SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-931-20

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County.
v.	:	
JEFFREY T. HARLEY,	:	
Defendant-Appellant.	:	Indictment No. 16-11-1411
	:	Sat Below: Hon. Patrick J. Arre, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: January 12, 2023

DEFENDANT IS CONFINED

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Record materials are cited as follows:

"Da" – defendant-appellant's appendix;
"1T" – January 10, 2018, volume 1 of 2, motion transcript;
"2T" – January 10, 2018, volume 2 of 2, motion transcript
"3T" – January 17, 2018 first trial transcript;
"4T" – January 18, 2018 first trial transcript;
"5T" – January 23, 2018 first trial transcript;
"6T" – January 24, 2018, volume 1 of 2, first trial transcript;
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"8T" – January 25, 2018 first trial transcript;
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"10T" – January 31, 2018 first trial transcript;
"11T" – February 1, 2018 first trial transcript;
"12T" – February 2, 2018 first trial transcript;
"13T" – February 5, 2018 first trial transcript;
"14T" – February 6, 2018 first trial transcript;
"15T" – February 7, 2018 first trial transcript;
"16T" – April 23, 2019, volume 1 of 2, second trial transcript;
"17T" – April 23, 2019, volume 2 of 2, second trial transcript;
"18T" – April 24, 2019, volume 1 of 2, second trial transcript;
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"20T" – April 30, 2019 second trial transcript;
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"22T" – May 1, 2019, volume 2 of 2, second trial transcript;
"23T" – May 2, 2019 second trial transcript;
"24T" – May 3, 2019 second trial transcript;
"25T" – May 6, 2019 second trial transcript;
"26T" – May 7, 2019 second trial transcript;
"27T" – May 8, 2019 second trial transcript;
"28T" – May 9, 2019 second trial transcript;
"29T" – July 19, 2019 sentencing transcript; and
"PSR" – presentence report.

PRELIMINARY STATEMENT

This is an appeal from a murder conviction where the most damning evidence against the defendant is that he lived across the street from a woman who was stabbed in her Lexington Avenue home in Jersey City. Mr. Jeffrey Harley has consistently maintained, however, that he has never been inside of his neighbor's home, and that he had nothing to do with this offense.

The State's proofs against Harley were weak. Although the offense was partially captured on video surveillance, the perpetrator's face is obscured. No witnesses were able to directly identify the perpetrator, who walked unapprehended from the crime scene to John F. Kennedy Boulevard, and then disappeared off-camera. The jury at the first trial hung on all charges after seven days of deliberations.

The State obtained a conviction at the second trial by alleging that Harley was not truthful in his recorded statement to police. Two witnesses who watched surveillance video out-of-court identified Harley as a faceless man who walked from the direction of Kennedy Boulevard toward Harley's home on Lexington Avenue, though Harley had told police he returned home from the opposite direction. That is the entire thrust of the State's case; even those same witnesses could not say that it was Harley on video entering and leaving his neighbor's house.

This Court should order a new trial for two reasons. First, the trial judge erred by admitting Harley's recorded statement as evidence in support of the State's criminal case-in-chief. Interrogators failed to give Harley Miranda warnings before confronting him with evidence that their murder suspect had walked toward his home. Because no reasonable person in Harley's position would have felt free to leave the interrogation, his unwarned statement should have been inadmissible.

Second, the trial judge failed to provide a mandatory jury instruction on how to evaluate the identification evidence, including that identification had to be proven beyond a reasonable doubt, and also failed to hold an admissibility hearing. Although the witnesses were familiar with Harley, he denies that they correctly identified him. Notably, the face of the person walking in the direction of Harley's home from Kennedy Boulevard is not visible, and the procedures used to obtain the identifications were partially unrecorded, and highly suggestive. Among other problems, one of the witnesses had earlier been unable to say that it was Harley, and the other witness only said it was Harley after the detective administering the identification procedure inappropriately prompted her to give the expected answer. But even if the identification evidence was admissible, the jury at minimum needed to be instructed on the standards for evaluating whether the State had met its burden.

Individually and cumulatively, in a case with a troubling lack of evidence that the defendant had anything to do with this offense, these errors had the capacity to cause a wrongful conviction. This Court must order a new trial.

PROCEDURAL HISTORY

On November 1, 2016, a Hudson County Grand Jury returned Indictment No. 16-11-01411, which accused Jeffrey Harley of eleven counts: first-degree murder, contrary to N.J.S.A. 2C:11-3a(1) and (2) (count eleven); first-degree felony murder, contrary to N.J.S.A. 2C:11-3a(3) (counts three and six); first- and second-degree robbery, contrary to N.J.S.A. 2C:15-1a(1) and N.J.S.A. 2C:15-1b (counts four and five); second- and third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1) and N.J.S.A. 2C:18-2b(1) (counts one and two); and third- and fourth-degree weapons offenses, contrary to N.J.S.A. 2C:39-4d and 5d (counts seven, eight, nine, and ten). (Da 1-4)

On January 10, 2018, Harley appeared before the Hon. Patrick J. Arre, J.S.C., for a hearing on his motion to change the venue. (1T 3-19 to 13-21) The court denied his motion. (1T 13-22 to 16-25; Da 5)

Harley appeared for a first trial from January 17, 2018 – February 7, 2018. (3T – 15T) The jury deliberated for 7 days (9T – 15T), beginning on January 30, 2018. (9T 158-17 to 19) On February 7, 2018, the court

determined that the jury was unable to reach a verdict on any of the eleven counts, and declared a mistrial. (15T 7-13 to 9-5)

Harley appeared for a second trial from May 1-9, 2019. (21T – 28T) On May 9, 2019, the jury convicted him on all counts except counts nine and ten. (28T 95-1 to 96-14; Da 6-9; Da 157-160)[1]

On July 19, 2019, Judge Arre imposed multiple maximum consecutive terms. (29T 55-1 to 8; Da 6-9) He imposed a prison term of life with a 75-year parole disqualifier for first-degree murder. (29T 55-11 to 14) He imposed a consecutive prison term of 20 years with a No Early Release Act 85 percent parole disqualifier for first-degree robbery. (29T 55-20 to 24) He imposed a consecutive prison term of 10 years with a No Early Release Act 85 percent parole disqualifier for second-degree burglary. (29T 55-15 to 19) He imposed a consecutive prison term of 1.5 years for fourth-degree possession of a serrated knife. (29T 55-25 to 56-4) The remaining counts merged. (29T 52-23 to 53-18) In aggregate, the court thus imposed a prison sentence of life plus 31.5 years, with a parole disqualifier of 100.5 years. (29T 56-10 to 11; Da 6-9) On December 5, 2020, Harley filed a notice of appeal. (Da 10-13)

[1] Harley was acquitted only of possessing a straight edge knife during the offense. (28T 96-6 to 11)

STATEMENT OF FACTS

The parties agreed at trial that decedent Lucila Cardenas Viejo met a gruesome end. The dispute was whether the State could prove beyond a reasonable doubt that it was Harley who killed her.

To summarize, on the night of February 6, 2016, someone entered Viejo's home at 64A Lexington Avenue in Jersey City, stabbed her multiple times, and then departed. The offense was partially recorded on her building's surveillance footage, but the perpetrator's face is not visible, and no one saw the crime itself. The State accused Harley, who lived across the street.

On the morning of February 7, 2016, several hours after the stabbing, Viejo's upstairs tenant[2] Juan Cortez contacted Viejo's adult son Armando Solorzano. (21T 141-12 to 19)[3] Armando arrived at his mother's house and observed blood stains on the property's exterior, including on the front railing and door. (21T 144-12 to 15; 146-3; 147-9 to 10) He went inside and saw more blood stains in the vestibule and hall, as well as his mother's dentures. (21T 149-7 to 16) When he entered his mother's apartment, he found her body on the floor and two knives in close proximity. (21T 151-16 to 19; 153-3 to 17)

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[2] Viejo owned the three-family building, lived on the first floor, and rented the second-floor apartment, and basement, to non-testifying tenants. (21T 166-6 to 8).
[3] To avoid confusion, Armando will be referred to in this brief by his first name because he shares a surname with his brother Victor Solorzano, who also testified at trial.

He then called 911 and reported that his mother had been stabbed to death. (21T 154-23; 157-6 to 10)

Both Armando's brother Victor Solorzano, and the police, arrived within minutes. (21T 164-7 to 9; 24T 29-24 to 30-16) The Solorzano brothers were upfront that their mother had believed third-party offenders were targeting her property (24T 32-25 to 33-1); the brothers also characterized the area as "high crime." (21T 160-4 to 5) Victor testified that his "mother kept complaining that she thinks somebody was – trying to break in[to] the house." (24T 32-25 to 33-1) Armando testified his mother had also evicted a tenant in late 2015 (21T 181-6 to 16), that the tenant had made "threats" to his mother (21T 181-23 to 25), and that his mother had expressed concern that the tenant would be "vengeful." (21T 181-21 to 25) Several sets of Viejo's house keys had also recently been lost or gone missing. (21T 170-8; 171-14 to 15) In light of these concerns, by February 2016, Viejo had changed her locks at least twice since late 2015. (21T 170-2 to 7; 171-17 to 19)

Investigators seized two cameras that Viejo had installed on her property at 64A Lexington. (24T 108-1 to 9) The footage showed the perpetrator at the crime scene. (Da 14; Da 15; 25T 103-20 to 104-3) However, no one was able to identify the perpetrator from the crime scene footage. (21T 175-23 to 176-6) On the stand, Armando conceded that officers had conducted an out-of-court

identification procedure, but that he had not been able to identify the person captured by Viejo's cameras at the crime scene. (21T 175-23 to 176-6)

Investigators also seized two knives from Viejo's apartment, including a serrated knife on a table that had blood on it (22T 214-18 to 19; 219-1 to 4), and a straight edge knife on the floor. (22T 223-19 to 23)[4] Investigators photographed shoe imprints in the blood stains, and took swabs. (22T 226-21 to 23; 236-11 to 237-17; 237-25 to 238-1) Finally, investigators located a safe in Viejo's home which still had over $10,000 inside. (22T 235-5 to 236-3)

An autopsy subsequently confirmed what Viejo's cameras and investigator's photographs showed, that the cause of death was multiple blunt and sharp force injuries to the head and neck. (21T 134-25 to 135-1)

Outside of Viejo's apartment, officers located surveillance video from the surrounding area. The State introduced footage from across the street at 57 Lexington Avenue (24T 110-16 to 21; Da 16), as well from 102 Lexington Avenue and 2335 Kennedy Boulevard. (24T 113-3 to 8; 127-17 to 23)

Officer Sherika Salmon canvassed outside. (24T 86-6 to 9) She approached Jeffrey Harley, who was standing across the street, and had an unrecorded oral conversation with him. (24T 86-17 to 19) Harley told Salmon that his name was Jeffrey (24T 88-16), and that he had lived across the street

[4] The two seized knives matched those kept in Viejo's drawer. (22T 224-16 to 21)

from Viejo — at 61 Lexington Avenue — for many years (24T 88-8 to 9); he also gave Salmon his phone number. (24T 101-15 to 16) Salmon also testified that Harley told her his last name was Olden (24T 88-16), and that he worked at Blue Apron (24T 89-9 to 10); Salmon thereafter contacted Blue Apron and determined that Harley was not an employee. (24T 99-6 to 9) Harley did not testify, but when he was interrogated the next day, on February 8, he gave his name as Harley (25T 13-8), and said that he worked in Bayonne, indicating that Salmon may have misheard. (25T 14-24; 82-16 to 83-15)

On February 8, the day after Officer Salmon reported a conversation with Harley that she had deemed suspicious, Officer Guershon Cherilien transported Harley in a police car to the police station. (25T 10-9 to 10) In an interrogation room, officers placed Harley under oath (25T 17-5 to 17), but did not warn him that he had the right to remain silent, or inform him of any of the other Miranda warnings, or ask him if he wished to waive those Miranda rights. (25T 10-22 to 23) During the interrogation, officers repeatedly confronted Harley with a photo still of their suspect captured by the surveillance camera at 57 Lexington Avenue — next door to his residence, and across the street from Viejo's residence — and alleged to Harley that the suspect went into Harley's house at 61 Lexington Avenue. (25T 12-21 to 88-17; Da 17; Da 18-74) Harley denied that the suspect was him, or that the

suspect had gone into his house, or that he had anything to do with the homicide. (25T 12-21 to 88-17; Da 17; Da 18-74) Officers repeatedly pressed Harley for details about his movements that night (25T 12-21 to 88-17; Da 17; Da 18-74); at trial, the prosecutor alleged that Harley lied during the interrogation to cover up guilt. (27T 49-9 to 13)

On March 8, officers conducted another out-of-court identification procedure with Armando, who had previously failed to make an identification. (21T 175-23 to 176-6)[5] In an apparently unrecorded session on March 8, officers had Armando watch surveillance recordings. (21T 176-7 to 9) The State did not present any evidence what identification instructions, if any, were given by officers to Armando during the March 8 unrecorded session. Afterward, officers brought Armando back on camera,[6] and presented him with the same photograph from the 57 Lexington Avenue recording that they had used to confront Harley. (25T 48-13 to 22) At trial, Armando testified about the out-of-court identification procedure on March 8, and told the jury that on March 8 he had identified an individual in the photograph as Harley. (21T 176-10 to 178-20) The photograph from the camera at 57 Lexington Avenue,

[5] Detectives summarized Armando's prior failed identification in a report dated February 9, 2016. (Da 75) To the best of appellate counsel's knowledge, this prior identification procedure was not video- or audio-recorded.

