Superior Court of New Jersey
Appellate Division
Docket No. A-002383-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD EASTERLING,

Defendant-Appellant.

Criminal action

On appeal from a final order denying post-conviction relief of the Superior Court of New Jersey, Law Division, Essex County, Ind. Nos. 15-04-0865-I, 15-04-0866-I
Honorable Siobhan A. Teare, J.S.C.

BRIEF AND APPENDIX (DA1-92) OF APPELLANT

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CONFINED

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Procedural History[1]

In 2015, a grand jury indicted defendant charging him with first degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1) (count one); second-degree aggravated assault; N.J.S.A. 2C:12-1(b)(1) (count two); third-degree aggravated assault of a law enforcement officer performing his duties resulting in bodily injuries, N.J.S.A. 2C:12-1(b) (5)(a) (count three); three counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts four, five, and six); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count seven); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count eight); fourth degree aggravated assault on a law enforcement officer in the performance of his duties not resulting in bodily injury, N.J.S.A. 2C:12-1(b)(5)(a) (count nine); fourth-degree aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4) (count ten); and fourth-degree possession of prohibited

[1] References to transcripts are as follows:

1T	12/9/22 (PCR hearing)
2T	12/16/22 (PCR hearing)
3T	12/1/16 (motion)
4T	12/6/16 (trial)
5T	12/7/16 (trial)
6T	12/8/16 (trial)
7T	12/8/16 (p.m.) (trial)
8T	12/9/16 (trial)
9T	12/12/16 (trial
10T	12/13/16 (trial)

ammunition, a high-capacity magazine, N.J.S.A. 2C:39-3(j) (count eleven). DA27. The grand jury charged defendant in a separate indictment with a single count of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b). DA27.

In 2016, defendant was tried before a jury. Count nine of the indictment was dismissed. DA27. The jury found defendant guilty of second-degree aggravated assault (count two); third-degree aggravated assault (count three), two counts of first-degree robbery (counts four and five), and the three weapons charges (counts seven, eight, and eleven). The jury acquitted defendant of attempted murder (count one), fourth-degree aggravated assault (count ten), and one count of robbery (count six). Defendant pled guilty to the certain-persons charge. DA27.

The trial court sentenced defendant to an aggregate extended term of 45 years of imprisonment (DA27), but defendant appealed, and the Appellate Division vacated defendant's conviction for first-degree robbery under count four, remanding for merger of defendant's conviction on count three with his conviction on count two, and resentencing (the Supreme Court denied review on January 17, 2020, State v. Easterling, A-4211-16T4, 2019 WL 3851650 (N.J. Super. Ct. App. Div. Aug. 16, 2019), cert. denied, 240 N.J. 401 (2020)). Defendant was resentenced on September 18, 2019. DA69.

In April 2020, defendant filed a petition for post-conviction relief, but the trial court dismissed it procedurally without assignment of counsel and without

substantive ruling on any claims. DA32. In May 2022, defendant re-filed his petition, with counsel, asserting that he received ineffective assistance. DA1. The trial court held an evidentiary hearing on two issues: (1) Trial counsel's omission to request that the Court conduct an individual voir dire of the jurors after one juror recognized a named individual during testimony at trial, and (2) Trial counsel's omission to cross- examine the State's ballistics expert at trial. The Court denied an evidentiary hearing regarding the issue raised by Petitioner that trial counsel omitted to pursue a statement from one of the alleged victims in the case, Fabian Daniels, denying that claim on its face. DA71. Following the evidentiary hearing, the trial court denied defendant's claims by Order and Opinion entered March 1, 2023. DA66. Defendant now appeals. DA88.

Statement of Facts

The Prosecution's Case at Trial

The State charged defendant with armed robbery of a 99-cent store and several persons in it, and with shooting a responding officer in his knee. According to the prosecution's case, defendant entered the store with his gun cocked and loaded, then ordered the store owner and two others on the floor. He pointed his gun at the store owner's head when he refused to get on the floor and demanded that his victims empty their pockets. One victim threw his watch, money, and fanny pack on the floor, which defendant picked up. DA268, DA7-9.

Defendant headed toward the front door. But a person inside the store had escaped and flagged down a police car. DA26-28, DA7-9. A police officer approached the store with his gun drawn. The officer fired twice at defendant and wounded him. A second officer arrived. The wounded defendant was the grabbed by three people in the store, who dragged and stomped on him. DA26-28, DA7-9.

Officer Dominguez was standing just outside the front of the store. He made eye contact with defendant. Dominguez said he heard a bang, saw "muzzle fire," and realized that defendant had shot him in the knee through the glass door. Other officers entered the store and arrested defendant. Police said they found a Glock handgun beneath defendant where he'd been dragged. DA26-28, DA7-9.

Defendant testified at trial, telling the jury he was an innocent bystander in the store who was attacked by the store owner and his associates who were selling marijuana at the front counter. DA27. Defendant testified that he was struggling to get away from the men who were assaulting him when he was shot by the police officer. The Glock handgun found belonged to the store owner, not defendant, who affirmed he did not shoot Officer Dominguez as claimed. DA27.

Defendant's Ineffective Assistance Claims on Post-Conviction Relief

Defendant claimed that his trial counsel was ineffective for not cross-examining and confronting the ballistics expert the State retained and presented at trial – Detective Sergeant Robert Parsons. DA1. Parsons claimed that the casings

recovered outside the store were fired from the gun of Captain Richard Perez, whereas the casing recovered with the Glock was fired from that Glock. (6T 37-8 to 11; 6T 38-21 to 40-21). The projectile recovered from Dominguez's leg was fired from the Glock. The bullet fragment found at the scene was too small to test, Parsons testified. (6T42-5 to 43-16; 6T38-10 to 15). Defendant's counsel conducted no cross-examination of this expert at trial and took no steps to obtain any countering evidence on defendant's behalf. DA1-25.

Defendant argued that the issue of which gun fired which shots was critical to the State's version of events against defendant, and the evidence about the gun defendant allegedly fired at Officer Dominguez was inconsistent. DA7-9.

Lloyd Darby, who owned the 99 cent store where marijuana was apparently being sold, said he was "sitting in the back" with Fabian Daniels and a man named Qaree Jones when a man came into the store, pulled out a gun, and told everyone to get on the floor. (4T 113-12 to 21). Darby claimed that defendant was this man. (5T 119-4 to 122-16). The gun "looked like a Glock," Darby said, and it had an "extended clip." (5T 114- 6 to 24). Darby denied that defendant fired that gun while they held him down on the floor of store, but, he testified, defendant had fired it once earlier when running toward the front of the store -- a significant difference from the account police gave. (5T 137-19 to 138-10). Darby told police that the gun was a Glock and had an extended clip – a description so specific for an

eyewitness that it indicated that Darby was actually the owner and possessor of the gun. (5T 142-19 to 24). Darby testified at trial that the robbery took three to five minutes, but, in his statement to police, he said that the robber occurred in "two seconds" after the man demanded money. (5T 146-12 to 147-2).

Detective Nicholas Rizzitello testified that he seized four guns at the scene: the Newark Police Sig Sauers carried by Perez, Peppers, and Dominguez, and the Glock recovered from the store. (4T 129-22 to 130-6). One spent shell casing was recovered with the Glock. (4T 134-18 to 22). Of the officers' guns, only Perez's was missing rounds from the usual 13 that are in such weapons; his gun contained only 11 rounds. (4T 138-16 to 143- 25). Rizzitello tried to get fingerprints from the Glock and, more generally from the scene, but was unsuccessful. (4T 148-23 to 156- 1). However, he found two shell casings near cars, and a bullet fragment at the scene. (4T 152-2 to 155-16; 4T 168-8 to 15; 5T 30-12 to 18). The detective also recovered, from the floor of the store, an "extended magazine" built to hold 31 rounds, but it only contained 17, (4T 175-23 to 24). That magazine fits the Glock that was seized, he testified, but it hangs off the bottom of the gun because it is not the magazine that came with the weapon. (4T 175- 23 to 176-6).

Captain Perez said that other officers broke through the door into the store and arrested defendant, who was "on the floor." (5T 53-19 to 54-2). Perez grabbed a Glock handgun that he found on the floor; the gun "looked jammed."

(5T 54-2 to 17). Sergeant Barry Baker testified that, when he arrived at the scene, Captain Perez was outside the store with his gun drawn and pointed at a man on the floor of the store. (5T 159-7 to 16). Baker testified that defendant did not have a gun in his possession. (5T 163-6 to 15).

In support of his ineffective assistance of counsel claim, defendant obtained and presented to the PCR court a countering expert ballistics report (DA50) that, defendant charged, his trial lawyer had failed to obtain before trial. Carl Leisinger, III, a forensic ballistics expert, reviewed the discovery and examined the evidence that was still available in this case – the Glock and shell found at the scene. Leisinger noted that by the time of his involvement, all the other evidence was no longer available for his inspection – the other guns which fired some of the bullets at the scene, defendant's clothing worn that day (which could have been tested for gun shot residue, Leisinger noted), and the plexiglass door through which defendant allegedly fired the shot at Officer Dominguez. Expert Leisinger stressed that cross-examination of Detective Parsons should have been conducted, because of the difficulty of matching a shell from a particular Glock handgun. DA50.

