.J. 4, 30 (2012).

Finally, the burden is on the Petitioner to prove the facts in support of his PCR petition by a preponderance of the evidence. State v. Goodwin, 173 N.J. 583, 593 (2002) ("A Petitioner must establish such relief by a preponderance of the credible evidence.").

In the prior appeal regarding this same PCR petition, the Appellate Division held that the critical question to be addressed on remand is whether "defendant was told that he could not apply to PTI." Pa119. The Appellate Division held that if, as a result of the evidentiary hearing, Mr. Iglesias proved, by a preponderance of the evidence, that "trial counsel affirmatively misadvised defendant that he was ineligible for the PTI program," then he should be "given a reasonable opportunity to withdraw his guilty plea to permit him to submit his PTI application." Ibid. (internal quotation marks and citation omitted).

B. Standard of Review on Appeal

Reviewing courts apply an "abuse of discretion" standard for reviewing the factual findings of a PCR court, as long as those findings are "supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013). That deference is particularly appropriate regarding witness credibility, assessments of which are best resolved by a trial court that had the "opportunity to hear and see the witnesses." Ibid.

However, any exercise of judicial discretion must rest on factual underpinnings and a sound legal basis. State v. Madan, 366 N.J. Super. 98, 110 (App. Div. 2004). In general, a lower court's decision will constitute an abuse of discretion if "the decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002). Moreover, "[j]udicial discretion is not unbounded and it is not the personal predilection of the particular judge," Madan, 366 N.J. Super. at 109, and must be "supported by sufficient credible evidence in the record." Matter of Fernandez, 468 N.J. Super. 377, 394 (App. Div. 2021). Additionally, the failure of a trial court to consider all relevant factors can constitute an abuse of discretion. State v. Baynes, 148 N.J. 434, 444 (1997).

With regard to matters of law, a PCR court's "legal conclusion is reviewed de novo." Nash, 212 N.J. at 541.

LEGAL ARGUMENT

I. THE PCR COURT ABUSED ITS DISCRETION IN FINDING THAT TRIAL COUNSEL'S ERRONEOUS LEGAL ADVICE REGARDING PTI DID NOT CONSTITUTE MISTAKEN LEGAL ADVICE [2T6:10 to 2T8:6]

A PCR court's findings of fact will not customarily be disturbed absent an abuse of discretion. However, that deference is primarily invoked in cases where the credibility of a witness is at issue in a proceeding below. State v. Elders, 192 N.J. 224, 244 (2007) ("An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by his opportunity **to hear and see the witnesses** . . .' " (quoting State v. Johnson, 42 N.J. 146, 161 (1964), emphasis added.).

In the case at bar, the credibility of Mr. Robert Dunn, Esq. was never in issue. The PCR court makes no reference to any issue of credibility related to Mr. Dunn. Further, the PCR court conducted extensive questioning of Mr. Dunn which provided the court ample opportunity to explore both the substance and credibility of Mr. Dunn's testimony. 2T10:5 to 2T14:5. Nowhere in the PCR court's opinion, or in the court's statements on the record, does the PCR court assert that Mr. Dunn's testimony lacked credibility, or shouldn't be afforded its full weight as evidence. Rather, the PCR court accepted Mr. Dunn's testimony as substantive evidence in the record as proof of the matters asserted.

Mr. Dunn's testimony, when fairly reviewed, reveals that he mis-advised Mr. Iglesias, by telling him that he could not apply to PTI without the consent of the prosecutor.

> Q. Thank you. So, you told Mr. Iglesias that **he could *not apply* to PTI because the prosecutor would not** give a letter of consent; is that correct?
>
> A. In essence, that's correct.
>
> [1T7:19-22, (emphasis added).]

In response to questioning by the Court, Mr. Dunn further testified:

> MR. DUNN: I do think that what I said to him was without the prosecutor's consent to your application, Criminal Assignment **is *not going* to take the application** and without the prosecutor's consent. . .
>
> [1T12:2-6, (emphasis added).]

Mr. Dunn reiterated that point again in his testimony, stating that: "in essence . . . without the prosecutor's consent it was not happening." 1T8:9-10.

The PCR court acknowledged Mr. Dunn's belief that Mr. Iglesias could not apply to PTI without the consent of the prosecutor. Pa15.

> Dunn recalled **the policy at the time**, based on his experience handling sex crimes cases, that for a second-degree crime **consent of the prosecutor was needed *to apply*** and enter the PTI program..
>
> [Pa15, (emphasis added).]

The PCR court accurately summarized Mr. Dunn's testimony—testimony that provided uncontroverted and unequivocal evidence that Mr. Dunn believed that because the Defendant was charged with a second degree offense, the consent of the prosecutor was required to **apply** to PTI. Yet, inexplicably, the PCR court concluded "there is no credible evidence in the record to support defendant's current assertion that Dunn . . . advised defendant he could not even apply to PTI without consent of the prosecutor." Pa17.

The PCR court also acknowledged that the Court Rules at the time did not require consent of the prosecutor. "Defendant could also apply to PTI on a second-degree offense without the prosecutor's consent." Pa16, citing to Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, cmt. on Guideline 3(i), following R. 3:28 at 1128-29 (2013).

The PCR court specifically confirmed that, contrary to the testimony of Mr. Dunn, the "Defendant had the right to apply to PTI notwithstanding the prosecutor's denial of consent, and to appeal to the court when an application is rejected because the prosecutor refuses to consent to the filing of the application." Pa17 (internal quotation marks omitted).

A trial court, acting in a fact-finding capacity, abuses its discretion when its factual findings are not "supported by sufficient credible evidence in the record." Fernandez, 468 N.J. Super. at 394. Here, the trial court abused its discretion when it found that Mr. Dunn did not provide Mr. Iglesias with incorrect legal advice, despite the court acknowledging that Mr. Dunn told the Defendant that, because he was charged with a second degree offense, he could not **apply** to PTI without the prosecutor's consent. Pa15.

Indeed, the PCR court directly contradicted the unmistakably clear evidence in the record when it held: "[T]here is no credible evidence in the record to support defendant's current assertion that Dunn misunderstood the law or advised defendant he could not even apply to PTI without consent of the prosecutor." Pa17.

The credible evidence in the record below shows that Mr. Dunn repeatedly reiterated his belief that Mr. Iglesias could not apply to PTI without the consent of the prosecutor because he was charged with a second degree offense.

> MR. DUNN: And as I recall today . . . at that time the policy was if it was a sex crime or if it was a **second-degree crime**, that you would have to have the **consent of the prosecutor *to apply***. So, you would have to get a note from the prosecutor.
>
> [1T6:17-22, (emphasis added).]

> Q. Thank you. So, you told Mr. Iglesias that he could not apply to PTI because the prosecutor would not give a letter of consent; is that correct?
>
> A. In essence, that's correct.
>
> [1T7:19-22.]

> MR. DUNN: [I]t was a policy that you had to get a letter from the prosecutor [to apply to PTI].
>
> [1T11:10-11.]

> MR. DUNN: [What] I said to him was without the prosecutor's consent to your application, Criminal Assignment is not going to take the application . . .
>
> [1T12:2-4, (emphasis added).]

Both the words spoken by Mr. Dunn to Mr. Iglesias in 2013, and what Mr. Dunn believed the law to be at the time were clearly stated on the record. What

Mr. Dunn told Mr. Iglesias was based on his beliefs as to what the law required or permitted. The critical evidence in this case is what kind of legal advice Mr. Dunn conveyed to Mr. Iglesias.

By his own words, Mr. Dunn expressed the belief that "without the prosecutor's consent to your application, Criminal Assignment is **not going to take the application.**" 1T12:2-4; (emphasis added). Telling Mr. Iglesias that "Criminal Assignment" is not going to take his PTI application without the prosecutor's consent—a factually incorrect belief as pointed out by the PCR court (see Pa16, Pa17)—is the functional equivalent of telling him that he is ineligible for PTI, and is expressly advising Mr. Iglesias that he cannot apply for PTI.

Thus, the testimony of Mr. Dunn — with unmistakable clarity — establishes that he believed that without the consent of the prosecutor, Mr. Iglesias could not apply to PTI. The testimony also revealed that Mr. Dunn communicated that perception to Mr. Iglesias. The PCR court's finding that Mr. Dunn did not misadvise the Defendant regarding his eligibility to apply to PTI is an abuse of discretion, as it rested on no credible evidence in the record. Indeed, the PCR court's findings are plainly contradicted by the very same record.