[6] The portion of the March 8, 2016 out-of-court identification procedure that was video-recorded and transcribed is at Da 76 and Da 77-86 respectively.

signed and dated during the out of court procedure, was admitted as identification evidence. (Da 87-88)

On March 11, officers formally charged Harley. (25T 154-6 to 9) That same day, officers obtained a warrant to search Harley's house at 61 Lexington Avenue. (23T 7-23 to 8-5) Investigators seized sneakers (23T 40-22 to 25), a mop (22T 243-22 to 24), a trash can lid (22T 244-2 to 4), gloves (22T 29-21), a cell phone (23T 22 to 30-4), and a copy of the Jersey Journal from February 8 that had a story about the death of their neighbor across-the-street. (23T 35-20 to 21) Investigators swabbed apparent blood stains, some of which also tested positive for blood. (22T 244-8 to 9; 23T 47-15 to 25)

Despite investigators' suspicions, all of the subsequent forensic testing either entirely failed to connect Harley to the homicide at Viejo's house, or was actually exculpatory. First, the State lab examined whether Viejo's DNA was at Harley's house, or Harley's DNA was at Viejo's house. In three separate reports, the State lab concluded only that Viejo's DNA was at Viejo's house, and that Harley's DNA was at Harley's house. (Da 89-95; 23T 48-12 to 82-13) Moreover, the State lab explicitly concluded that blood swabbed at Harley's house was not Viejo's blood. (23T 81-24 to 82-1)

Second, the State asked a private lab to conduct additional DNA testing. The private lab also explicitly concluded that Viejo's DNA was not on the

shoes seized from Harley's house that had tested positive for blood. Rather, Viejo was excluded as a possible contributor. (25T 156-9 to 157-5)

Third, the State lab examined whether the shoes seized from Harley's house had made the bloody shoe imprints at Viejo's house. In a report (Da 96-97), the lab concluded Harley's shoes had not made the impressions at Viejo's house. (23T 102-10 to 11; Da 96-97) The lab concluded that the imprints could have been made by any number of shoe brands. (23T 103-17 to 24; Da 96-97)

Fourth, the State lab examined the phone seized from Harley's house. The lab concluded that the location-related mobile data (e.g., GPS) was not able to place Harley at Viejo's house. (24T 76-21 to 77-3; 77-25 to 78-2)

On August 11, 2017 — nearly 1.5 years after Harley had been formally arrested — officers conducted another out-of-court identification procedure with Harley's ex-girlfriend, Malicta Coleman. (24T 19-25 to 20-3) As with Armando, officers had Coleman watch surveillance videos in an apparently unrecorded session, with no evidence of what identification instructions, if any, were given to her. (24T 21-17 to 19) Afterward, officers brought Coleman back on camera,[7] and Coleman told officers that the faceless person in the still photo was Harley, the person awaiting trial for murder. (24T 19-20 to 24; 21-9

[7] The portion of the August 11, 2017 out-of-court identification procedure that was video-recorded and transcribed is at Da 98 and Da 99-138 respectively.

to 16) At trial, Coleman testified about the out-of-court identification procedure, and the photograph from the camera at 57 Lexington Avenue, signed and dated by Coleman during the out-of-court procedure, was admitted as identification evidence. (Da 139-140; 24T 20-4 to 14)

The court never held a Miranda hearing before admitting Harley's statement into evidence against him. The court never held a Wade-Henderson hearing before admitting Armando's and Coleman's out-of-court identifications into evidence. The court failed to give the jury any instruction on how to evaluate the out-of-court identification evidence.

LEGAL ARGUMENT

POINT I

Because interrogating officers failed to provide Miranda warnings, or secure a waiver of the Fifth Amendment privilege before confronting defendant with photographic evidence that he had committed a homicide, the court's admission of his unwarned statement[8] into evidence violated his right to a fair trial. (Not raised below)

Under the circumstances, no reasonable person in Harley's position would have felt free to leave the interrogation. Officers transported Harley by

[8] The video and transcript of Harley's statement on February 8, 2016 are at Da 17 and Da 18-74 respectively. An alternative transcript is at 25T 12-21 to 88-17. The court's order admitting the statement into evidence is at 25T 12-3 to 6.

police car to an interrogation room, placed him under oath, and confronted him with photographic evidence that the person who had murdered his neighbor across the street had then circled back into the driveway of his house. This was a custodial interrogation, because no one in their right mind would believe they could simply walk out in the face of such accusation — least of all a reasonable person with a felony record, who would be keenly aware that his history alone would arouse suspicion. Nonetheless, officers elicited the defendant's responses without informing him of his Miranda rights. The Law Division's erroneous admission of Harley's unwarned statement (Da 17), as evidence of guilt, requires a remand for a new trial. (25T 12-3 to 6) U.S. Const., amends. V, XIV; N.J. Const., art. I, pars. 1, 9, 10.

Before interrogating Harley, detectives had already reviewed video seized from around the neighborhood, and developed a theory of the case that made Harley their prime suspect. Detectives theorized that the perpetrator walked east after departing from Viejo's residence at 64 Lexington Avenue, went off camera on John F. Kennedy Boulevard, and then circled back on camera and turned at or near the driveway of Harley's residence at 61 Lexington Avenue. (Da 40-44; Da 47-49; Da 54; 25T 45-22 to 46-15; 47-12 to 16; 48-3 to 8; 49-12 to 14; 53-21 to 54-5; 55-8 to 11; 56-2 to 3; 62-18 to 19)

After placing Harley under oath (25T 17-5 to 17; Da 21), detectives asked Harley to describe his relationship with and communication with Viejo. (25T 18-5 to 6 to 21-6; Da 21-24) Harley responded that they had been neighbors since approximately 1980 (25T 18-17 to 19; Da 22), but that their communication was limited because he did not want to pry. (25T 87-12 to 13; Da 24; Da 74) They would wave at each other and say 'hi.' (25T 20-24 to 21-6; Da 24) He occasionally shoveled snow for her (25T 18-18 to 19; Da 22), but had never been inside of her house. (25T 86-7 to 5; Da 73)

For approximately 20 minutes (Da 17), detectives next pressed Harley on whether he could prove that he had an alibi. (Da 24-39; 25T 21-7 to 44-4) They asked Harley to describe his movements on Saturday, February 6, 2016, with detailed follow-up questions about where he went and who he saw. (Da 24-39; 25T 21-7 to 44-4) Harley responded that he woke up late that Saturday and watched television. (25T 21-10 to 25; Da 24) His cousin, Will, arrived at the house in the afternoon (Da 25), and they walked to a chicken restaurant. (25T 22-16 to 17; 23-10 to 19; Da 26) Harley returned to the house by 9 p.m., when his elderly mother's alarm went off as a reminder to take her medicine. (25T 22-1 to 4; Da 24) He remained at the house until his mother had gone to sleep. (25T 25-5 to 16; 28-5 to 7; Da 27; Da 29; Da 34) When he left the house again, a liquor store on Lexington Avenue and John F. Kennedy Boulevard —

which he believed would generally be open until 10 p.m. — had already closed. (25T 28-11 to 14; 37-16 to 18; Da 27; Da 29; Da 35) He walked to a bar on Clendenny Avenue (south of Lexington Avenue) and bought a shot of gin. (25T 25-19 to 23; 29-8 to 11; Da 27; Da 29) The bartender made a mistake and gave him a different type of liquor from what he had ordered. (25T 26-3 to 4; Da 27-28) Harley spoke to other people in the bar. (25T 26-5; Da 28) After half-an-hour (25T 26-22 to 23; Da 28), he walked north up West Side Avenue (west of his home on Lexington Avenue) and was on the intersection of Lexington Avenue and West Side Avenue when he saw a Guyanese neighbor, and invited the neighbor back to the same bar on Clendenny Avenue. (25T 27-8 to 19; 29-15 to 16; 33-16; Da 28-30; Da 32) Harley returned with the neighbor to the bar, and bought another shot of gin. (25T 27-20 to 21; 32-23 to 24; Da 28) Harley and his neighbor left the bar and went into a Chinese restaurant on the intersection of Lexington Avenue and West Side Avenue. (25T 27-23 to 24; 34-18 to 20; Da 28; Da 33) At the Chinese restaurant, Harley bought chicken wings. (25T 27-24 to 25; Da 28) After leaving the Chinese restaurant, Harley walked east back to his house at 61 Lexington Avenue for the night. (25T 34-22 to 35-7; 39-21 to 25; Da 33; Da 36) Harley denied walking to or from Kennedy Boulevard. (Da 37; 25T 42-1 to 6)

After Harley gave this account, detectives left Harley in the interrogation room and had him wait. (Da 17; Da 39; 25T 44-21) They returned with the printed out still image from the surveillance camera at 57 Lexington Avenue (Da 17; Da 40; Da 87; Da 138; 25T 44-25 to 45-2), and confronted Harley with their theory that their faceless suspect had walked west from Kennedy Boulevard into his driveway at 61 Lexington Avenue. (Da 17; 25T 45-4 to 66-7; Da 40-57) In response to the detectives' unsubtle implication, the tenor of Harley's response changed; he appeared spooked, and repeatedly stood up. (Da 17) Again and again, detectives pressed Harley on what he knew; Harley repeatedly denied that he knew the identity of the faceless individual in the detectives' photograph, denied that it was him, denied that he knew of anyone else who had come into his home, and denied that he knew anything at all about the homicide. (Da 17; 25T 45-4 to 66-7; Da 40-57)

Specifically, over about 40 minutes after detectives confronted Harley with the photograph of their suspect in front of his house at 10:38 p.m. on Saturday night, Harley was forced to deny all knowledge at least twelve times. (Da 17) First, Harley said about the person in front of his house, "I swear, I swear I don't recognize that person." (Da 40; 25T 45-8 to 9; Da 17 at 27:00 to 27:07)

Second, a detective emphasized his suspicion that the suspect was Harley and that the suspect had gone into Harley's house: "He's coming from the Boulevard and he's walking down Lexington …. [S]o this is … 61 [Lexington] …. Which is your house. We see the individual actually come here and go right into your driveway. So, we're trying to figure out …. [Y]ou're … 100% that that's not you?" (Da 40-41; 25T 45-22 to 46-15; Da 17 at 27:25 to 27:55) Harley responded, "I'm 110% that's not me." (Da 41; 25T 46-16; Da 17 at 27:55 to 27:57)

Detectives pushed Harley for a third time. "And you don't know … [w]ho the individual is?" (Da 41; 25T 46-17 to 19; Da 17 at 27:57 to 27:59) Harley responded, "No way, hold up …. No way. I swear …. I swear, no way. I would never in my life do nothing like this." (Da 41; 25T 46-20 to 25; Da 17 at 27:58 to 28:06)

Detectives attempted a minimization tactic on the fourth attempt. "We're not suggesting that you did anything …. [W]hat we're trying to do is narrow it down. If that's not you then what we're trying to see is if you know this individual cause he clearly goes into your driveway like he knows the place." (Da 42; 25T 47-4 to 16: Da 17 at 28:06 to 28:28) Harley responded, "I swear, I swear I [would] help. I come from a[n] era, you got a code …. I done been in stuff in my lifetime …. I haven't been in no trouble since '93 …. Nothing at

all …. Nothing at all …. I swear if I could help you [I would]. I swear." (Da 42-43; 25T 47-17 to 48-2; Da 17 at 28:34 to 29:18)

Detectives again emphasized their suspicion that the suspect was Harley on a fifth push: "He looks like he goes into your driveway. He's kinda got a bald head. That's why we figured we should talk to you because … either you know him … [o]r you can shed light and help us out[.]" (Da 43; 25T 48-3 to 8; Da 17 at 29:21 to 29:30) Harley responded, "I'm looking …. I'm really looking." (Da 43-44; 25T 48-9 to 10; Da 17 at 29:32 to 29:37)

On a sixth push, detectives challenged Harley's explanation that he had not arrived that night at 61 Lexington by walking west from Kennedy Boulevard, where the perpetrator had gone. "Alright but 110% you never walked up to the Boulevard for any reason and then come back down any time after the bar?" (Da 44; 25T 49-12 to 14; Da 17 at 29:51 to 29:59) Harley responded "no," that he had "no reason to go to the Boulevard …. I did not go up to the Boulevard at all. I'm positive." (Da 44; 25T 49-15 to 18; Da 17 at 30:00 to 31:09)

Seventh, detectives again emphasized their suspicion of Harley: "I wanna make 110% clear to you … I don't want you to think that we're certainly not railroading anything here but we want you to be aware that if you know who this is because it looks like he's going into your house." (Da 47;

25T 53-21 to 54-5; Da 17 at 32:56 to 33:15) Harley responded, "I swear, I swear to my life …. I got[] a mother. I got[] a mother …. It's not a good thing you know, like silent treatment; don't speak to ya'll whatever, whatever …. I would not cause that can be my mother." (Da 47-48; 25T 54-9 to 25; Da 17 at 33:16 to 33:41)

On an eighth attempt, detectives again tried a minimization tactic: "At the time you may not have even known that, this person had done anything. You understand what I mean? …. Maybe they didn't come into your house but they clearly come up to your driveway. They clearly look like they go into your yard. That's what I'm trying to get at." (Da 48; 25T 55-3 to 11; Da 17 at 33:42 to 34:00) The detective suggested aloud that Harley was "getting … nervous." (Da 48; 25T 55-20 to 21; Da 17 at 34:23 to 34:26) The detective minimized, "We're not pointing the finger at you …. What we're trying to say, Jeff is … this clearly is pointing at this individual." (Da 49; 55-23 to 56-3; Da 17 at 34:27 to 34:35) Harley responded, "I would tell. I would tell and be proud of telling." (Da 49; 25T 55-1 to 5; Da 17 at 34:36 to 34:39)

Detectives pushed Harley for a ninth time. "[Y]ou don't recognize the person in here at all? In this photo? I just want to make sure." (Da 50; 25T 57-14 to 16; Da 17 at 36:09 to 36:15) Harley responded, "I swear …. If I c[ould]

help you with it … I swear I would. I swear I would." (Da 50; 25T 57-17 to 19; Da 17 at 36:23 to 36:38)

For the tenth time, detectives pushed Harley to identify the suspect standing by his house. "[A]fter seeing this individual, does he resemble anybody that you associate with Lucila?" (Da 53; 25T 60-22 to 24; Da 17 at 39:30 to 39:35) Harley responded, "I swear if I can make this person out I would." (Da 53; 25T 60-25 to 61-1; Da 17 at 39:36 to 39:41)

For an eleventh time, detectives again raised their suspicions: "[T]here was somebody definitely in your yard whether you knew it or not." (Da 54; 25T 62-18 to 19; Da 17 at 41:14 to 41:18) Harley responded, "I swear ain't no one come to my [house]." (Da 54; 25T 62-20 to 21; Da 17 at 41:18 to 41:22)

After this confrontation, detectives had Harley wait in the interrogation room. (Da 17; Da 56; 25T 64-12 to 20) Detectives kept him in the interrogation room for six minutes. (Da 17) When detectives returned, Harley said, "That's not right …. That's not right …. I don't know who that person is." (Da 56; 25T 65-13 to 18; Da 17 at 49:11 to 49:21) For a twelfth time, detectives pressed Harley, "[Y]ou don't recognize him you said, right?" (Da 56; 25T 65-24 to 25; Da 17 at 49:27 to 49:29) Harley responded, "I swear I don't know." (Da 56-57; 25T 66-6 to 7; Da 17 at 49:35 to 49:40)

Detectives then collected additional information from Harley on his alibi and movements on February 6. (Da 57-69) Harley provided the name of the bartender at the intersection of Clendenny Avenue and West Side Avenue, John. (Da 58; Da 61; 25T 71-12 to 17) Harley provided his Guyanese neighbor's address and a detailed description of his neighbor's home and employer. (Da 30; Da 62-63; 25T 30-1 to 24; 72-12 to 73-6) Harley provided the name of the Chinese restaurant at the intersection of Lexington Avenue and West Side Avenue, China Garden. (Da 59-60; 25T 69-11 to 19)

Detectives then confronted Harley about his supposed unrecorded misstatements to Officer Salmon the day before. The detective emphasized that they had believed Harley was a "foe" in part because his unrecorded statements allegedly "didn't add up." (25T 82-8 to 11; Da 69) Harley disputed Officer Salmon's characterizations and said he was "positive" she misheard or made an "honest mistake." (Da 70-72; 25T 82-12 to 84-20)

At the end of the interrogation, detectives indicated that they would allow Harley to leave (Da 73), and told him that they would transport him back to 61 Lexington Avenue. (Da 73-74) Detectives asked Harley for verbal consent to search his yard (without advising him of his right to refuse), and Harley acquiesced. (Da 69) Again, detectives had Harley wait in the interrogation room for several minutes, then escorted him out. (Da 17; Da 74)

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amends. V., XIV. This constitutional provision protects the accused "against governmental compulsion to disclose information that would tend to incriminate [him]." State v. Patton, 133 N.J. 389, 395-96 (1993).

