STATE OF NEW JERSEY, Respondent, VS. MICHELLE LODZINSKI, Defendant-Petitioner.	SUPREME COURT OF NEW JERSEY Docket No. 083398 Criminal Action On Certification From: Superior Court of New Jersey, Appellate Division Honorable Carmen Messano, P.J.A.D. Honorable Douglas M. Fasciale, J.A.D. Honorable Lisa Rose, J.A.D.

BRIEF OF PROPOSED *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

Lawrence S. Lustberg (023131983)
Michael R. Noveck (901172012)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Alexander Shalom (021162004)
Jeanne LoCicero (024052000)
ACLU New Jersey Foundation
P.O. Box 32159
89 Market Street
Newark, NJ 07102
(973) 642-2084

Counsel for Amici Curiae

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PRELIMINARY STATEMENT

The Due Process Clause of the Fourteenth Amendment prevents a criminal conviction except upon evidence sufficient to support a finding of guilt beyond a reasonable doubt. And while the law generally entrusts the jury with applying that standard, it also recognizes that jurors sometimes err because they may, for example, engage in speculation, or be swayed by emotional considerations, such as passion or prejudice, that will result in a guilty verdict even when not supported by the evidence. Thus, trial judges, as well as appellate courts, serve an essential role in preventing unconstitutional convictions based on insufficient evidence, for in such cases they must enter a judgment of acquittal either prior to the jury's deliberation or after the jury returns a wrongful verdict of guilt.

In this case, the Appellate Division failed to fulfill this essential constitutional responsibility. Instead, the court below erroneously failed to consider substantial evidence introduced by the defense that undercuts the State's claim that it had sufficiently proven defendant Michelle Lodzinski's guilt beyond a reasonable doubt. Because the standard applied by the Appellate Division is contrary to the Court Rules, as well as to the precedents of this Court and of the United States Supreme Court, the American Civil Liberties Union of New Jersey (ACLU-NJ) and Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) respectfully submit this brief *amici curiae* urging this Court to make clear that consideration of a motion for acquittal requires

a review of *all* of the evidence, including that adduced by the defense, to prevent the due process violation that would result from a conviction without sufficient evidence. This Court should accordingly reverse defendant Lodzinski's conviction as unsupported by sufficient evidence of guilt or, at the very least, remand the matter to the Appellate Division for application of the constitutionally correct standard.

Specifically, while deference to the jury's factfinding is appropriate, the courts below improperly failed to analyze the totality of the evidence to determine whether it could persuade a reasonable juror of proof beyond a reasonable doubt. In particular, the Appellate Division explicitly declined, in deciding the sufficiency of the evidence, to consider the defense's evidence that contradicted the State's theory of the case. This failure was glaring, for as the Appellate Division acknowledged, the evidence presented by Ms. Lodzinski "was substantial and in many ways directly rebutted the State's proofs." *State v. Lodzinski*, Docket No. A-2118-16T2 (App. Div. Aug. 7, 2019) (slip op. at 9). But the court's reasoning on this point was fundamentally and profoundly flawed, in a way that, at the end of the day, threatens principles at the core of our system of justice, including its adherence to a rule that guilt must be proven beyond a reasonable doubt, however that doubt arises. That is, a court may not ignore substantial evidence of reasonable doubt, and affirm a conviction notwithstanding legally insufficient evidence. Here, however, the Appellate Division simply disregarded whole swaths of

highly probative, persuasive defense evidence, simply because it was introduced by the defense, notwithstanding that this would serve to permit an unconstitutional conviction where the evidence might very well have led a reasonable juror to vote for acquittal.

While the trial court's role in assessing the sufficiency of the evidence is crucial in every criminal case, it is all the more important in high-profile, emotionally charged trials like this one. This case involved the tragic murder of an innocent five-year-old boy whose disappearance set off a massive manhunt. The case went cold shortly thereafter, though it was reinvigorated eleven months later when the victim's body was found buried in a shallow grave; it then went cold again, this time for over twenty years, when the boy's mother was charged with the crime. The case attracted extensive press attention, both local and national, for many years, reflecting the highly emotional nature of the case. But even in light of the tragic, heart-wrenching facts of the case, it was – and still is – the court's role to ensure that a conviction was not based on emotion, but instead comported with the constitutional requirement that the State prove guilt beyond a reasonable doubt. Because the courts below failed to play this critical role, the conviction should be reversed; at the very least, the case should be remanded for proper application of the correct test.

