Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-002509-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction Entered in the Superior
	:	Court, Law Division,
v.		Atlantic County.
	:	
TIMOTHY WRIGHT,		Sat Below:
Defendant-Appellant.	:	Hon. Dorothy Incarvito-Garrabrant, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

WILLIAM E. REYNOLDS
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ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY

DEFENDANT IS CONFINED

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OF COUNSEL AND ON THE BRIEF

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PROCEDURAL HISTORY[1]

For the limited purpose of this submission, the State adopts the procedural history as described in Defendant's appellate brief. Db1-2.

STATEMENT OF FACTS

On or about February 12, 2014, the victim, Joyce Vanderhoff, contacted a friend and former partner, Matthew Flamensfeld, to ask him to drive the defendant to the motel where Vanderhoff was living in Atlantic City. 4T 100:3-14. Flamensfeld agreed and brought the defendant to the motel after stopping briefly in Pleasantville to acquire drugs. 4T 100:3-101:14. The three then returned to the defendant's home in Mays Landing. 4T 101:24-102:16. There, Flamensfeld and the victim briefly argued regarding payment for the ride,

[1] Db: Defendant's brief
Da: Defendant's appendix
1T: July 19, 2021 (motion to suppress)
2T: August 2, 2021 (motion to suppress)
3T: October 14, 2021 (motion)
4T: October 18, 2022 (trial)
5T: October 19, 2022 (trial)
6T: October 20, 2022 (trial)
7T: October 21, 2022 (trial)
8T: October 24, 2022 (trial)
9T: October 26, 2022 (trial)
10T: October 27, 2022 (trial)
11T: October 28, 2022 (trial)
12T: November 1, 2022 (trial)
13T: November 2, 2022 (trial)
14T: February 17, 2023 (sentencing)

before Flamensfeld left. 4T 102:19-103:14. The victim contacted him several times in the early morning hours, around 3:30am or possibly 5:30am or 6:30am. 4T 103:17-104:2. Flamensfeld blocked her number from his phone and stopped answering the calls. 4T 103:13-104:14. The victim called Flamensfeld once or twice and sent about ten text messages to him during the night and early morning hours. 4T 105:10-24.

The following morning, upon awakening, Flamensfeld checked his cell phone and noted that the victim had informed him that her phone was dying. 4T 104:21-105:9. He returned to the victim's motel room, for which he had a key, but did not locate her and it seemed to him that she had not returned to the room since he had seen her the day before. 4T 106:8-21; 109:7-8. Despite calling around to the victim's friends and family, Flamensfled was unable to reach anyone who had knowledge of the victim's whereabouts. One individual whom he contacted was the defendant, who advised him that the victim had left with three men, who he did not identify. 4T 108:5-12. Worried and hearing that a body was found in Mays Landing, Flamensfeld called the police department and asked if the body was the victim's. 4T 109:21-110:12. Officers arrived to meet Flamensfeld shortly after.

The victim had been found by local citizens, who were driving trucks for a blueberry farm, between 9:00am and 10:00am on Weymouth Road and

officers arrived to survey the scene at 10:00am. 5T 153:10-11. Ms. Vanderhoff's body was nude, in a fetal position on her back and tangled in briars and vegetation several feet off the side of the road. 5T 154:16-23. The defendant was investigated and officers viewed his home. They did not find trace evidence at the defendant's home but did locate large bins, a large freezer, and a carpet cleaning machine that he had rented the same day on which the victim's body was found. 7T 208:2-209:4; Db11.

The investigation ended in 2014 but was reopened in 2019 with a discovery from the defendant's cell phone- saved audio directions beginning near the location where the victim's body was dumped (near Weymouth Road) and ending near the defendant's apartment. Db6. The reopened investigation culminated with trial on October 18, 2022. 4T.

At trial, the time at which the victim's body was placed on Weymouth Road was contested between the parties. The State's pathologist, Dr. Frederick DiCarlo, opined that her body was placed there between 8:00pm on the 13th and 2:00am on the 14th. Db7. His conclusion was drawn based on post-mortem rigor mortis and lividity, both of which can be used to measure time since death, as well as decomposition and skin slippage, information regarding the victim's potential physical activity prior to death and cocaine in her system (both of which can accelerate these body processes), and information regarding the

temperature of the ambient air and the axillary (body) temperature. Db7-8. Dr. DiCarlo further opined that, where multiple readings of the ambient temperature were taken, one thermometer with a reading inconsistent with the body conditions and other readings was likely faulty or did not work properly. 7T 67:7-19. A pathologist and meteorologist testifying on behalf of the defendant disputed Dr. DiCarlo's findings. Db9.

Other evidence corroborated the State's theory of events, to include the audio directions directing the defendant from the body's location to his home (Db7), a witness to the defendant's confession to the murder (6T 106-117), surveillance video discounting the defendant's theory that another of the victim's partners was responsible (5T 76:6-81:22), cell phone records (e.g., 4T 105:10-24), evidence related to the strangulation like the location of bruising and fractured bones (7T 52:6-55:12), and the rented carpet cleaning machine (Db11), large bins, and large freezer found within Wright's home (7T 208:2-209:4).

LEGAL ANALYSIS

I. DEFENDANT'S CELLULAR PHONE WAS PROPERLY SEIZED VIA PROBABLE CAUSE AND AN EXCEPTION TO THE WARRANT REQUIREMENT, AND THE TRIAL COURT DID NOT ERR.

It is undisputed that the defendant gave consent for the search of his cell phone at 1:50am on February 15, 2014, at which time he signed a consent to

search form and waived his right to be present during the search. Da11; Da16. The form specified that consent could be withdrawn, consistent with state law. State v. White, 305 N.J. Super. 322, 332 (App. Div. 1997). The phone was kept and stored due to due to technical difficulties with the software used by the State to "dump" cell phones. Da13. On March 24, 2014, the Honorable Donna M. Taylor, J.S.C., issued a search warrant ordering law enforcement to search for and seize evidence stored on the phone or removable media located within that that was reasonably relevant to the offenses that took place on February 13-14, as well as any and all electronic information pertaining to passwords and/or encryption related to the computer system, computer software, and/or any related device. Da12. The phone "dump" occurred the following day, March 25, 2024. Da13.

