
STATE OF NEW JERSEY,
Appellee,

VS.

KEVIN BAKER,
Defendant-Appellant.

STATE OF NEW JERSEY,
Appellee,

VS.

SEAN WASHINGTON,
Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket Nos. A-716-17T3,
A-719-17T3

On Appeal from Final Judgment
of August 31, 2017, in Ind.
No. 1950-08-95

Superior Court of New Jersey,
Law Division, Camden County

Sat below:
Hon. Samuel D. Natal, J.S.C.
(Ret./Rec.)

**PROPOSED BRIEF OF AMICI CURIAE INNOCENCE PROJECT,
EXONERATION INITIATIVE, AND INNOCENCE NETWORK**

IN SUPPORT OF APPELLANTS

Linda Mehling, #024881978
Frank R. Krack & Linda Mehling
Attorneys at Law
807 Dorian Road
Westfield, New Jersey 07090
(908) 233-3700
lindamehling@gmail.com
*Counsel for Proposed Amici Curiae Innocence Project, Exoneration
Initiative, and Innocence Network*

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INTEREST OF THE AMICI CURIAE

The Innocence Project ("IP") is a non-profit organization that works toward the freedom of wrongfully convicted individuals. It has served as counsel or provided critical assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide, mostly through the use of exculpatory DNA evidence.

The Exoneration Initiative ("EXI") is a non-profit organization that provides free legal assistance to wrongfully convicted people in New York who have compelling claims of actual innocence, focusing on the most challenging cases, those that lack DNA evidence.

The Innocence Network is an association of independent organizations dedicated to exonerating the innocent. Members of the Innocence Network represent hundreds of people in prison with innocence claims in all 50 states, the District of Columbia, and Puerto Rico.

IP, EXI, and the Innocence Network also seek to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system - reforms that both help free the innocent and help lead to the prosecution of actual perpetrators. The IP,

EXI, and the Innocence Network also work to inform and educate the public, the legal profession, and the judiciary about the causes of wrongful convictions and the fallibility of the criminal justice system.

IP, EXI, and the Innocence Network also work to advance legal precedent favorable to wrongfully convicted people by participating as amici curiae in many cases around the country to advance legal precedent favorable to potentially wrongfully convicted people. Because wrongful convictions of the innocent destroys lives and allow actual perpetrators to remain free, their work serves as an important check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society.

The role of the post-conviction judge as fact finder in proceedings involving new evidence of innocence is crucial to the just resolution of claims brought on post-conviction review by wrongfully convicted persons, whether such claims are of Constitutional violations or newly-discovered evidence. IP, the Innocence Network, and EXI have a strong interest in providing courts with their expertise and insight on these matters to help advance the cause of the wrongfully convicted.

PRELIMINARY STATEMENT

A certain amount of confusion appears to have arisen in New Jersey in regard to a judge's role as fact finder in criminal cases when a post-conviction court hears live testimony and other evidence not heard by the original jury. Such confusion should have been dispelled by State v. Pierre, 223 N.J. 560 (2015), and State v. L.A., 433 N.J. Super. 1 (App. Div. 2013), which made clear that a PCR court's opinions concerning the credibility of new exculpatory witnesses form only one part of its obligation to assess the potential impact of new evidence on a jury. To discharge its obligation under the law, a post-conviction court must add all the new evidence to the body of evidence heard at trial, and then fairly assess whether there is a reasonable probability that, in the face of the entire body of evidence, a jury, acting reasonably and conscientiously according to the standards imposed by the law, would have reasonable doubt about guilt. The case at bar, however, presents an example of how some post-conviction judges in New Jersey disregard these clear mandates, and deny relief without engaging in the required analysis.

Concomitant confusion also may have arisen concerning the amount of deference that an appellate court can or should give to the results flowing from a trial court's adverse factual findings and credibility determinations in such cases,

especially the trial court's opinions concerning new witnesses' credibility. Because it is the jury¹ whose role it is to make the actual operative factual findings, the post-conviction judge's factual findings can be given no deference beyond their rational persuasive effect. The appellate court's function is not to affirm and defer to the results flowing from a judge's credibility findings, but to independently review the quality of the trial court's assessment of the likely impact of the new evidence on a hypothetical jury. This, too, should have been made clear by Pierre and L.A. But based on a review of recent cases, Amici believe that confusion still haunts this area, and hope to provide helpful clarification.

Amici will confine themselves herein to the question of the judicial role in assessing the impact of exculpatory and impeaching evidence not heard by the jury at the original trial. That is, Amici will assume for present purposes that in a given case a legal basis has been laid for the claim that the jury should have heard the evidence at the original trial or should hear the evidence at a new trial, or both. Whether the absence of the evidence at the trial is held to be newly-discovered evidence or whether its absence at trial is held to be due to a

¹ The term "jury" is used herein to mean the factfinder whose role it is to determine guilt or innocence in the first instance, usually a jury.

Brady violation or a failure of investigation by ineffective counsel--whatever the reason or reasons for the absence of such evidence at trial, the judicial role in evaluating the new evidence is the same. The court's role is not to find facts or weigh credibility as if it were the fact finder of first instance, but rather to fairly assess the impact of the entire body of new evidence on a jury.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici rely on the Statement of Facts and Procedural History of the Appellants' brief.