INTEREST OF *AMICI CURIAE*

Both *amici curiae* are non-profit organizations dedicated to the protection of the legal rights of criminal defendants against

unwarranted and unjustified State prosecutions. Both accordingly have a profound interest in this case, which implicates one of the most fundamental guarantees of our national and State system of justice: that one cannot be deprived of her precious liberty without the State having proven her guilt of the charged criminal offense, beyond a reasonable doubt.

Amicus curiae the ACDL-NJ is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good[.]" *ACDL-NJ By-Laws*, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders. The ACDL-NJ has, over the years, participated as *amicus curiae* in numerous cases before this Court, including in cases involving sufficiency of the evidence to convict. *See State v. Morrison*, 188 N.J. 2 (2006) (holding evidence insufficient to convict for distribution of narcotics where individuals involved have joint possession). *See also, e.g., State ex rel. A.A.*, 240 N.J. 341 (2020); *State v. L.H.*, 239 N.J. 22 (2019); *State v. Cassidy*, 235 N.J. 482 (2018); *State v. Lunsford*, 226 N.J. 129 (2016); *State v. Scoles*, 214 N.J. 236 (2013); *In re State Grand Jury Investigation*,

200 N.J. 481 (2009); *State v. Osorio*, 199 N.J. 486 (2009); *State v. Franklin*, 184 N.J. 516 (2005); *State v. Natale*, 184 N.J. 458 (2005); *State v. Feaster*, 184 N.J. 235 (2005); *State v. Reiner*, 180 N.J. 307 (2004); *In re Seelig*, 180 N.J. 234 (2004); *State v. Rivera*, 175 N.J. 612 (2003); *State v. Goodwin*, 173 N.J. 583 (2003); *In re Proportionality Review Project (II)*, 165 N.J. 206 (2000); *State v. Collier*, 162 N.J. 27 (1999); *State v. Branch*, 155 N.J. 317 (1998). On various occasions, the ACDL-NJ affirmatively has been requested to file *amicus* briefs on matters of importance to the Court; in addition, the ACDL-NJ has been requested by the Court to articulate positions on proposed changes in rules and policies relating to the criminal justice system.

Amicus curiae the ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principles of liberty enshrined in the Constitutions of the United States and of the State of New Jersey. Founded in 1960, the ACLU-NJ has more than 41,000 members in the State of New Jersey; it is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for similar purposes, and has approximately 1,750,000 members nationwide. The ACLU-NJ has a long history of, among many other issues, defending the rights of criminal defendants and advocating for procedures that will make for fairer trials, and to assure the vindication of criminal defendants' constitutional rights. The ACLU-NJ has thus long been a strong protector of the constitutional rights of those who come into contact with New Jersey's system of criminal justice. *See, e.g.*, *State v. Zuber*,

227 N.J. 422 (2017); *State v. Rosario*, 229 N.J. 263 (2017); *State v. Bryant*, 227 N.J. 60 (2016); *State v. Coles*, 218 N.J. 322 (2014); *State v. Skinner*, 218 N.J. 496 (2014); *State v. Cahill*, 213 N.J. 253 (2013); *State ex rel A.W.*, 212 N.J. 114 (2012); *A.A. ex rel. B.A. v. N.J. Att'y Gen.*, 189 N.J. 128 (2007); *State v. Fuller*, 182 N.J. 174 (2004); *State v. Allah*, 170 N.J. 269 (2002).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the statements of facts and procedural history contained in defendant's Appellate Division briefs and Petition for Certification. Briefly restated, Ms. Lodzinski was charged with and convicted of first-degree murder of her son, Timothy Wiltsey. Ms. Lodzinski had reported Timothy missing on May 25, 1991, and his body was found eleven months later. While Ms. Lodzinksi was the initial suspect, she was not charged after the initial investigation, nor was anyone else charged with the crime before the investigation closed. The case was ultimately reopened in 2011, and Ms. Lodzinksi was charged in August 2014.

The State's case at trial was, by its own admission, entirely circumstantial. *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 15). Indeed, neither the original medical examiner, who died before trial, nor a second medical examiner who reviewed the autopsy report and did testify at trial, were able to determine the cause of Timothy's death. *Id.* (slip op. at 4). The State theorized, however, that Ms. Lodzinski had killed Timothy and buried him "near" an industrial complex where she had worked several years before. *Id.* (slip op. at 2-3).

