STATE OF NEW JERSEY, Plaintiff, v. AFRIM TAIRI, Defendant.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003772-22 On Appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY INDICTMENT NO. 01-06-1503-I Sat Below: Honorable James X. Sattely, J.S.C. **CRIMINAL ACTION**

BRIEF OF DEFENDANT-APPELLANT AFRIM TAIRI

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Preliminary Statement

In 2009, Appellant Afrim Tairi was convicted at trial for his alleged participation in three home invasions, dating back to the 1990s. There existed scant trial evidence connecting Mr. Tairi to the home invasions—no DNA; no biological testing; no serological analysis; no fingerprinting; no blood spatter; and no eye witnesses. To the contrary, the little evidence that was presented pointed elsewhere.

Accordingly, the only prosecution witness meaningfully connecting Mr. Tairi to the home invasions was codefendant Edwin Torres, who testified that he and Mr. Tairi participated in the home invasions together.

The testimony and credibility of Torres was the single most important aspect of Mr. Tairi's trial—the State concedes that fact. During its opening, the State referred to Torres as "the best evidence it had." Finally, during summation, the State referred to Torres's testimony as "extremely important." With precious little inculpatory evidence, Torres's testimony alone resulted in Mr. Tairi's conviction.

However, at the time Torres testified, the Bergen County Prosecutor's Office (hereinafter "BCPO"), was in possession of a Sworn Statement signed by Torres, that he filed in connection with a Habeas Corpus Petition in Federal Court. BCPO was counsel of record in Torres's federal case and opposed his Petition. The Sworn Statement – that contradicted Torres's testimony at Mr. Tairi's trial – was

intentionally withheld from Appellant; that is, rather than disclosing the Sworn Statement to Mr. Tairi, the State offered Torres the opportunity to testify in Mr. Tairi's trial, in exchange for a reduced sentence. The State then elicited testimony from Torres that it knew to be false, or in contradiction to his falsely sworn Habeas Petition.

There exists no authority that excuses the State's failure to turn over the Sworn Statement made by Torres. Disclosure of the Sworn Statement was not discretionary, it was mandated by Jencks, Brady, and Giglio. The failure to disclose the Sworn Statement constitutes a violation of Mr. Tairi's fundamental right to due process; all courts who have considered this issue have ordered reversal. Thus, this Court must do the same.

Procedural History

Bergen County Indictment No. 01-06-1503 charged Afrim Tairi with Second Degree Kidnapping, contrary to the provisions of N.J.S.A. 2C:13-la (Counts One and Thirteen); Second and Third Degree Receiving Stolen Property, contrary to the provisions of N.J.S.A. 2C:20-7 (Counts Two and Three); Second Degree Burglary, contrary to the provisions of N.J.S.A. 2C:18-2 (Counts Four and Twelve); First Degree Robbery, contrary to the provisions of N.J.S.A. 2C:15-l (Counts Five, Ten and Eleven); Second Degree Aggravated Assault, contrary to the provisions of N.J.S.A. 2C:12-lb(l) (Count Six); Second Degree Possession of a Firearm for an

Unlawful Purpose, contrary to the provisions of N.J.S.A. 2C:39-4a (Counts Seven and Fifteen); Murder, contrary to the provisions of N.J.S.A. 2C:11-3a(l) and/or (2) (Count Eight); Felony Murder, contrary to the provisions of N.J.S.A. 2C:11-3a(3) (Count Nine); Third Degree Theft, contrary to the provisions of N.J.S.A. 2C:20-3 (Count Fourteen); Second Degree Conspiracy, contrary to the provisions of N.J.S.A. 2C:5-2 and 2C:15-l (Count Sixteen); and Third Degree Theft of a Credit Card, contrary to the provisions of N.J.S.A. 2C:21-6c (Count Seventeen).[1] (Da001).

On July 10, 1996, co-defendants Felix DeJesus and Edwin Torres were arrested for the above-referenced crimes, and tried separately in 1998. (Da005).

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[1] 1T refers to transcript dated October 6, 2009, Volume I.
2T refers to transcript dated October 6, 2009, Volume II.
3T refers to transcript dated October 7, 2009.
4T refers to transcript dated October 14, 2009.
5T refers to transcript dated October 15, 2009, Volume I.
6T refers to transcript dated October 15, 2009, Volume II.
7T refers to transcript dated October 20, 2009.
8T refers to transcript dated October 20, 2009.
9T refers to transcript dated October 21, 2009.
10T refers to transcript dated October 22, 2009.
11T refers to transcript dated October 27, 2009.
12T refers to transcript dated October 28, 2009.
13T refers to transcript dated October 29, 2009.
14T refers to transcript dated January 12, 2010.
15T refers to transcript dated September 12, 2018.
16T refers to transcript dated March 21, 2019.
17T refers to transcript dated July 27, 2021.
18T refers to transcript dated May 5, 2023.

Each co-defendant was found guilty and sentenced to life in prison, for their respective roles and participation in the commission of these crimes. The Indictment against Mr. Tairi charged him with essentially all of the crimes for which DeJesus and Torres were previously indicted for and convicted of. (Da009). Felix DeJesus subsequently died in prison. (Da018). Mr. Tairi was arrested on December 1, 2006, and later tried before a Bergen County jury from September 29, 2009, to October 29, 2009, and was convicted of all charges. (Da001). Thereafter, on the same date that he was convicted, the Honorable Donald R. Venezia, J.S.C. sentenced Mr. Tairi to an aggregate term of life in prison, plus eighty years, with seventy years of parole ineligibility. (Da001).

Mr. Tairi filed a notice of appeal on February 9, 2010. On February 16, 2010, the Appellate Division issued a per curiam opinion affirming Mr. Tairi's conviction and sentence, but remanding the case for entry of an amended Judgment of Conviction, to vacate the imposition of the Law Enforcement Officers' Training and Equipment Fund fee. The Supreme Court denied Certification on July 12, 2012, and on February 17, 2013, Mr. Tairi's Judgment of Conviction was amended.

Subsequently, Mr. Tairi filed his first petition for Post-Conviction Relief (also known as "PCR"), which was denied by Judge Venezia on March 20, 2013. Approximately eight months later, on November 27, 2013, Mr. Tairi filed a notice

of appeal. On March 3, 2016, the Appellate Division issued a per curiam opinion reversing and remanding the matter for a new PCR hearing. The Appellate Division concluded that, given the limitations Judge Venezia imposed on PCR counsel, Mr. Tairi's attorney "was unable to fully investigate and assess the trial record for potential claims for relief." (Da024).

On April 28, 2017, Mr. Tairi filed his second petition for Post-Conviction Relief predicated on a recantation made by Edwin Torres to another inmate, Steven Kadonsky. The petition was denied on October 10, 2018 without an evidentiary hearing. (Da028). Approximately two weeks later, on October 26, 2018, Mr. Tairi filed a motion for reconsideration which was largely unopposed by the State. The court granted an evidentiary hearing. (Da050). The evidentiary hearing — which was limited to the testimony of Kadonsky with respect to Torres's recantation— was held on March 21, 2019. (16T).

Subsequently, on May 21, 2019, the court denied Mr. Tairi's petition, having found that the testimony did not constitute "newly discovered evidence," warranting a new trial. (Da052).

On November 7, 2019, Mr. Tairi filed a notice of appeal arguing, in part, that the PCR Judge should have afforded him an opportunity to examine Torres at an evidentiary hearing. On January 19, 2021, the Appellate Division affirmed the denial of Mr. Tairi's second petition for Post-Conviction Relief. However, on

March 3, 2021, after Mr. Tairi filed a motion for reconsideration, the Appellate Division remanded the matter for a continuation of the evidentiary hearing:

> We conclude the issue of the failure to produce Torres as a witness was preserved for appeal, and the PCR judge should have permitted defendant to produce Torres and question him during the evidentiary hearing. As a result, we grant defendant's motion for reconsideration. Additionally [,] we vacate our January 19, 2021 judgment and remand the matter to the Law Division to continue the evidentiary hearing for the purpose of permitting defendant to call Torres as a witness at that hearing. The court shall assist defendant to compel Torres' appearance as necessary…If the PCR court reaffirms its original decision, defendant…may file a supplemental brief within twenty-one days thereafter."

(Da071).

In preparation for the evidentiary hearing and examination of Torres, counsel for Mr. Tairi came across a Sworn Statement dated August 12, 2008– one year prior to Mr. Tairi's conviction – filed by Torres in the Federal Court for the District of New Jersey, in support of his Habeas Petition to overturn his conviction (hereinafter "Sworn Statement"). (Da074). The Sworn Statement disavowed Torres's involvement in the charged offenses. The Bergen County Prosecutor's Office was in possession of this Sworn Statement, having opposed the Habeas Petition. (See Da082).

The evidentiary hearing was conducted on July 27, 2021. (17T). Following the hearing, the court denied Mr. Tairi's second petition for post-conviction relief.

Although the Court was unmoved by the *primary* argument in the PCR – Torres's recantation to Kadonsky– the Superior Court found that Appellant's arguments related to the falsely Sworn Statement had "merit." (Da084). The court also made the following factual finding:

> Torres, as part of his federal habeas corpus petition submitted in August 2008, claimed to have no prior knowledge of the events stemming from the Staten Island robbery before the crime occurred and that he previously sought to introduce an affidavit from DeJesus (who was deceased at the time) that would have included false statements that supported Torres' claim that he had no knowledge of the Staten Island home invasion beforehand. . . **Based on the testimony provided at [Mr. Tairi's] trial, it is clear that Torres submitted false statements under oath in his Habeas Petition when he claimed to have no knowledge of the Staten Island robbery before it occurred.**

(Da084) (emphasis added).

Notwithstanding the conclusion drawn by the Superior Court that the most significant witness against Mr. Tairi testified falsely at trial, the PCR was nevertheless denied, because Petitioner purportedly did not "satisfy all three prongs of the Carter analysis, [and thus] the grant of a new trial for [Mr. Tairi] [wa]s not warranted." (Da084). However, the court did not analyze the Brady violation.

Appellant filed a supplemental brief with this Appellate Division, as expressly permitted. In his supplemental brief, Mr. Tairi noted that the "sworn affidavit – affixed to a Habeas Petition filed by Torres one year prior to [his (Mr. Tairi's)] trial . . . was not produced to Mr. Tairi before his trial, a palpable violation

of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Giglio, 405 U.S. 150 (1972).” (Da126). Mr. Tairi also noted that he “intend[ed] to timely file a separate PCR related to the apparent Brady and Giglio violation,” but he did not request that the Appellate Division refrain from reviewing the issue. (Da127).

While the Carter analysis / Torres recantation issue was pending before the Appellate Division, on January 13, 2022, Mr. Tairi filed the instant petition for Post-Conviction Relief, seeking a new trial based on the State’s failure to disclose Brady material or, alternatively, based on ineffective assistance of counsel. At the State’s request, all briefing on the instant PCR was suspended, pending decision by the Appellate Division. (Da141).

In a July 15, 2022 per curiam decision, the Appellate Division “address[ed] the issue **solely** in the context of whether the habeas petition, along with the testimony of Kadonsky, the affidavits referenced in Tairi IV, and . . . the testimony of Torres combine[d] to meet the standards justifying a new trial based on newly discovered evidence.” (Da145) (emphasis added). This Court did not evaluate whether the State’s conduct constituted a Brady violation.

Finally, on June 22, 2023, the PCR Court denied Mr. Tairi’s petition, finding that: (1) Mr. Tairi’s Brady and Strickland/Fritz claims were procedurally barred under Rule 3:22-4(b)(2)(B); (2) notwithstanding the procedural bar, Mr. Tairi failed to demonstrate a prima facie Brady or Strickland/Fritz claim; and (3) Mr.

Tairi's Jencks and Giglio claims were procedurally barred as they were raised for the first time in his reply brief, rather than in the original petition and original brief. (Da148).

Following the denial of his petition for Post-Conviction Relief, on July 7, 2023, Mr. Tairi filed a motion for reconsideration. The court denied that motion on August 7, 2023. (Da181).

This Appeal follows.

Issues Presented

1. Did the State violate its Brady obligations by failing to disclose Edwin Torres's Sworn Statement to Mr. Tairi prior to his trial?

2. Did the court err in not considering Giglio and Jencks in its analysis of Brady?

3. Would Edwin Torres's Sworn Statement have been admissible at Mr. Tairi's trial?

Statement of Facts

A. THREE HOME INVASIONS

This case stems from the conviction of Afrim Tairi related to three unsuccessful home invasions:

- Staten Island (victim Elenodorus ["Lenny"] Theoudoulou) – September 16, 1995;
- Englewood (victim Mark Urich) – November 1, 1995; and
- Teaneck (victim Howard Lewis) – November 8, 1995.

Staten Island Home Invasion

The first home invasion occurred in Staten Island at the home of Michael Theodoulou, Evangelia Theodoulou, and their son, Lenny. (1T 12-6). The family owned a diner in Staten Island where Mr. Tairi and his brother had worked for many years. (1T 12-11).

Lenny was 35 at the time he testified at trial. (1T 41-42). On September 16, 1995, the date of the incident, he was only 21 years old, living with his parents, and working at the diner. (1T 42-43). On the evening of the home invasion, Lenny was getting out of his car when a man (later identified as co-defendant Torres) approached him and placed a gun to his head. (1T 44:25). Lenny testified that he had never seen this man before. (1T 45:2). He described the gunman as shorter than him, maybe 5'8" or 5'7", with a thin build, and Hispanic. (1T 45:10). Lenny testified that he saw the man's face for 15-20 seconds, at a distance of less than one foot. (1T 46:11). Torres told Lenny that he wanted the car and directed him to get back in it. (1T 46:17). He pushed Lenny into the passenger's side and told him to get down on the floor as Torres continued to hold the gun to Lenny's head. (1T 46-24).

Lenny testified that he kept his head down in the vehicle so as not to look at Torres when a second man got into the backdoor passenger side. (1T 47:19). Lenny was instructed to get into the back seat and climb over the partition between the two seats while the second man kept a gun to his head. Id.

Eventually, the second man in the backseat duct taped Lenny around his head and hands. (1T 48). Lenny never saw the man in the backseat (1T 48-49), however, the man spoke to him—asking for information about his father's employment and girlfriend's residence. (1T 49). Lenny confirmed that there was only ever one individual with him in the back seat and that the individual did not have a stutter or accent. (1T 109, 110, 140). On the contrary, Mr. Tairi is Eastern European and speaks with a distinct accent and a stutter.

Next, the two men drove back to the house and instructed Lenny to get out of the car, then walked him to the front door at gunpoint. (1T 50). They instructed Lenny to open the door. (1T 50).

After obtaining entry into the house, the men asked Lenny what type of car he drove and where the keys for the car were. Lenny told the men that he drove a Corvette and that the keys were in a cup in the China closet in the dining room. Lenny gave them the keys. (1T 51-1).

Lenny testified that his father was either sleeping on the couch in the living room or that he was watching TV, when his father realized what was occurring, and stood up to confront the two individuals inside of the house. (1T 62). Lenny could not see what was happening because of the duct tape on his eyes (1T 62); however, he confirmed that only two men were in the house: one that was holding

the gun to his head, and one that was somewhere in the vicinity of his father. (1T 64:11).

Lenny testified that his mother heard the commotion from upstairs, came to the stairs, and put the light on. (1T 64). The men ordered her to come down and placed her next to Lenny on the floor between the foyer and the living room. (1T 64-65). The men then placed Mr. Theodoulou in the same area as Lenny and his mother, while at gunpoint. The individuals asked the family where their money and valuables were, and made threats to cut Lenny's fingers off, to rape Mrs. Theodoulou, and to kill them all. (1T-66). The individual who made the threats did not speak with an accent or stutter. (1T 109, 110, 140).

Lenny testified that there were only two men in the room with him and his parents, and that the men's voices were the same voices he had heard in the car. (1T 67-68). Lenny's mother and father told the men that the jewelry was in their basement. The men took all three victims down to the basement. (1T 68).