A defendant must be "adequately and effectively apprised of his rights" before he is subject to a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 467 (1966). In order to safeguard a suspect's Fifth Amendment right against self-incrimination, incriminating statements obtained during a custodial interrogation are inadmissible as evidence unless a defendant has been advised of his or her rights. Id. at 492. The failure to administer Miranda warnings prior to custodial interrogation "creates a presumption of compulsion." Oregon v. Elstad, 470 U.S. 298, 307 (1985). "Hence, if warnings were required but not given, the unwarned statements must be suppressed — even when they 'are otherwise voluntary within the meaning of the Fifth Amendment.'" State v. Hubbard, 222 N.J. 249, 265 (2015) (quoting Elstad, 470 U.S. at 307); see also State v. O'Neill, 193 N.J. 148, 170 (2007); State v. O'Neal, 190 N.J. 601, 616 (2007). The State has the burden beyond a reasonable doubt of proving that a defendant was advised of the Miranda rights, and gave a valid waiver. O'Neill, 193 N.J. at 168 n.12.

Miranda applies only to custodial interrogation. See Minnesota v. Murphy, 465 U.S. 420, 429-33 (1984) (no requirement to administer Miranda warnings where defendant is not in custody). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Miranda turns on the "inquisitorial nature of police questioning" and "inherent psychological pressure on a suspect in custody." State v. P.Z., 152 N.J. 86, 102 (1997).

Custody "does not necessitate a formal arrest, nor does it require physical constraint in a police station, nor the application of handcuffs, and may occur in … a public place other that a police station." Hubbard, 222 N.J. at 266. "Whether a suspect is 'in custody' is an objective inquiry." J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011). "Two discrete inquiries" are involved: first, the circumstances surrounding the interrogation, and second, "would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." Ibid.; see also Hubbard, 222 N.J. at 267 ("The relevant inquiry is determined objectively, based on 'how a reasonable person in the suspect's position would have understood his situation.'") (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). A defendant is in custody for Miranda purposes if "a reasonable person in defendant's position, based on

the nature of the police encounter, would not have believed that he was free to leave." O'Neal, 190 N.J. at 616. Where the police convey their suspicions to the suspect, that is relevant to whether a reasonable person would feel that he or she was free to leave. Stansbury v. California, 511 U.S. 318, 325 (1994); see also O'Neal, 190 N.J. at 616 (where officer had probable cause to arrest, but had not yet formally arrested defendant, he was still in custody).

Interrogation means "either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). It refers to "words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." Ibid.

Our Supreme Court has frequently suppressed defendants' statements under circumstances similar to those in Harley's case. For example, in Hubbard, 222 N.J. at 254, a defendant "acceded to [a] detective's request to come to the police station" and provide medical information about his daughter. "After the interview was concluded, the detective drove defendant home. The detective never administered Miranda warnings to the defendant." Id. at 255. Our Supreme Court "determine[d] that the interview conducted by the detectives at the police station was a custodial interrogation and the failure to administer Miranda warnings prior to the interview requires suppression of that recorded statement." Id. at 256. The Court cited several reasons for

determining that Hubbard was in custody. A detective had "directed defendant to ride in the police cruiser to the station …. Although not handcuffed, defendant rode in the backseat of the vehicle." Id. at 271. At the station, Hubbard "was directed into an interrogation room," where his interrogator "positioned himself between defendant and the door." Ibid. The detective "questioned defendant for approximately an hour before exiting the room," and Hubbard was also "le[ft] to wait." Ibid. The detective "never advised defendant that he was free to leave" during the interrogation. Ibid. During the interrogation, the "detective asked defendant to account for all of his movements …. Rather than an attempt to secure information that may have assisted … treatment, the targeted questions reflect a clear attempt on the part of the detective to cause defendant to incriminate himself." Id. at 272.

Similarly, in State v. Stott, 171 N.J. 343, 351 (2002), detectives approached a patient in a psychiatric hospital and asked "whether he 'would accompany us over to the police department for an interview on this investigation." Detectives informed Stott that it was a "voluntary interview," asked him if he was "willing to make a voluntary and truthful statement," and "advised defendant more than once that he was 'free to leave,'" but did not "inform defendant of his right to remain silent or to have a lawyer present before questioning." Ibid. The Court "h[e]ld that, given the absence of

Miranda warnings, defendant's statements must be suppressed." Id. at 365. The Court cited several reasons for determining that Stott was in custody. "The place of the interrogation and the status of the interrogators weigh in favor of defendant's assertion that he was in custody." Ibid. Specifically, the police "isolated" Stott in an "area reserved solely for police purposes," and the officers' "status as criminal investigators was clear." Ibid. Additionally, because officers' "direct questions" about controlled substances provided an "objective indication[] that defendant was a suspect," "a reasonable person in defendant's position would conclude from those circumstances that he was, or was becoming, a focus of a police investigation." Id. at 365-66. The Court rejected the State's argument that Stott was not in custody "because the officers were not overbearing, and the interrogation room was not inherently intimidating"; Stott "was subjected to an incommunicado interrogation in a police dominated atmosphere" without being informed of his constitutional rights. Id. at 366-67. The Court also rejected the State's argument that Stott did not need to be Mirandized because he had "prior arrests"; even if Stott had been Mirandized in the past, "required warnings are an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere," and "no amount of circumstantial evidence that the person may have been aware of his or her rights will suffice to stand in their stead." Ibid. Finally, the Court

rejected the State's argument that Stott was not in custody because officers "informed defendant he was free to leave the interrogation area," because his "movements were circumscribed." Id. at 367-68.

More recently, in State v. Ahmad, 246 N.J. 592, 599 (2021), detectives transported an apparent gunshot victim "in the back of a patrol car" to the police department. Ahmad then "rode with his father" to the prosecutor's office, with a police escort. Ibid. Detectives had some indication to believe that "defendant needed to be interviewed because he was a victim of a shooting." Id. at 600. Detectives did "not advise him of his Miranda rights. Id. at 600. The Supreme Court concluded that Ahmad was "in custody at the time he provided his statement." Id. at 614. The Court cited as significant the fact that, upon release from the hospital, Ahmad "was placed in the back of a patrol car — where arrestees are normally held — and taken to the police station." Id. at 613-14. The Court rejected the State's argument that Miranda warnings did not need to be given because "defendant was viewed as a victim by law enforcement at the time of questioning." Id. at 613. The Court explained that even if detectives "believed defendant was a victim," the custodial inquiry is not based on "subjective views," but rather whether "a reasonable person in the defendant's position would have believed they were free to leave." Id. at 613-14.

Our Appellate Division has also suppressed defendants' statements under similar circumstances. For example, in State v. Pearson, 318 N.J. Super. 123, 130 (App. Div. 1999), detectives investigating an infant's death "asked defendant to accompany him to the Hudson County Prosecutor's Office, and she agreed to do so. He did not advise her that she was free to refuse his request." The detectives "put defendant in the back of their unmarked vehicle and drove her to the prosecutor's office where … she was placed in a ten-by-ten-foot room in the homicide unit for further questioning." Ibid. During the interview, detectives "sat on either side of her." Ibid. Pearson "then took the oath and gave a formal tape-recorded statement," comprising "twenty-five pages of transcribed questions and answers." Id. at 131. She was not advised of her Miranda rights. Ibid. This Court concluded "that the court erred in admitting the statement." Id. at 135. This Court cited several reasons for determining that Pearson was in custody. Ibid. "The circumstances included the "inherently coercive physical environment of the prosecutor's office, the length of time defendant remained at the office, and the nature of the questions put to defendant. These were such that a reasonable person in defendant's position would have realized she was a target of the prosecutor's investigation and was not free to leave." Id. at 134. The Court noted that "before the questioning began, defendant was warned of the solemnity of the oath, was

sworn to tell the truth, and was then asked questions designed to elicit incriminating responses." Ibid.

Similarly, in State v. Godfrey, 131 N.J. Super. 168, 172 (App. Div. 1974), detectives investigating a shooting sought to interview several people present. Godfrey "learned through his girlfriend that the police wanted him to come to the police station, and he voluntarily did so." Ibid. This Court concluded that Godfrey was "deprived of his freedom of action to a significant degree and was entitled to full Miranda warnings before any statements made by him thereafter could be considered voluntary." Id. at 178. This Court cited several reasons for determining that Godfrey was in custody. Id. at 177. Godfrey was interrogated "in a room cut off from the outside world; a police-dominated atmosphere." Ibid. Moreover, detectives "were in possession of information indicating to them that (1) defendant had lied to them, (2) defendant was present at the shooting and (3) defendant was actually the man who shot." Ibid.

As in Hubbard, Stott, Ahmad, Pearson, and Godfrey, the evidence that Harley's freedom of movement was constrained is overwhelming. A reasonable person in his position objectively would not have felt free to leave at any time. For Miranda purposes, Harley was in custody.

First, Harley was transported by officers to the police station. See, e.g., Hubbard, 222 N.J. at 271 ("defendant acceded to the detective's request to come to the police station"); Pearson, 318 N.J. Super. at 130 (investigators "put defendant in the back of their unmarked vehicle and drove her to the prosecutor's office"); Ahmad, 246 N.J. at 613-14 (defendant was "placed in the back of a patrol car," where "arrestees are normally held").

Second, the interrogation took place in a traditional police interrogation room, an inherently coercive environment. See, e.g., Hubbard, 222 N.J. at 271 ("defendant was directed to an interrogation room"); Stott, 171 N.J. at 366-67 ("defendant was subjected to an incommunicado interrogation in a police-dominated atmosphere"); Pearson, 318 N.J. Super. at 134 (prosecutor's office was an "inherently coercive physical environment"); Godfrey, 131 N.J. Super. at 177 ("defendant's interrogation occurred in a room cut off from the outside world; a police-dominated atmosphere").

Third, detectives sat between Harley and the door, a reminder that he needed to move past them to leave. See, e.g., Hubbard, 222 N.J. at 271 ("officer positioned himself between defendant and the door"); Pearson, 318 N.J. Super. at 130 (investigators "seated themselves on either side of her").

Fourth, detectives in the small interrogation room outnumbered Harley two to one. See, e.g., Pearson, 318 N.J. Super. at 130 (same).

Fifth, detectives administered a formal oath to Harley, and required him to speak the truth. See, e.g., Pearson, 318 N.J. Super. at 131, 134 ("defendant was warned of the solemnity of the oath, was sworn to tell the truth, and was then asked questions designed to elicit incriminating responses").

Sixth, the nature of the questioning conveyed that Harley was a suspect, because detectives focused on his relationship with and communications with Viejo, factors relevant to motive, and on his movements at the time of the homicide, factors relevant to opportunity to commit the offense. See, e.g., Hubbard, 222 N.J. at 272 ("detective asked defendant to account for all of his movements"); Pearson, 318 N.J. Super. at 134 ("nature of the questions").

Seventh, detectives used photographic evidence to repeatedly confront Harley about a theory that implicated him in the homicide, namely that their suspected perpetrator walked from Kennedy Boulevard to Harley's driveway. Moreover, detectives directly expressed to Harley that they believed he was that suspected perpetrator, in at least four ways: (i) they repeated asked Harley to confirm that he did not come from the direction of John F. Kennedy Boulevard; (ii) they repeatedly asked Harley to confirm that their suspect was not him; (iii) they repeatedly told Harley that their suspect was captured on video in front of Harley's house and driveway and yard; and (iv) they told Harley that the suspect appeared bald and that Harley appeared bald. These

repeated queries sent the unmistakable message that detectives did not believe Harley's continued pleas of ignorance about the identity of that individual. See, e.g., Stott, 171 N.J. at 365 ("there were objective indications that defendant was a suspect"); Pearson, 318 N.J. Super. at 134 ("a reasonable person in defendant's position would have realized she was a target … and was not free to leave"); Godfrey, 131 N.J. Super. at 177 (a reasonable person would have understood detectives believed they "were in possession of information" that "defendant was actually the man who shot" the victim).

Eighth, Harley has a criminal record. A reasonable person in his position would not have felt free to leave, because he would have been aware that his record alone would draw suspicion. Indeed, Harley worried aloud that his record was making him a target, and he insisted that his record was in the past: "I haven't been in no trouble since '93." (Da 43)

Ninth, detectives confronted Harley with an allegation that he had lied to an officer the day before the interrogation. In addition, detectives conveyed that they consequently viewed him as a "foe." (25T 82-8 to 11; Da 69) See Godfrey, 131 N.J. Super. at 177 (police "were in possession of information indicating to them that … defendant had lied to them").