The defense vigorously contested the key facts upon which the State relied in attempting to prove guilt, adducing clearly exculpatory evidence on nearly every issue. For example, the State alleged that although Ms. Lodzinski reported Timothy missing from a carnival in Sayerville, Timothy was never present at that carnival, having been killed and buried before then; but the defense rebutted the State's assertion by introducing three contemporaneous witness statements identifying a boy matching Timothy's description who was present at the carnival. (Dab9-10; Dar5-6.)[1] Likewise, the defense offered evidence in support of Ms. Lodzinski's claim of third-party guilt (specifically, that Timothy was abducted from the carnival), including one witness who voluntarily came forward and testified that a prison cellmate in Arizona had confessed to a crime resembling Timothy's murder (Dab8) and another who observed two men running from the carnival area with an object the size of Timothy's body rolled up in a blanket, which they threw into the trunk of a car, then sped away with their lights off (Dar6-7).

Further, the defense attacked the State's key piece of physical evidence, a blanket found near Timothy's burial site, which the State claimed to be taken from the home where Timothy and his mother's lived and used to transport him to the scene. A defense expert testified that under the State's theory, the blanket

[1] "Dab" is Defendant's Appellate Division Brief, dated February 9, 2018. "Dar" is Defendant's Appellate Division Reply Brief, dated September 12, 2018.

would have contained some trace evidence, such as hair or fibers, but none was found. (Dab20.) And the defense challenged the State's evidence that Ms. Lodzinski killed Timothy because he was a "burden" on her, instead showing that Ms. Lodzinski was a loving, caring mother of a healthy, thriving young boy. (Dab5-6.) In light of all of this evidence, it is unsurprising that the Appellate Division characterized the defense case as "substantial," concluding that it "in many ways directly rebutted the State's proofs." *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9).

The defense moved for a judgment of acquittal both following the close of the State's case, *see R.* 3:18-1, and after the jury returned its guilty verdict, *see R.* 3:18-2, both of which were denied. On appeal, the Appellate Division affirmed the denial of both motions and affirmed the jury verdict. *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 7-22).[2] In doing so, the court applied a deferential standard of review, under which the court viewed it as unnecessary to consider the "worth, nature, or extent" of the State's evidence. *Id.* (slip op. at 7) (quoting *State v. Brooks*, 366 N.J. Super. 447, 453 (App. Div. 2004)). But even more fundamentally – raising the question that is at issue here - the

[2] The Appellate Division also rejected Ms. Lodzinski's appeal from the denial of her motion to dismiss the indictment for pre-trial delay, *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 22-24), a matter which the defense did not appeal to this Court. And the Appellate Division affirmed the trial court's decisions regarding issues that arose during jury deliberations, *id.* (slip op. at 24-34), which issues are before this Court, but not here addressed by *amici*.

Appellate Division also held that a motion for judgment of acquittal, even after verdict, is decided based only on the State's proofs. *Ibid.* It therefore determined that it was, in its words, "alleviate[d of] the necessity of describing in detail evidence defendant adduced at trial," which, as noted above, "was substantial and in many ways directly rebutted the State's proofs." *Id.* (slip op. at 9). The court then reviewed the State's evidence alone and, although it acknowledged that the issue of the sufficiency of the evidence "present[ed] a close question," *id.* (slip op. at 17), it nonetheless "conclude[d that] there was sufficient evidence to prove beyond a reasonable doubt that defendant purposefully or knowingly caused Timmy's death." *Id.* (slip op. at 22).

This Court granted Ms. Lodzinski's petition for certification. 241 N.J. 81 (2020).

ARGUMENT

I. THE APPELLATE DIVISION VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY FAILING TO IN ANY WAY CONSIDER THE EVIDENCE INTRODUCED BY THE DEFENSE THAT DEMONSTRATED THAT DEFENDANT WAS NOT GUILTY

Over forty years ago, the United States Supreme Court held in no uncertain terms that "[t]he Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship,* 397 U.S. 358 (1970)). This Court has adopted and reiterated that principle: "[i]t is well settled that due process requires the State to prove each element of a charged

crime beyond a reasonable doubt." *State v. Hill*, 199 N.J. 545, 558 (2009). Because it is a violation of due process for a court "to enter an unreasonable verdict of guilty," *Jackson*, 443 U.S. at 318 n.10, it follows that a court "must provide some avenue by which the defendant can challenge the constitutional sufficiency of the evidence against him." 6 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 24.6(b) (6th ed., Dec. 2019 update). This Court's *Rules* thus provide that a criminal defendant can move for an acquittal as a matter of law on three separate occasions: first, "[a]t the close of the State's case," *R.* 3:18-1; second, "after the evidence of all parties has been closed," *ibid.*; and third, if necessary, after the jury either returns a verdict of guilt or is unable to return a verdict, *R.* 3:18-2.