While in the basement, the two men duct taped Lenny's body, while keeping his arms flush with his torso. Mrs. Theodoulou gave the men all of their jewelry and told them that "this is what we have of value." (1T 71-72).

The two men decided that they were going to take Lenny for ransom and demanded $250,000.00. (1T 72-73). The man who made the demand did not speak

with an accent or stutter. (1T 109, 110, 140). The men then took Lenny to the car, a 1984 blue Mercedes sedan in the garage, and put him inside of the trunk. (1T 75).

The car traveled for about 40 to 45 minutes. (1T 76-77). After the car stopped, Lenny was able to release the trunk's lock and escape, running frantically down the street. (1T 78-79); (1T 80-8).

On April 28, 1997, Detective Callahan of the Bergen County Prosecutor's Office presented Lenny with a photo array, where he was able to identify with certainty the man who had held the gun to his head— Edwin Torres. (1T 92; 1T 94). Subsequently, a live lineup took place one week later in Paterson, where Lenny again identified Torres as the individual who held the gun to his head. (1T 95-96).

Mrs. Theodoulou was presented with a photo array and identified the man who did not have a mask on as Torres. (1T 177-3). She also went to Paterson for a live lineup with her husband and son, and identified the man not wearing the mask. **The individual she identified in this lineup procedure was not Afrim Tairi.** (1T 179). She testified that she only learned of Mr. Tairi's alleged involvement when she was told by law enforcement several months later. She testified that she was surprised to learn of Mr. Tairi's involvement. (2T 208-209) The family had a close relationship with Mr. Tairi and his brother because they worked at the Theodoulou family's diner and Mr. Tairi frequently acted as Michael

Theodoulou's tailor. (1T 105-5); (1T 102-104). Mr. Tairi had even been to the Staten Island house many times and had spoken to Lenny's father. (1T 102-107). Following the incident, Mr. Tairi and his brother continued to visit the diner. (10T 122).

The victims in the Staten Island home invasion did not see Afrim Tairi at their house on September 16, 1995, nor did they hear his voice. (1T 108-109). If they had, they would have recognized it. (1T 110-5); (1T 140); (1T 152-18 to 215-1); (1T 159). Mr. Tairi spoke with a heavy accent and stutter. (7T 158) They believed that Torres was one of the perpetrators, and the other was a Hispanic male. The only scintilla of a suggestion that a third individual was present in the house was the sound of footsteps above them while they were in basement. (1T 74). Further, no forensic evidence connected Mr. Tairi to the offense. (10T 118).

Englewood Cliffs Home Invasion

Mark Urich, victim of the November 1, 1995, home invasion, testified that on the night of the invasion, he was living in Englewood Cliffs and had owned several bagel stores at the time. (3T 19-20). On the date of the incident, he had stopped at his girlfriend's house with the day's financial records and a paper bag full of cash. He returned home at about 2:45 a.m. (3T 20-22). Urich testified he had pulled into his garage and was still sitting in his car when a person appeared at the driver's side window wearing a wolf mask, and holding a gun, which he testified

resembled a machine gun. He was told to open the garage door. (3T 24). When asked to describe the man's voice, Urich stated that there was nothing unusual about it (i.e., no accent or stutter). (3T 27) Urich opened the door to the house slightly to activate the alarm and then opened the garage door as directed to allow another individual to enter. (3T 32-33). Following an altercation that lasted 35-40 seconds, the alarm sounded, and the perpetrators ran off. (3T 33-36) (3T 79).

Urich testified that he later received a telephone call demanding ransom money in the amount of $250,000. (3T 50-51). He did not know who was speaking but stated that there was nothing unusual or distinctive about the voice of the caller. (3T 50-51). When describing the voice of the man talking to him, Urich did not believe the man had an accent, stutter, lisp or any other distinguishable marks in his voice. (3T 82). Urich did not believe he had ever seen Mr. Tairi before. (1T 89-90).

No trial witness nor victim identified Mr. Tairi in connection with the Englewood Cliffs home invasion. Further, no forensic evidence connected Mr. Tairi to the offense. (10T 118).

Teaneck Home Invasion and Murder

The victim in the November 8, 1995, Teaneck home invasion was 49-year old Howard Lewis, an heir to the Sealy Mattress fortune. (1T 20). Mr. Lewis

suffered from mental and physical disabilities but continued to work every day at the Sealy Mattress factory in Paterson. Id.

On the date of the incident, Mr. Lewis left work early because his mother had a doctor's appointment. After leaving work, Mr. Lewis stopped at a bank in Fair Lawn, and withdrew a few thousand dollars, then continued his drive home. (1T 20-21). When Mr. Lewis arrived home, he exited his car and was accosted in the garage by two men, one of whom had a gun. Mr. Lewis attempted to defend himself but was overpowered and beaten by the men. He was then duct taped and handcuffed while the men took his wallet and money. Ultimately, Mr. Lewis died on the garage floor after choking on his own vomit. (1T 20-21).

The two men then entered the house. They duct taped and handcuffed Mr. Lewis's mother, Lilian Lewis. The men brought Mr. Lewis's body upstairs and placed him on the floor. They told Ms. Lewis that her son was sleeping from some sleeping pills that they had given him. Eventually, they fled the house in Mr. Lewis's Cadillac. (1T 22-6).

Co-defendant Felix DeJesus was present at the Lewis residence and involved in the burglary. He left the home with Mr. Lewis's credit card and, at the direction of a man named Alexander Cowan a/k/a "Father Nation," gave the credit card to an individual named Dennis Rolon. (5T 162). Rolon testified that, on the day of the home invasion, DeJesus came to his place of employment at Father Nation's

direction because Father Nation sent him to use a credit card to purchase some clothes. (5T 161-62). Rolon stated he knew DeJesus through Father Nation. Father Nation was a "stick up man" and drug dealer in Paterson. (5T 161). Rolon believed that the clothes he was told to purchase were for Father Nation. (5T 162).

After making the purchase as directed, Rolon went to Father Nation's house in Paterson and gave the new clothes to him. (5T 168-170). DeJesus was present at Father Nation's house. Id. Rolon overheard DeJesus tell Father Nation that there were police and caution tape around the Lewis residence. (5T 168-170).

Rolon was eventually approached by the Bergen County Prosecutor's Office and charged with fraudulent use of a credit card. (5T 173). He gave a statement incriminating DeJesus and Father Nation at that time, but not Mr. Tairi.[2] (5T 179). In fact, Rolon testified that he did not know Mr. Tairi. (5T 179). He agreed to cooperate with law enforcement as a confidential informant and wore a wire during conversations with DeJesus. Id. As a result of his suspected cooperation, Rolon testified that DeJesus delivered rat food to his house with a note that read "rat food for a rat." (5T 174-178).

No trial witness nor victim identified Mr. Tairi in connection with the Teaneck home invasion. Furthermore, no forensic evidence connected Mr. Tairi to the offense. (10T 118).

[2] Father Nation was never charged in the home invasion and murder.

B. ARREST OF FELIX DEJESUS AND EDWIN TORRES

From November 2005 through July 2006, no arrests were made in connection with the home invasions. Rather, Felix DeJesus was arrested in December 2005 for credit card fraud related to the fraudulent purchases of clothes from Lewis's credit card – a charge that was subsequently dismissed.

Detective Callahan suspected that DeJesus was involved in the Teaneck home invasion, and eventually connected him to the other two home invasions. Callahan testified that DeJesus was living with his sister, Marisol, and Edwin Torres, who was Marisol's boyfriend. (l0T 21-22). He stated that he went to Paterson quite a bit and looked at the Sealy Mattress factory and DeJesus' residence and frequently saw DeJesus with Torres. (10T 23). He also stated that once he focused on DeJesus, he was able to identify Torres as a coconspirator. (l0T 23).

Callahan testified he was confident that the second perpetrator was Torres but could not identify an alleged third coconspirator. (l0T 27-28). He hadn't seen DeJesus and Torres with a third party and the three home invasions did not lead him to a third suspect. (l0T 28-29).

Callahan testified that Torres was arrested on the morning of July 11, 1996, followed by the arrest of DeJesus later that morning. (l0T 44). Torres and DeJesus were interviewed for several hours, and initially uncooperative and disrespectful.

(10T 45). Torres and DeJesus requested an opportunity to consult with one another while in custody, which was granted. (7T 102). Only *after* that meeting did they decide to frame Mr. Tairi, who was living in Europe at the time.[3] (l0T 41-42); (llT 45-46); (llT 49-50).

DeJesus and Torres' fabricated statements, however, were materially inconsistent as to time and place, and as to manner and means. Also, DeJesus and Torres did not disclose the identities of their true coconspirators: DeJesus's father (Torres' stepfather), who had already fled the country, and Alexander Cowan (Father Nation), who had been murdered. Their stories were not consistent with one another's, and differed substantially from the victims' trial testimony—making them unreliable at best, and presumably fabricated:

Staten Island Home Invasion

Statement Subject Matter	**DeJesus Statement to Authorities**	**Torres Statement to Authorities**	**Torres Trial Testimony**	**Victim Testimony**
Gunpoint	DeJesus "did not want to expound on the details" but Torres wanted him present because he "wasn't afraid to stick a gun in somebody's face." (Da201).	DeJesus approached Lenny at gunpoint. (Da199).	DeJesus and Mr. Tairi captured Lenny at gunpoint. (7T 16).	Torres captured Lenny at gunpoint. (1T 45).

[3] Torres later attempted to suppress this statement, admitting that he was easily manipulated and under the influence of drugs at the time.

The number of coconspirators in the living room		DeJesus, Torres, and Mr. Tairi confronted the victims in the living room. (Da199).	DeJesus, Torres, and Mr. Tairi confronted the victims in the living room. (7T 23).	Only saw two Hispanic males. (Da191).
The number of coconspirators in the basement			Three men were in basement with victims. (7T 25, 168).	Only two men were in basement with victims. (1T 71-74); (Da 192).
Masks		All three had black ski masks. (Da199)	All three had black ski masks. (7T 18, 172).	One had pig face mask. One did not wear a mask. (1T 155).

Englewood Cliffs Home Invasion

Statement Subject Matter	**DeJesus Statement to Authorities**	**Torres Statement to Authorities**	**Torres Trial Testimony**	**Victim Testimony**
Identity of coconspirators	DeJesus and Torres conducted the home invasion. (Da202).	DeJesus and Tairi conducted the home invasion. (Da199).	DeJesus and Tairi conducted the home invasion. (7T 52)	The men who conducted the home invasion did not speak with an accent or stutter. (3T 51, 82).
The identity of the coconspirator	Tairi was "wheel man" and remained in car. (Da202).	Torres was "wheel man" and remained in car. (Da199).	Torres was "wheel man" and	The men who conducted the home invasion did

who was in the car			remained in car. (7T 52)	not speak with an accent or stutter. (3T 51, 82).
Identity of the coconspirator who entered the garage	Torres entered the garage. DeJesus could not make it initially. Later he entered and struck the victim. (Da202).	Tairi entered the garage and struck the victim. DeJesus did not. (Da199).	Tairi entered the garage and struck the victim. DeJesus did not. (7T 55).	The men who conducted the home invasion did not speak with an accent or stutter. (3T 51, 82).
Involvement of DeJesus's father	Did not identify DeJesus's father as participant.	Did not identify DeJesus's father as participant.	DeJesus' father was a participant. (7T 47)	

Teaneck Home Invasion

State-ment Subject Matter	**DeJesus 1st Statement to Authorities**	**DeJesus 2nd Statement to Authorities**	**Torres Statement to Authorities**	**Torres Trial Testimony**	**Victim Testimony**
Identity of the coconsp-irators	The invasion was conducted by two coconspirators: Ed and Joe. (Da 189).	The invasion was conducted by two coconspirators: Edwin and Tairi. (Da200).	"Afrim did everything. He went in the house" (Da195).	The invasion was conducted by Torres and Tairi. DeJesus was the "watch out guy." (7T 68).	The invasion was conducted by two men: one who wore a hood and one who wore a mask.

Involve-ment of Father Nation	Did not identify Alexander Cowan a/k/a Father Nation as coconspirator	Did not identify Alexander Cowan a/k/a Father Nation as coconspirator	Did not identify Alexander Cowan a/k/a Father Nation as coconspirator	Did not identify Alexander Cowan a/k/a Father Nation as coconspirator (8T 213)	
Masks				Torres had a Halloween mask and Tairi had a ski mask. (8T 215)	One had mask, one did not.

C. TORRES' TESTIMONY AGAINST AFRIM TAIRI

Since the date of his arrest, Torres has done – and said – whatever necessary to salvage his freedom.

Initially, Torres gave a post arrest statement attempting to deflect blame in lieu of being charged.

Eventually, however, he was charged, prosecuted and later tried before the Honorable John A. Conte, J.S.C., and a jury, from November 2, 1998, through November 16, 1998. A jury returned a verdict of guilty on all charges. Judge Conte sentenced Torres on December 18, 1998, to an aggregate term of life plus sixty-nine (69) years in prison with a fifty-eight (58) year parole disqualifier.

He appealed his conviction, and his conviction was then affirmed in 2001. State v. Torres, No. A-5292-97T4 (App. Div. December 10, 2001). The Supreme Court denied Torres's petition for certification in an order filed February 14, 2002. State v. Torres, 171 N.J. 338 (2002). On April 25, 2002, Torres filed a verified petition for post-conviction relief. Hearings were conducted on November 15, 2004, and March 23, 2005. On April 5, 2005, Judge Conte issued a written opinion, denying Torres post-conviction relief. Torres appealed the denial of his PCR petition to the Superior Court of New Jersey, Appellate Division. The Appellate Division affirmed Judge Conte's denial of post-conviction relief in a per curiam opinion decided on July 25, 2007. State v. Edwin Torres, Docket No. A-6445-03T4 (App. Div. 2007). The Supreme Court denied certification on October 24, 2007. State v. Torres, 192 N.J. 599 (2007).

On December 31, 2008, in a desperate, final attempt to salvage his freedom, Torres filed an Amended Petition for habeas corpus in the Federal District Court for the District of New Jersey. Torres v. Ricci, Civil Action No. 08-4046 (SDW). In the Petition, Torres sworn, under penalty of perjury, that he was being held unlawfully because "[c]ounsel on the initial PCR ignored Petitioner's request to investigate claims that Petitioner's co-defendant would have submitted an affidavit on his behalf, which would have explained that **Petitioner had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou."** (Da005)

(emphasis added). The Bergen County Prosecutor's Office was counsel of record in the Habeas action and opposed the Petition.

Within months of the filing of the Petition, Torres wrote a letter to the Bergen County Prosecutor's Office, seeking a reduction in his sentence. His trial testimony with respect to his letter was as follows:

> Q: Mr. Torres, do you remember how it came about that my office came to speak to you at Trenton regarding your testimony or regarding whether you were interested in testifying?
>
> A: I wrote you a letter.
>
> Q: When did you write the letter?
>
> A: Either May or June.
>
> Q: Why did you write the letter?
>
> A: Try to get a deal.
>
> Q: And why did you want a deal?
>
> A: I didn't want to die in prison.

(8T 252).

The State offered Torres a reduction in his sentence if he testified against Mr. Tairi. On October 20, 2009, Torres testified at Mr. Tairi's trial. (7T 4). By then, codefendant DeJesus had died in prison from cancer. (7T 125).

The State acknowledged to the jury that "Edwin Torres is the best evidence that [the state] can give you with respect to the involvement of Afrim Tairi." (1T 26). As a result of his testimony against Mr. Tairi, Torred will be released in two years, on or about July 11, 2026.