ARGUMENT

- I. **When a court holds an evidentiary hearing on post-conviction claims that exculpatory evidence was not presented at the original trial due to claimed ineffective assistance of counsel or Brady violations, the court is obligated by the applicable Federal Constitutional standards to fairly assess the likely impact of the unheard evidence on a jury, taking into account the entire body of evidence and giving due regard to the role of the jury in resolving the credibility of witnesses and the plausibility of conflicting accounts.**

When a convicted person makes a claim that his or her trial was not fair because exculpatory and impeaching evidence could have been presented at trial, but was not--whether this absence is due to the negligence of trial counsel or to the State's failure to turn over Brady material (or both)--such Constitutional claims must be examined in the light of the

applicable Constitutional law. And when the court holds an evidentiary hearing on such claims, the court is required to assess the evidence elicited at such a hearing according to the standards set out in the applicable law. Under those standards, it is not for the PCR court to deny relief on a Strickland or Brady claim merely based on its declarations that it finds the new defense witness or witnesses unconvincing. Rather, the judge must analyze to what extent the new evidence would have altered the evidentiary picture at trial; must conduct a fair assessment of the likelihood that the jury would have credited the testimony and other new evidence; and must evaluate the likelihood that a different result would have followed, in the light of the entire body of evidence now before the court.

While the foregoing may seem obvious, a review of cases, including the case at bar, indicates that some post-conviction courts interpret their task very differently from what is required under the Constitution. Instead they take themselves to be authorized to issue blanket declarations of lack of credibility of the new witnesses, treat those declarations as dispositive of the issues before them, and deny post-conviction relief on that basis. Amici will briefly set out the governing law, familiar though it is, and then show that such courts have seriously misapprehended the nature of the Constitutional task before them.

To establish a claim of ineffective assistance of counsel under U.S. Const. Amend. VI and N.J.S. Const. Art. I ¶10, a petitioner must show that counsel performed deficiently and that the petitioner suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). When counsel has overlooked, failed to exculpatory and impeaching information that could have been presented to the original jury but was not, a post-conviction court must determine the likelihood that the unheard evidence, presented by competent counsel, would have led a jury—assuming a jury “reasonably, conscientiously, and impartially applying the standards that govern the decision”—to have a reasonable doubt about guilt or punishment. Strickland, supra, 466 U.S. at 695.

The standard of proof on a Strickland claim is a reasonable probability of an acquittal. Strickland, 466 U.S. at 694. (The general law covers questions of both guilt and punishment. For simplicity’s sake and given the facts of the case at bar, Amici will refer herein exclusively to the law as it applies to the plain question of guilt or innocence.) A “reasonable probability” is not the same as “more likely than not”; rather, a “reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.; Nix v. Whiteside, 475 U.S. 157, 175 (1986). Hence, the PCR court’s task is to determine whether there is a reasonable probability that a

conscientious jury would have had a reasonable doubt about guilt, were it exposed to the additional evidence presented to the PCR court.

To show a Brady violation, a petitioner must show that the State withheld favorable evidence, whether it is exculpatory or impeaching, and that prejudice resulted from its suppression. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); State v. Knight, 145 N.J. 233, 245 (1996). To show prejudice from a Brady violation, the petitioner must show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, supra, 514 U.S. at 434-35 (citing United States v. Bagley, 473 U.S. 667, 682 (1985) and United States v. Agurs, 427 U.S. 97, 111 (1976)). It "bears emphasis" that a reasonable probability for a Brady claim, just as for a Strickland claim, is not more likely than not, but rather a "probability sufficient to undermine confidence in the outcome." Kyles, 514 U.S. at 434 (internal citations omitted). Hence, Strickland and Brady claims that are premised on evidence not heard at trial must be addressed in the same way, because in both situations the court must evaluate the effect on a hypothetical jury of evidence which the original jury should have been exposed to, but was not, owing to Constitutional violations.

In making its prejudice assessment on a Strickland or Brady claim, the PCR court must consider the new evidence in the context of "the totality of the evidence." Strickland, supra, 466 U.S. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. (emphasis added). See also United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt") (emphasis added). In Gray, for example, the court held that, in the context of the State's relatively weak case, the petitioner was prejudiced when the uncalled witness could have corroborated his defense of self-defense.

The court's task on a Strickland claim, then, is "to fairly assess ... trial counsel's decisions in the context of the State's case against defendant and the strengths and weaknesses of the evidence available to the defense." Pierre, supra, 223 N.J. at 579. Likewise, on a Brady claim, where multiple items of evidence have been suppressed, the prejudice flowing from Brady violations "turns on the cumulative effect" of such evidence, and thus courts are obligated to consider the State's non-disclosures "collectively, not item-by-item." Knight, supra, 145 N.J. at 245-48 (citing Kyles, supra, 514 U.S. at 420) (emphasis

added). The court should examine all of the evidence that the jury was not exposed to, in order to fairly assess its likely cumulative impact and whether, in the context of the entire body of evidence, it is reasonably likely that the jury would have had a reasonable doubt if it had been presented with all the evidence presented to the post-conviction court.

