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December 4, 2023
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3048-22T4

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
	:	ON APPEAL FROM FINAL ORDER
Plaintiff-Respondent,	:	DENYING PETITION FOR POST-
	:	CONVICTION RELIEF, SUPERIOR
v.	:	COURT OF NEW JERSEY, LAW
	:	DIVISION, CAMDEN COUNTY
RALPH LEMAR,	:	
	:	INDICTMENT NO. 2401-08-15
Defendant-Appellant.	:	
	:	SAT BELOW:
	:	THE HONORABLE DAVID M.
	:	RAGONESE, J.S.C.
	:	

BRIEF FOR DEFENDANT-APPELLANT CONFINED

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TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

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[1] The petition for post-conviction relief is tantamount to a complaint and thus is included in the appendix pursuant to Rule 2:6-1(a)(1).

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PROCEDURAL HISTORY

On August 12, 2015, Camden County Indictment No. 2401-08-15 was filed, charging defendant, along with Brian K. Williams and Jovani A. Diaz, with first-degree robbery, N.J.S.A. 2C:15-1a(1) and (2) (count one); second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:15-1a(1) and (2) (count two); second-degree aggravated assault, N.J.S.A. 2C:12-1b(1) (count three); third-degree aggravated assault, N.J.S.A. 2C:12-1b(2) (count four); third-degree possession of a weapon, a tire iron, for an unlawful purpose, N.J.S.A. 2C:39-4d (count five); and fourth-degree unlawful possession of a weapon (the tire iron), N.J.S.A. 2C:39-5d (count six). Innis J. Henderson, Jr., and Marvela Brown-Bailey were charged in the same indictment with kidnapping, robbery, and other related offenses. (Da 1 to 14).[2]

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[2] "Da" denotes defendant's appendix.
"1T" denotes trial transcript dated September 27, 2016.
"2T" denotes trial transcript dated September 28, 2016.
"3T" denotes trial transcript dated September 29, 2016.
"4T" denotes trial transcript dated October 4, 2016.
"5T" denotes trial transcript dated October 5, 2016.
"6T" denotes trial transcript dated October 6, 2016.
"7T" denotes trial transcript dated October 13, 2016.
"8T" denotes trial transcript dated October 18, 2016.
"9T" denotes trial transcript dated October 19, 2016.
"10T" denotes trial transcript dated October 20, 2016.

(Continued)

From September 27 to October 24, 2016, defendant, along with Williams, Henderson, and Brown-Bailey, was tried to a jury, with the Honorable Richard F. Wells, J.S.C., presiding. (1T to 12T). Defendant was convicted of counts one, two, four, five, and six, as charged. On count three, he was convicted of the lesser-included offense of third-degree aggravated assault, N.J.S.A. 2C:12-1b(7), while Williams was convicted of the lesser-included offense of simple assault. Henderson and Brown-Bailey were convicted of the lesser-included charges of false imprisonment, conspiracy to commit false imprisonment, and theft. Henderson also was convicted of related weapons offenses. (12T 29-15 to 39-3; Da 15 to 24).

On January 20, 2017, Judge Wells, after merging counts two, three (as amended), four, and five into count one, imposed a 17-year prison term, subject to an 85 percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On count six, defendant was sentenced to a

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"11T" denotes trial transcript dated October 21, 2016.
"12T" denotes trial transcript dated October 24, 2016.
"13T" denotes sentencing transcript dated January 20, 2017.
"14T" denotes post-conviction relief hearing transcript dated February 17, 2023.

concurrent 18-month prison term. (13T 23-7 to 14; 13T 29-16 to 30-9; Da 25 to 28).

On April 9, 2019, the Appellate Division affirmed defendant's convictions and sentence. (Da 29 to 51).

On October 2, 2019, the Supreme Court denied defendant's petition for certification. (Da 52).

On February 28, 2020, defendant filed a pro se petition for post-conviction relief (PCR). (Da 53 to 54). In support of the petition, Charlotte J. Ward, Ph.D., subsequently submitted a certification, a report, and a curriculum vitae. (Da 55 to 84).

On February 17, 2023, the Honorable David M. Ragonese, J.S.C., heard argument regarding the petition (14T), and on May 1, 2023, issued an opinion and order denying relief. (Da 85 to 125).

On June 8, 2023, defendant filed a notice of appeal. (Da 126 to 129).

STATEMENT OF FACTS

Bail Bondsman and co-defendant Marvella Brown-Bailey was employed by Ms. Nancy Bail Bonds. Ms. Brown-Bailey testified that in that capacity, she had "the right to pick ... up" "bailed-out" people who do not appear for court dates; unlike a "bounty hunter," she did not have the authority to "forcibly" take people into custody, although she could handcuff people. (8T 213-9 to 214-10; 8T 217-3 to 24; 9T 11-17 to 12-25). She "usually" would call the local police to let them know when she was apprehending someone. Ibid. In her statement to police, Brown-Bailey said that Mr. Lemar was not certified as a bail bondsman, but was "going to school for it," and had a "certified number" for that occupation. (6T 80-2 to 82-2).

On March 25, 2015, Brown-Bailey went to Chesilhurst to apprehend Eric Webb, who had been released on bail of $100,000, following charges of possession of drugs and a weapon, and had not appeared for a court date. (8T 218-3 to 219-8; 8T 222-4 to 25). Defendant Ralph Lemar was working with her that night, although he arrived separately. Also in her car was a "bounty hunter," who was not further identified in the record. (8T 223-11 to 224-6). Brown-Bailey testified that Lemar was not a bounty hunter, but worked for Ms. Nancy on an occasional basis, and would accompany her when she went to "look for

someone," to "make sure that [she] was safe." (8T 229-4 to 231-5). She testified that when Lemar arrived to help her apprehend Webb, co-defendants Innis Henderson and Brian Williams were with him; she had not hired the other two, and did not expect them. (8T 232-3 to 234-7).

Brown-Bailey testified that her plan to apprehend Webb involved the cooperation of Katie Wilson, a heroin addict who had bought drugs on an ongoing basis from Webb and would rent cars for him. (2T 79-7 to 82-16). Brown-Bailey gave Wilson $100 and offered to help her with legal problems, in return for luring Webb to her home. (2T 86-14 to 88-19). Wilson testified that she was willing to "set [Webb] up" because she was afraid of him. (2T 105-15 to 106-9).

Wilson testified that when Webb arrived, she texted Brown-Bailey. Shortly afterward, she saw two cars arrive and block in Webb's car. The car that went to the back was red, and she had previously seen Brown-Bailey and Henderson in it; the car in the front was white, and contained "a couple more gentlemen." (2T 89-1 to 90-19).

Jovani Diaz testified[3] that she drove the car containing defendant Lemar in a car chase, which occurred when Webb tried to escape. (4T 12-18 to 6; 4T

[3] Diaz pled guilty to conspiracy to commit robbery in connection with this

24-16 to 25-10). Brown-Bailey had also given Diaz money to participate in the setup of Webb. Diaz testified that she had gone to an Applebee's with defendants Lemar, Henderson, and Williams. They met Brown-Bailey there, and were "re-routed" to the "trailer" park in which Wilson lived. Brown-Bailey and Henderson remained at the scene; Diaz, Lemar, and Wilson left, returning when they received a call that Webb had arrived. (4T 13-5 to 22-2).

Franklin Espinoza, a juvenile, rode to Wilson's home with Webb. (2T 90-19 to 24). Espinoza admitted that he delivered drugs for Webb. (4T 92-1 to 94-4). He testified that he and Webb went to Wilson's home because she had told Espinoza that she had a gun for Webb. He did not tell the police about a gun, or that he sold drugs for Webb. (4T 137-23 to 139-12). He also acknowledged that "part" of his reason for going to Wilson's home was to pick up money, and not having said that in his statement to police. (3T 58-13 to 23).

Wilson testified that the people who arrived to apprehend Webb (Lemar, Diaz, and Williams) got out of their cars and yelled at Webb to get out of his. Espinoza testified that one car was a Dodge and the other an Impala, and that Lemar was in the Impala. (4T 100-2 to 101-6).

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matter but had not been sentenced at the time of trial. (4T 8-23 to 9-22).

Espinoza testified that the doors of Webb's car were opened, and people "told him and Webb to get the F out or they're going to shoot" them; Espinoza thought that he and Webb were being robbed. (4T 96-25 to 97-25). According to Espinoza, the people then said to Webb, "'You're under arrest.'" (4T 98-1 to 9). In court, Espinoza identified defendant Henderson as having come from the Dodge, and defendant Lemar as from the Impala. (4T 100-2 to 101-6). Espinoza testified that at that point, he jumped out of Webb's car. (2T 90-24 to 92-23). Wilson testified that Brown-Bailey and a man whom she did not know handcuffed Espinoza, "put" him in a car, and drove away. (2T 95-7 to 101-21).[4]

Espinoza saw Webb strike the car in front of him with his car, and drive away. According to Espinoza, either two or three people, including Lemar, got into the Impala and followed Webb. (4T 101-23 to 102-11). Jovani Diaz testified that she drove the Impala, and was given directions by Lemar. (4T 25-8 to 28-20).