Argument

I. Mr. Tairi is Entitled to a New Trial Based on the State's Failure to Produce a Sworn Statement that Categorically Undermined the Credibility of an Important State Witness

Rule 3:22-2(a) provides that a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." When the State fails to provide a criminal defendant with exculpatory evidence in its possession, the defendant's constitutional rights are violated, necessitating a new trial. See State v. Marshall, 148 N.J. 89, 154, cert. denied, 522 U.S. 850 (1997) (citing State v. Knight, 145 N.J. 233, 245-46 (1996)). Here, the State neglected its Brady, Jencks, and Giglio obligations and failed to produce Edwin Torres' Sworn Statement to Mr. Tairi; thus, violating his rights.

a. The Failure to Produce Torres' Sworn Statement to Mr. Tairi Constitutes a Brady Violation

The Superior Court's determination that Torres' Sworn Statement was not Brady material – even though it categorically undermined his testimony as the State's primary witness against Mr. Tairi – is erroneous.

It is well established that the State has a "constitutional obligation to provide criminal defendants with exculpatory evidence in the State's possession." Marshall, 148 N.J. at 154, (citing Knight, 145 N.J. at 245-46); see also State v.

Morton, 155 N.J. 383, 413 (1998) (A prosecutor's obligation to "turn over material, exculpatory evidence to the defendant" is well established and does not require extended discussion"). This obligation extends as well to impeachment evidence within the prosecution's possession. Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing United States v. Bagley, 473 U.S. 667, 676 (1985)); see also State v. Nelson, 155 N.J. 487, 497-98 (1998); Attorney General Law Enforcement Directive No. 2019-6 (Dec. 4, 2019) (confirming that Brady material includes prior inconsistent and exculpatory statements made by a State's witness) (citing State v. Cahill, 125 N.J. Super. 492 (Law Div. 1973)). Accordingly, the Brady rule is invoked where information is discovered after trial "which had been known to the prosecution but unknown to the defense." United States v. Agurs, 427 U.S. 97, 103 (1976). Summarily, a Brady violation occurs where: (1) the evidence at issue is favorable to the accused, either as exculpatory or impeachment evidence; (2) the State suppressed the evidence, either purposely or inadvertently; and (3) the evidence is material to the defendant's case. See Nelson, 155 N.J. at 497.

With respect to the first element, evidence found to be favorable to the accused has generally involved information that impeaches the testimony of a government witness. See State v. Henries, 306 N.J. Super. 512, 535-36 (App. Div. 1997) (finding that newly discovered evidence—evidence that would impeach and powerfully undermine the credibility of the prosecutor's principal witness—

warranted a new trial in a murder case). Courts often presume the existence of this Brady factor, and few courts have considered exactly what must be shown in order to establish that withheld evidence is favorable to the defendant. However, it has been recognized by courts that favorability is not limited to impeachment, in cases where evidence simply bolsters a defendant's claims. See Nelson, 155 N.J. at 497.

As to the second element, the prosecutor is charged with knowledge of evidence in his file, "even if he has actually overlooked it." Agurs, 427, U.S. at 110. Thus, even an inadvertent failure to disclose evidence may violate Brady. State v. Brown, 236 N.J. 497, 519 (2019). The State is deemed to have suppressed evidence when it had either actual or imputed knowledge of the materials. Nelson, 155 N.J. at 498. Knowledge is attributed to the trial prosecutor when the evidence is in the possession of "the prosecutor's entire office …, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." Id. at 499 (quoting Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 824 (10th Cir. 1995)) (alteration in original).

The third and final element of a Brady claim involves the materiality of the suppressed evidence. "[E]vidence is material for Brady purposes 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Marshall, 148 N.J. at 156

(quoting Bagley, 473 U.S. at 682 (1985)). In Nelson, 155 N.J. at 500, the New Jersey Supreme Court further explained this element as follows:

> [A] showing of materiality does not require demonstration by a preponderance that a disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles v. Whitley, supra, 514 U.S. at 434, 115 S.Ct. at 1565. Rather, the question is whether in the absence of the undisclosed evidence the defendant received a fair trial, "understood as a trial resulting in a verdict worth of confidence." Id. at 434, 115 S.Ct. at 1566.

Here, the State obtained the sworn Petition for Habeas Corpus of Edwin Torres one year prior to Mr. Tairi's trial, wherein Torres affirmed that he had no knowledge of the State Island robbery and kidnapping of Lenny Theodoulou; that he was prepared to submit an affidavit from a witness confirming that fact; that additional evidence in the form of letters existed that would corroborate that he did not participate in the Staten Island home invasion and kidnapping; and that his counsel failed to contact the witness who would have provided proof to support same. In addition, Torres affirmed that: (1) he was intoxicated at the time he incriminated Mr. Tairi (a fact that could be corroborated by Torres' mother, cousin, and cousin's daughter); and (2) he was deceived by arresting officers at the time he incriminated Mr. Tairi. (Da074). Indeed, the State opposed Torres' Habeas Petition.

At Mr. Tairi's trial, the State elicited testimony from Torres that he *did* have knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou, and

that he participated in this crime with Mr. Tairi (notwithstanding the evidence in its possession to the contrary). (7T 13:1-8; 12:11-17; 13:9-4). Mr. Tairi's counsel was never provided with Torres' falsely Sworn Statement, even though it stood in stark contrast to his trial testimony.

It is indisputable that when a State witness—particularly one as critical as Torres—has perjured himself to a Federal District Court in relation to the subject matter of his testimony, the evidence is definitively considered impeachment material and would therefore be favorable to the defense. Evidence that serves to undermine the credibility of a State's witness is favorable, material, and probative; therefore, constitutionally mandating disclosure to a criminal defendant.

It is immaterial whether the suppression of Brady evidence was intentional or inadvertent here. The record is unequivocal that the Bergen County Prosecutor's Office *did* have this evidence in its possession when it called Torres to testify before a Bergen County jury at Mr. Tairi's trial. Thus, the State's obligation under Brady was triggered, mandating disclosure to Mr. Tairi—the State failed to do so.

Finally, the suppressed evidence was material. Torres was—by the State's own admission—the most important evidence against Mr. Tairi. (See 11T 41:17-21 (quoting Assistant Prosecutor Fantuzzi on behalf of the State "Defense counsel made a big point about the fact that I told you during my opening that Edwin Torres was the best evidence I have, and I submit to you, ladies and gentlemen,

that that [sic] is true")). By any governing standard, however, Torres' credibility would have been undermined had the trial jury had the opportunity to consider the withheld, falsely Sworn Statement. Rather, the State deprived Mr. Tairi of a fair trial by suppressing the evidence, and justice requires that Mr. Tairi be afforded a new trial.

i. In Accordance With New Jersey Law, the Admissibility of Torres' Sworn Statement at Trial Does Not Impact its Status as Brady Material

In denying Mr. Tairi's Petition, the Superior Court concluded erroneously that Torres' sworn statement was not admissible as a prior inconsistent statement pursuant to N.J.R.E. 803(a)(1) because Torres "did not disclaim knowledge of the Staten Island home invasion" and he could not "be impeached on statements he did not conceive." (Da173-74). The court reiterated this conclusion in its August 7, 2023 Order and Opinion denying Mr. Tairi's Motion for Reconsideration. (Da185).

At the outset, the admissibility of Torres' Sworn Statement at trial does **not** impact its status as Brady material or the State's obligation to disclose its existence. Indeed, almost all courts considering the issue have held that inadmissibility at trial does not preclude evidence from being designated as Brady material subject to disclosure. See e.g., Dennis v. Sec'y, Penn. Dep't of Corr., 834 F.3d 263, 307-11 (3d Cir. 2016) (en banc) (holding that it is "an unreasonable application of, and contrary to, clearly established law" for a court to hold that

inadmissible evidence is automatically immaterial under Brady); Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) ("evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence there could be no justification for withholding it"); United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002) (evidence is Brady material if it "could lead to admissible evidence" or "would be an effective tool in disciplining witnesses during cross-examination"); Johnson v. Folino, 705 F.3d 117, 130 (3d Cir. 2013) ("inadmissible evidence may be material if it could have led to the discovery of admissible evidence"); Nicolas v. Att'y Gen. of Md., 820 F.3d 124, 130 n.4 (4th Cir. 2016) ("Brady material does not have to be admissible under state evidence rules as long as it could lead to admissible evidence") (citing Kyles, 514 U.S. at 434); Spence v. Johnson, 80 F.3d 989, 1005 n.14 (5th Cir. 1996) ("inadmissible evidence may be material under Brady").

Accordingly, even if the Sworn Statement was not admissible, its disclosure to the defense was nevertheless mandated.

1. Torres' Sworn Statement *Would* Be Admissible at Trial Under N.J.R.E. 803(a)(1)

Contrary to the Superior Court's June 22, 2023 and August 7, 2023 Opinions, Torres' sworn statement would be admissible at trial under N.J.R.E. 803(a)(1).

The only objective conclusion here is that Torres' Sworn Statement was inconsistent with his trial testimony. At Mr. Tairi's trial, Torres testified that he

had knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou, and that he participated in the crime with Mr. Tairi. (17T 13:1-8; 12:11-17; 13:9-14). Torres' trial testimony directly contradicted his Sworn Statement, wherein he claimed that his codefendant, DeJesus, "would have submitted an affidavit on his behalf . . explain[ing] that [Torres] had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou." (Da074). Torres further alleged that his PCR counsel "ignored [his] request to investigate claims that [DeJesus] would have submitted [the] affidavit on his behalf." (Da074). By signing the petition under penalty of perjury, Torres—the declarant—affirmed that there existed proof that he had no knowledge of the crime in Staten Island.

The only reasonable inference that can be drawn from the Sworn Statement is that Torres disavowed his involvement in the Staten Island kidnapping of Lenny Theodoulou under penalty of perjury. Indeed, that is how the Superior Court interpreted the Sworn Statement in its November 17, 2021 Opinion:

> Torres, as part of his federal habeas corpus petition submitted in August 2008, claimed to have no prior knowledge of the events stemming from the Staten Island robbery before the crime occurred and that he previously sought to introduce an affidavit from DeJesus (who was deceased at the time) that would have included false statements that supported Torres' claim that he had no knowledge of the Staten Island home invasion beforehand. . . . **Based on the testimony provided at Petitioner's trial, it is clear that Torres submitted false statements under oath in his Habeas Petition when he claimed to**

> **have no knowledge of the Staten Island robbery before it occurred.**

(Da108-10) (emphasis added).

Having already made that factual finding—which was wholly appropriate—the court adopted the manifestly incorrect argument that the Habeas Petition and Sworn Statements contained therein were not admissible at Mr. Tairi's trial. Torres' statements in his Habeas Petition were inconsistent with his trial testimony and would have been admissible under N.J.R.E. 803(a)(1).

2. Torres' Sworn Statement is Admissible Under N.J.R.E. 608

In addition, because Torres perjured himself when submitting the Habeas Petition to the Federal District Court for the District of New Jersey, the Sworn Statement is also admissible under N.J.R.E. 608. Indeed, the Petition itself requires the declarant to swear to the truthfulness of the contents of the Petition. Torres' sworn statement is admissible under N.J.R.E. 608 as evidence of a witness's character for truthfulness or untruthfulness. N.J.R.E. provides that "[i]n a criminal case . . . the court may, on cross-examination, permit inquiry into specific instances of conduct **that are probative of the character for truthfulness or untruthfulness of the witness**" so long as the proponent of the specific conduct inquiry shows that "a reasonable factual basis exists that the specific instance of

conduct occurred, and the specific instance of conduct has a probative value in assessing the witness's character for truthfulness." N.J.R.E. 608 (emphasis added).

Here, it is irrefutable that the specific conduct occurred; Torres filed the Habeas Petition in the District Court for the District of New Jersey. (Da074). In addition, Torres' Sworn Statement has probative value in assessing his character for truthfulness. Indeed, the PCR Judge has already found that "the Habeas Petition is certainly relevant because it . . . touched Torres' credibility," (Da171), making it plainly admissible pursuant to N.J.R.E. 608.

3. Torres' Sworn Statement is Admissible Because He Conceived the Contents of the Sworn Statement

The PCR Judge maintained a preconceived notion that Mr. Tairi was guilty of the crimes charged and would not grant the Petition, regardless of the merits of the application. Recognizing that the Sworn Statement should have been produced by the State in advance of Mr. Tairi's trial, the Court pivoted, concluding that the Sworn Statement was not Brady because another inmate assisted with drafting the Habeas Petition, notwithstanding the fact that Torres swore under penalty of perjury to the accuracy of the contents.

In reaching the conclusion that Torres' Sworn Statement would not be admissible under N.J.R.E. 803(a)(1), the PCR Court found that the statement was not material, because "the court knows now that Kadonsky conceived the contents of the petition; indeed, these are not truly Torres words." (Da172-73).

At the outset, this finding ignores Torres' testimony at the July 27, 2021 evidentiary hearing. At the hearing, Torres admitted that the substance of the Petition was conceived years *prior* and memorialized in communications between Torres and DeJesus, as well as Torres and defense counsel. Torres admitted that he possessed letters from DeJesus, wherein DeJesus advised that "he was willing to give an affidavit on [Torres'] behalf." (7T 47:3 – 49:20). These letters were prepared and sent in the late 1990s and early 2000s (i.e., nearly a decade *prior* to Torres seeking assistance from Kadonsky with the Habeas Petition). In fact, following his testimony, the Bergen County Prosecutor's Office subpoenaed Torres for the letters. Although Torres no longer possessed many of the letters, including letters to defense counsel,[4] he was able to produce at least one letter from DeJesus, confirming that the substance of the arguments in the Sworn Statement **were actually conceived by Torres and DeJesus, *not* Kadonsky**.

The Superior Court's findings were erroneous, merely pretextual, and designed purely to support a decision to deny the Petition for Post-Conviction Relief.

b. The Failure to Produce to Mr. Tairi the Sworn Statement Prior to His Trial Constitutes Giglio and Jencks Violations

[4] Discovery constitutes Brady material if it is impeaching or exculpatory, but *also* if it has the potential to lead to other discoverable information. By withholding the Sworn Statement, Mr. Tairi was prevented from seeking additional records that existed and were confirmed by Torres.

Mr. Tairi's petition for post-conviction relief was predicated on the State's failure to disclose evidence material to the defense. Although Brady is the seminal authority in support of that mandate, Brady encompasses various forms of impeachment material, such as Giglio and Jencks. See Giglio, 405 U.S. at 153-55 (holding that Brady encompasses impeachment evidence); see also Henries, 306 N.J. Super. at 535-46 (finding that impeachment material was Brady material mandating disclosure); Nelson, 155 N.J. at 497 (explaining that evidence that simply bolsters a defendant's claims may be Brady material).

Notwithstanding the foregoing, the PCR Judge erroneously refused to consider Jencks and Giglio in conjunction with his Brady analysis. More specifically, in denying Mr. Tairi's petition for post-conviction relief, the Court incorrectly concluded that Mr. Tairir raised his Giglio and Jencks claims for the first time in a reply brief and thus, found that both arguments were procedurally barred. (Da178-79). The court reemphasized this finding in its denial of Mr. Tairi's motion for reconsideration. (Da187). This determination was rendered, notwithstanding the fact that Appellant's Petition for Post-Conviction relief cited Brady, in addition to other authority, *including* Giglio.

The Superior Court's decision to "not consider" Giglio and Jencks in conjunction with the decision to deny Mr. Tairi's petition for post-conviction relief based on Brady was palpably incorrect. The obligation to produce exculpatory

evidence in a timely manner pursuant to Brady is not diminished by the fact that such evidence *also* constitutes evidence that must be produced pursuant to other authority. Indeed, the obligation to produce impeachment material to the defense existed long *prior* to the United States Supreme Court decision in Brady v. Maryland, 373 U.S. 83, 87 (1963). See State v. Hunt, 25 N.J. 514, 531 (1958); see also State v. Farmer, 48 N.J. 145, 152 (1966); State v. Pacheco, 38 N.J. 120, 126 (1962).