II. THE PCR COURT DISREGARDED THE INSTRUCTIONS OF THE APPELLATE COURT BY SPECULATING ABOUT WHAT THE PROSECUTOR WOULD HAVE DONE IF THE DEFENDANT HAD APPLIED TO PTI AND APPEALED ANY PTI DENIAL [2T12:24 to 2T13:12]

In its prior decision in this matter, the Appellate Division expressed concern over the extent to which the PCR court had assumed the role of the prosecutor in evaluating Mr. Iglesias' PCR petition.

> We question the propriety of this procedure, whereby the judge stepped into the shoes of the prosecutor and analyzed the likelihood of defendant's admission into the PTI program pursuant to the factors enumerated under N.J.S.A. 2C:43-12(e). If "a trial [court] does not have the authority in PTI matters to substitute [its] discretion for that of the prosecutor," State v. Von Smith, 177 N.J. Super. 203, 208 (App. Div. 1980), then assuredly the PCR judge cannot subsume the role of the prosecutor and, under these circumstances, decide that defendant would have been denied admission when the prosecutor never passed judgment on this issue in the first instance.
>
> [Pa119.]

Despite that admonition from the Appellate Division, the PCR court once again speculated about how the prosecutor would have responded had Mr. Iglesias applied to PTI, or appealed any subsequent denial of his admission to the program. Pa13, Pa19. The PCR court engaged in this speculation even though "the prosecutor never passed judgement on this issue in the first instance." Pa119.

A. <u>The PCR court's Decision Was Based on Speculation About What an Assistant Prosecutor Might Have Done a Decade Ago If the Defendant Had Applied to PTI</u>

The PCR court based its speculation on an assertion made by the State in response to Mr. Iglesias' PCR:

> The State points out that had counsel pursued PTI without the State's consent and an appeal, the State would have sought an indictment at the Grand Jury, which likely would have resulted in an escalated plea offer. The result, as argued by the State, would be that defendant would have been left in a much worse bargaining position with a much less favorable plea agreement.
>
> [Pa13, (internal quotation marks omitted).]

Picking up on the State's argument, the PCR court made a conclusion of fact that was pure speculation. To the extent the PCR court's decision was influenced by speculation—such as the statement below—then the court's decision to deny the PCR was an abuse of discretion.

> As reasonably argued by the prosecutor, a PTI application and appeal likely **would have resulted** in the State seeking an indictment, which in turn may have resulted in an escalated plea offer for defendant.
>
> [Pa19, (emphasis added).]

It is also important to note that neither of the prosecutors representing the State at the PCR proceedings were the prosecutor who handled the original matter in 2013: Assistant Prosecutor Elizabeth Beaman, Esq., represented the State at the PCR hearing and Assistant Prosecutor Catherine LaQuaglia, Esq., represented the State on the briefing and argument submitted to the PCR court. 1T3:8-9; 2T3:7-8. At the time of Mr. Iglesias arrest and prosecution in 2013 and

2014, the State was represented by Assistant Prosecutor Brent Rafuse. Pa45, Pa53, Pa75, Pa89.

Admission into PTI is at the discretion of the prosecutor. State v. Von Smith, 177 N.J. Super. 203, 208 (App. Div. 1980). That discretion is exercised by individual prosecutors, acting on behalf of the State, who bring to their analysis their own understanding of the facts and circumstances of the case, as well as their own beliefs about how the law should be applied. As acknowledged by Ms. LaQuaglia, as she was not the prosecutor on the 2013 case, "none of us are privy to the private conversations that happened." 2T20:19-21. Consequently, neither Ms. Laquaglia nor Ms. Beaman can speak for Mr. Rafuse, or speculate how he would have responded had Mr. Iglesias applied for PTI, or if denied, had appealed that denial to the trial court.

B. The PCR Court Abused Its Discretion by Relying on the State's False Timeline Regarding PTI and the State's Plea Offer

The State presented a false timeline, thereafter adopted by the PCR court, suggesting that any application to PTI would have triggered indictment and a probable escalation of the plea offer. Pa13, Pa19.

It was clear from Mr. Dunn's testimony that the application to the PTI program could have been made well before any initial plea offer was made to the Defendant. Indeed, Mr. Dunn's testimony suggested that his conversation with the prosecutor—in which Mr. Rafuse advised him the State and the victim's family opposed PTI—preceded the initial plea offer.

MR. DUNN: We did not apply at that time of the intake, and we left it that I would contact the prosecutor. The prosecutor on that case was Brett [sic] Rafuse. I contacted him and asked him whether or not he would consent to the application, and he advised me that he would not consent, that PTI was not going to be something that would consider, and that the family was not on board with PTI. That's what he had told me.

So, I reported back to my client that the prosecutor was not going to agree to PTI for him in the case **and at that point we did other things**. We got a lot of letters of recommendation. I mean, everyone thought highly of my client. I believe I had a psychosexual evaluation done. **I presented that to the prosecutor** and **we worked out the plea** that he ultimately pled guilty to.

[1T7:3-18, (emphasis added).]

In argument before the PCR court, the State suggested that any application to PTI, or appeal of a PTI denial, created the risk of indictment and an escalating plea offer. 2T19:16 to 2T20:12. However, Mr. Dunn's testimony indicates he was discussing PTI with Mr. Iglesias soon after his arrest and well before any initial plea offer was made by the State. No initial plea offer had been made by the State when Mr. Dunn mis-advised Mr. Iglesias that he could not apply to PTI without the prosecutor's consent. 1T7:3-18. Thus, there is simply no basis in the record to conclude that any application to PTI would have triggered a presentment to the Grand Jury or an escalation of a plea offer, as no initial plea offer had even been made by the State, when Mr. Dunn first told Mr. Iglesias that he could not apply to PTI without the prosecutor's consent.

C. The PCR court's Decision Rested on Speculation About the PTI Application Mr. Dunn Could Have Presented If He Hadn't Mistakenly Believed No Application Was Possible

In addition to speculating about how the prosecutor at the time would have reacted to a PTI application, the PCR court also prejudged the persuasiveness of a PTI application that was never submitted.

Neither the State nor the PCR court can now speculate on how Mr. Rafuse would have responded to the particular PTI application that could have been filed, but never was (because of Mr. Dunn's mistaken belief that the PTI application could not be made). Only after a PTI application has been filed—with its statement of compelling and material facts in the case of a second degree charged offense—could that application be fairly assessed.

Mr. Iglesias' PCR Petition outlined an approach to advocating for admission into PTI that presents a strong factual basis for approving the application under the seventeen PTI factors. N.J.S.A. 2C:43-12; Pa31-33. However, the PCR court ignored this evidence. Instead, the PCR court, in both instances, presumed that any application by the Defendant to PTI would have been denied, and would lead to indictment and escalation of the plea offer. The PCR court made its findings based solely on the court's own speculation. Of course, such speculative presumption of facts is improper and was admonished by the Appellate Division opinion in the first appeal. As the Appellate Court stated, the PCR court had no right to guess what Mr. Rafuse would have done, especially as "the prosecutor never passed judgment on this issue in the first instance." Pa119.

Additionally, the wishes of the victim regarding acceptance into PTI is one of the seventeen factors that prosecutors and courts **are required** to consider when reviewing a PTI application. N.J.S.A. 2C:43-12 (Factor 4). As acknowledged by the Appellate Division in its prior decision, **the victim and his mother did not want Mr. Iglesias prosecuted, did not what him imprisoned, and did not want him to have a felony record.** Pa110. Diligent counsel, preparing a statement of compelling facts in support of PTI Factor 4, would have contacted the victim and his mother, to assess their wishes regarding PTI. Given their strong statements at sentencing, it is nearly certain that a defense investigation would have revealed a desire on the part of the victim and his mother that Mr. Iglesias be admitted to PTI.

Mr. Dunn testified that Brent Rafuse told him that the family was "not on board" with PTI. 1T7:4-10. However, if, in fact, the family favored PTI, then neither the PCR court nor this Court can appropriately speculate whether the State's position on consenting to PTI would have changed; or if an appeals court (either the trial court, or an appellate court) would have overruled the prosecutor's objection to PTI—when presented with evidence that the victim and his family strongly favored PTI for the defendant.

Because the PCR court's decision rested on speculation about how the prosecutor would have responded to a timely and appropriately filed PTI application, and further speculated about the content and persuasiveness of a PTI application that was never filed, the PCR court's decision denying Mr. Iglesias' PCR petition was an abuse of discretion.