Tenth, detectives repeatedly left the interrogation room to consult with an unseen sergeant and kept Harley waiting for stretches of time until they

returned, a reminder that he could not leave the interrogation room until law enforcement gave him permission. (Da 17) See, e.g., Hubbard, 222 N.J. at 271 ("le[ft] to wait"); Stott, 171 N.J. at 367-68 ("movements were circumscribed").

Eleventh, the interrogation lasted for over an hour. See, e.g., Hubbard, 222 N.J. at 271 ("detective questioned defendant for approximately an hour").

Twelfth, Harley was not able to or permitted to leave on his own volition. He was dependent upon detectives, who escorted him out of the police station and transported him back to his home, where they searched the grounds of Harley's home for evidence of a crime. (Da 69) See, e.g., id. at 255 ("After the interview was concluded, the detective drove defendant home").

Thirteenth, detectives did not inform Harley during the interrogation that he was free to leave at any time. And relatedly, there is no evidence that detectives informed Harley he had been free to refuse to be transported to the police station. See, e.g., Hubbard, 222 N.J. at 271 ("The detective never advised defendant that he was free to leave").

Had detectives not failed to administer the required Miranda warnings, Harley might have invoked his right to silence and counsel without answering. When detectives administered the Miranda warnings during an attempted follow-up interrogation, after Harley had been formally charged, he responded to the warnings by immediately exercising his Fifth Amendment rights. (Da

141; Da 142-144) But a question-first, warn-later interrogation strategy is prohibited in New Jersey. See O'Neill, 193 N.J. at 180 ("The two-step, 'question-first, warn-later' interrogation is a technique devised to undermine both the efficacy of Miranda and our state law privilege.").

That Harley's statement was capable of causing an unjust result "is reflected in the prosecutor's argument in summation." Pearson, 318 N.J. Super. at 136. The prosecutor highlighted the State's allegation that Harley had lied to detectives during his statement, and even replayed a portion of the statement to signal its importance. (27T 76-1 to 80-6) The prosecutor emphasized that the jury should convict based on the defendant's statement: "You know what else [defense counsel] didn't bring up during his summation? The defendant's statement. Why is that? Because, ladies and gentlemen, it was replete with lies …. [H]e lied throughout his statement, and … his story fell apart." (27T 49-9 to 14) The prosecutor argued, "How do we know he did it? Because, as the evidence has shown, his own words … will tell us that he did it. We're going to listen to his words …. If the defendant lied, he is guilty. He lied multiple times to investigators in this case[.]" (27T 50-3 to 10) (emphasis added)

Specifically, the prosecutor argued that Harley lied about his alibi, that his lies were "[t]he defining moment in this case" (27T 80-24 to 6) and that "if he lies, he is guilty." (27T 82-18 to 83-1; 94-22 to 95-6; 101-7 to 9) The

prosecutor also argued that the jury should interpret Harley's statement as evidence that Harley was tracking Viejo's movements. (27T 52-24 to 53-8; 93-7 to 12) The prosecutor also argued that Harley's pauses indicated concealment. (27T 56-16 to 23) The prosecutor also argued that the jury should be suspicious of Harley's word choices when he was confronted with the photograph of the detective's suspect in front of his house, and denied it was him. (27T 67-9 to 17; 75-1 to 10; 78-1 to 80-16)

Significantly, after deliberations had begun, the jury also asked to re-watch the interrogation video. (28T 20-11) Jurors re-watched the defendant's statement. (28T 21-2 to 91-22) Later that day, Harley was convicted. (28T 95-1 to 3) That the prosecutor harped on the defendant's statement in summation, and that the jury re-watched the defendant's unwarned statement just before convicting, precludes a finding that its erroneous admission was harmless.

Although defense counsel did not object, the trial court had an independent gatekeeping responsibility to find that the State had met its burden to prove that the defendant was Mirandized and that he gave a valid waiver before erroneously moving the statement into evidence. The improper admission by the trial court of the defendant's unwarned statement, when the State had not met its burden, was plain error "clearly capable of producing an unjust result," R. 2:10-2, "sufficient to raise a reasonable doubt" as to whether

the jury was "led to a result it otherwise might not have reached." State v. Williams, 168 N.J. 323, 336 (2001). Moreover, this is not a case where the defendant invited the error by putting his own statement into evidence; rather, it was the government, not defense counsel, which put Harley's statement into evidence. On that same note, it was also primarily the government which relied on Harley's statement during closing argument, going so far as to re-play a portion in the State's summation. (27T 76-1 to 80-6) To the extent that defense counsel referenced the defendant's statement after it had been introduced into evidence by the prosecutor, "defense counsel did not precipitate the error, but was responding to the prosecutor's line of inquiry on direct examination." State v. Hyde, 292 N.J. Super. 159, 166-67 (App. Div. 1996).

Because detectives failed to administer Miranda warnings before proceeding with a custodial interrogation, Harley's statement should have been inadmissible to support the State's criminal case-in-chief. This Court should reverse the improper admission of Harley's statement into evidence, and order a new trial.

POINT II

The court erred by (1) failing to provide the jury with any instruction on how to assess the out-of-court identification evidence, including that identification had to be proven beyond a reasonable doubt, and (2) admitting that evidence[9] without holding a Wade-Henderson hearing to test its reliability. (Not raised below)

Misidentification is "widely recognized as the single greatest cause of wrongful convictions in this country." State v. Henderson, 208 N.J. 208, 231 (2011). Even if the out-of-court identifications of a faceless individual at Da 87-88 and Da 139-140 were admissible despite flawed law enforcement procedures, the trial court's failure to administer any part of the "in-court and out-of-court identification" instruction (Da 145-156) to the jury disrupted the core guarantee of a fair trial, and was clearly capable of producing an unjust result. U.S. Const., amends. V, XIV; N.J. Const., art. I, pars. 1, 9, 10.

On February 9, 2016, Officer Willy Caicedo reported that detectives conducted an out-of-court identification procedure at 8:15 p.m. that same day with Viejo's sons, Victor and Armando Solorzano. (Da 75) The Solorzano brothers "review[ed] video footage from the residence at 64A Lexington Ave. and 57 Lexington Av. Jersey City to determine if they recognized any

[9] The court's orders admitting the out-of-court identification evidence are at 21T 177-22 to 25 and 24T 20-11 to 14.

individuals depicted in the footage." (Da 75) Caicedo reported of the results: "Upon reviewing the video footage they were unable to conclusively identify any of the parties depicted." (Da 75) Caicedo noted as a caveat, "Victor Solorzano pointed out that the individual depicted walking west on the south side of Lexington Ave. appeared to resemble a neighbor, 'Tyrone,' that lives across the street. It should be noted that Tyrone [is] Jeff[re]y Harley." (Da 75)

On March 8, 2016, Armando participated in another out-of-court identification procedure. (Da 76; Da 77-86) When Detectives Infantes and Kickey brought Armando on camera, Infantes reiterated that "on February 8[10] you came to our office and you reviewed two video[s]," including "video … from the camera that was at 57 Lexington Avenue …. [T]he time stamp [was] 11:41 and 51 seconds through 11:41 and 56 seconds." (Da 79) Infantes asked Armando, "were you able to identify anyone in that video?" (Da 79) Armando answered, "Yes …. [A]fter the guy that had come out of my mom's house crosses the street, a few minutes later, I see Tyron[e] coming back to his home. That's what I said when I looked at the video the first time." (Da 79) Kickey then reiterated that on March 8, 2016, Armando had again "watched both," in apparently unrecorded sessions. (Da 79) Infantes asked Armando, "[B]oth,

[10] Infantes referred on March 8 to a February 8 procedure; as indicated, Caicedo reported on February 9 that the procedure actually occurred on February 9, 2016.

okay …. On that video today, are you still able to identify anybody?" (Da 79-80) Armando answered, "Yes uh the walk, the frame, the body frame, and the timing looks like Tyron[e] is the one now comes out of the shadow here and walks back to his house with a bag in his, in his hands." (Da 80) After some discussion, Infantes presented a photo: "I have here a picture …. [I]t's a snap shot of the video that we showed you before. The date on the video was 2/6/16. The time on it is 11:41 and 54 seconds which is inside of the time frame of the video you watched which was 11:41 [and] 51 [seconds] to 56 [seconds] …. [A]nd this is part of the video that you were able to identify Tyron[e], correct?" (Da 84) Armando answered, "Yes[.]" (Da 84) At detectives' direction, Armando signed and dated his signature on the photograph. (Da 84; Da 87-88) Detectives then also asked him to also sign and date a driver's license photograph with the defendant's face, which Armando did. (Da 84-85)

At trial, Armando testified that he was previously "not 100 percent" "able to identify the person" after being "shown videos from [his] mother's home." (21T 175-23 to 176-4) Armando testified that he identified "Tyrone Harley" after being "shown a video from across the street, facing [his] mother's house[.]" (21T 176-7 to 16) The prosecutor moved into evidence the photograph that Armando had signed on March 8, 2016. (21T 177-18 to 25; Da 87-88) The prosecutor asked, "And the video that you watched, do you see

where this individual goes?" (7T 178-14 to 16) Armando testified, "Yes, he's going to his house." (7T 178-16)

On August 11, 2017, seventeen months after Harley had been charged, detectives conducted an out-of-court identification procedure with Coleman. (Da 98; Da 99-138) Like Armando on February 9 and March 8, 2016, Coleman reviewed video surveillance footage from 57 Lexington Avenue in an apparently unrecorded session (Da 121-122); thereafter, Detective Cherilien told Coleman, "That video is across the street and adjacent to the victim's residence …. [I]n that video is a male returning to his residence on Lexington Avenue[?]" (Da 122) Coleman answered, "Right." (Da 122) Cherilien asked, "Did you recognize who that male was returning to his residence?" (Da 122) Coleman answered, "The returning male, yes, I did." (Da 122) Cherilien asked, "And who was that male?" (Da 122) Coleman answered, "Tyrone." (Da 122) Cherilien presented the photo, time stamp 11:41, from "the same video that you just watched." (Da 122-123) Cherilien asked, "This is that male returning into his residence?" (Da 123) Coleman answered, "Yes." (Da 123) Cherilien asked, "Is that the male you recognize as Tyrone returning to (indiscernible) [his residence]?" (Da 123) Coleman answered, "Right." (Da 123) At the detective's direction, Coleman signed and dated her signature on the photograph. (Da 123)

At trial, the prosecutor moved into evidence the photograph that Coleman had signed on August 11, 2017. (24T 20-4 to 14) Coleman confirmed that the photograph was taken from surveillance footage from the "house next door," 57 Lexington Avenue, and that she "actually watched the video where this still was developed from." (24T 20-19 to 21; 21-17 to 19) The prosecutor asked her who she had "recognize[d] this to be" when she had signed and dated the photograph on August 11, 2017. Coleman answered, "Tyrone." (24T 19-22 to 24) The prosecutor asked Coleman "how did you recognize Tyrone on that photograph?" (24T 21-9 to 10) Coleman answered, "Because I just know Tyrone. I know Tyrone. That's Tyrone. I've been around him enough to know him." (24T 21-11 to 13) The prosecutor asked, "At any point, does Tyrone turn into the left?" (24T 21-20 to 21) Coleman answered that "I didn't get to see him turn in. It looks like he's turning in." (24T 21-22 to 23) The prosecutor asked, "And if you were turning into the left, where would you be going?" (24T 21-24 to 250 Coleman answered, "Into the gate, towards the back." (24T 22-1) The prosecutor asked, "Towards the alleyway that leads … to his house?" (24T 22-2 to 4) Coleman answered, "Yes." (24T 22-5)

The trial court erred by admitting identification evidence without a jury instruction on how to evaluate it. See State v. Green, 86 N.J. 281, 288 (1981) ("a mandatory duty exists on the part of the trial judge to instruct the jury as to

the fundamental principles of law which control the case"); Henderson, 208 N.J. at 302 ("juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear").

The pivotal dispute at trial was whether Harley was being misidentified as the perpetrator. Harley has consistently maintained that he had nothing to do with this crime. In his February 8, 2016 recorded statement, Harley said that he was at a bar and the China Garden restaurant when the offense occurred. At trial, his attorney maintained that he never went to the crime scene. By contrast, the prosecutor introduced evidence from out-of-court identification procedures that a faceless individual walking west on Lexington Avenue was Harley, and argued circumstantially that this faceless individual was the same person as the faceless perpetrator whom no one was able to identify directly.

When, as here, the identity of the perpetrator is a "key issue" and "the major, if not the sole, thrust of the defense," the defendant has a "right to expect that the appropriate guidelines" on the "identification question … w[ill] be given." Green, 86 N.J. at 291-92. A trial court has a "mandatory duty" to instruct the jury on such "control[ling] legal principles," especially in "a criminal case when a person's liberty is at stake." Id. at 288-89. The court has a "duty to instruct the jury on the State's obligation to prove identification even when such a charge [is] not requested," as "[a]ppropriate and proper

charges to the jury are essential for a fair trial." State v. Davis, 363 N.J. Super. 556, 558, 560 (App. Div. 2003). See also State v. Cotto, 182 N.J. 316, 325 (2005) (agreeing with Davis that the trial court must instruct the jury on identification when it is a key issue, whether requested or not); State v. Sanchez-Medina, 231 N.J. 452, 466 (2018) (same). A "model identification charge should be given in every case in which identification is a legitimate issue," Davis, 363 N.J. Super. at 561, "even when" — unlike in Harley's case — "defendant's misidentification argument is 'thin.'" Cotto, 182 N.J. Super. at 326. Trial courts are "not at liberty to withhold an instruction, particularly when that instruction addresses the sole basis for defendant's claim of innocence and it goes to an essential element of the State's case." Davis, 363 N.J. Super. at 562. The "complete absence of any reference to identification as an issue or as an essential element of the State's case is improper." Id. at 561.