The Court's failure to consider Jencks, Giglio or other authority in its Brady analysis is reversible error.

i. The Failure to Produce Torres' Sworn Statement to Mr. Tairi Constitutes a Giglio Violation

"Evidence impeaching the testimony of a government witness falls within the Brady rule when **the reliability of the witness** may be determinative of a criminal defendant's guilt or innocence." State v. Carter, 91 N.J. 86, 111 (1982) (citing Giglio, 405 U.S. at 150) (emphasis added). The New Jersey Supreme Court in Carter held that "the State's obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause **even where the evidence concerns only the credibility of a State's witness**." Id. (emphasis added).

There can be little doubt that the State's case against Mr. Tairi was predicated on the reliability and credibility of Torres. Indeed, the State stipulated to that fact at trial. During its opening, the State referred to Torres as the best evidence it had. (See 1T26:8-10). During summation, the State referred to Torres' testimony as "extremely important." (See 12T48:25 – 49:1). The State recognized that Torres' credibility was an issue but did not "think" that the reduction of his life sentence alone made him unworthy of belief.

> Back to Mr. Torres. Mr. – Mr. Simms doesn't want you to believe Mr. Torres based on the deal that he got, but I would submit to you that the 30 years without parole, ladies and gentlemen, is not any slap on the wrist, it's a substantial period of time, and I'm sure Mr. [Torres] doesn't believe that he was given any tremendous break. I don't think, based on the circumstances, that it would be enough for you to disregard his testimony based on the fact that his sentence was reduced.

(12T 65:6-16).

Torres' Sworn Statement supports Mr. Tairi's defense— that he did not commit the crimes charged, and that Torres lied when he inculpated Tairi in the Staten Island home invasion and kidnapping. As such, the Sworn Statement clearly falls within Brady.

On the other hand, if Torres' sworn Habeas Petition was false, and strategically invented to overturn his conviction, then he perjured himself before the federal court in relation to the facts of this matter, and the Superior Court has

sustained their finding on a fictional basis. See (Da108) ("[D]uring the evidentiary hearing in July 2021, Torres was forthcoming about his effort to introduce the false affidavit for his habeas petition"). Although the Superior Court more recently credited Torres for being candid about his false statements, that does not retroactively cure the Giglio violation from years prior. If Torres perjured himself to the Federal Court one year before Mr. Tairi's trial, and the State possessed the perjured statement, Giglio mandates disclosure of the perjured statement.

ii. The Failure to Produce Torres' Sworn Statement to Mr. Tairi Constitutes a Jencks Violation

It is reversible error when the Government fails to produce "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at trial." Jencks v. United States, 353 U.S. 657, 672 (1957). Congress has codified this rule with the Jencks Act, providing that:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18.U.S.C. § 3500(b).[5]

[5] Although not required under the Jencks Act, the government may voluntarily disclose witness statements *before* a witness testifies. United States v. Murphy, 569 F.2d 771, n.10 (3d Cir. 1978). In the District of New Jersey, for example, it is the government's practice "to provide Jencks material in advance of a directive to avoid delays." United States v. Evans, Crim. No. 2:21-cv-899 (WJM), 2022 WL 16631263, at *3 (D.N.J. Nov. 2, 2022).

Under the Jencks Act, statements requiring production include "a written statement made by [the] witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e).

As the Third Circuit has emphasized, in determining whether a statement must be produced pursuant to the Jencks Act, "[w]hat matters is that the statement relates to the witness's testimony and is in the possession of the government." United States v. Zomber, 299 Fed. Appx. 130, 134 (2008).

In line with federal law on the disclosure of witness statements, New Jersey courts have long recognized the rule "in both civil and criminal cases." State v. Sullivan, 43 N.J. 209, 249 (1964). In fact, the authority in this State has remained settled for decades—the defense is entitled to inspect and use prior notes or statements on cross-examination if the "prior notes or statements relat[e] to the subject matter of [the witness's] testimony." Hunt, 25 N.J. at 531. In other words, in a criminal case, **as long as a witness's prior statement relates to his or her testimony, the statement is subject to disclosure**. See Farmer, 48 N.J. at 152 (discussing the Hunt decision and explaining that "if the witness had made notes or a statement . . . covering the topics of his testimony, the notes or statement were . . . subject to defendant's demand, even though the witness had not used them to refresh his recollection before trial"); Pacheco, 38 N.J. at 126 ("[t]he law in this State is clear that after a witness for the prosecution has testified, the defendant in a

criminal case is entitled to inspect and use on cross-examination any prior notes or statements made by the witness relating to the subject matter of his direct testimony").

In fact, New Jersey goes even further than federal law, and requires that a witness's statement be disclosed during pretrial discovery rather than after the witness testifies at a hearing. State v. Robinson, 229 N.J. 44, 61, 77 (2017). Specifically, Rule 3:4-2(c)(2) requires that, where a prosecutor seeks pretrial detention:

> [T]he prosecutor no later than 24 hours before the detention hearing shall provide the defendant with (A) the discovery referenced in subparagraph (1) above, (B) all statements or reports relating to the affidavit of probable cause, (C) all statements or reports relating to additional evidence the State relies on to establish probable cause at the hearing, (D) all statements or reports relating to the factors listed in N.J.S.A. 2A:162-18(a)(1) that the Statement advances at the hearing, and € all exculpatory evidence.

The New Jersey Supreme Court has interpreted this rule[6] to require disclosure of "any initial police reports about . . . witnesses" and "copies of statements or reports of . . . eyewitnesses."

Applying this rule here, the State had an unequivocal obligation to disclose Torres' Sworn Statement to Mr. Tairi, as it indisputably constituted a statement

[6] In Robinson, 229 N.J. 44, the Supreme Court analyzed disclosure under Rule 3:4-2(c)(1)(B); following subsequent amendment and revision, the rule now appears as Rule 3:4-2(c)(2), but "[t]he current rule retains the same categories of discovery materials." State v. Hyppolite, 236 N.J. 154, n.2 (2018).

related to his testimony. In particular, portions of Torres' Sworn Statement related to arguably, the most relevant subject matter of his trial testimony: his knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou. See 7T, Volume I, 10:13-25, 11:7-10, 13:1-8 (Torres knew a robbery would occur in Staten Island); id. at 13:17-19 (Torres knew a kidnapping would occur in connection with the Staten Island robbery); id. at 12:11-17, 13:9-14 (Torres helped plan the robbery and knew what his role would be); id. at 11:11-12,12:2-3 (Torres knew who the victims were); id. at 12:24 – 13:6 (Torres even travelled to Staten Island on two prior occasions to "stake" the area of the house); id. at 13:21 – 17:3, 18:17 – 24:24, 25:9 – 31:18, 32:20 – 42:6, 154:17 – 156:7, 164:5 – 179:12 (Torres recalled details about when the robbery occurred, how he and his codefendants arrived at the location, and how the robbery and kidnapping unfolded, including what each perpetrators' role was and the victims' reactions); id. at 17:4 – 18:16, 25:1-8 (Torres knew two weapons, duct tape, handcuffs, ski masks, and gloves were used in perpetrating the Staten Island robbery and kidnapping); id. at 42:19 – 43:24, 119:23 – 122:7 (Torres wrote the Theodoulou family's address on the envelope that was used to mail the ransom note, which he also wrote); id. at 114:23 – 115:8 (Torres identified the Mercedes taken during the Staten Island robbery); id. at 118:11 – 119:5 (Torres knew DeJesus sold jewelry taken during the Staten Island robbery); id. at 144:2 – 149:6 (Torres identified various photographs of the

Theodoulou residence); id. at 180:2-3 (Torres participated in the Staten Island robbery to "get money").

Although, as set forth supra, the State also had a duty to disclose Torres' Sworn Statement pursuant to Brady, New Jersey law required disclosure of the statement notwithstanding whether it ultimately impeached Torres.

II. There Exists No Procedural Bar to the Relief Sought in the Petition

a. The Issue Before the Court Has Never Been Raised or Adjudicated, Nor Could it Have Been Raised or Adjudicated

To date, the PCR court and this Court have only ruled on whether Mr. Tairi is entitled to a new trial *based on newly discovered evidence*; no court has ruled on whether Mr. Tairi is entitled to a new trial based on the State's violation of its obligation to turn over Brady material prior to Mr. Tairi's trial. In its July 15, 2022 decision, this Panel made clear: "We address the issue solely in the context of whether the habeas petition, along with the testimony of Kadonsky, the affidavits referenced in Tairi IV, and now the testimony of Torres combine to meet the standards justifying a new trial based on newly discovered evidence." Mr. Tairi's brief indicates his intention to 'file a [future] separate PCR related to' the State's alleged violation of its obligation to turn over exculpatory evidence prior to defendant's trial.' See, e.g., State v. Nash, 212 N.J. 518, 544 (2013) (explaining prosecutor's obligation to produce exculpatory information, including impeachment evidence, to defendant).'" Because the standard for a new trial based

on the State's violation of its obligation to turn over exculpatory evidence prior to trial is different from the standard for a new trial based on newly discovered evidence, the prior rulings by the PCR Court and this Court do not preclude the Court from granting the relief now sought.

i. Torres' Sworn Statement Was Not Discoverable at the Time of Mr. Tairi's Trial or Appeal

The Superior Court incorrectly found that Mr. Tairi's claim was procedurally barred under Rule 3:22-4(b)(2)(B), concluding that Torres' Sworn Statement was "discoverable" sooner. (Da163; Da186). This finding is clearly erroneous.

The Sworn Statement was discovered by current counsel in preparation for the examination of Torres at an evidentiary hearing by searching a number of databases, including PACER, a catalogue of Federal cases requiring subscription. Seventeen years ago, Mr. Tairi, a pretrial detainee in a county jail, did not have access to PACER and could not, under any circumstance, access the PACER catalogue. This is particularly true where the Habeas Petition was filed under the name "Erwin" not "Edwin," as Torres identified himself in court. (Da074). Although Torres' Sworn Statement may be discoverable today by a simple search on the PACER filing system utilized by federal courts, seventeen years ago, PACER was not readily available or used prominently.

Furthermore, if Mr. Tairi's trial counsel *could* have somehow discovered Edwin Torres' Sworn Statement, then he *should* have. That is, even if the Sworn Statement could have been discovered by reasonable diligence during Mr. Tairi's trial, trial counsel's failure to discover it "would almost certainly point to ineffective assistance of counsel." Nash, 212 N.J. at 549-50. For that reason, the New Jersey Supreme Court has stressed, "we would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less than reasonably diligent attorney." Id. Accordingly, "the pertinent question is not whether the evidence was theoretically discoverable at the time of trial, but whether a reasonably diligent attorney would have discovered it prior to trial." State v. Baker, No. A-0716-17T3, A-0719-17T3, 2019 WL 7187443, at *23 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (citing State v. Peterson, 364 N.J. Super. 364, 398 (App. Div. 2003)). However, the standard for a new trial under Brady does not require evidence to have been discoverable earlier by reasonable diligence.

ii. The Petition for Post-Conviction Relief is Timely

The Superior Court incorrectly found that Mr. Tairi's claim was procedurally barred under Rule 3:22-12(a)(2)(B). To the contrary, Mr. Tairi's instant petition for post-conviction relief was timely filed within the limitations imposed by Rule 3:22-12(a)(2)(B)—within one year of his discovery of Torres'

Sworn Statement. Thus, the petition should have been considered on the merits by the Superior Court in accordance with Rule 3:22-12(a)(2)(B), or alternatively, on the grounds that his petition alleges a constitutional violation.

Rule 3:22-12(a)(2)(B) provides that a second or subsequent petition for post-conviction relief may be filed within one year of "the date on which the factual predicate for the relief sought was discovered." Here, Appellant did not discover the existence of Torres' Sworn Statement until August 2021 and, as set forth supra, "the factual predicate for the relief could not have been discovered through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole . . . raise a reasonable probability that the relief sought [will] be granted."[7] Mr. Tairi's instant petition for post-conviction relief was then filed approximately seven months later, in January 2022.

Further, even if the Court finds that Mr. Tairi's petition is procedurally barred by Rule 3:22-12, the petition alleges a constitutional violation—a claim which may be brought at any time. In State v. Preciose, the New Jersey Supreme Court explained that the exceptions to Rule 3:22-4 should generally not be read narrowly and that "'an error [that[denies fundamental fairness in a constitutional

[7] Rule 3:22-4(b)(2)(B) provides that "[a] second or subsequent petition for post-conviction relief shall be dismissed unless it alleges on its face . . . that the factual predicate for relief could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven, and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted."

sense and hence denies the due process of law' can be asserted in post-conviction proceedings as long as it was not litigated previously." 129 N.J. 451, 476 (quoting State v. Smith, 43 N.J. 67, 74 (1964)). Similarly, the New Jersey Supreme Court has found that the five-year procedural bar to bringing *any* petition for post-conviction relief is not absolute. State v. Milne, 178 N.J. 486, 492 (2004). Rather, Rule 3:22-12's time bar may be relaxed for "'compelling, extenuating circumstances,'" which may be determined by examining "1) the extent and cause of the delay [in bringing the claim]; 2) the prejudice to the State; and 3) the importance of the petitioner's claim." State v. Gonzalez, No. A-3760-13T3, 2015 WL 9491939, at *2 (N.J. Super. Ct. App. Div. Dec. 31, 2015) (quoting and citing State v. Afanador, 151 N.J. 41, 52 (1997)).

Here, Mr. Tairi filed a petition for post-conviction relief on April 28, 2017, related to newly discovered evidence: a recantation that Edwin Torres made to a fellow inmate, Steven Kadonsky. Although that petition was denied on October 11, 2018, Mr. Tairi's subsequent motion for reconsideration was granted on November 30, 2018. On reconsideration, Mr. Tairi's petition was again denied, and he thus filed an appeal on November 7, 2019.

On March 3, 2021, the Appellate Division reversed this Court's decision and ordered that an evidentiary hearing be held. In August 2021, an evidentiary hearing was held, wherein Torres testified, and defense counsel learned—**for the first**

time, more than four years after the petition was filed and after two appeals—of Torres' Sworn Statement. Despite Torres' testimony at the evidentiary hearing, on November 17, 2021, Mr. Tairi's petition was nevertheless denied.

Almost immediately after his 2017 petition for post-conviction relief was denied, but before the Appellate Division decision, on January 13, 2022, Mr. Tairi filed the instant Petition for Post-Conviction Relief based on the State's failure to disclose Torres' Sworn Statement, despite its obligation to do so under Brady. Two weeks later, on January 27, 2022, *the State* requested that briefing on Mr. Tairi's petition be stayed. Approximately six months later, Mr. Tairi's appeal was denied.

The instant petition is therefore timely and should have been considered on the merits by the Superior Court. The State conceded that it was in possession of Torres' Sworn Statement for nearly 15 years and failed to disclose it to Mr. Tairi. It should go without saying that the State should not be rewarded for doing so.

III. Alternatively, Mr. Tairi is Entitled to a New Trial Based on Ineffective Assistance of Counsel

The State's violation of its obligations under Brady is sufficient to warrant a new trial. However, in the event that the Court finds that defense counsel had the ability or opportunity to obtain Torres' Sworn Statement through alternative means, then Mr. Tairi was deprived of his Due Process right to constitutionally effective assistance of counsel.

An ineffective-assistance-of-counsel claim is evaluated under the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court explained that a "convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction or death sentence has two components." Id. at 687. "First, the defendant must show that counsel's performance was deficient. . . Second, the defendant must show that the deficient performance prejudiced the defense." Id.; see State v. Fritz, 105 N.J. 42, 58 (1987) (adopting Strickland test and "recogniz[ing] the soundness and efficacy of both the substance and formulation" of that test in defining state constitutional guarantee of effective assistance of counsel).