III. THE PCR COURT ABUSED ITS DISCRETION IN HOLDING THAT PRIOR DEFENSE COUNSEL MADE A STRATEGIC DECISION TO PURSUE PLEA NEGOTIATIONS RATHER THAN PURSUE PTI [2T11:1 to 2T12:16]

The decision by Mr. Dunn to abandon PTI and pursue a negotiated plea was not a strategic choice, as determined by the PCR court. Pa18. To the extent that Mr. Dunn made any strategic decision, it was based on a misunderstanding of the law, as well as a misrepresentation of fact by the prosecutor, and was therefore stripped of its presumption of competence. State v. Davis, 116 N.J. 341, 357 (1989). Further, the decision to apply to PTI, and whether to appeal any prosecutorial denial, is ultimately a decision for the defendant to make, not his attorney.

A. Decisions Grounded in Misunderstanding of the Law Can Never Be Strategic Choices

When a decision is made by an attorney based on a misunderstanding of the law, that decision cannot be said to be the product of a strategic choice.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . .Thus, an **inadequate investigation of law** or fact robs a strategic choice of any presumption of competence.
>
> [State v. Marshall, 148 N.J. 89, 290–91 (1997), (internal quotation marks and citations omitted), emphasis added.]

First, the PCR court misconstrued the timeline. See discussion supra at 21. The opportunity to apply for PTI became available the moment Mr. Iglesias was arrested. Mr. Iglesias did not have to wait for the State to make a plea offer

to apply for PTI. The argument made by the State and the PCR court—that Mr. Dunn made a strategic choice not to apply for PTI after the State made a plea offer in order to avoid indictment and a potential escalation of the plea—is a straw man argument. Mr. Dunn could have advised Mr. Iglesias of his right to apply to PTI at any time between his arrest and the State making its initial plea offer. Because the PTI application could have been made well before the State even made its initial plea offer, there was no "strategic choice" to make so as to avoid indictment and a plea escalation.

Second, Mr. Dunn's understanding of the law was simply wrong. See discussion supra at 14. Mr. Dunn incorrectly believed that Mr. Iglesias could not apply to PTI without the prosecutor's consent. As the PCR court made clear, Mr. Iglesias was legally entitled to file a PTI application irrespective of the position taken by the prosecutor. Pa17. Any decisions made by counsel that are based on a misunderstanding of the law, are stripped of any presumption of competence, and thus constitutes deficient performance. Davis, 116 N.J. at 357.

Third, the assistant prosecutor misled Mr. Dunn regarding an important and material fact that is a statutorily required factor for consideration of a PTI application: the position of the victim and his family regarding the admission of the defendant into PTI. Any decisions made by defense counsel that are based on a misunderstanding of material fact — especially when resulting from the intentional actions or statements of the State — are stripped of any presumption of competence, and thus constitutes deficient performance.

B. The Decision Whether to Pursue a PTI Application or an Appeal of a PTI Denial, Belongs to the Defendant, Not Defense Counsel.

The decision as to whether to pursue an application to PTI ultimately rests with the client, not counsel. State v. Savage, 120 N.J. 594, 629 (1990) (finding failure to advise a defendant of important rights in a criminal proceeding constituted ineffective assistance of counsel). Therefore, even assuming, *arguendo*, that the decision to file a PTI application or an appeal of any subsequent denial by the prosecutor was a strategic choice by Mr. Dunn, it was a choice that subverted his clients rights and interests.

The PCR court also suggested that Mr. Dunn made a strategic choice to seek to negotiate a plea rather than pursue PTI. Counsel cannot make a strategic choice that robs his client of a significant procedural right; the choice is for the defendant to make, not counsel. By failing to properly advise Mr. Iglesias, Mr. Dunn robbed his client of critical agency in decisions regarding his procedural due process rights.

IV. THE PCR COURT'S REMAINING BASES FOR DENYING DEFENDANT'S PCR PETITION WERE UNSUPPORTED IN THE RECORD, RENDERING THE DENIAL AN ABUSE OF DISCRETION [Not Raised Below][6]

In its decision, the PCR court referenced several other bases to justify its decision to deny Mr. Iglesias' PCR Petition, none of which are fairly grounded in the record.

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[6] These points were raised for the first time by the PCR court in its decision and thus, PCR counsel had no prior opportunity to address them below.

The PCR court alleged that Mr. Iglesias changed his theory of ineffective assistance of counsel, noting that initially the Defendant alleged counsel advised him that he was not eligible to apply to PTI because of the nature of his offense, and then, after Mr. Dunn testified, asserted that counsel had advised him that he could not apply to PTI without the prosecutor's consent. However, Mr. Iglesias did not change the underlying basis for his ineffective assistance of counsel claim. It is evident from the record that Mr. Dunn believed that the prosecutor refused to consent to the waiver **because of the nature of the charge**.

> MR. DUNN: [A]t that time the policy was if it was a **sex crime** or if it was a **second-degree crime**, that you would have to have the consent of the prosecutor to apply.
>
> [1T6:18-21, (emphasis added).]

> MR. DUNN: I said to him was without the prosecutor's consent to your application, Criminal Assignment is not going to take the application and without the prosecutor's consent, as a practical matter, are **not getting PTI on a second-degree crime.**
>
> [1T12:2-6, (emphasis added).]

Clearly, then, Mr. Dunn believed that Mr. Iglesias could not apply to PTI without the consent of the prosecutor, and that the prosecutor was not consenting to the PTI application because of the **nature of the crime** as a second degree sex offense. This belief by Mr. Dunn constituted a clear mistake of law. There has been no change in Defendant's argument.

The PCR court also stressed that Mr. Dunn had discussed PTI during his

initial consultation with the defendant as well as on several occasions afterward. Pa14-16. Indeed, the PCR court called the fact that PCR counsel did not "significantly challenge Dunn's assertion that he discussed PTI with defendant at their initial meeting" a "significant omission." Pa14.

However, the issue in this case is not when or how frequently Mr. Dunn discussed PTI with Mr. Iglesias. The issue is what Mr. Dunn **told** Mr. Iglesias about PTI. The frequency or extent of Mr. Dunn's communications with Mr. Iglesias regarding PTI are irrelevant—they cannot cure the mis-advice Mr. Dunn gave Mr. Iglesias. Mr. Dunn's communication that without the prosecutor's consent, Mr. Iglesias could not apply to PTI because the "Criminal Assignment is not going to take the application," was a mistake of law, irrespective of how many times Mr. Dunn met with the Defendant. See 1T12:2-6.

The PCR court found it significant that the defendant did not testify "that he had a desire then to seek PTI notwithstanding the prosecutor's lack of consent." Pa17. However, the question before the PCR court was the accuracy of counsel's legal advice; the fact that the defendant did not pursue a course of action that his attorney had told him was foreclosed to him, is completely irrelevant to that assessment. When a lawyer tells a client that the law does not permit them to do something, then the client is normally and justifiably going to follow that legal counsel.

The PCR court also justified its decision to deny the PCR petition by asserting that the defendant did not testify and seek to "rebut Dunn's testimony or establish that Dunn affirmatively told him he could not apply to PTI without

the consent of the prosecutor." Ibid. This conclusion by the PCR court is contradicted not only by the record, but by the court's own findings. Just two pages earlier in the court's decision, the court summarized Mr. Dunn's testimony: "Dunn recalled the policy at the time . . . that for a second-degree crime consent of the prosecutor was needed to apply and enter the PTI program." Pa15. On the next page, the court observes that under the Court Rules in effect in 2013, "Defendant could [] apply to PTI on a second-degree offense without the prosecutor's consent." Pa16.

The Defendant did not need to testify to rebut any of Mr. Dunn's testimony, because Mr. Dunn's testimony was consistent with the Defendant's assertion that Mr. Dunn misadvised him about his ability to apply for PTI. Nor did the Defendant need to testify in order to establish that Mr. Dunn told him he could not apply to PTI without the consent of the prosecutor. Citing to Mr. Dunn's own testimony, the court already acknowledged that this is what Mr. Dunn believed and what he told the defendant. Pa15.

All of the additional reasons given by the PCR court for denying Mr. Iglesias' PCR Petition either lack evidentiary support in the record or are irrelevant to the factual and legal question before the court: Did Mr. Dunn mis-advise Mr. Iglesias about his eligibility to apply to PTI when Mr. Dunn told him that he could not apply without the prosecutor's consent.

