STEPHEN W. KIRSCH, Esq.
3111 Route 38, Suite 11, #302
Mount Laurel, NJ 08054
e-mail: SteveKirschLaw@gmail.com
phone: 609-354-8402
Attorney I.D. 034601986
Designated Counsel

Joseph E. Krakora, Public Defender
Attorney for Defendant-Appellant
31 Clinton St., 8th Floor
Newark, NJ 07102

Date: July 13, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-565-22T1

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Somerset County
RYAN D. KEOGH,	:	Ind. No. 19-05-0288
a/k/a RYAN KEOGH,	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Peter J. Tober, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

TABLE OF CONTENTS

Page Nos.

INDEX TO APPENDIX

[1] While R. 2:6-1(a)(2) normally forbids the inclusion of trial-court briefs in the appendix, this short sentencing letter is nevertheless included because it is the only place in the record where trial defense counsel suggests certain specific mitigating factors.

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF TRANSCRIPTS

1T – motion dated 10/22/19
2T – motion dated 12/17/19
3T – motion dated 2/18/20
4T – motion dated 6/4/20
5T – motion dated 7/8/20
6T – motion dated 4/28/21
7T – motion dated 6/2/21 Volume 1
8T – motion dated 6/2/21 Volume 2
9T – motion dated 6/16/21
10T – motion dated 10/18/21
11T – motion dated 3/7/22
12T – motion dated 3/8/22
13T – motion dated 3/9/22
14T – trial dated 3/15/22
15T – trial dated 3/16/22

16T – trial dated 3/17/22
17T – trial dated 3/21/22
18T – trial dated 3/22/22
19T – trial dated 3/23/22
20T – trial dated 3/24/22
21T – trial dated 3/29/22 Volume 1
22T – trial dated 3/29/22 Volume 2
23T – trial dated 3/30/22 Volume 1
24T – trial dated 3/30/22 Volume 2
25T – trial dated 3/31/22
26T – trial dated 4/1/22
27T – trial dated 4/4/22
28T – trial dated 4/18/22
29T – trial dated 4/19/22 Volume 1
30T – trial dated 4/19/22 Volume 2
31T – trial dated 4/20/22
32T – trial dated 4/21/22
33T – trial dated 4/22/22
34T – trial dated 4/25/22
35T – trial dated 4/26/22
36T – sentencing dated 8/26/22
37T – motion to correct sentence dated 9/19/22

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PROCEDURAL HISTORY

The Somerset County Grand Jury returned Indictment 19-05-0288 charging defendant Ryan Keogh[2] with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a (1) or N.J.S.A. 2C:11-3a (2) (Count One); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Two); third-degree hindering apprehension, contrary to N.J.S.A. 2C:29-3b(4) (Count Three); third-degree endangering an injured victim, contrary to N.J.S.A. 2C:12-1.2a (Count Four); five counts of false swearing, contrary to N.J.S.A. 2C:28-2a (Counts Five through Nine); fourth-degree tampering with evidence, contrary to N.J.S.A. 2C: 28-6(1) (Count Ten); and fourth-degree possession of a large-capacity magazine, contrary to N.J.S.A. 2C:39-3j (Count Eleven). (Da 1 to 7)[3]

After trial in March and April 2022 before the Honorable Peter J. Tober, J.S.C. and a jury, defendant was convicted of all counts except Count Seven, of which he was acquitted. (Da 8 to 9) On August 26, 2022, after various mergers, Judge Tober sentenced defendant to serve the following two consecutive prison terms -- a 50-year/30-without-parole sentence for Count One, and a three-year

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[2] Defendant's parents, David and Cindy Keogh, were also charged with multiple counts of false swearing, contrary to N.J.S.A. 2C:28-2a (Counts Twelve through Nineteen), but those charges were severed from defendant's for trial.

[3] Da – defendant's appendix to this brief
PSR – presentence report

sentence Count Four. (Da 10 to 14) The judge imposed concurrent sentences on any remaining counts, so they are not enumerated here, plus $10,115.16 in restitution. (Da 10 to 14) The final order memorializing that sentence, and making it clear, ,after reconsideration on September 19, 2022, that an 85% parole bar applied to the murder sentence under NERA, was not filed until September 28, 2022. (Da 10 to 14) On October 21, 2022, defendant filed a notice of appeal. (Da 15 to 18)

STATEMENT OF FACTS

Defendant was convicted of murder and related offenses for causing the January 9, 2019, death of Terrence Coulanges, a former housemate whom defendant claimed showed up on his family's porch at night and attacked him when defendant opened the door. The defense at trial was self-defense, and, as discussed in detail in Point I, infra, the trial judge denied a defense request for the jury to be instructed on passion/provocation manslaughter. The State presented the following evidence at trial.

Dr. Frederick DiCarlo, the medical examiner, testified that the cause of Coulanges' death was a "perforating gunshot wound to left chest and perforating gunshot wound of right thigh with re-entry and exit gunshot wound of left thigh." (19T 100-16 to 19) Coulanges was 65" tall and weighed 157 pounds. (19T 109-17 to 24) No projectiles were found in the body because both shots exited the body. (19T 103-11 to 12; 19T 105-14 to 20; 19T 107-14 to 25; 19T

107-5 to 6) DiCarlo estimated that because he found no stippling on the body, the shots were fired from "at least six feet away."[4] (19T 127-10 to 13) He described the chest wound as indicating a shot that was fired "up to down" and the thigh wounds as "down to up" -- or "slightly upward" -- but he agreed that such descriptors assume the decedent was "standing straight up." (19T 106-11 to 15; 19T 109-10 to 12; 19T 127-19 to 128-4) Coulanges only suffered two other wounds, which were abrasions to his forehead. (19T 112-10 to 23)

Lisa Myrick,[5] Coulanges' mother, testified that Coulanges' most recent fixed address was an apartment in Old Bridge or Sayreville where he lived "with an elderly woman" in 2018. (15T 6-22 to 7-1; 15T 27-11 to 13) Prior to that, he lived with defendant's family, the Keoghs, on Farm Lane in Bound Brook "for a couple of years," which were "prior to him going missing" for a few days in early 2017, and, after that incident, he lived with Lisa and her husband Darin for a "period of time," Lisa testified. (15T 7-2 to 7-22) When her son "went missing" briefly in 2017, he was located in a mental hospital in Elizabeth, but Lisa claimed that even though Coulanges went to live with her and her husband upon his discharge from that facility, she did not know what his diagnosis was,

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[4] Later testimony called this estimate into question because stippling can still be absent when a shot is fired much closer than six feet. (28T 27-13 to 29-25)

[5] Whenever a surname of a witness is shared by another witness, this brief refers to the witnesses in question by their first names to avoid confusion. However, the decedent is referred to consistently in the brief as "Coulanges."

and did not know anything about his medication -- including whether he was taking it -- because "he was an adult." (15T 14-10 to 15-18; 15T 60-20 to 61-15; 15T 65-2 to 17) Eventually, Coulanges left their house when he and Darin could not get along and were fighting over "house rules" like "coming in late," or "conducting yourself," Lisa claimed. (15T 67-3 to 20) At that point, Coulanges went to live at the apartment with the elderly woman, and then he went on a "road trip" that took him to Florida and Texas. (15T 27-11 to 29-1) When he returned to New Jersey in January 2019, shortly before his death, Lisa and her husband would not even let him leave a bag at their house, let alone live there, and Lisa does not know where he was staying at the time. (15T 42-12 to 43-4)

Coulanges and defendant were friends for "[m]aybe about ten years" and were also musicians who collaborated, Lisa testified. (15T 7-19 to 9-12) She acknowledged that Coulanges had a criminal record for theft, but she claimed he was non-violent and non-confrontational. (15T 16-4 to 22) She also claimed that at some point Coulanges had tried to get "stuff" of his from the Keoghs' house, but she admitted: (1) that she does not know if he got it all, and (2) that when she gave a statement to police, she never claimed that a laptop was part of that "stuff" even though at one point early on in her testimony she said that it was. (15T 76-7 to 78-20; 15T 15-23 to 16-3)

Darin Myrick, Coulanges' stepfather, testified that Coulanges had a

criminal record for burglary and criminal trespass, and that he and Coulanges had a "rocky" relationship when Coulanges was in high school because Coulanges was "introduced to some" of the "elements of the streets." (15T 109-16 to 20; 15T 115-12 to 15) Coulanges would steal from Darin and Lisa but Darin claimed he was not violent. (15T 116-3 to 117-4) When Coulanges returned from the mental hospital to live with them, Darin never discussed Coulanges' medication with him, did not know "what it was for," and did not know if or when Coulanges stopped taking the medication, he admitted. (15T 138-8 to 139-2; 15T 147-5 to 11) After Coulanges' death, Darin told police that Coulanges had been barred from their home for "stealing, drinking, and a drug problem." (15T 141-20 to 24) Darin believed Coulanges had left a keyboard behind when he moved out of the Keoghs' home in 2017, but his daughter, Shanise, told him the item was a laptop. (15T 149-6 to 11)

Police Officer Brian Wertheim testified that on February 2, 2017, at 1:29 p.m., almost two years before Coulanges died, defendant's mother Cindy Keogh reported Coulanges "missing," and that Coulanges was eventually located at the mental hospital in Elizabeth four days later. (17T 157-23 to 159-8; 17T 170-21 to 171-1) When Wertheim went to the Keoghs' home while Coulanges was missing, Cindy Keogh allowed Wertheim to look through Coulanges' bedroom and Wertheim noticed a backpack, laptop, and camera in plain view; the items were not hidden. (17T 173-3 to 174-21)

Shanise Myrick testified that she was "slightly aware" of Coulanges' mental-health issues, but that she never discussed them with him and that he was not violent. (16T 16-22 to 17-5; 16T 18-7 to 19-10) Shanise knew, however, that in 2017 Coulanges was found "wandering the streets in Elizabeth" and placed in a hospital for psychiatric issues. (16T 47-9 to 22) She admitted that she told police that a few days before -- or even maybe "a day before" -- Coulanges died, he sounded "upset," "irrational," and "impulsive" on a phone call. (16T 38-1 to 39-3) Shanise testified that in October 2018, she drove Coulanges to the Keoghs' house to get his "property," and she parked in the driveway and waited about ten minutes or "maybe a little less" while Coulanges went to the door of the main house, but no one answered, which "annoyed" him. (15T 178-4 to 179-19; 16T 56-5 to 9; 16T 62-16 to 18) She believed that that "property" was "a laptop and, like, music equipment." (15T 178-24 to 25) Pastor Edward Steed similarly testified that he dropped Coulanges off at a house on Farm Lane in Bound Brook in 2016 or 2017 to get "musical equipment" of his that defendant had at the time, but Steed also said that Coulanges was "staying" at that address at the time. (16T 182-9 to 183-16) He also told police that that incident occurred in 2018, but he testified that he was mistaken about that. (16T 200-17 to 25) Steed claimed on cross-examination not to know of any incidents where Coulanges "showed up at the [Keoghs'] house uninvited and threatened the family." (16T 206-23 to 207-2)

Danielle Coulanges, aunt of the decedent, testified that Coulanges showed up at her door in Texas in December 2018, stayed nearby at her sister's house for "three weeks" and left on a plane to New Jersey "the week after New Year's" in 2019. (16T 135-16 to 139-7) Danielle testified that she saw no sign that Coulanges was abusing substances or that he had a mental-health problem, but she also had no idea that he had a criminal record or a mental-health or substance-abuse history. (16T 147-2 to 14; 16T 153-20 to 154-6) When Coulanges left Texas, he said, "I have to go back to New Jersey," but did not say why. (16T 163-10 to 19)

Jasmine Garcia testified that she knew Coulanges from church and from Narcotics Anonymous meetings that they both attended at one point. (17T 28-22 to 31-12) She and their mutual friend Brian Morris picked up Coulanges at Newark airport on January 4, 2019, and took him to Garcia's Plainsboro apartment where Garcia searched his bags for drugs -- because her housing at the time came from a program that did not allow them -- but found none. (17T 34-16 to 37-15) Garcia testified that Coulanges suffered from addiction and mental-health issues but was not violent. (17T 30-17 to 32-7) Garcia was not allowed to have overnight guests at the time, so Coulanges was sleeping at night in her car from the day after she picked him up through January 9, the day he died. (17T 39-12 to 40-15) Garcia testified that Coulanges had been taking medication for his mental health but had stopped "about a year" before his death

because the medication caused unwanted side effects. (17T 73-9 to 12; 17T 85-14 to 20) Garcia spent time on January 5 trying to get "social services" for Coulanges because he did not want to take medication for his mental-health problems, but "[t]hat didn't work out," she testified. (17T 40-16 to 41-11) That effort continued on January 8, and Coulanges had begun acting "peculiar" according to Garcia -- "[l]aughing at inappropriate times" and "mumbling to himself." (17T 44-14 to 46-5) Garcia asked Coulanges if he would check into the nearby Behavioral Health Center, but he refused. (17T 46-20 to 47-13) She conceded on cross-examination that Coulanges was acting "so weird" in January 2019 that she "wanted to get him to a hospital." (17T 89-22 to 25) Around that same time, Garcia rechecked Coulanges' bags but did not find drugs or a weapon. (17T 48-1 to 49-7)

On January 9, 2019, the day Coulanges died, Garcia testified, she was running errands in a car driven by Brian Morris, and with defendant as a passenger in the back. (17T 52-3 to 11) Around 2:30 p.m., Coulanges was "upset" because he "wanted to go to Bound Brook" for reasons that he did not explain, so they agreed to take him there. (17T 54-5 to 55-20) But then Coulanges realized that he had left his phone at Garcia's apartment, so they went to get the phone first, arriving there at 4 p.m. (17T 54-5 to 56-16) Then they drove to Farm Lane in Bound Brook, where the Keoghs' house is, arriving at a time that Garcia initially estimated to be sometime between 5:50 and 6:30 p.m.,

but dropping Coulanges off, at his request, down the street from that house, and agreeing to pick him up "in an hour or two" whenever he called for a ride. (17T 57-14 to 65-22) Garcia admitted that she was "[a] little bit" concerned about Coulanges, because he was not "letting them" drop him off at his intended destination, but they nevertheless did what he asked and then she and Morris drove to the Bridgewater Inn where Garcia was going to meet her boyfriend. (17T 65-23 to 66-19) A receipt shows that she checked in there at 6:01 p.m., so she then estimated that she dropped off Coulanges at 5:45 or 5:50 p.m. (17T 67-5 to 20; 17T 109-19 to 20) There, they waited almost three hours, Garcia claimed, for Coulanges to call, but he never did, so, after trying in vain to call Coulanges, Garcia called Pastor Steed and left a message that she was worried about Coulanges. (17T 70-8 to 71-21)

Garcia testified that Coulanges told her he was going to pick up clothes -- saying nothing about a laptop -- but that Coulanges did not even have a bag or backpack with him. (17T 71-22 to 72-1; 17T 108-3 to 8; 17T 111-15 to 19) Garcia found it to be "strange," she admitted, that Coulanges had them drop him off "a block or so" from his destination, but she said nothing about it at the time and was "just kind of going with the flow." (17T 108-9 to 22) She also noted that Coulanges made a phone call at 5:09 p.m. to an unknown person during the drive, and was not on that call for long. (17T 109-4 to 111-11) Garcia admitted that she had no idea whether Coulanges was telling the truth about the reason he

was being dropped off. (17T 121-15 to 17) Garcia also told police that Coulanges had "a bad drug problem," and had used marijuana, MDMA, alcohol, and amphetamines for "a long time." (17T 113-21 to 116-17) She also told police that Coulanges "settles" things "with his fists" sometimes, but she claimed she meant "as opposed to using a weapon," and was not saying that he was normally violent. (17T 90-10 to 91-18) Garcia agreed that Coulanges was "out of his element and anxious" that night and that she thought it was "weird" that he was not being "forthcoming with what the situation was" regarding the trip to Bound Brook. (17T 128-2 to 22) She had "a bad feeling" when she dropped him off. (17T 123-17 to 19) Coulanges had even been "mumbling to himself in the car" and was acting "a little bit" irrational, Garcia testified. (17T 127-1 to 4)

Otto Bowens, who lives in Aliquippa, Pennsylvania, testified that he is a friend of defendant and had done musical collaborations with both defendant and Coulanges. (25T 144-20 to 148-25) Bowens claimed that in "maybe 2018" he gave defendant the gun that the State claimed was used later to shoot Coulanges on January 9, 2019, but he did so solely so defendant could "get rid of it for me," he testified, because he didn't want the gun around his children. (25T 159-2 to 162-1; 25T 186-1 to 22) Defendant had gone to Aliquippa to show Bowens some sketches, and Bowens made clear that defendant did not travel there to get a gun from Bowens; rather, Bowens sprung the request to get rid of the gun on defendant once he was already there, and defendant acceded to the

request. (25T 186-12 to 187-21)

Bowens testified that on January 9, 2019, defendant called him. "panicking" and "upset" because, he said, he had just shot Coulanges in what Bowens told police was defendant's self-described attempt to protect his family. (25T 192-9 to 195-1) However, Bowens admitted that he was not really listening to much of what defendant said after he said he shot someone in self-defense because Bowens was angry and "upset at the fact that [defendant] would call me" and "I just didn't want no part to the situation at all. . . . I'm thinking like, bro, why'd you call the black guy?" (25T 196-2 to 197-14) Bowens also admitted that he has a prior CDS conviction and "several pending charges in Pennsylvania" for which he initially got a "two million dollar bail" and then received immunity in order to testify in defendant's trial. (25T 169-4 to 174-20) During Bowens' testimony, the State also played a wiretap recording of a January 29, 2019, phone call from Bowens to defendant in which Bowens complained that "they" know he gave defendant a gun, and in which defendant chided Bowens for calling him "on this phone" instead of "on the other phone." (25T 164-7 to 165-1)

Officer Phillip Gatti testified that he was dispatched to the Keoghs' property at 142 Farm Lane in Bound Brook at 7:36 p.m. on January 9, 2019, and was the first officer to arrive. (17T 193-8 to 24) Cindy Keogh met them in the driveway and called defendant and David, who were in the main house, and

asked them to come outside with their hands up at the request of the police, which they did. (17T 194-13 to 196-12) Officers then located Coulanges' body lying face down on the porch of the carriage house on the property, and, after handcuffing Coulanges when he did not respond to orders, another officer -- Vincent Pelino -- "kicked away" a gun that was lying "near" Coulanges, according to Gatti. (17T 201-1 to 205-20) Coulanges was not breathing and did not respond to CPR, which was administered by police until medical personnel arrived at 7:46 p.m. (17T 206-22 to 23; 17T 210-10 to 12; 17T 211-4 to 6) Pelino also testified that he heard defendant say to one of the responding officers, when defendant first came out of the house, "[t]hat a subject might have been shot and that he's still in the back of the, the house with a firearm." (18T 72-19 to 73-7) Another officer on the scene, Jason Kreideweis, testified that, before police approached Coulanges, he heard defendant say that "there was an intruder in the backyard by the carriage-house porch that was shot and still [was] in possession of a weapon." (18T 30-14 to 16)

Detective Jason Gianotto secured the gun, plus Coulanges' sweatpants, wallet, and phone, and at police headquarters, once defendant was taken there, Gianotto secured defendant's phone as well, which was then returned to David Keogh on January 24, 2019. (18T 104-20 to 106-16; 18T 108-15 to 18; 18T 136-7 to 137-21) Gianotto claimed not to know at the time he returned the phone that there was a wiretap order on it. (18T 140-11 to 15) On January 10, Gianotto

found a shell casing on the stairs to the porch of the carriage house. (18T 120-22 to 121-6)

When Detective Kevin Parmalee processed the scene on January 9, he found a spent projectile, coins and a hat on the porch of the carriage house, and a table on that porch was knocked over and resting at a 45-degree angle. (21T 52-13 to 55-14; 21T 82-11 to 83-8) Inside the carriage house, Parmalee found blood on the first floor at the bottom of the stairs and also on a TV, and both stains turned out to be defendant's blood. (21T 60-7 to 20) He also collected a board from the deck of the porch a few weeks later that appeared to have a mark from a projectile on it. (21T 69-12 to 73-23) Parmalee agreed that the interior of the carriage house, in conjunction with the bloodstains, could look like a struggle took place inside, but he could not definitively say that it looked like a struggle happened rather than just looking like "a messy place." (21T 91-13 to 25) Parmalee noted that the lighting on the porch was "poor" and that if someone knocks on the outer part of the door of the carriage house, a person inside cannot see who is outside. (21T 81-2 to 20)

On January 9, Detective Sergeant Sasha Higazi testified, he took photos of defendant and noticed no injuries to his face, hands, or forearms. (19T 29-3 to 30-5; 19T 55-12 to 21) But he admitted that he did not know what defendant wore at the time of the incident, and that if defendant wore a hooded sweatshirt, he might have avoided any scratches even if there had been a struggle. (19T 59-

24 to 60-2; 19T 81-18 to 20) Higazi reviewed security footage, from a neighbor's camera, that recorded from 4 to 8 p.m. on the day of the incident, and, corroborating Jasmine Garcia's account, he did not see a car drop off Coulanges at the Keogh property. (19T 69-17 to 23; 19T 74-22 to 24)

Sergeant Kristen Houck, a fingerprint expert, testified that, in addition to the first shell casing that was found, there was a second one found under the porch. (20T 95-21 to 96-12; 20T 98-19 to 101-8) The gun that was discovered near Coulanges was a 9-mm, with 16-round capacity and six rounds inside. (20T 115-1 to 5) Two fingerprints were found on the magazine, one matching defendant and one from someone other than defendant or Coulanges, and none were found on the gun itself, the shell casings, or the live rounds. (20T 115-9 to 119-23) To leave a print on the spot on the magazine where defendant's print was discovered would have required the magazine to be separate from the gun at the time, Houck testified. (20T 139-1 to 20) Houck did not check the doorknob to the carriage house or the gate leading to the carriage house for fingerprints. (20T 137-8 to 13)

Mark Matthews, a ballistics expert, testified that both shell casings that were found and the spent projectile that was recovered were all fired from the gun that was recovered at the scene. 20T 153-14 to 154-22) Robyn French, a next-door neighbor of the Keoghs, testified that he heard two shots, one right after the other, at 5:45 p.m. on January 9, and wrote down the time when he

heard them. (17T 8-2 to 9-25; 17T 12-17 to 19) Another neighbor, Stephen Savitt, heard "a loud bang" (singular, not plural) between 5:30 and 6 p.m., he testified. (17T 145-15 to 22; 17T 153-18 to 20) Steven Clouser, a neighbor who turned over the security footage to Detective Higazi, also testified that he heard what sounded like two M-80 firecrackers at about 5:45 p.m. on January 9. (19T 184-1 to 18; 19T 199-1 to 23)

FBI Agent John Hauger testified to locations of various people based on cell-phone call data. Hauger testified that between October 26 and 28, 2019, defendant's phone and Otto Bowens' phone were both using a tower near Bowens' home in Aliquippa, PA. (20T 55-4 to 56-11) Defendant's call data showed him on January 9, 2019 to be at or near: his Bound Brook home between 5:09 and 6:09 p.m. (20T 47-21 to 23), and DJK Consulting (David's place of business) on Route 22 at 7:09 p.m. and then back home from 7:31 to 7:42 p.m. (20T 48-1 to 49-13). According to Hauger, Cindy's phone that same day was at or near: DJK Consulting from 5:11 to 5:15 p.m. (20T 49-17 to 50-4); home in Bound Brook from 5:25 p.m. to 5:47 p.m., but "moving during that time frame" (20T 51-9 to 15); "in the general area of home," but possibly "away from there at certain times' from 5:56 to 6:15 p.m. (20T 51-16 to 52-12); back at DJK Consulting from 6:35 to 6:45 p.m. (20T 52-17 to 18); and back home from 7:20 to 7:58 p.m. (20T 52-19 to 20) David's phone on that same day was at or near: DJK Consulting from 5:13 to 6:30 p.m. (20T 53-4 to 5); moving "toward the

area of home" at 6:58 p.m. (20T 53-4 to 10); "heading back towards" DJK Consulting at 7:04 p.m. and then there at 7:06 p.m. (20T 53-11 to 54); and back home from 7:24 to 7:53 p.m. (20T 54-6 to 8) Hauger also testified that another phone associated with defendant was using a cell site in Manchester, NJ on February 8, 2019. (20T 56-18 to 57-7) Hauger agreed that he was never asked by police to check Coulanges' locations. (20T 58-25 to 59-2)

Sergeant Thomas Kulpinski testified that police obtained a wiretap order for defendant's main phone from January 23 through February 12, 2019, and for defendant's secondary phone from January 29 through February 18, 2019. (21T 17-21 to 18-1; 21T 22-10 to 16)

Detective Sergeant Andy Sidorski testified that on the night of January 9, 2019, after reading defendant his rights, he interrogated defendant about the death of Coulanges. (21T 105-16 to 107-12) Defendant said that he had a long history with Coulanges and that the Keoghs "always took him in" when he was homeless. (21T 111-22 to 25) But Coulanges "had problems" with them, including "altercations with" with David Keogh, that involved "[s]how[ing] up at the house" and "threaten[ing] them." (21T 111-25 to 112-4) Coulanges also stole from defendant's family. (21T 115-18) When Coulanges showed up again after going "missing," he "continuously lied" and "stole" from defendant to a degree that defendant no longer wanted anything to do with him, but Coulanges "kept showing up." (21T 115-24 to 116-4)