This case involves application of those *Rules* where the defense presents, as the Appellate Division characterized it, "substantial" evidence of reasonable doubt. *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9). As is described in detail below, the *Rules* and the *Jackson* standard require an appellate court to consider *all* of the evidence in evaluating a motion for judgment of acquittal, which necessarily includes the defense evidence. Indeed, consideration of defense evidence in determining the sufficiency of the evidence is entirely consistent with this Court's pronouncements, in multiple contexts, that courts should consider the totality of the circumstances in applying facts to law, as well as with this Court's precedents in a number of areas stressing the important of a defendant's ability to present

exculpatory evidence to the jury. This Court should, accordingly, reverse the conviction in this case or at the very least, remand the matter for review of *all* of the evidence, including evidence put forth by Ms. Lodzinski, in determining whether her conviction should stand.

A. The *Reyes* Rule, Which Prohibits the State From Relying on Corroborative Evidence in the Defense Case, Does Not Preclude Consideration of the Defense's Evidence Showing Reasonable Doubt

The Appellate Division's erroneous evaluation of the motion for judgment of acquittal resulted from its belief that "only the State's proofs [should] be considered." *Id.* (slip op. at 7) (quoting *State v. Sugar*, 240 N.J. Super. 148, 152-53 (App. Div. 1990)). The court below thus admitted to disregarding the evidence presented by the defense, notwithstanding having properly concluded that it "was substantial and in many ways directly rebutted the State's proofs." *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9). But the court's belief that it was not required to assess the defense's evidence was clearly based upon a misunderstanding of the applicable law.

Indeed, the precedent upon which the Appellate Division relied does not support its alarming limitation upon the scope of its review. Thus, the court's quotation from *State v. Sugar* (that "only the State's proofs [should] be considered") relied in turn upon this Court's decision in *State v. Reyes*, 50 N.J. 454 (1967), which stated that a reviewing court must "view[] the State's evidence in its entirety" in assessing a motion for judgment of

acquittal. *Id.* at 459; *see also Sugar*, 240 N.J. Super. at 152 (quoting *Reyes*, 50 N.J. at 458-59). *Reyes* also indicated that "under the current state of our law, no consideration may be given to any evidence or inferences from the defendant's case" in deciding such a motion. *Reyes*, 50 N.J. at 459 (citing *State v. Fiorello*, 36 N.J. 80, 86-87 (1961)). More recently, this Court has described the *Reyes* standard as standing for the proposition that "a court 'may not consider any evidence adduced by the defense *in determining if the State has met its burden as to all elements of the crime charged*.'" *State v. Samuels*, 189 N.J. 236, 245 (2007) (emphasis added) (quoting Pressler, *Current N.J. Court Rules,* comment 1 on *R.* 3:18 (2006)).

By its terms, this holding provides no more than that the State cannot invoke defense proofs in an effort to demonstrate that it has borne its burden of proof beyond a reasonable doubt. But critically for this case, *Reyes* and its progeny have never applied that rule to bar a court from reviewing evidence introduced by the defense that undermines the State's case in determining sufficiency. Thus, *Reyes* itself did not involve such exculpatory evidence; to the contrary, the *Reyes* court concluded that the defense's case actually "strengthen[ed] the State's position," holding that such evidence could not be cited in an effort to establish that the State had proven its case. *Reyes*, 50 N.J. at 462. That is, as the Court held in *Fiorello*, upon which *Reyes* relied, an appellate court, in reviewing the denial of a motion for judgment of acquittal *at the end of the State's case*, cannot

"reference . . . any *corroborative* evidence introduced during the defendant's case." *Fiorello*, 36 N.J. at 86-87 (emphasis added). In other words, when the defendant appeals the denial of a motion to acquit, the State cannot use the defendant's evidence to bolster its own evidence of his guilt.

