

No. _____

SUPREME COURT OF THE UNITED STATES

JOSH POMPEY,

Petitioner,

vs.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit**

PETITIONER'S APPENDIX B

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**Order and Opinion Denying Petitioner's Petition for a Writ of Habeas Corpus,
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NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JOSH POMPEY,

Petitioner,

v.

WARDEN BRUCE DAVIS,

Respondent.

Civil Action No. 23-00324 (BRM)

OPINION

MARTINOTTI, DISTRICT JUDGE

Before the Court is Petitioner Josh Pompey's ("Petitioner") petition for a writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Petitioner is a state prisoner confined at New Jersey State Prison in Trenton, New Jersey. Respondents filed a Motion to Dismiss ("Motion") the Petition as time barred. (ECF No. 7.) Petitioner filed a counseled response (ECF No. 10), and Respondents replied (ECF No. 12). Having considered the submissions of the parties without oral argument, for the reasons set forth below and for good cause shown, Respondents' Motion is **GRANTED** and the Petition is **DENIED**.

I. BACKGROUND

In March 1998, Petitioner was convicted of the murder and sexual assault of his former girlfriend, Audrey Robinson, and the murder of her aunt, Madeline Mitchell. The Superior Court of New Jersey, Law Division summarized this matter's lengthy factual history as follows:

A. Scene of the Murder

On September 5, 1989, the bodies of Audrey Robinson and her aunt Madeline Mitchell were discovered in Ms. Robinson's Hackensack apartment. The medical examiner determined that the cause of death

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for both victims was multiple stab wounds. When Audrey Robinson's body was discovered in her bedroom, she was wearing only a pair of socks with a belt tied around her neck and had 30 stab wounds to her head and neck. The fact that Ms. Robinson was discovered without any clothing led detectives to believe that there had been a sexual assault prior to her murder. Similarly, Ms. Mitchell's body was discovered in the living room and had a single stab wound below her left eye and 12 stab wounds to her chest. Medical examiners also discovered numerous contusions to both victims' faces which were consistent with being struck by closed fists.

Detectives from the Bergen County Prosecutor's Office and Hackensack Police Department conducted the crime scene investigation. The detectives found that a door leading from the basement to the kitchen had been shattered, and also noticed a basement window that appeared to be forcibly opened. Throughout the entire crime scene, detectives observed bloody hand prints that did not have any fingerprints leading them to conclude that the suspect wore gloves at the time of the murders. In addition, detectives found a bloody knife in Ms. Robinson's bedroom. The bedroom was in a state of disarray demonstrating that there had been a struggle. As with the bloody handprints, detectives found no fingerprints on the bloody knife.

As detectives searched Ms. Robinson's vehicle, which was parked in her driveway, they discovered that somebody had attempted to hot-wire it. In addition, the interior of the victim's vehicle contained a large amount of blood, which led detectives to believe that the suspect may have been injured by the knife used during the commission of the murders. Much like the inside of the victim's home, detectives found bloody hand prints on the vehicle but no fingerprints. Due to the similar nature of the hand impressions, detectives believed that the same person who left the bloody hand prints inside the victim's apartment, attempted to hot-wire the victim's vehicle to flee the scene of the murders.

B. Investigation of Suspects

After ruling out two initial suspects, detectives went to the [Petitioner]'s residence at 227 Central Avenue in Hackensack to interview him on September 6, 1989. When they arrived, the [Petitioner]'s brother advised the detectives that he was not home. The detectives then contacted Larry Holmes, a professional boxer, with whom the [Petitioner] trained. Mr. Holmes told detectives that he hadn't seen the [Petitioner] in a few days, but was able to provide

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them with a phone number where he could be reached. Later that evening, detectives returned to the [Petitioner]'s residence to speak with his mother. The detectives asked the [Petitioner]'s mother to have him contact the police when he arrived home.

The next day, September 1, 1989, Detective Michael Mordaga of the Hackensack Police Department observed the [Petitioner] walking along train tracks in Maywood. Detective Mordaga, who was off-duty at the time, turned his vehicle around and made eye contact with the [Petitioner]. Upon seeing Detective Mordaga, the [Petitioner] turned and walked away in the opposite direction and eventually ran through yards in an apparent attempt to evade police. Eventually, Detective Mordaga called the Maywood Police for backup and apprehended the [Petitioner]. While placing the [Petitioner] under arrest, Detective Mordaga observed cuts on the [Petitioner]'s knuckles and palms, which appeared to be knife wounds.

C. [Petitioner]'s Statement

Once the [Petitioner] was transported to police headquarters, detectives provided him with a *Miranda* rights form which the [Petitioner] signed, indicating that he understood and voluntarily waived his rights. Initially, the [Petitioner] maintained that he had nothing to do with the murders and stated that he had been home all day on September 5, 1989. However, after further questioning, the [Petitioner] gave a detailed statement recounting the murders of Audrey Robinson and Madeline Mitchell and the disposal of key evidence.

Specifically, the [Petitioner] admitted that he went to the victim's home on September 5, 1989, and that he wore his mother's gloves because he did not want to leave any fingerprints. The [Petitioner] stated that he pried open a basement window to gain access to the victim's home to wait until she got home so he could talk her into rekindling their past relationship. At around 1:30 p.m. his ex-girlfriend, Ms. Robinson, pulled into the driveway and entered her first floor apartment. She left the apartment, but returned again around 3:30 p.m., and at that time discovered the [Petitioner] in her apartment.

The [Petitioner] told detectives that Ms. Robinson tried to get him to leave, but he pushed her toward her bedroom. After exchanging words with Ms. Robinson, the [Petitioner] stated that he began to choke her and asked her to have sexual intercourse. After rejecting his advances, the [Petitioner] claimed that Ms. Robinson eventually

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got undressed due to his “persuasiveness” and he proceeded to have intercourse with her. The [Petitioner] claimed he became angry when he could not perform sexually due to Ms. Robinson’s resistance. He then began to choke her again and a struggle ensued. During the struggle, the [Petitioner] stated that Ms. Robinson pulled the glove off of his right hand. Importantly, the [Petitioner] told officers that he wrapped a belt around Ms. Robinson’s neck in an attempt to make her pass out and quiet her down.

Upon hearing the struggle, the victim’s aunt, Ms. Mitchell, came downstairs. When she saw the [Petitioner], she attempted to run back to her upstairs apartment to call the police. The [Petitioner] ran after her and grabbed her leg as she was running up the stairs, dragging her back into Ms. Robinson’s living room. At that time, the [Petitioner] punched Ms. Mitchell in the face repeatedly. After striking Ms. Mitchell, the [Petitioner] stated that he saw Ms. Robinson moving and ran to the kitchen to get a knife. The [Petitioner] then proceeded to stab Ms. Robinson repeatedly in the chest. The [Petitioner] specifically told officers that as he was stabbing Ms. Robinson, his hand slipped off of the knife handle, causing him to cut his hand. After stabbing Ms. Robinson numerous times, the [Petitioner] saw Ms. Mitchell attempting to stand up in the living room. According to the [Petitioner], he went to the kitchen and took a smaller knife which he used to stab Ms. Mitchell.

D. Items Recovered After [Petitioner]’s Statement

During the [Petitioner]’s statement, he told detectives that after committing the murders, he left Ms. Robinson’s apartment and attempted to hot-wire her vehicle which was parked in the driveway. When he was unable to start it, he fled the scene, walking along the railroad tracks so that nobody would see him covered in blood. The [Petitioner] stated that he took money from Ms. Robinson’s purse before discarding it, along with the knife used to stab Ms. Mitchell, in a dumpster. Once the [Petitioner] returned home, he removed the bloody clothing and returned to the railroad tracks where he hid the clothing under old tires next to the tracks. After discarding the bloody clothes, the [Petitioner] returned home to wash the blood off of his sneakers.

When detectives received this information, they advised other officers to search for the discarded evidence at the locations described with great specificity by the [Petitioner], in the vicinity of Second Street in Hackensack. The detectives searched the dumpster that the [Petitioner] described, and discovered a white short-sleeve shirt which was covered in blood. The officers then proceeded to

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search the area for the rest of the clothing that the [Petitioner] claimed to have discarded under old tires. After searching the area to no avail, the officers requested the assistance of a canine to locate the evidence. Approximately half an hour later, the canine located a brown plastic bag with yellow pull ties which contained a pair of dark pants, and a maroon jacket, both of which were also covered in blood. Notably, these items were discovered under old tires in a wooded area near the railroad tracks, exactly as the [Petitioner] had described to detectives during his statement. In addition, officers discovered a left-handed knit glove which was described as having cut marks and what appeared to be blood stains. When the glove was discovered, it was extremely damp and seemed to have been sitting in stagnant water.

After securing the items discovered in the dumpster and next to the railroad tracks, the officers secured and executed a search warrant at the [Petitioner]'s home. Upon searching the [Petitioner]'s home, officers discovered brown plastic garbage bags with yellow pull ties, matching the bag in which the bloody clothing was found. In addition, officers seized a pair of sneakers from the [Petitioner]'s home which subsequently tested positive for blood. Forensic analysis of the items retrieved from the dumpster and railroad tracks revealed transfer fibers, linking those articles of clothing to the victim's home and car.

E. [Petitioner]'s Statements for Medical Treatment

After the [Petitioner]'s arrest, he was seen by the intake nurse at the Bergen County Jail, Margaret Neely, L.P.N. Upon examining the [Petitioner], Ms. Neely noticed cuts on his left hand. According to Ms. Neely's testimony, the cuts appeared to be 24 to 48 hours old. Ms. Neely's report indicated that the [Petitioner] stated that he cut his hand on a kitchen knife on September 5, 1989, the day of the victims' murders.

(ECF No. 7-23 at 156–61, PCR Court Op. 8/29/2017.)

On December 4, 1989, a Bergen County grand jury returned indictment number 89-12-01594-1, charging the defendant with two counts of knowing or purposeful murder contrary to N.J.S.A. 2C:11- 3(1) and (2); four counts of felony murder contrary to N.J.S.A. 2C:11-3a(3); one count of aggravated sexual assault contrary to N.J.S.A. 2C:14-2a(3); and one count of aggravated assault contrary to N.J.S.A. 2C:12-1b(5)(a). (*See id.* at 154.) Petitioner's initial trial, during which

the State sought the death penalty, resulted in a mistrial due to a deadlocked jury. (*Id.*) The State did not seek the death penalty on retrial, and Petitioner's retrial was scheduled before the Honorable William C. Meehan, J.S.C. (*Id.*) On March 9, 1990, following the retrial, Petitioner was found guilty on all counts of the indictment. (*Id.* at 154-155.) On April 3, 1998, the trial court sentenced Petitioner to an aggregate term of two life sentences plus 21 ½ years, with a 7-year and 9-month period of parole ineligibility. (*Id.* at 155.)

Petitioner filed a Notice of Appeal and on May 17, 2004, the Appellate Division affirmed Petitioner's conviction. (ECF No. 7-12 at 63–121.) On June 22, 2005, the New Jersey Supreme Court denied Petitioner's petition for certification. (ECF No. 7-7 at 66.) Petitioner did not file a petition for certiorari with the Supreme Court of the United States.

On January 4, 2006, Petitioner filed his first *pro se* Petition for Post-Conviction Relief ("PCR"). (*Id.* at 67–72.) On May 24, 2007, the State moved for summary dismissal of Petitioner's *pro se* PCR petition. (*Id.* at 73.) On August 14, 2007, Petitioner filed a counseled amended PCR petition, as well as a request for DNA testing. (ECF No. 7-9 at 23 to ECF No. 7-11 at 69.) On September 28, 2007, the PCR judge held a hearing and denied Petitioner's PCR petition on the record as time-barred but granted Petitioner's request for DNA testing. (ECF No. 7-32.) On October 18, 2017, the PCR court filed an Order memorializing the dismissal of Petitioner's PCR petition. (ECF No. 7-21 at 66–68.)

On December 18, 2007, Petitioner filed a Notice of Appeal from the PCR court's October 18, 2007 order dismissing the PCR petition as time-barred. (ECF No. 7-7 at 74.) On July 21, 2008, Petitioner sought to stay his appeal until conclusion of the DNA testing, or in the alternative to extend the deadline for filing his appellate brief. (*Id.* at 75–82.) The State did not oppose Petitioner's request, rather the State left the matter to the Appellate Divisions discretion. (*Id.* at

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83.) On August 13, 2008, the New Jersey Superior Court, Appellate Division, dismissed Petitioner's appeal without prejudice, noting that Petitioner may file a new appeal at the completion of the DNA testing because "in that manner, all post-conviction proceedings [could] be considering one appeal." (*Id.* at 84.)

On September 9, 2011, Petitioner filed a motion seeking (i) a new trial based on newly discovered evidence; (ii) an evidentiary hearing; (iii) request for post-conviction discovery; or alternatively, to include these newly discovered facts and evidence with respect to existing PCR and/or as part of excluded record in future direct appeal. (ECF No. 7-21 at 144–79.) Petitioner sought a new trial, arguing that news articles related to one of the detectives involved in Petitioner's case alleged that the detective was associated with the mob. (*See id.*) On February 1, 2012, the PCR court denied Petitioner's motion for a new trial. The PCR court also found that if the motion was treated as a second PCR petition, that petition was dismissed as time barred. (ECF No. 7-21 at 192–200.)

On March 13, 2012, Petitioner motioned the Appellate Division to consolidate all issues related to the 2012 denial of his second PCR petition with his first 2007 PCR petition appeal. (ECF No. 7-7 at 85–91.) On April 9, 2012, the Appellate Division denied Petitioner's motion to consolidate issues and noted that there was nothing to consolidate, as Petitioner's first PCR appeal was dismissed in August 2008. (*Id.* at 92.) The DNA testing was completed in 2014. (ECF No. 7-22 at 114.)

