No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROY L. RAMBO, JR.,

Petitioner,

v.

ADMIN. EAST JERSEY STATE PRISON, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by,

Roy L. Rambo, Jr., *Pro Se*
INM#521696 / SBI#205593-B
South Woods State Prison
215 Burlington Road South
Bridgeton, New Jersey 08302
(No telephone number available)

PETITIONER IS INCARCERATED

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APPENDIX A

DLD-012 **October 15, 2020**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2196**

ROY L. RAMBO, JR., Appellant

VS.

ADMINISTRATOR EAST JERSEY STATE PRISON, ET AL.

(D.N.J. Civ. No. 14-cv-00874)

Present: JORDAN, KRAUSE and PHIPPS, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellees' response; and

(3) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The District Court denied Rambo's claims as meritless. Jurists of reason would not debate the correctness of this decision. See Strickland v. Washington, 466 U.S. 668, 687-96 (1984) (describing standard for ineffective assistance of counsel); United States v. Lore, 430 F.3d 190, 208 (3d Cir. 2005) (court may place reasonable limits on cross-examination); Bishop v. Mazurkiewicz, 634 F.2d 724, 725 (3d Cir. 1980) (proposed jury instruction is only required by due process if it has rational support in the evidence); see also United States

v. Wrensford, 866 F.3d 76, 91 (3d Cir. 2017) (applying rational support standard to passion or provocation element of voluntary manslaughter instruction).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: October 19, 2020
Lmr/cc: Roy L. Rambo, Jr.
Dit Mosco

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROY L. RAMBO, JR., Petitioner, v. PATRICK A. NOGAN, et al., Respondents.	Civil Action No. 14-0874 (MAS) **OPINION**

SHIPP, District Judge

Before the Court is the Petition for a writ of habeas corpus of Petitioner Roy L. Rambo, ("Petitioner") brought pursuant to 28 U.S.C. § 2254. (Pet., ECF No. 1.) This Court previously granted the Petition. (Order, Sept. 1, 2017, ECF No. 45.) The Third Circuit Court of Appeals reversed and remanded for consideration of Petitioner's other arguments raised in his Petition. (USCA J., Jan. 30, 2019, ECF No. 72.) For the reasons stated below, the Petition is now denied.[1]

I. BACKGROUND

For the purposes of this Opinion, the Court relies substantially on the facts and legal standard recited in its Opinion granting habeas relief. (*See* Op. 2–13, Sept. 1, 2017, ECF No. 44.) The Court provides only a brief summary of the facts relevant to this Opinion.

[1] Also pending before the Court are Petitioner's Motion to Compel the Production of Transcripts (ECF No. 96), Motion for the Production of Documents, (ECF No. 97), and Motion to Appoint Pro Bono Counsel, (ECF No. 98). Because the Court will deny the Petition, the pending motions are denied as moot. The additional discovery sought by Petitioner would not alter the Court's conclusion.

Petitioner was indicted for murdering his wife. After his indictment, Petitioner's marital assets were frozen by the Superior Court of New Jersey, Chancery Division. (Ra. Ex. 114, Nov. 7, 2003, Order, ECF No. 24.) The Chancery Division, relying on the New Jersey Slayer Statute, N.J. Stat. Ann. § 3B:7-1, *et seq.*[2] ("Slayer Statute"), denied Petitioner access to his assets for the purpose of hiring counsel in his criminal proceedings. (*Id.*)

Petitioner chose to represent himself at trial and was convicted. (Ra. Ex. 2, J. of Conviction, Apr. 22, 2005, ECF No. 14.) Petitioner appealed his criminal conviction. The Superior Court of New Jersey, Appellate Division, affirmed on July 22, 2008. *State v. Rambo*, 951 A.2d 1075 (N.J. Super. Ct. App. Div. 2008). The New Jersey Supreme Court denied certification, and the United States Supreme Court denied certiorari. *State v. Rambo*, 962 A.2d 529 (N.J. 2008), *cert. denied, Rambo v. New Jersey*, 556 U.S. 1225 (2009).

In or around February 2009, Petitioner filed a motion to reinstate his civil appeal—which was previously dismissed for Petitioner's failure to prosecute—from the Chancery Division's orders that froze his assets. (Ra. Exs. 132, 133, Pet'r's Mot. to Reinstate Appeal, ECF No. 24.) The Appellate Division denied Petitioner's appeal without prejudice and permitted Petitioner to file a subsequent appeal after securing a final judgment from the Chancery Division. (Ra. Ex. 134, Mar. 6, 2009 Order, ECF No. 24.) After securing a final judgment, Petitioner appealed. (App. Div. Ex. 69, Jan. 4, 2011, ECF No. 87-8.) The Appellate Division affirmed. *In re Estate of Rambo*, No. 5308-09, 2012 WL 1969954 (N.J. Super. Ct. App. Div. June 4, 2012). The New Jersey Supreme Court denied certification, and the United States Supreme Court denied certiorari. *In re*

[2] At the time, the relevant provisions of the New Jersey Slayer Statute were codified at N.J. Stat. Ann. 3B:7-1 (1982) (repealed 2004) (current version at N.J. Stat. Ann. 3B:7-1.1), N.J. Stat. Ann. 3B:7-2 (1982) (repealed 2004) (current version at N.J. Stat. Ann. 3B:7-1.1), and N.J. Stat. Ann. 3B:7-6 (1982) (amended 2004).

Estate of Rambo, 54 A.3d 810 (N.J. 2012), *cert. denied Rambo v. Estate of Rambo*, 571 U.S. 1237 (2014).

Following exhaustion of his direct appeals, Petitioner filed an application for post-conviction relief ("PCR"). The PCR court denied the application. (Ra. Ex. 40, Aug. 10, 2010 Order, ECF No. 18-1.) The Superior Court of New Jersey, Appellate Division, affirmed. *State v. Rambo*, No. A-0382-10T2, 2013 WL 512116 (N.J. Super. Ct. App. Div. Feb. 13, 2013). The New Jersey Supreme Court denied Petitioner's appeal. *State v. Rambo*, 75 A.3d 1160 (N.J. 2013). On or about February 11, 2014, Petitioner filed the instant Petition raising sixteen ground for habeas relief:

1) Ground One: The pre-trial restraint of Petitioner's assets by the chancery court wrongfully interfered with Petitioner's right to retain criminal defense counsel of his choice.

2) Ground Two: The New Jersey "Slayer Statute" is invalid because it conflicts with two other New Jersey state statutes. The Petitioner's conviction must be reversed because it was obtained following a state court's application of an invalid statute, where the application interfered with the Petitioner's property, counsel of choice, due process, fundamental fairness, fair trial, and equal protection rights.

3) Ground Three: The New Jersey "Slayer Statute" is unconstitutional because it is in conflict with federal law and Supreme Court precedent. The Petitioner's conviction must be reversed because it was obtained following a state court's application of an unconstitutional state statute, where the application interfered with the Petitioner's property, counsel of choice, due process, fundamental fairness, fair trial, and equal protection rights.

4) Ground Four: The Chancery Court misconstrued the scope of the New Jersey "Slayer Statute" to include assets that the Petitioner legitimately owned prior to the alleged criminal act. The court's erroneous expansion of the statute deprived the Petitioner of property rights guaranteed under the United States Constitution, Amendments V and XIV. The Petitioner's conviction must be reversed because the flawed application impermissibly interfered with his rights to counsel of choice, due process, fundamental fairness, a fair trial, and equal protection under the law, thereby infecting the entire criminal trial process.

5) Ground Five: The New Jersey courts erred when they failed to distinguish the

Petitioner's qualified Sixth Amendment right to counsel of his own choosing from the more familiar Sixth Amendment right to assigned counsel for an impoverished defendant.

6) Ground Six: The lower courts unreasonably applied federal law in a manner that was contrary to decisions by other New Jersey courts of equal or higher jurisdictions deciding similar matters. These divergent holdings, including the appellate decisions of February 13, 2013 and June 4, 2012, failed to protect the Petitioner's federal rights to property, counsel of choice, due process, fundamental fairness, a fair trial, and equal protection under the law. The violations constitute "structural errors" that require the reversal of Petitioner's conviction.

7) Ground Seven: The lower courts unreasonably applied federal law in a manner that was contrary to decisions by other states and federal courts of equal or higher jurisdictions deciding similar matters. These divergent holdings, including the appellate decisions of February 13, 2013 and June 4, 2012, failed to protect the Petitioner's federal rights to property, counsel of choice, due process, fundamental fairness, a fair trial, and equal protection under the law. The violations constitute "structural errors" that require the reversal of Petitioner's conviction.

8) Ground Eight: The New Jersey "Slayer Statute" was arbitrarily applied in a radically different manner for this Petitioner than it has been applied to similarly situated defendants, in violation of the Equal Protection Clause guaranteed by the United States Constitution, Amendment XIV.

9) Ground Nine: The Petitioner's waiver of counsel (predicated upon the erroneous deprivation of his assets) was not a valid "knowing, intelligent and voluntary waiver" of his Sixth Amendment right to counsel.

10) Ground Ten: Total forfeiture of Petitioner's assets pursuant to [N.J. Stat. Ann.] 3b:7-1, *et seq.* constitutes punishment and infringement on the United States Constitution, Amendment VIII and the New Jersey Constitution, Art. 1, ¶ 12 prohibitions against excessive fines; and intimates that further criminal prosecution violated the United States Constitution, Amends. V, XIV and the New Jersey Constitution, Art. 1, ¶¶ 1 and 11 (double jeopardy and due process of law clauses).

11) Ground Eleven: The trial court erred by restricting the scope of cross-examination of a material state's witness where the defense intended to impeach the credibility of her testimony by revealing her bias and the significant financial interest expected to be gained as a result of the Petitioner's conviction, in violation of the United States Constitution, Amendments VI and XIV.

12) Ground Twelve: The trial and appellate courts applied an improper evidence standard in determining whether to deliver a passion/provocation manslaughter jury instruction. Therefore, the trial court's refusal to charge passion/provocation

manslaughter as a lesser-included offense of murder reduced the state's burden of proof and impermissibly infringed upon the Petitioner's rights to due process and a fair trial, in violation of the United States Constitution, Amendments VI and XIV; and the New Jersey Constitution, Article 1, paragraphs 1, 9, 10.

13) Ground Thirteen: The trial court's failure to refus[e] to grant the Petitioner's request for a jury instruction on the affirmative defense of premises denied the Petitioner of his constitutional rights to due process and a fair trial, in violation of the United States Constitution, Amendments VI and XIV; and the New Jersey Constitution, Article 1, Paragraphs 1, 9, 10.

14) Ground Fourteen: The court-appointed attorneys failed to research the "Slayer Statute" case law and failed to pursue resolution or an interlocutory appeal of Petitioner's assets claims in the criminal, civil, or appellate courts prior to the criminal trial. Therefore, counsels' deficient performance prejudicially deprived the Petitioner of the effective assistance of pre-trial counsel, counsel of his own choosing, due process and a fair trial, in violation of the United States Constitution. Amendments V, VI and XIV.

15) Ground Fifteen: The decisions reached by the Appellate and Chancery Divisions were against the interest of the public where the defense costs were improperly shifted from the Petitioner to the office of the public defender.

16) Ground Sixteen: In the interests of justice, fundamental fairness, and to preserve judicial and taxpayer resources, this court should craft the appropriate remedy as a matter of first impression with respect to the "Slayer Statute" and the counsel of choice claims. The court should then order the trial court to immediately implement those remedies, including dismissal of the indictment with prejudice, and immediate release of the Petitioner from custody.

(Pet. 20–33) (capitalized in original).)

This Court granted Petitioner relief, finding that Petitioner was denied his right to counsel of choice under the Sixth Amendment. (Order, Sept. 1, 2017.) The Third Circuit reversed, finding that the particular issue presented "whether the state court's freezing of an individual's assets under the slayer statute could violate the Sixth Amendment right to choice of counsel—had not been addressed by the Supreme Court when the District Court granted relief." *Rambo v. Adm'r E. Jersey State Prison*, No. 17-3156, 2019 WL 386888, at *3 (3d Cir. Jan. 30, 2019). The Third Circuit remanded to consider Petitioner's other arguments raised in the Petition. *Id.*

II. DISCUSSION

A. Grounds One through Eight: Slayer Statute

Petitioner raises arguments under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution regarding the Slayer Statute and the Chancery Division's refusal to release funds to Petitioner for his criminal trial. Petitioner initially raised these arguments in his direct appeal of his criminal conviction. *See Rambo*, 951 A.2d at 1080, 1085–86. The Appellate Division declined to address any argument relating to the freezing of Petitioner's assets, finding that Petitioner failed to prosecute his appeal from the Chancery Division's order freezing his assets. *Id.* at 1083–84. The Appellate Division also noted that Petitioner had not made any attempt to "include in his Notice of Appeal the orders entered in the Chancery Division[.]" *Id.* at 1083.

As a result, Petitioner filed a motion to reinstate his appeal from the Chancery Division's order that froze his assets. (Mot. to Reinstate Appeal, June 15, 2010, ECF No. 85-9.) The Appellate Division ultimately reinstated the appeal. (Order, Aug. 23, 2010, ECF No. 85-7 at 6.) Petitioner then filed a lengthy appeal of the Chancery Division decision, arguing, among other things, that his constitutional rights were violated by the Chancery Division's decision to freeze his assets. (Rambo *Pro Se* Br., Jan. 4, 2011, ECF No. 87-8.) Specifically, Petitioner argued that his rights under the Fifth, Sixth, and Fourteenth Amendments were violated, that he was divested of his property rights, that he was denied a fair trial, that the Slayer Statute is unconstitutional, and that the Chancery Court's application of the Slayer Statute to Petitioner was unconstitutional. (*Id.*)

The Appellate Division affirmed the Chancery Division. *In re Estate of Rambo*, 2012 WL 1969954 *4. In that decision, the Appellate Division reviewed the Chancery Division's application of the New Jersey Slayer Statute. As to all other claims raised by Petitioner, the court merely

stated that the arguments "lack[ed] sufficient merit to warrant a discussion in a written opinion."[3] *Id.* Based on the foregoing, it appears that Petitioner's constitutional claims relating to the freezing of his assets under the Slayer Statute were exhausted in Petitioner's civil matter.[4]

Petitioner raised these constitutional arguments for a third time on PCR. The Appellate Division on PCR refused to review in detail any claims relating to the freezing of Petitioner's assets, finding that all the claims had already been ruled on by the Appellate Division, in Petitioner's appeal of the probate matter. *See Rambo*, 2013 WL 512116. The PCR appellate court did, however, repeat its decision in *In re Estate of Rambo*, 2012 WL 1969954, incorporating that holding into the PCR appellate court's holding. Thus, it appears that nearly all of Petitioner's constitutional claims relating to the freezing of his assets under the Slayer Statute were raised and exhausted before the New Jersey state courts and are entitled to AEDPA[5] deference.[6]

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[3] Petitioner raised these same constitutional arguments in his petition for certification before the New Jersey Supreme Court. (Rambo Pet. for Cert. June 25, 2012, ECF No. 90-1 at 2–21.) The New Jersey Supreme Court denied certification. *See In re Estate of Rambo*, 54 A.3d 810, *cert. denied Rambo*, 571 U.S. 1237.

[4] The Court also notes that in Petitioner's memorandum in support of the instant Petition, he refers to the constitutional arguments he raised when appealing the decision of the Chancery Division: "Petitioner appealed the chancery matter, in its entirety. He maintained . . . [that] the 'Slayer Statute' deprived him of his Federal and State constitutional rights to property, counsel of his choice, due process, fundamental fairness, a fair trial, and equal protection under the law." (Pet'r's Mem. in Support of Petition Part 1 at 12, ECF No. 1-1.)

[5] AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996 which "provides that a federal court may grant habeas relief to a state prisoner based on a claim adjudicated by a state court on the merits if the resulting decision is 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Kernan v. Cuero*, 138 S. Ct. 4, 5 (2017), *reh'g denied*, 138 S. Ct. 724 (2018) (citing 28 U.S.C. § 2254(d)(1)).

[6] Only ground Ten of the instant Petition does not appear to have been raised before the New Jersey state courts. In Ground Ten, Petitioner argues that the total forfeiture of his assets violated the Eighth Amendment prohibition against excessive fines and the Fifth Amendment Double Jeopardy Clause. The Court addresses these arguments separately.

In this circumstance, because Petitioner's constitutional claims relating to the freezing of his assets were raised in state court and summarily rejected, Petitioner can only establish that the state court's ruling was unreasonable within the meaning of 28 U.S.C. § 2254(d)(1) "by showing that 'there was no reasonable basis' for the [state court's] decision." *Cullen v. Pinholster*, 563 U.S. 170, 187–88 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). Petitioner fails to meet his burden.

This Court is constrained by the Third Circuit's narrow view of this issue under the Sixth Amendment. Petitioner fails to cite, nor has this Court found, any clearly established Supreme Court precedent, at the time the state courts rendered their decisions, addressing whether a slayer statute used to freeze an individual's assets violates a petitioner's Fifth, Sixth, or Fourteenth Amendment rights. Whether this argument is raised in the context of equal protection, right to a fair trial, fundamental fairness, the denial of property rights, due process, or any other constitutional right, without Supreme Court case law directly on point, this Court is unable to grant relief on these claims.

Petitioner also raises claims under state law, *i.e.*, that the Slayer Statute violates various provisions of the New Jersey State Constitution, and other state statutes. Because a district court, on federal habeas review, is required to determine whether a person is in custody "in violation of the *Constitution or laws or treaties of the United States*[,]" these arguments are not cognizable to grant habeas relief. *See* 28 U.S.C. § 2254(a) (emphasis added).

Finally, in Ground Five, Petitioner argues that the state courts failed to distinguish between the Sixth Amendment right to counsel of choice, and the Sixth Amendment right to assigned counsel for an impoverished defendant. In raising this argument, Petitioner cites the same case law he used to argue that he was denied his right to counsel of choice under the Sixth Amendment.

(*See* Pet. 23; Pet'r's Mem. in Supp. of Pet. Part 2, at 50–54, ECF No. 1-2.) Petitioner primarily relies on *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) to support this argument, which specifically addressed the right to counsel of choice. Without presenting any new law or fact, the Court cannot conceive of how defining the issue within the context of a separate Sixth Amendment right was unreasonable within the meaning of 28 U.S.C. § 2254(d)(1)–(2). Petitioner's argument fails for the same reasons expressed above. Grounds One through Eight are denied.

B. Ground Nine: Waiver of Counsel

Petitioner asserts that his waiver of counsel was not knowing, intelligent and voluntary. (Pet. 24.) The Appellate Division, in affirming the Chancery Division, declined to address this claim on the merits. *In re Estate of Rambo*, 2012 WL 1969954, at *4. Nor did the Appellate Division, in affirming the denial of PCR, address this particular argument. *Rambo*, 2013 WL 512116. As noted *supra*, Petitioner must therefore show that there was no reasonable basis for the state court's decision. *See Pinholster*, 563 U.S. at 187–88. Once again, Petitioner fails to meet his burden.

Criminal defendants have a right under the Sixth Amendment to self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835. After a defendant asserts his desire to represent himself, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* (internal quotation marks and citation omitted).

In clarifying his argument, Petitioner explains that by freezing his assets he was deprived of his choice of counsel, and was thereby forced to proceed *pro se*. (*See* Pet'r's Mem. in Supp. of Pet. Part 2, at 65–66.) He explains, "[t]he validity of forcing a defendant to exercise one constitutional right because of a previous deprivation of another, cannot be justified." (*Id.* at 67.) At a hearing on March 15, 2004, Petitioner moved to represent himself at trial. (Ra. Ex. 76, Mar. 15, 2004, Hr'g Tr. 3:18-23, ECF No. 20-2.) Petitioner stated, on the record, that he made the motion "both knowingly and voluntarily, but . . . out of necessity." (*Id.* at 3:18-4:11.) He explained that he made the decision to proceed *pro se* because the Chancery Division refused to release his assets for the purpose of retaining private counsel, a private investigator, or expert witnesses. (*Id.* at 3:18-4:11.)

Petitioner presents a novel argument which fails to overcome AEDPA deference. *Faretta* and its progeny establish that to assert the right of self-representation, a defendant "must voluntarily and intelligently elect to conduct his own defense[.]" *Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (internal quotation marks and citations omitted). Courts must then conduct a "[*Faretta*] inquiry . . . directed towards determining whether the defendant's waiver is knowing and voluntary[.]" *Alongi v. Ricci*, 367 F. App'x 341, 348 (3d Cir. Feb. 26, 2010). In this instance, the trial court conducted an inquiry and permitted Petitioner to represent himself. While the record indicates that Petitioner chose to proceed *pro se* out of "*necessity*," that is a far cry from establishing that his waiver of counsel was *involuntary*. The fact remains that the state courts were prepared to provide Petitioner with a public defender, and he decided to forego that right. There is no Supreme Court case law which establishes that a defendant's choice to proceed *pro se* as a result of frozen assets constitutes a violation of the Sixth Amendment.

Petitioner also argues that his waiver was involuntary because it resulted from dissatisfaction with assigned counsel. (*See* Pet'r's Mem. in Supp. of Pet. Part 2, at 69.) This argument similarly fails. As the Third Circuit has explained:

> [T]he fact that [the defendant] was motivated to proceed *pro se* because he was dissatisfied with retained counsel is of only passing consequence, at most, under *Faretta*. In *Buhl v. Cooksey*, 233 F.3d 783 (3d Cir. 2000), we explained that almost all requests for *pro se* representation will arise from dissatisfaction with trial counsel. "It is the rare defendant who will ask to proceed *pro se* even though he/she is thoroughly delighted with counsel's representation, ability, and preparation." *Id.* at 794. Thus, that a defendant wishes to proceed without representation because s/he is dissatisfied with that representation is not usually relevant to whether that defendant's request is clear and unequivocal. In fact, *Faretta* was also motivated by his concerns about the quality of his representation. *Faretta* stated that "he did not want to be represented by the public defender because he believed that that office was very loaded down with a heavy case load." *Faretta*, 422 U.S. at 807, 95 S. Ct. 2525 (internal quotation marks and punctuation omitted).

Alongi, 367 F. App'x at 346–47 (3d Cir. 2010). For these reasons, Petitioner is denied relief on Ground Nine.

C. Ground Ten: Total Forfeiture of Assets

In Ground Ten, Petitioner argues that the forced forfeiture of his assets violates the Eighth Amendment prohibition against excessive fines, and the Fifth Amendment Double Jeopardy Clause. Unlike Petitioner's previous grounds for relief—which were raised before the New Jersey state courts and entitled to AEDPA deference—these arguments do not appear to have been fully raised before the New Jersey courts. Whether or not that is the case, because AEDPA deference is more deferential than *de novo* review, the Court finds these claims fail under either standard.

The Court first notes that claims related to the excessiveness of fines are generally not cognizable on habeas review. *See Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003) (holding that imposition of a fine "is not enough of a restraint on liberty to constitute 'custody' within the

meaning of the habeas corpus statutes"). To the extent this claim can be raised, however, it is entirely without merit. The Eighth Amendment prohibits the imposition of "excessive fines." U.S. Const. amend. VIII. To comport with the Eighth Amendment, a fine "must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (citing *Austin v. United States*, 509 U.S. 602, 622–23 (1993)). A fine is unconstitutional if it is "grossly disproportional to the gravity" of the offense. *Id.* at 337. The Supreme Court has observed that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336; *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy").

Here, even assuming the New Jersey Slayer statute could be construed as a "fine" within the meaning of the Eighth Amendment, the New Jersey legislature determined that total forfeiture of an individual's assets under the Slayer Statute to be appropriate. That decision is properly left to the New Jersey legislature. *See Bajakajian*, 524 U.S. at 336. The Court also observes that the statute in place at the time Petitioner's assets were frozen, was specifically designed to prohibit a surviving spouse, heir, or devisee, who "*criminally and intentionally kills* the decedent" from receiving any benefits.[7] *See* N.J. Stat. Ann. 3B:7-1 (1982) (repealed 2004). The Court finds no compelling reason to deem this statute "grossly disproportional to the gravity" of the offense, when

[7] At the time, the relevant provision of the New Jersey Slayer Statute provided:

> N.J.S.A. 3B:7-1: A surviving spouse, heir or devisee who criminally and intentionally kills the decedent is not entitled to any benefits under a testate or intestate estate and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

the offense is one of intentional killing. While the total forfeiture of Petitioner's assets in this instance may have affected his criminal trial, the statute on its face is not unconstitutional under the excessive fines clause of the Eighth Amendment.

Nor is Petitioner entitled to relief under the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause of the United States Constitution "provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *United States v. Dixon*, 509 U.S. 688, 695–96 (1993) (quoting U.S. Const. amend. V). The clause protects individuals both from successive punishments and from successive prosecutions for the same criminal offense. *Id.* at 696. In this context, Petitioner has not been subjected to successive punishments. The Supreme Court has explained that the Double Jeopardy Clause does not apply to civil forfeitures because it does not constitute punishment. *See United States v. Ursery*, 518 U.S. 267, 274 (1996) ("[I]n a long line of cases, this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment."); *see also One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam) ("[T]he forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments.")

In determining whether a legislative measure constitutes punishment, a court must "inquir[e] into 'the legislature's stated intent.'" *E.B. v. Verniero*, 119 F.3d 1077, 1095 (3d Cir. 1997) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In this instance, the New Jersey legislature placed the Slayer Statute in the laws governing the administration of estates, not as part of the criminal code. *See id.* (citing *Hendricks*, 521 U.S. at 368) (explaining that in *Hendricks* the Supreme Court found that "Kansas' placement of the challenged provision in the probate code

instead of the criminal code, and the legislature's description of its creation as a 'civil commitment procedure,' to be evidence of the legislature's 'disavow [ing] any punitive intent'"). The Supreme Court has further explained that while a "civil label is not always dispositive . . . we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it civil[.]" *Hendricks*, 521 U.S. 361 (citations and quotation marks omitted) (alterations in original). This is a "heavy burden" and applies only in "limited circumstances." *Id.*

The Court finds that Petitioner has not met his burden in this instance. The forfeiture imposed by the Slayer Statute is civil in nature as intended by the New Jersey legislature. The Court finds the imposition of the Slayer Statute, accompanied by Petitioner's subsequent criminal punishment, not violative of the Double Jeopardy Clause. Ground Ten is denied.

D. Ground Eleven: Scope of Cross-Examination

Petitioner next alleges a claim of trial court error. He argues that the trial court erred by restricting the scope of cross-examination of a State's witness to impeach her credibility. (Pet'r's Mem. in Supp. of Pet. Part 2, at 75–80.)

The Appellate Division, on direct appeal, addressed this claim as follows:

> The State called to the stand Jessica Lukachek, the girlfriend of Bruce Rambo, only son of defendant and his deceased wife. Defendant sought to cross-examine Ms. Lukachek to establish that she would benefit financially from the estate of his deceased wife. Defendant contends that the trial court's refusal to permit such cross-examination deprived him of due process. We disagree. The trial court was correct that Ms. Lukachek had no legal claim to any of the assets in the estate and thus had no direct pecuniary interest in it. Additionally, Ms. Lukache[]k testified about her close relationship with Mrs. Rambo; we are confident her antipathy to defendant was apparent to the jury. The scope of cross-examination rests within the sound discretion of the trial court, and the trial court did not abuse that discretion in its rulings in this regard. *State v. Petillo*, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973);

> *Casino Reinvestment Dev. Auth. v. Lustgarten*, 753 A.2d 1190 (App. Div.), *certif. denied*, 762 A.2d 221 (2000).

Rambo, 951 A.2d at 1087.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. "[T]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (internal citations and quotation marks omitted) (emphasis in original).

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'

Id. at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). Significantly, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 679 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)) (emphasis excluded).

In applying *Van Arsdall*, the Third Circuit has explained that "the denial of cross-examination upon a proper subject for cross-examination is a ground for reversal if the denial appears to have been harmful." *United States v. Riggi*, 951 F.2d 1368, 1376 (3d Cir. 1991). "Whether the denial [of cross-examination] appears to have been harmful depends on the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Id.*

The Appellate Division decision on this matter was neither contrary to, nor an unreasonable application of, Supreme Court precedent. On direct examination, Jessica Lukachek ("Lukachek") testified that the victim was a happy woman, with a good demeanor, eager to help her son. (Ra. Ex. 96, Jan. 27, 2005, Trial Tr. 114:10–115:17, ECF No. 23.) During cross-examination, Petitioner began asking Lukachek about her and Bruce Rambo's assets. (*Id.* at 120:2–121:15.) The State objected, arguing that the line of questioning was irrelevant. (*Id.* at 121:16–19.) Petitioner, through standby counsel, explained that he wished to reveal that the "witness [Lukachek] and Bruce Rambo have a financial motive . . . in the outcome of . . . trial." (*Id.* at 121:16–122:5.) The trial court ultimately refused to permit Petitioner to question Lukachek about what she stood to benefit from a possible conviction. (*Id.* 123:14–124:6.) The court emphasized that because Lukachek "ha[d] no legal status to benefit from [the outcome of trial]," questioning her on any financial motive was impermissible. (*Id.* 139:5–13.) The court did permit cross-examination relating to Lukachek's relationship with Petitioner and whether Petitioner provided her and Bruce Rambo with money. (*Id.* 123:14–124:6.) The court also explained that it would be permissible to question Bruce Rambo on financial motive, were he to testify.[8] (*Id.* 139:5–13.)