It is further undisputed that the defendant was upset on February 24, 2014 that his phone had not been returned to him. That day, Defendant and his partner at the time, Shannon Carlin, went to the prosecutor's office to inquire about his phone. Neither Carlin nor Det. Cruz, who testified at the suppression motion about overhearing some of Defendant's anger from her cubicle on February 24 (2T), were able to recall the specifics of about which the defendant spoke. The defendant later cashed the voucher given to him by the State to purchase another cell phone. The phone "dump" did not occur until after

acquisition of a warrant for the same, thus the objection is to the seizure, rather than the search, of the cell phone. Da17.

The Court made several findings, first that Det. Cruz and another detective who testified, Det. Fernan, testified credibly based on their demeanor and the consistency of their testimony. Da11; Da14. The Court found that Ms. Carlin was credible in "much of her testimony." Da15. The Court further found that probable cause to search the phone arose long before consent was sought and existed in combination with one or more relevant warrant exceptions: that returning the phone to the defendant prior to the search of the phone would have resulted in the creation of exigent circumstances, that the phone was validly seized pursuant to lawfully-given consent, and additionally found that the evidence should not be suppressed and that related testimony and evidence was admissible at trial. Da9-Da27.

Appellate courts reviewing a grant or denial of a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). The Court accords deference to those factual findings because they "are substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

"Thus, appellate courts should reverse only when the trial court's determination is 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Lamb, 218 N.J. 300, 313 (2014) (quoting Elders, at 243). The State contends that the trial court's admission of the evidence does not require reversal, as it is not so clearly mistaken that the interests of justice demand intervention and correction.

A. THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE WAS PROBABLE CAUSE TO SEARCH THE CELL PHONE

Provided there was probable cause to search the cell phone and that an exception to the warrant requirement existed, the seizure was lawful. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Probable cause exists if at the time of the police action there is a well-grounded suspicion that a crime has been or is being committed. State v. Sullivan, 169 N.J. 204, 210-11 (2001). It reflects a determination that, in view of all the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Demeter, 124 N.J. 374, 380–81 (1991).

The request for consent for Defendant's cell phone occurred following the defendant's interview with law enforcement on February 14, 2014. At that interview, law enforcement officers were equipped with the knowledge that 1) the defendant spent the night of February 12 and the early morning of February

13 with the victim (1T 33:5-12), 2) that the victim's last acts were to engage in illegal and sexual activity with the defendant (Ibid.), and 3) that the defendant photographed the victim nude and sent the photos to other individuals (34:21-41:22); Da10. Additionally, the defendant had been well-established to have been the last known person to see the victim before her death. The defendant further had indicated that he'd attempted to contact the victim using the cell phone several times on February 14 (and thus the phone would contain evidence of these contact attempts). 1T 48:1-49:10; Da11.

The fact that one may speculate that the defendant's conduct may have had some type of innocent explanation is not fatal to the finding of probable cause. Cf. State v. Arthur, 149 N.J. 1, 11 (1997). The State contends that, certainly, there was a well-grounded suspicion that a crime had been committed, and that there also was a fair probability that evidence would be found on the phone. The phone was admitted by the defendant to contain evidence of contact attempts made upon the victim on the day of her death, at the very least.

B. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE SEIZURE OF THE PHONE WAS PURSUANT TO THE CONSENT EXCEPTION TO THE WARRANT REQUIREMENT

The trial court judge determined that the defendant consented to the seizure of the phone, obviating the need for a warrant and probable cause.

Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). It appears that Defendant does not contest the consent he gave for the original seizure of the phone. Da22-23. Defendant's complaint arises from what he contends was a withdrawal of consent as opposed to a denial that he consented initially.

As probable cause to search existed prior to the request for consent and one or more warrant exceptions applied, the search and seizure of the phone was lawful even assuming *arguendo* that the defendant at some point revoked his consent to search the phone. However, regardless, the State contends that the defendant did not revoke his consent to the search.

The trial court judge found that this did not occur based on the testimony of the detectives and Ms. Carlin in particular, who could recall no request by the defendant to return his phone (2T). Da24. The trial court judge weighed and judged unconvincing the "incredible" testimony of the defendant on that point. Da24. As discussed *supra*, appellate courts reviewing a grant or denial of a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). The trial court judge articulated precisely the facts that led to her assessment that the defendant did not request his phone back, all of which were facts supported by sufficient credible evidence from the record.

C. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE SEIZURE OF THE CELL PHONE WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES

Where there is both exigency and probable cause, an officer's failure to acquire a warrant may be excused. State v. Cassidy, 179 N.J. 150, 160 (2004). Exigency exists when the State proves by a preponderance of evidence that the search was premised on probable cause and that law enforcement acted in an objectively reasonable manner to meet an exigency that did not permit time to secure a warrant. State v. Manning, 240 N.J. 308, 333 (2020).

Although the actions of officers in this case in returning the defendant's phone, had they done so, would have been in a sense a cause of the resulting exigency, this does not render the seizure unlawful in and of itself. This is made clearer through analogy; where officers chase an armed suspect into a home, officers may enter based on exigency. The exigency is predicated on actions taken by officers. The exigency would not exist but for the officers' actions in chasing the suspect; after all, had the officers not observed and chased the suspect, there would be no need to enter the home. But the exigency is not invalid because the exigency was "police-created." Db24.

The New Jersey Supreme Court elucidated this in State v. Hutchins, in which it found that "although the exigent circumstance [in Hutchins] can properly be described as 'police-created,' it may have arisen as a result of

reasonable police investigative conduct intended to generate evidence of criminal activity. In that context, the exigency of potential destruction of narcotics, if accompanied by probable cause, could support a warrantless entry into the premises." Hutchins, 116 N.J. 457, 460 (1989). The Court arrived at this conclusion supported by United States Supreme Court precedent holding the same, including United States v. Santana, 427 U.S. 38, 96 (1976) ("Once Santana saw the police [who had followed her into the vestibule of her home], there was likewise a realistic expectation that any delay would result in destruction of evidence.").