Defendant charged that his trial counsel's failure to voir dire the entire jury panel also was ineffective assistance. Though the jury issue was raised on direct appeal, it was doomed to fail because counsel failed to preserve the error at trial, as the Appellate Division noted in rejecting the argument. During trial, a court officer

went to the jury room to check on the condition of a juror who had accidentally cut himself. (5T 130-10 to 24). After determining that the juror was okay, the court officer was approached by Juror 14, a woman who told him that she had realized that she recognized the name of Quaree Jones, one of the men who was allegedly in the store at the time of the robbery. (5T 130-23 to 131-4). According to the court officer, the remark by Juror 14 was made "in an open forum," i.e., in front of the rest of the jury.

The judge brought Juror 14 into the courtroom and asked her questions. The juror stated that Quaree Jones had been "in a relationship with [the juror's] daughter's grandmother years ago" and that the juror had not "seen him in years." (5T 131-24 to 132-2). Juror 14 stated that she did not think that knowing Jones would affect her impartiality. (5T 132-5 to 9). The judge asked the court officer to answer a few questions, and he made it clear during that questioning that the comment that he witnessed from Juror 14 regarding Quaree Jones was made "in the presence of all the jurors." (5T 133-22 to 25). The judge re-examined Juror 14, who admitted that, in addition to the comment that the court officer heard her make in front of the other jurors, Juror 14 asked other jurors whether they had seen the name Quaree Jones on the witness list and told them that she needed to inform the judge that she knew Jones. (5T 135-2 to 7).

The judge excused Juror 14 from the panel (5T 135-15 to 16}, but the judge did not conduct a voir dire of any of the other jurors to determine if Juror 14's memory of what she had said about Jones was accurate and whether the other jurors were impacted by Juror 14's comments to them. The court simply told the remaining jurors, "You'll see your jury panel has shrunk by one." (5T 137-6)

On direct appeal, defendant argued that the judge's failure to conduct individualized *voir dire* of the remaining jurors violated his Sixth Amendment right to an impartial jury, his Fourteenth Amendment right to due process, and his corresponding state constitutional rights. But the Appellate Division rejected defendant's claim, stressing, "When asked by the court, both defense counsel and the State agreed that there was no need to question the other jurors about the incident. They expressed concern that further questioning would highlight Jones unnecessarily, given that Juror No. 14 did not convey any information about him to them. Defendant argues for the first time on appeal that the trial court erred by not questioning the remaining jurors to determine if Juror No. 14 told them anything about Jones." (DA30). The Appellate Division ruled,

> Our review of the record reveals that the court did not abuse its discretion when it decided not to individually question the jurors who were not excused. As a preliminary matter, we note that the invited error doctrine would permit this court to decline to review this issue. *Van Syoc, 235 N.J. Super. at 465*.
>
> Defense counsel, apparently satisfied that Juror No. 14 gave a credible account of her interaction with the other jurors, declined the trial

> court's suggestion that voir dire of the other jurors might be necessary. We review the issue, however, for plain error. R. 2:10-2.
>
> The court, having had the opportunity to question Juror No. 14 and to assess her credibility, determined that she did not share any information, other than reporting that she knew Jones, with the other jurors. In addition, the extent of Juror No. 14's relationship was Jones was limited and ended years before the trial. She did not have any personal knowledge of the events that gave rise to the indictments or Jones's involvement in those events. She expressed to the court no opinion on his credibility or character. The court acted within its discretion when it determined that questioning the other jurors about Jones would unnecessarily highlight him in their minds. [DA30]

Defendant contended, on PCR below, that his trial counsel failed to protect his right to a fair trial by not requesting that *voir dire* of the other jurors.

The Evidentiary Hearing

Defendant's trial counsel testified at the evidentiary hearing held before the PCR court below. Counsel said that "the general defense was Mr. Easterling never possessed or shot any gun, he was actually the victim upon entering the bodega or the store. The people in the store attacked him." 1T12.

Q Do you recall during the trial the State presenting a ballistics expert?

A I do believe they put on a ballistics expert, yes.

Q Do you recall if you cross-examined that expert at all?

A I do not believe I did.

Q Do you have an explanation as to why you did not cross-examine that ballistics expert?

A Well, the theory of the defense's case was that Mr. Easterling never possessed, never had the gun, never shot the gun, so ballistics wouldn't have -- any questions towards a ballistics expert wouldn't have been helpful or useful. They wouldn't have been able to say who shot the gun and who possessed the gun, just whether, and this may not be totally accurate, but whether casings matched with the -- the gun that was recovered, but nothing in terms of who actually fired the weapon.

Q So, in other words, whether or not a recovered gun matched any other ballistic evidence didn't matter to your defense, is that correct?

A That's correct.

Q Because your defense was Mr. Easterling never possessed or shot the gun, is that correct?

A That is correct. 1T13-14

Defense counsel admitted never considering retaining an expert for defendant:

Q Did you ever consider retaining your own ballistics expert in this case?

A No.

Q Why not?

A Well, again, it -- ballistics wouldn't have showed or given any evidence to who possessed the gun. So a ballistics expert wouldn't have aided in the defense. 1T15

Q -- have you ever called a ballistics expert?

A No.

Q Have you ever seen a defense attorney call a ballistics expert in defense in this Courthouse?

A No. 1T17

With regard to the jury issue, trial counsel admitted not asking to voir dire the other jurors:

Q Did you make any request to voir dire the other jurors as to what was said about her knowledge of the other name?

A I believe that I -- no, I did not ask the Court to voir dire the rest of the jurors. 1T19

Q And do you recall why you did not ask the Court to voir dire the rest of the jurors?

A I believe it was a couple reasons. Mainly not to highlight the name anymore than it had already been or the issue. And secondly, based on what the juror who was excused told us it -- it -- they didn't indicate how they knew the person or what they knew about the person, their relationship with the person. Just

that they recognized the name and that name was not on the witness list, so there didn't seem to be any harm, even if other jurors heard that, to continue with the trial.

Q You said you didn't request cause you didn't want to highlight it anymore. Can you elaborate on that at all?

A Well, to -- to individually voir dire them would have made them think that it was more important or the name had more meaning or import to the trial than -- than it did, since it -- from my recollection that person didn't even testify and it was just a name mentioned. So it didn't seem necessary and might just also add some confusion to -- to continue questioning other jurors on it. 1T20

Q And the reason why you didn't ask for the individual voir dire because you were afraid it was going highlight the Quarry Jones name in any of the other juror's minds?

A Not necessarily highlight, but unnecessarily emphasize a name that wouldn't mean anything at the time. It was just on the witness -- was not on the witness list. It was just mentioned in passing during testimony. 1T25

Trial counsel noted, however, that "Quarry Jones at least according to Mr. Darby was one of the men that was inside the store at the time of the robbery:"

A According to the testimony, yes.

Q According to the testimony. And that was testimony called by the prosecution, correct?

A It says direct, so yes.

Q Okay. And juror 14, and correct me if I'm wrong, had said Quarry Jones is a name I know, he wasn't on the witness list, right?

A Something to that effect, yes. 1T26

Q And what did juror 14 say the relationship was?

A Her -- he was in a relationship with her daughter's grandmother and she hadn't seen him in years.

Q Okay. So at one point at least according to what the transcript references this was somebody that she knew at one point, right?

A It seems that way, yes, at least the name, but -- and she hadn't seen him years, so yeah, she knew him.

Q And at least according to Mr. Darby, one of the prosecution witnesses, this man who juror 14 knew, right, was one of the alleged robbery victims inside the store?

A I don't know if he was an alleged victim. I -- based on the testimony he was in the store. I – I don't know if he was a victim at the time. I don't know what his role was. But based on the testimony I just know he was there. 1T28

Q All right. So in other words, according to Mr. Darby's prosecution testimony Quarry Jones was in the store with him and Quarry Jones was one of the ones whose watches was taken allegedly by your client, Mr. Easterling.

A Based on Darby's testimony, yes.

Q But she did at one point apparently know him, right?

A Yes.

Q And he was technically one of the victims in the case, right?

A Yes. 1T29

Trial counsel said Darby being one of the alleged victims of the robbery was the reason counsel wanted Juror 14 excused in the first place: "Well, yeah, that's why we asked them before we empanel them if you know any of these witnesses, names on the witness list. So, yes, that's often the times for the Court to excuse jurors." 1T30. Yet, "by not individually asking the other members of the panel you essentially was -- were you – you basically were taking juror 14's word that she didn't say anything else to the other jury members, right?"