The trial court's "mandatory duty" included "specifically charg[ing] the jury that it was the State's burden to prove beyond a reasonable doubt that it was defendant who had [committed the crime], that it was not defendant's burden to prove that he was elsewhere when the offense occurred, and that the State's case depended on the eyewitness identification[s]." Green, 86 N.J. at 293. Similarly, in Davis, the Appellate Division found error where the court "gave no instruction whatsoever as to the State's obligation to prove

identification beyond a reasonable doubt." 363 N.J. Super. at 560. Under Green, 86 N.J. at 288, the "failure to give such an instruction, even when not requested, may constitute reversible error." Davis, 363 N.J. Super. at 561. The model charge on the State's separate burden to present "sufficient reliable evidence" of the perpetrator's identity is at Da 145.

The Green instruction on the State's separate burden to prove identity was necessary to guard against a wrong conviction here, because the face of the individual walking west on Lexington is not visible. Even a detective interrogating Harley said that "you can't really make out" the person in the screenshot from the 57 Lexington camera. (Da 53; Da 17 at 39:43 to 39:47) Moreover, no one at trial was able to directly identify the individual who departed from 64A Lexington.

In addition to failing to give the Green instruction on the State's burden to prove identification, the court failed to provide a tailored instruction to the jury on the relevant Henderson factors. In Henderson, the Supreme Court ordered, "To help jurors weigh [identification factors], they must be told about relevant factors and their effect on reliability." Id. at 219. The Court "direct[ed] that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case. These instructions are to be included in the court's comprehensive jury

charge at the close of evidence." Id. at 296. The Supreme Court promised: "Juries will continue to hear about all relevant system and estimator variables at trial," id. at 296, "even when there is no evidence of suggestiveness in the case." Id. at 294.

A Henderson instruction on relevant factors that could have adversely impacted the reliability of the out-of-court identifications was necessary here, for several reasons. Jurors were never given an appropriate, tailored instruction on essential principles, including (1) that witness confidence may not indicate reliability; (2) that the State has the burden of proving an accurate record of identification procedures; (3) that a prior unsuccessful identification procedure may indicate unreliability; and that it can indicate an unreliable identification procedure if (4) administrators fail to inform witnesses that they should not feel compelled to make an identification, (5) the administrator is not "blind," and is aware of the suspect, (6) the administrator gives clues before an identification is given, or offers positive feedback afterward; and (7) the witness has discussed the identification with others.

First, the trial court erred by failing to warn jurors that witness confidence about an identification may not render it reliable.[11] See Henderson,

[11] The model instruction warns, "Although nothing may appear more convincing than a witness's categorical identification," "[s]uch identifications, even if made in good faith, may be mistaken. Therefore ... be advised that a witness's level of

208 N.J. at 236 ("accuracy and confidence 'may not be related to one another at all.'"). Given the absence of a visible face, the court was obliged to warn the jury to critically analyze even confident testimony.

Second, the trial court erred by failing to instruct the jury to consider if the failure to make a full and complete record rendered identification evidence unreliable.[12] Officers must make a written record of "the dialogue between the witness and the interlocutor, and the results." State v. Anthony, 237 N.J. 213,

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confidence, standing alone, may not be an indication of the reliability of the identification." (Da 146-147) The model instruction further warns, "[E]yewitness confidence is generally an unreliable indicator of accuracy." (Da 152)

[12] The model charge warns, "Among the factors that you may consider in assessing the reliability of the identification is the failure of law enforcement officials to make an electronic recording of the identification procedure. Our Rules require the electronic recording of identification procedures, preferably by video, if feasible, so as to ensure that you will have before you a complete picture of all circumstances under which an identification is made, the precise details of the identification procedure, and whether it was accurately reported by [the] State's witnesses." (Da 147) The model instruction further warns, "Where there is a failure to electronically record an identification procedure, you have not been provided with a complete picture." (Da 148) The model instruction further warns that if "electronic recording was not feasible, police officers [still] are required to prepare a contemporaneous, verbatim written account of the identification procedure. This way, there would [still] be a record of the exact words exchanged between the eyewitnesses and law enforcement, written down during the identification procedure itself." (Da 148) The model instruction further warns, "You may take into account the police failure to preserve a record of the identification procedure when you evaluate the identification evidence in this case. The absence of either an electronic recording or contemporaneous written record permits but does not compel you to conclude that the State has failed to prove that the identification was … accurately reported by the State's witnesses." (Da 149)

227 (2019) (referring to State v. Delgado, 188 N.J. 48, 63 (2006) and R. 3:11(b)). "'Preserving the words exchanged … may be as important as preserving' a picture of a live lineup or an array." Anthony, 237 N.J. at 227. "If the police … did not capture the dialogue between the witness and the officer … the jury may take that into account." Id. at 235.

Here, the State failed to prove officers accurately recorded Armando's and Coleman's identification procedures. The only apparent documentation of Armando's first identification procedure is a paper report (Da 75) that failed to record the words exchanged. How did Armando go, on February 9, 2016, from being "unable to conclusively identify any of the parties depicted" on the 57 Lexington Avenue recording," to identifying Harley on the same 57 Lexington Avenue recording on March 8, 2016? Additionally, detectives did not record the actual procedure during which Armando and Coleman reviewed the 57 Lexington Avenue video on March 8, 2016 and August 11, 2017 respectively, so dialogue between the witnesses and law enforcement was lost.

Third, the trial court erred by failing to instruct the jury to evaluate, as per the model charge, "whether the witness did not identify the defendant at a prior identification procedure." (Da 152) Before Armando's March 8, 2016 identification, he could not "conclusively" identify Harley from the same 57 Lexington Avenue video. (Da 75)

Fourth, the trial court erred by failing to instruct the jury of the State's burden to prove detectives told the witnesses that they should not feel compelled to make an identification. The model instruction warns, "[P]olice officers must instruct witnesses that the person that they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification." (Da 154) "Witness instructions are regarded as one of the most useful techniques for enhancing the reliability of identifications." Henderson, 208 N.J. at 250. Some may be "inclined to guess," so administrators "should instruct witnesses that they … should not feel compelled to make an identification." Id. at 260-61. This instruction was necessary because Armando may have felt compelled to make an identification on March 8 after failing on February 9, and Coleman may have felt compelled to name Harley as the police had had him in custody for seventeen months.

Fifth, the trial court erred by failing to instruct about blind identification procedures. As the Court explained in Henderson, "Double-blind administrators do not know who the actual suspect is …. [D]ouble-blind administration is the single most important characteristic that should apply to eyewitness identification procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision. Research has shown that … administrators familiar with the suspect"

corrupt the identification via the "expectancy effect." Id. at 248-49. This is the "tendency for experimenters to obtain results they expect … because they have helped to shape that response." Id. at 249. An "ideal" administrator is someone who "is not investigating the particular case and does not know who the suspect is." Ibid. Here, Detective Cherilien elicited Coleman's identification after interrogating Harley; Detectives Kickey, who elicited Armando's identification, also investigated.

Sixth, the trial court erred by failing to instruct the jury on how feedback by an administrator of an identification procedure can render an identification unreliable.[13] The Court warned administrators to avoid giving witnesses "information" about a suspect "both before and after an identification." Henderson, 208 N.J. at 253. Suggestive "pre-identification remarks" and "post-identification feedback" can each render an identification unreliable. Ibid. Here, the State failed to introduce a record of what detectives said to the witnesses. As just one example of how the procedures could have been

[13] Feedback encompasses both prompts or hints before an identification is made, and positive comments afterward. The model charge warns witnesses to consider whether an identification "was the result of a suggestive procedure," including "everything that was done or said by law enforcement to the witness during the identification process." (Da 153) The model charge further warns, "Feedback occurs when police officers … signal to eyewitnesses that they correctly identified a suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness." (Da 155)

corrupted by feedback, during the on-camera portion of Coleman's identification procedure, Detective Cherilien did not ask Coleman neutrally who the faceless person was; he asked her who the "male … returning to his residence" was. (Da 122) The detective's pre-identification question implied that the answer he expected was the person who resided next to the camera at 57 Lexington Avenue. Since Coleman knew that was Harley, a reasonable person in Coleman's position would have understood the expected answer.

Seventh, the trial court erred by failing to instruct the jury on how feedback by non-law enforcement sources can render an identification unreliable. The model charge warns, "You may consider whether the witness was exposed to opinions, descriptions, or identifications by other witnesses or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification." (Da 155-156) Non-state actors can "affect the reliability of eyewitness identification evidence, just as the police can." Henderson, 208 N.J. at 268, 271; State v. Chen, 208 N.J. 307, 320 (2008). As just one example, Victor first suggested that the faceless person in front of 57 Lexington Avenue "appeared to resemble a neighbor"; Victor gave Armando feedback, resulting in Armando's identification. (Da 75)

The trial court's admission of identification evidence, without any jury instruction, was not harmless. "Erroneous instructions on material points are

presumed to be reversible error." State v. Robinson, 165 N.J. 32, 53 (2000). Jury charges are a "road map to guide the guy, and without an appropriate charge a jury can take a wrong turn." Ibid. "Erroneous instructions in a criminal case are poor candidates for rehabilitation under the plain error theory." State v. Jordan, 147 N.J. 409, 422 (1997).

The "trial court's failure to instruct the jury on identification constituted plain error," "requir[ing] a reversal of defendant's judgment of conviction." Davis, 363 N.J. Super. at 559. "The failure to give such a charge or to give an adequate charge is most often reversible error," even "absent a specific request." Id. at 560-61 (emphasis added on the presumption in favor of reversal). See also Sanchez-Medina, 231 N.J. at 455 (even though no party requested an instruction on evaluating identification evidence, the failure to "instruct the jury on the subject" required reversal); State v. Pierce, 330 N.J. Super. 479, 482, 487 (App. Div. 2000) (even though "there was no specific request to charge on the issue of identification and no objection to the instruction to the jury on that issue," the "inadequacy of the jury instruction as to identification" required reversal); State v. Frey, 194 N.J. Super. 326, 329-30 (App. Div. 1984) ("Notwithstanding the failure of defense counsel to request an instruction on identification," it "was the trial judge's responsibility to

instruct the jury," and the "instruction … fell far short of properly advising the jury on how to decide such a crucial issue," "requir[ing] reversal").

The general charge was not a substitute for a specific directive on how to evaluate the reliability of the identification evidence. See Green, 86 N.J. at 285, 287 ("inadequa[te]" for the jury to be "generally charged" on "its fact finding responsibility, the elements of each crime and the State's burden of proof," in lieu of a specific instruction on the State's burden to prove identity); Davis, 363 N.J. Super. at 561 (inadequate to only give "general instructions on such things as credibility and the elements of the crimes").

Cross-examination and summation are also not substitutes for a jury instruction. "[W]e do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions." Henderson, 208 N.J. at 296.

The instruction-less admission of identification evidence was capable of causing an unjust result, as illustrated by the prosecutor trumpeting the identifications in summation. Specifically, the prosecutor said in closing, "[Defense counsel] didn't talk about S-102 whatsoever. This is a photograph that Malicta Coleman identified and signed and said that is Jeffrey Harley. That's Tyrone. Now, why would Counsel not bring that up? There's a reason

why, ladies and gentlemen. He didn't talk about S-15 either. This is the photograph that Armando Solorzano identified depicting Jeffrey Harley in it." (14T 48-10 to 24) Later, the prosecutor again argued the jury should find the faceless person was "Mr. Harley, no one else. Why? Malicta Coleman tells us it's Mr. Harley. Armando Solorzano tells us it's Mr. Harley." (14T 67-1 to 4)

Familiarity does not obviate the need for an instruction, particularly when the witnesses were asked to make an identification of a faceless person. Even an immediate relative may misidentify a loved one. In more than 15 percent of misidentification cases, there was a confirmed prior familiarity between the witness and the person eventually exonerated. Emily West and Vanessa Meterko, Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings From the First 25 Years, 718 Albany L. Rev. 717, 737 (2015). The scientific literature reveals that people misidentify strangers as people they believe are familiar, even people they see every day. In one study, 30 subjects who worked at the same firm for at least two years were asked to identify photos of co-workers intermingled with strangers. José H. Kerstholt et al., The Effect of Expectation on the Identification of Known and Unknown Persons, 6 Applied Cognitive Psychol. 173, 179-80 (1993). Fifty-six percent of familiar persons were correctly recognized, but 22 percent of strangers were

misidentified as colleagues. Ibid. At minimum, the jurors needed an instruction to consider whether the identifications of a faceless person were reliable.

In addition to that bare minimum, this Court must also order an admissibility hearing. To obtain a hearing, the defendant has an "initial burden of showing some suggestiveness," tied to a system variable. Henderson, 208 N.J. at 288. Here, the facts support an examination, even if the identification evidence is re-admitted with "focused jury charges." Id. at 294.

Initially, no one can make a sufficiently reliable identification from an image that does not clearly display a person's face, as here. "The most important source of information that we used to identify someone in daily life is the face." Vicki Bruce, Remembering Faces at 66, in The Visual World in Memory (2009). When faces are lower quality or degraded, they are less recognizable. See Sharon Gilad-Gutnick, Galit Yovel & Pawan Sinha, Recognizing Degraded Faces: The Contribution of Configural and Featural Cues, 41 Perception 1497, 1498 (2012). The more downgraded the image, the less likely that humans can accurately recognize the person, even when the person is very familiar. Karen Lander, Vick Bruce & Harry Hill, Evaluating the Effectiveness of Pixelation and Blurring on Masking the Identity of Familiar Faces, 15 Applied Cognitive Psychol. 101, 102-03 (2001).

Moreover, the system variables here clearly show "some evidence of impermissible suggestiveness" here that "could lead to a mistaken identification." Henderson, 208 N.J. at 238, 288. Hence, Harley was entitled to elicit testimony about the identification evidence at a hearing.