Wilson testified that she did not see any weapons or hear any gunshots during that incident, and had not previously seen Webb with a gun. (2T 95-7 to

[4] Brown-Bailey and Henderson were charged with, inter alia, kidnapping, as to Espinoza. Because defendant Lemar was not charged with offenses concerning Espinoza, evidence concerning him is set forth here only as pertinent to Lemar's case.

24; 2T 102-3 to 11). Brown-Bailey told the police that she had heard gunshots, but testified that she had mistaken the sound of Webb's car striking the others for gunshots, and no gun was at the scene. (8T 237-21 to 238-2). Diaz also told police that she had heard a noise that could have been gunshots, but it could also have been the result of an automobile collision. (8T 116-17 to 117-18).

Eric Webb testified[5] that he went to Wilson's home with Espinoza, who sold drugs for him. He testified that he went to see Wilson because she had said that she wanted to "smooth over [their] differences" (2T 199-11 to 202-9), and denied having gone because Wilson had said that she could get a gun for him. (3T 20-9 to 21-2).

Webb testified that when he and Espinoza arrived at Wilson's, in a silver Malibu (2T 212-18 to 21), a white Impala pulled up on the driver's side of his car, and what he described as a black Dodge Avenger pulled up behind. Lemar, whom he did not know, was in the Impala. (2T 202-13 to 204-23; 25 205-8 to 16). Webb maintained that he did not know the people who were chasing him, and addressed statements seemingly to the contrary in his statement to police by

[5] Webb acknowledged approximately ten prior convictions, and that at the time of trial he was serving a sentence for possession of heroin and pointing a firearm, after pleading guilty to charges arising from this incident. (2T 190-5 to 199-6; 3T 12-23 to 13-3). He maintained that he had not been promised anything in return for his testimony. (3T 101-7 to 18).

noting that before giving the statement, he had been hit in the head with a tire iron. (3T 26-2 to 28-21).

According to Webb, his car door was opened, and Lemar yelled "Get the fuck out the car .... I'm gonna shoot your black ass." (2T 205-5 to 206-6). At that point, Espinoza jumped out of Webb's car. Webb saw "something black" in Lemar's hand, but could not tell what it was. No one present had a weapon, according to Webb, and no shots were fired. (2T 208-4 to 17). Webb then "pulled off," striking both other cars. (2T 206-17 to 25).

After Webb drove away, a high-speed chase, ending in woods behind a Travel Lodge, ensued. (1T 218-19 to 21). Mark Anthony Jay, a Camden County 911 dispatcher, testified that he received a call, in which the caller stated that he was "on a high speed"; that he was pursuing a person he identified as Eric Webb; and that the person was "on the run" and armed and dangerous," and had previously "shot up (inaudible)." (1T 96-5 to 9; 1T 97-3).[6] Asked whether he was a "cop," the caller replied, "We're bounty hunters." (1T 96-11 to 13). He repeated that the person being chased was "armed and dangerous," and had "just smashed into a pedestrian." (1T 97-3 to 7). He repeated that the person had "hit somebody" and had shot someone, and could be heard saying, "Slow down,

[6] The caller was not identified in the record, but evidently was defendant Lemar.

Bailey." (1T 100-12 to 101-12; 1T 104-10 to 12). Waterford Police Officer Michael Hackman testified that a pedestrian had not been struck that night. (4T 200-7 to 201-12).

The caller later told the dispatcher that the person being chased had crashed into the woods. (1T 106-14 to 107-1).[7] The recording reflects the caller then fighting with that person and making threatening statements, such as "You want a piece of me? I will fuck you up." (1T 107-2 to 109-5). Another 911 operator, Kevin James McAleer, identified a call from the same number in which the speaker said "...we got him. We're in the woods. Tell the cops to turn around," and "He ain't going nowhere. He can't go far." (1T 127-24 to 15).

Webb testified that he drove onto White Horse Pike, and then drove at 110-120 mph on that road, followed by the Impala containing Lemar. His tire "gave out," and he drove into a wooded area behind a Travel Lodge. (2T 207-5 to 23; 2T 211-13 to 16).

Webb continued that he entered the wooded area at 45-50 mph, but that the ground cover slowed him down. He denied that he had crashed into anything in the woods. (2T 220-10 to 20). When Webb stopped, he tried to lock his door,

[7] Counsel for defendant Lemar argued in summation that Webb received his injury from crashing into an object in the woods. (9T 131-23 to 132-8).

but mistakenly unlocked it. At that point, the Impala pulled alongside his car. (2T 213-22 to 214-23). Webb testified that after he stopped his car, his phone, which he identified in court, was on the front seat. He testified he would have called the police, because he was afraid that he would be shot, but could not because his phone was locked. (2T 212-11 to 213-14).

Jovani Diaz, who drove the Impala chasing Webb, followed Webb into the woods behind Travel Lodge. She testified that Lemar was on the phone with police during the chase. (4T 28-7 to 29-19; 4T 32-22 to 25). Diaz testified that Lemar got out of the car, followed by Williams and herself, and that she later saw Lemar holding a tire iron. She saw Lemar hit Webb once in the face with it, and then Lemar and Williams "continually hitting him" while Diaz held his legs. (4T 28-6 to 32-2; 4T 32-13 to 18).

Diaz testified that Lemar told her to take Webb's property, and that she took his phone and money. Diaz acknowledged having told police that Lemar had said to "put it in the car," but that the police intervened before she could. (4T 32-10 to 24; 4T 46-21 to 49-5).

Diaz also acknowledged that she had told the police that Lemar was merely trying to calm Webb down, and did not punch or assault him. (4T 44-14 to 45-9). Also, in entering her plea, she said that she saw no one hit Webb. (4T

53-4 to 18). She acknowledged that she had given three accounts, and that in the first two she denied that Lemar had a weapon or assaulted anyone; she testified that she changed her account because she "wanted to tell the truth." (4T 57-12 to 58-13).

Webb testified that after the car containing Lemar arrived behind his, Lemar entered his car from the passenger side and hit him in the forehead, once, with a tire iron. Webb continued that Lemar was trying to hit him again, but he had grabbed the tire iron and prevented him from doing so; Lemar let go when the police arrived, and threw it into the woods. (3T 78-2 to 22).

Webb acknowledged that his statement reflects him telling the police that he had been hit six to seven times with the iron; however, he maintained that he was struck once. Webb testified that he did not recall saying in his statement that someone had brought the iron to Lemar; rather, he had said that Lemar threw it into the woods. (3T 70-14 to 71-20). Webb added that an officer, whose identity he did not know, told him that he would find the iron. (3T 73-7 to 23; 3T 78-23 to 79-21). Webb testified that he received a "head injury," while acknowledging that he was released from the hospital "within hours." (3T 52-24 to 53-6).

Webb also testified that another man repeatedly punched him in the side, bruising his ribs, and a woman "attacked" him from the driver's side and crossed his legs to prevent him from kicking. (2T 214-24 to 216-20; 2T 217-14 to 19). Webb also testified that, behind the Travel Lodge, he heard Lemar on the phone, telling a person whom he believed to be Ms. Nancy where they were. When police arrived, Webb testified, he was leaning out of the car on the passenger side. He heard Lemar tell officers that he (Webb) had fired shots at them. (2T 225-8 to 23; 2T 227-13 to 15; 3T 25-22 to 26-5). He also heard Lemar say that he worked for the bail bondsmen. (2T 227-6 to 15).

Footage taken by the body camera of then-Waterford officer Matthew Barber, who was in an ambulance with Webb, depicted Webb stating that "the girl that's with them" went into his pockets, and that "[t]he guys" "stopped the car ... and they jumped in and started beating [him] with a crowbar." (4T 251-7 to 254-1). Barber testified that in the ambulance, Webb identified Lemar as having been involved. (4T 257-12 to 258-21). Webb testified that Lemar took his glasses and chain, and Diaz went through his pockets and took his phone and money, which he believed to be $475, after Lemar "ordered" her to take his money. (2T 218-1 to 19; 2T 237-7 to 12). Webb acknowledged telling the

police that he had $360, but described that figure as a "roundabout." (3T 35-19 to 36-16).

Webb also identified a photograph of his watch, and said that he had not seen it since the incident. (2T 221-1 to 5; 3T 33-15 to 34-1). He "assumed" that the watch had been taken because it was not on his wrist after the "tussle." (3T 33-15 to 34-1). Barber acknowledged having picked up a watch from the ground and "thr[own] it into the silver car," explaining that at the time, it was "underneath" Webb, and his primary concern was Webb's condition. (4T 271-1 to 22).