Here too, as in Hutchins and Santana, the situation arose from reasonable police investigative conduct intended to generate evidence of criminal activity. The officers in this case could have handed the phone back to the defendant, then seized it from his hand on the grounds of exigency and probable cause. Their reasonable choice not to do so appropriately reflected applicable law and the practicalities of returning evidence to a defendant only to invite potential physical confrontation or evidence destruction in seizing it once more. The officers' decision is rendered even more reasonable in light of the well-established holding that entries into homes are subject to considerable and even heightened scrutiny than searches of other places or objects. Reasonableness is the touchstone of the Fourth Amendment. Riley v. California, 573 U.S. 373,

381–82 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). The State asserts that law enforcement acted reasonably under all the circumstances.

D. THE TRIAL COURT DID NOT ERR IN NOT GRANTING DEFENDANT'S SUPPRESSION MOTION AFTER THE TRIAL TESTIMONY OF THE WITNESSES WHO HAD TESTIFIED AT THE SUPPRESSION HEARING.

Defendant contends that the trial court judge was bound to reopen the suppression hearing at which the seizure of Defendant's phone was found proper after hearing additional testimony at trial from the witnesses who had testified at the original suppression hearing. Defendant points to State v. Boston, 469 N.J. Super. 223, 240-41 (App. Div. 2021) as an authority to demonstrate that the court should reopen suppression hearings where trial testimony varies from testimony taken at the suppression hearing.

Boston is not a case in which the Court held that suppression hearings should be reopened upon the establishment of specific criteria. The issue is discussed sparsely, as the case concerns the seizure of a driver and passenger at a traffic stop at which officers requested their identification and the timing at which the seizure occurred, as opposed to any hypothetical reopening of the suppression hearing (which was not contemplated and did not occur). The Court determined that because a video was shown at trial showing the officer requesting identification upon approaching the car, and not only for the first

time after arresting the defendant, his passenger, and waiting for the defendant's children to be retrieved, as he had testified at the suppression hearing, the suppression hearing should therefore have been reopened.

In Boston, the court was viewing a situation in which irrefutable evidence directly contradicted the officer's testimony at the suppression hearing on the very fact at issue, whether the timing of the demand for identification and the defendant's subsequent actions rendered the seizure lawful. The testimony at the suppression hearing indicated that the evidence need not be suppressed, while the video indisputably demonstrated facts that invariably would lead to the opposite outcome. This situation is not analogous.

Firstly, the testimony at trial was not contradictory to the testimony at the suppression hearing. Detective Cruz did not agree that the defendant asked for the phone back and explicitly corrected Defendant's counsel, explaining the reasoning for why the phone was kept. 8T 98:25-99:9. She did acknowledge that the phone was not returned to the defendant, a fact that the State does not dispute. Ibid. In explaining what occurred on direct examination, Det. Cruz described, "[I] could hear someone being a little irate, yelling, and so I informed, you know – because you want to see and make sure everybody else is good on the opposite side, so I went over and then that's when I interacted [with Defendant], and I saw that he was there, and I said, who is that, and they said,

Timothy Wright, he's upset because he couldn't get his cellphone back." 8T 57:2-24. Ms. Carlin's testimony was similarly uncontradictory. When asked at trial if the defendant requested his phone back during a visit to the Prosecutors Office, she agreed, though did not recall much of the conversation. 8T 98:1-99:9. Carlin was not asked this question at the suppression hearing, thus there was nothing to contradict. 2T. Consistent with her trial testimony, she had indicated at the suppression hearing that the defendant asked about the phone but did not know what he said specifically. 2T 19:25-20:5. Presumably, this was because in the course of the defendant's conversation with detectives at the Prosecutors Office, she "was humiliated" by the defendant's raging and ill-mannered conduct and "walked outside," where a detective came to speak with her and with the defendant departing the building afterwards. 2T 21:16-22:7. Secondly, the judge had already determined that the seizure was lawful on grounds unrelated to the consent issue. That is, whether the defendant had withdrawn consent or not, the seizure was lawful. Any issue of conflicting testimony appearing at trial on the consent issue did not affect the trial court judge's ultimate conclusion as it was drawn on grounds unrelated to that testimony.

Witnesses rarely, if ever, testify identically between motion hearings and trial. The more detailed elucidations made by the witnesses at trial did not call

for a *sua sponte* rehearing and reversal of the trial court judge's original ruling, which was well-grounded and well-documented. Da9-27. No objection nor request to that effect was made by defense counsel (nor by the State).

In sum, the trial court judge's ruling was not "so clearly mistaken that the interests of justice demand intervention and correction." It was well-supported by facts drawn from the testimony at the hearing, which were thoroughly explained in the judge's written opinion. Da9-27. The State asserts that the Court should "accord[] deference to [the] factual findings because they "are substantially influenced by an opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

II. THE TRIAL COURT JUDGE DID NOT ABUSE HER DISCRETION IN ADMITTING THE STATE'S PATHOLOGIST'S TESTIMONY

An abuse of discretion standard is applied to decisions made by trial courts relating to matters of discovery, which encompass admission of an expert. Bending v. Adelson, 187 N.J. 411, 428 (2006); Townsend v. Pierre, 221 N.J. 36, 52–53 (2015) ("As a discovery determination, a trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review… "[W]e apply [a] deferential approach to a trial court's decision to

admit expert testimony, reviewing it against an abuse of discretion standard." (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371–72 (2011))).

A. THE PATHOLOGIST'S OPINIONS DID NOT VIOLATE DISCOVERY RULES.

The record indicates, consistent with the judge's opinion, that the information upon which the opinion was based was known to all parties and properly complied with discovery rules. Abuse of discretion defies simple definition; "[w]hile the concept is difficult to define with precision, an appellate court "may find an abuse of discretion when a decision 'rest[s] on an impermissible basis' or was 'based upon a consideration of irrelevant or inappropriate factors'… An appellate court can also discern an abuse of discretion when the trial court fails to take into consideration all relevant factors and when its decision reflects a clear error in judgment." State v. S.N., 231 N.J. 497, 515 (2018) (quoting State v. Baynes, 148 N.J. 434, 444 (1997) (internal citations omitted)).