The PCR court concluded that Mr. Iglesias failed to establish that counsel "affirmatively misadvised defendant that he was ineligible for the PTI program." Pa21 (quoting the Appellate Division decision at Pa120). However, the

definition of "eligible" is: "a person or thing that is qualified or permitted to do or be something." "Eligible." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/eligible. And the record shows that Mr. Dunn told Mr. Iglesias he **could not apply** to PTI—indeed, that the "Criminal Assignment is not going to take the application"—without the prosecutor's consent. Thus, according to Mr. Dunn, without the prosecutor's consent, Mr. Iglesias was not "qualified or permitted to do . . . something" (apply for PTI); i.e., he was not "eligible" to apply. Consequently, in Mr. Dunn's view, Mr. Iglesias was **ineligible** to apply for PTI, absent the prosecutor's consent. That belief by Mr. Dunn was legally incorrect.

Mr. Dunn also acknowledged that he **told** Mr. Iglesias "that he could not apply to PTI without the prosecutor's consent. 1T7:19-22; 1T12:3-6. That was an "affirmative statement." Because that "affirmative statement" was legally incorrect, Mr. Dunn **affirmatively misadvised** the defendant that he was **ineligible** to apply to the PTI program.

FILED, Clerk of the Appellate Division, February 12, 2024, **A-000439-23**, **AMENDED**

CONCLUSION

For the reasons set forth above, and on the record created below, this Court should find that the PCR court abused its discretion in denying Mr. Iglesias' PCR petition, reverse the decision below, and remand the matter to a PCR court, with a different judge, for a determination as to the appropriate remedy.

Respectfully submitted,
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February 6, 2024

FILED, Clerk of the Appellate Division, May 14, 2024, **A-000439-23**

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LETTER-BRIEF ON BEHALF OF THE STATE

Appellate Division
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Re: State of New Jersey (Plaintiff-Respondent) v. Ronald Iglesias (Defendant-Appellant)

Docket No. A-000439-23T2

Criminal Action: On Appeal from an Order denying Post-Conviction Relief by the Superior Court, Law Division, Morris County

Sat Below: Hon. Stephen J. Taylor, P.J.Cr.

Honorable Judges:

Kindly accept this letter-brief in opposition to defendant's appeal in this matter.

TABLE OF CONTENTS

TABLE OF APPENDIX..ii

TABLE OF AUTHORITIES..iii

COUNTER-STATEMENT OF PROCEDURAL HISTORY
AND FACTS………………………………………………………….....1

LEGAL ARGUMENT...8

POINT I THE PCR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S APPLICATION FOR PCR……………………………8

CONCLUSION..20

COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State shall rely upon the procedural history and statement of facts as described by this Court in remanding defendant's initial application for post-conviction relief (*hereinafter* PCR) for an evidentiary hearing:

> On May 12, 2013, an officer from the Chatham Township Police Department found defendant, disrobed, in his car with a minor who was attempting to hide in the backseat. Defendant was arrested, and the minor provided a statement to police that he met defendant "who took him first to an area where they engaged in some kissing," and then into defendant's vehicle in an "isolated area and engaged in sexual activity." Although the minor was unable to consent to sexual contact, he characterized the encounter as "consensual," and denied that defendant used any force or coercion.
>
> On or about May 13, 2013, a complaint was issued for defendant's arrest stemming from this incident. Defendant was charged with second-degree sexual assault of a victim between the ages of thirteen and sixteen when the actor was four or more years older than the victim, N.J.S.A. 2C:14-2(c)(4), and third-degree endangering, abuse, neglect, or sexual act by a non-caretaker, N.J.S.A. 2C:24-4(a). On or about May 21, 2013, another complaint was issued that charged defendant with an additional count of second-degree sexual assault of a victim between the ages of thirteen and sixteen when the actor was four or more years older than the victim, and an additional count of third-degree endangering, abuse, neglect, or sexual act by a non-caretaker.
>
> On April 7, 2014, under Accusation No. 14-04-315[2], defendant pled guilty to fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). In exchange, the State agreed to dismiss the remaining counts in the complaints. The State also agreed to recommend probation with up to 180 days in county jail, and compliance with the requirements as set forth in Megan's Law, N.J.S.A. 2C:7-1 to -23.

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[1] Because the facts and procedural history are intertwined, the State has combined them for the sake of clarity.

[2] As this Court correctly noted, this accusation form is absent from the record.

A sentencing hearing was conducted on May 23, 2014.

[. . .]

The State conceded that there was "no allegation of force" and acknowledged that "this was a one-time incident." The judge observed that defendant expressed remorse for his actions and, in fact, the pre-sentence report indicated his remorse was sincere. Indeed, the pre-sentence report highlighted that defendant was "embarrassed" and "remorseful," and that it appeared "extremely unlikely that this defendant will have future contact with the criminal justice system."

The judge proceeded to analyze the aggravating and mitigating factors under N.J.S.A. 2C:44-1. The judge applied aggravating factor nine because "there ha[d] to be a strong message . . . that to, in effect, take advantage of youth comes with consequence, significant consequence." N.J.S.A. 2C:44-1(a)(9). As to the mitigating factors, the judge applied mitigating factor seven because defendant had no prior criminal activity. N.J.S.A. 2C:44-1(b)(7). The judge also found mitigating factor eight because defendant's remorse was "sincere," and he reflected on his actions which made recurrence unlikely. N.J.S.A. 2C:44-1(b)(8). The judge applied mitigating factor nine because defendant was unlikely to commit an offense again. N.J.S.A. 2C:44-1(b)(9). The judge also determined defendant would be responsive to probation. N.J.S.A. 2C:44-1(b)(10). The judge concluded that the mitigating factors preponderated.

Defendant was sentenced, in accordance with the plea agreement, to 180 days in county jail and two years' probation. Defendant was also subject to Megan's Law registration and ordered to have no contact with the victim.

Defendant did not file an appeal and successfully completed probation with no violations or infractions. On May 22, 2019, defendant filed a PCR petition arguing, among other things, that his trial counsel was ineffective in advising him that he was ineligible for admission into the PTI program. Defendant certified that, although his trial counsel initially told him that he needed more discovery to decide whether he was eligible, he was later told that he was "not eligible."

> In additional support of his petition, defendant provided a report from Peter N. DeNigris, Psy.D. DeNigris noted that defendant never missed or cancelled his treatment sessions, and presented as "forthcoming, accountable, and cooperative." DeNigris opined that defendant gained insight into the factors that contributed to his arrest, which prevented such circumstances from reoccurring.
>
> The PCR judge assumed for the sake of argument that defendant's trial counsel was deficient in misadvising him about his eligibility for PTI admission. Nonetheless, the judge denied defendant's petition on the basis that "the nature of the original charges" and the "compelling need to prosecute offenders who target children" would have precluded him from admission to PTI.[3]
>
> [(Pa108-Pa113).[4]]

This Court ultimately reversed and remanded for an evidentiary hearing. (Pa107-Pa120). This Court found that the hearing would allow the parties to present evidence as to whether trial counsel affirmatively misadvised defendant that he was ineligible for the PTI program. If so, this Court found that defendant "shall be given a reasonable opportunity to withdraw his guilty plea to 'permit [him] to submit his PTI application.'" State v. Green, 407 N.J. Super. 95, 99

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[3] For similar reasons, the PCR judge determined that, if defendant's application to PTI was denied, his appeal would have ultimately been unsuccessful. (Pa113).

[4] Pa refers to defendant's appendix.
PaX refers to defendant's confidential appendix.
Pb refers to defendant's brief.
"1T" refers to the transcript dated August 16, 2022.
"2T" refers to the transcript dated March 15, 2023.

(2009). Additionally, this Court found that the case should be assigned to a different judge on remand. (Pa120).

The State filed a petition for certification before the New Jersey Supreme Court. Defendant filed a cross-petition. The New Jersey Supreme Court ultimately denied certification but remanded the matter to the same judge for further proceedings and disposition in his discretion. (Pa121).

On August 16, 2022, an evidentiary hearing was held before the Honorable Stephen J. Taylor, P.J.Cr. on the issue of "whether trial counsel affirmatively misadvised defendant that he was ineligible for the PTI program." (1T4:11-20; Pa10).

The sole witness at the hearing was plea counsel, Robert Dunn, Esq. (1T5:8 to 1T14:15).