According to Barber, a later search of Lemar disclosed two large "lumps" of cash, amounting to $4500, and a "police issued handcuff key." (4T 262-25 to 263-25). He later asked Lemar whether he had any belongings of Webb's; Lemar gave him sunglasses, and Webb identified them as his. (4T 261-15 to 262-10). Camden County Prosecutor's Detective James Brining testified that he did not know why the sunglasses were not collected as evidence. (8T 51-3 to 17).

Corporal Kenneth L. Seymour, Jr., of the Chesilhurst Police Department, testified that both a silver car and a white Impala were in the wooded area behind the Travel Lodge, and that both were damaged; he believed that the air bag was

deployed on the silver car and "possibly" the Impala. (1T 206-8 to 16). Waterford Officer Michael Hackman testified that two cars were in the woods, one white and one silver. He testified that neither had sustained "significant" damage to the front end or windshield, and that the airbag of neither had been deployed. (4T 211-5 to 212-9). Hackman also testified that the silver car had blood in the front passenger area, and "some loose marijuana" was in the back seat. (4T 212-11 to 213-5). He also testified that a tire iron was on the driver's seat of the Impala (4T 213-5 to 6); however, after being shown a photograph, he testified that it depicted the tire iron on the passenger seat. (4T 241-1 to 215-18). Neither Hackman nor Waterford officer Timothy Lyons recalled seeing blood on the tire iron. (4T 223-9 to 14; 5T 42-2 to 10).

Camden County Detective James Brining agreed that the airbag of Webb's car had not been deployed, and that the car bore blood on the front passenger seat and "doorjamb." (6T 15-5 to 25). Lyons testified that no damage to the front end had occurred to the silver car, and agreed that the airbags had not been deployed. (5T 17-17 to 20-7).

Then-Waterford Detective Leonard Thackston testified that on the following day, he collected the tire iron from the car, at the repair shop to which it had been towed. He also took blood swabbings from Webb's car. (5T 150-

21 to 152-2). Thackston testified that he did not see the tire iron in his initial review of the scene, adding that officers at the scene said that it had been thrown into the woods. (5T 150-21 to 152-2). He testified that he did not believe that it had been in the woods, although he could cite no evidence for that belief. (5T 186-17 to 187-13).

Thackston did not "process" the tire iron for fingerprints, because he had been "told" that if an item was dusted for fingerprints it could not be submitted for DNA analysis. (5T 152-20 to 155-9; 5T 184-23 to 185-7). However, it was Detective Brining's understanding that fingerprint and DNA tests could be conducted on the same piece of evidence. (6T 43-14 to 20). Brining requested that the tire iron be tested for DNA, but that was not done; it was not tested for fingerprints, he testified, because the authorities wanted it tested for DNA and were concerned that fingerprint powder would "contaminate" it. (8T 47-19 to 49-20).

Courtney MacDonald, a forensic scientist with the Camden County Prosecutor's Office, testified that her testing did not show blood on the tire iron. (5T 104-6 to 9). Riza Ysla, a DNA analyst for the State Police who qualified as an expert in DNA analysis (5T 117-10 to 119-24), testified that the tire iron was not submitted to her for analysis. (5T 131-25 to 132-8).

Webb acknowledged that at the hospital after the incident, the police found two and one-half "bundles" of heroin that had been in his pocket. In his statement, he denied that it was his and said that the assailants had planted it, but he admitted ownership in connection with his plea. He did admit, at the scene, to owning the loose marijuana that was in the car. (2T 229-17 to 230-8; 3T 12-18 to 3).

Webb was taken to the police station after being released from the hospital. There, he heard the ring of a cell phone, which had been placed in the shoe of Jovani Diaz, who was in a cell. Webb identified the phone as his; an officer gave it to him and told him to unlock it, which he did, and another officer later confiscated it. (2T 233-5 to 234-17).

DNA analyst Ysla testified that she identified Eric Webb as the source of bloodstains found on Lemar's jeans, as well as on a sweatshirt belonging to Brian Williams. (5T 127-5 to 127-19).

Sergeant Anthony Mangelli of the State Police testified that he had found no records of a license as a private detective or bounty hunter for defendants Lemar, Diaz, Henderson, or Williams. (8T 126-14 to 25).

Mr. Lemar declined to testify. (8T 157-21 to 158-2).

LEGAL ARGUMENT

THIS MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING BECAUSE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF TRIAL COUNSEL'S INEFFECTIVENESS. (Da 105 to 108; Da 113 to 115)

Claims of ineffective assistance of counsel generally are governed by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in interpreting the New Jersey Constitution. State v. Fritz, 105 N.J. 42 (1987). To be entitled to a new trial based on ineffective assistance of counsel, a defendant must make a two-part showing:

> First, the defendant must show that counsel=s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel=s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the convictions... resulted from a breakdown in the adversary process that renders the result unreliable.
> [Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687).]

To satisfy the "prejudice" prong, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.@ Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52.

Additionally, United States v. Cronic, 466 U.S. 648, 659 (1984), commented upon constructive, or per se, ineffectiveness:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Accord State v. Davis, 116 N.J. 341, 352-53 (1989):

> This test recognizes that when the level of counsel's participation makes the idea of a fair trial a nullity, no prejudice need be shown. It is presumed.... To establish this category of ineffective assistance, defendant is not required to show prejudice. That degree of deficient performance is tantamount to a "complete denial of counsel." [quoting Cronic, 466 U.S. at 659.]

While evidentiary hearings are not required if a defendant has presented a prima facie case in support of PCR, an evidentiary hearing generally should be conducted. State v. Marshall, 148 N.J. 89, cert. denied, 522 U.S. 850 (1997). When determining the propriety of conducting an evidentiary hearing, the PCR court should view the facts in the light most favorable to the defendant. Ibid. (citing State v. Preciose, 129 N.J. 451, 462-63 (1992)); see also State v. Porter, 216 N.J. 343, 354 (2013). If with the facts so viewed the PCR claim has a reasonable probability of being meritorious, then the defendant should receive an evidentiary hearing to prove his entitlement to relief. Ibid.

Such is the case in the instant matter.

A. Trial Counsel Failed to Move to Suppress the Tire Iron. (Da 105 to 108)

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution prohibit "'unreasonable searches and seizures' by government officials." State v. Watts, 223 N.J. 503, 513 (2015). "'Warrantless searches are presumptively unreasonable,'" and "the State bears the burden of proving by a preponderance of the evidence not only that the [warrantless] search or seizure was premised on probable cause, but also that it 'f[ell] within one of the few well-delineated exceptions to the warrant requirement.'" State v. Bryant, 227 N.J. 60, 69-70 (2016) (quoting State v. Johnson, 193 N.J. 528, 552 (2008)). Consent to search is a "long-recognized" exception to the warrant requirement. State v. Coles, 218 N.J. 322, 337 (2014).

Consent searches of motor vehicles that are pulled over by police are valid only if (1) "there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop," State v. Carty, 170 N.J. 632, 647 (2002); and (2) the consent is "given knowingly and voluntarily," id. at 639. The linchpin to voluntary consent "is whether a person has knowingly waived [her] right to refuse to consent to the

search." State v. Domicz, 188 N.J. 285, 308 (2006) (citing State v. Johnson, 68 N.J. 349, 353-54 (1975)). The burden is on the State to prove "that the individual giving consent knew that he or she 'had a choice in the matter.'" Carty, 170 N.J. at 639 (quoting Johnson, 68 N.J. at 354). Specifically, the consenting individual must have been aware of her right to refuse, before giving consent. Johnson, 68 N.J. at 354.

In State v. King, 44 N.J. 346, 352-53 (1965), the Court delineated factors for use by our courts in considering the voluntariness of consent. Factors potentially indicating coerced consent include:

> (1) that consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; [and] (5) that consent was given while the defendant was handcuffed.
> [Ibid. (citations omitted).]

Factors potentially indicating voluntariness of consent include:

> (1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted to guilt before his consent; and (3) that the defendant affirmatively assisted the police officers.
> [Id. at 53 (citations omitted).]

The Court emphasized that those factors were not commandments, but "guide posts" to aid a trial judge in arriving at his conclusion. Ibid. The Court

cautioned that "the existence or absence of one or more of the factors mentioned above may be of great significance and the circumstances of one case, yet may be of slight significance in another." Ibid. Indeed, voluntariness depends on "the totality of the particular circumstances of the case" with each case "necessarily depend[ing] upon its own facts." Ibid.