In October 2018, defendant said, Coulanges went through a closed back gate, went up to the house, while defendant and his parents were there, was banging on a back door, and started "talking about a gun" in what defendant perceived to be "a threatening way." (21T 116-2 to 117-22) Coulanges was placing his hand in his pocket at the time and "fidgeting with it," which caused David to ask him why he was doing that, whereupon Coulanges said, with slurred speech, "something about a gun." (21T 123-4 to 21) At least two other times, Coulanges went to the house, but defendant refused to answer the door because Coulanges was punching the siding of the house in a "violent and abrupt" manner as if to try to damage it. (21T 117-23 to 118-11) Coulanges had told defendant that he has "a schizoaffective disorder" and he had stopped taking his medication. (21T 142-11 to 22) Coulanges was, however, also "always doing cocaine" and "experimented with a lot of drugs." (21T 142-23 to 25)

Defendant also told Sidorski that he, defendant, is "permanently disabled" from back surgery after a car accident. (21T 113-20 to 21; 21T 119-14 to 17) Defendant stated that on January 9, Coulanges went to the carriage-house door, because that was where defendant was living at that point, and started "banging on the door." (21T 119-18 to 120-6) When defendant asked what he wanted, Coulanges said, "For you to come outside. We need to handle this." (21T 120-9 to 11) When defendant went outside, Coulanges "started to pull a gun" on him and they "got into a wrestling match." (21T 120-13 to 14) Defendant recalled at

that moment that Coulanges had previously threatened to shoot defendant and had said that if they ever had "an issue," Coulanges would "go to guns." (21T 120-14 to 121-8) Five or six years earlier, Coulanges had even shown defendant a gun and said he "had an issue" with someone. (21T 122-1 to 7) As they wrestled on January 9, when defendant got his hand on the gun he "fired twice defending my space." (21T 121-19 to 22)

Defendant said that Coulanges had also made threatening references to defendant on social media "a month or two earlier." (124-18 to 125-25) He said that they had not had even a telephone conversation in the two years prior to Coulanges' death. (21T 129-10 to 25) Defendant said that as he walked out of the door, at about 6 p.m. on January 9, Coulanges was "right there going for it," and, as Coulanges reached for what defendant thought was a gun, defendant tried to punch him, but only hit him "in the shoulder or something," and then they began to wrestle. (21T 131-1 to 25; 21T 135-21 to 22) Defendant said he "thinks" he actually got the gun out of Coulanges' hand before he fired "instinctively," and that he "tried to aim low" in order "just to get away from him." (21T 133-10 to 25; 21T 145-22 to 23) He also said that he "didn't mean to fire twice." (21T 145-21 to 23) Thereafter, defendant said, he went inside the carriage house, locked the door, and called his mother, Cindy, who arrived home in "[m]aybe 20" minutes, but he said his perception of time may be "really off." (21T 135-21 to 136-25) Defendant was "distraught," and watched TV, "trying

to get my mind off" what had just happened. (21T 139-8 to 24)

When Cindy arrived, defendant immediately told her, "Mom, it was self-defense. He pulled a gun on me," and, "I didn't want this to happen." (21T 137-10 to 25) They did not call 911 until David Keogh, whom Cindy had called, arrived home "maybe 20" or 30 minutes later. (21T 138-11 to 24) When Sidorski asked what took so long to call 911, defendant said that he "panicked." (21T 138-25 to 139-2) His immediate thought during the struggle had been "to disarm" Coulanges, and the whole incident "happened pretty quickly." (21T 146-21 to 25)

At that point ended the interrogation, went back to the carriage house, conducted a search, and decided to re-interrogate defendant once Sidorski found blood inside and on the porch of the carriage house. (21T 153-15 to 155-8) He reread defendant his rights and defendant told him he had no idea how blood got inside the house and that Coulanges was not inside at all. (21T 166-1 to 171-24) However, defendant said that in October when Coulanges had come by, Coulanges tried "to open the doors and pick the locks." (21T 181-1 to 5)

Defendant said he did not know whether he personally sustained any injury because the "scuffle" on January 9 had "happened so fast" that "adrenaline took over." (21T 168-20 to 169-3) Defendant denied that the delay in calling 911 was so he and his parents could "get a story straight." (21T 173-3 to 10) Defendant repeated that he told his mother when she arrived at the scene

that Coulanges "banged on the door, went for a gun. We had a tussle," and "it was self-defense." (21T 176-14 to 16) Defendant denied that he got Coulanges onto the ground in the struggle, but said that he "briefly" had him against the wall. (21T 176-20 to 177-1) Defendant also made clear in the second statement that he saw Coulanges pull a handgun out of his pocket. (21T 183-3 to 10) As they talked more, defendant wavered a bit on whether Coulanges might have gotten inside the house. The struggle was "right at the front door," and defendant admitted while he did not think Coulanges got inside, they might have gone from the porch to the inside as they struggled because "it happened so quickly that I was just protecting myself." (21T 186-1 to 9) Defendant again denied that he and Coulanges spoke or texted right before the incident: "I haven't talked with him at all in a long time." (21T 188-20 to 189-4) He admitted that, in retrospect, he "should have" called 911 right away, but he said he "just was trying to process everything" and "didn't know what to do." (21T 194-2 to 3) Defendant said that he "aimed low" and "wasn't trying to kill him," but Coulanges "was an intruder" who had a history of coming to the property and making the Keoghs feel "violated," and so defendant "felt somebody pulled a gun on me and tried to cause harm to me. And I didn't know what to do." (21T 196-22 to 197-13) He also said that he took the magazine out of the gun after the incident, and he agreed that the first shot was intentional but the second shot "went off" during the incident. (21T 198-22 to 199-13; 22T 204-11 to 15) Sidorski said that based

on defendant's remarks during the statement, he understood defendant to say that Coulanges was "within 24 inches" of defendant when he was shot. (22T 208-20 to 21)

When Sidorski viewed the neighbor's security footage, he saw: an SUV enter the Keoghs' driveway at 5:54 p.m. and exit at 5:55 p.m.; an SUV enter the driveway at 6:06 p.m. and leave at 6:20 p.m.; a sedan enter the driveway at 6:52 p.m. and leave at 6:58 p.m. as an SUV entered the driveway and then left behind the sedan; both vehicles return to the property at 7:24 p.m.; and a police car arrives at 7:37 p.m. (22T 226-25 to 228-24) Sidorski admitted that police were never able to unlock Coulanges' mobile phone, so they never searched it. (22T 236-12 to 13) He said police also checked the dumpsters at DJK Consulting, but he did not say that they found anything of note there. (22T 241-16 to 20) They also found no evidence at all of cell-phone, social-media, or other contact between defendant and Coulanges leading up to the January 9 incident, nor any cell-phone or social-media contact between the men at any time after August 2017. (22T 246-2 to 6; 25T 55-8 to 20) However, two calls to Otto Bowens by defendant beginning at 6:08 p.m. on January 9 had been manually deleted from defendant's phone. (22T 248-4 to 22) The first call lasted five minutes, 33 seconds and the second lasted only six second; both were answered. (22T 250-5 to 9)

Sidorski testified that the January 28, 2019, search of the Keoghs' main

house and carriage house that resulted in Detective Parmalee seizing a wooden plank from the porch of the carriage house did not reveal a laptop belonging to Coulanges. (23T 35-3 to 36-11) Numerous wiretapped phone calls from 2019, after the death of Coulanges, were played for the jury. Most are of little relevance to the issues in this appeal, so only a few of them are recounted here: a January 29 call in which defendant appears to scold Otto Bowens for calling him on the wrong phone, which led police to discover the existence of defendant's second phone, which they then wiretapped (23T 50-3 to 51-16); numerous calls to various people in which defendant appeared to complain about the case and about Bowens, and often would state that he was defending himself when Coulanges was shot (23T 66-1 to 93-20); and calls in which defendant stated that he did not think his new phone was tapped (it was) and in which he talked about possibly changing his phone number (23T 143-24 to 144-2; 23T 149-24 to 150-5) Sidorski admitted both that defendant got his second phone when police had initially seized his primary phone after the death of Coulanges (and had not returned it for a number of days), and that defendant was under no obligation to tell police about that second phone. (25T 57-1 to 58-17)

Sidorski testified that police arrested defendant for murder on February 14, 2019, at his aunt's residence in Manchester, and that they located him by "pinging" his secondary phone, which was seized in the arrest, to determine its location. (23T 198-22 to 199-14; 24T 200-4 to 203-11) When arrested,

defendant also turned over his primary phone to police; it was located in the trunk of his car. (24T 203-12 to 19) At the time of his arrest, defendant was 5'11" and weighed 200 pounds. (24T 204-11 to 13)

Sidorski testified that he cannot "recall" if police did a search to find the location of Coulanges' phone in the months leading up to his death (it seems that they did not), and cross-examination emphasized that if police had done so, they could have confirmed defendant's accounts of previous unannounced trips by Coulanges to the Keoghs' property. (25T 70-16 to 71-17) Sidorski admitted that Brian Morris told him that he thought it was unusual that Coulanges was allegedly going to the Keoghs' house on January 9 to retrieve clothing, but he had no backpack or other bag with him. (25T 108-4 to 7) Moreover, defense counsel stressed on cross-examination that social-media posts of Coulanges' seemed to indicate in August 2018 that he had a laptop at that time. (25T 113-1 to 23) Sidorski also claimed never to have noticed a red mark that was on defendant's forehead when he was interviewed on January 9, but he agreed that defendant told him he was wearing a hooded sweatshirt during the struggle, which might account for his lack of other similar injuries. (25T 93-10 to 20) Further, Sidorski agreed that the 5:09 p.m. phone call that Coulanges placed while en route to the Keogh property on January 9 was to someone named Edwin Simmons, not to defendant. (25T 71-1 to 20; 25T 77-23 to 24)

After his arrest, defendant placed calls to his family from the county jail

which were recorded. In those calls, which were played for the jury, he complained about wiretaps and "the false picture that's being painted of me." (24T 227-3 to 228-25; 25T 6-1 to 15-25) Sidorski also testified that there are photos on social media of defendant, Coulanges, and Otto Bowens together, and that there are social-media posts that show defendant and Coulanges communicating with one another. (25T 22-14 to 16; 25T 29-10 to 30-1) In those posts, from the summer of 2017, Coulanges would ask for certain personal items, like "clothes," back -- but never a laptop -- and Sidorski testified, over repeated defense objection, that he perceived defendant's responses to be "confrontational" and to contain "threat[s]," and even a reference to "a prior assault," while Coulanges was "more trying to keep the peace, just being more easygoing."[6] (25T 30-6 to 32-14; 25T 66-2 to 18; 25T 40-10 to 43-9) Sidorski also testified that defendant "Googled" Coulanges' name on December 28, 2018, and searched something else called "My Life" for Coulanges' name on the same day. (25T 37-18 to 39-11) Sidorski also claimed, on cross-examination, not to have noticed Instagram posts by Coulanges that read: "Calm mind, strong heart, violent hands," and "Never let them see you coming." (25T 47-13 to 49-24)

The State also called as a witness Barrick Wesley, a man with a lengthy

[6] See Point III, infra, for more discussion of this significant improper-lay-opinion issue, including detailed references to examples of the content of those social-media posts.

prior record,[7] and a history of "snitching" to get favorable deals.[8] (28T 52-12 to 54-9; 28T 57-19 to 67-7) In exchange for his testimony at defendant's trial, Wesley was avoiding what would be a life-without-parole three-strikes sentence on his pending first-degree robbery case and was hoping to get probation instead, despite having spent most of his adult life in prison. (28T 67-8 to 69-8; 28T 136-4 to 138-20) It even became clear that he had missed a prior court April 1, 2021 court date in defendant's case -- because he left the hotel that the State had put him up in and got arrested on a new drug charge[9] -- but, despite a "no new arrests" clause in his pretrial-release agreement, that fact did not dim the willingness of the State to use him as a witness against defendant. (28T 54-10 to 57-12; 28T 141-3 to 155-22)

Wesley claimed to have spoken to defendant "almost every day" -- sometimes for five minutes, sometimes for "more than an hour" -- from the third week of February 2020 until March 25, 2020, while both men were inmates at the Somerset County Jail. (28T 84-14 to 22) When Wesley wrote a letter to the

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[7] In his direct testimony, Wesley admitted multiple prior convictions for robbery, theft, and weapons offenses. (28T 52-12 to 54-9)

[8] The judge's improper refusal to allow defense counsel to ask questions of Wesley that would have revealed to the jury that the Attorney General eventually exonerated (as wrongfully convicted) a person against whom Wesley testified -- a man named Taron Hill -- is the subject of Point IV, infra.

[9] Wesley initially testified that he "overslept" that day, as opposed to getting arrested on a new charge, which is what really happened. (28T 54-18 to 23; 28T 141-3 to 155-22)

prosecutor in late February 2020 offering to provide information against defendant in exchange for a benefit to his own case, he admitted, he did not even know defendant's real name, and yet, he also admitted, all inmates had potential access to one another's cells where each inmate had a box of "private" materials, which often would contain discovery from their cases.[10] (29T 31-2 to 36-3; 28T 96-9 to 21) Indeed, by only a short time later when he finally gave his first statement to law enforcement about the case, on March 9, 2020, Wesley claimed to know defendant's full name, but did not know how to pronounce it -- an odd issue unless he had been reading it, rather than hearing it from defendant. (29T 51-20 to 24)

Nevertheless, the following was Wesley's story for the jury. He said he initially got into a discussion with defendant about the parameters of New Jersey self-defense law. (28T 91-4 to 93-1) Allegedly defendant wavered about whether his parents were home at the time of the incident, first claiming they were and then were not, and said that he knew the intruder, both of which led Wesley to tell him that he did not "see an actual self-defense" claim. (28T 93-15 to 94-25) Wesley said defendant even told him that "it was murder." (28T 95-23 to 24) Wesley also claimed to know about Coulanges' prior friendship

[10] In fact, Wesley had seen defendant retrieve a photo of defendant with Muhammad Ali from defendant's "personal papers" to show Wesley -- so Wesley knew where those papers were stored. (28T 85-15 to 87-21)

with defendant, his history of stealing from the Keoghs, his mental-health issues, and his later falling out with defendant. (28T 97-21 to 104-15) Wesley testified that defendant told him he had a gun at the house prior to Coulanges' arrival on January 9, and that he and Coulanges had arranged for Coulanges to pick up items at the house, but that defendant then refused to give them to him, which upset Coulanges. (28T 104-23 to 107-21) But Wesley also said that defendant told him he had threatened Coulanges via email in the past but had not had any contact with him in eight months. (28T 108-7 to 109-9) Wesley claimed to know the "basic layout" of the Keogh property from conversations with defendant. (28T 109-10 to 110-21)

Despite the fact that police found no evidence of phone or social-media contact between Coulanges and defendant leading up to January 9, Wesley testified that defendant told him the two communicated that day by means of a "second" phone that defendant had, and that defendant "expected" Coulanges to come to the house, but not as early as he arrived. (28T 117-21 to 119-23) Wesley claimed that defendant said Coulanges was there to get a laptop of his, which defendant was going to exchange for jewelry that Coulanges had stolen from Cindy Keogh. (28T 120-10 to 21) Defendant allegedly told Wesley that he had no intent to actually give back the laptop, and that his "defense" was that Coulanges brought a gun that they then struggled over, but that the gun was really defendant's. (28T 120-1 to 121-14) Wesley claimed that defendant said

that Coulanges was dropped off at the house by "a girl and a guy" who then went to a hotel, and that defendant was going to drive Coulanges home once they exchanged the items. (28T 121-21 to 122-3) Defendant also allegedly told Wesley that he planned to say that Coulanges was a "prowler" who had broken a lock on a gate to the carriage house, but that the gate was already broken and "anybody could walk through there." (28T 123-1 to 13)

Wesley testified further that defendant told him that on January 9, Coulanges went into the carriage house and spoke with defendant, but then, when he did not get what he wanted, Coulanges went outside "and started banging on windows and doors," whereupon defendant "[w]ent outside and he shot" Coulanges, who was unarmed, "in the leg and in the chest" with a handgun that had "an extended clip" that held, according to Wesley, "I believe 17 shots." (28T 124-1 to 23) Wesley claimed defendant told him that the first shot was to the leg, and the second to the chest when Coulanges said, "This ain't going to be over." (28T 125-16 to 20) Then defendant allegedly told Wesley that he left the gun "there beside" Coulanges. (28T 129-11 to 12) Wesley also testified that defendant told him conflicting stories about whether neither, either, or both of his parents were home at the time, and even said that he told Coulanges to arrive at a time when his mother would be at the grocery store. (28T 130-17 to 132-16) Defendant allegedly told Wesley that when Coulanges asked for the laptop, he said: "It was collateral," and "We don't owe you anything. If anything, we're

even." (28T 134-1 to 6)

In addition to Wesley's significant criminal history, defense counsel's focus on cross examination was on: the extraordinarily lenient treatment Wesley was given by Somerset prosecutors, especially when he committed a new offense and missed court as a result (28T 142-2 to 155-22); Wesley's long history of "snitching" on many others in case after case, in exchange for lenient treatment. (28T 159-16 to 212-17; 29T 13-9 to 21-5); and Wesley's repeated letters to prosecutors in this case offering information about defendant, which culminated in his statement to them on March 9, 2020. (29T 23-18 to 46-1)

The defense called three witnesses. Dr. Jonathan Arden, an expert in forensic pathology, testified that: (1) he cannot tell the order of shots in the case from the wounds to Coulanges (28T 20-22 to 23); (2) the shot to the chest was the fatal one because it went through the aorta (28T 20-2 to 19); (3) Coulanges would have "bled out" and been dead within just two to three minutes (28T 24-15 to 25-5); (4) the bullets' paths through the body show nothing about the trajectory of the shots because we do not know how the bodies were positioned (28T 33-4 to 14); (5) the medical examiner's opinion of a six-foot or greater distance because no stippling was found is inaccurate because stippling can be found much closer than six feet, so a minimum two-to-three-foot distance would be a better estimation (28T 27-13 to 29-25); and (6) failing to call 911 for a while had no effect on the treatment of Coulanges because he would have been

dead before help ever arrived even with an immediate call. (28T 42-14 to 19)

Cindy Keogh testified that Coulanges had "show[n] up twice" in 2018 after he no longer lived with the Keoghs, but prior to January 9, 2019, and that she was there for one of those occasions, in October 2018, when Coulanges was "banging on the front door" and spoke and acted as if he had a gun, which caused them to change the locks on both houses on the property. (29T 158-21 to 161-17) That incident made her fear for defendant's safety thereafter. (31T 25-13 to 21) When she got a call from defendant at 5:46 p.m., while she was at a grocery store, on January 9, she went to the house, and, when she arrived about eight minutes later, she believed Coulanges to be dead already when she "checked" him. (29T 163-13 to 166-15; 29T 184-3 to 185-17) A gun was lying nearby the body. (29T 166-22 to 25) Defendant said that Coulanges "rushed him" and that they "struggled," and he "had to protect myself," according to Cindy. (29T 165-11 to 17; 29T 199-5 to 16) She convinced defendant to go with her to David's nearby office to tell him what had happened, and defendant had still not spoken about the gun by the time they arrived. (29T 167-4 to 169-23) Then after they spoke, they all went back to the house, but soon went back to David's office because defendant was still so upset that he said he was "not ready" to call 911 and they agreed to talk more. (29T 173-20 to 174-18) There, Cindy claimed, defendant told her the gun was his and she convinced them all to tell authorities that Coulanges brought the gun to the scene, which is what they subsequently

did. (29T 174-20 to 176-12) She also testified that Coulanges had long previously picked up his laptop from the house sometime after he moved out in 2017 because "[h]e wouldn't go anywhere without it." (31T 53-14 to 21) No one in the Keogh family was holding the laptop "hostage." (31T 53-14 to 17)

David testified that, in late 2016, while defendant was recovering from surgery, but Coulanges was still living at their house, he saw Coulanges and defendant have "one actual physical fight" which Coulanges started, and which involved Coulanges tackling and punching defendant before David could break them apart. (31T 104-3 to 106-18) When Coulanges moved out after being 'found" in a psychiatric hospital in early 2017, Ryan picked him up, brought him to the Keoghs' house to get all his things, and took "as much as they could" to Coulanges' new residence. (31T 112-4 to 114-6) David called any notion that the family was holding Coulanges' laptop "hostage" as "absurd." (31T 114-7 to 19) David testified that he did not see Coulanges again until June or July 2018 when someone drove Coulanges to their house and he began "pounding on the door." (31T 115-15 to 117-3) Defendant insisted that they not answer, David testified, and Coulanges eventually left. (31T 117- 8 to 13) David also testified about the October 2018 incident, and said Coulanges was pounding on the door again, said, "We're going to finish this right now," and intimated that he had a gun, whereupon David told him he was no longer welcome there and Coulanges "walked away," but said, "This isn't over." (31T 119-10 to 120-13) David

testified similarly to Cindy about the events of January 9, so that testimony is not recounted in full here. (31T 122-15 to 134-5)

LEGAL ARGUMENT

POINT I

THE JUDGE COMMITTED REVERSIBLE ERROR WHEN HE DENIED THE DEFENDANT'S REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED HOMICIDE OFFENSE OF PASSION/PROVOCATION MANSLAUGHTER. (RULING AT 32T 19-24 TO 20-2)

Because the evidence in the case -- when viewed in a light best for the defense -- clearly supported a claim of so-called "intruder" self-defense, N.J.S.A. 2C:3-4c,[11] because defendant claimed that Terrence Coulanges, who had been told he was not welcome at the Keogh property (31T 119-10 to 120-13), showed up at night, banging on the front door and/or walls and threatening defendant before attacking him, the judge instructed the jury on "intruder" self-defense as a means to an acquittal of any homicide charge. But, in direct conflict

[11] Ordinarily, the use of deadly force in self-defense is limited to when a reasonable person defends against the threat of infliction of death or serious injury, N.J.S.A. 2C:3-4b(2), but self-defense against an intruder in a dwelling -- which includes the porch of a dwelling, see State v. Martinez, 229 N.J. Super. 593, 601-604 (App. Div.1989), citing State v. Bonano, 59 N.J. 515, 520 (1971) -- allows the use of deadly force against an intruder if the intruder uses any unlawful force, and either the actor reasonably believes the intruder might cause any injury, not merely serious injury, or even if the intruder is commanded to surrender or leave and refuses to do so. N.J.S.A. 2C:3-4c.

with a wealth of case law that makes it clear that passion/provocation manslaughter often presents a viable middle-ground lesser-included-offense option between a verdict for murder and an acquittal on self-defense grounds, and must be charged -- if requested and if the evidence in the case presents a mere "rational basis" for a conviction of that lesser offense -- the judge refused a defense request to instruct the jury on the lesser-included offense of passion/provocation manslaughter.[12] (32T 19-24 to 20-2) Because it was clearly error to deny such a request, defendant's conviction for murder must be reversed and that count remanded for retrial. Defendant's rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution were violated by the refusal to instruct the jury on a rationally supported lesser-included homicide offense.

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[12] Defense counsel initially stated that he preferred that no lesser-included offenses be submitted to the jury, but noted that if the State's request for instructions on reckless and aggravated manslaughter was granted, his request was for a corresponding instruction on passion/provocation manslaughter. (32T 4-15 to 5-3) The State then argued that reckless and aggravated manslaughter should be charged, but that there was no evidence to support a passion/provocation instruction (32T 5-14 to 6-19) -- the latter part of that argument being a strange point of view from the same prosecutor who told the court earlier in the case that he had submitted passion/provocation manslaughter to the grand jury as an option. (1T 24-20 to 23) The judge nevertheless agreed with the State, and decided to charge reckless and aggravated manslaughter as lesser-included offenses but to deny the defense request to charge passion/provocation manslaughter because he believed "the facts" did not "support it" and to provide that option would "run[] a risk of confusion." (32T 18-11 to 15; 32T 19-24 to 20-2)

When a lesser-included offense is requested, as it was here, the standard of review regarding the denial of that request is a plenary consideration by the appellate court of whether "the evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant of the lesser." State v. Brent, 137 N.J. 107, 117 (1994). When the request is made, "the trial court is obligated, in view of the defendant's interest, to examine the record thoroughly to determine if there is a rational basis in the evidence for finding that the defendant was not guilty of the higher offense charged but that the defendant was guilty of a lesser-included offense." State v. Sloane, 111 N.J. 293, 299 (1988). The "rational-basis test imposes a low threshold" for charging a lesser-included offense if the instruction is requested, State v. Crisantos, 102 N.J. 265, 278 (1986), and is met so long as "it would not be idle to have the jury decide whether the defendant had committed the lesser-included offense." State v. Mauricio, 117 N.J. 402, 417-18 (1990) (emphasis in original; internal quotation marks omitted). The question is merely whether the evidence "leave[s] room for dispute." Id. at 415. While "sheer speculation does not constitute a rational basis," Brent, 137 N.J. at 118, the judge's duty to "examine the record thoroughly" under Sloane and Crisantos must necessarily recognize the time-honored maxim from State v. Ernst, 32 N.J. 567, 583 (1960), that the jury is free to believe some, all, or none of the evidence presented to it because the "rational basis" test looks to all the evidence in the case, and evidence supporting a

finding of a rational basis can come from anywhere in the record. State v. Blanks, 313 N.J. Super. 55, 69-70 (App. Div. 1998) (a rational basis for giving a jury instruction can come from any evidence in the case, including entirely from the State's case). Moreover, the passion/provocation manslaughter instruction, if requested and supported by the evidence, must be given "regardless of whether the charge [of passion/provocation] is consistent with the defense." State v. Carrero, 229 N.J. 118, 121 (2017) (emphasis added), citing Brent, 137 N.J. at 118. In the Third Circuit, the failure to charge an appropriate lesser-included offense is a violation of the constitutional guarantee of due process. Vujosevic v. Rafferty, 844 F.2d 1023, 1027-1028 (3rd Cir. 1988).