Dunn testified that he represented defendant approximately from the period of 2013 through 2014 throughout the period from intake to sentencing. (1T5:19 to 1T6:1; Pa10). He testified that he gave defendant "the background of what happens in PTI." (1T6:4-5; Pa10). Dunn explained that his customary habit when first meeting with clients was to generally discuss the degrees of crimes and explain the possibilities for resolving the case, which would include PTI. Dunn concluded that he "would think [he] had that discussion with [defendant] when he first came in." (1T8:14-25; Pa10).

Regarding defendant's first appearance, Dunn testified that he and defendant went to intake at the criminal division and met with "Helen,"[5] who took all his background information. Dunn stated that "after all of the background information was taken, [they] had a discussion about PTI." He recalled that "at that time the policy was if it was a second-degree sex crime, that you would have to have the consent of the prosecutor to apply." (1T6:12-21; Pa10). Dunn further testified that at the time, he and his law partner "had a number of sex cases and there were [. . .] a couple where the prosecutor did agree and they sent a note over to intake indicating that they agreed to the application, not necessarily the admission but just the application. (1T6:22 to 1T7:2; Pa10).

Dunn testified that they "did not apply at the time of intake" and "left it that I would contact the prosecutor." Dunn testified that he contacted the prosecutor to ask whether or not he would consent to the application, and the prosecutor advised him that he would not consent, that PTI was not going to be something that the State would consider, and that the family was not on board with PTI. (1T7:3-10; Pa11).

Dunn further testified that he reported back to his client that the prosecutor was not going to agree to PTI and "at that point we did other things." He stated

[5] Dunn testified that he did not know Helen's last name but that she had "been there a long time." (1T11:6-9).

that "everyone really thought highly of [defendant]." Dunn obtained letters of recommendation and a psychosexual evaluation, which Dunn presented to the State as mitigation. Dunn testified that as a result, he was able to work out the plea that defendant ultimately pled guilty to. (1T7:11-18; Pa11). Defendant ultimately pled guilty to a fourth-degree crime as opposed to the second-degree crime that he was initially charged with. (1T9:11-22).

When pressed by defense counsel whether he told defendant he could not apply to PTI because the assistant prosecutor would not provide a letter of consent, Dunn admitted that he could not exactly recall the specific words that he spoke to defendant eight to ten years ago. However, Dunn testified that although he could not recall his specific words, in essence the conversation was that without the State's consent, PTI "was not happening." (1T7:19 to 1T8:13; Pa11).

Dunn repeated his understanding of the law at the time with regard to making an application to PTI when questioned by the court. He testified that he could not recall in his discussion with defendant that he affirmatively told him that he could not apply to PTI. He testified that he handled many sex cases and at the time there was a policy that a defendant was not going to get PTI unless the prosecutor consented to the application. (1T10:18 to 1T11:5).

Dunn testified that he could not say exactly what he said to defendant, but did believe that what he said to defendant was "Criminal Assignment is not going

to take the application and without the prosecutor's consent, as a practical matter, you are not getting PTI on a second-degree crime." He therefore advised defendant that they had to take a different approach to the case. (1T11:17 to 1T12:8; 1T12:10 to 1T13:23; Pa11).

Defendant did not testify to refute any of Dunn's recollections regarding their discussions pertaining to PTI. (Pa11).

On March 15, 2023, the court permitted supplemental briefing by counsel and heard final arguments after the final briefings. (2T; Pa10).

On August 28, 2023, Judge Taylor issued an order and accompanying opinion denying defendant's petition for PCR. (Pa6-Pa23).

This appeal follows. (Pa1-Pa5).

LEGAL ARGUMENT

POINT I
THE PCR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S APPLICATION FOR PCR.
(Addressing Points I, II, III, and IV of defendant's brief)

The two-part test of Strickland governs ineffective assistance claims. Strickland v Washington, 466 U.S. 668, 687-88 (1984). This test comports with both state and federal law. State v. Fritz, 105 N.J. 42, 58 (1987).

First, the accused must show that counsel's performance was deficient. To do so, she must show that counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 695. A court evaluating a claim of ineffective assistance of counsel "must avoid second-guessing defense counsel's tactical decisions and viewing those decisions under the 'distorting effects of hindsight.'" State v. Marshall, 148 N.J. 89, 157, cert. denied, 522 U.S. 850 (1997) (quoting Strickland, 466 U.S. at 689).

Specifically, the Court in Strickland held, "The court must then fairly assess the reasonableness of an attorney's performance by eliminating the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. The Court also held that courts should apply a strong presumption that counsel's conduct fell within "the wide range of reasonable professional assistance." Id. They recognize that a prisoner has everything to gain and nothing to lose by

attacking counsel's performance. Id. Courts have held that the reasonableness standard that counsel is measured by "does not require 'the best of attorneys,' but rather requires that attorneys be not 'so ineffective as to make the idea of a fair trial meaningless.'" State v. Drisco, 355 N.J. Super. 283, 290 (App. Div. 2002) (quoting State v. Davis, 116 N.J. 341, 351 (1989)); see also State v. Fisher, 156 N.J. 494, 500 (1998).

Second, the accused must show 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 695. A reasonable probability is a probability sufficient to undermine confidence in the outcome below. Id.

In this case, defendant has not made a *prima facie* showing of ineffective assistance of counsel. The PCR court correctly concluded that trial counsel did not affirmatively misadvise defendant that he was ineligible for the PTI program. (Pa14).

The PCR court found that Dunn testified credibly that he initially spoke with defendant regarding PTI at their initial meeting when he was retained by defendant's parents. Although Dunn did not recall specifically discussing PTI with defendant due to the significant passage of time, the PCR court found that he testified credibly regarding his past practices in meeting with clients. The PCR court noted that defendant did not testify and refute Dunn's assertion that PTI was

discussed with him "when he first came in." Nor did defense counsel significantly challenge Dunn's assertion that he discussed PTI with defendant at their initial meeting, which the PCR court found to be a significant omission considering his arguments that Dunn failed to properly advise him that he could apply to PTI notwithstanding the prosecutor's lack of consent. The PCR court further noted that although Dunn likely would not have remembered specific details of his conversation with defendant, counsel could have, but did not, explore the general parameters of Dunn's initial discussion of PTI with defendant. (Pa14).

Dunn also testified that after defendant's first court appearance, he took defendant to intake to meet with an intake officer. After defendant's background information was taken, Dunn testified that they had a discussion about PTI, which was unrefuted. Dunn could not recall all of the details of his discussion with the intake officer given the passage of time. The PCR court found that this was not an unusual occurrence given the relevant events occurred close to a decade ago. (Pa14-Pa15). As our Supreme Court has recognized, "[a]s time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgment increases." State v. Afanador, 151 N.J. 41, 52 (1997). The PCR court found that Dunn nevertheless recalled the policy at the time, based on his experience handling sex crime cases, that for a second-degree crime, consent of the prosecutor was needed to apply and enter the PTI program. Thus, Dunn did not

apply at that time but "left it that I would contact the prosecutor" regarding his consent to the PTI application. (Pa15).

The PCR court found that Dunn's testimony did not support defendant's assertion that he was misinformed that he was categorically ineligible for PTI. Dunn testified that he advised defendant of PTI at their initial meeting, and again when they met with the intake officer following court. Dunn also advised defendant that he spoke with the assistant prosecutor about PTI, but the prosecutor refused to consent to his application and entry into the program. The PCR court found that Dunn "understandably did not recall the specific details of the conversations," but the gist of his testimony was that he "*conscientiously pursued PTI as an option for defendant and, when that avenue was foreclosed, negotiated an advantageous plea for defendant given the nature of the charges.*" (Pa15-Pa16) (emphasis added).

The PCR court addressed defendant's claim that Dunn advised him that he could not apply to PTI without the consent of the assistant prosecutor, which purported "mis-advice" constituting ineffective assistance of counsel. The PCR court noted that defendant's argument in his regard has changed since his initial insistence in his petition that Dunn "advised [him] that he was ineligible for PTI due to the nature of the crime." The PCR court concluded that Dunn's testimony that he discussed PTI with the intake officer and explored PTI discussions with the

prosecutor shows the fallacy of defendant's initial argument. The PCR court posed a valid, and very practical, question: if Dunn thought defendant was categorically ineligible for PTI due to the nature of the charge, why would he discuss PTI with the intake officer and later with the prosecutor? The State agrees with the PCR court in that simple answer is that he would not. (Pa16).

The PCR court opined that in light of Dunn's testimony, defendant apparently shifted his argument and now asserts that Dunn wrongly advised him he could not even apply to PTI. The PCR court found that "[t]his reworked argument fails as well." (Pa16).