Here, Defendant concedes that all of the information supporting Dr. DiCarlo's opinion that the thermometer at issue was faulty was available both to Dr. DiCarlo and all of the parties. Db33-34. Dr. DiCarlo's opinion on the temperature of the body was simply an expansion connecting his opinion on the temperature of the deceased victim's body and his observation of the many

records of possible ambient temperatures with which he was supplied. Defendant in fact met with Dr. DiCarlo prior to trial, at which they could have asked any and all potential questions regarding possible temperature discrepancies. And in fact, they did so; the trial judge's assessment of the record indicated that "[i]n June of 2022, the Defense met with Dr. DiCarlo at which time they raised issues relating to discrepancies in the ambient temperature readings by the medical examiner and law enforcement at the scene of the body and the reading of local weather stations that way." Da83. Defendant invites the State to draw inferences between expert conclusions and provide them to the defense where the inference could be drawn by any person who examines the reports as simply an expansion of the existing opinions. The trial court judge implicitly acknowledged this by holding that 1) all of the relevant information was discovered between the parties in advance of trial, and 2) the testimony did not contradict his previously provided written reports and the opinions and conclusions contained therein. Da88. The trial court judge cited the temperatures from the reports in her opinion, as well as the facts to which the expert testified. Da82-90. Her decision did not rest on an impermissible basis and was not based upon a consideration of irrelevant or inappropriate factors. It did not amount to a clear error in judgment.

To any extent that the State's actions were improper in not delivering this specific conclusion to Defendant in the same words in which Dr. DiCarlo phrased it at trial (which the State does not concede), the Court fashioned an order "as it deem[ed] appropriate" consistent with R. 3:13-3(b)(1)(i) in light of the defendant's previous conversations with Dr. DiCarlo prior to trial, the defendant's thorough cross-examination on the issue at trial of both Dr. DiCarlo and other witnesses, and, as the judge mentioned in her oral opinion and implied in her written opinion, the fact that the defendant's argument was largely an argument about the weight that should be ascribed to Dr. DiCarlo's opinion, which was within the jury's province. 10T 66:19-68:12; Da89. The question is not whether the trial court judge could have hypothetically arrived at a different ruling but whether an abuse of discretion occurred in admitting the expert's testimony. The State contends that there was no abuse of discretion.

B. THE PATHOLOGIST'S OPINIONS WERE NOT NET OPINIONS AND THEIR ADMISSION WAS NOT AN ABUSE OF DISCRETION

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court. As discussed *supra*, a discovery determination, including a trial court's grant or denial of a motion to strike expert testimony, is entitled to deference on appellate review… "[The Court] appl[ies a] deferential approach to a trial court's decision to admit expert

testimony, reviewing it against an abuse of discretion standard." Townsend v. Pierre, 221 N.J. 36, 52–53 (2015) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371–72 (2011) (internal citations omitted)).

In discerning whether an expert may testify, the Court must consider three core requirements for the admission of expert testimony: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. N.J.R.E. 702, 703; Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)). The net opinion rule bars expert testimony where the admission into evidence of an expert's conclusions is not supported by factual evidence or other data; the rule requires that an expert give the why and wherefore that supports the opinion, rather than a mere conclusion. The net opinion rule is a "corollary of [N.J.R.E. 703]." Townsend v. Pierre, 221 N.J. 36, 53–54 (2015) (internal citations omitted).

The State would contend that there was no abuse of discretion. The State suspects that all parties agree that the testimony of a pathologist is the sort of testimony that would assist the triers of fact in understanding relevant issues beyond their ken and that the state of the field of pathology is such that a

properly qualified pathologist could reliably testify regarding it. The trial court based its assessment of the pathologist's expertise in "Dr. DiCarlo's present employment as deputy chief state medical examiner, his 25 years of professional experience, his education, board certifications, continued education training, the fact that he was an assistant professor of anatomy, he's published scholarly articles, he's testified in State and Federal Courts, been accepted and qualified as an expert in State and Federal Courts, [and] based on his professional duties as explained in detail during his testimony." 7T 28:3-15. The State contends that this testimony during the voir dire properly established the expert's expertise.

With regards to the information upon which Dr. DiCarlo's opinions were based, the doctor based his opinions on the investigative report made by the medical/legal death investigator, and photographs of the scene, the autopsy report, autopsy photos. 7T 34:15-36:6. Pertaining to the temperature of the body specifically as it relates to time of death, Dr. DiCarlo based his opinion on post-mortem changes to the body including stiffening of the musculature, post-mortem lividity, discoloration of the body, blanching blood vessels, skin sloughing, the rate at which these changes occur, the toxicology report documenting substances in the victim's blood which accelerate post-mortem changes, and the reports of the defense meteorological expert. 7T 57:24-70:17;

72:25-76:12. These are the types of facts and data typically relied upon by pathologists with established scientific veracity. This is a far cry from what is prohibited by the net opinion rule: "[the] 'net opinion' doctrine under New Jersey evidence law weeds out experts who base their opinions on purely personal standards or 'rules of thumb.'" State v. Olenowski, 255 N.J. 529, n. 28 (2023) (referencing, e.g., State v. Burney, 255 N.J. 1, 23-24 (2023); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372-74 (2011)). The trial court judge did not abuse her discretion as her decision did not "rest on an impermissible basis" and was not "based upon a consideration of irrelevant or inappropriate factors." State v. S.N., 231 N.J. 497, 515 (2018) (internal citations omitted). Clearly, Defendant disagrees with Dr. DiCarlo's opinion. But more pertinently, the State contends that there was no abuse of discretion and thus there is no requirement of reversal.