But that rule obviously has no application here, where the evidence introduced by defendant did not buttress or corroborate the State's case, but rather "was substantial and in many ways directly rebutted the State's proofs." *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9). As a leading treatise recognizes, "there are instances in which a trial court could refuse to direct a verdict of acquittal following the prosecution's case-in-chief, and yet be willing to rule otherwise following the presentation of all the evidence." LaFave, § 24.6(b); *see, e.g., United States v. Overbay*, 444 F. Supp. 259, 263 (E.D. Tenn. 1977) (granting judgment of acquittal where defendant's "own testimony reflect[ed] without dispute" that she had not embezzled funds); *Schools v. United States*, 84 A.3d 503, 509-10 (D.C. 2013) (considering "uncontradicted" defense evidence in granting judgment of acquittal). This Court has similarly phrased the *Reyes* rule as requiring consideration of "the evidence viewed *in its entirety*." *State v. D.A.*, 191 N.J. 158, 163 (2007) (emphasis added). Indeed, the Appellate Division's own precedent implicitly acknowledged the requirement that a court consider evidence introduced by the defense in evaluating the sufficiency of the evidence on appeal. Thus, in *Sugar*, for example, the Appellate Division specifically

concluded that where the defendant introduces evidence in support of a lesser-included charge, "the sufficiency of the evidence should be tested upon a consideration of the *entire record* and not merely a limited application of the *Reyes* criteria to the State's proofs." 240 N.J. Super. at 153 (emphasis added).[3]

Of course, the notion that defense evidence may not be considered in adjudging the sufficiency of the evidence is entirely inconsistent with *Rule* 3:18-1, which provides that a defendant can move for a judgment of acquittal either "[a]t the close of the State's case *or after the evidence of all parties has been closed*," *ibid.* (emphasis added), making clear that the defense evidence is part of the analysis. Indeed, the *Rule* further instructs that an acquittal should be entered "if *the evidence* is insufficient to warrant a conviction," without distinguishing between the State's evidence and the defense's evidence. *Ibid.* (emphasis added). In sum, New Jersey's *Rule*, like its federal counterpart, necessarily requires a court to consider evidence introduced by the defense. *See United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980) (concluding under federal analogue to *Rule* 3:18-1 that "[t]he standard is not so strict that the defendant's evidence must be

[3] *Sugar* involved consideration of defense evidence that supported a finding of guilt on a lesser-included offense, rather than evidence of the kind here, which seriously undermines any finding of guilt. *See Sugar*, 240 N.J. Super. at 154 (discussing defendant's testimony that supported finding of guilt on lesser included charge). The rule that emerges is, however, the same: a court may not, as the Appellate Division did here, purposefully ignore exculpatory evidence simply because it was introduced by the defense in evaluating a motion for a judgment of acquittal.

disregarded"); *Schools*, 84 A.3d at 509 (citing *Beck* and considering defendant's evidence in granting judgment of acquittal).

The Appellate Division's failure to consider the defense's evidence against guilt was especially prejudicial here, where the court explicitly recognized the strength of the defense's evidence, *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9), leaving the sufficiency of the evidence to be a "close question." *Id.* (slip op. at 17). Because, as described above, the *Reyes* standard does not prohibit consideration of this evidence, and *Rule* 3:18-1 specifically contemplates that it be included in the analysis, the Appellate Division erred in entirely ignoring this admittedly powerful evidence in determining whether the evidence before the Court was legally sufficient to withstand scrutiny on appeal.

B. The Failure to Consider All of the Evidence, Including Defense Evidence, Showing Reasonable Doubt Violates Due Process

The *Jackson* holding recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." 443 U.S. at 318; *see also LaFave*, § 24.6(b) ("That a particular jury or juror should conclude that the evidence was sufficient does not mean that conclusion had a reasonable grounding."). Although a jury is of course a fundamental protector of liberty, *see Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), a trial court's authority to enter a judgment of acquittal recognizes that juries may, at times, inappropriately adjudicate guilt based "upon pure

speculation or from passion, prejudice or sympathy." *Curley v. United States*, 160 F.2d 229, 232 (D.C. Cir. 1947); *see also* 26 James Wm. Moore, et al., *Moore's Federal Practice – Criminal* § 629.02[4] (Mar. 2020 update) (judgment of acquittal "takes cognizance of the reality that jurors may not always be capable of applying strictly the instructions of the court, or of basing their verdict entirely on the evidence developed at the trial"). Indeed, "[p]ublic confidence in our jury trial system requires that verdicts be 'based upon an honest consideration of the evidence and not upon prejudice or sympathy.'" *State v. Jenkins*, 182 N.J. 112, 129 (2004) (quoting *Panko v. Flintkote Co.*, 7 N.J. 55, 62 (1951)).[4]

A court's authority to enter a judgment of acquittal thus serves to protect against a criminal conviction that is irrational or unreasonable, for "[i]t is the function of the judge to deny the jury any opportunity to operate beyond its province." *Curley*,