On April 13, 2015, Petitioner filed a "successor" PCR petition, and a motion for a new trial and for additional DNA testing. (*Id.* at 43–88.) In addition to other arguments, Petitioner argued that new DNA evidence pertaining to the right-hand glove, shows the Petitioner is innocent and that his confession is false. (*See id.*) On August 29, 2017, following oral argument, the PCR court

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denied Petitioner's third PCR petition and motion for a new trial. (ECF No. 7-23 at 154–77.) Petitioner filed appeals from the 2007 and 2017 orders denying him PCR relief. On May 18, 2021, the New Jersey Superior Court, Appellate Division, affirmed both the 2007 and 2017 denials of Petitioner's PCR petitions. (ECF No. 7-1.) On January 28, 2022, the New Jersey Supreme Court denied Petitioner's petition for certification. (ECF No. 7-30.)

On January 20, 2023, Petitioner filed his petition for writ of habeas corpus. (ECF No. 1.)

Petitioner raises to following claims:

1. PETITIONER SHOULD BE GRANTED AN EVIDENTIARY HEARING BECAUSE NEWLY DISCOVERED EVIDENCE DERIVED FROM STATE-OF-THE-ART DNA TESTING PROVES THAT THE CONFESSION WAS FALSE AND ESTABLISHES A PRIMA FACIE CASE THAT PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS;
2. THE DISTRICT COURT SHOULD GRANT ADDITIONAL DNA TESTING TO ALLOW PETITIONER TO ESTABLISH THIRD-PARTY GUILT;
3. THE NEWLY DISCOVERED EVIDENCE RAISES PROOF THAT NAPUE VIOLATIONS INCLUDING MANUFACTURED OR FALSE EVIDENCE AND FALSE TESTIMONY OCCURRED AND THIS AFFECTED THE OUTCOME OF THE VERDICT;
4. NEWLY DISCOVERED EVIDENCE IMPACTS PREVIOUS RULINGS AS TO THE SUPPRESSION OF THE BLOOD EVIDENCE, THE CONFESSION, AND THE BARRING OF THE FALSE CONFESSION EXPERT, THE PLANTED EVIDENCE EXPERT, THE FINGERPRINT EXPERT AND THE EDTA EXPERTS' TESTIMONY;
5. THE TRIAL COURT EFFECTIVELY DENIED PETITIONER THE RIGHT TO A DEFENSE;
6. THE TAMPERED WINDBREAKER LABEL EVIDENCE REQUIRES REVERSAL OF THE CONVICTIONS;
7. PROSECUTORIAL MISCONDUCT IN THE FORM OF BRADY VIOLATIONS, FALSE TESTIMONY THAT REMAINS UNCORRECTED TO THIS DAY, AND INTENTIONAL TAMPERING AND DESTRUCTION OF EXCULPATORY PHYSICAL EVIDENCE DENIED PETITIONER THE RIGHT TO DUE PROCESS AND A FAIR TRIAL; and

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8. PETITIONER ASSERTS A FREE-STANDING ACTUAL INNOCENCE CLAIM (ECF No. 2 at 34–89.)

On February 17, 2023, Petitioner filed a brief in support of his habeas petition. (ECF No. 2.) Respondents subsequently filed the instant Motion to Dismiss, arguing that the petition is untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). (ECF No. 7.) Petitioner filed a response, and Respondents filed a reply. (ECF Nos. 10, 11, 12.)

The matter is now ripe for decision without oral argument. Fed. R. Civ. P. 78(b).

II. STANDARD OF REVIEW

The AEDPA imposes a one-year period of limitation on a petitioner seeking to challenge his state conviction and sentence through a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1), the limitation period runs from the latest of:

(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.

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28 U.S.C. § 2244(d)(1); *see also Jones v. Morton*, 195 F.3d 153, 157 (3d Cir. 1999). “[T]he statute of limitations set out in § 2244(d)(1) should be applied on a claim-by-claim basis.” *Fielder v. Varner*, 379 F.3d 113, 118 (3d Cir. 2004).

Pursuant to § 2244(d), evaluation of the timeliness of a § 2254 petition requires a determination of, first, when the pertinent judgment became “final,” and, second, the period of time during which an application for state post-conviction relief was “properly filed” and “pending.” The judgment is determined to be final by the conclusion of direct review, or the expiration of time for seeking such review, including the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court. *See Gonzalez v. Thaler*, 132 S.Ct. 641, 653–54 (2012).

The AEDPA limitations period is tolled, however, during any period a properly filed PCR petition is pending in the state courts. 28 U.S.C. § 2244(d)(2); *see also Thompson v. Adm’r New Jersey State Prison*, 701 F. App’x 118, 121 (3d Cir. 2017); *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 85 (3d Cir. 2013). The PCR petition is considered to be pending, and the AEDPA limitations period continues to be tolled, during the time the petitioner could have appealed a PCR decision within the state courts, even if the petitioner did not in fact file such an appeal. *Carey v. Saffold*, 536 U.S. 214, 219–21 (2002); *Swartz v. Meyers*, 204 F.3d 417, 420–24 (3d Cir. 2000) (citing *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999)). However, “[t]he application for state postconviction review is...not ‘pending’ after the state court’s postconviction review is complete, and § 2244(d)(2) does not toll the 1-year limitations period during the pendency of a petition for certiorari.” *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

III. DECISION

Respondents argue that the Petition is untimely. The Court agrees.

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A. Timeliness

Petitioner's conviction became final within the meaning of AEDPA on September 20, 2005, 90 days after the New Jersey Supreme Court denied certification of his direct appeal on June 22, 2005. (ECF No. 7-7 at 66); *see Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 84 (3d Cir. 2013) (“[T]he expiration of the time for seeking direct review is the deadline for petitioning for certiorari to the United States Supreme Court.”) Therefore, absent statutory tolling, Petitioner's AEDPA one-year time limitation expired one year later, on September 20, 2006.

1. Statutory Tolling

The AEDPA limitations period is tolled during the time a properly filed PCR petition is pending in the state courts. 28 U.S.C. § 2244(d)(2); *see also Thompson v. Adm'r New Jersey State Prison*, 701 F. App'x 118, 121 (3d Cir. 2017); *Jenkins*, 705 F.3d at 85. A properly filed application is one that the Court accepted for filing by the appropriate court officer and the Petitioner filed the application within the time limits prescribed by the relevant jurisdiction. *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). A properly filed PCR petition will continue to be “pending” in the state courts following an adverse determination by the PCR court until the time in which a petitioner has to file a timely direct appeal in the state courts has run. *See Swartz*, 204 F.3d 420-24, 423 n.6. Importantly, it is well established that a petition for state post-conviction relief that was rejected by the state courts as untimely is not deemed “properly filed” under § 2244(d)(2). *See Pace*, 544 U.S. at 414 (“When a postconviction relief petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2).”) (internal quotation marks and citation omitted); *see also Allen v. Siebert*, 552 U.S. 3 (2007).

As noted above, Petitioner's judgment of conviction became final on September 20, 2005. The following day on September 21, 2005, Petitioner's habeas statute of limitations began to run,

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and it elapsed one year later, on September 21, 2006. *See* 28 U.S.C. § 2244(d)(1)(a). Petitioner filed this habeas petition in January 2023, over sixteen years later.

The fact that Petitioner filed his first PCR petition on January 4, 2006, after the AEDPA limitations period ran for only 104 days, does not induce statutory tolling of Petitioner's one-year habeas deadline because Petitioner's first PCR was not "properly filed." (ECF No. 7-7 at 67–72.) *See Pace*, 544 U.S. at 414; *see also Long v. Wilson*, 393 F.3d 390, 394–95 (3d Cir. 2004) ("The state habeas petition had no effect on tolling, because an untimely state post-conviction petition is not properly filed for the purposes of tolling."). Under New Jersey Court Rule 3:22-12, a petition for PCR must be filed within five years of the date of entry of a judgment of conviction. *See e.g.*, Pressler, Current N.J. Court Rules, cmt. 2 on N.J. Ct. R. 3:22-12 (2015) ("The five-year period . . . commences when the judgment of conviction is entered and is neither stayed nor tolled by appellate or other review proceedings."); *State v. Dillard*, 506 A.2d 848, 850 (N.J. Super. Ct. App. Div.), *cert. denied*, 523 A.2d 169 (1986) (finding that "there is no provision for tolling in R. 3:22-12 by reason of a direct appeal").

In Petitioner's case, the PCR court held that his first PCR petition was untimely because more than five years elapsed between Petitioner's judgment of conviction on April 3, 1998, and Petitioner's filing of his PCR on January 4, 2006. (*See* ECF No. 7-32.) Therefore, since Petitioner's PCR was not "properly filed," he is not entitled to statutory tolling for the pendency of his PCR proceedings.

Petitioner argues that although the PCR court dismissed his first PCR petition as untimely, his properly filed motion for DNA testing triggered statutory tolling. (*See* ECF No. 10 at 16–20.) Petitioner argues that the PCR judge's grant of Petitioner's motion for post-conviction DNA

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testing remained pending until the New Jersey Supreme court denied certification on January 28, 2022, within one year of the filing of the habeas petition on January 20, 2023. (*Id.*)

The Third Circuit Court of Appeals has not resolved the issue of whether a post-conviction request for DNA testing in New Jersey constitutes a “properly filed application for . . . other collateral review” under Section 2244(d)(2). However, the majority of circuits to examine this issue have determined that post-conviction motions for discovery or DNA testing are not forms of collateral or post-conviction review. *See Woodward v. Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012) (determining that a motion under Kansas statute permitting biological testing is not an application for collateral review that tolls AEDPA’s statute of limitations); *Brown v. Sec’y for Dep’t of Corr.*, 530 F.3d 1335, 1338 (11th Cir. 2008) (determining that Florida rule permitting post-conviction DNA testing did not toll AEDPA’s limitations period because it did not provide a review mechanism); *Price v. Pierce*, 617 F.3d 947, 952–53 (7th Cir. 2010) (determining that Illinois statute permitting postconviction forensic testing was not a collateral review mechanism and did not toll AEDPA’s limitations period); *Ramirez v. Yates*, 571 F.3d 993, 999–1000 (9th Cir. 2009) (determining that post-conviction discovery motions did not toll AEDPA limitations period because they did not challenge his conviction); *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001) (determining that post-conviction motion for discovery under New York law did not challenge conviction and therefore did not toll AEDPA’s limitations period).

However, this Court does not need to determine whether Petitioner’s motion for DNA testing tolled the AEDPA statute of limitations. Even assuming, *arguendo*, that the AEDPA limitations period was tolled from January 4, 2006, the date of filing of Petitioner’s first PCR petition and request for DNA testing, until January 28, 2022, the date the New Jersey Supreme Court denied Petitioner’s petition for certification, the habeas petition is still untimely. As

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explained above, the AEDPA limitations period ran for 104 days from September 21, 2005, the date Petitioner's habeas statute of limitations began to run, until January 4, 2006, the date he filed his first PCR petition and motion for DNA testing. Petitioner's habeas clock would have started to run again on January 28, 2022, the date the New Jersey Supreme Court denied Petitioner's petition for certification, with 261 days ($365 - 104 = 261$) days remaining on his habeas limitation period. As such, Petitioner had 261 days, or until October 17, 2022, to file a timely habeas Petition. The instant habeas petition was not filed until January 20, 2023, over three months after Petitioner's AEDPA limitations period had run. Therefore, even allowing for statutory tolling for the time in which Petitioner's DNA results were pending, his habeas petition is still untimely.

2. Alternate Habeas Limitations Start Date

While Petitioner does not argue that his "newly discovered" DNA evidence qualifies for an alternate start date under § 2244(d)(1), the Court will address the issue. The AEDPA gives a state prisoner one year to file a federal habeas petition, starting from "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). But if the petition alleges newly discovered evidence, the filing deadline is one year from "the date on which the factual predicate of the claim . . . could have been discovered through . . . due diligence." § 2244(d)(1)(D).

By way of background, the New Jersey Superior Court, Appellate summarized the original DNA testing results from Petitioner's trial as follows:

DNA testing established that [Petitioner] could not be ruled out as a major contributor, and the former girlfriend a minor contributor, to blood samples taken from inside her car and from his black pants. Additional items, found at the locations [Petitioner] identified, were also tested. The victim could not be ruled out as the major contributor and [Petitioner] the minor contributor, to blood found on his windbreaker and to blood stains found on a shirt in a dumpster. Additionally, [Petitioner] could not be ruled out as a contributor to the blood on the mattress and the victim's brassiere. Her boyfriend was excluded as a contributor to any samples.

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(ECF No. 7-1 at 3.)

Petitioner argues the following pieces of DNA evidence are “new” and show his confession was coerced and exonerate him.