A That's correct. They had no -- I mean she didn't even have to tell us that she knew this – recognized the name, recognize the name, knew this person, but she came forward to us forthright. There was no reason to doubt her. 1T30

Q If you had individually asked the other jurors, right, on the panel, you don't know what answers you would have gotten in terms of if you would

have said, okay, juror one, for example, what did juror 14 say to you about know -- you know, did you – did she say anything about knowing this witness, did she name the witness, what did she say about the witness, did she say anything else about the witness. You don't know what the answer would be, right --

A No. 1T31

Q Let me ask you a question. If you had asked the other individuals or if they could have contradicted what juror 14 said about what she told them about Quarry Jones, right?

A Yes.

Q Are you aware whether or not the issue was raised on appeal on the defendant's direct appeal?

A I feel like it may have, but I'm not certain.

Okay.

A I know that we did have a resentencing, but I don't -- that wasn't -- I don't think that was the issue, so obviously not the issue, so I don't – I don't know 100 percent. 1T33

Turning back to the ballistics issue, "you said that your theory of the defense was that your client was not the man who actually shot the Glock, right?"

A Yes.

Q So, in other words, what you were basically saying, correct me if I'm wrong, is that you were trying to challenge the fact that, okay, this bullet that wound up in Officer Dominguez' knee was – might have been fired from the Glock but it wasn't Mr. Easterling who actually fired the weapon, is that --

A Correct, 1T37

Q And you remember, right, Ms. Bilotta, that there were other weapons at -- in -- in play in the case?

A Other weapons, well, the police officers had weapons, yes.

Q Well, let me ask you this. The police officers had weapons.

A Right.

Q Right? Do you recall if one of the police officers discharged his weapons?

A I know Mr. -- I'm pretty sure Mr. Easterling got shot, so yes.

Q Okay. So that's one.

A Right.

Q Do you recall if the police managed weapon was the same kind of weapon, same kind of handgun, as the -- as the Glock or was --

A I don't think it was.

Q A Glock's a 9 millimeter, right?

A That I don't know. ***

Q … Did you ever obtain a report from a ballistics expert before in any other case?

A No.

Q Did you --

A Did I ever retain an expert and have them write a report, just not use it at trial?

Q Yeah.

A No, I've never done that.

Q Okay. And -- and you've never saw a ballistics expert in any other case that you may have observed in your earlier --

A No, not to my recollection, no.

Q Were you aware at the time of Mr. Easterling's trial and, you know, in the pre-trial area, were you aware that that was something that you could do that you could go out and get a ballistics expert?

A Oh, absolutely

Q Okay. Did you ever look into any experts, like who's a ballistics expert, what kind of qualifications are they?

A Again, it wasn't relative to our defense, so no, I didn't. 1T39

With regard to the State's expert:

Q But do you remember if you reviewed Parsons' report?

A Yes, if it was provided in discovery, I reviewed everything that was provided.

Q Do you remember if you evaluated, whether or not you thought Parsons was qualified to testify in the area.

A I believe we received his CV as well, so yes. And he was also voir dired before he testified as well. ***

Q Did you -- did you look and say, well, I -- in other words, did you make that determination pretrial I think this man's qualified to testify?

A I likely did, yes.

Q Do you recall it at all?

A His qualifications?

Q No. Do you recall your thought process?

A No, I'm sorry I don't.

Q Do -- have you recalled in any other case making that determination of -- of a ballistics experts from the State's expertise?

A I -- I don't know ballistics. I know I've done it with fingerprints before and sometimes even DNA. But I mean nothing -- nothing specific jumps out to me about ballistics. 1T40-41

Q Let's say it's a fingerprint expert. Just give me like a snapshot. Like what do you -- what do you do, in other words, to go, oh, Mr. Smith is being proffered

as a fingerprint expert, how do I tell if he's actually qualified to testified in this area. What would you do as the defense lawyer in that regard?

A I review his CV and his report and that's pretty much his qualifications right there.

Q So, in other words, do you have to look at some external source to see if he's actually qualified or you just know based on with your own experience?

A In -- own experience and other office, we -- we do share State's witnesses and how -- how good or – or bad they are. So we -- we do keep track of that and we talk about that as well at the office.

Q You mean among the other public defenders.

A Yes

Q And do you remember if you did that in this case with regard to Mr. Parsons?

A I likely didn't since it wasn't relevant to the defense. 1T41

Q … when did you form this theory of the defense? Let me ask you that.

A Probably when Mr. Easterling told me he wanted to go trial. So I -- I don't know exactly when.

Q Okay. So when he went to trial that was your theory of the defense.

A Yes.

Q And you don't know -- you didn't know at the time you went to trial, you didn't know whether or not you could obtain an independent ballistics expert, right?

A Well, I could if I submitted a request for it. They -- we have a process, but I've never been denied when I've requested one in the past.

Q Do you know whether or not you could – but you don't know, in other words what I'm trying to get at, Ms. Bilotta, you don't know whether or not you could have obtained an expert opinion that would have undercut or contradicted in whole or in part what Mr. Parsons had said, right?

A No, I don't.

Q Cause you didn't do that.

A No. 1T42

Q Let's say that you had done it before trial. I understood the theory of the case. Let's say that you said, all right, well, I know that's our theory of the case, but let's see if this Glock actually, you know, Parsons is basically saying, and you correct me if I'm wrong, Parsons is basically saying, okay, the bullet that went into Officer Dominguez' leg, right, his knee I think is specific, was fired from this Glock and some of the testimony at least from the prosecution put the Glock somewhere underneath the body of Mr. Easterling, right?

A Okay.

Q Let's say you were able to get an expert ballistics expert, okay, somebody who's like Mr. Parsons, okay, let's assume that. Let's assume that you could get the ballistics expert and he gave – he looked at the same things, right? What would he have looked at? He would have looked at the Glock itself, right? You agree with that?

A Yes.

Q In a pre-trial posture, right, before trial this would have been, right, is that what we're talking about?

A Yes.

Q So you would have had access to whatever evidence the State had?

A I would have had access even without an expert, but yes, an expert would have been given access to it as well.

Q Expert could have had -- but he would have had access to the Glock, right?

A Yes.

Q He would have had access to the actual bullet that was removed from Officer Dominguez' leg, his knee, right?

A Yes.

Q You would have had access to the shell casing that apparently was found and also matched with the Glock, right?

A Yes.

Q Do you know whether or not you would have had access to let's say the plexiglass door of the store? Do you recall that, the bullet went through the door?

A I do recall it went through the door. That I -- I don't know.

Q Did you ever look into that at any point? During the case did you say let's see if we can get this plexiglass examined?

A Again, no, because it wasn't the theory of my defense. 1T44

Q … So what about his clothes, the clothes that Mr. Easterling was wearing at the time of the offense? Did you ever examine his clothes?

A No, I did not.

Q Did you ever look into whether or not his clothes were available for examination?

A No, I did not.

Q Did you ever consider whether or not there could have been any kind of a gun powder residue issue?

A I don't know if I did cause it might have been something that I thought about, but I -- I can't say for sure whether or not that was something that I -- I pursued.

Q Is that something you ever pursued in any other case before in any of your trials?

A I recall it being an issue one -- one or two times. It's not -- doesn't come up very often. 1T46

Q So if you had gotten the shirt or the clothes or whatever he was wearing at the time, right, the time of the event, and you had gotten an expert, is it -- it's possible, right, that you could have had some kind of an argument there on gun powder residue?

A Certainly possible I suppose.

Q At the trial did you try to present any other alternative version about who fired it then?

A Burden's not on the defense, so no, we didn't. 1T48-49

With regard to the gun the State claimed defendant possessed:

Q … did you see on page 114 Mr. Darby testified, right, at one point it is on line 21 where Mr. Darby said, yeah, he put it to my head and cocked the trigger back, right?

A Um-hmm.

Q So cocking the trigger back, that wouldn't make you think that it was a Glock, is that right?

A That's correct. 1T55

Q … So let me return that briefly to what I was saying. So you still have your theory of the case, right, that, okay, the Glock fired this bullet that went into

Officer Dominguez' knee but it wasn't Mr. Easterling who fired it. But why wouldn't it have added to your defense overall if you could have said and also their expert says that this bullet went into Dominguez' knee but in fact our expert says no, that's not what the scientific evaluation shows at all. It's inconclusive. But would you agree with me that if you had gone out and gotten your own ballistics expert, he may not have agreed with Detective Parsons' opinion, right?

A Anything's possible, but it wouldn't have – I wouldn't -- I wouldn't -- it wouldn't have been used at trial. I mean it -- it -- if I'm not putting the gun in his hand, I'm not saying Donald shot it, I don't really care what the ballistics expert said, which is why I didn't cross him at trial, cause it doesn't go towards Mr. Easterling's involvement. 1T62

Q Isn't -- isn't attacking the ballistics opinion of the State, isn't that just an additional defense in an attempt to -- reasonable doubt about the case overall? How does that prove your case? That's what I'm trying to understand.