[4] The risk that the verdict would be based other than on the evidence was particularly great here, given the high-profile nature of the case and the inflammatory nature of the allegations against the defendant. Thus, the case was featured twice on "America's Most Wanted," with Timothy Wiltsey's picture circulated on milk cartons, missing persons flyers, and even the scoreboard at Yankee Stadium. Robin Gaby Fisher, *Timothy Wiltsey: Ten years after the 5-year-old South Amboy boy disappeared*, The (Newark) Star-Ledger, May 20, 2001, https://www.nj.com/news/2014/08/post_357.html. And it continued to attract national press coverage, including at the time of Ms. Lodzinski's arrest. *See, e.g.*, Lorenzo Ferrigno, *New Jersey mother charged in son's death decades after he disappears*, CNN, Aug. 7, 2014, https://cnn.it/2WmQKdX; Marc Santora & Nate Schweber, *Arrest in New Jersey Boy's Death Stirs Memories, but Mysteries Remain*, N.Y. Times, Aug. 7, 2014, https://nyti.ms/3colxfO.

160 F.2d at 232; *see also State v. DiRienzo*, 53 N.J. 360, 378 (1969) ("the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction" is part of "the trial judge's responsibility for safeguarding the integrity of the jury trial" (quoting *United States v. Gainey*, 380 U.S. 63, 68 (1965)) (internal quotation marks omitted)). The standard of proof beyond a reasonable doubt, and the obligation of courts to give meaning to that standard even in cases where juries return guilty verdicts, "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself," *Jackson*, 443 U.S. at 315, whether that liberty is lost to a prison sentence, as here, or by virtue of the many collateral consequences entailed by a criminal conviction. *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1791 (1992) ("For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.").

It follows that, as this Court has emphasized, "appropriate judicial review" of a motion for a judgment of acquittal requires "a meticulous and objective analysis of the evidence." *State v. Brown*, 80 N.J. 587, 594 (1979). Thus, a court must "determine whether the record evidence could reasonably support a finding of

guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318. "[T]he governing test" under this standard is "whether the evidence *viewed in its entirety*, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged." *D.A.*, 191 N.J. at 163 (emphasis added) (citing *Reyes*, 50 N.J. at 458-59).[5] Indeed, even though a court reviewing the sufficiency of the evidence must consider that evidence in the light most favorable to the State, a court's "analysis of the record" must recognize "that the State's right to the benefit of reasonable inference cannot be used to reduce the State's burden of establishing the essential elements of the offense charged beyond a reasonable doubt." *State v. Martinez*, 97 N.J. 567, 572 (1984); *see also State v. Perez*, 177 N.J. 540, 549 (2003) (same); *State v. Thomas*, 132 N.J. 247, 256-57 (1993) (same); *Brown*, 80 N.J. at 592 (same).

And in order to perform the "meticulous" review required to assure that this standard is met, *Brown,* 80 N.J. at 594, it simply cannot be, as a matter of either fairness or common sense, that a court can refuse to consider whether the State's evidence is undermined by the evidence presented by the defense. Nor is the contrary rule adopted by the Appellate Division even consistent with the dictionary definition of "meticulous," the word used by

[5] On appeal, an appellate court applies the same standard of review. *State v. Fuqua*, 234 N.J. 583, 590 (2018).

this Court to describe how this sacred obligation of courts is to be satisfied. *See Meticulous*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/meticulous (last visited May 9, 2020) (defining "meticulous" as "marked by extreme or excessive care in the consideration or treatment of details").

Indeed, *Jackson* itself specifically requires a court to conduct a "judicial review [of] *all of the evidence*." 443 U.S. at 319; *see also D.A.*, 191 N.J. at 163 (requiring "the evidence [to be] viewed in its entirety"); *Brown*, 80 N.J. at 592 (quoting *Jackson*). Yet in this case, the Appellate Division found itself "alleviate[d of] the necessity of describing in detail evidence defendant adduced at trial." *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9). Had it reviewed that evidence, as it should have been required to do, it would have been forced to grapple with the strength of Ms. Lodzinski's proofs, including: contemporaneous statements from three witnesses identifying a boy substantially matching Timothy's description at the carnival, contrary to the State's assertion that Timothy was never at the carnival from which Ms. Lodzinski alleged that he was abducted (Dab9-10, Dar5-6); evidence of a confession to the crime from another person, made to his cellmate at a prison in Arizona (Dab8); and expert testimony that it was "virtually impossible" for the blanket found at Timothy's burial site to lack any physical evidence connecting it to Ms. Lodzinski if she were guilty (Dab20).