Moreover, the "rational basis" standard for charging the lesser-included offense if it is requested by counsel, as it was here, is significantly lower than the standard if it is not requested. Carrero, 229 N.J. at 127-128; State v. Thomas, 187 N.J. 119, 132 (2006). In the absence of a request, the basis for charging the lesser must be "clearly indicated" from the record and the trial judge is not under the same duty "meticulously to sift" through the record to see if any aspect of the evidence supports the instruction. Id.; State v. Choice, 98 N.J. 295, 299 (1985). Indeed, if not requested, the need for the instruction must be "jumping off the page" of the record for its absence to be reversible error. State v. Funderburg, 225 N.J. 66, 81-82 (2016), quoting State v. Denofa, 187 N.J. 24, 42 (2016); see also State v. Canfield, 252 N.J. 497, 501 (2023) (comparing and

contrasting the two standards). Obviously, with the defense request for the instruction here, the plenary review of the judge's decision in this case must be under the mere "rational basis" standard of Brent, Carrero, and Sloane.

A passion/provocation manslaughter is a murder committed in the heat of passion in response to a provocation. N.J.S.A. 2C:11-4b(2). Passion/provocation manslaughter is a lesser-included offense of murder and has four elements under Mauricio, 117 N.J. at 411: (1) reasonable, adequate provocation; (2) a lack of cooling-off time; (3) a defendant who, in fact, was provoked to kill; and (4) a defendant who, in fact, did not "cool off" before killing. The first two elements are objective and, if the lesser offense is requested and there is a rational basis for finding them in the evidence (or, if there is no request and the basis for finding them is clearly indicated from the evidence), the trial judge should instruct the jury on passion/provocation manslaughter, leaving the decision on the last two subjective elements "for the jury." State v. Robinson, 136 N.J. 476, 491 (1994), quoting Mauricio, supra, 117 N.J. at 413.

The Supreme Court has said that the right to have the jury consider a lesser-included offense is at "the very core of the guarantee of a fair trial," State v. Short, 131 N.J. 47, 52 (1993). In addition, the Court has recognized that a passion/provocation charge can be an appropriate complement to an instruction on self-defense. It has explained that where, as here, a jury rejects self-defense, it might well find that the decedent's conduct nevertheless constituted adequate

provocation to satisfy the lesser passion/provocation-manslaughter offense. See State v. Bowens, 108 N.J. 622, 634, 641 (1987) (where jury finds "shooting to kill an unarmed attacker who has fallen to the ground" was not self-defense, it may find passion/provocation). Indeed, in Carrero, the Court upheld the reversal of a murder conviction for just that reason, in circumstances very close to the instant matter. In that case, the defense was self-defense and the jury was instructed on reckless and aggravated manslaughter as lesser-included offenses, but the trial judge improperly refused a request to charge passion/provocation manslaughter, and the Court held that the jury could have returned a passion/provocation-manslaughter verdict under either of two theories: (1) that the decedent drew a gun, after which there was a tussle over the gun and the defendant shot the decedent, or (2) that there simply was "a physical struggle" between the two men and defendant over-responded to that struggle -- which itself constituted a "battery" -- and shot the decedent. 229 N.J. at 130-131.

The decision in Carrero follows a long line of precedent in that regard. In New Jersey, mutual combat or any "battery, except for a light blow, has traditionally been considered, almost as a matter of law, to be sufficiently provocative" to reduce murder to passion/provocation manslaughter. Mauricio, 117 N.J. at 414; see also Robinson, 136 N.J. at 492. Essentially any type of fighting situation, whether initially mutual or not, that is "started" by the eventual decedent, can result in a passion/provocation manslaughter rather than

a murder, and, thus, the offense must be instructed to a jury where there is such evidence. Bowens, 108 N.J. at 641 (imperfect self-defense, or "over"-defending oneself, is not an independent or standalone defense, but it is a rational basis for charging passion/provocation manslaughter); Blanks, 313 N.J. Super. at 72 (App. Div. 1998) (defendant who may have overreacted -- with a gun against an unarmed victim -- in self-defense to a punch warranted passion/provocation instruction); State v. Castagna, 376 N.J. Super. 323, 358-359 (App. Div.), certif. den. sub nom State v. Morales, 185 N.J. 36 (2005) (overreaction -- by dropping a heavy stone onto the head of the unarmed victim -- in defense of another who was merely punched warranted passion/provocation instruction). Robinson, 136 N.J. at 492 (defendant shot an unarmed person who punched him; attempted passion/provocation clearly indicated as a lesser offense); State v. Coyle, 119 N.J. 194, 224 (1990) (defendant pursued abusive husband of defendant's girlfriend down a street and repeatedly shot the unarmed husband to protect the girlfriend from him; passion/provocation manslaughter properly charged to the jury).

Here -- just like in Carrero -- if the jury rejected self-defense,[13] either of

[13] We obviously do not know why the jury rejected self-defense -- which, as noted, was "intruder" self-defense in this case -- but it could have occurred for at least two reasons: with the jury concluding either that Coulanges was not an intruder, or that defendant responded in a manner that was simply too extreme, i.e., not "immediately necessary" to protect himself. N.J.S.A. 2C:3-4c(1).

two different views of the evidence provided a rational basis for giving the instruction on passion/provocation manslaughter as a lesser-included offense. First, the defendant's statement to police -- entered into evidence by the State -- along with other evidence, provided a rational basis to charge passion/provocation manslaughter. In that statement, defendant contended that Coulanges -- whom David Keogh had testified was forbidden by David from coming onto the property after the October 2018 incident -- drew a gun on defendant and the two men then tussled over the gun, resulting in defendant shooting Coulanges. If the jury believed that evidence that Coulanges drew the gun -- which they were entitled to do despite the contrary testimony of defendant's parents and Barrick Wesley[14] -- obviously the first of the Carrero rationales for charging passion/provocation manslaughter would have applied: that the decedent drew a weapon. 229 N.J. at 130-131.

But there was a second independent reason to charge that lesser offense. Even if the jury believed that defendant had the weapon before the incident and grabbed it and shot Coulanges as the result of Coulanges attacking him without a weapon, the second Carrero rationale would have nevertheless applied: that Coulanges committed a battery against defendant, to which defendant over-

[14] Carrero could not be clearer that when requested and supported by a rational basis in the evidence, the lesser offense of passion/provocation manslaughter must be instructed "even if the instruction is inconsistent with the defense theory." 229 N.J. at 228 (emphasis added).

responded in self-defense and shot Coulanges. 229 N.J. at 130-131. As noted in the Statement of Facts, there was evidence, again from defendant's statement, that Coulanges had previously threatened defendant more than once, even vowing to shoot him, and that he was banging on the front door when he arrived, telling defendant to come outside so they could "handle this," whereupon he immediately rushed defendant and engaged in a struggle with him. As the Carrero Court noted, battery -- via a "physical struggle" as in Carrero, or via a punch or other infliction of injury, like in Robinson, 136 N.J. at 492; Blanks, 313 N.J. Super. at 72; Mauricio, 117 N.J. at 414; and Castagna, 376 N.J. Super. at 358-359 -- may constitute adequate provocation to allow the jury to reduce murder to passion/provocation manslaughter even when the defendant uses a deadly weapon and the decedent is unarmed. Carrero, 229 N.J. at 130-131.

As noted, while Blanks, Robinson, and Castagna all involved plain-error reversals for the failure to charge passion/provocation under the much tougher "clearly indicated" appellate standard of Funderburg and Canfield, the instant case, like Mauricio and Carrero, involves the mere "rational basis" test: does the evidence "leave room for dispute," in the words of Mauricio, 117 N.J. at 415, for the jury on the issue of passion/provocation? Of course it does. The jury easily could have found a purposeful or knowing killing and rejected self-defense, but had at least a reasonable doubt that the State nevertheless did not disprove passion/provocation. See State v. Grunow, 102 N.J. 133, 145 (1986)

(assigning the burden of disproving passion/provocation to the State in a murder case). There was ample evidence, from the defendant's statement and elsewhere, that defendant was attacked by the decedent, whether the decedent was armed or not, and that the defendant immediately over-responded by arming himself and shooting the decedent dead. Both of the objective prongs of the Mauricio test were met, and, thus, as in Carrero, the lesser-included-offense instruction on passion/provocation manslaughter should have been given, and the two subjective elements left for the jury to decide. 229 N.J. at 129, citing Mauricio, 117 N.J. at 413. Defendant's murder conviction should be reversed and that count remanded for retrial.

POINT II

THE MODEL JURY CHARGE ON "USE OF FORCE UPON AN INTRUDER" UNDER N.J.S.A. 2C:3-4C WRONGLY TELLS THE JURY THAT WHEN EVALUATING THE REASONABLENESS OF A DEFENDANT'S BELIEF IN THE NEED TO USE FORCE AGAINST AN INTRUDER, THE JURY SHOULD VIEW THE SITUATION AS A "REASONABLE PERSON WITH A DETACHED VIEWPOINT" WOULD VIEW IT, RATHER THAN A REASONABLE PERSON SITUATED AS THE DEFENDANT WAS; THE "DETACHED VIEWPOINT" REQUIREMENT IS NOWHERE IN THE RELEVANT STATUTE AND SHOULD NOT HAVE BEEN INSTRUCTED TO THIS JURY. (NOT RAISED BELOW).

Because it was the defense contention that Terrence Coulanges was an

intruder, who had been previously barred from coming to the property, and who attacked defendant as soon as defendant opened the door, the jury was instructed specifically on so-called "intruder" self-defense as set forth in N.J.S.A. 2C:3-4c. (154-2 to 158-12) The judge delivered the model charge, but, unfortunately, a review of that model charge reveals the presence of a critical sentence that is simply wrong, because it completely misstates the "reasonable person" standard that is used in the statute and the case law. That model charge, used here, tells the jury to view the defendant's actions through a lens of "reasonableness" that would be employed by "an ordinary reasonable person with a detached point of view," rather than as reasonableness is normally measured: by a reasonable person in the same situation. (Da 25; 32T 155-17 to 18) (emphasis added) That error was so potentially critical to the jury's deliberations on the issue of self-defense that its inclusion in this jury instruction constituted plain error, clearly capable of causing an unjust result, and thus, defendant's convictions for murder and possession of a weapon for an unlawful purpose should be reversed and those counts remanded for retrial.

The focus on the reasonableness of an actor's belief or actions related to the justification defense of self-defense in New Jersey has always depended on the jury's "view of what a reasonable [person] would have done under the circumstance" of the case at bar. State v. Colon, 298 N.J. Super. 569, 577 (App. Div. 1997), quoting State v. Bess, 53 N.J. 10, 16 (1968) (emphasis added). "The

reasonableness of the defendant's belief is determined by the jury, using an objective standard of what a reasonable person in the defendant's position would have done at the time the force was used." State v. Josephs, 174 N.J. 44, 101 (2002) (emphasis added), citing State v. Kelly, 97 N.J. 178, 199-200 (1984). There has never been a requirement that the jury view the defendant's beliefs or actions as a "reasonable person with a detached viewpoint," as the model instruction on "intruder" self-defense commands. (Da 25; 32T 156-17 to 18) (emphasis added) Nor does the "intruder" self-defense statute impose such a requirement.

Rather, it has always been the opposite rule: that "[d]etached reflection is not demanded in the face of an uplifted knife." Kelly, 97 N.J. at 198, quoting Brown v. United States, 256 N.J. 335, 343 (1921) (emphasis added); see also State v. Bryant, 288 N.J. Super. 27, 34 (App. Div. 1986) (same). Indeed, the statute in question states that the use of force toward an intruder is "justifiable" when the actor merely "reasonably believes that the force is immediately necessary for the purpose of protecting himself . . . against the use of unlawful force by the intruder on the present occasion." N.J.S.A. 2C:3-4c(1) (emphasis added). Further, the statute states that a "reasonable belief exists" if the actor was in his or her own dwelling and the encounter was "sudden and unexpected, compelling the actor to act instantly," N.J.S.A. 2C:3-4c(2), and that the actor must have "reasonably believed that the intruder would inflict personal injury"

upon someone in the dwelling. Id.

None of that quoted language implies that the "reasonableness" of an actor's beliefs or conduct is to be measured "by how an ordinary reasonable person with a detached viewpoint would view it." Yet that is exactly what this jury was told. (32T 156-17 to 18; Da 25) Rather, the terms "reasonable" and "reasonably believed" are commonly used terms that should "be given their generally accepted meaning," N.J.S.A. 1:1-1; State v. Lopez-Carrera, 295 N.J. 596, 613 (2021), not interpreted to graft onto the definition of reasonableness that it must be viewed through the lens of a "person with a detached viewpoint." In fact, with respect to this very statute governing "intruder self-defense," the Court in State v. Bass, 224 N.J. 285, 321 (2016), has said that the terms used in the statute are to be given "their ordinary and accepted meaning."

More specifically, this "intruder" self-defense subsection of the statute was clearly intended to loosen the requirements for self-defense against an intruder in a dwelling, not tighten them, because, as further noted by the Court in Bass, 224 N.J. at 322, and also in State v. Bilek, 308 N.J. Super. 1, 11 (App. Div. 1998), the "intruder" self-defense portion of the statute, N.J.S.A. 2C:3-4c, allows the use of deadly force in a dwelling against an intruder who merely threatens ordinary bodily injury, not serious injury, whereas the general rules of self-defense contained elsewhere in N.J.S.A. 2C:3-4 require that a person be threatened with serious injury before using deadly force. Yet the model

instruction for ordinary self-defense correctly defines a "reasonable belief' as "one which would be held by a person of ordinary prudence and intelligence situated as this defendant was" (Da 20) (emphasis added), whereas the more-liberal "intruder self-defense" has a model instruction, given here, that erroneously demands that reasonableness of the defendant's beliefs or actions be made "by how an ordinary reasonable person with a detached viewpoint would view it." (Da 25) (emphasis added)

It would not make a shred of sense -- in the face of a statute that is clearly intended to loosen self-defense requirements against an intruder, and which uses ordinary, commonly accepted terms like "reasonable" and "reasonableness" – for the "intruder" self-defense statute to be interpreted in a manner that grafts a "detached viewpoint" requirement onto a jury evaluating the defendant's "reasonableness." People who are confronted with "sudden and unexpected" encounters with an intruder in a dwelling that "compel[] the actor to act instantly," N.J.S.A. 2C:3-4c(2), are no more required to think or act like a person with "detached reflection" in such a situation than any other person acting in self-defense. To hold otherwise would make a mockery of both the statutory language, which says nothing about "a detached viewpoint," and of a long history of cited case law -- e.g., Kelly, 97 N.J. at 198, quoting Brown v. United States, 256 U.S. at 343, and Bryant, 288 N.J. Super. at 34 (App. Div. 1986) (same) -- that has never required such "detached reflection" for ordinary

self-defense, let alone for a more liberal version of self-defense such as is present in the statute at issue.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015); State v. Concepcion, 111 N.J. 373, 379 (1988) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial"). "[T]he trial court has an absolute duty to instruct the jury on the law governing the facts of the case." State v. Butler, 27 N.J. 560, 595 (1958). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations. Thus, the court must explain the controlling legal principles and the questions the jury is to decide." State v. Martin, 119 N.J. 2, 15 (1990). Moreover, a trial judge must depart from the model instruction where doing so is critical to preserving a defendant's right to a fair trial. That obligation requires tailoring the legal definitions in a jury instruction to the demands of a case, see Concepcion, 111 N.J. at 379 (manslaughter conviction reversed when explanation of "recklessness," which was critical in that case, did not explain the concept in light of the unusual facts); State v. Gartland, 149 N.J. 456, 475-476 (1997) (defendant's manslaughter conviction reversed, because of plain error, when the jury instruction on the duty of retreat in a self-defense situation was not tailored to the facts of that case to explain how that duty might have applied in those

specific factual circumstances), but more obviously requires a judge not to use a model instruction that is so obviously wrong as this one is. Instructional errors on essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. State v. Rhett, 127 N.J. 3, 5-7 (1992); Concepcion, 111 N.J. at 379. Nothing could be more worthy of plain-error reversal than convictions that are directly affected by the error in question. Defendant's convictions for murder and possession of a weapon for an unlawful purpose -- both of which were fully intertwined with the concept of self-defense -- should be reversed, and those counts remanded for retrial. This erroneous and prejudicial instruction should never be given in a criminal trial.

POINT III

THE JUDGE IMPROPERLY RULED, IN CONTRAVENTION OF N.J.R.E. 701 AND STATE V. MCLEAN, THAT A DETECTIVE COULD OFFER HIS LAY OPINION TO THE JURY THAT CERTAIN SOCIAL-MEDIA POSTS BY DEFENDANT WERE THREATENING TO THE DECEDENT WHILE THE DECEDENT APPEARED, IN HIS SOCIAL-MEDIA RESPONSES, TO BE "TRYING TO KEEP THE PEACE." (RULINGS AT 25T 31-1 TO 4; 25T 32-6 TO 10)

Detective Sidorski testified that there are social-media posts that show defendant and Coulanges communicating with one another. (25T 29-10 to 30-1) In those posts, from the summer of 2017, Coulanges would ask for the return of

certain personal items, like "clothes," and Sidorski testified, over repeated defense objection, that he perceived defendant's responses to be "confrontational" and to contain "threat[s]," and even a reference to "a prior assault," while Coulanges was "more trying to keep the peace, just being more easygoing."[15] (25T 30-6 to 32-14; 25T 66-2 to 18; 25T 40-10 to 43-9) Defense counsel specifically objected that the social-media posts "speak for themselves," that "[w]e don't need an interpretation from this witness," and that the jurors should be free to "form their own opinion" of what the various intents of

[15] Examples of statements by defendant that Sidorski told the jury were threatening or, in one instance, "evidence of a prior act of assault," are: (1) "[B]e careful not to offend the wrong one. That's what you continuously did, and if there's no amends, someday there will be ramifications. Good luck in life, but unlike what you disrespectfully said to me a few years ago, you're not going to need luck, and I say that sincerely" (25T 32-19 to 24); (2) "All the false, irrational comments you made will not be forgotten. Refer to the earlier quote[:] do not offend the wrong one without amends" (25T 33-10 to 13); (3) "You feel entitled but who are you? You got multiple personalities and act according – according different to who you around [sic], but I'm done talking. I'll see you around. You should off the wrong one without amends, and I shouldn't have had to written that three times. The obliviousness will continue" (25T 33-18 to 23); (4) When I knocked you down, you got up and said no one ever hit me that hard. I needed that. Then a month later denied saying that and claimed the only reason you went down was you were still on drugs. All these situations could have been prevented" (25T 34-17 to 21); and (5) "Doug got killed recently. His own brother shot him in the head. Google Piscataway shooting. Something to ponder upon." (25T 35-3 to 5) Sidorski also testified that the following post by Coulanges to defendant exhibited an attempt "to defuse [spelled "diffuse" in the transcript] what is being written to him" by defendant: "Both times I reach out to you with normal energy just seeking out and twice you responded with negativity trying to put me in a child's place when I'm a grown man. Why was that[?] And you lash me with things from the past like you're a saint. You're not, bro, so stop trying to judge me." (25T 37-5 to 10)

defendant and Coulanges were in those posts. (25T 30-23 to 25; 25T 31-22 to 32-1) But the judge overruled the objections, holding that it was a proper line of inquiry (25T 31-1 to 4), and that he was not going to "instruct counsel how to present [his] case and tell him what to do and not to do." (25T 32-6 to 10) Later, the prosecutor specifically argued to the jury in summation that Sidorski's opinion regarding the threatening nature of defendant's posts should be taken into account when rendering a verdict. (32T 62-14 to 22)

Because, in fact, defense counsel was absolutely correct that lay opinion testimony regarding defendant's or Coulanges' supposed intent in their social-media posts was not remotely admissible under N.J.R.E. 701, and because the erroneous admission of that testimony was cited by the prosecutor to the jury as a reason to convict and, thus, was not harmless beyond a reasonable doubt, defendant's convictions should be reversed, and the matter remanded for retrial. Defendant's Fourteenth Amendment and state-constitutional rights to due process and a fair trial were violated.

N.J.R.E. 701 provides: "If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." That rule has been clearly interpreted in State v. McLean, 205 N.J. 438, 457-458 (2011), to only allow a "narrow" category of lay opinion: that which will "assist

the trier of fact by helping to explain the witness's testimony or by shedding light on the determination of the disputed factual issue"; moreover, it is specifically "limit[ed] to the perceptions of the testifying witness." Id. McLean held that it went beyond that narrow area of permissible lay opinion for an officer to testify that he believed he had witnessed a drug deal. Id. at 461. The Court held that the construction of the "perception" requirement is strict: lay opinion is admissible only if it is "firmly rooted in the personal observations and perceptions of the lay witness in the traditional meaning of the [sic] N.J.R.E. 701," id. at 459. Citing State v. Labrutto, 114 N.J. 187, 199-200 (1989), the McLean Court defined the "perception" requirement as "rest[ing] on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell, or hearing." (Emphasis added). Consequently, the Court in McLean stated that permissible lay opinion testimony is "an ordinary fact-based recitation by a witness with firsthand knowledge," and does not convey information about what the officer 'believed,' 'thought,' or 'suspected.'" Id. at 460 (emphasis added); see also State v. Derry, 250 N.J. 611, 632-634 (2022) (lay opinion under N.J.R.E. 701 by an FBI agent -- about the meaning of slang terms used in a conversation in which he did not participate -- was improper under McLean because it was not based on perception, but instead on the officer's belief or understanding); State v. Hyman, 451 N.J. Super. 429, 450-452 (App. Div. 2017) (same as Derry).

There can be no doubt that asking Detective Sidorski what he thought

defendant or the decedent intended when posting to social media was clearly violative of N.J.R.E. 701. It was indisputably error for the judge to allow that testimony, and it is reversible error because it may have affected the jury's view of the case, particularly when relied upon in summation by the State, as noted. The whole point of the State's case was to paint defendant as someone who deeply disliked Coulanges, who was threatening him, and who, in order to carry out those threats, lured him to his death. This evidence may well have helped "sell" that theory to the jury by putting Detective Sidorski's thumb on the evidentiary scale on an issue that should have been entirely the jury's to figure out without the help of improper opinion from a high-ranking detective.

Reversal of the resulting convictions is necessarily required where, as here, the error potentially tips the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021), citing State v. Scott, 229 N.J. 468, 484-485 (2017) (errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's resulting convictions should be reversed and the matter remanded for retrial.

POINT IV

THE JUDGE VIOLATED N.J.R.E. 608(B)(1) WHEN HE BARRED DEFENSE COUNSEL FROM EXPLORING ON CROSS-EXAMINATION OF THE STATE'S JAILHOUSE-INFORMANT WITNESS THAT THAT WITNESS HAD PREVIOUSLY FALSELY ACCUSED SOMEONE OF MURDER. (RULING AT 28T 173-7 TO 8)

As noted in the Statement of Facts, State witness Barrick Wesley was a jailhouse informant, a.k.a. "snitch," who testified against many fellow inmates over his career as a criminal. Most notable among those cases is his 2008 testimony against a man named Taron Hill, who was convicted, in part, based on Wesley's testimony against him, but then exonerated when the New Jersey Attorney General's Conviction Review Unit deemed Hill to be innocent of that crime, after which Hill was released as wrongfully convicted.[16] In other words, there is strong evidence -- from no less than the Attorney General's exoneration of Hill -- that Barrick Wesley provided testimony falsely accusing Hill of

[16] The exoneration of Taron Hill by the New Jersey Attorney General is a matter of public record and an undisputed fact. A Google search for "Taron Hill New Jersey exoneration" will lead to multiple news stories on release of Hill and his exoneration by the Attorney General. The Hill case is also listed in the University of Michigan's database of notable after-the-fact exonerations. After Hill's trial, Barrick Wesley later recanted his testimony against Hill, and then tried to "un"-recant it, claiming he was telling the truth against Hill all along and had initially recanted under duress. (28T 173-17 to 193-13; 28T 202-20 to 203-9) The Attorney General obviously believes Wesley lied in his testimony against Hill, or they would not have exonerated Hill.

murder. Thus, defense counsel, in cross-examining Wesley, sought to question Wesley about the fact that Hill had been exonerated, and that Wesley had, in the words of N.J.R.E. 608(b): "made a prior false accusation against any person of a crime similar to the crime with which defendant is charged."