A I didn't say it would hurt my case. I'm just saying it -- there are many, many different avenues you can go if you're looking to -- to try to figure out how to attack the State's case.

Q Right.

A I chose a certain way to defend the case.

Q So it wouldn't -- but you're acknowledging it wouldn't hurt the case.

A It wouldn't have helped it either based on how I -- what my arguments were to the jury. 1T63

Q All right. Let's just -- you said it wouldn't have helped, right? But you don't know if it would have helped because you didn't get the expert, right?

A Based on my theory of the case it would not have helped.

Q Well, I understand. But the short answer is you didn't go and investigate and get your own opinion.

A That is true, yes.

Q So we don't really know if it would have helped.

A Based on my theory of the case it wouldn't have helped. 1T64

Q Let me ask you this. All right. What happens if I said, all right, I want you to assume as we stand here I -- let's say we were back at the trial before the trial came, okay, and I said I -- I looked at -- I was your assistant, I got Parsons' report, I got my own expert here, he's a ballistics expert, too, he's all ready and willing to go and to testify and he impeaches and contradicts Parsons' expert opinion that the Glock fired the weapon. And we think this will raise reasonable doubt on whether or not that bullet that went into the officer's leg even continued from the Glock. If you had that, would you have called that countervailing expert at trial?

A I can't say right now at this point.

THE COURT: That's all speculation. It's all speculation. You know, I understand what you're saying.

MR. CONFUSIONE: The nature of the beast.

THE COURT: You can -- you -- right, you can raise those arguments in your summation, you can raise these arguments with the other expert, but you can't change the facts as they exist. She went with one theory of the case. She -- or I'm not trying to put words in her mouth or what I have heard. She did not bring in, did not want to bring in, anything concerning a gun because she doesn't want to put the gun in the defendant's hand. It's -- it's trial strategy. You could have a hundred different trial strategies.1T64-65

MR. CONFUSIONE: Well, I'm saying, but the law, Your Honor, is trial strategy, you can't say I -- it was strategic if you didn't actually go and get the evidence. If a lawyer goes and gets the evidence, in other words, if I -- if I was the trial lawyer and I said, oh, I got the State's expert, Mr. Parsons, let me see what he says, I'm going to look at it myself, I got my own expert, and then I say I don't want to call my own expert, that's trial strategy. Trial strategy under the law, Your Honor, under the governing standard as Your Honor knows, isn't -- I didn't look, I just had one theory of the case and I ignored the rest of it, that's not trial strategy, that's the governing standard. 1T66

THE COURT: But I'm disagreeing with you with your theory.

MR. CONFUSIONE: Yeah.

THE COURT: There are various different theories. If you come to a theory that you believe does not assist your client and it is not -- it -- I -- why would you expend the money for it? It doesn't make sense.

MR. CONFUSIONE: But as we'll see in this case, unfortunately our expert got the tow truck, but we have the evidence. Now, it'll be up to Your Honor to say, well, was it deficient in not getting the expert we have. 1T66.

Defendant also testified at the PCR hearing. He affirmed that he relied entirely on his lawyer with regard to the voir dire issue. With regard to the ballistics issue, defendant reviewed state expert Parson's report:

Q … Did you talk to Ms. Bilotta at all about this expert report from Mr. Parsons?

A I can't say I talked to her, but I know I wrote her numerous letters requesting for her to hire her own ballistics expert just from the -- just from the inconsistencies that I seen from the witness statements. 1T71

Q … So you got the Parsons report from your -- your trial lawyer, right, Ms. Bilotta, she sent it to you.

A Yes.

Q Okay. And when you read it, just -- when was this? Like how long before the trial? Are we talking like within a year or what -- do you remember?

A Maybe less than a year.

Q All right. So it's in the pre-trial?

A Yes.

Q Okay. Pre-trial phase. You read Parsons' report, right?

A Yes.

Q And what were your questions about it that you had?

A Everything.

Q All right. Well, give me the most -- give me the most – the thing that stuck out to you the most about Parsons' report.

A How he come up with that you show that the projectile came from the Glock, like what type of testing did he use. And even before that did he have any training in that area. This was before he all testified at trial and heard all his qualifications. That -- that was like the main -- that was like the main thing that I needed to know.

Q So let's stay with that main thing. So you had those questions about reading the report. Did you -- did you tell Ms. Bilotta about those concerns that you had?

A Yes.

Q All right. And you said that you wrote her letters?

A Yes.

Q Was it a phone call, too, or was it just in letters?

A No. I knew -- I knew this was in October of 2016. We had a video conference twice.

Q So we're talking like about two months before the trial occurred.

A The trial, yes.

Q But you had a video conference with your attorney at the time.

A Yes, yes.

Q And you're saying you raised this issue with the ballistics expert for the State?

A Yes.

Q What did you say?

A Basically I was telling her that if I've never -- if I've never fired the gun, then the ballistics expert would be able to prove that by my clothing because he'd be able to tell that there's no gunshot residue on my hand, and the posture where -- and the -- where the witness said I fired the gun. So he'd be able to -- the ballistics expert would have been able to prove that. And not only that, I didn't know -- back then I really didn't know like the extent of a ballistics expert. I just knew that I needed a ballistics expert. So I wanted the ballistics expert to test the Glock for

fingerprints to know that the extended clip for fingerprints, and in this report he did, he said he tested that and he didn't find no fingerprints, no skin cells, no DNA, nothing from me on the Glock or period. 1T77-78

Q Was a ballistics expert -- a ballistics expert wasn't hired, right?

A No.

Q Did you get any response from your lawyer to the questions you raised about the ballistics expert?

A No.

Q Did she say anything about or address it with you in any way?

A No. [1T79]

Q Did you ever ask your defense lawyer, Ms. -- Ms. Bilotta, did you ever ask her specifically about the plexiglass?

A That was a -- that was another thing that we discussed at the video conference that we had because the officer -- I know one of the officers said he only shot twice and I seen a pex -- the plexiglass from the crime scene photos and it was three bullet holes in there. And that's another thing that I wanted her to look into. 1T83

Q Mr. Easterling, you said you had your own theory of the case?

A Yes.

Q What was that?

A Basically that -- that whoever fired the gun they threw the gun because the gun was found just laying in the middle of the floor when the officer got in there. And I was shot, I was temporarily paralyzed. I couldn't even move my legs. And I was being beaten on throughout the whole time. I had three different people on top of me and there was no way possible that I could have fired the gun that I didn't have. And I tried to -- I tried to comb through the witness, all the statements that the witness gave, and just tried to paint a picture for her, like this is possible what happened or that's possible what happened and how the cop got shot because it's -- it's no denying that he got shot or not. 1T86

Q And your theory that you said you had was that somebody else shot the gun and threw it, correct?

A Yes.

Q All right. So your theory is the same as the statement you gave after your arrest, is that correct?

A Yes.

Q All right. Cause you did give a statement after your arrest, right?

A Yes.

Q And you stated you did not have a gun, is that right?

A Yes. 1T87

Defendant also presented the testimony (following up on his expert report, DA50) of ballistics expert Carl Leisinger. 2T

Q How many times would you say that you testified as an expert in a ballistics case?

A Approximately 350 times. [2T11]

Q Okay. And is that testimony of Sergeant Parsons part of what you looked at in forming your own opinion in D-3?

A Yes. 2T18

Q Okay. So going back now to D-3, which is your expert report itself, can you just kind of walk me through, I guess, like what the major highlights are of what you discovered when you -- when you finally went to the Essex County Sheriff's ballistics unit?

A Looking for the evidence became a bit of an issue 'cause of time and most of the evidence was no longer available. The only evidence that was available was the actual Glock firearm. And a discharged shell. The bullet in question was not in evidence anymore. And neither was the plexi-glass door that the shots were fired through. So when I went to the Essex County -- Newark, to look at the ballistics, I had a Glock firearm and I had a discharged shell. So what I basically did is I fired the Glock into the water tank to retrieve two shells, two bullets. And I looked at

the shell and compared against the shell from the case and they were a positive, they were a match. 2T19.

Expert Leisinger explained the vulnerability of the state expert's opinion:

> I didn't have a bullet to look at anymore, because it was not part of evidence. One thing I found, I'm gonna rely back on my report, is Mr. Parsons had matched that particular bullet that was from the knee of the officer. The bullet itself only had one land and one groove. Now, when I say land and groove, I'm gonna say basically in a polygonal bore which the Glock has, there is no traditional rifle, they're just like humps.
>
> And what happens with that is the bullet travels a linear path down the barrel, there is no more traditional rifling to rip the bullet and make it follow that path. The polygonal rifling is just a -- series of humps. It spins it, but doesn't grip it as securely as the lands and grooves.
>
> So what happens, as it's going down the barrel, there's slippage. And not only that, the barrels are so well made by Glock there's very few accidental marks to compare against. And what marks you have are sometimes overridden by the slippage.
>
> So in my experience, if you can match 20 25 percent of the Glock bullets, you're lucky. Now, they did come out with a new type of rifling and marker in the barrel, but that's been recent, it wouldn't effect this case.
>
> So what I notice is, Mr. Parsons and that particular bullet, he had only one land, I'll say one land, or whatever you want to call the humps and the whatevers, the valleys, he only had one of each to compare. And he said both were positive, which struck me funny right away for the simple that when you have a whole bullet it's very difficult to match. If you have six lands and six grooves that means you have 12 opportunities to match something. He had two. 2T20-21

Q Okay. And so in other words, when you looked at it, your opinion was that there was insufficient markings to really make much of a conclusion about that, is that the –

A I -- I never looked at the bullet in question, because that was a piece that was lost in evidence.