The Henderson court provided a "non-exhaustive list of system variables" more than sufficient "to trigger a hearing" in Harley's case. Id. at 289-90. First, the Court wrote: "Blind Administration …. [D]id the police … ensure that the administrator had no knowledge of … the suspect[?]" Ibid. Here, Detectives Kickey and Cherilien both elicited identifications, and were investigating Harley. Second, the Court wrote: "Pre-identification instructions. Did the administrator provide neutral, pre-identification instructions warning that … the witness should not feel compelled to make an identification?" Id. at 290. There is no evidence that detectives ever directed the witnesses not to feel compelled to identify the faceless individual. Third, the Court wrote: "Feedback. Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?" Ibid. Before Coleman made an identification, Detective Cherilien prompted her with his expectation that the faceless individual on the 57 Lexington Avenue video resided next door, at 61 Lexington Avenue. Similarly, Armando was exposed to Victor's theory on February 9, 2016 that the faceless person

"resemble[d]" Harley, even though Armando was "unable to conclusively identify" the faceless person, and in fact did not identify the faceless person as Harley until March 8. Fourth, the Court wrote: "Multiple viewings. Did the witness view the suspect more than once as part of multiple identification procedures …. [or] initially make no choice…?" Ibid. Armando viewed the suspect more than once; he viewed the 57 Lexington Avenue video on February 9, 2016 and again on March 8, 2016. That he was "unable to conclusively identify" the faceless person the first time cuts against the admission of an identification made during the second viewing, one month later. Fifth, the Court wrote: "Private Actors. Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?" Ibid. The Court ordered: "officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources." Id. at 271 (emphasis added) Here, there is no indication officers warned the witnesses not to seek third-party feedback. And yet, Armando had a month between February 9, 2016 and March 8, 2016 to discuss the identification of the suspect with his brother Victor, and Coleman had seventeen months of exposure to other opinions before she made her identification on August 11, 2017. Sixth, when there is no "recording" of the relevant conversations about eyewitness

confidence, "defendants will not need to offer proof of suggestive behavior tied to a system variable to get a pretrial hearing." Anthony, 237 N.J. at 233. See also L.H., 239 N.J. at 29 (given "the failure to record," the court must hold "a Wade hearing to inquire into the reliability of the identification" evidence). There is no recording at all of Armando's first identification procedure on February 9, 2016, and no recording of dialogue as Armando and Coleman watched the video from 57 Lexington Avenue on March 8, 2016 and August 11, 2017, before they were each brought back into the interrogation room.

Even if the evidence is not excluded, a hearing will "lay the groundwork for proper jury charges and … [also] facilitate meaningful appellate review" if the defendant is re-convicted. Id. at 295. It is "the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial." Id. at 297. Without "appropriate jury instructions," jurors cannot be expected to "determine the reliability" of identification evidence. Id. at 303.

To summarize, the trial court must hold a hearing and examine the variables pertinent to reliability. If the evidence is re-admitted, then the trial court has a mandatory duty to administer detailed instructions on how the jury should evaluate the reliability of the State's identification evidence.

POINT III

The errors, individually and cumulatively, require a new trial. (Not raised below)

The court erred by admitting the defendant's recorded statement into evidence. The court also erred by admitting the identification evidence without any jury instruction. These errors, individually and cumulatively, were plain error, and capable of causing an unjust result. See State v. Jenewicz, 193 N.J. 440, 474 (2008); State v. Orecchio, 16 N.J. 125, 129 (1954).

The State failed to uncover corroborative proof of guilt. Thus, Harley's case is not one of the minority of cases where, given admission errors and instructional errors of this magnitude, the presumption of reversal is overcome. Rather, as in Sanchez-Medina, "looking at all of the proofs together, the evidence against defendant was not overwhelming." 231 N.J. at 469.

Weaknesses in the State's case include:

- The perpetrator's face is not visible in footage of the crime being committed. (Da 14-15)
- The State found no witnesses who were present during the crime and who could directly testify that Harley or anyone else perpetrated it.
- The faceless perpetrator went off camera on Kennedy Boulevard after leaving the crime scene without being apprehended.
- Although the State contends the faceless perpetrator later returned to Lexington Avenue after going off-camera, the State found no witness able to testify it was the same person.

• The video evidence is inadequate to conclude the two faceless individuals are the same person with any reliability. Da 15 is a close-up of the faceless perpetrator at 64A Lexington Avenue, committing the offense; at Da 87-88 and Da 139-140, Armando and Coleman signed a photograph of another faceless person at 57 Lexington Avenue.

• Lexington Avenue was a busy street in Jersey City. Many people were traveling in all directions, making it improbable to narrow the suspect list to any one person. By way of just one example, the video from 57 Lexington Avenue (Da 16) shows the individual crossing paths with another individual on the sidewalk just seconds before Da 87/Da 139 was recorded.

• Armando's identification evidence was suspect because he previously was unable to conclusively identify Harley in the 57 Lexington Avenue footage; he was susceptible to feedback from his brother about Harley; part of the March 8, 2016 procedure was unrecorded; he was not instructed not to feel compelled to make an identification; and the administrator was part of the investigation. (Da 75; Da 76; Da 77-86; Da 87-88)

• Coleman's identification evidence was suspect because part of the August 11, 2017 procedure was unrecorded; she was not instructed not to feel compelled to make an identification; she was aware that law enforcement had had Harley in custody for seventeen months; the administrator was part of the investigation and had interrogated Harley; and he prompted her to identify the person on the 57 Lexington Avenue footage as a man returning to his residence. (Da 98; Da 99-138; Da 139-140)

• Although the prosecutor opined that the faceless individual on the 57 Lexington Avenue footage was walking to Harley's address at 61 Lexington Avenue, the camera does not show if he entered Harley's residence. (Da 16)

• Even if Armando and Coleman correctly identified Harley at 57 Lexington Avenue, it only proves that he was outside of his own house.

• The State obtained no confession. Although Harley was prejudiced by the prosecutor's argument that even Harley's denials were incriminating, Harley made no admissions of guilt. See Frey, 194 N.J. Super. at 329 ("denial of guilt" made it "essential" to "instruct the jury on identification").

- The DNA testing failed to place Harley's DNA in Viejo's home, or Viejo's DNA in Harley's home. Moreover, at least some of the DNA swabbed at Harley's home did not belong to Viejo. (Da 89-95)
- The footwear testing failed to show that the shoes seized from Harley's home had been in Viejo's home. Instead, the lab concluded that the shoes seized from Harley's home had not been in Viejo's home. (Da 96-97)
- Location-related data from a phone seized from Harley's home failed to show that the phone had been in Viejo's home.
- The State only presented speculative proofs of motive. There is no evidence that Harley saw a Facebook post from Coleman that the prosecutor speculated somehow set him off to kill his neighbor. (24T 26-13 to 22) There is also no evidence that any cash was taken from Viejo. (27T 30-17 to 18)

That the State's proofs were very weak is illustrated by the first trial, where the State introduced comparable proofs, including Armando's and Coleman's out-of-court identifications (3T 123-3 to 126-16; 4T 168-22 to 172-5), and Harley's recorded statement. (6T 33-13 to 37-21; 42-22 to 49-2; 53-25 to 60-23; 65-4 to 68-4; 69-2 to 72-1; 79-5 to 91-7; 93-5 to 99-6; 101-4 to 7; 103-12 to 17; 104-8 to 114-21; 115-16 to 124-2) Jury deliberations began on January 30, 2018, and continued for seven days, on January 31, February 1-2, and February 5-7, 2018. (9T – 15T) On February 7, the jury informed the court that its deliberations had "reached an impasse," and that it was "unable to reach a unanimous verdict" on "[c]ounts I to XI." (15T 7-1 to 3) In other words, at least some jurors believed that the State had not met its burden of proving Harley guilty beyond a reasonable doubt on any of the charges. The

court then declared a mistrial. (15T 8-13 to 18) Even if not determinative, it is a significant factor that at least some jurors believed the State's case to be inadequate. See, e.g., Bey v. Superintendent Greene SCI, 856 F.3d 230, 242-43 (3rd Cir. 2017) ("At the first trial, nearly identical evidence resulted in a hung jury. A hung jury can signal that the outcome of a case was close and support a finding that an error on retrial prejudiced a convicted defendant …. [E]ven a single prior hung jury has been deemed sufficient to indicate that the case was close and an error on retrial was not harmless. Here, the fact that [the] first jury was unable to reach a verdict after hearing [an] unequivocal identification strongly suggests that the evidence was not as 'overwhelming' as the state would like us to believe."); United States v. Paguio, 114 F.3d 928, 935 (9th Cir. 1997) ("We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close and might have turned on [an erroneous] evidence [decision].").

The trial court's erroneous admission of the defendant's unwarned statement and instruction-less identification evidence improperly allowed the prosecutor to hammer the defendant for allegedly being untruthful. Because the prosecutor failed to present corroborating evidence that Harley had anything to do with this offense, the errors complained of were not harmless.

POINT IV

Alternatively, this court must remand for resentencing, because the judge erred by imposing multiple maximum consecutive terms. (Da 6-9)

Harley received an aggregate prison sentence of life plus 31.5 years, with a parole disqualifier of over a century. This Court should order a resentencing because the court erred by imposing four maximum consecutive terms: the court misapplied the Yarbough factors, and failed to evaluate the overall fairness of a life-plus term with a century-long parole disqualifier.

Consecutive terms can "drastically alter the aggregate sentence," and may only be imposed in a "uniform[], predictab[le], and proportiona[te]" manner. State v. Torres, 246 N.J. 246, 251-52 (2021). The test in State v. Yarbough, 100 N.J. 627 (1985), "promote[s] consistency." Torres, 246 N.J. at 264, 271 (whether the offenses were "predominantly independent," involved "separate acts" of violence, were so close in time and place as to be "a single period of aberrant behavior," involved multiple victims, and were numerous).

In addition, the court must "place on the record its statement of reasons for the decision to impose consecutive sentences," with a focus on the "fairness of the overall sentence." Id. at 267. The "explanation of the fairness of the overall sentence is a necessary feature in any Yarbough analysis." Id. at 270. "[I]mposition of consecutive sentences for multiple offenses must not

only be procedurally correct, it must also be free from any scent of pervading unfairness …. [W]e require an explicit explanation for the overall fairness of a sentence, in the interest of promoting proportionality." Id. at 270-71.

Imposition of four maximum consecutive sentences deserves special scrutiny. See State v. Randolph, 210 N.J. 330, 354 (2012) ("we adhere to the cautioning in Miller and Pennington against the imposition of multiple consecutive maximum sentences unless circumstances justifying such an extraordinary overall sentence are fully explicated on the record"). In State v. Miller, 108 N.J. 112, 122 (1987), the Court warned that factors "relied on to sentence a defendant to the maximum term for each offense should not be used again to justify imposing those sentences consecutively. Where the offenses are closely related, it would ordinarily be inappropriate to sentence a defendant to the maximum term for each offense and also require that those sentences be served consecutively[.]" In State v. Pennington, 154 N.J. 344, 361 (1998), the Court similarly articulated, "Once the sentencing court used the aggravating factors to impose the maximum base sentences with maximum parole disqualifiers for the two burglaries, Miller required the court to articulate other reasons for imposing the sentences consecutively."

Here, the Yarbough factors support concurrent terms. Harley was convicted of first-degree robbery, and it was an element of robbery that he

used a deadly weapon. The robbery and homicide by use of a deadly weapon were not "separate acts" of violence against "multiple victims" with "independent" objectives; rather, they were a single act of violence against a single victim, during a "single period." Similarly, Harley was convicted of second-degree burglary, and it was an element of burglary that he had the purpose to commit an offense, here robbery and homicide with a deadly weapon. Thus, the burglary was not a "separate act" from the robbery and homicide, nor did it have a "predominantly independent" objective; rather, the burglary, robbery, and homicide all involved a single act of violence against a single victim during a single period. Similarly, Harley was convicted of fourth-degree possession of a serrated knife; whoever committed this crime used this deadly weapon in the homicide, robbery, and burglary. Thus, the possession was not "predominantly independent" of the homicide, robbery, and burglary, nor were there multiple victims or separate acts of violence. Sentences for homicide, robbery, burglary, and possession should have been concurrent.

The sentencing court merely offered a bare conclusion in lieu of analysis: "Court finds that consecutive sentences imposed upon this defendant is appropriate because the defendant's distinct, independent offenses had separate criminal objectives. Thus, separate crimes deserve separate

punishments." (29T 55-1 to 5) The record does not support this conclusion: there was a single act of violence against one victim during one period.

In addition to failing to qualitatively apply the Yarbough factors, the court failed to give an "overall assessment of the fairness" of four maximum consecutive terms, as required by Torres, 246 N.J. at 270-71. There was no "explicit explanation for the overall fairness" of requiring a man in his fifties to serve a minimum of a century in prison. The court certainly did not explain, as per Miller, 108 N.J. at 122, why it was not "inappropriate to sentence [Harley] to the maximum term for [four] offense[s] and also require that those sentences be served consecutively." Harley is entitled to a resentencing.

CONCLUSION

As argued in Points I-IV, this Court must order a new trial and resentencing.

Respectfully submitted,

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Dated: January 12, 2022

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0931-20T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEFFREY T. HARLEY,

Defendant-Appellant.

Criminal Action

On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County.

Sat Below:
Hon. Patrick J. Arre, J.S.C., and a Jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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Dated: July 14, 2023

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

The State adopts and incorporates by reference the procedural history set forth in defendant's brief on appeal. (Db3-4).[1]

COUNTERSTATEMENT OF FACTS

The State adopts and incorporates by reference the statement of facts set forth in defendant's brief on appeal. (Db5-12).

[1] "Db" refers to defendant's brief on appeal. Other references to the record are abbreviated consistent with his brief.

LEGAL ARGUMENT

POINT I

JUDGE ARRE'S ADMISSION OF DEFENDANT'S VIDEOTAPED STATEMENT INTO EVIDENCE DID NOT AMOUNT TO PLAIN ERROR.

Defendant argues -- for the first time on appeal -- that he was subjected to custodial interrogation without the benefit of Miranda[2] warnings when he gave his February 8, 2016 videotaped statement to detectives, so Judge Arre's admission of that statement into evidence was improper. (Db12-36). For the reasons discussed below, this argument lacks merit and should be rejected.