This matter is akin to the First Circuit decision in Flores-Rivera v. United States, No. 18-1963, 2021 WL 5027508, at *1 (1st Cir. 2021). In Flores-Rivera, appellant was granted a new trial, by successfully arguing ineffective assistance of counsel under Strickland, after her appellate counsel failed to raise a Brady claim on direct appeal. After a guilty verdict, but prior to sentencing, defense counsel learned that the government had failed to turn over three pieces of evidence—including a letter from a cooperating witness and notes reflecting communication between witnesses—that could have been used to impeach the testimony of the government's cooperating witnesses. Id. at *2. In granting a new trial, the court stated:

> The government led with its chin at trial by presenting a [drug] case predicated almost exclusively on the testimony of cooperating witnesses with little, if any corroboration. The withheld notes could be said to show [the one cooperator] coaching the other two cooperators. And the notes strongly suggested that the cooperators had lied at trial when they denied coordinating their testimony [. . . . and] the withheld letter 'provid[ed] a powerful tool in the hands of any good trial counsel to call into question the credibility of both the key witness and, implicitly, the lead prosecutor.'

Id. at *4 (citations omitted).

To the extent that the Court finds that defense counsel improperly failed to request, discover, or otherwise obtain Torres' falsely Sworn Statement, Mr. Tairi was deprived of constitutionally effective assistance of counsel. That deprivation, by and of itself, warrants a new trial.

Conclusion

For the foregoing reasons, and in accordance with all courts who have considered this issue, Defendant Afrim Tairi's Appeal should be granted in its entirety, and a new trial should be granted.

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Dated: November 27, 2023

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-3772-22

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from an Order Denying Post-Conviction Relief Entered in the Superior Court of New Jersey, Law
vs.	:	Division, Bergen County.
AFRIM TAIRI,	:	
Defendant-Appellant.	:	Sat Below:
		Hon. James X. Sattely, P.J.Cr. Hon. Donald Venezia, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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"Db" refers to Defendant's Brief.
"Da" refers to Defendant's Appendix.
"Pa" refers to the State's Appendix.
1T – transcript dated October 6, 2009, Volume I.
2T – transcript dated October 6, 2009, Volume II.
3T – transcript dated October 7, 2009.
4T – transcript dated October 14, 2009.
5T – transcript dated October 15, 2009, Volume I.
6T – transcript dated October 15, 2009, Volume II.
7T – transcript dated October 20, 2009.
8T – transcript dated October 20, 2009.
9T – transcript dated October 21, 2009.
10T – transcript dated October 22, 2009.
11T – transcript dated October 27, 2009.
12T – transcript dated October 28, 2009.
13T – transcript dated October 29, 2009.
14T – transcript dated January 12, 2010.
15T – transcript dated September 12, 2018.
16T – transcript dated March 21, 2019.
17T – transcript dated July 27, 2021.
18T – transcript dated May 5, 2023.

PRELIMINARY STATEMENT

On July 15, 2022, this Court affirmed the prior decision of the Honorable James X. Sattely, P.J.Cr., denying defendant Afrim Tairi's first amended post-conviction relief (PCR) petition without an evidentiary hearing. The factual predicate of defendant's first amended petition was that he was entitled to a new trial based on the content of a habeas corpus petition submitted in federal court by the State's key witness, Edwin Torres, prior to defendant's trial. Defendant alleged that a statement contained therein contradicted Torres' trial testimony. This Court determined that defendant's claim failed to meet the "rigorous standard" that a jury verdict should only be set aside "except for the clearest of reasons" based on newly discovered evidence. State v. Tairi, No. A-1016-19, 2022 WL 2760858 at *3 (App. Div. Jul. 15, 2022) (internal quotation marks omitted).

Defendant is now back before this Court, appealing the denial of a second PCR petition which raises the same factual predicate – Torres' habeas petition. Defendant now recasts his claim as a Brady-Giglio[1] issue, a legal theory that he raised in a reply brief in support of his first amended PCR petition. In short, this appeal presents nothing new. Defendant's claim is both

[1] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

procedurally barred under the Court Rules and, as this Court has already decided, meritless.

COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS[2]

A. Defendant's Offenses.

This case has an extensive factual and procedural history, which the State acknowledges is well-known to the Court. In three separate 1995 home invasions, defendant and two co-conspirators, Edwin Torres and Felix DeJesus: kidnapped for ransom a Staten Island man, Lenny Theodolou, who they transported to Paterson before he escaped; attempted to kidnap Mark Urich at his home in Englewood Cliffs; and murdered Howard Lewis, dumped his corpse in front of his elderly mother, Lillian, and robbed Lillian at the Lewises' Teaneck home. Ibid. DeJesus and Torres were arrested and tried shortly after the crimes, but defendant was not apprehended until 2006. State v. Tairi, No. A-2684-09, 2012 WL 489101, at *2-7 (App. Div. Feb. 16, 2012).

B. Torres' 2008 Habeas Corpus Petition.

In December 2008, shortly before defendant's trial, Torres filed a habeas corpus petition in the United States District Court for the District of New Jersey. Relevant to defendant's instant appeal, Torres claimed:

> Counsel on the initial PCR [filed by Torres] ignored [Torres'] request to investigate claims that [Torres'] co-

[2] Because these sections are intertwined, they are combined in this brief.

> defendant [Felix DeJesus] would have submitted an affidavit on [Torres'] behalf, which would have explained that [Torres] had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodolou.
>
> [(Da79).]

Torres added that DeJesus was deceased and that he had letters from DeJesus in which DeJesus expressed his willingness to provide an affidavit. (Da79). Only one such letter has been produced by defendant throughout his numerous appeals and PCR filings. That one letter, dated August 4, 2005, and sent by DeJesus to Torres, does not include any discussion of the Staten Island kidnapping, let alone any assertion that Torres had no knowledge of it. (Pa1-3).

C. Defendant's Trial and Direct Appeal.

By the time defendant's case went to trial in 2009, the only co-conspirator available to testify against defendant was Torres. The Honorable Donald Venezia, J.S.C., presided over defendant's trial. Relevant here, Torres testified to the Staten Island kidnapping of Lenny Theodolou and to defendant's masterminding of the kidnapping. E.g. (7T10-14 to 11-4).

On October 29, 2009, a jury found defendant guilty on all counts. (13T). Defendant received a total sentence of life imprisonment plus eighty years with a seventy-year parole disqualifier. (Da1). Thereafter, defendant appealed.

Notably, defendant contended on appeal from his conviction that the evidence the State presented was insufficient to convict him at trial, because "there was no physical evidence linking him to the crimes and that Torres's testimony was so rife with inconsistencies and contradicted by other witnesses as to be unworthy of belief." Tairi, 2012 WL 489101, at *15. Finding that Torres' testimony, while flawed, was well-corroborated by other testimony and evidence, this Court rejected defendant's argument that Torres' inconsistencies in testifying were fatal to the State's case:

> Defendant contends that there was no physical evidence linking him to the crimes and that Torres's testimony was so rife with inconsistencies and contradicted by other witnesses as to be unworthy of belief. We have said, "[i]t is within the sole and exclusive province of the jury to determine the credibility of the testimony of a witness." State v. Vandeweaghe, 351 N.J. Super. 467, 481 (App. Div. 2002), aff'd, 177 N.J. 229 (2003). Moreover, Torres's testimony was corroborated in many details by the victims of the crimes, other physical evidence, and by the testimony of [Marisol] Melton,[3] which circumstantially established defendant's active involvement in the criminal enterprise.
>
> In short, the testimony taken as a whole was sufficient to establish defendant's guilt of the charges beyond a reasonable doubt . . . .
>
> [Ibid.]

[3] Marisol Melton is DeJesus' sister.

This Court's opinion detailed several examples of how the State corroborated Torres' testimony despite its inconsistencies. For example, according to Lenny Theodolou, DeJesus and Torres had no connection to his family. However, defendant worked at the family's Staten Island diner, was familiar with the family home, and had been at the home weeks before the home invasion to ask for money. (1T43-10 to 25, 102-16 to 22, 103-15 to 104-4, 105-3 to 13, 105-20 to 106-18, 106-21 to 107-2; 7T11-7 to 22); Tairi, 2012 WL 489101, at *3.[4] Defendant provided Marisol Melton, DeJesus' sister, with bail money for DeJesus after DeJesus was arrested for the theft of Howard Lewis' credit card following the Teaneck home invasion and murder. (9T42-9 to 20, 43-7 to 9, 43-24 to 44-5, 57-19 to 58-1); Tairi, 2012 WL 489101, at *6. And defendant fit a description provided to police by Melton: a white male of Eastern European descent who stuttered, with a name similar to "Efrim." (10T36-20 to 37-6); Tairi, 2012 WL 489101, at *7. Each of these facts corroborated that defendant was not only involved in the home invasions and murder but also masterminded the scheme.

On July 12, 2012, the Supreme Court denied certification. 211 N.J. 608.

[4] Defendant also knew DeJesus and Torres from a Paterson pool hall and through defendant's cousin, (7T8-2 to -7); he was the only person who knew both the Staten Island family along with DeJesus and Torres.

D. Defendant Files His First PCR Petition. Judge Venezia Denies the Petition and this Court Reverses and Remands.

Defendant subsequently petitioned for PCR, raising ineffective assistance of counsel (IAC) claims. On March 20, 2013, Judge Venezia denied defendant's petition without an evidentiary hearing. This Court reversed Judge Venezia's denial of defendant's first PCR petition, reasoning that PCR counsel did not have time to fully investigate defendant's case or consult with his client. State v. Tairi, No. A-1560-13, 2016 WL 818615, at *2-4 (App. Div. Mar. 3, 2016).

E. Defendant Files His Amended First PCR Petition, Which Makes Reference to Torres' Habeas Petition. Judge Sattely Denies the Petition and this Court Reverses the Decision and Remands.

On April 28, 2017, defendant filed an amended PCR petition and a motion for a new trial, this time based on out of court statements made by DeJesus and Torres to a fellow inmate, Steven Kadonsky, prior to DeJesus' death. Defendant claimed these statements would have been admissible at trial and would have been exculpatory, because DeJesus and Torres allegedly told Kadonsky that they framed defendant. On page forty-seven of defendant's brief in support of his PCR petition, defendant acknowledged the existence of a petition for habeas corpus filed by Torres in 2008:

> Torres was . . . confined at the New Jersey State Prison since 1999. Torres and Mr. Kadonsky became friends. Approximately three years after the death of DeJesus,

> Torres asked Mr. Kadonsky to help prepare his Petition for Habeas Corpus to be filed in the United States District Court for the District of New Jersey.
>
> [(Pa55).]

Defendant did not make a legal argument premised on the existence of Torres' habeas petition and seemingly mentioned it to provide background as to the relationship between Torres and Kadonsky.

The Honorable James X. Sattely, P.J.Cr., granted defendant a PCR evidentiary hearing, which was held on March 21, 2019. (16T). Only Kadonsky testified at the hearing. (16T). On May 21, 2019, Judge Sattely denied PCR. (Da53-70).

On March 3, 2021, this Court reversed Judge Sattely's decision and remanded the matter so that Torres could be given an opportunity to testify at an evidentiary hearing. (Da71-73).

F. Following Remand, Torres Testifies at a July 27, 2021 Evidentiary Hearing on the Amended First PCR Petition.

Following remand and relevant to this appeal, Torres testified at the July 27, 2021, evidentiary hearing that he paid Kadonsky to prepare the 2008 habeas petition for him. (17T83-18 to 84-2). Torres explained on cross-examination:

> Q: These ideas [in the habeas petition] were from [Kadonsky], not from you?
>
> A: Correct.

. . . .

Q: And one of the major points of this habeas corpus is that the Staten Island conduct did not fall in the jurisdiction of the New Jersey court, correct?

A: Correct.

Q: And that was his idea, not yours, right?

A: Right.

Q: So, Mr. Kadonsky was advising you as to how to proceed with your habeas corpus.

A: Correct.

Q: While it's in your handwriting, none of these ideas came from you, is that correct?

A: Correct.

. . . .

Q: Now, at no point in your petition for habeas corpus did you say you were not present?

A: Correct.

Q: You simply said that the affidavit would be from DeJesus that you had no knowledge of the Staten Island robbery.

A: Correct

. . . .

Q: And this was pertaining specifically to the Staten Island robbery because Mr. Kadonsky advised you to raise a jurisdiction issue, correct?

A: Correct.

[(17T86-16 to 88-4, 93-13 to 94-1) (emphasis added).]

Torres' testimony was corroborated by Kadonsky's 2019 testimony, in which Kadonsky stated that "Torres asked [him] to prepare a [habeas] petition for him." (16T70-15 to -18).

G. In a September 29, 2021 Supplemental Brief and a November 1, 2021 Reply Brief in Support of His Amended First PCR Petition, Defendant Argues that Torres' Habeas Petition was Additional New Evidence Justifying a New Trial and Brady Evidence.

Four years after making reference to Torres' habeas petition in his April 28, 2017 brief in support of his PCR petition, defendant submitted a supplemental brief arguing that the habeas petition was new evidence which justified granting defendant a new trial under Carter.[5] (Pa165-180).

Defendant asserts that in the habeas petition, Torres disclaimed any knowledge of the Staten Island kidnapping of Lenny Theodolou. (Db28). But that is not what Torres wrote. Rather, Torres wrote that DeJesus "would have submitted an affidavit on [Torres'] behalf, which would have explained that [Torres] had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodolou." (Da79). Stated differently, the habeas petition claims DeJesus would have said that Torres had no knowledge of the Staten Island

[5] State v. Carter, 85 N.J. 300 (1981).

kidnapping had Torres' attorney better investigated Torres' case. The statement is nothing more than the hypothetical statement of a third party, and plainly, Torres did not actually disclaim knowledge of the Staten Island robbery in his habeas petition, as defendant claims.

Defendant not only raised Torres' habeas petition as new evidence, but he also raised it as Brady-Giglio evidence in a November 1, 2021 reply brief in support of his amended first PCR petition. (Pa181-91). Defendant characterized Torres' habeas petition as impeachment evidence which the State suppressed. Ibid.

H. Judge Sattely Denies Defendant's Amended First PCR Petition and Denies Defendant a New Trial Based on Torres' Habeas Petition.

On November 17, 2021, Judge Sattely denied defendant's amended first PCR petition. Judge Sattely squarely addressed defendant's argument that Torres' habeas petition was new evidence which justified granting defendant a new trial:

> Petitioner requests that this court find that there is sufficient evidence that Torres recanted his trial testimony and, therefore, a new trial is warranted. Petitioner argues that Torres is "not a witness that is worthy and belief and that his testimony alone resulted in [Petitioner's] conviction" and thus mandates a new trial. . . . During the evidentiary hearing on July 27, 2021, the court listened closely to Torres to assess his credibility and the reasonableness of his testimony. . . . Petitioner's argument is cumulative and fails because the jury was aware of the inconsistencies in Torres'

testimony and still felt that Petitioner was guilty of the crimes charged.

The main point at issue in Petitioner's argument is the contradiction between the statements in Torres' habeas corpus petition and his trial testimony. Specifically, Torres, as part of his federal habeas corpus petition submitted in August 2008, claimed to have no prior knowledge of the events stemming from the Staten Island robbery before the crime occurred and that he previously sought to introduce an affidavit from DeJesus (who was deceased at the time) that would have included false statements that supported Torres' claim that he had no knowledge of the Staten Island home invasion beforehand. However, Torres' testimony at Petitioner's trial in October 2009, his affidavit from July 2018, and his testimony at the evidentiary hearing on July 27, 2021, are consistent. Moreover, during the evidentiary hearing in July 2021, Torres was forthcoming about his effort to introduce the false affidavit for his habeas petition and did not seek to deny such actions. Thus, while Torres has admitted to lacking candor to a court in the past, this court finds that a new trial is not warranted because the jury during Petitioner's trial was aware of the inconsistencies in Torres' testimony, yet still found that the weight of the evidence against Petitioner warranted a guilty verdict.

. . . .