At the PCR hearing in the instant matter, counsel asserted that trial counsel was ineffective by failing to move to suppress the tire iron found in the Impala driven by Jovani Diaz; specifically, that Diaz had not given valid consent to search the car. To buttress his claim, counsel persisted that the court review the "videos of Bodycams" taken in this matter. (14T 3-17 to 12-9). Counsel maintained:

> And Ms. Diaz does say she does not want to allow the search because it wasn't her car. And after that the officers continued to speak with her to obtain this consent.
>
> And I would submit based on the King factors, Your Honor, that the consent was not lawfully obtained. That factor stands out in No. 2 [sic]. Defendant was handcuffed at the time. So there was really no reason and that's one of the factors that's looked at as to whether consent is valid. And I set forth the law in my brief. But that's one of the factors that a Court can look at, defendant was already handcuffed at the time. Ms. Diaz already said that she wasn't going to -- said no, and then the consent occurred after that.
>
> And, yes, I agree that there is certainly a signed document for Ms. Diaz, indicating she does consent, but, again, that goes back to, you

> know, she originally said no. so that's what will -- that's what I will show.
> [14T 12-18 to 13-12.]

The PCR court, not having reviewed the Bodycams, reserved decision. (14T 4-15 to 8-13; 14T 37-7 to 8).

The court subsequently rejected defendant's claim, reasoning, in pertinent part:

> Applying the King factors here, the court finds the consent to search was knowing and voluntary. First, the video evidence shows that Diaz was not handcuffed when she consented to the search. Additionally, Diaz was not under arrest when she provided consent and police did not obtain consent after Diaz denied any guilt. Also, Diaz did not refuse initial requests for consent to search, instead she believed that she did not have the authority to give consent because she did not own the car. What is more, Diaz was advised of her right to refuse consent. Based upon the totality of the circumstances, the court finds the consent provided by Diaz to search the Impala was knowing and voluntary.
>
> Furthermore, the seizure of the evidence was justified by the plain view doctrine.
> [Da 106 to 107.]
>
> * * *
>
> In this case, the officers were lawfully at the scene investigating the car crash and injuries they came upon behind the motel. The car doors to the Impala had been left open by its occupants, and from outside the car the officers could see the tire iron. Finally, the officers had probable cause to associate the tire iron with the assault perpetrated on Webb. They had been told that Webb was struck with the tire iron and they could see injuries to his head. Based

> upon the record, the seizure of the tire iron was equally justified by the plain view doctrine.
>
> The conclusion, then, is that any motion to suppress the tire iron would have been unsuccessful and the failure to file a meritless motion is not ineffective assistance of counsel.
> [Da 108.]

The PCR court erred in denying relief.

Contrary to the court's finding, the Bodycam of the incident reveals that Diaz was Mirandized[8] and handcuffed prior to her consenting to search the car. (Da 132, 20:16-01 to 20:24-40[9]). Indeed, Diaz had been arrested prior to her consenting, and based on "the totality of the particular circumstances of the case," King, 44 N.J. at 53, her consent was negated.

Additionally, the tire iron was identified and recovered from the car subsequent to Diaz's "consenting" (Da 132, 20:35-37 to 20:43-50), thereby undermining any prior plain-view exception.

Suppression of the tire iron must not be underestimated. Trial counsel argued in summation that Webb's injuries resulted from his crashing into an object in the woods. (9T 131-23 to 132). Therefore, absent the tire iron's discovery, the State's case relied upon the dubious credibility of Webb, the

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

[9] The numbers referred to are the time stamps on the disc.

fugitive, who possessed approximately ten prior convictions (2T 190-5 to 199-6); and Diaz, the possessor of four prior convictions, who previously had denied that defendant had a weapon or assaulted anyone, and whose recommended sentence in this matter was contingent upon her "truthful" testimony. (4T 9-2 to 10-10; 4T 53-4 to 18; 4T 57-12 to 58-13).

Therefore, trial counsel's failure to move to suppress the tire iron established a prima facie case of ineffectiveness pursuant to the Strickland/Fritz two-pronged test and/or the Cronic/Davis per se analyses, thereby necessitating an evidentiary hearing to resolve defendant's claim. Preciose, 129 N.J. at 464.

B. Trial Counsel Failed to Have a Forensic Expert Testify Regarding the Viability of Testing the Tire Iron for Fingerprints and DNA. (Da 113 to 115)

As referenced in POINT A, the State's case was reliant upon defendant's having weaponized a tire iron to assault and rob Eric Webb. Consequently, the identity of the individual who employed the tire iron was essential to the State's case.

In this regard, Detective Thackston did not "process" the tire iron for fingerprints, because he had been "told" that if an item was dusted for

fingerprints, it could not be submitted for DNA analysis due to contamination. (5T 152-20 to 155-9; 5T 184-23 to 185-7).

Detective Brining understood that fingerprint and DNA analyses could be conducted on the same piece of evidence. (8T 43-14 to 20). He requested that the tire iron be tested for DNA, but that it was not done, nor was it tested for fingerprints, Brining testified, because the authorities wanted it tested for DNA and were concerned the fingerprint powder would "contaminate it." (8T 47-19 to 49-20).

In support of defendant's PCR petition, Charlotte J. Word, having a Ph.D. in microbiology, submitted a report with an extensive C.V. (Da 56 to 84). In response to the inquiry "whether it is possible to perform testing for both fingerprints and DNA on handled items of evidence" (Da 56), she concluded:

> In summary, the totality of the information presented above clearly supports that there is no technical or procedural problem that would preclude conducting both fingerprinting and DNA testing on various items of evidence, including a tire iron, in New Jersey as long as proper procedures and materials free of human DNA are used throughout the testing. Furthermore, even if contamination did occur, it is possible that interpretable and comparable DNA profiles may still be obtained that could be relevant to the case using standard methods in the DNA testing laboratory. These statements are provided based on my background, education, experience, training and active participation in the field of forensic DNA testing for the past 32+ years and based strongly on numerous scientific studies conducted by various institutions and general routine practices in place both at the time of trial in this case and currently

> with forensic science service providers. As recommended by the national Commission on Forensic Science and approved by the Attorney General of the United States in 2016, the statement "to a reasonable degree of scientific certainty" is no longer a term to be used by forensic scientists; however, I provide and support these statements with strong conviction based on the information available in the field.
> [Da 58.]

The PCR court, in rejecting defendant's claim that trial counsel was ineffective for not having a forensic expert testify that the tire iron could have been tested for fingerprints and DNA reasoned, in pertinent part:

> [Defendant] has submitted a report from Charlotte Lee [sic], Ph.D., and [sic] expert in forensic DNA testing. Dr. Lee [sic] has opined that scientific practices allow for both fingerprint and DNA testing on the tire iron. According to defendant, one of the State's witnesses [Detective Thackston] testified at trial that testing the tire iron for fingerprints would have made DNA analysis impossible, but another witness for the State [Detective Brining] testified that fingerprint and DNA tests could be conducted on the same piece of evidence. Defendant contends that trial counsel's performance was objectively unreasonable for failing to call an expert to testify that the State's assertion that the tire iron could not be tested for fingerprints was incredible.
> [Da 113 to 114.]

The PCR court proceeded that trial counsel "explicitly reminded the jury about the two witnesses who contradicted each other" (Da 114); that defendant "fails to show that the outcome of the trial would have been different had a defense expert presented in this regard" (Da 115); and "[e]ven if an expert had

been called, the jury still heard the testimony of Webb and Diaz who identified defendant as the person who attacked Webb with the tire iron." (Da 115).

The PCR court's rationale was egregiously flawed.

Contrary to the PCR court's mischaracterization that Thackston's and Brining's testimony contradicted one another, their bottom line, as cited herein, was consistent - that fingerprint testing contaminated DNA analyses.

Consequently, expert testimony, such as that of Dr. Word, would have exposed an irretrievable vacuum in the State's case regarding the wielder of the tire iron and clearly transcended the dubious credibility of Eric Webb and Jovani Diaz.

It is essential - and particularly in this matter's context - that a defendant must be provided with a "'meaningful opportunity to present a complete defense.'" State v. Garron, 177 N.J. 147, 168 (2003) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)), cert. denied, 540 U.S. 1160 (2004).

Therefore, trial counsel's failure to have a forensic expert testify regarding the viability of testing the tire iron for fingerprints and DNA constituted a prima facie case of ineffectiveness pursuant to the Strickland/Fritz two-pronged test and/or the Cronic/Davis per se analyses.

Accordingly, this matter must be remanded for an evidentiary hearing so as to resolve defendant's claim. Preciose, 129 N.J. at 464.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the denial of defendant=s PCR petition be reversed, and this matter be remanded for an evidentiary hearing.

Respectfully submitted,

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Dated: December 4, 2023

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March 8, 2024

LETTER-BRIEF AND APPENDIX IN LIEU OF FORMAL 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.
Ralph Lemar (Defendant-Appellant)

Docket No. A-003048-22T4

Criminal Action: On Appeal from An Order Denying Defendant's Petition for Post-Conviction Relief of the Superior Court of the Superior Court of New Jersey, Law Division, Camden County.
Indictment No.: 2401-08-15-I

Sat Below: Hon. David M. Ragonese, J.S.C

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a) this letter-brief is submitted on behalf of the State of New Jersey.