While questioning Lukachek on possible financial motive may have been helpful to Petitioner, he fails to demonstrate that his constitutional rights were violated by the trial court's decision to limit the scope of cross-examination. As explained by the Appellate Division, at the time she testified, Lukachek had no legal claim to any assets. Thus, finding that line of questioning irrelevant was not unreasonable. The trial court permitted Petitioner to impeach Lukachek's credibility in any other manner, and the record reveals that he did so. Petitioner questioned Lukachek about the victim being lonely (*id.* at 135:15–17), having emotionally "bad days" (*id.*

[8] Bruce Rambo does not appear to have been called as a witness at trial by the State or defense.

136:18–24), and often thinking something was wrong (*id.* at 132:16–133:11). To the extent the cross-examination was limited, the Appellate Division's reasoning does not amount to an unreasonable application of Supreme Court law. This claim for relief is denied.

E. Ground Twelve: Lesser Included Offense

Petitioner next asserts that the trial court erred in failing to charge passion-provocation manslaughter as a lesser-included offense of murder. (Pet. 27–28.) The Appellate Division, on direct appeal, rejected this claim relying solely on state law. *See State v. Rambo*, 951 A.2d 1075, 1079–81 (N.J. Super. Ct. App. Div. 2008). The Appellate Division explained:

> Murder that is committed in the heat of passion induced by a reasonable provocation is reduced to manslaughter. *State v. Josephs*, 803 A.2d 1074 (2002); [N.J. Stat. Ann.] 2C:11–4(b)(2). The elements of passion/provocation manslaughter are well-known.
>
> > Passion/provocation manslaughter has four elements: the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying.
> >
> > [*State v. Viera*, 787 A.2d 256 (N.J. Super. Ct. App. Div. 2001) (quoting *State v. Mauricio*, 568 A.2d 879 (1990)), *certif. denied*, 803 A.2d 634 (2002).]
>
> . . . .
>
> When considering a defendant's request to charge the jury on passion/provocation, the trial court must review the record before it in the light most favorable to the defendant. *State v. Castagna*, 357, 870 A.2d 653 (N.J. Super. Ct. App. Div. 2005), *rev'd on other grounds*, 901 A.2d 363 (2006).
>
> > The threshold for a jury instruction for passion-provocation manslaughter is relatively low. The defendant need only show a rational basis for a verdict convicting the defendant of the lesser-included offense. However, the judge will not so

> instruct the jury if the evidence is so weak as to preclude jury consideration.
>
> [*Copling, supra*, 741 A.2d 624 (citations and internal quotation marks omitted).]

"[W]ords alone, no matter how offensive or insulting, never constitute sufficient provocation." *Castagna, supra*, 870 A.2d 653. Several cases have, nonetheless, recognized that a course of conduct over a period of time may constitute sufficient provocation. *State v. Erazo*, 594 A.2d 232 (1991) (stating that "continuing strain in a marriage fraught with violence" may constitute sufficient provocation); *State v. Guido*, 191 A.2d 45 (1963) (holding that "[A] course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation."); *State v. Vigilante*, 608 A.2d 425 (N.J. Super. Ct. App. Div. 1992) (finding that jury could conclude that past history of violence "accumulated a detonating force which caused him to explode").

We are satisfied, nonetheless, that the record presented here is sufficiently distinguishable from those cases. In *Guido* and *Vigilante*, for instance, the defendants had been subjected to physical abuse at the hands of their ultimate victims. In *Erazo*, defendant contended he killed his wife in the heat of passion when she said she would seek to have his parole revoked on the basis of a fabrication; she had previously threatened to report him to parole authorities. 594 A.2d 232.

Here, although defendant testified that his wife made continued threats against his life, there was no evidence of anything beyond her words. The record indicates, for instance, that when defendant left the marital residence, he left on the premises his gun cabinet to which she had ready access. He did not say that he saw any weapon in her hand on the day he shot her, only that he did not know what was in her hand. (According to the record, her keys, a pair of sunglasses and a Tupperware container were found beneath her body.) His stated fear that she might be going to retrieve a weapon cannot, in our judgment, constitute reasonable provocation for purposes of a passion/provocation instruction. The law should not have the effect of benefiting one who takes such a fatal pre-emptive action. *State v. Rodriguez*, 949 A.2d 197 (2008) ("We will not sanction the gratuitous use of deadly force. . . .").

Rambo, 951 A.2d 1080–81.

Petitioner's claim rests on matters of state law. "[I]t is not the province of a federal habeas court to re-examine state court determinations on state-law questions. . . . [T]he fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 67–72 (1991). To the extent this can be raised as a federal claim, as well, Petitioner's argument fails under federal law. A state trial court's refusal to give a requested jury instruction does not, by itself, create a federal habeas claim. Instead, a habeas petitioner must establish that the instructional error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation and quotation marks omitted). The error must have resulted in "actual prejudice." *Id.* at 637 (citation omitted).[9]

The testimony at trial simply did not support a passion-provocation manslaughter instruction. Petitioner testified that the victim did not physically touch him on the day of the shooting, she did not come into the bedroom with a gun or knife, and he knew when he shot the victim it was a fatal shot. (Ra. Ex. 99, Feb. 3, 2005, Trial Tr. 38:7–39:24, ECF No. 23-2.) Because a passion-provocation charge was unsupported by the testimony, Petitioner fails to prove that he suffered actual prejudice from the trial court's ruling. *See Brecht*, 507 U.S. at 637. Accordingly, the Appellate Division decision denying this claim, albeit under state law, was not an unreasonable application of Supreme Court precedent. Ground Twelve is denied.

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[9] Notably, the Supreme Court has never recognized that an individual has a due process right to jury instructions on lesser-included offenses in non-capital cases. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("[o]utside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error"); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (holding it unconstitutional to impose a sentence of death "when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense").

F. Ground Thirteen: Affirmative Defense

Petitioner also asserts that the trial court failed to provide a jury instruction on use of force in defense of premises. (Pet. 29.) Like the previous claim, the Appellate Division, on direct appeal, rejected this claim under state law. *See State v. Rambo*, 951 A.2d 1075, 1079–81 (N.J. Sup. Ct. App. Div. 2008). The Appellate Division held as follows:

> Defendant's next contention is that the trial court committed reversible error when it declined to give an instruction to the jury on the use of force in defense of premises. [N.J. Stat. Ann.] 2C:3–6. We disagree. The statute refers to the use of force "to prevent or terminate what [the actor] reasonably believes to be the commission or attempted commission of a criminal trespass by such other person in or upon such premises." Defendant's wife, however, was not a trespasser; she was a co-owner of the property, a staff member of the business and had keys, permitting her entry as she wished.

Rambo, 951 A.2d at 1087.

Once again, Petitioner's claim rests purely on matters of state law. *See Estelle*, 502 U.S. at 67–72. The Supreme Court has indicated that a defendant's right to a complete defense does not include the right to assert affirmative defenses. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (explaining that Supreme Court cases defining the constitutional right to present a complete defense "dealt with the exclusion of evidence . . . or the testimony of defense witnesses" and not "restrictions imposed on a defendant's ability to present an affirmative defense"). Here, the state court determined that Petitioner was not entitled to the requested instruction on defense of premises because the statute did not apply under the facts of the case. Petitioner fails to cite Supreme Court precedent relating to the precise issue in question, which holds otherwise. Because the state court decision was neither contrary to, nor an unreasonable application of, Supreme Court precedent, Petitioner is not entitled to relief on Ground Thirteen.

G. Ground Fourteen: Ineffective Assistance of Counsel

Petitioner next asserts that his court-appointed pretrial defense attorneys were ineffective insofar as they failed to appropriately research the Slayer Statute and failed to file an interlocutory appeal. (*See* Pet'r's Mem. in Supp. of Pet. Part 2, at 106–13.) Petitioner avers that his attorneys should have petitioned the Law Division to assume jurisdiction over the matter relating to Petitioner's Sixth Amendment rights. (*Id.*)

The Appellate Division, in denying PCR, denied Petitioner's claim as follows:

> A defendant seeking to vacate a conviction on grounds of ineffective assistance of counsel bears the heavy burden of proving (1) "that counsel's performance was deficient[,]" and (2) that the deficient performance prejudiced the defense[,]" meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *State v. Fritz*, 519 A.2d 336 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) [(internal quotation marks omitted)]. Prejudice is shown by proof creating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra*, 466 U.S. at 694.
>
> Defendant cannot prove either prong of the *Strickland* test. This court has determined that defendant was not permitted to use the proceeds of the marital estate to pay the cost of private counsel in this matter. *In re Estate of Linda Ann Rambo* (slip op. at 10–11). Accordingly, we conclude that pretrial counsel was not ineffective for failing to file a motion to transfer the probate matter to the Law Division. *Id.* 466 U.S. at 688; *see also State v. Worlock*, 569 A.2d 1314, 1329 (1990) (holding that "[t]he failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel").
>
> We also conclude that defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11–3(e)(2).

Rambo, 2013 WL 512116, at *5.

The PCR court reviewed the actions of each pretrial attorney, and held as follows:

> Defendant does not cite to any authority that any pretrial attorney would have been required or even permitted to enter into the chancery proceedings. As public defenders are not traditionally permitted to participate in fee generating cases, this Court cannot view the inaction of the attorneys to be ineffective.

(Ra. Ex. 40, Aug. 10, 2010, PCR Op. at 20–21, ECF No. 18-1.)

The Sixth Amendment guarantees the accused the "right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel is the right to the effective assistance of counsel, and counsel can deprive a defendant of the right by failing to render adequate legal assistance. *See Strickland*, 466 U.S. at 686. A claim that counsel's assistance was so defective as to require reversal of a conviction has two components, both of which must be satisfied. *Id.* at 687. First, the defendant must "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. To meet this prong, a "convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The court must then determine whether, in light of all the circumstances at the time, the identified errors fell "below an objective standard of reasonableness." *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014).

Second, a petitioner must establish that counsel's "deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 669. To establish prejudice, the defendant must show that "there is a reasonable probability that the result of trial would have been different absent the deficient act or omission." *Id.* at 694. On habeas review, it is not enough that a federal judge would have found counsel ineffective. The judge must find that the state court's resolution of the issue was unreasonable, a higher standard. *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

The state courts' reasoning does not amount to an unreasonable application of the *Strickland* standard. The pretrial public defenders were assigned to assist Petitioner in all manners relating to his criminal conviction, not his matter pending in the Chancery Division. The Slayer Statute was addressed by the Chancery Division and appealed in that forum. In fact, the Appellate Division on direct appeal, and on appeal from the denial of PCR, found all issues relating to the Slayer Statute procedurally barred. Pretrial counsel cannot be faulted for failing to raise arguments and research issues that were not properly before them.

Further, the Chancery Division's decision to freeze Petitioner's assets was appealed and affirmed. *In re Estate of Rambo*, 2012 WL 1969954, at *4. That decision was reiterated in the Appellate Division decision denying PCR. *See Rambo*, 2013 WL 512116, at *4. Because the claim was addressed and upheld on the merits, this Court is hard-pressed to find that Petitioner was prejudiced by the failure of pretrial counsel to file an interlocutory appeal. Under the prejudice prong of *Strickland*, a petitioner must establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695. Petitioner raised the issue of his assets being frozen before every conceivable New Jersey state court; each of those courts denied him relief. Thus, even had pretrial counsel raised the argument in an interlocutory appeal, Petitioner fails to prove prejudice. Petitioner is denied relief on Ground Fourteen.

H. Ground Fifteen: Waste of Taxpayer Resources

In his next ground for relief, Petitioner argues that the decision to freeze his assets was against the public interest, because he was forced to use taxpayer money for his defense. (Pet'r's Mem. in Supp. of Pet. Part 2, at 114–17.) Petitioner fails to persuade this Court that he is entitled to relief on this claim. While a waste of taxpayer resources can be cause for concern, Petitioner

fails to establish that the state courts *unreasonably* froze his assets under the Slayer Statute. Once his assets were frozen, Petitioner was entitled to receive the assistance of counsel in his defense—a constitutional right of every indigent criminal defendant. This claim for relief is denied.

I. Ground Sixteen: Prayer for Relief

Ground Sixteen must be denied insofar as it represents a prayer for relief from this Court. Petitioner asks this Court to release Petitioner from incarceration and find the state court decisions unconstitutional. (Pet. 32–33.) For the reasons expressed by the Third Circuit, as well as the reasons expressed above, Petitioner is not entitled to relief under 28 U.S.C. § 2254.

III. CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. §2253(c), a petitioner may not appeal from a final order in a habeas proceeding where that petitioner's detention arises out of his state court conviction unless he has "made a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason would not disagree with this Court's conclusion that Petitioner has failed to make a substantial showing of the denial of a constitutional right, Petitioner's habeas petition is inadequate to deserve encouragement to proceed further. A certificate of appealability is, therefore, denied.

IV. CONCLUSION

For the reasons stated above, the Petition for habeas relief is DENIED and Petitioner is DENIED a certificate of appealability. An appropriate order follows.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: February 29, 2020

APPENDIX C

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3156

ROY L. RAMBO

v.

ADMINISTRATOR EAST JERSEY STATE PRISON;
ATTORNEY GENERAL NEW JERSEY,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(District Court No. 3-14-cv-00874)
District Judge: Hon. Michael A. Shipp

Argued on March 14, 2018

Before: McKEE, AMBRO, and RESTREPO, *Circuit Judges*.

(Opinion filed: January 30, 2019)

Richard T. Burke
Kelly A. Shelton [Argued]
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Counsel for Appellants

Richard Coughlin [Argued]
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OPINION*

McKEE, *Circuit Judge*.

The State of New Jersey appeals the District Court's grant of habeas relief to Roy Rambo, who was convicted of the first degree murder of his wife. The court granted Rambo relief based upon his claim that his murder conviction was obtained in violation of his Sixth Amendment right to hire defense counsel of his own choosing. For the reasons that follow, we will reverse.[1]

I. Factual Background and Procedural Posture

The background of this appeal is as tragic as it is unique. It involves not only Rambo's criminal conviction for murdering his wife, but litigation in New Jersey Chancery Court arising out of a dispute over marital assets, Rambo's individual assets, and application of New Jersey's Slayer Act.[2] However, inasmuch as we are writing only

* This disposition is not an opinion of the full court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] The District Court has jurisdiction over habeas petitions under 28 U.S.C. §§ 2241 and 2254. This Court has jurisdiction over appeals of habeas petitions under 28 U.S.C. §§ 1291 and 2253.

[2] At the time of Rambo's trial and conviction the relevant provisions of the New Jersey Slayer Act were codified at N.J.S.A. 3B:7-1 (1982) (repealed 2004) (current version at N.J.S.A. 3B:7-1.l), and N.J.S.A. 3B:7-6 (1982) (amended 2004). N.J.S.A. 3B:7-1 provided:

> A surviving spouse . . . who criminally and intentionally kills the decedent is not entitled to any benefits under a testate or intestate estate and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

for the parties who are familiar with the intricate procedural history of this case, we need only note that the New Jersey Chancery Court froze all of Rambo's individual assets as well as his interest in the marital estate in response to a petition that was filed by Rambo's son in his capacity as administrator of his late mother's estate.

Although Rambo was a dentist with considerable assets of his own, the Chancery Court's action prevented him from accessing any of his own assets to retain a lawyer of his own choosing to represent him in the criminal prosecution. Rather than accept appointed counsel that was offered by the trial judge in the murder case, Rambo reluctantly chose to proceed *pro se* in that prosecution. He was convicted of the first degree murder of his wife and sentenced to 40 years' imprisonment.

After his criminal appeals were denied, Rambo filed a habeas petition in District Court alleging that his murder conviction must be vacated because he was denied his Sixth Amendment right to choice of counsel. The District Court agreed and granted habeas relief.[3] It reasoned that the Chancery Court erred in freezing assets that Rambo owned outside of the marital estate. Since those assets amounted to almost $300,000, the District Court reasoned that Rambo could have hired counsel of his own choosing.[4] The District Court therefore concluded that the "choice" offered by the New Jersey Superior

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And N.J.S.A. 3B:7-6 provided: "A final judgment of conviction of intentional killing is conclusive for purposes of this chapter. In the absence of a conviction of intentional killing the court may determine by a preponderance of evidence whether the killing was intentional for purposes of this chapter."

[3] *See Rambo v. Nogan*, No. CV 14-874 (MAS), 2017 WL 3835670, at *14 (D.N.J. Sept. 1, 2017).

[4] *Id.* at *12, *14.

Court of proceeding *pro se* or accepting appointed counsel violated Rambo's Sixth Amendment right to counsel and Rambo was entitled to a new trial because his murder conviction was obtained in violation of his constitutional rights.[5] The appeals that proceeded in state court included an appeal of the Chancery Court's freezing of all of Rambo's assets as well as a direct appeal of his murder conviction and post-conviction relief proceedings. After Rambo's criminal appeals were denied, he filed the petition for habeas relief, which the District Court granted and which the State of New Jersey is appealing.

II. Discussion

A habeas petitioner may obtain relief under 28 U.S.C. § 2254 if s/he "is in custody in violation of the Constitution or laws of the United States."[6] The parties disagree about whether our review of the state court decisions to freeze Rambo's assets is *de novo* or whether we are restrained by the deference provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[7] Under AEDPA, a federal court can only provide habeas relief if the state court ruling "resulted in a decision that was contrary to," or "involved an unreasonable application of," clearly established federal law, as determined by the Supreme Court.[8] This deferential standard is appropriate when the state courts decide the underlying federal claim on the merits. Where "the state court has not reached the merits

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[5] *Id.* at *14.
[6] 28 U.S.C. § 2254(a).
[7] 28 U.S.C. § 2244 *et. seq.*
[8] 28 U.S.C. § 2254(d).

of a claim . . . presented to a federal habeas court," deferential review under AEDPA is not appropriate; instead, "we must conduct a *de novo* review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA."[9]

The New Jersey Appellate Division concluded that Rambo's "argument[] . . . attacking the Chancery Division's decision as a denial of his right to counsel under the Sixth Amendment . . . lack[ed] sufficient merit to warrant a discussion in a written opinion."[10] Rambo argues that this was not an adjudication on the merits. However, the Supreme Court has explained, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits."[11] In "instances in which a state court . . . simply regard[s] a claim as too insubstantial to merit discussion," the same rebuttable presumption that the claim was adjudicated on the merits applies.[12] Under the "look through" doctrine, "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."[13] Nothing on this record rebuts that presumption. Accordingly, we must presume that the Appellate Division's rejection of Rambo's Sixth Amendment claim rests

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[9] *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009), *as corrected* (July 15, 2009).
[10] *In re Estate of Rambo*, No. A-5308-09T2, 2012 WL 1969954, at *4 (N.J. Super. Ct. App. Div. June 4, 2012).
[11] *Harrington v. Richter*, 562 U.S. 86, 99 (2011).
[12] *Johnson v. Williams*, 568 U.S. 289, 299 (2013).
[13] *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

upon the same grounds as the Chancery Court's and afford that ruling AEDPA deference.[14] When a District Court adjudicates a § 2254 petition, the relevant Supreme Court precedent is the law at the time the state court renders its decision.[15]

Here, the District Court based its conclusion that Rambo was entitled to relief on three Supreme Court decisions: *Caplin & Drysdale, Chartered v. United States*,[16] *United States v. Monsanto*,[17] and *Luis v. United States*.[18] However, since *Caplin* and *Monsanto* were the only cases that had been decided before Rambo was convicted, only those decisions are relevant here.[19]

In *Caplin*, the Court had to determine whether a federal statute that authorized pre-trial forfeiture of property acquired as a result of drug trafficking with no exemption for property that could be used to pay defense counsel violated the Sixth Amendment.[20]

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[14] *See Rambo v. Nogan*, 2017 WL 3835670, at *3 ("[A]lthough there is a Sixth Amendment right, that right is not . . . a[n] absolute right. Obviously the [Petitioner] will have . . . an opportunity to have counsel, whether it's a counsel that he pays for or whether [it is] counsel that is provided to him. . . . In the circumstances of this case[,] I conclude that the funds from the sale of the . . . farm are to be held in trust and are not available to [Petitioner] for purposes of his defense in the criminal matter.") (quoting Chancery Court Judge Kumpf).

[15] *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("State-court decisions are measured against this Court's precedents as of the time the state court renders its decision.") (internal quotations omitted).

[16] 491 U.S. 617 (1989).

[17] 491 U.S. 600 (1989).

[18] 136 S. Ct. 1083 (2016).

[19] *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citing *Cullen*, 563 U.S. at 182) ("As we explained, § 2254(d)(1) requires federal courts to 'focu[s] on what a state court knew and did,' and to measure state-court decisions against this Court's precedents as of '*the time the state court renders its decision.*'") (internal quotation marks omitted).

[20] *Caplin*, 491 U.S. at 619.

The Court concluded that the Sixth Amendment right to counsel was limited, circumscribed by the defendant's ability to pay: "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney even if those funds are the only way that that defendant will be able to retain the attorney of his choice."[21]

The Court did not have any reason to address whether a separate contemporaneous civil court order freezing a defendant's untainted assets, and thereby precluding him from being able to afford counsel of his choosing, violated the Sixth Amendment right to counsel.

Similarly, in *Monsanto* the Court granted the Government's request to freeze certain assets that the Government alleged the defendant had acquired as a result of a criminal enterprise.[22] In rejecting the Sixth Amendment claim, the Court explained that upon commission of the crime, the forfeiture statute "vest[ed] . . . all right, title and interest" in the subject property "in the United States."[23] The Court refused to permit "a defendant . . . use [of] assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs."[24] The Court thus held that "the Government may—without offending the Fifth or Sixth Amendment—obtain forfeiture of property that a defendant might have wished to use to pay his attorney."[25]

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[21] *Id.* at 626.
[22] *Monsanto*, 491 U.S. at 602.
[23] *Id.* at 613.
[24] *Id.*
[25] *Id.* at 616.

Here, the District Court reasoned that Rambo's interest in the disputed assets should not have been restrained before he was convicted of murder because he still enjoyed the presumption of innocence.[26] Accordingly, the District Court believed that the state court had erred in restraining him from accessing any portion of the marital assets (or his individual assets) to retain counsel of his own choice.[27]

Rambo's purported Sixth Amendment right, however, is different than the right at issue in *Caplin* and in *Monsanto*. Rambo's claim had nothing to do with an interest in property that was subject to Governmental seizure because of its nexus to alleged illegal activity. The issue here – whether the state court's freezing of an individual's assets under a slayer statute could violate the Sixth Amendment right to choice of counsel – had not been addressed by the Supreme Court when the District Court granted relief.

The District Court also relied on *Luis*, but because *Luis* was decided nearly seven years after the state court rendered its decision under review, it was irrelevant under AEDPA.[28] AEDPA "does not require state courts to *extend* . . . precedent or license federal courts to treat the failure to do so as error."[29]

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[26] *Rambo v. Nogan*, 2017 WL 3835670, at *13.
[27] *Id.* ("[A]bsent a determination as to whether any portion of the marital assets was untainted, Petitioner was improperly precluded from accessing his untainted portion of the marital assets prior to his conviction.").
[28] *Cullen*, 563 U.S. at 182 ("State-court decisions are measured against this Court's precedents as of the time the state court renders its decision.").
[29] *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (emphasis in original).

III. Conclusion

For the reasons set forth above, we will vacate the District Court's grant of habeas relief and remand for that court to consider other potentially meritorious arguments (if any) that Rambo may have raised in his petition.[30]

[30] In his habeas petition, Rambo alleged violations of his Fifth, Eighth, and Fourteenth Amendment rights, and rights guaranteed under the New Jersey State Constitution. He claimed also, among other things, that the Slayer Statute is invalid and unconstitutional, the Chancery Court misconstrued the Slayer Statute, that his waiver of counsel was not valid, that the trial court erred in refusing to charge passion/provocation manslaughter as a lesser included offense, and ineffective assistance of his initial court-appointed counsel.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROY L. RAMBO, JR., Petitioner, v. PATRICK A. NOGAN, et al., Respondents.	Civil Action No. 14-0874 (MAS) **OPINION**

SHIPP, District Judge

This matter comes before the Court on the State of New Jersey's (the "State") Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 59(e).[1] (ECF No. 46.) The State seeks an order vacating the Court's September 1, 2017 Opinion and Order (ECF Nos. 44, 45).[2] Petitioner Roy L. Rambo Jr. ("Petitioner") filed opposition.[3] (ECF No. 47.) The Court has carefully considered the parties' submissions and decides the matter without oral argument. For the reasons stated below, the State's Motion is DENIED.

[1] The State also filed a Motion to Stay the Court's September 1, 2017 Order and Opinion. (ECF No. 48.) The Court will address the Motion to Stay in a separate opinion.

[2] As the Court noted in its September 1, 2017 Opinion, the State failed to adequately respond to Petitioner's habeas petition with arguments specifically tailored to the petition. (Sept. 1, 2017 Op. 14, ECF No. 44.) Instead, the State relied on its briefing on direct appeal of Petitioner's conviction and Petitioner's PCR application, as well as various state court decisions. (*Id.*) The Court conducted a careful review of the record to ensure that the State's arguments were given proper consideration despite the State's failure to specifically address relevant arguments in its federal court submissions.

[3] The Court reviewed Petitioner's submission but does not set forth his arguments here.

I. FACTUAL BACKGROUND

The Court relies substantially on the facts set forth in its prior opinion granting habeas relief. (*See* Sept. 1, 2017 Op. 2-12, ECF No. 44 ("Prior Opinion").) The Court recites facts here only as necessary for the instant motion.

Petitioner was arrested and charged with murdering his wife, Linda Rambo. (Prior Op. 2.) Petitioner's son was appointed as administrator of the wife's estate in a related probate proceeding in the Superior Court of New Jersey, Chancery Division, and sought to freeze his parents' marital assets. (*Id.* at 2-3.) Petitioner's son argued that the New Jersey Slayer Statute permitted the Chancery Division to freeze the marital assets to prevent Petitioner from squandering assets that may ultimately belong to the wife's estate. (*Id.* at. 2.) The Chancery Division granted the son's request. (*Id.* at 3.)

Thereafter, Petitioner moved to unfreeze a portion of the assets, asserting that he was entitled to use the assets for his criminal defense, and denial of access to his assets violated his Sixth Amendment right to counsel. (Prior Op. 3-4.) The Chancery Division denied the motion, finding that his Sixth Amendment right to counsel was not absolute. (*Id.* at 5.) After a jury trial, during which Petitioner proceeded *pro se*, Petitioner was found guilty of murdering his wife. (*Id.* at 6.) Years later, in the probate matter, the Chancery Division found that Petitioner was entitled to $290,314.51 by way of equitable distribution. (*Id.* at 9.) The Chancery Division credited this amount against a subsequent $6,000,000 wrongful death civil judgment against Petitioner in favor of Linda Rambo's estate, and transferred the full amount of Petitioner's entitlement to his wife's estate. (*Id.*)

After his conviction, Petitioner continued to assert his Sixth Amendment claim on direct appeal of his conviction, on direct appeal of his probate matter, and throughout his post-conviction

relief ("PCR") application and appeal. (Prior Op. at 10-11.) The Petitioner also filed appeals with the Supreme Court of New Jersey and the Supreme Court of the United States. (*Id.* at 10.) All of Petitioner's appeals were unsuccessful. (*Id.* at 10-11.) The instant Petition followed. (*Id.* at 11.)

II. STANDARD OF REVIEW

"The scope of a motion for reconsideration" of a final judgment under Rule 59(e) is extremely limited. *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). "The standard of review involved in a motion for reconsideration is high and relief is to be granted sparingly." *Warner v. Twp. of S. Harrison*, 885 F. Supp. 2d 725, 747 (D.N.J. 2012) (citations omitted). The moving party must set forth the factual matters or controlling legal authorities it believes the Court overlooked when rendering its initial decision. *Blystone*, 664 F.3d at 415; L. Civ. R. 7.1(i) (governing motions for reconsideration). To prevail on a motion for reconsideration under Rule 59(e), the movant must show "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [rendered the judgment in question]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.*; *see also U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837, 848-49 (3d Cir. 2014). The third prong requires the movant to show that "dispositive factual matters or controlling decisions of law were brought to the court's attention but not considered." *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 161 F. Supp. 2d 349, 353 (D.N.J. 2001) (citation omitted). A motion for reconsideration is not an opportunity to raise new arguments that could have been raised before the original decision was made. *See Bowers v. NCAA*, 130 F. Supp. 2d 610, 612-13 (D.N.J. 2001). Nor is a motion for reconsideration an opportunity "to ask the Court to rethink what it has already thought through." *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 215 F. Supp. 2d 482, 507 (D.N.J. 2002) (citation omitted).