As discussed above, Petitioner's primary argument supporting his position that he is entitled to a new trial is that Torres[] lied in his habeas corpus petition. While there is merit to this claim, testimony provided by both Kadonsky and Torres adds additional context to the content and preparation of Torres' habeas petition. Specifically, both Kadonsky and Torres agreed under oath that the content of Torres' habeas corpus petition came from Kadonsky, not Torres. . . . Thus, Petitioner's argument that Torres lied under oath due to the false

statements contained within the habeas petition also implicates Petitioner's own witness, Kadonsky, because he certified that he prepared the petition for Torres, including the petition's content. . . . Based on the testimony provided at Petitioner's trial, it is clear that Torres submitted false statements under oath in his habeas petition when he claimed to have no knowledge of the Staten Island robbery before it occurred. However, the court cannot ignore that the petition was prepared by Kadonsky, whom the court previously found to lack credibility as a witness. Moreover, while Torres handwrote the habeas petition, the idea to include the affidavit from a "dead guy" (DeJesus) which could not be verified originated from Kadonsky. . . .

The court also takes notice that Petitioner filed a motion with the trial court to set aside the jury verdict based upon the weight of the evidence. (Sb25). Specifically, Petitioner's trial counsel argued that Torres' testimony was "so replete with inconsistencies" that it was "null and void." This motion was denied by the trial judge. However, Petitioner brought this exact issue up on direct appeal where a three-judge appellate panel rejected the claim and affirmed Petitioner's conviction. . . . Thus, because this argument has been argued and ruled on several times by multiple judges, Petitioner's argument is cumulative and falls well short of the high burden to set aside a jury verdict.

. . . .

Here, the jury made a determination on Torres' credibility when he testified at Petitioner's trial. Even if the jury found Torres to lack credibility as a witness, it still found the weight of the other evidence against Petitioner to justify a guilty verdict. Moreover, this line of argument from Petitioner was previously addressed by several courts in prior proceedings. State v. Tairi, No. A-2684-09T3 (App. Div. Feb. 16, 2012) (slip op. at

> 38) ("Torres's testimony was corroborated in many details by the victims of the crimes, other physical evidence, and by the testimony of Melton, which circumstantially established defendant's active involvement in the criminal enterprise."). As noted by the State, the Appellate Division already ruled that "the testimony, taken as a whole was sufficient to establish [Petitioner's] guilt of the charges beyond a reasonable doubt."
>
> [(Da107-11) (internal citations omitted).]

Judge Sattely's conclusion that the jury in defendant's trial was already aware that Torres was not completely truthful in his testimony echoed this Court's conclusion in its February 2012 opinion affirming defendant's conviction.

I. This Court Affirms the Denial of Defendant's Amended First PCR Petition, Which Like His Instant Petition, Was Premised on Torres' Habeas Petition.

On July 15, 2022, this Court affirmed Judge Sattely's decision denying defendant's second PCR petition. This Court determined:

> Here, reduced to its essence, defendant claims Torres' "recantation"[6] in his 2008 habeas petition of his involvement in the Staten Island home invasion, combined with Kadonsky's affidavits and testimony at the evidentiary hearing, are "not 'merely' cumulative, impeaching or contradictory," Ways, 180 N.J. at 187 (quoting Carter, 85 N.J. at 314), but rather "shake[s] the very foundation of the State's case and almost certainly [would] alter the earlier jury verdict," id. at 189.

[6] The State maintains that Torres' habeas petition was not a recantation and did not actually contradict his testimony against defendant at defendant's 2009 trial.

> However, Torres admitted his recantation, drafted with the assistance of Kadonsky's deft hand, was itself false. The judge found Torres credible in this regard. The judge earlier found Kadonsky was not credible in his assertion that Torres and DeJesus admitted framing defendant. Applying appropriate standards to the review of the judge's findings and conclusion following two evidentiary hearings, we find no reason to conclude defendant met the rigorous standards required to set aside "[a] jury verdict rendered after a fair trial [which] should not be disturbed except for the clearest of reasons." Id. at 187.
>
> [State v. Tairi, No. A-1016-19, 2022 WL 2760858, at *3 (App. Div. Jul. 15, 2022)]

In sum, this Court determined that Torres' habeas petition was not material enough to justify granting defendant a new trial.

J. Defendant Files His Second PCR Petition, Which Again Raises Torres' Habeas Petition as a Brady Issue. Judge Sattely Denies Defendant's Second PCR Petition, Finding that It was Procedurally Barred and Failed to State a Prima Facie Brady Claim.

While defendant's appeal of the denial of his first amended PCR petition was pending, defendant filed a second PCR petition on January 13, 2022. (Pa192-200). Defendant argued:

> Here, one year prior to Petitioner's trial, the State obtained the sworn Petition for Habeas Corpus of Edwin Torres wherein Torres affirmed that he had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou.[7] . . . Indeed, the State opposed Torres's Habeas Petition.

[7] The State maintains that this is a mischaracterization of what Torres actually wrote in his habeas petition. To reiterate, Torres wrote that DeJesus would have

At Petitioner's trial, the State elicited testimony from Torres that he did have knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou, and that he participated in this crime with Petitioner. Petitioner's counsel was never provided with Torres's falsely sworn statement, even though it stood in stark contrast to his trial testimony.

It is indisputable that when a State witness (particularly one as vital as Torres) has perjured himself to a Federal District Court in relation to the subject matter of his trial testimony, the evidence is definitively impeachment material and would therefore be favorable to the defense. Evidence that serves to undermine the credibility of a State's witness is favorable, material, and probative, constitutionally mandating disclosure to a criminal defendant.

It is immaterial whether the suppression of Brady evidence was intentional or inadvertent. The record is clear that the Bergen County Prosecutor Office did have this evidence in its possession when it called Torres to testify before a Bergen County jury at Mr. Tairi's trial. The State's obligation under Brady was triggered, mandating disclosure to Petitioner. The State failed to do so.

Finally, the suppressed evidence was material. The State has acknowledged the importance of Torres's testimony. (See Trial Transcript dated October 27, 2009, 41:17-21, quoting Assistant Prosecutor Fantuzzi on behalf of the State "Defense counsel made a big point about the fact that I told you during my opening that Edwin Torres was the best evidence I have, and I submit to you, ladies and gentlemen, that that[sic] is true."). By any governing standard, however, Torres's

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submitted an affidavit stating that Torres had no knowledge of the Staten Island kidnapping.

> credibility would have been undermined had the trial jury considered the withheld, falsely sworn statement. Instead, the State deprived Petitioner of a fair trial by suppressing the evidence, and justice requires that Petitioner be afforded a new trial.
>
> [(Pa197-98) (internal citations omitted) (emphasis added).]

Demonstrably, defendant raised the same factual predicate and same basic argument as he did in his amended first PCR petition – that Torres' habeas petition would have convinced the jury to find defendant not guilty because Torres would not have been viewed as a credible witness by the jury. Of course, Judge Sattely and this Court had previously determined that Torres' habeas petition was not sufficiently material to warrant granting defendant a new trial.

Defendant also raised an ineffective assistance of counsel claim on the premise that "defense counsel" was ineffective by failing to uncover Torres' habeas petition earlier. (Pa199-200). In an April 21, 2023 reply brief, defendant also raised arguments under Giglio and Jencks.[8] (Pa204-06, 209-10).

On June 22, 2023, Judge Sattely denied defendant's second PCR petition without an evidentiary hearing. (Da148-80). First, Judge Sattely determined

[8] Jencks v. United States, 353 U.S. 657 (1957).

that Torres' habeas petition was discoverable before the filing of defendant's second PCR petition, so therefore, defendant's argument was barred by Rule 3:22-4(b)(2)(B). (Da163-66). Judge Sattely astutely noted that defendant raised the same factual predicate in his prior PCR and that Brady claims have "notable overlap" with motions for new trials based on new evidence under Carter. Moreover, Judge Sattely determined that he and this Court, in adjudicating defendant's first amended PCR petition, had both already determined that Torres' habeas petition was not material evidence because despite Torres' flaws as a witness, the State presented evidence corroborating Torres' testimony at defendant's trial. (Da165). Further undermining the materiality of the habeas petition was the well-established fact that the petition was conceived by Kadonsky, who dictated to Torres how Torres should prepare the petition. Therefore, according to Judge Sattely, defendant failed to demonstrate that his Brady claim had a reasonable probability of success on the merits. (Da165-66).

Essentially finding defendant's petition barred under Rule 3:22-5 as well, Judge Sattely further noted that defendants are barred from raising "substantially equivalent" legal arguments on second or subsequent PCR petitions. Here, defendant raised a Brady claim based on Torres' habeas petition, even though Judge Sattely had already determined that the habeas

petition was not material evidence which could justify granting a new trial. (Da164) (citing State v. McQuaid, 147 N.J. 464, 484 (1997) (citing R. 3:22-5)).

On the merits, Judge Sattely determined that even if defendant's second PCR petition was not procedurally barred, defendant failed to state a prima facie Brady claim, because Torres' habeas petition was not favorable to defendant as the statements in the petition were attributable to Kadonsky, not Torres. (Da167-68). Judge Sattely also determined that the petition was not suppressed because it was easily accessible using the PACER filing system used by federal courts. (Da169-70). And the habeas petition was not material evidence because defendant's jury already knew that Torres did not testify completely truthfully yet convicted defendant anyway because the State sufficiently corroborated Torres' testimony. (Da170-71). The habeas petition was also not material evidence because it would not have been admissible at trial under N.J.R.E. 803(a)(1) as a prior inconsistent statement of Torres, as Torres himself never disclaimed knowledge of the Staten Island kidnapping and because Kadonsky conceived the contents of the petition. (Da172-73). For the same reason, defendant failed to state a prima facie claim of ineffective assistance of counsel. (Da176-77).

With respect to defendant's claims under Jencks, Judge Sattely determined that these arguments were improperly raised for the first time in defendant's reply brief. (Da177-78).

Because an evidentiary hearing would not aid his analysis, Judge Sattely denied defendant's second PCR petition without an evidentiary hearing. (Da178-79).

On July 7, 2023, defendant moved for reconsideration. On June 22, 2023, Judge Sattely denied reconsideration. (Da181-87). This appeal follows.

LEGAL ARGUMENT

POINT I[9]

DEFENDANT'S CLAIMS ARE PROCEDURALLY BARRED BECAUSE HE RAISED THIS SAME FACTUAL PREDICATE AND THIS SAME LEGAL THEORY IN HIS PRIOR PCR PETITION. DEFENDANT'S PETITON IS ALSO TIME BARRED BECAUSE HE DISCOVERED TORRES' HABEAS PETITION IN 2017.

Defendant argues that the trial judge erred by finding his second PCR petition procedurally barred because Torres' habeas petition was not discoverable earlier by reasonable diligence. (Db43-45). The State submits that defendant's second PCR petition is barred for three reasons. First, under Rules 3:22-4(b)(2)(B) because (1) Torres' habeas petition was discoverable,

[9] This Point responds to Point II of defendant's brief.

and in fact was discovered, earlier; and (2) Torres' habeas petition does not raise a reasonable probability that relief will be granted. Second, defendant's second PCR petition is barred under Rule 3:22-5, because his Brady claim is substantially similar to his prior Carter claim. Third, defendant's instant PCR petition is time barred under Rule 3:22-12(a)(2)(B) because it was filed five years after defendant discovered Torres' habeas petition in 2017.

Whether a PCR petition is procedurally barred is a legal question which this Court reviews de novo. See State v. Nash, 212 N.J. 518, 545-553 (2013). However, the factual findings underlying a motion judge's decision that a petition is time barred are given deference. Id. at 540.

A. Defendant's Second PCR Petition is Barred Under Rule 3:22-4(b)(2)(B) Because Torres' Habeas Petition was Discovered at the Time Defendant Filed His First PCR Petition and was Discoverable Earlier. This Cout Has Also Already Determined that the Factual Predicate is Insufficient to Warrant Relief.

The State submits that defendant's second PCR petition is barred under Rule 3:22-4(b)(2)(B) because Torres' habeas petition was discoverable years earlier by reasonable diligence and, in fact, was discovered earlier. Under Rule 3:22-4(b)(2)(B), a second or subsequent PCR petition "shall be dismissed" unless it alleges a "factual predicate for the relief sought" which could not have been discoverable earlier by "reasonable diligence."

First, as Judge Sattely found, Torres' habeas petition could have been discovered prior to defendant's trial through a simple search of the PACER filing system. PACER is ubiquitous in federal litigation:

> Public Access to Court Electronic Records (PACER) is a service of the federal Judiciary. Its mission is to provide the public with the broadest possible access to court records and to foster greater public understanding of the court system. PACER users include court staff; members of the bar; city, state, and federal employees; the news media; and the general public.
>
> . . . .
>
> The PACER system was established by the Judicial Conference in 1988 as a way to improve public access to court information, which then typically required a trip to the local courthouse. Today, PACER provides the public with instantaneous access to more than 1 billion documents filed at more than 200 federal courts – nearly all the documents filed by a judge or the parties in any case.
>
> [About Us, PACER, https://pacer.uscourts.gov/about-us (last visited Jan. 24, 2024).]

Defendant's appendix includes a printout of the PACER docket of Torres' habeas petition, demonstrating how an attorney – including defendant's current PCR attorneys who have represented him since June 28, 2018 – can easily access the system. (Da82-83; Pa164).

Additionally, not only could Torres' habeas petition have been discovered prior to defendant's trial, but the petition was known to defendant

when he filed his first PCR petition on April 28, 2017. As detailed in the Counter-Statement of Procedural History and Facts of this brief, defendant's brief in support of his petition made reference to Torres' habeas petition in providing background on Torres' relationship with Kadonsky. (Pa55). At that point, not only could defendant have discovered Torres' habeas petition had he proactively searched on PACER for such a petition but defendant was actually aware of the existence of the habeas petition and could have sought to ascertain the statements made as part of that petition.

And defendant raised the factual predicate of Torres' habeas petition as part of his amended first PCR petition, as demonstrated by this table:

September 29, 2021 Brief in Further Support of Amended First PCR Petition (Pa172)	Torres testified that in 2008, he filed with the Federal District Court for the District of New Jersey a Petition for Habeas Corpus . . . . The Habeas Petition was handwritten by Torres and signed under penalty of perjury, affirming that the petition and everything included in the petition was true and correct. Torres argued in the petition that he had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou (the first of the three home invasions he [and Tairi] were convicted of).[10]

[10] Again, the State submits that this is a mischaracterization of the content of Torres' habeas petition.

November 1, 2021 Reply Brief in Support of Amended First PCR Petition (Pa184-85)	Torres is a witness who is not worthy of belief. . . . He lied to a Federal District Court Judge in his Habeas Petition. . . . . [T]he State recognizes that Torres perjured himself before the [United States] District Court for the District of New Jersey in relation to this case and that this was the "sharpest line of attack" against Torres and the conviction. . . . Indeed, the State was aware of the perjured statement but, most significantly, did not produce the statement to Mr. Tairi before his trial.
January 11, 2022 Brief in Support of Second PCR Petition (Pa197)	Here, one year prior to Petitioner's trial, the State obtained the sworn Petition for Habeas Corpus of Edwin Torres wherein Torres affirmed that he had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou. . . . Indeed, the State opposed Torres's Habeas Petition.

As much as defendant seeks to obfuscate his prior PCR claims and the prior decisions of this Court, defendant cannot change the procedural history of this case.

With respect to the ineffective assistance of counsel component to defendant's instant petition, this claim could have been raised in his prior PCR petition, because again, defendant raised this factual predicate as grounds for a new trial on the basis of newly discovered evidence. (Pa172). Defendant had his opportunity to raise his ineffective assistance of counsel claim earlier and failed to do so.

Moreover, Rule 3:22-4(b)(2)(B) requires that the factual predicate of a second of subsequent PCR petition must "raise a reasonable probability that the relief sought would be granted" if "proven and viewed in light of the evidence as a whole." This Court has already determined that defendant was not entitled to a new trial on the basis of Torres' habeas petition, because the petition was not materially impeaching and did not strike at the heart of the State's case.[11] For that reason, defendant cannot prove the prejudice prong of his ineffective assistance of counsel claim.[12] As such, there is no reasonable probability that this Court would grant defendant relief under Brady or under Strickland were his petition not procedurally barred.