- 1) DNA evidence from the right glove. Petitioner argues that the NJSP DNA lab identified DNA that was from the interior of the right brown glove [sample 57-3] and the lab called it an ‘as worn’ sample that had no blood on it.” (ECF No. 2 at 20.) Petitioner submits that the DNA results from inside the right glove finger matches the victim’s, Audrey Robinson, DNA profile and excluded Petitioner. (*Id.*, *see also* ECF No. 7-19 at 146.) Petitioner also submits that blood found on the right glove was a match to the victim’s DNA profile, and no male DNA was found in the blood sample. (*Id.* at 22; *see also* ECF No. 7-16 at 147.)
- 2) DNA evidence from the left glove. Petitioner submits that the new DNA results indicate no DNA was found on the left glove. (*Id.*, *see also* ECF No. 7-16 at 147.)
- 3) DNA evidence from the belt. Petitioner submits that the new DNA results indicate that DNA found on the belt that was used to strangle the victim matched the DNA profile of the victim, but Petitioner’s DNA was not found on the belt. (*Id.* at 25, *see also* ECF No. 7-16 at 149.)
- 4) DNA evidence from the brown plastic bag. Petitioner submits that the new DNA results from the brown plastic bag that Petitioner confessed to carrying his bloody clothes in indicated that no blood was found on the bag. (*Id.* at 26–27; *see also* ECF No. 7-16 at 149.)
- 5) DNA evidence from hair from the crime scene. Petitioner submits that the new DNA results from the hairs from the crime scene exclude Petitioner. (*Id.* at 26; *see also* ECF No. 7-16 at 149.)
- 6) DNA evidence from the rape kit evidence. Petitioner submits that the new DNA results excluded Petitioner from being a contributor from the rape kit evidence. (*Id.*; *see also* ECF No. 7-16 at 149.)

The Appellate Division also summarized Petitioner’s claims in his first 2006 PCR petition as follows:

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[Petitioner] filed his first PCR petition in January 2006, claiming that his experts were improperly barred from testifying as established by subsequent caselaw and news articles; the prosecutor engaged in misconduct during opening and closing statements; police tampered with evidence and conspired against him, as did the judges who presided over the case; the DNA evidence had been tampered with and was unreliable; he was wrongfully precluded from pursuing an investigation into the victim's boyfriend as a "bloody" fingerprint had been found on the utensil drawer (during the trial, the State's fingerprint expert said that although the boyfriend's fingerprint was found on the utensil drawer, it had no blood on it, and was not in a bloody area); the jury charge was erroneous; his confession was coerced and he should have been granted a *Miranda* rehearing after it was revealed that he had a handcuff on one arm when the stenographer transcribed his statement to police; the physical evidence against him should have been suppressed; the jury was prejudiced and engaged in misconduct; he was wrongfully precluded from trying on one of two knit gloves he allegedly wore during the killing; he was wrongly denied discovery essential to his attack on the credibility of the investigating officers who testified against him; the serology log books were doctored by police and prosecutors; the prosecutor presented perjured testimony regarding photos taken of the victim's car; defense witness testimony regarding his reaction to "learning" of the victim's death was wrongfully precluded; there was judicial bias against him; and appellate counsel failed to advise him of PCR filing deadlines and was otherwise ineffective. [Petitioner] also requested an evidentiary hearing and additional DNA testing.

(ECF No. 7-1 at 4–5.)

In order to determine the "factual predicate of the claim or claims presented" for purposes of section 2244(d)(1)(D), the Court must identify Petitioner's claims. Petitioner's brief in support of habeas relief is voluminous and many of his claims overlap. In addition to his request for an evidentiary hearing and additional DNA testing, Petitioner raises several due process claims, allegedly supported by "newly discovered evidence." Petitioner argues that he was denied due process and a fair trial because newly discovered DNA evidence shows Petitioner's confession was coerced, law enforcement manufactured false evidence, and prosecutorial misconduct in the form of introducing false testimony and the intentional tampering and destruction of exculpatory

pet. a 18

physical evidence. Petitioner also argues that the newly discovered DNA evidence impacts the trial court's rulings as to the suppression of blood evidence, Petitioner's confession, and the preclusion of various experts. Petitioner's claims all boil down to his allegations that he was not the perpetrator, law enforcement coerced his confession, and law enforcement and the prosecution planted the evidence to match his coerced confession and/or tampered with the evidence. Petitioner argues that the "new" DNA results prove that he is innocent, and his confession was coerced.

The Third Circuit Court of Appeals considered what section 2241(d)(1)(A)'s term "factual predicate" means and explained "though the AEDPA does not define 'factual predicate,' we have held that '[s]ection 2244(d)(1)(D) provides a petitioner with the later accrual date than section 2244(d)(1)(A) only if *vital facts* could not have been known.'" *McAleese v. Brennan*, 483 F.3d 206, 214 (3d. Cir. 2007) (citation omitted). The Third Circuit found that the "factual predicate" of petitioner's claims constitutes the "vital facts" underlying those claims. *Id.*

Here, Petitioner confuses the facts that make up his claims, with "new" DNA evidence that support his claims. *McAleese*, 483 F.3d at 214, citing *Johnson v. McBride*, 381 F.3d 587, 589 (7th Cir. 2004) ("A desire to see more information in the hope that something will turn up differs from 'the factual predicate of [a] claim or claims' for purposes of § 2244(d)(1)(D).").

Any argument that the new DNA results from the left glove, the belt, the brown plastic bag, the hairs, or the rape kit presents a new factual predicate for Petitioner's claims fails, as it is merely additional support for a claim already raised by Petitioner. The PCR court explained in Petitioner's third PCR petition that these items are not new. (ECF No. 7-23 at 175–76.) In fact, the PCR court noted that "the defense strategy at trial was to highlight the lack of [Petitioner's] DNA found on the gloves, in the victim's car and at the crime scene in general," and defense counsel argued in his summation that the left glove lacked Petitioner's DNA. (*Id.* at 175.) Defense counsel

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noted that Petitioner's hairs were not found on the glove or the knife. (ECF No. 14-4 at 91.) The fact that hairs tested post-conviction were not a match for Petitioner is not new evidence, rather just additional support for an argument already made to the jury regarding the lack of Petitioner's hairs at the scene. Defense counsel argued to the jury at trial that there was no blood in the plastic bag. (*Id.* at 122.) Therefore, the lack of Petitioner's DNA in the plastic bag is not new evidence. The jury was informed that DNA testing of the rape kit was not done because state laboratory had reported the absence of any seminal fluid. (ECF No. 14-2 at 81.) Finally, the lack of DNA on the belt is not "new evidence" that would be the factual predicate for a new claim, rather it is simply additional support for Petitioner's position that he is not the perpetrator and law enforcement tampered with evidence. The absence of Petitioner's DNA on these items is not new evidence and does not provide a new factual predicate for a different habeas limitations start date under section 2241(d)(1)(D).

The alleged "newly discovered" DNA evidence of the victim's DNA inside the finger of the right glove is merely cumulative evidence that Petitioner is attempting to use to corroborate his argument that his confession was coerced, and he is not the owner of and did not wear the gloves. Petitioner has claimed all along that he was not the owner of the gloves and that the police planted the gloves and coerced him to testify that he brought the gloves to the victim's house. (*See generally*, ECF No. 14-4.) The DNA testing results of the right glove from prior to trial indicated that the blood matched the DNA profile of the victim, and Petitioner was excluded as a contributor. (*See* ECF No. 14-2 at 66.) Therefore, the DNA evidence before trial already excluded Petitioner as a contributor and found that blood on the right glove matches the DNA profile of the victim. Additional DNA from the victim on the right glove is cumulative of the evidence before the jury

Pet. a 20

and merely supports for the claim petitioner was already making, *i.e.*, that he was not the owner of the gloves.

Petitioner now attempts to resurrect his time-barred habeas claims by alleging the fact that the victim's DNA was found on a different portion of the right glove is newly discovered evidence which is the factual predicate for his claim. Here, since his first PCR petition filed prior to the 2007, Petitioner set out the argument that his DNA was not on the gloves, which proved they were planted and his confession was coerced, the "newly discovered" DNA evidence of the victim inside the glove is not a fact that Petitioner is using to support a new claim, rather is support for previous claim. At this juncture Petitioner would be precluded from resorting to § 2244(d)(1)(D) to reset the limitations clock.

3. Equitable Tolling

The one-year statute of limitations period under § 2244(d) is also subject to equitable tolling.

"Equitable tolling is proper only when the 'principles of equity would make [the] rigid application [of a time period] unfair.' Generally, this will occur when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.' Moreover, to be entitled to equitable tolling, '[t]he petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient." *Brown v. Shannon*, No. 01-1308, 2003 WL 1215520 at *4 (3d Cir. March 17, 2003) (citations omitted).

Equitable tolling may be appropriate where: "(1) the defendant has actively misled the plaintiff; (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Jones v. Morton*, 195 F.3d 153, 159 (3rd Cir.1999).

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In the final analysis, federal review, on an equitable basis, of an untimely habeas petition is limited to the “rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.” *Id.*

Petitioner argues that he is entitled to equitable tolling because the DNA test results upon which his habeas petition is based were not previously available to him, and they show that the prosecution used a false confession to convict Petitioner. The Court notes that Petitioner argues “actual innocence” as one of his habeas claims.¹ To the extent Petitioner is arguing that the DNA results show Petitioner is actually innocent and that is a basis for equitable tolling, Petitioner has not met his burden of proof.

In *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), the Supreme Court held that a credible claim of actual innocence may serve as an “equitable exception” that can overcome the bar of AEDPA’s one-year limitations period. However, the *McQuiggin* Court cautioned that “tenable actual-innocence gateway pleas are rare,” and a petitioner only meets the threshold requirement by “persuad[ing] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 1928. An actual innocence claim must be based on “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence [] that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). In the Third Circuit, evidence is “new” for the purposes of the *Schlup* standard only if it was not available at the time of trial and could not have been

¹ To the extent that Petitioner argues actual innocence as an independent basis for habeas relief, free-standing claims of actual innocence are not reviewable in habeas actions. A claim of actual innocence is merely a gateway-the petitioner must allege at least one separate constitutional violation. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”).

discovered earlier through the exercise of due diligence, except in situations where that evidence was not discovered due to the ineffective assistance of trial counsel. *See Houck v. Stickman*, 625 F.3d 88, 93–94 (3d Cir. 2010). In turn, when determining if a petitioner’s new evidence shows it is “more likely than not that no reasonable juror would have convicted him,” a court must consider “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006). Finally, a court “may consider how the timing of the submission [of actual innocence] and the likely credibility of the affiant[] bear on the probable reliability of that evidence.” *Schlup*, 513 U.S. at 332.

As explained above, Petitioner bases his claim of “actual innocence” on the absence of his DNA on both the right and left gloves, the brown plastic bag, the belt that was used to strangle the victim, the hairs found at the crime scene, and the rape kits. Additionally, Petitioner claims that the victim’s DNA on the inside of the right gloves proves that he is innocent, and that law enforcement tampered with the evidence. Petitioner’s argument fails for several reasons. First, as noted above, the lack of Petitioner’s DNA on the gloves, the victim’s DNA on the right glove, the lack of Petitioner’s hairs at the scene, and the lack of blood on the plastic bag were presented to the jury at trial. The PCR court found on Petitioner’s third PCR appeal “that the DNA test results of: (1) the gloves believed to be worn by the defendant, during the murder, (2) the brown plastic bag that the defendant’s bloody clothing was discovered in; (3) the belt found around the victim’s neck; and (4) swabs #81 and #82 from the victim’s rape kit, all amount to cumulative, impeachment, and contradictory evidence and would not have had a probable impact on the jury’s verdict.” (ECF No. 7-23 at 175.) This is not “new reliable evidence” that was “not presented at trial.” *Schlup*, 513 U.S. at 324.

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Second, regarding the new DNA results that the victim's DNA was found inside the right glove, this evidence is cumulative of the evidence produced at trial. The DNA available prior to trial showed that the victim's DNA was found on the outside of the right glove. Additionally, as the PCR court noted "the DNA being discovered on the inside of the right glove is the only evidence that was not presented at the time of [Petitioner's] trial. However, this evidence is consistent with [Petitioner's] statement to detectives that the victim pulled his right glove off during the struggle, which the jury heard and considered before convicting [Petitioner]." (ECF No. 7-23 at 176.)

The PCR court explained that:

The evidence at the [Petitioner's] trial included the [Petitioner's] own statement recounting the murders with specific details that were not disclosed to anyone prior to his statement. The [Petitioner's] statement included (1) how he entered the victim's apartment, (2) the rooms in which the bodies were found, (3) the areas of the victims' bodies that were stabbed, (4) the use of a belt tied around the victim's neck, (5) the fact that he attempted to hot-wire her car to flee the scene, (6) the route he took to avoid being seen covered in blood, and (7) the areas along the railroad tracks where he discarded key evidence. Virtually all of the [Petitioner's] statements were corroborated by the evidence collected by investigating officers.

In addition, the following evidence was presented at trial: (1) the [Petitioner] had cuts on his palms and knuckles that corresponded with the cuts on the glove which was believed to be used during the murder, (2) the [Petitioner] made a statement to the nurse at the Bergen County Jail stating that he cut his hand on a kitchen knife on the same date as the murder, (3) there was blood discovered on the [Petitioner's] sneaker after officers executed the search warrant at his home, and (4) brown garbage bags with yellow ties that were seized from the [Petitioner's] home, which matched the brown bag that his bloody clothing was found in.

(ECF No. 7-23 at 173.)

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Additionally, on appeal, the Appellate Division summarized the DNA evidence from Petitioner's trial that did place him at the crime scene as follows:

DNA testing established that [Petitioner] could not be ruled out as a major contributor, and the former girlfriend a minor contributor, to blood samples taken from inside her car and from his black pants. Additional items, found at the locations [Petitioner] identified, were also tested. The victim could not be ruled out as the major contributor and [Petitioner] the minor contributor, to blood found on his windbreaker and to blood stains found on a shirt in a dumpster. Additionally, [Petitioner] could not be ruled out as a contributor to the blood on the mattress and the victim's brassiere. Her boyfriend was excluded as a contributor to any samples.

(ECF No. 7-1 at 3.)