Initially, when the matter was first discussed, the judge had indicated that he intended to give defense counsel free rein in cross-examining Wesley about the Hill matter, which obviously would include the exoneration. (23T 8-18 to 15-11) The judge even viewed the Hill exoneration to be such a matter of public record that he denied a defense application to have the Attorney General provide specific confirmation of the exoneration. (23T 13-24 to 15-11) But when Wesley was on the stand testifying in front of the jury, the State suddenly objected to any mention of the exoneration in cross-examination of Wesley (28T 169-7 to 170-17), stating specifically: "[M]y concern is that on questioning Mr. Wesley about the recantation and how it resulted in a back-ature [sic] of the conviction on Taron Hill will plant the seed in the jury's mind that his testimony is falsely going to convict Ryan Keogh" -- to which defense counsel replied that that was "exactly" the whole point of allowing cross-examination which would indicate that Wesley previously falsely accused someone of murder. (28T 170-13 to 18) The judge sided with the State and told defense counsel to "stay away" from the exoneration of Hill when cross-examining Wesley. (28T 173-7 to 8)

Because the judge clearly erred under N.J.R.E. 608(b) in barring cross-

examination of Wesley regarding the exoneration of Taron Hill -- which would have proved that Wesley falsely accused Hill of murder -- and because that cross-examination was critical to confronting Wesley's accusatory testimony against defendant, not only was N.J.R.E. 608(b) violated, but so were defendant's Sixth Amendment and state-constitutional rights to confrontation and his Fourteenth Amendment and state-constitutional rights to due process. Consequently, defendant's resulting convictions should be reversed and the matter remanded for retrial.

N.J.R.E. 608(b) provides: "The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime which defendant is charged." The rule commands the judge to hold a hearing under N.J.R.E. 104 to determine if the false accusation was made; if so, it is admissible to affect the credibility of the witness. Subsection (b) of the rule was developed as a matter of "eminently good sense," State v. Scott, 229 N.J. 169, 492 (2017) (Rabner, C.J., concurring), in response to the decision in State v. Guenther, 181 N.J. 129, 157-160 (2004), which established similar admissibility of a prior false accusation, as a constitutional matter of confrontation. But Guenther only applied in sex-assault cases; the post-Guenther rule goes further and is intended to apply any time the credibility of a key witness is a "central issue in a criminal case." State v. Terry, 218 N.J. 224, 242 (2014), quoting Guenther, 181 N.J. at 160.

Here, the judge made two mistakes. The first was in not holding a Rule 104 hearing, as required by Rule 608(b), to determine whether Wesley had previously falsely accused someone. But that omission is almost understandable because in this instance the judge clearly did not need a hearing to tell him what he stated that he, the State, and the defense already knew: that Barrick Wesley had accused Taron Hill of murder and that Taron Hill was later exonerated by the highest law-enforcement agency in the state. (23T 13-24 to 15-11) Obviously, Wesley's accusation against Hill was false; the Attorney General said so. But that fact makes the judge's second error more confoundingly impossible to understand: why he then forbade defense counsel from doing what Rule 608(b) clearly allows -- cross-examining Wesley on the fact of Hill's exoneration to prove that Wesley falsely accused Hill of murder.

Simply put, that error was huge in this case. Barrick Wesley was the main State witness used to counter defendant's account of the events of January 9 with Terrance Coulanges. Yes, defense counsel was able to paint a picture for the jury of Wesley as a frequent snitch, but the proof that Wesley was a lying snitch -- willing to lie about a murder case for his own benefit -- was the tale of his testimony against Taron Hill and the resulting exoneration of Hill. By excluding the exoneration part of the story -- and, thus, the proof that Wesley had previously made a false accusation in another murder case -- the judge allowed Wesley and the State to assert, unchecked but completely falsely, that

Taron Hill's case was an example of Wesley accurately testifying for the State. (29T 96-18 to 25) In addition, the prosecutor, through Wesley, was able to make another assertion that went unchallenged as a result of this ruling: that Wesley's testimony against Hill resulted in the Bloods gang putting out a contract on Wesley (29T 103-18 to 105-24) -- as opposed to the far more likely possibility that any feelings of animosity toward Wesley from Hill would be because Wesley lied about Hill and tried to frame him for murder.

The defense wanted to show the jury that what Barrick Wesley did to Taron Hill -- falsely accuse him of murder -- was exactly what he was doing again to defendant in this case. The judge's ruling that improperly prevented the defense from doing just that was reversible error for the simple reason that it potentially affected the jury's consideration of the credibility or evidentiary worth of the State's case. State v. Briggs 279 N.J. Super. 555, 565 (App. Div. 1995); State v. W.L., 278 N.J. Super. 295, 301 (App. Div. 1995); see also State v. Hedgespeth, 249 N.J. 234, 253 (2021), citing Scott, 229 N.J. at 484-485 (errors which improperly exclude admissible evidence which could affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless). Defendant's resulting convictions should be reversed and the matter remanded for retrial.

POINT V

THE COURT SHOULD HAVE GRANTED THE MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT FOUR, ENDANGERING AN INJURED VICTIM, BECAUSE THE STATE ENTERED NO PROOFS TO SHOW THAT THE DECEDENT WAS ALIVE FOR MORE THAN A FEW MOMENTS AFTER BEING SHOT; ALTERNATIVELY, A NEW TRIAL SHOULD BE ORDERED BECAUSE THE JURY INSTRUCTION DID NOT EXPLAIN THAT LEAVING A DECEASED VICTIM IS NOT COVERED BY THAT STATUTE. (ACQUITTAL RULING AT 29T 138-19 TO 139-24; JURY-INSTRUCTION ISSUE NOT RAISED BELOW)

In Count Four, defendant was charged with Endangering an Injured Victim, under N.J.S.A. 12-1.2a. As noted in the Statement of Facts, the defense forensic medical expert testified that Terrance Coulanges would have "bled out" and been dead within just two to three minutes of being shot. (28T 24-15 to 25-5) The State, on the other hand, offered no proofs on that issue, and seemed to incorrectly believe that failing to call 911 for a victim that appeared to have died immediately nevertheless satisfied the elements of N.J.S.A. 12-1.2a. (29T 135-19 to 136-5) The defense moved for an acquittal at the close of the State's case under State v. Reyes, 50 N.J. 454 (1967) (29T 133-22 to 25), and the judge denied the motion without giving any reasons other than to say that the State presented sufficient proofs on all counts. (29T 138-19 to 139-24) Then, when the jury was instructed on Count Four, the jurors were not told the rule of State

v. Moon, 396 N.J. Super. 109, 116-117 (App. Div. 2009), that failing to call help for a deceased victim does not satisfy the elements of that crime, despite the fact that a deceased victim is technically "incapacitated" and "helpless." (32T 170-1 to 173-5) No objection was made to that omission.

Two errors were committed here, and defendant raises them both, the second as an alternative to the first. First, the Moon rule is clear: leaving a dead victim behind does not satisfy the statute. The judge should have acquitted defendant of this count. Failing to do so denied defendant his Fourteenth Amendment and state-constitutional rights to due process. Defendant's conviction for Count Four should be reversed and a judgment of acquittal entered on that count. Alternatively, even if somehow the evidence could be viewed to allow the State's proofs to survive an acquittal motion, the jury instruction on Count Four was grossly deficient in not explaining the rule of Moon to the jury in a case where the jury easily could have found as a fact that Coulanges died immediately. Defendant's rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution were denied by that omission. If somehow the State's proofs survive the acquittal issue, defendant's conviction for Count Four should be reversed as a matter of plain error on the jury-instruction issue and that count remanded for retrial.

The constitutional guarantee of due process is violated if, when the

State's proofs on a particular crime are viewed in a light best for the State, those proofs do not support a guilty verdict on all elements of that crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979); Reyes, 50 N.J. at 459. The decision in Moon could be no clearer: in order to survive a judgment of acquittal in a prosecution under N.J.S.A. 2C:12-1.2a, "the State must introduce evidence that would permit the jurors to find that the victim was alive and 'physically helpless, mentally incapacitated or otherwise unable to care for himself' and that the defendant left the scene of the injury knowing or reasonably believing that the victim was in that condition." 396 N.J. Super. at 117 (emphasis added). Here, not only did the State not enter any such evidence, they appeared in their argument on the Reyes motion to accept the conclusion of the defense expert that Coulanges died within two to three minutes at most. (29T 135-22 to 24) The State (and the judge) just did not seem to realize that it mattered that Coulanges was dead and that calling for help would not have done a thing; in other words, they appeared not to know about Moon. Obviously, under Moon, the State and the judge were wrong. Defendant's conviction for Count Four should be reversed under Moon, and a judgment of acquittal entered on that count.

Alternatively, the jury could not possibly properly deliberate on the facts of this case without knowing the Moon rule, but the jury instruction told them only to find whether Coulanges was left helpless or incapacitated, failing to

inform the jurors that a dead victim does not fall under those statutory terms. (32T 170-1 to 173-5) As noted in Point II, supra, "[a]n essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. McKinney, 223 N.J. 475, 495 (2015); State v. Concepcion, 111 N.J. 373, 379 (1988). Moreover, a trial judge must depart from the model instruction when doing so, as here, is critical to preserving a defendant's right to a fair trial. That obligation requires tailoring the legal definitions in a jury instruction to the demands of a case. Concepcion, 111 N.J. at 379; State v. Gartland, 149 N.J. 456, 475-476 (1997); State v. Martinez, 229 N.J. Super. 593-601-604 (App. Div. 1989). Instructional errors on such essential matters, even in cases where those errors are not raised below, are traditionally deemed prejudicial and reversible error because they interfere with the jury's proper assessment of the defendant's culpability. Id.; State v. Rhett, 127 N.J. 3, 5-7 (1992); Concepcion, 111 N.J. at 379. This jury could not possibly fairly return a verdict on Count Four without determining whether Coulanges had died immediately after being shot, as the defense expert testified he had, and as the State appeared to concede, but they had not a clue that a dead victim is not an incapacitated one under Moon. That omission was plain error and warrants a reversal of the conviction for Count Four and a remand for retrial if defendant is not acquitted of that count based upon the primary argument in this point.

POINT VI

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE AND A RESENTENCING REMAND IS REQUIRED. (RULINGS AT DA 10 TO 14; 36T 98-18 TO 102-11; 37T 4-16 TO 7-24)

The trial judge imposed an aggregate sentence of 53 years, 42.5 years without parole consisting of two consecutive terms -- a 50-year/85%-without-parole sentence for murder, followed by a mandatory consecutive term of three years for endangering an injured victim -- plus $10,115.16 in restitution. (Da 10 to 14; 36T 98-18 to 102-11; 37T 4-16 to 7-24) Three distinct problems with that sentence exist, each requiring a remand for resentencing.

First, defense counsel proposed multiple mitigating factors in a sentencing letter to the court (Da 27; 36T 83-15 to 16), and, in direct contravention of State v. Case, 220 N.J. 49, 69 (2014) (sentencing court is "obliged to give reasons for rejecting those mitigating factors brought to its attention), the judge did not individually address any of the five of them that he rejected; he simply said no. (36T 99-19 to 23) Indeed, when he changed the parole bar from 30 to 42.5 years, he also gave no real reasons for doing that. (37T 4-16 to 7-24) Case makes it clear that the proper remedy for such a violation of basic sentencing protocol is a remand for resentencing, which should be ordered. Id. at 65-69.

Second, recently the Supreme Court twice has made clear that above and beyond a finding and balancing of aggravating and mitigating factors, every

sentencing decision must make clear why the judge independently believes the overall length of the term imposed is warranted. State v. Cuff, 239 N.J. 321, 347-352 (2019); State v. Torres, 246 N.J. 246, 270 (2021). Yet the judge said nothing about why he believed incarcerating defendant for 53 years, 42.5 without parole -- as opposed to a shorter term -- on his first adult offense was warranted. A Torres/Cuff remand is, thus, warranted as well.

Finally, over $10,000 of restitution was imposed with no finding that defendant has an ability to pay it. N.J.S.A. 44-2b(2), another reason for a resentencing remand.

CONCLUSION

For all of the reasons set forth in Points I through IV, the defendant's convictions should be reversed and the matter remanded for retrial. For the reasons in Point V, the conviction for Count Four should be reversed and an acquittal should be entered on that count or, alternatively a new trial ordered. Alternatively, for the reasons in Point VI, the matter should be remanded for resentencing.

Respectfully submitted,

Joseph E. Krakora
Public Defender
Attorney for Defendant-Appellant

BY: /s/Stephen W. Kirsch
STEPHEN W. KIRSCH
Designated Counsel
Attorney I.D. No. 034601986

Date: July 13, 2023

FILED, Clerk of the Appellate Division, August 01, 2023, **A-000565-22**

Ryan Keogh
New Jersey State Prison
Post Office Box-861
Trenton, New Jersey 08625

STATE OF NEW JERSEY
Plaintiff

V.

RYAN KEOGH
Defendant

SUPERIOR COURT OF NEW JERSEY
SOMERSET COUNTY LAW DIVISION
IND. NO.

CRIMINAL ACTION

APPELLANT PRO-SE BRIEF AND APPENDIX

Ryan Keogh
New Jersey State Prison
Post Office Box-861
Trenton, New Jersey 08625

TABLE OF CONTENT

TABLE OF APPENDIX

LEGAL ARGUMENT

POINT-I

DEFENDANT'S FUNDAMENTAL RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS VIOLATED WHEN THE PROSECUTOR WITHHELD VIABLE IMPEACHMENT MATERIAL CONTRARY TO BRADY V. MARYLAND, 373 U.S. 83, (1963)

As noted by the trial court, the testimony of State's witness Barrick Wesley is major factor in the prosecution's theory of the case. Barrick Wesley was an inmate at Somerset County Jail. He reached out to the Prosecutor's Office and claimed he had information in the Ryan Keogh case. Wesley claimed he obtained information through multiple conversation with defendant. Wesley claimed to have spoken to defendant almost every day, sometimes for five minutes, sometimes for more than an hour, from the third week of February 2020 until March 25, 2020, while both men were inmates at the Somerset County Jail. (28T84-14 to 22) Wesley wrote a letter to the prosecutor in late February 2020 offering to provide information against defendant in exchange for a benefit to his own case. On March 9, 2020, Wesley gave his first statement to law enforcement.

Following a trial by jury defendant was found guilty of first degree murder. Prior to sentencing the defendant discovered that the Somerset County Prosecutor's Office did not provide evidence that Barrick Wesley had accused

three innocent men of murder in three separate cases. The State's failure to disclose such powerful impeachment material was a direct violation of Brady v. Maryland, 373 U.S. 83 (1963)

To prove a Brady violation a defendant must show, 1.) the evidence at issue is favorable to the accused either because it is exculpatory or because it is impeaching, 2.) the evidence must have been suppressed by the State either willfully or inadvertently, and 3.) Prejudice must have ensued. Dennis v. Secretary, Penns. of Dept. of Corr., 834 F. 3d 263 (3rd Cir. 2016);

Here the evidence at issue is favorable because it is impeaching in nature. In State v. Feaster, 156 N.J. 29, a death penalty case, Barrick Wesley tried to frame Herrill Washington for the murder of a gas station attendant. Wesley, claimed while he was in Salem County Jail on unrelated charges, on October 5, 1993, Herrill Washington confessed to him that he did the gas station robbery and he shot the clerk in the face and killed him. However, it was later determined that Richard Feaster was responsible for the gas station killing. Barrick Wesley falsely accused Herrill Washington of murder. The State failed to disclose this potent impeachment material. 156 N.J. 29 (1998)

In August 2022, four months after the conclusion of defendant's trial, the Somerset County Prosecutor's office provided defense counsel with additional discovery. Specifically, a 1990 Essex County Murder case, State v. Rodney

Lance, In that case, Barrick Wesley provide information and testified against Lance, who was found "Not Guilty" of Murder. The State also failed to disclose this impeachment material.

Lastly, the Somerset County Prosecutor's Office excluded discovery regarding the Final Disposition of State v. Taron Hill, a Camden County double murder case in which Barrick Wesley claimed he had information against Taron Hill. Hill was eventually convicted of the Double Murder but later exonerated by the New Jersey Attorney General. It was determined that Hill was innocent of the double murder.

These three instances of Barrick Wesley testifying for the State is most certainly favorable to defendant as powerful impeachment material. It proves a consistent pattern of behavior on the part of Barrick Wesley, wherein he claims to have credible information against a defendant in a murder case and in exchange for his testimony he seeks favorable treatment. After he gains said favorable treatment, it is later determined that Wesley falsely claimed to have credible firsthand information against these defendants and they are either exonerated or found not guilty. Here, defendant has satisfied the first prong of the Brady Test.

The Prosecuting Attorney was aware of this impeachment material and was obligated to disclose these three instances of Barrick Wesley's cooperation. Instead, the prosecuting attorney either willfully or inadvertently suppressed it. Thus satisfying the second prong of the Brady Test. Dennis v. Sec., Penns. of

Dept. of Corr. 834 F. 3d 263 (3rd Cir. 2016) Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936; The duty to disclose under Brady is absolute it does not depend on defense counsel's actions. United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392; Brady's mandate and its progeny are entirely focused on prosecution disclosure, not defense counsel's diligence. Id. Prosecutors have a special obligation to ensure that the testimony they elicit from witnesses is honest and accurate. This includes a responsibility to disclose to the defendant any evidence that may be used to impeach a government witness. State v. Carter, 91 N.J. 86, 111 (1986); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

In December 2019, the Attorney General reiterated these requirements in Law Enforcement Directive 2019-6 (the Statewide Brady-Giglio Directive), which mandated that each County Prosecutor's Office establish policies to ensure compliance with discovery obligations under Brady and Giglio. The Attorney General as Chief Law Enforcement Officer of the State in order to secure the benefits of a uniform and efficient enforcement of the law and the administration of Criminal Justice throughout the State, directed all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the procedures outlined in Direct 2019-6

Da-1 Specifically, one of the procedures outlined in Directive 2019-6 is found in section 5 which states:

> "**Any known prior testimony by informant.** The case name and jurisdiction of any criminal case known to the prosecution team in which the jailhouse informant testified (or a prosecutor intended to have the informant testify) about statements made by another suspect or criminal defendant while detained or incarcerated, and whether the jailhouse informant was offered or received any benefit in exchange for or subsequent to such testimony".

Here, the Somerset County Prosecutor's Office did not only violate Brady-Giglio, it also violated the Attorney General's Directive when it failed to disclose potent impeachment material that demonstrates a consistent pattern of unreliable information provided by Barrick Wesley in High-Profile cases. Thus, satisfying the second prong of the Brady Test.

Defendant suffered actual prejudice from the prosecutor's failure to disclose this impeachment evidence. As noted by the trial court, the testimony of State's witness Barrick Wesley is a major factor in the prosecution's theory of the case.

Had the prosecutor disclosed Wesley's prior testimony the jury would have heard the Wesley provided false information against Herrill Washington in the gas station homicide. The jury would have heard, while Wesley was in the County Jail he spoke to Washington over the phone, and Washington told him he was response for the gas station shooting. See State v. Feaster, 156 N.J. 29(1998); However, further investigation revealed Richard Feaster was responsible for the gas station shooting. When Feaster discovered that Wesley provided this false information against Washington, Feaster's attorney called Wesley as a witness in the defense case to advance a third party guilt defense. The jury did not believe Wesley's testimony and convicted Richard Feaster of murder and sentenced him to death.

Had the prosecutor disclosed Wesley's prior testimony the jury would have heard, that Wesley provide information against Rodney Lance in an Essex County murder case. The jury would have heard, while Wesley was in the County Jail he reached out to the prosecutor's office and became a witness against Rodney Lance. However, Wesley testimony was not reliable in the Rodney Lance matter and the jury acquitted Lance in that Murder case.

Had the prosecutor disclosed Wesley's prior testimony the jury would have heard, that Wesley provided information against Taron Hill in a Camden County double murder case. The jury would have heard, while Wesley was in the County Jail he reached out to the Camden County Prosecutor's Office and became a witness against Taron Hill. Ultimately, Taron Hill was convicted of the double murder. Upon appealing his case the New Jersey Attorney General's Conviction Review Unit, exonerated Taron Hill and determined he was wrongfully convicted. During the course of the Attorney General's review it was discovered that Wesley provided an affidavit detailing how he provided false information against Taron Hill and others in exchange for favorable treatment in his own case.

Barrick Wesley has demonstrated a consistent pattern of behavior where he provides false information in exchange for favorable treatment from county prosecutors. In the three cases the prosecutor failed to disclose Wesley false accused three innocent men of committing murder. Such powerful impeachment material would have penetrated the credibility of Barrick Wesley testimony. But for the false testimony he provided in the circumstances before the court there is a reasonable likelihood that the jury would have returned a verdict of justifiable homicide, self-defense, or passion provocation manslaughter.

For the foregoing reasons defendant's conviction must be reversed and the matter be remanded for a new trial.

CONCLUSION

For the foregoing reasons defendant's convictions must be vacated and matter remanded for a new trial.

Respectfully submitted,

Dated: 7/14/2023

Ryan Keogh

THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-00565-22T1

STATE OF NEW JERSEY,	:	
	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
	:	
v.	:	On Appeal from a Final Judgment
	:	of Conviction of the Superior
RYAN D. KEOGH,		
a/k/a RYAN KEOGH,	:	Court of New Jersey,
	:	Law Division, Somerset County.
Defendant-Appellant.	:	
		Sat Below:
		Hon. Peter J. Tober, P.J.Cr.,
		and a jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

JOHN P. MCDONALD
SOMERSET COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

EMILY M. M. PIRRO, ATTORNEY NO. 197602017
ASSISTANT PROSECUTOR
OF COUNSEL AND ON THE BRIEF
SOMERSET COUNTY PROSECUTOR'S OFFICE
40 NORTH BRIDGE STREET
POST OFFICE BOX 3000
SOMERVILLE, NEW JERSEY 08876
TELEPHONE:(908) 231-7100
EMAIL: epirro@co.somerset.nj.us
E-Filed: September 14, 2023

TABLE OF CONTENTS

INDEX TO THE APPENDIX

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State adopts defendant Ryan Keogh's recitation of this case's procedural history. (Db1-2).[1]

COUNTER-STATEMENT OF FACTS

On January 9, 2019, at approximately 7:36 p.m., police were dispatched to 142 Farm Lane in Bound Brook on a report of shots fired in a home invasion, and an injury to the intruder. (17T:193-8 to 198-17; 18T:26-17 to 30-19, 68-23 to 73-25). Police responded accordingly, and when they arrived, they found Cindy Keogh[2] standing at the end of the driveway. The property contained a main house and a separate carriage house. When Cindy told the responding officers that her husband and son were inside the main house, police asked her to call them and ask them to exit the home with their hands up. David Keogh and defendant complied. When defendant exited the home, officers observed that he was "very calm." Defendant also told the responding officers that an intruder was in the backyard, by the carriage house, that he was still in possession of a weapon, and that the intruder was shot in the stomach. Ibid.

Officers then proceeded to approach the carriage house. (17T:198-18 to

[1] The State adopts defendant's citation conventions (Dbiv-v, 1 n. 3).
[2] Cindy, David, and Ryan Keogh all share a last name. Defendant Ryan Keogh will hereinafter be referred to as "defendant" while Cindy Keogh and David Keogh will be referred to via their first names to avoid confusion.

211-9; 18T:30-20 to 42-23; 74-1 to 81-23). Police found the prone body of Terrance Coulanges lying on the porch, face down, with one hand tucked beneath his body. Beside him, within reach, was a gun with an ejected magazine. Police reacted to what was – as far as they knew – an active shooter and demanded that Mr. Coulanges show them his hands with their guns drawn and aimed at Mr. Coulanges. He did not respond. After one officer kicked the gun away from Mr. Coulanges' body, the other officers proceeded to handcuff him. When they rolled Mr. Coulanges over, they realized he was nonresponsive and was not breathing. They began to administer CPR, and continued to do so until an ambulance arrived. Ibid.

There was no blood visible before rolling Mr. Coulanges over. (18T:10-19 to 20; 12-22 to 4; 38-19 to 39-24). What blood there was did not appear in any notable quantities until they ripped open Mr. Coulanges' shirt and saw a gunshot wound in his chest. Ibid. Mucous was coming out of Mr. Coulanges' mouth and nose when he was rolled over, as well. (18T:38-22 to 39-4). Although the January air was cold, one officer observed that Mr. Coulanges' body was warm to the touch. (18T:73-1 to 4; 82-9 to 13).

The Keoghs were transported to the police station to give formal

statements; defendant was Mirandized[3] and questioned twice. (21T:110-15 to 148-22, 164-16 to 22T:205-18). In his first statement, defendant interrupted his Miranda warnings to launch into his story—indeed, Detective Randy Sidorski had to stop defendant from continuing in order to Mirandize him. (21T:111-14 to 114-24). Defendant immediately told Detective Sidorski the moment the interview began that Mr. Coulanges was "somebody who's always homeless. He always had no place to go. I always took him in. We had problems. He had altercations with my father. He threatened people—" (21T:111-23 to 112-1).

After allowing Detective Sidorski to continue, defendant claimed that he "always held this guy up," and that Cindy and David had been like Mr. Coulanges' parents. (21T:115-14 to 117-8). He claimed that Mr. Coulanges had "shamelessly" disrespected them, stole from them, and threatened all three Keoghs many times despite the fact that Mr. Coulanges had lived with them for several years. Ibid. Defendant said that Mr. Coulanges had gone missing at one point two years prior, and after returning, Mr. Coulanges had continuously lied and stole from them. He claimed that he parted ways with Mr. Coulanges, and wanted nothing further to do with him. However, two months before the shooting, defendant claimed Mr. Coulanges had come to the house and started

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

talking about guns in a threatening manner. Ibid. Defendant took great umbrage at this, asserting that "if men have to fight, you know, put on some boxing gloves or something, that was my solution," but he claimed that Mr. Coulanges would "always talk about weapons and guns." (21T:116-19 to 23). And, although Mr. Coulanges showed up at defendant's home speaking about a gun in a threatening manner, defendant still claimed to have said, "I don't want anything to do with you, but I wish you well. You know, get the help you need." (21T:117-1 to 8). He told detectives that Mr. Coulanges had recently been in a psychiatric ward, had provoked and harassed defendant, and only wanted Mr. Coulanges to leave him alone. Ibid. Defendant also claimed that Mr. Coulanges had come to the house on two occasions prior to this, but defendant had not answered the door. (21T:117-23 to 118-7).