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APPENDIX

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

A Camden County Grand Jury returned a ten-count Indictment, Number 2401-08-15, charging defendant Ralph Lemar with the following six counts of a multi-defendant indictment: first-degree armed robbery, in violation of N.J.S.A. 2C:15-1a(1)/(2) (Count One); second-degree conspiracy to commit armed robbery, in violation of N.J.S.A. 2C:5-2/2C:15-1a(1)/(2) (Count Two); second-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(1) (Count Three); third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(2) (Count Four); third-degree possession of a weapon (tire iron) for an unlawful purpose, in violation of N.J.S.A. 2C:39-4d (Count Five); and fourth-degree unlawful possession of a weapon (tire iron), in violation of N.J.S.A. 2C:39-5d (Count Six). (Da1-14).

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[1] 1T refers to the September 27, 2016 trial transcript.
2T refers to the September 28, 2016 trial transcript.
3T refers to the September 29, 2016 trial transcript.
4T refers to the October 4, 2016 trial transcript.
5T refers to the October 5, 2016 trial transcript.
6T refers to the October 6, 2016 trial transcript.
7T refers to the October 13, 2016 trial transcript.
8T refers to the October 18, 2016 trial transcript.
9T refers to the October 19, 2016 trial transcript.
10T refers to the October 20, 2016 trial transcript.
11T refers to the October 21, 2016 trial transcript.
12T refers to the October 24, 2016 trial transcript.
13T refers to the January 20, 2017 sentencing transcript.
14T refers to the February 17, 2023 post-conviction relief hearing transcript.
"Da" refers to the appendix to defendant's brief.
"Db" refers to defendant's brief.
"Pa" refers to the appendix to the State's brief.

On September 27, 2016, defendant's jury trial commenced with the Honorable Richard F. Wells, J.S.C., presiding.[2] (1T). On October 24, 2016, the jury found defendant guilty of first-degree armed robbery, second-degree conspiracy to commit robbery, a lesser-included third-degree aggravated assault, third-degree aggravated assault with a deadly weapon, third-degree possession of a tire iron for an unlawful purpose, and fourth-degree unlawful possession. (12T37-20 to 39-13; Da15-24).

On January 20, 2017, the trial court denied the State's motion for an extended term sentence. (13T19-5 to 23). The court, after merging Counts Two, Three (as amended), Four, and Five with Count One, sentenced defendant on Count One, first-degree armed robbery, to seventeen years New Jersey State Prison subject to the No Early Release Act and on Count Six, fourth-degree unlawful possession of a weapon, to eighteen months New Jersey State Prison, concurrent to the sentence imposed on Count One. (13T23-1 to 30-9; Da25-28).

On April 9, 2019, this Court affirmed defendant's conviction and sentence. (Da29-51). On October 7, 2019, the New Jersey Supreme Court denied defendant's petition for certification. (Da52).

On February 28, 2020, defendant filed a petition for post-conviction relief (hereinafter "PCR"). (Da53-54). On February 17, 2023, the Honorable David M. Ragonese, J.S.C., held a hearing on defendant's PCR petition. (14T). On May 1, 2023,

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[2] Co-defendants Brian K. Williams, Marvela S. Brown-Bailey, and Innis J. Henderson, Jr. were tried with defendant.

the PCR court denied his petition for the reasons stated in a written decision and order. (Da85-125).

On June 8, 2023, defendant filed a notice of appeal. (Da126-29). This appeal follows:

COUNTERSTATEMENT OF FACTS

A. Facts Developed at Defendant's Jury Trial

The following facts were set forth in this Court's April 9, 2019 opinion, affirming defendant's conviction and sentence on direct appeal:

> On the afternoon of March 25, 2015, Brown-Bailey, a licensed bail bondsman, traveled to the residence of Katie Wilson. Brown-Bailey enlisted Wilson's help in apprehending Eric Webb, who was wanted for failing to appear at a court hearing. Wilson was a former associate of Webb's. Wilson admitted she and Webb participated in a car rental scheme whereby Wilson rented cars in her name for Webb to drive because Webb did not have a license; she also admitted to purchasing heroin from Webb.
>
> Brown-Bailey asked Wilson if she would be willing to set up a meeting with Webb so Brown-Bailey could apprehend him. Wilson agreed. In exchange, Brown-Bailey gave her $100, and promised her assistance with her "municipal problems," which included a pending charge related to the car rental scheme.
>
> Wilson contacted Webb and arranged for him to come to her residence that night. When Webb pulled up, Wilson sent Brown-Bailey a text message, and, within moments, "a couple of cars pulled up. One pulled from the front to block [Webb] in and another came from the back so his car wasn't able to move." Wilson testified she was "pretty sure" Brown-Bailey's red Dodge Avenger was in the back and a white Chevrolet Impala associated with defendant was in the front. Wilson testified she observed four people exit the Dodge and the Impala. By that time, it was dark outside so Wilson could only positively identify Brown-Bailey and Henderson, but she was certain the other two were black men. Wilson testified they all yelled at Webb to get out of the car. In response, F.E., Webb's seventeen-year-old passenger, emerged from the car, but Webb did not. Instead, Webb drove his car back and forth, hitting the vehicles blocking him so he could get away.
>
> Webb then fled in his silver Chevrolet Malibu. Defendant, Williams, and co-defendant Jovani A. Diaz pursued Webb as he

fled.[3] Diaz testified she was driving the Impala, which belonged to the mother of one of defendant's children, during the high-speed pursuit, which eventually terminated in a wooded area behind a motel in Atco. Diaz also testified Webb was unable to exit his car via the driver's side door because she stopped the Impala alongside the Malibu. Diaz admitted Webb "was trying to get out. He was coming from the driver's side leaning over to the passenger's side trying to get out the car." Webb testified it was at that point defendant opened the passenger's side door, jumped in, and hit him in the head with a tire iron. Diaz's testimony corroborated Webb's — she stated she witnessed defendant hit Webb in the face with the tire iron. Webb stated he received seven stitches in his forehead as a result of defendant striking him with the tire iron.

Webb testified another male "jumped on" him from the back and began punching him in the ribs. Webb could not positively identify Williams as the other male, however, Diaz testified she witnessed Williams "punching on" Webb. Diaz also testified defendant and Williams were both "beating on" Webb. Webb also testified a woman "attacked [him] from the driver's side," and restrained his legs. Although Webb could not identify the woman, Diaz admitted to holding Webb's legs and to "hitting" him."

Webb testified defendant took his sunglasses and necklace, and stated, "You don't need this. You goin' to jail." Webb also stated the woman removed money from his pockets after being ordered to do so by defendant. Diaz admitted to taking Webb's cell phone and cash. Webb's cell phone was recovered from Diaz's belongings after her arrest.

On the date he testified, Webb was serving two prison terms, one for fourth-degree aggravated assault, and the other for charges stemming from the heroin he was in possession of when the police searched him on the night of the incident. Webb also testified to his prior convictions for burglary, resisting arrest, and drug offenses; admitted he knew he had an arrest warrant out for him for violating his probation, and for failing to appear for a court date while out on bail on firearms charges; and admitted he had not made the required payments to the bail bondsman.

Officers Michael Hackman and Timothy Arthur Lyons of the

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[3] "Diaz was charged with the same offenses as defendant and Williams, but entered into a plea agreement prior to trial, pleading guilty to second-degree conspiracy to commit robbery." (Da31 n.1).

> Waterford Township Police Department both testified they observed blood in the front passenger side area of Webb's car and a tire iron on the front passenger's seat of the Impala. Officer Lyons also testified only Webb appeared injured. The scientific testimony elicited at trial established the clothing worn by defendant and Williams had Webb's blood on it.
>
> Brown-Bailey told police defendant helped her catch bail jumpers "every now and then." She testified defendant occasionally accompanied her when she went in search of bail jumpers to ensure her safety. According to Brown-Bailey, it was defendant who enlisted the help of Williams, Henderson, and Diaz, who was Henderson's then girlfriend.
>
> [(Da30-34).]

B. Findings and Rulings of the PCR Court

Following a hearing, on May 1, 2023, in written opinion, the PCR court denied defendant's PCR petition without an evidentiary hearing. (Da85-125). As to the claims that defendant raises in this appeal, the PCR court, in relevant part, found that defendant failed to establish a prima facie case of ineffective assistance of counsel to warrant relief because his claims that trial counsel should have filed motions and called certain witnesses did not establish that counsel's performance was deficient and the alleged failures did not create a reasonable probability that the outcome of trial would have been different. (Da101).