The jury was informed that Petitioner's DNA was not found on the gloves and plastic bag and Petitioner's hairs were not found at the scene. The jury was also informed that the victim's DNA was found on the right glove. The jury was informed that DNA testing of the rape kit was not done because state laboratory had reported the absence of any seminal fluid. Additionally, the jury was informed that Petitioner's could not be ruled out as a major contributor to blood samples inside the victim's car and he could not be ruled out as a contributor to the blood on the mattress and the victim's bra. (ECF No. 7-1 at 3.) Finally, DNA testing showed the victim was a minor contributor to blood samples from Petitioner's black pants and a major contributor to blood samples from Petitioner's windbreaker and shirt. (*Id.*) "To qualify for [the actual innocence] exception, the petition must present new, reliable evidence showing it is more likely than not that no reasonable juror would have voted to convict him. *Reeves v. Fayette SCI*, 897 F.3d 154, 157 (3d Cir. 2018). Considering, Petitioner's reliance on DNA results that already existed at trial, the extensive DNA evidence at trial that placed Petitioner at the scene, and Petitioner's detailed confession, he cannot show that it is more likely than not that no reasonable juror would have convicted him if they had known about the victim's DNA being on the inside of the right glove.

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Therefore, Petitioner's actual innocence argument does not qualify him for equitable tolling. Petitioner's petition for habeas relief is dismissed as time-barred.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 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 a state court proceeding 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).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, no certificate of appealability shall issue.²

V. CONCLUSION

For the reasons set forth above, Respondents' Motion is **GRANTED**, Petitioner's petition for a writ of habeas corpus (ECF No. 1) is **DENIED**, and Petitioner is **DENIED** a certificate of appealability.³ An appropriate order follows.

Date: November 15, 2023

/s/Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

² We need not order an evidentiary hearing. Congress permits evidentiary hearings for section 2254 petitions "only in a limited number of circumstances." *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000). Petitioner must show, among other things, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Petitioner does not make such a showing because his petition is time barred.

³ Petitioner's request for additional DNA testing is denied as moot.

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ORDERED Respondents' supplemental motion to dismiss (ECF No. 14) is not a Motion, but a response to the Court's Order instructing Respondents to provide supplemental documentation and has been treated as such; and it is finally

ORDERED the Clerk shall serve this Order and the accompanying Opinion upon all counsel of record electronically and shall mark this matter **CLOSED**.

/s/ *Brian R. Martinotti*
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

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SUPREME COURT OF NEW JERSEY
C-365 September Term 2021
085866

State of New Jersey,

Plaintiff-Respondent,

v.

O R D E R

Josh Pompey,

Defendant-Petitioner.

A petition for certification of the judgment in A-000600-17
having been submitted to this Court, and the Court having considered the
same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this
25th day of January, 2022.

A handwritten signature in cursive script, appearing to read "Heather J. Bate".

CLERK OF THE SUPREME COURT

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**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0600-17**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSH POMPEY,

Defendant-Appellant.

Argued February 10, 2021 – Decided May 18, 2021

Before Judges Alvarez and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 89-12-1594.

Eric V. Kleiner argued the cause for appellant (Eric V. Kleiner, attorney; Eric V. Kleiner and Rudie Weatherman, on the briefs).

John J. Scaliti, Legal Assistant, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; Jaimee Chasmer, Assistant Prosecutor, of counsel and on the brief; John J. Scaliti, on the brief).

PER CURIAM

Pa 4 Pet. a30

Defendant Josh Pompey appeals from two Law Division orders denying his petitions for post-conviction relief (PCR). We affirm.

A jury found defendant guilty of two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2) (counts one and two); four counts of felony murder, N.J.S.A. 2C:11-3(a)(3) (counts three through six); aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3) (count seven); and aggravated assault, N.J.S.A. 2C:12-1(b)(5)(a) (count eight). Defendant was first charged with capital murder, resulting in a hung jury.

The next trial, a non-capital prosecution, took place between November 5, 1997, and March 9, 1998, and defendant was convicted of all charges. After appropriate mergers, defendant was sentenced to an aggregate two life terms plus twenty-one and one-half years, with a seventy-year and nine-month parole bar. Sentence was imposed on April 3, 1998, and the judgment signed April 8, 1998. On appeal, we affirmed. State v. Pompey, No. A-5772-97 (App. Div. May 17, 2004). The Supreme Court denied certification on June 22, 2005. State v. Pompey, 184 N.J. 211 (2005).

Defendant's convictions arose from the murder of his former girlfriend and her aunt. He broke into the victims' home through a basement window and waited there for the former girlfriend's return for several hours. Defendant

Pa 5² Pet. a 31

confronted her about resuming the relationship; she became fearful and attempted to appease him to no avail. When her aunt came downstairs to inquire about the commotion, defendant, who had attempted to engage in sexual relations with his former girlfriend, stabbed them both. He unsuccessfully attempted to hotwire her car.

Defendant ran from the scene, hiding his clothing, including the gloves worn during the killing, along the way. In his confession, he directed police to the locations where the scattered clothing could be found. Cuts were observed on his left hand when he was processed at the jail, which defendant said were injuries from a kitchen knife on the day of the murders.

DNA testing established that defendant could not be ruled out as a major contributor, and the former girlfriend a minor contributor, to blood samples taken from inside her car and from his black pants. Additional items, found at the locations defendant identified, were also tested. The victim could not be ruled out as the major contributor and defendant the minor contributor, to blood found on his windbreaker and to blood stains found on a shirt in a dumpster. Additionally, defendant could not be ruled out as a contributor to the blood on the mattress and the victim's brassiere. Her boyfriend was excluded as a contributor to any samples.

Pa 6³ Pet. 932

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Defendant's pretrial Miranda¹ motion was denied. Among the grounds he raised for suppression of his statement was his limited IQ of 80. He later claimed the police bullied him, struck him, and kept him handcuffed during the interview.

Defendant filed his first PCR petition in January 2006, claiming that his experts were improperly barred from testifying as established by subsequent caselaw and news articles; the prosecutor engaged in misconduct during opening and closing statements; police tampered with evidence and conspired against him, as did the judges who presided over the case; the DNA evidence had been tampered with and was unreliable; he was wrongfully precluded from pursuing an investigation into the victim's boyfriend as a "bloody" fingerprint had been found on the utensil drawer (during the trial, the State's fingerprint expert said that although the boyfriend's fingerprint was found on the utensil drawer, it had no blood on it, and was not in a bloody area); the jury charge was erroneous; his confession was coerced and he should have been granted a Miranda rehearing after it was revealed that he had a handcuff on one arm when the stenographer transcribed his statement to police; the physical evidence against him should have been suppressed; the jury was prejudiced and engaged in misconduct; he

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

Pa 7⁴

Pet. a 33

A-0600-17

was wrongfully precluded from trying on one of two knit gloves he allegedly wore during the killing; he was wrongly denied discovery essential to his attack on the credibility of the investigating officers who testified against him; the serology log books were doctored by police and prosecutors; the prosecutor presented perjured testimony regarding photos taken of the victim's car; defense witness testimony regarding his reaction to "learning" of the victim's death was wrongfully precluded; there was judicial bias against him; and appellate counsel failed to advise him of PCR filing deadlines and was otherwise ineffective. Defendant also requested an evidentiary hearing and additional DNA testing.

The judge who heard the petition on September 28, 2007, ruled that it was time-barred, having been filed more than seven and one-half years after entry of the judgment of conviction. He considered defendant's claim of excusable neglect—based on appellate counsel's alleged failure to advise him of the time limits for filing for PCR—unavailing, as counsel had no duty to do so and no other exceptional circumstances existed. The judge also found the majority of defendant's claims to be barred under Rule 3:22-4 and 3:22-5 because either they were raised on direct appeal, or could have been raised on direct appeal, and recent caselaw and post-trial newspaper articles were not newly discovered evidence. The judge observed:

Pa 8⁵ Pet. a 34

[T]he only change between the defendant's arguments as presented today and those presented approximately ten years ago, is that the defendant has added myself and a three [j]udge Appellate [c]ourt [p]anel to the ever growing list of conspirators, which already includes the current Assignment Judge, two Superior Court [j]udges, the Bergen County Prosecutors office and the entire Hackensack Police Department. Accordingly, those arguments raised by the defendant which have already been adjudicated[,] are barred by Rule 3:22-5.

Despite finding no prima facie case had been established, the judge granted defendant's request for additional DNA testing. Defendant appealed, but requested a stay of appeal pending the new DNA results. On August 15, 2008, we dismissed defendant's appeal without prejudice, expressly authorizing him to file a new appeal after the additional DNA testing was completed.

The parties spent two years litigating which items would be submitted for additional DNA testing. Ultimately, a judge signed orders on November 19, 2009, and August 27, 2010, authorizing the testing, and in some cases the repeat testing, of: (1) the black pants; (2) the burgundy windbreaker; (3) the victim's boyfriend's red gym bag (which had been found in the trunk of the victim's car) and up to four items from the car; (4) a surgical glove; (5) the cut wires from the victim's car; (6) "[v]aginal, oral and anal swabs designated as SP 81, 82 and 83"; (7) the left and right hand gloves and defendant's sneakers (at the State's

Pa 9⁶ Pet. a 35

election); (8) the plastic bag found in the woods; (9) the victim's bra; and (10) the brown belt. After the additional testing was completed, the appeal was not reinstated.

On September 9, 2011, defendant filed a motion for a new trial based upon news articles regarding one of the officers whose work was crucial to the investigation and who testified at trial. As a result of these news articles, defendant alleged, among other things, that the officer was in the mob, a liar, and a contract killer for hire. The motion was denied on February 1, 2012, because the claims were speculative and conclusory. That judge opined that if the application was treated as a PCR petition, it was time-barred.

On March 13, 2012, defendant filed a motion in our court under the initial PCR appeal docket number, asking that the issues be consolidated with his appeal of the denial of a new trial and any issues that might arise from the ongoing DNA testing. That motion was denied on April 9, 2012, because defendant's initial appeal had been dismissed and was never reinstated.

The additional DNA testing was completed February 7, 2014. Among other things, it established again that defendant was the main contributor of one of the blood stains on the black pants, and the main contributor to another blood stain, with the victim a minor contributor. The DNA testing also revealed that

Pa 10⁷

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both the aunt and the boyfriend were excluded, and that defendant was the main contributor of the blood found on the cut wires in the victim's car.

No DNA was present on the left-hand glove. As a result, on April 13, 2015, defendant filed another petition for PCR, supported by a DNA, serology, and criminalistics expert. He sought the vacation of his convictions, further DNA testing, a new trial, or dismissal of the charges against him. Defendant claimed not only that the judge had improperly excluded his experts at trial, but he had improperly prevented him from exploring the criminality of the officers involved, as well as the status of the victim's boyfriend. In addition, defendant argued the new DNA test results indicating that only DNA belonging to the victim was found on the right glove meant that he was entirely innocent and his confession entirely false, while one of the principal officers in the investigation was "a serial mobster[.]" "a depraved monster[.]" and "[a] dirty cop[.]" who acted as a "mastermind" in framing defendant.

Defendant contended that the State's entire case rested upon him having worn the recovered gloves, and since DNA did not establish that he had, it meant that an officer engaged in unlawful conduct, including planting evidence taken from the crime scene. He further contended that his innocence was supported by the absence of semen in vaginal swabs from the victim. Defendant's expert

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Pa 11

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report stated that since defendant's DNA was not found on the right glove, that meant he did not wear it, and since no DNA traces were found on the left glove, or on the inside of the plastic bag in which he allegedly transported his clothing to hiding places, or on the belt used to choke the victim, more DNA testing should be conducted. The State opposed the application on the basis that the test results were merely cumulative to the proofs presented at the two trials, would not change the jury's verdict, and ignored the crucial fact that only defendant's blood was found on the cut wires in the victim's car.

Judge Margaret M. Foti heard oral argument, denying relief on August 29, 2017. Now on appeal, defendant raises the following points:

POINT I

EVIDENTIARY HEARINGS ARE REQUIRED BASED ON APPELLANT'S PRIMA FACIE SHOWING THAT FACTS SUPPORTING HIS PETITION FOR POST-CONVICTION RELIEF WARRANT FURTHER DEVELOPMENT AND THE MERITORIOUS DEFENSES ASSERTED INVOLVE FACTS AND EXPERT OPINIONS WHICH ARE GENERALLY OUTSIDE OF THE TRIAL AND APPELLATE RECORD.

POINT II

THE PCR COURT FAILED TO COMPREHEND THE SIGNIFICANCE OF NEWLY AVAILABLE STR DNA TEST RESULTS AND ABUSED ITS DISCRETION IN FAILING TO HOLD

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Pa 12

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EVIDENTIARY HEARINGS, PRECLUDING SCIENTIFIC EVIDENCE, AND REFUSING TO ORDER ADDITIONAL DNA TESTING.

POINT III

THE PCR COURT ABUSED ITS DISCRETION IN DENYING DISCOVERY AND A PLENARY HEARING TO FURTHER DEVELOP EVIDENCE OF THIRD-PARTY GUILT.

POINT IV

THE PCR COURT ABUSED ITS DISCRETION IN FAILING TO ORDER ADDITIONAL SCIENTIFIC TESTING.

POINT V

THE TRIAL COURT WOULD NOT HAVE PRECLUDED APPELLANT'S EXPERT AND SCIENTIFIC EVIDENCE HAD THE STR DNA EVIDENCE BEEN AVAILABLE AT THE TIME.

POINT VI

PROSECUTORIAL MISCONDUCT IN THE FORM OF BRADY VIOLATIONS, FALSE TESTIMONY THAT REMAINS UNCORRECTED TO THIS DAY, AND INTENTIONAL TAMPERING AND DESTRUCTION OF EXCULPATORY PHYSICAL EVIDENCE DENIED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

POINT VII

SUPPRESSION OF THE ALLEGED CONFESSION IS REQUIRED DUE TO VIOLATIONS OF THE

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Pa 13 Pet. a 39

FOURTH, FIFTH, SIXTH, AND FOURTEENTH
AMENDMENTS.