Defendant is correct that the Court Rules in effect in 2013 and 2014 did not include a bar in applying to PTI based on the degree of an offense. R. 3:28 (2013). The PCR court found that defendant could have applied to PTI on a second-degree offense without the prosecutor's consent. The comment on Guideline 3(i) of the Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, states:

> It is to be emphasized that while all persons are eligible for pretrial intervention programs, those charged with offenses encompassed within certain enumerated categories must bear the burden of presenting compelling facts and materials justifying admission. First and second degree crimes . . . are specific categories of offenses that establish a rebuttable presumption against admission of defendants into a PTI program. This presumption reflects the public policy of PTI. PTI programs should ordinarily reject applications by defendants who fall within these categories unless the prosecutor has affirmatively joined in the application . . . When a defendant charged with a first or second

> degree crime . . . has been rejected because the prosecutor refuses to consent to the filing of the application, the burden lies with the defendant upon appeal to show the court that the prosecutor . . . abused such discretion. When an application is rejected because the defendant is charged with a crime of the first or second degree . . . and the prosecutor refuses to join affirmatively in the filing of an application . . . such refusal should create a rebuttable presumption against enrollment.
>
> [(citation omitted) (Pa16-Pa17).]

The PCR court found that defendant had the right to apply to PTI notwithstanding the prosecutor's denial of consent, and to appeal to the court when an application is "rejected because the prosecutor refuses to consent to the filing of the application," a path defendant now suggests plea counsel should have taken. The PCR court correctly found that there is no credible evidence in the record to support that Dunn misunderstood the law or advised defendant he could not even apply to PTI without consent of the prosecutor. The PCR court noted that there was no testimony from defendant that he had a desire then to seek PTI notwithstanding the prosecutor's lack of consent. (Pa17).

The PCR court correctly stated that a petitioner asserting ineffective assistance of counsel bears the burden of proving his right to relief by a preponderance of the evidence. <u>Strickland</u>, 466 U.S. at 694; <u>Fritz</u>, 105 N.J. at 58; <u>State v. Echols</u>, 199 N.J. 344, 357 (2009). Here, defendant chose not to testify or to rebut Dunn's testimony or establish that Dunn affirmatively told him he could not apply to PTI without the consent of the prosecutor. The PCR court found that

the record did not support a finding that Dunn misled defendant regarding his ability to apply to PTI even without consent. (Pa17-Pa18).

The PCR court considered Dunn's testimony that he could not recall the specifics of his conversation with defendant or the intake officer, but unequivocally recalled discussing PTI with both the intake officer, in the presence of the defendant, and the assigned prosecutor. The PCR court found that the lack of specific recall does not inexorably lead to the conclusion that Dunn failed to advise defendant of his right to apply to PTI notwithstanding lack of prosecutorial consent. The PCR court pointed to Dunn's testimony that although he could not say "exactly what I said to him . . . I do think that what I said to him was without the prosecutor's consent to your application, Criminal Assignment is not going to take the application and without the prosecutor's consent, as a practical matter, you are not getting into PTI on a second-degree crime." (1T11:17 to 1T12:8; 1T12:10 to 1T13:23; Pa18).

Dunn instead opted to negotiate a favorable plea for defendant. The PCR court found that Dunn's testimony did not establish a "fundamental misunderstanding of the law," but rather "*a practical assessment of the likelihood of PTI based on the law and the nature of the case*." (emphasis added). Dunn was aware that the State was not going to consent to PTI, and he knew under the guidelines that PTI programs should ordinarily reject applications by defendants

with second-degree offenses like defendant, unless the prosecutor affirmatively joined in the application. (Pa18).

The PCR court ultimately concluded that Dunn's decision to pursue a favorable plea rather than a PTI appeal was a strategic decision that was *not* ineffective assistance of counsel. (Pa18).

Based upon the governing standards of Strickland and Fritz, the PCR court found that defendant failed to establish that Dunn's decision to pursue a favorable plea rather than a PTI appeal was not "sound trial strategy." The PCR court found that a PTI application and appeal likely would have resulted in the State seeking an indictment, which in turn may have resulted in an escalated plea offer. (Pa19).

The PCR court further found that defendant failed to demonstrate how pursuing a PTI appeal that required showing the prosecutor abused his discretion was a better strategy than negotiating a favorable plea agreement that allowed him to plead guilty to a significantly reduced charge that eliminated the presumption of incarceration that accompanies a second-degree offense. The PCR court correctly noted that an attorney is *not required* to pursue a course of action that he reasonably believes would not result in a positive outcome for his client. (Pa19-Pa20).

The PCR court concluded that defendant's current dissatisfaction with counsel's exercise of judgment, coming years after the resolution of the case, was

insufficient to warrant overturning a conviction. Echols, 199 N.J. at 358. The PCR court reasoned:

> Dunn, an experience criminal defense attorney, first pursued the possibility of PTI for defendant, and when PTI became unlikely "as a practical matter" due to the prosecutor's lack of consent, he exercised "reasonable professional judgment" and "sound trial strategy" in negotiating a favorable plea prior to indictment." Strickland, 466 U.S. at 689-90. Defendant's present argument that Dunn should have filed an appeal of the prosecutor's denial of consent amounts to nothing more than second-guessing trial counsel considerably after the fact. Dunn's decision to pursue a favorable plea rather than a questionable PTI appeal on a second-degree crime carrying a rebuttable presumption against enrollment was reasonable at the time of the decision and remains so.
>
> [(Pa20-Pa21) (emphasis added).]

Thus, the PCR court correctly found that defendant failed to establish that counsel affirmatively misadvised him that he was ineligible for the PTI program or was otherwise ineffective. (Pa21).

Further, the PCR court correctly rejected defendant's argument that trial counsel was ineffective by failing to seek a judicial remedy after learning the victim and his family purportedly did not want defendant prosecuted and that the allegedly false claim by the State that the victim and his family opposed defendant's admission into the PTI program constituted State induced constructive ineffective assistance of counsel. The PCR court found that defendant's arguments relied upon "considerable speculation and conjecture" and were "not supported by any credible evidence in the record." (Pa21).

The PCR court found that defendant drew this "dubious conclusion not from testimony adduced at the evidentiary hearing, but from victim impact statements written near the time of sentencing, as well as an investigator's brief, one page report regarding alleged conversation with the victim and his mother that occurred after the evidentiary hearing." The report was authored more than eight years after defendant's plea and sentencing and stated that neither the victim nor his mother recalled speaking with the State regarding PTI. (Pa21).

The PCR court concluded that this "evidence" relied on by defendant to advance these arguments was "unreliable hearsay." It found that if defendant wanted to present this information to the court, he could have simply requested to reopen the evidentiary hearing prior to final briefing and arguments, and called the victim, his mother, or the former assistant prosecutor to testify, subject to cross-examination, but he chose not to do so. (Pa21-Pa22).

The PCR court found that even if the victim and his mother wanted to enter the PTI program, a position not supported by the investigator's brief report, the views of the victim are one but seventeen factors that the prosecutor must consider in determining "amenability to correction" and potential "responsiveness to rehabilitation." State v. Roseman, 221 N.J. 611, 621-22 (2015). The decision to permit version to PTI "is a quintessentially prosecutorial function," not one left to the victims." State v. Wallace, 146 N.J. 576, 582 (1996).

Moreover, the PCR court did not disregard this Court's instructions and did not step in the shoes of the prosecutor and analyze the likelihood of defendant's admission into the PTI program pursuant to the factors enumerated under N.J.S.A. 2C:43-12(e). (Pb19-Pb24; Pa119). It is clear that the PCR court was well aware that the issue on remand was "whether trial counsel affirmatively misadvised defendant that he was ineligible for the PTI program." (1T4:11-20; Pa10).

In fact, the PCR court questioned defense counsel not once, but at least twice, that it "thought we weren't getting into the merits of the application" regarding the victim and his families' position regarding entry into the PTI program. (2T33:13-15; 2T54:18-19). Thus it is clear that the PCR court knew the appropriate parameters of the remand by this Court.

Defendant's attempts at cherry picking the transcript below are misleading. At no point did the PCR court step into the shoes of the prosecutor and analyze the likelihood of defendant's admission into the PTI program. Rather, the court merely acknowledged that it was a reasonable argument by the State that the PTI application and appeal "*likely* would have resulted in the State seeking an indictment, which in turn *may* have resulted in an escalated plea offer for defendant." (Pa19) (emphasis added). The State submits that the PCR court merely made these comments with regard to any type of resulting prejudice to

defendant in analyzing his ineffective assistance of counsel claim as opposed to taking a position regarding the merits of a potential PTI application.