With regard to the judge's role in assessing the credibility of witnesses who testify at a PCR hearing but did not testify at trial due to ineffective counsel or Brady violations (such witnesses are often referred to as "absent witnesses," "uncalled witnesses," or "missing witnesses"), it is clear that a judge's adverse credibility findings cannot dispose of the legal issues before it. In Pierre, for example, the defense at trial was an alibi, premised solely on a speeding ticket issued to Pierre in South Carolina at a time the made Pierre's involvement in the murder impossible. The State argued that Pierre's brother was the person driving the car. At the PCR hearing, the brother and other relatives testified that it was Pierre and not the brother who had driven the car down to Florida to visit relatives. The PCR court found Pierre's witnesses unconvincing because of family bias and inconsistencies in their testimony, as well as Pierre's brother's criminal record. But, the Supreme Court said, regardless of such inconsistencies and credibility problems, if

believed by a jury as to the fundamental points testified to, this testimony compelled the conclusion that when the murder occurred, Pierre was in South Carolina on his way to visit family in Florida, and would have been invaluable at trial in bolstering Pierre's alibi. In the context of the evidence presented at trial, a "fully-developed alibi defense, carefully constructed on defendant's behalf, would likely have altered the outcome of his trial." Pierre, supra, 223 N.J. at 586-87.

Thus, a post-conviction judge is not authorized to deny relief on a Strickland or Brady claim merely because he or she finds the new defense witnesses unconvincing. Rather, the judge must conduct a fair assessment of the likelihood that the jury would have credited the witnesses as to the material points testified to, and the likelihood that an acquittal would have followed, had it heard all the admissible evidence, old and new, now known to the PCR court.

A review of Federal cases shows that this approach is mandated by Federal Constitutional standards. For example, in Avery v. Prelesnik, 548 F.3d 434 (6th Cir. 2008), cert. den. sub. nom. Prelesnik v. Avery, 558 U.S. 932 (2009), the court held that the state court's reasons for finding Avery's new alibi witnesses "incredibly inconsistent" and "totally incredible" could not dispose of the issue of prejudice, given the weakness of the State's case, which rested on a single

eyewitness. As in Pierre, supra, the potential alibi witnesses in Avery, coupled with an otherwise weak prosecution case, rendered counsel's failure to investigate Avery's alibi Constitutionally ineffective, because the jury was deprived of the opportunity to hear testimony that could have supplied reasonable doubt about Avery's guilt. Avery, 548 F.3d at 439 (affirming the District Court's grant of habeas relief).

Similarly, in Ramonez v. Berghuis, 490 F.3d 482, 490-91 (6th Cir. 2007), reh'g and reh'g en banc den. Oct. 10, 2007), it was held that "[w]hile there would have been plenty of grist for the cross-examination mill as to Ramonez's three witnesses," and notwithstanding the state post-conviction court's adverse opinions concerning their bias and inconsistencies, "the question whether those witnesses were believable for purposes of evaluating Ramonez's guilt is properly a jury question." There was a reasonable probability that the jury would have credited these witnesses, and petitioner was prejudiced by their absence at trial, because their testimony would have helped corroborate his testimony and contradict that of the complaining witness. See also Nealy v. Cabana, 764 F.2d 1173, 1180 (5th Cir. 1985) (where testimony of missing witnesses directly contradicted prosecution witness and supported defense's theory of the case, petitioner met his burden of showing prejudice, i.e., a reasonable probability of an acquittal); Matthews v. Abramajtys,

319 F.3d 780 (6th Cir. 2003) (affirming habeas relief where the state's case was "not overwhelming," and trial defense counsel, who had expected to be able to obtain a directed verdict based on the weakness of the state's case, had failed to present defendant's mother, sister, and sister-in-law to testify to his alibi, which was reasonably likely to have given rise to reasonable doubt). And see also Munchinski v. Wilson, 694 F.3d 308 (3d Cir. 2012), which granted relief on an actual innocence claim that overcame procedural bars to Federal habeas relief, and noted in a footnote that, while it "must give due regard to any unreliability of" Munchinski's new evidence, and "may have to make some credibility assessments," nevertheless, the task of weighing credibility "would ultimately lie with the jury...Our role is not to weigh the credibility of each witness; rather, we must consider all of the relevant evidence and account for any credibility issues in our analysis." Id. at 336 n. 19.

Hence, it is clear from both Pierre and analogous Federal cases that a PCR court's opinions concerning the credibility of new witnesses are by no means dispositive of Strickland and Brady claims. Rather, they form only one part of the assessment that the court is required to undertake concerning the likely outcome of a trial if all the new evidence were heard. A PCR court is not the ultimate factfinder in regard to credibility in this context; rather, it must determine whether the new

witnesses' testimony, if believed, and taken in the context of the entire body of evidence, is sufficient to undermine confidence in the original verdict. Even a court that makes adverse credibility findings concerning the new witnesses must still assess whether there is a reasonable likelihood that an acquittal would have followed, if a reasonable, conscientious jury were exposed to all of the new evidence. As the Sixth Circuit said in Matthews: "The actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides." Matthews, supra, 319 F.3d at 790.

The Supreme Court's recent Brady cases show how clear and inescapable these requirements are, whether for Strickland or for Brady claims. In Wearry v. Cain, 136 S. Ct. 1002 (2016), the prosecution withheld several items of evidence that could have been used at trial to impeach the State's witnesses. Wearry also claimed ineffective assistance for failing to conduct an independent investigation that could have bolstered Wearry's alibi. The state court denied post-conviction relief after an evidentiary hearing. On a petition of certiorari, the Supreme Court reversed the conviction on the Brady claims. Finding it unnecessary to reach the ineffective assistance claim, the Court

said, in regard to the withheld impeachment evidence, that the state post-conviction court had "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively"; had "emphasized reasons a juror might disregard new evidence while ignoring reasons she might not"; and had "failed even to mention" two of the impeaching statements. Wearry, 136 S. Ct. at 1007. As for the court's predictive assessment of the impact of the new evidence on a jury, the Court said: "Even if the jury—armed with all of this new evidence—could have voted to convict Wearry, we have "no confidence that it would have done so." Wearry, 136 S.Ct. at 1009, quoting Smith v. Cain, 565 U.S. 73, 76 (2012)) (emphasis in the original).