POINT VIII

THE PROCEDURAL BAR DOES NOT PRECLUDE
APPELLANT'S PCR CLAIMS.

POINT IX

APPELLANT ASSERTS A FREE STANDING
ACTUAL INNOCENCE CLAIM ON PCR.

I.

We address defendant's arguments by combining the issues he raises. Rule 3:22-12(a)(1)(A) provides that a first petition for PCR must be filed no more than five years after conviction unless a defendant can demonstrate excusable neglect and the reasonable probability that, if his factual assertions were true, enforcement of the time bar would result in a fundamental injustice. The rule further provides that a defendant may file a first PCR petition within one year of the recognition of a new constitutional right or of a factual predicate for relief that could not have been discovered earlier through reasonable diligence. R. 3:22-12(a)(1)(B). The trial court should relax the time bar only in exceptional circumstances and when the error complained of "played a role in the determination of guilt." State v. Mitchell, 126 N.J. 565, 580 (1992); accord

State v. Nash, 212 N.J. 518, 547 (2013); State v. Afanador, 151 N.J. 41, 52 (1997).

Defendant's asserted reason for the late filing, that appellate counsel failed to advise him of his right to seek PCR and of the applicable filing deadline, lacks merit. It is well-established that ignorance of the law does not equate to excusable neglect. State v. Murray, 315 N.J. Super. 535, 539-40 (App. Div. 1998); accord State v. Cummings, 321 N.J. Super. 154, 166-67 (App. Div. 1999) (difficulty reading and writing and defendant's ignorance of law did not excuse late filing).

In addition to defendant's failure to establish excusable neglect, many of the points raised in his petition are barred because, pursuant to Rule 3:22-5, they were previously addressed in prior appellate and trial court decisions, or could have been resolved on the direct appeal. These include: (1) the allegation the prosecutor engaged in misconduct during opening and closing statements; (2) that defendant was improperly precluded from presenting evidence that the victim's boyfriend was the actual perpetrator based in part on the presence of the victim's boyfriend's "bloody" fingerprint on the utensil drawer; (3) error in the jury charge; (4) that defendant's confession was coerced and he should have been granted a rehearing after it was "revealed" that he was handcuffed while in police

custody; (5) the physical evidence should have been suppressed; (6) the jury was prejudiced and engaged in misconduct; (7) the serology books were doctored by police and the prosecutor; (8) the prosecutor presented perjured testimony regarding photos taken of the victim's car; (9) other defense witness testimony was wrongfully precluded; (10) the DNA evidence was unreliable; and (11) the judges who presided over his prosecution were biased against him.

Defendant attempts to gain consideration of these issues a second, third, or fourth time, in part by arguing that appellate counsel was ineffective for failing to raise them. In order to establish that, pursuant to the familiar standard, defendant would have to show not only the particular manner in which counsel's performance was deficient, but also the manner in which the deficiency prejudiced his right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); State v. DiFrisco, 137 N.J. 434, 457 (1994); State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must not make bald assertions, but must allege facts sufficient to demonstrate that his or her counsel's performance was substandard. State v. Porter, 216 N.J. 343, 355 (2013); Cummings, 321 N.J. Super. at 170.

Defendant has entirely failed to do more than make bald assertions and engage in broad-ranging speculation. This simply is not enough to satisfy his

prima facie burden. Porter, 216 N.J. at 355; Cummings, 321 N.J. Super. at 170.

Many of the claims are simply factually inaccurate.

There has never been any proof, for example, that the victim's boyfriend left a bloody fingerprint on a utensil drawer. In fact, to the contrary, the only evidence in the record regarding his fingerprint on the drawer was proffered by the initial fingerprint expert, who testified it was taken from an area on which no blood was found, and the print itself had no blood.

Defendant may be unhappy with the outcome of the Miranda motion. But years of litigation have still not made his confession one that should have been suppressed.

Defendant is not entitled to an evidentiary hearing as he has not established "a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, [would] ultimately succeed on the merits." R. 3:22-10(b); Porter, 216 N.J. at 355; State v. Preciose, 129 N.J. 451, 462-64 (1992). Thus, this attack upon the judge's dismissal of his 2006 PCR petition—essentially a belated appeal—lacks merit. R. 2:11-3(e)(2).

II.

With regard to the 2015 PCR petition, Judge Foti correctly concluded that defendant had not established all of the eight conditions required for additional

DNA testing under N.J.S.A. 2A:84A-32a(a). Again, by seeking to test more items, defendant is in actuality engaging in a belated appeal of the 2007 decision.

Furthermore, as Judge Foti pointed out, the jury convicted defendant despite his argument at trial that the absence of DNA on the left glove mandated acquittal. Additional DNA testing would serve no purpose. The finding, for example, that no trace of defendant's DNA was found on the inside of the right glove is consistent with his statement to police that the victim pulled it off during the struggle. The jury heard that testimony before convicting defendant.

Defendant's claims regarding police and prosecutorial misconduct are nothing more than baseless allegations. No new trial should have been granted based on purely speculative assertions.

N.J.S.A. 84:32a(d)(5) provides in part that a trial court must deny a motion for DNA testing unless

the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial.

Under subsection (5), a defendant need not prove that the DNA results will be favorable; rather, he or she need only establish a reasonable probability that if the DNA results are favorable to him or her, a new trial would be granted.

State v. Peterson, 364 N.J. Super. 387, 396-97 (App. Div. 2003). A defendant is entitled to a new trial where "the State's proofs are weak, when the record supports at least reasonable doubt of guilt, and when there exists a way to establish guilt or innocence once and for all." State v. Reldan, 373 N.J. Super. 396, 402 (App. Div. 2004) (quoting State v. Thomas, 245 N.J. Super. 428, 436 (App. Div. 1991)).

Defendant claims the new DNA test results prove his innocence—a claim that does not require much discussion. R. 2:11-3(e)(2). The new DNA results were inconsequential. Their lack of significance is highlighted by the findings regarding the cut wires and black pants—which corroborated, not refuted, his confession. Thus, his motion for more DNA testing was properly denied.

III.

Defendant does not show excusable neglect or any fundamental unfairness that would impact application of the rules that bar further consideration. Appellate counsel was not ineffective because the issues defendant contends he mishandled had no merit from inception. The deficiencies defendant now alleges fail to meet either the performance or prejudice prongs of Strickland.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

JOSEPH H. ORLANDO
CLERK

JOHN K. GRANT
DEPUTY CLERK

MARIE C. HANLEY
CHIEF COUNSEL



RICHARD J. HUGHES JUSTICE
COMPLEX
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TRENTON, NEW JERSEY 08625-0006
(609) 815-2950

DATE: June 03, 2021

TO: ALL COUNSEL OF RECORD

TITLE: STATE OF NEW JERSEY V. JOSH POMPEY
DOCKET NO.: A-0600-17
OPINION FILED: 05/18/2021

Dear Counsel:

The opinion filed in the above matter was found to need typographical, grammatical or substantive change(s). As a consequence, at the direction of the court, please substitute the enclosed copy of the opinion. If you have any questions, please contact the Clerk's Office at 609-815-2950.

Page 4, line 12, the State's DNA expert should be the State's fingerprint expert

Page 14, line 6, the initial DNA expert should be the initial fingerprint expert

JOSEPH H. ORLANDO
CLERK

Enclosure(s)

cc: WestGroup
Lexis/Nexis

Pa 21

Ret. a 47

FILED

AUG 29 2017

MARGARET M. POTI, P.J.S.C.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL
BERGEN COUNTY**

STATE OF NEW JERSEY

v.

INDICTMENT #: 89-12-01594-I

JOSH POMPEY
Defendant

**ORDER ON POST-CONVICTION APPLICATIONS
ON INDICTABLE OFFENSES**

This matter being opened on the application of defendant, **JOSH POMPEY**, by:

☒ Petition for Post-Conviction Relief determined to be defendant's

☐ first petition

☒ second or subsequent petition

☐ Motion for Change or Reduction of Sentence pursuant to *Rule 3:21-10*

☐ Motion for _____ and Motion for Assignment of Counsel, filed pro se

_____, Assistant Deputy Public Defender

_____, Retained or Designated Counsel (circle one) or

☐ The court having concluded that there was no good cause entitling the assignment of counsel on the application, and the State having been represented by:

_____, Assistant Prosecutor, and

☒ There having been proceedings conducted on the record on **JULY 17th, 2017**, or

☐ The matter having been disposed of on the papers;

It is on this **29th day of AUGUST, 2017**, ORDERED THAT DEFENDANT'S APPLICATION IS HEREBY:

☐ Granted

☒ Denied.

☐ Other

For the reasons:

Expressed in the court's written opinion on **AUGUST 29, 2017**.

Expressed orally on the record on _____

MARGARET M. POTI, P.J. Cr.

Pet. a48

Da 2544

FILED

AUG 29 2017

MARGARET M. FOTI, P.J.S.C.

Opinion Prepared by the Court

STATE OF NEW JERSEY

vs.

JOSH POMPEY

Defendant.

SUPERIOR COURT OF NEW JERSEY
Law Division - Criminal Part
County of Bergen

Indictment No.: 89-12-01594-I

Criminal Action

OPINION

Assistant Prosecutors James V. Santulli and John J. Scaliti, for
the State of New Jersey

Eric V. Kleiner, Esq., for defendant Josh Pompey

Heard: July 17, 2017

Decided: August 29, 2017

Foti, P.J.Cr.

I. Introduction and Procedural History

The matter comes before the court by way of the defendant's third application for post-conviction relief (PCR).

On December 4, 1989, a Bergen County grand jury returned indictment number 89-12-01594-I charging the defendant with two counts of knowing or purposeful murder contrary to N.J.S.A. 2C:11-3(1) and (2); four counts of felony murder contrary to N.J.S.A. 2C:11-3a(3); one count of aggravated sexual assault contrary to N.J.S.A. 2C:14-2a(3); and one count of aggravated assault contrary to N.J.S.A. 2C:12-1b(5)(a).

The defendant's initial trial, during which the State sought the death penalty, resulted in a mistrial due to a deadlocked jury. Following the mistrial, the State again sought to try defendant on the charges, but did not seek the death penalty. The retrial was scheduled before the Honorable William C. Meehan, J.S.C. On March

9, 1998, following the retrial, the petitioner was found guilty on all counts of the indictment. On April 3, 1998, Judge Meehan sentenced the defendant to an aggregate term of two life sentences plus 21 ½ years, with a 7 year and 9 month period of parole ineligibility. On May 17, 2004 the Appellate Division affirmed the defendant's conviction. The New Jersey Supreme Court denied the defendant's Petition for Certification on June 22, 2005. Counsel filed a PCR on the defendant's behalf which was denied by Judge Meehan on September 28, 2007 after conducting two days of proceedings. Judge Meehan did, however, grant defendant's request for post-conviction DNA testing.

In November 2009, the Honorable Harry G. Carroll, P.J.Cr. heard testimony from Joseph R. Petersack, the Director of the New Jersey State DNA Laboratory and heard the arguments of counsel. Following the hearing, Judge Carroll entered an order pursuant to N.J.S.A. 2A:84A-32a allowing the petitioner to test certain items of evidence, which were used at his trial, for DNA. Following Judge Carroll's order, the defendant filed a second PCR before the Honorable Liliana DeAvila-Silebi, P.J.Cr. In a written opinion filed on February 1, 2012, Judge DeAvila-Silebi denied the defendant's petition on the grounds that none of the evidence presented by the defendant in the second PCR, which included news articles about alleged misconduct by the police officers involved in the investigation of the defendant, warranted further evidentiary hearings. In addition, Judge DeAvila-Silebi held that the newly discovered evidence proffered by the defense did not warrant a new trial.

Following Judge DeAvila-Silebi's denial of his second PCR, the defendant received the DNA results on the items ordered to be tested under Judge Carroll's November 2009 order. After counsel's review of the results, he felt that the results could exonerate the defendant and sought the financial assistance of the Office of

the Public Defender to hire DNA expert Marc Taylor to prepare a report and testify on the defendant's behalf. After his request was denied, counsel for defendant filed a motion to compel the Office of the Public Defender to provide ancillary services for defendant, specifically, to fund the defendant's DNA expert. The motion was heard by the Honorable Susan J. Steele, P.J.Cr. on February 23, 2016. In a written decision filed on May 10, 2016, Judge Steele granted the defendant's motion and ordered the Office of the Public Defender to provide defendant with the necessary funds to have DNA expert Marc Taylor review and prepare a report as to the results of the post-conviction DNA testing. Taylor rendered a report on March 18, 2017, the contents of which will be discussed below.

The defendant now asks this court to (1) vacate his convictions; and/or (2) order further post-conviction DNA testing and additional testing if necessary; and/or (3) grant his request for a new trial or in the alternative dismiss the charges against him with prejudice.

II. Facts of the Case

Based upon the briefs and exhibits submitted by counsel in this matter, and the testimony adduced at the defendant's trial, the court discerns the following facts:

A. Scene of the Murder

On September 5, 1989, the bodies of Audrey Robinson and her aunt Madeline Mitchell were discovered in Ms. Robinson's Hackensack apartment. The medical examiner determined that the cause of death for both victims was multiple stab wounds. When Audrey Robinson's body was discovered in her bedroom, she was wearing only a pair of socks with a belt tied around her neck and had 30 stab wounds to her head and neck. The fact that Ms. Robinson was discovered without any clothing led detectives to believe that there had been a sexual assault prior to her murder. Similarly,

Ms. Mitchell's body was discovered in the living room and had a single stab wound below her left eye and 12 stab wounds to her chest. Medical examiners also discovered numerous contusions to both victims' faces which were consistent with being struck by closed fists.