III. DISCUSSION

The State asserts that the Court erred in granting habeas relief because: (i) Petitioner did not exhaust his state court remedies (Resp't's Br. 2-3, ECF No. 46-1); (ii) the actions of a private party, in this case, Petitioner's son, cannot be the basis of a Sixth Amendment claim (*id.* at 6-9); (iii) at the time of the alleged violation, the Supreme Court had not clearly established the Sixth Amendment right under which the Court granted habeas relief (*id.* at 9-13); and (iv) the marital assets at issue are not the equivalent of "untainted" assets (*id.* at 13-15). For the reasons explained below, the Court rejects each of these arguments.

A. Exhaustion of State Court Remedies

The Court's Prior Opinion addressed the issue of exhaustion of state court remedies. (Prior Op. 17.) The State now raises additional arguments in support of its position, specifically that Petitioner should have filed interlocutory appeals of Chancery Court decisions; however, it is inappropriate to submit new justifications on a motion for reconsideration. *See Interfaith Cmty. Org.*, 215 F. Supp. 2d at 507 (D.N.J. 2002). In any event, the Court is unpersuaded.

The State failed to cite any case law in its original response to Petitioner's habeas petition and similarly fails to cite any case law in its current motion supporting the proposition that an interlocutory appeal is required to exhaust state court remedies. In addition, the Court's independent research did not identify any case law supporting this assertion. Here, based on the Court's extensive review of the record summarized in the Court's Prior Opinion, it is clear that Petitioner raised his Sixth Amendment claim at all levels of the state court during the direct appeal of his conviction, when seeking PCR, and during the related probate proceedings.[4]

[4] The State also argues that Petitioner did not quickly appeal Chancery Court actions (Resp'ts' Br. 2-4) and "sat on his rights pending the outcome of his criminal trial." (*Id.* at 5.) As explained in the Court's Prior Opinion, the Court disagrees. (Prior Op. 3-6. 17.) The Court found that Petitioner

To be clear, Petitioner fairly presented his constitutional claim to the state court during the PCR process. (Prior Op. 17.) "[T]he substance of the claim presented . . . rather than its technical designation" controls. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992) (citation omitted). Although the state courts failed to explicitly rule on the constitutional issue during the criminal proceeding,[5] on appeal from denial of Petitioner's PCR application, the Appellate Division found that the constitutional issue had already been decided by the lower court. *State v. Rambo*, No. A-0382-10T2, 2013 WL 512116, at *10-11 (N.J. Sup. Ct. App. Div. Feb. 13, 2013). In its opinion affirming the denial of Petitioner's PCR application, the Appellate Division stated that "[t]he Chancery court's decision [was] not properly before [the Court], and defendant's argument relating to that decision [was] adjudicated on the merits [in the probate matter]." (*Id.* at 11.) As such, the Court again finds that Petitioner properly exhausted his state court remedies, and relief on this ground is denied.

B. Third Party Action

The State argues that because a third party, Petitioner's son, moved to freeze Petitioner's assets in a separate civil action, the result cannot be the basis of Petitioner's Sixth Amendment claim in the criminal matter. (Resp't's Br. 6-9.) The State asserts that it "never took action to enjoin the defendant's funds[;] [r]ather, a third party restrained assets in a civil matter [and] . . .

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adequately raised the violation of his Sixth Amendment right to counsel of his choice in the relevant state court proceedings. (*Id.* at 17.) The State further asserts that "[t]he [P]etitioner's failure to exhaust his state remedies is not simply a technical violation, rather it directly caused the alleged error in the criminal case." (Resp't's Br. 6.) Again, the Court disagrees. The Chancery Court order freezing Petitioner's assets and denial of Petitioner's motion to release assets to fund his criminal defense caused the constitutional violation in the criminal case.

[5] The state courts' refusal to adjudicate Petitioner's claim did not amount to procedural default. No state court held that state law barred Petitioner from bringing his claim; the courts simply declined to rule on the issue on jurisdictional grounds.

the State did not deprive [P]etitioner of [the] right to counsel of his choice." (*Id.* at 9.) The Court finds no merit in the State's argument.

Habeas relief is not limited to situations where the government deprives a defendant of his constitutional rights. Courts have held that habeas relief is available based on conduct that deprived defendants of a fair trial, none of which were attributable to the prosecution or to the court. *See Stouffer v. Trammell*, 738 F.3d 1205, 1218-19 (10th Cir. 2013) (jury tampering), *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995) (juror misconduct), and *Norris v. Risley*, 918 F.2d 828, 831 (9th Cir. 1990) (spectator interference). "[W]e are interested in whether the adversarial process at trial, in fact, worked adequately." *Rompilla v. Horn*, 355 F.3d 233, 259 (3d Cir. 2004) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)), *rev'd on other grounds*, 545 U.S. 374 (2005). Regardless of the source, if a petitioner is deprived of a fair trial in state court, then he is in custody pursuant to a state court judgment in violation of the Constitution—the touchstone of a habeas claim pursuant to 28 U.S.C. § 2254.

In addition, the Court is not persuaded by either of the two cases the State cites to support its argument. The first is an unpublished case from the District of Utah, *United States v. Johnson*, No. 11-cr-501, 2016 WL 4087351 (D. Utah July 28, 2016), and the second is from the Supreme Court of Vermont, *Estate of Lott v. O'Neill*, 165 A.3d 1099 (Vt. 2017). Neither case is binding on this Court. Moreover, the *Johnson* case is distinguishable and not applicable to the instant situation.[6] As to the *Lott* decision, the Court respectfully declines to follow the analysis provided

[6] In *United States v. Johnson*, the district court held that the defendant's Sixth Amendment right to counsel of his choice was not violated, despite his assets being frozen by a court-ordered receiver in another civil matter, because "[b]y the time [defendant] Johnson was indicted in the criminal case, the civil action against him . . . had been proceeding [for] some time, and a Receiver had been appointed . . . by court order." *Johnson*, 2016 WL 4087351, at *3. Accordingly, the facts in *Johnson* involved a prior and unrelated civil matter.

by the majority of the Supreme Court of Vermont in its 3-2 split decision. In sum, the Court rejects the State's argument on this ground, and relief is denied.

C. **Clearly Established Law**

Next, the State argues that: (i) the Court should have considered only Supreme Court case law in existence prior to the date Petitioner's conviction became final, unless a case decided after that date "illustrate[s] the prior state of the law[;]"(Resp't's Br. 10) and (ii) the Court relied upon federal law that was not clearly established until the Supreme Court's decision in *Luis v. United States*, 136 S. Ct. 1083 (2016). (*Id.* at 9.)

In its Prior Opinion, the Court applied the principles set forth in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), in its analysis, not the reasoning of *Luis*. Both of these cases pre-date the Petitioner's conviction. In any event, however, *Luis* is simply a further illustration of the constitutional principles addressed in *Caplin* and *Monsanto*. *See* Federal Habeas Manual § 3:29 (2017) ("A Supreme Court case decided after the relevant state court decision can be considered as illustrative of the proper application of the constitutional principle at issue.") (citing as an example *Wiggins v. Smith*, 539 U.S. 510 (2003)). The *Caplin* and *Monsanto* decisions addressed whether freezing "tainted" assets was proper. *Caplin*, 491 U.S. at 626; *Monsanto*, 491 U.S. at 616. The *Luis* case considered the protections afforded to "untainted" assets, the inverse of the *Caplin* and *Monsanto* cases. *See Luis*, 136 S. Ct. at 1088. Accordingly, the state has not set forth a valid basis for reconsideration and relief is denied on this ground.

D. Characterization of Marital Assets

On this point, the State essentially disagrees with the Court's Prior Opinion, arguing that "[t]he [P]etitioner had a diminished interest in the property since he was *charged* with killing his wife." (Resp't's Br. 13 (emphasis added).). The Court has already addressed and rejected this argument. (*See* Prior Op. 24.) The State neither asserts new facts nor points to any clear error of law the Court may have made; therefore, relief on this ground is denied.

IV. CONCLUSION

For the reasons set forth above, the State's Motion is DENIED.

MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Date: 10/2/17

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROY L. RAMBO, JR., Petitioner, v. PATRICK A. NOGAN, et al., Respondents.	Civil Action No. 14-874 (MAS) **OPINION**

SHIPP, District Judge

This matter comes before the Court on Petitioner Roy L. Rambo, Jr.'s ("Petitioner") Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (the "Petition"), challenging a sentence imposed by the State of New Jersey for the first-degree murder of his wife.[1] (ECF No. 1.) Respondents Patrick A. Nogan, Administrator, East Jersey State Prison, and John J. Hoffman, former Attorney General of the State of New Jersey, (collectively, "Respondents" or the "State") filed an Answer (ECF No. 11), along with numerous exhibits (ECF Nos. 14-24). Petitioner replied (ECF No. 26), and filed numerous items of correspondence in further support of his Petition (ECF Nos. 27, 29, 32, 37, 40). Respondents filed responsive correspondence. (ECF Nos. 30, 31, 39.) The Court has carefully considered the parties' submissions and decides the matter without oral argument. For the reasons stated below, the Petition is GRANTED.

[1] Petitioner subsequently filed an exhibit to the Petition, consisting of additional point headings in support of his Petition that were missing from his original filing. (ECF No. 25.)

I. Background

On or about August 16, 2002, Petitioner was indicted for purposely and/or knowingly causing the death of his wife, Linda Rambo, in violation of N.J.S.A. 2C:11-3(a)(1) or (2), and for knowingly and unlawfully possessing a .380 caliber Taurus pistol with a purpose to use it unlawfully against the person of another, pursuant to N.J.S.A. 2C:39-4a. (Ra. Ex. 1, Indictment, ECF No. 14.)

At the time of the indictment, Petitioner was a dentist and, prior to her death, Linda Rambo had worked in Petitioner's dental practice.[2] (Answer 5, ECF No. 11.) Immediately before Linda Rambo's death, Petitioner and Linda Rambo's marital assets primarily consisted of the following: (1) Petitioner's dental practice; (2) the real estate where Petitioner's dental practice was located, which was held in a tenancy by the entirety; and (3) the marital home (the "farm"), which was held in a tenancy by the entirety. (Ra. Ex. 107, Oct. 15, 2003 Hr'g Tr. 10:6, 12:11-15:15, ECF No. 24.)

On August 23, 2002, Petitioner and Linda Rambo's son, Bruce Rambo, filed an order to show cause for the appointment of a temporary and/or permanent administrator and for temporary and permanent restraints with the Superior Court of New Jersey, Chancery Division in Warren County (the "Chancery Division"). (Ra. Ex. 108, Aug. 23, 2002 OTSC, ECF No. 24.) Bruce Rambo sought to appoint himself as the administrator for the Estate of Linda Rambo, and sought to freeze all of Petitioner's assets and enjoin him "from expending any sums of money owned individually or as a marital asset." (*Id.*)

[2] In addition to running his dental practice, Petitioner was "the keeper" of the couple's financial assets, such that it was normal practice for Linda Rambo to ask Petitioner for money to pay for her living expenses. (Answer 5-7.) Petitioner also appeared to handle the couple's finances even throughout a period in which he and his wife were separated. (*Id.*)

Upon reviewing the matter, on August 28, 2002, the Honorable Harry K. Seybolt, J.S.C., of the Chancery Division appointed Bruce Rambo as the permanent administrator of the Estate of Linda Rambo and ordered that: "(1) all assets of Roy L. Rambo will be frozen, wherever located"; "(2) Roy L. Rambo or any of his agents or representatives is enjoined from entering onto any property owned either jointly or individually by Roy L. Rambo and Linda Ann Rambo"; and "(3) Roy L. Rambo is enjoined from expending any sums of money owned individually or as a marital asset."[3] (Ra. Ex. 109, Aug. 28, 2002 Order 1-2, ECF No. 24.)

On September 19, 2002, before the Superior Court of New Jersey Law Division, Criminal Part in Warren County (the "Criminal Part"), Petitioner explained to the Honorable John H. Pursel, J.S.C., that he was found ineligible for a public defender, yet also had his assets frozen, precluding him from retaining private counsel. (Ra. Ex. 59, Sept. 19, 2002 Hr'g Tr. 3:12-4:3, ECF No. 20.) In response, Judge Pursel stated: "[w]ell, you're mistaken on that fact, Dr. Rambo. The funds were frozen for—for your protection. . . . An application may be made to the [c]ourt to release those funds to hire private counsel. So there is no disability to assess [sic] those funds." (*Id.* at 4:4-10.) Judge Pursel further stated: "[the Chancery Division] froze your assets to protect them. . . . Not to prevent you from hiring an attorney." (*Id.* at 6:1-5.) Petitioner insisted, however, that his assets were unavailable to him, but Judge Pursel responded "I think you're dead wrong. . . . Civil . . . litigation takes a back seat to your [criminal] litigation. . . . It takes a front seat to other creditors." (*Id.* at 8:3-9.)

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[3] On November 15, 2002, Judge Seybolt of the Chancery Division held a case management conference with respect to the assets initially frozen upon Bruce Rambo's order to show cause. (Ra. Ex. 106, Nov. 15, 2002 Hr'g Tr., ECF No. 24.) At the conference, Judge Seybolt noted that he was troubled about disposing of any of the frozen property at that time because he was "concerned . . . [that the property] may ultimately end up being [Petitioner]'s property." (*Id.* at 7:7-15.)

In a subsequent hearing before the Criminal Part, on October 9, 2002, Petitioner again communicated to the court that he was unable to retain private counsel due to the fact that his assets remained frozen. (Ra. Ex. 61, Oct. 9, 2002 Hr'g Tr. 3:18-4:10, ECF No. 20.) Judge Pursel stated that he received correspondence from Petitioner's son's counsel that argued "that under the law . . . people in your circumstances in his opinion would forfeit any right to have the assets." (*Id.* at 4:11-5:7.) Judge Pursel then indicated that "of course the one thing that [Bruce Rambo's counsel] overlooks is the fact that you're still an innocent person in the eyes of the law. . . . he makes one mistake, you haven't been convicted of anything yet." (*Id.* at 5:2-8.) Judge Pursel proceeded to state: "At any rate, I'm going to authorize the appointment of a public defender for you," until Petitioner, if able, can access assets to retain private counsel. (*Id.* at 5:10-25.)

Petitioner subsequently filed a motion in 2003 in the Chancery Division, requesting access to his portion of the marital assets for the purpose of retaining private counsel in his criminal proceedings. (Ra. Ex. 114, Nov. 7, 2003 Order, at 1-2, ECF No. 24.) Oral argument was held on October 15, 2003, where Petitioner argued that he should have access to his assets to mount a proper defense in his criminal proceeding pursuant to the Sixth Amendment. (Ra. Ex. 107, Oct. 15, 2003 Hr'g Tr. 3:12-19:7.) At oral argument, the Honorable Fred H. Kumpf, J.S.C., denied Petitioner's request under the New Jersey Slayer Statute.[4] At the time, the relevant provision of the New Jersey Slayer Statute provided:

> N.J.S.A. 3B:7-1: A surviving spouse, heir or devisee who criminally and intentionally kills the decedent is not entitled to any benefits under a testate or intestate estate and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by

[4] At the time of Petitioner's request, the relevant provisions of the New Jersey Slayer Statute were codified at N.J.S.A. 3B:7-1 (1982) (repealed 2004) (current version at N.J.S.A. 3B:7-1.1), N.J.S.A. 3B:7-2 (1982) (repealed 2004) (current version at N.J.S.A. 3B:7-1.1), and N.J.S.A. 3B:7-6 (1982) (amended 2004).

> the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.
>
> N.J.S.A. 3B:7-2: Any joint tenant who criminally and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies and tenancies by the entirety, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of coownership with survivorship incidents.
>
> N.J.S.A. 3B:7-6: A final judgment of conviction of intentional killing is conclusive for purposes of this chapter. In the absence of a conviction of intentional killing the court may determine by a preponderance of evidence whether the killing was intentional for purposes of this chapter.

In reaching his decision, Judge Kumpf first distinguished the instant case from *Jacobson v. Jacobson*, 376 A.2d 558 (N.J. Super. Ct. App. Div. 1977)—which supported Petitioner's argument—by finding that the statute had been amended in such a way that the assets must remain frozen until the court determined whether Petitioner intentionally killed his spouse. (Ra. Ex. 107, Oct. 15, 2003 Hr'g Tr. 20:24-21:24.) With respect to the Sixth Amendment, Judge Kumpf stated:

> although there is a Sixth Amendment right, that right is not . . . a[n] absolute right. Obviously the [Petitioner] will have . . . an opportunity to have counsel, whether it's a counsel that he pays for or whether [it is] counsel that is provided to him. . . . In the circumstances of this case[,] I conclude that the funds from the sale of the . . . farm are to be held in trust and are not available to [Petitioner] for purposes of his defense in the criminal matter.

(*Id.* at 23:19-24:8.) Moreover, although Judge Kumpf did not specifically discuss the proceeds from the sale of Petitioner's dental practice in relation to the Sixth Amendment, he decided that the proceeds from the sale of the farm "should be held in trust in the *same way* [as] the proceeds from the sale of the dental practice building," indicating that Petitioner would be denied access to

all marital assets including proceeds associated with Petitioner's dental practice. (*Id.* at 23:9-18 (emphasis added).)

Accordingly, on November 7, 2003, the Chancery Division denied Petitioner's motion to access his assets for the purpose of hiring counsel for his criminal proceedings. (Ra. Ex. 114, Nov. 7, 2003 Order, ECF No. 24.) On December 13, 2004, the Chancery Division decided that it would conduct an equitable distribution hearing to determine Petitioner's portion of the marital assets after resolution of the criminal proceeding. (Ra. Ex. 116, Dec. 13, 2004 Order, ECF No. 24.)

Prior to the criminal trial, in a hearing on March 15, 2004 before Judge Pursel in the Criminal Part, Petitioner moved to represent himself at trial. (Ra. Ex. 76, Mar. 15, 2004 Hr'g Tr. 3:18-23, ECF No. 20-2.) Petitioner stated that he made the motion knowingly and voluntarily, but "out of necessity" because the Chancery Division never released his assets for the purpose of retaining private counsel, a private investigator, and expert witnesses. (*Id.* at 3:18-4:11.) In response, Judge Pursel stated, "I have never understood why you've been deprived of your assets." (*Id.* at 9:21-22.) Judge Pursel further stated:

> that may be an issue that is going to come back a long time from now and be revisited. . . . [U]nless you're bankrupt there must be something that would be available for you to use for your defense. I agree with you. However, the Appellate Division has got to do that. I can't do that. There have been two Judges who said no, we're not going to give you the assets. I don't know why. I don't disagree with it because I don't know why they did that. I don't know what the reason for it was. And I have no authority to disagree with it.

(*Id.* at 9:25-10:14.) Accordingly, Petitioner represented himself at trial. (*See* Ra. Ex. 86, Jan. 3, 2005 Trial Tr. 43:8-11, ECF No. 21-1.)

On February 9, 2005, Petitioner was found guilty by a jury of first-degree murder under N.J.S.A. 2C:11-3(a)(1) and (2), and second-degree possession of a weapon for an unlawful purpose

in violation of N.J.S.A. 2C:39-4(a).[5] (Ra. Ex. 2, Judgment of Conviction, ECF No. 14.) On April 22, 2005, Petitioner was sentenced to a forty-year term of imprisonment, of which Petitioner would have to serve thirty years before becoming eligible for parole.[6] (*Id.*)

Following the criminal trial, on July 6, 2005, the Superior Court of New Jersey, Law Division in Somerset County (the "Law Division") issued a judgment against Petitioner in a civil wrongful death action brought by Bruce Rambo. (Ra. Ex. 119, July 6, 2005 Order, ECF No. 24.) The Law Division found Petitioner liable in the amount of: (1) $310,000 for loss of services and counseling to Bruce Rambo; (2) $1,000,000 for pain and suffering; and (3) $5,000,000 for punitive damages. (*Id.*) Subsequently, on August 5, 2005, the Chancery Division transferred the deed of the marital property to Bruce Rambo.[7] (Ra. Ex. 120, Aug. 5, 2005 Order, ECF No. 24.)

Petitioner filed an interlocutory appeal from the Chancery Division to the Appellate Division, where the Appellate Division granted his motion to waive fees but denied his motions for access to free transcripts and assignment of counsel. (Ra. Ex. 122, Dec. 15, 2005 Order, ECF No. 24.) This appeal was later dismissed for Petitioner's failure to prosecute the appeal. (Ra. Ex. 123, Jan. 6, 2006 Order, ECF No. 24.) On January 18, 2006, Petitioner filed a motion to vacate the dismissal of his appeal and reinstate his appeal of the Chancery Division's August 5, 2005

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[5] New Jersey Superior Court, Law Division, Criminal Part in Warren County (No. 2002-12-472-I).

[6] The trial court directed that the eighty-five percent period of parole ineligibility pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2, would attach to the ten years remaining on Petitioner's sentence after he had served the initial thirty-year mandatory minimum term. (Ra. Ex. 2, Judgment of Conviction.) The Appellate Division subsequently affirmed the conviction but remanded for re-sentencing to apply NERA to the entire forty year sentence, and Petitioner was sentenced accordingly. *New Jersey v. Rambo*, 951 A.2d 1075, 1085 (N.J. Super. Ct. App. Div. 2008).

[7] On May 1, 2006, the Chancery Division issued a similar order pertaining to an unnamed redacted property. (Ra. Ex. 121, May 1, 2006 Order, ECF No. 24.)

order. (Ra. Ex. 124, Jan. 18, 2006 Mot., ECF No. 24.) The Appellate Division denied Petitioner's motion on February 23, 2006. (Ra. Ex. 125, Feb. 23, 2006 Order, ECF No. 24; *see also* Ra. Ex. 126, Apr. 10, 2006 Order, ECF No. 24 (denying Petitioner's motion for reconsideration); Ra. Ex. 127, July 17, 2006 Order, ECF No. 24 (New Jersey Supreme Court denying petition for certification for lack of prosecution).) Sometime thereafter, Petitioner sought relief from the Chancery Division, requesting that fifty percent of the marital assets be unfrozen. (*See* Ra. Ex. 129, Jan. 5, 2007 Order, ECF No. 24.) Petitioner's request was denied. (*Id.*)

In addition to ongoing civil proceedings, Petitioner filed a direct appeal of his conviction with the Appellate Division, which affirmed his conviction and sentence on July 22, 2008. *New Jersey v. Rambo*, 951 A.2d 1075 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 556 U.S. 1225 (2009). In the appeal, Petitioner raised an issue with respect to his Sixth Amendment right to counsel of his choice. (*Id.*; Ra. Ex. 3, Pet'r's Br. App. Div. Direct Appeal 26-37, ECF No. 14.) In its decision, the Appellate Division distinguished Petitioner's case from *United States v. Gonzalez-Lopez*, 548 U.S. 140, 142-52 (2006), a case in which the United States Supreme Court decided that "a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitle[d] him to a reversal of his conviction." *Rambo*, 951 A.2d at 1083. The Appellate Division stated:

> In *Gonzalez-Lopez*, the orders which had the effect of depriving defendant of the counsel of his choice were entered in connection with the same matter that was under appeal. The only appeal before this court is from the judgment of conviction. [Petitioner] did not include in his Notice of Appeal the orders entered in the Chancery Division and, indeed, his earlier filed appeal from those orders was dismissed.

Id. The Appellate Division further added that Petitioner failed to prosecute his appeal from the Chancery Division's order, and, despite being denied free transcripts, Petitioner could have submitted purely legal arguments to the Appellate Division. *Id.* at 1084. Accordingly, the

Appellate Division determined that it did not have jurisdiction to review the Chancery Division's order to freeze Petitioner's assets. *Id.*

Petitioner proceeded to file a direct appeal to the New Jersey Supreme Court, where he raised his Sixth Amendment right to choice of counsel and where his Petition was summarily denied. *New Jersey v. Rambo*, 962 A.2d 529 (N.J. 2008). Petitioner then filed a petition for certiorari in the United States Supreme Court, and his Petition was again summarily denied. *Rambo*, 556 U.S. at 1225.

In or around February 2009, Petitioner filed another motion to reinstate his appeal from the Chancery Division's orders that froze his assets and, thereby, precluded him from retaining private counsel. (Ra. Ex. 132, Pet'r's Moving Br., ECF No. 24.) The Appellate Division denied Petitioner's appeal without prejudice and permitted Petitioner to file a subsequent appeal after securing a final judgment from the Chancery Division. (Ra. Ex. 134, Mar. 6, 2009 Order, ECF No. 24.) On May 17, 2010, the Chancery Division issued a final judgment ordering:

> 1. That [Petitioner] shall be and is hereby awarded by way of equitable distribution of the marital assets the sum of $290,314.51.
>
> 2. That the debt of $6,000,000, not including interest, which [Petitioner] owes the Estate [of Linda Rambo], shall be credited $290,314.51, making the debt owed to the Estate $5,709,685.49, not including interest.
>
> 3. That the administrator of the Estate shall turn over any of the clothing and pre-marital property belonging to [Petitioner] . . . to [Petitioner's] sister. [Petitioner] shall arrange for his sister or her agent to pick up such property from the Estate.
>
> 4. That [Petitioner] shall be responsible for paying any taxes the Estate incurs due to the distribution of the [Individual Retirement Account] to the Estate.

(Ra. Ex. 135, May 17, 2010 Order, ECF No. 24.)

Petitioner appealed to the Appellate Division. *In re Estate of Rambo*, No. A-5308-09T2, 2012 WL 1969954 (N.J. Super. Ct. App. Div. June 4, 2012). The Appellate Division solely reviewed the Chancery Division's application of the New Jersey Slayer Statute. *Id.* at *4. The court determined that "[t]he restraints issued, which prevented [Petitioner] from accessing the marital property to fund his defense against charges of murdering his wife, are directly supported by N.J.S.A. 3B:7-1." *Id.* The court further stated that "[t]o permit [Petitioner] to use the proceeds of the marital estate to pay the cost of private counsel would be a perversion of justice and in direct violation of the public policy expressed by the Legislature in N.J.S.A. 3B:7-5." *Id.* As to Petitioner's arguments under the Sixth Amendment, the court merely stated that the arguments "lack[ed] sufficient merit to warrant a discussion in a written opinion." *Id.* Petitioner appealed the Appellate Division's decision, and both the New Jersey Supreme Court and the United States Supreme Court summarily denied Petitioner's appeals. *See In re Estate of Rambo*, 54 A.3d 810 (N.J. 2012); *Rambo v. Estate of Rambo*, 134 S. Ct. 1490 (2014).

On March 23, 2009, Petitioner filed an application for post-conviction relief ("PCR Application") with the New Jersey Superior Court, Law Division, Criminal Part, Warren County (No. 2002-12-472-I). (Ra. Ex. 21, ECF No. 17-1.) Petitioner's PCR Application was ultimately denied. (Ra. Ex. 40, Aug. 10, 2010 Order, ECF No. 18-1.) The Criminal Part determined that Petitioner's Sixth Amendment arguments related to the Chancery Division's application of the Slayer Statute, and declined to review the issue. (*Id.*) Petitioner appealed to the Appellate Division, which affirmed the Law Division's decision. *See New Jersey v. Rambo*, No. A-0382-10T2, 2013 WL 512116, at *1 (N.J. Super. Ct. App. Div. Feb. 13, 2013). The Appellate Division similarly declined to address Petitioner's Sixth Amendment arguments because "[t]he Chancery [Division's] decision [was] not properly before [the Appellate Division]." *Id.* at *4. The Appellate

Division denied Petitioner's appeal (Ra. Ex. 41, Sept. 15, 2010 Notice of Appeal, ECF No. 18-1), and the New Jersey Supreme Court denied his subsequent petition for certification (Ra. Ex. 58, Denial of Pet. for Cert., ECF No. 20).

On February 11, 2014, Petitioner filed the instant Petition (Pet., ECF No. 1), which was served on Respondents in or around October 2014 (ECF Nos. 5, 6, 8). Respondents subsequently requested a sixty-day extension to file their Answer. (ECF No. 9.) The Court granted Respondents' request for an extension. (ECF No. 10.) On February 4, 2015, Respondents filed their Answer. (ECF No. 11.) Respondents, however, submitted correspondence on February 4, 2015 and February 10, 2015, stating that they could not file the relevant exhibits due to technical problems. (ECF Nos. 12, 13.) Respondents finally filed their exhibits on February 18, 2015. (ECF Nos. 14-24.) On March 23, 2015, Petitioner filed his Reply to Respondents' Answer. (ECF No. 26.)

On June 3, 2015, Petitioner submitted correspondence notifying the Court that Respondents had failed to file numerous exhibits that Respondents had listed in their index. (ECF No. 29.) On July 8, 2015, Respondents submitted correspondence setting forth reasons why certain exhibits were missing. (ECF No. 30.) On August 24, 2015, Petitioner filed a motion to compel electronic filing of all missing exhibits and requested an order from the Court that Respondents must "include a certified statement that the DVD's represent a complete and accurate reproduction of all Exhibits filed by . . . Respondents in this matter." (ECF No. 33.) The issues raised in Petitioner's motion to compel were fully briefed by September 16, 2015 (ECF Nos. 34, 35), and the Court denied Petitioner's motion on November 20, 2015 (ECF No. 36).