Hence, a PCR court cannot deny such a claim simply by choosing to credit the State's witnesses (no matter how weak) over the uncalled witnesses, or choosing to believe that the jury would disregard impeaching evidence. To deny such a claim, the court must "have confidence," after the appropriate required analysis, that "armed with all of this new evidence," the jury would still have credited the State's case beyond a reasonable doubt. Wearry sets out clearly the Federally mandated process and standard of decision for post-conviction courts that must be paid to the role of the jury in making the required assessments on Brady and Strickland claims.

An example of how these principles have been applied on appeal in New Jersey (in addition to Pierre, as shown supra) is in State v. L.A., 433 N.J. Super. 1 (App. Div. 2013). In L.A., the complaining witness, a 15-year-old, testified to three separate incidents when she claimed that her father had sexually assaulted her. The defendant took the stand, giving a very different version of events, and denying that any of the assaults had occurred. On post-conviction relief, he claimed that his counsel had negligently failed to call his wife (the complainant's stepmother) and his son, both of whom would have directly contradicted the complainant's testimony as to one of the incidents. His wife would also have testified generally about the complainant's behavioral problems, including incidents of lying about important matters. The PCR court denied relief, saying that it found the wife (referred to in the appellate opinion as "D.A.") "generally credible," but that because she was an "interested witness," the jury was "more than reasonably likely" to believe instead the complaining witness (referred to in the appellate opinion as "L.N"):

The day in question was not particularly notable, yet [D.A.] supposedly remembered every detail. I do not believe that it is reasonably probable that a jury would have heard [D.A.'s] testimony, weighed it against [L.N.'s], and found [D.A.] to be more credible than [L.N.]. I believe that it is more than reasonably probable that the opposite would have happened, that [L.N.] would have been found to be the more credible of the two and that [D.A.'s] testimony would

have been largely discredited by her status as Defendant's wife.

L.A., 433 N.J. Super. at 13 (quoting the PCR judge's written opinion (brackets in the original appellate opinion). The appellate court reversed, finding that the PCR court had "accurately recited," but not properly applied, the Strickland test, "particularly since, on reconsideration, the court deemed decisive its comparison of L.N.'s and D.A.'s credibility." Id. at 18-19. This section of L.A. merits extensive quotation:

In considering the impact of the absent witness, a court should consider: "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." All three factors derive from the court's obligation under Strickland to consider the totality of the evidence in making its prejudice determination.

We determine that the judge, in denying defendant's motion for reconsideration, answered the wrong question. The issue was not whether L.N. was more credible, or more likely to be believed, than D.A. The issue was whether there was a reasonable probability—that is, a probability sufficient to undermine confidence in the outcome—that the jury would have found reasonable doubt about defendant's guilt, had it heard from the absent witnesses. A jury may well have determined that L.N. was more credible than D.A., but that would not necessarily be enough to convict. The jury would have had to believe L.N. beyond a reasonable doubt, notwithstanding the apparently credible testimony of D.A., the testimony of L.H., and the now-corroborated testimony of defendant.

L.A., 433 N.J. Super. at 15-19 (quoting McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996)).

Hence, a post-conviction court's judgments of a new witness's credibility cannot be binary—a witness “is credible” or is “not credible.” Nor is the court authorized to act as the ultimate fact finder, weighing credibility and deciding that one witness is more credible than the other. Nor is the preponderance standard hinted at by the PCR court in L.A. appropriate.² Rather, the court must analyze what the unheard witnesses would have testified to, whether the testimony bears on points material to the defense, and assess whether there is a reasonable probability that a jury, “reasonably, conscientiously, and impartially applying the standards that

² Some confusion about this may have arisen from language used in State v. Preciose, 129 N.J. 451 (1992), in which it was said in an introductory paragraph that the petitioner has the burden to establish his right to post-conviction relief “by a preponderance of the credible evidence.” Id. at 459 (citing State v. Mitchell, 126 N.J. 565, 579 (1992), State v. Marshall, 244 N.J. Super. 60, 69 (Law. Div.1990), and State v. Zold, 105 N.J. Super. 194, 203 (Law Div.1969)). Westlaw lists hundreds of New Jersey cases that quote this language, which on its face flatly contradicts the standards governing the Federal Constitutional claims discussed herein and in Preciose itself. It should go without saying that a state may provide greater protection under its own Constitution than those provided by the Federal Constitution, but cannot provide less. See, e.g., State v. Hempele, 120 N.J. 182, 197 (1990); Fritz, supra, 105 N.J. at 57 (1987). Preciose does afterwards correctly recite the Strickland-Fritz standard several times, without noting the contradiction. As noted in the text, the United States Supreme Court specifically rejected a preponderance standard for these Constitutional claims, see, e.g., Bagley, supra, 473 U.S. at 680; Strickland, supra, 466 U.S. at 694; Nix, supra, 475 U.S. at 175; and the PCR court's role in weighing credibility is limited, as has also been shown in the text.

govern the decision," Strickland, 466 U.S. at 695, and in the face of all the new evidence, would still find the defendant guilty beyond reasonable doubt. As the Court said in Strickland:

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, supra, 466 U.S. at 695-96.