Detectives from the Bergen County Prosecutor's Office and Hackensack Police Department conducted the crime scene investigation. The detectives found that a door leading from the basement to the kitchen had been shattered, and also noticed a basement window that appeared to be forcibly opened. Throughout the entire crime scene, detectives observed bloody hand prints that did not have any fingerprints leading them to conclude that the suspect wore gloves at the time of the murders. In addition, detectives found a bloody knife in Ms. Robinson's bedroom. The bedroom was in a state of disarray demonstrating that there had been a struggle. As with the bloody handprints, detectives found no fingerprints on the bloody knife.

As detectives searched Ms. Robinson's vehicle, which was parked in her driveway, they discovered that somebody had attempted to hot-wire it. In addition, the interior of the victim's vehicle contained a large amount of blood, which led detectives to believe that the suspect may have been injured by the knife used during the commission of the murders. Much like the inside of the victim's home, detectives found bloody hand prints on the vehicle but no fingerprints. Due to the similar nature of the hand impressions, detectives believed that the same person who left the bloody hand prints inside the victim's apartment, attempted to hot-wire the victim's vehicle to flee the scene of the murders.

B. Investigation of Suspects

After ruling out two initial suspects, detectives went to the defendant's residence at 227 Central Avenue in Hackensack to interview him on September 6, 1989. When they arrived, the

defendant's brother advised the detectives that he was not home. The detectives then contacted Larry Holmes, a professional boxer, with whom the defendant trained. Mr. Holmes told detectives that he hadn't seen the defendant in a few days, but was able to provide them with a phone number where he could be reached. Later that evening, detectives returned to the defendant's residence to speak with his mother. The detectives asked the defendant's mother to have him contact the police when he arrived home.

The next day, September 7, 1989, Detective Michael Mordaga of the Hackensack Police Department observed the defendant walking along train tracks in Maywood. Detective Mordaga, who was off-duty at the time, turned his vehicle around and made eye contact with the defendant. Upon seeing Detective Mordaga, the defendant turned and walked away in the opposite direction and eventually ran through yards in an apparent attempt to evade police. Eventually, Detective Mordaga called the Maywood Police for backup and apprehended the defendant. While placing the defendant under arrest, Detective Mordaga observed cuts on the defendant's knuckles and palms, which appeared to be knife wounds.

C. Defendant's Statement¹

Once the defendant was transported to police headquarters, detectives provided him with a Miranda rights form which the defendant signed, indicating that he understood and voluntarily waived his rights. Initially, the defendant maintained that he had nothing to do with the murders and stated that he had been home all day on September 5, 1989. However, after further questioning, the defendant gave a detailed statement recounting the murders of Audrey Robinson and Madeline Mitchell and the disposal of key evidence.

¹ PCR counsel maintains that the defendant's entire statement was coerced and/or fabricated.

Specifically, the defendant admitted that he went to the victim's home on September 5, 1989, and that he wore his mother's gloves because he did not want to leave any fingerprints. The defendant stated that he pried open a basement window to gain access to the victim's home to wait until she got home so he could talk her into rekindling their past relationship. At around 1:30 p.m. his ex-girlfriend, Ms. Robinson, pulled into the driveway and entered her first floor apartment. She left the apartment, but returned again around 3:30 p.m., and at that time discovered the defendant in her apartment.

The defendant told detectives that Ms. Robinson tried to get him to leave, but he pushed her toward her bedroom. After exchanging words with Ms. Robinson, the defendant stated that he began to choke her and asked her to have sexual intercourse. After rejecting his advances, the defendant claimed that Ms. Robinson eventually got undressed due to his "persuasiveness" and he proceeded to have intercourse with her. The defendant claimed he became angry when he could not perform sexually due to Ms. Robinson's resistance. He then began to choke her again and a struggle ensued. During the struggle, the defendant stated that Ms. Robinson pulled the glove off of his right hand. Importantly, the defendant told officers that he wrapped a belt around Ms. Robinson's neck in an attempt to make her pass out and quiet her down.²

Upon hearing the struggle, the victim's aunt, Ms. Mitchell, came downstairs. When she saw the defendant, she attempted to run back to her upstairs apartment to call the police. The defendant ran after her and grabbed her leg as she was running up the stairs, dragging her back into Ms. Robinson's living room. At that time, the defendant punched Ms. Mitchell in the face repeatedly. After

² This fact was not disclosed to the defendant prior to his statement and accurately describes the way Ms. Robinson's body was discovered by officers.

striking Ms. Mitchell, the defendant stated that he saw Ms. Robinson moving and ran to the kitchen to get a knife. The defendant then proceeded to stab Ms. Robinson repeatedly in the chest. The defendant specifically told officers that as he was stabbing Ms. Robinson, his hand slipped off of the knife handle, causing him to cut his hand. After stabbing Ms. Robinson numerous times, the defendant saw Ms. Mitchell attempting to stand up in the living room. According to the defendant, he went to the kitchen and took a smaller knife which he used to stab Ms. Mitchell.

D. Items Recovered After Defendant's Statement

During the defendant's statement, he told detectives that after committing the murders, he left Ms. Robinson's apartment and attempted to hot-wire her vehicle which was parked in the driveway. When he was unable to start it, he fled the scene, walking along the railroad tracks so that nobody would see him covered in blood. The defendant stated that he took money from Ms. Robinson's purse before discarding it, along with the knife used to stab Ms. Mitchell, in a dumpster. Once the defendant returned home, he removed the bloody clothing and returned to the railroad tracks where he hid the clothing under old tires next to the tracks. After discarding the bloody clothes, the defendant returned home to wash the blood off of his sneakers.

When detectives received this information, they advised other officers to search for the discarded evidence at the locations described with great specificity by the defendant, in the vicinity of Second Street in Hackensack. The detectives searched the dumpster that the defendant described, and discovered a white short-sleeve shirt which was covered in blood. The officers then proceeded to search the area for the rest of the clothing that the defendant claimed to have discarded under old tires. After searching the area to no avail, the officers requested the assistance of a canine to locate the evidence. Approximately half

an hour later, the canine located a brown plastic bag with yellow pull ties which contained a pair of dark pants, and a maroon jacket, both of which were also covered in blood. Notably, these items were discovered under old tires in a wooded area near the railroad tracks, exactly as the defendant had described to detectives during his statement. In addition, officers discovered a left-handed knit glove which was described as having cut marks and what appeared to be blood stains. When the glove was discovered, it was extremely damp and seemed to have been sitting in stagnant water.

After securing the items discovered in the dumpster and next to the railroad tracks, the officers secured and executed a search warrant at the defendant's home. Upon searching the defendant's home, officers discovered brown plastic garbage bags with yellow pull ties, matching the bag in which the bloody clothing was found. In addition, officers seized a pair of sneakers from the defendant's home which subsequently tested positive for blood. Forensic analysis of the items retrieved from the dumpster and railroad tracks revealed transfer fibers, linking those articles of clothing to the victim's home and car.

E. Defendant's Statements for Medical Treatment

After the defendant's arrest, he was seen by the intake nurse at the Bergen County Jail, Margaret Neely, L.P.N. Upon examining the defendant, Ms. Neely noticed cuts on his left hand. According to Ms. Neely's testimony, the cuts appeared to be 24 to 48 hours old. Ms. Neely's report indicated that the defendant stated that he cut his hand on a kitchen knife on September 5, 1989, the day of the victims' murders.

III. Petitioner's Arguments

At oral argument and in his submissions, PCR counsel seeks the following relief: (1) limited additional testing of certain items on an expedited basis; (2) a reversal of the convictions;

(3) a new trial; (4) to have defendant's innocence arguments considered; and (5) to hold evidentiary hearings. Counsel sets forth the following arguments in support of the defendant's petition.

A. Items Sought to be Tested

Petitioner now seeks to have four additional items of evidence tested for blood and/or DNA. The items include the following: (1) the contents of Eddie Hoffman's gym bag found in the trunk of the victim's car³; (2) the fingerprint lifted from the drawer where the murder weapon was retrieved; (3) Audrey Robinson's rape kit swab #84; and (4) the latex gloves found at the crime scene (S-133).

i. Eddie Hoffman's Gym Bag

PCR counsel argues that the gym bag belonging to the initial suspect, Eddie Hoffman, and its contents, requires further testing⁴ to establish third-party guilt. According to PCR counsel, the record indicates Hoffman was present at the victim's house around the time of her death. In 2011, the New Jersey State Police DNA lab conducted a presumptive blood test of the "stained items" from Hoffman's gym bag, which was discovered in Audrey Robinson's vehicle. The results came back negative for blood. However, the defense now seeks to have additional items tested utilizing more sensitive blood and DNA testing because the blood would now be degraded due to the amount of time since the items were recovered. PCR counsel submits that if either of the victims' blood or DNA is present in Eddie Hoffman's gym bag, that result would substantiate that Hoffman lied about his involvement at the crime scene. PCR

³ Eddie Hoffman was Audrey Robinson's boyfriend at the time of the murder.

⁴ By Order dated November 19, 2009, Judge Carroll allowed PCR counsel to test Eddie Hoffman's gym bag and up to 3 items contained therein. PCR counsel now seeks to test additional items from the gym bag after the results of the initial tests came back negative for blood.

counsel urges that this would reveal powerful evidence, connecting Eddie Hoffman as the third-party suspect to the murders.

ii. Fingerprint Found on Drawer

PCR counsel requests that the fingerprint, which was lifted from the drawer where the murder weapon was retrieved (and confirmed to be that of Eddie Hoffman) be tested to find whether or not it contains blood and/or DNA that is material to this matter. The defense posits that if the results conclude Hoffman's fingerprint was made in and/or on blood, then it would inculcate him, and exonerate the defendant.

iii. Rape Kit Swab #84

PCR counsel also claims that the State unilaterally decided not to send rape kit swab #84 to the State Police laboratory for testing. PCR counsel insists that Judge Carroll ordered all evidence to be tested, yet the State decided not to send swab #84 for DNA testing.⁵ This swab, which was the only one with a presumptively positive test, was never tested. PCR counsel claims that those results could have exculpated the defendant. He further suggests that if the defendant's DNA is not found in the victim's rape kit, he could not have committed these crimes. Accordingly, he seeks to have swab #84 sent for the more sophisticated, STR/DNA testing.

iv. Latex Gloves

Finally, PCR counsel argues that the latex gloves (S-133) discovered on Audrey Robinson's porch, require testing for DNA, blood, or fingerprints, to determine the owner/wearer. Since the defense theory was that these gloves may have been worn by the person responsible for these murders, PCR counsel submits that they should undergo testing to determine the possible presence of

⁵ Judge Carroll's November 19, 2009 Order explicitly states that Swabs 81, 82, and 83 must be submitted for re-testing, but the Order did not specify Swab 84.

blood, and the interior should be tested for STR/DNA, and fingerprints to determine the actual owner/wearer.

B. DNA Results - Marc Taylor's Report

PCR counsel argues that the results of the DNA tests prove that the defendant made a false confession. In addition, PCR counsel suggests that the gloves in question (S-57 and S-109) may have been manipulated by Detective Michael Mordaga of the Hackensack Police Department, based upon the discovery of gloves both at the initial crime scene and in a tertiary location two days later. PCR counsel posits that the evidence was manipulated by Detective Mordaga in an attempt to corroborate the defendant's false confession. Counsel submits the following arguments based upon the results of the DNA tests, and the report prepared by defense expert Marc Taylor:

i. Right and Left Gloves

The defense expert, Marc Taylor, concluded that the victim, Audrey Robinson, was the owner/wearer of the right glove that was allegedly used by defendant during the commission of the murders, and further concluded that there was no DNA found on the left glove at all. According to PCR counsel, the fact that none of the defendant's DNA was found on the inside of either of the gloves establishes that (1) the defendant's confession was false since he could not have worn those gloves during the murder without leaving his DNA on them; and (2) that detectives planted and tampered with evidence, by moving the glove from the crime scene to the location where it was allegedly discovered, in an attempt to "validate" the defendant's confession.

ii. Brown Plastic Bag

PCR counsel also points to defense expert Marc Taylor's conclusion that there was no detectable blood on the inside of the brown plastic bag that the defendant was found to have transported his bloody clothing in. According to PCR counsel, this fact also

shows that the defendant's confession was false. At the time the defendant gave his statement to Hackensack detectives, he stated that he placed his bloody clothing in a brown plastic bag and walked along the train tracks near the victim's home in an effort to conceal the evidence and ensure that nobody saw him.

iii. DNA from Victim's Belt

Counsel further argues that the results of the DNA test of the belt found wrapped around the victim's neck indicated that Ms. Robinson was the only DNA contributor. According to PCR counsel, these results disprove the defendant's statement that he handled the belt while attempting to strangle Ms. Robinson and keep her quiet when he heard her aunt, Ms. Mitchell, coming downstairs. PCR counsel argues that since the defendant's DNA was not on the belt, his statement was clearly false, and that he should therefore be entitled to either an evidentiary hearing or a new trial.

iv. Swabs #81 and #82 from Rape Kit

Finally, PCR counsel argues that the swabs from the victim's rape kit (swab #81 and swab #82) excluded the defendant as a contributor. Specifically, counsel refers to Taylor's report in which he asserts that "even without ejaculation it is possible to detect DNA from a male if he penetrated a woman's vagina or anus." PCR counsel maintains that the results of the two DNA swabs amount to newly discovered exculpatory evidence which warrants a new trial. However, PCR counsel maintains that swab #84 should be tested as it may contain the DNA of a third-party which would exculpate the defendant.