Thus, the PCR court appropriately denied defendant's application for PCR for all of the reasons outlined above.

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should AFFIRM the Order of the Honorable Stephen J. Taylor, P.J.Cr., denying defendant's petition for PCR.

Respectfully submitted,
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Dated: May 14, 2024

cc: James H. Maynard, Esq.

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June 28, 2024

Via eCourts
New Jersey Superior Court
Appellate Division
P.O. Box 006
Trenton, New Jersey 08625

RE: State of New Jersey (Plaintiff-Respondent) v. Ronald Iglesias (Defendant-Appellant)

Docket No.: A-000439-23T2

Reply Brief in further support of Defendant/Appellant's appeal.

Honorable Judges:

Please accept the following reply letter-brief in lieu of a formal brief in further support of Appellant's Appeal.

COUNTERSTATEMENT OF FACTS

Mr. Iglesias was represented by Robert Dunn, Esq., in the matter State v. Iglesias, Accusation No.: 14-04-315, which representation is the subject of this PCR petition and appeal. The question before this court, as set forth by the Appellate Division, is whether Mr. Dunn's representation of Mr. Iglesias was constitutionally ineffective because the "defendant was told [by Mr. Dunn] that he **could not apply to PTI**" due to the nature of the offense with which he was charged. State v. Iglesias, A-1727-19 (App. Div. June 28, 2021; Pa107-120, at Pa120) (emphasis added). The Appellate Division remanded the matter for an evidentiary hearing at which the PCR

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Court could receive testimony on this question. Ibid. The hearing was held on August 16, 2022 with Mr. Dunn testifying as the only witness. 1T.

The State's response brief reproduces excerpts from the evidentiary hearing which support the finding that Mr. Dunn did, indeed, advise Mr. Iglesias that he "could not apply to PTI." Pa120.

> [Mr. Dunn] recalled that "at that time the policy was if it was a second-degree sex crime, that you would **have to have the consent of the prosecutor to apply**."
>
> [State's Brief in Response to Defendant's Appeal, May 14, 2024, hereinafter Sb at 5 (emphasis added) quoting 1T6:12-21, Pa10.]

The State's Brief further concedes that Mr. Dunn reiterated this understanding of the policy at the time under questioning by the PCR Court.

> Dunn repeated his understanding of the law at the time with regard to making an application to PTI when questioned by the court. . . . He testified that he handled many sex cases and at the time there was a policy that a defendant was not going to get PTI **unless the prosecutor consented to the *application***.
>
> [Sb6, quoting 1T10:18 to 1T11:5 (emphasis added.]

The PCR Court acknowledged that these statements by Mr. Dunn were incorrect:

> Defendant is correct that the Court Rules in effect in 2013 and 2014 included no bar to applying to PTI based on the degree of offense. See R. 3:28 (2013). **Defendant could also apply to PTI on a second-degree offense without the prosecutor's consent.**
>
> [Pa16 (emphasis added).]

According to the State's Brief, Mr. Dunn confirmed that the prosecutor would not consent to a PTI application. "Dunn testified that . . . the prosecutor advised him that he would not consent." Pa5, citing 1T7:3-10; Pa11.

The State further acknowledges that Mr. Dunn testified that he told Mr. Iglesias: "**Criminal assignment is not going to take** the application. . . ." Sb6-7, quoting 1T12:2-6 (emphasis added).

Relevant to this admission from Mr. Dunn, the PCR Court quoted extensively from the Guideline for Operation of Pretrial Intervention in New Jersey, noting that "'all persons are eligible for pretrial intervention programs.'" Pa17, quoting Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, cmt. on Guideline 3(i), following R. 3:28 at 1128-29 (2013).

The PCR Court failed to acknowledge a critical sentence from Guideline 3(i). Referring to the application process for defendants charged with first or second degree offenses, the Guideline states:

> [I]n such cases, the applicant **shall have the opportunity to present to the criminal division manager**, and through the criminal division manager to the prosecutor, any facts or material demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.
>
> [Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Guideline 3(i), following R. 3:28 at 1126-17 (2013) (emphasis added).]

However, the PCR Court concluded:

> Defendant had the right to apply to PTI notwithstanding the prosecutor's denial of consent, and to appeal to the court when an application is "rejected because the prosecutor refuses to consent to the filing of the application."
>
> [Pa17, quoting from cmt. on Guideline 3(i).]

Based on the record in this case, the PCR Court's legal findings and factual findings directly contradict each other.

PCR COURT LEGAL FINDINGS AND COURT RULES	MR. DUNN'S TESTIMONY
"Defendant could . . . apply to PTI on a second-degree offense **without the prosecutor's consent."** [Pa16, citing R. 3:28 (2013)]	"At that time, the policy was if it was a second-degree sex crime, that you would **have to have the consent of the prosecutor to apply**," [Sb5, quoting 1T6:12-10.]
"[T]he applicant **shall** have the **opportunity to present to the criminal division manager**" the PTI application. [Guideline for Operation of Pretrial Intervention in New Jersey, Pressler & Verniero, Current N.J. Court Rules, Guideline 3(i), following R. 3:28 at 1126-17 (2013) (emphasis added).]	**"Criminal assignment is not going to take** the application. . . ." [(emphasis added). Sb6-7.]

The evidentiary record shows that there is a clear divergence between what the law authorized (pursuant to the PTI statute, the court rule, and the guidelines),

and Mr. Dunn's erroneous understanding of what the law authorized. In fact, the law, and Mr. Dunn's understanding of the law, were in direct contradiction.

The clear evidence in the record proves that the Court Rules governing Pretrial Intervention in 2013 and 2014, provided R.I. a **right to apply to PTI**, **with or without the consent of the prosecutor.** The record also proves that Mr. Dunn told his client that "… if it was a second-degree sex crime, you would **have to have the consent of the prosecutor to apply**;" and also, **"Criminal assignment is not going to take** the application. . . ." 1T6:12-21; 1T12:2-6.

The factual record is explicitly clear in this matter; it requires no interpretation, assumption, or speculation. The relevant law requires no statutory construction. Therefore, it is perplexing that the PCR Court ruled in a manner that is contradictory to the unambiguous (and undisputed) evidence in the record. The PCR Court held: "[T]here is no credible evidence in the record to support defendant's current assertion that Dunn misunderstood the law or advised defendant he could not even apply to PTI without consent of the prosecutor." Pa17.

The PCR Court's holding defies any intellectually honest reading of the evidentiary record. The credible evidence in the record proves beyond question that Mr. Dunn misunderstood the law and advised the defendant that he could not even apply to PTI without consent of the prosecutor. Further, as discussed below, the PCR Court's various holdings are internally inconsistent — and therefore, lack the degree of coherence expected and required of a written legal opinion.

LEGAL ARGUMENT

I. TRIAL COUNSEL AFFIRMATIVELY MISADVISED R.I. THAT HE COULD NOT APPLY FOR PTI, WHICH ADVICE WAS INCORRECT, AS A MATTER OF LAW

A. <u>The Record Below Clearly Establishes that Mr. Dunn Misadvised R.I. Regarding His Right to Apply to PTI Without the Prosecutor's Consent.</u>

Based on the statutory provisions and Court Rules governing Pretrial Intervention in 2013 and 2014, the PCR Court acknowledged that R.I. had a **right to apply to PTI**, with or without the consent of the prosecutor. <u>See</u> Pa16 ("Defendant could also apply to PTI on a second-degree offense **without the prosecutor's consent**." [emphasis added]).

Having just acknowledged R.I.'s right to apply to PTI, the PCR Court went on to make the following finding as what Mr. Dunn's actual advice to R.I. was:

> Dunn recalled **the policy at the time**, based on his experience handling sex crimes cases, that for a second-degree crime **consent of the prosecutor *was needed to apply*** and enter the PTI program..
>
> [Pa15 (emphasis added).]

The PCR Court's finding that Mr. Dunn did not misadvise R.I. about his ability to apply to PTI, is contrary to the Court's own statements about the right to PTI. When these findings of the PCR Court are then juxtaposed against the Court's factual findings as to what Mr. Dunn told R.I. about his inability to apply to PTI, the result is internally inconsistent; and therefore, constitutes an abuse of discretion.