C. THERE WAS NO DUE PROCESS VIOLATION

Exculpatory evidence is treated differently from merely potentially useful evidence. Suppression of requested exculpatory evidence violates due process, regardless of the prosecution's good faith. State v. Knight, 145 N.J. 233, 245 (1996). However, "[w]ithout bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " Id. (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988)); See

State v. Mustaro, 411 N.J. Super. 91, 102–03 (App. Div. 2009). To determine if a due process violation has occurred in the instance of loss, destruction, or suppression of physical evidence in a criminal trial, courts consider: (1) "whether there was bad faith ... on the part of the government"; (2) "whether the evidence ... was sufficiently material to the defense"; and (3) "whether [the] defendant was prejudiced by the loss or destruction of the evidence." State v. M.B., 471 N.J. Super. 376, 382-83 (App. Div. 2022) (alteration in original) (quoting State v. Hollander, 201 N.J. Super. 453, 479 (App. Div. 1985)).

The State would contend, firstly, that the thermometer was not exculpatory evidence but at most, simply potentially useful evidence. The thermometer does not exculpate the defendant from being responsible for the victim's death; at best, it disputes the time at which the defendant dumped Ms. Vanderhoff's body on the roadside. Defendant all but concedes this, characterizing the evidence merely as "*potentially* exculpatory evidence." Db44 (emphasis added). And contrary to Defendant's contention that "the State may not… assum[e] that the lost evidence would not have been exculpatory," it is Defendant's burden to demonstrate a due process violation and, inherent within, whether the evidence was exculpatory.

Assuming *arguendo* that the thermometer, which was brought by the medicolegal death investigator from the medical examiner's office (7T 67:7-25),

was possessed by the prosecution, there is no allegation that the thermometer was not preserved due to bad faith. With regards to the materiality prong of M.B.'s test, constitutional materiality means evidence that both possesses an exculpatory value that was apparent before the evidence was destroyed, and that is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. George v. City of Newark, 384 N.J. Super. 232, 244 (App. Div. 2006) (referencing California v. Trombetta, 467 U.S. 479, 489 (1984)).

Neither of these conditions were met on the facts of this case. Thermometers are used to measure axillary and ambient temperature for standard death investigations; they are basic equipment, the functionality of which is not typically at issue. At the time the thermometer was presumably returned to circulation within the medical examiner's office, there was no reason to expect that the thermometer, any more than a scale or a measuring tape, would have any evidentiary value. Certainly, at the time when the thermometer was used, there was no reason to expect that there was anything notable about the thermometer at all. This is likely why Defendant made no request to preserve it, which further increases the standard of proof Defendant must meet in order to demonstrate a due process violation in this context. The temperature was capable of being (and was) measured by other tools at the scene and

thoroughly explored by experts (including the defense's own expert who brought and argued meteorological evidence of the temperature), all of whom managed to form opinions regarding the thermometer's functionality without physically operating the thermometer.

The defendant was not prejudiced by the lack of the presence of the thermometer. As the trial court judge observed, Defendant produced his own experts to opine about the thermometer and thoroughly cross-examined multiple witnesses on the temperature issue. 10T 68:13-69:9; Da88. There was never any dispute regarding what temperature the thermometer read.

III. DEFENDANT'S SENTENCE IS NOT EXCESSIVE.

Trial judges are given wide discretion in imposing sentence. State v. Bieniek, 200 N.J. 601, 607–08 (2010). Appellate courts' standard of review is "one of great deference and 'judges who exercise discretion and comply with the principles of sentencing remain free from the fear of second guessing.' " State v. Dalziel, 182 N.J. 494, 501 (2005) (quoting State v. Megargel, 143 N.J. 484, 494 (1996)).

Defendant contends that the weight that the trial court judge ascribed to the aggravating and mitigating factors was different from what he believes was appropriate. This is not the standard for whether a sentence is excessive. The

reviewing court "must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.' " State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984) (alteration in original)). An appellate court is not to substitute its assessment of aggravating and mitigating factors for that of the trial court. State v. O'Donnell, 117 N.J. 210, 215 (1989).

Defendant makes no allegation of a violation of sentencing guidelines and there exists no unusual circumstance to "shock the judicial conscience." Bolvito, at 228. The record makes clear that the sentencing judge based her assessment on competent credible evidence in the record, which she specifies in her oral ruling. Her findings were based on facts from the record, including the defendant's violent response to the victim's request for shelter and her known status as a vulnerable person, the facts of the victim's disposal on the side of the road, nude and subject to the elements, flora, and fauna, the defendant's drug use as it informs future possibilities of continued criminality, and the defendant's criminal history. 14T 23:7-26:25. There is abundant credible evidence in the record to support the sentencing judge's findings. With regard to the defendant's drug use, "The [Criminal] Code [] does not condone leniency

even where the commission of the offense may be related to the offender's drug or alcohol addiction." State v. Setzer, 268 N.J. Super. 553, 568 (App. Div. 1993) (citing State v. Rivera, 124 N.J. 122, 126 (1991); State v. Ghertler, 114 N.J. 383, 390 (1990)).

CONCLUSION

It is the State's position that the defendant's appeal should be denied on these grounds. The State respectfully urges the Court to deny Defendant's appeal.

Respectfully Submitted,

/ss/Kristen Pulkstenis

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LETTER IN LIEU OF BRIEF ON BEHALF OF 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.
TIMOTHY P. WRIGHT (Defendant-Appellant)
Docket No. A-2509-22

Criminal Action: On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Atlantic County

Sat Below: Hon. Bernard E. DeLury, Jr., P.J.Cr.
Hon. Dorothy Incarvito-Garrabrant, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b) and Rule 2:6-4(a), please accept this letter in lieu of a formal brief on behalf of the State of New Jersey.

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PROCEDURAL HISTORY[1]

The State relies upon the Procedural History of the State's responding brief filed in this appeal on April 5, 2024, which in turn adopts the Procedural History as described in Appellant's opening brief at Db1-2.

STATEMENT OF FACTS

The State relies upon its Statement of Facts contained in the State's responding brief filed in this appeal on April 5, 2024. Sb1-4.

LEGAL ANALYSIS

I. AS IT IS EVIDENT BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED HIS PRIOR CRIMES ON SEPARATE OCCASIONS, THE TRIAL COURT'S DETERMINATION OF THE OCCASIONS INQUIRY IS HARMLESS ERROR.