IV. State's Arguments

A. State's Opposition to Additional Testing

At oral argument, and in its submission, the State argues that the petitioner's request for further testing should be denied. It is the State's position that all items that should have been

tested in this case have already been tested, and urges this court to deny PCR counsel's request for further testing.

i. Eddie Hoffman's Gym Bag

The State makes it clear that the contents of Eddie Hoffman's stained gym bag, which were specifically selected by PCR counsel at his request, were already tested for blood and DNA all of which came back negative for blood. The State argues that the re-tested items from Eddie Hoffman's gym bag did not change the fact that the defendant remains the only individual responsible for these crimes. According to the State, PCR counsel already had the opportunity to request the testing of items from Eddie Hoffman's gym bag. Therefore, the State submits the defendant should not be permitted to continue to test items simply because he is dissatisfied with the results of the last series of DNA tests.

ii. Fingerprint Found on Drawer

The State also argues that the defendant is not entitled to further tests of the fingerprint found on a drawer at the murder scene. At the defendant's trial, Judge Meehan noted that the defense expert report did not reflect that the fingerprint in question was made with blood or in blood. Moreover, the State asserts that its fingerprint expert, Kyra Deegan, specifically testified at the defendant's trial that the fingerprint did not contain blood. In addition, the State argues that although Judge Carroll granted permission for future testing to be conducted on the fingerprint (if necessary), there are no new results to warrant the testing. The fingerprint was located on the western part of the drawer, away from the blood, and no contrary information has been presented. For those reasons, the State argues that the defendant is not entitled to further testing of the fingerprint.

iii. Rape Kit Swab #84

The State submits that it never sent swab #84 to the NJSP DNA lab for testing because Judge Carroll did not order them to do so.

In addition, the State argues that the DNA results from swabs #81 and #82 indicated that the defendant was not a contributor. However, as the State points out, the defendant told police in his statement that he was not able to ejaculate when he penetrated Ms. Robinson. This fact makes it significantly less likely that the rape kit would detect a DNA sample.⁶ Finally, as the State informed PCR counsel, swab #84 is redundant and would not likely contain any DNA evidence differing from samples #81 and #82.

iv. Latex Gloves

The State submits that DNA and fingerprint testing of the latex gloves would not be of any evidentiary value. The latex gloves found on the victim's porch were consistent with the type of gloves worn by first responders. Indeed, there was testimony adduced at the defendant's trial indicating that detectives and other emergency responders wear the exact type of gloves that were left at the crime scene, likely during the course of the investigation.

B. State's Rebuttal to Marc Taylor's Report

The State also maintains that the outcome of the DNA tests, and the conclusions of defense expert Marc Taylor, are not the type of evidence that would have changed the jury's previous verdict.

i. Right and Left Gloves

The State asserts that the lack of DNA on the left glove is unsurprising, as various tests have been performed on the glove which likely would have degraded any remaining DNA. Additionally, the State argues that PCR counsel ignores several factors which provide an explanation as to why the defendant's DNA was not found on the glove including: (1) DNA is not always left behind on

⁶ The State concedes that it is possible to detect DNA without ejaculation, but also notes that without ejaculation the chances of detecting DNA is significantly less likely.

evidence; (2) degradation may have occurred based upon the wet conditions where the glove was found and the amount of time between the discovery of the glove and the DNA testing; and (3) the fact that critical portions of the left glove were exhausted by earlier testing.

Finally, the State points out that the cuts on the defendant's hands matched up with the cuts on the gloves. When the defendant was interviewed by the nurse at the Bergen County Jail, he explained that he cut his hand on a kitchen knife, which also corroborates the source of the cuts on the glove. In the defendant's confession, he stated that during the tussle with Audrey Robinson, she ripped the glove off of his right hand. Thus, it is not unusual that the victim's DNA was discovered on the glove in question.

ii. Brown Plastic Bag

The State argues that the mere fact that no blood was found on the inside of the brown plastic bag does not render the defendant's confession false, nor does it amount to evidence requiring a new trial. Specifically, the State submits that the manner in which the defendant handled his bloody clothes that he placed in the bag, the amount of blood on the clothing, and the way the defendant folded the clothing when putting it in the bag all explain why no blood was discovered on the brown plastic bag that was recovered after the defendant told Hackensack detectives where he disposed of it.

iii. DNA from Victim's Belt

The State argues that defense expert Marc Taylor's conclusion that the lack of defendant's DNA on the belt used to strangle Audrey Robinson "gives no support to [defendant's] confession" is without merit. The State points out that Marc Taylor fails to conclude that any such evidence would remain on the belt over 20 years after it was collected, and submits that the lack of

defendant's DNA on the belt is not "newly discovered evidence" that requires a new trial.

iv. Swabs #81 and #82 from Rape Kit

As noted above, the State concedes that the DNA results from swabs #81 and #82 indicated that the defendant was not a contributor. However, as the State also points out, the defendant told police in his statement that he was not able to ejaculate when he penetrated Ms. Robinson. According to the State, this fact makes it significantly less likely that the rape kit would detect a DNA sample. Additionally, the results of the tests on swabs #81 and #82 do not point to a third-party contributor exculpating the defendant.

v. Results Not Discussed in Marc Taylor's Reports

Most persuasively, the State sheds light on the DNA results that defendant's DNA expert did not include in his report. First, the State points out that the Black Pants which were found near the railroad tracks, contained a mixture of two DNA contributors. The major contributor of DNA was that of defendant, and the victim, Audrey Robinson could not be excluded as the minor contributor. Second, the defendant's DNA was discovered on the cut wires which were torn out of the victim's vehicle in an attempt to hot-wire it. Eddie Hoffman, Madeline Mitchell, and Audrey Robinson were all excluded as possible contributors to this specimen.⁷

V. Law on Post-Conviction Relief

R. 3:22-1 provides: "Any person convicted of a crime may... file with the criminal division manager's office of the county in which the conviction took place a petition for post-conviction relief." R. 3:22-2 provides four grounds for post-conviction relief: (a) "substantial denial in the conviction proceedings" of

⁷ The failure of defense expert Marc Taylor to address these DNA test results, which are not favorable to the defendant, casts doubt upon the credibility of the conclusions in his report.

a defendant's state or federal constitutional rights; (b) a sentencing court's lack of jurisdiction; (c) an unlawful sentence; and (d) any habeas corpus, common-law, or statutory grounds for a collateral attack. (emphasis added). A defendant must establish the right to such relief by a preponderance of the credible evidence. State v. Preclose, 129 N.J. 451, 459 (1992) (citing R. 3:22-2).

As discussed above, defendant seeks the following relief: (1) limited additional testing of certain items on an expedited basis; (2) a reversal of the convictions and a new trial; (3) to have defendant's innocence arguments considered; and (4) to hold evidentiary hearings. For the reasons that follow, the defendant's petition for post-conviction relief is **DENIED** in its entirety.

A. Additional Post-Conviction DNA Testing

PCR counsel seeks additional testing on items of evidence from the defendant's trial on an expedited basis.

i. Law

Under certain circumstances, a defendant is entitled to file a motion for post-conviction DNA testing of evidence if the defendant can establish all of the statutory requirements. N.J.S.A. 2A:84A-32a(a). Under the statute, the court is granted with the discretion to order a hearing on the defendant's motion. N.J.S.A. 2A:84A-32a(b). There are eight specific conditions that a defendant must establish to be entitled to post-conviction DNA testing. N.J.S.A. 2A:84A-32a(d) provides:

The court shall not grant the motion for DNA testing unless, after conducting a hearing, it determines that all of the following have been established:

(1) the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion;

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) the identity of the defendant was a significant issue in the case;

(4) the eligible person has made a prima facie showing that the evidence sought to be tested is material to the issue of the eligible person's identity as the offender;

(5) the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial;

(6) the evidence sought to be tested meets either of the following conditions:

(a) it was not tested previously;

(b) it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results;

(7) the testing requested employs a method generally accepted within the relevant scientific community; and

(8) the motion is not made solely for the purpose of delay.

[Emphasis added.]

Under subsection (5), a defendant need not prove the DNA results will be favorable, rather it must only be established that there

is a reasonable probability that a new trial would be granted if the DNA results are favorable to the defendant. State v. Peterson, 364 N.J. Super. 387 (App. Div. 2003). However, subsection (5) makes it clear that a judge considering a post-conviction motion for DNA testing has the authority to review any evidence whether or not it was introduced at trial. State v. Reldan, 373 N.J. Super. 396 (App. Div. 2004). A new trial would only be granted where "the State's proofs are weak, when the record supports at least reasonable doubt of guilt, and when there exists a way to establish guilt or innocence once and for all." Ibid. (quoting State v. Thomas, 245 N.J. Super. 428, 436 (App. Div. 1991)).

In Reldan, our Appellate Division reviewed a trial court's denial of a petitioner's post-conviction motion for DNA testing. The Appellate panel affirmed the denial of defendant's motion because the trial judge properly based his decision on the overwhelming evidence of defendant's guilt that was presented at trial, as well as evidence not presented at trial, when determining that the defendant did not meet the requirements of subsection (5). Specifically, the Appellate panel concluded that the trial judge correctly found that it was not reasonably probable that a new trial would be granted because the evidence of the defendant's guilt made it unlikely to change the jury verdict.

Similarly, in the present case, the defendant has not satisfied the requirements of subsection (5) because the evidence that was presented at his trial overwhelmingly established that he was responsible for the two murders, and the results of any further testing, even if favorable to the defendant, would not be likely to change the jury verdict. For that reason, even assuming *arguendo* that the defendant was able to establish the remaining requirements at a hearing, further post-conviction DNA testing is not warranted in this case.

ii. Analysis

The evidence at the defendant's trial included the defendant's own statement recounting the murders with specific details that were not disclosed to anyone prior to his statement. The defendant's statement included (1) how he entered the victim's apartment, (2) the rooms in which the bodies were found, (3) the areas of the victims' bodies that were stabbed, (4) the use of a belt tied around the victim's neck, (5) the fact that he attempted to hot-wire her car to flee the scene, (6) the route he took to avoid being seen covered in blood, and (7) the areas along the railroad tracks where he discarded key evidence. Virtually all of the defendant's statements were corroborated by the evidence collected by investigating officers.

In addition, the following evidence was presented at trial: (1) the defendant had cuts on his palms and knuckles that corresponded with the cuts on the glove which was believed to be used during the murder, (2) the defendant made a statement to the nurse at the Bergen County Jail stating that he cut his hand on a kitchen knife on the same date as the murder, (3) there was blood discovered on the defendant's sneaker after officers executed the search warrant at his home, and (4) brown garbage bags with yellow ties that were seized from the defendant's home, which matched the brown bag that his bloody clothing was found in.

Simply stated, the abundance of evidence presented at trial, pointing to the defendant's guilt, cannot be ignored.

iii. Decision

There was more than sufficient evidence in the trial record to support the defendant's conviction. The defense argued vehemently at trial that the lack of defendant's DNA required that he be acquitted. Nevertheless, the jury found that the State had proven the defendant's guilt beyond a reasonable doubt and convicted him. Even if the DNA tests that the defendant now seeks

were favorable to his case, there is no reasonable probability that those test results would change the change the jury's verdict nor would they result in a new trial.

Accordingly, the court finds that the defendant has not satisfied the requirements of N.J.S.A. 2A:84A-32a(d)(5) and his request for further post-conviction DNA tests and/or a hearing on those issues is hereby **DENIED.**^{*}

B. New Trial Based upon Newly Discovered Evidence

PCR counsel also submits that the results of the DNA tests require that defendant be granted a new trial.

i. Law

To be entitled to a new trial based on newly discovered evidence, a defendant must show that the new evidence is (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted. State v. Carter, 85 N.J. 300, 314 (1981). With regard to prong one, material evidence is any evidence that would "have some bearing on the claims being advanced." State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1991). Prong three may be satisfied if the newly discovered evidence would have the probable effect of raising a reasonable doubt as to the defendant's guilt. Id. at 535.

However, our courts have consistently recognized that all three prongs of the Carter test must be met before the evidence can be said to justify a new trial. State v. Engle, 249 N.J. Super. 336 (App. Div. 1991). The failure of a defendant to satisfy any

^{*} The court notes that the items of evidence, on which counsel now seeks further post-conviction DNA tests, were available to be tested at the time of defendant's first motion for post-conviction DNA testing in 2007 and his second motion in 2009. Only now, after receiving the results of the prior DNA tests does PCR counsel seek additional testing.

one of the three prerequisites of newly discovered evidence is sufficient to warrant denial of a defendant's request for new trial. State v. Johnson, 34 N.J. 212, 223 (1961).

ii. Analysis

In the present case, the DNA test results of: (1) the gloves believed to be worn by the defendant during the murder, (2) the brown plastic bag that the defendant's bloody clothing was discovered in; (3) the belt found around the victim's neck; and (4) swabs #81 and #82 from the victim's rape kit, all amount to cumulative, impeachment, and contradictory evidence and would not have had a probable impact on the jury's verdict. Accordingly, defendant has not satisfied prong one nor prong three of the Carter test.

Determining whether evidence is merely cumulative, impeaching, or contradictory, and, therefore, insufficient to justify a new trial requires an evaluation of the probable impact such evidence would have on a jury verdict. Therefore, the focus properly turns to prong three of the Carter test, namely, whether the evidence is "of the sort that would probably change the jury's verdict if a new trial were granted." State v. Ways, 180 N.J. 171 (2004).