The case at bar presents an example of a New Jersey PCR court that not only answers "the wrong question," L.A., supra, 433 N.J. Super. at 18, but actually fails to engage at all in the required task, deciding instead that its statements concerning the credibility of the PCR hearing witnesses are dispositive of the Strickland, Brady, and other claims before it. As in Wearry, supra, 136 S. Ct. at 1007, but in an even more extreme way, the court in the case at bar "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively"; "failed even to mention" much of the impeaching and exculpatory evidence; declared most of the

hearing witnesses to be simply and globally “not credible”³; and, in short, failed to conduct the required analysis. And, as in L.A., supra, where the PCR court determined which witness it believed was more credible, the court in the case at bar decided that the case detective was more “credible” than the professionally obtained statistical results of an anonymous online survey.⁴ Also as in L.A., the court in the case at bar dismissed new forensic evidence pointing to one gun used in the crime (contrary to the sole witness’s testimony) by simply relying on the fact that the original jury apparently found the sole witness credible when she claimed at trial that she saw two guns used.⁵ The fact that the jury apparently found her credible, at least to some degree, is undeniably true, being inherent in the fact that they voted to convict. But that leaves open entirely the question “whether the jury would have found reasonable doubt had it heard from the absent witnesses,” and therefore the PCR court “did not fulfill the Strickland mandate

³ See, e.g., Da53-54, Da60, Da64, Da66, Da71, Da73, Da97, Da101, Da127, Da141, Da145. The court did “determine” that several witnesses were “credible,” e.g., Da108, Da109, but did not analyze the import of their testimony in relation to the case at trial. The parties’ brief addresses these matters in detail.

⁴ See Da 77-78.

⁵ See Da90.

to consider the totality of the circumstances.” L.A., supra, 433 N.J. Super. at 17-18.

If the court in the case at bar had engaged in the task required by Strickland by (for example) using the three-part analysis set out in L.A., it would have had to discuss, first, the weakness of the case at trial⁶ and then analyze how the new evidence would have altered “evidentiary picture,” Strickland, supra, 466 U.S. at 695. As was said in McCauley-Bey, supra: “[W]e are required to add the proffered testimony of McCauley-Bey’s uncalled witnesses to the body of evidence that actually was presented at his trial. Using this hypothetical construct, we must gauge the likely outcome of a trial based on this total body of evidence. Prejudice exists if there is a reasonable probability that the outcome would be different than that at the actual trial.” McCauley-Bey, supra, 97 F.3d at 1105-06. Under Pierre, L.A., and the controlling Federal law, the task at hand

⁶ The PCR judge in the case at bar did not comment on the weakness of the case, but during previous proceedings had specifically expressed the opinion, several times over a period of years, that the defense attorneys had decided to not put on a defense case based on a “well-formed belief” that “no jury would believe” Denise Rand (the sole witness to connect the defendants to the crime). 6T10; 7T11; 9T64-65; 10T57. And this court once noted also: “The State’s evidence was not overwhelming. The prosecution relied on the testimony of Denise Rand, a drug addict, who claimed to have witnessed the shootings.” Da1583. An appropriate Strickland or Brady analysis would have mentioned the weakness of the original case as commented on by the court itself.

required that the court discuss what the State's case at trial was, add to the picture all the new evidence, and fairly assess the probability of a different outcome, assuming a jury "reasonably, conscientiously, and impartially applying the standards that govern the decision," Strickland, 466 U.S. at 695.

II. Appellate review of a PCR court's determinations on such claims is plenary and de novo, and, given the importance of the jury's fact-finding role under the Federal Constitutional standards to be applied, the result flowing from a PCR court's factual findings and adverse credibility findings can be given no more deference than is warranted by the quality of the court's analysis and its rational persuasive effect.

Review of denials of Strickland and Brady claims after evidentiary hearings is necessarily plenary and de novo, as these claims involve "mixed questions of law and fact," Strickland, supra, 466 U.S. at 698 ("both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"), and such claims furthermore require courts to "carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case," id. at 702 (Brennan, J., concurring in part and dissenting in part). An appellate court should therefore "freely review" the lower court's conclusions. Gray, supra, 878 F.2d at 704 (stating the

necessity of undertaking on appeal a "detailed examination of the record at trial and at the post-trial evidentiary hearing on the ineffectiveness claim"). In the light of the Federal Constitutional standards to be applied, appellate deference to a post-conviction court's factual findings can go no further than is due, i.e., deference warranted by the quality of the post-conviction court's analysis and its rational persuasive effect.

As shown above, Federal courts have made it clear that a post-conviction court's role in deciding Strickland and Brady claims based on evidence not heard at the trial is not to make the ultimate factual findings and credibility findings, which fall within the realm of the jury to make. After all, the core of the claim in such cases is that the petitioner's trial was not fair because the jury was deprived of hearing evidence that it should have heard. The role of the post-conviction court is to assess whether there is a reasonable probability that a jury would have had a reasonable doubt, had it been "armed with all of this new evidence," Wearry, supra, 136 S.Ct. at 1009. In fact, as shown supra, when there is new evidence that was absent at the trial because of Constitutional violations, the court cannot deny relief unless it is confident that a jury would still have convicted in the light of all the new evidence. Id. The resolution of conflicting accounts arising in the light of new evidence is a matter for a jury to determine, as long as

there is a reasonable probability that a jury would take the new evidence sufficiently into account such that "the decision reached would reasonably likely have been different," Strickland, supra, 466 U.S. 696. "The actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides." Matthews, supra, 319 F.3d at 790. Appellate review, then, must be plenary and do novo.