"If a defendant, as here, does not object or otherwise preserve an issue for appeal at the trial court level," an appellate court "review[s] the issue for plain error." State v. Santamaria, 236 N.J. 390, 404 (2019) (citing R. 2:10-2). "Under that standard, an unchallenged error constitutes plain error if it was 'clearly capable of producing an unjust result.'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting R. 2:10-2). "Such an 'error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached.'" State v. Gonzalez, 249 N.J. 612, 633 (2022) (quoting State v. Singh, 245 N.J. 1, 13 (2021)). Our Supreme Court has made clear that "[p]lain error is a high bar," and has further "cautioned that

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

'rerun[ning] a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal.'" Singh, 245 N.J. at 13 (alterations in original) (quoting Santamaria, 236 N.J. at 404-05). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.'" Clark, 251 N.J. at 287 (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this state's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. Bullock, 253 N.J. 512, 532 (2023) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). In Miranda, "the United States Supreme Court imposed procedural safeguards to try to dispel the inherent pressures of custodial interrogations and protect the right against self-incrimination." State v. O.D.A.-C., 250 N.J. 408, 419-20 (2022) (citing Miranda, 384 U.S. at 467, 478-79). The Miranda Court held that before law enforcement can interrogate a person in custody, the person must be advised

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

[Miranda, 384 U.S. at 479.]

Thus, "[t]he protections provided by Miranda apply only when a person is both in custody and subjected to police interrogation." State v. Hubbard, 222 N.J. 249, 270 (2015).

"'Custody' for the purposes of Miranda requires a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" State v. Erazo, ___ N.J. ___, ___ (2023) (slip op. at 25) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). Determining whether a person is in custody entails "a fact-sensitive inquiry" that turns on "'whether there has been a significant deprivation of [his] freedom of action based on the objective circumstances,'" State v. Ahmad, 246 N.J. 592, 611 (2021) (quoting State v. P.Z., 152 N.J. 86, 103 (1997)), which "include: the time, place and duration of the detention; the physical surroundings; the nature and degree of the pressure applied to detain the individual; language used by the officer; and objective indications that the person questioned is a suspect." State v. Smith, 374 N.J. Super. 425, 431 (App. Div. 2005). But "simply because someone is questioned at a police station, by police officers, does not mean they are 'in custody.' Nor is it dispositive whether police consider someone a 'suspect,' 'person of interest,' or 'witness.'" Ibid. (citation omitted). "The inquiry is an objective one, determined by 'how a reasonable [person] in the suspect's

position would have understood his situation.'" Bullock, 253 N.J. at 533 (alteration in original) (quoting Hubbard, 222 N.J. at 267).

An "interrogation" for Miranda's purposes occurs when law enforcement subjects a person "to either express questioning or its functional equivalent." State v. Wright, 444 N.J. Super. 347, 363 (App. Div.) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980)), certif. denied, 228 N.J. 240 (2016). That is, "interrogation includes not only direct questioning but also 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.'" State ex rel. A.A., 240 N.J. 341, 354 (2020) (quoting Hubbard, 222 N.J. at 267). "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." Wright, 444 N.J. Super. at 364 (quoting Innis, 446 U.S. at 301).

"It is the State that must prove, beyond a reasonable doubt, that a defendant's statement was voluntary and, if made while in custody, that the defendant knowingly, voluntarily, and intelligently waived the rights afforded him under Miranda." State v. Gore, 205 N.J. 363, 382 (2011).

Here, in addition to the circumstances highlighted in defendant's brief, (Db13-21), the following facts are pertinent to his newly minted argument on appeal that his videotaped statement to Detectives Cherilien and Caicedo was

erroneously admitted into evidence because he was subjected to custodial interrogation without receiving Miranda warnings.

The detectives conducted the interview of defendant at about 6:00 p.m. on February 8, 2016. (25T9-3 to 10-2, 93-10 to 16). Detective Cherilien had called defendant "to see if he would be willing to give a voluntary statement." (25T10-6 to 8, 140-19 to 141-8). Defendant then returned the phone call, and Cherilien suggested that they meet near his residence and they would take him to their headquarters and speak with him. (25T10-8 to 10, 141-9 to 142-15). Defendant "indicated he was willing to give [them] a voluntary statement." (25T141-9 to 12). Defendant went to the agreed-upon location, and the detectives picked him up and drove him to headquarters. (25T142-16 to 143-3).

Detective Cherilien was "interviewing [defendant] as a witness" and "explained to him what the purpose of [the] meeting was"; defendant "was well aware of that" and "agreed to [it]." (25T10-11 to 14, 143-4 to 10). According to Cherilien, interviewing a witness "differe[d] from interviewing a potential suspect" in that it involved

> receiving information [from] a witness, as somebody who observed the incident. A suspect, we start off with Miranda warnings when we suspect them of committing a crime. So at that point, I would Mirandize him and advise him of his rights. In [defendant]'s case, I did not Mirandize him.

[25T10-15 to 23.]

Detective Cherilien did not "provide any specifics to [defendant] regarding the investigation prior to speaking to him." (25T93-17 to 20). And, according to Cherilien, "there was no question at that time [defendant] was not in any type of custody," and "[i]t was a totally voluntary trip on his behalf at [Cherilien]'s request." (25T143-11 to 16).

Detective Cherilien advised defendant at the outset of the interview that the detectives

> request your appearance here today for the purpose of answering questions concerning your knowledge of a matter now under investigation involving the death of Lucila Cardenas Viejo. As regard to this matter that I wish to question you and record your responses on audio and tape recorder. With full knowledge of the foregoing, are you now willing to . . . reply to questions concerning your knowledge of this matter now under investigation?
>
> [25T16-17 to 17-3.]

Defendant replied, "Yes." (25T17-4).

The interview ended after about an hour, and the detectives informed defendant that he could leave and that they would bring him home. (25T85-18 to 88-16). Defendant did indeed go home. Cherilien proceeded to conduct "approximately [twenty] interviews" of other witnesses "in the days and weeks after the incident." (25T96-25 to 97-8).

Because the record demonstrates that defendant's statement was given voluntarily and that he was not in custody, Judge Arre did not commit any error -- let alone plain error -- in admitting the statement into evidence without objection. Viewed objectively, a reasonable person in defendant's position would have felt free to leave the interview. The interview took place in the early evening and lasted only about an hour. Defendant -- after having agreed to give the detectives a voluntary statement as a witness to the incident -- did not so much as hint at a desire to leave the interview at any point while it was taking place. Indeed, defendant was quick and seemingly eager to detail his account of what he did on the night of the murder. And the detectives were not particularly accusatory or unrelenting in their questioning of defendant, who was not handcuffed. Ultimately, defendant was free to leave, and he did so. There was no significant deprivation of his freedom of action based on the objective circumstances.

Significantly, defendant's failure to raise this issue before the trial court "denied the State the opportunity to confront the claim head-on; it denied the trial court the opportunity to evaluate the claim in an informed and deliberate manner; and it denied any reviewing court the benefit of a robust record within which the claim could be considered." State v. Robinson, 200 N.J. 1, 21 (2009). Defendant has failed to meet his burden of establishing plain error.

Moreover, defendant's failure to object "permits an inference that any error . . . was not prejudicial." State v. Cotto, 471 N.J. Super. 489, 537 (App. Div.), certif. denied, 252 N.J. 166 (2022); see also State v. Green, 318 N.J. Super. 361, 373 (App. Div. 1999) ("The absence of an objection suggests that trial counsel perceived no error or prejudice, and, in any event, prevents the trial judge from remedying any possible confusion in a timely manner."), aff'd o.b., 163 N.J. 140 (2000). Indeed, defense counsel's lack of an objection is understandable here, as defendant never admitted culpability and continually denied any guilt in the murder. Although the State argued in summation that defendant was lying during the interview, the substance of his statements was not especially incriminating or inculpatory. In light of this as well as the State's strong circumstantial proofs establishing defendant's guilt of the crimes charged, he has not met his burden of establishing plain error.

POINT II

JUDGE ARRE DID NOT COMMIT PLAIN ERROR EITHER IN NOT CHARGING THE JURY ON HOW TO ASSESS OUT-OF-COURT IDENTIFICATION EVIDENCE OR IN NOT CONDUCTING A WADE[3] HEARING.

Defendant next argues -- again for the first time on appeal -- that Judge Arre erred both "by admitting identification evidence without a jury instruction on how to evaluate it" and by doing so without first holding a Wade hearing to test its reliability. (Db37-57). As will be discussed, this argument lacks merit and should be rejected.

"Appropriate and proper jury instructions are essential for a fair trial," State v. A.L.A., 251 N.J. 580, 591 (2022), and "erroneous instructions on material points are presumed to be reversible error." State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Nelson, 173 N.J. 417, 446 (2002)). But "a party may generally not 'urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict.'" State v. Macchia, 253 N.J. 232, 251 (2023) (quoting R. 1:7-2). If a defendant, as here, "does not request an instruction or fails to object to its omission in the final jury charge," an appellate court "review[s] the omission of that instruction for plain error." State v. Dunbrack, 245 N.J.

[3] United States v. Wade, 388 U.S. 218 (1967).

531, 544 (2021); see also Sanchez-Medina, 231 N.J. at 468 (reviewing a "missing instruction on identification . . . for plain error"). In the context of jury instructions, "plain error requires demonstration of '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Kille, 471 N.J. Super. 633, 641 (App. Div.) (alteration in original) (quoting State v. Burns, 192 N.J. 312, 341 (2007)), certif. denied, 252 N.J. 228 (2022). And "[t]he error must be considered in light of the entire charge and must be evaluated in light 'of the overall strength of the State's case.'" State v. Galicia, 210 N.J. 364, 388 (2012) (quoting State v. Walker, 203 N.J. 73, 90 (2010)).

In State v. Henderson, the defendant challenged an identification on the ground police officers had unduly influenced the eyewitness. 208 N.J. 208, 217 (2011). The eyewitness initially expressed doubt about the identity of the perpetrator but was able to confidently identify the defendant after meeting with investigators. Id. at 223-24. The Court identified numerous factors that can affect the ability of a witness to remember and identify perpetrators, resulting in misidentifications, and ordered an amplified, comprehensive jury charge. Id. at 298-99. The Model Jury Charges (Criminal), "Identification: In-

Court and Out-of-Court Identifications" (rev. July 19, 2012), was then drafted and adopted by the Court.

In Sanchez-Medina, the Court made clear that "[w]hen eyewitness identification is a 'key issue' the trial court must instruct the jury how to assess the evidence -- even if defendant does not request the charge." Id. at 466 (quoting State v. Cotto, 182 N.J. 316, 325 (2005)). For the failure to deliver the charge to be plain error, however, identification must be "a critical issue at trial that defendant disputed." Id. at 469; see also Cotto, 182 N.J. at 325. An issue is made a "key issue" if it is "the major, if not the sole, thrust of the defense." State v. Green, 86 N.J. 281, 291 (1981).

The record here supports the conclusion that Judge Arre's failure to give a detailed identification charge is not "of such a nature as to have been clearly capable of producing an unjust result." See R. 2:10-2. The jury was clearly instructed that the State must prove beyond a reasonable doubt that defendant committed the crimes for which he was indicted. Judge Arre specifically instructed the jury "to determine whether the State has proven beyond a reasonable doubt that the defendant violated a specific criminal statute." (27T121-6 to 14). Judge Arre's reasonable-doubt instruction referred several times to "defendant's guilt." (27T108-11 to 22). Further, when detailing the elements of each of the crimes charged against defendant, the judge repeatedly

referred to the defendant as the person who allegedly committed each crime. (27T121-21 to 175-19). For example, the judge made clear to the jury that in order for defendant to be found guilty of murder, the State was required to prove two elements beyond a reasonable doubt: "one, that the defendant caused [Ms.] Viejo's death or serious bodily injury that then resulted in [Ms.] Viejo's death; and two, that the defendant did so purposely or knowingly." (27T169-3 to 170-1).

In addition, the trial court instructed the jury to "weigh the testimony of each witness and then determine the weight to give to it," specifically asking the jury to consider, among other things, a witness's "means of obtaining the knowledge of the facts" and the extent to which the witness is "corroborated or contradicted, supported or discredited by other evidence." (27T113-24 to 114-23). The court also instructed the jury on circumstantial evidence, stating that all the facts need not "be proven by direct evidence" and that "[t]hey may be proven by direct evidence, circumstantial evidence, or by a combination of direct and circumstantial evidence." (27T112-15 to 113-23).

Of course, the record is clear that Armando and Coleman both knew defendant personally. And both used defendant's name in identifying the person in the photo, which was not direct evidence of identification because it was taken well after the murder had been committed. (21T176-7 to 177-25;

24T19-16 to 20-21). So, neither Armando nor Coleman observed the murder firsthand. In these circumstances, the model identification charge explaining the risk of eyewitness misidentification would not have been helpful and was not necessary. Support for this conclusion can be found in State v. Gaines, where this court found that the failure to provide an identification instruction did not require reversal because the two eyewitnesses knew the defendant prior to the aggravated manslaughter for which he was convicted, and "[t]heir independent identifications . . . were not dependent upon their ability to observe and recall physical features and characteristics of a person who was a stranger to them." 377 N.J. Super. 612, 626 (App. Div.), certif. denied, 185 N.J. 264 (2005). This court further observed that the court's other instructions "did not permit the jurors to conclude that they could convict [the] defendant if the State had not established beyond a reasonable doubt that he was the person who fired the fatal shot." Id. at 625. In light of the foregoing, Judge Arre did not commit any error, let alone plain error, in his jury instructions.

Defendant has also failed to show that Judge Arre committed plain error in not conducting a Wade hearing on the out-of-court identifications. A trial court may hold a Wade hearing under N.J.R.E. 104(a) to determine whether a pretrial identification of a criminal defendant was properly conducted and therefore admissible under N.J.R.E. 803(a)(3). However, the right to a Wade

hearing is not absolute and a hearing is not required in every case involving an out-of-court identification. State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004). "A threshold showing of some evidence of impermissive suggestiveness is required." Ibid. (citing State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985)). Impermissible suggestibility is described as follows:

> [T]he determination [of impermissible suggestibility] can only be reached so as to require the exclusion of the evidence where all of the circumstances lead forcefully to the conclusion that the identification was not actually that of the eyewitness, but was imposed upon him so that a substantial likelihood of irreparable misidentification can be said to exist.
>
> [State v. Madison, 109 N.J. 223, 234 (1988).]

To obtain a hearing under the Henderson legal framework, "a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification," tied to a "system . . . variable." Henderson, 208 N.J. at 288-89. "System variables" are "variables within the State's control," and include, for example, "[p]re-identification [i]nstructions" and "[s]howups." Id. at 248, 250, 259-61. "[E]stimator variables are factors beyond the control of the criminal justice system," and "can include factors related to the incident, the witness, or the perpetrator." Id. at 261.