The Appellate Division, by refusing to even consider the defense's evidence, failed as a matter of law, and of constitutional right, to conduct the review required to ensure that Ms. Lodzinski's conviction complied with due process. Accordingly, this Court should reverse the judgment below and direct the entry of a judgment of acquittal or, alternatively, remand for consideration of the evidence under an appropriate standard, one that requires consideration of all the facts of the case.

C. Consideration of All of the Evidence, Including Defense Evidence, is Consistent with the "Totality of the Circumstances" Approach Taken in Sufficiency Cases and Other Criminal Contexts

Of course, the notion that all of the evidence should be considered in deciding a question of sufficiency, beyond being rooted in fundamental constitutional principles of fairness and in the language and structure of the relevant *Rule* promulgated by this Court, is also consistent with the Court's general approach of considering, with respect to both the sufficiency of the evidence and other issues, the "totality of the circumstances." Indeed, this Court specifically applied a totality of the circumstances test to a sufficiency of the evidence claim in the companion cases of *State v. Williams*, 218 N.J. 576 (2014), and *State v. Dekowski*, 218 N.J. 596 (2014), which were decided on the same day. In both cases, the issue was whether the evidence was sufficient to elevate a robbery conviction to the first degree because "the victim actually and reasonably believed that the

robber possessed a" deadly weapon. *Dekowski*, 218 N.J. at 605 (citing *Williams*, 218 N.J. at 594-96). In addressing that question, the Court applied "[a] totality-of-the-circumstances analysis," which "requires that a court 'consider the defendant's words that convey the threat, his overall conduct, his dress, and any other relevant factors.'" *Id.* at 606 (quoting *Williams*, 218 N.J. at 593).

Nor, of course, is it at all unusual to demand consideration of the totality of the circumstances – as opposed to consideration of a limited factual basis – in either federal or New Jersey criminal law. For example, the United States Supreme Court recently reemphasized the application of a totality-of-the-circumstances test in evaluating whether exigent circumstances justified a warrantless blood draw in drunk-driving cases. *See Missouri v. McNeely*, 569 U.S. 141, 156 (2013); *State v. Adkins*, 221 N.J. 300, 316-17 (2015) (criticizing this Court's own "case law contain[ing] language that provide[d] a basis for . . . a belief" that a *per se* rule, rather than totality of the circumstances analysis, applied to warrantless blood draws prior to *McNeely*). Other doctrinal areas, as well, call for consideration of the totality of the circumstances. *See State v. L.H.*, 239 N.J. 22, 43 (2019) (voluntariness of confession); *State v. Pineiro*, 181 N.J. 13, 22 (2004) (reasonable suspicion for a brief investigatory stop); *State v. Jones*, 179 N.J. 377, 389 (2004) (probable cause for a search warrant). The reason for such an approach is obvious: it makes little sense for a court, which is

or should be doing its best to achieve justice, to so purposefully and one-sidedly blind itself to a subset of the evidence in the case. *See State v. Hreha*, 217 N.J. 368, 386 (2014) (noting, in context of voluntariness of confession, that "the parties are free to introduce" evidence that bears on the issue, all of which the trial court must consider "when it applies the totality-of-the-circumstances test"). Certainly, when required to evaluate "any . . . relevant factors," *Williams*, 218 N.J. at 593, a court should not refuse to consider evidence in adjudicating the most important motion in any case, simply because it was introduced by the defense, as the Appellate Division did here. *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9). Because that approach is contrary to "[t]he State's concern for an effective, efficient, fair and balanced system of criminal justice," *In re Hinds*, 90 N.J. 604, 624 (1982), it should, in the interest of maintaining the kind of thorough and fair system of criminal justice for which New Jersey has always been known, and of which it is justifiably so proud, be rejected.

D. The Appellate Division's Failure to Consider Defense Evidence of Reasonable Doubt Undermines this Court's Repeated Affirmations of the Defense's Right to Produce Exculpatory Evidence

Finally, the Appellate Division's failure to consider the evidence put forth by the defense in this case is inconsistent with a long and uninterrupted line of cases, in a number of other contexts, in which this Court has emphasized the importance of a criminal defendant's ability to present favorable evidence to a

finder of fact. For example, and of particular relevance here, the Court has repeatedly made clear, including reiterating just this past Term, that an essential aspect of the constitutional right to present "a complete defense includes a criminal defendant's right to introduce evidence of third-party guilt." *State v. R.Y.*, --- N.J. ---, 2020 WL 2182230, at *9 (May 6, 2020) (quoting *State v. Cotto*, 182 N.J. 316, 332 (2005)). The rationale for this rule, of course, is that such evidence "creates the possibility of reasonable doubt." *Ibid.* (quoting *State v. Perry*, 225 N.J. 222, 238 (2016)).