B. Defendant's Second PCR Petition is Barred Under Rule 3:22-5 Because Defendant Raised a Substantially Similar Legal Claim in His First Amended PCR Petition.

Rule 3:22-5 also bars PCR for any ground previously adjudicated in a prior proceeding. PCR will be barred if the issue presented is "substantially equivalent" to an issue raised in a prior petition. McQuaid, 147 N.J. at 484 (quoting Picard v. Connor, 404 U.S. 270, 276-77 (1971)). The key question is

[11] Although the Appellate Division's decision was unpublished, it should preclude defendant from re-litigating the same issue in this petition. Matter of Adoption of Amendments to N.J.A.C. 11:22-1.1, 459 N.J. Super. 32, 39 (App. Div. 2018); R. 1:36-3.

[12] See Strickland v. Washington, 466 U.S. 668, 687 (1984).

whether a court "had a fair opportunity to consider the . . . claim and to correct that asserted constitutional defect . . . ." Picard, 404 U.S. at 276. Although defendant has refashioned his claim as a Brady issue, this Court has already concluded that Torres' habeas petition is not material evidence, which, if introduced at trial, would have been likely to change the outcome of defendant's case. It should also be re-emphasized that defendant did, in fact, raise this same Brady claim in a reply brief in support of his first amended PCR petition. (Pa184-85). There is nothing both new and of consequence for this Court to decide. As such, defendant's Brady claim is barred under Rule 3:22-5.

For over a decade, defendant has attacked the credibility of Torres as the State's star witness at defendant's 2009 trial in various motions and appeals. Each time, trial judges and this Court have reached the same conclusion: defendant's jury knew that Torres was a liar based on his inconsistent testimony at trial, but they believed Torres anyway because much of Torres' testimony was corroborated by other evidence and testimony.

C. Defendant's Second PCR Petition is Time Barred Under Rule 3:22-12(a)(2)(B).

Defendant submits that Judge Sattely erred by finding his second PCR petition was time barred. (Db45-48). Judge Sattely never addressed whether defendant's second PCR petition was time barred.

The State notes, however, that defendant discovered Torres' habeas petition as early as April 2017, when defendant referenced its existence in his brief in support of his first PCR petition. (Pa55). Rule 3:22-12(a)(2)(B) provides:

> Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after . . . the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence.

Defendant filed his second PCR petition in January 2022, almost five years after the latest date Torres' habeas petition was discovered. Therefore, defendant's second PCR petition based on Torres' habeas petition was filed four years out of time.

POINT II

PETITIONER FAILS TO STATE A PRIMA FACIE BRADY-GIGLIO CLAIM BECAUSE TORRES' HABEAS PETITION IS NEITHER MATERIAL NOR WOULD IT BE ADMISSIBLE AT A NEW TRIAL. JENCKS IS INAPPOSITE AND WAS IMPROPERLY RAISED IN A REPLY BRIEF.

Defendant submits that Judge Sattely erred in determining that Torres' habeas petition was not Brady-Giglio evidence entitling him to a new trial. Defendant submits that the admissibility of evidence has no bearing as to whether evidence is material for Brady-Giglio purposes. Defendant further submits that Torres' habeas petition: was admissible under N.J.R.E. 803(a)(1)

as impeachment evidence; was admissible under N.J.R.E. 608 as evidence of his character for truthfulness; and the statements in the habeas petition can be attributed to Torres. Defendant also submits that the State committed a Jencks violation by not turning over the habeas petition. (Db25-43). The State counters that defendant's arguments are meritless and contrary to well-established facts, or they were not raised below.

Post-conviction relief is New Jersey's "analogue to the federal writ of habeas corpus." State v. Jones, 219 N.J. 298, 310 (2014); State v. Preciose, 129 N.J. 451, 459 (1992). PCR is not "a substitute for direct appeal." Id. at 459; see also R. 3:22-3. Courts have discretion to adjudicate PCR petitions without an evidentiary hearing. R. 3:22-10(b). If a judge perceives that holding an evidentiary hearing will not aid the analysis, see State v. Flores, 228 N.J. Super. 586, 590 (App. Div. 1988), or if the judge believes that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, see Preciose, 129 N.J. at 462-64; State v. Odom, 113 N.J. Super. 186, 192 (App. Div. 1971), then an evidentiary hearing need not be granted. See State v. Marshall, 148 N.J. 89, 158 (1997). Thus, as the Marshall Court explained, there is a "pragmatic dimension" to the "PCR court's determination." Ibid.

In order to prevail on a Brady claim, a defendant must show:

> (1) the evidence at issue [is] favorable to the accused, either as exculpatory or impeachment evidence; (2) the State . . . suppressed the evidence, either purposely or inadvertently; and (3) the evidence [is] material to the defendant's case.
>
> [State v. Brown, 236 N.J. 497, 518 (2019).]

Evidence is material for Brady purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Marshall, 148 N.J. at 156 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).[13] Giglio simply expanded the scope of Brady to include impeachment evidence. 405 U.S. at 153-55.

A. Torres' Habeas Petition is Not Material Evidence, so it Does Not Entitle Defendant to a New Trial Under Brady or Giglio.

The State reiterates that this Court has already held in its July 15, 2022 opinion affirming the denial of defendant's first amended PCR petition that Torres' habeas petition is not material evidence. Tairi, 2022 WL 2760858, at *3. Additionally the State reemphasizes that this Court found in deciding defendant's direct appeal: "Torres's testimony was corroborated in many details by the victims of the crimes, other physical evidence, and by the testimony of [DeJesus' sister], which circumstantially established defendant's

[13] Although the standard for a new trial under Brady does not require evidence to have been discoverable earlier by reasonable diligence, Rule 3:22-4(b)(2)(B) still requires that the factual predicate for a second PCR petition to not have been discoverable earlier by reasonable diligence.

active involvement in the criminal enterprise." Tairi, 2012 WL 489101, at *15. And moreover, as this Court has already determined in both its February 2012 and July 2022 opinions, Torres' credibility was challenged at trial and the jury had reason to doubt his testimony. Tairi, 2012 WL 489101, at *15; Tairi, 2022 WL 2760858, at *3. Nevertheless, the jury clearly believed Torres' testimony against defendant because of the significant amount of evidence corroborating his testimony. Fundamentally, the core issues that defendant presents to this Court in this appeal have already been adjudicated.

As such, defendant cannot demonstrate that Torres' habeas petition would have changed the outcome of defendant's trial, Marshall, 148 N.J. at 156, and he has failed to state a prima facie Brady claim entitling him to a PCR evidentiary hearing.

B. The Statement that Torres "had no knowledge of the Staten Island robbery and kidnapping," Is Not Itself a Prior Inconsistent Statement by Torres, Is Not Admissible Under N.J.R.E. 803(a)(1), and Is Not Brady Evidence. Defendant Did Not Raise Admissibility Under N.J.R.E. 608 Below.

A witness may be impeached with a prior statement by the witness that "is inconsistent with the declarant-witness' testimony at trial . . . ." N.J.R.E. 803(a)(1). "'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." N.J.R.E. 801(a). "'Declarant' means the person who made the statement." N.J.R.E. 801(b).

Torres' habeas petition is not a prior inconsistent statement, because nowhere in that petition does Torres himself claim to have no knowledge of the Staten Island robbery and kidnapping. Rather, Torres explained his PCR counsel had been ineffective by:

> [I]gnor[ing] [Torres]'[] request to investigate claims that [Torres]'[] co-defendant would have submitted an affidavit on his behalf, which would have explained that [Torres] had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodoulou.
>
> [(Da79).]

Clearly, Torres did not actually disclaim knowledge of the Staten Island home invasion in his habeas petition, so this statement does not contradict his testimony against defendant. Likewise, Torres did not indicate that DeJesus' hypothetical statement would have been true. Defendant mischaracterizes the contents of Torres' habeas petition in asserting that "Torres affirmed that he had no knowledge of the Staten Island robbery and kidnapping . . . ." (Db at 3).

DeJesus was the hypothetical declarant of the statement that Torres "had no knowledge of the Staten Island robbery and kidnapping," not Torres, because DeJesus is the "person who" would have "ma[d]e the statement." N.J.R.E. 801(b). Therefore, the statement that Torres "had no knowledge of the Staten Island robbery and kidnapping" would not itself be admissible to

impeach Torres as a witness against defendant, N.J.R.E. 803(a)(1), so it is not Brady evidence. Further attenuating that statement from Torres is the fact that the contents of Torres' habeas petition were conceived by Kadonsky. As such, defendant was not entitled to a PCR evidentiary hearing. Flores, 228 N.J. Super. at 590.

With respect to Torres' habeas petition being admissible as N.J.R.E. 608 evidence, defendant did not raise this below, so this Court reviews for plain error. R. 2:10-2. Because, as this Court has already determined, defendant's jury was already well aware that he was not entirely truthful in his testimony, admitting his habeas petition as extrinsic evidence of his character for truthfulness would not have changed the result of defendant's trial. Tairi, 2012 WL 489101, at *15. Therefore, any error by Judge Sattely in ruling defendant's petition inadmissible despite the provisions of N.J.R.E. 608 was not "clearly capable of producing an unjust result." R. 2:10-2.

And while inadmissibility is not the end of an analysis as to whether evidence is material for Brady purposes, inadmissible evidence is only material if it could lead to the discovery of admissible evidence which, in turn, could have affected the outcome of a defendant's trial. Defendant has never indicated any admissible evidence that Torres' habeas petition could have

uncovered, so this Court should reject his arguments. See State v. Hernandez, 225 N.J. 451, 466-67 (2016).

C. Because No Court Has Ever Ordered the State to Produce Torres' Habeas Petition, Jencks is Inapposite. Defendant Also Improperly Raised this Argument for the First Time in a Reply Brief.

With respect to his Jencks argument, defendant does not actually explain why this Court should have considered a new legal theory for the first time in a reply brief. Rather, defendant baldly asserts that Judge Sattely's decision "was palpably incorrect." (Db36-37). The State disagrees. A defendant cannot use his reply brief to enlarge his argument. State v. Smith, 55 N.J. 476, 488 (1970).

Additionally, defendant's Jencks-based argument was that a criminal case must be dismissed if the State withholds impeachment evidence. However, this oversimplifies the holding of Jencks v. United States, which was:

> the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.
>
> [353 U.S. 657, 672 (emphasis added).]

As the State has never been ordered to produce Torres' habeas petition, Jencks is irrelevant to defendant's case. Not only was this argument improperly raised for

the first time in a reply brief, but it is premised on inapposite caselaw and meritless.

POINT III

PETITIONER FAILS TO STATE A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

"The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that the accused shall have the right to the assistance of counsel in a criminal prosecution." Jones, 219 N.J. at 310. "[T]he right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984) (internal quotation marks omitted). An ineffective assistance of counsel (IAC) claim has two components: (1) actual deficiency, or "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by Sixth Amendment"; and (2) "the deficient performance prejudiced the defense" such that "the result [is] unreliable." Id. at 687. Our Supreme Court has adopted the same standard with respect to a defendant's right to counsel under the New Jersey Constitution. State v. Fritz, 105 N.J. 42, 58 (1987). "Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding." Preciose, 129 N.J. at 460.

In his instant PCR petition, defendant claims that one of his prior attorneys (he does not specify which) was ineffective for failing to uncover Torres' habeas petition and in failing to raise his Brady-Giglio claim. (Db7-9). Because the discovery (and alleged withholding by the State) of Torres' habeas petition would not have changed the outcome of defendant's trial and does not entitle defendant to a new trial, defendant cannot satisfy the prejudice prong of the Strickland-Fritz test. He fails to state a prima facie claim of ineffective assistance of counsel, and therefore, he is not entitled to an evidentiary hearing. Flores, 228 N.J. Super. at 590.

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of defendant's second PCR petition.

Respectfully submitted,

MARK MUSELLA
BERGEN COUNTY PROSECUTOR

/s/K. Charles Deutsch
Assistant Prosecutor
Attorney No. 332522021

Dated: February 2, 2024

STATE OF NEW JERSEY, Plaintiff, v. AFRIM TAIRI, Defendant.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003772-22 On Appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY INDICTMENT NO. 01-06-1503-I Sat Below: Honorable James X. Sattely, J.S.C. **CRIMINAL ACTION**

REPLY BRIEF OF DEFENDANT-APPELLANT AFRIM TAIRI

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Rules

Preliminary Statement

The factual allegations made by Appellant Afrim Tairi are undisputed, uncontested and uncontradicted and the Court can accept them as true:

1. At the time of his trial, the Bergen County Prosecutor's Office was in possession of a signed, sworn statement (the "Sworn Statement" or "Habeas Petition") from Codefendant Edwin Torres;

2. By the State's own admission, Torres was the single most important witness in the trial;

3. The Sworn Statement undermined Torres' credibility and the substance of his testimony; and

4. The State failed to disclose the statement to Mr. Tairi prior to his trial.

There exists no authority that excuses the State's failure to turn over the Sworn Statement made by Torres. Disclosure of the Sworn Statement was not discretionary; it was mandated by Brady, Giglio, and the Jencks Act (as memorialized in Rule 3:13-3(b) and State v. Farmer, 48 N.J. 145, 152 (1966)). Rather than acknowledge the Brady violation, however, the State plays the blame game. The State blames (1) Mr. Tairi for not searching PACER, an electronic, federal cataloguing system he did not have access to as a pretrial detainee at the Bergen County Jail while he was preparing for trial; (2) Mr. Tairi's trial counsel, Jeffrey Simms, for not discovering Edwin Torres' Habeas Petition in the PACER catalogue, notwithstanding the fact that it was filed under an alias, "Erwin" Torres; and (3) Craig S. Leeds – the attorney who filed Mr. Tairi's 2017 Post-Conviction

Relief Petition – for not raising the Brady issue at the time of his filing. Notably, the State fails to disclose that Mr. Leeds, a court-appointed lawyer, was conflicted out of the case shortly after he filed the Petition ***because he previously represented Codefendant Edwin Torres in this matter.***[1]

There exist no procedural hurdles preventing this Court from determining on the merits that Mr. Tairi's constitutional rights were violated. The Sworn Statement was Brady material, and its disclosure was mandated. Because Torres was, by the State's own admission, the most critical evidence against Mr. Tairi, the Sworn Statement would have provided ample opportunity for cross-examination and significantly undermined his credibility. In fact, the State recognized that Torres' credibility was an issue at trial but did not "think" that the benefit he received as a cooperating witness (the reduction of his life sentence) *alone* made him unworthy of belief. 12T 65:6-16.

In other words, the State argued that the jury should require something else before finding that Torres was not a credible witness. Meanwhile, the State was in possession of a Sworn Statement from Torres that materially undermined his credibility and trial testimony—a finding that has already been rendered by the PCR Judge. (Da108-10) ("It is clear that Torres submitted false statements under

[1] In fact, Mr. Leeds is identified by Torres in his Habeas Petition as the attorney who "ignored" Torres' request to investigate an alibi defense to the Staten Island home invasion (the home invasion at the heart of this Appeal). (Da077).

oath in his Habeas Petition when he claimed to have no knowledge of the Staten Island robbery before it occurred").

During Mr. Tairi's trial and for the next fifteen years while it adjudicated appeals and post-conviction applications, the State possessed the Sworn Statement and did not disclose it to Appellant or the Court. The State's failure to do so constitutes a violation of Mr. Tairi's fundamental right to due process and all courts considering this issue have ordered reversal. This Court must do the same. Rewarding the State for its conduct would present a serious miscarriage of justice.