In addition to Petitioner's motion to compel based on Respondents' allegedly inadequate document production, the parties submitted numerous items of correspondence further analyzing

the merits of Petitioner's underlying habeas Petition. (ECF Nos. 27, 31, 32, 37.) On May 26, 2016, the Court granted Respondents' request for an extension to respond to Petitioner's April 27, 2016 correspondence, which further discussed the merits of the Petition. (ECF No. 38.) Accordingly, Respondents filed their response on June 30, 2016. (ECF No. 39.) Petitioner proceeded to file additional substantive correspondence on July 18, 2016 (ECF No. 40), and, on August 2, 2016, Respondents requested another extension to respond to Petitioner's correspondence (ECF No. 42). The Court, however, denied Respondents' request in August 2016, and the parties did not further supplement their voluminous submissions.[8] (ECF No. 43.)

II. Legal Standard

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

When a claim has been adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Parker v. Matthews*, 567 U.S. 37, 40 (2012). A state court decision is "contrary to" clearly established federal law if the state court (1) "applies a rule that contradicts the governing law set forth in [Supreme Court precedent]," or (2) "confronts a set of facts that are

[8] Petitioner's submissions consist of more than three hundred seventy pages, and Respondents' submissions consist of over four thousand four hundred pages. Accordingly, the Court now reaches its decision based on a comprehensive review of the parties' considerable submissions.

materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 406 (2000); *see Dennis v. Sec., Pa. Dep't of Corr.*, 834 F.3d 263, 280 (3d Cir. 2016). Federal courts must follow a highly deferential standard when evaluating, and thus give the benefit of the doubt to, state court decisions. *See Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *Eley v. Erickson*, 712 F.3d 837, 845 (3d Cir. 2013).

III. Parties' Positions[9]

A. Petitioner

Petitioner argues that his Sixth Amendment right to counsel of his choice was violated because he was unable to use his assets to retain private counsel for his criminal proceeding. (Pet. 18-20.) According to Petitioner, a number of factors contributed to the constitutional violation. First, Petitioner argues that his Sixth Amendment right was violated when the Chancery Division froze his individual and marital assets and precluded him from using those assets to obtain private counsel for his criminal proceedings. (*Id.* at 21.) Moreover, Petitioner argues that the New Jersey Slayer Statute, which was invoked to freeze his individual and marital assets, "was either unconstitutional, as written, or it was unconstitutionally applied [to Petitioner] by the Chancery [Division]." (*Id.* at 22, 35-39.) According to Petitioner, the Chancery Division improperly applied the Slayer Statute and froze more assets than permitted under the statute. (*Id.* at 42-46.) In other words, Petitioner asserts that the Chancery Division froze assets that were untainted by his alleged

[9] The Court sets forth the parties' positions only with respect to Petitioner's Sixth Amendment argument. The Court further incorporates into the Discussion section the parties' positions on various issues regarding the State's alleged affirmative defenses. Additionally, the Court acknowledges that the parties submitted supplemental submissions that distinguished or analogized specific cases. (ECF Nos. 27, 31, 32, 37, 39, 40.) The Court similarly incorporates any material analyses from these submissions into its Discussion section below.

criminal conduct. (*Id.*) Petitioner further explains that the Slayer Statute "is solely limited to the portion of the marital assets owned by his wife prior to her death." (*Id.* at 48.)

Additionally, Petitioner asserts that Judge Pursel, who presided over Petitioner's criminal proceeding, failed to address the Sixth Amendment violation and instead permitted Petitioner's trial to proceed. (*Id.* at 30-31.) Petitioner further argues that the Appellate Division similarly did not adequately address the Sixth Amendment violation in every appeal that he filed. (*Id.* at 31, 50-54.) Accordingly, Petitioner asserts that the violation of his Sixth Amendment right to counsel of his choice constitutes a structural error that requires the reversal of his conviction. (*Id.* at 34-35.) Petitioner further argues that although he elected to proceed pro se during his criminal proceedings, he did so only because his Sixth Amendment right to counsel of his choice was already violated, which he made clear on the record. (*Id.* at 25.)

B. Respondents

In its Answer, the State responds to Petitioner's Sixth Amendment claim by stating that it relies on the briefs it submitted on direct appeal of Petitioner's conviction and on Petitioner's PCR Application. (Answer 16-17.) The State further notes that it relies on the various decisions by the state courts in this matter. (*Id.* at 17.)

In its brief on direct appeal, the State argued that the Sixth Amendment right to retain counsel of one's choice is not an absolute right. (Ra. Ex. 10, State's Direct Appeal Br. 21, ECF No. 16-2.) The State asserted that Petitioner was unable to choose counsel because he could not afford private counsel at the time, due to his assets being frozen. (*Id.* at 22.) The State further argued that a public defender was provided and that Petitioner knowingly and voluntarily waived his right to counsel and represented himself. (*Id.* at 23-24.)

Specifically, with respect to the application of the Slayer Statute, the State argued that "most of the property owned by the Rambos was held as tenants by the entireties." (*Id.* at 24.) According to the State, Petitioner's share of the marital assets was properly held in a constructive trust pending the outcome of his criminal trial. (*Id.* at 25.) In support, the State relied on *In re Karas*, 469 A.2d 99 (N.J. Super. Ct. Law Div. 1983), *aff'd and modified by*, 485 A.2d 1083 (N.J. Super. Ct. App. Div. 1984). (Ra. Ex. 10, State's Direct Appeal Br. 26.) The State argued that the facts of the instant matter were similar to the facts in *Karas*, and that the outcome should therefore be the same—assets were properly frozen pending the outcome of the criminal trial. (*Id.*) The State next distinguished the instant matter from *Wasserman v. Shwartz*, 836 A.2d 828 (N.J. Super. Ct. Law Div. 2001).[10] (Ra. Ex. 10, State's Direct Appeal Br. 27.) The State argued that: (1) *Wasserman* is a Law Division decision and, therefore, is not controlling authority; (2) the action under the New Jersey Slayer Statute under *Wasserman* was filed after the criminal conviction; and (3) the court in *Wasserman* found that the convicted murderer had dissipated assets that were part of the marital estate and subject to distribution. (*Id.* at 27-28.)

Finally, with regard to the State's briefs in connection with Petitioner's PCR Application, the State's arguments on the issue of the Sixth Amendment right to counsel of choice were limited to procedural arguments. (Ra. Ex. 36, State's PCR Trial Br. 4-9,[11] ECF No. 18; Ra. Ex. 48, State's PCR App. Div. Br. 23-28, ECF No. 19-3.) Specifically, the State argued that, in his PCR

[10] In *Wasserman*, the court applied the New Jersey Slayer Statute where a husband was convicted of aggravated manslaughter for slaying his wife. 836 A.2d at 829-30. The *Wasserman* court invoked its equitable powers to equitably distribute the marital assets "in order to recognize" the victim-wife's interest in the marital estate. *Id.* at 832-36.

[11] The Court cites to the page numbers assigned by the electronic filing system as indicated in the header.

Application, Petitioner could not properly raise issues with respect to the Chancery Division's order to freeze his assets because they were outside the scope of his conviction proceedings and that Petitioner's Sixth Amendment right to counsel of his choice was already adjudicated on direct appeal from Petitioner's conviction. (Ra. Ex. 36, State's PCR Trial Br. 4-9, ECF No. 18; Ra. Ex. 48, State's PCR App. Div. Br. 23-28, ECF No. 19-3.)

IV. Discussion

A. Respondents' Defenses

1. Jurisdiction

Respondents argue that the Court does not have subject matter jurisdiction over Petitioner's claims that challenge the New Jersey Slayer Statute—a civil statute—and civil state court orders. (Answer 28-29.) Respondents, however, provide no legal analysis in support of this assertion. Contrary to Respondents' cursory argument, the Court's jurisdiction on a petition for the writ of habeas corpus requires a prisoner's custody to be "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a). As Petitioner asserts a violation of his Sixth Amendment right to counsel of his choice,[12] Petitioner has adequately established the Court's subject matter jurisdiction over the Petition.

2. Failure to State a Claim

Respondents argue that Petitioner "fail[s] to establish a claim for habeas corpus relief," and that "Petitioner's [F]ederal constitutional rights were clearly not violated or infringed by the alleged errors" raised in the Petition. (Answer 29-30.) As set forth in the Court's Discussion

[12] *See infra* Part IV.B.

section, however, Petitioner has established a violation of his Sixth Amendment right to counsel of his choice.[13] *See infra* Part IV.B.

3. Exhaustion of Administrative Remedies

In furtherance of this defense, after setting forth the general legal standard, Respondents provide three sentences of cursory analysis, devoid of any citations to the record or relevant legal authority:

> In this case, the [P]etition raised many point headings regarding the [New Jersey] Slayer Statute and the Chancery Division. However, the [P]etitioner did not raise this point heading. Therefore, the request for habeas corpus relief should be denied.

(Answer 31-33.) In light of Respondents' failure to cite to the record in support of their position, and upon the Court's review of the record, the Court finds that Petitioner adequately raised the violation of his Sixth Amendment right to counsel of his choice in the relevant state court proceedings. Accordingly, the Court finds Respondents' exhaustion defense unpersuasive.

[13] Respondents argue that "[P]etitioner seeks to cloak his claims on federal law and constitutional issues, [but] in reality, he is challenging a state law and the application of that law in the Chancery Division in his habeas proceeding from his criminal conviction." (Answer 30.) The Court disagrees. Respondents' argument is improperly premised on the assumption that Petitioner's Sixth Amendment right to counsel of his choice was never violated. Respondents' characterization of Petitioner's argument as a mere issue of state law reveals a critical error in Respondents' position with respect to the instant Petition. Respondents' submissions primarily focus on attempting to construe the Sixth Amendment issue as a state law issue pertaining to the application of the New Jersey Slayer Statute and fail to devote adequate analysis to the federal Sixth Amendment implications. Moreover, Respondents' primary reliance on briefs submitted to the state courts on this matter, as opposed to filing updated briefing appropriately tailored to the federal constitutional issues most pertinent on a petition for writ of habeas corpus, resulted in Respondents' undercoverage of the material legal issues and did not aid in furthering Respondents' position.

4. Procedural Default

In furtherance of this defense, after setting forth the general legal standard, Respondents provide only three sentences of cursory analysis, devoid of any citations to the record or relevant legal authority:

> In this case, [P]etitioner failed to provide any reason for not raising this particular issue previously nor has the [P]etitioner demonstrate [sic] any prejudice because there was no violation of his constitutional rights. Petitioner was fairly convicted and there was no violation of his constitutional rights. Habeas corpus relief should be denied.

(Answer 33-34.) In light of Respondents' failure to cite to the record in support of their position, and upon the Court's review of the record, the Court finds that Petitioner adequately raised the violation of his Sixth Amendment right to counsel of his choice in the relevant state court proceedings. Accordingly, the Court finds Respondents' procedural default defense unpersuasive.

5. Timeliness

Under the AEDPA, a one-year statute of limitations applies to a writ of habeas corpus by a person in custody from a state court judgment. 28 U.S.C. § 2244(d)(1). The one-year statutory period runs from the latest of the following:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation [with respect to 28 U.S.C. § 2244(d)]." 28 U.S.C. § 2244(d)(2).

Upon reviewing the parties' submissions, the Court finds that Petitioner timely filed the instant Petition within the one-year statute of limitations. The Petition was filed on February 11, 2014. (Pet.) The State's argument that the Petition was filed after the one-year statutory period is based on the State's error. The State identified August 24, 2011 as the date on which "[t]he decision of the trial court was affirmed" by the Appellate Division, with respect to Petitioner's PCR Application. (Answer 37.) In support, the State references Respondents' Exhibit 51. (*Id.*) Respondents' Exhibit 51, however, is merely an order from the Appellate Division permitting Petitioner "to supplement the record by providing transcripts and pleadings." (*See* Ra. Ex. 51, Aug. 24, 2011 Order, ECF No. 20.) Instead, a copy of the pertinent Appellate Division's decision is contained in Respondents' Exhibit 55, which explicitly identifies February 13, 2013—the date identified by Petitioner—as the date the decision was rendered. (Ra. Ex. 55, Mar. 9, 2013 Corresp., ECF No. 20.) Accordingly, after considering the proper date of the Appellate Division's decision with regard to Petitioner's PCR Application, the Court finds that the instant Petition was timely filed.

B. Sixth Amendment Right to Counsel of Choice

The Sixth Amendment "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the

defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989). Moreover, an "erroneous deprivation of the right to counsel of choice [results in] '. . . consequences that are necessarily unquantifiable and indeterminate, . . . [thus constituting a] structural error.'" *Gonzalez-Lopez*, 548 U.S. at 150 (citation omitted). Accordingly, a wrongful deprivation of a defendant's right to counsel of his choice "is not subject to harmless-error analysis." *Id.* at 152.

A defendant's right to choose his counsel, however, is not absolute and "has limits." *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (plurality). "A defendant has no right, for example, to an attorney who is not a member of the bar, or who has a conflict of interest due to a relationship with an opposing party." *Id.* (citation omitted). The limitation most pertinent here is that "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice." *Caplin*, 491 U.S. at 626. Where funds are in a defendant's possession unlawfully—i.e., "tainted"—the defendant's Sixth Amendment right to counsel of his choice is not violated when those funds are seized, and the defendant is precluded from using those funds to retain defense counsel in criminal proceedings. *Id.*

Precedent related to the freezing of assets and the effect on a criminal defendant's Sixth Amendment right is largely predicated on the United States Supreme Court's analysis of federal statutes—e.g., 21 U.S.C. § 853—that permit the United States government to seize certain assets where a person has committed certain crimes. *See, e.g.*, *Caplin*, 491 U.S. at 622-34; *United States v. Monsanto*, 491 U.S. 600, 606-16 (1989). When considering these federal statutes, the Supreme Court determined that the crucial inquiry is whether the property is "tainted" because the Sixth Amendment "does not go beyond 'the individual's right to spend his own money to obtain the

advice and assistance of . . . counsel'"—i.e., one does not have a right to spend money he unlawfully obtained and is, therefore, tainted. *Caplin*, 491 U.S. at 626 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).

Here, Petitioner's Sixth Amendment argument arises from the freezing of assets pursuant to the New Jersey Slayer Statute. Unlike 18 U.S.C. § 1345 and 21 U.S.C. § 853, the New Jersey Slayer Statute passes title of certain assets to the victim's estate, as opposed to the government. N.J.S.A. 3B:7-1; N.J.S.A. 3B:7-2. Despite the difference in the recipient of the forfeited property, the inquiry for purposes of the Sixth Amendment remains whether any portion of the frozen assets constituted Petitioner's untainted property. *See Caplin*, 491 U.S. at 626-32. This inquiry remains applicable even where the assets are frozen prior to the conviction on the underlying wrongful act. *Monsanto*, 491 U.S. at 616 ("[W]e find no constitutional infirmity in . . . [the] authorization of a . . . restraint on [the criminal defendant's] property to protect its 'appearance' at trial and protect the community's interest in full recovery of any ill-gotten gains.").

In the underlying criminal proceeding, Judge Pursel recognized that precluding Petitioner from accessing his frozen assets to retain criminal defense counsel would potentially violate Petitioner's Sixth Amendment right to counsel of his choice. Specifically, Judge Pursel indicated that Petitioner should have access to his frozen assets because he remains an "innocent person in the eyes of the law" prior to conviction, and because "civil litigation takes a back seat to . . . [criminal] litigation." (*See* Ra. Ex. 59, Sept. 19, 2002 Hr'g Tr. 8:3-9; Ra. Ex. 61, Oct. 9, 2002 Hr'g Tr. 5:2-8.) When the Chancery Division failed to grant Petitioner access to his frozen assets to retain private counsel in his criminal proceeding, Judge Pursel stated on the record that he "never understood why [Petitioner was] deprived of [his] assets." (Ra. Ex. 76, Mar. 15, 2004 Hr'g Tr. 9:21-22.) While Judge Pursel determined that he did not possess the authority to release assets

that were restrained by the Chancery Division, Judge Pursel predicted that Petitioner's Sixth Amendment right to counsel of choice "may be an issue that is going to come back a long time from now and be revisited." (*Id.* at 9:25-10:14.) More than a decade after Judge Pursel's statements, the Sixth Amendment issue has "come back," and this Court must revisit the issue recognized by Judge Pursel. Accordingly, the Court performed a painstaking review of the extensive record in this matter. In order to determine whether Respondents violated Petitioner's Sixth Amendment right to counsel of his choice, the Court must initially determine whether the assets Petitioner sought to release in order to fund his defense were tainted, a fundamental determination that Judge Pursel recognized and the Chancery Court failed to perform.

To determine whether any of the frozen assets were untainted, the Court first looks to the Chancery Division's final judgment applying the New Jersey Slayer Statute. On May 17, 2010, after Petitioner was convicted, the Chancery Division determined that Petitioner was entitled to $290,314.51 by way of equitable distribution.[14] (Ra. Ex. 135, May 17, 2010 Order.) The Chancery Division proceeded to credit the $290,314.51 toward Petitioner's $6,000,000 debt to Linda Rambo's Estate arising from a civil judgment against Petitioner for the wrongful death of his wife.[15] (*Id.*)

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[14] New Jersey law applies equitable distribution, which is typically applied in divorces, where one intentionally kills his or her spouse. *See Jacobson v. Jacobson*, 370 A.2d. 65, 68 (N.J. Super. Ct. Ch. Div. 1976).

[15] Here, the Court does not reach a determination as to whether the attachment of a debt to Linda Rambo's Estate arising from a judgment in a wrongful death action infringes on Petitioner's right to choose counsel because the debt was attached *after* the conviction—i.e., after Petitioner would have received his portion of the untainted funds to hire private counsel. *Cf. Estate of Lott v. O'Neill*, No. 16-389, 2017 WL 462184, at *1-6 (Vt. Feb. 3, 2017) (finding that attaching the civil wrongful death judgment to the criminal defendant's funds, such that it prevented the criminal defendant from retaining his chosen private counsel, did not violate the criminal defendant's Sixth Amendment right to choose counsel).

As the issue before the Court is whether the underlying state court decisions erroneously applied clearly established *federal* law, the Court defers to the Chancery Division's determinations under *state* law that: (1) equitable distribution was appropriate where the New Jersey Slayer Statute applied; and (2) $290,314.51 was the appropriate award to Petitioner by way of equitable distribution of the marital assets.[16] (Ra. Ex. 135, May 17, 2010 Order.) Based on the Chancery Division's decision, therefore, Petitioner owned, at minimum, $290,314.51 even after the conviction. In other words, at least $290,314.51 constituted Petitioner's untainted property prior to the conviction. *See Monsanto*, 491 U.S. at 616 (holding that if the appropriate pretrial determination required by the forfeiture statute is reached, assets may be frozen pre-conviction if those assets would be forfeitable upon conviction).

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[16] The Court similarly defers to the decision by the Appellate Division affirming the Chancery Division's decision with respect to these determinations. *In re Estate of Rambo*, 2012 WL 1969954, at *1-4. The Court notes that the state court decisions applying the New Jersey Slayer Statute or common law authority in similar cases do not appear to provide clear guidance with respect to the application of equitable distribution, the precise manner by which marital assets are apportioned or forfeited, or whether state law requires a criminal defendant to access frozen funds to pay for his criminal defense. *See Neiman v. Hurff*, 93 A.2d 345, 348-49 (N.J. 1952) (holding, prior to enactment of the New Jersey Slayer Statute, that the victim should be presumed to have survived the wrongdoer and that the victim's sole beneficiary was entitled "to an absolute *one-half* interest and a remainder interest in the *other half*, subject only to the value of the life estate of the defendant in such half") (emphasis added); *Wasserman*, 836 A.2d at 834 (applying equitable distribution under the New Jersey Slayer Statute such that the wife's estate would be entitled to its "interest or share . . . in the marital property"); *Jacobson*, 376 A.2d at 561 ("[W]e reverse that portion of the order of the Chancery Division denying defendant the right to withdraw any funds to pay his attorneys' fees and costs in connection with the defense of the indictment pending against him . . . ."); *D'Arc v. D'Arc*, 421 A.2d 602, 604 (N.J. Super. Ct. App. Div. 1980) ("[A] plaintiff cannot be permitted to obtain *any distribution* from a woman whom he tried to have murdered.") (emphasis added); *In re Estate of Karas*, 469 A.2d at 102-03 (finding that the New Jersey Slayer Statute changed the common law, which "would impose a constructive trust on the killer's remainder for the benefit of the decedent's heirs," such that "the constructive trust on the killer's *one-half* would be for the benefit of *his* heirs") (first emphasis added). Accordingly, despite the parties' extensive analysis pertaining to the proper application of the New Jersey Slayer Statute as to the division of assets, the Court does not conduct an independent analysis with respect to this issue.

Under the New Jersey Slayer Statute, an alleged killer only loses benefits to the marital assets upon a determination that the victim was intentionally killed by either a preponderance of the evidence or by criminal conviction. N.J.S.A. 3B:7-6. Prior to the conclusion of the criminal proceeding, the Chancery Division never determined by a preponderance of the evidence that Petitioner intentionally killed his wife. Rather, the Chancery Division froze the marital assets pending resolution of the criminal trial, at which point the Chancery Division finally made the requisite determination based on Petitioner's conviction. Accordingly, absent a determination as to whether any portion of the marital assets was untainted, Petitioner was improperly precluded from accessing his untainted portion of the marital assets prior to his conviction. As a result, the Court finds that "the relevant state-court decision[s] applied clearly established federal law erroneously or incorrectly." *Renico v. Lett*, 559 U.S. 766, 773 (2010).

Although the AEDPA "'imposes a highly deferential standard for evaluating state-court rulings,'"[17] the state court decisions on Petitioner's direct appeal and PCR Application never addressed Petitioner's Sixth Amendment argument on its merits. On direct appeal, the Appellate Division determined that it did not possess jurisdiction over the issue as a matter of state law. *Rambo*, 951 A.2d at 1083-84. Petitioner's subsequent appeals to the New Jersey Supreme Court and the United States Supreme Court were summarily denied without discussion of the Sixth Amendment issue. *See generally Rambo*, 962 A.2d at 529; *Rambo*, 556 U.S. at 1225. Petitioner's subsequent PCR Application and related appeals resulted in the same determinations. (*See* Ra. Exs. 21, 40, 41, 58); *Rambo*, 2013 WL 512116, at *1. Accordingly, the Court is unable to defer

[17] *Felkner*, 562 U.S. at 598 (citation omitted).

to the state court decisions on Petitioner's direct appeal and PCR Application with respect to the Sixth Amendment, as no conclusions were drawn on the merits.

Similarly, minimal deference is owed to the state court decisions on the related civil matter. Initially, when Bruce Rambo filed an order to show cause with the Chancery Division in August 2002, the Chancery Division froze "*all assets* of [Petitioner] . . . , wherever located," and enjoined Petitioner "from expending *any sums of money owned individually* or as a marital asset." (Ra. Ex. 109, Aug. 28, 2002 Order 1-2 (emphasis added).) From the outset, Petitioner's assets were frozen without any determination as to which assets were tainted by Petitioner's alleged murder of his wife.[18]

In 2003, Petitioner filed a motion in the Chancery Division "to utilize assets or funds held by the Estate for his criminal defense," which the court denied. (Ra. Ex. 114, Nov. 7, 2003 Order 1-2.) Here, the Chancery Division actually addressed Petitioner's Sixth Amendment argument but its conclusions were "objectively unreasonable." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012). The Chancery Division first identified certain properties that were held by Petitioner and his wife in tenancies by the entirety and interpreted the New Jersey Slayer Statute as requiring all marital assets to remain frozen until a determination was made as to whether Petitioner intentionally killed his wife. (Ra. Ex. 107, Oct. 15, 2003 Hr'g Tr. 20:2-21:24.) With respect to the Sixth Amendment, the Chancery Division provided only cursory analysis:

> And although there is a Sixth Amendment right, that right is not . . . a[n] absolute right. Obviously the [Petitioner] will have . . . an opportunity to have counsel, whether it's a counsel that he pays for

[18] Although it appears that the Chancery Division froze assets that were undisputedly Petitioner's property and not marital assets, Petitioner's submissions focus on his inability to access his portion of *marital* assets as the cause for his inability to retain private counsel. (*See generally* Petition.) Accordingly, the Court focuses its analysis on Petitioner's lack of access to his portion of the *marital* assets.

> or whether counsel that is provided to him. *State v. Ray*[19] indicates that [Petitioner's] right to counsel of his choice is not absolute and must give way when required by the fair and proper administration of justice. In the circumstance[s] of this case[,] I conclude that the funds from the sale of the . . . farm are to be held in trust and are not available to Dr. Rambo for purposes of his defense in the criminal matter.

(*Id.* at 23:19-24:8.) Although the Chancery Division was correct that the Sixth Amendment right to counsel of choice is not absolute, clearly established federal law dictates that the seizure of untainted assets amounts to an encroachment on that right. *See Caplin*, 491 U.S. at 624-33; *Monsanto*, 491 U.S. at 611-16. When the Chancery Division arrived at a final determination under the New Jersey Slayer Statute after Petitioner's conviction, the final judgment did not contain any analysis of Petitioner's Sixth Amendment right to counsel of his choice, and, therefore, is not owed any deference with respect to that issue. (*See* Ra. Ex. 135, May 17, 2010 Order.)

Similarly, when Petitioner ultimately appealed from the Chancery Division's final judgment applying the New Jersey Slayer Statute, the Appellate Division dismissed Petitioner's Sixth Amendment argument in conclusory fashion, stating that it "lack[ed] sufficient merit to warrant a discussion in a written opinion." *In re Estate of Rambo*, 2012 WL 1969954, at *4. Additionally, the New Jersey Supreme Court and the United States Supreme Court summarily denied Petitioner's subsequent appeals without discussing the Sixth Amendment issue. *See In re Estate of Rambo*, 54 A.3d 810 (N.J. 2012); *Rambo v. Estate of Rambo*, 134 S. Ct. 1490 (2014).

Accordingly, the Court finds that Petitioner's Sixth Amendment right to counsel of his choice was violated due to the combination of: (1) the Chancery Division's pretrial restraint of Petitioner and his wife's marital assets, and subsequent refusal to release any of Petitioner's untainted portion of the marital assets for his criminal defense; (2) the Chancery Division's failure

[19] The Chancery Division's decision does not provide a citation.

to determine the applicability of the New Jersey Slayer Statute until *after* Petitioner's conviction and *after* the denial of Petitioner's request for the release of his assets; and (3) the Criminal Part's decision to proceed to trial even though Petitioner was unable to access his assets to retain private counsel. The Court's decision was further necessitated by the state courts' decisions, on direct appeal from Petitioner's conviction and with respect to his PCR Application, not to address the merits of Petitioner's Sixth Amendment violation based on state procedural rules, despite the significant and direct ramifications of a Sixth Amendment violation on a criminal conviction. The adjudication with respect to Petitioner's Sixth Amendment right, therefore, was contrary to clearly established federal law, as determined by the United States Supreme Court. Moreover, as this violation constitutes a structural defect, the Court need not engage in an analysis as to whether the violation was harmless. *See Gonzalez-Lopez*, 548 U.S. at 150, 152 (citation omitted).[20]

[20] As the Court finds that Petitioner's Sixth Amendment right to counsel of his choice was violated, the Court does not reach Petitioner's other grounds for relief.

V. Conclusion

For the reasons set forth above, the Petition is GRANTED. Petitioner's judgment of conviction is VACATED. The State shall have 90 days from the entry of the accompanying Order to determine whether to initiate a new trial against Petitioner or to release him from incarceration.[21]

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: September 1, 2017

[21] The Court notes for the benefit of Respondents that merely initiating a new trial against Petitioner may not cure the Sixth Amendment violation if Petitioner remains unable to retain the counsel of his choice. Due to the fact that at least $290,314.51 of Petitioner's untainted assets were applied to the civil judgement he owed to Linda Rambo's Estate, Petitioner may no longer have access to those funds, which he should have had available to him prior to his conviction. Whether a Sixth Amendment violation persists will likely involve a fact-sensitive inquiry that the Court does not reach in the instant decision.

APPENDIX F

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0382-10T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROY L. RAMBO, JR.,

Defendant-Appellant.

Submitted January 16, 2013 - Decided February 13, 2013

Before Judges Simonelli and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Warren County, Indictment No. 02-12-0472.

Joseph E. Krakora, Public Defender, attorney for appellant (Philip V. Lago, Designated Counsel, on the brief).

Richard T. Burke, Warren County Prosecutor, attorney for respondent (Tara Kirkendall, Assistant Prosecutor, of counsel and on the brief).

Appellant filed pro se supplemental briefs.

PER CURIAM

Defendant Roy L. Rambo, Jr. appeals from the August 10, 2010 Law Division order, which denied his petition for post-conviction relief (PCR). We affirm.

On August 16, 2002, defendant was charged with murdering his wife, and a related weapons offense. On August 23, 2002, the parties' only son filed a probate action in the Chancery Division, seeking to freeze his parents' assets pursuant to the so-called "Slayer Statute," N.J.S.A. 3B:7-1 to -7.[1] In an August 28, 2002 order, the Chancery court granted the relief requested.