As to defendant's claim that counsel was ineffective for failing to file a motion to suppress the tire iron, the PCR court found that defendant must prove that such a motion would have been granted had it been filed and noted that a failure to raise unsuccessful legal arguments does not constitute ineffective assistance. (Da105 (citing

State v. Worlock, 117 N.J. 596, 625 (1990)). The court found that the record showed that Jovani Diaz gave consent to search the Impala, consent is a cognizable exception to the warrant requirements, and, therefore, a motion to suppress would have been a futile motion. (Da105). Applying the factors from State v. King, 44 N.J. 346 (1965) to determine whether an individual's consent to search was coerced, the court found that the consent was knowing and voluntary. (Da106). It found that the video evidence showed that Diaz was not handcuffed when she consented to the search, she was not under arrest when she consented to the search, and police did not obtain her consent after she denied any guilt. (Da106-07). Further, the court found that Diaz did not refuse initial requests for consent to search, but instead she had believed she did not have the authority to give consent because she did not own the car. (Da107). Finally, the court found that Diaz was advised of her right to refuse consent. (Da107). The court concluded that, based on the totality of the circumstances, the consent to search the Impala was knowing and voluntary. (Da107).

The PCR court also ruled that the seizure of the tire iron was justified by the plain view doctrine. (Da107). It found that the officers were lawfully at the scene investigating the car crash and injuries, the Impala car doors had been left open by its occupants, and from outside the car the officers could see the tire iron. (Da108). It further ruled that the officers had probable cause to associate the tire iron with the assault on Webb, as they had been told that Webb was struck with a tire iron and they could see his head injuries. (Da108). The court concluded that based upon the record

the seizure of the tire iron was equally justified by the plain view doctrine. (Da108). It ruled that the conclusion then was that any motion to suppress the tire iron would have been unsuccessful and the failure to file a meritless motion was not ineffective assistance of counsel. (Da108).

The PCR court also rejected defendant's challenge to trial counsel's failure to have an expert testify that the State's assertion that the tire iron could not be tested for fingerprints was not credible or argue inconsistencies in the State's explanation of the reason as to why the tire iron was not tested for fingerprints. (Da113-15). The court found that defendant's argument was "belied by the record", noting that during cross-examination counsel elicited from the State's expert witnesses that the State did not request to dust the tire iron for fingerprints and in summation counsel pointed out the absence of fingerprint and DNA testing to the jury. (Da114). The court further quoted defense counsel's closing argument that reminded the jury about two State witnesses who contradicted each other—specifically Detective Thackston and Detecting Brining testifying that if DNA analysis was done on a piece of evidence that fingerprints could not be taken. (Da114).

The court further found that defendant failed to show that the outcome of the trial would have been different had a defense expert been presented. (Da115). The court found that the absence of fingerprints and DNA evidence connecting defendant to the tire iron was established during trial and counsel argued that there was no blood and that the existence of fingerprint or DNA were unknown because the State "never

bothered to check". (Da115). The court found "[t]he jury considered the evidence, heard the arguments of counsel, and was unpersuaded about their impact on the defendant's guilt." (Da115). The court found that even if an expert had been called, the jury still heard Webb's and Diaz's testimonies identifying defendant as the person who attacked Webb with the tire iron. (Da115). It further noted that the jury saw video from the officers' body-worn cameras showing the tire iron in the front seat of the Impala and that it heard testimony describing Webb's injuries and the video showed him injured. (Da115). The court ruled, "The evidence tending to prove that defendant used the tire iron to assault Webb was substantial." (Da115). It found that any limited expert testimony to point out inconsistencies in two witnesses' testimonies would have done little to change the outcome of the trial. (Da115). The court concluded that defendant failed to establish an ineffective assistance claim on that ground. (Da115).

LEGAL ARGUMENT

POINT I: THE PCR COURT PROPERLY DENIED DEFENDANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING. [(Raised below).] [(Da85-125).]

Defendant argues that the PCR court erred in denying his claim that trial counsel was ineffective for failing to move to suppress the tire iron found in the Impala driven by Jovani Diaz. (Db22-25). He further argues that the PCR court erred in denying his ineffective assistance of trial counsel claim based on counsel's failure to have a forensic expert testify regarding the viability of testing the tire iron for fingerprints and DNA. (Db25-29). The State submits that defendant failed to establish a prima facie case of ineffective assistance of counsel on either basis, and thus, the PCR court properly denied his claims. Accordingly, the State respectfully requests that this Court affirm.

Rule 3:22-10 recognizes the court's discretion to conduct an evidentiary hearing on a PCR petition. State v. Preciose, 129 N.J. 451, 462 (1992). If a defendant has presented a prima facie claim of ineffective assistance of counsel in support of his PCR application, the trial court will ordinarily grant an evidentiary hearing. Ibid. However, an evidentiary hearing need not be granted "if the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to post-conviction relief" or "the defendant's

allegations are too vague, conclusory or speculative". State v. Marshall, 148 N.J. 89, 158 (1997) (citations omitted).

To establish a prima facie claim of ineffectiveness of counsel to warrant an evidentiary hearing, a defendant "must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984), which was adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42 (1987). Preciose, 129 N.J. at 463. First, defendant must establish his counsel's performance was deficient, "which requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 677–89. Second, defendant must demonstrate the deficient performance prejudiced the defense, which requires showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Ibid. "Unless a defendant makes both showings [deficient performance and resultant prejudice], it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Ibid.

Our courts also require that "a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Defendants must allege facts "sufficient to demonstrate counsel's alleged substandard performance." Ibid.

Thus, when a petitioner claims his trial counsel inadequately investigated his case, "he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid.

Here, defendant failed to demonstrate a prima facie case of ineffective assistance of counsel on any ground raised below, including those he maintains in this appeal. Therefore, the State respectfully requests that this Court affirm the denial of his PCR petition.

A. The PCR court properly denied defendant's ineffective assistance of counsel claim based on counsel's failure to file a motion to suppress the tire iron.

Defendant argues that the PCR court erred in denying his claim that his trial counsel was ineffective for failing to move to suppress the tire iron found in the Impala driven by Jovani Diaz, specifically that Diaz did not give valid consent to search that car. (Db20-25). Defendant's claim fails because he did not establish that such a motion to suppress would have been meritorious had it been filed and, therefore, did not establish a prima facie claim of ineffective assistance of counsel.

When asserting that trial counsel was ineffective for failing to file a suppression motion, the defendant, in addition to establishing both parts of the Strickland test, must also prove that his Fourth Amendment claim is meritorious. State v. Goodwin, 173 N.J. 583, 597 (2002) (citing State v. Fisher, 156 N.J. 494, 501 (1998)). Counsel's failure to file a motion to suppress is not a circumstance under

which prejudice concerning the denial of assistance of counsel can be presumed. Id. (citations omitted). Further, "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." Worlock, 117 N.J. at 625.

"Consent to search is a 'long-recognized' exception to the warrant requirement." State v. Hagans, 233 N.J. 30, 39 (2018) (quoting State v. Coles, 218 N.J. 322, 337 (2014)). "[W]here the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." State v. Johnson, 68 N.J. 349, 353-54 (1975). "To be voluntary the consent must be 'unequivocal and specific' and 'freely and intelligently given.'" King, 44 N.J. at 352 (quoting Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951)).

In King, the New Jersey Supreme Court "delineated factors for use by our courts in considering the voluntariness of consent." Hagans, 233 N.J. at 39 (citing King, 44 N.J. at 352-53). Factors that tend to show that consent had been voluntarily given are: "(1) that consent was given where the accused had reason to believe that the police would find no contraband"; "(2) that the defendant admitted his guilt before consent, and "(3) that the defendant affirmatively assisted the police officers." King, 44 N.J. at 353 (internal citations omitted). In contrast, factors that tend to show that the consent was coerced are: "(1) that consent was made by an individual already arrested," "(2) that consent was obtained despite a denial of guilt," "(3) that

consent was obtained only after the accused had refused initial requests for consent to search," "(4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered," and "(5) that consent was given while the defendant was handcuffed". Id. at 352-53 (internal citations omitted). "[T]he existence or absence of one or more of the above factors is not determinative of the issue." Id. at 353. Rather, those factors are "only guideposts to aid a trial judge in arriving at his conclusion" and voluntariness must be determined based upon "the totality of the particular circumstances of the case". Ibid.

Another well-recognized exception to the warrant requirement is plain view doctrine. "A warrantless seizure of evidence in plain view is justified when a police officer is lawfully in the area where he observed the evidence, it is 'immediately apparent' that the item observed is evidence of a crime or contraband, and the discovery of the evidence is inadvertent."[4] State v. Gonzales, 227 N.J. 77, 81 (2016) (citing State v. Bruzzese, 94 N.J. 210, 236 (1983)).