As for the events of the shooting, defendant claimed that Mr. Coulanges had shown up at the carriage house and banged on the door, demanding that defendant come outside because "we need to handle this." (21T:119-18 to 120-11). Defendant went outside onto the porch and claimed that Mr. Coulanges then "started to pull a gun on me." (21T:120-13 to 19). He claimed that Mr. Coulanges had told him several times in the past that if it came down to it, he would shoot defendant. Ibid. Defendant claimed that he had seen Mr. Coulanges with a gun several years prior; specifically, defendant reported that Mr.

Coulanges told him he had an issue with someone and showed defendant the gun. (21T:122-2 to 18). Defendant claimed he had wanted nothing to do with it. Ibid. So, on the night of the shooting, defendant knew that Mr. Coulanges was reaching for a gun. (21T:123-4 to 124-18). They then "got into some wrestling match" and when defendant "got [his] hand on the gun," he "fired twice defending [his] space." (21T:121-19 to 22). When asked whether defendant had actually seen the gun before starting to wrestle with Mr. Coulanges, defendant said that he only saw Mr. Coulanges to reach to pull something out of his pocket. (21T:123-18 to 126-11). He claimed, however, that it was too dark to tell exactly what it was, but he just "knew" it was a gun because he had seen vague, veiled threats on Facebook that he had surmised were meant for him. Ibid. Nonetheless, defendant claimed they "hadn't talked in a while." (21T:125-15). Defendant claimed the only contact he had with Mr. Coulanges in years were his uninvited visits to the Keogh home. (21T:129-2 to 25).

Defendant claimed that once he saw Mr. Coulanges go for the gun, he tried to throw a punch at Mr. Coulanges. (21T:131-16 to 140-4). Defendant's story changed at this point, however—now he claimed he could see the gun before he grabbed for it. Defendant claimed he overpowered Mr. Coulanges to take the gun away, and had Mr. Coulanges pushed against the outer wall of the carriage house. Ibid. He then fired two shots on instinct, "aiming low."

(21T:133-22 to 25). Defendant said he was "panicked," and ejected the magazine from the gun, dropped the gun, and left Mr. Coulanges on the porch while he went inside the carriage house. (21T:134-1 to 135-15). Defendant then called his mother "around six o' clock," and told her to come home because "it's an emergency." (21T:135-19 to 136-20). He called her again a few minutes later to see how far away she was, and he stated that she was "almost home." Ibid. Defendant initially claimed she got home 15 to 20 minutes later, and when she arrived, he stepped past Mr. Coulanges' body to go to her and tell her "It was self-defense mom. I didn't want this to happen. I – I was protecting us." (21T:136-21 to 138-24). Defendant then claimed that his mother called his father, and told his father to come home. Once his father arrived 20 to 30 minutes later, defendant claimed they called 911. Ibid.

Defendant claimed he took so long to call 911 because he panicked. (21T:138-25 to 140-4). He claimed that he "lost track of time," and then claimed he had not actually called his mother immediately after the shooting. Ibid. Instead, he went inside and watched baseball for a while because "I'm a huge baseball fan, so I wanted to see what was going on." Ibid. Defendant went on to repeat that Mr. Coulanges was on drugs, and claimed that Mr. Coulanges had told him he was diagnosed with schizoaffective disorder after leaving the hospital. (21T:142-11 to 143-7). Defendant claimed, however, that Mr.

Coulanges also had dissociative identity disorder, an entirely separate disorder. Ibid. Defendant further claimed to be scared of Mr. Coulanges because he was a "convicted felon," was "homeless and begging for money," and had "been arrested numerous times." (21T:143-9 to 144-9, 145-5). Defendant ended his statement by saying that the first shot was all he intended to fire, aiming low, and that he did not mean for the second shot to go off. (21T:145-21 to 147-25). Ibid. Notably, defendant was completely uninjured. (19T:28-23 to 30-18, 79-16 to 80-3). There was no sign of a struggle observed at the carriage house, either. (21T:154-22 to 155-2).

Defendant's second statement came later that same night, and in this statement, he was confronted with the issues surrounding his timeline of events. (21T:172-4 to 178-18, 185-13 to 22; 192-15 to 21). Specifically, Detective Sidorski noted that Cindy had told police in her statement that it took her two hours to get home, but defendant had said that he had called her around six, and she had been home 15 minutes later. Ibid. Defendant's response was that he disagreed, and did not think it had been two hours. (21T:172-12 to 17). He claimed that Cindy's "perception of time might have been off." (21T:185-17 to 22). He also said that he prayed before calling his mother, and called her first before 911 because he did not want her to come home to find him in jail. (21T:172-13 to 175-16). Detective Sidorski pressed the issue, saying that it

seemed like the Keogh family had had ample time to get their stories straight. Defendant denied this, and knew he should have called 911 sooner. He continued to insist that he shot instinctively, trying to aim low, and that he felt threatened. Ibid. He also added a new detail, that when Mr. Coulanges had come to the back door two months prior, he was trying to pick the house's locks. (21T:181-1 to 20). He also stated that he did not feel compassion or any desire to get Mr. Coulanges help because he was an intruder and defendant "felt violated." (21T:196-18 to 197-13).

Defendant said multiple times that he felt he did nothing wrong. (21T:182-11 to 184-10). He said that he felt his life was in danger once he saw the gun. When Detective Sidorski reminded defendant that he had initially stated he could not see the gun, defendant now insisted that yes, he had. Notably, he said he would not have felt as threatened if he had not seen the gun, but once he saw it, "it was a different story." Ibid. Defendant again stated, emphatically, that "I'm telling the truth, sir. Somebody came to my property with a gun…" (21T:189-12 to 13). Defendant also claimed that when he shot Mr. Coulanges, they were very close together – approximately two feet apart. (21T:194-15 to 195-9; 22T:208-7 to 21).

Mr. Coulanges was shot once in the leg, and then fatally in the chest, and his death was declared a homicide. (19T:100-10 to 22). There were no abrasions

or injuries to Mr. Coulanges' hands or arms, and there were no drugs or alcohol in his system at the time of his death. (19T:116-6 to 119-4). Defendant's tale of victimhood and tragic heroism in the face of an intruder was soon debunked through several pieces of evidence that the Keoghs had neglected to mention to police.

First, Cindy called 911 at approximately 7:30 p.m. on January 9, 2019. According to the story defendant told police, the shooting had happened soon before the call to 911 – but, as it happens, several neighbors heard two gunshots nearly two hours before Cindy called 911. (17T:9-5 to 12-23, 145-15 to 22; 9T:184-1 to 18). One neighbor had specifically made a note of when she heard the shots: at 5:45 p.m. Ibid.

Cindy's claim that she was far away when her son called to tell her to come home was also false, as another neighbor's home security system captured her vehicle[4] pulling into 142 Farm Lane eleven minutes after the shots were fired, at 5:54 p.m. (20T:10-13 to 16-4). Her SUV then pulls out again a minute later, and then loiters in front of the neighbor's house at 6:04 p.m. It pulls back into 142 Farm Lane at 6:06 p.m. Then, at 6:20 p.m., the SUV leaves 142 Farm Lane again. At 6:52 p.m., a smaller car pulls into 142 Farm Lane, followed by

[4] It is uncontested that the vehicles in the video belong to Cindy and David Keogh.

the SUV at 6:58 p.m. Both vehicles leave again at 6:59 p.m. Both cars return at 7:24 p.m. and stay at 142 Farm Lane until police arrive at 7:37 p.m. Ibid. Mr. Coulanges was laying on the Keoghs' carriage house porch for that entire time. The video of these movements was not recovered until January 14, 2019, several days after the shooting had occurred. (19T:40-19 to 41-25).

Cell phone tracking data was acquired for Cindy, David, and defendant's phones for the night of January 9, 2019. (20T:43-21 to 44-6). This data showed that defendant's cell phone was located in the area of 142 Farm Lane between 5:09 p.m. and 6:09 p.m. (20T:47-21 to 49-13). Defendant's phone was also in the area of his father's workplace, DJK Consulting, at 7:07 p.m. and travels back towards 142 Farm Lane by 7:31 p.m. Ibid. Cindy's cell phone data shows that her phone was at or near 142 Farm Lane between 5:56 p.m. and 6:15 p.m., at DJK Consulting between 6:35 p.m. and 6:45 p.m., and then back at 142 Farm Lane by 7:20 p.m. (20T:51-16 to 52-23). Between 5:13 p.m. and 6:30 p.m. David's phone is at DJK Consulting, but 6:58 p.m. shows his phone being at or near 142 Farm Lane. (20T:53-4 to 54-8). At 7:04 p.m. and 7:06 p.m., David's cell phone is by DJK Consulting, and then goes back to 142 Farm Lane by 7:21 p.m. Ibid. These movements line up with the surveillance videos. David worked roughly three miles – approximately a 10-minute drive – from the family home. (18T:165-20 to 24 179-20 to 24). None of the Keoghs had mentioned anything

about going to DJK Consulting during their statements, let alone that the place even existed. (22T:242-1 to 4).

Additionally, a forensic investigation of defendant's phone from the night in question revealed a call that he had neglected to mention to officers. Specifically, defendant called Otto Bowens, a resident of Pennsylvania, twice, right after he called his mother. (22T:237-8 to 239-10, 249-3 to 250-20). The calls lasted roughly five minutes in total, but defendant then deleted the records of those calls from his phone. Defendant lied about his calls on January 9, 2019, and claimed he only called his mother. Ibid. Otto Bowens later revealed that defendant had called him after killing Mr. Coulanges, to "let him know" that defendant shot Mr. Coulanges. (25T:154-10 to 157-1). This changed the narrative in a significant way. Defendant was no longer an unarmed victim, accosted by Mr. Coulanges in his own home. Defendant admitted on wiretapped calls that he had the gun and lied to police about that fact as well. (23T:71-16 to 72-1). Instead, defendant had been the one to fatally shoot an unarmed visitor.

When police searched the Keogh residence, nothing belonging to Mr. Coulanges was found on the premises, in either the carriage house or the main residence. When police realized the extent of the Keoghs' falsities, and received information that defendant and his parents had visited David's workplace several times after the shooting, they wanted to search the dumpsters located at

DJK Consulting. (18T:161-24 to 167-21; 19T:174-5 to 175-14). However, that search did not occur until January 17, 2019, and the dumpsters at David's workplace are emptied three to four times per week. Thus, by that time, the dumpsters had been emptied and nothing could be recovered from the night in question. Ibid. Mr. Coulanges' family maintains that defendant had a laptop and items of clothing that he had left behind, and which the Keoghs would not return. (22T:215-3 to 9). Notably, when Cindy had reported Mr. Coulanges missing in 2017, and police responded to Mr. Coulanges' bedroom in her house, they observed the laptop in question in his room. (17T:168-13 to 17).

Additionally, though defendant claimed not to have had any contact with defendant since he had moved out in 2017, social-media messages were discovered between the two from before the shooting, and after Mr. Coulanges had moved out. (25T:30-2 to 3). In those messages, defendant warned Mr. Coulanges three times not to "offend the wrong one" without making amends because "someday there will be ramifications." (25T:32-12 to 33-23). Defendant also told Mr. Coulanges "all the false, irrational comments you made will not be forgotten," and that he should not have had to write the line about offending the wrong one three times. Ibid. In those posts, defendant also admits to hitting Mr. Coulanges in the past, a blow that was not reciprocated: "When I knocked you down, you got up and said no one ever hit me that hard. I needed that." (25T:34-

17 to 21).

Most tellingly, defendant said that Mr. Coulanges should "ponder upon" another case in which someone had gotten shot, and told defendant to google it. (25T:35-3 to 5). Mr. Coulanges, in these exchanges, never threatened anyone or even referenced guns, while defendant did. (25T:35-10 to 37-19, 40-10 to 42-18). Mr. Coulanges just repeatedly asked when he can come back to Farm Lane to pick up his property: "Look, I need to get the rest of my things. When can I come get my stuff?" Ibid. Defendant responded that the locks have been changed, and he already FedExed everything to him. Defendant went on to say "This is not one of our traditional debates. This could transcend into an unprecedented place that still could be prevented. Before you write another sarcastic response, think it through." Ibid. Mr. Coulanges then said that defendant needed to calm down, and again referenced that he left clothes at the house, but defendant can keep them; Mr. Coulanges stated he would just work hard to get them back. Ibid. Defendant also googled Mr. Coulanges' name on December 28, 2018, mere days before the shooting. Ibid.

Defendant also claimed in his statement to police that he was struggling with Mr. Coulanges when the gun went off, and was very close to him – within two feet. (21T:194-15 to 195-9; 22T:208-7 to 21). However, the medical examiner determined that this was not possible, as there was no soot or stippling

on Mr. Coulanges' clothes or on his body from the gunshots. (19T:101-7 to 102-7, 119-12 to 120-7).[5] Moreover, there was a bullet hole in the decking of the carriage house porch, and that bullet hole, when analyzed, revealed that the shot was fired at or near a 90-degree angle – perpendicular to the ground. (21T:94-5 to 22). This was not a shot fired at an acute angle, but closer to straight down at Mr. Coulanges. Ibid.

After these acts of deception were revealed, defendant was subsequently arrested on February 14, 2019. (18T:140-16 to 20). In his jail calls with his mother, defendant expressed indignance that Mr. Coulanges' family was angered by their son's death and spoke to the press about it, saying: "I was the one that had the career going. I was the one that was in the movies. I was the one getting things in motion, getting major producers to be there. Nobody cared about him [Mr. Coulanges] to be real." (24T:221-6 to 222-6). He said that the looks Mr. Coulanges' mother gave him were "bothering" him, and he was looking right back at her because "I don't care. I'm sorry. I don't mean to sound unsympathetic. I don't care what she thinks of me … in her mind she thinks her

[5] Defendant's expert testified similarly. While the medical examiner determined defendant had to be at least six feet from the victim, (19T:127-8 to 13), defendant's expert opined that he could have been two to three feet away. (28T:27-18 to 28-24). Either way, defendant's version of events was disproven—he claimed he was actively struggling and wrestling with Mr. Coulanges when the gun went off. Gunpowder stippling had to have been present under those circumstances.

son was this prophetic chosen one, and I'm this big bad guy that ended his life." Ibid.

At trial, Cindy and David both testified on their son's behalf, and they admitted that Mr. Coulanges had always been nice, respectful, and a part of their family. (29T:151-20 to 153-5). Both Cindy and David repeatedly testified that they loved Mr. Coulanges like a son, and that defendant was a brother to him. (29T:148-2 to 148-7, 165-4 to 5, 166-7, 186-12 to 15, 187-1 to 2; 31T:137-6 to 7). They admitted that they had lied about the timeline of events, and the fact that the gun belonged to defendant, not Mr. Coulanges. (29T:163-4 to 176-12; 31T:39-25 to 51-4, 131-15 to 134-9). They claimed that the repeated trips back to David's workplace were because Cindy took defendant to his father's workplace to tell David what had happened, first. Ibid. Then, once they all went back home, defendant declared he was not "ready" to call 911 yet and wanted to go back to tell his parents something else. Ibid. When they went back to David's workplace, he admitted to his parents that he had the gun, not Mr. Coulanges. Cindy then told David and defendant to lie and say that Mr. Coulanges had brought the gun, erroneously believing that it was illegal for defendant to own a gun in his own home. Only then did they go back to Farm Lane to finally call 911. Ibid.

Despite claiming to love Mr. Coulanges, Cindy and David both admitted

that they never once even touched Mr. Coulanges' body in the two hours they left him on the porch. (29T:184-3 to 186-25, 188-13 to 17, 191-12 to 15; 30T:202-22 to 203-7, 31T:47-9 to 17, 181-17 to 184-20). They never checked for a pulse. They did not check for breathing. There was no effort on any Keoghs' part to ascertain whether Mr. Coulanges was alive or dead. Ibid.

Jasmine Garcia came forward to reveal that she had driven Mr. Coulanges to Farm Lane that night, as he had been staying with her. (17T:38-17 to 40-15). She stated that Mr. Coulanges had instructed her to drop him off a block or so away from the house, and was going to collect clothes and belongings from the Keoghs. (17T:56-21 to 66-14, 70-8 to 71-15). He expected to be back later, and told Garcia he would call in a few hours to be picked up; that call never came. Ibid. Garcia had personally searched Mr. Coulanges for drugs and weapons, and had not found anything in his bags or pockets while he was with her. (17T:48-13 to 50-14).

Garcia testified that she observed that Mr. Coulanges was acting strange, in that he would laugh at inappropriate times and mumbled to himself at times. (17T:44-18 to 47-18). He had refused her offer to take him to a behavioral health center, however, and Garcia never feared for her safety or observed any tendency towards violence from Mr. Coulanges at any point. Ibid. Indeed, they were friends, and she had no reservations about him staying with her and no

concerns for her safety at any point, despite any past mental health or substance-abuse issues. (17T:29-14 to 32-7). Garcia testified that she had no worries for her safety with Mr. Coulanges, and no concern for anyone else's safety in his presence on January 9, 2019. (17T:58-13 to 21, 66-2 to 14).

Otto Bowens also testified that he had been angry with defendant for calling him after shooting Mr. Coulanges. (25T:154-10 to 157-22, 197-18 to 21). He said it unnecessarily involved him in defendant's case, and said, "I don't understand why you picked up the phone and called me. Why you ain't call 911?" Ibid. He had given the gun to defendant in 2018, to have defendant dispose of it for him, not to keep for protection. (25T:159-5 to 160-10, 187-15 to 23). Bowens knew Mr. Coulanges as well, as he, defendant, and Bowens had all composed and performed music together in the past. Ibid. Defendant also knew that his cell phone was wiretapped, and scolded Bowens for calling him back on the wrong phone. (23T:50-5 to 51-1, 83-20 to 84-9). Indeed, a second phone number was used over 50 times on February 8, 2019, at the address in Manchester, New Jersey where defendant was staying prior to his arrest. (20T:56-18 to 57-11).

After that recorded telephone conversation, police found defendant's second phone, and tapped that as well, where defendant called Bowens' cousin, complaining that Bowens shouldn't have called him on the tapped line, and

repeatedly asked Bowens' cousin to tell "her,"[6] that defendant was keeping his mouth shut, and to pass that information to Bowens. (23T:69-1 to 9, 73-16 to 23, 74-7 to 79-22, 114-2 to 119-2). This information was corroborated when cell phone data showed defendant's cell phone at or near Bowens' address in Pennsylvania between October 26 and 28, 2018, when Bowens claimed to have given defendant the gun. (20T:55-20 to 25). Bowens identified the gun used on the night of the murder as the same one he gave to defendant. (25T:159-11 to 160-4). Additionally, defendant's fingerprint was found on the gun's magazine. (20T:126-10 to 13).

Defendant also frequently talked about how the police had nothing on him, and could only speculate. (23T: 74-7 to 79-22). In recorded jail calls with his mother, defendant talked about the different phones he had, how he was trying to avoid having his calls tapped, how he did not want to keep some of them around, and claimed there was also a third phone he had used as well, though police never found that number. (23T:129-2 to 3, 143-21 to 144-2, 146-146-14 to 147-11, 149-24 to 150-2; 24T:227-1 to 227-15; 25T:6-6-4 to 7-19). The second cell phone was recovered during defendant's arrest as well. (23T:200-16 to 24, 24T:202-1 to 204-5).

[6] It is not clear who this unnamed woman is – she may be Bowens' cousin's mother. (23T:124-20 to 22).

While defendant was incarcerated in the Somerset County Jail, he spoke to another inmate, Barrick Wesley, who had taken paralegal courses while incarcerated in the past, and defendant asked him several legal questions. (28T:82-15 to 85-4, 87-25 to 96-5, 97-21 to 100-23). Defendant asked Wesley for his advice on whether New Jersey had self-defense as an option for an affirmative defense, and Wesley told him that it was. Ibid. Defendant then informed Wesley that he was "stuck" with self-defense as that was what he had originally told the police, and asked Wesley how best to "make it appear as though" it was self-defense. Ibid. Defendant called Mr. Coulanges a freeloader and lowlife. Ibid. Defendant also told Wesley that he had been the one to have the gun, not Mr. Coulanges. (28T:104-23 to 25).

Wesley testified for the State as to some additional details that defendant revealed: specifically, that defendant had told Mr. Coulanges to come over that night to retrieve his belongings, and told Mr. Coulanges to approach the house from a block away and from behind to avoid cameras. (28T:106-8 to 126-4, 130-17 to 132-21). Defendant had communicated this to Mr. Coulanges on a burner phone that he had gotten rid of before the police could get it, and had offered to be Mr. Coulanges' ride back home after the meeting. He also planned to have Mr. Coulanges arrive when his mother would not be home. Wesley then claimed defendant had told him that he refused to give Mr. Coulanges' laptop back

because the Keoghs did not owe Mr. Coulanges anything. When Mr. Coulanges had become angry about this, defendant shot Mr. Coulanges once in the leg, and then as Mr. Coulanges tried to get up, shot him again in the chest. Defendant told Wesley that Mr. Coulanges had never been violent towards him. Ibid.

LEGAL ARGUMENT

Point I

> There is no factual basis in the record to justify a lesser-included charge for passion-provocation manslaughter, and the trial court correctly refused to include it.

Defendant first argues the jury should have been charged with a lesser-included offense, specifically, passion-provocation manslaughter. (Db32-41). Defendant contends that his statement to police on the night of Mr. Coulanges' death provides ample basis for the jury to conclude that he was provoked into the murder. Defendant is wrong.

The question is not whether any evidence exists in the record – indeed, were that the case, any defendant's story, any defendant's testimony at trial, would be a basis for any charge they request. Rather, the question is whether there is a rational basis for the charge. Or, as defendant candidly notes, "room for dispute." (Db40). There was no such room here, and the trial court was correct to disallow a passion/provocation charge to the jury.

Otto Bowens, Barrick Wesley, and defendant's own parents completely

gutted the credibility of defendant's statement to police, particularly regarding who brought the gun to that porch. Moreover, defendant's own messages to Mr. Coulanges and Mr. Coulanges' responses display why Mr. Coulanges was at the house, and it was not Mr. Coulanges who did the threatening, but defendant. Moreover, there was evidence that at least one of the gunshots to Mr. Coulanges was perpendicular to the decking on the porch, meaning Mr. Coulanges was likely already disabled when he was killed. Thus, while there may have been self-serving evidence presented showing some basis that defendant "overreacted" to a provocation by Mr. Coulanges, that basis was anything but rational.

A lesser-included offense is one "where the proof required to establish a greater offense is also sufficient to establish every element of a lesser offense" and "where two offenses are the same but a lesser degree of culpability is required to establish the lesser offense." State v. Thomas, 187 N.J. 119, 129-30 (2006) (citing State v. Muniz, 228 N.J. Super. 492, 496 (App. Div. 1988)); see also State v. Bell, 241 N.J. 552, 561-62 (2020). "[I]nstructing a petit jury on lesser-included offenses is intended 'to give juries a range of options so that they will not be forced to decide between a conviction for a crime more serious than the one committed or no conviction at all.'" Bell, 241 N.J. at 562 (quoting State v. Short, 131 N.J. 47, 58 (1993)). Thus, "trial courts must charge the jury on a

lesser-included offense when the facts 'clearly indicate the appropriateness of that charge.'" Ibid. (quoting State v. Alexander, 233 N.J. 132, 143 (2018).

N.J.S.A. 2C:1-8(e), which governs included offenses, directs that "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." Two factors must be satisfied before charging a defendant with a lesser-included offense: "(1) that the requested charge satisfy the definition of an included offense set forth in N.J.S.A. 2C:1-8(d), and (2) that there be a rational basis in the evidence to support a charge on that included offense." State v. Cassady, 198 N.J. 165, 178 (2009).

"A defendant is entitled to a lesser-included offense instruction rationally supported by the evidence, even if the instruction is inconsistent with the defense theory." State v. Carrero, 229 N.J. 118, 129 (2017) (citing State v. Brent, 137 N.J. 107, 118 (1994)); State v. Powell, 84 N.J. 305, 317 (1980); State v. Hollander, 201 N.J. Super. 453, 473, (App. Div.), certif. denied, 101 N.J. 335, 501 (1985). "In deciding whether the rational-basis test has been satisfied, the trial court must view the evidence in the light most favorable to the defendant." Ibid. (citing State v. Mauricio, 117 N.J. 402, 412 (1990)).

The four elements of passion/provocation manslaughter are as follows:

(1) there must be adequate provocation;
(2) "the defendant must not have had time to 'cool

off' between the provocation and the slaying";
(3) "the defendant must have been actually impassioned by the provocation"; and
(4) "the defendant must not have actually cooled off before the slaying."