Defendant subsequently filed a motion in the probate matter for an order permitting the release of funds that were rightly his to use to retain an attorney to represent him in the criminal matter. The Chancery court denied the motion. The court determined that Jacobson v. Jacobson, 151 N.J. Super. 62 (App. Div. 1997), on which defendant relied, did not apply because it pre-dated N.J.S.A. 3B:7-1. Citing to the statute and In re Estate of Karas, 192 N.J. Super. 107, 111-13 (Law Div. 1983), aff'd as modified, 197 N.J. Super. 642 (App. Div. 1984), certif. denied, 101 N.J. 228 (1985), the court reasoned that defendant would not be entitled to funds if convicted of intentionally killing his wife. The court determined that the right to retain counsel of choice was "not absolute and must give way . . . [to] the fair and proper administration of [the Slayer Statute]." The court concluded that all funds would be

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[1] In 2002, the year the murder occurred, the Slayer Statute was codified under N.J.S.A. 3B:7-1. The Legislature repealed this version of the statute effective February 27, 2005, and replaced it with N.J.S.A. 3B:7-1.1.

held in trust pending the outcome of the criminal matter. The court entered an order on November 7, 2003 memorializing its decision. Defendant appealed, but the appeal was dismissed for failure to prosecute.[2]

Following a jury trial in the criminal matter, defendant was convicted of first-degree murder, N.J.S.A. 2C:11-3a(1), (2), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a. On April 22, 2005, the court sentenced defendant to a forty-year term of imprisonment with thirty years of parole ineligibility. The court directed that the eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, would attach to the ten years remaining on defendant's sentence after he had served the initial thirty-year mandatory minimum term.

Defendant appealed his conviction and sentence. He asserted that the Chancery court's erroneous application of the Slayer Statute to freeze his assets deprived him of his federal and State constitutional rights to retain counsel of his choice. We declined to address this argument, finding the issue was not properly before us. State v. Rambo, 401 N.J. Super. 506, 520, 524 (App. Div.), certif. denied, 197 N.J. 258 (2008), cert. denied, 556 U.S. 1225, 129 S. Ct. 2165, 173 L. Ed. 2d 1162

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[2] On March 6, 2009, we denied defendant's motion to vacate the dismissal and reinstate the appeal.

(2009). We affirmed the conviction, but remanded for re-sentencing to apply NERA to the entire forty-year sentence. Id. at 527.

On March 30, 2009, defendant filed a pro se PCR petition. He argued that the Chancery court misinterpreted and wrongly applied the Slayer Statute and committed numerous other errors that deprived him of his federal and State constitutional rights to counsel of his choice; and the Slayer Act as applied to him violated his federal and State constitutional rights. He also argued that the appointed public defender who represented him pre-trial[3] rendered ineffective assistance by failing to file a motion to transfer the probate matter to the Law Division, thus depriving him of his assets and right to use the assets to retain counsel of his choice. He also claimed that a defective verdict sheet denied him a fair trial.

PCR counsel was subsequently appointed to represent defendant on the PCR petition. Counsel filed a brief, arguing the petition was not time-barred under Rule 3:22, and defendant provided prima facie proof of ineffective assistance of counsel warranting an evidentiary hearing.

On February 23, 2010, defendant filed a pro se motion for bail pending the outcome of his PCR petition, and a pro se

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[3] Defendant represented himself during the trial.

motion to dismiss the indictment with prejudice based on the deprivation of his constitutional right to counsel of his choice. In an April 23, 2010 order and oral decision, the court denied the bail motion, concluding there was no authority permitting bail pending a PCR petition. The court also denied defendant's motion to dismiss the indictment, concluding defendant should have filed it pre-trial. The court also found there was no basis to dismiss the indictment.

The Chancery matter was still pending at the time defendant filed his PCR petition and motions in the criminal matter. On May 17, 2010, the Chancery court entered a final order, which ended the probate litigation. Defendant appealed. He asserted that the Slayer Statute was ambiguous; the Chancery court erroneously and unconstitutionally applied the statute by enjoining him from using his share of the marital assets; the Chancery court erred by failing to defer to the Law Division; and the Slayer Statute deprived him of his federal and State constitutional rights to counsel of his choice.

Two months later, in an August 10, 2010 order and written opinion on defendant's PCR petition, the criminal court concluded defendant's arguments relating to the Chancery court's decision were not properly before it. The court also determined that Rule 3:22-5 barred defendant's defective verdict sheet

argument, which had been adjudicated on the merits in defendant's direct appeal.

Addressing defendant's ineffective assistance of counsel claim, the court found that because Rule 4:3-1(a)(2) required probate matters to be filed in the Chancery Division, a motion to transfer that matter to the Law Division would likely have been denied. The court also found that it lacked jurisdiction over the Chancery court's decision, and defendant's ineffective assistance claim based on that decision was premature. This appeal followed.

On appeal, appellate counsel raises the following arguments:

POINT I THE LOWER COURT ORDER MUST BE REVERSED SINCE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF PRE-TRIAL COUNSEL.

POINT II THE LOWER COURT ORDER MUST BE REVERSED SINCE THE INDICTMENT SHOULD HAVE BEEN DISMISSED.

POINT III THE LOWER COURT ORDER MUST BE REVERSED IN LIGHT OF ADDITIONAL ERRORS.

POINT IV THE LOWER COURT ORDER DENYING THE PETITION MUST BE REVERSED SINCE DEFENDANT'S CLAIMS ARE NOT PROCEDURALLY BARRED UNDER [RULE] 3:22-5.

POINT V THE LOWER COURT ERRED IN NOT GRANTING DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING AND THE LOWER COURT ORDER MUST THEREFORE BE REVERSED.

In a pro se supplemental brief, defendant raises the following arguments:

POINT I

> THE PCR COURT ERRED BY DENYING [PCR] BECAUSE DR. RAMBO MADE A PRIMA FACIE SHOWING THAT THE CHANCERY COURT WRONGFULLY INFRINGED ON HIS RIGHT TO RETAIN CRIMINAL[]DEFENSE COUNSEL OF HIS CHOICE AS GUARANTEED BY THE [U.S. CONST., AMENDS. VI AND XIV; N.J. CONST., ART. 1, PARS. 1, 10.]

POINT II

> THE PCR COURT FAILED TO PROPERLY APPLY THE AUTOMATIC "PRESUMPTION OF PREJUDICE" STANDARD LINKED TO A COUNSEL OF CHOICE VIOLATION; INSTEAD IT APPLIED THE SECOND PRONG OF THE INEFFECTIVE ASSISTANCE OF COUNSEL STA[N]DARD, WHICH REQUIRES THE DEFENDANT TO PROVE THE PREJUDICE.

POINT III

> WHERE THE PCR COURT WAS PROVIDED WITH A COPY OF THE FINAL CHANCERY DECISION, AND ALSO WAS INFORMED THAT AN APPEAL FROM THAT ORDER HAD BEEN FILED, THE PCR COURT ERRED BY FINDING THAT THE CHANCERY MATTER HAD NOT BEEN FINALIZED. THEREFORE MATERIAL EVIDENCE SHOWING THAT DR. RAMBO HAD BEEN DEPRIVED OF SUFFICIENT ASSETS NEEDED TO EXERCISE HIS SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF HIS CHOOSING WAS NOT PROPERLY CONSIDERED.

POINT IV

> THE PCR COURT ERRED BY ITS FAILURE TO FIND THAT DR. RAMBO WAS UNEQUIVOCALLY DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE [U.S. CONST., AMEND. XIV; N.J. CONST., ART. 1, PAR. 1.]

POINT V

THE PCR COURT IMPROPERLY APPLIED THE STANDARDS FOR [PCR], AND THEREBY DEPRIVED DR. RAMBO OF THE OPPORTUNITY TO COLLATERALLY ATTACK HIS CONVICTION.

POINT VI

THE PCR COURT ERRED BY FAILING TO ASSUME JURISDICTION OVER THE DEFENDANT'S ASSET ISSUES.

POINT VII

PCR COUNSEL, [], PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PCR BRIEF BY:

A. MERELY LISTING THE GROUNDS RAISED IN THE DEFENDANT'S PRO SE VERIFIED PETITION;

B. COPYING A FEW PARAGRAPHS FROM THE PROCEDURAL HISTORY FROM THE DIRECT APPEAL BRIEFS;

C. "CUTTING AND PASTING" THREE BOILER [] PLATE POINT HEADINGS AND LEGAL ARGUMENT; AND/OR

D. CITING NO FACTS OR CASE LAW IN SUPPORT OF THE CLAIMS ADVANCED BY THE DEFENDANT.

THIS DEFICIENT PERFORMANCE DOES NOT SATISFY THE CONDUCT REQUIRED BY [STATE v. RUE] FOR PCR COUNSEL, OR THE [STRICKLAND-FRITZ] STANDARDS FOR EFFECTIVE ASSISTANCE OF COUNSEL. FURTHERMORE, PCR COUNSEL'S DEFICIENT CONDUCT VIOLATED [RULE] 3:22-6(d), WHICH REQUIRES A REMAND AND ASSIGNMENT OF COMPETENT PCR COUNSEL BEFORE A DIFFERENT TRIAL COURT. (NOT RAISED BELOW).

POINT [VIII]

DR. RAMBO REITERATES ALL CONSTITUTIONAL CLAIMS ADVANCED IN COUNSEL'S BRIEF, IN THE

PRO SE SUPPLEMENTAL BRIEF, IN THE MOTIONS TO DISMISS AND FOR NOMINAL BAIL, AND DURING ORAL ARGUMENTS OF THIS MATTER, AS IF SET FORTH HEREIN AT LENGTH.

POINT [IX]

THE WAIVER OF COUNSEL WAS NOT VOLUNTARY BECAUSE DR. RAMBO WAS FORCED TO FOREGO APPOINTED COUNSEL IN ORDER TO ASSERT HIS RIGHT TO COUNSEL OF HIS CHOICE.

POINT [X]

BECAUSE THE COUNSEL OF CHOICE CLAIM WILL LIKELY EMERGE FOR A THIRD TIME ON REMAND FOR A NEW TRIAL, THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION TO RESOLVE THE JURISDICTIONAL CONTROVERSY FOR APPLICATION OF THE SLAYER'S ACT. FURTHERMORE, IN THE INTEREST[] OF JUSTICE, FUNDAMENTAL FAIRNESS, AND TO PRESERVE JUDICIAL AND TAXPAYER RESOURCES, THIS COURT SHOULD CRAFT THE APPROPRIATE REMEDY AS A MATTER OF FIRST IMPRESSION IN THIS STATE. THE COURT SHOULD THEN ORDER THE TRIAL COURT TO IMMEDIATELY IMPLEMENT THOSE REMEDIES, INCLUDING DISMISSAL OF THE INDICTMENT WITH PREJUDICE AND/OR NOMINAL BAIL.

Following the filing of this appeal, on June 4, 2012, we rendered our opinion in defendant's appeal of the probate matter. In re Estate of Linda Ann Rambo, No. A-5308-09 (App. Div.), certif. denied, 212 N.J. 430 (2012). We affirmed substantially for the reasons expressed by the Chancery court. (slip op. at 9). We reasoned that "[a]s the Court made clear in Neiman v. Hurff, 11 N.J. 55, 60-62 (1952), the common law doctrine codified in [the Slayer Statute] is 'so essential to the observance of morality and justice [that it] has been

universally recognized in the laws of civilized communities for centuries and is as old as equity.'" We concluded that defendant "was not denied competent counsel in his criminal case. To permit defendant to use the proceeds of the marital estate to pay the cost of private counsel would be a perversion of justice and in direct violation of the public policy expressed by the Legislature in N.J.S.A. 3B:7-5." (slip op. at 10-11). We also determined that defendant's remaining arguments, including those attacking the Chancery court's decision as a denial of his constitutional right to counsel of his choice, "lack[ed] sufficient merit to warrant a discussion in a written opinion. R. 2:11-3(e)(1)(E)." (slip op. at 11).

We decline to address defendant's arguments in this appeal relating to the Chancery court's decision. The Chancery court's decision is not properly before us, and defendant's argument relating to that decision were adjudicated on the merits in In re Estate of Linda Ann Rambo.

Nor will we address defendant's argument relating to the indictment and defective verdict sheet. Defendant should have raised these arguments on direct appeal. R. 3:22-4. In addition, defendant's challenge to the indictment was untimely, and he showed no defect in the indictment. R. 3:10-2(c) and (d); State v. Hogan, 144 N.J. 216, 228-29 (1996). Defendant also cites no authority permitting bail pending the outcome of a

PCR petition. We, thus, limit our review to defendant's ineffective assistance of counsel claim.

A defendant seeking to vacate a conviction on grounds of ineffective assistance of counsel bears the heavy burden of proving (1) "'that counsel's performance was deficient[,]'" and (2) "'that the deficient performance prejudiced the defense[,]'" meaning "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Prejudice is shown by proof creating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Defendant cannot prove either prong of the Strickland test. This court has determined that defendant was not permitted to use the proceeds of the marital estate to pay the cost of private counsel in this matter. In re Estate of Linda Ann Rambo (slip op. at 10-11). Accordingly, we conclude that pretrial counsel was not ineffective for failing to file a motion to transfer the probate matter to the Law Division. Id. 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also State v. Worlock, 117 N.J. 596, 625 (1990) (holding that "[t]he

failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel").

We also conclude that defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). However, we make the following brief comment.

PCR counsel did not render ineffective assistance by filing an insufficient PCR brief. Counsel was not required to advance arguments on claims raised by defendant that were clearly without merit. State v. Webster, 187 N.J. 254, 257 (2006); R. 3:22-6(d).

Affirmed.

APPENDIX G

prospectivity. This is why the exceptions to the rule have been carefully circumscribed. To consider an enactment which "improves" the statutory scheme (in itself a painfully subjective determination) as meeting the curative exception is at odds with the fundamental principal of fairness that new laws should not affect situations which predated them.

[219 *N.J.Super.* at 289, 530 *A.*2d 334.]

The third and final factor under *Gibbons, supra,* relates to the expectations of the parties. 86 *N.J.* at 523, 432 *A.*2d 80. Here, the parties' expectations must be gauged by the legal principles governing the common law right of freedom to contract prevailing during the time of the accident.

Plaintiff's accident occurred on April 13, 2004. Approximately four months earlier, on January 21, 2004, we published our decision upholding the enforceability of step-down clauses in business auto policies. *Pinto v. N.J. Mfrs. Ins. Co.,* 365 *N.J.Super.* 378, 839 *A.*2d 134 (App.Div.2004), *aff'd,* 183 *N.J.* 405, 874 *A.*2d 520 (2005). The Supreme Court granted certification on April 26, 2004,[3] and affirmed our holding on June 6, 2005. *Pinto, supra,* 183 *N.J.* 405, 874 *A.*2d 520. Thus, the prevailing state of the law at the time of the accident favors a prospective application of the S–1666 amendment. In this light, Federal Insurance had a reasonable basis to believe that its contractual provisions were proper and enforceable; by contrast, plaintiff's prospect for success was dependent upon overturning a published decision of this court. Thus, it cannot be said that the reasonable expectations of the parties at the time of the accident favor retroactive application of S–1666.

III

The judgment of the Law Division giving retroactive effect to *N.J.S.A.* 17:28–1.1(f) is reversed. Applying well-established principles of statutory construction, we hold that this statutory amendment must be applied prospectively, commencing from the date of its passage by the Legislature. Any UM/UIM claim predicated upon an accident which predates the adoption of *N.J.S.A.* 17:28–1.1(f) must be governed by the legal principles articulated by the Supreme Court in *Pinto, supra,* 183 *N.J.* 405, 874 *A.*2d 520.

Reversed and remanded.

401 N.J.Super. 506

STATE of New Jersey, Plaintiff–Respondent,

v.

Roy L. RAMBO, Jr., Defendant–Appellant.

Superior Court of New Jersey, Appellate Division.

Argued March 5, 2008.

Decided July 22, 2008.

Background: Defendant was convicted in the Superior Court, Law Division, Warren County, of murder and possession of a weapon for an unlawful purpose. He appealed.

Holdings: The Superior Court, Appellate Division, Wefing, P.J.A.D., held that:

(1) jury instruction on passion/provocation manslaughter was not warranted;

3. *Pinto v. N.J. Mfrs. Ins. Co.,* 180 *N.J.* 151, 849 *A.*2d 184 (2004).

(2) jury instruction on duty to retreat in context of self defense was adequate;

(3) trial court acted within its discretion in refusing to allow defendant to cross examine witness to establish that witness would benefit financially from estate of victim; and

(4) jury instruction on use of force in defense of premises was not warranted.

Conviction affirmed; remanded for resentencing.

1. **Homicide** ⇐1457

Jury instruction on passion/provocation manslaughter was not warranted at trial for murder, even though defendant testified that victim, who was his wife, made continued threats against his life, that victim had something in her hand on day of incident, and that he feared that victim might have been going to retrieve a weapon; there was no evidence of anything beyond victim's words, as defendant did not say that he saw any weapon in victim's hand on day of incident, and defendant preemptively shot victim. N.J.S.A. 2C:11–4(b)(2).

2. **Homicide** ⇐668

Murder that is committed in the heat of passion induced by a reasonable provocation is reduced to manslaughter. N.J.S.A. 2C:11–4(b)(2).

3. **Homicide** ⇐667

Passion/provocation manslaughter has four elements, which are (1) the provocation must be adequate, (2) the defendant must not have had time to cool off between the provocation and the slaying, (3) the provocation must have actually impassioned the defendant, and (4) the defendant must not have actually cooled off before the slaying; the first two elements are objective, i.e., they are viewed from the perspective of a reasonable person, while the last two elements are subjective, i.e., whether the defendant was actually impassioned and whether the defendant actually did cool off before committing the fatal act. N.J.S.A. 2C:11–4(b)(2).

4. **Homicide** ⇐1457

When considering a murder defendant's request to charge a jury on passion/provocation manslaughter, a trial court must review the record before it in the light most favorable to the defendant. N.J.S.A. 2C:11–4(b)(2).

5. **Homicide** ⇐1457

Threshold for a jury instruction for passion/provocation manslaughter is relatively low; the murder defendant need only show a rational basis for a verdict convicting the defendant of the lesser-included offense. N.J.S.A. 2C:11–4(b)(2).

6. **Homicide** ⇐1457

A trial court will not instruct a jury on passion/provocation manslaughter as lesser included offense of murder if the evidence is so weak as to preclude jury consideration. N.J.S.A. 2C:11–4(b)(2).

7. **Homicide** ⇐674

Words alone, no matter how offensive or insulting, never constitute sufficient provocation for purposes of passion/provocation manslaughter. N.J.S.A. 2C:11–4(b)(2).

8. **Criminal Law** ⇐1134.15

Appellate court would not consider murder defendant's argument that effect of chancery orders freezing his assets and denying him any access to marital funds interfered with his Sixth Amendment right to counsel; only appeal before appellate court was from judgment of conviction, analysis of defendant's argument would inextricably require appellate court to either uphold or reverse a determination made in chancery that was not properly before it,

and question of whether that determination was correct in context of defendant's desire to retain counsel was complex. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1134.24

Superior Court, Appellate Division, only has jurisdiction to review orders that have been appealed to it.

10. Homicide ⇐1485

Jury instruction on duty to retreat in context of self defense was adequate at trial for murder despite lack of a definition of "dwelling," even though defendant pointed to dual nature of premises in question, which served both as defendant's office and living quarters; there was no reasonable prospect that jury could not have understood that upper floor of house on premises, which was where victim was shot in alleged self defense, was defendant's dwelling and had been for some months, and, moreover, the state never contended that self defense was not an issue because shooting did not occur in a dwelling. N.J.S.A. 2C:3–4(b)(2).

11. Witnesses ⇐372(2)

Trial court acted within its discretion at murder trial in refusing to allow defendant to cross examine witness to purportedly establish that witness would benefit financially from estate of victim, who was defendant's wife; witness had no legal claim to any assets of estate and thus had no direct pecuniary interest in it, and witness testified about her close relationship with victim, such that it could be confidentially said that witness's antipathy to defendant was apparent to jury.

12. Homicide ⇐1490

Jury instruction on use of force in defense of premises was not warranted at trial for murder; victim, who was defendant's wife, was not a trespasser on premises where defendant shot her. N.J.S.A. 2C:3–6.

Marcia Blum, Assistant Deputy Public Defender, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney; Ms. Blum, of counsel and on the brief).

Tara J. Kirkendall, Assistant Warren County Prosecutor, argued the cause for respondent (Thomas S. Ferguson, Prosecutor, attorney; Ms. Kirkendall, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges WEFING, PARKER, and R.B. COLEMAN.

The opinion of the court was delivered by

WEFING, P.J.A.D.

[510]Tried to a jury, defendant was convicted of murder, *N.J.S.A.* 2C:11–3(a)(1),(2) and possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a). The trial court sentenced defendant to forty years in prison, thirty of which had to be served before defendant could be eligible for parole. The trial court specifically directed that the eighty-five percent parole disqualification provisions of the No Early Release Act ("NERA"), *N.J.S.A.* 2C:43–7.2, would attach to the ten years remaining on defendant's sentence after he had served the initial thirty-year mandatory minimum period. Defendant has appealed his conviction and sentence. After reviewing the record in light of the contentions advanced on appeal, we affirm defendant's conviction but remand for re-sentencing.

The victim was defendant's wife, to whom he had been married for nearly

thirty years. Defendant did not deny that he shot and killed her but maintained that he acted in self-defense. By its verdict, the jury rejected that assertion.

The couple had had a contentious relationship for some time. They had been separated for nearly eighteen months at the time of the shooting, which took place in the late afternoon of August 16, 2002. That, however, was not their first separation. In 1996 they separated for approximately a year. During that separation, [511] defendant lived at the farm with his then-girlfriend. After about one year, defendant and his wife decided to live together again, but defendant testified that it was not a complete reconciliation. He explained that it was more aimed at providing time to get their financial affairs in order so that they could eventually divorce with fewer problems. He said that he understood they had an agreement that they were free to date other people during this period. He freely availed himself of that understanding and had several intimate relationships, including one with a member of his office staff.

In April 2001 they again separated. Despite that separation, the couple continued their professional relationship, which they had maintained for many years. Defendant is a dentist, and had his office on the lower level of a split-level house located at 409 Ohio Avenue in Pohatcong. Mrs. Rambo continued to work in the office, as she had for many years, working both as a dental assistant and handling patient billing and paying the bills received. When they separated for the second time, defendant moved into the main floor of 409 Ohio Avenue while Mrs. Rambo remained at the marital residence, a farm in Alpha. Defendant acknowledged that even after their final separation they continued to attend certain social occasions as a couple and that many people did not know that, in fact, they were separated.

Defendant testified that his relationships with other women bothered Mrs. Rambo. He said that from the time of their "reconciliation" in 1996, she made constant threats against him. He testified that after he moved to the Ohio Street building, she would enter at all hours of the day or night, that he would awaken during the night to find her standing over his bed gesturing as if she had a gun. He said that she made constant threats to pour gasoline over him as he slept and ignite a fire.

He testified about the events of the week of the shooting. He said that on the afternoon of August 12, he had been in the break room with one of the hygienists with whom he admitted he had an intimate relationship. He said Mrs. Rambo burst into the room [512] and punched the hygienist in the head. He tried to restrain Mrs. Rambo, but she was kicking him and shouting.

He testified that based upon that incident, he wanted to obtain a restraining order against his wife but that when he mentioned that the next day, the other members of the staff persuaded him not to do so, saying it would be bad for business.

He said that on the night of August 15, she silently entered his room while he was at the computer. She held a metal object in her hand and made a click as if pulling a trigger. She laughed and turned and left.

He testified that on the afternoon of August 16, she stormed upstairs with a letter she had come across, which indicated he was seeking to practice elsewhere. He said that she was very angry, and told him she was going to take care of him and this would be the last day he left the house alive. She then returned downstairs.

He continued that after the office closed for the day, she again came upstairs, de-

manding money. He said she was very angry and continued to threaten to kill him. He testified that he did not really respond, other than refusing to give her the money. He said he remained at his computer, letting her, in his words, "vent." He said that when she turned to leave she again said she was going to burn the house down and that he was not getting out alive. He explained he kept a gun in his room because of her constant threats and retrieved the gun from where he kept it. Putting it behind his back, he followed her down the hall. He said she walked down the stairs to the office area, turned and began screaming at him again and said this would be his last night. She turned and headed to the door to the office and he shot her in the back. He testified he was "very scared" by her constant threats and by the fact that when she got to the bottom of the stairs, she did not go out of the house but turned as if to go to the office. He said he was afraid that she had hidden a weapon in the office area. He also knew there were many flammable substances in the office.

|513In response to a question as to his intent when he shot her, defendant responded:

> I just needed her to stop threatening me and threatening everybody else, threatening to kill me and my feeling was is that she had a weapon right then and there, or readily accessible and I just didn't want to die.

Asked if he intended to kill her, he said:

> No. It was just to stop her. Just to stop, stop the threats, and stop her from doing harm to me and everybody else.

He said the fact that she walked into the office area made him fear that she was going for a weapon. He entered the room and found her standing there. He continued,

> I really can't tell you what exactly she was doing, but she was kind of like coming at me. She had some things in her hand. I didn't know what they were. She also was coming at me that was—it wasn't fast, but it gave me the impression that she had something in her hand. And all I did was, was try to block her from coming at me. I thought she was lunging at me. It wasn't as if she was coming, really fast, but she was just kind of like leaning towards me. And so what I did was I did the only thing that I could think of, was just, I tapped her on the top of the head with the gun.

He admitted that after he retrieved the gun and followed her down the hall, he never told her to stop or warned her that he had a gun. He simply took aim and fired, shooting her in the back.

Immediately after the shooting, defendant placed a call to 911 to report it and advised the 911 operator that he had shot his wife. Police responded immediately to the scene. They found defendant sitting on the outside front steps awaiting their arrival. He was immediately advised of his *Miranda* rights, *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966), and said, "She's been harassing me, harassing me, harassing me over and over."

Defendant was fully cooperative with the police. He answered all their questions and later that evening, reenacted the shooting for them at the house. He told them that their relationship had become highly acrimonious and that Mrs. Rambo had made repeated threats to burn the house down and to kill him. He said that her repeated threats had made him fear for his safety and that he had purchased a semiautomatic handgun for protection, which he kept in his bed. He said that she had come to him after |514the office had closed for the day, demanding $200. He said she repeatedly screamed at him that

this was the last time he was going to treat her like that.

He said that she continued walking after being shot, and he fired again, but the gun jammed. He followed her into the office area and struck her in the head with the gun, fracturing her skull. At that point, the gun discharged a bullet, which entered the wall. Dr. Rambo pointed out where he had been standing when he shot his wife; a shell casing was found there.

As we noted, there was testimony that earlier in the day Mrs. Rambo became agitated when she found a letter which indicated that defendant was seeking positions with another dental practice in a different area. There was also testimony that defendant was very quiet and distant during the day, which was not his usual demeanor in the office. Defendant agreed that Mrs. Rambo had come up demanding money, saying she wanted $200 to get him arrested. He understood this to be in reference to the altercation in the office earlier that week and declined to give her the money.

Defendant raises the following arguments on appeal:

POINT I THE COURT'S REFUSAL TO CHARGE PASSION–PROVOCATION MANSLAUGHTER AS A LESSER OFFENSE OF MURDER VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

POINT II DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO COUNSEL OF CHOICE AND DUE PROCESS OF LAW

POINT III THE INADEQUATE CHARGE ON THE DUTY TO RETREAT RENDERED THE SELF–DEFENSE INSTRUCTION FATALLY FLAWED, VIOLATING DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL

POINT IV THE SENTENCE, WHICH CALLS FOR DEFENDANT TO SERVE 40 YEARS, 30 YEARS WITHOUT PAROLE, AND 85 PERCENT OF THE REMAINING TEN YEARS WITHOUT PAROLE, IS ILLEGAL

I

[1–3] Murder that is committed in the heat of passion induced by a reasonable provocation is reduced to manslaughter. *State v. [515]Josephs*, 174 *N.J.* 44, 103, 803 *A.*2d 1074 (2002); *N.J.S.A.* 2C:11–4(b)(2). The elements of passion/provocation manslaughter are well-known.

> Passion/provocation manslaughter has four elements: the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying.
>
> [*State v. Viera*, 346 *N.J.Super.* 198, 212, 787 *A.*2d 256 (App.Div.2001) (quoting *State v. Mauricio*, 117 *N.J.* 402, 411, 568 *A.*2d 879 (1990)), *certif. denied*, 174 *N.J.* 38, 803 *A.*2d 634 (2002).]