The PCR Court's own statements confirm that R.I. had a statutory right to apply to PTI. When compared with the PCR Court's finding that Mr. Dunn told R.I. that he could not apply to PTI, it becomes clear that the PCR Court's holding that Mr. Dunn did not misadvise his client is an abuse of discretion.

The factual findings of trial courts are normally accorded deference; however, those discretionary determinations must rest on factual underpinnings. State v. Madan, 366 N.J. Super. 98, 110 (App. Div. 2004). Moreover, those factual findings must be based on sufficient credible evidence in the record. The PCR Court's finding that Mr. Dunn did not misadvise R.I. — by telling him he could not apply to PTI without the prosecutor's consent — is contradicted by the credible evidence in the record, as well as the PCR Court's own factual findings. The record in this matter also establishes that Mr. Dunn misadvised R.I. about whether the Criminal Division manager would accept defendant's PTI applications.

It is clear from the Court Rules that in 2013-14, the Criminal Division manager was required to accept all PTI applications, irrespective of whether the prosecutor consented to the application. See Guideline 3(i) supra at 1126-17 (2013). Yet, Mr. Dunn testified that he told R.I. that: "Criminal Assignment is **not going to take the application**." (1T12:2-6, emphasis added). Here too, Mr. Dunn's advice to R.I. was wrong, as a matter of law.

Again, the PCR Court's finding that there was no credible evidence in the record to support the conclusion that Mr. Dunn misadvised R.I. on matters of law, was a clear abuse of discretion — as the Court's conclusion was unsupported by (and contradictory to) any credible evidence.

Notwithstanding the overwhelming evidence that Mr. Dunn's legal advice to R.I. was patently wrong, the State makes several arguments as to why the PCR Court's decision should stand, each of which will be addressed in turn.

B. The State's Argument that the PCR Court found Mr. Dunn's Testimony Credible Actually Supports R.I.'s Claim of Ineffective Assistance of Counsel

The State argues that this Court should affirm the PCR Court's decision because the PCR Court found Mr. Dunn's testimony credible. Sb9-10.

R.I. agrees that Mr. Dunn testified credibly. R.I. also agrees with the State's characterization of what Mr. Dunn credibly testified to regarding what he told R.I.: "He recalled that 'at that time the policy was if it was a second-degree sex crime, that you would have to have the consent of the prosecutor to apply.'" Sb5 (quoting 1T6:12-21; Pa10). Those statements are credible **and** demonstrate that Mr. Dunn misunderstood the law regarding PTI, and misadvised R.I. as a result.

The State goes to some length to show that Mr. Dunn discussed PTI with R.I., Sb5-6. R.I. does not dispute that such conversations occurred. However, during those discussions, Mr. Dunn told him that he could not apply to PTI because the prosecutor refused to consent to the application — which is entirely consistent with Mr. Dunn's testimony. The PCR Court's credibility findings support R.I.'s PCR Claim.

C. Mr. Dunn's Testimony About His Erroneous Understanding of the Requirements for Applying to PTI in 2013-14 Is Alone Sufficient to Grant Relief, Even If Mr. Dunn Could Not Recall the Exact Words He Spoke to R.I. About Applying to PTI.

The State points out that Mr. Dunn was unable to recall "exactly what he said to defendant." Sb6. However, Mr. Dunn was clear as to what he believed the law and PTI requirements were at the time: e.g., for individuals charged with a second degree offense, the prosecutor's consent was needed to **apply** to PTI; and, the criminal division manager could **not accept** such an application without that consent. Mr. Dunn would have given R.I. legal advice consistent with his belief of R.I.'s legal rights at that time.

D. The State Misrepresented R.I.'s Basis for His Ineffective Assistance of Counsel Claim.

The State claimed that R.I. asserted that "he was misinformed that he was categorically ineligible for PTI." Sb11. However, R.I. **never asserted** that Mr. Dunn told him he was "categorically ineligible for PTI." Ibid. Rather, as is clearly stated in R.I.'s PCR Petition, he asserted that "Defense counsel advised [R.I.] that he was ineligible for PTI due to the nature of his crime." Pa27 at ¶ 14.

The definition of the word "ineligible" is "not allowed to do or have something, according to particular rules." Cambridge Online Dictionary, https://dictionary.cambridge.org/us/dictionary/english/ineligible.

R.I. was told that to apply to PTI, the prosecutor must consent to the application. He was told that the prosecutor would not consent to the application. It was entirely reasonable for R.I. to conclude that meant he could not apply—i.e., he was ineligible to apply—to PTI. Further, Mr. Dunn told R.I. that without the prosecutor's consent the criminal division manager would not accept his application.

R.I. was told by Mr. Dunn that he was ineligible to apply to PTI due to the nature of his crime. About this, there can be no disagreement based on the record: According to Mr. Dunn, R.I. was told by Mr. Dunn that to apply to PTI, the prosecutor must consent. Mr. Dunn testified that the prosecutor would not consent to the application and that he conveyed this information to R.I. Thus, because the prosecutor would not consent to the application, R.I. was "ineligible to apply to PTI."

Mr. Dunn also testified as to the reason why the prosecutor's consent was necessary. As acknowledged by the State in its brief, Mr. Dunn believed "if it was a **second-degree sex crime**, that you would **have to have the consent of the prosecutor to apply**." Sb5 (emphasis added) (quoting 1T6:12-21). Thus, as R.I.

alleged in his PCR petition, he was told he was ineligible to apply to PTI because of the nature of his crime (a second degree sex offense).

Contrary to the PCR Court's finding, the claim by R.I. in his PCR petition has not changed.

E. R.I. Did Not Seek to Pursue PTI, Notwithstanding the Prosecutor's Lack of Consent, Because He Was Told He Could Not.

Both the State and the PCR Court below inexplicably chastise R.I. for not pursuing PTI **against** the advice of counsel. Sb13; Pa17. To prove ineffective assistance of counsel, the State and the PCR Court hold forth the legally absurd notion that a layperson — with no knowledge of the intricacies of the law or Court Rules regarding PTI — should pursue an application to PTI, after being told by his attorney that he cannot apply to PTI without the consent of the prosecutor. There is no basis in law (or common sense) for suggesting that a defendant should have to ignore the advice of his lawyer at trial in order to later assert a PCR claim of ineffective assistance of counsel.

F. The Fact that Mr. Dunn Negotiated What the State Considers To Be a Favorable Plea Resolution Is Irrelevant to Whether R.I. Was Denied His Right to Apply to PTI by the Mis-advice of Counsel.

The State and the PCR Court incorrectly reasoned that because Mr. Dunn obtained a favorable plea agreement, Mr. Dunn's advice to R.I. (that he could not apply to PTI, when he had a legal right to) constituted a "practical assessment of the likelihood of PTI based on the law and the nature of the case." Pa18. The PCR Court concluded that Mr. Dunn's decision to pursue a favorable plea, rather than a PTI appeal, was a strategic decision, ibid. This holding by the PCR Court lacks any basis in the record.

First, there was nothing for R.I. to appeal as no application to PTI had ever been made and rejected. It could not have been a strategic choice to choose between

pursuing a favorable plea and pursuing a PTI appeal where there was no court decision to appeal.

Second, there was no testimony from Mr. Dunn indicating he was even aware of the fact that he could appeal a denial of consent to apply to PTI. There cannot be a strategic decision between two options when one of the options doesn't exist.

Third, defendants have a statutory right to apply to PTI. See State v. Savage, 120 N.J. 594, 629 (1990). The ultimate decision about applying to PTI, and whether to appeal any denial that might result, is a decision that belongs to the defendant, not his attorney. Had R.I. been properly advised as to his right to apply to PTI, and had that application been rejected, Mr. Dunn would have had a duty to advise R.I. of his options, one of which would have been to appeal the PTI denial to the trial court. While Mr. Dunn would have a responsibility to discuss with R.I. the pros and cons of such an appeal, and the likelihood of success versus pursuing a plea agreement, the decision as to which course of action to take would have rested with R.I., not Mr. Dunn.

CONCLUSION

For the reasons set forth above, and in R.I.'s plenary brief, R.I. respectfully requests that this Court vacate the judgment below and find that Mr. Dunn misadvised R.I. regarding his eligibility to apply to PTI, notwithstanding the prosecutor's refusal to consent. Further, R.I. asks this Court to find that Mr. Dunn's mistake of law constituted ineffective assistance of counsel.

Respectfully submitted,
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