Relying on the United States Supreme Court's opinion in Erlinger v. United States, 144 S. Ct. 1840 (2024), defendant contends that his sentence must be vacated and the case remanded for resentencing because his extended-term sentence as a persistent offender was based on the judge's finding that

[1] This brief, for ease of the reader, utilizes the abbreviations used in Defendant's opening brief:
Db- Defendant's opening brief filed February 22, 2024
Da- Defendant's appendix appended to Defendant's opening brief filed February 22, 2024
Sb- State's responding brief filed April 5, 2024
14T refers to sentencing transcript of January 14, 2015

Defendant's prior crimes were committed on separate occasions, as opposed to a finding made by grand and petit juries.

In Erlinger, the Supreme Court considered the question "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." Id. at 1846. The defendant in Erlinger was federally charged with being a convicted felon in possession of a firearm. Id. Due to the defendant's criminal history, he was also charged under the federal Armed Career Criminal Act (ACCA), which provides for enhanced sentencing if a defendant "has three previous convictions…for a violent felony or a serious drug offense, or both, committed on occasions different from one another[.]" 18 U.S.C.S. § 924(e)(1); Id.

The ACCA imposes a minimum term of imprisonment as well as a maximum term of life in prison. Erlinger, 144 S. Ct. at 1846. After the defendant pled guilty, "the judge [ ] found it more likely than not that [the defendant's] past included three ACCA-qualifying offenses committed on three different occasions." Id. Based on that finding, the sentencing judge imposed a 15-year sentence under the ACCA. Id. In reaching its decision in Erlinger, the Supreme Court relied on Apprendi v. New Jersey, 530 U.S. 466

(2000), which involved a New Jersey statute permitting enhanced sentencing if a judge found by a preponderance of the evidence that the defendant's crime was motivated by racial bias. Id. at 1850; Apprendi at 491. The Supreme Court held that "'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." Id. at 1851 (quoting Apprendi at 490).

Concurring in the Erlinger Court's judgment, Chief Justice John Roberts emphasized that a violation of this rule is subject to harmless error review. Id. at 1860-61 (Roberts, C.J., concurring). On this point, Chief Justice Roberts drew upon the principal dissent by Justice Brett Kavanaugh, who noted that "[i]n any case that has not become final, the relevant appellate court can apply harmless-error analysis." Id. at 1866 (Kavanaugh, J. dissenting). The lower court assessed a defendant who was previously convicted of three burglaries committed on different dates against different victims at different locations. Id. at 1867 (Kavanaugh, J. dissenting). As Justice Kavanaugh observed, "[i]n most (if not all) cases, the fact that a judge rather than a jury applied ACCA's different-occasions requirement will be harmless" because the occasions inquiry "is usually a straightforward question." Erlinger, 144 S. Ct. at 1866 (Kavanaugh, J. dissenting). Frequently, as further discussed *infra* and as in

this case, the question of whether the offenses occurred on separate dates yields an obvious answer beyond reproach and, more saliently, beyond a reasonable doubt.

Elaborating in a footnote, Justice Kavanaugh opined, "For any case that is already final, the Teague rule will presumably bar the defendant from raising today's new rule in collateral proceedings." Id. at n.3. In Teague, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310 (1989).

This naturally suggests that Erlinger be given "pipeline retroactivity" to cases on appeal from judgments of conviction. The New Jersey Supreme Court took this position in a case implicating similar issues, State v. Grate, 220 N.J. 317 (2015). In Grate, the Court held that Alleyne v. United States, which was decided while the relevant criminal convictions were pending appeal, applied to the defendants at issue. Id.; Alleyne, 570 U.S. 99, 111-13 (2013) (holding that imposing a mandatory minimum sentence based upon a fact not submitted to the jury for determination beyond a reasonable doubt violates the Sixth Amendment). In keeping with Teague, Alleyne and thereafter Grate, Erlinger must apply to cases where the judgments are not final because they were pending appeal when Erlinger was decided.

The Court in Teague elucidated some of the rationale for its rule: "The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application.'" Teague at 310 (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment)). "In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions." Id. (referencing Younger v. Harris, 401 U.S. 37, 43–54 (1971)). This is because "it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Id.

Prior to Teague, the Court in Engle v. Isaac also identified this problem: "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover… new constitutional commands." Engle, 456 U.S. 107, 128, n. 33 (1982) (referring to matters occurring on writs of habeas corpus). "State courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them.'" Teague at 310 (quoting Brown v. Allen, 344 U.S. 443, 424 (1953) (Jackson, J., concurring in result)). Accepting Defendant's implicit argument, New Jersey courts would be required to remand for resentencing every case invoking the persistent

offender statute, no matter how distant and despite the fact that Erlinger was decided within the last two months. This would be a practical impossibility and an unnecessary burden considering the patent obviousness inherent of most separate-occasions analyses.

Here, Defendant was convicted in January of 2008 of third-degree shoplifting under a Gloucester county indictment, of third-degree receiving stolen property in September of 2008 under a Camden county indictment, and of third-degree aggravated assault and third-degree resisting arrest in September of 2010 under a Cape May county indictment.[2] 14T 27:6-14. Therefore, it is "evident beyond a reasonable doubt that the failure to submit the different-occasions question to the jury had no effect on the defendant's sentence." Erlinger, 144 S. Ct. at 1866 (Kavanaugh, J. dissenting).

As it is unquestionable that Defendant committed his prior crimes on separate occasions, it was harmless error for the trial court to decide the occasions inquiry. Thus, the trial court appropriately and correctly determined that Defendant is subject to an extended term of imprisonment as a persistent offender. N.J.S.A. 2C:44-3a.

[2] Defendant did not append any record of his criminal history to either of his briefs, nor did he reveal the nature or dates of his previous convictions in any submissions. However, Defendant did submit the presentence report in tandem with the first submission of his opening brief (which was later amended). This information is gleaned from this presentence report as well as 14T: 27:6-14.

CONCLUSION

It is the State's position that the defendant's conviction should be affirmed and that his request for remand for resentencing should be denied on these grounds.