State v. Funderburg, 225 N.J. 66, 80 (2016) (quoting State v. Mauricio, 117 N.J. 402, 411 (1990). Passion/provocation manslaughter is a "well-established lesser-included offense of murder." State v. Carrero, 229 N.J. 118, 129 (2017) (citing State v. Robinson, 136 N.J. 476, 482 (1994)). The offense "contains all the elements of murder except that the presence of reasonable provocation, coupled with defendant's impassioned actions, establish a lesser culpability." Id. at 482. Essentially, passion/provocation manslaughter "is an intentional homicide committed under extenuating circumstances that mitigate the murder." Id. at 481.

"As to the first element, 'the provocation must be "sufficient to arouse the passions of an ordinary [person] beyond the power of his [or her] control."'" Carrero, 229 N.J. at 129-130 (quoting Mauricio, 117 N.J. at 412 (alterations in original)). "Words alone are insufficient to create adequate provocation…but the presence of a gun or knife can satisfy the provocation requirement." Ibid. (internal citations omitted). Additionally, "[b]attery is also considered adequate provocation 'almost as a matter of law.'" Ibid.

"With respect to the second element, the cooling-off period, we have

recognized that 'it is well-nigh impossible to set specific guidelines in temporal terms.'" Ibid. (quoting Mauricio, 117 N.J. at 413). However, the New Jersey Supreme Court has found "that a reasonable person in the defendant's position 'might not have had time to cool down between the provocation and the retaliation' where the defendant shot his uncle 'almost immediately' after being provoked." Ibid. (quoting Robinson, 136 N.J. at 492). Moreover, the Court has recognized that "[t]he first two elements are assessed objectively, while the third and fourth are 'more subjective because they relate to the defendant's actual response.'" Ibid. (quoting Robinson, 136 N.J. at 490).

"To warrant the passion/provocation jury charge, the evidence must rationally support only the first two elements." Ibid. The final two elements "should usually be left to the jury to determine." Mauricio, 117 N.J. at 413. New Jersey determined in State v. Crisantos, "the rational-basis test of the Code [under N.J.S.A. 2C:1-8(e)] imposes a low threshold" such that "[w]hen the lesser-included offense charge is requested by a defendant ... the trial court is obligated, in view of defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied." 102 N.J. 265, 278 (1986) (first citing State v. Sinclair, 49 N.J. 525, 540 (1967); and then citing Powell, 84 N.J. at 318-19).

Defendant asserts that, accepting the version of events he presented to

police on the night of the murder, there was a rational basis to present a passion/provocation charge to the jury. Specifically, he claims that his statement that Mr. Coulanges brought the gun to his house that night, coupled with the fact that he claimed they both got into a wrestling match, is enough to so charge the jury. Defendant relies heavily on the fact that he requested this charge, meaning his threshold is lower.

Defendant is mistaken. While the rational-basis analysis is less exacting, that does not mean the charge is permitted to be completely baseless so long as a defendant claims he was provoked in some way. The evidence presented at trial must bear that assertion out. While the charge need not be in line with defendant's theory of self-defense, it must still be rational.

As to the first issue, defendant's own parents, called as witnesses as a part of his own defense, both admitted that the entire story that Mr. Coulanges had brought a gun to their home was complete fabrication in order to shield defendant from liability. (29T:163-4 to 176-12; 31T:39-25 to 51-4, 131-15 to 134-9). On top of that, Otto Bowens identified the gun used that night as the one he had given to defendant. (25T:159-11 to 160-4). This completely negates any "rational" claim that defendant was provoked by the possession of a gun by the decedent. Defendant claims this is irrelevant because the charge need not comport with the defense theory of the case (Db39) — but, what defendant

ignores is that it must comport with the evidence at trial. In defendant's case in chief, he fully admitted that the gun had always been his, and that Mr. Coulanges never had a weapon. He may not now claim that this lie forms a rational basis for adequate provocation.

Defendant claims he was also provoked by the "battery" he described in his statement as well. He claims the statement he gave to police is enough to establish a rational basis for passion/provocation as to this alternative argument. However, the evidence showed no injuries on defendant, (19T:28-23 to 30-18, 79-16 to 80-3), and no injuries on Mr. Coulanges' hands or arms, (19T:116-6 to 119-4). Moreover, by defendant's own account of that night, defendant is the one who threw the first punch. (21T:131-16 to 140-4). He claimed he immediately tried to hit defendant in the shoulder when he did – or did not, depending on what point in the night he is being questioned – see Mr. Coulanges reach for a gun that did not exist. The entire "struggle" that defendant describes occurs because Mr. Coulanges supposedly had a gun, and that was admitted to be a complete lie. Ibid. Moreover, at least one of the gunshots was fired at a 90-degree angle to the ground, straight down. (21T:94-5 to 22).

It is not "rational" to find that an unarmed person moving angrily towards you, at the absolute best possible interpretation of the viable evidence at trial, is adequate provocation for such a passion/provocation charge, and when it is now

undisputed that defendant was the armed party, not Mr. Coulanges. In State v. Purnell, 126 N.J. 518 (1992), despite looking at the evidence in a light most favorable to the defendant, the New Jersey Supreme Court found that a passion/provocation charge was not appropriate: "Even in State v. Perry,...124 N.J. 128[, 141 (1991)]... where there was evidence that the victim, angered in a dispute over drug money, spoke harshly to the defendant, walked toward him, and pointed at him while the defendant was trying to inject himself with drugs, we held that that evidence 'provided no basis for a passion/provocation manslaughter charge.'" Id. at 542.

Moreover, defendant looks to his claims that Mr. Coulanges threatened to shoot him in the past, (Db40), but this too is summarily debunked by the evidence at trial. It was defendant who told Mr. Coulanges to "ponder" a shooting case after repeatedly telling Mr. Coulanges not to "offend the wrong one." (25T:32-12 to 33-23, 35-3 to 5). Mr. Coulanges, by contrast, only wanted to know when he could come by to collect his belongings and told defendant to calm down. (25T:35-10 to 37-19, 40-10 to 42-18).

Defendant likens his case to Carrero, where the jury could have accepted defendant's version of events; specifically, that his victim pulled a gun, and even if he had not, the physical struggle between the two was enough battery to provide a rational basis for the charge. 229 N.J. at 130-31. Again, there is no

rational basis to conclude that Mr. Coulanges pulled a gun — defendant has admitted that claim was false. But, even if the court were to conclude that the jury could have accepted defendant's version of events, defendant also admitted that he began the physical struggle and altercation by punching Mr. Coulanges, who he has now admitted was unarmed.

Defendant claims that all "mutual" combat between two parties is adequate provocation, even if he "over-defends" himself. (Db37-38). However, defendant forgets what the actual definition of mutual combat is. Namely, the Court has held that:

> "to reduce the offense from murder to manslaughter the contest must have been waged on equal terms and no unfair advantage taken of the deceased. * * * The offense is not manslaughter but murder where the defendant alone was armed; and took an unfair advantage of the deceased." ... Another authority expresses the same rule in these terms: "But if a person, under color of fighting on equal terms, kills the other with a deadly weapon which he used from the beginning or concealed on his person from the beginning, the homicide constitutes murder."

State v. Crisantos, 102 N.J. 265, 274-75 (1986) (emphasis added)(quoting 1, 2 2 C. Torcia, Wharton's Criminal Law § 110 at 254, 525-26 (14th ed.1979)). In Crisantos, two younger assailants were brawling with an older, inebriated man. Id. at 278-81. The men began to fight and struggle with each other after the victim allegedly used ethnic slurs against the assailants. Crisantos himself, just

as defendant here claims, said he was "willing to fight [the victim] if that's what he wanted." Crisantos then claimed his co-defendant, Ruiz, took out a knife and stabbed the victim to death. There was no evidence that Crisantos was hurt by or in fear of the victim, nor was there any evidence that Crisantos had become enraged by any extreme emotional disturbance. Ibid.

Rather, the New Jersey Supreme Court found that "[t]he very slight evidence of appellant's provocation, consisting of the "ethnic slurs" and the victim's attempt to strike appellant, after being spurred on by appellant's invitation to fight, was not acknowledged by any witness to have caused appellant to participate in the homicide." Id. at 280. Thus, there was no rational basis to charge passion-provocation manslaughter despite the brawl, because "[w]hat appellant's version of the evidence clearly conveyed was the existence of a gross mismatch, an older inebriated man against two younger men, at least one armed with a knife." Id. at 279. The Court so ruled even though it acknowledged the "common-law rule was that mutual combat under certain circumstances could constitute adequate provocation to reduce murder to manslaughter." Id. at 274 (citing Model Penal Code, § 210.3 comt. at 57 (Official Draft and Revised Comments, 1980)).

Crisantos is particularly telling, here, and is part of a long-standing principle in New Jersey that mutual combat does not exist when only one person

is armed, particularly where the admitted armed party also admitted, in his statement to police, to throwing the first punch. See State v. Viera, 346 N.J. Super. 198, 216 (App. Div. 2001) ("although mutual combat under certain circumstances may constitute adequate provocation and reduce murder to manslaughter, the contest must be waged on equal terms....Thus, the offense is not manslaughter where the defendant alone is armed.") (emphasis added); see also State v. Purnell, 126 N.J. 518, 541 (1992) ("Several scratches and bruises when compared to fifteen stab wounds do not suggest mutual combat."); People v. Austin, 133 Ill.2d 118, 139 (Ill. Sup. Ct. 1989) ("One who instigates combat can not rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter.").

"Even in instances of 'mutual combat,' the defendant's response must be proportionate to the provocation." State v. Docaj, 407 N.J. Super. 352, 369 (App. Div.), certif. denied, 200 N.J. 370 (2009) ("Defendant brought a concealed and loaded handgun to the home that night. His response to his wife's refusal to abandon divorce proceedings, and even her slap, was wholly disproportionate to any provocation."). That situation cannot exist here, even if Mr. Coulanges had been the one to strike defendant first, because defendant's response was to shoot the unarmed Mr. Coulanges with a concealed weapon. See, e.g., State v. Oglesby, 122 N.J. 522, 536 (1991) ("On the record before us, even if Russell

struck Oglesby, we cannot hold that the jury should have been allowed to find that a single blow by an unarmed woman could have aroused the passions of an ordinary man beyond the power of his control.").

Crisantos also notes the clear advantage that the killers had over their victim physically. Here, defendant was 5'11" and weighed 200 pounds. (24T:204-11 to 13). Mr. Coulanges was six inches shorter and 43 pounds lighter, at 5'5" and 157 pounds. (19T:109-17 to 24). So, defendant faced a much smaller person while armed with a gun, representing the same kind of disadvantageous mismatch Crisantos dealt with. 102 N.J. at 279. This also flows into another long-held maxim that defendant has ignored. Namely, passion-provocation is not permitted where there is no fury, or such extreme emotion that defendant lost complete control over himself. "As we have repeatedly stated, the test for adequate provocation is provocation sufficient to arouse the passions of an ordinary person beyond the power of his or her control." Oglesby, 122 N.J. at 536 (citing Mauricio, 117 N.J. at 412).

State v. Galicia is particularly enlightening here. 210 N.J. 364 (2012). Under a rational-basis analysis, the New Jersey Supreme Court found that the facts of that case did not support charging the jury with passion/provocation manslaughter. Id. at 384-86. In that case, Galicia was involved in a love triangle with his boyfriend, Cordero, and Cordero's ex-boyfriend, Colon. Galicia and

Cordero met Colon to inquire as to the return of a borrowed SUV, and to persuade Colon to enter back into a relationship with them both. Id. at 367–68. This civil conversation quickly escalated into a full-scale brawl, where all three defendants were physically fighting each other. Ibid. The brawl reached its climax when Galicia got into his car and fatally struck Colon with his vehicle. Ibid. Nonetheless, despite the heightened romantic emotions at play and the physical brawl in which Colon punched and kicked Galicia prior to the killing, the Court held that "[n]either of these factors supports passion/provocation mitigation in this case." Id. at 385. There were two reasons for that conclusion.

First, when Galicia got into his car "in the critical moments before Colon's injury," there was nothing to suggest that he had acted in a jealous rage or heat of passion. Ibid. Rather, the court found that defendant's claim that he acted out of "panic," not "fury," and that he characterized the killing as a "tragic accident" meant that the extreme, control-eliminating passions needed for passion/provocation did not exist. Second:

> [A]lthough defendant and Colon exchanged blows before defendant returned to his car, the victim in this case did not die in a physical altercation "waged on equal terms." .... After defendant was struck by Colon, he retreated to the safety of a locked car that he owned and controlled. Minutes later, at the moment of Colon's fatal injury, defendant exercised that control to drive in a manner that precipitated Colon's death. Neither of the two "objective elements" of passion/provocation—reasonable and adequate provocation and an absence of

> adequate cooling-off time—is evidenced by the facts presented.

Ibid. (citing Crisantos, 102 N.J. at 274).

Such is the case here. Defendant, at all points, claimed he acted out of sheer panic, that he did not mean to kill Mr. Coulanges and consciously tried to "aim low," and that the second shot was an accident. (21T:131-16 to 140-4). This is not the furious, wild, uncontrolled passion needed for this charge. Moreover, as defendant had a concealed weapon on him, any scuffle the two men got into prior to the shooting was not entered into on equal terms. Thus, defendant was not entitled to a charge on passion/provocation, as the trial court aptly found, and no reversal is warranted.

Point II

> The judge's charge on use of force on an intruder followed the Model Charge, and there is no basis whatsoever for defendant's claim that the Model Charge is lacking regarding a "detached viewpoint."

Defendant next claims, for the first time on appeal, that the model jury charge as to "intruder" self-defense is lacking. (Db41-47). Specifically, defendant claims that the charge should not have the following sentence: "an ordinary reasonable person with a detached point of view." Rather, defendant claims the Model Charge should instruct the jury to look at how a person in defendant's situation should have reacted. Defendant claims this constitutes

plain error.

Defendant's opinion, however, is not controlling, nor is it supported by our caselaw. Model Charges are presumed to be accurate, and are created only after rigorous review by experienced jurists. Defendant's disagreement with a charge is no basis to reverse his conviction, particularly when his understanding of controlling caselaw is erroneous. Defendant's claim, as our courts have recognized, would serve to make any honest belief into a reasonable one, which was clearly not what the Legislature intended. Indeed, the Legislature expressly rejected the idea that any honestly held belief is enough justification for self-defense, and chose instead to ensure that even an honestly held belief must be objectively reasonable.

Because defendant did not object to the charge at trial, his claim must be assessed for plain error. See R. 1:7-2; State v. Wakefield, 190 N.J. 397, 473 (2007) ("[T]he failure to object to a jury instruction requires review under the plain error standard."). "Pursuant to Rule 1:7-2, a defendant is required to challenge instructions at the time of trial or else waives the right to contest the instructions on appeal." State v. Belliard, 415 N.J. Super 51, 66 (App. Div. 2010) (citing State v. Adams, 194 N.J. 186, 206-07 (2008)). Where there is a failure to object, reviewing courts presume the instruction was "not error" and "unlikely to prejudice the defendant's case." State v. Singleton, 211 N.J. 157, 182 (2012).

When there is failure to object, this Court presumes that the instructions were adequate. State v. Macon, 57 N.J. 325, 333 (1971). Failing to object to a charge is also indicative that trial counsel perceived no prejudice would result. State v. Wilbely, 63 N.J. 420, 422 (1973). Consequently, this Court can reverse only if it finds plain error, or error that is likely to produce an unjust result. State v. Afanador, 151 N.J. 41, 54 (1997); R. 2:10-2. In terms of a jury charge, meeting the plain error standard requires "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing [C]ourt and to convince the [C]ourt that of itself the error possessed a clear capacity to bring about an unjust result." State v. Nero, 195 N.J. 397, 406 (2008) (quoting State v. Hock, 54 N.J. 526, 538 (1969)).

This burden rests on defendant's shoulders. State v. Koskovich, 168 N.J. 448, 529 (2001). The effect of any error must be considered "in light 'of the overall strength of the State's case.'" State v. Walker, 203 N.J. 73, 90 (2010) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)). Any unchallenged issue with the jury charge is considered "in light of 'the totality of the entire charge, not in isolation.'" State v. Burns, 192 N.J. 312, 341 (2007) (quoting Chapland, 187 N.J. at 289). "The mere possibility of an unjust result is not enough." Funderburg, 225 N.J. at 79. "Rather, '[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a

result it otherwise might not have reached.'" State v. Alexander, 233 N.J. 132, 142 (2018) (alteration in original) (quoting Macon, 57 N.J. at 336). Nevertheless, "we acknowledge that 'correct jury charges are especially critical in guiding deliberations in criminal matters, [and] improper instructions on material issues are presumed to constitute reversible error.'" Funderburg, 225 N.J. at 84 (alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

Here, it is uncontroverted that the trial court delivered the model jury charge, Justification of Use of Force Upon an Intruder (N.J.S.A. 2C:3-4c)." (Db42). "[I]nsofar as consistent with and modified to meet the facts adduced at trial, model jury charges should be followed and read in their entirety to the jury." State v. R.B., 183 N.J. 308, 325 (2005). "The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers." Ibid. "Generally speaking, the language contained in any Model Charge results from the considered discussion amongst experienced jurists and practitioners." Flood v. Aluri-Vallabhaneni, 431 N.J. Super. 365, 383 (App. Div.), certif. denied, 216 N.J. 14 (2013). Thus, "model jury charges should be followed and read in their entirety to the jury." R.B., 183 N.J. at 325. Indeed, reading the model jury charge "is a persuasive argument in favor of the charge as delivered." State v. Angoy,

329 N.J.Super. 79, 84 (App. Div.), certif. denied, 165 N.J. 138 (2000).

There is a "presumption of propriety that attaches to a trial court's reliance on the model jury charge." Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 596 (2015). Deviating from the Model Charges is thus generally inappropriate, and reading a Model Charge accurately is not considered plain error. See Mogull v. C.B. Comm. Real Estate Group, Inc., 162 N.J. 449, 466 (2000) (noting "it is difficult to find that a charge that follows the Model Charge so closely constitutes plain error").

At the outset, it should be noted that the portion of the Model Charge that deals with a "detached viewpoint" specifically cites to N.J.S.A. 2C:3-4(c)(3), regarding intruder self-defense. (Da25 n. 12). It also cites to State v. Bass, 224 N.J. 285, 321 (2016).[7] Ibid. This exemplifies the fact that the Model Charge was created with both the statute and governing law in mind. In State v. Kelly, the Court noted that "[d]etached reflection is not demanded in the face of an uplifted knife." 97 N.J. 178, 198 (1984) (quoting Brown v. United States, 256 U.S. 335, 343 (1921)).

[7] Defendant cites to Bass to allege that the Supreme Court of New Jersey found all terms in N.J.S.A. 2C:3-4(c) are to be given their ordinary and accepted meaning. (Db44). Defendant is mistaken; in reading the case, Bass specifically dealt with interpreting a single word in the statute: "intruder." 224 N.J. at 321-23. There is no challenge here to the meaning of the word intruder, making that analysis irrelevant.

However, what defendant fails to realize is that even Kelly places a distinction between an honest belief and a reasonable one; a defendant needs both, not just one. "While it is not imperative that actual necessity exist, a valid plea of self-defense will not lie absent an actual (that is, honest) belief on the part of the defendant in the necessity of using force.... Honesty alone, however, does not suffice. A defendant claiming the privilege of self-defense must also establish that her belief in the necessity to use force was reasonable." Id. at 198-99. The detached viewpoint requirement is not taking away from what his honest belief in the situation was. The "honest" belief requirement for self-defense is where defendant's unique facts and circumstances come into play. Indeed, to establish an honest belief in the necessity of force means that "the first step toward the defense is taken." Cannel, New Jersey Criminal Code Annotated, cmt. 1 on N.J.S.A. 2C:3-4(c) (2023) ("If there is necessity, but the actor does not believe it, there is no defense...."). This must, necessarily, take into account what the defendant truly and honestly believed at the time of the event, given the circumstances he faced. But, that is only the first step.

Reasonableness, however, is not a subjective standard to be measured by the defendant, but an objective one to be measured by the jury. State v. Bess, 53 N.J. 10, 15-17 (1968); State v. Moore, 158 N.J. 292, 309-10 (1984); Kelly, 97 N.J at 204; State v. Sanders, 467 N.J. Super. 325, 334 (App. Div.), certif. denied,

248 N.J. 390 (2021), State v. Bryant, 288 N.J. Super. 27, 34 (App. Div.), certif. denied, 144 N.J. 589 (1996). This has been long-held in New Jersey, and reiterated as recently as 2021 in State v. Sanders:

> "While it is not requisite that actual necessity exist, the justification of self-defense requires an honest belief on the part of the defendant in the need to use force." ... "Honesty, alone, however, does not suffice. A defendant claiming the privilege of self-defense must also establish that his belief in the need to use force was reasonable."..."The reasonableness of the defendant's belief is to be determined by the jury using an objective standard of what a reasonable person would have done in defendant's position in light of the circumstances known to defendant at the time the force was used."

467 N.J. Super. at 334 (emphasis added) (quoting Bryant, 288 N.J. Super. at 34). While it is true that reasonableness includes the light of the circumstances defendant faced, assessing those circumstances must be objectively undertaken by the jury. The jury is not to place themselves in defendant's shoes after honesty of belief has been established. This is explained, fully, in the full quote from the model jury instructions that were read to the jury:

> I instruct you that a reasonable belief is different than an honest belief. What is reasonable is not measured by what a defendant found reasonable but rather by what a jury finds reasonable. Thus, the reasonableness of defendant's belief is based on an objective standard – that is, by how an ordinary reasonable person with a detached viewpoint would view it. A subjective belief, based on the viewpoint of the defendant, is immaterial.

(Da24-25); Model Jury Charges (Criminal), "Justification: Use of Force Upon

an Intruder N.J.S.A. 2C:3-4(c)" (rev. Sept. 12, 2016); (32T:156-13 to 20). This follows our jurisprudence "[t]hat...an honest but unreasonable belief in the necessity to use deadly force is not a legal justification and results in purposeful criminal liability." Moore, 158 N.J. at 310. This charge explains this concept in an easily understandable way, and is not a misstatement of the law, or an erroneous understanding of objective reasonableness.

Indeed, New Jersey specifically chose not to codify defendant's point of view, as outlined in the comments in the current 2C:

> The Code as proposed required only the honest belief of the actor as the basis for justification. The Legislature rejected this view and added the word "reasonably" before "believes" throughout the chapter. The result, reasonable belief that force is necessary, is a codification of pre-Code caselaw.

Cannel, New Jersey Criminal Code Annotated, cmt. 1 on N.J.S.A. 2C:3-4(c) (2023). Thus, while defendant hyper-focuses on the "detached viewpoint" phrase, claiming it is deviating from all other forms of reasonableness in the law, he fails to realize that this was a conscious choice. The Legislature had the opportunity to sign on to defendant's position, that any honestly held belief by a defendant is enough, but consciously chose not to do so. The Legislature's intent, then, is clear, and the Model Charge accurately reflects the distinction it chose to create. See Bass, 224 N.J. at 322 (finding that, to determine the Legislature's intended meaning, "the goal is to divine and effectuate the

Legislature's intent." (quoting State v. Shelley, 205 N.J. 320, 323 (2011)). Defendant's opinion otherwise is of no moment—the Legislature's intent controls, not his.

Defendant's argument is not novel. Indeed, his claim regarding the "detached viewpoint" language in the Model Charge was raised in an unpublished case, State v. Coppola, No. A-0256-08T4, 2010 WL 3516745, at *14-*15 (App. Div. Sept. 7, 2010), (Pa1-17). The defendant in that case similarly claimed that the Model Charges' definition of reasonableness is inapposite to the statute's language for intruder self-defense, and denied him of a fair trial under plain-error review. Ibid. (Pa12). This Court disagreed then, as it should now. The Coppola court noted that defense against an intruder is different than general self-defense, and that there is a distinction present between an honest belief and a reasonable one. Ibid. (Pa12). A reasonable belief must be subject to an objective standard, because to do otherwise "would make any honest belief reasonable—a result not intended by the statute." Ibid. (Pa12); see also N.J.S.A. 2C:3-4(c); Cannel, New Jersey Criminal Code Annotated, cmt. 3 on N.J.S.A. 2C:3-4(c) (2023) ("To employ a subjective standard would make any honest belief a reasonable belief."). "Analysis of a defendant's state of mind by any standard other than an objective one is neither plausible nor reasonable," and thus, this Court found that the Model Charge was neither confusing,

erroneous, nor improper in any way, and this argument failed under plain-error review. Ibid. (Pa12).

Coppola, like defendant, (Db43), relied on Kelly, 97 N.J. 178 (1984). Kelly, however, does not support defendant's claim here either. Kelly, too, noted the distinction between an honestly held belief and a reasonable one, noting that "even when the defendant's belief in the need to kill in self-defense is conceded to be sincere, if it is found to have been unreasonable under the circumstances, such a belief cannot be held to constitute complete justification for a homicide... the question of the reasonableness of this belief "is to be determined by the jury, not the defendant, in light of the circumstances existing at the time of the homicide." Id. at 199-200.