Here, the PCR properly denied defendant's claim that trial counsel was ineffective for failing to file a motion to suppress the tire iron. It properly found,

[4] The "inadvertency" prong for plain view was later removed, prospectively, however, the State addresses that prong here because the incident occurred on March 25, 2015, prior to the change in the law. State v. Gonzales, 227 N.J. 77, 82, 101 (2016).

consistent with the caselaw, that to establish counsel was ineffective for failing to file a motion to suppress, defendant must prove that such a motion would have been granted had it been filed and a failure to raise unsuccessful legal arguments does not constitute ineffective assistance. (See Da105 (citing Worlock, 117 N.J. at 625). It also appropriately ruled that Diaz, who was the driver of the car, gave consent to search, which is a cognizable exception to the warrant requirement. (Da105). Not only did Diaz give verbal consent, but also written consent by executing a consent to search form, which the State had submitted to the PCR court below. (Pa1). The PCR court also properly found that Diaz was advised of her right to refuse consent. (Da107). The form specifically advised her of her right to refuse consent to search and provided that she gave consent voluntarily and without any threats or promises of any kind. (Pa1). Further, on the body-camera video, regarding consent, the officer told Diaz, "I'm just asking. You can tell me to go pound sand for all I care. And then we'll just do it the other way." (Da132, 20:25:12 to 20:25:18). Thus, the officer verbally made Diaz aware of her ability to refuse, in addition to the written form.

Further, while defendant contends that, contrary to the PCR court's finding, the body-camera of the incident reveals that Diaz was Mirandized[5] and handcuffed prior to her consenting to search the car, (Db24 (citing Da132, 20:16-01 to 20:24-40)), the PCR court acknowledged Diaz was still in handcuffs at the point when an officer took

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5 Miranda v. Arizona, 384 U.S. 436 (1966).

an identification card for a woman in the Impala and asked if it belonged to Diaz. (Da88-89, 89 n.3). The PCR court then provided its account of the exchange between one of the officers and Diaz. (Da88-90). The court noted that when the officer said, "'turn around,'" the officer released Diaz from her handcuffs. (Da89 n.3). The body-camera video shows that when Diaz verbally consented to the search she was not handcuffed. (Da132, 20:24:23 to 20:25:26). She was, however, handcuffed while she signed the consent to search form. (Da132, 20:26:48 to 20:32:45). Yet, the fact that Diaz was handcuffed is but one factor in determining whether a consent to search is voluntary or coerced, and the existence of that factor is not determinative. See King, 44 N.J. 346, 353.

Here, the PCR court clearly reviewed the record, including the body-camera footage, and the exchange between Diaz and the police regarding consent. Based on the totality of the circumstances, the PCR court reached the proper conclusion that Diaz's consent to search was voluntary and knowing. Thus, as the PCR court properly found, a motion to suppress would not have been successful. Accordingly, defendant did not establish his ineffective assistance of counsel claim on that basis.

Additionally, the PCR court ruled that the seizure of the tire iron was justified by the plain view doctrine, finding that the officers were lawfully at the scene investigating the car crash and injuries, the Impala car doors had been left open by its occupants, and from outside the car the officers could see the tire iron. (Da107-

08). The body-camera footage showed that prior to Mirandizing Diaz one officer told another that there was a crowbar in the back seat of the white vehicle. (Da131, 20:15:50 to 20:16:30). It also sounds like the officer asking Diaz for consent to search references the tire iron when asking her for consent. (Da132, 20:24:48 to 20:25:00). Thus, the officers, while lawfully at the scene, observed the tire iron prior to even asking Diaz for consent to search. Further, while the PCR court did not address "inadvertency", it is evident from the record that the officers inadvertently found the tire iron when they were on the scene responding to the 911 call.

In sum, defendant failed to establish a prima facie case of ineffective assistance of counsel for failing to file a futile motion to suppress. Accordingly, the State respectfully requests that this Court affirm.

B. The PCR court properly denied defendant's ineffective assistance of counsel claim based on counsel's failure to have a forensic expert testify regarding the viability of testing the tire iron for fingerprints and DNA.

Defendant argues that the PCR court erred in denying his claim that trial counsel was ineffective for failing to have a forensic expert testify regarding the viability of testing the tire iron for fingerprints and DNA. (Db25-29). The State submits that the PCR court properly rejected defendant's argument based on the record and respectfully requests that this Court affirm.

The PCR court appropriately ruled that defendant's ineffective assistance of counsel claim related to fingerprints and DNA was meritless. The PCR court found

that on cross-examination counsel elicited from the State's expert witnesses that the State did not request to dust the tire iron for fingerprints and pointed out the absence of fingerprint and DNA testing to the jury in summation. (Da114).

Here, defendant failed to show that his counsel was deficient on these grounds. Counsel cross-examined a State witness, who had testified as an expert in fingerprinting in the past, and who testified that he was not involved in any fingerprinting of any of the evidence in this case. (5T90-3 to 10). Counsel also cross-examined another witness who testified that he did not fingerprint the tire iron because he believed there was DNA evidence on it. (5T189-15 to 190-2). Thus, counsel questioned the State's witnesses regarding the absence of fingerprint testing. Counsel further highlighted the absence of fingerprint and DNA testing to the jury in summation, and noted the contradiction between detectives on whether DNA analysis and fingerprint testing could both be done on a piece of evidence. (9T123-18 to 125-11). Given counsel's questioning and argument regarding the absence of testing and contradictions, defendant failed to show how counsel was deficient.

Further, the PCR court properly concluded that defendant failed to show that the outcome of the trial would have been different had a defense expert been presented. (Da115). The court found that the absence of fingerprints and DNA evidence connecting defendant to the tire iron was established during trial and counsel argued that there was no blood and that the existence of fingerprint or DNA

were unknown because the State "never bothered to check". (Da115). The court found "[t]he jury considered the evidence, heard the arguments of counsel, and was unpersuaded about their impact on the defendant's guilt." (Da115). Further, it properly found that even if an expert had been called, the jury still heard Webb's and Diaz's testimonies identifying defendant as the person who attacked Webb with the tire iron. (Da115). The court ruled, "The evidence tending to prove that defendant used the tire iron to assault Webb was substantial." (Da115). It found that any limited expert testimony to point out inconsistencies in two witnesses' testimonies would have done little to change the outcome of the trial. (Da115).

The State submits that the PCR court properly addressed and concluded that defendant failed to establish any prejudice. As the State argued below, defendant failed show he was prejudiced by counsel not having an expert testify that the State could have performed both fingerprint and DNA analysis on the tire iron when counsel presented this to the jury on summation to undermine the State's witnesses and pointed out the alleged inconsistencies in the State's witnesses' testimonies as to the absence of both testing procedures.

Based on the foregoing, the State submits that the PCR court properly denied defendant's claim and respectfully requests that this Court affirm.

CONCLUSION

For all those reasons set forth herein, the State respectfully urges this Court to affirm the ruling below denying defendant's PCR petition.

Respectfully submitted,

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CAMDEN COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

By: *s/ Maura Murphy Sullivan*
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OF COUNSEL AND ON THE BRIEF

DATED: March 8, 2024

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Presently Confined

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION, CRIMINAL PART
INDICTMENT NO.: 15-08-2401

CRIMINAL ACTION

STATE OF NEW JERSEY Respondant	:	CRIMINAL DIVISION
v.	:	CERTIFICATION SUPPLEMENTARY LETTER BRIEF IN SUPPORT OF POST CONVICTION RELIEF
RALPH M. LAMAR Defendant	:	

To:

Please accept this letter brief in lieu of a formal brief in support of my petition for post-conviction relief. Embodied in this letter brief is an amendment specifically to one argument pertaining to consent of search.

Petitioner will rely on the Extensive Procedural History and Statement of Facts contained in the record.

A. TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS THE TIRE IRON. (Da 105 to 108) (also see video disc #2- #05d021922015032520080700l)

The Fourth Amendment of the United States Constitution and article I, Paragraph 7 of the New Jersey Constitution prohibit "unreasonable searches and seizures' by government officials." State v. Watts, 223 N.J. 503, 513 (2015). ' "Warrantless searches are presumptively unreasonable," ' and "the State bears the burden of proving by a preponderance of the evidence not only that the [warrantless] search or seizure was premised on probable cause, but also that it 'f[ell] within one of the few well-delineated exceptions to the warrant requirement."' State v. Bryant, 227 N.J. 60, 69-70 (2016) (quoting State v. Johnson, 193 N.J. 528, 552 (2008)). Consent to search is a "long-recognized" exception to the warrant requirement. State v. Coles, 218 N.J. 322, 337 (2014).

Consent searches of motor vehicles that are pulled over by police are valid only if (1) "there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, State v. Carty, 170 N.J. 632, 647 (2002); and (2) the consent is "given knowingly and voluntarily," id. at 639. The linchpin to voluntary consent "is whether a person has knowingly waived [her] right to refuse to consent to the search." State v. Domicz, 188 N.J. 285, 308 (2006) (citing State v. Johnson., 68 N.J. 349,-54 (1975)). The burden is on the State to prove "that the individual giving consent knew that he or she 'had a choice in the matter.'" Carty, 170 N.J. at 639 (quoting Johnson, 68 N.J. at 354). Specifically, the consenting individual must have been aware of her right to refuse, before giving consent. Johnson, 68 N.J. at 354.