The first two elements are objective; that is, they are viewed from the perspective of a reasonable person, while the last two elements are subjective; that is, whether the defendant was actually impassioned, and whether the defendant actually did cool off before committing the fatal act. *Id.* at 212–13, 787 *A.*2d 256. "The first element of passion-provocation manslaughter requires an objective showing of adequate provocation. The provocation must be sufficiently extreme so as to cause a reasonable person to lose 'mastery of his [or her] understanding....'" *State v. Copling*, 326 *N.J.Super.* 417, 429, 741 *A.*2d

624 (App.Div.1999) (quoting *State v. Pratt*, 226 *N.J.Super.* 307, 317, 544 *A.*2d 392 (App.Div.), *certif. denied*, 114 *N.J.* 314, 554 *A.*2d 864 (1988)), *certif. denied*, 164 *N.J.* 189, 752 *A.*2d 1290 (2000).

[4–6] When considering a defendant's request to charge the jury on passion/provocation, the trial court must review the record before it in the light most favorable to the defendant. *State v. Castagna*, 376 *N.J.Super.* 323, 357, 870 *A.*2d 653 (App.Div.2005), *rev'd on other grounds*, 187 *N.J.* 293, 901 *A.*2d 363 (2006).

> The threshold for a jury instruction for passion-provocation manslaughter is relatively low. The defendant need only show a rational basis for a verdict convicting the defendant of the lesser-included offense. However, the judge will not so instruct the jury if the evidence is so weak as to preclude jury consideration.
>
> [*Copling, supra*, 326 *N.J.Super.* at 428, 741 *A.*2d 624 (citations and internal quotation marks omitted).]

[7] "[W]ords alone, no matter how offensive or insulting, never constitute sufficient provocation." *Castagna, supra*, 376 *N.J.Super.* at 357, 870 *A.*2d 653. Several cases have, nonetheless, recognized that a course of conduct over a period of time may [5][6]constitute sufficient provocation. *State v. Erazo*, 126 *N.J.* 112, 124, 594 *A.*2d 232 (1991) (stating that "continuing strain in a marriage fraught with violence" may constitute sufficient provocation); *State v. Guido*, 40 *N.J.* 191, 211, 191 *A.*2d 45 (1963) (holding that "[A] course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation."); *State v. Vigilante*, 257 *N.J.Super.* 296, 305–06, 608 *A.*2d 425 (App.Div. 1992) (finding that jury could conclude that past history of violence "accumulated a detonating force which caused him to explode").

We are satisfied, nonetheless, that the record presented here is sufficiently distinguishable from those cases. In *Guido* and *Vigilante*, for instance, the defendants had been subjected to physical abuse at the hands of their ultimate victims. In *Erazo*, defendant contended he killed his wife in the heat of passion when she said she would seek to have his parole revoked on the basis of a fabrication; she had previously threatened to report him to parole authorities. 126 *N.J.* at 124, 594 *A.*2d 232.

Here, although defendant testified that his wife made continued threats against his life, there was no evidence of anything beyond her words. The record indicates, for instance, that when defendant left the marital residence, he left on the premises his gun cabinet to which she had ready access. He did not say that he saw any weapon in her hand on the day he shot her, only that he did not know what was in her hand. (According to the record, her keys, a pair of sunglasses and a Tupperware container were found beneath her body.) His stated fear that she might be going to retrieve a weapon cannot, in our judgment, constitute reasonable provocation for purposes of a passion/provocation instruction. The law should not have the effect of benefiting one who takes such a fatal pre-emptive action. *State v. Rodriguez*, 195 *N.J.* 165, 949 *A.*2d 197 (2008) ("We will not sanction the gratuitous use of deadly force. . . .").

[5][7]II

[8] Defendant's next argument requires that we set forth certain additional facts, about events which occurred after the shooting of August 19. Defendant and his wife had accumulated through the years substantial assets, the great bulk of

which, despite the continuing discord between defendant and his wife, were held in joint names. The couple's primary assets were real estate: the house in Pohatcong in which defendant maintained his dental practice and the marital residence in Alpha, which was located on eleven acres of land. Both of these were held as joint tenants by the entirety. The couple also owned a parcel of land in North Carolina and a time-share in North Carolina, again in joint names.

Several days after the shooting, the couple's only child, Bruce, filed an order to show cause in the Chancery Division seeking to be appointed as administrator of his mother's estate, which he estimated at approximately three million dollars. On August 23, 2002, the court entered an order appointing Bruce Rambo administrator of the estate. The order included the following provision:

> It is further ordered that (1) all assets of Roy L. Rambo will be frozen, wherever located; (2) Roy L. Rambo or any of his agents or representatives is enjoined from entering onto any property owned either jointly or individually by Roy L. Rambo and Linda Ann Rambo; and (3) Roy L. Rambo is enjoined from expending any sums of money owned individually or as a marital asset....

On September 4, 2002, defendant submitted an application to be represented by the Public Defender's Office, but it was denied the following day on the ground that he was not indigent. On October 9, 2002, the trial court presiding over the criminal proceedings entered an order declaring defendant indigent and entitled to representation by the Office of the Public Defender.

In October 2002 the attorney representing Bruce Rambo as administrator of his mother's estate submitted a letter brief to the Chancery judge, setting forth the estate's position with respect to ownership of the marital property. He contended that all property acquired by Dr. Rambo and his wife since the date of their marriage in 1973 should be deemed "marital property," one-half of which belonged to the decedent and one-half of which belonged to defendant. The attorney argued that Bruce, as the only child of the decedent, succeeded to her one-half interest in the marital property and that the remaining one-half of the marital property should be held in a constructive trust pending completion of the criminal proceedings in the Law Division. In support of his argument, he cited *N.J.S.A.* 3B:7–1 and –2 (the "slayer statutes") [1] and *In re Estate of Karas*, 192 *N.J.Super.* 107, 469 *A.*2d 99 (Law Div. 1983), *aff'd as modified*, 197 *N.J.Super.* 642, 485 *A.*2d 1083 (App.Div.1984), *certif. denied*, 101 *N.J.* 228, 501 *A.*2d 907 (1985).

In November 2002 defendant appeared without counsel in Chancery in connection with the estate proceedings. He advised the court that he had no funds to hire an attorney to represent him in connection with the probate proceedings and did not wish the public defender assigned to him to be involved in the probate proceedings. The Chancery judge at several points clearly indicated to defendant that he would look favorably upon an application to have funds released for the purpose of retaining an attorney for the estate matters. Defendant did not make such an application at that time.

He did, however, in July 2003, through counsel, file a petition in the Chancery Division for an order directing release of

1. *N.J.S.A.* 3B:7–1 and –2 were in effect at the time of the shooting. They have since been repealed and replaced by *N.J.S.A.* 3B:7–1.1 to –7.7. The amended statute does not affect the analysis.

funds to permit him to retain an attorney to defend him in the criminal proceedings. According to the papers submitted on his behalf, he sought to have one-half the proceeds of the sale of the marital assets deposited in a constructive trust, to be held pending the completion of the criminal proceedings. From that one-half, he sought one-half, to permit him to retain William Harth, Esq., a certified criminal defense attorney, to represent him on the criminal charge. He did not make any contention that he had funds in his own name, individually, to which he should have been permitted[519] access. Defendant's son opposed that application. After a hearing, the court denied his motion and refused to release any funds to him.

Defendant filed an appeal from that order and, in connection with that appeal, filed a motion to be declared an indigent, for free transcripts, and to have counsel assigned to represent him. His motion to proceed as an indigent was granted but the motion for free transcripts and counsel was denied. Defendant did not attempt to prosecute the appeal without transcripts, and it was ultimately dismissed.

Defendant did not have a successful relationship with the several attorneys assigned from the Public Defender's Office to represent him on the criminal charges. The last attorney filed a motion to be relieved as counsel. During the course of that motion the trial court stated, "I am now convinced that no matter what this court does Dr. Rambo will not cooperate with any attorney." That motion was granted. Thus defendant represented himself at this murder trial, with the assistance of stand-by counsel who was appointed to assist him.

Defendant argues that the effect of the Chancery orders freezing his assets and denying him any access to marital funds interfered with his Sixth Amendment right to counsel. He relies upon *United States v. Gonzalez–Lopez,* 548 *U.S.* 140, 126 *S.Ct.* 2557, 165 *L.Ed.*2d 409 (2006), in which the Supreme Court concluded that a defendant wrongfully deprived of the counsel of his choice was entitled to a new trial, without the necessity of showing that the attorney who represented him was ineffective under the two-pronged test of *Strickland v. Washington,* 466 *U.S.* 668, 104 *S.Ct.* 2052, 80 *L.Ed.*2d 674 (1984).

In *Gonzalez–Lopez,* the defendant was charged in Missouri federal court with conspiracy to distribute a controlled dangerous substance. He retained California counsel to represent him, but the District Court incorrectly denied the application of that attorney to be admitted pro hac vice. Indeed, it not only denied such admission, it refused to permit that attorney to sit at counsel table[520] and refused to permit local counsel to consult that attorney during the course of the trial. 548 *U.S.* at 143, 126 *S.Ct.* at 2560, 165 *L.Ed.*2d at 416. In reversing defendant's conviction, the Court concluded, "In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.' " *Id.* at 146, 126 *S.Ct.* at 2562, 165 *L.Ed.*2d at 418 (footnote omitted).

There is a fundamental procedural distinction between *Gonzalez–Lopez* and defendant's appeal. In *Gonzalez–Lopez,* the orders which had the effect of depriving defendant of the counsel of his choice were entered in connection with the same matter that was under appeal. The only appeal before this court is from the judgment of conviction. He did not include in his Notice of Appeal the orders entered in the Chancery Division and, indeed, his earlier filed appeal from those orders was dismissed.

[9] It is a fundamental of appellate practice that we only have jurisdiction to review orders that have been appealed to us. *N.J. Div. of Youth & Family Servs. v. K.M.*, 136 *N.J.* 546, 561–62, 643 *A.*2d 987 (1994) (holding that the Appellate Division could not review a judgment not before it when a related case had been appealed); *1266 Apartment Corp. v. New Horizon Deli, Inc.*, 368 *N.J.Super.* 456, 459, 847 *A.*2d 9 (App.Div.2004) (stating that "[O]nly the judgment or orders designated in the notice of appeal ... are subject to the appeal process and review.").

Critical to the Court's conclusion in *Gonzalez–Lopez* that defendant had been wrongfully denied the counsel of his choice was the fact that the denial of admission pro hac vice to his counsel of choice had been incorrect. Analysis of defendant's claim to us would inextricably require that we either uphold or reverse a determination made in Chancery which is not properly before us.

The question whether those determinations were correct in the context of defendant's desire to retain counsel is complex. It requires a close analysis of the statutory language, the legislative [521] goals sought to be achieved by the statute and the proper balance to be given to defendant's choice of counsel. It also involves a consideration of the competing policy goals of not permitting a wrongdoer to receive a benefit from the wrongful act and requiring the taxpaying public to assume the cost of a legal defense when private funds might be available. We do not consider it inappropriate in such an instance to insist that proper appellate practice be followed. Finally, we also note that defendant made no effort, after his request for free transcripts was denied, to prepare and file a brief setting forth his legal position at that juncture, arguing that transcripts were unnecessary to resolve the purely legal issue.

III

[10] Defendant's next argument relates to one aspect of the trial court's charge on self-defense; specifically, the trial court's failure, in the course of dealing with whether there was a duty to retreat, to define "dwelling." The trial court instructed the jury in the following manner:

> Self-defense exonerates a person who uses force if in the reasonable belief that such action was necessary to prevent his death or serious injury, even though the belief was later proven to be mistaken. Accordingly, the law requires only reasonable, not necessarily correct, judgment.
>
> Even if you find that the use of deadly force was reasonable, there are limitations on the use of deadly force. If you find that the defendant, for the purpose of causing death or serious bodily harm to another person, provoked or incited the use of force against himself in the same encounter, then the defense is not available to him.
>
> If you find that the defendant knew that he could avoid the necessity of using deadly force by retreating, provided that the defendant knew he could do so with complete safety, then that defense is not available to him. An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including a porch, unless he or she is the initial aggressor.

This instruction correctly told the jury that defendant did not have to retreat before resorting to deadly force if he was faced with the prospect of death or serious injury in his own dwelling but that he would have the duty to retreat, even in his own dwelling, if he were the initial aggressor. *N.J.S.A.* 2C:3–4(b)(2).

|522Defendant contends that the charge as given was incomplete because the trial court did not define for the jury the term "dwelling." He stresses the dual nature of the premises at 409 Ohio Avenue, which served both as his office and his living quarters following the couple's final separation. We agree with the State that in this case there is no reasonable prospect that the jury could not have understood that the upper floor of this house was defendant's dwelling and had been for some months. We note, moreover, that the State never contended that self-defense was not an issue because the shooting did not occur in a "dwelling." The charge as given was entirely adequate.

IV

Defendant also challenges the manner in which the trial court structured his sentence, which had the effect of extending the period of time in which he would have to remain incarcerated without being eligible for parole. The State agrees with defendant that the parole ineligibility provisions of NERA, *N.J.S.A.* 2C:43–7.2, apply to the whole term imposed for murder, not just the period in excess of the mandatory thirty-year parole disqualifier which is required for any sentence for murder. *N.J.S.A.* 2C:11–3(b).

V

Defendant has filed a pro se supplemental brief in which he raises the following issues:

POINT I A SERIES OF FLAWED CIVIL TRIAL COURT ORDERS CAUSED SIGNIFICANT "STRUCTURAL ERRORS" BY: WRONGFULLY APPLYING *N.J.S.A.* 3B:7–1 ET SEQ. ("SLAYER'S ACT"); DEPRIVING THIS DEFENDANT OF HIS FINANCIAL RESOURCES; INFRINGING UPON HIS RIGHT TO RETAIN THE COUNSEL OF HIS CHOICE; AND DUE PROCESS RIGHT TO A FAIR TRIAL; IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDS. V, VI, XIV, § 1; AND THE NEW JERSEY CONSTITUTION, ART. I, ¶¶ 1 AND 10. (ADDENDUM TO COUNSEL'S BRIEF POINT II)

POINT II THE ERRONEOUS CRIMINAL TRIAL COURT ORDER TO DECLARE DEFENDANT AS AN "INDIGENT" PREJUDICED DEFENDANT'S |523RIGHT TO COUNSEL AND INFRINGED ON HIS ABILITY TO RETAIN PRIVATE COUNSEL

POINT III TOTAL FORFEITURE OF DEFENDANT'S ASSETS PURSUANT TO *N.J.S.A.* 3B:7–1 ET SEQ. CONSTITUTES PUNISHMENT AND INFRINGEMENT ON THE UNITED STATES CONSTITUTION, AMENDMENT VIII AND THE NEW JERSEY CONSTITUTION, ART. 1, ¶ 12 PROHIBITIONS AGAINST EXCESSIVE FINES; AND INTIMATES THAT FURTHER CRIMINAL PROSECUTION VIOLATED THE UNITED STATES CONSTITUTION, AMENDS. VI, XIV AND THE NEW JERSEY CONSTITUTION, ART. 1, ¶¶ 1 AND 11 (DOUBLE JEOPARDY AND DUE PROCESS OF LAW CLAUSES) (Not Raised Below)

POINT IV THE DEFENDANT'S WAIVER OF COUNSEL (PREDICATED UPON THE ERRONEOUS DEPRIVATION OF HIS ASSETS) WAS NOT A VALID "KNOWING, INTELLIGENT AND VOLUNTARY WAIVER" OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

POINT V THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE TRIAL COURT'S DENIAL OF DEFENSE

MOTION TO SEQUESTER LIEUTENANT DALRYMPLE AS A POTENTIAL STATE'S WITNESS, PERMITTING HIM TO BE SEATED AT THE PROSECUTION TABLE DURING THE ENTIRE TRIAL PROCESS, THEREBY CAUSING PREJUDICE TO THE DEFENDANT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMEND. XIV; AND THE NEW JERSEY CONSTITUTION, ART. 1, ¶ 1

POINT VI THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE TRIAL COURT'S ABUSE OF DISCRETION TO DISALLOW CROSS-EXAMINATION OF STATE'S WITNESS AS TO BIAS AND FINANCIAL INTEREST IN THE OUTCOME OF THE TRIAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMEND. VI; AND THE NEW JERSEY CONSTITUTION, ART. 1, ¶ 10

POINT VII THE CRIMINAL TRIAL COURT COMMITTED HARMFUL ERROR BY FAILING TO TAILOR THE JURY CHARGES TO THE FACTS OF THE CASE

POINT VIII THE TRIAL COURT'S FAILURE TO GRANT DEFENDANT'S REQUEST FOR A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF PREMISES DENIED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION, AMENDS. VI, XIV; AND THE NEW JERSEY CONSTITUTION, ART. 1, ¶¶ 1, 9, 10

POINT IX PRETRIAL INEFFECTIVE ASSISTANCE BY THE COURT-APPOINTED COUNSEL AND MULTIPLE ADDITIONAL TRIAL ERRORS DEPRIVED THE DEFENDANT OF A FAIR TRIAL

POINT X THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. 1, ¶ 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ACCUMULATION OF TRIAL ERRORS (Partially Raised Below)

[524] **POINT XI** THE SENTENCE IMPOSED DOES NOT PROPERLY APPLY THE NERA PERIOD OF PAROLE INELIGIBILITY PURSUANT TO *N.J.S.A.* 2C:43-7.2 (ADDENDUM TO COUNSEL'S BRIEF POINT IV)

POINT XII THE TRIAL JUDGE INFRINGED ON DEFENDANT'S EFFECTIVE ASSISTANCE OF COUNSEL BY RESTRICTIONS PLACED UPON STAND-BY COUNSEL

The first four points of defendant's pro se supplemental brief are various challenges to the orders entered in the Chancery Division with respect to the refusal to release funds to defendant to retain criminal defense counsel. As we noted earlier, those orders are procedurally not before us, and we decline to address the question.

In his next point, defendant asserts that the fact that Lieutenant Dalrymple of the Warren County Prosecutor's Office was permitted to sit at counsel table during the trial deprived him of due process. We are uncertain as to how defendant was prejudiced by Lieutenant Dalrymple's physical presence. There is no merit to his suggestion that the jury would have considered the State's case more worthy because two people sat at counsel table. The jury could just as easily have concluded that the State's case was weak and required two persons at counsel table. And, since Lieutenant Dalrymple did not testify dur-

ing the course of the trial, there is no merit to the contention that he should have been sequestered.

[11] The State called to the stand Jessica Lukachek, the girlfriend of Bruce Rambo, only son of defendant and his deceased wife. Defendant sought to cross-examine Ms. Lukachek to establish that she would benefit financially from the estate of his deceased wife. Defendant contends that the trial court's refusal to permit such cross-examination deprived him of due process. We disagree. The trial court was correct that Ms. Lukachek had no legal claim to any of the assets in the estate and thus had no direct pecuniary interest in it. Additionally, Ms. Lukacheck testified about her close relationship with Mrs. Rambo; we are confident her antipathy to defendant was apparent to the jury. The scope of cross-examination rests within the sound discretion of the
525 trial court, and the trial court did not abuse that discretion in its rulings in this regard. *State v. Petillo*, 61 *N.J.* 165, 169, 293 *A.*2d 649 (1972), *cert. denied*, 410 *U.S.* 945, 93 *S.Ct.* 1393, 35 *L.Ed.*2d 611 (1973); *Casino Reinvestment Dev. Auth. v. Lustgarten*, 332 *N.J.Super.* 472, 492, 753 *A.*2d 1190 (App.Div.), *certif. denied*, 165 *N.J.* 607, 762 *A.*2d 221 (2000).

Defendant's next contention is that the trial court erred in not tailoring its jury charge to the facts of the case. Defendant's brief stresses the importance of a trial court molding its charge to reflect the facts of the case at hand. *State v. Robinson*, 165 *N.J.* 32, 754 *A.*2d 1153 (2000). That principle cannot be gainsaid. Defendant, however, does not demonstrate how that principle was violated here; i.e., in what areas of the charge, more specificity was called for. Despite the length of the trial (and the extensive number of transcripts supplied to us in connection with this appeal), the issue at trial was fundamentally a simple one: did defendant act in self-defense when he shot and killed his wife.

[12] Defendant's next contention is that the trial court committed reversible error when it declined to give an instruction to the jury on the use of force in defense of premises. *N.J.S.A.* 2C:3–6. We disagree. The statute refers to the use of force "to prevent or terminate what [the actor] reasonably believes to be the commission or attempted commission of a criminal trespass by such other person in or upon such premises." Defendant's wife, however, was not a trespasser; she was a co-owner of the property, a staff member of the business and had keys, permitting her entry as she wished.

In defendant's next contention, he asserts that he was deprived of the effective assistance of counsel at various points in the proceedings. We decline to address these complaints on this direct appeal. Contentions of ineffective assistance of counsel are more effectively addressed through petitions for post-conviction relief, at which point an appropriate record may be developed. *State v. Preciose*, 129 *N.J.* 451, 460, 609 *A.*2d 1280 (1992).

526 Defendant includes within this point heading an argument that several of the trial court's evidentiary rulings deprived him of fair trial. None of the challenged rulings were an abuse of the wide discretion vested in the trial court and provide no basis to overturn the judgment.

Defendant also notes that immediately prior to the trial court commencing its charge, it made the following remark to the jury: "I understand Mrs. Romagnoli [the court clerk] indicated at one time you wanted a side-bar with me, but we never went that far." Defendant complains that neither party was ever informed during the trial that at least one member of the

jury wanted to speak to the trial court and that the denial of that request denied him a fair trial. There is no support for such a conclusion. Although the remark may be somewhat cryptic, it is important to see it in context. The entire statement was:

> Also, you know during the course of the trial I was required to make certain rulings on admissibility, referred to as side-bars, and I understand Mrs. Romagnoli indicated at one time you wanted a side-bar with me, but we never went that far.

We consider defendant's contention that the trial court refused to respond to an inquiry from the jury to be wholly speculative and not warranted from the context.

Defendant also complains of several remarks by the prosecutor in her summation. Those comments addressed to defendant's admitted infidelities were proper comments upon the evidence. Defendant complains that the prosecutor in her summation misstated the law with respect to self-defense. The jury was repeatedly told that the instructions of the court on the legal issues were binding, not any comments the attorneys might have made in summation. The court's instructions on self-defense were accurate and corrected any misimpression that may have been conveyed by the summation.

Defendant also complains that the trial court's charge on murder was defective because it precluded the jury from considering self-defense. There is no merit to the claim; the jury was fully instructed on the law governing self-defense. Nor is there any |527 merit to the remainder of his arguments with respect to the court's charge.

Defendant complains of the denial of his request for free transcripts in connection with his attempt to appeal from orders of the Chancery Division. As we noted earlier, we only have jurisdiction over defendant's criminal appeal.

Having found no error, we reject defendant's invocation of the principle of cumulative error.

Defendant makes a generalized complaint, without any specific references, that the trial court placed improper restrictions on stand-by counsel. We decline to comb the record searching for any examples, indeed if any exist. Our review of the record indicates no instances in which defendant was not permitted to consult stand-by counsel when he wished to do so. Defendant was not entitled, however, to have stand-by counsel assume an active courtroom role in his defense.

Defendant's conviction is affirmed. The matter is remanded to the trial court for resentencing.

401 N.J.Super. 527

STATE of New Jersey, Plaintiff–Respondent,

v.

V.D., Defendant–Appellant.

Superior Court of New Jersey, Appellate Division.

Argued May 21, 2008.

Decided July 23, 2008.

Background: Defendant pleaded guilty in the Superior Court, Law Division, Somerset County, to two counts of possession of a false document, and she was placed on probation with a special condition that she notify the Bureau of Immigration and Customs Enforcement (ICE) of her conviction within 90 days. Defendant appealed.

APPENDIX H

2012 WL 1969954
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the Matter of the ESTATE OF Linda Ann RAMBO, Deceased.

Submitted Sept. 14, 2011.

Decided June 4, 2012.

On appeal from Superior Court of New Jersey, Chancery Division, Warren County, Docket No. P–02–438–D.

Attorneys and Law Firms

Roy L. Rambo, Jr., appellant pro se.

Florio Perrucci Steinhardt & Fader, LLC, attorneys for respondent Bruce M. Rambo (Christian M. Perrucci, of counsel; Veronica P. Hallett, on the brief).

Before Judges FUENTES and GRAVES.

Opinion

PER CURIAM.

*1 In 2002, defendant Roy L. Rambo, Jr. was indicted and charged with murdering his wife Linda Ann Rambo. While defendant was awaiting trial on this criminal charge, Bruce M. Rambo, defendant and decedent's only son, obtained an order from the Chancery Division pursuant to the so-called "Slayer Statute," [1] restraining defendant from utilizing any assets from the marital estate to fund his criminal defense. The court appointed Bruce Rambo administrator of his mother's estate, and the matter proceeded in the Chancery Division from 2002 through 2005.

Defendant was tried before a jury and, on February 9, 2005, was convicted of murdering his wife. The court sentenced him to a term of forty years, with thirty years of parole ineligibility. [2] Although the exact date of filing is not clear in the record, sometime between 2002 and 2005 Bruce Rambo filed a wrongful death and survivor action against defendant on behalf of himself and as representative of his mother's estate. On July 6, 2005, the Law Division in Somerset County entered judgment against defendant in the wrongful death suit and awarded plaintiffs $6,310,000 in damages.

In this appeal, defendant challenges an order entered by the Chancery Division on May 17, 2010 equitably distributing the assets of his former marital estate. Defendant argues that the court misapplied the Slayer Statute and improperly prevented him from accessing funds that were rightly his, resulting in the deprivation of his Sixth Amendment right to counsel of his choice in the criminal case.

We affirm.

I

Defendant and decedent married in 1973. After graduating from dental school in 1977, defendant established a dental practice in the Township of Pohatcong; decedent served as a dental assistant and bookkeeper in the office. During the marriage, defendant and decedent acquired several parcels of real estate in New Jersey (referred to as "the Ohio Avenue property" and "the New Brunswick Avenue property") and in North Carolina, as well as extensive personal property and investment accounts. We will refer to these assets collectively as "the marital estate."

On August 16, 2002, officers from the Pohatcong Police Department reported to defendant's dental office in response to a 911 call. Upon arrival, the officers discovered decedent's body. Defendant told the officers that he "had just shot his wife;" a firearm was found nearby. Defendant was arrested at the scene.

While defendant was detained awaiting trial, Bruce Rambo filed a verified complaint and order to show cause in the Warren County Chancery Division, requesting that the court appoint a temporary and/or permanent administrator of decedent's estate [3] and restraining the disposition of any marital asset pending the outcome of defendant's criminal trial. The marital estate was valued at approximately $3,000,000.

from the sale of the Ohio Avenue to pay debts of the New Brunswick Avenue property, and directed the Administrator to provide a "complete accounting of all monies he has spent on behalf of the Estate, including proof of all payments made, no later than July 2, 2004."

After both counsel for the Estate and the Administrator complied with the court's order, the court found that an equitable distribution hearing was necessary to determine and settle the pending distribution of the marital estate. In response, the Administrator moved to stay this hearing pending the outcome of defendant's criminal trial. The court granted the stay by order dated December 13, 2004.

On February 9, 2005, a jury convicted defendant of murdering his wife Linda Rambo, and of possessing a weapon for an unlawful purpose. The criminal court sentenced defendant to a term of forty years, with a thirty-year period of parole ineligibility. The remaining ten years would be subject to the provisions of the No Early Release Act, *N.J.S.A.* 2C:43–7.2, requiring defendant to serve eighty-five percent of the ten years before becoming eligible for parole.

On July 6, 2005, the Law Division in Somerset County awarded Bruce Rambo $6,310,000 in compensatory and economic damages pursuant to the wrongful death and survival claim against defendant. On August 5, 2005, the Chancery Division entered an order granting the Administrator's motion to transfer the deed to the New Brunswick Avenue property to Bruce Rambo as surviving heir. [6]

On May 17, 2010, following an equitable distribution hearing, the Chancery Division entered an order stating as follows:

> 1. That defendant shall be and is hereby awarded by way of equitable distribution of the marital assets the sum of $290,314.51.
>
> 2. That the debt of $6,000,000, not including interest, which defendant owes the Estate [pursuant to the wrongful death and survival claim judgment], shall be credited $290,314.51, making the debt owed to the Estate $5,709,685.49, not including interest.
>
> 3. That the administrator of the Estate shall turn over any of the clothing and pre-marital property belonging to the defendant ... to the defendant's sister. The defendant shall arrange for his sister or her agent to pick up such property from the Estate.
>
> *4 4. That the defendant shall be responsible for paying any taxes the Estate incurs due to the distribution of the I.R.A. to the Estate.

Defendant now appeals from this order.

II

Defendant argues that the Chancery Division erred when it applied *N.J.S.A.* 3B:7–1 to deny his request for the release of funds from the marital estate to cover the cost of his criminal defense. We disagree and affirm on this issue substantially for the reasons expressed by the Chancery Division. The restraints issued, which prevented defendant from accessing the marital property to fund his defense against charges of murdering his wife, are directly supported by *N.J.S.A.* 3B:7–1, which, at the time stated:

> A surviving spouse, heir or devisee who criminally and intentionally kills the decedent is not entitled to any benefits under a testate or intestate estate and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

N.J.S.A. 3B:7–2, further provides that:

> Any joint tenant who criminally and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies and tenancies by the entirety, joint accounts in banks, savings and loan

> associations, credit unions and other institutions, and any other form of coownership with survivorship incidents.