Again, the jury charge does not contradict this despite the use of the circumstances existing at the time. The Model Charge correctly alerts the jury to the fact that its analysis is not limited to what the defendant would have perceived and honestly believed at the time—that is only part of the analysis. The jury's assessment must be objective and detached from defendant's honest belief in order to satisfy both aspects of the Legislature's intent in drafting the Code as they did. Defendant's repeated emphasis on the Kelly quote in which one is not required to use detached contemplation in the face of an uplifted knife, Id. at 198, is not availing. As Kelly noted, this maxim does not gut the

Legislature's intent, but serves a different purpose: "the law accordingly requires only a reasonable, not necessarily a correct, judgment." Ibid. (citing State v. Hipplewith, 33 N.J. 300, 316-17 (1960); State v. Mount, 73 N.J.L. 582, 583 (E. & A. 1905); State v. Lionetti, 93 N.J.L. 24 (Sup. Ct. 1919)); see also Bryant, 288 N.J. Super. at 34 (finding quote from Brown v. United States means that "the law thus recognizes the frailties of human perception, requiring only a reasonable, and not necessarily correct, judgment."). Thus, a reasonable belief need not be a thoughtfully assessed, accurate belief in the heat of a heightened situation, but it must still be objectively understandable by a reasonable person.

Defendant is not incorrect to say that the defense against intruders statute is a lower standard to meet than that of general self-defense; but, that applies to a separate part of the statute, in that general self-defense applies only when a defendant reasonably believes force is necessary to protect himself from "death or serious bodily harm." (Db45), N.J.S.A. 2C:3-4(b)(2). However, Intruder self-defense is present when there is a risk of mere personal injury. N.J.S.A. 2C:3-4(c). This has nothing to do with whether reasonableness should remain an objective standard. To the extent that the "detached viewpoint" language is not in the general self-defense charge, this would track to defendant's benefit, despite his claims. The "detached viewpoint" language instructs the jury that he need not be accurate to be reasonable. If an ordinary person using reasonable

judgment would believe the same as defendant's honest belief, regardless of whether there was a true threat, the reasonableness element is satisfied. This is easier to prove, not harder.

Defendant generally claims that this jury instruction produced an unjust result in his case, and his convictions should be reversed for plain error. (Db47). Defendant is mistaken. There is no real possibility of an unjust result here given the proofs against defendant, particularly when Mr. Coulanges was unarmed, defendant was uninjured, one of the shots was fired straight down, defendant had threatened Mr. Coulanges with references to guns in the past, and the detached viewpoint phrase is a correct statement of the law as it pertains to reasonableness in self-defense. Walker, 203 N.J. at 90 (2010) (finding the effect of any error must be considered "in light 'of the overall strength of the State's case.'" (quoting Chapland, 187 N.J. at 289)). "The mere possibility of an unjust result is not enough." Funderburg, 225 N.J. at 79.

There is no possibility here; the law was correct, and the Model Charge cannot have led the jury to a result it otherwise would not have reached. Alexander, 233 N.J. at 142. To instruct otherwise, that a reasonable belief need only come from defendant's perspective, is a wholly inaccurate legal statement; our Legislature has determined the exact opposite to be the case in New Jersey. The jury charges here were thus sound, mirrored the Model Charges, comported

with our Legislative history and caselaw, and correctly guided the jury to a just result. Defendant's convictions should be affirmed.

Point III

> Detective Sidorski's testimony regarding the social media messages between defendant and Mr. Coulanges were not improper, and even if they were, they were fleeting and clearly harmless error.

Defendant next contends that two sentences in Detective Sidorski's three-day-long testimony so prejudiced the jury against defendant that he was denied a fair trial. (Db47-51). Specifically, when the content of defendant's social media messages to Mr. Coulanges was presented to the jury, Detective Sidorski said, once, that defendant's messages seemed "confrontational," and a few questions later, said that Mr. Coulanges' responses "seemed to be more trying to keep the peace." (25T:30-14 to 31-1). Defendant also takes umbrage with the fact that Detective Sidorski identified his threats to Mr. Coulanges, and identified where defendant stated he had hit Mr. Coulanges so hard he had knocked him down. (25T:31-17 to 43-20). Defendant claims this testimony violated N.J.R.E. 701 as impermissible lay testimony that prejudiced the jury, and was not harmless error.

Defendant is, once again, mistaken. First, it was not a subjective opinion that defendant threatened Mr. Coulanges, it was a fact. It was not

"interpretation" to say that defendant's multiple statements about "don't offend the wrong one" and "Doug got killed recently. His own brother shot him in the head. Google Piscataway shooting. Something to ponder upon," were threats. (25T:31-17 to 43-20). It is also a fact that hitting someone hard enough to knock them over, (25T:34-17 to 21), is an assault. These are not opinions Detective Sidorski divined from the ether or his own subjective interpretation.

Moreover, Detective Sidorski personally observed and found those threats through his investigation, making him a competent witness to present these pieces of evidence as he was the one who rationally perceived them. As for characterizing the statements as "confrontational" or defusing\"keeping the peace," these were rationally based on Detective Sidorski's perception. Regardless, these fleeting words in a case with over 30 witnesses, in a days-long testimony presentation by the witness in question, are not capable of producing an unjust result.

Lay opinion testimony by officers, like all lay opinions, "must be[] firmly rooted in the personal observations and perceptions of the lay witness in the traditional meaning of the Rule 701." State v. McLean, 205 N.J. 438, 459 (2011). However, there are limits on lay testimony. Namely, "[t]he Rule does not permit a witness to offer a lay opinion on a matter 'not within [the witness's] direct

ken...and as to which the jury is as competent as he to form a conclusion[.]'" Ibid. (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955)). Lay-witness officers are thus able to "set forth what he or she perceived through one or more of the senses," but does not include any "opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." Id. at 460.

"[S]uch testimony sets forth facts that are not so outside the ken of jurors that they need an expert to spell out for them whether that defendant engaged in a criminal transaction and that offering an expert in those circumstances would be improper." Ibid. No lay witness may opine as to the ultimate issue of guilt, either. See State v. Trinidad, 241 N.J. 425, 445-47 (2020) (holding lieutenant's testimony that defendant's actions "appeared to be criminal" was impermissible lay testimony but was not plain error due to the clear video and document evidence showing defendant's guilt);

Moreover, even if a statement is improper, when the strength of the State's case is overwhelming, it is considered harmless error. R. 2:10-2; Trinidad, 241 N.J. at 445-47 (holding lieutenant's testimony that defendant's actions "appeared to be criminal" was impermissible lay testimony, but was not plain error); State v. Hightower, 120 N.J. 378, 410 (1990) (holding officer's testimony

that defendant "was the person responsible for the murder" was harmless error because of "the strength of the State's case, the length of the trial, and the number of witnesses called"). The harmless error standard "requires that there be 'some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" State v. Lazo, 209 N.J. 9, 26 (2012); R.B., 183 N.J. at 330 (alterations in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)).

As our Supreme Court has recently reaffirmed, "[w]hen we consider whether a given error is harmless, that error 'must be evaluated in light of the overall strength of the State's case.'" State v. Allen, 254 N.J. 530, 550 (2023) (quoting Galicia, 210 N.J. a 388 (internal quotation marks omitted)); State v. Walker, 203 N.J. 73, 90 (2010); accord Trinidad, 241 N.J. at 451; State v. Sanchez-Medina, 231 N.J. 452, 468 (2018). "As we have observed, 'no trial can ever be entirely free of even the smallest defect,' but our goal 'must always be fairness. "A defendant is entitled to a fair trial but not a perfect one."'" Ibid. (quoting R.B., 183 N.J. at 333-34 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953))). "'[C]onvictions after a fair trial, based on strong evidence proving guilt beyond a reasonable doubt, should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or

affected the end result.'" State v. J.R., 227 N.J. 393, 417 (2017) (quoting State v. W.B., 205 N.J. 588, 614 (2011); see also State v. Hyman, 451 N.J. Super. 429, 458 (App. Div. 2017) (applying the same principle to improper officer lay opinion).

Allen specifically dealt with harmless error relating to improper lay opinion testimony by an officer, and noted the following standard when dealing with that issue:

> Thus, in appeals involving the erroneous admission of improper police officer lay testimony, the nature and extent of the admitted testimony is balanced against the strength of the prosecution's case beyond that testimony in determining whether the court's error requires a new trial.

Ibid.; see also State v. Derry, 250 N.J. 611, 617 (2022) (holding that while an officer offered improper opinion testimony as a lay person that should have been qualified as expert testimony, the Supreme Court of New Jersey found that the error was harmless because of the "overwhelming evidence of defendants' guilt presented at trial").

Here, defendant's position is unfounded for two reasons. First, half of what he claims to be improper lay opinion is not a subjective opinion at all. Hitting someone hard enough to knock them down and then being happy ("I needed that") that the victim said "no one ever hit me that hard" is an assault. Notably, defense counsel did not object to that question or answer, strongly

suggesting that this question was not so egregious that it produced an unjust result. (25T:34-7 to 23). Trinidad, 241 N.J. at 451 (2020); R. 2:10-2. Calling an assault an assault is not invading the province of the jury, it does not relate to an ultimate issue as to any element of any offense defendant was charged with, and is precisely what Detective Sidorski read in defendant's messages: a mention of a prior assault.

Additionally, defendant takes issue with calling defendant's other messages threats. Again, these messages are, objectively, threats. One message deals with telling Mr. Coulanges about a case where a man shot another brother in the head, and that it is "something to ponder upon." This came after telling Mr. Coulanges in three separate messages that Mr. Coulanges should "be careful" not to "offend the wrong one" because "someday there will be ramifications," and that defendant would not forget the past comments Mr. Coulanges said to him. (25T:32-12 to 33-23, 35-2 to 5). These are threats. Telling someone that they had better not offend you or else there will be "ramifications," that you will not forget some past transgression, and then following that with a message to "ponder" upon a man shooting his brother in the head are, explicitly, threats. Detective Sidorski used the phrase "seemed to be threats," but this is clearly a turn of phrase and not an indication that he had to sus out the true meaning of these words. Again, these are not invading the

province of the jury, it does not relate to an ultimate issue as to any element of any offense defendant was charged with, and is literally just what Detective Sidorski read in defendant's messages: threats.

Defendant finally takes issue with Detective Sidorski saying that defendant's messages were confrontational, and that Mr. Coulanges' messages were keeping the peace and defusing the situation, and claims that this characterization is so improper that it put "Detective Sidorski's thumb on the evidentiary scale on an issue that should have been entirely the jury's to figure out without the help of improper opinion from a high-ranking detective." (Db51). This is clear hyperbole. Firstly, the State expressly stopped Detective Sidorski from offering his opinion in the brief exchange where defendant is called confrontational:

> [Prosecutor:] Can you describe the posts?
>
> [Det. Sidorski:] Yes. Generally speaking, Terrance was asking for some clothing back, and my opinion, Ryan Keogh –
>
> [Prosecutor]: Well, not your opinion. We don't want your – we don't want you to express an opinion, but can you describe, having read the posts, how would you describe them?
>
> [Det. Sidorski:] Confrontational.
>
> [Prosecutor:] Which person is confrontational?
>
> [Det. Sidorski:] The defendant.

(25T:30-13 to 21). This is clearly a mere observation of the demeanor of the posts' general tone, something that Detective Sidorski is certainly allowed to testify to. See State v. Sui Kam Tung, 460 N.J. Super. 75, 101 (App. Div.), certif. denied, 240 N.J. 249 (2019) (finding officer's testimony that defendant was "aggravated" at one point and "clearly upset" at another "were his opinions based on first-hand perception of defendant's appearance, demeanor, and reactions, which fall within the lay opinion rule."). "As to a defendant's demeanor, fact witnesses are permitted to testify regarding what they 'perceived through one or more of the senses.'" Id. at 100 (quoting McLean, 205 N.J. at 460). As Detective Sidorski read the posts himself with his own eyes, he is permitted to observe the general demeanor of the posts and testify to them. The State was careful to make sure he did not give a personal opinion or interpretation.

The same is true of Detective Sidorski's testimony that Mr. Coulanges was "trying to keep the peace, just being more easy going" in his responses to the messages. (25T:31-7 to 11). That Mr. Coulanges was trying to defuse the situation is referenced twice:

> [Prosecutor:] Are there any responses by Terrance to the defendant to diffuse [sic] what is being written to him?
>
> [Det. Sidorski:] At times.

(25T:36-22 to 24). There was no objection to this question. The State again asked about defusing the situation a bit later, when asking if there was another response to a different message, but defense counsel objected to that question. (25T:41-13 to 7). It was sustained, so the State rephrased and did not mention the word again, asking only if there were responses. Ibid.

While these comments, as to keeping the peace and defusing specifically, are on the borderline of interpretation, they should not be considered improper lay-opinion testimony. "A witness may offer lay opinion testimony on an individual's emotional state if it '(a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.'" Sui Kam Tung, 460 N.J. Super. at 101 (quoting N.J.R.E. 701). Detective Sidorski read the messages himself, and perceived the tone and tenor of the conversation personally. And, his testimony helped to clarify what the relationship between the two men was. Thus, this testimony was permitted.

Nonetheless, even if this Court were to disagree and find the word "defuse" and a sentence about keeping the peace to be improper lay-opinion testimony, the error is clearly harmless. One sentence about keeping the peace and one permitted use of the word "defuse" cannot outweigh the wealth of evidence pointing to defendant's guilt in this case, nor can such fleeting

references be so inflammatory and prejudicial that defendant's verdict is called into question.

Defendant was caught lying about who had the gun that night, lied about where he was in the two hours before 911 was called, and was revealed to have shot an unarmed former roommate where there were no signs of a struggle. (21T:154-22 to 155-2; 29T:163-4 to 176-12; 31T:39-25 to 51-4, 131-15 to 134-9). Testimony at trial identified the gun planted near Mr. Coulanges' body as belonging to defendant, (25T:159-11 to 160-4), and other testimony claimed defendant had admitted to a jailhouse informant that he shot Mr. Coulanges over a dispute over a laptop. (28T:106-8 to 126-4, 130-17 to 132-21). One of the shots was fired straight down. (21T:94-5 to 22). Jail calls and wiretap calls all corroborate the fact that defendant sold a false narrative to police on the night of Mr. Coulanges' murder, and there was no objection to the substance of the messages coming in, merely the minute comments provided by Detective Sidorski. So, the messages showing defendant threatening Mr. Coulanges, referencing brothers shooting brothers, and prior assaults were before the jury regardless. So too were Mr. Coulanges' messages telling defendant to calm down, (25T:42-12 to 18), that he just wanted his property back, (25T:40-23 to 24), and that he would just work hard to get new things, (25T:42-11 to 18).

One sentence and one word in a three-day long testimony cannot outweigh

this volume of evidence, even if improper. Indeed, even if this Court were to decide that all of the above-mentioned statements (defendant threatened Mr. Coulanges, defendant assaulted Mr. Coulanges, and the messages were confrontational) are improper lay-opinion testimony, the evidence here is so greatly stacked against this defendant that these minor, fleeting, isolated statements cannot be so prejudicial as to create reasonable doubt as to defendant's convictions. R.B. 183 N.J. at 330.

It should be noted that defendant claims in a parenthetical that State v. Hedgespeth, 249 N.J. 234 (2021), a recent Supreme Court decision, held that "errors which affect the weight the jury will give the State's arguments in favor of conviction versus the defendant's arguments in favor of acquittal are reversible and never harmless." (Db51). This maxim is nowhere in that case—in fact the phrase "never harmless" exists only where the Court expressly "decline[d] to adopt defendant's position that an evidentiary ruling that results in a defendant's decision not to testify can never be harmless." Hedgespeth, 249 N.J. at 240. Hedgespeth instead found that erroneously admitted prior convictions had caused that defendant, in that case, to choose not to testify and therefore could not challenge the State's witness' credibility to full effect, and stopped the jury from assessing his demeanor and hearing his counter-theory of the case effectively. Id. at 252-53. Moreover, the evidence in the case was not

strong enough to link defendant to the weapon in question, so the error could not be harmless. Ibid.

Defendant also cites to State v. Briggs, 279 N.J. Super. 555 (App. Div.), for the same claim, that any erroneously admitted evidence or testimony that would serve to tip the scales in any way requires reversal. See Id. at 565-66, certif. denied, 141 N.J. 99 (1995); (Db51). Defendant does not accurately represent the holding in Briggs; there, improperly admitted hearsay evidence was "a critical piece of evidence to the State and was not cumulative—there is no other evidence establishing the alleged Robin police statement…the evidence of guilt was anything but overwhelming." Ibid. Thus, the weakness of the State's case made the error not harmless, as the erroneous evidence was the lynchpin of the case. Ibid.

Nothing could be farther from the truth here. One borderline statement, and a collection of words from a small segment of one day of a witness's testimony that spanned three days were clearly not the lynchpin of the State's case here. Defendant's verdict is sound even if the comments were improper, though the State maintains that they were not. Independent of Detective Sidorski's isolated comments, the State had a wealth of information and evidence to provide to the jury to establish defendant's guilt. Defendant's convictions should be affirmed.

Point IV[8]

> The trial court did not err in prohibiting a mini-trial on a decade-old case to smear Barrick Wesley's character, where that evidence was already substantively presented to the jury, the exoneration of Taron Hill was not predicated on Wesley's testimony, and it would only serve to confuse the issues for trial. Additionally, there was no Brady[9] violation whatsoever.

A. Defendant's Counseled Brief

Defendant next claims that the trial court violated N.J.R.E. 608(b) when he did not allow defendant to cross-examine the jail informant, Barrick Wesley, about a specific aspect of his cooperation in the Taron Hill matter. (Db52-56). The trial court allowed extensive cross-examination on Wesley's many other cooperative actions in the past, which included several offers to testify for the State, some of which resulted in lower sentences for him. The trial court also allowed much cross-examination on how Wesley recanted his testimony against Hill at one point, and then upon contact from the Attorney General later, un-recanted that testimony and said he recanted under duress. However, the trial court did not allow cross-examination on the fact that Hill was later exonerated by New Jersey's Conviction Review Unit. Defendant is greatly troubled by this,

[8] This Point also addresses defendant's Pro Se brief, designated as "Psb."
[9] Brady v. Maryland, 373 U.S. 83 (1963).

claiming that the jury had no way of knowing that defendant was a "lying snitch," and could only know that he was a "frequent snitch." Defendant also claims an N.J.R.E. 104 hearing should have been held, but claims the lack of a hearing was "understandable" because everyone already knew exactly what the claims were and what happened in Hill's case.

Defendant is, again, mistaken. Trial courts are given wide latitude in limiting prior false-accusation testimony and cross-examination in order to avoid a distracting side-show that confuses the issues at trial. Here, the trial court exercised that discretion appropriately. The jury was made well-aware of the fact that Wesley had recanted his testimony and then un-recanted it in the Hill case – in fact, that made up several pages worth of cross-examination. The only additional fact that was not allowed was that Hill was later exonerated, and why is clear: Wesley's testimony was not at the core of why Hill was exonerated. Moreover, a Rule 104 hearing was not necessary here as the State conceded that the recantation testimony can, and should, come in as evidence of a prior false accusation.

In State v. Guenther, 181 N.J. 129 (2004), our Supreme Court held that "in limited circumstances and under very strict controls a defendant has the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility." Id. at 154. This created a

"narrow exception" to N.J.R.E. 608 as it was then-written, which had previously disallowed such testimony.

This exception was later codified as N.J.R.E. 608(b)(1), which reads as follows:

> In a criminal case, a witness' character for truthfulness may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

Then, in State v. A.O., 198 N.J. 69 (2009), which came down after the exception was codified, the Supreme Court again acknowledges that this rule remains limited and only "applies when the credibility of the victim-witness is the central issue in the case," and reiterated that the rule is narrow and subject to strict controls. Id. at 93 (citing Guenther, 181 N.J. at 154). The Supreme Court also noted that Guenther remains "good law," and "[c]ourts should continue to apply the factors it sets forth in deciding the question of admissibility and be mindful of its concerns to avoid distracting mini-trials." Id. at 94.

Those factors are as follows:

1. whether the credibility of the victim-witness is the central issue in the case;

2. the similarity of the prior false criminal accusation to the crime charged;

3. the proximity of the prior false accusation to the allegation that is the basis of the crime charged;

4. the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial; and

5. whether the probative value of the false accusation evidence will be outweighed by undue prejudice, confusion of the issues, and waste of time.

Guenther, 181 N.J. at 157. The Supreme Court here also emphasized that "[t]he court must ensure that testimony on the subject does not become a second trial, eclipsing the trial of the crimes charged." Ibid.

At the outset, it should be noted that the jury was aware of Hill's case, Wesley's testimony for the State, his later recantation of his testimony, and then his later recantation of his recantation. First, the State elicited this information on direct examination; specifically, that he testified at Hill's trial in 2006, that he testified about a jailhouse statement Hill made to him, and that he later recanted that testimony because he had been threatened by Hill. (28T:58-15 to 60-18, 66-9 to 67-3; 29T:104-11 to 106-24, 108-21 to 110-12, 114-16 to 19). The State elicited the same information about several other cases Wesley had testified in as a jailhouse informant, whether he got reduced sentences for his cooperation – he had, in some cases – and elicited that Wesley had solicited the courts and the Cumberland County Prosecutor to have his sentence reduced in exchange for his cooperation. (28T:57-16 to 58-14, 60-19 to 66-11).

Wesley was cross examined on the fact that he was currently facing life in prison, and his testimony in defendant's case was pursuant to a plea that reduced that exposure to possible probation in exchange for his truthful testimony. (28T:135-25 to 136-15, 138-16 to 24). He was cross-examined about testifying for the State and his criminal history extensively. (28T:156-8 to 167-8). Indeed, at one point, defense counsel read each and every name he had provided information on or testified to, other than Hill: Clayton Cox, Anthony Harris, Brian Hillman, Richard Ray, Richard Smith, Art Folkes, Rahim Williams, Keshon Coleman, Porky Gordo, and Herrill Washington.[10] (28T:167-9 to 168-19).

As for Hill, Wesley was extensively cross-examined about that as well. (28T:173-17 to 178-2, 183-17 to 196-5; 29T:28-10 to 22). In that cross examination, defense counsel elicited that Wesley, in his recantation, admitted to falsely testifying against Hill, Harris, and Cox. (28T:185-21 to 188-9). Specifically, defense counsel elicited that Wesley signed a statement saying that the testimony he provided "as a state's witness was fabricated and untrue." Ibid.

Defense counsel went on to elicit testimony specifically about the Attorney General review of Hill's case. (28T:188-20 to 189-6). Defense counsel

[10] Herrill Washington's name was mistakenly transcribed as "Harold" Washington, but refers to Wesley's testimony on behalf of the defendant, not the State, in State v. Feaster, 156 N.J. 1, 29 (1998).

elicited explicitly that it was the Conviction Review Unit who followed up with him, and that Wesley had not bothered to tell anyone in any official capacity that he had recanted under duress until the Conviction Review Unit interviewed him in 2020. Ibid.

Thus, the added detail that Hill was exonerated would add nothing to this thorough, extensive cross-examination of Wesley, his history of crime, his history of cooperation, his history of recanting testimony, and his dubious credibility. The jury was well aware that the Conviction Review Unit had been the only official record of his re-recantation in Hill's case. To add that piece of information, as the trial court properly ascertained, would require extensive testimony about Hill's case as follows.

Hill was exonerated based on many issues in his case, most paramount being that the eyewitness who placed him at the scene of the murder was unreliable, and was subjected to a suggestive single-picture identification procedure. (Pa18-21).[11] That eyewitness also recanted in a letter, saying she was too drunk to remember anything about that night other than seeing a gray car. She also expressly stated that she did not see Hill at the scene. The eyewitness then testified that she had been pressured to write that letter by Hill's father and

[11] This information is taken from the National Registry of Exonerations' page on Hill's case, attached to this brief as Pa18-21.

claimed she did see Hill. Other witnesses testified that the eyewitness was unable to see the shooting because the eyewitness had been somewhere else entirely at the time. Ibid.

Wesley was not even the only, or most probative, jailhouse informant in that case — Wesley's testimony was that Hill had told him that the shooting was an accident and wondered if the eyewitness could be paid to recant. The other jailhouse informant said in a statement that Hill had admitted to shooting the victims for money. Ibid.

Additionally, another person subsequently came forward as a viable suspect post-conviction, there was no forensic evidence, and the Conviction Review Unit had obtained post-conviction recordings that supported Hill's claim of innocence. Ibid. The State explained this on the record during the defense's objection, (28T:169-16 to 173-6), and then again later when defendant wanted to overturn the jury verdict, (36T:37-8 to 22). It should be noted, as well, that there was no objection to defendant eliciting the recantation, or that Wesley at one point claimed his testimony was fabricated. Ibid. The State conceded that this was valid cross examination.[12] Ibid. The only objection was to the fact that

[12] Thus, the Rule 104 hearing defendant claims was necessary was not necessary at all—the impeachment testimony was always going to come in, and the jury was always going to hear that Wesley recanted his testimony and signed a statement that he fabricated his story.

Hill was exonerated, and the implication that this was solely because of Wesley's recantation.

Wesley's recantation was not the sole or even main reason for Hill's exoneration. To present that fact to the jury as if it were a certainty, that Wesley and Wesley alone was the reason for exonerating Hill, would be a gross misstatement of the truth. Moreover, it would necessitate digging deeply into Hill's facts to debunk that claim, as was just done ante, with testimony and evidence on extraneous issues in that case that have nothing to do with defendant's case. As Guenther and A.O. both stated, to do so would be a distracting sideshow that would "become a second trial, eclipsing the trial of the crimes charged." Guenther, 181 N.J. at 157; A.O., 198 N.J. at 93. The trial court was right to decline to delve into that digression when the testimony already adequately addresses Wesley's credibility

Turning to the actual analysis under N.J.R.E. 608(b)(1), Wesley is not a victim-witness, central to the outcome of this case. Guenther, 181 N.J. at 157. Even to ignore the victim-witness part, Wesley was simply not as central to the case as defendant claims. Wesley's testimony filled in certain gaps regarding whether the meeting between defendant and Mr. Coulanges was planned or not, and that Mr. Coulanges had left a laptop at defendant's home, forming the basis of their dispute that night. These add to the general picture of the case and

defendant's possible motive, but are not dispositive of the ultimate issue.