In viewing video disc #2 sequence # ending with 7001 and starting at time stamp:

@8:18:35-The Officer is seen reading Ms. Diaz her rights, and places her in handcuffs.

@8:20:25-The Officer is seen removing the handcuffs from Ms. Diaz and replacing with a different set, behind her back.

@8:24:00-The Officer is seen now moving the handcuffs on Ms. Diaz from behind her back to the front.

@8:24:50-The Officer is heard asking Ms. Diaz if she would give consent to search the Impala. Diaz states it is not her car.

@8:24:56- The Officer is heard telling Diaz a tire iron that was used as a weapon is in the car.

HOW COULD THE OFFICER HAVE KNOWN SUCH A THING? THE IMPALA WINDOWS ARE TINTED WITH A 5% TINT. THIS IS A FACT. AS WELL AS ANOTHER FACT THAT MR. LAMAR WANTED HIS WINDOWS DARKER YET AND SPECIFICALLY DOUBLED UP ON THE 5% TINT. THE IMPALAS' WINDOWS ARE 5% OVER 5%, THEREFORE PROHIBITING ANYONE FROM SEEING THROUGH THOSE WINDOWS EVEN FROM A PERSPECTIVE RIGHT UP AGAINST THEM.

Revert back to video disc #2 seq. # ending with 8001, and at time stamp @8:11:40 , The officer is seen opening the door of the Impala.

@8:11:47- The officer who was seen opening the Impala door is heard saying

"he beat him with the Jack thingy."

In State v. King, 44 N.J. 346, 352-53(1965), the Court delineated factors for use by our courts in considering the voluntariness of consent. Factors potentially indicating coerced consent include:

> (1) that consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; [and] (5) that consent was given while the defendant was handcuffed. [Ibid. (citations omitted)

Factors potentially indicating voluntariness of consent include:

> (1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted to guilt before his consent; and (3) that the defendant affirmatively assisted the police officers.
> [Id. at 53 (citations omitted).]

The Court emphasized that those factors were not commandments, but "guide posts" to aid a trial judge in arriving at his conclusion. Ibid. The Court cautioned that "the existence or absence of one or more of the factors mentioned above may be of great significance in another." Ibid. Indeed, voluntariness depends on "the totality of the particular circumstances of the case" with each case "necessarily depend[ing] upon its own facts." Ibid.

At the PCR hearing in the instant matter, counsel asserted that trial counsel was ineffective by failing to move to suppress the tire iron found in the Impala driven by Jovani Diaz; specifically, that Diaz had not given valid consent to search the car. To buttress his claim, counsel persisted that the court review the "videos of Bodycams" taken in this matter. (14T 3-17 to 12-9). Counsel maintained, as well as Defendant adds time stamp fact from disc #2 Seq. No. ending with 7001:

@8:25:12- This is the 5th time Ms. Diaz said **"No"** that it is not her car and the officer still did not advise her that she did not have to consent. However the officer did persist on obtaining the consent from her. The officer then phrased regarding the consent that either she can give it or he could basically charge her and obtain a warrant to get it. This tactic clearly made Ms. Diaz nervous as can be seen by her facial expression. Ms. Diaz does say she does not want to allow the search because it wasn't her car. And after that the officers continued to speak with her to obtain this consent:

@8:27:45- A woman officer is seen searching Ms. Diaz.

@8:31:14- Officer Hackman is heard asking Ms. Diaz what car she was in and begin to tell her about the consent form to sign.

@8:32:00- Ms. Diaz does now sign the consent while the handcuffs are still on her wrists.

@8:32:09- Officer Hackman is handed back the pen followed by him signing the consent form as well.

@8:33:08- Ms. Diaz is seen being walked by officer Hackman over to Mr. Lamar's, what turns out to be already searched Chevy Impala to do infact another search.

I would submit based on the King factors, Your Honor, that the consent was not lawfully obtained. That factor stands out in No. 2 [sic]. Defendant was handcuffed at the time. So there was really no reason and that's one of the factors that's looked at as to whether consent is valid. And the law is set forth in my brief. But that's one of the factors that a Court can look at, defendant was already handcuffed at the time. Ms. Diaz already said that she wasn't going to – said No, and then the consent occurred after that.

And, yes, I agree that there is certainly a signed document for Ms. Diaz, indicating she does consent, but, again, that goes back to, you know, she originally said No. So that

what will be shown. [14T 12-18 to 13-12.] (also video #2 ending in seq. No. 7001, and 8001)

The PCR court, not having reviewed the Bodycams, reserved decision. (14T 4-15 to 8-13; 14T 37-7 to 8)(Petitioner would also point out to review video disc #2 ending in seq. # 7001) Attn: time stamp @8:11:40-8:11:47.

The Court subsequently rejected defendant's claim, reasoning, in pertinent part:

> Applying the King factors here, the court finds the consent to search Was knowing and voluntary. First, the video evidence shows that Ms. Diaz was not handcuffed when she when she consented to the search. Additionally, Ms. Diaz was not under arrest when she provided consent And police did not obtain consent after Diaz denied any guilt. Also, Diaz Did not refuse initial requests for consent to search, instead she believed That she did not have the authority to give consent because she did not Own the car. What is more, Diaz was advised of her right to refuse Consent. Based upon the totality of the circumstances, the court finds The consent provided by Diaz to search the Impala was knowing and Voluntary.
>
> Furthermore, the seizure of the evidence was justified by the plain view Doctrine. [Da 106 to 107.]
>
> * * *

In this case, the officers were lawfully at the scene investigating the car Crash and injuries they came upon behind the motel. The car doors to

> the Impala had been left open by its occupants, and from outside the car the officers could see the tire iron. Finally, the officers had probable cause to associate the tire iron with the assault perpetrated on Webb. They had been told that Webb was struck with the tire iron and they could see injuries to his head. Based upon the record, the seizure of the tire iron was equally justified by the plain view doctrine.
>
> The conclusion, then, is that any motion to suppress the tire iron would have been unsuccessful and the failure to file a meritless motion is not ineffective assistance of counsel

The PCR court erred in denying relief.

Contrary to the court's finding, the Bodycam of the incident reveals that Ms. Diaz was Mirandized and handcuffed prior to her consenting to search the car. See Disc #2 Seq. No.ending with 7001,(time stamp @8:32:00- Diaz signs the consent form while under arrest and wearing handcuffs.) Indeed, Diaz had been arrested prior to her consenting, and based on the "totality of the particular circumstances of the case," King, 44 N.J. at 53, her consent was negated.

Additionally, the tire iron was identified and recovered from the car subsequent to Diaz's consenting (which as per the Waterford Township Police Department **Consent To Search**, was signed by Ms. Diaz at 8:22 PM on the 25th day of March 2015.....see attached) Also note that the officers claim of the tire iron in the Impala took place at @8:11:40 as per time stamp on disc #2 ending in seq. # 7001.....as well as the officer being seen opening the door of the Impala at @8:11:40 followed by the same officer being seen in the same video @8:11:47 and being heard saying "he beat him with the Jack thingy." Also note that in the same video @8:18:35 the officer is seen and heard reading Ms. Diaz her rights, and placing her in handcuffs, under arrest. Again reiterating that this video proof is well before the

actual signing of the **Consent to Search** form, which again was signed at 8:22 PM while Ms. Diaz was in fact under arrest. Therefore undermining any prior plain-view exception.

Suppression of the tire iron must not be underestimated. Trial argued in summation that Webb's injuries resulted from his crashing into an object in the woods. (9T 131-23 to 132). Therefore, absent the tire iron's discovery, the State's case relied upon the dubious credibility of Webb, the fugitive, who possessed approximately ten prior convictions (2T 190-5 to 199-6); and Diaz, the possessor of four prior convictions, who previously had denied that defendant had a weapon or assaulted anyone, and whose recommended sentence in this matter was contingent upon her "truthful" testimony. (4T 9-2 to 10-10; 4T 53-4 to 18; 4T 57-12 to 58-13).

Therefore, trial counsel's failure to move to suppress the tire iron established a prima facie case of ineffectiveness pursuant to the Strickland/Fritz two-pronged test and/or the Cronic/Davis per se analyses, thereby necessitating an evidentiary hearing to resolve defendant's claim. Preciose, 129 N.J. at 464.

Accordingly, this matter must be remanded for an evidentiary hearing so as to resolve defendants claim.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the denial of defendants PCR petition be reversed, and this matter be remanded for an evidentiary hearing.

Respectfully submitted,

Ralph Lamar-Pro-se