Indeed, even under Federal habeas law, with all of its statutory constraints and federalism considerations, the presumption of correctness to state courts' factual findings⁷ does not apply to a state court's "blanket assessment of the credibility of a potential witness," because "our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." Ramonez, supra, 490 F.3d at 490-91. In Ramonez, the court reversed the denial of federal habeas corpus where three witnesses would have supported defendant's account at trial, saying:

⁷ "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. 2254(e) (1).

In the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the Strickland prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption. Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have. Ramonez's case was therefore prejudiced where their testimony would have helped corroborate his testimony and contradict that of complaining witness Fox, but where counsel's default in carrying out his constitutional obligations resulted in that testimony not being introduced at trial.

Id. (internal citation omitted).

Similarly, in Avery, supra, it was held that the state court had mistakenly adopted a role as "the factfinder." Finding the exculpatory witnesses to be "incredibly inconsistent" and "totally incredible," the state court had failed to reasonably assess the likelihood that the jury would have come to a different conclusion. Avery, supra, at 548 F.3d 434, 439 (6th Cir. 2008) (affirming the grant of habeas grant and ordering a new trial). "We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury," not by a reviewing court. Id. (quoting Matthews, supra, 319 F.3d at 790).

Along the same lines are Luna v. Cambra, 306 F.3d 954, 959 (9th Cir. 2002) (reversing denial of habeas and ordering a new trial where, despite assumed bias arising from the family

relationship of the uncalled alibi witnesses, their testimony would have "altered significantly the evidentiary posture of the case"); Workman v. Tate, 957 F.2d 1339, 1343, 1346 (6th Cir.1992) (finding a reasonable probability that the jury would have acquitted if it had heard the uncalled witnesses' testimony, despite their friendship with petitioner and the magistrate's finding that their testimony was "implausible"); Brown v. Myers, 137 F.3d 1154, 1157-58 (9th Cir. 1998) (reversing denial of petition for habeas corpus because, given the inconsistencies in the state's witnesses' testimony, it was reasonably probable that the jury would have credited the uncalled alibi witnesses, despite their vagueness with regard to times); Nealy, supra, 764 F.2d at 1180 (reversing denial of habeas corpus and ordering a new trial because the testimony of witnesses not called by trial counsel directly contradicted prosecution witness and supported defense's theory of the case, and "might have affected the jury's appraisal of the truthfulness of the state's witness and its evaluation of the relative credibility of the conflicting witnesses"); Stitts v. Wilson, 713 F.3d 887, 894, 896 (7th Cir.2013) (reversing denial of habeas because, with the testimony of the uncalled witnesses, "the trial would have been transformed from a one-sided presentation of the prosecution's case into a battle between competing eyewitness testimony, where there would have been a

'reasonable probability' that a jury would have reasonable doubt as to Stitts's guilt and therefore acquit").

It is important in this context to make a crucial distinction between the de novo standard of review applicable to the assessment of new evidence discussed herein and the deferential standard of review that applies when the lower court acts as factfinder within its own province, such as in assessing a juror's impartiality at voir dire, assessing testimony at a Miranda hearing, or assessing testimony about what advice the attorney gave to his client. Such findings are "different in kind from a finding that a jury would not believe a witness's testimony" at a trial. Ramonez, supra, 490 F.3d at 490. In the latter case, the jury was deprived of the opportunity to make the factual findings and weighing credibility in their proper role as the factfinder in the first instance. It is important, then, for purposes of appellate review, to draw a clear distinction between adverse fact findings, especially credibility findings, which are properly within the judge's province and those which are within the province of the jury.

This distinction was scrupulously observed in Pierre and L.A., supra, in spite of prefatory boilerplate language contained therein that may be taken to reflect an inappropriate level of deference to the PCR court's factual findings with

respect to matters within the jury's province.⁸ That prefatory language does not derive from the governing Federal standards, but applies instead to contexts in which the judge's role is that of factfinder in the first instance, such as bench trials, suppression hearings, motions for new trial not based on any new

⁸ Since 2004 our courts reviewing post-conviction proceedings have stated in prefatory language such propositions as "We will uphold the PCR court's findings that are supported by sufficient credible evidence in the record," and "An appellate court should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses." See, e.g., State v. Nash, 212 N.J. 518, 540-541 (2013) and State v. Harris, 181 N.J. 391, 415 (2004). These statements, to the extent that they are taken to refer to findings within the jury's province, do not conform to the appellate court's role under the applicable Federal Constitutional mandates under Brady and Strickland, and may have inadvertently swelled and distorted post-conviction courts' notions of their fact-finding role in post-conviction proceedings. These are some of the cases cited for the above-quoted propositions, in Harris, Nash, Pierre, L.A., and other cases: Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002) (bench trial held on builder's claim of Mount Laurel violations); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (bench trial on complaint of insurer's bad faith in settlement negotiations); State v. Johnson, 42 N.J. 146 (1964) (bench trial in municipal drunk driving case); State v. Locurto, 157 N.J. 463, 469-72 (1999) (suppression motion); State v. Elders, 192 N.J. 224, 244 (2007) (suppression motion); State v. Gamble, 218 N.J. 412, 424 (2014) (suppression motion); State v. Marshall, 148 N.J. 89, 186 (1997) (Brady claim whose only relevance was to the suppression motion); State v. Sims, 65 N.J. 359 (1974) (motion for new trial under R. 3:20 not based on any new evidence but only on the trial evidence itself); Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960) (bench trial on negligence in auto collision case); Brundage v. New Jersey Zinc Co., 48 N.J. 450 (1967) (action in chancery to enjoin corporate merger); New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969) (appeal of orders on pretrial motions).

evidence, administrative proceedings, civil proceedings in equity, and the like, in all of which a higher level of deference to the fact-finding of the judge is appropriate because they do not involve findings within the jury's province. See Ramonez, supra, 490 F.3d at 490.