If a defendant makes a threshold showing, the burden shifts to the State to "offer proof . . . that the proffered eyewitness identification is reliable --

accounting for system and estimator variables." Id. at 289. If the court finds the identification procedure was impermissibly suggestive, it must then determine whether the procedure was nevertheless reliable. Id. at 232-33. "The totality of the circumstances must be considered in weighing the suggestive nature of the identification against the reliability of the identification." State v. Herrera, 187 N.J. 493, 504 (2006). In Manson, the United States Supreme Court identified five reliability factors to be considered by the trial court: (1) whether the witness had the opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the time of the identification confrontation; and (5) the amount of time between the crime and the confrontation. 432 U.S. at 114. At the hearing, "the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 289.

If after evaluating those factors the court is convinced that, notwithstanding the suggestive nature of the procedure, the witness's identification is reliable, then the identification may be admitted into evidence. Manson, 432 U.S. at 114.

However, our Supreme Court has noted that a Wade hearing is not required for a "confirmatory" identification because such an identification "is

not considered suggestive." State v. Pressley, 232 N.J. 587, 592 (2018). "A confirmatory identification occurs when a witness identifies someone he or she knows from before but cannot identify by name." Id. at 592-93.

> [A] confirmatory identification is typically an informal procedure that relies upon a witness's prior familiarity with a suspect. During a confirmatory identification, the witness is not asked to view an unknown suspect (or suspects) and select the wrongdoer. Instead, the witness is merely asked to confirm that a suspect shown to the witness is the person the witness knew from before the crime. Only a witness who is familiar with the suspect can make a confirmatory identification.
>
> [Reyes v. State, 292 A.3d 416, 439 (Md. App. Ct. 2023).]

The Pressley Court explained that "the person may be a neighbor or someone known only by a street name." 232 N.J. at 593; see also State v. Herrera, 187 N.J. 493, 507 (2006) (finding that the defendant not being a stranger to the victim was a "significant, if not controlling," fact in determining the reliability of an identification procedure).

Applying the foregoing principles here, it was not necessary for Judge Arre to conduct a Wade hearing because the identifications were confirmatory and thus "not considered suggestive." Pressley, 232 N.J. at 592; see generally Wright, 444 N.J. Super. at 360-61 ("The central point of Henderson is the recognition that suggestive identification procedures can skew a witness's

report of his opportunity to view the crime, his degree of attention, and, most importantly perhaps, his level of certainty at the time of the identification."). As discussed above, Armando and Coleman knew defendant personally and used defendant's name when identifying the person in the photo taken after the murder had been committed. As a result, there was no need to conduct a Wade hearing, and defendant's convictions should be affirmed.

POINT III

THE ERRORS ALLEGED BY DEFENDANT DID NOT, INDEPENDENTLY OR CUMULATIVELY, DEPRIVE HIM OF A FAIR TRIAL.

Defendant further argues that the cumulative effect of the errors he now asserts for the first time on appeal warrants reversal and a new trial. (Db58-61). It is true that "[e]ven if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." Sanchez-Medina, 231 N.J. at 469. "However, this principle does not apply 'where no error was prejudicial and the trial was fair.'" Cotto, 471 N.J. Super. at 547 (quoting State v. T.J.M., 220 N.J. 220, 238 (2015)). As discussed above, no prejudicial error occurred in this case, so this court should affirm defendant's convictions.

POINT IV

AS JUDGE ARRE DID NOT COMMIT AN ABUSE OF DISCRETION IN SENTENCING DEFENDANT, HIS SENTENCE SHOULD BE AFFIRMED.

Defendant stole the keys from his 81-year-old neighbor's porch and, when they did not work to open the door, rang the doorbell. When she opened the door to let him in, he pushed his way inside, entered the vestibule, and beat her so brutally over the course of four minutes that he knocked out her dentures. He then dragged her -- bruised and bloodied -- into her apartment, where he continued his violent attack and ransacked her apartment for the next thirty minutes. He beat her, broke her nose, strangled her, and stabbed her multiple times, including in the neck with a serrated knife, severing her carotid artery. For all of his brutality, which he perpetrated against his 81-year-old neighbor and which was captured on surveillance video, he received a sentence of life plus thirty-one and a half years. This sentence was entirely reasonable and should be affirmed.

On July 19, 2019, Judge Arre heard several victim impact statements from the victim's family and friends before hearing the arguments of counsel, with the State arguing that aggravating factors one, two, three, six, nine, and twelve applied, and that no mitigating factors applied. (29T34-9 to 39-12). The judge then turned to the applicable aggravating and mitigating factors.

The judge found aggravating factor one applied, noting that defendant "did much more than that which was minimally required to satisfy an element of an offense, and therefore, the nature and circumstances may be considered as an aggravating factor." (29T46-3 to 6). The judge found that the defendant killed the victim during the course of a burglary and robbery "in a manner that exceeds the far reaches of human behavior." (29T46-9 to 13). The judge noted that defendant "violently assaulted an 81-year-old retired nurse in the sanctuary of her home when she was alone and vulnerable" -- he "punched and battered the victim, breaking her nose and assaulting her for an extended period of minutes in her vestibule, knocking out her dentures, bruising her face, strangling her, causing petechia in the eye, stabbing her with a serrated knife, severing her carotid artery, and inflicting other stab wounds." (29T46-14 to 47-5). The judge thus found that aggravating factor one applied. (29T47-5 to 6).

As to aggravating factor two, the judge found that it applied because defendant knew his victim and knew that she was a slight, elderly woman who was in poor health and "physically unable to resist the attacker's ambush" when he viciously attacked and killed her -- beating, strangling, and stabbed her with a serrated knife. (29T47-16 to 22).

With respect to aggravating factor three, the judge found that defendant poses a risk of reoffending. (29T48-13 to 15). As the judge noted, defendant has five prior adult convictions, including convictions for two separate robberies, and that "[i]t is apparent . . . that not only has this defendant not responded to previous convictions and periods of incarceration, but this defendant has escalated his criminality into homicidal violence." (29T48-23 to 49-5). The judge thus found aggravating factor three applicable. (29T49-5 to 6).

Turning to aggravating factor six, the judge noted that defendant had eight prior arrests and five prior indictable convictions dating back to 1986. (29T49-7 to 12). As the judge noted, upon defendant's 1986 conviction for his first robbery, he "was afforded the opportunity of a 364-day county jail term as a consideration of probation" but, despite this leniency, reoffended only four years later and was convicted of two separate CDS offense. (29T49-12 to 21). And just four years after that, he was convicted of robbery for the second time, this time receiving a twenty-year prison term. (29T49-22 to 25). As the judge noted, "[t]his most recent conviction of robbery murder and felony murder and the other charges in this case is the culmination of this criminal's previous body of work." (29T50-9 to 12). The judge thus found that aggravating factor

six applied due to the defendant's extend and gravity of defendant's criminal history. (29T50-12 to 15).

In finding that aggravating factor nine applied, the judge found that defendant "has failed to reform after numerous interactions with law enforcement for serious crimes" and "that a lengthy term serves the dual purpose of specific and general deterrence in this case as to this defendant and as to society at large." (29T50-17 to 51-4). The judge noted that "defendant's modus operandi is to rob and impose violence [on] others to use the proceeds for his own personal desires" and that his "evil and selfish greed directly resulted in the brutal murder of a helpless victim, which this Court cannot and will not tolerate." (29T51-7 to 15). The judge found that "a significant term of imprisonment sufficiently would deter this defendant and others from violating the law." (29T51-16 to 18).

The judge also applied aggravating factor twelve, finding that, "[b]ased upon defendant's previous work for the victim removing snow, his previous contact with her for the lengthy number of years he lived there across the street from the victim, when he was not in prison, . . . [defendant] knew exactly who his victim was and, in fact, she was selected because of her vulnerability." (29T51-19 to 52-3).

Finally, the judge noted that "defendant offers nothing in support of a finding of any mitigating factors," and found that no mitigating factors applied. (29T52-4 to 6).

After appropriately merging count one into count two, count four into count five, and counts three, six, and seven into count eleven, the judge addressed the propriety of consecutive sentences. (29T52-23 to 56-11). The judge found that consecutive sentences were appropriate "because the defendant's distinct, independent offenses had separate criminal objectives," such that his separate crimes deserve separate sentences. (29T55-1 to 5). The judge then sentenced defendant to four consecutive prison terms -- a ten-year term subject to NERA on count two (armed burglary); a 20-year term subject to NERA on count five (armed robbery); an eighteen-month term on count eight (unlawful possession of a weapon); and a life term subject to NERA on count eleven (purposeful/knowing murder). (29T52-23 to 56-11).

A trial court's "sentencing determinations are entitled to substantial deference" on appeal. State v. Jaffe, 220 N.J. 114, 124-25 n.1 (2014) (quoting State v. Pagan, 378 N.J. Super. 549, 558 (App. Div. 2005)). "Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). The reviewing

court may "not substitute its judgment for the judgment of the sentencing court," State v. Lawless, 214 N.J. 594, 606 (2013), and

> must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Miller, 237 N.J. 15, 28 (2019) (alteration in original) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).]

Therefore, even if a reviewing court "would have arrived at a different result," it is "bound to affirm a sentence . . . as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. Grate, 220 N.J. 317, 337 (2015). The decision to upend a sentence must not be based on a mere "difference of opinion or individual sentencing philosophy." State v. Roth, 95 N.J. 334, 365 (1984). Rather, upending a sentence is appropriate only if it was "a judgment that reasonable people [could] not reasonably make on the basis of the evidence presented." Ibid.

And just as appellate courts must not substitute their judgment with respect to the overall sentence imposed, they must not "substitute [their] assessment of aggravating and mitigating factors." Miller, 237 N.J. at 28

(alteration in original) (quoting State v. Miller, 205 N.J. 109, 127 (2011)). Indeed, it is a "fundamental principle" of sentencing law "that an 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." State v. O'Donnell, 117 N.J. 210, 216 (1989) (citing Roth, 95 N.J. at 365-66).

Here, Judge Arre appropriately found aggravating factors one, two, three, six, nine, and twelve, and no mitigating factors based on competent and credible evidence in the record, sentenced defendant to terms within the applicable statutory ranges, conducted a detailed analysis as to why consecutive sentences were appropriate, and thoughtfully and thoroughly explained his reasons for both each individual sentence and the aggregate term as a whole.[4] Defendant's sentence was lawful, reasonable, and does not shock the conscience, and it should be affirmed.

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[4] Defendant does not challenge on appeal the judge's findings regarding the aggravating factors and lack of any applicable mitigating factors, and has thus waived any such challenges. See Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining that claims not addressed in merits brief are deemed abandoned); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2018) (noting that an issue not briefed is considered waived). Nevertheless, for the reasons thoughtfully and thoroughly expressed by Judge Arre at sentencing, the judge properly applied each of the aggravating factor and properly found that no mitigating factors applied.

When determining whether multiple sentences of imprisonment should run concurrently or consecutively, a sentencing court's exercise of discretion is to be guided by the criteria set forth in Yarbough, the first of which is that "there can be no free crimes in a system for which the punishment shall fit the crime." Yarbough, 100 N.J. at 643. The third criteria requires sentencing courts to consider "facts relating to the crimes," including whether

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims; [and]
>
> (e) the convictions for which the sentences are to be imposed are numerous.
>
> [100 N.J. at 644.]

Yarbough's fifth criteria instructs that "successive terms for the same offense should not ordinarily be equal to the punishment for the first offense."[5] Id. at 643.

[5] Yarbough's sixth criteria, which established an outer limit on the cumulation of consecutive sentences, was expressly rejected by the Legislature in 1993,

But "the Yarbough guidelines are just that -- guidelines." Carey, 168 N.J. at 427. "They were intended to promote uniformity in sentencing while retaining a fair degree of discretion in the sentencing courts." Carey, 168 N.J. at 427-28. Thus, as the Court recognized in Yarbough, "even within the[se] general parameters . . . there are cases so extreme and so extraordinary that deviation from the guidelines may be called for." 100 N.J. at 647; see also State v. Liepe, 239 N.J. 359, 373 (2019). For example, "[c]rimes involving multiple deaths or victims who have sustained serious bodily injuries represent especially suitable circumstances for the imposition of consecutive sentences." Carey, 168 N.J. at 428. And because the five "facts relating to the crimes" set forth in Yarbough's third criteria are "applied qualitatively, not quantitatively," consecutive sentences may be imposed "even though a majority of the Yarbough factors support concurrent sentences." Carey, 168 N.J. at 427-28.

Ultimately, "in determining whether the terms should be concurrent or consecutive, the focus of the court should be on the fairness of the overall sentence." State v. Sutton, 132 N.J. 471, 485 (1993).

As Judge Arre properly found after analyzing the Yarbough factors, consecutive sentences were appropriate here. While the events may have taken

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when it amended N.J.S.A. 2C:44-5(a) to make clear that "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." L. 1993, c. 233, § 1.

place during one horrifying period of time, each of defendant's offenses was distinct and independent, with separate criminal objectives. Defendant could have just burglarized his victim's home, but he did not stop there. He could have just minimally injured his victim or used minimal force during the course of his theft, but he did not stop there either. Instead, he escalated his criminality at every step. When the keys he stole to break in did not work, he rang the doorbell. When the victim answered, he pushed past her to get into her apartment. But instead of just continuing on his path to steal her belongings, he viciously beat, strangled, and stabbed her multiple times during the course of his theft. Thus, while his offenses may have occurred in a single event, Judge Arre correctly found that they were distinct and independent offenses warranting distinct and independent sentences rather than awarding defendant multiple free crimes.

Finally, though not under the language of Torres, which had not yet been decided, Judge Arre did consider the whether the significant overall term was fair. And there can be no doubt that it was given the multitude and brutality of defendant's crimes. As the judge recognized throughout his sentencing, defendant's ambush and murder of the helpless victim was exceedingly vicious, each of his individual offenses were independent of one another, and, as he noted in the context of the aggravating factors, "a significant term of

imprisonment" was appropriate. Defendant's life-plus prison term befits his actions, is reasonable under the circumstances, and should be affirmed.

CONCLUSION

For the foregoing reasons, the State urges this court to affirm defendant's convictions and sentence.

Respectfully submitted,

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