Respectfully Submitted,

/ss/Kristen Pulkstenis

Kristen Pulkstenis
Assistant Prosecutor

Cc: Austin J. Howard, Esq. (Sent via eCourts Appellate)

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SUPPLEMENTAL LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2509-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Atlantic County.
v.	:	
TIMOTHY P. WRIGHT,	:	
Defendant-Appellant.	:	Indictment No. 19-06-01274-I
	:	Sat Below:
		Hon. Bernard E. DeLury, Jr., P.J.Cr.; Hon. Dorothy Incarvito-Garrabrant, J.S.C.; and a Jury.
		DEFENDANT IS CONFINED

Your Honors:

Please accept this letter-brief on behalf of defendant-appellant in lieu of a formal brief pursuant to Rule 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant Timothy P. Wright relies on the procedural history and facts set forth in his opening brief as well as in his certification in support of his motion to file this supplemental brief. (Db 1-12)[1]

LEGAL ARGUMENT

Mr. Wright relies on the arguments in his opening brief and adds the following additional sentencing point. (Db 12-50)

POINT I

SENTENCING DEFENDANT AS A PERSISTENT OFFENDER WITHOUT GRAND AND PETIT JURY FINDINGS OF THE PREDICATE FACTS VIOLATED DUE PROCESS AND HIS RIGHTS TO A JURY TRIAL. (14T 21-16 to 29-8)

Should this Court decline to vacate Mr. Wright's convictions for the reasons stated in his opening brief, he is entitled to a resentencing because the court sentenced him to an extended term as a persistent offender pursuant to N.J.S.A. 2C:44-3(a) without a jury having found beyond a reasonable doubt the statutorily required facts regarding his predicate convictions. Because a judge made those findings under a lesser preponderance-of-the-evidence standard, his sentence is illegal and must be vacated. See U.S. Const. amends. VI, XIV; N.J.

[1] "Db" refers to defendant's opening brief. All other abbreviations are set forth in defendant's opening brief. (See Db iv; Db 1 n.1)

Const. art. I, ¶¶ 1, 8, 9, 10.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The Court most recently explained the scope and extent of that requirement in Erlinger v. United States, 144 S. Ct. 1840 (2024). Erlinger reiterated that the Apprendi rule is grounded in due process and the Sixth Amendment jury-trial guarantee, which "sought to ensure that a judge's power to punish would 'deriv[e] wholly' from, and remain always 'control[led]' by, the jury and its verdict." Id. at 1849 (alterations in original) (quoting Blakely v. Washington, 542 U.S. 296, 306 (2004)). The Apprendi Court had struck down a sentencing scheme that allowed a judge to impose a longer sentence than otherwise permitted by the jury's verdict if the judge -- rather than the jury -- found that the crime was motivated by racial bias. Id. at 1850 (citing Apprendi, 530 U.S. at 468-71, 490).

Erlinger concerned a federal sentencing enhancement, 18 U.S.C. § 924(e)(1), which increased the penalty for a felon-in-possession conviction from a maximum sentence of 10 years to a mandatory minimum sentence of 15 years if the sentencing judge found that the defendant had been previously convicted of three predicate offenses "committed on occasions different from

one another." Id. at 1846. At first blush, it may have seemed like the question of whether a defendant's predicate offenses were committed on separate occasions fell within the one exception to Apprendi, which allows sentencing enhancements based on a judge's finding of a prior conviction. But Erlinger reiterated that that exception is a "'narrow exception' permitting judges to find only 'the fact of a prior conviction.'" Id. at 1853-54 (quoting Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013)). "Under that exception, a judge may 'do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.'" Id. at 1854 (quoting Mathis v. United States, 579 U.S. 500, 511-12 (2016)). The Court explained that to decide whether defendant Erlinger's prior convictions satisfied the different occasions provision of 18 U.S.C. § 924(e)(1) required the sentencing court "to do more than identify his previous convictions and the legal elements required to sustain them. It had to find that those offenses occurred on at least three separate occasions." Ibid. The Court held that the factual finding of whether those offenses occurred on separate occasions exceeded the "prior conviction" exception to Apprendi. Ibid.

The Erlinger Court rejected the argument that a sentencing judge should be permitted to determine the date of an offense by consulting so-called

"Shepard"[2] documents such as "judicial records, plea agreements, and colloquies between a judge and the defendant." Ibid. The Court allowed that a sentencing judge may consult Shepard documents to determine "the jurisdiction in which the defendant's crime occurred and its date" but only "for the 'limited function' of determining the fact of a prior conviction and the then-existing elements of that offense." Ibid. (quoting Descamps v. United States, 570 U.S. 254, 260 (2013)). "[A] judge may not use information in Shepard documents to decide 'what the defendant . . . actually d[id],' or the 'means' or 'manner' in which he committed his offense"; nor may a judge use Shepard documents to determine whether a defendant's prior offenses were committed "on different occasions." Id. at 1855 (quoting Mathis, 579 U.S. at 504, 510-11).

In a key passage, the Erlinger Court concluded:

> Often, a defendant's past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions. But none of that means a judge rather than a jury should make the call. There is no efficiency exception to the Fifth and Sixth Amendments. In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers "regardless of how overwhelmin[g]" the evidence may seem to a judge.

[2] Shepard v. United States, 544 U.S. 13 (2005).

> [Id. at 1856 (alteration in original) (quoting Rose v. Clark, 478 U.S. 570, 578 (1986)).]

Our Supreme Court anticipated that reasoning in State v. Franklin, 184 N.J. 516 (2005), where the Court "reject the State's argument that defendant's trial admissions and his attorney's trial concessions were a sufficient basis for the judge to impose an extended Graves Act sentence." Id. at 536. The Court determined that those concessions -- unless in the context of a plea -- were an insufficient substitute for submission of those questions to a jury. Id. at 536-37.