In Pierre, for example, the Court conducted an independent review of the trial and post-conviction evidentiary record and rejected the State's argument that it should simply defer to the PCR court's adverse credibility findings. Pierre, supra, 223 N.J. at 575-76, 586-87. Likewise, in L.A., the court concluded that the PCR court had "answered the wrong question," and had "accurately recited," but not properly applied, the Strickland test to the post-conviction witnesses' testimony. L.A., supra, 433 N.J. Super. at 18-19. These cases establish that appellate review of denials of PCR relief, when premised on new evidence, requires an independent examination of the post-conviction court's conclusions in light of the "totality of the evidence," given that "the ultimate focus of our inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 19 (quoting Strickland, supra, 466 U.S. at 696. As noted supra, this exercise requires the appellate court to undertake a "detailed examination of the record at trial and at the post-trial evidentiary hearing on the ineffectiveness claim," Gray, supra, 878 F.2d at 704.

Indeed, where a post-conviction court has previously made statements casting doubt on the credibility of the only witness at trial to connect the defendants to the crime, as it did in the case at bar, and where the court then boldly announced, as it did here, a lack of belief in the credibility of crucial uncalled witnesses, without even mentioning how any of the new evidence would have affected the State's case, or the jury's assessment of the State's witnesses' credibility, the appellate court, having access to the evidentiary record before the PCR court, is fully authorized under N.J.S.A. Const. Art. 6, § 5, ¶ 3 to undertake its own review and analysis under the standards governing the case, to determine whether there is a reasonable probability that a jury, "armed with all of this new evidence," Wearry, supra, 136 S.Ct. at 1009, would have had a reasonable doubt about defendants' guilt.

III. The post-conviction court's function is likewise constrained, and the appellate court's function is likewise governed, when hearing claims of newly-discovered evidence, since the core issue is the same—the probable impact on a jury if it heard the new evidence.

The task for a post-conviction court in regard to evaluating newly-discovered evidence is likewise one of gauging the impact of new evidence on a jury, with due regard given to the role of the jury in deciding factual matters relevant to their determination of guilt or innocence. While the court's task on "newly discovered" evidence is not necessarily mandated

by the Federal Constitutional law governing the Brady and Strickland claims of absent evidence and missing witnesses discussed, supra in Points I and II, Amici submit that the same or similar analysis is required as a matter of New Jersey law, and for analogous reasons, as will be shown.

To meet the standard for a new trial based on newly discovered evidence, defendant must show (1) that the evidence is material, and not "merely" cumulative, impeaching, or contradictory; (2) that the evidence was discovered after completion of the trial and was "not discoverable by reasonable diligence beforehand"; and (3) that the evidence "would probably change the jury's verdict if a new trial were granted." State v. Ways, 180 N.J. 171, 187 (2004). The emphasis is on the likely impact on a jury in its role as factfinder, even in the absence of a specific Constitutional violation.

Whether such a Constitutional violation has occurred at a trial, leading to the absence of exculpatory or impeaching evidence, is not always clear, as pointed out in Ways. "[E]vidence clearly capable of altering the outcome of a verdict that could have been discovered by reasonable diligence at the time of trial would almost certainly point to ineffective assistance of counsel We would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less

than reasonably diligent attorney.” Id. at 192; State v. Nash, 212 N.J. 518, 550 (2013). Furthermore, even absent a clear Constitutional violation, quasi-Constitutional problems, or problems of basic fairness, can arise in this context.

For example, in Nash, it was held that there was neither prosecutorial misconduct nor ineffective assistance (and hence no specific Constitutional violation) where a key prosecution witness deliberately hamstrung defense counsel’s investigation by issuing a “gag order” on his employees, who were exculpatory witnesses in the case. This did serious damage to the defendant’s ability to prepare and present a defense at trial. Nash, 212 N.J. at 553. Such misconduct, by a prosecution witness acting in his private capacity, can deprive a defendant of a fair trial, even if the situation presents no specific Constitutional violation. Similarly, in State v. Henries, 306 N.J. Super. 512 (1997), there was no question of a Constitutional violation, but new evidence emerged after trial of the sole witness’s psychiatric disorders, which could be used at a new trial to impeach his “mental capacity and ability to make accurate perceptions and to accurately and reliably recall and recount his perceptions.” This gave a right to relief on the grounds of newly-discovered evidence, because a trial at which the jury was deprived of this information could not be relied on to have produced an accurate verdict. Id. at 531, 535.

Indeed, the court in *Henries* drew a straight analogy between “materiality” for newly-discovered evidence and “materiality” for a Brady violation, an analogy based on the simple necessity of fairness and truth-seeking at a trial. The court pointed out in that context that “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors...that a defendant’s life or liberty may depend.” *Henries*, 306 N.J. Super. at 535. “The critical issue, then, we are convinced, is whether the additional evidence probably would have affected the outcome.” Id.