Q Okay.

A But, from my experience, looking at quite a few Glocks, which I own one, you have to match it, the -- the bullets are extremely hard. If you have the whole bullet, let alone if you have one sixth of it, damaged -- *** -- so it just struck me funny as like, that's quite remarkable. Now, I'm not saying he's wrong, I'm just saying I find it hard to believe. 2T22

Q … What about from a trajec -- you know, there's been an issue about whether or not there was any way to gouge the trajectory of the bullet, would the fact that the plexi-glass -

A The plexi-glass -- I just saw pictures.

Q Okay.

A And I don't know the thickness. I just know that. Ideally, you need two points to get a perfect angle. But sometimes you have something thick enough, you can put a dowel on it and get an approximation. Of course -- there's no way I could determine.

Q ‘Cause you didn’t have the actual --

A No, did not have -- and that was another part that was missing.

Q Okay. So in other words, the ability to give a complete opinion was a little compromised in 2022 because some of the physical evidence was no longer preserved?

A That’s correct. 2T22-24

Expert Leisinger also explained the problem with defendant’s clothing no longer available for testing for gunshot residue.

Q … Is that -- is gunshot residue something that you’re familiar with?

A Yes.

Q Okay. Is that something that you’ve ever testified about in court?

A Many times.

Q Does that kind of fall within the ambit of the ballistics area?

A Yes.

Q Okay. And what -- could you explain -- since the clothing wasn’t there, what -- in other words, what would that have shown or potentially shown?

A Well, that would solidify more the shooter by having gunshot residue on his hand and obviously possibly on the clothing too. The hand, they would do swabs. On the clothing, we would get it into the lab and check for the discharge

nitrates and nitrites. Nitrite is part of the powder that's been consumed through the chemical process of -- . It loses an oxygen. So it goes from nitrate to nitrite. And we can test for both. 2T37. This gunshot residue assessment also could no longer be done, Leisinger confirmed. DA50; 2T37.

Defendant's argument for ineffective assistance of counsel

Defendant argued that the evidence showed ineffective assistance of trial counsel. 2T60. With regard to the ballistics issue, having the countering expert like Leisinger could have impeached the claimed facts underlying the aggravated assault charge by raising reasonable doubt about the firing weapon itself.

> The nature of the case would have been a lot different, I think, if -- if the defense attorney had been able to say, you know, he didn't shoot the policeman through the glass. This was a robbery of a 99 cent store, is a lot different then, and then he shot the police officer who responded to the scene. It just made it a much different kind of a case. And I think my ineffective assistance claim, at least the way I tried to articulate it for Mr. Easterling, is that, you know, granted it only really effects that one conviction, the second degree, but it really would have changed the tenor of the case number one, and even if Your Honor said, you know -- 'cause what's my argument, if you really think about it, my argument is, okay, well, they had a ballistics expert, Sergeant Parsons. You know, if I had gone out and looked at it and gotten Mr. Leisinger, and to be frank, when we got Mr. Leisinger, I was like, he's not gonna be able to say anything, maybe 'cause I'm not sufficiently expert in ballistics. I didn't think he was gonna really be able to make any -- words on the opinion. And I was wrong. He did. And I think, you know, we have a dark area 'cause we don't have some of the evidence unfortunately. It's not the fault of The State. But it's not our fault either. We're kind of handicapped in that regard.
>
> But I think what's interesting about Mr. Leisinger is, if we had gone back in time, at least we could have countered The State's expert

> opinion and tried to raise reasonable doubt on this issue of, maybe Mr. Easterling didn't shoot Officer Dominguez in the knee.
>
> And I think that a reasonable lawyer looking at that part of the case, you know, at least would have gone and consulted a Mr. Leisinger, or somebody like him and would have gotten the kind of opinion that we've been able to show The Court, was attainable. If I couldn't get the opinion I wouldn't have any -- you know, there's no read on the bones, so to speak.
>
> But the fact that Mr. Leisinger came in and gave the opinion, I understand the prosecutor -- that he's a tremendous prosecutor, he would have cross examined him up a storm. But the jury could have -- could have at least went, eh, you know, it's a Glock, it's not a traditional barrelled rifle, maybe we're not that convinced about that part of his case. And if he had been acquitted on that, it really would have changed the nature of the case. 2T61-67

The PCR Court's Decision

The court credited the testimony of expert Leisinger and defendant's trial counsel, but said that petitioner was not "fully credible" in all respects. DA73-74.

With regard to the ballistics issue, "[t]he Court does not find that the trial counsel was ineffective," ruling that "the claim raised by the Petitioner that the trial counsel's decision to not cross examine the State's ballistics expert or consult a ballistics expert was merely a complaint based on matters of trial strategy. The Court finds that the Petitioner did not sufficiently show that trial counsel demonstrated ineffective assistance of counsel under the first prong of the Strickland standard." DA82. Though believing prejudice under the second prong of Strickland was irrelevant because of the failure under the first prong, "the Court

maintains that the trial would have not yielded a different result because the ballistics expert's testimony did not contradict the defense's trial strategy." DA82.

With regard to the voir dire issue, the court said that "Petitioner's claim that trial counsel's decision to not request a voir dire of the remaining jurors was merely a complaint based on matters of trial strategy." The court noted that trial counsel "testified that the decision not to conduct the voir dire prevented unnecessarily highlighting a non- testifying witness recognized by a juror through a limited relationship. Additionally, The Appellate Court determined that this Court acted within its discretion when it determined not to conduct a voir dire of the panel after the juror was excused. For the reasons stated above, Court finds that the Petitioner did not sufficiently show that trial counsel demonstrated ineffective assistance of counsel under the first prong of the Strickland standard." DA86. Prejudice was again irrelevant, but "the Court maintains that the trial would not have yielded a different result because the Petitioner's claim that the jury could have been impartial is not supported by the testimony of the trial counsel, the determination of the Appellate Court, or the discretion of this Court at the time of trial. Therefore, the Petitioner did not meet the second prong of the Strickland standard."

ARGUMENT

Point 1

The trial court erred in ruling that defendant's trial counsel provided constitutionally effective assistance with regard to countering at trial the State's ballistics expert (DA82)

The defendant must show that his counsel's performance was deficient and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). The PCR court must consider whether the witness the trial lawyer failed to present would have addressed a significant issue at trial. State v. L.A., 433 N.J. Super. 1, 15 (App. Div. 2013). "A reasonable probability" under the second prong "is a probability sufficient to undermine confidence in the outcome." Strickland, supra, 466 U.S. 694; cf. State v. L.A., 433 N.J. Super. 1, 15 (App. Div. 2013) (in ineffective assistance claim based on failure to call witness, PCR court must consider whether absent witness's testimony would have addressed a significant fact in the case).

The trial court erred in ruling that defendant's trial counsel acted reasonably in not cross examining the State's ballistics expert and in failing to consult a ballistics expert on defendant's behalf to counter the State expert opinion. Da82. This was not a matter of reasonable trial strategy because, the record showed, counsel did not investigate or assess the State's ballistics opinion in any manner.

Counsel did not subject this opinion evidence to any confrontation at all. Failing to sufficiently investigate dooms a claim of "trial strategy" Strickland emphasizes:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> [Strickland, supra, 466 U.S. 668]

Williams v. Taylor, 529 U.S. 362, 396 (2000) further shows that trial counsel's complete failure to subject to the ballistics issue to any meaningful adversarial testing was deficient under Strickland's first prong. In Williams, counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, the Supreme Court said, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." Williams, supra, 529 U.S. 396 (citing Standard 4-4.1 Duty to Investigate and Engage Investigators, ABA Standards for Criminal Justice 4-4.1).

In Wiggins v. Smith, 539 U.S. 510, 521–22 (2003), the Supreme Court again stressed these principles, noting that the Maryland state court "merely assumed that the investigation by counsel was adequate." "In light of what the PSI and the DSS

records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible," the Supreme Court stressed. "[T]the court's subsequent deference to counsel's strategic decision not 'to present every conceivable mitigation defense,' … despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable. As we established in Strickland, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" Wiggins, 539 U.S. at 527.