As the Court made clear in *Neiman v. Hurff*, 11 *N.J.* 55, 60–62 (1952), the common law doctrine codified in this statute is "so essential to the observance of morality and justice [that it] has been universally recognized in the laws of civilized communities for centuries and is as old as equity." Defendant was not denied competent counsel in his criminal case. To permit defendant to use the proceeds of the marital estate to pay the cost of private counsel would be a perversion of justice and in direct violation of the public policy expressed by the Legislature in *N.J.S.A.* 3B:7–5.

Defendant's remaining arguments, including those attacking the Chancery Division's decision as a denial of his right to counsel under the Sixth Amendment, lack sufficient merit to warrant a discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 1969954

Footnotes

1 In 2002, the Slayer Statute was codified under *N.J.S.A.* 3B:7–1. The Legislature repealed this version of the statute effective February 27, 2005, and replaced it with *N.J.S.A.* 3B:7–1.1.

2 Defendant's conviction was affirmed on appeal. *State v. Rambo*, 401 *N.J.Super.* 506 (App.Div.), *certif. denied*, 197 *N.J.* 258 (2008), *cert. denied*, 566 *U.S.* 1225, 129 *S.Ct.* 2165, 173 *L. Ed.*2d 1162 (2009).

3 Decedent died intestate.

4 Defendant sought the immediate sale of the New Brunswick Avenue property, with fifty percent of the proceeds to be placed in a constructive trust pending the outcome of the criminal proceedings. He requested that the remaining fifty percent be held in a trust account, with fifty percent of that amount being made available for his defense in the criminal trial.

5 By order dated August 20, 2003, the court authorized the Administrator to sell the Ohio Avenue property.

6 Defendant filed a notice of appeal from the August 5, 2005 order of the Chancery Division. The appeal was ultimately dismissed for lack of prosecution.

End of Document

APPENDIX I

SHEET 1

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, PROBATE PART
WARREN COUNTY
DOCKET NO. WRN-P-02-438-D
APP. DIV. NO._____

IN THE MATTER OF
THE ESTATE OF
LINDA ANN RAMBO,

TRANSCRIPT
of
MOTION

Place: Warren Co. Courthouse
413 Second Street
Belvidere, N.J. 07823

Date: October 15, 2003

BEFORE:

HONORABLE FRED H. KUMPF, J.S.C.

TRANSCRIPT ORDERED BY:

MARCIA BLUM, ESQ. (Office of the Public Defender, Appellate Section, 9th Floor, 31 Clinton Street, Box 46003, Newark, NJ 07101)

APPEARANCES:

ED WOSINSKI, ESQ.
Attorney for Roy Rambo

MICHAEL J. PERRUCCI, ESQ. (Florio, Perrucci & Steinhardt)
Attorney for Estate of Linda Rambo

Transcriber Regina Z. Monaghan
ELITE TRANSCRIPTS, INC.
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I N D E X

THE COURT: All right. IN THE MATTER OF THE ESTATE OF LINDA RAMBO, Docket No. P-02-438-D. May I have your appearances please?

MR. WOSINSKI: Good morning, Your Honor. Ed Wosinski (phonetic) appearing on behalf of the Law Offices of James Dork (phonetic), moving party, representing Dr. Ray -- excuse me -- Roy Rambo.

MR. PERRUCCI: Michael Perrucci, Your Honor, on behalf of the estate of Linda Rambo.

THE COURT: All right. This is your application, sir, go ahead.

MR. WOSINSKI: Thank you, Judge. To start off with, Judge, this is a case that I believe cries out for the cornerstone of our justice system, not only criminally, but I believe civilly. Our criminal justice system starts off with that a person is innocent until proven guilty.

That's a cornerstone of everything, even civilly because that's the point where liberty can be taken from someone, not money, but liberty. In this particular case we're seeking from the Court to allow Dr. Rambo to access what arguably under even the case law CARAS that somewhat goes against us is his marital property right now.

We're seeking to access that so that he can

then mount a defense. And that defense is his constitutional right.

And basically if we look at some of the case law in New Jersey alone quoting from STATE V. MORGENSTEIN, 14-- excuse me -- 141 New Jersey Super. 525, the Sixth Amendment of the Constitution of the United States provides in part in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense.

It goes on to say the right of counsel is incorporated in the Fourteenth Amendment, also stated through GIDEON V. WAINWRIGHT, 372 U.S. 335, and includes within it a scope of the right of defendants to secure counsel of his own choice.

Additionally, that is memorialized in our own Constitution on again in STATE V. MORGENSTEIN on 526, the New Jersey Constitution, Article 1, Paragraph 10. "In all criminal prosecutions the accused shall have the right to have the assistance of counsel in all defense."

As furthermore memorialized in STATE V. YORMACK, under 117 New Jersey Super. at 315, quoting from it, from the case, "It is firmly established that one -- one accused of a crime has a right to the assistance of counsel for his defense." GIDEON V.

WAINWRIGHT it cites.

"Additionally, has a right to the fair opportunity to secure counsel of his own choice." It does say that the right to choose counsel is not an absolute right, however, it goes on to state in further cases that not that he doesn't have the right to choose counsel, but that he can't use that right to delay proceedings.

That's not what we're doing here at all, Your Honor. Additionally, further in a New Jersey case, STATE V. YACHINDO on 138 New Jersey Super., quoting on Page 67.

THE COURT: I don't think you have to talk about the right to -- the Sixth Amendment right. I think what you need to talk about is why you're entitled to these particular assets.

MR. WOSINSKI: Okay, Judge. Well, let's start first with the CARAS case which is quoted most often in this particular situation. And I would say that Your Honor should distinguish from CARAS, three points I feel should be distinguished and where the Justices may have unfortunately not focused enough on.

In the CARAS case they did very little discussion, almost no discussion of a person's constitutional rights. We're talking about the United

States Constitution and the New Jersey constitutional rights to have a defense of his own choosing.

Additionally, I believe in CARAS and many of the cases that are quoted around CARAS had to do with when there were minor children of the deceased. And I believe the Justices were more concerned on how do you protect assets for minor children.

In this case we don't have that condition. The Rambos' son was emancipated, did not live with either of the parties, and he's not a minor child. So I believe that should be differentiated. Additionally, it goes on to say that no one should profit from an allegation eventually proven of the taking of someone's life.

Again, it's an allegation at this point, Judge. That's number one. And in CARAS, CARAS allowed equity to trump an established rule of law. There's no doubt that between that and underneath New Jersey Statutes Annotated 3B:7-1 we're not arguing that 50 percent of the estate should go in a constructive trust.

There was joint tenancy on almost all the assets in this case. We're not arguing about that 50 percent at this point. If he's cleared of all criminal charges and if there's a civil action and he's cleared

and he finds not guilty on a civil action of an intentional killing, then there will be another argument on that.

But we're talking about the 50 percent that arguably is his. It's a marital asset. CARAS went and said equity trumps the law and we should take that. In fact, if we're going to deal with equity, Judge, I believe that leaves it in your hand to say then equity should show that his constitutional right is to allow him to have a defense.

To do anything else, Judge, is to try him now and convict him now because he no longer has the chance to use those assets to mount a defense. Yes, he's innocent until proven guilty, but the State is going to mount a case against him. He should have the ability to choose those people.

In this case he was declared an indigent by letters from opposing counsel. He wrote to coun-- he wrote to the probation department saying based on the statute, based on CARAS, these are the assets, we're freezing them up. That's why he's indigent.

He's not when you look at the assets, when you look at 50 percent of what's his, he's far from indigent, not even a question. So he's not indigent.

And again in CARAS it's equity, but equity

also should in my opinion respectfully to Your Honor show that he should have a defense because if that defense is provided to him and he would prevail with that defense, what would be the wrong? The wrong in equity be he might not survive that way should he have a public defender.

At this point as an indigent he's had two public defenders, one that left his -- his representation, not by him firing him, but left and he has now -- has another public defender.

In his certification he has told you that there's been no investigation. No one has taken any statements, done anything at this point. And it was scheduled to go to trial in September.

We again are not talking about a third-degree crime, a second-degree crime. We're talking about a first-degree crime where he will spend the rest of his natural days in jail. Again, we're talking about money, Judge. We're talking about money that gives him the constitutional right to represent himself.

Additionally, what I would like to present to the Court at this point is another Appellate Division in JACOBSON V. JACOBSON, 151 New Jersey Super. at 62. It's exactly on point. This was a case where a gentleman owned a pharmacy, he was a pharmacist. He

was accused of killing his wife.

There had been a prior Chancery Division action pursuant to a divorce complaint. There was assets that were frozen. He was accused of dissipating assets. Same in this case. We have a dentist, a professional with a dentist practice accused of dissipating assets. They froze everything in the trust account.

The Appellate Division said no, we are going to allow him to access that money for his defense. And this case goes into all the constitutional rights that he has which I've quoted already because the three cases I quoted to Your Honor in the beginning of my argument are taken right from JACOBSON.

And again it says counsel of choice. And if you go through on Page 67, "Defendant of course is entitled to retain qualified counsel of their own choice."

THE COURT: Did that case involve the application of N.J.S.A. 3B:7-1 --

MR. WOSINSKI: No, it did not, Judge. It did not involve that, but it did involve a Chancery decision where a Judge made an equitable decision to freeze those accounts. Then he made the further decision that I'm going to open up those accounts. And

that's exactly what happened in that particular case.
And that's -- what's of importance I believe, Judge, is in that particular case it allowed him to do that. If you look through that case and that case -- I again believe is very important in this case there was a sale of a pharmacy. Here there was a sale of the dental practice.
And, again, he's not indigent. And it went on at this particular Court, that was the argument there. He's indigent. Well, he's indigent if you freeze all his assets. He's not indigent if -- and again, Judge, we're not looking at her side of the equation.
That -- that's allowed at this point. We agree that there will be a constructive trust on that. But what is the harm here? There is none, Judge, besides we're looking at money. But again these are allegations. I don't care what anyone puts in a certification of who was found where, was there a gun, what was said, that's not evidentiary at this point.
That will come out in the criminal trial. But he has the right to that defense. That's fundamental, Judge. At this point we're asking for a minimum that -- we've asked originally for 50 percent which is his, which is -- again even in CARAS says it's

his, it's marital property.
But we'll even go less than that, Judge. Originally in the moving papers by counsel they equated this estate as a million dollars and plus. Even in their further letters one piece is worth 400, 200, 300. We're saying -- Judge, at minimum allow the 50 percent to go in a constructive trust for the deceased.
50 percent to go in a constructive trust and allow 200,000 of that 50 percent to go to his defense between counsel fees, experts, and between an investigator. In court today I do have the counsel that wants to go forward in the case and the investigator. They've been chosen by Mr. Rambo.
Unfortunately, I have to argue that -- Mr. Dork, I am co-counsel, would be co-counsel in this case. But all those things are in place to get going with this trial. Without that he basically does not have in his opinion at this point effective counsel of his choice.
And once again, to conclude, Judge, that's a constitutional right. Yes, in Equity we can change things, but again, Judge, you're going to have to look at taking away a person's fundamental and United States constitutional rights and confirmed by our -- our Constitution.

And I say that, Judge, in Equity you shouldn't do that because we're dealing again with dollars versus a man's liberty. And we are also willing to ask this Court to give us a portion of that 50 percent. It's going to be more -- more than -- $200,000 for his 50 portion. He should be allowed to access that, Judge, for his own defense. Thank you.

MR. PERRUCCI: Thank you, Your Honor. In this particular case the law is extremely clear. I think what --

THE COURT: Let me just -- what has been sold and what has not been sold at this point?

MR. PERRUCCI: The -- the [redacted] home that was used as a dental office that was held in tenancy by the entirety has been sold. And other than paying some routine bills the money has been held in escrow.

The [redacted] property which is the other piece of real estate which was the marital home has not been sold at this point.

THE COURT: Is that the farm or is --

MR. PERRUCCI: That's the farm, Judge. Right. 11 acres, I believe.

THE COURT: And that's the only real estate that there is?

MR. PERRUCCI: They're the only two pieces of real estate. There's a small lot in like North or South Carolina that we can't seem to give away. But, Judge, I think, you know, counsel made an impassioned speech, but quite frankly he's dead wrong on the law.

The case he just handed me a few minutes ago, JACOBSON, is a 1977 case. It was before the statutory change of the law under 3B:7-1, et seq., as well as prior to IN RE CARAS that doesn't even cite it. And it is quite inapposite on the facts of this case.

The -- I guess what counsel is asking this Court to do is to rule 3B:7-1, 3B:7-2, et seq., is unconstitutional. I think they're asking for a statutory determination that the statutory scheme that the Legislature passed in New Jersey is unconstitutional.

I mean very clearly it suggests that a surviving spouse -- devisee who criminally and intentionally kills the decedent is not entitled to any benefits under the testate or intestate estate. And it passes as though the killer had predeceased the decedent.

So, as Your Honor knows, we're not talking about a pharmacy that's held in someone's name, we're talking about two pieces of real estate that are held

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as husband and wife. The [redacted] property and the farm on [redacted] were both in both of their names as husband and wife, tenancy by the entirety.

Under the statute it's crystal clear that in that particular situation that the killer is presumed to have predeceased the murder victim and as a result the entire estate would flow into the murder victim's estate.

IN RE CARAS supports that. IN RE CARAS was a situation that took it upon itself to create trust because at the Law Division at that particular time, Probate Court in Monmouth county, that particular individual, Mr. Caras, had not been convicted yet.

So as part of the Court's equitable powers since the criminal trial just like here had not come up, they created constructive trust because they didn't want the assets depleted by defense counsel in regard to the murder trial.

And then subsequently when the Appellate Division looked at it it was clear that he had been subsequently convicted. So the result, Your Honor, obviously upon a conviction or even a trial in this particular case on a civil trial, if we succeed there's no doubt that all the assets go to Linda Rambo's estate and they would flow through her particular estate.

In the meantime, what Judge Seybolt (phonetic) did was create a constructive trust and freeze all these assets. And I think that's what we've been operating on. The law is crystal clear in that regard.

This is not a situation where Mr. Rambo had 100 or $200,000 in a separate account that we could designate was his assets and there would be a question as to whether Linda would have any claim to that. These are tenancy by the entirety properties, Your Honor.

And the only other major asset to my knowledge are two life insurance policies that the insurance companies had not put forward yet waiting for the criminal determination.

So we don't have a situation anywhere remotely able to take any equitable argument and say that Mr. Rambo is entitled to some of the assets because obviously the entire policy in this area of the law and all of these slayer statutes that there have been numerous Law Review articles written about it both at Harvard and Iowa Law Review have talked about all -- what they call the slayer statutes, they've all been held in recent -- to be constitutional.

To attack it from a constitutional basis on

Sixth Amendment grounds I think does not win the day, Your Honor. As the Courts have recently said, Chief Justice Renquist of the Supreme Court on the WHEAT case has made it clear that the right to counsel under the Sixth Amendment does not mean the right to a particular lawyer.

I mean if that were the case, everyone can come in and say, you know, we want the government to pay for F. Lee Bailey. In this particular case, Your Honor, the law is very clear and I think Your Honor's bound by the statutes and case precedent.

THE COURT: What -- do you have a position concerning the sale of the [redacted] farm?

MR. PERRUCCI: We're not adverse to that particular sale, Your Honor. I think there was some preliminary discussion at one of the prior hearings that I was not here that the Court had suggested that. I think the one thing for the estate's benefit is -- if Your Honor's at all familiar with [redacted] which is basically Old Route 22 coming off of 78 in Pohatcong Township.

It's 11 acres mostly in Alpha Borough. It joins up against an industrial zone. I mean the one thing I think the estate should seriously consider is what's the highest and best use for that particular

land.

It probably makes some sense to go before the planning board and/or zoning board to try to get it rezoned so we can increase the value of it before it's sold. But, short of that, we don't have any objection to it being sold.

MR. WOSINSKI: Judge, if I may respond briefly. Thank you. First of all, I am not representing to the Court that I believe that the statute, again N.J.S.A. 3B:7-1, et seq., and 7-2 in particular, are unconstitutional.

Absolutely if Dr. Rambo is found guilty then the statute applies, but it applies then, Judge. It says a surviving spouse -- devisee who criminally and intentionally kills; are we still in America, Judge, he hasn't been found guilty of that in any court of law.

He's been indicted. Nothing further. So the statute is constitutionally sound on its face once that comes to be. As far as CARAS again, Judge, CARAS does exactly what happens many times, especially in the Chancery Division, equity did in those Justices eyes say that -- should be a constructive trust, however, when I quoted a '77 case it's interesting that CARAS never bothered to quote that case. That was on the record.

And they went into the constitutional rights of this person. And again, Judge, I think when we get down to equity we really have to look at what we're talking about. We're talking about dollars. Yes, he shouldn't profit from something he did, but he should have the right first to defend himself so that he can show that he didn't do that intentionally or otherwise.

That's what we're talking about here, Judge. And we're not asking again -- at minimum we're asking for at least 200,000 that -- which is less than his 50 percent share that until he's found guilty the statute can't take away from him.

That's why it's put in a constructive trust on both sides because if he is found innocent and the civil case does not by a preponderance of evidence show that he had intentionally killed, everything goes to him. That's our laws.

And finally, Judge, with the argument of the United States case saying that anyone will go for F. Lee Bailey, we're talking about indigents. Indigents cannot use the argument that I don't like this guy and I want this guy who's private practice, but what indigents can do even in our system in many counties, they have conflicts for P.D.s and P.D. pools.

So if you're not comfortable and you don't

have the rapport with that particular person, you can ask for someone else. No, you can't ask for F. Lee Bailey or you can't ask for William Harth (phonetic) who's a private attorney unless you can pay for them.

Again, Judge, just to sum one more time, we're talking about money versus a person's liberty for the rest of his life. Thank you.

THE COURT: Let me take a minute and look at that case since that case --

MR. WOSINSKI: I have a copy for you, Judge, if you want.

THE COURT: No. I have -- I have it right inside. Let me just take a minute to look at that and I'll be -- my decision.

(Off the record. Back on the record)

THE CLERK: Come to order --

THE COURT: Be seated. Thank you. I didn't ask you whether you had an opinion about counsel's position concerning or defense position concerning the highest and best use of the property so perhaps change the zoning before its attempt to be sold.

MR. WOSINSKI: Judge, we don't have a position at this point. Again, we would assume that since the son was not at the property prior to this alleged incident that the property should be sold and

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it should be listed at a fair market value and sold.
THE COURT: Okay. All right. This is an application filed by Roy Rambo to have property, real estate located at [redacted] in Alpha, Block [redacted], Lot [redacted], and Block [redacted] Lot [redacted] to be sold -- first to be sold and then a portion of the amount be used for paying for the defense of -- of Roy Rambo's criminal charges for killing his wife.
The defendant is the son of the decedent and is the only heir of the decedent. The property in question, there was a prior order of this Court to sell one piece of property that was the [redacted] home which was the dental office of Roy Rambo, Dr. Rambo.
And that has been sold and except for paying expenses -- some expenses, the amount is being held in escrow. Both of the properties were held apparently as tenants in entireties.
Aside from the impact of the -- of Mr. Rambo killing his wife, the intestacy laws would -- the manner of holding of those properties as tenants in the entirety would essentially mean that the -- those pieces of real estate would pass to the plaintiff in this matter in the normal course.
There is, as counsel for the plaintiff pointed out, case law, JACOBSON V. JACOBSON, 152 New

Decision 21

Jersey Super. 62, Appellate Division 1977, case which deals with that issue, that is whether the marital assets are available to a husband who has been charged with killing his wife.
And that case does provide essentially that monies would be available to -- from the marital estate to pay for legal expenses associated with the charges for killing his wife.
That decision, however, as counsel for the defendant pointed out, in 1977 pre-dated the enactment of N.J.S.A. 3B:7-1 and 3B:7-2 which were enacted in 1981 and became effective in May of 1982.
Those particular provisions provide that a person who is -- has intentionally killed their spouse is not to inherit either by way of joint tenancy or any other way any of the assets of the estate.
So the application of those statutes would seem to indicate that the -- until there's been a determination on the question of whether the -- Dr. Rambo actually did intentionally kill his wife that those -- or if it is determined that he intentionally killed his wife, he would not be able to receive any of the assets from the -- those properties held by way of -- by the entireties under N.J.S.A. 3B:7-2.
So the question is in the circumstance of

this case is whether any of those assets -- first the question of whether the property should be sold and, second, whether any of those assets or proceeds would be available to Dr. Rambo for his defense in the criminal action.

Obviously if he's found to be guilty ultimately none of these assets would -- he would be entitled to. If he's found to be innocent, because of the difference in the standard of proof there may have to be a subsequent hearing here in order to determine whether based upon the preponderance of the evidence he is guilty of intentional killed.

Obviously the criminal case being based upon a standard of beyond a reasonable doubt. So there's a difference of standards under the two -- under the criminal action as to here.

~~So even if he's found to be innocent in the~~ criminal action, there may have to be an initially hearing here to determine whether by a preponderance of the evidence he's still found to be -- intentionally killed his wife.

And if that in fact is found to be not the case, then obviously he would be entitled to -- entitled to the entire estate because N.J.S.A. 3B:7.2 -- 7.1 would not be applicable.

This is the reason why I think in CARAS the proceeds of the -- of the estate, marital estate were held in -- in constructive trust until a final -- that was also a case where it was prior to the determination in the criminal matter and the Court determined that the matter -- that the assets should be held in trust pending an outcome of whether N.J.S.A. 3B:7-2 acted to prohibit the access to the marital assets.

So in the circumstances of this case I think that is the appropriate thing to do. First of all, I think it is appropriate to sell this property. I don't -- not requiring that it be sold immediately, but I think you should take the steps to obtaining the most value that you can from that -- from the sale of that property and then those proceeds should be held in trust in the same way that the proceeds from the sale of the dental practice building has been held in trust pursuant to the order of Judge Seybolt.

And although there is a Sixth Amendment right, that right is not -- is not without some -- is not a absolute right. Obviously the doctor will have a -- an opportunity to have counsel, whether it's a counsel that he pays for or whether counsel that is provided to him.

STATE V. RAY indicates that defendant's right

to counsel of his choice is not absolute and must give way when required by the fair and proper administration of justice.

In the circumstance of this case I conclude that the funds from the sale of the [redacted] farm are to be held in trust and are not available to Dr. Rambo for purposes of his defense in the criminal matter.

And, therefore, I will permit the sale of the property, but I will -- direct that those be held in trust pending the outcome of the criminal proceedings.

MR. PERRUCCI: Thank you, Your Honor.

MR. WOSINSKI: Thank you, Judge.

THE COURT: Would you prepare --

MR. PERRUCCI: Yes, Your Honor.

THE COURT: -- an order under the five-day rule?

(Proceedings concluded)

CERTIFICATION

I, REGINA Z. MONAGHAN, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Warren County Superior Court on October 15, 2003, Tape No. 1, Index No. 4152 - 7235, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

Regina Z. Monaghan

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July 17, 2006

APPENDIX J

EXCERPTS FROM OTHER STATE AND FEDERAL DECISIONS THAT CONFLICT WITH THE HOLDINGS IN THIS MATER.

(**Emphasis** has been added and **internal quotations** omitted)
(Alphabetically arranged by state of origin and year of decisions)

ARKANSAS 1985

The Supreme Court of Arkansas in Luecke v. Mercantile Bank of Jonesboro, 286 Ark. 304; 691 S.W.2d 843; 1985 Ark. LEXIS 2060, affirmed the Chancery Court's decree in a murder/suicide case ordering that:

> **All jointly held property was to be allocated ½ to the estate of [the slayer] and ½ to the estate of [the victim]....All the real and personal property owned by [the slayer] in his name vested in his estate and in the devisees under his will, exclusive of [the victim] and her estate.** Id. at 306-307.
>
> * * * *
>
> [T]he logical conclusion was that the murder/suicide **severed the marital relationship and the parties became tenants in common, entitling each to recover ½ of the property.** We agree with the rationale of the trial court and affirm its judgment. Id. at 307.
>
> * * * *
>
> As to the property held by [the slayer and the decedent] as tenants by the entirety, we think the better rule is that applied by the trial court which holds that the murder/suicide severed the marital relationship and the parties **became tenants in common, entitling each to recover ½ of the property. In adopting this viewpoint, we apparently align ourselves with the majority of courts who have ruled on this subject.** The effect of the severance of the marital relationship is much like that caused by divorce...which provides for a similar equal division of the property. Id. at 309.

DISTRICT OF COLUMBIA 1995

In Gallimore v. Washington, 666 A.2d 1200 (D.C.App. 1995), the Court of Appeals reversed the Superior Court's decree (which operated to divest one joint tenant, who murdered the other joint tenant, of all of his interest in the property held jointly with the decedent). The Court held that:

> [The D.C. slayer statute] addresses the disposition of property that would be received by the killer "from or after" the death of the decedent, **not property already owned by the killer. Thus, the statute does not even arguably address the disposition of [the slayer's] interest in the property he jointly owned with [the decedent] while she was alive; rather, the paragraph concerns only those of [the decedent] that might be received by [the slayer] after, or as a result of, [the decedent's] death.** Id. at 1207.
>
> * * * *
>
> It is only [the decedent's] present right that passes, according to the terms of the paragraph, as though [the slayer] had predeceased [the decedent]. Therefore, under the statute, [the decedent's] heirs would take her present alienable right to share in the possession and profits of the property, **but would not get her extinguished contingent future right to the remainder of the property. In other words, under the statute they would get a tenancy in common with [the slayer].** Id. at 1207-08.
>
> * * * *
>
> **[T]he statute would not affect his own present estate at all because it did not change hands. In other words, under the statute [the slayer's] joint tenancy interest would be converted to a tenancy in common with [the decedent's] heirs.** Id. at 1208.

The Court further addressed applicable common law observing that:

> The common law policy that we discern is the same as the one many other courts have stated - to prevent a murderer from profiting from his wrong....That policy

> is not inconsistent with [the slayer's statute], nor was the common law policy changed by the statute. If anything, prevention of profit from murder is the general policy underlying the statute.
>
> **We do not, however, discern any common law policy to punish the murderer or compensate the decedent's heirs or next-of-kin by means of forfeiture of the murderer's property interest, either to the state or to private persons.** Id. at 1208-09.
>
> * * * *
>
> In our view ... **a forfeiture of the murderer's interest ... goes beyond the common law's policy to prevent the murderer from enriching himself as a result of the murder.** Id. at 1209.

Dissenting Associate Judge Schwelb recommended a different distribution than the majority. The judge stated, "'[N]o man may take advantage of his own wrong.'...that '[e]quity abhors forfeitures,' and so, indeed, does the law." Id. at 1211. "I cannot agree with [the trial court's] disposition, for it effects a forfeiture of [the slayer's] interest during his own lifetime." Id. at 1213.

The judge further quoting Maryland case law noted that:

> [T]he principle that a murderer cannot enrich his estate by his act of wrongdoing, **but neither can he be deprived of an interest in property which he possessed at the time he committed his wrongful act. An unconstitutional forfeiture would result in the later instance....I can find in [the slayer statute] no provision clearly authorizing, or indeed authorizing at all, the forfeiture of an interest in property which the murderer owned prior to the homicide.** The statute precludes a murderer from profiting from his own wrong, **but it does not confiscate property which was previously his.** Ibid.

FLORIDA 1990

While considering a property forfeiture and innocent owner claim through tenancy by the entirety, and on appeal from the United States District Court for the Southern District of Florida in United States v. One Single Family Residence with Out Buildings, 894 F.2d 1511; 1990 U.S.App. LEXIS 2757, the United States Court of Appeals for the Eleventh Circuit noted:

> [S]hould one spouse murder the other, **the surviving spouse becomes a tenant in common with the deceased spouse's heirs....**([S]pouses in the process of divorcing; husband attempts to kill his wife but only renders her incompetent to do anything, including completing the divorce proceedings; court held that equity demanded that they be deemed tenants in common as if the divorce had been entered, even though all the unities were still present, so that husband could not gain from wife predeceasing him).
> Id. at footnote 2.

INDIANA 2002

In the Estate of Charlotte A. Foleno v. Estate of Billy J. Foleno, 772 N.E.2d 490; 2002 Ind. App. LEXIS 1204, a murder/suicide case, the Court of Appeals of Indiana, Fifth District elaborated on their **"Slayer's Rule"** and held that:

> That an amendment to the state's statute "declared that **a person "legally convicted of intentionally causing the death of another" became a "constructive trustee" of any property acquired from the decedent or the decedent's estate.** Id. at 495.
>
> * * * *
>
> A 1984 amendment to Indiana Code **specified that a killer became a constructive trustee of "any property" he was to receive as a result of the decedent's death.** Ibid.

* * * *

In other words, the Constructive Trust Statute was **intended to "supplement the prevailing equity rule" not "to supersede it."...[T]he killer does not lose his undivided half interest in the tenancy by the entireties, only the victim's half.** Id. at 496.