The transcripts show that the defense strategy at trial was to highlight the lack of defendant's DNA found on the gloves, in the victim's car and at the crime scene in general. As the State points out, defense counsel repeatedly argued to the jury, including in his summation, that the lack of the defendant's DNA at the crime scene, or on the left glove, required that he be acquitted. Despite defense counsel's efforts to call the integrity of the investigation into question, the jury was not persuaded and convicted the defendant of murder. The results of the new tests do not bring forth any substantially new evidence that was not submitted to the jury at trial. Indeed, the victim's DNA being

discovered on the inside of the right glove is the only evidence that was not presented at the time of the defendant's trial. However, this evidence is consistent with the defendant's statement to detectives that the victim pulled his right glove off during the struggle, which the jury heard and considered before convicting the defendant.

The new evidence that PCR counsel relies upon as the basis of his request for a new trial amounts to impeachment evidence. Claims of manufactured and planted evidence, as well as police misconduct, are woven into the entirety of PCR counsel's submission and were set forth on the record at oral argument on July 17, 2017. The crux of PCR counsel's argument is that the lack of defendant's DNA on the items that were tested proves that his confession was false or fabricated, and that detectives planted and manufactured evidence in order to convict the defendant of murder.

iii. Decision

The arguments set forth by PCR counsel ultimately cut against his request for a new trial. The majority of the new evidence relied upon in the defendant's petition for post-conviction relief was already presented and argued to the jury that convicted him. In addition, PCR counsel's arguments go to the credibility of the investigating detectives and therefore would have been used as impeachment evidence at the defendant's trial.

Accordingly, the defendant's request for a new trial based upon the results of the post-conviction DNA tests is hereby DENIED.

C. Defendant's Remaining Arguments

PCR counsel also seeks (1) a new trial for the defendant on the grounds that the recent DNA tests prove that there was police and prosecutorial misconduct, and (2) to have his conviction vacated based upon his free standing claim of innocence.

With regard to PCR counsel's claims of police and prosecutorial misconduct, a petitioner must allege facts that are

more than mere "bald assertions." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). Here, there are no facts set forth by PCR counsel to support these serious allegations. Counsel claims that the results of the DNA tests prove that the detectives in this case planted or manufactured evidence, and that the Assistant Prosecutors engaged in prosecutorial misconduct by colluding with the detectives. The court is not persuaded. There is no evidence before this court that any misconduct took place. This court will not grant a new trial, or even an evidentiary hearing, based upon conclusory and speculative assertions. Accordingly, the defendant's request for a new trial based upon police and prosecutorial misconduct is hereby DENIED.

Finally, for the reasons discussed in sections V(A) and V(B) above, defendant's request to vacate his conviction based upon his freestanding claim of innocence is hereby DENIED.

VI. Conclusion

Based upon the foregoing, the defendant's application for post-conviction relief shall be and is hereby DENIED.

Dated:

8/24/17

7-2065
Margaret M. Foti, P.J.Cr.

A1860-07T4

ORDER ON MOTION

STATE OF NEW JERSEY

VS

JOSH POMPEY

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

John M. Clecker
CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A -001860-07T4

MOTION NO. M -006638-07

BEFORE PART: I

JUDGE(S): STERN

MOTION FILED:

JULY 22, 2008

FILED

BY: JOSH POMPEY

ANSWER(S) FILED:

AUGUST 01, 2008

APPELLATE DIVISION

STATE OF NEW JERSEY

AUG 15 2008

RECEIVED
APPELLATE DIVISION

SUBMITTED TO COURT: AUGUST 12, 2008

AUG 15 2008

ORDER

SUPERIOR COURT
OF NEW JERSEY

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS

13th DAY OF August, 2008, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

TO STAY APPELLATE PROCEEDINGS

TO EXTEND TIME TO FILE APPELLANT BRIEF

TO 11/14/08

GRANTED

DENIED

OTHER

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(X)

SUPPLEMENTAL: The appeal is dismissed without prejudice, and the matter is remanded to the Law Division. Defendant may file a new appeal or cross appeal after the DNA testing is completed and the proceedings based thereon are concluded. In that manner, all post-

BER 89-12-1594 conviction proceedings can be considered in one appeal, and defendant can raise therein any issue he could have raised on this appeal and issues relating to the DNA testing and impact thereof.

FOR THE COURT:

[Signature]
EDWIN H. STERN P.J.A.D.

DA 2546

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JOSH POMPEY,

Petitioner,

Case No.: 1:23-cv-00324

v.

WARDEN BRUCE DAVIS,

Respondent.

**PETITIONER'S BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF HABEAS CORPUS**

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PRELIMINARY STATEMENT

Petitioner Josh Pompey is serving two life sentences for a double murder committed in Hackensack, New Jersey in 1989. This law firm represented Petitioner during two trials and later in a state post-conviction relief ("PCR") claim. Since 2015, the undersigned has agreed to represent Petitioner pro bono. Petitioner challenges his 1998 conviction and now comes before the District Court seeking habeas relief and a targeted evidentiary hearing.

Petitioner has gained powerful, newly-discovered DNA evidence as a result of post-conviction testing ordered in state court. As demonstrated below, the newly discovered information establishes that Mr. Pompey's conviction was obtained in violation of Due Process, and that he is probably innocent of the murders of Audrey Robinson ("AA") and Madeline Mitchell ("MM"). Petitioner now requests limited follow-up DNA testing to inculcate a third-party suspect. At a minimum, the newly discovered evidence is material in that it could raise a reasonable doubt and alter the verdict.

During the criminal investigation, the police played judge, jury, and executioner by determining that a conviction by any means necessary was required. There was a race to judgment to charge Petitioner, a cognitively impaired professional boxer, with no time taken to consider the actual mode and manner of the crime. Once the police and the prosecution went down this dark path there was

no turning back. Rampant prosecutorial misconduct also occurred at trial and on retrial. The prosecution's entire case rested on planted blood evidence, planted physical evidence, a stenographic statement filled with now-proven falsehoods, and manufactured and tampered with physical evidence, including a pair of gloves which were manipulated to fit to the false confession. The lynchpin of the State's case was that Pompey confessed to stabbing both victims while wearing a pair of his mother's brown gloves. However, it has now been proven by DNA testing conducted by the New Jersey State Police ("NJSP") that victim A.R. was the sole owner and chronic wearer of the gloves. Pompey has been cleared as to the gloves and the NJSP lab conclusively stated by their results grids and reports that Pompey never wore them. Given that the glove evidence was central predominant piece of evidence used to bolster and buttress the confession evidence and was the key piece of physical evidence used to convict Pompey, the State's case is left in tatters and is actually dead on arrival. Had the jury known what today we know today, the outcome of the second trial would have been different.

The premise of the confession is that Petitioner said he used his mother's brown gloves to break into the victims' home and stab them to death while wearing those gloves. The confession is replete with Pompey claiming he got his blood all over the murder weapon that killed A.R. by repeatedly slipping on the knife and bleeding through the left glove onto the knife. At trial, using older DNA testing

methods and serology, the defense proved that Pompey's blood was not on the knife, but the prosecution argued that DNA testing of the gloves was impeded by low-grade technology of the time, and claimed that degradation explained not finding Pompey's DNA on the gloves. However, DNA science has finally caught up and modern STR/DNA testing cracked the case for us when the NJSP ruled out Petitioner as ever contributing any blood or DNA to these gloves. The best exoneration evidence any habeas petitioner could ever dream of in a false confession case came when the NJSP found that A.R. was the actual owner/wearer of the gloves—the key piece of physical evidence in the prosecution's case-in-chief. Our state court appeals are now exhausted.

Moreover, the new evidence also shows that police took the left glove, in evidence at the time of the confession, and tore it to fit the cuts on Pompey's hands. The new DNA evidence also corroborates photographic and documentary evidence suggesting that the police planted evidence recovered at the double murder scene two days later to fit aspects of the false confession. Thus, Petitioner respectfully requests a targeted evidentiary hearing as to the new DNA findings, as well as limited additional DNA testing to establish third-party guilt, as A.R.'s boyfriend was also a person of interest, and forensic fingerprint evidence, potential blood evidence, and pathological evidence all placed him at the crime scene at the approximate time of death, with no alibi.

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The PCR court failed to comprehend the significance of newly available STR DNA test results and failed to hold evidentiary hearings, precluded scientific evidence, and refused to order additional DNA testing. The errors made in this case in state court involve multiple and compounding violations of our U.S. Constitution making this case now ripe for federal review.

This is a case of innocence, and we pray to God that this Honorable Court will not turn away from grappling with this exceptional travesty of justice perpetrated upon Petitioner and society at large. The New Jersey state courts have unfortunately turned a blind eye to the newly discovered DNA and forensic blood evidence proving that Petitioner's purported confession was false. We trust that this Court, upon absorbing the new evidence presented in this Brief, will see the light in this case, not turn its back on the truth as the state courts have and recognize Petitioner's gateway claim to innocence.

FACTUAL BACKGROUND

A. THE CRIMINAL INVESTIGATION

On September 5, 1989, AR and her MM were murdered in their home in Hackensack, New Jersey. Based on the medical and forensic evidence, the victims were each stabbed to death by two different knives. The knife that killed AR was taken from the kitchen utensil drawer in the victims' kitchen and was found by investigators for the Bergen County Prosecutor's Office ("BCPO") during a search

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of AR's bedroom. It appeared that the killer went to the victim A.R.'s car and was secreting bloody evidence in it and was going to flee in it.

A.R.'s boyfriend Edward Hoffman immediately became a person of interest in the slayings. The police accused him of the murders on the day the bodies were discovered. After the police erroneously let Hoffman go that first night, forensic fingerprint evidence, potential blood evidence, and pathological evidence all placed Hoffman at the crime scene at the approximate time of death with no alibi.

The case next took a turn when an off-duty Hackensack Police Sergeant named Michael Mordaga decided on his own without an arrest warrant or supervisory clearance to arrest Petitioner, Josh Pompey. Petitioner, a former amateur and professional boxer, exhibits borderline intellectual functioning with an IQ of 78, and as a child tested as low as 50. Before his arrest, Petitioner received little or no formal education. In addition, he suffered innumerable concussive blows to the head as an amateur and then professional boxer fighting off and on out of Larry Holmes Boxing Camp. Because of CT scans of deceased professional boxers, it is now understood that this type of head trauma commonly causes brain damage and significant cognitive impairment.

Lacking any hard evidence, Mordaga staged the arrest. The Mordaga police report fixated on whether or not Petitioner had cuts on his hands, as Mordaga claimed he believed that the killer had cut his hands during the attack. Mordaga

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also inconsistently claimed he was not assigned to the homicide division or the case, and he claimed he had not entered the crime scene, but somehow he knew the killer had bled at the scene. Mordaga's claim of lack of involvement early on is a disputed fact. Mordaga in the end had his fingerprints all over this case from the start when he vouched for Hoffman and directed the BCPO towards another target, namely, Petitioner. Mordaga was a part of the process to tamper with evidence and he orchestrated and extracted a false confession as part of the frame-up of petitioner.

Once Mordaga had Pompey in custody two additional investigators arrived. Hackensack Police Officer Jay Alpert was assigned to the case. He testified that he had no hard evidence to arrest Pompey and during Mordaga's interrogation of Pompey Alpert suddenly and mysteriously left his own interrogation. BCPO Investigator Michael Carlino, armed with police reports, medical examiner pathological evidence, and details of the mode and manner of death joined Mordaga in the interrogation room. Carlino falsely claimed under oath he had no notes or case files and the killer told him things only the killer would know. Before the trial a photo was found depicting Carlino at the confession location with a red well brown file filled with case reports and documents. It was also learned years later that at least one police interrogator was armed with a gun in plain sight. No

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handwritten notes were retained, and the interrogation was neither videotaped nor audiotaped.

At first, Petitioner denied any involvement in the murders and explained that he had cut his hands while jumping a chain-link fence to run track after hours at Hackensack High School in preparation for a boxing match. Officers Mordaga and Carlino had complete knowledge of the crime scene and the intricacies of the mode and manner of death. In the confession Pompey indicates he tried to rekindle a relationship with A.R. that had broken off for many months. Pompey stated he broke in through the basement of the home where A.R. lived with her two aunts. He stated A.R. was angry at him for the break-in. Pompey claimed she had sex with him, but he had armed himself with a knife and in the course of a struggle she was strangled by a belt and stabbed to death numerous times. The crime scene itself involved a bloody bedroom mess filled with clothes and belongings owned by A.R, with A.R. lying dead in the middle of the room.

In page after page of almost the entire stenographic statement the one major key piece of central identification that the police honed-in on was establishing that Josh Pompey wore brown gloves owned by his mother to burglarize the home, rape A.R. and stab both victims to death. Pompey goes into great detail page after page as to how he slipped badly on the knife cutting his left hand while wearing the left glove and he stated he bled all over the knife and the glove/s and by implication all

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this occurred while he was holding the belt. The confession indicates [albeit falsely] that somehow A.R. pulled off Pompey's right glove as she is stabbed to death and asphyxiated by the belt ligature. Pompey then confesses he tried to hot wire the car outside unsuccessfully and he then washed up at his home carrying bloody belongings from the crime scene back to his home. Pompey then confesses that he used a plastic bag from his home to put the bloody evidence in which includes bloody pants, a bloody shirt, the bloody glove [left] and other assorted items all purportedly taken by him from the crime scene and he then stated he dumped these items and the plastic bag in a wooden area not far from the original crime scene. Pompey also states he dumped bloody evidence in a dumpster outside a school not far from the crime scene or the wooded area.

As we now know through newly discovered DNA and serology and blood testing evidence from the PCR this entire connection of matching up found bloody evidence in the tertiary crime scenes [dumpster and wooded area] was manufactured and planted to give the false appearance that the confession and the evidence linked up together interdependently and was truthful.

As it turned out, the police had actually photographed the crime scene where the victim A.R.'s body was found on 9/5/89. This included limited film of what is known as the roll over the body snapshot where what was beneath A.R. was depicted as the police rolled her body over. As seen in the photo progressions

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