Erlinger applies directly to New Jersey's persistent-offender statute, which allows the court to sentence a defendant to an extended term only if certain criteria are met. N.J.S.A. 2C:44-3(a) authorizes an extended term as a "persistent offender" if the court finds that "[t]he defendant has been convicted of a crime of the first, second or third degree[,] . . . who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced." Under Erlinger, a sentencing judge may still determine whether the defendant was previously convicted of two crimes, but the sentencing court may "do no more." 144 S.Ct. at 1854 (quoting Mathis, 579 U.S.

at 511-12). Thus, a judge may not determine whether a defendant's prior offenses were "committed at different times" or whether "the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentence." Because those questions go beyond determining "what crime, with what elements, the defendant was convicted of," they must be submitted to a jury and cannot be decided by a judge.[3] Ibid. (quoting Mathis, 579 U.S. at 511-12).

Erlinger directly abrogates State v. Pierce, 188 N.J. 155 (2006), which held that there was "no Sixth Amendment violation in the sentencing court's consideration of objective facts about defendant's prior convictions, such as the dates of convictions, his age when the offenses were committed, and the elements and degrees of the offenses, in order to determine whether he qualifies as a 'persistent offender.'" Id. at 163. Because Erlinger directly abrogates Pierce, it is a new rule of law. As with every other new rule announced under the Apprendi framework, Erlinger must be given pipeline retroactivity, permitting relief to defendants, like Mr. Wright, whose convictions are still

[3] Erlinger thus answers the question that this Court previously acknowledged was unanswered. See State v. Clarity, 461 N.J. Super. 320, 326 (App. Div. 2019) ("Apprendi does not expressly hold that proof of the 'last release from confinement' also falls within this narrow exception, nor are we aware of any authorities suggesting it does.").

pending direct appeal. See, e.g., State v. Grate, 220 N.J. 317, 335 (2015) (affording pipeline retroactivity to Alleyne); State v. Natale, 184 N.J. 458, 494 (2005) (affording pipeline retroactivity to Blakely claims).

In addition, Erlinger requires that the state allege in the indictment and submit to a grand jury the questions of whether the defendant's predicate offenses occurred at "different times" and whether the latest of them or his release from confinement was within the required ten-year period. "[U]nder the Due Process Clause of the [Fourteenth] Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Apprendi, 530 U.S. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)). New Jersey courts have likewise held that all questions which must be determined by a petit jury under Apprendi must also be submitted to the grand jury and included in the indictment. Franklin, 184 N.J. at 534 ("That a defendant possessed a gun during the commission of a crime is a fact that must be presented to a grand jury and found by a petit jury beyond a reasonable doubt if the court intends to rely on it to impose a sentence exceeding the statutory maximum."); State v. Fortin, 178 N.J. 540, 646 (2004) ("We, therefore, hold that our State Constitution requires that aggravating factors be submitted to the grand jury and returned in

an indictment."). Thus, the factual findings which must be determined by a petit jury pursuant to Erlinger -- whether the defendant's predicate convictions were committed at different times and within the requisite ten-year period -- must also be submitted to the grand jury and included in the indictment.

In this case, the State moved to sentence Mr. Wright to an extended term as a persistent offender and sought a sentence in the "mid to high range of the extended term" based on its arguments that the extended term range for murder was thirty-five years to life (not the ordinary thirty-to-life range); that 50.5 years was the midpoint and "logical starting point" under Natale for the extended range; and that the aggravating factors preponderated. (14T 10-5 to 9, 16-7 to 8) The sentencing court granted the State's motion; found that Mr. Wright was "extended term eligible" and "is a persistent offender" based on his prior convictions; and imposed a heightened fifty-five-year sentence in accord with the State's request. (14T 27-6 to 20; accord Da 100 (judgment of conviction noting defendant's "persistent offender" status)) But because the State failed to allege Mr. Wright's prior convictions in the indictment, present them to the grand jury, or prove them beyond a reasonable doubt to the petit jury, that extended term sentence violated state and federal due process and his rights to a jury trial. As Erlinger makes clear, it was for the jury to determine the critical facts regarding whether Mr. Wright's prior convictions were committed at

"different times" and whether the latest of them or his release from confinement occurred within ten years of the present offense. Therefore, Mr. Wright's fifty-five-year sentence violates Apprendi and Erlinger and must be vacated.

Finally, even though the court could have imposed fifty-five years under the ordinary sentencing range, the court expressly chose to consider Mr. Wright's status as a persistent offender and did so immediately before pronouncing his sentence, indicating its importance to the ultimate sentencing decision. (14T 27-6 to 20; Da 100) That extended term finding necessarily influenced the court's decision because it made Mr. Wright appear more deserving of a harsher sentence. See State v. Blann, 429 N.J. Super. 220, 226-27 (App. Div. 2013) (holding overall sentence did "not shock our judicial conscience" where defendant was extended term eligible but judge imposed "a sentence on the high end of the ordinary term"), rev'd on other grounds, 217 N.J. 517 (2014). In addition, in the context of the State's request based on Natale's midpoint reasoning, it appears that the court also improperly elevated the minimum term from the ordinary thirty-years to the extended term thirty-five years in arriving at the heightened fifty-five-year base term. See Alleyne, 570 U.S. at 103 (holding any fact that increases the mandatory minimum must be submitted to a jury); Pierce, 188 N.J. at 168-69 (explaining that the extended term range cannot raise the minimum ordinary term).

Either way, the court's unconstitutional extended term finding was critical to its sentencing decision, and therefore a resentencing is required. See State v. Roth, 95 N.J. 334, 363 (1984) (explaining resentencing is "always require[d]" where the sentencing court fails to "apply correct legal principles in exercising its discretion"); accord, e.g., State v. Sutton, 132 N.J. 471, 486 (1993) (even where the ultimate sentence was not an abuse of discretion, remanding for resentencing because "confidence in the ultimate sentencing determination will be enhanced substantially by a sentencing proceeding that incorporates the deliberation and exercise of reasoned discretion . . . .").

CONCLUSION

For the reasons stated in Points I and II of Mr. Wright's opening brief, his conviction must be reversed. Alternatively, for the reasons stated in Point III of his opening brief and above, a resentencing is required.

Respectfully submitted,

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BY: _____
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Dated: August 6, 2024