Even evidence that could not have been known or discovered by anyone involved in the original case (for example, evidence made available through modern DNA testing techniques) raises issues of fundamental fairness and the integrity of the criminal justice system, which is at bottom a truth-seeking system, whose goal is to convict the guilty and free the innocent. As Judge Baime said, in a decision remanding a post-conviction application for DNA testing):

[T]he objective of the criminal justice system is the fair conviction of the guilty and the protection of the innocent. The system fails if an innocent person is convicted. We offer no view on that subject. We merely note that post-conviction relief remedies were designed to provide one last avenue of review to assure that no mistake was made. Our decision does no more than seek to implement that mandate.

State v. Velez, 329 N.J. Super. 128, 137 (App. Div. 2000). And in State v. Behn, 375 N.J. Super. 409 (App. Div. 2005), a new trial was ordered on newly-discovered evidence impeaching the forensic evidence presented by the State at trial that vastly overstated the probability that defendant's bullets came from the same batch as the bullets used in the crime, because such evidence had the capacity to change the jury's verdict "to a probability—not a certainty," id. at 433 (citing Ways, supra, 180 N.J. at 197).

Again, the court in Behn made no suggestion of any wrongdoing in the State's presentation of inaccurate forensic evidence not specifically known to be inaccurate at the time of trial (and hence no due process or other Constitutional violation leading to the conviction), but the Court added: "The integrity of the criminal justice system is ill-served by allowing a conviction based on evidence of this quality, whether described as false, unproven or unreliable, to stand." Behn, 375 N.J. Super. at 434 (citing State v. Gookins, 135 N.J. 42, 48-51 (1994)).

The interest of the criminal justice system, then, is to safeguard against injustice whenever it is discovered, whether it was initially caused by a Constitutional violation or not. As the Court said in Ways, "We must keep in mind that the purpose of post-conviction review in light of newly discovered evidence

is to provide a safeguard in the system for those who are unjustly convicted of a crime," Ways, supra, 180 N.J. at 187-88.

In all cases bringing to the court's attention new evidence not known to the original jury (absent any wrongful withholding of evidence by the defendant personally), the court's task is to conduct a reasonable assessment of the total impact on a jury of the new witnesses and other new evidence, in relation to the body of evidence that was presented at the original trial. The post-conviction court "must determine whether that newly discovered evidence undermines our confidence in the verdict, thus compelling the grant of a new trial," and in order to do so, the court "must engage in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." Ways, supra, 180 N.J. at 173, 191-92. "The critical issue" is "whether the additional evidence probably would have affected the outcome, regardless of whether it is characterized as impeachment evidence." Henries, supra, 306 N.J. Super. at 535.

In the context of newly-discovered evidence, as in the context of evidence not before the original jury due to Strickland or Brady violations, credibility determinations and the resolution of other factual matters are matters that lie within the province of the jury as factfinder in the first instance. Therefore the task for the post-conviction court

evaluating newly-discovered evidence is the same--to conduct a "thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury. The power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." Ways, supra, 180 at 191-92. Hence, the court's task is to do what it must do in the case of Strickland and Brady violations--examine the trial record and then analyze how that case would be affected at a new trial in the light of the new evidence and the likelihood that a jury would come to a different verdict.

It has been said that the standard of proof is higher for "newly discovered evidence" than for claims of constitutional violations, but that is only because such a standard "presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." Strickland, supra, 466 U.S. 668 at 466. Such a presupposition may not be warranted in an individual case. After all, in many cases the characterization of evidence as "newly discovered" may rest on nice questions about the State's presumptively (but not necessarily) innocent use of unreliable forensic evidence or witness perjury, or defense counsel's negligence, or the misconduct of private actors, as shown in the examples cited herein. In any event, the court

should take into account all new evidence, whether it is considered “newly discovered” or whether it was absent from the trial due to a Constitutional violation. The overall standard should be in every case and in every context, and determine the extent to which the new evidence “undermines our confidence in the verdict,” Ways, supra, 180 N.J. at 173.

Appellate review of claims of newly-discovered evidence should also be de novo, for the reasons given supra for de novo review of Constitutional claims, because an appellate court should likewise be evaluating whether the post-conviction court conducted the analysis in light of the governing standard, and likewise the post-conviction court’s credibility findings can be given no more deference beyond their rational persuasive effect.⁹

⁹ References to the high level of deference owed in cases in which a trial court granted or denied a motion for new trial not based on any new evidence, e.g., State v. Brown, 118 N.J. 595, 603-04 (1990), and State v. Sims, 65 N.J. 359 (1974), are clearly inapposite, as they do not require a court to gauge the likely effect of new evidence on a jury. With respect to how a court should evaluate the effect of formal recantation testimony by a State’s trial witness (a circumstance not present in the case at bar), this type of newly-discovered evidence is treated as a special case, and properly so, because it involves a trial witness’s formal admission of perjury and, as such, a special risk to the trial and post-conviction system of justice. See, e.g., State v. Puchalski, 45 N.J. 97 (1965) (trial court has the duty to inquire closely into the believability of the recantation, the witness’s explanation for the original alleged perjury, and the circumstances under which the recantation was made). See also Ways, supra, 180 N.J. 196-97 (referring to recantation testimony as “a species of newly discovered evidence generally regarded “as suspect and untrustworthy”); State v. Carter, 69 N.J. 420, 427-28 (1976) (“The determination of the

Respectfully submitted,

/s/ Linda Mehling
Linda Mehling, #024881978
Counsel for Proposed Amici
Innocence Project, Exoneration Initiative, and
Innocence Network

credibility or lack thereof of recantation testimony is peculiarly the function of the trial judge who sees the witnesses, hears their testimony and has the feel of the case”).