In *R.Y.*, this Court reversed a conviction where the trial court excluded the defense's evidence of third-party guilt, concluding that the excluded evidence "call[ed] into question the State's evidence against defendant." *Ibid.* In this case, of course, the trial court admitted evidence of third-party guilt. *See Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9) (noting that "defendant produced witnesses that supported the defense of third-party guilt"). But although this Court has made clear that such evidence was required to be admitted, the Appellate Division understood the law to be that it could nonetheless disregard that evidence simply because it was introduced by the defense, even though it certainly affected the strength of the case against Ms. Lodzinski – a key factor, of course, in determining whether "the evidence viewed in its entirety" was sufficient to support her conviction. *D.A.*, 191 N.J. at 163. There is, however, no possible rationale, and Appellate Division does not articulate one, for a

rule that, as part of the sufficiency analysis, certain otherwise admissible proof that "directly rebut[s] the State's proofs" of guilt may be categorically excluded based only on which party introduces that evidence. *Lodzinski*, Docket No. A-2118-16T2 (slip op. at 9).

Nor is evidence of third-party guilt the only category of evidence undermining the State's case that this Court has made clear must not be excluded. Thus, for example, this Court has likewise held the exclusion of alibi evidence improper, and prejudicial to the defense. *See, e.g.*, *State v. Bradshaw*, 195 N.J. 493, 508 (2008) (describing "obvious" prejudice to defendant of exclusion of alibi evidence, without which defendant "was unable to offer evidence that he was someplace else at the time of the offense"). Still other evidence, where newly discovered, can be so devastating to a prior finding of guilt that it requires reversal of a conviction. *See, e.g.*, *State v. Nash*, 212 N.J. 518, 551 (2013) (ordering new trial based on newly discovered evidence that "was clearly material because it strongly advanced [defendant's] general denial of guilt and corroborated that he was telling the truth"). And, of course, the prosecution's refusal to disclose exculpatory material (*i.e.*, so-called *Brady* material), requires that convictions be reversed where there is "a real possibility that the evidence would have affected the result." *State v. Marshall*, 123 N.J. 1, 200 (1991) (quoting *State v. Carter*, 91 N.J. 86, 113 (1982)).

To be sure, the introduction of any of this type of evidence at trial does not necessarily establish reasonable doubt as a matter of law, and it may raise issues, such as witness credibility, that are solely within the jury's province. *See Bradshaw*, 195 N.J. at 509-10 (in the absence of alibi evidence, "the jury was denied the opportunity to fairly evaluate the evidence and determine the credibility of the witnesses"). But the notion that such evidence sufficiently undermines a finding of guilt that a conviction must be set aside if it is excluded, but nonetheless may play absolutely no role in a determination of the sufficiency of the evidence, even in light of the Supreme Court's admonition that such a sufficiency analysis requires "judicial review [of] *all of the evidence*," *Jackson*, 443 U.S. at 319, does not withstand a challenge based upon simple common sense. And that is especially so when the purpose of the sufficiency analysis is to give meaning to one of the most fundamental pillars of our system of justice: that one should not be faced with the loss of her liberty unless her guilt is proven by the State beyond a reasonable doubt. The dangerous and alarming decision of the Appellate Division should therefore be reversed and defendant Ms. Lodzinski's conviction should be vacated or, at the very least, the matter should be remanded to the Appellate Division for consideration of the sufficiency of the evidence in light of the proper standard, one that takes into account evidence presented by the defense.

CONCLUSION

No matter how emotionally charged a case, a criminal conviction may only be sustained based upon legally sufficient evidence, and the question of whether such evidence existed must follow upon a careful evaluation of the facts, including a meticulous review of *all* of the evidence, and not just that introduced by the State. Because the Appellate Division expressly refused to consider all of the evidence by excluding that introduced by the defense, even as it acknowledged that such evidence was "substantial" and "in many ways directly rebutted the State's proofs," its decision should be reversed and the defendant's conviction vacated or, at the very least, the matter should be remanded for reconsideration under the appropriate standard, one that even-handedly considers all of the proofs in determining whether a conviction may stand in the face of a powerful challenge to the sufficiency of the evidence to support a conviction.

Respectfully submitted,

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amici Curiae

BY: */s Lawrence S. Lustberg*
Lawrence S. Lustberg, Esq.

BY: */s Michael R. Noveck*
Michael R. Noveck, Esq.

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