The same assessment applies to the performance of Mr. Easterling's trial counsel with regard to the ballistics opinion evidence the State presented and counsel completely failed to evaluate in any manner – let alone subject to adversarial testing as expert Leisinger's report shows plainly was available had counsel evaluated and investigated pretrial. Several federal courts have held that where, as in Mr. Easterling's case, a state expert witness testifies regarding crucial medical or scientific evidence, the need for defense counsel to consult with an expert is underscored. As noted by the United States Court of Appeals for the Ninth Circuit, "[a]lthough it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies

about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. 2008); see Pavel v. Hollins, 261 F.3d 210, 223 (2d Cir. 2001) (holding counsel's performance was deficient where "he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution"); Miller v. Senkowski, 268 F. Supp. 2d 296, 312 (E.D.N.Y. 2003) (determining trial counsel's "decision to not call an expert witness to rebut the prosecution's witness, or at least confer with an expert prior to cross-examination, constituted error and was not related to a valid trial strategy"); Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), aff'd sub nom. Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987) (holding trial counsel's failure to retain expert resulted in deficient performance where "expert testimony would have been helpful in cross-examining and/or rebutting the State's expert"). Mr. Easterling's trial counsel admitted she had no knowledge about ballistics, making her duty to consult with someone who did even more critical for reasonable performance of counsel. It was "especially important for counsel to seek the advice of an expert" in this case, see Bucio v. Sutherland, 674 F. Supp. 2d 882, 942 (S.D. Ohio 2009) (failure to consult with and seek expert testimony deficient where "[t]here is no evidence that counsel had prior experience in similar

cases or special knowledge to enable him to evaluate the competency and strength of the forensic evidence to be presented by the State").

Trial counsel's failure to contact a ballistics expert like Mr. Leisinger was deficient under Strickland. Other courts have found ineffective assistance of counsel on this ground. In Harris By & Through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd sub nom. Harris By & Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995), the court ruled that trial counsel had not provided effective assistance because he failed to obtain an independent ballistics evaluation and failed to interview key State witnesses regarding the defendant's mental state: "Counsel did not obtain an independent evaluation of the ballistic evidence or the forensic evidence in the case. Such an investigation may have led to information useful in creating a defense to the charges, especially since two individuals were charged with the murder." In Troedel, supra, 667 F. Supp. 1461, there were two defendants and the crucial issue was who fired the fatal shot. The prosecution's expert testified that the defendant had fired the shot, but the defendant's expert at the federal habeas hearing showed that the prosecution's expert did not base his conclusion on the tests the prosecution conducted. Because the expert's testimony was the only way that the jury could have found beyond a reasonable doubt that the defendant had fired the lethal shot, trial counsel's failure to investigate prejudiced the defendant, the court ruled, see also Caro v. Woodford,

280 F.3d 1247, 1254–56 (9th Cir. 2002) (counsel deficient for failing to consult expert and present expert testimony about physiological effect of toxic chemical exposure on defendant's brain); Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995) (finding that "defense counsel's failures to prepare for the introduction of [state's scientific evidence]" and "to subject the state's theories to the rigors of adversarial testing" involving "an issue of the utmost importance" in the state's case constituted ineffective assistance).

The trial court further erred in ruling that defendant failed to establish prejudice under Strickland's second prong ("the Court maintains that the trial would have not yielded a different result because the ballistics expert's testimony did not contradict the defense's trial strategy," DA82). Had expert Leisinger or a like expert testified on defendant's behalf, there is a "reasonable probability" that, but for his counsel's errors, the result of the trial and appeal proceedings would have been different. Strickland, supra, 466 U.S. 694. The jury would have had more than sufficient basis to find reasonable doubt on whether defendant in fact was proven to have shot Officer Dominguez, resulting in acquittal of this criminal charge. This is prejudice under Strickland because the result of the proceeding would have been different, Strickland, 466 U.S. 694; Fritz, 105 N.J. 58.

Point 2

The trial court erred in ruling that defendant's trial counsel provided constitutionally effective assistance with regard to the voir dire of the jury panel following the revelation about Juror No. 14 (DA86)

The trial court said that "Petitioner's claim that trial counsel's decision to not request a voir dire of the remaining jurors was merely a complaint based on matters of trial strategy." But "Quarry Jones at least according to Mr. Darby was one of the men that was inside the store at the time of the robbery." Juror No. 14 knew this alleged victim Jones. 1T26. So one of the prosecution witnesses and claimed victim was a man "who juror 14 knew, right, was one of the alleged robbery victims inside the store," 1T28. By "not individually asking the other members of the panel," defense counsel was "basically … taking juror 14's word that she didn't say anything else to the other jury members," 1T30.

Q If you had individually asked the other jurors, right, on the panel, you don't know what answers you would have gotten in terms of if you would have said, okay, juror one, for example, what did juror 14 say to you about know -- you know, did you – did she say anything about knowing this witness, did she name the witness, what did she say about the witness, did she say anything else about the witness. You don't know what the answer would be, right --

A No. 1T31

Q Let me ask you a question. If you had asked the other individuals or if they could have contradicted what juror 14 said about what she told them about Quarry Jones, right? 1T33

The trial court erred in ruling this was reasonable strategy because there was great potential prejudice from the Quarry Jones – Juror No. 14 connection, which counsel failed to ensure did not taint the other jury members by declining to voir dire the entire panel. In Smith v. Phillips, 455 U.S. 209 (1982), the Supreme Court said that though "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," stressing that the Due Process Clause and the Sixth Amendment's right to an impartial jury requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen" in a hearing. In Tanner v. United States, 483 U.S. 107, 120 (1987), the Court again stressed the hearing requirement, stating, "The Court's holdings requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process." See also United States v. Olano, 507 U.S. 725, 739 (1993) (hearing needed to evaluate

prejudice to defendant); Dietz v. Bouldin, 579 U.S. 40 (2016), 195 L. Ed. 2d; cf. Daniel v. W. Virginia, 191 F.3d 447 (4th Cir. 1999) (“failure of Daniel's counsel to request a hearing was ‘incomprehensible’” and “fell below an objective standard of reasonableness”).

Defendant Easterling’s trial counsel failed to protect defendant’s right to a fair trial by not requesting that the trial court voir dire the remaining jurors. Under the Sixth Amendment of the United States Constitution and Article I, Paragraph Ten of the New Jersey Constitution, criminal defendants are guaranteed "the right to *** trial by an impartial jury." The securing and preservation of an impartial jury goes to the very essence of a fair trial and the right to due process of law. Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966); Patterson v. People of State of Colorado ex rel. Attorney Gen. of State of Colorado, 205 U.S. 454, 462 (1907); State v. Marshall, 123 N.J. 1 (1991), supplemented, 130 N.J. 109 (1992). Misconduct by any jury member that may have interfered with this fundamental right, or may have prevented a fair, due, and impartial consideration of the State’s case, violates the constitutional right, nullifies the jury’s verdict, and warrants a new trial. Trial counsel failed to protect these rights of defendant by not requesting that the court *voir dire* the entire jury.

Conclusion

The Court should reverse the March 1, 2023 order denying post-conviction relief to defendant.

Respectfully submitted,

/s/ Michael Confusione
Counsel for Appellant,
Donald Easterling

Dated: September 4, 2023

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LETTER IN LIEU OF BRIEF ON BEHALF OF
THE STATE OF NEW JERSEY

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

Re: State of New Jersey (Plaintiff-Respondent) v.
Donald Easterling (Defendant-Appellant)
Docket No. A-002383-22

Criminal Action: On Appeal from an Order Denying a Petition for Post-Conviction Relief entered in the Superior Court of New Jersey, Law Division, Essex County.

Sat Below: Hon. Siobhan A. Teare. J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b), this letter brief is submitted on behalf of the State of New Jersey.

Table of Contents

Counterstatement of Procedural History

The State accepts the defendant's recitation of the case's procedural history for purposes of this appeal. The State also adopts the defendant's transcript designation codes. (Db1 n.1).

Counterstatement of Facts

Lloyd Darby owned the 99-cent store at 303 Clinton Avenue, Newark. On July 30, 2014, at around 3:00 p.m., Darby was in the store's back office with Quaree Jones and Fabian Daniels. Darby's uncle, James Harris, was behind the counter that was behind a glass enclosure, doing some handiwork. (3T76-21 to 80-12; 3T111-20 to 113-11; 3T115-8 to 17). As Clifton Darby, Lloyd's brother, left the store, Lloyd Darby and Harris saw defendant enter the store and walk to the back office. Defendant pulled a gun with an extended clip, cocked back, from a handbag, and ordered everyone on the floor. Defendant stated, "[you all] know what this is." (3T80-13 to 82-4; 3T113-18 to 114-19).

Defendant "put" the gun, described as a black Glock with a "very long" clip "hanging out the bottom," to Darby's head, and "cocked it back." (3T114-20 to 115-7). Daniels and Jones got on the floor, but Darby refused, protesting that defendant would have to shoot him standing up. Defendant demanded that everyone empty their pockets. Darby threw his watch and money on the floor.