Argument

I. Mr. Tairi is Entitled to a New Trial Under Brady, Giglio and/or Jencks

a. Torres' Sworn Statement is Material Evidence and Entitles Mr. Tairi to a New Trial Under Brady and Giglio

To establish a prima facie Brady claim, a defendant must show that (1) the evidence at issue is favorable to him, either as exculpatory or impeachment evidence; (2) the prosecution suppressed the evidence, either purposely or inadvertently; and (3) the evidence is material to his case. See State v. Nelson, 155 N.J. 487, 497-98 (1998). Here, the State does not contest that Torres' Sworn Statement is favorable to Mr. Tairi, nor does it deny that it suppressed the Sworn Statement, either purposely or inadvertently. Rather, the State argues—in a purely

conclusory fashion—that Mr. Tairi fails to state a prima facie Brady claim because Torres' Sworn Statement is not "material."

Courts have long recognized that the touchstone of materiality is a "concern that the suppressed evidence **might have** affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976)) (emphasis added). Although a materiality analysis may involve examining the nature and strength of the prosecution's case, the materiality test does not involve evaluating the sufficiency of all non-suppressed evidence, nor does it require that the defendant prove "by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in [his] acquittal" Kyles v. Whitley, 514 U.S. 419, 434-35 (1995)) (emphasis added). Accordingly, the test is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler v. Greene, 527 U.S. 263, 290 (1999).

At trial, there was no forensic evidence suggesting that Mr. Tairi was involved in the home invasions. In fact, no witness (other than Torres) placed Mr. Tairi at the scenes of the crimes. That is why the State conceded at trial that Torres' testimony was the single most important evidence. That is also why Torres' Sworn Statement significantly undermining his testimony is material.

Torres' Sworn Statement was unequivocal: He had no knowledge of the first of three home invasions. Torres was so adamant that he wrote to his attorney and

memorialized his defense in writing. His counsel "ignored [Torres'] request to investigate…that [Torres] had no knowledge of the Staten Island robbery and kidnapping of Lenny Theodeoulou." (Da077). Torres further claimed that he possessed "letters that [he] sent to the attorney about this affidavit and letters from co-defendant saying he was willing to give an affidavit." (Da079). In other words, Torres denied his involvement in the criminal conduct and had ample corroboration for his defense.

Had Torres' Sworn Statement been disclosed to Mr. Tairi at the time of his trial, he could have served a subpoena demanding the letter Torres wrote to his attorney,[2] which may have been exculpatory. Further, as set forth supra at note 3, Torres possessed letters from codefendant DeJesus (written years *prior* to the Habeas Petition) corroborating Torres' claim that he had no knowledge of the first home invasion. If Torres' Sworn Statement was disclosed to Mr. Tairi at the time of his trial, he could have served a subpoena for the DeJesus letters, which may also have contained exculpatory material. Although Mr. Tairi was provided with **one** letter in 2021 following an evidentiary hearing, the other letters were destroyed. Mr. Tairi was never able to review the letters from Torres to his counsel.

[2] Because Torres claimed ineffective assistance in his Habeas Petition, his communications with counsel were no longer privileged. See Da074 – Da081.

i. A Finding that Torres' Sworn Statement is Immaterial Would Be Inconsistent with Well-Established Authority in This Jurisdiction and Others

Courts consistently award new trials where a prosecution witness's prior inconsistent statement are withheld from a defendant. See e.g., People v. Bond, 95 N.Y.2d 840 (2000); Spicer v. Roxbury Corr. Inst., 194 F.3d 547 (4th Cir. 1999); Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003); State v. Scheidel, 165 Ohio App.3d 131 (2006).

As in Bond, 95 N.Y.2d at 843, wherein the witness's testimony "was crucial to the People's theory [of the case]," here, Torres' testimony was critical to the State's case.

Although the State asserts that Torres' testimony was corroborated by other evidence, the examples and inferences it relies on are weak, and undermined by other trial evidence. State v. Lodzinski, 249 N.J. 116, 157 (N.J. 2021) ("Bootstrapped inferences cannot substitute for the proof necessary to satisfy an element of an offense"). For example, the State cites Mr. Tairi's relationship with the Theodolou family—a relationship that neither of his codefendants had—as evidence that he participated in the home invasion in Staten Island. State Br. at 5. Mr. Tairi's relationship with the Theodolou family, however, would have made it *easier* to identify him as a perpetrator. Nevertheless, the family did *not* identify Mr. Tairi as a perpetrator and their reason for not doing so is simple: he was not

involved. Likewise, the State cites Marisol Melton nee DeJesus's testimony that Mr. Tairi provided her with bail money for DeJesus after his arrest as evidence of his participation in offense conduct. State Br. at 5. However, Ms. Melton's testimony is not corroborative of anything, particularly given that she, herself, was a biased witness. In fact, **Ms. Melton's father** was a coconspirator in the home invasions, a fact identified for the first-time during Mr. Tairi's trial. See 9T 10-111. Finally, the State fails to acknowledge the countless references in the evidence and testimony that actually *exonerated* Mr. Tairi altogether. See e.g. 1T 109, 110, 140 (Lenny Theodolou testified that the individual in the back seat of the car and the individual who made the threats against him and his family did not speak with an accent or stutter; Mr. Tairi speaks with a distinct accent and stutter); 1T 108-109, 110:5, 152:18 – 215:1, 159 (Theodoulou's did not see Mr. Tairi at their house on the date of the incident, nor did they hear his voice, which they would have recognized); 10T 118 (absence of forensic evidence). See also Def. Br. at 10-17.

b. Torres' Sworn Statement is Brady Material Regardless of its Admissibility at Trial

Torres' Sworn Statement would be admissible at trial under New Jersey Rules of Evidence 803(a)(1) and 608. See Def. Br. at 31-34. The State's assertion that Torres's prior inconsistent statement would not be admissible is meritless; indeed, the States does not and cannot identify any rule of evidence that would

exclude it. However, even if this Court finds that it would not be admissible at trial, Torres' Sworn Statement still constitutes Brady material.

The State concedes that "inadmissibility is not the end of an analysis as to whether evidence is material for Brady purposes." State Br. at 31. The State argues, however, that "inadmissible evidence is only material [for Brady purposes] if it could lead to the discovery of admissible evidence which, in turn, could have affected the outcome of a defendant's trial." Ibid. In support of its argument, the State relies upon State v. Hernandez, 225 N.J. 451 (2016), wherein the issue was limited to "whether [defendants] have a right to discovery of the files *in unrelated cases* involving the same cooperating witnesses." (emphasis added). Because Torres' Sworn Statement relates to *the same case*, same conduct and same Indictment, Hernandez is inapposite. Rather, the State's discovery obligations are governed by Rule 3:13-3, as set forth more fully infra.

Notwithstanding, the State does not dispute – because it cannot – that the disclosure of the Sworn Statement would have led to the discovery of other material evidence. See Section II(a); see also State v. Hernandez, 225 N.J. 451, 466-67 (2016) (inadmissible evidence is material if it could lead to the discovery of admissible evidence that could have affected the outcome of a defendant's trial); State v. Ballard, 331 N.J. Super 529, 538 (App. Div. 2000) (explaining that "[d]iscovery is appropriate if it will lead to relevant and material information");

State v. Stein, 225 N.J. 582, 596 (2016) (recognizing that "[d]iscovery . . . in a criminal case, 'is appropriate if it will lead to relevant' information"). If the State disclosed the existence of the Sworn Statement it possessed, Mr. Tairi could have investigated further, subpoenaed additional records, and adjusted his trial strategy accordingly.

Thus, Torres' Sworn Statement still constitutes Brady because it *would* have led to the discovery of other, admissible evidence in Torres' possession.

c. Jencks is Encompassed and Triggered by Rule 3:13-3 and Compelled the Production of the Sworn Statement Prior to Mr. Tairi's Trial

The New Jersey Rules of Court memorialize and mandate the disclosure of Jencks material. Specifically, Rule 3:13-3(b) provides that "[d]iscovery shall include exculpatory information or material." However, even if this Court determines that Torres' Sworn Statement is not exculpatory or "material," the State was still obligated to produce it pursuant to Rule 3:13-3(b). Rule 3:-13-3(b) provides that, in addition to "exculpatory information or material," discovery "shall **also include…***record of statements*, signed or unsigned…*by co-defendants which are within the possession, custody or control of the prosecutor.*" (emphasis added). Thus, the Rules of Court mandate the disclosure of a Sworn Statement by a testifying witness. Notably, unlike Brady/Giglio the disclosure obligation is triggered *regardless* of whether the statement is "material" or not. This conclusion

was further emphasized by the New Jersey Supreme Court. See State v. Farmer, 48 N.J. 145, 152 (1966);

d. Mr. Tairi's Argument that the PCR Judge Failed to Consider the Sworn Statement as Giglio is Unopposed and Warrants Reversal

On appeal, Appellant argued that the PCR Judge erroneously refused to consider Giglio in conjunction with his Brady analysis. Specifically, in denying Mr. Tairi's petition for post-conviction relief, the Court incorrectly concluded that Mr. Tairi raised his Giglio claim for the first time in a reply brief and thus, found that the Giglio argument was procedurally barred. (Da178-79). This determination was rendered, notwithstanding the fact that Appellant's Petition for Post-Conviction relief cited Brady, in addition to other authority, *including* Giglio.

The State does not oppose Appellant's argument that the failure to consider his Giglio arguments was erroneous, warranting reversal. Furthermore, the State concedes that Giglio is encompassed in Brady. See State Br. at 26-29. Reversal is warranted for this reason alone.

II. Mr. Tairi's Petition for Post-Conviction Relief is Neither Procedurally Improper nor Time Barred

The State argues that Mr. Tairi's PCR petition is barred under Rule 3:22-4(b)(2)(B) because Torres' Sworn Statement was discoverable earlier; Rule 3:22-5 for being substantially similar to a prior claim; and Rule 3:22-12(a)(2)(B) for

having been filed five years after discovery. State Br. at 19-20. For the reasons set forth infra, Mr. Tairi's PCR petition is neither procedurally barred nor time barred.

a. Mr. Tairi's PCR Petition is Not Barred by Rule 3:22-4(b)(2)(B)

i. Mr. Tairi Could Not Have Discovered Torres' Sworn Statement Earlier Himself

Torres' Sworn Statement was not, as the State argues, "discoverable years earlier by reasonable diligence." State Br. at 20. At the time Edwin Torres filed the Habeas Petition under the alias "Erwin" Torres, PACER was not available or used prominently, particularly for a pretrial State detainee in county jail. Def. Br. at 44. Indeed, the State does *not* argue that Mr. Tairi actually possessed Torres' Sworn Statement. It follows that Mr. Tairi cannot be blamed for the State's (or counsel's) conduct.

ii. If the Court Finds that Torres' Sworn Statement Was or Should Have Been Discovered Earlier, Mr. Tairi Cannot be Blamed for Ineffective Assistance of Counsel

The State should not be permitted to shift blame for the Brady violation on Mr. Tairi's trial counsel, appellate counsel, or PCR counsel. If the Court is inclined to agree that counsel *could* have discovered the Sworn Statement through reasonable diligence, the Court should also agree that counsel was ineffective.

The State hardly addresses Appellant's arguments related to ineffectiveness of counsel, and for good reason. Rather, the State argues, in purely conclusory

fashion, that Appellant has not met his burden of establishing ineffective assistance of counsel. This argument, however, belies the State's own position that counsel could have identified and raised arguments related to the Brady violation but failed to do so. More specifically, the State readily concedes that the blame falls on Appellant's counsel, not the State, for the violation. See State Br. at 20-24.

If the Court finds that counsel was required to take some further action, notwithstanding the State's failure to disclose Brady material, Mr. Tairi has met his burden of establishing that he was deprived of his Due Process right to constitutionally effective assistance of counsel as defined in Strickland v. Washington, 466 U.S. 668 (1984) and State v. Fritz, 105 N.J. 42 (1987).

First, if the Court agrees with the State that Torres' Sworn Statement "was discoverable years earlier by reasonable diligence" (State Br. at 20) and finds that counsel should have raised the issue at trial, Mr. Tairi's trial counsel, Jeffrey Simms, was ineffective for failing to do so. Of course, putting the onus on trial counsel in 2008 to search and examine all databases and cataloguing systems for statements made under an alias would be unreasonable.

Second, if the Court agrees with the State that Torres' Sworn Statement "was known to [Mr. Tairi] when he filed his first PCR petition on April 28, 2017" (State Br. At 21-22), Mr. Tairi's original PCR counsel, Craig Leeds, was ineffective for failing to raise the issue in the petition. As set forth supra, Mr.

Leeds was quickly removed from his court-appointed representation because he previously represented Torres **in connection with this matter**. Although Leeds' filing generally referenced a habeas petition filed by Torres, it was offered strictly for background, and Mr. Tairi had no specific knowledge of its contents.[3] See Pa055 ("Torres asked [another inmate] *to help prepare* his Petition for Habeas Corpus *to be filed* . . .") (emphasis added). Specifically, the 2017 PCR was predicated on Torres' recantation of his trial testimony regarding the Staten Island home invasion to another inmate; the habeas petition was only referenced to provide context for why and how the other inmate met Torres. If Leeds actually possessed Torres' Sworn Statement (there is no indication that he did) and did not present an argument related to the substance of the Statement, Leeds was ineffective.

Thus, if this Court finds that Torres' Sworn Statement could have been discovered earlier through reasonable diligence by Mr. Tairi's counsel, Mr. Tairi's

[3] Likewise, during the course of his "numerous appeals and PCR filings" (State Br. at 3), Mr. Tairi was not aware that Torres was in possession of letters from DeJesus in which DeJesus expressed his willingness to provide an affidavit. Mr. Tairi only learned of these letters when he was given an opportunity to examine Torres about this issue during the 2021 evidentiary hearing. Upon learning of the DeJesus letters, Mr. Tairi subpoenaed Torres' records, but Torres only produced one letter as he apparently did not preserve the others. Had the State disclosed Torres' Sworn Statement at the time of Mr. Tairi's trial, Mr. Tairi would have been able to subpoena and request the DeJesus letters in advance of his trial. Thus, the State's failure to disclose Torres' Sworn Statement directly resulted in the failure of Torres to preserve the DeJesus letters.

constitutional right to effective assistance of counsel was compromised, necessitating a new trial. State v. Nash, 212 N.J. 518, 549-50 (2013).

iii. The Factual Predicate is Sufficient to Warrant Relief and Has Never Previously Been Adjudicated

The State asserts that "[t]his Court [h]as . . . [a]lready [d]etermined that the [f]actual [p]redicate is [i]nsufficient to [w]arrant [r]elief" in connection with Mr. Tairi's amended first PCR petition. State Br. at 20, 22. However, this Court has only ever decided that Torres' Sworn Statement is insufficient to warrant a new trial *as newly discovered evidence*. See Pa232 – Pa234. This Court was never tasked with, nor has it ever decided whether there existed a Brady violation that undermined Mr. Tairi's constitutional rights. See Da024-27; Da071-73; Da145-47. Indeed, the standard for granting a new trial based on newly discovered evidence is **not** the same as the standard for granting a new trial based on a substantial denial of a defendant's constitutional rights. Thus, contrary to the State's assertion, the PCR court did not "ha[ve] a fair opportunity to consider the . . . claim and to correct that asserted constitutional defect." (State Br. at 24-25) (quoting Picard v. Connor, 404 U.S. 270, 276 (1971)) (internal quotation marks omitted). Accordingly, the instant PCR petition cannot be barred under Rule 3:22-5.

To succeed on a claim based on newly discovered evidence, a defendant must demonstrate that the evidence is "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not

discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Szemple, 247 N.J. 82, 99 (2021). In contrast, to succeed on Brady claim, a defendant need only prove that there was a "[s]ubstantial denial in the conviction proceedings of [his] rights under the Constitution of the United States or the Constitution or laws of the state of New Jersey." Here, Mr. Tairi's constitutional rights were violated when the State failed to produce Torres' Sworn Statement despite its obligations to do so pursuant to Brady, Jencks (as memorialized in the New Jersey Rules of Court), and Giglio. Accordingly, Mr. Tairi is entitled to a new trial.

Conclusion

For the foregoing reasons, and in accordance with all courts who have considered this issue, Defendant Afrim Tairi's Appeal should be granted.

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Dated: March 19, 2024