Everything else Wesley testified to — that defendant planned to claim self-defense; that defendant had the gun, not Mr. Coulanges; that he shot Mr. Coulanges twice — was independently testified to by multiple other sources, including defendant's own statements to police, Otto Bowens, and admissions by his parents. Mr. Coulanges' family also corroborated that the laptop had been left at the Keoghs' home.

Defendant spun a tale that he was attacked by an intruder with a gun, and wrestled the gun away and shot to save himself. The evidence at trial completely debunked that tale, regardless of Wesley's testimony, as his parents admitted that defendant had the gun all along, and that Mr. Coulanges had been unarmed. Otto Bowens identified the gun as defendant's as well. And, the angle of the shot in the decking was straight down. Moreover, that also means that Wesley's testimony was independently verified by those other sources. The trial court highlighted this fact before sentencing, noting that even without any testimony from Wesley, there was ample evidence in the record to convict defendant of murder. (36T:42-17 to 44-1).

Hill was charged with murder, as was defendant — so, the second factor of N.J.R.E. 608(b)(1) is satisfied. As for the third factor, proximity, Hill's case took place in 2006, with the murder in 2004, and Mr. Coulanges was murdered

in 2019. There is no proximity to the crime or the case in defendant's situation. Factor four involves what would be required to present at trial to explain the issue adequately, and here, much extrinsic evidence and additional testimony would be needed to present both sides of why Hill was exonerated, as previously noted. This flows into factor five, the prejudice, confusion of issues, and waste of time the evidence would present.

The evidence would have been cumulative in this case; the jury was already well aware that Wesley admitted to fabricating testimony in the past. They were also always going to know that Wesley claimed he lied because of duress, regardless. The effort required to provide the jury with the truth as to the defendant's contention, that Hill was exonerated because of Wesley's testimony, would most certainly confuse the issues as trial, namely whether Wesley's testimony about defendant, not Hill, was true, and would definitely waste time explaining things the jury was already aware of: that Wesley admitted to fabricating testimony in the past.

Thus, even to assume that defendant's case falls into the narrow category of cases covered by N.J.R.E. 608b(1), he still fails the analysis under Guenther and A.O. Additionally, no Rule 104 hearing was necessary as there was no dispute that evidence of the prior false testimony can and should come in. It is clear that defendant believes his entire case rested on Barrick Wesley's

testimony, but the reality is that he was the last witness in a list of witnesses who provided direct evidence of his guilt. And, his own parents' testimony served to be much more damning to his position than anything else — certainly much more than Wesley. Indeed, his parents made Wesley's testimony more credible by corroborating the gun's provenance.

The trial court properly employed the "limited circumstances" and "very strict controls" Guenther, 181 N.J. at 154, and A.O., 198 N.J. at 93, required. Indeed, the maximum amount of information possible without treading into a "distracting mini trial" was permitted on cross. Thus, there was no error here and defendant's convictions should stand.

B. Defendant's Pro-Se Brief

In his pro se brief, defendant claims the State committed Brady violations because it did not provide discovery on Taron Hill, on State v. Feaster, and on a case against someone called Rodney Lance out of Essex County that resulted in a not-guilty verdict. (Psb1-8).

In the specific context of a Brady violation, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87. In order to establish a Brady violation, a defendant must show that: "(1) the prosecution suppressed evidence; (2) the evidence is favorable to

the defense; and (3) the evidence is material." State v. Martini, 160 N.J. 248, 269 (1999); accord State v. J.J., 397 N.J. Super. 91, 101 (App. Div. 2007). In each case, the burden rests upon the defendant to establish each prong of the test. Martini, 160 N.J. at 269.

"[A] post-conviction request for even purported Brady materials must make a threshold showing that the requested materials are, in fact, Brady materials." State v. Szemple, 247 N.J. 82, 101 (2021). For the second prong, if the evidence is material to either guilt or punishment, the good or bad faith of the prosecutor in withholding the evidence is irrelevant. Martini, 160 N.J. at 268. "The Brady disclosure rule applies to information of which the prosecution is actually or constructively aware." State v. Nelson, 330 N.J. Super. 206, 213 (App. Div. 2000). "Whether evidence is material and thus subject to disclosure under the Brady rule is a mixed question of law and fact." State v. Marshall, 148 N.J. 89, 185 (1997) (citing United States v. Pelullo, 14 F.3d 881, 886 (3d Cir. 1994); United States v. Perdomo, 929 F.2d 967, 969 (3d Cir. 1991); Carter v. Rafferty, 826 F.2d 1299, 1306 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988)). Appellate courts thus "give deference to 'supported factual findings of the trial court, but review de novo the lower court's application of any legal rules to such factual findings.'" State v. Behn, 375 N.J. Super. 409, 432 (App. Div. 2005) (quoting State v. Harris, 181 N.J. 391, 416 (2004)).

In State v. Marshall, the New Jersey Supreme Court extolled the virtues and simplicity of the unified materiality test set forth in United States v. Bagley, 473 U.S. 667, 676 (1985). Marshall, 148 N.J. 89, 155-56 (1996); see also State v. Knight, 145 N.J. 233, 247 (1996) (adopting the Bagley standard).

Thus, "[i]n all instances, evidence is material for Brady purposes 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Id. at 156 (quoting Bagley, 473 U.S. at 682). "A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.'" Martini, 160 N.J. at 269 (quoting Bagley, 473 U.S. at 682). The evidence need not be of the sort that would have resulted in the defendant's acquittal, but it does have to make the guilty verdict one that the court no longer has confidence in. State v. Brown, 236 N.J. 497, 520 (2019). "The significance of the nondisclosure 'depends primarily on the importance of the [evidence] and the strength of the State's case against [a] defendant as a whole.'" Ibid. (quoting State v. Marshall, 123 N.J. 1, 200 (1991)).

"Evidence that is merely cumulative does not create a reasonable possibility that the verdict would have been affected." State v. Carter, 91 N.J. 86, 114 (1982). Evidence that has some mitigation value, but opens the defendant up to an adverse jury reaction and damaging rebuttal evidence is not material, as such a situation would not result in a different outcome. Martini,

160 N.J. at 270.

The first two issues are easily dealt with: Taron Hill was a central aspect of defendant's cross-examination of Wesley, and the State had given defendant and his attorneys all possible information about his case. That is the literal subject of his counseled brief, that he wanted to cross examine on more information he had on Taron Hill. (Db52-56). Additionally, at trial during the cross examination of Wesley regarding Hill, defense counsel even stated that the prosecutor provided "extensive discovery" about Hill's case. (28T:170-20 to 24). Thus, discovery was clearly provided, and fails the first step of the Brady analysis.

Defendant's argument on Feaster is also misplaced, as the trial transcript shows that he was aware of that case and Wesley's testimony against Herrill Washington. (28T:168-13 to 25). Indeed, he was cross-examined on it. Ibid. Thus, discovery was clearly provided to defendant about that case.

As for the last one, regarding Rodney Lance, the defense was also aware of that case, and what discovery was provided to defendant was placed on the record. (36T:12-17 to 14-21). Specifically, on August 10, 2022, defendant filed a letter to the State about an unnamed Essex County case in which Barrick Wesley was a witness. The State noted that defense counsel was aware of that unnamed case as it was referenced in materials provided to defendant on William

Boston's case. When the State became aware of the case before trial in September 2021, it reached out to the Essex County Prosecutor's Office to acquire information about it, but never received any documents. Ibid.

On August 16, 2022, Detective Sidorski asked Wesley if he had any other information after defendant filed his letter, and in so doing, discovered the case was State v. Rodney Lance. Ibid. The State then reached out to Essex County again, who informed the State that that case was a multi-defendant case, and they only had filings from one of the codefendants, none of which mentioned Wesley or any cooperation agreements involving him. The State then asked Essex County again to go into their archives for Lance to find anything else, but no further information was provided. The State did provide a Promis/Gavel printout for the case to defense counsel. Ibid.

Defendant now claims that this case ended in a not-guilty verdict, and that this was valuable impeachment material. At the outset, that is not impeachment material. A not-guilty verdict does not equate to false testimony. As this is the same exact information that already was presented to the jury – that Wesley had testified for the State in other cases a multitude of times – this evidence is also cumulative as well, and does not constitute a Brady violation. "Evidence that is merely cumulative does not create a reasonable possibility that the verdict would have been affected." Carter, 91 N.J. at 114. Moreover, there is no evidence that

the State suppressed anything. Indeed, whatever the State could acquire, the State provided. Moreover, the trial court made an explicit finding that "I commented many times through the case that [the State] had gone above and beyond in providing the information he had to by the Attorney General's Directive." (36T:43-22 to 25).

Thus, there is no basis for any of defendant's arguments, and there was no Brady violation. His convictions should be affirmed.

Point V

> Defendant's understanding of the Endangering an Injured Victim is wholly incorrect, and his assertion as to the rule established in State v. Moon is unfounded as that case is vastly different from the one at bar.

Defendant claims that he should have been acquitted of endangering an injured victim because, in his estimation, the fact that he left Mr. Coulanges on the porch for two hours after shooting him without even checking for a pulse is irrelevant. (Db56-60). Specifically, he claims that the fact that Mr. Coulanges was going to die regardless means that this course of action means nothing. Alternatively, he claims the jury should have been charged with language from State v. Moon, 396 N.J. Super. 109, 114-16 (App. Div. 2007), where it is not endangering an injured victim to walk away from an already dead body.

Defendant is grossly mistaken. First off, in Moon, the victim had been

shot directly through the brain and the Medical Examiner testified that he died instantly, before he even hit the ground. Id. at 113. This is wildly different from defendant's case, where he shot Mr. Coulanges in the leg and then in the torso, neither of which are instantaneously fatal. The evidence in the case also shows that a jury certainly could have found that defendant failed to render aid to Mr. Coulanges and that he did not die instantly. Indeed, although defendant's expert opined that Mr. Coulanges "likely" died within minutes, that is far different than the obvious and instant death clear in a head shot. Two hours after the shooting, in fact, officers observed that Mr. Coulanges' body was still warm despite being left outside in the cold January air.

Defendant is not required to save the life he endangered, but he is required to at least try to help the person he shot and injured so critically. In short, he is obligated to care enough about the human life he endangered to at least call 911. But as defendant said in his statement to police, he had no compassion for Mr. Coulanges, and did not feel he had to call for help, even though he acknowledged that he should have. Instead, he went inside and watched baseball until his mother got home, and then stepped past Mr. Coulanges' prone, injured body for two hours without even checking for a pulse. To say that this, somehow, does not constitute endangering an injured victim such that he should have been acquitted is preposterous and this court should not countenance such an

argument.

Endangering an injured victim is codified at N.J.S.A. 2C:12-1.2, which reads as follows:

> (a.) A person is guilty of endangering an injured victim if he causes bodily injury to any person or solicits, aids, encourages, or attempts or agrees to aid another, who causes bodily injury to any person, and leaves the scene of the injury knowing or reasonably believing that the injured person is physically helpless, mentally incapacitated or otherwise unable to care for himself.
>
> (b.) As used in this section, the following definitions shall apply:
>
> (1) "Physically helpless" means the condition in which a person is unconscious, unable to flee, or physically unable to summon assistance; …
>
> (2) "Bodily injury" shall have the meaning set forth in N.J.S. 2C:11-1.

N.J.S.A. 2C:11-1 defines bodily injury as "physical pain, illness or any impairment of physical condition."

Defendant claims there was no evidence to suggest Mr. Coulanges was alive for more than a few moments and should have been acquitted of that count in his indictment. Defendant is deeply mistaken. Two hours after he was shot, after laying in the cold January air for that entire time, Mr. Coulanges' body was still warm to the touch. (18T:73-1 to 4; 82-9 to 13). There was no blood visible until his body was rolled over. (18T:10-19 to 20; 12-22 to 4; 38-19 to 39-24). In

Moon, the gunshot to the head was very obviously bloody as it blew a hole through his skull. 396 N.J. Super at 113. Moreover, mucous was leaking from Mr. Coulanges' mouth and nose as well when he was rolled over. (18T:38-22 to 39-4). Additionally, defendant admitted that he knew he should have called 911 sooner, and had aimed "low" to avoid a fatal shot. (21T:172-4 to 178-18, 185-13 to 22; 192-15 to 21). Regardless, defendant also admitted to watching baseball after shooting Mr. Coulanges, and stated that his compassion was gone as he felt he had been "violated." (21T:131-16 to 140-4, 196-18 to 197-13).

Defendant obviously caused bodily injury to Mr. Coulanges by shooting him in the body twice. Secondly, the gunshot wounds rendered Mr. Coulanges physically helpless; he was unable to flee or call for help and inevitably lost consciousness, but did not die in the same moment he was shot as the victim did in Moon. Thirdly, defendant must have reasonably believed Mr. Coulanges was physically helpless, given the respective locations of the gunshot wounds, his claim to aim "low," and his statement that he knew he should have called for help. With all elements of N.J.S.A. 2C:12-1.2(a) satisfied by defendant's conduct, it certainly did not violate defendant's Fourteenth Amendment right to due process to convict him of the offense. Thus, there was ample evidence in the record for a jury to determine that defendant was guilty of this crime.

While it may be true that Mr. Coulanges would have died quickly anyway,

even if help had been called right away, that is irrelevant. Nothing in the statute states defendant must successfully save the life he endangered. Indeed, it is an affirmative defense to show evidence that a defendant called for help, with no caveat that help must be successfully life-saving. N.J.S.A. 2C: 12-1.2(c). What matters is that defendant caused bodily injury to Mr. Coulanges that rendered him physically helpless and in need of help, that defendant knew Mr. Coulanges needed help, knew that he supposedly "aimed low" to avoid a fatal gunshot wound, and instead of rendering any aid or calling for help, left him lying on the porch for two hours while he watched baseball and drove around with his parents. There is no basis for acquittal on this count because Mr. Coulanges would have died regardless of whether help had been called, be it in minutes or hours or days. Mr. Coulanges' death was not instantaneous like a shot to brain, and he lingered for some amount of time, however short, in pain and helpless. Any amount of time thus spent is unconscionable.

What matters is that not one member of the Keogh family bothered to even touch Mr. Coulanges, a supposed brother and son, while he lay on their porch, dying. (29T:184-3 to 186-25, 188-13 to 17, 191-12 to 15; 30T:202-22 to 203-7, 31T:47-9 to 17, 181-17 to 184-20).

This is also why defendant's claim that, alternatively, he should have had the benefit of a charge instructing the jury that, pursuant to Moon, it is not

endangering an injured victim to walk away from a corpse fails. In Moon, this Court found that:

> in the opinion of the medical examiner, the extensive damage to Corie's brain would have incapacitated him instantly, and he was dead or dying when his face hit the ground. Corie had an abrasion under his ear and a 'substantial split' inside his mouth where his lip and cheek hit his teeth. Neither injury showed any of the swelling, bruising or bleeding that would be present if his blood were circulating at the time of the impact…'[t]o all intents and purposes, he was dead' when shot. His heart could not continue to beat without his brain.

396 N.J. Super. at 113 (emphasis added) (quoting trial record). Under these circumstances, "no juror could reasonably find that Corie was alive and helpless, incapacitated or unable at the relevant time — when defendant left him on the street — or that defendant knew or reasonably believed that he was alive…The crime cannot be construed to apply to a person who kills another and leaves the body behind." Id. at 115-16.

Defendant did not request this charge at trial, meaning this claim must be reviewed for plain error, or error 'clearly capable of producing an unjust result.'" Singleton, 211 N.J. at 182 (quoting Adams, 194 N.J. at 207); R. 1:7–2. There is no error in not sua sponte adding a charge when there is no rational basis for it, such that it is "jumping off the page." State v. Fowler, 239 N.J. 171, 188 (2019) (citing Funderburg, 225 N.J. at 81). The trial court is not required "to

meticulously sift through the entire record...to see if some combination of facts and inferences might rationally sustain" a possible charge. Ibid.

Here, defendant did not walk away from a corpse whose brain was immediately shredded from a shot to the head. Defendant walked away from someone who he shot in the body, "aiming low," who survived for, at minimum, minutes while incapacitated. There was evidence Mr. Coulanges' lingered longer, as he was still warm to the touch two hours later. An expert opinion is just that: an opinion, not a certainty, and there is nothing to suggest that defendant knew that Mr. Coulanges' death was inevitable when he made his choice to watch baseball and call his mom instead of calling 911.

While blowing someone's skull open is obviously instant death, Moon also had evidence that the victim was dead before he even hit the ground, with no swelling, bruising, or bleeding that should have been present after such an impact. 396 N.J. Super. at 113. Here, Mr. Coulanges bled so much that it killed him—a quart of blood had filled his chest cavity, with even more blood filling his abdominal cavity and his pericardial cavity around the heart. (19T:103-21 to 104-8). That takes time. Even if the effort would have been futile, the lack of effort is what New Jersey has declared to be criminal.

Thus, there was no basis in the record to have sua sponte charged the jury with Moon's holding. Defendant's conviction on this count should be affirmed.

Point VI

Defendant's sentence is sound, and should be affirmed.

Defendant finally contends that his sentence is manifestly excessive. (Db61-62). Defendant claims first that the trial court failed to adequately explain why it opted to only apply one of the six mitigating factors he asked for, failed to explain the overall fairness of his sentence, and failed to find that he had the ability to pay the Victims of Crime Compensation Office ("VCCO") restitution required of him by statute. Ibid.

None of these arguments hold water. Defendant's sentence is wholly fair given the charges against him and the facts of the case. Why defendant got the mitigating factor he did was adequately explained, and the reason why the others were not imposed is clear from the record the judge made. The same is true for the overall fairness of the sentence. Finally, the restitution in defendant's case is mandatory, and thus, properly imposed.

It is well settled that when reviewing a trial court's sentencing decision, "[a]n appellate court may not substitute its judgment for that of the trial court." State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Evers, 175 N.J. 355, 386 (2003); State v. Johnson, 118 N.J. 10, 15 (1990); See also State v. O'Donnell, 117 N.J. 210, 215-16 (1989)("[A]n appellate court should not second-guess a trial court's finding of sufficient facts to support an aggravating or mitigating

factor if that finding is supported by substantial evidence in the record."). This Court may only review and modify a sentence when the trial court's discretion was "clearly mistaken." Evers, 175 N.J. at 386; State v. Jabbour, 118 N.J. 1, 6 (1990); State v. Jarbath, 114 N.J. 394, 401 (1989). With this limitation in mind, an appellate court can:

> (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience.

Evers, 175 N.J. at 387; Jabbour, 118 N.J. at 6; State v. Roth, 95 N.J. 334, 364-65 (1984). "[I]n sentencing, the Code 'channel[s] the discretion of trial courts' by focusing on the gravity of the offense rather than the offender's blameworthiness or capacity for rehabilitation." Evers, 175 N.J. at 387; Jabbour, 118 N.J. at 6; State v. Hodge, 95 N.J. 369, 375 (1984); Roth, 95 N.J. at 355.

The New Jersey Supreme Court has held that "sentences can be upheld where the sentencing transcript makes it possible to 'readily deduce' the judge's reasoning." State v. Miller, 205 N.J. 109, 129–30 (2011) (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)); see also State v. Molina, 168 N.J. 436, 442–43 (2001); State v. Perry, 124 N.J. 128, 177 (1991)).

In his letter to the trial court, defendant requested mitigating factors 3 (defendant acted under strong provocation), 4 (substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense), 5 (victim of the defendant's conduct induced or facilitated its commission), 7 (defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense), 8 (defendant's conduct was the result of circumstances unlikely to recur), and 9 (character and attitude of the defendant indicate that the defendant is unlikely to commit another offense). (Da26-27); N.J.S.A. 2C:44-1(b)(3-5, 7-9).

The trial court noted that defendant had asked for a "host" of mitigating factors in his presentence letter, but stated that it "can only find number seven...He's 31. This is his first indictable conviction. I find factor seven to apply." (36T:99-19 to 23). While the trial court did not go through each of the other five factors he asked for explicitly, the trial court did, obviously, consider them. And, the reasons why those factors do not apply are clear from the court's other statements and findings in the record. As for mitigating factors 3, 4, and 5, all of which deal with provocation, the victim's conduct, and that defendant's actions were justified, the trial court noted in its recitation of the facts that defendant's narrative of being attacked and forced to wrestle a gun away from

an assailant were all proven demonstrably false. (36T:96-13 to 98-3). This was proven by geolocation evidence, surveillance videos, and Otto Bowens' testimony that he gave the gun used that night to defendant. Defendant had also admitted to throwing a punch at Mr. Coulanges. Ibid. Thus, none of these mitigating factors apply and why is readily deduced from the sentencing transcript. Miller, 205 N.J. at 129-30; Bieniek, 200 N.J. at 609; Molina, 168 N.J. at 442-43; Perry, 124 N.J. at 177.

It is unclear why mitigating factor 8, that the circumstances were unlikely to recur, would apply here. Someone coming to your house to retrieve their property, whatever that property is, and falling out with a former friend, could certainly recur. Additionally, the sentencing transcript makes it abundantly clear why mitigating factor 9, that defendant's attitude indicates that he is unlikely to commit another offense, did not apply. In his statement to the court at sentencing, defendant stated that he is not a murderer but a "protector" who always "protected" and took care of Mr. Coulanges for years. (36T:91-10 to 17). He claimed he was "here for protecting myself and my parents." Ibid. He also stated that he was on amphetamines and had smoked weed at the time of the murder and "was not in a clear state of mind." (36T:92-15 to 16). He also referenced the Bible in Exodus, where using deadly force to defend one's home is allowed. (36T:94-13 to 18). It is thus readily deducible why the trial court did

not apply these factors. Miller, 205 N.J. at 129–30; Bieniek, 200 N.J. at 609; Molina, 168 N.J. at 442–43; Perry, 124 N.J. at 177.

Defendant also mentions that the trial court did not explain why he changed the parole bar from 30 to 42.5 years at the motion to correct defendant's sentence. (Db61). Defendant forgets that 42.5 is the correct No Early Release Act calculation, and this was placed on the record during argument. (37T:4-20 to 5-2, 5-24 to 6-4); N.J.S.A. 2C:43-7.2(a).

As for restitution, defendant never disputed the amount of restitution he was mandated to pay, and thus, there is no reason to hold an ability-to-pay hearing. Restitution's purpose is to rehabilitate, not punish, the defendant and to compensate the victim. State v. DeAngelis, 329 N.J. Super. 178, 190 (App. Div. 2000); State in Interest of R.V., 280 N.J. Super. 118, 122 (App. Div. 1995). N.J.S.A. 2C:44-2(b) requires a court to sentence a defendant to pay restitution "if: (1) [t]he victim, or in the case of a homicide, the nearest relative of the victim, suffered a loss; and (2) [t]he defendant is able to pay or, given a fair opportunity, will be able to pay restitution." In determining the amount of restitution, a court must "take into account the financial resources of the defendant and the nature of the burden that its payment will impose." N.J.S.A. 2C:44-2(c)(1); see also State v. Williams, 467 N.J. Super. 1, 7 (App. Div. 2021).

"When a sentencing court has not conducted a meaningful evaluation of a

defendant's ability to pay, appellate courts routinely vacate restitution orders and remand for reconsideration." RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 478 (2018). However, when there is "no dispute as to the amount ordered or defendant's ability to make restitution ... [n]o restitution hearing is required ...." State v. Orji, 277 N.J. Super. 582, 589-90 (App. Div. 1994) (emphasis added).

At the motion hearing to correct the sentence, restitution came up, specifically about the amount in that there had been an error in a minimum fine. (37T:6-22 to 7-18). When the amount was clarified, the trial court expressly asked if defense counsel had anything further to add, and defense counsel answered that he did not. Ibid. Thus, defendant never disputed his restitution amount, nor raised any indication that he had an inability to pay even when expressly asked to place such an argument on the record. No hearing is thus necessary. See Orji, 277 N.J. Super. at 589 (finding "[w]hile we recognize that a defendant is entitled to a restitution hearing under certain circumstances, those circumstances do not exist here. No dispute exists as to amount of restitution," and "Defendant raised no objection to the concession made by his counsel nor did he dispute his ability to pay.").

Moreover, N.J.S.A. 2C:44-2(c)(2) mandates that "[t]he court shall not reduce a restitution award by any amount that the victim has received from the

Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board." (emphasis added). As defendant's restitution is payable to the VCCO presumably for the payout given to Mr. Coulanges' family, this penalty is mandatory and shall not be reduced.

Thus, there is no need for defendant's sentence to be disturbed at all. His sentence and convictions should be affirmed.

CONCLUSION

For the above reasons and authorities cited in support thereof, the State respectfully urges this Court to affirm the conviction and sentence entered below.

Respectfully submitted,

JOHN P. MCDONALD
SOMERSET COUNTY PROSECUTOR

By: **s/ Emily M. M. Pirro____**
Emily M. M. Pirro
Attorney No. 197602017
Assistant Prosecutor
Of Counsel and on the brief