As he pointed the gun at the trapped trio, the "kind of high, spaced out" defendant scooped the money off the floor. (3T116-2 to 118-20).

Meanwhile, Harris fell to the floor, and then, seeing that defendant was in the office, climbed through a slide window by the counter and escaped the store, locking the door. (3T81-6 to 82-22). The "frightened" Harris then either flagged down or tapped on the car hood of Captain Richard Perez, who was slowly driving because of traffic, east-bound on Clinton Avenue, and told the captain that "the store across the street was being robbed," pointing to the 99-cent store. (3T35-14 to 40-14; 3T82-17 to 84-6).

Perez radioed other units, turned on his unmarked car's overhead lights, and then parked his car, blocking traffic on Clinton Avenue both ways. (3T40-15 to 43-12). Perez exited his car, approached the front door of the 99-cent store, and then took out his service revolver, holding it in a ready position, downwards. Perez saw defendant approaching the door, holding a gun that appeared to be a Glock. In "immediate fear that [defendant] was going to kill him," Perez fired a shot. Perez fired a second shot, seeing that, while defendant was turning, he still had the gun in his hands. Defendant then retreated inside the store. (3T43-13 to 44-3).

As he tried to open the front door, Harris saw defendant, holding a gun, run from the back of the store. Perez pushed Harris away. Harris then heard

gunshots and fell to the ground. Harris was unable to identify defendant. (3T84-14 to 86-7). Meanwhile, Detective Rasheen Peppers was on duty around the 99-cent store and saw a man on the sidewalk flailing his arms to attract attention, while other people were "running and scattering." Peppers radioed for back-up, saw Perez driving in the other direction, and then did a u-turn to get behind Perez's car. A man "hit[]" on Perez's car, spoke with Perez in a "frantic" manner, and Perez exited. (2T39-19 to 45-9).

Perez was already approaching the 99-cent store, with his service gun drawn, when Peppers exited his unmarked vehicle. Peppers saw an armed man walk to the front door of the store, and then saw Perez shoot a round. Three other people were behind defendant. Peppers described defendant "was almost like a silhouette – it was really bright out. You could see him really well. ... There was some slight silhouette because of the dark background of the store, but when he came up to the door you could see him really well." Peppers, nonetheless, could not identify defendant in-court. (2T48-5 to 51-12).

Lloyd Darby, who has three prior convictions, noticed that defendant was wounded, and, with his two friends, "grabbed" and tussled with defendant. The three people in the store tried to subdue defendant by jumping on, kicking, and fighting with him, and throwing a "radiator" (presumably a portable heater) at him. The trio eventually dragged defendant to the front of the store,

stomped on him, and tossed him to the floor. Defendant didn't relinquish the gun despite being hit by the three men. Defendant fell to the floor, face down, with a gun underneath him. (2T51-18 to 21; 2T52-5 to 12; 2T83-7 to 16; 3T43-25 to 44-3; 3T47-17 to 48-2; 3T48-25 to 49-8; 3T52-21 to 53-13; 3T128-21 to 130-6; 3T147-18 to 148-17; 3T151-8 to 152-15).

Meanwhile, after hearing the dispatch and hearing two gunshots fired, Officer Dennis Dominguez, who was patrolling the area, ran to the store, where he saw Perez holding a gun, yelling, "[s]how me your hands. Drop the gun." Dominguez asked Perez whether he had been hit, and then drew his attention to the store's front door. He saw no indication that Perez had been shot. (2T94-17 to 96-23).

Dominguez heard a bang, then saw "muzzle fire," and realized that defendant had shot him when he saw a "pool of blood" "coming down my leg." Dominguez "started backpedaling," and radioed, "I've been shot." When he reached the curb, Dominguez "fell down," and saw Peppers standing along the nearby concrete wall. Peppers yelled out, "I got you, D. I got you," then threw Dominguez on his shoulder, carried him a little down Clinton Street, then put Dominguez in a patrol car that had arrived, which took Dominguez to University Hospital. (2T105-16 to 108-11).

Peppers corroborated much of Dominguez's testimony, explaining that there was a risk of danger because defendant was on top of a gun. Peppers saw the gun and muzzle fire, and Dominguez get shot in the knee by defendant's gun. Peppers took the "distraught" and "screaming" Dominguez, who was bleeding from the knee, retrieved Dominguez's service gun, which had fallen, and carried Dominguez on his shoulder to a nearby SUV until a patrol car arrived to take him to the hospital. He also radioed for back-up because an officer had been shot. (2T63-22 to 67-16; 2T69-1 to 75-21).

Perez corroborated that he heard a shot as he tried to push in the door lock. Next, Perez described, "I could literally feel to this day the plexiglass vibration, and I heard Dennis [Dominguez] scream, Ah." Perez was afraid, and retreated with Dominguez, who was holding his leg, when they met Peppers, who assisted the two. (3T48-8 to 19).

Other officers who responded broke through the door, entered the store, and arrested defendant, who was "on the floor." Perez grabbed a Glock handgun from the floor. It "looked jammed" probably caused by the gun being too close to defendant's body, preventing a round from entering the chamber. (3T53-18 to 55-12).

Newark Officer Barry Baker was patrolling the area and responded to the dispatch of an armed man. He saw Perez pointing his gun toward

defendant, who was on the floor of the store. Three other men were in the store, shouting at defendant. (3T157-22 to 160-11). Baker saw Dominguez, who was "rolling on the ground in pain," having been shot in the leg.

As Baker escorted defendant to a patrol car, he noticed that defendant was "bleeding profusely from his back," and asked if he had been shot. Defendant answered yes, and Baker put him in a patrol car to take him to the hospital. While on route, Baker saw an ambulance, and flagged down the emergency service workers, who then transported defendant to the hospital. Baker drove to, and then remained at the hospital. (2T78-6 to 9; 3T163-16 to 167-2).

Detective Nicholas Rizzitello of the Technical Services Unit was in the area working on another investigation and responded to the robbery scene. He recovered four guns: three of them the Sig Sauer service weapons carried by Perez, Peppers, and Dominguez, and the last, a Glock 19 FC 9-millimeter Luger, which Perez had recovered from defendant and had given to Rizzitello. One spent shell casing was recovered with the Glock. Of the officers' weapons, Perez's was missing two rounds from the usual 13 that are in service weapons, containing 11; the two others contained 13. Twelve of the rounds are in the magazine, one is in the weapon's chamber. (2T124-9 to 127-7; 2T128-13 to 143-25; 3T50-13 to 24).

From outside the 99-cent store, Rizzitello recovered two .40-caliber Smith and Wesson shell casings, and two bullet fragments. (2T152-2 to 160-19; 3T23-19 to 24-5). Inside the store, Rizzitello recovered the following: (1) a fanny pack containing $280 (Darby claimed it was between $600-$700) from the rear of the store; (2) a wallet with Lloyd Darby's driver's license in it; (3) a small cup with baggies of marijuana inside from near the cash register; (4) from the floor, an extended magazine capable of holding 31 rounds, but it contained 17, that fit the Glock weapon, but was not the magazine that came with the gun; and (5) a projectile. (2T171-14 to 176-23; 3T6-7 to 17-12; 3T20-12 to 22-16; 3T149-11 to 24).

Lloyd Darby denied selling marijuana from his store, and Harris, who has three prior convictions, was unsure if marijuana sales took place at the store. (3T99-10 to 101-10; 3T152-16 to 154-3). The State's ballistics expert, Sergeant Robert Parsons, confirmed that the Sig Sauer service weapons held twelve .40-caliber rounds in their magazines. (4T15-12 to 16-7). Parsons testified that the Glock gun was operable, and that the magazine on it could hold 30 rounds. (4T34-7 to 23). Parsons' examination of the ballistics evidence showed that the casings recovered outside the store were fired from Perez's weapon, while the casing recovered with the Glock was fired from that weapon. The projectile recovered form Dominguez's leg was fired from the

Glock. The bullet fragment recovered from the scene was too small to test. According to Parsons, it is a possibility that a .9-millimeter bullet could be fired from a .40 caliber weapon, but a .40 caliber weapon couldn't fire .9-millimeter ammunition. (4T32-18 to 40-21).

Defendant was convicted by a jury, and his convictions were affirmed on direct appeal by this Court, with a remand for resentencing. State v. Easterling, No. A-4211-16T4 (App. Div. Aug. 16, 2019) (slip op at 1). Subsequently, defendant filed a motion for Post Conviction Relief (PCR) alleging his trial counsel was inadequate for failing to hire a ballistics expert and further purportedly ineffective for failing to voir dire the entire jury after one single member of the jury was dismissed. (Da1-20).

The PCR court held an evidentiary hearing and heard testimony from defendant's prior counsel, defendant, and an expert—Leisinger—retained by defendant for his PCR petition. (1T; 2T). The PCR court issued a thorough and comprehensive order and opinion denying the petition. (Da66-89).