* * * *

As a result, the killer receives an undivided one-half interest in the tenancy. **To deprive the killer of his half of the tenancy through a constructive trust would impose an unconstitutional forfeiture....**("In fact the murderer is not deprived of any property which he obtained in any other way than through the murder, he is merely prevented from enriching himself by acquiring property through the murder.") To sum up, although rules of equity supplement the Constructive Trust Statute, **they do not extend so far as to deprive the killer of his own property.** Ibid.

* * * *

The Court "had never applied" equitable principles "to cause a wrongdoer's forfeiture of a vested property interest." Id. at 498.

* * * *

Imposing a constructive trust on the proceeds would be a deprivation of this property interest and would run counter to our supreme court's general rule laid down in Bledsoe, [National City Bank of Evansville v. Bledsoe, (1957) 237 Ind. 130, 144 N.E.2d 710] that **a killer does not forfeit his own property interests.** Foleno at 499.

INDIANA 1995

In the Matter of the Estate of Grund v. Grund, 648 N.E.2d 1182; 1995 Ind. App. LEXIS 308, where a wife was convicted of murdering her husband, the Court of Appeals of Indiana, Second District explaining and following Bledsoe, supra, declared:

> **[T]hat the murderer becomes a constructive trustee for the victim's estate in one-half of the property. Thus the entire estate did not vest in the husband [the murderer]. Instead, the court determined that he held**

his decedent wife's one-half interest in constructive trust for the benefit of her estate. Grund at 1184.

* * * *

The court in Bledsoe recognized that divorce severs a tenancy by the entirety. Analogizing divorce, the court then determined that **all tenancy by the entirety property is severed when one tenant murders the other tenant,** writing that "there is no reason why the same division should not be made where a tenancy by entireties is dissolved by murder." Id. at 1185.

* * * *

Our Supreme Court chose to establish a constructive trust only over the victim's one-half of the property, allowing the murderer to take the other half.... [The murderer, or his] heirs received only one-half of the estate, that which the Court recognized he was inherently entitled. Ibid.

* * * *

Bledsoe is controlling [in Indiana]. In so holding, we do not attempt to quantify that portion of the property [the murderer] owned before [the decedent] died, nor do we cast doubt upon our Supreme Court's recognition that the surviving spouse had something akin to a one-half interest before death. That being the case, [the murderer] **did not gain any additional interest as a result of her actions; she merely cannot acquire any of [the decedent's] interest once she is "found guilty, or guilty but mentally ill, of murder, causing suicide, or voluntary manslaughter, because of the decedent's death."** Accordingly, to hold that entire estate be held in constructive trust pending a later determination of guilt would require murderer] to forfeit the one-half of the property to which Bledsoe has established [the murderer] was legally entitled upon [decedent's] death. **Such a holding would clearly violate Article 1, Section 30 of the Indiana Constitution.** Id. at 1186-87.

* * * *

Nearly all [others states] hold that the murderer is entitled to the value of a life estate in an undivided one-half interest. See, e.g., **Matter of Estate of Karas, 192 N.J. Super. 107, 469 A.2d 99.** Id. at footnote 13.

* * * *

The trial court properly concluded that **[the murderer], or her successor in interest, owned one-half of the**

tenancy by the entirety real estate, and that she does not forfeit her share should her guilt be established. The trial court also properly concluded that the remaining one-half interest in the real property was to be held by the Estate in a constructive trust pending further court order. Id. at 1187.

INDIANA 1980

In the Matter of John Kelly Jeffers, III, 3 B.R. 49; 1980 Bankr. LEXIS 5570 quoting Indiana Code, the Bankruptcy Court notes **"[A] spouse who murders the other holds one-half the estate in constructive trust for the heirs at law of the victim."** Id. at 57, footnote 4.

MARYLAND 2004

In Cook v. Grierson, 380 Md. 502, 845 A.2d 1231 (Md. 2004), the Court of Appeals of Maryland, a state without a slayer statute, summarized analogous cases within their jurisdiction. At issue there, the Court was required to determine whether the grandchildren of an intestate murder victim could inherit his property given the fact that their father had committed the murder. The Court noted that:

> Corruption of blood is a common law doctrine providing that " 'when any one is attainted of felony or treason, then his blood is said to be corrupt; by means whereof neither his children, nor any of his blood, can be heirs to him, or to any other ancestor, for that they ought to claim by him. And if he were noble or gentleman before, he and all his children are made thereby ignoble and ungentle....'" Diep v. Rivas, 357 Md. 668, 677, 745 A.2d 1098, 1103, n. 4 (2000) (quoting Termes de la Ley 125 (1st Am. ed. 1812), as quoted in Black's Law Dictionary 348 (7th ed.1999)). **Article 27**

of the Maryland Declaration of Rights prohibits application of the doctrine in Maryland. It provides: "[t]hat no conviction shall work corruption of blood or forfeiture of estate." In discussing the prohibition and its effect on our analysis with regard to the Slayer's Rule, the Court said:

> In the view that we take of the case, the constitutional and statutory prohibition against corruption of blood and forfeiture of estate by conviction has no application, because by reason of the murderous act the husband never acquired a beneficial interest in any part of his wife's estate. These provisions apply to the forfeiture of an estate held by the criminal at the time of the commission of the crime, or which he might thereafter become legally or equitably entitled to. **In other words, it is a constitutional declaration against forfeiture for a general conviction of crime.** There can be no forfeiture without first having beneficial use or possession. One cannot forfeit what he never had. The surviving husband in the case before us, never having acquired any interest in his wife's estate, there is nothing upon which the constitutional or statutory prohibition can operate. **By virtue of his act he is prevented from acquiring property which he would otherwise have acquired, but does not forfeit an estate which he possessed.** Price, 164 Md. at 508, 165 A. at 471. (internal citations omitted).

[Cook v. Grierson, 380, Md. at 507-508, 845 A.2d at 1234.]

MARYLAND 1997

On appeal in Pannone v. McLaughlin, 377 A.2d 597, 37 Md.App. 395 (1997), a murder/suicide matter, the Court of Special Appeals

of Maryland modified the lower court's declaratory judgment, holding that:

> Where husband and wife possess real property as tenants by the entireties, each tenant is said to be in possession of the whole, rather than equal portions, during the lives of both. Upon the death of one spouse, **title vests in the survivor, not because of any new interest, but because of the original conveyance.** Id. at 601.
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> * * * *
>
> With respect to the jointly held property, however, we conclude that the cotenancies were severed by the killing [but not the title survivorship] and that a constructive trust should be imposed upon one-half of the property held by the estate of the killer in favor of the heirs of the victim. Id. at 599.
>
> * * * *
>
> **[T]he constitutional provision against forfeiture of property upon conviction of a crime** does not permit a murderer to claim a share of the victim's estate as an heir or next of kin, but **does protect from forfeiture that property which the wrongdoer already possessed at the time of his illegal act.** Id. at 601.
>
> * * * *
>
> The import ... for our purposes is that no additional benefit should accrue to the estate of [the slayer] by virtue of his wrongful act, **but that [he or his heirs] cannot be divested of property in which [the slayer] had a prior legal interest.** Ibid.
>
> * * * *
>
> We also decline to follow those cases which hold that the killer is not entitled to receive any portion of the property held as tenants by the entireties by virtue of his wrongful act....**We regard such cases as extreme in position and violative of the provision against forfeiture of property upon conviction of crime** in Article 27 of the Declaration of Rights. Id. at 602.
>
> * * * *
>
> We encounter no difficulty in utilizing the constructive trust to satisfy the demands of equity here. The trial court ordered that all property held ... as tenants by the entireties passed to [the victim's] estate. **Such disposition, in our view, would**

work a forfeiture upon the rights of a [slayer or the] slayer's children, who should not be precluded from claiming an interest in the property which rightfully belonged to [the slayer] before his wrongful act. Id. at 604.

MICHIGAN 2004

In re: Bonnie May Spears, Debtor, 308 B.R. 793; 2004 Bank. LEXIS 558, the United States Bankruptcy Court dealt with issues relating to properties held through tenancy by the entirety and tenants in common. The Court noted that:

> Michigan is one of a minority of states that still recognizes tenancy by the entirety. The United States Supreme Court itself recently described the characteristics of entireties property under Michigan law in U.S. v. Craft, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed.2d 437 (2002)." Id. at 801.
>
> * * * *
>
> A tenancy by the entirety is a unique sort of concurrent ownership that can only exist between married persons....Like joint tenants, tenants by the entirety enjoy right of survivorship. Id. at 802.
>
> * * * *
>
> Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divorce decree specifies otherwise....[And each spouse has] the right to sell the property with the [other's] consent and to receive half of the proceeds from such a sale. Id. at 803.
>
> * * * *
>
> Obviously, if the theoretic unity of the spouses is destroyed, in other words if the marital relation is terminated, the estate by the entireties may not continue as such. Id. at 807.
>
> * * * *
>
> Michigan law prohibits a person who has murdered his or her spouse to succeed as the survivor to whatever the couple had owned as tenants by the entirety prior to the spouse's murder. **Rather, the murderer is permitted to take only an undivided one-half interest in the subject property as a tenant in common. The other**

undivided half is left to pass to the murdered spouses heirs either by will or by intestacy. Id. at 808. [Citing Goldsmith v. Pearce, 345 Mich. 146, 152; 75 N.W.2d 810; 1956 Mich. LEXIS 375].

* * * *

[W]henever a tenancy by the entireties is involuntarily severed by a divorce, Michigan law divides the severed estate **equally** between the two former spouses." Id. at 820.

* * * *

The bankruptcy estate and the non-filing spouse must instead hold their respective undivided interests in the property during this interval as tenants in common. However, **a tenant in common, unlike a tenant by the entirety, can convey her undivided interest in the tenancy without the consent of the other co- tenant.** Id. at 827.

* * * *

A co-tenant of an entireties property owned in New Jersey or Massachusetts may also convey his undivided interest in the property without severing the entireties estate. [Citing Mueller v. Youmans, 117 B.R. 113, 116-17 (Bankr. D. N.J. 1990)]" Id. at footnote 23.

MICHIGAN 1956

In Goldsmith v. Pearce, supra, where a husband killed his wife and determined to be sane at the time of the offense, the Michigan Supreme Court reversed the lower court ruling and recognized that **each party retains an equal one-half interest in the properties.**

NEBRASKA 2004

In a diversity action, the Court in Hughes v. Wheeler, 364 F.3d 920 (8th Cir. 2004) affirmed a judgment in favor of the father for life insurance benefits on the slayer. The slayer first killed his wife, who was designated as the primary

beneficiary under the policy, and subsequently he committed suicide in another state. The District Court of Nebraska determined that the proceeds of the policy, despite being community property, passed to the slayer's father, who was named as the contingent beneficiary, not to the victim's estate or her heirs.

NEVADA 1997

In United States v. Real Property Located at Incline Village, 976 F.Supp. 1327; 1997 U.S.Dist. LEXIS 12945 where the District Court quoting Gallimore v. Washington, 666 A.2d 1200, 1209 (Ct. App. D.C. 1995) which ruled that **murder of one joint tenant by the other joint tenant did not forfeit wrongdoer's own half-interest, but merely transformed the joint tenancy into a tenancy in common.**

NEW YORK 2001

In the Matter of the Estates of Kathleen L. Covert and Another, Deceased, 97 N.Y.2d 68; 761 N.E.2d 571; 735 N.Y.S.2d 879; 2001 LEXIS 3426, the Court of Appeals of New York resolved the probate issue in a murder/suicide case involving a jointly executed will of the spouses. The will designated the jointly held property to be divided into three equal shares -- one-third to the killer's parents, one-third to the victim's parents and the remaining one-third to the decedents' siblings. Id. at 73. The Court stated:

The Riggs [infra] rule prevents wrongdoers from acquiring a property interest, or otherwise profiting from their own wrongdoing. **However, we have never applied the doctrine to cause a wrongdoer's forfeiture of a vested property interest. Indeed, public policy, as embodied in Civil Rights Law § 79-b, militates against application of Riggs as a means of effecting a proprietary forfeiture.** Section 79-b provides, in pertinent part, that "[a] conviction of a person for any crime, does not work a forfeiture of any property, real or personal, or any right or interest therein" (Civil Rights Law § 79-b). Id. at 74.

* * * *

The individual assets owned outright, other than the specific bequest..., must pass through the decedents' respective wills, and into the residuary. Similarly, [the slayer's] individual property owned outright passes through his will....

* * * *

In contrast to individual property, a joint tenant is entitled to an immediate one-half interest in the joint property. This interest is immediately vested, entitling either tenant to a half portion, even though only one tenant may have established and contributed to the asset. **Thus, before their deaths, [the slayer and victim] each owned an undivided one-half interest, with a right of survivorship, in their joint property. Allowing [the slayer] the one-half interest in that property would not afford him any benefit from his wrongdoing. Consistent with the public policy articulated in Civil Rights Law § 79-b, his one-half interest is not forfeited.** Id. at 75-76.

Riggs, however, prevents [the slayer] from profiting from his own wrongdoing. Because [he killed her], he cannot succeed to the survivorship interest that would ordinarily arise on the death of his joint tenant. **Therefore, the joint property should be divided evenly, half passing through [the slayer's] estate** and half through [the victim's]. Id. at 76.

NEW YORK 2000

In the Matter of the Estate of Mary Mathew, 270 A.D.2d 416; 706 N.Y.S.2d 432; 2000 N.Y. App. Div. LEXIS 2968 where the New York Supreme Court Appellate Division reversed the lower court ruling by holding that:

> Thus, it is well settled that an individual who kills his or her spouse is not entitled to succeed to sole ownership of real property as a surviving tenant by the entirety...."**[A] conviction of a person for any crime does not work a forfeiture of any property, real or personal, or any right or interest therein". Accordingly, the slayer does not forfeit his or her own undivided interest in property which the couple held as tenants by the entirety....[and the slayer] is entitled to the commuted value of a life estate in one-half of the property or the proceeds from its sale...[T]he slayer may not be completely deprived of all interest in property which the couple held as tenants by the entirety**, and it has been held that **the surviving tenant, whose property rights may not be diminished by reason of a criminal act**, is entitled to the commuted value of a life estate in one-half of the property or the proceeds from its sale. Id. at 417.
>
> * * * *
>
> [T]he prevailing view in most jurisdictions which have considered this issue, [is] that **the slayer may not be completely deprived of all interest in property which the couple held as tenants by the entirety**. Ibid.

NEW YORK 1992

In Community National Bank and Trust Company of New York v. Wisan, 185 A.D.2d 870; 586 N.Y.S.2d 1000; 1992 N.Y. App. Div. LEXIS 10005 where a wife [the accused] was implicated in the death of her husband, the New York Supreme Court Appellate Division held that the wife **does not forfeit her own undivided**

interest in the property, which was subject to a mortgage lien she obtained after the date of her husband's death.

NEW YORK 1988

In the Matter of the Estate of Diane Brown,[1] 141 Misc. 2d 572; 533 N.Y.S.2d 823; 1988 N.Y. Misc. LEXIS 840 the Surrogate's Court suggested that the interest of the killer would be limited to a life estate in one half of the property.

NEW YORK 1980

In the Matter of the Estate of Irene Nicpon,[2] 102 Misc. 2d 619; 424 N.Y.S.2d 100; 1980 N.Y. Misc. LEXIS 1994, where the husband pleaded guilty to manslaughter in the first-degree of his wife, the Surrogate's Court noted that: "To convert the husband's life tenancy with the possibility of ownership to a tenancy in common would improperly elevate the nature of his ownership, wrongful misconduct contrary, and therefore benefit from his wrongful act. Id. at 620. The Court thus ordered the title to be subject to a life estate in the [slayer]. Id. at 621. The Court, however, stated that: **"Although the law is well established that one may not benefit by his act, it is also well settled that the interest of the wrongful party cannot be diminished.** Inasmuch as the [slayer] possessed an undivided one-

[1] This case was clarified or reversed by In the Matter of the Estate of Mary Mathew, supra.

[2] See Footnote #1

half life interest in the premises, **this interest cannot be extinguished**. Ibid.

NEW YORK 1980

In the Matter of the Estate of Florence Busacca,[3] 102 Misc.2d 567; 423 N.Y.S.2d 622; 1980 N.Y. Misc. LEXIS 1988, where the husband was convicted for murdering his wife, the Surrogate's Court previously "approved the sale of the real property and directed the proceeds to be placed in escrow pending the proper distribution of assets. Now the [reviewing] court determines that in accordance with the views heretofore mentioned, [the slayer] is entitled to the computed value of a life estate in one-half of the proceeds based on his life expectancy." Id. at 569.

NEW YORK 1975

In the Matter of the Estates of Granville Pinnock and Enid Pinnock,[4] 83 Misc.2d 233; 371 N.Y.S.2d 797; 1975 N.Y.Misc. LEXIS 2884 in a murder/suicide, the Surrogate's Court noted that:

> It is well established that one may not inherit or succeed to property as a result of his own wrongful act. Likewise, a wrongdoer's estate may not profit from the wrongful act. Id. at 237.

[3] See Footnote #1
[4] See Footnote #1

* * * *

The nature of the tenancy is pertinent since while **one may not suffer a forfeiture of his own property as a result of a criminal act**, it must be determined whether the wrongful act of the malfeasor has altered his property rights so as to improve his position as a result of the wrongful conduct. Ibid.

* * * *

[B]ut [the slayer] could not be deprived of his one half of the [joint bank] **account without such a deprivation constituting a forfeiture of his own property.** While a wrongdoer may not benefit from his wrong, the law does not contemplate the forfeiture of that which is his unrelated to his wrongful act. Id. at 239.

* * * *

[The slayer] still had the right to one half the proceeds of the [joint bank] **account that belonged to him independent of the death of his wife. His estate has the same right.** Ibid.

NORTH CAROLINA 1999

Considering the appeal in a murder/suicide, Woolbert v. Kimble Glass, Inc., 54 F.Supp.2d 539; 1999 U.S.Dist. LEXIS 1711, the Western District of North Carolina Court upheld the lower court findings that:

> [T]he rulings of the North Carolina courts that **the slayer statute only serves to exclude a slayer from his victim's estate,** and not to alter the actual time of death of any decedent. Id. at 541-542.
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> The Statute deems the slayer to have predeceased his victim **only** for the purposes of excluding the slayer from **his victim's estate**...The Statute does not indulge the fiction that the slayer's date if death is other than the actual date of death, but **merely establishes a presumption to exclude the slayer....It does not act to include the victim in the slayer's estate due to the slayer's crime.** Id. at 542.
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> [T]he statute the Plaintiff's seek to apply does not, and **cannot**, produce the result the Plaintiffs seek, that is, the inclusion of the Estate of [the victim] in that of her slayer/husband's estate. Ibid.
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> **[T]he denial of a slayer's heirs from taking their share of the estate of the slayer is not the common law in this country, and is unconstitutional.** Id. at 542-543.

NORTH CAROLINA 1992

In Mothershed v. Schrimsher, 105 N.C.App. 209; 412 S.E.2d 123; 1992 N.C.App. LEXIS 30, a son murdered his mother and then kills himself. The court was asked to determine if the mother/victim's estate would benefit from the son/killer's estate through the Slayer Statute. The North Carolina Appellate Court said:

> The Statute deems the slayer to have predeceased the victim **only** for purposes of excluding the slayer from his victim's estate....The Statute's plain language clearly bars the slayer from participating in the victim's estate. **Nowhere does the Statute authorize the victim to participate in the slayer's estate...The Statute is one of exclusion, not of inclusion.** When applicable it acts to exclude a slayer from participation in the victim's estate. **It does not act to include the victim in the slayer's estate due to the slayer's crime.** Id. at 212-213.

NORTH DAKOTA 1981

In the Matter of the Estate of Snortland, 311 N.W.2d 36 (N.D.1981)--and in Montana--In Re Estate of Matye, 645 P.2d 955 (Mont.1982), the highest appellate courts have held that **the wrongdoer, under the statute, retains the benefit of a one-half**

interest in the property formerly held by the entireties. It must be noted, however, that even under the common law, some states had so held. [See In the Matter of the Estate of Karas, 192 N.J. Super. 107, 111-12, 469 A.2d 99 (Law.Div. 1983); Neiman v. Hurff, 11 N.J. 55, 60, 93 A.2d 345 (1952).]

PENNSYLVANIA 2003

In the Estate of Romeo A. Luongo, 823 A.2d 942 (Pa.Super. 2003), the Superior Court of Pennsylvania considered the contest of a probated will. Because the long-time girlfriend and companion of the decedent was implicated in the decedent's death, the Court discussed the Pennsylvania Slayer's Act bar to distribution of the decedent's estate. The Court held that:

> Any person "who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of another person" is statutorily barred from acquiring or receiving any property or benefit arising from the death of that person. 20 Pa.C.S.A §§ 8801, 8802. Any property which would have passed to or for the benefit of the slayer by devise or legacy from the decedent shall be distributed as if the slayer predeceased the decedent. 20. Pa.C.S.A. § 8803. Id. at 962.

The Court further declared that:

> **Even a felonious killing will not act to bar the slayer of property to which she is otherwise entitled and over which the felonious killing had no effect.** Ibid.
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> The Slayer's Act also identifies contests regarding the continuation or forfeiture of rights by devise or legacy from the decedent to a slayer as generally matters for the distribution stage of the estate....[T]he Slayer's Act [acts] as a bar to

distribution in the event of appropriate proof. Id. at 963.

PENNSYLVANIA 1992

Where property was held by the entireties and the husband was convicted of voluntary manslaughter of his wife, the Superior Court of Pennsylvania, In re Estate of Bartolovich, 420 Pa.Super. 419, 422, 616 A.2d 1043, 1045 (1993), commented:

> In addition, "[t]he principal focus of the [Slayer's] Act is not ... one of balancing the slayer's interests against the interests of his victim's estate **nor does the act reflect a legislative intent to profit the decedent's estate by diminishing any property right held by the slayer....**" Drumheller v. Marcello, 516 Pa. 428, 433, 532 A.2d 807, 809 (1987) (quoting In re Estate of Larendon, 439 Pa. 535, 539, 266 A.2d 763, 765-66 (1970)).

TENNESSEE 1993

In Hicks, Chadwell, Reed and Ashbury v. Boshears, 846 S.W.2d 812; 1993 Tenn. LEXIS 27, the Supreme Court of Tennessee reversed the trial and appellate courts' rulings which awarded the entire estate to the slayer, and held that:

> Accordingly, in the case before the Court, the statute prohibits the defendant from gaining the conversion of his tenancy by the entirety into a fee simple estate. **Instead, the tenancy by the entirety is converted into a tenancy in common by the defendant's act in feloniously killing the other tenant.** The result is that an undivided one-half interest in the property is owned by the defendant, and an undivided one-half interest descends [to the decedent's estate] by "the laws of descent and distribution, or by will, deed, or other conveyance" as the case may be. Chapter 11, Public Acts of 1905.

> The conversion of a tenancy by the entirety into a tenancy in common at the time of the felonious murder of a spouse, prevents a person from turning an expectant interest into a vested interest by "killing, or conspiring with another to kill, or procuring to be killed, any other person." This conclusion accommodates the two historic legal principles at issue: the equitable maxim that one should not be allowed to profit by wrongdoing, codified in the statutory prohibition against a killer taking or inheriting property from his victim, and the ownership of property as tenants by the entirety. T.C.A. §§ 31-1-106, 108 (1984).
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> This interpretation does not, as contended by the defendant, violate Article 1, Section 12 of the state constitution by allowing a forfeiture of vested interest in land. As discussed above, the defendant's interest in the property at the time of the murder was not a fee simple estate. He has no constitutional right to have the tenancy by the entirety converted into a fee simple by his felonious act. T.C.A. § 31-1-106 only prohibits the conversion of a tenancy by the entirety into a fee simple estate by his criminal act to his benefit. **The interest that he already possessed, an undivided interest in the property equally shared with his wife, is preserved and converted into a non-contingent estate.**
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> **This conclusion also is consistent with the treatment of tenancies by the entirety in other areas of the law.** [i.e., as in divorce proceedings, the inheritance tax statute, and simultaneous death cases].
> Id. at 818.

VERMONT 1980

In Chabot v. Chabot, 138 Vt. 170; 412 A.2d 930; 1980 Vt. LEXIS 1053, a husband pleaded guilty to the second-degree murder of his wife, with whom he owned property as tenants by the entirety. After his release from prison, the widower remarried

and purportedly conveyed title in the above property to his second wife as tenancy by the entirety and executed a new will leaving the majority of his estate to his second wife. Upon his subsequent death, the children of the first marriage sought their mother's share in the property.

Relying on Mahoney, infra, the Vermont Supreme Court affirmed the lower court's order for the **second wife to hold one-half of the property in a constructive trust for the benefits of the first wife's heirs and the second wife to receive the other one-half interest in the property**. Id. at 173. [It is unclear from the opinion whether the second wife inherited the one-half share via deed or will. Whichever method, the slayer's property remained in his estate and was not forfeited.]

The Supreme Court determined the trial court correctly indicated that:

> [I]t would be unconscionable for [the slayer], after murdering his wife and cotenant by the entirety, to retain the entire interest in the property and then pass title to his second wife as a successor tenant by the entirety. A husband who murders his wife should not be better off propertywise merely because he holds property by the entireties rather than some other way. Therefore, to avoid this unconscionable result, the trial court imposed a constructive trust on one-half of the subject property for benefit of [the victim's heirs].
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> The trial court found, and we think correctly, that the most equitable and appropriate method of distribution for resolving the instant case is one which recognizes that **the estate was severed by the unlawful killing, and that...his estate is required to hold one-half of the property in constructive trust for [the decedent's] heirs**, the plaintiffs. The trial court analogized the

present situation to a divorce, which under Vermont law destroys the tenancy by the entirety and creates by operation of law a tenancy in common among the parties. **This position has been taken by other jurisdictions to prevent the "unconscionable mode" of acquiring full legal title by the husband's survival of his murdered wife.**

This result works no forfeiture to [the slayer's estate and his heirs] as they receive what [the slayer] was entitled to. Nor, however, do [the slayer's estate and his heirs] profit, as they are prevented from acquiring any additional benefits from the murder.... **Death severed the tenancy by the entirety and created a tenancy in common between the parties....**
Id. at 174-175.

VERMONT 1966

In re Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966) the Court reasoned that where a killer acquired the victim's property as a result of the killing, the slayer should not be permitted to improve his position by the killing, **but should not be compelled to lose property that he had a vested interest in had there been no killing.** Id. at 34, 220 A.2d at 478.

VIRGINIA 1980

In Sundin v. Klein, 221 Va. 232; 269 S.E.2d 787; 1980 Va. LEXIS 240 where a husband murdered his wife, the executrices sought a declaratory judgment from the trial court to "adjudicate and determine the rights of the parties in and to" property held as tenants by the entirety. The Virginia Supreme Court, as a matter of first impression, reversed the trial court's ruling

that the surviving slayer was the sole owner in fee simple, and entered a final decree. The Court noted:

> For this court to provide a remedy here, however, would not require the reversal of any established rule, but, instead, would permit the full play of a common law maxim of ancient vintage, viz. that no person should be permitted to profit by his own wrong. Id. at 236.
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> [W]e need not linger over the question whether all the property should be subject to a constructive; we have indicated earlier that [the victim's] estate seeks the imposition of a trust upon **only a one-half interest** in the land, and [the slayer] does not challenge this division as unreasonable, if a division is made. Id. at 237.
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> **[T]o divest the [slayer] of property he had acquired from someone other than his murder victim would work an unlawful forfeiture.** Id. at 238.
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> **Furthermore, if an unlawful forfeiture is caused by a judicial decision limiting the interest of the murderer of a cotenant in entirety, then obviously, [the no corruption of blood statute] would cause an illegal forfeiture as well.** But similar statutes uniformly have been upheld on the ground that they do not deprive the murderer of any property rights, **but prevent his acquisition of additional rights by unlawful and unauthorized means.** Id. at 240.
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> We conclude that the soundest and most equitable course to follow in this case is to impress a constructive trust upon a one-half undivided interest in the property in dispute for the benefit of [the victim's] estate, to be disposed of according to the terms of her will, with **[the slayer] holding the other undivided one-half interest free of any trust.** Under this disposition, [the victim's] estate receives all it asks, and **[the slayer] keeps all he is due.** Id. at 241. See also note 5 for numerous secondary authorities.

WISCONSIN 1999

In the Estate of Diane L. Hackl v. Cody Hackl, 231 Wis.2d 43; 604 N.W.2d 579; 1999 Wisc.App. LEXIS 1124 where the Appellate Court decided in a pension dispute owned by a husband who killed his wife. The Court stated that:

> [T]his court has recognized a distinction between property acquired by a murderer as a consequence of a wrongful act and property lawfully acquired by the murderer prior to such an act....[Although a] murderer is not permitted to keep property which he acquires by the murder, **he will not be deprived of property which he does not acquire through the murder.... [A] murderer is not deprived of property lawfully acquired by him but is merely prevented from acquiring [a] beneficial interest in property through his unlawful act.** Id. at 55.
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> [W]here two persons have an interest in property and the interest of one of them is enlarged by his murder of the other, **the extent to which it is enlarged he holds it upon a constructive trust for the estate of the other.** Ibid.