The PCR court credited the testimony of expert Leisinger and defendant's trial counsel but found that the defendant was not "fully credible." (Da73-74). Regarding the ballistics issue, "[t]he [c]ourt does not find that the trial counsel was ineffective," ruling that "the claim raised by the [defendant] that . . . counsel's decision to not cross examine the State's ballistics expert or

consult a ballistics expert was merely a complaint based on matters of trial strategy." (Da82). Thus, the PCR court found that defendant "did not sufficiently show that trial counsel demonstrated ineffective assistance of counsel under the first prong of the Strickland standard." (Da82.) Although the court determined finding whether defendant suffered prejudice under the second prong of Strickland was irrelevant because of the failure under the first prong, the court nonetheless held "the trial would have not yielded a different result because the ballistics expert's testimony did not contradict the defense's trial strategy." (Da82.)

Regarding the voir dire issue, the court found that trial "counsel's decision to not request a voir dire of the remaining jurors was merely a complaint based on matters of trial strategy." (Da82.) The court examined the first prong of Strickland and noted:

> [prior counsel] testified that the decision not to conduct the voir dire prevented unnecessarily highlighting a non- testifying witness recognized by a juror through a limited relationship. Additionally, the Appellate Court determined that this Court acted within its discretion when it determined not to conduct a voir dire of the panel after the juror was excused. For the reasons stated above, Court finds that the Petitioner did not sufficiently show that trial counsel demonstrated ineffective assistance of counsel under the first prong of the Strickland standard.
>
> [(Da86).]

The PCR court further found, regarding purported prejudice on the issue of voir dire, "that the trial would not have yielded a different result because the [defendant's] claim that the jury could [not] have been impartial" was wholly unsupported by the evidence in the record. (Da86). Therefore, the PCR court held defendant did not meet the second prong of the Strickland standard, and the court denied the petition in its entirety. (Da87). Defendant now appeals the PCR court's order, denying his PCR petition, to this Court.

Legal Argument

Point I

The PCR Court Properly Denied Defendant's Petition.

On appeal the defendant reprises his two arguments from the PCR court: (1) prior counsel was purportedly ineffective for failing to retain a ballistics expert (Db40), and (2) prior counsel was further allegedly ineffective for failing to voir dire the entire jury after one juror was excused. (Db46). Neither argument is warranted, and both must be rejected. The State addresses each argument in turn, under subheadings' "B" and "C," respectively.

This Court reviews the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004). The de novo standard of review also applies to mixed questions of fact and law. Id. at 420. Where, as here, an evidentiary hearing was held, this Court reviews PCR claims in a manner that

"is necessarily deferential to [the] court's factual findings based on its review of live witness testimony." State v. Nash, 212 N.J. 518, 540 (2013); see also State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) ("If a court has conducted an evidentiary hearing on a petition for PCR, we necessarily defer to the trial court's factual findings").

A. PCR Procedure.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel in his or her defense. The right to counsel includes "the right to the effective assistance of counsel." Nash, 212 N.J. at 541 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)).

In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), as the standard under the New Jersey Constitution, to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687. Under the first prong of the standard, a petitioner must show that counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A petitioner must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004) (citing Strickland, 466 U.S. at 694).

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012). The factual assertions providing the "predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing." R. 3:22-10(c). "[A] petitioner must do more than make bald assertions that he was denied the effective assistance of counsel. He must allege facts sufficient to demonstrate counsel's alleged substandard

performance." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Strickland, 466 U.S. at 700. Courts are permitted to look first to the prejudice prong, and if it is not present they can deny the claim without inquiring as to the first prong. Gaitan, 209 N.J. at 349.

B. Trial Counsel Was Effective With Regard to The State's Ballistic Expert.

The defendant contends prior counsel was ineffective for purportedly failing to effectively counter the State's ballistics' expert. (Db40). This argument is entirely without merit.

Defendant posits that prior counsel's decision to not cross-examine the State's expert nor call an expert of its own is akin to counsel's decision to not present mitigating evidence at sentencing, held by the Supreme Court as mandating post-conviction relief in Williams v. Taylor, 529 U.S. 362, 396 (2000), and in Wiggins v. Smith, 539 U.S. 510, 521–22 (2003). However, Williams and Wiggins are both unavailing, as in both instances the Court found the respective defendants met their burdens under Strickland because counsel did not adequately investigate the respective backgrounds of their clients and as such failed to provide the sentencing court with large amounts of

mitigating evidence that would have resulted in a lesser sentence. Wiggins, 529 U.S. at 396-97; Williams, 539 U.S. at 521-22.[1]

This is not at all equivalent nor even remotely analogous to the present matter. First, defendant makes no claim that prior counsel was ineffective at defendant's sentencing, but more pertinently defendant's argument ignores the fact that the testimony of the State's expert did not contradict the defense's trial strategy. Specifically, as the PCR court properly found:

> [Prior counsel] testified that the defense's theory of the case was that her client never possessed a weapon in accordance with his statement given to police after the incident. [Prior counsel] stated that she did not cross examine the ballistics expert at trial because what he testified to did not contradict the defense's position that the defendant never possessed a weapon. [Prior counsel] further stated that she did not consult [a] ballistics expert for Petitioner's trial because any match or non-match of the shell casing to the [G]lock found inside of the 99-cent store would not have provided evidence as to who possessed the gun or aid in the defense theory in this case.
>
> [(Da81).]

Thus, defendant's claim of ineffective assistance fails the second Strickland prong, prejudice, because the defendant was not prejudiced by the strategic decision of prior counsel and thus it cannot be said the purported

[1] The State notes defendant also cites to Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987), for the proposition that a trial counsel's failure to retain an expert resulted in deficient performance where "expert testimony would have been helpful in cross-examining and/or rebutting the State's expert." This is the exact point advanced by the State herein, i.e., there was no deficient performance because "expert testimony would [not] have been helpful" to defendant. (Db43).

"error committed" was of such severity "as to undermine the court's confidence in the jury's verdict or result reached." Chew, 179 N.J. at 204. Thus, defendant's claim on this point fails. Strickland, 466 U.S. at 700.

Moreover, regarding the first prong of Strickland, because defendant's theory of the case was that he did not possess a gun during the robbery attempt, any attempts by counsel to cross-examine the ballistics expert or to call a counter-expert simply would not have been meritorious. See State v. Worlock, 117 N.J. 596, 625 (1990) (holding counsel is not ineffective for failing to raise meritless arguments).

C. Trial Counsel Was Effective With Regard to Jury Voir Dire.

Defendant further contends that prior counsel was ineffective for purportedly failing to properly handle the voir dire of the entire jury, after one juror was excused. (Db46). This argument is also without merit.

Defendant goes to great lengths to insinuate and speculate regarding what the excused juror may have said to the other jurors, before she was excused. (Db46-49). However, nowhere in defendant's attempts at misdirection is there an accurate rendition of what occurred that led to the juror being excused from the trial. The PCR court correctly observed that, during the trial:

> The [c]ourt questioned the juror outside of the presence of the other jurors. The juror stated that Jones had been in a relationship

> with her daughter's grandmother "years ago", but she had not seen him in years. The juror stated that knowing Jones would not interfere with her ability to be fair and impartial. She acknowledged that she asked other juror's if they had seen Jones' name on the witness list because she thought she may have overlooked it and told them that she needed to inform the Court that she knew Jones. The Court excused the juror.
>
> [(Da83).]

Against this backdrop, it is far easier to understand prior counsel's concern that further voir direing the entire jury would "unnecessarily highlight Jones" and elevate his importance at the expense of defendant's theory of the case, specifically that defendant was not in possession of a gun and was actually the victim in the violent incident. (Db3-15).

Moreover, this Court itself opined in defendant's direct appeal that the decision to not voir dire the entire jury again was not an error. Easterling, No. A-4211-16T4 (slip op. at 9). The PCR court properly noted this and reiterated:

> The [trial] [c]ourt had the opportunity to question the juror and to assess her credibility and determined that she did not share any information, other than reporting that she knew Jones, with the other jurors. In addition, th[e] trial court determined that the extent of the juror's relationship with Jones was limited, ended years before the trial, and she did not have any personal knowledge of the events that gave rise to the indictments or Jones' involvement in the incident. The Appellate Court stated that the juror did not express an opinion on Jones' credibility or character to th[e trial] [c]ourt and determined that the [trial] court acted within its discretion when it determined that questioning the other jurors about Jones would unnecessarily highlight the individual [witness].

[(Da83-84).]

Thus, it cannot be said defendant suffered any prejudice from the decision not to voir dire, negating the second prong of Strickland. Further, as noted in the prior subheading, it cannot be said prior counsel was ineffective for failing to raise unsuccessful arguments. Worlock, 117 N.J. at 625. Therefore, neither prong was met, and defendant's arguments must be rejected in their entirety.

Conclusion

No basis exists to reverse the court's order denying the defendant's petition for PCR. Thus, this Court must affirm.

Respectfully submitted,

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